



Judiciary Committee

Wednesday, February 8, 2012

8:30 AM

404 HOB

Meeting Packet

Committee Meeting Notice

HOUSE OF REPRESENTATIVES

Judiciary Committee

Start Date and Time: Wednesday, February 08, 2012 08:30 am
End Date and Time: Wednesday, February 08, 2012 10:30 am
Location: 404 HOB
Duration: 2.00 hrs



Consideration of the following bill(s):

HB 243 Expert Testimony by Metz, Weinstein
CS/HB 313 Premises Liability by Agriculture & Natural Resources Subcommittee, Bemby, Steube
CS/HB 565 Equitable Distribution of Marital Assets and Liabilities by Civil Justice Subcommittee, Porter
CS/HB 671 Liens on Real Property by Community & Military Affairs Subcommittee, Wood
CS/HB 729 Hiring, Leasing, or Obtaining Personal Property or Equipment with the Intent to Defraud by Criminal Justice Subcommittee, Pilon
CS/HB 823 Florida Uniform Principal and Income Act by Civil Justice Subcommittee, McBurney
HB 851 Natural Guardians by Schwartz
CS/HB 935 Child Support Enforcement by Civil Justice Subcommittee, Baxley
CS/HB 1001 Timeshares by Business & Consumer Affairs Subcommittee, Eisnaugle
CS/HB 1081 Controlled Substances by Health & Human Services Quality Subcommittee, McBurney
CS/HB 1175 Controlled Substances by Criminal Justice Subcommittee, Ingram
CS/HB 1331 Property Fraud by Criminal Justice Subcommittee, Wood

NOTICE FINALIZED on 02/06/2012 16:16 by Jones.Missy

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 243 Expert Testimony
SPONSOR(S): Metz and Weinstein
TIED BILLS: None IDEN./SIM. BILLS: SB 378

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Civil Justice Subcommittee	11 Y, 4 N	Caridad	Bond
2) Judiciary Committee		Caridad 	Havlicak 

SUMMARY ANALYSIS

An expert witness is a person who has developed skill or knowledge in a particular subject so that he or she may form an opinion that will assist the fact-finder during a hearing or trial. In evaluating whether testimony of a particular expert witness will be admitted in a Florida court, the court looks at whether the underlying basic principles of evidence are generally accepted within the scientific community. The standard is known as the *Frye* standard.

This bill rejects the *Frye* standard and provides a three-part test to determine whether expert testimony will be admitted in a particular case. This bill adopts a standard commonly referred to as the *Daubert* standard, which requires the court to determine if (1) the testimony is based upon sufficient facts or data; (2) the testimony is the product of reliable principles and methods; and (3) the witness has applied the principles and methods reliably to the facts of the case.

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

The bill takes effect July 1, 2012.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Expert Witness

An expert witness is a person, who, through education or experience, has developed skill or knowledge in a particular subject, so that he or she may form an opinion that will assist the fact-finder.¹ Previously, both Federal and Florida courts used the standard established in *Frye v. United States*² to determine whether scientific and expert testimony could be admitted into evidence. In *Frye*, the court established a test regarding admitting expert testimony of new or novel theories. The court held that in order to introduce expert testimony deduced from a scientific principle or discovery, the principle or discovery "must be sufficiently established to have gained general acceptance in the particular field in which it belongs."³ Under the *Frye* standard, a judge must determine that the basic underlying principles of scientific evidence have been tested and accepted by the scientific community.

The Federal Rules of Evidence were formally promulgated in 1975. Federal courts still continued to use the *Frye* standard until 1993, though, when the United States Supreme Court held in *Daubert*⁴ that the *Frye* standard had been superseded by the Federal Rules of Evidence which provides in relevant part that:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.⁵

The Florida Evidence Code was established in 1979 and was patterned after the Federal Rules of Evidence. Section 90.102, F.S., provides that the Florida Evidence Code replaces and supersedes existing statutory or common law in conflict with its provisions. Section 90.702, F.S., relates to the admissibility of expert witness testimony and provides that:

If scientific, technical, or other specialized knowledge will assist the trier of fact in understanding the evidence or in determining a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify about it in the form of an opinion; however, the opinion is admissible only if it can be applied to evidence at trial.⁶

Florida courts still use the *Frye* standard, however, for expert testimony.⁷ The Florida Supreme Court held in *Brim v. State* that "despite the federal adoption of a more lenient standard in *Daubert* . . . we have maintained the higher standard of reliability as dictated by *Frye*."⁸

In November 2007, the Florida Supreme Court decided *Marsh v. Valyou*.⁹ In the case, the court addressed a conflict between the 1st and the 5th Florida District Courts of Appeal regarding expert

¹ Bryan A. Garner, Black's Law Dictionary, 9th Edition (West Publishing Co. 2009), "expert."

² *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923).

³ *Id.* at 1013.

⁴ *Daubert v. Merrell Dow Pharmaceuticals*, 509 US. 579 (1993).

⁵ Rule 702, Federal Rules of Evidence.

⁶ Section 90.702, F.S.

⁷ *Flanagan v. State*, 625 So.2d 827 (Fla. 1993); *Hadden v. State*, 690 So.2d 573 (Fla. 1997).

⁸ *Brim v. State*, 695 So.2d 268, 271 (Fla. 1997).

⁹ *Marsh v. Valyou*, 977 So.2d 543 (Fla. 2007).

testimony on fibromyalgia.¹⁰ The court held that the testimony should have come in under pure opinion testimony¹¹ and in the alternative should have also come in under *Frye*. In the concurring opinion, Justice Anstead questioned why Florida still uses the *Frye* standard, stating that "we have never explained how *Frye* has survived the adoption of the rules of evidence."¹² Both the concurring and dissenting opinions concluded that *Frye* was superseded by the adoption of Florida's Evidence Code.

Effect of the Bill

This bill provides a standard regarding witness testimony that is more closely related to *Daubert* and the Federal Code of Evidence than *Frye*. This bill provides a three-part test to be used in determining whether an expert may testify. The test provides that an expert may testify in the particular field in which he or she is qualified in the form of an opinion or otherwise if:

- The testimony is based on sufficient facts or data,
- The testimony is the product of reliable principles and methods, and
- The witness has applied the principles and methods reliably to the facts.

The bill requires the courts of this state to interpret and apply the above requirements and s. 90.704, F.S., in accordance with *Daubert v. Merrel Dow Pharmaceuticals, Inc.*, and subsequent U.S. Supreme Court cases that reaffirm expert witness testimony under the *Daubert* standard. The *Daubert* standard laid out in the bill will also apply to all proposed expert testimony, including pure opinion testimony as discussed in *Marsh v. Valyou*. The bill also provides that *Frye v. United States* and subsequent Florida decisions applying and implementing *Frye* no longer apply to s. 90.702, F.S., or s. 90.704, F.S.

B. SECTION DIRECTORY:

Section 1 amends s. 90.702, F.S., regarding testimony by experts.

Section 2 amends s. 90.704, F.S., regarding the basis of opinion testimony by experts.

Section 3 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:

The change in standard to admit expert opinions in Florida courts may have an impact on the number of pre-trial hearings needed, but it is difficult to estimate due to the unavailability of data needed to quantify any increase or decrease in judicial workload.

In criminal proceedings, the state may incur costs, and it is difficult to affirmatively quantify, in that well-established evidentiary standards in areas involving mental health, substance abuse, cognitive dysfunction, dual diagnosis, psychosis, and other areas litigated in some criminal cases may be expanded beyond the already extensive body of testimony and evidence currently litigated.

¹⁰ Fibromyalgia is a chronic condition characterized by widespread pain in the muscles, ligaments and tendons, as well as fatigue and multiple tender points. See <http://www.mayoclinic.com/health/fibromyalgia/DS00079> (last visited November 28, 2011).

¹¹ Pure opinion testimony is based on the expert's personal experience and training and does not have to meet the *Frye* standard. See *Flanagan*, 625 So. 2d at 828.

¹² *Marsh* at 551.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

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

2. Other:

There is a balance between enactments of the Legislature and the Florida Supreme Court on matters relating to rules of evidence. The Legislature has enacted and continues to revise ch. 90, F.S. (the Evidence Code), and the Florida Supreme Court tends to adopt these changes as rules. The Florida Supreme Court regularly adopts amendments to the Evidence Code as rules of court when it is determined that the matter is procedural rather than substantive. If the Florida Supreme Court views the changes in this bill as an infringement upon the Court's rule authority over practice and procedure in state courts, it may refuse to adopt the changes in the bill as a court rule.¹³

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.

¹³ See, e.g., *In re Florida Evidence Code*, 782 So.2d 339 (Fla. 2000) (Florida Supreme Court adopting Evidence Code to the extent it is procedural and rejecting hearsay exception as a rule of court); compare *In re Florida Evidence Code*, 372 So.2d 1369 (Fla. 1979) (Florida Supreme Court adopting Florida Evidence Code to the extent it is procedural), clarified, *In re Florida Evidence Code*, 376 So.2d 1161 (Fla. 1979).

1 A bill to be entitled
 2 An act relating to expert testimony; amending s.
 3 90.702, F.S.; providing that a witness qualified as an
 4 expert by knowledge, skill, experience, training, or
 5 education may testify in the form of an opinion as to
 6 the facts at issue in a case under certain
 7 circumstances; requiring the courts of this state to
 8 interpret and apply the principles of expert testimony
 9 in conformity with specified United States Supreme
 10 Court decisions; subjecting pure opinion testimony to
 11 such requirements; amending s. 90.704, F.S.; providing
 12 that facts or data that are otherwise inadmissible in
 13 evidence may not be disclosed to the jury by the
 14 proponent of the opinion or inference unless the court
 15 determines that the probative value of the facts or
 16 data in assisting the jury to evaluate the expert's
 17 opinion substantially outweighs the prejudicial effect
 18 of the facts or data; providing an effective date.

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

21
 22 Section 1. Section 90.702, Florida Statutes, is amended to
 23 read:

24 90.702 Testimony by experts.—

25 (1) If scientific, technical, or other specialized
 26 knowledge will assist the trier of fact in understanding the
 27 evidence or in determining a fact in issue, a witness qualified
 28 as an expert by knowledge, skill, experience, training, or

29 education may testify about it in the form of an opinion or
 30 otherwise, if:

31 (a) The testimony is based upon sufficient facts or data;

32 (b) The testimony is the product of reliable principles
 33 and methods; and

34 (c) The witness has applied the principles and methods
 35 reliably to the facts of the case; however, the opinion is
 36 admissible only if it can be applied to evidence at trial.

37 (2) The courts of this state shall interpret and apply the
 38 requirements of subsection (1) and s. 90.704 in accordance with
 39 *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579
 40 (1993); *General Electric Co. v. Joiner*, 522 U.S. 136 (1997); and
 41 *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137 (1999). *Frye v.*
 42 *United States*, 293 F. 1013 (D.C. Cir. 1923) and subsequent
 43 Florida decisions applying or implementing *Frye* no longer apply
 44 to subsection (1) or s. 90.704. All proposed expert testimony,
 45 including pure opinion testimony as discussed in *Marsh v.*
 46 *Valyou*, 977 So. 2d 543 (Fla. 2007), is subject to subsection (1)
 47 and s. 90.704.

48 Section 2. Section 90.704, Florida Statutes, is amended to
 49 read:

50 90.704 Basis of opinion testimony by experts.—The facts or
 51 data upon which an expert bases an opinion or inference may be
 52 those perceived by, or made known to, the expert at or before
 53 the trial. If the facts or data are of a type reasonably relied
 54 upon by experts in the subject to support the opinion expressed,
 55 the facts or data need not be admissible in evidence. Facts or
 56 data that are otherwise inadmissible shall not be disclosed to

HB 243

2012

57 | the jury by the proponent of the opinion or inference unless the
58 | court determines that their probative value in assisting the
59 | jury to evaluate the expert's opinion substantially outweighs
60 | their prejudicial effect.

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

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/HB 313 Premises Liability

SPONSOR(S): Agriculture & Natural Resources Subcommittee; Bemby; Steube and others

TIED BILLS: None **IDEN./SIM. BILLS:** SB 802

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Civil Justice Subcommittee	13 Y, 0 N	Caridad	Bond
2) Agriculture & Natural Resources Subcommittee	14 Y, 0 N, As CS	Deslatte	Blalock
3) Judiciary Committee		Caridad DC	Havlicak RN

SUMMARY ANALYSIS

Current law provides that private property owners who offer public opportunities for outdoor recreation on their property have limited liability for incidents occurring on the land if the property owner:

- Does not charge for entry to the property nor conduct commercial or other activity where profit is derived from public patronage on any part of the property; or
- Leases the property to the state for outdoor recreational purposes.

The bill allows private property owners who provide outdoor recreational opportunities on their land to enter into written agreements with the state, as opposed to a lease, and still receive the benefit of the limitation of liability. The bill provides that the written agreement must recognize that the state may be responsible for personal injury or loss of property resulting from negligence or wrongful acts or omissions of the state to the extent authorized under s. 768.28, F.S.

The bill also provides limitation of liability protection to private landowners who make their land available to specific persons, as opposed to only the general public, for the purpose of hunting, fishing, or wildlife viewing. To benefit from this limitation of liability, the landowner must provide notice of the liability limits to the person or persons using the land in addition to the current requirement that the landowner make no profit from nor charge a fee for using the land.

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.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Liability to Persons on Land - In General

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.

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

Background

Under current law, a private property owner who provides public opportunities for outdoor recreation on his or her property has limited liability for incidents occurring on the land if the property owner:

- Does not charge for entry to the property nor conduct commercial or other activity where profit is derived from public patronage on any part of the property; or
- Leases the property to the state for outdoor recreational purposes.¹

A private property owner who qualifies under one of these two categories owes no duty of care to keep the property safe for people coming on the land or using the land, and has no duty to warn anyone entering the property about hazardous conditions, structures, or activities on the land. The law also provides that the private landowner is not liable for an injury caused by the acts or omissions of others on the property. However, the statute does not relieve the landowner of liability if there is a deliberate, willful, or malicious injury to persons or property.

Under current law, if a private landowner enters into a lease with the state, he or she may benefit from the liability protections under the statute. However, he or she will not receive protection from any other type of formal agreement for use of the property (i.e. an easement), and arguably has no protection if utilizing something short of a lease (i.e. oral license).²

Private landowners who make their land available to the general public for outdoor recreational activities are also afforded liability protection. However, this protection does not apply in instances where the landowner wishes to make the property available only to individuals or groups of individuals, instead of the general public. By contrast, other neighboring states do provide liability protection to landowners who provide limited public access.³

¹Section 375.251, F.S.

² An easement is "[a]n interest in land owned by another person, consisting in the right to use or control the land, or an area above or below it, for a specific limited purpose (such as to cross it for access to a public road)." Black's Law Dictionary (9th ed. 2009).

³ Georgia and Alabama provide landowner liability protection to landowners who allow people other than the general public to use their land for recreational purposes. *See, e.g.*, s. 51-2-22, GA Code ("Except as specifically recognized by or provided in Code Section 51-3-25, an owner of land owes no duty of care to keep the premises safe for entry or use by others for recreational purposes or to give warning of a dangerous condition, use, structure, or activity on the premises to persons entering for recreational purposes.").

Outdoor recreational purposes include, but are not limited to: hunting, fishing, swimming, boating, camping, picnicking, hiking, pleasure driving, nature study, water skiing, motorcycling, and visiting historical, archaeological, scenic, or scientific sites.

Effect of Proposed Changes:

The bill amends s. 375.251, F.S., to provide that a private property owner who provides outdoor recreational opportunities on his or her land may enter into other types of "written agreements" with the state, as opposed to only a lease, and still receive the liability protections under the statute. The change also allows the state to execute written agreements with landowners without taking a leasehold interest in the property where the activities are conducted. The bill specifies that the written agreement must recognize that the state may be responsible for personal injury or loss of property resulting from negligence or wrongful acts or omissions of the state to the extent authorized under s. 768.28, F.S.⁴

This bill also revises s. 375.251, F.S. to provide limitation of liability protection to a private landowner who makes his or her land available to any person — not only the general public — for the purpose of hunting, fishing, or wildlife viewing. To benefit from the limitation of liability, the landowner must provide notice of the liability limits to the person or persons using the land in addition to the current requirement that the landowner make no profit from nor charge a fee for using the land.

B. SECTION DIRECTORY:

Section 1 amends s. 375.251, F.S., regarding limitations on liability for private landowners who make their property available to others for outdoor recreational purposes.

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

⁴ Section 768.28, F.S., provides that in accordance with s. 13, Art. X of the State Constitution, the state, for itself and for its agencies or subdivisions, hereby waives sovereign immunity for liability for torts, but only to a certain extent. Neither the state nor its agencies or subdivisions shall be liable to pay a claim or a judgment by any one person which exceeds the sum of \$200,000 or any claim or judgment, or portions thereof, which, when totaled with all other claims or judgments paid by the state or its agencies or subdivisions arising out of the same incident or occurrence, exceeds the sum of \$300,000.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

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

D. FISCAL COMMENTS:

There is the potential for a positive fiscal impact on the private sector in the form of reduced litigation. However, individuals using the land will be limited in the lawsuits they can bring against the landowners.

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:

Tort limitations may implicate judicial review under the access to courts provision of the state constitution. The Florida Supreme Court has held that the current statute does not deny access to courts.⁵

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 24, 2012, the Agriculture & Natural Resources Subcommittee amended and passed HB 313 as a committee substitute (CS). The CS specifies that the written agreement must recognize that the state may be responsible for personal injury or loss of property resulting from negligence or wrongful acts or omissions of the state to the extent authorized under s. 768.28, F.S.

This analysis is drafted to the committee substitute as passed by the Agriculture & Natural Resources Subcommittee.

⁵ See *Abdin v. Fischer*, 374 So.2d 1379 (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)

CS/HB 313

2012

1 A bill to be entitled
 2 An act relating to premises liability; amending s.
 3 375.251, F.S.; providing that an owner or lessee who
 4 makes an area available to another person for hunting,
 5 fishing, or wildlife viewing is entitled to certain
 6 limitations on liability if notice is provided to a
 7 person upon entry to the area; providing that an owner
 8 of an area who enters into a written agreement with
 9 the state for the area to be used for outdoor
 10 recreational purposes is entitled to certain
 11 limitations on liability; deleting a requirement that
 12 the area be leased to the state in order for the
 13 limitations on liability to apply; defining the term
 14 "area"; making technical and grammatical changes;
 15 providing an effective date.

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

18
 19 Section 1. Section 375.251, Florida Statutes, is amended
 20 to read:

21 375.251 Limitation on liability of persons making
 22 available to public certain areas for recreational purposes
 23 without charge.—

24 (1) The purpose of this section ~~act~~ is to encourage
 25 persons to make land, water areas, and park areas available to
 26 the public ~~land, water areas and park areas~~ for outdoor
 27 recreational purposes by limiting their liability to persons
 28 using these areas ~~going thereon~~ and to third persons who may be

29 damaged by the acts or omissions of persons using these areas
 30 ~~going thereon.~~

31 (2) (a) An owner or lessee who provides the public with an
 32 ~~a park area or other land~~ for outdoor recreational purposes owes
 33 no duty of care to keep that ~~park area or land~~ safe for entry or
 34 use by others, or to give warning to persons entering or going
 35 on that ~~park area or land~~ of any hazardous conditions,
 36 structures, or activities on the area thereon. An owner or
 37 lessee who provides the public with an ~~a park area or other land~~
 38 for outdoor recreational purposes ~~shall not by providing that~~
 39 ~~park area or land~~:

40 1. Is not ~~be~~ presumed to extend any assurance that the
 41 ~~such park area or land~~ is safe for any purpose;7

42 2. Does not incur any duty of care toward a person who
 43 goes on the ~~that park area or land~~;7 or

44 3. Is not ~~Become~~ liable or responsible for any injury to
 45 persons or property caused by the act or omission of a person
 46 who goes on the ~~that park area or land~~.

47 (b) Notwithstanding the inclusion of the term "public" in
 48 this subsection and subsection (1), an owner or lessee who makes
 49 available to any person an area primarily for the purposes of
 50 hunting, fishing, or wildlife viewing is entitled to the
 51 limitation on liability provided herein so long as the owner or
 52 lessee gives notice of this provision to the person upon entry
 53 to the area.

54 (c) ~~(b)~~ The Legislature recognizes that an area offered for
 55 outdoor recreational purposes may be subject to multiple uses.
 56 The limitation of liability extended to an owner or lessee under

57 | this subsection applies only if no charge is made for entry to
 58 | or use of the area for outdoor recreational purposes and no
 59 | other revenue is derived from patronage of the area for outdoor
 60 | recreational purposes. ~~This section shall not apply if there is~~
 61 | ~~any charge made or usually made for entering or using such park~~
 62 | ~~area or land, or any part thereof, or if any commercial or other~~
 63 | ~~activity , whereby profit is derived from the patronage of the~~
 64 | ~~general public, is conducted on such park area or land, or any~~
 65 | ~~part thereof.~~

66 | (3) (a) An owner of an ~~land or water~~ area who enters into a
 67 | written agreement concerning the area with ~~leased to~~ the state
 68 | for outdoor recreational purposes owes no duty of care to keep
 69 | the ~~that~~ ~~land or water~~ area safe for entry or use by others, or
 70 | to give warning to persons entering or going on the area ~~that~~
 71 | ~~land or water~~ of any hazardous conditions, structures, or
 72 | activities thereon. An owner who enters into a written agreement
 73 | concerning the area with ~~leases~~ ~~land or water area to~~ the state
 74 | for outdoor recreational purposes, where such agreement
 75 | recognizes that the state may be responsible for personal injury
 76 | or loss of property resulting from negligence or wrongful acts
 77 | or omissions of the state to the extent authorized under s.
 78 | 768.28 shall not by giving such lease:

79 | 1. Is not ~~be~~ presumed to extend any assurance that the
 80 | ~~such land or water~~ area is safe for any purpose;;

81 | 2. Does not incur any duty of care toward a person who
 82 | goes on the ~~leased land or water~~ area that is subject to the
 83 | agreement; or

84 | 3. Is not ~~become~~ liable or responsible for any injury to

85 persons or property caused by the act or omission of a person
 86 who goes on the ~~leased land or water~~ area that is subject to the
 87 agreement.

88 (b) This subsection applies to all persons going on the
 89 area that is subject to the agreement, including invitees,
 90 licensees, and trespassers. ~~The foregoing applies whether the~~
 91 person going on the leased land or water area is an invitee,
 92 licensee, trespasser, or otherwise.

93 (4) This section ~~act~~ does not relieve any person of
 94 liability that ~~which~~ would otherwise exist for deliberate,
 95 willful, or malicious injury to persons or property. This
 96 section does not ~~The provisions hereof shall not be deemed to~~
 97 create or increase the liability of any person.

98 (5) As used in this section, the term:

99 (a) "Area" includes land, water, and park areas.

100 (b) "Outdoor recreational purposes" includes ~~as used in~~
 101 ~~this act shall include,~~ but is not necessarily be limited to,
 102 hunting, fishing, wildlife viewing, swimming, boating, camping,
 103 picnicking, hiking, pleasure driving, nature study, water
 104 skiing, motorcycling, and visiting historical, archaeological,
 105 scenic, or scientific sites.

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

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/HB 565 Equitable Distribution of Marital Assets and Liabilities

SPONSOR(S): Civil Justice Subcommittee; Porter

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

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Civil Justice Subcommittee	14 Y, 0 N, As CS	Caridad	Bond
2) Judiciary Committee		Caridad <i>DC</i>	Havlicak <i>RH</i>

SUMMARY ANALYSIS

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

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

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Background

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

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

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).

Security and Interest for Installment payments

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.

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 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.²³

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.

²³ Office of the State Courts Administrator, 2011 Judicial Impact Statement for SB 752 (Nov. 9, 2011) (on file with the House Civil Justice Subcommittee).

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

On January 18, 2012, the Civil Justice Subcommittee adopted one amendment and reported the bill favorably as a committee substitute. The amendment:

- Reformats the formula laid out in the bill;
- Replaces the term coverture fraction with marital fraction; and
- Provides that the value of the marital portion of nonmarital real property, as opposed to merely the active appreciation of the property, may not exceed the total net equity of the property on the valuation date in the dissolution action.

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

1 A bill to be entitled
 2 An act relating to equitable distribution of marital
 3 assets and liabilities; amending s. 61.075, F.S.;
 4 redefining the term "marital assets and liabilities"
 5 to include the value of the marital portion of the
 6 passive appreciation of nonmarital real property;
 7 authorizing a court to require security and the
 8 payment of a reasonable rate of interest if
 9 installment payments are required for the distribution
 10 of marital assets and liabilities; requiring the court
 11 to provide written findings regarding any installment
 12 payments; creating s. 61.0765, F.S.; providing
 13 formulas for the calculation of the value of the
 14 marital portion of nonmarital real property subject to
 15 equitable distribution; requiring the court in the
 16 dissolution action to use the formulas unless
 17 sufficient evidence is presented showing that the
 18 application of the formulas is not equitable;
 19 providing an effective date.

20
 21 Be It Enacted by the Legislature of the State of Florida:

22
 23 Section 1. Paragraph (a) of subsection (6) and subsection
 24 (10) of section 61.075, Florida Statutes, are amended to read:
 25 61.075 Equitable distribution of marital assets and
 26 liabilities.—

27 (6) As used in this section:

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

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

31 b. The enhancement in value and appreciation of nonmarital
32 assets resulting either from the efforts of either party during
33 the marriage or from the contribution to or expenditure thereon
34 of marital funds or other forms of marital assets, or both.

35 c. The value of the marital portion of the passive
36 appreciation of nonmarital real property as provided in s.
37 61.0765(2).

38 d.e. Interspousal gifts during the marriage.

39 e.d. All vested and nonvested benefits, rights, and funds
40 accrued during the marriage in retirement, pension, profit-
41 sharing, annuity, deferred compensation, and insurance plans and
42 programs.

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

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

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

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

62 (b) If installment payments are ordered, the court may
 63 require security and a reasonable rate of interest, or otherwise
 64 recognize the time value of money in determining the amount of
 65 the installments. If security or interest is required, the court
 66 shall make written findings relating to any deferred payments,
 67 the amount of any security required, and the interest. This
 68 paragraph does not preclude the application of chapter 55,
 69 relating to judgments, to any subsequent default.

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

72 61.0765 Valuation of marital portion of nonmarital real
 73 property.-

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

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

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

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

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

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

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

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

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

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

99 (b) The numerator of the marital fraction consists of the
 100 amount of the mortgage principal paid on any mortgage on the
 101 property from marital funds. The denominator consists of the
 102 value of the property on the date of the marriage, the date of
 103 acquisition of the property, or the date the property was first
 104 encumbered by a mortgage on which principal was paid from
 105 marital funds, whichever is later.

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

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

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/HB 671 Liens on Real Property
SPONSOR(S): Community & Military Affairs Subcommittee; Wood and others
TIED BILLS: None **IDEN./SIM. BILLS:** CS/SB 670

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Civil Justice Subcommittee	14 Y, 0 N	Cary	Bond
2) Community & Military Affairs Subcommittee	13 Y, 0 N, As CS	Gibson	Hoagland
3) Judiciary Committee		Cary <i>JMC</i>	Havlicak <i>RH</i>

SUMMARY ANALYSIS

Local governments have authority to attach liens to property for many purposes including to recover funds for improvements made, services rendered, or fines and penalties imposed.

Generally, liens against real property are not effective unless subsequent purchasers have notice of the lien. Notice can be actual notice or constructive notice. The filing of a lien in the county recorder's office provides constructive notice.

Many local governments elect not to record all liens in the county recorder's office and instead to maintain them in the office of the local government. Liens assessed and maintained in the office of a local government often go undetected when unrecorded due to the difficulty in finding the liens and knowing which units of government have the right to impose the lien and whom to contact to determine the existence of a possible lien. Often this can result in liens going undetected and unpaid through successive mortgages and transfers of ownership, and the burden of the lien falling on innocent purchasers.

The bill provides that a lien by a governmental entity or quasi-governmental entity, which attaches to real property for an improvement, service, fine, or penalty, other than a lien for taxes, non-ad valorem or special assessments, or utilities, is valid and effectual against creditors and subsequent purchasers only if the lien is recorded in the official records of the county in which the property is located. The bill requires the recorded notice of lien to contain: the name of the owner of record, a description or address of the property, and the tax or parcel identification number applicable to the property as of the date of recording.

The bill does not appear to have a fiscal impact on state government.

The bill may increase revenues for local governments that are able to more easily collect on liens that have been recorded, but any increase in revenues is indeterminate. The bill may have a minimal indeterminate cost to those local governments that do not currently record all liens. This cost is indeterminate and is likely to be offset or eliminated by collecting on costs incurred in the recording or satisfying of the lien. The bill may also have a positive, indeterminate impact on the private sector to the extent that the sale and purchase of real property will not be encumbered by hidden liens.

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

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Current Situation

A lien is a charge on property for payment of some debt, obligation or duty.¹ Florida is a "notice" state, where a subsequent mortgagee of real property for value and without notice (actual and constructive) of a prior mortgage or the said real property will prevail against the prior mortgagee.² The primary function of a "notice" type of recording statute is to protect subsequent purchasers against claims arising from prior unrecorded instruments.³ Furthermore, Florida is a "lien theory" state, where a mortgage is a specific lien on a property.⁴ As a notice state and a lien theory state, liens are generally afforded precedence based on whether subsequent purchasers had notice of the lien.

Notice can be either actual or constructive unless statutes specifically require the filing of certain liens.⁵ The act of recording an instrument in accordance with s. 695.01, F.S., constitutes constructive notice of a prior encumbrance on the property which is the subject of the instrument.⁶

Section 695.01(1), F.S., provides:

(1) No conveyance, transfer, or mortgage of real property, or of any interest therein, nor any lease for a term of 1 year or longer, shall be good and effectual in law or equity against creditors or subsequent purchasers for a valuable consideration and without notice, unless the same be recorded according to law; nor shall any such instrument made or executed by virtue of any power of attorney be good or effectual in law or in equity against creditors or subsequent purchasers for a valuable consideration and without notice unless the power of attorney be recorded before the accruing of the right of such creditor or subsequent purchaser.

State⁷ and local⁸ governments are also authorized to impose liens on real property for improvements, services, fines or penalties. In some cases, the lien is legally effective even if it is not recorded in the public records of the county in which the real property is located.⁹ This is known as a "hidden lien" because it is not readily determinable by searching the official records maintained by the clerk or county recorder relating to the property.

Chapter 162, F.S., covers the powers of counties and municipalities to enforce municipal and county codes. Counties and municipalities are authorized to appoint code enforcement boards with authority to impose administrative fines and other noncriminal penalties to provide an equitable, expeditious, effective, and inexpensive method for enforcing local codes and ordinances, where a pending or repeated violation continues to exist.¹⁰ The local government may record in the public records a

¹ *Black's Law Dictionary*, 5th Ed.

² *Argent Mortg. Co., LLC v. Wachovia Bank N.A.*, 52 So.3d 796 at 799 (Fla 5th DCA 2010). *See also* s. 695.01, F.S.

³ *Id.*

⁴ Section 697.02, F.S.

⁵ "Actual notice" is defined as "notice expressly and actually given, and brought home to the party directly," while "constructive notice" is defined by as "information or knowledge of a fact imputed by law to a person (although he may not actually have it), because he could have discovered the fact by proper diligence, and his situation was such as to cast upon him the duty of inquiring into it." *Black's Law Dictionary*, 5th Ed.

⁶ *Lafitte v. Gigliotti Pipeline, Inc.*, 624 So.2d 844 at 845 (Fla. 2d DCA 1993).

⁷ *See, e.g.*, s. 589.13, F.S., which allows the state Division of Forestry or other governmental authority, to file a lien in the public records where the agency and the landowner enter into an agreement for the improvement of land.

⁸ *See*, s. 162.09(3), F.S., which allows local governments to file a lien in the public records upon valid order imposing a code enforcement fine; and *see* s. 893.138(11), F.S., which allows local recorded orders on public nuisances to become liens against the real property subject to the order.

⁹ *See Dade County v. Certain Lands*, 247 So.2d 787 (Fla. 3d DCA 1971).

¹⁰ *See* s. 162.02, F.S.

certified copy of an order imposing a code enforcement fine, thereby constituting a lien against the land where the violation exists and upon any other real or personal property owned by the violator.¹¹ No lien may continue for a period longer than 20 years after the certified copy of an order imposing a fine has been recorded, unless within that time an action is brought to foreclose on the lien or to sue to recover a money judgment for the lien plus interest.¹² The local government is also allowed to collect all costs incurred in recording and satisfying a valid lien.¹³

According to the Real Property, Probate, and Trust Law Section of the Florida Bar (RPPTL Section),¹⁴ liens assessed and maintained by a municipality or branch of a municipality often go undetected because:

- They are difficult to find when unrecorded;
- There is confusion over which branch of government has the right to impose the lien; and
- There is confusion as to whom to contact to determine the existence of possible liens.

Unrecorded liens can be difficult to discover for property owners, title insurance companies, and real estate attorneys, and as a result, often go undetected and unpaid for extended periods and through successive mortgages and transfer of ownerships. As a result, the burden of such liens may unfairly fall on innocent purchasers of property.¹⁵ Unrecorded liens are also not typically covered by Florida title insurance policies, except in rare instances.¹⁶

Effect of the Bill:

The bill amends s. 695.01, F.S., to provide that a lien by a governmental entity or quasi-governmental entity, which attaches to real property for an improvement, service, fine or penalty, is only valid and effectual against creditors and subsequent purchasers for a valuable consideration if the lien is recorded in the official records of the county in which the property is located. The bill specifies that it does not apply to liens for taxes, non-ad valorem or special assessments, or utilities. The bill requires the recorded notice of lien to contain: the name of the owner of record; a description or address of the property; and the tax or parcel identification number applicable to the property as of the date of recording.

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

B. SECTION DIRECTORY:

Section 1 amends s. 695.01, F.S., relating to conveyances to be recorded.

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

¹¹ Section 162.09(3), F.S., provides in part that a lien arising from a fine imposed runs in favor of the local governing body, and the local governing body may execute a satisfaction or release of lien. After 3 months from the filing of any such lien which remains unpaid, the enforcement board may authorize the local governing body attorney to foreclose on the lien or to sue to recover a money judgment for the amount of the lien plus accrued interest. However, no lien may be foreclosed on real property that is a homestead under s. 4, Art. X, Fla. Const.

¹² Section 162.10, F.S.

¹³ *Id.*

¹⁴ See Real Property, Probate, and Trust Law Section of the Florida Bar, White Paper, *Fair Notice of Governmental Liens* (on file with the Civil Justice Subcommittee). According to an unscientific poll of local governments by the RPPTL Section, only 60.8 percent of the responding local governments recorded all of their liens in the official county records.

¹⁵ See Christin Erazo, *Homebuyer warns purchasers about unrecorded liens in Port St. Lucie*, Treasure Coast Palm, December 22, 2011, available at <http://www.tcpalm.com/news/2011/dec/22/homebuyer-warns-purchasers-about-unrecorded-in/?partner=RSS> (last accessed Jan. 20, 2012).

¹⁶ See Real Property, Probate, and Trust Law Section of the Florida Bar, White Paper, *Fair Notice of Governmental Liens* (on file with the Civil Justice Subcommittee).

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:

Some local governments may experience an increase in revenues as a result of increased collection on recorded liens, which are more easily detected by property owners and title insurance companies. However, the fiscal impact is indeterminate.

2. Expenditures:

Some local governments that do not currently record all liens may experience a small increase in expenditures resulting from recording costs. The fee to record most single-page liens is \$10, set by statute in s. 28.24, F.S. Any required expenditure relating to recording fees, however, is likely to be offset by collecting on costs incurred in the recording or satisfying of the lien.

Because of the nature of hidden liens, it is difficult to estimate how many local governments are currently not recording all liens, or how many additional liens will be recorded as a result of the bill. Therefore, the fiscal impact is indeterminate.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

Purchasers of real property will no longer be liable for hidden liens. The bill may have a positive, indeterminate impact on the private sector to the extent that the sale and purchase of real property will not be encumbered by hidden liens. The bill may also have a positive indeterminate fiscal impact benefiting companies conducting real estate closings.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not Applicable. This bill does not appear to require counties or municipalities to spend funds or take action requiring the expenditures of funds; reduce the authority that counties or municipalities have to raise revenues in the aggregate; or 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 Community & Military Affairs Subcommittee adopted an amendment to specify that the bill does not apply to liens for taxes, non-ad valorem or special assessments, or utilities. The analysis has been updated to reflect this amendment.

