Judiciary Committee

Thursday, February 16, 2012
11:30 AM
404 HOB

Meeting Packet

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	Havlicak

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.[1] 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.[2]

Private entities who wish to provide misdemeanor probation services must contract with the county in which the services are to be rendered.[3] 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.[4]

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.[5] 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.[6]

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.[7]

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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[1] 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.

[2] Section 948.15(2), F.S.

[3] 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.

[4] Section 948.15(3), F.S.

[5] *Id.*

[6] *Id.*

[7] 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.[8] The bill amends current law to *require* a licensed substance abuse education and intervention provider to provide

[8] 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,[9] 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.

[9] 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).

A bill to be entitled

An act relating to misdemeanor probation services; amending s. 948.15, F.S.; requiring probation supervision services for defendants convicted of certain misdemeanor controlled substance offenses to be provided by a licensed substance abuse education and intervention provider in certain instances; requiring a licensed substance abuse education and intervention provider to provide substance abuse education and intervention services and probation supervision services; providing an effective date.

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

Section 1. Subsection (2) of section 948.15, Florida Statutes, is amended to read:

948.15 Misdemeanor probation services.—

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

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

intervention services as well as probation supervision services.

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

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) K-20 Competitiveness Subcommittee	13 Y, 0 N, As CS	Valenstein	Ahearn
2) Judiciary Committee		Bond NB	Havlicak RH
3) 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. The agreement must also include a process for determining where and how joint use of either school board or local government facilities can be shared for mutual benefit and efficiency. Some district school boards currently authorize, through their interlocal agreements, public access to sports and recreational facilities on school campuses.

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. 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 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.[1] The prevalence of obesity among children and adolescents has almost tripled since 1980.[2]

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.[3]

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.[4]

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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[1] 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).

[2] 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).

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

[4] 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 (last visited February 10, 2012).

either school board or local government facilities can be shared for mutual benefit and efficiency.[5] 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.[6]

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."[7]

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.[8] 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.[9] 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.[10] 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.[11]

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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[5] Sections 163.31777(1) and (2)(g) and 1013.33(2)(a) and (3)(g), F.S.
[6] Staff of the Florida Department of Education, *2012 Agency Legislative Bill Analysis for HB 431* (2012).
[7] 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-tgesjcWdCg&usg=AFQjCNFODeQ20Nfba11H5mNDHW3u39EyHg&sig2=PIUZ5STd6Q-LR9U_yiZf1w. The term of the interlocal agreement is 5 years. *Id.* at 11.
[8] Staff of the Florida Department of Education, *2012 Agency Legislative Bill Analysis for HB 431* (2012).
[9] *Id.*
[10] *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.
[11] 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.[12]

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

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.[16]

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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[12] Section 1013.33(1), F.S.
[13] Section 1013.33(2)(a), F.S.
[14] Section 1013.33(4)(a), F.S.
[15] Section 1013.33(2)(d), F.S.
[16] 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.[17] School districts are a state agency or subdivision for purposes of sovereign immunity.[18] 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.[19] 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.[20]

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.[21]

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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[17] 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."

[18] 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.

[19] Section 768.28(5), F.S.

[20] Section 768.28(9), F.S.

[21] 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.[22]

   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.

[22] Memorandum, Florida School Boards Association, Inc. (Jan. 18, 2012).

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.[23]

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.[24]

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.

[23] *Kluger v. White*, 281 So.2d 1, 4 (Fla. 1973).

[24] *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.

A bill to be entitled

An act relating to the joint use of public school facilities; creating s. 1013.105, F.S.; providing legislative findings; encouraging each district school board to adopt written policies to promote public access to outdoor recreation and sports facilities on school property and increase the number of joint-use agreements; providing duties of district school boards and the Department of Education; creating s. 768.072, F.S.; providing immunity from liability for a district school board that adopts public access policies or enters into a joint-use agreement except in instances of gross negligence or intentional misconduct; defining the term "gross negligence"; providing an effective date.

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

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

1013.105 Joint use of public school facilities.—

(1) The Legislature finds that greater access to recreation and sports facilities is needed to reduce the impact of obesity on personal health and health care expenditures. The Legislature further finds that public schools are equipped with taxpayer-funded playgrounds, fields, tracks, courts, and other outdoor recreation and sports facilities that offer easily accessible opportunities for physical activity for residents of

the community.

(2) Each district school board is encouraged to:

(a) Adopt written policies to promote public access to the outdoor recreation and sports facilities on public school property during nonschool hours when a school-sponsored or school-related activity is not occurring. 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.

(b) Increase the number of joint-use agreements entered into with a local government or a private organization. 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.

Within 30 days after 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 Department of Education.

(3) The Department of Education shall:

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

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

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

Section 2. Section 768.072, Florida Statutes, is created

to read:

768.072 Limitation on public school premises liability.—

(1) A district school board is not liable for civil damages 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 under s. 1013.105, unless gross negligence or intentional misconduct on the part of the district school board is a proximate cause of the injury, damage, or death.

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

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.[1] The clerk is also required to ensure that the papers do not leave the office without leave of court.[2] 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.[3] 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.[4]

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

Certain personal information of some agency personnel, including law enforcement personnel, firefighters, justices and judges, state attorneys, magistrates, and specified others, is made exempt[7] from public records requirements by state law.[8] 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.[9] 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.[10]

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[1] Section 28.13, F.S.
[2] *Id.*
[3] Section 28.222(1), F.S.
[4] *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.).
[5] *See* art. I, s. 24 of the Florida Const. and Florida Rule of Judicial Administration 2.420.
[6] Florida Rule of Judicial Administration 2.420(c)(7).
[7] 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).
[8] Section 119.071(4)(d), F.S.
[9] Section 119.071(4)(d)2., F.S.
[10] 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.[11] 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.[12] 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.[13] State agencies are also exempt from all court-related fees and charges assessed by the clerk.[14] 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.[15] 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.[16] Generally, proof of such publication is made by printed affidavit.[17] 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.[18]

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.[19] 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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[11] Section 24.244, F.S.
[12] *Id.*
[13] Section 28.345, F.S.
[14] *Id.*
[15] Section 28.24(12)(d), F.S.
[16] *See, e.g.,* s. 50.011, F.S.
[17] Sections 50.031 and 50.041(1), F.S.
[18] 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.
[19] 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.[20] The tax collector then pays the certificate owner the amount received by the tax collector, less the redemption fee.[21]

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.[22] If full payment of the final bid is not made within 24 hours, the clerk cancels all bids, readvertises the sale, and pays all costs of the sale from the deposit.[23] Any remaining funds must be applied toward the opening bid.[24]

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.

[20] Section 197.472, F.S.
[21] *Id.*
[22] Section 197.542(2), F.S.
[23] *Id.*
[24] *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.[25]

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.

[25] 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.

A bill to be entitled

An act relating to clerks of court; amending s. 28.13, F.S.; providing requirements for storage of electronic filings; requiring papers and electronic filings to be electronically time stamped; amending s. 28.222, F.S.; authorizing the clerk to remove sealed or expunged court records from the Official Records; amending s. 28.24, F.S.; revising language concerning an exemption from charges for services provided to specified officials and their staffs; amending s. 28.244, F.S.; increasing the threshold amount for automatic repayment of overpayments; amending s. 28.345, F.S.; providing for access to clerks' files by state agencies and an exemption from copying fees and charges; limiting the application of an exemption from payment of fees and charges assessed by clerks of circuit courts to official use; amending s. 28.37, F.S.; providing that certain penalties or fines need not be deposited in the clerk's Public Records Modernization Trust Fund; amending s. 50.041, F.S.; authorizing the use of electronic proof of publication affidavits; amending s. 119.0714, F.S.; requiring certain persons to provide specific information to the clerk to maintain the public records exemption status of certain information under specified provisions; amending s. 197.542, F.S.; authorizing the clerk to issue a refund to the depositor for redeemed property subject to a tax sale; providing an effective date.

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

the clerk's office in recording documents and instruments and in performing the duties enumerated in amounts not to exceed those specified in this section, except as provided in s. 28.345. ~~Notwithstanding any other provision of this section, the clerk of the circuit court shall provide without charge to the state attorney, public defender, guardian ad litem, public guardian, attorney ad litem, criminal conflict and civil regional counsel, and private court-appointed counsel paid by the state, and to the authorized staff acting on behalf of each, access to and a copy of any public record, if the requesting party is entitled by law to view the exempt or confidential record, as maintained by and in the custody of the clerk of the circuit court as provided in general law and the Florida Rules of Judicial Administration. The clerk of the circuit court may provide the requested public record in an electronic format in lieu of a paper format when capable of being accessed by the requesting entity.~~

Charges

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

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

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

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

3.50

(5)(a) For making copies by photographic process of any instrument in the public records consisting of pages of not more than 14 inches by 8 1/2 inches, per page 1.00

(b) For making copies by photographic process of any instrument in the public records of more than 14 inches by 8 1/2 inches, per page 5.00

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

(a) 16 mm 100' microfilm roll 42.00

(b) 35 mm 100' microfilm roll 60.00

(c) Microfiche, per fiche 3.50

(7) For copying any instrument in the public records by other than photographic process, per page 6.00

(8) For writing any paper other than herein specifically mentioned, same as for copying, including signing and sealing 7.00

(9) For indexing each entry not recorded 1.00

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

(a)1. First $500, percent 3

2. Each subsequent $100, percent 1.5

(b) Eminent domain actions, per deposit 170.00

(11) For examining, certifying, and recording plats and for recording condominium exhibits larger than 14 inches by 8 1/2 inches:

(a) First page 30.00

(b) Each additional page 15.00

(12) For recording, indexing, and filing any instrument not more than 14 inches by 8 1/2 inches, including required

notice to property appraiser where applicable:

(a) First page or fraction thereof 5.00

(b) Each additional page or fraction thereof 4.00

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

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

1. First page 1.00

2. Each additional page 0.50

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

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

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

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

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

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

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

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

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

(15) For preparing affidavit of domicile 5.00

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

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

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

(b) For signing and sealing only 2.00

(19) For approving bond 8.50

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

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

proceeds 60.00

(22) For disbursement of excess proceeds of tax deed sale, first $100 or fraction thereof 10.00

(23) Upon receipt of an application for a marriage license, for preparing and administering of oath; issuing, sealing, and recording of the marriage license; and providing a certified copy 30.00

(24) For solemnizing matrimony 30.00

(25) For sealing any court file or expungement of any record 42.00

(26)(a) For receiving and disbursing all restitution payments, per payment 3.50

(b) For receiving and disbursing all partial payments, other than restitution payments, for which an administrative processing service charge is not imposed pursuant to s. 28.246, per month 5.00

(c) For setting up a payment plan, a one-time administrative processing charge in lieu of a per month charge under paragraph (b) 25.00

(27) Postal charges incurred by the clerk of the circuit court in any mailing by certified or registered mail shall be paid by the party at whose instance the mailing is made.

(28) For furnishing an electronic copy of information contained in a computer database: a fee as provided for in chapter 119.

Section 4. Section 28.244, Florida Statutes, is amended to read:

28.244 Refunds.—A clerk of the circuit court or a filing

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

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

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

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

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

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

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

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

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

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

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

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

50.041 Proof of publication; uniform affidavits required.—

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

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

119.0714 Court files; court records; official records.—

(2) COURT RECORDS.—

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

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

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

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

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

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

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

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

(3) OFFICIAL RECORDS.—

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

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

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

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

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

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

that official record.

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

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

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

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

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

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

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

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

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

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

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

197.542 Sale at public auction.—

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

Section 10. This act shall take effect upon becoming a 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 DC	Havlicak RH

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

Section 61.08(2), F.S., provides factors that a court must consider in awarding alimony. 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.[4]

Florida law provides for four types of alimony; bridge-the-gap alimony,[5] rehabilitative alimony,[6] durational alimony,[7] and permanent alimony.[8]

- 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.[9]

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[1] Victoria Ho & Jennifer Johnson, *Overview of Florida Alimony Law*, 78 Fla.B.J. 71, 71 (Oct. 2004).
[2] *Id.*
[3] *Id.*
[4] Section 61.08(4), F.S.
[5] Section 61.08(5), F.S.
[6] Section 61.08(6), F.S.
[7] Section 61.08(7), F.S.
[8] Section 61.08(8), F.S.
[9] 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.[10]
- 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.[11]

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.[12] Suit money is a spouse's payment to the other spouse to cover his or her reasonable attorney's fees in a divorce action.[13] 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.[14] However, adultery is not a bar to entitlement to alimony[15] and marital misconduct may not be used as a basis for alimony unless the misconduct causes a depletion of marital assets.[16] This bill deletes the statutory authorization for a court to consider adultery by either spouse in determining the amount of alimony.

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[10] Section 61.08(6)(a), F.S.
[11] Section 61.08(8), F.S.
[12] *See Grace v. Grace*, 162 So.2d 314, 320 (Fla. 1st DCA 1964).
[13] Black's Law Dictionary (9th ed. 2009).
[14] Section 61.08(1), F.S.
[15] *See Coltea v. Coltea*, 856 So.2d 1047 (Fla. 4th DCA).
[16] *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."[17] 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;

[17] *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.

Bifuration 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.[18]

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.

[18] *Claughton v. Claughton*, 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.

A bill to be entitled

An act relating to dissolution of marriage; amending s. 61.071, F.S.; limiting awards of suit money in dissolution of marriage cases; amending s. 61.08, F.S.; revising factors to be considered for alimony awards; requiring a court to make certain written findings concerning alimony; revising factors to be considered in whether to award alimony or maintenance; revising provisions relating to the protection of awards of alimony; revising provisions for awards of bridge-the-gap alimony and durational alimony; redesignating permanent alimony as long-term alimony and revising provisions relating to its award; requiring written findings regarding the standard of living of the parties after dissolution of marriage; amending s. 61.14, F.S.; revising provisions relating to the effect of a supportive relationship on an award of alimony; requiring refund of alimony paid and an award of costs and fees if the recipient of alimony denies the existence of a supportive relationship that is later found to exist or denies material facts relating to a supportive relationship that are later found to be true; prohibiting a court from reserving jurisdiction to reinstate an alimony award if the supportive relationship ends; providing that income and assets of the obligor's spouse or the person with whom the obligor resides may not be considered in the redetermination in a modification action; providing

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

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

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

61.071 Alimony pendente lite; suit money.—In every

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

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

61.08 Alimony.—

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

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

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

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

(b) The duration of the marriage.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1. The redevelopment of previous skills or credentials; or

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

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

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

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

(7) There shall be a presumption in favor of durational alimony over long-term ~~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 or following a marriage of long duration if there is no ongoing need for support on a long-term ~~permanent~~ basis as provided in subsection (8). An award of durational alimony terminates upon the death of either party or upon the remarriage of the party receiving alimony. The amount of an award of durational alimony shall ~~may~~ be modified or terminated based upon a substantial change in circumstances or upon the existence of a supportive relationship in accordance with s. 61.14. ~~However,~~ The length of an award of durational alimony may not ~~be modified except under exceptional circumstances and may not~~ exceed the length of the marriage.

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

appropriate based upon clear and convincing evidence after consideration of the factors set forth in subsection (2), or following a short-term marriage ~~of short duration~~ if there are written findings of exceptional circumstances. In awarding long-term ~~permanent~~ alimony, the court shall include findings ~~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 is fair and reasonable under the circumstances of the parties. An award of long-term ~~permanent~~ alimony terminates upon the death of either party, ~~or~~ upon the remarriage of the party receiving alimony, or as provided in s. 61.14(12). An award shall ~~may~~ be modified or terminated based upon a substantial change in circumstances or upon the existence of a supportive relationship in accordance with s. 61.14.

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

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

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

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

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

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

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

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

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

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

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

(1)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(11)

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

(d) If the 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.

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

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

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

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

61.19 Entry of judgment of dissolution of marriage; ~~,~~ delay period; bifurcation.—

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

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

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

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 DC	Havlicak RH

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.[1] 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.[2] The court's findings must identify which assets are nonmarital and those that are marital.[3]

"Marital assets and liabilities" generally include:

- Assets acquired and liabilities incurred during the marriage, individually by either spouse or jointly by them.[4]
- 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.[5]
- Interspousal gifts during the marriage.[6]
- 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.[7]
- Real property held by the parties as tenants by the entireties.[8]
- All personal property titled jointly by the parties as tenants by the entireties.[9]

"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.[10]
- Assets acquired separately by either party by noninterspousal gift, bequest, devise, or descent, and assets acquired in exchange for such assets.[11]
- All income derived from nonmarital assets during the marriage unless the income was treated, used, relied upon by the parties as a marital asset.[12]
- 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.[13]
- 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.[14]

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[1] Section 61.075(1), F.S.
[2] Section 61.075(3), F.S.
[3] Section 61.075(3)(a) and (b), F.S.
[4] Section 61.075(6)(a)1.a., F.S.
[5] Section 61.075(6)(a)1.b., F.S.
[6] Section 61.075(6)(a)1.c., F.S.
[7] Section 61.075(6)(a)1.d., F.S.
[8] Section 61.075(6)(a)2., F.S.
[9] Section 61.075(6)(a)3., F.S.
[10] Section 61.075(6)(b)1., F.S.
[11] Section 61.075(6)(b)2., F.S.
[12] Section 61.075(6)(b)3., F.S.
[13] Section 61.075(6)(b)4., F.S.

