

**The Florida Senate**  
**COMMITTEE MEETING EXPANDED AGENDA**

**JUDICIARY**  
**Senator Flores, Chair**  
**Senator Joyner, Vice Chair**

**MEETING DATE:** Wednesday, January 25, 2012  
**TIME:** 3:30 —5:30 p.m.  
**PLACE:** *Toni Jennings Committee Room*, 110 Senate Office Building

**MEMBERS:** Senator Flores, Chair; Senator Joyner, Vice Chair; Senators Braynon, Gardiner, Richter, Simmons, and Thrasher

TAB	BILL NO. and INTRODUCER	BILL DESCRIPTION and SENATE COMMITTEE ACTIONS	COMMITTEE ACTION
1	<b>SB 978</b> Fasano (Similar CS/H 823)	Florida Uniform Principal and Income Act; Repealing provisions relating to the administration of a trust and its applicability, which is being transferred to another section; deleting a duplicative provision relating to conclusive determinations of the terms of a unitrust; revising provisions relating to the determination and distribution of net income; substituting the term "fiduciary" for "trustee" to clarify that provisions apply to all fiduciaries; revising provisions relating to the allocation between income and principal when liquidating assets; clarifying the apportionment of expenses between tenants and remaindermen, etc.	JU      01/25/2012 BI BC
2	<b>SB 996</b> Dean (Identical H 1331)	Property Fraud; Providing that a person who, with intent to defraud another, knowingly files or causes to be filed with the clerk of the circuit court a document relating to the ownership, transfer, or encumbrance of or claim against real or personal property, or any interest in real or personal, which contains a material misstatement, misrepresentation, or omission of fact commits the offense of fraudulent creation of an interest in real or personal property; providing criminal penalties, etc.	JU      01/25/2012 CJ BC

**COMMITTEE MEETING EXPANDED AGENDA**

Judiciary

Wednesday, January 25, 2012, 3:30 —5:30 p.m.

TAB	BILL NO. and INTRODUCER	BILL DESCRIPTION and SENATE COMMITTEE ACTIONS	COMMITTEE ACTION
3	<b>SB 1458</b> Diaz de la Portilla (Identical H 963)	Dispute Resolution; Revising the short title of the "Florida Arbitration Code" to the "Revised Florida Arbitration Code"; providing that an agreement may waive or vary the effect of statutory arbitration provisions; providing for petitions for judicial relief; providing for service of notice of an initial petition for such relief; requiring a court to decide whether an agreement to arbitrate exists or a controversy is subject to an agreement to arbitrate; providing for consolidation of separate arbitration proceedings as to all or some of the claims in certain circumstances; providing immunity from civil liability for an arbitrator or an arbitration organization acting in the capacity of an arbitrator, etc.  JU 01/25/2012 GO BC	
4	<b>SB 1360</b> Hays (Identical H 1209)	Application of Foreign Law in Certain Cases; Clarifying that the public policies expressed in the act apply to violations of a natural person's fundamental liberties, rights, and privileges guaranteed by the State Constitution or the United States Constitution; declaring that certain decisions rendered under such laws, codes, or systems are void; providing that the act may not be construed to require or authorize any court to adjudicate, or prohibit any religious organization from adjudicating, ecclesiastical matters in violation of specified constitutional provisions or to conflict with any federal treaty or other international agreement to which the United States is a party to a specified extent, etc.  JU 01/25/2012 BC	
5	<b>SB 1390</b> Joyner (Similar CS/H 1193)	Public Records/Victims of Domestic Violence, Repeat Violence, Sexual Violence, and Dating Violence; Providing exemptions from public records requirements for personal identifying and location information of victims of domestic violence, repeat violence, sexual violence, and dating violence held by the Florida Association of Court Clerks and Comptrollers in conjunction with the automated process developed by the association by which a petitioner may request notification of service of an injunction for protection against said violence and other court actions related to the injunction for protection, etc.  JU 01/25/2012 GO RC	

**COMMITTEE MEETING EXPANDED AGENDA**

Judiciary

Wednesday, January 25, 2012, 3:30 —5:30 p.m.

TAB	BILL NO. and INTRODUCER	BILL DESCRIPTION and SENATE COMMITTEE ACTIONS	COMMITTEE ACTION
6	<b>SB 1146</b> Simmons (Identical H 401)	Effect of Dissolution or Annulment of Marriage on Certain Designations; Providing that a designation made by or on behalf of a decedent providing for the payment or transfer at death of an interest in an asset to or for the benefit of the decedent's former spouse shall become void if the decedent's marriage was judicially dissolved or declared invalid before the decedent's death, if the designation was made prior to the dissolution or order; providing for disposition of assets; specifying assets subject to provisions; providing exceptions; providing that payors are not liable for payments or transfers to beneficiaries contrary to this provision in certain circumstances; providing that certain provisions apply notwithstanding the payor's knowledge that the person to whom the asset is transferred is different from the person who would own the interest due to the dissolution of the decedent's marriage or declaration of the marriage's validity before the decedent's death; providing that the provisions do not affect specified interests and rights, etc.	
		JU 01/25/2012 BC	
7	<b>SB 1268</b> Simmons (Identical H 4077)	Actions for Damages; Repealing provisions relating to an optional settlement conference in certain tort actions, etc.	
		JU 01/25/2012 BC RC	
8	<b>SB 1570</b> Simmons (Compare CS/H 971)	Judiciary; Providing that if a retired justice or judge is assigned to temporary duty, such assignment does not affect his or her eligibility for benefits under the Florida Retirement System; providing that, with the exception of members selected from a list of nominees provided by the Board of Governors of The Florida Bar, a current member of a judicial nominating commission appointed by the Governor serves at the pleasure of the Governor; providing for each expired term or vacancy to be filled by appointment in the same manner as the member whose position is being filled; deleting a requirement that the Executive Office of the Governor establish uniform rules of procedure consistent with the State Constitution when suspending for cause a member of a judicial nominating commission, etc.	
		JU 01/25/2012 BC	

**COMMITTEE MEETING EXPANDED AGENDA**

Judiciary

Wednesday, January 25, 2012, 3:30 —5:30 p.m.

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TAB	BILL NO. and INTRODUCER	BILL DESCRIPTION and SENATE COMMITTEE ACTIONS	COMMITTEE ACTION
9	<b>CS/SB 950</b> Criminal Justice / Simmons (Compare H 1099)  <b>(If Received)</b>	Stalking and Aggravated Stalking; Redefining the terms "course of conduct" and "credible threat" and defining the term "immediate family"; providing that a person who makes a threat which places another person in reasonable fear for his or her safety or the safety of his or her immediate family commits the offense of aggravated stalking under certain circumstances; creating a civil cause of action for an injunction for protection against stalking or cyberstalking; providing procedures to follow when the respondent has violated the injunction for protection, etc.  CJ 01/12/2012 Temporarily Postponed CJ 01/19/2012 Fav/CS JU 01/25/2012 If received BC	

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Other Related Meeting Documents

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**The Florida Senate**  
**BILL ANALYSIS AND FISCAL IMPACT STATEMENT**

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

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Prepared By: The Professional Staff of the Judiciary Committee

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BILL: SB 978

INTRODUCER: Senator Fasano

SUBJECT: Florida Uniform Principal and Income Act

DATE: January 24, 2012

REVISED: \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Munroe	Cibula	JU	<b>Pre-meeting</b>
2.			BI	
3.			BC	
4.				
5.				
6.				

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**I. Summary:**

The bill makes a number of clarifying and substantive changes to the Florida Principal and Income Act (UPIA). This bill represents the first broad revision of the Act since it was enacted in 2002.

The bill implements a smoothing rule where fiduciaries calculated the average fair market value of the current year assets and the preceding years' assets. The bill modifies the default guidelines applicable to unitrusts, distribution of income, the partial liquidation rule, marital tax deductions, liquidating assets, income taxes, and property improvements.

This bill is the product of the coordinated efforts of the Real Property, Probate and Trust Law Section of the Florida Bar, the Florida Bankers Association, and the Florida Institute of Certified Public Accountants.

This bill amends section 738.102, 738.1041, 738.105, 738.201, 738.202, 738.301, 738.302, 738.303, 738.401, 738.402, 738.403, 738.501, 738.502, 738.503, 738.504, 738.601, 738.602, 738.603, 738.604, 738.605, 738.606, 738.607, 738.608, 738.701, 738.702, 738.703, 738.704, 738.705, 738.801, 738.804, Florida Statutes.

This bill repeals 738.104(11), Florida Statutes.

**II. Present Situation:**

In 2002, the Florida Legislature enacted a slightly modified version of the Uniform Principal and Income Act (1997) (UPIA), as developed by the National Commissioners on Uniform State

Laws.<sup>1</sup> The Florida Uniform Principal and Income Act (act) specifies procedures for trustees administering an estate in separating principal from income and to ensure that the intention of the trust creator is the guiding principle for trustees.<sup>2</sup> The act establishes default rules for trustees and fiduciaries when making allocations of principal and income where the will or trust instrument is silent.<sup>3</sup>

Under the act, “principal” means “property held in trust for distribution to a remainder beneficiary when the trust terminates.”<sup>4</sup> Under the act, the term “income” means “money or property that a fiduciary<sup>5</sup> receives as current return from a principal asset. The term includes a portion of receipts from a sale, exchange, or liquidation of a principal asset, to the extent provided in [the act].”<sup>6</sup> “Fiduciary” is defined under the act to mean “a personal representative or a trustee. The term includes an executor, administrator, successor, personal representative, special administrator, or a person performing substantially the same function.”<sup>7</sup> “Trustee” is defined under the act, “to includ[e] an original, additional, or successor trustee, whether or not appointed or confirmed by a court.”<sup>8</sup>

### III. Effect of Proposed Changes:

#### Trustee/Fiduciary

The bill changes the term, “trustee” to “fiduciary” throughout ch. 738, F.S., wherever the term, “trustee” should also apply to a fiduciary that is not specifically designated as a trustee.

Section 738.104(11), F.S., is repealed which provides that s. 738.104, F.S., relating to a trustee’s power to adjust, “shall be construed as pertaining to the administration of a trust and is applicable to any trust that is administered in [Florida] or under Florida law.”<sup>9</sup> This provision would be redundant to the bill’s changes in s. 738.804, F.S., which provide that ch. 738, F.S., pertains to the administration of trusts administered in Florida or under its law, and to any estate that is administered in Florida unless the provision of the chapter is limited in application to a trustee, rather than a fiduciary.

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<sup>1</sup> Chapter 2002-42, Laws of Florida. See Senate Staff Analysis and Economic Impact Statement for CS/CS/SB 1166 (2002 Reg. Session) by the Senate Committee on Banking and Insurance (February 26, 2002).

<sup>2</sup> National Conference of Commissioners on Uniform State Laws, *Why States Should Adopt UPIA*, available at <http://www.uniformlaws.org/Narrative.aspx?title=Why%20States%20Should%20Adopt%20UPIA> (last visited Jan. 21, 2012).

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

<sup>4</sup> Section 738.102(10), F.S.

<sup>5</sup> See e.g., “Fiduciary” is defined to mean “A person who is required to act for the benefit of another person on all matters within the scope of their relationship; one who owes to another the duties of good faith, trust, confidence, and candor. One who must exercise a high standard of care in managing another’s money or property.” BLACK’S LAW DICTIONARY (9th ed. 2009).

<sup>6</sup> Section 738.102(4), F.S.

<sup>7</sup> Section 738.102(3), F.S.

<sup>8</sup> Section 738.102(13), F.S.

<sup>9</sup> Section 738.104(11), F.S.

## Carrying Value

The bill amends s. 738.102, F.S., to define “carrying value” to mean the fair market value at the time the assets are received by the fiduciary. If there is a change in fiduciaries, a majority of the continuing fiduciaries may elect to adjust the carrying values to reflect the fair market value of the assets at the beginning of their administration. The bill amends s. 738.202, F.S., to apply the carrying value, which will simplify administration of trusts by not requiring the fiduciary to revalue the assets on each distribution date unless there is a disproportionate distribution to one or more beneficiaries, in which case the bill provides guidelines on how to make the distribution.<sup>10</sup>

## Unitrusts

A “unitrust” is defined as “a trust from which a fixed percentage of the fair market value of the trust’s assets, valued annually, is paid each year to the beneficiary.”<sup>11</sup> The bill creates new rules for valuing assets for unitrusts. The bill amends s. 738.1041(1)(a), F.S., to create a definition of the term, “average fair market value” which includes what is commonly referred to as the “smoothing rule.” The “smoothing rule” is intended to reduce the large differences in amounts distributable to a beneficiary from year to year resulting from large market fluctuations by using the average fair market value over the past three years to value assets.<sup>12</sup>

## Determination and Distribution of Net Income

Under current law, a fiduciary is required, to distribute to the beneficiary who receives a pecuniary amount outright the interest provided by will, the terms of the trust, or applicable law. This concept was adopted as part of the UPIA. However, the Real Property, Probate and Trust Law Section of The Florida Bar indicates that there are not any situations to which this law applies in Florida.<sup>13</sup>

The bill amends s. 738.201(3), F.S., to remove unnecessary language referring to “applicable law” where there is no applicable law and to remove UPIA language relating to a statutory right to income on a pecuniary device, which is not a right in Florida.<sup>14</sup>

## Character of Receipts

Current law establishes a default provision for determining whether money or property received by a trust should be allocated to principal or income. Payments in excess of 20 percent of an entity’s assets are assumed to be liquidating distributions which are allocated to principal (the 20

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<sup>10</sup> See Real Property, Probate, and Trust Law Section of The Florida Bar, *White Paper on a Proposed Bill to Amend the Florida Uniform Principal and Income Act, Chapter 738, Florida Statutes* (2010) (on file with the Senate Committee on Judiciary).

<sup>11</sup> BLACK’S LAW DICTIONARY (9th ed. 2009).

<sup>12</sup> Real Property, Probate, and Trust Law Section of The Florida Bar, *White Paper on a Proposed Bill to Amend the Florida Uniform Principal and Income Act, Chapter 738, Florida Statutes* (2010) (on file with the Senate Committee on Judiciary).

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

percent partial liquidation rule). Certain entities pay large dividends that may exceed this limit despite not being liquidating assets.<sup>15</sup>

The bill amends s. 738.401, F.S., to retain the 20 percent partial liquidation for non-publicly-traded entities, but only after the trust or estate has received a cumulative minimum return of 3 percent annually. The bill provides a framework for allocating dividends and other stock payments that exceed 10 percent of the fair market value of the trust's interest in an entity, and provides rules for different types of entities, such as publicly-traded companies, partnerships, subchapter S corporations, and other entities.<sup>16</sup>

### **Marital Trusts and Deductions**

Provisions within the act contain a methodology for computing income from assets held in marital trusts and another more complex method of computing the allocation of principal and income from non-marital trusts.<sup>17</sup>

The bill amends s. 738.602(4), F.S., to simplify the method for computing income held in non-marital trusts. The bill also amends s. 738.602(5), F.S., to ensure that the estate or gift tax marital deduction applies not only federal tax laws, but tax laws of other states where the trust is administered in Florida. The bill also amends s. 738.606(1), F.S., to clarify that the marital deduction may apply to the federal tax laws or tax laws of other states.

### **Liquidating Asset**

Assets in a trust which are expected to produce receipts for a limited period of time are allocated so that 10 percent of the payments go to income and the rest are applied to principal. According to the Real Property, Probate, and Trust Law Section of The Florida Bar, the Internal Revenue Service (IRS) recently ruled that the safe harbor for allocations to income was between 3 percent and 5 percent to income, putting Florida trusts at risk for additional tax liabilities.<sup>18</sup>

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

### **Income Taxes**

Current law provides guidelines for paying income taxes out of a trust, including guidelines specifically for paying taxes on an entity's taxable income. Current law also requires payment from income to the extent receipts from the entity are allocated to income and from principal to the extent that receipts from the entity are allocated to principal and the trust's share of the entity's taxable income exceeds the total of such receipts. Receipts allocated to principal or

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<sup>15</sup> Section 738.401, F.S.

<sup>16</sup> Real Property, Probate, and Trust Law Section of The Florida Bar, *White Paper on a Proposed Bill to Amend the Florida Uniform Principal and Income Act, Chapter 738, Florida Statutes* (2010) (on file with the Senate Committee on Judiciary).

<sup>17</sup> Compare ss. 738.602(4) and 738.602(5), F.S.

<sup>18</sup> Real Property, Probate, and Trust Law Section of The Florida Bar, *White Paper on a Proposed Bill to Amend the Florida Uniform Principal and Income Act, Chapter 738, Florida Statutes* (2010) (on file with the Senate Committee on Judiciary).

income are reduced by the amount distributed to a beneficiary from principal or income for which the trust receives a deduction in calculating the tax.<sup>19</sup>

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

### **Improvements**

Under the common law, when a tenant of a property had a life estate, the tenant was generally responsible for the maintenance of the property while the holder of the remainder interest, or the remainderman, was responsible for capital improvements. The original adoption of UPIA attempted to codify the common law rule, but the wording of the act could lead to different conclusion for the apportionment of expenses because the UPIA used terms commonly used in trust law, which did not exist at common law.<sup>20</sup>

The bill amends s. 738.801, F.S., to provide definitions and additional guidelines for apportioning expenses between the life tenant and the remainderman. Life tenants are responsible for paying ordinary expenses and maintenance, recurring insurance premiums, and other expenses which are attributable to the property's use by the life tenant. The remainderman is responsible for paying mortgage debt (debt secured by the property) not allocated to the tenant, expenses of any proceeding concerning the title to the property other than the title to the tenant's estate, environmental expenses, and extraordinary repairs. If either the life estate tenant or the remainderman incurs an expense for personal benefit without the consent of the other, then he or she bears the expense in full. For improvements that add value to the property forming part of the principal, the expense is split between the life tenant and the remainderman. The tenant pays to the extent that the improvement increases the value of the tenant's estate if the improvement is not reasonably expected to outlast the life tenant's estate.

The bill provides an effective date of January 1, 2013.

## **IV. Constitutional Issues:**

### **A. Municipality/County Mandates Restrictions:**

None.

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<sup>19</sup> Section 738.705, F.S.

<sup>20</sup> Real Property, Probate, and Trust Law Section of The Florida Bar, *White Paper on a Proposed Bill to Amend the Florida Uniform Principal and Income Act, Chapter 738, Florida Statutes* (2010) (on file with the Senate Committee on Judiciary).

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

**V. Fiscal Impact Statement:**

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

None.

**VI. Technical Deficiencies:**

None.

**VII. Related Issues:**

None.

**VIII. Additional Information:**

A. Committee Substitute – Statement of Substantial Changes:

(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

B. Amendments:

None.



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LEGISLATIVE ACTION

Senate	.	House
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The Committee on Judiciary (Joyner) recommended the following:

**Senate Amendment (with title amendment)**

Delete everything after the enacting clause  
and insert:

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

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

(3) "Carrying value" means the fair market value at the  
time the assets are received by the fiduciary. For the estates  
of decedents and trusts described in s. 733.707(3), after the  
grantor's death, the assets are considered received as of the



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14 date of death. If there is a change in fiduciaries, a majority  
15 of the continuing fiduciaries may elect to adjust the carrying  
16 values to reflect the fair market value of the assets at the  
17 beginning of their administration. If such election is made, it  
18 must be reflected on the first accounting filed after the  
19 election. For assets acquired during the administration of the  
20 estate or trust, the carrying value is equal to the acquisition  
21 costs of the asset.

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

24 738.103 Fiduciary duties; general principles.—

25 (3) Except as provided in s. 738.1041(9), this chapter  
26 pertains to the administration of a trust and is applicable to  
27 any trust that is administered in this state or under its law.  
28 This chapter also applies to any estate that is administered in  
29 this state unless the provision is limited in application to a  
30 trustee, rather than a fiduciary.

31 Section 3. Subsections (5) and (11) of section 738.104,  
32 Florida Statutes, are amended to read:

33 738.104 Trustee's power to adjust.—

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

37 ~~(b)~~ A trustee may release the entire power to adjust  
38 conferred by subsection (1) or may release only the power to  
39 adjust from income to principal or the power to adjust from  
40 principal to income if the trustee is uncertain about whether  
41 possessing or exercising the power will cause a result described  
42 in paragraphs (3)(a)-(e) or paragraph (3)(g) or if the trustee



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43 determines that possessing or exercising the power will or may  
44 deprive the trust of a tax benefit or impose a tax burden not  
45 described in subsection (3).

46 ~~(e) A release under this subsection may be permanent or for~~  
47 ~~a specified period, including a period measured by the life of~~  
48 ~~an individual. Notwithstanding anything contrary to this~~  
49 ~~subsection, a release of the power to adjust pursuant to~~  
50 ~~paragraph (a) shall remain effective only for as long as the~~  
51 ~~trust is administered as a unitrust pursuant to s. 738.1041.~~

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

55 Section 4. Section 738.1041, Florida Statutes, is amended  
56 to read:

57 738.1041 Total return unitrust.—

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

59 (a) "Average fair market value" means the average of the  
60 fair market values of assets held by the trust at the beginning  
61 of the current and each of the 2 preceding years, or for the  
62 entire term of the trust if there are less than 2 preceding  
63 years, and adjusted as follows:

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

67 2. If assets have been distributed from the trust during  
68 the years used to determine the average, other than in  
69 satisfaction of the unitrust amount, the amount of each  
70 distribution is subtracted from all years in which such  
71 distribution was not included.



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72            (b) ~~(a)~~ "Disinterested person" means a person who is not a  
73 "related or subordinate party" ~~as defined in s. 672(e) of the~~  
74 ~~United States Internal Revenue Code, 26 U.S.C. ss. 1 et seq., or~~  
75 ~~any successor provision thereof,~~ with respect to the person then  
76 acting as trustee of the trust and excludes the grantor and any  
77 interested trustee.

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

81            (d) ~~(e)~~ "Income trust" means a trust, created by ~~either~~ an  
82 inter vivos or a testamentary instrument, which directs or  
83 permits the trustee to distribute the net income of the trust to  
84 one or more persons, ~~either~~ in fixed proportions or in amounts  
85 or proportions determined by the trustee and regardless of  
86 whether the trust directs or permits the trustee to distribute  
87 the principal of the trust to one or more such persons.

88            (e) ~~(d)~~ "Interested distributee" means a person to whom  
89 distributions of income or principal can currently be made and  
90 who has the power to remove the existing trustee and designate  
91 as successor a person who may be a "related or subordinate  
92 party," ~~as defined in the Internal Revenue Code, 26 U.S.C. s.~~  
93 ~~672(e),~~ with respect to such distributee.

94            (f) ~~(e)~~ "Interested trustee" means an individual trustee to  
95 whom the net income or principal of the trust can currently be  
96 distributed or would be distributed if the trust were then to  
97 terminate and be distributed, any trustee whom an interested  
98 distributee has the power to remove and replace with a related  
99 or subordinate party ~~as defined in paragraph (d),~~ or an  
100 individual trustee whose legal obligation to support a



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101 beneficiary may be satisfied by distributions of income and  
102 principal of the trust.

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

106 (h) ~~(f)~~ "Unitrust amount" means the amount determined by  
107 multiplying the average fair market value of the assets as  
108 calculated defined in paragraph (a) ~~(b)~~ by the percentage  
109 calculated under paragraph (2) (b).

110 (2) A trustee may, without court approval, convert an  
111 income trust to a total return unitrust, reconvert a total  
112 return unitrust to an income trust, or change the percentage  
113 used to calculate the unitrust amount or the method used to  
114 determine the fair market value of the trust if:

115 (a) The trustee adopts a written statement regarding trust  
116 distributions which ~~that~~ provides:

117 1. In the case of a trust being administered as an income  
118 trust, that future distributions from the trust will be unitrust  
119 amounts rather than net income, and indicates the manner in  
120 which the unitrust amount will be calculated and the method in  
121 which the fair market value of the trust will be determined.

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

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

126 b. The percentage used to calculate the unitrust amount or  
127 the method used to determine the fair market value of the trust  
128 will be changed, and indicates the manner in which the new  
129 unitrust amount will be calculated and the method in which the



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130 new fair market value of the trust will be determined;  
131 (b) The trustee determines the terms of the unitrust under  
132 one of the following methods:  
133 1. A disinterested trustee determines, or if there is no  
134 trustee other than an interested trustee, the interested trustee  
135 appoints a disinterested person who, in its sole discretion but  
136 acting in a fiduciary capacity, determines for the interested  
137 trustee:  
138 a. The percentage to be used to calculate the unitrust  
139 amount, provided the percentage used is not greater than 5  
140 percent nor less than 3 percent;  
141 b. The method to be used in determining the fair market  
142 value of the trust; and  
143 c. Which assets, if any, are to be excluded in determining  
144 the unitrust amount; or  
145 2. The interested trustee or disinterested trustee  
146 administers the trust such that:  
147 a. The percentage used to calculate the unitrust amount is  
148 50 percent of the ~~applicable federal~~ rate as defined in the  
149 Internal Revenue Code, 26 U.S.C. s. 7520, in effect for the  
150 month the conversion under this section becomes effective and  
151 for each January thereafter; however, if the percentage  
152 calculated exceeds 5 percent, the unitrust percentage ~~is shall~~  
153 ~~be~~ 5 percent and if the percentage calculated is less than 3  
154 percent, the unitrust percentage ~~is shall be~~ 3 percent; and  
155 b. The fair market value of the trust shall be determined  
156 at least annually on an asset-by-asset basis, reasonably and in  
157 good faith, in accordance with ~~the provisions of~~ s. 738.202(5),  
158 except the following property shall not be included in



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159 determining the value of the trust:

160 (I) Any residential property or any tangible personal  
161 property that, as of the first business day of the current  
162 valuation year, one or more current beneficiaries of the trust  
163 have or have had the right to occupy, or have or have had the  
164 right to possess or control, ~~other than in his or her capacity~~  
165 ~~as trustee of the trust~~, and instead the right of occupancy or  
166 the right to possession and control ~~is shall be deemed to be~~ the  
167 unitrust amount with respect to such property; however, the  
168 unitrust amount must ~~shall~~ be adjusted to take into account  
169 partial distributions from or receipt into the trust of such  
170 property during the valuation year;~~-~~

171 (II) Any asset specifically given to a beneficiary and the  
172 return on investment on such property, which return on  
173 investment shall be distributable to the such beneficiary; ~~or-~~

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

176 (c) The trustee sends written notice of its intention to  
177 take such action, along with copies of the such written  
178 statement regarding trust distributions and this section, and,  
179 if applicable, the determinations of ~~either~~ the trustee or the  
180 disinterested person to:

- 181 1. The grantor of the trust, if living.
- 182 2. All living persons who are currently receiving or  
183 eligible to receive distributions of income from ~~of~~ the trust.
- 184 3. All living persons who would receive distributions of  
185 principal of the trust if the trust were to terminate at the  
186 time of ~~the~~ giving ~~of~~ such notice ~~(without regard to the~~  
187 ~~exercise of any power of appointment,)~~ or, if the trust does not



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188 provide for its termination, all living persons who would  
189 receive or be eligible to receive distributions of income or  
190 principal of the trust if the persons identified in subparagraph  
191 2. were deceased.

192 4. All persons acting as advisers or protectors of the  
193 trust.

194

195 Notice under this paragraph shall be served informally, in the  
196 manner provided in the Florida Rules of Civil Procedure relating  
197 to service of pleadings subsequent to the initial pleading.  
198 Notice may be served on a legal representative or natural  
199 guardian of a person without ~~the~~ filing ~~of~~ any proceeding or  
200 approval of any court;

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

203 (e) No person receiving such notice objects, by written  
204 instrument delivered to the trustee, to the proposed action of  
205 the trustee or the determinations of the disinterested person  
206 within 60 days after service of such notice. An objection ~~under~~  
207 ~~this section~~ may be executed by a legal representative or  
208 natural guardian of a person without ~~the~~ filing ~~of~~ any  
209 proceeding or approval of any court.

210 (3) If a trustee desires to convert an income trust to a  
211 total return unitrust, reconvert a total return unitrust to an  
212 income trust, or change the percentage used to calculate the  
213 unitrust amount or the method used to determine a fair market  
214 value of the trust but does not have the ability to or elects  
215 not to do it under subsection (2), the trustee may petition the  
216 circuit court for such order as the trustee deems appropriate.



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217 In that event, the court, in its own discretion or on the  
218 petition of such trustee or any person having an income or  
219 remainder interest in the trust, may appoint a disinterested  
220 person who, acting in a fiduciary capacity, shall present such  
221 information to the court as is ~~shall be~~ necessary for the court  
222 to make a determination hereunder.

223 ~~(4) All determinations made pursuant to sub-subparagraph~~  
224 ~~(2)(b)2.b. shall be conclusive if reasonable and made in good~~  
225 ~~faith. Such determination shall be conclusively presumed to have~~  
226 ~~been made reasonably and in good faith unless proven otherwise~~  
227 ~~in a proceeding commenced by or on behalf of a person interested~~  
228 ~~in the trust within the time provided in s. 736.1008. The burden~~  
229 ~~will be on the objecting interested party to prove that the~~  
230 ~~determinations were not made reasonably and in good faith.~~

231 (4)~~(5)~~ Following the conversion of an income trust to a  
232 total return unitrust, the trustee:

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

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

238 1. Net short-term capital gain described in the Internal  
239 Revenue Code, 26 U.S.C. s. 1222(5), for such year, or portion  
240 thereof, but only to the extent that the amount so allocated  
241 together with all other amounts allocated to trust income, as  
242 determined under the provisions of this chapter without regard  
243 to this section and s. 738.104, for such year, or portion  
244 thereof, does not exceed the unitrust amount for such year, or  
245 portion thereof.



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246           2. Net long-term capital gain described in the Internal  
247 Revenue Code, 26 U.S.C. s. 1222(7), for such year, or portion  
248 thereof, but only to the extent that the amount so allocated  
249 together with all other amounts, including amounts described in  
250 subparagraph 1., allocated to trust income for such year, or  
251 portion thereof, does not exceed the unitrust amount for such  
252 year, or portion thereof.

253           (5)~~(6)~~ In administering a total return unitrust, the  
254 trustee may, in its sole discretion but subject to the  
255 provisions of the governing instrument, determine:

256           (a) The effective date of the conversion.

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

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

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

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

266           (6)~~(7)~~ Conversion to a total return unitrust under ~~the~~  
267 ~~provisions of~~ this section does ~~shall~~ not affect any other  
268 provision of the governing instrument, if any, regarding  
269 distributions of principal.

270           (7)~~(8)~~ Any trustee or disinterested person who in good  
271 faith takes or fails to take any action under this section is  
272 ~~shall~~ not be liable to any person affected by such action or  
273 inaction, regardless of whether such person received written  
274 notice as provided in this section or ~~and regardless of whether~~



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275 such person was under a legal disability at the time of the  
276 delivery of such notice. Such person's exclusive remedy ~~is shall~~  
277 ~~be~~ to obtain, under subsection (8) ~~(9)~~, an order of the court  
278 directing the trustee to convert an income trust to a total  
279 return unitrust, to reconvert from a total return unitrust to an  
280 income trust, or to change the percentage used to calculate the  
281 unitrust amount. If a court determines that the trustee or  
282 disinterested person has not acted in good faith in taking or  
283 failing to take any action under this section, ~~the provisions of~~  
284 s. 738.105(3) applies ~~apply~~.

285 (8) ~~(9)~~ If a majority in interest of ~~either~~ the income or  
286 remainder beneficiaries of an income trust has delivered to the  
287 trustee a written objection to the amount of the income  
288 distributions of the trust, and, if the trustee has failed to  
289 resolve the objection to the satisfaction of the objecting  
290 beneficiaries within 6 months after ~~from the~~ receipt of such  
291 written objection, ~~then~~ the objecting beneficiaries may petition  
292 the court in accordance with subsection (3).

293 (9) ~~(10)~~ This section pertains ~~shall be construed as~~  
294 ~~pertaining~~ to the administration of a trust and is applicable to  
295 any trust that is administered ~~either~~ in this state or under  
296 Florida law unless:

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

300 (b) The trust is a trust described in the Internal Revenue  
301 Code, 26 U.S.C. s. 170(f)(2)(B), s. 642(c)(5), s. 664(d), s.  
302 2702(a)(3), or s. 2702(b);

303 (c) One or more persons to whom the trustee could



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304 distribute income have a power of withdrawal over the trust:  
305 1. That is not subject to an ascertainable standard under  
306 the Internal Revenue Code, 26 U.S.C. s. 2041 or s. 2514, and  
307 exceeds in any calendar year the amount set forth in the  
308 Internal Revenue Code, 26 U.S.C. s. 2041(b)(2) or s. 2514(e); or

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

311 (d) The governing instrument expressly prohibits use of  
312 this section by specific reference to the section. A provision  
313 in the governing instrument that, "The provisions of section  
314 738.1041, Florida Statutes, as amended, or any corresponding  
315 provision of future law, may shall not be used in the  
316 administration of this trust," or similar words reflecting such  
317 intent are shall be sufficient to preclude the use of this  
318 section; ~~or~~

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

321 ~~(10)(11)~~ The grantor of a trust may create an express total  
322 return unitrust that which will be become effective as provided  
323 in the trust instrument document without requiring a conversion  
324 under this section.

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

329 1.(a) That distributions from the trust will be unitrust  
330 amounts and the manner in which the unitrust amount will be  
331 calculated; ~~and the method in which the fair market value of the~~  
332 ~~trust will be determined.~~



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333           ~~2.(b)~~ The percentage to be used to calculate the unitrust  
334 amount, provided the percentage used is not greater than 5  
335 percent nor less than 3 percent.

336           (b) The trust instrument may also contain provisions  
337 specifying:

338           ~~1.(e)~~ The method to be used in determining the fair market  
339 value of the trust, including whether to use an average fair  
340 market value or the fair market value of the assets held by the  
341 trust at the beginning of the current year; or-

342           ~~2.(d)~~ Which assets, if any, are to be excluded in  
343 determining the unitrust amount.

344           (c) This section establishes the method of determining the  
345 fair market value of the trust if the trust instrument is silent  
346 as to subparagraph (b)1., and to specify those assets, if any,  
347 which are to be excluded in determining the unitrust amount if  
348 the trust instrument is silent as to subparagraph (b)2.

349           Section 5. Subsections (1), (3), and (4) of section  
350 738.105, Florida Statutes, are amended to read:

351           738.105 Judicial control of discretionary powers.-

352           (1) A court may ~~shall~~ not change a trustee's fiduciary's  
353 decision to exercise or not to exercise a discretionary power  
354 conferred by this chapter unless the court determines that the  
355 decision was an abuse of the trustee's fiduciary's discretion. A  
356 court may ~~shall~~ not determine that a trustee fiduciary abused  
357 its discretion merely because the court would have exercised the  
358 discretion in a different manner or would not have exercised the  
359 discretion.

360           (3) If a court determines that a trustee fiduciary has  
361 abused its discretion, the remedy is ~~shall be~~ to restore the



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362 income and remainder beneficiaries to the positions they would  
363 have occupied if the trustee ~~fiduciary~~ had not abused its  
364 discretion, in accordance with ~~according to~~ the following rules:

365 (a) To the extent the abuse of discretion has resulted in  
366 no distribution to a beneficiary or a distribution that is too  
367 small, the court shall require the trustee ~~fiduciary~~ to  
368 distribute from the trust to the beneficiary an amount the court  
369 determines will restore the beneficiary, in whole or in part, to  
370 his or her appropriate position.

371 (b) To the extent the abuse of discretion has resulted in a  
372 distribution to a beneficiary that is too large, the court shall  
373 restore the beneficiaries, the trust, or both, in whole or in  
374 part, to their appropriate positions by requiring the trustee  
375 ~~fiduciary~~ to withhold an amount from one or more future  
376 distributions to the beneficiary who received the distribution  
377 that was too large or requiring that beneficiary to return some  
378 or all of the distribution to the trust.

379 (c) To the extent the court is unable, after applying  
380 paragraphs (a) and (b), to restore the beneficiaries or, the  
381 trust, or both, to the positions they would have occupied if the  
382 trustee ~~fiduciary~~ had not abused its discretion, the court may  
383 require the trustee ~~fiduciary~~ to pay an appropriate amount from  
384 its own funds to one or more of the beneficiaries or the trust  
385 or both.

386 (4) Upon the filing of a petition by the trustee ~~fiduciary~~,  
387 the court having jurisdiction over the trust ~~or estate~~ shall  
388 determine whether a proposed exercise or nonexercise by the  
389 trustee ~~fiduciary~~ of a discretionary power conferred by this  
390 chapter will result in an abuse of the trustee's ~~fiduciary's~~



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391 discretion. If the petition describes the proposed exercise or  
392 nonexercise of the power and contains sufficient information to  
393 inform the beneficiaries of the reasons for the proposal, the  
394 facts upon which the trustee ~~fiduciary~~ relies, and an  
395 explanation of how the income and remainder beneficiaries will  
396 be affected by the proposed exercise or nonexercise of the  
397 power, a beneficiary who challenges the proposed exercise or  
398 nonexercise has the burden of establishing that such exercise or  
399 nonexercise will result in an abuse of discretion.

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

402 738.201 Determination and distribution of net income.—After  
403 a decedent dies, in the case of an estate, or after an income  
404 interest in a trust ends, the following rules apply:

405 (1) A fiduciary of an estate or of a terminating income  
406 interest shall determine the amount of net income and net  
407 principal receipts received from property specifically given to  
408 a beneficiary under ~~the rules in ss. 738.301-738.706 which apply~~  
409 ~~to trustees and the rules in~~ subsection (5). The fiduciary shall  
410 distribute the net income and net principal receipts to the  
411 beneficiary who is to receive the specific property.

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

415 (a) Including in net income all income from property used  
416 to discharge liabilities.

417 (b) Paying from income or principal, in the fiduciary's  
418 discretion, fees of attorneys, accountants, and fiduciaries;  
419 court costs and other expenses of administration; and interest



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420 on death taxes. ~~but~~ The fiduciary may pay those expenses from  
421 income of property passing to a trust for which the fiduciary  
422 claims an estate tax marital or charitable deduction under the  
423 Internal Revenue Code or comparable law of any state only to the  
424 extent the payment of those expenses from income will not cause  
425 the reduction or loss of the deduction.

426 (c) Paying from principal all other disbursements made or  
427 incurred in connection with the settlement of a decedent's  
428 estate or the winding up of a terminating income interest,  
429 including debts, funeral expenses, disposition of remains,  
430 family allowances, and death taxes and related penalties that  
431 are apportioned to the estate or terminating income interest by  
432 the will, the terms of the trust, or applicable law.

433 (3) ~~If A fiduciary shall distribute to a beneficiary who~~  
434 ~~receives a pecuniary devise amount outright is also entitled to~~  
435 ~~receive the interest or any other amount on the devise under the~~  
436 ~~terms of provided by the will or, the terms of the trust, the~~  
437 ~~fiduciary shall distribute the interest or other amount~~  
438 ~~applicable law~~ from net income determined under subsection (2)  
439 or from principal to the extent net income is insufficient. ~~If a~~  
440 ~~beneficiary is to receive a pecuniary amount outright from a~~  
441 ~~trust after an income interest ends and no interest or other~~  
442 ~~amount is provided for by the terms of the trust or applicable~~  
443 ~~law, the fiduciary shall distribute the interest or other amount~~  
444 ~~to which the beneficiary would be entitled under applicable law~~  
445 ~~if the pecuniary amount were required to be paid under a will.~~

446 (4) A fiduciary shall distribute the net income remaining  
447 after distributions required under subsections (1)-(3) by  
448 ~~subsection (3)~~ in the manner described in s. 738.202 to all



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449 other beneficiaries, including a beneficiary who receives a  
450 pecuniary amount in trust, even if the beneficiary holds an  
451 unqualified power to withdraw assets from the trust or other  
452 presently exercisable general power of appointment over the  
453 trust.

454 Section 7. Section 738.202, Florida Statutes, is amended to  
455 read:

456 738.202 Distribution to residuary and remainder  
457 beneficiaries.—

458 (1) Each beneficiary described in s. 738.201(4) is entitled  
459 to receive a portion of the net income remaining after the  
460 application of s. 738.201(1)-(3), which is equal to the  
461 beneficiary's fractional interest in undistributed principal  
462 assets, using carrying values as of the distribution date. If a  
463 fiduciary makes more than one distribution of assets to  
464 beneficiaries to whom this section applies, each beneficiary,  
465 including one who does not receive part of the distribution, is  
466 entitled, as of each distribution date, to the net income the  
467 fiduciary ~~has~~ received after the date of death or terminating  
468 event or earlier distribution date but has not distributed as of  
469 the current distribution date.

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

472 (a) The beneficiary is entitled to receive a portion of the  
473 net income equal to the beneficiary's fractional interest in the  
474 carrying value of the undistributed principal assets immediately  
475 before the distribution date, excluding the amount of unpaid  
476 liabilities including assets that later may be sold to meet  
477 principal obligations.



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478 (b) The beneficiary's fractional interest in the  
479 undistributed principal assets shall be calculated: ~~without~~  
480 ~~regard to~~

481 1. At the time the interest began and adjusted for any  
482 disproportionate distributions since the interest began;

483 2. By excluding any liabilities of the estate or trust from  
484 the calculation;

485 3. By also excluding property specifically given to a  
486 beneficiary and property required to pay pecuniary amounts not  
487 in trust; and-

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

493 (c) If a disproportionate distribution of principal is made  
494 to any beneficiary, the respective fractional interests of all  
495 beneficiaries in the remaining underlying assets shall be  
496 recomputed by:

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

499 2. Reducing the fractional interest of the recipient of the  
500 disproportionate distribution in the remaining principal assets  
501 by the fair market value of the principal distribution; and

502 3. Recomputing the fractional interests of all  
503 beneficiaries in the remaining principal assets based upon the  
504 now restated carrying values.

505 ~~(d) The distribution date for purposes of this section may~~  
506 ~~be the date as of which the fiduciary calculates the value of~~



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507 ~~the assets if that date is reasonably near the date on which~~  
508 ~~assets are actually distributed.~~

509 (3) If a fiduciary does not distribute all of the collected  
510 but undistributed net income to each person as of a distribution  
511 date, the fiduciary shall maintain appropriate records showing  
512 the interest of each beneficiary in that net income.

513 (4) A fiduciary may apply the provisions of rules ~~in~~ this  
514 section, to the extent the fiduciary considers appropriate, to  
515 net gain or loss realized after the date of death or terminating  
516 event or earlier distribution date from the disposition of a  
517 principal asset if this section applies to the income from the  
518 asset.

519 (5) The carrying value or fair market value of trust assets  
520 shall be determined on an asset-by-asset basis and are ~~shall be~~  
521 conclusive if reasonable and determined in good faith.  
522 Determinations of fair market value based on appraisals  
523 performed within 2 years before or after the valuation date are  
524 ~~shall be~~ presumed reasonable. The values ~~value~~ of trust assets  
525 are ~~shall be~~ conclusively presumed to be reasonable and  
526 determined in good faith unless proven otherwise in a proceeding  
527 commenced by or on behalf of a person interested in the trust  
528 within the time provided in s. 736.1008.

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

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

533 738.301 When right to income begins and ends.—An income  
534 beneficiary is entitled to net income from the date on which the  
535 income interest begins.



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

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

542 738.302 Apportionment of receipts and disbursements when  
543 decedent dies or income interest begins.—

544 (1) A fiduciary ~~trustee~~ shall allocate an income receipt or  
545 disbursement other than one to which s. 738.201(1) applies to  
546 principal if the due date of the receipt or disbursement occurs  
547 before a decedent dies in the case of an estate or before an  
548 income interest begins in the case of a trust or successive  
549 income interest.

550 (2) A fiduciary ~~trustee~~ shall allocate an income receipt or  
551 disbursement to income if the due date of the receipt or  
552 disbursement occurs on or after the date on which a decedent  
553 dies or an income interest begins and the due date is a periodic  
554 due date. An income receipt or disbursement shall be treated as  
555 accruing from day to day if the due date of the receipt or  
556 disbursement is not periodic or the receipt or disbursement has  
557 no due date. The portion of the receipt or disbursement accruing  
558 before the date on which a decedent dies or an income interest  
559 begins shall be allocated to principal and the balance shall be  
560 allocated to income.

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

563 738.303 Apportionment when income interest ends.—

564 (2) When a mandatory income interest ends, the fiduciary



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565 ~~trustee~~ shall pay to a mandatory income beneficiary who survives  
566 that date, or the estate of a deceased mandatory income  
567 beneficiary whose death causes the interest to end, the  
568 beneficiary's share of the undistributed income that is not  
569 disposed of under the terms of the trust unless the beneficiary  
570 has an unqualified power to revoke more than 5 percent of the  
571 trust immediately before the income interest ends. In the latter  
572 case, the undistributed income from the portion of the trust  
573 that may be revoked shall be added to principal.

574 (3) When a fiduciary's ~~trustee's~~ obligation to pay a fixed  
575 annuity or a fixed fraction of the value of the trust's assets  
576 ends, the fiduciary ~~trustee~~ shall prorate the final payment if  
577 and to the extent required by applicable law to accomplish a  
578 purpose of the trust or its grantor relating to income, gift,  
579 estate, or other tax requirements.

580 Section 11. Section 738.401, Florida Statutes, is amended  
581 to read:

582 738.401 Character of receipts.—

583 (1) For purposes of this section, the term "entity" means a  
584 corporation, partnership, limited liability company, regulated  
585 investment company, real estate investment trust, common trust  
586 fund, or any other organization in which a fiduciary ~~trustee~~ has  
587 an interest other than a trust or estate to which s. 738.402  
588 applies, a business or activity to which s. 738.403 applies, or  
589 an asset-backed security to which s. 738.608 applies.

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

593 (3) Except as otherwise provided in this section, a



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594 fiduciary trustee shall allocate the following receipts from an  
595 entity to principal:

596 (a) Property other than money.

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

600 (c) Money received in total or partial liquidation of the  
601 entity.

602 (d) Money received from an entity that is a regulated  
603 investment company or a real estate investment trust if the  
604 money received distributed represents short-term or long-term  
605 capital gain realized within the entity.

606 (e) Money received from an entity listed on a public stock  
607 exchange during any year of the trust or estate which exceeds 10  
608 percent of the fair market value of the trust's or estate's  
609 interest in the entity on the first day of that year. The amount  
610 to be allocated to principal must be reduced to the extent that  
611 the cumulative distributions from the entity to the trust or  
612 estate allocated to income does not exceed a cumulative annual  
613 return of 3 percent of the fair market value of the interest in  
614 the entity at the beginning of each year or portion of a year  
615 for the number of years or portion of years in the period that  
616 the interest in the entity has been held by the trust or estate.  
617 If a trustee has exercised a power to adjust under s. 738.104  
618 during any period the interest in the entity has been held by  
619 the trust, the trustee, in determining the total income  
620 distributions from that entity, must take into account the  
621 extent to which the exercise of that power resulted in income to  
622 the trust from that entity for that period. If the income of the



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623 trust for any period has been computed under s. 738.1041, the  
624 trustee, in determining the total income distributions from that  
625 entity for that period, must take into account the portion of  
626 the unitrust amount paid as a result of the ownership of the  
627 trust's interest in the entity for that period.

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

633 (5) Money is received in partial liquidation:

634 (a) To the extent the entity, at or near the time of a  
635 distribution, indicates that such money is a distribution in  
636 partial liquidation; or

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

644  
645 This subsection does not apply to an entity to which subsection  
646 (7) applies.

647 (6) Money may not ~~is not received in partial liquidation,~~  
648 ~~nor may money~~ be taken into account in determining any excess  
649 under paragraph (5) (b), to the extent that the cumulative  
650 distributions from the entity to the trust or the estate  
651 allocated to income do not exceed the greater of: such money



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652 ~~does not exceed the amount of income tax a trustee or~~  
653 ~~beneficiary must pay on taxable income of the entity that~~  
654 ~~distributes the money.~~

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

670 (b) If the entity is treated as a partnership, subchapter S  
671 corporation, or a disregarded entity pursuant to the Internal  
672 Revenue Code of 1986, as amended, the amount of income tax  
673 attributable to the trust's or estate's ownership share of the  
674 entity, based on its pro rata share of the taxable income of the  
675 entity that distributes the money, for the number of years or  
676 portion of years that the interest in the entity was held by the  
677 fiduciary, calculated as if all of that tax was incurred by the  
678 fiduciary.

679 (7) The following ~~applies~~ special rules shall apply to  
680 money ~~monies~~ or property received by a private trustee as a



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681 distribution from an investment entity ~~entities~~ described in  
682 this subsection:

683 (a) The trustee shall first treat as income of the trust  
684 all of the money or property received from the investment entity  
685 in the current year which would be considered income under this  
686 chapter if the trustee had directly held the trust's pro rata  
687 share of the assets of the investment entity. For this purpose,  
688 all distributions received in the current year must be  
689 aggregated.

690 (b) The trustee shall next treat as income of the trust any  
691 additional money or property received in the current year which  
692 would have been considered income in the prior 2 years under  
693 paragraph (a) if additional money or property had been received  
694 from the investment entity in any of those prior 2 years. The  
695 amount to be treated as income shall be reduced by any  
696 distributions of money or property made by the investment entity  
697 to the trust during the current and prior 2 years which were  
698 treated as income under this paragraph.

699 (c) The remainder of the distribution, if any, is treated  
700 as principal.

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

702 1. "Investment entity" means an entity, other than a  
703 business activity conducted by the trustee described in s.  
704 738.403 or an entity that is listed on a public stock exchange,  
705 which is treated as a partnership, subchapter S corporation, or  
706 disregarded entity pursuant to the Internal Revenue Code of  
707 1986, as amended, and which normally derives 50 percent or more  
708 of its annual cumulative net income from interest, dividends,  
709 annuities, royalties, rental activity, or other passive



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710 investments, including income from the sale or exchange of such  
711 passive investments.

712 2. "Private trustee" means a trustee who is a natural  
713 person, but only if the trustee is unable to use the power to  
714 adjust between income and principal with respect to receipts  
715 from entities described in this subsection pursuant to s.  
716 738.104. A bank, trust company, or other commercial trustee is  
717 not considered a private trustee.

718 (8) This section shall be applied before ss. 738.705 and  
719 738.706 and does not modify or change any of the provisions of  
720 those sections.

