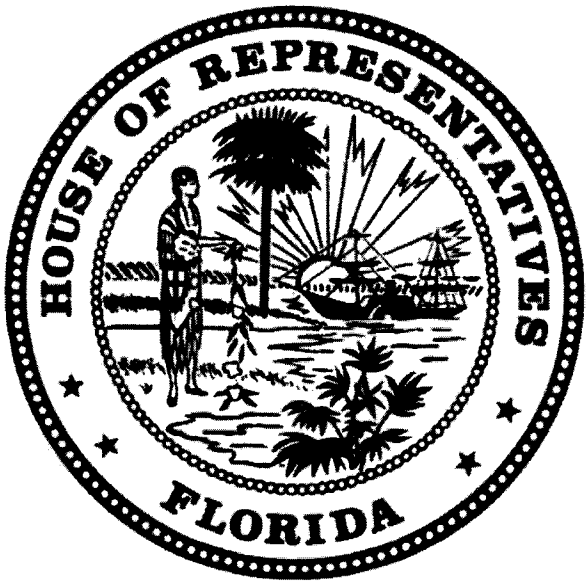

Civil Justice Subcommittee

Wednesday, January 13, 2016
9:00 a.m. – 12:00 p.m.
Sumner Hall (404 HOB)

MEETING PACKET

Steve Crisafulli
Speaker

Kathleen Passidomo
Chair

Committee Meeting Notice

HOUSE OF REPRESENTATIVES

Civil Justice Subcommittee

Start Date and Time: Wednesday, January 13, 2016 09:00 am

End Date and Time: Wednesday, January 13, 2016 12:00 pm

Location: Sumner Hall (404 HOB)

Duration: 3.00 hrs

Consideration of the following bill(s):

HB 379 Transfers of Structured Settlement Payment Rights by Santiago
HB 715 Child Protection Teams by Harrell
HB 747 Digital Assets by Fant
HB 815 Courts by Harrison
HB 821 Reimbursement of Assessments by Rooney

Consideration of the following proposed committee substitute(s):

PCS for CS/HB 259 -- Temporary Care of a Minor Child Pursuant to a Power of Attorney
PCS for HB 675 -- Federal Immigration Enforcement

NOTICE FINALIZED on 01/11/2016 4:12PM by Ingram.Michele

PCS for CS/HB 259

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: PCS for CS/HB 259 Temporary Care of a Minor Child Pursuant to a Power of Attorney
SPONSOR(S): Civil Justice Subcommittee
TIED BILLS: None **IDEN./SIM. BILLS:** SB 1102

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
Orig. Comm.: Civil Justice Subcommittee		Robinson	Bond

SUMMARY ANALYSIS

Families are often confronted with circumstances, such as drug abuse, illness, unemployment, or homelessness, which, if not appropriately addressed, can lead to abuse, neglect, or abandonment of their children. Several programs in Florida are working to support such families in crisis. The programs assist parents with finding safe temporary placements for their children to ensure the children do not enter the formal child welfare system while parents work to reestablish a safe and stable living environment.

PCS for CS/HB 259 creates s. 709.2209, F.S., entitled the "Temporary Care of Minor Children by Safe Families Act," as a means of preventing the entry of a child at risk of abuse or neglect into the formal child welfare system.

The bill authorizes the parent of a minor child, by executing a power of attorney, to delegate certain powers regarding the care and custody of the child to volunteer families screened and trained by certain nonprofit organizations. The delegation of powers regarding care and custody do not deprive a child's parent of parental rights, obligations, or authority regarding custody, visitation, or support unless determined by a court to be in the best interests of the child.

The bill:

- Prohibits a parent or volunteer family from receiving compensation related to the delegation of care and custody.
- Limits the delegation of care and custody to a period of 6 months.
- Requires both parents to consent to the delegation of care and custody, or, the provision of notice to a nonconsenting parent.
- Specifies requirements for the execution, form, and revocation of the power of attorney delegating care and custody.
- Requires nonprofit organizations that assist with the temporary placement of the child to provide training to the volunteer families, conduct background screenings, provide support services to the families, maintain certain records, and notify the Department of Children and Families (DCF) if a family seeking services is the subject of an open child protective investigation.
- Requires DCF to provide information regarding temporary care programs to parents during a child protective investigation if appropriate.

The bill also exempts the nonprofit organization that assists the parent with the temporary placement of the child, and a volunteer family serving as an agent under the power of attorney, from licensing and regulation by DCF. However, the bill does not prevent DCF or law enforcement from investigating allegations of abandonment, abuse, neglect, unlawful desertion of a child, or human trafficking.

The bill has no fiscal impact on local government. The bill has an indeterminate fiscal impact on state expenditures.

The bill has an effective date of July 1, 2016.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

BACKGROUND

Child Welfare System

The child welfare system identifies families whose children are in danger of suffering or have suffered abuse, abandonment, or neglect and works with those families to address the problems that are endangering children, if possible. If the problems cannot be ameliorated, the child welfare system finds safe out-of-home placements for children, such as relative and non-relative caregivers, foster families, or adoptive families.[1] As of November 30, 2015, there were 22,628 children under the supervision of the Department of Children and Families (DCF) in out of-home care.[2]

Prevention

DCF's Child Welfare Program works in partnership with local communities and the courts to ensure the safety, timely permanency and well-being of children.

Child welfare services are directed toward the prevention of abandonment, abuse, and neglect of children.[3] DCF's practice model is based on the safety of the child within their home, utilizing in-home services, such as parenting coaching and counseling, to maintain and strengthen that child's natural supports in their home environment.

However, when it is determined that a child cannot safely remain in their own home, DCF works, through the involvement of the courts, toward guaranteeing the safety of the child out of home while providing services to reunify the child and family as soon as it is no longer unsafe to do so.

Ultimately, if a child's home remains unsafe and the court is unable to reunify him or her in the family home, the child welfare system works to find a permanent home for that child through the adoption process.

Types of placements and licensure

For children who cannot safely remain in their own homes, the child welfare system finds an appropriate out-of-home placement. The placements range from temporary placement with a family member to a permanent adoptive placement with a family previously unknown to the child.

The following placements do not require licensure by DCF:

- Relative caregivers;
- Non-relative caregivers;
- An adoptive home which has been approved by DCF or by a licensed child-placing agency for children placed for adoption; and
- Persons or neighbors who care for children in their homes for less than 90 days.[4]

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[1] *See* s. 39.001(1), F.S.

[2] "Out-of-home care" includes both children in board-paid foster care and those receiving protective supervision in the home of a relative or approved non-relative after a removal. Children under protective supervision in the home of a relative or approved non-relative after removal are considered "out-of-home," as they are entitled to the same safeguards as board-paid foster children. *See* Florida Department of Children and Families, *Performance Dashboard Application: Number of Children in out-of-home care*, http://dcfdashboard.dcf.state.fl.us/index.cfm?page=details&id=M0297 (last visited January 7, 2016).

[3] S. 39.001(8), F.S.

[4] S. 409.175, F.S.

Placements that require licensure and regulation, include family foster homes, residential child-caring agencies, and child-placing agencies.[5]

Section 409.175(2)(d), F.S., defines a "child-placing agency" as any person, corporation or agency, public or private that receives a child for placement and places or arranges for the placement of a child in a family foster home, residential child-caring agency, or adoptive home.

Section 409.175(2)(e), F.S., defines a "family foster home" as a private residence in which children who are unattended by a parent or legal guardian are provided 24-hour care. Such homes include emergency shelter family homes and specialized foster homes for children with special needs. A family foster home does not include a person who cares for a child of a friend for a period not to exceed 90 days, a relative who cares for a child and does not receive reimbursement for such care from the state or federal government, or an adoptive home which has been approved by the department or by a licensed child-placing agency for children placed for adoption.

Licensure involves meeting rules and regulations pertaining to:

- The operation, conduct, and maintenance of these homes,
- The provision of food, clothing, educational opportunities, services, equipment, and individual supplies to assure the healthy physical, emotional, and mental development of the children served,
- The appropriateness, safety, cleanliness, and general adequacy of the premises, including fire prevention and health standards, to provide for the physical comfort, care, and well-being of the children served,
- The ratio of staff to children required to provide adequate care and supervision of the children served and, in the case of foster homes,
- The maximum number of children in the home, and
- The good moral character based upon screening, education, training, and experience requirements for personnel.[6]

Background Screening

DCF is required to determine the good moral character of personnel of the child welfare system,[7] through level 2 background screenings, as provided for in ch. 435, F.S.[8] "Personnel" includes all owners, operators, employees, and volunteers working in a child-placing agency, family foster home, or residential child-caring agency.[9] Family members and persons between the ages of 12 and 18 residing with the owner or operator of a family foster home or agency must also undergo a delinquency record check, but such record check does not require fingerprinting.[10]

A level 2 background screening involves a state and national fingerprint-based criminal record check through the Florida Department of Law Enforcement (FDLE) and the Federal Bureau of Investigation (FBI).[11] Level 2 background screenings require that no person has been arrested for and awaits final disposition, has been found guilty of, or entered a plea of nolo contendere to crimes related to sexual misconduct, child or adult abuse, murder, manslaughter, battery, assault, kidnapping, weapons, arson, burglary, theft, robbery, and exploitation.[12] The cost for a Level 2 background screening ranges from $38 to $75 depending upon the selected vendor.[13] DCF processes the background screenings through

[5] S. 409.175, F.S.
[6] S. 409.175, F.S.
[7] S. 409.175(5)(a), F.S.
[8] S. 409.175(2)(k), F.S.
[9] S. 409.175(2)(i), F.S.
[10] *Id.*
[11] S. 435.04, F.S.
[12] S. 435.04(2), F.S.
[13] Department of Children and Families, *Livescan Vendor Locations*, available at http://www.dcf.state.fl.us/programs/backgroundscreening/map.asp (last visited November 5, 2015).

the Care Provider Background Screening Clearinghouse for individuals working in the child welfare system who are required by law to be background screened.

DCF may grant exemptions from disqualification of employment in certain circumstances,[14] such as felonies that are older than 3 years and offenses that were felonies when committed, but that are now classified as misdemeanors.[15]

Care Provider Background Screening Clearinghouse

The Care Provider Background Screening Clearinghouse[16] (clearinghouse) is a statewide system that enables certain specified state agencies, such as DCF and the Agency for Persons with Disabilities, to submit requests for level 2 background screenings for certain statutorily-defined purposes, such as licensure or license-related employment. The level 2 screening results are provided to the requesting agency, not the individual or employer organization, and are also retained in the clearinghouse.

There are several benefits to utilizing the clearinghouse including significant cost savings due to use of existing screenings, access to a screened individual's Florida public criminal record, and immediate notification of an employee or licensee arrest in Florida due to the active monitoring of the record.

Alternatives to Child Welfare System

Sometimes, parents are in crisis and are unable to adequately deal with both the crisis and parenting at the same time due to the lack of family or supportive relationships to help them through the crisis while caring for their child.[17] This type of social isolation combined with the stress of a crisis can increase the likelihood of child abuse, often through child neglect.[18] Furthermore, homelessness, unemployment, domestic violence, illness, mental health issues, and substance addiction can all lead to situations in which a parent must choose between addressing the immediate crisis and adequate care of his or her child.[19]

Safe Families for Children (SFFC)

In 2002, the Safe Families for Children (SFFC) program originated in Chicago as a ministry of the LYDIA Home Association, a Christian social service organization. The program created a model in which parents in crisis without family or support relationships had a place to go for help without entering the child welfare system and losing custody of their children.[20] The model includes placing a child with an unpaid volunteer host family, allowing a parent the time and space to deal with whatever issues brought them to SFFC, such as hospitalization, or a longer-term crisis, such as drug treatment or incarceration. By temporarily placing the child with a host family, SFFC hopes to reduce the risk of child abuse and neglect, as well as provide a safe place for a child.[21]

These private, voluntary placements require that the parent sign an agreement reciting the terms and conditions of the arrangement, including what the parent will need to do to be reunified with their children and how the program will respond if the parent is unable to complete performance.[22] The parent thereafter delegates care and custody of the child to the host volunteer family through a power of attorney.

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[14] S. 409.175(5)(a)6., F.S.
[15] S. 435.07, F.S.
[16] S. 435.12, F.S.
[17] Murray, K, et al., Safe Families for Children's Program Model and Logic Model Description Report, University of Maryland School of Social Work, 3.
[18] *Id.*
[19] *Id.*
[20] *Id.*
[21] *Id.*
[22] The Florida Senate, Committee on Children, Families, and Elder Affairs, *Issue Brief 2010-304: "Temporary Parents" as an Alternative to the Foster Care System (September 2009)*, at 2, *available at* http://archive.flsenate.gov/data/Publications/2010/Senate/reports/interim_reports/pdf/2010-304cf.pdf (last visited Jan. 8, 2016).

SFFC states that it has three main objectives: child welfare deflection, child abuse prevention, and family support and stabilization.[23] SFFC reports that the hallmarks of the program are that parents retain full legal custody of children, volunteer families are extensively screened and supported, the average length of stay is 6 weeks (but may range from 2 days to 1 year), there is a close working relationship between the Safe Families organization, local churches, and the referring organization, and that the model is committed to reuniting the family as soon as possible.[24] Volunteers and families served often continue a relationship after reunification has occurred – the program does not consider this "recidivism", as re-entry into the child welfare system is classified, but a normal and natural "re-use" of parental support and friendship.[25]

Programs based on the SFFC model are active throughout the country (54 active programs in 25 states),[26] with Oregon, Wisconsin, and Oklahoma codifying similar models in statute.[27] Florida currently has 4 areas where SFFC models operate: SFFC Southwest Florida in Naples, Bethany Christian Services of the Gulf Coast in Pensacola, Bethany Christian Services of Orlando, and Bethany Christian Services of Tampa Bay.[28]

Background Screenings for SFFC Volunteers

Florida SFFC organizations currently perform background screening through the Volunteer and Employee Criminal History System (VECHS) program, offered by the Florida Department of Law Enforcement.[29]

VECHS was implemented in 1999 and is authorized by the National Child Protection Act (NCPA) and s. 943.0542, F.S. The VECHS program provides a means to background screen the employees and volunteers of organizations who work with vulnerable individuals but who are not required by law to be background screened. Examples of organizations that may use VECHS are churches and volunteer organizations that serve children, the elderly or persons with disabilities but are not licensed or contracted by the state.

Through the VECHS program, FDLE and the FBI provide state and national criminal history record information on applicants, employees, and volunteers to qualified organizations (not individuals or state agencies) in Florida. With this criminal history information, the organizations can more effectively screen out those current and prospective volunteers and employees who are not suitable for contact with children, the elderly, or persons with disabilities.[30]

Unlike the clearinghouse, screenings through the VECHS program are not actively monitored. The screenings provide a snapshot in time of that particular employee or volunteer's criminal record at the time the screen is completed. Any arrest or judicial action after that screening is completed is unknown. Additionally, the organization receiving the screening results makes its own determination of whether to employ the individual or use the volunteer based on its own standards.

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[23] Safe Families for Children, Who we help, *available at*: http://www.safe-families.org/whatis_whowehelp.aspx (last visited November 14, 2015).
[24] *Id.*
[25] The Florida Senate, Committee on Children, Families, and Elder Affairs, *Issue Brief 2010-304: "Temporary Parents" as an Alternative to the Foster Care System (September 2009)*, at 2, *available at* http://archive.flsenate.gov/data/Publications/2010/Senate/reports/interim_reports/pdf/2010-304cf.pdf (last visited January 8, 2016).
[26] *Supra* note 23.
[27] The Foundation for Government Accountability, Safe Families in the States – 2016, *available at*: http://thefga.org/solutions/foster-care-reform/safe-families/ (last visited November 13, 2015).
[28] Safe Families for Children, Location/Contact Us, *available at*: http://www.safe-families.org/whatis_locations.aspx (last visited November 14, 2015).
[29] Email from Andrew Brown, Senior Fellow, Foundation for Government Accountability, RE: HB 259, (11/16/15).
[30] Florida Department of Law Enforcement, Volunteer and Employee Background checks, *available at:* http://www.fdle.state.fl.us/Content/Background-Checks/Menu/VECHS.aspx (last visited November 2, 2015).

Liability and Insurance

Should a child become ill or injured while in the care of a SFFC volunteer host family, the host family may have limited personal liability pursuant to the federal Volunteer Protection Act[31] (VPA) and Florida Volunteer Protection Act[32] (FVPA). The VPA provides that a volunteer of a nonprofit organization may not be liable for harm caused by his or her act or omission if:

- The volunteer was acting within the scope of his or her responsibilities for the organization; and
- The harm was not caused by willful or criminal misconduct, gross negligence, reckless misconduct, or a conscious, flagrant indifference to the rights or safety of the individual harmed by the volunteer.[33]

The FVPA also provides immunity from civil liability if the volunteer was acting with good faith within the scope of his or her duties, as an ordinary reasonable person would have acted under the same or similar circumstances, and the harm was not caused by wanton or willful misconduct.[34] Neither the VPA or the FVPA provide immunity to the nonprofit organization itself.

The Chicago SFFC program reported that it purchases liability insurance to cover the program volunteers and suggests that their volunteer families purchase an umbrella policy to provide additional protection.[35]

Powers of Attorney

Powers of attorney are governed by Part II of ch. 709, F.S., the Florida Power of Attorney Act (FPAA). A power of attorney is a document that grants authority to an agent to act in the place of a principal.[36] The scope of the authority granted to an agent depends upon the specific language of the power of attorney. An agent may only exercise authority specifically granted in a power of attorney and any authority reasonably necessary to give effect to that express grant of specific authority.[37] A power of attorney must be signed by the principal, by two subscribing witnesses, and be acknowledged by the principal before a notary public.[38] The power of attorney benefits and binds the principal to an agent's actions as if the principal had done them himself or herself.

Under federal law, all enlisted military members who have dependents and are either single or part of a dual-military couple must have a Family Care Plan,[39] which includes a military power of attorney for the care of the member's dependent children.[40] Such military powers of attorney are valid and must be accepted in Florida under the FPAA if executed in accordance with federal law.[41]However, current law is silent as to whether a power of attorney can be created and used for the delegation of the care and custody of a minor child under the FPAA.[42]

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[31] Volunteer Protection Act of 1997, 42 U.S.C. § 14501 *et seq*
[32] S. 768.1355, F.S.
[33] 42 U.S.C. § 14503.
[34] S. 768.1355(1), F.S.
[35] *Supra* note 25, at 3.
[36] Chapter 709, F.S.
[37] S. 709.2201(1), F.S.
[38] S. 709.2105(2), F.S.
[39] A "family care plan" is the means by which a soldier plans in advance for the care of his family members when the soldier is deployed, TDY, or otherwise not available because of military duty. The plan includes DA Form 5305-R, Family Care Plan; DA Form 5841-R, Power of Attorney; DA Form 5840-R, Certificate of Acceptance as Guardian or Escort; DD Form 1172, Application for Uniformed Services Identification Card DEERS Enrollment; DD Form 2558, Authorization to start, stop, or change allotment, for Active Duty or Retired Personnel; and DA Form 5304-R, Family Care Plan Counseling Checklist.
[40] Department of Defense, Instruction No.1342.19 (May 7, 2010) *available at* www.dtic.mil/whs/directives/corres/pdf/134219p.pdf (last visited January 8, 2016).
[41] A military power of attorney is valid if it is executed in accordance with 10 U.S.C. s. 1044b, as amended. A deployment-contingent power of attorney may be signed in advance, is effective upon the deployment of the principal, and shall be afforded full force and effect by the courts of this state. S. 709.2106(4).
[42] However, s. 743.0645, F.S., recognizes the validity of a limited power of attorney to provide consent to medical care or treatment of a minor.

EFFECT OF PROPOSED CHANGES

PCS for CS/HB 259 creates s. 709.2209, F.S., entitled the "Temporary Care of Minor Children by Safe Families Act," which provides a framework for the operation of programs based upon the Safe Families for Children model.

Safe Families Programs

The bill establishes a number of requirements for qualified nonprofit organizations operating based on the SFFC model. A "qualified nonprofit organization" is defined as a charity or religious institution organized under s. 501(c)(3) of the Internal Revenue Code that, without compensation, assists parents with the provision of voluntary temporary care of children pursuant to a power of attorney. The nonprofit organization must:

- Require disclosure of any open DCF investigation or involvement by a parent seeking to utilize its assistance with the temporary placement of child pursuant to a power of attorney. If the organization learns of undisclosed DCF involvement, the bill requires the organization to inform DCF.
- Ensure background screenings of employees and volunteers of the organization who will have unsupervised contact with a child placed by the organization with a volunteer family, including all members of the volunteer family household who are 12 years of age or older. The bill requires DCF to conduct such background screenings pursuant to its own screening procedures for out-of-home placements.[43] The department must inform the organization if such persons pass the background screening.
- Identify appropriate and safe placements for children based on the results of the background screenings and home visits.
- Train volunteer families that will serve as an agent under a power of attorney delegating the care and custody of a minor child.
- Provide ongoing services and resources to support the minor child, parents, and volunteer families.
- Maintain a record of each child placement facilitated by the organization for at least 5 years following the expiration of the power of attorney.

The bill excludes a qualified nonprofit organization from the definition of a "child-placing agency"[44] under ch. 409, F.S., thereby exempting the organization from DCF licensure requirements unless the qualified nonprofit organization pursues child-placing activities. Further, the bill provides that facilitating the temporary care of a child by a volunteer family through a power of attorney does not constitute placing the child in foster care and the agent is not required to be licensed as a family foster home.

Power of Attorney for Temporary Care of Minor Child

The bill authorizes a parent of a minor child to delegate the care and custody of the child to an agent through a power of attorney as required by many SFFC programs. An "agent" is defined as a natural

[43] S. 39.0138(1), F.S. provides in pertinent part: "the department shall conduct a records check through the State Automated Child Welfare Information System (SACWIS) and a local and statewide criminal history records check on all persons, including parents, being considered by the department for placement of a child under this chapter, including all nonrelative placement decisions, and all members of the household, 12 years of age and older, of the person being considered. For purposes of this section, a criminal history records check may include, but is not limited to, submission of fingerprints to the Department of Law Enforcement for processing and forwarding to the Federal Bureau of Investigation for state and national criminal history information, and local criminal records checks through local law enforcement agencies of all household members 18 years of age and older and other visitors to the home. An out-of-state criminal history records check must be initiated for any person 18 years of age or older who resided in another state if that state allows the release of such records. The department shall establish by rule standards for evaluating any information contained in the automated system relating to a person who must be screened for purposes of making a placement decision."

[44] "Child-placing agency" means any person, corporation, or agency, public or private, other than the parent or legal guardian of the child or an intermediary acting pursuant to chapter 63, that receives a child for placement and places or arranges for the placement of a child in a family foster home, residential child-caring agency, or adoptive home. S. 409.175(2)(d), F.S.

person that is at least 18 years old who has successfully passed the training and background screening requirements. The bill prohibits the parent and the agent from receiving any compensation related to the delegation of care and custody.

The delegation of care and custody pursuant to the power of attorney may not:

- Delegate the power to consent to marriage or adoption of the child, the performance or inducement of an abortion on or for the child, or the termination of parental rights of the child.
- Exceed a period of 6 months. However, the bill does not limit the number of times a power of attorney may be re-executed with the same or a different agent.

