The Florida Senate

COMMITTEE MEETING EXPANDED AGENDA

JUDICIARY
Senator Flores, Chair
Senator Joyner, Vice Chair

MEETING DATE: Monday, March 28, 2011
TIME: 3:15 —5:15 p.m.
PLACE: *Toni Jennings Committee Room,* 110 Senate Office Building

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

TAB	BILL NO. and INTRODUCER	BILL DESCRIPTION and SENATE COMMITTEE ACTIONS	COMMITTEE ACTION
1	**SJR 1538** Flores (Identical HJR 1179)	Abortion/Public Funding/Construction of Rights; Proposes amendments to the State Constitution to prohibit public funding of abortions and prohibit the State Constitution from being interpreted to create broader rights to an abortion than those contained in the United States Constitution. HR 03/14/2011 Favorable JU 03/22/2011 Not Considered JU 03/28/2011 BC RC	
2	**SB 888** Dean (Similar CS/H 75)	Offense of Sexting; Provides that a minor commits the offense of sexting if he or she knowingly uses a computer, or any other device capable of electronic data transmission or distribution, to transmit or distribute to another minor any photograph or video of himself or herself which depicts nudity and is harmful to minors. Provides noncriminal and criminal penalties. Provides that the act does not prohibit prosecution of a minor for conduct relating to material that includes the depiction of sexual conduct or sexual excitement or for stalking, etc. CJ 03/14/2011 Fav/1 Amendment JU 03/28/2011 CU BC	
3	**CS/SB 438** Criminal Justice / Hill (Compare H 563)	Injunctions for Protection Against Violence; Subject to available funding, directs the Florida Association of Court Clerks and Comptrollers to develop an automated process by which a petitioner for an injunction for protection may request notification of service of the injunction or notice of other court actions related to the injunction. Requires that notice be given to the petitioner within a specified time. Provides for the content of the notice. CJ 03/14/2011 Fav/CS JU 03/28/2011 BC	

TAB	BILL NO. and INTRODUCER	BILL DESCRIPTION and SENATE COMMITTEE ACTIONS	COMMITTEE ACTION
4	**CS/SB 450** Military Affairs, Space, and Domestic Security / Bennett (Similar CS/H 215)	Emergency Management; Cites this act as the "Postdisaster Relief Assistance Act." Provides immunity from civil liability for providers of temporary housing and aid to emergency first responders and their immediate family members following a declared emergency. Provides definitions. Provides nonapplicability. Authorizes specified registration with a county emergency management agency as a provider of housing and aid for emergency first responders. MS 03/10/2011 Fav/CS JU 03/28/2011 RC	
5	**SB 664** Benacquisto (Similar CS/H 513)	Missing Person Investigations/Silver Alert; Provides that certain specified persons are immune from civil liability for damages for complying with the request to release Silver Alert information to appropriate agencies. Authorizes only the law enforcement agency having jurisdiction over a case to submit a Silver Alert report to the Missing Endangered Persons Information Clearinghouse involving a missing adult who is suspected by a law enforcement agency of meeting the criteria for activation of the Silver Alert Plan, etc. CJ 03/09/2011 Fav/1 Amendment JU 03/28/2011 BC	
6	**SB 104** Ring (Identical H 4035, S 1628, Compare S 1060)	Misdemeanor Pretrial Substance Abuse Programs; Provides that a person who has previously been admitted to a pretrial program may qualify for a misdemeanor pretrial substance abuse program. CJ 03/09/2011 Favorable JU 03/28/2011 BC	

TAB	BILL NO. and INTRODUCER	BILL DESCRIPTION and SENATE COMMITTEE ACTIONS	COMMITTEE ACTION
7	**CS/SB 1300** Criminal Justice / Storms (Compare H 839, H 997) **(If Received)**	Juvenile Civil Citations; Requires the Department of Juvenile Justice to encourage and assist in the implementation and improvement of civil citation and similar diversionary programs. Requires that a juvenile civil citation and similar diversion program be established at the local level with the concurrence of the chief judge of the circuit and other designated persons. Authorizes a law enforcement agency, the Department of Juvenile Justice, a juvenile assessment center, the county or municipality, or an entity selected by the county or municipality to operate the civil citation or similar diversion program, etc. CJ 03/22/2011 Fav/CS JU 03/28/2011 If received BC	
8	**SB 998** Simmons (Identical H 701)	Property Rights; Shortens a notice period for certain actions. Provides for the state land planning agency to receive notice of claims. Revises procedures for determining a governmental entity's final decision identifying the allowable uses for a property. Provides that enactment of a law or adoption of a regulation does not constitute applying the law or regulation. Provides for a waiver of sovereign immunity for liability. Provides for prospective application, etc. CA 03/07/2011 Favorable JU 03/28/2011 BC	
9	**SB 1152** Simmons (Identical CS/H 253)	Limited Liability Companies; Provides that a charging order against a member's limited liability company interest is the sole and exclusive remedy available to enforce a judgment creditor's unsatisfied judgment against a member or member's assignee. Provides an exception for enforcing a judgment creditor's unsatisfied judgment against a judgment debtor or assignee of the judgment debtor of a single-member limited liability company under certain circumstances. Provides legislative intent. Provides for retroactive application. CM 03/16/2011 Favorable JU 03/28/2011 BI	

