The Florida Senate

COMMITTEE MEETING EXPANDED AGENDA

JUDICIARY
Senator Flores, Chair
Senator Joyner, Vice Chair

MEETING DATE: Wednesday, December 8, 2010
TIME: 1:30 —3:30 p.m.
PLACE: *Toni Jennings Committee Room,* 110 Senate Office Building

MEMBERS: Senator Flores, Chair; Senator Joyner, Vice Chair; Senators Bogdanoff, Richter, Simmons, and Thrasher

TAB	BILL NO. and INTRODUCER	BILL DESCRIPTION and SENATE COMMITTEE ACTIONS	COMMITTEE ACTION
	Introductory comments by committee chair and members.		
1	Overview of committee jurisdiction and interim assignments.		Presented
2	Review of judiciary-related legislation from 2010 Regular Session.		Presented
	Professional staff presentations of the following Open Government Sunset Reviews:		
3	Section 744.1076, F.S., Court Orders and Reports by Court Monitors in Guardianship Proceedings;		Presented
4	Section 744.7082(6), F.S., Direct-Support Organization for Statewide Public Guardianship Office; and		Presented
5	Section 787.03(6)(c), F.S., Interference with Custody.		Presented

The Florida Senate
Committee on Judiciary

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Overview of Jurisdiction: Committee on Judiciary

The Committee on Judiciary has one of the broadest subject-matter jurisdictions among the substantive committees in the Florida Senate. Its principal focus is civil legal matters and issues affecting the operation of the state courts system. In addition to the bills the committee receives on first reference, it also is a frequent recipient of bills on subsequent reference from committees including, but not limited to, the Committee on Criminal Justice (CJ); the Committee on Children, Families, and Elder Affairs (CF); and the Committee on Commerce and Tourism (CM).

Although not an exhaustive list, following are the principal subject areas and entities or organizations within the policy oversight of the Committee on Judiciary.

Principal Subject Areas

- Operation of the state courts system, including issues relating to:
  - Judges;
  - Clerks of court;
  - Legal profession; and
  - Revision 7 to Article V of the State Constitution.

- Civil legal matters, including, for example:
  - Wrongful death;
  - Medical malpractice (with the Committee on Health Regulation and the Committee on Banking and Insurance);
  - Sovereign immunity;
  - Litigation reform;
  - Real property;
  - Landlord-tenant relations;
  - Condominium and community associations (with the Committee on Regulated Industries and the Committee on Community Affairs);
  - Business associations (with CM);
  - Probate and trust law;
  - Family law, such as marriage, alimony, and visitation (and some issues, such as child support enforcement and adoption, with CF);
  - Evidence;
  - Alternative dispute resolution;
  - Liens and judgments; and
  - Compensation for wrongful incarceration (with CJ).

- Some criminal law matters (on subsequent reference to CJ).

- Often legislation proposing revisions to the State Constitution or implicating state or federal constitutional issues.

Key Entities Interacting with Committee

- State Courts System, including:
  - Florida Supreme Court;
  - District courts of appeal;
  - Circuit courts;
  - County courts;
  - Office of the State Courts Administrator;
  - Judicial nominating commissions; and
  - Judicial Qualifications Commission.

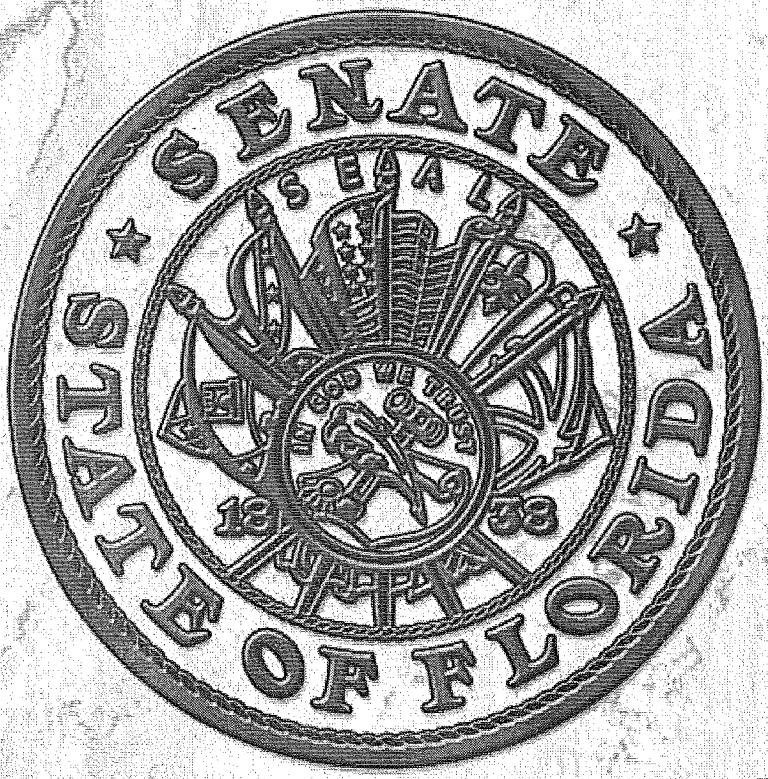
- Clerks of court, including:
  - Florida Clerks of Court Operations Corporation.

- Justice Administrative Commission (with CJ and the Budget Subcommittee on Criminal and Civil Justice Appropriations), including:
  - State attorneys;
  - Public defenders; and
  - Criminal conflict and civil regional counsel and private conflict counsel.