1 A bill to be entitled
 2 An act relating to liens on real property; amending s.
 3 695.01, F.S.; providing that a lien imposed on real
 4 property by a governmental or quasi-governmental
 5 entity for certain purposes is not valid against a
 6 creditor or subsequent purchasers unless the lien is
 7 recorded; providing exceptions; specifying the
 8 required contents of the recorded notice of lien;
 9 providing an effective date.

10
 11 Be It Enacted by the Legislature of the State of Florida:

12
 13 Section 1. Subsection (3) is added to section 695.01,
 14 Florida Statutes, to read:

15 695.01 Conveyances and liens to be recorded.—

16 (3) A lien by a governmental entity or quasi-governmental
 17 entity which attaches to real property for an improvement,
 18 service, fine, or penalty, other than a lien for taxes, non-ad
 19 valorem or special assessments, or utilities, is valid and
 20 effectual against creditors and subsequent purchasers for a
 21 valuable consideration only if the lien is recorded in the
 22 official records of the county in which the property is located.
 23 The recorded notice of lien must contain the name of the owner
 24 of record, a description or address of the property, and the tax
 25 or parcel identification number applicable to the property as of
 26 the date of recording.

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

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/HB 729 Hiring, Leasing, or Obtaining Personal Property or Equipment with Intent to Defraud

SPONSOR(S): Criminal Justice Subcommittee; Pilon and others

TIED BILLS: None **IDEN./SIM. BILLS:** CS/SB 1276

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Criminal Justice Subcommittee	15 Y, 0 N, As CS	Krol	Cunningham
2) Judiciary Committee		Krol TK	Havlicak RN

SUMMARY ANALYSIS

Section 812.155, F.S., prohibits a person from:

- (1) Obtaining any personal property or equipment by trick, deceit, or fraudulent or willful false representation.
- (2) Hiring or leasing personal property or equipment with intent to defraud.
- (3) Knowingly abandoning or refusing to redeliver rented personal property or equipment at the conclusion of the rental period where the failure to return such property or equipment is done without the consent of the person letting such property or equipment.

The statute also provides the following evidentiary examples relating to the above offenses:

- Obtaining the property or equipment under false pretenses, absconding without payment, or removing or attempting to remove the property or equipment from the county without the express written consent of the lessor is evidence of fraudulent intent.
- Failure to redeliver the property or equipment within 5 days after receipt of, or within 5 days after return receipt from, the certified letter of the demand for return is evidence of abandonment or refusal to redeliver the property or equipment.
- Failure to pay any amount due which is incurred as the result of the failure to redeliver property after the rental period expires and after the demand for return is made is evidence of abandonment or refusal to redeliver the property.

Property or equipment owners can make a demand for the return of overdue property or equipment and for payment of amounts due. Currently, this demand must be made in person, by hand delivery, or by certified mail, return receipt requested, addressed to the lessee's address in the rental contract.

The bill:

- Makes all of the statutory evidentiary examples *prima facie evidence* of fraudulent intent and abandonment or refusal to redeliver the property or equipment (rather than simply *evidence*).
- Provides the demand for return of such property or equipment can be sent by a courier service with tracking capabilities.
- Prohibits possession of the personal property or equipment by a third party from being used as a defense for failure to return the property.
- Makes minor changes to the statute to improve its organization and readability.
- Entitles the lessor of any vehicle that is not returned at the conclusion of the lease and that meets the requirements of s. 812.155, F.S., to report the vehicle as stolen to law enforcement and have the vehicle listed as a stolen vehicle on any local or national registries, such as FCIC/NCIC.

The bill appears to have no fiscal impact and is effective October 1, 2012.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Offense Related to the Hiring, Leasing, or Obtaining Personal Property or Equipment

Section 812.155, F.S., contains criminal offenses related to hiring, leasing, or obtaining personal property or equipment with the intent to defraud. These offenses prohibit a person from:

- (1) Obtaining any personal property or equipment by trick, deceit, or fraudulent or willful false representation.¹
- (2) Hiring or leasing personal property or equipment with intent to defraud.²
- (3) Knowingly abandoning or refusing to redeliver rented personal property or equipment at the conclusion of the rental period where the failure to return such property or equipment is done without the consent of the person letting such property or equipment.³

The offenses described above are second degree misdemeanors⁴ if the offense involves property valued at less than \$300, or third degree felonies⁵ if the property is valued at \$300 or more.

Section 812.155(5), F.S., specifies that property or equipment owners can make a demand for the return of overdue property or equipment and for payment of amounts due. Currently, this demand must be made in person, by hand delivery, or by certified mail, return receipt requested, addressed to the lessee's address in the rental contract.

Effect of the Bill

The bill allows the demand for the return of overdue property or equipment and for payments of amounts due to be made by courier service with tracking capabilities.

The bill also makes minor changes to the language in s. 815.155(1), (2), and (3), F.S., to improve the statute's organization and readability.

Statutory Evidentiary Examples

Section 812.155, F.S., sets forth various evidentiary provisions relating to the above described offenses. For example, paragraph (4)(a) provides the following examples as evidence of fraudulent intent:

- Obtaining the property or equipment under false pretenses;
- Absconding without payment; or
- Removing or attempting to remove the property or equipment from the county without the express written consent of the lessor.⁶

Paragraphs (4)(b) and (c) provide the following examples as evidence of abandonment or refusal to redeliver the property or equipment at the conclusion of the rental period:

- (b) Failure to redeliver the property or equipment within 5 days after receipt of, or within 5 days after return receipt from, the certified mailing⁷ of the demand for return.⁸
- (c) Failure to pay any amount due⁹ which is incurred as the result of the failure to redeliver property after the rental period expires, and after the demand for return is made.¹⁰

¹ Section 812.155(1), F.S.

² Section 812.155(2), F.S.

³ Section 812.155(3), F.S.

⁴ A second degree misdemeanor is punishable by a fine of up to \$500 and imprisonment of up to 60 days. Sections 775.082 and 775.083, F.S.

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

⁶ Section 812.155(4)(a), F.S.

⁷ Notice mailed by certified mail, return receipt requested, to the address given by the renter at the time of rental is deemed sufficient and equivalent to notice having been received by the renter, should the notice be returned undelivered. Section 812.155(4)(b), F.S.

⁸ Section 812.155(4)(b), F.S.

Effect of the Bill

The bill makes the above-listed evidentiary examples *prima facie evidence* of fraudulent intent and abandonment or refusal to redeliver the property (rather than simply *evidence* of abandonment or refusal to redeliver the property or equipment) and incorporates the above-described changes allowing the demand for return to be by courier service with tracking capability.

The bill also provides that a lessee may not use possession of the personal property or equipment by a third party as a defense to failure to return such property.

Reporting a Hired Vehicle as Stolen

Currently, Florida law does not specify how or when a leased vehicle can be reported as stolen, nor is there a statewide standard law enforcement procedure.¹¹ However, the Florida Sheriff's Association's model policy on the subject is described below.

Before reporting a hired vehicle as stolen, law enforcement must first receive several documents, as suggested by the State Attorney's Office:

- Legible copies of the rental agreement, both front and backsides.
- An affidavit on the failure to redeliver a hired vehicle, which should contain:
 - The reportee's ability to identify the subject, or a statement that they looked at the subject's photo identification, and if possible, a photocopy of the subject's drivers license.
 - A statement that no extensions to the rental agreement were given at any time and indicate the attempts made by the rental company to recover the vehicle such as: telephone calls, personal visits, and certified notifications.
- A certified or registered letter should have been sent to the last known address of the subject, requesting that the vehicle be returned or the case will be turned over to a law enforcement agency.¹²

At the time of reporting, the vehicle should be at least 5 days overdue.¹³ The reporting law enforcement officer will provide all pertinent information to the Sheriff's Judicial Process Unit for entry into the Florida Crime Information Center (FCIC),¹⁴ the National Crime Information Center (NCIC),¹⁵ and appropriate bulletins will be issued subsequent to the completion of the affidavit.¹⁶

Effect of the Bill

The bill entitles the lessor of any vehicle that is not returned at the conclusion of the lease and that meets the requirements of s. 812.155, F.S., to:

- Report the vehicle as stolen to law enforcement.

⁹ Amounts due include unpaid rental for the time period during which the property or equipment was not returned and include the lesser of the cost of repairing or replacing the property or equipment if it has been damaged. Section 812.155(4)(c), F.S.

¹⁰ Section 812.155(4)(c), F.S.

¹¹ E-mail from Steve Casey, Florida Sheriff's Association. January 6, 2012. (On file with subcommittee staff).

¹² Brevard County Sheriff's Office Policy/Procedure 500.68 Stolen Vehicle Investigations. Last revised on July 26, 2010.

¹³ *Id.*

¹⁴ The Florida Crime Information Center (FCIC) is an electronic database of crime data managed by the Florida Department of Law Enforcement (FDLE). It contains Florida stolen property information as reported to FDLE by law enforcement agencies through the state. "The Florida Crime Information Center." FDLE Stolen Vehicles Search.

<http://pas.fdle.state.fl.us/pas/item/displayVehicleSearch.a> (last accessed on January 9, 2012).

¹⁵ The National Crime Information Center (NCIC) is an electronic clearinghouse of crime data that can be tapped into by virtually every criminal justice agency nationwide, 24 hours a day, 365 days a year. NCIC is managed by the FBI and federal, state, local, and tribal criminal justice agencies. NCIC helps law enforcement officers recover stolen property. "National Crime Information Center." Federal Bureau of Investigation. <http://www.fbi.gov/about-us/cjis/ncic> (last accessed on January 9, 2012).

¹⁶ *Supra* note 12.

- Have the vehicle listed as a stolen vehicle on any local or national registries, such as FCIC/NCIC.

B. SECTION DIRECTORY:

Section 1. Amends s. 812.155, F.S., relating to hiring, leasing, or obtaining personal property or equipment with the intent to defraud; failing to return hired or leased personal property or equipment; rules of evidence.

Section 2. 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 entitles a lessor to report a vehicle that is not returned as stolen to law enforcement who must then list the vehicle as stolen on any local or national registries. This may result in the recovery of more stolen vehicles.

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:

In 2005, the evidentiary examples contained in s. 812.155(4)(b), F.S., were considered to be "prima facie evidence of fraudulent intent." That year, in *State v. Rygwelski*, Florida's 2nd District Court of Appeal upheld the statute finding that the term "prima facie evidence" created a permissive inference rather than an unconstitutional mandatory presumption.^{17,18}

¹⁷ *State v. Rygwelski*, 899 So.2d 498 (Fla. 2nd DCA 2005). Also see, *State v. Higsby*, 899 So.2d 1269 (Fla. 2nd DCA 2005).

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 approved one amendment and reported the bill favorably as a committee substitute. The amendment:

- Makes the evidentiary examples listed in 812.155(4), F.S., *prima facie evidence* of fraudulent intent.
- Provides that it is considered *prima facie evidence* of abandonment of refusal to redeliver property or equipment within 5 days *after* receiving the demand from delivery by courier service with tracking capabilities or by certified mail, return receipt requested.

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

¹⁸ In 2006, the Legislature removed the term “prima facie evidence of fraudulent intent” from s. 812.155(4)(b) and (c), F.S., and replaced it with “evidence of abandonment or refusal to redeliver the property or equipment.” “Prima facie” was also removed from s. 812.155(a), F.S., however, the term “fraudulent intent” remained in statute. Chapter 2006-51, L.O.F.

1 A bill to be entitled
 2 An act relating to hiring, leasing, or obtaining
 3 personal property or equipment with the intent to
 4 defraud; amending s. 812.155, F.S.; revising
 5 requirements for notice to the lessee of the property
 6 or equipment after failure to return it when due;
 7 providing examples of prima facie evidence of
 8 abandonment or refusal to redeliver the property or
 9 equipment; providing that possession of the property
 10 or equipment by a third party is not a defense to
 11 failure to return the property or equipment; providing
 12 that the lessor of a vehicle that is not returned at
 13 the conclusion of the lease who satisfies specified
 14 requirements concerning the vehicle is entitled to
 15 report the vehicle as stolen; providing an effective
 16 date.

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

19
 20 Section 1. Section 812.155, Florida Statutes, is amended
 21 to read:

22 812.155 Hiring, leasing, or obtaining personal property or
 23 equipment with the intent to defraud; failing to return hired or
 24 leased personal property or equipment; rules of evidence.—

25 (1) OBTAINING BY TRICK, FALSE REPRESENTATION, ETC.—A
 26 person who ~~whoever~~, with the intent to defraud the owner or any
 27 other person lawfully possessing any personal property or
 28 equipment, obtains the custody of the ~~such personal~~ property or

29 equipment by trick, deceit, or fraudulent or willful false
 30 representation commits: ~~shall be guilty of~~

31 (a) A misdemeanor of the second degree, punishable as
 32 provided in s. 775.082 or s. 775.083, if unless the value of the
 33 ~~personal~~ property or equipment is less than ~~of a value of~~ \$300.
 34 ~~or more; in that event the violation constitutes~~

35 (b) A felony of the third degree, punishable as provided
 36 in s. 775.082, s. 775.083, or s. 775.084, if the value of the
 37 property or equipment is \$300 or more.

38 (2) HIRING OR LEASING WITH THE INTENT TO DEFRAUD.—A person
 39 who ~~Whoever~~, with intent to defraud the owner or any other
 40 person lawfully possessing any personal property or equipment of
 41 the rental thereof, hires or leases the ~~personal~~ property or
 42 equipment from the owner or the owner's agents or any other
 43 person in lawful possession thereof commits: ~~shall, upon~~
 44 ~~conviction, be guilty of~~

45 (a) A misdemeanor of the second degree, punishable as
 46 provided in s. 775.082 or s. 775.083, if unless the value of the
 47 ~~personal~~ property or equipment is less than ~~of a value of~~ \$300.
 48 ~~or more; in that event the violation constitutes~~

49 (b) A felony of the third degree, punishable as provided
 50 in s. 775.082, s. 775.083, or s. 775.084, if the value of the
 51 property or equipment is \$300 or more.

52 (3) FAILURE TO REDELIVER HIRED OR LEASED PERSONAL
 53 PROPERTY.—A person who ~~Whoever~~, after hiring or leasing any
 54 personal property or equipment under an agreement to redeliver
 55 the property or equipment ~~same~~ to the person letting it, ~~such~~
 56 ~~personal property or equipment~~ or his or her agent, at the

57 termination of the period for which it was let, ~~shall, without~~
 58 ~~the consent of such person or persons~~ knowingly and without the
 59 consent of such person or persons ~~abandons~~ ~~abandon~~ or refuses
 60 ~~refuse~~ to redeliver the ~~personal~~ property or equipment as
 61 agreed, commits: ~~shall, upon conviction, be guilty of~~

62 (a) A misdemeanor of the second degree, punishable as
 63 provided in s. 775.082 or s. 775.083, if ~~unless~~ the value of the
 64 ~~personal~~ property or equipment is less than ~~of a value of \$300.~~
 65 ~~or more; in that event the violation constitutes~~

66 (b) A felony of the third degree, punishable as provided
 67 in s. 775.082, s. 775.083, or s. 775.084, if the value of the
 68 property or equipment is \$300 or more.

69 (4) EVIDENCE.—

70 (a) In prosecutions under this section, obtaining the
 71 property or equipment under false pretenses; absconding without
 72 payment; or removing or attempting to remove the property or
 73 equipment from the county without the express written consent of
 74 the lessor, is prima facie evidence of fraudulent intent.

75 (b) In a prosecution under subsection (3), failure to
 76 redeliver the property or equipment within 5 days after
 77 receiving the demand for return from a courier service with
 78 tracking capability or by certified mail, return receipt
 79 requested after receipt of, or within 5 days after delivery by
 80 the courier service or return receipt from, the certified
 81 mailing of the demand for return, is prima facie evidence of
 82 abandonment or refusal to redeliver the property. Notice mailed
 83 by a courier service with tracking capabilities or by certified
 84 mail, return receipt requested, to the address given by the

85 renter at the time of rental shall be deemed sufficient and
 86 equivalent to notice having been received by the renter, if
 87 ~~should~~ the notice is ~~be~~ returned undelivered.

88 (c) In a prosecution under subsection (3), failure to pay
 89 any amount due which is incurred as the result of the failure to
 90 redeliver property or equipment after the rental period expires,
 91 and after the demand for return is made, is prima facie evidence
 92 of abandonment or refusal to redeliver the property or
 93 equipment. Amounts due include unpaid rental for the time period
 94 during which the property or equipment was not returned and
 95 include the lesser of the cost of repairing or replacing the
 96 property or equipment if it has been damaged.

97 (5) DEMAND FOR RETURN.—Demand for return of overdue
 98 property or equipment and for payment of amounts due may be made
 99 in person, by hand delivery, by courier service with tracking
 100 capabilities, or by certified mail, return receipt requested,
 101 addressed to the lessee's address shown in the rental contract.

102 (6) NOTICE REQUIRED.—As a prerequisite to prosecution
 103 under this section, the following statement must be contained in
 104 the agreement under which the owner or person lawfully
 105 possessing the property or equipment has relinquished its
 106 custody, or in an addendum to that agreement, and the statement
 107 must be initialed by the person hiring or leasing the rental
 108 property or equipment:

109
 110 Failure to return rental property or equipment upon
 111 expiration of the rental period and failure to pay all
 112 amounts due (including costs for damage to the property or

CS/HB 729

2012

113 equipment) are evidence of abandonment or refusal to
 114 redeliver the property, punishable in accordance with
 115 section 812.155, Florida Statutes.

116
 117 (7) POSSESSION BY OTHERS NOT A DEFENSE.—Possession of
 118 personal property or equipment by a third party is not a defense
 119 to failure to return the property.

120 (8) REPORTING VEHICLE AS STOLEN.—A lessor of a vehicle
 121 that is not returned at the conclusion of the lease who
 122 satisfies the requirements of this section concerning the
 123 vehicle is entitled to report the vehicle as stolen to law
 124 enforcement and have the vehicle listed as stolen on any local
 125 or national registries of such vehicles.

126 Section 2. This act shall take effect October 1, 2012.

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/HB 823 Florida Uniform Principal and Income Act
SPONSOR(S): Civil Justice Subcommittee, McBurney
TIED BILLS: None **IDEN./SIM. BILLS:** CS/SB 978

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Civil Justice Subcommittee	14 Y, 0 N, As CS	Cary	Bond
2) Insurance & Banking Subcommittee	12 Y, 0 N	Read	Cooper
3) Judiciary Committee		Cary <i>JMC</i>	Havlicak <i>RH</i>

SUMMARY ANALYSIS

Florida law governs the creation of wills and trusts and the administration of such instruments. Drafters of wills and trusts have broad authority to create parameters for administering the instrument within the documents, but the Florida statutes serve to provide default guidelines where the instrument is silent.

The Florida Uniform Principal and Income Act (Act) is modeled after the Uniform Principal and Income Act as drafted by the National Conference of Commissioners on Uniform State Laws. The Florida act is similar to the model act.

Practitioners have identified several issues with the Act, including some misuse of the terms "fiduciary" and "trustee". Trustees are always fiduciaries, but fiduciaries are not always trustees. In some cases, the word "trustee" was used in a context where the provision should apply to all fiduciaries.

Fluctuations in the stock market make it difficult to evaluate assets and can lead to a wide variance in distributions from year to year. This bill implements a "smoothing rule" where fiduciaries calculate the average fair market value of the current year assets and the two preceding years' assets. The bill also provides clarification for allocating assets between principal and income, including providing a new definition for "carrying value," which is the fair market value at the time the assets are received by the fiduciary.

The bill also modifies the default guidelines for several other aspects, including unitrusts, distribution of income, the partial liquidation rule, marital deductions, liquidating assets, income taxes, and property improvements.

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

This bill takes effect on January 1, 2013.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Background

In 2002, a modified version of the Uniform Principal and Income Act, as developed by the National Commissioners on Uniform State Laws in 1997, was enacted.¹ The Act provides procedures for trustees administering an estate in differentiating principal from income and ensuring that the intention of the trust creator is the guiding principal for trustees.² The Act provides default rules to trustees and fiduciaries where the will or trust instrument is silent.

The Act defines principal as property held in trust for distribution to a remainder beneficiary when the trust terminates.³ Income is money or property that a fiduciary receives as current return from a principal asset.⁴

Effects of the Bill

Trustee and Fiduciary

Trustees and fiduciaries both have the responsibility to act primarily for another's benefit.⁵ However, a trustee is the owner of the legal title to the property of the trust.⁶ Current law defines a trustee to include an original, additional, or successor trustee, whether or not appointed or confirmed by a court.⁷ A fiduciary is a personal representative or a trustee. The term includes an executor, administrator, successor personal representative, special administrator, or a person performing substantially the same function.⁸ A trustee is always a fiduciary, but a fiduciary is not always a trustee.

The bill changes "trustee" to "fiduciary" throughout wherever the word "trustee" should also apply to fiduciaries that are not specifically designated as trustees. Furthermore, the bill amends s. 738.103, F.S., to provide that the chapter pertains to the administration of trusts administered in this state or under its law, and to any estate that is administered in this state unless the provision is limited in application to a trustee, rather than a fiduciary.

Carrying Value

The bill amends s. 738.102, F.S., to provide a new standard for valuing assets. The term "carrying value" is defined as the fair market value at the time the assets are received by the fiduciary, and a change in fiduciaries allows the majority of continuing fiduciaries to elect to adjust the carrying values to reflect the fair market value of the assets at the beginning of their administration. The bill amends ss. 738.202, 738.302, and s. 738.603, F.S., to apply the carrying value, which will simplify administration of trusts by not requiring the fiduciary to revalue the assets on each distribution date unless there is a non

¹ Chapter 2002-42, L.O.F.

² The National Conference of Commissioners on Uniform State Laws, [http://www.nccusl.org/Narrative.aspx?title=Why States Should Adopt UPIA](http://www.nccusl.org/Narrative.aspx?title=Why%20States%20Should%20Adopt%20UPIA) (last visited on Jan. 4, 2012).

³ Section 738.102(10), F.S.

⁴ Section 738.102(4), F.S.

⁵ See, e.g., *Black's Law Dictionary*, which defines a fiduciary as ". . . a person holding the character of a trustee, or a character analogous to that of a trustee, in respect to the trust and confidence involved in it and the scrupulous good faith and candor which it requires. A person having duty, created by his undertaking, to act primarily for another's benefit in matters connected with such undertaking." 5th Ed., at 563.

⁶ See, e.g., *Black's Law Dictionary*, which defines a trustee as a "person holding property in trust. The person appointed, or required by law, to execute a trust; one in whom an estate, interest, or power is vested, under an express or implied agreement to administer or exercise it for the benefit or to the use of another called the cestui que trust. Person who holds title to res and administers it for others' benefit." 5th Ed., at 1357.

⁷ Section 738.102(13), F.S.

⁸ Section 738.102(3), F.S.

pro-rata distribution to one or more beneficiaries, in which case the bill provides guidelines on how to make the distribution.

Unitrusts

A "unitrust" is a "trust from which a fixed percentage of the net fair market value of the trust's assets, valued annually, is paid each year to the beneficiary."⁹ The value of assets in a unitrust are calculated by the "fair market value" method, which is the fair market value of assets held by the trust as otherwise determined under this chapter, reduced by all known noncontingent liabilities.¹⁰

The bill provides new rules for valuing assets for unitrusts. The bill amends s. 738.1041(1)(a), F.S., to add a definition for "average fair market value" which includes what is commonly referred to as the "smoothing rule." This rule is intended to reduce the large differences in amounts distributable to a beneficiary from year to year depending on large market fluctuations by using the average fair market value over the past three years to value assets. The bill then implements the smoothing rule in the definition of "unitrust amount" in s. 738.1041(1), F.S.

Determination and Distribution of Net Income

Current law requires a fiduciary, in certain situations, to distribute to the beneficiary who receives a pecuniary amount outright the interest provided by will, the terms of the trust, or applicable law. However, this was model act language and there are no situations where this law applies in Florida. Current law also contains language from the model act that implies that there is a statutory right to income on an outright pecuniary device in Florida, where such a right does not exist.¹¹

The bill amends s. 738.201(3), F.S., to remove unnecessary language referencing "applicable law" where there is no applicable law and to remove model act language pertaining to a statutory right to income on an outright pecuniary device, which is not a right in Florida.

Character of Receipts

Current law provides a default provision for determining whether assets should be allocated to principal or income: payments in excess of 20% of the entities' assets are presumed to be liquidating distributions which are allocated to principal (the 20% partial liquidation rule). However, certain entities pay large dividends that may exceed this limit despite not being liquidating assets.¹²

The bill amends s. 738.401, F.S., to retain the 20% partial liquidation rule for non-publicly-traded entities, but only after the trust or estate has received a cumulative minimum return of 3% annually. The bill provides a framework for allocating dividends and other stock payments which exceed 10% of fair market value of the trust's interest in that entity, and provides rules for different types of entities, such as publicly-traded companies, partnerships, subchapter S corporations, and other entities.

Marital Trusts and Deductions

Current law contains one method of computing income from assets held in marital trusts and another more complex method of computing the allocation of principal and income for non-marital trusts.¹³

The bill amends s. 738.602(4), F.S., to simplify the method for computing income held in non-marital trusts. The bill also amends s. 738.602(5), F.S., to ensure that the estate or gift tax marital deduction applies to not only federal tax laws, but tax laws of other states where the trust is administered in

⁹ *Black's Law Dictionary*, 5th Ed., at 1376.

¹⁰ Section 738.1041(1)(b), F.S.

¹¹ Section 738.201, F.S.

¹² Section 738.401, F.S.

¹³ Compare s. 738.602(4) and (5), F.S.

Florida. The bill also amends s. 738.606(1), F.S., to clarify that the marital deduction in that section can apply to the IRS or a comparable law of any state.

Liquidating Asset

Assets in a trust that are expected to produce receipts for a limited period of time are allocated such that 10% of the payments go to income and the rest is applied to principal. The Internal Revenue Service (IRS) recently ruled that the safe harbor was between 3 % and 5% to income, putting Florida trusts at risk for additional tax liabilities.

The bill amends s. 738.603(2), F.S., to change the percentage of limited-duration assets applied to income from 10% to 5% to comply with an IRS ruling that 5% is the maximum safe harbor for such an allocation.

Disbursements from Income

Current law requires fiduciaries to make certain disbursements from income, providing that the disbursements are not income from property used to discharge liabilities or disbursements paying from principal which were incurred in connection with the settlement of a decedent's estate or the winding up of a terminating income interest.¹⁴

The bill amends s. 738.701, F.S., to add an additional exclusion from disbursements from income, payments from income or principal including, at the fiduciary's discretion, attorney, accountant, or fiduciary fees, court costs, other administration expenses, and interest on death taxes.

Income Taxes

Current law provides guidelines for paying income taxes out of a trust, including guidelines specifically for paying taxes on an entity's taxable income. Current law also requires payment from income to the extent receipts from the entity are allocated to income and from principal to the extent that receipts from the entity are allocated to principal and the trust's share of the entity's taxable income exceeds the total of such receipts. Receipts allocated to principal or income are reduced by the amount distributed to a beneficiary from principal or income for which the trust receives a deduction in calculating the tax.¹⁵

The bill amends s. 738.705, F.S., to provide new guidelines for paying income taxes out of a trust. The bill provides that an income tax required to be paid on the trust or estate's share of an entity's taxable income is to be paid proportionally from income to the extent the receipts from the entity are allocated to income, from principal to the extent the receipts from the entity are allocated to principal, and from principal to the extent that the income taxes payable by the trust or estate exceed the total distributions from the entity. Then, the fiduciary is to adjust income or principal receipts to the extent that the trust or estate's income taxes are reduced, but not eliminated, because the trust or estate receives a deduction for payments made to a beneficiary, with additional guidelines to provide clarity to the fiduciary.

Improvements

Under the common law, when a tenant of a property had a life estate, the tenant was generally responsible for the maintenance of the property while the holder of the remainder interest, or the remainderman, was responsible for capital improvements. The original adoption of the act attempted to codify the common law rule, but the wording of the act could lead to different conclusion for the apportionment of expenses because the act used terms common in trust law, which did not exist at common law.

The bill amends s. 738.801, F.S., to provide definitions and additional guidelines for apportioning expenses between the life tenant and the remainderman in the absence of a trust. Life tenants are

¹⁴ Section 738.701, F.S.

¹⁵ Section 738.705, F.S.

responsible for paying ordinary expenses and maintenance, recurring insurance premiums, and other expenses which are the result of the property's use by the tenant. The remainderman is responsible for paying mortgage debt not allocated to the tenant, expenses due to title other than the tenant's estate, environmental expenses, and extraordinary repairs. If either party incurs an expense for personal benefit without the consent of the other, that party bears the expense in full. For improvements that add value to the property forming part of the principal, the expense is split between the tenant and the remainderman, with the tenant paying to the extent that the improvement increases the value of the tenant's estate.

Effective Date

The bill provides an effective date of January 1, 2013, in order to provide practitioners enough lead time to prepare for the changes in the law.

B. SECTION DIRECTORY:

Section 1 amends s. 738.102, F.S., providing an additional definition.

Section 2 amends s. 738.103, F.S., relating to fiduciary duties.

Section 3 amends s. 738.104, F.S., relating to the trustee's power to adjust.

Section 4 amends s. 738.1041, F.S., relating to total return unitrusts.

Section 5 amends s. 738.105, F.S., relating to judicial control of discretionary powers.

Section 6 amends s. 738.201, F.S., relating to determination and distribution of net income.

Section 7 amends s. 738.202, F.S., relating to distribution to residuary and remainder beneficiaries.

Section 8 amends s. 738.301, F.S., relating to right to income.

Section 9 amends s. 738.302, F.S., relating to apportionment of receipts and disbursements.

Section 10 amends s. 738.303, F.S., relating to apportionment when income interest ends.

Section 11 amends s. 738.401, F.S., relating to the character of receipts.

Section 12 amends s. 738.402, F.S., relating to distribution from trust or estate.

Section 13 amends s. 738.403, F.S., relating to business and other activities conducted by fiduciaries.

Section 14 amends s. 738.501, F.S., relating to principal receipts.

Section 15 amends s. 738.502, F.S., relating to rental property.

Section 16 amends s. 738.503, F.S., relating to the obligation to pay money.

Section 17 amends s. 738.504, F.S., relating to insurance policies and similar contracts.

Section 18 amends s. 738.601, F.S., relating to insubstantial allocations.

Section 19 amends s. 738.602, F.S., relating to payments from deferred compensation plans, annuities, and retirement plans or accounts.

Section 20 amends s. 738.603, F.S., relating to liquidating assets.

Section 21 amends s. 738.604, F.S., relating to minerals, water, and other natural resources.

Section 22 amends s. 738.605, F.S., relating to timber.

Section 23 amends s. 738.606, F.S., relating to property not productive of income.

Section 24 amends s. 738.607, F.S., relating to derivatives and options.

Section 25 amends s. 738.608, F.S., relating to asset-backed securities.

Section 26 amends s. 738.701, F.S., relating to disbursements from income.

Section 27 amends s. 738.702, F.S., relating to disbursements from principal.

Section 28 amends s. 738.703, F.S., relating to transfers from income to principal for depreciation.

Section 29 amends s. 738.704, F.S., relating to transfers from income to reimburse principal.

Section 30 amends s. 738.705, F.S., relating to income taxes.

Section 31 amends s. 738.801, F.S., relating to apportionment of expenses for improvements.

Section 32 provides an effective date of January 1, 2013.

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:

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 require 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 January 11, 2012, the Civil Justice Subcommittee approved a proposed committee substitute which made numerous minor grammatical and stylistic changes throughout. It also changes "trustee" to "fiduciary", as appropriate. This analysis is drafted to the committee substitute as passed by the Civil Justice Subcommittee.

1 A bill to be entitled
2 An act relating to the Florida Uniform Principal and
3 Income Act; amending s. 738.102, F.S.; defining the
4 term "carrying value"; amending s. 738.103, F.S.;
5 providing application; amending s. 738.104, F.S.;
6 deleting a provision authorizing a trustee to release
7 the power to adjust between principal and income if
8 the trustee desires to convert the form of certain
9 trusts; limiting the power to adjust a trust; deleting
10 a provision that provides construction and application
11 relating to the administration of trusts in this state
12 or under this state's law; amending s. 738.1041, F.S.;
13 defining the term "average fair market value" and
14 revising the term "unitrust amount"; deleting a
15 duplicative provision relating to conclusive
16 determinations of the terms of a unitrust; revising
17 provisions relating to an express total return
18 unitrust; amending s. 738.105, F.S.; substituting the
19 term "trustee" for "fiduciary" with respect to
20 judicial control of discretionary powers; amending s.
21 738.201, F.S.; revising provisions relating to the
22 determination and distribution of net income; amending
23 s. 738.202, F.S.; revising provisions relating to
24 distributions to residuary and remainder
25 beneficiaries; amending ss. 738.301, 738.302, and
26 738.303, F.S.; substituting the term "fiduciary" for
27 "trustee" to clarify that provisions apply to all
28 fiduciaries; amending s. 738.401, F.S.; substituting

29 the term "fiduciary" for "trustee" to clarify that
 30 provisions apply to all fiduciaries; revising how
 31 distributions from entities are allocated between
 32 income and principal; amending ss. 738.402, 738.403,
 33 738.501, 738.502, 738.503, 738.504, and 738.601, F.S.;
 34 substituting the term "fiduciary" for "trustee" to
 35 clarify that provisions apply to all fiduciaries;
 36 amending s. 738.602, F.S.; substituting the term
 37 "fiduciary" for "trustee" to clarify that provisions
 38 apply to all fiduciaries; revising provisions relating
 39 to allocations to trusts; amending s. 738.603, F.S.;
 40 substituting the term "fiduciary" for "trustee" to
 41 clarify that provisions apply to all fiduciaries;
 42 revising provisions relating to the allocation between
 43 income and principal when liquidating assets; amending
 44 ss. 738.604, 738.605, 738.606, 738.607, 738.608,
 45 738.701, 738.702, 738.703, and 738.704, F.S.;
 46 substituting the term "fiduciary" for "trustee" to
 47 clarify that provisions apply to all fiduciaries;
 48 amending s. 738.705, F.S.; substituting the term
 49 "fiduciary" for "trustee" to clarify that provisions
 50 apply to all fiduciaries; revising the method for
 51 allocating income taxes between income and principal;
 52 amending s. 738.801, F.S.; clarifying the
 53 apportionment of expenses between tenants and
 54 remaindermen; providing an effective date.

55
 56 Be It Enacted by the Legislature of the State of Florida:

57
58
59
60
61
62
63
64
65
66
67
68
69
70
71
72
73
74
75
76
77
78
79
80
81
82
83
84

Section 1. Present subsections (3) through (13) of section 738.102, Florida Statutes, are renumbered as subsections (4) through (14), respectively, and a new subsection (3) is added to that section, to read:

738.102 Definitions.—As used in this chapter, the term:
(3) "Carrying value" means the fair market value at the time the assets are received by the fiduciary. For the estates of decedents and trusts described in s. 733.707(3), after the grantor's death, the assets are considered received as of the date of death. If there is a change in fiduciaries, a majority of the continuing fiduciaries may elect to adjust the carrying values to reflect the fair market value of the assets at the beginning of their administration. If such election is made, it must be reflected on the first accounting filed after the election. For assets acquired during the administration of the estate or trust, the carrying value is equal to the acquisition costs of the asset.

Section 2. Subsection (3) is added to section 738.103, Florida Statutes, to read:

738.103 Fiduciary duties; general principles.—
(3) Except as provided in s. 738.1041(9), this chapter pertains to the administration of a trust and is applicable to any trust that is administered in this state or under its law. This chapter also applies to any estate that is administered in this state unless the provision is limited in application to a trustee, rather than a fiduciary.

Section 3. Subsections (5) and (11) of section 738.104,

CS/HB 823

2012

85 Florida Statutes, are amended to read:

86 738.104 Trustee's power to adjust.-

87 (5) (a) ~~A trustee may release the entire power to adjust~~
 88 ~~conferred by subsection (1) if the trustee desires to convert an~~
 89 ~~income trust to a total return unitrust pursuant to s. 738.1041.~~

90 (b) A trustee may release the entire power to adjust
 91 conferred by subsection (1) or may release only the power to
 92 adjust from income to principal or the power to adjust from
 93 principal to income if the trustee is uncertain about whether
 94 possessing or exercising the power will cause a result described
 95 in paragraphs (3) (a)-(e) or paragraph (3) (g) or if the trustee
 96 determines that possessing or exercising the power will or may
 97 deprive the trust of a tax benefit or impose a tax burden not
 98 described in subsection (3).