TAB	BILL NO. and INTRODUCER	BILL DESCRIPTION and SENATE COMMITTEE ACTIONS	COMMITTEE ACTION
	SJR 1664 Bogdanoff (Compare HJR 1097)	Senate Confirmation/Appointments to Supreme Court; Proposes an amendment to the State Constitution to require Senate confirmation of appointments to the office of justice of the Supreme Court. JU 03/22/2011 Not Considered JU 03/28/2011 GO RC	
10	**SJR 1672** Flores (Compare HJR 7039)	Retention of Justices or Judges; Proposes amendments to the State Constitution to increase the vote required to retain a justice or judge in a judicial office and to provide for the increased vote requirement to apply beginning with retention elections during the 2012 General Election. EE RC JU 03/28/2011 BC	
11	**SJR 1704** Hays (Compare HJR 7037)	Judicial Qualifications Commission; Proposes an amendment to the State Constitution to require that certain proceedings, records, and materials of the Judicial Qualifications Commission be open to the public and to require the commission to notify the Speaker of the House of Representatives of complaints received or initiated, investigations conducted, and complaints concluded. JU 03/28/2011 GO RC	
	Consideration of proposed committee bill:		
12	**SPB 7076**	Repeal of Supreme Court Rule by General Law; Proposes an amendment to the State Constitution to eliminate the requirement that a general law repealing a rule of court be enacted by a two-thirds vote of the membership of each house of the Legislature and to prohibit the Supreme Court from readopting a rule repealed by the Legislature for a prescribed period.	
	Consideration of proposed committee bill:		

TAB	BILL NO. and INTRODUCER	BILL DESCRIPTION and SENATE COMMITTEE ACTIONS	COMMITTEE ACTION
13	**SPB 7222**	Judicial Nominating Commissions; Provides for the Attorney General, rather than the Board of Governors of The Florida Bar, to submit nominees for certain positions on judicial nominating commissions. Provides for the termination of terms of all current members of judicial nominating commissions. Provides for staggered terms of newly appointed members.	
14	**SB 978** Flores (Identical H 469)	Individual Retirement Accounts; Clarifies the exemption of inherited individual retirement accounts from legal processes. Provides intent. Provides for retroactive application. BI 03/22/2011 Favorable JU 03/28/2011 BC	
15	**SM 1344** Flores (Similar HM 1047)	U.S. Treasury/Deposits by Nonresident Aliens; Urges the Congress of the United States to direct the Department of the Treasury to withdraw a proposed rule on deposits made by nonresident aliens and to examine the proposed rule for negative effects. BI 03/16/2011 Favorable JU 03/28/2011	

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LEGISLATIVE ACTION

Senate . House

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The Committee on Judiciary (Richter) recommended the following:

Senate Amendment (with ballot and title amendments)

Delete lines 20 - 26
and insert:
(a) Public funds may not be expended for any abortion or for health-benefits coverage that includes coverage of abortion. This subsection does not apply to:
(1) Expenditures required by federal law;
(2) An abortion that is necessary to save the life of the mother; or
(3) Pregnancies that result from rape or incest.
(b) This constitution may not be interpreted to create broader rights to an abortion than those contained in the United


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States Constitution.

====== B A L L O T S T A T E M E N T A M E N D M E N T ======
And the ballot statement is amended as follows:

Delete lines 31 - 35

and insert:

PROHIBITION ON PUBLIC FUNDING OF ABORTIONS; CONSTRUCTION OF ABORTION RIGHTS.—This proposed amendment provides that public funds may not be expended for any abortion or for health-benefits coverage that includes coverage of abortion. This prohibition does not apply to expenditures required by federal law, an abortion that is necessary to save the life of the mother, or cases of rape or incest.

================ T I T L E A M E N D M E N T ================
And the title is amended as follows:

Delete line 3

and insert:

28 of Article I of the State Constitution to generally prohibit

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:	SJR 1538
INTRODUCER:	Senator Flores
SUBJECT:	Abortion/Public Funding/Construction of Rights
DATE:	March 21, 2011
REVISED:	03/22/11 03/25/11

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	O'Callaghan/Brown	Stovall	HR	**Favorable**
2.	Munroe	Maclure	JU	**Pre-meeting**
3.			BC	
4.			RC	
5.				
6.				

I. Summary:

The joint resolution proposes an amendment to the Florida Constitution to prohibit the spending of public funds for any abortion or for health-benefits coverage that includes the coverage of abortion, unless such expenditure is required by federal law or is required to save the life of the mother. The joint resolution specifies that the Florida Constitution may not be interpreted to create broader rights to an abortion than those contained in the U.S. Constitution.

This joint resolution also includes a ballot summary, which outlines the provisions of the joint resolution.

This joint resolution creates section 28, Article I of the Florida Constitution.

