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# **Justice Appropriations Subcommittee**

## **Meeting Packet**

**February 17, 2015  
1:00 p.m. – 3:00 p.m.  
Morris Hall**



**The Florida House of Representatives**  
APPROPRIATION COMMITTEE

Justice Appropriations Subcommittee

**Steve Crisafulli**  
Speaker

**Larry Metz**  
Chair

**MEETING AGENDA**


Morris Hall  
February 17, 2015

- I.** Meeting Called To Order
- II.** Opening Remarks by Chair
- III.** Consideration of the following bill(s):
  - CS/HB 5 - Guardianship Proceedings by Civil Justice Subcommittee, Reps. Passidomo, Rodriguez, J.
  - HB 115 - Sentencing by Rep. Gaetz
  - HB 193 - Crime Stoppers Trust by Rep. Broxson
- IV.** Presentation:  
DOC/FDLE
- V.** Closing Remarks
- VI.** Meeting Adjourned



## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** CS/HB 5 Guardianship Proceedings  
**SPONSOR(S):** Civil Justice Subcommittee; Passidomo and others  
**TIED BILLS:** HB 7 **IDEN./SIM. BILLS:** SB 366

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Civil Justice Subcommittee	12 Y, 0 N, As CS	Robinson	Bond
2) Justice Appropriations Subcommittee		Schrader	Lloyd
3) Judiciary Committee		JSS	

### SUMMARY ANALYSIS

Guardianship is a concept whereby a "guardian," acts for another, called the "ward," whom the law regards as incapable of managing his or her own affairs due to age or incapacity. Due to the seriousness of the loss of individual rights, guardianships are generally disfavored, and a guardian may not be appointed if the court finds there is a sufficient alternative to guardianship. There are two main forms of guardianship: guardianship over the person or guardianship over the property, which may be limited or plenary. Guardianships may be established for both adults and minors. The bill:

- Allows a court to refer contested guardianship matters to mediation or alternative dispute resolution;
- Allows the court to appoint the Office of Criminal Conflict and Civil Regional Counsel to act as a court monitor if the ward is indigent;
- Allows a court to authorize payments to experts and professionals acting on behalf of the guardianship without the need for expert testimony;
- Allows a court to waive appointment of a guardian ad litem in a guardianship case regarding the settlement of a claim by a minor;
- Requires notice to an alleged incapacitated person and his or her counsel of the appointment of an emergency temporary guardian unless such notice would cause the alleged incapacitated person harm;
- Requires letters of guardianship to specify, where applicable, the authority of a health care surrogate;
- Prohibits a court from giving preference to the emergency temporary guardian when selecting the permanent guardian;
- Requires appointment of professional guardians on a rotating basis, except where the court believes that the special needs of the guardianship require a specific guardian;
- Prohibits a professional guardian in most circumstances from being appointed as a permanent guardian if he or she was appointed as the emergency temporary guardian;
- Requires the state to pay the fees of an examining committee in the event that the court finds that an adult is not incapacitated. In such case, if the court finds the petitioner acted in bad faith, the court may require the petitioner to reimburse these fees;
- Prohibits abuse, exploitation, or neglect of a ward by a guardian;
- Creates additional duties of a guardian;
- Requires that annual guardianship plans be filed prior to the time that they take effect; and
- Provides the legal standard for restoration to capacity and requires a court to give priority to hearings thereon.

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

The bill takes effect upon becoming law and applies to all pending proceedings.

This document does not reflect the intent or official position of the bill sponsor or House of Representatives.

STORAGE NAME: h0005a.JUAS.DOCX

DATE: 2/10/2015



## FULL ANALYSIS

### I. SUBSTANTIVE ANALYSIS

#### A. EFFECT OF PROPOSED CHANGES:

Guardianship is a concept whereby a “guardian,” acts for another, called the “ward,” whom the law regards as incapable of managing his or her own affairs due to age or incapacity. Due to the seriousness of the loss of individual rights, guardianships are generally disfavored, and a guardian may not be appointed if the court finds there is a sufficient alternative to guardianship. There are two main forms of guardianship: guardianship over the person or guardianship over the property (or a combination of both), which may be limited or plenary. Guardianships may be established for both adults and minors. For adults, a guardianship may be established when a person has demonstrated that he or she is unable to manage his or her own affairs. If the adult is mentally competent this can be accomplished voluntarily. However, in situations where an individual’s mental competence is in question, an involuntary guardianship may be required. The involuntary guardianship is established through an adjudication of incompetence, which is based upon the determination of an examination committee.

#### **Fiduciary Duties of a Guardian**

Florida courts have long recognized the relationship between a guardian and his or her ward as a classic fiduciary relationship<sup>1</sup>. A fiduciary relationship exists between two persons when one of them is under a duty to act for or to give advice for the benefit of another upon matters within the scope of that relation<sup>2</sup>. The most basic duty of a fiduciary is the duty of loyalty: a fiduciary must refrain from self-dealing, must not take unfair advantage of the ward, must act in the best interest of the ward, and must disclose material facts.<sup>3</sup> In addition to the duty of loyalty, a fiduciary also owes a duty of care to carry out its responsibilities in an informed and considered manner. Section 744.362, F.S., imposes specific duties upon a guardian consistent with the basic duties of a fiduciary including protecting and preserving the property of the ward and ensuring that the ward is personally visited by the guardian periodically to assess the ward’s overall physical and social health. A guardian is also under a duty to file an initial guardianship report,<sup>4</sup> an annual guardianship report<sup>5</sup>, and an annual accounting of the ward’s property<sup>6</sup>. Such reports provide evidence of the guardian’s faithful execution of his or her fiduciary duties.<sup>7</sup>

At the heart of a court’s interpretation of a fiduciary relationship is a concern that persons who assume trustee-like positions with discretionary power over the interests of others might breach their duties and abuse their position. Section 744.446, F.S. explicitly states that the “fiduciary relationship which exists between the guardian and the ward may not be used for the private gain of the guardian other than the remuneration for fees and expenses provided by law.” Section 744.446(4), F.S., also provides that in the event of “a breach by the guardian of the guardian’s fiduciary duty, the court shall take those necessary actions to protect the ward and the ward’s assets.”

One of the tools available to a court when the breach of a guardian’s fiduciary duty is alleged or suspected is the appointment of an court monitor under s. 744.107, F.S., or an emergency court monitor under s. 744.1075, F.S., if the court finds there is imminent danger that the physical or mental health or safety of the ward will be seriously impaired or that the ward’s property is in danger of being wasted, misappropriated, or lost. A monitor may investigate allegations of wrongdoing, seek

<sup>1</sup> *Lawrence v. Norris*, 563 So.2d 195, 197 (Fla. 1st DCA 1990).

<sup>2</sup> *Doe v. Evans*, 814 So.2d 370, 374 (Fla. 2002).

<sup>3</sup> *Capital Bank v. MVP, Inc*, 644 So.2d 515, 520 (Fla. 3d DCA 1994).

<sup>4</sup> Section 744.362, F.S.

<sup>5</sup> Section 744.367, F.S.

<sup>6</sup> Section 744.3678, F.S.

<sup>7</sup> Section 744.368, F.S.

information, examine documents, and interview the ward. A monitor must report his or her findings to the court for judicial action.<sup>8</sup> The court may appoint any person as monitor except a family member of the ward or any person with a personal interest in the proceedings.<sup>9</sup>

In addition to action by the court in response to a report from a court monitor finding fraud, including removal as guardian,<sup>10</sup> guardians may be subject to criminal penalties under s. 825.103(1)(c), F.S., for breaching certain fiduciary duties to the ward, including committing fraud in obtaining their appointments, abusing their powers, or wasting, embezzling, or intentionally mismanaging the assets of the ward.

The public is also required to report abuse, neglect, or exploitation of vulnerable adults to the Department of Children and Families by s. 415.1034, F.S.

### **Effect of Proposed Changes - Fiduciary Duties of a Guardian**

The bill amends s. 744.107, F.S. and s. 744.1075, F.S. to authorize a court to appoint the Office of Criminal Conflict and Civil Regional Counsel as a court monitor for an indigent ward.<sup>11</sup> The bill would serve to codify current practice in that the Office of Criminal Conflict and Civil Regional Counsel are currently providing this service.

The bill creates s. 744.359, F.S. to provide that a guardian may not abuse, neglect, or exploit a ward under the guardian's care. Exploitation is described as any action whereby a guardian commits fraud in obtaining appointment as a guardian, abuses his or her power as guardian, or wastes, embezzles, or intentionally mismanages the ward's assets. Any person believing that a guardian is abusing, neglecting, or exploiting a ward must report the incident to the central abuse hotline of the Department of Children and Families. The court is directed to interpret s.744.359, F.S. in conformance with s. 825.103, F.S. which statute creates criminal penalties related to the exploitation of an elderly person or disabled adult.

The bill amends s. 744.361(1), F.S. to confirm and codify pre-existing Florida law that a guardian is a fiduciary with respect to a ward under the guardian's care. The bill further amends s. 744.361, F.S. to impose additional statutory duties upon a guardian as a fiduciary:

- To act only within the scope of the authority granted to the guardian;
- To act in good faith;
- To act in the ward's best interests; and
- To keep clear, distinct, and accurate records.<sup>12</sup>

Specific to guardians of the person, the bill creates the duty of a guardian to:

- Consider the expressed desires of the ward;
- Allow the ward to maintain contact with family and friends except where contact may harm the ward (the court may review such decisions upon petition by an interested person);
- Not restrict the physical liberty of the ward more than necessary;
- Assist the ward in developing or regaining capacity if medically possible;

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<sup>8</sup> Section 744.107(2), F.S.

<sup>9</sup> Section 744.107(1), F.S.

<sup>10</sup> Section 744.474, F.S.

<sup>11</sup> The Offices of Criminal Conflict and Civil Regional Counsel are created at s. 27.511, F.S. They provide representation to persons entitled to court-appointed counsel under the Federal or State Constitution or as authorized by general law in criminal cases where Office of the Public Defender has a conflict of interest as well as in certain civil proceedings, including the appointment of counsel for an indigent alleged incapacitated person under ch. 744, F.S.

<sup>12</sup> The language here is modeled after that creating a similar duty in the Florida Trust Code at s. 736.0810, F.S.

- Notify the court if the guardian believes that the ward may have capacity to exercise one or more of the ward's removed rights;
- Make provisions for medical services and, to the extent possible, acquire a clear understanding of the risks and benefits of a recommended course of treatment;
- Evaluate the ward's medical and health care options, financial resources, and desires in making decisions regarding the ward's residence; and
- Advocate for the ward in institutional and residential settings.

### **Guardianship Plan**

In order that the court may monitor and supervise a guardian's compliance as a fiduciary, a guardian must file reports and plans. A guardian of the person must file an annual plan. If the court requires calendar year planning, the plan must be filed by April 1 of the plan year. Otherwise, the plan must be filed within 90 days after the anniversary month that the letters of guardianship were filed.<sup>13</sup> An approved plan is a court order giving the guardian power to act within its terms and limits the powers of the guardian to such terms.<sup>14</sup>

Because proposed plans are filed within the term in which they are effective, it is unclear which plan controls. Also unclear is the effect of failure to file or what is the effect of the court failing to timely review and approve a plan.

### **Effect of Proposed Changes - Guardianship Plan**

The bill amends s. 744.367, F.S. to revise when a guardian of the person must file an annual guardianship plan. Where a calendar year filing is required, the plan must be filed between September 1 and December 1 of the previous year. Otherwise, the plan must be filed between 60 and 90 days before the last day of the anniversary month.

The bill amends s. 744.369, F.S. to provide that a guardian may continue to act under a previous year's annual guardianship plan until the next year's annual guardianship plan has been approved by the court unless otherwise ordered by the court.

### **Emergency Temporary Guardianship**

A guardianship is initiated when a competent adult, who can attest as to why he or she believes a person may be incapacitated, files with a court a petition to determine another person's incapacity.<sup>15</sup> Upon the filing of the petition, the court must appoint an examining committee of relevant medical professionals to conduct a comprehensive examination of the alleged incapacitated person, review the reports of the examining committee, and hold an adjudicatory hearing prior to finding that a person is incapacitated. Accordingly, establishing a guardianship can take several weeks.<sup>16</sup> However, where there appears to be imminent danger that the physical or mental health or safety of the person will be seriously impaired or that the person's property is in danger of being wasted, misappropriated, or lost unless immediate action is taken, the court may appoint an emergency temporary guardian any time after the filing of the petition to determine incapacity.<sup>17</sup> This may occur on the court's own motion or in response to a petition for an emergency temporary guardian. A court may also appoint an emergency temporary guardian if a petition for the appointment of a guardian has not been filed at the time of the hearing on the petition to determine capacity.<sup>18</sup>

<sup>13</sup> Section 744.367(1), F.S.

<sup>14</sup> Section 744.369(8), F.S.

<sup>15</sup> Section 744.3201, F.S.

<sup>16</sup> Section 744.331, F.S. provides for up to 34 days, or longer upon a showing of good cause, for a court to hold an adjudicatory hearing on a petition to determine incapacity.

<sup>17</sup> Section 744.3031, F.S.

<sup>18</sup> Section 744.344(4), F.S.

Although the alleged incapacitated person and his or her attorney are entitled to notice and copies of the petition to determine incapacity and any subsequent petition for the appointment of a permanent guardian<sup>19</sup>, s. 744.3031, F.S., which governs the appointment of an emergency temporary guardian, is silent regarding notice to the alleged incapacitated person and his or her counsel of the petition to appoint an emergency temporary guardian and any hearing thereon. Practitioners and members of the public have reported that emergency temporary guardians are often appointed without notice to the alleged incapacitated person.

### **Effect of Proposed Changes - Emergency Temporary Guardianship**

The bill amends s. 744.344(4), F.S., to allow for the appointment of an emergency temporary guardian if a petition for appointment of a guardian has not been ruled upon at the time of the hearing on the petition to determine incapacity.

