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# **Judiciary Committee**

**Thursday, February 16, 2012**

**11:30 AM**

**404 HOB**

**Meeting Packet**

**REVISED**

**Dean Cannon  
Speaker**

**William Snyder  
Chair**

# Committee Meeting Notice

## HOUSE OF REPRESENTATIVES

### Judiciary Committee

**Start Date and Time:** Thursday, February 16, 2012 11:30 am

**End Date and Time:** Thursday, February 16, 2012 02:30 pm

**Location:** 404 HOB

**Duration:** 3.00 hrs

**Consideration of the following proposed committee bill(s):**

PCB JDC 12-03 -- Legislative Immunity

**Consideration of the following bill(s):**

CS/HB 233 Misdemeanor Probation Services by Criminal Justice Subcommittee, Rouson

CS/HB 431 Joint Use of Public School Facilities by K-20 Competitiveness Subcommittee, Nehr

CS/CS/CS/HB 481 Clerks of Court by Justice Appropriations Subcommittee, Government Operations Subcommittee, Civil Justice Subcommittee, Pilon

CS/HB 549 Dissolution of Marriage by Civil Justice Subcommittee, Workman

PCS for CS/HB 565 -- Dissolution of Marriage

CS/HB 681 Interlock Ignition Devices Ordered for Probation for DUI by Transportation & Highway Safety Subcommittee, Baxley

HB 777 Securities Law Violations by Eisnaugle

CS/HB 897 Construction Liens and Bonds by Civil Justice Subcommittee, Moraitis

CS/HB 959 Divestiture by the State Board of Administration by Government Operations Subcommittee, Bileca

CS/HB 971 Judiciary by Civil Justice Subcommittee, Gaetz

CS/HB 1013 Residential Construction Warranties by Civil Justice Subcommittee, Artiles

CS/HB 1099 Stalking and Aggravated Stalking by Criminal Justice Subcommittee, Plakon

CS/CS/HB 1443 Local Administrative Action to Abate Public Nuisances and Criminal Gang Activity by Community & Military Affairs Subcommittee, Criminal Justice Subcommittee, Frishe

HB 4125 Judges by Stargel

HB 4155 Declaratory Judgments by Stargel

HB 4157 District Courts of Appeal by Stargel

**NOTICE FINALIZED on 02/14/2012 16:17 by Jones.Missy**



HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** CS/HB 233 Misdemeanor Probation Services

**SPONSOR(S):** Criminal Justice Subcommittee; Rouson

**TIED BILLS:** None **IDEN./SIM. BILLS:** CS/SB 498

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Criminal Justice Subcommittee	15 Y, 0 N, As CS	Williams	Cunningham
2) Judiciary Committee		Williams <i>JW</i>	Havlicak <i>RH</i>

**SUMMARY ANALYSIS**

Section 948.15, F.S., relating to misdemeanor probation, currently authorizes misdemeanor probation services to be provided by both public and private entities under the supervision of the board of county commissioners or the court. Private entities who wish to provide misdemeanor probation services must contract with the county in which the services are to be rendered.

The bill amends 948.15, F.S., to require a licensed substance abuse education and intervention provider to provide probation supervision services in instances where the board of county commissioners or court has established a misdemeanor probation program targeting defendants convicted of a misdemeanor for possession of a controlled substance or drug paraphernalia under ch. 893, F.S. In addition, the licensed substance abuse education and intervention provider must provide substance abuse education and intervention services.

This bill may have a fiscal impact on counties. See "Fiscal Comments."

The bill is effective July 1, 2012.



## FULL ANALYSIS

### I. SUBSTANTIVE ANALYSIS

#### A. EFFECT OF PROPOSED CHANGES:

##### **Misdemeanor Probation Services**

Section 948.15, F.S., relates to misdemeanor (i.e., county) probation. The term for misdemeanor probation generally cannot exceed 6 months unless otherwise specified by the court.<sup>1</sup> Currently, misdemeanor probation services can be provided by both public and private entities under the supervision of the board of county commissioners or the court.<sup>2</sup>

Private entities who wish to provide misdemeanor probation services must contract with the county in which the services are to be rendered.<sup>3</sup> Terms of the contract must state, but are not limited to:

- The extent of the services to be rendered by the entity providing supervision or rehabilitation.
- Staff qualifications and criminal record checks of staff in accordance with essential standards established by the American Correctional Association as of January 1, 1991.
- Staffing levels.
- The number of face-to-face contacts with the offender.
- Procedures for handling the collection of all offender fees and restitution.
- Procedures for handling indigent offenders which ensure placement irrespective of ability to pay.
- Circumstances under which revocation of an offender's probation may be recommended.
- Reporting and recordkeeping requirements.
- Default and contract termination procedures.
- Procedures that aid offenders with job assistance.
- Procedures for accessing criminal history records of probationers.<sup>4</sup>

Private entities must also provide the chief judge's office with a quarterly report summarizing the number of offenders supervised, payment of the required contribution under supervision or rehabilitation, and the number of offenders for whom supervision or rehabilitation will be terminated.<sup>5</sup> Additionally, all records of the private entity must be open to inspection upon the request of the county, the court, the Auditor General, the Office of Program Policy Analysis and Government Accountability, or agents thereof.<sup>6</sup>

Private entities that provide misdemeanor probation services to offenders and that charge a fee for such services must also register with the board of county commissioners in the county in which the services are offered, and provide the following information for each program it operates:

- The length of time the program has been operating in the county.
- A list of the staff and a summary of their qualifications.
- A summary of the types of services that are offered under the program
- The fees the entity charges for court-ordered services and its procedures, if any, for handling indigent offenders.<sup>7</sup>

##### *Effect of the Bill*

The bill amends 948.15, F.S., to require a licensed substance abuse education and intervention provider to provide probation supervision services in instances where the board of county

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<sup>1</sup> If the use of alcohol was a significant factor in the misdemeanor offense, the period of probation may be up to 1 year. Section 948.15(1), F.S.

<sup>2</sup> Section 948.15(2), F.S.

<sup>3</sup> In a county with a population of less than 70,000, the county court judge, or the administrative judge of the county court in a county that has more than one county court judge, must approve the contract. Section 948.15(3), F.S.

<sup>4</sup> Section 948.15(3), F.S.

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> Section 948.15(4), F.S.

commissioners or court has established a misdemeanor probation program targeting defendants convicted of a misdemeanor for possession of a controlled substance or drug paraphernalia under ch. 893, F.S. In addition, the licensed substance abuse education and intervention provider must provide substance abuse education and intervention services.

**B. SECTION DIRECTORY:**

Section 1. Amends s. 948.15, F.S., relating to misdemeanor probation services.

Section 2. Provides an effective date of July 1, 2012.

**II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT**

**A. FISCAL IMPACT ON STATE GOVERNMENT:**

1. Revenues:

The bill does not appear to have any impact on state government revenues.

2. Expenditures:

The bill does not appear to have any impact on state government expenditures.

**B. FISCAL IMPACT ON LOCAL GOVERNMENTS:**

1. Revenues:

The bill does not appear to have any impact on local government revenues.

2. Expenditures:

The bill amends 948.15, F.S., to require a licensed substance abuse education and intervention provider to provide probation supervision services in instances where the board of county commissioners or court has established a misdemeanor probation program targeting defendants convicted of a misdemeanor for possession of a controlled substance or drug paraphernalia under ch. 893, F.S. In addition, the licensed substance abuse education and intervention provider must provide substance abuse education and intervention services. This may require an increase in expenditures for counties that currently have such programs and use a less-expensive entity to provide probation supervision services.

**C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:**

None.

**D. FISCAL COMMENTS:**

None.

**III. COMMENTS**

**A. CONSTITUTIONAL ISSUES:**

1. Applicability of Municipality/County Mandates Provision:

Current law authorizes misdemeanor probation services to be provided by both public and private entities under the supervision of the board of county commissioners or the court.<sup>8</sup> The bill amends current law to *require* a licensed substance abuse education and intervention provider to provide

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<sup>8</sup> Section 948.15(2), F.S.

probation supervision services, where the board of county commissioners or court has established a misdemeanor probation program targeting defendants convicted of a misdemeanor for possession of a controlled substance or drug paraphernalia under ch. 893, F.S. In addition, such licensed substance abuse education and intervention providers are required to provide substance abuse education and intervention services as well as probation supervision services. Since the bill may require increased expenditures by counties for which no funding source is provided and imposes constraints on counties, the bill could constitute a mandate as defined in Article VII, Section 18 of the Florida Constitution.

Laws that have an insignificant fiscal impact are exempt from the requirements of Article VII, Section 18 of the Florida Constitution. For purposes of legislative application of Article VII, Section 18 of the Florida Constitution, the term "insignificant" has been defined as a matter of legislative policy as an amount not greater than the average statewide population for the applicable fiscal year times ten cents. Based on Florida's estimated population on April 1, 2011,<sup>9</sup> a bill that has a statewide fiscal impact on counties and municipalities in aggregate or in excess of \$1.89 million would be characterized as a mandate. It is unknown at this time how much counties would be required to spend to provide the probation supervision services required by the bill. If the fiscal impact is less than \$1.89 million, the impact is insignificant, and an exemption to the mandates provision exists.

This bill could also be deemed 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:

The bill does not appear to create a need for rulemaking or rulemaking authority.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

#### **IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES**

On January 12, 2012, the Criminal Justice Subcommittee adopted one strike-all amendment and reported the bill favorably as a committee substitute. The amendment requires a licensed substance abuse education and intervention provider to provide probation supervision services, in addition to substance abuse education and intervention services, where the board of county commissioners or court has established a misdemeanor probation program targeting defendants convicted of a misdemeanor for possession of a controlled substance or drug paraphernalia under ch. 893, F.S.

This analysis is drafted to the committee substitute as passed by the Criminal Justice Subcommittee.

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<sup>9</sup> Florida Population Estimates for Counties and Municipalities: April 1, 2011. (<http://edr.state.fl.us/Content/population-demographics/data/index.cfm>)(on file with House Criminal Justice Subcommittee staff).

1                                   A bill to be entitled  
2           An act relating to misdemeanor probation services;  
3           amending s. 948.15, F.S.; requiring probation  
4           supervision services for defendants convicted of  
5           certain misdemeanor controlled substance offenses to  
6           be provided by a licensed substance abuse education  
7           and intervention provider in certain instances;  
8           requiring a licensed substance abuse education and  
9           intervention provider to provide substance abuse  
10          education and intervention services and probation  
11          supervision services; providing an effective date.

12  
13 Be It Enacted by the Legislature of the State of Florida:  
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15           Section 1. Subsection (2) of section 948.15, Florida  
16 Statutes, is amended to read:

17           948.15 Misdemeanor probation services.—

18           (2) (a) A private entity or public entity under the  
19 supervision of the board of county commissioners or the court  
20 may provide probation services for offenders sentenced by the  
21 county court.

22           (b) If the board of county commissioners or court has  
23 established a misdemeanor probation program for defendants  
24 convicted of a misdemeanor for possession of a controlled  
25 substance or drug paraphernalia under chapter 893, probation  
26 supervision services for such persons shall be provided by a  
27 licensed substance abuse education and intervention provider.  
28 Such providers shall provide substance abuse education and

CS/HB 233

2012

29 | intervention services as well as probation supervision services.

30 |       Section 2. This act shall take effect July 1, 2012.



HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/HB 431 Joint Use of Public School Facilities
SPONSOR(S): K-20 Competitiveness Subcommittee; Nehr and others
TIED BILLS: None IDEN./SIM. BILLS: CS/SB 808

Table with 4 columns: REFERENCE, ACTION, ANALYST, STAFF DIRECTOR or BUDGET/POLICY CHIEF. Rows include K-20 Competitiveness Subcommittee, Judiciary Committee, and Education Committee.

SUMMARY ANALYSIS

Currently, the county and municipalities located within the geographic area of a school district must enter into an interlocal agreement with the district school board. Within the agreement, the parties must jointly establish the specific ways the entities will coordinate their growth and development plans and processes.

In an effort to address the obesity epidemic, the bill encourages each district school board to adopt written policies to promote public access to outdoor recreation and sports facilities on public school property and to increase the number of joint-use agreements a district school board enters into with local governments or private organizations.

The Department of Education (DOE) is required to develop and post on its website a model joint-use agreement; develop and post on its website criteria for the acceptance of grants for implementing joint-use agreements; and post links to, or copies of, the public access policies and joint-use agreements submitted by a district school board.

The bill also grants a district school board immunity from liability for civil damages for personal injury, property damage, or death that occurs on a public school property that the district has opened up to the public, through public access policies or joint-use agreements, unless gross negligence or intentional misconduct on the part of the district school board is a proximate cause of the damage, injury, or death.

This bill may have a minimal fiscal impact on state and local governments. See Fiscal Comments.

The bill provides an effective date of July 1, 2012.

## FULL ANALYSIS

### I. SUBSTANTIVE ANALYSIS

#### A. EFFECT OF PROPOSED CHANGES:

##### Overweight Children and Adults

###### **Present Situation**

The Centers for Disease Control and Prevention (CDC) estimates that 33.9% of American adults are obese and another 34.4% are overweight, and more than 12.5 million children and adolescents are obese.<sup>1</sup> The prevalence of obesity among children and adolescents has almost tripled since 1980.<sup>2</sup>

The Surgeon General estimates 300,000 deaths per year may be attributed to obesity and reports individuals who are obese have a 50-100% increased risk of premature death from all causes, when compared to individuals with a healthy weight.<sup>3</sup>

One of the reasons proffered by the CDC for the increasing rates of obesity is the lack of safe and appealing places to play or be active. According to the CDC, many communities are built in ways that make it difficult or unsafe to be physically active. For some families, getting to parks and recreation centers may be difficult, and public transportation may not be available. For many children, safe routes for walking or biking to school or play may not exist. According to the Department of Health and Human Services and the CDC, less than half of Florida's youth have access to parks, community centers and sidewalks in their neighborhood. Also, youth without access to opportunities for physical activity during nonschool hours are less likely to be as physically active as their peers.<sup>4</sup>

###### **Effect of Proposed Changes**

In an effort to address the obesity epidemic, the bill encourages each district school board to adopt written policies to promote public access to outdoor recreation and sports facilities on public school property and to increase joint-use agreements between district school boards and local governments or private organizations. A public access policy should outline the outdoor recreation and sports facilities that are open to the public and the hours the facilities are open. A joint-use agreement should set forth the terms and conditions for the shared use of outdoor recreation and sports facilities on public school property. The bill requires that within 30 days of adopting a public access policy or entering into a joint-use agreement, a district school board must submit a copy of the policy or agreement to the DOE.

##### Interlocal Agreements

###### **Present Situation**

Currently, the county and municipalities located within the geographic area of a school district must enter into an interlocal agreement with the district school board. Within the agreement, the parties must jointly establish the specific ways they will coordinate their growth and development plans and processes. The agreement must also include a process for determining where and how joint use of

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<sup>1</sup> Centers for Disease Control and Prevention, *Obesity and Overweight*, <http://www.cdc.gov/nchs/fastats/overwt.htm> (last visited Jan. 15, 2012); Centers for Disease Control and Prevention, Data and Statistics, *Obesity rates among all children in the United States*, <http://www.cdc.gov/obesity/childhood/data.html> (last visited January 15, 2012).

<sup>2</sup> Centers for Disease Control and Prevention, Data and Statistics, *Obesity rates among all children in the United States*, <http://www.cdc.gov/obesity/childhood/data.html> (last visited January 15, 2012).

<sup>3</sup> Office of the Surgeon General, *Overweight and Obesity: Health Consequences*, [http://www.surgeongeneral.gov/topics/obesity/calltoaction/fact\\_consequences.htm](http://www.surgeongeneral.gov/topics/obesity/calltoaction/fact_consequences.htm) (last visited January 15, 2012).

<sup>4</sup> Centers for Disease Control and Prevention, *Overweight and Obesity: A Growing Problem*, <http://www.cdc.gov/obesity/childhood/problem.html> (last visited Jan. 15, 2012); Department of Health and Human Services and Centers for Disease Control and Prevention, *State Indicator Report on Physical Activity, 2010*, at 3 and 13, available at [http://www.cdc.gov/physicalactivity/downloads/PA\\_State\\_Indicator\\_Report\\_2010.pdf](http://www.cdc.gov/physicalactivity/downloads/PA_State_Indicator_Report_2010.pdf) (last visited February 10, 2012).



either school board or local government facilities can be shared for mutual benefit and efficiency.<sup>5</sup> Usually, interlocal agreements provide general information related to sharing facilities, but not specific details. The specific details related to sharing facilities, such as, the hours the facility will be open and which entity will be liable for any damages or injuries sustained on the property, are contained in a joint-use agreement.

Some district school boards currently authorize, through their interlocal agreements, public access to sports and recreational facilities on school campuses. In fact, according to DOE, school district facilities staff members have informally expressed support for shared use of facilities. However, the school district staff members report that reaching agreements for shared use is highly dependent on variables related to individual facilities. For this reason, while a district school board may have a general policy to allow public access and shared use of facilities, agreements for shared or public use of facilities are typically considered on a facility-by-facility basis.<sup>6</sup>

For example, the Pinellas County interlocal agreement with the School Board of Pinellas County, among others, authorizes the parties to establish an agreement “for each instance of collocation and shared use to address legal liability, operating and maintenance costs, scheduling of use, and facility supervision or any other issues that may arise from collocation or shared use.”<sup>7</sup>

According to the DOE, school district facilities planners have noted the following barriers to expanding joint-use of and public access to facilities: premises liability concerns; additional costs for supervision, custodial services, utilities, and wear and tear on fields and equipment; and forecasts of continued reductions in revenues available for facilities operation and maintenance.<sup>8</sup> Additionally, one school district risk manager reported that the school board has directed the development of a policy to prohibit public use of outdoor school grounds and facilities during periods of darkness.<sup>9</sup> The bill does not specifically address access during daylight hours; however, the bill does not prohibit a school district from establishing such a policy.

School districts are not limited to partnering with governmental entities in joint-use agreements. Pursuant to the terms of the school district’s interlocal agreements, school districts may establish joint-use agreements with private entities.<sup>10</sup> For example, in 2003, a Best Financial Management Practices Review of the Duval County School District stated that the school district had established 47 joint-use agreements with the City of Jacksonville, the YMCA, and various community groups for the use of school facilities.<sup>11</sup>

When establishing an interlocal agreement, the law requires district school boards and local governments to consider, among other things, allowing students to attend the school located nearest their homes when a new housing development is constructed, including attendance at a school located

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<sup>5</sup> Sections 163.31777(1) and (2)(g) and 1013.33(2)(a) and (3)(g), F.S.

<sup>6</sup> Staff of the Florida Department of Education, *2012 Agency Legislative Bill Analysis for HB 431* (2012).

<sup>7</sup> The Pinellas County interlocal agreement states, “The collocation and shared use of facilities are important to the Parties. The Parties will look for opportunities to collocate or share the use of each Parties’ facilities. Opportunities for collocation and shared use will be considered for libraries, parks, recreational facilities, community centers, auditoriums, learning centers, museums, performing arts centers, stadiums, healthcare and social services, schools, and other uses and facilities as may be determined appropriate. An agreement will be developed for each instance of collocation and shared use to address legal liability, operating and maintenance costs, scheduling of use, and facility supervision or any other issues that may arise from collocation or shared use.” *Interlocal Agreement between Pinellas County, Florida, et al. and the School Board of Pinellas County, Florida*, at 4 (2007), available at [http://pinellascounty.org%2FPlan%2Fpdf\\_files%2F1906\\_IA.pdf&ei=XLnnTs\\_aMo2-tgesjcWdCq&usq=AFQjCNFODEQ20Nfba11H5mNDHW3u39EyHq&sig2=PIUZ5STd6Q-LR9U\\_yiZf1w](http://pinellascounty.org%2FPlan%2Fpdf_files%2F1906_IA.pdf&ei=XLnnTs_aMo2-tgesjcWdCq&usq=AFQjCNFODEQ20Nfba11H5mNDHW3u39EyHq&sig2=PIUZ5STd6Q-LR9U_yiZf1w). The term of the interlocal agreement is 5 years. *Id.* at 11.

<sup>8</sup> Staff of the Florida Department of Education, *2012 Agency Legislative Bill Analysis for HB 431* (2012).

<sup>9</sup> *Id.*

<sup>10</sup> See *Duval County Interlocal Agreement for Public School Facility Planning*, at 10 (Nov. 2007), available at [www.duvalschools.org/static/.../ILA%20FINAL%2011-30-07.pdf](http://www.duvalschools.org/static/.../ILA%20FINAL%2011-30-07.pdf).

<sup>11</sup> The Florida Legislature, Office of Program Policy Analysis and Government Accountability, *Best Financial Management Practices Review of the Duval County School District*, Report No. 03-41, ch. 7 Facilities Construction, at 18, Aug. 2003, available at <http://www.oppaga.state.fl.us/Summary.aspx?reportNum=03-41> (last visited January 15, 2012).

in an adjacent county; consider the effects of the location of public education facilities, including the feasibility of keeping central city facilities viable in order to encourage central city redevelopment; and consult with state and local road departments to assist in implementing the Safe Routes to Schools Program administered by the Department of Transportation.<sup>12</sup>

Each interlocal agreement must be submitted to the Office of Educational Facilities of the Department of Education (DOE) and the state land planning agency.<sup>13</sup> The Office of Educational Facilities is required to submit any comments or concerns regarding an interlocal agreement to the state land planning agency.<sup>14</sup> Additionally the state land planning agency is required to assemble and make available model interlocal agreements.<sup>15</sup>

Additional public access to educational facilities and grounds is currently authorized in law for any legal assembly, community use centers, or voting precinct, if allowed by the district school board or the board of trustees for the Florida College System institution, the State University System institution, or the Florida School for the Deaf and the Blind. Rules, regulations, or policies and procedures must be adopted by each board to protect educational facilities and grounds when used for such purposes.<sup>16</sup>

### **Effect of Proposed Changes**

The bill encourages each district school board to adopt written policies to promote public access to outdoor recreation and sports facilities on public school property and to increase joint-use agreements between district school boards and local governments or private organizations. However, as demonstrated by Pinellas and Duval Counties, district school boards currently appear to have the authority to adopt public use policies and enter into joint-use agreements that include provisions regarding public use of school facilities.

The bill also requires the DOE to develop and post a model joint-use agreement on its website; develop and post criteria for the acceptance of grants for implementing joint-use agreements; and post links to or copies of each joint-use agreement received from a district school board on the DOE website. By developing and posting criteria for the acceptance of grants, the DOE may provide districts access to additional funding sources to expand public access to outdoor recreation and sports facilities on public school campuses.

### **School District Liability**

#### **Present Situation -- Landowner Liability**

In tort law, a plaintiff must prove that a lawful duty exists, that the duty was breached, and that the plaintiff suffered damages as a result of the breach. Current tort law related to a landowner's duty to persons on his or her land is governed by the status of the person. There are two basic categories of persons on land: invitees and trespassers.

An invitee is a person who was invited to enter the land. Section 768.075(3)(a)1., F.S., defines invitation to mean "that the visitor entering the premises has an objectively reasonable belief that he or she has been invited or is otherwise welcome on that portion of the real property where injury occurs." A landowner owes certain duties to invitees, and can be sued in tort should the landowner fail a duty and a person is injured due to that failure. The duties owed to most invitees are: the duty to keep property in reasonably safe condition; the duty to warn of concealed dangers which are known or should be known to the property holder, and which the invitee cannot discover through the exercise of due care; and the duty to refrain from wanton negligence or willful misconduct.

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<sup>12</sup> Section 1013.33(1), F.S.

<sup>13</sup> Section 1013.33(2)(a), F.S.

<sup>14</sup> Section 1013.33(4)(a), F.S.

<sup>15</sup> Section 1013.33(2)(d), F.S.

<sup>16</sup> Section 1013.10, F.S.; *see also* s. 1013.01(3), F.S. (defines "Board").

A trespasser is any person who is not an invitee. This bill does not affect tort law related to trespassers.

## **Present Situation -- Sovereign Immunity**

Where a government may be liable in tort, such as for landowner liability, current law limits such liability. Article X, s. 13 of the Florida Constitution recognizes the concept of sovereign immunity and gives the Legislature the right to waive the state's immunity in part or in full by general law. The Legislature did in fact establish a limited waiver of sovereign immunity for liability for tort for state agencies or subdivisions.<sup>17</sup> School districts are a state agency or subdivision for purposes of sovereign immunity.<sup>18</sup> The statutory waiver of sovereign immunity limits the recovery in a tort action against the state or subdivision to \$200,000 for any one person or one incident and limits all recovery related to one incident to a total of \$300,000.<sup>19</sup> When the state's sovereign immunity applies, the officers, employees, and agents of the state that were involved in the commission of the tort are not personally liable to an injured party.<sup>20</sup>

## **Effect of Proposed Changes**

The bill changes the standard for liability for district school boards from negligence to gross negligence or intentional misconduct. More particularly, the bill provides a district school board immunity from liability for personal injury, property damage, or death that occurs on a public school property that the district school board has opened up to the public, through public access policies or joint-use agreements, unless gross negligence or intentional misconduct on the part of the district school board is a proximate cause of the damage, injury, or death.

The bill defines gross negligence as the intentional failure to perform a manifest duty in reckless disregard of the consequences as affecting the life or property of another. By changing the liability standard from negligence to gross negligence or intentional misconduct, the bill may encourage more district school boards to adopt public access policies or enter into more joint-use agreements, and thus, increase the number of outdoor recreation and sports facilities available to the public.

The limitation on liability established in the bill will result in a plaintiff only receiving damages for personal injury, property damage, or death that was caused by gross negligence or intentional misconduct. Therefore, an injured party will not be able to recover damages for an injury sustained due to negligence. However, the bill does not prevent a lawsuit from being filed against the district; therefore, a school district may incur costs associated with litigation.

Additionally, even if a school district's actions are found to be a proximate cause of the damage, injury, or death, the school district is protected by sovereign immunity, and the damages would be capped pursuant to law.<sup>21</sup>

## **B. SECTION DIRECTORY:**

**Section 1.** Creates s. 1013.105, F.S., relating to joint use of public school facilities.

**Section 2.** Creates s. 768.072, F.S., relating to limitation on public school premises liability.

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<sup>17</sup> Section 768.28(1) and (2), F.S.; see *Op. Att'y Gen. Fla. 78-145 (1978)*; see also *Wallace v. Dean*, 3 So.3d 1035, 1045 (Fla. 2009), citing *Hutchins v. Mills*, 363 So.2d 818, 821 (Fla. 1st DCA 1978). "Prior to the effective date of s. 768.28(6), F.S., courts did not have subject matter jurisdiction of tort suits against the State and its agencies because they enjoyed sovereign immunity pursuant to Article X, section 13, Florida Constitution. However, by enacting s. 768.28[, F.S.,] the Legislature provided for waiver of sovereign immunity in tort actions. Therefore, pursuant to that statute, courts...now have subject matter jurisdiction to consider suits that fall within the parameters of the statute."

<sup>18</sup> The term "state" means "state agencies or subdivisions" which includes the executive departments, the Legislature, the judicial branch, and the independent establishments of the state, including state university boards of trustees; counties and municipalities; and corporations primarily acting as instrumentalities or agencies of the state, counties, or municipalities. Section 768.28(2), F.S.

<sup>19</sup> Section 768.28(5), F.S.

<sup>20</sup> Section 768.28(9), F.S.

<sup>21</sup> Section 768.28(5), F.S.

**Section 3.** Provides an effective date of July 1, 2012.

## II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

### A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

The bill does not appear to have any impact on state revenues.

2. Expenditures:

The bill requires the DOE to develop and make available a model joint-use agreement. The DOE is also required to post links to or copies of district joint-use agreements and also develop criteria for accepting grants for implementing joint-use agreements. These requirements are anticipated to be accomplished within departmental resources. Accordingly, no impact on state expenditures is expected.

### B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

The bill does not appear to have any impact on local government revenues.

2. Expenditures:

The bill appears to have an indeterminate impact on local government expenditures. The bill encourages school districts to adopt public access policies and enter into joint-use agreements to increase public access to outdoor recreation and sports facilities on public school property. If more school recreational facilities are open to the public, cities and counties may be able to reduce spending on the development and maintenance of public parks and recreation areas; however, school districts may have a fiscal impact from the increased "wear and tear" on the facilities. Additionally, school districts anticipate needing someone to oversee the use of the school property, which may result in an additional cost to the school district, even though the bill does not require this supervision.<sup>22</sup>

While the bill provides districts immunity from liability except in cases of gross negligence or intentional misconduct, the bill does not prevent a suit from being filed against the district; therefore, a school district may incur costs associated with litigation.

### C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

Damages received by an injured party may be limited due to a school district's immunity from liability. A plaintiff will only receive damages if the injury, damage, or death was caused by gross negligence or intentional misconduct. Therefore, an injured party will not be able to recover damages for an injury sustained due to negligence.

### 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 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:

Article 1, s. 21, Fla. Const., provides that the "courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial or delay." The Florida Supreme Court has in the past found that this provision limits the ability of the Legislature to amend tort law. In the leading case, the Florida Supreme Court first explained the constitutional limitation on the ability of the Legislature to abolish a civil cause of action:

We hold, therefore, that where a right of access to the courts for redress for a particular injury has been provided by statutory law predating the adoption of the Declaration of Rights of the Constitution of the State of Florida, or where such right has become a part of the common law of the State pursuant to Fla. Stat. s. 2.01, F.S.A., the Legislature is without power to abolish such a right without providing a reasonable alternative to protect the rights of the people of the State to redress for injuries, unless the Legislature can show an overpowering public necessity for the abolishment of such right, and no alternative method of meeting such public necessity can be shown.<sup>23</sup>

Specific to use of public property, the courts have upheld as constitutional a statute similar to that created by the bill. Current law limits the liability of a state or local government that allows members of the public to use government-owned lands for recreational purposes.<sup>24</sup>

#### B. RULE-MAKING AUTHORITY:

None.

#### C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

### IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

On January 25, 2012, the K-20 Competitiveness Subcommittee of the Education Committee reported the proposed committee substitute for HB 431 favorably as a committee substitute. The proposed committee substitute (PCS) differs from HB 431 in the following ways:

- The PCS removes the whereas clauses and the definitions from HB 431.
- The PCS adds a requirement that districts submit a copy of each public access policy or joint-use agreement to the DOE within 30 days of adoption of the policy or execution of the agreement.
- The PCS adds a requirement that DOE post the criteria it develops for the acceptance of grants for implementing joint-use agreements on its website.

<sup>23</sup> *Kluger v. White*, 281 So.2d 1, 4 (Fla. 1973).

<sup>24</sup> *See Abdin v. Fischer*, 374 So.2d 1379 (Fla. 1979) (holding that s. 375.251, F.S., limiting liability of owners and lessees who provide the public with a park area for outdoor recreational purposes, is a reasonable exercise of legislative power and does not violate Art. I, s. 21, Fla. Const., regarding access to courts)

- The PCS clarifies that liability does not exist for damages arising out of personal injury, property damage, or death that occur on school property that was open to the public, unless the gross negligence or intentional misconduct of a district school board is a proximate cause of the injury, damage, or death.
- The PCS amends the definition of “gross negligence” to be consistent with the legal definition.

This analysis is drafted to the committee substitute as passed by the K-20 Competitiveness Subcommittee.

1                                   A bill to be entitled  
 2           An act relating to the joint use of public school  
 3           facilities; creating s. 1013.105, F.S.; providing  
 4           legislative findings; encouraging each district school  
 5           board to adopt written policies to promote public  
 6           access to outdoor recreation and sports facilities on  
 7           school property and increase the number of joint-use  
 8           agreements; providing duties of district school boards  
 9           and the Department of Education; creating s. 768.072,  
 10          F.S.; providing immunity from liability for a district  
 11          school board that adopts public access policies or  
 12          enters into a joint-use agreement except in instances  
 13          of gross negligence or intentional misconduct;  
 14          defining the term "gross negligence"; providing an  
 15          effective date.

16  
 17   Be It Enacted by the Legislature of the State of Florida:  
 18

19           Section 1.   Section 1013.105, Florida Statutes is created  
 20   to read:

21           1013.105   Joint use of public school facilities.—  
 22           (1)   The Legislature finds that greater access to  
 23           recreation and sports facilities is needed to reduce the impact  
 24           of obesity on personal health and health care expenditures. The  
 25           Legislature further finds that public schools are equipped with  
 26           taxpayer-funded playgrounds, fields, tracks, courts, and other  
 27           outdoor recreation and sports facilities that offer easily  
 28           accessible opportunities for physical activity for residents of

29 the community.

30 (2) Each district school board is encouraged to:

31 (a) Adopt written policies to promote public access to the  
 32 outdoor recreation and sports facilities on public school  
 33 property during nonschool hours when a school-sponsored or  
 34 school-related activity is not occurring. A public access policy  
 35 should outline the outdoor recreation and sports facilities that  
 36 are open to the public and the hours the facilities are open.

37 (b) Increase the number of joint-use agreements entered  
 38 into with a local government or a private organization. A joint-  
 39 use agreement should set forth the terms and conditions for the  
 40 shared use of outdoor recreation and sports facilities on public  
 41 school property.

42  
 43 Within 30 days after adopting a public access policy or entering  
 44 into a joint-use agreement, a district school board must submit  
 45 a copy of the policy or agreement to the Department of  
 46 Education.

47 (3) The Department of Education shall:

48 (a) Develop a model joint-use agreement and post the model  
 49 agreement on its website.

50 (b) Post on its website links to or copies of all district  
 51 school board public access policies and joint-use agreements  
 52 submitted to the department by a district school board.

53 (c) Develop criteria for the acceptance of grants for  
 54 implementing joint-use agreements and post the criteria on its  
 55 website.

56 Section 2. Section 768.072, Florida Statutes, is created



CS/HB 431

2012

57 | to read:

58 |       768.072 Limitation on public school premises liability.-

59 |       (1) A district school board is not liable for civil  
60 | damages for personal injury, property damage, or death that  
61 | occurs on a public school property that the district school  
62 | board has opened up to the public, through public access  
63 | policies or joint-use agreements under s. 1013.105, unless gross  
64 | negligence or intentional misconduct on the part of the district  
65 | school board is a proximate cause of the injury, damage, or  
66 | death.

67 |       (2) As used in this section, the term "gross negligence"  
68 | means the intentional failure to perform a manifest duty in  
69 | reckless disregard of the consequences as affecting the life or  
70 | property of another.

71 |       Section 3. This act shall take effect July 1, 2012.



**HOUSE OF REPRESENTATIVES STAFF ANALYSIS**

**BILL #:** CS/CS/CS/HB 481 Clerks of Court

**SPONSOR(S):** Justice Appropriations Subcommittee; Government Operations Subcommittee; Civil Justice Subcommittee; Pilon

**TIED BILLS:** None **IDEN./SIM. BILLS:** CS/SB 860

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Civil Justice Subcommittee	14 Y, 0 N, As CS	Cary	Bond
2) Government Operations Subcommittee	14 Y, 0 N, As CS	Naf	Williamson
3) Justice Appropriations Subcommittee	12 Y, 0 N, As CS	Toms	Jones Darity
4) Judiciary Committee		Cary JMC	Havlicak RH

**SUMMARY ANALYSIS**

Relating to the clerks of the circuit courts, this bill:

- Provides guidelines for electronic filing of documents;
- Requires clerks to seal or expunge certain court documents upon court order;
- Requires persons filing a written request to have their personal information protected under the general agency personnel information public record exemption to specify the document type, name, identification number, and page number of the court record or official record;
- Increases the minimum amount the clerks are required to refund without a written request in the event of an overpayment from \$5 to \$10;
- Limits the state agency exemption from payment of court-related fees to the state agency and the party it is representing;
- Provides that certain fines should not be deposited into the clerk's Public Records Modernization Trust Fund;
- Authorizes the filing of electronic affidavits regarding publication of a legal advertisement; and
- Provides that following the sale of a tax certificate, if a property is redeemed prior to the clerk receiving full payment from the sale at a public auction, the high bidder must submit a written request in order to receive a refund of the deposit.

The bill may have a positive impact on the Clerks of the Court due to the increased efficiencies in day-to-day office operations the bill provides.

The bill has an effective date upon becoming law.

## FULL ANALYSIS

### I. SUBSTANTIVE ANALYSIS

#### A. EFFECT OF PROPOSED CHANGES:

This bill makes several changes relating to the clerks of courts.

##### ***Electronic Filings***

The clerk of the circuit court is required to keep all papers with the utmost care and security, arranged in appropriate files.<sup>1</sup> The clerk is also required to ensure that the papers do not leave the office without leave of court.<sup>2</sup> The statute does not address requirements to maintain electronic filings.

This bill amends s. 28.13, F.S., to address electronic filings. The bill specifically requires clerks to affix a stamp to submissions to the office indicating the date and time when it was filed. The bill also replaces a provision in current law that papers do not leave the office with language that the clerk must ensure that documents must not be removed from the control or custody of the clerk.

##### ***Clerk as County Recorder***

The clerk of the circuit court generally acts as the county recorder.<sup>3</sup> This bill amends s. 28.222, F.S., to add a new subsection (4) requiring the clerk, when acting in his or her capacity as a county recorder, to remove recorded court documents from the Official Records pursuant to a sealing or expunction order.

##### ***Public Records***

A clerk of court is a custodian of public records and is thus required to provide access to and copies of public records, if the requesting party is entitled by law to view the record.<sup>4</sup>

Certain information held by clerks of court is exempt from public record requirements pursuant to state statute or judicial rule.<sup>5</sup> Any information made confidential under state or federal constitutional or statutory law is confidential if contained in a court record.<sup>6</sup>

Certain personal information of some agency personnel, including law enforcement personnel, firefighters, justices and judges, state attorneys, magistrates, and specified others, is made exempt<sup>7</sup> from public records requirements by state law.<sup>8</sup> If such exempt information is held by an agency other than the employer of a specified person, the person must submit a written request for maintenance of the exemption to that agency.<sup>9</sup> Currently, a clerk of court usually requires a person requesting maintenance of the exemption to specify the document type, name, identification number, and page number of the court record or official record that contains the exempt information.<sup>10</sup>

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<sup>1</sup> Section 28.13, F.S.

<sup>2</sup> *Id.*

<sup>3</sup> Section 28.222(1), F.S.

<sup>4</sup> See art. I, s. 24(a) of the Florida Const., ch. 119, F.S., and s. 28.24, F.S. The Florida Constitution provides a process by which the Legislature may make certain records or portions of records exempt from public disclosure (Art. I, Sec. 24(c), FLA. CONST.).

<sup>5</sup> See art. I, s. 24 of the Florida Const. and Florida Rule of Judicial Administration 2.420.

<sup>6</sup> Florida Rule of Judicial Administration 2.420(c)(7).

<sup>7</sup> There is a difference between records the Legislature designates as exempt from public record requirements and those the Legislature deems confidential and exempt. A record classified as exempt from public disclosure may be disclosed under certain circumstances. (See *WFTV, Inc. v. The School Board of Seminole*, 874 So.2d 48, 53 (Fla. 5th DCA 2004), rev. den. 892 So.2d 1015 (Fla. 2004); *City of Riviera Beach v. Barfield*, 642 So.2d 1135 (Fla. 4th DCA 1994); *Williams v. City of Minneola*, 575 So.2d 687 (Fla. 5th DCA 1991). If the Legislature designates a record as confidential and exempt from public disclosure, such record may not be released, by the custodian of public records, to anyone other than the persons or entities specifically designated in the statutory exemption. (See Attorney General Opinion 85-62, August 1, 1985).

<sup>8</sup> Section 119.071(4)(d), F.S.

<sup>9</sup> Section 119.071(4)(d)2., F.S.

<sup>10</sup> Telephone call with Florida Association of Court Clerks staff (January 10, 2012).

This bill amends s. 119.0714, F.S., to require that a person who submits such written request to maintain the identification and location information exemption in a court record or official record to also specify the document type, name, identification number, and page number of the record that contains the exempt information.

### **Refunds**

If a clerk of court determines that an overpayment was made, the clerk is required to make a refund if the overpayment exceeds \$5.<sup>11</sup> If the amount of the overpayment is \$5 or less, the clerk need only refund the amount if the person who made the overpayment submits a written request.<sup>12</sup> This bill amends s. 24.244, F.S., to increase the minimum from \$5 to \$10.

### **Fee Exemption**

Certain individuals and groups, such as judges, state attorneys, and public defenders, are exempt from all court-related fees and charges assessed by the clerk of the circuit court, when such officials make the request acting in their official capacity.<sup>13</sup> State agencies are also exempt from all court-related fees and charges assessed by the clerk.<sup>14</sup> This bill amends ss. 28.24 and 28.345, F.S., limiting the state agency exemption to the agency and the party it is representing.

### **Public Records Modernization Trust Fund**

The clerks' Public Records Modernization Trust Fund was established for the clerks to deposit 10 percent of all court-related fines they collect. The trust fund is used for equipment, maintenance of equipment, personnel training, and technical assistance.<sup>15</sup> This bill amends s. 28.37, F.S. to provide that certain fines should not be deposited into the clerk's trust fund. Those fines include penalties assessed and collected by counties or municipalities.

### **Proof of Publication**

Numerous statutes require the publication of legal notice for various actions.<sup>16</sup> Generally, proof of such publication is made by printed affidavit.<sup>17</sup> This bill amends s. 50.041(2), F.S., to authorize an alternative, electronic affidavit, provided the notarization of the affidavit complies with the electronic notarization statute in s. 117.021, F.S.<sup>18</sup>

### **Sale at Public Auction**

A tax certificate is issued by a local government relating to unpaid delinquent real property taxes, non-ad valorem assessments, special assessments, interest, and related costs and charges, issued in accordance with ch. 172, F.S., and against a specific parcel of real property.<sup>19</sup> An unpaid tax certificate is a lien against the real property that can lead to public sale of the property.

When a tax certificate is redeemed (paid by the property owner), the certificate holder receives the amount of his or her investment (the tax certificate face amount) plus the interest accrued up to the date of redemption. A tax certificate can be redeemed anytime before a tax deed is issued or the

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<sup>11</sup> Section 24.244, F.S.

<sup>12</sup> *Id.*

<sup>13</sup> Section 28.345, F.S.

<sup>14</sup> *Id.*

<sup>15</sup> Section 28.24(12)(d), F.S.

<sup>16</sup> *See, e.g.,* s. 50.011, F.S.

<sup>17</sup> Sections 50.031 and 50.041(1), F.S.

<sup>18</sup> Section 117.021, F.S., requires that when a document is notarized electronically, it contains an electronic signature that is unique to the notary public, capable of independent verification, retained under the notary public's sole control, and attached to or logically associated with the electronic document.

<sup>19</sup> Section 197.102(1)(f), F.S.

property is placed on the list of lands available for sale either by redeeming a tax certificate from the investor or by purchasing a county-held tax certificate. The person redeeming or purchasing the tax certificate is required to pay the face amount of the certificate, plus costs and charges and all interest due, which is either the interest rate due on the certificate or a 5 percent mandatory minimum interest, whichever is greater.<sup>20</sup> The tax collector then pays the certificate owner the amount received by the tax collector, less the redemption fee.<sup>21</sup>

When property is sold by the clerk of court at a public auction, the certificate holder has the right to bid. The high bidder must post a nonrefundable deposit of 5 percent of the bid or \$200, whichever is greater, to be applied to the sale price at the time of full payment.<sup>22</sup> If full payment of the final bid is not made within 24 hours, the clerk cancels all bids, advertises the sale, and pays all costs of the sale from the deposit.<sup>23</sup> Any remaining funds must be applied toward the opening bid.<sup>24</sup>

This bill amends s. 197.542(2), F.S., to provide that if the property is redeemed prior to the clerk receiving full payment from the sale at a public auction, the high bidder must submit a written request in order to receive a refund of the deposit. Upon receipt of a written request, the clerk must refund the cash deposit.

#### B. SECTION DIRECTORY:

Section 1 amends s. 28.13, F.S., relating to papers and electronic filings.

Section 2 amends s. 28.222, F.S., relating to clerk to be county recorder.

Section 3 amends s. 28.24, F.S., relating to service charges.

Section 4 amends s. 28.244, F.S., relating to refunds by the clerk of the circuit court.

Section 5 amends s. 28.345, F.S., relating to state access to records and exemption from court-related fees and charges.

Section 6 amends s. 28.37, F.S., relating to fines, fees, service charges, and costs remitted to the state.

Section 7 amends s. 50.041, F.S., relating to affidavits for proof of publication.

Section 8 amends s. 119.0714, F.S., relating to court files, court records, and official court records.

Section 9 amends s. 197.542, F.S., relating to sale at public auction.

Section 10 provides an effective date of upon becoming a law.

## II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

### A. FISCAL IMPACT ON STATE GOVERNMENT:

#### 1. Revenues:

None.

#### 2. Expenditures:

See "fiscal comments" section.

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<sup>20</sup> Section 197.472, F.S.

<sup>21</sup> *Id.*

<sup>22</sup> Section 197.542(2), F.S.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

**B. FISCAL IMPACT ON LOCAL GOVERNMENTS:**

1. Revenues:

None.

2. Expenditures:

See "fiscal comments" section.

**C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:**

None.

**D. FISCAL COMMENTS:**

The Florida Association of Court Clerks anticipates an indeterminate, positive impact on the Clerks of Court due to the increased efficiencies in day-to-day office operations this bill provides.<sup>25</sup>

**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 does not appear to create a need for rulemaking or rulemaking authority.

**C. DRAFTING ISSUES OR OTHER COMMENTS:**

None.

**IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES**

Civil Justice Subcommittee

On November 16, 2011, the Civil Justice Subcommittee adopted three amendments and passed HB 481 as a committee substitute. The amendments:

- Moved a provision relating to fee exemptions for state agencies from the statute relating to service charges to the statute relating to exemption from court-related fees and charges; and
- Removed a potentially confusing cross-reference.

Government Operations Subcommittee

On January 11, 2012, the Government Operations Subcommittee adopted one amendment and passed CS/HB 481 as a committee substitute. The amendment clarified that the additional public record exemption requirement applies to records held by clerks of court, not to all agency records.

<sup>25</sup> Florida Association of Court Clerks, 2012 Impact Statement/Bill Analysis, HB 481, November 8, 2011.

Justice Appropriations Subcommittee

On January 30, 2012, the Justice Appropriations Subcommittee adopted one amendment and passed CS/CS/HB 481 as a committee substitute. The amendment provides that certain fines should not be deposited into the clerk's Public Records Modernization Trust Fund.

The analysis is drafted to the committee substitute as passed by the Justice Appropriations Subcommittee.



1                   A bill to be entitled  
 2           An act relating to clerks of court; amending s. 28.13,  
 3           F.S.; providing requirements for storage of electronic  
 4           filings; requiring papers and electronic filings to be  
 5           electronically time stamped; amending s. 28.222, F.S.;  
 6           authorizing the clerk to remove sealed or expunged  
 7           court records from the Official Records; amending s.  
 8           28.24, F.S.; revising language concerning an exemption  
 9           from charges for services provided to specified  
 10          officials and their staffs; amending s. 28.244, F.S.;  
 11          increasing the threshold amount for automatic  
 12          repayment of overpayments; amending s. 28.345, F.S.;  
 13          providing for access to clerks' files by state  
 14          agencies and an exemption from copying fees and  
 15          charges; limiting the application of an exemption from  
 16          payment of fees and charges assessed by clerks of  
 17          circuit courts to official use; amending s. 28.37,  
 18          F.S.; providing that certain penalties or fines need  
 19          not be deposited in the clerk's Public Records  
 20          Modernization Trust Fund; amending s. 50.041, F.S.;  
 21          authorizing the use of electronic proof of publication  
 22          affidavits; amending s. 119.0714, F.S.; requiring  
 23          certain persons to provide specific information to the  
 24          clerk to maintain the public records exemption status  
 25          of certain information under specified provisions;  
 26          amending s. 197.542, F.S.; authorizing the clerk to  
 27          issue a refund to the depositor for redeemed property  
 28          subject to a tax sale; providing an effective date.

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

Section 1. Section 28.13, Florida Statutes, is amended to read:

28.13 ~~To keep~~ Papers and electronic filings.—The clerk of the circuit court shall keep all papers and electronic filings ~~filed~~ in the clerk's office with the utmost care and security, storing them in association with related case arranged in ~~appropriate~~ files and affixing a stamp to the submission ~~indicating~~ (endorsing upon each ~~the~~ date and time when the ~~submission same~~ was filed. The clerk ~~},~~ and shall not permit any attorney or other person to remove documents, ~~take papers~~ once filed, from the control or custody ~~out of the office~~ of the clerk without leave of the court, except as otherwise is ~~hereinafter~~ provided by law.

Section 2. Subsections (4) through (6) of section 28.222, Florida Statutes, are renumbered as subsections (5) through (7), respectively, and a new subsection (4) is added to that section to read:

28.222 Clerk to be county recorder.—

(4) The county recorder shall remove recorded court documents from the Official Records pursuant to a sealing or expunction order.

Section 3. Section 28.24, Florida Statutes, is amended to read:

28.24 ~~Service charges by clerk of the circuit court.~~—The clerk of the circuit court shall charge for services rendered by

57 the clerk's office in recording documents and instruments and in  
58 performing the duties enumerated in amounts not to exceed those  
59 specified in this section, except as provided in s. 28.345.

60 ~~Notwithstanding any other provision of this section, the clerk~~  
61 ~~of the circuit court shall provide without charge to the state~~  
62 ~~attorney, public defender, guardian ad litem, public guardian,~~  
63 ~~attorney ad litem, criminal conflict and civil regional counsel,~~  
64 ~~and private court-appointed counsel paid by the state, and to~~  
65 ~~the authorized staff acting on behalf of each, access to and a~~  
66 ~~copy of any public record, if the requesting party is entitled~~  
67 ~~by law to view the exempt or confidential record, as maintained~~  
68 ~~by and in the custody of the clerk of the circuit court as~~  
69 ~~provided in general law and the Florida Rules of Judicial~~  
70 ~~Administration. The clerk of the circuit court may provide the~~  
71 ~~requested public record in an electronic format in lieu of a~~  
72 ~~paper format when capable of being accessed by the requesting~~  
73 ~~entity.~~

Charges

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75 (1) For examining, comparing, correcting, verifying, and  
76 certifying transcripts of record in appellate proceedings,  
77 prepared by attorney for appellant or someone else other than  
78 clerk, per page 5.00

79 (2) For preparing, numbering, and indexing an original  
80 record of appellate proceedings, per instrument 3.50

81 (3) For certifying copies of any instrument in the public  
82 records 2.00

83 (4) For verifying any instrument presented for  
84 certification prepared by someone other than clerk, per page

85 3.50

86 (5) (a) For making copies by photographic process of any

87 instrument in the public records consisting of pages of not more

88 than 14 inches by 8 1/2 inches, per page 1.00

89 (b) For making copies by photographic process of any

90 instrument in the public records of more than 14 inches by 8 1/2

91 inches, per page 5.00

92 (6) For making microfilm copies of any public records:

93 (a) 16 mm 100' microfilm roll 42.00

94 (b) 35 mm 100' microfilm roll 60.00

95 (c) Microfiche, per fiche 3.50

96 (7) For copying any instrument in the public records by

97 other than photographic process, per page 6.00

98 (8) For writing any paper other than herein specifically

99 mentioned, same as for copying, including signing and sealing

100 7.00

101 (9) For indexing each entry not recorded 1.00

102 (10) For receiving money into the registry of court:

103 (a) 1. First \$500, percent 3

104 2. Each subsequent \$100, percent 1.5

105 (b) Eminent domain actions, per deposit 170.00

106 (11) For examining, certifying, and recording plats and

107 for recording condominium exhibits larger than 14 inches by 8

108 1/2 inches:

109 (a) First page 30.00

110 (b) Each additional page 15.00

111 (12) For recording, indexing, and filing any instrument

112 not more than 14 inches by 8 1/2 inches, including required

113 notice to property appraiser where applicable:

114 (a) First page or fraction thereof 5.00

115 (b) Each additional page or fraction thereof 4.00

116 (c) For indexing instruments recorded in the official  
117 records which contain more than four names, per additional name  
118 1.00

119 (d) An additional service charge shall be paid to the  
120 clerk of the circuit court to be deposited in the Public Records  
121 Modernization Trust Fund for each instrument listed in s.  
122 28.222, except judgments received from the courts and notices of  
123 lis pendens, recorded in the official records:

124 1. First page 1.00

125 2. Each additional page 0.50

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127 Said fund shall be held in trust by the clerk and used  
128 exclusively for equipment and maintenance of equipment,  
129 personnel training, and technical assistance in modernizing the  
130 public records system of the office. In a county where the duty  
131 of maintaining official records exists in an office other than  
132 the office of the clerk of the circuit court, the clerk of the  
133 circuit court is entitled to 25 percent of the moneys deposited  
134 into the trust fund for equipment, maintenance of equipment,  
135 training, and technical assistance in modernizing the system for  
136 storing records in the office of the clerk of the circuit court.  
137 The fund may not be used for the payment of travel expenses,  
138 membership dues, bank charges, staff-recruitment costs, salaries  
139 or benefits of employees, construction costs, general operating  
140 expenses, or other costs not directly related to obtaining and

141 maintaining equipment for public records systems or for the  
 142 purchase of furniture or office supplies and equipment not  
 143 related to the storage of records. On or before December 1,  
 144 1995, and on or before December 1 of each year immediately  
 145 preceding each year during which the trust fund is scheduled for  
 146 legislative review under s. 19(f)(2), Art. III of the State  
 147 Constitution, each clerk of the circuit court shall file a  
 148 report on the Public Records Modernization Trust Fund with the  
 149 President of the Senate and the Speaker of the House of  
 150 Representatives. The report must itemize each expenditure made  
 151 from the trust fund since the last report was filed; each  
 152 obligation payable from the trust fund on that date; and the  
 153 percentage of funds expended for each of the following:  
 154 equipment, maintenance of equipment, personnel training, and  
 155 technical assistance. The report must indicate the nature of the  
 156 system each clerk uses to store, maintain, and retrieve public  
 157 records and the degree to which the system has been upgraded  
 158 since the creation of the trust fund.

159 (e) An additional service charge of \$4 per page shall be  
 160 paid to the clerk of the circuit court for each instrument  
 161 listed in s. 28.222, except judgments received from the courts  
 162 and notices of lis pendens, recorded in the official records.  
 163 From the additional \$4 service charge collected:

164 1. If the counties maintain legal responsibility for the  
 165 costs of the court-related technology needs as defined in s.  
 166 29.008(1)(f)2. and (h), 10 cents shall be distributed to the  
 167 Florida Association of Court Clerks and Comptroller, Inc., for  
 168 the cost of development, implementation, operation, and

169 maintenance of the clerks' Comprehensive Case Information  
 170 System, in which system all clerks shall participate on or  
 171 before January 1, 2006; \$1.90 shall be retained by the clerk to  
 172 be deposited in the Public Records Modernization Trust Fund and  
 173 used exclusively for funding court-related technology needs of  
 174 the clerk as defined in s. 29.008(1)(f)2. and (h); and \$2 shall  
 175 be distributed to the board of county commissioners to be used  
 176 exclusively to fund court-related technology, and court  
 177 technology needs as defined in s. 29.008(1)(f)2. and (h) for the  
 178 state trial courts, state attorney, public defender, and  
 179 criminal conflict and civil regional counsel in that county. If  
 180 the counties maintain legal responsibility for the costs of the  
 181 court-related technology needs as defined in s. 29.008(1)(f)2.  
 182 and (h), notwithstanding any other provision of law, the county  
 183 is not required to provide additional funding beyond that  
 184 provided herein for the court-related technology needs of the  
 185 clerk as defined in s. 29.008(1)(f)2. and (h). All court records  
 186 and official records are the property of the State of Florida,  
 187 including any records generated as part of the Comprehensive  
 188 Case Information System funded pursuant to this paragraph and  
 189 the clerk of court is designated as the custodian of such  
 190 records, except in a county where the duty of maintaining  
 191 official records exists in a county office other than the clerk  
 192 of court or comptroller, such county office is designated the  
 193 custodian of all official records, and the clerk of court is  
 194 designated the custodian of all court records. The clerk of  
 195 court or any entity acting on behalf of the clerk of court,  
 196 including an association, shall not charge a fee to any agency

197 as defined in s. 119.011, the Legislature, or the State Court  
 198 System for copies of records generated by the Comprehensive Case  
 199 Information System or held by the clerk of court or any entity  
 200 acting on behalf of the clerk of court, including an  
 201 association.

202 2. If the state becomes legally responsible for the costs  
 203 of court-related technology needs as defined in s.  
 204 29.008(1)(f)2. and (h), whether by operation of general law or  
 205 by court order, \$4 shall be remitted to the Department of  
 206 Revenue for deposit into the General Revenue Fund.

207 (13) Oath, administering, attesting, and sealing, not  
 208 otherwise provided for herein 3.50

209 (14) For validating certificates, any authorized bonds,  
 210 each 3.50

211 (15) For preparing affidavit of domicile 5.00

212 (16) For exemplified certificates, including signing and  
 213 sealing 7.00

214 (17) For authenticated certificates, including signing and  
 215 sealing 7.00

216 (18)(a) For issuing and filing a subpoena for a witness,  
 217 not otherwise provided for herein (includes writing, preparing,  
 218 signing, and sealing) 7.00

219 (b) For signing and sealing only 2.00

220 (19) For approving bond 8.50

221 (20) For searching of records, for each year's search 2.00

222 (21) For processing an application for a tax deed sale  
 223 (includes application, sale, issuance, and preparation of tax  
 224 deed, and disbursement of proceeds of sale), other than excess



CS/CS/CS/HB 481

2012

225 proceeds 60.00  
 226 (22) For disbursement of excess proceeds of tax deed sale,  
 227 first \$100 or fraction thereof 10.00  
 228 (23) Upon receipt of an application for a marriage  
 229 license, for preparing and administering of oath; issuing,  
 230 sealing, and recording of the marriage license; and providing a  
 231 certified copy 30.00  
 232 (24) For solemnizing matrimony 30.00  
 233 (25) For sealing any court file or expungement of any  
 234 record 42.00  
 235 (26)(a) For receiving and disbursing all restitution  
 236 payments, per payment 3.50  
 237 (b) For receiving and disbursing all partial payments,  
 238 other than restitution payments, for which an administrative  
 239 processing service charge is not imposed pursuant to s. 28.246,  
 240 per month 5.00  
 241 (c) For setting up a payment plan, a one-time  
 242 administrative processing charge in lieu of a per month charge  
 243 under paragraph (b) 25.00  
 244 (27) Postal charges incurred by the clerk of the circuit  
 245 court in any mailing by certified or registered mail shall be  
 246 paid by the party at whose instance the mailing is made.  
 247 (28) For furnishing an electronic copy of information  
 248 contained in a computer database: a fee as provided for in  
 249 chapter 119.  
 250 Section 4. Section 28.244, Florida Statutes, is amended to  
 251 read:  
 252 28.244 Refunds.—A clerk of the circuit court or a filing

253 officer of another office where records are filed who receives  
 254 payment for services provided and thereafter determines that an  
 255 overpayment has occurred shall refund to the person who made the  
 256 payment the amount of any overpayment that exceeds \$10 ~~\$5~~. If  
 257 the amount of the overpayment is \$10 ~~\$5~~ or less, the clerk of  
 258 the circuit court or a filing officer of another office where  
 259 records are filed is not required to refund the amount of the  
 260 overpayment unless the person who made the overpayment makes a  
 261 written request.

262 Section 5. Section 28.345, Florida Statutes, is amended to  
 263 read:

264 28.345 State access to records; exemption from court-  
 265 related fees and charges.-

266 (1) Notwithstanding any other provision of law to the  
 267 contrary, the clerk of the circuit court shall provide without  
 268 charge to the state attorney, public defender, guardian ad  
 269 litem, public guardian, attorney ad litem, criminal conflict and  
 270 civil regional counsel, and private court-appointed counsel paid  
 271 by the state, and to the authorized staff acting on behalf of  
 272 each, access to and a copy of any public record. If the public  
 273 record is exempt or confidential, the requesting party is only  
 274 entitled by law to view or copy the exempt or confidential  
 275 record if authority is provided in general law or the Florida  
 276 Rules of Judicial Administration. The clerk of the circuit court  
 277 may provide the requested public record in an electronic format  
 278 in lieu of a paper format when the requesting entity is capable  
 279 of accessing it in an electronic format. For purposes of this  
 280 subsection, the term "copy of a public record" means any

281 facsimile, replica, photograph, or other reproduction of a  
 282 record.

283 (2) Notwithstanding any other ~~provision of this chapter or~~  
 284 law to the contrary, judges and those court staff acting on  
 285 behalf of judges, state attorneys, guardians ad litem, public  
 286 guardians, attorneys ad litem, court-appointed private counsel,  
 287 criminal conflict and civil regional counsel, ~~and~~ public  
 288 defenders, and state agencies, while acting in their official  
 289 capacity, ~~and state agencies,~~ are exempt from all court-related  
 290 fees and charges assessed by the clerks of the circuit courts.

291 (3) The exemptions provided in subsections (1) and (2)  
 292 apply only to state agencies and state entities and the party  
 293 that an agency or entity is representing. The clerk of court  
 294 shall collect the filing fees and services charges as required  
 295 in this chapter from all other parties.

296 Section 6. Subsection (2) of section 28.37, Florida  
 297 Statutes, is amended to read:

298 28.37 Fines, fees, service charges, and costs remitted to  
 299 the state.—

300 (2) Except as otherwise provided in ss. 28.241 and 34.041,  
 301 all court-related fines, fees, service charges, and costs are  
 302 considered state funds and shall be remitted by the clerk to the  
 303 Department of Revenue for deposit into the Clerks of the Court  
 304 Trust Fund within the Justice Administrative Commission.  
 305 However, 10 percent of all court-related fines collected by the  
 306 clerk, except for penalties or fines distributed under s.  
 307 316.0083(1)(b)3. or s. 318.18(15)(a) to counties or  
 308 municipalities, shall be deposited into the clerk's Public

309 Records Modernization Trust Fund to be used exclusively for  
 310 additional clerk court-related operational needs and program  
 311 enhancements.

312 Section 7. Subsection (2) of section 50.041, Florida  
 313 Statutes, is amended to read:

314 50.041 Proof of publication; uniform affidavits required.—

315 (2) Each such affidavit shall be printed upon white bond  
 316 paper containing at least 25 percent rag material and shall be 8  
 317 1/2 inches in width and of convenient length, not less than 5  
 318 1/2 inches. A white margin of not less than 2 1/2 inches shall  
 319 be left at the right side of each affidavit form and upon or in  
 320 this space shall be substantially pasted a clipping which shall  
 321 be a true copy of the public notice or legal advertisement for  
 322 which proof is executed. Alternatively, each such affidavit may  
 323 be provided in electronic rather than paper form, provided the  
 324 notarization of the affidavit complies with the requirements of  
 325 s. 117.021.

326 Section 8. Subsections (2) and (3) of section 119.0714,  
 327 Florida Statutes, are amended to read:

328 119.0714 Court files; court records; official records.—

329 (2) COURT RECORDS.—

330 (a)1. Until January 1, 2012, if a social security number  
 331 or a bank account, debit, charge, or credit card number is  
 332 included in a court file, such number may be included as part of  
 333 the court record available for public inspection and copying  
 334 unless redaction is requested by the holder of such number or by  
 335 the holder's attorney or legal guardian.

336 ~~2.(b)~~ A request for redaction must be a signed, legibly

337 written request specifying the case name, case number, document  
 338 heading, and page number. The request must be delivered by mail,  
 339 facsimile, electronic transmission, or in person to the clerk of  
 340 the court. The clerk of the court does not have a duty to  
 341 inquire beyond the written request to verify the identity of a  
 342 person requesting redaction.

343 ~~3.(e)~~ A fee may not be charged for the redaction of a  
 344 social security number or a bank account, debit, charge, or  
 345 credit card number pursuant to such request.

346 ~~4.(d)~~ The clerk of the court has no liability for the  
 347 inadvertent release of social security numbers, or bank account,  
 348 debit, charge, or credit card numbers, unknown to the clerk of  
 349 the court in court records filed on or before January 1, 2012.

350 ~~5.a.(e)1.~~ On January 1, 2012, and thereafter, the clerk of  
 351 the court must keep social security numbers confidential and  
 352 exempt as provided for in s. 119.071(5)(a), and bank account,  
 353 debit, charge, and credit card numbers exempt as provided for in  
 354 s. 119.071(5)(b), without any person having to request  
 355 redaction.

356 ~~b.2.~~ Section 119.071(5)(a)7. and 8. does not apply to the  
 357 clerks of the court with respect to court records.

358 (b) A request for maintenance of a public record exemption  
 359 in s. 119.071(4)(d)1. made pursuant to s. 119.071(4)(d)2. must  
 360 specify the document type, name, identification number, and page  
 361 number of the court record that contains the exempt information.

362 (3) OFFICIAL RECORDS.—

363 (a)1. Any person who prepares or files a record for  
 364 recording in the official records as provided in chapter 28 may

365 | not include in that record a social security number or a bank  
 366 | account, debit, charge, or credit card number unless otherwise  
 367 | expressly required by law.

368 |     2.a.(b)1. If a social security number or a bank account,  
 369 | debit, charge, or credit card number is included in an official  
 370 | record, such number may be made available as part of the  
 371 | official records available for public inspection and copying  
 372 | unless redaction is requested by the holder of such number or by  
 373 | the holder's attorney or legal guardian.

374 |     b.2. If such record is in electronic format, on January 1,  
 375 | 2011, and thereafter, the county recorder must use his or her  
 376 | best effort, as provided in subparagraph 8. ~~paragraph (h)~~, to  
 377 | keep social security numbers confidential and exempt as provided  
 378 | for in s. 119.071(5)(a), and to keep complete bank account,  
 379 | debit, charge, and credit card numbers exempt as provided for in  
 380 | s. 119.071(5)(b), without any person having to request  
 381 | redaction.

382 |     c.3. Section 119.071(5)(a)7. and 8. does not apply to the  
 383 | county recorder with respect to official records.

384 |     3.(e) The holder of a social security number or a bank  
 385 | account, debit, charge, or credit card number, or the holder's  
 386 | attorney or legal guardian, may request that a county recorder  
 387 | redact from an image or copy of an official record placed on a  
 388 | county recorder's publicly available Internet website or on a  
 389 | publicly available Internet website used by a county recorder to  
 390 | display public records, or otherwise made electronically  
 391 | available to the public, his or her social security number or  
 392 | bank account, debit, charge, or credit card number contained in

393 that official record.

394 4.~~(d)~~ A request for redaction must be a signed, legibly  
 395 written request and must be delivered by mail, facsimile,  
 396 electronic transmission, or in person to the county recorder.  
 397 The request must specify the identification page number of the  
 398 record that contains the number to be redacted.

399 5.~~(e)~~ The county recorder does not have a duty to inquire  
 400 beyond the written request to verify the identity of a person  
 401 requesting redaction.

402 6.~~(f)~~ A fee may not be charged for redacting a social  
 403 security number or a bank account, debit, charge, or credit card  
 404 number.

405 7.~~(g)~~ A county recorder shall immediately and  
 406 conspicuously post signs throughout his or her offices for  
 407 public viewing, and shall immediately and conspicuously post on  
 408 any Internet website or remote electronic site made available by  
 409 the county recorder and used for the ordering or display of  
 410 official records or images or copies of official records, a  
 411 notice stating, in substantially similar form, the following:

412 a.1.~~1.~~ On or after October 1, 2002, any person preparing or  
 413 filing a record for recordation in the official records may not  
 414 include a social security number or a bank account, debit,  
 415 charge, or credit card number in such document unless required  
 416 by law.

417 b.2.~~2.~~ Any person has a right to request a county recorder  
 418 to remove from an image or copy of an official record placed on  
 419 a county recorder's publicly available Internet website or on a  
 420 publicly available Internet website used by a county recorder to

421 display public records, or otherwise made electronically  
 422 available to the general public, any social security number  
 423 contained in an official record. Such request must be made in  
 424 writing and delivered by mail, facsimile, or electronic  
 425 transmission, or delivered in person, to the county recorder.  
 426 The request must specify the identification page number that  
 427 contains the social security number to be redacted. A fee may  
 428 not be charged for the redaction of a social security number  
 429 pursuant to such a request.

430 8.~~(h)~~ If the county recorder accepts or stores official  
 431 records in an electronic format, the county recorder must use  
 432 his or her best efforts to redact all social security numbers  
 433 and bank account, debit, charge, or credit card numbers from  
 434 electronic copies of the official record. The use of an  
 435 automated program for redaction shall be deemed to be the best  
 436 effort in performing the redaction and shall be deemed in  
 437 compliance with the requirements of this subsection.

438 9.~~(i)~~ The county recorder is not liable for the  
 439 inadvertent release of social security numbers, or bank account,  
 440 debit, charge, or credit card numbers, filed with the county  
 441 recorder.

442 (b) A request for maintenance of a public record exemption  
 443 in s. 119.071(4)(d)1. made pursuant to s. 119.071(4)(d)2. must  
 444 specify the document type, name, identification number, and page  
 445 number of the official record that contains the exempt  
 446 information.

447 Section 9. Subsection (2) of section 197.542, Florida  
 448 Statutes, is amended to read:



449 197.542 Sale at public auction.—

450 (2) The certificateholder has the right to bid as others  
 451 present may bid, and the property shall be struck off and sold  
 452 to the highest bidder. The high bidder shall post with the clerk  
 453 a nonrefundable deposit of 5 percent of the bid or \$200,  
 454 whichever is greater, at the time of the sale, to be applied to  
 455 the sale price at the time of full payment. Notice of the  
 456 deposit requirement must be posted at the auction site, and the  
 457 clerk may require bidders to show their willingness and ability  
 458 to post the deposit. If full payment of the final bid and of  
 459 documentary stamp tax and recording fees is not made within 24  
 460 hours, excluding weekends and legal holidays, the clerk shall  
 461 cancel all bids, readvertise the sale as provided in this  
 462 section, and pay all costs of the sale from the deposit. Any  
 463 remaining funds must be applied toward the opening bid. If the  
 464 property is redeemed prior to the clerk receiving full payment  
 465 for the issuance of a tax deed, in order to receive a refund of  
 466 the deposit described in this subsection, the high bidder must  
 467 submit a request for such refund in writing to the clerk. Upon  
 468 receipt of the refund request, the clerk shall refund the cash  
 469 deposit. The clerk may refuse to recognize the bid of any person  
 470 who has previously bid and refused, for any reason, to honor  
 471 such bid.