- Other entities/organizations, including:
  - Statewide Guardian ad Litem Office/Florida Guardian ad Litem Program (with CF);
  - Office of the Attorney General (civil);
  - The Florida Bar and its organizational units (e.g., Family Law Section; Real Property, Probate, and Trust Law Section; Business Law Section; Trial Lawyers Section; etc.).

Prepared by professional staff of the Senate Committee on Judiciary (December 2010).

THE FLORIDA SENATE



INTERIM WORK PLAN

2011 SESSION

Jeff Atwater
President of the Senate

Mike Fasano
President Pro Tempore

JUDICIARY

Interim Projects

INTERIM PROJECT TITLE:
Review the Procedures and Standards for Securing Protective Injunctions

DATE DUE: November 1, 2010

PROJECT NUMBER: 2011-127

ISSUE DESCRIPTION and BACKGROUND:

It has been estimated that more than 1.5 million adults in the United States are victims of domestic violence each year, and more than 85 percent of the victims are women. In Florida, 113,123 incidents of domestic violence were reported in 2008, 1.8 percent fewer than were reported for the same period in 2007. Data also indicate that 13.4 percent of adult women in the United States have been victims of a forcible rape sometime during their lifetime. Based on this national data, one report found that more than 11 percent of adult women in Florida have been victims of one or more completed forcible rapes during their lifetime. Additionally, statistics show that one in five high school girls has reported being physically or sexually abused by a dating partner, and females ages 16 through 24 are three times more vulnerable for partner violence than any other age group.

The Florida Statutes authorize distinct types of orders of protection against violence. These include injunctions for protection against domestic violence, repeat violence, sexual violence, and dating violence. Securing one of the injunctions is accomplished through a civil proceeding governed by the Florida Family Law Rules of Procedure. For example, some of the elements in the process for securing a domestic violence injunction include: filing with the clerk of court a sworn petition that alleges the existence of domestic violence and includes specific facts and circumstances upon which relief is sought; an ex parte review by a judge; potential awarding of a temporary injunction; the scheduling of a return hearing; personal service on the respondent with a copy of the petition; and issuance or denial of a final injunction. The statutes also prescribe grounds and penalties for violating an injunction for protection against violence.

Legal scholarship notes that misuse of orders of protection against violence does occur through the filing of false petitions. For example, an abuser may file a false petition against his or her victim, perhaps to intimidate the victim or exclude the victim from a shared residence. In other cases, a person who is not truly a victim of violence, or who does not have reasonable cause to believe that he or she is in imminent danger of becoming a victim of violence, may file a petition in order to harass the respondent or to gain an advantage over the respondent in a related family law matter, such as a divorce or child custody proceeding. In addition to thwarting the intended public-safety purposes underlying the injunctions, misuse of the process can result in inefficiencies and costs for the state courts system.

OBJECTIVE:

The purpose of this interim project is to review the current procedures and standards governing the award of injunctions for protection against domestic violence, repeat violence, sexual violence, and dating violence, in an effort to identify the extent to which misuse of the process is occurring, or may occur, and to identify enhancements to the statutory and court-rule framework to discourage misuse.

METHODOLOGY:

Senate professional staff will consult with clerks of court, judges, practicing attorneys, domestic violence experts, and other interested parties. Professional staff will also review legal literature, statutory provisions, rules of court, and case law from Florida, as well as from other states.

INTERIM PROJECT TITLE:
Review the Procedures and Standards Governing Judicial Disqualification

DATE DUE: November 1, 2010

PROJECT NUMBER: 2011-128

ISSUE DESCRIPTION and BACKGROUND:

Judicial impartiality is a core principle of the administration of justice in civil and criminal matters in the United States. Thus, state judicial systems provide mechanisms for judges to be disqualified from a matter if a legally sufficient argument can be made that the judge's continued participation would prevent a party from receiving a fair hearing.

In Florida, disqualification of a trial judge is governed by statutory provisions and by rules of court, as well by the Code of Judicial Conduct. A judge may disqualify himself or herself, or a party may formally move for disqualification. Under the Florida Rules of Judicial Administration, a motion to disqualify a trial judge must be in writing and specifically allege the facts and reasons that are the basis for disqualification. In addition, the motion must be sworn to by the moving party by signing the motion under oath or by a separate affidavit. Further, the attorney for the moving party must separately certify that the motion and the client's statements are made in good faith. Grounds for granting a motion to disqualify a judge include: (1) that the party fears he or she will not receive a fair trial or hearing due to judicial prejudice or bias; or (2) that the judge has an interest in the outcome of the matter, is related to one of the attorneys, or is a material witness.

In addition to the procedural requirements, a motion to disqualify a trial judge must be legally sufficient, meaning that the facts alleged in the motion would cause a reasonably prudent person to fear that he or she would not receive a fair or impartial trial. Case law in Florida establishes the parameters for legal sufficiency of disqualification motions.

With regard to Supreme Court justices and district court of appeal judges in Florida, the Rules of Appellate Procedure do not explicitly address disqualification. However, under case law, each justice or judge must determine for himself or herself both the legal sufficiency of a request seeking his or her disqualification and the propriety of withdrawing in any particular circumstances.

Legal authors have noted that one of the atypical elements of Florida's framework governing disqualification of judges is that the judge solely rules on the legal sufficiency of the motion and does not comment on the moving party's assertions. In fact, under Florida case law, disqualification may be mandated if a judge adjudicates on the facts in the motion. However, according to these authors, in some other states a judge is not penalized for responding to a motion or otherwise taking issue with it.