The bill amends s. 744.3031, F.S., to require that notice of the filing of a petition for appointment of an emergency temporary guardian and any hearing thereon be served on an alleged incapacitated person, and the alleged incapacitated person's attorney, at least 24 hours prior to commencement of the hearing unless the petitioner can demonstrate that substantial harm to the alleged incapacitated person would occur if notice was given.

### **Costs and Fees of Examining Committee**

When a petition for incapacity is filed, the court is required to appoint an examining committee consisting of three members, at least one of which must be a psychiatrist or other physician.<sup>20</sup> The remaining members must be either a psychologist or gerontologist, another psychiatrist or physician, a registered nurse, nurse practitioner, licensed social worker with an advanced degree in gerontology from an accredited institution of higher education, or other person who by knowledge, skill, experience, training or education may, in the court's discretion, "advise the court in the form of an expert opinion."<sup>21</sup>

Each member of the examining committee is charged with examining the alleged incapacitated person, making a comprehensive assessment, and rendering to the court a professional opinion as to a diagnosis, a prognosis and a recommended course of treatment. This evaluation includes an assessment of the capacity of the individual to exercise enumerated rights in s. 744.3215, F.S.

Compensation of examining committee members is governed by s. 744.331(7), F.S., which provides generally that the examining committee and any attorney appointed to represent the alleged incapacitated person are entitled to reasonable fees to be determined by the court. Under current law, the fees awarded are to be paid by the guardian from the property of the ward or if the ward is indigent, "by the state."<sup>22</sup> If the court finds the petition was brought in bad faith, the costs may be assessed against the petitioner.<sup>23</sup>

The statute is silent, however, with respect to how the examining committee members are to be compensated in the event the petition is dismissed and the court finds no bad faith in the filing of the petition to determine incapacity. Under such circumstances, no guardian is appointed and no property ever comes into the hands of a guardian or under the authority of the court. Likewise, there is no authority for assessing such fees against the petitioner or against the alleged incapacitated person.

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<sup>19</sup> Section 744.331(1), F.S.

<sup>20</sup> Section 744.331(3)(a), F.S.

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

<sup>22</sup> Section 744.331(7)(b), F.S.

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



This “gap” in s. 744.331(7), F.S., as to who is responsible for the payment of such fees has been recognized in several reported decisions, all of which have recognized the need for remedy by the Legislature.<sup>24</sup>

### **Effect of Proposed Changes - Costs and Fees of Examining Committee**

This bill amends s. 744.331(7)(c), F.S., to provide that if the petition is dismissed, the fees of the examining committee are paid upon court order as “expert witness” fees under s. 29.004(6), F.S. This change implements the provisions of s. 29.004(6), F.S., which awards fees to court appointed experts generally, and provides a secure source of funding to insure that the members of the examining committee are reasonably compensated as contemplated by s. 744.331, F.S., without incentive to find incompetency. The bill also provides that, where the petitioner was found to have filed a petition in bad faith and the state has paid the members of the examining committee, the petitioner must reimburse the state for fees paid.

### **Appointing a Guardian**

An order appointing a guardian indicates the nature of the guardianship as either plenary or limited and the specific powers and duties of the guardian.<sup>25</sup> A plenary guardian exercises all delegable rights<sup>26</sup> and powers of the ward, while a limited guardian may exercise only the rights and powers of the ward specifically designated by the court order.<sup>27</sup>

A court may appoint any person qualified under s. 744.309, F.S., to serve as guardian of the ward. However, in appointing a guardian, the court is required to give preference to certain qualified persons.<sup>28</sup>

The court issues letters of guardianship upon the entry of the order appointing a guardian. Letters evidence the guardian’s authority to act on behalf of the ward to the public, similar to letters of administration in probate proceedings. Letters of guardianship also state the nature of the guardianship as plenary or limited, but only specify the powers and duties of the guardian if the guardianship is limited.<sup>29</sup> Additionally, a court must address the authority of a guardian to act with regard to a previously executed advance directive in the letters of guardianship for a limited guardianship.<sup>30</sup>

### **Effect of Proposed Changes**

The bill amends s. 744.312, F.S., to provide that a court may not give the emergency temporary guardian preference in appointment of a permanent guardian. Additionally, the bill requires a court to appointment professional guardians on a rotating basis; unless the court finds that the special requirements of the guardianship require appointment of a specific professional guardian. Also, a court may not appointment an emergency temporary guardian who is a professional guardian to be the permanent guardian, unless such professional guardian had been designated as a standby guardian or

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<sup>24</sup> See, *Ehrlich v. Severinson*, 985 So.2d 639 (Fla. 4th DCA 2008); *Levine v. Levine*, 4 So.3d 730 (Fla. 5th DCA 2009); and *Faulkner v. Faulkner*, 65 So.3d 1167 (Fla. 1st DCA 2011).

<sup>25</sup> Section 744.344(1), F.S.

<sup>26</sup> The delegable rights of a ward include the right to contract, to sue and defend lawsuits, to apply for government benefits, to manage property or to make any gift or disposition of property, to determine his or her residence, to consent to medical and mental health treatment, and to make decisions about his or her social environment or other social aspects of his or her life. Section 744.3215(3), F.S.

<sup>27</sup> Section 744.102(9), F.S.

<sup>28</sup> Section 744.312, F.S.

<sup>29</sup> Section 744.345, F.S.

<sup>30</sup> Id.

preneed guardian<sup>31</sup> or the court makes specific written findings that such professional guardian meets special requirements of the guardianship.

The bill amends ss. 744.3115 and 744.345, F.S., to provide that the court must specify in any order appointing a guardian of the person and in all letters of guardianship what authority the guardian may exercise with regard to the ward's health care decisions versus what authority, if any, a health care surrogate previously designated by the ward may continue to exercise.

The bill amends s. 744.331(6), F.S., to require that a court consider the incapacitated person's unique needs and abilities when determining what rights should be removed in a guardianship proceeding. It further requires that the court only remove such rights which the alleged incapacitated person does not have the legal capacity to exercise.

### **Costs and Fees Associated with Guardianship Administration**

Section 744.108, F.S., governs awards of compensation to a guardian or attorney in connection with a guardianship. It provides that "a guardian, or an attorney who has rendered services to the ward or to the guardian on the ward's behalf, is entitled to a reasonable fee for services rendered and reimbursement of costs incurred on behalf of the ward."<sup>32</sup> Similarly, s. 744.311(7), F.S.,<sup>33</sup> provides that any attorney appointed under s. 744.311(2), F.S., is entitled to a reasonable fee to be determined by the court.

Section 744.108(8), F.S., provides that fees and costs incurred in determining compensation are part of the guardianship administration and are generally awardable from the guardianship estate, unless the court finds the requested compensation substantially unreasonable.<sup>34</sup> It is unclear whether the scope of this subsection covers all requests for attorney's fees or is limited to only fees for the guardian's attorney. Specifically, the statute does not address whether an attorney who has rendered services to a ward, such as court-appointed counsel for the ward, is entitled to recover attorney fees and costs associated with proceedings to review and determine compensation.

Further, it is unclear whether expert testimony is required to establish a reasonable fee for a guardian or an attorney. Section 744.108, F.S., is silent on the subject. Practitioners report that many attorneys and judges interpret the current law as requiring testimony from an expert witness to establish a reasonable attorney's fee unless a statute dispenses with that requirement.<sup>35</sup> If this is a correct interpretation of existing law, then expert testimony is presently required in all guardianship proceedings for an award of attorney's fees.

Cost considerations are a significant factor in many guardianships. Requiring expert testimony at every hearing for determination of interim guardian's fees or attorney's fees adds a layer of costs that deplete the ward's estate. Practitioners report that the judiciary is capable of determining a reasonable fee without expert testimony in the vast majority of cases. In those cases where expert testimony would be necessary, the interested party may present such testimony.

### **Effect of Proposed Changes - Costs and Fees Associated with Guardianship Administration**

The bill adds subsection (9) to s. 744.108, F.S., dispensing with any requirement for expert testimony to support an award of fees unless requested. Expert testimony may be offered at the option of either

<sup>31</sup> A standby guardian is a guardian selected by the natural guardians (primarily parents) of a minor child in anticipation of the future need for a guardian of the minor. See s. 744.304, F.S. A preneed guardian is a guardian nominated by a competent adult while the adult is still competent, in anticipation of a future guardianship. See s. 744.3045, F.S.

<sup>32</sup> Section 744.108(1), F.S.

<sup>33</sup> This section provides that an attorney will be provided for the alleged incompetent.

<sup>34</sup> Section 744.108(8), F.S.

<sup>35</sup> See, *Shwartz, Gold & Cohen, P.A. v. Streicher*, 549 So.2d 1044 (Fla. 4th DCA 1989); *Estate of Cordiner v. Evans*, 497 So.2d 920 (Fla. 2d DCA 1986); *Clark v. Squire, Sanders & Dempsey*, 495 So.2d 264 (Fla. 3d DCA 1986).

party after giving notice to interested parties. If expert testimony is offered, a reasonable expert witness fee must be awarded by the court and paid from the assets of the ward.<sup>36</sup>

The bill amends s. 744.108(8), F.S., to provide that the court may award attorneys' fees and costs associated with proceedings to determine the fees of a guardian or an attorney who has rendered services to a guardian or ward, including court-appointed counsel.

### **Alternative Dispute Resolution**

Disputes may arise in guardianship proceedings regarding the extent of the guardianship (limited or plenary), guardianship care plans, the ward's right to choose a guardian, real estate and property sale and division issues, methods of accounting for finances, use of funds, medical care, the ward's right to travel and manage affairs, whether to use independent care professionals, less restrictive alternatives for the ward, visitation, and issues involving respect among family members and care providers. Such disputes are litigated within the guardianship proceeding which burden judicial calendars, delay resolution of critical guardianship issues, and increase the cost of the guardianship to wards and family members.

Alternative dispute resolution ("ADR") is a term that refers broadly to many different methods of settling disputes outside of litigation. ADR typically includes negotiation, conciliation, mediation, and arbitration. Mediation is an alternative to judicial action whereby a neutral third person called a mediator acts to encourage and facilitate the resolution of a dispute between two or more parties. It is an informal and nonadversarial process with the objective of helping the disputing parties reach a mutually acceptable and voluntary agreement.<sup>37</sup> Courts are required to refer certain cases to mediation under s. 44.102, F.S. Although the statute does not specifically provide for guardianship mediation, courts have the general discretion to refer to mediation all or any part of a filed civil action for which mediation is not required under s. 44.102, F.S.

Florida Probate Rules also allow the referral of adversarial matters to mediation.<sup>38</sup> However, because only proceedings to remove a guardian or surcharge a guardian are adversarial, it is unclear whether the types of disputes described above may be referred to mediation.

### **Effect of Proposed Changes - Alternative Dispute Resolution**

The bill creates s. 744.1065, F.S. to authorize a court, upon its own motion or the motion of an interested person, to refer a guardianship matter under ch. 744, F.S., to alternative dispute resolution, including mediation. Alternative dispute resolution may only be ordered if it is in the best interest of the alleged incapacitated person, ward or minor.

### **Restoration to Capacity**

A ward has the right to be restored to capacity at the earliest possible time.<sup>39</sup> Section 744.464, F.S., describes the legal procedure for restoration to capacity in Florida. The ward, or any interested person filing a suggestion of capacity, has the burden of proving the ward is capable of exercising some or all of the rights which were removed, but the statute is silent regarding the evidentiary standard used to determine restoration to capacity. In the adjudicatory hearing on a petition alleging incapacity, the

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<sup>36</sup> This provision is derived from and similar to s. 733.6175(4), F.S., of the Florida Probate Code.

<sup>37</sup> Section 44.1011, F.S.

<sup>38</sup> Florida Rules of Civil Procedure govern an adversary proceeding under the Florida Probate Rules. Fla. Prob. R. 5.025.; See also Fla. R. Civ. P. 1.700(a): "The presiding judge may enter an order referring all or any part of a contested civil matter to mediation or arbitration".

<sup>39</sup> Section 744.3215(1)(c), F.S.

petitioner must establish the partial or total incapacity of the person by clear and convincing evidence.<sup>40</sup> However, a circuit court case, *In re Guardianship of Branch*, 10 FLW Supp. 23, 25 (2nd Cir. 2002), suggests that the standard for restoration to capacity is a preponderance of evidence.<sup>41</sup> Without clear statutory guidance, uncertainty remains in the law regarding the proper evidentiary standard in restoration to capacity proceedings.

### **Effect of Proposed Changes - Restoration to Capacity**

The bill amends s. 744.464, F.S., to establish a “preponderance of the evidence” burden of proof for the restoration of an incapacitated person’s rights. The bill also requires that a court make specific findings of fact regarding competency and that a court to give priority to any suggestion of capacity and advance such cause on the judicial calendar.

### **Claims of Minors**

Section 744.3025(1)(a), F.S., provides that a court may appoint a guardian ad litem before approving a settlement of a minor’s claim in any case in which the gross settlement of the claim exceeds \$15,000.<sup>42</sup> The statute is silent as to the specific criteria to be utilized by the court in its determination of the need for the appointment of a guardian ad litem.

### **Effect of Proposed Changes - Claims of Minors**

The bill amends s. 744.3025(1)(a), F.S., to provide that the court may appoint a guardian ad litem only “if the court believes that a guardian ad litem is necessary to protect the minor’s interest.”

## **B. SECTION DIRECTORY:**

Section 1 creates s. 744.1065, F.S., regarding mediation and alternative dispute resolution.

Section 2 amends s. 744.107, F.S., regarding court monitors.

Section 3 amends s. 744.1075, F.S., regarding emergency court monitors.

Section 4 amends s. 744.108, F.S., regarding guardian's and attorney's fees and expenses.

Section 5 amends s. 744.3025, F.S., regarding claims of minors.

Section 6 amends s. 744.3031, F.S., regarding emergency temporary guardianship.

Section 7 amends s. 744.3115, F.S., regarding advance directives for health care.