Equitable Distribution of Marital Assets and Liabilities under Kaaa v. Kaaa[15]

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."[16] For instance, passive appreciation in the value of nonmarital real property is subject to equitable distribution where the mortgage is paid with marital funds.[17] 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.[18]

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.[19] 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.[20]

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.[21]

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.[22]

Security and Interest for Installment payments

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[14] Section 61.075(6)(b)5., F.S.
[15] *Kaaa v. Kaaa*, 58 So. 3d 867 (Fla. 2010).
[16] *Id.* at 868.
[17] *Id.* at 869.
[18] *Id.* at 871-72.
[19] *Id.* at 872.
[20] *Id.*
[21] *Id.* at 872 (quoting *Stevens v. Stevens*, 651 So.2d 1306, 1307-08 (Fla. 1st DCA 1995).
[22] *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.[23] 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

[23] Victoria Ho & Jennifer Johnson, *Overview of Florida Alimony Law*, 78 Fla.B.J. 71, 71 (Oct. 2004).

ability to pay.[24] 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,[25] rehabilitative alimony,[26] durational alimony,[27] and permanent alimony.[28]

- 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.[29]
- 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.[30]
- 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.[31]

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."[32] 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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[24] *Id.*
[25] Section 61.08(5), F.S.
[26] Section 61.08(6), F.S.
[27] Section 61.08(7), F.S.
[28] Section 61.08(8), F.S.
[29] Section 60.08(5), F.S.
[30] Section 61.08(6)(a), F.S.
[31] Section 61.08(8), F.S.
[32] *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.

Bifuration 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.[33]

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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[33] *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.[34]

[34] 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.

A bill to be entitled

An act relating to dissolution of marriage; amending s. 61.075, F.S.; redefining the term "marital assets and liabilities" to include the value of the marital portion of the passive appreciation of nonmarital real property; authorizing a court to require security and the payment of a reasonable rate of interest if installment payments are required for the distribution of marital assets and liabilities; requiring the court to provide written findings regarding any installment payments; creating s. 61.0765, F.S.; providing formulas for the calculation of the value of the marital portion of nonmarital real property subject to equitable distribution; requiring the court in the dissolution action to use the formulas unless sufficient evidence is presented showing that the application of the formulas is not equitable; amending s. 61.08, F.S.; revising factors to be considered for alimony awards; revising factors to be considered in whether to award alimony or maintenance; requiring written findings regarding the standard of living of the parties after dissolution of marriage; amending s. 61.14, F.S.; revising provisions relating to the effect of a supportive relationship on an award of alimony; requiring refund of alimony paid and an award of costs and fees if the recipient of alimony denies the existence of a supportive relationship that is later found to exist or denies material facts relating

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

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

Section 1. Paragraph (a) of subsection (6) and subsection (10) of section 61.075, Florida Statutes, are amended to read:

61.075 Equitable distribution of marital assets and liabilities.—

(6) As used in this section:

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

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

b. The enhancement in value and appreciation of nonmarital assets resulting either 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.

c. The value of the marital portion of the passive

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

d.~~e.~~ Interspousal gifts during the marriage.

e.~~d.~~ 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.

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

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

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

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

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

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

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

61.0765 Valuation of marital portion of nonmarital real property.—

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

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

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

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

(b) 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.

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

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

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

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

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

(b) The numerator of the marital fraction consists of the amount of the mortgage principal paid on any mortgage on the property from marital funds. The denominator consists of the value of the property on the date of the 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.

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

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

61.08 Alimony.—

(7) There shall be a presumption in favor of durational alimony over ~~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 or following

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

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

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

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

(1)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

61.19 Entry of judgment of dissolution of marriage;~~,~~ delay period; bifurcation.—

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

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

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,[1] despite the fact that American drivers traveled nearly 46 billion more miles in 2010 than in 2009.[2] 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.[3] This figure represents 31% of all motor vehicle fatalities.[4] 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.[5] 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.[6]

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.[7]

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[8] 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.[9]

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

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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[1] *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).

[2] *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).

[3] *See* the National Conference of State Legislatures website at http://www.ncsl.org (search "Alcohol Impaired/Drunk Driving" (last visited Feb. 9, 2012)).

[4] *Id.*

[5] *Id.*

[6] *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.

[7] 2012 DHSMV Agency Analysis for HB 681.

[8] A "license suspension" means the suspension of all driving privileges. *See* 23 U.S.C.A. s. 164(a)(3).

[9] 23 U.S.C.A, s. 164(a)(5)A.

[10] 23 U.S.C.A, s. 164(a)(5)B.

- Is under the influence of alcoholic beverages, or chemical substance,[11] or any controlled substance[12] 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.[13]

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.[14] 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.[15]

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).[16]

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.[17]

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.[18] The court must also suspend the offender's license for at least 5 years.[19]

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,[20] 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.[21]

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).[22]

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[11] As set forth under s. 877.111, F.S.
[12] As set forth under chapter 893, F.S.
[13] Section 316.193(1), F.S.
[14] Section 316.193(2), F.S.
[15] Section 316.193(6)(a), F.S.
[16] Section 316.193(4), F.S.
[17] Section 316.193(2), F.S
[18] Section 316.193(6)(b), F.S.
[19] Section 322.28(2)(a)2, F.S.
[20] Section 316.193(4), F.S.
[21] Section 316.193(4)(c), F.S.
[22] 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.[23] 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).[24] Additionally, there is a 30-day minimum imprisonment period, of which at least 48 hours must be consecutive.[25] Finally, the court must also suspend the offender's license for at least 10 years.[26]

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.[27]

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.[28] 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.[29]

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.[30] A DUI offense involving serious injury results in a third degree felony.[31] A DUI conviction resulting in death is a second degree felony.[32] 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.[33]

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[23] 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.
[24] Section 316.193(2)(b), F.S.
[25] Section 316.193(6)(c), F.S.
[26] Section 322.28(2)(a)3, F.S.
[27] Section 316.193(4)(a)3, F.S.
[28] Section 316.193(2)(b)3, F.S.
[29] Section 316.193(6)(c), F.S.
[30] 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.
[31] 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.
[32] 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.
[33] 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
1st	• **Fine**: $500 - $1000 • **Imprisonment**: Up to 6 mo • **Probation**: Up to 1 yr • **License suspension**: 6 mo - 1 yr • **Monthly reporting requirement**, including DUI school • **Community service**: 50 hrs • **Impoundment or immobilization**: 10 days, as a condition of probation (must not occur concurrently with jail time) Enhanced penalties if BAC ≥ 0.15, or if passenger is minor: • **Fine**: $1000 - $2000 • **Imprisonment**: Up to 9 mo • **IID**: At least 6 continuous months
2nd	If *more* than 5 yrs since a prior conviction: • **Fine**: $1,000 - $2,000 • **Imprisonment**: Up to 9 mo • **License Suspension**: 6 mo - 1 yr • **Monthly reporting requirement**, including DUI school • **IID**: Mandatory for at least 1 yr Enhanced penalties if *less* than 5 yrs since a prior conviction: • **Imprisonment**: 10 day minimum (48 hrs consecutive) • **License suspension**: 5 yrs • **Impoundment or Immobilization**: Up to 30 days Enhanced penalties if BAC ≥ 0.15; Or if passenger is < 18 yrs: • **Fine**: $2,000 - $4,000 • **Imprisonment**: Up to 1 yr • **IID**: At least 2 continuous yrs
3rd	If *more* than 10 yrs since a prior conviction: • **Fine**: $2,000 - $5,000 • **Imprisonment**: 12 mo maximum • **IID**: Mandatory, at least 2 continuous yrs • **Monthly reporting requirement**, including DUI school If *less* than 10 yrs since a prior conviction: • **3rd degree felony** • **Fine**: Up to $5,000 • **Imprisonment**: 30 days minimum, 5 yrs maximum (48 hrs consecutive) • **IID**: Mandatory, at least 2 continuous yrs • **Monthly reporting requirement**, including DUI school • **License suspension**: At least 10 yrs • **Impoundment or Immobilization**: 90 days, as a condition of probation (must not occur concurrently with jail time) Enhanced penalties if BAC ≥ 0.15; Or if passenger is < 18 yrs: • **Fine**: At least $4,000 (3rd or subsequent offense)

Administrative License Suspension

Under Florida's "Implied Consent Law,"[34] 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.[35]

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[36] 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).[37] 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.[38]

IID Use in Florida

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

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

[34] Section 316.1932, F.S.
[35] *Id.*
[36] 0.05 by statute, or as otherwise set by the court.
[37] IIDs that conduct these randomized tests provide warnings of upcoming tests in order to allow drivers the opportunity to pull over safely.
[38] 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)).
[39] *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[40] IID for at least 6 continuous months.[41] This authorization is in addition to any other authorized penalties, including the current mandatory installation of an IID for second and third-time offenders.[42]

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.[43] 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[44]

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.[45]

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.[46] 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.[47]

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[40] 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.
[41] With exceptions provided for those required to drive within the scope of employment.
[42] 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.
[43] Section 316.1937(2)(d), F.S.
[44] *See* FDHSMV's website at http://www.flhsmv.gov/ddl/iid.html (last visited Feb. 14, 2012).
[45] Section 316.1937(6), F.S.
[46] Section 316.1937(5)(a), F.S.
[47] 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.[48] 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.[49]

Information courtesy of "Mothers Against Drunk Driving":

Mandatory with .08 Conviction	**Mandatory with a BAC of at least .15 - .18**	**Mandatory with 2nd Conviction**	**Discretionary**
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

[48] *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).
[49] 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.[50] The impoundment or immobilization must not occur concurrently with incarceration of the offender.[51] 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.[52]

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.[53] 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,[54] 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*[55] vehicle registered in the offender's name at the time of impoundment or immobilization; or
- The installation of an IID[56] 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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[50] Section 316.193(6), F.S.
[51] *Id.*
[52] Section 316.193(6), F.S.
[53] Section 316.193(6)(d), F.S.
[54] 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.
[55] The bill strikes the word "one" from the current statute. *See* s. 316.193(6)(a), F.S.
[56] 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.[57] 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.[58]

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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[57] 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.

[58] 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.

A bill to be entitled

An act relating to interlock ignition devices ordered for probation for DUI; amending s. 316.193, F.S.; requiring that the court, as a condition of probation for a conviction of the offense of driving under the influence, impound or immobilize the vehicle that was operated by or was in the actual control of the defendant or require the defendant to install an interlock ignition device on all vehicles that are individually or jointly leased or owned and routinely operated by the defendant; prohibiting the installation of an ignition interlock device from occurring concurrently with the incarceration of the defendant; providing an exception from a requirement that the installation of an ignition interlock device occur concurrently with the driver license revocation; providing an effective date.

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

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

316.193 Driving under the influence; penalties.—

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1. The impoundment or immobilization of a vehicle; or

2. The installation of an ignition interlock device.

The order of impoundment or immobilization must include the name and telephone numbers of all immobilization agencies meeting all ~~of~~ the conditions of subsection (13). Within 7 business days after the date that the court issues the order of impoundment or immobilization, the clerk of the court 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.

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

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

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

or immobilization of the vehicle if the court finds that the family of the owner of the vehicle has no other private or public means of transportation.

(h) The court may ~~also~~ dismiss the order of impoundment or immobilization of any vehicle ~~vehicles~~ that is ~~are~~ owned by the defendant but that is ~~are~~ operated solely by the employees of the defendant or any business owned by the defendant.

(i) All costs and fees for the impoundment or immobilization, including the cost of notification, must be paid by the owner of the vehicle or, if the vehicle is leased or rented, by the person leasing or renting the vehicle, unless the impoundment or immobilization order is dismissed. All provisions of s. 713.78 ~~shall~~ apply. The costs and fees for the impoundment or immobilization must be paid directly to the person impounding or immobilizing the vehicle.

(j) The person who owns a vehicle that is impounded or immobilized under this subsection ~~paragraph~~, or a person who has a lien of record against such a vehicle and who has not requested a review of the impoundment pursuant to paragraph (e), paragraph (f), or paragraph (g), may, within 10 days after the date that person has knowledge of the location of the vehicle, file a complaint in the county in which the owner resides to determine whether the vehicle was wrongfully taken or withheld from the owner or lienholder. Upon the filing of a complaint, the owner or lienholder may have the vehicle released by posting with the court a bond or other adequate security equal to the amount of the costs and fees for impoundment or immobilization, including towing or storage, to ensure the payment of such costs

and fees if the owner or lienholder does not prevail. When the bond is posted and the fee is paid as set forth in s. 28.24, the clerk of the court shall issue a certificate releasing the vehicle. At the time of release, after reasonable inspection, the owner or lienholder must give a receipt to the towing or storage company indicating any loss or damage to the vehicle or to the contents of the vehicle.

(k) A defendant~~, in the court's discretion,~~ may be required to serve all or any portion of a term of imprisonment to which the defendant has been sentenced pursuant to this section in a residential alcoholism treatment program or a residential drug abuse treatment program. Any time spent in such a program must be credited by the court toward the term of imprisonment.

For the purposes of this section, a ~~any~~ conviction for a violation of s. 327.35; a previous conviction for the violation of former s. 316.1931, former s. 860.01, or former s. 316.028; or a previous conviction outside this state for driving under the influence, driving while intoxicated, driving with an unlawful blood-alcohol level, driving with an unlawful breath-alcohol level, or any other similar alcohol-related or drug-related traffic offense, is also considered a previous conviction for violation of this section. However, in satisfaction of the fine imposed pursuant to this section, the court may, upon a finding that the defendant is financially unable to pay ~~either~~ all or part of the fine, order that the defendant participate for ~~a~~ specified additional ~~period of~~ time

in public service or a community work project in lieu of payment of that portion of the fine which the court determines the defendant is unable to pay. In determining such additional sentence, the court shall consider the amount of the unpaid portion of the fine and the reasonable value of the services to be ordered; however, the court may not compute the reasonable value of services at a rate less than the federal minimum wage at the time of sentencing.

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	Havlicak

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 3rd 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 3rd 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.[1] 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.[2] 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.[3]

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.[4] 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.[5]

Florida Securities and Investor Protection Act

Chapter 517, F.S., is entitled the "Florida Securities and Investor Protection Act" (FSIPA).[6] The purpose of FSIPA is to protect the public from fraudulent and deceptive practices in the sale and marketing of securities.[7,8] 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.[9]

The Office of Financial Regulation (OFR)[10] is the entity responsible for registering securities and securities dealers.[11] 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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[1] Section 921.002, F.S.
[2] Section 921.0022, F.S.
[3] Section 921.0023, F.S.
[4] Section 921.0024, F.S.
[5] 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.
[6] Section 517.011, F.S.
[7] 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.
[8] *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).
[9] *See* 32 Fla. Jur 2d Investment Securities, Etc. s. 122.
[10] 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).
[11] 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 3rd degree felonies, ranked in Level 2 of the Offense Severity Ranking Chart.[12] A Level 2 offense equates to 10 sentencing points.[13]

Section 517.12(1), F.S., specifies that no dealer, associated person, or issuer[14] 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.[15] A violation of s. 517.12(1), F.S., is a 3rd degree felony ranked in Level 1 of the Offense Severity Ranking Chart.[16] A Level 1 offense equates to 4 sentencing points.[17]

In addition to the above-described unlawful acts, FSIPA contains many other provisions that prescribe unlawful behavior relating to securities.[18] With one exception,[19] these offenses are 3rd degree felonies, and except as provided above, are ranked in Level 1 of the Offense Severity Ranking Chart.[20]

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.

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[12] *See* ss. 517.302 and 921.0022(3)(b), F.S.
[13] *See* s. 921.0024, F.S.
[14] Section 517.021, F.S., defines the terms "dealer," "associated person," and "issuer."
[15] Section 517.12(1), F.S.
[16] *See* ss. 517.302 and 921.0022(3)(a), F.S.
[17] *See* s. 921.0024, F.S.
[18] *See, e.g.,* ss. 517.301, 517.311, and 517.312, F.S.
[19] 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 1st degree felony. Section 517.302(2), F.S.
[20] *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.[21]

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.

[21] Office of Financial Regulation Analysis on HB 777. January 6, 2012. (On file with House Criminal Justice Subcommittee staff).

A bill to be entitled

An act relating to securities law violations; amending s. 921.0022, F.S.; reclassifying certain securities law offenses for purposes of the offense severity ranking chart of the Criminal Punishment Code; providing an effective date.

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

Section 1. Paragraphs (b) and (d) of subsection (3) of section 921.0022, Florida Statutes, are amended to read:

921.0022 Criminal Punishment Code; offense severity ranking chart.—

(3) OFFENSE SEVERITY RANKING CHART

(b) LEVEL 2

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

		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.
517.07(2)	3rd	~~Registration of securities and~~ Furnishing of prospectus required.
590.28(1)	3rd	Intentional burning of lands.
784.05(3)	3rd	Storing or leaving a loaded firearm within reach of minor who uses it to inflict injury or death.
787.04(1)	3rd	In violation of court order, take, entice, etc., minor beyond state limits.
806.13(1)(b)3.	3rd	Criminal mischief; damage $1,000 or more to public communication or any other public service.

810.061(2)	3rd	Impairing or impeding telephone or power to a dwelling; facilitating or furthering burglary.
810.09(2)(e)	3rd	Trespassing on posted commercial horticulture property.
812.014(2)(c)1.	3rd	Grand theft, 3rd degree; $300 or more but less than $5,000.
812.014(2)(d)	3rd	Grand theft, 3rd degree; $100 or more but less than $300, taken from unenclosed curtilage of dwelling.
812.015(7)	3rd	Possession, use, or attempted use of an antishoplifting or inventory control device countermeasure.
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,

		etc., credit card, value over $300.
817.52(3)	3rd	Failure to redeliver hired vehicle.
817.54	3rd	With intent to defraud, obtain mortgage note, etc., by false representation.
817.60(5)	3rd	Dealing in credit cards of another.
817.60(6)(a)	3rd	Forgery; purchase goods, services with false card.
817.61	3rd	Fraudulent use of credit cards over $100 or more within 6 months.
826.04	3rd	Knowingly marries or has sexual intercourse with person to whom related.
831.01	3rd	Forgery.
831.02	3rd	Uttering forged instrument;

		utters or publishes alteration with intent to defraud.
831.07	3rd	Forging bank bills, checks, drafts, or promissory notes.
831.08	3rd	Possessing 10 or more forged notes, bills, checks, or drafts.
831.09	3rd	Uttering forged notes, bills, checks, drafts, or promissory notes.
831.11	3rd	Bringing into the state forged bank bills, checks, drafts, or notes.
832.05(3)(a)	3rd	Cashing or depositing item with intent to defraud.
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.,

		(2)(c)6., (2)(c)7., (2)(c)8., (2)(c)9., (3), or (4) drugs other than cannabis.
893.147(2)	3rd	Manufacture or delivery of drug paraphernalia.