II. Present Situation:

Background

Under Florida law the term "abortion" means the termination of human pregnancy with an intention other than to produce a live birth or to remove a dead fetus.[1] "Viability" means that stage of fetal development when the life of the unborn child may, with a reasonable degree of medical probability, be continued indefinitely outside the womb.[2] Induced abortion can be elective (performed for nonmedical indications) or therapeutic (performed for medical indications). Abortion can be performed by surgical or medical means (medicines that induce a

[1] Section 390.011, F.S.
[2] Section 390.0111(4), F.S.

miscarriage).[3] An abortion in Florida must be performed by a physician licensed to practice medicine or osteopathic medicine who is licensed under ch. 458, F.S., or ch. 459, F.S., or a physician practicing medicine or osteopathic medicine in the employment of the United States.[4] No person who is a member of, or associated with, the staff of a hospital, or any employee of a hospital or physician in which, or by whom, the termination of a pregnancy has been authorized or performed, who states an objection to the procedure on moral or religious grounds is required to participate in the procedure. The refusal to participate may not form the basis for any disciplinary or other recriminatory action.[5]

In 2007, a total of 91,954 abortions were performed in Florida: for 83,890 of those, the gestational age of the fetus was 12 weeks and under; for 8,063, the gestational age of the fetus was 13 to 24 weeks; and for 1, the gestational age was over 25 weeks.[6]

Abortion Clinics

Abortion clinics are licensed and regulated by the Agency for Health Care Administration (Agency) under ch. 390, F.S., and part II of ch. 408, F.S. The Agency has adopted rules in Chapter 59A-9, Florida Administrative Code, related to abortion clinics. Section 390.012, F.S., requires these rules to address the physical facility, supplies and equipment standards, personnel, medical screening and evaluation of patients, abortion procedures, recovery room standards, and follow-up care. The rules relating to the medical screening and evaluation of each abortion clinic patient, at a minimum, shall require:

- A medical history, including reported allergies to medications, antiseptic solutions, or latex; past surgeries; and an obstetric and gynecological history;
- A physical examination, including a bimanual examination estimating uterine size and palpation of the adnexa;
- The appropriate laboratory tests, including:
    - For an abortion in which an ultrasound examination is not performed before the abortion procedure, urine or blood tests for pregnancy performed before the abortion procedure,
    - A test for anemia,
    - Rh typing, unless reliable written documentation of blood type is available, and
    - Other tests as indicated from the physical examination;
- An ultrasound evaluation for patients who elect to have an abortion after the first trimester. If a person who is not a physician performs the ultrasound examination, that person must have documented evidence that he or she has completed a course in the operation of ultrasound equipment. If a patient requests, the physician, registered nurse, licensed practical nurse, advanced registered nurse practitioner, or physician assistant must review the ultrasound evaluation results and the estimate of the probable gestational age of the fetus with the patient before the abortion procedure is performed; and

[3] Suzanne R. Trupin, M.D., *Elective Abortion*, December 21, 2010, *available at* http://www.emedicine.com/med/TOPIC3312.HTM (last visited Mar. 17, 2011).
[4] Section 390.0111(2) and s. 390.011(7), F.S.
[5] Section 390.0111(8), F.S.
[6] Florida Vital Statistics Annual Report 2007, *available at* http://www.flpublichealth.com/VSBOOK/VSBOOK.aspx# (Last visited on Mar 17, 2011).

- The physician to estimate the gestational age of the fetus based on the ultrasound examination and obstetric standards in keeping with established standards of care regarding the estimation of fetal age and write the estimate in the patient's medical history. The physician must keep original prints of each ultrasound examination in the patient's medical history file.

Relevant Case Law

In 1973, the landmark case of *Roe v. Wade* established that restrictions on a woman's access to secure an abortion are subject to a strict scrutiny standard of review.[7] In *Roe*, the U.S. Supreme Court determined that a woman's right to have an abortion is part of the fundamental right to privacy guaranteed under the Due Process Clause of the Fourteenth Amendment of the U.S. Constitution, justifying the highest level of review.[8] Specifically, the Court concluded that: (1) during the first trimester, the state may not regulate the right to an abortion; (2) after the first trimester, the state may impose regulations to protect the health of the mother; and (3) after viability, the state may regulate and proscribe abortions, except when it is necessary to preserve the life or health of the mother.[9] Therefore, a state regulation limiting these rights may be justified only by a compelling state interest, and the legislative enactments must be narrowly drawn to express only legitimate state interests at stake.[10]

In 1992, in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, the U.S. Supreme Court relaxed the standard of review in abortion cases involving adult women from strict scrutiny to unduly burdensome, while still recognizing that the right to an abortion emanates from the constitutional penumbra of privacy rights.[11] In *Planned Parenthood*, the Court determined that, prior to fetal viability, a woman has the right to an abortion without being unduly burdened by government interference.[12] The Court concluded that the state may regulate the abortion as long as the regulation does not impose an undue burden on a woman's decision to choose an abortion.[13] If the purpose of a provision of law is to place substantial obstacles in the path of a woman seeking an abortion before viability, it is invalid; however, after viability the state may restrict abortions if the law contains exceptions for pregnancies endangering a woman's life or health.[14]

The unduly burdensome standard as applied in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, generally considered to be a hybrid between strict scrutiny and intermediate level scrutiny, shifted the Court's focus to whether a restriction creates a substantial obstacle to access. This is the prevailing standard today applied in cases in which abortion access is statutorily restricted.