99 (b)(e) A release under this subsection may be permanent or
 100 for a specified period, including a period measured by the life
 101 of an individual. ~~Notwithstanding anything contrary to this~~
 102 ~~subsection, a release of the power to adjust pursuant to~~
 103 ~~paragraph (a) shall remain effective only for as long as the~~
 104 ~~trust is administered as a unitrust pursuant to s. 738.1041.~~

105 ~~(11) This section shall be construed as pertaining to the~~
 106 ~~administration of a trust and is applicable to any trust that is~~
 107 ~~administered either in this state or under Florida law.~~

108 Section 4. Section 738.1041, Florida Statutes, is amended
 109 to read:

110 738.1041 Total return unitrust.-

111 (1) For purposes of this section, the term:

112 (a) "Average fair market value" means the average of the

113 fair market values of assets held by the trust at the beginning
 114 of the current and each of the 2 preceding years, or for the
 115 entire term of the trust if there are less than 2 preceding
 116 years, and adjusted as follows:

117 1. If assets have been added to the trust during the years
 118 used to determine the average, the amount of each addition is
 119 added to all years in which such addition was not included.

120 2. If assets have been distributed from the trust during
 121 the years used to determine the average, other than in
 122 satisfaction of the unitrust amount, the amount of each
 123 distribution is subtracted from all years in which such
 124 distribution was not included.

125 (b) (a) "Disinterested person" means a person who is not a
 126 "related or subordinate party" ~~as defined in s. 672(c) of the~~
 127 ~~United States Internal Revenue Code, 26 U.S.C. ss. 1 et seq., or~~
 128 ~~any successor provision thereof,~~ with respect to the person then
 129 acting as trustee of the trust and excludes the grantor and any
 130 interested trustee.

131 (c) (b) "Fair market value" means the fair market value of
 132 the assets held by the trust as otherwise determined under this
 133 chapter, reduced by all known noncontingent liabilities.

134 (d) (e) "Income trust" means a trust, created by ~~either~~ an
 135 inter vivos or a testamentary instrument, which directs or
 136 permits the trustee to distribute the net income of the trust to
 137 one or more persons, ~~either~~ in fixed proportions or in amounts
 138 or proportions determined by the trustee and regardless of
 139 whether the trust directs or permits the trustee to distribute
 140 the principal of the trust to one or more such persons.

141 (e)~~(d)~~ "Interested distributee" means a person to whom
 142 distributions of income or principal can currently be made and
 143 who has the power to remove the existing trustee and designate
 144 as successor a person who may be a "related or subordinate
 145 party," ~~as defined in the Internal Revenue Code, 26 U.S.C. s.~~
 146 ~~672(e)~~, with respect to such distributee.

147 (f)~~(e)~~ "Interested trustee" means an individual trustee to
 148 whom the net income or principal of the trust can currently be
 149 distributed or would be distributed if the trust were ~~then~~ to
 150 terminate and be distributed, any trustee whom an interested
 151 distributee has the power to remove and replace with a related
 152 or subordinate party ~~as defined in paragraph (d)~~, or an
 153 individual trustee whose legal obligation to support a
 154 beneficiary may be satisfied by distributions of income and
 155 principal of the trust.

156 (g) "Related or subordinate party" has the same meaning as
 157 provided in 26 U.S.C. s. 672(c) of the Internal Revenue Code, or
 158 any successor provision thereof.

159 (h)~~(f)~~ "Unitrust amount" means the amount determined by
 160 multiplying the average fair market value of the assets as
 161 calculated ~~defined~~ in paragraph (a) ~~(b)~~ by the percentage
 162 calculated under paragraph (2) (b).

163 (2) A trustee may, without court approval, convert an
 164 income trust to a total return unitrust, reconvert a total
 165 return unitrust to an income trust, or change the percentage
 166 used to calculate the unitrust amount or the method used to
 167 determine the fair market value of the trust if:

168 (a) The trustee adopts a written statement regarding trust

169 distributions which ~~that~~ provides:

170 1. In the case of a trust being administered as an income
 171 trust, that future distributions from the trust will be unitrust
 172 amounts rather than net income, and indicates the manner in
 173 which the unitrust amount will be calculated and the method in
 174 which the fair market value of the trust will be determined.

175 2. In the case of a trust being administered as a total
 176 return unitrust, that:

177 a. Future distributions from the trust will be net income
 178 rather than unitrust amounts; or

179 b. The percentage used to calculate the unitrust amount or
 180 the method used to determine the fair market value of the trust
 181 will be changed, and indicates the manner in which the new
 182 unitrust amount will be calculated and the method in which the
 183 new fair market value of the trust will be determined;

184 (b) The trustee determines the terms of the unitrust under
 185 one of the following methods:

186 1. A disinterested trustee determines, or if there is no
 187 trustee other than an interested trustee, the interested trustee
 188 appoints a disinterested person who, in its sole discretion but
 189 acting in a fiduciary capacity, determines for the interested
 190 trustee:

191 a. The percentage to be used to calculate the unitrust
 192 amount, provided the percentage used is not greater than 5
 193 percent nor less than 3 percent;

194 b. The method to be used in determining the fair market
 195 value of the trust; and

196 c. Which assets, if any, are to be excluded in determining

197 the unitrust amount; or

198 2. The interested trustee or disinterested trustee
199 administers the trust such that:

200 a. The percentage used to calculate the unitrust amount is
201 50 percent of the ~~applicable federal~~ rate as defined in the
202 Internal Revenue Code, 26 U.S.C. s. 7520, in effect for the
203 month the conversion under this section becomes effective and
204 for each January thereafter; however, if the percentage
205 calculated exceeds 5 percent, the unitrust percentage is ~~shall~~
206 ~~be~~ 5 percent and if the percentage calculated is less than 3
207 percent, the unitrust percentage is ~~shall be~~ 3 percent; and

208 b. The fair market value of the trust shall be determined
209 at least annually on an asset-by-asset basis, reasonably and in
210 good faith, in accordance with ~~the provisions of~~ s. 738.202(5),
211 except the following property shall not be included in
212 determining the value of the trust:

213 (I) Any residential property or any tangible personal
214 property that, as of the first business day of the current
215 valuation year, one or more current beneficiaries of the trust
216 have or have had the right to occupy, or have or have had the
217 right to possess or control, ~~other than in his or her capacity~~
218 ~~as trustee of the trust~~, and instead the right of occupancy or
219 the right to possession and control is ~~shall be deemed to be~~ the
220 unitrust amount with respect to such property; however, the
221 unitrust amount must ~~shall~~ be adjusted to take into account
222 partial distributions from or receipt into the trust of such
223 property during the valuation year;~~-~~

224 (II) Any asset specifically given to a beneficiary and the

CS/HB 823

2012

225 return on investment on such property, which return on
 226 investment shall be distributable to the ~~such~~ beneficiary; or.

227 (III) Any asset ~~while~~ held in a decedent's ~~testator's~~
 228 estate;

229 (c) The trustee sends written notice of its intention to
 230 take such action, along with copies of the ~~such~~ written
 231 statement regarding trust distributions and this section, and,
 232 if applicable, the determinations of ~~either~~ the trustee or the
 233 disinterested person to:

234 1. The grantor of the trust, if living.

235 2. All living persons who are currently receiving or
 236 eligible to receive distributions of income from ~~of~~ the trust.

237 3. All living persons who would receive distributions of
 238 principal of the trust if the trust were to terminate at the
 239 time of ~~the~~ giving ~~of~~ such notice ~~(without regard to the~~
 240 exercise of any power of appointment,~~)~~ or, if the trust does not
 241 provide for its termination, all living persons who would
 242 receive or be eligible to receive distributions of income or
 243 principal of the trust if the persons identified in subparagraph
 244 2. were deceased.

245 4. All persons acting as advisers or protectors of the
 246 trust.

247

248 Notice under this paragraph shall be served informally~~7~~ in the
 249 manner provided in the Florida Rules of Civil Procedure relating
 250 to service of pleadings subsequent to the initial pleading.

251 Notice may be served on a legal representative or natural
 252 guardian of a person without ~~the~~ filing ~~of~~ any proceeding or

253 approval of any court;

254 (d) At least one person receiving notice under each of
 255 subparagraphs (c)2. and 3. is legally competent; and

256 (e) No person receiving such notice objects, by written
 257 instrument delivered to the trustee, to the proposed action of
 258 the trustee or the determinations of the disinterested person
 259 within 60 days after service of such notice. An objection ~~under~~
 260 ~~this section~~ may be executed by a legal representative or
 261 natural guardian of a person without ~~the~~ filing ~~of~~ any
 262 proceeding or approval of any court.

263 (3) If a trustee desires to convert an income trust to a
 264 total return unitrust, reconvert a total return unitrust to an
 265 income trust, or change the percentage used to calculate the
 266 unitrust amount or the method used to determine a fair market
 267 value of the trust but does not have the ability to or elects
 268 not to do it under subsection (2), the trustee may petition the
 269 circuit court for such order as the trustee deems appropriate.
 270 In that event, the court, in its own discretion or on the
 271 petition of such trustee or any person having an income or
 272 remainder interest in the trust, may appoint a disinterested
 273 person who, acting in a fiduciary capacity, shall present such
 274 information to the court as is ~~shall be~~ necessary for the court
 275 to make a determination hereunder.

276 ~~(4) All determinations made pursuant to sub-subparagraph~~
 277 ~~(2)(b)2.b. shall be conclusive if reasonable and made in good~~
 278 ~~faith. Such determination shall be conclusively presumed to have~~
 279 ~~been made reasonably and in good faith unless proven otherwise~~
 280 ~~in a proceeding commenced by or on behalf of a person interested~~

281 ~~in the trust within the time provided in s. 736.1008. The burden~~
 282 ~~will be on the objecting interested party to prove that the~~
 283 ~~determinations were not made reasonably and in good faith.~~

284 (4)~~(5)~~ Following the conversion of an income trust to a
 285 total return unitrust, the trustee:

286 (a) Shall treat the unitrust amount as if it were net
 287 income of the trust for purposes of determining the amount
 288 available, from time to time, for distribution from the trust.

289 (b) May allocate to trust income for each taxable year of
 290 the trust, or portion thereof:

291 1. Net short-term capital gain described in the Internal
 292 Revenue Code, 26 U.S.C. s. 1222(5), for such year, or portion
 293 thereof, but only to the extent that the amount so allocated
 294 together with all other amounts allocated to trust income, as
 295 determined under the provisions of this chapter without regard
 296 to this section and s. 738.104, for such year, or portion
 297 thereof, does not exceed the unitrust amount for such year, or
 298 portion thereof.

299 2. Net long-term capital gain described in the Internal
 300 Revenue Code, 26 U.S.C. s. 1222(7), for such year, or portion
 301 thereof, but only to the extent that the amount so allocated
 302 together with all other amounts, including amounts described in
 303 subparagraph 1., allocated to trust income for such year, or
 304 portion thereof, does not exceed the unitrust amount for such
 305 year, or portion thereof.

306 (5)~~(6)~~ In administering a total return unitrust, the
 307 trustee may, in its sole discretion but subject to the
 308 provisions of the governing instrument, determine:

CS/HB 823

2012

309 (a) The effective date of the conversion.

310 (b) The timing of distributions, including provisions for
 311 prorating a distribution for a short year in which a
 312 beneficiary's right to payments commences or ceases.

313 (c) Whether distributions are to be made in cash or in
 314 kind or partly in cash and partly in kind.

315 (d) If the trust is reconverted to an income trust, the
 316 effective date of such reconversion.

317 (e) Such other administrative issues as may be necessary
 318 or appropriate to carry out the purposes of this section.

319 (6)~~(7)~~ Conversion to a total return unitrust under ~~the~~
 320 ~~provisions of~~ this section does ~~shall~~ not affect any other
 321 provision of the governing instrument, if any, regarding
 322 distributions of principal.

323 (7)~~(8)~~ Any trustee or disinterested person who in good
 324 faith takes or fails to take any action under this section is
 325 ~~shall~~ not be liable to any person affected by such action or
 326 inaction, regardless of whether such person received written
 327 notice as provided in this section or ~~and regardless of whether~~
 328 such person was under a legal disability at the time of the
 329 delivery of such notice. Such person's exclusive remedy is ~~shall~~
 330 ~~be~~ to obtain, under subsection (8) ~~(9)~~, an order of the court
 331 directing the trustee to convert an income trust to a total
 332 return unitrust, to reconvert from a total return unitrust to an
 333 income trust, or to change the percentage used to calculate the
 334 unitrust amount. If a court determines that the trustee or
 335 disinterested person has not acted in good faith in taking or
 336 failing to take any action under this section, ~~the provisions of~~

337 s. 738.105(3) applies ~~apply~~.

338 (8) ~~(9)~~ If a majority in interest of ~~either~~ the income or
 339 remainder beneficiaries of an income trust has delivered to the
 340 trustee a written objection to the amount of the income
 341 distributions of the trust, and, if the trustee has failed to
 342 resolve the objection to the satisfaction of the objecting
 343 beneficiaries within 6 months after ~~from the~~ receipt of such
 344 written objection, ~~then~~ the objecting beneficiaries may petition
 345 the court in accordance with subsection (3).

346 (9) ~~(10)~~ This section pertains ~~shall be construed as~~
 347 ~~pertaining~~ to the administration of a trust and is applicable to
 348 any trust that is administered ~~either~~ in this state or under
 349 Florida law unless:

350 (a) The governing instrument reflects an intention that
 351 the current beneficiary or beneficiaries are to receive an
 352 amount other than a reasonable current return from the trust;

353 (b) The trust is a trust described in the Internal Revenue
 354 Code, 26 U.S.C. s. 170(f)(2)(B), s. 642(c)(5), s. 664(d), s.
 355 2702(a)(3), or s. 2702(b);

356 (c) One or more persons to whom the trustee could
 357 distribute income have a power of withdrawal over the trust:

358 1. That is not subject to an ascertainable standard under
 359 the Internal Revenue Code, 26 U.S.C. s. 2041 or s. 2514, and
 360 exceeds in any calendar year the amount set forth in the
 361 Internal Revenue Code, 26 U.S.C. s. 2041(b)(2) or s. 2514(e); or

362 2. A power of withdrawal over the trust that can be
 363 exercised to discharge a duty of support he or she possesses; or

364 (d) The governing instrument expressly prohibits use of

365 this section by specific reference to the section. A provision
 366 in the governing instrument that, "The provisions of section
 367 738.1041, Florida Statutes, as amended, or any corresponding
 368 provision of future law, may ~~shall~~ not be used in the
 369 administration of this trust," or similar words reflecting such
 370 intent are ~~shall be~~ sufficient to preclude the use of this
 371 section; ~~or~~

372 ~~(e) The trust is a trust with respect to which a trustee~~
 373 ~~currently possesses the power to adjust under s. 738.104.~~

374 (10) ~~(11)~~ The grantor of a trust may create an express
 375 total return unitrust that ~~which~~ will be ~~become~~ effective as
 376 provided in the trust instrument ~~document~~ without requiring a
 377 conversion under this section.

378 (a) An express total return unitrust created by the
 379 grantor of the trust is ~~shall be~~ treated as a unitrust ~~under~~
 380 ~~this section~~ only if the terms of the trust instrument ~~document~~
 381 contain all of the following provisions:

382 1.(a) That distributions from the trust will be unitrust
 383 amounts and the manner in which the unitrust amount will be
 384 calculated; ~~and the method in which the fair market value of the~~
 385 ~~trust will be determined.~~

386 2.(b) The percentage to be used to calculate the unitrust
 387 amount, provided the percentage used is not greater than 5
 388 percent nor less than 3 percent.

389 (b) The trust instrument may also contain provisions
 390 specifying:

391 1.(e) The method to be used in determining the fair market
 392 value of the trust, including whether to use an average fair

393 market value or the fair market value of the assets held by the
 394 trust at the beginning of the current year; or-

395 2.(d) Which assets, if any, are to be excluded in
 396 determining the unitrust amount.

397 (c) This section establishes the method of determining the
 398 fair market value of the trust if the trust instrument is silent
 399 as to subparagraph (b)1., and to specify those assets, if any,
 400 which are to be excluded in determining the unitrust amount if
 401 the trust instrument is silent as to subparagraph (b)2.

402 Section 5. Subsections (1), (3), and (4) of section
 403 738.105, Florida Statutes, are amended to read:

404 738.105 Judicial control of discretionary powers.—

405 (1) A court may ~~shall~~ not change a trustee's ~~fiduciary's~~
 406 decision to exercise or not to exercise a discretionary power
 407 conferred by this chapter unless the court determines that the
 408 decision was an abuse of the trustee's ~~fiduciary's~~ discretion. A
 409 court may ~~shall~~ not determine that a trustee ~~fiduciary~~ abused
 410 its discretion merely because the court would have exercised the
 411 discretion in a different manner or would not have exercised the
 412 discretion.

413 (3) If a court determines that a trustee ~~fiduciary~~ has
 414 abused its discretion, the remedy is ~~shall be~~ to restore the
 415 income and remainder beneficiaries to the positions they would
 416 have occupied if the trustee ~~fiduciary~~ had not abused its
 417 discretion, in accordance with ~~according to~~ the following rules:

418 (a) To the extent the abuse of discretion has resulted in
 419 no distribution to a beneficiary or a distribution that is too
 420 small, the court shall require the trustee ~~fiduciary~~ to

CS/HB 823

2012

421 distribute from the trust to the beneficiary an amount the court
 422 determines will restore the beneficiary, in whole or in part, to
 423 his or her appropriate position.

424 (b) To the extent the abuse of discretion has resulted in
 425 a distribution to a beneficiary that is too large, the court
 426 shall restore the beneficiaries, the trust, or both, in whole or
 427 in part, to their appropriate positions by requiring the trustee
 428 ~~fiduciary~~ to withhold an amount from one or more future
 429 distributions to the beneficiary who received the distribution
 430 that was too large or requiring that beneficiary to return some
 431 or all of the distribution to the trust.

432 (c) To the extent the court is unable, after applying
 433 paragraphs (a) and (b), to restore the beneficiaries or ~~the~~
 434 trust, or both, to the positions they would have occupied if the
 435 trustee ~~fiduciary~~ had not abused its discretion, the court may
 436 require the trustee ~~fiduciary~~ to pay an appropriate amount from
 437 its own funds to one or more of the beneficiaries or the trust
 438 or both.

439 (4) Upon the filing of a petition by the trustee
 440 ~~fiduciary~~, the court having jurisdiction over the trust or
 441 estate shall determine whether a proposed exercise or
 442 nonexercise by the trustee ~~fiduciary~~ of a discretionary power
 443 conferred by this chapter will result in an abuse of the
 444 trustee's ~~fiduciary's~~ discretion. If the petition describes the
 445 proposed exercise or nonexercise of the power and contains
 446 sufficient information to inform the beneficiaries of the
 447 reasons for the proposal, the facts upon which the trustee
 448 ~~fiduciary~~ relies, and an explanation of how the income and

449 remainder beneficiaries will be affected by the proposed
 450 exercise or nonexercise of the power, a beneficiary who
 451 challenges the proposed exercise or nonexercise has the burden
 452 of establishing that such exercise or nonexercise will result in
 453 an abuse of discretion.

454 Section 6. Subsections (1) through (4) of section 738.201,
 455 Florida Statutes, are amended to read:

456 738.201 Determination and distribution of net income.—
 457 After a decedent dies, in the case of an estate, or after an
 458 income interest in a trust ends, the following rules apply:

459 (1) A fiduciary of an estate or of a terminating income
 460 interest shall determine the amount of net income and net
 461 principal receipts received from property specifically given to
 462 a beneficiary under ~~the rules in~~ ss. 738.301-738.706 ~~which apply~~
 463 ~~to trustees and the rules in~~ subsection (5). The fiduciary shall
 464 distribute the net income and net principal receipts to the
 465 beneficiary who is to receive the specific property.

466 (2) A fiduciary shall determine the remaining net income
 467 of a decedent's estate or a terminating income interest under
 468 ~~the rules in~~ ss. 738.301-738.706 ~~which apply to trustees and by:~~

469 (a) Including in net income all income from property used
 470 to discharge liabilities.

471 (b) Paying from income or principal, in the fiduciary's
 472 discretion, fees of attorneys, accountants, and fiduciaries;
 473 court costs and other expenses of administration; and interest
 474 on death taxes. ~~but~~ The fiduciary may pay those expenses from
 475 income of property passing to a trust for which the fiduciary
 476 claims an estate tax marital or charitable deduction under the

477 Internal Revenue Code or comparable law of any state only to the
 478 extent the payment of those expenses from income will not cause
 479 the reduction or loss of the deduction.

480 (c) Paying from principal all other disbursements made or
 481 incurred in connection with the settlement of a decedent's
 482 estate or the winding up of a terminating income interest,
 483 including debts, funeral expenses, disposition of remains,
 484 family allowances, and death taxes and related penalties that
 485 are apportioned to the estate or terminating income interest by
 486 the will, the terms of the trust, or applicable law.

487 (3) If A fiduciary shall distribute to a beneficiary who
 488 receives a pecuniary ~~devise~~ amount outright is also entitled to
 489 receive the interest or any other amount on the devise under the
 490 terms of provided by the will or, the terms of the trust, the
 491 fiduciary shall distribute the interest or other amount
 492 ~~applicable law~~ from net income determined under subsection (2)
 493 or from principal to the extent net income is insufficient. ~~If a~~
 494 ~~beneficiary is to receive a pecuniary amount outright from a~~
 495 ~~trust after an income interest ends and no interest or other~~
 496 ~~amount is provided for by the terms of the trust or applicable~~
 497 ~~law, the fiduciary shall distribute the interest or other amount~~
 498 ~~to which the beneficiary would be entitled under applicable law~~
 499 ~~if the pecuniary amount were required to be paid under a will.~~

500 (4) A fiduciary shall distribute the net income remaining
 501 after distributions required under subsections (1)-(3) by
 502 ~~subsection (3)~~ in the manner described in s. 738.202 to all
 503 other beneficiaries, including a beneficiary who receives a
 504 pecuniary amount in trust, even if the beneficiary holds an

CS/HB 823

2012

505 unqualified power to withdraw assets from the trust or other
 506 presently exercisable general power of appointment over the
 507 trust.

508 Section 7. Section 738.202, Florida Statutes, is amended
 509 to read:

510 738.202 Distribution to residuary and remainder
 511 beneficiaries.—

512 (1) Each beneficiary described in s. 738.201(4) is
 513 entitled to receive a portion of the net income remaining after
 514 the application of s. 738.201(1)-(3), which is equal to the
 515 beneficiary's fractional interest in undistributed principal
 516 assets, using carrying values as of the distribution date. If a
 517 fiduciary makes more than one distribution of assets to
 518 beneficiaries to whom this section applies, each beneficiary,
 519 including one who does not receive part of the distribution, is
 520 entitled, as of each distribution date, to the net income the
 521 fiduciary ~~has~~ received after the date of death or terminating
 522 event or earlier distribution date but has not distributed as of
 523 the current distribution date.

524 (2) In determining a beneficiary's share of net income,
 525 the following applies ~~rules apply~~:

526 (a) The beneficiary is entitled to receive a portion of
 527 the net income equal to the beneficiary's fractional interest in
 528 the carrying value of the undistributed principal assets
 529 immediately before the distribution date, excluding the amount
 530 of unpaid liabilities ~~including assets that later may be sold to~~
 531 ~~meet principal obligations.~~

532 (b) The beneficiary's fractional interest in the

533 undistributed principal assets shall be calculated: without
 534 ~~regard to~~

535 1. At the time the interest began and adjusted for any
 536 disproportionate distributions since the interest began;

537 2. By excluding any liabilities of the estate or trust
 538 from the calculation;

539 3. By also excluding property specifically given to a
 540 beneficiary and property required to pay pecuniary amounts not
 541 in trust; and-

542 ~~4.(c) The beneficiary's fractional interest in the~~
 543 ~~undistributed principal assets shall be calculated~~ On the basis
 544 of the aggregate carrying value of those assets determined under
 545 subsection (1) as of the distribution date without reducing the
 546 value by any unpaid principal obligation.

547 (c) If a disproportionate distribution of principal is
 548 made to any beneficiary, the respective fractional interests of
 549 all beneficiaries in the remaining underlying assets shall be
 550 recomputed by:

551 1. Adjusting the carrying value of the principal assets to
 552 their fair market value before the distribution;

553 2. Reducing the fractional interest of the recipient of
 554 the disproportionate distribution in the remaining principal
 555 assets by the fair market value of the principal distribution;
 556 and

557 3. Recomputing the fractional interests of all
 558 beneficiaries in the remaining principal assets based upon the
 559 now restated carrying values.

560 ~~(d) The distribution date for purposes of this section may~~

561 ~~be the date as of which the fiduciary calculates the value of~~
 562 ~~the assets if that date is reasonably near the date on which~~
 563 ~~assets are actually distributed.~~

564 (3) If a fiduciary does not distribute all of the
 565 collected but undistributed net income to each person as of a
 566 distribution date, the fiduciary shall maintain appropriate
 567 records showing the interest of each beneficiary in that net
 568 income.

569 (4) A fiduciary may apply the provisions of rules in this
 570 section, to the extent the fiduciary considers appropriate, to
 571 net gain or loss realized after the date of death or terminating
 572 event or earlier distribution date from the disposition of a
 573 principal asset if this section applies to the income from the
 574 asset.

575 (5) The carrying value or fair market value of trust
 576 assets shall be determined on an asset-by-asset basis and are
 577 ~~shall be~~ conclusive if reasonable and determined in good faith.
 578 Determinations of fair market value based on appraisals
 579 performed within 2 years before or after the valuation date are
 580 ~~shall be~~ presumed reasonable. The values ~~value~~ of trust assets
 581 are ~~shall be~~ conclusively presumed to be reasonable and
 582 determined in good faith unless proven otherwise in a proceeding
 583 commenced by or on behalf of a person interested in the trust
 584 within the time provided in s. 736.1008.

585 (6) All distributions to a beneficiary shall be valued
 586 based on their fair market value on the date of distribution.

587 Section 8. Subsection (4) of section 738.301, Florida
 588 Statutes, is amended to read:

589 738.301 When right to income begins and ends.—An income
590 beneficiary is entitled to net income from the date on which the
591 income interest begins.

592 (4) An income interest ends on the day before an income
593 beneficiary dies or another terminating event occurs, or on the
594 last day of a period during which there is no beneficiary to
595 whom a fiduciary ~~trustee~~ may distribute income.

596 Section 9. Subsections (1) and (2) of section 738.302,
597 Florida Statutes, are amended to read:

598 738.302 Apportionment of receipts and disbursements when
599 decedent dies or income interest begins.—

600 (1) A fiduciary ~~trustee~~ shall allocate an income receipt
601 or disbursement other than one to which s. 738.201(1) applies to
602 principal if the due date of the receipt or disbursement occurs
603 before a decedent dies in the case of an estate or before an
604 income interest begins in the case of a trust or successive
605 income interest.

606 (2) A fiduciary ~~trustee~~ shall allocate an income receipt
607 or disbursement to income if the due date of the receipt or
608 disbursement occurs on or after the date on which a decedent
609 dies or an income interest begins and the due date is a periodic
610 due date. An income receipt or disbursement shall be treated as
611 accruing from day to day if the due date of the receipt or
612 disbursement is not periodic or the receipt or disbursement has
613 no due date. The portion of the receipt or disbursement accruing
614 before the date on which a decedent dies or an income interest
615 begins shall be allocated to principal and the balance shall be
616 allocated to income.

CS/HB 823

2012

617 Section 10. Subsections (2) and (3) of section 738.303,
 618 Florida Statutes, are amended to read:

619 738.303 Apportionment when income interest ends.—

620 (2) When a mandatory income interest ends, the fiduciary
 621 ~~trustee~~ shall pay to a mandatory income beneficiary who survives
 622 that date, or the estate of a deceased mandatory income
 623 beneficiary whose death causes the interest to end, the
 624 beneficiary's share of the undistributed income that is not
 625 disposed of under the terms of the trust unless the beneficiary
 626 has an unqualified power to revoke more than 5 percent of the
 627 trust immediately before the income interest ends. In the latter
 628 case, the undistributed income from the portion of the trust
 629 that may be revoked shall be added to principal.

630 (3) When a fiduciary's ~~trustee's~~ obligation to pay a fixed
 631 annuity or a fixed fraction of the value of the trust's assets
 632 ends, the fiduciary ~~trustee~~ shall prorate the final payment if
 633 and to the extent required by applicable law to accomplish a
 634 purpose of the trust or its grantor relating to income, gift,
 635 estate, or other tax requirements.

636 Section 11. Section 738.401, Florida Statutes, is amended
 637 to read:

638 738.401 Character of receipts.—

639 (1) For purposes of this section, the term "entity" means
 640 a corporation, partnership, limited liability company, regulated
 641 investment company, real estate investment trust, common trust
 642 fund, or any other organization in which a fiduciary ~~trustee~~ has
 643 an interest other than a trust or estate to which s. 738.402
 644 applies, a business or activity to which s. 738.403 applies, or

645 an asset-backed security to which s. 738.608 applies.

646 (2) Except as otherwise provided in this section, a
 647 fiduciary ~~trustee~~ shall allocate to income money received from
 648 an entity.

649 (3) Except as otherwise provided in this section, a
 650 fiduciary ~~trustee~~ shall allocate the following receipts from an
 651 entity to principal:

652 (a) Property other than money.

653 (b) Money received in one distribution or a series of
 654 related distributions in exchange for part or all of a trust's
 655 or estate's interest in the entity.

656 (c) Money received in total or partial liquidation of the
 657 entity.

658 (d) Money received from an entity that is a regulated
 659 investment company or a real estate investment trust if the
 660 money received ~~distributed~~ represents short-term or long-term
 661 capital gain realized within the entity.

662 (e) Money received from an entity listed on a public stock
 663 exchange during any year of the trust or estate which exceeds 10
 664 percent of the fair market value of the trust's or estate's
 665 interest in the entity on the first day of that year. The amount
 666 to be allocated to principal must be reduced to the extent that
 667 the cumulative distributions from the entity to the trust or
 668 estate allocated to income does not exceed a cumulative annual
 669 return of 3 percent of the fair market value of the interest in
 670 the entity at the beginning of each year or portion of a year
 671 for the number of years or portion of years in the period that
 672 the interest in the entity has been held by the trust or estate.

673 If a trustee has exercised a power to adjust under s. 738.104
 674 during any period the interest in the entity has been held by
 675 the trust, the trustee, in determining the total income
 676 distributions from that entity, must take into account the
 677 extent to which the exercise of that power resulted in income to
 678 the trust from that entity for that period. If the income of the
 679 trust for any period has been computed under s. 738.1041, the
 680 trustee, in determining the total income distributions from that
 681 entity for that period, must take into account the portion of
 682 the unitrust amount paid as a result of the ownership of the
 683 trust's interest in the entity for that period.

684 (4) If a fiduciary trustee elects, or continues an
 685 election made by its predecessor, to reinvest dividends in
 686 shares of stock of a distributing corporation or fund, whether
 687 evidenced by new certificates or entries on the books of the
 688 distributing entity, the new shares ~~shall~~ retain their character
 689 as income.

690 (5) Money is received in partial liquidation:

691 (a) To the extent the entity, at or near the time of a
 692 distribution, indicates that such money is a distribution in
 693 partial liquidation; or

694 (b) To the extent ~~if~~ the total amount of money and
 695 property received in a distribution or series of related
 696 distributions from an entity that is not listed on a public
 697 stock exchange exceeds ~~is greater than~~ 20 percent of the trust's
 698 or estate's pro rata share of the entity's gross assets, as
 699 shown by the entity's year-end financial statements immediately
 700 preceding the initial receipt.

701
702
703
704
705
706
707
708
709
710
711
712
713
714
715
716
717
718
719
720
721
722
723
724
725
726
727
728

This subsection does not apply to an entity to which subsection (7) applies.

(6) Money may not ~~is not received in partial liquidation,~~ nor may money be taken into account in determining any excess under paragraph (5) (b), to the extent that the cumulative distributions from the entity to the trust or the estate allocated to income do not exceed the greater of: such money does not exceed the amount of income tax a trustee or beneficiary must pay on taxable income of the entity that distributes the money.

(a) A cumulative annual return of 3 percent of the entity's carrying value computed at the beginning of each period for the number of years or portion of years that the entity was held by the fiduciary. If a trustee has exercised a power to adjust under s. 738.104 during any period the interest in the entity has been held by the trust, the trustee, in determining the total income distributions from that entity, must take into account the extent to which exercise of the power resulted in income to the trust from that entity for that period. If the income of a trust for any period has been computed pursuant to s. 738.1041, the trustee, in determining the total income distributions from the entity for that period, must take into account the portion of the unitrust amount paid as a result of the ownership of the trust's interest in the entity for that period; or

(b) If the entity is treated as a partnership, subchapter S corporation, or a disregarded entity pursuant to the Internal

729 Revenue Code of 1986, as amended, the amount of income tax
 730 attributable to the trust's or estate's ownership share of the
 731 entity, based on its pro rata share of the taxable income of the
 732 entity that distributes the money, for the number of years or
 733 portion of years that the interest in the entity was held by the
 734 fiduciary, calculated as if all of that tax was incurred by the
 735 fiduciary.

736 (7) The following applies ~~special rules shall apply~~ to
 737 money ~~moneys~~ or property received by a private trustee as a
 738 distribution from an investment entity ~~entities~~ described in
 739 this subsection:

740 (a) The trustee shall first treat as income of the trust
 741 all of the money or property received from the investment entity
 742 in the current year which would be considered income under this
 743 chapter if the trustee had directly held the trust's pro rata
 744 share of the assets of the investment entity. For this purpose,
 745 all distributions received in the current year must be
 746 aggregated.

747 (b) The trustee shall next treat as income of the trust
 748 any additional money or property received in the current year
 749 which would have been considered income in the prior 2 years
 750 under paragraph (a) if additional money or property had been
 751 received from the investment entity in any of those prior 2
 752 years. The amount to be treated as income shall be reduced by
 753 any distributions of money or property made by the investment
 754 entity to the trust during the current and prior 2 years which
 755 were treated as income under this paragraph.

756 (c) The remainder of the distribution, if any, is treated

757 | as principal.

758 | (d) As used in this subsection, the term:

759 | 1. "Investment entity" means an entity, other than a
 760 | business activity conducted by the trustee described in s.
 761 | 738.403 or an entity that is listed on a public stock exchange,
 762 | which is treated as a partnership, subchapter S corporation, or
 763 | disregarded entity pursuant to the Internal Revenue Code of
 764 | 1986, as amended, and which normally derives 50 percent or more
 765 | of its annual cumulative net income from interest, dividends,
 766 | annuities, royalties, rental activity, or other passive
 767 | investments, including income from the sale or exchange of such
 768 | passive investments.

769 | 2. "Private trustee" means a trustee who is a natural
 770 | person, but only if the trustee is unable to use the power to
 771 | adjust between income and principal with respect to receipts
 772 | from entities described in this subsection pursuant to s.
 773 | 738.104. A bank, trust company, or other commercial trustee is
 774 | not considered a private trustee.

775 | (8) This section shall be applied before ss. 738.705 and
 776 | 738.706 and does not modify or change any of the provisions of
 777 | those sections.