472 Section 10. This act shall take effect upon becoming a  
 473 law.



**HOUSE OF REPRESENTATIVES STAFF ANALYSIS**

**BILL #:** CS/HB 549 Dissolution of Marriage  
**SPONSOR(S):** Civil Justice Subcommittee; Workman and others  
**TIED BILLS:** None **IDEN./SIM. BILLS:** CS/SB 748

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Civil Justice Subcommittee	10 Y, 2 N, As CS	Caridad	Bond
2) Judiciary Committee		Caridad <i>DC</i>	Havlicak <i>RH</i>

**SUMMARY ANALYSIS**

Alimony provides financial support to a financially dependent former spouse. The primary basis for determining alimony is whether there is need and ability to pay. There are four different types of alimony: bridge-the-gap alimony, rehabilitative alimony, durational alimony, and permanent alimony.

A court may grant a request to modify alimony where there is a change in circumstances or the financial ability of the parties. It may also reduce or terminate an award of alimony based on its specific written findings that the spouse receiving alimony has entered into a supportive relationship with another person.

The bill amends current law on alimony and divorce to:

- Limit suit money.
- Change the term "permanent alimony" to "long-term" alimony.
- Limit the types of alimony that may be awarded concurrently.
- Remove the statutory authority of a court to consider adultery when determining alimony.
- Require written findings justifying factors regarding an alimony award.
- Modify the factors used in determining alimony.
- Create a presumption that the parties will have a lower standard of living after divorce.
- Require that the cost of a life insurance policy or bond purchased to protect an alimony award be deducted from the award.
- Modify the line between moderate-term and long-term marriage from 17 to 20 years.
- Create a presumption in favor of durational alimony over long-term alimony.
- Require that an alimony award may not require the person paying the award to have a lower standard of living than the person receiving alimony.
- Require retroactive modification or termination of alimony upon proof of a supportive relationship if the obligee denies the relationship or any material facts related to the relationship.
- Create a rebuttable presumption that alimony terminates upon retirement of the obligor, which may be overcome by a written finding of exceptional circumstances.
- Create a presumptive retirement age of 67.
- Prohibit factoring the income or assets of a new spouse of the obligor.
- Prohibit modification based solely on a reduction in child support.
- Require a person receiving alimony to maximize the potential for rehabilitation.
- Allow bifurcation of a case if the case is pending more than 180 days.

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

This bill provides an effective date of July 1, 2012.

# FULL ANALYSIS

## I. SUBSTANTIVE ANALYSIS

### A. EFFECT OF PROPOSED CHANGES:

#### **Alimony - In General**

Alimony provides financial support to a financially dependent former spouse.<sup>1</sup> 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.<sup>2</sup> Before a court can make an award of alimony, equitable distribution of the former spouse's assets must occur.<sup>3</sup>

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

- The standard of living established during the marriage;
- The duration of the marriage;
- The age and the physical and emotional condition of each party;
- The financial resources of each party, including the nonmarital and the marital assets and liabilities distributed to each;
- 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;
- The contribution of each party to the marriage, including, but not limited, services rendered in homemaking, child care, education, and career building of the other party;
- 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 any alimony award, including the designation of all or a portion of the payment as a nontaxable nondeductible payment;
- All sources of income available to either party, including income available to either party through investments of any asset held by that party; and
- Any other factor necessary to do equity and justice between the parties.

For purposes of determining alimony, there is a rebuttable presumption that:

- A short-term marriage is a marriage having a duration of less than seven years;
- A moderate-term marriage is a marriage having a duration of greater than seven years but less than seventeen years; and
- A long-term marriage is a marriage having a duration of seventeen years or greater.<sup>4</sup>

Florida law provides for four types of alimony; bridge-the-gap alimony,<sup>5</sup> rehabilitative alimony,<sup>6</sup> durational alimony,<sup>7</sup> and permanent alimony.<sup>8</sup>

- 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.<sup>9</sup>

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<sup>1</sup> Victoria Ho & Jennifer Johnson, *Overview of Florida Alimony Law*, 78 Fla.B.J. 71, 71 (Oct. 2004).

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> Section 61.08(4), F.S.

<sup>5</sup> Section 61.08(5), F.S.

<sup>6</sup> Section 61.08(6), F.S.

<sup>7</sup> Section 61.08(7), F.S.

<sup>8</sup> Section 61.08(8), F.S.

<sup>9</sup> Section 60.08(5), F.S.

- Rehabilitative alimony may be awarded to assist a party in establishing the capacity for self-support through either the redevelopment of previous skills or credentials; or the acquisition of education, training, or work experience necessary to develop appropriate employment skills or credentials.<sup>10</sup>
- 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.
- 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 dissolution of marriage.

Permanent alimony may be awarded following a marriage of long duration if such an award is appropriate upon consideration of the factors set forth in s. 61.08(2), following a marriage of moderate duration if such an award is appropriate based upon clear and convincing evidence after consideration of the factors set forth in s. 61.08(2), or following a marriage of short duration if there are written findings of exceptional circumstances. In awarding permanent alimony, the court shall include a finding that no other form of alimony is fair and reasonable under the circumstances of the parties.<sup>11</sup>

The bill changes divorce and alimony laws as follows:

### **Alimony Pendente Lite and Suit Money**

Alimony pendente lite is temporary alimony awarded to a spouse during pendency of a dissolution of marriage action to furnish such spouse the means of living so he or she may not become a charge upon the state while the case is being adjudicated.<sup>12</sup> Suit money is a spouse's payment to the other spouse to cover his or her reasonable attorney's fees in a divorce action.<sup>13</sup> Current law provides that in every proceeding for dissolution of marriage, a party may claim alimony and suit money. If a court grants a request for alimony or suit money, the only restriction to such a determination is that the award and fees be a reasonable sum.

The bill provides that suit money may not exceed either \$7,000 or the reasonable value of the representation of the party paying the fee, whichever is greater.

### **Award of Multiple Types of Alimony**

Current law at s. 61.08(1), F.S., provides that a court may award multiple forms of alimony. This bill limits awards of multiple forms of alimony to combination of bridge-the-gap and rehabilitative alimony.

### **Adultery**

Section 61.08(1), F.S., provides that a court may also consider the adultery of either party and the circumstances surrounding that adultery in determining an award of alimony.<sup>14</sup> However, adultery is not a bar to entitlement to alimony<sup>15</sup> and marital misconduct may not be used as a basis for alimony unless the misconduct causes a depletion of marital assets.<sup>16</sup> This bill deletes the statutory authorization for a court to consider adultery by either spouse in determining the amount of alimony.

<sup>10</sup> Section 61.08(6)(a), F.S.

<sup>11</sup> Section 61.08(8), F.S.

<sup>12</sup> See *Grace v. Grace*, 162 So.2d 314, 320 (Fla. 1st DCA 1964).

<sup>13</sup> *Black's Law Dictionary* (9th ed. 2009).

<sup>14</sup> Section 61.08(1), F.S.

<sup>15</sup> See *Coltea v. Coltea*, 856 So.2d 1047 (Fla. 4th DCA).

<sup>16</sup> See *Noah v. Noah*, 491 So.2d 1124 (Fla. 1986) (holding that the trial court erred in distributing virtually all assets to the wife on the basis of her husband's adultery where there was no evidence that the adultery depleted the family resources or that the emotional devastation visited on the wife translated into her having a greater financial need).

## **Alimony Awards and Written Findings**

This bill requires that a court awarding alimony must make written findings regarding:

- The need for and ability to pay alimony.
- Application of the factors listed in s. 61.08(2), F.S.
- Additional equitable factors relied upon by the court in making an alimony award.
- The relative incomes and standards of living of the parties.
- Rehabilitation efforts and imputation of income to the spouse during and after rehabilitation.

## **Modification of Factors Regarding Alimony**

Section 61.08(2), F.S., lists 10 factors that a court must consider when determining any alimony award (see above for comprehensive list of the factors). This bill amends the factors as follows:

- The standard of living factor is amended to specify that the standard of living of each party must be considered.
- The financial resources factor is amended to delete the ability of the court to look to nonmarital assets.
- The tax treatment factor is amended to require that an alimony award must be tax deductible by the obligor and taxable to the recipient; however, an award for the cost of the obligee's education or training necessary to establishing the capacity for self support need not be deductible by the obligor.
- The sources of income factor is amended to limit the court to only considering income from assets acquired during the marriage.
- The bill adds a new factor to require that a court must consider the standard of living of each party after the application of the alimony award. In addition, the bill creates a rebuttable presumption that both parties will have a lower standard of living after divorce than the standard of living enjoyed during the marriage.

## **Security for an Alimony Award**

Section 61.08(3), F.S., provides that the court may protect an alimony award by requiring the obligor to purchase life insurance or post a bond. This bill provides that the cost of life insurance or a bond must be deducted from the alimony award, provides that any requirement of insurance or a bond may be modified separately, and specifies that a requirement for life insurance or a bond ends when the term of alimony ends.

## **Length of Marriage**

Section 61.08(4), F.S., utilizes the length of the marriage in years to determine whether the marriage is considered short-term, moderate term, or long-term. The types of alimony available are dependent upon which of these categories applies. This bill:

- Removes the language creating a legal presumption, thereby making the length in years determinative (that is, eliminating judicial discretion).
- Redefines the line between moderate-term marriage and long-term marriage from 17 to 20 years.

## **Changes to Durational Alimony**

The bill:

- Creates a presumption in favor of durational alimony over long-term alimony.
- Provides that durational alimony is not authorized following a short-term marriage.

- Requires modification or termination upon a substantial change in circumstances or upon the existence of a supportive relationship.
- Removes the requirement that a party prove "exceptional circumstances" in order to modify the alimony award.

### **Changes to Permanent Alimony**

Permanent alimony continues until the death of the obligor, death of the obligee, remarriage of the obligee, or termination by a court. This bill changes the term "permanent alimony" to "long-term" alimony. The bill also:

- Changes the requirement that long-term alimony provide for the needs and necessities of life as they were established during the marriage, to a requirement that such alimony provide for the needs and necessities of life.
- Requires a court to modify the award based on a substantial change in circumstances.
- Provides that in awarding long-term alimony, the court must include a finding that no other form of alimony will provide for the needs and necessities of life of the recipient and that no other form of alimony is fair and reasonable under the circumstances of the parties.

### **Evaluation of Relative Standards of Living**

Section 61.08(9), F.S., requires that an award of alimony may not leave the payor with significantly less net income than the net income of the recipient, absent exceptional circumstances. This bill amends this provision to provide that an award may not leave the payor with less net income or with a lower standard of living than the recipient. The bill also removes the ability of a court to consider exceptional circumstances. The court must make written findings regarding the relative incomes and standards of living of the parties.

### **Modification of Alimony Based on the Existence of a Supportive Relationship**

A court may grant a request to modify alimony where the moving party shows "a permanent, unanticipated, substantial change in financial circumstances in one or both of the parties."<sup>17</sup> One form of change of circumstances warranting modification of an alimony award is the existence of a supportive relationship. A court may reduce or terminate an award of alimony based on its specific written findings that, since the granting of a divorce and the award of alimony, the spouse receiving alimony, or the obligee, has entered into a supportive relationship with a person with whom he or she resides. Section 61.14(1), F.S., enumerates factors a court must consider when determining whether a supportive relationship exists between the obligee and the individual with whom such former spouse resides (i.e. the extent to which the obligee and the person hold themselves out as a married couple). The spouse paying spousal support, or the obligor, has the burden to prove that a supportive relationship exists.

The bill amends the statutory guidelines regarding enforcement and modification of an alimony award relating to instances where an obligee enters into a supportive relationship following an award of alimony. Current law provides that modification is discretionary, the bill provides that a court must reduce or terminate an award upon specific written findings by the court that a supportive relationship has existed between the obligee and a person with whom the obligee resides.

If the obligee denies or fails to admit any material fact regarding the existence of a supportive relationship when he or she knew or should have known about the material fact, and the obligor subsequently proves the existence of the material fact the court must:

- Enter an order modifying the alimony award retroactive to the beginning of the supportive relationship;

<sup>17</sup> *Townsend v. Townsend*, 585 So.2d 468 (Fla. 2d DCA 1991).

- Award the obligor a refund of all alimony the obligor actually paid to the obligee from the beginning of the supportive relationship; and
- Award the obligor reasonable costs and attorneys fees incurred in proving the fact.

If the obligee denies the existence of a supportive relationship and the obligor subsequently proves the existence of a supportive relationship, the court must:

- Order termination of the alimony award retroactive to the beginning of the supportive relationship;
- Award the obligor a refund of all the alimony the obligor actually paid to the obligee from the beginning of the supportive relationship; and
- Award to the obligor reasonable costs and attorneys fees incurred in proving the existence of the supportive relationship.

In addition, a court may not reserve jurisdiction to later reinstate alimony when it terminates alimony based on the existence of a supportive relationship.

### **Retirement of the Obligor**

The bill creates a rebuttable presumption that alimony terminates upon retirement of the obligor, which may be overcome by a written finding of exceptional circumstances. The obligor may file a petition for termination or modification of the alimony award effective upon the retirement date. If the presumption is overcome, the court must modify the alimony award based on the circumstances of the parties after retirement of the obligor and the factors set out in s. 61.08(2), F.S. The bill also creates a rebuttable presumption that the normal retirement age is 67.

### **Other Changes Regarding Alimony Awards**

Regarding alimony awards, the bill also requires that:

- If an obligor remarries or resides with another person, the income and assets of the obligor's spouse or person with whom the obligor resides may not be considered in a modification action regarding such obligor.
- If a court orders alimony payable concurrent with a child support order, the alimony award may not be modified solely because of a later modification or termination of child support payments.
- A court must require a person receiving alimony to maximize the reasonable potential for rehabilitation and impute all income to the obligee that could be reasonably earned both before and after rehabilitation. In addition, it must make written findings concerning the reasonable potential of the obligee for rehabilitation and the amount of income that should be imputed to the obligee.

### **Bifurcation of Divorce Action**

Bifurcation is a split procedure in which the court grants a dissolution of marriage and reserves jurisdiction regarding property settlement, debts, alimony and child support. A party might petition the court for bifurcation of a case where the party would like to expedite the divorce so he or she can remarry. Current case law discourages the use of bifurcation. Specifically, in *Claughton v. Claughton*, the Florida Supreme Court explained:

[W]e believe trial judges should avoid this split procedure. The general law and our procedural rules at both the trial and appellate levels are designed for one final judgment and one appeal. Splitting the process can cause multiple legal and procedural problems which result in delay and additional expense to the litigants. This split procedure should be used only when it is clearly necessary for the best



interests of the parties or their children. The convenience of one of the parties for an early remarriage does not justify its use.<sup>18</sup>

The bill provides that a court must grant a request to bifurcate the divorce, thus dissolving the marriage and reserving jurisdiction to determine all issues other than dissolution, if more than 180 days have elapsed since the action of dissolution was filed.

**B. SECTION DIRECTORY:**

Section 1 amends s. 61.071, F.S., regarding alimony pendent lite; suit money.

Section 2 amends s. 61.08, F.S., relating to alimony.

Section 3 amends s. 61.14, F.S., relating to enforcement and modification of support, maintenance, of alimony agreements or orders.

Section 4 amends s. 61.19, F.S., relating to entry of judgment of dissolution of marriage.

Section 5 provides an effective date of July 1, 2012.

**II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT**

**A. FISCAL IMPACT ON STATE GOVERNMENT:**

1. Revenues:

The bill does not appear to have any impact on state revenues.

2. Expenditures:

The bill does not appear to have any impact on state expenditures.

**B. FISCAL IMPACT ON LOCAL GOVERNMENTS:**

1. Revenues:

The bill does not appear to have any impact on local government revenues.

2. Expenditures:

The bill does not appear to have any impact on local government expenditures.

**C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:**

The bill does not appear to have any direct economic impact on the private sector.

**D. FISCAL COMMENTS:**

This bill may increase the courts' workload in dissolution of marriage cases. For instance, the bill requires written findings for determinations of alimony; and requires bifurcation of a case if more than 180 days have passed since the action of dissolution was filed.

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<sup>18</sup> *Cloughton v. Cloughton*, 393 So.2d 1061, 1062 (Fla. 1981).

### 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:

The bill does not appear to create a need for rulemaking or rulemaking authority.

#### C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

### IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

On December 7, 2011, the Civil Justice Subcommittee adopted two amendments and reported the bill favorably as a committee substitute.

- Amendment 1 provides that an alimony award must be deductible by the obligor and taxable to the obligee; however, an award for the cost of the obligee's education or training necessary to establishing the capacity for self support need not be deductible by the obligor.
- Amendment 2 provides that in awarding long-term alimony, the court must include a finding that no other form of alimony will provide for the needs and necessities of life of the recipient and that no other form of alimony is fair and reasonable under the circumstances of the parties.

This analysis is drafted to the committee substitute as passed by the Civil Justice Subcommittee.



29 that if the court orders alimony concurrent with a  
 30 child support order, the alimony award may not be  
 31 modified due to the later modification or termination  
 32 of child support payments; providing that the  
 33 attaining of retirement age is a substantial change in  
 34 circumstances; creating a rebuttable presumption that  
 35 alimony terminates upon retirement of the obligor;  
 36 providing for a petition for termination or  
 37 modification of the alimony award effective upon the  
 38 retirement date; providing for recalculation of an  
 39 alimony award if the presumption is rebutted;  
 40 requiring a court to require an obligee to maximize  
 41 both his or her reasonable potential for  
 42 rehabilitation and reasonable earning capacity to  
 43 impute all income to the obligee that could be  
 44 reasonably earned after achieving maximum  
 45 rehabilitation and reasonably increasing earning  
 46 capacity; requiring written findings regarding  
 47 rehabilitation; amending s. 61.19, F.S.; requiring  
 48 bifurcation of a dissolution of marriage case if the  
 49 case is more than 180 days past filing; providing  
 50 legislative intent; providing an effective date.

51

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

53

54 Section 1. Section 61.071, Florida Statutes, is amended to  
 55 read:

56

61.071 Alimony pendente lite; suit money.—In every

57 proceeding for dissolution of the marriage, a party may claim  
 58 alimony and suit money in the petition or by motion, and if the  
 59 petition is well founded, the court shall allow a reasonable sum  
 60 therefor. If a party in any proceeding for dissolution of  
 61 marriage claims alimony or suit money in his or her answer or by  
 62 motion, and the answer or motion is well founded, the court  
 63 shall allow a reasonable sum therefor. Suit money allowed under  
 64 this section may not exceed the greater of \$7,000 or the  
 65 reasonable value of the representation of the party paying the  
 66 fee.

67 Section 2. Section 61.08, Florida Statutes, is amended to  
 68 read:

69 61.08 Alimony.—

70 (1) In a proceeding for dissolution of marriage under s.  
 71 61.052(1)(a), the court may grant alimony to either party, which  
 72 alimony may be bridge-the-gap, rehabilitative, durational, or  
 73 long-term permanent in nature or a any combination of bridge-  
 74 the-gap and rehabilitative ~~these forms of alimony where~~  
 75 appropriate. In any award of alimony, the court may order  
 76 periodic payments, ~~or~~ payments in lump sum, or both. ~~The court~~  
 77 ~~may consider the adultery of either spouse and the circumstances~~  
 78 ~~thereof in determining the amount of alimony, if any, to be~~  
 79 ~~awarded~~. In all dissolution actions, the court shall include  
 80 findings of fact relative to the factors enumerated in  
 81 subsection (2) supporting an award or denial of alimony.

82 (2) In determining whether to award alimony or  
 83 maintenance, the court shall first make, in writing, a specific  
 84 factual determination as to whether either party has an actual

85 need for alimony or maintenance and whether either party has the  
 86 ability to pay alimony or maintenance. If the court finds that a  
 87 party has a need for alimony or maintenance and that the other  
 88 party has the ability to pay alimony or maintenance, then in  
 89 determining the proper type and amount of alimony or maintenance  
 90 under subsections (5)-(8), the court shall consider and make  
 91 written findings regarding all relevant factors, including, ~~but~~  
 92 ~~not limited to:~~

93 (a) The standard of living of each party established  
 94 during the marriage.

95 (b) The duration of the marriage.

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

98 (d) The financial resources of each party, only to include  
 99 ~~including the nonmarital and~~ the marital assets and liabilities  
 100 distributed to each.

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

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

109 (g) The responsibilities each party will have with regard  
 110 to any minor children the parties ~~they~~ have in common.

111 (h) The tax treatment and consequences to both parties of  
 112 any alimony award, which award must be deductible by the obligor

113 and taxable to the obligee, except that an award for the cost of  
 114 the obligee's education or training necessary to establish the  
 115 capacity for self support need not be deductible by the obligor  
 116 ~~including the designation of all or a portion of the payment as~~  
 117 ~~a nontaxable, nondeductible payment.~~

118 (i) All sources of income available to either party,  
 119 including income available to either party through investments  
 120 of any asset held by that party that were acquired during the  
 121 marriage.

122 (j) The standard of living of each party after the  
 123 application of the alimony award. There shall be a rebuttable  
 124 presumption that both parties will necessarily have a lower  
 125 standard of living after the dissolution of marriage than the  
 126 standard of living they enjoyed during the marriage.

127 ~~(k)-(j)~~ Any other factor necessary to do equity and justice  
 128 between the parties, if that factor is specifically identified  
 129 in the award with findings of fact justifying the application of  
 130 the factor.

131 (3) To the extent necessary to protect an award of  
 132 alimony, the court may order any party who is ordered to pay  
 133 alimony to purchase or maintain a life insurance policy or a  
 134 bond, or to otherwise secure such alimony award with any other  
 135 assets which may be suitable for that purpose. The cost of life  
 136 insurance or a bond shall be deducted from the alimony award.  
 137 The requirements of this subsection are separately modifiable  
 138 pursuant to s. 61.14 and terminate upon termination of the award  
 139 of alimony.

140 (4) For purposes of determining alimony, ~~there is a~~

141 ~~rebuttable presumption that~~ a short-term marriage is a marriage  
 142 having a duration of less than 7 years, a moderate-term marriage  
 143 is a marriage having a duration of greater than 7 years but less  
 144 than 20 ~~17~~ years, and long-term marriage is a marriage having a  
 145 duration of 20 ~~17~~ years or greater. The length of a marriage is  
 146 the period of time from the date of marriage until the date of  
 147 filing of an action for dissolution of marriage.

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

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

- 160 1. The redevelopment of previous skills or credentials; or
- 161 2. The acquisition of education, training, or work
- 162 experience necessary to develop appropriate employment skills or
- 163 credentials.

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

167 (c) An award of rehabilitative alimony shall ~~may~~ be  
 168 modified or terminated in accordance with s. 61.14 based upon a



169 substantial change in circumstances, upon noncompliance with the  
 170 rehabilitative plan, or upon completion of the rehabilitative  
 171 plan.

172 (7) There shall be a presumption in favor of durational  
 173 alimony over long-term ~~may be awarded when permanent periodic~~  
 174 alimony ~~is inappropriate~~. The purpose of durational alimony is  
 175 to provide a party with economic assistance for a set period of  
 176 time following a marriage of ~~short or~~ moderate duration or  
 177 following a marriage of long duration if there is no ongoing  
 178 need for support on a long-term permanent basis as provided in  
 179 subsection (8). An award of durational alimony terminates upon  
 180 the death of either party or upon the remarriage of the party  
 181 receiving alimony. The amount of an award of durational alimony  
 182 shall ~~may~~ be modified or terminated based upon a substantial  
 183 change in circumstances or upon the existence of a supportive  
 184 relationship in accordance with s. 61.14. ~~However,~~ The length of  
 185 an award of durational alimony may not ~~be modified except under~~  
 186 ~~exceptional circumstances and may not~~ exceed the length of the  
 187 marriage.

188 (8) Long-term Permanent alimony may be awarded to provide  
 189 for the needs and necessities of life ~~as they were established~~  
 190 ~~during the marriage of the parties~~ for a party who lacks the  
 191 financial ability to meet his or her needs and necessities of  
 192 life following a dissolution of marriage. Long-term Permanent  
 193 alimony may be awarded following a long-term marriage ~~of long~~  
 194 ~~duration~~ if such an award is appropriate upon consideration of  
 195 the factors set forth in subsection (2), following a moderate-  
 196 term marriage ~~of moderate duration~~ if such an award is

197 appropriate based upon clear and convincing evidence after  
 198 consideration of the factors set forth in subsection (2), or  
 199 following a short-term marriage ~~of short duration~~ if there are  
 200 written findings of exceptional circumstances. In awarding long-  
 201 term ~~permanent~~ alimony, the court shall include findings a  
 202 finding that no other form of alimony will provide for the needs  
 203 and necessities of life of the recipient and that no other form  
 204 is fair and reasonable under the circumstances of the parties.  
 205 An award of long-term ~~permanent~~ alimony terminates upon the  
 206 death of either party, ~~or~~ upon the remarriage of the party  
 207 receiving alimony, or as provided in s. 61.14(12). An award  
 208 shall ~~may~~ be modified or terminated based upon a substantial  
 209 change in circumstances or upon the existence of a supportive  
 210 relationship in accordance with s. 61.14.

211 (9) Notwithstanding any other law to the contrary, an ~~The~~  
 212 award of alimony may not leave the payor with ~~significantly~~ less  
 213 net income or with a lower standard of living than the ~~net~~  
 214 ~~income of the recipient unless there are written findings of~~  
 215 ~~exceptional circumstances.~~ The court shall make written findings  
 216 regarding the relative incomes and standards of living citing to  
 217 evidence in the record and to this subsection.

218 (10)(a) With respect to any order requiring the payment of  
 219 alimony entered on or after January 1, 1985, unless ~~the~~  
 220 ~~provisions of~~ paragraph (c) or paragraph (d) applies ~~apply~~, the  
 221 court shall direct in the order that the payments of alimony be  
 222 made through the appropriate depository as provided in s.  
 223 61.181.

224 (b) With respect to any order requiring the payment of

225 alimony entered before January 1, 1985, upon the subsequent  
 226 appearance, on or after that date, of one or both parties before  
 227 the court having jurisdiction for the purpose of modifying or  
 228 enforcing the order or in any other proceeding related to the  
 229 order, or upon the application of either party, unless ~~the~~  
 230 ~~provisions of~~ paragraph (c) or paragraph (d) applies apply, the  
 231 court shall modify the terms of the order as necessary to direct  
 232 that payments of alimony be made through the appropriate  
 233 depository as provided in s. 61.181.

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

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

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

252 3. In IV-D cases, the IV-D agency shall have the same

253 rights as the obligee in requesting that payments be made  
 254 through the depository.

255 Section 3. Paragraph (b) of subsection (1) of section  
 256 61.14, Florida Statutes, is amended, paragraphs (c) and (d) are  
 257 added to subsection (11) of that section, and subsections (12)  
 258 and (13) are added to that section, to read:

259 61.14 Enforcement and modification of support,  
 260 maintenance, or alimony agreements or orders.—

261 (1)

262 (b)1. The court must ~~may~~ reduce or terminate an award of  
 263 alimony upon specific written findings by the court that since  
 264 the granting of a divorce and the award of alimony a supportive  
 265 relationship has existed between the obligee and a person with  
 266 whom the obligee resides. On the issue of whether alimony should  
 267 be reduced or terminated under this paragraph, the burden is on  
 268 the obligor to prove by a preponderance of the evidence that a  
 269 supportive relationship exists.

270 2. In determining whether an existing award of alimony  
 271 should be reduced or terminated because of an alleged supportive  
 272 relationship between an obligee and a person who is not related  
 273 by consanguinity or affinity and with whom the obligee resides,  
 274 the court shall elicit the nature and extent of the relationship  
 275 in question. The court shall give consideration, without  
 276 limitation, to circumstances~~7~~ including, but not limited to, the  
 277 following~~7~~ in determining the relationship of an obligee to  
 278 another person:

279 a. The extent to which the obligee and the other person  
 280 have held themselves out as a married couple by engaging in

281 | conduct such as using the same last name, using a common mailing  
 282 | address, referring to each other in terms such as "my husband"  
 283 | or "my wife," or otherwise conducting themselves in a manner  
 284 | that evidences a permanent supportive relationship.

285 |       b. The period of time that the obligee has resided with  
 286 | the other person in a permanent place of abode.

287 |       c. The extent to which the obligee and the other person  
 288 | have pooled their assets or income or otherwise exhibited  
 289 | financial interdependence.

290 |       d. The extent to which the obligee or the other person has  
 291 | supported the other, in whole or in part.

292 |       e. The extent to which the obligee or the other person has  
 293 | performed valuable services for the other.

294 |       f. The extent to which the obligee or the other person has  
 295 | performed valuable services for the other's company or employer.

296 |       g. Whether the obligee and the other person have worked  
 297 | together to create or enhance anything of value.

298 |       h. Whether the obligee and the other person have jointly  
 299 | contributed to the purchase of any real or personal property.

300 |       i. Evidence in support of a claim that the obligee and the  
 301 | other person have an express agreement regarding property  
 302 | sharing or support.

303 |       j. Evidence in support of a claim that the obligee and the  
 304 | other person have an implied agreement regarding property  
 305 | sharing or support.

306 |       k. Whether the obligee and the other person have provided  
 307 | support to the children of one another, regardless of any legal  
 308 | duty to do so.

309           3. This paragraph does not abrogate the requirement that  
 310 every marriage in this state be solemnized under a license, does  
 311 not recognize a common law marriage as valid, and does not  
 312 recognize a de facto marriage. This paragraph recognizes only  
 313 that relationships do exist that provide economic support  
 314 equivalent to a marriage and that alimony terminable on  
 315 remarriage may be reduced or terminated upon the establishment  
 316 of equivalent equitable circumstances as described in this  
 317 paragraph. The existence of a conjugal relationship, though it  
 318 may be relevant to the nature and extent of the relationship, is  
 319 not necessary for the application of ~~the provisions of~~ this  
 320 paragraph.

321           4. If the obligee denies or fails to admit any material  
 322 fact regarding the existence of a supportive relationship in  
 323 circumstances where the obligee knew or should have known about  
 324 the material fact and the obligor subsequently proves the  
 325 existence of the material fact, the court shall, in the form of  
 326 a civil judgment:

327           a. Order modification of the alimony award retroactive to  
 328 the beginning of the supportive relationship.

329           b. Award to the obligor a refund of all of the alimony the  
 330 obligor actually paid to the obligee from the beginning of the  
 331 supportive relationship.

332           c. Award to the obligor reasonable costs and attorney fees  
 333 incurred in proving the fact.

334           5. If the obligee denies the existence of a supportive  
 335 relationship and the obligor subsequently proves the existence  
 336 of a supportive relationship, the court shall order termination

337 of the alimony award retroactive to the beginning of the  
 338 supportive relationship, award to the obligor a refund of all of  
 339 the alimony the obligor actually paid to the obligee from the  
 340 beginning of the supportive relationship, and award to the  
 341 obligor reasonable costs and attorney fees incurred in proving  
 342 the existence of the supportive relationship. An award under  
 343 this subparagraph shall be a civil judgment.

344 6. A court terminating an alimony award based on the  
 345 existence of a supportive relationship may not reserve  
 346 jurisdiction to later reinstate alimony.

347 (11)

348 (c) If the obligor remarries or resides with another  
 349 person, the income and assets of the obligor's spouse or the  
 350 person with whom the obligor resides may not be considered in a  
 351 modification action regarding such obligor.

352 (d) If the court orders alimony payable concurrent with a  
 353 child support order, the alimony award may not be modified  
 354 solely because of a later modification or termination of child  
 355 support payments.

356 (12) The fact that an obligor has reached the normal  
 357 retirement age shall be considered a substantial change in  
 358 circumstances as a matter of law. There is a rebuttable  
 359 presumption that the normal retirement age for purposes of this  
 360 subsection is 67 years of age. In anticipation of retirement,  
 361 the obligor may file a petition for termination or modification  
 362 of the alimony award effective upon the retirement date. There  
 363 is a rebuttable presumption that alimony terminates upon  
 364 retirement of the obligor, which may be overcome only by a

365 written finding of exceptional circumstances. If this  
 366 presumption is overcome, the court shall modify the alimony  
 367 award based on the circumstances of the parties after retirement  
 368 of the obligor and based on the factors in subsection (2).

369 (13) In any alimony award, the court shall require an  
 370 obligee to maximize both his or her reasonable potential for  
 371 rehabilitation and reasonable earning capacity and shall impute  
 372 all income to the obligee that could be reasonably earned after  
 373 achieving maximum rehabilitation and reasonably increasing  
 374 earning capacity. The court shall make written findings of fact  
 375 concerning the reasonable potential of the obligee for  
 376 rehabilitation and the amount of income that should be imputed  
 377 to the obligee.

378 Section 4. Section 61.19, Florida Statutes, is amended to  
 379 read:

380 61.19 Entry of judgment of dissolution of marriage; ~~7~~ delay  
 381 period; bifurcation.-

382 (1) A ~~Ne~~ final judgment of dissolution of marriage may not  
 383 be entered until at least 20 days have elapsed from the date of  
 384 filing the original petition for dissolution of marriage, ~~7~~ but  
 385 the court, on a showing that injustice would result from this  
 386 delay, may enter a final judgment of dissolution of marriage at  
 387 an earlier date.

388 (2) If more than 180 days has elapsed since the filing of  
 389 an action for dissolution of marriage, upon the request of  
 390 either spouse the court shall enter an order bifurcating the  
 391 action and, if legal grounds for dissolution are proved, shall  
 392 enter a judgment dissolving the marriage and reserving



CS/HB 549

2012

393 | jurisdiction to determine all issues other than dissolution. It  
 394 | is the intent of the Legislature that the decision in *Cloughton*  
 395 | *v. Cloughton*, 393 So.2d 1061 (Fla. 1981), shall not prevent  
 396 | bifurcation or entry of a final judgment pursuant to this  
 397 | subsection.

398 |       Section 5. This act shall take effect July 1, 2012.



## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** PCS for CS/HB 565    Dissolution of Marriage

**SPONSOR(S):** Judiciary Committee

**TIED BILLS:** None    **IDEN./SIM. BILLS:** CS/SB 752

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
Orig. Comm.: Judiciary Committee		Caridad <i>DC</i>	Havlicak <i>RH</i>

### SUMMARY ANALYSIS

This bill (1) creates a formula for a court to use in determining the value of certain real property which is subject to equitable distribution in a divorce proceeding; and (2) makes changes to provisions relating to alimony and divorce proceedings.

In a contested marital dissolution, the court must identify which assets are nonmarital and those that are marital. In general, marital assets are divided equitably between the parties, whereas nonmarital assets remain as property of a spouse.

Under current law, passive appreciation of real property that accrues during the marriage is subject to equitable distribution even though the property itself is a nonmarital asset. Courts determine the value of the passive appreciation of nonmarital real property to be equitably distributed according to a formula created by the courts. The bill establishes a statutory formula for determining the value of the marital portion of nonmarital real property which is subject to equitable distribution in a divorce proceeding.

The bill also amends current law on alimony and divorce. Alimony provides financial support to a financially dependent former spouse. A court may grant a request to modify alimony where there is a change in circumstances or the financial ability of the parties. It may also reduce or terminate an award of alimony based on its specific written findings that the spouse receiving alimony has entered into a supportive relationship with another person.

The bill amends current law on alimony and divorce to:

- Create a presumption in favor of durational alimony over long-term alimony.
- Require retroactive modification or termination of alimony upon proof of a supportive relationship if the obligee denies the relationship or any material facts related to the relationship.
- Require a person receiving alimony to maximize the potential for rehabilitation and reasonable earning capacity.
- Allow the court to grant the dissolution of marriage and reserve jurisdiction regarding the property settlement, or to bifurcate the case, if the case is pending more than 180 days.

The bill may have an indeterminate fiscal impact on state courts. This bill does not appear to have a fiscal impact on local governments.

This bill provides an effective date of July 1, 2012.

## FULL ANALYSIS

### I. SUBSTANTIVE ANALYSIS

#### A. EFFECT OF PROPOSED CHANGES:

##### Equitable Distribution

##### *Statutory Framework for the Equitable Distribution of Marital Assets and Liabilities*

Chapter 61, F.S., governs proceedings for the dissolution of marriage in Florida. Current law provides that a court must distribute the marital assets and liabilities based on the premise that the distribution be equal.<sup>1</sup> The court must do so unless justification exists for an unequal distribution based on relevant factors specified in s. 61.075(1), F.S. In a contested marital dissolution in which a stipulation and agreement has not been entered and filed, the distribution of marital assets or liabilities must be supported by factual findings based on competent substantial evidence with reference to the relevant statutory factors.<sup>2</sup> The court's findings must identify which assets are nonmarital and those that are marital.<sup>3</sup>

"Marital assets and liabilities" generally include:

- Assets acquired and liabilities incurred during the marriage, individually by either spouse or jointly by them.<sup>4</sup>
- The enhancement in value and appreciation of nonmarital assets resulting from the efforts of either party during the marriage or from the contribution to or expenditure thereon of marital funds or other forms of marital assets, or both.<sup>5</sup>
- Interspousal gifts during the marriage.<sup>6</sup>
- All vested and nonvested benefits, rights, and funds accrued during the marriage in retirement, pension, profit-sharing, annuity, deferred compensation, and insurance plans and programs.<sup>7</sup>
- Real property held by the parties as tenants by the entireties.<sup>8</sup>
- All personal property titled jointly by the parties as tenants by the entireties.<sup>9</sup>

"Nonmarital assets and liabilities" generally include:

- Assets acquired and liabilities incurred by either party prior to marriage, and assets acquired and liabilities incurred in exchange for such assets and liabilities.<sup>10</sup>
- Assets acquired separately by either party by noninterspousal gift, bequest, devise, or descent, and assets acquired in exchange for such assets.<sup>11</sup>
- All income derived from nonmarital assets during the marriage unless the income was treated, used, relied upon by the parties as a marital asset.<sup>12</sup>
- Assets and liabilities excluded from marital assets and liabilities by valid written agreement of the parties, and assets acquired and liabilities incurred in exchange for such assets and liabilities.<sup>13</sup>
- Any liability incurred by forgery or unauthorized signature by one spouse signing the name of the other spouse. Any such liability shall be a nonmarital liability only of the party having committed forgery or having affixed the unauthorized signature.<sup>14</sup>

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<sup>1</sup> Section 61.075(1), F.S.

<sup>2</sup> Section 61.075(3), F.S.

<sup>3</sup> Section 61.075(3)(a) and (b), F.S.

<sup>4</sup> Section 61.075(6)(a)1.a., F.S.

<sup>5</sup> Section 61.075(6)(a)1.b., F.S.

<sup>6</sup> Section 61.075(6)(a)1.c., F.S.

<sup>7</sup> Section 61.075(6)(a)1.d., F.S.

<sup>8</sup> Section 61.075(6)(a)2., F.S.

<sup>9</sup> Section 61.075(6)(a)3., F.S.

<sup>10</sup> Section 61.075(6)(b)1., F.S.

<sup>11</sup> Section 61.075(6)(b)2., F.S.

<sup>12</sup> Section 61.075(6)(b)3., F.S.

<sup>13</sup> Section 61.075(6)(b)4., F.S.

## *Equitable Distribution of Marital Assets and Liabilities under Kaaa v. Kaaa*<sup>15</sup>

In *Kaaa v. Kaaa*, the Florida Supreme Court held that “passive appreciation of the marital home that accrues during the marriage is subject to equitable distribution even though the home itself is a nonmarital asset.”<sup>16</sup> For instance, passive appreciation in the value of nonmarital real property is subject to equitable distribution where the mortgage is paid with marital funds.<sup>17</sup> The Court recognized that the marital portion of nonmarital property encumbered by a mortgage paid down with marital funds includes two components: (1) a portion of the enhancement value of the marital asset resulting from the contributions of the nonowner spouse; and (2) a portion of the value of the passive appreciation of that asset that accrued during the marriage.<sup>18</sup>

In *Kaaa*, the Supreme Court provided a methodology for courts to use in determining the value of the passive appreciation of nonmarital real property to be equitably distributed and in allocating that value to both owner and nonowner spouse.<sup>19</sup> Pursuant to the methodology, a court must make several steps:

First, the court must determine the overall current fair market value of the home. Second, the court must determine whether there has been a passive appreciation in the home's value. Third, the court must determine whether the passive appreciation is a marital asset under section 61.075(5)(a)(2)[, F.S.]. This step must include findings of fact by the trial court that marital funds were used to pay the mortgage and that the nonowner spouse made contributions to the property. Moreover, the trial court must determine to what extent the contributions of the nonowner spouse affected the appreciation of the property. Fourth, the trial court must determine the value of the passive appreciation that accrued during the marriage and is subject to equitable distribution. Fifth, after the court determines the value of the passive appreciation to be equitably distributed, the court's next step is to determine how the value is allocated.<sup>20</sup>

The Supreme Court adopted the following formula used in *Stevens v. Stevens*, for the allocation of the appreciated value of nonmarital real property:

If a separate asset is unencumbered and no marital funds are used to finance its acquisition, improvement, or maintenance, no portion of its value should ordinarily be included in the marital estate, absent improvements effected by marital labor. If an asset is financed entirely by borrowed money which marital funds repay, the entire asset should be included in the marital estate. In general, in the absence of improvements, the portion of the appreciated value of a separate asset which should be treated as a marital asset will be the same as the fraction calculated by dividing the indebtedness with which the asset was encumbered at the time of the marriage by the value of the asset at the time of the marriage.<sup>21</sup>

Passive appreciation of a nonmarital asset that is unencumbered is not subject to equitable distribution, absent the use of any marital funds or marital labor for its acquisition, improvement, or maintenance.<sup>22</sup>

### *Security and Interest for Installment payments*

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<sup>14</sup> Section 61.075(6)(b)5., F.S.

<sup>15</sup> *Kaaa v. Kaaa*, 58 So. 3d 867 (Fla. 2010).

<sup>16</sup> *Id.* at 868.

<sup>17</sup> *Id.* at 869.

<sup>18</sup> *Id.* at 871-72.

<sup>19</sup> *Id.* at 872.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.* at 872 (quoting *Stevens v. Stevens*, 651 So.2d 1306, 1307-08 (Fla. 1st DCA 1995).

<sup>22</sup> *Stevens v. Stevens*, 651 So.2d 1306, 1307 (Fla. 1st DCA 2006); Dawn D. Nichols and Sean K. Ahmed, *Nonmarital Real Estate: Is the Appreciation Marital, Nonmarital, or a Combination of Both?*, 81 FLA. B.J. 75, 75 (Oct. 2007).

In equitably distributing marital assets and liabilities, pursuant to s. 61.075(10), F.S., a court may order a party to pay a monetary payment in a lump sum or in installments paid over a fixed period. Section 61.075(10), F.S., does not currently give courts the discretion to require the payor to provide security or pay a reasonable rate of interest if installments are ordered.

### *Effect of Proposed Changes*

The bill establishes a formula for a court to use in determining the value of the marital portion of nonmarital real property which is subject to equitable distribution in a divorce proceeding. Under the bill, the value of the marital portion of nonmarital real property is the sum of the following:

- The mortgage principal paid during the marriage from marital funds.
- A portion of the passive appreciation in the property which is related to the amount of marital funds used to pay the mortgage.
- Any active appreciation of the property resulting from the efforts or contributions of either party during the marriage.

Under the formula, the passive appreciation in the marital property, which is subject to equitable distribution, must be determined by multiplying the marital fraction by the passive appreciation of the property during the marriage.

The passive appreciation is determined by subtracting the gross value of the property on date of the marriage or the date of acquisition of the property, whichever is later, from the value of the property on the valuation date in the dissolution action, less any active appreciation of the property during the marriage and less any additional debts secured by the property during the marriage.

The numerator of the marital fraction consists of the amount of mortgage principal paid on any mortgage on the property from marital funds. The denominator consists of the value of the real property on the date of marriage, the date of acquisition of the property, or the date the property was first encumbered by a mortgage on which principal was paid from marital funds, whichever is later.

The total marital portion of the property consists of the marital portion of the passive appreciation, the mortgage principal paid during the marriage from marital funds, and any active appreciation of the property. The value of the marital portion of nonmarital real property may not exceed the total net equity of the property on the valuation date in the dissolution action.

The bill also allows a court to deviate from the formula if a party proves that application of the formula is not equitable under the circumstances of the case.

Additionally, the bill authorizes the court to require a person who is ordered to make installment payments as part of the equitable distribution of marital assets and liabilities to provide security and a reasonable rate of interest, or otherwise recognize the time value of money in determining the amount of the installments. If a court requires security or interest, the court must make written findings relating to any deferred payments, the amount of any security required, and the interest. The bill does not preclude the intended recipient of the installment payments from taking action under the procedures to enforce a judgment, in ch. 55, F.S., to collect any funds from a person who fails to make the court-ordered payments.

### Alimony and Divorce Proceedings

Alimony provides financial support to a financially dependent former spouse.<sup>23</sup> 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

<sup>23</sup> Victoria Ho & Jennifer Johnson, *Overview of Florida Alimony Law*, 78 Fla.B.J. 71, 71 (Oct. 2004).

ability to pay.<sup>24</sup> Section 61.08(2), F.S., provides factors that a court must consider in awarding alimony (i.e. the standard of living established during the marriage; duration of the marriage).

Florida law provides for four types of alimony; bridge-the-gap alimony,<sup>25</sup> rehabilitative alimony,<sup>26</sup> durational alimony,<sup>27</sup> and permanent alimony.<sup>28</sup>

- 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.<sup>29</sup>
- Rehabilitative alimony may be awarded to assist a party in establishing the capacity for self-support through either the redevelopment of previous skills or credentials; or the acquisition of education, training, or work experience necessary to develop appropriate employment skills or credentials.<sup>30</sup>
- 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.
- 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 dissolution of marriage.

Permanent alimony may be awarded following a marriage of long duration if such an award is appropriate upon consideration of the factors set forth in s. 61.08(2), following a marriage of moderate duration if such an award is appropriate based upon clear and convincing evidence after consideration of the factors set forth in s. 61.08(2), or following a marriage of short duration if there are written findings of exceptional circumstances. In awarding permanent alimony, the court shall include a finding that no other form of alimony is fair and reasonable under the circumstances of the parties.<sup>31</sup>

#### *Modification of Alimony Based on the Existence of a Supportive Relationship*

A court may grant a request to modify alimony where the moving party shows "a permanent, unanticipated, substantial change in financial circumstances in one or both of the parties."<sup>32</sup> One form of change of circumstances warranting modification of an alimony award is the existence of a supportive relationship. A court may reduce or terminate an award of alimony based on its specific written findings that, since the granting of a divorce and the award of alimony, the spouse receiving alimony, or the obligee, has entered into a supportive relationship with a person with whom he or she resides. Section 61.14(1), F.S., enumerates factors a court must consider when determining whether a supportive relationship exists between the obligee and the individual with whom such former spouse resides (i.e. the extent to which the obligee and the person hold themselves out as a married couple). The spouse paying spousal support, or the obligor, has the burden to prove that a supportive relationship exists.

The bill amends the statutory guidelines regarding enforcement and modification of an alimony award relating to instances where an obligee enters into a supportive relationship following an award of alimony. Current law provides that modification is discretionary, the bill provides that a court must reduce or terminate an award upon specific written findings by the court that a supportive relationship has existed between the obligee and a person with whom the obligee resides.

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<sup>24</sup> *Id.*

<sup>25</sup> Section 61.08(5), F.S.

<sup>26</sup> Section 61.08(6), F.S.

<sup>27</sup> Section 61.08(7), F.S.

<sup>28</sup> Section 61.08(8), F.S.

<sup>29</sup> Section 60.08(5), F.S.

<sup>30</sup> Section 61.08(6)(a), F.S.

<sup>31</sup> Section 61.08(8), F.S.

<sup>32</sup> *Townsend v. Townsend*, 585 So.2d 468 (Fla. 2d DCA 1991).

If the obligee denies or fails to admit any material fact regarding the existence of a supportive relationship when he or she knew or should have known about the material fact, and the obligor subsequently proves the existence of the material fact the court must:

- Enter an order modifying the alimony award retroactive to the beginning of the supportive relationship;
- Award the obligor a refund of all alimony the obligor actually paid to the obligee from the beginning of the supportive relationship; and
- Award the obligor reasonable costs and attorneys fees incurred in proving the fact.

If the obligee denies the existence of a supportive relationship and the obligor subsequently proves the existence of a supportive relationship, the court must:

- Order termination of the alimony award retroactive to the beginning of the supportive relationship;
- Award the obligor a refund of all the alimony the obligor actually paid to the obligee from the beginning of the supportive relationship; and
- Award to the obligor reasonable costs and attorneys fees incurred in proving the existence of the supportive relationship.

### *Bifurcation of Divorce Action*

Bifurcation is a split procedure in which the court grants a dissolution of marriage and reserves jurisdiction regarding property settlement, debts, alimony and child support. A party might petition the court for bifurcation of a case where the party would like to expedite the divorce so he or she can remarry. Current case law discourages the use of bifurcation. Specifically, in *Claughton v. Claughton*, the Florida Supreme Court explained:

[W]e believe trial judges should avoid this split procedure. The general law and our procedural rules at both the trial and appellate levels are designed for one final judgment and one appeal. Splitting the process can cause multiple legal and procedural problems which result in delay and additional expense to the litigants. This split procedure should be used only when it is clearly necessary for the best interests of the parties or their children. The convenience of one of the parties for an early remarriage does not justify its use.<sup>33</sup>

The bill provides that a court must grant a request to bifurcate the divorce, thus dissolving the marriage and reserving jurisdiction to determine all issues other than dissolution, if more than 180 days have elapsed since the action of dissolution was filed.

### *Other Changes Regarding Alimony Awards*

This bill provides that an alimony award may not leave the payor with a lower standard of living than the recipient. It further requires that a court awarding alimony must make written findings regarding the relative incomes and standards of living of the parties.

With respect to durational alimony, the bill:

- Creates a presumption in favor of durational alimony over long-term alimony.
- Provides that durational alimony is not authorized following a short-term marriage.
- Requires modification or termination upon a substantial change in circumstances or upon the existence of a supportive relationship.
- Removes the requirement that a party prove "exceptional circumstances" in order to modify the alimony award.

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<sup>33</sup> *Claughton v. Claughton*, 393 So.2d 1061, 1062 (Fla. 1981).



The bill also provides that a court must require a person receiving alimony to maximize the reasonable potential for rehabilitation and reasonable earning capacity and impute all income to the obligee that could be reasonably earned after rehabilitation. In addition, it must make written findings concerning the reasonable potential of the obligee for rehabilitation and the amount of income that should be imputed to the obligee.

**B. SECTION DIRECTORY:**

Section 1 amends s. 61.075, F.S., relating to equitable distribution of marital assets and liabilities.

Section 2 creates s. 61.0765, F.S., relating to valuation of marital portion of nonmarital real property.

Section 3 amends s. 61.08, F.S., relating to alimony.

Section 4 amends s. 61.14, F.S., relating to enforcement and modification of support, maintenance, or alimony agreements or orders.

Section 5 amends 61.19, F.S., relating to entry of judgment of dissolution of marriage.

Section 6 provides an effective date of July 1, 2012.

**II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT**

**A. FISCAL IMPACT ON STATE GOVERNMENT:**

1. Revenues:

The bill does not appear to have any impact on state revenues.

2. Expenditures:

The bill does not appear to have any impact on state expenditures.

**B. FISCAL IMPACT ON LOCAL GOVERNMENTS:**

1. Revenues:

The bill does not appear to have any impact on local government revenues.

2. Expenditures:

The bill does not appear to have any impact on local government expenditures.

**C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:**

The bill does not appear to have any direct economic impact on the private sector.

**D. FISCAL COMMENTS:**

There may be an indeterminate fiscal impact on state courts. The Office of the State Courts Administrator reports that the trial court's task in determining the passive appreciation of real property characterized as a marital asset will continue to be an extremely fact-intensive one. Significant judicial time will be expended in both the determination of the facts and use of the mathematical calculation. The fiscal impact on expenditures of the State Courts System cannot be accurately determined due to the unavailability of data needed to quantify any increase in judicial workload.<sup>34</sup>

<sup>34</sup> Office of the State Courts Administrator, 2011 Judicial Impact Statement for SB 752 (Nov. 9, 2011) (on file with the House Civil Justice Subcommittee).

With respect to the changes relating to alimony and divorce proceedings, this bill may increase the courts' workload in dissolution of marriage cases. For instance, the bill requires written findings regarding the party's relative incomes and standards of living; and requires bifurcation of a case if more than 180 days have passed since the action of dissolution was filed.

### **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:**

The bill does not appear to create a need for rulemaking or rulemaking authority.

#### **C. DRAFTING ISSUES OR OTHER COMMENTS:**

None.

### **IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES**

None.

1 A bill to be entitled  
 2 An act relating to dissolution of marriage; amending  
 3 s. 61.075, F.S.; redefining the term "marital assets  
 4 and liabilities" to include the value of the marital  
 5 portion of the passive appreciation of nonmarital real  
 6 property; authorizing a court to require security and  
 7 the payment of a reasonable rate of interest if  
 8 installment payments are required for the distribution  
 9 of marital assets and liabilities; requiring the court  
 10 to provide written findings regarding any installment  
 11 payments; creating s. 61.0765, F.S.; providing  
 12 formulas for the calculation of the value of the  
 13 marital portion of nonmarital real property subject to  
 14 equitable distribution; requiring the court in the  
 15 dissolution action to use the formulas unless  
 16 sufficient evidence is presented showing that the  
 17 application of the formulas is not equitable; amending  
 18 s. 61.08, F.S.; revising factors to be considered for  
 19 alimony awards; revising factors to be considered in  
 20 whether to award alimony or maintenance; requiring  
 21 written findings regarding the standard of living of  
 22 the parties after dissolution of marriage; amending s.  
 23 61.14, F.S.; revising provisions relating to the  
 24 effect of a supportive relationship on an award of  
 25 alimony; requiring refund of alimony paid and an award  
 26 of costs and fees if the recipient of alimony denies  
 27 the existence of a supportive relationship that is  
 28 later found to exist or denies material facts relating

29 to a supportive relationship that are later found to  
 30 be true; requiring a court to require an obligee to  
 31 maximize both his or her reasonable potential for  
 32 rehabilitation and reasonable earning capacity to  
 33 impute all income to the obligee that could be  
 34 reasonably earned after achieving maximum  
 35 rehabilitation and reasonably increasing earning  
 36 capacity; requiring written findings regarding  
 37 rehabilitation; amending s. 61.19, F.S.; requiring  
 38 bifurcation of a dissolution of marriage case if the  
 39 case is more than 180 days past filing; providing  
 40 legislative intent; providing an effective date.

41  
 42 Be It Enacted by the Legislature of the State of Florida:

43  
 44 Section 1. Paragraph (a) of subsection (6) and subsection  
 45 (10) of section 61.075, Florida Statutes, are amended to read:  
 46 61.075 Equitable distribution of marital assets and  
 47 liabilities.—

48 (6) As used in this section:

49 (a)1. "Marital assets and liabilities" include:

50 a. Assets acquired and liabilities incurred during the  
 51 marriage, individually by either spouse or jointly by them.

52 b. The enhancement in value and appreciation of nonmarital  
 53 assets resulting either from the efforts of either party during  
 54 the marriage or from the contribution to or expenditure thereon  
 55 of marital funds or other forms of marital assets, or both.

56 c. The value of the marital portion of the passive

57 appreciation of nonmarital real property as provided in s.  
 58 61.0765 (2).

59 d.e. Interspousal gifts during the marriage.

60 e.d. All vested and nonvested benefits, rights, and funds  
 61 accrued during the marriage in retirement, pension, profit-  
 62 sharing, annuity, deferred compensation, and insurance plans and  
 63 programs.

64 2. All real property held by the parties as tenants by the  
 65 entireties, whether acquired before ~~prior to~~ or during the  
 66 marriage, shall be presumed to be a marital asset. If, in any  
 67 case, a party makes a claim to the contrary, the burden of proof  
 68 shall be on the party asserting the claim that the subject  
 69 property, or some portion thereof, is nonmarital.

70 3. All personal property titled jointly by the parties as  
 71 tenants by the entireties, whether acquired before ~~prior to~~ or  
 72 during the marriage, shall be presumed to be a marital asset. In  
 73 the event a party makes a claim to the contrary, the burden of  
 74 proof shall be on the party asserting the claim that the subject  
 75 property, or some portion thereof, is nonmarital.

76 4. The burden of proof to overcome the gift presumption  
 77 shall be by clear and convincing evidence.

78 (10) (a) To do equity between the parties, the court may,  
 79 in lieu of or to supplement, facilitate, or effectuate the  
 80 equitable division of marital assets and liabilities, order a  
 81 monetary payment in a lump sum or in installments paid over a  
 82 fixed period of time.

83 (b) If installment payments are ordered, the court may  
 84 require security and a reasonable rate of interest, or otherwise

85 recognize the time value of money in determining the amount of  
 86 the installments. If security or interest is required, the court  
 87 shall make written findings relating to any deferred payments,  
 88 the amount of any security required, and the interest. This  
 89 paragraph does not preclude the application of chapter 55,  
 90 relating to judgments, to any subsequent default.

91 Section 2. Section 61.0765, Florida Statutes, is created  
 92 to read:

93 61.0765 Valuation of marital portion of nonmarital real  
 94 property.—

95 (1)(a) The total value of the marital portion of  
 96 nonmarital real property consists of the sum of the following:

97 1. The value of the active appreciation of the property as  
 98 described in s. 61.075(6)(a)1.b.

99 2. The amount of the mortgage principal paid from marital  
 100 funds.

101 3. A portion of any passive appreciation of the property,  
 102 if the mortgage principal was paid from marital funds.

103 (b) The value of the marital portion of nonmarital real  
 104 property may not exceed the total net equity of the property on  
 105 the valuation date in the dissolution action.

106 (2) The marital portion of the passive appreciation as  
 107 provided in subparagraph (1)(a)3. is calculated by multiplying  
 108 the passive appreciation of the property by the marital  
 109 fraction.

110 (a) The passive appreciation of the property is calculated  
 111 by subtracting all of the following from the value of the  
 112 property on the valuation date in the dissolution action:

113 1. The gross value of the property on the date of the  
 114 marriage or on the date the property was acquired, whichever is  
 115 later.

116 2. The value of the active appreciation of the property  
 117 during the marriage as described in s. 61.075(6)(a)1.b.

118 3. The amount of any additional debts secured by the  
 119 property during the marriage.

120 (b) The numerator of the marital fraction consists of the  
 121 amount of the mortgage principal paid on any mortgage on the  
 122 property from marital funds. The denominator consists of the  
 123 value of the property on the date of the marriage, the date of  
 124 acquisition of the property, or the date the property was first  
 125 encumbered by a mortgage on which principal was paid from  
 126 marital funds, whichever is later.

127 (3) The court in a dissolution action must apply the  
 128 formulas provided in this section to determine the value of the  
 129 marital portion of nonmarital real property subject to equitable  
 130 dissolution unless a party presents sufficient evidence to  
 131 establish that the application of these formulas is not  
 132 equitable under the particular circumstances of the case.

133 Section 3. Subsections (7) and (9) of section 61.08,  
 134 Florida Statutes, are amended to read:

135 61.08 Alimony.—

136 (7) There shall be a presumption in favor of durational  
 137 alimony ~~over may be awarded when permanent periodic alimony is~~  
 138 ~~inappropriate.~~ The purpose of durational alimony is to provide a  
 139 party with economic assistance for a set period of time  
 140 following a marriage of ~~short or~~ moderate duration or following

141 a marriage of long duration if there is no ongoing need for  
 142 support on a permanent basis. An award of durational alimony  
 143 terminates upon the death of either party or upon the remarriage  
 144 of the party receiving alimony. The amount of an award of  
 145 durational alimony shall ~~may~~ be modified or terminated based  
 146 upon a substantial change in circumstances or upon the existence  
 147 of a supportive relationship in accordance with s. 61.14.  
 148 ~~However,~~ The length of an award of durational alimony may not ~~be~~  
 149 ~~modified except under exceptional circumstances and may not~~  
 150 exceed the length of the marriage.

151 (9) Notwithstanding any other law to the contrary, ~~an~~ The  
 152 award of alimony may not leave the payor with ~~significantly~~ less  
 153 net income or with a lower standard of living than the ~~net~~  
 154 ~~income of the recipient unless there are written findings of~~  
 155 ~~exceptional circumstances.~~ The court shall make written findings  
 156 regarding the relative incomes and standards of living citing to  
 157 evidence in the record and to this subsection.

158 Section 4. Paragraph (b) of subsection (1) of section  
 159 61.14, Florida Statutes, is amended, and subsection (12) is  
 160 added to that section, to read:

161 61.14 Enforcement and modification of support,  
 162 maintenance, or alimony agreements or orders.-

163 (1)

164 (b)1. The court must ~~may~~ reduce or terminate an award of  
 165 alimony upon specific written findings by the court that since  
 166 the granting of a divorce and the award of alimony a supportive  
 167 relationship has existed between the obligee and a person with  
 168 whom the obligee resides. On the issue of whether alimony should



169 be reduced or terminated under this paragraph, the burden is on  
170 the obligor to prove by a preponderance of the evidence that a  
171 supportive relationship exists.

172 2. In determining whether an existing award of alimony  
173 should be reduced or terminated because of an alleged supportive  
174 relationship between an obligee and a person who is not related  
175 by consanguinity or affinity and with whom the obligee resides,  
176 the court shall elicit the nature and extent of the relationship  
177 in question. The court shall give consideration, without  
178 limitation, to circumstances, including, but not limited to, the  
179 following, in determining the relationship of an obligee to  
180 another person:

181 a. The extent to which the obligee and the other person  
182 have held themselves out as a married couple by engaging in  
183 conduct such as using the same last name, using a common mailing  
184 address, referring to each other in terms such as "my husband"  
185 or "my wife," or otherwise conducting themselves in a manner  
186 that evidences a permanent supportive relationship.

187 b. The period of time that the obligee has resided with  
188 the other person in a permanent place of abode.

189 c. The extent to which the obligee and the other person  
190 have pooled their assets or income or otherwise exhibited  
191 financial interdependence.

192 d. The extent to which the obligee or the other person has  
193 supported the other, in whole or in part.

194 e. The extent to which the obligee or the other person has  
195 performed valuable services for the other.

196 f. The extent to which the obligee or the other person has  
 197 performed valuable services for the other's company or employer.

198 g. Whether the obligee and the other person have worked  
 199 together to create or enhance anything of value.

200 h. Whether the obligee and the other person have jointly  
 201 contributed to the purchase of any real or personal property.

202 i. Evidence in support of a claim that the obligee and the  
 203 other person have an express agreement regarding property  
 204 sharing or support.

205 j. Evidence in support of a claim that the obligee and the  
 206 other person have an implied agreement regarding property  
 207 sharing or support.

208 k. Whether the obligee and the other person have provided  
 209 support to the children of one another, regardless of any legal  
 210 duty to do so.

211 3. This paragraph does not abrogate the requirement that  
 212 every marriage in this state be solemnized under a license, does  
 213 not recognize a common law marriage as valid, and does not  
 214 recognize a de facto marriage. This paragraph recognizes only  
 215 that relationships do exist that provide economic support  
 216 equivalent to a marriage and that alimony terminable on  
 217 remarriage may be reduced or terminated upon the establishment  
 218 of equivalent equitable circumstances as described in this  
 219 paragraph. The existence of a conjugal relationship, though it  
 220 may be relevant to the nature and extent of the relationship, is  
 221 not necessary for the application of ~~the provisions of this~~  
 222 paragraph.

223 4. If the obligee denies or fails to admit any material  
 224 fact regarding the existence of a supportive relationship in  
 225 circumstances where the obligee knew or should have known about  
 226 the material fact and the obligor subsequently proves the  
 227 existence of the material fact, the court shall, in the form of  
 228 a civil judgment:

229 a. Order modification of the alimony award retroactive to  
 230 the beginning of the supportive relationship.

231 b. Award to the obligor a refund of all of the alimony the  
 232 obligor actually paid to the obligee from the beginning of the  
 233 supportive relationship.

234 c. Award to the obligor reasonable costs and attorney fees  
 235 incurred in proving the fact.

236 5. If the obligee denies the existence of a supportive  
 237 relationship and the obligor subsequently proves the existence  
 238 of a supportive relationship, the court shall order termination  
 239 of the alimony award retroactive to the beginning of the  
 240 supportive relationship, award to the obligor a refund of all of  
 241 the alimony the obligor actually paid to the obligee from the  
 242 beginning of the supportive relationship, and award to the  
 243 obligor reasonable costs and attorney fees incurred in proving  
 244 the existence of the supportive relationship. An award under  
 245 this subparagraph shall be a civil judgment.

246 (12) In any alimony award, the court shall require an  
 247 obligee to maximize both his or her reasonable potential for  
 248 rehabilitation and reasonable earning capacity and shall impute  
 249 all income to the obligee that could be reasonably earned after  
 250 achieving maximum rehabilitation and reasonably increasing

251 earning capacity. The court shall make written findings of fact  
 252 concerning the reasonable potential of the obligee for  
 253 rehabilitation and the amount of income that should be imputed  
 254 to the obligee.

255 Section 5. Section 61.19, Florida Statutes, is amended to  
 256 read:

257 61.19 Entry of judgment of dissolution of marriage; ~~;~~ delay  
 258 period; bifurcation.-

259 (1) A ~~No~~ final judgment of dissolution of marriage may not  
 260 be entered until at least 20 days have elapsed from the date of  
 261 filing the original petition for dissolution of marriage, ~~;~~ but  
 262 the court, on a showing that injustice would result from this  
 263 delay, may enter a final judgment of dissolution of marriage at  
 264 an earlier date.



265 (2) If more than 180 days has elapsed since the filing of  
 266 an action for dissolution of marriage, upon the request of  
 267 either spouse the court shall enter an order bifurcating the  
 268 action and, if legal grounds for dissolution are proved, shall  
 269 enter a judgment dissolving the marriage and reserving  
 270 jurisdiction to determine all issues other than dissolution. It  
 271 is the intent of the Legislature that the decision in *Cloughton*  
 272 *v. Cloughton*, 393 So.2d 1061 (Fla. 1981), shall not prevent  
 273 bifurcation or entry of a final judgment pursuant to this  
 274 subsection.

275 Section 6. This act shall take effect July 1, 2012.



## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** CS/HB 681 Driving Under the Influence  
**SPONSOR(S):** Transportation & Highway Safety Subcommittee; Baxley and others  
**TIED BILLS:** None **IDEN./SIM. BILLS:** SB 864

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Transportation & Highway Safety Subcommittee	13 Y, 0 N, As CS	Kiner	Kruse
2) Judiciary Committee		Smith 	Havlicak 
3) Economic Affairs Committee			

### SUMMARY ANALYSIS

The bill broadens a criminal court's discretion when ordering the terms of probation for the offense of driving under the influence ("DUI"). Specifically, the bill gives a criminal court the choice of ordering, at the time of sentencing, either of the following as a condition of probation:

- The impoundment or immobilization of the vehicle that was operated by, or was in the actual control of, the offender or any vehicle registered in the offender's name at the time of impoundment or immobilization; or
- The installation of an ignition interlock device ("IID") on all vehicles that are individually or jointly leased or owned and routinely operated by the offender for at least 3 continuous months.

The bill expands the scope of vehicles that may be impounded or immobilized by applying the section to "any" vehicle registered in the defendant's name at the time of impoundment or immobilization.

If the court elects to order IID installation, it may not occur concurrently with imprisonment or concurrently with any driver's license suspension. The period of installation will vary depending on the offender's previous convictions. The bill sets the following installation periods:

- 3 continuous months for the first conviction;
- 6 continuous months for a second conviction (within 5 years of a prior conviction); or
- 1 year for a third or subsequent conviction (within 10 years of a prior conviction).

The bill has an indeterminate fiscal impact.

The bill has an effective date of July 1, 2012.

# FULL ANALYSIS

## I. SUBSTANTIVE ANALYSIS

### A. EFFECT OF PROPOSED CHANGES:

#### Current Situation

##### **Alcohol-Impaired Driving Statistics**

Highway deaths fell in 2010 to their lowest level since 1949,<sup>1</sup> despite the fact that American drivers traveled nearly 46 billion more miles in 2010 than in 2009.<sup>2</sup> However, alcohol-impaired driving remains a serious concern. According to the National Conference of State Legislatures, there were 10,228 alcohol-impaired traffic fatalities in 2010.<sup>3</sup> This figure represents 31% of all motor vehicle fatalities.<sup>4</sup> According to the American Automobile Association (“AAA”), alcohol is a factor in about 40% of traffic fatalities each year, and nearly 1.5 million people are arrested annually for driving under the influence of alcohol or drugs.<sup>5</sup> There are social costs as well. The National Highway Traffic Safety Administration (“NHTSA”) estimates alcohol-related crashes in the United States cost the public \$114.3 billion in 2000, including \$51.1 billion in monetary costs and an estimated \$63.2 billion in quality of life losses.<sup>6</sup>

According to the Florida Department of Highway Safety and Motor Vehicles (“DHSMV”), there are 62,275 DUI arrests in Florida annually, of which 14,140 (22%) are second or third-time offenders.<sup>7</sup>

##### **Federal DUI Law**

Title 23 U.S.C., s. 164, and its implementing regulations, 23 C.F.R., Part 1275, set minimum penalties for repeat DUI offenders. These regulations include requirements that an individual convicted of a second or subsequent DUI offense be subject to either a “hard” license suspension<sup>8</sup> for at least 1 year, or a “hard” license suspension for at least 45 days followed by a reinstatement of restricted driving privileges for the remainder of the 1 year suspension period. The restricted driving privileges must occur concurrently with IID installation, and the privileges must be restricted to driving to and from work, school, or an alcohol treatment program.<sup>9</sup>

Additionally, each motor vehicle owner, operated (or both) by the offender must be impounded or immobilized, or installed with an IID.<sup>10</sup>

##### **Florida DUI Law**

###### Elements of the Offense

Section 316.193, F.S., provides that a person is guilty of the offense of DUI if the person is driving or is in actual physical control of a vehicle, and either:

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<sup>1</sup> See the American Association of State Highway and Transportation Officials (“AASHTO”) press release on “NHTSA Updates 2010 Death Count; Releases Distracted Driving Survey.” Available at <http://www.aashtojournal.org/Pages/120911deaths.aspx> (last visited Feb. 9, 2012).

<sup>2</sup> See the United States Department of Transportation’s press release titled “U.S. Transportation Secretary LaHood Announces Lowest Level of Annual Traffic Fatalities in More than Six Decades.” The press release may be viewed at <http://www.dot.gov/affairs/2011/nhtsa2111.html> (Last visited Feb. 9, 2012).