The power of attorney must:

- Be signed by both parents, if both parents are living and have shared custody of the child. If the parents do not have shared custody, the parent with sole custody may execute the power of authority but must notify the noncustodial parent at his or her last known address within 5 days. Notification is not required to a noncustodial parent whose parental rights have been terminated.
- Be signed by a representative of the nonprofit organization attesting that the agent has successfully completed the required training and background screening.
- Be executed in accordance with the Florida Power of Attorney Act.

The bill details the requirements of the power of attorney form to include the identity of the child and parent(s) delegating authority, the identity of the agent to whom the powers are delegated, a statement of delegated and non-delegated powers, and the expiration date.

Any parent of the child with custodial rights may revoke the power of attorney prior to its expiration and the agent must immediately return the child to the custody of the revoking parent.

The power of attorney is governed in all other respects by the requirements of the Florida Power of Attorney Act.

Effect of Power of Attorney upon Parental Rights

The bill further specifies that the execution of a power of attorney does not deprive a parent of parental rights, obligations, or authority regarding custody, visitation, or support unless determined by a court to be in the best interests of the child. Such rights include the ability to appoint a guardian under ch. 744, F.S. This provision may affect the ability of courts to modify custody and child support obligations established under ch. 61, F.S.

Child Welfare Investigations

The bill requires DCF, during a child protective investigation that does not result in an out-of-home placement, to provide information to a parent regarding respite care services, voluntary temporary placement, or other support services for families in crisis, such as SFFC programs, if deemed appropriate by a child protective investigator.

The execution of a power of attorney authorized by the bill after using such community services may not be construed as abandonment, abuse, or neglect as defined in s. 39.01, F.S. without other evidence or except as otherwise provided by law. However, the bill does not prevent DCF or law enforcement from investigating allegations of abuse, abandonment, neglect, unlawful desertion of a child, or human trafficking.

Exclusions

The bill does not apply to the delegation of the care and custody of a minor child pursuant to a military power of attorney executed under federal law.

B. SECTION DIRECTORY:

Section 1: Amends s. 409.175, F.S., relating to licensure of family foster homes.
Section 2: Creates a new section of law, s. 709.2209, F.S. entitled "Power of attorney for temporary care of minor child."
Section 3: Provides an effective date of July 1, 2016.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

   None.

2. Expenditures:

   The bill requires DCF to conduct a child abuse records check and criminal history background screening on specified individuals. The number of individuals required to be screened by DCF under the bill is indeterminate. DCF estimates the cost to complete a child abuse and criminal history background check at $46.75 per individual.[45] Additional fees may be charged by each live scan provider for their services.

   DCF indicates that additional costs may be incurred if the department must consider exemptions for disqualifying offenses, including costs related to the provision of an administrative hearing and department legal representation.[46]

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

   None.

2. Expenditures:

   None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The bill requires notarization of a power of attorney for the temporary care of a minor child. The cost of notarial services varies among notaries but is expected to be insignificant. Additionally, a custodial parent that is required to provide notice to a noncustodial parent of the delegation of care and custody may incur approximately $6.74 in postage costs.

D. FISCAL COMMENTS:

None.

[45] Florida Department of Children and Families, Agency Analysis of 2016 House Bill 259, p. 5 (October 16, 2015)(on file with the Civil Justice Subcommittee).
[46] *Id.*

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.

2. Other:

It is well settled that the interest of parents in the care, custody, and control of their children is perhaps the oldest of the recognized fundamental liberty interests protected by the Due Process Clause of the Fourteenth Amendment to the United States Constitution.[47] The United States Supreme Court has explained the fundamental nature of this right is rooted in history and tradition:

> The history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition.[48]

These constitutional protections extend to the parenting interests of custodial and non-custodial parents alike.[49] To the extent that the bill authorizes delegation of the care and custody of a minor child to an agent through a power of attorney without the consent of both parents, such delegation may be unenforceable if challenged by a nonconsenting parent.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

The bill does not require background screenings to be held in the Care Provider Background Screening Clearinghouse under s. 435.12, F.S.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

n/a

[47] *Troxel v. Granville,* 530 U.S. 57, 65 (2000).
[48] *Wisconsin v. Yoder*, 406, U.S. 205, 232 (1972).
[49] *See Stanley v. Illinois*, 405 U.S. 645(1972); *Caban v. Mohammed*, 441 U.S. 380 (1979).

A bill to be entitled

An act relating to temporary care of a minor child pursuant to a power of attorney; amending s. 409.175, F.S.; redefining the term "family foster home" to exclude certain agents; exempting certain agents from licensure as a foster home; creating s. 709.2209, F.S.; providing a short title; providing legislative findings and definitions; authorizing a parent to provide for temporary care of his or her child by delegating care to an agent by a properly executed power of attorney; limiting the power of attorney to a term of 6 months; prohibiting an agent or parent from receiving compensation related to the execution of the power of attorney; specifying execution requirements; providing for revocation of the power of attorney; specifying form of the power of attorney; providing construction; providing requirements for a qualified nonprofit organization that assists a parent in delegating parental authority through a power of attorney; requiring a criminal history background check for the agent, family members of the agent, and certain employees or volunteers of the nonprofit organization; requiring such organization to notify the Department of Children and Families under certain circumstances; requiring such organization to maintain a record of placements; authorizing child protective

investigators of the department to provide information regarding voluntary placements under certain circumstances; exempting military power of attorneys from the provisions of the act; providing limitations; providing an effective date.

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

Section 1. Paragraph (e) of subsection (2) and paragraph (d) of subsection (4) of section 409.175, Florida Statutes, is amended to read:

409.175 Licensure of family foster homes, residential child-caring agencies, and child-placing agencies; public records exemption.—

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

(e) "Family foster home" means a private residence in which children who are unattended by a parent or legal guardian are provided 24-hour care. Such homes include emergency shelter family homes and specialized foster homes for children with special needs. A person who cares for a child of a friend for a period not to exceed 90 days, a relative who cares for a child and does not receive reimbursement for such care from the state or federal government, or an adoptive home which has been approved by the department or by a licensed child-placing agency for children placed for adoption, or an agent who cares for a child pursuant to s. 709.2209 is not considered a family foster

home.

(4)

(d) This license requirement does not apply to boarding schools, recreation and summer camps, nursing homes, hospitals, or to persons who care for children of friends or neighbors in their homes for periods not to exceed 90 days or to persons who have received a child for adoption from a licensed child-placing agency, or agents who care for children pursuant to s. 709.2209.

Section 2. Section 709.2209, Florida Statutes, is created to read:

709.2209 Power of attorney for temporary care of minor child by safe families.—

(1) SHORT TITLE.—This section may be cited as the "Temporary Care of Minor Children by Safe Families Act."

(2) FINDINGS.—The Legislature finds that in circumstances in which the parent of a minor child is temporarily unable to provide care for the child, but does not need the full support of the child welfare system, a less intrusive alternative to supervision by the Department of Children and Families and the dependency court under chapter 39 should be available. In such circumstances, a parent may delegate temporary care of the child through a properly executed power of attorney to a safe family identified by a qualified nonprofit organization.

(3) DEFINITIONS.—As used in this section, the term:

(a) "Agent" means a natural person that is 18 years of age or older who successfully meets the training and background

screening requirements under paragraph(6)(b) and is granted authority to act for a principal under a power of attorney authorized by this section, whether such person is denominated an agent, attorney in fact, or otherwise. The term includes an original agent and co-agent. Successor agents are not permitted under this section.

(b) "Department" means the Department of Children and Families.

(c) "Qualified nonprofit organization" means a charity or religious institution organized under s. 501(c)(3) of the United States Internal Revenue Code that, without compensation, assists parents with the provision of volunteer temporary care of children pursuant to a power of attorney executed under this section. A qualified nonprofit organization is not a child-placing agency as defined in s. 409.175(2)(d) and is not required to be licensed as such unless the qualified nonprofit organization attempts to place or arrange for the placement of a child as provided in s. 409.175(2)(d).

(4) POWER OF ATTORNEY.—A parent of a minor child, by a properly executed power of attorney authorized under this section, may delegate to an agent, for a period not to exceed 6 months, any of the powers regarding the care and custody of the child, except the power to consent to marriage or adoption of the child, the performance or inducement of an abortion on or for the child, or the termination of parental rights to the child. The agent must serve without compensation and the parent

may not receive compensation for delegating the care and custody of the child.

(a) The power of attorney must:

1. Be signed by both parents, if both parents are living and have shared responsibility and timesharing of the child as a matter of law or pursuant to a court order. If the parents do not have shared responsibility and timesharing of the child, the parent having sole custody of the child has the authority to execute the power of attorney but shall notify the noncustodial parent in writing of the name and address of the agent under the power of attorney. Such notification must be provided by certified mail, return receipt requested, to the noncustodial parent at his or her last known address within 5 days after the execution of the power of attorney. Notification is not required to a noncustodial parent whose parental rights have been terminated.

2. Be signed by a representative of the qualified nonprofit organization which assisted with the placement of the child certifying the statement in subparagraph (b)4.

3. Be signed by the agent.

4. Be signed by two subscribing witnesses.

5. Be acknowledged by the parent or parents, as applicable under subparagraph 1., and the representative of the qualified nonprofit organization before a notary public.

(b) The following information must be provided in the power of attorney:

1. The name of the child.

2. The name of the parent or parents delegating authority for the care and custody of the child.

3. The name of the agent to whom powers are delegated.

4. A statement that the agent and all other appropriate members of the agent's household have successfully completed the background screening required under subparagraph (6)(b)1.

5. A statement of the powers delegated to the agent for the care and custody of the child.

6. A statement that the delegation does not include authority to consent to marriage or adoption of the child, the performance or inducement of an abortion on or for the child, or the termination of parental rights to the child.

7. The expiration date of the power of attorney which may not be later than 6 months from the date of execution.

(c) Except as specifically provided herein, such power of attorney shall be governed by all other provisions of this chapter.

(5) REVOCATION OF POWER OF ATTORNEY.—Either parent of the child may revoke the power of attorney if the parent has custodial rights to the child. Upon revocation of the power of attorney, the agent shall return the child to the custody of the revoking parent.

(6) QUALIFIED NONPROFIT ORGANIZATIONS.—

(a) A qualified nonprofit organization shall require a parent seeking its services to disclose if the department is

conducting an ongoing investigation of abuse or neglect involving the child or the parent, or if the department is otherwise providing services to the child or the parent. If the qualified nonprofit organization learns that the department has an open investigation of abuse or neglect involving the child or the parent and the parent failed to disclose this information, the qualified nonprofit organization shall immediately notify the department.

(b) A qualified nonprofit organization shall train all agent families and volunteers, identify appropriate and safe placements for children based on background screenings and home visits, and provide services and resources to support the child, parents, and agents authorized to provide temporary care for the child.

1. All employees or volunteers of the qualified nonprofit organization who may have unsupervised contact with a child placed with an agent pursuant to this section, including the agent and all members of the agent's household who are 12 years of age or older, must undergo a background screening under s. 39.0138, which shall include a state and national criminal history record check. The department shall inform the qualified nonprofit organization if such persons successfully pass the background screening under s. 39.0138.

2. The qualified nonprofit organization shall maintain a separate record for each child placement assisted by the organization, which must include a copy of the department

notification of screening results and the executed power of attorney, for at least 5 years following the expiration of the power of attorney.

(7) INFORMATION REGARDING SAFE FAMILY PROGRAMS.—During a child protective investigation that does not result in an out-of-home placement, if the child protective investigator feels it is appropriate, the department shall provide information to the parent about available community service programs that provide respite care, voluntary temporary placement pursuant to this section, or other support services for families in crisis.

(8) LIMITATIONS.—The execution of a power of attorney under this section does not:

(a) Constitute placing the child in foster care, an agent is not required to meet foster care licensing requirements under chapter 409, and an agent's home does not constitute a family foster home as defined in s. 409.175(2)(e) for purposes of caring for a child placed pursuant to this section.

(b) Limit the ability of a parent to appoint a guardian for a child pursuant to chapter 744.

(c) Change or modify parental or legal rights, obligations, or authority established by an existing court order, and does not deprive a parent of parental or legal rights, obligations, or authority regarding the custody, visitation, or support of the child unless determined by a court to be in the best interests of the child.

(d) Except as otherwise provided by law, or without other

evidence, constitute abandonment, abuse, or neglect as defined in s. 39.01. This paragraph does not prevent the department or law enforcement from investigating allegations of abandonment, abuse, neglect, unlawful desertion of a child, or human trafficking.

(9) APPLICABILITY.—This section does not apply to a military power of attorney executed in accordance with 10 U.S.C. s. 1044b, as amended.

Section 3. This act shall take effect July 1, 2016.

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 379 Transfers of Structured Settlement Payment Rights
SPONSOR(S): Santiago
TIED BILLS: None **IDEN./SIM. BILLS:** CS/SB 458

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Civil Justice Subcommittee		King	Bond
2) Insurance & Banking Subcommittee			
3) Judiciary Committee			

SUMMARY ANALYSIS

A structured settlement agreement is an arrangement for the periodic payment of damages for personal injuries in connection with a personal injury claim or lawsuit. Payees under such arrangements sometimes wish to forgo future payments in favor of an immediate cash payout. In short, current law requires certain disclosures and court approval before a payee may transfer his or her rights under a structured settlement.

The bill:

- Repeals the requirement to disclose the quotient;
- Requires the court case for approval of the transfer to be filed in the county where the payee lives, or to the circuit where the underlying tort occurred if the payee is not a state resident;
- Allows a court to authorize assignment of the rights under a structured settlement notwithstanding a non-assignment clause;
- Requires the payee to attend the hearing;
- Requires additional information to be included in the petition for authority to transfer; and
- Makes other technical and style changes and other clarifications to the statute.

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

The effective date of the bill is July 1, 2016.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

A structured settlement is an agreement for the periodic future payment of damages in a personal injury case.[1] This arrangement often involves the at-fault party in the personal injury claim or lawsuit paying a lump-sum premium to an insurance company to purchase an annuity in the name of and for the benefit of the injured party (the payee). Once the annuity is purchased, the insurance company begins to make periodic payments to the payee for the negotiated period of time. A structured settlement arrangement provides the payee long-term financial stability, and may provide tax benefits for beneficiaries[2] and annuity issuers.[3]

For some payee's, however, their personal financial circumstances may change, or they may simply want to "cash out" the future annuity. As such, instead of receiving payments under a structured settlement plan, the payee may wish to transfer his or her rights to future payments to another organization—known as a transferee—in exchange for a lump sum.[4]

In 2001, the Legislature created s. 626.99296, F.S., to regulate the transfer of structured settlements. Fundamentally, the statute requires such transfers to receive prior court approval.[5] This approval must be conditioned upon statutorily-enumerated factors, including an explicit finding by the court that the transfer is "in the best interests of the" individual opting to sell his or her settlement rights in order to receive a lump sum.[6] The entity contracting to receive the structured settlement rights must file an application with the court at least 20 days before the application hearing[7] and must make a series of disclosures to the payee.[8]

Disclosure of the Quotient

One of the required disclosures that must be made to a payee is the "quotient" of the transaction.[9] The "quotient" is described by statute as "a percentage, obtained by dividing the net payment amount by the discounted present value of the payments."[10] The bill repeals the requirement that the quotient be disclosed to the payee as a part of the pre-transfer disclosures.

Venue

The legal term "venue" refers to the place in which a case can be filed and pursued. In general, venue is proper where the cause of action accrued[11] or where the defendant resides. However, the plaintiff

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[1] *See* s. 626.99296(2)(m), F.S. Structured settlements occur in all forms of personal injury matters, including worker's compensation claims.
[2] 26 U.S.C. § 104 (providing that, for taxation purposes, gross income does not include the amount of damages received on account of personal physical injuries or physical sickness); s. 626.99296(2)(j), F.S. (defining "payee" as an individual receiving tax-free damage payments under a structured settlement).
[3] *See* 26 U.S.C. § 130; *First Providian, LLC v. Evans*, 852 So. 2d 908 (Fla. 4th DCA 2003).
[4] *See, e.g., First Providian, LLC v. Evans*, 852 So. 2d 908 (Fla. 4th DCA 2003).
[5] s. 626.99296(3)(a), F.S.; *Rapid Settlements, Ltd. v. Dickerson*, 941 So. 2d 1275, 1276-77 (Fla. 4th DCA 2006) (affirming lower court decision to deny petition, noting that "[t]ransfers of structured settlement rights are regulated by statute and court approval is required before a transfer may go forward.").
[6] s. 626.99296(3)(a)3., F.S.
[7] s. 626.99296(4), F.S.
[8] s. 626.99296(3), F.S.
[9] s. 626.99296(3)(a)2.g., F.S.
[10] *Id.*
[11] The structured settlements referenced in this bill arise from tort claims. The cause of action for a tort claim accrues in the jurisdiction where the injury occurs.

picks a venue by the act of filing the case, and if the defendant does not object then it is said that venue is waived and the case proceeds where it was filed. Thus, where the parties agree, and unless a statute provides otherwise, a case can be filed in any court that has jurisdiction.

The bill limits venue of a case regarding approval of the transfer of a structured settlement to the circuit court where the payee resides. If the payee is not domiciled in the state, then venue is proper in the circuit court that approved the structured settlement or the circuit court where the case was pending when the parties agreed to a structured settlement.

Non-Assignment Clauses

A structured settlement is a contract that is initially one between the original payor and the original payee. The parties to a contract are generally free to include any term they wish into the contract. At common law, a party to most contracts is free to assign his or her rights and obligations under the contract to another unless there is a statute or contract clause that limits or prohibits assignment. Many structured settlement contracts prohibit the payee from assigning (selling) the right to future payments.[12]

Like all contract terms, a non-assignment clause is not absolute. It is also a fundamental concept of contract law that the parties to a contract may agree to modify or change the terms of the contract. Thus, the parties to a structured settlement agreement may agree to waive a non-assignment clause.

The bill adds that a court may "hear any application for approval of a structured settlement" notwithstanding the existence of a non-assignment clause in the structured settlement contract. At the hearing, either party may waive or assert rights. The court may rule on the merits.

Please see sections entitled CONSTITUTIONAL ISSUES and DRAFTING ISSUES OR OTHER COMMENTS below regarding this provision of the bill.

Procedural Changes

Current law provides procedural requirements related to a court approval of the transfer of a structured settlement.[13] The bill:

- changes the time for filing of a written response to a petition for approval of transfer from "within 15 days after service of the petition to at least 5 days prior to the hearing;[14]
- adds that the transferee is the person responsible for filing the petition;
- requires the payee to appear in person at the hearing, absent good cause; and
- requires the petition to include information regarding the payee and the transaction.

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[12] One reason for such clauses was a provision in federal tax law, now repealed, that penalized the payor should the payee take a lump sum payout. Another significant reason for a non-assignment clause is that one goal of a structured settlement arrangement is the protection of a payee who may be naïve, financially unsophisticated, or who relies on the periodic payments as his or her sole means of support.

[13] s. 626.99296(4), F.S.

[14] *E.g.*, *First Providian, LLC v. Evans*, 852 So. 2d 908, 908 (Fla. 4th DCA 2003) (where the court dealt with a late filed response by a defendant insurance company). The change from "within 15 days after service of the transferee's notice" to "at least 5 days before the date of the scheduled hearing" could extend the period an interested party has to file a response, or it may leave it unchanged. A transferee must give notice at least 20 days before the hearing. If the transferee only gave the minimum 20 day notice, the time period would remain unchanged (e.g., 20 day notice - 5 days before hearing = 15 day period to respond). If the transferee gave more than 20 days notice, the interested party would have more than a 15 day window. The window would increase by the difference between the length of the notice given and the 20 day minimum (e.g., 30 day notice - 5 days before hearing = 25 day period to respond). In sum, the change could increase the interested party's period to respond to the notice, and could never make it shorter than it already is.

The additional information required is:

- the payee's age, domicile, and ages of the payee's dependents;
- a copy of the transfer agreement and disclosure statement;
- the reasons why the payee seeks to transfer the right to future payment under the structured settlement; and
- a summary statement of completed financial transactions between the payee and the transferee (or related entities) during the past 4 years, of denied transfers in the past 2 years, of all other transfers in the past 3 years; and of proposed transfers.

Other Changes Made by the Bill

The bill eliminates references to "other interested party." The transfer of a structured settlement is, at its core, simply a form of a contract. The parties to a contract can specify the law that will apply in interpreting the contract, which election will prevail in the absence of a controlling statute. Current law defines "applicable law" to limit the use of applicable law to only be those of the United States, Florida, the payee, any interested party, a court that approved a structured settlement, or a court in which the underlying tort claim was pending at settlement. The bill repeals the reference to laws of "any other interested party."

Included within the statute on transfer of structured settlements are disclosure requirements that apply to the creation of a structured settlement agreement.[15] The bill repeals from that paragraph the requirement to disclose that transfer of the structured settlement rights may have "serious adverse tax consequences."[16]

Current law provides that the provisions of s. 626.99296, F.S., cannot be waived by any person; the bill provides that this protection and limitation only applies to a payee.

The bill specifies that compliance with the contract, notice and court approval requirements is solely the responsibility of the transferee. The other parties to the transaction do not incur liability for noncompliance.

The bill specifies that a structured settlement obligor and an annuity issuer may rely on the court order approving transfer, and are only legally liable for paying according to the court order.

The bill requires that a waiver of the right to receive independent professional advice must be in writing.

The bill also makes technical, grammatical and style changes to the statute.

B. SECTION DIRECTORY:

Section 1 amends s. 626.99296, F.S., regarding transfers of structured settlement payments.

Section 2 provides an effective date of July 1, 2016.

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[15] s. 626.99296(3)(d), F.S.

[16] While a transfer of a structured settlement right may have significant federal income tax consequences, there are many instances where the transfer would have little impact. In general, personal injury proceeds for medical bills, property loss and pain and suffering damages are not considered income and thus the payee pays no income tax upon receipt. Personal injury proceeds that reimburse the claimant for lost wages, however, are taxable. Since a structured settlement is an agreement, the parties can usually designate the type of payout and thus avoid characterization as taxable income. However, where the facts require designation as income, the payments are taxable in the year received. Where a structured settlement for future lost wages is transferred in exchange for a lump sum, the payee may face a significant tax bill compounded by several factors, such as moving into a higher tax bracket and a large tax bill that may be forgotten until April 15 of the following year.

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 may have an indeterminate fiscal impact on persons owning a structured settlement and on the companies that purchase to rights to those future payments.

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:

   One paragraph in the bill allows a court to hear and rule on the merits of an application to transfer a structured settlement even where the structured settlement contains a clause prohibiting its transfer and a party objects to the transfer. This paragraph may implicate art. I, s. 10 of the Florida Constitution and art. I, s. 10 of the United States Constitution, which limit the legislature from passing any law that impairs "the obligation of contracts."

   As a threshold matter, a law must "substantially impair" a contractual right for it be constitutionally problematic.[17] The Florida Supreme Court has held that "[a]n impairment may be constitutional if it is reasonable and necessary to serve an important public purpose."[18]

[17] *Pomponio v. Claridge of Pompano Condo., Inc.*, 378 So. 2d 774, 779 (Fla.1979) (citing *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 244-45 (1978)).
[18] *Id.* at 778–79 (*citing United States Trust Co.*, 431 U.S. at 25 (1977)).