721 ~~(a) Moneys or property received from a targeted entity that~~  
722 ~~is not an investment entity which do not exceed the trust's pro~~  
723 ~~rata share of the undistributed cumulative net income of the~~  
724 ~~targeted entity during the time an ownership interest in the~~  
725 ~~targeted entity was held by the trust shall be allocated to~~  
726 ~~income. The balance of moneys or property received from a~~  
727 ~~targeted entity shall be allocated to principal.~~

728 ~~(b) If trust assets include any interest in an investment~~  
729 ~~entity, the designated amount of moneys or property received~~  
730 ~~from the investment entity shall be treated by the trustee in~~  
731 ~~the same manner as if the trustee had directly held the trust's~~  
732 ~~pro rata share of the assets of the investment entity~~  
733 ~~attributable to the distribution of such designated amount.~~  
734 ~~Thereafter, distributions shall be treated as principal.~~

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

737 ~~1. "Cumulative net income" means the targeted entity's net~~  
738 ~~income as determined using the method of accounting regularly~~



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739 ~~used by the targeted entity in preparing its financial~~  
740 ~~statements, or if no financial statements are prepared, the net~~  
741 ~~book income computed for federal income tax purposes, for every~~  
742 ~~year an ownership interest in the entity is held by the trust.~~  
743 ~~The trust's pro rata share shall be the cumulative net income~~  
744 ~~multiplied by the percentage ownership of the trust.~~

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

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

751 ~~b. The amount of income of the investment entity for the~~  
752 ~~current year and the prior 2 years, as reported to the trustee~~  
753 ~~by the investment entity for federal income tax purposes, less~~  
754 ~~any distributions of moneys or property made by the investment~~  
755 ~~entity to the trustee during the prior 2 years.~~

756 ~~3. "Investment entity" means a targeted entity that~~  
757 ~~normally derives 50 percent or more of its annual cumulative net~~  
758 ~~income from interest, dividends, annuities, royalties, rental~~  
759 ~~activity, or other passive investments, including income from~~  
760 ~~the sale or exchange of such passive investments.~~

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

767 ~~5. "Targeted entity" means any entity that is treated as a~~



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768 ~~partnership, subchapter S corporation, or disregarded entity~~  
769 ~~pursuant to the Internal Revenue Code of 1986, as amended, other~~  
770 ~~than an entity described in s. 738.403.~~

771 ~~6. "Undistributed cumulative net income" means the trust's~~  
772 ~~pro rata share of cumulative net income, less all prior~~  
773 ~~distributions from the targeted entity to the trust that have~~  
774 ~~been allocated to income.~~

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

778 ~~(8) A trustee may rely upon a statement made by an entity~~  
779 ~~about the source or character of a distribution, about the~~  
780 ~~amount of profits of a targeted entity, or about the nature and~~  
781 ~~value of assets of an investment entity if the statement is made~~  
782 ~~at or near the time of distribution by the entity's board of~~  
783 ~~directors or other person or group of persons authorized to~~  
784 ~~exercise powers to pay money or transfer property comparable to~~  
785 ~~those of a corporation's board of directors.~~

786 Section 12. Section 738.402, Florida Statutes, is amended  
787 to read:

788 738.402 Distribution from trust or estate.—A fiduciary  
789 ~~trustee~~ shall allocate to income an amount received as a  
790 distribution of income from a trust or an estate in which the  
791 trust has an interest other than a purchased interest and ~~shall~~  
792 allocate to principal an amount received as a distribution of  
793 principal from such a trust or estate. If a fiduciary ~~trustee~~  
794 purchases an interest in a trust that is an investment entity,  
795 or a decedent or donor transfers an interest in such a trust to  
796 a fiduciary ~~trustee~~, s. 738.401 or s. 738.608 applies to a



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797 receipt from the trust.

798 Section 13. Section 738.403, Florida Statutes, is amended  
799 to read:

800 738.403 Business and other activities conducted by  
801 fiduciary trustee.-

802 (1) If a fiduciary trustee who conducts a business or other  
803 activity determines that it is in the best interest of all the  
804 beneficiaries to account separately for the business or activity  
805 instead of accounting for the business or activity as part of  
806 the trust's or estate's general accounting records, the  
807 fiduciary trustee may maintain separate accounting records for  
808 the transactions of the such business or other activity, whether  
809 or not the assets of such business or activity are segregated  
810 from other trust or estate assets.

811 (2) A fiduciary trustee who accounts separately for a  
812 business or other activity may determine the extent to which the  
813 net cash receipts of the such business or activity must be  
814 retained for working capital, the acquisition or replacement of  
815 fixed assets, and other reasonably foreseeable needs of the  
816 business or activity, and the extent to which the remaining net  
817 cash receipts are accounted for as principal or income in the  
818 trust's or estate's general accounting records. If a fiduciary  
819 trustee sells assets of the business or other activity, other  
820 than in the ordinary course of the business or activity, the  
821 fiduciary must trustee shall account for the net amount received  
822 as principal in the trust's or estate's general accounting  
823 records to the extent the fiduciary trustee determines that the  
824 amount received is no longer required in the conduct of the  
825 business.



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826 (3) Activities for which a fiduciary trustee may maintain  
827 separate accounting records include:

828 (a) Retail, manufacturing, service, and other traditional  
829 business activities.

830 (b) Farming.

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

832 (d) Management of rental properties.

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

834 (f) Timber operations.

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

836 Section 14. Section 738.501, Florida Statutes, is amended  
837 to read:

838 738.501 Principal receipts.—A fiduciary trustee shall  
839 allocate to principal:

840 (1) To the extent not allocated to income under this  
841 chapter, assets received from a donor transferor during the  
842 donor's transferor's lifetime, a decedent's estate, a trust with  
843 a terminating income interest, or a payor under a contract  
844 naming the trust, estate, or fiduciary its trustee as  
845 beneficiary.

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

849 (3) Amounts recovered from third parties to reimburse the  
850 trust or estate because of disbursements described in s.  
851 738.702(1)(g) or for other reasons to the extent not based on  
852 the loss of income.

853 (4) Proceeds of property taken by eminent domain; however,  
854 ~~but~~ a separate award made for the loss of income with respect to



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855 an accounting period during which a current income beneficiary  
856 had a mandatory income interest is income.

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

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

861 Section 15. Section 738.502, Florida Statutes, is amended  
862 to read:

863 738.502 Rental property.—~~If To the extent~~ a fiduciary  
864 ~~trustee~~ accounts for receipts from rental property pursuant to  
865 this section, the fiduciary ~~trustee~~ shall allocate to income an  
866 amount received as rent of real or personal property, including  
867 an amount received for cancellation or renewal of a lease. An  
868 amount received as a refundable deposit, including a security  
869 deposit or a deposit that is to be applied as rent for future  
870 periods, must ~~shall~~ be added to principal and held subject to  
871 the terms of the lease and is not available for distribution to  
872 a beneficiary until the fiduciary's ~~trustee's~~ contractual  
873 obligations have been satisfied with respect to that amount.

874 Section 16. Subsections (1), (2), and (3) of section  
875 738.503, Florida Statutes, are amended to read:

876 738.503 Obligation to pay money.—

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

882 (2) Except as otherwise provided herein, a fiduciary  
883 ~~trustee~~ shall allocate to principal an amount received from the



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884 sale, redemption, or other disposition of an obligation to pay  
885 money to the fiduciary trustee.

886 (3) The increment in value of a bond or other obligation  
887 for the payment of money bearing no stated interest but payable  
888 at a future time in excess of the price at which it was issued  
889 or purchased, if purchased after issuance, is distributable as  
890 income. If the increment in value accrues and becomes payable  
891 pursuant to a fixed schedule of appreciation, it may be  
892 distributed to the beneficiary who was the income beneficiary at  
893 the ~~this~~ time of increment from the first principal cash  
894 available or, if none is available, when the increment is  
895 realized by sale, redemption, or other disposition. If ~~When~~  
896 unrealized increment is distributed as income but out of  
897 principal, the principal must ~~shall~~ be reimbursed for the  
898 increment when realized. If, in the reasonable judgment of the  
899 fiduciary trustee, exercised in good faith, the ultimate payment  
900 of the bond principal is in doubt, the fiduciary trustee may  
901 withhold the payment of incremental interest to the income  
902 beneficiary.

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

905 738.504 Insurance policies and similar contracts.—

906 (1) Except as otherwise provided in subsection (2), a  
907 fiduciary trustee shall allocate to principal the proceeds of a  
908 life insurance policy or other contract in which the trust,  
909 estate, or fiduciary ~~its trustee~~ is named as beneficiary,  
910 including a contract that insures the trust, estate, or  
911 fiduciary ~~its trustee~~ against loss for damage to, destruction  
912 of, or loss of title to a trust or estate asset. The fiduciary



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913 ~~trustee~~ shall allocate dividends on an insurance policy to  
914 income if the premiums on the policy are paid from income and to  
915 principal if the premiums are paid from principal.

916 (2) A fiduciary ~~trustee~~ shall allocate to income the  
917 proceeds of a contract that insures the fiduciary ~~trustee~~  
918 against loss of occupancy or other use by an income beneficiary,  
919 loss of income, or, subject to s. 738.403, loss of profits from  
920 a business.

921 Section 18. Section 738.601, Florida Statutes, is amended  
922 to read:

923 738.601 Insubstantial allocations not required.—If a  
924 fiduciary ~~trustee~~ determines that an allocation between  
925 principal and income required by s. 738.602, s. 738.603, s.  
926 738.604, s. 738.605, or s. 738.608 is insubstantial, the  
927 fiduciary ~~trustee~~ may allocate the entire amount to principal  
928 unless one of the circumstances described in s. 738.104(3)  
929 applies to the allocation. This power may be exercised by a  
930 cofiduciary under ~~cotrustee in~~ the circumstances described in s.  
931 738.104(4) and may be released for the reasons and in the manner  
932 described in s. 738.104(5). An allocation is presumed to be  
933 insubstantial if:

934 (1) The amount of the allocation would increase or decrease  
935 net income in an accounting period, as determined before the  
936 allocation, by less than 10 percent; or

937 (2) The value of the asset producing the receipt for which  
938 the allocation would be made is less than 10 percent of the  
939 total value of the trust or estate ~~trust's~~ assets at the  
940 beginning of the accounting period.

941 Section 19. Section 738.602, Florida Statutes, is amended



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942 to read:

943 738.602 Payments from deferred compensation plans,  
944 annuities, and retirement plans or accounts.—

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

946 (a) "Fund" means a private or commercial annuity, an  
947 individual retirement account, an individual retirement annuity,  
948 a deferred compensation plan, a pension plan, a profit-sharing  
949 plan, a stock-bonus plan, an employee stock-ownership plan, or  
950 another similar arrangement in which federal income tax is  
951 deferred.

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

954 (c) "Nonseparate account" means a fund for which the value  
955 of the participant's or account owner's right to receive  
956 benefits can be determined only by the occurrence of a date or  
957 event as defined in the instrument governing the fund.

958 (d) "Payment" means a distribution from a fund that a  
959 fiduciary trustee may receive over a fixed number of years or  
960 during the life of one or more individuals because of services  
961 rendered or property transferred to the payor in exchange for  
962 future payments. The term includes a distribution made in money  
963 or property from the payor's general assets or from a fund  
964 created by the payor or payee.

965 (e) "Separate account" means a fund holding assets  
966 exclusively for the benefit of a participant or account owner  
967 and:

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

970 2. The administrator of the fund maintains records that



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971 show receipts and disbursements associated with such assets.

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

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

976 2. As a unitrust amount calculated by multiplying the fair  
977 market value of the fund as of the first day of the first  
978 accounting period and, thereafter, as of the last day of the  
979 accounting period that immediately precedes the accounting  
980 period during which a payment is received by the percentage  
981 determined in accordance with s. 738.1041(2)(b)2.a. The  
982 fiduciary trustee shall determine such percentage as of the  
983 first month that the fiduciary's trustee's election to treat the  
984 income of the fund as a unitrust amount becomes effective. For  
985 purposes of this subparagraph, "fair market value" means the  
986 fair market value of the assets held in the fund as of the  
987 applicable valuation date determined as provided in this  
988 subparagraph. The fiduciary trustee is not liable for good faith  
989 reliance upon any valuation supplied by the person or persons in  
990 possession of the fund. If the fiduciary trustee makes or  
991 terminates an election under this subparagraph, the fiduciary  
992 trustee shall make such disclosure in a trust disclosure  
993 document that satisfies the requirements of s. 736.1008(4)(a).

994 (b) The fiduciary may trustee shall have discretion to  
995 elect the method of determining the income of the fund pursuant  
996 to this subsection and may change the method of determining  
997 income of the fund for any future accounting period.

998 (3) For a fund that is a nonseparate account, income of the  
999 fund is a unitrust amount determined by calculating the present



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1000 value of the right to receive the remaining payments under 26  
1001 U.S.C. s. 7520 of the Internal Revenue Code as of the first day  
1002 of the accounting period and multiplying it by the percentage  
1003 determined in accordance with s. 738.1041(2)(b)2.a. The  
1004 fiduciary trustee shall determine the unitrust amount as of the  
1005 first month that the fiduciary's trustee's election to treat the  
1006 income of the fund as a unitrust amount becomes effective.

1007 (4) Except for those trusts described in subsection (5),  
1008 the fiduciary trustee shall allocate to income the lesser of the  
1009 payment received from a fund or the income determined under  
1010 subsection (2) or subsection (3). Any remaining amount of the  
1011 payment shall be allocated to principal ~~a payment from a fund as~~  
1012 ~~follows:~~

1013 ~~(a) That portion of the payment the payor characterizes as~~  
1014 ~~income shall be allocated to income, and any remaining portion~~  
1015 ~~of the payment shall be allocated to principal.~~

1016 ~~(b) To the extent that the payor does not characterize any~~  
1017 ~~portion of a payment as income or principal and the trustee can~~  
1018 ~~ascertain the income of the fund by the fund's account~~  
1019 ~~statements or any other reasonable source, the trustee shall~~  
1020 ~~allocate to income the lesser of the income of the fund or the~~  
1021 ~~entire payment and shall allocate to principal any remaining~~  
1022 ~~portion of the payment.~~

1023 ~~(c) If the trustee, acting reasonably and in good faith,~~  
1024 ~~determines that neither paragraph (a) nor paragraph (b) applies~~  
1025 ~~and all or part of the payment is required to be made, the~~  
1026 ~~trustee shall allocate to income 10 percent of the portion of~~  
1027 ~~the payment that is required to be made during the accounting~~  
1028 ~~period and shall allocate the balance to principal. If no part~~



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1029 ~~of a payment is required to be made or the payment received is~~  
1030 ~~the entire amount to which the trustee is entitled, the trustee~~  
1031 ~~shall allocate the entire payment to principal. For purposes of~~  
1032 ~~this paragraph, a payment is not "required to be made" to the~~  
1033 ~~extent the payment is made because the trustee exercises a right~~  
1034 ~~of withdrawal.~~

1035 (5) For a trust that which, in order to qualify for the  
1036 estate or gift tax marital deduction under the Internal Revenue  
1037 Code or comparable law of any state, entitles the spouse to all  
1038 of the income of the trust, and the terms of the trust are  
1039 silent as to the time and frequency for distribution of the  
1040 income of the fund, ~~then~~:

1041 (a) For a fund that is a separate account, unless the  
1042 spouse directs the fiduciary trustee to leave the income of the  
1043 fund in the fund, the fiduciary trustee shall withdraw and pay  
1044 to the spouse, at least no less frequently than annually:

1045 1. All of the income of the fund determined in accordance  
1046 with subparagraph (2) (a)1.; or

1047 2. The income of the fund as a unitrust amount determined  
1048 in accordance with subparagraph (2) (a)2.

1049 (b) For a fund that is a nonseparate account, the fiduciary  
1050 ~~trustee~~ shall withdraw and pay to the spouse, at least no less  
1051 ~~frequently than~~ annually, the income of the fund as a unitrust  
1052 amount determined in accordance with subsection (3).

1053 (6) This section does not apply to payments to which s.  
1054 738.603 applies.

1055 Section 20. Section 738.603, Florida Statutes, is amended  
1056 to read:

1057 738.603 Liquidating asset.—



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1058 (1) For purposes of this section, the term "liquidating  
1059 asset" means an asset the value of which will diminish or  
1060 terminate because the asset is expected to produce receipts for  
1061 a period of limited duration. The term includes a leasehold,  
1062 patent, copyright, royalty right, and right to receive payments  
1063 for ~~during a period of~~ more than 1 year under an arrangement  
1064 that does not provide for the payment of interest on the unpaid  
1065 balance. The term does not include a payment subject to s.  
1066 738.602, resources subject to s. 738.604, timber subject to s.  
1067 738.605, an activity subject to s. 738.607, an asset subject to  
1068 s. 738.608, or any asset for which the fiduciary ~~trustee~~  
1069 establishes a reserve for depreciation under s. 738.703.

1070 (2) A fiduciary ~~trustee~~ shall allocate to income 5 ~~10~~  
1071 percent of the receipts from the carrying value of a liquidating  
1072 asset and the balance to principal. Amounts allocated to  
1073 principal shall reduce the carrying value of the liquidating  
1074 asset, but not below zero. Amounts received in excess of the  
1075 remaining carrying value must be allocated to principal.

1076 Section 21. Subsections (1), (3), and (4) of section  
1077 738.604, Florida Statutes, are amended to read:

1078 738.604 Minerals, water, and other natural resources.—

1079 (1) If ~~To the extent~~ a fiduciary ~~trustee~~ accounts for  
1080 receipts from an interest in minerals or other natural resources  
1081 pursuant to this section, the fiduciary ~~trustee~~ shall allocate  
1082 such receipts as follows:

1083 (a) If received as nominal delay rental or nominal annual  
1084 rent on a lease, a receipt shall be allocated to income.

1085 (b) If received from a production payment, a receipt shall  
1086 be allocated to income if and to the extent the agreement



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1087 creating the production payment provides a factor for interest  
1088 or its equivalent. The balance shall be allocated to principal.

1089 (c) If an amount received as a royalty, shut-in-well  
1090 payment, take-or-pay payment, bonus, or delay rental is more  
1091 than nominal, 90 percent shall be allocated to principal and the  
1092 balance to income.

1093 (d) If an amount is received from a working interest or any  
1094 other interest not provided for in paragraph (a), paragraph (b),  
1095 or paragraph (c), 90 percent of the net amount received shall be  
1096 allocated to principal and the balance to income.

1097 (3) This chapter applies whether or not a decedent or donor  
1098 was extracting minerals, water, or other natural resources  
1099 before the interest became subject to the trust or estate.

1100 (4) If a trust or estate owns an interest in minerals,  
1101 water, or other natural resources on January 1, 2003, the  
1102 fiduciary trustee may allocate receipts from the interest as  
1103 provided in this chapter or in the manner used by the fiduciary  
1104 trustee before January 1, 2003. If the trust or estate acquires  
1105 an interest in minerals, water, or other natural resources after  
1106 January 1, 2003, the fiduciary trustee shall allocate receipts  
1107 from the interest as provided in this chapter.

1108 Section 22. Section 738.605, Florida Statutes, is amended  
1109 to read:

1110 738.605 Timber.—

1111 (1) ~~If To the extent~~ a fiduciary trustee accounts for  
1112 receipts from the sale of timber and related products pursuant  
1113 to this section, the fiduciary trustee shall allocate such ~~the~~  
1114 net receipts as follows:

1115 (a) To income to the extent the amount of timber removed



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1116 from the land does not exceed the rate of growth of the timber  
1117 during the accounting periods in which a beneficiary has a  
1118 mandatory income interest;

1119 (b) To principal to the extent the amount of timber removed  
1120 from the land exceeds the rate of growth of the timber or the  
1121 net receipts are from the sale of standing timber;

1122 (c) To or between income and principal if the net receipts  
1123 are from the lease of timberland or from a contract to cut  
1124 timber from land owned by a trust or estate by determining the  
1125 amount of timber removed from the land under the lease or  
1126 contract and applying the rules in paragraphs (a) and (b); or

1127 (d) To principal to the extent advance payments, bonuses,  
1128 and other payments are not allocated pursuant to paragraph (a),  
1129 paragraph (b), or paragraph (c).

1130 (2) In determining net receipts to be allocated pursuant to  
1131 subsection (1), a fiduciary trustee shall deduct and transfer to  
1132 principal a reasonable amount for depletion.

1133 (3) This chapter applies whether or not a decedent or donor  
1134 ~~transferor~~ was harvesting timber from the property before the  
1135 property became subject to the trust or estate.

1136 (4) If a trust or estate owns an interest in timberland on  
1137 January 1, 2003, the fiduciary trustee may allocate net receipts  
1138 from the sale of timber and related products as provided in this  
1139 chapter or in the manner used by the fiduciary trustee before  
1140 January 1, 2003. If the trust or estate acquires an interest in  
1141 timberland after January 1, 2003, the fiduciary trustee shall  
1142 allocate net receipts from the sale of timber and related  
1143 products as provided in this chapter.

1144 Section 23. Subsection (1) of section 738.606, Florida



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1145 Statutes, is amended to read:

1146 738.606 Property not productive of income.—

1147 (1) If a marital deduction under the Internal Revenue Code  
1148 or comparable law of any state is allowed for all or part of a  
1149 trust the income of which must ~~is required to~~ be distributed to  
1150 the grantor's spouse and the assets of which consist  
1151 substantially of property that does not provide the spouse with  
1152 sufficient income from or use of the trust assets, and if the  
1153 amounts the trustee transfers from principal to income under s.  
1154 738.104 and distributes to the spouse from principal pursuant to  
1155 the terms of the trust are insufficient to provide the spouse  
1156 with the beneficial enjoyment required to obtain the marital  
1157 deduction, the spouse may require the trustee to make property  
1158 productive of income, convert property within a reasonable time,  
1159 or exercise the power conferred by ss. 738.104 and 738.1041. The  
1160 trustee may decide which action or combination of actions to  
1161 take.

1162 Section 24. Subsections (2) and (3) of section 738.607,  
1163 Florida Statutes, are amended to read:

1164 738.607 Derivatives and options.—

1165 (2) To the extent a fiduciary ~~trustee~~ does not account  
1166 under s. 738.403 for transactions in derivatives, the fiduciary  
1167 ~~trustee~~ shall allocate to principal receipts from and  
1168 disbursements made in connection with those transactions.

1169 (3) If a fiduciary ~~trustee~~ grants an option to buy property  
1170 from the trust or estate whether or not the trust or estate owns  
1171 the property when the option is granted, grants an option that  
1172 permits another person to sell property to the trust or estate,  
1173 or acquires an option to buy property for the trust or estate or



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1174 an option to sell an asset owned by the trust or estate, and the  
1175 fiduciary trustee or other owner of the asset is required to  
1176 deliver the asset if the option is exercised, an amount received  
1177 for granting the option shall be allocated to principal. An  
1178 amount paid to acquire the option shall be paid from principal.  
1179 A gain or loss realized upon the exercise of an option,  
1180 including an option granted to a grantor of the trust or estate  
1181 for services rendered, shall be allocated to principal.

1182 Section 25. Subsections (2) and (3) of section 738.608,  
1183 Florida Statutes, are amended to read:

1184 738.608 Asset-backed securities.—

1185 (2) If a trust or estate receives a payment from interest  
1186 or other current return and from other proceeds of the  
1187 collateral financial assets, the fiduciary trustee shall  
1188 allocate to income the portion of the payment which the payor  
1189 identifies as being from interest or other current return and  
1190 ~~shall~~ allocate the balance of the payment to principal.

1191 (3) If a trust or estate receives one or more payments in  
1192 exchange for the trust's or estate's entire interest in an  
1193 asset-backed security during a single accounting period, the  
1194 fiduciary trustee shall allocate the payments to principal. If a  
1195 payment is one of a series of payments that will result in the  
1196 liquidation of the trust's or estate's interest in the security  
1197 over more than a single accounting period, the fiduciary trustee  
1198 shall allocate 10 percent of the payment to income and the  
1199 balance to principal.

1200 Section 26. Section 738.701, Florida Statutes, is amended  
1201 to read:

1202 738.701 Disbursements from income.—A fiduciary trustee



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1203 shall make the following disbursements from income to the extent  
1204 they are not disbursements to which s. 738.201(2) ~~(a) or (c)~~  
1205 applies:

1206 (1) One-half of the regular compensation of the fiduciary  
1207 ~~trustee~~ and of any person providing investment advisory or  
1208 custodial services to the fiduciary ~~trustee~~.

1209 (2) One-half of all expenses for accountings, judicial  
1210 proceedings, or other matters that involve both the income and  
1211 remainder interests.

1212 (3) All of the other ordinary expenses incurred in  
1213 connection with the administration, management, or preservation  
1214 of trust property and the distribution of income, including  
1215 interest, ordinary repairs, regularly recurring taxes assessed  
1216 against principal, and expenses of a proceeding or other matter  
1217 that concerns primarily the income interest.

1218 (4) Recurring premiums on insurance covering the loss of a  
1219 principal asset or the loss of income from or use of the asset.

1220 Section 27. Subsection (1) of section 738.702, Florida  
1221 Statutes, is amended to read:

1222 738.702 Disbursements from principal.—

1223 (1) A fiduciary ~~trustee~~ shall make the following  
1224 disbursements from principal:

1225 (a) The remaining one-half of the disbursements described  
1226 in s. 738.701(1) and (2).

1227 (b) All of the trustee's compensation calculated on  
1228 principal as a fee for acceptance, distribution, or termination  
1229 and disbursements made to prepare property for sale.

1230 (c) Payments on the principal of a trust debt.

1231 (d) Expenses of a proceeding that concerns primarily



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1232 principal, including a proceeding to construe the trust or will,  
1233 or to protect the trust, estate, or its property.

1234 (e) Premiums paid on a policy of insurance not described in  
1235 s. 738.701(4) of which the trust or estate is the owner and  
1236 beneficiary.

1237 (f) Estate, inheritance, and other transfer taxes,  
1238 including penalties, apportioned to the trust.

1239 (g) Disbursements related to environmental matters,  
1240 including reclamation, assessing environmental conditions,  
1241 remedying and removing environmental contamination, monitoring  
1242 remedial activities and the release of substances, preventing  
1243 future releases of substances, collecting amounts from persons  
1244 liable or potentially liable for the costs of such activities,  
1245 penalties imposed under environmental laws or regulations and  
1246 other payments made to comply with those laws or regulations,  
1247 statutory or common law claims by third parties, and defending  
1248 claims based on environmental matters.

1249 (h) Payments representing extraordinary repairs or expenses  
1250 incurred in making a capital improvement to principal, including  
1251 special assessments; however, a fiduciary trustee may establish  
1252 an allowance for depreciation out of income to the extent  
1253 permitted by s. 738.703.

1254 Section 28. Subsection (2) of section 738.703, Florida  
1255 Statutes, is amended to read:

1256 738.703 Transfers from income to principal for  
1257 depreciation.—

1258 (2) A fiduciary trustee may transfer to principal a  
1259 reasonable amount of the net cash receipts from a principal  
1260 asset that is subject to depreciation but may not transfer any



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1261 amount for depreciation:

1262 (a) Of that portion of real property used or available for  
1263 use by a beneficiary as a residence or of tangible personal  
1264 property held or made available for the personal use or  
1265 enjoyment of a beneficiary;

1266 (b) During the administration of a decedent's estate; or

1267 (c) Under this section if the fiduciary ~~trustee~~ is  
1268 accounting under s. 738.403 for the business or activity in  
1269 which the asset is used.

1270 Section 29. Subsections (1), (2), and (3) of section  
1271 738.704, Florida Statutes, are amended to read:

1272 738.704 Transfers from income to reimburse principal.—

1273 (1) If a fiduciary ~~trustee~~ makes or expects to make a  
1274 principal disbursement described in this section, the fiduciary  
1275 ~~trustee~~ may transfer an appropriate amount from income to  
1276 principal in one or more accounting periods to reimburse  
1277 principal or to provide a reserve for future principal  
1278 disbursements.

1279 (2) Principal disbursements to which subsection (1) applies  
1280 include the following, but only to the extent the fiduciary  
1281 ~~trustee~~ has not been and does not expect to be reimbursed by a  
1282 third party:

1283 (a) An amount chargeable to income but paid from principal  
1284 because the amount is unusually large.

1285 (b) Disbursements made to prepare property for rental,  
1286 including tenant allowances, leasehold improvements, and  
1287 broker's commissions.

1288 (c) Disbursements described in s. 738.702(1)(g).

1289 (3) If the asset the ownership of which gives rise to the



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1290 disbursements becomes subject to a successive income interest  
1291 after an income interest ends, a fiduciary trustee may continue  
1292 to transfer amounts from income to principal as provided in  
1293 subsection (1).

1294 Section 30. Section 738.705, Florida Statutes, is amended  
1295 to read:

1296 738.705 Income taxes.—

1297 (1) A tax required to be paid by a fiduciary trustee based  
1298 on receipts allocated to income shall be paid from income.

1299 (2) A tax required to be paid by a fiduciary trustee based  
1300 on receipts allocated to principal shall be paid from principal,  
1301 even if the tax is called an income tax by the taxing authority.

1302 (3) A tax required to be paid by a fiduciary trustee on the  
1303 trust's or estate's share of an entity's taxable income shall be  
1304 paid proportionately:

1305 (a) From income to the extent receipts from the entity are  
1306 allocated to income; ~~and~~

1307 (b) From principal to the extent:

1308 ~~1. receipts from the entity are allocated to principal; and~~

1309 ~~2. The trust's share of the entity's taxable income exceeds~~  
1310 ~~the total receipts described in paragraph (a) and subparagraph~~  
1311 ~~1.~~

1312 (c) From principal to the extent that the income taxes  
1313 payable by the trust or estate exceed the total receipts from  
1314 the entity.

1315 (4) After applying subsections (1)-(3), the fiduciary shall  
1316 adjust income or principal receipts to the extent that the  
1317 trust's or estate's income taxes are reduced, but not  
1318 eliminated, because the trust or estate receives a deduction for



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1319 payments made to a beneficiary. The amount distributable to that  
1320 beneficiary as income as a result of this adjustment shall be  
1321 equal to the cash received by the trust or estate, reduced, but  
1322 not below zero, by the entity's taxable income allocable to the  
1323 trust or estate multiplied by the trust's or estate's income tax  
1324 rate. The reduced amount shall be divided by the difference  
1325 between 1 and the trust's or estate's income tax rate in order  
1326 to determine the amount distributable to that beneficiary as  
1327 income before giving effect to other receipts or disbursements  
1328 allocable to that beneficiary's interest. For purposes of this  
1329 section, receipts allocated to principal or income shall be  
1330 reduced by the amount distributed to a beneficiary from  
1331 principal or income for which the trust receives a deduction in  
1332 calculating the tax.

1333 Section 31. Section 738.801, Florida Statutes, is amended  
1334 to read:

1335 (Substantial rewording of section. See  
1336 s. 738.801, F.S., for present text.)

1337 738.801 Apportionment of expenses; improvements.-

1338 (1) For purposes of this section, the term:

1339 (a) "Remainderman" means the holder of the remainder  
1340 interests after the expiration of a tenant's estate in property.

1341 (b) "Tenant" means the holder of an estate for life or term  
1342 of years in real property or personal property, or both.

1343 (2) If a trust has not been created, expenses shall be  
1344 apportioned between the tenant and remainderman as follows:

1345 (a) The following expenses are allocated to and shall be  
1346 paid by the tenant:

1347 1. All ordinary expenses incurred in connection with the



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1348 administration, management, or preservation of the property,  
1349 including interest, ordinary repairs, regularly recurring taxes  
1350 assessed against the property, and expenses of a proceeding or  
1351 other matter that concerns primarily the tenant's estate or use  
1352 of the property.

1353 2. Recurring premiums on insurance covering the loss of the  
1354 property or the loss of income from or use of the property.

1355 3. Any of the expenses described in subparagraph (b)3.  
1356 which are attributable to the use of the property by the tenant.

1357 (b) The following expenses are allocated to and shall be  
1358 paid by the remainderman:

1359 1. Payments on the principal of a debt secured by the  
1360 property, except to the extent the debt is for expenses  
1361 allocated to the tenant.

1362 2. Expenses of a proceeding or other matter that concerns  
1363 primarily the title to the property, other than title to the  
1364 tenant's estate.

1365 3. Except as provided in subparagraph (a)3., expenses  
1366 related to environmental matters, including reclamation,  
1367 assessing environmental conditions, remedying and removing  
1368 environmental contamination, monitoring remedial activities and  
1369 the release of substances, preventing future releases of  
1370 substances, collecting amounts from persons liable or  
1371 potentially liable for the costs of such activities, penalties  
1372 imposed under environmental laws or regulations and other  
1373 payments made to comply with those laws or regulations,  
1374 statutory or common law claims by third parties, and defending  
1375 claims based on environmental matters.

1376 4. Extraordinary repairs.



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1377           (c) If the tenant or remainderman incurred an expense for  
1378 the benefit of his or her own estate without consent or  
1379 agreement of the other, he or she must pay such expense in full.

1380           (d) Except as provided in paragraph (c), the cost of, or  
1381 special taxes or assessments for, an improvement representing an  
1382 addition of value to property forming part of the principal  
1383 shall be paid by the tenant if the improvement is not reasonably  
1384 expected to outlast the estate of the tenant. In all other  
1385 cases, only a part shall be paid by the tenant while the  
1386 remainder shall be paid by the remainderman. The part payable by  
1387 the tenant is ascertainable by taking that percentage of the  
1388 total that is found by dividing the present value of the  
1389 tenant's estate by the present value of an estate of the same  
1390 form as that of the tenant, except that it is limited for a  
1391 period corresponding to the reasonably expected duration of the  
1392 improvement. The computation of present values of the estates  
1393 shall be made by using the rate defined in 26 U.S.C. s. 7520,  
1394 then in effect and, in the case of an estate for life, the  
1395 official mortality tables then in effect under 26 U.S.C. s.  
1396 7520. Other evidence of duration or expectancy may not be  
1397 considered.

1398           (3) This section does not apply to the extent it is  
1399 inconsistent with the instrument creating the estates, the  
1400 agreement of the parties, or the specific direction of the  
1401 taxing or other statutes.

1402           (4) The common law applicable to tenants and remaindermen  
1403 supplements this section, except as modified by this section or  
1404 other laws.

1405           Section 32. This act shall take effect January 1, 2013.



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

And the title is amended as follows:

Delete everything before the enacting clause  
and insert:

A bill to be entitled

An act relating to the Florida Uniform Principal and  
Income Act; amending s. 738.102, F.S.; defining the  
term "carrying value"; amending s. 738.103, F.S.;  
providing for application; amending s. 738.104, F.S.;  
deleting a provision authorizing a trustee to release  
the power to adjust between principal and income if  
the trustee desires to convert the form of certain  
trusts; limiting the power to adjust a trust; deleting  
a provision that provides construction and application  
relating to the administration of trusts in this state  
or under this state's law; amending s. 738.1041, F.S.;  
defining the term "average fair market value" and  
revising the term "unitrust amount"; deleting a  
duplicative provision relating to conclusive  
determinations of the terms of a unitrust; revising  
provisions relating to an express total return  
unitrust; amending s. 738.105, F.S.; substituting the  
term "trustee" for "fiduciary" with respect to  
judicial control of discretionary powers; amending s.  
738.201, F.S.; revising provisions relating to the  
determination and distribution of net income; amending  
s. 738.202, F.S.; revising provisions relating to  
distributions to residuary and remainder



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1435 beneficiaries; amending ss. 738.301, 738.302, and  
1436 738.303, F.S.; substituting the term "fiduciary" for  
1437 "trustee" to clarify that provisions apply to all  
1438 fiduciaries; amending s. 738.401, F.S.; substituting  
1439 the term "fiduciary" for "trustee" to clarify that  
1440 provisions apply to all fiduciaries; revising how  
1441 distributions from entities are allocated between  
1442 income and principal; amending ss. 738.402, 738.403,  
1443 738.501, 738.502, 738.503, 738.504, and 738.601, F.S.;  
1444 substituting the term "fiduciary" for "trustee" to  
1445 clarify that provisions apply to all fiduciaries;  
1446 amending s. 738.602, F.S.; substituting the term  
1447 "fiduciary" for "trustee" to clarify that provisions  
1448 apply to all fiduciaries; revising provisions relating  
1449 to allocations to trusts; amending s. 738.603, F.S.;  
1450 substituting the term "fiduciary" for "trustee" to  
1451 clarify that provisions apply to all fiduciaries;  
1452 revising provisions relating to the allocation between  
1453 income and principal when liquidating assets; amending  
1454 ss. 738.604, 738.605, 738.606, 738.607, 738.608,  
1455 738.701, 738.702, 738.703, and 738.704, F.S.;  
1456 substituting the term "fiduciary" for "trustee" to  
1457 clarify that provisions apply to all fiduciaries;  
1458 amending s. 738.705, F.S.; substituting the term  
1459 "fiduciary" for "trustee" to clarify that provisions  
1460 apply to all fiduciaries; revising the method for  
1461 allocating income taxes between income and principal;  
1462 amending s. 738.801, F.S.; clarifying the  
1463 apportionment of expenses between tenants and



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remaindermen; providing an effective date.

By Senator Fasano

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1 A bill to be entitled  
 2 An act relating to the Florida Uniform Principal and  
 3 Income Act; amending s. 738.102, F.S.; defining the  
 4 term "carrying value"; repealing s. 738.104(11), F.S.,  
 5 relating to the administration of a trust and its  
 6 applicability, which is being transferred to another  
 7 section; amending s. 738.1041, F.S.; defining the term  
 8 "average fair market value" and revising the term  
 9 "unitrust amount"; deleting a duplicative provision  
 10 relating to conclusive determinations of the terms of  
 11 a unitrust; revising provisions relating to an express  
 12 total return unitrust; amending s. 738.105, F.S.;  
 13 substituting the term "trustee" for "fiduciary" with  
 14 respect to judicial control of discretionary powers;  
 15 amending s. 738.201, F.S.; revising provisions  
 16 relating to the determination and distribution of net  
 17 income; amending s. 738.202, F.S.; revising provisions  
 18 relating to distributions to residuary and remainder  
 19 beneficiaries; amending ss. 738.301, 738.302, and  
 20 738.303, F.S.; substituting the term "fiduciary" for  
 21 "trustee" to clarify that provisions apply to all  
 22 fiduciaries; amending s. 738.401, F.S.; substituting  
 23 the term "fiduciary" for "trustee" to clarify that  
 24 provisions apply to all fiduciaries; revising how  
 25 distributions from entities are allocated between  
 26 income and principal; amending ss. 738.402, 738.403,  
 27 738.501, 738.502, 738.503, 738.504, and 738.601, F.S.;  
 28 substituting the term "fiduciary" for "trustee" to  
 29 clarify that provisions apply to all fiduciaries;

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30 amending s. 738.602, F.S.; substituting the term  
 31 "fiduciary" for "trustee" to clarify that provisions  
 32 apply to all fiduciaries; revising provisions relating  
 33 to allocations to trusts; amending s. 738.603, F.S.;  
 34 substituting the term "fiduciary" for "trustee" to  
 35 clarify that provisions apply to all fiduciaries;  
 36 revising provisions relating to the allocation between  
 37 income and principal when liquidating assets; amending  
 38 ss. 738.604, 738.605, 738.606, 738.607, 738.608,  
 39 738.701, 738.702, 738.703, and 738.704, F.S.;  
 40 substituting the term "fiduciary" for "trustee" to  
 41 clarify that provisions apply to all fiduciaries;  
 42 amending s. 738.705, F.S.; substituting the term  
 43 "fiduciary" for "trustee" to clarify that provisions  
 44 apply to all fiduciaries; revising the method for  
 45 allocating income taxes between income and principal;  
 46 amending s. 738.801, F.S.; clarifying the  
 47 apportionment of expenses between tenants and  
 48 remaindermen; amending s. 738.804, F.S.; transferring  
 49 a provision relating to applicability; providing an  
 50 effective date.

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

54 Section 1. Present subsections (3) through (13) of section  
 55 738.102, Florida Statutes, are renumbered as subsections (4)  
 56 through (14), respectively, and a new subsection (3) is added to  
 57 that section, to read:  
 58 738.102 Definitions.—As used in this chapter, the term:

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59 (3) "Carrying value" means the fair market value at the  
 60 time the assets are received by the fiduciary. For the estates  
 61 of decedents and trusts described in s. 733.707(3), after the  
 62 grantor's death, the assets are considered received as of the  
 63 date of death. If there is a change in fiduciaries, a majority  
 64 of the continuing fiduciaries may elect to adjust the carrying  
 65 values to reflect the fair market value of the assets at the  
 66 beginning of their administration. If such election is made, it  
 67 must be reflected on the first accounting filed after the  
 68 election. For assets acquired during the administration of the  
 69 estate or trust, the carrying value is equal to the acquisition  
 70 costs of the asset.

71 Section 2. Subsection (11) of section 738.104, Florida  
 72 Statutes, is repealed.

73 Section 3. Section 738.1041, Florida Statutes, is amended  
 74 to read:

75 738.1041 Total return unitrust.—

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

77 (a) "Average fair market value" means the average of the  
 78 fair market values of assets held by the trust at the beginning  
 79 of the current and each of the 2 preceding years, or for the  
 80 entire term of the trust if there are less than 2 preceding  
 81 years, and adjusted as follows:

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

85 2. If assets have been distributed from the trust during  
 86 the years used to determine the average, other than in  
 87 satisfaction of the unitrust amount, the amount of each

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88 distribution is subtracted from all years in which such  
 89 distribution was not included.

90 (b)-(a) "Disinterested person" means a person who is not a  
 91 "related or subordinate party" as defined in s. 672(e) of the  
 92 United States Internal Revenue Code, 26 U.S.C. ss. 1 et seq., or  
 93 any successor provision thereof, with respect to the person then  
 94 acting as trustee of the trust and excludes the grantor and any  
 95 interested trustee.

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

99 (d)-(e) "Income trust" means a trust, created by either an  
 100 inter vivos or a testamentary instrument, which directs or  
 101 permits the trustee to distribute the net income of the trust to  
 102 one or more persons, either in fixed proportions or in amounts  
 103 or proportions determined by the trustee and regardless of  
 104 whether the trust directs or permits the trustee to distribute  
 105 the principal of the trust to one or more such persons.

106 (e)-(d) "Interested distributee" means a person to whom  
 107 distributions of income or principal can currently be made and  
 108 who has the power to remove the existing trustee and designate  
 109 as successor a person who may be a "related or subordinate  
 110 party," as defined in the Internal Revenue Code, 26 U.S.C. s.  
 111 672(e), with respect to such distributee.

112 (f)-(e) "Interested trustee" means an individual trustee to  
 113 whom the net income or principal of the trust can currently be  
 114 distributed or would be distributed if the trust were then to  
 115 terminate and be distributed, any trustee whom an interested  
 116 distributee has the power to remove and replace with a related

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117 or subordinate party ~~as defined in paragraph (d)~~, or an  
 118 individual trustee whose legal obligation to support a  
 119 beneficiary may be satisfied by distributions of income and  
 120 principal of the trust.

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

124 (h)(f) "Unitrust amount" means the amount determined by  
 125 multiplying the average fair market value of the assets as  
 126 calculated in subparagraph (a)1. defined in paragraph (b) by the  
 127 percentage calculated under paragraph (2) (b).

128 (2) A trustee may, without court approval, convert an  
 129 income trust to a total return unitrust, reconvert a total  
 130 return unitrust to an income trust, or change the percentage  
 131 used to calculate the unitrust amount or the method used to  
 132 determine the fair market value of the trust if:

133 (a) The trustee adopts a written statement regarding trust  
 134 distributions which ~~that~~ provides:

135 1. In the case of a trust being administered as an income  
 136 trust, that future distributions from the trust will be unitrust  
 137 amounts rather than net income, and indicates the manner in  
 138 which the unitrust amount will be calculated and the method in  
 139 which the fair market value of the trust will be determined.

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

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

144 b. The percentage used to calculate the unitrust amount or  
 145 the method used to determine the fair market value of the trust

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146 will be changed, and indicates the manner in which the new  
 147 unitrust amount will be calculated and the method in which the  
 148 new fair market value of the trust will be determined;

149 (b) The trustee determines the terms of the unitrust under  
 150 one of the following methods:

151 1. A disinterested trustee determines, or if there is no  
 152 trustee other than an interested trustee, the interested trustee  
 153 appoints a disinterested person who, in its sole discretion but  
 154 acting in a fiduciary capacity, determines for the interested  
 155 trustee:

156 a. The percentage to be used to calculate the unitrust  
 157 amount if, provided the percentage used is not greater than 5  
 158 percent or not less than 3 percent;

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

161 c. Which assets, if any, are to be excluded in determining  
 162 the unitrust amount; or

163 2. The interested trustee or disinterested trustee  
 164 administers the trust such that:

165 a. The percentage used to calculate the unitrust amount is  
 166 50 percent of the ~~applicable federal~~ rate as defined in the  
 167 Internal Revenue Code, 26 U.S.C. s. 7520, in effect for the  
 168 month the conversion under this section becomes effective and  
 169 for each January thereafter; however, if the percentage  
 170 calculated exceeds 5 percent, the unitrust percentage is shall  
 171 ~~be~~ 5 percent and if the percentage calculated is less than 3  
 172 percent, the unitrust percentage is shall be 3 percent; and

173 b. The fair market value of the trust shall be determined  
 174 at least annually on an asset-by-asset basis, reasonably and in

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 175 good faith, in accordance with ~~the provisions of~~ s. 738.202(5),  
 176 except the following property may ~~shall~~ not be included in  
 177 determining the value of the trust:

178 (I) Any residential property or any tangible personal  
 179 property that, as of the first business day of the current  
 180 valuation year, one or more current beneficiaries of the trust  
 181 have or have had the right to occupy, or have or have had the  
 182 right to possess or control, ~~(other than in his or her capacity~~  
 183 ~~as trustee of the trust)~~, and instead the right of occupancy or  
 184 the right to possession and control is ~~shall be deemed to be~~ the  
 185 unitrust amount with respect to such property; however, the  
 186 unitrust amount must ~~shall~~ be adjusted to take into account  
 187 partial distributions from or receipt into the trust of such  
 188 property during the valuation year;~~-~~

189 (II) Any asset specifically given to a beneficiary and the  
 190 return on investment on such property, which return on  
 191 investment shall be distributable to the ~~such~~ beneficiary; ~~or-~~

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

194 (c) The trustee sends written notice of its intention to  
 195 take such action, along with copies of the ~~such~~ written  
 196 statement regarding trust distributions and this section, and,  
 197 if applicable, the determinations of ~~either~~ the trustee or the  
 198 disinterested person to:

- 199 1. The grantor of the trust, if living.
- 200 2. All living persons who are currently receiving or
- 201 eligible to receive distributions of income from ~~of~~ the trust.
- 202 3. All living persons who would receive distributions of
- 203 principal of the trust if the trust were to terminate at the

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 204 time of ~~the~~ giving ~~of~~ such notice ~~(without regard to the~~  
 205 ~~exercise of any power of appointment,~~) or, if the trust does not  
 206 provide for its termination, all living persons who would  
 207 receive or be eligible to receive distributions of income or  
 208 principal of the trust if the persons identified in subparagraph  
 209 2. were deceased.

210 4. All persons acting as advisers or protectors of the  
 211 trust.

212  
 213 Notice under this paragraph shall be served informally~~-~~ in the  
 214 manner provided in the Florida Rules of Civil Procedure relating  
 215 to service of pleadings subsequent to the initial pleading.  
 216 Notice may be served on a legal representative or natural  
 217 guardian of a person without ~~the~~ filing ~~of~~ any proceeding or  
 218 approval of any court;

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

221 (e) Persons ~~No person~~ receiving such notice under each of  
 222 subparagraphs (c)2. and 3. do not object ~~objects~~, by written  
 223 instrument delivered to the trustee, to the proposed action of  
 224 the trustee or the determinations of the disinterested person  
 225 within 60 days after service of such notice. An objection ~~under~~  
 226 ~~this section~~ may be executed by a legal representative or  
 227 natural guardian of a person without ~~the~~ filing ~~of~~ any  
 228 proceeding or approval of any court.

229 (3) If a trustee desires to convert an income trust to a  
 230 total return unitrust, reconvert a total return unitrust to an  
 231 income trust, or change the percentage used to calculate the  
 232 unitrust amount or the method used to determine a fair market

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 233 value of the trust but does not have the ability to or elects  
 234 not to do it under subsection (2), the trustee may petition the  
 235 circuit court for such order as the trustee deems appropriate.  
 236 In that event, the court, in its own discretion or on the  
 237 petition of such trustee or any person having an income or  
 238 remainder interest in the trust, may appoint a disinterested  
 239 person who, acting in a fiduciary capacity, shall present such  
 240 information to the court as is ~~shall be~~ necessary for the court  
 241 to make a determination hereunder.

~~(4) All determinations made pursuant to sub-subparagraph  
 (2)(b)2.b. shall be conclusive if reasonable and made in good  
 faith. Such determination shall be conclusively presumed to have  
 been made reasonably and in good faith unless proven otherwise  
 in a proceeding commenced by or on behalf of a person interested  
 in the trust within the time provided in s. 736.1008. The burden  
 will be on the objecting interested party to prove that the  
 determinations were not made reasonably and in good faith.~~

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

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

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

1. Net short-term capital gain described in the Internal  
 Revenue Code, 26 U.S.C. s. 1222(5), for such year, or portion  
 thereof, but only to the extent that the amount so allocated  
 together with all other amounts allocated to trust income, as  
 determined under the provisions of this chapter without regard

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 262 to this section and s. 738.104, for such year, or portion  
 263 thereof, does not exceed the unitrust amount for such year, or  
 264 portion thereof.

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

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

(a) The effective date of the conversion.

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

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

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

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

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

(7)(8) Any trustee or disinterested person who in good  
 faith takes or fails to take any action under this section is

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291 ~~shall not be~~ liable to any person affected by such action or  
 292 inaction, regardless of whether such person received written  
 293 notice as provided in this section ~~or and regardless of whether~~  
 294 such person was under a legal disability at the time of the  
 295 delivery of such notice. Such person's exclusive remedy ~~is shall~~  
 296 ~~be to obtain~~, under subsection ~~(8) (9)~~, an order of the court  
 297 directing the trustee to convert an income trust to a total  
 298 return unitrust, to reconvert from a total return unitrust to an  
 299 income trust, or to change the percentage used to calculate the  
 300 unitrust amount. If a court determines that the trustee or  
 301 disinterested person has not acted in good faith in taking or  
 302 failing to take any action under this section, ~~the provisions of~~  
 303 s. 738.105(3) applies apply.

304 ~~(8)(9)~~ If a majority in interest of ~~either~~ the income or  
 305 remainder beneficiaries of an income trust has delivered to the  
 306 trustee a written objection to the amount of the income  
 307 distributions of the trust, and, if the trustee has failed to  
 308 resolve the objection to the satisfaction of the objecting  
 309 beneficiaries within 6 months after ~~from the~~ receipt of such  
 310 written objection, ~~then~~ the objecting beneficiaries may petition  
 311 the court in accordance with subsection (3).

312 ~~(9)(10)~~ This section pertains ~~shall be construed as~~  
 313 ~~pertaining~~ to the administration of a trust and is applicable to  
 314 any trust that is administered ~~either~~ in this state or under  
 315 Florida law unless:

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

319 (b) The trust is a trust described in the Internal Revenue

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320 Code, 26 U.S.C. s. 170(f)(2)(B), s. 642(c)(5), s. 664(d), s.  
 321 2702(a)(3), or s. 2702(b);

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

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

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

330 (d) The governing instrument expressly prohibits use of  
 331 this section by specific reference to the section. A provision  
 332 in the governing instrument that, "The provisions of section  
 333 738.1041, Florida Statutes, as amended, or any corresponding  
 334 provision of future law, may shall not be used in the  
 335 administration of this trust," or similar words reflecting such  
 336 intent are shall be sufficient to preclude the use of this  
 337 section; ~~or~~

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

340 ~~(10)(11)~~ The grantor of a trust may create an express total  
 341 return unitrust that becomes ~~which will become~~ effective as  
 342 provided in the trust instrument document without requiring a  
 343 conversion under this section.

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

348 1.(a) That distributions from the trust will be unitrust

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 349 amounts and the manner in which the unitrust amount will be  
 350 calculated; and ~~the method in which the fair market value of the~~  
 351 ~~trust will be determined.~~

352 2.(b) The percentage to be used to calculate the unitrust  
 353 amount ~~if, provided~~ the percentage used is not greater than 5  
 354 percent nor less than 3 percent.

355 (b) The trust instrument may also contain provisions  
 356 specifying:

357 1.(e) The method to be used in determining the fair market  
 358 value of the trust, including whether to use an average fair  
 359 market value or the fair market value of the assets held by the  
 360 trust at the beginning of the current year; or-

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

363 (c) The remaining provisions of this section establish the  
 364 method of determining the fair market value of the trust if the  
 365 trust instrument is silent as to subparagraph (b)1., and to  
 366 specify those assets, if any, which are to be excluded in  
 367 determining the unitrust amount if the trust instrument is  
 368 silent as to subparagraph (b)2.