<sup>3</sup> See the National Conference of State Legislatures website at <http://www.ncsl.org> (search “Alcohol Impaired/Drunk Driving” (last visited Feb. 9, 2012)).

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> See Taylor, Dexter; Miller, Ted; and Cox, Kenya, “*Impaired Driving in the United States Cost Fact Sheets.*” Washington, DC: National Highway Traffic Safety Administration, 2002. Available at [http://www.nhtsa.gov/people/injury/alcohol/impaired\\_driving\\_pg2/US.htm](http://www.nhtsa.gov/people/injury/alcohol/impaired_driving_pg2/US.htm).

<sup>7</sup> 2012 DHSMV Agency Analysis for HB 681.

<sup>8</sup> A “license suspension” means the suspension of all driving privileges. See 23 U.S.C.A. s. 164(a)(3).

<sup>9</sup> 23 U.S.C.A. s. 164(a)(5)A.

<sup>10</sup> 23 U.S.C.A. s. 164(a)(5)B.

- Is under the influence of alcoholic beverages, or chemical substance,<sup>11</sup> or any controlled substance<sup>12</sup> to the extent the person's normal faculties are impaired; or
- Has a blood-alcohol level of 0.08 or more grams of alcohol per 100 milliliters of blood; or
- Has a breath-alcohol level of 0.08 or more grams of alcohol per 210 liters of breath.<sup>13</sup>

### Criminal Penalties

Criminal penalties vary depending on the number of previous convictions, how much time has passed between convictions, the offender's breath-alcohol content or blood-alcohol content ("BAC") when arrested, and the age of any passengers in the vehicle at the time of arrest.

*First-Time Offender.* A first-time offender is subject to a fine ranging from \$500 to \$1,000, as well as imprisonment for up to 6 months and a driver's license suspension of 6 months to 1 year.<sup>14</sup> The offender must also be placed on probation for up to 1 year and participate in 50 hours of community service. As a condition of probation, the offender's vehicle is impounded or immobilized for a period of 10 days (or the unexpired term of any lease or rental agreement that expires within 10 days) and the impoundment or immobilization must not occur concurrently with the imprisonment.<sup>15</sup>

However, if the first-time offender's BAC is 0.15 or higher, or if a passenger under 18 years of age is present in the vehicle, the penalty is enhanced to a fine ranging from \$1,000 to \$2,000, imprisonment for up to 9 months, and mandatory IID installation upon all vehicles leased or owned and routinely operated by the person for at least 6 continuous months (provided the offender qualifies for a permanent or restricted license).<sup>16</sup>

*Second-Time Offender.* A second DUI conviction carries a fine ranging from \$1,000 to \$2,000, imprisonment for a period of up to 9 months, and mandatory IID installation upon all vehicles leased or owned and routinely operated by the offender for at least 1 year, provided the offender qualifies for a permanent or restricted license.<sup>17</sup>

However, if a second offense occurs within 5 years of a previous DUI conviction, there is a mandatory imprisonment period of at least 10 days, of which at least 48 hours must be consecutive. Additionally, as a condition of probation, the offender's vehicle is impounded for 30 days, which may not occur concurrently with the imprisonment.<sup>18</sup> The court must also suspend the offender's license for at least 5 years.<sup>19</sup>

Enhanced penalties also apply when the second-time offender's BAC is 0.15 or higher, or when a passenger under the age of 18 is present in the vehicle. These enhanced penalties require a fine ranging from \$2,000 to \$4,000, imprisonment not exceeding 1 year,<sup>20</sup> and mandatory IID installation upon all vehicles leased or owned and routinely operated by the person for at least 2 continuous years, provided the offender qualifies for a permanent or restricted license.<sup>21</sup>

*Third-Time and Subsequent Offender.* A third DUI conviction occurring more than 10 years after the date of a prior DUI conviction carries a fine ranging from \$2,000 to \$5,000, imprisonment for no more than 1 year, and mandatory IID installation upon all vehicles leased or owned and routinely operated by the person for at least 2 years (provided the offender qualifies for a permanent or restricted license).<sup>22</sup>

<sup>11</sup> As set forth under s. 877.111, F.S.

<sup>12</sup> As set forth under chapter 893, F.S.

<sup>13</sup> Section 316.193(1), F.S.

<sup>14</sup> Section 316.193(2), F.S.

<sup>15</sup> Section 316.193(6)(a), F.S.

<sup>16</sup> Section 316.193(4), F.S.

<sup>17</sup> Section 316.193(2), F.S.

<sup>18</sup> Section 316.193(6)(b), F.S.

<sup>19</sup> Section 322.28(2)(a)2, F.S.

<sup>20</sup> Section 316.193(4), F.S.

<sup>21</sup> Section 316.193(4)(c), F.S.

<sup>22</sup> Section 316.193(2)(b)2, F.S.



A third DUI conviction occurring within 10 years of a prior DUI conviction is a third degree felony.<sup>23</sup> The offense also requires IID installation upon all vehicles leased or owned and routinely operated by the offender for a period of not less than 2 years (provided the offender qualifies for a permanent or restricted license).<sup>24</sup> Additionally, there is a 30-day minimum imprisonment period, of which at least 48 hours must be consecutive.<sup>25</sup> Finally, the court must also suspend the offender's license for at least 10 years.<sup>26</sup>

If the offender's BAC is 0.15 or higher, or if a passenger under the age of 18 is present in the vehicle at the time of the offense, the penalty increases to at least \$4,000.<sup>27</sup>

A fourth or subsequent conviction, regardless of when it occurs, is a third degree felony, punishable by up to 5 years in prison and a fine of not less than \$1,000 or more than \$5,000.<sup>28</sup> If the fourth or subsequent conviction was for an offense that occurred within 10 years after the date of a prior conviction, the court must order imprisonment for not less than 30 days.<sup>29</sup>

*Property Damage or Injury.* Section 316.193(3), F.S., provides penalties for a person convicted of DUI who causes, or contributes to causing, damage to the property or person of another, serious bodily injury to another, or the death of another. A DUI conviction involving damage to another or to property is a first degree misdemeanor.<sup>30</sup> A DUI offense involving serious injury results in a third degree felony.<sup>31</sup> A DUI conviction resulting in death is a second degree felony.<sup>32</sup> If, however, the offender knew or should have known, at the time of the crash, that the crash occurred and the offender failed to give information and render aid, the offender commits a first degree felony.<sup>33</sup>

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<sup>23</sup> A third degree felony is punishable by up to five years imprisonment and a \$5,000 fine. Sections 775.082 and 775.083, F.S.

<sup>24</sup> Section 316.193(2)(b), F.S.

<sup>25</sup> Section 316.193(6)(c), F.S.

<sup>26</sup> Section 322.28(2)(a)3, F.S.

<sup>27</sup> Section 316.193(4)(a)3, F.S.

<sup>28</sup> Section 316.193(2)(b)3, F.S.

<sup>29</sup> Section 316.193(6)(c), F.S.

<sup>30</sup> A first degree misdemeanor is punishable by up to one year in county jail and a \$1,000 fine. Sections 775.082 and 775.083, F.S.

<sup>31</sup> A third degree felony is punishable by up to five years imprisonment and a \$5,000 fine. Sections 775.082 and 775.083, F.S.

<sup>32</sup> A second degree felony is punishable by up to 15 years imprisonment and a \$10,000 fine. Sections 775.082 and 775.083, F.S.

<sup>33</sup> A first degree felony is punishable by up to 30 years imprisonment and a \$10,000 fine. Sections 775.082 and 775.083, F.S.

The following chart summarizes DUI criminal penalties:

Offense #	Criminal Penalties
1 <sup>st</sup>	<ul style="list-style-type: none"> <li>• <b>Fine:</b> \$500 - \$1000</li> <li>• <b>Imprisonment:</b> Up to 6 mo</li> <li>• <b>Probation:</b> Up to 1 yr</li> <li>• <b>License suspension:</b> 6 mo - 1 yr</li> <li>• <b>Monthly reporting requirement,</b> including DUI school</li> <li>• <b>Community service:</b> 50 hrs</li> <li>• <b>Impoundment or immobilization:</b> 10 days, as a condition of probation (must not occur concurrently with jail time)</li> </ul> <p>Enhanced penalties if BAC <math>\geq</math> 0.15, or if passenger is minor:</p> <ul style="list-style-type: none"> <li>• <b>Fine:</b> \$1000 - \$2000</li> <li>• <b>Imprisonment:</b> Up to 9 mo</li> <li>• <b>IID:</b> At least 6 continuous months</li> </ul>
2 <sup>nd</sup>	<p>If <i>more</i> than 5 yrs since a prior conviction:</p> <ul style="list-style-type: none"> <li>• <b>Fine:</b> \$1,000 - \$2,000</li> <li>• <b>Imprisonment:</b> Up to 9 mo</li> <li>• <b>License Suspension:</b> 6 mo - 1 yr</li> <li>• <b>Monthly reporting requirement,</b> including DUI school</li> <li>• <b>IID:</b> Mandatory for at least 1 yr</li> </ul> <p>Enhanced penalties if <i>less</i> than 5 yrs since a prior conviction:</p> <ul style="list-style-type: none"> <li>• <b>Imprisonment:</b> 10 day minimum (48 hrs consecutive)</li> <li>• <b>License suspension:</b> 5 yrs</li> <li>• <b>Impoundment or Immobilization:</b> Up to 30 days</li> </ul> <p>Enhanced penalties if BAC <math>\geq</math> 0.15; Or if passenger is &lt; 18 yrs:</p> <ul style="list-style-type: none"> <li>• <b>Fine:</b> \$2,000 - \$4,000</li> <li>• <b>Imprisonment:</b> Up to 1 yr</li> <li>• <b>IID:</b> At least 2 continuous yrs</li> </ul>
3 <sup>rd</sup>	<p>If <i>more</i> than 10 yrs since a prior conviction:</p> <ul style="list-style-type: none"> <li>• <b>Fine:</b> \$2,000 - \$5,000</li> <li>• <b>Imprisonment:</b> 12 mo maximum</li> <li>• <b>IID:</b> Mandatory, at least 2 continuous yrs</li> <li>• <b>Monthly reporting requirement,</b> including DUI school</li> </ul> <p>If <i>less</i> than 10 yrs since a prior conviction:</p> <ul style="list-style-type: none"> <li>• <b>3<sup>rd</sup> degree felony</b></li> <li>• <b>Fine:</b> Up to \$5,000</li> <li>• <b>Imprisonment:</b> 30 days minimum, 5 yrs maximum (48 hrs consecutive)</li> <li>• <b>IID:</b> Mandatory, at least 2 continuous yrs</li> <li>• <b>Monthly reporting requirement,</b> including DUI school</li> <li>• <b>License suspension:</b> At least 10 yrs</li> <li>• <b>Impoundment or Immobilization:</b> 90 days, as a condition of probation (must not occur concurrently with jail time)</li> </ul> <p>Enhanced penalties if BAC <math>\geq</math> 0.15; Or if passenger is &lt; 18 yrs:</p> <ul style="list-style-type: none"> <li>• <b>Fine:</b> At least \$4,000 (3<sup>rd</sup> or subsequent offense)</li> </ul>

### Administrative License Suspension

Under Florida's "Implied Consent Law,"<sup>34</sup> there are also administrative penalties imposed as a result of a person's refusal to submit to an approved chemical test or physical test to determine the person's BAC. Section 316.1932, F.S., provides that the chemical or physical breath test must be incidental to a lawful arrest and administered at the request of a law enforcement officer who has reasonable cause to believe the person was driving or was in actual physical control of a motor vehicle while under the influence. When an officer requests the breath, urine or blood test, the offender must be told that:

- Refusal to submit to the test will result in the suspension of the offender's driving privilege for 1 year.
- Refusal to submit to the test will result in the suspension of the offender's driving privilege for 18 months if the offenders driving privilege has previously been suspended for a refusal to submit.
- Refusal to submit to test is a misdemeanor if the offender's driving privilege has previously been previously suspended for a prior refusal to submit to a lawful test of his or her breath, urine, or blood.<sup>35</sup>

### **Ignition Interlock Devices ("IIDs")**

The purpose of an IID is to prevent individuals who have been drinking alcohol from operating their vehicles. Before starting a vehicle with an IID installed, the driver must blow into a breathalyzer tube. If the IID detects a BAC above the pre-set level<sup>36</sup> it will prevent the vehicle from starting. Additionally, modern IIDs conduct randomized tests while the vehicle is being operated in order to help ensure that the driver did not use another person's breath sample to start the car, or did not begin drinking after starting the vehicle (for example, by drinking in a bar while leaving the vehicle running).<sup>37</sup> If the IID detects BAC above the pre-set level during one of these tests, the IID will not stop or disable the engine, but will record the violation. When violations occur, the IID must be checked and reset by the IID servicer and the record will be sent to the proper authorities.<sup>38</sup>

### IID Use in Florida

The following table summarizes the IID requirements under s. 316.193, F.S.:

<b>DUI Conviction</b>	<b>Ignition Interlock Requirement</b>
1 <sup>st</sup> Conviction	If court ordered
1 <sup>st</sup> Conviction if 0.15 or above, or minor in car	At least 6 months
2 <sup>nd</sup> Conviction	At least 1 year
2 <sup>nd</sup> Conviction if 0.15 or above, or minor in car	At least 2 years
3 <sup>rd</sup> Conviction	At least 2 years
4 <sup>th</sup> + Convictions (Condition of Hardship License)	At least 5 years <sup>39</sup>

<sup>34</sup> Section 316.1932, F.S.

<sup>35</sup> *Id.*

<sup>36</sup> 0.05 by statute, or as otherwise set by the court.

<sup>37</sup> IIDs that conduct these randomized tests provide warnings of upcoming tests in order to allow drivers the opportunity to pull over safely.

<sup>38</sup> Jeanne Mejeur, "Ignition Interlocks: Turn the Key and Blow – Can Technology Stop Drunk Driving?" (Dec. 2007). Jeanne Mejeur is the National Conference of State Legislatures' expert on drunken driving laws. This article may be viewed at <http://www.ncsl.org> (search "Alcohol Impaired/Drunk Driving," then click link for article (last visited Feb. 10, 2012)).

<sup>39</sup> See FDHSMV's website at <http://www.flhsmv.gov/ddl/iid.html> (last visited Feb. 14, 2012).

Additionally, s. 316.1937, F.S., authorizes the court to require the installation of a certified<sup>40</sup> IID for at least 6 continuous months.<sup>41</sup> This authorization is in addition to any other authorized penalties, including the current mandatory installation of an IID for second and third-time offenders.<sup>42</sup>

The offending driver pays for the installation, maintenance, and monitoring of the IID. However, Florida law contains provisions for those the court determines are unable to pay. For example, the court may order that any portion of a fine paid as a result of a DUI offense be counted against installation costs.<sup>43</sup> The cost (plus tax) to the convicted person for an ignition interlock device is:

- \$12 Interlock fee
- \$70 for installation
- \$67.50 for monthly monitoring and calibration
- \$100 refundable deposit or a \$5 monthly insurance charge<sup>44</sup>

With regard to attempts to circumvent the IID, s. 316.1937, F.S., prohibits the following acts:

- Tampering with or circumventing the operation of an IID;
- Requesting or soliciting another person to blow into the IID for the purpose of starting or operating the motor vehicle;
- Blowing into an IID for the purpose of starting or operating the motor vehicle for another; and
- Knowingly leasing or lending a motor vehicle to a person who has been required to have an IID installed on his or her motor vehicle.<sup>45</sup>

A violation of s. 316.1937, F.S., carries a 1 year license suspension. A separate violation of s. 316.1937, F.S., during the same period of IID installation carries a 5 year license suspension.<sup>46</sup> If a person commits any of the prohibited acts specified above and is not a licensed driver, he or she will be subject to a fine between \$250 and \$500 for each violation.<sup>47</sup>

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<sup>40</sup> Pursuant to s. 316.1938, F.S., the FDHSMV is required to certify, or cause to be certified, the accuracy and precision of the breath-testing component of IIDs.

<sup>41</sup> With exceptions provided for those required to drive within the scope of employment.

<sup>42</sup> Sections 316.193(2)(a)3, 316.193(2)(b)1, and 316.193(2)(b)2, F.S., require mandatory placement of an IID on all vehicles individually or jointly leased or owned and routinely operated by the convicted person.

<sup>43</sup> Section 316.1937(2)(d), F.S.

<sup>44</sup> See FDHSMV's website at <http://www.flhsmv.gov/ddl/iid.html> (last visited Feb. 14, 2012).

<sup>45</sup> Section 316.1937(6), F.S.

<sup>46</sup> Section 316.1937(5)(a), F.S.

<sup>47</sup> Section 316.1937(5)(b), F.S.

## IID Use Nationwide

As of January 1, 2012, 16 states require mandatory IID installation for drivers caught with BAC above the legal limit, even for first-time offenders.<sup>48</sup> In 2005, New Mexico became the first state to adopt such requirements, and since then the state has seen a 28% decline in alcohol-related fatalities.<sup>49</sup>

Information courtesy of "Mothers Against Drunk Driving":

<b>Mandatory with .08 Conviction</b>	<b>Mandatory with a BAC of at least .15 - .18</b>	<b>Mandatory with 2<sup>nd</sup> Conviction</b>	<b>Discretionary</b>
Alaska (01/2009)	Alabama (09/2011)	Georgia ****	Idaho
Arizona (09/2007)	Delaware (07/2009)	Massachusetts	Indiana
Arkansas (04/2009)	Florida (10/2008)	Missouri	Iowa
California (pilot program) (07/2010)**	Maryland (10/2011)	Montana	Kentucky
Colorado (01/2009)*	Michigan (10/2010)	Pennsylvania	Maine
Connecticut (01/2012)	Minnesota (07/2011)*	South Carolina	Mississippi
Hawaii (01/2011)	New Hampshire		Nevada (.18)
Illinois (01/2009)*	New Jersey (01/2010)		North Dakota
Kansas (07/2011)	North Carolina (12/2007)		Ohio
Louisiana (07/2007)	Oklahoma (11/2009)		Rhode Island
Nebraska (01/2009)	Tennessee (01/2011)		South Dakota
New Mexico (06/2005)	Texas (09/2005)***		Vermont
New York (08/2010)	Virginia (10/2004)		
Oregon (01/2008)***	West Virginia (07/2008)		
Utah (07/2009)	Wisconsin (07/2010)		
Washington (01/2009)	Wyoming (07/2009)		

\*There is a strong incentive to use an IID- if the offender chooses not to use an IID, his or her license is suspended for one year, and any violation of the suspension is a felony.

\*\*California's pilot program includes the counties of Los Angeles, Alameda, Sacramento, and Tulare. These counties combined have a population of over 14 million.

\*\*\*Mandatory upon license reinstatement

\*\*\*\*Mandatory as a condition of probation

## **Impoundment or Immobilization**

<sup>48</sup> See information on ignition interlock devices on Mothers Against Drunk Driving's website at <http://www.madd.org/laws/ignition-interlock.html> (last visited Feb. 8, 2012).

<sup>49</sup> Jeanne Mejeur, "Ignition Interlocks: Turn the Key and Blow – Can Technology Stop Drunk Driving?" (Dec. 2007). Jeanne Mejeur is the National Conference of State Legislatures' expert on drunken driving laws. This article may be viewed at <http://www.ncsl.org> (search "Alcohol Impaired/Drunk Driving," then click link for article (last visited Feb. 10, 2012)).

Current Florida law requires the court to order, as a condition of probation and at the time of sentencing, the impoundment or immobilization of the vehicle that was operated by, or in the actual control of the offender, or any *one* vehicle registered in the offender's name at the time of impoundment or immobilization, for a period of 10 days.<sup>50</sup> The impoundment or immobilization must not occur concurrently with incarceration of the offender.<sup>51</sup> Impoundment or immobilization orders may be dismissed under the following circumstances:

- The order of impoundment or immobilization pertains to a vehicle that was reported stolen (owner must show police report);
- Documentation is shown that the vehicle referenced in the order of impoundment or immobilization was purchased from an entity other than the offender (or the offender's agent) after the offense was committed – and the sale was not made to circumvent the order and allow the offender to drive;
- If the court finds that the offender owner's family has no other private or public means of transportation; or
- If the vehicle is owned by the offender, but operated solely by the offender's employees or business.<sup>52</sup>

Within 7 business days after the date that the court issues the order of impoundment or immobilization, the clerk must send notice by certified mail, return receipt requested, to the registered owner of each vehicle, if the registered owner is a person other than the defendant, and to each person of record claiming a lien against the vehicle.<sup>53</sup> Sections 316.193(6)(e), 316.193(6)(f), and 316.193(6)(g), F.S., provide certain remedial procedures for a person who owns, but was not operating, the vehicle when the offense occurred.

### **Effect of Proposed Changes**

The bill expands a criminal court's discretion when ordering the terms of probation for the offense of driving under the influence ("DUI"). Specifically, the bill gives a criminal court the choice of ordering, at the time of sentencing,<sup>54</sup> either of the following as a condition of probation:

- The impoundment or immobilization of the vehicle that was operated by, or was in the actual control of, the offender, or *any*<sup>55</sup> vehicle registered in the offender's name at the time of impoundment or immobilization; or
- The installation of an IID<sup>56</sup> on all vehicles that are individually or jointly leased or owned and routinely operated by the offender for at least 3 continuous months.

The bill expands the scope of vehicles that may be impounded or immobilized by applying the section to "any" vehicle registered in the defendant's name at the time of impoundment or immobilization.

If the court elects to order the IID installation, the period of installation will vary depending on the offender's previous convictions. The bill sets the following installation periods:

- At least 3 continuous months for the first conviction;
- At least 6 continuous months for a second conviction (within 5 years of a prior conviction); or
- At least 12 continuous months for a third or subsequent conviction (within 10 years of a prior conviction).

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<sup>50</sup> Section 316.193(6), F.S.

<sup>51</sup> *Id.*

<sup>52</sup> Section 316.193(6), F.S.

<sup>53</sup> Section 316.193(6)(d), F.S.

<sup>54</sup> The bill amends s. 316.193(6)(d), F.S., to require the court to issue the order for immobilization or installation of an IID at the time of sentencing.

<sup>55</sup> The bill strikes the word "one" from the current statute. *See* s. 316.193(6)(a), F.S.

<sup>56</sup> In accordance with s. 316.1938, F.S.

For first-time offenders, the effect of the proposed change will provide the court more latitude in ordering probation by giving the court the opportunity to choose impoundment /immobilization, or IID installation.<sup>57</sup> Assuming the court orders IID installation instead of impoundment or immobilization, a first-time offender will be able to drive legally after the offender has served any term of imprisonment ordered by the court, provided the offender complies with IID installation requirements for at least 3 continuous months.

The bill also provides the court with broader discretion in ordering probation for second and third-time offenders. Because second and third-time offenders are already subject to mandatory IID installation (at least 1 year and at least 2 continuous years, respectively), the bill's proposed changes extend the minimum IID installation period for this class of offenders. Assuming the court orders IID instead of impoundment or immobilization, second-time offenders (within 5 years of a prior conviction) must comply with IID installation requirements for 18 months, while third-time offenders (within 10 years of a prior conviction) will be required to comply with IID installation requirements for 3 years.<sup>58</sup>

The bill also makes non-substantive technical changes to the language of s. 316.193, F.S.

**B. SECTION DIRECTORY:**

**Section 1.** Amends s. 316.193, F.S., relating to penalties for driving under the influence.

**Section 2.** Provides that the act shall take effect July 1, 2012.

**II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT**

**A. FISCAL IMPACT ON STATE GOVERNMENT:**

1. Revenues:

The bill has an indeterminate fiscal impact on state government revenues. DHSMV will likely see an increase in the amount of fees relating to IID installation cases.

2. Expenditures:

None.

**B. FISCAL IMPACT ON LOCAL GOVERNMENTS:**

1. Revenues:

The bill does not appear to have any impact on local government revenues.

2. Expenditures:

None.

**C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:**

In instances where a criminal court orders IID installation as a part of probation, persons convicted of DUI will be responsible for the costs associated with the installation, maintenance and monitoring of the IID.

**D. FISCAL COMMENTS:**

None.

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<sup>57</sup> Of the 62,275 persons arrested annually for DUI in Florida, 78% are first-time offenders. See DHSMV Agency Analysis of HB 681 at p. 9.

<sup>58</sup> Required 3-year compliance must include at least 2 continuous years.

### **III. COMMENTS**

#### **A. CONSTITUTIONAL ISSUES:**

##### **1. Applicability of Municipality/County Mandates Provision:**

The provisions of the bill addressing criminal provisions appear 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:**

The bill does not appear to create a need for rulemaking or rulemaking authority.

#### **C. DRAFTING ISSUES OR OTHER COMMENTS:**

None.

### **IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES**

On January 31, 2012, the Transportation & Highway Safety Subcommittee adopted PCS for HB 681 favorably. This analysis is drafted to CS/HB 681.



1                   A bill to be entitled  
 2           An act relating to interlock ignition devices ordered  
 3           for probation for DUI; amending s. 316.193, F.S.;  
 4           requiring that the court, as a condition of probation  
 5           for a conviction of the offense of driving under the  
 6           influence, impound or immobilize the vehicle that was  
 7           operated by or was in the actual control of the  
 8           defendant or require the defendant to install an  
 9           interlock ignition device on all vehicles that are  
 10          individually or jointly leased or owned and routinely  
 11          operated by the defendant; prohibiting the  
 12          installation of an ignition interlock device from  
 13          occurring concurrently with the incarceration of the  
 14          defendant; providing an exception from a requirement  
 15          that the installation of an ignition interlock device  
 16          occur concurrently with the driver license revocation;  
 17          providing an effective date.

18  
 19 Be It Enacted by the Legislature of the State of Florida:

20  
 21           Section 1. Subsection (6) of section 316.193, Florida  
 22 Statutes, is amended to read:

23           316.193 Driving under the influence; penalties.—

24           (6) With respect to any person convicted of a violation of  
 25 subsection (1), regardless of any penalty imposed pursuant to  
 26 subsection (2), subsection (3), or subsection (4):

27           (a) For the first conviction, the court shall place the  
 28 defendant on probation for a period not to exceed 1 year and, as

29 a condition of the ~~such~~ probation, shall order the defendant to  
 30 participate in public service or a community work project for a  
 31 minimum of 50 hours. The court may order a defendant to pay a  
 32 fine of \$10 for each hour of public service or community work  
 33 otherwise required only if the court finds that the residence or  
 34 location of the defendant at the time public service or  
 35 community work is required or the defendant's employment  
 36 obligations would create an undue hardship for the defendant.  
 37 ~~However,~~ The total period of probation and incarceration may not  
 38 exceed 1 year. The court must also, as a condition of probation,  
 39 order:

40 1. The impoundment or immobilization of the vehicle that  
 41 was operated by or was in the actual control of the defendant or  
 42 any ~~one~~ vehicle registered in the defendant's name at the time  
 43 of impoundment or immobilization, for a period of 10 days or for  
 44 the unexpired term of any lease or rental agreement that expires  
 45 within 10 days. The impoundment or immobilization must not occur  
 46 concurrently with the incarceration of the defendant. The  
 47 impoundment or immobilization order may be dismissed in  
 48 accordance with paragraph (e), paragraph (f), paragraph (g), or  
 49 paragraph (h); or

50 2. The installation of an interlock ignition device in  
 51 accordance with s. 316.1938 on all vehicles that are  
 52 individually or jointly leased or owned and routinely operated  
 53 by the defendant for at least 3 continuous months.

54 (b) For the second conviction for an offense that occurs  
 55 within ~~a period of~~ 5 years after the date of a prior conviction  
 56 for violation of this section, the court shall order

57 imprisonment for at least ~~not less than~~ 10 days. The court must  
 58 also, as a condition of probation, order:

59 1. The impoundment or immobilization of all vehicles owned  
 60 by the defendant at the time of impoundment or immobilization,  
 61 for a period of 30 days or for the unexpired term of any lease  
 62 or rental agreement that expires within 30 days; or

63 2. The installation of an interlock ignition device in  
 64 accordance with s. 316.1938 on all vehicles that are  
 65 individually or jointly leased or owned and routinely operated  
 66 by the defendant for at least 6 continuous months.

67  
 68 The impoundment, immobilization, or the installation of an  
 69 ignition interlock device under this paragraph must not occur  
 70 concurrently with the incarceration of the defendant, but, not  
 71 including the installation of an ignition interlock device under  
 72 this paragraph, must occur concurrently with the driver ~~driver's~~  
 73 license revocation imposed under s. 322.28(2)(a)2. The  
 74 impoundment or immobilization order may be dismissed in  
 75 accordance with paragraph (e), paragraph (f), paragraph (g), or  
 76 paragraph (h). At least 48 hours of confinement must be  
 77 consecutive.

78 (c) For the third or subsequent conviction for an offense  
 79 that occurs within ~~a period of~~ 10 years after the date of a  
 80 prior conviction for violation of this section, the court shall  
 81 order imprisonment for at least ~~not less than~~ 30 days. The court  
 82 must also, as a condition of probation, order:

83 1. The impoundment or immobilization of all vehicles owned  
 84 by the defendant at the time of impoundment or immobilization,

CS/HB 681

2012

85 for a period of 90 days or for the unexpired term of any lease  
 86 or rental agreement that expires within 90 days; or

87 2. The installation of an interlock ignition device in  
 88 accordance with s. 316.1938 upon all vehicles that are  
 89 individually or jointly leased or owned and routinely operated  
 90 by the defendant for at least 12 continuous months.

91  
 92 The impoundment, immobilization, or the installation of an  
 93 ignition interlock device under this paragraph must not occur  
 94 concurrently with the incarceration of the defendant, but, not  
 95 including the installation of an ignition interlock device under  
 96 this paragraph, must occur concurrently with the driver ~~driver's~~  
 97 license revocation imposed under s. 322.28(2)(a)3. The  
 98 impoundment or immobilization order may be dismissed in  
 99 accordance with paragraph (e), paragraph (f), paragraph (g), or  
 100 paragraph (h). At least 48 hours of confinement must be  
 101 consecutive.

102 (d) The court must, at the time of sentencing the  
 103 defendant, issue an order for:

- 104 1. The impoundment or immobilization of a vehicle; or  
 105 2. The installation of an ignition interlock device.

106  
 107 The order of impoundment or immobilization must include the name  
 108 and telephone numbers of all immobilization agencies meeting all  
 109 ~~of~~ the conditions of subsection (13). Within 7 business days  
 110 after the date that the court issues the order of impoundment or  
 111 immobilization, the clerk of the court must send notice by  
 112 certified mail, return receipt requested, to the registered

113 owner of each vehicle, if the registered owner is a person other  
 114 than the defendant, and to each person of record claiming a lien  
 115 against the vehicle.

116 (e) A person who owns but was not operating the vehicle  
 117 when the offense occurred may submit to the court a police  
 118 report indicating that the vehicle was stolen at the time of the  
 119 offense or documentation of having purchased the vehicle after  
 120 the offense was committed from an entity other than the  
 121 defendant or the defendant's agent. If the court finds that the  
 122 vehicle was stolen or that the sale was not made to circumvent  
 123 the order and to allow the defendant continued access to the  
 124 vehicle, the order must be dismissed, and the owner of the  
 125 vehicle will incur no costs. If the court denies the request to  
 126 dismiss the order of impoundment or immobilization, the  
 127 petitioner may request an evidentiary hearing.

128 (f) A person who owns but was not operating the vehicle  
 129 when the offense occurred, and whose vehicle was stolen or who  
 130 purchased the vehicle after the offense was committed directly  
 131 from the defendant or the defendant's agent, may request an  
 132 evidentiary hearing to determine whether the impoundment or  
 133 immobilization should occur. If the court finds that ~~either~~ the  
 134 vehicle was stolen or the purchase was made without knowledge of  
 135 the offense, that the purchaser had no relationship to the  
 136 defendant other than through the transaction, and that the ~~such~~  
 137 purchase would not circumvent the order and allow the defendant  
 138 continued access to the vehicle, the order must be dismissed,  
 139 and the owner of the vehicle will incur no costs.

140 (g) The court shall also dismiss the order of impoundment

141 or immobilization of the vehicle if the court finds that the  
 142 family of the owner of the vehicle has no other private or  
 143 public means of transportation.

144 (h) The court may ~~also~~ dismiss the order of impoundment or  
 145 immobilization of any vehicle ~~vehieles~~ that is ~~are~~ owned by the  
 146 defendant but that is ~~are~~ operated solely by the employees of  
 147 the defendant or any business owned by the defendant.

148 (i) All costs and fees for the impoundment or  
 149 immobilization, including the cost of notification, must be paid  
 150 by the owner of the vehicle or, if the vehicle is leased or  
 151 rented, by the person leasing or renting the vehicle, unless the  
 152 impoundment or immobilization order is dismissed. All provisions  
 153 of s. 713.78 ~~shall~~ apply. The costs and fees for the impoundment  
 154 or immobilization must be paid directly to the person impounding  
 155 or immobilizing the vehicle.

156 (j) The person who owns a vehicle that is impounded or  
 157 immobilized under this subsection ~~paragraph~~, or a person who has  
 158 a lien of record against such a vehicle and who has not  
 159 requested a review of the impoundment pursuant to paragraph (e),  
 160 paragraph (f), or paragraph (g), may, within 10 days after the  
 161 date that person has knowledge of the location of the vehicle,  
 162 file a complaint in the county in which the owner resides to  
 163 determine whether the vehicle was wrongfully taken or withheld  
 164 from the owner or lienholder. Upon the filing of a complaint,  
 165 the owner or lienholder may have the vehicle released by posting  
 166 with the court a bond or other adequate security equal to the  
 167 amount of the costs and fees for impoundment or immobilization,  
 168 including towing or storage, to ensure the payment of such costs

CS/HB 681

2012

169 and fees if the owner or lienholder does not prevail. When the  
 170 bond is posted and the fee is paid as set forth in s. 28.24, the  
 171 clerk of the court shall issue a certificate releasing the  
 172 vehicle. At the time of release, after reasonable inspection,  
 173 the owner or lienholder must give a receipt to the towing or  
 174 storage company indicating any loss or damage to the vehicle or  
 175 to the contents of the vehicle.

176 (k) A defendant, ~~in the court's discretion,~~ may be  
 177 required to serve all or any portion of a term of imprisonment  
 178 to which the defendant has been sentenced pursuant to this  
 179 section in a residential alcoholism treatment program or a  
 180 residential drug abuse treatment program. Any time spent in such  
 181 a program must be credited by the court toward the term of  
 182 imprisonment.

183  
 184 For the purposes of this section, a ~~any~~ conviction for a  
 185 violation of s. 327.35; a previous conviction for the violation  
 186 of former s. 316.1931, former s. 860.01, or former s. 316.028;  
 187 or a previous conviction outside this state for driving under  
 188 the influence, driving while intoxicated, driving with an  
 189 unlawful blood-alcohol level, driving with an unlawful breath-  
 190 alcohol level, or any other similar alcohol-related or drug-  
 191 related traffic offense, is also considered a previous  
 192 conviction for violation of this section. However, in  
 193 satisfaction of the fine imposed pursuant to this section, the  
 194 court may, upon a finding that the defendant is financially  
 195 unable to pay ~~either~~ all or part of the fine, order that the  
 196 defendant participate for ~~a~~ specified additional ~~period of~~ time

CS/HB 681

2012

197 | in public service or a community work project in lieu of payment  
 198 | of that portion of the fine which the court determines the  
 199 | defendant is unable to pay. In determining such additional  
 200 | sentence, the court shall consider the amount of the unpaid  
 201 | portion of the fine and the reasonable value of the services to  
 202 | be ordered; however, the court may not compute the reasonable  
 203 | value of services at a rate less than the federal minimum wage  
 204 | at the time of sentencing.

205 |       Section 2. This act shall take effect July 1, 2012.





**HOUSE OF REPRESENTATIVES STAFF ANALYSIS**

**BILL #:** HB 777 Securities Law Violations  
**SPONSOR(S):** Eisnaugle  
**TIED BILLS:** None **IDEN./SIM. BILLS:** SB 1290

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Criminal Justice Subcommittee	14 Y, 0 N	Williams	Cunningham
2) Justice Appropriations Subcommittee	12 Y, 0 N	McAuliffe	Jones Darity
3) Judiciary Committee		Williams <i>JD</i>	Havlicak <i>RH</i>

**SUMMARY ANALYSIS**

Chapter 517, F.S., entitled the "Florida Securities and Investor Protection Act" (FSIPA), is designed to protect the public from fraudulent and deceptive practices in the sale and marketing of securities. This purpose is achieved principally by requiring the registration of securities and securities dealers.

Section 517.07(1), F.S., makes it unlawful for any person to sell or offer to sell specified securities unless they are registered. In addition to being registered, s. 517.07(2), F.S., requires that a securities purchaser be furnished with a prospectus meeting specified requirements. Violations of s. 517.07(1) and (2), F.S., are currently 3<sup>rd</sup> degree felonies, ranked in Level 2 of the Offense Severity Ranking Chart.

Section 517.12(1), F.S., makes it unlawful for a dealer, associated person, or issuer of securities to sell or offer for sale any securities in or from offices in Florida, or sell securities to persons in Florida from offices outside of Florida, by mail or otherwise, unless the person has been registered. A violation of s. 517.12(1), F.S., is a 3<sup>rd</sup> degree felony ranked in Level 1 of the Offense Severity Ranking Chart.

The bill increases the ranking of securities-related offenses in the Offense Severity Ranking Chart as follows:

- A violation of s. 517.07(1), F.S., goes from a Level 2 offense to a Level 4 offense; and
- A violation of s. 517.12(1), F.S., goes from a Level 1 offense to a Level 4 offense.

As a result, the lowest permissible sentence for these offenses will be increased.

The Criminal Justice Impact Conference met January 17, 2012, and determined this bill will have an insignificant impact on the state prison beds because of the low volume of individuals reported with this offense.

The bill is effective upon becoming law.

# FULL ANALYSIS

## I. SUBSTANTIVE ANALYSIS

### A. EFFECT OF PROPOSED CHANGES:

#### **The Criminal Punishment Code - Offense Severity Ranking Chart**

The Criminal Punishment Code applies to sentencing for felony offenses (except capital felonies) committed on or after October 1, 1998.<sup>1</sup> Criminal offenses are ranked in the Offense Severity Ranking Chart from Level 1 (least severe) to Level 10 (most severe) and are assigned points based on the severity of the offense as determined by the legislature.<sup>2</sup> As the offense level increases, the number of points rises. If an offense is not listed in the ranking chart, it defaults to a ranking based on the degree of the felony.<sup>3</sup>

A defendant's sentence is calculated based on points, which are assigned for factors including: the offense for which the defendant is being sentenced; victim injury; additional offenses that the defendant committed at the time of the primary offense; the defendant's prior record and other aggravating factors.<sup>4</sup> The points are added in order to determine the "lowest permissible sentence" for the offense. If the total sentence points equals or is less than 44 points, the lowest permissible sentence is a non-state prison sanction (i.e., jail). If the total sentence points exceed 44 points, a prison sentence is the lowest permissible sentence. In each instance, the sentencing range is the lowest permissible sentence up to the maximum penalty provided in s. 775.082, F.S., which is based on the degree of the felony.<sup>5</sup>

#### **Florida Securities and Investor Protection Act**

Chapter 517, F.S., is entitled the "Florida Securities and Investor Protection Act" (FSIPA).<sup>6</sup> The purpose of FSIPA is to protect the public from fraudulent and deceptive practices in the sale and marketing of securities.<sup>7,8</sup> This purpose is achieved principally by requiring the registration of securities and securities dealers, which provides potential investors with sufficient information to enable them to protect themselves.<sup>9</sup>

The Office of Financial Regulation (OFR)<sup>10</sup> is the entity responsible for registering securities and securities dealers.<sup>11</sup> The processes for registering are outlined in ss. 517.081, 517.082, 517.12, and 517.1201, F.S., which include requirements that OFR be provided an application, certain financial statements, and other specified information.

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<sup>1</sup> Section 921.002, F.S.

<sup>2</sup> Section 921.0022, F.S.

<sup>3</sup> Section 921.0023, F.S.

<sup>4</sup> Section 921.0024, F.S.

<sup>5</sup> The statutory maximum sentence for a first degree felony is thirty years, for a second degree felony is fifteen years and for a third degree felony is five years. Section 775.082, F.S.

<sup>6</sup> Section 517.011, F.S.

<sup>7</sup> Section 517.021, F.S., defines the term "security" to include any of the following: notes, stocks, treasury stocks, bond, a debenture, an evidence of indebtedness, certificates of deposit, certificates of deposit for a security, certificates of interest or participation, whiskey warehouse receipts or other commodity warehouse receipts, certificates of interest in a profit-sharing agreement or the right to participate therein, certificates of interest in an oil, gas, petroleum, mineral, or mining title or lease or the right to participate therein, collateral trust certificates, reorganization certificates, preorganization subscriptions, transferable shares, investment contracts, a beneficial interest in title to property, profits, or earnings, an interest in or under a profit-sharing or participation agreement or scheme, any option contract which entitles the holder to purchase or sell a given amount of the underlying security at a fixed price within a specified period of time, other instruments commonly known as a security, including an interim or temporary bond, debenture, note, or certificate, receipts for a security, or for subscription to a security, or any right to subscribe to or purchase any security, and viatical settlement investments.

<sup>8</sup> *Rushing v. Wells Fargo Bank, N.A.*, 752 F.Supp.2d 1254 (M.D. Fla. 2010); *Arthur Young & Co. v. Mariner Corp.*, 630 So.2d 1199, 1203 (Fla. 4th DCA 1994).

<sup>9</sup> See 32 Fla. Jur 2d Investment Securities, Etc. s. 122.

<sup>10</sup> The Office of Financial Regulation regulates the banking, finance and securities industries in Florida and is administratively housed within the Department of Financial Services. OFR is headed by a commissioner appointed by the Financial Services Commission, which consists of the Governor and Cabinet. See <http://www.flofr.com/Office/Aboutofr.aspx> (last visited on January 5, 2012).

<sup>11</sup> Sections 517.081 and 517.12, F.S.

Section 517.07(1), F.S., makes it unlawful for any person to sell or offer to sell specified securities unless they are registered. In addition to being registered, s. 517.07(2), F.S., requires that a securities purchaser be furnished with a prospectus meeting the requirements of rules adopted by the Financial Services Commission. Violations of s. 517.07(1) and (2), F.S., are currently 3<sup>rd</sup> degree felonies, ranked in Level 2 of the Offense Severity Ranking Chart.<sup>12</sup> A Level 2 offense equates to 10 sentencing points.<sup>13</sup>

Section 517.12(1), F.S., specifies that no dealer, associated person, or issuer<sup>14</sup> of securities shall sell or offer for sale any securities in or from offices in Florida, or sell securities to persons in this state from offices outside this state, by mail or otherwise, unless the person has been registered with OFR. In addition, OFR is prohibited from registering any person as an associated person of a dealer unless the dealer with which the applicant seeks registration is lawfully registered with the office pursuant to chapter 517, F.S.<sup>15</sup> A violation of s. 517.12(1), F.S., is a 3<sup>rd</sup> degree felony ranked in Level 1 of the Offense Severity Ranking Chart.<sup>16</sup> A Level 1 offense equates to 4 sentencing points.<sup>17</sup>

In addition to the above-described unlawful acts, FSIPA contains many other provisions that prescribe unlawful behavior relating to securities.<sup>18</sup> With one exception,<sup>19</sup> these offenses are 3<sup>rd</sup> degree felonies, and except as provided above, are ranked in Level 1 of the Offense Severity Ranking Chart.<sup>20</sup>

### **Effect of the Bill**

The bill increases the ranking of securities-related offenses in the Offense Severity Ranking Chart as follows:

- A violation of s. 517.07(1), F.S. (requiring certain securities to be registered prior to sale), goes from a Level 2 offense (equating to 10 sentencing points) to a Level 4 offense (equating to 22 sentencing points).
- A violation of s. 517.12(1), F.S. (requiring securities dealers, etc. to be registered), goes from a Level 1 offense (equating to 4 sentencing points) to a Level 4 offense (equating to 22 sentencing points).

As a result, the lowest permissible sentence for violations of ss. 517.07(1) and 517.12(1), F.S., will be increased.

### **B. SECTION DIRECTORY:**

Section 1. Amends s. 921.0022, F.S., relating to Criminal Punishment Code; offense severity ranking chart.

Section 2. Provides an effective date upon becoming a law.

<sup>12</sup> See ss. 517.302 and 921.0022(3)(b), F.S.

<sup>13</sup> See s. 921.0024, F.S.

<sup>14</sup> Section 517.021, F.S., defines the terms “dealer,” “associated person,” and “issuer.”

<sup>15</sup> Section 517.12(1), F.S.

<sup>16</sup> See ss. 517.302 and 921.0022(3)(a), F.S.

<sup>17</sup> See s. 921.0024, F.S.

<sup>18</sup> See, e.g., ss. 517.301, 517.311, and 517.312, F.S.

<sup>19</sup> A person who violates s. 517.312(1), F.S., by obtaining money or property of an aggregate value exceeding \$50,000 from five or more persons is guilty of a 1<sup>st</sup> degree felony. Section 517.302(2), F.S.

<sup>20</sup> See ss. 517.302 and 921.0022(3)(a), F.S.

## II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

### A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

The Criminal Justice Impact Conference met January 17, 2012, and determined this bill will have an insignificant impact on the state prison beds because of the low volume of individuals reported with this offense.

The Florida Department of Law Enforcement reported that there were 48 convictions for violations of s. 517.07(1), F.S., and 53 convictions for violations of s. 517.12(1), F.S., from 2006 - 2011.<sup>21</sup>

### 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:

The 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:

The bill does not appear to create a need for rulemaking or rulemaking authority.

### C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

## IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

None.

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<sup>21</sup> Office of Financial Regulation Analysis on HB 777. January 6, 2012. (On file with House Criminal Justice Subcommittee staff).

HB 777

2012

1                                    A bill to be entitled  
 2            An act relating to securities law violations; amending  
 3            s. 921.0022, F.S.; reclassifying certain securities  
 4            law offenses for purposes of the offense severity  
 5            ranking chart of the Criminal Punishment Code;  
 6            providing an effective date.

7  
 8 Be It Enacted by the Legislature of the State of Florida:  
 9

10            Section 1. Paragraphs (b) and (d) of subsection (3) of  
 11            section 921.0022, Florida Statutes, are amended to read:  
 12            921.0022 Criminal Punishment Code; offense severity  
 13            ranking chart.—

- 14            (3) OFFENSE SEVERITY RANKING CHART  
 15            (b) LEVEL 2  
 16

Florida Statute	Felony Degree	Description
379.2431 (1)(e)3.	3rd	Possession of 11 or fewer marine turtle eggs in violation of the Marine Turtle Protection Act.
379.2431 (1)(e)4.	3rd	Possession of more than 11 marine turtle eggs in violation of the Marine Turtle Protection

HB 777

2012

19			Act.
	403.413(5)(c)	3rd	Dumps waste litter exceeding 500 lbs. in weight or 100 cubic feet in volume or any quantity for commercial purposes, or hazardous waste.
20	517.07(2)	3rd	<del>Registration of securities and</del> Furnishing of prospectus required.
21	590.28(1)	3rd	Intentional burning of lands.
22	784.05(3)	3rd	Storing or leaving a loaded firearm within reach of minor who uses it to inflict injury or death.
23	787.04(1)	3rd	In violation of court order, take, entice, etc., minor beyond state limits.
24	806.13(1)(b)3.	3rd	Criminal mischief; damage \$1,000 or more to public communication or any other public service.
25			

HB 777

2012

26	810.061(2)	3rd	Impairing or impeding telephone or power to a dwelling; facilitating or furthering burglary.
27	810.09(2)(e)	3rd	Trespassing on posted commercial horticulture property.
28	812.014(2)(c)1.	3rd	Grand theft, 3rd degree; \$300 or more but less than \$5,000.
29	812.014(2)(d)	3rd	Grand theft, 3rd degree; \$100 or more but less than \$300, taken from unenclosed curtilage of dwelling.
30	812.015(7)	3rd	Possession, use, or attempted use of an antishoplifting or inventory control device countermeasure.
31	817.234(1)(a)2.	3rd	False statement in support of insurance claim.
	817.481(3)(a)	3rd	Obtain credit or purchase with false, expired, counterfeit,



HB 777

2012

			etc., credit card, value over \$300.
32	817.52 (3)	3rd	Failure to redeliver hired vehicle.
33	817.54	3rd	With intent to defraud, obtain mortgage note, etc., by false representation.
34	817.60 (5)	3rd	Dealing in credit cards of another.
35	817.60 (6) (a)	3rd	Forgery; purchase goods, services with false card.
36	817.61	3rd	Fraudulent use of credit cards over \$100 or more within 6 months.
37	826.04	3rd	Knowingly marries or has sexual intercourse with person to whom related.
38	831.01	3rd	Forgery.
39	831.02	3rd	Uttering forged instrument;

HB 777

2012

40			utters or publishes alteration with intent to defraud.
41	831.07	3rd	Forging bank bills, checks, drafts, or promissory notes.
42	831.08	3rd	Possessing 10 or more forged notes, bills, checks, or drafts.
43	831.09	3rd	Uttering forged notes, bills, checks, drafts, or promissory notes.
44	831.11	3rd	Bringing into the state forged bank bills, checks, drafts, or notes.
45	832.05 (3) (a)	3rd	Cashing or depositing item with intent to defraud.
46	843.08	3rd	Falsely impersonating an officer.
	893.13 (2) (a) 2.	3rd	Purchase of any s. 893.03 (1) (c), (2) (c) 1., (2) (c) 2., (2) (c) 3., (2) (c) 5.,

HB 777

2012

(2)(c)6., (2)(c)7., (2)(c)8.,  
 (2)(c)9., (3), or (4) drugs  
 other than cannabis.

47

893.147(2)                      3rd      Manufacture or delivery of drug  
 paraphernalia.

48

49

(d)    LEVEL 4

50

Florida	Felony	
Statute	Degree	Description

51

316.1935(3)(a)	2nd	Driving at high speed or with wanton disregard for safety while fleeing or attempting to elude law enforcement officer who is in a patrol vehicle with siren and lights activated.
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52

499.0051(1)	3rd	Failure to maintain or deliver pedigree papers.
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53

499.0051(2)	3rd	Failure to authenticate pedigree papers.
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54

499.0051(6)	2nd	Knowing sale or delivery, or possession with intent to sell,
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HB 777

2012

55			contraband prescription drugs.
56	<u>517.07(1)</u>	<u>3rd</u>	<u>Registration of securities.</u>
57	<u>517.12(1)</u>	<u>3rd</u>	<u>Registration of dealers, associated persons, and issuers required.</u>
58	784.07(2)(b)	3rd	Battery of law enforcement officer, firefighter, etc.
59	784.074(1)(c)	3rd	Battery of sexually violent predators facility staff.
60	784.075	3rd	Battery on detention or commitment facility staff.
61	784.078	3rd	Battery of facility employee by throwing, tossing, or expelling certain fluids or materials.
62	784.08(2)(c)	3rd	Battery on a person 65 years of age or older.
63	784.081(3)	3rd	Battery on specified official or employee.

HB 777

2012

64	784.082(3)	3rd	Battery by detained person on visitor or other detainee.
65	784.083(3)	3rd	Battery on code inspector.
66	784.085	3rd	Battery of child by throwing, tossing, projecting, or expelling certain fluids or materials.
67	787.03(1)	3rd	Interference with custody; wrongly takes minor from appointed guardian.
68	787.04(2)	3rd	Take, entice, or remove child beyond state limits with criminal intent pending custody proceedings.
69	787.04(3)	3rd	Carrying child beyond state lines with criminal intent to avoid producing child at custody hearing or delivering to designated person.
70	790.115(1)	3rd	Exhibiting firearm or weapon within 1,000 feet of a school.

HB 777

2012

71	790.115 (2) (b)	3rd	Possessing electric weapon or device, destructive device, or other weapon on school property.
72	790.115 (2) (c)	3rd	Possessing firearm on school property.
73	800.04 (7) (c)	3rd	Lewd or lascivious exhibition; offender less than 18 years.
74	810.02 (4) (a)	3rd	Burglary, or attempted burglary, of an unoccupied structure; unarmed; no assault or battery.
75	810.02 (4) (b)	3rd	Burglary, or attempted burglary, of an unoccupied conveyance; unarmed; no assault or battery.
76	810.06	3rd	Burglary; possession of tools.
77	810.08 (2) (c)	3rd	Trespass on property, armed with firearm or dangerous weapon.

HB 777

2012

78	812.014 (2) (c) 3.	3rd	Grand theft, 3rd degree \$10,000 or more but less than \$20,000.
79	812.014 (2) (c) 4.-10.	3rd	Grand theft, 3rd degree, a will, firearm, motor vehicle, livestock, etc.
80	812.0195 (2)	3rd	Dealing in stolen property by use of the Internet; property stolen \$300 or more.
81	817.563 (1)	3rd	Sell or deliver substance other than controlled substance agreed upon, excluding s. 893.03(5) drugs.
82	817.568 (2) (a)	3rd	Fraudulent use of personal identification information.
83	817.625 (2) (a)	3rd	Fraudulent use of scanning device or reencoder.
84	828.125 (1)	2nd	Kill, maim, or cause great bodily harm or permanent breeding disability to any registered horse or cattle.

HB 777

2012

85	837.02 (1)	3rd	Perjury in official proceedings.
86	837.021 (1)	3rd	Make contradictory statements in official proceedings.
87	838.022	3rd	Official misconduct.
88	839.13 (2) (a)	3rd	Falsifying records of an individual in the care and custody of a state agency.
89	839.13 (2) (c)	3rd	Falsifying records of the Department of Children and Family Services.
90	843.021	3rd	Possession of a concealed handcuff key by a person in custody.
91	843.025	3rd	Deprive law enforcement, correctional, or correctional probation officer of means of protection or communication.
	843.15 (1) (a)	3rd	Failure to appear while on bail for felony (bond estreature or



HB 777

2012

92			bond jumping).
93	847.0135 (5) (c)	3rd	Lewd or lascivious exhibition using computer; offender less than 18 years.
94	874.05 (1)	3rd	Encouraging or recruiting another to join a criminal gang.
95	893.13 (2) (a) 1.	2nd	Purchase of cocaine (or other s. 893.03(1) (a), (b), or (d), (2) (a), (2) (b), or (2) (c) 4. drugs).
96	914.14 (2)	3rd	Witnesses accepting bribes.
97	914.22 (1)	3rd	Force, threaten, etc., witness, victim, or informant.
98	914.23 (2)	3rd	Retaliation against a witness, victim, or informant, no bodily injury.
99	918.12	3rd	Tampering with jurors.
	934.215	3rd	Use of two-way communications

HB 777

2012

device to facilitate commission  
of a crime.

100

101

Section 2. This act shall take effect upon becoming a law.



**HOUSE OF REPRESENTATIVES STAFF ANALYSIS**

**BILL #:** CS/HB 897 Construction Liens and Bonds  
**SPONSOR(S):** Civil Justice Subcommittee; Moraitis  
**TIED BILLS:** None **IDEN./SIM. BILLS:** CS/SB 1202

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Civil Justice Subcommittee	12 Y, 0 N, As CS	Caridad	Bond
2) Government Operations Subcommittee	12 Y, 0 N	Williamson	Williamson
3) Judiciary Committee		Caridad <i>DC</i>	Havlicak <i>RH</i>

**SUMMARY ANALYSIS**

In Florida, "surety insurance" is defined to include both payment and performance bonds. A payment bond guarantees that the contractor will pay certain subcontractors, laborers, and material suppliers. A performance bond protects the owner from financial loss should the contractor fail to perform the contract in accordance to its terms and conditions. Current law requires any person who enters into a formal contract over \$100,000 with the state, a county, a city, a political subdivision, or other public authority for the construction, completion, or repair of a public building, to deliver a payment and performance bond issued by a state-authorized surety insurer to the public owner. The bill:

- Requires the surety's bond number to be listed on the front page of the bond;
- Specifies that any provision in a payment bond which limits or expands the duration of a bond, or which adds conditions precedent to the enforcement of the claim against the bond is unenforceable;
- Replaces mailing by clerk of court with service by the contractor or the contractor's attorney who records a notice of contest of claim against the payment bond;
- Gives claimants additional time to serve required notices when the bond is not recorded before commencement of construction; and
- Creates a new provision which provides that if a contractor furnishes and records a payment and performance bond, the public authority may not condition its payments to the contractor on the production of a waiver from a claimant showing that such claimant does not have an outstanding claim for payments due on the project.

A construction lien is a statutory lien that secures payment for labor or materials supplied in improving, repairing, or maintaining real property. The bill:

- Creates a provision in the construction lien law relating to effective notice where a lessor has an interest in a specific premises on a parcel of land;
- Requires that all lienors including those hired directly by the owner be served with a notice of termination of a notice of commencement;
- Provides additional information (i.e. description of the project) that must be included in a demand for a copy of contract or statements of account;
- Makes changes to mirror proposed changes related to bonds; and
- Makes various grammatical and stylistic changes.

The effective date of the bill is October 1, 2012.

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

# FULL ANALYSIS

## I. SUBSTANTIVE ANALYSIS

### A. EFFECT OF PROPOSED CHANGES:

#### Background

In Florida, "surety insurance" is defined to include both payment and performance bonds.<sup>1</sup> A payment bond guarantees that the contractor will pay certain subcontractors, laborers, and material suppliers.<sup>2</sup> A performance bond protects the owner from financial loss should the contractor fail to perform the contract in accordance to its terms and conditions.<sup>3</sup>

These types of bonds involve a surety company that is paid a premium by a principal (i.e., general contractor) and agrees to stand in the place of the principal in the event of default to either the performance or payment of the contract.<sup>4</sup> Unlike customary two-party insurance agreements, which involve the insurer and the insured, a surety agreement is a tripartite agreement that consists of:

- The obligee, the person purchasing the performance in a performance bond.
- The principal (i.e., the contractor).
- The surety, who provides the bond to protect against the principal's default.

#### Payment Bonds for Public Projects

Section 255.05 F.S., requires any person who enters into a formal contract over \$100,000 with the state, a county, a city, a political subdivision, or other public authority for the construction, completion, or repair of a public building, to deliver a payment and performance bond with a state authorized surety insurer to the public owner.<sup>5</sup> The following information must be provided on the first page of a payment or performance bond:

- The name, principal business address, and the phone number of the contractor, surety, and owner of the property being improved and, if different from the owner, the contracting public entity.
- The contract number assigned by the contracting public entity.
- A description of the project being improved that is sufficient to identify it (i.e., a legal description or the property's street address) and a general description of the improvement.<sup>6</sup>

Section 225.05(2)(a)2., F.S., requires a claimant who is not in privity with the contractor and who has not received payment for his or her labor, services, or materials to provide written notice to both the contractor and the surety stating that he or she intends to make a claim against the bond for payment. The statute provides a "Notice of Contest of Claim Against Payment Bond" form.

No performance or payment bond is required for state contracts that are \$100,000 or less. In addition, if a state project is between \$100,000 and \$200,000, a state agency can exempt the contractor from the bond requirement pursuant to delegated authority from the Secretary of the Department of Management Services.<sup>7</sup>

The bill:

- Requires the surety's bond number to be listed on the front page of the bond;
- Specifies that any provision in a payment bond which limits or expands the duration of a bond, or which adds a condition precedent to the enforcement of the claim against the bond beyond

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<sup>1</sup> Section 624.606(1)(a), F.S.

<sup>2</sup> See Black's Law Dictionary (9th ed. 2009), bond.

<sup>3</sup> See Black's Law Dictionary (9th ed. 2009), performance bond.

<sup>4</sup> Toomey, Daniel and Tamara McNulty, *Surety Bonds: A Basic User's Guide for Payment Bond Claimants and Obligees*, 22 Construction Lawyer 5 (Winter 2002) (American Bar Association 2002).

<sup>5</sup> See s. 255.05, F.S.

<sup>6</sup> Section 255.05(1)(a), F.S.

<sup>7</sup> *Id.*

those provided in statute, is unenforceable;<sup>8</sup>

- Replaces mailing by clerk of court with service by the contractor or the contractor's attorney who records a notice of contest of claim against the payment bond;
- Gives a claimant additional time to serve required notices when the bond is not recorded before commencement of construction. Specifically, the time period for the claimant to serve any required notices may be calculated from the date specified in s. 255.05, F.S., or from the date the claimant is served a copy of the bond, whichever the claimant chooses;<sup>9</sup> and
- Creates a new provision which provides that if a contractor furnishes and records a payment and performance bond, the public authority may not condition its payments to the contractor on the production of a document from a claimant showing that such claimant does not have an outstanding claim against the contractor, the surety, the payment bond, or the public authority for payments due on labor, services, or materials furnished on the project.

### Florida Construction Lien Law

Chapter 713, F.S., governs construction liens. A construction lien<sup>10</sup> is a statutory lien that secures payment for labor or materials supplied in improving, repairing, or maintaining real property.<sup>11</sup>

The construction lien law requires various notices, demands, and requests to be provided in writing to the homeowner, contractor, subcontractor, lender, and building officials. It requires that the notices, demands, and requests be in a statutory form. The following notices are required by the act: Notice of Commencement,<sup>12</sup> Notice to Owner, Claim of Lien,<sup>13</sup> Notice of Termination,<sup>14</sup> Waiver and Release of Lien,<sup>15</sup> Notice of Contest of Lien,<sup>16</sup> Contractor's Final Payment Affidavit,<sup>17</sup> and Demands of Written Statement of Account.<sup>18</sup>

### *Extent of Liens*

Section 713.10, F.S., provides that the interest of the lessor is not subject to liens for improvements made by the lessee when:

- The lease or memo of the lease containing the language prohibiting such liability is recorded in the county where the premises are located before the recording of a notice of commencement for improvements to the premises and the terms of the lease expressly prohibit such liability; or
- The terms of the lease expressly prohibit such liability and a notice advising that leases for the rental of premises on a parcel of land prohibit such liability has been recorded in the county where the parcel of land is located before the recording of a notice of commencement for

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<sup>8</sup> This provision prevents a situation where a bond terminates prior to completion, the project goes upside-down, and claims against the bond cannot be paid due to expiration of the bond.

<sup>9</sup> This provision is similar to language in s. 713.23(c), F.S., governing liens:

If a notice of commencement is not recorded, or a reference to the bond is not given in the notice of commencement, and in either case if the lienor not in privity with the contractor is not otherwise notified in writing of the existence of the bond, the lienor not in privity with the contractor shall have 45 days from the date the lienor is notified of the existence of the bond within which to serve the notice.

<sup>10</sup> The term "lien" is not defined in ch. 713, F.S., but can be found elsewhere in statute to mean "a charge against or an interest in property to secure payment of a debt or performance of an obligation, and includes a security interest created by agreement, a judicial lien obtained by legal or equitable process or proceedings, a common-law lien, or a statutory lien." See s. 726.102(8), F.S.

<sup>11</sup> Black's Law Dictionary (9th ed. 2009), "lien."

<sup>12</sup> Section 713.13, F.S. "Though the Notice of Commencement was originally required to trigger a commencement date from which to measure time limitations under the Mechanic's Lien Law, the information contained in the Notice of Commencement provides all the details necessary to complete a Notice to Owner." *MHB Const. Servs., L.L.C. v. RM-NA HB Waterway Shoppes, L.L.C.*, 74 So.3d 587, 589 (Fla. 4th DCA 2011).

<sup>13</sup> Section 713.08, F.S.

<sup>14</sup> Section 713.132, F.S.

<sup>15</sup> Section 713.20, F.S.

<sup>16</sup> Section 713.22(2), F.S.

<sup>17</sup> Section 713.06, F.S.

<sup>18</sup> Section 713.16, F.S.

improvements to the premises. The statute sets out information that must be included in the notice:

- The name of the lessor.
- The legal description of the parcel of land which the notice applies.
- The specific language contained in the various leases prohibiting such liability.
- A statement that all or a majority of the leases entered into for premises on the parcel of land expressly prohibit such liability.

The bill expands on the notice requirement in s. 713.10(2)(b)2., F.S. Specifically, it provides that, if the lease for the specific premises as to which a lien could otherwise be claimed against the lessor's interest expressly provides that the interest of the lessor is not subject to liens for improvements made by the lessee, the notice is still effective and the lessor's interest in a premises on the parcel of land is not subject to liens for improvement made by the lessee of such premises regardless of whether:

- The leases for all of the premises on the parcel of land contain language prohibiting such liability; or
- The language prohibiting such liability varies in the various leases or does not match the language in the notice.

#### *Notice of Commencement*

An owner must record a notice of commencement before actually commencing to improve any real property.<sup>19</sup> The statute lists information that must be included in the notice (i.e. a general description of the improvement).

Section 713.13(1)(e), F.S., provides that a copy of any payment bond must be attached to the notice of commencement at the time the latter is recorded. However, if the payment bond exists but was not attached, the bond may be used to transfer any recorded lien of a lienor, except that of the contractor, by the recordation and service of notice of bond pursuant to s. 713.23(2), F.S., relating to payment bonds. Under current law, the time limits for serving any required notices must begin running from the dates specified in s. 713.23, F.S., or the date the notice of bond is served on the lienor, whichever is later. The bill provides that the lienor may choose whether the time limits are calculated from the dates specified in s. 713.23, F.S., or the date the notice of bond is served on the lienor.

#### *Notice of Termination*

Under current law, an owner may terminate the period of effectiveness of a notice of commencement by executing, swearing to, and recording a notice of termination (NOT). The statute lists information that must be included in the NOT. For instance, the notice must contain:

A statement that the owner has, before recording the notice of termination, served a copy of the notice of termination on the contractor and *on each lienor who has given notice.*<sup>20</sup>

The bill provides that all lienors, including those hired directly by the owner or in privity with the owner, must be served with a NOT of a notice of commencement.

#### *Demand for Copy of Contract and Statements of Account*

A copy of the lienor's or owner's contract and a statement of the amount due must be provided upon written demand of an owner or lienor contracting or employed by the other party, at the expense of the demanding party.<sup>21</sup> A request for a sworn statement of account must be in accordance with the statutory format prescribed in s. 713.16(3), F.S. Failure to provide such information within 30 days or furnishing a false or fraudulent statement may result in a loss of that person's right to recover under the lien or to recover attorney fees.<sup>22</sup> An owner may serve in writing a demand of any lienor for a written statement under oath of his or her account showing the nature of the labor and services performed and

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<sup>19</sup> Section 713.13(1)(a), F.S.

<sup>20</sup> Section 713.132(1)(f), F.S., (emphasis added).

<sup>21</sup> Section 713.16(1), F.S.

<sup>22</sup> Section 713.16(4), F.S.

to be performed, materials furnished, the amount paid on account to date, and the amount due as of the date of the statement by the lienor. Any such demand to a lienor must be served on the lienor at the address and to the attention of any person who is designated to receive the demand in the notice to owner served by such lienor.

The bill provides that any written demand to a lienor must include a description of the project, including the names of the owner, the contractor, and the lienor's customer — as set forth in the lienor's notice to owner.

In addition, the bill provides that any lienor who is perfecting a claim of lien may serve with the claim of lien or thereafter a written demand on the owner for a written statement under oath.

#### *Service*

Section 713.18(1), F.S., provides that a service of a notice, claim of lien, affidavit, assignment, and other instrument must be served by personal service, registered or certified mail, overnight or second-day mail, or, if the other types of service cannot be accomplished, posting on the premises.<sup>23</sup> Service of an instrument is effective on the date of mailing if the instrument is sent to the last known address in the notice of commencement, building application or the last known address of the person to be served; and returned as not delivered or undeliverable through no fault of the person serving the item.<sup>24</sup> Under current law, the lienor must use the exact address in the notice of commencement to serve an owner even if the address is clearly incomplete (i.e. does not include a zip code or city).

The bill updates certain service provisions to include methods of delivery by any common carrier and to allow for use of USPS's Global Express Guaranteed service for overseas delivery.

The bill also provides that if the address shown on the notice of commencement or the building permit application is incomplete for purposes of mailing or delivery, the person serving the item may complete the address using information from the property appraiser or another public record or directory without affecting the validity of service under this section. The bill also makes minor grammatical and stylistic changes.

#### *Duration of Lien*

Under current law, a lien pursuant to s. 713.22, F.S., must not continue for longer than one year after the claim of lien has been recorded or one year after the recording of an amended claim of lien that shows a later date of final furnishing of labor, services, or materials, unless within that time an action to enforce the lien is commenced in a court of competent jurisdiction. The continuation of the lien affected by the commencement of an action is not enforceable against creditors or subsequent purchasers for a valuable consideration and without notice, unless a notice of lis pendens is recorded. An owner may shorten the time within which to commence an action to enforce any claim of lien or claim against a bond by recording a notice, as set out in statute, in the clerk's office. The clerk must mail a copy of the notice of contest to the lien claimant and service is deemed complete upon mailing.<sup>25</sup>

The bill makes changes to mirror proposed changes to s. 255.05, F.S., discussed above. The bill:

- Provides that the clerk of court must serve a copy of the notice of contest to the lien claimant in accordance with s. 713.18, F.S., as opposed to sending it by mail; and
- Deletes language providing that service is deemed complete upon mailing.

The bill also makes grammatical and stylistic changes.

#### *Payment of Bond*

Section 713.23, F.S., includes requirements for a payment bond to exempt an owner from the construction lien provision. The statute requires that the contractor provide the owner with a bond for at least the amount of the original contract price before beginning the construction of the improvement

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<sup>23</sup> See ss. 713.18(1)(a)-(c), F.S.

<sup>24</sup> Section 713.18(3), F.S.

<sup>25</sup> Section 713.22(2), F.S.



under the direct contract, and a copy of the bond attached to the recorded notice of commencement. The owner, contractor, or surety must furnish a copy of the bond to any lienor demanding it. A lienor seeking protection from the contractor's bond for his or her work and who is not in privity with the contractor (except a laborer) must serve the contractor with a written notice stating the lienor's intent. Such written notice must be served 45 days before beginning to furnish labor, materials or supplies.

Section 713.08, F.S., provides information that must be included in a claim of lien (i.e. the name of the lienor and the address where notices of process may be served on the lienor) and a corresponding form which a lienor must record to perfect his or her lien. However, the negligent inclusion or omission of any information in the claim of lien which does not prejudice the owner does not constitute a default that would defeat an otherwise valid lien.<sup>26</sup>

Section 713.24, F.S., provides that a person with an interest in real property upon which a lien is imposed or the contract under which the lien is claimed may transfer a construction lien from such real property to other security by depositing a sum of money in the clerk's office; or filing a bond executed as surety by a surety insurer, in the clerk's office.

