Civil Justice Subcommittee

Monday, February 1, 2016
3:00 p.m. – 6:00 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:	Monday, February 01, 2016 03:00 pm
End Date and Time:	Monday, February 01, 2016 06:00 pm
Location:	Sumner Hall (404 HOB)
Duration:	3.00 hrs

Consideration of the following bill(s):

CS/HB 743 Mobile Homes by Business & Professions Subcommittee, Latvala, Burgess
HB 3509 Relief/Andrea Castillo/City of Hialeah by Nuñez
HB 3515 Relief/Q.B./Palm Beach County School Board by Fitzenhagen
HB 3517 Relief/Alex Zaldivar, Brienna Campos, & Remington Campos/Orange County by Bracy
HB 3525 Relief/Melvin & Alma Colindres/City of Miami by Artiles

Consideration of the following proposed committee substitute(s):

PCS for HB 615 -- Parenting Plans
PCS for HB 679 -- Public Records
PCS for HB 949 -- Attorneys for Dependent Children with Special Needs
PCS for HB 1005 -- Prejudgment Interest
PCS for HB 1073 -- Military Support

NOTICE FINALIZED on 01/28/2016 4:23PM by Ingram.Michele

PCS for HB 615

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: PCS for HB 615 Parenting Plans
SPONSOR(S): Civil Justice Subcommittee
TIED BILLS: None **IDEN./SIM. BILLS:** SB 794

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

SUMMARY ANALYSIS

A parenting plan is a document established in a divorce or support action which details the legal rights and responsibilities of separated parents with regard to timesharing and parenting of their minor child. A parenting plan has two basic components: "parental responsibility" and "time-sharing."

Parental responsibility refers to the responsibility and right of each parent to make parenting decisions regarding the child's education, health care, and social and religious activities. Under current law, a court must order shared parental responsibility in almost every case unless the court finds that shared parental responsibility would be detrimental to the child. Shared parental responsibility requires that both parents confer with one another so that major decisions affecting the welfare of the child will be determined jointly.

The bill provides that a parenting plan which orders shared parental responsibility over healthcare decisions for a child must authorize either parent to consent to mental health treatment. Accordingly, each parent retains full parental rights but does not have to confer with or obtain the assent of the other parent before seeking mental health treatment for the child.

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

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

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

BACKGROUND

Parenting Plans – In General

A parenting plan is a document established in a divorce or support proceeding under ch. 61, F.S., which details the legal rights and responsibilities of separated parents with regard to timesharing and parenting of their minor child. The parenting plan must be developed and agreed to by the parents and approved by a court; or established by the court, if the parents cannot agree.[1]

The parenting plan may address the child's education, health care, and physical, social, and emotional well-being, but at a minimum must:[2]

- Describe in adequate detail how the parents will share and be responsible for the daily tasks associated with the upbringing of the child;
- Include a time-sharing schedule which specifies the time that the minor child will spend with each parent;
- Designate the parent(s) responsible for health care, school-related matters, including the address to be used for school-boundary determination and registration, and other activities; and
- Address the methods and technologies that the parents will use to communicate with the child.

Thus, a parenting plan has two basic components: a "parental responsibility order" and a "time-sharing order." "Parental responsibility" refers to the responsibility and right to make parenting decisions for the child after the parents separate. "Timesharing" refers to the time, including overnights and holidays, that the child will spend with each parent.[3]

In establishing parental responsibility and timesharing, a court must consider the "best interests of the child.[4] Determining the best interest of the child requires the evaluation of all the factors affecting the welfare and interests of the child and the circumstances of the family, including, but not limited to:

- Any history of domestic violence.
- The moral fitness of the parents.
- The mental and physical health of the parents.
- The preference of the child.
- The willingness of each parent to comply with the parenting plan and encourage a close and continuing parenting relationship.
- The developmental stage and needs of the child.[5]

Parental Responsibility

Section 61.13(2)(c)2. requires that a court order *shared parental responsibility* in almost every case unless the court finds that shared parental responsibility would be detrimental to the child.[6] Shared parental responsibility provides that both parents retain full parental rights and responsibilities with respect to their child and both parents must confer with each other so that major decisions affecting the

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[1] s. 61.046(14), F.S.
[2] s. 61.13(2)(b), F.S.; A rebuttable presumption exists that shared parenting is detrimental to the child in cases in which a parent has been convicted of domestic violence or is incarcerated.
[3] s. 61.046(23), F.S.
[4] s. 61.13(2)(c), F.S.
[5] s. 61.13(3), F.S.
[6] *Id.*

welfare of the child will be determined jointly.[7] This statutory mandate limits the ability of courts to order any other parenting arrangement if not affirmatively requested by the parties, even if it is obvious that the best interests of the child are not served by *shared parental responsibility*.[8] Most parties routinely plead for shared parenting or consent to share parenting in a settlement agreement, even where there is considerable evidence that the parents are incapable of sharing parenting decisions.[9]

Nevertheless, in ordering shared parental responsibility, the court may consider the expressed desires of the parents and may grant to one party the ultimate responsibility over specific aspects of the child's welfare or may divide those responsibilities between the parties based on the best interests of the child.[10] An *ultimate responsibility shared parenting order* allows the parent given "ultimate authority" over an aspect of the child's life the authority to make a decision when the parents do not agree. However, the other parent may make a motion to have that parenting decision reviewed by the court.[11] Areas of responsibility may include education, health care, or any other responsibility the court finds unique to a particular family.[12]

A parent seeking *sole parental responsibility*, the exclusive right to make decisions regarding the minor child,[13] must petition the court for sole parental responsibility. A trial court has no independent authority to order sole parenting if there is no pleading asking for sole parenting and an allegation of a detriment to the child if shared parenting is ordered.[14] Upon the petitioner establishing that shared parenting is detrimental, the court must order sole parental responsibility if it is in the best interest of the child.[15]

Mental Health Treatment

Mental health professionals have recently identified a number of challenges presented in providing mental health or counseling services to minor clients whose parents are divorced or separated and share parenting decisions.[16] Obtaining the consent of both parents often involves navigating emotionally-charged and history-laden territory. This can create a tug-of-war between divorced or separated spouses who are, in effect, using their child as leverage in their marital dispute. This seems to arise most often when children need in-patient or full-day treatment for psychiatric issues related to depression, often caused by the family discord.[17]

In a 2010 article for the *Commentator*, a publication of the Family Law Section of the Florida Bar, one Florida Judge lamented the effect of the shared parenting requirement on decision-making regarding mental health:[18]

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[7] s. 61.046(17), F.S.

[8] Due process requires notice and an opportunity to be heard. Therefore, if a party does not ask for a particular relief allowed by law, i.e. sole parental responsibility, the court has no authority to grant the relief. *See Furman v. Furman*, 707 So. 2d 1183(Fla. 2d DCA 1998); *McDonald v. McDonald*, 732 So. 2d 505 (Fla. 4th DCA 1999); *McKeever v.McKeever*, 792 So. 2d 1234 (Fla. 4th DCA 2001).

[9] The Honorable R. Thomas Corbin, *A Parenting Plan Must Include a Parental Responsibility Order and a Time-Sharing Schedule*, THE FLORIDA BAR FAMILY LAW SECTION: COMMENTATOR (Fall 2010), p. 18, available at www.familylawfla.org/newsletter/pdfs/Fam-Fall-2010-web.pdf.

[10] s. 61.13(2)(c)2.a.

[11] *Supra* FN 9, at 19.

[12] s. 61.13(2)(c)2.a., F.S.

[13] s. 61.046(18), F.S.

[14] *Furman v. Furman*, 707 So. 2d 1183 (Fla. 2d DCA 1998).

[15] s. 61.13(2)(c)2.b.

[16] School of Social Work, University of North Carolina at Chapel Hill, *Theimann Advisory: FAQ on Services to Minors of Divorced Parents*, p. 2, available at, http://ssw.unc.edu/files/web/pdf/TheimannAdvisoryJune09.pdf (last visited January 29, 2016).

[17] Ann Bittinger, *Legal Hurdles to Leap to Get Medical Treatment for Children*, THE FLORIDA BAR JOURNAL (January 2006), p. 24, available at https://www.floridabar.org/DIVCOM/JN/JNJournal01.nsf/c0d731e03de9828d852574580042ae7a/afc19001ffae74fc852570e70055d33a!OpenDocument&Highlight=0,ann,bittinger*.

[18] *Supra* FN 9, at 18.

> In cases in which a settlement agreement or a judgment said the parents will "share parenting" family judges are frequently asked in post judgment motions to decide if a child should take medication for ADHD, depression, a bipolar condition, etc.,... because the parents cannot "confer with each other" and "share" these parenting decisions and neither one has any authority to make the decision alone because the order in their case requires them to "share parenting decisions."
>
> However, there is no authority that a judge in a Chapter 61 case has the power to make such parenting decision. A Chapter 61 judge has no authority to become a "super parent."

Arguments over the merits or disadvantages of a proposed treatment in post judgement motions delay the provision of necessary mental health treatment to the child until a court designates a parent to exercise either ultimate responsibility or sole responsibility over medical care of the child.

EFFECT OF THE BILL

The bill provides that a parenting plan which orders *shared parental responsibility* over healthcare decisions for the child must authorize either parent to consent to mental health treatment for the child. Accordingly, each parent retains full parental rights but does not have to confer with the other parent or obtain the assent of the other parent before seeking mental health treatment for the child.

If a parent exercises his or her right to consent to mental health treatment for the child without conferring with or obtaining the assent of the other parent as authorized by the bill, current law provides a mechanism for the non-consenting parent to file a petition for a modification of the parenting plan.[19] The supplemental petition must allege the disagreement on a parenting decision, that the disagreement is detrimental to the child, and request ultimate authority or sole responsibility as to health care decisions or all aspects of the child's life.[20] The court may modify the parenting plan if the non-consenting parent shows a substantial, material, and unanticipated change of circumstances.[21]

The bill does not authorize either parent to consent to mental health treatment in cases in which the court has designated one parent to exercise ultimate authority with regard to health care decisions or in cases in which the court has awarded sole parental responsibility to one parent because shared parenting has been determined to be a detriment to the child.

B. SECTION DIRECTORY:

Section 1 amends s. 61.13, F.S., relating to support of children; parenting and time-sharing; powers of court.

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.

[19] s. 61.13(3), F.S.
[20] *Supra* FN 9, at 18.
[21] s. 61.13(2)(c), F.S.

2. Expenditures:

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

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

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

2. Expenditures:

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

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

The bill does not appear to require counties or municipalities to take an action 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 parenting plans; amending s. 61.13, F.S.; providing that a parenting plan which provides for shared parental responsibility over health care decisions must authorize either parent to consent to mental health treatment for the child; providing an effective date.

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

Section 1. Paragraph (b) of subsection (2) of section 61.13, Florida Statutes, is amended to read:

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

(2)

(b) A parenting plan approved by the court must, at a minimum:

1. ~~,~~—Describe in adequate detail how the parents will share and be responsible for the daily tasks associated with the upbringing of the child;

2. Include the time-sharing schedule arrangements that specify the time that the minor child will spend with each parent;

3. Designate ~~a designation of~~ who will be responsible for:

a. Any and all forms of health care.~~,~~ If the court orders shared parental responsibility over health care decisions, the

parenting plan must provide that either parent may consent to mental health treatment for the child.

b. School-related matters including the address to be used for school-boundary determination and registration.~~, and~~

c. Other activities; and

4. Describe in adequate detail the methods and technologies that the parents will use to communicate with the child.

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

PCS for HB 679

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: PCS for HB 679 Public Records
SPONSOR(S): Civil Justice Subcommittee
TIED BILLS: None **IDEN./SIM. BILLS:** SB 1436

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

SUMMARY ANALYSIS

Victims of domestic, repeat, dating, or sexual violence, or stalking or cyberstalking may seek an injunction for protection if certain requirements are met.

The bill creates a public records exemption to provide that a petition for an injunction against domestic violence, repeat violence, dating violence, sexual violence, stalking, or cyberstalking that is dismissed without a hearing or at an ex parte hearing due to failure to state a claim, lack of jurisdiction, or any reason having to do with the sufficiency of the petition itself without an injunction being issued, and the contents of such a petition, is confidential and exempt from s. 119.07(1), F.S., and article I, s. 24(a) of the Florida Constitution.

The bill repeals the exemption on October 2, 2021, unless reviewed and saved from repeal by the Legislature. It also provides a statement of public necessity as required by the Florida Constitution.

The bill may have a minimal fiscal impact on the state and local governments. *See* Fiscal Comments section.

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

Article I, s. 24(c) of the Florida Constitution requires a two-thirds vote of the members present and voting for final passage of a newly created or expanded public records or public meetings exemption. The bill creates a public records exemption for certain court files related to a petition for an injunction against violence; thus, it requires a two-thirds vote for final passage.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Public Records, In General

Florida Constitution

Article I, s. 24(a) of the Florida Constitution sets forth the state's public policy regarding access to government records. The section guarantees every person a right to inspect or copy any public record of the legislative, executive, and judicial branches of government.

The Legislature, however, may provide by general law for the exemption of records from the requirements of article I, s. 24(a) of the Florida Constitution provided the exemption passes by two-thirds vote of each chamber, states with specificity the public necessity justifying the exemption (public necessity statement), and is no broader than necessary to meet its public purpose.[1]

Florida Statutes

The Florida Statutes also address the public policy regarding access to government records. Section 119.07(1), F.S., guarantees every person a right to inspect and copy any state, county, or municipal record, unless the record is exempt.

The Open Government Sunset Review Act[2] provides that a public record exemption may be created or maintained only if it serves an identifiable public purpose and the "Legislature finds that the purpose is sufficiently compelling to override the strong public policy of open government and cannot be accomplished without the exemption."[3] However, the exemption may be no broader than is necessary to meet one of the following purposes:

- Allow the state or its political subdivisions to effectively and efficiently administer a governmental program, which administration would be significantly impaired without the exemption;
- Protect sensitive personal information that, if released, would be defamatory or would jeopardize an individual's safety; however, only the identity of an individual may be exempted under this provision; or
- Protect trade or business secrets.[4]

The Open Government Sunset Review Act requires the automatic repeal of a public records exemption on October 2nd of the fifth year after its creation or substantial amendment, unless the Legislature reenacts the exemption.[5]

Public Records and Court Proceedings and Files

Independent of constitutional and statutory provisions that require court files to be generally open to the public, the courts have found that "both civil and criminal court proceedings in Florida are public events" and that courts must "adhere to the well established common law right of access to court proceedings and records."[6] The court found that "closure of court proceedings or records should occur only when necessary (a) to comply with established public policy set forth in the constitution, statutes, rules, or case law; (b) to protect trade secrets; (c) to protect a compelling governmental interest [e.g., national security; confidential informants]; (d) to obtain evidence to properly determine legal issues in a case; (e) to avoid substantial injury to innocent third parties [e.g., to protect young witnesses from offensive

[1] FLA. CONST. art. I, s. 24(c).
[2] s. 119.15, F.S.
[3] s. 119.15(6)(b), F.S.
[4] *Id.*
[5] s. 119.15(3), F.S.
[6] *Barron v. Florida Freedom Newspapers, Inc.*, 531 So.2d 113, 116 (Fla. 1988)(ruling that court files in divorce cases are generally open despite the desire of the parties for privacy).

testimony; to protect children in a divorce]; or (f) to avoid substantial injury to a party by disclosure of matters protected by a common law or privacy right not generally inherent in the specific type of civil proceeding sought to be closed."[7]

Public Record Exemption for Certain Court Files

Currently, s. 119.0714(1), F.S., in relevant part, provides public records exemptions for various types of personal information of contained in court files. Information currently exempt from public records requirements includes records prepared by an agency attorney,[8] various law enforcement confidential records,[9] social security numbers,[10] and bank account numbers.[11]

Injunctions for Protection against Specified Acts of Violence

Domestic Violence

Any person who is the victim of domestic violence[12] or who reasonably believes that he or she is in imminent danger of becoming the victim of domestic violence may file a petition for an injunction for protection against domestic violence.[13] The sworn petition must allege the existence of domestic violence and include specific facts and circumstances upon which relief is sought.[14]

The petition is immediately presented to a judge, who must review the petition. If it appears to the court that an immediate and present danger of domestic violence exists when the petition is filed, the court may grant a temporary injunction ex parte.[15,16] Temporary injunctions are only effective for a fixed period that cannot exceed 15 days.[17] The hearing on the petition must be set for a date on or before the date when the temporary injunction expires.[18] If the petition is insufficient, the court must dismiss the petition. Importantly, where the petition is dismissed as insufficient, the respondent is not notified of the petition.

If the petition is sufficient, a hearing must be set at the earliest possible time after a petition is filed and the respondent must be personally served with a copy of the petition.[19] At the hearing, specified injunctive relief may be granted if the court finds that the petitioner is:

- The victim of domestic violence; or
- Has reasonable cause to believe he or she is in imminent danger of becoming a victim of domestic violence.[20]

Alternatively, the court may dismiss the petition at the hearing.

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[7] *Id.* at 118.
[8] s. 119.0714(1)(a), F.S.
[9] ss. 119.0714(1)(c) through 119.0714(1)(h), F.S.
[10] s. 119.0714(1)(i), F.S.
[11] s. 119.0714(1)(j), F.S.
[12] Section 741.28, F.S., defines "domestic violence" as any assault, aggravated assault, battery, aggravated battery, sexual assault, sexual battery, stalking, aggravated stalking, kidnapping, false imprisonment, or any criminal offense resulting in physical injury or death of one family or household member by another family or household member.
[13] s. 741.30(1), F.S.
[14] s. 741.30(3), F.S.
[15] The court may grant such relief as it deems proper, including an injunction restraining the respondent from committing any acts of domestic violence, awarding to the petitioner the temporary exclusive use and possession of the dwelling that the parties share or excluding the respondent from the residence of the petitioner, and providing the petitioner a temporary parenting plan. s. 741.30(5), F.S.
[16] The only evidence admissible in the ex parte hearing is verified pleadings or affidavits, unless the respondent appears at the hearing *or* has received reasonable notice of the hearing. s. 741.30(5)(b), F.S.
[17] s. 741.30(5)(c), F.S.
[18] The court may grant a continuance of the hearing for good cause, which may include obtaining service of process. A temporary injunction must be extended, if necessary, during any period of continuance. s. 741.30(5)(c), F.S.
[19] s. 741.30(4), F.S.
[20] s. 741.30(6), F.S. Either party may move the court to modify or dissolve an injunction at any time. s. 741.30(6)(c) and (10), F.S.

Repeat, Dating, and Sexual Violence
Section 784.046, F.S., governs the issuance of injunctions against repeat violence,[21] dating violence,[22] and sexual violence.[23] This statute largely parallels the provisions and procedures discussed above regarding domestic violence injunctions.

Stalking and Cyberstalking
Section 784.0485, F.S., governs the issuance of injunctions against stalking and cyberstalking. This statute largely parallels the provisions and procedures discussed above regarding domestic violence injunctions.

Effect of the Bill
The bill creates s. 119.0714(1)(k), F.S., to provide that a petition for an injunction against domestic violence, repeat violence, dating violence, sexual violence, stalking, or cyberstalking that is dismissed without a hearing or at an ex parte hearing due to failure to state a claim, lack of jurisdiction, or any reason having to do with the sufficiency of the petition itself without an injunction being issued, and the contents of such a petition, are confidential and exempt[24] from s. 119.07(1), F.S., and article I, s. 24(a) of the Florida Constitution.