(d) LEVEL 4

Florida Statute	Felony Degree	Description
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.
499.0051(1)	3rd	Failure to maintain or deliver pedigree papers.
499.0051(2)	3rd	Failure to authenticate pedigree papers.
499.0051(6)	2nd	Knowing sale or delivery, or possession with intent to sell,

		contraband prescription drugs.
517.07(1)	3rd	Registration of securities.
517.12(1)	3rd	Registration of dealers, associated persons, and issuers required.
784.07(2)(b)	3rd	Battery of law enforcement officer, firefighter, etc.
784.074(1)(c)	3rd	Battery of sexually violent predators facility staff.
784.075	3rd	Battery on detention or commitment facility staff.
784.078	3rd	Battery of facility employee by throwing, tossing, or expelling certain fluids or materials.
784.08(2)(c)	3rd	Battery on a person 65 years of age or older.
784.081(3)	3rd	Battery on specified official or employee.

784.082(3)	3rd	Battery by detained person on visitor or other detainee.
784.083(3)	3rd	Battery on code inspector.
784.085	3rd	Battery of child by throwing, tossing, projecting, or expelling certain fluids or materials.
787.03(1)	3rd	Interference with custody; wrongly takes minor from appointed guardian.
787.04(2)	3rd	Take, entice, or remove child beyond state limits with criminal intent pending custody proceedings.
787.04(3)	3rd	Carrying child beyond state lines with criminal intent to avoid producing child at custody hearing or delivering to designated person.
790.115(1)	3rd	Exhibiting firearm or weapon within 1,000 feet of a school.

790.115(2)(b)	3rd	Possessing electric weapon or device, destructive device, or other weapon on school property.
790.115(2)(c)	3rd	Possessing firearm on school property.
800.04(7)(c)	3rd	Lewd or lascivious exhibition; offender less than 18 years.
810.02(4)(a)	3rd	Burglary, or attempted burglary, of an unoccupied structure; unarmed; no assault or battery.
810.02(4)(b)	3rd	Burglary, or attempted burglary, of an unoccupied conveyance; unarmed; no assault or battery.
810.06	3rd	Burglary; possession of tools.
810.08(2)(c)	3rd	Trespass on property, armed with firearm or dangerous weapon.

812.014(2)(c)3.	3rd	Grand theft, 3rd degree $10,000 or more but less than $20,000.
812.014 (2)(c)4.-10.	3rd	Grand theft, 3rd degree, a will, firearm, motor vehicle, livestock, etc.
812.0195(2)	3rd	Dealing in stolen property by use of the Internet; property stolen $300 or more.
817.563(1)	3rd	Sell or deliver substance other than controlled substance agreed upon, excluding s. 893.03(5) drugs.
817.568(2)(a)	3rd	Fraudulent use of personal identification information.
817.625(2)(a)	3rd	Fraudulent use of scanning device or reencoder.
828.125(1)	2nd	Kill, maim, or cause great bodily harm or permanent breeding disability to any registered horse or cattle.

837.02(1)	3rd	Perjury in official proceedings.
837.021(1)	3rd	Make contradictory statements in official proceedings.
838.022	3rd	Official misconduct.
839.13(2)(a)	3rd	Falsifying records of an individual in the care and custody of a state agency.
839.13(2)(c)	3rd	Falsifying records of the Department of Children and Family Services.
843.021	3rd	Possession of a concealed handcuff key by a person in custody.
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

		bond jumping).
847.0135(5)(c)	3rd	Lewd or lascivious exhibition using computer; offender less than 18 years.
874.05(1)	3rd	Encouraging or recruiting another to join a criminal gang.
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).
914.14(2)	3rd	Witnesses accepting bribes.
914.22(1)	3rd	Force, threaten, etc., witness, victim, or informant.
914.23(2)	3rd	Retaliation against a witness, victim, or informant, no bodily injury.
918.12	3rd	Tampering with jurors.
934.215	3rd	Use of two-way communications

device to facilitate commission of a crime.

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 DC	Havlicak RH

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.[1] A payment bond guarantees that the contractor will pay certain subcontractors, laborers, and material suppliers.[2] A performance bond protects the owner from financial loss should the contractor fail to perform the contract in accordance to its terms and conditions.[3]

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.[4] 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.[5] 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.[6]

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.[7]

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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[1] Section 624.606(1)(a), F.S.
[2] *See* Black's Law Dictionary (9th ed. 2009), bond.
[3] *See* Black's Law Dictionary (9th ed. 2009), performance bond.
[4] 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).
[5] *See* s. 255.05, F.S.
[6] Section 255.05(1)(a), F.S.
[7] *Id.*

those provided in statute, is unenforceable;[8]
- 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;[9] 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[10] is a statutory lien that secures payment for labor or materials supplied in improving, repairing, or maintaining real property.[11]

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,[12] Notice to Owner, Claim of Lien,[13] Notice of Termination,[14] Waiver and Release of Lien,[15] Notice of Contest of Lien,[16] Contractor's Final Payment Affidavit,[17] and Demands of Written Statement of Account.[18]

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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[8] 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.

[9] 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.

[10] 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.

[11] Black's Law Dictionary (9th ed. 2009), "lien."

[12] 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).

[13] Section 713.08, F.S.

[14] Section 713.132, F.S.

[15] Section 713.20, F.S.

[16] Section 713.22(2), F.S.

[17] Section 713.06, F.S.

[18] 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.[19] 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.*[20]

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.[21] 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.[22] 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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[19] Section 713.13(1)(a), F.S.
[20] Section 713.132(1)(f), F.S., (emphasis added).
[21] Section 713.16(1), F.S.
[22] 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.[23] 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.[24] 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.[25]

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

[23] *See* ss. 713.18(1)(a)-(c), F.S.
[24] Section 713.18(3), F.S.
[25] 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.[26]

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;[27]
- 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.

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[26] Section 713.08(3), F.S.

[27] 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.

A bill to be entitled

An act relating to construction liens and bonds; amending s. 255.05, F.S.; requiring that the bond number be stated on the first page of the bond; providing that a provision in a payment bond furnished for a public works contract that limits or expands the effective duration of the bond or adds conditions precedent is unenforceable; requiring a contractor, or the contractor's attorney, to serve rather than mail a notice of contest of claim against the payment bond; providing additional time for service when the bond is not recorded; specifying the duration of the bond; providing that payment to a contractor who has furnished a payment bond on a public works project may not be conditioned upon production of certain documents; providing prerequisites for commencement of an action against a payment bond; amending s. 713.10, F.S.; providing that a specified notice concerning a lessor's liability for liens for improvements made by the lessee is effective notwithstanding that all of 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, 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 shall not be subject to

liens for improvements made by the lessee; amending s. 713.13, F.S.; providing additional time for service when a notice of commencement is not recorded with a copy of the bond attached; amending s. 713.132, F.S.; requiring notice of termination to be served on lienors in privity with the owner; amending s. 713.16, F.S.; revising requirements for demands for a copy of a construction contract and a statement of account; authorizing a lienor to make certain written demands to an owner for certain written statements; providing requirements for such written demands; amending s. 713.18, F.S.; providing additional methods by which certain items may be served; revising provisions relating to when service of specified items is effective; specifying requirements for certain written instruments under certain circumstances; amending s. 713.22, F.S.; requiring that the clerk serve rather than mail a notice of contest of lien; amending s. 713.23, F.S.; revising the contents of a notice to contractor; requiring that a contractor serve rather than mail a notice of contest of claim against the payment bond and a notice of bond; clarifying the attachment of the bond to the notice; providing that a provision in a payment bond that limits or expands the effective duration of the bond or adds conditions precedent is unenforceable; clarifying applicability of certain provisions; providing an effective date.

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

Section 1. Subsection (1) and paragraph (a) of subsection (2) of section 255.05, Florida Statutes, are amended, and subsection (11) is added to that section, to read:

255.05 Bond of contractor constructing public buildings; form; action by materialmen.—

(1)(a) Any person entering into a formal contract with the state or any county, city, or political subdivision thereof, or other public authority or private entity, for the construction of a public building, for the prosecution and completion of a public work, or for repairs upon a public building or public work shall be required, before commencing the work or before recommencing the work after a default or abandonment, to execute, deliver to the public owner, and record in the public records of the county where the improvement is located, a payment and performance bond with a surety insurer authorized to do business in this state as surety. A public entity may not require a contractor to secure a surety bond under this section from a specific agent or bonding company. The bond must state on its front page: the name, principal business address, and phone number of the contractor, the surety, the 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; the bond number assigned by the surety; and a description of the project sufficient to identify it, such as a legal description or the street address of the property being improved, and a general description of the

improvement. Such bond shall be conditioned upon the contractor's performance of the construction work in the time and manner prescribed in the contract and promptly making payments to all persons defined in s. 713.01 who furnish labor, services, or materials for the prosecution of the work provided for in the contract. Any claimant may apply to the governmental entity having charge of the work for copies of the contract and bond and shall thereupon be furnished with a certified copy of the contract and bond. The claimant shall have a right of action against the contractor and surety for the amount due him or her, including unpaid finance charges due under the claimant's contract. Such action shall not involve the public authority in any expense. When such work is done for the state and the contract is for $100,000 or less, no payment and performance bond shall be required. At the discretion of the official or board awarding such contract when such work is done for any county, city, political subdivision, or public authority, any person entering into such a contract which is for $200,000 or less may be exempted from executing the payment and performance bond. When such work is done for the state, the Secretary of Management Services may delegate to state agencies the authority to exempt any person entering into such a contract amounting to more than $100,000 but less than $200,000 from executing the payment and performance bond. In the event such exemption is granted, the officer or officials shall not be personally liable to persons suffering loss because of granting such exemption. The Department of Management Services shall maintain information on the number of requests by state agencies for delegation of

authority to waive the bond requirements by agency and project number and whether any request for delegation was denied and the justification for the denial. Any provision in a payment bond furnished for public work contracts as provided by this subsection which further restricts the classes of persons ~~as defined in s. 713.01~~ protected by the bond, which restricts ~~or~~ the venue of any proceeding relating to such bond, which limits or expands the effective duration of the bond, or which adds conditions precedent to the enforcement of a claim against the bond beyond those provided in this section is unenforceable.

(b) The Department of Management Services shall adopt rules with respect to all contracts for $200,000 or less, to provide:

1. Procedures for retaining up to 10 percent of each request for payment submitted by a contractor and procedures for determining disbursements from the amount retained on a pro rata basis to laborers, materialmen, and subcontractors, as defined in s. 713.01.

2. Procedures for requiring certification from laborers, materialmen, and subcontractors, as defined in s. 713.01, prior to final payment to the contractor that such laborers, materialmen, and subcontractors have no claims against the contractor resulting from the completion of the work provided for in the contract.

The state shall not be held liable to any laborer, materialman, or subcontractor for any amounts greater than the pro rata share as determined under this section.

(c)1. The amount of the bond shall equal the contract price, except that for a contract in excess of $250 million, if the state, county, municipality, political subdivision, or other public entity finds that a bond in the amount of the contract price is not reasonably available, the public owner shall set the amount of the bond at the largest amount reasonably available, but not less than $250 million.

2. For construction-management or design-build contracts, if the public owner does not include in the bond amount the cost of design or other nonconstruction services, the bond may not be conditioned on performance of such services or payment to persons furnishing such services. Notwithstanding paragraph (a), such a bond may exclude persons furnishing such services from the classes of persons protected by the bond.

(2)(a)1. If a claimant is no longer furnishing labor, services, or materials on a project, a contractor or the contractor's agent or attorney may elect to shorten the ~~prescribed~~ time ~~in this paragraph~~ within which an action to enforce any claim against a payment bond must ~~provided pursuant to this section may~~ be commenced by recording in the clerk's office a notice in substantially the following form:

NOTICE OF CONTEST OF CLAIM
AGAINST PAYMENT BOND

To: ...(Name and address of claimant)...

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 after the date of service of this notice.

DATED on ....., ...

Signed: ...(Contractor or Attorney)...

The claim of any claimant upon whom such 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 such notice shall be extinguished automatically. The contractor of the contractor's attorney ~~clerk~~ shall serve ~~mail~~ a copy of the notice of contest to the claimant at the address shown in the notice of nonpayment or most recent amendment thereto and shall certify to such service on the face of such notice and record the notice. ~~Service is complete upon mailing.~~

2. A claimant, except a laborer, who is not in privity with the contractor must ~~shall~~, before commencing or not later than 45 days after commencing to furnish labor, services, or materials for the prosecution of the work, furnish the contractor with a written notice that he or she intends to look to the bond for protection. A claimant who is not in privity with the contractor and who has not received payment for his or her labor, services, or materials shall deliver to the contractor and to the surety written notice of the performance of the labor or delivery of the materials or supplies and of the

nonpayment. The notice of nonpayment must ~~may~~ be served ~~at any time~~ during the progress of the work or thereafter but may not be served earlier than ~~before~~ 45 days after the first furnishing of labor, services, or materials or~~, and not~~ later than 90 days after the final furnishing of the labor, services, or materials by the claimant or, with respect to rental equipment, not later than 90 days after the date that the rental equipment was last on the job site available for use. Any notice of nonpayment served by a claimant who is not in privity with the contractor which includes sums for retainage must specify the portion of the amount claimed for retainage. An ~~No~~ action for the labor, materials, or supplies may not be instituted against the contractor or the surety unless the notice to the contractor and notice of nonpayment have been served, if required by this section ~~both notices have been given~~. If the payment bond is not recorded before commencement of construction, the time periods for the claimant to serve the required notices may at the option of the claimant be calculated from the dates specified in this section or from the date the claimant is served a copy of the bond. In no event, however, shall the limitation period for commencement of an action against a payment bond as established in s. 95.11 be expanded. Notices required or permitted under this section may be served in accordance with s. 713.18. A claimant may not waive in advance his or her right to bring an action under the bond against the surety. In any action brought to enforce a claim against a payment bond under this section, the prevailing party is entitled to recover a reasonable fee for the services of his or her attorney for trial and appeal or for

arbitration, in an amount to be determined by the court, which fee must be taxed as part of the prevailing party's costs, as allowed in equitable actions. The time periods for service of a notice of nonpayment or for bringing an action against a contractor or a surety shall be measured from the last day of furnishing labor, services, or materials by the claimant and shall not be measured by other standards, such as the issuance of a certificate of occupancy or the issuance of a certificate of substantial completion.

(11) If a contractor furnishes and records a payment and performance bond for a public works project in accordance with this section, the public authority may not condition its payments to the contractor on the production of a release, waiver, or like documentation from a claimant demonstrating that the 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 public works project.

Section 2. Paragraph (b) of subsection (2) of section 713.10, Florida Statutes, is amended to read:

713.10 Extent of liens.—

(2)

(b) The interest of the lessor shall not be subject to liens for improvements made by the lessee when:

1. The lease, or a short form or a memorandum of the lease that contains the specific language in the lease prohibiting such liability, is recorded in the official records of 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

2. 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 official records of the county in which the parcel of land is located before the recording of a notice of commencement for improvements to the premises, and the notice includes the following:

a. The name of the lessor.

b. The legal description of the parcel of land to which the notice applies.

c. The specific language contained in the various leases prohibiting such liability.

d. A statement that all or a majority of the leases entered into for premises on the parcel of land expressly prohibit such liability.

The notice required by this subparagraph shall still be effective and the lessor's interest in a premises on the parcel of land shall not be subject to liens for improvements made by the lessee of such premises, notwithstanding that all of 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, 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 shall not be subject to liens for improvements made by the lessee.

3. The lessee is a mobile home owner who is leasing a mobile home lot in a mobile home park from the lessor.

Section 3. Paragraph (e) of subsection (1) of section 713.13, Florida Statutes, is amended to read:

713.13 Notice of commencement.—

(1)

(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. 713.02(6). However, if a payment bond under s. 713.23 exists but was not attached at the time of recordation of the notice of commencement, the bond may be used to transfer any recorded lien of a lienor except that of the contractor by the recordation and service of a notice of bond pursuant to s. 713.23(2). The notice requirements of s. 713.23 apply to any claim against the bond; however, the time limits for serving any required notices shall, at the option of the lienor, be calculated from the dates ~~begin running from the later of the time~~ specified in s. 713.23 or the date the notice of bond is served on the lienor.

Section 4. Paragraph (f) of subsection (1) and subsection (4) of section 713.132, Florida Statutes, are amended to read:

713.132 Notice of termination.—

(1) An owner may terminate the period of effectiveness of a notice of commencement by executing, swearing to, and recording a notice of termination that contains:

(f) 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 a direct contract with the owner or who has served a notice to owner ~~given notice~~. The owner is not required to serve a copy of the notice of termination on any lienor who has executed a waiver and release of lien upon final payment in accordance with s. 713.20.

(4) A notice of termination is effective to terminate the notice of commencement at the later of 30 days after recording of the notice of termination or the date stated in the notice of termination as the date on which the notice of commencement is terminated, if ~~provided that~~ the notice of termination has been served pursuant to paragraph (1)(f) on the contractor and on each lienor who has a direct contract with the owner or who has served a notice to owner ~~given notice~~.