The bill:

- Revises the statutory notice to the contractor form to follow the language and format of a claim of lien;
- Makes the section consistent with other provisions in statute extending time to serve notices when the bond is not recorded. Specifically, it provides that if a notice of commencement with the attached bond is not recorded before commencement of construction, the lienor not in privity with the contractor may, in the alternative, elect to serve the notice to contractor up to 45 days from the date the lienor is served with a copy of the bond;
- Provides that the bond must be attached to a notice of bond when it is recorded and served;
- Provides that the notice to contractor form may be combined with a notice to owner;<sup>27</sup>
- Mirrors proposed changes to s. 255.05, F.S., and provides that if the payment bond is not recorded before commencement of construction, the time period for the lienor to serve a notice of nonpayment may be calculated from the date specified in s. 713.23, F.S., or the date the lienor is served a copy of the bond, whichever the lienor chooses;
- Specifies that the limitation period for commencement of an action against a payment bond in s. 95.11, F.S., is not expanded;
- Replaces mailing by clerk of court with service by the contractor or the contractor's attorney who records a notice of contest of claim against the payment bond;
- Deletes language stating "[s]ervice is complete upon mailing;"
- Mirrors proposed changes to s. 255.05, F.S., and provides that any provision in a payment bond which limits or expands the duration of a bond, or which adds conditions precedent to the enforcement of the claim against the bond beyond those provided in statute, is unenforceable;
- Provides that the provisions of s. 713.24(3), F.S., relating to transfer of a lien to a security, apply to bonds pursuant to s. 713.08, F.S., except where those provisions conflict with the latter section; and
- Makes grammatical and stylistic changes.

#### B. SECTION DIRECTORY:

Section 1 amends s. 255.05, F.S., relating to bond of contractor constructing public buildings.

Section 2 amends s. 713.10, F.S., relating to extent of liens.

Section 3 amends s. 713.13, F.S., relating to notice of commencement.

Section 4 amends s. 713.132, F.S., relating to notice of termination.

<sup>26</sup> Section 713.08(3), F.S.

<sup>27</sup> Section 713.06, F.S., (relating to liens of persons not in privity with the owner).

Section 5 amends s. 713.16, F.S., relating to demands for a copy of a contract and statements of account.

Section 6 amends s. 713.18, F.S., relating to manner of serving notices and other instruments.

Section 7 amends s. 713.22, F.S., relating to duration of lien.

Section 8 amends s. 713.23, F.S., relating to payment bond.

Section 9 provides an effective date of October 1, 2012.

## **II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT**

### **A. FISCAL IMPACT ON STATE GOVERNMENT:**

#### **1. Revenues:**

The bill does not appear to have any impact on state revenues.

#### **2. Expenditures:**

The bill does not appear to have any impact on state expenditures.

### **B. FISCAL IMPACT ON LOCAL GOVERNMENTS:**

#### **1. Revenues:**

The bill does not appear to have any impact on local government revenues.

#### **2. Expenditures:**

The bill does not appear to have any impact on local government expenditures.

### **C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:**

The bill does not appear to have any direct economic impact on the private sector.

### **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 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 does not appear to create a need for rulemaking or require rulemaking authority.

### C. DRAFTING ISSUES OR OTHER COMMENTS:

The bill provides for an effective date of October 1, 2012. It is unclear from the effective date provision whether the bill applies to current or future contracts.

### IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

On January 25, 2012, the Civil Justice Subcommittee adopted one amendment and reported the bill favorably as a committee substitute. The amendment:

- Specifies that any provision in a payment bond which limits or expands the duration of a bond, or which adds conditions precedent to the enforcement of the claim against the bond beyond those provided in statute, is unenforceable.
- Creates a new provision in s. 255.05, F.S., which provides that if a contractor furnishes and records a payment and performance bond, the public authority may not condition its payments to the contractor on the production of a document (i.e. waiver) from a claimant showing that such claimant does not have an outstanding claim against the contractor, the surety, the payment bond, or the public authority for payments due on labor, services, or materials furnished on the project.
- Provides that notice recorded pursuant to s. 713.10(2)(b)2., F.S., is effective — and the lessor's interest in a premises on the parcel of land is not subject to liens for improvements made by the lessee of such premises — where the lease for the specific premises expressly provides that the interest of the lessor is not subject to liens for improvements made by the lessee. This is so even if the leases for all of the premises on the parcel of land do not contain language prohibiting such liability or the language prohibiting such liability varies in the various leases or does not match the language in the notice.
- Makes the language in certain provisions consistent throughout the statute (i.e. provisions extending time to serve notices when bond is not recorded).
- Deletes contradictory language in s. 713.16(5), F.S.
- Makes grammatical and stylistic changes.

The analysis is drafted to the committee substitute as passed by the Civil Justice Subcommittee.

1                                   A bill to be entitled  
 2       An act relating to construction liens and bonds;  
 3       amending s. 255.05, F.S.; requiring that the bond  
 4       number be stated on the first page of the bond;  
 5       providing that a provision in a payment bond furnished  
 6       for a public works contract that limits or expands the  
 7       effective duration of the bond or adds conditions  
 8       precedent is unenforceable; requiring a contractor, or  
 9       the contractor's attorney, to serve rather than mail a  
 10      notice of contest of claim against the payment bond;  
 11      providing additional time for service when the bond is  
 12      not recorded; specifying the duration of the bond;  
 13      providing that payment to a contractor who has  
 14      furnished a payment bond on a public works project may  
 15      not be conditioned upon production of certain  
 16      documents; providing prerequisites for commencement of  
 17      an action against a payment bond; amending s. 713.10,  
 18      F.S.; providing that a specified notice concerning a  
 19      lessor's liability for liens for improvements made by  
 20      the lessee is effective notwithstanding that all of  
 21      the leases for all of the premises on the parcel of  
 22      land do not contain language prohibiting such  
 23      liability or the language prohibiting such liability  
 24      varies in the various leases or does not match the  
 25      language in the notice, if the lease for the specific  
 26      premises as to which a lien could otherwise be claimed  
 27      against the lessor's interest expressly provides that  
 28      the interest of the lessor shall not be subject to

29 | liens for improvements made by the lessee; amending s.  
 30 | 713.13, F.S.; providing additional time for service  
 31 | when a notice of commencement is not recorded with a  
 32 | copy of the bond attached; amending s. 713.132, F.S.;  
 33 | requiring notice of termination to be served on  
 34 | lienors in privity with the owner; amending s. 713.16,  
 35 | F.S.; revising requirements for demands for a copy of  
 36 | a construction contract and a statement of account;  
 37 | authorizing a lienor to make certain written demands  
 38 | to an owner for certain written statements; providing  
 39 | requirements for such written demands; amending s.  
 40 | 713.18, F.S.; providing additional methods by which  
 41 | certain items may be served; revising provisions  
 42 | relating to when service of specified items is  
 43 | effective; specifying requirements for certain written  
 44 | instruments under certain circumstances; amending s.  
 45 | 713.22, F.S.; requiring that the clerk serve rather  
 46 | than mail a notice of contest of lien; amending s.  
 47 | 713.23, F.S.; revising the contents of a notice to  
 48 | contractor; requiring that a contractor serve rather  
 49 | than mail a notice of contest of claim against the  
 50 | payment bond and a notice of bond; clarifying the  
 51 | attachment of the bond to the notice; providing that a  
 52 | provision in a payment bond that limits or expands the  
 53 | effective duration of the bond or adds conditions  
 54 | precedent is unenforceable; clarifying applicability  
 55 | of certain provisions; providing an effective date.  
 56 |

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

58

59 Section 1. Subsection (1) and paragraph (a) of subsection  
60 (2) of section 255.05, Florida Statutes, are amended, and  
61 subsection (11) is added to that section, to read:

62 255.05 Bond of contractor constructing public buildings;  
63 form; action by materialmen.—

64 (1) (a) Any person entering into a formal contract with the  
65 state or any county, city, or political subdivision thereof, or  
66 other public authority or private entity, for the construction  
67 of a public building, for the prosecution and completion of a  
68 public work, or for repairs upon a public building or public  
69 work shall be required, before commencing the work or before  
70 recommencing the work after a default or abandonment, to  
71 execute, deliver to the public owner, and record in the public  
72 records of the county where the improvement is located, a  
73 payment and performance bond with a surety insurer authorized to  
74 do business in this state as surety. A public entity may not  
75 require a contractor to secure a surety bond under this section  
76 from a specific agent or bonding company. The bond must state on  
77 its front page: the name, principal business address, and phone  
78 number of the contractor, the surety, the owner of the property  
79 being improved, and, if different from the owner, the  
80 contracting public entity; the contract number assigned by the  
81 contracting public entity; the bond number assigned by the  
82 surety; and a description of the project sufficient to identify  
83 it, such as a legal description or the street address of the  
84 property being improved, and a general description of the

85 improvement. Such bond shall be conditioned upon the  
 86 contractor's performance of the construction work in the time  
 87 and manner prescribed in the contract and promptly making  
 88 payments to all persons defined in s. 713.01 who furnish labor,  
 89 services, or materials for the prosecution of the work provided  
 90 for in the contract. Any claimant may apply to the governmental  
 91 entity having charge of the work for copies of the contract and  
 92 bond and shall thereupon be furnished with a certified copy of  
 93 the contract and bond. The claimant shall have a right of action  
 94 against the contractor and surety for the amount due him or her,  
 95 including unpaid finance charges due under the claimant's  
 96 contract. Such action shall not involve the public authority in  
 97 any expense. When such work is done for the state and the  
 98 contract is for \$100,000 or less, no payment and performance  
 99 bond shall be required. At the discretion of the official or  
 100 board awarding such contract when such work is done for any  
 101 county, city, political subdivision, or public authority, any  
 102 person entering into such a contract which is for \$200,000 or  
 103 less may be exempted from executing the payment and performance  
 104 bond. When such work is done for the state, the Secretary of  
 105 Management Services may delegate to state agencies the authority  
 106 to exempt any person entering into such a contract amounting to  
 107 more than \$100,000 but less than \$200,000 from executing the  
 108 payment and performance bond. In the event such exemption is  
 109 granted, the officer or officials shall not be personally liable  
 110 to persons suffering loss because of granting such exemption.  
 111 The Department of Management Services shall maintain information  
 112 on the number of requests by state agencies for delegation of

113 authority to waive the bond requirements by agency and project  
 114 number and whether any request for delegation was denied and the  
 115 justification for the denial. Any provision in a payment bond  
 116 furnished for public work contracts as provided by this  
 117 subsection which further restricts the classes of persons ~~as~~  
 118 ~~defined in s. 713.01~~ protected by the bond, which restricts ~~or~~  
 119 the venue of any proceeding relating to such bond, which limits  
 120 or expands the effective duration of the bond, or which adds  
 121 conditions precedent to the enforcement of a claim against the  
 122 bond beyond those provided in this section is unenforceable.

123 (b) The Department of Management Services shall adopt  
 124 rules with respect to all contracts for \$200,000 or less, to  
 125 provide:

126 1. Procedures for retaining up to 10 percent of each  
 127 request for payment submitted by a contractor and procedures for  
 128 determining disbursements from the amount retained on a pro rata  
 129 basis to laborers, materialmen, and subcontractors, as defined  
 130 in s. 713.01.

131 2. Procedures for requiring certification from laborers,  
 132 materialmen, and subcontractors, as defined in s. 713.01, prior  
 133 to final payment to the contractor that such laborers,  
 134 materialmen, and subcontractors have no claims against the  
 135 contractor resulting from the completion of the work provided  
 136 for in the contract.

137  
 138 The state shall not be held liable to any laborer, materialman,  
 139 or subcontractor for any amounts greater than the pro rata share  
 140 as determined under this section.



CS/HB 897

2012

141 (c)1. The amount of the bond shall equal the contract  
 142 price, except that for a contract in excess of \$250 million, if  
 143 the state, county, municipality, political subdivision, or other  
 144 public entity finds that a bond in the amount of the contract  
 145 price is not reasonably available, the public owner shall set  
 146 the amount of the bond at the largest amount reasonably  
 147 available, but not less than \$250 million.

148 2. For construction-management or design-build contracts,  
 149 if the public owner does not include in the bond amount the cost  
 150 of design or other nonconstruction services, the bond may not be  
 151 conditioned on performance of such services or payment to  
 152 persons furnishing such services. Notwithstanding paragraph (a),  
 153 such a bond may exclude persons furnishing such services from  
 154 the classes of persons protected by the bond.

155 (2) (a)1. If a claimant is no longer furnishing labor,  
 156 services, or materials on a project, a contractor or the  
 157 contractor's agent or attorney may elect to shorten the  
 158 ~~prescribed time in this paragraph~~ within which an action to  
 159 enforce any claim against a payment bond must ~~provided pursuant~~  
 160 ~~to this section~~ may be commenced by recording in the clerk's  
 161 office a notice in substantially the following form:

162  
 163 NOTICE OF CONTEST OF CLAIM  
 164 AGAINST PAYMENT BOND

165  
 166 To: ... (Name and address of claimant) ...  
 167

168 You are notified that the undersigned contests your notice

CS/HB 897

2012

169 of nonpayment, dated ....., ....., and served on the  
170 undersigned on ....., ....., and that the time within  
171 which you may file suit to enforce your claim is limited to 60  
172 days after the date of service of this notice.

173  
174 DATED on ....., .....

175  
176 Signed: ...(Contractor or Attorney)...

177  
178 The claim of any claimant upon whom such notice is served and  
179 who fails to institute a suit to enforce his or her claim  
180 against the payment bond within 60 days after service of such  
181 notice shall be extinguished automatically. The contractor of  
182 the contractor's attorney ~~clerk~~ shall serve ~~mail~~ a copy of the  
183 notice of contest to the claimant at the address shown in the  
184 notice of nonpayment or most recent amendment thereto and shall  
185 certify to such service on the face of such notice and record  
186 the notice. ~~Service is complete upon mailing.~~

187 2. A claimant, except a laborer, who is not in privity  
188 with the contractor must ~~shall~~, before commencing or not later  
189 than 45 days after commencing to furnish labor, services, or  
190 materials for the prosecution of the work, furnish the  
191 contractor with a written notice that he or she intends to look  
192 to the bond for protection. A claimant who is not in privity  
193 with the contractor and who has not received payment for his or  
194 her labor, services, or materials shall deliver to the  
195 contractor and to the surety written notice of the performance  
196 of the labor or delivery of the materials or supplies and of the

197 nonpayment. The notice of nonpayment must ~~may~~ be served ~~at any~~  
 198 ~~time~~ during the progress of the work or thereafter but may not  
 199 be served earlier than ~~before~~ 45 days after the first furnishing  
 200 of labor, services, or materials or, ~~and not~~ later than 90 days  
 201 after the final furnishing of the labor, services, or materials  
 202 by the claimant or, with respect to rental equipment, not later  
 203 than 90 days after the date that the rental equipment was last  
 204 on the job site available for use. Any notice of nonpayment  
 205 served by a claimant who is not in privity with the contractor  
 206 which includes sums for retainage must specify the portion of  
 207 the amount claimed for retainage. An ~~No~~ action for the labor,  
 208 materials, or supplies may not be instituted against the  
 209 contractor or the surety unless the notice to the contractor and  
 210 notice of nonpayment have been served, if required by this  
 211 section ~~both notices have been given.~~ If the payment bond is not  
 212 recorded before commencement of construction, the time periods  
 213 for the claimant to serve the required notices may at the option  
 214 of the claimant be calculated from the dates specified in this  
 215 section or from the date the claimant is served a copy of the  
 216 bond. In no event, however, shall the limitation period for  
 217 commencement of an action against a payment bond as established  
 218 in s. 95.11 be expanded. Notices required or permitted under  
 219 this section may be served in accordance with s. 713.18. A  
 220 claimant may not waive in advance his or her right to bring an  
 221 action under the bond against the surety. In any action brought  
 222 to enforce a claim against a payment bond under this section,  
 223 the prevailing party is entitled to recover a reasonable fee for  
 224 the services of his or her attorney for trial and appeal or for

225 arbitration, in an amount to be determined by the court, which  
 226 fee must be taxed as part of the prevailing party's costs, as  
 227 allowed in equitable actions. The time periods for service of a  
 228 notice of nonpayment or for bringing an action against a  
 229 contractor or a surety shall be measured from the last day of  
 230 furnishing labor, services, or materials by the claimant and  
 231 shall not be measured by other standards, such as the issuance  
 232 of a certificate of occupancy or the issuance of a certificate  
 233 of substantial completion.

234 (11) If a contractor furnishes and records a payment and  
 235 performance bond for a public works project in accordance with  
 236 this section, the public authority may not condition its  
 237 payments to the contractor on the production of a release,  
 238 waiver, or like documentation from a claimant demonstrating that  
 239 the claimant does not have an outstanding claim against the  
 240 contractor, the surety, the payment bond, or the public  
 241 authority for payments due on labor, services, or materials  
 242 furnished on the public works project.

243 Section 2. Paragraph (b) of subsection (2) of section  
 244 713.10, Florida Statutes, is amended to read:

245 713.10 Extent of liens.—

246 (2)

247 (b) The interest of the lessor shall not be subject to  
 248 liens for improvements made by the lessee when:

249 1. The lease, or a short form or a memorandum of the lease  
 250 that contains the specific language in the lease prohibiting  
 251 such liability, is recorded in the official records of the  
 252 county where the premises are located before the recording of a

253 notice of commencement for improvements to the premises and the  
 254 terms of the lease expressly prohibit such liability; or

255 2. The terms of the lease expressly prohibit such  
 256 liability, and a notice advising that leases for the rental of  
 257 premises on a parcel of land prohibit such liability has been  
 258 recorded in the official records of the county in which the  
 259 parcel of land is located before the recording of a notice of  
 260 commencement for improvements to the premises, and the notice  
 261 includes the following:

- 262 a. The name of the lessor.
- 263 b. The legal description of the parcel of land to which  
 264 the notice applies.
- 265 c. The specific language contained in the various leases  
 266 prohibiting such liability.
- 267 d. A statement that all or a majority of the leases  
 268 entered into for premises on the parcel of land expressly  
 269 prohibit such liability.

270  
 271 The notice required by this subparagraph shall still be  
 272 effective and the lessor's interest in a premises on the parcel  
 273 of land shall not be subject to liens for improvements made by  
 274 the lessee of such premises, notwithstanding that all of the  
 275 leases for all of the premises on the parcel of land do not  
 276 contain language prohibiting such liability or the language  
 277 prohibiting such liability varies in the various leases or does  
 278 not match the language in the notice, if the lease for the  
 279 specific premises as to which a lien could otherwise be claimed  
 280 against the lessor's interest expressly provides that the

281 interest of the lessor shall not be subject to liens for  
 282 improvements made by the lessee.

283 3. The lessee is a mobile home owner who is leasing a  
 284 mobile home lot in a mobile home park from the lessor.

285 Section 3. Paragraph (e) of subsection (1) of section  
 286 713.13, Florida Statutes, is amended to read:

287 713.13 Notice of commencement.—

288 (1)

289 (e) A copy of any payment bond must be attached at the  
 290 time of recordation of the notice of commencement. The failure  
 291 to attach a copy of the bond to the notice of commencement when  
 292 the notice is recorded negates the exemption provided in s.  
 293 713.02(6). However, if a payment bond under s. 713.23 exists but  
 294 was not attached at the time of recordation of the notice of  
 295 commencement, the bond may be used to transfer any recorded lien  
 296 of a lienor except that of the contractor by the recordation and  
 297 service of a notice of bond pursuant to s. 713.23(2). The notice  
 298 requirements of s. 713.23 apply to any claim against the bond;  
 299 however, the time limits for serving any required notices shall,  
 300 at the option of the lienor, be calculated from the dates ~~begin~~  
 301 ~~running from the later of the time~~ specified in s. 713.23 or the  
 302 date the notice of bond is served on the lienor.

303 Section 4. Paragraph (f) of subsection (1) and subsection  
 304 (4) of section 713.132, Florida Statutes, are amended to read:

305 713.132 Notice of termination.—

306 (1) An owner may terminate the period of effectiveness of  
 307 a notice of commencement by executing, swearing to, and  
 308 recording a notice of termination that contains:

CS/HB 897

2012

309 (f) A statement that the owner has, before recording the  
 310 notice of termination, served a copy of the notice of  
 311 termination on the contractor and on each lienor who has a  
 312 direct contract with the owner or who has served a notice to  
 313 owner ~~given notice~~. The owner is not required to serve a copy of  
 314 the notice of termination on any lienor who has executed a  
 315 waiver and release of lien upon final payment in accordance with  
 316 s. 713.20.

317 (4) A notice of termination is effective to terminate the  
 318 notice of commencement at the later of 30 days after recording  
 319 of the notice of termination or the date stated in the notice of  
 320 termination as the date on which the notice of commencement is  
 321 terminated, if ~~provided that~~ the notice of termination has been  
 322 served pursuant to paragraph (1)(f) on the contractor and on  
 323 each lienor who has a direct contract with the owner or who has  
 324 served a notice to owner ~~given notice~~.

325 Section 5. Section 713.16, Florida Statutes, is amended to  
 326 read:

327 713.16 Demand for copy of contract and statements of  
 328 account; form.—

329 (1) A copy of the contract of a lienor or owner and a  
 330 statement of the amount due or to become due if fixed or  
 331 ascertainable thereon must be furnished by any party thereto,  
 332 upon written demand of an owner or a lienor contracting with or  
 333 employed by the other party to such contract. If the owner or  
 334 lienor refuses or neglects to furnish such copy of the contract  
 335 or such statement, or willfully and falsely states the amount  
 336 due or to become due if fixed or ascertainable under such

337 contract, any person who suffers any detriment thereby has a  
 338 cause of action against the person refusing or neglecting to  
 339 furnish the same or willfully and falsely stating the amount due  
 340 or to become due for his or her damages sustained thereby. The  
 341 information contained in such copy or statement furnished  
 342 pursuant to such written demand is binding upon the owner or  
 343 lienor furnishing it unless actual notice of any modification is  
 344 given to the person demanding the copy or statement before such  
 345 person acts in good faith in reliance on it. The person  
 346 demanding such documents must pay for the reproduction thereof;  
 347 and, if such person fails or refuses to do so, he or she is  
 348 entitled only to inspect such documents at reasonable times and  
 349 places.

350 (2) The owner may serve in writing a demand of any lienor  
 351 for a written statement under oath of his or her account showing  
 352 the nature of the labor or services performed and to be  
 353 performed, if any, the materials furnished, the materials to be  
 354 furnished, if known, the amount paid on account to date, the  
 355 amount due, and the amount to become due, if known, as of the  
 356 date of the statement by the lienor. Any such demand to a lienor  
 357 must be served on the lienor at the address and to the attention  
 358 of any person who is designated to receive the demand in the  
 359 notice to owner served by such lienor and must include a  
 360 description of the project, including the names of the owner,  
 361 the contractor, and the lienor's customer, as set forth in the  
 362 lienor's notice to owner. The failure or refusal to furnish the  
 363 statement does not deprive the lienor of his or her lien if the  
 364 demand is not served at the address of the lienor or directed to



365 the attention of the person designated to receive the demand in  
 366 the notice to owner. The failure or refusal to furnish the  
 367 statement under oath within 30 days after the demand, or the  
 368 furnishing of a false or fraudulent statement, deprives the  
 369 person so failing or refusing to furnish such statement of his  
 370 or her lien. If the owner serves more than one demand for  
 371 statement of account on a lienor and none of the information  
 372 regarding the account has changed since the lienor's last  
 373 response to a demand, the failure or refusal to furnish such  
 374 statement does not deprive the lienor of his or her lien. The  
 375 negligent inclusion or omission of any information deprives the  
 376 person of his or her lien to the extent the owner can  
 377 demonstrate prejudice from such act or omission by the lienor.  
 378 The failure to furnish a response to a demand for statement of  
 379 account does not affect the validity of any claim of lien being  
 380 enforced through a foreclosure case filed prior to the date the  
 381 demand for statement is received by the lienor.

382 (3) A request for sworn statement of account must be in  
 383 substantially the following form:

384

REQUEST FOR SWORN STATEMENT OF ACCOUNT

385

386  
 387 WARNING: YOUR FAILURE TO FURNISH THE REQUESTED STATEMENT, SIGNED  
 388 UNDER OATH, WITHIN 30 DAYS OR THE FURNISHING OF A FALSE  
 389 STATEMENT WILL RESULT IN THE LOSS OF YOUR LIEN.

390

391 To: ... (Lienor's name and address) ...

392

CS/HB 897

2012

393 The undersigned hereby demands a written statement under oath of  
 394 his or her account showing the nature of the labor or services  
 395 performed and to be performed, if any, the materials furnished,  
 396 the materials to be furnished, if known, the amount paid on  
 397 account to date, the amount due, and the amount to become due,  
 398 if known, as of the date of the statement for the improvement of  
 399 real property identified as ...(property description)....

400

401 ...(name of contractor)...

402

403 ...(name of the lienor's customer, as set forth in the lienor's  
 404 Notice to Owner, if such notice has been served)....

405

406 ... (signature and address of owner)...

407 ... (date of request for sworn statement of account)...

408

409 (4) When a contractor has furnished a payment bond  
 410 pursuant to s. 713.23, he or she may, when an owner makes any  
 411 payment to the contractor or directly to a lienor, serve a  
 412 written demand on any other lienor for a written statement under  
 413 oath of his or her account showing the nature of the labor or  
 414 services performed and to be performed, if any, the materials  
 415 furnished, the materials to be furnished, if known, the amount  
 416 paid on account to date, the amount due, and the amount to  
 417 become due, if known, as of the date of the statement by the  
 418 lienor. Any such demand to a lienor must be served on the lienor  
 419 at the address and to the attention of any person who is  
 420 designated to receive the demand in the notice to contractor

421 served by such lienor. The demand must include a description of  
 422 the project, including the names of the owner, the contractor,  
 423 and the lienor's customer, as set forth in the lienor's notice  
 424 to contractor. The failure or refusal to furnish the statement  
 425 does not deprive the lienor of his or her rights under the bond  
 426 if the demand is not served at the address of the lienor or  
 427 directed to the attention of the person designated to receive  
 428 the demand in the notice to contractor. The failure to furnish  
 429 the statement within 30 days after the demand, or the furnishing  
 430 of a false or fraudulent statement, deprives the person who  
 431 fails to furnish the statement, or who furnishes the false or  
 432 fraudulent statement, of his or her rights under the bond. If  
 433 the contractor serves more than one demand for statement of  
 434 account on a lienor and none of the information regarding the  
 435 account has changed since the lienor's last response to a  
 436 demand, the failure or refusal to furnish such statement does  
 437 not deprive the lienor of his or her rights under the bond. The  
 438 negligent inclusion or omission of any information deprives the  
 439 person of his or her rights under the bond to the extent the  
 440 contractor can demonstrate prejudice from such act or omission  
 441 by the lienor. The failure to furnish a response to a demand for  
 442 statement of account does not affect the validity of any claim  
 443 on the bond being enforced in a lawsuit filed prior to the date  
 444 the demand for statement of account is received by the lienor.

445 (5) (a) Any lienor who is perfecting a claim of lien ~~has~~  
 446 ~~recorded a claim of lien~~ may serve with the claim of lien or  
 447 thereafter a ~~make~~ written demand on the owner for a written  
 448 statement under oath showing:

449 1. The amount of the direct contract under which the lien  
450 was recorded;

451 2. The dates and amounts paid or to be paid by or on  
452 behalf of the owner for all improvements described in the direct  
453 contract;

454 3. The reasonable estimated costs of completing the direct  
455 contract under which the lien was claimed pursuant to the scope  
456 of the direct contract; and

457 4. If known, the actual cost of completion.

458 (b) Any owner who does not provide the statement within 30  
459 days after demand, or who provides a false or fraudulent  
460 statement, is not a prevailing party for purposes of an award of  
461 attorney ~~attorney's~~ fees under s. 713.29. The written demand  
462 must include the following warning in conspicuous type in  
463 substantially the following form:

464

465 WARNING: YOUR FAILURE TO FURNISH THE REQUESTED  
466 STATEMENT WITHIN 30 DAYS OR THE FURNISHING OF A FALSE  
467 STATEMENT WILL RESULT IN THE LOSS OF YOUR RIGHT TO  
468 RECOVER ATTORNEY FEES IN ANY ACTION TO ENFORCE THE  
469 CLAIM OF LIEN OF THE PERSON REQUESTING THIS STATEMENT.

470

471 (6) Any written demand served on the owner must include a  
472 description of the project, including the names of the  
473 contractor and the lienor's customer, as set forth in the  
474 lienor's notice to owner.

475 (7) For purposes of this section, the term "information"  
476 means the nature and quantity of the labor, services, and

477 materials furnished or to be furnished by a lienor and the  
 478 amount paid, the amount due, and the amount to become due on the  
 479 lienor's account.

480 Section 6. Section 713.18, Florida Statutes, is amended to  
 481 read:

482 713.18 Manner of serving notices and other instruments.—

483 (1) Service of notices, claims of lien, affidavits,  
 484 assignments, and other instruments permitted or required under  
 485 this part, or copies thereof when so permitted or required,  
 486 unless otherwise specifically provided in this part, must be  
 487 made by one of the following methods:

488 (a) By actual delivery to the person to be served; if a  
 489 partnership, to one of the partners; if a corporation, to an  
 490 officer, director, managing agent, or business agent; or, if a  
 491 limited liability company, to a member or manager.

492 (b) By common carrier delivery service or sending the same  
 493 by registered, Global Express Guaranteed, or certified mail,  
 494 with postage or shipping paid by the sender and prepaid, or by  
 495 overnight or second-day delivery with evidence of delivery,  
 496 which may be in an electronic format.

497 (c) ~~If the method specified in paragraph (a) or paragraph~~  
 498 ~~(b) cannot be accomplished,~~ By posting on the site of the  
 499 improvement if service as provided by paragraph (a) or paragraph  
 500 (b) cannot be accomplished premises.

501 (2) Notwithstanding subsection (1), service of ~~if~~ a notice  
 502 to owner, or a notice to contractor under s. 713.23, s. 337.18,  
 503 ~~or a preliminary notice under s. 255.05 is mailed by registered~~  
 504 ~~or certified mail with postage prepaid to the person to be~~

505 ~~served at any of the addresses set forth in subsection (3)~~  
 506 ~~within 40 days after the date the lienor first furnishes labor,~~  
 507 ~~services, or materials, service of that notice is effective as~~  
 508 of the date of mailing if:

509 (a) The notice is mailed by registered, Global Express  
 510 Guaranteed, or certified mail, with postage prepaid, to the  
 511 person to be served at any of the addresses set forth in  
 512 subsection (3);

513 (b) The notice is mailed within 40 days after the date the  
 514 lienor first furnishes labor, services, or materials; and

515 (c) The person who served the notice maintains a  
 516 registered or certified mail log that shows the registered or  
 517 certified mail number issued by the United States Postal  
 518 Service, the name and address of the person served, and the date  
 519 stamp of the United States Postal Service confirming the date of  
 520 mailing or if the person who served the notice maintains  
 521 electronic tracking records generated through use of the United  
 522 States Postal Service Confirm service or a similar service  
 523 containing the postal tracking number, the name and address of  
 524 the person served, and verification of the date of receipt by  
 525 the United States Postal Service.

526 (3) (a) Service of ~~If~~ an instrument ~~served~~ pursuant to this  
 527 section is effective on the date of mailing the instrument if  
 528 it:

529 1. Is sent to the last address shown in the notice of  
 530 commencement or any amendment thereto or, in the absence of a  
 531 notice of commencement, to the last address shown in the  
 532 building permit application, or to the last known address of the

533 person to be served; and ~~, is not received, but~~

534 2. Is returned as being "refused," "moved, not  
535 forwardable," or "unclaimed," or is otherwise not delivered or  
536 deliverable through no fault of the person serving the item,  
537 ~~then service is effective on the date the instrument was sent.~~

538 (b) If the address shown in the notice of commencement or  
539 any amendment to the notice of commencement, or, in the absence  
540 of a notice of commencement, in the building permit application,  
541 is incomplete for purposes of mailing or delivery, the person  
542 serving the item may complete the address and properly format it  
543 according to United States Postal Service addressing standards  
544 using information obtained from the property appraiser or  
545 another public record without affecting the validity of service  
546 under this section.

547 (4) A notice served by a lienor on one owner or one  
548 partner of a partnership owning the real property ~~If the real~~  
549 ~~property is owned by more than one person or a partnership, a~~  
550 ~~lienor may serve any notices or other papers under this part on~~  
551 ~~any one of such owners or partners, and such notice is deemed~~  
552 ~~notice to all owners and partners.~~

553 Section 7. Section 713.22, Florida Statutes, is amended to  
554 read:

555 713.22 Duration of lien.—

556 (1) A ~~No~~ lien provided by this part does not ~~shall~~  
557 continue for a longer period than 1 year after the claim of lien  
558 has been recorded or 1 year after the recording of an amended  
559 claim of lien that shows a later date of final furnishing of  
560 labor, services, or materials, unless within that time an action

561 to enforce the lien is commenced in a court of competent  
 562 jurisdiction. A lien that has been continued beyond the 1-year  
 563 period ~~The continuation of the lien effected~~ by the commencement  
 564 of an ~~the~~ action is shall not enforceable ~~be good~~ against  
 565 creditors or subsequent purchasers for a valuable consideration  
 566 and without notice, unless a notice of lis pendens is recorded.

567 (2) An owner or the owner's ~~agent or~~ attorney may elect to  
 568 shorten the time prescribed in subsection (1) within which to  
 569 commence an action to enforce any claim of lien or claim against  
 570 a bond or other security under s. 713.23 or s. 713.24 by  
 571 recording in the clerk's office a notice in substantially the  
 572 following form:

573  
 574 NOTICE OF CONTEST OF LIEN

575  
 576 To: ...(Name and address of lienor)...

577  
 578 You are notified that the undersigned contests the claim of lien  
 579 filed by you on ....., ...(year)..., and recorded in .... Book  
 580 ....., Page ....., of the public records of .... County, Florida,  
 581 and that the time within which you may file suit to enforce your  
 582 lien is limited to 60 days from the date of service of this  
 583 notice. This .... day of ....., ...(year)....

584  
 585 Signed: ...(Owner or Attorney)...

586  
 587 The lien of any lienor upon whom such notice is served and who  
 588 fails to institute a suit to enforce his or her lien within 60



589 days after service of such notice shall be extinguished  
 590 automatically. The clerk shall serve, in accordance with s.  
 591 713.18, mail a copy of the notice of contest to the lien  
 592 claimant at the address shown in the claim of lien or most  
 593 recent amendment thereto and shall certify to such service and  
 594 the date of service on the face of such notice and record the  
 595 notice. ~~Service shall be deemed complete upon mailing.~~

596 Section 8. Paragraphs (c), (d), (e), and (f) of subsection  
 597 (1) and subsections (2) and (4) of section 713.23, Florida  
 598 Statutes, are amended to read:

599 713.23 Payment bond.—

600 (1)

601 (c) ~~Either~~ Before beginning or within 45 days after  
 602 beginning to furnish labor, materials, or supplies, a lienor who  
 603 is not in privity with the contractor, except a laborer, shall  
 604 serve the contractor with notice in writing that the lienor will  
 605 look to the contractor's bond for protection on the work. If a  
 606 notice of commencement with the attached bond is not recorded,  
 607 before commencement of construction ~~or a reference to the bond~~  
 608 ~~is not given in the notice of commencement, and in either case~~  
 609 ~~if the lienor not in privity with the contractor is not~~  
 610 ~~otherwise notified in writing of the existence of the bond, the~~  
 611 lienor not in privity with the contractor may, in the  
 612 alternative, elect to serve the notice to contractor up to shall  
 613 have 45 days from the date the lienor is served with a copy  
 614 ~~notified of the existence of the bond within which to serve the~~  
 615 ~~notice.~~ The notice may be in substantially the following form  
 616 and may be combined with a notice to owner given under s. 713.06

CS/HB 897

2012

617 and, if so, may be entitled "NOTICE TO OWNER/NOTICE TO  
 618 CONTRACTOR:

619

620

NOTICE TO CONTRACTOR

621

622 To ... (name and address of contractor)...

623

624 The undersigned hereby informs you that he or she has furnished  
 625 or is furnishing services or materials as follows:

626

627 ...(general description of services or materials)... for the  
 628 improvement of the real property identified as ...(property  
 629 description)... under an order given by ...(lienor's  
 630 customer)....

631

632 This notice is to inform you that the undersigned intends to  
 633 look to the contractor's bond to secure payment for the  
 634 furnishing of materials or services for the improvement of the  
 635 real property.

636

637 ...(name of lienor)...

638 ...(signature of lienor or lienor's representative)...

639 ...(date)...

640 ...(lienor's address)...

641

642 ~~The undersigned notifies you that he or she has furnished or is~~  
 643 ~~furnishing ...(services or materials)... for the improvement of~~  
 644 ~~the real property identified as ...(property description)...~~

CS/HB 897

2012

645 ~~owned by ... (owner's name and address) ... under an order given~~  
 646 ~~by .... and that the undersigned will look to the contractor's~~  
 647 ~~bond for protection on the work.~~

648

649 ~~... (Lienor's signature and address) ...~~

650

651 (d) In addition, a lienor is required, as a condition  
 652 precedent to recovery under the bond, to serve a written notice  
 653 of nonpayment to the contractor and the surety not later than 90  
 654 days after the final furnishing of labor, services, or materials  
 655 by the lienor. A written notice satisfies this condition  
 656 precedent with respect to the payment described in the notice of  
 657 nonpayment, including unpaid finance charges due under the  
 658 lienor's contract, and with respect to any other payments which  
 659 become due to the lienor after the date of the notice of  
 660 nonpayment. The time period for serving a written notice of  
 661 nonpayment shall be measured from the last day of furnishing  
 662 labor, services, or materials by the lienor and shall not be  
 663 measured by other standards, such as the issuance of a  
 664 certificate of occupancy or the issuance of a certificate of  
 665 substantial completion. The failure of a lienor to receive  
 666 retainage sums not in excess of 10 percent of the value of  
 667 labor, services, or materials furnished by the lienor is not  
 668 considered a nonpayment requiring the service of the notice  
 669 provided under this paragraph. If the payment bond is not  
 670 recorded before commencement of construction, the time period  
 671 for the lienor to serve a notice of nonpayment may, at the  
 672 option of the lienor, be calculated from the date specified in

CS/HB 897

2012

673 this section or the date the lienor is served a copy of the  
 674 bond. In no event, however, shall the limitation period for  
 675 commencement of an action against a payment bond as established  
 676 in s. 95.11 be expanded. The notice under this paragraph may be  
 677 in substantially the following form:

678  
 679 NOTICE OF NONPAYMENT

680  
 681 To ...(name of contractor and address)...  
 682 ...(name of surety and address)...

683  
 684 The undersigned notifies you that he or she has furnished  
 685 ...(describe labor, services, or materials)... for the  
 686 improvement of the real property identified as ...(property  
 687 description).... The amount now due and unpaid is \$.....

688  
 689 ...(signature and address of lienor)...

690  
 691 (e) An ~~Ne~~ action for the labor or materials or supplies  
 692 may not be instituted or prosecuted against the contractor or  
 693 surety unless both notices have been given, if required by this  
 694 section. An ~~Ne~~ action may not ~~shall~~ be instituted or prosecuted  
 695 against the contractor or against the surety on the bond under  
 696 this section after 1 year from the performance of the labor or  
 697 completion of delivery of the materials and supplies. The time  
 698 period for bringing an action against the contractor or surety  
 699 on the bond shall be measured from the last day of furnishing  
 700 labor, services, or materials by the lienor. The time period and

701 shall not be measured by other standards, such as the issuance  
 702 of a certificate of occupancy or the issuance of a certificate  
 703 of substantial completion. A contractor or the contractor's  
 704 ~~agent or~~ attorney may elect to shorten the ~~prescribed~~ time  
 705 within which an action to enforce any claim against a payment  
 706 bond provided under this section or s. 713.245 must ~~may~~ be  
 707 commenced at any time after a notice of nonpayment, if required,  
 708 has been served for the claim by recording in the clerk's office  
 709 a notice in substantially the following form:

710  
 711 NOTICE OF CONTEST OF CLAIM  
 712 AGAINST PAYMENT BOND  
 713

714 To: ... (Name and address of lienor) ...  
 715

716 You are notified that the undersigned contests your notice  
 717 of nonpayment, dated ....., ....., and served on the undersigned  
 718 on ....., ....., and that the time within which you may file suit  
 719 to enforce your claim is limited to 60 days from the date of  
 720 service of this notice.  
 721

722 DATED on ....., .....

723 Signed: ... (Contractor or Attorney) ...  
 724

725 The claim of any lienor upon whom the notice is served and who  
 726 fails to institute a suit to enforce his or her claim against  
 727 the payment bond within 60 days after service of the notice  
 728 shall be extinguished automatically. The contractor or the

729 contractor's attorney ~~clerk~~ shall serve ~~mail~~ a copy of the  
 730 notice of contest to the lienor at the address shown in the  
 731 notice of nonpayment or most recent amendment thereto and shall  
 732 certify to such service on the face of the notice and record the  
 733 notice. ~~Service is complete upon mailing.~~

734 (f) Any lienor has a direct right of action on the bond  
 735 against the surety. Any provision in a payment bond which  
 736 further restricts ~~A bond must not contain any provisions~~  
 737 ~~restricting~~ the classes of persons who are protected by the  
 738 payment bond, which restricts ~~thereby or~~ the venue of any  
 739 proceeding relating to such payment bond, which limits or  
 740 expands the effective duration of the payment bond, or which  
 741 adds conditions precedent to the enforcement of a claim against  
 742 a payment bond beyond those provided in this part is  
 743 enforceable. The surety is not entitled to the defense of pro  
 744 tanto discharge as against any lienor because of changes or  
 745 modifications in the contract to which the surety is not a  
 746 party; but the liability of the surety may not be increased  
 747 beyond the penal sum of the bond. A lienor may not waive in  
 748 advance his or her right to bring an action under the bond  
 749 against the surety.

750 (2) The bond shall secure every lien under the direct  
 751 contract accruing subsequent to its execution and delivery,  
 752 except that of the contractor. Every claim of lien, except that  
 753 of the contractor, filed subsequent to execution and delivery of  
 754 the bond shall be transferred to it with the same effect as  
 755 liens transferred under s. 713.24. Record notice of the transfer  
 756 shall be effected by the contractor, or any person having an

CS/HB 897

2012

757 interest in the property against which the claim of lien has  
758 been asserted, by recording in the clerk's office a notice, with  
759 the bond attached, in substantially the following form:

760  
761 NOTICE OF BOND

762  
763 To ... (Name and Address of Lienor)...

764  
765 You are notified that the claim of lien filed by you on .....,  
766 ....., and recorded in Official Records Book .... at page .... of  
767 the public records of .... County, Florida, is secured by a  
768 bond, a copy being attached.

769  
770 Signed: ... (Name of person recording notice)...

771  
772 The notice shall be verified. The person recording the notice of  
773 bond clerk shall serve mail a copy of the notice along with a  
774 copy of the bond to the lienor at the address shown in the claim  
775 of lien, or the most recent amendment to it; shall certify to  
776 the service on the face of the notice; and shall record the  
777 notice. ~~The clerk shall receive the same fee as prescribed in s.~~  
778 ~~713.24(1) for certifying to a transfer of lien.~~

779 (4) The provisions of s. 713.24(3) ~~shall~~ apply to bonds  
780 under this section except where those provisions conflict with  
781 this section.

782 Section 9. This act shall take effect October 1, 2012.





HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/HB 959 Divestiture by the State Board of Administration

SPONSOR(S): Government Operations Subcommittee; Bileca and others

TIED BILLS: None IDEN./SIM. BILLS: SB 1144

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Government Operations Subcommittee	15 Y, 0 N, As CS	Meadows	Williamson
2) Judiciary Committee		Cary JMC	Havlicak RH
3) State Affairs Committee			

SUMMARY ANALYSIS

The State Board of Administration (SBA or "board") is established by Article IV, s. 4(e) of the Florida Constitution, and is composed of the Governor as Chair, the Chief Financial Officer as Treasurer, and the Attorney General as Secretary. The board derives its powers to oversee state funds from Art. XII, Sec. 9 of the Florida Constitution.

The bill prohibits the SBA from serving as a fiduciary with respect to voting on a proxy resolution that advocates for expanded United States trade with Cuba or Syria. In addition, the SBA cannot vote in favor of a proxy resolution that would expand United States trade with Cuba or Syria. The bill requires the SBA to report on its activities in its Annual Proxy Voting Report.

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

The bill provides an effective date of July 1, 2012.

# FULL ANALYSIS

## I. SUBSTANTIVE ANALYSIS

### A. EFFECT OF PROPOSED CHANGES:

#### Current Situation

##### State Board of Administration

The State Board of Administration ("SBA" or "board") is established by Article IV, Sec. 4(e) of the Florida Constitution, and is composed of the Governor as Chair, the Chief Financial Officer as Treasurer, and the Attorney General as Secretary. The board members are commonly referred to as "Trustees." The board derives its powers to oversee state funds from Art. XII, Sec. 9 of the Florida Constitution.

The SBA has responsibility for managing investments for the Florida Retirement System (FRS) Pension Plan and for administering the FRS Investment Plan, which represent approximately \$125.1 billion, or 85%, of the \$147.5 billion in assets managed by the SBA, as of November 30, 2011.<sup>1</sup> The SBA also manages 33 other investment portfolios, with combined assets of \$21.7 billion<sup>2</sup>, including the Florida Hurricane Catastrophe Fund, the Florida Lottery Fund, the Florida Pre-Paid College Plan, and various debt-service accounts for state bond issues.

##### Divestiture from Cuba

Current law prohibits the SBA from investing in stocks, securities, or other obligations of any institution or company domiciled in the United States that does business of any kind with Cuba, in violation of federal law.<sup>3</sup> In addition, the SBA is prohibited from investing in any company domiciled outside of the United States if the President of the United States has applied sanctions against the country in which that company is domiciled.<sup>4</sup>

Florida law also provides that state agencies are prohibited from investing in any financial institution or company domiciled in the United States, which directly through the domestically domiciled company or a foreign subsidiary, issues a loan, extends credit, or makes purchases or trades goods with Cuba.<sup>5</sup> State agencies also are prohibited from investing in any foreign company if the President of the United States has applied sanctions to the country in which that company is domiciled.<sup>6</sup>

##### Divestment of Securities

Divestment of securities is one method of applying economic pressures to companies, groups, or countries whose practices are not condoned by shareholders. Divestment may be used in conjunction with or in lieu of other sanctioning methods such as economic embargoes, and diplomatic and military activities. Alternatively, divestment may be used as a protective device if a particular investment carries a high level of risk to the performance of a fund.<sup>7</sup>

The State of Florida has practiced divestment four times in modern history.<sup>8</sup> From 1986 to 1993, the Legislature directed the SBA to divest from companies doing business with South Africa.<sup>9</sup> Beginning October 1, 1988, the Legislature placed restrictions on investments in any institution or company doing

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<sup>1</sup> See State Board of Administration of Florida, *Monthly Performance Report to the Trustees*, November 30, 2011, issued December 31, 2011, at 7 (on file with the Government Operations Subcommittee).

<sup>2</sup> *Id.*

<sup>3</sup> Section 215.471, F.S.

<sup>4</sup> *Id.*

<sup>5</sup> Section 215.472(1), F.S.

<sup>6</sup> Section 215.472(2), F.S.

<sup>7</sup> See generally Cody Ferguson, *Fallacies on Divestment, Pensions & Investments*, January 7, 2008 <http://www.pionline.com/article/20080107/PRINTSUB/241283606> (last visited February 9, 2012).

<sup>8</sup> Information provided to Government Operations Subcommittee staff on February 3, 2012, by Mr. Ron Poppell, Senior Defined Contribution Programs Officer, State Board of Administration.

<sup>9</sup> *Id.*

business in or with Northern Ireland.<sup>10</sup> From 1997 until 2001, the SBA made a decision to divest of 16 tobacco stocks due to pending litigation involving the state and those companies.<sup>11</sup> From 2007 to the present, the Legislature has directed the SBA to divest funds from companies that are actively seeking and providing certain business opportunities with Iran and Sudan.<sup>12</sup>

### **Effect of Proposed Changes**

The bill prohibits the SBA from serving as a fiduciary with respect to voting on a proxy resolution that advocates for expanded United States trade with Cuba or Syria. In addition, the SBA cannot vote in favor of a proxy that would expand United States trade with Cuba or Syria. The bill requires the SBA to report on its activities in its Annual Proxy Voting Report.

The bill provides for an effective date of July 1, 2012.

#### **B. SECTION DIRECTORY:**

Section 1 amends s. 215.471, F.S., relating to Divestiture by the State Board of Administration.

Section 2 provides an effective date of July 1, 2012.

## **II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT**

#### **A. FISCAL IMPACT ON STATE GOVERNMENT:**

##### **1. Revenues:**

The bill does not appear to have any impact on state revenues.

##### **2. Expenditures:**

The bill does not appear to have any impact on state expenditures.

#### **B. FISCAL IMPACT ON LOCAL GOVERNMENTS:**

##### **1. Revenues:**

The bill does not appear to have any impact on local government revenues.

##### **2. Expenditures:**

The bill does not appear to have any impact on local government expenditures.

#### **C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:**

The bill has the potential to negatively impact companies who seek to expand business in Cuba or Syria if the SBA votes against that expansion by proxy vote.

#### **D. FISCAL COMMENTS:**

None.

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<sup>10</sup> Section 121.153, F.S.

<sup>11</sup> Information provided to Government Operations Subcommittee staff on February 3, 2012, by Mr. Ron Poppell, Senior Defined Contribution Programs Officer, State Board of Administration.

<sup>12</sup> Section 215.473, F.S.

### 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:

The bill does not appear to create a need for rulemaking or rulemaking authority.

#### C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

### IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

On February 6, 2012, the Government Operations Subcommittee adopted a strike-all amendment and reported the bill favorably as a committee substitute. The strike-all amendment provides that the SBA will not be a fiduciary with respect to voting on a proxy resolution that would expand United States trade with Cuba or Syria. In addition, the SBA cannot vote in favor of a proxy that would expand United States trade with Cuba or Syria. The strike-all amendment requires the SBA to report on its activities in its Annual Proxy Voting Report.

The strike-all amendment removes the requirement that the SBA create a scrutinized companies list for businesses with prohibited business operations in Cuba or Syria. It also removes the requirement that the SBA divest of investments in companies who have business relationships with Cuba or Syria.

This analysis is drafted to the committee substitute as passed by the Governmental Operations Subcommittee.

1                                   A bill to be entitled  
 2           An act relating to divestiture by the State Board of  
 3           Administration; amending s. 215.471, F.S.; prohibiting  
 4           the State Board of Administration from being a  
 5           fiduciary with respect to voting on any proxy  
 6           resolution advocating expanded United States trade  
 7           with Cuba or Syria; prohibiting the State Board of  
 8           Administration from being a fiduciary with respect to  
 9           having the right to vote in favor of any proxy  
 10          resolution advocating expanded United States trade  
 11          with Cuba or Syria; creating reporting requirements;  
 12          providing an effective date.

13  
 14 Be It Enacted by the Legislature of the State of Florida:

15  
 16           Section 1. Section 215.471, Florida Statutes, is amended  
 17 to read:

18           215.471 Divestiture by the State Board of Administration;  
 19 reporting requirements.-

20           (1) The State Board of Administration shall divest any  
 21 investment under s. 121.151 and ss. 215.44-215.53, and is  
 22 prohibited from investment in stocks, securities, or other  
 23 obligations of:

24           (a)~~(1)~~ Any institution or company domiciled in the United  
 25 States, or foreign subsidiary of a company domiciled in the  
 26 United States, doing business in or with Cuba, or with agencies  
 27 or instrumentalities thereof in violation of federal law.

28           (b)~~(2)~~ Any institution or company domiciled outside of the

CS/HB 959

2012

29 United States if the President of the United States has applied  
30 sanctions against the foreign country in which the institution  
31 or company is domiciled pursuant to s. 4 of the Cuban Democracy  
32 Act of 1992.

33 (2) The State Board of Administration may not be a  
34 fiduciary under this section with respect to voting on, and may  
35 not have the right to vote in favor of, any proxy resolution  
36 advocating expanded United States trade with Cuba or Syria. The  
37 board's staff shall report on its activities in its annual proxy  
38 voting report.

39 Section 2. This act shall take effect July 1, 2012.



**HOUSE OF REPRESENTATIVES STAFF ANALYSIS**

**BILL #:** CS/HB 971 Judiciary  
**SPONSOR(S):** Civil Justice Subcommittee; Gaetz  
**TIED BILLS:** None **IDEN./SIM. BILLS:** SB 1570

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Civil Justice Subcommittee	10 Y, 5 N, As CS	Caridad	Bond
2) Government Operations Subcommittee	10 Y, 3 N	Meadows	Williamson
3) Judiciary Committee		Caridad <i>DC</i>	Havlicak <i>RH</i>

**SUMMARY ANALYSIS**

The Florida Constitution and the Florida Rules of Judicial Administration allow the Chief Justice of the Supreme Court to temporarily assign retired justices and judges to any court in which they are qualified to serve. Under current law, a public employee or officer who retires or terminates participation in the Deferred Retirement Option Program (DROP) on or after July 1, 2010, and who becomes employed by an employer participating in the Florida Retirement System (FRS) during the first six months after retirement or termination of DROP, is not considered retired and may not receive retirement benefits. This prohibition currently applies to retired judges or justices serving temporary duty.

Trial court judgeships that become vacant during a judge's term and all appellate judgeships are filled by the Governor from a list of nominees provided by a judicial nominating commission (JNC). The number of members and composition of each JNC is provided for by statute.

The bill:

- Provides that if a retired judge or justice is assigned to temporary duty, such assignment does not affect his or her eligibility for benefits under the FRS;
- Provides that certain members of the JNC serve at the pleasure of the governor;
- Provides that each expired term or vacancy on a JNC is filled by appointment in the same manner as the member whose position is being filled;
- Deletes an obsolete provision providing that the Executive Office of the Governor establish uniform rules of procedure consistent with the State Constitution when suspending for cause a member of the JNC.

This bill may have a fiscal impact on state government. Because the bill appears to provide an increase in benefits to members of the FRS, an actuarial study is required to determine the estimated cost and to meet state constitutional requirements.

The bill provides for an effective date of July 1, 2012.



## FULL ANALYSIS

### I. SUBSTANTIVE ANALYSIS

#### A. EFFECT OF PROPOSED CHANGES:

##### Retirement

###### *Present Situation*

A "senior judge" is an honorary designation that refers to a retired judge serving on assignment to temporary judicial duty. The Florida Constitution and the Florida Rules of Judicial Administration allow the Chief Justice of the Supreme Court to temporarily assign retired justices and judges to any court in which they are qualified to serve.<sup>1</sup> The Florida Rules of Judicial Administration define a retired judge as a judge who is not engaged in the practice of law and who has been a judicial officer of this state.<sup>2</sup> Retired judges must comply with continuing judicial education requirements, including completion of 30 hours of approved judicial education programs every three years.<sup>3</sup>

Current law provides that a retired justice or judge is a former justice or judge who is not engaged in the practice of law and who has not been defeated in seeking re-election or has not failed to be retained in seeking retention in his or her last judicial office.<sup>4</sup> A justice or judge may not serve more than 60 days on temporary duty during a year without the approval of the Chief Justice.<sup>5</sup>

Retired judges may receive compensation as set by law.<sup>6</sup> Only persons who meet the qualifications set forth in s. 25.073(1), F.S., may be compensated for service as retired justices or judges. Current law sets the compensation for retired justices or judges at not less than \$200 per day.<sup>7</sup> According to the Florida Supreme Court's office, retired justices or judges are currently paid \$350 per day for service. In addition, retired justices or judges are entitled to necessary travel expenses.<sup>8</sup>

Chapter 121, F.S., relates to the Florida Retirement System (FRS). Section 121.021(39)(b), F.S., defines "termination", providing that:

"[T]ermination" for a member electing to participate in the Deferred Retirement Option Program [(DROP)] occurs when the program participant ceases all employment relationships with participating employers in accordance with statute.

However, the section further provides that any member of FRS who retires or terminates DROP participation on or after July 1, 2010, and who becomes employed by any FRS employer during the first six calendar months after such time, does not meet the requirements for "termination." Such individuals are not considered retired and, therefore, may not receive retirement benefits.

Section 121.091, F.S., sets out what retirement benefits are payable to an individual who has terminated employment under s. 121.021(39)(a), F.S., or begun participation in DROP. The statute provides that, any person whose retirement is effective on or after July 1, 2010, who is retired under this chapter, may be reemployed by an employer that participates in a state-administered retirement system and receive both retirement benefits and compensation from such employer.<sup>9</sup> However, a person may not be reemployed by an employer participating in the FRS before meeting the definition of

<sup>1</sup> Art. V, s. (2)(b) Fla. Const.; *See also* Fla.R.Jud.Admin. 2.205(a)(3)(A).

<sup>2</sup> Fla. R.Jud.Admin. 2.205(a)(3)(B).

<sup>3</sup> *See* Fla.R.Jud.Admin. 2.320.

<sup>4</sup> Section 25.073(1), F.S.

<sup>5</sup> *See* s. 25.073(2)(a), F.S.

<sup>6</sup> *See* Fla.R.Jud.Admin. 2.030(a)(3)(A).

<sup>7</sup> *See* s. 25.073(2)(a), F.S.

<sup>8</sup> Section 25.073(2)(b), F.S.

<sup>9</sup> Section 121.091(9)(c), F.S.

"termination" in s. 121.021, F.S., and may not receive both a salary from the employer and retirement benefits for 6 calendar months after meeting the definition of "termination."<sup>10</sup>

#### *Effect of Proposed Changes*

The bill provides that the definition of "termination" in s. 121.021(39)(b), F.S., relating to individuals participating in DROP, does not apply to a retired judge or justice assigned to temporary duty. Instead, termination occurs upon the judge's retirement from non-temporary, active duty as a judge. The bill also provides that s. 121.091(9)(c), F.S., does not apply to a retired judge serving temporary duty and that temporary duty under this section is not considered reemployment or employment after retirement for purposes of Chapter 121, F.S.

The bill revises s. 121.591, F.S., to conform retirement system provisions to temporary appointment of retired justice of judges as senior judges.

In sum, the bill provides that if a retired judge or justice is assigned to temporary duty, such assignment does not affect his or her eligibility for benefits under the FRS.

#### Judicial Nominating Commission

##### *Present Situation*

Trial court judgeships that become vacant during a judge's term and all appellate judgeships are filled by the Governor from a list of nominees provided by a judicial nominating commission (JNC).<sup>11</sup> The number of members and composition of each JNC is provided for by statute.<sup>12</sup> When an appellate judgeship becomes vacant, candidates submit their applications to the JNC for that court. The commission sends a list of three to six nominees to the Governor and the Governor fills the vacancy by selecting from that list.<sup>13</sup> Circuit and county court judges are determined by election,<sup>14</sup> but vacancies on the circuit or county courts that occur between elections are filled in the same manner as vacancies on the appellate bench.<sup>15</sup>

Article V, s. 11(d), Fla. Const., provides that a JNC must be created by general law for the Supreme Court, each district court of appeal, and each judicial circuit for all trial courts within that circuit. Section 43.291, F.S., implements the constitutional provisions. Each JNC consists of nine members appointed by the Governor.<sup>16</sup> Members serve 4 year terms.<sup>17</sup> All JNC members must be residents of the territorial jurisdiction serviced by the JNC to which the member is appointed.<sup>18</sup>

The Governor may appoint five of the nine members of each JNC without input from the Florida Bar. Two of those five appointees must be members of the Florida Bar who are engaged in the practice of law.<sup>19</sup> The remaining four members are appointed by the Governor from a list of nominees selected and provided by the Board of Governors of the Florida Bar. The Governor may reject all of the nominees recommended for the position and request that the Board submit a new list of three different nominees who have not previously been recommended by the Board. These four members of the JNC must be members of the Florida Bar engaged in the practice of law.

##### *Effect of Proposed Changes*

The bill provides that members of the JNC, except the four members selected from a list provided by the Florida Bar, serve at the pleasure of the governor. The bill also:

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<sup>10</sup> *Id.*

<sup>11</sup> *See* art. V, s.11, Fla. Const.

<sup>12</sup> *See* s. 43.291, F.S.

<sup>13</sup> *See* art. V, s. 11(a), Fla. Const.

<sup>14</sup> Circuits and counties may, by local option, choose to select judges in the same manner as appellate judges are selected. *See* art. V, s. 10, Fla. Const.

<sup>15</sup> *See* art. V, s. 11(b), Fla. Const.

<sup>16</sup> Section 43.291(1), F.S.

<sup>17</sup> Section 43.291(3), F.S.

<sup>18</sup> Section 43.291(1)(a), (b), F.S.

<sup>19</sup> Section 43.291(1)(b), F.S.

- Updates provisions relating to the staggering of terms for members selected from the list provided by the Board of Governors of the Florida Bar;
- Provides that an appointment to a JNC of a member selected from a list of nominees provided by the Board of Governors of the Florida Bar — unless it is to a vacant, unexpired term — is for 4 years;
- Provides that each expired term or vacancy is filled by appointment in the same manner as the member whose position is filled; and
- Deletes an obsolete requirement that the Executive Office of the Governor establish uniform rules of procedure consistent with the State Constitution when suspending for cause a member of a JNC.

**B. SECTION DIRECTORY:**

Section 1 amends s. 25.073, F.S., relating to retired justices or judges assigned to temporary duty.

Section 2 amends s. 43.291, F.S., relating to judicial nominating commissions.

Section 3 amends s. 121.021, F.S., relating to definitions.

Section 4 amends s. 121.091, F.S., relating to benefits payable under the system.

Section 5 amends s. 121.591, F.S., relating to payment of benefits.

Section 6 provides an effective date of July 1, 2012.

**II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT**

**A. FISCAL IMPACT ON STATE GOVERNMENT:**

1. Revenues:

None.

2. Expenditures:

Unknown. See Fiscal Comments.

**B. FISCAL IMPACT ON LOCAL GOVERNMENTS:**

1. Revenues:

None.

2. Expenditures:

None.

**C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:**

The bill does not appear to have any direct economic impact on the private sector.

**D. FISCAL COMMENTS:**

The provisions of the bill provide for an improvement of benefits under the FRS for retired judges and justices. As such, an actuarial study is required to determine the estimated cost.

### 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:

Article X, s. 14 of the State Constitution requires that benefit improvements under public pension plans in the State of Florida be concurrently funded on a sound actuarial basis, as set forth below:

SECTION 14. State retirement systems benefit changes.--A governmental unit responsible for any retirement or pension system supported in whole or in part by public funds shall not after January 1, 1977, provide any increase in the benefits to the members or beneficiaries of such system unless such unit has made or concurrently makes provision for the funding of the increase in benefits on a sound actuarial basis.

Article X, s. 14 of the State Constitution is implemented by statute under part VII of chapter 112, F.S., the "Florida Protection of Public Employee Retirement Benefits Act" (Act). The Act establishes minimum standards for the operation and funding of public employee retirement systems and plans in the State of Florida. It prohibits the use of any procedure, methodology, or assumptions the effect of which is to transfer to future taxpayers any portion of the costs which may reasonably have been expected to be paid by the current taxpayers.

The bill appears to require an actuarial study in order to determine the estimated cost and to meet the requirements of Article X, s. 14 of the State Constitution.<sup>20</sup>

#### B. RULE-MAKING AUTHORITY:

The bill does not appear to create a need for rulemaking or require additional rulemaking authority.

#### C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

### IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

On January 11, 2012, the Civil Justice Subcommittee amended the bill to provide that members of the JNC appointed, except those selected from a list provided by the Florida Bar, shall serve at the pleasure of the governor. It also deleted provisions related to the term "normal retirement date" and made other conforming provisions to retirement law.

The analysis is drafted to the committee substitute as passed by the Civil Justice Subcommittee.

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<sup>20</sup> The Senate Committee on Governmental Oversight and Accountability published a report finding that the creation of an exception to the six-month termination period in s. 121.021(3), F.S., constitutes an increase in benefits which requires an actuarial study. See "Retired Judges Returning to Temporary Duty Status within Six Months of Retirement," September 2011.

1                                   A bill to be entitled  
 2           An act relating to the judiciary; amending s. 25.073,  
 3           F.S.; providing that if a retired justice or judge is  
 4           assigned to temporary duty, such assignment does not  
 5           affect his or her eligibility for benefits under the  
 6           Florida Retirement System or renew his or her  
 7           membership in the Florida Retirement System; amending  
 8           s. 43.291, F.S.; revising requirements for the  
 9           appointment of members of judicial nominating  
 10          commissions; providing that, with the exception of  
 11          members selected from a list of nominees provided by  
 12          the Board of Governors of The Florida Bar, a current  
 13          member of a judicial nominating commission appointed  
 14          by the Governor serves at the pleasure of the  
 15          Governor; providing for each expired term or vacancy  
 16          to be filled by appointment in the same manner as the  
 17          member whose position is being filled; deleting  
 18          obsolete provisions; deleting a requirement that the  
 19          Executive Office of the Governor establish uniform  
 20          rules of procedure consistent with the State  
 21          Constitution when suspending for cause a member of a  
 22          judicial nominating commission; amending ss. 121.021,  
 23          121.091, and 121.591, F.S.; conforming retirement  
 24          system provisions to temporary appointment of retired  
 25          justices or judges as senior judges; providing an  
 26          effective date.

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

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Section 1. Subsection (4) is added to section 25.073, Florida Statutes, to read:

25.073 Retired justices or judges assigned to temporary duty; additional compensation; appropriation.—

(4) For a former justice or retired judge who has reached his or her normal retirement age or date under chapter 121 and who has consented to temporary duty in any court, as assigned by the Chief Justice of the Supreme Court in accordance with s. 2, Art. V of the State Constitution:

(a) The definition of the term "termination" in s. 121.021 does not apply, and termination occurs when the former justice or judge ceases all non-temporary, active duty as a judge and retires from the Florida Retirement System.

(b) Section 121.091(9)(c) does not apply, and such temporary duty is not considered reemployment or employment after retirement for purposes of chapter 121 and renewed membership in the Florida Retirement System is not permitted.

Section 2. Subsections (1), (3), and (5) of section 43.291, Florida Statutes, are amended to read:

43.291 Judicial nominating commissions.—

(1)(a) Each judicial nominating commission shall be composed of the following members:

1.(a) Four members of The Florida Bar, appointed by the Governor, who are engaged in the practice of law, each of whom is a resident of the territorial jurisdiction served by the commission to which the member is appointed. The Board of Governors of The Florida Bar shall submit to the Governor three

CS/HB 971

2012

57 recommended nominees for each position. The Governor shall  
 58 select the appointee from the list of nominees recommended for  
 59 that position, but the Governor may reject all of the nominees  
 60 recommended for a position and request that the Board of  
 61 Governors submit a new list of three different recommended  
 62 nominees for that position who have not been previously  
 63 recommended by the Board of Governors.

64 2.-(b) Five members appointed by the Governor who shall  
 65 serve at the pleasure of the Governor, each of whom is a  
 66 resident of the territorial jurisdiction served by the  
 67 commission to which the member is appointed, of which at least  
 68 two are members of The Florida Bar engaged in the practice of  
 69 law. Notwithstanding any other law, each current member of a  
 70 judicial nominating commission appointed by the Governor, other  
 71 than those selected from a list of nominees provided by the  
 72 Board of Governors of The Florida Bar, shall serve at the  
 73 pleasure of the Governor.

74 (b) Each expired term or vacancy shall be filled by  
 75 appointment in the same manner as the member whose position is  
 76 being filled.

77 (3) Notwithstanding any other provision of this section,  
 78 each current member of a judicial nominating commission selected  
 79 from a list of nominees provided ~~appointed directly~~ by the Board  
 80 of Governors of The Florida Bar shall serve the remainder of his  
 81 or her term, unless removed for cause. ~~The terms of all other~~  
 82 ~~members of a judicial nominating commission are hereby~~  
 83 ~~terminated, and the Governor shall appoint new Members~~ selected  
 84 from a list of nominees provided by the Board of Governors of

85 The Florida Bar shall serve terms ~~to each judicial nominating~~  
 86 ~~commission~~ in the following manner:

87 (a) One appointment ~~Two appointments~~ for a term ~~terms~~  
 88 ending July 1, 2012 ~~2002~~, ~~one of which shall be an appointment~~  
 89 ~~selected from nominations submitted by the Board of Governors of~~  
 90 ~~The Florida Bar pursuant to paragraph (1)(a);~~

91 (b) Two appointments for terms ending July 1, 2014 ~~2003~~;  
 92 and

93 (c) One appointment ~~Two appointments~~ for a term ~~terms~~  
 94 ending July 1, 2015 ~~2004~~.

95  
 96 Every subsequent appointment of a member selected from a list of  
 97 nominees provided by the Board of Governors of The Florida Bar,  
 98 except an appointment to fill a vacant, unexpired term, shall be  
 99 for 4 years. ~~Each expired term or vacancy shall be filled by~~  
 100 ~~appointment in the same manner as the member whose position is~~  
 101 ~~being filled.~~

102 (5) A member of a judicial nominating commission may be  
 103 suspended for cause by the Governor ~~pursuant to uniform rules of~~  
 104 ~~procedure established by the Executive Office of the Governor~~  
 105 consistent with s. 7, ~~of~~ Art. IV of the State Constitution.

106 Section 3. Subsection (39) of section 121.021, Florida  
 107 Statutes, is amended to read:

108 121.021 Definitions.—The following words and phrases as  
 109 used in this chapter have the respective meanings set forth  
 110 unless a different meaning is plainly required by the context:

111 (39) (a) "Termination" occurs, except as provided in  
 112 paragraph (b) or paragraph (d), when a member ceases all



CS/HB 971

2012

113 employment relationships with participating employers, however:

114 1. For retirements effective before July 1, 2010, if a  
 115 member is employed by any such employer within the next calendar  
 116 month, termination shall be deemed not to have occurred. A leave  
 117 of absence constitutes a continuation of the employment  
 118 relationship, except that a leave of absence without pay due to  
 119 disability may constitute termination if such member makes  
 120 application for and is approved for disability retirement in  
 121 accordance with s. 121.091(4). The department or state board may  
 122 require other evidence of termination as it deems necessary.

123 2. For retirements effective on or after July 1, 2010, if  
 124 a member is employed by any such employer within the next 6  
 125 calendar months, termination shall be deemed not to have  
 126 occurred. A leave of absence constitutes a continuation of the  
 127 employment relationship, except that a leave of absence without  
 128 pay due to disability may constitute termination if such member  
 129 makes application for and is approved for disability retirement  
 130 in accordance with s. 121.091(4). The department or state board  
 131 may require other evidence of termination as it deems necessary.