Where a party objects to a law believing that the law impairs the obligation of a contract, the courts have adopted a balancing test to "determine whether the nature and extent of the impairment is constitutionally tolerable in light of the importance of the state's objective, or whether it unreasonably intrudes into the parties' bargain to a degree greater than is necessary to achieve that objective."[19] Factors considered in the balancing test include:

- Was the law enacted to deal with a broad, generalized economic or social problem?[20]
- Does the law operate in an area which was already subject to state regulation at the time the parties' contractual obligations were originally undertaken, or does it invade an area never before subject to regulation by the state?
- Does the law effect a temporary alteration of the contractual relationships of those within its coverage, or does it work a severe, permanent, and immediate change in those relationships irrevocably and retroactively?[21]

B. RULE-MAKING AUTHORITY:

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

C. DRAFTING ISSUES OR OTHER COMMENTS:

New paragraph (e) in subsection (5) at lines 245-253 is unclear.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

n/a

[19] *Id.* at 780.
[20] In determining the purpose of a statute, courts frequently look to the legislature's express statements of intent in the statute. *See Pomponio*, 378 So. 2d at 781 (noting in its analysis of the public purpose of the statute that the specific objectives for the statute are "neither expressly articulated nor plainly evident" in the statute).
[21] *Id.* at 779.

A bill to be entitled

An act relating to transfers of structured settlement payment rights; amending s. 626.99296, F.S.; revising definitions; revising provisions relating to transfers of structured settlement payment rights and structured settlement agreements; revising provisions relating to the venue and procedure for approval of transfers of structured settlement payment rights; providing requirements of a transferee's application to the court; revising applicability of certain provisions relating to waiver; providing liability; providing conditions relating to reliance on a court order; providing an effective date.

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

Section 1. Paragraphs (b), (i), and (p) of subsection (2), paragraphs (a) and (d) of subsection (3), and subsections (4) and (5) of section 626.99296, Florida Statutes, are amended to read:

626.99296 Transfers of structured settlement payment rights.—

(2) DEFINITIONS.—As used in this section, the term:

(b) "Applicable law" means any of the following, as applicable in interpreting the terms of a structured settlement:

1. The laws of the United States;

2. The laws of this state, including principles of equity applied in the courts of this state; and

3. The laws of any other jurisdiction:

a. That is the domicile of the payee ~~or any other interested party~~;

b. Under whose laws a structured settlement agreement was approved by a court; or

c. In whose courts a settled claim was pending when the parties entered into a structured settlement agreement.

(i) "Interested parties" means:

1. The payee;

2. Any beneficiary irrevocably designated under the annuity contract to receive payments following the payee's death or, if such designated beneficiary is a minor, the designated beneficiary's parent or guardian;

3. The annuity issuer;

4. The structured settlement obligor; or

5. Any other party to the structured settlement that ~~who~~ has continuing rights or obligations to receive or make payments under the structured settlement.

(p) "Structured settlement payment rights" means rights to receive periodic payments, including lump-sum payments under a structured settlement, whether from the structured settlement obligor or the annuity issuer, if:

1. The payee ~~or any other interested party~~ is domiciled in this state;

2. The structured settlement agreement was approved by a court of this state; or

3. The settled claim was pending before the courts of this state when the parties entered into the structured settlement agreement.

(3) CONDITIONS TO TRANSFERS OF STRUCTURED SETTLEMENT PAYMENT RIGHTS AND STRUCTURED SETTLEMENT AGREEMENTS.—

(a) A direct or indirect transfer of structured settlement payment rights is not effective and a structured settlement obligor or annuity issuer is not required to make a payment directly or indirectly to a transferee or assignee of structured settlement payment rights unless the transfer is authorized in advance in a final order by a court of competent jurisdiction which is based on the written express findings by the court that:

1. The transfer complies with this section and does not contravene other applicable law;

2. At least 10 days before the date on which the payee first incurred an obligation with respect to the transfer, the transferee provided to the payee a disclosure statement in bold type, no smaller than 14 points in size, which specifies:

a. The amounts and due dates of the structured settlement payments to be transferred;

b. The aggregate amount of the payments;

c. The discounted present value of the payments, together with the discount rate used in determining the discounted

present value;

d. The gross amount payable to the payee in exchange for the payments;

e. An itemized listing of all brokers' commissions, service charges, application fees, processing fees, closing costs, filing fees, referral fees, administrative fees, legal fees, and notary fees and other commissions, fees, costs, expenses, and charges payable by the payee or deducted from the gross amount otherwise payable to the payee;

f. The net amount payable to the payee after deducting all commissions, fees, costs, expenses, and charges described in sub-subparagraph e.;

~~g. The quotient, expressed as a percentage, obtained by dividing the net payment amount by the discounted present value of the payments, which must be disclosed in the following statement: "The net amount that you will receive from us in exchange for your future structured settlement payments represent .... percent of the estimated current value of the payments based upon the discounted value using the applicable federal rate";~~

g.~~h.~~ The effective annual interest rate, which must be disclosed in the following statement: "Based on the net amount that you will receive from us and the amounts and timing of the structured settlement payments that you are turning over to us, you will, in effect, be paying interest to us at a rate of .... percent per year"; and

h.~~i.~~ The amount of any penalty and the aggregate amount of any liquidated damages, including penalties, payable by the payee in the event of a breach of the transfer agreement by the payee;

3. The payee has established that the transfer is in the best interests of the payee, taking into account the welfare and support of the payee's dependents;

4. The payee has received, or waived in writing his or her right to receive, independent professional advice regarding the legal, tax, and financial implications of the transfer;

5. The transferee or assignee has given written notice of his or her ~~the transferee's~~ name, address, and taxpayer identification number to the annuity issuer and the structured settlement obligor and has filed a copy of the notice with the court;

6. The transfer agreement provides that if the payee is domiciled in this state, any disputes between the parties will be governed in accordance with the laws of this state and that the domicile state of the payee is the proper venue to bring any cause of action arising out of a breach of the agreement; and

7. The court has determined that the net amount payable to the payee is fair, just, and reasonable under the circumstances then existing.

(d) In negotiating a structured settlement of claims brought by or on behalf of a claimant who is domiciled in this state, the structured settlement obligor must disclose in

writing to the claimant or the claimant's legal representative all of the following information that is not otherwise specified in the structured settlement agreement:

1. The amounts and due dates of the periodic payments to be made under the structured settlement agreement. In the case of payments that will be subject to periodic percentage increases, the amounts of future payments may be disclosed by identifying the base payment amount, the amount and timing of scheduled increases, and the manner in which increases will be compounded;

2. The amount of the premium payable to the annuity issuer;

3. The discounted present value of all periodic payments that are not life-contingent, together with the discount rate used in determining the discounted present value;

4. The nature and amount of any costs that may be deducted from any of the periodic payments; and

5. Where applicable, that any transfer of the periodic payments is prohibited by the terms of the structured settlement and may otherwise be prohibited or restricted under applicable law.~~; and~~

~~6. That any transfer of the periodic payments by the claimant may subject the claimant to serious adverse tax consequences.~~

(4) VENUE ~~JURISDICTION~~; PROCEDURE FOR APPROVAL OF TRANSFERS; CONTENTS OF APPLICATION.—

(a) At least 20 days before the scheduled hearing on an application for authorizing a transfer of structured settlement payment rights under this section, the transferee must file with the court and provide all interested parties with a notice of the proposed transfer and the application for its authorization. The notice must include:

1.~~(a)~~ A copy of the transferee's application to the court;

2.~~(b)~~ A copy of the transfer agreement;

3.~~(c)~~ A copy of the disclosure statement required under subsection (3);

4.~~(d)~~ Notification that an interested party may support, oppose, or otherwise respond to the transferee's application, in person or by counsel, by submitting written comments to the court or by participating in the hearing; and

5.~~(e)~~ Notification of the time and place of the hearing and notification of the manner in which and the time by which any written response to the application must be filed in order to be considered by the court. A written response to an application must be filed at least 5 ~~within 15~~ days before the date of the scheduled hearing in order to be considered by the court ~~after service of the transferee's notice~~.

(b) The application must be made by the transferee and filed in the circuit court of the county in which the payee is domiciled. However, if the payee is not domiciled in this state, the application may be filed in the court in this state that approved the structured settlement agreement or in the court in

which the settled claim was pending when the parties entered into the structured settlement.

(c) A hearing shall be held on the application, and the payee must appear in person at the hearing unless the court determines that good cause exists to excuse the payee from appearing.

(d) In addition to the requirements of this section, the application must include:

1. The payee's name, age, county of domicile, and the number and ages of the payee's dependents;

2. A copy of the transfer agreement and disclosure statement;

3. The reasons why the payee seeks to complete the proposed transfer; and

4. A summary of:

a. Any transfers by the payee to the transferee or an affiliate, or through the transferee or an affiliate to an assignee, made within the 4 years before the date of the transfer agreement, and any proposed transfers by the payee to the transferee or an affiliate, or through the transferee or an affiliate to an assignee, applications for the approval of which were denied within the 2 years before the date of the transfer agreement.

b. Any transfers by the payee to any person or entity other than the transferee or an affiliate or an assignee of a transferee or affiliate made within the 3 years before the date

of the transfer agreement, and any prior proposed transfers by the payee to any person or entity other than the transferee or an affiliate or an assignee of a transferee or affiliate, applications for the approval of which were denied within the 1 year before the date of the current transfer agreement, if such transfers or proposed transfers were disclosed to the transferee by the payee in writing or are actually known by the transferee.

(5) WAIVER PROHIBITED; NO PENALTIES INCURRED BY PAYEE; RELIANCE ON COURT ORDER; CONSTRUCTION AND APPLICABILITY.—

(a) The provisions of this section may not be waived by the payee.

(b) If a transfer of structured settlement payment rights fails to satisfy the conditions of subsection (3), the payee who proposed the transfer does not incur any penalty, forfeit any application fee or other payment, or otherwise incur any liability to the proposed transferee.

(c) In a transfer of structured settlement payment rights, compliance with the requirements of paragraph (3)(a) and subsection (4) is solely the responsibility of the transferee, and the structured settlement obligor and annuity issuer bear no responsibility for, or any liability arising from, noncompliance. This section does not authorize any transfer of structured settlement payment rights in contravention of general law.

(d) After issuance of a court order approving a transfer of structured settlement payment rights under this section, the

structured settlement obligor and annuity issuer:

1. May rely on the court order in redirecting future structured settlement payments to the transferee or an assignee in accordance with the order; and

2. Shall, as to all parties except the transferee or an assignee, be discharged and released from any and all liability for the transferred payments. The discharge and release are not affected by the failure of any party to the transfer to comply with this section or with the orders of the court approving the transfer.

(e) A court may hear any application for approval of a transfer of structured settlement payment rights even if the terms of the structured settlement prohibit the sale or the assignment or encumbrance of such payment rights. The parties to the structured settlement may waive or assert their rights under the terms. The court hearing an application for approval of a transfer of structured settlement payment rights under such structured settlement may rule on the merits of the application and any objections to the merits.

Section 2. This act shall take effect July 1, 2016.

Amendment No. 1

COMMITTEE/SUBCOMMITTEE ACTION	
ADOPTED	__ (Y/N)
ADOPTED AS AMENDED	__ (Y/N)
ADOPTED W/O OBJECTION	__ (Y/N)
FAILED TO ADOPT	__ (Y/N)
WITHDRAWN	__ (Y/N)
OTHER	_____

Committee/Subcommittee hearing bill: Civil Justice Subcommittee

Representative Santiago offered the following:

Amendment (with title amendment)

Remove everything after the enacting clause and insert:

Section 1. Section 626.99296, Florida Statutes, is amended to read:

626.99296 Transfers of structured settlement payment rights.—

(1) PURPOSE.—The purpose of this section is to protect recipients of structured settlements who are involved in the process of transferring structured settlement payment rights.

(2) DEFINITIONS.—As used in this section, the term:

(a) "Annuity issuer" means an insurer that has issued an annuity contract to be used to fund periodic payments under a structured settlement.

(c) ~~(b)~~ "Applicable law" means any of the following, as

applicable in interpreting the terms of a structured settlement:

1. The laws of the United States;

2. The laws of this state, including principles of equity applied in the courts of this state; and

3. The laws of any other jurisdiction:

a. That is the domicile of the payee ~~or any other interested party~~;

b. Under whose laws a structured settlement agreement was approved by a court; or

c. In whose courts a settled claim was pending when the parties entered into a structured settlement agreement.

(b) ~~(c)~~ "Applicable federal rate" means the most recently published applicable rate for determining the present value of an annuity, as issued by the United States Internal Revenue Service pursuant to s. 7520 of the United States Internal Revenue Code, as amended.

(d) "Assignee" means any party that acquires structured settlement payment rights directly or indirectly from a transferee of such rights.

(e) "Dependents" means a payee's spouse and minor children and all other family members and other persons for whom the payee is legally obligated to provide support, including spousal maintenance.

(f) "Discount and finance charge" means the sum of all charges that are payable directly or indirectly from assigned structured settlement payments and imposed directly or

indirectly by the transferee and that are incident to a transfer of structured settlement payment rights, including:

1. Interest charges, discounts, or other compensation for the time value of money;

2. All application, origination, processing, underwriting, closing, filing, and notary fees and all similar charges, however denominated; and

3. All charges for commissions or brokerage, regardless of the identity of the party to whom such charges are paid or payable.

The term does not include any fee or other obligation incurred by a payee in obtaining independent professional advice concerning a transfer of structured settlement payment rights.

(g) "Discounted present value" means, with respect to a proposed transfer of structured settlement payment rights, the fair present value of future payments, as determined by discounting the payments to the present using the most recently published applicable federal rate as the discount rate.

(h) "Independent professional advice" means advice of an attorney, certified public accountant, actuary, or other licensed professional adviser:

1. Who is engaged by a payee to render advice concerning the legal, tax, and financial implications of a transfer of structured settlement payment rights;

2. Who is not in any manner affiliated with or compensated

by the transferee of the transfer; and

3. Whose compensation for providing the advice is not affected by whether a transfer occurs or does not occur.

(i) "Interested parties" means:

1. The payee;

2. Any beneficiary irrevocably designated under the annuity contract to receive payments following the payee's death or, if such designated beneficiary is a minor, the designated beneficiary's parent or guardian;

3. The annuity issuer;

4. The structured settlement obligor; or

5. Any other party to the structured settlement who has continuing rights or obligations to receive or make payments under the structured settlement.

(j) "Payee" means an individual who is receiving tax-free damage payments under a structured settlement and proposes to make a transfer of payment rights under the structured settlement.

(k) "Qualified assignment agreement" means an agreement providing for a qualified assignment, as authorized by 26 U.S.C. s. 130 of the United States Internal Revenue Code, as amended.

(l) "Settled claim" means the original tort claim resolved by a structured settlement.

(m) "Structured settlement" means an arrangement for periodic payment of damages for personal injuries established by settlement or judgment in resolution of a tort claim.

(n) "Structured settlement agreement" means the agreement, judgment, stipulation, or release embodying the terms of a structured settlement, including the rights of the payee to receive periodic payments.

(o) "Structured settlement obligor" means the party who is obligated to make continuing periodic payments to the payee under a structured settlement agreement or a qualified assignment agreement.

(p) "Structured settlement payment rights" means rights to receive periodic payments, including lump-sum payments under a structured settlement, whether from the structured settlement obligor or the annuity issuer, if:

1. The payee ~~or any other interested party~~ is domiciled in this state;

2. The structured settlement agreement was approved by a court of this state; or

3. The settled claim was pending before the courts of this state when the parties entered into the structured settlement agreement.

(q) "Terms of the structured settlement" means the terms of the structured settlement agreement; the annuity contract; a qualified assignment agreement; or an order or approval of a court or other government authority authorizing or approving the structured settlement.

(r) "Transfer" means a sale, assignment, pledge, hypothecation, or other form of alienation or encumbrance made

by a payee for consideration.

(s) "Transfer agreement" means the agreement providing for transfer of structured settlement payment rights from a payee to a transferee.

(t) "Transferee" means a person who is receiving or who will receive structured settlement payment rights resulting from a transfer.

(3) CONDITIONS TO TRANSFERS OF STRUCTURED SETTLEMENT PAYMENT RIGHTS AND STRUCTURED SETTLEMENT AGREEMENTS.—

(a) A direct or indirect transfer of structured settlement payment rights is not effective and a structured settlement obligor or annuity issuer is not required to make a payment directly or indirectly to a transferee <u>or assignee</u> of structured settlement payment rights unless the transfer is authorized in advance in a final order by a court of competent jurisdiction which is based on the written express findings by the court that:

1. The transfer complies with this section and does not contravene other applicable law;

2. At least 10 days before the date on which the payee first incurred an obligation with respect to the transfer, the transferee provided to the payee a disclosure statement in bold type, no smaller than 14 points in size, which specifies:

a. The amounts and due dates of the structured settlement payments to be transferred;

b. The aggregate amount of the payments;

c. The discounted present value of the payments, together with the discount rate used in determining the discounted present value;

d. The gross amount payable to the payee in exchange for the payments;

e. An itemized listing of all brokers' commissions, service charges, application fees, processing fees, closing costs, filing fees, referral fees, administrative fees, legal fees, and notary fees and other commissions, fees, costs, expenses, and charges payable by the payee or deductible from the gross amount otherwise payable to the payee;

f. The net amount payable to the payee after deducting all commissions, fees, costs, expenses, and charges described in sub-subparagraph e.;

g. ~~The quotient, expressed as a percentage, obtained by dividing the net payment amount by the discounted present value of the payments, which must be disclosed in the following statement: "The net amount that you will receive from us in exchange for your future structured settlement payments represent .... percent of the estimated current value of the payments based upon the discounted value using the applicable federal rate";~~

~~h.~~ The effective annual interest rate, which must be disclosed in the following statement: "Based on the net amount that you will receive from us and the amounts and timing of the structured settlement payments that you are turning over to us,

you will, in effect, be paying interest to us at a rate of .... percent per year"; and

h.~~i.~~ The amount of any penalty and the aggregate amount of any liquidated damages, including penalties, payable by the payee in the event of a breach of the transfer agreement by the payee;

3. The payee has established that the transfer is in the best interests of the payee, taking into account the welfare and support of the payee's dependents;

4. The payee has received, or waived in writing his or her right to receive, independent professional advice regarding the legal, tax, and financial implications of the transfer;

~~5. The transferee has given written notice of the transferee's name, address, and taxpayer identification number to the annuity issuer and the structured settlement obligor and has filed a copy of the notice with the court;~~

5.~~6.~~ The transfer agreement provides that if the payee is domiciled in this state, any disputes between the parties will be governed in accordance with the laws of this state and that the domicile state of the payee is the proper venue to bring any cause of action arising out of a breach of the agreement; and

6.~~7.~~ The court has determined that the net amount payable to the payee is fair, just, and reasonable under the circumstances then existing.

(b) If a proposed transfer would contravene the terms of the structured settlement, upon the filing of a written

objection by any interested party and after considering the objection and any response to it, the court may grant, deny, or impose conditions upon the proposed transfer which the court deems just and proper given the facts and circumstances and in accordance with established principles of law. Any order approving a transfer must require that the transferee indemnify the annuity issuer and the structured settlement obligor for any liability, including reasonable costs and attorney ~~attorney's~~ fees, which arises from compliance by the issuer or obligor with the order of the court.

(c) Any provision in a transfer agreement which gives a transferee power to confess judgment against a payee is unenforceable to the extent that the amount of the judgment would exceed the amount paid by the transferee to the payee, less any payments received from the structured settlement obligor or payee.

(d) In negotiating a structured settlement of claims brought by or on behalf of a claimant who is domiciled in this state, the structured settlement obligor must disclose in writing to the claimant or the claimant's legal representative all of the following information that is not otherwise specified in the structured settlement agreement:

1. The amounts and due dates of the periodic payments to be made under the structured settlement agreement. In the case of payments that will be subject to periodic percentage increases, the amounts of future payments may be disclosed by

identifying the base payment amount, the amount and timing of scheduled increases, and the manner in which increases will be compounded;

2. The amount of the premium payable to the annuity issuer;

3. The discounted present value of all periodic payments that are not life-contingent, together with the discount rate used in determining the discounted present value;

4. The nature and amount of any costs that may be deducted from any of the periodic payments; and

5. Where applicable, that any transfer of the periodic payments is prohibited by the terms of the structured settlement and may otherwise be prohibited or restricted under applicable law~~; and~~

~~6. That any transfer of the periodic payments by the claimant may subject the claimant to serious adverse tax consequences~~.

(4) VENUE ~~JURISDICTION~~; PROCEDURE FOR APPROVAL OF TRANSFERS; CONTENTS OF APPLICATION.—

(a) At least 20 days before the scheduled hearing on an application for authorizing a transfer of structured settlement payment rights under this section, the transferee must file with the court and provide to all interested parties a notice of the proposed transfer and the application for its authorization. The notice must include:

1.~~(a)~~ A copy of the transferee's application to the court;

2. ~~(b)~~ A copy of the transfer agreement;

3. ~~(c)~~ A copy of the disclosure statement required under subsection (3);

4. ~~(d)~~ Notification that an interested party may support, oppose, or otherwise respond to the transferee's application, in person or by counsel, by submitting written comments to the court or by participating in the hearing; and

5. ~~(e)~~ Notification of the time and place of the hearing and notification of the manner in which and the time by which any written response to the application must be filed in order to be considered by the court. A written response to an application must be filed no later than 5 ~~within 15~~ days before the date ~~after service~~ of the scheduled hearing in order to be considered by the court ~~transferee's notice~~.

(b) An application must be made by the transferee and filed in the circuit court of the county where the payee is domiciled. However, if the payee is not domiciled in this state, the application may be filed in the court in this state which approved the structured settlement agreement or in the court where the settled claim was pending when the parties entered into the structured settlement.

(c) The court shall hold a hearing on the application. The payee shall appear in person at the hearing unless the court determines that good cause exists to excuse the payee from appearing.

(d) In addition to complying with the other requirements

of this section, the application must include:

1. The payee's name, age, and county of domicile and the number and ages of the payee's dependents;

2. A copy of the transfer agreement;

3. A copy of the disclosure statement required under subsection (3);

4. An explanation of reasons as to why the payee is seeking approval of the proposed transfer; and

5. A summary of each of the following:

a. Any transfers by the payee to the transferee or an affiliate, or through the transferee or an affiliate to an assignee, within the 4 years preceding the date of the transfer agreement.

b. Any transfers within the 3 years preceding the date of the transfer agreement made by the payee to any person or entity other than the transferee or an affiliate, or an assignee of a transferee or an affiliate, to the extent such transfers were disclosed to the transferee by the payee in writing or are otherwise actually known by the transferee.

c. Any proposed transfers by the payee to the transferee or an affiliate, or through the transferee or an affiliate to an assignee, for which an application was denied within the 2 years preceding the date of the transfer agreement.

d. Any proposed transfers by the payee to any person or entity other than the transferee, or an assignee of a transferee or an affiliate, to the extent such proposed transfers were

disclosed to the transferee by the payee in writing or are otherwise actually known by the transferee, for which applications were denied within the year preceding the date of the transfer agreement.

(5) WAIVER PROHIBITED; NO PENALTIES INCURRED BY PAYEE; RELIANCE ON COURT ORDER; COMPLIANCE; RELEASE FROM LIABILITY; CONSTRUCTION.—

(a) The provisions of this section may not be waived by the payee.