778 | ~~(a) Moneys or property received from a targeted entity~~
 779 | ~~that is not an investment entity which do not exceed the trust's~~
 780 | ~~pro rata share of the undistributed cumulative net income of the~~
 781 | ~~targeted entity during the time an ownership interest in the~~
 782 | ~~targeted entity was held by the trust shall be allocated to~~
 783 | ~~income. The balance of moneys or property received from a~~
 784 | ~~targeted entity shall be allocated to principal.~~

785 ~~(b) If trust assets include any interest in an investment~~
 786 ~~entity, the designated amount of moneys or property received~~
 787 ~~from the investment entity shall be treated by the trustee in~~
 788 ~~the same manner as if the trustee had directly held the trust's~~
 789 ~~pro rata share of the assets of the investment entity~~
 790 ~~attributable to the distribution of such designated amount.~~
 791 ~~Thereafter, distributions shall be treated as principal.~~

792 ~~(c) For purposes of this subsection, the following~~
 793 ~~definitions shall apply:~~

794 ~~1. "Cumulative net income" means the targeted entity's net~~
 795 ~~income as determined using the method of accounting regularly~~
 796 ~~used by the targeted entity in preparing its financial~~
 797 ~~statements, or if no financial statements are prepared, the net~~
 798 ~~book income computed for federal income tax purposes, for every~~
 799 ~~year an ownership interest in the entity is held by the trust.~~
 800 ~~The trust's pro rata share shall be the cumulative net income~~
 801 ~~multiplied by the percentage ownership of the trust.~~

802 ~~2. "Designated amount" means moneys or property received~~
 803 ~~from an investment entity during any year that is equal to the~~
 804 ~~amount of the distribution that does not exceed the greater of:~~

805 ~~a. The amount of income of the investment entity for the~~
 806 ~~current year, as reported to the trustee by the investment~~
 807 ~~entity for federal income tax purposes; or~~

808 ~~b. The amount of income of the investment entity for the~~
 809 ~~current year and the prior 2 years, as reported to the trustee~~
 810 ~~by the investment entity for federal income tax purposes, less~~
 811 ~~any distributions of moneys or property made by the investment~~
 812 ~~entity to the trustee during the prior 2 years.~~

813 ~~3. "Investment entity" means a targeted entity that~~
 814 ~~normally derives 50 percent or more of its annual cumulative net~~
 815 ~~income from interest, dividends, annuities, royalties, rental~~
 816 ~~activity, or other passive investments, including income from~~
 817 ~~the sale or exchange of such passive investments.~~

818 ~~4. "Private trustee" means a trustee who is an individual,~~
 819 ~~but only if the trustee is unable to utilize the power to adjust~~
 820 ~~between income and principal with respect to receipts from~~
 821 ~~entities described in this subsection pursuant to s. 738.104. A~~
 822 ~~bank, trust company, or other commercial trustee shall not be~~
 823 ~~considered to be a private trustee.~~

824 ~~5. "Targeted entity" means any entity that is treated as a~~
 825 ~~partnership, subchapter S corporation, or disregarded entity~~
 826 ~~pursuant to the Internal Revenue Code of 1986, as amended, other~~
 827 ~~than an entity described in s. 738.403.~~

828 ~~6. "Undistributed cumulative net income" means the trust's~~
 829 ~~pro rata share of cumulative net income, less all prior~~
 830 ~~distributions from the targeted entity to the trust that have~~
 831 ~~been allocated to income.~~

832 ~~(d) This subsection shall not be construed to modify or~~
 833 ~~change any of the provisions of ss. 738.705 and 738.706 relating~~
 834 ~~to income taxes.~~

835 ~~(8) A trustee may rely upon a statement made by an entity~~
 836 ~~about the source or character of a distribution, about the~~
 837 ~~amount of profits of a targeted entity, or about the nature and~~
 838 ~~value of assets of an investment entity if the statement is made~~
 839 ~~at or near the time of distribution by the entity's board of~~
 840 ~~directors or other person or group of persons authorized to~~

CS/HB 823

2012

841 ~~exercise powers to pay money or transfer property comparable to~~
 842 ~~those of a corporation's board of directors.~~

843 Section 12. Section 738.402, Florida Statutes, is amended
 844 to read:

845 738.402 Distribution from trust or estate.—A fiduciary
 846 ~~trustee~~ shall allocate to income an amount received as a
 847 distribution of income from a trust or an estate in which the
 848 trust has an interest other than a purchased interest and ~~shall~~
 849 allocate to principal an amount received as a distribution of
 850 principal from such a trust or estate. If a fiduciary trustee
 851 purchases an interest in a trust that is an investment entity,
 852 or a decedent or donor transfers an interest in such a trust to
 853 a fiduciary trustee, s. 738.401 or s. 738.608 applies to a
 854 receipt from the trust.

855 Section 13. Section 738.403, Florida Statutes, is amended
 856 to read:

857 738.403 Business and other activities conducted by
 858 fiduciary trustee.—

859 (1) If a fiduciary trustee who conducts a business or
 860 other activity determines that it is in the best interest of all
 861 the beneficiaries to account separately for the business or
 862 activity instead of accounting for the business or activity as
 863 part of the trust's general accounting records, the fiduciary
 864 ~~trustee~~ may maintain separate accounting records for the
 865 transactions of the ~~such~~ business or other activity, whether or
 866 not the assets of such business or activity are segregated from
 867 other trust assets.

868 (2) A fiduciary trustee who accounts separately for a

CS/HB 823

2012

869 business or other activity may determine the extent to which the
 870 net cash receipts of the ~~such~~ business or activity must be
 871 retained for working capital, the acquisition or replacement of
 872 fixed assets, and other reasonably foreseeable needs of the
 873 business or activity, and the extent to which the remaining net
 874 cash receipts are accounted for as principal or income in the
 875 trust's general accounting records. If a fiduciary ~~trustee~~ sells
 876 assets of the business or other activity, other than in the
 877 ordinary course of the business or activity, the fiduciary must
 878 ~~trustee shall~~ account for the net amount received as principal
 879 in the trust's general accounting records to the extent the
 880 fiduciary ~~trustee~~ determines that the amount received is no
 881 longer required in the conduct of the business.

882 (3) Activities for which a fiduciary ~~trustee~~ may maintain
 883 separate accounting records include:

884 (a) Retail, manufacturing, service, and other traditional
 885 business activities.

886 (b) Farming.

887 (c) Raising and selling livestock and other animals.

888 (d) Management of rental properties.

889 (e) Extraction of minerals and other natural resources.

890 (f) Timber operations.

891 (g) Activities to which s. 738.607 ~~738.608~~ applies.

892 Section 14. Section 738.501, Florida Statutes, is amended
 893 to read:

894 738.501 Principal receipts.—A fiduciary ~~trustee~~ shall
 895 allocate to principal:

896 (1) To the extent not allocated to income under this

897 chapter, assets received from a transferor during the
 898 transferor's lifetime, a decedent's estate, a trust with a
 899 terminating income interest, or a payor under a contract naming
 900 the trust or its fiduciary ~~trustee~~ as beneficiary.

901 (2) Money or other property received from the sale,
 902 exchange, liquidation, or change in form of a principal asset,
 903 including realized profit, subject to this section.

904 (3) Amounts recovered from third parties to reimburse the
 905 trust because of disbursements described in s. 738.702(1)(g) or
 906 for other reasons to the extent not based on the loss of income.

907 (4) Proceeds of property taken by eminent domain; however
 908 ~~but~~ a separate award made for the loss of income with respect to
 909 an accounting period during which a current income beneficiary
 910 had a mandatory income interest is income.

911 (5) Net income received in an accounting period during
 912 which there is no beneficiary to whom a fiduciary ~~trustee~~ may or
 913 shall distribute income.

914 (6) Other receipts as provided in ss. 738.601-738.608.

915 Section 15. Section 738.502, Florida Statutes, is amended
 916 to read:

917 738.502 Rental property.—~~If To the extent~~ a fiduciary
 918 ~~trustee~~ accounts for receipts from rental property pursuant to
 919 this section, the fiduciary ~~trustee~~ shall allocate to income an
 920 amount received as rent of real or personal property, including
 921 an amount received for cancellation or renewal of a lease. An
 922 amount received as a refundable deposit, including a security
 923 deposit or a deposit that is to be applied as rent for future
 924 periods, must ~~shall~~ be added to principal and held subject to

925 the terms of the lease and is not available for distribution to
 926 a beneficiary until the fiduciary's ~~trustee's~~ contractual
 927 obligations have been satisfied with respect to that amount.

928 Section 16. Subsections (1), (2), and (3) of section
 929 738.503, Florida Statutes, are amended to read:

930 738.503 Obligation to pay money.—

931 (1) An amount received as interest, whether determined at
 932 a fixed, variable, or floating rate, on an obligation to pay
 933 money to the fiduciary ~~trustee~~, including an amount received as
 934 consideration for prepaying principal, shall be allocated to
 935 income without any provision for amortization of premium.

936 (2) Except as otherwise provided herein, a fiduciary
 937 ~~trustee~~ shall allocate to principal an amount received from the
 938 sale, redemption, or other disposition of an obligation to pay
 939 money to the fiduciary ~~trustee~~.

940 (3) The increment in value of a bond or other obligation
 941 for the payment of money bearing no stated interest but payable
 942 at a future time in excess of the price at which it was issued
 943 or purchased, if purchased after issuance, is distributable as
 944 income. If the increment in value accrues and becomes payable
 945 pursuant to a fixed schedule of appreciation, it may be
 946 distributed to the beneficiary who was the income beneficiary at
 947 the ~~this~~ time of increment from the first principal cash
 948 available or, if none is available, when the increment is
 949 realized by sale, redemption, or other disposition. If ~~When~~
 950 unrealized increment is distributed as income but out of
 951 principal, the principal must ~~shall~~ be reimbursed for the
 952 increment when realized. If, in the reasonable judgment of the

953 fiduciary ~~trustee~~, exercised in good faith, the ultimate payment
 954 of the bond principal is in doubt, the fiduciary ~~trustee~~ may
 955 withhold the payment of incremental interest to the income
 956 beneficiary.

957 Section 17. Subsections (1) and (2) of section 738.504,
 958 Florida Statutes, are amended to read:

959 738.504 Insurance policies and similar contracts.—

960 (1) Except as otherwise provided in subsection (2), a
 961 fiduciary ~~trustee~~ shall allocate to principal the proceeds of a
 962 life insurance policy or other contract in which the trust or
 963 its fiduciary ~~trustee~~ is named as beneficiary, including a
 964 contract that insures the trust or its fiduciary ~~trustee~~ against
 965 loss for damage to, destruction of, or loss of title to a trust
 966 asset. The fiduciary ~~trustee~~ shall allocate dividends on an
 967 insurance policy to income if the premiums on the policy are
 968 paid from income and to principal if the premiums are paid from
 969 principal.

970 (2) A fiduciary ~~trustee~~ shall allocate to income the
 971 proceeds of a contract that insures the fiduciary ~~trustee~~
 972 against loss of occupancy or other use by an income beneficiary,
 973 loss of income, or, subject to s. 738.403, loss of profits from
 974 a business.

975 Section 18. Section 738.601, Florida Statutes, is amended
 976 to read:

977 738.601 Insubstantial allocations not required.—If a
 978 fiduciary ~~trustee~~ determines that an allocation between
 979 principal and income required by s. 738.602, s. 738.603, s.
 980 738.604, s. 738.605, or s. 738.608 is insubstantial, the

CS/HB 823

2012

981 fiduciary ~~trustee~~ may allocate the entire amount to principal
 982 unless one of the circumstances described in s. 738.104(3)
 983 applies to the allocation. This power may be exercised by a
 984 cofiduciary under ~~co~~~~trustee~~ in the circumstances described in s.
 985 738.104(4) and may be released for the reasons and in the manner
 986 described in s. 738.104(5). An allocation is presumed to be
 987 insubstantial if:

- 988 (1) The amount of the allocation would increase or
- 989 decrease net income in an accounting period, as determined
- 990 before the allocation, by less than 10 percent; or
- 991 (2) The value of the asset producing the receipt for which
- 992 the allocation would be made is less than 10 percent of the
- 993 total value of the trust's assets at the beginning of the
- 994 accounting period.

995 Section 19. Section 738.602, Florida Statutes, is amended
 996 to read:

997 738.602 Payments from deferred compensation plans,
 998 annuities, and retirement plans or accounts.—

999 (1) As used in ~~For purposes of~~ this section, the term:

1000 (a) "Fund" means a private or commercial annuity, an
 1001 individual retirement account, an individual retirement annuity,
 1002 a deferred compensation plan, a pension plan, a profit-sharing
 1003 plan, a stock-bonus plan, an employee stock-ownership plan, or
 1004 another similar arrangement in which federal income tax is
 1005 deferred.

1006 (b) "Income of the fund" means income that is determined
 1007 according to subsection (2) or subsection (3).

1008 (c) "Nonseparate account" means a fund for which the value

1009 of the participant's or account owner's right to receive
 1010 benefits can be determined only by the occurrence of a date or
 1011 event as defined in the instrument governing the fund.

1012 (d) "Payment" means a distribution from a fund that a
 1013 fiduciary trustee may receive over a fixed number of years or
 1014 during the life of one or more individuals because of services
 1015 rendered or property transferred to the payor in exchange for
 1016 future payments. The term includes a distribution made in money
 1017 or property from the payor's general assets or from a fund
 1018 created by the payor or payee.

1019 (e) "Separate account" means a fund holding assets
 1020 exclusively for the benefit of a participant or account owner
 1021 and:

1022 1. The value of such assets or the value of the separate
 1023 account is ascertainable at any time; or

1024 2. The administrator of the fund maintains records that
 1025 show receipts and disbursements associated with such assets.

1026 (2)(a) For a fund that is a separate account, income of
 1027 the fund shall be determined:

1028 1. As if the fund were a trust subject to the provisions
 1029 of ss. 738.401-738.706; or

1030 2. As a unitrust amount calculated by multiplying the fair
 1031 market value of the fund as of the first day of the first
 1032 accounting period and, thereafter, as of the last day of the
 1033 accounting period that immediately precedes the accounting
 1034 period during which a payment is received by the percentage
 1035 determined in accordance with s. 738.1041(2)(b)2.a. The
 1036 fiduciary trustee shall determine such percentage as of the

1037 first month that the fiduciary's ~~trustee's~~ election to treat the
 1038 income of the fund as a unitrust amount becomes effective. For
 1039 purposes of this subparagraph, "fair market value" means the
 1040 fair market value of the assets held in the fund as of the
 1041 applicable valuation date determined as provided in this
 1042 subparagraph. The fiduciary ~~trustee~~ is not liable for good faith
 1043 reliance upon any valuation supplied by the person or persons in
 1044 possession of the fund. If the fiduciary ~~trustee~~ makes or
 1045 terminates an election under this subparagraph, the fiduciary
 1046 ~~trustee~~ shall make such disclosure in a trust disclosure
 1047 document that satisfies the requirements of s. 736.1008(4)(a).

1048 (b) The fiduciary may ~~trustee shall have discretion to~~
 1049 elect the method of determining the income of the fund pursuant
 1050 to this subsection and may change the method of determining
 1051 income of the fund for any future accounting period.

1052 (3) For a fund that is a nonseparate account, income of
 1053 the fund is a unitrust amount determined by calculating the
 1054 present value of the right to receive the remaining payments
 1055 under 26 U.S.C. s. 7520 of the Internal Revenue Code as of the
 1056 first day of the accounting period and multiplying it by the
 1057 percentage determined in accordance with s. 738.1041(2)(b)2.a.
 1058 The fiduciary ~~trustee~~ shall determine the unitrust amount as of
 1059 the first month that the fiduciary's ~~trustee's~~ election to treat
 1060 the income of the fund as a unitrust amount becomes effective.

1061 (4) Except for those trusts described in subsection (5),
 1062 the fiduciary ~~trustee~~ shall allocate to income the lesser of the
 1063 payment received from a fund or the income determined under
 1064 subsection (2) or subsection (3). Any remaining amount of the

1065 payment shall be allocated to principal ~~a payment from a fund as~~
 1066 ~~follows:~~

1067 ~~(a) That portion of the payment the payor characterizes as~~
 1068 ~~income shall be allocated to income, and any remaining portion~~
 1069 ~~of the payment shall be allocated to principal.~~

1070 ~~(b) To the extent that the payor does not characterize any~~
 1071 ~~portion of a payment as income or principal and the trustee can~~
 1072 ~~ascertain the income of the fund by the fund's account~~
 1073 ~~statements or any other reasonable source, the trustee shall~~
 1074 ~~allocate to income the lesser of the income of the fund or the~~
 1075 ~~entire payment and shall allocate to principal any remaining~~
 1076 ~~portion of the payment.~~

1077 ~~(c) If the trustee, acting reasonably and in good faith,~~
 1078 ~~determines that neither paragraph (a) nor paragraph (b) applies~~
 1079 ~~and all or part of the payment is required to be made, the~~
 1080 ~~trustee shall allocate to income 10 percent of the portion of~~
 1081 ~~the payment that is required to be made during the accounting~~
 1082 ~~period and shall allocate the balance to principal. If no part~~
 1083 ~~of a payment is required to be made or the payment received is~~
 1084 ~~the entire amount to which the trustee is entitled, the trustee~~
 1085 ~~shall allocate the entire payment to principal. For purposes of~~
 1086 ~~this paragraph, a payment is not "required to be made" to the~~
 1087 ~~extent the payment is made because the trustee exercises a right~~
 1088 ~~of withdrawal.~~

1089 (5) For a trust that which, in order to qualify for the
 1090 estate or gift tax marital deduction under the Internal Revenue
 1091 Code or comparable law of any state, entitles the spouse to all
 1092 of the income of the trust, and the terms of the trust are

CS/HB 823

2012

1093 silent as to the time and frequency for distribution of the
 1094 income of the fund, ~~then:~~

1095 (a) For a fund that is a separate account, unless the
 1096 spouse directs the fiduciary ~~trustee~~ to leave the income of the
 1097 fund in the fund, the fiduciary ~~trustee~~ shall withdraw and pay
 1098 to the spouse, at least ~~no less frequently than~~ annually:

1099 1. All of the income of the fund determined in accordance
 1100 with subparagraph (2)(a)1.; or

1101 2. The income of the fund as a unitrust amount determined
 1102 in accordance with subparagraph (2)(a)2.

1103 (b) For a fund that is a nonseparate account, the
 1104 fiduciary ~~trustee~~ shall withdraw and pay to the spouse, at least
 1105 ~~no less frequently than~~ annually, the income of the fund as a
 1106 unitrust amount determined in accordance with subsection (3).

1107 (6) This section does not apply to payments to which s.
 1108 738.603 applies.

1109 Section 20. Section 738.603, Florida Statutes, is amended
 1110 to read:

1111 738.603 Liquidating asset.—

1112 (1) For purposes of this section, the term "liquidating
 1113 asset" means an asset the value of which will diminish or
 1114 terminate because the asset is expected to produce receipts for
 1115 a period of limited duration. The term includes a leasehold,
 1116 patent, copyright, royalty right, and right to receive payments
 1117 for during a period of ~~more than 1 year~~ under an arrangement
 1118 that does not provide for the payment of interest on the unpaid
 1119 balance. The term does not include a payment subject to s.
 1120 738.602, resources subject to s. 738.604, timber subject to s.

1121 738.605, an activity subject to s. 738.607, an asset subject to
 1122 s. 738.608, or any asset for which the fiduciary trustee
 1123 establishes a reserve for depreciation under s. 738.703.

1124 (2) A fiduciary trustee shall allocate to income 5 ~~10~~
 1125 percent of the receipts from the carrying value of a liquidating
 1126 asset and the balance to principal. Amounts allocated to
 1127 principal shall reduce the carrying value of the liquidating
 1128 asset, but not below zero. Amounts received in excess of the
 1129 remaining carrying value must be allocated to principal.

1130 Section 21. Subsections (1) and (4) of section 738.604,
 1131 Florida Statutes, are amended to read:

1132 738.604 Minerals, water, and other natural resources.—

1133 (1) ~~If To the extent~~ a fiduciary trustee accounts for
 1134 receipts from an interest in minerals or other natural resources
 1135 pursuant to this section, the fiduciary trustee shall allocate
 1136 such receipts as follows:

1137 (a) If received as nominal delay rental or nominal annual
 1138 rent on a lease, a receipt shall be allocated to income.

1139 (b) If received from a production payment, a receipt shall
 1140 be allocated to income if and to the extent the agreement
 1141 creating the production payment provides a factor for interest
 1142 or its equivalent. The balance shall be allocated to principal.

1143 (c) If an amount received as a royalty, shut-in-well
 1144 payment, take-or-pay payment, bonus, or delay rental is more
 1145 than nominal, 90 percent shall be allocated to principal and the
 1146 balance to income.

1147 (d) If an amount is received from a working interest or
 1148 any other interest not provided for in paragraph (a), paragraph

CS/HB 823

2012

1149 (b), or paragraph (c), 90 percent of the net amount received
 1150 shall be allocated to principal and the balance to income.

1151 (4) If a trust or estate owns an interest in minerals,
 1152 water, or other natural resources on January 1, 2003, the
 1153 fiduciary trustee may allocate receipts from the interest as
 1154 provided in this chapter or in the manner used by the fiduciary
 1155 ~~trustee~~ before January 1, 2003. If the trust or estate acquires
 1156 an interest in minerals, water, or other natural resources after
 1157 January 1, 2003, the fiduciary trustee shall allocate receipts
 1158 from the interest as provided in this chapter.

1159 Section 22. Subsections (1), (2), and (4) of section
 1160 738.605, Florida Statutes, are amended to read:

1161 738.605 Timber.—

1162 (1) ~~If To the extent~~ a fiduciary trustee accounts for
 1163 receipts from the sale of timber and related products pursuant
 1164 to this section, the fiduciary trustee shall allocate such the
 1165 net receipts as follows:

1166 (a) To income to the extent the amount of timber removed
 1167 from the land does not exceed the rate of growth of the timber
 1168 during the accounting periods in which a beneficiary has a
 1169 mandatory income interest;

1170 (b) To principal to the extent the amount of timber
 1171 removed from the land exceeds the rate of growth of the timber
 1172 or the net receipts are from the sale of standing timber;

1173 (c) To or between income and principal if the net receipts
 1174 are from the lease of timberland or from a contract to cut
 1175 timber from land owned by a trust or estate by determining the
 1176 amount of timber removed from the land under the lease or

1177 contract and applying the rules in paragraphs (a) and (b); or
 1178 (d) To principal to the extent advance payments, bonuses,
 1179 and other payments are not allocated pursuant to paragraph (a),
 1180 paragraph (b), or paragraph (c).

1181 (2) In determining net receipts to be allocated pursuant
 1182 to subsection (1), a fiduciary ~~trustee~~ shall deduct and transfer
 1183 to principal a reasonable amount for depletion.

1184 (4) If a trust or estate owns an interest in timberland on
 1185 January 1, 2003, the fiduciary ~~trustee~~ may allocate net receipts
 1186 from the sale of timber and related products as provided in this
 1187 chapter or in the manner used by the fiduciary ~~trustee~~ before
 1188 January 1, 2003. If the trust or estate acquires an interest in
 1189 timberland after January 1, 2003, the fiduciary ~~trustee~~ shall
 1190 allocate net receipts from the sale of timber and related
 1191 products as provided in this chapter.

1192 Section 23. Subsection (1) of section 738.606, Florida
 1193 Statutes, is amended to read:

1194 738.606 Property not productive of income.—

1195 (1) If a marital deduction under the Internal Revenue Code
 1196 or comparable law of any state is allowed for all or part of a
 1197 trust the income of which must ~~is required to~~ be distributed to
 1198 the grantor's spouse and the assets of which consist
 1199 substantially of property that does not provide the spouse with
 1200 sufficient income from or use of the trust assets, and if the
 1201 amounts the trustee transfers from principal to income under s.
 1202 738.104 and distributes to the spouse from principal pursuant to
 1203 the terms of the trust are insufficient to provide the spouse
 1204 with the beneficial enjoyment required to obtain the marital

CS/HB 823

2012

1205 deduction, the spouse may require the trustee to make property
 1206 productive of income, convert property within a reasonable time,
 1207 or exercise the power conferred by ss. 738.104 and 738.1041. The
 1208 trustee may decide which action or combination of actions to
 1209 take.

1210 Section 24. Subsections (2) and (3) of section 738.607,
 1211 Florida Statutes, are amended to read:

1212 738.607 Derivatives and options.—

1213 (2) To the extent a fiduciary ~~trustee~~ does not account
 1214 under s. 738.403 for transactions in derivatives, the fiduciary
 1215 ~~trustee~~ shall allocate to principal receipts from and
 1216 disbursements made in connection with those transactions.

1217 (3) If a fiduciary ~~trustee~~ grants an option to buy
 1218 property from the trust or estate whether or not the trust or
 1219 estate owns the property when the option is granted, grants an
 1220 option that permits another person to sell property to the trust
 1221 or estate, or acquires an option to buy property for the trust
 1222 or estate or an option to sell an asset owned by the trust or
 1223 estate, and the fiduciary ~~trustee~~ or other owner of the asset is
 1224 required to deliver the asset if the option is exercised, an
 1225 amount received for granting the option shall be allocated to
 1226 principal. An amount paid to acquire the option shall be paid
 1227 from principal. A gain or loss realized upon the exercise of an
 1228 option, including an option granted to a grantor of the trust or
 1229 estate for services rendered, shall be allocated to principal.

1230 Section 25. Subsections (2) and (3) of section 738.608,
 1231 Florida Statutes, are amended to read:

1232 738.608 Asset-backed securities.—

CS/HB 823

2012

1233 (2) If a trust or estate receives a payment from interest
 1234 or other current return and from other proceeds of the
 1235 collateral financial assets, the fiduciary ~~trustee~~ shall
 1236 allocate to income the portion of the payment which the payor
 1237 identifies as being from interest or other current return and
 1238 ~~shall~~ allocate the balance of the payment to principal.

1239 (3) If a trust or estate receives one or more payments in
 1240 exchange for the trust's or estate's entire interest in an
 1241 asset-backed security during a single accounting period, the
 1242 fiduciary ~~trustee~~ shall allocate the payments to principal. If a
 1243 payment is one of a series of payments that will result in the
 1244 liquidation of the trust's or estate's interest in the security
 1245 over more than a single accounting period, the fiduciary ~~trustee~~
 1246 shall allocate 10 percent of the payment to income and the
 1247 balance to principal.

1248 Section 26. Section 738.701, Florida Statutes, is amended
 1249 to read:

1250 738.701 Disbursements from income.—A fiduciary ~~trustee~~
 1251 shall make the following disbursements from income to the extent
 1252 they are not disbursements to which s. 738.201(2)(a) ~~or (c)~~
 1253 applies:

1254 (1) One-half of the regular compensation of the fiduciary
 1255 ~~trustee~~ and of any person providing investment advisory or
 1256 custodial services to the fiduciary ~~trustee~~.

1257 (2) One-half of all expenses for accountings, judicial
 1258 proceedings, or other matters that involve both the income and
 1259 remainder interests.

1260 (3) All of the other ordinary expenses incurred in

1261 connection with the administration, management, or preservation
 1262 of trust property and the distribution of income, including
 1263 interest, ordinary repairs, regularly recurring taxes assessed
 1264 against principal, and expenses of a proceeding or other matter
 1265 that concerns primarily the income interest.

1266 (4) Recurring premiums on insurance covering the loss of a
 1267 principal asset or the loss of income from or use of the asset.

1268 Section 27. Subsection (1) of section 738.702, Florida
 1269 Statutes, is amended to read:

1270 738.702 Disbursements from principal.—

1271 (1) A fiduciary ~~trustee~~ shall make the following
 1272 disbursements from principal:

1273 (a) The remaining one-half of the disbursements described
 1274 in s. 738.701(1) and (2).

1275 (b) All of the trustee's compensation calculated on
 1276 principal as a fee for acceptance, distribution, or termination
 1277 and disbursements made to prepare property for sale.

1278 (c) Payments on the principal of a trust debt.

1279 (d) Expenses of a proceeding that concerns primarily
 1280 principal, including a proceeding to construe the trust or will,
 1281 or to protect the trust, estate, or its property.

1282 (e) Premiums paid on a policy of insurance not described
 1283 in s. 738.701(4) of which the trust or estate is the owner and
 1284 beneficiary.

1285 (f) Estate, inheritance, and other transfer taxes,
 1286 including penalties, apportioned to the trust.

1287 (g) Disbursements related to environmental matters,
 1288 including reclamation, assessing environmental conditions,

CS/HB 823

2012

1289 remedying and removing environmental contamination, monitoring
 1290 remedial activities and the release of substances, preventing
 1291 future releases of substances, collecting amounts from persons
 1292 liable or potentially liable for the costs of such activities,
 1293 penalties imposed under environmental laws or regulations and
 1294 other payments made to comply with those laws or regulations,
 1295 statutory or common law claims by third parties, and defending
 1296 claims based on environmental matters.

1297 (h) Payments representing extraordinary repairs or
 1298 expenses incurred in making a capital improvement to principal,
 1299 including special assessments; however, a fiduciary ~~trustee~~ may
 1300 establish an allowance for depreciation out of income to the
 1301 extent permitted by s. 738.703.

1302 Section 28. Subsection (2) of section 738.703, Florida
 1303 Statutes, is amended to read:

1304 738.703 Transfers from income to principal for
 1305 depreciation.—

1306 (2) A fiduciary ~~trustee~~ may transfer to principal a
 1307 reasonable amount of the net cash receipts from a principal
 1308 asset that is subject to depreciation but may not transfer any
 1309 amount for depreciation:

1310 (a) Of that portion of real property used or available for
 1311 use by a beneficiary as a residence or of tangible personal
 1312 property held or made available for the personal use or
 1313 enjoyment of a beneficiary;

1314 (b) During the administration of a decedent's estate; or

1315 (c) Under this section if the fiduciary ~~trustee~~ is
 1316 accounting under s. 738.403 for the business or activity in

1317 which the asset is used.

1318 Section 29. Subsections (1), (2), and (3) of section
1319 738.704, Florida Statutes, are amended to read:

1320 738.704 Transfers from income to reimburse principal.—

1321 (1) If a fiduciary ~~trustee~~ makes or expects to make a
1322 principal disbursement described in this section, the fiduciary
1323 ~~trustee~~ may transfer an appropriate amount from income to
1324 principal in one or more accounting periods to reimburse
1325 principal or to provide a reserve for future principal
1326 disbursements.

1327 (2) Principal disbursements to which subsection (1)
1328 applies include the following, but only to the extent the
1329 fiduciary ~~trustee~~ has not been and does not expect to be
1330 reimbursed by a third party:

1331 (a) An amount chargeable to income but paid from principal
1332 because the amount is unusually large.

1333 (b) Disbursements made to prepare property for rental,
1334 including tenant allowances, leasehold improvements, and
1335 broker's commissions.

1336 (c) Disbursements described in s. 738.702(1)(g).

1337 (3) If the asset the ownership of which gives rise to the
1338 disbursements becomes subject to a successive income interest
1339 after an income interest ends, a fiduciary ~~trustee~~ may continue
1340 to transfer amounts from income to principal as provided in
1341 subsection (1).

1342 Section 30. Section 738.705, Florida Statutes, is amended
1343 to read:

1344 738.705 Income taxes.—

1345 (1) A tax required to be paid by a fiduciary ~~trustee~~ based
 1346 on receipts allocated to income shall be paid from income.

1347 (2) A tax required to be paid by a fiduciary ~~trustee~~ based
 1348 on receipts allocated to principal shall be paid from principal,
 1349 even if the tax is called an income tax by the taxing authority.

1350 (3) A tax required to be paid by a fiduciary ~~trustee~~ on
 1351 the trust's or estate's share of an entity's taxable income
 1352 shall be paid proportionately:

1353 (a) From income to the extent receipts from the entity are
 1354 allocated to income; ~~and~~

1355 (b) From principal to the extent:
 1356 ~~1.~~ receipts from the entity are allocated to principal;
 1357 and

1358 ~~2. The trust's share of the entity's taxable income~~
 1359 ~~exceeds the total receipts described in paragraph (a) and~~
 1360 ~~subparagraph 1.~~

1361 (c) From principal to the extent that the income taxes
 1362 payable by the trust or estate exceed the total distributions
 1363 from the entity.

1364 (4) After applying subsections (1)-(3), the fiduciary
 1365 shall adjust income or principal receipts to the extent that the
 1366 trust's or estate's income taxes are reduced, but not
 1367 eliminated, because the trust or estate receives a deduction for
 1368 payments made to a beneficiary. The amount distributable to that
 1369 beneficiary as income as a result of this adjustment shall be
 1370 equal to the cash received by the trust or estate, reduced, but
 1371 not below zero, by the entity's taxable income allocable to the
 1372 trust or estate multiplied by the trust's or estate's income tax

1373 rate. The reduced amount shall be divided by the difference
 1374 between 1 and the trust's or estate's income tax rate in order
 1375 to determine the amount distributable to that beneficiary as
 1376 income before giving effect to other receipts or disbursements
 1377 allocable to that beneficiary's interest. For purposes of this
 1378 ~~section, receipts allocated to principal or income shall be~~
 1379 ~~reduced by the amount distributed to a beneficiary from~~
 1380 ~~principal or income for which the trust receives a deduction in~~
 1381 ~~calculating the tax.~~

1382 Section 31. Section 738.801, Florida Statutes, is amended
 1383 to read:

1384 (Substantial rewording of section. See
 1385 s. 738.801, F.S., for present text.)

1386 738.801 Apportionment of expenses; improvements.-

1387 (1) For purposes of this section, the term:

1388 (a) "Remainderman" means the holder of the remainder
 1389 interests after the expiration of a tenant's estate in property.

1390 (b) "Tenant" means the holder of an estate for life or
 1391 term of years in real property or personal property, or both.

1392 (2) If a trust has not been created, expenses shall be
 1393 apportioned between the tenant and remainderman as follows:

1394 (a) The following expenses are allocated to and shall be
 1395 paid by the tenant:

1396 1. All ordinary expenses incurred in connection with the
 1397 administration, management, or preservation of the property,
 1398 including interest, ordinary repairs, regularly recurring taxes
 1399 assessed against the property, and expenses of a proceeding or
 1400 other matter that concerns primarily the tenant's estate or use

1401 of the property.

1402 2. Recurring premiums on insurance covering the loss of
 1403 the property or the loss of income from or use of the property.

1404 3. Any of the expenses described in subparagraph (b)3.
 1405 which are attributable to the use of the property by the tenant.

1406 (b) The following expenses are allocated to and shall be
 1407 paid by the remainderman:

1408 1. Payments on the principal of a debt secured by the
 1409 property, except to the extent the debt is for expenses
 1410 allocated to the tenant.

1411 2. Expenses of a proceeding or other matter that concerns
 1412 primarily the title to the property, other than title to the
 1413 tenant's estate.

1414 3. Except as provided in subparagraph (a)3., expenses
 1415 related to environmental matters, including reclamation,
 1416 assessing environmental conditions, remedying and removing
 1417 environmental contamination, monitoring remedial activities and
 1418 the release of substances, preventing future releases of
 1419 substances, collecting amounts from persons liable or
 1420 potentially liable for the costs of such activities, penalties
 1421 imposed under environmental laws or regulations and other
 1422 payments made to comply with those laws or regulations,
 1423 statutory or common law claims by third parties, and defending
 1424 claims based on environmental matters.

1425 4. Extraordinary repairs.

1426 (c) If the tenant or remainderman incurred an expense for
 1427 the benefit of his or her own estate without consent or
 1428 agreement of the other, he or she must pay such expense in full.

1429 (d) Except as provided in paragraph (c), the cost of, or
 1430 special taxes or assessments for, an improvement representing an
 1431 addition of value to property forming part of the principal
 1432 shall be paid by the tenant if the improvement is not reasonably
 1433 expected to outlast the estate of the tenant. In all other
 1434 cases, only a part shall be paid by the tenant while the
 1435 remainder shall be paid by the remainderman. The part payable by
 1436 the tenant is ascertainable by taking that percentage of the
 1437 total that is found by dividing the present value of the
 1438 tenant's estate by the present value of an estate of the same
 1439 form as that of the tenant, except that it is limited for a
 1440 period corresponding to the reasonably expected duration of the
 1441 improvement. The computation of present values of the estates
 1442 shall be made by using the rate defined in 26 U.S.C. s. 7520,
 1443 then in effect and, in the case of an estate for life, the
 1444 official mortality tables then in effect under 26 U.S.C. s.
 1445 7520. Other evidence of duration or expectancy may not be
 1446 considered.

1447 (3) This section does not apply to the extent it is
 1448 inconsistent with the instrument creating the estates, the
 1449 agreement of the parties, or the specific direction of the
 1450 taxing or other statutes.

1451 (4) The common law applicable to tenants and remaindermen
 1452 supplements this section, except as modified by this section or
 1453 other laws.

1454 Section 32. This act shall take effect January 1, 2013.

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 851 Natural Guardians
SPONSOR(S): Schwartz
TIED BILLS: None IDEN./SIM. BILLS: SB 990

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Civil Justice Subcommittee	13 Y, 0 N	Caridad	Bond
2) Judiciary Committee		Caridad <i>XC</i>	Havlicak <i>RH</i>

SUMMARY ANALYSIS

Under current law, the mother and father of a child are the natural guardians of their child. Natural guardians have substantial authority to act on the behalf of their minor child in matters of managing assets, transferring real or personal property, and settling of disputes when, in the aggregate, those matters do not exceed \$15,000.

This bill conforms terminology used in the law regarding natural guardians to terminology used in other laws regarding parents and children. Specifically, the bill changes the terms "mother and father" to "parents" and changes "child custody" to "parental responsibility."