369 Section 4. Subsections (1), (3), and (4) of section  
 370 738.105, Florida Statutes, are amended to read:

371 738.105 Judicial control of discretionary powers.-

372 (1) A court ~~may shall~~ not change a trustee's fiduciary's  
 373 decision to exercise or not to exercise a discretionary power  
 374 conferred by this chapter unless the court determines that the  
 375 decision was an abuse of the trustee's fiduciary's discretion. A  
 376 court ~~may shall~~ not determine that a trustee fiduciary abused  
 377 its discretion merely because the court would have exercised the

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 378 discretion in a different manner or would not have exercised the  
 379 discretion.

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

385 (a) To the extent the abuse of discretion has resulted in  
 386 no distribution to a beneficiary or a distribution that is too  
 387 small, the court shall require the trustee fiduciary to  
 388 distribute from the trust to the beneficiary an amount the court  
 389 determines will restore the beneficiary, in whole or in part, to  
 390 his or her appropriate position.

391 (b) To the extent the abuse of discretion has resulted in a  
 392 distribution to a beneficiary that is too large, the court shall  
 393 restore the beneficiaries, the trust, or both, in whole or in  
 394 part, to their appropriate positions by requiring the trustee  
 395 fiduciary to withhold an amount from one or more future  
 396 distributions to the beneficiary who received the distribution  
 397 that was too large or requiring that beneficiary to return some  
 398 or all of the distribution to the trust.

399 (c) To the extent the court is unable, after applying  
 400 paragraphs (a) and (b), to restore the beneficiaries ~~or,~~ the  
 401 trust, or both, to the positions they would have occupied if the  
 402 trustee fiduciary had not abused its discretion, the court may  
 403 require the trustee fiduciary to pay an appropriate amount from  
 404 its own funds to one or more of the beneficiaries or the trust  
 405 or both.

406 (4) Upon the filing of a petition by the trustee fiduciary,

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407 the court having jurisdiction over the trust or estate shall  
 408 determine whether a proposed exercise or nonexercise by the  
 409 ~~trustee fiduciary~~ of a discretionary power conferred by this  
 410 chapter will result in an abuse of the trustee's fiduciary's  
 411 discretion. If the petition describes the proposed exercise or  
 412 nonexercise of the power and contains sufficient information to  
 413 inform the beneficiaries of the reasons for the proposal, the  
 414 facts upon which the ~~trustee fiduciary~~ relies, and an  
 415 explanation of how the income and remainder beneficiaries will  
 416 be affected by the proposed exercise or nonexercise of the  
 417 power, a beneficiary who challenges the proposed exercise or  
 418 nonexercise has the burden of establishing that such exercise or  
 419 nonexercise will result in an abuse of discretion.

420 Section 5. Subsections (1) through (4) of section 738.201,  
 421 Florida Statutes, are amended to read:

422 738.201 Determination and distribution of net income.—After  
 423 a decedent dies, in the case of an estate, or after an income  
 424 interest in a trust ends, the following rules apply:

425 (1) A fiduciary of an estate or of a terminating income  
 426 interest shall determine the amount of net income and net  
 427 principal receipts received from property specifically given to  
 428 a beneficiary under ~~the rules in ss. 738.301-738.706 which apply~~  
 429 ~~to trustees and the rules in subsection (5).~~ The fiduciary shall  
 430 distribute the net income and net principal receipts to the  
 431 beneficiary who is to receive the specific property.

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

435 (a) Including in net income all income from property used

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436 to discharge liabilities.

437 (b) Paying from income or principal, in the fiduciary's  
 438 discretion, fees of attorneys, accountants, and fiduciaries and  
 439 court costs and other expenses of administration. ~~However, and~~  
 440 ~~interest on death taxes, but~~ the fiduciary may pay interest on  
 441 death taxes ~~those expenses~~ from income of property passing to a  
 442 trust for which the fiduciary claims an estate tax marital or  
 443 charitable deduction under the Internal Revenue Code or  
 444 comparable law of any state only to the extent the payment of  
 445 those expenses from income will not cause the reduction or loss  
 446 of the deduction.

447 (c) Paying from principal all other disbursements made or  
 448 incurred in connection with the settlement of a decedent's  
 449 estate or the winding up of a terminating income interest,  
 450 including debts, funeral expenses, disposition of remains,  
 451 family allowances, and death taxes and related penalties that  
 452 are apportioned to the estate or terminating income interest by  
 453 the will, the terms of the trust, or applicable law.

454 (3) ~~If A fiduciary shall distribute to a beneficiary who~~  
 455 ~~receives a pecuniary amount outright~~ is also entitled to receive  
 456 the interest on the amount or any other amount provided by the  
 457 will ~~or, the terms of the trust, a fiduciary shall distribute~~  
 458 ~~the interest or applicable law~~ from net income determined under  
 459 subsection (2) or from principal to the extent net income is  
 460 insufficient. ~~If a beneficiary is to receive a pecuniary amount~~  
 461 ~~outright from a trust after an income interest ends and no~~  
 462 ~~interest or other amount is provided for by the terms of the~~  
 463 ~~trust or applicable law, the fiduciary shall distribute the~~  
 464 ~~interest or other amount to which the beneficiary would be~~

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465 ~~entitled under applicable law if the pecuniary amount were~~  
 466 ~~required to be paid under a will.~~

467 (4) A fiduciary shall distribute the net income remaining  
 468 after distributions required under subsections (1)-(3) by  
 469 ~~subsection (3)~~ in the manner described in s. 738.202 to all  
 470 other beneficiaries, including a beneficiary who receives a  
 471 pecuniary amount in trust, even if the beneficiary holds an  
 472 unqualified power to withdraw assets from the trust or other  
 473 presently exercisable general power of appointment over the  
 474 trust.

475 Section 6. Section 738.202, Florida Statutes, is amended to  
 476 read:

477 738.202 Distribution to residuary and remainder  
 478 beneficiaries.-

479 (1) Each beneficiary described in s. 738.201(4) is entitled  
 480 to receive a portion of the net income remaining after the  
 481 application of s. 738.201(1)-(3), which is equal to the  
 482 beneficiary's fractional interest in undistributed principal  
 483 assets, using carrying values as of the distribution date. If a  
 484 fiduciary makes more than one distribution of assets to  
 485 beneficiaries to whom this section applies, each beneficiary,  
 486 including one who does not receive part of the distribution, is  
 487 entitled, as of each distribution date, to the net income the  
 488 fiduciary ~~has~~ received after the date of death or terminating  
 489 event or earlier distribution date but has not distributed as of  
 490 the current distribution date.

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

493 (a) The beneficiary is entitled to receive a portion of the

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494 net income equal to the beneficiary's fractional interest in the  
 495 carrying value of the undistributed principal assets immediately  
 496 before the distribution date, excluding the amount of unpaid  
 497 liabilities including assets that later may be sold to meet  
 498 principal obligations.

499 (b) The beneficiary's fractional interest in the  
 500 undistributed principal assets shall be calculated: without  
 501 regard to

502 1. At the time the interest began and adjusted for any  
 503 disproportionate distributions since the interest began;

504 2. By excluding any liabilities of the estate or trust from  
 505 the calculation;

506 3. By also excluding property specifically given to a  
 507 beneficiary and property required to pay pecuniary amounts not  
 508 in trust; and-

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

514 (c) If a disproportionate distribution of principal is made  
 515 to a beneficiary, the respective fractional interests of all  
 516 beneficiaries in the remaining underlying assets shall be  
 517 recomputed by:

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

520 2. Reducing the fractional interest of the recipient of the  
 521 disproportionate distribution in the remaining principal assets  
 522 by the fair market value of the principal distribution; and

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523 3. Recomputing the fractional interests of all  
 524 beneficiaries in the remaining principal assets based upon the  
 525 now restated carrying values.

526 ~~(d) The distribution date for purposes of this section may~~  
 527 ~~be the date as of which the fiduciary calculates the value of~~  
 528 ~~the assets if that date is reasonably near the date on which~~  
 529 ~~assets are actually distributed.~~

530 (3) If a fiduciary does not distribute all of the collected  
 531 but undistributed net income to each person as of a distribution  
 532 date, the fiduciary shall maintain appropriate records showing  
 533 the interest of each beneficiary in that net income.

534 (4) A fiduciary may apply the provisions of rules in this  
 535 section, to the extent the fiduciary considers appropriate, to  
 536 net gain or loss realized after the date of death or terminating  
 537 event or earlier distribution date from the disposition of a  
 538 principal asset if this section applies to the income from the  
 539 asset.

540 (5) The carrying value or fair market value of trust assets  
 541 shall be determined on an asset-by-asset basis and are ~~shall be~~  
 542 conclusive if reasonable and determined in good faith.  
 543 Determinations of fair market value based on appraisals  
 544 performed within 2 years before or after the valuation date are  
 545 ~~shall be~~ presumed reasonable. The ~~values~~ value of trust assets  
 546 are ~~shall be~~ conclusively presumed to be reasonable and  
 547 determined in good faith unless proven otherwise in a proceeding  
 548 commenced by or on behalf of a person interested in the trust  
 549 within the time provided in s. 736.1008.

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

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552 Section 7. Subsection (4) of section 738.301, Florida  
 553 Statutes, is amended to read:

554 738.301 When right to income begins and ends.—An income  
 555 beneficiary is entitled to net income from the date on which the  
 556 income interest begins.

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

561 Section 8. Subsections (1) and (2) of section 738.302,  
 562 Florida Statutes, are amended to read:

563 738.302 Apportionment of receipts and disbursements when  
 564 decedent dies or income interest begins.—

565 (1) A fiduciary trustee shall allocate an income receipt or  
 566 disbursement other than one to which s. 738.201(1) applies to  
 567 principal if the due date of the receipt or disbursement occurs  
 568 before a decedent dies in the case of an estate or before an  
 569 income interest begins in the case of a trust or successive  
 570 income interest.

571 (2) A fiduciary trustee shall allocate an income receipt or  
 572 disbursement to income if the due date of the receipt or  
 573 disbursement occurs on or after the date on which a decedent  
 574 dies or an income interest begins and the due date is a periodic  
 575 due date. An income receipt or disbursement shall be treated as  
 576 accruing from day to day if the due date of the receipt or  
 577 disbursement is not periodic or the receipt or disbursement has  
 578 no due date. The portion of the receipt or disbursement accruing  
 579 before the date on which a decedent dies or an income interest  
 580 begins shall be allocated to principal and the balance shall be

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581 allocated to income.

582 Section 9. Subsections (2) and (3) of section 738.303,  
583 Florida Statutes, are amended to read:

584 738.303 Apportionment when income interest ends.—

585 (2) When a mandatory income interest ends, the fiduciary  
586 ~~trustee~~ shall pay to a mandatory income beneficiary who survives  
587 that date, or the estate of a deceased mandatory income  
588 beneficiary whose death causes the interest to end, the  
589 beneficiary's share of the undistributed income that is not  
590 disposed of under the terms of the trust unless the beneficiary  
591 has an unqualified power to revoke more than 5 percent of the  
592 trust immediately before the income interest ends. In the latter  
593 case, the undistributed income from the portion of the trust  
594 that may be revoked shall be added to principal.

595 (3) When a fiduciary's ~~trustee's~~ obligation to pay a fixed  
596 annuity or a fixed fraction of the value of the trust's assets  
597 ends, the fiduciary ~~trustee~~ shall prorate the final payment if  
598 and to the extent required by applicable law to accomplish a  
599 purpose of the trust or its grantor relating to income, gift,  
600 estate, or other tax requirements.

601 Section 10. Section 738.401, Florida Statutes, is amended  
602 to read:

603 738.401 Character of receipts.—

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

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

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

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

617 (a) Property other than money.

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

621 (c) Money received in total or partial liquidation of the  
622 entity.

623 (d) Money received from an entity that is a regulated  
624 investment company or a real estate investment trust if the  
625 money distributed represents short-term or long-term capital  
626 gain realized within the entity.

627 (e) Money received from an entity listed on a public stock  
628 exchange during any year of the trust or estate which exceeds 10  
629 percent of the fair market value of the trust's or estate's  
630 interest in the entity on the first day of that year. The amount  
631 to be allocated to principal must be reduced to the extent that  
632 the cumulative distributions from the entity to the trust or  
633 estate allocated to income does not exceed a cumulative annual  
634 return of 3 percent of the fair market value of the interest in  
635 the entity at the beginning of each year or portion of a year  
636 for the number of years or portion of years in the period that  
637 the interest in the entity was held by the trust or estate. If a  
638 trustee has exercised a power to adjust under s. 738.104 during

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 639 any period the interest in the entity was held by the trust, the  
 640 trustee, in determining the total income distributions from that  
 641 entity, must take into account the extent to which the exercise  
 642 of that power resulted in income to the trust from that entity  
 643 for that period. If the income of the trust for any period was  
 644 computed under s. 738.1041, the trustee, in determining the  
 645 total income distributions from that entity for that period,  
 646 must take into account the portion of the unitrust amount paid  
 647 as a result of the ownership of the trust's interest in the  
 648 entity for that period.

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

654 (5) Money is received in partial liquidation:

655 (a) To the extent the entity, at or near the time of a  
 656 distribution, indicates that such money is a distribution in  
 657 partial liquidation; or

658 (b) If the total amount of money and property received in a  
 659 distribution or series of related distributions from an entity  
 660 that is not listed on a public stock exchange is greater than 20  
 661 percent of the trust or estate's pro rata share of the entity's  
 662 gross assets, as shown by the entity's year-end financial  
 663 statements immediately preceding the initial receipt.

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

666 (6) Money ~~may not~~ ~~is not~~ received in partial liquidation,

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 668 ~~nor may money~~ be taken into account in determining any excess  
 669 under paragraph (5) (b), to the extent that the cumulative  
 670 distributions from the entity to the trust or the estate  
 671 allocated to income do not exceed the greater of: such money  
 672 ~~does not exceed the amount of income tax a trustee or~~  
 673 ~~beneficiary must pay on taxable income of the entity that~~  
 674 ~~distributes the money.~~

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

689 (b) If the entity is treated as a partnership, subchapter S  
 690 corporation, or a disregarded entity pursuant to the Internal  
 691 Revenue Code of 1986, as amended, the amount of income tax  
 692 attributable to the trust's or estate's ownership share of the  
 693 entity, based on its pro rata share of the taxable income of the  
 694 entity that distributes the money, for the number of years or  
 695 portion of years that the interest in the entity was held by the  
 696 fiduciary, calculated as if all of that tax was incurred by the

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697 fiduciary.

698 (7) The following ~~applies special rules shall apply~~ to

699 moneys or property received by a private trustee ~~as a~~

700 distribution from an entity entities described in this

701 subsection:

702 (a) If treated as a partnership, subchapter S corporation,

703 or disregarded entity pursuant to the Internal Revenue Code of

704 1986, as amended, the trustee shall first treat as income of the

705 trust all of the money or property received from the investment

706 entity in the current year which would be considered income

707 under this chapter if the trustee had directly held the trust's

708 pro rata share of the assets of the investment entity. For this

709 purpose, all distributions received in the current year must be

710 aggregated.

711 (b) The trustee shall next treat as income of the trust any

712 additional money or property received in the current year which

713 would have been considered income in the prior 2 years under

714 paragraph (a) if additional money or property had been received

715 from the investment entity in any of those prior 2 years. The

716 amount to be treated as income shall be reduced by any

717 distributions of money or property made by the investment entity

718 to the trust during the current and prior 2 years which were

719 treated as income under this paragraph.

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

721 as principal.

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

723 1. "Investment entity" means an entity, other than a

724 business activity conducted by the trustee described in s.

725 738.403 or an entity that is listed on a public stock exchange,

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726 which is treated as a partnership, subchapter S corporation, or

727 disregarded entity pursuant to the Internal Revenue Code of

728 1986, as amended, and which normally derives 50 percent or more

729 of its annual cumulative net income from interest, dividends,

730 annuities, royalties, rental activity, or other passive

731 investments, including income from the sale or exchange of such

732 passive investments.

733 2. "Private trustee" means a trustee who is a natural

734 person, but only if the trustee is unable to use the power to

735 adjust between income and principal with respect to receipts

736 from entities described in this subsection pursuant to s.

737 738.104. A bank, trust company, or other commercial trustee is

738 not considered a private trustee.

739 (8) This section shall be applied before ss. 738.705 and

740 738.706 and does not modify or change any of the provisions of

741 those sections.

742 ~~(a) Moneys or property received from a targeted entity that~~

743 ~~is not an investment entity which do not exceed the trust's pro~~

744 ~~rata share of the undistributed cumulative net income of the~~

745 ~~targeted entity during the time an ownership interest in the~~

746 ~~targeted entity was held by the trust shall be allocated to~~

747 ~~income. The balance of moneys or property received from a~~

748 ~~targeted entity shall be allocated to principal.~~

749 ~~(b) If trust assets include any interest in an investment~~

750 ~~entity, the designated amount of moneys or property received~~

751 ~~from the investment entity shall be treated by the trustee in~~

752 ~~the same manner as if the trustee had directly held the trust's~~

753 ~~pro rata share of the assets of the investment entity~~

754 ~~attributable to the distribution of such designated amount.~~

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755 ~~Thereafter, distributions shall be treated as principal.~~

756 ~~(e) For purposes of this subsection, the following~~  
 757 ~~definitions shall apply:~~

758 ~~1. "Cumulative net income" means the targeted entity's net~~  
 759 ~~income as determined using the method of accounting regularly~~  
 760 ~~used by the targeted entity in preparing its financial~~  
 761 ~~statements, or if no financial statements are prepared, the net~~  
 762 ~~book income computed for federal income tax purposes, for every~~  
 763 ~~year an ownership interest in the entity is held by the trust.~~  
 764 ~~The trust's pro rata share shall be the cumulative net income~~  
 765 ~~multiplied by the percentage ownership of the trust.~~

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

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

772 ~~b. The amount of income of the investment entity for the~~  
 773 ~~current year and the prior 2 years, as reported to the trustee~~  
 774 ~~by the investment entity for federal income tax purposes, less~~  
 775 ~~any distributions of moneys or property made by the investment~~  
 776 ~~entity to the trustee during the prior 2 years.~~

777 ~~3. "Investment entity" means a targeted entity that~~  
 778 ~~normally derives 50 percent or more of its annual cumulative net~~  
 779 ~~income from interest, dividends, annuities, royalties, rental~~  
 780 ~~activity, or other passive investments, including income from~~  
 781 ~~the sale or exchange of such passive investments.~~

782 ~~4. "Private trustee" means a trustee who is an individual,~~  
 783 ~~but only if the trustee is unable to utilize the power to adjust~~

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784 ~~between income and principal with respect to receipts from~~  
 785 ~~entities described in this subsection pursuant to s. 738.104. A~~  
 786 ~~bank, trust company, or other commercial trustee shall not be~~  
 787 ~~considered to be a private trustee.~~

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

792 ~~6. "Undistributed cumulative net income" means the trust's~~  
 793 ~~pro rata share of cumulative net income, less all prior~~  
 794 ~~distributions from the targeted entity to the trust that have~~  
 795 ~~been allocated to income.~~

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

799 ~~(8) A trustee may rely upon a statement made by an entity~~  
 800 ~~about the source or character of a distribution, about the~~  
 801 ~~amount of profits of a targeted entity, or about the nature and~~  
 802 ~~value of assets of an investment entity if the statement is made~~  
 803 ~~at or near the time of distribution by the entity's board of~~  
 804 ~~directors or other person or group of persons authorized to~~  
 805 ~~exercise powers to pay money or transfer property comparable to~~  
 806 ~~those of a corporation's board of directors.~~

807 Section 11. Section 738.402, Florida Statutes, is amended  
 808 to read:

809 738.402 Distribution from trust or estate.—A fiduciary  
 810 trustee shall allocate to income an amount received as a  
 811 distribution of income from a trust or an estate in which the  
 812 trust has an interest other than a purchased interest and shall

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 813 allocate to principal an amount received as a distribution of  
 814 principal from such a trust or estate. If a fiduciary trustee  
 815 purchases an interest in a trust that is an investment entity,  
 816 or a decedent or donor transfers an interest in such a trust to  
 817 a fiduciary trustee, s. 738.401 or s. 738.608 applies to a  
 818 receipt from the trust.

819 Section 12. Section 738.403, Florida Statutes, is amended  
 820 to read:

821 738.403 Business and other activities conducted by  
 822 fiduciary trustee.-

823 (1) If a fiduciary trustee who conducts a business or other  
 824 activity determines that it is in the best interest of all the  
 825 beneficiaries to account separately for the business or activity  
 826 instead of accounting for the business or activity as part of  
 827 the trust's general accounting records, the fiduciary trustee  
 828 may maintain separate accounting records for the transactions of  
 829 the such business or other activity, whether or not the assets  
 830 of such business or activity are segregated from other trust  
 831 assets.

832 (2) A fiduciary trustee who accounts separately for a  
 833 business or other activity may determine the extent to which the  
 834 net cash receipts of the such business or activity must be  
 835 retained for working capital, the acquisition or replacement of  
 836 fixed assets, and other reasonably foreseeable needs of the  
 837 business or activity, and the extent to which the remaining net  
 838 cash receipts are accounted for as principal or income in the  
 839 trust's general accounting records. If a fiduciary trustee sells  
 840 assets of the business or other activity, other than in the  
 841 ordinary course of the business or activity, the fiduciary must

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 842 ~~trustee shall~~ account for the net amount received as principal  
 843 in the trust's general accounting records to the extent the  
 844 fiduciary trustee determines that the amount received is no  
 845 longer required in the conduct of the business.

846 (3) Activities for which a fiduciary trustee may maintain  
 847 separate accounting records include:

848 (a) Retail, manufacturing, service, and other traditional  
 849 business activities.

850 (b) Farming.

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

852 (d) Management of rental properties.

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

854 (f) Timber operations.

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

856 Section 13. Section 738.501, Florida Statutes, is amended  
 857 to read:

858 738.501 Principal receipts.-A fiduciary trustee shall  
 859 allocate to principal:

860 (1) To the extent not allocated to income under this  
 861 chapter, assets received from a transferor during the  
 862 transferor's lifetime, a decedent's estate, a trust with a  
 863 terminating income interest, or a payor under a contract naming  
 864 the trust or its fiduciary trustee as beneficiary.

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

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

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

875 (5) Net income received in an accounting period during  
 876 which there is no beneficiary to whom a fiduciary trustee may or  
 877 shall distribute income.

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

879 Section 14. Section 738.502, Florida Statutes, is amended  
 880 to read:

881 738.502 Rental property.-~~If To the extent~~ a fiduciary  
 882 ~~trustee~~ accounts for receipts from rental property pursuant to  
 883 this section, the fiduciary trustee shall allocate to income an  
 884 amount received as rent of real or personal property, including  
 885 an amount received for cancellation or renewal of a lease. An  
 886 amount received as a refundable deposit, including a security  
 887 deposit or a deposit that is to be applied as rent for future  
 888 periods, must shall be added to principal and held subject to  
 889 the terms of the lease and is not available for distribution to  
 890 a beneficiary until the trustee's contractual obligations have  
 891 been satisfied with respect to that amount.

892 Section 15. Subsections (1), (2), and (3) of section  
 893 738.503, Florida Statutes, are amended to read:

894 738.503 Obligation to pay money.-

895 (1) An amount received as interest, whether determined at a  
 896 fixed, variable, or floating rate, on an obligation to pay money  
 897 to the fiduciary trustee, including an amount received as  
 898 consideration for prepaying principal, shall be allocated to  
 899 income without any provision for amortization of premium.

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

904 (3) The increment in value of a bond or other obligation  
 905 for the payment of money bearing no stated interest but payable  
 906 at a future time in excess of the price at which it was issued  
 907 or purchased, if purchased after issuance, is distributable as  
 908 income. If the increment in value accrues and becomes payable  
 909 pursuant to a fixed schedule of appreciation, it may be  
 910 distributed to the beneficiary who was the income beneficiary at  
 911 ~~the this~~ time of increment from the first principal cash  
 912 available or, if none is available, when the increment is  
 913 realized by sale, redemption, or other disposition. ~~If When~~  
 914 unrealized increment is distributed as income but out of  
 915 principal, the principal must shall be reimbursed for the  
 916 increment when realized. If, in the reasonable judgment of the  
 917 fiduciary trustee, exercised in good faith, the ultimate payment  
 918 of the bond principal is in doubt, the fiduciary trustee may  
 919 withhold the payment of incremental interest to the income  
 920 beneficiary.

921 Section 16. Subsections (1) and (2) of section 738.504,  
 922 Florida Statutes, are amended to read:

923 738.504 Insurance policies and similar contracts.-

924 (1) Except as otherwise provided in subsection (2), a  
 925 fiduciary trustee shall allocate to principal the proceeds of a  
 926 life insurance policy or other contract in which the trust or  
 927 its fiduciary trustee is named as beneficiary, including a  
 928 contract that insures the trust or its fiduciary trustee against

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 929 loss for damage to, destruction of, or loss of title to a trust  
 930 asset. The fiduciary trustee shall allocate dividends on an  
 931 insurance policy to income if the premiums on the policy are  
 932 paid from income and to principal if the premiums are paid from  
 933 principal.

934 (2) A fiduciary trustee shall allocate to income the  
 935 proceeds of a contract that insures the fiduciary trustee  
 936 against loss of occupancy or other use by an income beneficiary,  
 937 loss of income, or, subject to s. 738.403, loss of profits from  
 938 a business.

939 Section 17. Section 738.601, Florida Statutes, is amended  
 940 to read:

941 738.601 Insubstantial allocations not required.—If a  
 942 fiduciary trustee determines that an allocation between  
 943 principal and income required by s. 738.602, s. 738.603, s.  
 944 738.604, s. 738.605, or s. 738.608 is insubstantial, the  
 945 fiduciary trustee may allocate the entire amount to principal  
 946 unless one of the circumstances described in s. 738.104(3)  
 947 applies to the allocation. This power may be exercised by a  
 948 cofiduciary under e trustee in the circumstances described in s.  
 949 738.104(4) and may be released for the reasons and in the manner  
 950 described in s. 738.104(5). An allocation is presumed to be  
 951 insubstantial if:

952 (1) The amount of the allocation would increase or decrease  
 953 net income in an accounting period, as determined before the  
 954 allocation, by less than 10 percent; or

955 (2) The value of the asset producing the receipt for which  
 956 the allocation would be made is less than 10 percent of the  
 957 total value of the trust's assets at the beginning of the

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 958 accounting period.

959 Section 18. Section 738.602, Florida Statutes, is amended  
 960 to read:

961 738.602 Payments from deferred compensation plans,  
 962 annuities, and retirement plans or accounts.—

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

964 (a) "Fund" means a private or commercial annuity, an  
 965 individual retirement account, an individual retirement annuity,  
 966 a deferred compensation plan, a pension plan, a profit-sharing  
 967 plan, a stock-bonus plan, an employee stock-ownership plan, or  
 968 another similar arrangement in which federal income tax is  
 969 deferred.

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

972 (c) "Nonseparate account" means a fund for which the value  
 973 of the participant's or account owner's right to receive  
 974 benefits can be determined only by the occurrence of a date or  
 975 event as defined in the instrument governing the fund.

976 (d) "Payment" means a distribution from a fund that a  
 977 fiduciary trustee may receive over a fixed number of years or  
 978 during the life of one or more individuals because of services  
 979 rendered or property transferred to the payor in exchange for  
 980 future payments. The term includes a distribution made in money  
 981 or property from the payor's general assets or from a fund  
 982 created by the payor or payee.

983 (e) "Separate account" means a fund holding assets  
 984 exclusively for the benefit of a participant or account owner  
 985 and:

986 1. The value of such assets or the value of the separate

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987 account is ascertainable at any time; or  
 988 2. The administrator of the fund maintains records that  
 989 show receipts and disbursements associated with such assets.  
 990 (2) (a) For a fund that is a separate account, income of the  
 991 fund shall be determined:  
 992 1. As if the fund were a trust subject to the provisions of  
 993 ss. 738.401-738.706; or  
 994 2. As a unitrust amount calculated by multiplying the fair  
 995 market value of the fund as of the first day of the first  
 996 accounting period and, thereafter, as of the last day of the  
 997 accounting period that immediately precedes the accounting  
 998 period during which a payment is received by the percentage  
 999 determined in accordance with s. 738.1041(2)(b)2.a. The  
 1000 fiduciary trustee shall determine such percentage as of the  
 1001 first month that the fiduciary's trustee's election to treat the  
 1002 income of the fund as a unitrust amount becomes effective. For  
 1003 purposes of this subparagraph, "fair market value" means the  
 1004 fair market value of the assets held in the fund as of the  
 1005 applicable valuation date determined as provided in this  
 1006 subparagraph. The fiduciary trustee is not liable for good faith  
 1007 reliance upon any valuation supplied by the person or persons in  
 1008 possession of the fund. If the fiduciary trustee makes or  
 1009 terminates an election under this subparagraph, the fiduciary  
 1010 trustee shall make such disclosure in a trust disclosure  
 1011 document that satisfies the requirements of s. 736.1008(4)(a).  
 1012 (b) The fiduciary may trustee shall have discretion to  
 1013 elect the method of determining the income of the fund pursuant  
 1014 to this subsection and may change the method of determining  
 1015 income of the fund for any future accounting period.

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1016 (3) For a fund that is a nonseparate account, income of the  
 1017 fund is a unitrust amount determined by calculating the present  
 1018 value of the right to receive the remaining payments under 26  
 1019 U.S.C. s. 7520 of the Internal Revenue Code as of the first day  
 1020 of the accounting period and multiplying it by the percentage  
 1021 determined in accordance with s. 738.1041(2)(b)2.a. The  
 1022 fiduciary trustee shall determine the unitrust amount as of the  
 1023 first month that the fiduciary's trustee's election to treat the  
 1024 income of the fund as a unitrust amount becomes effective.  
 1025 (4) Except for those trusts described in subsection (5),  
 1026 the fiduciary trustee shall allocate to income the lesser of the  
 1027 payment received from a fund or the income determined under  
 1028 subsection (2) or subsection (3). Any remaining amount shall be  
 1029 allocated to principal a payment from a fund as follows:  
 1030 (a) ~~That portion of the payment the payor characterizes as~~  
 1031 ~~income shall be allocated to income, and any remaining portion~~  
 1032 ~~of the payment shall be allocated to principal.~~  
 1033 (b) ~~To the extent that the payor does not characterize any~~  
 1034 ~~portion of a payment as income or principal and the trustee can~~  
 1035 ~~ascertain the income of the fund by the fund's account~~  
 1036 ~~statements or any other reasonable source, the trustee shall~~  
 1037 ~~allocate to income the lesser of the income of the fund or the~~  
 1038 ~~entire payment and shall allocate to principal any remaining~~  
 1039 ~~portion of the payment.~~  
 1040 (c) ~~If the trustee, acting reasonably and in good faith,~~  
 1041 ~~determines that neither paragraph (a) nor paragraph (b) applies~~  
 1042 ~~and all or part of the payment is required to be made, the~~  
 1043 ~~trustee shall allocate to income 10 percent of the portion of~~  
 1044 ~~the payment that is required to be made during the accounting~~

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 1045 ~~period and shall allocate the balance to principal. If no part~~  
 1046 ~~of a payment is required to be made or the payment received is~~  
 1047 ~~the entire amount to which the trustee is entitled, the trustee~~  
 1048 ~~shall allocate the entire payment to principal. For purposes of~~  
 1049 ~~this paragraph, a payment is not "required to be made" to the~~  
 1050 ~~extent the payment is made because the trustee exercises a right~~  
 1051 ~~of withdrawal.~~

1052 (5) For a trust that which, in order to qualify for the  
 1053 estate or gift tax marital deduction under the Internal Revenue  
 1054 Code or comparable law of any state, entitles the spouse to all  
 1055 of the income of the trust, and the terms of the trust are  
 1056 silent as to the time and frequency for distribution of the  
 1057 income of the fund, ~~then~~:

1058 (a) For a fund that is a separate account, unless the  
 1059 spouse directs the fiduciary trustee to leave the income of the  
 1060 fund in the fund, the fiduciary trustee shall withdraw and pay  
 1061 to the spouse, at least no less frequently than annually:

1062 1. All of the income of the fund determined in accordance  
 1063 with subparagraph (2) (a)1.; or

1064 2. The income of the fund as a unitrust amount determined  
 1065 in accordance with subparagraph (2) (a)2.

1066 (b) For a fund that is a nonseparate account, the fiduciary  
 1067 ~~trustee~~ shall withdraw and pay to the spouse, at least no less  
 1068 ~~frequently than~~ annually, the income of the fund as a unitrust  
 1069 amount determined in accordance with subsection (3).

1070 (6) This section does not apply to payments to which s.  
 1071 738.603 applies.

1072 Section 19. Section 738.603, Florida Statutes, is amended  
 1073 to read:

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 1074 738.603 Liquidating asset.-  
 1075 (1) For purposes of this section, the term "liquidating  
 1076 asset" means an asset the value of which will diminish or  
 1077 terminate because the asset is expected to produce receipts for  
 1078 a period of limited duration. The term includes a leasehold,  
 1079 patent, copyright, royalty right, and right to receive payments  
 1080 ~~for during a period of~~ more than 1 year under an arrangement  
 1081 that does not provide for the payment of interest on the unpaid  
 1082 balance. The term does not include a payment subject to s.  
 1083 738.602, resources subject to s. 738.604, timber subject to s.  
 1084 738.605, an activity subject to s. 738.607, an asset subject to  
 1085 s. 738.608, or any asset for which the fiduciary trustee  
 1086 establishes a reserve for depreciation under s. 738.703.

1087 (2) A fiduciary trustee shall allocate to income 5 10  
 1088 percent of the receipts from the carrying value of a liquidating  
 1089 asset and the balance to principal. Amounts allocated to  
 1090 principal may not reduce the carrying value of the liquidating  
 1091 asset below zero. Amounts received in excess of the remaining  
 1092 carrying value must be allocated to principal.

1093 Section 20. Subsections (1) and (4) of section 738.604,  
 1094 Florida Statutes, are amended to read:

1095 738.604 Minerals, water, and other natural resources.-

1096 (1) ~~If To the extent~~ a fiduciary trustee accounts for  
 1097 receipts from an interest in minerals or other natural resources  
 1098 pursuant to this section, the fiduciary trustee shall allocate  
 1099 such receipts as follows:

1100 (a) If received as nominal delay rental or nominal annual  
 1101 rent on a lease, a receipt shall be allocated to income.

1102 (b) If received from a production payment, a receipt shall

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1103 be allocated to income if and to the extent the agreement  
1104 creating the production payment provides a factor for interest  
1105 or its equivalent. The balance shall be allocated to principal.

1106 (c) If an amount received as a royalty, shut-in-well  
1107 payment, take-or-pay payment, bonus, or delay rental is more  
1108 than nominal, 90 percent shall be allocated to principal and the  
1109 balance to income.

1110 (d) If an amount is received from a working interest or any  
1111 other interest not provided for in paragraph (a), paragraph (b),  
1112 or paragraph (c), 90 percent of the net amount received shall be  
1113 allocated to principal and the balance to income.

1114 (4) If a trust owns an interest in minerals, water, or  
1115 other natural resources on January 1, 2003, the fiduciary  
1116 ~~trustee~~ may allocate receipts from the interest as provided in  
1117 this chapter or in the manner used by the fiduciary trustee  
1118 before January 1, 2003. If the trust acquires an interest in  
1119 minerals, water, or other natural resources after January 1,  
1120 2003, the trustee shall allocate receipts from the interest as  
1121 provided in this chapter.

1122 Section 21. Subsections (1), (2), and (4) of section  
1123 738.605, Florida Statutes, are amended to read:

1124 738.605 Timber.—

1125 (1) ~~If To the extent~~ a fiduciary trustee accounts for  
1126 receipts from the sale of timber and related products pursuant  
1127 to this section, the fiduciary trustee shall allocate such the  
1128 net receipts as follows:

1129 (a) To income to the extent the amount of timber removed  
1130 from the land does not exceed the rate of growth of the timber  
1131 during the accounting periods in which a beneficiary has a

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1132 mandatory income interest;

1133 (b) To principal to the extent the amount of timber removed  
1134 from the land exceeds the rate of growth of the timber or the  
1135 net receipts are from the sale of standing timber;

1136 (c) To or between income and principal if the net receipts  
1137 are from the lease of timberland or from a contract to cut  
1138 timber from land owned by a trust by determining the amount of  
1139 timber removed from the land under the lease or contract and  
1140 applying the rules in paragraphs (a) and (b); or

1141 (d) To principal to the extent advance payments, bonuses,  
1142 and other payments are not allocated pursuant to paragraph (a),  
1143 paragraph (b), or paragraph (c).

1144 (2) In determining net receipts to be allocated pursuant to  
1145 subsection (1), a fiduciary trustee shall deduct and transfer to  
1146 principal a reasonable amount for depletion.

1147 (4) If a trust owns an interest in timberland on January 1,  
1148 2003, the fiduciary trustee may allocate net receipts from the  
1149 sale of timber and related products as provided in this chapter  
1150 or in the manner used by the fiduciary trustee before January 1,  
1151 2003. If the trust acquires an interest in timberland after  
1152 January 1, 2003, the fiduciary trustee shall allocate net  
1153 receipts from the sale of timber and related products as  
1154 provided in this chapter.

1155 Section 22. Subsection (1) of section 738.606, Florida  
1156 Statutes, is amended to read:

1157 738.606 Property not productive of income.—

1158 (1) If a marital deduction under the Internal Revenue Code  
1159 or comparable law of any state is allowed for all or part of a  
1160 trust the income of which ~~must is required to~~ be distributed to

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1161 the grantor's spouse and the assets of which consist  
 1162 substantially of property that does not provide the spouse with  
 1163 sufficient income from or use of the trust assets, and if the  
 1164 amounts the fiduciary trustee transfers from principal to income  
 1165 under s. 738.104 and distributes to the spouse from principal  
 1166 pursuant to the terms of the trust are insufficient to provide  
 1167 the spouse with the beneficial enjoyment required to obtain the  
 1168 marital deduction, the spouse may require the fiduciary trustee  
 1169 to make property productive of income, convert property within a  
 1170 reasonable time, or exercise the power conferred by ss. 738.104  
 1171 and 738.1041. The fiduciary trustee may decide which action or  
 1172 combination of actions to take.

1173 Section 23. Subsections (2) and (3) of section 738.607,  
 1174 Florida Statutes, are amended to read:

1175 738.607 Derivatives and options.—

1176 (2) To the extent a fiduciary trustee does not account  
 1177 under s. 738.403 for transactions in derivatives, the fiduciary  
 1178 ~~trustee~~ shall allocate to principal receipts from and  
 1179 disbursements made in connection with those transactions.

1180 (3) If a fiduciary trustee grants an option to buy property  
 1181 from the trust whether or not the trust owns the property when  
 1182 the option is granted, grants an option that permits another  
 1183 person to sell property to the trust, or acquires an option to  
 1184 buy property for the trust or an option to sell an asset owned  
 1185 by the trust, and the fiduciary trustee or other owner of the  
 1186 asset is required to deliver the asset if the option is  
 1187 exercised, an amount received for granting the option shall be  
 1188 allocated to principal. An amount paid to acquire the option  
 1189 shall be paid from principal. A gain or loss realized upon the

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1190 exercise of an option, including an option granted to a grantor  
 1191 of the trust for services rendered, shall be allocated to  
 1192 principal.

1193 Section 24. Subsections (2) and (3) of section 738.608,  
 1194 Florida Statutes, are amended to read:

1195 738.608 Asset-backed securities.—

1196 (2) If a trust receives a payment from interest or other  
 1197 current return and from other proceeds of the collateral  
 1198 financial assets, the fiduciary trustee shall allocate to income  
 1199 the portion of the payment which the payor identifies as being  
 1200 from interest or other current return and ~~shall~~ allocate the  
 1201 balance of the payment to principal.

1202 (3) If a trust receives one or more payments in exchange  
 1203 for the trust's entire interest in an asset-backed security  
 1204 during a single accounting period, the fiduciary trustee shall  
 1205 allocate the payments to principal. If a payment is one of a  
 1206 series of payments that will result in the liquidation of the  
 1207 trust's interest in the security over more than a single  
 1208 accounting period, the fiduciary trustee shall allocate 10  
 1209 percent of the payment to income and the balance to principal.

1210 Section 25. Section 738.701, Florida Statutes, is amended  
 1211 to read:

1212 738.701 Disbursements from income.—A fiduciary trustee  
 1213 shall make the following disbursements from income to the extent  
 1214 they are not disbursements to which s. 738.201(2)(~~a~~) or (c)  
 1215 applies:

1216 (1) One-half of the regular compensation of the fiduciary  
 1217 ~~trustee~~ and of any person providing investment advisory or  
 1218 custodial services to the fiduciary trustee.

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1219 (2) One-half of all expenses for accountings, judicial  
1220 proceedings, or other matters that involve both the income and  
1221 remainder interests.

1222 (3) All of the other ordinary expenses incurred in  
1223 connection with the administration, management, or preservation  
1224 of trust property and the distribution of income, including  
1225 interest, ordinary repairs, regularly recurring taxes assessed  
1226 against principal, and expenses of a proceeding or other matter  
1227 that concerns primarily the income interest.

1228 (4) Recurring premiums on insurance covering the loss of a  
1229 principal asset or the loss of income from or use of the asset.

1230 Section 26. Subsection (1) of section 738.702, Florida  
1231 Statutes, is amended to read:

1232 738.702 Disbursements from principal.—

1233 (1) A fiduciary trustee shall make the following  
1234 disbursements from principal:

1235 (a) The remaining one-half of the disbursements described  
1236 in s. 738.701(1) and (2).

1237 (b) All of the fiduciary's trustee's compensation  
1238 calculated on principal as a fee for acceptance, distribution,  
1239 or termination and disbursements made to prepare property for  
1240 sale.

1241 (c) Payments on the principal of a trust debt.

1242 (d) Expenses of a proceeding that concerns primarily  
1243 principal, including a proceeding to construe the trust or will,  
1244 or to protect the trust, estate, or its property.

1245 (e) Premiums paid on a policy of insurance not described in  
1246 s. 738.701(4) of which the trust or estate is the owner and  
1247 beneficiary.

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1248 (f) Estate, inheritance, and other transfer taxes,  
1249 including penalties, apportioned to the trust.

1250 (g) Disbursements related to environmental matters,  
1251 including reclamation, assessing environmental conditions,  
1252 remedying and removing environmental contamination, monitoring  
1253 remedial activities and the release of substances, preventing  
1254 future releases of substances, collecting amounts from persons  
1255 liable or potentially liable for the costs of such activities,  
1256 penalties imposed under environmental laws or regulations and  
1257 other payments made to comply with those laws or regulations,  
1258 statutory or common law claims by third parties, and defending  
1259 claims based on environmental matters.

1260 (h) Payments representing extraordinary repairs or expenses  
1261 incurred in making a capital improvement to principal, including  
1262 special assessments; however, a fiduciary trustee may establish  
1263 an allowance for depreciation out of income to the extent  
1264 permitted by s. 738.703.

1265 Section 27. Subsection (2) of section 738.703, Florida  
1266 Statutes, is amended to read:

1267 738.703 Transfers from income to principal for  
1268 depreciation.—

1269 (2) A fiduciary trustee may transfer to principal a  
1270 reasonable amount of the net cash receipts from a principal  
1271 asset that is subject to depreciation but may not transfer any  
1272 amount for depreciation:

1273 (a) Of that portion of real property used or available for  
1274 use by a beneficiary as a residence or of tangible personal  
1275 property held or made available for the personal use or  
1276 enjoyment of a beneficiary;

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1277 (b) During the administration of a decedent's estate; or  
 1278 (c) Under this section if the fiduciary trustee is  
 1279 accounting under s. 738.403 for the business or activity in  
 1280 which the asset is used.

1281 Section 28. Subsections (1), (2), and (3) of section  
 1282 738.704, Florida Statutes, are amended to read:  
 1283 738.704 Transfers from income to reimburse principal.—  
 1284 (1) If a fiduciary trustee makes or expects to make a  
 1285 principal disbursement described in this section, the fiduciary  
 1286 trustee may transfer an appropriate amount from income to  
 1287 principal in one or more accounting periods to reimburse  
 1288 principal or to provide a reserve for future principal  
 1289 disbursements.

1290 (2) Principal disbursements to which subsection (1) applies  
 1291 include the following, but only to the extent the fiduciary  
 1292 trustee has not been and does not expect to be reimbursed by a  
 1293 third party:

1294 (a) An amount chargeable to income but paid from principal  
 1295 because the amount is unusually large.

1296 (b) Disbursements made to prepare property for rental,  
 1297 including tenant allowances, leasehold improvements, and  
 1298 broker's commissions.

1299 (c) Disbursements described in s. 738.702(1)(g).

1300 (3) If the asset the ownership of which gives rise to the  
 1301 disbursements becomes subject to a successive income interest  
 1302 after an income interest ends, a fiduciary trustee may continue  
 1303 to transfer amounts from income to principal as provided in  
 1304 subsection (1).

1305 Section 29. Section 738.705, Florida Statutes, is amended

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1306 to read:  
 1307 738.705 Income taxes.—  
 1308 (1) A tax required to be paid by a fiduciary trustee based  
 1309 on receipts allocated to income shall be paid from income.  
 1310 (2) A tax required to be paid by a fiduciary trustee based  
 1311 on receipts allocated to principal shall be paid from principal,  
 1312 even if the tax is called an income tax by the taxing authority.  
 1313 (3) A tax required to be paid by a fiduciary trustee on the  
 1314 trust's or estate's share of an entity's taxable income shall be  
 1315 paid proportionately:

1316 (a) From income to the extent receipts from the entity are  
 1317 allocated to income; ~~and~~  
 1318 (b) From principal to the extent+  
 1319 ~~±~~ receipts from the entity are allocated to principal; and  
 1320 ~~2. The trust's share of the entity's taxable income exceeds~~  
 1321 ~~the total receipts described in paragraph (a) and subparagraph~~  
 1322 ~~±.~~

1323 (c) From principal to the extent that the income taxes  
 1324 payable by the trust or estate exceed the total distributions  
 1325 from the entity.

1326 (4) After applying subsections (1)-(3), the fiduciary shall  
 1327 adjust income or principal receipts to the extent that the  
 1328 trust's or estate's income taxes are reduced, but not  
 1329 eliminated, because the trust or estate receives a deduction for  
 1330 payments made to a beneficiary. The amount distributable to that  
 1331 beneficiary as income as a result of this adjustment shall be  
 1332 equal to the cash received by the trust or estate, reduced, but  
 1333 not below zero, by the entity's taxable income allocable to the  
 1334 trust or estate multiplied by the trust's or estate's income tax

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 1335 rate. The reduced amount shall be divided by the difference  
 1336 between 1 and the trust's or estate's income tax rate in order  
 1337 to determine the amount distributable to that beneficiary as  
 1338 income before giving effect to other receipts or disbursements  
 1339 allocable to that beneficiary's interest. For purposes of this  
 1340 section, receipts allocated to principal or income shall be  
 1341 reduced by the amount distributed to a beneficiary from  
 1342 principal or income for which the trust receives a deduction in  
 1343 calculating the tax.

1344 Section 30. Section 738.801, Florida Statutes, is amended  
 1345 to read:

1346 (Substantial rewording of section. See  
 1347 s. 738.801, F.S., for present text.)

1348 738.801 Apportionment of expenses; improvements.-

1349 (1) For purposes of this section, the term:

1350 (a) "Remainderman" means the holder of the remainder  
 1351 interests after the expiration of a tenant's estate in property.

1352 (b) "Tenant" means the holder of an estate for life or term  
 1353 of years in real property or personal property, or both.

1354 (2) If a trust has not been created, expenses shall be  
 1355 apportioned between the tenant and remainderman as follows:

1356 (a) The following expenses are allocated to and shall be  
 1357 paid by the tenant:

1358 1. All ordinary expenses incurred in connection with the  
 1359 administration, management, or preservation of the property,  
 1360 including interest, ordinary repairs, regularly recurring taxes  
 1361 assessed against the property, and expenses of a proceeding or  
 1362 other matter that concerns primarily the tenant's estate or use  
 1363 of the property.

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 1364 2. Recurring premiums on insurance covering the loss of the  
 1365 property or the loss of income from or use of the property.  
 1366 3. Any of the expenses described in subparagraph (b)3.  
 1367 which are attributable to the use of the property by the tenant.  
 1368 (b) The following expenses are allocated to and shall be  
 1369 paid by the remainderman:  
 1370 1. Payments on the principal of a debt secured by the  
 1371 property, except to the extent the debt is for expenses  
 1372 allocated to the tenant.  
 1373 2. Expenses of a proceeding or other matter that concerns  
 1374 primarily the title to the property, other than title to the  
 1375 tenant's estate.  
 1376 3. Except as provided in subparagraph (a)3., expenses  
 1377 related to environmental matters, including reclamation,  
 1378 assessing environmental conditions, remedying and removing  
 1379 environmental contamination, monitoring remedial activities and  
 1380 the release of substances, preventing future releases of  
 1381 substances, collecting amounts from persons liable or  
 1382 potentially liable for the costs of such activities, penalties  
 1383 imposed under environmental laws or regulations and other  
 1384 payments made to comply with those laws or regulations,  
 1385 statutory or common law claims by third parties, and defending  
 1386 claims based on environmental matters.  
 1387 4. Extraordinary repairs.  
 1388 (c) If the tenant or remainderman incurred an expense for  
 1389 the benefit of his or her own estate without consent or  
 1390 agreement of the other, he or she must pay such expense in full.  
 1391 (d) Except as provided in paragraph (c), the cost of, or  
 1392 special taxes or assessments for, an improvement representing an

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 1393 addition of value to property forming part of the principal  
 1394 shall be paid by the tenant if the improvement is not reasonably  
 1395 expected to outlast the estate of the tenant. In all other  
 1396 cases, only a part shall be paid by the tenant while the  
 1397 remainder shall be paid by the remainderman. The part payable by  
 1398 the tenant is ascertainable by taking that percentage of the  
 1399 total that is found by dividing the present value of the  
 1400 tenant's estate by the present value of an estate of the same  
 1401 form as that of the tenant, except that it is limited for a  
 1402 period corresponding to the reasonably expected duration of the  
 1403 improvement. The computation of present values of the estates  
 1404 shall be made by using the rate defined in 26 U.S.C. s. 7520,  
 1405 then in effect and, in the case of an estate for life, the  
 1406 official mortality tables then in effect under 26 U.S.C. s.  
 1407 7520. Other evidence of duration or expectancy may not be  
 1408 considered.

1409 (3) This section does not apply to the extent it is  
 1410 inconsistent with the instrument creating the estates, the  
 1411 agreement of the parties, or the specific direction of the  
 1412 taxing or other statutes.

1413 (4) The common law applicable to tenants and remaindermen  
 1414 supplements this section, except as modified by this section or  
 1415 other laws.

1416 Section 31. Section 738.804, Florida Statutes, is amended  
 1417 to read:

1418 738.804 Application.—

1419 (1) Except as provided in s. 738.1041(9), this chapter  
 1420 pertains to the administration of a trust and is applicable to  
 1421 any trust that is administered in this state or under its law.

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 1422 This chapter also applies to any estate that is administered in  
 1423 this state unless the provision is limited in application to a  
 1424 trustee, rather than a fiduciary.

1425 (2) Except as provided in the trust instrument, the will,  
 1426 or this chapter, this chapter ~~applies shall apply~~ to any receipt  
 1427 or expense received or incurred and any disbursement made after  
 1428 January 1, 2003, by any trust or decedent's estate, whether  
 1429 established before or after January 1, 2003, and whether the  
 1430 asset involved was acquired by the trustee or personal  
 1431 representative before or after January 1, 2003. Receipts or  
 1432 expenses received or incurred and disbursements made before  
 1433 January 1, 2003, ~~are shall be~~ governed by the law of this state  
 1434 in effect at the time of the event, except as otherwise  
 1435 expressly provided in the will or terms of the trust or ~~under~~ ~~the~~  
 1436 this chapter.