132 (b) "Termination" for a member electing to participate in  
 133 the Deferred Retirement Option Program occurs when the program  
 134 participant ceases all employment relationships with  
 135 participating employers in accordance with s. 121.091(13),  
 136 however:

137 1. For termination dates occurring before July 1, 2010, if  
 138 the member is employed by any such employer within the next  
 139 calendar month, termination will be deemed not to have occurred,  
 140 except as provided in s. 121.091(13)(b)4.c. A leave of absence

141 shall constitute a continuation of the employment relationship.

142 2. For termination dates occurring on or after July 1,  
 143 2010, if the member becomes employed by any such employer within  
 144 the next 6 calendar months, termination will be deemed not to  
 145 have occurred, except as provided in s. 121.091(13)(b)4.c. A  
 146 leave of absence constitutes a continuation of the employment  
 147 relationship.

148 (c) Effective July 1, 2011, "termination" for a member  
 149 receiving a refund of employee contributions occurs when a  
 150 member ceases all employment relationships with participating  
 151 employers for 3 calendar months. A leave of absence constitutes  
 152 a continuation of the employment relationship.

153 (d) Effective July 1, 2012, a former justice or retired  
 154 judge who has reached his or her normal retirement age or date  
 155 and consents to temporary employment as a senior judge in any  
 156 court, as assigned by the Chief Justice of the Supreme Court in  
 157 accordance with s. 2, Art. V of the State Constitution, meets  
 158 the definition of "termination" when all non-temporary  
 159 employment as a judge ceases and the former justice or judge  
 160 retires under this chapter.

161 Section 4. Subsection (9) of section 121.091, Florida  
 162 Statutes, is amended to read:

163 121.091 Benefits payable under the system.—Benefits may  
 164 not be paid under this section unless the member has terminated  
 165 employment as provided in s. 121.021(39)(a) or begun  
 166 participation in the Deferred Retirement Option Program as  
 167 provided in subsection (13), and a proper application has been  
 168 filed in the manner prescribed by the department. The department

169 may cancel an application for retirement benefits when the  
 170 member or beneficiary fails to timely provide the information  
 171 and documents required by this chapter and the department's  
 172 rules. The department shall adopt rules establishing procedures  
 173 for application for retirement benefits and for the cancellation  
 174 of such application when the required information or documents  
 175 are not received.

176 (9) EMPLOYMENT AFTER RETIREMENT; LIMITATION.—

177 (a) Any person who is retired under this chapter, except  
 178 under the disability retirement provisions of subsection (4),  
 179 may be employed by an employer that does not participate in a  
 180 state-administered retirement system and receive compensation  
 181 from that employment without limiting or restricting in any way  
 182 the retirement benefits payable to that person.

183 (b) Any person whose retirement is effective before July  
 184 1, 2010, or whose participation in the Deferred Retirement  
 185 Option Program terminates before July 1, 2010, except under the  
 186 disability retirement provisions of subsection (4) or as  
 187 provided in s. 121.053, may be reemployed by an employer that  
 188 participates in a state-administered retirement system and  
 189 receive retirement benefits and compensation from that employer,  
 190 except that the person may not be reemployed by an employer  
 191 participating in the Florida Retirement System before meeting  
 192 the definition of termination in s. 121.021 and may not receive  
 193 both a salary from the employer and retirement benefits for 12  
 194 calendar months immediately subsequent to the date of  
 195 retirement. However, a DROP participant shall continue  
 196 employment and receive a salary during the period of

CS/HB 971

2012

197 participation in the Deferred Retirement Option Program, as  
 198 provided in subsection (13).

199 1. A retiree who violates such reemployment limitation  
 200 before completion of the 12-month limitation period must give  
 201 timely notice of this fact in writing to the employer and to the  
 202 Division of Retirement or the state board and shall have his or  
 203 her retirement benefits suspended for the months employed or the  
 204 balance of the 12-month limitation period as required in sub-  
 205 subparagraphs b. and c. A retiree employed in violation of this  
 206 paragraph and an employer who employs or appoints such person  
 207 are jointly and severally liable for reimbursement to the  
 208 retirement trust fund, including the Florida Retirement System  
 209 Trust Fund and the Public Employee Optional Retirement Program  
 210 Trust Fund, from which the benefits were paid. The employer must  
 211 have a written statement from the retiree that he or she is not  
 212 retired from a state-administered retirement system. Retirement  
 213 benefits shall remain suspended until repayment has been made.  
 214 Benefits suspended beyond the reemployment limitation shall  
 215 apply toward repayment of benefits received in violation of the  
 216 reemployment limitation.

217 a. A district school board may reemploy a retiree as a  
 218 substitute or hourly teacher, education paraprofessional,  
 219 transportation assistant, bus driver, or food service worker on  
 220 a noncontractual basis after he or she has been retired for 1  
 221 calendar month. A district school board may reemploy a retiree  
 222 as instructional personnel, as defined in s. 1012.01(2)(a), on  
 223 an annual contractual basis after he or she has been retired for  
 224 1 calendar month. Any member who is reemployed within 1 calendar

CS/HB 971

2012

225 month after retirement shall void his or her application for  
 226 retirement benefits. District school boards reemploying such  
 227 teachers, education paraprofessionals, transportation  
 228 assistants, bus drivers, or food service workers are subject to  
 229 the retirement contribution required by subparagraph 2.

230       b. A community college board of trustees may reemploy a  
 231 retiree as an adjunct instructor or as a participant in a phased  
 232 retirement program within the Florida Community College System,  
 233 after he or she has been retired for 1 calendar month. A member  
 234 who is reemployed within 1 calendar month after retirement shall  
 235 void his or her application for retirement benefits. Boards of  
 236 trustees reemploying such instructors are subject to the  
 237 retirement contribution required in subparagraph 2. A retiree  
 238 may be reemployed as an adjunct instructor for no more than 780  
 239 hours during the first 12 months of retirement. A retiree  
 240 reemployed for more than 780 hours during the first 12 months of  
 241 retirement must give timely notice in writing to the employer  
 242 and to the Division of Retirement or the state board of the date  
 243 he or she will exceed the limitation. The division shall suspend  
 244 his or her retirement benefits for the remainder of the 12  
 245 months of retirement. Any retiree employed in violation of this  
 246 sub-subparagraph and any employer who employs or appoints such  
 247 person without notifying the division to suspend retirement  
 248 benefits are jointly and severally liable for any benefits paid  
 249 during the reemployment limitation period. The employer must  
 250 have a written statement from the retiree that he or she is not  
 251 retired from a state-administered retirement system. Any  
 252 retirement benefits received by the retiree while reemployed in

253 excess of 780 hours during the first 12 months of retirement  
 254 must be repaid to the Florida Retirement System Trust Fund, and  
 255 retirement benefits shall remain suspended until repayment is  
 256 made. Benefits suspended beyond the end of the retiree's first  
 257 12 months of retirement shall apply toward repayment of benefits  
 258 received in violation of the 780-hour reemployment limitation.

259 c. The State University System may reemploy a retiree as  
 260 an adjunct faculty member or as a participant in a phased  
 261 retirement program within the State University System after the  
 262 retiree has been retired for 1 calendar month. A member who is  
 263 reemployed within 1 calendar month after retirement shall void  
 264 his or her application for retirement benefits. The State  
 265 University System is subject to the retired contribution  
 266 required in subparagraph 2., as appropriate. A retiree may be  
 267 reemployed as an adjunct faculty member or a participant in a  
 268 phased retirement program for no more than 780 hours during the  
 269 first 12 months of his or her retirement. A retiree reemployed  
 270 for more than 780 hours during the first 12 months of retirement  
 271 must give timely notice in writing to the employer and to the  
 272 Division of Retirement or the state board of the date he or she  
 273 will exceed the limitation. The division shall suspend his or  
 274 her retirement benefits for the remainder of the 12 months. Any  
 275 retiree employed in violation of this sub-subparagraph and any  
 276 employer who employs or appoints such person without notifying  
 277 the division to suspend retirement benefits are jointly and  
 278 severally liable for any benefits paid during the reemployment  
 279 limitation period. The employer must have a written statement  
 280 from the retiree that he or she is not retired from a state-

281 administered retirement system. Any retirement benefits received  
 282 by the retiree while reemployed in excess of 780 hours during  
 283 the first 12 months of retirement must be repaid to the Florida  
 284 Retirement System Trust Fund, and retirement benefits shall  
 285 remain suspended until repayment is made. Benefits suspended  
 286 beyond the end of the retiree's first 12 months of retirement  
 287 shall apply toward repayment of benefits received in violation  
 288 of the 780-hour reemployment limitation.

289 d. The Board of Trustees of the Florida School for the  
 290 Deaf and the Blind may reemploy a retiree as a substitute  
 291 teacher, substitute residential instructor, or substitute nurse  
 292 on a noncontractual basis after he or she has been retired for 1  
 293 calendar month. Any member who is reemployed within 1 calendar  
 294 month after retirement shall void his or her application for  
 295 retirement benefits. The Board of Trustees of the Florida School  
 296 for the Deaf and the Blind reemploying such teachers,  
 297 residential instructors, or nurses is subject to the retirement  
 298 contribution required by subparagraph 2.

299 e. A developmental research school may reemploy a retiree  
 300 as a substitute or hourly teacher or an education  
 301 paraprofessional as defined in s. 1012.01(2) on a noncontractual  
 302 basis after he or she has been retired for 1 calendar month. A  
 303 developmental research school may reemploy a retiree as  
 304 instructional personnel, as defined in s. 1012.01(2)(a), on an  
 305 annual contractual basis after he or she has been retired for 1  
 306 calendar month after retirement. Any member who is reemployed  
 307 within 1 calendar month voids his or her application for  
 308 retirement benefits. A developmental research school that

CS/HB 971

2012

309 reemploys retired teachers and education paraprofessionals is  
 310 subject to the retirement contribution required by subparagraph  
 311 2.

312 f. A charter school may reemploy a retiree as a substitute  
 313 or hourly teacher on a noncontractual basis after he or she has  
 314 been retired for 1 calendar month. A charter school may reemploy  
 315 a retired member as instructional personnel, as defined in s.  
 316 1012.01(2)(a), on an annual contractual basis after he or she  
 317 has been retired for 1 calendar month after retirement. Any  
 318 member who is reemployed within 1 calendar month voids his or  
 319 her application for retirement benefits. A charter school that  
 320 reemploys such teachers is subject to the retirement  
 321 contribution required by subparagraph 2.

322 2. The employment of a retiree or DROP participant of a  
 323 state-administered retirement system does not affect the average  
 324 final compensation or years of creditable service of the retiree  
 325 or DROP participant. Before July 1, 1991, upon employment of any  
 326 person, other than an elected officer as provided in s. 121.053,  
 327 who is retired under a state-administered retirement program,  
 328 the employer shall pay retirement contributions in an amount  
 329 equal to the unfunded actuarial liability portion of the  
 330 employer contribution which would be required for regular  
 331 members of the Florida Retirement System. Effective July 1,  
 332 1991, contributions shall be made as provided in s. 121.122 for  
 333 retirees who have renewed membership or, as provided in  
 334 subsection (13), for DROP participants.

335 3. Any person who is holding an elective public office  
 336 which is covered by the Florida Retirement System and who is



337 concurrently employed in nonelected covered employment may elect  
 338 to retire while continuing employment in the elective public  
 339 office if he or she terminates his or her nonelected covered  
 340 employment. Such person shall receive his or her retirement  
 341 benefits in addition to the compensation of the elective office  
 342 without regard to the time limitations otherwise provided in  
 343 this subsection. A person who seeks to exercise the provisions  
 344 of this subparagraph as they existed before May 3, 1984, may not  
 345 be deemed to be retired under those provisions, unless such  
 346 person is eligible to retire under this subparagraph, as amended  
 347 by chapter 84-11, Laws of Florida.

348 (c) Any person whose retirement is effective on or after  
 349 July 1, 2010, or whose participation in the Deferred Retirement  
 350 Option Program terminates on or after July 1, 2010, who is  
 351 retired under this chapter, except under the disability  
 352 retirement provisions of subsection (4) or as provided in s.  
 353 121.053, may be reemployed by an employer that participates in a  
 354 state-administered retirement system and receive retirement  
 355 benefits and compensation from that employer. However, a person  
 356 may not be reemployed by an employer participating in the  
 357 Florida Retirement System before meeting the definition of  
 358 termination in s. 121.021 and may not receive both a salary from  
 359 the employer and retirement benefits for 6 calendar months after  
 360 meeting the definition of termination, except as provided in  
 361 paragraph (f). However, a DROP participant shall continue  
 362 employment and receive a salary during the period of  
 363 participation in the Deferred Retirement Option Program, as  
 364 provided in subsection (13).

CS/HB 971

2012

365 1. The reemployed retiree may not renew membership in the  
 366 Florida Retirement System.

367 2. The employer shall pay retirement contributions in an  
 368 amount equal to the unfunded actuarial liability portion of the  
 369 employer contribution that would be required for active members  
 370 of the Florida Retirement System in addition to the  
 371 contributions required by s. 121.76.

372 3. A retiree initially reemployed in violation of this  
 373 paragraph and an employer that employs or appoints such person  
 374 are jointly and severally liable for reimbursement of any  
 375 retirement benefits paid to the retirement trust fund from which  
 376 the benefits were paid, including the Florida Retirement System  
 377 Trust Fund and the Public Employee Optional Retirement Program  
 378 Trust Fund, as appropriate. The employer must have a written  
 379 statement from the employee that he or she is not retired from a  
 380 state-administered retirement system. Retirement benefits shall  
 381 remain suspended until repayment is made. Benefits suspended  
 382 beyond the end of the retiree's 6-month reemployment limitation  
 383 period shall apply toward the repayment of benefits received in  
 384 violation of this paragraph.

385 (d) This subsection applies to retirees, as defined in s.  
 386 121.4501(2), except as provided in paragraph (f), of the Florida  
 387 Retirement System Investment Plan, subject to the following  
 388 conditions:

389 1. A retiree may not be reemployed with an employer  
 390 participating in the Florida Retirement System until such person  
 391 has been retired for 6 calendar months.

392 2. A retiree employed in violation of this subsection and

393 an employer that employs or appoints such person are jointly and  
 394 severally liable for reimbursement of any benefits paid to the  
 395 retirement trust fund from which the benefits were paid. The  
 396 employer must have a written statement from the retiree that he  
 397 or she is not retired from a state-administered retirement  
 398 system.

399 (e) The limitations of this subsection apply to  
 400 reemployment in any capacity irrespective of the category of  
 401 funds from which the person is compensated, except as provided  
 402 in paragraph (f).

403 (f) Effective July 1, 2012, a former justice or retired  
 404 judge who has reached his or her normal retirement age or date  
 405 and consents to temporary employment as a senior judge in any  
 406 court, as assigned by the Chief Justice of the Supreme Court in  
 407 accordance with s. 2, Art. V of the State Constitution, is not  
 408 subject to paragraph (c), paragraph (d), or paragraph (e).

409 Section 5. Paragraph (a) of subsection (1) of section  
 410 121.591, Florida Statutes, is amended to read:

411 121.591 Payment of benefits.—Benefits may not be paid  
 412 under the Florida Retirement System Investment Plan unless the  
 413 member has terminated employment as provided in s.  
 414 121.021(39)(a) or is deceased and a proper application has been  
 415 filed as prescribed by the state board or the department. Before  
 416 termination of employment, benefits, including employee  
 417 contributions, are not payable under the investment plan for  
 418 employee hardships, unforeseeable emergencies, loans, medical  
 419 expenses, educational expenses, purchase of a principal  
 420 residence, payments necessary to prevent eviction or foreclosure

421 on an employee's principal residence, or any other reason prior  
 422 to termination from all employment relationships with  
 423 participating employers. The state board or department, as  
 424 appropriate, may cancel an application for retirement benefits  
 425 if the member or beneficiary fails to timely provide the  
 426 information and documents required by this chapter and the rules  
 427 of the state board and department. In accordance with their  
 428 respective responsibilities, the state board and the department  
 429 shall adopt rules establishing procedures for application for  
 430 retirement benefits and for the cancellation of such application  
 431 if the required information or documents are not received. The  
 432 state board and the department, as appropriate, are authorized  
 433 to cash out a de minimis account of a member who has been  
 434 terminated from Florida Retirement System covered employment for  
 435 a minimum of 6 calendar months. A de minimis account is an  
 436 account containing employer and employee contributions and  
 437 accumulated earnings of not more than \$5,000 made under the  
 438 provisions of this chapter. Such cash-out must be a complete  
 439 lump-sum liquidation of the account balance, subject to the  
 440 provisions of the Internal Revenue Code, or a lump-sum direct  
 441 rollover distribution paid directly to the custodian of an  
 442 eligible retirement plan, as defined by the Internal Revenue  
 443 Code, on behalf of the member. Any nonvested accumulations and  
 444 associated service credit, including amounts transferred to the  
 445 suspense account of the Florida Retirement System Investment  
 446 Plan Trust Fund authorized under s. 121.4501(6), shall be  
 447 forfeited upon payment of any vested benefit to a member or  
 448 beneficiary, except for de minimis distributions or minimum

449 required distributions as provided under this section. If any  
 450 financial instrument issued for the payment of retirement  
 451 benefits under this section is not presented for payment within  
 452 180 days after the last day of the month in which it was  
 453 originally issued, the third-party administrator or other duly  
 454 authorized agent of the state board shall cancel the instrument  
 455 and credit the amount of the instrument to the suspense account  
 456 of the Florida Retirement System Investment Plan Trust Fund  
 457 authorized under s. 121.4501(6). Any amounts transferred to the  
 458 suspense account are payable upon a proper application, not to  
 459 include earnings thereon, as provided in this section, within 10  
 460 years after the last day of the month in which the instrument  
 461 was originally issued, after which time such amounts and any  
 462 earnings attributable to employer contributions shall be  
 463 forfeited. Any forfeited amounts are assets of the trust fund  
 464 and are not subject to chapter 717.

- 465 (1) NORMAL BENEFITS.—Under the investment plan:
- 466 (a) Benefits in the form of vested accumulations as  
 467 described in s. 121.4501(6) are payable under this subsection in  
 468 accordance with the following terms and conditions:
- 469 1. Benefits are payable only to a member, an alternate  
 470 payee of a qualified domestic relations order, or a beneficiary.
  - 471 2. Benefits shall be paid by the third-party administrator  
 472 or designated approved providers in accordance with the law, the  
 473 contracts, and any applicable board rule or policy.
  - 474 3. The member must be terminated from all employment with  
 475 all Florida Retirement System employers, as provided in s.  
 476 121.021(39).

477 4. Benefit payments may not be made until the member has  
 478 been terminated for 3 calendar months, except that the state  
 479 board may authorize by rule for the distribution of up to 10  
 480 percent of the member's account after being terminated for 1  
 481 calendar month if the member has reached the normal retirement  
 482 date as defined in s. 121.021. Effective July 1, 2012, a former  
 483 justice or retired judge who has consented to temporary  
 484 employment as a senior judge in any court pursuant to s. 25.073  
 485 may receive a regular distribution of his or her account as  
 486 provided in this paragraph after providing proof of termination  
 487 from his or her regularly established position.

488 5. If a member or former member of the Florida Retirement  
 489 System receives an invalid distribution, such person must either  
 490 repay the full amount within 90 days after receipt of final  
 491 notification by the state board or the third-party administrator  
 492 that the distribution was invalid, or, in lieu of repayment, the  
 493 member must terminate employment from all participating  
 494 employers. If such person fails to repay the full invalid  
 495 distribution within 90 days after receipt of final notification,  
 496 the person may be deemed retired from the investment plan by the  
 497 state board and is subject to s. 121.122. If such person is  
 498 deemed retired, any joint and several liability set out in s.  
 499 121.091(9)(d)2. is void, and the state board, the department, or  
 500 the employing agency is not liable for gains on payroll  
 501 contributions that have not been deposited to the person's  
 502 account in the investment plan, pending resolution of the  
 503 invalid distribution. The member or former member who has been  
 504 deemed retired or who has been determined by the state board to

CS/HB 971

2012

505 | have taken an invalid distribution may appeal the agency  
506 | decision through the complaint process as provided under s.  
507 | 121.4501(9)(g)3. As used in this subparagraph, the term "invalid  
508 | distribution" means any distribution from an account in the  
509 | investment plan which is taken in violation of this section, s.  
510 | 121.091(9), or s. 121.4501.

511 |       Section 6. This act shall take effect July 1, 2012.





HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/HB 1013 Residential Construction Warranties

SPONSOR(S): Civil Justice Subcommittee; Artiles

TIED BILLS: None IDEN./SIM. BILLS: CS/SB 1196

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Civil Justice Subcommittee	9 Y, 2 N, As CS	Cary	Bond
2) Judiciary Committee		Cary JML	Havlicak RN

SUMMARY ANALYSIS

There is a common law implied warranty of fitness and merchantability or habitability related to the purchase of improved real estate purchased from the builder. This common law implied warranty applies to buildings and other improvements which are affixed to the real property, as opposed to fixtures that can be removed from the real property without damage to the premises.

A recent District Court of Appeal (DCA) decision expanded the common law implied warranty of fitness and merchantability or habitability to off-site improvements, such as roads and drainage areas within a subdivision. This opinion is contrary to a previous Florida Supreme Court opinion. This bill provides that the implied warranty of fitness and merchantability or habitability does not include off-site improvements.

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

The bill provides an effective date of July 1, 2012, and applies to all cases accruing before, pending on, or filed after that date.

## FULL ANALYSIS

### I. SUBSTANTIVE ANALYSIS

#### A. EFFECT OF PROPOSED CHANGES:

##### Present Situation

In general, in an exchange between a buyer and a seller, the seller conveys to the buyer with either an express or an implied warranty of fitness and merchantability.<sup>1</sup> Florida has adopted the Uniform Commercial Code (UCC), which provides an implied warranty of merchantability for the sale of goods.<sup>2</sup> However, the UCC does not apply to the sale of real property, and furthermore, it does not apply to affixed buildings upon real property.<sup>3</sup>

Florida courts have created a common law implied warranty of fitness and merchantability for the purchase of real estate.<sup>4</sup> For the warranty to apply, there must be privity between the builder and the first purchaser.<sup>5</sup> This common law implied warranty applies to realty which is affixed to the real property, as opposed to fixtures that can be removed from the real property without damage to the premises.<sup>6</sup> For example, a window unit air conditioner is a fixture, while a central air system is realty.<sup>7</sup> In another case, a court decided that a seawall abutting a lot is not covered by the implied warranty.<sup>8</sup>

Florida courts have previously ruled that an implied warranty only applies to first purchasers of real estate in Florida and is extended only to the construction of a home or other improvements immediately supporting the residence.<sup>9</sup> That was understood to be the law until recently, when a conflicting decision in the 5th DCA held that roads and drainage ditches of a subdivision were within the scope of the common law implied warranty of fitness and merchantability.<sup>10</sup> This decision extended the doctrine beyond what the Supreme Court had previously allowed and directly conflicted with a prior DCA decision, which followed the Supreme Court's reasoning. The 5th DCA case noted, "[w]e also reject the Developer's argument that extending the implied warranties is a matter for the legislature. In the absence of a legislative pronouncement, we are free to apply common law, and this is a case of application of common law warranties."<sup>11</sup>

##### Effects of Proposed Changes

This bill creates s. 553.835, F.S., within the Florida Building Codes Act. This bill contains a Legislative finding that courts have reached different conclusions concerning the scope and extent of the common law doctrine of implied warranty of fitness and merchantability or habitability for improvements immediately supporting the structure of a new home. The bill proclaims the Legislature's intent to affirm the limits to the doctrine of implied warranty of fitness and merchantability or habitability associated with the construction of a new home.

The bill defines "off-site improvement" as the street, road, driveway, sidewalk, drainage, utilities, or any other improvement or structure that is not located on or under the lot on which a new home is constructed, except such improvements that are shared by and part of the overall structure of two or more separately owned homes that are attached, if such improvements affect the fitness and

<sup>1</sup> See, e.g., s. 672.301, F.S., et. seq, the Florida Uniform Commercial Code regarding general obligation and construction of contract.

<sup>2</sup> Section 672.314, F.S.

<sup>3</sup> Section 672.105, F.S., defines "goods" as all things (including specially manufactured goods) which are movable at the time of identification to the contract for sale. . ."

<sup>4</sup> *Gable v. Silver*, 258 So.2d 11 (Fla. 4th DCA 1972).

<sup>5</sup> *Strathmore Riverside Villas Condominium Ass'n, Inc. v. Paver Development Corp.*, 369 So.2d 971 (Fla. 2d DCA 1979).

<sup>6</sup> *Id.* at 14.

<sup>7</sup> *Id.*

<sup>8</sup> *Conklin v. Hurley*, 428 So.2d 654 (Fla. 1983).

<sup>9</sup> *Port Sewall Harbor & Tennis Club Owners Ass'n v. First Fed. S. & L. Ass'n.*, 463 So.2d 530, 531 (Fla. 4th DCA 1985).

<sup>10</sup> *Lakeview Reserve Homeowners et. al. v. Maronda Homes, Inc., et. al.*, 48 So.3d 902, 908 (Fla. 5th DCA 2010).

<sup>11</sup> *Id.* at 909. The Supreme Court has jurisdiction due to a certified conflict and heard oral arguments on December 6, 2011, to resolve the issue, however, a decision has not yet been released.

merchantability or habitability of one or more of the other adjoining structures. "Off-site improvement" also includes the street, road, driveway, sidewalk, drainage, utilities, or any other improvement or structure that is located on or under the lot but that does not immediately and directly support the habitability of the home itself.

The bill provides that there is no cause of action in law or equity for the purchaser of a home or to a homeowners' association based upon the doctrine of implied warranty of fitness and merchantability or habitability for off-site improvements, except as otherwise provided by statute, with specific reference to ss. 718.203 and 719.203, F.S., relating to condominiums and cooperatives.

The bill contains a severability clause.

The bill provides an effective date of July 1, 2012, and applies retroactively to all cases accruing before, pending on, or filed after the effective date.

**B. SECTION DIRECTORY:**

Section 1 creates s. 553.835, F.S., relating to implied warranties.

Section 2 provides a severability clause.

Section 3 provides an effective date of July 1, 2012.

**II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT**

**A. FISCAL IMPACT ON STATE GOVERNMENT:**

1. Revenues:

The bill does not appear to have any impact on state revenues.

2. Expenditures:

The bill does not appear to have any impact on state expenditures.

**B. FISCAL IMPACT ON LOCAL GOVERNMENTS:**

1. Revenues:

The bill does not appear to have any impact on local government revenues.

2. Expenditures:

The bill does not appear to have any impact on local government expenditures.

**C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:**

The bill does not appear to have any direct economic impact on the private sector.

**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 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 bill takes effect on July 1, 2012, and contains a provision applying the bill to all cases accruing before, pending on, or filed after that date. This provision gives the bill retroactive application.

To determine whether a statute should be retroactively applied, courts apply two interrelated inquiries. First, courts determine whether there is clear evidence of legislative intent to apply the statute retrospectively. If so, then courts determine whether retroactive application is constitutionally permissible.<sup>12</sup>

The bill clearly intends to apply retroactively, so only the second inquiry need be considered. A retrospective provision is not necessarily invalid. It is only invalid in those cases wherein vested rights are adversely affected or destroyed. Generally, due process considerations prevent the state from retroactively abolishing vested rights.<sup>13</sup> To be vested, a right must be more than a mere expectation based on an anticipation of the continuance of an existing law.<sup>14</sup> It must be an immediate, fixed right of present or future enjoyment.<sup>15</sup>

A statute does not operate retrospectively merely because it is applied in a case arising from conduct prior to the statute's enactment. Rather, the court looks to whether the new provision attaches new legal consequences to events completed before its enactment. Retroactive application of a civil statute is generally unconstitutional if the statute impairs vested rights, creates new obligations, or imposes new penalties.<sup>16</sup>

In one case, the Florida Supreme Court struck down a law that applied bad faith penalties against insurers retroactively because the penalty would have been over \$200,000 higher if they had applied the statute retroactively.<sup>17</sup> In another case, the Supreme Court upheld a statute enacted soon after a controversy as to the interpretation of the original law, reasoning that the Legislature was not making a substantive change, but rather clarifying the original intent of the law.<sup>18</sup> A statute barring a suit against a governmental employee, intended to apply retroactively, was struck down under the due process clause in art. I, s. 9 of the Florida Constitution because the plaintiff's right to sue had become vested "since the suit was filed long before the statute was amended."<sup>19</sup> However, a retroactive statute was upheld because the class subject to the statute was on fair notice that a statutory provision for curing a violation was not a vested right, but rather a matter of legislative grace that could be withdrawn by subsequent legislative action.<sup>20</sup>

Once a cause of action has accrued, the right to pursue that cause of action is generally considered a vested right and a statute that becomes effective subsequently may not be applied to eliminate or

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<sup>12</sup> *Metropolitan Dade County v. Chase Federal Housing Corp.*, 737 So.2d 494, 499 (Fla. 1999).

<sup>13</sup> *Id.* at 503.

<sup>14</sup> *R.A.M. of South Florida, Inc. v. WCI Communities, Inc.*, 869 So.2d 1210, 1218 (Fla. 2nd DCA 2004).

<sup>15</sup> *Florida Hosp. Waterman, Inc. v. Buster*, 948 So.2d 478, 490 (Fla. 2008).

<sup>16</sup> *R.A.M.* at 1216.

<sup>17</sup> *State Farm Mut. Auto. Ins. Co. v. Laforet*, 658 So.2d 55 (Fla. 1995).

<sup>18</sup> *Lowry v. Parole and Probation Com'n*, 473 So.2d 1248 (Fla. 1985).

<sup>19</sup> *Bryant v. School Bd. of Duval County, Fla.*, 399 So.2d 417 (Fla. 1st DCA 1981).

<sup>20</sup> *R.A.M.* at 1217.

curtail the cause of action. Likewise, it is impermissible for a statute to be applied to prevent the enforcement of a judgment obtained before the effective date of the statute.<sup>21</sup>

**B. RULE-MAKING AUTHORITY:**

The bill does not appear to create a need for rulemaking or rulemaking authority.

**C. DRAFTING ISSUES OR OTHER COMMENTS:**

None.

**IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES**

On January 31, 2012, the Civil Justice Subcommittee adopted two amendments and reported the bill favorably as a committee substitute. The amendments remove a definition; provide that there is no cause of action available to a homeowners' association under the doctrine of implied warranty of fitness and merchantability or habitability; and provide that this bill does not alter statutory warranties applicable to condominium or cooperative associations.

This analysis is drafted to the committee substitute as passed by the Civil Justice Subcommittee.

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<sup>21</sup> *American Optical Corp. v. Spiewak*, 73 So.3d 120, 126 (Fla. 2011).

1 A bill to be entitled  
 2 An act relating to residential construction  
 3 warranties; creating s. 553.835, F.S.; providing  
 4 legislative findings; providing legislative intent to  
 5 affirm the limitations to the doctrine or theory of  
 6 implied warranty of fitness and merchantability or  
 7 habitability associated with the construction and sale  
 8 of a new home; providing a definition; prohibiting a  
 9 cause of action in law or equity based upon the  
 10 doctrine or theory of implied warranty of fitness and  
 11 merchantability or habitability for damages to offsite  
 12 improvements; providing that the existing rights of  
 13 purchasers of homes or homeowners' associations to  
 14 pursue certain causes of action are not altered or  
 15 limited; providing for applicability of the act;  
 16 providing for severability; providing an effective  
 17 date.

18  
 19 WHEREAS, the Legislature recognizes and agrees with the  
 20 limitations on the applicability of the doctrine or theory of  
 21 implied warranty of fitness and merchantability or habitability  
 22 for a new home as established in the seminal cases of *Gable v.*  
 23 *Silver*, 258 So.2d 11 (Fla. 4th DCA 1972) adopted and cert. *dism*,  
 24 264 So.2d 418 (Fla. 1972); *Conklin v. Hurley*, 428 So.2d 654  
 25 (Fla. 1983); and *Port Sewall Harbor & Tennis Club Owners Ass'n*  
 26 *v. First Fed. S. & L. Ass'n.*, 463 So.2d 530 (Fla. 4th DCA 1985),  
 27 and does not wish to expand any prospective rights,  
 28 responsibilities, or liabilities resulting from these decisions,

29 and

30 WHEREAS, the recent decision by the Fifth District Court of  
31 Appeal rendered in October of 2010, in *Lakeview Reserve*  
32 *Homeowners et. al. v. Maronda Homes, Inc., et. al.*, 48 So.3d 902  
33 (Fla. 5th DCA, 2010), expands the doctrine or theory of implied  
34 warranty of fitness and merchantability or habitability for a  
35 new home to the construction of roads, drainage systems,  
36 retention ponds, and underground pipes, which the court  
37 described as essential services, supporting a new home, and

38 WHEREAS, the Legislature finds, as a matter of public  
39 policy, that the *Maronda* case goes beyond the fundamental  
40 protections that are necessary for a purchaser of a new home and  
41 that form the basis for imposing an implied warranty of fitness  
42 and merchantability or habitability for a new home and creates  
43 uncertainty in the state's fragile real estate and construction  
44 industry, and

45 WHEREAS, it is the intent of the Legislature to reject the  
46 decision by the Fifth District Court of Appeal in the *Maronda*  
47 case insofar as it expands the doctrine or theory of implied  
48 warranty and fitness and merchantability or habitability for a  
49 new home to include essential services as defined by the court,  
50 NOW THEREFORE,

51

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

53

54 Section 1. Section 553.835, Florida Statutes, is created  
55 to read:

56 553.835 Implied warranties.—

57 (1) The Legislature finds that the courts have reached  
 58 different conclusions concerning the scope and extent of the  
 59 common law doctrine or theory of implied warranty of fitness and  
 60 merchantability or habitability for improvements immediately  
 61 supporting the structure of a new home, which creates  
 62 uncertainty in the state's fragile real estate and construction  
 63 industry.

64 (2) It is the intent of the Legislature to affirm the  
 65 limitations to the doctrine or theory of implied warranty of  
 66 fitness and merchantability or habitability associated with the  
 67 construction and sale of a new home.

68 (3) As used in this section, the term "offsite  
 69 improvement" means:

70 (a) The street, road, driveway, sidewalk, drainage,  
 71 utilities, or any other improvement or structure that is not  
 72 located on or under the lot on which a new home is constructed,  
 73 excluding such improvements that are shared by and part of the  
 74 overall structure of two or more separately owned homes that are  
 75 adjoined or attached whereby such improvements affect the  
 76 fitness and merchantability or habitability of one or more of  
 77 the other adjoining structures; and

78 (b) The street, road, driveway, sidewalk, drainage,  
 79 utilities, or any other improvement or structure that is located  
 80 on or under the lot but that does not immediately and directly  
 81 support the fitness and merchantability or habitability of the  
 82 home itself.

83 (4) There is no cause of action in law or equity available  
 84 to a purchaser of a home or to a homeowners' association based



CS/HB 1013

2012

85 upon the doctrine or theory of implied warranty of fitness and  
 86 merchantability or habitability for damages to offsite  
 87 improvements. However, this section does not alter or limit the  
 88 existing rights of purchasers of homes or homeowners'  
 89 associations to pursue any other cause of action arising from  
 90 defects in offsite improvements based upon contract, tort, or  
 91 statute, including, but not limited to, ss. 718.203 and 719.203.

92 Section 2. If any provision of the act or its application  
 93 to any person or circumstance is held invalid, the invalidity  
 94 does not affect other provisions or applications of the act  
 95 which can be given effect without the invalid provision or  
 96 application, and to this end the provisions of this act are  
 97 severable.

98 Section 3. This act shall take effect July 1, 2012, and  
 99 applies to all cases accruing before, pending on, or filed after  
 100 that date.



HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/HB 1099 Stalking and Aggravated Stalking  
SPONSOR(S): Criminal Justice Subcommittee; Plakon and others  
TIED BILLS: None IDEN./SIM. BILLS: CS/SB 950

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Criminal Justice Subcommittee	9 Y, 0 N, As CS	Krol	Cunningham
2) Judiciary Committee		Krol TK	Havlicak RH

SUMMARY ANALYSIS

The bill makes a variety of changes to s. 784.048, F.S., the stalking statute. Specifically, the bill:

- Revises stalking-related definitions, primarily the definition of "credible threat."
- Creates a statutory cause of action for an injunction for protection against stalking and cyberstalking.
- Provides a first degree misdemeanor penalty for violating an injunction against stalking or cyberstalking.
- Requires the court, for any sentence, to consider issuing an injunction restraining a defendant from victim contact for up to ten years.

The bill may have an impact on local government because the bill creates a first degree misdemeanor penalty for persons who violate an injunction against stalking or cyberstalking. This could have a negative jail bed impact for counties and municipalities.

The bill is effective October 1, 2012.

## FULL ANALYSIS

### I. SUBSTANTIVE ANALYSIS

#### A. EFFECT OF PROPOSED CHANGES:

##### **Stalking**

Section 784.048, F.S., criminalizes the offenses of stalking and aggravated stalking. Stalking is a first degree misdemeanor<sup>1</sup> and is committed when a person willfully, maliciously, and repeatedly follows, harasses, or cyberstalks another person.<sup>2</sup>

Section 784.048, F.S., establishes four aggravated stalking offenses, each of which is a third degree felony:<sup>3</sup>

- Subsection (3) provides that aggravated stalking occurs when a person willfully, maliciously, and repeatedly follows, harasses, or cyberstalks another person while making a credible threat with the intent to place that person in reasonable fear of death or bodily injury for himself, his child, sibling, spouse, parent, or dependent.
- Subsection (4) provides that aggravated stalking occurs when a person, after an injunction for protection against repeat violence, sexual violence, dating violence, domestic violence, or any other court imposed prohibition of conduct toward the subject person or his property, knowingly, willfully, maliciously, and repeatedly follows, harasses, or cyberstalks that person.
- Subsection (5) provides that aggravated stalking occurs when a person willfully, maliciously, and repeatedly follows, harasses, or cyberstalks a minor under 16 years of age.
- Subsection (7) provides that aggravated stalking occurs when a person, after being sentenced for sexual battery, a lewd or lascivious offense, or lewd or lascivious exhibition via computer transmission and after having been issued a no contact order under s. 921.244, F.S., willfully, maliciously, and repeatedly follows, harasses, or cyberstalks the victim.

Section 748.048, F.S., provides the following definitions:

- “Harass” means engaging in a course of conduct directed at a specific person that causes substantial emotional distress and serves no legitimate purpose.<sup>4</sup>
- “Course of conduct” means “a pattern of conduct composed of a series of acts over a period of time, however short, evidencing a continuity of purpose.”<sup>5</sup>
- “Credible threat” means “a threat made with the intent to cause the person who is the target of the threat to reasonably fear for his or her safety. The threat must be against the life of, or a threat to cause bodily injury to, a person.”<sup>6</sup>
- “Cyberstalk” means engaging in a course of conduct to communicate through words or images by electronic communication, directed at a specific person, causing substantial emotional distress to that person and serving no legitimate purpose.<sup>7</sup>

In 1995, the constitutionality of Florida’s stalking statute was upheld by the Florida Supreme Court against an overbreadth and vagueness challenge.<sup>8</sup>

##### *Effect of the Bill*

The bill substantively changes the definition of the term “credible threat” to “a verbal or nonverbal threat, including a threat delivered by electronic communication or a threat implied by a pattern of conduct, or a combination of the two, which places the person who is the target of the threat in

<sup>1</sup> Punishable by up to one year in jail and a fine of up to \$1,000. Sections 775.082 and 775.083, F.S.

<sup>2</sup> Section 784.048(2), F.S.

<sup>3</sup> Punishable by up to 5 years imprisonment and a fine of up to \$5,000. Sections 775.082 and 775.083, F.S.

<sup>4</sup> Section 784.048(1)(a), F.S.

<sup>5</sup> Section 784.048(1)(b), F.S.

<sup>6</sup> Section 784.048(1)(c), F.S.

<sup>7</sup> Section 784.048(1)(d), F.S.

<sup>8</sup> *Bouters v. State*, 659 So.2d 235 (Fla. 1995), *cert.denied*, 516 U.S. 894 (1995).

reasonable fear for his or her safety or the safety of his or her immediate family or household member...<sup>9</sup> and which is made with the apparent ability to carry out the threat to cause such harm.” The bill provides that it is not necessary to prove that the person making the threat had the intent to actually carry out the threat and that the present incarceration of the person making the threat is not a bar to prosecution.

The bill also deletes the current language requiring that the threat be against the life of, or a threat to cause bodily injury to, a person.

The bill adds the definition of “immediate family” as “a person’s spouse, parent, child, grandparent, or sibling.”

The bill removes “intent to place the person in reasonable fear of death or bodily injury” as an element of aggravated stalking as defined in s. 784.048(3), F.S. Consequently, under subsection (3), aggravated stalking occurs when a person willfully, maliciously, and repeatedly follows, harasses, or cyberstalks another person, and makes a credible threat to that person.

The bill allows the sentencing court to consider, as part of any sentence, issuing an injunction restraining the defendant from any victim contact for up to ten years. The bill expresses legislative intent that the length of the restraining order be based upon the seriousness of the case facts, the probability of future violations, and the victim’s safety. The court may issue the injunction regardless of whether the defendant is in prison, county jail, or has his or her sentence suspended and is placed on probation.

### **Injunctions for Protection against Domestic Violence, Repeat Violence, Sexual Violence, or Dating Violence**

A victim of domestic violence<sup>10</sup> or a person who has reasonable cause to believe that he or she is in imminent danger of becoming a victim of domestic violence may seek protective injunctive relief.<sup>11</sup> In seeking protective injunctive relief, a person must file a sworn petition with the court that alleges the existence of domestic violence and includes specific facts and circumstances upon which relief is sought.<sup>12</sup> The court must set a hearing at the earliest possible time after a petition is filed.<sup>13</sup> The respondent must be personally served with a copy of the petition, financial affidavit, Uniform Child Custody Jurisdiction and Enforcement Act affidavit (if any), notice of hearing, and any temporary injunction that has been issued.<sup>14</sup>

The court can enforce a violation of an injunction through a civil or criminal contempt proceeding, or the state attorney may prosecute it as a first degree misdemeanor<sup>15</sup> under s. 741.31, F.S.<sup>16</sup> Either party may move the court to modify or dissolve an injunction at any time.<sup>17</sup>

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<sup>9</sup> As defined in s. 741.28, F.S., which defines “family or household member” as “spouses, former spouses, persons related by blood or marriage, persons who are presently residing together as if a family or who have resided together in the past as if a family, and persons who are parents of a child in common regardless of whether they have been married. With the exception of persons who have a child in common, the family or household members must be currently residing or have in the past resided together in the same single dwelling unit.”

<sup>10</sup> Section 741.28(2), F.S., defines “domestic violence” as “any assault, aggravated assault, battery, aggravated battery, sexual assault, sexual battery, stalking, aggravated stalking, kidnapping, false imprisonment, or any criminal offense resulting in physical injury or death of one family or household member by another family or household member.”

<sup>11</sup> Section 741.30(1), F.S.

<sup>12</sup> Section 741.30(3), F.S.

<sup>13</sup> Section 741.30(4), F.S.

<sup>14</sup> *Id.* When an immediate and present danger of domestic violence exists, the court may grant a temporary injunction ex parte, pending a full hearing. Section 741.30(5), F.S.

<sup>15</sup> Punishable by up to 1 year imprisonment or a fine of up to \$1,000.

<sup>16</sup> Section 741.30(9), F.S.

<sup>17</sup> Section 741.30(10), F.S.

Section 784.046, F.S., governs the issuance of injunctions for protection against repeat violence,<sup>18</sup> dating violence,<sup>19</sup> and sexual violence.<sup>20</sup> This statute largely parallels the provisions discussed above regarding the domestic violence injunction.

Currently, a statutory cause of action does not exist *specifically* for an injunction for protection against stalking or aggravated stalking. As such, persons desiring an injunction based on stalking behavior must pursue injunctive relief through the domestic violence or the repeat violence injunction statutes outlined above, which each include stalking and/or aggravated stalking as a basis for petitioning for an injunction.

- Domestic violence injunctions require stalking or aggravated stalking resulting in physical injury or death of one family or household member by another member.<sup>21</sup>
- Dating violence injunctions require stalking or aggravated stalking resulting in physical injury or death between individuals who have or have had a continuing and significant relationship of a romantic or intimate nature.<sup>22</sup>
- Repeat violence injunctions require two incidents of stalking or aggravated stalking, one being within six months of the petition's filing, which are directed against the petitioner or an immediate family member.<sup>23</sup>

#### *Effect of the Bill*

The bill creates a statutory cause of action for an injunction for protection against stalking and cyberstalking, which is substantially similar to the current causes of action for injunctions for protection against domestic violence, repeat violence, sexual violence, and dating violence. The cause of action that the bill establishes, however, does not include a requirement that physical injury or death be involved.

The bill provides the following procedures and protections for obtaining a temporary or final injunction against stalking or cyberstalking, which are similar to those currently existing for domestic violence and repeat violence injunctions:

- A stalking victim may file a sworn petition for an injunction for protection against stalking or cyberstalking in circuit court.
- The petition for protection must allege the incidents of stalking or cyberstalking and include specific facts and circumstances upon which relief is sought.
- The court may not require the petitioner to file a bond upon the issuance of the injunction, nor pay a filing fee.
- Upon filing the petition, the court must set a hearing at the earliest time possible. The respondent must be personally served with a copy of the petition, notice of hearing, and temporary injunction, if any, before the hearing.

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<sup>18</sup> Section 784.046(1)(b), F.S., defines "repeat violence" as "two incidents of violence or stalking committed by the respondent, one of which must have been within 6 months of the filing of the petition, which are directed against the petitioner or the petitioner's immediate family member." Section 784.046(1)(a), F.S., defines "violence" as "any assault, aggravated assault, battery, aggravated battery, sexual assault, sexual battery, stalking, aggravated stalking, kidnapping, or false imprisonment, or any criminal offense resulting in physical injury or death, by a person against any other person."

<sup>19</sup> Section 784.046(1)(d), F.S., defines "dating violence" as "violence between individuals who have or have had a continuing and significant relationship of a romantic or intimate nature." The following factors come into play when determining the existence of such a relationship: (1) a dating relationship must have existed within the past six months; (2) the nature of the relationship must have been characterized by the expectation of affection or sexual involvement between the parties; and (3) the persons involved in the relationship must have been involved over time and on a continuous basis during the course of the relationship. Dating violence does not include violence in a casual acquaintanceship or between individuals who have only engaged in ordinary fraternization.

<sup>20</sup> Section 784.046(1)(c), F.S., defines "sexual violence" as "any one incident of: 1. Sexual battery, as defined in ch. 794, F.S.; 2. A lewd or lascivious act, as defined in ch. 800, F.S., committed upon or in the presence of a person younger than 16 years of age; 3. Luring or enticing a child, as described in ch. 787, F.S.; 4. Sexual performance by a child, as described in ch. 827, F.S.; or 5. Any other forcible felony wherein a sexual act is committed or attempted." For purposes of this definition, it does not matter whether criminal charges based on the incident were filed, reduced, or dismissed by the state attorney.

<sup>21</sup> Section 741.30(3)(b), F.S.

<sup>22</sup> See s. 784.046(1)(a) and (d), F.S., for the definitions of "violence" and "dating violence," respectively.

<sup>23</sup> See s. 784.046(1)(a) and (b), F.S., for the definitions of "violence" and "repeat violence," respectively.

- If it appears to the court that an immediate and present danger of stalking or cyberstalking exists, the court may grant a temporary injunction ex parte, pending a full hearing.
- The terms of an injunction restraining the respondent or ordering other relief for the protection of the victim remain in effect until modified or dissolved.
- The clerk of the court must provide the petitioner with a certified copy of the protective injunction entered by the court.
- A final judgment on an injunction for protection against stalking or cyberstalking provides that it is a violation of s. 790.233, F.S., and a first degree misdemeanor for the respondent to have in his or her care, custody, possession, or control any firearm or ammunition.
- Within 24 hours after the court issues the injunction, the clerk of the court must forward a certified copy of the injunction for service to the sheriff.
- Within 24 hours after receiving the injunction, the sheriff must make information related to the injunction available to other law enforcement agencies by electronically transmitting the information to the Florida Department of Law Enforcement.

The bill also creates a first degree misdemeanor penalty<sup>24</sup> for violating an injunction against stalking or cyberstalking, similar to the current criminal penalty that exists for violating a domestic violence or repeat violence injunction.

The bill also provides that a person who suffers an injury or loss as a result of a violation of an injunction for protection against stalking or cyberstalking may be awarded economic damages<sup>25</sup> for that injury or loss by the court issuing the injunction.

#### B. SECTION DIRECTORY:

Section 1. Amends s. 784.048, F.S., relating to stalking; definitions; penalties.

Section 2. Creates s. 784.0485, F.S., relating to stalking or cyberstalking; injunction; powers and duties of court and clerk; petition; notice and hearing; temporary injunction; issuance of injunction; statewide verification system; enforcement.

Section 3. Creates s. 784.0487, F.S., relating to violation of an injunction for protection against stalking or cyberstalking.

Section 4. Provides an effective date of October 1, 2012.

## II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

#### A. FISCAL IMPACT ON STATE GOVERNMENT:

##### 1. Revenues:

The bill does not appear to have any impact on state revenues.

##### 2. Expenditures:

The bill does not appear to have any impact on state expenditures.

#### B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

##### 1. Revenues:

The bill does not appear to have any impact on local government revenues.

<sup>24</sup> Punishable by up to one year in jail and a fine of up to \$1,000. Sections 775.082 and 775.083, F.S.

<sup>25</sup> The bill provides that damages includes costs and attorney fees for enforcement of the injunction.

2. Expenditures:

The bill creates a first degree misdemeanor penalty for persons who violate an injunction against stalking or cyberstalking. The bill also provides that it is a violation of s. 790.233, F.S., and a first degree misdemeanor for the respondent to have in his or her care, custody, possession, or control any firearm or ammunition. This could have a negative jail bed impact for counties and municipalities.

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:

The bill does not appear to create a need for rulemaking or rulemaking authority.

C. DRAFTING ISSUES OR OTHER COMMENTS:

The bill provides that it is a violation of s. 790.233, F.S., and a first degree misdemeanor for the respondent to have in his or her care, custody, possession, or control any firearm or ammunition. However, s. 790.233, F.S., contains no reference specifying violations related to s. 784.0485, F.S., which is created by the bill.

### IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

On January 31, 2012, the Criminal Justice Subcommittee adopted a strike all amendment and reported the bill favorably as a committee substitute. The amendment:

- Deletes the enhanced criminal penalties for aggravated stalking and the conforming changes to the Criminal Punishment Code.
- Deletes the provision that required a court to order defendants found guilty of stalking or aggravated stalking to batterers' intervention program.
- Provides procedures and protections for obtaining a temporary or final injunction against stalking or cyberstalking.
- Provides a first degree misdemeanor penalty for violating an injunction against stalking or cyberstalking.

The analysis is drafted to the committee substitute as passed by the Criminal Justice Subcommittee.



1                                   A bill to be entitled  
 2           An act relating to stalking and aggravated stalking;  
 3           amending s. 784.048, F.S.; redefining the terms  
 4           "course of conduct" and "credible threat" and defining  
 5           the term "immediate family"; providing that a person  
 6           who makes a threat which places another person in  
 7           reasonable fear for his or her safety or the safety of  
 8           his or her immediate family commits the offense of  
 9           aggravated stalking under certain circumstances;  
 10          requiring that the sentencing court consider issuing  
 11          an injunction that restrains a defendant from any  
 12          contact with the victim for up to 10 years; providing  
 13          legislative intent regarding the length of any such  
 14          restraining order; creating s. 784.0485, F.S.;

15          creating a civil cause of action for an injunction for  
 16          protection against stalking or cyberstalking;  
 17          providing that the victim of stalking or cyberstalking  
 18          has standing in the circuit court to file a sworn  
 19          petition for an injunction for protection against  
 20          stalking or cyberstalking; prohibiting a court from  
 21          issuing mutual orders of protection, but authorizing  
 22          the court to issue a separate injunction for  
 23          protection against stalking or cyberstalking if each  
 24          party has complied with the provisions of law;  
 25          providing for venue of the cause of action;  
 26          prohibiting the clerk of the court from assessing a  
 27          filing fee; providing an exception; providing that a  
 28          petitioner is not required to post a bond; requiring

29 | the clerks of court to assist petitioners in filing  
 30 | petitions with the court; requiring the clerk of the  
 31 | court in each county to make available informational  
 32 | brochures; providing a sample petition for an  
 33 | injunction for protection against stalking or  
 34 | cyberstalking; authorizing the court to grant a  
 35 | temporary injunction ex parte, pending a full hearing,  
 36 | under certain circumstances; authorizing the court to  
 37 | grant such relief as the court deems necessary and  
 38 | proper; providing procedures for an ex parte  
 39 | injunction hearing; setting forth the relief the court  
 40 | may grant if it finds that the petitioner is in  
 41 | imminent danger of becoming a victim of stalking or  
 42 | cyberstalking; setting forth the criteria the court  
 43 | must consider at the hearing; requiring the court to  
 44 | allow an advocate from a state attorney's office, law  
 45 | enforcement agency, or certified domestic violence  
 46 | center to be present with the petitioner or respondent  
 47 | during any court proceeding; requiring the clerk of  
 48 | the court to furnish a copy of the petition, notice of  
 49 | hearing, and temporary injunction, if any, to the  
 50 | sheriff or a law enforcement agency of the county  
 51 | where the respondent resides or can be found, who  
 52 | shall serve it upon the respondent as soon thereafter  
 53 | as possible on any day of the week and at any time of  
 54 | the day or night; authorizing the court to order a law  
 55 | enforcement officer to accompany the petitioner;  
 56 | authorizing the court to enforce a violation of an

57 | injunction for protection against stalking or  
 58 | cyberstalking through a civil or criminal contempt  
 59 | proceeding; authorizing a state attorney to use  
 60 | criminal procedures for a violation of an injunction  
 61 | for protection; creating s. 784.0487, F.S.; providing  
 62 | procedures to follow when the respondent has violated  
 63 | the injunction for protection; providing legislative  
 64 | intent; providing criminal penalties; providing that a  
 65 | court may award a person who suffers an injury or loss  
 66 | as a result of a violation of an injunction for  
 67 | protection against stalking or cyberstalking economic  
 68 | damages for that injury or loss, including costs and  
 69 | attorney fees for enforcement of the injunction;  
 70 | providing an effective date.

71 |  
 72 | Be It Enacted by the Legislature of the State of Florida:

73 |  
 74 | Section 1. Section 784.048, Florida Statutes, is amended  
 75 | to read:

76 | 784.048 Stalking; definitions; penalties.—

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

78 | (a) "Harass" means to engage in a course of conduct  
 79 | directed at a specific person which ~~that~~ causes substantial  
 80 | emotional distress to that ~~in such~~ person and serves no  
 81 | legitimate purpose.

82 | (b) "Course of conduct" means a pattern of conduct  
 83 | composed of a series of acts over a period of time, however  
 84 | short, which evidence ~~evidencing~~ a continuity of purpose. The

85 term does not include constitutionally protected activity such  
 86 as is not included within the meaning of "course of conduct."  
 87 ~~Such constitutionally protected activity includes picketing or~~  
 88 other organized protests.

89 (c) "Credible threat" means a verbal or nonverbal threat,  
 90 including a threat delivered by electronic communication or a  
 91 threat implied by a pattern of conduct, or a combination of the  
 92 two, which places the person who is the target of the threat in  
 93 reasonable fear for his or her safety or the safety of his or  
 94 her immediate family or household member, as defined in s.  
 95 741.28, and which is made with the apparent ability to carry out  
 96 the threat to cause such harm. It is not necessary to prove that  
 97 the person making the threat had the intent to actually carry  
 98 out the threat. The present incarceration of the person making  
 99 the threat is not a bar to prosecution under this section ~~made~~  
 100 ~~with the intent to cause the person who is the target of the~~  
 101 ~~threat to reasonably fear for his or her safety. The threat must~~  
 102 ~~be against the life of, or a threat to cause bodily injury to, a~~  
 103 ~~person.~~

104 (d) "Cyberstalk" means to engage in a course of conduct to  
 105 communicate, or to cause to be communicated, words, images, or  
 106 language by or through the use of electronic mail or electronic  
 107 communication, directed at a specific person, causing  
 108 substantial emotional distress to that person and serving no  
 109 legitimate purpose.

110 (e) "Immediate family" means a person's spouse, parent,  
 111 child, grandparent, or sibling.

112 (2) A ~~Any~~ person who willfully, maliciously, and

113 repeatedly follows, harasses, or cyberstalks another person  
 114 commits the offense of stalking, a misdemeanor of the first  
 115 degree, punishable as provided in s. 775.082 or s. 775.083.

116 (3) A ~~Any~~ person who willfully, maliciously, and  
 117 repeatedly follows, harasses, or cyberstalks another person, and  
 118 makes a credible threat to that person ~~with the intent to place~~  
 119 ~~that person in reasonable fear of death or bodily injury of the~~  
 120 ~~person, or the person's child, sibling, spouse, parent, or~~  
 121 ~~dependent,~~ commits the offense of aggravated stalking, a felony  
 122 of the third degree, punishable as provided in s. 775.082, s.  
 123 775.083, or s. 775.084.

124 (4) A ~~Any~~ person who, after an injunction for protection  
 125 against repeat violence, sexual violence, or dating violence  
 126 pursuant to s. 784.046, or an injunction for protection against  
 127 domestic violence pursuant to s. 741.30, or after any other  
 128 court-imposed prohibition of conduct toward the subject person  
 129 or that person's property, knowingly, willfully, maliciously,  
 130 and repeatedly follows, harasses, or cyberstalks another person  
 131 commits the offense of aggravated stalking, a felony of the  
 132 third degree, punishable as provided in s. 775.082, s. 775.083,  
 133 or s. 775.084.

134 (5) A ~~Any~~ person who willfully, maliciously, and  
 135 repeatedly follows, harasses, or cyberstalks a child ~~minor~~ under  
 136 16 years of age commits the offense of aggravated stalking, a  
 137 felony of the third degree, punishable as provided in s.  
 138 775.082, s. 775.083, or s. 775.084.

139 (6) A ~~Any~~ law enforcement officer may arrest, without a  
 140 warrant, any person that he or she has probable cause to believe

141 | has violated ~~the provisions of~~ this section.

142 |       (7) A ~~Any~~ person who, after having been sentenced for a  
 143 | violation of s. 794.011, s. 800.04, or s. 847.0135(5) and  
 144 | prohibited from contacting the victim of the offense under s.  
 145 | 921.244, willfully, maliciously, and repeatedly follows,  
 146 | harasses, or cyberstalks the victim commits the offense of  
 147 | aggravated stalking, a felony of the third degree, punishable as  
 148 | provided in s. 775.082, s. 775.083, or s. 775.084.

149 |       (8) The punishment imposed under this section shall run  
 150 | consecutive to any former sentence imposed for a conviction for  
 151 | any offense under s. 794.011, s. 800.04, or s. 847.0135(5).

152 |       (9) (a) The sentencing court shall consider, as a part of  
 153 | any sentence, issuing an injunction restraining the defendant  
 154 | from any contact with the victim, which may be valid for up to  
 155 | 10 years, as determined by the court. It is the intent of the  
 156 | Legislature that the length of any such restraining order be  
 157 | based upon the seriousness of the facts before the court, the  
 158 | probability of future violations by the perpetrator, and the  
 159 | safety of the victim and his or her immediate family.

160 |       (b) The injunction may be issued by the court even if the  
 161 | defendant is sentenced to a state prison or a county jail or  
 162 | even if the imposition of the sentence is suspended and the  
 163 | defendant is placed on probation.

164 |       Section 2. Section 784.0485, Florida Statutes, is created  
 165 | to read:

166 |       784.0485 Stalking or cyberstalking; injunction; powers and  
 167 | duties of court and clerk; petition; notice and hearing;  
 168 | temporary injunction; issuance of injunction; statewide

169 verification system; enforcement.-

170 (1) There is created a cause of action for an injunction  
 171 for protection against stalking or cyberstalking.

172 (a) A person who is the victim of stalking or  
 173 cyberstalking has standing in the circuit court to file a sworn  
 174 petition for an injunction for protection against stalking or  
 175 cyberstalking.

176 (b) The cause of action for an injunction for protection  
 177 may be sought regardless of whether any other cause of action is  
 178 currently pending between the parties. However, the pendency of  
 179 any such cause of action shall be alleged in the petition.

180 (c) The cause of action for an injunction may be sought by  
 181 any affected person.

182 (d) The cause of action for an injunction does not require  
 183 either party to be represented by an attorney.

184 (e) The court may not issue mutual orders of protection;  
 185 however, the court is not precluded from issuing separate  
 186 injunctions for protection against stalking or cyberstalking if  
 187 each party has complied with this section. Compliance with this  
 188 section may not be waived.

189 (f) Notwithstanding chapter 47, a petition for an  
 190 injunction for protection against stalking or cyberstalking may  
 191 be filed in the circuit where the petitioner currently or  
 192 temporarily resides, where the respondent resides, or where the  
 193 stalking or cyberstalking occurred. There is no minimum  
 194 requirement of residency to petition for an injunction for  
 195 protection.

196 (2) (a) Notwithstanding any other law, the clerk of court

197 may not assess a filing fee to file a petition for protection  
 198 against stalking or cyberstalking. However, subject to  
 199 legislative appropriation, the clerk of the circuit court may,  
 200 on a quarterly basis, submit to the Office of the State Courts  
 201 Administrator a certified request for reimbursement for  
 202 petitions for protection against stalking or cyberstalking  
 203 issued by the court, at the rate of \$40 per petition. The  
 204 request for reimbursement shall be submitted in the form and  
 205 manner prescribed by the Office of the State Courts  
 206 Administrator. From this reimbursement, the clerk shall pay any  
 207 law enforcement agency serving the injunction the fee requested  
 208 by the law enforcement agency; however, this fee may not exceed  
 209 \$20.

210 (b) A bond is not required by the court for the entry of  
 211 an injunction.

212 (c)1. The clerk of the court shall assist petitioners in  
 213 seeking both injunctions for protection against stalking and  
 214 enforcement of a violation thereof as specified in this section.

215 2. All offices of the clerk of the court shall provide  
 216 simplified petition forms for the injunction and any  
 217 modifications to and the enforcement thereof, including  
 218 instructions for completion.

219 3. The clerk of the court shall ensure the petitioner's  
 220 privacy to the extent practicable while completing the forms for  
 221 an injunction for protection against stalking or cyberstalking.

222 4. The clerk of the court shall provide a petitioner with  
 223 a minimum of two certified copies of the order of injunction,  
 224 one of which is serviceable and will inform the petitioner of



225 the process for service and enforcement.

226 5. The clerk of the court and appropriate staff in each  
227 county shall receive training in the effective assistance of  
228 petitioners as provided or approved by the Florida Association  
229 of Court Clerks.

230 6. The clerk of the court in each county shall make  
231 available informational brochures on stalking when such a  
232 brochure is provided by the local certified domestic violence  
233 center.

234 7. The clerk of the court in each county shall distribute  
235 a statewide uniform informational brochure to petitioners at the  
236 time of filing for an injunction for protection against stalking  
237 or cyberstalking when such brochures become available. The  
238 brochure must include information about the effect of giving the  
239 court false information.

240 (3) (a) The sworn petition shall allege the existence of  
241 such stalking or cyberstalking and shall include the specific  
242 facts and circumstances for which relief is sought.

243 (b) The sworn petition shall be in substantially the  
244 following form:

245  
246 PETITION FOR INJUNCTION FOR PROTECTION AGAINST STALKING

247  
248 Before me, the undersigned authority, personally appeared  
249 Petitioner....(Name)...., who has been sworn and says that  
250 the following statements are true:

- 251  
252 1. Petitioner resides at:....(address)....

- 253 (Petitioner may furnish the address to the court in a  
 254 separate confidential filing if, for safety reasons,  
 255 the petitioner requires the location of the current  
 256 residence to be confidential.)  
 257 2. Respondent resides at:....(last known address)....  
 258 3. Respondent's last known place of employment:....(name  
 259 of business and address)....  
 260 4. Physical description of respondent:....  
 261 5. Race....  
 262 6. Sex....  
 263 7. Date of birth....  
 264 8. Height....  
 265 9. Weight....  
 266 10. Eye color....  
 267 11. Hair color....  
 268 12. Distinguishing marks or scars....  
 269 13. Aliases of respondent:....

270  
 271 (c) The petitioner shall describe any other cause of  
 272 action currently pending between the petitioner and respondent.  
 273 The petitioner shall also describe any previous attempt by the  
 274 petitioner to obtain an injunction for protection against  
 275 stalking or cyberstalking in this or any other circuit, and the  
 276 result of that attempt. (Case numbers should be included, if  
 277 available.)

278 (d) The petition must provide space for the petitioner to  
 279 specifically allege that he or she is a victim of stalking or  
 280 cyberstalking because respondent has:

281  
282 (Mark all sections that apply and describe in the spaces below  
283 the incidents of stalking or cyberstalking specifying when and  
284 where they occurred, including, but not limited to, locations  
285 such as a home, school, or place of employment.)

286  
287 .... Committed or threatened to commit stalking.

288 .... Previously threatened, harassed, stalked,  
289 cyberstalked, or physically abused the petitioner.

290 .... Threatened to harm the petitioner or family members or  
291 individuals closely associated with the petitioner.

292 .... Intentionally injured or killed a family pet.

293 .... Used, or has threatened to use, against the petitioner  
294 any weapons such as guns or knives.

295 .... A criminal history involving violence or the threat of  
296 violence (if known).

297 .... Another order of protection issued against him or her  
298 previously or from another jurisdiction, if known.

299 .... Destroyed personal property, including, but not  
300 limited to, telephones or other communication equipment,  
301 clothing, or other items belonging to the petitioner.

302 (e) The petitioner seeks an injunction: (Mark appropriate  
303 section or sections.)

304 .... Immediately restraining the respondent from committing  
305 any acts of stalking or cyberstalking.

306 .... Restraining the respondent from committing any acts of  
307 stalking or cyberstalking.

308 .... Providing any terms the court deems necessary for the

309 protection of a victim of stalking or cyberstalking, including  
 310 any injunctions or directives to law enforcement agencies.

311 (f) Every petition for an injunction against stalking or  
 312 cyberstalking must contain, directly above the signature line, a  
 313 statement in all capital letters and bold type not smaller than  
 314 the surrounding text, as follows:

315  
 316 I HAVE READ EVERY STATEMENT MADE IN THIS PETITION AND  
 317 EACH STATEMENT IS TRUE AND CORRECT. I UNDERSTAND THAT  
 318 THE STATEMENTS MADE IN THIS PETITION ARE BEING MADE  
 319 UNDER PENALTY OF PERJURY, PUNISHABLE AS PROVIDED IN  
 320 SECTION 837.02, FLORIDA STATUTES.

321  
 322 ....(initials)....

323  
 324 (4) Upon the filing of the petition, the court shall set a  
 325 hearing to be held at the earliest possible time. The respondent  
 326 shall be personally served with a copy of the petition, notice  
 327 of hearing, and temporary injunction, if any, before the  
 328 hearing.

329 (5) (a) If it appears to the court that an immediate and  
 330 present danger of stalking or cyberstalking exists, the court  
 331 may grant a temporary injunction ex parte, pending a full  
 332 hearing, and may grant such relief as the court deems proper,  
 333 including an injunction restraining the respondent from  
 334 committing any act of stalking or cyberstalking.

335 (b) In a hearing ex parte for the purpose of obtaining  
 336 such ex parte temporary injunction, evidence other than verified

337 pleadings or affidavits may not be used as evidence, unless the  
 338 respondent appears at the hearing or has received reasonable  
 339 notice of the hearing. A denial of a petition for an ex parte  
 340 injunction shall be by written order noting the legal grounds  
 341 for denial. If the only ground for denial is no appearance of an  
 342 immediate and present danger of stalking or cyberstalking, the  
 343 court shall set a full hearing on the petition for injunction  
 344 with notice at the earliest possible time. This paragraph does  
 345 not affect a petitioner's right to promptly amend any petition,  
 346 or otherwise be heard in person on any petition consistent with  
 347 the Florida Rules of Civil Procedure.

348 (c) Any such ex parte temporary injunction is effective  
 349 for a fixed period not to exceed 15 days. A full hearing, as  
 350 provided in this section, shall be set for a date no later than  
 351 the date when the temporary injunction ceases to be effective.  
 352 The court may grant a continuance of the hearing before or  
 353 during a hearing for good cause shown by any party, which shall  
 354 include a continuance to obtain service of process. An  
 355 injunction shall be extended if necessary to remain in full  
 356 force and effect during any period of continuance.

357 (6) (a) Upon notice and hearing, when it appears to the  
 358 court that the petitioner is the victim of stalking or  
 359 cyberstalking, the court may grant such relief as the court  
 360 deems proper, including an injunction:

361 1. Restraining the respondent from committing any act of  
 362 stalking or cyberstalking.

363 2. Ordering the respondent to participate in treatment,  
 364 intervention, or counseling services to be paid for by the

365 respondent.

366 3. Referring a petitioner to a certified domestic violence  
 367 center. The court must provide the petitioner with a list of  
 368 certified domestic violence centers in the circuit which the  
 369 petitioner may contact.

370 4. Ordering such other relief as the court deems necessary  
 371 for the protection of a victim of stalking or cyberstalking,  
 372 including injunctions or directives to law enforcement agencies,  
 373 as provided in this section.

374 (b) When determining whether a petitioner has reasonable  
 375 cause to believe that there is a credible threat that he or she  
 376 is in imminent danger of becoming a victim of stalking or  
 377 cyberstalking, the court shall consider and evaluate all  
 378 relevant factors alleged in the petition, including, but not  
 379 limited to:

380 1. The history between the petitioner and the respondent,  
 381 including threats, harassment, stalking or cyberstalking, and  
 382 physical abuse.

383 2. Whether the respondent has attempted to harm the  
 384 petitioner or family members or individuals closely associated  
 385 with the petitioner.

386 3. Whether the respondent has intentionally injured or  
 387 killed a family pet.

388 4. Whether the respondent has used, or has threatened to  
 389 use, against the petitioner any weapons such as guns or knives.

390 5. Whether the respondent has a criminal history involving  
 391 violence or the threat of violence.

392 6. The existence of a verifiable order of protection

393 issued previously or from another jurisdiction.