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

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

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Chapter 744, F.S., governs issues related to natural guardians. A mother and father, together, are natural guardians of their own children and of their adopted children, during minority.¹ If the marriage between the parents dissolves, guardianship belongs to the parent to whom "custody" was awarded. If the parents are given "joint custody," then both continue as natural guardians. The statute gives natural guardians substantial authority to act on the behalf of their minor child in various matters, such as managing assets, transferring real or personal property, and settling of disputes when — in the aggregate — those matters do not exceed \$15,000.²

Chapter 61, F.S., governs issues arising from dissolution of marriage such as parental responsibility and child support. Over the years, revisions to the family law statute have resulted in a change to terminology. For instance, the Legislature revised the statute to shift away from an award of "custody" to a presumption of "shared parental responsibility."³ Chapter 61 also defines and refers to "parents" throughout the chapter; while s. 744.301, F.S., currently uses the phrase "mother and father." As a result, s. 744.301, F.S., does not reflect current statutory terminology as defined and used in family law.

The bill replaces the terms "custody" with "parental responsibility" and "mother and father" with "parents." As a result, the bill merely clarifies current law to provide that if parents are granted shared parental responsibility, both may serve as natural guardians; and if a court grants sole parental responsibility to one parent, the natural guardianship belongs to the parent to whom sole parental responsibility was awarded.

B. SECTION DIRECTORY:

Section 1 amends 744.301, F.S., relating to natural guardians.

Section 2 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.

¹ Section 744.301, F.S.

² *Id.*

³ Section 61.046(17), F.S., (providing a definition of "shared parental responsibility").

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

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

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

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

2. Other:

None.

B. RULE-MAKING AUTHORITY:

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

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

None.

HB 851

2012

1 A bill to be entitled
 2 An act relating to natural guardians; amending s.
 3 744.301, F.S.; revising terminology relating to
 4 natural guardians; providing an effective date.

5
 6 Be It Enacted by the Legislature of the State of Florida:

7
 8 Section 1. Subsections (1) and (2) of section 744.301,
 9 Florida Statutes, are amended to read:

10 744.301 Natural guardians.—

11 (1) The parents ~~mother and father~~ jointly are natural
 12 guardians of their own children and of their adopted children,
 13 during minority. If one parent dies, the surviving parent
 14 remains the sole natural guardian even if he or she remarries.
 15 If the marriage between the parents is dissolved, the natural
 16 guardianship belongs to the parent to whom sole parental
 17 responsibility has been granted or, if the parents have been
 18 granted shared parental responsibility ~~custody of the child is~~
 19 ~~awarded. If the parents are given joint custody,~~ then both
 20 continue as natural guardians. If the marriage is dissolved and
 21 neither parent ~~the father nor the mother~~ is given parental
 22 responsibility for custody ~~of the child,~~ neither may ~~shall~~ act
 23 as natural guardian of the child. The mother of a child born out
 24 of wedlock is the natural guardian of the child and is entitled
 25 to primary residential care and custody of the child unless a
 26 court of competent jurisdiction enters an order stating
 27 otherwise.

28 (2) Except as otherwise provided in this chapter, natural

29 guardians are authorized, on behalf of any of their minor
 30 children, without appointment, authority, or bond, when the
 31 amounts received, in the aggregate, do not exceed \$15,000, to:

32 (a) Settle and consummate a settlement of any claim or
 33 cause of action accruing to the child ~~any of their minor~~
 34 ~~children~~ for damages to the person or property of the child ~~any~~
 35 ~~of said minor children;~~

36 (b) Collect, receive, manage, and dispose of the proceeds
 37 of any such settlement;

38 (c) Collect, receive, manage, and dispose of any real or
 39 personal property distributed from an estate or trust;

40 (d) Collect, receive, manage, and dispose of and make
 41 elections regarding the proceeds from a life insurance policy or
 42 annuity contract payable to, or otherwise accruing to the
 43 benefit of, the child; and

44 (e) Collect, receive, manage, dispose of, and make
 45 elections regarding the proceeds of any benefit plan as defined
 46 by s. 710.102, of which the child ~~minor~~ is a beneficiary,
 47 participant, or owner;

48
 49 ~~without appointment, authority, or bond, when the amounts~~
 50 ~~received, in the aggregate, do not exceed \$15,000.~~

51 Section 2. This act shall take effect October 1, 2012.

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/HB 935 Child Support Enforcement
SPONSOR(S): Civil Justice Subcommittee; Baxley
TIED BILLS: None **IDEN./SIM. BILLS:** SB 1342

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Civil Justice Subcommittee	11 Y, 0 N, As CS	Caridad	Bond
2) Health & Human Services Quality Subcommittee	14 Y, 0 N	Mathieson	Calamas
3) Judiciary Committee		Caridad <i>DC</i>	Havlicak <i>RH</i>

SUMMARY ANALYSIS

Child support enforcement is a federally funded program that has been administered by the Department of Revenue (DOR) since 1994. A "Title IV-D case" is defined as any case in which the child support enforcement agency is enforcing the child support order pursuant to Title IV-D of the Social Security Act. To remain eligible for the Temporary Assistance for Needy Families (TANF) Block Grant, Florida must have a federally compliant child support program, meaning the state's program must provide certain services such as enforcement of child support orders. Statute provides DOR with alternative means of enforcing such orders, including suspension of an obligor's driver license.

The bill:

- Provides that an obligor's license will not be suspended if the obligor pays the delinquency through income deduction;
- Authorizes DOR to send notices to a garnishee by secure e-mail or facsimile upon consent by the garnishee;
- Requires the Chief Financial Officer and DOR to work together to establish an automated method for identifying individuals doing business with the state and owe overdue support so that support payments may be withheld by the state;
- Makes changes related to the use of unclaimed property for payment of past due support; and
- Authorizes DOR to place an administrative lien on certain claims, judgments, and property.

The bill does not appear to have 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:

Background

Child support enforcement is a federally funded program that has been administered by the Department of Revenue (DOR) since 1994.¹ A "Title IV-D case" is defined as any case in which the child support enforcement agency is enforcing the child support order pursuant to Title IV-D of the Social Security Act.² DOR provides services under the federally required program in 65 counties and through contracts in two counties.³

DOR is responsible for some case-processing activities including opening and closing cases; collecting and maintaining case, location, and financial data; and receiving and responding to verbal and written inquiries. To remain eligible for the Temporary Assistance for Needy Families (TANF) Block Grant,⁴ Florida must have a federally compliant child support program.⁵ The program must contain the following services:

- Paternity establishment;
- Support order establishment;
- Support order review and modification;
- Location of parents;
- Payment collection and disbursement; and
- Order enforcement.⁶

In Florida, DOR establishes the initial child support order and modifies existing orders when a family's circumstances change.

DOR utilizes various statutory resources in its attempt to collect past due child support. For instance, DOR may suspend the obligor's driver's license. Pursuant to s. 61.13016, F.S., a person (the obligor) who is 15 days delinquent in paying child support may have his or her driver's license suspended after notice and an opportunity for a hearing in circuit court. The obligor may avoid suspension by paying the full amount of the delinquency, entering into a written agreement with DOR to pay the past due amount, or filing a petition in circuit court to contest suspension.⁷ Although not provided for in statute, DOR also allows an obligor to begin paying a delinquent support order by income deduction in order to avoid license suspension.

If a person has a support obligation subject to enforcement by DOR, the department may inform all persons with credits or personal property (i.e. wages) belonging to the obligor under their control to not transfer any of the credits or personal property up to the amount listed in the notice, without DOR consent.⁸

¹ Florida Department of Revenue, http://dor.myflorida.com/dor/childsupport/about_us.html (last visited Jan. 27, 2012).

² See, 42 U.S.C. ss. 651-669b *et seq.*

³ Florida Department of Revenue, http://dor.myflorida.com/dor/childsupport/about_us.html (last visited Jan. 27, 2012). Miami-Dade County cases are handled by the state attorney's office, and Manatee County cases are handled by the clerk of court.

⁴ TANF is a block grant program to help move recipients into work and turn welfare into a program of temporary assistance. Under the welfare reform legislation of 1996, TANF replaced the old welfare programs known as the Aid to Families with Dependent Children (AFDC) program, the Job Opportunities and Basic Skills Training (JOBS) program, and the Emergency Assistance (EA) program. The law ended Federal entitlement to assistance and instead created TANF as a block grant that provides States, Territories, and Tribes Federal funds each year. These funds cover benefits and services targeted to needy families. U.S. Dep't of Health and Human Servs., http://www.acf.hhs.gov/opa/fact_sheets/tanf_factsheet.html (last visited Jan. 27, 2012).

⁵ Section 61.1826(1)(d), F.S.

⁶ See 42 U.S.C. ss. 654(4), (8), (10), and (29).

⁷ Section 61.13016(1)(c), F.S.

⁸ Section 409.25656(1), F.S.

Under current law, DOR must provide notice to the Chief Financial Officer (CFO) identifying the obligor and the amount of support outstanding. The CFO must then withhold all payments to any obligor who provides commodities or services to the state, leases real property to the state, or constructs a public building or public work for the state. DOR may then levy upon the withheld payments.⁹

Effect of Proposed Changes

This bill amends Florida law relating to child support enforcement. Specifically, the bill:

- Allows an obligor to pay any delinquency in child support through income deduction so as to avoid suspension of his or her driver's license;
- Provides that if the garnishee provides written consent, DOR may send notices to the garnishee by secure e-mail or facsimile;
- Requires the CFO and DOR to establish an automated method for disclosing to DOR the names of individuals doing business with the state who owe past due support so the state may withhold payments owed to such individuals;¹⁰

Current law authorizes DOR to intercept unclaimed property for payment of past due support once Department of Financial Services approves a claim. When a claim is approved, DOR notifies the obligor by certified mail of the intent to intercept the claim up to the amount of past-due support owed. The obligor is also notified of his or her right to contest the action at an administrative hearing pursuant to ch. 120, F.S. If there is a hearing and the action is sustained, DOR enters a final order directing DFS to transfer the property to DOR. DOR is required to enter final orders in all cases, even when the action is uncontested.

The bill provides that:

- If a claim for unclaimed property is approved by DFS, DOR shall send a notice by certified mail to the obligor at the address provided by the obligor to DFS, advising the obligor of the department's intent to intercept the approved claim.
- DFS must retain custody of the property until a final order has been entered and any appeals have concluded or, if the intercept is uncontested, until notified by DOR;
- If an obligor does not request a hearing, DOR must notify DFS, electronically or in writing, to transfer the property to DOR;
- Eliminates the requirement for DOR to enter a final order when the obligor does not contest the action.

Under current law, DOR may place an administrative lien on a motor vehicle or vessel that is registered in the name of an obligor who is delinquent in support payments, "if the title to the property is held by a lienholder."¹¹ The statute does not authorize DOR to place a lien on property owned "free and clear" by the obligor.

The bill authorizes DOR to place an administrative lien for unpaid support on a motor vehicle or vessel, even if owned free and clear by the obligor, and upon a claim, settlement, or judgment that may result in payment to the obligor. The bill further provides that DOR must notify the obligor of the intent to place a lien by regular mail sent to the obligor's address on file with the depository. The notice must state the amount of past due support owed and inform the obligor of the right to contest the lien at an administrative hearing.

⁹ Section 409.25656(10), F.S.

¹⁰ Under current law, DOR provides to the CFO a listing of obligors for whom warrants are outstanding. The CFO then withholds all payments to any obligor doing business with the state and DOR may levy upon the withheld payments. The change made by this bill essentially reverses this method, so that the CFO is disclosing to DOR a file of individuals to whom the state pays money.

¹¹ Section 409.2575(1), F.S.

B. SECTION DIRECTORY:

- Section 1:** Amends s. 61.13016, F.S., relating to suspension of driver licenses and motor vehicle registrations.
- Section 2:** Amends s. 322.058, F.S., relating to suspension of driving privileges due to support delinquency.
- Section 3:** Amends s. 409.25656, F.S., relating to garnishment.
- Section 4:** Amends s. 409.25658, F.S., relating to uses of unclaimed property for past due support.
- Section 5:** Amends s. 409.2575, F.S., relating to administrative liens.
- Section 6:** Provides for 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:

3. According to DOR, its procedures must be modified to implement the changes made by this bill. However, the department expects that any operational impact of the bill will be insignificant.¹²

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:

¹² Dep't of Revenue, 2012 Bill Analysis, HB 935, p. 5 (Dec. 16, 2011) (on file with the House Civil Justice Subcommittee).

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 25, 2012, the Civil Justice Subcommittee adopted a Proposed Committee Substitute. The CS/HB 935 differs from the bill as filed in that the PCS:

- Removed provisions that would have allowed service of process by regular mail.
- Removed a provision that would have allowed any caregiver of a child to execute an affidavit alleging paternity of a child.

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

1 A bill to be entitled
2 An act relating to child support enforcement; amending
3 s. 61.13016, F.S.; providing that a child support
4 obligor may avoid the suspension of his or her driver
5 license and motor vehicle registration by beginning to
6 pay his or her obligation by income deduction within a
7 specified period; amending s. 322.058, F.S.; providing
8 that a child support obligor may avoid the suspension
9 of his or her driver license and motor vehicle
10 registration by beginning to pay his or her obligation
11 by income deduction within a specified period;
12 amending s. 409.25656, F.S.; providing that a
13 garnishee may consent to receive certain notices by
14 secure e-mail or fax; requiring establishment of an
15 automated method for the Chief Financial Officer to
16 periodically provide the Department of Revenue an
17 electronic file of individuals to whom the state pays
18 money for goods or services or who lease real property
19 to the state; requiring garnishment of such payments
20 for past due or overdue support; deleting provisions
21 requiring the Department of Revenue to provide certain
22 information to the Chief Financial Officer for such
23 purpose; amending s. 409.25658, F.S.; revising
24 provisions concerning use of unclaimed property for
25 collection of past due support; amending s. 409.2575,
26 F.S.; revising language concerning who may cause
27 certain liens to be placed for unpaid and delinquent
28 support; authorizing liens on a claim, settlement, or

29 judgment that may result in payment to the obligor;
 30 providing for notice to the obligor; providing
 31 requirements for such notice; providing an effective
 32 date.

33

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

35

36 Section 1. Subsection (1), paragraph (a) of subsection
 37 (2), and subsection (3) of section 61.13016, Florida Statutes,
 38 are amended to read:

39 61.13016 Suspension of driver ~~driver's~~ licenses and motor
 40 vehicle registrations.-

41 (1) The driver ~~driver's~~ license and motor vehicle
 42 registration of a support obligor who is delinquent in payment
 43 or who has failed to comply with subpoenas or a similar order to
 44 appear or show cause relating to paternity or support
 45 proceedings may be suspended. When an obligor is 15 days
 46 delinquent making a payment in support or failure to comply with
 47 a subpoena, order to appear, order to show cause, or similar
 48 order in IV-D cases, the Title IV-D agency may provide notice to
 49 the obligor of the delinquency or failure to comply with a
 50 subpoena, order to appear, order to show cause, or similar order
 51 and the intent to suspend by regular United States mail that is
 52 posted to the obligor's last address of record with the
 53 Department of Highway Safety and Motor Vehicles. When an obligor
 54 is 15 days delinquent in making a payment in support in non-IV-D
 55 cases, and upon the request of the obligee, the depository or
 56 the clerk of the court must provide notice to the obligor of the

57 delinquency and the intent to suspend by regular United States
 58 mail that is posted to the obligor's last address of record with
 59 the Department of Highway Safety and Motor Vehicles. In either
 60 case, the notice must state:

61 (a) The terms of the order creating the support
 62 obligation;

63 (b) The period of the delinquency and the total amount of
 64 the delinquency as of the date of the notice or describe the
 65 subpoena, order to appear, order to show cause, or other similar
 66 order that ~~which~~ has not been complied with;

67 (c) That notification will be given to the Department of
 68 Highway Safety and Motor Vehicles to suspend the obligor's
 69 driver ~~driver's~~ license and motor vehicle registration unless,
 70 within 20 days after the date the notice is mailed, the obligor:

71 1.a. Pays the delinquency in full and any other costs and
 72 fees accrued between the date of the notice and the date the
 73 delinquency is paid;

74 b. Enters into a written agreement for payment with the
 75 obligee in non-IV-D cases or with the Title IV-D agency in IV-D
 76 cases; or in IV-D cases, complies with a subpoena or order to
 77 appear, order to show cause, or a similar order; ~~or~~

78 c. Files a petition with the circuit court to contest the
 79 delinquency action; or ~~and~~

80 d. Begins paying the delinquency by income deduction; and

81 2. Pays any applicable delinquency fees.
 82

83 If the obligor in non-IV-D cases enters into a written agreement
 84 for payment before the expiration of the 20-day period, the

CS/HB 935

2012

85 obligor must provide a copy of the signed written agreement to
 86 the depository or the clerk of the court.

87 (2)(a) Upon petition filed by the obligor in the circuit
 88 court within 20 days after the mailing date of the notice, the
 89 court may, in its discretion, direct the department to issue a
 90 license for driving privileges restricted to business purposes
 91 only, as defined by s. 322.271, if the person is otherwise
 92 qualified for such a license. As a condition for the court to
 93 exercise its discretion under this subsection, the obligor must
 94 agree to a schedule of payment on any child support arrearages
 95 and to maintain current child support obligations. If the
 96 obligor fails to comply with the schedule of payment, the court
 97 shall direct the Department of Highway Safety and Motor Vehicles
 98 to suspend the obligor's driver ~~driver's~~ license.

99 (3) If the obligor does not, within 20 days after the
 100 mailing date on the notice, pay the delinquency; or enter into a
 101 written payment agreement; or comply with the subpoena, order to
 102 appear, order to show cause, or other similar order; begin
 103 paying the delinquency by income deduction; or file a motion to
 104 contest, the Title IV-D agency in IV-D cases, or the depository
 105 or clerk of the court in non-IV-D cases, may ~~shall~~ file the
 106 notice with the Department of Highway Safety and Motor Vehicles
 107 and request the suspension of the obligor's driver ~~driver's~~
 108 license and motor vehicle registration in accordance with s.
 109 322.058.

110 Section 2. Subsections (1) and (2) of section 322.058,
 111 Florida Statutes, are amended to read:

112 322.058 Suspension of driving privileges due to support
 113 delinquency; reinstatement.—

114 (1) When the department receives notice from the Title IV-
 115 D agency or depository or the clerk of the court that any person
 116 licensed to operate a motor vehicle in the State of Florida
 117 under the provisions of this chapter has a delinquent support
 118 obligation or has failed to comply with a subpoena, order to
 119 appear, order to show cause, or similar order, the department
 120 shall suspend the driver ~~driver's~~ license of the person named in
 121 the notice and the registration of all motor vehicles owned by
 122 that person.

123 (2) The department must reinstate the driving privilege
 124 and allow registration of a motor vehicle when the Title IV-D
 125 agency in IV-D cases or the depository or the clerk of the court
 126 in non-IV-D cases provides to the department an affidavit
 127 stating that:

- 128 (a) The person has paid the delinquency;
- 129 (b) The person has reached a written agreement for payment
 130 with the Title IV-D agency or the obligee in non-IV-D cases;
- 131 (c) A court has entered an order granting relief to the
 132 obligor ordering the reinstatement of the license and motor
 133 vehicle registration; ~~or~~
- 134 (d) The person has complied with the subpoena, order to
 135 appear, order to show cause, or similar order; or
- 136 (e) The obligor is paying the delinquency by income
 137 deduction.

138 Section 3. Subsections (4) and (10) of section 409.25656,
 139 Florida Statutes, are amended to read:

140 409.25656 Garnishment.-

141 (4) A notice that is delivered under this section is
 142 effective at the time of delivery against all credits, other
 143 personal property, or debts of the obligor which are not at the
 144 time of such notice subject to an attachment, garnishment, or
 145 execution issued through a judicial process. Upon the
 146 garnishee's written consent, the department may send notices to
 147 the garnishee by secure e-mail or fax.

148 (10) The Chief Financial Officer shall work cooperatively
 149 with the department to establish an automated method for
 150 periodically disclosing to the department an electronic file of
 151 individuals to whom the state pays money for goods or services
 152 or who lease real property to the state. The department shall
 153 use the data provided to identify individuals who owe past due
 154 or overdue support and may garnish payments owed to such
 155 individuals by the state as provided in this section ~~The~~
 156 ~~department shall provide notice to the Chief Financial Officer,~~
 157 ~~in electronic or other form specified by the Chief Financial~~
 158 ~~Officer, listing the obligors for whom warrants are outstanding.~~
 159 ~~Pursuant to subsection (1), the Chief Financial Officer shall,~~
 160 ~~upon notice from the department, withhold all payments to any~~
 161 ~~obligor who provides commodities or services to the state,~~
 162 ~~leases real property to the state, or constructs a public~~
 163 ~~building or public work for the state. The department may levy~~
 164 ~~upon the withheld payments in accordance with subsection (3).~~
 165 Section 215.422 does not apply from the date the notice is filed
 166 with the Chief Financial Officer until the date the department
 167 notifies the Chief Financial Officer of its consent to make

168 | payment to the person or 60 days after receipt of the
 169 | department's notice in accordance with subsection (1), whichever
 170 | occurs earlier.

171 | Section 4. Subsections (1) and (4) of section 409.25658,
 172 | Florida Statutes, are amended to read:

173 | 409.25658 Use of unclaimed property for past due support.—

174 | (1) In a joint effort to facilitate the collection and
 175 | payment of past due support, the Department of Revenue, in
 176 | cooperation with the Department of Financial Services, shall
 177 | identify persons owing support collected by the department
 178 | ~~through a court~~ who are presumed to have unclaimed property held
 179 | by the Department of Financial Services.

180 | (4) Before ~~Prior to~~ paying an obligor's approved claim,
 181 | the Department of Financial Services shall notify the department
 182 | that the ~~such~~ claim has been approved. Upon confirmation that
 183 | the Department of Financial Services has approved the claim, the
 184 | department shall immediately send a notice by certified mail to
 185 | the obligor at the address provided by the obligor to the
 186 | Department of Financial Services, with a copy to the Department
 187 | of Financial Services, advising the obligor of the department's
 188 | intent to intercept the approved claim up to the amount of the
 189 | past due support, and informing the obligor of the obligor's
 190 | right to request a hearing under chapter 120. The Department of
 191 | Financial Services shall retain custody of the property until a
 192 | final order has been entered and any appeals thereon have been
 193 | concluded, or, if the intercept is uncontested, until notified
 194 | by the department. If the obligor fails to request a hearing,
 195 | the department shall notify ~~enter a final order instructing the~~

196 Department of Financial Services, electronically or in writing,
 197 to transfer to the department the property in the amount stated
 198 in the notice or electronic file ~~final order~~. Upon such
 199 transfer, the Department of Financial Services shall be released
 200 from further liability related to the transferred property.

201 Section 5. Section 409.2575, Florida Statutes, is amended
 202 to read:

203 409.2575 Administrative liens ~~on motor vehicles and~~
 204 ~~vessels.~~

205 (1) The department ~~director of the state IV-D program, or~~
 206 ~~the director's designee,~~ may cause a lien for unpaid and
 207 delinquent support to be placed upon motor vehicles, as defined
 208 in chapter 320, ~~and~~ upon vessels, as defined in chapter 327,
 209 that are registered in the name of an obligor who is delinquent
 210 in support payments, ~~if the title to the property is held by a~~
 211 ~~lienholder,~~ in the manner provided in chapter 319 or chapter
 212 328, and upon a claim, settlement, or judgment that may result
 213 in payment to the obligor. The department shall notify the
 214 obligor of the intent to place a lien by certified mail sent to
 215 the obligor's address of record on file with the depository. The
 216 notice must state the amount of past due support owed and inform
 217 the obligor of the right to contest the lien at an
 218 administrative hearing as provided by chapter 120. Notice of
 219 lien shall not be mailed unless the delinquency in support
 220 exceeds \$600.

221 (2) If the first lienholder fails, neglects, or refuses to
 222 forward the certificate of title to the appropriate department
 223 as requested pursuant to s. 319.24 or s. 328.15, the department

CS/HB 935

2012

224 | ~~director of the IV-D program, or the director's designee,~~ may
225 | apply to the circuit court for an order to enforce the
226 | requirements of s. 319.24 or s. 328.15, whichever applies.

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

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/HB 1001 Timeshares
SPONSOR(S): Business & Consumer Affairs Subcommittee and Eisnaugle
TIED BILLS: None **IDEN./SIM. BILLS:** CS/SB 1408

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Business & Consumer Affairs Subcommittee	14 Y, 0 N, As CS	Collins	Creamer
2) Judiciary Committee		Caridad DC	Havlicak RH
3) Economic Affairs Committee			

SUMMARY ANALYSIS

The bill amends ch. 721, F.S., to require the full and fair disclosure of terms, conditions and services offered by timeshare resale service providers. Specifically, the bill:

- Redefines the term 'resale service provider;'
- Defines the terms 'consumer resale timeshare interest,' 'consumer timeshare reseller,' 'resale broker,' 'resale brokerage services,' 'resale advertiser,' and 'resale advertising service;'
- Provides specific activities that a resale service provider may not engage in;
- Provides specific activities that a resale advertising service provider may not engage in;
- Requires resale advertising service providers to comply with certain contract requirements, including a minimum right of termination that must be afforded to the consumer reseller;
- Provides that a violation of this section is a violation by both the resale service provider and the individual actually committing the violation;
- Provides jurisdiction for Florida courts regarding violations of this section by a resale advertising service provider who offers services related to a timeshare interest located or offered within the state, or in a multi-state timeshare plan registered to be offered within the state; and
- Provides that violation of this section results in a civil penalty, and is also a violation of the Florida Deceptive and Unfair Trade Practices Act.

The bill has an indeterminate fiscal impact on state funds. See Fiscal Comments.

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

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Current Situation

Chapter 721, F.S., Purposes

Chapter 721, F.S., governs vacation plans and timesharing. Section 721.02, F.S., provides that the purposes of the chapter are to: 1) give statutory recognition to real and personal property timeshare plans in the state; 2) establish procedures for the creation, sale, exchange, promotion and operation of timeshare plans; 3) provide full and fair disclosure to the purchasers and prospective purchasers of timeshare plans; 4) require every timeshare plan in the state to be subjected to the provisions of this chapter; and 5) recognize that a uniform and consistent method of regulation is necessary in order to safeguard Florida's tourism industry and the state's economic well-being. No mention is made regarding resale service providers.

Definition of Resale Service Provider

A "resale service provider" is defined as any person who uses unsolicited telemarketing, direct mail, or email in connection with the offering of resale brokerage and/or advertising services to owners of timeshare interests. This definition explicitly states that it does not include developers, managing entities, or exchange companies, to the extent that they offer brokerage and/or advertising services to owners of timeshare interests in their own timeshare plans or members of their own exchange programs.¹

Resale Service Provider Disclosures

Section 721.20(9)(a), F.S., requires resale service providers to disclose the description of any fees or costs related to advertising, listing, or selling the timeshare interest that must be paid to the resale service provider or third party, and when that fee is due. Additionally, the resale service provider must disclose the ratio or percentage of the number of timeshare interests for sale versus the number of interests sold by the service provider for the previous two years. This is essentially a success rate of the broker or advertiser's services.

Resale Service Provider Penalties

Section 721.20(9)(b), F.S., provides that failure by a resale service provider to disclose required information in writing constitutes an unfair and deceptive trade practice pursuant to ch. 501, F.S. Further, any contract entered into in violation of the section is void, which entitles the purchaser to a full refund.

Effect of Proposed Changes

Chapter 721, F.S., Purposes

The bill amends s. 721.02, F.S., to designate that an additional purpose of ch. 721, F.S., is to require full and fair disclosure of terms, conditions, and services by resale service providers who are acting on

¹ Fla. Stat. § 721.05(44).

behalf of consumer timeshare resellers or purchasers, regardless of the business model employed by the service provider.

Definition of Resale Service Provider

The bill amends s. 721.05(44), F.S., to define a 'resale service provider' as any resale broker, advertiser, or other person or entity who offers or uses telemarketing, direct mail, email, or any other means of communication in connection with the offering of resale brokerage and/or advertising services to consumer timeshare resellers. This definition includes agents and employees of such person or entity. The definition does not include:

- Developers, managing entities, or exchange companies, to the extent that they offer brokerage or advertising services to owners of timeshare interests in their own timeshare plans or members of their own exchange programs;
- A consumer timeshare reseller who acquires a timeshare interest for his or her own use, and later offers that interest for rent or offers for resale seven or fewer of such timeshare interests within a year; or
- A resale broker to the extent that resale advertising services are offered in connection with resale brokerage services and no fee for the advertising service is collected in advance.

In addition, to better define "resale service provider," the bill defines the terms: "consumer resale timeshare interest," "consumer timeshare reseller," "resale broker," "resale brokerage services," "resale advertiser," and "resale advertising service."

- "Consumer resale timeshare interest" is defined as a timeshare interest owned by a purchaser; one or more reserved occupancy rights relating to a timeshare interest owned by a purchaser; or one or more reserved occupancy rights relating to or arranged through an exchange program in which a purchaser is a member.
- "Consumer timeshare reseller" is defined as a purchaser that acquires a timeshare interest for his or her own use and who later offers the interest for resale or rental.
- "Resale broker" is defined as any person, including an agent or employee of such person, who is licensed pursuant to ch. 475, F.S.,² and who offers or provides resale brokerage services to consumer timeshare resellers for compensation or valuable consideration. The offer may be made in person, by mail, by telephone, through the Internet, or by any other medium of communication.
- "Resale brokerage services" is defined as any activity that is traditionally performed by a broker and is carried out in relation to a consumer timeshare interest located or offered within the state.
- "Resale advertiser" is defined as any person, including an agent of such person, who offers resale advertising services to consumer timeshare resellers for compensation or valuable consideration. Generally, the term does not include: 1) media (i.e. a newspaper, periodical or website owner, operator or publisher), unless such media derives more than 10 percent of its gross revenue from providing resale advertising services; and 2) a resale broker, developer, managing entity or exchange company, so long as they are not providing advertising services.
- "Resale advertising service" is defined as any good or service relating to, or a promise of assistance in connection with, advertising or promoting the resale or rental of a consumer timeshare interest located or offered within the state.

Resale Service Provider Disclosures

The bill eliminates s. 721.20(9), F.S., and instead creates a new section providing disclosure requirements and penalties regarding resale service providers. These requirements are similar to the

² Chapter 475, F.S., relates to real estate brokers, sales associates, schools and appraisers.

current requirements in s. 721.20(9), F.S. Specifically, before providing resale advertising services, a service provider is required to disclose:

- The description of any fees or costs related to the service that must be paid to the resale service provider or third party; and
- When the fees or costs are due.

The bill eliminates the requirement that resale service providers supply the consumer with their success ratios for the previous two years, unless the resale service provider states or implies that it has sold or rented a specific number of timeshare interests.

In addition, the bill places specific limitations on the actions of resale brokerage activities. Specifically, a resale service provider may not provide brokering services unless validly licensed to do so pursuant to ch. 475, F.S.

The bill also provides a list of prohibited activities relating to resale advertising service providers. Specifically, when offering resale advertising services, an advertiser may not:

- State or imply that it will provide or assist in providing any type of direct sales or resale brokerage services other than the advertising of the timeshare interest;
- State or imply, directly or indirectly, that it has identified a person interested in buying or renting the timeshare interest without providing the contact information for the prospective purchaser;
- State or imply, directly or indirectly, that resales or rentals have been achieved or generated as a result of its advertising services, unless it possesses and is able to provide documentation to substantiate the statement to the consumer timeshare reseller;
- State or imply that the timeshare interest has a specific resale value;
- Make or submit any charge to a consumer reseller's credit card;
- Make or cause any electronic transfer of the consumer reseller's funds;
- Collect any payment from the consumer reseller until after the advertiser has received a written contract, signed by the consumer reseller; or
- Engage in any advertising services for compensation or valuable consideration without first obtaining a written contract, signed by the consumer reseller.

Further, a contract entered into by a resale advertising service provider must contain the following information:

- The name, address, phone number, and email address of the advertiser;
- The mailing and email address at which a contract cancellation notice may be delivered by the consumer;
- A complete description of all resale advertising services to be provided, including details regarding the advertising medium(s) expected to be used, the dates or time intervals for such advertising, the minimum number of times the advertising will be run in each medium, the itemized cost of each advertising service to be provided, and a statement of the total cost of all advertising services to be provided;
- A standardized statement of the timeshare owner's right of cancellation including the consumer reseller's right to cancel the contract within ten days, which is to immediately precede the consumer reseller's signature; and
- A statement that any resale contract entered into by or on behalf of the consumer reseller must comply with the provisions of s. 721.065, F.S., regarding resale purchase agreements, including the requirement of a ten-day cancellation period for the prospective purchaser.

If a resale advertiser fails to comply with the above contract requirements, the contract is voidable at the option of the consumer reseller, available within one year after the date the contract is executed. Moreover, the resale advertising service provider may not fail to honor a properly executed cancellation notice, or fail to provide a full refund in compliance with the right of cancellation statement.

Resale Service Provider Penalties

The bill creates s. 721.205, F.S., to provide a number of penalties regarding violation of the section. Specifically, the bill definitively states that it is the duty of the resale service provider to supervise, manage, and control all aspects of the offering of resale brokerage and/or advertising services. Any violation made while offering resale services is deemed a violation by both the resale service provider and the individual who actually commits the violation.

In addition, the bill specifically addresses resale advertising services. Specifically, it establishes that providing resale advertising services related to timeshare interests located or offered within the state constitutes "operating, conducting, engaging in, or carrying on a business or business venture" for the purposes of s. 48.193(1), F.S., relating to personal jurisdiction. Further, providing resale advertising services related to timeshare interests in a multi-state timeshare plan registered to be offered within the state constitutes "operating, conducting, engaging in, or carrying on a business or business venture" for the purposes of s. 48.193(1), F.S. These provisions effectively afford Florida courts with jurisdiction in the event of a dispute between the advertising service and the consumer reseller or another third party, so long as the timeshare interest is located within the state. It is immaterial whether any of the parties involved in the dispute are residents of the state.

Finally, the bill provides that the use of any unfair or deceptive practice by any person in connection with resale advertising services is a violation of s. 721.205, F.S., and that any violation of the section is subject to a civil penalty of not more than \$15,000 per violation. Moreover, a violation of the section will also be considered an unfair and deceptive trade practice as prohibited by s. 501.204, F.S., and is subject to the penalties and remedies otherwise provided in the Florida Deceptive and Unfair Trade Practices Act.³

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

B. SECTION DIRECTORY:

Section 1 amends s. 721.02, F.S., to designate that a purpose of ch. 721, F.S., is to require the full and fair disclosure of terms, conditions, and services offered by resale services providers.

Section 2 amends s. 721.05(44), F.S., to redefine the definition of "resale service provider," and creates definitions for "consumer retail interest," "consumer timeshare reseller," "resale broker," "resale brokerage services," "resale advertiser," and "resale advertising service."

Section 3 amends s. 721.20, F.S., to eliminate the current resale service provider disclosures and penalties.

Section 4 creates s. 721.205, F.S., which provides for increased disclosure and oversight of timeshare resale service providers, including resale advertising services.

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

³ See Part II of ch. 501, F.S.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

The bill may have a positive fiscal impact on the department's trust fund related to an increase in civil penalties. This impact is indeterminate.

2. Expenditures:

The bill may have a negative fiscal impact on the Department of Business and Professional Regulation and the Office of the Attorney General due to increased workload related to compliance oversight. This impact is indeterminate.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

There will be increased disclosure by and oversight of timeshare resale service providers, making these services more transparent to consumers.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

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

2. Other:

None.