As to injunctions dismissed prior to July 1, 2016, the bill provides a petition for an injunction against domestic violence, repeat violence, dating violence, sexual violence, stalking, or cyberstalking that is dismissed without a hearing or at an ex parte hearing due to failure to state a claim, lack of jurisdiction, or any reason having to do with the sufficiency of the petition itself without an injunction being issued, and the contents of such a petition, must be removed upon request by an individual named in the petition as a respondent. The request must be in the form of a signed, legibly written request specifying the case name, case number, document heading, and page number. The request must be delivered by mail, facsimile, electronic transmission, or in person to the clerk of the court. A fee may not be charged for the removal pursuant to the request.

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[21] Section 784.046(1)(b), F.S., defines "repeat violence" to mean two incidents of violence or stalking committed by the respondent, one of which must have been within 6 months of the filing of the petition, which are directed against the petitioner or the petitioner's immediate family member. Section 784.046(1)(a), F.S., defines "violence" to mean any assault, aggravated assault, battery, aggravated battery, sexual assault, sexual battery, stalking, aggravated stalking, kidnapping, or false imprisonment, or any criminal offense resulting in physical injury or death, by a person against any other person.

[22] Section 784.046(1)(d), F.S., defines "dating violence" to mean violence between individuals who have or have had a continuing and significant relationship of a romantic or intimate nature. Dating violence does not include violence in a casual acquaintanceship or between individuals who have only engaged in ordinary fraternization. The existence of such a relationship is determined by considering the following factors:

- A dating relationship must have existed within the past six months;
- The nature of the relationship must have been characterized by the expectation of affection or sexual involvement between the parties; and
- The persons involved in the relationship must have been involved over time and on a continuous basis during the course of the relationship.

[23] Section 784.046(1)(c), F.S., defines "sexual violence" to mean any one incident of: sexual battery; a lewd or lascivious act committed upon or in the presence of a person younger than 16 years of age; luring or enticing a child; sexual performance by a child; or any other forcible felony wherein a sexual act is committed or attempted. For purposes of this definition, it does not matter whether criminal charges based on the incident were filed, reduced, or dismissed by the state attorney.

[24] There is a difference between records the Legislature designates as exempt from public records requirements and those the Legislature designates as *confidential and* exempt. A record classified as exempt from public disclosure may be disclosed under certain circumstances. *See WFTV, Inc. v. The School Board of Seminole*, 874 So.2d 48 (Fla. 5th DCA 2004), review denied 892 So.2d 1015 (Fla. 2004); *City of Riviera Beach v. Barfield*, 642 So.2d 1135 (Fla. 4th DCA 2004); and *Williams v. City of Minneola*, 575 So.2d 687 (Fla. 5th DCA 1991). If the Legislature designates a record as confidential and exempt from public disclosure, the record may not be released by the custodian of public records to anyone other than the persons or entities specifically designated in statute. *See* 85-62 Fla. Op. Att'y Gen. (1985).

The public necessity statement specifies that the Legislature finds that existence of such a petition and of the unverified allegations contained in such a petition could be defamatory to an individual and cause unwarranted damage to the reputation of such individual and that correction of the public record by the removal of such a petition is the sole means of protecting the reputation of an individual named in such a petition.

The bill repeals the exemption on October 2, 2021, unless reviewed and saved from repeal by the Legislature. It also provides a statement of public necessity as required by the Florida Constitution.[25]

B. SECTION DIRECTORY:

Section 1 amends s. 119.0714, F.S., regarding court files, court records, and official records.

Section 2 provides a public necessity statement.

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

2. Expenditures:

   See Fiscal Comments.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

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

2. Expenditures:

   See Fiscal Comments.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

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

D. FISCAL COMMENTS:

The bill could have a minimal fiscal impact on court clerks because staff responsible for complying with public records requests may require training related to the creation of the public records exemption. In addition, clerks could incur costs associated with redacting the confidential and exempt information prior to releasing a record. The costs, however, would be absorbed, as they are part of the day-to-day responsibilities of clerks.

[25] FLA. CONST. art. I, s. 24(c).

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:

Vote Requirement

Article I, s. 24(c) of the Florida Constitution requires a two-thirds vote of the members present and voting for final passage of a newly created or expanded public records or public meetings exemption. The bill creates a public records exemption; therefore, it requires a two-thirds vote for final passage.

Public Necessity Statement and Breadth of Exemption

Article I, s. 24(c) of the Florida Constitution requires a public necessity statement for a newly created or expanded public records or public meetings exemption. The bill creates a public records exemption; therefore, it includes a public necessity statement. Article I, s. 24(c) of the Florida Constitution also requires a newly created public records or public meetings exemption to be no broader than necessary to accomplish the stated purpose of the law.

Where a proposed public records exemption is overly broad or lacks specificity in its application, the exemption is facially unconstitutional.[26]

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

[26] *Hallifax Hospital Medical Center v. News-Journal Corp.*, 724 So.2d 567 (Fla. 1999).

A bill to be entitled

An act relating to public records; amending s. 119.0714, F.S.; providing an exemption from public records requirements for a petition for an injunction that is dismissed and the petition's contents; providing for removal of petitions dismissed before the effective date of the act from publicly accessible records; providing for future legislative review and repeal of the exemption; providing a statement of public necessity; providing a directive to the Division of Law Revision and Information; providing an effective date.

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

Section 1. Paragraph (k) is added to subsection (1) of section 119.0714, Florida Statutes, to read:

119.0714 Court files; court records; official records.—

(1) COURT FILES.—Nothing in this chapter shall be construed to exempt from s. 119.07(1) a public record that was made a part of a court file and that is not specifically closed by order of court, except:

(k)1. A petition for an injunction against domestic violence, repeat violence, dating violence, sexual violence, stalking, or cyberstalking that is dismissed without a hearing or at an ex parte hearing due to failure to state a claim, lack

of jurisdiction, or any reason having to do with the sufficiency of the petition itself without an injunction being issued, and the contents of such a petition, is confidential and exempt from s. 119.07(1) and s. 24(a), Art. I of the State Constitution.

2.a. A petition described in subparagraph 1. dismissed on or after July 1, 2016, and the contents thereof must be removed from all publically accessible records upon dismissal.

b. A petition described in subparagraph 1. dismissed before July 1, 2016, and the contents thereof shall be removed upon request by an individual named in the petition as a respondent. The request must be in the form of a signed, legibly written request specifying the case name, case number, document heading, and page number. The request must be delivered by mail, facsimile, electronic transmission, or in person to the clerk of the court. A fee may not be charged for the removal pursuant to the request.

3. This paragraph is subject to the Open Government Sunset Review Act in accordance with s. 119.15 and shall stand repealed on October 2, 2021, unless reviewed and saved from repeal through reenactment by the Legislature.

Section 2. The Legislature finds that it is a public necessity that a petition for an injunction against domestic violence, repeat violence, dating violence, sexual violence, stalking, or cyberstalking that is dismissed without a hearing or at an ex parte hearing due to failure to state a claim, lack of jurisdiction, or any reason having to do with the sufficiency

of the petition itself without an injunction being issued, and the contents of such a petition, be made confidential and exempt from s. 119.07(1), Florida Statutes, and s. 24(a), Article I of the State Constitution. The Legislature finds that the existence of such a petition and of the unverified allegations contained in such a petition could be defamatory to an individual and cause unwarranted damage to the reputation of such individual and that correction of the public record by the removal of such a petition is the sole means of protecting the reputation of an individual named in such a petition.

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

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/HB 743 Mobile Homes
SPONSOR(S): Business & Professions Subcommittee; Latvala and Burgess
TIED BILLS: None **IDEN./SIM. BILLS:** CS/SB 826

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Business & Professions Subcommittee	11 Y, 0 N, As CS	Brown-Blake	Anstead
2) Civil Justice Subcommittee		Malcolm	Bond
3) Regulatory Affairs Committee			

SUMMARY ANALYSIS

The Florida Mobile Home Act (Act) regulates residential tenancies in which a mobile home is placed on a rented or leased lot in a mobile home park with 10 or more lots. The Division of Florida Condominiums, Timeshares, and Mobile Homes of the Department of Business and Professional Regulation (Division) enforces the Act. The bill makes the following changes to the Act:

- Revises the Division's notice requirements when a written complaint is filed with the Division;
- Provides that non-ad valorem assessments are considered a charge that a mobile home park owner may pass on to a mobile home owner;
- Provides that, if the park owner does not provide a notice of a lot rental increase 90 days before the renewal date of the rental agreement, the rental agreement remains under the same terms until a 90-day notice is given;
- Permits the purchaser of a mobile home to cancel or rescind a contract for the purchase of the mobile home if the park owner has not approved the purchaser's tenancy at least 5 days before the closing of the purchase.
- Provides that, upon incorporation, all consenting mobile homeowners may become members or shareholders of a homeowners' association and that upon incorporation and notification to the park owner, the association becomes the representative to all mobile homeowners in all matters related to the Act;
- Provides that owners of a jointly owned mobile home or subdivision lot are only permitted one vote.
- Authorizes members to vote in person or by secret ballot, including an absentee ballot.
- Prohibits members from recording meetings between the board of directors or an appointed committee and the park owner;
- Requires the Division to adopt rules implementing board member training and publish a notice of proposed rules by October 1, 2016; and
- Provides that board members will not be considered in violation for failure to comply with board member certification and education requirements until after October 1, 2017.

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

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

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Background

Chapter 723, F.S., is known as the "Florida Mobile Home Act" (Act) and provides for the regulation of mobile homes by the Division of Florida Condominiums, Timeshares, and Mobile Homes (Division) within the Department of Business and Professional Regulation (Department). The Act was created to address the unique relationship between a mobile home owner and a mobile home park owner. The Act provides in part that:

> [O]nce occupancy has commenced, unique factors can affect the bargaining position of the parties and can affect the operation of market forces. Because of those unique factors, there exist inherently real and substantial differences in the relationship which distinguish it from other landlord-tenant relationships. The Legislature recognizes that mobile home owners have basic property and other rights which must be protected. The Legislature further recognizes that the mobile home park owner has a legitimate business interest in the operation of the mobile home park as part of the housing market and has basic property and other rights which must be protected.

The provisions in ch. 723, F.S., apply to residential tenancies where a mobile home is placed upon a lot that is rented or leased from a mobile home park that has 10 or more lots offered for rent or lease. The Florida Supreme Court, in addressing mobile home park issues, has stated that "a hybrid type of property relationship exists between the mobile home owner and the park owner and that . . . relationship is not simply one of landowner and tenant. Each has basic property rights which must reciprocally accommodate and harmonize. Separate and distinct mobile home laws are necessary to define the relationships and protect the interests of the persons involved."[1]

Notice of Complaint Process

The Division has the power to institute various enforcement proceedings in its own name against a developer, mobile home park owner, or homeowners' association, or its assignee or agent if the Division has cause to believe a violation of any provision of ch. 723, F.S., has occurred. The permitted enforcement proceedings include:

- Allowing a person whose conduct or actions may be under investigation to waive formal proceedings and enter into a consent agreement;
- Issuing a cease and desist order to a mobile home park owner and requiring him or her to take affirmative action to correct the violation, including:
  - Issuing refunds of rent increases, improper fees, charges and assessments;
  - Filing and using documents which correct a violation.
  - Reasonable action necessary to correct a violation.
- Bringing an action in circuit court on behalf of a class of mobile home owners, mobile home park owners, lessees, or purchasers for declaratory relief, injunctive relief, or restitution; and
- Imposing a civil penalty.

The Division often initiates enforcement proceedings based on complaints by mobile home owners, mobile home park owners, and homeowners' associations. When the division receives a written complaint alleging a violation of ch. 723, F.S., or the rules, the Division is required to periodically notify, in writing, the person who filed the complaint of the status of the investigation whether probable cause has been found to believe a violation has occurred and the status of any administrative action, civil

[1] *Stewart v. Green*, 300 So. 2d 889, 892 (Fla. 1974).

action, or appellate action. If the Division has found probable cause to believe that a violation has occurred, it is required to notify, in writing, the party complained against of the results of the investigation and the disposition of the complaint.[2]

Pass-on Charges and Lot Rental Increases

In mobile home parks containing 26 or more lots, prior to entering into a rental agreement for a mobile home lot with a mobile homeowner, the park owner must deliver a prospectus or offering circular to the homeowner.[3] The prospectus in a mobile home park is the document that governs the landlord-tenant relationship between the park owner and the mobile home owner. The prospectus or offering circular, together with its attached exhibits, is a disclosure document intended to afford protection to the homeowners and prospective homeowners in the mobile home park.[4] The purpose of the document is to disclose the representations of the mobile home park owner concerning the operations of the mobile home park.[5]

The prospectus or offering circular must include "[a]n explanation of the manner in which the lot rental amount will be raised, including disclosure of the manner in which pass-through charges will be assessed."[6] The term "pass-through charge" is defined as "the mobile home owner's proportionate share of the necessary and actual direct costs and impact or hookup fees for a governmentally mandated capital improvement, which may include the necessary and actual direct costs and impact or hookup fees incurred for capital improvements required for public or private regulated utilities."[7]

The rental agreement must contain the lot rental amount and included services. A lot rental amount may not be increased during the term of the lot rental agreement except:

- When the manner of the increase is disclosed in a lot rental agreement longer than 12 months and which provides for such increases not more frequently than annually;
- For pass-through charges; and
- That a charge may not be collected that results in payment of money for sums previously collected as part of the lot rental amount.[8]

However, the park owner may pass-on ad valorem property taxes, and utility charges, or increases of either, if they are not otherwise being collected with the rent and that the passing on of the property taxes or utility charges, or increases of either, was:

- Disclosed prior to tenancy;
- A matter of custom between the park owner and the mobile homeowner; or
- Authorized by law.[9]

The property taxes and utility charges are required to be part of the lot rental amount. Pass-on charges[10], may be passed on only within one year of the date a mobile home park owner remits payment of the charge. A park owner is prohibited from passing on any fine, interest, fee, or increase in a charge resulting from a park owner's payment of the charge after the date such charges becomes delinquent. However, a park owner and a mobile homeowner may agree to an alternative manner of payment for the charges.[11]

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[2] s. 723.006(6), F.S.
[3] s. 723.011(1)(a), F.S.
[4] s. 723.011(3), F.S.
[5] *Id.*
[6] s. 723.012(9)(c), F.S.
[7] s. 723.003(17), F.S.
[8] s. 723.031(5), F.S.
[9] s. 723.031(5)(c), F.S.
[10] Note: Pass-on charges are different than pass-through charges.
[11] *Id.* at note 8.

Rights of a Mobile Home Purchaser

The purchaser of a mobile home in a mobile home park may become a tenant of the park if the purchaser meets the requirements of entry into the park under the park's rules and regulations, subject to the park owner's approval. The park owner may not unreasonably withhold approval.[12]

Homeowners' Association Formation

Section 723.075, F.S., requires mobile homeowners to form a homeowners' association in order to exercise certain rights. In order to create a homeowners' association, no less than two-thirds of all the mobile homeowners must have consented, in writing, to become members and shareholders of the corporation. Upon consent by two-thirds of the homeowners, all consenting homeowners and their successors become members of the association and are bound by the provisions of the articles of incorporation, the bylaws of the association, and other properly promulgated restrictions. All members must be bona fide owners of a mobile home located in the park. Upon incorporation and notification to the park owner, the association becomes the representative of mobile homeowners in all matters related to ch. 723, F.S.

Homeowners' Association Voting Requirements and Meetings

Section 723.078, F.S. provides that, unless the bylaws state otherwise, a quorum consists of 30% of the total membership of the association. In order to reach a decision, the association must have a majority of members present at a meeting where a quorum is present.

Members may vote at homeowner association meetings in person or by limited proxy but may not vote by general proxy. Both limited proxies and general proxies may be used to establish a quorum. [13]

Current law is silent as to how to count a member vote in cases where a mobile home or subdivision lot is jointly owned by two or more persons. Additionally, it is unclear in current law how many votes each mobile home or subdivision lot may have.

Section 723.078, F.S. was revised by the Legislature in 2015 to authorize any member to tape record or videotape meetings, and to require the division to adopt rules governing the tape recording and videotaping of meetings.[14]

Board Member Education Requirements

The 2015 changes also revise s. 723.006, F.S. to require the Division to approve training and educational programs for board members of mobile home owners' associations. The Division is required to review and approve educational criterial and training programs for board members and mobile home owners and to maintain a list of approved programs and providers.[15] However, the Division has not promulgated rules approving training and education programs or providing curriculum.

Within 90 days of being elected, a member of a board directors is required to certify by affidavit that he or she: has read the association's current articles of incorporation, bylaws, and the mobile home park's prospectus, rental agreement, rules, regulations, and written policies; will work to uphold the documents and policies to the best of his or her ability; and will faithfully discharge his or her fiduciary responsibility to the members.[16]

[12] s. 723.059(1), F.S.
[13] s. 723.078(2)(b)2., F.S.
[14] ch. 2015-90, Laws of Fla.
[15] s. 723.006(13), F.S.
[16] s. 723.0781, F.S.

In lieu of the written certification, the board members may submit a certificate of completion of the educational curriculum approved by the Division within 1 year before or 90 days after the date of his or her election.[17]

Effect of the Bill

Notice of Complaint Process

When there are disputes between a mobile home owner and a mobile home park owner, either party can request enforcement of ch. 723, F.S., by the Division by filing a complaint. The bill amends the notice requirements in s. 723, 006(6), F.S., that set out how the Division notifies the complainant and the person the complaint is filed against following the filing of a written complaint alleging a violation of ch. 723, F.S. The bill requires the Division to notify the complainant in writing within 30 days of receipt of the written complaint. Thereafter, the Division is required to notify the complainant of the investigation status within 90 days of receipt of the written complaint. When the investigation is complete, the Division is required to notify, in writing, both the complainant and the party complained against of the investigation's results.

Pass-through Charges and Lot Rental Increases

The bill amends s. 723.031(5)(c), F.S., to provide that non-ad valorem assessments, which are currently charged to mobile home owners, are considered a pass-on charge and thus may be passed on to homeowners in the same manner as ad valorem assessments and utility charges. The homeowners already pay these assessments, but by listing the assessments in the pass-on charges, the assessments would be itemized in the bill submitted to the homeowners by the park owners. This provides clearer notice to homeowners of what taxes and assessments they are paying.

The bill further provides that, if the park owner does not provide a notice of lot rental increase 90 days before the renewal date of the rental agreement, the rental agreement remains under the same terms until a 90-day notice of lot rental increase is given. The notice may provide for a rental term shorter than 1 year in order to maintain the same renewal date.

Rights of a Mobile Home Purchaser

The bill provides that the purchaser of a mobile home may cancel or rescind a contract for the purchase of the mobile home if the park owner has not approved the purchaser's tenancy at least 5 days before the closing of the purchase.

Homeowners' Association Formation

The bill maintains the requirement that two-thirds of the homeowners must consent to create the homeowners' association. However, the bill provides that, upon incorporation, all consenting mobile homeowners may become members or shareholders. The bill defines the terms "member" and "shareholder" to mean "a mobile home owner who consents to be bound by the articles of incorporation, bylaws, and policies of the incorporated homeowners' association," thus requiring that consent be provided by a homeowner prior to being bound by the association's governing documents. The bill removes the provision providing that the homeowners' successors are members of the association.

[17] *Id.*

Homeowners' Association Voting Requirements and Meetings

The bill provides that owners of a jointly owned mobile home or subdivision lot are only permitted one vote per lot or mobile home. Additionally, the bill provides that any number greater than 50% of the total number of votes cast at a meeting constitutes a majority for the purposes of determining whether an action passes at a homeowners' association member meeting. Finally, the bill provides that members may vote in person or by secret ballot, including an absentee ballot.

Additionally, the bill provides that any member may tape record or videotape meetings of the board of directors and its committees, except meetings between the board of directors or its appointed homeowners' committee and the park owner.