1437 Section 32. This act shall take effect January 1, 2013.

**The Florida Senate**  
**BILL ANALYSIS AND FISCAL IMPACT STATEMENT**

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

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Prepared By: The Professional Staff of the Judiciary Committee

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BILL: SB 996

INTRODUCER: Senator Dean

SUBJECT: Property Fraud

DATE: January 24, 2012

REVISED: \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	O'Connor	Cibula	JU	<b>Pre-meeting</b>
2.	_____	_____	CJ	_____
3.	_____	_____	BC	_____
4.	_____	_____	_____	_____
5.	_____	_____	_____	_____
6.	_____	_____	_____	_____

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**I. Summary:**

The bill defines the offense of fraudulent creation of an interest in real or personal property. The bill subjects a person who commits the new offense to punishment for a third-degree felony. A person commits the offense if the person, with the intent to defraud another, files or causes to be filed with the clerk of a circuit court any document against real or personal property that the person knows to contain a material misstatement, misrepresentation, or omission of fact.

This bill creates section 817.535, Florida Statutes.

**II. Present Situation:**

**Florida's Recording Act**

Florida law requires that any conveyance, transfer, mortgage, or other interest in real property be recorded in the public records of the county where the property is located.<sup>1</sup> Every state in the United States has an analogous statutory recording system making information about interests in property available to the public.<sup>2</sup> The purpose of a public recording system for land titles is to allow access to any person such as a creditor, tax collector, or prospective purchaser to ascertain who owns the property and what encumbrances might exist to the title.<sup>3</sup> Because these records are open for the public to rely on and have the potential to call into question the owner's clear title to the property, having accurate property records is vital.

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<sup>1</sup> Section 695.01, F.S.

<sup>2</sup> Jesse Dukeminier and James E. Krier, *PROPERTY*, 662 (5th ed. 2002).

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

## **Fraud**

Chapter 817 of the Florida Statutes covers a variety of fraudulent practices. Section 817.54, F.S., for example, states that a person commits a third-degree felony if he or she obtains a mortgage, mortgage note, or promissory note by false representation with the intent to defraud. Other chapters contain similar penalties specific to liens. Under s. 713.31(3), F.S., it is a third-degree felony to fraudulently file a construction lien. A construction lien is considered fraudulent if the lienor purposely exaggerates the amount of the lien, includes work not performed, or compiles his or her claim with willful and gross negligence.<sup>4</sup>

## **Fraudulent Recording of Deeds**

Florida law offers redress for a property owner where a fraudulent deed is recorded with respect to his or her property. A property owner who has a fraudulent deed recorded on his or her property may pursue a suit to quiet title, which is “an equitable action that involves clearing a title of an invalid charge against the title.”<sup>5</sup> A property owner may also choose to sue for slander of title, a tort action for which damages may be recovered.<sup>6</sup> The court may award costs as it considers equitable in a quiet title action, but such costs do not include attorney’s fees.<sup>7</sup> A tort claim is not actionable as slander of title if the defendant acted without malice and with the belief that he or she had a valid claim against the property and was entitled to record that claim.<sup>8</sup>

### **III. Effect of Proposed Changes:**

The bill defines the offense of fraudulent creation of an interest in real or personal property. The bill subjects a person who commits the new offense to punishment for a third-degree felony. A person commits the offense if the person, with the intent to defraud another, files or causes to be filed with the clerk of a circuit court any document against real or personal property that the person knows to contain a material misstatement, misrepresentation, or omission of fact.

Although ss. 817.54 and 713.31(3), F.S., provide penalties for fraud relating to mortgages and construction liens respectively, the bill language criminalizes a broader range of fraudulent filings that may not otherwise be specifically addressed under the Florida Statutes.

### **IV. Constitutional Issues:**

#### **A. Municipality/County Mandates Restrictions:**

None.

#### **B. Public Records/Open Meetings Issues:**

None.

<sup>4</sup> Section 713.31(2)(a), F.S.

<sup>5</sup> 65 AM. JUR. 2d *Quieting Title and Determination of Adverse Claims* s. 2 (2011).

<sup>6</sup> *Id.*

<sup>7</sup> Section 86.081, F.S.; *see also* *Wiggins v. Wiggins*, 446 So. 2d 1078, 1079 (Fla. 1984) (citing *State ex rel. Royal Ins. Co. v. Barrs*, 99 So. 668 (Fla. 1924)).

<sup>8</sup> *McAllister v. Breakers Seville Ass’n Inc.*, 981 So. 2d 566, 575 (Fla. 4th DCA 2008).

C. Trust Funds Restrictions:

None.

**V. Fiscal Impact Statement:**

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

A person found guilty of the third-degree felony offense articulated in the bill is subject to a fine of up to \$5,000<sup>9</sup> and up to five years in prison.<sup>10</sup>

C. Government Sector Impact:

According to the Office of the State Courts Administrator (the office), the bill may have a minimal fiscal impact because a few more cases may be filed as a result of the specific provisions of the statute. The office does not anticipate a large impact on judicial workload because existing statute essentially covers the behavior the bill prohibits.<sup>11</sup>

**VI. Technical Deficiencies:**

None.

**VII. Related Issues:**

None.

**VIII. Additional Information:**

A. Committee Substitute – Statement of Substantial Changes:

(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

B. Amendments:

None.

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This Senate Bill Analysis does not reflect the intent or official position of the bill's introducer or the Florida Senate.

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<sup>9</sup> Section 775.083(1)(c), F.S.

<sup>10</sup> Section 775.082(3)(d), F.S.

<sup>11</sup> Office of the State Courts Administrator, *2012 Judicial Impact Statement, SB 996* (Dec. 7, 2011) (on file with the Senate Committee on Judiciary).



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LEGISLATIVE ACTION

Senate	.	House
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The Committee on Judiciary (Richter) recommended the following:

**Senate Amendment (with title amendment)**

Delete everything after the enacting clause  
and insert:

Section 1. Section 817.535, Florida Statutes, is created to  
read:

817.535 Fraudulent creation of interest in real or personal  
property.—

(1) A person may not, with the intent to defraud another,  
file or cause to be filed for recording in the official records  
a document relating to real or personal property which the  
person knows to contain a material misstatement,  
misrepresentation, or omission of fact. The filed document may



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14 include, but is not limited to, a deed, lease, bill of sale,  
15 agreement, mortgage, notice of claim of lien, notice of levy,  
16 promissory note, mortgage note, or any other instrument that  
17 relates to the ownership, transfer, or encumbrance of or claim  
18 against real or personal property or any interest in real or  
19 personal property.

20 (2) A person who violates subsection (1) commits the  
21 offense of fraudulent creation of an interest in real or  
22 personal property, a felony of the third degree, punishable as  
23 provided in s. 775.082, s. 775.083, or s. 775.084.

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

25  
26 ===== T I T L E A M E N D M E N T =====

27 And the title is amended as follows:

28 Delete everything before the enacting clause  
29 and insert:

30 A bill to be entitled  
31 An act relating to property fraud; creating s.  
32 817.535, F.S.; prohibiting a person, with intent to  
33 defraud another, from filing or causing to be filed a  
34 document relating to the ownership, transfer, or  
35 encumbrance of or claim against real or personal  
36 property, or any interest in real or personal  
37 property, which the person knows contains a material  
38 misstatement, misrepresentation, or omission of fact;  
39 providing criminal penalties; providing an effective  
40 date.

By Senator Dean

3-00840-12

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1 A bill to be entitled  
 2 An act relating to property fraud; creating s.  
 3 817.535, F.S.; providing that a person who, with  
 4 intent to defraud another, knowingly files or causes  
 5 to be filed with the clerk of the circuit court a  
 6 document relating to the ownership, transfer, or  
 7 encumbrance of or claim against real or personal  
 8 property, or any interest in real or personal, which  
 9 contains a material misstatement, misrepresentation,  
 10 or omission of fact commits the offense of fraudulent  
 11 creation of an interest in real or personal property;  
 12 providing criminal penalties; providing an effective  
 13 date.

14  
 15 Be It Enacted by the Legislature of the State of Florida:

16  
 17 Section 1. Section 817.535, Florida Statutes, is created to  
 18 read:

19 817.535 Fraudulent creation of interest in real or personal  
 20 property.-

21 (1) A person who, with intent to defraud another, knowingly  
 22 files or causes to be filed with the clerk of the circuit court  
 23 for any county of this state a document, including, but not  
 24 limited to, a deed, lease, bill of sale, agreement, mortgage,  
 25 notice or claim of lien, notice of levy, or any other instrument  
 26 that relates to the ownership, transfer, or encumbrance of or  
 27 claim against real or personal property, or any interest in real  
 28 or personal property, and that contains a material misstatement,  
 29 misrepresentation, or omission of fact, commits the offense of

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30 fraudulent creation of an interest in real or personal property.  
 31 (2) A person who violates subsection (1) commits a felony  
 32 of the third degree, punishable as provided in s. 775.082, s.  
 33 775.083, or s. 775.084.

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

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

**The Florida Senate**  
**BILL ANALYSIS AND FISCAL IMPACT STATEMENT**

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Judiciary Committee

BILL: SB 1458

INTRODUCER: Senator Diaz de la Portilla

SUBJECT: Dispute Resolution

DATE: January 24, 2012      REVISED: \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	O'Connor	Cibula	JU	<b>Pre-meeting</b>
2.	_____	_____	GO	_____
3.	_____	_____	BC	_____
4.	_____	_____	_____	_____
5.	_____	_____	_____	_____
6.	_____	_____	_____	_____

**I. Summary:**

The Florida Arbitration Act (FAC), based on a 1955 model act, was passed in 1957 and revised in 1967. Since then, it has gone mostly unchanged. This bill creates the Revised Florida Arbitration Act based on a 2000 model act. The bill includes new concepts that were not included in the original act, such as the ability for arbitrators to issue provisional remedies, challenges based on notice, consolidation of separate arbitration proceedings, conflict disclosure requirements, immunity of arbitrators, and other substantive changes to the law. The bill provides a detailed framework for arbitration conducted under Florida law and repeals sections of the FAC, the substantive concepts of which are subsumed by the revised act.

This bill substantially amends the following sections of the Florida Statutes: 682.01, 682.02, 682.03, 682.04, 682.05, 682.06, 682.07, 682.08, 682.09, 682.10, 682.11, 682.12, 682.13, 682.14, 682.15, 682.19, 682.20, 44.104, 44.107, 440.1926, 489.1402, and 731.401.

This bill creates the following sections of the Florida Statutes: 682.011, 682.012, 682.013, 682.014, 682.015, 682.031, 682.032, 682.033, 682.041, 682.051, 682.081, 682.181, 682.23, 682.24, and 682.25.

This bill repeals the following sections of the Florida Statutes: 682.16, 682.17, 682.18, 682.21, and 682.22.

## II. Present Situation:

Florida has traditionally favored arbitration. In 1957, the Legislature enacted the Florida Arbitration Code,<sup>1</sup> which prescribes a framework governing the rights and procedures under arbitration agreements, and for the enforceability of arbitration agreements. It was subsequently amended in 1967,<sup>2</sup> but remains largely unchanged. Florida's current Arbitration Code is based on the 1955 Uniform Arbitration Act (UAA). Alternative dispute resolution has been recognized as a viable alternative to litigation in a court or jury trial, and it historically has been attractive for the resolution of commercial business disputes.

### Arbitration Generally

Arbitration is an alternative dispute resolution process in which parties “subm[it] a dispute to one or more impartial persons for a final and binding decision.”<sup>3</sup> Arbitration is intended to be a speedy and economical alternative to court litigation, which is often slow, time-consuming, and expensive.<sup>4</sup> Parties to arbitration voluntarily give up substantial safeguards that litigants in court proceedings enjoy, which may include the discovery process where parties obtain information from one another.<sup>5</sup>

### Federal Arbitration Act

Congress enacted the Federal Arbitration Act (FAA) in 1925 to establish, in part, the enforceability of pre-dispute arbitration agreements involving interstate commerce.<sup>6</sup> The United States Supreme Court has recognized that with the passage of the FAA, Congress expressed intent for courts to enforce arbitration agreements and to place these agreements on an equal footing with other contracts.<sup>7</sup> The FAA established a federal policy that favors and encourages the use of arbitration to resolve disputes. Due to this federal policy, 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 noncommercial consumer contracts.<sup>8</sup>

### Florida Arbitration Code

The Florida Arbitration Code<sup>9</sup> (FAC) is applicable to arbitration agreements that do not involve interstate commerce.<sup>10</sup> The FAC governs the arbitration process, including the scope and

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<sup>1</sup> Chapter 57-402, Laws of Fla.

<sup>2</sup> Chapter 67-254, Laws of Fla.

<sup>3</sup> See the definition of “arbitration” at the website of the American Arbitration Association, <http://www.adr.org/sp.asp?id=28749> (last visited Jan. 18, 2012).

<sup>4</sup> *ManorCare Health Services, Inc. v. Stiehl*, 22 So. 3d 96, 105 (Fla. 2d DCA 2009).

<sup>5</sup> Amanda Perwin, *Mandatory Binding Arbitration: Civil Injustice By Corporate America*, White Paper for the Center for Justice & Democracy, No. 13 (August 2005), available at <http://centerjd.org/content/white-paper-mandatory-binding-arbitration-civil-injustice-corporate-america> (last visited Jan. 18, 2012).

<sup>6</sup> See 9 U.S.C.A. ss. 1-16.

<sup>7</sup> *Allied-Bruce Terminix Cos, Inc. v. Dobson*, 513 U.S. 265, 270-271 (1995).

<sup>8</sup> Shelley McGill, *Consumer Arbitration Clause Enforcement: A Balanced Legislative Response*, 47 AM. BUS. L.J. 361, 366 (Fall 2010).

<sup>9</sup> Sections 682.01-682.22, F.S.

<sup>10</sup> Michael Cavendish, *The Concept of Arbitrability Under the Florida Arbitration Code*, 82 FLA. B.J. 18, 19 (Nov. 2008) (citing *O’Keefe Architects, Inc. v. CED Construction Partners, Ltd.*, 944 So. 2d 181, 184 (Fla. 2006)).

enforceability of arbitration agreements, the appointment of arbitrators, arbitration hearing procedures, the entry and enforcement of arbitral awards, and any appeals of awards. Under the FAC, Florida courts have held that the determination of whether any dispute is subject to arbitration should be resolved in favor of arbitration.<sup>11</sup> A court's role in deciding whether to compel arbitration is limited to three gateway issues to determine the enforceability of an arbitration agreement: (1) whether a valid written agreement to arbitrate exists; (2) whether an arbitrable issue exists; and (3) whether the right to arbitration has been waived.<sup>12</sup> The FAC applies in arbitration cases only to the extent that it is not in conflict with federal law.<sup>13</sup>

### **III. Effect of Proposed Changes:**

This bill largely adopts the provisions of the 2000 revision of the Uniform Arbitration Act, as approved by the National Conference of Commissioners on Uniform State Laws.<sup>14</sup> The bill significantly amends or repeals each section of the existing Florida Arbitration Code, and amends s. 682.01, F.S., to rename the chapter as the "Revised Florida Arbitration Code." This bill also creates s. 682.011, F.S., to provide definitions.

#### **Notice**

The bill creates s. 682.012, F.S., to provide notice requirements. Notice is provided by taking reasonable action to inform the other person, regardless of actual knowledge. Actual knowledge or receipt of notice is sufficient. Additionally, the delivery of a notice to the person's residence or place of business, or another location held out by the person as a place of delivery, is sufficient to provide notice.

#### **Applicability**

The bill creates s. 682.013, F.S., providing applicability of the revised act. The revised act applies prospectively for agreements to arbitrate made on or after the effective date. It also applies retroactively if all parties agree to apply the revised act. On July 1, 2015, the revised act will apply to all arbitration agreements, regardless of when they were made or whether the parties agreed retroactive application or not.

#### **Effect of Agreement to Arbitrate**

The bill creates s. 682.014, F.S., to indicate that although the revised act is a default statute, "the parties' autonomy as expressed in their agreements concerning an arbitration normally should control the arbitration."<sup>15</sup> However, there are some provisions that the parties cannot waive

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<sup>11</sup> *Id.* at 20 (citing *Waterhouse Constr. Group, Inc v. 5891 S.W. 64th Street, LLC*, 949 So. 2d 1095, 1099 (Fla. 3d DCA 2007)).

<sup>12</sup> *Seifert v. U.S. Home Corp.*, 750 So. 2d 633, 636 (Fla. 1999) (citing *Terminix Int'l Co. L.P. v. Ponzio*, 693 So. 2d 104, 106 (Fla. 5th DCA 1997)).

<sup>13</sup> *Powertel, Inc. v. Bexley*, 743 So. 2d 570, 573 (Fla. 1st DCA 1999), *review denied*, 763 So. 2d 1044 (Fla. 2000), and *Florida Power Corp. v. Casselberry*, 793 So. 2d 1174, 1179 (Fla. 5th DCA 2001).

<sup>14</sup> See Business Law Section of The Florida Bar, *Analysis of Proposed Revisions to the Florida Arbitration Code* (2012) (on file with the Senate Committee on Judiciary).

<sup>15</sup> *Id.* at 9.

before a dispute arises or cannot waive at any point.<sup>16</sup> Parties may not waive the right to judicial relief, the right to a provisional remedy, jurisdiction of the courts, the right to appeal, the right to notice, the right to disclosure, or the right to an attorney, before a controversy arises. Parties may not waive other requirements at any time which would fundamentally undermine the arbitration agreement.

### **Judicial Relief**

The bill creates s. 682.015, F.S., providing that a petition for judicial relief must be made to the court in a manner provided by law or by the rules of court. Notice of an initial petition to the court must be provided in a manner consistent with the service of a summons in a civil action. Other motions must be made in the manner provided by law or by the rules of court for serving motions in pending cases.

### **Nature of Arbitration Agreements**

The bill amends s. 682.02, F.S., providing that an agreement to submit to arbitration is valid, enforceable, and irrevocable except upon grounds that a contract can otherwise be revoked. The court decides whether an agreement to arbitrate is valid, while an arbitrator decides whether a condition precedent to arbitrability has been fulfilled and whether the contract containing the agreement to arbitrate is enforceable. Arbitration may continue during a court challenge of the arbitration agreement pending final resolution unless the court orders otherwise.

### **Compelling or Staying Arbitration**

The bill amends s. 682.03, F.S., providing that if a party with a valid agreement to arbitrate fails to appear or does not oppose a motion to compel arbitration, the court must order the arbitration. If the refusing party opposes the motion, the court must decide the issue and order arbitration unless it finds that there is no enforceable agreement to arbitrate the matter. If the court finds that there is no enforceable agreement to arbitrate, then it may not order the parties to arbitrate. However, the court may not refuse to order arbitration on the merits of the claim.

The motion to compel arbitration may be made in any court having jurisdiction. However, if the controversy is already pending in court, the motion to compel arbitration must be made in the court where the controversy is pending. If a pending case exists, the court must halt the judicial proceeding until it renders a final decision regarding arbitrability. If the court orders arbitration, the judicial proceeding must be stayed pending arbitration.

### **Provisional Remedies**

The bill creates s. 682.031, F.S., providing for conditions of provisional remedies. Before an arbitrator is appointed, the court may enter an order for provisional remedies to protect the effectiveness of the arbitration proceeding to the same extent and under the same conditions as if the controversy were the subject of a civil action. After an arbitrator is appointed, the arbitrator may issue provisional remedies to the same extent that a court could in a civil action. After an

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<sup>16</sup> *Id.* at 9.

arbitrator is appointed, a party may move for a court order for provisional remedies only if the matter is urgent and the arbitrator cannot act in a timely matter or provide an adequate remedy.

### **Initiation of Arbitration**

The bill creates s. 682.032, F.S., providing that a person initiates arbitration by providing notice by the manner agreed to by the parties, or by certified mail if the agreement does not provide for a method of notice, or by a method allowed by law or rules of court for the commencement of a civil action. The notice must describe the nature of the controversy and the remedy sought. Unless a party objects for lack of notice by the beginning of the arbitration hearing, notice challenges are waived if the party appears at the hearing.

### **Consolidation of Separate Arbitration Proceedings**

The bill creates s. 682.033, F.S., providing several conditions upon which a court may consolidate separate arbitration proceedings:

- Separate agreements and proceedings exist between the same parties or one party is a party to a separate agreement to arbitrate or a separate arbitration proceeding with a third person;
- The claims subject to the agreements to arbitrate arise in substantial part from the same transaction or series of transactions;
- The existence of a common issue of law or fact creates the possibility of conflicting decisions if separate arbitration proceedings occur; and
- Prejudice resulting from a failure to consolidate is not outweighed by the risk of undue delay or prejudice to the rights of or hardship to parties opposing consolidation.

The court may consolidate some claims while allowing other claims to be resolved separately. However, the court may not order consolidation if the agreement to arbitrate prohibits consolidation.

### **Appointment of Arbitrators by the Court**

The bill amends s. 682.04, F.S., to provide conditions for the court to appoint arbitrators. The court, on motion, must appoint one or more arbitrators if the parties have not agreed on a method or the agreed upon method fails, or one or more parties failed to respond to the demand for arbitration or an arbitrator fails to act and a successor has not been appointed. The court must not appoint an arbitrator with a known, direct, and material interest in the outcome of the arbitration or a relationship to a party if the agreement calls for a neutral arbitrator.

### **Disclosure by Arbitrator**

The bill amends s. 682.041, F.S., providing that before accepting appointment, an arbitrator must disclose potential conflicts or impartiality including financial or relationship conflicts. The arbitrator must continue to disclose any facts that may affect the arbitrator's impartiality that the arbitrator learns after accepting the appointment. Upon disclosure, if a party objects to the appointment or continued service, the objection may be grounds for vacating an award. If the arbitrator did not disclose a fact as required, the court may vacate an award upon timely

objection by a party. An arbitrator who does not disclose an interest in the outcome of the arbitration is presumed to act with evident partiality. Substantial compliance with agreed upon procedures is a condition precedent to a motion to vacate an award on these grounds.

### **Majority Action by Arbitrators**

The bill amends s. 682.05, F.S., providing that if there is more than one arbitrator; powers of the arbitrator must be exercised by a majority of the arbitrators.

### **Immunity of Arbitrator**

The bill creates s. 682.051, F.S., granting arbitrators immunity from civil liability to the same extent as judges acting in a judicial capacity. Failure of an arbitrator to disclose conflicts does not waive immunity. Arbitrators cannot be compelled to testify about occurrences during arbitration except to determine the claim of an arbitrator against a party or to a hearing on a motion to vacate an award if the moving party establishes prima facie that a ground for vacating the award exists. An arbitrator sued by a party must be awarded attorney fees if the court decides that the arbitrator has immunity.

### **Hearing**

The bill amends s. 682.06, F.S., granting broad authority to an arbitrator to conduct the arbitration as the arbitrator considers appropriate. An arbitrator may decide a request for summary disposition if the parties agree, or if a party gives notice of the request to the other parties and they have an opportunity to respond. The arbitrator must provide at least five days notice prior to the beginning of the hearing. The arbitrator then may control the hearing, including adjourning the hearing from time to time as necessary. Each party has the right to be heard, to present material evidence, and to cross-examine witnesses. If an arbitrator is unable to act during the proceeding, a replacement arbitrator must be appointed.

### **Representation by Attorney**

The bill amends s. 682.07, F.S., providing that a party to an arbitration proceeding may be represented by an attorney.

### **Witnesses, Subpoenas, and Depositions**

The bill amends s. 682.08, F.S., providing that an arbitrator has the authority to issue a subpoena in the same manner as a court in a civil action. Arbitrators may allow discovery and depositions of witnesses and may determine the conditions under which discovery and depositions may be taken. An arbitrator may also issue a protective order to prevent disclosure of privileged or confidential information, trade secrets, or other protected information, to the same extent as a court could in a civil action. Subpoena laws apply to arbitration proceedings, and out of state subpoenas are treated like they would be in a civil action.

### **Judicial Enforcement of Preaward Ruling by Arbitrator**

The bill creates s. 682.081, F.S., to establish that preaward rulings by an arbitrator may be incorporated into the ruling on motion by the prevailing party, and the court must then summarily decide the motion and issue an order.

### **Award**

The bill amends s. 682.09, F.S., to provide that an arbitrator must make a signed record of an award and provide a copy to each party. The award must be made within the time specified by the agreement to arbitrate or within the time ordered by the court. The time may be extended by a court order or by agreement of the parties to the arbitration.

### **Change of Award by Arbitrator**

The bill amends s. 682.10, F.S., to provide conditions to modify or correct an award. The arbitrator may correct an award when a miscalculation or problem of form, but not substance, results in an incorrect initial award. The arbitrator may also modify the award if the arbitrator has not yet made a final and definite award, or to clarify the award. A motion to change or modify an award must be made and notice provided within 20 days of the moving party receiving notice of the award. A motion to object to the award on any other basis must be made within 10 days of receipt of the notice of the award.

### **Remedies, Fees, and Expenses of Arbitration Proceeding**

The bill amends s. 682.11, F.S., providing that arbitrators may award punitive damages and attorney fees to the same extent they would be available in a civil action, but the arbitrator must justify such damages in the award. An arbitrator has broad authority to impose all other remedies, regardless of whether a court would provide similar remedies in a civil action.

### **Confirming or Vacating an Award**

The bill amends s. 682.12, F.S., providing that after an award is granted, a party may motion the court to confirm the award and provide a confirming order.

The bill amends s. 682.13, F.S., providing conditions upon which a court may vacate an award:

- Evident partiality by an arbitrator appointed as a neutral arbitrator;
- Corruption by an arbitrator;
- Misconduct by an arbitrator prejudicing the rights of a party to the arbitration proceeding;
- An arbitrator refused to postpone the hearing upon showing of sufficient cause of postponement;
- An arbitrator refused to consider material evidence;
- An arbitrator conducted the hearing contrary to the act so as to substantially prejudice the rights of a party to the arbitration proceeding;
- An arbitrator exceeded his or her powers;

- There was no agreement to arbitrate, unless the moving party participated in the hearing without objection; or
- The arbitration was conducted without proper notice so as to substantially prejudice the rights of a party to the arbitration proceeding.

A motion to vacate an award must be filed within 90 days of the award, or within 90 days of the finding of corruption, fraud, or other undue means, or within 90 days of when the party knew or should have known of such a finding. If the court vacates an award for any reason other than the lack of an agreement to arbitrate, the court may order a rehearing. If a motion to vacate is denied, the court must confirm the award.

### **Modification or Correction of Award**

The bill amends s. 682.14, F.S., providing the court must modify or correct an award if:

- A miscalculation of figures or mistake in the description of any person, thing, or property referred to in the award is evident;
- The arbitrator awarded something not submitted in the arbitration and making such a correction will not affect the merits of the decision; or
- The award is imperfect as a matter of form, not substance.

If the application is granted, the court must modify and correct the award. If not, the court must confirm the award.

### **Judgment or Decree on Award**

The bill amends s. 682.15, F.S., requiring the court, upon granting an order confirming, vacating, modifying, or correcting an award, to enter an order as if for a civil judgment. The court may allow reasonable costs of the motion and subsequent judicial proceedings. On motion by the prevailing party, the court may add reasonable attorney fees and expenses.

### **Jurisdiction**

The bill creates s. 682.181, F.S., providing a court with jurisdiction over the controversy has the right to enforce an agreement to arbitrate. An agreement to arbitrate in this state confers exclusive jurisdiction on the court to enter judgment on an award.

### **Venue**

The bill amends s. 682.19, F.S., providing that a petition for judicial relief under this act must be filed in the county specified in the agreement to arbitrate, unless a hearing has already been held, in which case the petition must be filed in that court. Otherwise, the petition may be filed in any Florida county in which an adverse party has a residence or a place of business. If no adverse party has a residence or place of business in Florida, the petition may be filed in any Florida county.

## **Appeals**

The bill amends s. 682.20, F.S., providing for appeals from:

- An order denying an application to compel arbitration;
- An order granting a motion to stay arbitration;
- An order confirming an award;
- An order denying confirmation of an award except in certain circumstances;
- An order modifying or correcting an award;
- An order vacating an award without directing a rehearing; or
- A judgment or decree entered pursuant to this act.

Appeals are taken in the same manner and to the same extent as from orders or judgments in a civil action.

## **Electronic Signatures in Global and National Commerce Act**

The bill creates s. 682.23, F.S., providing that the revised act conforms to the requirements of s. 102 of the Electronic Signatures in Global and National Commerce Act.<sup>17</sup>

## **Effective Date Applicability**

The revised act does not affect an action or proceeding commenced or right accrued before the revised act takes effect.

## **Disputes Excluded**

The bill creates s. 682.25, F.S., providing that the revised act does not apply to any dispute involving child custody, visitation, or child support.

## **Mediation Alternatives to Judicial Action**

The bill renames ch. 44, F.S., as "Alternative Dispute Resolution" and amends ss. 44.104, 44.107, and 731.401 F.S., removing references to binding arbitration. This ensures that the revised act is the sole statute in Florida pertaining to binding arbitration. The bill also amends ss. 440.1926 and 489.144, F.S., to correctly cross-reference the revised act.

## **Effective Date**

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

## **IV. Constitutional Issues:**

### **A. Municipality/County Mandates Restrictions:**

None.

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<sup>17</sup> 15 U.S.C. s. 7002.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. Other Constitutional Issues:

Retroactive operation is disfavored by courts and generally “statutes are prospective, and will not be construed to have retroactive operation unless the language employed in the enactment is so clear it will admit of no other construction.”<sup>18</sup> The Florida Supreme Court has articulated four issues to consider when determining whether a statute may be retroactively applied:

- Is the statute procedural or substantive?
- Was there an unambiguous legislative intent for retroactive application?
- Was a person’s right vested or inchoate?
- Is the application of the statute to these facts unconstitutionally retroactive?<sup>19</sup>

The general rule of statutory construction is that a procedural or remedial statute may operate retroactively, but that a substantive statute may not operate retroactively without clear legislative intent. Substantive laws either create or impose a new obligation or duty, or impair or destroy existing rights, and procedural laws enforce those rights or obligations.<sup>20</sup>

Notwithstanding a determination of whether the provisions in the bill are procedural or substantive, the bill makes it clear that the Legislature intends to apply the law retroactively to all pre-existing agreements to arbitrate after July 1, 2015. “Where a statute expresses clear legislative intent for retroactive application, courts will apply the provision retroactively.”<sup>21</sup> A court will not follow this rationale, however, if applying a statute retroactively will impair vested rights, create new obligations, or impose new penalties.<sup>22</sup>

Under limited circumstances, it is possible that the bill could affect vested rights under a contract if the contracting parties agreed to arbitration prior to the bill’s effective date and agreed to arbitrate under the laws governing arbitration at the time of their agreement. However, in effect the retroactive application of the bill is most likely constitutionally permissible as explained below by the Business Law Section of The Florida Bar:

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<sup>18</sup> Norman J. Singer and J.D. Shambie Singer, *Prospective or retroactive interpretation*, 2 SUTHERLAND STATUTORY CONSTR. s. 41:4 (6th ed. 2009).

<sup>19</sup> *Weingrad v. Miles*, 29 So. 3d 406, 409 (Fla. 3d DCA 2010) (internal citations omitted).

<sup>20</sup> See *Alamo Rent-A-Car, Inc. v. Mancusi*, 632 So. 2d 1352, 1358 (Fla. 1994); *In re Rules of Criminal Procedure*, 272 So. 2d 65, 65 (Fla. 1972).

<sup>21</sup> *Weingrad*, 29 So. 3d at 410.

<sup>22</sup> *Id.* at 411.

[Senate Bill]1458 includes a provision to apply it to contracts retroactively in order to apply the proposed arbitration law uniformly and avoid two sets of rules for arbitration agreements covering long durations, and therefore, there exists a legally legitimate rationale for retroactivity. Further, SB 1458 is not intended to eliminate existing rights belonging to contracting parties. Instead, the bill updates the law to make it consistent with how courts have interpreted the FAC. Moreover, contracting parties should not face the danger of losing vested rights because they have 3 years in which to determine whether to allow the revised act to cover their arbitration agreement or elect to have the original FAC govern their respective arbitration agreement. In other words, after SB 1458 becomes law but before 2015, the parties can agree to have the original FAC govern their arbitration agreement.<sup>23</sup>

#### **V. Fiscal Impact Statement:**

##### **A. Tax/Fee Issues:**

None.

##### **B. Private Sector Impact:**

None.

##### **C. Government Sector Impact:**

According to the Office of the State Courts Administrator (OSCA), the fiscal impact on the courts cannot be precisely quantified, but OSCA anticipates judicial workload may increase as a result of the bill. To the extent the bill results in additional court involvement in the arbitration process it could result in the need for more judges.<sup>24</sup>

#### **VI. Technical Deficiencies:**

The provisions in sections 4, 36, and 44 of this bill describing the application of the act to preexisting and future agreements to arbitrate are inconsistent. The Legislature may wish to resolve the inconsistency by removing sections 4, 36, and 44 from the bill and replacing those sections with a new section similar to the following:

Section XX. Section 682.XX, Florida Statutes, is created to read:

<sup>23</sup> E-Mail from the Business Law Section of The Florida Bar (Jan. 20, 2012) (on file with the Senate Committee on Judiciary).

<sup>24</sup> Office of the State Courts Administrator, *2012 Judicial Impact Statement, SB 1458* (Jan. 6, 2012) (on file with the Senate Committee on Judiciary).

682.XX Law applicable to arbitration agreements executed before July 1, 2012.--An agreement to arbitrate which is executed before July 1, 2012, shall be governed by chapter 682, Florida Statutes (2011) until July 1, 2015, unless the parties agree in a record to be governed by the law governing arbitration agreements in effect at the time of the arbitration. On and after July 1, 2015, all arbitration agreements shall be subject to the then applicable law governing agreements to arbitrate. This section may not be applied in a manner that impairs a contractual right.

**VII. Related Issues:**

Section 5 of the bill contains many internal cross references such as “a party to an agreement may not: (a) waive or agree to vary the effect of the requirements of s. 682.015(1), s. 682.02(1), s. 682.031, s. 682.08(1) or (2), s. 682.181, or s. 682.20 . . . .” The bill would be easier for practitioners to use if each reference was followed by a short descriptive clause of the referenced statute.

**VIII. Additional Information:**

- A. **Committee Substitute – Statement of Substantial Changes:**  
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

- B. **Amendments:**

None.



141064

LEGISLATIVE ACTION

Senate	.	House
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The Committee on Judiciary (Flores) recommended the following:

**Senate Amendment (with title amendment)**

Delete lines 212 - 223.

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

And the title is amended as follows:

Delete lines 8 - 9

and insert:

person receives notice;

By Senator Diaz de la Portilla

36-01261-12

20121458\_\_

1 A bill to be entitled  
 2 An act relating to dispute resolution; amending s.  
 3 682.01, F.S.; revising the short title of the "Florida  
 4 Arbitration Code" to the "Revised Florida Arbitration  
 5 Code"; creating s. 682.011, F.S.; providing  
 6 definitions; creating s. 682.012, F.S.; specifying how  
 7 a person gives notice to another person and how a  
 8 person receives notice; creating s. 682.013, F.S.;  
 9 specifying the applicability of the revised code;  
 10 creating s. 682.014, F.S.; providing that an agreement  
 11 may waive or vary the effect of statutory arbitration  
 12 provisions; providing exceptions; creating s. 682.015,  
 13 F.S.; providing for petitions for judicial relief;  
 14 providing for service of notice of an initial petition  
 15 for such relief; amending s. 682.02, F.S.; revising  
 16 provisions relating to the making of arbitration  
 17 agreements; requiring a court to decide whether an  
 18 agreement to arbitrate exists or a controversy is  
 19 subject to an agreement to arbitrate; providing for  
 20 determination of specified issues by an arbitrator;  
 21 providing for continuation of an arbitration  
 22 proceeding pending resolution of certain issues by a  
 23 court; revising provisions relating to applicability  
 24 of provisions to certain interlocal agreements;  
 25 amending s. 682.03, F.S.; revising provisions relating  
 26 to proceedings to compel and to stay arbitration;  
 27 creating s. 682.031, F.S.; providing for a court to  
 28 order provisional remedies before an arbitrator is  
 29 appointed and is authorized and able to act; providing

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

36-01261-12

20121458\_\_

30 for orders for provisional remedies by an arbitrator;  
 31 providing that a party does not waive a right of  
 32 arbitration by seeking provisional remedies in court;  
 33 creating s. 682.032, F.S.; providing for initiation of  
 34 arbitration; providing that a person waives any  
 35 objection to lack of or insufficiency of notice by  
 36 appearing at the arbitration hearing; providing an  
 37 exception; creating s. 682.033, F.S.; providing for  
 38 consolidation of separate arbitration proceedings as  
 39 to all or some of the claims in certain circumstances;  
 40 prohibiting consolidation if the agreement prohibits  
 41 consolidation; amending s. 682.04, F.S.; revising  
 42 provisions relating to appointment of an arbitrator;  
 43 prohibiting an individual with an interest in the  
 44 outcome of an arbitration from serving as a neutral  
 45 arbitrator; creating s. 682.041, F.S.; requiring  
 46 certain disclosures of interests and relationships by  
 47 a person before accepting appointment as an  
 48 arbitrator; providing a continuing obligation to make  
 49 such disclosures; providing for objections to an  
 50 arbitrator based on information disclosed; providing  
 51 for vacation of an award if an arbitrator failed to  
 52 disclose a fact as required; providing that an  
 53 arbitrator appointed as a neutral arbitrator who does  
 54 not disclose certain interests or relationships is  
 55 presumed to act with partiality for specified  
 56 purposes; requiring parties to substantially comply  
 57 with agreed to procedures of an arbitration  
 58 organization or any other procedures for challenges to

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

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59 arbitrators before an award is made in order to seek  
 60 vacation of an award on specified grounds; amending s.  
 61 682.05, F.S.; requiring that if there is more than one  
 62 arbitrator, the powers of an arbitrator must be  
 63 exercised by a majority of the arbitrators; requiring  
 64 all arbitrators to conduct the arbitration hearing;  
 65 creating s. 682.051, F.S.; providing immunity from  
 66 civil liability for an arbitrator or an arbitration  
 67 organization acting in the capacity of an arbitrator;  
 68 providing that this immunity is supplemental to any  
 69 immunity under other law; providing that failure to  
 70 make a required disclosure does not remove immunity;  
 71 providing that an arbitrator or representative of an  
 72 arbitration organization is not competent to testify  
 73 and may not be required to produce records concerning  
 74 the arbitration; providing exceptions; providing for  
 75 awarding an arbitrator, arbitration organization, or  
 76 representative of an arbitration organization with  
 77 reasonable attorney fees and expenses of litigation  
 78 under certain circumstances; amending s. 682.06, F.S.;  
 79 revising provisions relating to the conduct of  
 80 arbitration hearings; providing for summary  
 81 disposition, notice of hearings, adjournment, and  
 82 rights of a party to the arbitration proceeding;  
 83 requiring appointment of a replacement arbitrator in  
 84 certain circumstances; amending s. 682.07, F.S.;  
 85 providing that a party to an arbitration proceeding  
 86 may be represented by an attorney; amending s. 682.08,  
 87 F.S.; revising provisions relating to the issuance,

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88 service, and enforcement of subpoenas; revising  
 89 provisions relating to depositions; authorizing an  
 90 arbitrator to permit discovery in certain  
 91 circumstances; authorizing an arbitrator to order  
 92 compliance with discovery; authorizing protective  
 93 orders by an arbitrator; providing for applicability  
 94 of laws compelling a person under subpoena to testify  
 95 and all fees for attending a judicial proceeding, a  
 96 deposition, or a discovery proceeding as a witness;  
 97 providing for court enforcement of a subpoena or  
 98 discovery-related order; providing for witness fees;  
 99 creating s. 682.081, F.S.; providing for judicial  
 100 enforcement of a preaward ruling by an arbitrator in  
 101 certain circumstances; amending s. 682.09, F.S.;  
 102 revising provisions relating to the record needed for  
 103 an award; revising provisions relating to the time  
 104 within which an award must be made; amending s.  
 105 682.10, F.S.; revising provisions relating to  
 106 requirements for a motion to modify or correct an  
 107 award; amending s. 682.11, F.S.; revising provisions  
 108 relating to fees and expenses of arbitration;  
 109 authorizing punitive damages and other exemplary  
 110 relief and remedies; amending s. 682.12, F.S.;  
 111 revising provisions relating to confirmation of an  
 112 award; amending s. 682.13, F.S.; revising provisions  
 113 relating to grounds for vacating an award; revising  
 114 provisions relating to a motion for vacating an award;  
 115 providing for a rehearing in certain circumstances;  
 116 amending s. 682.14, F.S.; revising provisions relating

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

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117 to the time for moving to modify or correct an award;  
 118 deleting references to the term "umpire"; revising a  
 119 provision concerning confirmation of awards; amending  
 120 s. 682.15, F.S.; revising provisions relating to a  
 121 court order confirming, vacating without directing a  
 122 rehearing, modifying, or correcting an award;  
 123 providing for award of costs and attorney fees in  
 124 certain circumstances; repealing s. 682.16, F.S.,  
 125 relating to judgment roll and docketing of certain  
 126 orders; repealing s. 682.17, F.S., relating to  
 127 application to court; repealing s. 682.18, F.S.,  
 128 relating to the definition of the term "court" and  
 129 jurisdiction; creating s. 682.181, F.S.; providing for  
 130 jurisdiction relating to the revised code; amending s.  
 131 682.19, F.S.; revising provisions relating to venue  
 132 for actions relating to the code; amending s. 682.20,  
 133 F.S.; providing that an appeal may be taken from an  
 134 order denying confirmation of an award unless the  
 135 court has entered an order under specified provisions;  
 136 providing that all other orders denying confirmation  
 137 of an award are final orders; repealing s. 682.21,  
 138 F.S., relating to the previous code not applying  
 139 retroactively; repealing s. 682.22, F.S., relating to  
 140 conflict of laws; creating s. 682.23, F.S.; specifying  
 141 the relationship of the code to the Electronic  
 142 Signatures in Global and National Commerce Act;  
 143 creating s. 682.24, F.S.; specifying the effective  
 144 date of the revised code; providing for applicability;  
 145 creating s. 682.25, F.S.; providing that the revised

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146 code does not apply to any dispute involving child  
 147 custody, visitation, or child support; amending s.  
 148 44.104, F.S.; deleting references to binding  
 149 arbitration from provisions providing for voluntary  
 150 trial resolution; providing for temporary relief;  
 151 revising provisions relating to procedures in  
 152 voluntary trial resolution; providing that a judgment  
 153 is reviewable in the same manner as a judgment in a  
 154 civil action; deleting provisions relating to  
 155 applicability of the harmless error doctrine;  
 156 providing limitations on the jurisdiction of a trial  
 157 resolution judge; providing for the use of juries;  
 158 providing for the title of a trial resolution judge  
 159 and the use of judicial robes; amending s. 44.107,  
 160 F.S.; providing immunity for voluntary trial  
 161 resolution judges serving under specified provisions;  
 162 amending ss. 440.1926 and 489.1402, F.S.; conforming  
 163 cross-references; amending s. 731.401, F.S.; revising  
 164 a reference to binding arbitration under a specified  
 165 provision; providing directives to the Division of  
 166 Statutory Revision, including redesignating the title  
 167 of chapter 44, Florida Statutes, as "Alternative  
 168 Dispute Resolution"; providing an effective date.  
 169  
 170 Be It Enacted by the Legislature of the State of Florida:  
 171  
 172 Section 1. Section 682.01, Florida Statutes, is amended to  
 173 read:  
 174 682.01 Short title ~~Florida Arbitration Code.~~-This chapter

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175 ~~Sections 682.01-682.22~~ may be cited as the "Revised Florida  
176 Arbitration Code."

177 Section 2. Section 682.011, Florida Statutes, is created to  
178 read:

179 682.011 Definitions.—As used in this chapter, the term:

180 (1) "Arbitration organization" means an association,  
181 agency, board, commission, or other entity that is neutral and  
182 initiates, sponsors, or administers an arbitration proceeding or  
183 is involved in the appointment of an arbitrator.

184 (2) "Arbitrator" means an individual appointed to render an  
185 award, alone or with others, in a controversy that is subject to  
186 an agreement to arbitrate.

187 (3) "Court" means a court of competent jurisdiction in this  
188 state.

189 (4) "Knowledge" means actual knowledge.

190 (5) "Person" means an individual, corporation, business  
191 trust, estate, trust, partnership, limited liability company,  
192 association, joint venture, or government; governmental  
193 subdivision, agency, or instrumentality; public corporation; or  
194 any other legal or commercial entity.

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

198 Section 3. Section 682.012, Florida Statutes, is created to  
199 read:

200 682.012 Notice.—

201 (1) Except as otherwise provided in the Revised Florida  
202 Arbitration Code, a person gives notice to another person by  
203 taking action that is reasonably necessary to inform the other

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204 person in ordinary course, whether or not the other person  
205 acquires knowledge of the notice.

206 (2) A person has notice if the person has knowledge of the  
207 notice or has received notice.

208 (3) A person receives notice when it comes to the person's  
209 attention or the notice is delivered at the person's place of  
210 residence or place of business, or at another location held out  
211 by the person as a place of delivery of such communications.

212 Section 4. Section 682.013, Florida Statutes, is created to  
213 read:

214 682.013 Applicability of revised code.—

215 (1) The Revised Florida Arbitration Code governs an  
216 agreement to arbitrate made on or after the effective date of  
217 this act.

218 (2) The Revised Florida Arbitration Code governs an  
219 agreement to arbitrate made before the effective date of this  
220 act if all the parties to the agreement or to the arbitration  
221 proceeding so agree in a record.

222 (3) Beginning July 1, 2015, the Revised Florida Arbitration  
223 Code governs an agreement to arbitrate whenever made.

224 Section 5. Section 682.014, Florida Statutes, is created to  
225 read:

226 682.014 Effect of agreement to arbitrate; nonwaivable  
227 provisions.—

228 (1) Except as otherwise provided in subsections (2) and  
229 (3), a party to an agreement to arbitrate or to an arbitration  
230 proceeding may waive, or the parties may vary the effect of, the  
231 requirements of the Revised Florida Arbitration Code to the  
232 extent permitted by law.

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233 (2) Before a controversy arises that is subject to an  
 234 agreement to arbitrate, a party to the agreement may not:

235 (a) Waive or agree to vary the effect of the requirements  
 236 of s. 682.015(1), s. 682.02(1), s. 682.031, s. 682.08(1) or (2),  
 237 s. 682.181, or s. 682.20;

238 (b) Agree to unreasonably restrict the right under s.  
 239 682.032 to notice of the initiation of an arbitration  
 240 proceeding;

241 (c) Agree to unreasonably restrict the right under s.  
 242 682.041 to disclosure of any facts by a neutral arbitrator; or

243 (d) Waive the right under s. 682.07 of a party to an  
 244 agreement to arbitrate to be represented by an attorney at any  
 245 proceeding or hearing under the Revised Florida Arbitration  
 246 Code, but an employer and a labor organization may waive the  
 247 right to representation by an attorney in a labor arbitration.

248 (3) A party to an agreement to arbitrate or arbitration  
 249 proceeding may not waive, or the parties may not vary the effect  
 250 of, the requirements in this section or s. 682.013(1) or (3), s.  
 251 682.03, s. 682.051, s. 682.081, s. 682.10(4) or (5), s. 682.12,  
 252 s. 682.13, s. 682.14, s. 682.15(1) or (2), s. 682.23, s. 682.24,  
 253 or s. 682.25.

254 Section 6. Section 682.015, Florida Statutes, is created to  
 255 read:

256 682.015 Petition for judicial relief.—

257 (1) Except as otherwise provided in s. 682.20, a petition  
 258 for judicial relief under this chapter must be made to the court  
 259 and heard in the manner provided by law or rule of court for  
 260 making and hearing motions.

261 (2) Unless a civil action involving the agreement to

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262 arbitrate is pending, notice of an initial petition to the court  
 263 under this chapter must be served in the manner provided by law  
 264 for the service of a summons in a civil action. Otherwise,  
 265 notice of the motion must be given in the manner provided by law  
 266 or rule of court for serving motions in pending cases.

267 Section 7. Section 682.02, Florida Statutes, is amended to  
 268 read:

269 682.02 Arbitration agreements made valid, irrevocable, and  
 270 enforceable; scope.—

271 (1) An agreement contained in a record to submit to  
 272 arbitration any existing or subsequent controversy arising  
 273 between the parties to the agreement is valid, enforceable, and  
 274 irrevocable except upon a ground that exists at law or in equity  
 275 for the revocation of a contract.

276 (2) The court shall decide whether an agreement to  
 277 arbitrate exists or a controversy is subject to an agreement to  
 278 arbitrate.

279 (3) An arbitrator shall decide whether a condition  
 280 precedent to arbitrability has been fulfilled and whether a  
 281 contract containing a valid agreement to arbitrate is  
 282 enforceable.

283 (4) If a party to a judicial proceeding challenges the  
 284 existence of, or claims that a controversy is not subject to, an  
 285 agreement to arbitrate, the arbitration proceeding may continue  
 286 pending final resolution of the issue by the court, unless the  
 287 court otherwise orders.

288 ~~(5) Two or more parties may agree in writing to submit to~~  
 289 ~~arbitration any controversy existing between them at the time of~~  
 290 ~~the agreement, or they may include in a written contract a~~

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 291 ~~provision for the settlement by arbitration of any controversy~~  
 292 ~~thereafter arising between them relating to such contract or the~~  
 293 ~~failure or refusal to perform the whole or any part thereof.~~  
 294 This section also applies to written interlocal agreements under  
 295 ss. 163.01 and 373.713 in which two or more parties agree to  
 296 submit to arbitration any controversy between them concerning  
 297 water use permit motions ~~applications~~ and other matters,  
 298 regardless of whether or not the water management district with  
 299 jurisdiction over the subject motion ~~application~~ is a party to  
 300 the interlocal agreement or a participant in the arbitration.  
 301 ~~Such agreement or provision shall be valid, enforceable, and~~  
 302 ~~irrevocable without regard to the justiciable character of the~~  
 303 ~~controversy; provided that this act shall not apply to any such~~  
 304 ~~agreement or provision to arbitrate in which it is stipulated~~  
 305 ~~that this law shall not apply or to any arbitration or award~~  
 306 ~~thereunder.~~

307 Section 8. Section 682.03, Florida Statutes, is amended to  
 308 read:

309 682.03 Proceedings to compel and to stay arbitration.—

310 (1) On motion of a person showing an agreement to arbitrate  
 311 and alleging another person's refusal to arbitrate pursuant to  
 312 the agreement;

313 (a) If the refusing party does not appear or does not  
 314 oppose the motion, the court shall order the parties to  
 315 arbitrate.

316 (b) If the refusing party opposes the motion, the court  
 317 shall proceed summarily to decide the issue and order the  
 318 parties to arbitrate unless it finds that there is no  
 319 enforceable agreement to arbitrate. A party to an agreement or

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 320 ~~provision for arbitration subject to this law claiming the~~  
 321 ~~neglect or refusal of another party thereto to comply therewith~~  
 322 ~~may make application to the court for an order directing the~~  
 323 ~~parties to proceed with arbitration in accordance with the terms~~  
 324 ~~thereof. If the court is satisfied that no substantial issue~~  
 325 ~~exists as to the making of the agreement or provision, it shall~~  
 326 ~~grant the application. If the court shall find that a~~  
 327 ~~substantial issue is raised as to the making of the agreement or~~  
 328 ~~provision, it shall summarily hear and determine the issue and,~~  
 329 ~~according to its determination, shall grant or deny the~~  
 330 ~~application.~~

331 (2) On motion of a person alleging that an arbitration  
 332 proceeding has been initiated or threatened but that there is no  
 333 agreement to arbitrate, the court shall proceed summarily to  
 334 decide the issue. If the court finds that there is an  
 335 enforceable agreement to arbitrate, it shall order the parties  
 336 to arbitrate. If an issue referable to arbitration under an  
 337 agreement or provision for arbitration subject to this law  
 338 becomes involved in an action or proceeding pending in a court  
 339 having jurisdiction to hear an application under subsection (1),  
 340 such application shall be made in said court. Otherwise and  
 341 subject to s. 682.19, such application may be made in any court  
 342 of competent jurisdiction.