B. RULE-MAKING AUTHORITY:

The bill may require amendment to rule 61B-41.001, F.A.C., which relates to timeshare penalties. Section 4 of this bill stipulates that any violation of the section is subject to a civil penalty not to exceed \$15,000 per violation. The rule may need to be amended to reflect this guideline. Adequate rulemaking authority exists pursuant to s. 721.26(6), F.S.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

At the January 24, 2012 meeting of the Business & Consumer Affairs Subcommittee, one amendment was proposed and adopted. The bill was reported favorably as a Committee Substitute. Specifically, the amendment:

- Eliminated various references to “resale transfer agreements,” “resale transferee entities,” and “solicitation” of consumers;
- Amended the definition of a “resale service provider” to specifically exclude from the definition, a resale broker that offers resale advertising services in connection with resale brokerage services, so long as the resale broker collects no fee for the advertising service in advance;
- Amended the definition of “resale brokerage service” and “resale advertising service” to clarify that the provisions are only applicable to timeshare interests located or offered within the state;
- Eliminates service providers who engage in brokerage services from complying with the disclosure obligations of s. 721.205, F.S.;
- Eliminated the requirement that resale service providers supply the consumer with their success ratios for the previous two years, unless the resale service provider states or implies that it has sold or rented any specific number of timeshare interests;
- Prohibited resale service providers from stating or implying that resales or rentals have been achieved or generated as a result of its advertising services, unless they possess and are able to provide documentation to substantiate the statement to the consumer timeshare reseller;
- Prohibited resale service providers from stating or implying that the timeshare interest has a specific resale value;
- Increased the consumer timeshare reseller’s right to cancel the contract from seven to ten days;
- Eliminated the requirement that resale advertising service providers explicitly state in the contract for services that the resale value of the timeshare interest may be significantly less than it was purchased for;
- Clarified that it is a violation for a consumer resale service provider to fail to refund a consumer pursuant to the Timeshare Owners’ Right of Cancellation; and
- Clarified that Florida jurisdiction is proper in regards to a resale timeshare interest that is located or offered within the state, or in a multi-state timeshare plan registered to be offered within the state.

The analysis is drafted to the Committee Substitute adopted by the Business & Consumer Affairs Subcommittee.

1 A bill to be entitled
2 An act relating to timeshares; amending s. 721.02,
3 F.S.; revising purposes of the chapter to include the
4 provision of certain disclosure; amending s. 721.05,
5 F.S.; revising the definition of the term "resale
6 service provider"; defining the terms "consumer resale
7 timeshare interest," "consumer timeshare reseller,"
8 "resale broker," "resale brokerage services," "resale
9 advertiser," and "resale advertising service";
10 amending s. 721.20, F.S.; deleting a provision
11 requiring resale service providers to provide certain
12 fee or cost and listing information to timeshare
13 interest owners; creating s. 721.205, F.S.; specifying
14 information a resale service provider must provide to
15 the consumer timeshare reseller; prohibiting
16 unlicensed resale service providers from engaging in
17 certain activities; prohibiting certain services
18 related to the offering of resale advertising by
19 resale advertisers; providing certain restrictions on
20 the offering of resale advertising services by resale
21 advertisers; providing voidability of certain
22 contracts; providing duties of a resale service
23 provider; providing that the provision of resale
24 advertising services in this state constitutes
25 operating, conducting, engaging in, or carrying on a
26 business or business venture for purposes relating to
27 jurisdiction of the courts of this state; providing
28 penalties; providing an effective date.

29
30
31
32
33
34
35
36
37
38
39
40
41
42
43
44
45
46
47
48
49
50
51
52
53
54
55
56

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

Section 1. Subsection (5) of section 721.02, Florida Statutes, is renumbered as subsection (6), and a new subsection (5) is added to that section to read:

721.02 Purposes.—The purposes of this chapter are to:

(5) Require full and fair disclosure of terms, conditions, and services by resale service providers acting on behalf of consumer timeshare resellers or on behalf of prospective consumer resale purchasers, regardless of the business model employed by the resale service provider.

Section 2. Subsection (44) of section 721.05, Florida Statutes, is amended, and subsections (45) through (50) are added to that section, to read:

721.05 Definitions.—As used in this chapter, the term:

(44) "Resale service provider" means any resale broker, resale advertiser, or other person or entity, including any agent or employee of such person or entity, who offers or uses unsolicited telemarketing, direct mail, or e-mail, or any other means of communication in connection with the offering of resale brokerage services or resale advertising services to consumer owners of timeshare resellers interests. The term does not include developers, managing entities, or exchange companies to the extent they offer resale brokerage services or resale advertising services to owners of timeshare interests in their own timeshare plans or members of their own exchange programs; resale brokers to the extent that resale advertising services

57 are offered in connection with resale brokerage services and no
 58 fee for the advertising service is collected in advance; or a
 59 consumer timeshare reseller who acquires a timeshare interest or
 60 timeshare interests for his or her own use and occupancy and who
 61 later offers the timeshare interest or timeshare interests for
 62 rent or offers for resale in a given calendar year seven or
 63 fewer of the timeshare interests that he or she acquired for his
 64 or her own use and occupancy.

65 (45) "Consumer resale timeshare interest" means:

66 (a) A timeshare interest owned by a purchaser;

67 (b) One or more reserved occupancy rights relating to a
 68 timeshare interest owned by a purchaser; or

69 (c) One or more reserved occupancy rights relating to, or
 70 arranged through, an exchange program in which a purchaser is a
 71 member.

72 (46) "Consumer timeshare reseller" means a purchaser who
 73 acquires a timeshare interest for his or her own use and
 74 occupancy and later offers the timeshare interest for resale or
 75 rental.

76 (47) "Resale broker" means any person, or any agent or
 77 employee of such person, who is licensed pursuant to chapter 475
 78 and who offers or provides resale brokerage services to consumer
 79 timeshare resellers for compensation or valuable consideration,
 80 regardless of whether the offer is made in person, by mail, by
 81 telephone, through the Internet, or by any other medium of
 82 communication.

83 (48) "Resale brokerage services" means, with respect to a
 84 consumer resale timeshare interest in a timeshare property

85 located or offered within this state, any activity that directly
 86 or indirectly consists of any of activities described in s.
 87 475.01(1)(a).

88 (49) "Resale advertiser" means any person who offers,
 89 personally or through an agent, resale advertising services to
 90 consumer timeshare resellers for compensation or valuable
 91 consideration, regardless of whether the offer is made in
 92 person, by mail, by telephone, through the Internet, or by any
 93 other medium of communication. The term does not include:

94 (a) A resale broker to the extent that resale advertising
 95 services are offered in connection with timeshare resale
 96 brokerage services and no fee for the resale advertising service
 97 is collected in advance;

98 (b) A developer, managing entity, or exchange company to
 99 the extent that any of them offers resale advertising services
 100 to owners of timeshare interests in their own timeshare plans or
 101 members of their own exchange programs; or

102 (c) A newspaper, periodical, or website owner, operator,
 103 or publisher, unless the newspaper, periodical, or website
 104 owner, operator, or publisher derives more than 10 percent of
 105 its gross revenue from providing resale advertising services.
 106 For purposes of this paragraph, the calculation of gross revenue
 107 derived from providing resale advertising services includes
 108 revenue of any affiliate, parent, agent, and subsidiary of the
 109 newspaper, periodical, or website owner, operator, or publisher,
 110 so long as the resulting percentage of gross revenue is not
 111 decreased by the inclusion of such affiliate, parent,
 112 subsidiary, or agent in the calculation.

113 (50) "Resale advertising service" means any good or
 114 service relating to, or a promise of assistance in connection
 115 with, advertising or promoting the resale or rental of a
 116 consumer resale timeshare interest located or offered within
 117 this state, including any offer to advertise or promote the sale
 118 or purchase of any such interest.

119 Section 3. Subsection (9) of section 721.20, Florida
 120 Statutes, is amended to read:

121 721.20 Licensing requirements; suspension or revocation of
 122 license; exceptions to applicability; collection of advance fees
 123 for listings unlawful.-

124 ~~(9)(a) Prior to listing or advertising a timeshare~~
 125 ~~interest for resale, a resale service provider shall provide to~~
 126 ~~the timeshare interest owner a description of any fees or costs~~
 127 ~~relating to the advertising, listing, or sale of the timeshare~~
 128 ~~interest that the timeshare interest owner, or any other person,~~
 129 ~~must pay to the resale service provider or any third party, when~~
 130 ~~such fees or costs are due, and the ratio or percentage of the~~
 131 ~~number of listings of timeshare interests for sale versus the~~
 132 ~~number of timeshare interests sold by the resale service~~
 133 ~~provider for each of the previous 2 calendar years.~~

134 ~~(b) Failure to disclose this information in writing~~
 135 ~~constitutes an unfair and deceptive trade practice pursuant to~~
 136 ~~chapter 501. Any contract entered into in violation of this~~
 137 ~~subsection is void and the purchaser is entitled to a full~~
 138 ~~refund of any moneys paid to the resale service provider.~~

139 Section 4. Section 721.205, Florida Statutes, is created
 140 to read:

141 721.205 Resale service providers; disclosure obligations.-

142 (1) (a) Before engaging in resale advertising services, a
 143 resale service provider must provide to the consumer timeshare
 144 reseller:

145 1. A description of any fees or costs related to such
 146 services that the consumer timeshare reseller, or any other
 147 person, is required pay to the resale service provider or to any
 148 third party.

149 2. A description of when such fees or costs are due.

150 (b) A resale service provider may not engage in those
 151 activities described in s. 475.01(1)(a) without being the holder
 152 of a valid and current active license in accordance with chapter
 153 475.

154 (2) In the course of offering resale advertising services,
 155 a resale advertiser may not:

156 (a) State or imply that the resale advertiser will provide
 157 or assist in providing any type of direct sales or resale
 158 brokerage services other than the advertising of the consumer
 159 resale timeshare interest for sale or rent by the consumer
 160 timeshare reseller.

161 (b) State or imply to a consumer timeshare reseller,
 162 directly or indirectly, that the resale advertiser has
 163 identified a person interested in buying or renting the
 164 timeshare resale interest without providing the name, address,
 165 and telephone number of such represented interested resale
 166 purchaser.

167 (c) State or imply to a consumer timeshare reseller,
 168 directly or indirectly, that sales or rentals have been achieved

169 or generated as a result of its advertising services unless the
 170 resale advertiser, at the time of making such representation,
 171 possesses and is able to provide documentation to substantiate
 172 the statement or implication made to the consumer timeshare
 173 reseller. In addition, to the extent that a resale advertiser
 174 states or implies to a consumer timeshare reseller that the
 175 resale advertiser has sold or rented any specific number of
 176 timeshare interests, the resale advertiser must also provide the
 177 consumer timeshare reseller the ratio or percentage of the
 178 timeshare interests advertised for sale by the resale advertiser
 179 that have actually resulted in a sale, or the ratio or
 180 percentage of all timeshare interests advertised for rental by
 181 the resale advertiser that have actually resulted in a rental,
 182 for each of the previous 2 calendar years.

183 (d) State or imply to a consumer timeshare reseller that
 184 the timeshare interest has a specific resale value.

185 (e) Make or submit any charge to a consumer timeshare
 186 reseller's credit card account; make or cause to be made any
 187 electronic transfer of consumer timeshare reseller funds; or
 188 collect any payment from a consumer timeshare reseller until
 189 after the resale advertiser has received a written contract
 190 complying in all respects with paragraph (f) that has been
 191 signed by the consumer timeshare reseller.

192 (f) Engage in any resale advertising services for
 193 compensation or valuable consideration without first obtaining a
 194 written contract to provide such services signed by the consumer
 195 timeshare reseller. Notwithstanding any other law, the contract
 196 must be printed in at least 12-point type and must contain the

197 following information:

198 1. The name, address, telephone number, and web address,
 199 if any, of the resale advertiser and a mailing address and e-
 200 mail address to which a contract cancellation notice may be
 201 delivered at the consumer timeshare reseller's election.

202 2. A complete description of all resale advertising
 203 services to be provided, including, but not limited to, details
 204 regarding the publications, Internet sites, and other media in
 205 or on which the consumer resale timeshare interest will be
 206 advertised, the dates or time intervals for such advertising or
 207 the minimum number of times such advertising will be run in each
 208 specific medium, the itemized cost to the consumer timeshare
 209 reseller of each resale advertising service to be provided, and
 210 a statement of the total cost to the consumer timeshare reseller
 211 of all resale advertising services to be provided.

212 3. A statement printed in at least 12-point boldfaced type
 213 immediately preceding the space in the contract provided for the
 214 consumer timeshare reseller's signature in substantially the
 215 following form:

216
 217 TIMESHARE OWNER'S RIGHT OF CANCELLATION

218
 219 ...(Name of resale advertiser)... will provide resale
 220 advertising services pursuant to this contract. If
 221 ...(name of resale advertiser)... represents that
 222 ...(name of resale advertiser)... has identified a
 223 person who is interested in purchasing or renting your
 224 timeshare interest, then ...(name of resale

225 advertiser)... must provide you with the name,
 226 address, and telephone number of such represented
 227 interested resale purchaser.

228
 229 You have an unwaivable right to cancel this contract
 230 for any reason within 10 days after the date you sign
 231 this contract. If you decide to cancel this contract,
 232 you must notify ...(name of resale advertiser)... in
 233 writing of your intent to cancel. Your notice of
 234 cancellation shall be effective upon the date sent and
 235 shall be sent to ...(resale advertiser's physical
 236 address)... or to ...(resale advertiser's e-mail
 237 address).... Your refund will be made within 20 days
 238 after receipt of notice of cancellation or within 5
 239 days after receipt of funds from your cleared check,
 240 whichever is later.

241
 242 You are not obligated to pay ...(name of resale
 243 advertiser)... any money unless you sign this contract
 244 and return it to ...(name of resale advertiser)....

245
 246 IMPORTANT: Before signing this contract, you should
 247 carefully review your original timeshare purchase
 248 contract and other project documents to determine
 249 whether the developer has reserved a right of first
 250 refusal or other option to purchase your timeshare
 251 interest or to determine whether there are any
 252 restrictions or special conditions applicable to the

253 resale or rental of your timeshare interest.

254

255 4. A statement that any resale contract entered into by or
 256 on behalf of the consumer timeshare reseller must comply in all
 257 respects with s. 721.065, including the provision of a 10-day
 258 cancellation period for the prospective consumer resale
 259 purchaser.

260 (g) Fail to honor any cancellation notice received from
 261 the consumer timeshare reseller within 10 days after the date
 262 the consumer timeshare reseller signs the contract for resale
 263 advertising services in compliance with subparagraph (f)3.

264 (h) Fail to provide a full refund of all money paid by a
 265 consumer timeshare reseller within 20 days after receipt of
 266 notice of cancellation or within 5 days after receipt of funds
 267 from a cleared check, whichever is later.

268 (3) If a resale service provider uses a contract for
 269 resale advertising services that fails to comply with subsection
 270 (2), such contract shall be voidable at the option of the
 271 consumer timeshare reseller for a period of 1 year after the
 272 date it is executed by the consumer timeshare reseller.

273 (4) Notwithstanding obligations placed upon any other
 274 persons by this section, it is the duty of a resale service
 275 provider to supervise, manage, and control all aspects of the
 276 offering of resale brokerage services or resale advertising
 277 services by any agent or employee of the resale service
 278 provider. Any violation of this section that occurs during such
 279 offering shall be deemed a violation by the resale service
 280 provider as well as by the person actually committing the

281 violation.

282 (5) Providing resale advertising services with respect to
 283 a consumer resale timeshare interest in a timeshare property
 284 located or offered within this state, or in a multisite
 285 timeshare plan registered or required to be registered to be
 286 offered in this state, including acting as an agent or third-
 287 party service provider for a resale service provider,
 288 constitutes operating, conducting, engaging in, or carrying on a
 289 business or business venture in this state for the purposes of
 290 s. 48.193(1).

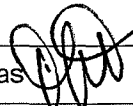
291 (6) The use of any unfair or deceptive act or practice by
 292 any person in connection with resale advertising services is a
 293 violation of this section.

294 (7) Notwithstanding any other penalties provided for in
 295 this section, any violation of this section is subject to a
 296 civil penalty of not more than \$15,000 per violation. In
 297 addition, a person who violates any provision of this section
 298 commits an unfair and deceptive trade practice as prohibited by
 299 s. 501.204 and is subject to the penalties and remedies provided
 300 in part II of chapter 501.

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

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/HB 1081 Controlled Substances
SPONSOR(S): Health & Human Services Quality Subcommittee; McBurney
TIED BILLS: None **IDEN./SIM. BILLS:** SB 1364

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Health & Human Services Quality Subcommittee	13 Y, 1 N, As CS	Mathieson	Calamas
2) Judiciary Committee		Thomas 	Havlicak RH
3) Health & Human Services Committee			

The bill provides that knowingly using a Schedule II controlled substance that is intended to be taken orally by a prescriber, in any other manner, is a misdemeanor of the first degree.

The bill has no fiscal impact on the state.

The bill provides for an effective date of October 1, 2012.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Current Situation

Controlled Substances

Controlled substances are drugs with the potential for abuse. Chapter 893, F.S., sets forth the Florida Comprehensive Drug Abuse Prevention and Control Act, and classifies controlled substances into five categories, known as schedules. The distinguishing factor between the schedules is the potential for abuse¹ of the substance and whether there is a currently accepted medical use. These schedules are used to regulate the manufacture, distribution, preparation and dispensing of the substances.²

- A **Schedule I** substance has a high potential for abuse and no currently accepted medical use in treatment in the United States and its use under medical supervision does not meet accepted safety standards. Examples: heroin and methaqualone.
- A **Schedule II** substance has a high potential for abuse, a currently accepted but severely restricted medical use in treatment in the United States, and abuse may lead to severe psychological or physical dependence. Examples: cocaine and morphine.
- A **Schedule III** substance has a potential for abuse less than the substances contained in Schedules I and II, a currently accepted medical use in treatment in the United States, and abuse may lead to moderate or low physical dependence or high psychological dependence or, in the case of anabolic steroids, may lead to physical damage. Examples: lysergic acid; ketamine; and some anabolic steroids.
- A **Schedule IV** substance has a low potential for abuse relative to the substances in Schedule III, a currently accepted medical use in treatment in the United States, and abuse may lead to limited physical or psychological dependence relative to the substances in Schedule III. Examples: alprazolam; diazepam; and phenobarbital.
- A **Schedule V** substance has a low potential for abuse relative to the substances in Schedule IV, a currently accepted medical use in treatment in the United States, and abuse may lead to limited physical or psychological dependence relative to the substances in Schedule IV. Examples: low dosage levels of codeine; certain stimulants; and certain narcotic compounds.

Many people who take prescription medications do so responsibly. However, the nonmedical use or abuse of prescription drugs remains a significant public health concern in the United States. Certain prescription drugs – opioid substances, central nervous system depressants and stimulants – when abused can lead to psychological and physiological dependence. According to research by the National Institute on Drug Abuse,³ the three most abused classes of prescription drugs are:

- Opioids, used to treat pain. Examples include codeine (Schedules II, III, V), oxycodone (OxyContin, Percocet – Schedule II), and morphine (Kadian, Avinza -Schedule II);
- Central nervous system depressants, used to treat anxiety and sleep disorders. Examples include barbiturates (Mebaral, Nembutal) and benzodiazepines (Valium, Xanax) (all in Schedule IV); and
- Stimulants, used to treat ADHD, narcolepsy, and obesity. Examples include dextroamphetamine (Dexedrine, Adderall) and methylphenidate (Ritalin, Concerta) (all in Schedule II).

In the 2011 Legislative Session, HB 7095 was enacted, which sought to deal with the prescription drug abuse issue in the state. The misuse of prescription drugs in the state is a serious public health emergency, and HB 7095 enacted a variety of measures to combat the problem, including for example, prohibiting practitioners dispensing controlled substances.

¹ Section 893.02(20), F.S.

² See, s. 893.03, F.S.

³ See <http://www.drugabuse.gov/drugs-abuse/prescription-medications> (last visited January 25, 2012).

Effect of Proposed Changes

The bill amends s. 893.13(7), F.S., to provide that a person who knowingly uses a Schedule II controlled substance, which was intended by their prescriber to be administered orally, in another manner, commits a misdemeanor of the first degree.⁴

The bill provides conforming changes to s. 893.055, F.S., s. 893.0551, F.S., and s. 921.0022, F.S.

B. SECTION DIRECTORY:

- Section 1:** Amends s. 893.13, F.S., related to prohibited acts; penalties.
Section 2: Amends s. 893.055, F.S., related to prescription drug monitoring program.
Section 3: Amends s. 893.0551, F.S., related to public records exemption for the prescription drug monitoring program.
Section 4: Amends s. 921.0022, F.S., related to the criminal punishment code; offence severity ranking chart.
Section 5: Provides an effective date.

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 creates a first degree misdemeanor offense, which may have a negative jail bed impact on local governments.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

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

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not Applicable. This bill does not appear to affect county or municipal governments.

⁴ A first degree misdemeanor is punishable by a fine not exceeding \$1,000 or imprisonment not exceeding one year. Sections. 775.082, 775.083, F.S.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

On January 31, 2012, the Health & Human Services Quality Subcommittee adopted two amendments to HB 1081. The amendments:

- Provided that knowingly using a Schedule II controlled substance that is intended to be taken orally by a prescriber, in any other manner, is a misdemeanor of the first degree.
- Deleted lines 243-296, removing the provisions of the bill relating to Schedule II opioid drugs that incorporate tamper-resistant technologies.

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

1 A bill to be entitled
 2 An act relating to controlled substances; amending s.
 3 893.13, F.S.; prohibiting the knowing use in another
 4 manner of a Schedule II controlled substance intended
 5 to be administered orally; providing criminal
 6 penalties; amending ss. 893.055, 893.0551, and
 7 921.0022, F.S.; conforming cross-references; providing
 8 an effective date.

9

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

11

12 Section 1. Subsection (7) of section 893.13, Florida
 13 Statutes, is amended to read:

14 893.13 Prohibited acts; penalties.—

15 (7)(a) A person may not:

- 16 1. Distribute or dispense a controlled substance in
 17 violation of this chapter.
- 18 2. Refuse or fail to make, keep, or furnish any record,
 19 notification, order form, statement, invoice, or information
 20 required under this chapter.
- 21 3. Refuse entry into any premises for any inspection or
 22 refuse to allow any inspection authorized by this chapter.
- 23 4. Distribute a controlled substance named or described in
 24 s. 893.03(1) or (2) except pursuant to an order form as required
 25 by s. 893.06.
- 26 5. Keep or maintain any store, shop, warehouse, dwelling,
 27 building, vehicle, boat, aircraft, or other structure or place
 28 which is resorted to by persons using controlled substances in

29 violation of this chapter for the purpose of using these
 30 substances, or which is used for keeping or selling them in
 31 violation of this chapter.

32 6. Use to his or her own personal advantage, or reveal,
 33 any information obtained in enforcement of this chapter except
 34 in a prosecution or administrative hearing for a violation of
 35 this chapter.

36 7. Possess a prescription form which has not been
 37 completed and signed by the practitioner whose name appears
 38 printed thereon, unless the person is that practitioner, is an
 39 agent or employee of that practitioner, is a pharmacist, or is a
 40 supplier of prescription forms who is authorized by that
 41 practitioner to possess those forms.

42 8. Knowingly use in another manner a Schedule II
 43 controlled substance intended by the prescriber to be
 44 administered orally.

45 ~~9.8.~~ Withhold information from a practitioner from whom
 46 the person seeks to obtain a controlled substance or a
 47 prescription for a controlled substance that the person making
 48 the request has received a controlled substance or a
 49 prescription for a controlled substance of like therapeutic use
 50 from another practitioner within the previous 30 days.

51 ~~10.9.~~ Acquire or obtain, or attempt to acquire or obtain,
 52 possession of a controlled substance by misrepresentation,
 53 fraud, forgery, deception, or subterfuge.

54 ~~11.10.~~ Affix any false or forged label to a package or
 55 receptacle containing a controlled substance.

56 ~~12.11.~~ Furnish false or fraudulent material information

57 | in, or omit any material information from, any report or other
 58 | document required to be kept or filed under this chapter or any
 59 | record required to be kept by this chapter.

60 | ~~13.12.~~ Store anhydrous ammonia in a container that is not
 61 | approved by the United States Department of Transportation to
 62 | hold anhydrous ammonia or is not constructed in accordance with
 63 | sound engineering, agricultural, or commercial practices.

64 | ~~14.13.~~ With the intent to obtain a controlled substance or
 65 | combination of controlled substances that are not medically
 66 | necessary for the person or an amount of a controlled substance
 67 | or substances that is not medically necessary for the person,
 68 | obtain or attempt to obtain from a practitioner a controlled
 69 | substance or a prescription for a controlled substance by
 70 | misrepresentation, fraud, forgery, deception, subterfuge, or
 71 | concealment of a material fact. For purposes of this
 72 | subparagraph, a material fact includes whether the person has an
 73 | existing prescription for a controlled substance issued for the
 74 | same period of time by another practitioner or as described in
 75 | subparagraph 9. 8.

76 | (b) A health care practitioner, with the intent to provide
 77 | a controlled substance or combination of controlled substances
 78 | that are not medically necessary to his or her patient or an
 79 | amount of controlled substances that is not medically necessary
 80 | for his or her patient, may not provide a controlled substance
 81 | or a prescription for a controlled substance by
 82 | misrepresentation, fraud, forgery, deception, subterfuge, or
 83 | concealment of a material fact. For purposes of this paragraph,
 84 | a material fact includes whether the patient has an existing

85 prescription for a controlled substance issued for the same
 86 period of time by another practitioner or as described in
 87 subparagraph (a)9. ~~(a)8.~~

88 (c) Any person who violates ~~the provisions of~~
 89 subparagraphs (a)1.-8. ~~(a)1.-7.~~ commits a misdemeanor of the
 90 first degree, punishable as provided in s. 775.082 or s.
 91 775.083; except that, upon a second or subsequent violation, the
 92 person commits a felony of the third degree, punishable as
 93 provided in s. 775.082, s. 775.083, or s. 775.084.

94 (d) Any person who violates ~~the provisions of~~
 95 subparagraphs (a)9.-13. ~~(a)8.-12.~~ commits a felony of the third
 96 degree, punishable as provided in s. 775.082, s. 775.083, or s.
 97 775.084.

98 (e) A person or health care practitioner who violates ~~the~~
 99 ~~provisions of~~ subparagraph (a)14. ~~(a)13.~~ or paragraph (b)
 100 commits a felony of the third degree, punishable as provided in
 101 s. 775.082, s. 775.083, or s. 775.084, if any controlled
 102 substance that is the subject of the offense is listed in
 103 Schedule II, Schedule III, or Schedule IV.

104 Section 2. Paragraph (a) of subsection (1), paragraph (b)
 105 of subsection (2), and paragraph (f) of subsection (7) of
 106 section 893.055, Florida Statutes, are amended to read:

107 893.055 Prescription drug monitoring program.—

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

109 (a) "Patient advisory report" or "advisory report" means
 110 information provided by the department in writing, or as
 111 determined by the department, to a prescriber, dispenser,
 112 pharmacy, or patient concerning the dispensing of controlled

113 substances. All advisory reports are for informational purposes
 114 only and impose no obligations of any nature or any legal duty
 115 on a prescriber, dispenser, pharmacy, or patient. The patient
 116 advisory report shall be provided in accordance with s.
 117 893.13(7)(a)9. ~~893.13(7)(a)8.~~ The advisory reports issued by the
 118 department are not subject to discovery or introduction into
 119 evidence in any civil or administrative action against a
 120 prescriber, dispenser, pharmacy, or patient arising out of
 121 matters that are the subject of the report; and a person who
 122 participates in preparing, reviewing, issuing, or any other
 123 activity related to an advisory report may not be permitted or
 124 required to testify in any such civil action as to any findings,
 125 recommendations, evaluations, opinions, or other actions taken
 126 in connection with preparing, reviewing, or issuing such a
 127 report.

128 (2)

129 (b) The department, when the direct support organization
 130 receives at least \$20,000 in nonstate moneys or the state
 131 receives at least \$20,000 in federal grants for the prescription
 132 drug monitoring program, shall adopt rules as necessary
 133 concerning the reporting, accessing the database, evaluation,
 134 management, development, implementation, operation, security,
 135 and storage of information within the system, including rules
 136 for when patient advisory reports are provided to pharmacies and
 137 prescribers. The patient advisory report shall be provided in
 138 accordance with s. 893.13(7)(a)9. ~~893.13(7)(a)8.~~ The department
 139 shall work with the professional health care licensure boards,
 140 such as the Board of Medicine, the Board of Osteopathic

141 Medicine, and the Board of Pharmacy; other appropriate
 142 organizations, such as the Florida Pharmacy Association, the
 143 Florida Medical Association, the Florida Retail Federation, and
 144 the Florida Osteopathic Medical Association, including those
 145 relating to pain management; and the Attorney General, the
 146 Department of Law Enforcement, and the Agency for Health Care
 147 Administration to develop rules appropriate for the prescription
 148 drug monitoring program.

149 (7)

150 (f) The program manager, upon determining a pattern
 151 consistent with the rules established under paragraph (2)(d) and
 152 having cause to believe a violation of s. 893.13(7)(a)9.
 153 ~~893.13(7)(a)8.~~, (8)(a), or (8)(b) has occurred, may provide
 154 relevant information to the applicable law enforcement agency.

155 Section 3. Subsection (4) of section 893.0551, Florida
 156 Statutes, is amended to read:

157 893.0551 Public records exemption for the prescription
 158 drug monitoring program.—

159 (4) The department shall disclose such confidential and
 160 exempt information to the applicable law enforcement agency in
 161 accordance with s. 893.055(7)(f). The law enforcement agency may
 162 disclose the confidential and exempt information received from
 163 the department to a criminal justice agency as defined in s.
 164 119.011 as part of an active investigation that is specific to a
 165 violation of s. 893.13(7)(a)9. ~~893.13(7)(a)8.~~, s. 893.13(8)(a),
 166 or s. 893.13(8)(b).

167 Section 4. Paragraph (c) of subsection (3) of section
 168 921.0022, Florida Statutes, is amended to read:

CS/HB 1081

2012

169 921.0022 Criminal Punishment Code; offense severity
 170 ranking chart.—

171 (3) OFFENSE SEVERITY RANKING CHART

172 (c) LEVEL 3

173

Florida Statute	Felony Degree	Description
--------------------	------------------	-------------

174

119.10(2)(b)	3rd	Unlawful use of confidential information from police reports.
--------------	-----	---

175

316.066 (3)(b)-(d)	3rd	Unlawfully obtaining or using confidential crash reports.
-----------------------	-----	---

176

316.193(2)(b)	3rd	Felony DUI, 3rd conviction.
---------------	-----	-----------------------------

177

316.1935(2)	3rd	Fleeing or attempting to elude law enforcement officer in patrol vehicle with siren and lights activated.
-------------	-----	---

178

319.30(4)	3rd	Possession by junkyard of motor vehicle with identification number plate removed.
-----------	-----	---

179

319.33(1)(a)	3rd	Alter or forge any certificate
--------------	-----	--------------------------------

CS/HB 1081

2012

			of title to a motor vehicle or mobile home.
180	319.33(1)(c)	3rd	Procure or pass title on stolen vehicle.
181	319.33(4)	3rd	With intent to defraud, possess, sell, etc., a blank, forged, or unlawfully obtained title or registration.
182	327.35(2)(b)	3rd	Felony BUI.
183	328.05(2)	3rd	Possess, sell, or counterfeit fictitious, stolen, or fraudulent titles or bills of sale of vessels.
184	328.07(4)	3rd	Manufacture, exchange, or possess vessel with counterfeit or wrong ID number.
185	376.302(5)	3rd	Fraud related to reimbursement for cleanup expenses under the Inland Protection Trust Fund.
186	379.2431	3rd	Taking, disturbing, mutilating,

CS/HB 1081

2012

	(1) (e) 5.		destroying, causing to be destroyed, transferring, selling, offering to sell, molesting, or harassing marine turtles, marine turtle eggs, or marine turtle nests in violation of the Marine Turtle Protection Act.
187	379.2431 (1) (e) 6.	3rd	Soliciting to commit or conspiring to commit a violation of the Marine Turtle Protection Act.
188	400.9935 (4)	3rd	Operating a clinic without a license or filing false license application or other required information.
189	440.1051 (3)	3rd	False report of workers' compensation fraud or retaliation for making such a report.
190	501.001 (2) (b)	2nd	Tampers with a consumer product or the container using materially false/misleading

CS/HB 1081

2012

			information.
191	624.401(4)(a)	3rd	Transacting insurance without a certificate of authority.
192	624.401(4)(b)1.	3rd	Transacting insurance without a certificate of authority; premium collected less than \$20,000.
193	626.902(1)(a) & (b)	3rd	Representing an unauthorized insurer.
194	697.08	3rd	Equity skimming.
195	790.15(3)	3rd	Person directs another to discharge firearm from a vehicle.
196	796.05(1)	3rd	Live on earnings of a prostitute.
197	806.10(1)	3rd	Maliciously injure, destroy, or interfere with vehicles or equipment used in firefighting.
198	806.10(2)	3rd	Interferes with or assaults

			firefighter in performance of duty.
199	810.09(2)(c)	3rd	Trespass on property other than structure or conveyance armed with firearm or dangerous weapon.
200	812.014(2)(c)2.	3rd	Grand theft; \$5,000 or more but less than \$10,000.
201	812.0145(2)(c)	3rd	Theft from person 65 years of age or older; \$300 or more but less than \$10,000.
202	815.04(4)(b)	2nd	Computer offense devised to defraud or obtain property.
203	817.034(4)(a)3.	3rd	Engages in scheme to defraud (Florida Communications Fraud Act), property valued at less than \$20,000.
204	817.233	3rd	Burning to defraud insurer.
205	817.234 (8)(b)-(c)	3rd	Unlawful solicitation of persons involved in motor

F L O R I D A H O U S E O F R E P R E S E N T A T I V E S

CS/HB 1081

2012

			vehicle accidents.
206	817.234(11)(a)	3rd	Insurance fraud; property value less than \$20,000.
207	817.236	3rd	Filing a false motor vehicle insurance application.
208	817.2361	3rd	Creating, marketing, or presenting a false or fraudulent motor vehicle insurance card.
209	817.413(2)	3rd	Sale of used goods as new.
210	817.505(4)	3rd	Patient brokering.
211	828.12(2)	3rd	Tortures any animal with intent to inflict intense pain, serious physical injury, or death.
212	831.28(2)(a)	3rd	Counterfeiting a payment instrument with intent to defraud or possessing a counterfeit payment instrument.
213			

CS/HB 1081

2012

214	831.29	2nd	Possession of instruments for counterfeiting drivers' licenses or identification cards.
215	838.021(3)(b)	3rd	Threatens unlawful harm to public servant.
216	843.19	3rd	Injure, disable, or kill police dog or horse.
217	860.15(3)	3rd	Overcharging for repairs and parts.
218	870.01(2)	3rd	Riot; inciting or encouraging.
219	893.13(1)(a)2.	3rd	Sell, manufacture, or deliver cannabis (or other 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).
	893.13(1)(d)2.	2nd	Sell, manufacture, or deliver 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 within 1,000 feet of university.
220	893.13(1)(f)2.	2nd	Sell, manufacture, or deliver 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 within 1,000 feet of public housing facility.
221	893.13(6)(a)	3rd	Possession of any controlled substance other than felony possession of cannabis.
222	<u>893.13(7)(a)9.</u> 893.13(7)(a)8.	3rd	Withhold information from practitioner regarding previous receipt of or prescription for a controlled substance.
223	<u>893.13(7)(a)10.</u> 893.13(7)(a)9.	3rd	Obtain or attempt to obtain controlled substance by fraud, forgery, misrepresentation, etc.
224	<u>893.13(7)(a)11.</u>	3rd	Affix false or forged label to

CS/HB 1081

2012

225	893.13(7)(a)10.		package of controlled substance.
226	<u>893.13(7)(a)12.</u>	3rd	Furnish false or fraudulent material information on any document or record required by chapter 893.
226	893.13(7)(a)11.		
227	893.13(8)(a)1.	3rd	Knowingly assist a patient, other person, or owner of an animal in obtaining a controlled substance through deceptive, untrue, or fraudulent representations in or related to the practitioner's practice.
227	893.13(8)(a)2.	3rd	Employ a trick or scheme in the practitioner's practice to assist a patient, other person, or owner of an animal in obtaining a controlled substance.
228	893.13(8)(a)3.	3rd	Knowingly write a prescription for a controlled substance for a fictitious person.
229			

CS/HB 1081

2012

230	893.13(8)(a)4.	3rd	Write a prescription for a controlled substance for a patient, other person, or an animal if the sole purpose of writing the prescription is a monetary benefit for the practitioner.
231	918.13(1)(a)	3rd	Alter, destroy, or conceal investigation evidence.
232	944.47 (1)(a)1.-2.	3rd	Introduce contraband to correctional facility.
233	944.47(1)(c)	2nd	Possess contraband while upon the grounds of a correctional institution.
234	985.721	3rd	Escapes from a juvenile facility (secure detention or residential commitment facility).
235	Section 5. This act shall take effect October 1, 2012.		