[7] 410 U.S. 113 (1973).
[8] 410 U.S. 113, 154 (1973).
[9] 410 U.S. 113, 162-65 (1973).
[10] 410 U.S. 113, 152-56 (1973).
[11] 505 U.S. 833, 876-79 (1992).
[12] *Id.*
[13] *Id*.
[14] *Id.*

However, the undue burden standard was held not to apply in Florida. The 1999 Legislature passed a parental notification law, the Parental Notice of Abortion Act, requiring a physician to give at least 48 hours of actual notice to one parent or to the legal guardian of a pregnant minor before terminating the pregnancy of the minor. Although a judicial waiver procedure was included, the act was never enforced.[15] In 2003, the Florida Supreme Court[16] ruled this legislation unconstitutional on the grounds that it violated a minor's right to privacy, as expressly protected under Article I, s. 23 of the Florida Constitution.[17] Citing the principle holding of *In re T.W.*,[18] the Court reiterated that, as the privacy right is a fundamental right in Florida, any restrictions on privacy warrant a strict scrutiny review, rather than that of an undue burden. Here, the Court held that the state failed to show a compelling state interest.[19]

The Hyde Amendment

The Hyde Amendment is a rider to the annual appropriations bill for the U.S. Departments of Labor, Health and Human Services (HHS), and Education, which prevents Medicaid and any other programs under these departments from funding abortions, except in limited cases. The amendment is named after Rep. Henry J. Hyde (R-IL), who, as a freshman legislator, first offered the amendment.

The Hyde Amendment has been enacted into law in various forms since 1976, during both Democratic and Republican administrations. In 1980, the U.S. Supreme Court affirmed the constitutionality of the Hyde Amendment in *Harris v. McRae*.[20] In *Harris*, the Court determined that funding restrictions created by the Hyde Amendment did not violate the U.S. Constitution's Fifth Amendment and, therefore, did not contravene the liberty or equal protection guarantees of the Due Process Clause of the Fifth Amendment.[21] The Court opined that, although government may not place obstacles in the path of a woman's exercise of her freedom of choice, it need not remove those obstacles that are not created by the government (in this case indigence).[22] The Court further opined that, although Congress has opted to subsidize medically necessary services generally, but not certain medically necessary abortions, the Hyde Amendment leaves an indigent woman with at least the same range of choice in deciding whether to obtain a medically necessary abortion as she would have had if Congress had chosen to subsidize no health care costs at all.[23]

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[15] *See* s. 390.01115, F.S. (repealed by s. 1, ch. 2005-52, Laws of Florida). Subsequent legislation was enacted in s. 390.01114, F.S.

[16] *North Florida Women's Health and Counseling Services, Inc., et al., v. State of Florida*, 866 So. 2d 612, 619-20 (Fla. 2003)

[17] The constitutional right of privacy provision reads: "Every natural person has the right to be let alone and free from governmental intrusion into the person's private life except as otherwise provided herein. This section shall not be construed to limit the public's right of access to public records and meetings as provided by law." FLA. CONST. art. I, s. 23.

[18] 551 So. 2d 1186, 1192 (Fla. 1989).

[19] *North Florida Women's Health and Counseling Services, supra* note 16, at 622 and 639-40.

[20] 448 U.S. 297 (1980). *See also Rust v. Sullivan*, 500 U.S. 173 (1991), and *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989), upholding *Harris v. McRae*.

[21] *Harris*, 448 U.S. at 326-27.

[22] *Harris*, *Id*. at 316-17

[23] *Id.*

In Florida, based on the Hyde Amendment, Medicaid reimburses for abortions for one of the following reasons:

- The woman suffers from a physical disorder, physical injury, or physical illness, including a life-endangering physical condition caused or arising from the pregnancy itself, that would place the woman in danger of death unless an abortion is performed;
- When the pregnancy is the result of rape (sexual battery) as defined in s. 794.011, F.S.; or
- When the pregnancy is the result of incest as defined in s. 826.04, F.S.[24]

An Abortion Certification Form must be completed and signed by the physician who performed the abortion for the covered procedures. The form must be submitted with the facility claim, the physician's claim, and the anesthesiologist's claim. The physician must record the reason for the abortion in the physician's medical records for the recipient.[25]

State Legislation in Response to the Patient Protection and Affordable Care Act[26]

The federal Patient Protection and Affordable Care Act (PPACA) include provisions that govern insurance coverage of abortion in state insurance exchanges, which are scheduled by the PPACA to be launched in 2014. The "Special Rules" (Section 1303) of the law and the related White House executive order contain these new provisions. The law maintains current Hyde Amendment restrictions that govern abortion policy, which prohibit federal funds from being used for abortion services (except in cases of rape or incest, or when the life of the woman would be endangered), and extends those restrictions to the health insurance exchanges.

The PPACA also maintains federal "conscience" protections for health care providers who object to performing abortion or sterilization procedures that conflict with their beliefs. In addition, the law provides new protections that prohibit discrimination against health care facilities and providers who are unwilling to provide, pay for, provide coverage of, or refer women for abortions. The law allows states (through legislation) to prohibit abortion coverage in qualified health plans offered through an exchange. If insurance coverage for abortion is included in a plan in the exchange, a separate premium is required for this coverage, to be paid for by the policyholder. In addition, the "Patient Protection and Affordable Care Act's Consistency with Longstanding Restrictions on the Use of Federal Funds for Abortion" executive order establishes an enforcement mechanism to ensure that federal funds are not used for abortion services, consistent with existing federal statute.[27]

Since enactment of the PPACA in March 2010, at least five states (Arizona, Louisiana, Mississippi, Missouri, and Tennessee) have enacted legislation to restrict coverage for abortion in their insurance exchanges.