Board Member Education Requirements

The bill requires the Division to adopt the rules implementing board member training, including course content for such training, and publish a notice of proposed rule by October 1, 2016. Furthermore, the bill provides that s. 723.0781, F.S., regarding the certification and education of board members, becomes effective October 1, 2016, but the board members will not be considered in violation for failure to comply until after October 1, 2017.

B. SECTION DIRECTORY:

Section 1 amends s. 723.006, F.S., revising certain notice requirements for written complaints.

Section 2 amends s. 723.031, F.S., authorizing a mobile home park owner to pass on non-ad valorem assessments to a tenant under certain circumstances, and providing other requirements regarding non-ad valorem assessments.

Section 3 amends s. 723.059, F.S., authorizing a mobile home purchaser to cancel or rescind the contract to purchase under certain circumstances.

Section 4 amends s. 723.075, F.S., revising the rights that mobile home owners exercise if they form an association and the manner in which it is formed.

Section 5 amends s. 723.078, F.S., specifying voting requirements for homeowners' associations.

Section 6 amends s. 723.0781, F.S., relating to board member training programs.

Section 7 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:

   None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

   None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not Applicable. This bill does not appear to affect county or municipal governments.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

On January 20, 2016, the Business & Professions Subcommittee adopted a strike-all amendment and reported the bill favorably as a committee substitute. The amendment:

- Requires the division to adopt rules regarding board member training requirements and sets deadlines for implementation and enforcement.
- Provides that the term non-ad valorem assessments has the same meaning as in s. 197.3632(1)(d), F.S.
- Clarifies that the homeowners' associations controls all mobile home parcels located within the mobile home park, rather than just those owns who agreed to join the homeowners' association.
- Requires the Division to adopt a rule defining "secret ballot."
- Prohibits the tape recording or video taping of meetings between the board or a committee and the park owner.

The staff analysis is drafted to reflect the committee substitute.

A bill to be entitled

An act relating to mobile homes; amending s. 723.006, F.S.; revising certain notice requirements for written complaints; requiring the Division of Florida Condominiums, Timeshares, and Mobile Homes to adopt rules relating to board member training for mobile home park homeowners' associations; requiring the department to publish a notice of the proposed rules; providing rule requirements; amending s. 723.031, F.S.; authorizing a mobile home park owner to pass on non-ad valorem assessments to a tenant under certain circumstances; providing that a mobile home park owner is deemed to have disclosed the passing on of certain taxes and assessments under certain circumstances; providing a definition; requiring the non-ad valorem assessments to be a part of the lot rental amount; requiring that a renewed rental agreement remain under the same terms unless certain notice is provided; amending s. 723.059, F.S.; authorizing a mobile home purchaser to cancel or rescind the contract to purchase under certain circumstances; amending s. 723.075, F.S.; revising the rights that mobile home owners exercise if they form an association; authorizing mobile home owners to become members upon incorporation of the association; defining the terms "member" and "shareholder"; deleting provisions

relating to memberships of successors to home owners; revising when the association becomes the representative of all the mobile home owners; amending s. 723.078, F.S.; specifying voting requirements for homeowners' associations; specifying the requirements for a majority of votes; authorizing members to vote by secret ballot and absentee ballot; prohibiting the tape recording or videotaping of meetings between the board or committee and the park owner; amending s. 723.0781, F.S.; delaying applicability of certain board member training requirements; specifying a future date after which directors who fail to comply with the training requirements are deemed to commit a violation; providing an effective date.

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

Section 1. Subsection (6) of section 723.006, Florida Statutes, is amended, and subsection (15) is added to that section, to read:

723.006 Powers and duties of division.—In performing its duties, the division has the following powers and duties:

(6) With regard to any written complaint alleging a violation of any provision of this chapter or any rule adopted ~~promulgated~~ pursuant thereto, the division shall, within 30 days after receipt of a written complaint, ~~periodically~~ notify, in

writing, the person who filed the complaint of the status of the complaint. Thereafter, the division shall notify the complainant of the status of the investigation within 90 days after receipt of the written complaint. Upon completion of the investigation, the division ~~investigation, whether probable cause has been found, and the status of any administrative action, civil action, or appellate action, and if the division has found that probable cause exists, it~~ shall notify, in writing, the complainant and the party complained against of the results of the investigation and disposition of the complaint.

(15) The division shall adopt rules to implement the board member training requirements for educational programs as provided in this chapter. The division shall publish a notice of the proposed rules pursuant to s. 120.54(3)(a), by October 1, 2016. The rules must include content and notice requirements for the board member training program to ensure that providers meet minimum training requirements.

Section 2. Subsection (5) of section 723.031, Florida Statutes, is amended to read:

723.031 Mobile home lot rental agreements.—

(5) The rental agreement shall contain the lot rental amount and services included. An increase in lot rental amount upon expiration of the term of the lot rental agreement shall be in accordance with ss. 723.033 and 723.037 or s. 723.059(4), whichever is applicable, provided that, pursuant to s. 723.059(4), the amount of the lot rental increase is disclosed

and agreed to by the purchaser, in writing. An increase in lot rental amount shall not be arbitrary or discriminatory between similarly situated tenants in the park. A ~~No~~ lot rental amount may not be increased during the term of the lot rental agreement, except:

(a) When the manner of the increase is disclosed in a lot rental agreement with a term exceeding 12 months and which provides for such increases not more frequently than annually.

(b) For pass-through charges as defined in s. 723.003.

(c) That a ~~no~~ charge may not be collected which ~~that~~ results in payment of money for sums previously collected as part of the lot rental amount. The provisions hereof notwithstanding, the mobile home park owner may pass on, at any time during the term of the lot rental agreement, ad valorem property taxes, non-ad valorem assessments, and utility charges, or increases of either, provided that the ad valorem property taxes, non-ad valorem assessments, and ~~the~~ utility charges are not otherwise being collected in the remainder of the lot rental amount and provided further that the passing on of such ad valorem taxes, non-ad valorem assessments, or utility charges, or increases of either, was disclosed prior to tenancy, was being passed on as a matter of custom between the mobile home park owner and the mobile home owner, or such passing on was authorized by law. A park owner shall be deemed to have disclosed the passing on of ad valorem property taxes and non-ad valorem assessments if ad valorem property taxes or non-ad

valorem assessments were disclosed as a factor for increasing the lot rental amount in the prospectus or rental agreement. Such ad valorem taxes, non-ad valorem assessments, and utility charges shall be a part of the lot rental amount as defined by this chapter. For purposes of this paragraph, the term "non-ad valorem assessments" has the same meaning as provided in s. 197.3632(1)(d). Other provisions of this chapter notwithstanding, pass-on charges may be passed on only within 1 year of the date a mobile home park owner remits payment of the charge. A mobile home park owner is prohibited from passing on any fine, interest, fee, or increase in a charge resulting from a park owner's payment of the charge after the date such charges become delinquent. Nothing herein shall prohibit a park owner and a homeowner from mutually agreeing to an alternative manner of payment to the park owner of the charges.

(d) If a notice of increase in lot rental amount is not given 90 days before the renewal date of the rental agreement, the rental agreement shall remain under the same terms until a 90-day notice of increase in lot rental amount is given. The notice may provide for a rental term shorter than 1 year in order to maintain the same renewal date.

Section 3. Subsection (1) of section 723.059, Florida Statutes, is amended to read:

723.059 Rights of purchaser.—

(1) The purchaser of a mobile home within a mobile home park may become a tenant of the park if such purchaser would

otherwise qualify with the requirements of entry into the park under the park rules and regulations, subject to the approval of the park owner, but such approval may not be unreasonably withheld. The purchaser of the mobile home may cancel or rescind the contract for purchase of the mobile home if the purchaser's tenancy has not been approved by the park owner 5 days before the closing of the purchase.

Section 4. Subsection (1) of section 723.075, Florida Statutes, is amended to read:

723.075 Homeowners' associations.—

(1) In order to exercise the rights provided in this chapter ~~s. 723.071~~, the mobile home owners shall form an association in compliance with this section and ss. 723.077, 723.078, and 723.079, which shall be a corporation for profit or not for profit and of which not less than two-thirds of all of the mobile home owners within the park shall have consented, in writing, to become members or shareholders. Upon incorporation of the association ~~such consent by two-thirds of the mobile home owners~~, all consenting mobile home owners in the park may become members or shareholders. The term "member" or "shareholder" means a mobile home owner who consents to be bound by the articles of incorporation, bylaws, and policies of the incorporated homeowners' association ~~and their successors shall become members of the association and shall be bound by the provisions of the articles of incorporation, the bylaws of the association, and such restrictions as may be properly~~

~~promulgated pursuant thereto~~. The association may not ~~shall~~ have a ~~no~~ member or shareholder who is not a bona fide owner of a mobile home located in the park. Upon incorporation and service of the notice described in s. 723.076, the association shall become the representative of all the mobile home owners in all matters relating to this chapter, regardless of whether the homeowner is a member of the association.

Section 5. Paragraphs (b) and (c) of subsection (2) of section 723.078, Florida Statutes, are amended to read:

723.078 Bylaws of homeowners' associations.—

(2) The bylaws shall provide and, if they do not, shall be deemed to include, the following provisions:

(b) Quorum; voting requirements; proxies.—

1. Unless otherwise provided in the bylaws, 30 percent of the total membership is required to constitute a quorum. Decisions shall be made by a majority of members represented at a meeting at which a quorum is present.

2. A member may not vote by general proxy but may vote by limited proxies substantially conforming to a limited proxy form adopted by the division. Limited proxies and general proxies may be used to establish a quorum. Limited proxies may be used for votes taken to amend the articles of incorporation or bylaws pursuant to this section, and any other matters for which this chapter requires or permits a vote of members, except that no proxy, limited or general, may be used in the election of board members. If a mobile home or subdivision lot is owned jointly,

the owners of the mobile home, or subdivision lot, shall be counted as one for the purpose of determining the number of votes required for a majority. Only one vote per mobile home or subdivision lot shall be counted. Any number greater than 50 percent of the total number of votes constitutes a majority. Notwithstanding ~~the provisions of~~ this section, members may vote in person at member meetings or by secret ballot, including absentee ballots, as defined by the division.

3. A proxy is effective only for the specific meeting for which originally given and any lawfully adjourned meetings thereof. In no event shall any proxy be valid for a period longer than 90 days after the date of the first meeting for which it was given. Every proxy shall be revocable at any time at the pleasure of the member executing it.

4. A member of the board of directors or a committee may submit in writing his or her agreement or disagreement with any action taken at a meeting that the member did not attend. This agreement or disagreement may not be used as a vote for or against the action taken and may not be used for the purposes of creating a quorum.

(c) Board of directors' and committee meetings.—

1. Meetings of the board of directors and meetings of its committees at which a quorum is present shall be open to all members. Notwithstanding any other provision of law, the requirement that board meetings and committee meetings be open to the members does not apply to board or committee meetings

held for the purpose of discussing personnel matters or meetings between the board or a committee and the association's attorney, with respect to potential or pending litigation, where the meeting is held for the purpose of seeking or rendering legal advice, and where the contents of the discussion would otherwise be governed by the attorney-client privilege. Notice of meetings shall be posted in a conspicuous place upon the park property at least 48 hours in advance, except in an emergency. Notice of any meeting in which assessments against members are to be considered for any reason shall specifically contain a statement that assessments will be considered and the nature of such assessments.

2. A board or committee member's participation in a meeting via telephone, real-time videoconferencing, or similar real-time telephonic, electronic, or video communication counts toward a quorum, and such member may vote as if physically present. A speaker shall be used so that the conversation of those board or committee members attending by telephone may be heard by the board or committee members attending in person, as well as by members present at a meeting.

3. Members of the board of directors may use e-mail as a means of communication but may not cast a vote on an association matter via e-mail.

4. The right to attend meetings of the board of directors and its committees includes the right to speak at such meetings with reference to all designated agenda items. The association

may adopt reasonable written rules governing the frequency, duration, and manner of members' statements. Any item not included on the notice may be taken up on an emergency basis by at least a majority plus one of the members of the board. Such emergency action shall be noticed and ratified at the next regular meeting of the board. Any member may tape record or videotape meetings of the board of directors and its committees, except meetings between the board of directors or its appointed homeowners' committee and the park owner. The division shall adopt reasonable rules governing the tape recording and videotaping of the meeting.

5. Except as provided in paragraph (i), a vacancy occurring on the board of directors may be filled by the affirmative vote of the majority of the remaining directors, even though the remaining directors constitute less than a quorum; by the sole remaining director; if the vacancy is not so filled or if no director remains, by the members; or, on the application of any person, by the circuit court of the county in which the registered office of the corporation is located.

6. The term of a director elected or appointed to fill a vacancy expires at the next annual meeting at which directors are elected. A directorship to be filled by reason of an increase in the number of directors may be filled by the board of directors, but only for the term of office continuing until the next election of directors by the members.

7. A vacancy that will occur at a specific later date, by

reason of a resignation effective at a later date, may be filled before the vacancy occurs. However, the new director may not take office until the vacancy occurs.

8.a. The officers and directors of the association have a fiduciary relationship to the members.

b. A director and committee member shall discharge his or her duties in good faith, with the care an ordinarily prudent person in a like position would exercise under similar circumstances, and in a manner he or she reasonably believes to be in the best interests of the corporation.

9. In discharging his or her duties, a director may rely on information, opinions, reports, or statements, including financial statements and other financial data, if prepared or presented by:

a. One or more officers or employees of the corporation who the director reasonably believes to be reliable and competent in the matters presented;

b. Legal counsel, public accountants, or other persons as to matters the director reasonably believes are within the persons' professional or expert competence; or

c. A committee of the board of directors of which he or she is not a member if the director reasonably believes the committee merits confidence.

10. A director is not acting in good faith if he or she has knowledge concerning the matter in question that makes reliance otherwise permitted by subparagraph 9. unwarranted.

11. A director is not liable for any action taken as a director, or any failure to take any action, if he or she performed the duties of his or her office in compliance with this section.

Section 6. Section 723.0781, Florida Statutes, is amended to read:

723.0781 Board member training programs.—

(1) Effective October 1, 2016:

(a) Within 90 days after being elected or appointed to the board, a newly elected or appointed director shall certify by an affidavit in writing to the secretary of the association that he or she has read the association's current articles of incorporation, bylaws, and the mobile home park's prospectus, rental agreement, rules, regulations, and written policies; that he or she will work to uphold such documents and policies to the best of his or her ability; and that he or she will faithfully discharge his or her fiduciary responsibility to the association's members.

(b) In lieu of this written certification, within 90 days after being elected or appointed to the board, the newly elected or appointed director may submit a certificate of having satisfactorily completed the educational curriculum approved by the division within 1 year before or 90 days after the date of election or appointment. The educational certificate is valid and does not have to be resubmitted as long as the director serves on the board without interruption.

(c) A director who fails to timely file the written certification or educational certificate is suspended from service on the board until he or she complies with this section. The board may temporarily fill the vacancy during the period of suspension.

(d) The secretary of the association shall retain a director's written certification or educational certificate for inspection by the members for 5 years after the director's election or the duration of the director's uninterrupted tenure, whichever is longer. Failure to have such written certification or educational certificate on file does not affect the validity of any board action.

(2) A director who fails to comply with the requirements of subsection (1) before October 1, 2017, is not deemed to have committed a violation of this section.

Section 7. This act shall take effect July 1, 2016.

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: PCS for HB 949 Attorneys for Dependent Children with Special Needs
SPONSOR(S): Civil Justice Subcommittee
TIED BILLS: None **IDEN./SIM. BILLS:** SB 1212

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

SUMMARY ANALYSIS

When the state removes a child from their parent's care and custody due to allegations of abuse, abandonment, or neglect, the child is under the jurisdiction of the state dependency system. Dependency proceedings are adversarial legal proceedings where the court must decide between the parents' constitutional rights to raise their children free from interference and the State's compelling interest to protect children from neglect or abuse.

All parents in dependency proceedings are constitutionally entitled to counsel, and indigent parents are entitled to appointed counsel. However, no provision in Florida law or rule requires appointment of counsel for dependent children unless the child has certain medical needs. The bill:

- Expands the right to appointed counsel in dependency proceedings to children under the age of 8 who have been prescribed psychotropic medication and to children who are ineligible for representation by the Statewide Guardian Ad Litem Program due to a conflict of interest;
- Requires the appointment of substitute counsel if an attorney appointed to represent a dependent child withdraws or is discharged by the court;
- Requires that all appointed attorneys and organizations, including pro bono attorneys, receive funding for litigation costs; and
- Requires that the Justice Administrative Commission contract with a non-profit entity to create the Quality Counsel Program. The Quality Counsel Program, using information submitted by appointed attorneys, provides a review and analysis of attorney advocacy and recommendations to enhance the quality of representation for dependent children.

The bill does not appear to have a fiscal impact on local government. The bill has an unknown negative recurring 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

Chapter 39, Florida Statutes, governs dependency proceedings in the state of Florida. Dependency proceedings are usually initiated upon a child being sheltered (i.e., removed from the parents' custody) based on probable cause to believe the child is, has been, or is at imminent risk of being abused, abandoned, or neglected. These are adversarial legal proceedings where the primary concern of the court is the interplay between the parents' constitutional rights to raise their children free from interference and the State's compelling interest to protect children.[1] The child is also a party to these proceedings,[2] and is vested with rights under ch. 39, F.S., including the right to a permanent home.[3] Children, therefore, have a critical stake in the outcome of dependency proceedings.

Dependency System-Overview

The dependency process begins with an investigation into a report of child abuse, abandonment, or neglect.[4] The report is referred to a child protection investigator in the Department of Children and Families (DCF) who conducts an on-site investigation of the alleged abuse, neglect, or abandonment.[5] Based on the results of the investigation, a petition may be filed by DCF requesting the court place the child in shelter and seeking adjudication that the child is dependent and should be placed in the state's care.[6] When a child is placed in the state's care the state "acts in the protective and provisional role of in loco parentis" for the child.[7] Upon the filing of a petition for dependency, whether or not the child is taken into custody,[8] the circuit court assigned to hear dependency cases (dependency court) will schedule an adjudicatory hearing to determine whether the child is dependent, based on a preponderance of the evidence.[9] A child is dependent if the child:

- Has been abandoned, abused, or neglected by the child's parent(s) or legal custodian(s);
- Has been surrendered to DCF or a licensed child-placing agency for adoption;
- Has been voluntarily placed with a licensed child-caring agency, licensed child-placing agency, an adult relative, or DCF, pursuant to an action under ch. 39 and the parent(s) or legal custodian(s) had substantially failed to comply with the case plan at the time of its expiration;
- Has been voluntarily placed with a licensed child-placing agency for subsequent adoption with the parent(s)' consent;
- Has no parent or legal custodian capable of providing supervision and care;
- Is at substantial risk of imminent abuse, abandonment, or neglect by the parent(s) or legal custodian(s); or

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[1] William A. Booth, *The Importance of Legal Representation of Children in Chapter 39 Proceedings*, THE FLORIDA BAR FAMILY LAW SECTION: COMMENTATOR (Fall 2010), p. 31, available at www.familylawfla.org/newsletter/pdfs/Fam-Fall-2010-web.pdf.

[2] s. 39.01(51), F.S.

[3] ss. 39.001(1)(h) and 39.0136(1), F.S.

[4] s. 39.301(1), F.S.

[5] *Id.*

[6] s. 39.501(3)(c), F.S.

[7] *Buckner v. Family Services of Central Florida, Inc.*, 876 So. 2d 1285 (Fla. 5th DCA 2004)

[8] s. 39.402, F.S.; A child may be taken into custody and placed in a shelter without a prior hearing if there is probable cause of imminent danger or injury to the child, the parent or legal custodian, responsible adult relative has materially violated a condition of placement, or the child has no parent, legal custodian, or responsible adult relative immediately known and able to provide supervision and care. If a child is taken into custody, a hearing is held within 24 hours.