394 7. Whether the respondent has destroyed personal property,  
 395 including, but not limited to, telephones or other  
 396 communications equipment, clothing, or other items belonging to  
 397 the petitioner.

398  
 399 In making its determination under this paragraph, the court is  
 400 not limited to those factors enumerated in subparagraphs 1.-7.

401 (c) The terms of an injunction restraining the respondent  
 402 under subparagraph (a)1. or ordering other relief for the  
 403 protection of the victim under subparagraph (a)4. shall remain  
 404 in effect until modified or dissolved. Either party may move at  
 405 any time to modify or dissolve the injunction. Specific  
 406 allegations are not required. Such relief may be granted in  
 407 addition to other civil or criminal remedies.

408 (d) A temporary or final judgment on injunction for  
 409 protection against stalking or cyberstalking entered pursuant to  
 410 this section shall, on its face, indicate that:

411 1. The injunction is valid and enforceable in all counties  
 412 of this state.

413 2. Law enforcement officers may use their arrest powers  
 414 pursuant to s. 901.15(6) to enforce the terms of the injunction.

415 3. The court has jurisdiction over the parties and matter  
 416 under the laws of this state and that reasonable notice and  
 417 opportunity to be heard was given to the person against whom the  
 418 order is sought sufficient to protect that person's right to due  
 419 process.

420 4. The date that the respondent was served with the

421 temporary or final order, if obtainable.

422 (e) The fact that a separate order of protection is  
 423 granted to each opposing party is not legally sufficient to deny  
 424 any remedy to either party or to prove that the parties are  
 425 equally at fault or equally endangered.

426 (f) A final judgment on an injunction for protection  
 427 against stalking or cyberstalking entered pursuant to this  
 428 section may, on its face, provide that it is a violation of s.  
 429 790.233 and a misdemeanor of the first degree for the respondent  
 430 to have in his or her care, custody, possession, or control any  
 431 firearm or ammunition.

432 (g) All proceedings under this subsection shall be  
 433 recorded. Recording may be by electronic means as provided by  
 434 the Rules of Judicial Administration.

435 (7) The court shall allow an advocate from a state  
 436 attorney's office, a law enforcement agency, or a certified  
 437 domestic violence center who is registered under s. 39.905 to be  
 438 present with the petitioner or respondent during any court  
 439 proceedings or hearings related to the injunction for protection  
 440 if the petitioner or respondent has made such a request and the  
 441 advocate is able to be present.

442 (8) (a) 1. The clerk of the court shall furnish a copy of  
 443 the petition, notice of hearing, and temporary injunction, if  
 444 any, to the sheriff or a law enforcement agency of the county  
 445 where the respondent resides or can be found, who shall serve it  
 446 upon the respondent as soon thereafter as possible on any day of  
 447 the week and at any time of the day or night. When requested by  
 448 the sheriff, the clerk of the court may transmit a facsimile



449 copy of an injunction that has been certified by the clerk of  
 450 the court, and this facsimile copy may be served in the same  
 451 manner as a certified copy. Upon receiving a facsimile copy, the  
 452 sheriff must verify receipt with the sender before attempting to  
 453 serve it on the respondent. In addition, if the sheriff is in  
 454 possession of an injunction for protection which has been  
 455 certified by the clerk of the court, the sheriff may transmit a  
 456 facsimile copy of that injunction to a law enforcement officer  
 457 who shall serve it in the same manner as a certified copy. The  
 458 clerk of the court shall furnish to the sheriff such information  
 459 concerning the respondent's physical description and location as  
 460 is required by the department to comply with the verification  
 461 procedures set forth in this section. Notwithstanding any other  
 462 law, the chief judge of each circuit, in consultation with the  
 463 appropriate sheriff, may authorize a law enforcement agency  
 464 within the jurisdiction to effect service. A law enforcement  
 465 agency serving injunctions pursuant to this section shall use  
 466 service and verification procedures consistent with those of the  
 467 sheriff.

468 2. If an injunction is issued and the petitioner requests  
 469 the assistance of a law enforcement agency, the court may order  
 470 that an officer from the appropriate law enforcement agency  
 471 accompany the petitioner to assist in the execution or service  
 472 of the injunction. A law enforcement officer shall accept a copy  
 473 of an injunction for protection against stalking, certified by  
 474 the clerk of the court, from the petitioner and immediately  
 475 serve it upon a respondent who has been located but not yet  
 476 served.

477       3. An order issued, changed, continued, extended, or  
 478 vacated subsequent to the original service of documents  
 479 enumerated under subparagraph 1. shall be certified by the clerk  
 480 of the court and delivered to the parties at the time of the  
 481 entry of the order. The parties may acknowledge receipt of such  
 482 order in writing on the face of the original order. If a party  
 483 fails or refuses to acknowledge the receipt of a certified copy  
 484 of an order, the clerk shall note on the original order that  
 485 service was effected. If delivery at the hearing is not  
 486 possible, the clerk shall mail certified copies of the order to  
 487 the parties at the last known address of each party. Service by  
 488 mail is complete upon mailing. When an order is served pursuant  
 489 to this subsection, the clerk shall prepare a written  
 490 certification to be placed in the court file specifying the  
 491 time, date, and method of service and shall notify the sheriff.

492       4. If the respondent has been served previously with a  
 493 temporary injunction and has failed to appear at the initial  
 494 hearing on the temporary injunction, any subsequent petition for  
 495 injunction seeking an extension of time may be served on the  
 496 respondent by the clerk of the court by certified mail in lieu  
 497 of personal service by a law enforcement officer.

498       (b)1. Within 24 hours after the court issues an injunction  
 499 for protection against stalking or cyberstalking or changes,  
 500 continues, extends, or vacates an injunction for protection  
 501 against stalking or cyberstalking, the clerk of the court must  
 502 forward a certified copy of the injunction for service to the  
 503 sheriff having jurisdiction over the residence of the  
 504 petitioner. The injunction must be served in accordance with

505 this subsection.

506 2. Within 24 hours after service of process of an  
 507 injunction for protection against stalking or cyberstalking upon  
 508 a respondent, the law enforcement officer must forward the  
 509 written proof of service of process to the sheriff having  
 510 jurisdiction over the residence of the petitioner.

511 3. Within 24 hours after the sheriff receives a certified  
 512 copy of the injunction for protection against stalking or  
 513 cyberstalking, the sheriff must make information relating to the  
 514 injunction available to other law enforcement agencies by  
 515 electronically transmitting such information to the Department  
 516 of Law Enforcement.

517 4. Within 24 hours after the sheriff or other law  
 518 enforcement officer has made service upon the respondent and the  
 519 sheriff has been so notified, the sheriff must make information  
 520 relating to the service available to other law enforcement  
 521 agencies by electronically transmitting such information to the  
 522 Department of Law Enforcement.

523 5. Within 24 hours after an injunction for protection  
 524 against stalking or cyberstalking is vacated, terminated, or  
 525 otherwise rendered no longer effective by ruling of the court,  
 526 the clerk of the court must notify the sheriff receiving  
 527 original notification of the injunction as provided in  
 528 subparagraph 2. That agency shall, within 24 hours after  
 529 receiving such notification from the clerk of the court, notify  
 530 the Department of Law Enforcement of such action of the court.

531 (9) (a) The court may enforce a violation of an injunction  
 532 for protection against stalking or cyberstalking through a civil

CS/HB 1099

2012

533 or criminal contempt proceeding, or the state attorney may  
 534 prosecute it as a criminal violation under s. 784.0487. The  
 535 court may enforce the respondent's compliance with the  
 536 injunction through any appropriate civil and criminal remedies,  
 537 including, but not limited to, a monetary assessment or a fine.  
 538 The clerk of the court shall collect and receive such  
 539 assessments or fines. On a monthly basis, the clerk shall  
 540 transfer the moneys collected pursuant to this paragraph to the  
 541 State Treasury for deposit into the Domestic Violence Trust  
 542 Fund.

543 (b) If the respondent is arrested by a law enforcement  
 544 officer under s. 901.15(6) or for a violation of s. 784.0487,  
 545 the respondent shall be held in custody until brought before the  
 546 court as expeditiously as possible for the purpose of enforcing  
 547 the injunction and for admittance to bail in accordance with  
 548 chapter 903 and the applicable rules of criminal procedure,  
 549 pending a hearing.

550 (10) The petitioner or the respondent may move the court  
 551 to modify or dissolve an injunction at any time.

552 Section 3. Section 784.0487, Florida Statutes, is created  
 553 to read:

554 784.0487 Violation of an injunction for protection against  
 555 stalking or cyberstalking.—

556 (1) If the injunction for protection against stalking or  
 557 cyberstalking has been violated and the respondent has not been  
 558 arrested, the petitioner may contact the clerk of the circuit  
 559 court of the county in which the violation is alleged to have  
 560 occurred. The clerk shall assist the petitioner in preparing an

561 affidavit in support of reporting the violation or directing the  
 562 petitioner to the office operated by the court that has been  
 563 designated by the chief judge of that circuit as the central  
 564 intake point for violations of injunctions for protection where  
 565 the petitioner can receive assistance in the preparation of the  
 566 affidavit in support of the violation.

567 (2) The affidavit shall be immediately forwarded by the  
 568 office assisting the petitioner to the state attorney of that  
 569 circuit and to such judge as the chief judge determines to be  
 570 the recipient of affidavits of violations of an injunction. If  
 571 the affidavit alleges that a crime has been committed, the  
 572 office assisting the petitioner shall also forward a copy of the  
 573 petitioner's affidavit to the appropriate law enforcement agency  
 574 for investigation. No later than 20 days after receiving the  
 575 initial report, the local law enforcement agency shall complete  
 576 its investigation and forward a report to the state attorney.  
 577 The policy adopted by the state attorney in each circuit under  
 578 s. 741.2901(2) shall include a policy regarding intake of  
 579 alleged violations of injunctions for protection against  
 580 stalking or cyberstalking under this section. The intake shall  
 581 be supervised by a state attorney who has been designated and  
 582 assigned to handle stalking or cyberstalking cases. The state  
 583 attorney shall determine within 30 working days whether his or  
 584 her office will file criminal charges or prepare a motion for an  
 585 order to show cause as to why the respondent should not be held  
 586 in criminal contempt, or prepare both as alternative findings,  
 587 or file notice that the case remains under investigation or is  
 588 pending subject to some other action.

589 (3) If the court has knowledge that the petitioner or  
 590 another person is in immediate danger if the court does not act  
 591 before the decision of the state attorney to proceed, the court  
 592 shall immediately issue an order of appointment of the state  
 593 attorney to file a motion for an order to show cause as to why  
 594 the respondent should not be held in contempt. If the court does  
 595 not issue an order of appointment of the state attorney, it  
 596 shall immediately notify the state attorney that the court is  
 597 proceeding to enforce the violation through criminal contempt.

598 (4) A person who willfully violates an injunction for  
 599 protection against stalking or cyberstalking issued pursuant to  
 600 s. 784.0485, or a foreign protection order accorded full faith  
 601 and credit pursuant to s. 741.315, by:

602 (a) Going to, or being within 500 feet of, the  
 603 petitioner's residence, school, place of employment, or a  
 604 specified place frequented regularly by the petitioner and any  
 605 named family or household member;

606 (b) Committing an act of stalking or cyberstalking against  
 607 the petitioner;

608 (c) Committing any other violation of the injunction  
 609 through an intentional unlawful threat, word, or act to do  
 610 violence to the petitioner;

611 (d) Telephoning, contacting, or otherwise communicating  
 612 with the petitioner, directly or indirectly, unless the  
 613 injunction specifically allows indirect contact through a third  
 614 party;

615 (e) Knowingly and intentionally coming within 100 feet of  
 616 the petitioner's motor vehicle, whether or not that vehicle is

CS/HB 1099

2012

617 occupied;

618 (f) Defacing or destroying the petitioner's personal  
619 property, including the petitioner's motor vehicle; or

620 (g) Refusing to surrender firearms or ammunition if  
621 ordered to do so by the court,

622

623 commits a misdemeanor of the first degree, punishable as  
624 provided in s. 775.082 or s. 775.083.

625 (5) A person who suffers an injury or loss as a result of  
626 a violation of an injunction for protection against stalking or  
627 cyberstalking may be awarded economic damages for that injury or  
628 loss by the court issuing the injunction. Damages includes costs  
629 and attorney fees for enforcement of the injunction.

630 Section 4. This act shall take effect October 1, 2012.





**HOUSE OF REPRESENTATIVES STAFF ANALYSIS**

**BILL #:** CS/CS/HB 1443 Local Administrative Action to Abate Public Nuisances and Criminal Gang Activity  
**SPONSOR(S):** Community & Military Affairs Subcommittee; Criminal Justice Subcommittee; Frishe and others  
**TIED BILLS:** None **IDEN./SIM. BILLS:** SB 1580

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Criminal Justice Subcommittee	12 Y, 0 N, As CS	Krol	Cunningham
2) Community & Military Affairs Subcommittee	14 Y, 0 N, As CS	Gibson	Hoagland
3) Judiciary Committee		Krol TK	Havlicak RH

**SUMMARY ANALYSIS**

Section 893.138, F.S., authorizes counties and municipalities to create an administrative board to hear complaints regarding certain public nuisances. These nuisances may include places or premises that have been used:

- on more than two occasions within a 6-month period, as the site of a violation relating to prostitution;
- on more than two occasions within a 6-month period, as the site of the unlawful sale, delivery, manufacture, or cultivation of any controlled substance;
- on one occasion as the site of the unlawful possession of a controlled substance, where such possession constitutes a felony and that has been previously used on more than one occasion as the site of the unlawful sale, delivery, manufacture, or cultivation of any controlled substance;
- by a criminal gang for the purpose of conducting criminal gang activity;
- on more than two occasions within a 6-month period, as the site of dealing in stolen property.

If the administrative board declares a place or premises to be a public nuisance, it may enter an order requiring the owner to adopt a procedure considered to be appropriate under the circumstances to abate the nuisance or it may enter an order immediately prohibiting:

- The maintaining of the nuisance;
- The operating or maintaining of the place or premises, including the closure of the place or premises or any part thereof; or
- The conduct, operation, or maintenance of any business or activity on the premises which is conducive to such nuisance.

An order entered expires after 1 year or earlier if stated in the order.

The bill amends s. 893.138, F.S., to add the following to the list of places that may be declared to be a public nuisance and that are subject to the local administrative abatement procedures:

- Places or premises that have been used on more than two occasions within a 6-month period, as the site of the storage of a controlled substance with intent to unlawfully sell or deliver the controlled substance off the premises.

The bill also allows an administrative board, after proper notice and a hearing, to extend the term of the abatement order for up to 1 year upon a finding of recurring public nuisance activity or noncompliance.

The bill may have a positive fiscal impact on counties and municipalities. See fiscal comments.

The bill has an effective date of July 1, 2012.

## FULL ANALYSIS

### I. SUBSTANTIVE ANALYSIS

#### A. EFFECT OF PROPOSED CHANGES:

##### Public Nuisances

Chapter 823, F.S., contains a variety of provisions that declare certain places public nuisances. For example, s. 823.05(1), F.S., declares any building, booth, tent, or place a public nuisance if such building, booth, tent, or place:

- tends to annoy the community or injure the health of the community, or become manifestly injurious to the morals or manners of the people as described in s. 823.01, F.S.;<sup>1</sup>
- constitutes a place of prostitution, assignation, or lewdness;
- is a place or building where games of chance are engaged in violation of law; or
- is a place where any law of the state is violated.<sup>2</sup>

Section 823.10, F.S., provides that a public nuisance is any store, shop, warehouse, dwelling house, building, structure, vehicle, ship, boat, vessel, or aircraft, or any place, which is:

- visited by persons to unlawfully use any substance controlled under ch. 893, F.S.,<sup>3</sup> or any drugs as described in ch. 499, F.S.,<sup>4</sup> or
- used to illegally keep, sell, or deliver the drugs described above.

Generally, the remedy for those harmed by a public nuisance is injunctive relief pursuant to the provisions of ch. 60, F.S. However, some statutes set forth criminal penalties for maintaining a public nuisance. For example, it is a third degree felony for any person to willfully keep or maintain a public nuisance described in s. 823.10, F.S., where such public nuisance is a warehouse, structure, or building.<sup>5</sup>

##### Abatement of Public Nuisances

Section 60.05, F.S., provides that when a nuisance as defined in s. 823.05, F.S., exists, the Attorney General, state attorney, city attorney, county attorney, or any citizen of the county may sue in the name of the state to enjoin the nuisance, the person or persons maintaining it, and the owner or agent of the building or ground on which the nuisance exists. The court may issue a temporary injunction without bond upon evidence<sup>6</sup> or affidavit that a location is shown to be a public nuisance, to enjoin:

- the maintaining of a nuisance;
- the operating and maintaining of the place or premises where the nuisance is maintained;
- the owner or agent of the building or ground upon which the nuisance exists;
- the conduct, operation, or maintenance of any business or activity operated or maintained in the building or on the premises in connection with or incident to the maintenance of the nuisance.<sup>7</sup>

<sup>1</sup> A violation of s. 823.01, F.S., is a second degree misdemeanor and punishable by a fine of up to \$500. Section 775.083, F.S.

<sup>2</sup> Section 823.05(1), F.S., also provides that if a person is found guilty of maintaining a public nuisance, the building, erection, place, tent, or booth and the furniture, fixtures, and contents are declared a nuisance.

<sup>3</sup> Section 893.02(4), F.S., defines "controlled substance" as "any substance named or described in Schedules I-V of s. 893.03, F.S."

<sup>4</sup> Section 499.003(19), F.S., defines "drug" as "an article that is: (a) Recognized in the current edition of the United States Pharmacopoeia and National Formulary, official Homeopathic Pharmacopoeia of the United States, or any supplement to any of those publications; (b) Intended for use in the diagnosis, cure, mitigation, treatment, therapy, or prevention of disease in humans or other animals; (c) Intended to affect the structure or any function of the body of humans or other animals; or (d) Intended for use as a component of any article specified in paragraph (a), paragraph (b), or paragraph (c), but does not include devices or their components, parts, or accessories." Section 499.003, F.S., also defines the following drugs: "compressed medical gas;" "contraband prescription drug;" "new drug;" "prescription drug;" "proprietary drug" or "OTC drug;" and "veterinary prescription drug."

<sup>5</sup> A third degree felony is punishable by up to 5 years imprisonment and a fine of up to \$5,000. Sections 775.082 and 775.083, F.S.

<sup>6</sup> Evidence of the general reputation of the alleged nuisance and place is admissible to prove the existence of the nuisance. Section 60.05(3), F.S.

<sup>7</sup> Section 60.05(2), F.S.

The injunction must specify the activities enjoined and must omit any lawful business unrelated to the maintenance of the nuisance complained of.<sup>8</sup> At least 3 days' notice in writing must be given to the defendant of the time and place of application for the temporary injunction.<sup>9</sup>

If the existence of the nuisance is proved at trial, the court will:

- issue a permanent injunction;
- order the costs to be paid by the person establishing or maintaining the nuisance; and
- assess the costs as a lien on all personal property found in the place of the nuisance.<sup>10</sup>

In a proceeding abating a nuisance pursuant to s. 823.10, F.S., or s. 823.05, F.S., if a tenant has been convicted of an offense under ch. 893, F.S., or s. 796.07, F.S., the court may order the tenant to vacate the property within 72 hours if the tenant and owner of the premises are parties to the nuisance abatement action and the order will lead to the abatement of the nuisance.<sup>11</sup>

### **Abatement of Public Nuisances through Administrative Boards**

In addition to the abatement of public nuisances through court proceedings pursuant to ch. 60, F.S., s. 893.138, F.S., provides counties and municipalities with local administrative action to abate criminal gang activity, and drug-related, prostitution-related, or stolen property-related public nuisances. Any county or municipality may, by ordinance, create an administrative board (board) to hear complaints regarding the public nuisances described below.<sup>12</sup>

Section 893.138(2), F.S., provides that the following places and premises may be declared a public nuisance if the place or premise has been used:

- on more than two occasions within a 6-month period, as the site of a violation of s. 796.07, F.S., relating to prostitution;
- on more than two occasions within a 6-month period, as the site of the unlawful sale, delivery, manufacture, or cultivation of any controlled substance;<sup>13</sup>
- on one occasion as the site of the unlawful possession of a controlled substance, where such possession constitutes a felony and that has been previously used on more than one occasion as the site of the unlawful sale, delivery, manufacture, or cultivation of any controlled substance;
- by a criminal gang for the purpose of conducting criminal gang activity as defined by s. 874.03, F.S.,<sup>14</sup> or
- on more than two occasions within a 6-month period, as the site of a violation of s. 812.019, F.S., relating to dealing in stolen property.

Section 893.138(3), F.S., also provides that any pain-management clinic, as described in s. 458.3265, F.S., or s. 459.0137, F.S., may be declared to be a public nuisance if the location has been used on more than two occasions within a 6-month period as the site of a violation of:

- s. 784.011, F.S., s. 784.021, F.S., s. 784.03, F.S., or s. 784.045, F.S., relating to assault and battery;
- s. 810.02, F.S., relating to burglary;

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<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> Section 60.05(4), F.S., providing that if the personal property lien is not enough to pay the costs then the lien will be placed on the real estate occupied by the nuisance. No lien will be attached to the real estate of any other than said persons unless 5 days' written notice has been given to the owner or his or her agent who fails to begin to abate the nuisance within the 5 days provided.

<sup>11</sup> Section 60.05(4), F.S.

<sup>12</sup> Section 893.138(4), F.S.

<sup>13</sup> "Controlled substance" is defined in s. 893.138(10), F.S. as including any substance sold in lieu of a controlled substance in violation of s. 817.563, F.S., or any imitation controlled substance defined in s. 817.564, F.S.

<sup>14</sup> Section 874.03(4), F.S., defines "criminal gang-related activity" as "an activity committed with the intent to benefit, promote, or further the interests of a criminal gang, or for the purposes of increasing a person's own standing or position within a criminal gang; an activity in which the participants are identified as criminal gang members or criminal gang associates acting individually or collectively to further any criminal purpose of a criminal gang; an activity that is identified as criminal gang activity by a documented reliable informant; or an activity that is identified as criminal gang activity by an informant of previously untested reliability and such identification is corroborated by independent information."

- s. 812.014, F.S., relating to dealing in theft;
- s. 812.131, F.S., relating to robbery by sudden snatching; or
- s. 893.13, F.S., relating to the unlawful distribution of controlled substances.

Any employee, officer, or resident of the county or municipality may bring a complaint before the board after giving at least 3 days' written notice of such complaint to the owner of the place or premises at the owner's last known address.<sup>15</sup> A hearing must then be held, where the board may consider any evidence<sup>16</sup> and the owner of the premises has an opportunity to present evidence in his or her defense. After such hearing, the board may declare the place or premises to be a public nuisance as described above.<sup>17</sup>

If the board declares a place or premises to be a public nuisance, it may enter an order requiring the owner of such place or premises to adopt a procedure considered to be appropriate under the circumstances to abate any such nuisance or it may enter an order immediately prohibiting:

- the maintaining of the nuisance;
- the operating or maintaining of the place or premises, including the closure of the place or premises or any part thereof; or
- the conduct, operation, or maintenance of any business or activity on the premises which is conducive to such nuisance.<sup>18</sup>

An order expires after 1 year, or earlier if stated in the order.<sup>19</sup> The order may be enforced pursuant to the procedures contained in s. 120.69, F.S.<sup>20,21</sup>

The board may also bring a complaint under s. 60.05, F.S., seeking temporary and permanent injunctive relief against any nuisance described in subsection (2).<sup>22,23</sup>

Nothing contained within s. 893.138, F.S., prohibits a county or municipality from proceeding against a public nuisance by any other means.<sup>24</sup>

Section 893.138(11), F.S., provides that the provisions outlined above may be supplemented by a county or municipal ordinance, which may include, but is not limited to, provisions that establish additional penalties for public nuisances that:

- include fines not to exceed \$250 per day;<sup>25</sup>
- provide for the payment of reasonable costs, including reasonable attorney fees associated with investigations of and hearings on public nuisances;
- provide for continuing jurisdiction for a period of 1 year over any place or premises that has been or is declared to be a public nuisance;
- establish penalties, including fines not to exceed \$500 per day for recurring public nuisances;<sup>26</sup>
- provide for the recording of orders on public nuisances so that notice must be given to subsequent purchasers, successors in interest, or assigns of the real property that is the subject of the order;

<sup>15</sup> Section 893.138(4), F.S.

<sup>16</sup> Section 893.138(4), F.S., provides that evidence of the general reputation of the place or premises is admissible at the hearing.

<sup>17</sup> *Id.*

<sup>18</sup> Section 893.138(5), F.S.

<sup>19</sup> Section 893.138(6), F.S.

<sup>20</sup> Section 120.69, F.S., relates to enforcement of agency action. This section provides that an agency may seek enforcement of an action by filing a petition for enforcement in the circuit court where the subject matter of the enforcement is located.

<sup>21</sup> Section 893.138(7), F.S.

<sup>22</sup> Section 893.138(8), F.S.

<sup>23</sup> Section 893.138(9), F.S., provides that this section does not restrict the right of any person to proceed under s. 60.05, F.S., against any public nuisance.

<sup>24</sup> Section 893.138(11), F.S.

<sup>25</sup> Section 893.138(11), F.S., provides that the total fines imposed pursuant to the authority of this section shall not exceed \$15,000.

<sup>26</sup> *Id.*

- provide that recorded orders on public nuisances may become liens against the real property that is the subject of the order; and
- provide for the foreclosure of property subject to a lien and the recovery of all costs, including reasonable attorney fees, associated with the recording of orders and foreclosure.<sup>27</sup>

### Effect of the Bill

The bill amends s. 893.138(2), F.S., to add the following to the list of places that may be declared to be a public nuisance and that are subject to the local administrative abatement procedures established in s. 893.138, F.S.:

- Places or premises that have been used on more than two occasions within a 6-month period, as the site of the storage of a controlled substance with intent to unlawfully sell or deliver the controlled substance off the premises.

Upon receiving a complaint of recurring public nuisance activity or noncompliance and after providing at least 3 days' notice to the owner of a place or premises that has been declared to be a public nuisance, the board must conduct a hearing to determine whether the owner has violated the administrative order. If a violation is found, the bill allows the administrative board to extend the term of the abatement order for up to 1 year and may impose additional penalties authorized by s. 893.138, F.S., and by a supplemental county or municipal ordinance.

The bill specifies that the above extension allows the administrative board continued jurisdiction over any place or premise that has been or is declared to be a public nuisance.

The bill also fixes statutory drafting errors created by the 2011 addition of subsection (3).<sup>28</sup>

### B. SECTION DIRECTORY:

**Section 1:** amends s. 893.138, F.S., relating to local administrative action to abate drug-related, prostitution-related, or stolen-property-related public nuisances and criminal gang activity.

**Section 2:** provides an effective date of July 1, 2012.

## 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:

The bill provides counties and municipalities with the ability to administer fines on public nuisances where the place or premise has been used on two or more occasions within a 6-month period as the site of storage of a controlled substance with intent to unlawfully sell or deliver the controlled substance off the premises. This may provide counties and municipalities with increased revenue.

<sup>27</sup> Section 893.138(11), F.S., provides that no lien created pursuant to the provisions of this section may be foreclosed on real property which is a homestead under s. 4, Art. X of the State Constitution.

<sup>28</sup> Ch. 2011-141, L.O.F.

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 take 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/ COMMITTEE SUBSTITUTE CHANGES

On January 25, 2012, the Criminal Justice Subcommittee approved a strike-all amendment and reported the bill favorably as a committee substitute. The amendment:

- Specifies that a place or premise that has been used on more than two occasions as the site of storage of a controlled substance with intent to sell or deliver the controlled substance off the premises may be declared a public nuisance.
- Clarifies the process the local administrative abatement board must follow when determining whether the owner of a place or premise declared to be a public nuisance has violated an order.
- Fixes statutory drafting errors.

On January 31, 2012, the Community & Military Affairs Subcommittee adopted an amendment to clarify that in order for a place or premises to be declared a public nuisance if the location has been used on more than two occasions within a 6-month period as the site of the storage of a controlled substance with intent to sell or deliver the controlled substance off the premises, there must be the intent to *unlawfully* sell or deliver the controlled substance off the premises.

The analysis is drafted to the committee substitute as passed by the Community & Military Affairs Subcommittee.

1                                   A bill to be entitled  
 2           An act relating to local administrative action to  
 3           abate public nuisances and criminal gang activity;  
 4           amending s. 893.138, F.S.; authorizing a local  
 5           administrative board to declare a place to be a public  
 6           nuisance if the place is used on more than two  
 7           occasions within a 6-month period as the site of the  
 8           storage of a controlled substance with intent to  
 9           unlawfully sell or deliver the controlled substance  
 10          off the premises; authorizing an administrative board  
 11          to hear complaints regarding any pain-management  
 12          clinic declared to be a public nuisance; providing  
 13          that an order entered against a person for a public  
 14          nuisance expires after 1 year or at an earlier time if  
 15          so stated in the order unless the person has violated  
 16          the order during the term of the order; requiring that  
 17          the board conduct a hearing to determine whether the  
 18          person violated the administrative order; authorizing  
 19          an administrative board to seek temporary and  
 20          permanent injunctive relief against any pain-  
 21          management clinic declared to be a public nuisance;  
 22          authorizing the board to extend the term of the order  
 23          by up to 1 additional year and to impose a penalty if  
 24          the board finds that the person violated the order;  
 25          authorizing a county or municipal ordinance to include  
 26          fines for days of public nuisance activities outside  
 27          the 6-month period in which the minimum number of  
 28          activities are shown to have occurred; authorizing a

CS/CS/HB 1443

2012

29 local ordinance to provide for continuing jurisdiction  
 30 over a place or premises that are subject to an  
 31 extension of the administrative order; providing an  
 32 effective date.

33  
 34 Be It Enacted by the Legislature of the State of Florida:

35  
 36 Section 1. Section 893.138, Florida Statutes, is amended  
 37 to read:

38 893.138 Local administrative action to abate drug-related,  
 39 prostitution-related, or stolen-property-related public  
 40 nuisances and criminal gang activity.—

41 (1) It is the intent of this section to promote, protect,  
 42 and improve the health, safety, and welfare of the citizens of  
 43 the counties and municipalities of this state by authorizing the  
 44 creation of administrative boards with authority to impose  
 45 administrative fines and other noncriminal penalties in order to  
 46 provide an equitable, expeditious, effective, and inexpensive  
 47 method of enforcing ordinances in counties and municipalities  
 48 under circumstances when a pending or repeated violation  
 49 continues to exist.

50 (2) Any place or premises that has been used:

51 (a) On more than two occasions within a 6-month period, as  
 52 the site of a violation of s. 796.07;

53 (b) On more than two occasions within a 6-month period, as  
 54 the site of the unlawful sale, delivery, manufacture, or  
 55 cultivation of a ~~any~~ controlled substance, or as the site of the  
 56 storage of a controlled substance with intent to unlawfully sell



57 | or deliver the controlled substance off the premises;

58 |       (c) On one occasion as the site of the unlawful possession  
59 | of a controlled substance, where such possession constitutes a  
60 | felony and that has been previously used on more than one  
61 | occasion as the site of the unlawful sale, delivery,  
62 | manufacture, or cultivation of a ~~any~~ controlled substance;

63 |       (d) By a criminal gang for the purpose of conducting  
64 | criminal gang-related ~~gang~~ activity as defined in ~~by~~ s. 874.03;  
65 | or

66 |       (e) On more than two occasions within a 6-month period, as  
67 | the site of a violation of s. 812.019 relating to dealing in  
68 | stolen property,

69 |  
70 | may be declared to be a public nuisance, and such nuisance may  
71 | be abated pursuant to ~~the procedures provided in~~ this section.

72 |       (3) Any pain-management clinic, as described in s.  
73 | 458.3265 or s. 459.0137, which has been used on more than two  
74 | occasions within a 6-month period as the site of a violation of:

75 |       (a) Section 784.011, s. 784.021, s. 784.03, or s. 784.045,  
76 | relating to assault and battery;

77 |       (b) Section 810.02, relating to burglary;

78 |       (c) Section 812.014, relating to dealing in theft;

79 |       (d) Section 812.131, relating to robbery by sudden  
80 | snatching; or

81 |       (e) Section 893.13, relating to the unlawful distribution  
82 | of controlled substances,

83 |  
84 | may be declared to be a public nuisance, and such nuisance may

85 be abated pursuant to the procedures provided in this section.

86 (4) Any county or municipality may, by ordinance, create  
 87 an administrative board to hear complaints regarding the  
 88 nuisances described in subsections ~~subsection~~ (2) and (3). Any  
 89 employee, officer, or resident of the county or municipality may  
 90 bring a complaint before the board after giving not less than 3  
 91 days' written notice of such complaint to the owner of the place  
 92 or premises at his or her last known address. After a hearing in  
 93 which the board may consider any evidence, including evidence of  
 94 the general reputation of the place or premises, and at which  
 95 the owner of the premises shall have an opportunity to present  
 96 evidence in his or her defense, the board may declare the place  
 97 or premises to be a public nuisance as described in subsection  
 98 (2) or subsection (3).

99 (5) If the board declares a place or premises to be a  
 100 public nuisance, it may enter an order requiring the owner of  
 101 such place or premises to adopt such procedure as may be  
 102 appropriate under the circumstances to abate any such nuisance  
 103 or it may enter an order immediately prohibiting:

- 104 (a) The maintaining of the nuisance;
- 105 (b) The operating or maintaining of the place or premises,  
 106 including the closure of the place or premises or any part  
 107 thereof; or
- 108 (c) The conduct, operation, or maintenance of any business  
 109 or activity on the premises which is conducive to such nuisance.

110 (6) An order entered under subsection (5) expires ~~(4)~~  
 111 ~~shall expire~~ after 1 year or at such earlier time as is stated  
 112 in the order unless the owner of a place or premises that has

113 been declared to be a public nuisance has violated the order  
 114 during the term of the order. Upon receiving a complaint of  
 115 recurring public nuisance activity or noncompliance and after  
 116 providing at least 3 days' written notice to the owner of such  
 117 place or premises, the board shall conduct a hearing to  
 118 determine whether the owner violated the administrative order  
 119 entered under subsection (5). If the board finds that the owner  
 120 of such place or premises violated the order, the board may  
 121 extend the term of the order by up to 1 additional year and may  
 122 impose an additional penalty to the extent authorized by this  
 123 section and by a supplemental county or municipal ordinance.

124 (7) An order entered under subsection (5) ~~(4)~~ may be  
 125 enforced pursuant to the procedures contained in s. 120.69. This  
 126 subsection does not subject a municipality that creates a board  
 127 under this section, or the board so created, to any other  
 128 provision of chapter 120.

129 (8) The board may bring a complaint under s. 60.05 seeking  
 130 temporary and permanent injunctive relief against any nuisance  
 131 described in subsection (2) or subsection (3).

132 (9) This section does not restrict the right of any person  
 133 to proceed under s. 60.05 against any public nuisance.

134 (10) As used in this section, the term "controlled  
 135 substance" includes any substance sold in lieu of a controlled  
 136 substance in violation of s. 817.563 or any imitation controlled  
 137 substance defined in s. 817.564.

138 (11) ~~The provisions of~~ This section may be supplemented by  
 139 a county or municipal ordinance. The ordinance may include, but  
 140 need is not be limited to, provisions that establish additional

141 penalties for public nuisances, including fines not to exceed  
 142 \$250 per day for each day that the public nuisance activities  
 143 described in subsections (2) and (3) have occurred, including  
 144 days outside the 6-month period in which the minimum number of  
 145 public nuisance activities are shown to have occurred. The  
 146 ordinance may also provide for the payment of reasonable costs,  
 147 including reasonable attorney fees associated with  
 148 investigations of and hearings on public nuisances; provide for  
 149 continuing jurisdiction for a period of 1 year over any place or  
 150 premises that have ~~has~~ been or are ~~is~~ declared to be a public  
 151 nuisance, subject to an extension for up to 1 additional year as  
 152 provided in subsection (6); establish penalties, including fines  
 153 not to exceed \$500 per day for recurring public nuisances;  
 154 provide for the recording of orders on public nuisances so that  
 155 notice must be given to subsequent purchasers, successors in  
 156 interest, or assigns of the real property that is the subject of  
 157 the order; provide that recorded orders on public nuisances may  
 158 become liens against the real property that is the subject of  
 159 the order; and provide for the foreclosure of the property that  
 160 is subject to a lien and the recovery of all costs, including  
 161 reasonable attorney fees, associated with the recording of  
 162 orders and foreclosure. A ~~No~~ lien created pursuant to ~~the~~  
 163 ~~provisions of~~ this section may not be foreclosed on real  
 164 property that ~~which~~ is a homestead under s. 4, Art. X of the  
 165 State Constitution. When ~~Where~~ a local government seeks to bring  
 166 an administrative action, based on a stolen property nuisance,  
 167 against a property owner operating an establishment where  
 168 multiple tenants, on one site, conduct their own retail

CS/CS/HB 1443

2012

169 business, the property owner is ~~shall~~ not ~~be~~ subject to a lien  
 170 against his or her property or the prohibition of operation  
 171 provision if the property owner evicts the business declared to  
 172 be a nuisance within 90 days after notification by registered  
 173 mail to the property owner of a second stolen property  
 174 conviction of the tenant. The total fines imposed pursuant to  
 175 ~~the authority of this section~~ may ~~shall~~ not exceed \$15,000.  
 176 ~~Nothing contained within~~ This section does not prohibit  
 177 ~~prohibits~~ a county or municipality from proceeding against a  
 178 public nuisance by any other means.

179 Section 2. This act shall take effect July 1, 2012.



HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** HB 4125 Judges  
**SPONSOR(S):** Stargel  
**TIED BILLS:** None **IDEN./SIM. BILLS:** None

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Civil Justice Subcommittee	14 Y, 0 N	Bond	Bond
2) Judiciary Committee		Bond <i>MB</i>	Havlicak <i>RH</i>

**SUMMARY ANALYSIS**

This bill repeals an 1887 law regarding the appointment of a judge ad litem upon consent of the parties after disqualification of a judge. The provision has been superseded by court rules providing for assignment of other judges in the circuit and by laws providing for voluntary binding arbitration or voluntary trial resolution.

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

This bill has an effective date of July 1, 2012.

## FULL ANALYSIS

### I. SUBSTANTIVE ANALYSIS

#### A. EFFECT OF PROPOSED CHANGES:

Section 38.13, F.S. was first enacted in 1887. The statute provides that, where a judge is disqualified from hearing a case, the parties may agree to the selection of a private attorney to act as the judge ad litem to hear the case. The law was enacted at a time when there were few judges in the state, and disqualification could require travel to another part of the state for hearings in front of a different judge. This no longer applies.

The Chief Judge of each judicial circuit is responsible for, among other duties, the establishment of a system for assignment of judges, including the transfer of a case to a new judge upon disqualification.<sup>1</sup> Additionally, the parties to a lawsuit can agree to voluntary binding arbitration or voluntary trial resolution, with or without disqualification of the state court judge, which hearing is fundamentally no different than a hearing before a judge ad litem.<sup>2</sup>

The current Florida Rules of Judicial Administration do not address appointment of a judge ad litem or otherwise implementing s. 38.13, F.S.

This bill repeals s. 38.13, F.S.

#### B. SECTION DIRECTORY:

Section 1 repeals s. 38.13, F.S., relating to judge ad litem.

Section 2 provides an effective date of July 1, 2012.

### II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

#### A. FISCAL IMPACT ON STATE GOVERNMENT:

##### 1. Revenues:

The bill does not appear to have any impact on state revenues.

##### 2. Expenditures:

The bill does not appear to have any impact on state expenditures.

#### B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

##### 1. Revenues:

The bill does not appear to have any impact on local government revenues.

##### 2. Expenditures:

The bill does not appear to have any impact on local government expenditures.

#### C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The bill does not appear to have any direct economic impact on the private sector.

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<sup>1</sup> Rule 2.215(b)(4) of the Florida Rules of Judicial Administration.

<sup>2</sup> See s. 44.104, F.S.



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 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 does not appear to create a need for rulemaking or rulemaking authority.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

**IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES**

None.

HB 4125

2012

1                                   A bill to be entitled  
2           An act relating to judges; repealing s. 38.13, F.S.,  
3           relating to selection of judges ad litem in circuit or  
4           county court; providing an effective date.

5  
6   Be It Enacted by the Legislature of the State of Florida:

7  
8           Section 1.   Section 38.13, Florida Statutes, is repealed.

9           Section 2.   This act shall take effect July 1, 2012.



HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 4155 Declaratory Judgments

SPONSOR(S): Stargel

TIED BILLS: None IDEN./SIM. BILLS: None

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Civil Justice Subcommittee	15 Y, 0 N	Caridad	Bond
2) Judiciary Committee		Caridad DC	Havlicak RN

SUMMARY ANALYSIS

Current law provides that the court may award costs in a declaratory judgment action. Another statute, applicable to all civil actions, provides that the prevailing party shall be awarded costs. The term "costs" does not include attorney's fees.

This bill repeals the specific statute relating to costs in a declaratory judgment action. Parties would still be awarded costs pursuant to the general statute.

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

This bill has an effective date of July 1, 2012.

## FULL ANALYSIS

### I. SUBSTANTIVE ANALYSIS

#### A. EFFECT OF PROPOSED CHANGES:

Chapter 86, F.S., relates to declaratory judgment actions. Section 86.081, F.S., provides that the court may award costs in declaratory judgment actions as are equitable. Section 57.041(1), F.S., provides that "the party recovering judgment shall recover all his or her legal costs and charges which shall be included in the judgment." While s. 86.081, F.S., provides that the court may award costs as are equitable,<sup>1</sup> s. 57.041, F.S., makes an award of costs mandatory.<sup>2</sup> A court explained:

Under section 57.041, the recovery of costs is generally available to any "party recovering judgment." This general provision may be displaced by context-specific statutory costs provisions. For example, in declaratory judgment proceedings, section 86.081, Florida Statutes (2005), provides that "[t]he court may award costs as are equitable." And in dissolution cases, section 61.16, Florida Statutes (2005), provides that "a reasonable amount" may be awarded for the costs of a party "after considering the financial resources of both parties." Although the standard for the award of costs may - based on specific statutory provisions - vary from the general standard set forth in section 57.041, it is universally true that costs are at issue when a lawsuit is brought.<sup>3</sup>

This bill repeals s. 86.081, F.S. Recovery of costs would therefore be governed under the general provisions of s. 57.041, F.S.

#### B. SECTION DIRECTORY:

Section 1 repeals s. 86.081, F.S., relating to costs in declaratory judgment actions.

Section 2 provides an effective date of July 1, 2012.

### II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

#### A. FISCAL IMPACT ON STATE GOVERNMENT:

##### 1. Revenues:

The bill does not appear to have any impact on state revenues.

##### 2. Expenditures:

The bill does not appear to have any impact on state expenditures.

#### B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

##### 1. Revenues:

The bill does not appear to have any impact on local government revenues.

##### 2. Expenditures:

The bill does not appear to have any impact on local government expenditures.

<sup>1</sup> See *Davis v. Davis*, 301 So.2d 154 (Fla. 3d DCA 1974).

<sup>2</sup> See *Hendry Tractor Company v. Fernandez*, 432 So.2d 1315, 1316 (Fla. 1983).

<sup>3</sup> *First Protective Insurance Company v. Featherston*, 978 So.2d 881, 884 (Fla. 2d DCA 2008).

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The bill does not appear to have any direct economic impact on the private sector.

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 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 does not appear to create a need for rulemaking or rulemaking authority.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

**IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES**

None.

HB 4155

2012

1                   A bill to be entitled  
2           An act relating to declaratory judgments; repealing s.  
3           86.081, F.S., relating to a grant of authority to the  
4           courts to award equitable costs in declaratory  
5           judgment proceedings; providing an effective date.

6  
7   Be It Enacted by the Legislature of the State of Florida:

8  
9           Section 1.   Section 86.081, Florida Statutes, is repealed.

10          Section 2.   This act shall take effect July 1, 2012.





HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 4157 District Courts of Appeal  
SPONSOR(S): Stargel  
TIED BILLS: None IDEN./SIM. BILLS: None

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Civil Justice Subcommittee	15 Y, 0 N	Caridad	Bond
2) Judiciary Committee		Caridad DC	Havlicak RN

SUMMARY ANALYSIS

Current law provides that three judges on a district court of appeal shall consider each case and that the concurrence of a majority shall be necessary to a decision. The Florida Constitution provides that three judges on a district court shall consider each case and the concurrence of two shall be necessary to a decision. The statute restates the constitutional provision. This bill repeals the redundant statute.

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

This bill has an effective date of July 1, 2012.

## FULL ANALYSIS

### I. SUBSTANTIVE ANALYSIS

#### A. EFFECT OF PROPOSED CHANGES:

Section 35.13, F.S., provides that three judges on a district court of appeal shall consider each case and that the concurrence of a majority shall be necessary to a decision. Article V, s. 4(a), Fla. Const., provides that three judges on a district court shall consider each case and the concurrence of two shall be necessary to a decision. Section 35.13, F.S., restates the constitutional provision. This bill repeals the redundant statute.

#### B. SECTION DIRECTORY:

Section 1 repeals s. 35.13, F.S., relating to a quorum of a district court of appeal.

Section 2 provides an effective date of July 1, 2012.

### II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

#### A. FISCAL IMPACT ON STATE GOVERNMENT:

##### 1. Revenues:

The bill does not appear to have any impact on state revenues.

##### 2. Expenditures:

The bill does not appear to have any impact on state expenditures.

#### B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

##### 1. Revenues:

The bill does not appear to have any impact on local government revenues.

##### 2. Expenditures:

The bill does not appear to have any impact on local government expenditures.

#### C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The bill does not appear to have any direct economic impact on the private sector.

#### 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 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 Office of the State Courts Administrator states: "Repeal of section 35.13 will have no impact on consideration of cases by district courts of appeal."

**B. RULE-MAKING AUTHORITY:**

The bill does not appear to create a need for rulemaking or rulemaking authority.

**C. DRAFTING ISSUES OR OTHER COMMENTS:**

None.

**IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES**

None.

HB 4157

2012

1                   A bill to be entitled  
2           An act relating to district courts of appeal;  
3           repealing s. 35.13, F.S., relating to requirements for  
4           a quorum and requiring a majority for a decision;  
5           providing an effective date.

6  
7   Be It Enacted by the Legislature of the State of Florida:

8  
9           Section 1. Section 35.13, Florida Statutes, is repealed.

10          Section 2. This act shall take effect July 1, 2012.



## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** PCB JDC 12-03 Legislative Immunity

**SPONSOR(S):** Judiciary Committee

**TIED BILLS:** **IDEN./SIM. BILLS:**

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
Orig. Comm.: Judiciary Committee		De La Paz	Havlicak RH

### SUMMARY ANALYSIS

The Florida Constitution has no express provision regarding legislative immunity. Legislators or their staff have occasionally been subpoenaed to testify concerning their legislative activity including their motivations and intentions concerning legislative acts. Although there is considerable federal law providing protection for state legislators in federal court based on long standing case precedent protecting inherent state legislative power, there is virtually no reported case law developing, explaining or acknowledging legislative immunity at the state constitutional level. Currently, there is no general law provision articulating any standard of legislative immunity for state legislators.

Under federal law, legislative immunity for state legislators is based on federal common law and is similar in scope to the immunity provided members of Congress under the Speech or Debate Clause of the United States Constitution. Federal legislators are protected from inquiry into legislative acts or the motivation for legislative acts, from having to defend themselves against certain types of suits, and from the consequences of litigation. They are also shielded by an evidentiary privilege protecting them from having their legislative acts used against them in court, and a testimonial privilege protecting legislators and their staff from questioning regarding legislative acts. The critical factor in determining whether legislative action is protected by immunity in a given situation is whether the action was within the sphere of legitimate legislative activity. Under this federal level of protection, state and local legislators, including their surrogates, have immunity from civil liability for their legislative acts.

This bill includes legislative findings which in essence find a comparable level of legislative immunity, including testimonial and evidentiary privilege, for state legislators in state level proceedings by the executive and judicial branches of government, that exist for Congress in proceedings brought by the co-equal branches of government at the federal level.

This bill is a legislative articulation of privileges and immunities found by the legislature for its members and staff. The bill specifies that a member or former member of the legislature has an absolute privilege in any civil action, judicial administrative proceeding or executive branch administrative proceeding against compelled testimony or the compelled production of any document or record in connection with any action taken or function performed in a legislative capacity. Legislative staff members also have the privilege to the same extent as legislators with regard to duties performed within the scope of their legislative employment. The privilege stated in the bill belongs to legislators and former legislators and may only be waived by the legislator in writing before it may be waived by a legislative staff member or former staff member. The bill also preserves in perpetuity the privilege of a deceased legislator or former legislator in the same status it was on the date of his or her death. The bill specifically provides that it shall not affect or alter the right of access to public records which are open to personal inspection and copying pursuant to s. 24, Art. I of the State Constitution or s. 11.0431, F.S.

Article III, Section 1 of the Florida Constitution vests the lawmaking power of the state in the Florida Legislature. Powers vested among the respective branches of government are provided in the Constitution and cannot be enlarged or reduced by general law.

The bill does not appear to have a fiscal impact.

The bill provides an effective date of upon becoming law.

This document does not reflect the intent or official position of the bill sponsor or House of Representatives.

STORAGE NAME: pcb03.JDC.DOCX

DATE: 2/14/2012

## FULL ANALYSIS

### I. SUBSTANTIVE ANALYSIS

#### A. EFFECT OF PROPOSED CHANGES:

##### **Legislators as Witnesses or Parties to Suits for Legislation**

Legislators or their staff have occasionally been subpoenaed to testify concerning their legislative activity including their motivations and intentions concerning legislative acts.<sup>1</sup> Although there is considerable federal law providing protection for state legislators in federal court based on long standing case precedent protecting inherent state legislative power, there is virtually no reported case law developing, explaining or acknowledging legislative immunity at the state constitutional level.<sup>2</sup> Further, there is no general law provision articulating any standard of legislative immunity for state legislators.

##### **Federal Protection of Legislative Power**

###### Members of Congress

United States Senators and Representatives are protected by legislative immunity which is expressly established under the "Speech or Debate Clause" of the United States Constitution.<sup>3</sup> It provides:

"The Senators and Representatives . . . shall in all Cases, except Treason, Felony, and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same; and for any Speech or Debate in either House, they shall not be questioned in any other Place."

The United States Supreme Court has interpreted the Speech or Debate Clause (the Clause) broadly to effectuate its purposes.<sup>4</sup> The Court has explained its purposes as follows:

'The immunities of the Speech or Debate Clause were not written into the Constitution simply for the personal or private benefit of Members of Congress, but to protect the integrity of the legislative process by insuring the independence of individual legislators.' *United States v. Brewster, supra*, 408 U.S. 507, 92 S.Ct. at 2535.

. . . our cases make it clear that the 'central role' of the Clause is to 'prevent intimidation of legislators by the Executive and accountability before a possibly hostile judiciary, *United States v. Johnson*, 383 U.S. 169, 181, 86 S.Ct. 749, 15 L.Ed.2d 681 (1966),' *Gravel v. United States, supra*, 408 U.S. at 617, 92 S.Ct. at 2623. That role is not the sole function of the Clause, however, and English history does not totally define the reach of the Clause. Rather, it 'must be interpreted in light of the American experience, and in the context of the American constitutional scheme of government . . .' *United States v. Brewster, supra*, 408 U.S. at 508, 92 S.Ct. at 2535.<sup>5</sup>

<sup>1</sup> Most recently, Representative Kriseman was subpoenaed for testimony in litigation involving online travel companies and suits against several local governments. Also, Representatives Baxley and McKeel, along with a legislative staff member on the House side, and Senators Dockery and Diaz de la Portilla, along with a senate staff member, were subpoenaed in connection with preclearance litigation regarding HB 1355 relating to elections. See footnote 46 for other examples.

<sup>2</sup> See, *Lake Country Estates Inc. v. Tahoe Regional Planning Agency*, 440 U.S. 391, 404-05 (1979) where the Supreme Court explained that the federal protection recognized in their case precedent did not depend on the presence of a Speech or Debate clause in any state constitution.

<sup>3</sup> ART. I, SEC. 6, U.S. CONST.

<sup>4</sup> *Eastland v. U.S. Serviceman's Fund*, 421 U.S. 491, 502 (1975); *Kilbourn v. Thompson*, 103 U.S. 168, 204 (1881); *United States v. Johnson*, 383 U.S. 169, 179 (1966); *Powell v. McCormack*, 395 U.S. 486, 502-03 (1969); *United States v. Brewster*, 408 U.S. 501, 508-09 (1972); *Gravel v. United States*, 408 U.S. 606, 617-18 (1972); *Tenney v. Brandhove*, 341 U.S. 367, 376-78 (1951).

<sup>5</sup> *Eastland, supra* at 503.

The Clause has been interpreted to protect federal legislators "engaged in the sphere of legitimate legislative activity."<sup>6</sup> It expressly excludes arrest for all criminal offenses from its protection.<sup>7</sup> The protection it provides from arrest applies to civil cases which were still common in America at the time the Constitution was adopted.<sup>8</sup> The Clause, also does not grant immunity from service of process in a civil case or from being called as a witness in a criminal case.<sup>9</sup>

Specifically, members of Congress are protected from inquiry into legislative acts or the motivation for actual performance of legislative acts,<sup>10</sup> from having to defend themselves against certain types of suits,<sup>11</sup> and "from the consequences of litigation."<sup>12</sup> They are also shielded by an evidentiary privilege protecting them from having their legislative acts used against them in court,<sup>13</sup> and a testimonial privilege protecting legislators and their staff from questioning regarding legislative acts.<sup>14</sup>

The critical factor in determining the Speech or Debate Clause's protection to a member of Congress in a given situation is whether the legislative action was within the sphere of legitimate legislative activity. With respect to activities other than speech and debate, federal courts look to see whether the activities took place "in a session of the House by one of its members in relation to the business before it."<sup>15</sup> In making this assessment, courts will determine whether the activities are "an integral part of the deliberative and communicative processes by which Members participate in committee and House proceedings with respect to the consideration and passage or rejection of proposed legislation or with respect to other matters which the Constitution places within the jurisdiction of either House."<sup>16</sup> Supreme Court precedent has made clear that not every action a legislator may do while serving in a legislative role is necessarily protected by the Speech or Debate Clause.<sup>17</sup> For example:

A Member of Congress may not with impunity publish a libel from the speaker's stand in his home district, and clearly the Speech or Debate Clause would not protect such an act even though the libel was read from an official committee report. (footnote omitted) The reason is that republishing a libel under such circumstances is not an essential part of the legislative process and is not part of that deliberative process 'by which members participate in committee and House proceedings.'<sup>18</sup>

Courts determining the legitimacy of legislative activity may not inquire into motives for legislative acts or look at the final product of a legislative inquiry.<sup>19</sup> The Supreme Court explained:

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<sup>6</sup> *Supreme Court of Virginia v. Consumers Union of the U.S., Inc.*, 446 U.S. 719, 732 (1980).

<sup>7</sup> The reference in the Clause to "Breach of the Peace" had a broader meaning in the 18th century to mean breach of the king's peace and was meant to embrace a whole range of crimes at common law. *Brewster, supra* at 521.

<sup>8</sup> *Gravel, supra* at 614.

<sup>9</sup> *Gravel, supra* at 614-15.

<sup>10</sup> *Brewster, supra* at 509.

<sup>11</sup> *Dombrowski v. Eastland*, 387 U.S. 82, 85 (1967).

<sup>12</sup> *Id.*

<sup>13</sup> *U.S. v. Helstoski*, 442 U.S. 477, 488-89 (1979)

<sup>14</sup> As used in this analysis the term "immunity" refers to the general principles of protection from suit and defense from the consequences of litigation, and the term "privilege" refers either to an evidentiary or testimonial privilege precluding inquiry into legislative acts, motivations for legislative acts and protection from compelled testimony concerning legislative activity. Privilege is considered a subset of immunity.

<sup>15</sup> *Eastland, supra* at 503; *Kilbourn, supra* at 204.

<sup>16</sup> *Eastland, supra* at 504; *Grave, supra* at 625.

<sup>17</sup> *Doe v. McMillan*, 412 U.S. 306, 313 (1973).

<sup>18</sup> *Doe, supra* at 314-15, citing *Gravel* at 625.

<sup>19</sup> *Eastland, supra* at 508. In one case involving a charge of racial discrimination speaking of determining invidious discriminatory purpose, the Supreme Court acknowledged that in some "extraordinary circumstances the members might be called to . . . testify concerning the purpose of the official action, although even then such testimony will frequently be barred by privilege." *Village of Arlington Heights v. Metropolitan Housing Development Corporation*, 429 U.S. 252, 268 (1977), citing *Tenney v. Brandhove*, 341 U.S. 367 (1951). The Court followed this remark with a footnote stating: "This Court has recognized, ever since *Fletcher v. Peck*, 6 *Cranch* 87, 130-31, 3 L.Ed. 162 (1810), that judicial inquiries into legislative or executive motivation represent a substantial intrusion into the workings of other branches of government. Placing a decision maker on the stand is therefore 'usually to be avoided.'" (Citation Omitted). *Arlington Heights, supra* at n. 18.



the Speech or Debate Clause protects against inquiry into acts that occur in the regular course of the legislative process and into the motivation for those acts.' 408 U.S. at 525, 92 S.Ct. at 2544 (emphasis added). And in *Tenney v. Brandhove* we said that '(t)he claim of an unworthy purpose does not destroy the privilege.' 341 U.S. at 377, 71 S.Ct., at 788. If the mere allegation that a valid legislative act was undertaken for an unworthy purpose would lift the protection of the Clause, then the Clause simply would not provide the protection historically undergirding it. 'In times of political passion, dishonest or vindictive motives are readily attributed to legislative conduct and as readily believed.' *Id.* at 378, 71 S.Ct. at 789. The wisdom of congressional approach or methodology is not open to judicial veto. *Doe v. McMillan*, 412 U.S. at 313, 93 S.Ct. at 2025. Nor is the legitimacy of a congressional inquiry to be defined by what it produces.<sup>20</sup>

Once it is determined that the action of the member was within the "legitimate legislative sphere, the Clause is an absolute bar to interference."<sup>21</sup> That interference exists not only when legislators are sued, but also when they are called to defend a lawsuit, because it "creates a distraction and forces Members to divert their time, energy, and attention from their legislative tasks to defend the litigation."<sup>22</sup>

The Clause extends its legislative immunity to staff or surrogates performing tasks which would be legislative acts if performed by the legislator directly.<sup>23</sup> The privilege, however, belongs entirely to the legislator and must be invoked by the legislator or the staff member on his or her behalf.<sup>24</sup>

As noted earlier, the protection from arrest under the Speech or Debate Clause does not apply to criminal offenses. However, it's evidentiary and testimonial privilege still applies to legislative acts. In order for federal criminal prosecutions involving federal legislators to proceed, the government's case cannot rely on the legitimate legislative acts involved, or the motivation for such acts, in its prosecution of the offense.<sup>25</sup>

### State Legislators

With respect to state legislators, the United States Supreme Court, in *Tenney v. Brandhove*, extended protections similar to those found in the federal Speech or Debate Clause to state legislators for actions taken in "the sphere of legitimate legislative activity."<sup>26</sup> After discussing the historical origins and the "indispensable" necessity of protections embodied in the Speech or Debate Clause,<sup>27</sup> the Supreme Court explained that with respect to state legislators:

Legislators are immune from deterrents to the uninhibited discharge of their legislative duty, not for their private indulgence but for the public good. One must not expect uncommon courage even in legislators. The privilege would be of little value if they could be subjected to the cost and inconvenience and distractions of a trial upon a conclusion of the pleader, or to the hazard of a judgment against them based upon a jury's speculation as to motives. The holding of this Court in *Fletcher v. Peck*, 6 *Cranch* 87, 130, 3 L.Ed. 162, that it was not consonant with our scheme of government for a court to inquire into the motives of legislators, has remained unquestioned.<sup>28</sup>

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<sup>20</sup> *Eastland, supra* at 508-09.

<sup>21</sup> *Eastland, supra* at 503.

<sup>22</sup> *Id.*

<sup>23</sup> *Gravel, supra* at 616-17.

<sup>24</sup> *Gravel, supra*, at 622.

<sup>25</sup> *Brewster, supra*.

<sup>26</sup> *Id.* at 376.

<sup>27</sup> *Tenney v. Brandhove*, 341 U.S. 367, 372-73 (1951).

<sup>28</sup> *Id.* at 377. See also, *Lake County Estates, Inc, supra*.

The United States Court of Appeals for the Eleventh Circuit (Eleventh Circuit) has explained:

Doctrinally, legislative immunity emanates from the well-spring of the federal common law; nevertheless, it is similar in scope and object to the immunity provided federal legislators under the Speech or Debate Clause. Indeed, when the Supreme Court initially recognized state legislative immunity as a constituent of the federal common law, it looked to its Speech or Debate Clause jurisprudence for guidance anent the contours of the doctrine. See *Tenney v. Brandhove*, 341 U.S. 367, 376-79, 71 S.Ct. 783, 788-90, 95 L.Ed. 1019 (1951). In later decisions, the Court acknowledged that the legislative immunity federal and state legislators enjoy are essentially coterminous. See *Supreme Court of Va. v. Consumers Union of the U.S., Inc.*, 446 U.S. 719, 732-33, 100 S.Ct. 1967, 1974-75, 64 L.Ed.2d 641 (1980).<sup>29</sup>

Under this federal level of protection, state and local legislators, including their surrogates, have immunity from civil liability for their legislative acts.<sup>30</sup> The Eleventh Circuit has described this immunity as being "parallel" with that provided to Congress under the Speech or Debate Clause.<sup>31</sup> However, unlike the Speech or Debate Clause's level of evidentiary and testimonial privilege as it applies members of Congress against federal prosecution, a parallel level of evidentiary and testimonial privilege does not apply to state legislators facing federal criminal prosecutions. With respect to federal common law protection of state legislators, the Supreme Court "[drew] the line" at civil actions.<sup>32</sup> The Supreme Court said:

Here, we believe that recognition of an evidentiary privilege for state legislators for their legislative acts would impair the legitimate interest of the Federal Government in enforcing its criminal statutes with only speculative benefit to the state legislative process.<sup>33</sup>

Part of the Supreme Court's rationale also rested on a recognition that federal interference in the state legislative process is not on the same constitutional footing with the interference of one branch of the Federal Government in the affairs of a coequal branch.<sup>34</sup>

The level of evidentiary and testimonial privilege which federal law extends to state legislators in civil actions has not been specifically addressed by the Eleventh Circuit. These privileges, however, have been treated at the trial court level as part and parcel of that which is necessary to craft the protection of legislative immunity in such a way as to effectuate its purposes as articulated by the U.S. Supreme Court, i.e., to shield legislators from inquiry into their legislative acts and the motivations for such acts, and to protect legislators from the burden of defending themselves for performing their legislative duties.<sup>35</sup> Several federal district courts from the Eleventh Circuit, as well as, other circuits have recognized that legislative immunity includes testimonial and evidentiary privilege.<sup>36</sup>

<sup>29</sup> *Bryant v. Jones*, 575 F.3d 1281, 1304 (11th Cir. 2009), See also, *Gravel*, *supra* at 618 (1972).

<sup>30</sup> *Lake Country Estates Inc*, *supra* at 405.

<sup>31</sup> *Bryant*, *supra* at 1303.

<sup>32</sup> *U.S. v. Gillock*, 445 U.S. 360, 373(1980)

<sup>33</sup> *Gillock*, *supra* at 373

<sup>34</sup> *Gillock*, *supra* at 370 citing *Baker v. Carr*, 369 U.S. 186, 210 (1962).

<sup>35</sup> See, *Eastland*, *supra*; *Tenney*, *supra*; *Lake County Estates*, *supra*; and *Dombrowski*, *supra*.

<sup>36</sup> *M Securities & Investments, Inc., v. Miami- Dade County*, 2001 WL 1685515 (S.D. Fla. 2001); *Dyas v. City of Fairhope*, 2009 WL 3151879 (S.D. Ala. 2009); *Marylanders for Fair Representation Inc. v. Schaefer*, 144 F.R.D. 292, 297-98 (D. Md. 1992); *Miles-Un-Ltd., Inc. v Town of New Shoreham, R.I.*, 917 F.Supp. 91, 98 (D.N.H. 1996); *Johnson v. Metro. Gov't of Nashville & Davidson County*, 2009 WL 819491; *Knights of Columbus v. Town of Lexington*, 138 F. Supp. 136, 140 (D. Mass. 2001); See also, *Burnick v. McLean*, 76 F.3d 611, 613 (4th Cir. 1996); *Corporacion Insular de Seguros v. Garcia*, 709 F. Supp. 288, 297 (D.P.R 1989).

## Lack of an Articulated Protection in Florida Law

The Florida Constitution has no express provision regarding legislative immunity.<sup>37</sup>

Article III, Section 1, of the Florida Constitution provides that "the legislative power of the state shall be vested in a legislature of the State of Florida . . ."

Article II, Section 3, the Separation of Powers Clause of the Florida Constitution, provides

The powers of the state government shall be divided into legislative, executive and judicial branches. No person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided herein.

There are two District Court of Appeal opinions where arguments were raised to have the court recognize legislative privilege as being inherent within the Separation of Powers Clause of the state constitution. In neither instance did the court decide the issue.

The more recent of these two cases was *City of Pompano Beach v. Swerdlow Lightspeed Management Company*.<sup>38</sup> This case involved the appeal of a trial court order for city commissioners to appear at a deposition in a civil action. The trial order, however, stated that the commissioners did not have to answer questions "touching the legislative process." The appellate court dismissed the challenge without prejudice finding it was premature because the commissioners had not been ordered to answer specific questions claimed to violate a privilege.<sup>39</sup>

The prior case was *Girardeau v. State*.<sup>40</sup> This case involved an appeal of a judgment of contempt against a state representative for refusal to answer questions before a grand jury. In *Girardeau* a representative was serving as chair of the House Committee on Corrections and as a member of an ad hoc subcommittee investigating the death of an inmate at a correctional facility. He and other members received information from inmates and correctional officers during the course of their investigation. A grand jury was also investigating the death. The grand jury issued a subpoena duces tecum for the representative to appear and bring tapes and documents in his possession relating to the inmate's death. The representative filed a motion to quash the subpoena which was denied before his appearance before the grand jury. The representative asserted legislative privilege and refused to answer questions of the grand jury. The trial court denied the claim of legislative privilege and when the representative continued in his refusal to answer questions, he was held in contempt and sentenced to 30 days in jail unless he testified.

On appeal to the First District Court of Appeal (1st DCA), the state argued that even without an express Speech or Debate clause in the state constitution, the interplay between the separation of powers provision and the express legislative power to conduct investigations<sup>41</sup> protected such legislative acts. The state's position was that the separation of powers provision implies the ability of the legislature to refuse to disclose its findings "when necessary," and that the power to conduct legislative investigations would be severely diminished if it had to make forced disclosures to a grand jury. In its argument to the 1st DCA, the state pointed out the fundamental aspect of constitutional jurisprudence, that specific grants of power to one branch of government carry with them inherent powers which necessarily facilitate the exercise of express powers.<sup>42</sup> The state used as one example the fact that no express constitutional provision exists for the United States Congress to conduct investigations, yet the U.S. Supreme Court has ruled that such power is inherent in congressional

<sup>37</sup> While Florida's Constitution of 1865 contained a Speech or Debate clause, the clause was omitted from the 1868, 1885, and the current Constitution.

<sup>38</sup> *City of Pompano Beach v. Swerdlow Lightspeed Management Company*, 942 So.2d 455 (4th DCA 2006).

<sup>39</sup> *City of Pompano Beach*, *supra* at 457.

<sup>40</sup> *Girardeau v. State*, 403 So.2d 513 (1st DCA, 1981)

<sup>41</sup> ART. III, SEC. 5, FLA. CONST.

<sup>42</sup> *Girardeau*, *supra* at 515 noting appellant's reference to *McCulloch v. Maryland*, 17 U.S. 316 (1819) and to *Amos v. Matthews*, 126 So. 308 (1930).

legislative power.<sup>43</sup> The state also noted that the United States Constitution contains no specific separation of powers clause, yet its principles are firmly established.<sup>44</sup>

The 1st DCA did not find it necessary to determine the matter of an inherent legislative privilege:

In reaching our decision we are not called upon and do not decide the scope or even the existence of a "legislative privilege" similar to that provided to members of Congress under the Speech or Debate clause. There is every reason to believe that all due deference will and should be extended by the judicial branch to any properly asserted legislative claim of privilege, and it is imperative that it be kept in mind that such claims of privilege are supported by substantial authority. "Legislators are immune from deterrents to the uninhibited discharge of their legislative duty, not for their private indulgence but for the public good." *Tenney v. Brandhove*, 341 U.S. 367, 377, 71 S.Ct. 783, 788, 95 L.Ed. 1019 (1931); (citation omitted). However, even assuming (without deciding) the existence of a legislative power to conduct confidential investigations and a generalized privilege on the part of a member to refuse to disclose evidence received in the course of such an investigation, any such claim of confidentiality cannot override or defeat the pressing need of the criminal justice system, of which the grand jury is an integral part, for evidence of a crime alleged to have been committed in the state.<sup>45</sup>

Notwithstanding the absence of reported opinions describing or admitting that the Florida Legislature inherently possesses no less immunity protecting its lawmakers for their legitimate legislative acts than lawmakers of other states, multiple trial courts have quashed subpoenas directed to legislators<sup>46</sup> seeking compelled testimony for legislative activity. In addition, the Florida Supreme Court has issued an order prohibiting a circuit judge from enforcing a subpoena to compel testimony from a legislative assistant.<sup>47</sup>

### Effect of the Bill

This bill includes legislative findings which in essence find a comparable level of legislative immunity, including testimonial and evidentiary privilege, for state legislators in state level proceedings by the executive and judicial branches of government, that exist for Congress in proceedings brought by the co-equal branches of government at the federal level.

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<sup>43</sup> *Id.* at 515 citing *Sinclair v. United States*, 279 U.S. 263 (1928) and *McGrain v. Daugherty*, 273 U.S. 135 (1926)..

<sup>44</sup> *Id.* at 515 citing *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

<sup>45</sup> *Id.* at 516-17.