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[24] Agency for Health Care Administration, *Florida Medicaid: Ambulatory Surgery Center Services Coverage and Limitations Handbook*, January 2005, *available at* http://www.baccinc.org/medi/CD_April_2005/Provider_Handbooks/Medicaid_Coverage_and_Limitations_Handbooks/Ambulatory_Surgical_Center_Updated_January_2005.pdf (last visited Mar. 17, 2011).
[25] *Id.*
[26] National Conference of State Legislatures, *Health Reform and Abortion Coverage in the Insurance Exchanges*, November 2010, *available at* http://www.ncsl.org/default.aspx?tabid=21099 (last visited Mar. 17, 2011).
[27] *Id.*

Arizona law expands on provisions that prohibit the use of public funds to finance abortions, by prohibiting the funding of abortion in insurance coverage; the law also provides a few exemptions. The law prohibits any qualified health insurance policy, contract, or plan offered through any state health care exchange from providing coverage for abortions unless the coverage is offered as a separate optional rider for which an additional insurance premium is charged. The law prohibits public and tax monies of the state or any political subdivision of the state from directly or indirectly paying the costs, premiums, or charges associated with a health insurance policy, contract, or plan that provides coverage, benefits, or services related to the performance of any abortion. Exemptions to this provision include saving the life of the woman having the abortion and averting impairment of a major bodily function. In addition, this law does not prohibit the state from complying with the federal law requirements.

Louisiana law prohibits elective abortions to be included in a policy available through the state health exchange. In accordance with the PPACA as well as longstanding policies of the state related to abortion, the law states that no health care plan required to be established in the state through an exchange shall offer coverage for abortion services.

Mississippi law creates the Federal Abortion-Mandate Opt-Out Act, which prohibits the use of federal funds to pay for elective abortions covered by private insurance in the state through a health care exchange. The law provides that no abortion coverage may be provided by a qualified health plan offered through an exchange created pursuant to the PPACA within the State of Mississippi. The act states that this limitation shall not apply to an abortion performed when the life of the mother is endangered by a physical disorder, physical illness, or physical injury, including a life-endangering physical condition caused by or arising from the pregnancy itself, or when the pregnancy is the result of an alleged act of rape or incest. The physician is required to maintain sufficient documentation in the medical record that supports the medical necessity or reason for the abortion.

In Missouri, among other abortion-related provisions, the law prohibits insurance plans or policies that provide coverage for elective abortions from inclusion in the state health insurance exchange. Elective abortions are defined as any abortion for any reason other than a spontaneous abortion or to prevent the death of the woman receiving the abortion. The law also prohibits coverage for elective abortions through the purchase of an optional rider within the exchange.

Tennessee law prohibits coverage for abortion services under any health care plan through an exchange required to be established in the state pursuant to PPACA.

State Legislation Prior to the Patient Protection and Affordable Care Act[28]

Prior to the enactment of the PPACA, at least five states (Idaho, Kentucky, Missouri, North Dakota, and Oklahoma) had laws that restrict health insurance policies covering abortion.

Idaho's law requires various insurance policies to exclude coverage for elective abortions. Exclusion of this coverage may be waived if a separate premium is paid, and the availability of

[28] *Id.*

coverage is the option of the insurance carrier. Elective abortion is defined as an abortion for any reason other than to preserve the life of the female upon whom the abortion is performed.

In Kentucky, the law prohibits health insurance and health care contracts in the state from providing coverage for elective abortions, except by an optional rider for which there must be paid an additional premium. Elective abortion is defined as an abortion for any reason other than to preserve the life of the female upon whom the abortion is performed.

In Missouri, the law prohibits health insurance contracts, plans, or policies from providing coverage for elective abortions except by an optional rider for which there must be paid an additional premium. Elective abortion is defined as an abortion for any reason other than a spontaneous abortion or to prevent the death of the female upon whom the abortion is performed.

In North Dakota, the law states that health insurance contracts, plans, or policies may not provide coverage for abortions except by an optional rider for which there must be paid an additional premium. This does not apply to an abortion necessary to prevent the death of the woman.

In Oklahoma, the law prohibits health insurance contracts, plans, or policies from providing coverage for elective abortions except by an optional rider paid by an additional premium. Elective abortion is defined as an abortion for any reason other than a spontaneous miscarriage, to prevent the death of the woman, or when the pregnancy resulted from rape reported to the proper law enforcement authorities or when the pregnancy resulted from incest committed against a minor and the perpetrator has been reported to the proper law enforcement authorities.

Constitutional Amendments

Section 1, Article XI, of the Florida Constitution authorizes the Legislature to propose constitutional amendments by joint resolution approved by a three-fifths vote of the membership of each house. The amendment must be placed before the electorate at the next general election held after the proposal has been filed with the Secretary of State's office, or at a special election held for that purpose.[29] Section 5(e), Article XI, of the Florida Constitution requires 60-percent voter approval for a constitutional amendment to take effect. An approved amendment will be effective on the first Tuesday after the first Monday in January following the election at which it is approved, or on such other date as may be specified in the amendment or revision.[30]

III. Effect of Proposed Changes:

This is a joint resolution proposing the creation of Section 28 of Article I of the Florida Constitution, to prohibit the spending of public funds for any abortion or for health-benefits coverage that includes the coverage of abortion, unless such expenditure is *required* by federal law or to save the life of the mother. The joint resolution (subsection (b)) specifies that the Florida Constitution may not be interpreted to create broader rights to an abortion than those contained in the U.S. Constitution, meaning that the joint resolution, should it become law,

[29] FLA. CONST. art. XI, s. 5(a).
[30] FLA. CONST. art. XI, s. 5(e).

would overrule court decisions[31] which have concluded that the right of privacy under Article I, Section 23, of the Florida Constitution is broader in scope than that of the U.S. Constitution.