(b) If a transfer of structured settlement payment rights fails to satisfy the conditions of subsection (3), the payee who proposed the transfer does not incur any penalty, forfeit any application fee or other payment, or otherwise incur any liability to the proposed transferee.

(c) In any transfer of structured settlement payment rights, the transferee is solely responsible for compliance with the requirements of paragraph (3)(a) and subsection (4), and neither the structured settlement obligor nor the annuity issuer shall incur any liability arising from noncompliance.

(d) Following issuance of a court order approving a transfer of structured settlement payment rights under this section, the structured settlement obligor and annuity issuer:

1. May rely on the court order in redirecting future structured settlement payments to the transferee or an assignee in accordance with the order; and

2. Are released and discharged from any liability for the

transferred payments to any party except the transferee or an assignee, notwithstanding the failure of any party to the transfer to comply with this section or with the orders of the court approving the transfer.

(e) If the terms of the structured settlement prohibit transfer of payment rights:

1. A court is not precluded from hearing an application for approval of a transfer of such payment rights or ruling on the merits of the application and any objections to the application; and

2. The parties to such structured settlement are not precluded from waiving or asserting their rights under such terms.

(6) NONCOMPLIANCE.—

(a) If a transferee violates the requirements for stipulating the discount and finance charge provided for in subsection (3), neither the transferee nor any assignee may collect from the transferred payments, or from the payee, any amount in excess of the net advance amount, and the payee may recover from the transferee or any assignee:

1. A refund of any excess amounts previously received by the transferee or any assignee;

2. A penalty in an amount determined by the court, but not in excess of three times the aggregate amount of the discount and finance charge; and

3. Reasonable costs and attorney ~~attorney's~~ fees.

(b) If the transferee violates the disclosure requirements in subsection (3), the transferee and any assignee are liable to the payee for:

1. A penalty in an amount determined by the court, but not in excess of three times the amount of the discount and finance charge; and

2. Reasonable costs and attorney ~~attorney's~~ fees.

(c) A transferee or assignee is not liable for any penalty in any action brought under this section if the transferee or assignee establishes by a preponderance of evidence that the violation was not intentional and resulted from a bona fide error, notwithstanding the transferee's maintenance of procedures reasonably designed to avoid such errors.

(d) Notwithstanding any other law, an action may not be brought under this section more than 1 year after the due date of:

1. The last transferred structured settlement payment, in the case of a violation of the requirements for stipulating the discount and finance charge provided for in subsection (3).

2. The first transferred structured settlement payment, in the case of a violation of the disclosure requirements of subsection (3).

(e) When any interested party has reason to believe that any transferee has violated this section, any interested party may bring a civil action for injunctive relief, penalties, and

any other relief that is appropriate to secure compliance with this section.

Section 2. This act shall take effect upon becoming a law.

T I T L E A M E N D M E N T

Remove everything before the enacting clause and insert: An act relating to transfers of structured settlement payment rights; amending s. 626.99296, F.S.; revising definitions; revising specified disclosures and notices that are or may be required to be given in order to effect transfers of structured settlement payment rights and payments under such rights; revising the time limit by which a written response to an application for transferring such rights must be filed; specifying requirements for the filing and contents of the application; requiring the court to hold a hearing on the application; requiring a payee to appear in person unless the court determines that good cause exists to excuse the payee; providing that the transferee is solely responsible for compliance with certain requirements; providing that following issuance of a court order approving the transfer, the structured settlement obligor and annuity issuer may rely on the order in redirecting certain payments and are released and discharged from certain liability; providing for construction if the terms of the structured settlement prohibit transfer for payment

rights; conforming provisions to changes made by the act; making technical changes; providing an effective date.

PCS for HB 675

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: PCS for HB 675 Federal Immigration Enforcement
SPONSOR(S): Civil Justice Subcommittee
TIED BILLS: None. **IDEN./SIM. BILLS:** SB 872

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
Orig. Comm.: Civil Justice Subcommittee		Malcolm	Bond

SUMMARY ANALYSIS

Although the federal government has broad powers over immigration enforcement, federal immigration agencies rely on state and local law enforcement agencies to assist and cooperate in the enforcement of federal immigration laws. The PCS creates the "Rule of Law Adherence Act" (Act) to require state and local governments and law enforcement agencies, including their officials and employees, to support and cooperate with federal immigration enforcement. Specifically, the PCS:

- prohibits a state or local governmental entity or law enforcement agency from having a law, policy, practice, procedure, or custom which impedes a law enforcement agency from communicating or cooperating with a federal immigration agency on immigration enforcement;
- prohibits any restriction on a state or local governmental entity or law enforcement agency's ability to use, maintain, or exchange immigration information for certain enumerated purposes;
- requires a state or local governmental entity and law enforcement agency to comply with and support the enforcement of federal immigration law;
- authorizes a board of county commissioners to enact an ordinance to recover costs for complying with an immigration detainer;
- requires an official or employee of a state or local governmental entity or law enforcement agency to report a violation of the Act to the Attorney General or state attorney, failure to report a violation may result in suspension or removal from office;
- authorizes the Attorney General or a state attorney to seek an injunction against a state or local governmental entity or law enforcement agency that violates the Act;
- requires a state or local governmental entity or law enforcement agency that violates the Act to pay a civil penalty of at least $1,000 but no more than $5,000 for each day the policy was in effect;
- creates a civil cause of action for a person injured by the conduct of an alien unlawfully present in the United States against a state or local governmental entity, law enforcement agency, or elected or appointed official whose violation of the Act contributed to the person's injury;
- prohibits the expenditure of public funds to reimburse or defend a public official or employee who violates the Act; and
- waives sovereign immunity for actions brought under the newly-created cause of action.

The PCS may have an indeterminate impact on local government expenditures. The PCS does not appear to have a fiscal impact on state government.

The PCS has an effective date of July 1, 2016.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Background

The federal government has "broad, undoubted power over the subject of immigration and the status of aliens," and thus has established an "extensive and complex" set of rules governing the admission and removal of aliens, along with conditions for aliens' continued presence within the United States.[1] While the federal government's authority over immigration is well established, the Supreme Court has recognized that not "every state enactment which in any way deals with aliens is a regulation of immigration and thus per se preempted" by the federal government.[2] The Tenth Amendment's reservation of powers to the states includes traditional "police powers" concerning the promotion and regulation of safety, health, and welfare within the state.[3] Pursuant to the exercise of these polices powers, states and municipalities have frequently enacted measures which address aliens residing in their communities.[4] The federal government's power to preempt activity in the area of immigration may be further limited by the constitutional bar against directly "commandeering" state or local governments into the service of federal immigration agencies.[5]

Information-Sharing

United States Immigration and Customs Enforcement (ICE) relies heavily on local law enforcement sharing information regarding an arrestee or inmate to identify and apprehend aliens who are unlawfully present in the United States. Over the years, some states and localities have restricted government agencies or employees from sharing information with federal immigration agencies.[6]

In 1996, Congress sought to end these restrictions on information-sharing through the Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA)[7] and Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA).[8] Neither PRWORA nor IIRIRA require state or local government entities to share immigration-related information with federal authorities. Instead, they bar any restrictions that prevent state or local government entities or officials from voluntarily communicating with federal immigration agencies regarding a person's immigration status.[9]

Immigration Detainers

An immigration detainer is a document by which ICE advises state and local law enforcement agencies of its interest in individual aliens whom those agencies are currently holding in relation to criminal violations.[10] ICE issues a detainer in three situations:

- To notify a law enforcement agency that ICE intends to assume custody of an alien in the agency's custody once the alien is no longer detained by the agency;
- To request information from a law enforcement agency about an alien's impending release so ICE may assume custody before the alien is released from the agency's custody; and

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[1] *Arizona v. United States*, 132 S. Ct. 2492, 2497 (2012).
[2] *De Canas v. Bica*, 424 U.S. 351, 355 (1976); *see Arizona*, 132 S. Ct. 2492.
[3] *Western Turf Ass'n v. Greenberg*, 204 U.S. 359, 363 (1907).
[4] Congressional Research Service, *State and Local "Sanctuary" Policies Limiting Participation in Immigration Enforcement*, 3 (July 20, 2015).
[5] *See Printz v. United States*, 521 U.S. 898 (1997); *New York v. United States*, 505 U.S. 144 (1992).
[6] Congressional Research Service, *supra* note 4, at 9.
[7] 8 U.S.C. §1644.
[8] 8 U.S.C. §1373.
[9] 8 U.S.C. §§ 1373, 1644.
[10] *See* 8 U.S.C. ss. 1226 and 1357;Congressional Research Service, *supra* note 4, at 13.

- To request that a law enforcement agency maintain custody of an otherwise releasable alien for no longer than 48 hours to allow ICE to assume custody.[11]

The federal courts and the federal government have characterized an ICE detainer as a request that does not require the receiving local law enforcement agency to comply with the detainer.[12] The federal courts have held any purported requirement that states hold aliens for ICE may run afoul of the anti-commandeering principles of the Tenth Amendment. For example, in *Galarza v. Szalczyk*, the U.S. Court of Appeals for the Third Circuit noted that if states and localities were required to detain aliens for ICE pursuant to a detainer, they would have to "expend funds and resources to effectuate a federal regulatory scheme," something found to be impermissible in prior Supreme Court decisions regarding commandeering.[13]

Additionally, a number of recent federal courts have held that ICE detainers requesting that local law enforcement detain (as opposed to notify) an otherwise releasable individual must specify that there is sufficient probable cause to detain that individual.[14]

"Sanctuary cities"

A number of states and municipalities have adopted formal or informal policies which prohibit or limit police cooperation with federal immigration enforcement efforts.[15] Municipalities that have adopted such policies are sometimes referred to as "sanctuary cities," though there is no consensus as to the meaning of this term. The term "sanctuary" jurisdiction is not defined by federal law, though it has been used by the Office of the Inspector General at the U.S. Department of Justice to reference "jurisdictions that may have [laws, ordinances, or policies] limiting the role of local law enforcement agencies and officers in the enforcement of immigration laws."[16] Examples of such polices include: not asking an arrested or incarcerated person his or her immigration status, not informing ICE about an alien in custody, not alerting ICE before releasing an alien from custody, not transporting an undocumented criminal alien to the nearest ICE location, and declining to honor an immigration detainer.[17]

It appears that there are seven local government entities in Florida that have adopted policies limiting cooperation with ICE specifically by placing conditions on honoring immigration detainers: Hernando, Pasco, Hillsborough, Pinellas, Palm Beach, Broward, and Miami-Dade.[18] In each of these counties

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[11] Law Enforcement Systems and Analysis, Department of Homeland Security, *Declined Detainer Outcome Report*, October 8, 2014 (redacted public version), at 3.

[12] *See, e.g., Garza v. Szalczyk,* 745 F. 3d 643, 641-644 (3d Cir. 2014) (noting that all Courts of Appeals that have commented on the character of ICE detainers refer to them as "requests" or as part of an "informal procedure.") ; *Ortega v. U.S. Immigration & Customs Enforcement*, 737 F. 3d 435, 438 (6th Cir. 2013); *Miranda-Olivares v. Clackamas County*, 2014 WL 1414305, slip op. (D. Oregon April 11, 2014); Memorandum from R. A. Cuevas, Jr. to Board of County Commissioners of Miami-Dade County, RE: Resolution directing the Mayer to implement policy on responding to detainer requests from the United States Department of Homeland Security Immigration Enforcement, Resolution R-1008-13, p 14 (Dec. 3, 2013) (containing correspondence from David Ventura, Assistant Director, U.S. Immigration and Customs Enforcement to Miguel Marquez , County Counsel, County of Santa Clara re: U.S. Immigration and Customs Enforcement Secure Communities Initiative).

[13] 745 F. 3d at 644.

[14] *Morales v. Chadburn*, 793 F. 3d 208, 214-217 (1st Cir. 2015); *Miranda-Olivares*, slip op. at 9-11; *Mendoza v. Osterberg*, 2014 WL 3784141 (D. Neb. 2014); *Uroza v. Salt Lake County*, 2013 WL 653968 (D. Utah 2013); *Galarza v. Szalczyk*, 2012 WL 1080020 (E.D.Pa. Mar.30, 2012) *rev'd on other grounds*, 745 F.3d 634 (3d Cir.2014).

[15] *See* Congressional Research Service, *supra* note 4, at 7-20 (providing examples of various types of "sanctuary" policies used across the country).

[16] U.S. Dep't of Justice, Office of the Inspector General, Audit Division, *Cooperation of SCAAP Recipients in the Removal of Criminal Aliens from the United States*, January 2007 (redacted public version), at vii, n.44 (defining "sanctuary" policies for purposes of study).

[17] *Id.* at 11-17.

[18] Law Enforcement Systems and Analysis, *supra* note 10, at 10, 13-14, 26; Frank Cerabino, *PBSO quietly changes policy on fed detainee requests*, PALM BEACH POST, July 15, 2015, http://www.mypalmbeachpost.com/news/news/crime-law/cerabino-pbso-quietly-changes-policy-on-fed-detain/nmzTT/ (last visited Jan. 4, 2016); Center for Immigration

except Miami-Dade, the policy was enacted by the Sheriff's Office. In Miami-Dade, the policy was enacted by the county commission.

In the six counties where the policy was enacted by the Sheriff's Office, an ICE detainer will not be honored unless it is supported by probable cause, such as a warrant from a federal judge or an order of deportation.[19] These policies appear to have been enacted after a Florida Sheriffs Association bulletin highlighted recent federal court decisions[20] relating to ICE detainers and explained that "sheriffs should be aware that any detention of an ICE detainee without probable cause may subject the sheriff's office to liability for an unlawful seizure."[21] The policy adopted by the county commission in Miami-Dade provides that an ICE detainer will only be honored if the federal government agrees to reimburse the county for costs incurred in complying with the detainer and the inmate subject to the detainer has a previous conviction for a forcible felony or the inmate has pending charges for a non-bondable offense.[22]

Effect of Proposed Changes

The PCS creates ch. 908, F.S., consisting of ss. 908.001-908.009, F.S., to create the "Rule of Law Adherence Act." The Act requires state and local governments and law enforcement agencies to support and cooperate with federal immigration enforcement.

Legislative Findings and Intent

The PCS creates s. 908.001, F.S., to provide legislative findings regarding immigration enforcement. The PCS states it is an important state interest that state agencies, local governments, and their officials owe an affirmative duty to assist the Federal Government with enforcement of federal immigration laws within this state, including complying with federal immigration detainers. It is also an important state interest that in the interest of public safety and adherence to federal law, this state must ensure that efforts to enforce immigration laws are not impeded or thwarted by state or local laws, policies, practices, procedures, or customs. Accordingly, state agencies, local governments, and their officials who encourage persons unlawfully present in the United States to locate within this state or who shield such persons from responsibility for their actions breach this duty and should be held accountable.

Prohibition against Sanctuary Policies

The PCS creates s. 908.003, F.S., to prohibit a state or local governmental entity, or a law enforcement agency[23] from adopting or having in effect a sanctuary policy. A "sanctuary policy" is defined in the PCS as a law, policy, practice, procedure, or custom adopted or permitted by a state entity, law enforcement agency, or local governmental entity which contravenes 8 U.S.C. s. 1373(a) or (b)[24], or which knowingly prohibits or impedes a law enforcement agency from communicating or cooperating with a federal

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Studies, Map: Sanctuary Cities, Counties and State (July 2015), http://www.cis.org/Sanctuary-Cities-Map (last visited Jan. 4, 2015).

[19] Julie B. Maglio, *HCSO Policy on Illegal Immigrant Detainment*, HERNANDO SUN, 2015, http://hernandosun.com/illegal_immigrant (last visited Jan. 4, 2015); Elizabeth Behrman, *Fla. sheriffs deny claims of 'sanctuary' cities in state*, The Tampa Tribune, July 19, 2015, http://www.tbo.com/news/crime/fla-sheriffs-deny-claims-of-sanctuary-cities-in-state-20150718/ (last visited Jan. 4, 2016); Broward County Sheriff's Office, *Legal Bulletin, Updated Immigration Detainers: Probable Cause Required*, July 17, 2014; Cerabino, *supra* note 4.

[20] *Galarza* 745 F. 3d 634; *Miranda-Olivares*, 2014 WL 1414305.

[21] Florida Sheriffs Association, *Legal Alert: ICE Detainers* (on file with the Civil Justice Subcommittee).

[22] Resolution No. R-1008-13, Board of County Commissioners, Miami-Dade County, Florida (Dec. 3, 2010).

[23] The definitions of "state entity," "local governmental entity," and "law enforcement agency" in the PCS include officials, persons holding public office, representatives, agents, and employees of those entities or agencies.

[24] 8 U.S.C. s. 1373(a) and (b) generally bar any restrictions that prevent state or local government entities or officials from voluntarily communicating with federal immigration agencies regarding a person's immigration status. *See also Congressional Research Service*, *supra* note X at 10.

immigration agency with respect to immigration enforcement . . . ." Examples of prohibited sanctuary polices include limiting or preventing a state or local governmental entity or law enforcement agency from:

- complying with an immigration detainer[25];
- providing a federal immigration agency access to an inmate for interview;
- initiating an immigration status investigation; or
- providing a federal immigration agency with the incarceration status or release date of an inmate.

Cooperation with Federal Immigration Authorities

The PCS creates s. 908.004, F.S., to prohibit any restriction on a state or local governmental entity or law enforcement agency's ability to:

- send information regarding a person's immigration status to, or requesting or receiving such information from, a federal immigration agency.
- maintain immigration information for purposes of the Act.
- exchange immigration information with a federal immigration agency, or governmental entity, or law enforcement agency.
- use immigration information to determine eligibility for a public benefit, service, or license.
- use immigration information to verify a claim of residence or domicile if such a determination of is required under federal or state law, local government ordinance or regulation, or pursuant to a court order.
- use immigration information to confirm the identity of an individual who is detained by a law enforcement agency.

The PCS requires a state or local governmental entity and a law enforcement agency to fully comply with and support the enforcement of federal immigration law. This requirement only applies with regard to an official, representative, agent, or employee of such entity or agency when he or she is acting within the scope of his or her official duties or employment.

Additionally, the PCS provides that a law enforcement agency that has received verification from a federal immigration official that an alien in the agency's custody is unlawfully present in the United States, the agency may transport the alien to a federal facility in this state or to a point of transfer to federal custody outside the jurisdiction of the agency. However, the law enforcement agency must obtain judicial authorization before transporting the alien to a point of transfer outside of this state.

The cooperation and support requirements in newly-created s. 908.004, F.S., do not require a state or local governmental entity or law enforcement agency to provide a federal immigration agency with information related to a victim or witness to a criminal offense, if the victim or witness cooperates in the investigation or prosecution of the crime. A victim or witness's cooperation pursuant to this exemption must be documented in the entity or agency's investigative records, and the entity or agency must retain the records for at least 10 years for the purposes of audit, verification, or inspection by the Auditor General.

Reimbursement of Costs for Complying with an Immigration Detainer

The PCS creates s. 908.005, F.S., to authorize a board of county commissioners to adopt an ordinance requiring any individual detained pursuant to a lawful and valid immigration detainer to reimburse the county for any expenses incurred in detaining the individual. However, an individual is not liable under

[25] "Immigration detainer" is defined in the PCS as "a written request issued by a federal immigration agency to another law enforcement agency to provide notice of release and to detain an individual based on an inquiry into the individual's immigration status or an alleged violation of a civil immigration law, including detainers issued pursuant to 8 U.S.C. ss. 1226 and 1357."

an ordinance enacted pursuant to this provision if a federal immigration agency determines that the immigration detainer was improperly issued.

Duty to Report

The PCS creates s. 908.006, F.S., to require an official or employee of a state or local governmental entity or law enforcement agency to promptly report a known or probable violation of the Act to the Attorney General or the state attorney. An official or employee's willful and knowing failure to report a violation may result in his or her suspension or removal from office pursuant to general law and the Florida Constitution.[26]

The PCS provides protections under the Whistle-blower's Act[27] to any official or employee of a state or local governmental entity or law enforcement agency who is retaliated against by the entity or agency or denied employment because he or she complied with the duty to report in s. 908.005, F.S.

Enforcement of Violations of the Act

The PCS creates s. 908.007, F.S., to provide for the enforcement of violations of the Act and establish penalties for such violations. The Attorney General or a state attorney may institute proceedings in circuit court to enjoin a state or local governmental entity or law enforcement agency that violates the Act. The court must expedite the action, including setting a hearing at the earliest practicable date.

Upon adjudication by the court or as provided in a consent decree declaring that a state or local governmental entity or law enforcement agency has violated the Act, the court must enjoin the unlawful policy or practice and order that the entity or agency pay a civil penalty of at least $1,000 but not more than $5,000 for each day the policy or practice was in effect. The court may award court costs and reasonable attorney fees to the prevailing party.

A state or local governmental entity or law enforcement agency ordered to pay a civil penalty must remit payment to the Chief Financial Officer for appropriation as provided in the General Appropriations Act, or if not provided for in the General Appropriations Act, such funds will revert to the General Revenue Fund.

The PCS also prohibits the expenditure of public funds to defend or reimburse any sanctuary policy maker or any official, representative, agent, or employee of a state entity, local governmental entity, or law enforcement agency who knowingly and willfully violates the Act.

Complaint by a Private Individual

The PCS creates s. 908.008, F.S., to require that the Attorney General provide a form on the Department of Legal Affairs' website for a person to submit a complaint alleging a violation of the Act. A person may still file an anonymous complaint or a complaint different than the prescribed format.

Cause of Action against State or Local Governmental Entity, Law Enforcement Agency, and any Sanctuary Policymaker

The PCS creates s. 908.009, F.S., to provide a civil cause of action for a person injured by (or the personal representative of a person killed by) the tortious conduct of an alien unlawfully present in the United States against any state or local governmental entity or law enforcement agency in violation of

[26] Section 1, Art. IV of the Florida Constitution provides that the governor may suspend "any state officer not subject to impeachment . . . or any county officer for for malfeasance, misfeasance, neglect of duty, drunkenness, incompetence, permanent inability to perform official duties, or commission of a felony, and may fill the office by appointment for the period of suspension. The suspended officer may at any time before removal be reinstated by the governor." The senate then "may. . . remove from office or reinstate the suspended official . . ."

[27] s. 112.3187, F.S.

newly-created ss. 908.003 and 908.004, F.S., and any sanctuary policymaker of the entity or agency. To prevail in the new cause of action, the plaintiff must prove by the greater weight of the evidence:

- The existence of a sanctuary policy; and
- Failure to comply with any provision of newly-created s. 908.004, F.S., resulting in the alien having access to the person injured or killed when the tortious conduct occurred.

A "sanctuary policymaker" is defined in the PCS as "a state or local elected official, or an appointed official of a local governmental entity governing body, who has voted for, allowed to be implemented, or voted against repeal or prohibition of a sanctuary policy."

A cause of action pursuant to this section may not be brought against a public official or employee of a state or local government or law enforcement agency, unless he or she is a sanctuary policymaker.

The parties in an action brought under this section have the right to trial by jury. Additionally, the PCS waives sovereign immunity for the state, its political subdivisions, and any sanctuary policymaker under the Florida Constitution and current law[28] for actions brought under this section.