343 (3) If the court finds that there is no enforceable  
 344 agreement to arbitrate, it may not order the parties to  
 345 arbitrate pursuant to subsection (1) or subsection (2). Any  
 346 action or proceeding involving an issue subject to arbitration  
 347 under this law shall be stayed if an order for arbitration or an  
 348 application therefor has been made under this section or, if the

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349 ~~issue is severable, the stay may be with respect thereto only.~~  
 350 ~~When the application is made in such action or proceeding, the~~  
 351 ~~order for arbitration shall include such stay.~~

352 (4) The court may not refuse to order arbitration because  
 353 the claim subject to arbitration lacks merit or grounds for the  
 354 claim have not been established. On application the court may  
 355 stay an arbitration proceeding commenced or about to be  
 356 commenced, if it shall find that no agreement or provision for  
 357 arbitration subject to this law exists between the party making  
 358 the application and the party causing the arbitration to be had.  
 359 The court shall summarily hear and determine the issue of the  
 360 making of the agreement or provision and, according to its  
 361 determination, shall grant or deny the application.

362 (5) If a proceeding involving a claim referable to  
 363 arbitration under an alleged agreement to arbitrate is pending  
 364 in court, a motion under this section must be made in that  
 365 court. Otherwise, a motion under this section may be made in any  
 366 court as provided in s. 682.19. An order for arbitration shall  
 367 not be refused on the ground that the claim in issue lacks merit  
 368 or bona fides or because any fault or grounds for the claim  
 369 sought to be arbitrated have not been shown.

370 (6) If a party makes a motion to the court to order  
 371 arbitration, the court on just terms shall stay any judicial  
 372 proceeding that involves a claim alleged to be subject to the  
 373 arbitration until the court renders a final decision under this  
 374 section.

375 (7) If the court orders arbitration, the court on just  
 376 terms shall stay any judicial proceeding that involves a claim  
 377 subject to the arbitration. If a claim subject to the

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378 arbitration is severable, the court may limit the stay to that  
 379 claim.

380 Section 9. Section 682.031, Florida Statutes, is created to  
 381 read:

382 682.031 Provisional remedies.—

383 (1) Before an arbitrator is appointed and is authorized and  
 384 able to act, the court, upon motion of a party to an arbitration  
 385 proceeding and for good cause shown, may enter an order for  
 386 provisional remedies to protect the effectiveness of the  
 387 arbitration proceeding to the same extent and under the same  
 388 conditions as if the controversy were the subject of a civil  
 389 action.

390 (2) After an arbitrator is appointed and is authorized and  
 391 able to act:

392 (a) The arbitrator may issue such orders for provisional  
 393 remedies, including interim awards, as the arbitrator finds  
 394 necessary to protect the effectiveness of the arbitration  
 395 proceeding and to promote the fair and expeditious resolution of  
 396 the controversy, to the same extent and under the same  
 397 conditions as if the controversy were the subject of a civil  
 398 action.

399 (b) A party to an arbitration proceeding may move the court  
 400 for a provisional remedy only if the matter is urgent and the  
 401 arbitrator is not able to act timely or the arbitrator cannot  
 402 provide an adequate remedy.

403 (3) A party does not waive a right of arbitration by making  
 404 a motion under this section.

405 Section 10. Section 682.032, Florida Statutes, is created  
 406 to read:

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407 682.032 Initiation of arbitration.-

408 (1) A person initiates an arbitration proceeding by giving  
 409 notice in a record to the other parties to the agreement to  
 410 arbitrate in the agreed manner between the parties or, in the  
 411 absence of agreement, by certified or registered mail, return  
 412 receipt requested and obtained, or by service as authorized for  
 413 the commencement of a civil action. The notice must describe the  
 414 nature of the controversy and the remedy sought.

415 (2) Unless a person objects for lack or insufficiency of  
 416 notice under s. 682.06(3) not later than the beginning of the  
 417 arbitration hearing, the person by appearing at the hearing  
 418 waives any objection to lack of or insufficiency of notice.

419 Section 11. Section 682.033, Florida Statutes, is created  
 420 to read:

421 682.033 Consolidation of separate arbitration proceedings.-

422 (1) Except as otherwise provided in subsection (3), upon  
 423 motion of a party to an agreement to arbitrate or to an  
 424 arbitration proceeding, the court may order consolidation of  
 425 separate arbitration proceedings as to all or some of the claims  
 426 if:

427 (a) There are separate agreements to arbitrate or separate  
 428 arbitration proceedings between the same persons or one of them  
 429 is a party to a separate agreement to arbitrate or a separate  
 430 arbitration proceeding with a third person;

431 (b) The claims subject to the agreements to arbitrate arise  
 432 in substantial part from the same transaction or series of  
 433 related transactions;

434 (c) The existence of a common issue of law or fact creates  
 435 the possibility of conflicting decisions in the separate

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436 arbitration proceedings; and

437 (d) Prejudice resulting from a failure to consolidate is  
 438 not outweighed by the risk of undue delay or prejudice to the  
 439 rights of or hardship to parties opposing consolidation.

440 (2) The court may order consolidation of separate  
 441 arbitration proceedings as to some claims and allow other claims  
 442 to be resolved in separate arbitration proceedings.

443 (3) The court may not order consolidation of the claims of  
 444 a party to an agreement to arbitrate if the agreement prohibits  
 445 consolidation.

446 Section 12. Section 682.04, Florida Statutes, is amended to  
 447 read:

448 682.04 Appointment of arbitrators by court.-

449 (1) If the parties to an agreement to arbitrate agree on ~~or~~  
 450 provision for arbitration subject to this law provides a method  
 451 for appointing ~~the appointment of~~ arbitrators ~~or an umpire~~, this  
 452 method ~~must shall~~ be followed, unless the method fails.

453 (2) The court, on application of a party to an arbitration  
 454 agreement, shall appoint one or more arbitrators, if:

455 (a) The parties have not agreed on a method;

456 (b) The agreed method fails;

457 (c) One or more of the parties failed to respond to the  
 458 demand for arbitration; or

459 (d) An arbitrator fails to act and a successor has not been  
 460 appointed.

461 (3) ~~In the absence thereof, or if the agreed method fails~~  
 462 ~~or for any reason cannot be followed, or if an arbitrator or~~  
 463 ~~umpire who has been appointed fails to act and his or her~~  
 464 ~~successor has not been duly appointed, the court, on application~~

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465 ~~of a party to such agreement or provision shall appoint one or~~  
 466 ~~more arbitrators or an umpire. An arbitrator or umpire so~~  
 467 ~~appointed has all the shall have like powers of an arbitrator~~  
 468 ~~designated as if named or provided for in the agreement to~~  
 469 ~~arbitrate appointed pursuant to the agreed method or provision.~~

470 (4) An individual who has a known, direct, and material  
 471 interest in the outcome of the arbitration proceeding or a  
 472 known, existing, and substantial relationship with a party may  
 473 not serve as an arbitrator required by an agreement to be  
 474 neutral.

475 Section 13. Section 682.041, Florida Statutes, is created  
 476 to read:

477 682.041 Disclosure by arbitrator.—

478 (1) Before accepting appointment, an individual who is  
 479 requested to serve as an arbitrator, after making a reasonable  
 480 inquiry, shall disclose to all parties to the agreement to  
 481 arbitrate and arbitration proceeding and to any other  
 482 arbitrators any known facts that a reasonable person would  
 483 consider likely to affect the person's impartiality as an  
 484 arbitrator in the arbitration proceeding, including:

485 (a) A financial or personal interest in the outcome of the  
 486 arbitration proceeding.

487 (b) An existing or past relationship with any of the  
 488 parties to the agreement to arbitrate or the arbitration  
 489 proceeding, their counsel or representative, a witness, or  
 490 another arbitrator.

491 (2) An arbitrator has a continuing obligation to disclose  
 492 to all parties to the agreement to arbitrate and arbitration  
 493 proceeding and to any other arbitrators any facts that the

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494 arbitrator learns after accepting appointment that a reasonable  
 495 person would consider likely to affect the impartiality of the  
 496 arbitrator.

497 (3) If an arbitrator discloses a fact required by  
 498 subsection (1) or subsection (2) to be disclosed and a party  
 499 timely objects to the appointment or continued service of the  
 500 arbitrator based upon the fact disclosed, the objection may be a  
 501 ground under s. 682.13(1)(b) for vacating an award made by the  
 502 arbitrator.

503 (4) If the arbitrator did not disclose a fact as required  
 504 by subsection (1) or subsection (2), upon timely objection by a  
 505 party, the court may vacate an award under s. 682.13(1)(b).

506 (5) An arbitrator appointed as a neutral arbitrator who  
 507 does not disclose a known, direct, and material interest in the  
 508 outcome of the arbitration proceeding or a known, existing, and  
 509 substantial relationship with a party is presumed to act with  
 510 evident partiality under s. 682.13(1)(b).

511 (6) If the parties to an arbitration proceeding agree to  
 512 the procedures of an arbitration organization or any other  
 513 procedures for challenges to arbitrators before an award is  
 514 made, substantial compliance with those procedures is a  
 515 condition precedent to a motion to vacate an award on that  
 516 ground under s. 682.13(1)(b).

517 Section 14. Section 682.05, Florida Statutes, is amended to  
 518 read:

519 682.05 Majority action by arbitrators.—If there is more  
 520 than one arbitrator, the powers of an arbitrator must be  
 521 exercised by a majority of the arbitrators, but all of the  
 522 arbitrators shall conduct the hearing under s. 682.06(3). ~~The~~

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523 ~~powers of the arbitrators may be exercised by a majority of~~  
524 ~~their number unless otherwise provided in the agreement or~~  
525 ~~provision for arbitration.~~

526 Section 15. Section 682.051, Florida Statutes, is created  
527 to read:

528 682.051 Immunity of arbitrator; competency to testify;  
529 attorney fees and costs.—

530 (1) An arbitrator or an arbitration organization acting in  
531 the capacity of an arbitrator is immune from civil liability to  
532 the same extent as a judge of a court of this state acting in a  
533 judicial capacity.

534 (2) The immunity afforded under this section supplements  
535 any immunity under other law.

536 (3) The failure of an arbitrator to make a disclosure  
537 required by s. 682.041 does not cause any loss of immunity under  
538 this section.

539 (4) In a judicial, administrative, or similar proceeding,  
540 an arbitrator or representative of an arbitration organization  
541 is not competent to testify, and may not be required to produce  
542 records as to any statement, conduct, decision, or ruling  
543 occurring during the arbitration proceeding, to the same extent  
544 as a judge of a court of this state acting in a judicial  
545 capacity. This subsection does not apply:

546 (a) To the extent necessary to determine the claim of an  
547 arbitrator, arbitration organization, or representative of the  
548 arbitration organization against a party to the arbitration  
549 proceeding; or

550 (b) To a hearing on a motion to vacate an award under s.  
551 682.13(1)(a) or (b) if the movant establishes prima facie that a

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552 ground for vacating the award exists.

553 (5) If a person commences a civil action against an  
554 arbitrator, arbitration organization, or representative of an  
555 arbitration organization arising from the services of the  
556 arbitrator, organization, or representative or if a person seeks  
557 to compel an arbitrator or a representative of an arbitration  
558 organization to testify or produce records in violation of  
559 subsection (4), and the court decides that the arbitrator,  
560 arbitration organization, or representative of an arbitration  
561 organization is immune from civil liability or that the  
562 arbitrator or representative of the organization is not  
563 competent to testify, the court shall award to the arbitrator,  
564 organization, or representative reasonable attorney fees and  
565 other reasonable expenses of litigation.

566 Section 16. Section 682.06, Florida Statutes, is amended to  
567 read:

568 682.06 Hearing.—

569 (1) An arbitrator may conduct an arbitration in such manner  
570 as the arbitrator considers appropriate for a fair and  
571 expeditious disposition of the proceeding. The arbitrator's  
572 authority includes the power to hold conferences with the  
573 parties to the arbitration proceeding before the hearing and,  
574 among other matters, determine the admissibility, relevance,  
575 materiality, and weight of any evidence. Unless otherwise  
576 provided by the agreement or provision for arbitration:

577 ~~(1)(a) The arbitrators shall appoint a time and place for~~  
578 ~~the hearing and cause notification to the parties to be served~~  
579 ~~personally or by registered or certified mail not less than 5~~  
580 ~~days before the hearing. Appearance at the hearing waives a~~

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581 ~~party's right to such notice. The arbitrators may adjourn their~~  
 582 ~~hearing from time to time upon their own motion and shall do so~~  
 583 ~~upon the request of any party to the arbitration for good cause~~  
 584 ~~shown, provided that no adjournment or postponement of their~~  
 585 ~~hearing shall extend beyond the date fixed in the agreement or~~  
 586 ~~provision for making the award unless the parties consent to a~~  
 587 ~~later date. An umpire authorized to hear and decide the cause~~  
 588 ~~upon failure of the arbitrators to agree upon an award shall, in~~  
 589 ~~the course of his or her jurisdiction, have like powers and be~~  
 590 ~~subject to like limitations thereon.~~

591 ~~(b) The arbitrators, or umpire in the course of his or her~~  
 592 ~~jurisdiction, may hear and decide the controversy upon the~~  
 593 ~~evidence produced notwithstanding the failure or refusal of a~~  
 594 ~~party duly notified of the time and place of the hearing to~~  
 595 ~~appear. The court on application may direct the arbitrators, or~~  
 596 ~~the umpire in the course of his or her jurisdiction, to proceed~~  
 597 ~~promptly with the hearing and making of the award.~~

598 (2) An arbitrator may decide a request for summary  
 599 disposition of a claim or particular issue:

600 (a) If all interested parties agree; or

601 (b) Upon request of one party to the arbitration  
 602 proceeding, if that party gives notice to all other parties to  
 603 the proceeding and the other parties have a reasonable  
 604 opportunity to respond. The parties are entitled to be heard, to  
 605 present evidence material to the controversy and to cross-  
 606 examine witnesses appearing at the hearing.

607 (3) If an arbitrator orders a hearing, the arbitrator shall  
 608 set a time and place and give notice of the hearing not less  
 609 than 5 days before the hearing begins. Unless a party to the

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610 arbitration proceeding makes an objection to lack or  
 611 insufficiency of notice not later than the beginning of the  
 612 hearing, the party's appearance at the hearing waives the  
 613 objection. Upon request of a party to the arbitration proceeding  
 614 and for good cause shown, or upon the arbitrator's own  
 615 initiative, the arbitrator may adjourn the hearing from time to  
 616 time as necessary but may not postpone the hearing to a time  
 617 later than that fixed by the agreement to arbitrate for making  
 618 the award unless the parties to the arbitration proceeding  
 619 consent to a later date. The arbitrator may hear and decide the  
 620 controversy upon the evidence produced although a party who was  
 621 duly notified of the arbitration proceeding did not appear. The  
 622 court, on request, may direct the arbitrator to conduct the  
 623 hearing promptly and render a timely decision. The hearing shall  
 624 be conducted by all of the arbitrators but a majority may  
 625 determine any question and render a final award. An umpire  
 626 authorized to hear and decide the cause upon the failure of the  
 627 arbitrators to agree upon an award shall sit with the  
 628 arbitrators throughout their hearing but shall not be counted as  
 629 a part of their quorum or in the making of their award. If,  
 630 during the course of the hearing, an arbitrator for any reason  
 631 ceases to act, the remaining arbitrator, arbitrators or umpire  
 632 appointed to act as neutrals may continue with the hearing and  
 633 determination of the controversy.

634 (4) At a hearing under subsection (3), a party to the  
 635 arbitration proceeding has a right to be heard, to present  
 636 evidence material to the controversy, and to cross-examine  
 637 witnesses appearing at the hearing.

638 (5) If an arbitrator ceases or is unable to act during the

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639 arbitration proceeding, a replacement arbitrator must be  
 640 appointed in accordance with s. 682.04 to continue the  
 641 proceeding and to resolve the controversy.

642 Section 17. Section 682.07, Florida Statutes, is amended to  
 643 read:

644 682.07 Representation by attorney.—A party to an  
 645 arbitration proceeding may has the right to be represented by an  
 646 attorney at any arbitration proceeding or hearing under this  
 647 law. A waiver thereof prior to the proceeding or hearing is  
 648 ineffective.

649 Section 18. Section 682.08, Florida Statutes, is amended to  
 650 read:

651 682.08 Witnesses, subpoenas, depositions.—

652 (1) An arbitrator may issue a subpoena for the attendance  
 653 of a witness and for the production of records and other  
 654 evidence at any hearing and may administer oaths. A subpoena  
 655 must be served in the manner for service of subpoenas in a civil  
 656 action and, upon motion to the court by a party to the  
 657 arbitration proceeding or the arbitrator, enforced in the manner  
 658 for enforcement of subpoenas in a civil action. Arbitrators, or  
 659 an umpire authorized to hear and decide the cause upon failure  
 660 of the arbitrators to agree upon an award, in the course of her  
 661 or his jurisdiction, may issue subpoenas for the attendance of  
 662 witnesses and for the production of books, records, documents  
 663 and other evidence, and shall have the power to administer  
 664 oaths. Subpoenas so issued shall be served, and upon application  
 665 to the court by a party to the arbitration or the arbitrators,  
 666 or the umpire, enforced in the manner provided by law for the  
 667 service and enforcement of subpoenas in a civil action.

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668 (2) In order to make the proceedings fair, expeditious, and  
 669 cost effective, upon request of a party to, or a witness in, an  
 670 arbitration proceeding, an arbitrator may permit a deposition of  
 671 any witness to be taken for use as evidence at the hearing,  
 672 including a witness who cannot be subpoenaed for or is unable to  
 673 attend a hearing. The arbitrator shall determine the conditions  
 674 under which the deposition is taken. On application of a party  
 675 to the arbitration and for use as evidence, the arbitrators, or  
 676 the umpire in the course of her or his jurisdiction, may permit  
 677 a deposition to be taken, in the manner and upon the terms  
 678 designated by them or her or him of a witness who cannot be  
 679 subpoenaed or is unable to attend the hearing.

680 (3) An arbitrator may permit such discovery as the  
 681 arbitrator decides is appropriate in the circumstances, taking  
 682 into account the needs of the parties to the arbitration  
 683 proceeding and other affected persons and the desirability of  
 684 making the proceeding fair, expeditious, and cost effective. All  
 685 provisions of law compelling a person under subpoena to testify  
 686 are applicable.

687 (4) If an arbitrator permits discovery under subsection  
 688 (3), the arbitrator may order a party to the arbitration  
 689 proceeding to comply with the arbitrator's discovery-related  
 690 orders, issue subpoenas for the attendance of a witness and for  
 691 the production of records and other evidence at a discovery  
 692 proceeding, and take action against a noncomplying party to the  
 693 extent a court could if the controversy were the subject of a  
 694 civil action in this state.

695 (5) An arbitrator may issue a protective order to prevent  
 696 the disclosure of privileged information, confidential

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697 information, trade secrets, and other information protected from  
 698 disclosure to the extent a court could if the controversy were  
 699 the subject of a civil action in this state.

700 (6) All laws compelling a person under subpoena to testify  
 701 and all fees for attending a judicial proceeding, a deposition,  
 702 or a discovery proceeding as a witness apply to an arbitration  
 703 proceeding as if the controversy were the subject of a civil  
 704 action in this state.

705 (7) The court may enforce a subpoena or discovery-related  
 706 order for the attendance of a witness within this state and for  
 707 the production of records and other evidence issued by an  
 708 arbitrator in connection with an arbitration proceeding in  
 709 another state upon conditions determined by the court so as to  
 710 make the arbitration proceeding fair, expeditious, and cost  
 711 effective. A subpoena or discovery-related order issued by an  
 712 arbitrator in another state must be served in the manner  
 713 provided by law for service of subpoenas in a civil action in  
 714 this state and, upon motion to the court by a party to the  
 715 arbitration proceeding or the arbitrator, enforced in the manner  
 716 provided by law for enforcement of subpoenas in a civil action  
 717 in this state.

718 (8)(4) Fees for attendance as a witness shall be the same  
 719 as for a witness in the circuit court.

720 Section 19. Section 682.081, Florida Statutes, is created  
 721 to read:

722 682.081 Judicial enforcement of preaward ruling by  
 723 arbitrator.—If an arbitrator makes a preaward ruling in favor of  
 724 a party to the arbitration proceeding, the party may request  
 725 that the arbitrator incorporate the ruling into an award under

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726 s. 682.12. A prevailing party may make a motion to the court for  
 727 an expedited order to confirm the award under s. 682.12, in  
 728 which case the court shall summarily decide the motion. The  
 729 court shall issue an order to confirm the award unless the court  
 730 vacates, modifies, or corrects the award under s. 682.13 or s.  
 731 682.14.

732 Section 20. Section 682.09, Florida Statutes, is amended to  
 733 read:

734 682.09 Award.—

735 (1) An arbitrator shall make a record of an award. The  
 736 record must be signed or otherwise authenticated by any  
 737 arbitrator who concurs with the award. The arbitrator or the  
 738 arbitration organization shall give notice of the award,  
 739 including a copy of the award, to each party to the arbitration  
 740 proceeding. The award shall be in writing and shall be signed by  
 741 the arbitrators joining in the award or by the umpire in the  
 742 course of his or her jurisdiction. They or he or she shall  
 743 deliver a copy to each party to the arbitration either  
 744 personally or by registered or certified mail, or as provided in  
 745 the agreement or provision.

746 (2) An award must be made within the time specified by the  
 747 agreement to arbitrate or, if not specified therein, within the  
 748 time ordered by the court. The court may extend, or the parties  
 749 to the arbitration proceeding may agree in a record to extend,  
 750 the time. The court or the parties may do so within or after the  
 751 time specified or ordered. A party waives any objection that an  
 752 award was not timely made unless the party gives notice of the  
 753 objection to the arbitrator before receiving notice of the  
 754 award. An award shall be made within the time fixed therefor by

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755 ~~the agreement or provision for arbitration or, if not so fixed,~~  
 756 ~~within such time as the court may order on application of a~~  
 757 ~~party to the arbitration. The parties may, by written agreement,~~  
 758 ~~extend the time either before or after the expiration thereof.~~  
 759 ~~Any objection that an award was not made within the time~~  
 760 ~~required is waived unless the objecting party notifies the~~  
 761 ~~arbitrators or umpire in writing of his or her objection prior~~  
 762 ~~to the delivery of the award to him or her.~~

763 Section 21. Section 682.10, Florida Statutes, is amended to  
 764 read:

765 682.10 Change of award by arbitrators ~~or umpire.~~-

766 (1) On motion to an arbitrator by a party to an arbitration  
 767 proceeding, the arbitrator may modify or correct an award:

768 (a) Upon a ground stated in s. 682.14(1)(a) or (c);

769 (b) Because the arbitrator has not made a final and  
 770 definite award upon a claim submitted by the parties to the  
 771 arbitration proceeding; or

772 (c) To clarify the award.

773 (2) A motion under subsection (1) must be made and notice  
 774 given to all parties within 20 days after the movant receives  
 775 notice of the award.

776 (3) A party to the arbitration proceeding must give notice  
 777 of any objection to the motion within 10 days after receipt of  
 778 the notice.

779 (4) If a motion to the court is pending under s. 682.12, s.  
 780 682.13, or s. 682.14, the court may submit the claim to the  
 781 arbitrator to consider whether to modify or correct the award:

782 (a) Upon a ground stated in s. 682.14(1)(a) or (c);

783 (b) Because the arbitrator has not made a final and

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784 definite award upon a claim submitted by the parties to the  
 785 arbitration proceeding; or

786 (c) To clarify the award.

787 (5) An award modified or corrected pursuant to this section  
 788 is subject to ss. 682.09(1), 682.12, 682.13, and 682.14. On  
 789 application of a party to the arbitration, or if an application  
 790 to the court is pending under s. 682.12, s. 682.13 or s. 682.14,  
 791 on submission to the arbitrators, or to the umpire in the case  
 792 of an umpire's award, by the court under such conditions as the  
 793 court may order, the arbitrators or umpire may modify or correct  
 794 the award upon the grounds stated in s. 682.14(1)(a) and (c) or  
 795 for the purpose of clarifying the award. The application shall  
 796 be made within 20 days after delivery of the award to the  
 797 applicant. Written notice thereof shall be given forthwith to  
 798 the other party to the arbitration, stating that he or she must  
 799 serve his or her objections thereto, if any, within 10 days from  
 800 the notice. The award so modified or corrected is subject to the  
 801 provisions of ss. 682.12-682.14.

802 Section 22. Section 682.11, Florida Statutes, is amended to  
 803 read:

804 682.11 Remedies; fees and expenses of arbitration  
 805 proceeding.-

806 (1) An arbitrator may award punitive damages or other  
 807 exemplary relief if such an award is authorized by law in a  
 808 civil action involving the same claim and the evidence produced  
 809 at the hearing justifies the award under the legal standards  
 810 otherwise applicable to the claim.

811 (2) An arbitrator may award reasonable attorney fees and  
 812 other reasonable expenses of arbitration if such an award is

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813 authorized by law in a civil action involving the same claim or  
814 by the agreement of the parties to the arbitration proceeding.

815 (3) As to all remedies other than those authorized by  
816 subsections (1) and (2), an arbitrator may order such remedies  
817 as the arbitrator considers just and appropriate under the  
818 circumstances of the arbitration proceeding. The fact that such  
819 a remedy could not or would not be granted by the court is not a  
820 ground for refusing to confirm an award under s. 682.12 or for  
821 vacating an award under s. 682.13.

822 (4) An arbitrator's expenses and fees, together with other  
823 expenses, must be paid as provided in the award.

824 (5) If an arbitrator awards punitive damages or other  
825 exemplary relief under subsection (1), the arbitrator shall  
826 specify in the award the basis in fact justifying and the basis  
827 in law authorizing the award and state separately the amount of  
828 the punitive damages or other exemplary relief. Unless otherwise  
829 provided in the agreement or provision for arbitration, the  
830 arbitrators' and umpire's expenses and fees, together with other  
831 expenses, not including counsel fees, incurred in the conduct of  
832 the arbitration, shall be paid as provided in the award.

833 Section 23. Section 682.12, Florida Statutes, is amended to  
834 read:

835 682.12 Confirmation of an award.—After a party to an  
836 arbitration proceeding receives notice of an award, the party  
837 may make a motion to the court for an order confirming the award  
838 at which time the court shall issue a confirming order unless  
839 the award is modified or corrected pursuant to s. 682.10 or s.  
840 682.14 or is vacated pursuant to s. 682.13. Upon application of  
841 a party to the arbitration, the court shall confirm an award,

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842 ~~unless within the time limits hereinafter imposed grounds are~~  
843 ~~urged for vacating or modifying or correcting the award, in~~  
844 ~~which case the court shall proceed as provided in ss. 682.13 and~~  
845 ~~682.14.~~

846 Section 24. Section 682.13, Florida Statutes, is amended to  
847 read:

848 682.13 Vacating an award.—

849 (1) Upon motion application of a party to an arbitration  
850 proceeding, the court shall vacate an arbitration award if when:

851 (a) The award was procured by corruption, fraud, or other  
852 undue means;—

853 (b) There was:

854 1. Evident partiality by an arbitrator appointed as a  
855 neutral arbitrator;

856 2. Corruption by an arbitrator; or

857 3. Misconduct by an arbitrator prejudicing the rights of a  
858 party to the arbitration proceeding; or corruption in any of the  
859 arbitrators or umpire or misconduct prejudicing the rights of  
860 any party.

861 (c) An arbitrator refused to postpone the hearing upon  
862 showing of sufficient cause for postponement, refused to  
863 consider evidence material to the controversy, or otherwise  
864 conducted the hearing contrary to s. 682.06, so as to prejudice  
865 substantially the rights of a party to the arbitration  
866 proceeding; The arbitrators or the umpire in the course of her  
867 or his jurisdiction exceeded their powers.

868 (d) An arbitrator exceeded the arbitrator's powers; The  
869 arbitrators or the umpire in the course of her or his  
870 jurisdiction refused to postpone the hearing upon sufficient

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871 ~~cause being shown therefor or refused to hear evidence material~~  
872 ~~to the controversy or otherwise so conducted the hearing,~~  
873 ~~contrary to the provisions of s. 682.06, as to prejudice~~  
874 ~~substantially the rights of a party.~~

875 (e) There was no agreement to arbitrate, unless the person  
876 participated in the arbitration proceeding without raising the  
877 objection under s. 682.06(3) not later than the beginning of the  
878 arbitration hearing; or ~~There was no agreement or provision for~~  
879 arbitration subject to this law, unless the matter was  
880 determined in proceedings under s. 682.03 and unless the party  
881 participated in the arbitration hearing without raising the  
882 objection.

883 (f) The arbitration was conducted without proper notice of  
884 the initiation of an arbitration as required in s. 682.032 so as  
885 to prejudice substantially the rights of a party to the  
886 arbitration proceeding.

887  
888 ~~But the fact that the relief was such that it could not or would~~  
889 ~~not be granted by a court of law or equity is not ground for~~  
890 ~~vacating or refusing to confirm the award.~~

891 (2) A motion under this section must be filed within 90  
892 days after the movant receives notice of the award pursuant to  
893 s. 682.09 or within 90 days after the movant receives notice of  
894 a modified or corrected award pursuant to s. 682.10, unless the  
895 movant alleges that the award was procured by corruption, fraud,  
896 or other undue means, in which case the motion must be made  
897 within 90 days after the ground is known or by the exercise of  
898 reasonable care would have been known by the movant. ~~As~~  
899 application under this section shall be made within 90 days

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900 ~~after delivery of a copy of the award to the applicant, except~~  
901 ~~that, if predicated upon corruption, fraud or other undue means,~~  
902 ~~it shall be made within 90 days after such grounds are known or~~  
903 ~~should have been known.~~

904 (3) If the court vacates an award on a ground other than  
905 that set forth in paragraph (1)(e), it may order a rehearing. If  
906 the award is vacated on a ground stated in paragraph (1)(a) or  
907 paragraph (1)(b), the rehearing must be before a new arbitrator.  
908 If the award is vacated on a ground stated in paragraph (1)(c),  
909 paragraph (1)(d), or paragraph (1)(f), the rehearing may be  
910 before the arbitrator who made the award or the arbitrator's  
911 successor. The arbitrator must render the decision in the  
912 rehearing within the same time as that provided in s. 682.09(2)  
913 for an award. In vacating the award on grounds other than those  
914 stated in paragraph (1)(e), the court may order a rehearing  
915 before new arbitrators chosen as provided in the agreement or  
916 provision for arbitration or by the court in accordance with s.  
917 682.04, or, if the award is vacated on grounds set forth in  
918 paragraphs (1)(e) and (d), the court may order a rehearing  
919 before the arbitrators or umpire who made the award or their  
920 successors appointed in accordance with s. 682.04. The time  
921 within which the agreement or provision for arbitration requires  
922 the award to be made is applicable to the rehearing and  
923 commences from the date of the order therefor.

924 (4) If a motion ~~the application~~ to vacate is denied and no  
925 motion to modify or correct the award is pending, the court  
926 shall confirm the award.

927 Section 25. Section 682.14, Florida Statutes, is amended to  
928 read:

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929 682.14 Modification or correction of award.-

930 (1) Upon motion made within 90 days after the movant

931 receives notice of the award pursuant to s. 682.09 or within 90

932 days after the movant receives notice of a modified or corrected

933 award pursuant to s. 682.10, the court shall modify or correct

934 the award if ~~Upon application made within 90 days after delivery~~

935 ~~of a copy of the award to the applicant, the court shall modify~~

936 ~~or correct the award when:~~

937 (a) There is an evident miscalculation of figures or an

938 evident mistake in the description of any person, thing, or

939 property referred to in the award.

940 (b) The arbitrators ~~or umpire~~ have awarded upon a matter

941 not submitted in the arbitration to them or him or her and the

942 award may be corrected without affecting the merits of the

943 decision upon the issues submitted.

944 (c) The award is imperfect as a matter of form, not

945 affecting the merits of the controversy.

946 (2) If the application is granted, the court shall modify

947 and correct the award ~~so as to effect its intent and shall~~

948 confirm the award as so modified and corrected. Otherwise,

949 unless a motion to vacate the award under s. 682.13 is pending,

950 the court shall confirm the award as made.

951 (3) An application to modify or correct an award may be

952 joined in the alternative with an application to vacate the

953 award under s. 682.13.

954 Section 26. Section 682.15, Florida Statutes, is amended to

955 read:

956 682.15 Judgment or decree on award.-

957 (1) Upon granting an order confirming, vacating without

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958 directing a rehearing, modifying, or correcting an award, the

959 court shall enter a judgment in conformity therewith. The

960 judgment may be recorded, docketed, and enforced as any other

961 judgment in a civil action.

962 (2) A court may allow reasonable costs of the motion and

963 subsequent judicial proceedings.

964 (3) On motion of a prevailing party to a contested judicial

965 proceeding under s. 682.12, s. 682.13, or s. 682.14, the court

966 may add reasonable attorney fees and other reasonable expenses

967 of litigation incurred in a judicial proceeding after the award

968 is made to a judgment confirming, vacating without directing a

969 rehearing, modifying, or correcting an award. Upon the granting

970 of an order confirming, modifying or correcting an award,

971 judgment or decree shall be entered in conformity therewith and

972 be enforced as any other judgment or decree. Costs of the

973 application and of the proceedings subsequent thereto, and

974 disbursements may be awarded by the court.

975 Section 27. Section 682.16, Florida Statutes, is repealed.

976 Section 28. Section 682.17, Florida Statutes, is repealed.

977 Section 29. Section 682.18, Florida Statutes, is repealed.

978 Section 30. Section 682.181, Florida Statutes, is created

979 to read:

980 682.181 Jurisdiction.-

981 (1) A court of this state having jurisdiction over the

982 controversy and the parties may enforce an agreement to

983 arbitrate.

984 (2) An agreement to arbitrate providing for arbitration in

985 this state confers exclusive jurisdiction on the court to enter

986 judgment on an award under the Revised Florida Arbitration Code.

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987 Section 31. Section 682.19, Florida Statutes, is amended to  
988 read:

989 682.19 Venue.—A petition pursuant to s. 682.015 must be  
990 filed in the court of the county in which the agreement to  
991 arbitrate specifies the arbitration hearing is to be held or, if  
992 the hearing has been held, in the court of the county in which  
993 it was held. Otherwise, the petition may be made in the court of  
994 any county in which an adverse party resides or has a place of  
995 business or, if no adverse party has a residence or place of  
996 business in this state, in the court of any county in this  
997 state. All subsequent petitions must be made in the court  
998 hearing the initial petition unless the court otherwise directs.  
999 Any application under this law may be made to the court of the  
1000 county in which the other party to the agreement or provision  
1001 for arbitration resides or has a place of business, or, if she  
1002 or he has no residence or place of business in this state, then  
1003 to the court of any county. All applications under this law  
1004 subsequent to an initial application shall be made to the court  
1005 hearing the initial application unless it shall order otherwise.

1006 Section 32. Section 682.20, Florida Statutes, is amended to  
1007 read:

1008 682.20 Appeals.—  
1009 (1) An appeal may be taken from:  
1010 (a) An order denying an application to compel arbitration  
1011 made under s. 682.03.  
1012 (b) An order granting a motion ~~an application~~ to stay  
1013 arbitration pursuant to made under s. 682.03(2)-(4).  
1014 (c) An order confirming ~~or denying confirmation of an~~  
1015 award.

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1016 (d) An order denying confirmation of an award unless the  
1017 court has entered an order under s. 682.10(4) or s. 682.13. All  
1018 other orders denying confirmation of an award are final orders.

1019 ~~(e)-(d)~~ An order modifying or correcting an award.

1020 ~~(f)-(e)~~ An order vacating an award without directing a  
1021 rehearing.

1022 ~~(g)-(f)~~ A judgment or decree entered pursuant to this  
1023 chapter ~~the provisions of this law.~~

1024 (2) The appeal shall be taken in the manner and to the same  
1025 extent as from orders or judgments in a civil action.

1026 Section 33. Section 682.21, Florida Statutes, is repealed.

1027 Section 34. Section 682.22, Florida Statutes, is repealed.

1028 Section 35. Section 682.23, Florida Statutes, is created to  
1029 read:

1030 682.23 Relationship to Electronic Signatures in Global and  
1031 National Commerce Act.—The provisions of this chapter governing  
1032 the legal effect, validity, and enforceability of electronic  
1033 records or electronic signatures and of contracts performed with  
1034 the use of such records or signatures conform to the  
1035 requirements of s. 102 of the Electronic Signatures in Global  
1036 and National Commerce Act, 15 U.S.C. s. 7002.

1037 Section 36. Section 682.24, Florida Statutes, is created to  
1038 read:

1039 682.24 Effective date; applicability.—

1040 (1) The Revised Florida Arbitration Code takes effect on  
1041 July 1, 2012.

1042 (2) The Revised Florida Arbitration Code does not affect an  
1043 action or proceeding commenced or right accrued before the  
1044 Revised Florida Arbitration Code takes effect. Subject to s.

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1045 682.013, an arbitration agreement made before July 1, 2012, is  
 1046 governed by the former Florida Arbitration Code.

1047 Section 37. Section 682.25, Florida Statutes, is created to  
 1048 read:

1049 682.25 Disputes excluded.—The Revised Florida Arbitration  
 1050 Code does not apply to any dispute involving child custody,  
 1051 visitation, or child support.

1052 Section 38. Section 44.104, Florida Statutes, is amended to  
 1053 read:

1054 44.104 Voluntary binding arbitration and voluntary trial  
 1055 resolution.—

1056 (1) Two or more opposing parties who are involved in a  
 1057 civil dispute may agree in writing to submit the controversy to  
 1058 ~~voluntary binding arbitration, or~~ voluntary trial resolution, in  
 1059 lieu of judicial litigation of the issues involved, prior to or  
 1060 after a lawsuit has been filed, ~~provided no constitutional issue~~  
 1061 ~~is involved.~~

1062 (2) If the parties have entered into such an agreement and  
 1063 the agreement which provides in voluntary binding arbitration  
 1064 ~~for a method for appointing of one or more arbitrators, or which~~  
 1065 ~~provides in voluntary trial resolution a method for appointing~~  
 1066 ~~the a member of The Florida Bar in good standing for more than 5~~  
 1067 ~~years to act as trial resolution judge, that method shall be~~  
 1068 ~~followed the court shall proceed with the appointment as~~  
 1069 ~~prescribed. However, in voluntary binding arbitration at least~~  
 1070 ~~one of the arbitrators, who shall serve as the chief arbitrator,~~  
 1071 ~~shall meet the qualifications and training requirements adopted~~  
 1072 ~~pursuant to s. 44.106. In the absence of an agreement on a~~  
 1073 ~~method for appointing the trial resolution judge, or if the~~

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1074 agreement method fails or for any reason cannot be followed, and  
 1075 the parties fail to agree on the person to serve as the trial  
 1076 resolution judge, the court, on application of a party, shall  
 1077 ~~appoint one or more qualified arbitrators, or~~ the trial  
 1078 resolution judge, as the case requires. A trial resolution judge  
 1079 must be a member of The Florida Bar in good standing for 5 years  
 1080 or more who has agreed to serve.

1081 (3) The ~~arbitrators or~~ trial resolution judge shall be  
 1082 compensated by the parties according to their agreement with the  
 1083 trial resolution judge.

1084 (4) Within 10 days after the submission of the request for  
 1085 ~~binding arbitration, or~~ voluntary trial resolution, the court  
 1086 shall provide for the appointment of the ~~arbitrator or~~  
 1087 ~~arbitrators, or~~ trial resolution judge, as the case requires.  
 1088 Once appointed, the ~~arbitrators or~~ trial resolution judge shall  
 1089 notify the parties of the time and place for the hearing.

1090 (5) Application for ~~voluntary binding arbitration or~~  
 1091 voluntary trial resolution shall be filed and fees paid to the  
 1092 clerk of court as if for complaints initiating civil actions.  
 1093 The clerk of the court shall handle and account for these  
 1094 matters in all respects as if they were civil actions, except  
 1095 that the clerk of court shall keep separate ~~the records of the~~  
 1096 ~~applications for voluntary binding arbitration and~~ the records  
 1097 of the applications for voluntary trial resolution from all  
 1098 other civil actions.

1099 (6) Filing of the application for ~~binding arbitration or~~  
 1100 voluntary trial resolution tolls will toll the running of the  
 1101 applicable statutes of limitation.

1102 (7) The ~~chief arbitrator or~~ trial resolution judge may

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1103 administer oaths or affirmations and conduct the proceedings as  
 1104 the rules of court shall provide. At the request of any party,  
 1105 the ~~chief arbitrator or~~ trial resolution judge shall issue  
 1106 subpoenas for the attendance of witnesses and for the production  
 1107 of books, records, documents, and other evidence and may apply  
 1108 to the court for orders compelling attendance and production.  
 1109 Subpoenas shall be served and shall be enforceable in the manner  
 1110 provided by law. The trial resolution judge may order temporary  
 1111 relief in the same manner, and to the same extent, as in civil  
 1112 actions generally. Any party may enforce such an order by filing  
 1113 a petition in the court. Orders entered by the court are  
 1114 reviewable by the appellate court in the same manner, and to the  
 1115 same extent, as orders in civil actions generally.

1116 (8) ~~A voluntary binding arbitration hearing shall be~~  
 1117 ~~conducted by all of the arbitrators, but a majority may~~  
 1118 ~~determine any question and render a final decision. A trial~~  
 1119 ~~resolution judge shall conduct a voluntary trial resolution~~  
 1120 ~~hearing. The trial resolution judge may determine any question~~  
 1121 ~~and render a final decision.~~

1122 (9) The Florida Evidence Code and Florida Rules of Civil  
 1123 Procedure shall apply to all proceedings under this section,  
 1124 except that voluntary trial resolution is not governed by  
 1125 procedural rules regulating general and special magistrates, and  
 1126 rulings of the trial resolution judge are not reviewable by  
 1127 filing exceptions with the court.

1128 ~~(10) An appeal of a voluntary binding arbitration decision~~  
 1129 ~~shall be taken to the circuit court and shall be limited to~~  
 1130 ~~review on the record and not de novo, of:~~

1131 ~~(a) Any alleged failure of the arbitrators to comply with~~

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1132 ~~the applicable rules of procedure or evidence.~~

1133 ~~(b) Any alleged partiality or misconduct by an arbitrator~~  
 1134 ~~prejudicing the rights of any party.~~

1135 ~~(c) Whether the decision reaches a result contrary to the~~  
 1136 ~~Constitution of the United States or of the State of Florida.~~

1137 (10)(11) Any party may enforce a final decision rendered in  
 1138 a voluntary trial by filing a petition for final judgment in the  
 1139 circuit court in the circuit in which the voluntary trial took  
 1140 place. Upon entry of final judgment by the circuit court, any  
 1141 party may appeal to the appropriate appellate court. The  
 1142 judgment is reviewable by the appellate court in the same  
 1143 manner, and to the same extent, as a judgment in a civil action.  
 1144 ~~Factual findings determined in the voluntary trial are not~~  
 1145 ~~subject to appeal.~~

1146 ~~(12) The harmless error doctrine shall apply in all~~  
 1147 ~~appeals. No further review shall be permitted unless a~~  
 1148 ~~constitutional issue is raised.~~

1149 (11)(13) If no appeal is taken within the time provided by  
 1150 rules promulgated by the Supreme Court, ~~then~~ the decision shall  
 1151 be referred to the presiding judge in the case, or if one has  
 1152 not been assigned, then to the chief judge of the circuit for  
 1153 assignment to a circuit judge, who shall enter such orders and  
 1154 judgments as are required to carry out the terms of the  
 1155 decision. Equitable remedies are, which orders shall be  
 1156 enforceable by the contempt powers of the court to the same  
 1157 extent as in civil actions generally. When a judgment provides  
 1158 for execution, and for which judgments execution shall issue on  
 1159 request of a party.

1160 (12)(14) This section does shall not apply to any dispute

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1161 ~~involving child custody, visitation, or child support, or to any~~  
 1162 ~~dispute that which~~ involves the rights of a third party not a  
 1163 party to the ~~arbitration or~~ voluntary trial resolution when the  
 1164 third party would be an indispensable party if the dispute were  
 1165 resolved in court or when the third party notifies ~~the chief~~  
 1166 ~~arbitrator or~~ the trial resolution judge that the third party  
 1167 would be a proper party if the dispute were resolved in court,  
 1168 that the third party intends to intervene in the action in  
 1169 court, and that the third party does not agree to proceed under  
 1170 this section.

1171 (13) A trial resolution judge does not have jurisdiction to  
 1172 declare unconstitutional a statute, ordinance, or provision of a  
 1173 constitution. If any such claim is made in the voluntary trial  
 1174 resolution proceeding, that claim shall be severed and  
 1175 adjudicated by a judge of the court.

1176 (14) (a) The parties may agree to a trial by a privately  
 1177 selected jury. The court's jury pool may not be used for this  
 1178 purpose. In all other cases, the trial resolution judge shall  
 1179 conduct a bench trial.

1180 (b) The trial resolution judge may wear a judicial robe and  
 1181 use the title "Trial Resolution Judge" when acting in that  
 1182 capacity.

1183 Section 39. Subsection (1) of section 44.107, Florida  
 1184 Statutes, is amended to read:

1185 44.107 Immunity for arbitrators, voluntary trial resolution  
 1186 judges, mediators, and mediator trainees.-

1187 (1) Arbitrators serving under s. 44.103, voluntary trial  
 1188 resolution judges serving under ~~or~~ s. 44.104, mediators serving  
 1189 under s. 44.102, and trainees fulfilling the mentorship

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1190 requirements for certification by the Supreme Court as a  
 1191 mediator ~~shall~~ have judicial immunity in the same manner and to  
 1192 the same extent as a judge and are entitled to the same immunity  
 1193 and remedies provided in s. 682.051.

1194 Section 40. Section 440.1926, Florida Statutes, is amended  
 1195 to read:

1196 440.1926 Alternate dispute resolution; claim arbitration.-  
 1197 Notwithstanding any other provision of this chapter, the  
 1198 employer, carrier, and employee may mutually agree to seek  
 1199 consent from a judge of compensation claims to enter into  
 1200 binding claim arbitration in lieu of any other remedy provided  
 1201 for in this chapter to resolve all issues in dispute regarding  
 1202 an injury. Arbitrations agreed to pursuant to this section shall  
 1203 be governed by chapter 682, the Revised Florida Arbitration  
 1204 Code, except that, notwithstanding any provision in chapter 682,  
 1205 the term "court" shall mean a judge of compensation claims. An  
 1206 arbitration award in accordance with this section ~~is shall be~~  
 1207 enforceable in the same manner and with the same powers as any  
 1208 final compensation order.

1209 Section 41. Paragraph (a) of subsection (1) of section  
 1210 489.1402, Florida Statutes, is amended to read:

1211 489.1402 Homeowners' Construction Recovery Fund;  
 1212 definitions.-

1213 (1) The following definitions apply to ss. 489.140-489.144:

1214 (a) "Arbitration" means alternative dispute resolution  
 1215 entered into between a claimant and a contractor either pursuant  
 1216 to a construction contract that contains a mandatory arbitration  
 1217 clause or through any binding arbitration under the Revised  
 1218 Florida Arbitration Code.

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1219 Section 42. Subsection (2) of section 731.401, Florida  
1220 Statutes, is amended to read:

1221 731.401 Arbitration of disputes.—

1222 (2) Unless otherwise specified in the will or trust, a will  
1223 or trust provision requiring arbitration shall be presumed to  
1224 require voluntary trial resolution ~~binding arbitration~~ under s.  
1225 44.104.

1226 Section 43. The Division of Statutory Revision is directed  
1227 to redesignate the title of chapter 44, Florida Statutes, as  
1228 "Alternative Dispute Resolution."

1229 Section 44. The Division of Statutory Revision is directed  
1230 to replace the phrase "the effective date of this act" wherever  
1231 it occurs in this act with the date this act becomes a law.

1232 Section 45. This act shall take effect July 1, 2012.

**The Florida Senate**  
**BILL ANALYSIS AND FISCAL IMPACT STATEMENT**

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

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Prepared By: The Professional Staff of the Judiciary Committee

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BILL: SB 1360

INTRODUCER: Senator Hays

SUBJECT: Application of Foreign Law in Certain Cases

DATE: January 24, 2012

REVISED: \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Irwin	Cibula	JU	<b>Pre-meeting</b>
2.			BC	
3.				
4.				
5.				
6.				

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**I. Summary:**

The bill states that any court decision or ruling based, in whole or in part, on any foreign law or legal code that does not grant the parties affected by the ruling the same fundamental liberties, rights, and privileges granted by the State Constitution or the Constitution of the United States violates public policy and is void and unenforceable. Also, any contract that provides for choice of law to govern disputes between the parties is void and unenforceable if the law chosen incorporates any substantive or procedural law that would not provide the parties the same fundamental liberties, rights, and privileges afforded by the State Constitution and the Constitution of the United States.

The bill states that if a contract provides for a choice of venue outside the state or territory of the United States and if enforcement of that choice of venue would result in a violation of any right guaranteed by the State Constitution or the Constitution of the United States, then the provision must be construed to preserve the constitutional rights of the person against whom enforcement is sought. Finally, a claim of forum non conveniens<sup>1</sup> must be denied if a court of this state finds that granting the claim violates or would likely lead to a violation of any constitutional right of the nonclaimant in the foreign forum.

The bill provides that it does not apply to corporations, partnerships, or other forms of business associations. And the bill only applies to actual or foreseeable denials of a natural person's

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<sup>1</sup> "Forum non conveniens" is the "doctrine that an appropriate forum – even though competent under the law – may divest itself of jurisdiction if, for the convenience of the litigants and the witnesses, it appears that the action should proceed in another forum in which the action might also have been properly brought in the first place." BLACK'S LAW DICTIONARY (9th ed. 2009).

constitutional rights in proceedings brought under or pertaining to the subject matter of chapter 61 or chapter 88, F.S., Dissolution of Marriage and the Uniform Interstate Family Support Act, respectively.

This bill creates section 45.022, Florida Statutes.

## II. Present Situation:

### Application or Interpretation of Foreign Laws or Decisions

Courts in the United States use three guiding doctrines when deciding cases that involve the application or interpretation of foreign laws or decisions: the political question doctrine, the act of state doctrine, and the international comity doctrine.

#### *Political Question Doctrine*

A court may determine, under the political question doctrine, that a dispute should be addressed by the political branches of government and that the judicial branch is the inappropriate forum for a decision concerning political matters. The political question doctrine stems from constitutional separation of powers concerns and contemplates the strong legislative and presidential foreign affairs powers.<sup>2</sup>

In *Baker v. Carr*, the U.S. Supreme Court found that if one of the following circumstances exists in a case, then typically the matter is a political question and should not be decided by the court.

- There exists a textually demonstrable constitutional commitment of the issue to a coordinate political department;
- There is a lack of judicially discoverable and manageable standards for resolving the issue;
- It is impossible to decide the issue without an initial policy determination of a kind clearly for nonjudicial discretion;
- It is impossible for a court to undertake independent resolution of the issue without expressing lack of the respect due to coordinate branches of government;
- There is an unusual need for unquestioning adherence to a political decision already made; or
- There is the potential for embarrassment from multifarious pronouncements by various departments on one question.<sup>3</sup>

#### *Act of State Doctrine*

The act of state doctrine provides that U.S. courts should not judge the acts of foreign heads of state made within their states' sovereign territory out of respect for those other states' sovereignty. When used in diplomatically sensitive suits, the doctrine stands for the proposition that when the executive branch makes a determination on a matter affecting U.S. foreign

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<sup>2</sup> Jay M. Zitter, *Construction and Application of Political Question Doctrine by State Courts*, 9 A.L.R. 6th 177 (2005).