An effective date for the amendment is not specified. Therefore, the amendment, if approved by the voters, will take effect on the first Tuesday after the first Monday in January following the election at which it is approved.[32]

Subsection (b) of the joint resolution is not a pure conformity clause; the resolution only specifies that the Florida Constitution may not be interpreted to create broader rights to an abortion than those contained in the United States Constitution. As in the case of conformity clauses, the joint resolution would not merely enshrine in the Florida Constitution the analysis that comes from the United States Constitution at the time the amendment is adopted, but would look to the analysis by the U.S. Supreme Court of the United States Constitution as it evolves in subsequent decisions as well.[33]

Unlike the conformity clauses in Art. I, Sections 12 and 17 of the Florida Constitution, the joint resolution does not provide that it is to be "construed in conformity with decisions of the United States Supreme Court" or "as interpreted by the United States Supreme Court." The Florida Supreme Court has construed such references to limit the application of the conformity clause to cases directly and specifically controlled by a decision of the U.S. Supreme Court.[34] Although it is unclear in the absence of such a reference how the Florida Supreme Court may interpret the joint resolution in the context of existing conformity clauses, it is possible the Florida Supreme Court may look more broadly to a wider range of federal interpretations in abortion cases beyond decisions by the U.S. Supreme Court that are factually on point.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

The provisions of the joint resolution have no impact on municipalities and the counties under the requirements of Article VII, Section 18 of the Florida Constitution.

B. Public Records/Open Meetings Issues:

The provisions of this bill have no impact on public records or open meetings issues under the requirements of Article I, Section 24(a) and (b) of the Florida Constitution.

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[31] *See, e.g., supra* note 16.
[32] FLA. CONST. art. XI, s. 5(e).
[33] *See State v. Moreno-Gonzalez*, 18 So. 3d 1180, 1182 (Fla. 3rd DCA 2009) (holding that an amendment to the Florida Constitution conforming the search-and-seizure provisions of the Florida Constitution to interpretations of the Fourth Amendment of the U.S. Constitution brings this state's search-and-seizure laws into conformity with all decisions of the U.S. Supreme Court rendered before and subsequent to the adoption of that amendment); *Bernie v. State*, 524 So. 2d 988, 992 (Fla. 1988) (same).
[34] *See e.g., Soca v. State*, 673 So. 2d 24, 26 (Fla. 1996) ("However, in the absence of a controlling U.S. Supreme Court decision, Florida courts are still 'free to provide its citizens with a higher standard of protection from governmental intrusion than that afforded by the Federal Constitution.'" (quoting *State v. Lavzzoli*, 434 So. 2d 321, 323 (Fla. 1983)).

C. Trust Funds Restrictions:

The provisions of the joint resolution have no impact on the trust fund restrictions under the requirements of Article III, Subsection 19(f) of the Florida Constitution.

D. Other Constitutional Issues:

See the discussion of relevant case law in "Present Situation" section of this bill analysis.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

Persons would not have access to public funding for any abortion or health-benefits coverage that includes coverage of abortion, unless required by federal law or to save the life of the mother. If federal law were to change, such that it no longer required the use of federal funds for an abortion if the pregnancy is the result of an act of rape or incest, then the use of public funds in such cases would not be authorized, unless that abortion would also save the life of the mother.

C. Government Sector Impact:

The state will not incur costs other than the state is presently required to incur under federal law or to provide abortion services for those who qualify for Medicaid and the abortion is required to save the life of the mother.[35]

The Department of State Division of Elections (department) is required to publish the proposed constitutional amendment twice in a newspaper of general circulation in each county. The average cost per word to advertise an amendment is $106.14 according to the department. If the joint resolution passes and the proposed constitutional amendment is placed on the ballot, the department will incur costs to advertise the proposed amendment.[36]

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

[35] *See*, *supra* fn. 19. The state policy mirrors the federal Hyde Amendment, which allows for Medicaid reimbursement under certain circumstances.
[36] See e.g., Fiscal Note on SJR 2 prepared by the Florida Department of State (January 4, 2011).

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.

141398

LEGISLATIVE ACTION

Senate . House

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The Committee on Judiciary (Thrasher) recommended the following:

Senate Amendment (with title amendment)

Delete lines 21 - 28

and insert:

Section 1. Sexting; prohibited acts; penalties.—

(1) A minor commits the offense of sexting if he or she knowingly uses a computer, or any other device capable of electronic data transmission or distribution, to possess and transmit or distribute to another minor any photograph or video of any person, including himself or herself, which depicts nudity, as defined in s. 847.001(9), Florida Statutes, and is harmful to minors, as defined in s. 847.001(6), Florida Statutes.

141398

14
15
16 ================ T I T L E A M E N D M E N T ================
17 And the title is amended as follows:
18 Delete line 6
19 and insert:
20 distribution, to possess and transmit or distribute to
21 another

968896

LEGISLATIVE ACTION

Senate . House

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The Committee on Judiciary (Thrasher) recommended the following:

Senate Substitute for Amendment (141398) (with title amendment)

Delete lines 25 - 36

and insert:

distribute to another minor any photograph or video of any person which depicts nudity, as defined in s. 847.001(9), Florida Statutes, and is harmful to minors, as defined in s. 847.001(6), Florida Statutes. The transmission or distribution of multiple photographs or videos is a single offense if the photographs or videos were transmitted or distributed within the same 24-hour period.