OBJECTIVE:

This purpose of this project is to examine the statutory, court-rule, and case law framework governing disqualification of trial and appellate judges in civil and criminal matters in Florida. The project will seek to identify any procedural or substantive elements of judicial disqualification that may merit revision by the Legislature through changes to statute or by the Supreme Court through changes to court rules.

METHODOLOGY:

Senate professional staff will consult with trial and appellate judges, practicing attorneys, legal scholars, and other interested parties. As part of its research, professional staff will also review Florida's statutory provisions, rules of court, and case law governing judicial disqualification, as well as comparable provisions from selected other jurisdictions.

INTERIM PROJECT TITLE:
Review the Use and Enforceability of Arbitration Agreements in the Medical Services and Nursing Home Care Contexts

DATE DUE: October 1, 2010

PROJECT NUMBER: 2011-129

ISSUE DESCRIPTION and BACKGROUND:

For many years, courts and legislatures have utilized arbitration as an alternative method to resolve disputes between parties in an efficient and inexpensive manner. However, when parties agree to participate in arbitration, they concede some of the safeguards that are traditionally afforded to those who proceed to court, one of which is the right to have the evidence weighed in accordance with established legal principles. Because of federal policy favoring and encouraging the use of arbitration to resolve disputes, the use of pre-dispute arbitration agreements has expanded beyond use in commercial contexts between large businesses and those with equal bargaining power, to use in many noncommercial consumer contracts.

Insurance companies, physicians, and nursing homes are more frequently requiring patients to enter into arbitration agreements regarding any potential medical malpractice claims resulting from the medical treatment or care. As a result, some patients may face a choice when seeking medical treatment or care: sign an arbitration agreement or forego treatment with a particular physician or other health care provider.

Some patients have challenged the enforceability of arbitration agreements in these contexts by asserting that the agreements are void as against public policy, are too broad, are essentially contracts of adhesion, and are unconscionable. Generally, courts will closely scrutinize physician-patient arbitration agreements under general contract principles to determine if the agreements are unenforceable contracts of adhesion. Because some state courts strictly uphold arbitration agreements in the medical services context, some state legislatures have enacted legislation prescribing certain safeguards for patients and consumers of medical treatment and other health care services. Some court decisions suggest that these statutes may be preempted by the Federal Arbitration Act.

OBJECTIVE:

The purpose of this interim project is to review the case law, statutes, and legal scholarship in Florida and other states regarding the use and enforceability of arbitration agreements in the medical services and nursing home care contexts to identify potential safeguards for patients and consumers subject to these agreements. In addition, the project will address preemption issues related to federal law on arbitration and compare other state laws regarding arbitration agreements.

METHODOLOGY:

Senate professional staff will consult with professional associations, patients and consumers, attorneys, insurance companies, and other legal experts to understand and evaluate the practical and legal ramifications of the use of arbitration agreements in the medical services and nursing home care contexts. Professional staff will identify any problems associated with arbitration, as well as potential improvements to the process for patients and consumers, physicians, nursing homes, and insurers. As part of its research, professional staff will also review legal literature and relevant case law, as well as arbitration statutes in other states.

Issue Briefs

(None)

Monitor Projects

INTERIM MONITOR PROJECT TITLE:
Deepwater Horizon Oil Leak Litigation and Liability

DATE DUE: N/A

PROJECT NUMBER: 2011-362

ISSUE DESCRIPTION and BACKGROUND:

The oil leak in the Gulf of Mexico has implications on a wide variety of public policy fronts – from environmental to economic development policy. BP, one of the businesses involved in the leak, has initiated claims processes for individuals, businesses, and governments seeking compensation. In addition, the company has pledged at least $20 billion toward a fund to be administered independently by Mr. Kenneth Feinberg, who previously administered the September 11th Victim Compensation Fund. The leak, nonetheless, may also generate significant litigation – from private sector and public sector plaintiffs – related to property damage, other economic losses, and cleanup costs. In mid-May, Governor Crist and Attorney General McCollum announced that two former state attorneys general would lead a legal advisory council to bring together private sector attorneys and other experts to assess the impact of the oil leak on the state. Among other things, the team will prepare the state for potential litigation related to the oil leak, should it become necessary. A press release from the Attorney General's Office stated that the council "will be chaired by former Attorneys General [Bob] Butterworth and Jim Smith who will immediately begin a vetting process and identify firms, lawyers, and other experts who can be of assistance to the council. The [c]council will also be charged with collecting the ideas and

suggestions of its members, including general courses of action to be taken now; legal strategies and theories; and data and information collection and preservation."

OBJECTIVE:

The purpose of this monitor project is to track state and federal actions, as well as private sector activity, related to potential litigation stemming from the oil leak in the Gulf of Mexico, in order to identify any matters that may warrant attention or action by the Legislature.

METHODOLOGY:

This monitor project will entail communicating with staff of the Governor's Office and the Attorney General's Office and representatives of the legal advisory council, monitoring implementation of the BP and independent claims processes, monitoring congressional and federal agency activity, and reviewing media reports and other literature in the field covering oil-leak litigation.