Additional Provisions

The PCS also creates s. 908.0010, F.S., to provide that the Act be implemented to the fullest extent permitted by federal immigration law and the legislative findings and intent declared in s. 908.001, F.S.

The PCS provides that it will take effect on July 1, 2016

B. SECTION DIRECTORY:

Section 1 creates a short title.

Section 2 creates ch. 908, F.S., consisting of ss. 908.001-908.0010, F.S., entitled "Federal Immigration Enforcement."

Section 3 provides an effective date of July 1, 2016

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

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

2. Expenditures:

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

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

   See "Expenditures" section below.

2. Expenditures:

   The PCS requires a local government or law enforcement agency to honor an ICE immigration detainer. Any costs incurred by a local government or law enforcement agency in holding an

[28] s. 768.28(9), F.S.

individual pursuant to an immigration detainer are not reimbursed by ICE.[29] However, the PCS authorizes a board of county commissioners to enact an ordinance to recover costs for complying with an immigration detainer.[30] Accordingly, the PCS may have an indeterminate negative impact on local expenditures.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

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

D. FISCAL COMMENTS:

It is unknown how much it costs local governments to comply with immigration detainers. According to the Board of County Commissioners in Miami-Dade County, compliance with immigration detainers in 2011 and 2012 cost the county $1,002,700 and $667,076, respectively.[31]

As noted above, recent federal courts have determined that a local law enforcement agency is not required to honor an ICE detainer because such detainers are simply requests to detain.[32] Federal courts have also held that an ICE detainer must be supported by probable cause.[33] Based on these two lines of federal cases, it appears that a law enforcement agency that voluntarily complies with an ICE detainer that is not supported by probable cause may be subject to a federal civil rights action.[34]

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

The PCS appears to require a county or municipality to spend funds or take an action requiring the expenditure of funds as described in article VII, section 18 of the Florida Constitution, specifically by requiring the county or municipality to comply with an immigration detainer. However, the PCS contains legislative findings that state and local government assistance and cooperation with federal immigration enforcement fulfills an important state interest, and it authorizes a board of county commissioners to enact an ordinance to recover costs for complying with an immigration detainer.[35]

2. Other:

None.

B. RULE-MAKING AUTHORITY:

Newly-created s. 908.008, F.S., in the PCS requires the Attorney General to prescribe and provide through the Department of Legal Affairs' website a form for a person to submit a complaint alleging a violation of the Act.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

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[29] Resolution No. R-1008-13, *supra* note 21.
[30] *See* "Reimbursement of Costs for Complying with an Immigration Detainer" sections above.
[31] Resolution No. R-1008-13, *supra* note 21.
[32] *See* "Immigration Detainers" section above.
[33] *Id.*
[34] *See Legal Alert*, *supra* note 20.
[35] *See* "Legislative Findings and Intent" and "Reimbursement of Costs for Complying with an Immigration Detainer" sections above.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

n/a

A bill to be entitled

An act relating to federal immigration enforcement; providing a short title; creating ch. 908, F.S., relating to federal immigration enforcement; providing legislative findings and intent; defining terms; prohibiting sanctuary policies; requiring a state or local governmental agency to comply with and support the enforcement of federal immigration law; prohibiting restrictions by state and local government entities and officials on the transfer of information regarding citizenship or immigration status of an individual, action taken with respect to such information, or enforcement of federal immigration law; authorizing a law enforcement agency to transport an unauthorized alien under certain circumstances; providing an exception to reporting requirements for crime victims or witnesses; requiring record keeping for crime victim and witness cooperation; authorizing a board of county commissioners adopt an ordinance to recover costs for complying with an immigration detainer; requiring state and local government officials to report violations; providing penalties for failing to report a violation; providing whistle-blower protections for government officials who report violations; providing for injunctive relief and civil penalties; providing for costs and attorney fees;

prohibiting the expenditure of public funds for violations; requiring the Attorney General to prescribe the format for submitting complaints; providing a cause of action for personal injury or wrongful death attributed to a sanctuary policy; providing that a trial by jury is a matter of right; waiving sovereign immunity for such actions; providing for implementation; providing an effective date.

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

Section 1. Short title.—This act may be cited as the "Rule of Law Adherence Act."

Section 2. Chapter 908, Florida Statutes, consisting of sections 908.001-908.0010, is created to read:

CHAPTER 908

FEDERAL IMMIGRATION ENFORCEMENT

908.001 Legislative findings and intent.—The Legislature finds it is an important state interest that state agencies, local governments, and their officials owe an affirmative duty to all citizens and other persons lawfully within the United States to assist the Federal Government with enforcement of federal immigration laws within this state, including complying with federal immigration detainers. The Legislature further finds it is an important state interest that, in the interest of public safety and adherence to federal law, this state shall

support federal immigration enforcement efforts and ensure that such efforts are not impeded or thwarted by state or local laws, policies, practices, procedures, or customs. State agencies, local governments, and their officials who encourage persons unlawfully present in the United States to locate within this state or who shield such persons from personal responsibility for their unlawful actions breach this duty and should be held accountable.

908.002 Definitions.—As used in this chapter, the term:

(1) "Federal immigration agency" means the United States Department of Homeland Security, or its successor agency, and any of its divisions, including United States Immigration and Customs Enforcement, United States Customs and Border Protection, or any other federal agency charged with the enforcement of immigration law. The term includes an official or employee of such agency.

(2) "Immigration detainer" means a written request issued by a federal immigration agency to another law enforcement agency to provide notice of release and to detain an individual based on an inquiry into the individual's immigration status or an alleged violation of a civil immigration law, including detainers issued pursuant to 8 U.S.C. ss. 1226 and 1357.

(3) "Inmate" means an individual in the custody of a law enforcement agency.

(4) "Law enforcement agency" means an agency in this state charged with enforcement of state, county, municipal, or federal

laws or with managing custody of detained persons in the state and includes municipal police departments, sheriff's offices, state police departments, campus police departments, and the Department of Corrections. The term includes an official or employee of such agency.

(5) "Local governmental entity" means any county, municipality, or other political subdivision of this state. The term includes a person holding public office or having official duties as a representative, agent, or employee of such entity.

(6) "Sanctuary policy" means a law, policy, practice, procedure, or custom adopted or permitted by a state entity, law enforcement agency, or local governmental entity which contravenes 8 U.S.C. s. 1373(a) or (b), or which knowingly prohibits or impedes a law enforcement agency from communicating or cooperating with a federal immigration agency with respect to federal immigration enforcement, including, but not limited to, limiting or preventing a state entity, local governmental entity, or law enforcement agency from:

(a) complying with an immigration detainer;

(b) providing a federal immigration agency access to an inmate for interview;

(c) initiating an immigration status investigation; or

(d) providing a federal immigration agency with the incarceration status or release date of an inmate.

(7) "Sanctuary policymaker" means a state or local elected official, or an appointed official of a local governmental

entity governing body, who has voted for, allowed to be implemented, or voted against repeal or prohibition of a sanctuary policy.

(8) "State entity" means the state or any office, board, bureau, commission, department, branch, division, or institution thereof. The term includes a person holding public office or having official duties as a representative, agent, or employee of such entity.

908.003 Sanctuary policies prohibited.—A state entity, law enforcement agency, or local governmental entity may not adopt or have in effect a sanctuary policy.

908.004 Cooperation with federal immigration authorities.—

(1) Except as otherwise expressly prohibited by federal law, a state entity, local governmental entity, or law enforcement agency may not prohibit or in any way restrict another state entity, local governmental entity, or law enforcement agency from taking any of the following actions with respect to information regarding an individual's immigration status:

(a) Sending such information to or requesting or receiving such information from a federal immigration agency for purposes of this chapter.

(b) Maintaining such information for purposes of this chapter.

(c) Exchanging such information with a federal immigration agency or another state entity, local governmental entity, or

law enforcement agency for purposes of this chapter.

(d) Using such information to determine eligibility for a public benefit, service, or license pursuant to federal or state law or an ordinance or regulation of a local governmental entity.

(e) Using such information to verify a claim of residence or domicile if a determination of residence or domicile is required under federal or state law, an ordinance or regulation of any local governmental entity, or under a judicial order issued pursuant to a civil or criminal proceeding in this state.

(f) Using such information to confirm the identity of an individual who is detained by a law enforcement agency.

(2) A state entity, local governmental entity, or law enforcement agency shall fully comply with and, to the full extent permitted by law, support the enforcement of federal immigration law. This subsection is only applicable to an official, representative, agent, or employee of such entity or agency when he or she is acting within the scope of his or her official duties or within the scope of his or her employment.

(3) Notwithstanding any other provision of law, if a law enforcement agency has received verification from a federal immigration agency that an alien in the law enforcement agency's custody is unlawfully present in the United States, the law enforcement agency may securely transport such alien to a federal facility in this state or to another point of transfer to federal custody outside the jurisdiction of the law

enforcement agency. A law enforcement agency shall obtain judicial authorization before securely transporting such alien to a point of transfer outside of this state.

(4) This section does not require a state entity, local governmental entity, or law enforcement agency to provide a federal immigration agency with information related to a victim of or a witness to a criminal offense, if such victim or witness timely and in good faith responds to the entity or agency's request for information and cooperation in the investigation or prosecution of such offense.

(5) A state entity, local governmental entity, or law enforcement agency who, pursuant to subsection (4), withholds information regarding the immigration information of a victim of or witness to a criminal offense shall document such person's cooperation in the entity or agency's investigative records related to the crime and shall retain such records for a period of no less than 10 years for the purposes of audit, verification, or inspection by the Auditor General.

908.005 Reimbursement of costs for complying with an immigration detainer.— A board of county commissioners may adopt an ordinance requiring any individual detained pursuant to a lawful and valid immigration detainer to reimburse the county for any expenses incurred in detaining the individual pursuant to the immigration detainer. An individual detained pursuant to an immigration detainer is not liable under this section if a federal immigration agency determines that the immigration

detainer was improperly issued.

908.006 Duty to report.—

(1) An official, representative, agent, or employee of a state entity, local governmental entity, or law enforcement agency shall promptly report a known or probable violation of this chapter to the Attorney General or the state attorney having jurisdiction over the state entity or local governmental entity.

(2) An official, representative, agent, or employee of a state entity, local governmental entity, or law enforcement agency who willfully and knowingly fails to report a known or probable violation of this chapter may be suspended or removed from office pursuant to general law and s. 7, Art. IV of the State Constitution.

(3) A state entity, local governmental entity, or law enforcement agency may not dismiss, discipline, take any adverse personnel action as defined in s. 112.3187(3), or take any adverse action described in s. 112.3187(4)(b), against an official, representative, agent, or employee for complying with subsection (1).

(4) The Whistle-blower's Act, s. 112.3187, shall apply to any official, representative, agent, or employee of a state entity, local governmental entity, or law enforcement agency who is dismissed, disciplined, subject to any adverse personnel action as defined in s. 112.3187(3) or any adverse action described in s. 112.3187(4)(b), or denied employment because he

or she complied with subsection (1).

908.007 Enforcement; penalties.—

(1) The Attorney General or a state attorney may institute proceedings in circuit court to enjoin a state entity, law enforcement agency, or local governmental entity found to be in violation of this chapter. The court shall expedite an action under this section, including setting a hearing at the earliest practicable date.

(2) Upon adjudication by the court or as provided in a consent decree declaring that a state entity, law enforcement agency, or local governmental entity has violated this chapter, the court shall enjoin the unlawful policy or practice and order that such entity or agency pay a civil penalty to the state of at least $1,000 but not more than $5,000 for each day that the policy or practice was in effect before the injunction was granted. The court shall have continuing jurisdiction over the parties and subject matter and may enforce its orders with imposition of additional civil penalties as provided for in this section and contempt proceedings as provided by law.

(3) A state entity, local governmental entity, or law enforcement agency ordered to pay a civil penalty pursuant to subsection (2) shall remit payment to the Chief Financial Officer for appropriation as provided in the General Appropriations Act, or if not provided for in the General Appropriations Act, such funds shall revert to the General Revenue Fund.

(4) The court may award court costs and reasonable attorney fees to the prevailing party in an action brought pursuant to this section.

(5) Except as required by applicable law, pubic funds may not be used to defend or reimburse any sanctuary policy maker or any official, representative, agent, or employee of a state entity, local governmental entity, or law enforcement agency who knowingly and willfully violates this chapter.

908.008 Resident complaint; penalties.—The Attorney General shall prescribe and provide through the Department of Legal Affairs' website the format for a person to submit a complaint alleging a violation of this chapter. This section does not prohibit the filing of an anonymous complaint or a complaint not submitted in the prescribed format.

908.009 Civil cause of action for personal injury or wrongful death attributed to a sanctuary policy; trial by jury; waiver of sovereign immunity.—

(1) A person injured by the tortious acts or omissions of an alien unlawfully present in the United States, or the personal representative of a person killed by the tortious acts or omissions of an alien unlawfully present in the United States, has a cause of action for damages against any state entity, local governmental entity, or law enforcement agency in violation of s. 908.003 and s. 908.004, and any sanctuary policymaker of any such entity or agency, upon proof by the greater weight of the evidence of:

(a) The existence of a sanctuary policy in violation of s. 908.003; and

(b) A failure to comply with any provision of s. 908.004 resulting in such alien having access to the person injured or killed when the tortious acts or omissions occurred.

(2) A cause of action brought pursuant to subsection (1) may not be brought against any individual who holds public office, or has official duties as a representative, agent, or employee of a state entity, local governmental entity, or law enforcement agency, unless such individual is a sanctuary policymaker.

(3) Trial by jury is a matter of right in actions brought under this section.

(4) In accordance with s. 13, Art. X of the State Constitution, the state, for itself and its political subdivisions, waives sovereign immunity for actions brought under this section. In addition, s. 768.28(9) does not apply to a sanctuary policymaker in any claims brought pursuant to this section.

908.0010 Implementation.—This chapter shall be implemented to the fullest extent permitted by federal law regulating immigration and the legislative findings and intent declared in s. 908.001.

Section 3. This act shall take effect July 1, 2016.

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 715 Child Protection Teams
SPONSOR(S): Harrell
TIED BILLS: None **IDEN./SIM. BILLS:** SB 670

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Civil Justice Subcommittee		Robinson	Bond
2) Appropriations Committee			
3) Health & Human Services Committee			

SUMMARY ANALYSIS

A child protection team (CPT) is a medically directed, multidisciplinary team of professionals contracted by the Children's Medical Services (CMS) Program in the Department of Health (DOH). CPTs supplement the child protective investigation activities of local sheriffs' offices and the Department of Children and Families (DCF) in cases of child abuse, abandonment, and neglect. CPTs provide expertise in evaluating alleged child abuse and neglect, assessing risk and protective factors, and providing recommendations for interventions to protect children and to enhance a caregiver's capacity to provide a safer environment when possible.

The bill provides that CPT members are included within the definition of the term "officer, employee, or agent" of the state for purposes of state sovereign immunity when carrying out the member's duties as part of the CPT. As a result, CPT members may not be held personally liable for torts committed in such capacity; instead the state may be held liable up to the limits established under the state's statutory waiver of sovereign immunity.

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

The bill has an effective date of July 1, 2016.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

BACKGROUND

Child Protection Teams

Generally

Section 39.303, F.S., provides for the establishment and maintenance of one or more Child Protection Teams (CPT) in each of the service districts of the Department of Children and Families (DCF). A CPT is a medically directed, multidisciplinary team contracted by the Children's Medical Services (CMS) program in the Department of Health (DOH) to supplement the child protective investigation efforts of local sheriffs' offices and DCF in cases of child abuse, abandonment, and neglect.[1] Upon a case referral[2] by DCF, these independent, community-based programs provide expertise in evaluating alleged child abuse and neglect, assessing risk and protective factors, and providing recommendations for interventions to protect children and to enhance a caregiver's capacity to provide a safer environment when possible. Specifically, CPT members provide:[3]

- Emergency telephone consultation services.
- Medical, psychological, and psychiatric diagnosis and evaluation services, including the provision and interpretation of laboratory tests and x-rays.
- Assessments that include, as appropriate, family psychosocial interviews, specialized clinical interviews, or forensic interviews.
- Expert medical, psychological, and related professional testimony in court cases.
- Case staffings to develop treatment plans for children whose cases have been referred to the team.
- Case service coordination and assistance.
- Training for DCF and DOH employees to enable them to develop and maintain their professional skills and abilities in handling child abuse, abandonment, and neglect cases.
- Educational and community awareness campaigns on child abuse, abandonment, and neglect.

Entities under contract with CMS to provide CPT services include non-profit agencies, hospitals, universities, and county governments.[4]

CPT Teams

There are currently 23 CPTs providing services to all 67 Florida counties.[5] Each CPT is led by a district medical director who must be a CMS approved provider pediatrician.[6] A CPT may be comprised of

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[1] Florida Department of Health, Children's Medical Services. *Child Protection Teams, available at* http://www.floridahealth.gov/AlternateSites/CMS-Kids/families/child_protection_safety/child_protection_teams.html (last visited December 30, 2015).

[2] Certain cases must be referred to a CPT for assessment and supportive services, including cases involving injuries to the head, bruises to the neck or head, burns, or fractures in a child of any age; bruises anywhere on a child 5 years of age or under; any report alleging sexual abuse of a child; any sexually transmitted disease in a prepubescent child; reported malnutrition of a child and failure of a child to thrive; reported medical neglect of a child; any family in which one or more children have been pronounced dead on arrival at a hospital or other health care facility, or have been injured and later died, as a result of suspected abuse, abandonment, or neglect, when any sibling or other child remains in the home; and symptoms of serious emotional problems in a child when emotional or other abuse, abandonment, or neglect is suspected. s. 39.303(4), F.S.

[3] s. 39.303(3), F.S.

[4] Florida Department of Health, Children's Medical Services, *Child Protection Team Program Handbook*, at 4, *available at* www.floridahealth.gov/alternatesites/cms-kids/providers/prevention/documents/handbook_cpt.pdf (last visited January 6, 2016).

representatives of school districts, healthcare providers, mental health providers, legal services, social service agencies, and law enforcement agencies,[7] but, at a minimum, includes:[8]

- An on-site team coordinator.
- One or more case coordinators.
- A Florida licensed psychologist with training and experience in evaluation and treatment of child abuse and neglect.
- An attorney who is a member of the Florida Bar.
- Professional consultants (including physicians, advanced registered nurse practitioners, psychiatrists, psychologists, or attorneys) as needed who respond to requests for medical consultation and evaluation of children suspected of being abused or neglected.

CPT Oversight and Control

CMS has oversight and contract management responsibility for the CPT Program and employs a Statewide Medical Director to provide medical oversight for the teams throughout the state. While working functionally under the statewide Medical Director, individual CPT Medical Directors are employed by DOH, and are under the overall direction of the CMS Deputy Secretary of Health.[9] The State Surgeon General and the DOH Deputy Secretary for Children's Medical Services, in consultation with the DCF Secretary, have responsibility for the screening, employment, and any necessary termination of child protection team medical directors, both at the state and district level.[10]

All other CPT providers are governed by the terms of their contracts with DOH and the *CPT Program Policy and Procedure Handbook* which specifies program objectives, roles and responsibilities, service delivery and practice and quality standards.[11]

Sovereign Immunity and Child Protection Teams

The CPT Program Handbook provides that "CPT medical providers appear to act under the color of law and are agents of the state when they examine children allegedly abused or neglected under ch. 39, F.S."[12] An agent of the state is immune from personal tort liability for acts or omissions within the scope of his or her function under the state's sovereign immunity provisions.

Sovereign Immunity

Adopted by the Legislative Council of the Territory of Florida in 1829,[13] the common law[14] doctrine of "sovereign immunity" prohibits lawsuits in state court against the state, its agencies, and political subdivisions without the state's consent.[15] Historically, this absolute doctrinal position held state and local governments immune from liability arising from the activities of its officers, employees, and agents.

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[5] Florida Department of Health, Children's Medical Services, *Child Protection Teams: CPT Statewide Directory*, *available at* http://www.floridahealth.gov/alternatesites/cms-kids/home/contact/cpt.pdf (last visited December 30, 2015).
[6] Rule 64C-8.002, F.A.C.
[7] s. 39.303(1), F.S.
[8] Rule 64C-8.002, F.A.C.
[9] Florida Department of Health, Children's Medical Services, *Provider Handbook: Physicians & Dentists* (2013), at 14, *available at* http://www.floridahealth.gov/alternatesites/cms-kids/providers/documents/handbook_physician.pdf (last visited January 6, 2016).
[10] s. 39.303(1), F.S.
[11] Supra note 4, at 1.
[12] *Supra* note 4, at 73.
[13] s. 2.01, F.S.
[14] At common law, the doctrine's foundation was premised on the maxim, "the king can do no wrong." As sovereign, the king was considered to be beyond the jurisdiction of any court. RESTATEMENT (SECOND) OF TORTS. Ch. 45A (1979).
[15] *Cauley v. City of Jacksonville,* 403 So.2d 379,381 (Fla. 1981).

Since 1868, the Florida Constitution has authorized the Legislature to waive sovereign immunity, in part or in full, by general law.[16] Pursuant to such constitutional authority, the Legislature enacted s. 768.28, F.S., a limited waiver of the sovereign immunity of the state, its agencies, and subdivisions[17] in tort.[18] Under s. 768.28, F.S., a governmental entity may be sued for the negligent or wrongful act or omission of an employee acting within the scope[19] of his or her employment or office, but there is a $200,000 per person and $300,000 per incident cap on the involuntary collectability of any judgment.[20] Damages in excess of the established caps may be paid in part or in whole only by further act of the Legislature through the passage of a claim bill.[21]

The officer, employee, or agent is not personally liable in tort for acts or omissions within the scope of her or his employment or function unless such acts are committed in bad faith, with malicious purpose, or in wanton and willful disregard of human rights, safety, or property.[22] In general, the only remedy for tortious injury by officers, employees, or agents of the state or its subdivisions lies against the government employer or entity that acts as the agent's principal.[23] The state assumes the financial responsibility of defending the claim on behalf of its officer, employee, or agent[24] and covers the payment of damages and court ordered attorney fees from the Insurance Risk Management Trust Fund.[25]

Private Contractors as "Officers, Employees, or Agents" of the State

The immunity from personal liability under s. 768.28(9)(a), F.S., may extend to certain private parties who are involved in contractual relationships with the state, provided that such parties are deemed "agents" of the state. However, the Legislature has not defined or provided an exhaustive list of private contractors that are "agents" of the state for purposes of sovereign immunity.[26] If a private contractor has not been statutorily designated as an "agent" for purposes of s. 768.28(9), F.S., courts must consider the following factors which establish an agency relationship:[27]

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[16] FLA. CONST. art. X, s. 3.

[17] "State agencies or subdivisions" include the executive departments, the Legislature, the judicial branch (including public defenders), and the independent establishments of the state, including state university boards of trustees; counties and municipalities; and corporations primarily acting as instrumentalities or agencies of the state, counties, or municipalities, including the Florida Space Authority.

[18] s. 768.28, F.S.

[19] Conduct is considered to be within the scope of employment when: (1) it is the type of conduct which the employee is hired to perform; (2) it occurs substantially within the time and space limits authorized or required by the work to be performed and (3) the conduct is activated at least in part by a purpose to serve the employer. *Craft v. John Sirounis and Sons, Inc.*, 575 So. 2d 795, 796 (Fla. 4th DCA 1991).

[20] s. 768.28(5), F.S.