Section 8 amends s. 744.312, F.S., regarding considerations in the appointment of a guardian.

Section 9 amends s. 744.331, F.S., regarding procedures to determine incapacity.

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<sup>40</sup> Section 744.331(5)(c), F.S. Clear and convincing evidence requires that the evidence must be found to be credible; the facts to which the witnesses testify must be distinctly remembered; the testimony must be precise and explicit and the witnesses must be lacking in confusion as to the facts in issue. The evidence must be of such weight that it produces in the mind of the trier of fact a firm belief or conviction, without hesitancy, as to the truth of the allegations sought to be established. *Inquiry Concerning a Judge*, 645 So.2d 398, 404 (Fla.1994)(quoting *Slomowitz v. Walker*, 429 So.2d 797, 800 (Fla. 4th DCA 1983).

<sup>41</sup> A preponderance of the evidence is the greater weight of the evidence or evidence that more likely than not tends to prove a certain proposition. *Gross v. Lyons*, 763 So.2d 276, 280 n. 1 (Fla. 2000).

<sup>42</sup> Under current law, parents as natural guardians may settle a claim of less than \$15,000 without appointment of a guardian ad litem. Sections 744.301 and 744.3025, F.S. These settlements are typically related to a personal injury case.



Section 10 amends s. 744.344, F.S., regarding the order of appointment of a guardian.

Section 11 amends s. 744.345, F.S., regarding letters of guardianship.

Section 12 creates s. 744.359, F.S., regarding abuse, neglect, or exploitation by a guardian.

Section 13 amends s. 744.361, F.S., regarding the powers and duties of a guardian.

Section 14 amends s. 744.367, F.S., regarding the duty to file the annual guardianship report.

Section 15 amends s. 744.369, F.S., regarding judicial review of guardianship reports.

Section 16 amends s. 744.464, F.S., regarding restoration to capacity.

Section 17 provides that the bill applies to all guardianship proceedings pending on the effective date.

Section 18 provides an effective date of upon becoming a law.

## 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. However, if the court finds a petition to determine incapacity has been filed in bad faith the petitioner will be assessed such fees reimbursable to the State Courts System.

#### 2. Expenditures:

In part, this bill provides that if a petition to determine incapacity is dismissed, the guardianship examining committee must be paid from state funds as court-appointed expert witnesses. This requirement is likely to create an insignificant fiscal impact on state expenditures. The Real Property, Probate, and Trust Law Section of the Florida Bar reports that compensation awarded to an examining committee is modest, generally \$600 or less per appointment. A finding that an alleged incapacitated person is competent is uncommon and the state currently pays the examining committee fees for indigent cases dismissed before hearing, so the provision would affect only payment of examining committee fees in the cases of non-indigent persons. The data on filings addressed in the bill fall under the general title of Guardianship;<sup>43</sup> the total number of statewide Guardianship filings dismissed before hearing in Fiscal Year 2013-14 was 629. The bill addresses a small subset of the Guardianship filings, specifically the dismissal of petitions to determine incapacity. An informal survey conducted of a sample of judicial circuits did not indicate that a significant number of petitions to determine incapacity (competency cases) are dismissed before hearing. Of the competency cases dismissed before hearing a percentage were indigent filings, and an indeterminate amount were filed in bad faith in which costs and attorney fees will be assessed against the petitioner and the petitioner will be required to reimburse the State Courts System for amounts paid to the examining committee. Additionally, some circuits are already paying examining committee fees in situations where the alleged incapacitated person is not indigent and a good faith petition is dismissed.

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<sup>43</sup> Collected "Guardianship" data includes all matters relating to determination of status; contracts and conveyances of incompetents; maintenance custody of wards and their property interests; control and restoration of rights; appointment and removal of guardians pursuant to ch. 744, F.S.; appointment of guardian advocates for individuals with developmental disabilities pursuant to s. 393.12, F.S., and actions to remove the disabilities of non-age minors pursuant to ss. 743.08 and 743.09, F.S.

**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:**

The provisions of the bill that lessen the need for expert testimony regarding fees may lower the cost to individuals for maintenance of a guardianship case. In the majority of guardianship cases the cost of presenting expert testimony will be avoided and the situations where expert testimony is used will be minimized.

The provision in this bill regarding mediation and alternative dispute resolution may lessen the costs to individuals of resolving disputed issues in guardianship proceedings.

**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:**

Section 2 and 3 of the bill provides that the Office of Criminal Conflict and Civil Regional Counsel ("office") may be appointed as a court monitor if the ward is indigent. Current law provides that the same office may be appointed as an attorney for an alleged incapacitated person<sup>44</sup>. Where the office had been previously appointed to represent the ward when the ward was an alleged incapacitated person, it is possible that the second appointment as monitor, while similar in nature (both appointments are for the protection of the ward), may create a potential conflict of interest that would require the office to decline.

**IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES**

On January 22, 2015, the Civil Justice Subcommittee adopted six amendments to a proposed committee substitute and reported the bill favorably as a committee substitute. The committee substitute passed by the subcommittee differs from the bill as filed by:

<sup>44</sup> Section 744.331(2)(a), F.S.  
STORAGE NAME: h0005a.JUAS.DOCX  
DATE: 2/10/2015

- Authorizing a court to refer disputed guardianship matters under ch. 744, F.S. to mediation and alternative dispute resolution.
- Authorizing a court to appoint the office of criminal conflict and civil regional counsel as a court monitor if a ward is indigent.
- Specifying the time of service for notice of the filing of a petition to appoint an emergency temporary guardian and the hearing thereon, but authorizing a court to omit such notice if the notice would cause substantial harm to the incapacitated person.
- Requiring appointment of professional guardians on a rotating basis, except where the court believes that the special needs of the guardianship require a specific guardian.
- Prohibiting a professional guardian in most circumstances from being appointed as a permanent guardian if he or she was appointed as the emergency temporary guardian.
- Requiring that proposed s. 744.359, F.S., which prohibits the abuse, neglect, or exploitation of a ward by a guardian, be interpreted in conformance with s. 825.103, F.S. Section 825.103, F.S. is a criminal law that prohibits the exploitation of an elderly person or disabled adult.
- Authorizing a court to review decisions of a guardian regarding visitation of the ward by family and friends.
- Requiring a court to give priority to a suggestion of capacity.
- Providing that the bill applies to all pending proceedings.

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

1                                   A bill to be entitled  
 2       An act relating to guardianship proceedings; creating  
 3       s. 744.1065, F.S.; authorizing a court to refer  
 4       guardianship matters to mediation or alternative  
 5       dispute resolution under certain circumstances;  
 6       amending ss. 744.107 and 744.1075, F.S.; authorizing a  
 7       court to appoint the office of criminal conflict and  
 8       civil regional counsel as a court monitor in  
 9       guardianship proceedings; amending s. 744.108, F.S.;  
 10      providing that fees and costs incurred by an attorney  
 11      who has rendered services to a ward in compensation  
 12      proceedings are payable from guardianship assets;  
 13      providing that expert testimony is not required in  
 14      proceedings to determine compensation for an attorney  
 15      or guardian; requiring a person offering expert  
 16      testimony to provide notice to interested persons;  
 17      providing that expert witness fees are recoverable by  
 18      the prevailing party; amending s. 744.3025, F.S.;  
 19      providing that a court may appoint a guardian ad litem  
 20      to represent a minor if necessary to protect the  
 21      minor's interest in a settlement; providing that a  
 22      settlement of a minor's claim is subject to certain  
 23      confidentiality provisions; amending s. 744.3031,  
 24      F.S.; requiring notification of an alleged  
 25      incapacitated person and such person's attorney of a  
 26      petition for appointment of an emergency temporary



27 guardian before a hearing on the petition commences;  
28 amending s. 744.3115, F.S.; directing the court to  
29 specify authority for health care decisions with  
30 respect to a ward's advance directive; amending s.  
31 744.312, F.S.; prohibiting a court from giving  
32 preference to the appointment of certain persons as  
33 guardians; providing requirements for the appointment  
34 of professional guardians; amending s. 744.331, F.S.;  
35 directing the court to consider certain factors when  
36 determining incapacity; requiring that the examining  
37 committee be paid from state funds as court-appointed  
38 expert witnesses if a petition for incapacity is  
39 dismissed; requiring that a petitioner reimburse the  
40 state for such expert witness fees if the court finds  
41 the petition to have been filed in bad faith; amending  
42 s. 744.344, F.S.; providing conditions under which the  
43 court is authorized to appoint an emergency temporary  
44 guardian; amending s. 744.345, F.S.; revising  
45 provisions relating to letters of guardianship;  
46 creating s. 744.359, F.S.; prohibiting abuse, neglect,  
47 or exploitation of a ward by a guardian; requiring  
48 reporting thereof to the Department of Children and  
49 Families central abuse hotline; providing for  
50 interpretation; amending s. 744.361, F.S.; providing  
51 additional powers and duties of a guardian; amending  
52 s. 744.367, F.S.; revising the period during which a

53 guardian must file an annual guardianship plan with  
 54 the court; amending s. 744.369, F.S.; providing for  
 55 the continuance of a guardian's authority to act under  
 56 an expired annual report under certain circumstances;  
 57 amending s. 744.464, F.S.; establishing the burden of  
 58 proof for determining restoration of capacity of a  
 59 ward in pending guardianship cases; requiring a court  
 60 to advance such cases on the calendar; providing  
 61 applicability; providing an effective date.

62

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

64

65 Section 1. Section 744.1065, Florida Statutes, is created  
 66 to read:

67 744.1065 Mediation; alternative dispute resolution.—At any  
 68 time, the court may, upon its own motion or the motion of an  
 69 interested person, refer a matter under the jurisdiction of this  
 70 chapter to mediation or alternative dispute resolution if the  
 71 court finds that mediation or alternative dispute resolution is  
 72 in the best interests of the alleged incapacitated person, ward,  
 73 or minor.

74 Section 2. Subsection (5) is added to section 744.107,  
 75 Florida Statutes, to read:

76 744.107 Court monitors.—

77 (5) The court may appoint the office of criminal conflict  
 78 and civil regional counsel as monitor if the ward is indigent.

79 Section 3. Subsection (6) is added to section 744.1075,  
80 Florida Statutes, to read:

81 744.1075 Emergency court monitor.—

82 (6) The court may appoint the office of criminal conflict  
83 and civil regional counsel as monitor if the ward is indigent.

84 Section 4. Subsections (5) and (8) of section 744.108,  
85 Florida Statutes, are amended, and subsection (9) is added to  
86 that section, to read:

87 744.108 Guardian ~~Guardian's~~ and attorney ~~attorney's~~ fees  
88 and expenses.—

89 (5) All petitions for guardian ~~guardian's~~ and attorney  
90 ~~attorney's~~ fees and expenses must be accompanied by an itemized  
91 description of the services performed for the fees and expenses  
92 sought to be recovered.

93 (8) When court proceedings are instituted to review or  
94 determine a guardian's or an attorney's fees under subsection  
95 (2), such proceedings are part of the guardianship  
96 administration process and the costs, including costs and  
97 attorney fees for the guardian's attorney, an attorney appointed  
98 under s. 744.331(2), or an attorney who has rendered services to  
99 the ward, shall be determined by the court and paid from the  
100 assets of the guardianship estate unless the court finds the  
101 requested compensation under subsection (2) to be substantially  
102 unreasonable.

103 (9) The court may determine that a request for  
104 compensation by the guardian, the guardian's attorney, a person



105 employed by the guardian, an attorney appointed under s.  
 106 744.331(2), or an attorney who has rendered services to the  
 107 ward, is reasonable without receiving expert testimony. A person  
 108 or party may offer expert testimony for or against a request for  
 109 compensation after giving notice to interested persons.  
 110 Reasonable expert witness fees shall be awarded by the court and  
 111 paid from the assets of the guardianship estate to the  
 112 prevailing party.

113 Section 5. Section 744.3025, Florida Statutes, is amended  
 114 to read:

115 744.3025 Claims of minors.—

116 (1)(a) The court may appoint a guardian ad litem to  
 117 represent the minor's interest before approving a settlement of  
 118 the minor's portion of the claim in a ~~any~~ case in which a minor  
 119 has a claim for personal injury, property damage, wrongful  
 120 death, or other cause of action in which the gross settlement of  
 121 the claim exceeds \$15,000 if the court believes a guardian ad  
 122 litem is necessary to protect the minor's interest.

123 (b) Except as provided in paragraph (e), the court shall  
 124 appoint a guardian ad litem to represent the minor's interest  
 125 before approving a settlement of the minor's claim in a ~~any~~ case  
 126 in which the gross settlement involving a minor equals or  
 127 exceeds \$50,000.

128 (c) The appointment of the guardian ad litem must be  
 129 without the necessity of bond or notice.

130 (d) The duty of the guardian ad litem is to protect the



131 minor's interests as described in the Florida Probate Rules.

132 (e) A court need not appoint a guardian ad litem for the  
 133 minor if a guardian of the minor has previously been appointed  
 134 and that guardian has no potential adverse interest to the  
 135 minor. ~~A court may appoint a guardian ad litem if the court  
 136 believes a guardian ad litem is necessary to protect the  
 137 interests of the minor.~~

138 (2) Unless waived, the court shall award reasonable fees  
 139 and costs to the guardian ad litem to be paid out of the gross  
 140 proceeds of the settlement.

141 (3) A settlement of a claim pursuant to this section is  
 142 subject to the confidentiality provisions of this chapter.

143 Section 6. Subsections (2) through (8) of section  
 144 744.3031, Florida Statutes, are renumbered as subsections (3)  
 145 through (9), respectively, and a new subsection (2) is added to  
 146 that section, to read:

147 744.3031 Emergency temporary guardianship.—

148 (2) Notice of filing of the petition for appointment of an  
 149 emergency temporary guardian and a hearing on the petition must  
 150 be served on the alleged incapacitated person and on the alleged  
 151 incapacitated person's attorney at least 24 hours before the  
 152 hearing on the petition is commenced, unless the petitioner  
 153 demonstrates that substantial harm to the alleged incapacitated  
 154 person would occur if the 24-hour notice is given.