Section 5. Section 713.16, Florida Statutes, is amended to read:

713.16 Demand for copy of contract and statements of account; form.—

(1) A copy of the contract of a lienor or owner and a statement of the amount due or to become due if fixed or ascertainable thereon must be furnished by any party thereto, upon written demand of an owner or a lienor contracting with or employed by the other party to such contract. If the owner or lienor refuses or neglects to furnish such copy of the contract or such statement, or willfully and falsely states the amount due or to become due if fixed or ascertainable under such

contract, any person who suffers any detriment thereby has a cause of action against the person refusing or neglecting to furnish the same or willfully and falsely stating the amount due or to become due for his or her damages sustained thereby. The information contained in such copy or statement furnished pursuant to such written demand is binding upon the owner or lienor furnishing it unless actual notice of any modification is given to the person demanding the copy or statement before such person acts in good faith in reliance on it. The person demanding such documents must pay for the reproduction thereof; and, if such person fails or refuses to do so, he or she is entitled only to inspect such documents at reasonable times and places.

(2) The 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 or services performed and to be performed, if any, the materials furnished, the materials to be furnished, if known, the amount paid on account to date, the amount due, and the amount to become due, if known, 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 and 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. The failure or refusal to furnish the statement does not deprive the lienor of his or her lien if the demand is not served at the address of the lienor or directed to

the attention of the person designated to receive the demand in the notice to owner. The failure or refusal to furnish the statement under oath within 30 days after the demand, or the furnishing of a false or fraudulent statement, deprives the person so failing or refusing to furnish such statement of his or her lien. If the owner serves more than one demand for statement of account on a lienor and none of the information regarding the account has changed since the lienor's last response to a demand, the failure or refusal to furnish such statement does not deprive the lienor of his or her lien. The negligent inclusion or omission of any information deprives the person of his or her lien to the extent the owner can demonstrate prejudice from such act or omission by the lienor. The failure to furnish a response to a demand for statement of account does not affect the validity of any claim of lien being enforced through a foreclosure case filed prior to the date the demand for statement is received by the lienor.

(3) A request for sworn statement of account must be in substantially the following form:

REQUEST FOR SWORN STATEMENT OF ACCOUNT

WARNING: YOUR FAILURE TO FURNISH THE REQUESTED STATEMENT, SIGNED UNDER OATH, WITHIN 30 DAYS OR THE FURNISHING OF A FALSE STATEMENT WILL RESULT IN THE LOSS OF YOUR LIEN.

To: ...(Lienor's name and address)...

The undersigned hereby demands a written statement under oath of his or her account showing the nature of the labor or services performed and to be performed, if any, the materials furnished, the materials to be furnished, if known, the amount paid on account to date, the amount due, and the amount to become due, if known, as of the date of the statement for the improvement of real property identified as ...(property description)....

...(name of contractor)...

...(name of the lienor's customer, as set forth in the lienor's Notice to Owner, if such notice has been served)....

...(signature and address of owner)...

...(date of request for sworn statement of account)...

(4) When a contractor has furnished a payment bond pursuant to s. 713.23, he or she may, when an owner makes any payment to the contractor or directly to a lienor, serve a written demand on any other lienor for a written statement under oath of his or her account showing the nature of the labor or services performed and to be performed, if any, the materials furnished, the materials to be furnished, if known, the amount paid on account to date, the amount due, and the amount to become due, if known, 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 contractor

served by such lienor. The demand 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 contractor. The failure or refusal to furnish the statement does not deprive the lienor of his or her rights under the bond if the demand is not served at the address of the lienor or directed to the attention of the person designated to receive the demand in the notice to contractor. The failure to furnish the statement within 30 days after the demand, or the furnishing of a false or fraudulent statement, deprives the person who fails to furnish the statement, or who furnishes the false or fraudulent statement, of his or her rights under the bond. If the contractor serves more than one demand for statement of account on a lienor and none of the information regarding the account has changed since the lienor's last response to a demand, the failure or refusal to furnish such statement does not deprive the lienor of his or her rights under the bond. The negligent inclusion or omission of any information deprives the person of his or her rights under the bond to the extent the contractor can demonstrate prejudice from such act or omission by the lienor. The failure to furnish a response to a demand for statement of account does not affect the validity of any claim on the bond being enforced in a lawsuit filed prior to the date the demand for statement of account is received by the lienor.

(5)(a) Any lienor who is perfecting a claim of lien ~~has recorded a claim of lien~~ may serve with the claim of lien or thereafter a ~~make~~ written demand on the owner for a written statement under oath showing:

1. The amount of the direct contract under which the lien was recorded;

2. The dates and amounts paid or to be paid by or on behalf of the owner for all improvements described in the direct contract;

3. The reasonable estimated costs of completing the direct contract under which the lien was claimed pursuant to the scope of the direct contract; and

4. If known, the actual cost of completion.

(b) Any owner who does not provide the statement within 30 days after demand, or who provides a false or fraudulent statement, is not a prevailing party for purposes of an award of attorney ~~attorney's~~ fees under s. 713.29. The written demand must include the following warning in conspicuous type in substantially the following form:

WARNING: YOUR FAILURE TO FURNISH THE REQUESTED STATEMENT WITHIN 30 DAYS OR THE FURNISHING OF A FALSE STATEMENT WILL RESULT IN THE LOSS OF YOUR RIGHT TO RECOVER ATTORNEY FEES IN ANY ACTION TO ENFORCE THE CLAIM OF LIEN OF THE PERSON REQUESTING THIS STATEMENT.

(6) Any written demand served on the owner must include a description of the project, including the names of the contractor and the lienor's customer, as set forth in the lienor's notice to owner.

(7) For purposes of this section, the term "information" means the nature and quantity of the labor, services, and

materials furnished or to be furnished by a lienor and the amount paid, the amount due, and the amount to become due on the lienor's account.

Section 6. Section 713.18, Florida Statutes, is amended to read:

713.18 Manner of serving notices and other instruments.—

(1) Service of notices, claims of lien, affidavits, assignments, and other instruments permitted or required under this part, or copies thereof when so permitted or required, unless otherwise specifically provided in this part, must be made by one of the following methods:

(a) By actual delivery to the person to be served; if a partnership, to one of the partners; if a corporation, to an officer, director, managing agent, or business agent; or, if a limited liability company, to a member or manager.

(b) By common carrier delivery service or ~~sending the same~~ by registered, Global Express Guaranteed, or certified mail, with postage or shipping paid by the sender and ~~prepaid, or by overnight or second-day delivery~~ with evidence of delivery, which may be in an electronic format.

(c) ~~If the method specified in paragraph (a) or paragraph (b) cannot be accomplished,~~ By posting on the site of the improvement if service as provided by paragraph (a) or paragraph (b) cannot be accomplished ~~premises~~.

(2) Notwithstanding subsection (1), service of ~~if~~ a notice to owner~~,~~ or a notice to contractor under s. 713.23, s. 337.18, or ~~a preliminary notice under~~ s. 255.05 is ~~mailed by registered or certified mail with postage prepaid to the person to be~~

~~served at any of the addresses set forth in subsection (3) within 40 days after the date the lienor first furnishes labor, services, or materials, service of that notice is~~ effective as of the date of mailing if:

(a) The notice is mailed by registered, Global Express Guaranteed, or certified mail, with postage prepaid, to the person to be served at any of the addresses set forth in subsection (3);

(b) The notice is mailed within 40 days after the date the lienor first furnishes labor, services, or materials; and

(c) The person who served the notice maintains a registered or certified mail log that shows the registered or certified mail number issued by the United States Postal Service, the name and address of the person served, and the date stamp of the United States Postal Service confirming the date of mailing or if the person who served the notice maintains electronic tracking records generated through use of the United States Postal Service Confirm service or a similar service containing the postal tracking number, the name and address of the person served, and verification of the date of receipt by the United States Postal Service.

(3)(a) Service of ~~If~~ an instrument ~~served~~ pursuant to this section is effective on the date of mailing the instrument if it:

1. Is sent to the last address shown in the notice of commencement or any amendment thereto or, in the absence of a notice of commencement, to the last address shown in the building permit application, or to the last known address of the

person to be served; and ~~, is not received, but~~

2. Is returned as being "refused," "moved, not forwardable," or "unclaimed," or is otherwise not delivered or deliverable through no fault of the person serving the item~~,~~ ~~then service is effective on the date the instrument was sent~~.

(b) If the address shown in the notice of commencement or any amendment to the notice of commencement, or, in the absence of a notice of commencement, in the building permit application, is incomplete for purposes of mailing or delivery, the person serving the item may complete the address and properly format it according to United States Postal Service addressing standards using information obtained from the property appraiser or another public record without affecting the validity of service under this section.

(4) A notice served by a lienor on one owner or one partner of a partnership owning the real property ~~If the real property is owned by more than one person or a partnership, a lienor may serve any notices or other papers under this part on any one of such owners or partners, and such notice~~ is deemed notice to all owners and partners.

Section 7. Section 713.22, Florida Statutes, is amended to read:

713.22 Duration of lien.—

(1) A ~~No~~ lien provided by this part does not ~~shall~~ continue for a longer period than 1 year after the claim of lien has been recorded or 1 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. A lien that has been continued beyond the 1-year period ~~The continuation of the lien effected~~ by the commencement of an ~~the~~ action is ~~shall~~ not enforceable ~~be good~~ against creditors or subsequent purchasers for a valuable consideration and without notice, unless a notice of lis pendens is recorded.

(2) An owner or the owner's ~~agent or~~ attorney may elect to shorten the time prescribed in subsection (1) within which to commence an action to enforce any claim of lien or claim against a bond or other security under s. 713.23 or s. 713.24 by recording in the clerk's office a notice in substantially the following form:

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 such notice and record the notice. ~~Service shall be deemed complete upon mailing.~~

Section 8. 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 serve the contractor with notice in writing that the lienor will look to the contractor's bond for protection on the work. If a notice of commencement with the attached bond is not recorded, before commencement of construction ~~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 may, in the alternative, elect to serve the notice to contractor up to ~~shall have~~ 45 days from the date the lienor is served with a copy ~~notified of the existence~~ of the bond ~~within which to serve the notice~~. The notice may be in substantially the following form and may be combined with a notice to owner given under s. 713.06

and, if so, may be entitled "NOTICE TO OWNER/NOTICE TO CONTRACTOR:

NOTICE TO CONTRACTOR

To ...(name and address of contractor)...

The undersigned hereby informs you that he or she has furnished or is furnishing services or materials as follows:

...(general description of services or materials)... for the improvement of the real property identified as ...(property description)... under an order given by ...(lienor's customer)....

This notice is to inform you that the undersigned intends to look to the contractor's bond to secure payment for the furnishing of materials or services for the improvement of the real property.

...(name of lienor)...
...(signature of lienor or lienor's representative)...
...(date)...
...(lienor's address)...

~~The undersigned notifies you that he or she has furnished or is furnishing ...(services or materials)... for the improvement of the real property identified as ...(property description)...~~

~~owned by ...(owner's name and address)... under an order given by .... and that the undersigned will look to the contractor's bond for protection on the work.~~

~~...(Lienor's signature and address)...~~

(d) In addition, a lienor is required, as a condition precedent to recovery under the bond, to serve a written notice of nonpayment to the contractor and the surety not later than 90 days after the final furnishing of labor, services, or materials by the lienor. A written notice satisfies this condition precedent with respect to the payment described in the notice of nonpayment, including unpaid finance charges due under the lienor's contract, and with respect to any other payments which become due to the lienor after the date of the notice of nonpayment. The time period for serving a written notice of nonpayment shall be measured from the last day of furnishing labor, services, or materials by the lienor and shall not be measured by other standards, such as the issuance of a certificate of occupancy or the issuance of a certificate of substantial completion. The failure of a lienor to receive retainage sums not in excess of 10 percent of the value of labor, services, or materials furnished by the lienor is not considered a nonpayment requiring the service of the notice provided under this paragraph. <u>If the payment bond is not recorded before commencement of construction, the time period for the lienor to serve a notice of nonpayment may, at the option of the lienor, be calculated from the date specified in</u>

this section or the date the lienor is served a copy of the bond. In no event, however, shall the limitation period for commencement of an action against a payment bond as established in s. 95.11 be expanded. The notice under this paragraph may be in substantially the following form:

NOTICE OF NONPAYMENT

To ...(name of contractor and address)...
...(name of surety and address)...

The undersigned notifies you that he or she has furnished ...(describe labor, services, or materials)... for the improvement of the real property identified as ...(property description).... The amount now due and unpaid is $.....

...(signature and address of lienor)...

(e) An ~~No~~ action for the labor or materials or supplies may not be instituted or prosecuted against the contractor or surety unless both notices have been given, if required by this section. An ~~No~~ action may not ~~shall~~ be instituted or prosecuted against the contractor or against the surety on the bond under this section after 1 year from the performance of the labor or completion of delivery of the materials and supplies. The time period for bringing an action against the contractor or surety on the bond shall be measured from the last day of furnishing labor, services, or materials by the lienor. The time period ~~and~~

shall not be measured by other standards, such as the issuance of a certificate of occupancy or the issuance of a certificate of substantial completion. A contractor or the contractor's ~~agent or~~ attorney may elect to shorten the ~~prescribed~~ time within which an action to enforce any claim against a payment bond provided under this section or s. 713.245 must ~~may~~ be commenced at any time after a notice of nonpayment, if required, has been served for the claim by recording in the clerk's office a notice in substantially the following form:

NOTICE OF CONTEST OF CLAIM
AGAINST PAYMENT BOND

To: ...(Name and address of lienor)...

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.

DATED on ...., ...
Signed: ...(Contractor or Attorney)...

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.~~

(f) 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 payment bond, which restricts ~~thereby or~~ the venue of any proceeding relating to such payment bond, which limits or expands the effective duration of the payment bond, or which adds conditions precedent to the enforcement of a claim against a payment bond beyond those provided in this part is enforceable. The surety is not entitled to the defense of pro tanto discharge as against any lienor because of changes or modifications in the contract to which the surety is not a party; but the liability of the surety may not be increased beyond the penal sum of the bond. A lienor may not waive in advance his or her right to bring an action under the bond against the surety.

(2) The bond shall secure every lien under the direct contract accruing subsequent to its execution and delivery, except that of the contractor. Every claim of lien, except that of the contractor, filed subsequent to execution and delivery of the bond shall be transferred to it with the same effect as liens transferred under s. 713.24. Record notice of the transfer shall be effected by the contractor, or any person having an

interest in the property against which the claim of lien has been asserted, by recording in the clerk's office a notice, with the bond attached, in substantially the following form:

NOTICE OF BOND

To ...(Name and Address of Lienor)...

You are notified that the claim of lien filed by you on ...., ..., and recorded in Official Records Book .... at page .... of the public records of .... County, Florida, is secured by a bond, a copy being attached.

Signed: ...(Name of person recording notice)...

The notice shall be verified. The person recording the notice of bond ~~clerk~~ shall serve ~~mail~~ a copy of the notice along with a copy of the bond to the lienor at the address shown in the claim of lien, or the most recent amendment to it; shall certify to the service on the face of the notice; and shall record the notice. ~~The clerk shall receive the same fee as prescribed in s. 713.24(1) for certifying to a transfer of lien.~~

(4) The provisions of s. 713.24(3) ~~shall~~ apply to bonds under this section except where those provisions conflict with this section.

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.[1] The SBA also manages 33 other investment portfolios, with combined assets of $21.7 billion[2], 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.[3] 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.[4]

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.[5] 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.[6]

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.[7]

The State of Florida has practiced divestment four times in modern history.[8] From 1986 to 1993, the Legislature directed the SBA to divest from companies doing business with South Africa.[9] Beginning October 1, 1988, the Legislature placed restrictions on investments in any institution or company doing

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[1] *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).
[2] *Id.*
[3] Section 215.471, F.S.
[4] *Id.*
[5] Section 215.472(1), F.S.
[6] Section 215.472(2), F.S.
[7] *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).
[8] Information provided to Government Operations Subcommittee staff on February 3, 2012, by Mr. Ron Poppell, Senior Defined Contribution Programs Officer, State Board of Administration.
[9] *Id.*

business in or with Northern Ireland.[10] 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.[11] 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.[12]

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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[10] Section 121.153, F.S.

[11] Information provided to Government Operations Subcommittee staff on February 3, 2012, by Mr. Ron Poppell, Senior Defined Contribution Programs Officer, State Board of Administration.

[12] 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.

A bill to be entitled

An act relating to divestiture by the State Board of Administration; amending s. 215.471, F.S.; prohibiting the State Board of Administration from being a fiduciary with respect to voting on any proxy resolution advocating expanded United States trade with Cuba or Syria; prohibiting the State Board of Administration from being a fiduciary with respect to having the right to vote in favor of any proxy resolution advocating expanded United States trade with Cuba or Syria; creating reporting requirements; providing an effective date.

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

Section 1. Section 215.471, Florida Statutes, is amended to read:

215.471 Divestiture by the State Board of Administration; reporting requirements.—

(1) The State Board of Administration shall divest any investment under s. 121.151 and ss. 215.44-215.53, and is prohibited from investment in stocks, securities, or other obligations of:

(a) ~~(1)~~ Any institution or company domiciled in the United States, or foreign subsidiary of a company domiciled in the United States, doing business in or with Cuba, or with agencies or instrumentalities thereof in violation of federal law.

(b) ~~(2)~~ Any institution or company domiciled outside of the

United States if the President of the United States has applied sanctions against the foreign country in which the institution or company is domiciled pursuant to s. 4 of the Cuban Democracy Act of 1992.

(2) The State Board of Administration may not be a fiduciary under this section with respect to voting on, and may not have the right to vote in favor of, any proxy resolution advocating expanded United States trade with Cuba or Syria. The board's staff shall report on its activities in its annual proxy voting report.