[9] s. 39.507(1)(a) and (b), F.S.

- Has been sexually exploited and has no parent, legal custodian, or responsible adult relative currently known and capable of providing for the care, maintenance, training, and education of a child.

If a court finds a child dependent, a disposition hearing is held to determine appropriate services and placement settings for the child.[10] At this hearing, the court also reviews and approves a case plan outlining services and desired goals, such as reunification with the family or another outcome, for the child.[11] The court holds periodic judicial reviews, generally every six months, until supervision is terminated, to determine the child's status, the progress in following the case plan, and the status of the goals and objectives of the case plan.[12] After twelve months, if the case plan goals have not been met, the court holds a permanency hearing to determine the child's permanent placement goal.[13]

Right to Counsel for Certain Dependent Children

In 2014, the legislature established a right to counsel for a limited class of dependent[14] children-children with special needs. Section 39.01305, F.S., requires a court to appoint an attorney for a dependent child who:[15]

- Resides in a skilled nursing facility or is being considered for placement in a skilled nursing home;
- Is prescribed a psychotropic medication but declines assent to the psychotropic medication;
- Has a diagnosis of a developmental disability;[16]
- Is being placed in a residential treatment center or being considered for placement in a residential treatment center; or
- Is a victim of human trafficking.[17]

An attorney who is appointed under s. 39.01305, F.S., must provide the dependent child with the complete range of legal services, from the removal from home or from the initial appointment through all available appellate proceedings.[18] However, with the court's permission, the attorney may arrange for supplemental or separate counsel to represent the child in appellate proceedings. The appointment of the attorney continues in effect until the attorney is allowed to withdraw, is discharged by the court, or the case is dismissed.

Before making an appointment under s. 39.01305, F.S., the court must first consult the Statewide Guardian Ad Litem Office to determine if an attorney is available and willing to represent the child pro bono. If such an attorney is available within 15 days of the court's request, the court must appoint a pro bono attorney.[19] If unavailable, the court must appoint and compensate an attorney or organization and provide the attorney or organization with access to funding for expert witnesses, depositions, and other costs of litigation. Fees for appointed attorneys may not exceed $1,000 per child per year.[20]

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[10] s. 39.521(1), F.S.
[11] s. 39.521(1)(a), F.S.
[12] s. 39.521(1)(c), F.S.
[13] s. 39.621(1), F.S.
[14] For purposes of s. 39.01305, F.S., "dependent child" means a child who is subject to any proceeding under ch. 39, F.S. The term does not require that a child be adjudicated dependent.
[15] s. 39.01305, F.S.
[16] "Developmental disability" means a disorder or syndrome that is attributable to intellectual disability, cerebral palsy, autism, spina bifida, or Prader-Willi syndrome; that manifests before the age of 18; and that constitutes a substantial handicap that can reasonably be expected to continue indefinitely. s. 393.063(9), F.S.
[17] "Human trafficking" means transporting, soliciting, recruiting, harboring, providing, enticing, maintaining, or obtaining another person for the purpose of exploitation of that person. s. 787.06(2)(d), F.S.
[18] s. 39.01305, F.S.
[19] s. 39.01305(4)(a), F.S.
[20] s. 39.01305(5), F.S.

Appointments of compensated counsel must be made through a court registry.[21] In FY 2014-2015, the Statewide Guardian Ad Litem Office and the Justice Administrative Commission (JAC) collaborated to establish registries that meet appointment needs for dependent children. The Statewide Guardian Ad Litem Office reviewed each judicial circuit's local rules and practices to establish the minimum criteria for education, experience and training for an attorney's inclusion in the registry for dependent children. By the beginning of FY 2015-2016, all but one judicial circuit had included the s. 39.01305, F.S., registry into their circuit registry.[22] There are currently 179 attorneys on s. 39.01305, F.S., registries statewide.[23]

EFFECT OF THE BILL

Appointment of Attorneys for Dependent Children (Section 1)
The bill amends s. 39.01305, F.S., to expand the right to appointed counsel to:

- Dependent children under the age of 8 who have been prescribed psychotropic medication. Under current law, children prescribed a psychotropic medication are entitled to appointed counsel only if they decline the medication. This revision provides for appointed counsel for children under 8 years of age regardless of the child's assent to the medication.
- Dependent children who cannot be represented by the Statewide Guardian Ad Litem Office due to a conflict of interest.

The bill further requires a court to appoint substitute counsel if an attorney appointed to represent any dependent child withdraws or is discharged from the representation and the child continues to meet the requirements for appointed counsel.

Quality Counsel Program (Section 2)
The bill creates s. 27.406, F.S., which directs the JAC to establish a Quality Counsel Program to ensure dependent children receive quality representation from attorneys appointed under ch. 39, F.S. Attorneys appointed under s. 39.01305, which includes pro bono attorneys, must submit a quarterly report to the Quality Counsel Program detailing the activities performed and results obtained on behalf of each dependent child. The JAC is directed to prescribe the form of the report. The Quality Counsel Program must:

- Be established pursuant to a contract with a non-profit entity by June 30, 2018.
- Review and analyze the information submitted by appointed attorneys for quality improvement purposes.
- Annually report collected data and recommendations to the President of the Florida Senate, Speaker of the Florida House of Representatives, Governor, Justice Administrative Commission, the Statewide Guardian Ad Litem Office, and the Office of the State Courts Administrator.

B. SECTION DIRECTORY:

Section 1 amends s. 39.01305, F.S., relating to appointment of an attorney for a dependent child with certain special needs.

Section 2 creates s. 27.406, F.S., relating to the Quality Counsel Program.

Section 3 provides an effective date of July 1, 2016.

[21] s. 27.40, F.S.
[22] *Supra* FN 21, at 3.
[23] *Supra* FN 21, at 4.

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 has an indeterminate but perhaps significant recurring negative impact on state expenditures. The expansion of the right to counsel for dependent children may result in a significant increase in court-appointed attorneys and, correspondingly, costs for fees. Children under the age of 8 prescribed psychotropic medications would be entitled to legal counsel under the bill. It is also unknown how many of the 6,100 children currently unrepresented by the Statewide Guardian Ad Litem Office are unrepresented due to a conflict and thereby entitled to representation. The Statewide Guardian Ad Litem Office estimated that if all 6,100 unrepresented children were entitled to representation under the bill, the costs of fees alone could exceed $6 million.[24]

   Additionally, the expansion of funding to all appointed attorneys, including pro bono attorneys, for litigation costs will likely result in a significant increase in the expenditure of state funds. The number of pro bono attorneys currently providing representation who would be entitled to litigation costs under the bill is unknown.

   The establishment of the Quality Counsel Program will result in an indeterminate increased expenditure of funds by the Judicial Administrative Commission.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

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

2. Expenditures:

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

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

Attorneys on a court registry for appointment under s. 39.01305, F.S., must contract with the Justice Administrative Commission for payment of fees and costs under ch. 27, F.S. In FY 2014-2015, the legislature provided $1,500,000, from recurring general revenue funds and $2,700,000, from nonrecurring general revenue funds for the JAC to contract with lawyers to represent dependent children pursuant to s. 39.01305, F.S. In the first 17 months of operation, attorneys have been appointed to represent 1,487 children under s. 39.01305, F.S.

JAC processed 681 billing submissions for attorney fees, costs, and related expenses amounting to a total of $679,700 for representation of dependent children pursuant to s. 39.01305, F.S. in FY

[24] *Supra* FN 21, at 6.

2014-2015. To date in FY 2015-2016, the JAC has processed 503 billing submissions for a total of $515,895. All but one payment has been for the flat fee, not exceeding $1,000.[25]

Prior to providing payment under ch. 27, F.S., the Justice Administrative Commission (JAC) reviews billing submissions for completeness and compliance with contractual and statutory requirements. The commission may approve the intended bill for a flat fee per case for payment without approval by the court if the intended billing is correct.

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:

The bill does not specify circumstances which would constitute "a conflict of interest" such that the Statewide Guardian Ad Litem Office would be precluded from providing representation to a dependent child and thereby entitling the child to appointed counsel.

The Quality Counsel Program appears to duplicate some functions of the JAC with regard to performance review of appointed counsel. Under current law, the JAC is required to review billing submissions for "completeness and compliance with contractual and statutory requirements." To the extent that such contracts provide for particular outcomes or benchmarks, additional review and analysis by the Quality Counsel Program may be redundant.

An attorney representing a child is in a unique position. In general, an attorney is required to advocate a client's position, and while a child near maturity may be able to competently express his or her desires, young children may not. The professional responsibility rules of the Florida Bar give this guidance to attorneys:

> The normal client-lawyer relationship is based on the assumption that the client, when properly advised and assisted, is capable of making decisions about important matters. When the client is a minor or suffers from a mental disorder or disability, however, maintaining the ordinary client-lawyer relationship may not be possible in all respects. In particular, an incapacitated person may have no power to make legally binding decisions. Nevertheless, a client lacking legal competence often has the ability to understand, deliberate upon, and reach conclusions about matters affecting the client's own well-being. Furthermore, to an increasing extent the law recognizes intermediate degrees of competence. For example, children as young as 5 or 6 years of age, and certainly those of 10 or 12, are regarded as having opinions that are entitled to weight in

[25]Since July 2014, the JAC has received three requests for extraordinary payment under ch. 27, F.S. Of such requests, one was paid, one was withdrawn, and one remains pending as of December 21, 2015. Justice Administrative Commission, Agency Analysis of 2016 House Bill 949, p. 4 (on file with the Civil Justice Subcommittee).

legal proceedings concerning their custody. So also, it is recognized that some persons of advanced age can be quite capable of handling routine financial matters while needing special legal protection concerning major transactions.

The fact that a client suffers a disability does not diminish the lawyer's obligation to treat the client with attention and respect. If the person has no guardian or legal representative, the lawyer often must act as de facto guardian. Even if the person does have a legal representative, the lawyer should as far as possible accord the represented person the status of client, particularly in maintaining communication.[26]

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

n/a

[26] Comments to Rule 4-1.4 of the Rules Regulating the Florida Bar.

A bill to be entitled

An act relating to attorneys for dependent children; amending s. 39.01305, F.S.; requiring that a court appoint an attorney for certain dependent children; requiring that the court appoint substitute counsel if an attorney withdraws or is discharged and the child still qualifies for appointed counsel; providing that all appointed attorneys and organizations are entitled to funding for costs of litigation; requiring appointed attorneys to provide periodic reports to the Quality Counsel Program; creating s. 27.406, F.S.; requiring the Justice Administrative Commission to create the Quality Counsel Program by a certain date; providing criteria for operation of the Quality Counsel Program; providing an effective date.

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

Section 1. Section 39.01305, Florida Statutes, is amended to read:

39.01305 Appointment of an attorney for a dependent child ~~with certain special needs~~.—

(1)(a) The Legislature finds that:

1. All children in proceedings under this chapter have important interests at stake, such as health, safety, and well-being and the need to obtain permanency.

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

V

2. A dependent child who has certain special needs has a particular need for an attorney to represent the dependent child in proceedings under this chapter, as well as in fair hearings and appellate proceedings, so that the attorney may address the child's medical and related needs and the services and supports necessary for the child to live successfully in the community.

(b) The Legislature recognizes the existence of organizations that provide attorney representation to children in certain jurisdictions throughout the state. Further, the statewide Guardian Ad Litem Program provides best interest representation for dependent children in every jurisdiction in accordance with state and federal law. The Legislature, therefore, does not intend that funding provided for representation under this section supplant proven and existing organizations representing children. Instead, the Legislature intends that funding provided for representation under this section be an additional resource for the representation of more children in these jurisdictions, to the extent necessary to meet the requirements of this chapter, with the cooperation of existing local organizations or through the expansion of those organizations. The Legislature encourages the expansion of pro bono representation for children. This section is not intended to limit the ability of a pro bono attorney to appear on behalf of a child.

(2) As used in this section, the term "dependent child" means a child who is subject to any proceeding under this

chapter. The term does not require that a child be adjudicated dependent for purposes of this section.

(3) An attorney shall be appointed for a dependent child ~~who~~:

(a) Who resides in a skilled nursing facility or is being considered for placement in a skilled nursing home;

(b) Who is prescribed a psychotropic medication and is under the age of 8 or ~~but~~ declines assent to the psychotropic medication;

(c) Who has a diagnosis of a developmental disability as defined in s. 393.063;

(d) Who is being placed in a residential treatment center or being considered for placement in a residential treatment center; ~~or~~

(e) Who is a victim of human trafficking as defined in s. 787.06(2)(d); or

(f) If the Statewide Guardian Ad Litem Program certifies that it has a conflict of interest that precludes the program from providing the child with a guardian ad litem.

(4)~~(a)~~ Before a court may appoint an attorney, who may be compensated pursuant to this section, the court must request a recommendation from the Statewide Guardian Ad Litem Office for an attorney who is willing to represent a child without additional compensation. If such an attorney is available within 15 days after the court's request, the court must appoint that attorney. However, the court may appoint a compensated attorney

within the 15-day period if the Statewide Guardian Ad Litem Office informs the court that it will not be able to recommend an attorney within that time period.

(5) ~~(b)~~ After an attorney is appointed, the appointment continues in effect until the attorney is allowed to withdraw, the attorney ~~or~~ is discharged by the court, or ~~until~~ the case is dismissed. If an attorney withdraws or is discharged, substitute counsel shall be appointed by the court if the child continues to meet any requirement for appointed counsel under subsection (3). An attorney who is appointed under this section to represent the child shall provide the complete range of legal services, from the removal from home or from the initial appointment through all available appellate proceedings. With the permission of the court, the attorney for the dependent child may arrange for supplemental or separate counsel to represent the child in appellate proceedings. A court order appointing an attorney under this section must be in writing.

(6) ~~(5)~~ Unless ~~Except if~~ the attorney has agreed to provide pro bono services, an appointed attorney or organization must be adequately compensated. All appointed attorneys and organizations must be ~~and~~ provided with access to funding for expert witnesses, depositions, and other costs of litigation. Payment to an attorney is subject to appropriations and subject to review by the Justice Administrative Commission for reasonableness. The Justice Administrative Commission shall contract with attorneys appointed by the court. Attorney fees

may not exceed $1,000 per child per year.

(7) Appointed attorneys shall, on a quarterly basis, report to the Quality Counsel Program pursuant to s. 27.406 on the activities performed and results obtained on behalf of each dependent child to the extent that such information does not violate any applicable privilege. The form of the report shall be prescribed by the Justice Administrative Commission.

(8) ~~(6)~~ The department shall develop procedures to identify a dependent child who has a special need specified under subsection (3) and to request that a court appoint an attorney for the child.

(9) ~~(7)~~ The department may adopt rules to administer this section.

(10) ~~(8)~~ This section does not limit the authority of the court to appoint an attorney for a dependent child in a proceeding under this chapter.

(11) ~~(9)~~ Implementation of this section is subject to appropriations expressly made for that purpose.

Section 2. Section 27.406, Florida Statutes, is created to read:

27.406 Quality Counsel Program.—

(1) To ensure that dependent children receive quality representation under chapter 39, the Justice Administrative Commission shall contract with a nonprofit entity to establish the Quality Counsel Program.

(2) The Quality Counsel Program must, at a minimum:

(a) Create a quality improvement program utilizing the information provided by appointed attorneys under s. 39.01305 that would include a review and analysis of the attorney's advocacy.

(b) Annually report to the President of the Florida Senate, Speaker of the Florida House of Representatives, Governor, Justice Administrative Commission, the Statewide Guardian ad Litem Program, and the Office of State Courts Administrator on the information collected, results achieved, and recommendations to enhance the quality of representation.

(3) The Quality Counsel Program must be complete and fully operational by June 30, 2018.

Section 3. 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 Cummings offered the following:

Amendment (with title amendment)

Remove lines 86-88 and insert:

counsel shall be appointed by the court. An attorney who is appointed under this section to

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

Remove lines 6-7 and insert:

an attorney withdraws or is discharged; providing that

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: PCS for HB 1005 Prejudgment Interest
SPONSOR(S): Civil Justice Subcommittee
TIED BILLS: None **IDEN./SIM. BILLS:** CS/SB 1086

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

SUMMARY ANALYSIS

The term "prejudgment interest" refers to an award of interest that is in addition to the base award of damages in a civil case. In general, prejudgment interest is awarded in civil actions on liquidated damages, but not on unliquidated damages. Liquidated damages are damages for an amount that can be determined or measured back to a fixed point in time.

The bill provides that prejudgment interest must be awarded in all civil actions for any measure of economic damages. The prejudgment interest begins at the time that the cost was incurred or paid. The term "economic damages" includes medical expenses, lost wages, and property damage.

The bill provides that prejudgment interest may not be awarded for punitive damages, pain and suffering, loss of consortium, loss of enjoyment of life, or any other similar damages; for attorney's fees and costs; for damages received from the state or a local government; where a contract between the parties provides that that prejudgment interest does not apply; or for amounts that the defendant paid or reimbursed to the plaintiff within 90 days.

The bill is prospective and thus will only apply to a cause of action that accrues on or after July 1, 2016.

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

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

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Prejudgment interest is part of Florida's common law tradition, and is not provided for in statute. The Florida Supreme Court has said that the general legal theory supporting an award of prejudgment interest is known as the "Loss Theory." The court explained:

> Under the "loss theory," ... neither the merit of the defense nor the certainty of the amount of loss affects the award of prejudgment interest. Rather, the loss itself is a wrongful deprivation by the defendant of the plaintiff's property. Plaintiff is to be made whole from the date of the loss once a finder of fact has determined the amount of damages and defendant's liability therefor.[1]

Prejudgment interest is the interest on a judgment which is calculated from the date of the injury or loss to the date a final judgment is entered for the plaintiff. Post-judgment interest is interest on a judgment that is calculated from the date of the final judgment until the plaintiff collects the award from the defendant.

Economic damages are damages that are computed and proved from the face of records or documents. They generally include past and future medical bills, wages, funeral expenses, and damages to someone's personal and real property.[2] Non-economic damages, which are not affected by the bill, are subjective intangible items which cannot be measured with certainty. Non-economic damages generally include damages for physical pain and suffering, mental anguish, and the loss of enjoyment of life.

Prejudgment interest is only awarded to the prevailing party for liquidated damages. A liquidated claim is a claim for an amount that can be determined or measured back to a fixed point in time. It is not speculative or intangible. An unliquidated claim, in contrast, is one that is based on intangible factors and is generally disputed until a jury determines the amount.

Prejudgment interest is common in commercial litigation and collection lawsuits. Prejudgment interest is, however, generally inapplicable to most of the award in a personal injury action because damages are too speculative to liquidate before a final judgment is rendered.[3] Prejudgment interest is appropriate and awarded in a personal injury action where the plaintiff can show that he or she suffered the loss of a vested property right[4] or incurs an actual out-of-pocket expense.[5]

Prejudgment interest is not an absolute right, it may be denied on equitable grounds.[6]

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[1] *Bosem v. Musa Holdings, Inc.*, 46 So3d 42, 45 (Fla. 2010).

[2] s. 768.81(1)(b), F.S., provides a more detailed list (as an example only and not binding on this bill): "Economic damages" means past lost income and future lost income reduced to present value; medical and funeral expenses; lost support and services; replacement value of lost personal property; loss of appraised fair market value of real property; costs of construction repairs, including labor, overhead, and profit; and any other economic loss that would not have occurred but for the injury giving rise to the cause of action.

[3] *Zorn v. Britton*, 162 So.879, 881 (Fla. 1935)("We have never recognized an allowance of interest on unliquidated damages for personal injuries, and the general rule seems against such allowance in the absence of statute providing for it.").