968896

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

And the title is amended as follows:

Delete lines 7 - 11

and insert:

minor any photograph or video of any person which depicts nudity and is harmful to minors; providing noncriminal and criminal penalties; providing that the transmission or distribution of multiple photographs or videos is a

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 888
INTRODUCER:	Senator Dean
SUBJECT:	Offense of Sexting
DATE:	March 25, 2011
REVISED:	

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Erickson	Cannon	CJ	**Fav/1 amendment**
2.	Boland	Maclure	JU	**Pre-meeting**
3.			CU	
4.			BC	
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:

"Sexting" is a term that describes the act of sending sexually explicit messages, photographs, or videos of oneself or another person by electronic means. The bill creates a new offense that applies to minors who engage in sexting that involves knowingly using a computer, or any other device capable of electronic data transmission or distribution, to transmit or distribute to another minor any photograph or video of himself or herself which depicts nudity and is harmful to minors. A minor who commits this act is subject to penalties that begin with a noncriminal violation for the first offense and escalate with subsequent offenses. Under the only laws that are currently available for prosecution of acts that are covered by this bill, such acts could be prosecuted as a felony and result in the minor having to register as a sexual offender and be subject to residency restriction laws.

This bill creates an unnumbered section of the Florida Statutes.

II. Present Situation:

Florida law currently contains various statutes that prohibit the creation, possession, and transmission of sexual materials depicting minors. Some of these laws address photographs or

videos that do not rise to the level of child pornography, which is statutorily defined as "any image depicting a minor engaged in sexual conduct."[1] Section 847.001(16), F.S., defines "sexual conduct" as:

> [A]ctual or simulated sexual intercourse, deviate sexual intercourse, sexual bestiality, masturbation, or sadomasochistic abuse; actual lewd exhibition of the genitals; actual physical contact with a person's clothed or unclothed genitals, pubic area, buttocks, or, if such person is a female, breast with the intent to arouse or gratify the sexual desire of either party; or any act or conduct which constitutes sexual battery or simulates that sexual battery is being or will be committed. A mother's breastfeeding of her baby does not under any circumstance constitute "sexual conduct."[2]

Sexual Performance by a Child

Section 827.071(5), F.S., provides that it is a third-degree felony for any person to knowingly possess a photograph, motion picture, exhibition, show, representation, or other presentation which, in whole or in part, he or she knows to include any sexual conduct by a child. The statute specifies that the possession of each photograph, motion picture, exhibition, show, representation, or presentation is a separate offense.

Prohibition of Acts Relating to Obscene and Lewd Materials

Section 847.011(1)(a), F.S., provides that it is a first-degree misdemeanor for a person to knowingly sell, lend, give away, distribute, transmit, show, or transmute, or have in his or her possession, custody, or control with intent to sell, lend, give away, distribute, transmit, show, or transmute, specified obscene items, including pictures, photographs, and images. However, s. 847.011(1)(c), F.S., provides that it is a third-degree felony if the violation of s. 847.011(1)(a) or (2), F.S., is based on materials that depict a minor[3] engaged in any act or conduct that is harmful to minors.[4]

Section 847.011(2), F.S., provides that it is a second-degree misdemeanor for a person to have in his or her possession, custody, or control specified obscene items, including pictures, photographs, and images, without the intent to sell, etc., such items.

Protection of Minors

Section 847.0133, F.S., provides that it is a third-degree felony for a person to knowingly sell, rent, loan, give away, distribute, transmit, or show any obscene[5] material to a minor. "Material" includes pictures, photographs, and images.

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[1] See ss. 775.0847(1)(b) and 847.001(3), F.S.
[2] "Sexual conduct" is defined identically in ss. 775.0847 and 827.071, F.S. It has a more limited definition in s. 365.161, F.S., which relates to obscene or indecent communications made by a telephone that describe certain sexual acts.
[3] The term "minor" is defined as "any person under the age of 18 years." Section 847.001(8), F.S.
[4] The term "harmful to minors" is defined in s. 847.001(6), F.S. For a more detailed definition, see the "Effect of Proposed Changes" section of this bill analysis.
[5] Section 847.001(10), F.S., defines the term "obscene" as the status of material which the average person, applying contemporary community standards, would find, taken as a whole, appeals to the prurient interest; depicts or describes, in a

Computer Pornography

Section 847.0135(2), F.S., provides that it is a third-degree felony for a person to:

- Knowingly compile, enter into, or transmit the visual depiction of sexual conduct with a minor by use of computer;
- Make, print, publish, or reproduce by other computerized means the visual depiction of sexual conduct with a minor;
- Knowingly cause or allow to be entered into or transmitted by use of computer the visual depiction of sexual conduct with a minor; or
- Buy, sell, receive, exchange, or disseminate the visual depiction of sexual conduct with a minor.

Transmission of Pornography

Section 847.0137(2), F.S., provides that any person in this state who knew or reasonably should have known that he or she was transmitting child pornography to another person in this state or another jurisdiction commits a third-degree felony.

Transmission of Material Harmful to Minors

Section 847.0138(2), F.S., provides that any person who knew or believed that he or she was transmitting an image, information, or data that is harmful to minors to a specific individual known or believed by the defendant to be a minor commits a third-degree felony.