155 Section 7. Section 744.3115, Florida Statutes, is amended  
 156 to read:

157           744.3115 Advance directives for health care.—In each  
 158 proceeding in which a guardian is appointed under this chapter,  
 159 the court shall determine whether the ward, prior to incapacity,  
 160 has executed any valid advance directive under chapter 765. If  
 161 any advance directive exists, the court shall specify in its  
 162 order and letters of guardianship what authority, if any, the  
 163 guardian shall exercise over the ward with regard to health care  
 164 decisions and what authority, if any, the surrogate shall  
 165 continue to exercise over the ward with regard to health care  
 166 decisions ~~surrogate~~. Pursuant to the grounds listed in s.  
 167 765.105, the court, upon its own motion, may, with notice to the  
 168 surrogate and any other appropriate parties, modify or revoke  
 169 the authority of the surrogate to make health care decisions for  
 170 the ward. For purposes of this section, the term "health care  
 171 decision" has the same meaning as in s. 765.101.

172           Section 8. Section 744.312, Florida Statutes, is reordered  
 173 and amended to read:

174           744.312 Considerations in appointment of guardian.—  
 175           (1) ~~(4)~~ If the person designated is qualified to serve  
 176 pursuant to s. 744.309, the court shall appoint any standby  
 177 guardian or preneed guardian, unless the court determines that  
 178 appointing such person is contrary to the best interests of the  
 179 ward.

180           (2) ~~(1)~~ If a guardian cannot be appointed under subsection  
 181 (1) ~~Subject to the provisions of subsection (4)~~, the court may  
 182 appoint any person who is fit and proper and qualified to act as

183 guardian, whether related to the ward or not.

184 ~~(2)~~ The court shall give preference to the appointment of  
185 a person who:

186 (a) Is related by blood or marriage to the ward;

187 (b) Has educational, professional, or business experience  
188 relevant to the nature of the services sought to be provided;

189 (c) Has the capacity to manage the financial resources  
190 involved; or

191 (d) Has the ability to meet the requirements of the law  
192 and the unique needs of the individual case.

193 (3) The court shall also:

194 (a) Consider the wishes expressed by an incapacitated  
195 person as to who shall be appointed guardian.†

196 (b) Consider the preference of a minor who is age 14 or  
197 over as to who should be appointed guardian.†

198 (c) Consider any person designated as guardian in any will  
199 in which the ward is a beneficiary.

200 (4) The court may not give preference to the appointment  
201 of a person under subsection (2) solely based on the fact that  
202 such person was appointed by the court to serve as an emergency  
203 temporary guardian.

204 (5) Appointment of professional guardians by the court  
205 shall be on a rotating basis of professional guardians deemed  
206 qualified by the chief judge of the circuit. However, the court  
207 may appoint a professional guardian without reference to the  
208 rotation where the special requirements of the guardianship



209 demand.

210 (6) An emergency temporary guardian who is a professional  
211 guardian may not be appointed as the permanent guardian of the  
212 ward unless such professional guardian had been designated as a  
213 standby guardian or preneed guardian or the court makes specific  
214 written findings that such professional guardian meets special  
215 requirements of the guardianship.

216 Section 9. Subsection (6) and paragraph (c) of subsection  
217 (7) of section 744.331, Florida Statutes, are amended to read:

218 744.331 Procedures to determine incapacity.—

219 (6) ORDER DETERMINING INCAPACITY.—If, after making  
220 findings of fact on the basis of clear and convincing evidence,  
221 the court finds that a person is incapacitated with respect to  
222 the exercise of a particular right, or all rights, the court  
223 shall enter a written order determining such incapacity. In  
224 determining incapacity, the court shall consider the person's  
225 unique needs and abilities and may only remove those rights that  
226 the court finds the person is incapable of exercising. A person  
227 is determined to be incapacitated only with respect to those  
228 rights specified in the order.

229 (a) The court shall make the following findings:

230 1. The exact nature and scope of the person's  
231 incapacities;

232 2. The exact areas in which the person lacks capacity to  
233 make informed decisions about care and treatment services or to  
234 meet the essential requirements for her or his physical or

235 | mental health or safety;

236 |         3. The specific legal disabilities to which the person is  
237 | subject; and

238 |         4. The specific rights that the person is incapable of  
239 | exercising.

240 |         (b) When an order determines that a person is incapable of  
241 | exercising delegable rights, the court must consider and find  
242 | whether there is an alternative to guardianship that will  
243 | sufficiently address the problems of the incapacitated person. A  
244 | ~~guardian must be appointed to exercise the incapacitated~~  
245 | ~~person's delegable rights unless the court finds there is an~~  
246 | ~~alternative.~~ A guardian may not be appointed if the court finds  
247 | there is an alternative to guardianship which will sufficiently  
248 | address the problems of the incapacitated person. If the court  
249 | finds there is not an alternative to guardianship that  
250 | sufficiently addresses the problems of the incapacitated person,  
251 | a guardian must be appointed to exercise the incapacitated  
252 | person's delegable rights.

253 |         (c) In determining that a person is totally incapacitated,  
254 | the order must contain findings of fact demonstrating that the  
255 | individual is totally without capacity to care for herself or  
256 | himself or her or his property.

257 |         (d) An order adjudicating a person to be incapacitated  
258 | constitutes proof of such incapacity until further order of the  
259 | court.

260 |         (e) After the order determining that the person is

261 incapacitated has been filed with the clerk, it must be served  
 262 on the incapacitated person. The person is deemed incapacitated  
 263 only to the extent of the findings of the court. The filing of  
 264 the order is notice of the incapacity. An incapacitated person  
 265 retains all rights not specifically removed by the court.

266 (f) Upon the filing of a verified statement by an  
 267 interested person stating:

268 1. That he or she has a good faith belief that the alleged  
 269 incapacitated person's trust, trust amendment, or durable power  
 270 of attorney is invalid; and

271 2. A reasonable factual basis for that belief,  
 272  
 273 the trust, trust amendment, or durable power of attorney shall  
 274 not be deemed to be an alternative to the appointment of a  
 275 guardian. The appointment of a guardian does not limit the  
 276 court's power to determine that certain authority granted by a  
 277 durable power of attorney is to remain exercisable by the agent  
 278 ~~attorney in fact~~.

279 (7) FEES.—

280 (c) If the petition is dismissed: ~~7~~

281 1. The fees of the examining committee shall be paid upon  
 282 court order as expert witness fees under s. 29.004(6).

283 2. Costs and attorney ~~attorney's~~ fees of the proceeding  
 284 may be assessed against the petitioner if the court finds the  
 285 petition to have been filed in bad faith. The petitioner shall  
 286 also reimburse the state courts system for any amounts paid



287 | under subparagraph 1. upon such a finding.

288 | Section 10. Subsection (4) of section 744.344, Florida  
 289 | Statutes, is amended to read:

290 | 744.344 Order of appointment.—

291 | (4) If a petition for the appointment of a guardian has  
 292 | not been filed or ruled upon at the time of the hearing on the  
 293 | petition to determine capacity, the court may appoint an  
 294 | emergency temporary guardian in the manner and for the purposes  
 295 | specified in s. 744.3031.

296 | Section 11. Section 744.345, Florida Statutes, is amended  
 297 | to read:

298 | 744.345 Letters of guardianship.—Letters of guardianship  
 299 | shall be issued to the guardian and shall specify whether the  
 300 | guardianship pertains to the person, or the property, or both,  
 301 | of the ward. The letters must state whether the guardianship is  
 302 | plenary or limited, and, if limited, the letters must state the  
 303 | powers and duties of the guardian. ~~If the guardianship is~~  
 304 | ~~limited,~~ The letters shall state whether or not and to what  
 305 | extent the guardian is authorized to act on behalf of the ward  
 306 | with regard to any advance directive previously executed by the  
 307 | ward.

308 | Section 12. Section 744.359, Florida Statutes, is created  
 309 | to read:

310 | 744.359 Abuse, neglect, or exploitation by a guardian.—

311 | (1) A guardian may not abuse, neglect, or exploit a ward.

312 | (2) A guardian has committed exploitation when the

313 guardian:

314 (a) Commits fraud in obtaining appointment as a guardian.

315 (b) Abuses his or her powers.

316 (c) Wastes, embezzles, or intentionally mismanages the  
 317 assets of the ward.

318 (3) A person who believes that a guardian is abusing,  
 319 neglecting, or exploiting a ward shall report the incident to  
 320 the central abuse hotline of the Department of Children and  
 321 Families.

322 (4) This section shall be interpreted in conformity with  
 323 s. 825.103.

324 Section 13. Section 744.361, Florida Statutes, is amended  
 325 to read:

326 744.361 Powers and duties of guardian.—

327 (1) The guardian of an incapacitated person is a fiduciary  
 328 and may exercise only those rights that have been removed from  
 329 the ward and delegated to the guardian. The guardian of a minor  
 330 shall exercise the powers of a plenary guardian.

331 (2) The guardian shall act within the scope of the  
 332 authority granted by the court and as provided by law.

333 (3) The guardian shall act in good faith.

334 (4) A guardian may not act in a manner that is contrary to  
 335 the ward's best interests under the circumstances.

336 (5) A guardian who has special skills or expertise, or is  
 337 appointed in reliance upon the guardian's representation that  
 338 the guardian has special skills or expertise, shall use those



339 special skills or expertise when acting on behalf of the ward.

340 ~~(6)(2)~~ The guardian shall file an initial guardianship  
341 report in accordance with s. 744.362.

342 ~~(7)(3)~~ The guardian shall file a guardianship report  
343 annually in accordance with s. 744.367.

344 ~~(8)(4)~~ The guardian of the person shall implement the  
345 guardianship plan.

346 ~~(9)(5)~~ When two or more guardians have been appointed, the  
347 guardians shall consult with each other.

348 ~~(10)(6)~~ A guardian who is given authority over any  
349 property of the ward shall:

350 (a) Protect and preserve the property and invest it  
351 prudently as provided in chapter 518, apply it as provided in s.  
352 744.397, and keep clear, distinct, and accurate records of the  
353 administration of the ward's property ~~account for it faithfully.~~

354 (b) Perform all other duties required of him or her by  
355 law.

356 (c) At the termination of the guardianship, deliver the  
357 property of the ward to the person lawfully entitled to it.

358 ~~(11)(7)~~ The guardian shall observe the standards in  
359 dealing with the guardianship property that would be observed by  
360 a prudent person dealing with the property of another, ~~and, if~~  
361 ~~the guardian has special skills or is named guardian on the~~  
362 ~~basis of representations of special skills or expertise, he or~~  
363 ~~she is under a duty to use those skills.~~

364 ~~(12)(8)~~ The guardian, if authorized by the court, shall

365 take possession of all of the ward's property and of the rents,  
366 income, issues, and profits from it, whether accruing before or  
367 after the guardian's appointment, and of the proceeds arising  
368 from the sale, lease, or mortgage of the property or of any  
369 part. All of the property and the rents, income, issues, and  
370 profits from it are assets in the hands of the guardian for the  
371 payment of debts, taxes, claims, charges, and expenses of the  
372 guardianship and for the care, support, maintenance, and  
373 education of the ward or the ward's dependents, as provided for  
374 under the terms of the guardianship plan or by law.

375 (13) Recognizing that every individual has unique needs  
376 and abilities, a guardian who is given authority over a ward's  
377 person shall, as appropriate under the circumstances:

378 (a) Consider the expressed desires of the ward as known by  
379 the guardian when making decisions that affect the ward.

380 (b) Allow the ward to maintain contact with family and  
381 friends unless the guardian believes that such contact may cause  
382 harm to the ward. Upon petition by an interested party, the  
383 court may review a decision of a guardian regarding visitation.

384 (c) Not restrict the physical liberty of the ward more  
385 than reasonably necessary to protect the ward or another person  
386 from serious physical injury, illness, or disease.

387 (d) Assist the ward in developing or regaining his or her  
388 own capacity, if medically possible.

389 (e) Notify the court if the guardian believes that the  
390 ward has regained capacity and that one or more of the rights

391 that have been removed should be restored to the ward.

392 (f) To the extent applicable, make provision for the  
 393 medical, mental, rehabilitative, or personal care services for  
 394 the welfare of the ward.

395 (g) To the extent applicable, acquire a clear  
 396 understanding of the risks and benefits of a recommended course  
 397 of health care treatment before making a health care decision.

398 (h) Evaluate the ward's medical and health care options,  
 399 financial resources, and desires when making residential  
 400 decisions that are best suited for the current needs of the  
 401 ward.

402 (i) Advocate on behalf of the ward in institutional and  
 403 other residential settings.

404 (14)-(9) A professional guardian must ensure that each of  
 405 the guardian's wards is personally visited by the guardian or  
 406 one of the guardian's professional staff at least once each  
 407 calendar quarter. During the personal visit, the guardian or the  
 408 guardian's professional staff person shall assess:

409 (a) The ward's physical appearance and condition.

410 (b) The appropriateness of the ward's current living  
 411 situation.

412 (c) The need for any additional services and the necessity  
 413 for continuation of existing services, taking into consideration  
 414 all aspects of social, psychological, educational, direct  
 415 service, health, and personal care needs.

416 (d) The nature and extent of visitation and communication



417 with the ward's family and friends.

418

419 This subsection does not apply to a professional guardian who  
420 has been appointed only as guardian of the property.