<sup>46</sup> See *Delta Air Lines, Inc. v. State of Florida, Department of Revenue*, No.83-761 (Fla. 2d Cir. Ct. April 26, 1983), (quashing subpoenas duces tecum for deposition of two legislative employees challenging the constitutionality of Chapter 83-3, Laws of Florida, relating to motor fuel taxation); *Leon County Research and Development Authority v. State of Florida*, No. 88-3273 (Fla. 2d Cir. Ct. Feb. 20, 1989) (quashing subpoenas directed to staff and a former member to discover information before the Legislature when it passed the 1988-89 General Appropriations Act); *Sea Club Associates IV, Ltd. v. Interval Marketing Associates, Inc.*, No. 84-1747-CA-01 (Fla. 12th Cir. Ct. July 31, 1987) (quashing a subpoena duces tecum to a member of the House staff seeking testimony concerning, among other things, the purpose and effect of a provision of Chapter 772, Florida Statutes); *Sanphil v. City of Pompano Beach*, No. 83-18017 (Fla. 17th Cir. Ct. Sept. 29, 1983) (quashing deposition subpoenas served on two legislators to determine information the Legislature had before it when it considered the subject bill); *Lanville Jvfengedoht v. Betty Pitt Burch and Frank Pitt*, No. 85-5671 CA-T (Fla. 18th Cir.Ct. Sept. 12, 1986) (quashing deposition subpoenas directed to two Senators concerning the intent or motivation of the Legislature); *State v. Billie*, No. 83-202 (Fla. 20th Cir. Ct. Oct. 29, 1984) (quashing subpoenas served on a staff director of a Senate committee where the Defendant wished to inquire into the source of information used in written and oral presentations to the legislative committee in the passage of the bill); and *Billie v. State of Florida*, No. 02-499-CA (Fla. 7th Cir. Ct. Feb. 7, 2003) (quashing a deposition subpoena of a state senator seeking the senator's intent or purpose of, or motives for sponsoring legislation).

<sup>47</sup> *The Florida Legislature et al. v. N. Sanders Sauls. Judge*, 614 So.2d 502 (Fla. 1993). Order issued in Case No. 80,834, February 2, 1993.

This bill makes legislative findings that:

- State legislators and their staff have broad privileges and immunities under the Florida Constitution arising from their service in the legislative branch of government, including a broad privilege and immunity against compelled testimony in forums outside the legislative body in which they serve, encompassing all legislative actions and functions and their mental impressions and intentions regarding legislative actions and functions.
- Such privileges and immunities exist to encourage and protect the uninhibited discharge of a legislator's duty for the public good and not a legislator's personal benefit.
- Such privileges and immunities are inherent in the legislative powers vested in the Florida Legislature by Art. III, s. 1, and implicit in the separation of powers under Art. II, s. 3, of the Florida Constitution.

This bill is a legislative articulation of privileges and immunities found by the legislature for its members and staff. The bill specifies that a member or former member of the legislature has an absolute privilege in any civil action, judicial administrative proceeding or executive branch administrative proceeding against compelled testimony or the compelled production of any document or record in connection with any action taken or function performed in a legislative capacity.

The bill provides that a legislative staff member or former legislative staff member also has an absolute privilege in the same types of proceedings and to the same extent as legislators with regard to matters, documents or records involving duties performed within the scope of their legislative employment.

The bill also provides that such legislative privilege belongs to legislators and former legislators. A legislative staff member or former legislative staff member cannot waive the privilege unless the privilege has been waived, in writing, by the legislator or former legislator on whose behalf the legislative staff member was acting. In situations where the staff member was not acting on behalf of a specific legislator, the presiding officer of the chamber at the time of the staff's employment must provide the waiver. The bill requires that, in order to be sufficient, the waiver must be an explicit and unequivocal renunciation of the privilege or immunity.

The bill preserves in perpetuity the privilege of a deceased legislator or former legislator in the same status it was on the date of his or her death.

The bill specifically provides that it shall not affect or alter the right of access to public records which are open to personal inspection and copying pursuant to s. 24, Art. I of the State Constitution or s. 11.0431, F.S.

#### B. SECTION DIRECTORY:

Section 1. Creates s. 11.112, F.S., relating to legislative privileges and immunities

Section 2. Provides an effective date of upon becoming 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:

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:

**The Relationship Between Legislative Immunity and Separation of Powers**

"The preservation of the inherent powers of the three branches of government-legislative, executive, and judicial-free from encroachment or infringement by one upon the other, is essential to the safekeeping of the American system of constitutional rule."<sup>48</sup>

The United States Supreme Court said in *Brewster*:

It is beyond doubt that the Speech or Debate Clause protects against inquiry into acts that occur in the regular course of the legislative process and into the motivation for those acts. So expressed, the privilege is broad enough to insure the historic independence of the Legislative Branch, essential to our separation of powers, but narrow enough to guard against the excesses of those who would corrupt the process by corrupting its Members.<sup>49</sup>

Three years later in *Eastland* the Court said:

In our system 'the [Speech and Debate] clause serves the additional function of reinforcing the separation of powers so deliberately established by the Founders.' *United States v. Johnson, supra*, 383 U.S., at 178, 86 S.Ct., at 754.

A comparison between the purposes served by the protections of the Speech or Debate Clause and the principals of separation of powers reveal some commonalities. It also directs attention to the fact

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<sup>48</sup> *Daniels v. State Road Department*, 170 So.2d 846, 851 (Fla. 1964) citing *Simmons v. State*, 36 So.2d 207, 208 (3rd DCA 1948).

<sup>49</sup> *Brewster, supra* at 525.

that what is protected by legislative immunity is the people's right to representation in the democratic process. The United States Supreme Court has said, with respect to the purpose of the separation of powers:

“Separation-of-powers principles are intended, in part, *to protect each branch of government from incursion by the others*. Yet the dynamic between and among the branches is not the only object of the Constitution's concern. The structural principles secured by the separation of powers *protect the individual as well.*” *Bond v. United States*, 564 U.S. —, —, 131 S.Ct. 2355, —, 180 L.Ed.2d 269, 2011 WL 2369334, \*8 (2011) (emphasis added).<sup>50</sup>

The relationship between legislative immunity and the separation of powers can be seen by examining their respective purposes both from the perspective of the government interaction with a co-equal branch of government on one hand, and from the perspective of government interaction with its people on the other hand. Contrast the above excerpt with the following excerpts from United States Supreme Court opinions explaining the purposes of the Speech or Debate Clause from these two different perspectives:

. . . our cases make it clear that the ‘central role’ of the Clause is to ‘prevent intimidation of legislators by the Executive and accountability before a possibly hostile judiciary,’<sup>51</sup> (citations omitted)

. . . the Supreme Judicial Court of Massachusetts, interpreting a provision of the Massachusetts Constitution granting the rights of freedom of Speech or Debate to state legislators, recognized that “the privilege secured by it is not so much the privilege of the house as an organized body, as of each individual member composing it, who is entitled to this privilege, even against the declared will of the house. For he does not hold this privilege at the pleasure of the house; but derives it from the will of the people....” *Coffin v. Coffin*, 4 Mass. 1, 27 (1808). This theme underlies our cases interpreting the Speech or Debate Clause and the federal common law of legislative immunity, where we have emphasized that any restriction on a legislator's freedom undermines the “public good” by interfering with the rights of the people to representation in the democratic process. *Lake Country Estates, supra*, 440 U.S. at 404-405, 99 S.Ct. at 1178-1179; *Tenney, supra*, 341 U.S. at 377, 71 S.Ct. at 788.<sup>52</sup>

The fact that the United States Supreme Court recognized that the Speech or Debate Clause serves an “additional function to reinforce the separation of powers” among co-equal branches of government,<sup>53</sup> and then extended similar protections to state legislatures in *Tenney*, suggests that legislative immunity protections at the state level would also reinforce the separation of powers among the co-equal branches of state government.

The extension of legislative immunity to state legislators by the United States Supreme Court was made without regard to whether the state constitutions themselves included a Speech or Debate clause.

. . . the absolute immunity for state legislators recognized in *Tenney* reflected the Court's interpretation of federal law; the decision did not depend on the presence of a speech or debate clause in the constitution of any State, or on any particular set of state rules or procedures available to discipline erring legislators. Rather, the rule of that case recognizes the need for immunity to protect the “public good.”<sup>54</sup>

<sup>50</sup> *Stern v. Marshall*, 131 S.Ct 2594 (2011).

<sup>51</sup> *Eastland, supra* at 503.

<sup>52</sup> *Spallone v. U.S.*, 493 U.S. 265 (1990).

<sup>53</sup> See *Gillock, supra*.

<sup>54</sup> *Lake Country Estates Inc. supra*, at 405 (1979).

The same historical rationale and "public good" which provided a basis for the United States Supreme Court to recognize legislative immunity protections to all state legislatures, exists for state courts to draw similar conclusions with respect to state level protection afforded inherently within their own respective state constitutions.<sup>55</sup>

Although the Florida Constitution does not contain a provision that specifically addresses immunity for "speech or debate" as is provided in the United States Constitution, the Speech or Debate Clause does not expressly mention all forms of legislative activity that is included within its protection. The United States Supreme Court has included inherent legislative powers within the scope of its protection because to do otherwise "would be a miserly reading of the Speech or Debate Clause in derogation of the 'integrity of the legislative process.'"<sup>56</sup>

### **Codifying Inherent Constitutional Power**

Article III, Section 1 of the Florida Constitution vests the lawmaking power of the state to the Florida Legislature. Powers vested among the respective branches of government are provided in the Constitution and cannot be enlarged or reduced by general law.

#### **B. RULE-MAKING AUTHORITY:**

The bill does not appear to create a need for rulemaking or rulemaking authority.

#### **C. DRAFTING ISSUES OR OTHER COMMENTS:**

### **Why Speech or Debate Clause Type Protections Were Extended to the States**

Justice Frankfurter, writing for Supreme Court in *Tenney*, elaborated on the essential nature and the scope of protection that ought to be contained within the legislative immunity protected by the Speech or Debate Clause:

Freedom of speech and action in the legislature was taken as a matter of course by those who severed the Colonies from the Crown and founded our Nation. It was deemed so essential for representatives of the people that it was written into the Articles of Confederation and later into the Constitution. Article V of the Articles of Confederation is quite close to the English Bill of Rights: 'Freedom of Speech or Debate in Congress shall not be impeached or questioned in any court or place out of Congress . . .

The reason for the privilege is clear. It was well summarized by James Wilson, an influential member of the Committee of Detail which was responsible for the provision in the Federal Constitution. 'In order to enable and encourage a representative of the public to discharge his public trust with firmness and success, it is indispensably necessary, that he should enjoy the fullest liberty of speech, and that he should be protected from the resentment of every one, however powerful, to whom the exercise of that liberty may occasion offense.' II Works of James Wilson (Andrews ed. 1896) 38. See the statement of the reason for the privilege in the Report from the Select Committee on the Official Secrets Acts (House of Commons, 1939) xiv. . . .

. . . I therefore think that the article ought not to be construed strictly, but liberally, that the full design of it may be answered. I will not confine it to delivering an opinion, uttering a speech, or haranguing in debate; but will extend it to the giving of a vote, to the making

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<sup>55</sup> See, *Bogan v. Scott-Harris*, 523 U.S. 44, 52 (1998) ("Absolute immunity for local legislators under § 1983 finds support not only in history, but also in reason."). See also, *Lake Country Estates Inc.*, *supra* at 405.

<sup>56</sup> *Eastland*, *supra* at 505 (Where the U.S. Supreme Court was discussing the integral nature of committee investigative and subpoena power to performing legislative functions assigned by Congress).



of a written report, and to every other act resulting from the nature, and in the execution, of the office; and I would define the article as securing to every member exemption from prosecution, for every thing said or done by him, as a representative, in the exercise of the functions of that office, without inquiring whether the exercise was regular according to the rules of the house, or irregular and against their rules.<sup>57</sup>

#### IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

N/A

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<sup>57</sup> *Tenney, supra* at 372-74.

1                                   A bill to be entitled  
 2           An act relating to legislative immunity; creating s.  
 3           11.112, F.S., providing legislative findings  
 4           concerning legislative privileges and immunities;  
 5           providing that legislators and former legislators have  
 6           an absolute privilege in any civil action or any  
 7           judicial administrative proceeding or executive branch  
 8           administrative proceeding against compelled testimony  
 9           or the compelled production of any document or record  
 10          in connection with any action taken or function  
 11          performed in a legislative capacity; providing an  
 12          absolute privilege for any legislative staff member or  
 13          former legislative staff member to the same extent as  
 14          a legislator's privilege; providing that the privilege  
 15          specified in this section may only be waived by a  
 16          legislative staff member or former legislative staff  
 17          member with a written waiver from the appropriate  
 18          legislator or former legislator; providing that in the  
 19          case of a legislator or former legislator who is  
 20          deceased the privilege remains in perpetuity in the  
 21          same status as it was on the date of the legislator's  
 22          or former legislator's death; providing that the  
 23          section shall not affect or alter the right of access  
 24          to public records pursuant to s. 24, Art. I of the  
 25          Florida Constitution or s. 11.0431, F.S.; providing an  
 26          effective date.

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

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Section 1. Section 11.112, Florida Statutes, is created to read:

11.112 .-- Legislative privileges and immunities

(1) The Florida Legislature finds:

(a) That state legislators and their staff have broad privileges and immunities under the Florida Constitution arising from their service in the legislative branch of government, including a broad privilege and immunity against compelled testimony in forums outside the legislative body in which they serve, encompassing all legislative actions and functions and their mental impressions and intentions regarding legislative actions and functions.

(b) That such privileges and immunities exist to encourage and protect the uninhibited discharge of a legislator's duty for the public good and not a legislator's personal benefit.

(c) That such privileges and immunities are inherent in the legislative powers vested in the Florida Legislature by Art. III, s. 1, and implicit in the separation of powers under Art. II, s. 3, of the Florida Constitution.

(d) That a codification of certain privileges and immunities in no way limits or abrogates the full privileges and immunities inherent in the legislative powers, the separation of powers and in the guarantee of a republican form of government.

(2) A member or former member of the legislature has an absolute privilege in any civil action, judicial administrative proceeding or executive branch administrative proceeding against compelled testimony or the compelled production of any document

57 or record in connection with any action taken or function  
 58 performed in a legislative capacity.

59 (3) Subject to the provisions of subsection (4), a  
 60 legislative staff member or former legislative staff member has  
 61 an absolute privilege in any civil action, judicial  
 62 administrative proceeding or executive branch administrative  
 63 proceeding to the same extent as a member of the legislature  
 64 when the matter at issue or document or record involves duties  
 65 performed within the scope of his or her employment as a  
 66 legislative staff member.

67 (4) The privilege specified in this section belongs to  
 68 legislators and former legislators. A legislative staff member  
 69 or former legislative staff member shall not waive the privilege  
 70 specified under this section except by a waiver of the privilege  
 71 by the legislator or former legislator on whose behalf the  
 72 legislative staff member was acting, or where not acting on  
 73 behalf of a specific legislator, by the presiding officer, at  
 74 the time, of the legislative chamber where the legislative staff  
 75 member was employed. In order for a waiver of a legislator's or  
 76 former legislator's privilege or immunity to be sufficient, it  
 77 must be an explicit and unequivocal renunciation of the  
 78 privilege or immunity in writing.

79 (5) In the case of a legislator or former legislator who is  
 80 deceased, the privilege or immunity shall remain in perpetuity  
 81 in the same status as it was on the date of the legislator's or  
 82 former legislator's death.

83 (6) This section shall not affect or alter the right of  
 84 access to public records which are open to personal inspection

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85 | and copying pursuant to s. 24, Art. I of the State Constitution  
86 | or s. 11.0431.

87 | Section 2. This act shall take effect upon becoming law.



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# **Judiciary Committee**

**Thursday, February 16, 2012**

**11:30 AM**

**404 HOB**

**AMENDMENT PACKET**

COMMITTEE/SUBCOMMITTEE AMENDMENT

Bill No. CS/HB 233 (2012)

Amendment No. 1

COMMITTEE/SUBCOMMITTEE ACTION

ADOPTED                                   \_\_\_ (Y/N)  
ADOPTED AS AMENDED                   \_\_\_ (Y/N)  
ADOPTED W/O OBJECTION               \_\_\_ (Y/N)  
FAILED TO ADOPT                       \_\_\_ (Y/N)  
WITHDRAWN                              \_\_\_ (Y/N)  
OTHER                                    \_\_\_\_\_

1 Committee/Subcommittee hearing bill: Judiciary Committee  
2 Representative Rouson offered the following:

3  
4       **Amendment (with title amendment)**

5       Remove lines 22-29 and insert:

6       (b) If the board of county commissioners or court has  
7 established a misdemeanor probation program for defendants  
8 convicted of a misdemeanor for possession of a controlled  
9 substance or drug paraphernalia under chapter 893, probation  
10 supervision services that include substance abuse education and  
11 intervention services shall be provided by a licensed substance  
12 abuse service provider under ch. 397, unless the provider is  
13 exempt from such licensure under s. 397.405.

Amendment No. 1

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**T I T L E   A M E N D M E N T**

Remove lines 3-11 and insert:  
amending s. 948.15, F.S.; requiring probation supervision  
services for defendants convicted of certain misdemeanor  
controlled substance offenses that include substance abuse  
education and intervention services to be provided by a licensed  
substance abuse service provider in certain instances; providing  
an effective date.



COMMITTEE/SUBCOMMITTEE AMENDMENT

Bill No. CS/HB 431 (2012)

Amendment No. 1

COMMITTEE/SUBCOMMITTEE ACTION

ADOPTED	___	(Y/N)
ADOPTED AS AMENDED	___	(Y/N)
ADOPTED W/O OBJECTION	___	(Y/N)
FAILED TO ADOPT	___	(Y/N)
WITHDRAWN	___	(Y/N)
OTHER	_____	

1 Committee/Subcommittee hearing bill: Judiciary Committee  
2 Representative Nehr offered the following:

3  
4 **Amendment (with title amendment)**

5 Between lines 41 and 42, insert:

6 (c) Develop and adopt policies and procedures providing for  
7 an appeal process in which a party seeking to enter into a  
8 joint-use agreement with a school district pursuant to this  
9 section may file an appeal with the district school  
10 superintendent if the negotiations for such joint-use agreement  
11 fail.

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15 -----  
16 **T I T L E A M E N D M E N T**

17 Remove line 8 and insert:

COMMITTEE/SUBCOMMITTEE AMENDMENT

Bill No. CS/HB 431 (2012)

Amendment No. 1

18 | agreements; requiring procedure for an appeal process if  
19 | negotiations for a joint-use agreement fail; providing duties of  
20 | district school boards

21

COMMITTEE/SUBCOMMITTEE AMENDMENT

Bill No. CS/HB 431 (2012)

Amendment No. 2

COMMITTEE/SUBCOMMITTEE ACTION

ADOPTED	___	(Y/N)
ADOPTED AS AMENDED	___	(Y/N)
ADOPTED W/O OBJECTION	___	(Y/N)
FAILED TO ADOPT	___	(Y/N)
WITHDRAWN	___	(Y/N)
OTHER	_____	

1 Committee/Subcommittee hearing bill: Judiciary Committee  
2 Representative Nehr offered the following:

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4 **Amendment (with title amendment)**

5 Between lines 70 and 71, insert:

6 (3) Nothing in this section shall be deemed a waiver of  
7 sovereign immunity beyond the limited waiver in s. 768.28.

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11 -----  
12 **T I T L E A M E N D M E N T**

13 Remove line 14 and insert:  
14 defining the term "gross negligence"; providing application;  
15 providing an  
16

COMMITTEE/SUBCOMMITTEE AMENDMENT

Bill No. CS/CS/CS/HB 481 (2012)

Amendment No. 1

COMMITTEE/SUBCOMMITTEE ACTION

ADOPTED \_\_\_\_\_ (Y/N)

ADOPTED AS AMENDED \_\_\_\_\_ (Y/N)

ADOPTED W/O OBJECTION \_\_\_\_\_ (Y/N)

FAILED TO ADOPT \_\_\_\_\_ (Y/N)

WITHDRAWN \_\_\_\_\_ (Y/N)

OTHER

1 Committee/Subcommittee hearing bill: Judiciary Committee

2 Representative Steinberg offered the following:

3  
4 **Amendment (with title amendment)**

5 Between lines 44 and 45, insert:

6 Section 2. Effective July 1, 2013, section 28.211, Florida  
7 Statutes, is amended to read:

8 28.211 Clerk to keep docket.—The clerk of the circuit  
9 court shall keep a progress docket in which he or she shall note  
10 the filing of each pleading, motion, or other paper and any step  
11 taken by him or her in connection with each action, appeal, or  
12 other proceeding before the court. The clerk may keep separate  
13 progress dockets for civil and criminal matters. The clerk shall  
14 keep an alphabetical index, direct and inverse, for the docket.  
15 Notwithstanding any other law, a clerk may not charge a fee to  
16 view or print a copy of a docket via the Internet.

17  
18 Remove lines 472-473 and insert:

Amendment No. 1

19 Section 11. Except as expressly provided in this act, this  
20 act shall take effect upon becoming a law.

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23

**T I T L E A M E N D M E N T**

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Remove line 5 and insert:

25

electronically time stamped; amending s. 28.211, F.S.;

26

prohibiting a clerk from charging a fee to view or

27

print a copy of a docket via the Internet; amending s.

28

28.222, F.S.;

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30

Remove line 28 and insert:

31

subject to a tax sale; providing effective dates.

COMMITTEE/SUBCOMMITTEE AMENDMENT

Bill No. CS/HB 549 (2012)

Amendment No. 1

COMMITTEE/SUBCOMMITTEE ACTION

ADOPTED \_\_\_\_\_ (Y/N)  
ADOPTED AS AMENDED \_\_\_\_\_ (Y/N)  
ADOPTED W/O OBJECTION \_\_\_\_\_ (Y/N)  
FAILED TO ADOPT \_\_\_\_\_ (Y/N)  
WITHDRAWN \_\_\_\_\_ (Y/N)  
OTHER \_\_\_\_\_

1 Committee/Subcommittee hearing bill: Judiciary Committee  
2 Representative Workman offered the following:

3  
4 **Amendment (with title amendment)**

5 Remove everything after the enacting clause and insert:

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

8 61.08 Alimony.—

9 (1) In a proceeding for dissolution of marriage, the court  
10 may grant alimony to either party, which alimony may be bridge-  
11 the-gap, rehabilitative, durational, or long-term ~~permanent~~ in  
12 nature or a any combination of these forms of alimony where  
13 appropriate. The court shall make written findings regarding the  
14 basis for awarding combinations of alimony, including the type  
15 of alimony and length of time during which it is awarded. The  
16 purpose of combining forms of alimony is to provide greater  
17 economic assistance to allow the recipient spouse to achieve  
18 rehabilitation or an ability to contribute to the needs and  
19 necessities of life, taking into account such needs and

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Amendment No. 1

20 necessities of life as they were established during the  
21 marriage. In any award of alimony, the court may order periodic  
22 payments, ~~or~~ payments in lump sum, or both. The court may  
23 consider the adultery of either spouse and the circumstances  
24 thereof in determining the amount of alimony, if any, to be  
25 awarded, only to the extent that the adultery caused a  
26 significant depletion in the material assets or caused a  
27 significant reduction in the income of a party. In all  
28 dissolution actions, the court shall include findings of fact  
29 relative to the factors enumerated in subsection (2) supporting  
30 an award or denial of alimony.

31 (2) In determining whether to award alimony or  
32 maintenance, the court shall first make, in writing, a specific  
33 factual determination as to whether either party has an actual  
34 need for alimony or maintenance and whether either party has the  
35 ability to pay alimony or maintenance. If the court finds that a  
36 party has a need for alimony or maintenance and that the other  
37 party has the ability to pay alimony or maintenance, then in  
38 determining the proper type and amount of alimony or maintenance  
39 under subsections (5)-(8), the court shall consider and make  
40 written findings regarding all relevant factors, including, ~~but~~  
41 not limited to:

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

44 (b) The duration of the marriage.

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

Amendment No. 1

47 (d) The financial resources of each party, including the  
48 nonmarital assets that were relied upon and utilized by the  
49 parties during the marriage and ~~and~~ the marital assets and  
50 liabilities distributed to each.

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

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

59 (g) The responsibilities each party will have with regard  
60 to any minor children the parties ~~they~~ have in common.

61 (h) The tax treatment and consequences to both parties of  
62 an ~~any~~ alimony award, which must be consistent with applicable  
63 state and federal tax laws ~~including the designation of all or a~~  
64 ~~portion of the payment as a nontaxable, nondeductible payment.~~

65 (i) All sources of income available to either party,  
66 including income available to either party through investments  
67 of any asset held by that party that were acquired during the  
68 marriage.

69 (j) The net income and standard of living available to  
70 each party after the application of the alimony award. There  
71 shall be a rebuttable presumption that both parties will  
72 necessarily have a lower standard of living after the  
73 dissolution of marriage than the standard of living they enjoyed  
74 during the marriage.



Amendment No. 1

75        ~~(k)-(j)~~ Any other factor necessary to do equity and justice  
76        between the parties, if that factor is specifically identified  
77        in the award with findings of fact justifying the application of  
78        the factor.

79        (3) To the extent necessary to protect an award of  
80        alimony, the court may order any party who is ordered to pay  
81        alimony to purchase or maintain a life insurance policy or a  
82        bond, or to otherwise secure such alimony award with any other  
83        assets which may be suitable for that purpose in an amount  
84        adequate to secure the alimony award. Any such security may only  
85        be awarded upon a showing of special circumstances. If the court  
86        finds special circumstances and awards such security, the court  
87        must make specific evidentiary findings regarding the  
88        availability, cost, and financial impact on the obligated party,  
89        Any security may be modifiable in the event the underlying  
90        alimony award is modified, and shall be reduced in an amount  
91        commensurate with any reduction in the alimony award.

92        (4) For purposes of determining alimony, ~~there is a~~  
93        ~~rebuttable presumption that~~ a short-term marriage is a marriage  
94        having a duration equal to or of less than 7 years, a moderate-  
95        term marriage is a marriage having a duration of greater than 7  
96        years but less than 20 17 years, and long-term marriage is a  
97        marriage having a duration of 20 17 years or greater. The length  
98        of a marriage is the period of time from the date of marriage  
99        until the date of filing of an action for dissolution of  
100        marriage.

101        (5) Bridge-the-gap alimony may be awarded to assist a  
102        party by providing support to allow the party to make a

Amendment No. 1

103 transition from being married to being single. Bridge-the-gap  
104 alimony is designed to assist a party with legitimate  
105 identifiable short-term needs, and the length of an award may  
106 not exceed 2 years. An award of bridge-the-gap alimony  
107 terminates upon the death of either party or upon the remarriage  
108 of the party receiving alimony. An award of bridge-the-gap  
109 alimony shall not be modifiable in amount or duration.

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

- 113 1. The redevelopment of previous skills or credentials; or
- 114 2. The acquisition of education, training, or work  
115 experience necessary to develop appropriate employment skills or  
116 credentials.

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

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

125 (7) ~~Durational alimony may be awarded when permanent~~  
126 ~~periodic alimony is inappropriate. The purpose of Durational~~  
127 ~~alimony may be awarded is~~ to provide a party with economic  
128 assistance for a set period of time following a marriage of  
129 ~~short or~~ moderate duration or following a marriage of long  
130 duration if there is no ongoing need for support on a long-term

Amendment No. 1

131 ~~permanent~~ basis. When awarding durational alimony, the court  
132 must provide written findings that an award of rehabilitative or  
133 bridge-the-gap alimony or a combination thereof is not  
134 appropriate. An award of durational alimony terminates upon the  
135 death of either party or upon the remarriage of the party  
136 receiving alimony. The amount of an award of durational alimony  
137 shall, except upon a written finding of exceptional  
138 circumstances, may be modified or terminated based upon a  
139 substantial change in circumstances or upon the existence of a  
140 supportive relationship in accordance with s. 61.14. ~~However,~~  
141 The length of an award of durational alimony may not ~~be modified~~  
142 ~~except under exceptional circumstances and may not~~ exceed the  
143 length of the marriage. In the event that the court awards  
144 durational alimony for a length of time greater than 50 percent  
145 of the length of the marriage, the court must make written  
146 findings of fact stating the circumstances warranting the length  
147 of the award.

148 (8) Long-term Permanent alimony may be awarded to provide  
149 for the needs and necessities of life ~~as they were established~~  
150 ~~during the marriage of the parties~~ for a party who lacks the  
151 financial ability to meet his or her needs and necessities of  
152 life following a dissolution of marriage. Long-term Permanent  
153 alimony may be awarded following a long-term marriage ~~of long~~  
154 ~~duration~~ if such an award is appropriate upon consideration of  
155 the factors set forth in subsection (2), following a moderate-  
156 term marriage ~~of moderate duration~~ if such an award is  
157 appropriate based upon clear and convincing evidence after  
158 consideration of the factors set forth in subsection (2), or

Amendment No. 1

159 following a short-term marriage ~~of short duration~~ if there are  
160 written findings of exceptional circumstances. In awarding long-  
161 term permanent alimony, the court shall include findings a  
162 finding that no other form of alimony will provide for the needs  
163 and necessities of life of the recipient and that no other form  
164 is fair and reasonable under the circumstances of the parties.  
165 An award of long-term permanent alimony terminates upon the  
166 death of either party, ~~or~~ upon the remarriage of the party  
167 receiving alimony, or as provided in s. 61.14(12). An award  
168 shall may be modified or terminated based upon a substantial  
169 change in circumstances or upon the existence of a supportive  
170 relationship in accordance with s. 61.14.

171 (9) Notwithstanding any other law to the contrary, an The  
172 award of alimony may not leave the payor with ~~significantly~~ less  
173 net income or with a lower standard of living than the ~~net~~  
174 ~~income of the~~ recipient unless there are written findings of  
175 exceptional circumstances. The court shall make written findings  
176 regarding the relative incomes and standards of living citing to  
177 evidence in the record and to this subsection.

178 (10)(a) With respect to any order requiring the payment of  
179 alimony entered on or after January 1, 1985, unless ~~the~~  
180 ~~provisions of~~ paragraph (c) or paragraph (d) applies apply, the  
181 court shall direct in the order that the payments of alimony be  
182 made through the appropriate depository as provided in s.  
183 61.181.

184 (b) With respect to any order requiring the payment of  
185 alimony entered before January 1, 1985, upon the subsequent  
186 appearance, on or after that date, of one or both parties before

COMMITTEE/SUBCOMMITTEE AMENDMENT

Bill No. CS/HB 549 (2012)

Amendment No. 1

187 the court having jurisdiction for the purpose of modifying or  
188 enforcing the order or in any other proceeding related to the  
189 order, or upon the application of either party, unless ~~the~~  
190 ~~provisions of~~ paragraph (c) or paragraph (d) applies ~~apply~~, the  
191 court shall modify the terms of the order as necessary to direct  
192 that payments of alimony be made through the appropriate  
193 depository as provided in s. 61.181.

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

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

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

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

941873 - h0549-strike.docx

Published On: 2/15/2012 7:02:13 PM

COMMITTEE/SUBCOMMITTEE AMENDMENT

Bill No. CS/HB 549 (2012)

Amendment No. 1

215 Section 2. Paragraphs (a) and (b) of subsection (1) of  
216 section 61.14, Florida Statutes, are ~~is~~ amended, paragraphs (c)  
217 and (d) are added to subsection (11) of that section, and  
218 subsections (12) and (13) are added to that section, to read:

219 61.14 Enforcement and modification of support,  
220 maintenance, or alimony agreements or orders.-

221 (1)(a) When the parties enter into an agreement for  
222 payments for, or instead of, support, maintenance, or alimony,  
223 whether in connection with a proceeding for dissolution or  
224 separate maintenance or with any voluntary property settlement,  
225 or when a party is required by court order to make any payments,  
226 and the circumstances or the financial ability of either party  
227 changes or the child who is a beneficiary of an agreement or  
228 court order as described herein reaches majority after the  
229 execution of the agreement or the rendition of the order, either  
230 party may apply to the circuit court of the circuit in which the  
231 parties, or either of them, resided at the date of the execution  
232 of the agreement or reside at the date of the application, or in  
233 which the agreement was executed or in which the order was  
234 rendered, for an order decreasing or increasing the amount of  
235 support, maintenance, or alimony, and the court has jurisdiction  
236 to make orders as equity requires, with due regard to the  
237 changed circumstances or the financial ability of the parties or  
238 the child, decreasing, increasing, or confirming the amount of  
239 separate support, maintenance, or alimony provided for in the  
240 agreement or order. For purposes of considering a petition for  
241 modification of an alimony award, an increase in an obligor's  
242 income shall not be considered permanent in nature unless the

941873 - h0549-strike.docx

Published On: 2/15/2012 7:02:13 PM

Amendment No. 1

243 increase has been maintained without interruption for at least  
244 one year. A finding that medical insurance is reasonably  
245 available or the child support guidelines schedule in s. 61.30  
246 may constitute changed circumstances. Except as otherwise  
247 provided in s. 61.30(11)(c), the court may modify an order of  
248 support, maintenance, or alimony by increasing or decreasing the  
249 support, maintenance, or alimony retroactively to the date of  
250 the filing of the action or supplemental action for modification  
251 as equity requires, giving due regard to the changed  
252 circumstances or the financial ability of the parties or the  
253 child.

254 (b)1. The court must, except upon a written finding of  
255 exceptional circumstances, ~~may~~ reduce or terminate an award of  
256 alimony upon specific written findings by the court that since  
257 the granting of a divorce and the award of alimony a supportive  
258 relationship has existed between the obligee and a person with  
259 whom the obligee resides. On the issue of whether alimony should  
260 be reduced or terminated under this paragraph, the burden is on  
261 the obligor to prove by a preponderance of the evidence that a  
262 supportive relationship exists.

263 2. In determining whether an existing award of alimony  
264 should be reduced or terminated because of an alleged supportive  
265 relationship between an obligee and a person who is not related  
266 by consanguinity or affinity and with whom the obligee resides,  
267 the court shall elicit the nature and extent of the relationship  
268 in question. The court shall give consideration, without  
269 limitation, to circumstances, including, but not limited to, the

COMMITTEE/SUBCOMMITTEE AMENDMENT

Bill No. CS/HB 549 (2012)

Amendment No. 1

270 following~~r~~ in determining the relationship of an obligee to  
271 another person:

272 a. The extent to which the obligee and the other person  
273 have held themselves out as a married couple by engaging in  
274 conduct such as using the same last name, using a common mailing  
275 address, referring to each other in terms such as "my husband"  
276 or "my wife," or otherwise conducting themselves in a manner  
277 that evidences a permanent supportive relationship.

278 b. The period of time that the obligee has resided with  
279 the other person in a permanent place of abode.

280 c. The extent to which the obligee and the other person  
281 have pooled their assets or income or otherwise exhibited  
282 financial interdependence.

283 d. The extent to which the obligee or the other person has  
284 supported the other, in whole or in part.

285 e. The extent to which the obligee or the other person has  
286 performed valuable services for the other.

287 f. The extent to which the obligee or the other person has  
288 performed valuable services for the other's company or employer.

289 g. Whether the obligee and the other person have worked  
290 together to create or enhance anything of value.

291 h. Whether the obligee and the other person have jointly  
292 contributed to the purchase of any real or personal property.

293 i. Evidence in support of a claim that the obligee and the  
294 other person have an express agreement regarding property  
295 sharing or support.



Amendment No. 1

296 j. Evidence in support of a claim that the obligee and the  
297 other person have an implied agreement regarding property  
298 sharing or support.

299 k. Whether the obligee and the other person have provided  
300 support to the children of one another, regardless of any legal  
301 duty to do so.

302 3. This paragraph does not abrogate the requirement that  
303 every marriage in this state be solemnized under a license, does  
304 not recognize a common law marriage as valid, and does not  
305 recognize a de facto marriage. This paragraph recognizes only  
306 that relationships do exist that provide economic support  
307 equivalent to a marriage and that alimony terminable on  
308 remarriage may be reduced or terminated upon the establishment  
309 of equivalent equitable circumstances as described in this  
310 paragraph. The existence of a conjugal relationship, though it  
311 may be relevant to the nature and extent of the relationship, is  
312 not necessary for the application of ~~the provisions of~~ this  
313 paragraph.

314 4. There shall be a rebuttable presumption that any  
315 modification or termination of an alimony award is retroactive  
316 to the date of the filing of the petition. In an action under  
317 this section, if it is determined that the obligee unnecessarily  
318 or unreasonably litigated the underlying petition for  
319 modification or termination, the court may award the obligor his  
320 or her reasonable attorney's fees and costs pursuant to s. 61.16  
321 and applicable case law.

Amendment No. 1

322 5. A court terminating an alimony award based on the  
323 existence of a supportive relationship may not reserve  
324 jurisdiction to later reinstate alimony.

325 (11)

326 (c) If the obligor remarries or resides with another  
327 person, the income and assets of the obligor's spouse or the  
328 person with whom the obligor resides may not be considered in a  
329 modification action regarding such obligor, except for purposes  
330 of discovery to determine the obligor's income or assets within  
331 the pooled income and assets.

332 (d) If the court orders alimony payable concurrent with a  
333 child support order, the alimony award may not be modified  
334 solely because of a later modification or termination of child  
335 support payments.

336 (12) The fact that an obligor has reached a reasonable  
337 retirement age shall be considered a substantial change in  
338 circumstances as a matter of law. There is a rebuttable  
339 presumption that a reasonable retirement age for purposes of  
340 this subsection is 67 years of age. In anticipation of  
341 retirement, the obligor may file a petition for termination or  
342 modification of the alimony award effective upon the retirement  
343 date. The court shall terminate or modify the alimony award  
344 based on the circumstances of the parties after retirement of  
345 the obligor and based on the factors in subsection (2), unless  
346 the court makes findings of fact that a termination or  
347 modification of an alimony award is not warranted. In  
348 determining whether the obligor's retirement age is reasonable,  
349 the court shall consider the following factors:

941873 - h0549-strike.docx

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Amendment No. 1

350 (a) Age.

351 (b) Health.

352 (c) Motivation for retirement.

353 (d) Type of work.

354 (e) Normal retirement age for that type of work.

355 (13) Except in cases of marriages of long duration, in any  
356 alimony award, the court shall impute income to the obligee  
357 based on the analysis and factors set forth in s. 61.30(2)(b),  
358 F.S.

359 Section 3. Section 61.19, Florida Statutes, is amended to  
360 read:

361 61.19 Entry of judgment of dissolution of marriage; ~~τ~~ delay  
362 period; bifurcation.—

363 (1) A ~~Ne~~ final judgment of dissolution of marriage may not  
364 be entered until at least 20 days have elapsed from the date of  
365 filing the original petition for dissolution of marriage, ~~τ~~ but  
366 the court, on a showing that injustice would result from this  
367 delay, may enter a final judgment of dissolution of marriage at  
368 an earlier date.

369 (2) (a) During the first 180 days after the date of service  
370 of the original petition for dissolution of marriage, the court  
371 shall not grant a final dissolution of marriage with a  
372 reservation of jurisdiction to subsequently determine all other  
373 substantive issues unless the court makes written findings that  
374 there are exceptional circumstances which make the use of this  
375 process clearly necessary to protect the parties or their  
376 children and that granting a final dissolution will not cause  
377 irreparable harm to either party or the children. Before

Amendment No. 1

378 granting a final dissolution of marriage with a reservation of  
379 jurisdiction to subsequently determine all other substantive  
380 issues, the court shall enter appropriate temporary orders  
381 necessary to protect the parties and their children, which  
382 orders shall remain effective until such time as all other  
383 issues can be adjudicated by the court. The desire of one of the  
384 parties to remarry does not justify the use of this process.

385 (b) If more than 180 days have elapsed after the date of  
386 service of the original petition for dissolution of marriage,  
387 the court may grant a final dissolution of marriage with a  
388 reservation of jurisdiction to subsequently determine all other  
389 substantive issues only if the court: enters appropriate  
390 temporary orders necessary to protect the parties and their  
391 children, which orders shall remain effective until such time as  
392 all other issues can be adjudicated by the court, and makes a  
393 written finding that no irreparable harm will result from  
394 granting a final dissolution.

395 (c) If more than 365 days have elapsed after the date of  
396 service of the original petition for dissolution of marriage,  
397 absent a showing by either party that irreparable harm will  
398 result from granting a final dissolution, the court shall, upon  
399 request of either party, immediately grant a final dissolution  
400 of marriage with a reservation of jurisdiction to subsequently  
401 determine all other substantive issues. Before granting a final  
402 dissolution of marriage with a reservation of jurisdiction to  
403 subsequently determine all other substantive issues, the court  
404 shall enter appropriate temporary orders necessary to protect  
405 the parties and their children, which orders shall remain

Amendment No. 1

406 effective until such time as all other issues can be adjudicated  
407 by the court.

408 (d) The temporary orders necessary to protect the parties  
409 and their children entered prior to granting a dissolution of  
410 marriage without an adjudication of all substantive issues may  
411 include, but shall not be limited to, temporary orders that:

- 412 1. Restrict the sale or disposition of property.
- 413 2. Protect and preserve the marital assets.
- 414 3. Establish temporary support.
- 415 4. Provide for maintenance of health insurance.
- 416 5. Provide for maintenance of life insurance.

417 (e) The court is not required to enter temporary orders to  
418 protect the parties and their children if the court enters a  
419 final judgment of marriage which adjudicates substantially all  
420 of the substantive issues between the parties but reserves  
421 jurisdiction to address ancillary issues such as the entry of a  
422 qualified domestic relations order or the adjudication of  
423 attorney's fees and costs.

424 Section 4. This act shall take effect July 1, 2012.

425

426

427

428

**T I T L E A M E N D M E N T**

429

Remove the entire title and insert:

430

An act relating to dissolution of marriage; amending s. 61.08,

431

F.S.; revising factors to be considered for alimony awards;

432

requiring a court to make certain written findings concerning

433

alimony; revising factors to be considered in whether to award

941873 - h0549-strike.docx

Published On: 2/15/2012 7:02:13 PM

COMMITTEE/SUBCOMMITTEE AMENDMENT

Bill No. CS/HB 549 (2012)

Amendment No. 1

434 alimony or maintenance; revising provisions relating to the  
435 protection of awards of alimony; revising provisions for an  
436 award of durational alimony; redesignating permanent alimony as  
437 long-term alimony and revising provisions relating to its award;  
438 requiring written findings regarding the standard of living of  
439 the parties after dissolution of marriage; amending s. 61.14,  
440 F.S.; revising provisions relating to the effect of a supportive  
441 relationship on an award of alimony; prohibiting a court from  
442 reserving jurisdiction to reinstate an alimony award if the  
443 supportive relationship ends; providing that income and assets  
444 of the obligor's spouse or the person with whom the obligor  
445 resides may not be considered in the redetermination in a  
446 modification action; providing that if the court orders alimony  
447 concurrent with a child support order, the alimony award may not  
448 be modified due to the later modification or termination of  
449 child support payments; providing that the attaining of  
450 retirement age is a substantial change in circumstances;  
451 creating a rebuttable presumption that the normal retirement age  
452 for purposes of the subsection is 67; providing a list of  
453 factors the court shall consider in determining whether the  
454 obligor's retirement is reasonable; requiring a court to impute  
455 income to the obligee based on the analysis and factors set  
456 forth in s. 61.20(2)(b), F.S.; amending s. 61.19, F.S.; allowing  
457 bifurcation of a dissolution of marriage case in certain  
458 circumstances; providing an effective date.



COMMITTEE/SUBCOMMITTEE AMENDMENT

Bill No. CS/HB 681 (2012)

Amendment No. 1

COMMITTEE/SUBCOMMITTEE ACTION

ADOPTED                                   \_\_\_ (Y/N)  
ADOPTED AS AMENDED                   \_\_\_ (Y/N)  
ADOPTED W/O OBJECTION               \_\_\_ (Y/N)  
FAILED TO ADOPT                       \_\_\_ (Y/N)  
WITHDRAWN                              \_\_\_ (Y/N)  
OTHER                                    \_\_\_\_\_

1 Committee/Subcommittee hearing bill: Judiciary Committee  
2 Representative Baxley offered the following:

3  
4       **Amendment (with title amendment)**

5       Remove lines 68-77 and insert:

6       The impoundment or immobilization must not occur concurrently  
7       with the incarceration of the defendant and must occur  
8       concurrently with the driver driver's license revocation imposed  
9       under s. 322.28(2)(a)2. The installation of an interlock  
10      ignition device must not occur concurrently with the  
11      incarceration of the defendant and must not occur until after  
12      the first 45 days of the driver license revocation period  
13      imposed on the defendant under s. 322.28(2)(a)2., after which  
14      time the interlock ignition device must remain installed for at  
15      least 12 months. Following the first 45 days of the driver  
16      license revocation period, the defendant may petition the  
17      department for reinstatement of his or her driving privilege on  
18      a restricted basis pursuant to s. 322.271 for the remaining  
19      period of license revocation imposed on the defendant under s.



COMMITTEE/SUBCOMMITTEE AMENDMENT

Bill No. CS/HB 681 (2012)

Amendment No. 1

20 322.28(2)(a)2. The impoundment or immobilization order may be  
21 dismissed in accordance with paragraph (e), paragraph (f),  
22 paragraph (g), or paragraph (h). At least 48 hours of  
23 confinement must be consecutive.

24  
25 Remove lines 92-101 and insert:

26 The impoundment or immobilization must not occur concurrently  
27 with the incarceration of the defendant and must occur  
28 concurrently with the driver ~~driver's~~ license revocation imposed  
29 under s. 322.28(2)(a)3. The installation of an interlock  
30 ignition device must not occur concurrently with the  
31 incarceration of the defendant and must not occur until after  
32 the first 45 days of the driver license revocation period  
33 imposed on the defendant under s. 322.28(2)(a)3., after which  
34 time the interlock ignition device must remain installed for at  
35 least 24 months. Following the first 45 days of the driver  
36 license revocation period, the defendant may petition the  
37 department for reinstatement of his or her driving privilege on  
38 a restricted basis, pursuant to s. 322.271, for the remaining  
39 period of license revocation imposed on the defendant under s.  
40 322.28(2)(a)3. The impoundment or immobilization order may be  
41 dismissed in accordance with paragraph (e), paragraph (f),  
42 paragraph (g), or paragraph (h). At least 48 hours of  
43 confinement must be consecutive.

COMMITTEE/SUBCOMMITTEE AMENDMENT

Bill No. CS/HB 681 (2012)

Amendment No. 1

48 **T I T L E A M E N D M E N T**

49 Remove lines 14-16 and insert:

50 defendant; requiring an interlock device to be installed for a  
51 specified period based on the underlying conviction; authorizing  
52 a petition for restoration of a driving privilege on a  
53 restricted basis after a specified period;



COMMITTEE/SUBCOMMITTEE AMENDMENT

Bill No. CS/HB 897 (2012)

Amendment No. 1

COMMITTEE/SUBCOMMITTEE ACTION

ADOPTED \_\_\_\_\_ (Y/N)  
ADOPTED AS AMENDED \_\_\_\_\_ (Y/N)  
ADOPTED W/O OBJECTION \_\_\_\_\_ (Y/N)  
FAILED TO ADOPT \_\_\_\_\_ (Y/N)  
WITHDRAWN \_\_\_\_\_ (Y/N)  
OTHER \_\_\_\_\_

1 Committee/Subcommittee hearing bill: Judiciary Committee  
2 Representative Moraitis offered the following:

3  
4 **Amendment (with title amendment)**

5 Remove everything after the enacting clause and insert:

6 Section 1. Subsections (2) and (5) of section 95.11,  
7 Florida Statutes, are amended to read:

8 95.11 Limitations other than for the recovery of real  
9 property.—Actions other than for recovery of real property shall  
10 be commenced as follows:

11 (2) WITHIN FIVE YEARS.—

12 (a) An action on a judgment or decree of any court, not of  
13 record, of this state or any court of the United States, any  
14 other state or territory in the United States, or a foreign  
15 country.

16 (b) A legal or equitable action on a contract, obligation,  
17 or liability founded on a written instrument, except for an  
18 action to enforce a claim against a payment bond, which shall be

Amendment No. 1

19 governed by the applicable provisions of s. 95.11(5)(e), s. ~~ss-~~  
20 255.05(10), s. 337.18(1), or s. ~~and~~ 713.23(1)(e).

21 (c) An action to foreclose a mortgage.

22 (d) An action alleging a willful violation of s. 448.110.

23 (e) Notwithstanding paragraph (b), an action for breach of  
24 a property insurance contract, with the period running from the  
25 date of loss.

26 (5) WITHIN ONE YEAR.—

27 (a) An action for specific performance of a contract.

28 (b) An action to enforce an equitable lien arising from  
29 the furnishing of labor, services, or material for the  
30 improvement of real property.

31 (c) An action to enforce rights under the Uniform  
32 Commercial Code—Letters of Credit, chapter 675.

33 (d) An action against any guaranty association and its  
34 insured, with the period running from the date of the deadline  
35 for filing claims in the order of liquidation.

36 (e) Except for actions governed by s. 255.05(10), s.  
37 337.18(1), or s. 713.23(1)(e), an action to enforce any claim  
38 against a payment bond on which the principal is a contractor,  
39 subcontractor, or sub-subcontractor as defined in s. 713.01, for  
40 private work as well as public work, from the last furnishing of  
41 labor, services, or materials or from the last furnishing of  
42 labor, services, or materials by the contractor if the  
43 contractor is the principal on a bond on the same construction  
44 project, whichever is later.

45 (f) Except for actions described in subsection (8), a  
46 petition for extraordinary writ, other than a petition

COMMITTEE/SUBCOMMITTEE AMENDMENT

Bill No. CS/HB 897 (2012)

Amendment No. 1

47 challenging a criminal conviction, filed by or on behalf of a  
48 prisoner as defined in s. 57.085.

49 (g) Except for actions described in subsection (8), an  
50 action brought by or on behalf of a prisoner, as defined in s.  
51 57.085, relating to the conditions of the prisoner's  
52 confinement.

53 Section 2. Section 255.05, Florida Statutes, is amended to  
54 read:

55 255.05 Bond of contractor constructing public buildings;  
56 form; action by claimants ~~materialmen~~.—

57 (1) ~~(a)~~ A ~~Any~~ person entering into a formal contract with  
58 the state or any county, city, or political subdivision thereof,  
59 or other public authority or private entity, for the  
60 construction of a public building, for the prosecution and  
61 completion of a public work, or for repairs upon a public  
62 building or public work shall be required, before commencing the  
63 work or before recommencing the work after a default or  
64 abandonment, to execute, ~~deliver to the public owner,~~ and record  
65 in the public records of the county where the improvement is  
66 located, a payment and performance bond with a surety insurer  
67 authorized to do business in this state as surety. A public  
68 entity may not require a contractor to secure a surety bond  
69 under this section from a specific agent or bonding company.

70 (a) The bond must state on its front page: the name,  
71 principal business address, and phone number of the contractor,  
72 of the surety, of the owner of the property being improved, and,  
73 if different from the owner, of the contracting public entity;  
74 the contract number assigned by the contracting public entity;

316769 - h0897-strike.docx

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Amendment No. 1

75 the bond number assigned by the surety; and a description of the  
76 project sufficient to identify it, such as a legal description  
77 or the street address of the property being improved, and a  
78 general description of the improvement.

79 (b) Before commencing the work or before recommencing the  
80 work after a default or abandonment, the contractor shall  
81 provide to the public entity a certified copy of the recorded  
82 bond. Notwithstanding the terms of the contract or other laws  
83 governing prompt payment for construction services, the public  
84 entity may not commence making payments to the contractor until  
85 the contractor has complied with this paragraph.

86 (c) The ~~Such~~ bond shall be conditioned upon the  
87 contractor's performance of the construction work in the time  
88 and manner prescribed in the contract and promptly making  
89 payments to all persons defined in s. 713.01 who furnish labor,  
90 services, or materials for the prosecution of the work provided  
91 for in the contract. ~~A Any~~ claimant may apply to the  
92 governmental entity having charge of the work for copies of the  
93 contract and bond and shall thereupon be furnished with a  
94 ~~certified~~ copy of the contract and the recorded bond. The  
95 claimant shall have a cause ~~right~~ of action against the  
96 contractor and surety for the amount due him or her, including  
97 unpaid finance charges due under the claimant's contract. Such  
98 action ~~may shall~~ not involve the public authority in any  
99 expense.

100 (d) When the ~~such~~ work is done for the state and the  
101 contract is for \$100,000 or less, no payment and performance  
102 bond shall be required. At the discretion of the official or

316769 - h0897-strike.docx

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COMMITTEE/SUBCOMMITTEE AMENDMENT

Bill No. CS/HB 897 (2012)

Amendment No. 1

103 board awarding such contract when such work is done for any  
104 county, city, political subdivision, or public authority, a ~~any~~  
105 person entering into such a contract that ~~which~~ is for \$200,000  
106 or less may be exempted from executing the payment and  
107 performance bond. When such work is done for the state, the  
108 Secretary of Management Services may delegate to state agencies  
109 the authority to exempt any person entering into such a contract  
110 amounting to more than \$100,000 but less than \$200,000 from  
111 executing the payment and performance bond. If an ~~In the event~~  
112 ~~such~~ exemption is granted, the officer or official is ~~officials~~  
113 ~~shall~~ not be personally liable to persons suffering loss because  
114 of granting such exemption. The Department of Management  
115 Services shall maintain information on the number of requests by  
116 state agencies for delegation of authority to waive the bond  
117 requirements by agency and project number and whether any  
118 request for delegation was denied and the justification for the  
119 denial.

120 (e) Any provision in a payment bond furnished for public  
121 work contracts as provided by this subsection which further  
122 restricts the classes of persons ~~as defined in s. 713.01~~  
123 protected by the bond, which restricts ~~or~~ the venue of any  
124 proceeding relating to such bond, which limits or expands the  
125 effective duration of the bond, or which adds conditions  
126 precedent to the enforcement of a claim against the bond beyond  
127 those provided in this section is unenforceable.

128 (f) ~~(b)~~ The Department of Management Services shall adopt  
129 rules with respect to all contracts for \$200,000 or less, to  
130 provide:

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Published On: 2/15/2012 7:04:05 PM



COMMITTEE/SUBCOMMITTEE AMENDMENT

Bill No. CS/HB 897 (2012)

Amendment No. 1

131 1. Procedures for retaining up to 10 percent of each  
132 request for payment submitted by a contractor and procedures for  
133 determining disbursements from the amount retained on a pro rata  
134 basis to laborers, materialmen, and subcontractors, as defined  
135 in s. 713.01.

136 2. Procedures for requiring certification from laborers,  
137 materialmen, and subcontractors, as defined in s. 713.01, before  
138 ~~prior to~~ final payment to the contractor that such laborers,  
139 materialmen, and subcontractors have no claims against the  
140 contractor resulting from the completion of the work provided  
141 for in the contract.

142  
143 The state is ~~shall~~ not ~~be held~~ liable to any laborer,  
144 materialman, or subcontractor for any amounts greater than the  
145 pro rata share as determined under this section.

146 (g) ~~(e)~~ 1. The amount of the bond shall equal the contract  
147 price, except that for a contract in excess of \$250 million, if  
148 the state, county, municipality, political subdivision, or other  
149 public entity finds that a bond in the amount of the contract  
150 price is not reasonably available, the public owner shall set  
151 the amount of the bond at the largest amount reasonably  
152 available, but not less than \$250 million.

153 2. For construction-management or design-build contracts,  
154 if the public owner does not include in the bond amount the cost  
155 of design or other nonconstruction services, the bond may not be  
156 conditioned on performance of such services or payment to  
157 persons furnishing such services. Notwithstanding paragraphs (c)

Amendment No. 1

158 and (e) ~~(a)~~, such a bond may exclude persons furnishing such  
159 services from the classes of persons protected by the bond.

160 (2)(a)1. If a claimant is no longer furnishing labor,  
161 services, or materials on a project, a contractor or the  
162 contractor's agent or attorney may elect to shorten the  
163 ~~prescribed time in this paragraph~~ within which an action to  
164 enforce any claim against a payment bond must ~~provided pursuant~~  
165 ~~to this section may~~ be commenced by recording in the clerk's  
166 office a notice in substantially the following form:

167  
168 NOTICE OF CONTEST OF CLAIM  
169 AGAINST PAYMENT BOND

170  
171 To: ... (Name and address of claimant) ...  
172

173 You are notified that the undersigned contests your notice  
174 of nonpayment, dated ....., ....., and served on the  
175 undersigned on ....., ....., and that the time within  
176 which you may file suit to enforce your claim is limited to 60  
177 days after the date of service of this notice.

178  
179 DATED on ....., .....

180  
181 Signed: ... (Contractor or Attorney) ...  
182

183 The claim of a ~~any~~ claimant upon whom such notice is served and  
184 who fails to institute a suit to enforce his or her claim  
185 against the payment bond within 60 days after service of such

Amendment No. 1

186 notice shall be extinguished automatically. The contractor or  
187 the contractor's attorney clerk shall serve mail a copy of the  
188 notice of contest to the claimant at the address shown in the  
189 notice of nonpayment or most recent amendment thereto and shall  
190 certify to such service on the face of the such notice and  
191 record the notice. ~~Service is complete upon mailing.~~

192 2. A claimant, except a laborer, who is not in privity  
193 with the contractor shall, before commencing or not later than  
194 45 days after commencing to furnish labor, services, or  
195 materials for the prosecution of the work, furnish the  
196 contractor with a written notice that he or she intends to look  
197 to the bond for protection. A claimant who is not in privity  
198 with the contractor and who has not received payment for his or  
199 her labor, services, or materials shall deliver to the  
200 contractor and to the surety written notice of the performance  
201 of the labor or delivery of the materials or supplies and of the  
202 nonpayment. The notice of nonpayment shall ~~may~~ be served ~~at any~~  
203 ~~time~~ during the progress of the work or thereafter but may not  
204 be served earlier than ~~before~~ 45 days after the first furnishing  
205 of labor, services, or materials or, and not later than 90 days  
206 after the final furnishing of the labor, services, or materials  
207 by the claimant or, with respect to rental equipment, not later  
208 than 90 days after the date that the rental equipment was last  
209 on the job site available for use. Any notice of nonpayment  
210 served by a claimant who is not in privity with the contractor  
211 which includes sums for retainage must specify the portion of  
212 the amount claimed for retainage. An ~~No~~ action for the labor,  
213 materials, or supplies may not be instituted against the

316769 - h0897-strike.docx

Published On: 2/15/2012 7:04:05 PM

Amendment No. 1

214 contractor or the surety unless the notice to the contractor and  
215 notice of nonpayment have been served, if required by this  
216 section ~~both notices have been given~~. Notices required or  
217 permitted under this section shall ~~may~~ be served in accordance  
218 with s. 713.18. A claimant may not waive in advance his or her  
219 right to bring an action under the bond against the surety. In  
220 any action brought to enforce a claim against a payment bond  
221 under this section, the prevailing party is entitled to recover  
222 a reasonable fee for the services of his or her attorney for  
223 trial and appeal or for arbitration, in an amount to be  
224 determined by the court, which fee must be taxed as part of the  
225 prevailing party's costs, as allowed in equitable actions. The  
226 time periods for service of a notice of nonpayment or for  
227 bringing an action against a contractor or a surety shall be  
228 measured from the last day of furnishing labor, services, or  
229 materials by the claimant and may ~~shall~~ not be measured by other  
230 standards, such as the issuance of a certificate of occupancy or  
231 the issuance of a certificate of substantial completion.

232 (b) When a person is required to execute a waiver of his  
233 or her right to make a claim against the payment bond in  
234 exchange for, or to induce payment of, a progress payment, the  
235 waiver may be in substantially the following form:

236  
237 WAIVER OF RIGHT TO CLAIM  
238 AGAINST THE PAYMENT BOND  
239 (PROGRESS PAYMENT)  
240

COMMITTEE/SUBCOMMITTEE AMENDMENT

Bill No. CS/HB 897 (2012)

Amendment No. 1

241 The undersigned, in consideration of the sum of \$....,  
242 hereby waives its right to claim against the payment bond for  
243 labor, services, or materials furnished through ...(insert  
244 date)... to ...(insert the name of your customer)... on the job  
245 of ...(insert the name of the owner)..., for improvements to the  
246 following described project:

247  
248 (description of project)

249  
250 This waiver does not cover any retention or any labor, services,  
251 or materials furnished after the date specified.

252  
253 DATED ON ....., .....

254 ... (Claimant)...

255 By:.....

256  
257 (c) When a person is required to execute a waiver of his  
258 or her right to make a claim against the payment bond, in  
259 exchange for, or to induce payment of, the final payment, the  
260 waiver may be in substantially the following form:

261  
262 WAIVER OF RIGHT TO CLAIM  
263 AGAINST THE PAYMENT BOND  
264 (FINAL PAYMENT)

265  
266 The undersigned, in consideration of the final payment in  
267 the amount of \$...., hereby waives its right to claim against  
268 the payment bond for labor, services, or materials furnished to

COMMITTEE/SUBCOMMITTEE AMENDMENT

Bill No. CS/HB 897 (2012)

Amendment No. 1

269 ...(insert the name of your customer)... on the job of  
270 ...(insert the name of the owner)..., for improvements to the  
271 following described project:

272  
273 (description of project)

274  
275 DATED ON ....., .....

276 ... (Claimant) ...  
277 By: .....

278  
279 (d) A person may not require a claimant to furnish a  
280 waiver that is different from the forms in paragraphs (b) and  
281 (c).

282 (e) A claimant who executes a waiver in exchange for a  
283 check may condition the waiver on payment of the check.

284 (f) A waiver that is not substantially similar to the  
285 forms in this subsection is enforceable in accordance with its  
286 terms.

287 (3) The bond required in subsection (1) may be in  
288 substantially the following form:

289  
290 PUBLIC CONSTRUCTION BOND  
291 Bond No.... (enter bond number) ...

292  
293 BY THIS BOND, We ....., as Principal and ....., a  
294 corporation, as Surety, are bound to ....., herein called Owner,  
295 in the sum of \$....., for payment of which we bind ourselves, our

Amendment No. 1

296 heirs, personal representatives, successors, and assigns,  
297 jointly and severally.

298 THE CONDITION OF THIS BOND is that if Principal:

299 1. Performs the contract dated . . . . , . . . . , between  
300 Principal and Owner for construction of . . . . , the contract being  
301 made a part of this bond by reference, at the times and in the  
302 manner prescribed in the contract; and

303 2. Promptly makes payments to all claimants, as defined in  
304 Section 255.05(1), Florida Statutes, supplying Principal with  
305 labor, materials, or supplies, used directly or indirectly by  
306 Principal in the prosecution of the work provided for in the  
307 contract; and

308 3. Pays Owner all losses, damages, expenses, costs, and  
309 attorney's fees, including appellate proceedings, that Owner  
310 sustains because of a default by Principal under the contract;  
311 and

312 4. Performs the guarantee of all work and materials  
313 furnished under the contract for the time specified in the  
314 contract, then this bond is void; otherwise it remains in full  
315 force.

316  
317 Any action instituted by a claimant under this bond for payment  
318 must be in accordance with the notice and time limitation  
319 provisions in Section 255.05(2), Florida Statutes.

320  
321 Any changes in or under the contract documents and compliance or  
322 noncompliance with any formalities connected with the contract

COMMITTEE/SUBCOMMITTEE AMENDMENT

Bill No. CS/HB 897 (2012)

Amendment No. 1

323 or the changes does not affect Surety's obligation under this  
324 bond.

325  
326 DATED ON ....., .....

327  
328 ... (Name of Principal) ...  
329 By ... (As Attorney in Fact) ...  
330 ... (Name of Surety) ...

331  
332 (4) The payment bond provisions of all bonds required by  
333 subsection (1) shall be construed and deemed statutory payment  
334 bonds furnished pursuant to this section and such bonds shall  
335 not under any circumstances be converted into common law bonds.

336 (5) In addition to the provisions of chapter 47, any  
337 action authorized under this section may be brought in the  
338 county in which the public building or public work is being  
339 constructed or repaired. This subsection shall not apply to an  
340 action instituted prior to May 17, 1977.

341 (6) All payment bond forms used by a public owner and all  
342 payment bonds executed pursuant to this section by a surety  
343 shall make reference to this section by number, ~~and~~ shall  
344 contain reference to the notice and time limitation provisions  
345 in subsections (2) and (10), and shall comply with the  
346 requirements of subsection (1)(a).

347 (7) In lieu of the bond required by this section, a  
348 contractor may file with the state, county, city, or other  
349 political authority an alternative form of security in the form  
350 of cash, a money order, a certified check, a cashier's check, an



Amendment No. 1

351 irrevocable letter of credit, or a security of a type listed in  
352 part II of chapter 625. Any such alternative form of security  
353 shall be for the same purpose and be subject to the same  
354 conditions as those applicable to the bond required by this  
355 section. The determination of the value of an alternative form  
356 of security shall be made by the appropriate state, county,  
357 city, or other political subdivision.

358 (8) When a contractor has furnished a payment bond  
359 pursuant to this section, he or she may, when the state, county,  
360 municipality, political subdivision, or other public authority  
361 makes any payment to the contractor or directly to a claimant,  
362 serve a written demand on any claimant who is not in privity  
363 with the contractor for a written statement under oath of his or  
364 her account showing the nature of the labor or services  
365 performed and to be performed, if any; the materials furnished;  
366 the materials to be furnished, if known; the amount paid on  
367 account to date; the amount due; and the amount to become due,  
368 if known, as of the date of the statement by the claimant. Any  
369 such demand to a claimant who is not in privity with the  
370 contractor must be served on the claimant at the address and to  
371 the attention of any person who is designated to receive the  
372 demand in the notice to contractor served by the claimant. The  
373 failure or refusal to furnish the statement does not deprive the  
374 claimant of his or her rights under the bond if the demand is  
375 not served at the address of the claimant or directed to the  
376 attention of the person designated to receive the demand in the  
377 notice to contractor. The failure to furnish the statement  
378 within 30 days after the demand, or the furnishing of a false or

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Amendment No. 1

379 fraudulent statement, deprives the claimant who fails to furnish  
380 the statement, or who furnishes the false or fraudulent  
381 statement, of his or her rights under the bond. If the  
382 contractor serves more than one demand for statement of account  
383 on a claimant and none of the information regarding the account  
384 has changed since the claimant's last response to a demand, the  
385 failure or refusal to furnish such statement does not deprive  
386 the claimant of his or her rights under the bond. The negligent  
387 inclusion or omission of any information deprives the claimant  
388 of his or her rights under the bond to the extent that the  
389 contractor can demonstrate prejudice from such act or omission  
390 by the claimant. The failure to furnish a response to a demand  
391 for statement of account does not affect the validity of any  
392 claim on the bond being enforced in a lawsuit filed before the  
393 date the demand for statement of account is received by the  
394 claimant.

395 (9) On any public works project for which the public  
396 authority requires a performance and payment bond, suits at law  
397 and in equity may be brought and maintained by and against the  
398 public authority on any contract claim arising from breach of an  
399 express provision or an implied covenant of a written agreement  
400 or a written directive issued by the public authority pursuant  
401 to the written agreement. In any such suit, the public authority  
402 and the contractor shall have all of the same rights and  
403 obligations as a private person under a like contract except  
404 that no liability may be based on an oral modification of either  
405 the written contract or written directive. Nothing herein shall  
406 be construed to waive the sovereign immunity of the state and

Amendment No. 1

407 its political subdivisions from equitable claims and equitable  
408 remedies. The provisions of this subsection shall apply only to  
409 contracts entered into on or after July 1, 1999.

410 (10) An action, except an action for recovery of  
411 retainage, must be instituted against the contractor or the  
412 surety on the payment bond or the payment provisions of a  
413 combined payment and performance bond within 1 year after the  
414 performance of the labor or completion of delivery of the  
415 materials or supplies. An action for recovery of retainage must  
416 be instituted against the contractor or the surety within 1 year  
417 after the performance of the labor or completion of delivery of  
418 the materials or supplies; however, such an action may not be  
419 instituted until one of the following conditions is satisfied:

420 (a) The public entity has paid out the claimant's  
421 retainage to the contractor, and the time provided under s.  
422 218.735 or s. 255.073(3) for payment of that retainage to the  
423 claimant has expired;

424 (b) The claimant has completed all work required under its  
425 contract and 70 days have passed since the contractor sent its  
426 final payment request to the public entity; or

427 (c) At least 160 days have passed since reaching  
428 substantial completion of the construction services purchased,  
429 as defined in the contract, or if not defined in the contract,  
430 since reaching beneficial occupancy or use of the project.

431 (d) The claimant has asked the contractor, in writing, for  
432 any of the following information and the contractor has failed  
433 to respond to the claimant's request, in writing, within 10 days  
434 after receipt of the request:

316769 - h0897-strike.docx

Published On: 2/15/2012 7:04:05 PM

Amendment No. 1

435 1. Whether the project has reached substantial completion,  
436 as that term is defined in the contract, or if not defined in  
437 the contract, if beneficial occupancy or use of the project has  
438 occurred.

439 2. Whether the contractor has received payment of the  
440 claimant's retainage, and if so, the date the retainage was  
441 received by the contractor.

442 3. Whether the contractor has sent its final payment  
443 request to the public entity, and if so, the date on which the  
444 final payment request was sent.

445  
446 If none of the conditions described in paragraph (a), paragraph  
447 (b), paragraph (c), or paragraph (d) is satisfied and an action  
448 for recovery of retainage cannot be instituted within the 1-year  
449 limitation period set forth in this subsection, this limitation  
450 period shall be extended until 120 days after one of these  
451 conditions is satisfied.

452 (11) When a contractor furnishes and records a payment and  
453 performance bond for a public works project in accordance with  
454 this section, and provides the public authority with a written  
455 consent from the surety regarding the project or payment in  
456 question, the public authority may not condition its payment to  
457 the contractor on the production of a release, waiver, or like  
458 documentation from a claimant demonstrating that the claimant  
459 does not have an outstanding claim against the contractor, the  
460 surety, the payment bond, or the public authority for payments  
461 due on labor, services, or materials furnished on the public  
462 works project. The surety may, in a writing served on the public

316769 - h0897-strike.docx

Published On: 2/15/2012 7:04:05 PM

Amendment No. 1

463 authority, revoke its consent or direct that the public  
464 authority withhold a specified amount from a payment, which  
465 shall be effective upon receipt.

466 Section 3. Section 255.0518, Florida Statutes, is created  
467 to read:

468 255.0518 Public bids; bid opening.—Notwithstanding s.  
469 119.071(1)(b), the state or any county or municipality thereof  
470 or any department or agency of the state, county, or  
471 municipality or any other public body or institution, shall:

472 (1) When opening sealed bids or the portion of any sealed  
473 bids that include the prices submitted, which are received  
474 pursuant to a competitive solicitation for construction or  
475 repairs on a public building or public work, open the sealed  
476 bids at a public meeting conducted in compliance with s.  
477 286.011.