INTERIM MONITOR PROJECT TITLE:
Judicial Branch Governance Study

DATE DUE: N/A

PROJECT NUMBER: 2011-363

ISSUE DESCRIPTION and BACKGROUND:

In 2009, the Supreme Court of Florida established the Judicial Branch Governance Study Group to conduct an in-depth study of the current governance system of the judicial branch of the state. In establishing the study group, the Court noted that the state "has historically maintained a diffuse governance and administrative structure, with reliance on multiple committees for policy development, and on district and circuit chief judges, supported by marshals and court administrators, as the primary administrators of policy implementation" (Supreme Court of Fla. Admin. Order No. AOSC09-43). However, the Court further noted, the shift in greater court funding responsibility from the local level to the state level, as a result of revisions to article V of the State Constitution, has contributed to the need to examine the branch's governance system and "further strengthen its capacity to support the effective and efficient management of the courts."

The study group is comprised of two Supreme Court justices, two district court of appeal judges, three circuit court judges, two county court judges, and one representative of the Florida Bar. The study group's final report and recommendations are due to the Court no later than December 31, 2010. Among other things, the study group may propose recommendations for policy, rule, or statutory changes that are related to judicial branch governance and that may serve to facilitate the branch's achievement of its mission.

OBJECTIVE:

The purpose of this monitor project is to track the conclusion of the study group's work and the release of its report and recommendations, in order to identify and assess any proposed statutory revisions that may warrant legislative attention or action.

METHODOLOGY:

This monitor project will entail attending meetings of the study group, to the extent feasible; communicating with the Office of the State Courts Administrator, which is providing staff support to the study group; and reviewing the final report and recommendations.

2011 Open Government Sunset Review Projects

CITATION	SUBJECT	COMMITTEE
112.3215(8)(d)	Audits or investigations by Constitution Revision Commission	EE
119.071(1)(b)1.b.	Rejected bids or proposals submitted in response to ITB or RFP	GO
119.071(1)(b)2.	Competitive sealed replies submitted in response to ITN; rejected replies	GO
119.071(4)(d)1.i.	Identifying info of probation officers, etc.	CJ
119.071(5)(g)	Biometric identification information	CJ
215.44(8)(c)	Info relating to investments made by SBA	GO
286.0113(2)	Meetings at which negotiation with vendor is conducted; related records exemptions	GO
381.8531	Florida Center for Brain Tumor Research	HR
744.1076	Orders and reports relating to court monitors	JU
744.7082(6)	Donors to DSO for Statewide Public Guardianship Office	JU
787.03(6)(c)	Address and telephone number in interference with custody reports	JU
790.0601	Personal identifying info of concealed weapon license applicants	CJ

All reviews should be completed by October 1, 2010.

2010 Regular Session Bills That Passed the Committee on Judiciary on First Reference But Did Not Become Law

Bill Number/Sponsor	Brief Description	Disposition	Comments
Passed Senate; Died in House Messages			
SB 86 by Sobel **Excuse from Jury Service**	This bill provides that any mother who is breastfeeding a child under 2 years of age must be excused from jury service upon her request. This bill also adds practicing psychologists to the list of persons a presiding judge is authorized to excuse from jury service upon his or her discretion. These changes would be an expansion of the current list of reasons a person may be excused from serving on a jury.	Passed Senate 40-0; died in House messages.	
SB 292 by Dockery **Adverse Possession**	This bill amends the current statutory process for gaining title to real property via an adverse possession claim without color of title. Specifically, the bill: -- Requires the property appraiser to provide notice to the owner of record that an adverse possession claim was made; -- Requires the adverse possessor to provide a "full and complete" legal description on the return; -- Compels the adverse possessor to attest to the truthfulness of the information provided in the return under penalty of perjury; -- Requires an adverse possessor to describe, on the return, how he or she is using the property subject to the adverse possession claim; -- Specifies when the property appraiser may add and	Passed Senate 33-0; died in House messages.	

Bill Number/Sponsor	Brief Description	Disposition	Comments
	remove the adverse possessor to and from the parcel information on the tax roll; -- Requires property appraisers to include a notation of an adverse possession claim in any searchable property database maintained by the property appraiser; -- Provides for priority of property tax payments made by owners of record by allowing for refunds of tax payments made by adverse possessors who submit a payment prior to the owner of record; and -- Sets forth the tax-payment and refund procedures for property subject to adverse possession claims.		
SB 606 by Gelber **Termination of Rental Agreement/ Foreclosure**	This bill addresses tenants' rights in foreclosure actions and provides that the immediate purchaser of a foreclosed residential property must give 90 days' notice to a tenant to vacate the property. If there is a written rental agreement, the tenant may reside in the property until the end of the lease or for at least 90 days following the date the tenant receives notice, whichever is longer. If the immediate purchaser of the foreclosed property sells the property to a purchaser who will occupy the premises as a primary residence, the immediate purchaser may terminate the rental agreement only after giving 90 days' notice to the tenant. Additionally, this bill requires the landlord to hold certain funds for the benefit of the tenant and provides that failure to hold these funds for the benefit of the tenant is theft.	Passed Senate 29-5; died in House messages.	
SB 2252 by Villalobos **Truth in Government Act**	This bill requires any person who wishes to address a committee of the Florida Legislature to take an oath or affirmation, either written or oral, prior to addressing the committee, declaring that he or she will speak truthfully.	Passed Senate 39-0; died in House messages.	