421 Section 14. Subsection (1) of section 744.367, Florida  
422 Statutes, is amended to read:

423 744.367 Duty to file annual guardianship report.—

424 (1) Unless the court requires filing on a calendar-year  
425 basis, each guardian of the person shall file with the court an  
426 annual guardianship plan at least 60 days, but no more than  
427 ~~within~~ 90 days, before ~~after~~ the last day of the anniversary  
428 month that the letters of guardianship were signed, and the plan  
429 must cover the coming fiscal year, ending on the last day in  
430 such anniversary month. If the court requires calendar-year  
431 filing, the guardianship plan for the forthcoming calendar year  
432 must be filed on or after September 1 but no later than December  
433 1 of the current year ~~before April 1 of each year.~~

434 Section 15. Subsection (8) of section 744.369, Florida  
435 Statutes, is amended to read:

436 744.369 Judicial review of guardianship reports.—

437 (8) The approved report constitutes the authority for the  
438 guardian to act in the forthcoming year. The powers of the  
439 guardian are limited by the terms of the report. The annual  
440 report may not grant additional authority to the guardian  
441 without a hearing, as provided for in s. 744.331, to determine  
442 that the ward is incapacitated to act in that matter. Unless the

443 court orders otherwise, the guardian may continue to act under  
 444 authority of the last-approved report until the forthcoming  
 445 year's report is approved.

446 Section 16. Paragraphs (a) and (b) of subsection (3) of  
 447 section 744.464, Florida Statutes, are amended, and subsection  
 448 (4) is added to that section, to read:

449 744.464 Restoration to capacity.—

450 (3) ORDER OF RESTORATION.—

451 (a) If no objections are filed, and the court is satisfied  
 452 that with the medical examination establishes by a preponderance  
 453 of the evidence that restoration of all or some of the ward's  
 454 rights is appropriate, the court shall enter an order of  
 455 restoration of capacity, restoring all or some of the rights  
 456 which were removed from the ward in accordance with those  
 457 findings. ~~The order must be issued within 30 days after the~~  
 458 ~~medical report is filed.~~

459 (b) At the conclusion of a hearing, conducted pursuant to  
 460 s. 744.1095, the court shall make specific findings of fact and,  
 461 based on a preponderance of the evidence, enter an order either  
 462 denying the suggestion of capacity or restoring all or some of  
 463 the rights which were removed from the ward. The ward has the  
 464 burden of proving by a preponderance of the evidence that the  
 465 restoration of capacity is warranted.

466 (4) TIMELINESS OF HEARING.—The court shall give priority  
 467 to any suggestion of capacity and shall advance the cause on the  
 468 calendar.

469           Section 17. The amendments made by this act apply to all  
470 proceedings pending on the effective date of this act.

471           Section 18. This act shall take effect upon becoming a  
472 law.

Amendment No. 1

COMMITTEE/SUBCOMMITTEE ACTION

ADOPTED	___	(Y/N)
ADOPTED AS AMENDED	___	(Y/N)
ADOPTED W/O OBJECTION	___	(Y/N)
FAILED TO ADOPT	___	(Y/N)
WITHDRAWN	___	(Y/N)
OTHER	_____	

---

1 Committee/Subcommittee hearing bill: Justice Appropriations  
2 Subcommittee  
3 Representative Passidomo offered the following:

**Amendment (with title amendment)**

6 Remove line 112 and insert:  
7 prevailing interested person.

9 -----  
10 **T I T L E A M E N D M E N T**

11 Remove line 18 and insert:  
12 the prevailing interested person; amending s. 744.3025, F.S.;

Amendment No. 2

COMMITTEE/SUBCOMMITTEE ACTION

ADOPTED	___	(Y/N)
ADOPTED AS AMENDED	___	(Y/N)
ADOPTED W/O OBJECTION	___	(Y/N)
FAILED TO ADOPT	___	(Y/N)
WITHDRAWN	___	(Y/N)
OTHER	_____	

1 Committee/Subcommittee hearing bill: Justice Appropriations  
2 Subcommittee

3 Representative Passidomo offered the following:

4  
5 **Amendment (with title amendment)**

6 Between lines 154 and 155, insert:

7 Section 7. Paragraph (a) of subsection (1) of section  
8 744.309, Florida Statutes, is amended to read:

9 744.309 Who may be appointed guardian of a resident ward.—

10 (1) RESIDENT.—

11 (a) Any resident of this state who is sui juris and is 18  
12 years of age or older, or a business entity that has met the  
13 registration requirements in s. 744.1083, is qualified to act as  
14 guardian of a ward.

15  
16  
17 -----



COMMITTEE/SUBCOMMITTEE AMENDMENT

Bill No. CS/HB 5 (2015)

Amendment No. 2

18  
19  
20  
21

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

Between lines 27 and 28, insert:  
amending s. 744.309, F.S.; providing that a business entity may  
act as guardian of a person;

Amendment No. 3

COMMITTEE/SUBCOMMITTEE ACTION

ADOPTED	___	(Y/N)
ADOPTED AS AMENDED	___	(Y/N)
ADOPTED W/O OBJECTION	___	(Y/N)
FAILED TO ADOPT	___	(Y/N)
WITHDRAWN	___	(Y/N)
OTHER	_____	

1 Committee/Subcommittee hearing bill: Justice Appropriations  
 2 Subcommittee

3 Representative Passidomo offered the following:

4  
 5 **Amendment**

6 Remove lines 200-215 and insert:

7 (4) The court may not give preference to the appointment  
 8 of a person under subsection (2) solely based on the fact that  
 9 such person was appointed by the court to serve as an emergency  
 10 temporary guardian. This limitation shall only apply where an  
 11 interested person objects to appointment of the emergency  
 12 temporary guardian as a permanent guardian. This limitation  
 13 shall not apply to a standby guardian or to a preneed guardian.

14 (5) Appointment of professional guardians by the court  
 15 shall be on a rotating basis of professional guardians deemed  
 16 qualified by the chief judge of the circuit. However, the court  
 17 may appoint a professional guardian without reference to the

Amendment No. 3

18 rotation where the special requirements of the guardianship  
19 demand that the court appoint a guardian with special talent or  
20 specific prior experience. The court must make specific findings  
21 of fact that justify a finding that there are special  
22 requirements requiring an appointment without reference to the  
23 rotation.

24 (6) An emergency temporary guardian who is a professional  
25 guardian may not be appointed as the permanent guardian of a  
26 ward. This limitation shall only apply where an interested  
27 person objects to appointment of the emergency temporary  
28 guardian as a permanent guardian. This limitation shall not  
29 apply to a standby guardian or to a preneed guardian. The court  
30 may waive this limitation only where the special requirements of  
31 the guardianship demand that the court appoint that professional  
32 guardian because he or she has special talent or specific prior  
33 experience. The court must make specific findings of fact that  
34 justify a finding that there are special requirements requiring  
35 an appointment without reference to this limitation.

36

COMMITTEE/SUBCOMMITTEE AMENDMENT

Bill No. CS/HB 5 (2015)

Amendment No. 4

COMMITTEE/SUBCOMMITTEE ACTION

ADOPTED	___	(Y/N)
ADOPTED AS AMENDED	___	(Y/N)
ADOPTED W/O OBJECTION	___	(Y/N)
FAILED TO ADOPT	___	(Y/N)
WITHDRAWN	___	(Y/N)
OTHER	_____	

1 Committee/Subcommittee hearing bill: Justice Appropriations  
2 Subcommittee

3 Representative Passidomo offered the following:

4

5 **Amendment**

6 Remove line 280 and insert:

7 (c) If the petition is dismissed or denied:~~7~~

8



Amendment No. 5

COMMITTEE/SUBCOMMITTEE ACTION

ADOPTED	___	(Y/N)
ADOPTED AS AMENDED	___	(Y/N)
ADOPTED W/O OBJECTION	___	(Y/N)
FAILED TO ADOPT	___	(Y/N)
WITHDRAWN	___	(Y/N)
OTHER	_____	

---

1 Committee/Subcommittee hearing bill: Justice Appropriations  
2 Subcommittee  
3 Representative Passidomo offered the following:

**Amendment (with title amendment)**

6 Remove lines 382-383 and insert:  
7 harm to the ward.

9 Between lines 445 and 446, insert:

10 Section 16. Subsection (1) of section 744.3715, Florida  
11 Statutes, is amended to read:

12 744.3715 Petition for interim judicial review.—

13 (1) At any time, any interested person, including the  
14 ward, may petition the court for review alleging that the  
15 guardian is not complying with the guardianship plan, ~~or~~ is  
16 exceeding his or her authority under the guardianship plan, is  
17 acting in manner contrary to s. 744.361, is denying visitation

Amendment No. 5

18 between the ward and his or her relatives in violation of s.  
19 744.361(13), or ~~and the guardian~~ is not acting in the best  
20 interest of the ward. The petition for review must state the  
21 nature of the objection to the guardian's action or proposed  
22 action. Upon the filing of any such petition, the court shall  
23 review the petition and act upon it expeditiously.

24

25

-----

26

**T I T L E   A M E N D M E N T**

27

Between lines 56 and 57, insert:

28

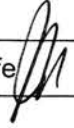

amending s. 744.3715, F.S.; providing that an interested party  
29 may petition the court regarding a guardian's failure to comply  
30 with the duties of a guardian;

30



## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** HB 115 Sentencing  
**SPONSOR(S):** Gaetz  
**TIED BILLS:** None **IDEN./SIM. BILLS:** None

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Criminal Justice Subcommittee	10 Y, 0 N	Cox	Cunningham
2) Justice Appropriations Subcommittee		McAuliffe 	Lloyd 
3) Judiciary Committee			

### SUMMARY ANALYSIS

Section 775.089, F.S., requires a judge to order a defendant convicted of any criminal offense to make restitution to a victim for damage or loss caused directly or indirectly by the defendant's offense, and damage or loss related to the defendant's criminal episode. The statute currently defines the term "victim," in part, as:

- Each *person* who suffers property damage or loss, monetary expense, or physical injury or death as a direct or indirect result of the defendant's offense or criminal episode.

While the definition of "victim" does not currently define the word "person," s. 1.01(3), F.S., defines the word "person" to "include individuals, children, firms, associations, joint adventures, partnerships, estates, trusts, business trusts, syndicates, fiduciaries, corporations, and all other groups or combinations." Read in conjunction, it appears that governmental entities and political subdivisions (governmental entities) can be "victims" for purposes of restitution. However, some Florida District Courts have held that governmental entities are barred from obtaining an order of restitution because they are not considered "victims" for purposes of restitution.

The bill amends the definition of "victim" in s. 775.089(1)(c), F.S., to clarify that the term includes governmental entities and political subdivisions when such entities are a direct victim of the defendant's offense or criminal episode and not merely providing public services in response to the offense or criminal episode.

The bill also creates ss. 838.23 and 839.27, F.S., to require a judge to order a person convicted of any offense in chs. 838 (entitled "Bribery; Misuse of Public Office") and 839, F.S., (entitled "Offenses by Public Officers and Employees") to:

- Make restitution to the victim of the offense if, after conducting a hearing, the judge finds that the victim suffered an actual financial loss caused directly or indirectly by the person's offense or an actual financial loss related to the person's criminal episode; and
- Perform 250 hours of community service work.

This bill may have a positive fiscal impact on governmental entities to the extent that governmental entities will be eligible for restitution for violations of chs. 838 and 839, F.S. This bill's restitution and community service requirements may have a negative fiscal impact on local governments and the Department of Corrections who may be required to supervise the community service hours and restitution payments. However, due to the low volume of offenders this impact will likely be insignificant. See Fiscal Impact Section.

The bill is effective on October 1, 2015.



## FULL ANALYSIS

### I. SUBSTANTIVE ANALYSIS

#### A. EFFECT OF PROPOSED CHANGES:

##### **Restitution**

Section 775.089, F.S., requires a judge to order a defendant convicted of any criminal offense to make monetary or non-monetary restitution to a victim for damage or loss caused directly or indirectly by the defendant's offense and damage or loss related to the defendant's criminal episode. Restitution must be ordered unless the judge finds clear and compelling reasons not to do so.<sup>1</sup> To enter an order of restitution, a trial court must first conduct a restitution hearing to determine by competent evidence the amount owed to the victim and the defendant's ability to pay.<sup>2</sup>

The purpose of restitution is two-fold: (1) it acts to compensate the victim; and (2) serves the rehabilitative, deterrent, and retributive goals of the criminal justice system.<sup>3</sup> Thus, the prime rationale underlying restitution are to give the perpetrator of a crime an opportunity to make amends, and to make the victim whole again, to the extent it is possible to do so.<sup>4</sup>

Currently, s. 775.089(1)(c), F.S., defines "victim," in part, as:

- Each *person* who suffers property damage or loss, monetary expense, or physical injury or death as a direct or indirect result of the defendant's offense or criminal episode.<sup>5</sup>

The restitution section does not currently define the word "person." However, s. 1.01(3), F.S., defines the word "person" to "*include* individuals, children, firms, associations, joint adventures, partnerships, estates, trusts, business trusts, syndicates, fiduciaries, corporations, and all other groups or combinations." Read in conjunction, it appears that governmental entities and political subdivisions (governmental entities) can be "victims" for purposes of restitution. However, Florida's District Courts of Appeal (DCAs) are somewhat divided on the subject.

Some DCAs have held that governmental entities are always barred from obtaining an order of restitution because they are not considered "victims" for purposes of restitution.<sup>6</sup> It appears that these holdings resulted from restitution being ordered in favor of these entities for conducting investigations or performing other public services that are within the normal scope of their duties as an entity, agency, or subdivision, rather than for actual damages suffered.<sup>7</sup> Other DCAs have held that governmental entities are "victims" for losses other than investigative costs, such as travel expenses incurred for trial, when the losses are a direct result of the defendant's criminal episode.<sup>8</sup> In *Childers v. State*, the First District Court held that because of the definition of the term "person" *included* a list of individuals and entities, the Legislature did not intend such a list to be limiting and exhaustive, but rather illustrative.<sup>9</sup>

---

<sup>1</sup> Section 775.089, F.S.

<sup>2</sup> *Exilorme v. State*, 857 So.2d 339 (Fla. 2d DCA 2003) and *Graham v. State*, 720 So.2d 294 (Fla. 5th DCA 1998).