<sup>3</sup> *Baker v. Carr*, 369 U.S. 186, 216 (1962).

relations, it is not for the judiciary to second-guess that branch's expertise by adjudicating what the executive concludes are sensitive claims.<sup>4</sup>

The classic American statement of the act of state doctrine is found in *Underhill v. Hernandez*, in which Chief Justice Fuller, speaking for a unanimous Court said:

Every sovereign state is bound to respect the independence of every other sovereign state, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory. Redress of grievances by reason of such acts must be obtained through the means open to be availed of by sovereign powers as between themselves.<sup>5</sup>

However, the application of the act of state doctrine is limited, and courts may decide certain controversies involving foreign judgments. The act of state doctrine applies only to "official" acts of a sovereign.<sup>6</sup> If there is a treaty or written U.S. State Department opinion disfavoring the application of the doctrine, the act of state doctrine may be avoided.<sup>7</sup> In addition, the Federal Arbitration Act expressly provides that enforcement of arbitration agreements shall not be refused on the basis of the act of state doctrine.<sup>8</sup>

The act of state doctrine merely requires that those acts by a sovereign within its own territory must be deemed valid under the sovereign's own law.<sup>9</sup>

### ***International Comity Doctrine***<sup>10</sup>

The doctrine of "comity" is based on respect for the sovereignty of other states or countries, and under it, the forum state will generally apply the substantive law of a foreign sovereign to causes of action which arise in that sovereign. "International comity" is the recognition that one nation allows within its territory the legislative, executive, or judicial acts of another nation, having due regard to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws.<sup>11</sup>

The principle of international comity is an abstention doctrine, which recognizes that there are circumstances under which the application of foreign law may be more appropriate than the application of U.S. law. Thus, under this doctrine, courts sometimes defer to laws or interests of a foreign country and decline to exercise the jurisdiction they otherwise have.

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<sup>4</sup> O'Donnell, Michael J., *A Turn for the Worse: Foreign Relations, Corporate Human Rights Abuse, and the Courts*, 24 B.C. Third World L.J. 223 (2004), available at <http://www.michael-odonnell.com/Note.pdf>.

<sup>5</sup> *Underhill v. Hernandez*, 168 U.S. 250, 252 (1897).

<sup>6</sup> *W.S. Kirkpatrick Co. v. Environ. Tectonics Corp. Int'l*, 493 U.S. 400, 406 (1990). Note: Commercial acts by foreign governments are not generally deemed to be "official acts."

<sup>7</sup> Scullion R. Scullion et al., *Proskauer on International Litigation and Arbitration: Ch. 9 Suing Non-U.S. Governmental Entities in U.S. Courts*, available at <http://www.proskauerguide.com/litigation/9/XV>.

<sup>8</sup> 9 U.S.C. s. 15.

<sup>9</sup> O'Donnell, *supra* note 4.

<sup>10</sup> Information concerning the international comity doctrine was adapted from 44B AM. JUR. 2D *International Law* s. 8 (2011).

<sup>11</sup> See *Allstate Life Insurance, Co. v. Linter Group Ltd.*, 994 F.2d 996, 998-99 (2d Cir. 1993), citing *Hilton v. Guyot*, 159 U.S. 113, 164 (1895).

Furthermore, international comity is a doctrine that permits a court having a legitimate claim to jurisdiction to conclude that another sovereign also has a legitimate claim to jurisdiction under principles of international law and may concede the case to that jurisdiction. The international comity principle provides for recognition of foreign proceedings to the extent that such proceedings are determined to be orderly, fair, and not detrimental to the nation's interests.<sup>12</sup>

The doctrine of comity is used as a guide for the court, in construing a statute, where the issues to be resolved are entangled in international relations. A generally recognized rule of international comity states that an American court will only recognize a final and valid judgment. This doctrine is not obligatory and is not a rule of law, but is a doctrine of practice, convenience, and expediency. However, the doctrine of comity creates a strong presumption in favor of recognizing foreign judicial decrees. A court may deny comity to a foreign legislative, executive, or judicial act if it finds that the extension of comity would be contrary or prejudicial to the interest of the United States, or violates any laws or public policies of the United States.<sup>13</sup>

### **Uniform Out-of-country Foreign Money-Judgment Recognition Act**

The recognition of foreign judgments in Florida is governed by the Uniform Out-of-country Foreign Money-Judgment Recognition Act (Florida Recognition Act).<sup>14</sup> The Supreme Court of Florida has noted that the Florida Recognition Act was adopted to “ensure the recognition abroad of judgments rendered in Florida.”<sup>15</sup> Accordingly, the Florida Recognition Act attempts to guarantee the recognition of Florida judgments in foreign countries by providing reciprocity in Florida for judgments rendered abroad.<sup>16</sup> However, even though the Florida Recognition Act presumes that foreign judgments are prima facie enforceable, the Florida Recognition Act is also designed to preclude Florida courts from recognizing foreign judgments in certain prescribed cases where the Legislature has determined that enforcement would be unjust or inequitable to domestic defendants.<sup>17</sup>

The Florida Recognition Act delineates three mandatory and eight discretionary circumstances under which a foreign judgment may not be entitled to recognition. In Florida, a foreign judgment is not conclusive if:

- The judgment was rendered under a system that does not provide impartial tribunals or procedures compatible with the requirements of due process of law.
- The foreign court did not have personal jurisdiction over the defendant.
- The foreign court did not have jurisdiction over the subject matter.<sup>18</sup>

A foreign judgment need not be recognized if:

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<sup>12</sup> See *Allstate Life Insurance, Co. v. Linter Group Ltd.*, 994 F.2d 996, 999 (2d Cir. 1993), citing *Cunard S.S. Co. v. Salen Reefer Serv. AB*, 773 F.2d 452, 457 (2d Cir. 1985).

<sup>13</sup> *Id.* at 1000.

<sup>14</sup> Sections 55.601-55.607, F.S.

<sup>15</sup> *Nadd v. Le Credit Lyonnais, S.A.*, 804 So. 2d 1226, 1228 (Fla. 2001).

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

- The defendant in the proceedings in the foreign court did not receive notice of the proceedings in sufficient time to enable him or her to defend.
- The judgment was obtained by fraud.
- The cause of action or claim for relief on which the judgment is based is repugnant to the public policy of this state.
- The judgment conflicts with another final and conclusive order.
- The proceeding in the foreign court was contrary to an agreement between the parties under which the dispute in question was to be settled otherwise than by proceedings in that court.
- In the case of jurisdiction based only on personal service, the foreign court was a seriously inconvenient forum for the trial of the action.
- The foreign jurisdiction where judgment was rendered would not give recognition to a similar judgment rendered in this state.
- The cause of action resulted in a defamation judgment obtained in a jurisdiction outside the United States, unless the court sitting in this state before which the matter is brought first determines that the defamation law applied in the foreign court's adjudication provided at least as much protection for freedom of speech and press in that case as would be provided by the U.S. Constitution and the Florida Constitution.<sup>19</sup>

### **Florida Arbitration Act**

In Florida, two or more opposing parties involved in a civil dispute may agree in writing to submit the controversy to voluntary binding arbitration, or voluntary trial resolution, in lieu of litigating the issues involved, prior to or after a lawsuit has been filed, provided no constitutional issue is involved.<sup>20</sup>

A voluntary binding arbitration decision may be appealed in a Florida circuit court and limited to review on the record of whether the decision reaches a result contrary to the U.S. Constitution or the Florida Constitution.<sup>21</sup>

### **Uniform Child Custody Jurisdiction and Enforcement Act**

In 2002, the Legislature enacted the “Uniform Child Custody Jurisdiction and Enforcement Act” (act) to:

- Avoid jurisdictional competition and conflict with courts of other states in matters of child custody which have in the past resulted in the shifting of children from state to state with harmful effects on their well-being.
- Promote cooperation with the courts of other states to the end that a custody decree is rendered in the state that can best decide the case in the interest of the child.
- Discourage the use of the interstate system for continuing controversies over child custody.
- Deter abductions.
- Avoid relitigating the custody decisions of other states in this state.
- Facilitate the enforcement of custody decrees of other states.

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<sup>19</sup> *Id.*

<sup>20</sup> Section 44.104(1), F.S.

<sup>21</sup> Section 44.104(10)(c), F.S.

- Promote and expand the exchange of information and other forms of mutual assistance between the courts of this state and those of other states concerned with the same child.
- Make uniform the law with respect to the subject of the act among the states enacting it.<sup>22</sup>

The act prescribes the circumstances under which a court has jurisdiction, mechanisms for granting temporary emergency jurisdiction, and procedures for the enforcement of out-of-state custody orders, including assistance from state attorneys and law enforcement in locating a child and enforcing an out-of-state decree. It facilitates resolution of interstate custody matters and provides for the custody, residence, visitation, or responsibility of a child.

In addition, the act requires a court of this state to treat a foreign country as if it were a state of the U.S. for purposes of applying the provisions of the act. Also, a child custody determination made in a foreign country under factual circumstances in substantial conformity with the jurisdictional standards of the act must be recognized and enforced, unless the child custody law of the foreign country violates fundamental principles of human rights.<sup>23</sup>

### **American Law for American Courts Movement**

Recently, there has been a movement around the country to ban the use of some foreign laws in United States courts. Although this movement has been primarily targeted at prohibiting the use of Islamic Shariah law, advocates of the movement have promoted model legislation banning the use of any law that infringes on constitutional rights.<sup>24</sup> Presumably, this action has been taken to avoid freedom of religion challenges. The American Public Policy Alliance,<sup>25</sup> a group focused on the promotion of American Law for American Courts, states:

One of the greatest threats to American values and liberties today comes from abroad, including foreign laws and foreign legal doctrines which have been infiltrating our court system at the municipal, state and federal levels. . . . [The] APPA focuses on countering this infiltration of anti-Constitutional laws across a broad variety of initiatives.<sup>26</sup>

This group offers model legislation that lawmakers may adopt and file as bills in their individual states.

In 2010, 70 percent of Oklahoma voters voted in favor of an Oklahoma constitutional amendment banning the use of Islamic Sharia law in court decisions.<sup>27</sup> A Muslim citizen of Oklahoma sought and was granted a preliminary injunction prior to the amendment being

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<sup>22</sup> Section 61.502, F.S. *See also*, ch. 2002-65, s. 5, Laws of Fla. Note: This act replaced the Uniform Child Custody Jurisdiction Act (UCCJA), adopted in 1977.

<sup>23</sup> Section 61.506, F.S.

<sup>24</sup> Public Policy Alliance, *American Law for American Courts*, [http://publicpolicyalliance.org/?page\\_id=38](http://publicpolicyalliance.org/?page_id=38) (last visited January 22, 2012).

<sup>25</sup> The American Public Policy Alliance describes itself as “a non-partisan advocacy organization dedicated to protecting U.S. constitutional rights, safeguarding U.S. sovereignty and promoting government transparency and accountability . . . .” See the organization’s website, [http://publicpolicyalliance.org/?page\\_id=2](http://publicpolicyalliance.org/?page_id=2) (last visited January 22, 2012).

<sup>26</sup> *Id.*

<sup>27</sup> Meredith Jessup, *Oklahoma Shariah Ban May Conflict with U.S. Constitution*, *The Blaze* (Nov. 4, 2010), <http://www.theblaze.com/stories/oklahoma-shariah-ban-may-conflict-with-u-s-constitution/> (last visited January 22, 2012).

certified by the Election Board as a constitutional amendment.<sup>28</sup> On appeal, the United States Court of Appeals for the 10th Circuit affirmed the preliminary injunction prohibiting the certification of the Oklahoma constitutional amendment. The Circuit Court stated:

The proposed amendment goes further than preventing courts from “applying” Sharia law. The amendment forbids state courts from “considering” those laws. Even if the state could identify and support a reason to single out and restrict Sharia law in its courts, the amendment’s complete ban of Sharia law is hardly an exercise of narrow tailoring. [The State has] not carried [its] burden to show why the proposed amendment is “closely fitted” to a compelling state interest.<sup>29</sup>

Additionally, other states, Florida, Tennessee, and Louisiana had comparable bills filed during the 2010 regular session in each of those states.<sup>30</sup> Those bills sought to ban the use of foreign laws in court decisions if the foreign laws would violate the fundamental rights guaranteed under the state or United States Constitutions.<sup>31</sup> The issue has received recent attention in Florida, where a circuit court judge in Hillsborough County issued an order on March 3, 2011, regarding the disposition of proceeds flowing from the 2008 eminent domain taking of a Tampa mosque.<sup>32</sup> The judge’s order states that the case will proceed under Ecclesiastical Islamic Law.<sup>33</sup>

### III. Effect of Proposed Changes:

The bill defines “foreign law, legal code, or system” as any law, legal code, or system of a jurisdiction outside any state or territory of the United States. The bill states that any court, tribunal, or administrative agency ruling or decision that bases the decision, in whole or in part, on any law, legal code, or system that does not grant the parties affected by the ruling the same fundamental liberties, rights, and privileges granted under the State Constitution and the Constitution of the United States violates public policy of the State of Florida and is void and unenforceable.

Similarly, the bill provides that any contract or contractual provision, if severable, that provides for a choice of law, legal code, or system to govern some or all of the disputes between parties, either in court or in arbitration, is void and unenforceable if the law, legal code, or system chosen includes or incorporates any substantive or procedural law that would not provide the parties the same fundamental liberties, rights, and privileges granted under the State Constitution and the Constitution of the United States. If a contractual provision provides for a choice of venue or forum outside the state or territory of the United States and if enforcement of that choice of venue or forum would result in a violation of any right guaranteed by the State Constitution or Constitution of the United States, then the provision must be construed to preserve the constitutional rights of the person against whom enforcement is sought. Finally, a claim of forum

<sup>28</sup> *Awad v. Ziriax*, 2012 WL 50636, at \*3 (10th Cir. 2012).

<sup>29</sup> *Id.* at \*14.

<sup>30</sup> CS/SB 1962 (2010 Reg. Session); Tennessee HB 3768 (2010); Louisiana HB 785 (2010).

<sup>31</sup> *Id.*

<sup>32</sup> William R. Levesque, *Hillsborough Judge in Islamic Law Case No Liberal*, St. Petersburg Times (April 1, 2011), <http://www.tampabay.com/news/courts/civil/hillsborough-judge-in-islamic-law-case-no-liberal/1160886> (last visited January 22, 2012).

<sup>33</sup> *Ghassan Mansour et al. v. Islamic Education Center of Tampa, Inc.*, case no. 08-03497 (Fla. 13th Jud. Cir. 2011), [http://tool.donation-net.net/Images/Email/1097/110303\\_Order\\_in\\_Connection\\_with\\_Plaintiffs\\_Emergency\\_Motion.pdf](http://tool.donation-net.net/Images/Email/1097/110303_Order_in_Connection_with_Plaintiffs_Emergency_Motion.pdf).

non conveniens must be denied if a court of this state finds that granting the claim violates or would likely lead to a violation of any constitutional right of the nonclaimant in the foreign forum.

The bill does not apply to a corporation, partnership, or other form of business association. Also, the bill only applies to actual or foreseeable denials of a natural person's constitutional rights. Finally, the bill contains a severability clause, providing that if any provision of this bill or its application is held invalid, the invalidity does not affect other provisions or applications of the bill.

The bill provides that it shall take effect upon becoming law.

#### **IV. Constitutional Issues:**

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. Other Constitutional Issues.<sup>34</sup>

#### **Federal Preemption**

The doctrine of preemption limits state action in foreign affairs. Article VI of the U.S. Constitution states that the laws and treaties of the U.S. are the "supreme Law of the Land," and, therefore, they preempt state law. The United States Court of Appeals for the 9th Circuit has recently held that even if a state statute was not preempted by a direct conflict with federal law, field preemption could still occur if the state law purported to regulate a "traditional state responsibility," but actually "infringed on a foreign affairs power reserved by the Constitution exclusively to the national government."<sup>35</sup> If the bill faces a federal preemption challenge, a court could potentially find that the bill substantially infringes on a foreign affairs power reserved to the national government. Such a finding would likely cause a court hold that the bill is preempted by federal foreign affairs powers.

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<sup>34</sup> The constitutional analysis was adapted, in part, from Eduardo E. Neret and Marcio W. Valladares, *The Florida International Affairs Act: A Model for State Activism in Foreign Affairs*, 1 J. Transnat'l L. & Pol'y 197 (1992).

<sup>35</sup> *Von Saher v. Norton Simon Museum of Art at Pasadena*, 592 F.3d 954, 964 (9th Cir. 2010).

## Dormant Federal Foreign Affairs Powers

Although not explicitly provided for in the U.S. Constitution, the Supreme Court has interpreted the U.S. Constitution to mean that the national government has exclusive power over foreign affairs. In *Zschernig v. Miller*, the Supreme Court reviewed an Oregon statute that refused to let a resident alien inherit property because the alien's home country barred U.S. residents from inheriting property. The Court held that the Oregon law as applied exceeded the limits of state power because the law interfered with the national government's exclusive power over foreign affairs. The Court also held that, to be unconstitutional, the state action must have more than "some incidental or indirect effect on foreign countries,"<sup>36</sup> and the action must pose a "great potential for disruption or embarrassment"<sup>37</sup> to the national unity of foreign policy. Such a determination would necessarily rely heavily on considerations of current political climates and foreign relations, as well as the United States' perception abroad. Due to the fact that these factors could only be evaluated if and when a challenge to this bill was brought, an assessment of the likelihood for success that such an action would have is not practical at this time.

## Separation of Powers

The first three articles of the U.S. Constitution define the powers given to the three branches of government in the United States.<sup>38</sup> Article I defines the legislative branch and vests with it all power to make law. Article II defines the executive branch and vest in it the power to enforce the law. Article III defines the judicial branch and vests in it all judicial power. For time immemorial, that power has been understood to mean the power to interpret and apply the law.<sup>39</sup>

As discussed above, to the extent that this bill directs Florida courts to consider and interpret foreign decisions and law in a certain manner, it may interfere with the federal government's ability to govern foreign policy with one voice. As such, this bill could be challenged as preempted by the federal government. Similarly, as previously stated, the judiciary's constitutional role is to act as the sole interpreter of laws; therefore, the bill could be challenged as an infringement on the essential role of the judicial branch in violation of the constitutional separation of powers. Similarly, the Florida Constitution explicitly mandates separation of powers between branches of the Florida government. Article II, section 3 of the Florida Constitution specifically states:

The powers of the state government shall be divided into legislative, executive and judicial branches. No person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided herein.

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<sup>36</sup> *Zschernig v. Miller*, 389 U.S. 429, 433 (1968).

<sup>37</sup> *Id.* at 435.

<sup>38</sup> Articles I, II, III, U.S. Const.

<sup>39</sup> *Marbury v. Madison*, 5 U.S. 137, 177 (1803).

Because of this language, Florida's separation of powers doctrine is even stronger than the federal concept of separation of powers. Therefore, the bill's application could result in a potentially successful separation of powers challenge under the Florida Constitution, as well. In this way, the bill may face an additional separation of powers problem if a court determines that the bill infringes on the court's exclusive judicial authority under the Florida Constitution.

**V. Fiscal Impact Statement:**

**A. Tax/Fee Issues:**

None.

**B. Private Sector Impact:**

The bill has the potential to affect a private right to freely contract. Constriction of the right to freely contract could negatively impact business flexibility and competitiveness. However, because the bill explicitly states that it does not apply to corporations or partnerships, the bill is not likely to have a significant impact on Florida's overall business climate.

**C. Government Sector Impact:**

In an analysis of a similar bill, SB 1294 (2011 Reg. Session), the Office of the State Courts Administrator identified a potential impact on both judicial time and court workload in identifying and determining whether a foreign law denies fundamental liberties, rights, and privileges otherwise afforded litigants under the Florida and the federal constitutions. However, the Office of State Courts Administrator also found that the fiscal impact of the workload increases could not be determined due to the unavailability of data needed to quantifiably establish such an increase.<sup>40</sup>

**VI. Technical Deficiencies:**

None.

**VII. Related Issues:**

None.

**VIII. Additional Information:**

**A. Committee Substitute – Statement of Substantial Changes:**

(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

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<sup>40</sup> Office of State Courts Administrator, *Judicial Impact Statement for SB 1294* (Mar. 3, 2011) (on file with the Committee on Judiciary).

B. Amendments:

None.

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This Senate Bill Analysis does not reflect the intent or official position of the bill's introducer or the Florida Senate.

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By Senator Hays

20-00106B-12

20121360\_\_

1 A bill to be entitled  
 2 An act relating to application of foreign law in  
 3 certain cases; creating s. 45.022, F.S.; defining the  
 4 term "foreign law, legal code, or system"; clarifying  
 5 that the public policies expressed in the act apply to  
 6 violations of a natural person's fundamental  
 7 liberties, rights, and privileges guaranteed by the  
 8 State Constitution or the United States Constitution;  
 9 providing that the act does not apply to a  
 10 corporation, partnership, or other form of business  
 11 association, except when necessary to provide  
 12 effective relief in proceedings under or relating to  
 13 chapters 61 and 88, F.S.; specifying the public policy  
 14 of this state in applying the choice of a foreign law,  
 15 legal code, or system under certain circumstances in  
 16 proceedings brought under or relating to chapters 61  
 17 and 88, F.S., which relate to dissolution of marriage,  
 18 support, time-sharing, the Uniform Child Custody  
 19 Jurisdiction and Enforcement Act, and the Uniform  
 20 Interstate Family Support Act; declaring that certain  
 21 decisions rendered under such laws, codes, or systems  
 22 are void; declaring that certain choice of venue or  
 23 forum provisions in a contract are void; providing for  
 24 the construction of a waiver by a natural person of  
 25 the person's fundamental liberties, rights, and  
 26 privileges guaranteed by the State Constitution or the  
 27 United States Constitution; declaring that claims of  
 28 forum non conveniens or related claims must be denied  
 29 under certain circumstances; providing that the act

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

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20121360\_\_

30 may not be construed to require or authorize any court  
 31 to adjudicate, or prohibit any religious organization  
 32 from adjudicating, ecclesiastical matters in violation  
 33 of specified constitutional provisions or to conflict  
 34 with any federal treaty or other international  
 35 agreement to which the United States is a party to a  
 36 specified extent; providing for severability;  
 37 providing an effective date.  
 38  
 39 Be It Enacted by the Legislature of the State of Florida:  
 40  
 41 Section 1. Section 45.022, Florida Statutes, is created to  
 42 read:  
 43 45.022 Application of foreign law contrary to public policy  
 44 in certain cases.—  
 45 (1) As used in this section, the term "foreign law, legal  
 46 code, or system" means any law, legal code, or system of a  
 47 jurisdiction outside any state or territory of the United  
 48 States, including, but not limited to, international  
 49 organizations or tribunals, and applied by that jurisdiction's  
 50 courts, administrative bodies, or other formal or informal  
 51 tribunals. The term does not include the common law and statute  
 52 laws of England as described in s. 2.01 or any laws of the  
 53 Native American tribes in this state.  
 54 (2) (a) This section applies only to actual or foreseeable  
 55 denials of a natural person's fundamental liberties, rights, and  
 56 privileges guaranteed by the State Constitution or the United  
 57 States Constitution from the application of a foreign law, legal  
 58 code, or system in proceedings brought under, pursuant to, or

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

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59 pertaining to the subject matter of chapter 61 or chapter 88.

60 (b) Except as necessary to provide effective relief in  
 61 proceedings brought under, pursuant to, or pertaining to the  
 62 subject matter of chapter 61 or chapter 88, this section does  
 63 not apply to a corporation, partnership, or other form of  
 64 business association.

65 (3) Any court, arbitration, tribunal, or administrative  
 66 agency ruling or decision violates the public policy of this  
 67 state and is void and unenforceable if the court, arbitration,  
 68 tribunal, or administrative agency bases its ruling or decision  
 69 in the matter at issue in whole or in part on any foreign law,  
 70 legal code, or system that does not grant the parties affected  
 71 by the ruling or decision the same fundamental liberties,  
 72 rights, and privileges guaranteed by the State Constitution or  
 73 the United States Constitution.

74 (4) (a) A contract or contractual provision, if severable,  
 75 that provides for the choice of a foreign law, legal code, or  
 76 system to govern some or all of the disputes between the parties  
 77 to be adjudicated by a court of law or by an arbitration panel  
 78 arising from the contract violates the public policy of this  
 79 state and is void and unenforceable if the foreign law, legal  
 80 code, or system chosen includes or incorporates any substantive  
 81 or procedural law, as applied to the dispute at issue, which  
 82 would not grant the parties the same fundamental liberties,  
 83 rights, and privileges guaranteed by the State Constitution or  
 84 the United States Constitution.

85 (b) This subsection does not limit the right of a natural  
 86 person in this state to voluntarily restrict or limit his or her  
 87 fundamental liberties, rights, and privileges guaranteed by the

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88 State Constitution or the United States Constitution by contract  
 89 or specific waiver consistent with constitutional principles,  
 90 but the language of any such contract or other waiver must be  
 91 strictly construed in favor of preserving such liberties,  
 92 rights, and privileges.

93 (5) (a) If any contractual provision or agreement provides  
 94 for the choice of venue or forum outside a state or territory of  
 95 the United States, and if the enforcement or interpretation of  
 96 the contract or agreement applying that choice of venue or forum  
 97 provision would result in a violation of any fundamental  
 98 liberties, rights, and privileges guaranteed by the State  
 99 Constitution or the United States Constitution, that contractual  
 100 provision or agreement shall be interpreted or construed to  
 101 preserve such liberties, rights, and privileges of the person  
 102 against whom enforcement is sought.

103 (b) If a natural person who is subject to personal  
 104 jurisdiction in this state seeks to maintain litigation,  
 105 arbitration, agency, or similarly binding proceedings in this  
 106 state and the courts of this state find that granting a claim of  
 107 forum non conveniens or a related claim denies or would likely  
 108 lead to the denial of any fundamental liberties, rights, and  
 109 privileges guaranteed by the State Constitution or the United  
 110 States Constitution of the nonclaimant in the foreign forum with  
 111 respect to the matter in dispute, it is the public policy of  
 112 this state that the claim be denied.

113 (6) This section may not be construed to:

114 (a) Require or authorize any court to adjudicate, or  
 115 prohibit any religious organization from adjudicating,  
 116 ecclesiastical matters, including, but not limited to, the

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117 election, appointment, calling, discipline, dismissal, removal,  
118 or excommunication of a member, officer, official, priest, nun,  
119 monk, pastor, rabbi, imam, or member of the clergy of the  
120 religious organization, or determination or interpretation of  
121 the doctrine of the religious organization, if such adjudication  
122 or prohibition would violate s. 3, Art. I of the State  
123 Constitution or the First Amendment to the United States  
124 Constitution; or

125 (b) Conflict with any federal treaty or other international  
126 agreement to which the United States is a party to the extent  
127 that such federal treaty or international agreement preempts or  
128 is superior to state law on the matter at issue.

129 (7) If any provision of this section or its application to  
130 any natural person or circumstance is held invalid, the  
131 invalidity does not affect other provisions or applications of  
132 this section which can be given effect, and to that end the  
133 provisions of this section are severable.

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

**The Florida Senate**  
**BILL ANALYSIS AND FISCAL IMPACT STATEMENT**

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Judiciary Committee

BILL: SB 1390

INTRODUCER: Senator Joyner

SUBJECT: Public Records/Victims of Domestic Violence

DATE: January 24, 2012      REVISED: \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	White	Cibula	JU	<b>Pre-meeting</b>
2.	_____	_____	GO	_____
3.	_____	_____	RC	_____
4.	_____	_____	_____	_____
5.	_____	_____	_____	_____
6.	_____	_____	_____	_____

**I. Summary:**

Pursuant to ss. 741.30 and 784.046, F.S., the Florida Association of Court Clerks and Comptrollers (Association), offers an automated process by which a petitioner may request notification of service of an injunction for protection against domestic violence, repeat violence, sexual violence, or dating violence. This process necessarily requires the petitioner to provide the Association with personal contact information. In many instances, the petitioner is a victim of a crime, and thus, the information he or she provides to the Association may be exempt from public records requirements pursuant to s. 119.07, F.S. However, a person does not have to be a crime victim in order to petition for a protective injunction. In these instances, the petitioner's information may be public record.

This bill substantially amends ss. 741.30 and 784.046, F.S., to expand an existing exemption to the public records law. The bill requires the automated notification of service of injunction to apprise the petitioner of his or her right to request in writing that specified information held by the Association be exempt from public record. Such information shall be exempt upon the written request by the petitioner for 5 years after the receipt of the written request. The bill grants access to any state or federal agency that is authorized by law to have access to such documents in furtherance of the agencies' statutory duties.

The bill conforms to the legislative review requirements of the Open Government Sunset Review Act, by providing for the repeal of the public records exemption effective October 2, 2017, unless reviewed and reenacted by the Legislature. The bill also provides a statement of public necessity as required by the State Constitution.

The bill substantially amends sections 741.30 and 784.046, Florida Statutes.

## II. Present Situation:

### Public Records Law

Florida's public records laws further the state policy of ensuring governmental transparency through broad public access to government records.<sup>1</sup> Generally, all state, county, and municipal records are open to the public because a personal, constitutional right guarantees that "every person" may inspect or copy any public record of the legislative, executive, and judicial branches of government, as well as the public records of counties and municipalities.<sup>2</sup>

Each agency has a duty to provide access to public records. Thus, a custodian of public records<sup>3</sup> must "acknowledge requests to inspect or copy records promptly and respond to such requests in good faith."<sup>4</sup> Public records encompass "all documents, papers, letters, maps, books, tapes, photographs, films, sound recordings, data processing software, or other material, regardless of the physical form, characteristics, or means of transmission, made or received pursuant to law or ordinance or in connection with the transaction of official business by any agency."<sup>5</sup>

### Public Records Exemptions

The Legislature is authorized to provide by general law for the exemption of records from the public records requirements.<sup>6</sup> A general law providing for such an exemption must meet the requirements established in the Constitution,<sup>7</sup> as well as by the Open Government Sunset Review Act.<sup>8</sup> The law must include a public necessity statement that states with specificity the public necessity justifying the exemption,<sup>9</sup> and the law must be no broader than necessary to accomplish its purpose.<sup>10</sup> Additionally, under the Open Government Sunset Review Act, an exemption may be created or maintained only if the identifiable public purpose it serves is no broader than necessary to meet one of three purposes enumerated in s. 119.15(6)(b), F.S. By way of example, an exemption will be valid if its identifiable public purpose is no broader than necessary to "[protect] sensitive personal information that, if released, would be defamatory or would jeopardize an individual's safety; however, only the identity of an individual may be exempted under this provision."<sup>11</sup>

While the determination of what constitutes a public record is a question of law,<sup>12</sup> Florida courts will not imply an exemption from the open records requirement.<sup>13</sup> Refusing to encroach upon the

<sup>1</sup> FLA. CONST. art. I, s. 24(a); Section 119.01, F.S.

<sup>2</sup> FLA. CONST. art. I, s. 24(a).

<sup>3</sup> A custodian of public records is defined as the "elected or appointed state, county, or municipal officer charged with the responsibility of maintaining the office having public records, or his or her designee." Section 119.011(5), F.S.

<sup>4</sup> Section 119.07(1)(c), F.S.

<sup>5</sup> Section 119.011(12), F.S.

<sup>6</sup> FLA. CONST. art. I, s. 24(c) (Any bill providing for such an exemption must pass by two-thirds vote of each house.)

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

<sup>8</sup> Section 119.15, F.S.

<sup>9</sup> FLA. CONST. art. I, s. 24(c).

<sup>10</sup> *Id.*

<sup>11</sup> Section 119.15(6)(b)(2), F.S. ("However, in exemptions under this subparagraph, only information that would identify the individuals may be exempted.")

<sup>12</sup> *Rogers v. Hood*, 906 So. 2d 1220 (2005).

legislative process for creating public records exemptions, The Supreme Court of Florida, in *Memorial Hospital-West Volusia, Inc. v. News-Journal Corporation*, stated, “we believe that an exemption from public records access is available only after the legislature has followed the express procedure provided in Article I, section 24(c) of the Florida Constitution.”

The Open Government Sunset Review Act provides for legislative review of exemptions from the open government laws. Pursuant to s. 119.15, F.S., any new exemption, or expansion of an existing exemption, shall be repealed on October 2 in the fifth year after the exemption was enacted. The Attorney General’s Office has found that the constitutional requirement of a two-thirds vote applies equally “to re-adoption of exemptions as well as initial creation of exemptions.”<sup>14</sup> The Legislature may act to reenact an exemption indefinitely,<sup>15</sup> but will be bound by the constitutional requirement of a two-thirds vote for enactment of exemptions.<sup>16</sup>

### **Public Record Exemptions for Victims of Crimes**

Recognizing that the personal safety of victims of crimes may be compromised when public records information about the victim is released, the Legislature has provided public record exemptions for victims of crimes.<sup>17</sup> For example, information or records that have been made part of a court file and that may reveal the identity of a person who is a victim of a sexual offense is exempt from the public records requirements.<sup>18</sup> More broadly, the Legislature enacted a blanket exemption from the public records laws for “[a]ny document that reveals the identity, home or employment telephone number, home or employment address, or personal assets of the victim of a crime and identifies that person as the victim of a crime, which document is received by any agency that regularly receives information from or concerning the victims of crime.”<sup>19</sup>

Furthermore, an exemption from the public records laws exists for any information, not otherwise held confidential or exempt, which reveals the home or employment telephone number, home or employment address, or personal assets of a person who has been the victim of sexual battery, aggravated child abuse, aggravated stalking, harassment, aggravated battery, or domestic violence.<sup>20</sup> To apply for an exemption, the victim files a written request to the appropriate agency, which must include official verification that an applicable crime has occurred.

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<sup>13</sup> *Memorial Hospital-West Volusia, Inc. v. News-Journal Corporation*, 729 So. 2d 373, 380 (Fla. 1999); *Indian River County Hospital District v. Indian River Memorial Hospital, Inc.*, 766 So. 2d 233, 237 (Fla. 4th DCA 2000).

<sup>14</sup> Op. Att’y Gen. Fla. 03-18 (July 31, 2003).

<sup>15</sup> Section 119.15(3), F.S.

<sup>16</sup> FLA. CONST. art. I, s. 24(c).

<sup>17</sup> See sections 119.071 and 119.0714, F.S.

<sup>18</sup> Section 119.0714(1)(h), F.S.

<sup>19</sup> Section 119.071(2)(j)1., F.S.

<sup>20</sup> *Id.*

### **Injunctions for Victims of Violence**

Sections 741.30 and 784.046, F.S., provide guidelines for the service of injunctions for protection against domestic violence, repeat violence, sexual violence, or dating violence. During the 2011 Legislative Session, these statutes were amended to require the Florida Association of Court Clerks and Comptrollers (Association), subject to available funding, to develop an automated process by which a petitioner may request notification of service of an injunction for protection against domestic violence, repeat violence, sexual violence, or dating violence.<sup>21</sup> This process necessarily requires the petitioner to provide the Association with personal contact information. In many instances, the petitioner is a victim of a crime, and thus the information he or she provides to the Association may be exempt from public records requirements pursuant to s. 119.07, F.S. However, a person does not have to be a crime victim in order to petition for a protective injunction. In these instances, the petitioner's information may be public record.

### **III. Effect of Proposed Changes:**

Sections 1 and 2 amend s. 741.30, F.S., and s. 784.046, F.S., respectively. Proposed changes to these statutes pertain to a petitioner who requests notification from the Florida Association of Court Clerks of the service of an injunction for protection against domestic violence, repeat violence, sexual violence, or dating violence and related court actions. The bill requires a notification to apprise such a petitioner of his or her right to make a public records exemption request. The bill provides that such a petitioner may request exemption from public records requirements for the following records:<sup>22</sup>

- Information which reveals a home or employment telephone number or address,
- Cellular telephone number,
- Electronic mail address, or
- Other electronic means of identification of the petitioner.

The bill provides that, upon the written request of the petitioner, the information held by the Association in conjunction with the automated injunction notification process is exempt from public record. Such information would cease to be exempt 5 years after the Association's receipt of the petitioner's written request. The bill grants access to state or federal agencies authorized by law to have access to such documents in furtherance of the agencies' statutory duties.

The bill specifies that the public records exemption is subject to the Open Government Sunset Review Act and repeals the exemption effective October 2, 2017, unless reviewed and saved from repeal through reenactment by the Legislature.

Section 3 provides a public necessity statement, as required by the State Constitution.<sup>23</sup> The statement of public necessity explains that without the public record exemption:

- A victim could be exposed to public humiliation and shame;

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<sup>21</sup> Chapter 2011-187, Laws of Fla.

<sup>22</sup> The petitioner's personal identifying information will remain confidential and exempt for 5 years after receipt of the request.

<sup>23</sup> FLA. CONST. art. I, s. 24(c).

- A victim could become inhibited from availing herself or himself of relief under state law; and
- Personal identifying and location information could be used to determine the location of the victim, placing the victim in jeopardy.

Section 4 provides an effective date of October 1, 2012.

**Other Potential Implications:**

**IV. Constitutional Issues:**

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

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

Article I, s. 24(c) of the State Constitution, requires a public necessity statement for a newly created or expanded public record or public meeting exemption. The bill expands the current exemption; thus, it includes a public necessity statement.

C. Trust Funds Restrictions:

None.

D. Other Constitutional Issues:

Article I, s. 24(c) of the State Constitution, contains a restriction on the scope of general laws enacted to create public records exemptions. Specifically, general laws creating public records exemptions “shall contain only exemptions from the requirements of [Article I, s. 24(a) or (b)] and provisions governing the enforcement of [s. 24(c)]”. Lines 68-72 and lines 146-149 of the bill appear to contain substantive law, in that they require the Association to apprise a petitioner of his or her right to make a public records exemption request. So long as these lines of the bill are considered “provisions governing” Article I, s. 24(c) of the State Constitution, and not substantive law other than creation of an exemption, their inclusion in this bill will not violate the State Constitution.

**V. Fiscal Impact Statement:**

A. Tax/Fee Issues:

None.

**B. Private Sector Impact:**

None

**C. Government Sector Impact:**

The bill does not appear to have any fiscal impact on the judiciary.<sup>24</sup>

**VI. Technical Deficiencies:**

None.

**VII. Related Issues:**

The bill requires the notification of service of an injunction to apprise the petitioner of his or her right to make the public records exemption request. As such, petitioners might only become aware of this right after providing personal information to the Association. Since the information only becomes exempt from public records upon the petitioner's written request, it would appear that a petitioner should be notified of his or her right to make the public records exemption request at the same time that the petitioner is making the request to be notified that the injunction was served. Otherwise, information provided to the Association prior to the petitioner making the request for exemption could be public record.

The bill provides that information held by the Association in conjunction with the automated injunction notification process which reveals specified personal information is exempt from public record. However, this information will necessarily have to be provided to the law enforcement agency who is serving the injunction. Thus, the bill should exempt information held by both the Association and law enforcement agencies.

In section 3, the bill provides that it is a public necessity that a petitioner's personal identifying and location information held by the Association in conjunction with the automated notification process be held confidential and exempt from s. 119.07(1), F.S. However, the remainder of the bill only requires that such information be held exempt from s. 119.07(1), F.S., and not held confidential. As confidentiality is a distinct and more absolute removal from availability by the public,<sup>25</sup> confusion may arise over the use of the term in section 3 of the bill. In order to ensure that the public necessity statement conforms to the bill, the reference to information being held confidential should either be removed, or used uniformly throughout the bill.

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<sup>24</sup> Fla. Office of the State Courts Administrator, *2012 Judicial Impact Statement: SB 1390*, Jan. 9, 2012 (on file with the Senate Committee on Judiciary).

<sup>25</sup> *WFTV, Inc. v. School Bd. of Seminole*, 874 So.2d 48, 53 (Fla. 5th DCA 2004). "There is a difference between records the Legislature has determined to be exempt from The Florida Public Records Act and those which the Legislature has determined to be exempt from The Florida Public Records Act and confidential. If information is made confidential in the statutes, the information is not subject to inspection by the public and may only be released to the persons or organizations designated in the statute."

**VIII. Additional Information:**

- A. **Committee Substitute – Statement of Substantial Changes:**  
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

- B. **Amendments:**

None.

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This Senate Bill Analysis does not reflect the intent or official position of the bill's introducer or the Florida Senate.

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508384

LEGISLATIVE ACTION

Senate	.	House
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The Committee on Judiciary (Joyner) recommended the following:

**Senate Amendment (with title amendment)**

Delete everything after the enacting clause  
and insert:

Section 1. Paragraph (c) of subsection (8) of section  
741.30, Florida Statutes, is amended to read:

741.30 Domestic violence; injunction; powers and duties of  
court and clerk; petition; notice and hearing; temporary  
injunction; issuance of injunction; statewide verification  
system; enforcement; public records exemption.-

(8)

(c)1. Within 24 hours after the court issues an injunction  
for protection against domestic violence or changes, continues,



14 extends, or vacates an injunction for protection against  
15 domestic violence, the clerk of the court must forward a  
16 certified copy of the injunction for service to the sheriff with  
17 jurisdiction over the residence of the petitioner. The  
18 injunction must be served in accordance with this subsection.

19 2. Within 24 hours after service of process of an  
20 injunction for protection against domestic violence upon a  
21 respondent, the law enforcement officer must forward the written  
22 proof of service of process to the sheriff with jurisdiction  
23 over the residence of the petitioner.

24 3. Within 24 hours after the sheriff receives a certified  
25 copy of the injunction for protection against domestic violence,  
26 the sheriff must make information relating to the injunction  
27 available to other law enforcement agencies by electronically  
28 transmitting such information to the department.

29 4. Within 24 hours after the sheriff or other law  
30 enforcement officer has made service upon the respondent and the  
31 sheriff has been so notified, the sheriff must make information  
32 relating to the service available to other law enforcement  
33 agencies by electronically transmitting such information to the  
34 department.

35 5.a. Subject to available funding, the Florida Association  
36 of Court Clerks and Comptrollers shall develop an automated  
37 process by which a petitioner may request notification of  
38 service of the injunction for protection against domestic  
39 violence and other court actions related to the injunction for  
40 protection. The automated notice shall be made within 12 hours  
41 after the sheriff or other law enforcement officer serves the  
42 injunction upon the respondent. The notification must include,



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43 at a minimum, the date, time, and location where the injunction  
44 for protection against domestic violence was served. When a  
45 petitioner makes a request for notification, the Florida  
46 Association of Court Clerks and Comptrollers must apprise the  
47 petitioner of her or his right to request in writing that the  
48 information specified in sub-subparagraph b. be held exempt from  
49 public records requirements for 5 years. The Florida Association  
50 of Court Clerks and Comptrollers may apply for any available  
51 grants to fund the development of the automated process.

52 b. Information held by the Florida Association of Court  
53 Clerks and Comptrollers and law enforcement agencies in  
54 conjunction with the automated process developed under sub-  
55 subparagraph a. which reveals the home or employment telephone  
56 number, cellular telephone number, home or employment address,  
57 electronic mail address, or other electronic means of  
58 identification of a petitioner requesting notification of  
59 service of an injunction for protection against domestic  
60 violence and other court actions related to the injunction for  
61 protection is exempt from s. 119.07(1) and s. 24(a), Art. I of  
62 the State Constitution, upon written request by the petitioner.  
63 Such information shall cease to be exempt 5 years after the  
64 receipt of the written request. Any state or federal agency that  
65 is authorized to have access to such documents by any provision  
66 of law shall be granted such access in the furtherance of such  
67 agency's statutory duties, notwithstanding this sub-  
68 subparagraph. This sub-subparagraph is subject to the Open  
69 Government Sunset Review Act in accordance with s. 119.15 and  
70 shall stand repealed on October 2, 2017, unless reviewed and  
71 saved from repeal through reenactment by the Legislature.



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72           6. Within 24 hours after an injunction for protection  
73 against domestic violence is vacated, terminated, or otherwise  
74 rendered no longer effective by ruling of the court, the clerk  
75 of the court must notify the sheriff receiving original  
76 notification of the injunction as provided in subparagraph 2.  
77 That agency shall, within 24 hours after receiving such  
78 notification from the clerk of the court, notify the department  
79 of such action of the court.

80           Section 2. Paragraph (c) of subsection (8) of section  
81 784.046, Florida Statutes, is amended to read:

82           784.046 Action by victim of repeat violence, sexual  
83 violence, or dating violence for protective injunction; dating  
84 violence investigations, notice to victims, and reporting;  
85 pretrial release violations; public records exemption.-

86           (8)

87           (c)1. Within 24 hours after the court issues an injunction  
88 for protection against repeat violence, sexual violence, or  
89 dating violence or changes or vacates an injunction for  
90 protection against repeat violence, sexual violence, or dating  
91 violence, the clerk of the court must forward a copy of the  
92 injunction to the sheriff with jurisdiction over the residence  
93 of the petitioner.

94           2. Within 24 hours after service of process of an  
95 injunction for protection against repeat violence, sexual  
96 violence, or dating violence upon a respondent, the law  
97 enforcement officer must forward the written proof of service of  
98 process to the sheriff with jurisdiction over the residence of  
99 the petitioner.

100           3. Within 24 hours after the sheriff receives a certified



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101 copy of the injunction for protection against repeat violence,  
102 sexual violence, or dating violence, the sheriff must make  
103 information relating to the injunction available to other law  
104 enforcement agencies by electronically transmitting such  
105 information to the department.

106 4. Within 24 hours after the sheriff or other law  
107 enforcement officer has made service upon the respondent and the  
108 sheriff has been so notified, the sheriff must make information  
109 relating to the service available to other law enforcement  
110 agencies by electronically transmitting such information to the  
111 department.

112 5.a. Subject to available funding, the Florida Association  
113 of Court Clerks and Comptrollers shall develop an automated  
114 process by which a petitioner may request notification of  
115 service of the injunction for protection against repeat  
116 violence, sexual violence, or dating violence and other court  
117 actions related to the injunction for protection. The automated  
118 notice shall be made within 12 hours after the sheriff or other  
119 law enforcement officer serves the injunction upon the  
120 respondent. The notification must include, at a minimum, the  
121 date, time, and location where the injunction for protection  
122 against repeat violence, sexual violence, or dating violence was  
123 served. When a petitioner makes a request for notification, the  
124 Florida Association of Court Clerks and Comptrollers must  
125 apprise the petitioner of her or his right to request in writing  
126 that the information specified in sub-subparagraph b. be held  
127 exempt from public records requirements for 5 years. The Florida  
128 Association of Court Clerks and Comptrollers may apply for any  
129 available grants to fund the development of the automated



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130 process.

131 b. Information held by the Florida Association of Court  
132 Clerks and Comptrollers and law enforcement agencies in  
133 conjunction with the automated process developed under sub-  
134 subparagraph a. which reveals the home or employment telephone  
135 number, cellular telephone number, home or employment address,  
136 electronic mail address, or other electronic means of  
137 identification of a petitioner requesting notification of  
138 service of an injunction for protection against repeat violence,  
139 sexual violence, or dating violence and other court actions  
140 related to the injunction for protection is exempt from s.  
141 119.07(1) and s. 24(a), Art. I of the State Constitution, upon  
142 written request by the petitioner. Such information shall cease  
143 to be exempt 5 years after the receipt of the written request.  
144 Any state or federal agency that is authorized to have access to  
145 such documents by any provision of law shall be granted such  
146 access in the furtherance of such agency's statutory duties,  
147 notwithstanding this sub-subparagraph. This sub-subparagraph is  
148 subject to the Open Government Sunset Review Act in accordance  
149 with s. 119.15 and shall stand repealed on October 2, 2017,  
150 unless reviewed and saved from repeal through reenactment by the  
151 Legislature.

152 6. Within 24 hours after an injunction for protection  
153 against repeat violence, sexual violence, or dating violence is  
154 lifted, terminated, or otherwise rendered no longer effective by  
155 ruling of the court, the clerk of the court must notify the  
156 sheriff or local law enforcement agency receiving original  
157 notification of the injunction as provided in subparagraph 2.  
158 That agency shall, within 24 hours after receiving such



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159 notification from the clerk of the court, notify the department  
160 of such action of the court.

161 Section 3. It is the finding of the Legislature that it is  
162 a public necessity that personal identifying and location  
163 information of victims of domestic violence, repeat violence,  
164 sexual violence, and dating violence held by the Florida  
165 Association of Court Clerks and Comptrollers and law enforcement  
166 agencies in conjunction with the automated process developed by  
167 the association under ss. 741.30 and 784.046, Florida Statutes,  
168 by which a petitioner may request notification of service of an  
169 injunction for protection against domestic violence, repeat  
170 violence, sexual violence, or dating violence and other court  
171 actions related to the injunction for protection be held exempt  
172 from s. 119.07(1), Florida Statutes, and s. 24(a), Article I of  
173 the State Constitution upon written request by the petitioner.  
174 Such information, if publicly available, could expose the  
175 victims of domestic violence, repeat violence, sexual violence,  
176 and dating violence to public humiliation and shame and could  
177 inhibit the victim from availing herself or himself of relief  
178 provided under state law. Additionally, if such information were  
179 publicly available, it could be used by the partner or former  
180 partner of the victim of domestic violence, repeat violence,  
181 sexual violence, or dating violence to determine the location of  
182 the victim, thus placing the victim in jeopardy.

183 Section 4. This act shall take effect October 1, 2012.

184  
185 ===== T I T L E A M E N D M E N T =====

186 And the title is amended as follows:

187



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188 Delete everything before the enacting clause  
189 and insert:

190 A bill to be entitled  
191 An act relating to public records; amending ss. 741.30  
192 and 784.046, F.S.; providing exemptions from public  
193 records requirements for personal identifying and  
194 location information of victims of domestic violence,  
195 repeat violence, sexual violence, and dating violence  
196 held by the Florida Association of Court Clerks and  
197 Comptrollers and law enforcement agencies in  
198 conjunction with the automated process developed by  
199 the association by which a petitioner may request  
200 notification of service of an injunction for  
201 protection against domestic violence, repeat violence,  
202 sexual violence, or dating violence and other court  
203 actions related to the injunction for protection;  
204 providing that the exemption is conditional upon the  
205 petitioner's request; providing specified duration of  
206 the exemption; providing for access by state or  
207 federal agencies in furtherance of the agencies'  
208 statutory duties; providing that the Florida  
209 Association of Court Clerks and Comptrollers must  
210 inform the petitioner of the right to request that the  
211 identifying and location information be held exempt  
212 from public records requirements; providing for future  
213 legislative review and repeal of the exemptions;  
214 providing a statement of public necessity; providing  
215 an effective date.

By Senator Joyner

18-01263A-12

20121390\_\_

A bill to be entitled

An act relating to public records; amending ss. 741.30 and 784.046, F.S.; providing exemptions from public records requirements for personal identifying and location information of victims of domestic violence, repeat violence, sexual violence, and dating violence held by the Florida Association of Court Clerks and Comptrollers in conjunction with the automated process developed by the association by which a petitioner may request notification of service of an injunction for protection against domestic violence, repeat violence, sexual violence, or dating violence and other court actions related to the injunction for protection; providing that the exemption is conditional upon the petitioner's request; providing specified duration of the exemption; providing for access by state or federal agencies in furtherance of the agencies' statutory duties; providing that notification to the petitioner of service of the injunction for protection must inform the petitioner of the right to request that the identifying and location information be held exempt from public records requirements; providing for future legislative review and repeal of the exemptions; providing a statement of public necessity; providing an effective date.