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

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/HB 971 Judiciary
SPONSOR(S): Civil Justice Subcomittee; 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 DC	Havlicak RH

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.[1] 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.[2] Retired judges must comply with continuing judicial education requirements, including completion of 30 hours of approved judicial education programs every three years.[3]

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.[4] A justice or judge may not serve more than 60 days on temporary duty during a year without the approval of the Chief Justice.[5]

Retired judges may receive compensation as set by law.[6] 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.[7] 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.[8]

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.[9] However, a person may not be reemployed by an employer participating in the FRS before meeting the definition of

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[1] Art. V, s. (2)(b) Fla. Const.; *See also* Fla.R.Jud.Admin. 2.205(a)(3)(A).
[2] Fla. R.Jud.Admin. 2.205(a)(3)(B).
[3] *See* Fla.R.Jud.Admin. 2.320.
[4] Section 25.073(1), F.S.
[5] *See* s. 25.073(2)(a), F.S.
[6] *See* Fla.R.Jud.Admin. 2.030(a)(3)(A).
[7] *See* s. 25.073(2)(a), F.S.
[8] Section 25.073(2)(b), F.S.
[9] 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."[10]

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).[11] The number of members and composition of each JNC is provided for by statute.[12] 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.[13] Circuit and county court judges are determined by election,[14] but vacancies on the circuit or county courts that occur between elections are filled in the same manner as vacancies on the appellate bench.[15]

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.[16] Members serve 4 year terms.[17] All JNC members must be residents of the territorial jurisdiction serviced by the JNC to which the member is appointed.[18]

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.[19] 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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[10] *Id.*
[11] *See* art. V, s.11, Fla. Const.
[12] *See* s. 43.291, F.S.
[13] *See* art. V, s. 11(a), Fla. Const.
[14] 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.
[15] *See* art. V, s. 11(b), Fla. Const.
[16] Section 43.291(1), F.S.
[17] Section 43.291(3), F.S.
[18] Section 43.291(1)(a), (b), F.S.
[19] 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.[20]

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.

[20] 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.

A bill to be entitled

An act relating to the judiciary; amending s. 25.073, F.S.; providing that if a retired justice or judge is assigned to temporary duty, such assignment does not affect his or her eligibility for benefits under the Florida Retirement System or renew his or her membership in the Florida Retirement System; amending s. 43.291, F.S.; revising requirements for the appointment of members of judicial nominating commissions; providing that, with the exception of members selected from a list of nominees provided by the Board of Governors of The Florida Bar, a current member of a judicial nominating commission appointed by the Governor serves at the pleasure of the Governor; providing for each expired term or vacancy to be filled by appointment in the same manner as the member whose position is being filled; deleting obsolete provisions; deleting a 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 judicial nominating commission; amending ss. 121.021, 121.091, and 121.591, F.S.; conforming retirement system provisions to temporary appointment of retired justices or judges as senior judges; providing an effective date.

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

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

recommended nominees for each position. The Governor shall select the appointee from the list of nominees recommended for that position, but the Governor may reject all of the nominees recommended for a position and request that the Board of Governors submit a new list of three different recommended nominees for that position who have not been previously recommended by the Board of Governors.

2.~~(b)~~ Five members appointed by the Governor who shall serve at the pleasure of the Governor, each of whom is a resident of the territorial jurisdiction served by the commission to which the member is appointed, of which at least two are members of The Florida Bar engaged in the practice of law. Notwithstanding any other law, each current member of a judicial nominating commission appointed by the Governor, other than those selected from a list of nominees provided by the Board of Governors of The Florida Bar, shall serve at the pleasure of the Governor.

(b) Each expired term or vacancy shall be filled by appointment in the same manner as the member whose position is being filled.

(3) Notwithstanding any other provision of this section, each current member of a judicial nominating commission selected from a list of nominees provided ~~appointed directly~~ by the Board of Governors of The Florida Bar shall serve the remainder of his or her term, unless removed for cause. ~~The terms of all other members of a judicial nominating commission are hereby terminated, and the Governor shall appoint new~~ Members selected from a list of nominees provided by the Board of Governors of

The Florida Bar shall serve terms ~~to each judicial nominating commission~~ in the following manner:

(a) One appointment ~~Two appointments~~ for a term ~~terms~~ ending July 1, 2012 ~~2002, one of which shall be an appointment selected from nominations submitted by the Board of Governors of The Florida Bar pursuant to paragraph (1)(a)~~;

(b) Two appointments for terms ending July 1, 2014 ~~2003~~; and

(c) One appointment ~~Two appointments~~ for a term ~~terms~~ ending July 1, 2015 ~~2004~~.

Every subsequent appointment of a member selected from a list of nominees provided by the Board of Governors of The Florida Bar, except an appointment to fill a vacant, unexpired term, shall be for 4 years. ~~Each expired term or vacancy shall be filled by appointment in the same manner as the member whose position is being filled.~~

(5) A member of a judicial nominating commission may be suspended for cause by the Governor ~~pursuant to uniform rules of procedure established by the Executive Office of the Governor~~ consistent with s. 7, ~~of~~ Art. IV of the State Constitution.

Section 3. Subsection (39) of section 121.021, Florida Statutes, is amended to read:

121.021 Definitions.—The following words and phrases as used in this chapter have the respective meanings set forth unless a different meaning is plainly required by the context:

(39)(a) "Termination" occurs, except as provided in paragraph (b) or paragraph (d), when a member ceases all

employment relationships with participating employers, however:

1. For retirements effective before July 1, 2010, if a member is employed by any such employer within the next calendar month, termination shall be deemed not to have occurred. A leave of absence constitutes a continuation of the employment relationship, except that a leave of absence without pay due to disability may constitute termination if such member makes application for and is approved for disability retirement in accordance with s. 121.091(4). The department or state board may require other evidence of termination as it deems necessary.

2. For retirements effective on or after July 1, 2010, if a member is employed by any such employer within the next 6 calendar months, termination shall be deemed not to have occurred. A leave of absence constitutes a continuation of the employment relationship, except that a leave of absence without pay due to disability may constitute termination if such member makes application for and is approved for disability retirement in accordance with s. 121.091(4). The department or state board may require other evidence of termination as it deems necessary.

(b) "Termination" for a member electing to participate in the Deferred Retirement Option Program occurs when the program participant ceases all employment relationships with participating employers in accordance with s. 121.091(13), however:

1. For termination dates occurring before July 1, 2010, if the member is employed by any such employer within the next calendar month, termination will be deemed not to have occurred, except as provided in s. 121.091(13)(b)4.c. A leave of absence

shall constitute a continuation of the employment relationship.

2. For termination dates occurring on or after July 1, 2010, if the member becomes employed by any such employer within the next 6 calendar months, termination will be deemed not to have occurred, except as provided in s. 121.091(13)(b)4.c. A leave of absence constitutes a continuation of the employment relationship.

(c) Effective July 1, 2011, "termination" for a member receiving a refund of employee contributions occurs when a member ceases all employment relationships with participating employers for 3 calendar months. A leave of absence constitutes a continuation of the employment relationship.

(d) Effective July 1, 2012, a former justice or retired judge who has reached his or her normal retirement age or date and consents to temporary employment as a senior judge in any court, as assigned by the Chief Justice of the Supreme Court in accordance with s. 2, Art. V of the State Constitution, meets the definition of "termination" when all non-temporary employment as a judge ceases and the former justice or judge retires under this chapter.

Section 4. Subsection (9) of section 121.091, Florida Statutes, is amended to read:

121.091 Benefits payable under the system.—Benefits may not be paid under this section unless the member has terminated employment as provided in s. 121.021(39)(a) or begun participation in the Deferred Retirement Option Program as provided in subsection (13), and a proper application has been filed in the manner prescribed by the department. The department

may cancel an application for retirement benefits when the member or beneficiary fails to timely provide the information and documents required by this chapter and the department's rules. The department shall adopt rules establishing procedures for application for retirement benefits and for the cancellation of such application when the required information or documents are not received.

(9) EMPLOYMENT AFTER RETIREMENT; LIMITATION.—

(a) Any person who is retired under this chapter, except under the disability retirement provisions of subsection (4), may be employed by an employer that does not participate in a state-administered retirement system and receive compensation from that employment without limiting or restricting in any way the retirement benefits payable to that person.

(b) Any person whose retirement is effective before July 1, 2010, or whose participation in the Deferred Retirement Option Program terminates before July 1, 2010, except under the disability retirement provisions of subsection (4) or as provided in s. 121.053, may be reemployed by an employer that participates in a state-administered retirement system and receive retirement benefits and compensation from that employer, except that the person may not be reemployed by an employer participating in the Florida Retirement System before meeting the definition of termination in s. 121.021 and may not receive both a salary from the employer and retirement benefits for 12 calendar months immediately subsequent to the date of retirement. However, a DROP participant shall continue employment and receive a salary during the period of

participation in the Deferred Retirement Option Program, as provided in subsection (13).

1. A retiree who violates such reemployment limitation before completion of the 12-month limitation period must give timely notice of this fact in writing to the employer and to the Division of Retirement or the state board and shall have his or her retirement benefits suspended for the months employed or the balance of the 12-month limitation period as required in sub-subparagraphs b. and c. A retiree employed in violation of this paragraph and an employer who employs or appoints such person are jointly and severally liable for reimbursement to the retirement trust fund, including the Florida Retirement System Trust Fund and the Public Employee Optional Retirement Program Trust Fund, from which the benefits were paid. The employer must have a written statement from the retiree that he or she is not retired from a state-administered retirement system. Retirement benefits shall remain suspended until repayment has been made. Benefits suspended beyond the reemployment limitation shall apply toward repayment of benefits received in violation of the reemployment limitation.

a. A district school board may reemploy a retiree as a substitute or hourly teacher, education paraprofessional, transportation assistant, bus driver, or food service worker on a noncontractual basis after he or she has been retired for 1 calendar month. A district school board may reemploy a retiree as instructional personnel, as defined in s. 1012.01(2)(a), on an annual contractual basis after he or she has been retired for 1 calendar month. Any member who is reemployed within 1 calendar

month after retirement shall void his or her application for retirement benefits. District school boards reemploying such teachers, education paraprofessionals, transportation assistants, bus drivers, or food service workers are subject to the retirement contribution required by subparagraph 2.

b. A community college board of trustees may reemploy a retiree as an adjunct instructor or as a participant in a phased retirement program within the Florida Community College System, after he or she has been retired for 1 calendar month. A member who is reemployed within 1 calendar month after retirement shall void his or her application for retirement benefits. Boards of trustees reemploying such instructors are subject to the retirement contribution required in subparagraph 2. A retiree may be reemployed as an adjunct instructor for no more than 780 hours during the first 12 months of retirement. A retiree reemployed for more than 780 hours during the first 12 months of retirement must give timely notice in writing to the employer and to the Division of Retirement or the state board of the date he or she will exceed the limitation. The division shall suspend his or her retirement benefits for the remainder of the 12 months of retirement. Any retiree employed in violation of this sub-subparagraph and any employer who employs or appoints such person without notifying the division to suspend retirement benefits are jointly and severally liable for any benefits paid during the reemployment limitation period. The employer must have a written statement from the retiree that he or she is not retired from a state-administered retirement system. Any retirement benefits received by the retiree while reemployed in

excess of 780 hours during the first 12 months of retirement must be repaid to the Florida Retirement System Trust Fund, and retirement benefits shall remain suspended until repayment is made. Benefits suspended beyond the end of the retiree's first 12 months of retirement shall apply toward repayment of benefits received in violation of the 780-hour reemployment limitation.

c. The State University System may reemploy a retiree as an adjunct faculty member or as a participant in a phased retirement program within the State University System after the retiree has been retired for 1 calendar month. A member who is reemployed within 1 calendar month after retirement shall void his or her application for retirement benefits. The State University System is subject to the retired contribution required in subparagraph 2., as appropriate. A retiree may be reemployed as an adjunct faculty member or a participant in a phased retirement program for no more than 780 hours during the first 12 months of his or her retirement. A retiree reemployed for more than 780 hours during the first 12 months of retirement must give timely notice in writing to the employer and to the Division of Retirement or the state board of the date he or she will exceed the limitation. The division shall suspend his or her retirement benefits for the remainder of the 12 months. Any retiree employed in violation of this sub-subparagraph and any employer who employs or appoints such person without notifying the division to suspend retirement benefits are jointly and severally liable for any benefits paid during the reemployment limitation period. The employer must have a written statement from the retiree that he or she is not retired from a state-

administered retirement system. Any retirement benefits received by the retiree while reemployed in excess of 780 hours during the first 12 months of retirement must be repaid to the Florida Retirement System Trust Fund, and retirement benefits shall remain suspended until repayment is made. Benefits suspended beyond the end of the retiree's first 12 months of retirement shall apply toward repayment of benefits received in violation of the 780-hour reemployment limitation.

d. The Board of Trustees of the Florida School for the Deaf and the Blind may reemploy a retiree as a substitute teacher, substitute residential instructor, or substitute nurse on a noncontractual basis after he or she has been retired for 1 calendar month. Any member who is reemployed within 1 calendar month after retirement shall void his or her application for retirement benefits. The Board of Trustees of the Florida School for the Deaf and the Blind reemploying such teachers, residential instructors, or nurses is subject to the retirement contribution required by subparagraph 2.

e. A developmental research school may reemploy a retiree as a substitute or hourly teacher or an education paraprofessional as defined in s. 1012.01(2) on a noncontractual basis after he or she has been retired for 1 calendar month. A developmental research school may reemploy a retiree as instructional personnel, as defined in s. 1012.01(2)(a), on an annual contractual basis after he or she has been retired for 1 calendar month after retirement. Any member who is reemployed within 1 calendar month voids his or her application for retirement benefits. A developmental research school that

reemploys retired teachers and education paraprofessionals is subject to the retirement contribution required by subparagraph 2.

f. A charter school may reemploy a retiree as a substitute or hourly teacher on a noncontractual basis after he or she has been retired for 1 calendar month. A charter school may reemploy a retired member as instructional personnel, as defined in s. 1012.01(2)(a), on an annual contractual basis after he or she has been retired for 1 calendar month after retirement. Any member who is reemployed within 1 calendar month voids his or her application for retirement benefits. A charter school that reemploys such teachers is subject to the retirement contribution required by subparagraph 2.

2. The employment of a retiree or DROP participant of a state-administered retirement system does not affect the average final compensation or years of creditable service of the retiree or DROP participant. Before July 1, 1991, upon employment of any person, other than an elected officer as provided in s. 121.053, who is retired under a state-administered retirement program, the employer shall pay retirement contributions in an amount equal to the unfunded actuarial liability portion of the employer contribution which would be required for regular members of the Florida Retirement System. Effective July 1, 1991, contributions shall be made as provided in s. 121.122 for retirees who have renewed membership or, as provided in subsection (13), for DROP participants.

3. Any person who is holding an elective public office which is covered by the Florida Retirement System and who is

concurrently employed in nonelected covered employment may elect to retire while continuing employment in the elective public office if he or she terminates his or her nonelected covered employment. Such person shall receive his or her retirement benefits in addition to the compensation of the elective office without regard to the time limitations otherwise provided in this subsection. A person who seeks to exercise the provisions of this subparagraph as they existed before May 3, 1984, may not be deemed to be retired under those provisions, unless such person is eligible to retire under this subparagraph, as amended by chapter 84-11, Laws of Florida.

(c) Any person whose retirement is effective on or after July 1, 2010, or whose participation in the Deferred Retirement Option Program terminates on or after July 1, 2010, who is retired under this chapter, except under the disability retirement provisions of subsection (4) or as provided in s. 121.053, may be reemployed by an employer that participates in a state-administered retirement system and receive retirement benefits and compensation from that employer. However, a person may not be reemployed by an employer participating in the Florida Retirement System before meeting the definition of termination in s. 121.021 and may not receive both a salary from the employer and retirement benefits for 6 calendar months after meeting the definition of termination, except as provided in paragraph (f). However, a DROP participant shall continue employment and receive a salary during the period of participation in the Deferred Retirement Option Program, as provided in subsection (13).

1. The reemployed retiree may not renew membership in the Florida Retirement System.

2. The employer shall pay retirement contributions in an amount equal to the unfunded actuarial liability portion of the employer contribution that would be required for active members of the Florida Retirement System in addition to the contributions required by s. 121.76.

3. A retiree initially reemployed in violation of this paragraph and an employer that employs or appoints such person are jointly and severally liable for reimbursement of any retirement benefits paid to the retirement trust fund from which the benefits were paid, including the Florida Retirement System Trust Fund and the Public Employee Optional Retirement Program Trust Fund, as appropriate. The employer must have a written statement from the employee that he or she is not retired from a state-administered retirement system. Retirement benefits shall remain suspended until repayment is made. Benefits suspended beyond the end of the retiree's 6-month reemployment limitation period shall apply toward the repayment of benefits received in violation of this paragraph.

(d) This subsection applies to retirees, as defined in s. 121.4501(2), <u>except as provided in paragraph (f),</u> of the Florida Retirement System Investment Plan, subject to the following conditions:

1. A retiree may not be reemployed with an employer participating in the Florida Retirement System until such person has been retired for 6 calendar months.

2. A retiree employed in violation of this subsection and

an employer that employs or appoints such person are jointly and severally liable for reimbursement of any benefits paid to the retirement trust fund from which the benefits were paid. The employer must have a written statement from the retiree that he or she is not retired from a state-administered retirement system.

(e) The limitations of this subsection apply to reemployment in any capacity irrespective of the category of funds from which the person is compensated, except as provided in paragraph (f).

(f) Effective July 1, 2012, a former justice or retired judge who has reached his or her normal retirement age or date and consents to temporary employment as a senior judge in any court, as assigned by the Chief Justice of the Supreme Court in accordance with s. 2, Art. V of the State Constitution, is not subject to paragraph (c), paragraph (d), or paragraph (e).