Bill Number/Sponsor	Brief Description	Disposition	Comments
Died on Senate Calendar			
SM 96 by Baker **Exercise of Federal Power**	This Senate Memorial urges the United States Congress to honor the provisions of the United States Constitution and federal case law which limit the scope and exercise of federal power. The memorial demands that Congress cease and desist from issuing mandates that are beyond the scope of its constitutionally delegated powers. The memorial also provides that all compulsory federal legislation that directs states to comply under threat of civil or criminal penalties or sanctions or requires states to pass legislation or lose federal funding should be prohibited or repealed.	References: JU, RC (withdrawn). Died on Senate calendar.	
SB 2276 by Negron **Judiciary**	This bill repeals multiple provisions related to the judiciary which appear to be obsolete.	References: JU, JA. Died on Senate calendar.	
Passed Senate Judiciary Committee; Died in Another Senate Committee			
SB 130 by Altman **Judicial Proceedings in Civil Cases**	The bill provides for the development of a program to use retired judges and justices (also known as "senior judges") to preside over motion hearings and trials in civil actions. Upon the written request of one party, the chief judge of the circuit may appoint a senior judge to hear nondispositive motions pending in a civil action, provided that the trial judge assigned to the case cannot accommodate the hearing within two weeks after the request for appointment. Upon the request of the parties, the chief judge of the circuit may appoint a senior judge to preside over dispositive motions and trials if all parties agree to the appointment and	References: JU, JA, WPSC. Died in JA.	

Bill Number/Sponsor	Brief Description	Disposition	Comments
	sufficient court resources are available to accommodate the request.		
SB 654 by Joyner **Compensation for Wrongful Incarceration**	The bill makes revisions to the Victims of Wrongful Incarceration Act (the Act). These revisions clarify inconsistent evidentiary standards in the Act. The procedures for processing a petitioner's fingerprints are altered to account for the submission of electronic fingerprints. The bill also simplifies the application process by eliminating the requirement that a wrongfully incarcerated person submit certain criminal history documentation. The bill clarifies that a wrongfully incarcerated person may not submit an application for compensation if the person has previously received a judgment in his or her favor in a civil action arising out of the wrongfully incarcerated person's conviction. The bill allows for the payment of the fees and costs of an attorney to assist the claimant during the process of seeking compensation, not to exceed $50,000.	References: JU, CJ, JA. Died in JA.	
SJR 1240 by Wise **Sovereignty of the State**	The joint resolution proposes an amendment to the Florida Constitution expressing the sovereignty of the state under the Tenth Amendment to the United States Constitution. The joint resolution provides that all powers not otherwise enumerated and granted to the federal government by the U.S. Constitution are reserved to the state, and that Floridians are not required to comply with mandates from the federal government which are beyond the scope of its constitutionally delegated powers. The joint resolution also provides that all compulsory federal legislation that directs states to comply under threat of losing federal funding should be repealed and are not recognized by the state.	References: JU, WPSC (withdrawn), RC. Died in RC.	
SB 1288 by Negron	This bill provides that a document that is able to be recorded by electronic means and is (or was previously) accepted for	References: JU, CA, GO, JA.	

Bill Number/Sponsor	Brief Description	Disposition	Comments
Official Records/ Electronic Documents	recordation is valid, even if the document was received and recorded prior to the Department of State adopting rules relating to the electronic recording of documents. These documents are also considered valid notwithstanding any defects in, deviations from, or the inability to demonstrate strict compliance with the statutory or regulatory framework in effect at the time of recordation.	Died in JA.	
SB 2034 by Wise **Arbitration Agreements/ Medical Negligence Claims**	The bill creates certain safeguards for patients and consumers relating to the execution and enforceability of arbitration agreements in the medical services and nursing home care context, and includes language detailing the issues and concerns surrounding arbitration agreements in this context, as well as the Legislature's intent to address those issues and concerns. The bill specifies that arbitration agreements executed prior to medical treatment or care (pre-dispute agreements), as well as arbitration agreements executed after medical treatment or care (post-dispute agreements), are voidable as against public policy if these agreements violate the Florida Arbitration Code (FAC) and the provisions created within the FAC under the bill. In addition, the bill delineates how arbitrators are to be selected in these arbitrations.	References: JU, HR. Died in HR.	
SB 2396 by Fasano **Persons with disabilities**	This bill amends Florida's Bill of Rights for Persons with Developmental Disabilities to provide that persons with developmental disabilities have a right to be free from abuse, regardless of the setting, as well as negligence. The bill clarifies that entities as well as individuals may be liable to a person for violating the rights and privileges of a person with developmental disabilities. Additionally, the bill creates the Floridians with Disabilities Act, statutorily adopts the federal Americans with Disabilities Act of 1990, as amended in	References: JU, GO, HA, WPSC. Died in HA.	

Bill Number/Sponsor	Brief Description	Disposition	Comments
	2008, and provides for civil and administrative remedies for alleged violations of the Floridians with Disabilities Act.		
2438 by Storms **Premarital Preparation**	This bill makes statutory changes to Florida's family law handbook, which is renamed the Florida Marriage Handbook (handbook) and divided into two parts. The bill creates the Marriage Education Committee (committee) to provide information for the handbook relating to resources, information, and skills to help couples have a healthy and successful marriage. The bill provides content that the committee may include in the handbook. Lastly, the bill requires that the Florida Marriage Handbook be reviewed and a report sent to the Legislature every 10 years in October explaining the changes made and recommendations for further updates to the handbook.	References: JU, HA. Died in HA.	
SB 2620 by Altman **Estate Tax**	This bill revises the conditions under which Florida imposes estate tax on eligible property of a nonresident decedent. The tax is imposed only if the nonresident decedent's state of domicile imposes a tax on the transfer of a Florida resident's property located in that state and the tax imposed on the Florida resident is in excess of the taxes that would be imposed by Florida on transfers of the nonresident's similar property located in Florida. The tax imposed on the nonresident's property is equal to the tax that his or her resident state would impose on a Floridian having property in nonresident's state at the time of the Floridian's death.	References: JU, CM, FT, WPSC. Died in FT.	