[21] *Id.*.; A claim bill, also known as a relief bill, is a legislative measure that directs the Chief Financial Officer of Florida, or, if applicable, a unit of local government, to pay a specific sum of money to a claimant to satisfy an excess judgment or equitable claim.

[22] *Id.*

[23] s. 768.28 (9)(a), F.S.

[24] s. 284.31, F.S.

[25] The State Risk Management Trust Fund provides the self-insurance pool for payment of workers' compensation claims, general liability claims, automotive liability claims, federal civil rights claims and court awarded attorney's fees. The revenues for this fund are premiums paid by state agencies from the agency's special appropriation category for risk management insurance.

[26] Private contractors that have been designated as agents under s. 768.28(9), F.S. by the Legislature include health care providers of medical care to indigent state residents; health care providers under contract with the Department of Corrections to provide care to inmates; physicians retained by the Florida State Boxing Commission; Health care practitioners contracted by a state university board of trustees to provide medical services to college student athletes; and vendors under contract with the Department of Juvenile Justice to provide services to children and families in need or services for juvenile offenders. *See* ss. 768.28(9)(b)2., F.S.; 768.28(10)(a), F.S.; 548.046(1), F.S.; 768.28(12), F.S.; and 768.28(11), F.S.

[27] RESTATEMENT (SECOND) OF AGENCY § 1 (1957).

- Acknowledgment by the principal that the agent will act for him;
- The agent's acceptance of the undertaking; and
- Control by the principal over the actions of the agent.

Applying these principles in a 1997 case, *Stoll v. Noel,*[28] the Florida Supreme Court found that in appropriate factual circumstances, contract physician consultants for CMS may be deemed agents of the state for purposes of liability protection under s. 768.28, F.S. The court explained that whether CMS physician consultants are agents of the state turns on the degree of control retained or exercised by CMS.[29] The court pointed to the terms of the employment contract, the consultant's agreement to abide by CMS policies and rules, CMS's authority to authorize recommended services, and CMS's supervisory authority over all personnel in finding the *Stoll* contract physicians were agents of the state.[30]

DOH has taken a cautious approach regarding the applicability of *Stoll* to all CMS contract physicians, including CPT members. In a 2013 memorandum, the Deputy State Health Officer for CMS declined to make any definitive statement of when CMS contract physicians, individually or collectively, may be deemed an agent of the state for purposes of liability protection. The memorandum explained that the *Stoll* decision "does not establish a bright line legal test to determine when a CMS contracted physician will be deemed to be an agent of the state as a matter of law" and that DOH would continue to evaluate each case on its own merits.[31] It is also unclear to what extent the *Stoll* decision may provide protection to non-physician CPT members.

In the last 5-10 years, the uncertain status of CPT members as "agents" of the state for purposes of liability protection under s. 768.28(9), F.S., has resulted in the loss of one CPT medical director and complicated agency efforts to recruit at least three others.[32]

EFFECT OF BILL

The bill statutorily designates members of child protection teams[33] as "officers, employees, or agents" of the state for purposes of sovereign immunity protection when acting within the scope of his or her duties as a team member. As a result, CPT members may not be held personally liable for torts committed in such capacity; instead the state may be held liable for such torts up to the limits established under the state's statutory waiver of sovereign immunity.

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[28] *Stoll v. Noel*, 694 So. 2d 701 (1997).
[29] *Id.* at 703.
[30] Specifically, the court found that "CMS requires each consultant, as a condition of participating in the CMS program, to agree to abide by the terms published in its HRS Manual and CMS Consultant's Guide which contain CMS policies and rules governing its relationship with the consultants. The Consultant's Guide states that all services provided to CMS patients must be authorized in advance by the clinic medical director. The language of the HRS Manual ascribes to CMS responsibility to supervise and direct the medical care of all CMS patients and supervisory authority over all personnel. The manual also grants to the CMS medical director absolute authority over payment for treatments proposed by consultants. The HRS Manual and the Consultant's Guide demonstrate that CMS has final authority over all care and treatment provided to CMS patients, and it can refuse to allow a physician consultant's recommended course of treatment of any CMS patient for either medical or budgetary reasons. Our conclusion is buttressed by HRS's acknowledgment that the manual creates an agency relationship between CMS and its physician consultants, and despite its potential liability in this case, HRS has acknowledged full financial responsibility for the physicians' actions. HRS's interpretation of its manual is entitled to judicial deference and great weight." *Stoll v. Noel*, 694 So. 2d 701, 703(Fla. 1997).
[31] Memorandum from Dennis V. Cookro, MD, MPH, Interim Deputy Secretary of Health, Deputy State Health Officer for CMS, to All CMS Physicians, RE: Liability Update (February 6, 2013)(on file with the Civil Justice Subcommittee).
[32] Email from Douglas S. Bell, Attorney at Law, Pennington, P.A., RE: CPT Related Questions (Feb. 3, 2015)(on file with the Civil Justice Subcommittee).
[33] "Child protection team" means a team of professionals established by the Department of Health to receive referrals from the protective investigators and protective supervision staff of the department and to provide specialized and supportive services to the program in processing child abuse, abandonment, or neglect cases. s. 39.01(13), F.S.

B. SECTION DIRECTORY:

Section 1 amends s. 768.28, F.S., relating to sovereign immunity in tort actions.

Section 2 provides an effective date of July 1, 2016.

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 may have a minimal negative fiscal impact on state expenditures. The bill extends liability coverage under the Insurance Risk Management Trust Fund to members of a CPT. Cases in which a CPT member is found liable will result in expenditures from the fund. Additionally, judgments in excess of the caps established under the sovereign immunity waiver may be presented to the Legislature for additional payment.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

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

2. Expenditures:

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

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

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

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

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

2. Other:

None.

B. RULE-MAKING AUTHORITY:

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

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

n/a

A bill to be entitled

An act relating to child protection teams; amending s. 768.28, F.S.; revising the definition of the term "officer, employee, or agent," as it applies to immunity from personal liability in certain actions, to include any member of a child protection team, in certain circumstances; providing an effective date.

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

Section 1. Paragraphs (a) and (b) of subsection (9) of section 768.28, Florida Statutes, are amended to read:

768.28 Waiver of sovereign immunity in tort actions; recovery limits; limitation on attorney fees; statute of limitations; exclusions; indemnification; risk management programs.—

(9)(a) An ~~No~~ officer, employee, or agent of the state or of any of its subdivisions may not ~~shall~~ be held personally liable in tort or named as a party defendant in any action for any injury or damage suffered as a result of any act, event, or omission of action in the scope of her or his employment or function, unless such officer, employee, or agent acted in bad faith or with malicious purpose or in a manner exhibiting wanton and willful disregard of human rights, safety, or property. However, such officer, employee, or agent shall be considered an adverse witness in a tort action for any injury or damage

CODING: Words ~~stricken~~ are deletions; words underlined are additions.

suffered as a result of any act, event, or omission of action in the scope of her or his employment or function. The exclusive remedy for injury or damage suffered as a result of an act, event, or omission of an officer, employee, or agent of the state or any of its subdivisions or constitutional officers is ~~shall be~~ by action against the governmental entity, or the head of such entity in her or his official capacity, or the constitutional officer of which the officer, employee, or agent is an employee, unless such act or omission was committed in bad faith or with malicious purpose or in a manner exhibiting wanton and willful disregard of human rights, safety, or property. The state or its subdivisions are ~~shall~~ not ~~be~~ liable in tort for the acts or omissions of an officer, employee, or agent committed while acting outside the course and scope of her or his employment or committed in bad faith or with malicious purpose or in a manner exhibiting wanton and willful disregard of human rights, safety, or property.

(b) As used in this subsection, the term:

1. "Employee" includes any volunteer firefighter.

2. "Officer, employee, or agent" includes, but is not limited to, any health care provider when providing services pursuant to s. 766.1115; any nonprofit independent college or university located and chartered in this state which owns or operates an accredited medical school, and its employees or agents, when providing patient services pursuant to paragraph (10)(f); ~~and~~ any public defender or her or his employee or

agent, including~~, among others,~~ an assistant public defender or ~~and~~ an investigator; and any member of a child protection team, as defined in s. 39.01, when carrying out her or his duties as a team member.

Section 2. This act shall take effect July 1, 2016.

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 747 Digital Assets
SPONSOR(S): Fant
TIED BILLS: None. **IDEN./SIM. BILLS:** CS/SB 494

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Civil Justice Subcommittee		Malcolm	Bond
2) Insurance & Banking Subcommittee			
3) Judiciary Committee			

SUMMARY ANALYSIS

The bill creates the Florida Fiduciary Access to Digital Assets Act to provide specified fiduciaries, specifically the personal representative of a decedent, an agent under a power of attorney, a guardian, or a trustee, with the ability to access the digital assets of the decedent, principal, or ward. Digital assets include electronic communications and records such as emails, text messages, online photographs, documents stored on the cloud, electronic bank statements, and other electronic communications or records.

In general, the bill provides that a fiduciary will have access to a catalogue of the user's communications (the "outside of the envelope") but not the content (the "inside of the envelope"), unless the user consented to the disclosure of the content of the communication.

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

The bill provides an effective date of July 1, 2016.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Current Situation

Many documents and records that once existed in tangible form, such as letters, contracts, and financial and bank statements, are being replaced by intangible digital assets[1] that are not readily discoverable or accessible. Substantial amounts of valuable electronic data and digital assets are acquired and stored in cell phones, computers, online accounts, and other devices. Consequently, a family member or personal representative often faces substantial challenges when trying to identify, locate, or access the digital assets of a deceased or incapacitated person.

This switch to digital assets raises a number of issues: Upon an account holder's death or incapacity, how does a fiduciary identify and locate that person's digital assets? Who then has control or ownership? How is an account accessed when no one has the decedent's password? Does the original terms-of-service agreement control whether a fiduciary may gain access to an account?

Resolution of these issues require balancing the fiduciary's duty to identify and access the digital assets with the Internet Service Provider's (ISP) duty to protect the original account holder's privacy in accordance with state and federal computer security laws. An additional barrier may exist in the terms-of-service agreement that the original account holder agreed to when initiating a contract with the ISP.

Electronic Communication Laws

Federal Law

Federal laws prohibit the unauthorized access of both computer systems and certain types of protected data. The Stored Communications Act[2] (SCA) establishes privacy rights and prohibits certain electronic communication services or remote computing services from knowingly divulging the contents of certain electronic communications and files. An ISP is prohibited from voluntarily divulging the contents of stored communications unless an exception applies under the act. However, a "lawful consent" exception allows an ISP to voluntarily disclose electronic communications if lawful consent is given.[3]

The privacy protections in the SCA are viewed by some as being substantial barriers for family members and fiduciaries who seek to access the contents of a deceased or incapacitated user's online accounts.[4] The ISPs see them as restrictions on their ability to disclose electronic communications to anyone, unless certain exceptions are met. Their reasoning is that if the SCA applies, the ISP is prohibited from disclosing the contents of the communications and files.[5]

The Computer Fraud and Abuse Act[6] (CFAA) is designed to protect computers in which there is a federal interest from certain threats and forms of espionage and from being used to commit fraud.[7] The

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[1] Some examples of digital assets are e-mail, photos, projects, online bank accounts, personal records, digital music, entertainment, presentations, domain names, intellectual property, and client lists. The assets are generally important because of their sentimental or financial value.
[2] 18 U.S.C. s. 2701 *et seq.*
[3] 18 U.S.C. s. 2702(b)(c).
[4] James D. Lamm, Digital Passing: *Your Client is Six Feet Under, But His Data is in the Cloud*, Nov. 2014, 12 (on file with the Civil Justice Subcommittee).
[5] *Id.*
[6] 18 U.S.C. s. 1030, *et seq.*
[7] Charles Doyle, Congressional Research Service, *Cybercrime: A Sketch of 18 U.S.C. 1030 and Related Federal Criminal Laws*, 1 (Oct. 15, 2014).

law imposes penalties for the unauthorized access of stored data, devices, and computer hardware.[8] The Department of Justice has stated that the CFAA is broad enough in scope to permit the federal government to prosecute a person who violates the access terms of a web site's terms-of-service agreement or usage policies.[9]

State Law

Chapter 815, F.S., the "Florida Computer Crimes Act," and ch. 934, F.S., related to security of communications surveillance, address computer related crimes and the security of communications. These provisions are modeled after the federal SCA. Like the SCA, neither provision addresses the ability of a fiduciary to legally access, duplicate, or control digital assets.[10]

The Model Uniform Law

Believing that legislation was needed to ensure that account holders and their fiduciaries retain control of digital property, the Uniform Law Commission developed and adopted the Uniform Fiduciary Access to Digital Assets Act in July 2014. Versions of the model act were introduced in numerous state legislatures in 2015. The Uniform Law Commission reconvened in 2015 to readdress the issue and produced a revised version of the model act for 2016. The bill is a state adaptation of the Revised Uniform Fiduciary Access to Digital Access Act, referred to as the Revised UFADAA.

Effect of the Bill

The bill creates ch. 740, F.S., consisting of ss. 740.001-740.09, F.S., the "Florida Fiduciary Access to Digital Assets Act," (Act) to provide fiduciaries with the authority to access, control, or copy digital assets and accounts. The Act only applies to four types of fiduciaries: personal representatives, guardians, agents acting pursuant to a power of attorney, and trustees. These fiduciaries are already bound to comply with existing fiduciary duties. The provisions of the Act do not extend to family members or others who seek access to the digital assets unless they are a fiduciary.

The bill is also limited by the definition of "digital asset." The Act only applies to an electronic record in which an individual has a right or interest, and does not apply to the underlying asset or liability unless the asset or liability is itself an electronic record.[11]

Definitions (Section 3)

The bill creates s. 740.002, F.S., to define terms used in the Act. The majority of the terms are found in the Florida Probate Code and the Florida Power of Attorney Act, while others are adapted from federal statutes or the Revised UFADAA. Below are some of the most frequently used new terms in the bill:

- An "account" is as an arrangement under a terms-of-service agreement in which the custodian carries, maintains, processes, receives, or stores a digital asset of the user or provides goods or services to the user;
- "Catalogue of electronic communications" means information that identifies each person with which a user has had an electronic communication, the time and date of the communication, and the electronic address of the person;

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[8] William Bissett and David Kauffman, *Surf the Evolving Web of Laws Affecting Digital Assets*, 41 Estate Planning No. 4 (Apr. 2014).
[9] Lamm, *supra* note 4, at 10.
[10] The Real Property, Probate, & Trust Law Section of The Florida Bar, *White Paper: Proposed Enactment of Chapter 740, Florida Statutes*, 2, (2015) (on file with the Civil Justice Subcommittee).
[11] "Digital assets include electronically-stored information, such as: 1) any information stored on a computer and other digital devices; 2) content uploaded onto websites, ranging from photos to documents; and 3) rights in digital property, such as domain names or digital entitlements associated with online games. Both the catalogue and content of an electronic communication are covered by the term 'digital assets.'" *Id.* at 7.

- "Content of an electronic communication" is defined to mean information concerning the substance of an electronic communication which has been sent or received by a user; is in electronic storage, or carried or maintained by a custodian; and, is not readily accessible to the public;[12]
- A "custodian" is defined as a person that carries, maintains, processes, receives, or stores a digital asset of a user, such as an ISP;
- A "designated recipient" is defined as a person chosen by a user through an online tool to administer digital assets of the user;
- A "digital asset" is defined as a record that is electronic but does not include the underlying asset or liability unless the asset or liability is a record that is electronic[13];
- "Electronic communication" has the same meaning as provided in federal law[14]; and
- "Online tool" means an electronic service provided by a custodian that allows the user, in an agreement separate and distinct from the terms-of-service agreement, to provide directions for disclosure or nondisclosure of digital assets to a third person.

A User's Direction for Disclosure of Digital Assets (Section 4)

The bill creates s. 740.003, F.S., to establish a user's ability to direct disclosure of the user's digital assets and the order of preference for his or her direction. It is a three-tiered priority system.

The first priority is a user's online direction for a specific account. If a company provides an online tool for a user to designate a person to have access to his or her account upon death or incapacity, and the user takes advantage of the online tool, then the user's designation prevails over a contrary provision in the user's will or trust provided that the online tool allows the user to modify or delete a direction at any time. The user may direct the custodian to disclose or not disclose some or all of his or her digital assets, even the content of electronic communications.

The second priority is the user's direction contained in a valid will, trust, power of attorney, or other record if the user has not used an online tool to give direction or the custodian has not provided an online tool. If the user makes plans for disposing of his or her digital assets, then the law gives effect to that plan and the custodian of the digital assets is required to comply with the plan.

The third priority is the terms-of-service agreement that governs the account. If the user does not provide for the disposition of his or her digital assets, whether via an online tool or in an estate plan, the terms-of-service governing the account control.

Terms-of-Service Agreement is Preserved (Section 5)

The bill creates s. 740.004, F.S., to provide that a terms-of-service agreement[15] is preserved and the fiduciary has no greater rights than the user has under the terms-of-service agreement. However, a fiduciary's access to digital assets may be modified or eliminated by a user, federal law, or by a terms-of-service agreement if the user has not provided direction under newly-created s. 740.003, F.S.

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[12] In lay terms, this is generally understood to be the "inside of an envelope" or the subject line of an e-mail, the body of an e-mail or attachment, or the body of other types of electronic communications.

[13] Based on this definition, a fiduciary's access to a digital asset does not mean that the fiduciary is entitled to "own" or otherwise engage in transactions with the asset; rather, the fiduciary has access to the electronically-stored information that constitutes the "digital asset." *White Paper*, *supra* note 11, at 7.

[14] 18 U.S.C. § 2510(12) ("Electronic communication" means "any transfer of signs, signals, writing, images, sounds, data, or intelligence of any nature transmitted in whole or in part by a wire, radio, electromagnetic, photoelectronic or photooptical system that affects interstate or foreign commerce, but does not include: any wire or oral communication; any communication made through a tone-only paging device; any communication from a tracking device; electronic funds transfer information stored by a financial institution in a communications system used for the electronic storage and transfer of funds.")

[15] A "terms-of-service agreement" is defined in the bill as "an agreement that controls the relationship between a user and a custodian."

Procedure for Custodians When Disclosing Assets (Section 6)

Section 740.005, F.S., is created to provide three options to a custodian for disclosing digital assets. When a custodian discloses a user's digital assets, the custodian may:

- allow the fiduciary or designated recipient full access to the user's account;
- allow the fiduciary or designated recipient partial access to the account that is sufficient to perform necessary tasks; or
- provide the fiduciary or designated recipient with a copy in a record of the digital asset that the user could have accessed if he or she were alive.

If a user directs or a fiduciary requests a custodian to disclose some, but not all of the user's digital assets, the custodian is not required to disclose the assets if segregating the assets would be unduly burdensome. If the custodian believes that an undue burden exists, the custodian or the fiduciary may seek a court order to disclose:

- a subset of the user's digital assets;
- all of the digital assets to the fiduciary or designated recipient, or to the court for a review in chambers; or
- none of the user's digital assets.

A custodian may charge a reasonable administrative fee for the cost of disclosing digital assets, and a custodian is not required to disclose a digital asset that a user has deleted.

Four Types of Fiduciaries Covered (Sections 7—14)

The bill creates ss. 740.006-740.04, F.S., to establish the rights of a personal representative, guardian, agent acting pursuant to a power of attorney, or trustee to access a user's digital assets. In general, fiduciaries will have access to a catalogue of the user's communications (the "outside of the envelope") but not the content (the "inside of the envelope"), unless the user consented to the disclosure of the content of the communication. Because the fiduciary has the same authority as the deceased user (no more and no less), the fiduciary is "authorized" by the deceased user as required under the two federal statutes (the SCA and CFAA) that prohibit unauthorized access.[16]

Disclosure of the Content of Electronic Communications of a Deceased User (Section 7)

The bill creates s. 740.006, F.S., to establish the rights of a personal representative of a decedent to access the contents of an electronic communication of the user.[17] A personal representative may not access the contents of a decedent's electronic communications unless the user consented to or a court directs such access.

A custodian must disclose the content of an electronic communication if the personal representative provides:

- a written request for disclosure;
- a certified copy of the user's death certificate;
- a certified copy of the letters of administration or similar specified authority;
- a copy of the user's will, trust, power of attorney, or other record evidencing the user's consent to disclosure of the content of electronic communications unless the user provided direction in an online tool; and
- if the custodian requests, the personal representative must provide specified information that will identify the user's account, evidence linking the account to the user; or a finding by the court that the user had a specific account with the custodian; that disclosure of the contents would not violate the SCA or other federal law relating to privacy of telecommunication carriers' customer

[16] *White Paper*, *supra* note 11, at 3.

[17] Newly-created s. 740.007, F.S., addresses disclosure of non-content and other digital assets of a deceased user.

information; that the user consented to disclosure of the content; or disclosure of the content is reasonably necessary for the administration of the estate.

Disclosure of Other Digital Assets of a Deceased User (Section 8)

Section 740.007, F.S., is created to provide a personal representative default access to the catalogue, or "outside of the envelope," of electronic communications and other digital assets that are not protected by federal privacy laws.[18] A personal representative is permitted to access all of a decedent's other digital assets, excluding the contents of electronic communications, unless the deceased user prohibited disclosure or a court orders otherwise. The custodian must disclose a catalog of the user's electronic communications and the user's digital assets of the user if the personal representative provides:

- a written request for disclosure;
- a certified copy of the user's death certificate;
- a certified copy of the letters of administration or similar specified authority; and
- if the custodian requests, the personal representative must provide information that will identify the user's account; evidence linking the account to the user; an affidavit stating that disclosure is reasonably necessary for the administration of the estate; or a court order finding that the user had an account with the custodian or that disclosure of the digital assets is reasonably necessary for the administration of the estate.

Disclosure of Content of Electronic Communications of a Principal (Section 9)

The bill creates s. 740.008, F.S., to provide that an agent acting pursuant to a power of attorney may access the contents of a principal's electronic communications if the authority is expressly granted by the principal and is not otherwise restricted by the principal or a court. The custodian is required to disclose the contents if the agent provides:

- a written request for disclosure;
- an original or copy of the power of attorney in which the authority over the content is expressly granted to the agent;
- a certification by the agent that the power of attorney is in effect; and
- if requested by the custodian, information assigned by the custodian to identify the principal's account or evidence linking the account to the principal.

Disclosure of Other Digital Assets of a Principal (Section 10)

Section 740.009, F.S., is created to provide that an agent acting pursuant to a power of attorney granting specific authority over the digital assets or granting general authority to act on behalf of the principal may access a catalog of the principal's electronic communications and the principal's digital assets, but not the content of electronic communications, unless otherwise ordered by a court, directed by the principal, or provided by a power of attorney. The custodian is required to disclose the digital assets if the agent provides:

- a written request for disclosure;
- an original or a copy of the power of attorney which grants the agent specific authority over digital assets or general authority to act on behalf of the principal;
- a certification by the agent that the power of attorney is in effect; and
- if requested by the custodian, identifying information assigned by the custodian to identify the principal's account or evidence linking the account to the principal.

[18] *See* "Electronic Communication Laws" section above.

Disclosure of Digital Assets held in Trust when the Trustee is the Original User (Section 11)

The bill creates s. 740.01, F.S., to provide that a trustee who is an original user may access any digital assets that are held in the trust, including the catalogue and the content of electronic communications, unless it is otherwise ordered by a court or provided in the trust.