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

Section 1. Paragraph (c) of subsection (8) of section

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

18-01263A-12

20121390\_\_

741.30, Florida Statutes, is amended to read:

741.30 Domestic violence; injunction; powers and duties of court and clerk; petition; notice and hearing; temporary injunction; issuance of injunction; statewide verification system; enforcement; public records exemption.-

(8)

(c)1. Within 24 hours after the court issues an injunction for protection against domestic violence or changes, continues, extends, or vacates an injunction for protection against domestic violence, the clerk of the court must forward a certified copy of the injunction for service to the sheriff with jurisdiction over the residence of the petitioner. The injunction must be served in accordance with this subsection.

2. Within 24 hours after service of process of an injunction for protection against domestic violence upon a respondent, the law enforcement officer must forward the written proof of service of process to the sheriff with jurisdiction over the residence of the petitioner.

3. Within 24 hours after the sheriff receives a certified copy of the injunction for protection against domestic violence, the sheriff must make information relating to the injunction available to other law enforcement agencies by electronically transmitting such information to the department.

4. Within 24 hours after the sheriff or other law enforcement officer has made service upon the respondent and the sheriff has been so notified, the sheriff must make information relating to the service available to other law enforcement agencies by electronically transmitting such information to the department.

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

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59 5.a. Subject to available funding, the Florida Association  
 60 of Court Clerks and Comptrollers shall develop an automated  
 61 process by which a petitioner may request notification of  
 62 service of the injunction for protection against domestic  
 63 violence and other court actions related to the injunction for  
 64 protection. The automated notice shall be made within 12 hours  
 65 after the sheriff or other law enforcement officer serves the  
 66 injunction upon the respondent. The notification must include,  
 67 at a minimum, the date, time, and location where the injunction  
 68 for protection against domestic violence was served, and must  
 69 advise the petitioner of her or his right to request in writing  
 70 that the information specified in sub-subparagraph b. be held  
 71 exempt from public records requirements for 5 years after the  
 72 receipt of the written request. The Florida Association of Court  
 73 Clerks and Comptrollers may apply for any available grants to  
 74 fund the development of the automated process.

75 b. Information held by the Florida Association of Court  
 76 Clerks and Comptrollers in conjunction with the automated  
 77 process developed under sub-subparagraph a. which reveals the  
 78 home or employment telephone number, cellular telephone number,  
 79 home or employment address, electronic mail address, or other  
 80 electronic means of identification of a petitioner requesting  
 81 notification of service of an injunction for protection against  
 82 domestic violence and other court actions related to the  
 83 injunction for protection is exempt from s. 119.07(1) and s.  
 84 24(a), Art. I of the State Constitution, upon written request by  
 85 the petitioner. Such information shall cease to be exempt 5  
 86 years after the receipt of the written request. Any state or  
 87 federal agency that is authorized to have access to such

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

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88 documents by any provision of law shall be granted such access  
 89 in the furtherance of such agency's statutory duties,  
 90 notwithstanding this sub-subparagraph. This sub-subparagraph is  
 91 subject to the Open Government Sunset Review Act in accordance  
 92 with s. 119.15 and shall stand repealed on October 2, 2017,  
 93 unless reviewed and saved from repeal through reenactment by the  
 94 Legislature.

95 6. Within 24 hours after an injunction for protection  
 96 against domestic violence is vacated, terminated, or otherwise  
 97 rendered no longer effective by ruling of the court, the clerk  
 98 of the court must notify the sheriff receiving original  
 99 notification of the injunction as provided in subparagraph 2.  
 100 That agency shall, within 24 hours after receiving such  
 101 notification from the clerk of the court, notify the department  
 102 of such action of the court.

103 Section 2. Paragraph (c) of subsection (8) of section  
 104 784.046, Florida Statutes, is amended to read:

105 784.046 Action by victim of repeat violence, sexual  
 106 violence, or dating violence for protective injunction; dating  
 107 violence investigations, notice to victims, and reporting;  
 108 pretrial release violations; public records exemption.-

109 (8)

110 (c)1. Within 24 hours after the court issues an injunction  
 111 for protection against repeat violence, sexual violence, or  
 112 dating violence or changes or vacates an injunction for  
 113 protection against repeat violence, sexual violence, or dating  
 114 violence, the clerk of the court must forward a copy of the  
 115 injunction to the sheriff with jurisdiction over the residence  
 116 of the petitioner.

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

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117 2. Within 24 hours after service of process of an  
 118 injunction for protection against repeat violence, sexual  
 119 violence, or dating violence upon a respondent, the law  
 120 enforcement officer must forward the written proof of service of  
 121 process to the sheriff with jurisdiction over the residence of  
 122 the petitioner.

123 3. Within 24 hours after the sheriff receives a certified  
 124 copy of the injunction for protection against repeat violence,  
 125 sexual violence, or dating violence, the sheriff must make  
 126 information relating to the injunction available to other law  
 127 enforcement agencies by electronically transmitting such  
 128 information to the department.

129 4. Within 24 hours after the sheriff or other law  
 130 enforcement officer has made service upon the respondent and the  
 131 sheriff has been so notified, the sheriff must make information  
 132 relating to the service available to other law enforcement  
 133 agencies by electronically transmitting such information to the  
 134 department.

135 5.a. Subject to available funding, the Florida Association  
 136 of Court Clerks and Comptrollers shall develop an automated  
 137 process by which a petitioner may request notification of  
 138 service of the injunction for protection against repeat  
 139 violence, sexual violence, or dating violence and other court  
 140 actions related to the injunction for protection. The automated  
 141 notice shall be made within 12 hours after the sheriff or other  
 142 law enforcement officer serves the injunction upon the  
 143 respondent. The notification must include, at a minimum, the  
 144 date, time, and location where the injunction for protection  
 145 against repeat violence, sexual violence, or dating violence was

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146 served, and must apprise the petitioner of her or his right to  
 147 request in writing that the information specified in sub-  
 148 paragraph b. be held exempt from public records requirements  
 149 for 5 years after the receipt of the written request. The  
 150 Florida Association of Court Clerks and Comptrollers may apply  
 151 for any available grants to fund the development of the  
 152 automated process.

153 b. Information held by the Florida Association of Court  
 154 Clerks and Comptrollers in conjunction with the automated  
 155 process developed under sub-subparagraph a. which reveals the  
 156 home or employment telephone number, cellular telephone number,  
 157 home or employment address, electronic mail address, or other  
 158 electronic means of identification of a petitioner requesting  
 159 notification of service of an injunction for protection against  
 160 repeat violence, sexual violence, or dating violence and other  
 161 court actions related to the injunction for protection is exempt  
 162 from s. 119.07(1) and s. 24(a), Art. I of the State  
 163 Constitution, upon written request by the petitioner. Such  
 164 information shall cease to be exempt 5 years after the receipt  
 165 of the written request. Any state or federal agency that is  
 166 authorized to have access to such documents by any provision of  
 167 law shall be granted such access in the furtherance of such  
 168 agency's statutory duties, notwithstanding this sub-  
 169 paragraph. This sub-subparagraph is subject to the Open  
 170 Government Sunset Review Act in accordance with s. 119.15 and  
 171 shall stand repealed on October 2, 2017, unless reviewed and  
 172 saved from repeal through reenactment by the Legislature.

173 6. Within 24 hours after an injunction for protection  
 174 against repeat violence, sexual violence, or dating violence is

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 175 lifted, terminated, or otherwise rendered no longer effective by  
 176 ruling of the court, the clerk of the court must notify the  
 177 sheriff or local law enforcement agency receiving original  
 178 notification of the injunction as provided in subparagraph 2.  
 179 That agency shall, within 24 hours after receiving such  
 180 notification from the clerk of the court, notify the department  
 181 of such action of the court.

182 Section 3. It is the finding of the Legislature that it is  
 183 a public necessity that personal identifying and location  
 184 information of victims of domestic violence, repeat violence,  
 185 sexual violence, and dating violence held by the Florida  
 186 Association of Court Clerks and Comptrollers in conjunction with  
 187 the automated process developed by the association under ss.  
 188 741.30 and 784.046, Florida Statutes, by which a petitioner may  
 189 request notification of service of an injunction for protection  
 190 against domestic violence, repeat violence, sexual violence, or  
 191 dating violence and other court actions related to the  
 192 injunction for protection be held confidential and exempt from  
 193 s. 119.07(1), Florida Statutes, and s. 24(a), Article I of the  
 194 State Constitution upon written request by the petitioner. Such  
 195 information, if publicly available, could expose the victims of  
 196 domestic violence, repeat violence, sexual violence, and dating  
 197 violence to public humiliation and shame and could inhibit the  
 198 victim from availing herself or himself of relief provided under  
 199 state law. Additionally, if such information were publicly  
 200 available, it could be used by the partner or former partner of  
 201 the victim of domestic violence, repeat violence, sexual  
 202 violence, or dating violence to determine the location of the  
 203 victim, thus placing the victim in jeopardy.

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 204 Section 4. This act shall take effect October 1, 2012.

**The Florida Senate**  
**BILL ANALYSIS AND FISCAL IMPACT STATEMENT**

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

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Prepared By: The Professional Staff of the Judiciary Committee

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BILL: SB 1146

INTRODUCER: Senator Simmons

SUBJECT: Effect of Dissolution or Annulment of Marriage on Certain Designations

DATE: January 24, 2012

REVISED: \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Munroe	Cibula	JU	<b>Pre-meeting</b>
2.			BC	
3.				
4.				
5.				
6.				

---

**I. Summary:**

The bill generally nullifies upon divorce or annulment the designation of a spouse as a beneficiary of nonprobate assets such as life insurance policies, individual retirement accounts, and payable on death accounts. If the provisions of the bill apply, an asset will pass as if the former spouse predeceased the decedent.

The bill also specifies criteria for a payor of a nonprobate asset to use in identifying the appropriate beneficiary. The bill specifically provides that the payor is not liable in some circumstances for transferring an asset to the beneficiary identified through the bill's criteria.

Lastly, the bill generally terminates upon the termination of a marriage the authority of a spouse under an advance directive to serve as a health care surrogate or to serve a surrogate for the purposes of a living will.

This bill creates the following sections of the Florida Statutes: 732.703, 765.2021, and 765.3031, Florida Statutes.

## II. Present Situation:

### Disposition of Nonprobate Assets

Chapters 731 to 735, F.S., are known as the “Florida Probate Code.”<sup>1</sup> Substantive rights regarding probate are covered in the probate code and procedural matters are governed by probate rules adopted by the Florida Supreme Court.

Chapter 732, F.S., governs substantive issues relating to wills. A provision of a will executed before the dissolution or annulment of a marriage which provides for a former spouse is void.<sup>2</sup> A court will interpret the will as if the former spouse “had died at the time of the dissolution, divorce, or annulment of the marriage, unless the will or the dissolution or divorce judgment expressly provides otherwise.”<sup>3</sup> A similar provision exists for trusts. If a revocable trust is created by a husband or wife as settlor before the entry of a judgment for a divorce or annulment of a marriage, then any provision of the trust that affects the divorced spouse is void unless the trust provides otherwise.<sup>4</sup>

In contrast, nonprobate assets<sup>5</sup> typically are transferred by the designation of a beneficiary as provided in the contract.<sup>6</sup> If an individual designates his or her spouse as beneficiary on the individual’s life insurance policy or other nonprobate asset, divorces the spouse, and fails to modify the beneficiary designated on the policy, the former spouse will receive the policy’s proceeds upon the individual’s death. Nonprobate assets are widely used as a tool for estate planning.<sup>7</sup>

Litigation has ensued to determine the disposition of nonprobate assets in instances where an individual who owns nonprobate assets, divorced, and later failed to remove the former spouse as beneficiary for the assets.<sup>8</sup> In that litigation, the Florida Supreme Court held that a former spouse as named beneficiary was entitled to term life insurance proceeds despite a general release in a marital settlement agreement.<sup>9</sup> The Court reasoned that the determination of who is entitled to the assets depends on the plain language in the insurance contract designating a beneficiary when a marital settlement agreement fails to specifically remove the former spouse.<sup>10</sup>

---

<sup>1</sup> Section 731.005, F.S.

<sup>2</sup> Section 732.507(2), F.S. *See also*, Henry P. Trawick, Jr., *Trawick’s Redfearn Wills and Administration in Florida*, s. 3:10 (2009-2010 ed.).

<sup>3</sup> Section 732.507(2), F.S.

<sup>4</sup> Section 736.1105, F.S.

<sup>5</sup> “Nonprobate asset” means “[p]roperty that passes to a named beneficiary upon the owner’s death according to the terms of some contract or arrangement other than a will. Such an asset is not a part of the probate estate and is not ordinarily subject to the probate court’s jurisdiction (and fees), though it is part of the taxable estate. Examples include life-insurance contracts, joint property arrangements with right of survivorship, pay-on-death accounts, and inter vivos trusts.” BLACK’S LAW DICTIONARY (9th ed. 2009).

<sup>6</sup> *Id.*

<sup>7</sup> *See* Suzanne Soliman, *A Fair Presumption: Why Florida Needs a Divorce Revocation Statute for Beneficiary-Designated Nonprobate Assets*, 36 STETSON L. REV. 397, 397 (Winter 2007).

<sup>8</sup> Real Property, Probate, and Trust Law Section of The Florida Bar, *White Paper on Effect of Dissolution or Invalidity of Marriage on Disposition of Certain Assets at Death* (on file with the Senate Committee on Judiciary).

<sup>9</sup> *Cooper v. Muccitelli*, 682 So. 2d 77, 79 (Fla. 1996).

<sup>10</sup> *Id.*

In a subsequent case, the Florida Supreme Court explained that:

absent the marital settlement agreement providing who is or is not to receive the death benefits or specifying who is to be the beneficiary, courts should look no further than the named beneficiary in the separate document of the policy, plan, or account. General language in a marital settlement agreement, such as language stating who is to receive ownership, is not specific enough to override the plain language of the beneficiary designation in the separate document. The spouse, who owns the policy, plan, or account following the dissolution of marriage, is otherwise free to name any individual as the beneficiary; however, if the spouse does not change the beneficiary, the beneficiary designation in the separate document controls.<sup>11</sup>

### Health Care Advance Directives

Chapter 765, F.S., details the requirements for health care advance directives. An “advanced directive” is “a witnessed written document or oral statement in which instructions are given by a principal or in which the principal’s desires are expressed concerning any aspect of the principal’s health care, and includes, but is not limited to, the designation of a health care surrogate, a living will, or an anatomical gift.”<sup>12</sup>

Chapter 765, F.S., outlines substantive rights and procedures for a “competent adult to make an advance directive instructing his or her physician to provide, withhold, or withdraw life-prolonging procedures, or to designate another to make the treatment decision for him or her in the event that such person should become incapacitated and unable to personally direct his or her medical care.”<sup>13</sup>

A competent adult may amend or revoke an advance directive or designation of a surrogate<sup>14</sup> at any time by means of any of the following:

- a signed, dated written document.<sup>15</sup>
- the physical cancellation or destruction of the advance directive by the principal or by another person in principal’s presence and at the principal’s direction.<sup>16</sup>
- an oral expression of an intent to revoke.<sup>17</sup>
- execution of a subsequent advance directive that is materially different from the previously executed advanced directive.<sup>18</sup>

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<sup>11</sup> *Crawford v. Barker*, 64 So. 3d 1246, 1248 (Fla. 2011).

<sup>12</sup> Section 765.101(1), F.S.

<sup>13</sup> Section 765.102(3), F.S.

<sup>14</sup> “Surrogate” means “any competent adult expressly designated by a principal to make health care decisions on behalf of the principal upon the principal’s incapacity.” Section 765.101(16), F.S.

<sup>15</sup> Section 765.104(1)(a), F.S.

<sup>16</sup> Section 765.104(1)(b), F.S.

<sup>17</sup> Section 765.104(1)(c), F.S.

<sup>18</sup> Section 765.104(1)(d), F.S.

The dissolution or annulment of marriage of the principal<sup>19</sup> automatically revokes the designation of the principal's spouse as the surrogate.<sup>20</sup>

Chapter 765, F.S., sets forth a procedure for the designation of a proxy to make health care decisions under certain circumstances for an incapacitated or developmentally disabled patient. Specifically, under s. 765.104, F.S.:

(1) If an incapacitated or developmentally disabled patient has not executed an advance directive, or designated a surrogate to execute an advance directive, or the designated or alternate surrogate is no longer available to make health care decisions, health care decisions may be made for the patient by any of the following individuals, in the following order of priority, if no individual in a prior class is reasonably available, willing, or competent to act:

- The judicially appointed guardian of the patient or the guardian advocate of the person having a developmental disability ... who has been authorized to consent to medical treatment, if such guardian has previously been appointed;
- The patient's spouse;
- An adult child of the patient, or if the patient has more than one adult child, a majority of the adult children who are reasonably available for consultation;
- A parent of the patient;
- The adult sibling of the patient or, if the patient has more than one sibling, a majority of the adult siblings who are reasonably available for consultation;
- An adult relative of the patient who has exhibited special care and concern for the patient and who has maintained regular contact with the patient and who is familiar with the patient's activities, health, and religious or moral beliefs; or
- A close friend of the patient.<sup>21</sup>

A clinical social worker licensed in Florida or who is a graduate of a court-approved guardianship program may also be selected by the health care provider's bioethics committee to serve as a proxy under additional procedures outlined in s. 765.104, F.S.

### **III. Effect of Proposed Changes:**

#### **Section 1. (Effect of Dissolution or Annulment of Marriage on Designation of Beneficiary for Certain Nonprobate Assets)**

The bill voids the designation of a former spouse as a beneficiary of an interest in an asset that will be transferred or paid upon the death of the decedent if:

<sup>19</sup> Section 765.101(14), F.S., defines "principal" to mean "a competent adult executing an advance directive and on whose behalf health care decisions are to be made."

<sup>20</sup> Section 765.104(2), F.S., states "[u]nless otherwise provided in the advance directive or in an order of dissolution or annulment of marriage, the dissolution or annulment of marriage of the principal revokes the designation of the principal's former spouse as a surrogate."

<sup>21</sup> Section 765.401, F.S.

- The decedent's marriage was judicially dissolved or declared invalid before the decedent's death; and
- The designation was made before the dissolution or order invalidating the marriage.

The decedent's interest in the asset must pass as if the decedent's former spouse predeceased the decedent. The nonprobate assets covered by the bill include:

- a life insurance policy, qualified annuity, or other similar tax-deferred contract held within an employee benefit plan;
- an employee benefit plan;
- an individual retirement account;
- a payable-on-death account;
- a security or other account registered in a transfer-on-death form; and
- a life insurance policy, annuity or other similar contract that is not held within an employee benefit plan or tax-qualified retirement account.

However, the bill does not void a beneficiary designation:

- to the extent federal law provides otherwise;
- if the governing instrument as defined in the bill<sup>22</sup> expressly provides that the interest will be payable to the designated former spouse after the order of dissolution or order declaring the marriage invalid and the instrument expressly provides that benefits will be payable to the decedent's former spouse;
- to the extent the disposition of the assets are governed by a will or trust;
- if a court order required the decedent to acquire or maintain the asset for the benefit of the former spouse or children of the marriage;
- if under terms of the order of dissolution or order declaring the marriage invalid, the decedent did not have the ability to unilaterally terminate or change the beneficiary or pay-on-death designation;
- if the designation of the decedent's former spouse as beneficiary is irrevocable under applicable law;
- if the contract or agreement is governed by the laws of another state;
- to an asset held in two or more names as to which the death of one co-owner vests ownership of the asset in the surviving co-owner or co-owners; or
- if the decedent remarries the person whose interest would otherwise have been revoked as a former spouse under the bill and the decedent and that person are married to one another at the time of the decedent's death.

### **Payment Procedures**

The bill outlines procedures and requirements for entities making payment of the decedent's interest in the following nonprobate assets: a life insurance policy, qualified annuity, or other

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<sup>22</sup> "Governing instrument" is defined in the bill to mean "any writing or contract governing the disposition of all or part of an asset upon the death of the decedent."

similar tax-deferred contract held within an employee benefit plan; an employee benefit plan; or an individual retirement account.

If the governing instrument does not explicitly specify the relationship between the beneficiary designated in the instrument and the decedent, or if the governing instrument explicitly provides that the beneficiary is not the decedent's spouse, the payor is not liable for making any payment or transferring any interest in the account to the beneficiary.

If the governing instrument specifies the *primary beneficiary as the spouse of the decedent*, the payor must examine the death certificate. If the death certificate provides that the decedent was married to the named beneficiary at the time of death, the payor may pay out the benefits to the named beneficiary. If the death certificate states that the decedent was not married, or was married to another individual other than the person specified on the account as the spouse, the payor is not liable for paying or transferring the interest in the asset to the secondary beneficiary under the governing instrument.

If the death certificate is silent as to the marital status of the decedent, the bill provides for the use of two form affidavits. One affidavit may be executed by an individual alleging to be the surviving spouse of the decedent. If the alleged surviving spouse executes the affidavit, certifying that he or she is the surviving spouse of the decedent and that the decedent was married to him or her at the time of the decedent's death, the payor is not liable for paying the account to such individual. The second affidavit may be executed by a secondary beneficiary who must certify that the primary beneficiary was not married to the decedent at the time of the decedent's death. The payor may also pay out the interest to the secondary beneficiary upon receipt of a properly executed affidavit.

### **Payors' Liability Extinguished**

The bill provides that in the case of pay-on-death accounts, securities or other accounts registered in transfer-on-death form, and life insurance policies, annuities or other similar contracts not held within an employee benefit plan or a tax-qualified retirement account, the payor is not liable for making any payment on account of, or transferring any interest in, such assets to any beneficiary.<sup>23</sup>

A payor's immunity for making a payment in accordance with the criteria in the bill applies notwithstanding the payor's knowledge that the person to whom the asset is transferred is different from the person who would own the interest due to the dissolution of the decedent's marriage or declaration of the marriage's validity before the decedent's death. As such, a secondary beneficiary will have a cause of action against the former spouse who receives the payment or transfer of the assets described in the bill if the beneficiary designations was made void upon divorce or annulment.<sup>24</sup>

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<sup>23</sup> This bill is not intended to impose any additional due diligence requirements, requirements to review death certificates, on the payors of the assets described in s. 732.703(6), F.S. Real Property, Probate, and Trust Law Section of The Florida Bar, *White Paper on Effect of Dissolution or Invalidity of Marriage on Disposition of Certain Assets at Death* (on file with the Senate Committee on Judiciary).

<sup>24</sup> "The primary purpose of [s. 732.703, F.S.] is to create the basis for a cause of action for accounts that are paid out to former spouses as opposed to intended beneficiaries." Real Property, Probate, and Trust Law Section of The Florida Bar,

The bill does not affect the ownership of an interest in an asset as between the former spouse and any other person entitled to such interest, the rights of any purchaser for value of any such interest, the rights of any creditor of the former spouse or any other person entitled to such interest, or the rights and duties of any insurance company, financial institution, trustee, administrator, or other third party.

The provisions of the bill, relating to beneficiary designations, apply to all designations made by or on behalf of decedents dying on or after July 1, 2012, regardless of when the designation was made.

### **Section 2. (Advance Directive-Health Care Surrogate)**

The bill provides that upon dissolution of a marriage, a former spouse's authority as a health care surrogate terminates upon the dissolution or annulment of the marriage, unless the document or the final judgment of dissolution provides otherwise. After the dissolution or annulment, the document designating a health care surrogate must be administered as if the former spouse predeceased the other spouse and is unable to perform his or her duties.

This section applies to all final judgment of dissolution or annulment entered on or after July 1, 2012.

### **Section 3. (Advance Directive- Living Wills)**

The bill creates s. 765.3031, F.S., to provide that upon dissolution of a marriage, a former spouse's authority as a surrogate for the other spouse under a living will terminates upon the dissolution or annulment of the marriage, unless the document or the final judgment of dissolution provides otherwise. After the dissolution or annulment, the living will must be administered as if the former spouse predeceased the other spouse and is unable to perform his or her duties.

This section applies to all final judgment of dissolution or annulment entered on or after July 1, 2012.

**Section 4.** The bill provides an effective date of July 1, 2012.

## **IV. Constitutional Issues:**

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

**V. Fiscal Impact Statement:**

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

Companies that administer the nonprobate assets covered by the bill may incur additional costs to implement the bill. Such costs are difficult to estimate.

C. Government Sector Impact:

None.

**VI. Technical Deficiencies:**

None.

**VII. Related Issues:**

Sections 2 and 3 of the bill remove the designation of a former spouse to make health care decisions under an advance directive if an individual becomes incapacitated and is unable to direct his or her medical care or to make decisions regarding the withholding or withdrawal of life-prolonging procedures. It appears that current law already addresses this circumstance in s. 765.104(2), F.S., which states, "Unless otherwise provided in the advance directive or in an order of dissolution or annulment of marriage, the dissolution or annulment of marriage of the principal revokes the designation of the principal's former spouse as a surrogate."

**VIII. Additional Information:**

A. Committee Substitute – Statement of Substantial Changes:

(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

B. Amendments:

None.



111670

LEGISLATIVE ACTION

Senate

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. .  
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. .  
. .

House

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The Committee on Judiciary (Simmons) recommended the following:

**Senate Amendment (with title amendment)**

Delete lines 251 - 279.

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

And the title is amended as follows:

Delete lines 31 - 40

and insert:

specified interests and rights; providing an effective  
date.



675008

LEGISLATIVE ACTION

Senate	.	House
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The Committee on Judiciary (Simmons) recommended the following:

1           **Senate Substitute for Amendment (111670) (with title**  
2 **amendment)**

3  
4           Delete lines 251 - 279.

5  
6 ===== T I T L E   A M E N D M E N T =====

7 And the title is amended as follows:

8           Delete lines 31 - 39

9 and insert:

10           specified interests and rights; providing

By Senator Simmons

22-00668A-12

20121146\_\_

1 A bill to be entitled  
 2 An act relating to effect of dissolution or annulment  
 3 of marriage on certain designations; creating s.  
 4 732.703, F.S.; providing definitions; providing that a  
 5 designation made by or on behalf of a decedent  
 6 providing for the payment or transfer at death of an  
 7 interest in an asset to or for the benefit of the  
 8 decedent's former spouse shall become void if the  
 9 decedent's marriage was judicially dissolved or  
 10 declared invalid before the decedent's death, if the  
 11 designation was made prior to the dissolution or  
 12 order; providing for disposition of assets; providing  
 13 for treatment of certain retirement plans; specifying  
 14 assets subject to provisions; providing exceptions;  
 15 providing that payors are not liable for payments or  
 16 transfers to beneficiaries contrary to this provision  
 17 in certain circumstances; specifying the form of an  
 18 affidavit that may be used to relieve a payor of  
 19 liability for a transfer if the death certificate is  
 20 silent as to the decedent's marital status at the time  
 21 of death; providing that the payor is not liable for  
 22 making any payment on account of, or transferring any  
 23 interest in, certain types of assets to a beneficiary;  
 24 providing that certain provisions apply  
 25 notwithstanding the payor's knowledge that the person  
 26 to whom the asset is transferred is different from the  
 27 person who would own the interest due to the  
 28 dissolution of the decedent's marriage or declaration  
 29 of the marriage's validity before the decedent's

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

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30 death; providing that the provisions do not affect  
 31 specified interests and rights; creating ss. 765.2021  
 32 and 765.3031, F.S.; providing that a spouse's  
 33 authority as a health care surrogate or a surrogate  
 34 under a living will, respectively, terminates upon the  
 35 dissolution or annulment of the marriage, unless the  
 36 document or the final judgment of dissolution provides  
 37 otherwise; providing for the administration of the  
 38 declaration of health care surrogacy or living will  
 39 after the dissolution or annulment; providing  
 40 applicability; providing an effective date.

41  
 42 Be It Enacted by the Legislature of the State of Florida:

43  
 44 Section 1. Section 732.703, Florida Statutes, is created to  
 45 read:

46 732.703 Effect of divorce, dissolution, or invalidity of  
 47 marriage on disposition of certain assets at death.-

48 (1) As used in this section, unless the context requires  
 49 otherwise, the term:

50 (a) "Asset," when not modified by other words or phrases,  
 51 means an asset described in subsection (3).

52 (b) "Beneficiary" means any person designated in a  
 53 governing instrument to receive an interest in an asset upon the  
 54 death of the decedent.

55 (c) "Death certificate" means a certified copy of a death  
 56 certificate issued by an official or agency for the place where  
 57 the decedent's death occurred.

58 (d) "Employee benefit plan" means any funded or unfunded

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

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59 plan, program, or fund established by an employer to provide an  
60 employee's beneficiaries with benefits that may be payable on  
61 the employee's death.

62 (e) "Governing instrument" means any writing or contract  
63 governing the disposition of all or any part of an asset upon  
64 the death of the decedent.

65 (f) "Payor" means any person obligated to make payment of  
66 the decedent's interest in an asset upon the death of the  
67 decedent, and any other person who is in control or possession  
68 of an asset.

69 (g) "Primary beneficiary" means a beneficiary designated  
70 under the governing instrument to receive an interest in an  
71 asset upon the death of the decedent who is not a secondary  
72 beneficiary. A person who receives an interest in the asset upon  
73 the death of the decedent due to the death of another  
74 beneficiary prior to the decedent's death is also a primary  
75 beneficiary.

76 (h) "Secondary beneficiary" means a beneficiary designated  
77 under the governing instrument who will receive an interest in  
78 an asset if the designation of the primary beneficiary is  
79 revoked or otherwise cannot be given effect.

80 (2) A designation made by or on behalf of the decedent  
81 providing for the payment or transfer at death of an interest in  
82 an asset to or for the benefit of the decedent's former spouse  
83 is void as of the time the decedent's marriage was judicially  
84 dissolved or declared invalid by court order prior to the  
85 decedent's death, if the designation was made prior to the  
86 dissolution or court order. The decedent's interest in the asset  
87 shall pass as if the decedent's former spouse predeceased the

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88 decedent. An individual retirement account described in s. 408  
89 or s. 408A of the Internal Revenue Code of 1986, or an employee  
90 benefit plan, may not be treated as a trust for purposes of this  
91 section.

92 (3) Subsection (2) applies to the following assets in which  
93 a resident of this state has an interest at the time of the  
94 resident's death:

95 (a) A life insurance policy, qualified annuity, or other  
96 similar tax-deferred contract held within an employee benefit  
97 plan.

98 (b) An employee benefit plan.

99 (c) An individual retirement account described in s. 408 or  
100 s. 408A of the Internal Revenue Code of 1986, including an  
101 individual retirement annuity described in s. 408(b) of the  
102 Internal Revenue Code of 1986.

103 (d) A payable-on-death account.

104 (e) A security or other account registered in a transfer-  
105 on-death form.

106 (f) A life insurance policy, annuity, or other similar  
107 contract that is not held within an employee benefit plan or a  
108 tax-qualified retirement account.

109 (4) Subsection (2) does not apply:

110 (a) To the extent that controlling federal law provides  
111 otherwise;

112 (b) If the governing instrument is signed by the decedent,  
113 or on behalf of the decedent, after the order of dissolution or  
114 order declaring the marriage invalid and such governing  
115 instrument expressly provides that benefits will be payable to  
116 the decedent's former spouse;

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117 (c) To the extent a will or trust governs the disposition  
 118 of the assets and s. 732.507(2) or s. 736.1005 applies;

119 (d) If the order of dissolution or order declaring the  
 120 marriage invalid requires that the decedent acquire or maintain  
 121 the asset for the benefit of a former spouse or children of the  
 122 marriage, payable upon the death of the decedent either outright  
 123 or in trust, only if other assets of the decedent fulfilling  
 124 such a requirement for the benefit of the former spouse or  
 125 children of the marriage do not exist upon the death of the  
 126 decedent;

127 (e) If, under the terms of the order of dissolution or  
 128 order declaring the marriage invalid, the decedent could not  
 129 have unilaterally terminated or modified the ownership of the  
 130 asset, or its disposition upon the death of the decedent;

131 (f) If the designation of the decedent's former spouse as a  
 132 beneficiary is irrevocable under applicable law;

133 (g) If the instrument directing the disposition of the  
 134 asset at death is governed by the laws of a state other than  
 135 this state;

136 (h) To an asset held in two or more names as to which the  
 137 death of one coowner vests ownership of the asset in the  
 138 surviving coowner or coowners; or

139 (i) If the decedent remarries the person whose interest  
 140 would otherwise have been revoked under this section and the  
 141 decedent and that person are married to one another at the time  
 142 of the decedent's death.

143 (5) In the case of an asset described in paragraph (3) (a),  
 144 paragraph (3) (b), or paragraph (3) (c), unless payment or  
 145 transfer would violate a court order directed to, and served as

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146 required by law on, the payor:

147 (a) If the governing instrument does not explicitly specify  
 148 the relationship of the beneficiary to the decedent or if the  
 149 governing instrument explicitly provides that the beneficiary is  
 150 not the decedent's spouse, the payor is not liable for making  
 151 any payment on account of, or transferring any interest in, the  
 152 asset to the beneficiary.

153 (b) As to any portion of the asset required by the  
 154 governing instrument to be paid after the decedent's death to a  
 155 primary beneficiary explicitly designated in the governing  
 156 instrument as the decedent's spouse:

157 1. If the death certificate states that the decedent was  
 158 married at the time of his or her death to that spouse, the  
 159 payor is not liable for making a payment on account of, or for  
 160 transferring an interest in, that portion of the asset to such  
 161 primary beneficiary.

162 2. If the death certificate states that the decedent was  
 163 not married at the time of his or her death, or if the death  
 164 certificate states that the decedent was married to a person  
 165 other than the spouse designated as the primary beneficiary at  
 166 the time of his or her death, the payor is not liable for making  
 167 a payment on account of, or for transferring an interest in,  
 168 that portion of the asset to a secondary beneficiary under the  
 169 governing instrument.

170 3. If the death certificate is silent as to the decedent's  
 171 marital status at the time of his or her death, the payor is not  
 172 liable for making a payment on account of, or for transferring  
 173 an interest in, that portion of the asset to the primary  
 174 beneficiary upon delivery to the payor of an affidavit validly

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175 executed by the primary beneficiary in substantially the  
 176 following form:

177  
 178 STATE OF \_\_\_\_\_  
 179 COUNTY OF \_\_\_\_\_

180 Before me, the undersigned authority, personally  
 181 appeared ... (type or print affiant's name)...  
 182 ("Affiant"), who swore or affirmed that:

183 1. ... (Type or print name of decedent)...  
 184 ("Decedent") died on ... (type or print the date of the  
 185 Decedent's death)...

186 2. Affiant is a "primary beneficiary" as that  
 187 term is defined in Section 732.703, Florida Statutes.  
 188 Affiant and Decedent were married on ... (type or print  
 189 the date of marriage )..., and were legally married to  
 190 one another on the date of the Decedent's death.

191  
 192 \_\_\_\_\_  
 193 ...( Affiant)...

194 Sworn to or affirmed before me by the affiant who  
 195 is personally known to me or who has produced  
 196 ...(state type of identification)... as identification  
 197 this .... day of ...(month)..., ...(year)....  
 198 ...(Signature of Officer)...  
 199 ...(Print, Type, or Stamp Commissioned name of Notary  
 200 Public)...

201  
 202 4. If the death certificate is silent as to the decedent's  
 203 marital status at the time of his or her death, the payor is not

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204 liable for making a payment on account of, or for transferring  
 205 an interest in, that portion of the asset to the secondary  
 206 beneficiary upon delivery to the payor of an affidavit validly  
 207 executed by the secondary beneficiary affidavit in substantially  
 208 the following form:

209  
 210 STATE OF \_\_\_\_\_  
 211 COUNTY OF \_\_\_\_\_

212 Before me, the undersigned authority, personally  
 213 appeared ... (type or print affiant's name)...  
 214 ("Affiant"), who swore or affirmed that:

215 1. ... (Type or print name of decedent)...  
 216 ("Decedent") died on ... (type or print the date of the  
 217 Decedent's death)...

218 2. Affiant is a "secondary beneficiary" as that  
 219 term is defined in Section 732.703, Florida Statutes.  
 220 On the date of the Decedent's death, the Decedent was  
 221 not legally married to the spouse designated as the  
 222 "primary beneficiary" as that term is defined in  
 223 Section 732.703, Florida Statutes.

224 Sworn to or affirmed before me by the affiant who  
 225 is personally known to me or who has produced  
 226 ...(state type of identification)... as identification  
 227 this .... day of ...(month)..., ...(year)....  
 228 ...(Signature of Officer)...  
 229 ...(Print, Type, or Stamp Commissioned name of Notary  
 230 Public)...

231  
 232 (6) In the case of an asset described in paragraph (3) (d),

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233 paragraph (3) (e), or paragraph (3) (f), the payor is not liable  
 234 for making any payment on account of, or transferring any  
 235 interest in, the asset to any beneficiary.

236 (7) Subsections (5) and (6) apply notwithstanding the  
 237 payor's knowledge that the person to whom the asset is  
 238 transferred is different from the person who would own the  
 239 interest pursuant to subsection (2).

240 (8) This section does not affect the ownership of an  
 241 interest in an asset as between the former spouse and any other  
 242 person entitled to such interest by operation of this section,  
 243 the rights of any purchaser for value of any such interest, the  
 244 rights of any creditor of the former spouse or any other person  
 245 entitled to such interest, or the rights and duties of any  
 246 insurance company, financial institution, trustee,  
 247 administrator, or other third party.

248 (9) This section applies to all designations made by or on  
 249 behalf of decedents dying on or after July 1, 2012, regardless  
 250 of when the designation was made.

251 Section 2. Section 765.2021, Florida Statutes, is created  
 252 to read:

253 765.2021 Termination of authority upon dissolution of  
 254 marriage.—

255 (1) Upon the dissolution or annulment of a marriage, a  
 256 former spouse's authority as a health care surrogate terminates  
 257 upon the dissolution or annulment of the marriage, unless the  
 258 document or the final judgment of dissolution or annulment  
 259 provides otherwise. After the dissolution or annulment, the  
 260 document designating a health care surrogate shall be  
 261 administered as if the former spouse predeceased the other

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262 spouse and is therefore unable to perform his or her duties. The  
 263 remainder of the document shall be unaffected.

264 (2) This section applies to all final judgments of  
 265 dissolution or annulment entered on or after July 1, 2012.

266 Section 3. Section 765.3031, Florida Statutes, is created  
 267 to read:

268 765.3031 Termination of authority upon dissolution of  
 269 marriage.—

270 (1) Upon the dissolution or annulment of a marriage, a  
 271 former spouse's authority as a surrogate for the other spouse  
 272 under a living will terminates upon the dissolution or annulment  
 273 of the marriage, unless the document or the final judgment of  
 274 dissolution or annulment provides otherwise. After the  
 275 dissolution or annulment, the living will shall be administered  
 276 as if the former spouse predeceased the other spouse, and the  
 277 remainder of the document shall be unaffected.

278 (2) This section applies to all final judgments of  
 279 dissolution or annulment entered on or after July 1, 2012.

280 Section 4. This act shall take effect July 1, 2012.

**The Florida Senate**  
**BILL ANALYSIS AND FISCAL IMPACT STATEMENT**

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Judiciary Committee

BILL: SB 1268  
 INTRODUCER: Senator Simmons  
 SUBJECT: Actions for Damages  
 DATE: January 24, 2012      REVISED: \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Irwin	Cibula	JU	<b>Pre-meeting</b>
2.	_____	_____	BC	_____
3.	_____	_____	RC	_____
4.	_____	_____	_____	_____
5.	_____	_____	_____	_____
6.	_____	_____	_____	_____

**I. Summary:**

This bill repeals s. 768.75, F.S., which authorizes a court in a negligence action to require the attorneys, parties, and persons having authority to settle to attend a settlement action at least 3 weeks before trial.

This bill repeals section 768.75, Florida Statutes.

**II. Present Situation:**

While s. 768.75, F.S., authorizes a court to order a pretrial settlement conference requiring all necessary parties to attend, Rule 1.200(a)(7), Fla. R. Civ. P., states that “[a]t any time after responsive pleadings or motions are due, the court may order . . . a case management conference. . . . At such a conference the court may . . . pursue the possibility of settlement.” And, Rule 1.200(b)(6), Fla. R. Civ. P., states that “[a]fter the action is at issue the court itself may or shall on the timely motion of any party require the parties to appear for a conference to consider and determine . . . any matters permitted under subdivision (a) of this rule.”

Furthermore, Fed. R. Civ. P. 16, states that “[i]n any action, the court may order the attorneys and any unrepresented parties to appear for one or more pretrial conferences for such purposes as . . . facilitating settlement.”

**III. Effect of Proposed Changes:**

This bill repeals s. 768.75, F.S., which states that:

- In negligence cases, the court may require a settlement conference to be held at least 3 weeks before the date set for trial; and
- The attorneys who will conduct the trial, parties, and persons with authority to settle shall attend the settlement conference held before the court unless excused by the court for good cause.

This bill takes effect upon becoming a law.

#### **IV. Constitutional Issues:**

##### **A. Municipality/County Mandates Restrictions:**

None.

##### **B. Public Records/Open Meetings Issues:**

None.

##### **C. Trust Funds Restrictions:**

None.

#### **V. Fiscal Impact Statement:**

##### **A. Tax/Fee Issues:**

None.

##### **B. Private Sector Impact:**

Committee staff does not anticipate any significant private sector impact because these settlement conferences are provided for under both the Florida Rules of Civil Procedure and the Federal Rules of Civil Procedure.

##### **C. Government Sector Impact:**

Committee staff does not anticipate any significant government sector impact because these settlement conferences are provided for under both the Florida Rules of Civil Procedure and the Federal Rules of Civil Procedure.

#### **VI. Technical Deficiencies:**

None.

#### **VII. Related Issues:**

None.

**VIII. Additional Information:**

- A. **Committee Substitute – Statement of Substantial Changes:**  
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

- B. **Amendments:**

None.

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This Senate Bill Analysis does not reflect the intent or official position of the bill's introducer or the Florida Senate.

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By Senator Simmons

22-01229-12

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A bill to be entitled

An act relating to actions for damages; repealing s.  
768.75, F.S., relating to an optional settlement  
conference in certain tort actions; providing an  
effective date.

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

Section 1. Section 768.75, Florida Statutes, is repealed.

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

**The Florida Senate**  
**BILL ANALYSIS AND FISCAL IMPACT STATEMENT**

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

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Prepared By: The Professional Staff of the Judiciary Committee

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BILL: SB 1570

INTRODUCER: Senator Simmons

SUBJECT: Judiciary

DATE: January 24, 2012

REVISED: \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	O'Connor	Cibula	JU	<b>Pre-meeting</b>
2.	_____	_____	BC	_____
3.	_____	_____	_____	_____
4.	_____	_____	_____	_____
5.	_____	_____	_____	_____
6.	_____	_____	_____	_____

---

**I. Summary:**

Senate Bill 1570:

- Provides that if a retired judge or justice is assigned to temporary duty, such assignment does not affect his or her eligibility for benefits under the Florida Retirement System;
- Provides that each expired term or vacancy on a judicial nominating commission (JNC) is filled by appointment in the same manner as the member whose position is being filled;
- Updates provisions relating to the staggering of terms of members of a JNC who are selected from the list provided by the Board of Governors of the Florida Bar;
- Provides that an appointment to a judicial nominating commission of a member selected from a list of nominees provided by the Board of Governors of The Florida Bar is for a term of 4 years, unless the appointment is to fill a vacancy or an unexpired term; and
- Deletes a requirement that the Executive Office of the Governor establish uniform rules of procedure consistent with the State Constitution when suspending a member of a judicial nominating commission for cause.

This bill substantially amends sections 25.073 and 43.29, Florida Statutes.

## II. Present Situation:

### Retirement

The Florida Constitution and the Florida Rules of Judicial Administration allow the Chief Justice of the Supreme Court to temporarily assign retired justices and judges to any court on which they are qualified to serve. Under current law, a public employee or officer who retires or terminates participation in the Deferred Retirement Option Program (DROP) on or after July 1, 2010, and who becomes employed by an employer participating in the Florida Retirement System (FRS) during the first six months after retirement or termination of DROP, is not considered retired and may not receive retirement benefits.<sup>1</sup> This prohibition currently applies to retired judges or justices serving temporary duty.

A "senior judge" is an honorary designation that refers to a retired judge serving on assignment to temporary judicial duty.<sup>2</sup> The Florida Constitution and the Florida Rules of Judicial Administration allow the Chief Justice of the Supreme Court to temporarily assign retired justices and judges to any court on which they are qualified to serve. The Florida Rules of Judicial Administration define a retired judge as a judge who is not engaged in the practice of law and who has been a judicial officer of this state.<sup>3</sup> Retired judges must comply with continuing judicial education requirements, including completion of 30 hours of approved judicial education programs every 3 years.<sup>4</sup>

Section 25.073, F.S., provides that a retired justice or judge is a former justice or judge who is not engaged in the practice of law and who has not been defeated in seeking re-election or has not failed to be retained in seeking retention in his or her last judicial office.<sup>5</sup> A justice or judge may not serve more than 60 days on temporary duty during a year without the approval of the Chief Justice of the Supreme Court.<sup>6</sup>

Retired judges may receive compensation as set by law.<sup>7</sup> Only persons who meet the qualifications set forth in s. 25.073(1), F.S., may be compensated for service as retired justices or judges. Current law sets the compensation for retired justices or judges at not less than \$200 per day.<sup>8</sup> According to the Office of the State Courts Administrator, retired justices or judges are currently paid \$350 per day for service. In addition, retired justices or judges are entitled to necessary travel expenses.<sup>9</sup>

Chapter 21, F.S., relates to the Florida Retirement System (FRS). Section 121.021(39)(b), F.S., defines "termination," providing that:

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<sup>1</sup> Section 121.021(39), F.S.

<sup>2</sup> FLA. CONST. art. 5, s. (2)(b); Fla. R. Jud. Admin. 2.205(a)(3)(A).

<sup>3</sup> Fla. R. Jud. Admin. 2.205(a)(3)(B).

<sup>4</sup> Fla. R. Jud. Admin. 2.320.

<sup>5</sup> Section 25.073(1), F.S.

<sup>6</sup> Section 25.073(2)(a), F.S.

<sup>7</sup> Fla. R. Jud. Admin. 2.205(a)(3)(A).

<sup>8</sup> Section 25.073(2)(a), F.S.

<sup>9</sup> Section 25.073(2)(b), F.S.

"[T]ermination" for a member electing to participate in the Deferred Retirement Option Program [(DROP)] occurs when the program participant ceases all employment relationships with participating employers in accordance with statute

However, the section further provides that any member of the FRS who retires or terminates DROP participation on or after July 1, 2010, and who becomes employed by any FRS employer during the first six calendar months after such time, does not meet the requirements for "termination." Such individuals are not considered retired and, therefore, may not receive retirement benefits.

Section 121.091, F.S., sets out what retirement benefits are payable to an individual who has terminated employment under s. 121.021(39)(a), F.S., or begun participation in DROP. The statute provides that, any person whose retirement is effective on or after July 1, 2010, who is retired under the chapter, may be reemployed by an employer that participates in a state-administered retirement system and receive both retirement benefits and compensation from such employer.<sup>10</sup> However, a person may not be reemployed by an employer participating in the Florida Retirement System before meeting the definition of "termination" in s. 121.021, F.S.

### **Judicial Nominating Commission**

Trial court judgeships that become vacant during a judge's term and all appellate judgeships are filled by the Governor from a list of nominees provided by a judicial nominating commission (JNC).<sup>11</sup> The number of members and composition of each JNC is provided for by statute.<sup>12</sup> When an appellate judgeship becomes vacant, candidates submit their applications to the JNC for that court. The commission sends a list of three to six nominees to the Governor and the Governor fills the vacancy by selecting from that list.<sup>13</sup> Circuit and county court judges are determined by election<sup>14</sup> but vacancies on the circuit or county courts that occur between elections are filled in the same manner as vacancies on the appellate bench.<sup>15</sup>

Article V, s. 11(d), Fla. Const., provides that a JNC must be created by general law for the Supreme Court, each district court of appeal, and each judicial circuit for all trial courts within that circuit. Section 43.291, F.S., implements the constitutional provisions. Each JNC consists of nine members appointed by the Governor.<sup>16</sup> Members serve four year terms.<sup>17</sup> All JNC members must be residents of the territorial jurisdiction serviced by the JNC to which the member is appointed.<sup>18</sup>

The Governor may appoint five of the nine members of each JNC without input from The Florida Bar. Two of those five appointees must be members of The Florida Bar who are engaged

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<sup>10</sup> Section 121.091(9)(c), F.S.

<sup>11</sup> FLA. CONST. art. V, s. 11.

<sup>12</sup> Section 43.291, F.S.

<sup>13</sup> FLA. CONST. art. V, s. 11(a).

<sup>14</sup> Circuits and counties may, by local option, choose to select judges in the same manner as appellate judges are selected. *See* FLA. CONST. art. V, s. 10.

<sup>15</sup> FLA. CONST. art. V, s. 11(b).

<sup>16</sup> Section 43.291(1), F.S.

<sup>17</sup> Section 43.291(3), F.S.

<sup>18</sup> Section 43.291(1)(a)-(b), F.S.

in the practice of law.<sup>19</sup> The remaining four members are appointed by the Governor from a list of nominees selected and provided by the Board of Governors of The Florida Bar. The Governor may reject all of the nominees recommended for the position and request that the Board submit a new list of three different nominees who have not previously been recommended by the Board. These four members of the JNC must be members of The Florida Bar engaged in the practice of law. The Governor may suspend a member of a JNC for cause through an executive order as outlined in the State Constitution.<sup>20</sup>

### **III. Effect of Proposed Changes:**

#### **Retirement**

The bill provides that the definition of "termination" in s. 121.021(39)(b), F.S., relating to individuals participating in DROP, does not apply to a retired judge or justice assigned to temporary duty. Instead, termination occurs upon the judge's retirement from non-temporary, active duty as a judge. The bill also provides that s. 121.091(9)(c), F.S., does not apply to a retired judge serving temporary duty and that temporary duty under this section is not considered reemployment or employment after retirement for purposes of ch 121, F.S.

In sum, the bill provides that if a retired judge or justice is assigned to temporary duty, such assignment does not affect his or her eligibility for benefits under the Florida Retirement System.

#### **Judicial Nominating Commission**

The bill provides that members of the JNC, except the four members selected from a list provided by the Florida Bar, shall serve at the pleasure of the governor. The bill also:

- Provides that each expired term or vacancy is filled by appointment in the same manner as the member whose position is being filled;
- Updates provisions relating to the staggering of terms for members selected from the list provided by the Board of Governors of the Florida Bar;
- Provides that an appointment to a judicial nominating commission of a member selected from a list of nominees provided by the Board of Governors of The Florida Bar is for a term of 4 years, unless the appointment is to fill a vacancy or an unexpired term; and
- Deletes a requirement that the Executive Office of the Governor establish uniform rules of procedure when suspending for cause a member of a JNC because such procedures are detailed under Article IV, section 7 of the State Constitution.

#### **Effective Date**

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

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<sup>19</sup> Section 43.291(1)(b), F.S.

<sup>20</sup> FLA. CONST. art. IV, s. 7(a).

**IV. Constitutional Issues:**

## A. Municipality/County Mandates Restrictions:

None.

## B. Public Records/Open Meetings Issues:

None.

## C. Trust Funds Restrictions:

None.

**V. Fiscal Impact Statement:**

## A. Tax/Fee Issues:

None.

## B. Private Sector Impact:

None.

## C. Government Sector Impact:

Article X, s. 14 of the State Constitution requires that benefit improvements under public pension plans in the State of Florida be concurrently funded on a sound actuarial basis, as set forth below:

SECTION 14. State retirement systems benefit changes.--A governmental unit responsible for any retirement or pension system supported in whole or in part by public funds shall not after January 1, 1977, provide any increase in the benefits to the members or beneficiaries of such system unless such unit has made or concurrently makes provision for the funding of the increase in benefits on a sound actuarial basis.