<sup>3</sup> 15B Fla. Jur 2d Criminal Law s. 2886 (citing *Kirby v. State*, 863 So.2d 238 (Fla. 2003)).

<sup>4</sup> *Id.* (citing *L.O. v. State*, 718 So.2d 155 (Fla. 1998)).

<sup>5</sup> The definition also includes the victim's estate if the victim is deceased, the victim's next of kin if the victim is deceased as a result of the offense, as well as the victim's trade association if the offense is a violation of s. 540.11(3)(a)3., F.S., involving the sale, or possession for purposes of sale, of physical articles and the victim has granted the trade association written authorization to represent the victim's interests in criminal legal proceedings and to collect restitution on the victim's behalf.

<sup>6</sup> See *Sims v. State*, 746 So.2d 546 (Fla. 2d DCA 1999); *Bain v. State*, 559 So.2d 106 (Fla. 4th DCA 1990); *T.H. Taylor v. State*, 672 So.2d 605 (Fla. 4th DCA 1996); and *Rodriguez v. State*, 691 So.2d 568 (Fla. 2d DCA 1997).

<sup>7</sup> *Id.*

<sup>8</sup> *Smith v. State*, 801 So.2d 1043 (Fla. 5th DCA 2001); *Childers v. State*, 936 So.2d 585 (Fla. 1st DCA 2006).

<sup>9</sup> *Childers*, at 597.

### Effect of the Bill

The bill amends the definition of "victim" in s. 775.089(1)(c), F.S., to clarify that the term includes governmental entities and political subdivisions when such entities are a direct victim of the defendant's offense or criminal episode and not merely providing public services in response to the offense or criminal episode.

The bill defines "governmental entities" and "political subdivisions" as these terms are defined in s. 11.45, F.S.

### **Offenses by Public Officials**

Chapters 838 (entitled "Bribery; Misuse of Public Office") and 839, F.S., (entitled "Offenses by Public Officers and Employees") create a variety of offenses related to public officials or employees and the performance of their official duties. For example, ch. 838, F.S., provides felony criminal penalties for the following offenses:

- Bribery involving a public servant;<sup>10</sup>
- Unlawful compensation or reward for official behavior;<sup>11</sup>
- Corruption by threat against public servant;<sup>12</sup>
- Official misconduct;<sup>13</sup>
- Bribery in athletic contests;<sup>14</sup>
- Soliciting, accepting, or agreeing to accept a commercial bribe;<sup>15</sup>
- Conferring, offering to confer, or agreeing to offer a commercial bribe;<sup>16</sup>
- Disclosure or use of confidential criminal justice information;<sup>17</sup> and
- Bid tampering.<sup>18</sup>

Chapter 839, F.S., provides misdemeanor and felony criminal penalties for the following offenses:

- County officers buying at discount or speculating specified certificates or warrants;<sup>19</sup>
- Municipal officers buying at discount or speculating in any scrip or other evidence of indebtedness issued by such officer's municipal corporation;<sup>20</sup>
- Tax collectors purchasing or receiving in exchange a lesser than face value amount specified certificates or orders;<sup>21</sup>
- Extortion by officers of the state;<sup>22</sup>
- Clerk of Court, Sheriff, or County Judge failing to keep records of costs;<sup>23</sup>
- Public Official or Employee falsifying records;<sup>24</sup>
- Officer withholding records from successor after the time officer's appointment or election has expired;<sup>25</sup>
- Judicial officer withholding records;<sup>26</sup>
- Fraud of clerk in drawing a jury;<sup>27</sup>

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<sup>10</sup> Section 838.015, F.S.

<sup>11</sup> Section 838.016, F.S.

<sup>12</sup> Section 838.021, F.S.

<sup>13</sup> Section 838.022, F.S.

<sup>14</sup> Section 838.12, F.S.

<sup>15</sup> Section 838.15, F.S.

<sup>16</sup> Section 838.16, F.S.

<sup>17</sup> Section 838.21, F.S.

<sup>18</sup> Section 838.22, F.S.

<sup>19</sup> Section 839.04, F.S.

<sup>20</sup> Section 839.05, F.S.

<sup>21</sup> Section 839.06, F.S.

<sup>22</sup> Section 839.11, F.S.

<sup>23</sup> Section 839.12, F.S.

<sup>24</sup> Section 839.13, F.S.

<sup>25</sup> Section 839.14, F.S.

<sup>26</sup> Section 839.15, F.S.

<sup>27</sup> Section 839.16, F.S.

- Misappropriation of moneys by commissioners to make sales;<sup>28</sup>
- Officer assuming to perform duties of office prior to qualification;<sup>29</sup>
- Sheriff or officer wilfully or corruptly refusing or neglecting to execute process;<sup>30</sup>
- Officer refusing to execute criminal process;<sup>31</sup>
- Jailer or officer refusing to receive prisoner;<sup>32</sup>
- Officer taking insufficient bail;<sup>33</sup>
- Willful failure of officer to perform any duty required under criminal procedure law;<sup>34</sup> and
- Misuse of confidential information.<sup>35</sup>

As noted above, courts generally order restitution pursuant to the provisions in s. 775.089, F.S. However, some criminal statutes include specific restitution and community service provisions that are tailored to that particular offense.<sup>36</sup> These provisions may provide a more tailored definition of restitution or may require a certain amount of community service hours.<sup>37</sup>

Chapters 838 and 839, F.S., do not currently include specific provisions related to restitution or community service.

Effect of the Bill:

The bill creates ss. 838.23 and 839.27, F.S., to require a judge to order a person convicted of any offense in chs. 838 or 839, F.S., to:

- Make restitution to the victim of the offense if, after conducting a hearing, the judge finds that the victim suffered an actual financial loss caused directly or indirectly by the person's offense or an actual financial loss related to the person's criminal episode; and
- Perform 250 hours of community service work.

These conditions of restitution and community service work are in addition to any fine or sentence that may be imposed and are not in lieu thereof.

**B. SECTION DIRECTORY:**

Section 1. Amends s. 775.089, F.S., relating to restitution.

Section 2. Creates s. 838.23, F.S., relating to restitution and community service.

Section 3. Creates s. 839.27, F.S., relating to restitution and community service.

Section 4. Provides an effective date of October 1, 2015.

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<sup>28</sup> Section 839.17, F.S.

<sup>29</sup> Section 839.18, F.S.

<sup>30</sup> Section 839.19, F.S.

<sup>31</sup> Section 839.20, F.S.

<sup>32</sup> Section 839.21, F.S.

<sup>33</sup> Section 839.23, F.S.

<sup>34</sup> Section 839.24, F.S.

<sup>35</sup> Section 839.26, F.S.

<sup>36</sup> Some examples of the statutes which include specified restitution provisions include: s. 267.13, F.S., relating to prohibition on unauthorized archeological excavation (provides a specified definition of restitution); s. 784.08, F.S., relating to assault or battery of a person 65 years or older (defendant shall be fined not more than \$10,000, ordered to pay restitution, and perform up to 500 hours of community service); s. 812.0145, F.S., relating to theft from a person 65 years or older (defendant shall be ordered to pay restitution and perform up to 500 hours of community service); s. 817.568, F.S., relating to criminal use of personal identification (provides a specified definition of restitution).

<sup>37</sup> *Id.*

## II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

### A. FISCAL IMPACT ON STATE GOVERNMENT:

#### 1. Revenues:

State governmental entities will now be able to recover restitution when they were previously barred from collection of such restitution.

#### 2. Expenditures:

According to the Department of Corrections (DOC), if an offender is sentenced to serve community supervision with the DOC (In Fiscal Year 2013-14 there were 64 offenders sentenced to community supervision for a violation of chs 838 and 839, F.S.) the new provision for the 250 hours of community service work would be enforced by a DOC probation officer as part of the probationers reporting requirements and therefore no significant additional workload for DOC.

The provisions of this bill could also be enforced on offenders released from prison to post release supervision if the special condition was imposed and the length of supervision was long enough for the offender to complete the hours (In Fiscal Year 2013-14 there were 13 offenders sentenced to state prison for a violation of chs 838 and 839, F.S.); however, it would not be possible for community service work hours to be accomplished by an inmate while incarcerated serving a prison sentence. Because of the low volume of offenders this will have an insignificant impact on DOC.

### B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

#### 1. Revenues:

Local governmental entities will now be able to recover restitution when they were previously barred from collection of such restitution.

#### 2. Expenditures:

This bill's restitution and community service requirements may have a negative fiscal impact on local governments who will be required to supervise the community service hours and restitution payments. Because of the low volume of offenders (In Fiscal Year 2013-14 there were 132 offenders sentenced state-wide for a violation of chs 838 and 839, F.S.), and that this type of local supervision is typically administrative, this bill should have an insignificant fiscal impact on local governments.

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

None.

### D. FISCAL COMMENTS:

None.

## III. COMMENTS

### A. CONSTITUTIONAL ISSUES:

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

This bill appears to be exempt from the requirements of Article VII, Section 18 of the Florida Constitution because it is a criminal law.

#### 2. Other:



None.

**B. RULE-MAKING AUTHORITY:**

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

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

None.

**IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES**

1                                   A bill to be entitled  
 2       An act relating to sentencing; amending s. 775.089,  
 3       F.S.; revising the definition of the term "victim" to  
 4       include governmental entities and political  
 5       subdivisions in certain instances; creating ss. 838.23  
 6       and 839.27, F.S.; requiring the sentencing judge to  
 7       order restitution and a specified number of community  
 8       service work hours for violations of chapter 838,  
 9       F.S., relating to bribery and misuse of public office,  
 10      or chapter 839, F.S., relating to offenses by public  
 11      officers and employees; providing an effective date.

12  
 13   Be It Enacted by the Legislature of the State of Florida:

14  
 15           Section 1. Paragraph (c) of subsection (1) of section  
 16   775.089, Florida Statutes, is amended to read:

17           775.089 Restitution.—

18           (1)

19           (c) The term "victim" as used in this section and in any  
 20   provision of law relating to restitution means:

21           1. Each person who suffers property damage or loss,  
 22   monetary expense, or physical injury or death as a direct or  
 23   indirect result of the defendant's offense or criminal episode,  
 24   and also includes the victim's estate if the victim is deceased,  
 25   and the victim's next of kin if the victim is deceased as a  
 26   result of the offense. The term includes governmental entities

27 and political subdivisions, as those terms are defined in s.  
 28 11.45, when such entities are a direct victim of the defendant's  
 29 offense or criminal episode and not merely providing public  
 30 services in response to the offense or criminal episode.<sup>7</sup>

31 2. The term also includes ~~and~~ the victim's trade  
 32 association if the offense is a violation of s. 540.11(3)(a)3.  
 33 involving the sale, or possession for purposes of sale, of  
 34 physical articles and the victim has granted the trade  
 35 association written authorization to represent the victim's  
 36 interests in criminal legal proceedings and to collect  
 37 restitution on the victim's behalf. The restitution obligation  
 38 in this ~~paragraph~~ subparagraph relating to violations of s.  
 39 540.11(3)(a)3. applies only to physical articles and does not  
 40 apply to electronic articles or digital files that are  
 41 distributed or made available online. As used in this  
 42 subparagraph ~~paragraph~~, the term "trade association" means an  
 43 organization founded and funded by businesses that operate in a  
 44 specific industry to protect their collective interests.

45 Section 2. Section 838.23, Florida Statutes, is created to  
 46 read:

47 838.23 Restitution and community service.—A person who is  
 48 convicted of any offense in this chapter shall be ordered by the  
 49 sentencing judge to make restitution to the victim of the  
 50 offense if, after conducting a hearing, the judge finds that the  
 51 victim suffered an actual financial loss caused directly or  
 52 indirectly by the person's offense or an actual financial loss

53 related to the person's criminal episode. A person who is  
 54 convicted of any offense in this chapter shall also be ordered  
 55 to perform 250 hours of community service work. Restitution and  
 56 community service work shall be in addition to any fine or  
 57 sentence that may be imposed and may not be in lieu thereof.

58 Section 3. Section 839.27, Florida Statutes, is created to  
 59 read:

60 839.27 Restitution and community service.—A person who is  
 61 convicted of any offense in this chapter shall be ordered by the  
 62 sentencing judge to make restitution to the victim of the  
 63 offense if, after conducting a hearing, the judge finds that the  
 64 victim suffered an actual financial loss caused directly or  
 65 indirectly by the person's offense or an actual financial loss  
 66 related to the person's criminal episode. A person who is  
 67 convicted of any offense in this chapter shall also be ordered  
 68 to perform 250 hours of community service work. Restitution and  
 69 community service work shall be in addition to any fine or  
 70 sentence that may be imposed and may not be in lieu thereof.

71 Section 4. This act shall take effect October 1, 2015.





## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** HB 193 Crime Stoppers Trust Fund  
**SPONSOR(S):** Broxson and others  
**TIED BILLS:** None **IDEN./SIM. BILLS:** SB 164

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Criminal Justice Subcommittee	11 Y, 0 N	Keegan	Cunningham
2) Justice Appropriations Subcommittee		McAuliffe	Lloyd
3) Judiciary Committee			

### SUMMARY ANALYSIS

Crime Stoppers programs are citizen-run not-for-profit corporations that operate on the principle that "someone other than the criminal has information that can solve a crime." Crime Stoppers programs allow citizens to anonymously provide information to law enforcement about crimes. Typically, a cash reward is given if the information leads to an arrest.

In 1991, the Legislature created s. 16.555, F.S., which required the Department of Legal Affairs to establish a Crime Stoppers Trust Fund. At the time, the Crime Stoppers Trust Fund was solely funded through federal, state, and private grants awarded to the Department.

In 1998, the Legislature added a funding source by imposing a \$20 court cost on persons convicted of any criminal offense. The proceeds from the \$20 court cost are deposited in a separate account within the Crime Stoppers Trust Fund and designated according to the judicial circuit from which they were collected. Counties may apply to the Department for a grant from the funds collected by their judicial circuit. However, grants may only be awarded to counties that are served by an official member of the Florida Association of Crime Stoppers, Inc. and used only to support Crime Stoppers and their crime fighting programs.