Compiled by professional staff of the Senate Committee on Judiciary (December 2010).

Open Government Sunset Review of Section 744.1076, F.S., Court Orders and Reports by Court Monitors in Guardianship Proceedings – Summary[1]

Background and Findings

Court Monitoring in Guardianship Cases

Court monitoring in guardianship cases is a mechanism "courts can use to review a guardian's activities, assess the well-being of the ward, and ensure that the ward's assets are being protected."[2] A court monitor may be appointed on an emergency or nonemergency basis and has the authority to investigate, seek information, examine documents, and interview the ward. The court monitor's findings must be reported to the court, and if it appears from the monitor's report that further action by the court is necessary to protect the ward's interests, the court may hold a hearing and enter any order necessary to protect the ward.

Court-Records Exemptions Relating to Court Monitors

In conjunction with the creation of the court monitor system in guardianship proceedings, the Legislature created exemptions from public access to judicial records related to court monitors in guardianship proceedings. Under these public-records exemptions, any order of a court appointing a nonemergency court monitor is confidential and exempt from public disclosure.[3] Similarly, the reports of an appointed court monitor relating to the medical condition, financial affairs, or mental health of the ward are confidential and exempt from public disclosure.[4] The public may access these records as determined by the court or upon demonstration of good cause to review the records. This exemption expires, and the public may access these records, if a court makes a finding of probable cause for further court action after consideration of the court monitor's report.[5] However, information in the report that is otherwise made confidential or exempt by law retains its confidential or exempt status.

In the emergency court monitor context, a similar public-records exemption exists in Florida law. Any order of a court appointing an emergency court monitor is exempt from public disclosure.[6] Similarly, the reports of an appointed court monitor relating to the medical condition, financial affairs, or mental health of the ward are confidential and exempt from public disclosure.[7] The public may access these records as determined by the court or upon demonstration of good cause to review the records. This exemption expires, and the public may access these records, if a court makes a finding of probable cause for further court action after consideration of the court

[1] Summary prepared by professional staff of the Senate Committee on Judiciary (December 2010).
[2] Supreme Court Commission on Fairness, Committee on Guardianship Monitoring, *Guardianship Monitoring in Florida: Fulfilling the Court's Duty to Protect Wards*, 13 (2003).
[3] Section 744.1076(1)(a), F.S.
[4] Section 744.1076(1)(b), F.S.
[5] Section 744.1076(1)(c), F.S.
[6] Section 744.1076(2)(a), F.S.
[7] Section 744.1076(2)(b), F.S.

monitor's report.[8] However, information in the report that is otherwise made confidential or exempt by law retains its confidential or exempt status.

Court determinations relating to a finding of no probable cause and court orders finding no probable cause in the nonemergency and emergency court monitor contexts are also confidential and exempt from public disclosure.[9] However, the court may allow access to these determinations and orders upon a showing of good cause.

These public-records exemptions stand repealed on October 2, 2011, unless reenacted by the Legislature after review under the Open Government Sunset Review Act. Based on the review, Senate professional staff concluded that, in addition to protecting the ward from the disclosure of information of a sensitive, personal nature, the exemptions also protect a guardian from unwarranted damage to his or her reputation. Furthermore, these exemptions are arguably necessary for the administration of the court monitor process.[10]

Recommendation

Senate professional staff recommends that the Legislature retain the public-records exemptions established in s. 744.1076, F.S., which make orders appointing nonemergency and emergency court monitors, reports of those monitors, and findings of no probable cause exempt or confidential and exempt from public disclosure.

Senate professional staff also recommends that the Legislature consider reorganizing the exemptions for clarity and providing that the order appointing a nonemergency court monitor be "exempt" only rather than "confidential and exempt." This change would make the exemption consistent with the current public-records exemption for orders appointing emergency court monitors and would allow nonemergency court monitors to share the order as necessary during their investigation.

Senate professional staff also recommends that the Legislature consider deleting the reference to "court determinations relating to a finding of no probable cause" in the public-records exemption governing determinations and orders finding no probable cause. In practice, the probable cause determination is reduced to a written order. Therefore, the exemption could provide that an order finding no probable cause should be confidential and exempt from public disclosure.

[8] Section 744.1076(2)(c), F.S.
[9] Section 744.1076(3), F.S.
[10] A public-records exemption must, among other criteria, protect information of a sensitive, personal nature or be necessary for the effective administration of a program. Section 119.15(6)(b), F.S.

THE FLORIDA SENATE

Committee on Judiciary

Open Government Sunset Review of Section 744.1076, F.S., Court Orders and Reports by Court Monitors in Guardianship Proceedings

December 8, 2010

Open Government Sunset Review Act

- Public-records review of s. 744.1076, F.S., which provides public-records exemptions for orders appointing nonemergency and emergency court monitors, monitors' reports, and no probable cause orders in guardianship proceedings.

- Exemptions will repeal on October 2, 2011, unless reenacted by Legislature.

Guardianship

Guardianship is:

A trust relationship in which one person, called a “guardian” acts for another, called the “ward,” whom the law regards as incapable of managing his or her own affairs.