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/HB 1175 Controlled Substances
SPONSOR(S): Criminal Justice Subcommittee; Ingram and others
TIED BILLS: None **IDEN./SIM. BILLS:** CS/SB 1502

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Criminal Justice Subcommittee	12 Y, 0 N, As CS	Williams	Cunningham
2) Justice Appropriations Subcommittee	13 Y, 0 N	McAuliffe	Jones Darity
3) Judiciary Committee		Williams <i>AW</i>	Havlicak <i>RH</i>

SUMMARY ANALYSIS

Synthetic cannabinoids (also known as "K2" or "Spice"), are chemically engineered substances containing one or more synthetic compounds that behave similarly to the primary psychoactive constituent of marijuana. Synthetic stimulants, routinely marketed as "bath salts," are psychoactive substances that, when used improperly, offer alternatives to illegal drugs. In recent years, synthetic cannabinoids and bath salts have begun being used as recreational drugs, and marketed as legal and safer alternatives to illegal methods of getting "high."

During the 2011 Legislative Session, s. 893.03, F.S., was amended to add specific synthetic cannabinoid and bath salt substances to Schedule I of Florida's controlled substance schedules. As a result, current law prohibits the possession, sale, manufacture, delivery and purchase of the synthetic cannabinoid and bath salt substances listed in Schedule I.

Since the 2011 Legislative Session, new formulas of synthetic cannabinoids and bath salts have been developed that are made up of chemicals not covered by current law.

The bill amends s. 893.03, F.S., to add additional synthetic cannabinoid and bath salt substances to Schedule I of Florida's controlled substance schedules. As a result, possession of these substances is a third degree felony ranked in Level 3 of the ranking chart. The offense of sale, manufacture or delivery or possession with intent to sell, manufacture or deliver these substances is a third degree felony ranked in Level 3 of the ranking chart. The purchase of these substances is a third degree felony ranked in Level 2 of the ranking chart.

According to FDLE, this bill could potentially increase the number of evidence submissions into FDLE's Crime Laboratory System. The lab system will need to acquire all of the required standards necessary to test the proposed chemical substances. However, FDLE's fiscal analysis stated that no new expenditures would be required to implement the bill.

The Criminal Justice Impact Conference met on January 17, 2012, and determined the bill will have an insignificant impact on state prison beds.

The bill is effective October 1, 2012.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Background

Synthetic Cannabinoids

Synthetic cannabinoids (also known as “K2” or “Spice”) are chemically engineered substances, similar to tetrahydrocannabinol (THC)—the active ingredient in marijuana—that, when smoked or ingested, can produce a high similar to marijuana.¹ Synthetic cannabinoids have been developed over the last 30 years for research purposes to investigate the cannabinoid system. No legitimate non-research uses have been identified for synthetic cannabinoids and they have not been approved by the U.S. Food and Drug Administration for human consumption.²

Bath Salts

3,4-Methylenedioxymethcathinone, 3,4-Methylenedioxypropylvalerone (MDPV), Methylmethcathinone, Methoxymethcathinone, Fluoromethcathinone, and Methylethcathinone, are psychoactive substances that, when used improperly, offer alternatives to illegal drugs.³ Much like the marketing of synthetic cannabinoids as incense, these synthetic stimulant substances are commercially available and are being marketed as “bath salts.”⁴ While these substances have become popular under the guise of being sold as bath salts, they are sometimes sold as other products such as insect repellent or plant food, with names like “Bonsai Grow,” among others.⁵

Substance Abuse

Despite being labeled “not for human consumption,” synthetic cannabinoids and bath salts have begun being used as recreational drugs and have been marketed as legal and safer alternatives to illegal methods of getting “high.”⁶ They have been found accessible at convenience stores, discount tobacco outlets, gas stations, pawnshops, tattoo parlors, and truck stops, amongst other locations.⁷ These substances are reportedly being used predominately by the youth population.⁸

Synthetic cannabinoids and bath salts are abused typically by smoking. However, bath salts have also been abused by injection, snorting and by the use of an atomizer.⁹ Reports of side effects from synthetic cannabinoids and bath salts include: tachycardia, hypertension, anxiety, high blood pressure,

¹ National Conference of State Legislatures, “Synthetic Drug Threats.” October 24, 2011 (<http://www.ncsl.org/?tabid=21398>) (last visited on January 12, 2012).

² “Schedules of Controlled Substances: Temporary Placement of Five Synthetic Cannabinoids Into Schedule I,” Federal Register, The Daily Journal of the United States Government, November 24, 2010 (<http://www.federalregister.gov/articles/2010/11/24/2010-29600/schedules-of-controlled-substances-temporary-placement-of-five-synthetic-cannabinoids-into-schedule>) (last visited on January 12, 2012).

³ *Id.*

⁴ “Bath salts” are known by a variety of names, including “Red Dove,” “Blue Silk,” “Zoom,” “Bloom,” “Cloud Nine,” “Ocean Snow,” “Lunar Wave,” “Vanilla Sky,” “Ivory Wave,” “White Lightning,” “Scarface,” “Purple Wave,” “Blizzard,” “Star Dust,” “Lovey, Dovey,” “Snow Leopard,” “Aura,” and “Hurricane Charlie.” Hunterdon Drug Awareness Program, Comprehensive Drug Information on MDPV, Mephedrone (“Bath Salts”). (<http://www.mdap.org/mdpv.html>) (last visited on January 12, 2012).

⁵ Drug Enforcement Administration. Methylenedioxypropylvalerone (MDPV). October, 2011. (http://www.deadiversion.usdoj.gov/drugs_concern/mdpv.pdf) (last visited on January 12, 2012).

⁶ See, Florida Fusion Center, Unit Reporting: Office of Statewide Intelligence. “Bath Salts” Receive Emergency Drug Scheduling. Brief # 10-194 Public, January 26, 2011. (http://www.fdle.state.fl.us/Content/BathSalts/FDLEBrief10_194BathSaltsPublic.pdf) (last visited on January 12, 2012). See also, *supra* note 2.

⁷ National Drug Intelligence Center. U.S. Department of Justice. DRUG WATCH: Increasing abuse of bath salts. December 17, 2010. (www.justice.gov/ndic/pubs43/43474/sw0007p.pdf) (last visited on January 12, 2012).

⁸ *Supra* note 6. See also, *supra* note 2.

⁹ *Supra* note 8.

and hallucinations.¹⁰ Additionally, there have been cases in which these substances have caused individuals to behave inappropriately, and in some instances cause public danger.¹¹

Drug Schedules

Chapter 893, F.S., sets forth the Florida Comprehensive Drug Abuse Prevention and Control Act and classifies controlled substances into five categories, known as schedules. These schedules are used to regulate the manufacture, distribution, preparation and dispensing of the substances listed therein.

The distinguishing factors between the different drug schedules are the "potential for abuse"¹² of the substance listed therein and whether there is a currently accepted medical use for the substance. Schedule I substances have a high potential for abuse and have no currently accepted medical use in the United States.¹³ Cannabis and heroin are examples of Schedule I drugs.¹⁴

Florida law

Synthetic Cannabinoids (Spice/K2)

During the 2011 Legislative Session, the following synthetic cannabinoids and synthetic cannabinoid-mimicking compounds were added to Schedule I of Florida's controlled substance schedules:

- 2-[(1R, 3S)-3-hydroxycyclohexyl]-5-(2-methyloctan-2-yl) phenol, also known as CP 47, 497 and its dimethyloctyl (C8) homologue.
- (6aR, 10aR)-9-(hydroxymethyl)-6,6-dimethyl-3-(2-methyloctan-2-yl)-6a,7,10,10a-tetrahydrobenzo [c] chromen-1-ol, also known as HU-210.
- 1-Pentyl-3-(1-naphthoyl) indole, also known as JWH-018.
- 1-Butyl-3-(1-naphthoyl) indole, also known as JWH-073.
- 1-[2-(4-morpholinyl)ethyl]-3-(1-naphthoyl) indole, also known as JWH-200.¹⁵

As a result, possession of these synthetic cannabinoids is a third degree felony¹⁶ in conformity with other Schedule I hallucinogens.¹⁷ This offense is ranked in Level 3 of the offense severity ranking chart (ranking chart). The offense of sale, manufacture or delivery or possession with intent to sell, manufacture or deliver synthetic cannabinoids is a third degree felony ranked in Level 3 of the ranking chart. The offense of purchase of synthetic cannabinoids is a third degree felony ranked in Level 2 of the ranking chart.

Bath Salts

During the 2011 Legislative Session, the following synthetic substances (bath salts) were added to Schedule I of Florida's controlled substance schedules:

- 3,4-Methylenedioxymethcathinone.
- 3,4-Methylenedioxypropylvalerone (MDPV).
- Methylenedioxymethcathinone.
- Methoxymethcathinone.
- Fluoromethcathinone.
- Methylethcathinone.¹⁸

¹⁰ *Supra* note 6. See also, *supra* note 2.

¹¹ According to Panama City Beach police, one of the most shocking cases of bath salts abuse involved a woman who burst into her 71-year-old mother's room swinging a machete. Alexia Campbell and Aaron Deslatte, Sun Sentinel, *Florida bans 'bath salt' drugs after violent outbursts*. January 27, 2011. (http://articles.sun-sentinel.com/2011-01-27/news/fl-bath-salts-florida-20110126_1_salts-fake-cocaine-bath) (last visited on January 12, 2012).

¹² See s. 893.02(19), F.S.

¹³ See s. 893.03, F.S.

¹⁴ *Id.*

¹⁵ Chapter 2011-73, L.O.F.

¹⁶ 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.

¹⁷ Possession of 3 grams or less of synthetic cannabinoids will be a first degree misdemeanor, unless the synthetic cannabinoid is in powdered form. See, ch. 2011-73, L.O.F.

¹⁸ Chapter 2011-90, L.O.F.

As a result, possession of these substances is a third degree felony ranked in Level 3 of the ranking chart. The offense of sale, manufacture or delivery or possession with intent to sell, manufacture or deliver these substances is a third degree felony ranked in Level 3 of the ranking chart. The purchase of these substances is a third degree felony ranked in Level 2 of the ranking chart.

Recent Issues

Since the 2011 Legislative Session, new formulas of synthetic cannabinoids and bath salts have been developed that are made up of chemicals not covered by current law.¹⁹ According to the Florida Department of Law Enforcement (FDLE), state and local law enforcement agencies are currently limited in their ability to intercede in cases involving any of these chemical substances, thus creating an environment where individuals feel free to possess, distribute, and/or use these harmful substances without fear of intervention by state and local law enforcement.²⁰

Effect of the Bill

The bill amends s. 893.03, F.S., to add additional synthetic cannabinoid and bath salt substances to Schedule I of Florida's controlled substance schedules. As a result, possession of these substances is a third degree felony ranked in Level 3 of the ranking chart. The offense of sale, manufacture or delivery or possession with intent to sell, manufacture or deliver these substances is a third degree felony ranked in Level 3 of the ranking chart. The purchase of these substances is a third degree felony ranked in Level 2 of the ranking chart.

The bill also reenacts ss. 893.13(1) – (6) and 921.0022(3)(b) – (e), F.S., to incorporate changes made to s. 893.03, F.S.

B. SECTION DIRECTORY:

Section 1. Amends s. 893.03, F.S., relating to standards and schedules.

Section 2. Reenacts s. 893.13, F.S., relating to prohibited acts; penalties.

Section 3. Reenacts s. 921.0022, F.S., relating to Criminal Punishment Code; offense severity ranking chart.

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 adds additional chemical substances to Schedule I of Florida's controlled substance schedules. According to FDLE, this could potentially increase the number of evidence submissions into FDLE's Crime Laboratory System.²¹ The lab system will need to acquire all of the required

¹⁹According to the FDLE, over 90 chemicals related to synthetic cannabinoids and bath salts have been discovered that have no accepted medical use or a legitimate industrial or commercial purpose. Although similar in structural make up, these chemical compounds differ by rearrangement of the molecules, creating a different drug. *See*, Florida Department of Law Enforcement. Analysis to HB 1175 relating to Controlled Substances. January 12, 2012. (On file with House Criminal Justice Subcommittee).

²⁰ *Id.*

²¹ *Id.*

standards necessary to test the proposed chemical substances.²² However, FDLE's fiscal analysis stated that no new expenditures would be required to implement the bill.²³

The Criminal Justice Impact Conference met on January 17, 2012, and determined the bill will have an insignificant impact on state prison beds.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

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

2. Expenditures:

Because the bill adds certain chemical substances to Schedule I, local agencies which fund and maintain their own crime lab with a chemistry section would potentially be facing a rise in evidence submissions associated with the additions of the proposed chemical substances.²⁴

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The bill prohibits the possession, sale, manufacture, delivery and purchase of related synthetic cannabinoids and bath salts chemical substances. As a result, the bill could have a negative fiscal impact on retailers currently profiting on the sale of such chemical substances.

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:

None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

On January 17, 2012, the Criminal Justice Subcommittee adopted one amendment and reported the bill favorably as a committee substitute. The amendment corrects the spelling of chemical substances listed in the bill.

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

²² *Id.*

²³ *Id.*

²⁴ *Id.*

1 A bill to be entitled
 2 An act relating to controlled substances; amending s.
 3 893.03, F.S.; adding to the list of Schedule I
 4 controlled substances certain specified materials,
 5 compounds, mixtures, or preparations that contain
 6 hallucinogenic substances or that contain any of these
 7 substances' salts, isomers, and salts of isomers, if
 8 the existence of such salts, isomers, and salts of
 9 isomers is possible within the specific chemical
 10 designation; reenacting ss. 893.13(1)-(6) and
 11 921.0022(3)(b)-(e), F.S., relating to prohibited acts
 12 involving controlled substances and the Criminal
 13 Punishment Code, respectively, to incorporate the
 14 amendments made to s. 893.03, F.S., in references
 15 thereto; providing an effective date.

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

18
 19 Section 1. Paragraph (c) of subsection (1) of section
 20 893.03, Florida Statutes, is amended to read:
 21 893.03 Standards and schedules.—The substances enumerated
 22 in this section are controlled by this chapter. The controlled
 23 substances listed or to be listed in Schedules I, II, III, IV,
 24 and V are included by whatever official, common, usual,
 25 chemical, or trade name designated. The provisions of this
 26 section shall not be construed to include within any of the
 27 schedules contained in this section any excluded drugs listed
 28 within the purview of 21 C.F.R. s. 1308.22, styled "Excluded

CS/HB 1175

2012

29 Substances"; 21 C.F.R. s. 1308.24, styled "Exempt Chemical
 30 Preparations"; 21 C.F.R. s. 1308.32, styled "Exempted
 31 Prescription Products"; or 21 C.F.R. s. 1308.34, styled "Exempt
 32 Anabolic Steroid Products."

33 (1) SCHEDULE I.—A substance in Schedule I has a high
 34 potential for abuse and has no currently accepted medical use in
 35 treatment in the United States and in its use under medical
 36 supervision does not meet accepted safety standards. The
 37 following substances are controlled in Schedule I:

38 (c) Unless specifically excepted or unless listed in
 39 another schedule, any material, compound, mixture, or
 40 preparation that ~~which~~ contains any quantity of the following
 41 hallucinogenic substances or that ~~which~~ contains any of their
 42 salts, isomers, and salts of isomers, if ~~whenever~~ the existence
 43 of such salts, isomers, and salts of isomers is possible within
 44 the specific chemical designation:

- 45 1. Alpha-ethyltryptamine.
- 46 2. 2-Amino-4-methyl-5-phenyl-2-oxazoline (4-
 47 methylaminorex).
- 48 3. 2-Amino-5-phenyl-2-oxazoline (Aminorex).
- 49 4. 4-Bromo-2,5-dimethoxyamphetamine.
- 50 5. 4-Bromo-2, 5-dimethoxyphenethylamine.
- 51 6. Bufotenine.
- 52 7. Cannabis.
- 53 8. Cathinone.
- 54 9. Diethyltryptamine.
- 55 10. 2,5-Dimethoxyamphetamine.
- 56 11. 2,5-Dimethoxy-4-ethylamphetamine (DOET).

- 57 | 12. Dimethyltryptamine.
- 58 | 13. N-Ethyl-1-phenylcyclohexylamine (PCE) (Ethylamine
- 59 | analog of phencyclidine).
- 60 | 14. N-Ethyl-3-piperidyl benzilate.
- 61 | 15. N-ethylamphetamine.
- 62 | 16. Fenethylamine.
- 63 | 17. N-Hydroxy-3,4-methylenedioxyamphetamine.
- 64 | 18. Ibogaine.
- 65 | 19. Lysergic acid diethylamide (LSD).
- 66 | 20. Mescaline.
- 67 | 21. Methcathinone.
- 68 | 22. 5-Methoxy-3,4-methylenedioxyamphetamine.
- 69 | 23. 4-methoxyamphetamine.
- 70 | 24. 4-methoxymethamphetamine.
- 71 | 25. 4-Methyl-2,5-dimethoxyamphetamine.
- 72 | 26. 3,4-Methylenedioxy-N-ethylamphetamine.
- 73 | 27. 3,4-Methylenedioxyamphetamine.
- 74 | 28. N-Methyl-3-piperidyl benzilate.
- 75 | 29. N,N-dimethylamphetamine.
- 76 | 30. Parahexyl.
- 77 | 31. Peyote.
- 78 | 32. N-(1-Phenylcyclohexyl)-pyrrolidine (PCPY) (Pyrrolidine
- 79 | analog of phencyclidine).
- 80 | 33. Psilocybin.
- 81 | 34. Psilocyn.
- 82 | 35. Salvia divinorum, except for any drug product approved
- 83 | by the United States Food and Drug Administration which contains
- 84 | Salvia divinorum or its isomers, esters, ethers, salts, and

85 salts of isomers, esters, and ethers, if ~~whenever~~ the existence
 86 of such isomers, esters, ethers, and salts is possible within
 87 the specific chemical designation.

88 36. Salvinorin A, except for any drug product approved by
 89 the United States Food and Drug Administration which contains
 90 Salvinorin A or its isomers, esters, ethers, salts, and salts of
 91 isomers, esters, and ethers, if ~~whenever~~ the existence of such
 92 isomers, esters, ethers, and salts is possible within the
 93 specific chemical designation.

94 37. Tetrahydrocannabinols.

95 38. 1-[1-(2-Thienyl)-cyclohexyl]-piperidine (TCP)
 96 (Thiophene analog of phencyclidine).

97 39. 3,4,5-Trimethoxyamphetamine.

98 40. 3,4-Methylenedioxymethcathinone.

99 41. 3,4-Methylenedioxypyrovalerone (MDPV).

100 42. Methylmethcathinone.

101 43. Methoxymethcathinone.

102 44. Fluoromethcathinone.

103 45. Methylethcathinone.

104 46. 2-[(1R,3S)-3-hydroxycyclohexyl]-5-(2-methyloctan-2-
 105 yl)phenol, also known as CP 47,497 and its dimethyloctyl (C8)
 106 homologue.

107 47. (6aR,10aR)-9-(hydroxymethyl)-6,6-dimethyl-3-(2-
 108 methyloctan-2-yl)-6a,7,10,10a-tetrahydrobenzo [c]chromen-1-ol,
 109 also known as HU-210.

110 48. 1-Pentyl-3-(1-naphthoyl)indole, also known as JWH-018.

111 49. 1-Butyl-3-(1-naphthoyl)indole, also known as JWH-073.

112 50. 1-[2-(4-morpholinyl)ethyl]-3-(1-naphthoyl) indole,

- 113 also known as JWH-200.
- 114 51. BZP (Benzylpiperazine).
- 115 52. Fluorophenylpiperazine.
- 116 53. Methylphenylpiperazine.
- 117 54. Chlorophenylpiperazine.
- 118 55. Methoxyphenylpiperazine.
- 119 56. DBZP (1,4-dibenzylpiperazine).
- 120 57. TFMPP (3-Trifluoromethylphenylpiperazine).
- 121 58. MBDB (Methylbenzodioxolylbutanamine).
- 122 59. 5-Hydroxy-alpha-methyltryptamine.
- 123 60. 5-Hydroxy-N-methyltryptamine.
- 124 61. 5-Methoxy-N-methyl-N-isopropyltryptamine.
- 125 62. 5-Methoxy-alpha-methyltryptamine.
- 126 63. Methyltryptamine.
- 127 64. 5-Methoxy-N,N-dimethyltryptamine.
- 128 65. 5-Methyl-N,N-dimethyltryptamine.
- 129 66. Tyramine (4-Hydroxyphenethylamine).
- 130 67. 5-Methoxy-N,N-Diisopropyltryptamine.
- 131 68. DiPT (N,N-Diisopropyltryptamine).
- 132 69. DPT (N,N-Dipropyltryptamine).
- 133 70. 4-Hydroxy-N,N-diisopropyltryptamine.
- 134 71. Methoxytryptamine.
- 135 72. DOI (4-Iodo-2,5-dimethoxyamphetamine).
- 136 73. DOC (4-Chloro-2,5-dimethoxyamphetamine).
- 137 74. 2C-E (4-Ethyl-2,5-dimethoxyphenethylamine).
- 138 75. 2C-T-4 (2,5-Dimethoxy-4-isopropylthiophenethylamine).
- 139 76. 2C-C (4-Chloro-2,5-dimethoxyphenethylamine).
- 140 77. 2C-T (2,5-Dimethoxy-4-methylthiophenethylamine).

- 141 | 78. 2C-T-2 (2,5-Dimethoxy-4-ethylthiophenethylamine).
- 142 | 79. 2C-T-7 (2,5-Dimethoxy-4-propylthiophenethylamine).
- 143 | 80. 2C-I (4-Iodo-2,5-dimethoxyphenethylamine).
- 144 | 81. Butylone (beta-keto-N-methylbenzodioxolylpropylamine).
- 145 | 82. Ethcathinone.
- 146 | 83. Ethylone (3,4-methylenedioxy-N-ethylcathinone).
- 147 | 84. Naphyrone (naphthylpyrovalerone).
- 148 | 85. N-N-Dimethyl-3,4-methylenedioxcathinone.
- 149 | 86. N-N-Diethyl-3,4-methylenedioxcathinone.
- 150 | 87. 3,4-methylenedioxy-propiofenone.
- 151 | 88. 2-Bromo-3,4-Methylenedioxypropiofenone.
- 152 | 89. 3,4-methylenedioxy-propiofenone-2-oxime.
- 153 | 90. N-Acetyl-3,4-methylenedioxcathinone.
- 154 | 91. N-Acetyl-N-Methyl-3,4-Methylenedioxcathinone.
- 155 | 92. N-Acetyl-N-Ethyl-3,4-Methylenedioxcathinone.
- 156 | 93. Bromomethcathinone.
- 157 | 94. Buphedrone (alpha-methylamino-butyrophenone).
- 158 | 95. Eutylone (beta-Keto-Ethylbenzodioxolylbutanamine).
- 159 | 96. Dimethylcathinone.
- 160 | 97. Dimethylmethcathinone.
- 161 | 98. Pentylone (beta-Keto-Methylbenzodioxolylpentanamine).
- 162 | 99. (MDPPP) 3,4-Methylenedioxy-alpha-
- 163 | pyrrolidinopropiofenone.
- 164 | 100. (MDPBP) 3,4-Methylenedioxy-alpha-
- 165 | pyrrolidinobutiophenone.
- 166 | 101. Methoxypyrrolidinopropiofenone (MOPPP).
- 167 | 102. Methylpyrrolidinohexiophenone (MPHP).
- 168 | 103. Benzocyclidine (BCP) or

- 169 benzothiophenylcyclohexylpiperidine (BTCP).
- 170 104. Fluoromethylaminobutyrophenone (F-MABP).
- 171 105. Methoxypyrrolidinobutyrophenone (MeO-PBP).
- 172 106. Ethylpyrrolidinobutyrophenone (Et-PBP).
- 173 107. 3-Methyl-4-Methoxymethcathinone (3-Me-4-MeO-MCAT).
- 174 108. Methylethylaminobutyrophenone (Me-EABP)
- 175 109. Methylaminobutyrophenone (MABP).
- 176 110. Pyrrolidinopropiophenone.
- 177 111. Pyrrolidinobutiophenone (PBP).
- 178 112. Pyrrolidinovalerophenone (PVP).
- 179 113. Methylpyrrolidinopropiophenone (MPPP).
- 180 114. JWH-007 (1-pentyl-2-methyl-3-(1-naphthoyl)indole).
- 181 115. JWH-015 (2-Methyl-1-propyl-1H-indol-3-yl)-1-
- 182 naphthalenylmethanone).
- 183 116. JWH-019 (Naphthalen-1-yl-(1-pentylindol-3-
- 184 yl)methanone).
- 185 117. JWH-020 (1-heptyl-3-(1-naphthoyl)indole).
- 186 118. JWH-072 (Naphthalen-1-yl-(1-propyl-1H-indol-3-
- 187 yl)methanone).
- 188 119. JWH-081 (4-methoxynaphthalen-1-yl-(1-pentylindol-3-
- 189 yl)methanone).
- 190 120. JWH-122 (1-Pentyl-3-(4-methyl-1-naphthoyl)indole).
- 191 121. JWH-133 ((6aR,10aR)-3-(1,1-Dimethylbutyl)-
- 192 6a,7,10,10a-tetrahydro-6,6,9-trimethyl-6H-dibenzo[b,d]pyran)).
- 193 122. JWH-175 (3-(naphthalen-1-ylmethyl)-1-pentyl-1H-
- 194 indole).
- 195 123. JWH-201 (1-pentyl-3-(4-methoxyphenylacetyl)indole).
- 196 124. JWH-203 (2-(2-chlorophenyl)-1-(1-pentylindol-3-

- 197 yl)ethanone).
- 198 125. JWH-210 (4-ethylnaphthalen-1-yl-(1-pentylindol-3-
- 199 yl)methanone).
- 200 126. JWH-250 (2-(2-methoxyphenyl)-1-(1-pentylindol-3-
- 201 yl)ethanone).
- 202 127. JWH-251 (2-(2-methylphenyl)-1-(1-pentyl-1H-indol-3-
- 203 yl)ethanone).
- 204 128. JWH-302 (1-pentyl-3-(3-methoxyphenylacetyl)indole).
- 205 129. JWH-398 (1-pentyl-3-(4-chloro-1-naphthoyl)indole).
- 206 130. HU-211 ((6aS,10aS)-9-(Hydroxymethyl)-6,6-dimethyl-3-
- 207 (2-methyloctan-2-yl)-6a,7,10,10a-tetrahydrobenzo[c]chromen-1-
- 208 ol)).
- 209 131. HU-308 ([91R,2R,5R)-2-[2,6-dimethoxy-4-(2-
- 210 methyloctan-2-yl)phenyl]-7,7-dimethyl-4-bicyclo[3.1.1]hept-3-
- 211 enyl]methanol).
- 212 132. HU-331 (3-hydroxy-2-[(1R,6R)-3-methyl-6-(1-
- 213 methylethenyl)-2-cyclohexen-1-yl]-5-pentyl-2,5-cyclohexadiene-
- 214 1,4-dione).
- 215 133. CB-13 (Naphthalen-1-yl-(4-pentyloxynaphthalen-1-
- 216 yl)methanone).
- 217 134. CB-25 (N-cyclopropyl-11-(3-hydroxy-5-pentylphenoxy)-
- 218 undecanamide).
- 219 135. CB-52 (N-cyclopropyl-11-(2-hexyl-5-hydroxyphenoxy)-
- 220 undecanamide).
- 221 136. CP55,940 (2-[(1R,2R,5R)-5-hydroxy-2-(3-
- 222 hydroxypropyl)cyclohexyl]-5-(2-methyloctan-2-yl)phenol).
- 223 137. AM-694 (1-[(5-fluoropentyl)-1H-indol-3-yl]-2-
- 224 iodophenyl)methanone).

225 138. AM-2201 (1-[(5-fluoropentyl)-1H-indol-3-yl]-
 226 (naphthalen-1-yl)methanone).

227 139. RCS-4 (((4-methoxyphenyl) (1-pentyl-1H-indol-3-
 228 yl)methanone)).

229 140. RCS-8 (1-(1-(2-cyclohexylethyl)-1H-indol-3-yl)-2-(2-
 230 methoxyphenylethanone).

231 141. WIN55,212-2 ((R)-(+)-[2,3-Dihydro-5-methyl-3-(4-
 232 morpholinylmethyl)pyrrolo[1,2,3-de]-1,4-benzoxazin-6-yl]-1-
 233 naphthalenylmethanone).

234 142. WIN55,212-3 ([3S)-2,3-Dihydro-5-methyl-3-(4-
 235 morpholinylmethyl)pyrrolo[1,2,3-de]-1,4-benzoxazin-6-yl]-1-
 236 naphthalenylmethanone).

237 Section 2. For the purpose of incorporating the amendment
 238 made by this act to section 893.03, Florida Statutes, in
 239 references thereto, subsections (1), (2), (3), (4), (5), and (6)
 240 of section 893.13, Florida Statutes, are reenacted to read:

241 893.13 Prohibited acts; penalties.—

242 (1)(a) Except as authorized by this chapter and chapter
 243 499, it is unlawful for any person to sell, manufacture, or
 244 deliver, or possess with intent to sell, manufacture, or
 245 deliver, a controlled substance. Any person who violates this
 246 provision with respect to:

247 1. A controlled substance named or described in s.
 248 893.03(1)(a), (1)(b), (1)(d), (2)(a), (2)(b), or (2)(c)4.,
 249 commits a felony of the second degree, punishable as provided in
 250 s. 775.082, s. 775.083, or s. 775.084.

251 2. A controlled substance named or described in s.
 252 893.03(1)(c), (2)(c)1., (2)(c)2., (2)(c)3., (2)(c)5., (2)(c)6.,

253 (2)(c)7., (2)(c)8., (2)(c)9., (3), or (4) commits a felony of
 254 the third degree, punishable as provided in s. 775.082, s.
 255 775.083, or s. 775.084.

256 3. A controlled substance named or described in s.
 257 893.03(5) commits a misdemeanor of the first degree, punishable
 258 as provided in s. 775.082 or s. 775.083.

259 (b) Except as provided in this chapter, it is unlawful to
 260 sell or deliver in excess of 10 grams of any substance named or
 261 described in s. 893.03(1)(a) or (1)(b), or any combination
 262 thereof, or any mixture containing any such substance. Any
 263 person who violates this paragraph commits a felony of the first
 264 degree, punishable as provided in s. 775.082, s. 775.083, or s.
 265 775.084.

266 (c) Except as authorized by this chapter, it is unlawful
 267 for any person to sell, manufacture, or deliver, or possess with
 268 intent to sell, manufacture, or deliver, a controlled substance
 269 in, on, or within 1,000 feet of the real property comprising a
 270 child care facility as defined in s. 402.302 or a public or
 271 private elementary, middle, or secondary school between the
 272 hours of 6 a.m. and 12 midnight, or at any time in, on, or
 273 within 1,000 feet of real property comprising a state, county,
 274 or municipal park, a community center, or a publicly owned
 275 recreational facility. For the purposes of this paragraph, the
 276 term "community center" means a facility operated by a nonprofit
 277 community-based organization for the provision of recreational,
 278 social, or educational services to the public. Any person who
 279 violates this paragraph with respect to:

280 1. A controlled substance named or described in s.

CS/HB 1175

2012

281 893.03(1)(a), (1)(b), (1)(d), (2)(a), (2)(b), or (2)(c)4.,
 282 commits a felony of the first degree, punishable as provided in
 283 s. 775.082, s. 775.083, or s. 775.084. The defendant must be
 284 sentenced to a minimum term of imprisonment of 3 calendar years
 285 unless the offense was committed within 1,000 feet of the real
 286 property comprising a child care facility as defined in s.
 287 402.302.

288 2. A controlled substance named or described in s.
 289 893.03(1)(c), (2)(c)1., (2)(c)2., (2)(c)3., (2)(c)5., (2)(c)6.,
 290 (2)(c)7., (2)(c)8., (2)(c)9., (3), or (4) commits a felony of
 291 the second degree, punishable as provided in s. 775.082, s.
 292 775.083, or s. 775.084.

293 3. Any other controlled substance, except as lawfully
 294 sold, manufactured, or delivered, must be sentenced to pay a
 295 \$500 fine and to serve 100 hours of public service in addition
 296 to any other penalty prescribed by law.

297
 298 This paragraph does not apply to a child care facility unless
 299 the owner or operator of the facility posts a sign that is not
 300 less than 2 square feet in size with a word legend identifying
 301 the facility as a licensed child care facility and that is
 302 posted on the property of the child care facility in a
 303 conspicuous place where the sign is reasonably visible to the
 304 public.

305 (d) Except as authorized by this chapter, it is unlawful
 306 for any person to sell, manufacture, or deliver, or possess with
 307 intent to sell, manufacture, or deliver, a controlled substance
 308 in, on, or within 1,000 feet of the real property comprising a

309 public or private college, university, or other postsecondary
 310 educational institution. Any person who violates this paragraph
 311 with respect to:

312 1. A controlled substance named or described in s.
 313 893.03(1)(a), (1)(b), (1)(d), (2)(a), (2)(b), or (2)(c)4.,
 314 commits a felony of the first degree, punishable as provided in
 315 s. 775.082, s. 775.083, or s. 775.084.

316 2. A controlled substance named or described in s.
 317 893.03(1)(c), (2)(c)1., (2)(c)2., (2)(c)3., (2)(c)5., (2)(c)6.,
 318 (2)(c)7., (2)(c)8., (2)(c)9., (3), or (4) commits a felony of
 319 the second degree, punishable as provided in s. 775.082, s.
 320 775.083, or s. 775.084.

321 3. Any other controlled substance, except as lawfully
 322 sold, manufactured, or delivered, must be sentenced to pay a
 323 \$500 fine and to serve 100 hours of public service in addition
 324 to any other penalty prescribed by law.

325 (e) Except as authorized by this chapter, it is unlawful
 326 for any person to sell, manufacture, or deliver, or possess with
 327 intent to sell, manufacture, or deliver, a controlled substance
 328 not authorized by law in, on, or within 1,000 feet of a physical
 329 place for worship at which a church or religious organization
 330 regularly conducts religious services or within 1,000 feet of a
 331 convenience business as defined in s. 812.171. Any person who
 332 violates this paragraph with respect to:

333 1. A controlled substance named or described in s.
 334 893.03(1)(a), (1)(b), (1)(d), (2)(a), (2)(b), or (2)(c)4.,
 335 commits a felony of the first degree, punishable as provided in
 336 s. 775.082, s. 775.083, or s. 775.084.

337 2. A controlled substance named or described in s.
 338 893.03(1)(c), (2)(c)1., (2)(c)2., (2)(c)3., (2)(c)5., (2)(c)6.,
 339 (2)(c)7., (2)(c)8., (2)(c)9., (3), or (4) commits a felony of
 340 the second degree, punishable as provided in s. 775.082, s.
 341 775.083, or s. 775.084.

342 3. Any other controlled substance, except as lawfully
 343 sold, manufactured, or delivered, must be sentenced to pay a
 344 \$500 fine and to serve 100 hours of public service in addition
 345 to any other penalty prescribed by law.

346 (f) Except as authorized by this chapter, it is unlawful
 347 for any person to sell, manufacture, or deliver, or possess with
 348 intent to sell, manufacture, or deliver, a controlled substance
 349 in, on, or within 1,000 feet of the real property comprising a
 350 public housing facility at any time. For purposes of this
 351 section, the term "real property comprising a public housing
 352 facility" means real property, as defined in s. 421.03(12), of a
 353 public corporation created as a housing authority pursuant to
 354 part I of chapter 421. Any person who violates this paragraph
 355 with respect to:

356 1. A controlled substance named or described in s.
 357 893.03(1)(a), (1)(b), (1)(d), (2)(a), (2)(b), or (2)(c)4.,
 358 commits a felony of the first degree, punishable as provided in
 359 s. 775.082, s. 775.083, or s. 775.084.

360 2. A controlled substance named or described in s.
 361 893.03(1)(c), (2)(c)1., (2)(c)2., (2)(c)3., (2)(c)5., (2)(c)6.,
 362 (2)(c)7., (2)(c)8., (2)(c)9., (3), or (4) commits a felony of
 363 the second degree, punishable as provided in s. 775.082, s.
 364 775.083, or s. 775.084.

365 3. Any other controlled substance, except as lawfully
 366 sold, manufactured, or delivered, must be sentenced to pay a
 367 \$500 fine and to serve 100 hours of public service in addition
 368 to any other penalty prescribed by law.

369 (g) Except as authorized by this chapter, it is unlawful
 370 for any person to manufacture methamphetamine or phencyclidine,
 371 or possess any listed chemical as defined in s. 893.033 in
 372 violation of s. 893.149 and with intent to manufacture
 373 methamphetamine or phencyclidine. If any person violates this
 374 paragraph and:

375 1. The commission or attempted commission of the crime
 376 occurs in a structure or conveyance where any child under 16
 377 years of age is present, the person commits a felony of the
 378 first degree, punishable as provided in s. 775.082, s. 775.083,
 379 or s. 775.084. In addition, the defendant must be sentenced to a
 380 minimum term of imprisonment of 5 calendar years.