478 (2) Announce at that meeting the name of each bidder and  
479 the price submitted.

480 (3) Make available upon request the name of each bidder  
481 and the price submitted.

482 Section 4. Paragraph (b) of subsection (2) of section  
483 713.10, Florida Statutes, is amended to read:

484 713.10 Extent of liens.—

485 (2)

486 (b) The interest of the lessor ~~is shall~~ not be subject to  
487 liens for improvements made by the lessee when:

488 1. The lease, or a short form or a memorandum of the lease  
489 that contains the specific language in the lease prohibiting  
490 such liability, is recorded in the official records of the

Amendment No. 1

491 county where the premises are located before the recording of a  
492 notice of commencement for improvements to the premises and the  
493 terms of the lease expressly prohibit such liability; or

494 2. The terms of the lease expressly prohibit such  
495 liability, and a notice advising that leases for the rental of  
496 premises on a parcel of land prohibit such liability has been  
497 recorded in the official records of the county in which the  
498 parcel of land is located before the recording of a notice of  
499 commencement for improvements to the premises, and the notice  
500 includes the following:

- 501 a. The name of the lessor.
- 502 b. The legal description of the parcel of land to which  
503 the notice applies.
- 504 c. The specific language contained in the various leases  
505 prohibiting such liability.
- 506 d. A statement that all or a majority of the leases  
507 entered into for premises on the parcel of land expressly  
508 prohibit such liability.

509 3. The lessee is a mobile home owner who is leasing a  
510 mobile home lot in a mobile home park from the lessor.

511  
512 A notice that is consistent with subparagraph 2. effectively  
513 prohibits liens for improvements made by a lessee even if other  
514 leases for premises on the parcel do not expressly prohibit  
515 liens or if provisions of each lease restricting the application  
516 of liens are not identical.

517 Section 5. Paragraphs (d) and (e) of subsection (1) of  
518 section 713.13, Florida Statutes, are amended to read:

316769 - h0897-strike.docx

Published On: 2/15/2012 7:04:05 PM

Amendment No. 1

519 713.13 Notice of commencement.—

520 (1)

521 (d) A notice of commencement must be in substantially the  
522 following form:

523

524 Permit No..... Tax Folio No.....

525 NOTICE OF COMMENCEMENT

526 State of....

527 County of....

528

529 The undersigned hereby gives notice that improvement will be  
530 made to certain real property, and in accordance with Chapter  
531 713, Florida Statutes, the following information is provided in  
532 this Notice of Commencement.

533 1. Description of property: ...(legal description of the  
534 property, and street address if available)....

535 2. General description of improvement:.....

536 3. Owner information or Lessee information if the Lessee  
537 contracted for the improvement:

538 a. Name and address:.....

539 b. Interest in property:.....

540 c. Name and address of fee simple titleholder (if  
541 different from Owner listed above):.....

542 4.a. Contractor: ...(name and address)....

543 b. Contractor's phone number:.....

544 5. Surety (if applicable, a copy of the payment bond is  
545 attached):

546 a. Name and address:.....

COMMITTEE/SUBCOMMITTEE AMENDMENT

Bill No. CS/HB 897 (2012)

Amendment No. 1

- 547 b. Phone number:.....
- 548 c. Amount of bond: \$.....
- 549 6.a. Lender: ...(name and address)....
- 550 b. Lender's phone number:.....
- 551 7. Persons within the State of Florida designated by Owner
- 552 upon whom notices or other documents may be served as provided
- 553 by Section 713.13(1)(a)7., Florida Statutes:
- 554 a. Name and address:.....
- 555 b. Phone numbers of designated persons:.....
- 556 8.a. In addition to himself or herself, Owner designates
- 557 ..... of ..... to receive a copy of the Lienor's
- 558 Notice as provided in Section 713.13(1)(b), Florida Statutes.
- 559 b. Phone number of person or entity designated by
- 560 owner:.....
- 561 9. Expiration date of notice of commencement (the
- 562 expiration date ~~may not be before the completion of construction~~
- 563 ~~and final payment to the contractor, but~~ will be 1 year from the
- 564 date of recording unless a different date is specified).....

565

566 WARNING TO OWNER: ANY PAYMENTS MADE BY THE OWNER AFTER THE

567 EXPIRATION OF THE NOTICE OF COMMENCEMENT ARE CONSIDERED IMPROPER

568 PAYMENTS UNDER CHAPTER 713, PART I, SECTION 713.13, FLORIDA

569 STATUTES, AND CAN RESULT IN YOUR PAYING TWICE FOR IMPROVEMENTS

570 TO YOUR PROPERTY. A NOTICE OF COMMENCEMENT MUST BE RECORDED AND

571 POSTED ON THE JOB SITE BEFORE THE FIRST INSPECTION. IF YOU

572 INTEND TO OBTAIN FINANCING, CONSULT WITH YOUR LENDER OR AN

573 ATTORNEY BEFORE COMMENCING WORK OR RECORDING YOUR NOTICE OF

574 COMMENCEMENT.

316769 - h0897-strike.docx

Published On: 2/15/2012 7:04:05 PM



Amendment No. 1

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602

~~Under penalty of perjury, I declare that I have read the foregoing notice of commencement and that the facts stated therein are true to the best of my knowledge and belief.~~

...(Signature of Owner or Lessee, or Owner's or Lessee's Authorized Officer/Director/Partner/Manager)...

...(Signatory's Title/Office)...

The foregoing instrument was acknowledged before me this .... day of ....., ...(year)...., by ...(name of person)... as ...(type of authority, . . . e.g. officer, trustee, attorney in fact)... for ...(name of party on behalf of whom instrument was executed)....

...(Signature of Notary Public - State of Florida)...

...(Print, Type, or Stamp Commissioned Name of Notary Public)...

Personally Known .... OR Produced Identification ....

Type of Identification Produced.....

(e) A copy of any payment bond must be attached at the time of recordation of the notice of commencement. The failure to attach a copy of the bond to the notice of commencement when the notice is recorded negates the exemption provided in s.

Amendment No. 1

603 713.02(6). However, if a payment bond under s. 713.23 exists but  
604 was not attached at the time of recordation of the notice of  
605 commencement, the bond may be used to transfer any recorded lien  
606 of a lienor except that of the contractor by the recordation and  
607 service of a notice of bond pursuant to s. 713.23(2). The notice  
608 requirements of s. 713.23 apply to any claim against the bond;  
609 however, the time limits for serving any required notices shall,  
610 at the option of the lienor, be calculated from the dates begin  
611 running from the later of the time specified in s. 713.23 or the  
612 date the notice of bond is served on the lienor.

613 Section 6. Section 489.118, Florida Statutes, is amended  
614 to read:

615 489.118 Certification of registered contractors;  
616 grandfathering provisions.—The board shall, upon receipt of a  
617 completed application and appropriate fee, issue a certificate  
618 in the appropriate category to any contractor registered under  
619 this part who makes application to the board and can show that  
620 he or she meets each of the following requirements:

621 (1) Currently holds a valid registered local license in  
622 one of the contractor categories defined in s. 489.105(3)(a)-  
623 (g) ~~(p)~~.

624 (2) Has, for that category, passed a written examination  
625 that the board finds to be substantially similar to the  
626 examination required to be licensed as a certified contractor  
627 under this part. For purposes of this subsection, a written,  
628 proctored examination such as that produced by the National  
629 Assessment Institute, Block and Associates, NAI/Block, Experior  
630 Assessments, Professional Testing, Inc., or Assessment Systems,

316769 - h0897-strike.docx

Published On: 2/15/2012 7:04:05 PM

Amendment No. 1

631 Inc., shall be considered to be substantially similar to the  
632 examination required to be licensed as a certified contractor.  
633 The board may not impose or make any requirements regarding the  
634 nature or content of these cited examinations.

635 (3) Has at least 5 years of experience as a contractor in  
636 that contracting category, or as an inspector or building  
637 administrator with oversight over that category, at the time of  
638 application. For contractors, only time periods in which the  
639 contractor license is active and the contractor is not on  
640 probation shall count toward the 5 years required by this  
641 subsection.

642 (4) Has not had his or her contractor's license revoked at  
643 any time, had his or her contractor's license suspended within  
644 the last 5 years, or been assessed a fine in excess of \$500  
645 within the last 5 years.

646 (5) Is in compliance with the insurance and financial  
647 responsibility requirements in s. 489.115(5).

648

649 Applicants wishing to obtain a certificate pursuant to this  
650 section must make application by November 1, 2015 ~~2005~~.

651 Section 7. Subsections (1) and (4) of section 713.132,  
652 Florida Statutes, are amended to read:

653 713.132 Notice of termination.—

654 (1) An owner may terminate the period of effectiveness of  
655 a notice of commencement by executing, swearing to, and  
656 recording a notice of termination that contains:

657 (a) The same information as the notice of commencement;

COMMITTEE/SUBCOMMITTEE AMENDMENT

Bill No. CS/HB 897 (2012)

Amendment No. 1

658 (b) The recording office document book and page reference  
659 numbers and date of the notice of commencement;

660 (c) A statement of the date as of which the notice of  
661 commencement is terminated, which date may not be earlier than  
662 30 days after the notice of termination is recorded;

663 (d) A statement specifying that the notice applies to all  
664 the real property subject to the notice of commencement or  
665 specifying the portion of such real property to which it  
666 applies;

667 (e) A statement that all lienors have been paid in full;  
668 and

669 (f) A statement that the owner has, before recording the  
670 notice of termination, served a copy of the notice of  
671 termination on the contractor and on each lienor who has a  
672 direct contract with the owner or who has served a notice to  
673 owner given notice. The owner is not required to serve a copy of  
674 the notice of termination on any lienor who has executed a  
675 waiver and release of lien upon final payment in accordance with  
676 s. 713.20.

677 (4) A notice of termination is effective to terminate the  
678 notice of commencement at the later of 30 days after recording  
679 of the notice of termination or the date stated in the notice of  
680 termination as the date on which the notice of commencement is  
681 terminated, if provided that the notice of termination has been  
682 served pursuant to paragraph (1)(f) on the contractor and on  
683 each lienor who has a direct contract with the owner or who has  
684 served a notice to owner given notice.

Amendment No. 1

685 Section 8. Section 713.16, Florida Statutes, is amended to  
686 read:

687 713.16 Demand for copy of contract and statements of  
688 account; form.—

689 (1) A copy of the contract of a lienor or owner and a  
690 statement of the amount due or to become due if fixed or  
691 ascertainable thereon must be furnished by any party thereto,  
692 upon written demand of an owner or a lienor contracting with or  
693 employed by the other party to such contract. If the owner or  
694 lienor refuses or neglects to furnish such copy of the contract  
695 or such statement, or willfully and falsely states the amount  
696 due or to become due if fixed or ascertainable under such  
697 contract, any person who suffers any detriment thereby has a  
698 cause of action against the person refusing or neglecting to  
699 furnish the same or willfully and falsely stating the amount due  
700 or to become due for his or her damages sustained thereby. The  
701 information contained in such copy or statement furnished  
702 pursuant to such written demand is binding upon the owner or  
703 lienor furnishing it unless actual notice of any modification is  
704 given to the person demanding the copy or statement before such  
705 person acts in good faith in reliance on it. The person  
706 demanding such documents must pay for the reproduction thereof;  
707 and, if such person fails or refuses to do so, he or she is  
708 entitled only to inspect such documents at reasonable times and  
709 places.

710 (2) The owner may serve in writing a demand of any lienor  
711 for a written statement under oath of his or her account showing  
712 the nature of the labor or services performed and to be

Amendment No. 1

713 performed, if any, the materials furnished, the materials to be  
714 furnished, if known, the amount paid on account to date, the  
715 amount due, and the amount to become due, if known, as of the  
716 date of the statement by the lienor. Any such demand to a lienor  
717 must be served on the lienor at the address and to the attention  
718 of any person who is designated to receive the demand in the  
719 notice to owner served by such lienor and must include a  
720 description of the property and the names of the owner, the  
721 contractor, and the lienor's customer, as set forth in the  
722 lienor's notice to owner. The failure or refusal to furnish the  
723 statement does not deprive the lienor of his or her lien if the  
724 demand is not served at the address of the lienor or directed to  
725 the attention of the person designated to receive the demand in  
726 the notice to owner. The failure or refusal to furnish the  
727 statement under oath within 30 days after the demand, or the  
728 furnishing of a false or fraudulent statement, deprives the  
729 person so failing or refusing to furnish such statement of his  
730 or her lien. If the owner serves more than one demand for  
731 statement of account on a lienor and none of the information  
732 regarding the account has changed since the lienor's last  
733 response to a demand, the failure or refusal to furnish such  
734 statement does not deprive the lienor of his or her lien. The  
735 negligent inclusion or omission of any information deprives the  
736 person of his or her lien to the extent the owner can  
737 demonstrate prejudice from such act or omission by the lienor.  
738 The failure to furnish a response to a demand for statement of  
739 account does not affect the validity of any claim of lien being

Amendment No. 1

740 enforced through a foreclosure case filed before ~~prior to~~ the  
741 date the demand for statement is received by the lienor.

742 (3) A request for sworn statement of account must be in  
743 substantially the following form:

744

745 REQUEST FOR SWORN STATEMENT OF ACCOUNT

746

747 WARNING: YOUR FAILURE TO FURNISH THE REQUESTED STATEMENT, SIGNED  
748 UNDER OATH, WITHIN 30 DAYS OR THE FURNISHING OF A FALSE  
749 STATEMENT WILL RESULT IN THE LOSS OF YOUR LIEN.

750

751 To: ...(Lienor's name and address)...

752

753 The undersigned hereby demands a written statement under oath of  
754 his or her account showing the nature of the labor or services  
755 performed and to be performed, if any, the materials furnished,  
756 the materials to be furnished, if known, the amount paid on  
757 account to date, the amount due, and the amount to become due,  
758 if known, as of the date of the statement for the improvement of  
759 real property identified as ...(property description)....

760

761 ...(name of contractor)...

762

763 ...(name of the lienor's customer, as set forth in the  
764 lienor's Notice to Owner, if such notice has been served)...

765

766

767 ...(signature and address of owner)...

Amendment No. 1

768                   ...(date of request for sworn statement of account)...

769

770

771           (4) When a contractor has furnished a payment bond  
772 pursuant to s. 713.23, he or she may, when an owner makes any  
773 payment to the contractor or directly to a lienor, serve a  
774 written demand on any other lienor for a written statement under  
775 oath of his or her account showing the nature of the labor or  
776 services performed and to be performed, if any, the materials  
777 furnished, the materials to be furnished, if known, the amount  
778 paid on account to date, the amount due, and the amount to  
779 become due, if known, as of the date of the statement by the  
780 lienor. Any such demand to a lienor must be served on the lienor  
781 at the address and to the attention of any person who is  
782 designated to receive the demand in the notice to contractor  
783 served by such lienor. The demand must include a description of  
784 the property and the names of the owner, the contractor, and the  
785 lienor's customer, as set forth in the lienor's notice to  
786 contractor. The failure or refusal to furnish the statement does  
787 not deprive the lienor of his or her rights under the bond if  
788 the demand is not served at the address of the lienor or  
789 directed to the attention of the person designated to receive  
790 the demand in the notice to contractor. The failure to furnish  
791 the statement within 30 days after the demand, or the furnishing  
792 of a false or fraudulent statement, deprives the person who  
793 fails to furnish the statement, or who furnishes the false or  
794 fraudulent statement, of his or her rights under the bond. If  
795 the contractor serves more than one demand for statement of

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Amendment No. 1

796 account on a lienor and none of the information regarding the  
797 account has changed since the lienor's last response to a  
798 demand, the failure or refusal to furnish such statement does  
799 not deprive the lienor of his or her rights under the bond. The  
800 negligent inclusion or omission of any information deprives the  
801 person of his or her rights under the bond to the extent the  
802 contractor can demonstrate prejudice from such act or omission  
803 by the lienor. The failure to furnish a response to a demand for  
804 statement of account does not affect the validity of any claim  
805 on the bond being enforced in a lawsuit filed prior to the date  
806 the demand for statement of account is received by the lienor.

807 (5) (a) Any lienor who is perfecting a claim of lien ~~has~~  
808 ~~recorded a claim of lien~~ may serve with the claim of lien or  
809 thereafter a ~~make~~ written demand on the owner for a written  
810 statement under oath showing:

811 1. The amount of the direct contract under which the lien  
812 was recorded;

813 2. The dates and amounts paid or to be paid by or on  
814 behalf of the owner for all improvements described in the direct  
815 contract;

816 3. The reasonable estimated costs of completing the direct  
817 contract under which the lien was claimed pursuant to the scope  
818 of the direct contract; and

819 4. If known, the actual cost of completion.

820 (b) Any owner who does not provide the statement within 30  
821 days after demand, or who provides a false or fraudulent  
822 statement, is not a prevailing party for purposes of an award of  
823 attorney ~~attorney's~~ fees under s. 713.29. The written demand

Amendment No. 1

824 must include the following warning in conspicuous type in  
825 substantially the following form:

826  
827 WARNING: YOUR FAILURE TO FURNISH THE REQUESTED STATEMENT WITHIN  
828 30 DAYS OR THE FURNISHING OF A FALSE STATEMENT WILL RESULT IN  
829 THE LOSS OF YOUR RIGHT TO RECOVER ATTORNEY FEES IN ANY ACTION TO  
830 ENFORCE THE CLAIM OF LIEN OF THE PERSON REQUESTING THIS  
831 STATEMENT.

832 (6) Any written demand served on the owner must include a  
833 description of the property and the names of the contractor and  
834 the lienor's customer, as set forth in the lienor's notice to  
835 owner.

836 (7)+(6) For purposes of this section, the term  
837 "information" means the nature and quantity of the labor,  
838 services, and materials furnished or to be furnished by a lienor  
839 and the amount paid, the amount due, and the amount to become  
840 due on the lienor's account.

841 Section 9. Section 713.18, Florida Statutes, is amended to  
842 read:

843 713.18 Manner of serving notices and other instruments.—

844 (1) Service of notices, claims of lien, affidavits,  
845 assignments, and other instruments permitted or required under  
846 this part, or copies thereof when so permitted or required,  
847 unless otherwise specifically provided in this part, must be  
848 made by one of the following methods:

849 (a) By actual delivery to the person to be served; if a  
850 partnership, to one of the partners; if a corporation, to an

Amendment No. 1

851 officer, director, managing agent, or business agent; or, if a  
852 limited liability company, to a member or manager.

853 (b) By common carrier delivery service or ~~sending the same~~  
854 ~~by registered, Global Express Guaranteed, or certified mail,~~  
855 ~~with postage or shipping paid by the sender and prepaid, or by~~  
856 ~~overnight or second day delivery~~ with evidence of delivery,  
857 which may be in an electronic format.

858 (c) ~~If the method specified in paragraph (a) or paragraph~~  
859 ~~(b) cannot be accomplished,~~ By posting on the site of the  
860 improvement if service as provided by paragraph (a) or paragraph  
861 (b) cannot be accomplished premises.

862 (2) Notwithstanding subsection (1), service of ~~if~~ a notice  
863 to owner ~~or~~ a preliminary notice to contractor under s. 713.23,  
864 s. 337.18, or a ~~preliminary notice~~ under s. 255.05 is mailed by  
865 ~~registered or certified mail with postage prepaid to the person~~  
866 ~~to be served at any of the addresses set forth in subsection (3)~~  
867 ~~within 40 days after the date the lienor first furnishes labor,~~  
868 ~~services, or materials, service of that notice is effective as~~  
869 of the date of mailing if:

870 (a) The notice is mailed by registered, Global Express  
871 Guaranteed, or certified mail, with postage prepaid, to the  
872 person to be served at any of the addresses set forth in  
873 subsection (3);

874 (b) The notice is mailed within 40 days after the date the  
875 lienor first furnishes labor, services, or materials; and

876 (c)1. The person who served the notice maintains a  
877 registered or certified mail log that shows the registered or  
878 certified mail number issued by the United States Postal

Amendment No. 1

879 Service, the name and address of the person served, and the date  
880 stamp of the United States Postal Service confirming the date of  
881 mailing; or ~~if~~

882 2. The person who served the notice maintains electronic  
883 tracking records generated by ~~through use of~~ the United States  
884 Postal Service ~~Confirm service or a similar service~~ containing  
885 the postal tracking number, the name and address of the person  
886 served, and verification of the date of receipt by the United  
887 States Postal Service.

888 (3) (a) Service of ~~if~~ an instrument served pursuant to this  
889 section is effective on the date of mailing the instrument if  
890 it:

891 1. Is sent to the last address shown in the notice of  
892 commencement or any amendment thereto or, in the absence of a  
893 notice of commencement, to the last address shown in the  
894 building permit application, or to the last known address of the  
895 person to be served; ~~and, is not received, but~~

896 2. Is returned as being "refused," "moved, not  
897 forwardable," or "unclaimed," or is otherwise not delivered or  
898 deliverable through no fault of the person serving the item,  
899 ~~then service is effective on the date the instrument was sent.~~

900 (b) If the address shown in the notice of commencement or  
901 any amendment to the notice of commencement, or, in the absence  
902 of a notice of commencement, in the building permit application,  
903 is incomplete for purposes of mailing or delivery, the person  
904 serving the item may complete the address and properly format it  
905 according to United States Postal Service addressing standards  
906 using information obtained from the property appraiser or

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Amendment No. 1

907 another public record without affecting the validity of service  
908 under this section.

909 (4) A notice served by a lienor on one owner or one  
910 partner of a partnership owning the real property ~~If the real~~  
911 ~~property is owned by more than one person or a partnership, a~~  
912 ~~lienor may serve any notices or other papers under this part on~~  
913 ~~any one of such owners or partners, and such notice is deemed~~  
914 notice to all owners and partners.

915 Section 10. Section 713.22, Florida Statutes, is amended  
916 to read:

917 713.22 Duration of lien.-

918 (1) A ~~No~~ lien provided by this part does not shall  
919 continue for a longer period than 1 year after the claim of lien  
920 has been recorded or 1 year after the recording of an amended  
921 claim of lien that shows a later date of final furnishing of  
922 labor, services, or materials, unless within that time an action  
923 to enforce the lien is commenced in a court of competent  
924 jurisdiction. A lien that has been continued beyond the 1-year  
925 period ~~The continuation of the lien effected~~ by the commencement  
926 of an ~~the~~ action is shall not enforceable ~~be good~~ against  
927 creditors or subsequent purchasers for a valuable consideration  
928 and without notice, unless a notice of lis pendens is recorded.

929 (2) An owner or the owner's ~~agent or~~ attorney may elect to  
930 shorten the time prescribed in subsection (1) within which to  
931 commence an action to enforce any claim of lien or claim against  
932 a bond or other security under s. 713.23 or s. 713.24 by  
933 recording in the clerk's office a notice in substantially the  
934 following form:

316769 - h0897-strike.docx

Published On: 2/15/2012 7:04:05 PM

Amendment No. 1

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NOTICE OF CONTEST OF LIEN

To: ... (Name and address of lienor)...

You are notified that the undersigned contests the claim of lien filed by you on ....., ... (year) ..., and recorded in .... Book ....., Page ....., of the public records of .... County, Florida, and that the time within which you may file suit to enforce your lien is limited to 60 days from the date of service of this notice. This .... day of ....., ... (year) .....

Signed: ... (Owner or Attorney)...

The lien of any lienor upon whom such notice is served and who fails to institute a suit to enforce his or her lien within 60 days after service of such notice shall be extinguished automatically. The clerk shall serve, in accordance with s. 713.18, ~~mail~~ a copy of the notice of contest to the lien claimant at the address shown in the claim of lien or most recent amendment thereto and shall certify to such service and the date of service on the face of the ~~such~~ notice and record the notice. ~~Service shall be deemed complete upon mailing.~~

Section 11. Paragraphs (c), (d), (e), and (f) of subsection (1) and subsections (2) and (4) of section 713.23, Florida Statutes, are amended to read:

713.23 Payment bond.-

(1)

(c) ~~Either~~ Before beginning or within 45 days after beginning to furnish labor, materials, or supplies, a lienor who is not in privity with the contractor, except a laborer, shall

COMMITTEE/SUBCOMMITTEE AMENDMENT

Bill No. CS/HB 897 (2012)

Amendment No. 1

963 serve the contractor with notice in writing that the lienor will  
964 look to the contractor's bond for protection on the work. If a  
965 notice of commencement with the attached bond is not recorded  
966 ~~before commencement of construction, or a reference to the bond~~  
967 ~~is not given in the notice of commencement, and in either case~~  
968 ~~if the lienor not in privity with the contractor is not~~  
969 ~~otherwise notified in writing of the existence of the bond, the~~  
970 ~~lienor not in privity with the contractor~~ may, in the  
971 alternative, elect to serve the notice to the contractor up to  
972 shall have 45 days after from the date the lienor is served with  
973 a copy notified of the existence of the bond within which to  
974 serve the notice. A notice to owner pursuant to s. 713.06 which  
975 has been timely served on the contractor satisfies the  
976 requirements of this paragraph. In no event, however, shall the  
977 limitation period for commencement of an action on the payment  
978 bond as established in paragraph (e) be expanded. The notice may  
979 be in substantially the following form and may be combined with  
980 a notice to owner given under s. 713.06 and, if so, may be  
981 entitled "NOTICE TO OWNER/NOTICE TO CONTRACTOR:

982  
983  
984 NOTICE TO CONTRACTOR

985  
986 To ... (name and address of contractor)...

987  
988 The undersigned hereby informs you that he or she has furnished  
989 or is furnishing services or materials as follows:

990  
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Amendment No. 1

991 ...(general description of services or materials)... for the  
992 improvement of the real property identified as ...(property  
993 description)... under an order given by ...(lienor's  
994 customer)....

995  
996 This notice is to inform you that the undersigned intends to  
997 look to the contractor's bond to secure payment for the  
998 furnishing of materials or services for the improvement of the  
999 real property.

1000  
1001 ...(name of lienor)...  
1002 ...(signature of lienor or lienor's representative)...  
1003 ...(date)...  
1004 ...(lienor's address)...

1005  
1006 ~~The undersigned notifies you that he or she has furnished or is~~  
1007 ~~furnishing ...(services or materials)... for the improvement of~~  
1008 ~~the real property identified as ...(property description)...~~  
1009 ~~owned by ...(owner's name and address)... under an order given~~  
1010 ~~by .... and that the undersigned will look to the contractor's~~  
1011 ~~bond for protection on the work.~~

1012  
1013 ~~...(Lienor's signature and address)...~~

1014  
1015 (d) In addition, a lienor is required, as a condition  
1016 precedent to recovery under the bond, to serve a written notice  
1017 of nonpayment to the contractor and the surety not later than 90  
1018 days after the final furnishing of labor, services, or materials



Amendment No. 1

1019 by the lienor. A written notice satisfies this condition  
1020 precedent with respect to the payment described in the notice of  
1021 nonpayment, including unpaid finance charges due under the  
1022 lienor's contract, and with respect to any other payments which  
1023 become due to the lienor after the date of the notice of  
1024 nonpayment. The time period for serving a written notice of  
1025 nonpayment shall be measured from the last day of furnishing  
1026 labor, services, or materials by the lienor and shall not be  
1027 measured by other standards, such as the issuance of a  
1028 certificate of occupancy or the issuance of a certificate of  
1029 substantial completion. The failure of a lienor to receive  
1030 retainage sums not in excess of 10 percent of the value of  
1031 labor, services, or materials furnished by the lienor is not  
1032 considered a nonpayment requiring the service of the notice  
1033 provided under this paragraph. If the payment bond is not  
1034 recorded before commencement of construction, the time period  
1035 for the lienor to serve a notice of nonpayment may at the option  
1036 of the lienor be calculated from the date specified in this  
1037 section or the date the lienor is served a copy of the bond.  
1038 However, the limitation period for commencement of an action on  
1039 the payment bond as established in paragraph (e) may not be  
1040 expanded. The notice under this paragraph may be in  
1041 substantially the following form:

1042  
1043 NOTICE OF NONPAYMENT

1044  
1045 To ... (name of contractor and address) ...  
1046

Amendment No. 1

1047 | ... (name of surety and address) ...

1048

1049 | The undersigned notifies you that he or she has furnished

1050 | ... (describe labor, services, or materials) ... for the

1051 | improvement of the real property identified as ... (property

1052 | description) .... The amount now due and unpaid is \$.....

1053

1054 | ... (signature and address of lienor) ...

1055

1056 | (e) An ~~No~~ action for the labor or materials or supplies

1057 | may not be instituted or prosecuted against the contractor or

1058 | surety unless both notices have been given, if required by this

1059 | section. An ~~No~~ action may not ~~shall~~ be instituted or prosecuted

1060 | against the contractor or against the surety on the bond under

1061 | this section after 1 year from the performance of the labor or

1062 | completion of delivery of the materials and supplies. The time

1063 | period for bringing an action against the contractor or surety

1064 | on the bond shall be measured from the last day of furnishing

1065 | labor, services, or materials by the lienor. The time period ~~and~~

1066 | may ~~shall~~ not be measured by other standards, such as the

1067 | issuance of a certificate of occupancy or the issuance of a

1068 | certificate of substantial completion. A contractor or the

1069 | contractor's ~~agent or~~ attorney may elect to shorten the

1070 | ~~prescribed~~ time within which an action to enforce any claim

1071 | against a payment bond provided under this section or s. 713.245

1072 | must ~~may~~ be commenced at any time after a notice of nonpayment,

1073 | if required, has been served for the claim by recording in the

1074 | clerk's office a notice in substantially the following form:

316769 - h0897-strike.docx

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Amendment No. 1

1075

1076

NOTICE OF CONTEST OF CLAIM

1077

AGAINST PAYMENT BOND

1078

1079

To: ...(Name and address of lienor)...

1080

You are notified that the undersigned contests your notice of nonpayment, dated ....., ....., and served on the undersigned on ....., ....., and that the time within which you may file suit to enforce your claim is limited to 60 days from the date of service of this notice.

1081

1082

1083

1084

1085

1086

DATED on ....., .....

1087

1088

Signed: ...(Contractor or Attorney)...

1089

1090

The claim of any lienor upon whom the notice is served and who fails to institute a suit to enforce his or her claim against the payment bond within 60 days after service of the notice shall be extinguished automatically. The contractor or the contractor's attorney ~~clerk~~ shall serve ~~mail~~ a copy of the notice of contest to the lienor at the address shown in the notice of nonpayment or most recent amendment thereto and shall certify to such service on the face of the notice and record the notice. ~~Service is complete upon mailing.~~

1091

1092

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1097

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1099

(f) A ~~Any~~ lienor has a direct right of action on the bond against the surety. Any provision in a payment bond which further restricts ~~A bond must not contain any provisions restricting~~ the classes of persons who are protected by the

1100

1101

1102

Amendment No. 1

1103 payment bond, which restricts ~~thereby~~ or the venue of any  
1104 proceeding relating to such payment bond, which limits or  
1105 expands the effective duration of the payment bond, or which  
1106 adds conditions precedent to the enforcement of a claim against  
1107 a payment bond beyond those provided in this part is  
1108 unenforceable. The surety is not entitled to the defense of pro  
1109 tanto discharge as against any lienor because of changes or  
1110 modifications in the contract to which the surety is not a  
1111 party; but the liability of the surety may not be increased  
1112 beyond the penal sum of the bond. A lienor may not waive in  
1113 advance his or her right to bring an action under the bond  
1114 against the surety.

1115 (2) The bond shall secure every lien under the direct  
1116 contract accruing subsequent to its execution and delivery,  
1117 except that of the contractor. Every claim of lien, except that  
1118 of the contractor, filed subsequent to execution and delivery of  
1119 the bond shall be transferred to it with the same effect as  
1120 liens transferred under s. 713.24. Record notice of the transfer  
1121 shall be effected by the contractor, or any person having an  
1122 interest in the property against which the claim of lien has  
1123 been asserted, by recording in the clerk's office a notice, with  
1124 the bond attached, in substantially the following form:

1125  
1126 NOTICE OF BOND

1127  
1128 To ... (Name and Address of Lienor) ...  
1129

Amendment No. 1

1130 You are notified that the claim of lien filed by you on .....,  
1131 ....., and recorded in Official Records Book .... at page .... of  
1132 the public records of .... County, Florida, is secured by a  
1133 bond, a copy being attached.

1134

1135 Signed: ... (Name of person recording notice)...

1136

1137 The notice shall be verified. The person recording the notice of  
1138 bond clerk shall serve mail a copy of the notice with a copy of  
1139 the bond to the lienor at the address shown in the claim of  
1140 lien, or the most recent amendment to it; shall certify to the  
1141 service on the face of the notice; and shall record the notice.  
1142 ~~The clerk shall receive the same fee as prescribed in s.~~  
1143 ~~713.24(1) for certifying to a transfer of lien.~~

1144 (4) The provisions of s. 713.24(3) ~~shall~~ apply to bonds  
1145 under this section except when those provisions conflict with  
1146 this section.

1147 Section 12. This act shall take effect October 1, 2012.

1148

1149

1150

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1151

**T I T L E A M E N D M E N T**

1152 Remove the entire title and insert:

1153 An act relating to construction contracting; amending s. 95.11,

1154 F.S.; adding cross-reference; amending s. 255.05, F.S.;

1155 requiring that the bond number be stated on the first page of

1156 the bond; providing that a public entity may not commence making

1157 payments to the contractor unless the public entity has received

COMMITTEE/SUBCOMMITTEE AMENDMENT

Bill No. CS/HB 897 (2012)

Amendment No. 1

1158 a certified copy of the bond; providing that a provision in a  
1159 payment bond furnished for a public works contract that limits  
1160 or expands the effective duration of the bond or adds conditions  
1161 precedent is unenforceable; requiring a contractor, or the  
1162 contractor's attorney, to serve rather than mail a notice of  
1163 contest of claim against the payment bond; specifying the  
1164 duration of the bond; providing that payment to a contractor who  
1165 has furnished a payment bond on a public works project may not  
1166 be conditioned upon production of certain documents if the  
1167 surety has given written consent; providing for the surety to  
1168 withhold or revoke consent; providing prerequisites for  
1169 commencement of an action against a payment bond; creating s.  
1170 255.0518, F.S.; requiring that the state, a county, a  
1171 municipality, or any other public body or institution open  
1172 sealed bids received in response to a competitive solicitation  
1173 at a public meeting, announce the name of each bidder and the  
1174 price submitted, and make available upon request the names of  
1175 bidders and submitted prices; amending s. 489.118, F.S.;  
1176 extending the date within which certain registered contractors  
1177 may apply for certification; amending s. 713.10, F.S.; providing  
1178 that a specified notice concerning a lessor's liability for  
1179 liens for improvements made by the lessee prohibits liens even  
1180 if other leases do not expressly prohibit liens or if certain  
1181 other provisions are not identical; amending s. 713.13, F.S.;  
1182 revising a notice form to clarify that the notice of  
1183 commencement expires 1 year after the date of recording;  
1184 removing a perjury clause; providing additional time for service  
1185 when a notice of commencement is not recorded with a copy of the

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COMMITTEE/SUBCOMMITTEE AMENDMENT

Bill No. CS/HB 897 (2012)

Amendment No. 1

1186 bond attached; amending s. 713.132, F.S.; requiring notice of  
1187 termination to be served on lienors in privity with the owner;  
1188 amending s. 713.16, F.S.; revising requirements for demands for  
1189 a copy of a construction contract and a statement of account;  
1190 authorizing a lienor to make certain written demands to an owner  
1191 for certain written statements; providing requirements for such  
1192 written demands; amending s. 713.18, F.S.; providing additional  
1193 methods by which certain items may be served; revising  
1194 provisions relating to when service of specified items is  
1195 effective; specifying requirements for certain written  
1196 instruments under certain circumstances; amending s. 713.22,  
1197 F.S.; requiring that the clerk serve rather than mail a notice  
1198 of contest of lien; amending s. 713.23, F.S.; revising the  
1199 contents of a notice to contractor; requiring that a contractor  
1200 serve rather than mail a notice of contest of claim against the  
1201 payment bond and a notice of bond; clarifying the attachment of  
1202 the bond to the notice; providing that a provision in a payment  
1203 bond that limits or expands the effective duration of the bond  
1204 or adds conditions precedent is unenforceable; clarifying  
1205 applicability of certain provisions; providing an effective  
1206 date.

COMMITTEE/SUBCOMMITTEE AMENDMENT

Bill No. CS/HB 971 (2012)

Amendment No. 1

COMMITTEE/SUBCOMMITTEE ACTION

ADOPTED \_\_\_\_\_ (Y/N)  
ADOPTED AS AMENDED \_\_\_\_\_ (Y/N)  
ADOPTED W/O OBJECTION \_\_\_\_\_ (Y/N)  
FAILED TO ADOPT \_\_\_\_\_ (Y/N)  
WITHDRAWN \_\_\_\_\_ (Y/N)  
OTHER \_\_\_\_\_

1 Committee/Subcommittee hearing bill: Judiciary Committee  
2 Representative Gaetz offered the following:

3  
4 **Amendment (with title amendment)**

5 Remove lines 30-46 and lines 106-510  
6  
7  
8

9 -----  
10 **T I T L E A M E N D M E N T**

11 Remove the entire title and insert:

12 An act relating to the judiciary; amending s. 43.291, F.S.;  
13 revising requirements for the appointment of members of judicial  
14 nominating commissions; providing that, with the exception of  
15 members selected from a list of nominees provided by the Board  
16 of Governors of The Florida Bar, a current member of a judicial  
17 nominating commission appointed by the Governor serves at the  
18 pleasure of the Governor; providing for each expired term or  
19 vacancy to be filled by appointment in the same manner as the

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COMMITTEE/SUBCOMMITTEE AMENDMENT

Bill No. CS/HB 971 (2012)

Amendment No. 1

20 member whose position is being filled; deleting obsolete  
21 provisions; deleting a requirement that the Executive Office of  
22 the Governor establish uniform rules of procedure consistent  
23 with the State Constitution when suspending for cause a member  
24 of a judicial nominating commission; providing an effective  
25 date.

Amendment No. 1

COMMITTEE/SUBCOMMITTEE ACTION

ADOPTED	___	(Y/N)
ADOPTED AS AMENDED	___	(Y/N)
ADOPTED W/O OBJECTION	___	(Y/N)
FAILED TO ADOPT	___	(Y/N)
WITHDRAWN	___	(Y/N)
OTHER	_____	

1 Committee/Subcommittee hearing bill: Judiciary Committee  
2 Representative Plakon offered the following:

3  
4 **Amendment (with title amendment)**

5 Remove everything after the enacting clause and insert:

6 Section 1. Subsection (2) of section 741.315, Florida  
7 Statutes, is amended to read:

8 741.315 Recognition of foreign protection orders.—

9 (2) Pursuant to 18 U.S.C. s. 2265, an injunction for  
10 protection against domestic violence issued by a court of a  
11 foreign state must be accorded full faith and credit by the  
12 courts of this state and enforced by a law enforcement agency as  
13 if it were the order of a Florida court issued under s. 741.30,  
14 s. 741.31, s. 784.046, ~~or~~ s. 784.047, 784.0485, or 784.0487 and  
15 provided that the court had jurisdiction over the parties and  
16 the matter and that reasonable notice and opportunity to be  
17 heard was given to the person against whom the order is sought  
18 sufficient to protect that person's right to due process. Ex  
19 parte foreign injunctions for protection are not eligible for

COMMITTEE/SUBCOMMITTEE AMENDMENT

Bill No. CS/HB 1099 (2012)

Amendment No. 1

20 enforcement under this section unless notice and opportunity to  
21 be heard have been provided within the time required by the  
22 foreign state or tribal law, and in any event within a  
23 reasonable time after the order is issued, sufficient to protect  
24 the respondent's due process rights.

25 Section 2. Section 784.048, Florida Statutes, is amended to  
26 read:

27 784.048 Stalking; definitions; penalties.—

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

29 . (a) "Harass" means to engage in a course of conduct  
30 directed at a specific person which ~~that~~ causes substantial  
31 emotional distress to that ~~in such~~ person and serves no  
32 legitimate purpose.

33 (b) "Course of conduct" means a pattern of conduct  
34 composed of a series of acts over a period of time, however  
35 short, which evidences ~~evidencing~~ a continuity of purpose. The  
36 term does not include constitutionally protected activity such  
37 as is not included within the meaning of "course of conduct."  
38 ~~Such constitutionally protected activity includes picketing or~~  
39 other organized protests.

40 (c) "Credible threat" means a verbal or nonverbal threat,  
41 or a combination of the two, including threats delivered by  
42 electronic communication or implied by a pattern of conduct,  
43 which places the person who is the target of the threat in  
44 reasonable fear for his or her safety or the safety of his or  
45 her family members or individuals closely associated with the  
46 person, and which is made with the apparent ability to carry out  
47 the threat to cause such harm. It is not necessary to prove that

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Amendment No. 1

48 the person making the threat had the intent to actually carry  
49 out the threat. The present incarceration of the person making  
50 the threat is not a bar to prosecution under this section ~~made~~  
51 ~~with the intent to cause the person who is the target of the~~  
52 ~~threat to reasonably fear for his or her safety. The threat must~~  
53 ~~be against the life of, or a threat to cause bodily injury to, a~~  
54 ~~person.~~

55 (d) "Cyberstalk" means to engage in a course of conduct to  
56 communicate, or to cause to be communicated, words, images, or  
57 language by or through the use of electronic mail or electronic  
58 communication, directed at a specific person, causing  
59 substantial emotional distress to that person and serving no  
60 legitimate purpose.

61 (2) A ~~Any~~ person who willfully, maliciously, and  
62 repeatedly follows, harasses, or cyberstalks another person  
63 commits the offense of stalking, a misdemeanor of the first  
64 degree, punishable as provided in s. 775.082 or s. 775.083.

65 (3) A ~~Any~~ person who willfully, maliciously, and  
66 repeatedly follows, harasses, or cyberstalks another person, ~~and~~  
67 makes a credible threat to that person ~~with the intent to place~~  
68 ~~that person in reasonable fear of death or bodily injury of the~~  
69 ~~person, or the person's child, sibling, spouse, parent, or~~  
70 ~~dependent,~~ commits the offense of aggravated stalking, a felony  
71 of the third degree, punishable as provided in s. 775.082, s.  
72 775.083, or s. 775.084.

73 (4) A ~~Any~~ person who, after an injunction for protection  
74 against repeat violence, sexual violence, or dating violence  
75 pursuant to s. 784.046, or an injunction for protection against

Amendment No. 1

76 domestic violence pursuant to s. 741.30, or after any other  
77 court-imposed prohibition of conduct toward the subject person  
78 or that person's property, knowingly, willfully, maliciously,  
79 and repeatedly follows, harasses, or cyberstalks another person  
80 commits the offense of aggravated stalking, a felony of the  
81 third degree, punishable as provided in s. 775.082, s. 775.083,  
82 or s. 775.084.

83 (5) A ~~Any~~ person who willfully, maliciously, and  
84 repeatedly follows, harasses, or cyberstalks a child ~~minor~~ under  
85 16 years of age commits the offense of aggravated stalking, a  
86 felony of the third degree, punishable as provided in s.  
87 775.082, s. 775.083, or s. 775.084.

88 (6) A ~~Any~~ law enforcement officer may arrest, without a  
89 warrant, any person that he or she has probable cause to believe  
90 has violated ~~the provisions of~~ this section.

91 (7) A ~~Any~~ person who, after having been sentenced for a  
92 violation of s. 794.011, s. 800.04, or s. 847.0135(5) and  
93 prohibited from contacting the victim of the offense under s.  
94 921.244, willfully, maliciously, and repeatedly follows,  
95 harasses, or cyberstalks the victim commits the offense of  
96 aggravated stalking, a felony of the third degree, punishable as  
97 provided in s. 775.082, s. 775.083, or s. 775.084.

98 (8) The punishment imposed under this section shall run  
99 consecutive to any former sentence imposed for a conviction for  
100 any offense under s. 794.011, s. 800.04, or s. 847.0135(5).

101 (9) (a) The sentencing court shall consider, as a part of  
102 any sentence, issuing an order restraining the defendant from  
103 any contact with the victim, which may be valid for up to 10

416577 - h1099-strike.docx

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Amendment No. 1

104 years, as determined by the court. It is the intent of the  
105 Legislature that the length of any such order be based upon the  
106 seriousness of the facts before the court, the probability of  
107 future violations by the perpetrator, and the safety of the  
108 victim and his or her family members or individuals closely  
109 associated with the victim.

110 (b) The order may be issued by the court even if the  
111 defendant is sentenced to a state prison or a county jail or  
112 even if the imposition of the sentence is suspended and the  
113 defendant is placed on probation.

114 Section 3. Section 784.0485, Florida Statutes, is created  
115 to read:

116 784.0485 Stalking; injunction; powers and duties of court  
117 and clerk; petition; notice and hearing; temporary injunction;  
118 issuance of injunction; statewide verification system;  
119 enforcement.-

120 (1) There is created a cause of action for an injunction  
121 for protection against stalking. For the purposes of injunctions  
122 for protection against stalking under this section, the offense  
123 of stalking shall include the offense of cyberstalking.

124 (a) A person who is the victim of stalking or the parent  
125 or legal guardian of a minor child who is living at home who  
126 seeks an injunction for protection against stalking on behalf of  
127 the minor child has standing in the circuit court to file a  
128 sworn petition for an injunction for protection against  
129 stalking.

130 (b) The cause of action for an injunction for protection  
131 may be sought regardless of whether any other cause of action is

Amendment No. 1

132 currently pending between the parties. However, the pendency of  
133 any such cause of action shall be alleged in the petition.

134 (c) The cause of action for an injunction may be sought by  
135 any affected person.

136 (d) The cause of action for an injunction does not require  
137 either party to be represented by an attorney.

138 (e) The court may not issue mutual orders of protection;  
139 however, the court is not precluded from issuing separate  
140 injunctions for protection against stalking if each party has  
141 complied with this section. Compliance with this section may not  
142 be waived.

143 (f) Notwithstanding chapter 47, a petition for an  
144 injunction for protection against stalking may be filed in the  
145 circuit where the petitioner currently or temporarily resides,  
146 where the respondent resides, or where the stalking occurred.  
147 There is no minimum requirement of residency to petition for an  
148 injunction for protection.

149 (2) (a) Notwithstanding any other law, the clerk of court  
150 may not assess a filing fee to file a petition for protection  
151 against stalking. However, subject to legislative appropriation,  
152 the clerk of the circuit court may, on a quarterly basis, submit  
153 to the Office of the State Courts Administrator a certified  
154 request for reimbursement for petitions for protection against  
155 stalking issued by the court, at the rate of \$40 per petition.  
156 The request for reimbursement shall be submitted in the form and  
157 manner prescribed by the Office of the State Courts  
158 Administrator. From this reimbursement, the clerk shall pay any  
159 law enforcement agency serving the injunction the fee requested

Amendment No. 1

160 by the law enforcement agency; however, this fee may not exceed  
161 \$20.

162 (b) A bond is not required by the court for the entry of  
163 an injunction.

164 (c)1. The clerk of the court shall assist petitioners in  
165 seeking both injunctions for protection against stalking and  
166 enforcement of a violation thereof as specified in this section.

167 2. All offices of the clerk of the court shall provide  
168 simplified petition forms for the injunction and any  
169 modifications to and the enforcement thereof, including  
170 instructions for completion.

171 3. The clerk of the court shall ensure the petitioner's  
172 privacy to the extent practicable while completing the forms for  
173 an injunction for protection against stalking.

174 4. The clerk of the court shall provide a petitioner with  
175 a minimum of two certified copies of the order of injunction,  
176 one of which is serviceable and will inform the petitioner of  
177 the process for service and enforcement.

178 5. The clerk of the court and appropriate staff in each  
179 county shall receive training in the effective assistance of  
180 petitioners as provided or approved by the Florida Association  
181 of Court Clerks.

182 6. The clerk of the court in each county shall make  
183 available informational brochures on stalking when such a  
184 brochure is provided by the local certified domestic violence  
185 center or certified rape crisis center.

186 7. The clerk of the court in each county shall distribute  
187 a statewide uniform informational brochure to petitioners at the



Amendment No. 1

188 time of filing for an injunction for protection against stalking  
189 when such brochures become available. The brochure must include  
190 information about the effect of giving the court false  
191 information.

192 (3) (a) The sworn petition shall allege the existence of  
193 such stalking and shall include the specific facts and  
194 circumstances for which relief is sought.

195 (b) The sworn petition shall be in substantially the  
196 following form:

197  
198 PETITION FOR INJUNCTION FOR PROTECTION AGAINST STALKING

199  
200 Before me, the undersigned authority, personally appeared  
201 Petitioner....(Name)...., who has been sworn and says that  
202 the following statements are true:

- 203  
204 1. Petitioner resides at:....(address)....  
205 (Petitioner may furnish the address to the court in a  
206 separate confidential filing if, for safety reasons,  
207 the petitioner requires the location of the current  
208 residence to be confidential.)  
209 2. Respondent resides at:....(last known address)....  
210 3. Respondent's last known place of employment:....(name  
211 of business and address)....  
212 4. Physical description of respondent:....  
213 5. Race....  
214 6. Sex....  
215 7. Date of birth....

Amendment No. 1

- 216 8. Height....
- 217 9. Weight....
- 218 10. Eye color....
- 219 11. Hair color....
- 220 12. Distinguishing marks or scars....
- 221 13. Aliases of respondent:....
- 222

223 (c) The petitioner shall describe any other cause of  
224 action currently pending between the petitioner and respondent.  
225 The petitioner shall also describe any previous attempt by the  
226 petitioner to obtain an injunction for protection against  
227 stalking in this or any other circuit, and the result of that  
228 attempt. (Case numbers should be included, if available.)

229 (d) The petition must provide space for the petitioner to  
230 specifically allege that he or she is a victim of stalking  
231 because respondent has:

232  
233 (Mark all sections that apply and describe in the spaces below  
234 the incidents of stalking specifying when and where they  
235 occurred, including, but not limited to, locations such as a  
236 home, school, or place of employment.)

237  
238 .... Committed stalking.

239 .... Previously threatened, harassed, stalked,  
240 cyberstalked, or physically abused the petitioner.

241 .... Threatened to harm the petitioner or family members or  
242 individuals closely associated with the petitioner.

243 .... Intentionally injured or killed a family pet.

Amendment No. 1

244 .... Used, or has threatened to use, against the petitioner  
245 any weapons such as guns or knives.

246 .... A criminal history involving violence or the threat of  
247 violence (if known).

248 .... Another order of protection issued against him or her  
249 previously or from another jurisdiction, if known.

250 .... Destroyed personal property, including, but not  
251 limited to, telephones or other communication equipment,  
252 clothing, or other items belonging to the petitioner.

253 (e) The petitioner seeks an injunction: (Mark appropriate  
254 section or sections.)

255 .... Immediately restraining the respondent from committing  
256 any acts of stalking.

257 .... Restraining the respondent from committing any acts of  
258 stalking.

259 .... Providing any terms the court deems necessary for the  
260 protection of a victim of stalking, including any injunctions or  
261 directives to law enforcement agencies.

262 (f) Every petition for an injunction against stalking must  
263 contain, directly above the signature line, a statement in all  
264 capital letters and bold type not smaller than the surrounding  
265 text, as follows:

266  
267 I HAVE READ EVERY STATEMENT MADE IN THIS PETITION AND  
268 EACH STATEMENT IS TRUE AND CORRECT. I UNDERSTAND THAT  
269 THE STATEMENTS MADE IN THIS PETITION ARE BEING MADE  
270 UNDER PENALTY OF PERJURY, PUNISHABLE AS PROVIDED IN  
271 SECTION 837.02, FLORIDA STATUTES.

Amendment No. 1

272

273

....(initials)....

274

275

276

277

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279

(4) Upon the filing of the petition, the court shall set a hearing to be held at the earliest possible time. The respondent shall be personally served with a copy of the petition, notice of hearing, and temporary injunction, if any, before the hearing.

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(5) (a) If it appears to the court that stalking exists, the court may grant a temporary injunction ex parte, pending a full hearing, and may grant such relief as the court deems proper, including an injunction restraining the respondent from committing any act of stalking.

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(b) In a hearing ex parte for the purpose of obtaining such ex parte temporary injunction, evidence other than verified pleadings or affidavits may not be used as evidence, unless the respondent appears at the hearing or has received reasonable notice of the hearing. A denial of a petition for an ex parte injunction shall be by written order noting the legal grounds for denial. If the only ground for denial is no appearance of an immediate and present danger of stalking, the court shall set a full hearing on the petition for injunction with notice at the earliest possible time. This paragraph does not affect a petitioner's right to promptly amend any petition, or otherwise be heard in person on any petition consistent with the Florida Rules of Civil Procedure.

298

299

(c) Any such ex parte temporary injunction is effective for a fixed period not to exceed 15 days. A full hearing, as

Amendment No. 1

300 provided in this section, shall be set for a date no later than  
301 the date when the temporary injunction ceases to be effective.

302 The court may grant a continuance of the hearing before or  
303 during a hearing for good cause shown by any party, which shall  
304 include a continuance to obtain service of process. An  
305 injunction shall be extended if necessary to remain in full  
306 force and effect during any period of continuance.

307 (6) (a) Upon notice and hearing, when it appears to the  
308 court that the petitioner is the victim of stalking, the court  
309 may grant such relief as the court deems proper, including an  
310 injunction:

311 1. Restraining the respondent from committing any act of  
312 stalking.

313 2. Ordering the respondent to participate in treatment,  
314 intervention, or counseling services to be paid for by the  
315 respondent.

316 3. Referring a petitioner to appropriate services. The  
317 court may provide the petitioner with a list of certified  
318 domestic violence centers, certified rape crisis centers, and  
319 other appropriate referrals in the circuit which the petitioner  
320 may contact.

321 4. Ordering such other relief as the court deems necessary  
322 for the protection of a victim of stalking, including  
323 injunctions or directives to law enforcement agencies, as  
324 provided in this section.

325 (b) The terms of an injunction restraining the respondent  
326 under subparagraph (a)1. or ordering other relief for the  
327 protection of the victim under subparagraph (a)4. shall remain

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Amendment No. 1

328 in effect until modified or dissolved. Either party may move at  
329 any time to modify or dissolve the injunction. Specific  
330 allegations are not required. Such relief may be granted in  
331 addition to other civil or criminal remedies.

332 (c) A temporary or final judgment on injunction for  
333 protection against stalking entered pursuant to this section  
334 shall, on its face, indicate that:

335 1. The injunction is valid and enforceable in all counties  
336 of this state.

337 2. Law enforcement officers may use their arrest powers  
338 pursuant to s. 901.15(6) to enforce the terms of the injunction.

339 3. The court has jurisdiction over the parties and matter  
340 under the laws of this state and that reasonable notice and  
341 opportunity to be heard was given to the person against whom the  
342 order is sought sufficient to protect that person's right to due  
343 process.

344 4. The date that the respondent was served with the  
345 temporary or final order, if obtainable.

346 (d) The fact that a separate order of protection is  
347 granted to each opposing party is not legally sufficient to deny  
348 any remedy to either party or to prove that the parties are  
349 equally at fault or equally endangered.

350 (e) A final judgment on an injunction for protection  
351 against stalking entered pursuant to this section must, on its  
352 face, provide that it is a violation of s. 790.233 and a  
353 misdemeanor of the first degree for the respondent to have in  
354 his or her care, custody, possession, or control any firearm or  
355 ammunition.

COMMITTEE/SUBCOMMITTEE AMENDMENT

Bill No. CS/HB 1099 (2012)

Amendment No. 1

356 (f) All proceedings under this subsection shall be  
357 recorded. Recording may be by electronic means as provided by  
358 the Rules of Judicial Administration.

359 (7) The court shall allow an advocate from a state  
360 attorney's office, a law enforcement agency, a certified rape  
361 crisis center, or a certified domestic violence center who is  
362 registered under s. 39.905 to be present with the petitioner or  
363 respondent during any court proceedings or hearings related to  
364 the injunction for protection if the petitioner or respondent  
365 has made such a request and the advocate is able to be present.

366 (8)(a)1. The clerk of the court shall furnish a copy of  
367 the petition, notice of hearing, and temporary injunction, if  
368 any, to the sheriff or a law enforcement agency of the county  
369 where the respondent resides or can be found, who shall serve it  
370 upon the respondent as soon thereafter as possible on any day of  
371 the week and at any time of the day or night. When requested by  
372 the sheriff, the clerk of the court may transmit a facsimile  
373 copy of an injunction that has been certified by the clerk of  
374 the court, and this facsimile copy may be served in the same  
375 manner as a certified copy. Upon receiving a facsimile copy, the  
376 sheriff must verify receipt with the sender before attempting to  
377 serve it on the respondent. In addition, if the sheriff is in  
378 possession of an injunction for protection which has been  
379 certified by the clerk of the court, the sheriff may transmit a  
380 facsimile copy of that injunction to a law enforcement officer  
381 who shall serve it in the same manner as a certified copy. The  
382 clerk of the court shall furnish to the sheriff such information  
383 concerning the respondent's physical description and location as

416577 - h1099-strike.docx

Published On: 2/15/2012 7:10:33 PM

Amendment No. 1

384 is required by the Department of Law Enforcement to comply with  
385 the verification procedures set forth in this section.

386 Notwithstanding any other law, the chief judge of each circuit,  
387 in consultation with the appropriate sheriff, may authorize a  
388 law enforcement agency within the jurisdiction to effect  
389 service. A law enforcement agency serving injunctions pursuant  
390 to this section shall use service and verification procedures  
391 consistent with those of the sheriff.

392 2. If an injunction is issued and the petitioner requests  
393 the assistance of a law enforcement agency, the court may order  
394 that an officer from the appropriate law enforcement agency  
395 accompany the petitioner to assist in the execution or service  
396 of the injunction. A law enforcement officer shall accept a copy  
397 of an injunction for protection against stalking, certified by  
398 the clerk of the court, from the petitioner and immediately  
399 serve it upon a respondent who has been located but not yet  
400 served.

401 3. An order issued, changed, continued, extended, or  
402 vacated subsequent to the original service of documents  
403 enumerated under subparagraph 1. shall be certified by the clerk  
404 of the court and delivered to the parties at the time of the  
405 entry of the order. The parties may acknowledge receipt of such  
406 order in writing on the face of the original order. If a party  
407 fails or refuses to acknowledge the receipt of a certified copy  
408 of an order, the clerk shall note on the original order that  
409 service was effected. If delivery at the hearing is not  
410 possible, the clerk shall mail certified copies of the order to  
411 the parties at the last known address of each party. Service by



Amendment No. 1

412 mail is complete upon mailing. When an order is served pursuant  
413 to this subsection, the clerk shall prepare a written  
414 certification to be placed in the court file specifying the  
415 time, date, and method of service and shall notify the sheriff.

416 4. If the respondent has been served previously with a  
417 temporary injunction and has failed to appear at the initial  
418 hearing on the temporary injunction, any subsequent petition for  
419 injunction seeking an extension of time may be served on the  
420 respondent by the clerk of the court by certified mail in lieu  
421 of personal service by a law enforcement officer.

422 (b)1. Within 24 hours after the court issues an injunction  
423 for protection against stalking or changes, continues, extends,  
424 or vacates an injunction for protection against stalking, the  
425 clerk of the court must forward a certified copy of the  
426 injunction for service to the sheriff having jurisdiction over  
427 the residence of the petitioner. The injunction must be served  
428 in accordance with this subsection.

429 2. Within 24 hours after service of process of an  
430 injunction for protection against stalking upon a respondent,  
431 the law enforcement officer must forward the written proof of  
432 service of process to the sheriff having jurisdiction over the  
433 residence of the petitioner.

434 3. Within 24 hours after the sheriff receives a certified  
435 copy of the injunction for protection against stalking, the  
436 sheriff must make information relating to the injunction  
437 available to other law enforcement agencies by electronically  
438 transmitting such information to the Department of Law  
439 Enforcement.

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Amendment No. 1

440 4. Within 24 hours after the sheriff or other law  
441 enforcement officer has made service upon the respondent and the  
442 sheriff has been so notified, the sheriff must make information  
443 relating to the service available to other law enforcement  
444 agencies by electronically transmitting such information to the  
445 Department of Law Enforcement.

446 5. Within 24 hours after an injunction for protection  
447 against stalking is vacated, terminated, or otherwise rendered  
448 no longer effective by ruling of the court, the clerk of the  
449 court must notify the sheriff receiving original notification of  
450 the injunction as provided in subparagraph 2. That agency shall,  
451 within 24 hours after receiving such notification from the clerk  
452 of the court, notify the Department of Law Enforcement of such  
453 action of the court.

454 (9) (a) The court may enforce a violation of an injunction  
455 for protection against stalking through a civil or criminal  
456 contempt proceeding, or the state attorney may prosecute it as a  
457 criminal violation under s. 784.0487. Any assessments or fines  
458 ordered by the court enforcing such an injunction shall be  
459 collected by the clerk of the court and transferred on a monthly  
460 basis to the State Treasury for deposit into the Domestic  
461 Violence Trust Fund.

462 (b) If the respondent is arrested by a law enforcement  
463 officer under s. 901.15(6) or for a violation of s. 784.0487,  
464 the respondent shall be held in custody until brought before the  
465 court as expeditiously as possible for the purpose of enforcing  
466 the injunction and for admittance to bail in accordance with  
467 chapter 903 and the applicable rules of criminal procedure,

416577 - h1099-strike.docx

Published On: 2/15/2012 7:10:33 PM

Amendment No. 1

468 pending a hearing.

469 (10) The petitioner or the respondent may move the court  
470 to modify or dissolve an injunction at any time.

471 Section 4. Section 784.0487, Florida Statutes, is created  
472 to read:

473 784.0487 Violation of an injunction for protection against  
474 stalking or cyberstalking.-

475 (1) If the injunction for protection against stalking or  
476 cyberstalking has been violated and the respondent has not been  
477 arrested, the petitioner may contact the clerk of the circuit  
478 court of the county in which the violation is alleged to have  
479 occurred. The clerk shall assist the petitioner in preparing an  
480 affidavit in support of reporting the violation or directing the  
481 petitioner to the office operated by the court that has been  
482 designated by the chief judge of that circuit as the central  
483 intake point for violations of injunctions for protection where  
484 the petitioner can receive assistance in the preparation of the  
485 affidavit in support of the violation.

486 (2) The affidavit shall be immediately forwarded by the  
487 office assisting the petitioner to the state attorney of that  
488 circuit and to such judge as the chief judge determines to be  
489 the recipient of affidavits of violations of an injunction. If  
490 the affidavit alleges that a crime has been committed, the  
491 office assisting the petitioner shall also forward a copy of the  
492 petitioner's affidavit to the appropriate law enforcement agency  
493 for investigation. No later than 20 days after receiving the  
494 initial report, the local law enforcement agency shall complete  
495 its investigation and forward a report to the state attorney.

Amendment No. 1

496 The policy adopted by the state attorney in each circuit under  
497 s. 741.2901(2) shall include a policy regarding intake of  
498 alleged violations of injunctions for protection against  
499 stalking or cyberstalking under this section. The intake shall  
500 be supervised by a state attorney who has been designated and  
501 assigned to handle stalking or cyberstalking cases. The state  
502 attorney shall determine within 30 working days whether his or  
503 her office will file criminal charges or prepare a motion for an  
504 order to show cause as to why the respondent should not be held  
505 in criminal contempt, or prepare both as alternative findings,  
506 or file notice that the case remains under investigation or is  
507 pending subject to some other action.

508 (3) If the court has knowledge that the petitioner or  
509 another person is in immediate danger if the court does not act  
510 before the decision of the state attorney to proceed, the court  
511 shall immediately issue an order of appointment of the state  
512 attorney to file a motion for an order to show cause as to why  
513 the respondent should not be held in contempt. If the court does  
514 not issue an order of appointment of the state attorney, it  
515 shall immediately notify the state attorney that the court is  
516 proceeding to enforce the violation through criminal contempt.

517 (4) A person who willfully violates an injunction for  
518 protection against stalking or cyberstalking issued pursuant to  
519 s. 784.0485, or a foreign protection order accorded full faith  
520 and credit pursuant to s. 741.315, by:

521 (a) Going to, or being within 500 feet of, the  
522 petitioner's residence, school, place of employment, or a  
523 specified place frequented regularly by the petitioner and any

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Published On: 2/15/2012 7:10:33 PM

Amendment No. 1

524 named family members or individuals closely associated with the  
525 petitioner;

526 (b) Committing an act of stalking against the petitioner;

527 (c) Committing any other violation of the injunction  
528 through an intentional unlawful threat, word, or act to do  
529 violence to the petitioner;

530 (d) Telephoning, contacting, or otherwise communicating  
531 with the petitioner, directly or indirectly, unless the  
532 injunction specifically allows indirect contact through a third  
533 party;

534 (e) Knowingly and intentionally coming within 100 feet of  
535 the petitioner's motor vehicle, whether or not that vehicle is  
536 occupied;

537 (f) Defacing or destroying the petitioner's personal  
538 property, including the petitioner's motor vehicle; or

539 (g) Refusing to surrender firearms or ammunition if  
540 ordered to do so by the court,

541

542 commits a misdemeanor of the first degree, punishable as  
543 provided in s. 775.082 or s. 775.083.

544 (5) A person who suffers an injury or loss as a result of  
545 a violation of an injunction for protection against stalking or  
546 cyberstalking may be awarded economic damages for that injury or  
547 loss by the court issuing the injunction. Damages includes costs  
548 and attorney fees for enforcement of the injunction.

549 Section 5. Section 790.233, Florida Statutes, is amended  
550 to read:

Amendment No. 1

551 790.233 Possession of firearm or ammunition prohibited  
552 when person is subject to an injunction against committing acts  
553 of domestic violence, stalking, or cyberstalking; penalties.-

554 (1) A person may not have in his or her care, custody,  
555 possession, or control any firearm or ammunition if the person  
556 has been issued a final injunction that is currently in force  
557 and effect, restraining that person from committing acts of  
558 domestic violence, as and that has been issued under s. 741.30  
559 or from committing acts of stalking or cyberstalking, as issued  
560 under s. 784.0485.

561 (2) A person who violates subsection (1) commits a  
562 misdemeanor of the first degree, punishable as provided in s.  
563 775.082 or s. 775.083.

564 (3) It is the intent of the Legislature that the  
565 disabilities regarding possession of firearms and ammunition are  
566 consistent with federal law. Accordingly, this section shall not  
567 apply to a state or local officer as defined in s. 943.10(14),  
568 holding an active certification, who receives or possesses a  
569 firearm or ammunition for use in performing official duties on  
570 behalf of the officer's employing agency, unless otherwise  
571 prohibited by the employing agency.

572 Section 6. This act shall take effect October 1, 2012.

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**T I T L E A M E N D M E N T**

Remove the entire title and insert:

COMMITTEE/SUBCOMMITTEE AMENDMENT

Bill No. CS/HB 1099 (2012)

Amendment No. 1

578 An act relating to stalking; amending s. 741.315, F.S.;

579 providing injunctions issued by a court of a foreign state be

580 accorded full faith and credit by the courts of this state and

581 enforced as if it were an order issued under s. 784.0485 or s.

582 784.0487, F.S.; amending s. 784.048, F.S.; redefining the terms

583 "course of conduct" and "credible threat"; providing that a

584 person who makes a threat which places another person in

585 reasonable fear for his or her safety or the safety of his or

586 her family members or individuals closely associated with the

587 person commits the offense of aggravated stalking under certain

588 circumstances; requiring that the sentencing court consider

589 issuing an order restraining a defendant from any contact with

590 the victim for up to 10 years; providing legislative intent

591 regarding the length of any such restraining order; creating s.

592 784.0485, F.S.; creating a civil cause of action for an

593 injunction for protection against stalking or cyberstalking;

594 providing that the victim of stalking or cyberstalking or the

595 parent or legal guardian on behalf of a minor child victim has

596 standing in the circuit court to file a sworn petition for an

597 injunction for protection against stalking or cyberstalking;

598 prohibiting a court from issuing mutual orders of protection,

599 but authorizing the court to issue a separate injunction for

600 protection against stalking or cyberstalking if each party has

601 complied with the provisions of law; providing for venue of the

602 cause of action; prohibiting the clerk of the court from

603 assessing a filing fee; providing an exception; providing that a

604 petitioner is not required to post a bond; requiring the clerks

605 of court to assist petitioners in filing petitions with the

416577 - h1099-strike.docx

Published On: 2/15/2012 7:10:33 PM

Page 22 of 24

COMMITTEE/SUBCOMMITTEE AMENDMENT

Bill No. CS/HB 1099 (2012)

Amendment No. 1

606 court; requiring the clerk of the court in each county to make  
607 available informational brochures; providing a sample petition  
608 for an injunction for protection against stalking or  
609 cyberstalking; authorizing the court to grant a temporary  
610 injunction ex parte, pending a full hearing, under certain  
611 circumstances; authorizing the court to grant such relief as the  
612 court deems necessary and proper; providing procedures for an ex  
613 parte injunction hearing; setting forth the criteria the court  
614 must consider at the hearing; requiring the court to allow an  
615 advocate from a state attorney's office, law enforcement agency,  
616 certified domestic violence center, or certified rape crisis  
617 center to be present with the petitioner or respondent during  
618 any court proceeding; requiring the clerk of the court to  
619 furnish a copy of the petition, notice of hearing, and temporary  
620 injunction, if any, to the sheriff or a law enforcement agency  
621 of the county where the respondent resides or can be found, who  
622 shall serve it upon the respondent as soon thereafter as  
623 possible on any day of the week and at any time of the day or  
624 night; authorizing the court to order a law enforcement officer  
625 to accompany the petitioner; authorizing the court to enforce a  
626 violation of an injunction for protection against stalking or  
627 cyberstalking through a civil or criminal contempt proceeding;  
628 authorizing a state attorney to use criminal procedures for a  
629 violation of an injunction for protection; creating s. 784.0487,  
630 F.S.; providing procedures to follow when the respondent has  
631 violated the injunction for protection; providing legislative  
632 intent; providing criminal penalties; providing that a court may  
633 award a person who suffers an injury or loss as a result of a

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Published On: 2/15/2012 7:10:33 PM



COMMITTEE/SUBCOMMITTEE AMENDMENT

Bill No. CS/HB 1099 (2012)

Amendment No. 1

634 violation of an injunction for protection against stalking or  
635 cyberstalking economic damages for that injury or loss,  
636 including costs and attorney fees for enforcement of the  
637 injunction; amending s. 790.233, F.S.; providing that a person  
638 may not have in his or her possession any firearm or ammunition  
639 if a final injunction is currently in force to restrain that  
640 person from committing acts of stalking or cyberstalking;  
641 providing an effective date.