Court Monitoring in Guardianship Cases

Court Monitoring is:

A mechanism courts can use to review a guardian's activities, assess the well-being of a ward, and ensure that the ward's assets are being protected.

Authority of Court Monitors

- Court Monitors:
  - Are appointed by court upon request by interested party or upon court's own initiative.
  - Are afforded authority to investigate, seek information, examine documents, and interview ward.
  - Report findings to court for determination of whether further action is needed by court to protect ward's interests.

Types of Court Monitors

There are 2 types of court monitors:

- Nonemergency Court Monitors
  Notice of appointment of court monitor is provided to guardian, ward, and other interested persons.

- Emergency Court Monitors
  Appointment of court monitor is made on emergency basis with no notice to guardian, ward, or other interested parties.

Court-Records Exemptions

Exemptions from public access to court records include:

- Court orders appointing nonemergency and emergency court monitors;
- Court-monitor reports relating to medical condition, financial condition, or mental health of ward; and
- Court determinations relating to findings of probable cause.

Application of Exemptions

- The exemptions expire if court makes a finding of probable cause for further action by court.

- Court may allow access to court records upon a showing of good cause.

Retention of Court-Records Exemptions

Grounds to reenact exemptions:

- They protect ward from disclosure of information of sensitive, personal nature.
- They protect guardian from unwarranted damage to his or her reputation as a result of false allegations.
- They are arguably necessary for administration of court monitor process.

Recommendations

- Retain the public-records exemptions established in s. 774.1076, F.S.
- Reorganize the statute for clarity.
- Provide that order appointing a nonemergency court monitor is “exempt” only rather than “confidential and exempt.”
- Delete reference to “court determinations relating to a finding of no probable cause.”

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Open Government Sunset Review of Section 744.7082(6), F.S., Direct-Support Organization for Statewide Public Guardianship Office – Summary[1]

Background and Findings

A guardian is a court-appointed surrogate to make personal or financial decisions for a minor or for an adult with mental or physical disabilities. The Statewide Public Guardianship Office appoints local public guardian offices, as required by law, to provide guardianship services when persons do not have adequate income or assets to afford a private guardian and there is no willing relative or friend to serve.[2]

In 2006, the Florida Legislature created a public-records exemption for the identity of donors or potential donors to the direct-support organization affiliated with the Statewide Public Guardianship Office.[3] Section 744.7082(6), F.S., provides that the identity of a donor or a prospective donor of money or property to the direct-support organization who wishes to remain anonymous, as well as all information identifying the donor or prospective donor, is confidential and exempt from disclosure. The exemption is scheduled for repeal on October 2, 2011, unless retained by the Legislature following a review under the Open Government Sunset Review Act.

The Foundation for Indigent Guardianship (foundation) serves as the direct-support organization for the Statewide Public Guardianship Office. The foundation is a not-for-profit corporation that is organized and operated to conduct programs and activities; to raise funds; to request and receive grants, gifts, and bequests of moneys; to acquire, receive, hold, invest, and administer funds; and to make expenditures to or for the direct or indirect benefit of the Statewide Public Guardianship Office. The funds that the foundation raises supplement the budgets of the contracted public guardianship offices.

Research completed in conjunction with the Open Government Sunset Review demonstrates that the public-records exemption is needed to protect the identity of donors participating in the foundation's fundraising who wish to remain anonymous. The public-records exemption for the identity of donors to the foundation allows the foundation to effectively and efficiently administer its fundraising activities on behalf of the local public guardianship offices that contract with the Statewide Public Guardianship Office to provide guardianship services. The exemption thereby satisfies one of the recognized criteria for retaining an exemption as outlined in the Open Government Sunset Review Act.[4] Additionally, the public-records exemption is consistent with comparable public-records exemptions that protect the identity of donors or potential donors in the Florida Statutes.[5]

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[1] Summary prepared by professional staff of the Senate Committee on Judiciary (December 2010).
[2] Sections 744.703 and 744.7021, F.S.
[3] See ch. 2006-179, Laws of Fla.
[4] Section 119.15(6)(b), F.S.
[5] *See, e.g.*, Enterprise Florida, Inc. (s. 11.45(3)(i), F.S.); Cultural Endowment Program (s. 265.605(2), F.S.); publicly owned house museum designated as a National Historic Landmark (s. 267.076, F.S.); direct-support organization for University of West Florida (s. 267.1732(8), F.S.); direct-support organization for University of Florida (s. 267.1736(9), F.S.); Florida Tourism Industry Marketing Corporation (s. 288.1226(6), F.S.); direct-support organization for Office of Tourism, Trade, and Economic Development (s. 288.12295, F.S.); and Florida Intergovernmental Relations Foundation (s. 288.809(4), F.S.).

Recommendation

Committee staff recommends that the Legislature save from repeal under the Open Government Sunset Review Act the public-records exemption for the identity of donors or potential donors to the direct-support organization affiliated with the Statewide Public Guardianship Office. Without the exemption, the identity of donors or potential donors to the direct-support organization affiliated with the Statewide Public Guardianship Office will become public.

THE FLORIDA SENATE

COMMITTEE ON JUDICIARY

Open Government Sunset Review

Direct-Support Organization

Statewide Public Guardianship Office

December 8, 2010

Guardianship

A guardian is a

surrogate decision-maker

appointed by a court

Direct-Support Organization

- A not-for-profit organization
- Conducts programs and activities
- Raises funds
- Requests and receives grants, gifts, and money for the benefit of SPGO.