[4] *Amerace Corp. v. Stallings*, 823 So. 2d 110 (Fla. 2002) (citing *Alvarado v. Rice*, 614 So.2d 498, 500 (Fla. 1993)). The vested property right in *Alvarado* was out-of-pocket medical expenses paid by the plaintiff before judgment.

[5] *Alvarado v. Rice*, 614 So. 2d 498, 500 (Fla. 1993)(finding that a claimant in a personal injury action is only entitled to prejudgment interest on past medical expenses when the trial court finds that the claimant has made actual, out-of-pocket payments on those medical bills at a date prior to the entry of judgment).

[6] *Broward County v. Finlayson*, 555 So.2d 1211, 1213 (Fla. 1990)("[O]nce damages are liquidated, prejudgment interest is considered an element of those damages as a matter of law, and the plaintiff is to be made whole from the date of the

The statutory interest rate on judgments is calculated quarterly by averaging the discount rate of the Federal Reserve Bank of New York for the preceding 12 months, adding 400 basis points.[7] Prejudgment interest is calculated by the trial judge based on the final award in a post-trial hearing, and thus is not presented to the jury.

Effect of the Bill

The bill creates s. 55.035, F.S., to require that a court award prejudgment interest in any civil action, calculated as follows:

- As to past medical costs paid prior to entry of a final judgment, from the date the medical services were paid;
- As to past medical costs unpaid at the time of entry of a final judgment, based on the amount determined by the court in a post-judgment hearing as adjusted by law,[8] from the date the payment for medical services was due in the ordinary course of business;
- As to lost wages, from the date that such wages would ordinarily have been paid to the employee;
- As to property damage, from the date of loss; and
- As to any other measure of economic damages, from the date the expense was paid by the party.

Because it is written as a mandatory award of prejudgment interest, the bill appears to provide that a court may not deny prejudgment interest on equitable grounds.

The bill also creates exceptions to the payment of prejudgment interest under the newly created statute, providing that no prejudgment interest may be awarded under this section:

- For any damages that were reimbursed to the plaintiff or paid on behalf of the plaintiff, if paid or reimbursed by the defendant or on behalf of the defendant by a third party and within 90 days;
- For exemplary or punitive damages, pain and suffering, loss of consortium, loss of enjoyment of life, or any other similar damages;
- For attorney's fees and costs;
- In any action against the state or any of its agencies of subdivisions to recover damages in tort, in accordance with the limit in s. 768.28(5), F.S.;[9] or
- Where a contract between the parties specifically provides that interest will not be applied.

The bill applies to a cause of action that accrues on or after July 1, 2016.

B. SECTION DIRECTORY:

Section 1 creates s. 55.035, F.S., providing for prejudgment interest.

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

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loss." 526 So.2d at 47. See also *Florida Steel Corp. v. Adaptable Devs. Inc.*, 503 So.2d 1232 (Fla.1986). This general rule is not absolute. In *Flack v. Graham*, 461 So.2d 82 (Fla.1984), we refused to permit recovery of any prejudgment interest, stating: " '[I]nterest is not recovered according to a rigid theory of compensation for money withheld, but is given in response to considerations of fairness. It is denied when its exaction would be inequitable.' " *Id.* at 84 (quoting *Board of Commissioners v. United States*, 308 U.S. 343 (1939)).

[7] s. 55.03, F.S.

[8] The collateral source rule, codified at s. 768.76, F.S., may require that a trial court reduce an award for past medical damages.

[9] s. 768.28, F.S., is a partial waiver of sovereign immunity in tort actions applicable to the state and its subdivisions. Subsection (5) specifically prohibits an award of interest in cases where sovereign immunity is deemed waived.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

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

2. Expenditures:

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

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

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

2. Expenditures:

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

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The bill appears to have an indeterminate direct economic impact on the private sector. The bill may have a positive impact on plaintiffs in personal injury cases and a corresponding negative impact on defendants and/or their insurance companies.

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 prejudgment interest; creating s. 55.035, F.S.; providing for the award of prejudgment interest in any action in which a plaintiff recovers economic damages; providing for calculation of interest; providing exceptions; providing an effective date.

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

Section 1. Section 55.035, Florida Statutes, is created to read:

55.035 Prejudgment interest.—

(1) In any action in which a party is entitled to recover economic damages the court shall additionally award interest at the rate specified in s. 55.03, calculated:

(a) As to past medical costs paid prior to entry of a final judgment, from the date the medical services were paid; and as to past medical costs unpaid at the time of entry of a final judgment, based on the amount determined by the court in a post-judgment hearing as adjusted by law, from the date the payment for medical services was due in the ordinary course of business;

(b) As to lost wages, from the date that such wages would ordinarily have been paid to the employee;

(c) As to property damage, from the date of loss; and

(d) As to any other measure of economic damages, from the

date the expense was paid by the party.

(2) Notwithstanding subsection (1), no prejudgment interest shall be awarded under this section:

(a) For any damages that were reimbursed to the plaintiff or paid on behalf of the plaintiff, if paid or reimbursed by the defendant or on behalf of the defendant by a third party and within 90 days;

(b) For exemplary or punitive damages, pain and suffering, loss of consortium, loss of enjoyment of life, or any other similar damages;

(c) For attorney's fees and costs;

(d) In any action against the state or any of its agencies of subdivisions to recover damages in tort, in accordance with the limit in s. 768.28(5); or

(e) Where a contract between the parties specifically provides that interest will not be applied.

(5) This section shall apply to any cause of action accruing on or after July 1, 2016.

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

PCS for HB 1073

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: PCS for HB 1073 Military Support
SPONSOR(S): Civil Justice Subcommittee
TIED BILLS: None **IDEN./SIM. BILLS:** SB 1656

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

SUMMARY ANALYSIS

America's servicemembers face many challenges related to their service to the country. This bill addresses one of those challenges, related to the challenges of leasing a new residence where an application and background check is required.

The bill requires that, if an application and review is required for a prospective tenant who is a servicemember, it must be completed within 7 days. Absent a rejection of the rental application within 7 days of its submission, the landlord must offer to lease the property to the servicemember. Condominiums, cooperatives, and homeowners associations who require a background check of prospective tenants must also complete the background check within 7 days for a servicemember or waive the requirement.

The 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:

Residential tenancies are governed by Part II of ch. 83, F.S., known as the Florida Residential Landlord and Tenant Act. The Act generally applies to the rental of a dwelling unit, but does not apply to residence or detention in a facility, temporary occupancy related to a contract for purchase and sale, transient occupancy in a hotel or motel, a mobile home park tenancy, or occupancy by the owner of a cooperative or condominium.[1]

While the Act regulates portions of the landlord-tenant relationship, many parts of that relationship are unregulated and left to the marketplace to regulate. One such area is that of rental application and tenant review prior to the landlord agreeing to offer a lease to a prospective tenant. Increasingly, landlords require every prospective tenant to submit to one or more reviews, including a criminal history background check, sexual offender check, credit check, or employment verification.

America's servicemembers face many challenges related to their service to the country. One such challenge is related to the frequent transfers between bases that are common to all servicemembers, referred to as a Permanent Change of Station (PCS). Relevant to this bill, the military will only authorize 10 days of temporary lodging expense (TLE) for transfers within the continental United States to the servicemember searching for new housing pursuant to a PCS.[2] When landlords do not approve the servicemember's rental application while awaiting results of a background check or checks, servicemembers report these delays sometimes far exceed the days authorized for TLE reimbursement.

This bill creates s. 83.683, F.S., to provide that, if a landlord requires a prospective tenant to complete a rental application before residing in a rental unit, the landlord must complete processing of the rental application submitted by a prospective tenant who is a servicemember within 7 days after submission of the application. Absent a timely denial of the rental application, the landlord must lease the rental unit to the servicemember provided that all other terms of the application and lease are complied with.[3]

Many community associations (condominium associations, cooperative associations, and homeowners associations) require review and approval of a prospective tenant of a condominium unit, cooperative unit, or parcel within the association's control. Similar to landlords, associations may require a rental application and review process. The bill provides that a community association must process the rental application submitted by a prospective tenant who is a servicemember within 7 days after submission. Absent a timely denial of the rental application, the association must allow the unit or parcel owner to lease to the servicemember and the landlord must lease the rental unit to the servicemember provided that all other terms of the application and lease are complied with.

To prevent coercion by landlords and associations, the bill provides that its provisions may not be waived or modified by the agreement of the parties under any circumstances.

B. SECTION DIRECTORY:

Section 1 creates s. 83.683, F.S., regarding rental application by a servicemember.

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

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[1] ss. 83.41 and 83.42, F.S.

[2] http://www.defensetravel.dod.mil/site/faqpcs.cfm (last accessed January 28, 2016).

[3] Other requirements typically include signing of the lease, payment of a security deposit, and payment of initial rent. These requirements are not waived or excluded by the bill.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

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

2. Expenditures:

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

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

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

2. Expenditures:

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

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

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

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

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

2. Other:

   None.

B. RULE-MAKING AUTHORITY:

The bill does not appear to create a need for rulemaking or 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 military support; creating s. 83.683, F.S.; requiring a landlord, a condominium association, a cooperative, or a homeowners association to complete the processing of a rental application submitted by a servicemember within a specified timeframe; providing applicability; providing an effective date.

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

Section 1. Section 83.683, Florida Statutes, is created to read:

83.683 Rental application by a servicemember.—

(1) If a landlord requires a prospective tenant to complete a rental application before residing in a rental unit, the landlord must complete processing of the rental application submitted by a prospective tenant who is a servicemember, as defined in s. 250.01, within 7 days after submission. Absent a timely denial of the rental application, the landlord shall lease the rental unit to the servicemember provided that all other terms of the application and lease are complied with.

(2) If a condominium association, as defined in ch. 718, a cooperative association, as defined in ch. 719, or a homeowners association, as defined in ch. 720, requires a prospective tenant of a condominium unit, cooperative unit, or parcel within

the association's control to complete a rental application before residing in a rental unit, the association must complete processing of the rental application submitted by a prospective tenant who is a servicemember, as defined in s. 250.01, within 7 days after submission. Absent a timely denial of the rental application, the association shall allow the unit or parcel owner to lease to the servicemember and the landlord shall lease the rental unit to the servicemember provided that all other terms of the application and lease are complied with.

(3) The provisions of this section may not be waived or modified by the agreement of the parties under any circumstances.

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

STORAGE NAME: h3509.CJS.DOCX
DATE: 1/29/2016

Florida House of Representatives
Summary Claim Bill Report

Bill #: HB 3509; Relief/Andrea Castillo/City of Hialeah
Sponsor: Nuñez
Companion Bill: SB 44 by Garcia
Special Master: Parker Aziz

Basic Information:

Claimants:	Susana Castillo, individually and as personal representative of the Estate of Andrea Castillo
Respondent:	The City of Hialeah ("Hialeah")
Amount Requested:	$455,000
Type of Claim:	Local equitable claim related to the wrongful death of Andrea Castillo; result of a settlement agreement.
Respondent's Position:	The Hialeah City Council approved the settlement of the instant claim on June 9, 2015. Hialeah supports the passage of the claim bill provided payment does not exceed $155,000 in any single Fiscal Year.
Collateral Sources:	The claimants collected $10,000 from State Farm Automobile Insurance Company under an uninsured motorist coverage policy.
Attorney's/Lobbying Fees:	The bill specifically provides that the total amount paid for attorney fees, lobbying fees, costs and similar expenses relating to the claim may not exceed 25% of the total awarded under the bill.
Prior Legislative History:	This is the first time this claim has been introduced to the Legislature.

Procedural Summary: On May 7, 2013, Susana Castillo, the decedent's mother, as personal representative of the Estate of Andrea Castillo, filed a wrongful death action in the 11th Judicial Circuit Court, in and for Dade County, against the City of Hialeah and Officer Raul Somarriba, individually, related to a motor vehicle accident on October 19, 2012, which resulted in the death of Andrea Castillo.

On June 9, 2015, a settlement was reached as to all claims involving the accident for $750,000. The City has paid $300,000 of the settlement, pursuant to the statutory limits/caps, of which $5,000 was paid to resolve claims against Officer Somarriba, individually. $150,000 of the initial payment was distributed to Marcos Barrios and the remainder to the Estate. According the terms of the settlement agreement, if a claim bill is approved, the remaining amount of the settlement will be paid in three payments as follows: $150,000 on May 1, 2016, $150,000 on May 1, 2017, and $155,000 on May 1, 2018.

Facts of Case: On October 19, 2012, 21-year-old Andrea Castillo ("Andrea") was a passenger in a Jeep Compass belonging to her boyfriend, Marco Barrios, as they traveled to the Hard Rock Café & Casino in Hollywood, Florida to celebrate Andrea's recent birthday. Along the route, Marco pulled into a Hess gas station at the intersection of E. 49th Street and E. 9th Court in Hialeah to refuel. Upon departing the Hess station, Marco pulled up to the stop sign, facing north, at the intersection.

The intersection at E. 49th Street and E. 9th Court is a two-way stop with four lanes of traffic going eastbound and westbound on E. 49th Street with the right-of-way and no stop signs at the intersection. Traffic on two lane E. 9th Court, heading north and southbound, has a stop sign. It was approximately 9:45pm, dark, but the intersection was well-lit with gas stations and a used car sales lot in the immediate vicinity. Marco stopped at the stop sign and then edged out into E. 49th Street, attempting to turn left and go westbound on E. 49th Street.

At the same time, Officer Raul Somarriba, a Hialeah police officer, was on duty and driving eastbound on E. 49th Street in an unmarked patrol car. Officer Somarriba was traveling at approximately 62 MPH, 22 miles-per-hour over the posted speed limit, with his emergency lights activated but no siren. Marco slowly drove his SUV into the intersection, attempting to turn left and head westbound on E. 49th Street, but stopped within the eastbound lanes. Officer Somarriba's patrol car struck Barrios' SUV, causing a violent collision in which the SUV flipped repeatedly, coming to rest on its side. Andrea was ejected from the front passenger seat and later found in the SUV's back hatch area.

Marco, Officer Somarriba and Andrea all suffered severe injuries. When Hialeah Fire Rescue arrived at the scene, it was discovered that Andrea had massive blunt trauma injuries to her head and torso. She was unresponsive. Officer Somarriba broke his arm and his femur in the crash. Barrios fractured his pelvis. The EMS decided to use the only air-rescue unit called to the scene on Officer Somarriba and not Andrea, despite her near comatose state. As a result, Andrea arrived at Ryder Trauma Center at Jackson Memorial Hospital approximately 23 minutes after Officer Somarriba. She died three days later.

The investigation performed by the City of Hialeah Police Department determined that none of the parties wore a seat belt. Officer Somarriba buckled the passenger seatbelt into the driver's seatbelt receiver. Both Marco's and Andrea's belts were in a locked and retracted position, indicating they were not in use at the time of the collision and the positions of their bodies within the SUV following the collision were consistent with not wearing a seatbelt. While Florida law requires passengers to

wear a seatbelt[1], in a civil case, the failure to wear a seat belt may be considered only as evidence of comparative negligence.[2]

It is unclear why Officer Somarriba was traveling at such an excessive speed or why his lights were activated but not his siren. He does not remember anything concerning the accident. Two witnesses came forward stating they saw the officer pursuing a speeding red Toyota Camry. Their testimony, however, is conflicting and no video surveillance from the accident shows a vehicle matching that description. If Officer Somarriba was in pursuit of a vehicle,[3] he violated Hialeah Police Department operating procedures for pursuing vehicles. However, General Order 22.04 requires police officers to engage both their siren and lights and to refrain from exceeding the posted speed limit by more than 10 miles per hour when pursuing vehicles. The policy is a further limitation on s. 316.072(5)(b)3., F.S., which provides that authorized emergency vehicles may exceed the maximum speed limits when in pursuit of suspected violator of the law, provided that such excessive speed does not endanger life or property.

Claimant's expert testified that four seconds elapsed from the time Marco's SUV entered into the intersection and the time of impact. In those four seconds, Officer Somarriba took no evasive actions or decreased his speed. The same expert testified that Officer Somarriba's speed before the impact, calculated from surveillance videos, exceeded even the 60MPH at time of impact. Hialeah's expert also testified that Officer Somarriba's speed far exceeded the posted speed limit of 40MPH. The City of Hialeah police investigation concluded that the Officer's speed was a contributing cause of the accident.

Following the accident, Marco's blood was taken for blood-alcohol analysis and the results of the toxicology report showed he did not have any alcohol or drugs in his system.

Andrea was a student at Miami Dade College with hopes of one day becoming a teacher. She is survived by her mother, Susana, her father, Osvaldo, her father, and her brother Kevin. The family founded the Andrea Castillo Foundation to honor her memory and love of education. The foundation provides a scholarship at Miami Dade College and Florida International University for students pursuing a degree in education. If the claim is approved by the Legislature, the award would be distributed to the Estate, and specifically Susana Castillo. Osvaldo and Marco have satisfied their claims from the initial settlement payment.

Recommendations: Settlement agreements are sometimes entered into for reasons that may have very little to do with the merits of a claim or the validity of a defense. Stipulations or settlement agreements between the parties to a claim bill are not necessarily binding on the Legislature or its committees, or on the Special Master. However, all such agreements must be evaluated. If found to be reasonable and based on equity, the settlement agreements can be given effect, at least at the Special Master's level of consideration.

There are several factors in this case that would cause a jury consternation at trial. The negligence of each actor appears to have contributed to the accident. Andrea was not wearing her seatbelt. Officer Somarriba was clearly traveling at excessive speeds, in violation of department operating procedures and Florida law, without his siren on and endangering life and property around him. Marco, inexplicitly, pulled out into a busy street and stopped his SUV while attempting to make a left turn. It is unclear whether he did not see the unmarked patrol car, or by the time he saw it he

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[1] Section 316.614(5), F.S., states "It is unlawful for any person 18 years of age or older to be a passenger in the front seat of a motor vehicle unless such person is restrained by a safety belt when the vehicle is in motion." A person who violates this section commits a nonmoving traffic violation.

[2] *Ridley v. Safety Kleen Corp.*, 693 So. 2d 934, 943 (Fla. 1996).

[3] Hialeah Police Department General Order 17.06 states that unmarked police vehicles may engage in pursuit when there is a reasonable belief that the fleeing suspect committed or attempted to commit a forcible felony.

attempted to stop and allow it to pass before completing his turn. Under either scenario, Marco's SUV was still in the middle of eastbound traffic. Nevertheless, although Officer Somarriba had the right-of-way, Florida law still required him to "take reasonable steps available to him to avoid the collision."[4] Officer Somarriba's excessive speed, in violation of Hialeah Police Department's code, and his lack of evasive maneuvers were not reasonable steps to avoid the collision.

Given the negligence of each party, the settlement agreement is an appropriate compromise. The damages in this claim are tragic and there is no reason to believe Andrea would not have led a long and productive life. I find that the settlement agreement in this case is reasonable and equitable in light of the negligence surrounding the accident and recommend that the settlement be given effect by the Legislature.

I respectfully recommend that HB 3509 be reported **FAVORABLY**.

1-29-16

Parker Aziz, Special Master Date

cc: Representative Nuñez, House Sponsor
Senator Garcia, Senate Sponsor
Ashley Peacock, Senate Special Master

[4] *Gordon's Tractor Serv., Inc. v. Bilello*, 336 So. 2d 1208, 1209 (Fla. 2d DCA 1976).

A bill to be entitled

An act for the relief of Susana Castillo, as personal representative of the Estate of Andrea Castillo; providing for an appropriation to compensate the Estate of Andrea Castillo for her death as a result of the negligence of the City of Hialeah; providing a limitation on the payment of fees and costs; providing that the amounts awarded are intended to provide the sole compensation for all present and future claims related to the wrongful death of Andrea Castillo; providing an effective date.