Disclosure of Content of Electronic Communications Held in Trust When a Trustee is not the Original User (Section 12)

The bill creates s. 740.02, F.S., to provide that a trustee, who is not an original user, may access the content of an electronic communication that was sent or received by an original or successor user and carried, maintained, processed, received, or stored by the custodian in the account of the trust if the trust instrument consents to the disclosure of the content to the trustee. A trustee's access may be limited by court order, at the direction of the user, or by the trust instrument. The custodian is required to disclose the contents if the agent provides:

- A written request for disclosure;
- A certified copy of the trust instrument or a certification of trust which includes consent to disclosure of the content to the trustee;
- A certification by the trustee that the trust exists and the trustee is a currently acting trustee; and
- If requested by the custodian, certain identifying information assigned by the custodian to identify the trust's account or evidence linking the account to the trust.

Disclosure of Other Digital Assets Held in Trust When the Trustee is not the Original User (Section 13)

The bill creates s. 740.03, F.S., to provide that unless prohibited by a court, the user, or the trust instrument, a trustee who is not the original user may access the catalog of electronic communications and any digital assets, except the content of electronic communications, in an account of the trust. The trustee must supply the custodian with:

- A written request for disclosure;
- A certified copy of the trust instrument or a certification of trust;
- A certification by the trustee that the trust exists and that the trustee is a currently acting trustee; and
- If requested by the custodian, specified information assigned by the custodian to identify the principal's account or evidence linking the account to the principal.

Disclosure of Digital Assets to a Guardian of a Ward (Section 14)

Section 740.04, F.S., is created to provide that a guardian is not authorized to access the contents of a ward's electronic communications unless the ward expressly grants consent to do so. A guardian is permitted, however, to access the ward's other digital assets pursuant to letters of guardianship or a court order, unless directed otherwise by a court or the user. The guardian must provide the custodian with:

- A written request for disclosure;
- A certified copy of letters of plenary guardianship of the property or the court order giving the guardian authority over the digital assets of the ward; and
- If requested by the custodian, specified information assigned by the custodian to identify the ward's account or evidence linking the account to the ward.

A custodian of the ward's digital assets may suspend or terminate the ward's account for good cause if requested to do so by a guardian with general authority to manage the ward's property. The request to suspend or terminate must be accompanied by a certified copy of the court order giving the guardian the authority over the ward's property.

Fiduciary Duty and Authority (Section 15)

Section 740.05, F.S., establishes the legal duties of a fiduciary charged with managing digital assets. This includes the duties of care, loyalty, and confidentiality. Section 740.05(2), F.S., establishes the fiduciary's authority to exercise control over the digital assets in conjunction with other statutes. The fiduciary's authority is:

- Subject to the terms-of-service agreement, except as directed in the online tool;
- Subject to other laws, including copyright law;
- Limited by the scope of the fiduciary's duties; and
- May not be used to impersonate the user.

A fiduciary who has authority over the tangible personal property of a decedent, ward, principal, or settlor has the right to access any digital asset in which those persons had or has a right or interest if the digital asset is not held by a custodian or subject to a terms-of-service agreement. For purposes of any applicable computer fraud or unauthorized computer access laws, a fiduciary who acts within the scope of the fiduciary's duties is an authorized user of the property. A fiduciary who has authority over the tangible personal property of a decedent, ward, principal, or settlor has the right to access the property and any digital assets that are stored in it and is an authorized user for the purpose of computer fraud and unauthorized computer access laws.

A custodian is authorized to disclose information in an account to a user's fiduciary if the information is required to terminate an account used to access digital assets licensed to the user.

A fiduciary who requests that a custodian terminate a user's account must submit the request in writing, along with:

- a certified copy of the death certificate of the user, if the user is deceased;
- a certified copy of the letters of administration or other specified court orders; and
- if requested by the custodian, specified information assigned by the custodian to identify the ward's account or evidence linking the account to the ward, or a court finding that the user had a specific account with the custodian, identifiable by certain enumerated information.

Custodian Compliance and Immunity (Section 16)

The bill creates s. 740.06, F.S., to provide that a custodian has 60 days to comply with a request from a fiduciary or designated recipient to disclose digital assets or to terminate an account. If the custodian does not comply, the fiduciary or designated representative may seek a court order directing compliance. An order directing compliance must contain a finding that compliance would not be in violation of 18 U.S.C. s. 2702, related to the disclosure of electronic communications or records.

A custodian may deny a request for disclosure or termination if the custodian is aware of any lawful access to the account after the custodian receives the fiduciary's request. The bill does not limit a custodian's ability to require a fiduciary or designated recipient from obtaining a court order that specifies that an account belongs to the ward or principal, specifies that there is sufficient consent from the ward or principal, and contains any findings required by law other than those required in the Act.

A custodian and its officers, employees, and agents are immune from liability for acts or omissions done in good faith and in compliance with the Act.

Electronic Signatures in Global and National Commerce Act (Section 17)

Section 740.07, F.S., is created to establish the relationship between the Act and the federal Electronic Signatures in Global and National Commerce Act,[19] noting where this Act does and does not modify, limit, or supersede federal law.

Applicability of the Act (Section 18)

Section 740.921, F.S., created by the bill, provides that the powers granted by the Act to a fiduciary, personal representative, guardian, trustee, or agent applies regardless of whether such person's authority arose on, before, or after July 1, 2016 (the effective date of the bill). The bill also provides that the Act applies to a custodian if the user resides in this state or resided in this state at the time of the user's death.

The bill does not apply to a digital asset of an employer used by an employee in the ordinary course of the employer's business.

Severability (Section 19)

Section 740.09, F.S., is created to provide a severability provision that provides that if any provision is held invalid, the other provisions of the Act will remain in effect.

Effective Date (Section 20)

The bill provides an effective date of July 1, 2016.

B. SECTION DIRECTORY:

Section 1 creates ch. 740, F.S., consisting of ss. 740.001-740.09, F.S., to be entitled "Fiduciary Access to Digital Assets."

Section 2 creates s. 740.001, F.S., relating to the short title.

Section 3 creates s. 740.002, F.S., relating to definitions.

Section 4 creates s. 740.003, F.S., relating to user direction for disclosure of digital assets.

Section 5 creates s. 740.004, F.S., relating to terms-of-service agreement preserved.

Section 6 creates s. 740.005, F.S., relating to procedure for disclosing digital assets.

Section 7 creates s. 740.006, F.S., relating to disclosure of content of electronic communications of deceased user.

Section 8 creates s. 740.007, F.S., relating to disclosure of other digital assets of deceased user.

Section 9 creates s. 740.008, F.S., relating to disclosure of content of electronic communications of principal.

Section 10 creates s. 740.009, F.S., relating to disclosure of other digital assets of principal.

[19] The Electronic Signatures in Global and National Commerce Act (ESIGN), 15 U.S.C. ss. 7001 et seq., is designed "to facilitate the use of electronic records and signatures in interstate and foreign commerce by ensuring the validity and legal effect of contracts entered into electronically." Bureau of Consumer Protection, Federal Trade Commission and National Telecommunications and Information Administration, Department of Commerce, *Report to Congress: Electronic Signatures in Global and National Commerce Act, The Consumer Consent Provision in Section 101(c)(1)(C)(ii)*, i (June 2001) www.ntia.doc.gov/files/ntia/publications/esign7.pdf (last visited Dec. 14, 2015).

Section 11 creates s. 740.01, F.S., relating to disclosure of digital assets held in trust when trustee is the original user.

Section 12 creates s. 740.02, F.S., relating to disclosure of content of electronic communications held in trust when trustee is not the original user.

Section 13 creates s. 740.03, F.S., relating to disclosure of other digital assets held in trust when trustee is not the original user.

Section 14 creates. s. 740.04, F.S., relating to disclosure of digital assets to guardian of ward.

Section 15 creates s. 740.05, F.S., relating to fiduciary duty and authority.

Section 16 creates s. 740.06, F.S., relating to custodian compliance and immunity.

Section 17 creates s. 740.07, F.S., relating to relation to Electronic Signatures in Global and National Commerce Act.

Section 18 creates s. 740.08, F.S., relating to applicability.

Section 19 creates s. 740.09, F.S., relating to severability.

Section 20 provides an effective date of July 1, 2016.

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:

   Provisions in the bill allowing application to the circuit courts for orders directing compliance, requests for disclosures segregating assets, assertions by custodians claiming selective disclosures impose an undue burden, and determinations requiring in camera review may increase the expenditure of judicial time and resources. However, these matters will be case-specific and any corresponding increase in judicial time or court workload is indeterminate.[20]

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.

[20] Office of the State Courts Administrator, 2016 Judicial Impact Statement, SB 494, p. 2 (Nov. 12, 2015) (on file with the Civil Justice Subcommittee).

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

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

2. Other:

The preemption doctrine is a principle of law which holds that federal laws take precedence over state laws, and as such, states may not enact laws that are inconsistent with the federal law. Under the Electronic Communications Privacy Act, or ECPA, a service provider, with few exceptions, may not divulge the contents of a communication without the "lawful consent" of the originator, addressee, intended recipient, or the subscriber.[21] Under the provisions of this bill, an online tool is created and controlled by the ISP that is separate from the terms of service agreement. This online tool allows the account holder or user to specifically "opt in" and grant permission to the fiduciary to access his or her digital assets. This affirmative act may be deemed to trigger the "lawful consent" exception to ECPA thus appearing to avoid conflict with the ECPA.

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

n/a

[21] 18 U.S.C. § 2702(b)(3).

A bill to be entitled

An act relating to digital assets; providing a directive to the Division of Law Revision and Information; creating s. 740.001, F.S.; providing a short title; creating s. 740.002, F.S.; defining terms; creating s. 740.003, F.S.; authorizing a user to use an online tool to allow a custodian to disclose or to prohibit a custodian from disclosing digital assets under certain circumstances; providing that specified user's direction overrides a contrary provision in a terms-of-service agreement under certain circumstances; creating s. 740.004, F.S.; providing construction; authorizing the modification of a fiduciary's assets under certain circumstances; creating s. 740.005, F.S.; providing procedures for the disclosure of digital assets; creating s. 740.006, F.S.; requiring a custodian to disclose the content of electronic communications of a deceased user under certain circumstances; creating s. 740.007, F.S.; requiring a custodian to disclose other digital assets of a deceased user under certain circumstances; creating s. 740.008, F.S.; requiring a custodian to disclose the content of electronic communications of a principal under certain circumstances; creating s. 740.009, F.S.; requiring a custodian to disclose other digital assets of a principal under certain

circumstances; creating s. 740.01, F.S.; requiring a custodian to disclose to a trustee who is the original user the digital assets held in trust under certain circumstances; creating s. 740.02, F.S.; requiring a custodian to disclose to a trustee who is not the original user the content of electronic communications held in trust under certain circumstances; creating s. 740.03, F.S.; requiring a custodian to disclose to a trustee who is not the original user other digital assets under certain circumstances; creating s. 740.04, F.S.; authorizing the court to grant a guardian the right to access a ward's digital assets under certain circumstances; requiring a custodian to disclose to a guardian a specified catalog of electronic communications and specified digital assets of a ward under certain circumstances; creating s. 740.05, F.S.; imposing fiduciary duties; providing for the rights and responsibilities of certain fiduciaries; creating s. 740.06, F.S.; requiring compliance of a custodian; providing construction; providing for immunity from liability for a custodian and its officers, employees, and agents acting in good faith in complying with their duties; creating s. 740.07, F.S.; providing construction; creating s. 740.08, F.S.; providing applicability; creating s. 740.09, F.S.; providing severability; providing an

effective date.

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

Section 1. The Division of Law Revision and Information is directed to create chapter 740, Florida Statutes, consisting of ss. 740.001-740.09, Florida Statutes, to be entitled "Fiduciary Access to Digital Assets."

Section 2. Section 740.001, Florida Statutes, is created to read:

740.001 Short title.—This chapter may be cited as the "Florida Fiduciary Access to Digital Assets Act."

Section 3. Section 740.002, Florida Statutes, is created to read:

740.002 Definitions.—As used in this chapter, the term:

(1) "Account" means an arrangement under a terms-of-service agreement in which the custodian carries, maintains, processes, receives, or stores a digital asset of the user or provides goods or services to the user.

(2) "Agent" means a person that is granted authority to act for a principal under a durable or nondurable power of attorney, whether denominated an agent, an attorney in fact, or otherwise. The term includes an original agent, a co-agent, and a successor agent.

(3) "Carries" means to engage in the transmission of electronic communications.

(4) "Catalog of electronic communications" means information that identifies each person with which a user has had an electronic communication, the time and date of the communication, and the electronic address of the person.

(5) "Content of an electronic communication" means information concerning the substance or meaning of the communication which:

(a) Has been sent or received by a user;

(b) Is in electronic storage by a custodian providing an electronic communication service to the public or is carried or maintained by a custodian providing a remote computing service to the public; and

(c) Is not readily accessible to the public.

(6) "Court" means a circuit court of this state.

(7) "Custodian" means a person that carries, maintains, processes, receives, or stores a digital asset of a user.

(8) "Designated recipient" means a person chosen by a user through an online tool to administer digital assets of the user.

(9) "Digital asset" means an electronic record in which an individual has a right or interest. The term does not include an underlying asset or liability unless the asset or liability is itself an electronic record.

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

(11) "Electronic communication" has the same meaning as

provided in 18 U.S.C. s. 2510(12).

(12) "Electronic communication service" means a custodian that provides to a user the ability to send or receive an electronic communication.

(13) "Fiduciary" means an original, additional, or successor personal representative, guardian, agent, or trustee.

(14) "Guardian" means a person who is appointed by the court as guardian of the property of a minor or an incapacitated individual. The term includes an original guardian, a co-guardian, and a successor guardian, as well as a person appointed by the court as an emergency temporary guardian of the property.

(15) "Information" means data, text, images, videos, sounds, codes, computer programs, software, databases, or the like.

(16) "Online tool" means an electronic service provided by a custodian which allows the user, in an agreement distinct from the terms-of-service agreement between the custodian and user, to provide directions for disclosure or nondisclosure of digital assets to a third person.

(17) "Person" means an individual, estate, trust, business or nonprofit entity, public corporation, government or governmental subdivision, agency, or instrumentality, or other legal entity.

(18) "Personal representative" means the fiduciary appointed by the court to administer the estate of a deceased

individual pursuant to letters of administration or an order appointing a curator or administrator ad litem for the estate. The term includes an original personal representative, a copersonal representative, and a successor personal representative, as well as a person who is entitled to receive and collect a deceased individual's property pursuant to an order of summary administration issued pursuant to chapter 735.

(19) "Power of attorney" means a record that grants an agent authority to act in the place of a principal pursuant to chapter 709.

(20) "Principal" means an individual who grants authority to an agent in a power of attorney.

(21) "Record" means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.

(22) "Remote computing service" means a custodian that provides to a user computer processing services or the storage of digital assets by means of an electronic communications system as defined in 18 U.S.C. s. 2510(14).

(23) "Terms-of-service agreement" means an agreement that controls the relationship between a user and a custodian.

(24) "Trustee" means a fiduciary that holds legal title to property under an agreement, declaration, or trust instrument that creates a beneficial interest in the settlor or other persons. The term includes an original trustee, a cotrustee, and a successor trustee.

(25) "User" means a person that has an account with a custodian.

(26) "Ward" means an individual for whom a guardian has been appointed.

(27) "Will" means an instrument admitted to probate, including a codicil, executed by an individual in the manner prescribed by the Florida Probate Code, which disposes of the individual's property on or after his or her death. The term includes an instrument that merely appoints a personal representative or revokes or revises another will.

Section 4. Section 740.003, Florida Statutes, is created to read:

740.003 User direction for disclosure of digital assets.—

(1) A user may use an online tool to direct the custodian to disclose or not to disclose some or all of the user's digital assets, including the content of electronic communications. If the online tool allows the user to modify or delete a direction at all times, a direction regarding disclosure using an online tool overrides a contrary direction by the user in a will, trust, power of attorney, or other record.

(2) If a user has not used an online tool to give direction under subsection (1) or if the custodian has not provided an online tool, the user may allow or prohibit disclosure to a fiduciary of some or all of the user's digital assets, including the content of electronic communications sent or received by the user, in a will, trust, power of attorney, or

other record.

(3) A user's direction under subsection (1) or subsection (2) overrides a contrary provision in a terms-of-service agreement that does not require the user to act affirmatively and distinctly from the user's assent to the terms of service.

Section 5. Section 740.004, Florida Statutes, is created to read:

740.004 Terms-of-service agreement preserved.—

(1) This chapter does not change or impair a right of a custodian or a user under a terms-of-service agreement to access and use the digital assets of the user.

(2) This chapter does not give a fiduciary any new or expanded rights other than those held by the user for whom, or for whose estate or trust, the fiduciary acts or represents.

(3) A fiduciary's access to digital assets may be modified or eliminated by a user, by federal law, or by a terms-of-service agreement if the user has not provided direction under s. 740.003.

Section 6. Section 740.005, Florida Statutes, is created to read:

740.005 Procedure for disclosing digital assets.—

(1) When disclosing the digital assets of a user under this chapter, the custodian may, at its sole discretion:

(a) Grant a fiduciary or designated recipient full access to the user's account;

(b) Grant a fiduciary or designated recipient partial

access to the user's account sufficient to perform the tasks with which the fiduciary or designated recipient is charged; or

(c) Provide a fiduciary or designated recipient a copy in a record of any digital asset that, on the date the custodian received the request for disclosure, the user could have accessed if the user were alive and had full capacity and access to the account.

(2) A custodian may assess a reasonable administrative charge for the cost of disclosing digital assets under this chapter.

(3) A custodian is not required to disclose under this chapter a digital asset deleted by a user.

(4) If a user directs or a fiduciary requests a custodian to disclose under this chapter some, but not all, of the user's digital assets to the fiduciary or a designated recipient, the custodian is not required to disclose the assets if segregation of the assets would impose an undue burden on the custodian. If the custodian believes the direction or request imposes an undue burden, the custodian or the fiduciary may seek an order from the court to disclose:

(a) A subset limited by date of the user's digital assets;

(b) All of the user's digital assets to the fiduciary or designated recipient, or to the court for review in chambers; or

(c) None of the user's digital assets.

Section 7. Section 740.006, Florida Statutes, is created to read:

740.006 Disclosure of content of electronic communications of deceased user.—If a deceased user consented to or a court directs the disclosure of the content of electronic communications of the user, the custodian shall disclose to the personal representative of the estate of the user the content of an electronic communication sent or received by the user if the personal representative gives to the custodian:

(1) A written request for disclosure which is in physical or electronic form;

(2) A certified copy of the death certificate of the user;

(3) A certified copy of the letters of administration, the order authorizing a curator or administrator ad litem, the order of summary administration issued pursuant to chapter 735, or other court order;

(4) Unless the user provided direction using an online tool, a copy of the user's will, trust, power of attorney, or other record evidencing the user's consent to disclosure of the content of electronic communications; and

(5) If requested by the custodian:

(a) A number, username, address, or other unique subscriber or account identifier assigned by the custodian to identify the user's account;

(b) Evidence linking the account to the user; or

(c) A finding by the court that:

1. The user had a specific account with the custodian, identifiable by information specified in paragraph (a);

2. Disclosure of the content of electronic communications of the user would not violate 18 U.S.C. ss. 2701 et seq., 47 U.S.C. s. 222, or other applicable law;

3. Unless the user provided direction using an online tool, the user consented to disclosure of the content of electronic communications; or

4. Disclosure of the content of electronic communications of the user is reasonably necessary for the administration of the estate.

Section 8. Section 740.007, Florida Statutes, is created to read:

740.007 Disclosure of other digital assets of deceased user.—Unless a user prohibited disclosure of digital assets or the court directs otherwise, a custodian shall disclose to the personal representative of the estate of a deceased user a catalog of electronic communications sent or received by the user and digital assets of the user, except the content of electronic communications, if the personal representative gives to the custodian:

(1) A written request for disclosure which is in physical or electronic form;

(2) A certified copy of the death certificate of the user;

(3) A certified copy of the letters of administration, the order authorizing a curator or administrator ad litem, the order of summary administration issued pursuant to chapter 735, or other court order; and

(4) If requested by the custodian:

(a) A number, username, address, or other unique subscriber or account identifier assigned by the custodian to identify the user's account;

(b) Evidence linking the account to the user;

(c) An affidavit stating that disclosure of the user's digital assets is reasonably necessary for the administration of the estate; or

(d) An order of the court finding that:

1. The user had a specific account with the custodian, identifiable by information specified in paragraph (a); or

2. Disclosure of the user's digital assets is reasonably necessary for the administration of the estate.

Section 9. Section 740.008, Florida Statutes, is created to read:

740.008 Disclosure of content of electronic communications of principal.—To the extent a power of attorney expressly grants an agent authority over the content of electronic communications sent or received by the principal and unless directed otherwise by the principal or the court, a custodian shall disclose to the agent the content if the agent gives to the custodian:

(1) A written request for disclosure which is in physical or electronic form;

(2) An original or copy of the power of attorney expressly granting the agent authority over the content of electronic communications of the principal;

(3) A certification by the agent, under penalty of perjury, that the power of attorney is in effect; and

(4) If requested by the custodian:

(a) A number, username, address, or other unique subscriber or account identifier assigned by the custodian to identify the principal's account; or

(b) Evidence linking the account to the principal.

Section 10. Section 740.009, Florida Statutes, is created to read:

740.009 Disclosure of other digital assets of principal.—Unless otherwise ordered by the court, directed by the principal, or provided by a power of attorney, a custodian shall disclose to an agent with specific authority over the digital assets or with general authority to act on behalf of the principal a catalog of electronic communications sent or received by the principal, and digital assets of the principal, except the content of electronic communications, if the agent gives the custodian:

(1) A written request for disclosure which is in physical or electronic form;

(2) An original or a copy of the power of attorney which gives the agent specific authority over digital assets or general authority to act on behalf of the principal;

(3) A certification by the agent, under penalty of perjury, that the power of attorney is in effect; and

(4) If requested by the custodian:

(a) A number, username, address, or other unique subscriber or account identifier assigned by the custodian to identify the principal's account; or

(b) Evidence linking the account to the principal.

Section 11. Section 740.01, Florida Statutes, is created to read:

740.01 Disclosure of digital assets held in trust when trustee is the original user.—Unless otherwise ordered by the court or provided in a trust, a custodian shall disclose to a trustee that is an original user of an account any digital asset of the account held in trust, including a catalog of electronic communications of the trustee and the content of electronic communications.

Section 12. Section 740.02, Florida Statutes, is created to read:

740.02 Disclosure of content of electronic communications held in trust when trustee is not the original user.—Unless otherwise ordered by the court, directed by the user, or provided in a trust, a custodian shall disclose to a trustee that is not an original user of an account the content of an electronic communication sent or received by an original or successor user and carried, maintained, processed, received, or stored by the custodian in the account of the trust if the trustee gives the custodian:

(1) A written request for disclosure which is in physical or electronic form;

(2) A certified copy of the trust instrument, or a certification of trust under s. 736.1017, which includes consent to disclosure of the content of electronic communications to the trustee;

(3) A certification by the trustee, under penalty of perjury, that the trust exists and that the trustee is a currently acting trustee of the trust; and

(4) If requested by the custodian:

(a) A number, username, address, or other unique subscriber or account identifier assigned by the custodian to identify the trust's account; or

(b) Evidence linking the account to the trust.