Section 5. Paragraph (a) of subsection (1) of section 121.591, Florida Statutes, is amended to read:

121.591 Payment of benefits.—Benefits may not be paid under the Florida Retirement System Investment Plan unless the member has terminated employment as provided in s. 121.021(39)(a) or is deceased and a proper application has been filed as prescribed by the state board or the department. Before termination of employment, benefits, including employee contributions, are not payable under the investment plan for employee hardships, unforeseeable emergencies, loans, medical expenses, educational expenses, purchase of a principal residence, payments necessary to prevent eviction or foreclosure

on an employee's principal residence, or any other reason prior to termination from all employment relationships with participating employers. The state board or department, as appropriate, may cancel an application for retirement benefits if the member or beneficiary fails to timely provide the information and documents required by this chapter and the rules of the state board and department. In accordance with their respective responsibilities, the state board and the department shall adopt rules establishing procedures for application for retirement benefits and for the cancellation of such application if the required information or documents are not received. The state board and the department, as appropriate, are authorized to cash out a de minimis account of a member who has been terminated from Florida Retirement System covered employment for a minimum of 6 calendar months. A de minimis account is an account containing employer and employee contributions and accumulated earnings of not more than $5,000 made under the provisions of this chapter. Such cash-out must be a complete lump-sum liquidation of the account balance, subject to the provisions of the Internal Revenue Code, or a lump-sum direct rollover distribution paid directly to the custodian of an eligible retirement plan, as defined by the Internal Revenue Code, on behalf of the member. Any nonvested accumulations and associated service credit, including amounts transferred to the suspense account of the Florida Retirement System Investment Plan Trust Fund authorized under s. 121.4501(6), shall be forfeited upon payment of any vested benefit to a member or beneficiary, except for de minimis distributions or minimum

required distributions as provided under this section. If any financial instrument issued for the payment of retirement benefits under this section is not presented for payment within 180 days after the last day of the month in which it was originally issued, the third-party administrator or other duly authorized agent of the state board shall cancel the instrument and credit the amount of the instrument to the suspense account of the Florida Retirement System Investment Plan Trust Fund authorized under s. 121.4501(6). Any amounts transferred to the suspense account are payable upon a proper application, not to include earnings thereon, as provided in this section, within 10 years after the last day of the month in which the instrument was originally issued, after which time such amounts and any earnings attributable to employer contributions shall be forfeited. Any forfeited amounts are assets of the trust fund and are not subject to chapter 717.

(1) NORMAL BENEFITS.—Under the investment plan:

(a) Benefits in the form of vested accumulations as described in s. 121.4501(6) are payable under this subsection in accordance with the following terms and conditions:

1. Benefits are payable only to a member, an alternate payee of a qualified domestic relations order, or a beneficiary.

2. Benefits shall be paid by the third-party administrator or designated approved providers in accordance with the law, the contracts, and any applicable board rule or policy.

3. The member must be terminated from all employment with all Florida Retirement System employers, as provided in s. 121.021(39).

4. Benefit payments may not be made until the member has been terminated for 3 calendar months, except that the state board may authorize by rule for the distribution of up to 10 percent of the member's account after being terminated for 1 calendar month if the member has reached the normal retirement date as defined in s. 121.021. Effective July 1, 2012, a former justice or retired judge who has consented to temporary employment as a senior judge in any court pursuant to s. 25.073 may receive a regular distribution of his or her account as provided in this paragraph after providing proof of termination from his or her regularly established position.

5. If a member or former member of the Florida Retirement System receives an invalid distribution, such person must either repay the full amount within 90 days after receipt of final notification by the state board or the third-party administrator that the distribution was invalid, or, in lieu of repayment, the member must terminate employment from all participating employers. If such person fails to repay the full invalid distribution within 90 days after receipt of final notification, the person may be deemed retired from the investment plan by the state board and is subject to s. 121.122. If such person is deemed retired, any joint and several liability set out in s. 121.091(9)(d)2. is void, and the state board, the department, or the employing agency is not liable for gains on payroll contributions that have not been deposited to the person's account in the investment plan, pending resolution of the invalid distribution. The member or former member who has been deemed retired or who has been determined by the state board to

have taken an invalid distribution may appeal the agency decision through the complaint process as provided under s. 121.4501(9)(g)3. As used in this subparagraph, the term "invalid distribution" means any distribution from an account in the investment plan which is taken in violation of this section, s. 121.091(9), or s. 121.4501.

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 JMC	Havlicak RH

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.[1] Florida has adopted the Uniform Commercial Code (UCC), which provides an implied warranty of merchantability for the sale of goods.[2] However, the UCC does not apply to the sale of real property, and furthermore, it does not apply to affixed buildings upon real property.[3]

Florida courts have created a common law implied warranty of fitness and merchantability for the purchase of real estate.[4] For the warranty to apply, there must be privity between the builder and the first purchaser.[5] 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.[6] For example, a window unit air conditioner is a fixture, while a central air system is realty.[7] In another case, a court decided that a seawall abutting a lot is not covered by the implied warranty.[8]

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.[9] 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.[10] 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."[11]

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

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[1] *See, e.g.*, s. 672.301, F.S., *et. seq, the Florida Uniform Commercial Code regarding general obligation and construction of contract.*
[2] Section 672.314, F.S.
[3] 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. . ."
[4] *Gable v. Silver*, 258 So.2d 11 (Fla. 4th DCA 1972).
[5] *Strathmore Riverside Villas Condominium Ass'n, Inc. v. Paver Development Corp.*, 369 So.2d 971 (Fla. 2d DCA 1979).
[6] *Id.* at 14.
[7] *Id.*
[8] *Conklin v. Hurley*, 428 So.2d 654 (Fla. 1983).
[9] *Port Sewall Harbor & Tennis Club Owners Ass'n v. First Fed. S. & L. Ass'n.*, 463 So.2d 530, 531 (Fla. 4th DCA 1985).
[10] *Lakeview Reserve Homeowners et. al. v. Maronda Homes, Inc., et. al.*, 48 So.3d 902, 908 (Fla. 5th DCA 2010).
[11] *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.[12]

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.[13] To be vested, a right must be more than a mere expectation based on an anticipation of the continuance of an existing law.[14] It must be an immediate, fixed right of present or future enjoyment.[15]

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.[16]

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.[17] 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.[18] 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."[19] 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.[20]

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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[12] *Metropolitan Dade County v. Chase Federal Housing Corp.*, 737 So.2d 494, 499 (Fla. 1999).
[13] *Id.* at 503.
[14] *R.A.M. of South Florida, Inc. v. WCI Communities, Inc.*, 869 So.2d 1210, 1218 (Fla. 2nd DCA 2004).
[15] *Florida Hosp. Waterman, Inc. v. Buster*, 948 So.2d 478, 490 (Fla. 2008).
[16] *R.A.M.* at 1216.
[17] *State Farm Mut. Auto. Ins. Co. v. Laforet*, 658 So.2d 55 (Fla. 1995).
[18] *Lowry v. Parole and Probation Com'n*, 473 So.2d 1248 (Fla. 1985).
[19] *Bryant v. School Bd. of Duval County, Fla.*, 399 So.2d 417 (Fla. 1st DCA 1981).
[20] *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.[21]

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.

[21] *American Optical Corp. v. Spiewak*, 73 So.3d 120, 126 (Fla. 2011).

A bill to be entitled

An act relating to residential construction warranties; creating s. 553.835, F.S.; providing legislative findings; providing legislative intent to affirm the limitations to the doctrine or theory of implied warranty of fitness and merchantability or habitability associated with the construction and sale of a new home; providing a definition; prohibiting a cause of action in law or equity based upon the doctrine or theory of implied warranty of fitness and merchantability or habitability for damages to offsite improvements; providing that the existing rights of purchasers of homes or homeowners' associations to pursue certain causes of action are not altered or limited; providing for applicability of the act; providing for severability; providing an effective date.

WHEREAS, the Legislature recognizes and agrees with the limitations on the applicability of the doctrine or theory of implied warranty of fitness and merchantability or habitability for a new home as established in the seminal cases of *Gable v. Silver,* 258 So.2d 11 (Fla. 4th DCA 1972) adopted and cert. dism, 264 So.2d 418 (Fla. 1972); *Conklin v. Hurley,* 428 So.2d 654 (Fla. 1983); and *Port Sewall Harbor & Tennis Club Owners Ass'n v. First Fed. S. & L. Ass'n.,* 463 So.2d 530 (Fla. 4th DCA 1985), and does not wish to expand any prospective rights, responsibilities, or liabilities resulting from these decisions,

and

WHEREAS, the recent decision by the Fifth District Court of Appeal rendered in October of 2010, in *Lakeview Reserve Homeowners et. al. v. Maronda Homes, Inc., et. al.,* 48 So.3d 902 (Fla. 5th DCA, 2010), expands the doctrine or theory of implied warranty of fitness and merchantability or habitability for a new home to the construction of roads, drainage systems, retention ponds, and underground pipes, which the court described as essential services, supporting a new home, and

WHEREAS, the Legislature finds, as a matter of public policy, that the *Maronda* case goes beyond the fundamental protections that are necessary for a purchaser of a new home and that form the basis for imposing an implied warranty of fitness and merchantability or habitability for a new home and creates uncertainty in the state's fragile real estate and construction industry, and

WHEREAS, it is the intent of the Legislature to reject the decision by the Fifth District Court of Appeal in the *Maronda* case insofar as it expands the doctrine or theory of implied warranty and fitness and merchantability or habitability for a new home to include essential services as defined by the court, NOW THEREFORE,

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

Section 1. Section 553.835, Florida Statutes, is created to read:

553.835 Implied warranties.—

(1) The Legislature finds that the courts have reached different conclusions concerning the scope and extent of the common law doctrine or theory of implied warranty of fitness and merchantability or habitability for improvements immediately supporting the structure of a new home, which creates uncertainty in the state's fragile real estate and construction industry.

(2) It is the intent of the Legislature to affirm the limitations to the doctrine or theory of implied warranty of fitness and merchantability or habitability associated with the construction and sale of a new home.

(3) As used in this section, the term "offsite improvement" means:

(a) 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, excluding such improvements that are shared by and part of the overall structure of two or more separately owned homes that are adjoined or attached whereby such improvements affect the fitness and merchantability or habitability of one or more of the other adjoining structures; and

(b) 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 fitness and merchantability or habitability of the home itself.

(4) There is no cause of action in law or equity available to a purchaser of a home or to a homeowners' association based

upon the doctrine or theory of implied warranty of fitness and merchantability or habitability for damages to offsite improvements. However, this section does not alter or limit the existing rights of purchasers of homes or homeowners' associations to pursue any other cause of action arising from defects in offsite improvements based upon contract, tort, or statute, including, but not limited to, ss. 718.203 and 719.203.

Section 2. If any provision of the act or its application to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of the act which can be given effect without the invalid provision or application, and to this end the provisions of this act are severable.

Section 3. This act shall take effect July 1, 2012, and applies to all cases accruing before, pending on, or filed after 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[1] and is committed when a person willfully, maliciously, and repeatedly follows, harasses, or cyberstalks another person.[2]

Section 784.048, F.S., establishes four aggravated stalking offenses, each of which is a third degree felony:[3]

- 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.[4]
- "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."[5]
- "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."[6]
- "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.[7]

In 1995, the constitutionality of Florida's stalking statute was upheld by the Florida Supreme Court against an overbreath and vagueness challenge.[8]

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

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[1] Punishable by up to one year in jail and a fine of up to $1,000. Sections 775.082 and 775.083, F.S.
[2] Section 784.048(2), F.S.
[3] Punishable by up to 5 years imprisonment and a fine of up to $5,000. Sections 775.082 and 775.083, F.S.
[4] Section 784.048(1)(a), F.S.
[5] Section 784.048(1)(b), F.S.
[6] Section 784.048(1)(c), F.S.
[7] Section 784.048(1)(d), F.S.
[8] *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...[9] 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[10] 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.[11] 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.[12] The court must set a hearing at the earliest possible time after a petition is filed.[13] 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.[14]

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[15] under s. 741.31, F.S.[16] Either party may move the court to modify or dissolve an injunction at any time.[17]

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[9] 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."

[10] 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."

[11] Section 741.30(1), F.S.

[12] Section 741.30(3), F.S.

[13] Section 741.30(4), F.S.

[14] *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.

[15] Punishable by up to 1 year imprisonment or a fine of up to $1,000.

[16] Section 741.30(9), F.S.

[17] Section 741.30(10), F.S.

Section 784.046, F.S., governs the issuance of injunctions for protection against repeat violence,[18] dating violence,[19] and sexual violence.[20] 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.[21]
- 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.[22]
- 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.[23]

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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[18] 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."

[19] 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.

[20] 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.

[21] Section 741.30(3)(b), F.S.

[22] *See* s. 784.046(1)(a) and (d), F.S., for the definitions of "violence" and "dating violence," respectively.

[23] *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[24] 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[25] 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.

[24] Punishable by up to one year in jail and a fine of up to $1,000. Sections 775.082 and 775.083, F.S.
[25] 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.

A bill to be entitled

An act relating to stalking and aggravated stalking; amending s. 784.048, F.S.; redefining the terms "course of conduct" and "credible threat" and defining the term "immediate family"; providing that a person who makes a threat which places another person in reasonable fear for his or her safety or the safety of his or her immediate family commits the offense of aggravated stalking under certain circumstances; requiring that the sentencing court consider issuing an injunction that restrains a defendant from any contact with the victim for up to 10 years; providing legislative intent regarding the length of any such restraining order; creating s. 784.0485, F.S.; creating a civil cause of action for an injunction for protection against stalking or cyberstalking; providing that the victim of stalking or cyberstalking has standing in the circuit court to file a sworn petition for an injunction for protection against stalking or cyberstalking; prohibiting a court from issuing mutual orders of protection, but authorizing the court to issue a separate injunction for protection against stalking or cyberstalking if each party has complied with the provisions of law; providing for venue of the cause of action; prohibiting the clerk of the court from assessing a filing fee; providing an exception; providing that a petitioner is not required to post a bond; requiring

the clerks of court to assist petitioners in filing petitions with the court; requiring the clerk of the court in each county to make available informational brochures; providing a sample petition for an injunction for protection against stalking or cyberstalking; authorizing the court to grant a temporary injunction ex parte, pending a full hearing, under certain circumstances; authorizing the court to grant such relief as the court deems necessary and proper; providing procedures for an ex parte injunction hearing; setting forth the relief the court may grant if it finds that the petitioner is in imminent danger of becoming a victim of stalking or cyberstalking; setting forth the criteria the court must consider at the hearing; requiring the court to allow an advocate from a state attorney's office, law enforcement agency, or certified domestic violence center to be present with the petitioner or respondent during any court proceeding; requiring the clerk of the court to furnish a copy of the petition, notice of hearing, and temporary injunction, if any, to the sheriff or a law enforcement agency of the county where the respondent resides or can be found, who shall serve it upon the respondent as soon thereafter as possible on any day of the week and at any time of the day or night; authorizing the court to order a law enforcement officer to accompany the petitioner; authorizing the court to enforce a violation of an

injunction for protection against stalking or cyberstalking through a civil or criminal contempt proceeding; authorizing a state attorney to use criminal procedures for a violation of an injunction for protection; creating s. 784.0487, F.S.; providing procedures to follow when the respondent has violated the injunction for protection; providing legislative intent; providing criminal penalties; providing that a court may award a person who suffers an injury or loss as a result of a violation of an injunction for protection against stalking or cyberstalking economic damages for that injury or loss, including costs and attorney fees for enforcement of the injunction; providing an effective date.

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

Section 1. Section 784.048, Florida Statutes, is amended to read:

784.048 Stalking; definitions; penalties.—

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

(a) "Harass" means to engage in a course of conduct directed at a specific person which ~~that~~ causes substantial emotional distress to that ~~in such~~ person and serves no legitimate purpose.

(b) "Course of conduct" means a pattern of conduct composed of a series of acts over a period of time, however short, which evidence ~~evidencing~~ a continuity of purpose. The

term does not include constitutionally protected activity such as ~~is not included within the meaning of "course of conduct." Such constitutionally protected activity includes~~ picketing or other organized protests.

(c) "Credible threat" means 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 reasonable fear for his or her safety or the safety of his or her immediate family or household member, as defined in s. 741.28, and which is made with the apparent ability to carry out the threat to cause such harm. It is not necessary to prove that the person making the threat had the intent to actually carry out the threat. The present incarceration of the person making the threat is not a bar to prosecution under this section ~~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.~~

(d) "Cyberstalk" means to engage in a course of conduct to communicate, or to cause to be communicated, words, images, or language by or through the use of electronic mail or electronic communication, directed at a specific person, causing substantial emotional distress to that person and serving no legitimate purpose.

(e) "Immediate family" means a person's spouse, parent, child, grandparent, or sibling.

(2) A ~~Any~~ person who willfully, maliciously, and

repeatedly follows, harasses, or cyberstalks another person commits the offense of stalking, a misdemeanor of the first degree, punishable as provided in s. 775.082 or s. 775.083.

(3) A ~~Any~~ person who willfully, maliciously, and repeatedly follows, harasses, or cyberstalks another person~~,~~ and makes a credible threat to that person ~~with the intent to place that person in reasonable fear of death or bodily injury of the person, or the person's child, sibling, spouse, parent, or dependent,~~ commits the offense of aggravated stalking, a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

(4) A ~~Any~~ person who, after an injunction for protection against repeat violence, sexual violence, or dating violence pursuant to s. 784.046, or an injunction for protection against domestic violence pursuant to s. 741.30, or after any other court-imposed prohibition of conduct toward the subject person or that person's property, knowingly, willfully, maliciously, and repeatedly follows, harasses, or cyberstalks another person commits the offense of aggravated stalking, a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

(5) A ~~Any~~ person who willfully, maliciously, and repeatedly follows, harasses, or cyberstalks a child ~~minor~~ under 16 years of age commits the offense of aggravated stalking, a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

(6) A ~~Any~~ law enforcement officer may arrest, without a warrant, any person that he or she has probable cause to believe

has violated ~~the provisions of~~ this section.