WHEREAS, on October 19, 2012, at about 9:45 p.m., 21-year-old Andrea Castillo was traveling as a passenger in a 2012 Jeep Compass being operated by her boyfriend, Marco Barrios, at or near the intersection of E 49th Street and E 9th Court in the City of Hialeah, and

WHEREAS, at the same time Officer Raul Somarriba, an on-duty patrolman with the Hialeah Police Department was traveling more than 20 miles per hour over the posted speed limit of 40 miles per hour eastbound on E 49th Street toward the intersection of E 9th Court in an unmarked patrol car, and

WHEREAS, Officer Somarriba does not recall being in pursuit of any suspect or vehicle, and records and dispatch communications do not indicate otherwise, and, in any case, the speed at which he was traveling violated General Order No. 17.06

of the City of Hialeah Police Department Vehicle Pursuit Protocols, which governs authorized pursuit, and

WHEREAS, Officer Somarriba did not activate the emergency lights or siren and, while traveling significantly over the speed limit, crashed into the driver's side of the Jeep Compass driven by Marco Barrios while it was crossing the eastbound lanes of E 49th Street, and

WHEREAS, the severe impact of the collision forced the Jeep to flip repeatedly and collide with several vehicles parked at an adjacent car dealership before coming to rest on its side, and

WHEREAS, the force of the crash was so great that Marco Barrios was gravely injured and Andrea Castillo was internally ejected from her seat and discovered in the back hatch area of the vehicle with massive blunt trauma injuries to her head and torso, and

WHEREAS, Andrea Castillo died as a result of her injuries within days of the crash, and

WHEREAS, at the conclusion of the traffic homicide investigation into the death of Andrea Castillo and a companion investigation by the state attorney, the Hialeah Police Department and other investigating agencies concluded that Marco Barrios duly observed the stop sign at the intersection of E 49th Street and E 9th Court and that Officer Somarriba's speed was a contributing factor to the fatal crash, and

WHEREAS, a toxicology test conducted in the course of the

homicide investigation determined that Marco Barrios was not impaired by alcohol or any other substance at the time of the crash, and

WHEREAS, the Hialeah Police Department failed to seek or request preservation of Officer Somarriba's blood samples within the 6-day preservation period protocol observed by Ryder Trauma Center for the retention of such samples, thereby losing the opportunity to test Officer Somarriba for intoxicants, and

WHEREAS, Andrea Castillo was the only daughter of Susana and Osvaldo Castillo and is survived by them, her younger brother, Kevin Castillo, and her grandparents, all of whom were emotionally dependent upon her and loved her dearly, and

WHEREAS, at the time of her death, Andrea Castillo was enrolled in college to obtain her degree in education in order to follow in the footsteps of her grandmother, May Garcia-Clissent, who served as a teacher in Cuba and, for 35 years, with the Miami-Dade County Public Schools, and her mother, Susana Castillo, who serves on the Miami-Dade County School Board, and

WHEREAS, the Andrea Castillo Foundation has been created in Andrea's honor in order to raise funds for students who do not have the financial means to pursue a degree in education, and

WHEREAS, in 2012, Susana Castillo, individually and as personal representative of the Estate of Andrea Castillo, filed a wrongful death lawsuit in the 11th Judicial Circuit Court in and for Miami-Dade County, *Susana Vicaria Castillo, as personal*

representative of the Estate of Andrea Nicole Castillo, deceased, v. City of Hialeah, Florida, a municipality and subdivision of the State of Florida, and Raul Somarriba, individually, Case No. 13-16278 CA 10, and

WHEREAS, in 2012, Marco Barrios filed a lawsuit in the 11th Judicial Circuit Court in and for Miami-Dade County, *Marco Barrios, individually, v. City of Hialeah, Florida, a Florida municipal governmental entity,* Case No. 13-15659 CA 10, and

WHEREAS, following litigation and mediation of their disputes, the parties to such actions on June 9, 2015, entered into a settlement agreement, which agreement was approved by the Hialeah City Council, and

WHEREAS, the terms of the settlement agreement required the claimants, Marco Barrios and the Estate of Andrea Castillo, to dismiss their cases with prejudice and provide a full release of liability to the City of Hialeah and its employees, which the claimants have done, in exchange for payments by the City of Hialeah totaling $750,000, inclusive of all claimants, and

WHEREAS, pursuant to the settlement agreement, the City of Hialeah has paid $295,000 to the claimants, leaving an unpaid balance of $455,000, and

WHEREAS, as part of the terms of the settlement agreement and general release, the City of Hialeah has agreed to support the passage of a claim bill and to pay the remaining balance of $455,000 in installments, with the last payment to be made on May 1, 2018, NOW, THEREFORE,

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

Section 1. The facts stated in the preamble to this act are found and declared to be true.

Section 2. The City of Hialeah is authorized and directed to appropriate from funds of the city not otherwise appropriated and to draw warrants totaling the amount of $455,000, payable to the law firm of Silva & Silva, P.A., Trust Account for the benefit of Susana Castillo, as personal representative of the Estate of Andrea Nicole Castillo, as compensation for injuries and damages sustained as a result of the death of Andrea Castillo. The amount of $150,000 shall be paid on May 1, 2016, the amount of $150,000 shall be paid on May 1, 2017, and the final payment amount of $155,000 shall be paid on May 1, 2018.

Section 3. The total amount paid for attorney fees, lobbying fees, costs, and other similar expenses relating to the claims may not exceed 25 percent of the total amount awarded under this act.

Section 4. The amounts awarded pursuant to the waiver of sovereign immunity under s. 768.28, Florida Statutes, and under this act are intended to provide the sole compensation for all present and future claims arising out of the factual situation described in the preamble to this act which resulted in the death of Andrea Castillo.

Section 5. This act shall take effect upon becoming a law.

COMMITTEE/SUBCOMMITTEE AMENDMENT

Bill No. HB 3509 (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 Moraitis offered the following:

Amendment (with title amendment)

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

Remove line 30 and insert:

siren and, while traveling significantly over the

STORAGE NAME: h3515.CJS.DOCX
DATE: 1/29/2016

Florida House of Representatives
Summary Claim Bill Report

Bill #: HB 3515; Relief/Q.B./Palm Beach County School Board
Sponsor: Fitzenhagen
Companion Bill: SB 58 by Abruzzo
Special Master: Parker Aziz

Basic Information:

Claimants:	Terry Burge and Syvena Walker, as Parents and Guardians of Q.B., a minor.
Respondent:	Palm Beach County School Board
Amount Requested:	$600,000
Type of Claim:	Local equitable claim; result of a settlement agreement
Respondent's Position:	Palm Beach County School Board does not oppose the claim bill as long as it is amended to reflect the settled amount of $600,000
Collateral Sources:	None reported.
Attorney's/Lobbying Fees:	Claimant's attorney provided an affidavit stating that the attorney's fees will be capped at 25% of the total claim award in accordance with s. 768.28(8), F.S., and that the lobbyist's fees, if any, will be included in the 25% fee cap. Notwithstanding the attorney's affidavit, the bill specifically provides that the total amount paid for attorney fees, lobbying fees, costs, and similar expenses relating to the claim may not exceed 25% of the total awarded under the bill.
Prior Legislative History:	Senate Bill 58 by Senator Abruzzo was filed during the 2014 Legislative Session. It did not have a House companion and it was not heard in any committee.

Procedural Summary: On January 6, 2010, Terry Burge and Syvena Walker., as Parents and Guardians of Q.B. ("Claimants") filed a suit against the Palm Beach County School Board ("School Board") in the Circuit Court of the Fifteenth Judicial Circuit, in and for Palm Beach County. Prior to trial, the School Board admitted liability for the negligence of its employees but contested the amount of damages. The case went to trial, and on February 6, 2013, the jury returned with a verdict of $1,700,000. The trial court also awarded Claimants $77,950.41 in costs. Prior to the Special Master hearing on November 10, 2015, the two parties agreed to settle the claim for $600,000. Pursuant to the settlement, the School Board has paid the sovereign immunity limit of $100,000.00.

Facts of Case: On January 16, 2007, Q.B. was a three-year-old exceptional student education (ESE) student at Glade View Elementary School in the Palm Beach County School District. At that time, Q.B.'s speech and language capabilities were developmentally delayed, and Q.B. had virtually no speech at all. She was being transported on a school bus from Glade View Elementary School to her home. A fifteen-year-old male high school student who had emotional and behavioral disabilities was also a passenger on the school bus. Because he had a history of causing trouble on the bus, his assigned seat was directly behind the bus driver, Laverne Sellers, so that she could monitor his behavior. The fifteen-year-old male left his assigned bus seat, and sat next to Q.B. in her assigned bus seat. He proceeded to sexually assault Q.B. for approximately fifteen minutes before the bus attendant, Granisha Williams, walked up and discovered the fifteen-year-old male, kneeling in front of Q.B., with his arms around her, his jacket covering her lap, and kissing her neck. When Ms. Williams walked up, Q.B. had tears streaming down her face.

Neither Ms. Williams nor Ms. Sellers made the male student return to his seat.[1] Instead, he was allowed to remain next to Q.B. in her assigned seat until he got off the bus at his stop.[2] Neither the attendant nor the driver notified Q.B.'s parents when she got off the bus. Later that evening, Q.B.'s mother and father were notified of the incident on the bus, but were only told minimal details. It was not until weeks later when they were called to the State Attorney's Office that they were shown tape of the incident and were made fully aware of what happened to their daughter.

Q.B.'s mother described that her daughter's behavior has changed since the incident occurred. Prior to the incident, Q.B. was a sweet and affectionate "girly girl." Since the incident, her parents have observed that she will no longer wear dresses, she acts like a boy, and tends to be very aggressive towards boys. She has also become reluctant to let others touch her. Q.B. has remained in generally good health aside from symptoms of precocious sexual development[3] that began around the age of six. She was also diagnosed with Attention Deficit Disorder with Hyperactivity and various academic learning disorders. In 2009, test results showed that she had an IQ of 77, placing her in the sixth percentile.

A psychiatric evaluation of Q.B. was conducted three years later by Dr. Michael Hughes, M.D., the Claimant's expert witness. The report from the evaluation revealed that because of her young age and virtually absent language skills at the time of the assault, Q.B. has no conscious narrative memory of the event. However, Dr. Hughes found that the assault will affect Q.B.'s basic developmental processes including the capacity to: reach out and trust the world around her or to withdraw into timidity and fear; to contain, calm, and soothe her inner emotional experiences as opposed to being overwhelmed by the strength of her own emotions; to manage fear and

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[1] Both Laverne Sellers, the bus driver, and Grenisha Williams, the bus attendant, have been terminated from their employment at the School Board. Grenisha Williams was criminally prosecuted and convicted of felony child neglect without great bodily harm.

[2] The fifteen-year-old male was criminally prosecuted for the assault; however, he was not convicted because the court found him to be mentally incompetent.

[3] Q.B.'s doctors describe her precocious sexual development as advanced bone age and possible early puberty, such that at age 6, Q.B. had a skeletal age between 8-10 years of age as well as early pubic hair.

aggression so that the emotions can be contained; to trust people around her as opposed to responding with mistrust, fear, doubt, and aggression; and to have curiosity and a desire to understand people and the world as opposed to withdrawal and doubt. Dr. Hughes noted that while some of these deficiencies were present before, they were aggravated by the assault. He concluded that as a result of the assault, Q.B. will continue to suffer from psychological injuries into the future.

The Dr. Hughes' report also stated there is potential for improvement, but it will take considerable effort. His treatment recommendations included: individual psychotherapy; counseling sessions for Q.B.'s mother and father; a trial of stimulant medication to treat Q.B.'s Attention Deficit/Hyperactivity Disorder; and tests and remediation for her psychoeducational and speech and language needs.

The School Board's expert witness, Harley V. Stock, Ph.D., wrote a report stating that the pediatrician's examination of Q.B. after the incident shows no indication of a physical sexual assault. However, he noted that this does not necessarily mean that no assault occurred. He also opined that the incident has not had any long-lasting or permanent effect on Q.B. because of her young age, cognitive impairment, and lack of memory processing abilities at the time of the incident. Thus, he concluded that Q.B. will not need any type of psychotherapeutic or related intervention in the future.

During the Special Master hearing, Q.B. presented as a pleasant and coherent twelve-year-old girl in the seventh grade. Despite her learning and developmental difficulties, she has been improving tremendously in school and is currently making all A's and B's.

Recommendation: Given the jury verdict and extensive costs of Dr. Hughes's recommendations for Q.B.'s future care, the $600,000 awarded through this claim bill is an appropriate settlement.

It should be noted that given the criminal records of both Terry Burge and Syvena Walker any monetary award should be placed into a special needs trust for the benefit of Q.B.[4]

I respectfully recommend that House Bill 3515 be reported **FAVORABLY.**

1-24-16

Parker Aziz, Special Master Date

cc: Representative Fitzenhagen, House Sponsor
Senator Abruzzo, Senate Sponsor
Diana Caldwell, Senate Special Master

[4] Burge was arrested seven times with only one misdemeanor conviction. Walker has been arrested sixteen times resulting in two misdemeanor convictions and three felony convictions. The remaining charges were either dropped or Nolle Prossed.

A bill to be entitled

An act for the relief of Q.B. by the Palm Beach County School Board; providing for an appropriation to compensate Q.B. for injuries sustained as a result of the negligence of employees of the Palm Beach County School District; providing a limitation on the payment of fees and costs; providing that the appropriation settles all present and future claims related to the negligent act; providing an effective date.

WHEREAS, in January 2007, Q.B. was a 3-year-old exceptional student education student at Glade View Elementary School in the Palm Beach County School District, and

WHEREAS, at that time, Q.B.'s speech and language capabilities were developmentally delayed and Q.B. had virtually no capacity for speech, and

WHEREAS, on January 16, 2007, a school bus owned by the Palm Beach County School District was being driven by a bus driver employed by the district with a bus aide, also employed by the district, riding as a passenger, to transport Q.B. to her home from Glade View Elementary School, and

WHEREAS, at the same time, a 15-year-old male high school student who had emotional and behavioral disabilities and who was considered severely emotionally disturbed by the Palm Beach County School District was also a passenger on the school bus, and

WHEREAS, the 15-year-old male high school student left his assigned bus seat, approached Q.B., and proceeded to sexually assault Q.B. for approximately 15 minutes before the sexual assault was discovered and stopped by the bus aide, and

WHEREAS, neither the bus driver or the bus aide made any effort to require the 15-year-old male high school student to return to his assigned seat in the wake of the sexual assault, but allowed him to remain sitting next to Q.B. for the remainder of the bus ride, and

WHEREAS, the duties of the bus driver and the bus aide included supervising the students on the bus, ensuring that all students were in compliance with bus safety rules, and ensuring the safety of all students on the bus, and

WHEREAS, the bus driver and the bus aide failed to properly supervise the 15-year-old male high school student, failed to properly supervise Q.B., failed to ensure the safety of Q.B., and, as a direct result of the breach of such duties, the 15-year-old male high school student was able to sexually assault Q.B., and

WHEREAS, the sexual assault was captured on video by a camera installed on the school bus, and the sexual assault resulted in physical, emotional, and psychological trauma to Q.B., and further diminished the quality of her life, and

WHEREAS, the Palm Beach County School Board is vicariously liable for the negligence of the bus driver and the bus aide under the doctrine of respondeat superior, s. 768.28(9)(a),

Florida Statutes, and

WHEREAS, on January 6, 2010, the parents of Q.B. filed a negligence action against the Palm Beach County School Board in Palm Beach County Circuit Court, styled *T.B. and S.W., as Parents and Natural Guardians of Q.B., a minor, Plaintiff v. The School Board of Palm Beach County, Defendant,* Case No. 502010CA000194MBAA, to recover damages for the injuries sustained by Q.B. due to the sexual assault, and

WHEREAS, six years after the sexual assault and 2 weeks before the commencement of trial, the Palm Beach County School Board admitted liability for negligence and the case proceeded to trial only on the issue of damages, and

WHEREAS, on February 6, 2013, the jury returned a verdict of $1,777,950 to compensate Q.B. for her injuries and provide for her future care and treatment, and

WHEREAS, the Palm Beach County School Board has paid $100,000 of the judgment pursuant to the statutory limits of liability under s. 768.28, Florida Statutes, and

WHEREAS, the Palm Beach County School Board is responsible for paying the remainder of the judgment, which is $1,677,950, NOW, THEREFORE,

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

Section 1. <u>The facts stated in the preamble to this act are found and declared to be true.</u>

Section 2. The Palm Beach County School Board is authorized and directed to appropriate from funds of the school board not otherwise appropriated and to draw a warrant in the sum of $1,677,950 payable to Q.B. as compensation for injuries and damages sustained as a result of the negligence of employees of the Palm Beach County School District.

Section 3. The total amount paid for attorney fees, lobbying fees, costs, and other similar expenses relating to this claim may not exceed 25 percent of the amount awarded under this act.

Section 4. The compensation awarded under this act is intended to provide the sole compensation for all present and future claims arising out of the factual situation described in this act which resulted in the injuries to Q.B.

Section 5. This act shall take effect upon becoming a law.

COMMITTEE/SUBCOMMITTEE AMENDMENT

Bill No. HB 3515 (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 Fitzenhagen offered the following:

Amendment (with title amendment)

Remove line 82 and insert:

sum of $600,000, payable in two annual installments of $300,000 each, which, after payment of fees costs, and expenses as provided in section 3, shall be placed in a special needs trust for the exclusive use and benefit of Q.B. to compensate for injuries

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

Remove lines 71-73 and insert:

WHEREAS, the parties have agreed to a settlement in the amount of $600,000, which was approved on December 16, 2015, by the Palm Beach County School Board, NOW, THEREFORE,

STORAGE NAME: **h3517.CJS.DOCX**
DATE: 1/29/2016

Florida House of Representatives
Summary Claim Bill Report

Bill #: HB 3517; Relief/Alex Zaldivar, Brienna Campos, & Remington Campos/Orange County
Sponsor: Bracy
Companion Bill: SB 20 by Diaz de la Portilla
Special Master: Parker Aziz

Basic Information

Claimants:	Estate of Alex Zaldivar, Brienna Campos, and Remington Campos
Respondent:	Orange County
Amount Requested:	$400,000
Type of Claim:	Local equitable claim; result of a settlement agreement
Respondent's Position:	Orange County does not oppose the claim bill.
Collateral Sources:	None reported.

Attorney's/Lobbying Fees: The claimant's attorney provided an affidavit stating that the attorney's fees will be waived in order to maximize the claimants' recovery. However, the affidavit provides that costs and lobbying fees are not waived. The affidavit lists costs at $9,103.83[1] and lobbying fees at 5% of the amount awarded.[2]

Notwithstanding the attorney's affidavit, the bill specifically provides the total amount paid for attorney fees, lobbying fees, costs, and similar expenses relating to the claim may not exceed 25% of the total awarded under the bill. However, the bill states that taxable costs, which does not include attorney fees or lobbying fees, related to the underlying civil action may be collected in addition to the aforementioned attorney fees and lobbying fees.

The Special Master understands the altruistic motives of claimants' attorneys but to avoid confusion, the bill should be amended to cap attorney's fees, lobbyist's fees, and costs at 25 percent and allow the parties to allocate the percentage pursuant to their individual agreements.

Prior Legislative History: This is the first time this claim has been introduced to the Legislature.

Procedural Summary: This claim was settled before any formal action was filed. The settlement agreement, entered into on September 5, 2014, settles all claims by the Estate of Alex Zaldivar (Estate) and Brienna and Remington Campos for $700,000. The settlement distributes the $700,000 between the parties with $300,000 to the Estate and $200,000 individually to both Remington and Brienna. Orange County has paid $100,000 to each claimant.