Section 13. Section 740.03, Florida Statutes, is created to read:

740.03 Disclosure of other digital assets held in trust when trustee is not the original user.—Unless otherwise ordered by the court, directed by the user, or provided in a trust, a custodian shall disclose to a trustee that is not an original user of an account, a catalog of electronic communications sent or received by an original or successor user and stored, carried, or maintained by the custodian in an account of the trust and any digital assets in which the trust has a right or interest, other than the content of electronic communications, if the trustee gives the custodian:

(1) A written request for disclosure which is in physical or electronic form;

(2) A certified copy of the trust instrument, or a certification of trust under s. 736.1017;

(3) A certification by the trustee, under penalty of perjury, that the trust exists and that the trustee is a currently acting trustee of the trust; and

(4) If requested by the custodian:

(a) A number, username, address, or other unique subscriber or account identifier assigned by the custodian to identify the trust's account; or

(b) Evidence linking the account to the trust.

Section 14. Section 740.04, Florida Statutes, is created to read:

740.04 Disclosure of digital assets to guardian of ward.—

(1) After an opportunity for a hearing under chapter 744, the court may grant a guardian access to the digital assets of a ward.

(2) Unless otherwise ordered by the court or directed by the user, a custodian shall disclose to a guardian the catalog of electronic communications sent or received by the ward and any digital assets in which the ward has a right or interest, other than the content of electronic communications, if the guardian gives the custodian:

(a) A written request for disclosure which is in physical or electronic form;

(b) A certified copy of letters of plenary guardianship of the property or the court order that gives the guardian

authority over the digital assets of the ward; and

(c) If requested by the custodian:

1. A number, username, address, or other unique subscriber or account identifier assigned by the custodian to identify the ward's account; or

2. Evidence linking the account to the ward.

(3) A guardian with general authority to manage the property of a ward may request a custodian of the digital assets of the ward to suspend or terminate an account of the ward for good cause. A request made under this section must be accompanied by a certified copy of the court order giving the guardian authority over the ward's property.

Section 15. Section 740.05, Florida Statutes, is created to read:

740.05 Fiduciary duty and authority.—

(1) The legal duties imposed on a fiduciary charged with managing tangible property apply to the management of digital assets, including:

(a) The duty of care;

(b) The duty of loyalty; and

(c) The duty of confidentiality.

(2) A fiduciary's authority with respect to a digital asset of a user:

(a) Except as otherwise provided in s. 740.003, is subject to the applicable terms-of-service agreement;

(b) Is subject to other applicable law, including

copyright law;

(c) Is limited by the scope of the fiduciary's duties; and

(d) May not be used to impersonate the user.

(3) A fiduciary with authority over the tangible personal property of a decedent, ward, principal, or settlor has the right to access any digital asset in which the decedent, ward, principal, or settlor had or has a right or interest and that is not held by a custodian or subject to a terms-of-service agreement.

(4) A fiduciary acting within the scope of the fiduciary's duties is an authorized user of the property of the decedent, ward, principal, or settlor for the purpose of applicable computer fraud and unauthorized computer access laws, including under chapter 815.

(5) A fiduciary with authority over the tangible personal property of a decedent, ward, principal, or settlor:

(a) Has the right to access the property and any digital asset stored in it; and

(b) Is an authorized user for the purpose of computer fraud and unauthorized computer access laws, including under chapter 815.

(6) A custodian may disclose information in an account to a fiduciary of the user when the information is required to terminate an account used to access digital assets licensed to the user.

(7) A fiduciary of a user may request a custodian to

terminate the user's account. A request for termination must be in writing, in paper or electronic form, and accompanied by:

(a) If the user is deceased, a certified copy of the death certificate of the user;

(b) A certified copy of the letters of administration; the order authorizing a curator or administrator ad litem; the order of summary administration issued pursuant to chapter 735; or the court order, power of attorney, or trust giving the fiduciary authority over the account; and

(c) If requested by the custodian:

1. A number, username, address, or other unique subscriber or account identifier assigned by the custodian to identify the user's account;

2. Evidence linking the account to the user; or

3. A finding by the court that the user had a specific account with the custodian, identifiable by the information specified in subparagraph 1.

Section 16. Section 740.06, Florida Statutes, is created to read:

740.06 Custodian compliance and immunity.—

(1) Not later than 60 days after receipt of the information required under ss. 740.006-740.04, a custodian shall comply with a request under this chapter from a fiduciary or designated recipient to disclose digital assets or terminate an account. If the custodian fails to comply, the fiduciary or designated representative may apply to the court for an order

directing compliance.

(2) An order under subsection (1) directing compliance must contain a finding that compliance is not in violation of 18 U.S.C. s. 2702.

(3) A custodian may notify a user that a request for disclosure or to terminate an account was made under this chapter.

(4) A custodian may deny a request under this chapter from a fiduciary or designated representative for disclosure of digital assets or to terminate an account if the custodian is aware of any lawful access to the account following the receipt of the fiduciary's request.

(5) This chapter does not limit a custodian's ability to obtain or require a fiduciary or designated recipient requesting disclosure or termination under this chapter to obtain a court order that:

(a) Specifies that an account belongs to the ward or principal;

(b) Specifies that there is sufficient consent from the ward or principal to support the requested disclosure; and

(c) Contains a finding required by a law other than this chapter.

(6) A custodian and its officers, employees, and agents are immune from liability for an act or omission done in good faith in compliance with this chapter.

Section 17. Section 740.07, Florida Statutes, is created

to read:

740.07 Relation to Electronic Signatures in Global and National Commerce Act.—This chapter modifies, limits, and supersedes the Electronic Signatures in Global and National Commerce Act, 15 U.S.C. ss. 7001 et seq., but does not modify, limit, or supersede s. 101(c) of that act, 15 U.S.C. s. 7001(c), or authorize electronic delivery of any of the notices described in s. 103(b) of that act, 15 U.S.C. s. 7003(b).

Section 18. Section 740.08, Florida Statutes, is created to read:

740.08 Applicability.—

(1) Subject to subsection (3), this chapter applies to:

(a) A fiduciary acting under a will, trust, or power of attorney executed before, on, or after July 1, 2016;

(b) A personal representative acting for a decedent who died before, on, or after July 1, 2016;

(c) A guardian appointed through a guardianship proceeding, whether pending in a court or commenced before, on, or after July 1, 2016; and

(d) A trustee acting under a trust created before, on, or after July 1, 2016.

(2) This chapter applies to a custodian if the user resides in this state or resided in this state at the time of the user's death.

(3) This chapter does not apply to a digital asset of an employer used by an employee in the ordinary course of the

employer's business.

Section 19. Section 740.09, Florida Statutes, is created to read:

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

Section 20. This act shall take effect July 1, 2016.

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 815 Courts
SPONSOR(S): Harrison
TIED BILLS: None **IDEN./SIM. BILLS:** None

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Civil Justice Subcommittee		King	Bond
2) Justice Appropriations Subcommittee			
3) Judiciary Committee			

SUMMARY ANALYSIS

The Second District Court of Appeal (2nd DCA) is currently headquartered in Lakeland, Florida. The court has long since outgrown its building in Lakeland and has been renting additional space inside Stetson University College of Law's Tampa Law Center about 35 miles west of the current headquarters for over 35 years. This bill moves the headquarters of the 2nd DCA to Tampa. It also provides for more flexibility in where the records for the District Courts of Appeal and Florida Supreme Court can be kept.

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

This bill becomes effective July 1, 2016.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Second District Court of Appeal

The state's judicial landscape is split into counties, circuits, and districts. Counties are the smallest judicial unit. County judges have jurisdiction over civil claims under $15,000 and criminal cases dealing with misdemeanors.[1] There are 67 counties in Florida. Judicial circuits are made up of between one[2] and seven[3] counties and serve as the trial courts for civil claims over $15,000, criminal cases dealing with felony charges, and are the first intermediate court of appeal for decisions of county courts.[4] Florida has 20 circuits. Florida's circuits are divided into five appellate districts. These five districts serve as the intermediate and final appeal of right for many cases in Florida.[5] These districts can be comprised of as few as two counties (3rd DCA) or as many as 32 counties (1st DCA).

The 2nd DCA is comprised of 12 counties and serves 28% of Florida's citizens. It is currently headquartered in Lakeland, Florida, 40 minutes east of Tampa, but the Court also has a branch inside Stetson University's Tampa Law Center[6] since 1980.[7] It leases this space for $513,324 per year.[8] Currently, 11 of the 16 judges and six of the 11 central staff attorneys have their offices in the Tampa Law Center.[9]

The Second District's geographical jurisdiction stretches from Pasco County in the north to Collier County in the South and over to Polk and Highlands Counties in the east. But, almost half of its cases come from Hillsborough and Pinellas Counties. This bill moves the headquarters of the 2nd DCA from Lakeland to Tampa, which is more geographically central for the majority of the citizen's using the Court. This bill does not affect the court's ability to keep a branch office in Lakeland, and because the bill no longer requires the clerk's office to be in the headquarters, it could remain in Lakeland.

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[1] s. 34.01, F.S.
[2] 3rd circuit.
[3] 11th, 13th, 15th, 16th, and 17th circuits.
[4] s. 26.012, F.S.
[5] s. 35.01, F.S.
[6] Stetson University, *About Tampa Law Center* (last visited Dec. 22, 2015) http://www.stetson.edu/law/about/home/tampa-law-center.php; Second District Court of Appeal, *Tampa Branch* (last visited Dec. 22, 2015) http://www.2dca.org/Directions/tampa.shtml.
[7] District Court of Appeal, Second District, *Facility Needs Assessment* 3 (July 2015) (on file with the Civil Justice Subcommittee).
[8] *Id.* at 5, n.3. The lease is designed to gradually increase the price of rent until it reaches $634,317 in FY 2022-23.
[9] *Id.* at 1.

2nd DCA Filings by County

County	%
Hillsborough	30.1%
Pinellas	19.3%
Polk	12.2%
Lee	8.7%
Pasco	6.1%
Manatee	6.1%
Sarasota	5.6%
Collier	4.6%
Charlotte	2.6%
Highlands	2.3%
DeSoto	1.1%
Hendry	0.7%
Hardee	0.5%
Glades	0.2%

Clerks of the Court

Background and Current Law

Appellate court clerks are constitutional officers.[10] However, the constitution says nothing about their duties. It only states that they serve at the pleasure of the Court they are attached to.[11] The duties of an appellate clerk are set forth in the Florida Judicial Rules of Administration.[12] The clerk collects filing fees, maintains the records of the Court, and issues mandates of the Court.[13]

Current law provides that the clerk of the Supreme Court must maintain an office and keep custody of all the court's records in the Supreme Court building,[14] while the clerk of a District Court must maintain an office and keep custody of all the court's records at the headquarters of the Court.[15]

Effect of the Bill

This bill removes the requirement that the clerks of the DCAs keep custody of the court's records at the headquarters; however, the Florida Rules of Judicial Administration still require that the clerk of the Supreme Court and DCAs keep the Court's records in the clerk's office which must be at the Court's headquarters.[16] The bill provides that an appellate clerk should maintain the records of the court as directed by the Supreme Court but deletes the requirement that the clerk keep custody of the records in his or her office. The clerk of a district court is still required to have an office at the Court's headquarters, but it likewise deletes the requirement that the clerk keep custody of the Court's records in his or her office.

B. SECTION DIRECTORY:

Section 1 amends s. 25.221, F.S., revising provisions concerning materials of the Florida Supreme Court.

Section 2 amends s. 25.301, F.S., revising provisions concerning filing decisions of the Florida Supreme Court.

Section 3 amends s. 35.05, F.S., changing the headquarters of the 2nd DCA to Tampa from Lakeland.

[10] FLA. CONST. art. V, ss. 3(c), 4(c).
[11] *Id.*
[12] FLA. R. J. ADMIN. 2.205(b), 2.210(b).
[13] *Id.*
[14] ss. 25.221, 25.211, 25.301, F.S.
[15] ss. 35.15, 35.23, 35.24, F.S.
[16] FLA. R. J. ADMIN. 2.205(b)(3), 2.210(b)(1).

Section 4 amends s. 35.15, F.S., revising provisions concerning custody and maintenance of decisions to be filed with the court.

Section 5 amends s. 35.23, F.S., revising provisions concerning location of the clerk's office.

Section 6 amends s. 35.24, F.S., revising provisions concerning court records.

Section 7 provides an effective date of July 1, 2016.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

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

2. Expenditures:

   This bill does not appear to have any impact on state expenditures.[17]

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

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

2. Expenditures:

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

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

This 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:

   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:

B. RULE-MAKING AUTHORITY:

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

[17] Office of State Courts Administrator, 2016 Judicial Impact Statement: House Bill 815, January 11, 2016 (on file with Civil Justice Subcommittee).

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

n/a

A bill to be entitled

An act relating to courts; amending s. 25.221, F.S.; revising provisions concerning books, records, and other materials of the Supreme Court; amending s. 25.301, F.S.; revising provisions concerning the filing of decisions of the Supreme Court; amending s. 35.05, F.S.; transferring the headquarters of the Second Appellate District; amending s. 35.15, F.S.; revising provisions concerning the filing of decisions of the district courts of appeal and their judges; amending s. 35.23, F.S.; deleting a requirement that the clerk of a district court of appeal keep records at the headquarters office; requiring such clerk to have an office at the headquarters; amending s. 35.24, F.S.; revising provisions concerning books, records, and other materials of the district courts of appeal; providing an effective date.

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

Section 1. Section 25.221, Florida Statutes, is amended to read:

25.221 Maintenance ~~Custody~~ of books, records, etc.—All books, papers, records, files, and the seal of the Supreme Court shall be maintained by ~~kept in the office of~~ the clerk of said court and in the clerk's control, as prescribed by the Supreme

Court ~~custody~~.

Section 2. Section 25.301, Florida Statutes, is amended to read:

25.301 Decisions to be filed; copies to be furnished.—All decisions and opinions delivered by said court or any justice thereof in relation to any action or proceeding pending in said court shall be filed ~~and remain~~ in the office of the clerk and maintained in the control of the clerk, as prescribed by the Supreme Court. Such decisions or opinions~~, and~~ shall not be taken out except by order of the court; but said clerk shall at all times be required to furnish to any person who may desire the same certified copies of such opinions and decisions, upon receiving his or her fees therefor.

Section 3. Subsection (1) of section 35.05, Florida Statutes, is amended to read:

35.05 Headquarters.—

(1) The headquarters of the First Appellate District shall be in the Second Judicial Circuit, Tallahassee, Leon County; of the Second Appellate District in the Thirteenth ~~Tenth~~ Judicial Circuit, Tampa ~~Lakeland~~, Hillsborough ~~Polk~~ County; of the Third Appellate District in the Eleventh Judicial Circuit, Miami-Dade County; of the Fourth Appellate District in the Fifteenth Judicial Circuit, Palm Beach County; and the Fifth Appellate District in the Seventh Judicial Circuit, Daytona Beach, Volusia County.

Section 4. Section 35.15, Florida Statutes, is amended to

read:

35.15 Decisions to be filed; copies to be furnished.—All decisions and opinions delivered by the district courts of appeal or any judge thereof in relation to any action or proceeding pending in said court shall be filed ~~and remain~~ in the office of the clerk and maintained in the control of the clerk. Such decisions or opinions~~, and~~ shall not be taken therefrom except by order of the court; but said clerk shall at all times be required to furnish to any person who may desire the same certified copies of such opinions and decisions, upon receiving his or her fees therefor.

Section 5. Section 35.23, Florida Statutes, is amended to read:

35.23 Location of clerk's office.—Each clerk shall have an office ~~keep his or her records~~ at the headquarters of the district court of appeal.

Section 6. Section 35.24, Florida Statutes, is amended to read:

35.24 Maintenance ~~Custody~~ of books, records, etc.—All books, papers, records, files, and the seal of each district court of appeal shall be maintained by, and in the control ~~kept in the office~~ of, the clerk of said court.

Section 7. This act shall take effect July 1, 2016.

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 821 Reimbursement of Assessments
SPONSOR(S): Rooney, Jr.
TIED BILLS: None **IDEN./SIM. BILLS:** SB 1692

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Civil Justice Subcommittee		Bond NB	Bond NB
2) Justice Appropriations Subcommittee			
3) Judiciary Committee			

SUMMARY ANALYSIS

An individual can be accredited by the Department of Veterans Affairs to become an "accredited representative." These representatives assist a claimant (a veteran) in applying for veterans benefits or appealing a denial of such benefits. If successful, the department may withhold and pay to the accredited representative the representative's fee. The department assesses and deducts an administrative fee from the fee for representation equal to the lesser of 5% of the representation fee or $100. The representative is prohibited from directly or indirectly charging the veteran for this administrative fee.

This bill provides that it is a third degree felony for any accredited representative to request, receive or obtain reimbursement of the administrative fee from the veteran.

The Criminal Justice Estimating Conference has not determined the prison bed impact of this bill.

The effective date of the bill is July 1, 2016, although the prohibition does not apply until October 1, 2017.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Background

The United States Department of Veterans Affairs (VA) provides our veterans with various benefits, including disability, pension, health care, and life insurance benefits. Since the VA is an agency of the Federal government, disputes as to a veteran's entitlement to benefits are resolved through the administrative process rather than the judicial process. The VA determines who is qualified to represent or assist veterans in their claim for benefits. Therefore, a person must apply and be approved by the VA in order to assist or advise a person who is considering bringing a claim for benefits before the VA.[1] An accredited representative does not need to be an attorney, though the accreditation requirements for attorneys and non-attorneys are different. Any non-attorney who meets certain character and fitness requirements, passes a written examination, and shows that he or she "is qualified to render valuable assistance to claimants, and is otherwise competent to advise and assist claimants in the preparation, presentation, and prosecution of their claim(s) before the Department" can be approved to assist veterans with claims.[2] The VA refers to an approved attorney or approved claim agent as an "accredited representative."

An accredited representative may charge and collect a fee for his or her work representing a veteran, but that fee must be reasonable.[3] A fee is presumed to be reasonable if the fee is under 20% and presumed to be unreasonable if it's over 33 1/3% of the past due benefits.[4] The fee agreement between the veteran and the representative may provide for the VA to pay the representation fee directly to the accredited representative out of the benefit award if the fee is 20% or less of the total benefit award.[5] For making a direct payment of the fee for representation, the VA charges the accredited representative an assessment[6] equal to the lesser of 5% of the fee award or $100.[7] Federal law prohibits an accredited representative from directly or indirectly charging the claimant for this assessment.[8]

The statute also provides that "[w]hoever wrongfully withholds from any claimant or beneficiary any part of a benefit or claim allowed and due to the claimant or beneficiary, shall be fined as provided in title 18,[9] or imprisoned not more than one year, or both."[10] It is possible that the action of an accredited representative in collecting a reimbursement of the representative's administrative fee would be a criminal offense under federal law.

Effect of the Bill

The bill provides that it is a third degree felony for any accredited person to request, receive or obtain reimbursement of the administrative fee from the veteran. A third degree felony is punishable by up to five years in prison or a $5,000 fine or both.

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[1] 38 U.S.C. §§ 5901-04; 38 C.F.R. § 14.629(b)(1).
[2] 38 C.F.R. § 14.629(b)(1)(i), (b)(2).
[3] 38 U.S.C. § 5904(a)(5)
[4] 38 C.F.R. § 14.636(e) and (f)
[5] 38 C.F.R. § 14.636(h)(i).
[6] 38 U.S.C. § 5904(a)(6)(A).
[7] 38 U.S.C. § 5904(a)(6)(B).
[8] 38 U.S.C. § 5904(a)(6)(D).
[9] Title 18 of the United States Code delineates federal crimes.
[10] 38 U.S.C. § 5905.

B. SECTION DIRECTORY:

Section 1 creates s. 295.24, F.S., regarding prohibited reimbursements.

Section 2 provides an effective date of July 1, 2016.

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 appears to have an indeterminate negative fiscal impact on state expenditures. The Criminal Justice Estimating Conference has not determined the prison bed impact of this bill.

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:

Article V, section 15 of the Florida Constitution vests the power to discipline lawyers in the Florida Supreme Court, and Florida Bar Rule 4-1.5(a) prohibits fees that are illegal. Since charging the claimant this fee is already illegal under Federal law, the Florida Bar rules regulate this conduct. A court may find that this law is an indirect attempt to discipline a lawyer for what is otherwise an unethical billing practice that subjects the attorney to professional discipline. If so, the court could find the statute to violate the court's exclusive jurisdiction to discipline attorneys.

On the other hand, this law is applied equally to individuals who are not attorneys. An accredited representative does not have to be an attorney. Also, the law does not speak to whether or not an

attorney found guilty of charging the administrative fee to the claimant must be professionally disciplined. Therefore, a court may find that the law does not regulate attorneys at all.

B. RULE-MAKING AUTHORITY:

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

C. DRAFTING ISSUES OR OTHER COMMENTS:

It is unclear why the effective date of the bill is July 1, 2016, but the effect of the bill is delayed in the text until October 1, 2017.

Under current law, the lowest dollar value related to a non-violent felony offense is $150.[11] This bill creates a felony for a non-violent offense of any sum, no matter how small, which sum would never exceed $100 in value.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

n/a

[11] s. 825.05(2)(a), F.S. (bad check in exchange for something of value).

A bill to be entitled

An act relating to reimbursement of assessments; creating s. 295.24, F.S.; prohibiting an agent or attorney representing a claimant from directly or indirectly requesting, receiving, or obtaining reimbursement from the claimant for assessments charged to the agent or attorney by the United States Department of Veterans Affairs; providing penalties; providing an effective date.

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

Section 1. Section 295.24, Florida Statutes, is created to read:

295.24 Prohibited reimbursement of assessments; penalty.-Effective October 1, 2017, a person who is recognized as an agent or attorney pursuant to 38 U.S.C. s. 5904 and representing a claimant may not, directly or indirectly, request, receive, or obtain reimbursement from the claimant for assessments charged to the agent or attorney by the United States Department of Veterans Affairs pursuant to 38 U.S.C. s. 5904(6)(A). A person who violates this section commits a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

Section 2. This act shall take effect July 1, 2016.

COMMITTEE/SUBCOMMITTEE AMENDMENT

Bill No. HB 821 (2016)

Amendment No. 1

COMMITTEE/SUBCOMMITTEE ACTION	
ADOPTED	__ (Y/N)
ADOPTED AS AMENDED	__ (Y/N)
ADOPTED W/O OBJECTION	__ (Y/N)
FAILED TO ADOPT	__ (Y/N)
WITHDRAWN	__ (Y/N)
OTHER	_____

Committee/Subcommittee hearing bill: Civil Justice Subcommittee

Representative Rooney offered the following:

Amendment

Remove lines 16-24 and insert:

A person who is recognized as an agent or attorney pursuant to 38 U.S.C. s. 5904 and representing a claimant may not, directly or indirectly, request, receive, or obtain reimbursement from the claimant for assessments charged to the agent or attorney by the United States Department of Veterans Affairs pursuant to 38 U.S.C. s. 5904(6)(A). A person who violates this section commits a misdemeanor of the second degree, punishable as provided in s. 775.082 or s. 775.083.

Section 2. This act shall take effect October 1, 2016.