The bill permits a county which is awarded funds under s. 16.555, F.S., to use the funds to purchase and distribute promotional items to increase public awareness and educate the public about Crime Stoppers.

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

The bill is effective July 1, 2015.

## FULL ANALYSIS

### I. SUBSTANTIVE ANALYSIS

#### A. EFFECT OF PROPOSED CHANGES:

##### Crime Stoppers

Crime Stoppers programs are citizen run not-for-profit corporations that operate on the principle that “someone other than the criminal has information that can solve a crime.”<sup>1</sup> Crime Stoppers allow citizens to anonymously provide information to law enforcement about crimes.<sup>2</sup> Typically, a cash reward is given if the information leads to an arrest.<sup>3</sup>

The Crime Stoppers concept originated in Albuquerque, New Mexico, in 1976 when a detective asked local media to broadcast a reenactment of an unsolved murder he was investigating.<sup>4</sup> Local media publicized the reenactment as the “Crime of the Week” and provided a phone number to call if anyone had information.<sup>5</sup> The broadcast promised anonymity for anyone who called with information and a cash reward if the information led to persons involved in the crime.<sup>6</sup>

The first Crime Stoppers program in Florida was established in 1977.<sup>7</sup> The Florida Association of Crime Stoppers, Inc. (hereinafter “Association”) was established in 1983 as a not-for-profit corporation formed to facilitate the flow of information and spread the Crime Stoppers program throughout the state.<sup>8</sup> The Association is currently composed of 32 programs and provides trainings for Crime Stoppers programs throughout Florida.<sup>9</sup>

##### Crime Stoppers Funding

In 1991, the Legislature created s. 16.555, F.S., which required the Department of Legal Affairs (hereinafter “Department”) to establish a Crime Stoppers Trust Fund.<sup>10</sup> At the time, the Crime Stoppers Trust Fund was solely funded through federal, state, and private grants awarded to the Department.<sup>11</sup>

In 1998, the Legislature added a funding source in s. 938.06, F.S., by imposing a \$20 court cost on persons convicted of any criminal offense.<sup>12</sup> The proceeds from the \$20 court cost are deposited in a separate account within the Crime Stoppers Trust Fund and designated according to the judicial circuit from which they were collected.<sup>13</sup> Counties may apply to the Department for a grant from the funds collected by their judicial circuit.<sup>14</sup> However, grants may only be awarded to counties that are served by

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<sup>1</sup> Big Bend Crime Stoppers, *About Us*, <http://www.bbcsi.org/about-2> (last visited on Jan. 20, 2015).

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

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

<sup>4</sup> Florida Association of Crime Stoppers, *Where It All Started*, <http://www.floridacrimestoppers.com/pages/where> (last visited on Jan. 20, 2015).

<sup>5</sup> Crime Stoppers USA, *CSUSA Profile*, <http://www.crimestoppersusa.com/profile.htm> (last visited on Jan. 21, 2015).

<sup>6</sup> Florida Association of Crime Stoppers, *Where It All Started*, <http://www.floridacrimestoppers.com/pages/where> (last visited on Jan. 20, 2015).

<sup>7</sup> Florida Association of Crime Stoppers, *Who We Are*, <http://www.floridacrimestoppers.com/pages/who> (last visited on Jan. 20, 2015).

<sup>8</sup> When the Association was originally established, it was named the Florida Association of Crimelines Anonymous, Inc., and the name was officially changed to the Florida Association of Crime Stoppers, Inc., in 1991; see Florida Association of Crime Stoppers, *Who We Are*, <http://www.floridacrimestoppers.com/pages/who> (last visited on Jan. 20, 2015).

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

<sup>10</sup> Chapter 91-205, L.O.F.

<sup>11</sup> *Id.*

<sup>12</sup> Chapter 98-319, L.O.F.

<sup>13</sup> Section 938.06, F.S.; Section 16.555, F.S.

<sup>14</sup> Section 16.555, F.S.

a Crime Stoppers program that is an official member of the Association, and the grants may only be used to support Crime Stoppers and their crime fighting programs.<sup>15</sup>

#### Effect of the Bill

The bill amends s. 16.555, F.S., to allow a county which is awarded a grant to use the funds to purchase and distribute promotional items. The bill specifies that the promotional items must be for the purpose of increasing public awareness of, and educating the public about, Crime Stoppers.

#### B. SECTION DIRECTORY:

Section 1. Amends s. 16.555, F.S., relating to Crime Stoppers Trust Fund; rulemaking.

Section 2. Provides an effective date of July 1, 2015.

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

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

##### 1. Revenues:

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

##### 2. Expenditures:

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

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

##### 1. Revenues:

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

##### 2. Expenditures:

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

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

None.

#### D. FISCAL COMMENTS:

None.

### **III. COMMENTS**

#### A. CONSTITUTIONAL ISSUES:

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

The bill does not appear to require counties or municipalities to take 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.

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<sup>15</sup> *Id.*



2. Other:

None.

**B. RULE-MAKING AUTHORITY:**

Section 16.555(6), F.S., requires the Department to adopt and enforce rules to implement the provisions of s. 16.555, F.S., and specifies what such rules must include (e.g., criteria for local governments to apply for funding from the "Crime Stoppers Trust Fund" in order to aid in local law enforcement). The bill does not appear to create a need for additional rulemaking or rulemaking authority.

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

None.

**IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES**

1 A bill to be entitled  
 2 An act relating to the Crime Stoppers Trust Fund;  
 3 amending s. 16.555, F.S.; authorizing a county that is  
 4 awarded a grant from the trust fund to use such funds  
 5 for the purchase and distribution of promotional  
 6 items; making technical changes; providing an  
 7 effective date.

8  
 9 Be It Enacted by the Legislature of the State of Florida:

10  
 11 Section 1. Subsection (5) of section 16.555, Florida  
 12 Statutes, is amended to read:

13 16.555 Crime Stoppers Trust Fund; rulemaking.—

14 (5) (a) The department shall be the disbursing authority  
 15 for the distribution of funding to units of local government  
 16 which apply, ~~upon their application~~ to the department for  
 17 funding assistance.

18 (b) Funds deposited in the trust fund pursuant to  
 19 paragraph (4) (b) shall be disbursed as provided in this  
 20 paragraph. A ~~Any~~ county may apply to the department under s.  
 21 938.06 for a grant from the funds collected in the judicial  
 22 circuit in which the county is located ~~under s. 938.06~~. A grant  
 23 may be awarded only to counties that ~~which~~ are served by an  
 24 official member of the Florida Association of Crime Stoppers and  
 25 may ~~only~~ be used only to support Crime Stoppers and its ~~their~~  
 26 crime fighting programs. Only one such official member is ~~shall~~

27 ~~be~~ eligible for support within any county. ~~In order~~ To aid the  
 28 department in determining eligibility, the secretary of the  
 29 Florida Association of Crime Stoppers shall furnish the  
 30 department with a schedule of authorized crime stoppers programs  
 31 and shall update the schedule as necessary. The department shall  
 32 award grants to eligible counties from available funds and shall  
 33 distribute funds as equitably as possible, based on amounts  
 34 collected within each county, if ~~when~~ more than one county is  
 35 eligible within a judicial circuit.

36 (c) A county that is awarded a grant under this section  
 37 may use such funds to purchase and distribute promotional items  
 38 to increase public awareness of, and to educate the public  
 39 about, Crime Stoppers.

40 Section 2. This act shall take effect July 1, 2015.





**MEMORANDUM OF UNDERSTANDING  
BETWEEN THE FLORIDA DEPARTMENT OF CORRECTIONS  
AND THE FLORIDA DEPARTMENT OF LAW ENFORCEMENT  
RE: INVESTIGATION OF SPECIFIED INCIDENTS**

This Memorandum of Understanding ("MOU") is entered into by and between the **Florida Department of Corrections** ("DOC") and the **Florida Department of Law Enforcement** ("FDLE"), ("the Party/Parties"), as state agencies, in furtherance of their respective duties under law, for the purpose of facilitating investigations of incidents as described herein, as required by Section 944.31, Florida Statutes<sup>1</sup>, and as authorized by Sections 943.03(5) and 943.04(2) and (5), Florida Statutes. The Parties, which include any entity providing inmate services on behalf of DOC, agree to carry out their respective duties and responsibilities outlined below, subject to controlling law, policy(ies) and/or procedure(s), and in consideration of the mutual interests and understandings expressed herein:

**I. MANDATORY Notification by DOC and MANDATORY Response by FDLE**

**A. Specified Incidents**

1. Death of Inmate: The homicide, suicide, or a death which occurs as a result of something other than apparent natural causes. This does not include a) the death of an inmate by execution pursuant to Chapter 922, Florida Statutes; or b) death of an inmate under the care of licensed medical staff for a terminal illness.
2. Death of Person Other Than Inmate: The homicide or death of any person other than an inmate a) when such person was on institutional property, or b) when the death of such person was in connection with the DOC care, custody, or control of inmates while off institutional property.
3. Life-Threatening Injury to Inmate: The infliction of injury(ies) upon an inmate when death is imminent or likely (as determined by medical staff), resulting from something other than an apparent accident or natural causes.
4. Life-Threatening Injury to a Person other Than an Inmate: The infliction of injury(ies) upon any person other than an inmate when death is imminent or likely (as determined by medical staff) resulting from something other than an apparent accident or natural causes a) when such person was on institutional property or b) when the injury was in connection with the DOC care, custody, and control of inmates while off institutional property.

**B. Notification by DOC**

When any Section I incident occurs, notification of FDLE by DOC is mandatory. The DOC Inspector General (designated herein as the Inspector General, Deputy Inspector General, Chief of Investigations, Assistant Chief of Investigations, or Inspector Supervisor) will ensure that DOC notifies FDLE according to the procedures specified in Section III.

<sup>1</sup> "The Department [of Corrections] shall maintain a memorandum of understanding with the Department of Law Enforcement for the notification and investigation of mutually agreed-upon predicate events that shall include, but are not limited to, suspicious deaths and organized criminal activity." s. 944.31, Florida Statutes.

C. Response by FDLE

After notification by DOC of any Section I incident, FDLE will respond to the scene with investigative assistance. FDLE will respond to the scene with forensic assistance as appropriate.

**II. DISCRETIONARY Notification by DOC and Response by FDLE**

A. Specified Incident

Major Organized Criminal Activity: The receipt by the DOC Inspector General of a credible complaint or other significant evidence of major organized criminal activity involving inmates or DOC personnel at one or more institution(s). Examples might include organized tax fraud, coordination of criminal activity with subjects outside of the correctional facility or system, or staff engaging in broad and substantial contraband introduction and/or conspiracy to introduce.

B. Notification by DOC – Discretionary

When any Section II incident occurs, the DOC Inspector General (designated herein as the Inspector General, Deputy Inspector General, Chief of Investigations, Assistant Chief of Investigations, or the Inspector Supervisor) has the discretion to notify FDLE according to the procedures specified in Section III.

C. Response by FDLE

After notification by DOC of any Section II incident, FDLE will respond to the scene with investigative assistance. FDLE will respond to the scene with forensic assistance as appropriate.

**III. Implementation Procedures**

A. Upon the occurrence of any of the events specified in Section I, the ranking DOC staff member on the scene will ensure that emergency medical services are provided to injured persons and that a secure crime scene perimeter is established with restricted access. Only emergency medical personnel, crime scene technicians, medical examiner personnel, State Attorney personnel, investigating FDLE members and other law enforcement investigators assisting FDLE will be permitted inside the crime scene perimeter. The ranking DOC staff member will ensure that the DOC Office of Inspector General is notified within 30 minutes of the incident. The DOC Office of Inspector General will:

1. Immediately call FDLE 24/7 Watch Desk at 850/410-7645 or 800/342-0820
2. Identify himself or herself and report the incident involving the Department of Corrections
3. Indicate the location of the incident
4. Briefly summarize the incident and the current situation
5. Provide the name and contact information of the DOC staff member in charge of the situation

FDLE Watch Desk personnel will contact the appropriate FDLE member(s), who will contact the responding DOC OIG personnel to confirm receipt of the notification and advise of FDLE's response.

- B. Pending FDLE's arrival on the scene, the ranking DOC staff member will ensure that the scene remains secure; that physical evidence and documentation are protected and preserved; and that all witnesses are identified and segregated pending initial interview. The ranking DOC staff member will also ensure that all known witnesses are instructed not to discuss the incident. The ranking DOC staff member will also provide any assistance requested by FDLE during and after the on-scene investigation has been concluded.
- C. When FDLE responds to any of the incidents specified in Section I, FDLE will assume operational direction of investigations and forensic assistance or coordination. Upon FDLE's request, DOC shall assign one or more inspector(s) to act as liaison to FDLE's investigative team. However, to avoid Garrity issues, no DOC inspector will be present during any investigative questioning by FDLE of DOC personnel. FDLE will notify the State Attorney as soon as reasonably possible and coordinate questioning of DOC personnel with the involved State Attorney's Office.
- D. Criminal investigative efforts regarding an incident shall take precedence over any related internal or administrative investigation conducted by DOC. To help ensure that the criminal investigation is not impeded or negatively affected by an internal or administrative investigation, DOC OIG shall initiate its internal or administrative investigation only after a) the criminal investigative efforts have been concluded, or b) in consultation with the FDLE and the prosecuting authority. DOC will retain overall direction and responsibility for any internal or administrative investigation initiated in response to any specified incident.
- E. No internal report or statement authored or obtained by DOC personnel involved in the subject incident that has been provided to DOC under order or policy shall be provided, or its contents revealed, to the criminal investigative team or the prosecutor, until such time as the criminal investigative team and the FDLE Office of General Counsel agree that the criminal investigation will not be adversely impacted by any immunity that may attach to any such statement. The criminal investigative team and the FDLE Office of General Counsel will consult with the prosecutor to determine whether such statement may adversely impact any subsequent criminal prosecution. However, the criminal investigative team and the FDLE Office of General Counsel will make the final determination regarding use of such statements in FDLE's investigation.
- F. At the appropriate stage(s) of an investigation initiated under this MOU, FDLE may forward copies of all investigative reports and investigative summaries to the State Attorney having jurisdiction over the case and to the DOC Inspector General, for review. Such reports by FDLE will reflect the material factual findings of the investigation but will not offer recommendations or reach legal conclusions concerning whether any force that may have been used was justified.
- G. Transmittal of reports and summaries will be done so as to preserve any applicable exemptions from public disclosure and to maintain any applicable confidentiality of information.
- H. The Office of the State Attorney may assert primary jurisdiction and responsibility for some investigations contemplated by this MOU, when applicable.