Facts of Case: On May 9, 2012, Bessman Okafor and Nolan Bernard forced their way by gunpoint into a home then occupied by Brienna Campos, Brandon Campos, Alex Zaldivar, and William Herrington. They tied the victims up with telephone cord and held them at gunpoint while they ransacked the house and collected valuables to take with them.[3] Unwittingly, the two suspects took an iPhone that was setup to be tracked by Apple's proprietary 'Find my iPhone' feature. The police tracked the phone to the house where the suspects were hiding out. When confronted, Bernard surrendered, and the police found the phone they tracked in his pocket. Okafor ran but was tracked down and apprehended. He had a backpack with some of the other property he and his accomplice had just stolen from the Campos house.

Officers picked up the victims and drove them by the scene where they had apprehended Bernard and Okafor. The victims positively identified the two suspects. Okafor and Bernard were arrested and charged with 14 felony offenses related to the robbery. Both Okafor and Bernard were assigned a $66,000 bond but were authorized to participate in the Home Confinement Unit program if the bond requirement was met, over the objection of the State Attorney. Unbeknownst to the victims, Okafor was placed in the Orange County Home Confinement program after posting bond

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[1] This does not include the costs incurred as a result of the Special Master hearing on November 9, 2015, which includes travel and lodging.

[2] If the claim bill is passed, the lobbying fees will total $20,000, with $10,000 from the $200,000 awarded to the Estate of Alex Zaldivar and $5,000 each from the $100,000 awarded individually to Remington and Brienna Campos.

[3] It is unclear what motivated Okafor or Bernard. Brienna Campos admitted to police that she use to sale marijuana but stated she never sold it out of her house.

and being released from jail on June 23, 2012.

The Orange County Home Confinement program, a division of the Community Surveillance Unit in the Orange County Corrections Department, allows defendants awaiting trial to remain at home with their families which allows them the opportunity to be a productive member of society in lieu of being incarcerated. Defendants are given electronic monitoring equipment consisting of a base unit and an ankle monitor which utilizes radio frequency to monitor the defendants. The majority of the ankle bracelets used by the program are not equipped with Global Positioning System technology to provide real-time data on location but rather equipment that sends signals to a monitoring service that documents whether a defendant ventures too far from his or her base unit.

Okafor incurred numerous violations in the few short months he was in home confinement. From June 24, 2012 to September 20, 2012 Okafor violated monitoring restrictions over 100 times, an average of over one violation each day. Many times these violations were not sufficiently investigated. Okafor continued to state that the curfew violations were due to a problem with the phone line. On one occasion, an investigator was not able to contact Okafor to resolve a curfew violation. Instead that investigator spoke to Okafor's sister on her cell phone and accepted her confirmation that Okafor was there with no further investigation. Even though employees were required to resolve multiple curfew violations over an hour, nothing was done to resolve Okafor's multiple curfew violations over an hour. Supervisors were required to review the performance of those under their lead, but case managers and field officers in Orange County's Home Confinement program were given 100% accuracy scores even where multiple unresolved curfew violations existed. Furthermore, a confinee is supposed to be "violated" (reported to his or her judge) when a new law violation is committed while on home confinement. Even though the Home Confinement staff knew Okafor committed a new law violation by failing to appear before a Polk County court for a speeding ticket, he was not reported to his judge. Overall, the Orange County Home Confinement program suffered from pervasive failure of its employees to follow policy and procedures.

All the victims were deposed about the robbery and were expected to testify in Okafor's and Bernard's trials. Before trial, the victims were visited twice by Okafor's mother, Cathy, and offered money in exchange for not testifying against the two robbers. On a third occasion, a different person visited the house to make the same request. At no time, however, were the victims threatened with violence. Brienna called the police the second time they were visited by Cathy. The police came and investigated a mysterious car that was left parked across the street.

On the day before his trial, September 10, 2012, Bessman Okafor returned with two accomplices to the same home he robbed in May. They kicked in the front door and forced their way into the victims' home. Only two, Alex and Brienna, of the original four victims were present at the home that early morning as well as Remington Campos[4], brother of Brienna. They made Alex, Brienna, and Remington lay on the ground at gunpoint. As Remington describes the scene, the suspects moved through the house and his friend, Alex, lay shaking on the floor next to him. Brienna states that she heard the suspects asking about the other two people that were witnesses to the previous home invasion robbery. She says that it was evident that they knew those two weren't present because they kept asking about them. Both Brienna and Remington heard three gunshots, and then one of the suspects asked another, "Did you miss?" The victims "played dead" for a couple minutes, then Remington looked up to see his sister raise her head. Alex's body lay lifeless as Okafor and his accomplices fatally shot him. Remington led Brienna out of the house, across the back yard, over the privacy fence and to a neighbor's house where they called for help.

The Orlando Police Department ("OPD") investigated the murder and put together a timeline of events from red light cameras, a personal surveillance camera at a nearby house, Okafor's cell

[4] Remington resided at the home at the time of the May 9, 2012 robbery but was not present.

phone, and his home confinement monitor. By piecing together the information available from these sources it was possible for the OPD to construct a timeline of the events that put Okafor right at the center of the murder of Alex Zaldivar and the shootings of Brienna and Remington Campos. There is little question that Okafor left his house that night, drove over to the house he and Bernard had robbed four months earlier and attempted to silence all the witnesses that might testify against him at his trial which was only hours away.

On September 10, 2012, Okafor's home confinement system showed that he was away from home for over an hour from 4:40 am to 5:40 am. The 911 call from Remington and Brienna, both suffering from gunshot wounds to the head, came in at 5:24 am.

In the aftermath of the carnage, Orange County performed internal audits of their Home Confinement program and eventually shut down the program entirely. Okafor has since been convicted and set to receive the death penalty for his heinous acts against Alex, Brienna, and Remington.

All three victims of the September 10 attack suffered horrific and incalculable damages. Alex Zaldivar, 19 years old at the time of his death, was a student at Valencia College and left behind his parents, Rafael and Kyoko, and his older brother Rafael Zaldivar, Jr. From all the evidence presented to the Special Master, Alex was kind, loving, and had a prosperous future before his tragic murder. Remington and Brienna were treated for their head wounds at Orlando Regional Medical Center. Brienna was shot in the left side of her head and was released after only one night in the hospital. Remington was shot in the back of the head, just above his neck. Along with the psychological pain, Brienna and Remington both suffer from migraines and back pain.

Recommendation/Conclusion of Law: Settlement agreements are sometimes entered into for reasons that may have very little to do with the merits of a claim or the validity of a defense. Stipulations or settlement agreements between the parties to a claim bill are not binding on the Legislature or its committees, or on the Special Master. However, all such agreements must be evaluated.

At the outset it will be helpful to note that the law defining a government's tort liability in Florida "has become a tangled web of incomprehensible and inconsistent principles, exceptions, and exceptions to the exceptions."[5] For that reason, it is sometimes difficult to determine whether the government will be held liable in tort or not. With that being said, it is my opinion that Orange County did not owe the claimants a duty of care and therefore is not liable for the injuries they sustained.

Duty

A threshold issue for tort liability is that of duty. All plaintiffs in tort actions must first establish that the defendant owed the plaintiff a duty of care, that is, a duty to act reasonably regarding the injured party's interests. When bringing tort claims against private individuals, duty is often a simple issue to decide. Individuals almost always have a duty to act with reasonable care regarding those they come into contact with. However, when government actions are in question, finding duty becomes more than a perfunctory task. As a threshold issue, this duty analysis is prior to any analysis of sovereign immunity.[6] The Public Duty Doctrine embodies the idea that for some actions, such as law enforcement,[7] a government entity owes a duty to the general public, but not to specific

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[5] William N. Drake, Jr., & Thomas A. Bustin, *Governmental Tort Liability in Florida A Tangled Web*, FLA. B.J., February 2003.

[6] *Trianon Park Condo. Ass'n, Inc.*, 468 So. 2d at 917 (for "there to be a governmental tort liability, there must be either an underlying common law or statutory duty of care with respect to the alleged negligent conduct.").

[7] *Trianon Park Condo. Ass'n, Inc. v. City Hialeah*, 468 So. 2d 912, 919 (Fla. 1985).

individuals,[8] unless the government has established a special relationship with the individual harmed or the action created a foreseeable zone of risk.[9]

In *State, Dep't of Corr. v. Vann*, 650 So. 2d 658, 659 (Fla. 1st DCA 1995), *approved sub nom., Vann v. Dep't of Corr.*, 662 So. 2d 339 (Fla. 1995), a prisoner escaped from the custody of the Department of Corrections "while away from the prison grounds as part of a work detail providing catering services to a community group at" a nearby school. The escapee killed a woman in the parking lot of a department store in a nearby town.[10] The decedent's estate claimed that the Department was negligent on several grounds, including: "improperly classifying the prisoner (including the failure to follow their own rules and procedures in the method of classification), failing to properly supervise the prisoner, and failing to warn the public of the prisoner's escape."[11] The court held that the state is not responsible for the injuries resulting from the criminal acts of escapees specifically because the state has no duty to protect individuals from such injuries.[12] The same three grounds alleged in *Vann* are alleged against Orange County in the claim at issue, and Okafor's "escape" from home confinement is much the same as the prisoner's escape from work detail. The only distinguishing fact is the target of the escapee's violent act. In the claim at issue, Okafor came back to the place of his original crime to silence witnesses. In *Vann*, the escapee attacked and murdered a random victim. This distinction does not create a special relationship.

In *Parker v. Murphy*, 510 So. 2d 990, 992 (Fla. 1st DCA 1987), a prisoner in the Department of Correction's custody escaped twice, and attacked the same elderly couple both times. The court also held that no special relationship existed between the Department and the victims, and there was no individual duty owed to them.[13] Though the court's opinion does not expound upon why the escapee went back to attack his previous victims, the victims in *Parker* are similarly situated to the victims in this claim. Like *Parker*, the claimants here were victims of violence perpetrated by the same assailant that ultimately escaped home confinement and attacked them again. In *Parker*, the court found that the Department was not liable because no special relationship was created,[14] therefore, a court is likely not to find a duty in this case as well.

In *Brown v. Woodham*, 840 So. 2d 1105, 1106–07 (Fla. 1st DCA 2003), a man was taken into custody for the domestic violence he perpetrated on his wife. During his one week stint in jail, he wrote several letters, which were retained in his file at the jail, describing further violence he intended to perpetrate on his wife upon his release.[15] The court ordered that he be held without bond; however, the Sheriff released him and called the victim to tell her he had been released, but mentioned nothing about the letters.[16] The court held that the Sheriff had a statutory duty in domestic violence cases to consider the safety of the victims and any other person reasonably thought to be in danger before releasing someone,[17] but the court stated that it would pass on the question of whether or not the Sheriff owed a common law duty to the victim.[18] This case, then, is distinguishable because the claimants have not claimed that the county had a similar statutorily created duty.

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[8] *Id.* at 915.
[9] *See, e.g., Sams v. Oelrich*, 717 So. 2d 1044, 1047 (Fla. 1st DCA 1998).
[10] *Vann*, 650 So. 2d at 659.
[11] *Id.*
[12] *Id.* at 661; *see Dep't of Corr. v. McGhee*, 653 So. 2d 1091, 1093 (Fla. 1st DCA 1995), *approved*, 666 So. 2d 140 (Fla. 1996).
[13] *Id.*
[14] *Id.*
[15] *Brown*, 840 So. 2d at 1106.
[16] *Id.* at 1106–08.
[17] s. 741.2901(3), F.S.
[18] *Id.* at 1106-07.

In *Wallace v. Dean*, 3 So. 3d 1035, 1041 (Fla. 2009), the court found that the Sheriff owed a duty to an individual that passed away after an officer performed a wellness check on her and determined that she was just sleeping. The court found that the Sheriff was no longer operating under his law enforcement duties, for which he owes a duty to the general public, but had undertaken a duty of care regarding the individual.[19] In *Wallace*, the duty is established only after the one who ultimately owed the duty "undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of the other's person or things. . . ."[20] This is clearly not the case in this claim. The County never offered protection nor was aware of any information that may make protection a necessity.

The claimants also allege that the State Attorney in Orange County failed to keep his promise to update them on Okafor's detainment status. Assuming, *arguendo*, the actions of a State Attorney could otherwise be imputed to the County, State Attorneys are quasi-judicial officers that are immune from suit for negligent performance of their duties.[21]

The claimants also called the police the second time a relative of Okafor's visited them to try to dissuade them from testifying. The police investigated a car that was left parked across the street after the visit, but it was "clean." In *Parrotino v. City of Jacksonville*, 612 So. 2d 586, 587 (Fla. 1st DCA 1992) (*Parrotino I*), *reversed on other grounds*, *Office of State Att'y, Fourth Judicial Cir. of Fla. v. Parrotino*, 628 So. 2d 1097 (Fla. 1993), a woman was killed by an abusive boyfriend after the police had been called out on numerous occasions because of his abusive, harassing, and threatening behavior. The police were said not to owe the victim a duty, even though they knew the perpetrator had proven himself willing and able to commit violent acts on her, because no special relationship existed.[22] Even the fact that the claimants made the police aware of the visits from Okafor's family members, none of which were reported to be violent or threatening, is analogous to *Parrotino I*, it cannot establish a special relationship.

No case law unearthed by the special master creates a special relationship between the claimants and Orange County. Claimants rely upon *Everton v. Willard,* 468 So. 2d 936 (Fla. 1985) to support their claim that they're entitled to a special relationship. In *Everton*, the Florida Supreme Court held that a Pinellas County Deputy Sheriff's decision to not arrest a drunk driver was a discretionary decision and immune from liability under sovereign immunity. In holding so, the Court stated:

> A law enforcement officer's duty to protect the citizens is a general duty owed to the public as a whole. The victim of a criminal offense, which might have been prevented through reasonable law enforcement action, does not establish a common law duty of care to the individual citizen and resulting tort liability, absent a special duty to the victim.[23]

The Court further stated, in dicta, that a special relationship "is illustrated by the situation in which the police accept the responsibility to protect a particular person who has assisted them in the arrest or prosecution of criminal defendants and the individual is in danger due to that assistance. In such a case, a special duty to use reasonable care in the protection of the individual may arise."[24] The court only hypothesizes that a special relationship may be established when the above facts are present, but it was not confronted with those facts and did not decide the issue of what duties are owed to a cooperating witness.

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[19] *Wallace*, 3 So. 3d at 1052.
[20] *Id.* at 1051.
[21] *Office of State Att'y, Fourth Judicial Cir. of Fla. v. Parrotino*, 628 So. 2d 1097, 1098-99 (Fla. 1993) (*Parrotino II*).
[22] *Parrotino I*, 612 So. 2d at 589.
[23] *Everton*, 468 So. 2d at 938.
[24] *Id.*

The *Everton* court cited *Schuster v. City of New York*[25], a New York Court of Appeals decision from 1958, to support its illustration of a special relationship. The *Schuster* court explained that "the public . . . owes a special duty to use reasonable care for the protection of persons who have collaborated with it in the arrest or prosecution of criminals, once it reasonably appears that they are in danger due to their collaboration."[26] Arnold Schuster volunteered to help the FBI apprehend a fugitive when he recognized a picture of a gentleman in a "wanted" poster.[27] Schuster's role in apprehending the fugitive was well publicized, and shortly afterward, Schuster started receiving death threats.[28] He notified the police of the threats and requested protection, but the police told him not to worry about the threats and declined to give him protection. Unlike *Schuster*, the claimants here were never threatened with violence and never requested police protection. Therefore it did not reasonably appear that they were in danger due to their cooperation with authorities. *Schuster* and its progeny, in order to establish a special relationship, require the police, through promises or action, to affirmatively accept a duty to protect the victim and for the victim to rely upon such affirmative action.[29]

In this case, there is nothing in the record to show that anyone from Orange County gave affirmative assurances to the victims that they would be protected or guarded nor is there anything in the record to show the victims asked for protection. While Okafor's relatives did visit Brienna to pay her from testifying, they never threatened violence and Brienna never requested protection from the police. No Florida court has held that being called to testify creates a special relationship.

There are, in fact, situations where law enforcement officers owe common law duties to individuals without a special relationship. They owe common law duties to certain individuals who are within a foreseeable zone of risk that was created by the officer's actions.[30] However, none of the foreseeable zone of risk cases go so far as to establish a zone of risk where the victim has become a witness against the assailant. Orange County owed the claimants a duty when they had Okafor in custody after the armed robbery and brought the claimants over to identify him. If Okafor would have escaped police custody and harmed the claimants when they were brought over to identify their assailant, Orange County would have been liable. This foreseeable zone of risk quickly vanishes when the parties are no longer in close proximity to one another.

Finally, the claimants main argument is that a duty was established when the claimants began to assist in the prosecution of Okafor by identifying him and his co-defendants, being deposed by the State Attorney, and by agreeing to be witnesses against Okafor.[31] Unfortunately, the case law does not support such a finding based on those facts. The County neither establishes a special

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[25] *Schuster v. City of New York*, 5 N.Y.2d 75 (1958).
[26] *Id.* at 81.
[27] *Id.* at 536
[28] *Id.*
[29] *Cuffy v. City of New York*, 69 N.Y.2d 255, 260 (1987).
[30] *Sams v. Olerich*, 717 So. 2d 1044, 1047 (Fla. 1st DCA 1998) (holding that a police officer owed a duty to those in the emergency room while he was detaining a patient); *City of Pinellas Park v. Brown*, 604 So. 2d 1222, 1225 (Fla. 1992) (holding that a high speed pursuit created a foreseeable zone of risk to those around but did not constitute negligence *per se*); *but see Milanese v. City of Boca Raton*, 84 So. 3d 339, 343 (Fla. 4th DCA 2012) (holding that the police did not create any zone of risk when they released an intoxicated individual who was injured on railroad tracks near the police station).
[31] The claimants emphasize the County's failure to notify them of Okafor's placement in Home Confinement, and they may argue that this special duty required only that the County notify them of Okafor's placement in the Home Confinement program. However, notification would not have protected the claimants. They point to no actions that they would have taken in response to knowing Okafor was released that would have prevented this tragedy. The claimants may argue that they would have requested police protection if they knew Okafor had been released, but this request would not have established a special relationship because the County had no evidence that the claimants lives were in danger. That failure to notify is, thus, not a legal cause of the claimants' injuries.

relationship nor creates a foreseeable zone of risk by seeking assistance in prosecuting a crime. To create a special relationship, the government must somehow accept or undertake the duty to protect the individual. A foreseeable zone of risk requires some actual proximity to a dangerous situation created by the government. The claimants may argue that danger is reasonably foreseeable where the person in custody has expressed a desire and willingness to commit violence against a specific victim.[32] But, as discussed above, the *Brown* court left that question open. Even so, there is no evidence that Okafor threatened the claimants with violence.

Finally, finding a special relationship based solely on the fact that an individual becomes a witness in a criminal case would open the proverbial floodgates of liability for government agencies. It would require individual protection for every witness in a trial where the defendant is released on bond.[33] The Public Duty Doctrine "also rests on the need to prevent the chilling of the law enforcement processes, as well as the availability of other remedies against private parties who initially created the danger which caused the damage."[34]

Therefore, for the legal and policy reasons laid out above, this Special Master finds that Orange County owed no duty to the claimants here.

In a strict legal analysis, because I find that there was no duty, there is no need to expound upon the issues of sovereign immunity, breach, causation, and damages. However, if the Legislature chooses to pass this claim under legislative grace, then I will discuss those issues and find that, if a duty did exist, Orange County did act negligently, that negligent action was the cause of the claimants' injuries, and those injuries substantiate the amount sought by the claimants. However, because Orange County owed the claimants no duty of care, it is not legally liable for the injuries caused by Okafor.