Article X, s. 14 of the State Constitution is implemented by statute under part VII of chapter 112, F.S., the "Florida Protection of Public Employee Retirement Benefits Act" (Act). The Act establishes minimum standards for the operation and funding of public employee retirement systems and plans in the State of Florida. It prohibits the use of any procedure, methodology, or assumptions the effect of which is to transfer to future taxpayers any portion of the costs which may reasonably have been expected to be paid by the current taxpayers.

The bill appears to require an actuarial study in order to determine the estimated cost and to meet the requirements of Article X, s. 14 of the State Constitution.<sup>21</sup>

**VI. Technical Deficiencies:**

Lines 64 and 72 of the bill refer to “each current member of the judicial nominating commission.” It is unclear to what time period the word “current” refers. It is not clear, for example, whether members would be considered “current” within the meaning of the bill if they were members as of the effective date of the bill, the date of passage, or at some other point in time.

Section 43.291, F.S., as amended by the bill only provides for the terms of four of the nine members of a JNC. The Legislature may wish to revise the bill to specify terms of all nine members of a JNC.

**VII. Related Issues:**

None.

**VIII. Additional Information:**

**A. Committee Substitute – Statement of Substantial Changes:**  
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

**B. Amendments:**

None.

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This Senate Bill Analysis does not reflect the intent or official position of the bill’s introducer or the Florida Senate.

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<sup>21</sup> The Senate Committee on Governmental Oversight and Accountability published a report finding that the creation of an exception to the six-month termination period in s. 121.021(3), F.S., constitutes an increase in benefits which requires an actuarial study. Committee on Governmental Oversight and Accountability, The Florida Senate, *Retired Judges Returning to Temporary Duty Status Within Six Months of Retirement* (Issue Brief 2012-217) (Sept. 2011).

By Senator Simmons

22-01468B-12

20121570\_\_

A bill to be entitled

An act relating to the judiciary; amending s. 25.073, F.S.; providing that if a retired justice or judge is assigned to temporary duty, such assignment does not affect his or her eligibility for benefits under the Florida Retirement System; amending s. 43.291, F.S.; revising requirements for the appointment of members of judicial nominating commissions; providing that, with the exception of members selected from a list of nominees provided by the Board of Governors of The Florida Bar, a current member of a judicial nominating commission appointed by the Governor serves at the pleasure of the Governor; providing for each expired term or vacancy to be filled by appointment in the same manner as the member whose position is being filled; deleting obsolete provisions; deleting a requirement that the Executive Office of the Governor establish uniform rules of procedure consistent with the State Constitution when suspending for cause a member of a judicial nominating commission; providing an effective date.

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

Section 1. Subsection (4) is added to section 25.073, Florida Statutes, to read:

25.073 Retired justices or judges assigned to temporary duty; additional compensation; appropriation.-

(4) For a retired judge who has reached his or her normal

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

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20121570\_\_

retirement age or date under chapter 121 and who has consented to temporary duty in any court, as assigned by the Chief Justice of the Supreme Court in accordance with s. 2, Art. V of the State Constitution:

(a) The definition of the term "termination" in s. 121.021 does not apply, and termination occurs when the judge ceases all permanent, nontemporary, active duty as a judge, and retires from the Florida Retirement System.

(b) Section 121.091(9)(c) does not apply, and such temporary duty is not considered reemployment or employment after retirement for purposes of chapter 121, and renewed membership in the Florida Retirement System is not allowed.

Section 2. Subsections (1), (3), and (5) of section 43.291, Florida Statutes, are amended to read:

43.291 Judicial nominating commissions.-

(1) Each judicial nominating commission shall be composed of the following members:

(a) Four members of The Florida Bar, appointed by the Governor, who are engaged in the practice of law, each of whom is a resident of the territorial jurisdiction served by the commission to which the member is appointed. The Board of Governors of The Florida Bar shall submit to the Governor three recommended nominees for each position. The Governor shall select the appointee from the list of nominees recommended for that position, but the Governor may reject all of the nominees recommended for a position and request that the Board of Governors submit a new list of three different recommended nominees for that position who have not been previously recommended by the Board of Governors.

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

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59 (b) Five members appointed by the Governor who shall serve  
 60 at the pleasure of the Governor, each of whom is a resident of  
 61 the territorial jurisdiction served by the commission to which  
 62 the member is appointed, of which at least two are members of  
 63 The Florida Bar engaged in the practice of law. Notwithstanding  
 64 any other law, each current member of a judicial nominating  
 65 commission appointed by the Governor, other than those selected  
 66 from a list of nominees provided by the Board of Governors of  
 67 The Florida Bar, shall serve at the pleasure of the Governor.

68 (c) Each expired term or vacancy shall be filled by  
 69 appointment in the same manner as the member whose position is  
 70 being filled.

71 (3) Notwithstanding any other provision of this section,  
 72 each current member of a judicial nominating commission selected  
 73 from a list of nominees provided ~~appointed directly~~ by the Board  
 74 of Governors of The Florida Bar shall serve the remainder of his  
 75 or her term, unless removed for cause. ~~The terms of all other~~  
 76 ~~members of a judicial nominating commission are hereby~~  
 77 ~~terminated, and the Governor shall appoint new Members~~ selected  
 78 from a list of nominees provided by the Board of Governors of  
 79 The Florida Bar shall serve terms to each judicial nominating  
 80 ~~commission~~ in the following manner:

81 (a) ~~One appointment~~ ~~Two appointments~~ for a term terms  
 82 ending July 1, ~~2012~~ ~~2002~~, ~~one of which shall be an appointment~~  
 83 ~~selected from nominations submitted by the Board of Governors of~~  
 84 ~~The Florida Bar pursuant to paragraph (1)(a);~~

85 (b) Two appointments for terms ending July 1, ~~2014~~ ~~2003~~;

86 and

87 (c) ~~One appointment~~ ~~Two appointments~~ for a term terms

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20121570\_\_

88 ending July 1, ~~2015~~ ~~2004~~.

89

90 Every subsequent appointment of a member selected from a list of  
 91 nominees provided by the Board of Governors of The Florida Bar,  
 92 except an appointment to fill a vacant, unexpired term, shall be  
 93 for 4 years. ~~Each expired term or vacancy shall be filled by~~  
 94 ~~appointment in the same manner as the member whose position is~~  
 95 ~~being filled.~~

96

97 (5) A member of a judicial nominating commission may be  
 98 suspended for cause by the Governor ~~pursuant to uniform rules of~~  
 99 ~~procedure established by the Executive Office of the Governor~~  
 consistent with s. ~~7~~ ~~of~~ Art. IV of the State Constitution.

100

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

**The Florida Senate**  
**BILL ANALYSIS AND FISCAL IMPACT STATEMENT**

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Judiciary Committee

**BILL:** CS/SB 950

**INTRODUCER:** Criminal Justice Committee and Senators Simmons and Storms

**SUBJECT:** Stalking & Aggravated Stalking

**DATE:** January 24, 2012      **REVISED:** \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Dugger	Cannon	CJ	Fav/CS
2.	White	Cibula	JU	Pre-meeting
3.			BC	
4.				
5.				
6.				

**Please see Section VIII. for Additional Information:**

A. COMMITTEE SUBSTITUTE.....  Statement of Substantial Changes

B. AMENDMENTS.....  Technical amendments were recommended

Amendments were recommended

Significant amendments were recommended

**I. Summary:**

The bill amends the stalking statute, s. 784.048, F.S., by revising definitions related to stalking, primarily the definition of “credible threat.” It establishes a cause of action for an injunction for protection against stalking and cyberstalking, provides procedures and protections for obtaining a temporary or final injunction against stalking or cyberstalking, provides a first-degree misdemeanor penalty for violating an injunction against stalking or cyberstalking, and requires the court to consider issuing an injunction restraining a defendant from victim contact for up to ten years.

This bill substantially amends section 784.048, Florida Statutes. The bill creates sections 784.0485 and 784.0487, Florida Statutes.

**II. Present Situation:**

**Stalking**

Section 784.048, F.S., criminalizes the offense of stalking and aggravated stalking. Stalking is a first-degree misdemeanor, punishable by up to one year in county jail and potentially a fine of up

to \$1,000. Stalking is committed when a person willfully, maliciously, and repeatedly follows, harasses, or cyberstalks another person.<sup>1</sup>

Aggravated stalking is a third-degree felony, punishable by up to five years in prison and potentially a fine of up to \$5,000. There are four aggravated stalking offenses provided in s. 784.048, F.S. Aggravated stalking occurs when a person willfully, maliciously, and repeatedly follows, harasses, or cyberstalks:

- Any person while making a credible threat with the intent to place that person in reasonable fear of death or bodily injury for himself, his child, sibling, spouse, parent, or dependent.<sup>2</sup>
- The same person for whom there has been an injunction for protection against repeat violence, sexual violence, dating violence, domestic violence, or any other court imposed prohibition of conduct toward the subject person or his property, so long as the aggravated stalking conduct is performed knowingly.<sup>3</sup>
- A minor under 16 years of age.<sup>4</sup>
- The victim of a crime for which the offender has been sentenced for sexual battery, a lewd or lascivious offense, or lewd or lascivious exhibition via computer transmission and for which the offender has been issued a no contact order under s. 921.244, F.S.<sup>5</sup>

The stalking law provides definitions for several common terms related to the offense of stalking. It defines “harass” as engaging in a “course of conduct directed at a specific person that causes substantial emotional distress and serves no legitimate purpose.”<sup>6</sup> A course of conduct is a “pattern of conduct composed of a series of acts over a period of time, however short, evidencing a continuity of purpose.”<sup>7</sup> A credible threat is one that is “made with the intent to cause the targeted person to reasonably fear for his or her safety.” Also, a credible threat must be made against the life of a person, or threaten to cause bodily injury to a person.<sup>8</sup> Lastly, cyberstalking means engaging in a course of conduct to communicate through words or images by electronic communication, directed at a specific person, causing substantial emotional distress to that person and serving no legitimate purpose.<sup>9</sup>

In 1995, the constitutionality of Florida’s stalking statute was upheld by the Florida Supreme Court against an overbreadth and vagueness challenge.<sup>10</sup>

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<sup>1</sup> Section 784.048(2), F.S.

<sup>2</sup> Section 784.048(3), F.S.

<sup>3</sup> Section 784.048(4), F.S.

<sup>4</sup> Section 784.048(5), F.S.

<sup>5</sup> Section 784.048(7), F.S.

<sup>6</sup> Section 784.048(1), F.S.

<sup>7</sup> Section 784.048(1)(b), F.S.

<sup>8</sup> Section 784.048(1)(c), F.S.

<sup>9</sup> Section 784.048(1)(d), F.S.

<sup>10</sup> *Bouters v. State*, 659 So. 2d 235 (1995), *cert. denied*, 116 S.Ct. 245, 516 U.S. 894, 133 L.Ed.2d 171.

## **Injunctions for Protection against Domestic Violence, Repeat Violence, Sexual Violence, or Dating Violence**

A victim of domestic violence,<sup>11</sup> or a person who has reasonable cause to believe that he or she is in imminent danger of becoming a victim of domestic violence, may seek protective injunctive relief.<sup>12</sup> In seeking protective injunctive relief, a person must file a sworn petition with the court which alleges the existence of domestic violence and includes specific facts and circumstances upon which relief is sought.<sup>13</sup> The court must set a hearing at the earliest possible time after a petition is filed.<sup>14</sup> The respondent must be personally served with a copy of the petition, financial affidavit, Uniform Child Custody Jurisdiction and Enforcement Act affidavit, if any, notice of hearing, and any temporary injunction that has been issued.<sup>15</sup> The court can enforce a violation of an injunction through a civil or criminal contempt proceeding, or the state attorney may prosecute it as a first-degree misdemeanor under s. 741.31, F.S.<sup>16</sup> Either party may move the court to modify or dissolve an injunction at any time.<sup>17</sup>

Section 784.046, F.S., governs the issuance of injunctions for protection against repeat violence,<sup>18</sup> dating violence,<sup>19</sup> and sexual violence.<sup>20</sup> To a large extent, this statute recreates provisions discussed above in the domestic violence law, applying the right to seek protective injunctive relief in instances of repeat violence, dating violence, and sexual violence.

Currently, a statutory cause of action does not exist specifically for an injunction for protection against stalking or cyberstalking. A person seeking such an injunction must pursue injunctive relief through the domestic violence injunction statute or the repeat violence injunction statute, as outlined above. The domestic violence definition requires stalking or aggravated stalking

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<sup>11</sup> Section 741.28(2), F.S., defines domestic violence as “any assault, aggravated assault, battery, aggravated battery, sexual assault, sexual battery, stalking, aggravated stalking, kidnapping, false imprisonment, or any criminal offense resulting in physical injury or death of one family or household member by another family or household member.”

<sup>12</sup> Section 741.30(1), F.S.

<sup>13</sup> Section 741.30(3), F.S.

<sup>14</sup> Section 741.30(4), F.S.

<sup>15</sup> *Id.* When an immediate and present danger of domestic violence exists, the court may grant a temporary injunction *ex parte*, pending a full hearing. Section 741.30(5), F.S.

<sup>16</sup> Section 741.30(9), F.S.

<sup>17</sup> Section 741.30(10), F.S.

<sup>18</sup> Section 784.046(1)(a), F.S., defines violence as “any assault, aggravated assault, battery, aggravated battery, sexual assault, sexual battery, stalking, aggravated stalking, kidnapping, or false imprisonment, or any criminal offense resulting in physical injury or death, by a person against any other person.” Section 784.046(1)(b), F.S., defines repeat violence as “two incidents of violence or stalking committed by the respondent, one of which must have been within 6 months of the filing of the petition, which are directed against the petitioner or the petitioner’s immediate family member.”

<sup>19</sup> Section 784.046(1)(d), F.S., defines dating violence as “violence between individuals who have or have had a continuing and significant relationship of a romantic or intimate nature.” The following factors come into play when determining the existence of such a relationship: (1) a dating relationship must have existed within the past six months; (2) the nature of the relationship must have been characterized by the expectation of affection or sexual involvement between the parties; and (3) the persons involved in the relationship must have been involved over time and on a continuous basis during the course of the relationship. Dating violence does not include violence in a casual acquaintanceship or between individuals who have only engaged in ordinary fraternization.

<sup>20</sup> Section 784.046(1)(c), F.S., defines sexual violence as any one incident of “1. Sexual battery, as defined in chapter 794; 2. A lewd or lascivious act, as defined in chapter 800, committed upon or in the presence of a person younger than 16 years of age; 3. Luring or enticing a child, as described in chapter 787; 4. Sexual performance by a child, as described in chapter 827; or 5. Any other forcible felony wherein a sexual act is committed or attempted.” For purposes of this definition, it does not matter whether criminal charges based on the incident were filed, reduced, or dismissed by the state attorney.

resulting in physical injury or death of one family or household member by another member.<sup>21</sup> Similarly, the violence definition in the repeat violence statute requires stalking or aggravated stalking resulting in physical injury or death by one person against any other person.<sup>22</sup> The repeat violence definition requires two incidents of stalking, one being within six months of the petitioner's filing, which are directed against the petitioner or an immediate family member.<sup>23</sup>

### III. Effect of Proposed Changes:

The bill amends the stalking statute, s. 784.048, F.S., by revising certain definitions, including the definition of what constitutes a "credible threat." Additionally, the bill establishes a cause of action for an injunction for protection against stalking and cyberstalking. It provides procedures and protections for obtaining a temporary or final injunction against stalking or cyberstalking, and also provides that it is a first-degree misdemeanor penalty for violating an injunction against stalking or cyberstalking.<sup>24</sup> Finally, the bill requires the court to consider issuing an injunction restraining a defendant from victim contact for up to ten years.

#### Stalking

This bill clarifies the stalking statute by revising the definition of "credible threat" and providing a definition of "immediate family." Under the definition provided in the bill, the standard for establishing a credible threat is relaxed, so that the threat no longer must be made against the life of the targeted person, or be a threat to cause bodily injury to the targeted person. Rather, the bill contemplates the possibility of a credible threat being made against a person's family or household member.

Under the bill, a "credible threat" means a verbal or nonverbal threat, including one delivered by electronic communication, which places the targeted person in reasonable fear of his or her safety or that of his or her immediate family or household member, and made with the apparent ability to carry it out. This language further strengthens the Supreme Court of Florida's interpretation of the existing statute,<sup>25</sup> in that the bill specifically sets out an objective, reasonable fear standard.<sup>26</sup> Additionally, the bill clarifies that it is not necessary to prove that the person making the threat had the intent to actually carry it out. The bill deletes the current language requiring that the credible threat be against the life of a person, or be a threat to cause bodily injury to a person. These changes should make it easier to establish aggravated stalking when a person willfully, maliciously, and repeatedly follows, harasses, or cyberstalks another and makes a credible threat against that person.

The bill also provides a definition of "immediate family" to include a person's spouse, parent, child, grandparent, or sibling. This definition potentially includes people not represented in the class established by the definition of "family or household member" as provided elsewhere in the

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<sup>21</sup> See *supra* note 11.

<sup>22</sup> See *supra* note 18.

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

<sup>24</sup> Generally, these same procedures, protections, and penalties exist for domestic violence and repeat violence injunctions. See ss. 741.30 and 741.046, F.S.

<sup>25</sup> *Bouters*, 659 So. 2d at 238.

<sup>26</sup> So long as a reasonable person in the targeted person's place would fear for his safety or that of his family or household members, the standard will be met.

statutes. For example, under the domestic violence statute, a “family or household member” means spouses, former spouses, persons related by blood or marriage, persons presently residing together, or persons who have a child in common.<sup>27</sup>

### **Injunctions for No Contact and for Protection Against Stalking and Cyberstalking**

The bill requires the sentencing court to consider issuing an injunction restraining the defendant from any victim contact for up to ten years. The length of this restraining injunction is intended to be based upon the seriousness of the case facts, the probability of future violations, and the victim’s safety. The court may issue the injunction regardless of whether the defendant is in prison, county jail, or on probation.

The bill creates a statutory cause of action for an injunction for protection against stalking and cyberstalking, which is similar to the current causes of action for injunctions against domestic violence, repeat violence, sexual violence, and dating violence. The cause of action that this bill establishes, however, does not include a requirement that physical injury or death be involved. The bill allows a stalking victim to file a sworn petition for an injunction for protection against stalking or cyberstalking in circuit court.

The petition for protection must allege the incidents of stalking or cyberstalking and include specific facts and circumstances upon which relief is sought. The court may not require the petitioner to file a bond upon the issuance of the injunction, nor pay a filing fee. The clerk of the court must provide the petitioner with a certified copy of any protective injunction against stalking entered by the court.

The bill provides procedures and protections for obtaining a temporary or final injunction against stalking or cyberstalking, which are generally similar to those currently existing for a domestic violence or repeat violence injunction. Additionally, the bill provides a first degree misdemeanor penalty for violating an injunction against stalking or cyberstalking, similar to the current criminal penalty that exists for violating a domestic violence or repeat violence injunction.

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

#### **IV. Constitutional Issues:**

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

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<sup>27</sup> Section 741.28(3), F.S.

**V. Fiscal Impact Statement:****A. Tax/Fee Issues:**

None.

**B. Private Sector Impact:**

None.

**C. Government Sector Impact:**

The first-degree misdemeanor penalty imposed upon violators of injunctions against stalking or cyberstalking would subject those violators to serving up to one year in jail and paying up to \$1,000 in a fine. Fines associated with the misdemeanor penalties established by this bill could result in an indeterminate amount of government revenues. An indeterminate fiscal impact upon local jails is expected because violators of stalking injunctions are subject to incarceration for up to one year in jail.

**VI. Technical Deficiencies:**

None.

**VII. Related Issues:**

None.

**VIII. Additional Information:****A. Committee Substitute – Statement of Substantial Changes:**  
(Summarizing differences between the Committee Substitute and the prior version of the bill.)**CS by Criminal Justice on January 19, 2012:**

- Deletes the enhanced criminal penalties for aggravated stalking and the conforming changes to the Criminal Punishment Code;
- Deletes mandatory attendance at a batterers' intervention program;
- Provides procedures and protections for obtaining a temporary or final injunction against stalking or cyberstalking (generally the same as exists for a domestic violence or repeat violence injunction); and
- Provides a first degree misdemeanor penalty for violating an injunction against stalking or cyberstalking (same as exists for a domestic violence or repeat violence injunction).

**B. Amendments:**

None.

By the Committee on Criminal Justice; and Senators Simmons and Storms

591-02052-12

2012950c1

1 A bill to be entitled  
 2 An act relating to stalking and aggravated stalking;  
 3 amending s. 784.048, F.S.; redefining the terms  
 4 "course of conduct" and "credible threat" and defining  
 5 the term "immediate family"; providing that a person  
 6 who makes a threat which places another person in  
 7 reasonable fear for his or her safety or the safety of  
 8 his or her immediate family commits the offense of  
 9 aggravated stalking under certain circumstances;  
 10 requiring that the sentencing court consider issuing  
 11 an injunction that restrains a defendant from any  
 12 contact with the victim for up to 10 years; providing  
 13 legislative intent regarding the length of any such  
 14 restraining order; creating s. 784.0485, F.S.;

15 creating a civil cause of action for an injunction for  
 16 protection against stalking or cyberstalking;  
 17 providing that the victim of stalking or cyberstalking  
 18 has standing in the circuit court to file a sworn  
 19 petition for an injunction for protection against  
 20 stalking or cyberstalking; prohibiting a court from  
 21 issuing mutual orders of protection, but authorizing  
 22 the court to issue a separate injunction for  
 23 protection against stalking or cyberstalking if each  
 24 party has complied with the provisions of law;  
 25 providing for venue of the cause of action;  
 26 prohibiting the clerk of the court from assessing a  
 27 filing fee; providing an exception; providing that a  
 28 petitioner is not required to post a bond; requiring  
 29 the clerks of court to assist petitioners in filing

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30 petitions with the court; requiring the clerk of the  
 31 court in each county to make available informational  
 32 brochures; providing a sample petition for an  
 33 injunction for protection against stalking or  
 34 cyberstalking; authorizing the court to grant a  
 35 temporary injunction ex parte, pending a full hearing,  
 36 under certain circumstances; authorizing the court to  
 37 grant such relief as the court deems necessary and  
 38 proper; providing procedures for an ex parte  
 39 injunction hearing; setting forth the relief the court  
 40 may grant if it finds that the petitioner is in  
 41 imminent danger of becoming a victim of stalking or  
 42 cyberstalking; setting forth the criteria the court  
 43 must consider at the hearing; requiring the court to  
 44 allow an advocate from a state attorney's office, law  
 45 enforcement agency, or certified domestic violence  
 46 center to be present with the petitioner or respondent  
 47 during any court proceeding; requiring the clerk of  
 48 the court to furnish a copy of the petition, notice of  
 49 hearing, and temporary injunction, if any, to the  
 50 sheriff or a law enforcement agency of the county  
 51 where the respondent resides or can be found, who  
 52 shall serve it upon the respondent as soon thereafter  
 53 as possible on any day of the week and at any time of  
 54 the day or night; authorizing the court to order a law  
 55 enforcement officer to accompany the petitioner;  
 56 authorizing the court to enforce a violation of an  
 57 injunction for protection against stalking or  
 58 cyberstalking through a civil or criminal contempt

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59 proceeding; authorizing a state attorney to use  
 60 criminal procedures for a violation of an injunction  
 61 for protection; creating s. 784.0487, F.S.; providing  
 62 procedures to follow when the respondent has violated  
 63 the injunction for protection; providing legislative  
 64 intent; providing criminal penalties; providing that a  
 65 court may award a person who suffers an injury or loss  
 66 as a result of a violation of an injunction for  
 67 protection against stalking or cyberstalking economic  
 68 damages for that injury or loss, including costs and  
 69 attorney fees for enforcement of the injunction;  
 70 providing an effective date.

71  
 72 Be It Enacted by the Legislature of the State of Florida:

73  
 74 Section 1. Section 784.048, Florida Statutes, is amended to  
 75 read:

76 784.048 Stalking; definitions; penalties.—

77 (1) As used in this section, the term:

78 (a) "Harass" means to engage in a course of conduct  
 79 directed at a specific person which ~~that~~ causes substantial  
 80 emotional distress to that ~~in such~~ person and serves no  
 81 legitimate purpose.

82 (b) "Course of conduct" means a pattern of conduct composed  
 83 of a series of acts over a period of time, however short, which  
 84 evidence evidencing a continuity of purpose. The term does not  
 85 include constitutionally protected activity such as is not  
 86 included within the meaning of "course of conduct." ~~Such~~  
 87 ~~constitutionally protected activity includes~~ picketing or other

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88 organized protests.

89 (c) "Credible threat" means a verbal or nonverbal threat,  
 90 including a threat delivered by electronic communication or a  
 91 threat implied by a pattern of conduct, or a combination of the  
 92 two, which places the person who is the target of the threat in  
 93 reasonable fear for his or her safety or the safety of his or  
 94 her immediate family or household member, as defined in s.  
 95 741.28, and which is made with the apparent ability to carry out  
 96 the threat to cause such harm. It is not necessary to prove that  
 97 the person making the threat had the intent to actually carry  
 98 out the threat. The present incarceration of the person making  
 99 the threat is not a bar to prosecution under this section made  
 100 with the intent to cause the person who is the target of the  
 101 threat to reasonably fear for his or her safety. The threat must  
 102 be against the life of, or a threat to cause bodily injury to, a  
 103 person.

104 (d) "Cyberstalk" means to engage in a course of conduct to  
 105 communicate, or to cause to be communicated, words, images, or  
 106 language by or through the use of electronic mail or electronic  
 107 communication, directed at a specific person, causing  
 108 substantial emotional distress to that person and serving no  
 109 legitimate purpose.

110 (e) "Immediate family" means a person's spouse, parent,  
 111 child, grandparent, or sibling.

112 (2) A ~~Any~~ person who willfully, maliciously, and repeatedly  
 113 follows, harasses, or cyberstalks another person commits the  
 114 offense of stalking, a misdemeanor of the first degree,  
 115 punishable as provided in s. 775.082 or s. 775.083.

116 (3) A ~~Any~~ person who willfully, maliciously, and repeatedly

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117 follows, harasses, or cyberstalks another person, and makes a  
 118 credible threat ~~to that person with the intent to place that~~  
 119 ~~person in reasonable fear of death or bodily injury of the~~  
 120 ~~person, or the person's child, sibling, spouse, parent, or~~  
 121 ~~dependent,~~ commits the offense of aggravated stalking, a felony  
 122 of the third degree, punishable as provided in s. 775.082, s.  
 123 775.083, or s. 775.084.

124 (4) ~~A~~ Any person who, after an injunction for protection  
 125 against repeat violence, sexual violence, or dating violence  
 126 pursuant to s. 784.046, or an injunction for protection against  
 127 domestic violence pursuant to s. 741.30, or after any other  
 128 court-imposed prohibition of conduct toward the subject person  
 129 or that person's property, knowingly, willfully, maliciously,  
 130 and repeatedly follows, harasses, or cyberstalks another person  
 131 commits the offense of aggravated stalking, a felony of the  
 132 third degree, punishable as provided in s. 775.082, s. 775.083,  
 133 or s. 775.084.

134 (5) ~~A~~ Any person who willfully, maliciously, and repeatedly  
 135 follows, harasses, or cyberstalks a child ~~minor~~ under 16 years  
 136 of age commits the offense of aggravated stalking, a felony of  
 137 the third degree, punishable as provided in s. 775.082, s.  
 138 775.083, or s. 775.084.

139 (6) ~~A~~ Any law enforcement officer may arrest, without a  
 140 warrant, any person that he or she has probable cause to believe  
 141 has violated ~~the provisions of~~ this section.

142 (7) ~~A~~ Any person who, after having been sentenced for a  
 143 violation of s. 794.011, s. 800.04, or s. 847.0135(5) and  
 144 prohibited from contacting the victim of the offense under s.  
 145 921.244, willfully, maliciously, and repeatedly follows,

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146 harasses, or cyberstalks the victim commits the offense of  
 147 aggravated stalking, a felony of the third degree, punishable as  
 148 provided in s. 775.082, s. 775.083, or s. 775.084.

149 (8) The punishment imposed under this section shall run  
 150 consecutive to any former sentence imposed for a conviction for  
 151 any offense under s. 794.011, s. 800.04, or s. 847.0135(5).

152 (9) (a) The sentencing court shall consider, as a part of  
 153 any sentence, issuing an injunction restraining the defendant  
 154 from any contact with the victim, which may be valid for up to  
 155 10 years, as determined by the court. It is the intent of the  
 156 Legislature that the length of any such restraining order be  
 157 based upon the seriousness of the facts before the court, the  
 158 probability of future violations by the perpetrator, and the  
 159 safety of the victim and his or her immediate family.

160 (b) The injunction may be issued by the court even if the  
 161 defendant is sentenced to a state prison or a county jail or  
 162 even if the imposition of the sentence is suspended and the  
 163 defendant is placed on probation.

164 Section 2. Section 784.0485, Florida Statutes, is created  
 165 to read:

166 784.0485 Stalking or cyberstalking; injunction; powers and  
 167 duties of court and clerk; petition; notice and hearing;  
 168 temporary injunction; issuance of injunction; statewide  
 169 verification system; enforcement.-

170 (1) There is created a cause of action for an injunction  
 171 for protection against stalking or cyberstalking.

172 (a) A person who is the victim of stalking or cyberstalking  
 173 has standing in the circuit court to file a sworn petition for  
 174 an injunction for protection against stalking or cyberstalking.

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175 (b) The cause of action for an injunction for protection  
 176 may be sought regardless of whether any other cause of action is  
 177 currently pending between the parties. However, the pendency of  
 178 any such cause of action shall be alleged in the petition.

179 (c) The cause of action for an injunction may be sought by  
 180 any affected person.

181 (d) The cause of action for an injunction does not require  
 182 either party to be represented by an attorney.

183 (e) The court may not issue mutual orders of protection;  
 184 however, the court is not precluded from issuing separate  
 185 injunctions for protection against stalking or cyberstalking if  
 186 each party has complied with this section. Compliance with this  
 187 section may not be waived.

188 (f) Notwithstanding chapter 47, a petition for an  
 189 injunction for protection against stalking or cyberstalking may  
 190 be filed in the circuit where the petitioner currently or  
 191 temporarily resides, where the respondent resides, or where the  
 192 stalking or cyberstalking occurred. There is no minimum  
 193 requirement of residency to petition for an injunction for  
 194 protection.

195 (2) (a) Notwithstanding any other law, the clerk of court  
 196 may not assess a filing fee to file a petition for protection  
 197 against stalking or cyberstalking. However, subject to  
 198 legislative appropriation, the clerk of the circuit court may,  
 199 on a quarterly basis, submit to the Office of the State Courts  
 200 Administrator a certified request for reimbursement for  
 201 petitions for protection against stalking or cyberstalking  
 202 issued by the court, at the rate of \$40 per petition. The  
 203 request for reimbursement shall be submitted in the form and

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204 manner prescribed by the Office of the State Courts  
 205 Administrator. From this reimbursement, the clerk shall pay any  
 206 law enforcement agency serving the injunction the fee requested  
 207 by the law enforcement agency; however, this fee may not exceed  
 208 \$20.

209 (b) A bond is not required by the court for the entry of an  
 210 injunction.

211 (c)1. The clerk of the court shall assist petitioners in  
 212 seeking both injunctions for protection against stalking and  
 213 enforcement of a violation thereof as specified in this section.

214 2. All offices of the clerk of the court shall provide  
 215 simplified petition forms for the injunction and any  
 216 modifications to and the enforcement thereof, including  
 217 instructions for completion.

218 3. The clerk of the court shall ensure the petitioner's  
 219 privacy to the extent practicable while completing the forms for  
 220 an injunction for protection against stalking or cyberstalking.

221 4. The clerk of the court shall provide a petitioner with a  
 222 minimum of two certified copies of the order of injunction, one  
 223 of which is serviceable and will inform the petitioner of the  
 224 process for service and enforcement.

225 5. The clerk of the court and appropriate staff in each  
 226 county shall receive training in the effective assistance of  
 227 petitioners as provided or approved by the Florida Association  
 228 of Court Clerks.

229 6. The clerk of the court in each county shall make  
 230 available informational brochures on stalking when such a  
 231 brochure is provided by the local certified domestic violence  
 232 center.

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233 7. The clerk of the court in each county shall distribute a  
 234 statewide uniform informational brochure to petitioners at the  
 235 time of filing for an injunction for protection against stalking  
 236 or cyberstalking when such brochures become available. The  
 237 brochure must include information about the effect of giving the  
 238 court false information.

239 (3) (a) The sworn petition shall allege the existence of  
 240 such stalking or cyberstalking and shall include the specific  
 241 facts and circumstances for which relief is sought.

242 (b) The sworn petition shall be in substantially the  
 243 following form:

244  
 245 PETITION FOR INJUNCTION FOR PROTECTION AGAINST STALKING

246  
 247 Before me, the undersigned authority, personally appeared  
 248 Petitioner....(Name)...., who has been sworn and says that  
 249 the following statements are true:

250  
 251 1. Petitioner resides at:....(address)....

252 (Petitioner may furnish the address to the court in a  
 253 separate confidential filing if, for safety reasons,  
 254 the petitioner requires the location of the current  
 255 residence to be confidential.)

256 2. Respondent resides at:....(last known address)....

257 3. Respondent's last known place of employment:....(name  
 258 of business and address)....

259 4. Physical description of respondent:....

260 5. Race....

261 6. Sex....

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262 7. Date of birth....

263 8. Height....

264 9. Weight....

265 10. Eye color....

266 11. Hair color....

267 12. Distinguishing marks or scars....

268 13. Aliases of respondent:....

269  
 270 (c) The petitioner shall describe any other cause of action  
 271 currently pending between the petitioner and respondent. The  
 272 petitioner shall also describe any previous attempt by the  
 273 petitioner to obtain an injunction for protection against  
 274 stalking or cyberstalking in this or any other circuit, and the  
 275 result of that attempt. (Case numbers should be included, if  
 276 available.)

277 (d) The petition must provide space for the petitioner to  
 278 specifically allege that he or she is a victim of stalking or  
 279 cyberstalking because respondent has:

280  
 281 (Mark all sections that apply and describe in the spaces below  
 282 the incidents of stalking or cyberstalking specifying when and  
 283 where they occurred, including, but not limited to, locations  
 284 such as a home, school, or place of employment.)

285  
 286 .... Committed or threatened to commit stalking.

287 .... Previously threatened, harassed, stalked,  
 288 cyberstalked, or physically abused the petitioner.

289 .... Threatened to harm the petitioner or family members or  
 290 individuals closely associated with the petitioner.

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291 ... Intentionally injured or killed a family pet.  
 292 ... Used, or has threatened to use, against the petitioner  
 293 any weapons such as guns or knives.

294 ... A criminal history involving violence or the threat of  
 295 violence (if known).

296 ... Another order of protection issued against him or her  
 297 previously or from another jurisdiction, if known.

298 ... Destroyed personal property, including, but not  
 299 limited to, telephones or other communication equipment,  
 300 clothing, or other items belonging to the petitioner.

301 (e) The petitioner seeks an injunction: (Mark appropriate  
 302 section or sections.)

303 ... Immediately restraining the respondent from committing  
 304 any acts of stalking or cyberstalking.

305 ... Restraining the respondent from committing any acts of  
 306 stalking or cyberstalking.

307 ... Providing any terms the court deems necessary for the  
 308 protection of a victim of stalking or cyberstalking, including  
 309 any injunctions or directives to law enforcement agencies.

310 (f) Every petition for an injunction against stalking or  
 311 cyberstalking must contain, directly above the signature line, a  
 312 statement in all capital letters and bold type not smaller than  
 313 the surrounding text, as follows:

314 I HAVE READ EVERY STATEMENT MADE IN THIS PETITION AND  
 315 EACH STATEMENT IS TRUE AND CORRECT. I UNDERSTAND THAT  
 316 THE STATEMENTS MADE IN THIS PETITION ARE BEING MADE  
 317 UNDER PENALTY OF PERJURY, PUNISHABLE AS PROVIDED IN  
 318 SECTION 837.02, FLORIDA STATUTES.  
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320  
 321 ... (initials)...  
 322

323 (4) Upon the filing of the petition, the court shall set a  
 324 hearing to be held at the earliest possible time. The respondent  
 325 shall be personally served with a copy of the petition, notice  
 326 of hearing, and temporary injunction, if any, before the  
 327 hearing.

328 (5) (a) If it appears to the court that an immediate and  
 329 present danger of stalking or cyberstalking exists, the court  
 330 may grant a temporary injunction ex parte, pending a full  
 331 hearing, and may grant such relief as the court deems proper,  
 332 including an injunction restraining the respondent from  
 333 committing any act of stalking or cyberstalking.

334 (b) In a hearing ex parte for the purpose of obtaining such  
 335 ex parte temporary injunction, evidence other than verified  
 336 pleadings or affidavits may not be used as evidence, unless the  
 337 respondent appears at the hearing or has received reasonable  
 338 notice of the hearing. A denial of a petition for an ex parte  
 339 injunction shall be by written order noting the legal grounds  
 340 for denial. If the only ground for denial is no appearance of an  
 341 immediate and present danger of stalking or cyberstalking, the  
 342 court shall set a full hearing on the petition for injunction  
 343 with notice at the earliest possible time. This paragraph does  
 344 not affect a petitioner's right to promptly amend any petition,  
 345 or otherwise be heard in person on any petition consistent with  
 346 the Florida Rules of Civil Procedure.

347 (c) Any such ex parte temporary injunction is effective for  
 348 a fixed period not to exceed 15 days. A full hearing, as

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349 provided in this section, shall be set for a date no later than  
 350 the date when the temporary injunction ceases to be effective.  
 351 The court may grant a continuance of the hearing before or  
 352 during a hearing for good cause shown by any party, which shall  
 353 include a continuance to obtain service of process. An  
 354 injunction shall be extended if necessary to remain in full  
 355 force and effect during any period of continuance.

356 (6) (a) Upon notice and hearing, when it appears to the  
 357 court that the petitioner is the victim of stalking or  
 358 cyberstalking, the court may grant such relief as the court  
 359 deems proper, including an injunction:

360 1. Restraining the respondent from committing any act of  
 361 stalking or cyberstalking.

362 2. Ordering the respondent to participate in treatment,  
 363 intervention, or counseling services to be paid for by the  
 364 respondent.

365 3. Referring a petitioner to a certified domestic violence  
 366 center. The court must provide the petitioner with a list of  
 367 certified domestic violence centers in the circuit which the  
 368 petitioner may contact.

369 4. Ordering such other relief as the court deems necessary  
 370 for the protection of a victim of stalking or cyberstalking,  
 371 including injunctions or directives to law enforcement agencies,  
 372 as provided in this section.

373 (b) When determining whether a petitioner has reasonable  
 374 cause to believe that there is a credible threat that he or she  
 375 is in imminent danger of becoming a victim of stalking or  
 376 cyberstalking, the court shall consider and evaluate all  
 377 relevant factors alleged in the petition, including, but not

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378 limited to:

379 1. The history between the petitioner and the respondent,  
 380 including threats, harassment, stalking or cyberstalking, and  
 381 physical abuse.

382 2. Whether the respondent has attempted to harm the  
 383 petitioner or family members or individuals closely associated  
 384 with the petitioner.

385 3. Whether the respondent has intentionally injured or  
 386 killed a family pet.

387 4. Whether the respondent has used, or has threatened to  
 388 use, against the petitioner any weapons such as guns or knives.

389 5. Whether the respondent has a criminal history involving  
 390 violence or the threat of violence.

391 6. The existence of a verifiable order of protection issued  
 392 previously or from another jurisdiction.

393 7. Whether the respondent has destroyed personal property,  
 394 including, but not limited to, telephones or other  
 395 communications equipment, clothing, or other items belonging to  
 396 the petitioner.

397  
 398 In making its determination under this paragraph, the court is  
 399 not limited to those factors enumerated in subparagraphs 1.-7.

400 (c) The terms of an injunction restraining the respondent  
 401 under subparagraph (a)1. or ordering other relief for the  
 402 protection of the victim under subparagraph (a)4. shall remain  
 403 in effect until modified or dissolved. Either party may move at  
 404 any time to modify or dissolve the injunction. Specific  
 405 allegations are not required. Such relief may be granted in  
 406 addition to other civil or criminal remedies.

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407 (d) A temporary or final judgment on injunction for  
 408 protection against stalking or cyberstalking entered pursuant to  
 409 this section shall, on its face, indicate that:

410 1. The injunction is valid and enforceable in all counties  
 411 of this state.

412 2. Law enforcement officers may use their arrest powers  
 413 pursuant to s. 901.15(6) to enforce the terms of the injunction.

414 3. The court has jurisdiction over the parties and matter  
 415 under the laws of this state and that reasonable notice and  
 416 opportunity to be heard was given to the person against whom the  
 417 order is sought sufficient to protect that person's right to due  
 418 process.

419 4. The date that the respondent was served with the  
 420 temporary or final order, if obtainable.

421 (e) The fact that a separate order of protection is granted  
 422 to each opposing party is not legally sufficient to deny any  
 423 remedy to either party or to prove that the parties are equally  
 424 at fault or equally endangered.

425 (f) A final judgment on an injunction for protection  
 426 against stalking or cyberstalking entered pursuant to this  
 427 section may, on its face, provide that it is a violation of s.  
 428 790.233 and a misdemeanor of the first degree for the respondent  
 429 to have in his or her care, custody, possession, or control any  
 430 firearm or ammunition.

431 (g) All proceedings under this subsection shall be  
 432 recorded. Recording may be by electronic means as provided by  
 433 the Rules of Judicial Administration.

434 (7) The court shall allow an advocate from a state  
 435 attorney's office, a law enforcement agency, or a certified

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436 domestic violence center who is registered under s. 39.905 to be  
 437 present with the petitioner or respondent during any court  
 438 proceedings or hearings related to the injunction for protection  
 439 if the petitioner or respondent has made such a request and the  
 440 advocate is able to be present.

441 (8)(a)1. The clerk of the court shall furnish a copy of the  
 442 petition, notice of hearing, and temporary injunction, if any,  
 443 to the sheriff or a law enforcement agency of the county where  
 444 the respondent resides or can be found, who shall serve it upon  
 445 the respondent as soon thereafter as possible on any day of the  
 446 week and at any time of the day or night. When requested by the  
 447 sheriff, the clerk of the court may transmit a facsimile copy of  
 448 an injunction that has been certified by the clerk of the court,  
 449 and this facsimile copy may be served in the same manner as a  
 450 certified copy. Upon receiving a facsimile copy, the sheriff  
 451 must verify receipt with the sender before attempting to serve  
 452 it on the respondent. In addition, if the sheriff is in  
 453 possession of an injunction for protection which has been  
 454 certified by the clerk of the court, the sheriff may transmit a  
 455 facsimile copy of that injunction to a law enforcement officer  
 456 who shall serve it in the same manner as a certified copy. The  
 457 clerk of the court shall furnish to the sheriff such information  
 458 concerning the respondent's physical description and location as  
 459 is required by the department to comply with the verification  
 460 procedures set forth in this section. Notwithstanding any other  
 461 law, the chief judge of each circuit, in consultation with the  
 462 appropriate sheriff, may authorize a law enforcement agency  
 463 within the jurisdiction to effect service. A law enforcement  
 464 agency serving injunctions pursuant to this section shall use

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465 service and verification procedures consistent with those of the  
 466 sheriff.

467 2. If an injunction is issued and the petitioner requests  
 468 the assistance of a law enforcement agency, the court may order  
 469 that an officer from the appropriate law enforcement agency  
 470 accompany the petitioner to assist in the execution or service  
 471 of the injunction. A law enforcement officer shall accept a copy  
 472 of an injunction for protection against stalking, certified by  
 473 the clerk of the court, from the petitioner and immediately  
 474 serve it upon a respondent who has been located but not yet  
 475 served.

476 3. An order issued, changed, continued, extended, or  
 477 vacated subsequent to the original service of documents  
 478 enumerated under subparagraph 1. shall be certified by the clerk  
 479 of the court and delivered to the parties at the time of the  
 480 entry of the order. The parties may acknowledge receipt of such  
 481 order in writing on the face of the original order. If a party  
 482 fails or refuses to acknowledge the receipt of a certified copy  
 483 of an order, the clerk shall note on the original order that  
 484 service was effected. If delivery at the hearing is not  
 485 possible, the clerk shall mail certified copies of the order to  
 486 the parties at the last known address of each party. Service by  
 487 mail is complete upon mailing. When an order is served pursuant  
 488 to this subsection, the clerk shall prepare a written  
 489 certification to be placed in the court file specifying the  
 490 time, date, and method of service and shall notify the sheriff.

491 4. If the respondent has been served previously with a  
 492 temporary injunction and has failed to appear at the initial  
 493 hearing on the temporary injunction, any subsequent petition for

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494 injunction seeking an extension of time may be served on the  
 495 respondent by the clerk of the court by certified mail in lieu  
 496 of personal service by a law enforcement officer.

497 (b)1. Within 24 hours after the court issues an injunction  
 498 for protection against stalking or cyberstalking or changes,  
 499 continues, extends, or vacates an injunction for protection  
 500 against stalking or cyberstalking, the clerk of the court must  
 501 forward a certified copy of the injunction for service to the  
 502 sheriff having jurisdiction over the residence of the  
 503 petitioner. The injunction must be served in accordance with  
 504 this subsection.

505 2. Within 24 hours after service of process of an  
 506 injunction for protection against stalking or cyberstalking upon  
 507 a respondent, the law enforcement officer must forward the  
 508 written proof of service of process to the sheriff having  
 509 jurisdiction over the residence of the petitioner.

510 3. Within 24 hours after the sheriff receives a certified  
 511 copy of the injunction for protection against stalking or  
 512 cyberstalking, the sheriff must make information relating to the  
 513 injunction available to other law enforcement agencies by  
 514 electronically transmitting such information to the Department  
 515 of Law Enforcement.

516 4. Within 24 hours after the sheriff or other law  
 517 enforcement officer has made service upon the respondent and the  
 518 sheriff has been so notified, the sheriff must make information  
 519 relating to the service available to other law enforcement  
 520 agencies by electronically transmitting such information to the  
 521 Department of Law Enforcement.

522 5. Within 24 hours after an injunction for protection

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523 against stalking or cyberstalking is vacated, terminated, or  
 524 otherwise rendered no longer effective by ruling of the court,  
 525 the clerk of the court must notify the sheriff receiving  
 526 original notification of the injunction as provided in  
 527 subparagraph 2. That agency shall, within 24 hours after  
 528 receiving such notification from the clerk of the court, notify  
 529 the Department of Law Enforcement of such action of the court.

530 (9) (a) The court may enforce a violation of an injunction  
 531 for protection against stalking or cyberstalking through a civil  
 532 or criminal contempt proceeding, or the state attorney may  
 533 prosecute it as a criminal violation under s. 784.0487. The  
 534 court may enforce the respondent's compliance with the  
 535 injunction through any appropriate civil and criminal remedies,  
 536 including, but not limited to, a monetary assessment or a fine.  
 537 The clerk of the court shall collect and receive such  
 538 assessments or fines. On a monthly basis, the clerk shall  
 539 transfer the moneys collected pursuant to this paragraph to the  
 540 State Treasury for deposit into the Domestic Violence Trust  
 541 Fund.

542 (b) If the respondent is arrested by a law enforcement  
 543 officer under s. 901.15(6) or for a violation of s. 784.0487,  
 544 the respondent shall be held in custody until brought before the  
 545 court as expeditiously as possible for the purpose of enforcing  
 546 the injunction and for admittance to bail in accordance with  
 547 chapter 903 and the applicable rules of criminal procedure,  
 548 pending a hearing.

549 (10) The petitioner or the respondent may move the court to  
 550 modify or dissolve an injunction at any time.

551 Section 3. Section 784.0487, Florida Statutes, is created

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552 to read:

553 784.0487 Violation of an injunction for protection against  
 554 stalking or cyberstalking.-

555 (1) If the injunction for protection against stalking or  
 556 cyberstalking has been violated and the respondent has not been  
 557 arrested, the petitioner may contact the clerk of the circuit  
 558 court of the county in which the violation is alleged to have  
 559 occurred. The clerk shall assist the petitioner in preparing an  
 560 affidavit in support of reporting the violation or directing the  
 561 petitioner to the office operated by the court that has been  
 562 designated by the chief judge of that circuit as the central  
 563 intake point for violations of injunctions for protection where  
 564 the petitioner can receive assistance in the preparation of the  
 565 affidavit in support of the violation.

566 (2) The affidavit shall be immediately forwarded by the  
 567 office assisting the petitioner to the state attorney of that  
 568 circuit and to such judge as the chief judge determines to be  
 569 the recipient of affidavits of violations of an injunction. If  
 570 the affidavit alleges that a crime has been committed, the  
 571 office assisting the petitioner shall also forward a copy of the  
 572 petitioner's affidavit to the appropriate law enforcement agency  
 573 for investigation. No later than 20 days after receiving the  
 574 initial report, the local law enforcement agency shall complete  
 575 its investigation and forward a report to the state attorney.  
 576 The policy adopted by the state attorney in each circuit under  
 577 s. 741.2901(2) shall include a policy regarding intake of  
 578 alleged violations of injunctions for protection against  
 579 stalking or cyberstalking under this section. The intake shall  
 580 be supervised by a state attorney who has been designated and

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581 assigned to handle stalking or cyberstalking cases. The state  
 582 attorney shall determine within 30 working days whether his or  
 583 her office will file criminal charges or prepare a motion for an  
 584 order to show cause as to why the respondent should not be held  
 585 in criminal contempt, or prepare both as alternative findings,  
 586 or file notice that the case remains under investigation or is  
 587 pending subject to some other action.

588 (3) If the court has knowledge that the petitioner or  
 589 another person is in immediate danger if the court does not act  
 590 before the decision of the state attorney to proceed, the court  
 591 shall immediately issue an order of appointment of the state  
 592 attorney to file a motion for an order to show cause as to why  
 593 the respondent should not be held in contempt. If the court does  
 594 not issue an order of appointment of the state attorney, it  
 595 shall immediately notify the state attorney that the court is  
 596 proceeding to enforce the violation through criminal contempt.

597 (4) A person who willfully violates an injunction for  
 598 protection against stalking or cyberstalking issued pursuant to  
 599 s. 784.0485, or a foreign protection order accorded full faith  
 600 and credit pursuant to s. 741.315, by:

601 (a) Going to, or being within 500 feet of, the petitioner's  
 602 residence, school, place of employment, or a specified place  
 603 frequented regularly by the petitioner and any named family or  
 604 household member;

605 (b) Committing an act of stalking or cyberstalking against  
 606 the petitioner;

607 (c) Committing any other violation of the injunction  
 608 through an intentional unlawful threat, word, or act to do  
 609 violence to the petitioner;

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610 (d) Telephoning, contacting, or otherwise communicating  
 611 with the petitioner, directly or indirectly, unless the  
 612 injunction specifically allows indirect contact through a third  
 613 party;

614 (e) Knowingly and intentionally coming within 100 feet of  
 615 the petitioner's motor vehicle, whether or not that vehicle is  
 616 occupied;

617 (f) Defacing or destroying the petitioner's personal  
 618 property, including the petitioner's motor vehicle; or

619 (g) Refusing to surrender firearms or ammunition if ordered  
 620 to do so by the court,

621  
 622 commits a misdemeanor of the first degree, punishable as  
 623 provided in s. 775.082 or s. 775.083.

624 (5) A person who suffers an injury or loss as a result of a  
 625 violation of an injunction for protection against stalking or  
 626 cyberstalking may be awarded economic damages for that injury or  
 627 loss by the court issuing the injunction. Damages includes costs  
 628 and attorney fees for enforcement of the injunction.

629 Section 4. This act shall take effect October 1, 2012.