(7) A ~~Any~~ person who, after having been sentenced for a violation of s. 794.011, s. 800.04, or s. 847.0135(5) and prohibited from contacting the victim of the offense under s. 921.244, willfully, maliciously, and repeatedly follows, harasses, or cyberstalks the victim commits the offense of aggravated stalking, a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

(8) The punishment imposed under this section shall run consecutive to any former sentence imposed for a conviction for any offense under s. 794.011, s. 800.04, or s. 847.0135(5).

(9)(a) The sentencing court shall consider, as a part of any sentence, issuing an injunction restraining the defendant from any contact with the victim, which may be valid for up to 10 years, as determined by the court. It is the intent of the Legislature that the length of any such restraining order be based upon the seriousness of the facts before the court, the probability of future violations by the perpetrator, and the safety of the victim and his or her immediate family.

(b) The injunction may be issued by the court even if the defendant is sentenced to a state prison or a county jail or even if the imposition of the sentence is suspended and the defendant is placed on probation.

Section 2. Section 784.0485, Florida Statutes, is created to read:

784.0485 Stalking or cyberstalking; injunction; powers and duties of court and clerk; petition; notice and hearing; temporary injunction; issuance of injunction; statewide

verification system; enforcement.—

(1) There is created a cause of action for an injunction for protection against stalking or cyberstalking.

(a) A person who is the victim of stalking or cyberstalking has standing in the circuit court to file a sworn petition for an injunction for protection against stalking or cyberstalking.

(b) The cause of action for an injunction for protection may be sought regardless of whether any other cause of action is currently pending between the parties. However, the pendency of any such cause of action shall be alleged in the petition.

(c) The cause of action for an injunction may be sought by any affected person.

(d) The cause of action for an injunction does not require either party to be represented by an attorney.

(e) The court may not issue mutual orders of protection; however, the court is not precluded from issuing separate injunctions for protection against stalking or cyberstalking if each party has complied with this section. Compliance with this section may not be waived.

(f) Notwithstanding chapter 47, a petition for an injunction for protection against stalking or cyberstalking may be filed in the circuit where the petitioner currently or temporarily resides, where the respondent resides, or where the stalking or cyberstalking occurred. There is no minimum requirement of residency to petition for an injunction for protection.

(2)(a) Notwithstanding any other law, the clerk of court

may not assess a filing fee to file a petition for protection against stalking or cyberstalking. However, subject to legislative appropriation, the clerk of the circuit court may, on a quarterly basis, submit to the Office of the State Courts Administrator a certified request for reimbursement for petitions for protection against stalking or cyberstalking issued by the court, at the rate of $40 per petition. The request for reimbursement shall be submitted in the form and manner prescribed by the Office of the State Courts Administrator. From this reimbursement, the clerk shall pay any law enforcement agency serving the injunction the fee requested by the law enforcement agency; however, this fee may not exceed $20.

(b) A bond is not required by the court for the entry of an injunction.

(c)1. The clerk of the court shall assist petitioners in seeking both injunctions for protection against stalking and enforcement of a violation thereof as specified in this section.

2. All offices of the clerk of the court shall provide simplified petition forms for the injunction and any modifications to and the enforcement thereof, including instructions for completion.

3. The clerk of the court shall ensure the petitioner's privacy to the extent practicable while completing the forms for an injunction for protection against stalking or cyberstalking.

4. The clerk of the court shall provide a petitioner with a minimum of two certified copies of the order of injunction, one of which is serviceable and will inform the petitioner of

the process for service and enforcement.

5. The clerk of the court and appropriate staff in each county shall receive training in the effective assistance of petitioners as provided or approved by the Florida Association of Court Clerks.

6. The clerk of the court in each county shall make available informational brochures on stalking when such a brochure is provided by the local certified domestic violence center.

7. The clerk of the court in each county shall distribute a statewide uniform informational brochure to petitioners at the time of filing for an injunction for protection against stalking or cyberstalking when such brochures become available. The brochure must include information about the effect of giving the court false information.

(3)(a) The sworn petition shall allege the existence of such stalking or cyberstalking and shall include the specific facts and circumstances for which relief is sought.

(b) The sworn petition shall be in substantially the following form:

PETITION FOR INJUNCTION FOR PROTECTION AGAINST STALKING

Before me, the undersigned authority, personally appeared Petitioner....(Name)...., who has been sworn and says that the following statements are true:

1. Petitioner resides at:....(address)....

(Petitioner may furnish the address to the court in a separate confidential filing if, for safety reasons, the petitioner requires the location of the current residence to be confidential.)

2. Respondent resides at:....(last known address)....

3. Respondent's last known place of employment:....(name of business and address)....

4. Physical description of respondent:....

5. Race....

6. Sex....

7. Date of birth....

8. Height....

9. Weight....

10. Eye color....

11. Hair color....

12. Distinguishing marks or scars....

13. Aliases of respondent:....

(c) The petitioner shall describe any other cause of action currently pending between the petitioner and respondent. The petitioner shall also describe any previous attempt by the petitioner to obtain an injunction for protection against stalking or cyberstalking in this or any other circuit, and the result of that attempt. (Case numbers should be included, if available.)

(d) The petition must provide space for the petitioner to specifically allege that he or she is a victim of stalking or cyberstalking because respondent has:

(Mark all sections that apply and describe in the spaces below the incidents of stalking or cyberstalking specifying when and where they occurred, including, but not limited to, locations such as a home, school, or place of employment.)

.... Committed or threatened to commit stalking.

.... Previously threatened, harassed, stalked, cyberstalked, or physically abused the petitioner.

.... Threatened to harm the petitioner or family members or individuals closely associated with the petitioner.

.... Intentionally injured or killed a family pet.

.... Used, or has threatened to use, against the petitioner any weapons such as guns or knives.

.... A criminal history involving violence or the threat of violence (if known).

.... Another order of protection issued against him or her previously or from another jurisdiction, if known.

.... Destroyed personal property, including, but not limited to, telephones or other communication equipment, clothing, or other items belonging to the petitioner.

(e) The petitioner seeks an injunction: (Mark appropriate section or sections.)

.... Immediately restraining the respondent from committing any acts of stalking or cyberstalking.

.... Restraining the respondent from committing any acts of stalking or cyberstalking.

.... Providing any terms the court deems necessary for the

protection of a victim of stalking or cyberstalking, including any injunctions or directives to law enforcement agencies.

(f) Every petition for an injunction against stalking or cyberstalking must contain, directly above the signature line, a statement in all capital letters and bold type not smaller than the surrounding text, as follows:

I HAVE READ EVERY STATEMENT MADE IN THIS PETITION AND EACH STATEMENT IS TRUE AND CORRECT. I UNDERSTAND THAT THE STATEMENTS MADE IN THIS PETITION ARE BEING MADE UNDER PENALTY OF PERJURY, PUNISHABLE AS PROVIDED IN SECTION 837.02, FLORIDA STATUTES.

....(initials)....

(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.

(5)(a) 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, and may grant such relief as the court deems proper, including an injunction restraining the respondent from committing any act of stalking or cyberstalking.

(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 or cyberstalking, 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.

(c) Any such ex parte temporary injunction is effective for a fixed period not to exceed 15 days. A full hearing, as provided in this section, shall be set for a date no later than the date when the temporary injunction ceases to be effective. The court may grant a continuance of the hearing before or during a hearing for good cause shown by any party, which shall include a continuance to obtain service of process. An injunction shall be extended if necessary to remain in full force and effect during any period of continuance.

(6)(a) Upon notice and hearing, when it appears to the court that the petitioner is the victim of stalking or cyberstalking, the court may grant such relief as the court deems proper, including an injunction:

1. Restraining the respondent from committing any act of stalking or cyberstalking.

2. Ordering the respondent to participate in treatment, intervention, or counseling services to be paid for by the

respondent.

3. Referring a petitioner to a certified domestic violence center. The court must provide the petitioner with a list of certified domestic violence centers in the circuit which the petitioner may contact.

4. Ordering such other relief as the court deems necessary for the protection of a victim of stalking or cyberstalking, including injunctions or directives to law enforcement agencies, as provided in this section.

(b) When determining whether a petitioner has reasonable cause to believe that there is a credible threat that he or she is in imminent danger of becoming a victim of stalking or cyberstalking, the court shall consider and evaluate all relevant factors alleged in the petition, including, but not limited to:

1. The history between the petitioner and the respondent, including threats, harassment, stalking or cyberstalking, and physical abuse.

2. Whether the respondent has attempted to harm the petitioner or family members or individuals closely associated with the petitioner.

3. Whether the respondent has intentionally injured or killed a family pet.

4. Whether the respondent has used, or has threatened to use, against the petitioner any weapons such as guns or knives.

5. Whether the respondent has a criminal history involving violence or the threat of violence.

6. The existence of a verifiable order of protection

issued previously or from another jurisdiction.

7. Whether the respondent has destroyed personal property, including, but not limited to, telephones or other communications equipment, clothing, or other items belonging to the petitioner.

In making its determination under this paragraph, the court is not limited to those factors enumerated in subparagraphs 1.-7.

(c) The terms of an injunction restraining the respondent under subparagraph (a)1. or ordering other relief for the protection of the victim under subparagraph (a)4. shall remain in effect until modified or dissolved. Either party may move at any time to modify or dissolve the injunction. Specific allegations are not required. Such relief may be granted in addition to other civil or criminal remedies.

(d) A temporary or final judgment on injunction for protection against stalking or cyberstalking entered pursuant to this section shall, on its face, indicate that:

1. The injunction is valid and enforceable in all counties of this state.

2. Law enforcement officers may use their arrest powers pursuant to s. 901.15(6) to enforce the terms of the injunction.

3. The court has jurisdiction over the parties and matter under the laws of this state and that reasonable notice and opportunity to be heard was given to the person against whom the order is sought sufficient to protect that person's right to due process.

4. The date that the respondent was served with the

temporary or final order, if obtainable.

(e) The fact that a separate order of protection is granted to each opposing party is not legally sufficient to deny any remedy to either party or to prove that the parties are equally at fault or equally endangered.

(f) A final judgment on an injunction for protection against stalking or cyberstalking entered pursuant to this section may, on its face, provide that it is a violation of s. 790.233 and a misdemeanor of the first degree for the respondent to have in his or her care, custody, possession, or control any firearm or ammunition.

(g) All proceedings under this subsection shall be recorded. Recording may be by electronic means as provided by the Rules of Judicial Administration.

(7) The court shall allow an advocate from a state attorney's office, a law enforcement agency, or a certified domestic violence center who is registered under s. 39.905 to be present with the petitioner or respondent during any court proceedings or hearings related to the injunction for protection if the petitioner or respondent has made such a request and the advocate is able to be present.

(8)(a)1. The clerk of the court shall furnish a copy of the petition, notice of hearing, and temporary injunction, if any, to the sheriff or a law enforcement agency of the county where the respondent resides or can be found, who shall serve it upon the respondent as soon thereafter as possible on any day of the week and at any time of the day or night. When requested by the sheriff, the clerk of the court may transmit a facsimile

copy of an injunction that has been certified by the clerk of the court, and this facsimile copy may be served in the same manner as a certified copy. Upon receiving a facsimile copy, the sheriff must verify receipt with the sender before attempting to serve it on the respondent. In addition, if the sheriff is in possession of an injunction for protection which has been certified by the clerk of the court, the sheriff may transmit a facsimile copy of that injunction to a law enforcement officer who shall serve it in the same manner as a certified copy. The clerk of the court shall furnish to the sheriff such information concerning the respondent's physical description and location as is required by the department to comply with the verification procedures set forth in this section. Notwithstanding any other law, the chief judge of each circuit, in consultation with the appropriate sheriff, may authorize a law enforcement agency within the jurisdiction to effect service. A law enforcement agency serving injunctions pursuant to this section shall use service and verification procedures consistent with those of the sheriff.

2. If an injunction is issued and the petitioner requests the assistance of a law enforcement agency, the court may order that an officer from the appropriate law enforcement agency accompany the petitioner to assist in the execution or service of the injunction. A law enforcement officer shall accept a copy of an injunction for protection against stalking, certified by the clerk of the court, from the petitioner and immediately serve it upon a respondent who has been located but not yet served.

3. An order issued, changed, continued, extended, or vacated subsequent to the original service of documents enumerated under subparagraph 1. shall be certified by the clerk of the court and delivered to the parties at the time of the entry of the order. The parties may acknowledge receipt of such order in writing on the face of the original order. If a party fails or refuses to acknowledge the receipt of a certified copy of an order, the clerk shall note on the original order that service was effected. If delivery at the hearing is not possible, the clerk shall mail certified copies of the order to the parties at the last known address of each party. Service by mail is complete upon mailing. When an order is served pursuant to this subsection, the clerk shall prepare a written certification to be placed in the court file specifying the time, date, and method of service and shall notify the sheriff.

4. If the respondent has been served previously with a temporary injunction and has failed to appear at the initial hearing on the temporary injunction, any subsequent petition for injunction seeking an extension of time may be served on the respondent by the clerk of the court by certified mail in lieu of personal service by a law enforcement officer.

(b)1. Within 24 hours after the court issues an injunction for protection against stalking or cyberstalking or changes, continues, extends, or vacates an injunction for protection against stalking or cyberstalking, the clerk of the court must forward a certified copy of the injunction for service to the sheriff having jurisdiction over the residence of the petitioner. The injunction must be served in accordance with

this subsection.

2. Within 24 hours after service of process of an injunction for protection against stalking or cyberstalking upon a respondent, the law enforcement officer must forward the written proof of service of process to the sheriff having jurisdiction over the residence of the petitioner.

3. Within 24 hours after the sheriff receives a certified copy of the injunction for protection against stalking or cyberstalking, the sheriff must make information relating to the injunction available to other law enforcement agencies by electronically transmitting such information to the Department of Law Enforcement.

4. Within 24 hours after the sheriff or other law enforcement officer has made service upon the respondent and the sheriff has been so notified, the sheriff must make information relating to the service available to other law enforcement agencies by electronically transmitting such information to the Department of Law Enforcement.

5. Within 24 hours after an injunction for protection against stalking or cyberstalking is vacated, terminated, or otherwise rendered no longer effective by ruling of the court, the clerk of the court must notify the sheriff receiving original notification of the injunction as provided in subparagraph 2. That agency shall, within 24 hours after receiving such notification from the clerk of the court, notify the Department of Law Enforcement of such action of the court.

(9)(a) The court may enforce a violation of an injunction for protection against stalking or cyberstalking through a civil

or criminal contempt proceeding, or the state attorney may prosecute it as a criminal violation under s. 784.0487. The court may enforce the respondent's compliance with the injunction through any appropriate civil and criminal remedies, including, but not limited to, a monetary assessment or a fine. The clerk of the court shall collect and receive such assessments or fines. On a monthly basis, the clerk shall transfer the moneys collected pursuant to this paragraph to the State Treasury for deposit into the Domestic Violence Trust Fund.

(b) If the respondent is arrested by a law enforcement officer under s. 901.15(6) or for a violation of s. 784.0487, the respondent shall be held in custody until brought before the court as expeditiously as possible for the purpose of enforcing the injunction and for admittance to bail in accordance with chapter 903 and the applicable rules of criminal procedure, pending a hearing.

(10) The petitioner or the respondent may move the court to modify or dissolve an injunction at any time.

Section 3. Section 784.0487, Florida Statutes, is created to read:

784.0487 Violation of an injunction for protection against stalking or cyberstalking.—

(1) If the injunction for protection against stalking or cyberstalking has been violated and the respondent has not been arrested, the petitioner may contact the clerk of the circuit court of the county in which the violation is alleged to have occurred. The clerk shall assist the petitioner in preparing an

affidavit in support of reporting the violation or directing the petitioner to the office operated by the court that has been designated by the chief judge of that circuit as the central intake point for violations of injunctions for protection where the petitioner can receive assistance in the preparation of the affidavit in support of the violation.

(2) The affidavit shall be immediately forwarded by the office assisting the petitioner to the state attorney of that circuit and to such judge as the chief judge determines to be the recipient of affidavits of violations of an injunction. If the affidavit alleges that a crime has been committed, the office assisting the petitioner shall also forward a copy of the petitioner's affidavit to the appropriate law enforcement agency for investigation. No later than 20 days after receiving the initial report, the local law enforcement agency shall complete its investigation and forward a report to the state attorney. The policy adopted by the state attorney in each circuit under s. 741.2901(2) shall include a policy regarding intake of alleged violations of injunctions for protection against stalking or cyberstalking under this section. The intake shall be supervised by a state attorney who has been designated and assigned to handle stalking or cyberstalking cases. The state attorney shall determine within 30 working days whether his or her office will file criminal charges or prepare a motion for an order to show cause as to why the respondent should not be held in criminal contempt, or prepare both as alternative findings, or file notice that the case remains under investigation or is pending subject to some other action.

(3) If the court has knowledge that the petitioner or another person is in immediate danger if the court does not act before the decision of the state attorney to proceed, the court shall immediately issue an order of appointment of the state attorney to file a motion for an order to show cause as to why the respondent should not be held in contempt. If the court does not issue an order of appointment of the state attorney, it shall immediately notify the state attorney that the court is proceeding to enforce the violation through criminal contempt.