Statewide Public Guardianship Office

Direct-Support Organization

Supplements Budgets of Local Public Guardianship Offices

Local Public Guardianship Offices

Provide Guardianship Services

Open Government Sunset Review

- Requires a cyclical review of public records exemptions created by law.

- Section 744.7082(6), F.S., is subject to review under the Open Government Sunset Review Act.

Section 744.7082(6), F.S. Public Records Exemption Protects Identity of Donors or Potential Donors

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Direct-Support Organization

Recommendation

Committee staff recommends that the Legislature save from repeal the public-records exemption for the identity of donors or potential donors to the direct-support organization affiliated with the Statewide Public Guardianship Office.

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Open Government Sunset Review of Section 787.03(6)(c), F.S., Interference with Custody – Summary[1]

Background and Findings

Interference with Custody Offense and Exception

The Legislature in 1974 created the offense of interference with custody. Under current Florida law, it is a third-degree felony for any person – without legal authority – to knowingly or recklessly take a minor or any incompetent person from the custody of his or her parent, a guardian, a public agency in charge of the child or incompetent person, or any other lawful custodian.[2] It also is a third-degree felony – in the absence of a court order determining custody or visitation rights – for a parent, stepparent, legal guardian, or relative who has custody of a minor or incompetent person to take or conceal the minor or incompetent person with a malicious intent to deprive another person of his or her right to custody.[3]

The statute specifies that the offense does not apply:

> in cases in which a person having a legal right to custody of a minor or incompetent person is the victim of any act of domestic violence, has reasonable cause to believe he or she is about to become the victim of any act of domestic violence . . . or believes that his or her action was necessary to preserve the minor or the incompetent person from danger to his or her welfare and seeks shelter from such acts or possible acts and takes with him or her the minor or incompetent person.[4]

To avail himself or herself of this exception, a person who takes a minor or incompetent person must make a report to the sheriff or state attorney that includes the name, current address, and telephone number of the minor or incompetent person along with the reasons the minor or incompetent person was taken. The person invoking the exception must also inform the sheriff or state attorney of any address or telephone number changes.[5]

Public-Records Exemption Relating to Interference with Custody

Currently, there is a public-records exemption for information submitted to the sheriff or state attorney for the purpose of obtaining immunity from prosecution for the offense of interference with custody.[6] This exemption protects from disclosure the current address and telephone number of a person who takes a minor child or incompetent person because the person is a victim of domestic violence or believes that taking the minor child or incompetent person is

[1] Summary prepared by professional staff of the Senate Committee on Judiciary (December 2010).
[2] Section 787.03(1), F.S.
[3] Section 787.03(2), F.S.
[4] Section 787.03(6)(a), F.S.
[5] Section 787.03(6)(b), F.S.
[6] Section 787.03(6)(c), F.S.

necessary to protect the child or incompetent person. The exemption will expire on October 2, 2011, unless saved from repeal through reenactment by the Legislature.

Recommendation

In reviewing the public-records exemption under the Open Government Sunset Review Act, professional staff of the Committee on Judiciary found that there is a public necessity in continuing to keep confidential and exempt certain information relating to a person who takes a minor child or incompetent person because he or she is the victim of domestic violence, or believes he or she is about to become a victim of domestic violence, or in order to maintain the safety of the minor or incompetent person. This public-records exemption appears to serve a public purpose by maintaining the safety of the person taking the minor or incompetent person, as well as the minor or incompetent person, by protecting their location and phone number. The Open Government Sunset Review Act provides that one of the identifiable public purposes for retaining an exemption is protecting sensitive information about an individual, the release of which would jeopardize the safety of that individual.[7]

Professional staff recommends that the Legislature reenact the public-records exemption established in paragraph (c) of s. 787.03(6), F.S., which makes specified information submitted to the sheriff or state attorney for the purpose of obtaining immunity from prosecution for the offense of interference with custody exempt from disclosure.

[7] Section 119.15(6)(b)2., F.S.

THE FLORIDA SENATE

Committee on Judiciary

Open Government Sunset Review of Section 787.03(6)(c), F.S., Interference with Custody

December 8, 2010

Interference with Custody

- Knowingly or recklessly taking a minor or an incompetent person from the custody of his or her parent, a guardian, a public agency, or any other lawful custodian.

- Taking, detaining, concealing, or enticing away a minor or an incompetent person with malicious intent to deprive another person of his or her right to custody.

Interference with Custody

Exception – Person with legal right to custody of minor or incompetent person:

- Is victim of domestic violence;
- Believes he or she is about to become victim of domestic violence; or
- Believes action is necessary to protect minor or person from danger.

Interference with Custody

Conditions for exception – Person must:

- Report name, current address, telephone number, and reasons to sheriff or state attorney;
- Commence custody proceeding consistent with law; and
- Inform sheriff or state attorney of address or telephone changes.

Interference with Custody

Public-records exemption:

- For current address and telephone number of the person who does the taking and of the minor or incompetent person.

- Expires October 2, 2011.

Retention of Public-Records Exemption

Grounds to reenact exemption:

- Protects sensitive information, release of which would jeopardize personal safety.
- Absent exemption, persons in danger could be located.

Recommendation

- Retain the public-records exemption prescribed in s. 787.03(6)(c), F.S., for addresses and telephone numbers in interference with custody cases.

- Delete scheduled repeal date.

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