Breach

If there was a duty of reasonable care, although one does not exist as described above, Orange County clearly breached it. Okafor violated curfew on 129 separate occasions, 39 of those were for more than half an hour. The confinement program's policy was to report and investigate excessive violations of curfew. This meant making contact with the confinee to ascertain the reason why curfew was violated to determine whether there was a significant excuse or the confinee should be reported to his judge to determine whether or not the confinee would remain in the program or be remanded into custody. Orange County failed to do that. They also failed to properly ascertain the reason for a 59 hour outage of the phone line connecting Okafor's monitoring station to the confinement program's office.

Causation

On the night of the murder, Okafor violated curfew several times for more than 30 minutes each time. If Orange County had properly reported and investigated this activity, the murders may have never happened. Moreover, the County failed to properly investigate and report several other previous curfew violations that could have very likely led to Okafor's being removed from the program.

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[32] *See, e.g., Brown v. Woodham*, 840 So. 2d 1105, 1106 (Fla. 1st DCA 2003) ("It is reasonably foreseeable that a victim of domestic violence, such as Michelle Stroba, would seek protection for herself and her family while under threat of physical violence and harm from William Stroba. The Gadsden County Sheriff owed a special duty to Michelle Stroba, as a victim of domestic violence, and to her reasonably foreseeable protector, Robert Brown.")

[33] *See* Mary Babb Morris, *Effect of Special Relationship; Public Duty Doctrine*, 28 Fla. Jur 2d Government Tort Liability § 18.

[34] *Id.*

Damages

On, September 10, 2012, Alex Zaldivar was shot twice in the head and died shortly thereafter. His two friends, Brienna and Remington Campos were shot in the head as well, but survived. Brienna continues to suffer short term memory problems that have made schooling extremely difficult for her. Remington suffers from headaches and back pain. Both have suffered unspeakable, lasting emotional harm from their experience. They had to play dead in a pool of their friend's blood and watch him bleed to death as they anxiously waited to see if their fate would be the same as his.

Conclusion

Therefore, although the damages in this case are truly horrendous, and the actions of Orange County's home confinement program fell below their own operating procedures, Florida law does not recognize a duty owed to the claimants by Orange County. The claimants rightly seek justice as recompense for the wrongs they have suffered, unfortunately, the law points not to Orange County but to Okafor and his co-defendants as the objects of its wrath.

Passing this claim bill may set a precedent in finding a special relationship with every witness in criminal proceedings where none currently exists in law. However, the Legislature is not bound by this report, jury verdicts, settlement agreements or past legislatures. Any claim bill passed is an act of legislative grace.[35] The Legislature may wish to make Alex's family, as well as Brienna and Remington whole for the criminal actions of Okafor. Though not legally responsible, the Legislature may feel called under a moral obligation to pass this claim bill to reconcile the inaction of Orange County's now defunct Home Confinement program.

For the reasons set forth above, I recommend that House Bill 3517 be reported **UNFAVORABLY**.

Respectfully submitted,

1-29-16

Parker Aziz, Special Master Date

cc: Representative Bracy, House Sponsor
Senator Diaz de la Portilla, Senate Sponsor
Daniel Looke, Senate Special Master

[35] *Gamble v. Wells*, 450 So. 2d 850, 853 (Fla. 1984).

A bill to be entitled

An act for the relief of Rafael Zaldivar and Kyoko Zaldivar, parents of Alex Zaldivar, deceased, individually and as co-personal representatives of the Estate of Alex Zaldivar, and Brienna Campos and Remington Campos by Orange County; providing for an appropriation to compensate Rafael Zaldivar and Kyoko Zaldivar for the death of Alex Zaldivar and to compensate Brienna Campos and Remington Campos for the injuries and damages they sustained as a result of the negligence of Orange County; providing a limitation on the payment of fees and costs; providing an effective date.

WHEREAS, on September 10, 2012, Alex Zaldivar, deceased, Brienna Campos, and Remington Campos were attacked and shot during a home invasion robbery perpetrated by Bessman Okafor, who was being monitored by Orange County Corrections Department's Community Corrections Division, and

WHEREAS, the Estate of Alex Zaldivar and Brienna Campos and Remington Campos have alleged that the negligence of Orange County was the proximate cause of the death of Alex Zaldivar and the injuries sustained by Brienna Campos and Remington Campos, and

WHEREAS, Rafael Zaldivar and Kyoko Zaldivar, as parents of Alex Zaldivar, and Brienna Campos and Remington Campos have

suffered extreme mental anguish and undergone great suffering as a result of the events of September 10, 2012, and

WHEREAS, Orange County and the Estate of Alex Zaldivar have agreed to settle the Estate's claim for $300,000; Orange County and Brienna Campos have agreed to settle her claim for $200,000; and Orange County and Remington Campos have agreed to settle his claim for $200,000, and

WHEREAS, pursuant to the settlement agreements, Orange County has paid $100,000 to each of the claimants, leaving an unpaid balance of $200,000 for the Estate of Alex Zaldivar and $100,000 each for Brienna Campos and Remington Campos, and

WHEREAS, the respective claims of the Estate of Alex Zaldivar, Brienna Campos, and Remington Campos will be fully satisfied upon payment by Orange County to the Estate of Alex Zaldivar in the amount $200,000, to Brienna Campos in the amount of $100,000, and to Remington Campos in the amount of $100,000 with the passage of a claim bill to pay the remaining balances, NOW, THEREFORE,

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

Section 1. The facts stated in the preamble to this act are found and declared to be true.

Section 2. Orange County is authorized and directed to appropriate from funds of the county not otherwise appropriated and to draw a warrant in the sum of $200,000 payable to the

Estate of Alex Zaldivar, as compensation for injuries and damages sustained by Rafael Zaldivar and Kyoko Zaldivar, as parents of Alex Zaldivar, deceased; a warrant in the sum of $100,000 payable to Brienna Campos as compensation for the injuries and damages sustained by the claimant, and a warrant in the sum of $100,000 payable to Remington Campos as compensation for the injuries and damages sustained by the claimant.

Section 3. The amount paid by Orange County pursuant to s. 768.28, Florida Statutes, and the amount awarded under this act are intended to provide the sole compensation for all present and future claims arising out of the factual situation described in the preamble to this act which resulted in the death of Alex Zaldivar and the injuries to Brienna Campos and Remington Campos. The total amount paid for attorney fees, lobbying fees, costs, and similar expenses relating to this claim may not exceed 25 percent of the total amount awarded under this act. However, taxable costs, which may not include attorney fees and lobbying fees, related to the underlying civil action may be collected in addition to the aforementioned attorney fees and lobbying fees.

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

COMMITTEE/SUBCOMMITTEE AMENDMENT

Bill No. HB 3517 (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 Metz offered the following:

Amendment

Remove lines 69-72

STORAGE NAME: h3525.CJS.DOCX
DATE: 1/29/2016

Florida House of Representatives
Summary Claim Bill Report

Bill #: HB 3525; Relief/Melvin & Alma Colindres/City of Miami
Sponsor: Artiles
Companion Bill: SB 46 by Flores
Special Master: Parker Aziz

Basic Information

Claimants:	Melvin and Alma Colindres, as personal representatives of the Estate of Kevin Colindres
Respondent:	City of Miami
Amount Requested:	$550,000
Type of Claim:	Local equitable claim; result of a settlement agreement.
Respondent's Position:	The City of Miami entered into a settlement agreement for $550,000.
Collateral Sources:	None reported.
Attorney's/Lobbying Fees:	The Claimants' attorneys have agreed to limit their fees to 25 percent of any amount awarded by the Legislature in compliance with section 768.28(8), Florida Statutes. Lobbyist's fees and costs are included with the attorney's fees.

Prior Legislative History:

Senate Bill 76 by Senator Flores was filed during the 2015 Legislative Session. It was never heard in any committee.

Senate Bill 42 by Senator Flores was filed during the 2014 Legislative Session. It was withdrawn prior to introduction.

House Bill 1361 by Representative Steube and Senate Bill 32 by Senator Flores were filed during the 2013 Legislative Session. The House Bill and the Senate Bill were not heard in their respective committee of reference.

House Bill 969 by Representative Grant and Senate Bill 72 by Senator Storms were filed during the 2012 Legislative Session. The House Bill passed its committees of reference (Civil Justice & Judiciary) but died on the House Calendar. The Senate Bill was never considered in its committee of reference.

House Bill 1315 by Representative Diaz and Senate Bill 54 by Senator Storms were filed during the 2011 Legislative Session. The House Bill passed its committee of reference (Civil Justice) but died on the House Calendar. The Senate Bill passed its committee of reference (Rules), passed the full Senate, but died on the House Calendar.

Procedural Summary: Alma and Melvin Colindres, as the personal representatives of Kevin's estate, filed a wrongful death action against the City of Miami in May of 2007. Following extensive discovery, non-binding arbitration was held on March 25, 2010. The arbitrator found that if "the City of Miami Police Officers had been more attentive to Kevin Colindres after they restrained him, there is a strong likelihood that he would be alive today." The arbitrator concluded that the City of Miami was negligent in its treatment of Kevin. Acknowledging that it was difficult to assess the appropriate amount of damages to compensate parents for the pain and suffering associated with the loss of a child, the arbitrator determined that a judgment of $2.75 million was warranted. The City of Miami was not bound by the arbitration, and could have proceeded with a de novo jury trial. Instead, the City of Miami decided to limit further litigation costs by agreeing to the entry of a final judgment for $2.75 million, with the intention of opposing a claim bill. The City of Miami has paid the statutory caps of $200,000.

On January 25, 2016, the Claimants and the City of Miami entered into a settlement agreement for $550,000.

Facts of Case: Kevin Colindres, an intellectually disabled and severely autistic 18-year-old, died on January 5, 2007, as the result of injuries he incurred while in custody of City of Miami police officers on December 12, 2006. Kevin was 5'9 and weighed approximately 210 pounds. Kevin would occasionally throw temper tantrums and the family sometimes required the assistance of law enforcement to control his behavior.

On the evening of December 12, 2006, Mrs. Alma Colindres, Kevin's mother, asked Kevin to get dressed and said she would take him to school, which he hated, unless he cooperated with her. In response, Kevin became violent and struck Alma in the face, put his hands around her neck, and threw a chair at her. These actions prompted Nerania Colindres, Kevin's sister, to call 911 at approximately 6:45 p.m.

Officer Kimberly Pile was the first law enforcement officer to respond to the call. Upon Officer Pile's arrival at the Colindres residence, Kevin had calmed down and was no longer engaged in violent behavior. Officer Pile told Kevin that she was there to help and Kevin sat down on the couch next to his mother.

Officer Pile remained on the scene and several backup officers arrived at the home a short time later. Although Kevin initially remained calm, he again became agitated when Nerania mentioned that he should be taken to the hospital to treat his ear, which was infected. At that point, Kevin stood up and began to run in the direction of his bedroom. As he did so, Kevin tripped and fell to the floor, which resulted in a laceration to his head. Officer Pile radioed for medical assistance at 7:15 p.m. Due to a miscommunication between the police department and fire rescue dispatchers, "cut to the head" was misinterpreted as "cut to the hand," which resulted in the call being assigned an "Alpha response," the slowest response level with the least priority.

While Kevin was still on the floor, the backup officers immediately handcuffed Kevin's wrists behind his back and removed him to the front yard. Kevin struggled against the officers' efforts, which resulted in the officers placing Kevin face-down on the ground. The officers then proceeded to attach a hobble restraint device to Kevin's ankles.

With his wrists handcuffed behind his back and his ankles hobbled, Kevin remained face-down in a prone position while being held in place by three officers, contrary to procedures of the Miami Police Department providing that handcuffed and hobbled subjects should be moved to a sitting position as quickly as possible to avoid the risk of asphyxiation. Positional asphyxiation and the procedures regarding the proper use of a hobble device are subjects that the Miami Police Department includes as part of officer training. However, testimony of the three officers revealed they were unaware of the relevant procedures regarding the hobble device and the positioning of subjects in custody.

The officers continued to hold Kevin in a prone position with at least one of the officers applying pressure to Kevin's back making it even more difficult for him to breathe. After being improperly held in the prone position for 10 to 12 minutes, Kevin stopped breathing. The officers did not notice, again violating department procedures by neglecting to adequately monitor Kevin. Kevin's mother advised the officers that she did not believe Kevin was breathing. In response, one of the officers placed an ammonia tube in Kevin's nose, with no effect.

Notwithstanding the obvious fact that Kevin was no longer moving and in distress, the officers kept Kevin in the prone position until the arrival of the paramedics at 7:30 p.m. By that time, Kevin had been face-down for a total of 15 minutes, and had not been breathing for approximately three to five minutes.

One of the responding paramedics instructed the officers to remove Kevin from the prone position and examined Kevin and discovered that his pupils were fixed, his facial complexion was blue, and he was not breathing. Although Kevin initially exhibited a pulse of 30 beats per minute, he went "flatline" moments later. CPR was then administered and Kevin was transported to the hospital. The prolonged period of respiratory arrest resulted in anoxic encephalopathy (brain death), and Kevin subsequently passed away at Coral Gables Hospital on January 5, 2007.

The Miami-Dade County Medical Examiner concluded that the use of the prone restraint position contributed to Kevin's cardiorespiratory arrest, which in turn caused Kevin's brain death. The Medical Examiner found that the "prone restraint position, and any position that restricts abdominal excursion, will interfere with breathing." The report identified Kevin's agitated emotional state as an additional factor contributing to his death.

Notwithstanding the plain language of the Medical Examiner's report, the Respondent argues that Kevin's cardiorespiratory arrest resulted not from positional asphyxia (i.e., suffocation caused by the prone position), but rather from "excited delirium." However, the undersigned is not persuaded by the opinions of Respondent's expert witnesses, Drs. Dimaio and Mash, and instead credits, as did the arbitrator, the conclusions of Dr. Werner Spitz, the Claimant's expert. Dr. Spitz opined that Kevin's brain death was the result of cardiac arrest initiated by compression of the chest, which in turn was caused by the use of the prone position and the application of force to Kevin's back.

Recommendation: The City clearly owed a duty of care to Kevin Colindres while he was in their custody. The City of Miami police officers breached this duty of care, as it should have been obvious to any reasonable person that restraining Kevin for 15 minutes while he was face-down, handcuffed, and hobbled, was dangerously and needlessly interfering with his ability to breathe. The officers further breached their duty of care when they failed to adequately monitor Kevin's breathing.

The greater weight of the evidence supports the conclusion that Kevin would be alive today had the officers not committed these breaches of duty. Accordingly, the Claimants have demonstrated that the negligence of the officers was the proximate cause of Kevin's death. The settled amount is fair and just in light of the damages.

For the reasons set forth above, the undersigned recommends that House Bill 3525 be reported **FAVORABLY**.

1-29-16

Parker Aziz, Special Master — Date

cc: Representative Artiles, House Sponsor
Senator Flores, Senate Sponsor
Scott Clodfelter, Senate Special Master

A bill to be entitled

An act for the relief of Melvin and Alma Colindres by the City of Miami; providing for an appropriation to compensate them for the wrongful death of their son, Kevin Colindres, which occurred as a result of the negligence of police officers of the City of Miami; providing a limitation on the payment of fees and costs; providing an effective date.

WHEREAS, on December 12, 2006, Melvin and Alma Colindres called the City of Miami police department seeking assistance with their severely autistic and intellectually disabled son, Kevin Colindres, and

WHEREAS, the police officers who arrived at the Colindreses' home were required, according to the City of Miami's policies and procedures, to have been trained on interaction with and restraint of persons with intellectual disabilities, such as Kevin Colindres, along with appropriate monitoring of an in-custody suspect's vital signs and the administration of cardiopulmonary resuscitation (CPR), and

WHEREAS, at the time of the first police officer's arrival at the Colindreses' home, Kevin Colindres was calmly seated on the couch in the living room, and

WHEREAS, the initial police officer who arrived at the Colindreses' house followed her training and the City of Miami's policies and procedures and approached Kevin Colindres in a

quiet and nonthreatening manner and the situation remained stable, and

WHEREAS, the backup police officers violated their training and the City of Miami's policies and procedures by aggressively approaching Kevin Colindres, causing Kevin to attempt to leave the room, and

WHEREAS, the backup police officers then placed Kevin Colindres into custody, handcuffing his hands behind his back, taking him out of the house, and placing him prone on the ground and applying a hobble restraint to his ankles, and

WHEREAS, in violation of their training and the City of Miami's policies and procedures, the backup police officers left Kevin Colindres prone on the ground and applied weight to his back, and

WHEREAS, in violation of their training and the City of Miami's policies and procedures, the backup police officers left Kevin Colindres in this position for more than 10 minutes, and

WHEREAS, in violation of their training and the City of Miami's policies and procedures, the backup police officers failed to appropriately check Kevin Colindres' vital signs, and

WHEREAS, upon realizing that Kevin Colindres had stopped breathing, and in violation of their training and the City of Miami's policies and procedures, the backup police officers failed to administer CPR, and

WHEREAS, in violation of their training and the City of Miami's policies and procedures, the backup police officers

failed to advise the fire rescue department of the urgency of the matter, thereby delaying the response by fire rescue personnel, and

WHEREAS, Kevin Colindres asphyxiated, which caused him to suffer anoxic encephalopathy, and, on January 5, 2007, he died as a result of his injuries, and

WHEREAS, the backup police officers of the City of Miami were negligent in their actions, which directly resulted in Kevin Colindres' death, and

WHEREAS, a tort claim was filed on behalf of Melvin and Alma Colindres, as personal representatives of the Estate of Kevin Colindres, Case No. 07-13294 CA 01, in the Circuit Court for the Eleventh Judicial Circuit, and

WHEREAS, the City of Miami filed a Motion for Arbitration that was granted by the court, an arbitration was held, and the arbitrator awarded the Estate of Kevin Colindres $2.75 million, and

WHEREAS, the City of Miami chose not to seek a de novo trial, and the court granted a final judgment in favor of the Estate of Kevin Colindres in the amount of $2.75 million, plus interest at the rate of 6 percent per annum, and

WHEREAS, the City of Miami has paid $200,000 to Melvin and Alma Colindres, as personal representatives of the Estate of Kevin Colindres, pursuant to its statutory limits of liability, and

WHEREAS, the City of Miami has a private insurance policy

to pay all claims in excess of $500,000, NOW, THEREFORE,

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

Section 1. The facts stated in the preamble to this act are found and declared to be true.

Section 2. The City of Miami is authorized and directed to appropriate from funds of the city not otherwise appropriated, as well as insurance, and to draw a warrant in the sum of $2.55 million payable to Melvin and Alma Colindres, as personal representatives of the Estate of Kevin Colindres, as compensation for the wrongful death of Kevin Colindres due to the negligence by police officers of the City of Miami.

Section 3. The amount paid by the City of Miami pursuant to s. 768.28, Florida Statutes, and the amount awarded under this act are intended to provide the sole compensation for all present and future claims arising out of the factual situation described in this act which resulted in Kevin Colindres' death. The total amount paid for attorney fees, lobbying fees, costs, and other similar expenses relating to this claim may not exceed 25 percent of the total amount awarded under this act.

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

COMMITTEE/SUBCOMMITTEE AMENDMENT

Bill No. HB 3525 (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 Artiles offered the following:

Amendment (with title amendment)

Remove lines 87-88 and insert:

as well as insurance, and to draw a warrant in the sum of $550,000 payable to Melvin and Alma Colindres, as personal

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

Remove line 78 and insert:

WHEREAS, the Estate of Kevin Colindres and the City of Miami have entered into a settlement agreement in the amount of $550,000 and the City of Miami has a private insurance policy