(4) A person who willfully violates an injunction for protection against stalking or cyberstalking issued pursuant to s. 784.0485, or a foreign protection order accorded full faith and credit pursuant to s. 741.315, by:

(a) Going to, or being within 500 feet of, the petitioner's residence, school, place of employment, or a specified place frequented regularly by the petitioner and any named family or household member;

(b) Committing an act of stalking or cyberstalking against the petitioner;

(c) Committing any other violation of the injunction through an intentional unlawful threat, word, or act to do violence to the petitioner;

(d) Telephoning, contacting, or otherwise communicating with the petitioner, directly or indirectly, unless the injunction specifically allows indirect contact through a third party;

(e) Knowingly and intentionally coming within 100 feet of the petitioner's motor vehicle, whether or not that vehicle is

occupied;

(f) Defacing or destroying the petitioner's personal property, including the petitioner's motor vehicle; or

(g) Refusing to surrender firearms or ammunition if ordered to do so by the court,

commits a misdemeanor of the first degree, punishable as provided in s. 775.082 or s. 775.083.

(5) 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 for that injury or loss by the court issuing the injunction. Damages includes costs and attorney fees for enforcement of the injunction.

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.;[1]
- 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.[2]

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.,[3] or any drugs as described in ch. 499, F.S.,[4] 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.[5]

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[6] 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.[7]

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[1] 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.
[2] 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.
[3] 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."
[4] 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."
[5] 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.
[6] 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.
[7] 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.[8] At least 3 days' notice in writing must be given to the defendant of the time and place of application for the temporary injunction.[9]

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.[10]

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.[11]

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.[12]

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;[13]
- 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.;[14] 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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[8] *Id.*
[9] *Id.*
[10] 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.
[11] Section 60.05(4), F.S.
[12] Section 893.138(4), F.S.
[13] "Controlled substance" is defined in s. 893.138(10), F.S. as includeing 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.
[14] 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.[15] A hearing must then be held, where the board may consider any evidence[16] 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.[17]

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.[18]

An order expires after 1 year, or earlier if stated in the order.[19] The order may be enforced pursuant to the procedures contained in s. 120.69, F.S.[20,21]

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).[22,23]

Nothing contained within s. 893.138, F.S., prohibits a county or municipality from proceeding against a public nuisance by any other means.[24]

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;[25]
- 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;[26]
- 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;

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[15] Section 893.138(4), F.S.
[16] Section 893.138(4), F.S., provides that evidence of the general reputation of the place or premises is admissible at the hearing.
[17] *Id.*
[18] Section 893.138(5), F.S.
[19] Section 893.138(6), F.S.
[20] 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.
[21] Section 893.138(7), F.S.
[22] Section 893.138(8), F.S.
[23] 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.
[24] Section 893.138(11), F.S.
[25] Section 893.138(11), F.S., provides that the total fines imposed pursuant to the authority of this section shall not exceed $15,000.
[26] *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.[27]

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).[28]

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.

[27] 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.
[28] 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.

A bill to be entitled

An act relating to local administrative action to abate public nuisances and criminal gang activity; amending s. 893.138, F.S.; authorizing a local administrative board to declare a place to be a public nuisance if the place is 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; authorizing an administrative board to hear complaints regarding any pain-management clinic declared to be a public nuisance; providing that an order entered against a person for a public nuisance expires after 1 year or at an earlier time if so stated in the order unless the person has violated the order during the term of the order; requiring that the board conduct a hearing to determine whether the person violated the administrative order; authorizing an administrative board to seek temporary and permanent injunctive relief against any pain-management clinic declared to be a public nuisance; authorizing the board to extend the term of the order by up to 1 additional year and to impose a penalty if the board finds that the person violated the order; authorizing a county or municipal ordinance to include fines for days of public nuisance activities outside the 6-month period in which the minimum number of activities are shown to have occurred; authorizing a

local ordinance to provide for continuing jurisdiction over a place or premises that are subject to an extension of the administrative order; providing an effective date.

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

Section 1. Section 893.138, Florida Statutes, is amended to read:

893.138 Local administrative action to abate drug-related, prostitution-related, or stolen-property-related public nuisances and criminal gang activity.—

(1) It is the intent of this section to promote, protect, and improve the health, safety, and welfare of the citizens of the counties and municipalities of this state by authorizing the creation of administrative boards with authority to impose administrative fines and other noncriminal penalties in order to provide an equitable, expeditious, effective, and inexpensive method of enforcing ordinances in counties and municipalities under circumstances when a pending or repeated violation continues to exist.

(2) Any place or premises that has been used:

(a) On more than two occasions within a 6-month period, as the site of a violation of s. 796.07;

(b) On more than two occasions within a 6-month period, as the site of the unlawful sale, delivery, manufacture, or cultivation of a ~~any~~ controlled substance, or as the site of the storage of a controlled substance with intent to unlawfully sell

or deliver the controlled substance off the premises;

(c) 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 a ~~any~~ controlled substance;

(d) By a criminal gang for the purpose of conducting criminal gang-related ~~gang~~ activity as defined in ~~by~~ s. 874.03; or

(e) On more than two occasions within a 6-month period, as the site of a violation of s. 812.019 relating to dealing in stolen property,

may be declared to be a public nuisance, and such nuisance may be abated pursuant to ~~the procedures provided in~~ this section.

(3) Any pain-management clinic, as described in s. 458.3265 or s. 459.0137, which has been used on more than two occasions within a 6-month period as the site of a violation of:

(a) Section 784.011, s. 784.021, s. 784.03, or s. 784.045, relating to assault and battery;

(b) Section 810.02, relating to burglary;

(c) Section 812.014, relating to dealing in theft;

(d) Section 812.131, relating to robbery by sudden snatching; or

(e) Section 893.13, relating to the unlawful distribution of controlled substances,

may be declared to be a public nuisance, and such nuisance may

be abated pursuant to the procedures provided in this section.

(4) Any county or municipality may, by ordinance, create an administrative board to hear complaints regarding the nuisances described in subsections ~~subsection~~ (2) and (3). Any employee, officer, or resident of the county or municipality may bring a complaint before the board after giving not less than 3 days' written notice of such complaint to the owner of the place or premises at his or her last known address. After a hearing in which the board may consider any evidence, including evidence of the general reputation of the place or premises, and at which the owner of the premises shall have an opportunity to present evidence in his or her defense, the board may declare the place or premises to be a public nuisance as described in subsection (2) or subsection (3).

(5) 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 such procedure as may be appropriate under the circumstances to abate any such nuisance or it may enter an order immediately prohibiting:

(a) The maintaining of the nuisance;

(b) The operating or maintaining of the place or premises, including the closure of the place or premises or any part thereof; or

(c) The conduct, operation, or maintenance of any business or activity on the premises which is conducive to such nuisance.

(6) An order entered under subsection (5) expires ~~(4) shall expire~~ after 1 year or at such earlier time as is stated in the order unless the owner of a place or premises that has

been declared to be a public nuisance has violated the order during the term of the order. Upon receiving a complaint of recurring public nuisance activity or noncompliance and after providing at least 3 days' written notice to the owner of such place or premises, the board shall conduct a hearing to determine whether the owner violated the administrative order entered under subsection (5). If the board finds that the owner of such place or premises violated the order, the board may extend the term of the order by up to 1 additional year and may impose an additional penalty to the extent authorized by this section and by a supplemental county or municipal ordinance.

(7) An order entered under subsection (5) ~~(4)~~ may be enforced pursuant to the procedures contained in s. 120.69. This subsection does not subject a municipality that creates a board under this section, or the board so created, to any other provision of chapter 120.

(8) The board may bring a complaint under s. 60.05 seeking temporary and permanent injunctive relief against any nuisance described in subsection (2) or subsection (3).

(9) This section does not restrict the right of any person to proceed under s. 60.05 against any public nuisance.

(10) As used in this section, the term "controlled substance" includes any substance sold in lieu of a controlled substance in violation of s. 817.563 or any imitation controlled substance defined in s. 817.564.

(11) ~~The provisions of~~ This section may be supplemented by a county or municipal ordinance. The ordinance may include, but need ~~is~~ not be limited to, provisions that establish additional

penalties for public nuisances, including fines not to exceed $250 per day for each day that the public nuisance activities described in subsections (2) and (3) have occurred, including days outside the 6-month period in which the minimum number of public nuisance activities are shown to have occurred. The ordinance may also~~;~~ 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 have ~~has~~ been or are ~~is~~ declared to be a public nuisance, subject to an extension for up to 1 additional year as provided in subsection (6); establish penalties, including fines not to exceed $500 per day for recurring public nuisances; 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; 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 the property that is subject to a lien and the recovery of all costs, including reasonable attorney fees, associated with the recording of orders and foreclosure. A ~~No~~ lien created pursuant to ~~the provisions of~~ this section may not be foreclosed on real property that ~~which~~ is a homestead under s. 4, Art. X of the State Constitution. When ~~Where~~ a local government seeks to bring an administrative action, based on a stolen property nuisance, against a property owner operating an establishment where multiple tenants, on one site, conduct their own retail

business, the property owner is ~~shall~~ not ~~be~~ subject to a lien against his or her property or the prohibition of operation provision if the property owner evicts the business declared to be a nuisance within 90 days after notification by registered mail to the property owner of a second stolen property conviction of the tenant. The total fines imposed pursuant to ~~the authority of~~ this section may ~~shall~~ not exceed $15,000. ~~Nothing contained within~~ This section does not prohibit ~~prohibits~~ a county or municipality from proceeding against a public nuisance by any other means.

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	Havlicak

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.[1] 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.[2]

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.

[1] Rule 2.215(b)(4) of the Florida Rules of Judicial Administration.
[2] 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.

A bill to be entitled

An act relating to judges; repealing s. 38.13, F.S., relating to selection of judges ad litem in circuit or county court; providing an effective date.

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

Section 1. Section 38.13, Florida Statutes, is repealed.

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 RH

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,[1] s. 57.041, F.S., makes an award of costs mandatory.[2] 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.[3]

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.

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[1] *See Davis v. Davis*, 301 So.2d 154 (Fla. 3d DCA 1974).
[2] *See Hendry Tractor Company v. Fernandez*, 432 So.2d 1315, 1316 (Fla. 1983).
[3] *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.

A bill to be entitled

An act relating to declaratory judgments; repealing s. 86.081, F.S., relating to a grant of authority to the courts to award equitable costs in declaratory judgment proceedings; providing an effective date.

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

Section 1. Section 86.081, Florida Statutes, is repealed.

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 RH

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.

A bill to be entitled

An act relating to district courts of appeal; repealing s. 35.13, F.S., relating to requirements for a quorum and requiring a majority for a decision; providing an effective date.

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

Section 1. Section 35.13, Florida Statutes, is repealed.

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

PCB JDC 12-03

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

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.

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.[1] 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.[2] 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.[3] 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.[4] 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.[5]

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[1] 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.

[2] *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.

[3] ART. I, SEC. 6, U.S. CONST.

[4] *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) .

[5] *Eastland*, supra at 503.

The Clause has been interpreted to protect federal legislators "engaged in the sphere of legitimate legislative activity."[6] It expressly excludes arrest for all criminal offenses from its protection.[7] The protection it provides from arrest applies to civil cases which were still common in America at the time the Constitution was adopted.[8] 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.[9]

Specifically, members of Congress are protected from inquiry into legislative acts or the motivation for actual performance of legislative acts,"[10] from having to defend themselves against certain types of suits,[11] and "from the consequences of litigation.[12] They are also shielded by an evidentiary privilege protecting them from having their legislative acts used against them in court,[13] and a testimonial privilege protecting legislators and their staff from questioning regarding legislative acts.[14]

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."[15] 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."[16] 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.[17] 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.[18]

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.[19] The Supreme Court explained:

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[6] *Supreme Court of Virginia. v. Consumers Union of the U.S., Inc.*, 446 U.S. 719, 732 (1980).

[7] 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.

[8] *Gravel, supra* at 614.

[9] *Gravel, supra* at 614-15.

[10] *Brewster, supra* at 509.

[11] *Dombrowski v. Eastland*, 387 U.S. 82, 85 (1967).

[12] *Id.*

[13] *U.S. v. Helstoski,* 442 U.S. 477, 488-89 (1979)

[14] 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.

[15] *Eastland, supra* at 503; *Kilbourn*, supra at 204.

[16] *Eastland, supra* at 504; *Grave, supra* at, 625.

[17] *Doe v. McMillan*, 412 U.S. 306, 313 (1973).

[18] *Doe, supra* at 314-15, *citing Gravel* at 625.

[19] *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.[20]

Once it is determined that the action of the member was within the "legitimate legislative sphere, the Clause is an absolute bar to interference."[21] 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."[22]

The Clause extends its legislative immunity to staff or surrogates performing tasks which would be legislative acts if performed by the legislator directly.[23] The privilege, however, belongs entirely to the legislator and must be invoked by the legislator or the staff member on his or her behalf.[24]

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.[25]

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."[26] After discussing the historical origins and the "indispensible" necessity of protections embodied in the Speech or Debate Clause,[27] 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.[28]

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[20] *Eastland, supra* at 508-09.
[21] *Eastland, supra* at 503.
[22] *Id.*
[23] *Gravel, supra* at 616-17.
[24] *Gravel, supra*, at 622.
[25] *Brewster, supra.*
[26] *Id.* at 376.
[27] *Tenney v. Brandhove*, 341 U.S. 367, 372-73 (1951).
[28] *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).[29]

Under this federal level of protection, state and local legislators, including their surrogates, have immunity from civil liability for their legislative acts.[30] The Eleventh Circuit has described this immunity as being "parallel" with that provided to Congress under the Speech or Debate Clause.[31] 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."[32] 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.[33]

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.[34]

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.[35] Several federal district courts from the Eleventh Circuit, as well as, other circuits have recognized that legislative immunity includes testimonial and evidentiary privilege.[36]

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[29] *Bryant v. Jones*, 575 F.3d 1281, 1304 (11th Cir. 2009), *See also, Gravel, supra* at 618 (1972).
[30] *Lake Country Estates Inc, supra* at 405.
[31] *Bryant, supra* at 1303.
[32] *U.S. v. Gillock*, 445 U.S. 360, 373(1980)
[33] *Gillock, supra* at 373
[34] *Gillock, supra* at 370 citing Baker v. Carr, 369 U.S. 186, 210 (1962).
[35] *See, Eastland, supra; Tenney, supra; Lake County Estates, supra*; and *Dombrowski, supra.*
[36] *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.[37]

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*.[38] 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.[39]

The prior case was *Girardeau v. State.*[40] 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[41] 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.[42] 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

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[37] While Florida's Constitution of 1865 contained a Speech or Debate clause, the clause was omitted from the 1868, 1885, and the current Constitution.

[38] *City of Pompano Beach v. Swerdlow Lightspeed Management Company*, 942 So.2d 455 (4th DCA 2006).

[39] *City of Pompano Beach, supra* at 457.

[40] *Girardeau v. State*, 403 So.2d 513 (1st DCA, 1981)

[41] ART. III, SEC. 5, FLA. CONST.

[42] *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.[43] The state also noted that the United States Constitution contains no specific separation of powers clause, yet it's principles are firmly established.[44]

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.[45]

Notwithstanding the absence of reported opinions describing or admitting that the Florida Legislature inherently posses 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[46] 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.[47]

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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[43] *Id.* at 515 citing *Sinclair v. United States*, 279 U.S. 263 (1928) and *McGrain v. Daughtery*, 273 U.S. 135 (1926)..

[44] *Id.* at 515 citing *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

[45] *Id.* at 516-17.

[46] *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).

[47] *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."[48]

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.[49]

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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[48] *Daniels v. State Road Department*, 170 So.2d 846, 851 (Fla. 1964) *citing Simmons v. State*, 36 So.2d 207, 208 (3rd DCA 1948).
[49] *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).[50]

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,[51] (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.[52]

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,[53] 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."[54]

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[50] *Stern v. Marshall*, 131 S.Ct 2594 (2011).
[51] *Eastland, supra* at 503.
[52] *Spallone v. U.S.*, 493 U.S. 265 (1990).
[53] See *Gillock, supra*.
[54] *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.[55]

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.'"[56]

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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[55] *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.

[56] *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.[57]

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

N/A

[57] *Tenney, supra* at 372-74.

A bill to be entitled

An act relating to legislative immunity; creating s. 11.112, F.S., providing legislative findings concerning legislative privileges and immunities; providing that legislators and former legislators have an absolute privilege in any civil action or any 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; providing an absolute privilege for any legislative staff member or former legislative staff member to the same extent as a legislator's privilege; providing that the privilege specified in this section may only be waived by a legislative staff member or former legislative staff member with a written waiver from the appropriate legislator or former legislator; providing that in the case of a legislator or former legislator who is deceased the privilege remains in perpetuity in the same status as it was on the date of the legislator's or former legislator's death; providing that the section shall not affect or alter the right of access to public records pursuant to s. 24, Art. I of the Florida Constitution or s. 11.0431, F.S.; providing an effective date.

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

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

or record in connection with any action taken or function performed in a legislative capacity.

(3) Subject to the provisions of subsection (4), a legislative staff member or former legislative staff member has an absolute privilege in any civil action, judicial administrative proceeding or executive branch administrative proceeding to the same extent as a member of the legislature when the matter at issue or document or record involves duties performed within the scope of his or her employment as a legislative staff member.

(4) The privilege specified in this section belongs to legislators and former legislators. A legislative staff member or former legislative staff member shall not waive the privilege specified under this section except by a waiver of the privilege by the legislator or former legislator on whose behalf the legislative staff member was acting, or where not acting on behalf of a specific legislator, by the presiding officer, at the time, of the legislative chamber where the legislative staff member was employed. In order for a waiver of a legislator's or former legislator's privilege or immunity to be sufficient, it must be an explicit and unequivocal renunciation of the privilege or immunity in writing.

(5) In the case of a legislator or former legislator who is deceased, the privilege or immunity shall remain in perpetuity in the same status as it was on the date of the legislator's or former legislator's death.

(6) This section 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.

Section 2. This act shall take effect upon becoming law.

CODING: Words ~~stricken~~ are deletions; words underlined are additions.

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