381 2. The commission of the crime causes any child under 16
 382 years of age to suffer great bodily harm, the person commits a
 383 felony of the first degree, punishable as provided in s.
 384 775.082, s. 775.083, or s. 775.084. In addition, the defendant
 385 must be sentenced to a minimum term of imprisonment of 10
 386 calendar years.

387 (h) Except as authorized by this chapter, it is unlawful
 388 for any person to sell, manufacture, or deliver, or possess with
 389 intent to sell, manufacture, or deliver, a controlled substance
 390 in, on, or within 1,000 feet of the real property comprising an
 391 assisted living facility, as that term is used in chapter 429.
 392 Any person who violates this paragraph with respect to:

393 1. A controlled substance named or described in s.
 394 893.03(1)(a), (1)(b), (1)(d), (2)(a), (2)(b), or (2)(c)4.
 395 commits a felony of the first degree, punishable as provided in
 396 s. 775.082, s. 775.083, or s. 775.084.

397 2. A controlled substance named or described in s.
 398 893.03(1)(c), (2)(c)1., (2)(c)2., (2)(c)3., (2)(c)5., (2)(c)6.,
 399 (2)(c)7., (2)(c)8., (2)(c)9., (3), or (4) commits a felony of
 400 the second degree, punishable as provided in s. 775.082, s.
 401 775.083, or s. 775.084.

402 (2)(a) Except as authorized by this chapter and chapter
 403 499, it is unlawful for any person to purchase, or possess with
 404 intent to purchase, a controlled substance. Any person who
 405 violates this provision with respect to:

406 1. A controlled substance named or described in s.
 407 893.03(1)(a), (1)(b), (1)(d), (2)(a), (2)(b), or (2)(c)4.,
 408 commits a felony of the second degree, punishable as provided in
 409 s. 775.082, s. 775.083, or s. 775.084.

410 2. A controlled substance named or described in s.
 411 893.03(1)(c), (2)(c)1., (2)(c)2., (2)(c)3., (2)(c)5., (2)(c)6.,
 412 (2)(c)7., (2)(c)8., (2)(c)9., (3), or (4) commits a felony of
 413 the third degree, punishable as provided in s. 775.082, s.
 414 775.083, or s. 775.084.

415 3. A controlled substance named or described in s.
 416 893.03(5) commits a misdemeanor of the first degree, punishable
 417 as provided in s. 775.082 or s. 775.083.

418 (b) Except as provided in this chapter, it is unlawful to
 419 purchase in excess of 10 grams of any substance named or
 420 described in s. 893.03(1)(a) or (1)(b), or any combination

421 | thereof, or any mixture containing any such substance. Any
 422 | person who violates this paragraph commits a felony of the first
 423 | degree, punishable as provided in s. 775.082, s. 775.083, or s.
 424 | 775.084.

425 | (3) Any person who delivers, without consideration, not
 426 | more than 20 grams of cannabis, as defined in this chapter,
 427 | commits a misdemeanor of the first degree, punishable as
 428 | provided in s. 775.082 or s. 775.083. For the purposes of this
 429 | paragraph, "cannabis" does not include the resin extracted from
 430 | the plants of the genus Cannabis or any compound manufacture,
 431 | salt, derivative, mixture, or preparation of such resin.

432 | (4) Except as authorized by this chapter, it is unlawful
 433 | for any person 18 years of age or older to deliver any
 434 | controlled substance to a person under the age of 18 years, or
 435 | to use or hire a person under the age of 18 years as an agent or
 436 | employee in the sale or delivery of such a substance, or to use
 437 | such person to assist in avoiding detection or apprehension for
 438 | a violation of this chapter. Any person who violates this
 439 | provision with respect to:

440 | (a) A controlled substance named or described in s.
 441 | 893.03(1)(a), (1)(b), (1)(d), (2)(a), (2)(b), or (2)(c)4.,
 442 | commits a felony of the first degree, punishable as provided in
 443 | s. 775.082, s. 775.083, or s. 775.084.

444 | (b) A controlled substance named or described in s.
 445 | 893.03(1)(c), (2)(c)1., (2)(c)2., (2)(c)3., (2)(c)5., (2)(c)6.,
 446 | (2)(c)7., (2)(c)8., (2)(c)9., (3), or (4) commits a felony of
 447 | the second degree, punishable as provided in s. 775.082, s.
 448 | 775.083, or s. 775.084.

449
 450 Imposition of sentence may not be suspended or deferred, nor
 451 shall the person so convicted be placed on probation.
 452 (5) It is unlawful for any person to bring into this state
 453 any controlled substance unless the possession of such
 454 controlled substance is authorized by this chapter or unless
 455 such person is licensed to do so by the appropriate federal
 456 agency. Any person who violates this provision with respect to:
 457 (a) A controlled substance named or described in s.
 458 893.03(1)(a), (1)(b), (1)(d), (2)(a), (2)(b), or (2)(c)4.,
 459 commits a felony of the second degree, punishable as provided in
 460 s. 775.082, s. 775.083, or s. 775.084.
 461 (b) A controlled substance named or described in s.
 462 893.03(1)(c), (2)(c)1., (2)(c)2., (2)(c)3., (2)(c)5., (2)(c)6.,
 463 (2)(c)7., (2)(c)8., (2)(c)9., (3), or (4) commits a felony of
 464 the third degree, punishable as provided in s. 775.082, s.
 465 775.083, or s. 775.084.
 466 (c) A controlled substance named or described in s.
 467 893.03(5) commits a misdemeanor of the first degree, punishable
 468 as provided in s. 775.082 or s. 775.083.
 469 (6)(a) It is unlawful for any person to be in actual or
 470 constructive possession of a controlled substance unless such
 471 controlled substance was lawfully obtained from a practitioner
 472 or pursuant to a valid prescription or order of a practitioner
 473 while acting in the course of his or her professional practice
 474 or to be in actual or constructive possession of a controlled
 475 substance except as otherwise authorized by this chapter. Any
 476 person who violates this provision commits a felony of the third

CS/HB 1175

2012

477 degree, punishable as provided in s. 775.082, s. 775.083, or s.
 478 775.084.

479 (b) If the offense is the possession of not more than 20
 480 grams of cannabis, as defined in this chapter, or 3 grams or
 481 less of a controlled substance described in s. 893.03(1)(c)46.-
 482 50., the person commits a misdemeanor of the first degree,
 483 punishable as provided in s. 775.082 or s. 775.083. For the
 484 purposes of this subsection, "cannabis" does not include the
 485 resin extracted from the plants of the genus Cannabis, or any
 486 compound manufacture, salt, derivative, mixture, or preparation
 487 of such resin, and a controlled substance described in s.
 488 893.03(1)(c)46.-50. does not include the substance in a powdered
 489 form.

490 (c) Except as provided in this chapter, it is unlawful to
 491 possess in excess of 10 grams of any substance named or
 492 described in s. 893.03(1)(a) or (1)(b), or any combination
 493 thereof, or any mixture containing any such substance. Any
 494 person who violates this paragraph commits a felony of the first
 495 degree, punishable as provided in s. 775.082, s. 775.083, or s.
 496 775.084.

497 (d) Notwithstanding any provision to the contrary of the
 498 laws of this state relating to arrest, a law enforcement officer
 499 may arrest without warrant any person who the officer has
 500 probable cause to believe is violating the provisions of this
 501 chapter relating to possession of cannabis.

502 Section 3. For the purpose of incorporating the amendment
 503 made by this act to section 893.03, Florida Statutes, in
 504 references thereto, paragraphs (b), (c), (d), and (e) of

CS/HB 1175

2012

505 subsection (3) of section 921.0022, Florida Statutes, are
 506 reenacted to read:

507 921.0022 Criminal Punishment Code; offense severity
 508 ranking chart.—

509 (3) OFFENSE SEVERITY RANKING CHART

510 (b) LEVEL 2

511

Florida Statute	Felony Degree	Description
--------------------	------------------	-------------

512

379.2431 (1)(e)3.	3rd	Possession of 11 or fewer marine turtle eggs in violation of the Marine Turtle Protection Act.
----------------------	-----	--

513

379.2431 (1)(e)4.	3rd	Possession of more than 11 marine turtle eggs in violation of the Marine Turtle Protection Act.
----------------------	-----	---

514

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.
---------------	-----	---

515

517.07	3rd	Registration of securities and furnishing of prospectus required.
--------	-----	--

516

590.28(1)	3rd	Intentional burning of lands.
-----------	-----	-------------------------------

517

CS/HB 1175

2012

518	784.05 (3)	3rd	Storing or leaving a loaded firearm within reach of minor who uses it to inflict injury or death.
519	787.04 (1)	3rd	In violation of court order, take, entice, etc., minor beyond state limits.
520	806.13 (1) (b) 3.	3rd	Criminal mischief; damage \$1,000 or more to public communication or any other public service.
521	810.061 (2)	3rd	Impairing or impeding telephone or power to a dwelling; facilitating or furthering burglary.
522	810.09 (2) (e)	3rd	Trespassing on posted commercial horticulture property.
523	812.014 (2) (c) 1.	3rd	Grand theft, 3rd degree; \$300 or more but less than \$5,000.
524	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

CS/HB 1175

2012

			device countermeasure.
525	817.234(1)(a)2.	3rd	False statement in support of insurance claim.
526	817.481(3)(a)	3rd	Obtain credit or purchase with false, expired, counterfeit, etc., credit card, value over \$300.
527	817.52(3)	3rd	Failure to redeliver hired vehicle.
528	817.54	3rd	With intent to defraud, obtain mortgage note, etc., by false representation.
529	817.60(5)	3rd	Dealing in credit cards of another.
530	817.60(6)(a)	3rd	Forgery; purchase goods, services with false card.
531	817.61	3rd	Fraudulent use of credit cards over \$100 or more within 6 months.
532	826.04	3rd	Knowingly marries or has sexual intercourse with person to whom related.
533	831.01	3rd	Forgery.
534			

F L O R I D A H O U S E O F R E P R E S E N T A T I V E S

CS/HB 1175

2012

535	831.02	3rd	Uttering forged instrument; utters or publishes alteration with intent to defraud.
536	831.07	3rd	Forging bank bills, checks, drafts, or promissory notes.
537	831.08	3rd	Possessing 10 or more forged notes, bills, checks, or drafts.
538	831.09	3rd	Uttering forged notes, bills, checks, drafts, or promissory notes.
539	831.11	3rd	Bringing into the state forged bank bills, checks, drafts, or notes.
540	832.05 (3) (a)	3rd	Cashing or depositing item with intent to defraud.
541	843.08	3rd	Falsely impersonating an officer.
542	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.

543

544

(c) LEVEL 3

545

Florida

Felony

Statute

Degree

Description

546

119.10(2)(b)

3rd

Unlawful use of confidential information from police reports.

547

316.066

3rd

Unlawfully obtaining or using confidential crash reports.

(3)(b)-(d)

548

316.193(2)(b)

3rd

Felony DUI, 3rd conviction.

549

316.1935(2)

3rd

Fleeing or attempting to elude law enforcement officer in patrol vehicle with siren and lights activated.

550

319.30(4)

3rd

Possession by junkyard of motor vehicle with identification number plate removed.

551

319.33(1)(a)

3rd

Alter or forge any certificate of title to a motor vehicle or mobile home.

552

319.33(1)(c)

3rd

Procure or pass title on stolen vehicle.

553

CS/HB 1175

2012

554	319.33 (4)	3rd	With intent to defraud, possess, sell, etc., a blank, forged, or unlawfully obtained title or registration.
555	327.35 (2) (b)	3rd	Felony BUI.
556	328.05 (2)	3rd	Possess, sell, or counterfeit fictitious, stolen, or fraudulent titles or bills of sale of vessels.
557	328.07 (4)	3rd	Manufacture, exchange, or possess vessel with counterfeit or wrong ID number.
558	376.302 (5)	3rd	Fraud related to reimbursement for cleanup expenses under the Inland Protection Trust Fund.
559	379.2431 (1) (e) 5.	3rd	Taking, disturbing, mutilating, destroying, causing to be destroyed, transferring, selling, offering to sell, molesting, or harassing marine turtles, marine turtle eggs, or marine turtle nests in violation of the Marine Turtle Protection Act.
	379.2431 (1) (e) 6.	3rd	Soliciting to commit or conspiring to commit a violation of the Marine Turtle

CS/HB 1175

2012

560			Protection Act.
561	400.9935(4)	3rd	Operating a clinic without a license or filing false license application or other required information.
562	440.1051(3)	3rd	False report of workers' compensation fraud or retaliation for making such a report.
563	501.001(2)(b)	2nd	Tampers with a consumer product or the container using materially false/misleading information.
564	624.401(4)(a)	3rd	Transacting insurance without a certificate of authority.
565	624.401(4)(b)1.	3rd	Transacting insurance without a certificate of authority; premium collected less than \$20,000.
566	626.902(1)(a) & (b)	3rd	Representing an unauthorized insurer.
567	697.08	3rd	Equity skimming.
	790.15(3)	3rd	Person directs another to discharge

CS/HB 1175

2012

			firearm from a vehicle.
568			
	796.05 (1)	3rd	Live on earnings of a prostitute.
569			
	806.10 (1)	3rd	Maliciously injure, destroy, or interfere with vehicles or equipment used in firefighting.
570			
	806.10 (2)	3rd	Interferes with or assaults firefighter in performance of duty.
571			
	810.09 (2) (c)	3rd	Trespass on property other than structure or conveyance armed with firearm or dangerous weapon.
572			
	812.014 (2) (c) 2.	3rd	Grand theft; \$5,000 or more but less than \$10,000.
573			
	812.0145 (2) (c)	3rd	Theft from person 65 years of age or older; \$300 or more but less than \$10,000.
574			
	815.04 (4) (b)	2nd	Computer offense devised to defraud or obtain property.
575			
	817.034 (4) (a) 3.	3rd	Engages in scheme to defraud (Florida Communications Fraud Act), property

CS/HB 1175

2012

			valued at less than \$20,000.
576			
	817.233	3rd	Burning to defraud insurer.
577			
	817.234	3rd	Unlawful solicitation of persons
	(8) (b) - (c)		involved in motor vehicle accidents.
578			
	817.234(11) (a)	3rd	Insurance fraud; property value less
			than \$20,000.
579			
	817.236	3rd	Filing a false motor vehicle insurance
			application.
580			
	817.2361	3rd	Creating, marketing, or presenting a
			false or fraudulent motor vehicle
			insurance card.
581			
	817.413(2)	3rd	Sale of used goods as new.
582			
	817.505(4)	3rd	Patient brokering.
583			
	828.12(2)	3rd	Tortures any animal with intent to
			inflict intense pain, serious physical
			injury, or death.
584			
	831.28(2) (a)	3rd	Counterfeiting a payment instrument with
			intent to defraud or possessing a

CS/HB 1175

2012

585			counterfeit payment instrument.
586	831.29	2nd	Possession of instruments for counterfeiting drivers' licenses or identification cards.
587	838.021(3)(b)	3rd	Threatens unlawful harm to public servant.
588	843.19	3rd	Injure, disable, or kill police dog or horse.
589	860.15(3)	3rd	Overcharging for repairs and parts.
590	870.01(2)	3rd	Riot; inciting or encouraging.
591	893.13(1)(a)2.	3rd	Sell, manufacture, or deliver cannabis (or other 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).
592	893.13(1)(d)2.	2nd	Sell, manufacture, or deliver 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 within 1,000 feet of university.

CS/HB 1175

2012

- 593 893.13(1)(f)2. 2nd Sell, manufacture, or deliver 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
within 1,000 feet of public housing
facility.
- 594 893.13(6)(a) 3rd Possession of any controlled substance
other than felony possession of
cannabis.
- 595 893.13(7)(a)8. 3rd Withhold information from practitioner
regarding previous receipt of or
prescription for a controlled substance.
- 596 893.13(7)(a)9. 3rd Obtain or attempt to obtain controlled
substance by fraud, forgery,
misrepresentation, etc.
- 597 893.13(7)(a)10. 3rd Affix false or forged label to package
of controlled substance.
- 598 893.13(7)(a)11. 3rd Furnish false or fraudulent material
information on any document or record
required by chapter 893.
- 893.13(8)(a)1. 3rd Knowingly assist a patient, other

599	893.13(8)(a)2.	3rd	person, or owner of an animal in obtaining a controlled substance through deceptive, untrue, or fraudulent representations in or related to the practitioner's practice.
600	893.13(8)(a)3.	3rd	Employ a trick or scheme in the practitioner's practice to assist a patient, other person, or owner of an animal in obtaining a controlled substance.
601	893.13(8)(a)4.	3rd	Knowingly write a prescription for a controlled substance for a fictitious person.
602	918.13(1)(a)	3rd	Write a prescription for a controlled substance for a patient, other person, or an animal if the sole purpose of writing the prescription is a monetary benefit for the practitioner.
603	944.47	3rd	Alter, destroy, or conceal investigation evidence.
604	(1)(a)1.-2.	3rd	Introduce contraband to correctional facility.

CS/HB 1175

2012

605	944.47 (1) (c)	2nd	Possess contraband while upon the grounds of a correctional institution.
606	985.721	3rd	Escapes from a juvenile facility (secure detention or residential commitment facility).
607	(d) LEVEL 4		
608			
609	Florida Statute	Felony Degree	Description
610	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.
611	499.0051 (1)	3rd	Failure to maintain or deliver pedigree papers.
612	499.0051 (2)	3rd	Failure to authenticate pedigree papers.
613	499.0051 (6)	2nd	Knowing sale or delivery, or possession with intent to sell, contraband prescription drugs.

F L O R I D A H O U S E O F R E P R E S E N T A T I V E S

CS/HB 1175

2012

614	784.07(2)(b)	3rd	Battery of law enforcement officer, firefighter, etc.
615	784.074(1)(c)	3rd	Battery of sexually violent predators facility staff.
616	784.075	3rd	Battery on detention or commitment facility staff.
617	784.078	3rd	Battery of facility employee by throwing, tossing, or expelling certain fluids or materials.
618	784.08(2)(c)	3rd	Battery on a person 65 years of age or older.
619	784.081(3)	3rd	Battery on specified official or employee.
620	784.082(3)	3rd	Battery by detained person on visitor or other detainee.
621	784.083(3)	3rd	Battery on code inspector.
622	784.085	3rd	Battery of child by throwing, tossing, projecting, or expelling certain fluids or materials.

CS/HB 1175

2012

623	787.03(1)	3rd	Interference with custody; wrongly takes minor from appointed guardian.
624	787.04(2)	3rd	Take, entice, or remove child beyond state limits with criminal intent pending custody proceedings.
625	787.04(3)	3rd	Carrying child beyond state lines with criminal intent to avoid producing child at custody hearing or delivering to designated person.
626	790.115(1)	3rd	Exhibiting firearm or weapon within 1,000 feet of a school.
627	790.115(2)(b)	3rd	Possessing electric weapon or device, destructive device, or other weapon on school property.
628	790.115(2)(c)	3rd	Possessing firearm on school property.
629	800.04(7)(c)	3rd	Lewd or lascivious exhibition; offender less than 18 years.
630	810.02(4)(a)	3rd	Burglary, or attempted burglary, of an unoccupied structure; unarmed; no assault or battery.

CS/HB 1175

2012

631	810.02(4)(b)	3rd	Burglary, or attempted burglary, of an unoccupied conveyance; unarmed; no assault or battery.
632	810.06	3rd	Burglary; possession of tools.
633	810.08(2)(c)	3rd	Trespass on property, armed with firearm or dangerous weapon.
634	812.014(2)(c)3.	3rd	Grand theft, 3rd degree \$10,000 or more but less than \$20,000.
635	812.014 (2)(c)4.-10.	3rd	Grand theft, 3rd degree, a will, firearm, motor vehicle, livestock, etc.
636	812.0195(2)	3rd	Dealing in stolen property by use of the Internet; property stolen \$300 or more.
637	817.563(1)	3rd	Sell or deliver substance other than controlled substance agreed upon, excluding s. 893.03(5) drugs.
638	817.568(2)(a)	3rd	Fraudulent use of personal identification information.
639	817.625(2)(a)	3rd	Fraudulent use of scanning device or reencoder.

CS/HB 1175

2012

640	828.125(1)	2nd	Kill, maim, or cause great bodily harm or permanent breeding disability to any registered horse or cattle.
641	837.02(1)	3rd	Perjury in official proceedings.
642	837.021(1)	3rd	Make contradictory statements in official proceedings.
643	838.022	3rd	Official misconduct.
644	839.13(2)(a)	3rd	Falsifying records of an individual in the care and custody of a state agency.
645	839.13(2)(c)	3rd	Falsifying records of the Department of Children and Family Services.
646	843.021	3rd	Possession of a concealed handcuff key by a person in custody.
647	843.025	3rd	Deprive law enforcement, correctional, or correctional probation officer of means of protection or communication.
648	843.15(1)(a)	3rd	Failure to appear while on bail for felony (bond estreature or bond jumping).

CS/HB 1175

2012

649	847.0135(5)(c)	3rd	Lewd or lascivious exhibition using computer; offender less than 18 years.
650	874.05(1)	3rd	Encouraging or recruiting another to join a criminal gang.
651	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).
652	914.14(2)	3rd	Witnesses accepting bribes.
653	914.22(1)	3rd	Force, threaten, etc., witness, victim, or informant.
654	914.23(2)	3rd	Retaliation against a witness, victim, or informant, no bodily injury.
655	918.12	3rd	Tampering with jurors.
656	934.215	3rd	Use of two-way communications device to facilitate commission of a crime.
657	(e)	LEVEL 5	
658	Florida	Felony	
659	Statute	Degree	Description

CS/HB 1175

2012

660	316.027(1)(a)	3rd	Accidents involving personal injuries, failure to stop; leaving scene.
661	316.1935(4)(a)	2nd	Aggravated fleeing or eluding.
662	322.34(6)	3rd	Careless operation of motor vehicle with suspended license, resulting in death or serious bodily injury.
663	327.30(5)	3rd	Vessel accidents involving personal injury; leaving scene.
664	381.0041(11)(b)	3rd	Donate blood, plasma, or organs knowing HIV positive.
665	440.10(1)(g)	2nd	Failure to obtain workers' compensation coverage.
666	440.105(5)	2nd	Unlawful solicitation for the purpose of making workers' compensation claims.
667	440.381(2)	2nd	Submission of false, misleading, or incomplete information with the purpose of avoiding or reducing workers' compensation premiums.
	624.401(4)(b)2.	2nd	Transacting insurance without a

			certificate or authority; premium collected \$20,000 or more but less than \$100,000.
668	626.902 (1) (c)	2nd	Representing an unauthorized insurer; repeat offender.
669	790.01 (2)	3rd	Carrying a concealed firearm.
670	790.162	2nd	Threat to throw or discharge destructive device.
671	790.163 (1)	2nd	False report of deadly explosive or weapon of mass destruction.
672	790.221 (1)	2nd	Possession of short-barreled shotgun or machine gun.
673	790.23	2nd	Felons in possession of firearms, ammunition, or electronic weapons or devices.
674	800.04 (6) (c)	3rd	Lewd or lascivious conduct; offender less than 18 years.
675	800.04 (7) (b)	2nd	Lewd or lascivious exhibition; offender 18 years or older.
676			

F L O R I D A H O U S E O F R E P R E S E N T A T I V E S

CS/HB 1175

2012

677	806.111(1)	3rd	Possess, manufacture, or dispense fire bomb with intent to damage any structure or property.
678	812.0145(2)(b)	2nd	Theft from person 65 years of age or older; \$10,000 or more but less than \$50,000.
679	812.015(8)	3rd	Retail theft; property stolen is valued at \$300 or more and one or more specified acts.
680	812.019(1)	2nd	Stolen property; dealing in or trafficking in.
681	812.131(2)(b)	3rd	Robbery by sudden snatching.
682	812.16(2)	3rd	Owning, operating, or conducting a chop shop.
683	817.034(4)(a)2.	2nd	Communications fraud, value \$20,000 to \$50,000.
684	817.234(11)(b)	2nd	Insurance fraud; property value \$20,000 or more but less than \$100,000.
	817.2341(1),	3rd	Filing false financial statements,

CS/HB 1175

2012

685	(2) (a) & (3) (a)		making false entries of material fact or false statements regarding property values relating to the solvency of an insuring entity.
686	817.568(2) (b)	2nd	Fraudulent use of personal identification information; value of benefit, services received, payment avoided, or amount of injury or fraud, \$5,000 or more or use of personal identification information of 10 or more individuals.
687	817.625(2) (b)	2nd	Second or subsequent fraudulent use of scanning device or reencoder.
688	825.1025(4)	3rd	Lewd or lascivious exhibition in the presence of an elderly person or disabled adult.
689	827.071(4)	2nd	Possess with intent to promote any photographic material, motion picture, etc., which includes sexual conduct by a child.
	827.071(5)	3rd	Possess, control, or intentionally view any photographic material, motion

			picture, etc., which includes sexual conduct by a child.
690	839.13(2)(b)	2nd	Falsifying records of an individual in the care and custody of a state agency involving great bodily harm or death.
691	843.01	3rd	Resist officer with violence to person; resist arrest with violence.
692	847.0135(5)(b)	2nd	Lewd or lascivious exhibition using computer; offender 18 years or older.
693	847.0137 (2) & (3)	3rd	Transmission of pornography by electronic device or equipment.
694	847.0138 (2) & (3)	3rd	Transmission of material harmful to minors to a minor by electronic device or equipment.
695	874.05(2)	2nd	Encouraging or recruiting another to join a criminal gang; second or subsequent offense.
696	893.13(1)(a)1.	2nd	Sell, manufacture, or deliver cocaine (or other s. 893.03(1)(a), (1)(b), (1)(d), (2)(a), (2)(b), or (2)(c)4.

CS/HB 1175

2012

697	893.13(1)(c)2.	2nd	drugs). Sell, manufacture, or deliver cannabis (or other 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) within 1,000 feet of a child care facility, school, or state, county, or municipal park or publicly owned recreational facility or community center.
698	893.13(1)(d)1.	1st	Sell, manufacture, or deliver cocaine (or other s. 893.03(1)(a), (1)(b), (1)(d), (2)(a), (2)(b), or (2)(c)4. drugs) within 1,000 feet of university.
699	893.13(1)(e)2.	2nd	Sell, manufacture, or deliver cannabis or other drug prohibited under 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) within 1,000 feet of property used for religious services or a specified business site.
700	893.13(1)(f)1.	1st	Sell, manufacture, or deliver cocaine

CS/HB 1175

2012

(or other s. 893.03(1)(a), (1)(b),
(1)(d), or (2)(a), (2)(b), or (2)(c)4.
drugs) within 1,000 feet of public
housing facility.

701

893.13(4)(b) 2nd Deliver to minor cannabis (or other 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).

702

893.1351(1) 3rd Ownership, lease, or rental for
trafficking in or manufacturing of
controlled substance.

703

704

Section 4. This act shall take effect October 1, 2012.

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/HB 1331 Property Fraud
SPONSOR(S): Criminal Justice Subcommittee; Wood
TIED BILLS: None **IDEN./SIM. BILLS:** CS/SB 996

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Criminal Justice Subcommittee	11 Y, 0 N, As CS	Krol	Cunningham
2) Judiciary Committee		Krol TK	Havlicak RN

SUMMARY ANALYSIS

The bill creates s. 817.535, F.S., entitled "fraudulent creation of interest in real or personal property." The bill makes it a third degree felony for a person, with the intent to defraud or harass another, to file or cause to be filed for recording in the official records a document related to real or personal property which the person knows to contain a material misstatement, misrepresentation, or omission of fact. Such documents include, but are not limited to:

- Deeds, leases, bills of sale, agreements, mortgages, notices of claim of lien, notices of levy, promissory notes, mortgage notes, or any other instrument that relates to the ownership, transfer, or encumbrance of or claim against real or personal property, or any interest in real or personal property.

The bill exempts persons who record construction liens from the offense and specifies that construction liens are subject to the fraud provisions of s. 713.31, F.S.

The bill may have a minimal fiscal impact on the Office of the State Courts Administrator because a few more cases may be filed as a result of the specific provisions of the bill.

The Criminal Justice Impact Conference met on January 30, 2012, and determined the bill would have an insignificant fiscal impact on the Department of Corrections.

The bill is effective on October 1, 2012.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Background

Florida's Recording Act

Section 695.01, F.S., requires that any conveyance, transfer, mortgage, or other interest in real property be recorded in the public records of the county where the property is located. Every state in the United States has an analogous statutory recording system making information about interests in property available to the public.¹ The purpose of a public recording system for land titles is to allow access to any person such as a creditor, tax collector, or prospective purchaser to ascertain who owns the property and what encumbrances might exist to the title.² Because these records are open for the public to rely on and have the potential to call into question the owner's clear title to the property, having accurate property records is vital.³

Section 28.222(1), F.S., requires the clerk of the circuit court to record all of the instruments, such as deeds, liens, mortgages, etc., in the county where he or she is clerk. The clerk must record instruments presented to him or her for recording upon payment of the service charges prescribed by law.⁴ Florida law does not require the clerk to investigate the accuracy of any such instruments he or she records.

Fraud

Chapter 817, F.S., covers a variety of fraudulent practices. Section 817.54, F.S., makes it a third degree felony⁵ for a person to obtain a mortgage, mortgage note, or promissory note by false representation with the intent to defraud. Other chapters contain similar penalties specific to liens. For example, s. 713.31(3), F.S., makes it is a third degree felony for a person to fraudulently file a construction lien. A construction lien is considered fraudulent if the lienor purposely exaggerates the amount of the lien, includes work not performed, or compiles his or her claim with willful and gross negligence.⁶

In a recent Florida federal case,⁷ the defendant filed false financial statements and liens and wrote numerous harassing documents against a number of federal officers who were involved in a separate criminal prosecution against him.⁸ Although the liens in this case were "fantastic, delusional, and incredible,"⁹ with each claiming the amount owed was "\$48,489,000,000 plus interest, penalties, and fees,"¹⁰ the court found that the sham documents could still be damaging to the credit of the federal officers because they were recorded in official state and local registries.¹¹ The court found that the liens were fraudulent and void, and enjoined the defendant from filing future liens against federal employees absent a commercial relationship and a contract authorizing the filing.¹² He was subsequently sentenced to 30 months in prison for the fraudulent filings.¹³

¹ Jesse Dukeminier and James E. Krier, PROPERTY, 662 (5th ed. 2002).

² *Id.*

³ *Id.*

⁴ Section 28.222(3), F.S.

⁵ Punishable by up to 5 years imprisonment and a fine of up to \$5,000. Sections 775.082 and 775.083, F.S.

⁶ Section 713.31(2)(a), F.S.

⁷ *United States v. Leitner*, 2011 WL 2532745 (N.D. Fla. June 6, 2011).

⁸ See Marie Young, "Man Sentenced for False Liens in Florida," The Epoch Times, Oct. 3, 2011,

<http://www.theepochtimes.com/n2/united-states/man-sentenced-for-false-liens-in-florida-62333.html> (last visited February 6, 2012).

⁹ *Supra* note 7 at *7.

¹⁰ *Supra* note 7 at *5.

¹¹ *Supra* note 7.

¹² *Id.*

¹³ *Supra* note 11.

Fraudulent Recording of Deeds

Florida law offers redress for a property owner where a fraudulent deed is recorded with respect to his or her property. A property owner who has a fraudulent deed recorded on his or her property may pursue a suit to quiet title, which is “an equitable action that involves clearing a title of an invalid charge against the title.”¹⁴ The court may award costs as it considers equitable in a quiet title action, but such costs do not include attorney’s fees.¹⁵ A property owner may also choose to sue for slander of title, a tort action for which damages may be recovered.¹⁶ A tort claim is not actionable as slander of title if the defendant acted without malice and with the belief that he or she had a valid claim against the property and was entitled to record that claim.¹⁷

Effect of the Bill

The bill creates s. 817.535, F.S., entitled “fraudulent creation of an interest in real or personal property.” The bill makes it a third degree felony for a person, with the intent to defraud or harass another, to file or cause to be filed for recording in the official records a document related to real or personal property which the person knows to contain a material misstatement, misrepresentation, or omission of fact. The bill describes the term “document” as including, but not limited to:

- Deeds, leases, bills of sale, agreements, mortgages, notices of claim of lien, notices of levy, promissory notes, mortgage notes, or any other instrument that relates to the ownership, transfer, or encumbrance of or claim against real or personal property, or any interest in real or personal property.

The bill exempts persons who record construction liens from the offense and specifies that construction liens are subject to the fraud provisions of s. 713.31, F.S.

B. SECTION DIRECTORY:

Section 1. Creates s. 817.535, F.S., relating to fraudulent creation of interest in real or personal property.

Section 2. 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 Criminal Justice Impact Conference met on January 30, 2012, and determined the bill would have an insignificant fiscal impact on the Department of Corrections.¹⁸

According to the Office of the State Courts Administrator (OSCA), the bill may have a minimal fiscal impact because a few more cases may be filed as a result of the specific provisions of the bill. OSCA does not anticipate a large impact on judicial workload because existing law essentially covers the behavior the bill prohibits.¹⁹

¹⁴ 65 AM. JUR. 2d, *Quieting Title and Determination of Adverse Claims* s. 2 (2011).

¹⁵ Section 86.081, F.S.; see also *Wiggins v. Wiggins*, 446 So.2d 1078, 1079 (Fla. 1984) (citing *State ex rel. Royal Ins. Co. v. Barrs*, 99 So. 668 (Fla. 1924).).

¹⁶ *Supra* note 7.

¹⁷ *McAllister v. Breakers Seville Ass'n Inc.*, 981 So.2d 566 (Fla. 4th DCA 2008).

¹⁸ Criminal Justice Impact Conference. http://edr.state.fl.us/Content/conferences/criminaljusticeimpact/CJIC_12.xls (last visited February 1, 2012).

¹⁹ Office of the State Courts Administrator, 2012 Judicial Impact Statement, SB 996 (Dec. 7, 2011) (on file with the House Criminal Justice Subcommittee).

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:

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:

None.

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:

- Reorganizes and clarifies the elements of the crime created by the bill.
- Changes the phrase "filed with the clerk of the court" to "filed for recording in the official records" to ensure the crime will apply in counties where the documents addressed by the bill may be filed through an entity other than the clerk of court.
- Adds "harass" to the intent of the crime created by the bill.
- Exempts construction liens from violating the section of statute created by the bill and specifies that construction liens are subject to the fraud provisions of s. 713.31, F.S.

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

1 A bill to be entitled
2 An act relating to property fraud; creating s.
3 817.535, F.S.; prohibiting a person with intent to
4 defraud or harass another from filing or causing to be
5 filed a document relating to the ownership, transfer,
6 or encumbrance of or claim against real or personal
7 property, or any interest in real or personal
8 property, which the person knows contains a material
9 misstatement, misrepresentation, or omission of fact;
10 providing criminal penalties; providing a person who
11 records a claim of lien in the official records
12 pursuant to part I of ch. 713, F.S., be subject to the
13 fraud provisions of s. 713.31, F.S., and not this
14 section; providing an effective date.

15
16 Be It Enacted by the Legislature of the State of Florida:

17
18 Section 1. Section 817.535, Florida Statutes, is created
19 to read:

20 817.535 Fraudulent creation of interest in real or
21 personal property.-

22 (1) (a) A person may not, with the intent to defraud or
23 harass another, file or cause to be filed for recording in the
24 official records a document relating to real or personal
25 property which the person knows to contain a material
26 misstatement, misrepresentation, or omission of fact. The filed
27 document may include, but is not limited to, a deed, lease, bill
28 of sale, agreement, mortgage, notice of claim of lien, notice of

CS/HB 1331

2012

29 levy, promissory note, mortgage note, or any other instrument
 30 that relates to the ownership, transfer, or encumbrance of or
 31 claim against real or personal property or any interest in real
 32 or personal property.

33 (b) A person who violates this subsection commits the
 34 offense of fraudulent creation of an interest in real or
 35 personal property, a felony of the third degree, punishable as
 36 provided in s. 775.082, s. 775.083, or s. 775.084.

37 (2) A person who records a claim of lien in the official
 38 records pursuant to part I of chapter 713 shall be subject to
 39 the fraud provisions of s. 713.31 and not this section.

40 Section 2. This act shall take effect October 1, 2012.