**IV. Health Insurance Portability and Accountability Act**

The Parties shall comply with the Health Insurance Portability and Accountability Act of 1996, and all applicable regulations promulgated thereunder.

**V. Financial Obligations**

This MOU is not a contract for services and is not intended to create financial obligations between the Parties. However, in the event that costs are incurred as a result of either or both of the Parties performing their duties or responsibilities under this MOU, the Parties agree to be responsible for their own respective costs.

**VI. Management and Administration of the MOU**

**A. MOU Managers**

The representatives of the Parties designated below are the MOU Managers and are responsible for enforcing performance of the terms of this MOU and will serve as liaison/agency contacts regarding issues arising out of this MOU, *except*, DOC will use the FDLE contact information listed in Section III A for notifications under Sections I and II of this MOU.

<b>FOR THE DEPARTMENT OF CORRECTIONS</b>	<b>FLORIDA DEPARTMENT OF LAW ENFORCEMENT</b>
Office of the Inspector General	Office of Executive Director
510 South Calhoun Street	P.O. Box 1489
Tallahassee, Florida 32399-2400	Tallahassee, Florida 32302-1489
Telephone: (850) 488-9265	Telephone: (850) 410-7001
Facsimile: (850) 414-0953	Facsimile: (850) 488-8213

**B. MOU Administrator for DOC**

The Operations Manager, Bureau of Contract Management and Monitoring, is designated the MOU Administrator for DOC and is responsible for maintaining the official MOU file, processing any amendments or termination of the MOU and for maintaining records of all formal correspondence between DOC and FDLE regarding administration of the MOU.

**DEPARTMENT OF CORRECTIONS**  
 Operations Manager, Contract Administration  
 Bureau of Contract Management and Monitoring  
 Florida Department of Corrections  
 501 South Calhoun Street  
 Tallahassee, Florida 32399-2500  
 Telephone: (850) 717-3681  
 Fax: (850) 488-7189

**VII. Training Program**

FDLE and DOC will use the jointly developed CJSTC approved training for DOC Inspectors and FDLE agents regarding conducting a death investigation inside a DOC facility. This training shall also be provided to appropriate personnel employed by any entity providing inmate services on behalf of DOC.



**VIII. Termination of Prior Agreement, Scope of Agreement, and Amendments**

The MOU between DOC and FDLE dated June 23, 2014, regarding the subject matter of this MOU, is hereby terminated and replaced by this MOU. This MOU represents the entire agreement between DOC and FDLE on this subject matter. Any alteration or amendment of provisions of this MOU, other than a change to the contact information in Section VI above and Section III A, shall be in writing, signed by duly authorized personnel of DOC and FDLE, and attached to the original(s) of this MOU.

**IX. Effective Date and Termination**

This MOU shall become effective after execution by DOC and FDLE, on whichever execution date is later, and shall terminate five years from the effective date or upon thirty (30) calendar days notice by either Party or by mutual agreement of both Parties. Notice of early termination shall be delivered by certified mail and return receipt requested to the MOU Managers of the Parties.

**X. Public Records**

FDLE agrees to: (a) keep and maintain public records that would ordinarily and necessarily be required by the DOC to perform the contracted services; (b) allow public access to records in accordance with the provisions of Chapter 119 and 945.10, Florida Statutes; (c) ensure that public records that are exempt or confidential and exempt from public records disclosure requirements are not disclosed except as authorized by law; (d) meet all requirements for retaining public records. Any press release related to investigative activities and responses to public records requests shall be coordinated jointly by the involved agencies to assure that disclosure, if any, is appropriate and timely. Either Party's failure to comply with this provision shall constitute sufficient cause for termination of this Agreement.

**XI. Prison Rape Elimination Act (PREA)**

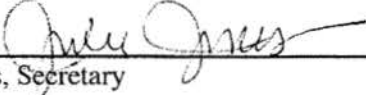
FDLE will comply with the national standards to prevent, detect, and respond to prison rape under the Prison Rape Elimination Act (PREA), Federal Rule 28 C.F.R. Part 115, as applicable.

**XII. Failure to Follow Implementation Procedures**

Failure to follow the procedures established within this MOU will be considered an administrative violation subject to internal investigation.

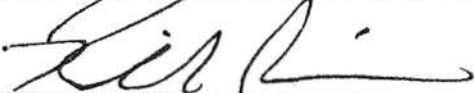
WHEREFORE, the Parties execute this Memorandum of Understanding by their undersigned duly authorized officials.

**FLORIDA DEPARTMENT OF CORRECTIONS**

  
\_\_\_\_\_  
Julie Jones, Secretary

2/3/15  
\_\_\_\_\_  
Date

**FLORIDA DEPARTMENT OF LAW ENFORCEMENT**

  
\_\_\_\_\_  
Rick Swearingen, Commissioner

2/4/15  
\_\_\_\_\_  
Date

## **FDLE Response to Incidents of Death or Serious Injury involving the Department of Corrections - \$2,258,436**

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### **Background**

Incidents involving police and corrections personnel use of force and in-custody death incidents attract media attention and invite public scrutiny. Florida law enforcement agencies often request independent investigation to alleviate citizen concerns and eliminate any perception that internal investigations may be biased. Independent, impartial investigations of this nature are imperative to maintain trust between the criminal justice community and the citizens of Florida.

As a statewide independent law enforcement agency, the Florida Department of Law Enforcement (FDLE) is uniquely positioned and has the authority to investigate use of force by a law enforcement or correctional officer and incidents of in-custody inmate deaths. Investigations are currently pursued at the request of a sheriff, police chief, administrator of a criminal justice agency, the State Attorney or designee, and with the approval of the Office of the Commissioner. Investigations can also be initiated pursuant to Executive Order of the Governor or by an existing Memorandum of Understanding (MOU).

The MOU currently under development with the Florida Department of Corrections requires FDLE to respond with investigative and/or forensic personnel as appropriate to:

1. Any homicide, suicide, or death of an inmate which occurs as a result of anything other than apparent natural causes; except (1) death by execution pursuant to Chapter 922, Florida Statutes, or (2) death of an inmate attended by a physician.
2. Any homicide, suicide, or death of any person other than an inmate, who dies on institutional property or in connection with DOC care, custody, or control of inmates while off institutional property.
3. Any incident that results in life-threatening injuries to any person

Additionally, DOC may request FDLE assistance with the investigation of a credible complaint or other significant evidence of major organized criminal activity involving inmates or DOC personnel. If DOC requests assistance, FDLE will respond with investigative and/or forensic personnel appropriate to the situation.

### **Issue / Impact**

While FDLE has traditionally responded when requested by Executive Order to investigate allegations involving state agencies including the Department of Corrections, the requirement to respond to all homicides, suicides, and unattended deaths of inmates is a new workload for which the FDLE is not sufficiently staffed. Without additional staffing dedicated to handle workload created by this new mandate, valuable investigative hours will be diverted from other core mission investigations including violent crime, economic / computer crime, organized drug crime, public integrity and domestic security investigations that help to keep Florida's citizens safe.

### **Resource Need**

During the period September through December 2014, FDLE responded to a total of 75 death or serious injury notifications from DOC which resulted in 15 investigations that would fall within the parameters of the MOU currently being developed. Projected over a one year period, FDLE estimates being required to respond to approximately **60** (15 x 4) such incidents. Although

resource requirements are dependent upon the circumstances of each incident, examination of data from the Automated Investigative Management System (AIMS) reference 35 closed in-custody death investigations (2009 – 2014) that meet the MOU requirements. FDLE responses in these investigations required between 100 and 1,000 investigative hours, with an average requirement of **219 hours/case**.

Additionally, the MOU requires FDLE to respond to unattended deaths of inmates. This is an unknown workload for which DOC cannot provide baseline numbers. FDLE assumes that 60 of the 75 incidents to which FDLE responded during the period September to December 2014 that did not result in a major criminal investigation is a reasonable approximation of additional workload that could be associated with FDLE response mandates. Annualizing these 60 responses, FDLE projects response under requirements of the MOU will be an additional **240** incidents per year. Assuming these responses do not develop into a major criminal investigation, the Department can anticipate a minimum commitment of an average **40 hours** per response.

Death or Serious Injury Response: 60 cases x 219/hours per case = 13,140 hours  
 Additional MOU Required Response 240 incidents x 40 hours per incident = 9,600 hours  
 Total work load requirement = 22,740 investigative hours / 1854 hours per FTE = 12 FTE

Based on projected work load data, FDLE will need a minimum of 12 Special Agent FTE to accommodate the new mandates without negatively impacting other investigative priorities.

Of the 75 incidents to which FDLE responded during the period September through December 2014, FDLE's Jacksonville, Pensacola, and Orlando regions were most heavily impacted, although every region recorded responses to DOC incidents. FDLE cannot respond to an incident covered by the MOU with less than two special agents. Besides the officer safety issues associated with response to a crime scene within a correctional facility, at least two agents are required to accomplish the initial tasks associated with the response. The limited access nature of the facility may require one person to go to the crime scene, while the other begins to collect records. Standard police procedure requires two agents to conduct interviews for officer safety, interview dynamics, and corroboration of facts particularly if the interview cannot be recorded.

Based on workload and officer safety considerations FDLE requests at least 2 special agents in each of the Department's 7 regions (14 FTE), with an additional special agent for the Jacksonville, Pensacola, and Orlando teams (3 FTE), for a total of **17 new special agent FTE**.

**FDLE Issue 3000510: Add Investigative Staffing for Public Integrity and Death Investigations**

		Per Position									Total Request		
		CAD	Benefits	Criminal Justice				OCO Nonrecurring	Vehicle	Total Per Position			
		(Miami Region)	(Insurance, FICA, Retirement)	Incentive Pay	HR Svc	Expense	Expense	(Radio & Laptop)	NonRecurring		Recurring	Nonrecurring	Total
FTE	Salary												
SA	15	45,997	23,823	1,650	344	17,850	8,382	9,050	25,000	132,096	1,344,965	636,480	1,981,446
SA	2	45,997	5,020	25,202	1,650	344	17,850	8,382	9,050	138,495	192,126	84,864	276,991
<b>Total:</b>											<b>1,537,092</b>	<b>721,345</b>	<b>2,258,436</b>



### Cause of Death by Gender 2000-2015

The table below reflects the number of inmate deaths from 2000 to 2015 by gender and by cause, as determined by the Medical Examiner. A "pending" status indicates that the Department has not received the conclusions of the Medical Examiner.

Year	HIV <sup>1</sup>		Cancer		Cardiac		Gastro <sup>2</sup>		Other Medical <sup>3</sup>		Accident		Homicide		Suicide		Pending		Total		Total	Inmate Population
	Male	Female	Male	Female	Male	Female	Male	Female	Male	Female	Male	Female	Male	Female	Male	Female	Male	Female	Male	Female		
2000	36	1	46	2	38	3	27	3	21	1	1	0	4	0	7	1	0	0	180	11	191	71,233
2001	25	1	53	2	57	1	15	1	20	1	1	0	3	0	2	0	0	0	176	6	182	72,007
2002	31	4	53	3	45	3	16	0	14	0	5	1	1	0	8	0	0	0	173	11	184	72,553
2003	27	3	64	4	58	3	21	0	28	2	2	0	4	1	4	0	0	0	208	13	221	77,316
2004	12	2	67	4	53	2	21	1	52	3	2	0	4	0	3	0	0	0	214	12	226	81,974
2005	18	1	57	3	71	2	29	1	43	5	2	0	8	0	4	0	0	0	232	12	244	74,901
2006	17	0	72	4	47	1	34	0	61	6	3	0	9	1	5	0	1	0	249	12	261	88,576
2007	15	1	56	1	82	4	21	3	48	2	1	0	8	0	7	0	0	0	238	11	249	92,844
2008	20	4	93	0	68	4	37	2	47	5	4	0	5	1	1	0	0	0	275	16	291	98,192
2009	10	1	91	4	84	3	36	2	27	0	3	0	8	2	7	0	0	0	266	12	278	100,894
2010	12	0	93	7	72	0	33	2	36	3	2	0	6	0	8	0	1	0	263	12	275	102,232
2011	12	2	84	7	69	6	43	1	49	0	5	0	10	0	7	0	2	0	281	16	297	102,319
2012	8	1	104	6	81	3	52	3	41	1	4	0	5	0	10	0	5	0	310	14	324	100,527
2013	7	0	83	9	86	4	49	6	34	5	5	0	4	0	7	0	6	0	281	24	305	100,884
2014	6	0	48	3	44	3	30	0	21	3	3	0	3	0	4	0	167	11	326	20	346	100,942
2015	0	0	0	0	0	0	1	0	0	0	0	0	0	0	0	0	30	3	31	3	34	100,873

<sup>1</sup>HIV: deaths resulting from complications of, or related to, human immunodeficiency virus (HIV).

<sup>2</sup>Gastro: deaths resulting from diseases of the digestive system, including but not limited to, chronic liver disease and cirrhosis.

<sup>3</sup>Other medical: deaths resulting from medical conditions not included in the other categories, including but not limited to, diabetes, pneumonia, respiratory arrest, multisystem organ failure, kidney disease and infections.

Information can be found on the department's website at: <http://www.dc.state.fl.us/pub/mortality/index.html>