Both minors and adults can be charged with any of the offenses described above.

Sexting

"Sexting" is a recently coined term that combines the words "sex" and "texting."[6] It is used to describe the act of sending sexually explicit messages, photographs, or videos of oneself or another person by electronic means. As the name suggests, "sext" messages are most commonly sent by a cell phone text message. Media reports and other studies indicate that sexting is a growing trend among teenagers. In a 2008 survey of 1,280 teenagers and young adults of both sexes, 20 percent of teens (ages 13-19) and 33 percent of young adults (ages 20-26) had sent nude or semi-nude photographs of themselves electronically.[7] Additionally, 39 percent of teens and 59 percent of young adults had sent sexually explicit text messages.[8]

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patently offensive way, sexual conduct as specifically defined herein; and taken as a whole, lacks serious literary, artistic, political, or scientific value. A mother's breastfeeding of her baby is not under any circumstance "obscene."

[6] Stacey Garfinkle, Sex + Texting = Sexting, *The Washington Post*, Dec. 10, 2008, available at http://voices.washingtonpost.com/parenting/2008/12/sexting.html (last visited March 7, 2011).

[7] National Campaign to Prevent Teen and Unplanned Pregnancy, Sex and Tech: Results from a Survey of Teens and Young Adults, 1, available at http://www.thenationalcampaign.org/sextech/PDF/SexTech_Summary.pdf (last visited March 7, 2011).

[8] *Id.*

There is no Florida law that specifically addresses sexting. Under current law, a person who knowingly sends certain sexually explicit images of a minor to another person, or a person who knowingly receives such images, could be charged with any number of different offenses that relate to sexual material depicting minors. For example, in 2007, 18-year-old Phillip Alpert was arrested and charged with transmitting child pornography (among other things) after he sent a nude photo of his 16-year-old girlfriend to her friends and family after they had an argument. In total, Alpert was charged with 72 offenses, sentenced to five years of probation, and was required to register as a sexual offender.[9]

Similarly, in other jurisdictions, some law enforcement officers and district attorneys have begun prosecuting teens who "sext" under laws generally reserved for producers and distributors of child pornography. For example, in Pennsylvania, a district attorney gave 17 students who were either pictured in images or found with "provocative" images on their cell phones the option of either being prosecuted under child pornography laws or agreeing to participate in a five-week after school program and probation.[10] Similar incidents have occurred in other states, e.g., Massachusetts, Ohio, and Iowa.[11]

As a result, state legislatures have considered making laws that downgrade the charges for sexting from felonies to misdemeanors. For example, in 2009, Vermont and Utah passed laws that downgraded the penalties for minors and first-time perpetrators of sexting.[12] A Utah statute that generally makes it a crime to distribute pornography in the state (not specifying child pornography) now sets differing punishments for the same offense based on the age of the offender.[13] If the offense is committed by someone over the age of 18, then the offense is a third-degree felony; if the offense is committed by someone 16 or 17 years of age, then the offense is a class A misdemeanor; and if the offense is committed by someone under the age of 16, then the offense is a class B misdemeanor.[14]

III. Effect of Proposed Changes:

The bill creates a new offense that applies to "sexting" *by a minor*. A minor who commits sexting is subject to penalties that are less than the punishment that could be assessed for the same conduct under existing law. Also, a conviction of sexting would not result in the requirement to register as a sexual offender or to comply with existing residency restriction laws or other laws that apply to persons who are convicted of certain sexual offenses.

Sexting occurs when a minor knowingly uses a computer, or any other device capable of electronic data transmission or distribution, to transmit or distribute to another minor any

[9] Vicki Mabrey and David Perozzi, 'Sexting': Should Child Pornography Laws Apply?, *ABC NEWS* (Apr. 1, 2010), available at http://abcnews.go.com/Nightline/phillip-alpert-sexting-teen-child-porn/story?id=10252790 (last March 2, 2011); Deborah Feyerick and Sheila Steffen, 'Sexting' lands teen on sex offender list, *CNN* (Apr. 8, 2009), available at http://www.cnn.com/2009/CRIME/04/07/sexting.busts/index.html (last visited March 7, 2011).
[10] Amanda Lenhart, Teens and Sexting: How and why minor teens are sending sexually suggestive nude or nearly nude images via text messaging, *Pew Research Ctr*., 3 (Dec. 15, 2009), available at http://www.pewinternet.org/~/media//Files/Reports/2009/PIP_Teens_and_Sexting.pdf (last visited March 7, 2011).
[11] *Id*.; *see also* Mabrey and Perozzi, *supra* note 9.
[12] Lenhart, *supra* note 10, at 3.
[13] UTAH CODE ANN. s. 76-10-1204.
[14] *Id*.

photograph or video of himself or herself which depicts nudity, as defined in s. 847.001(9), F.S., and is harmful to minors, as defined in s. 847.0016, F.S.

The term "nudity" is defined in s. 847.001(9), F.S., to mean:

> [T]he showing of the human male or female genitals, pubic area, or buttocks with less than a fully opaque covering; or the showing of the female breast with less than a fully opaque covering of any portion thereof below the top of the nipple; or the depiction of covered male genitals in a discernibly turgid state. A mother's breastfeeding of her baby does not under any circumstance constitute "nudity," irrespective of whether or not the nipple is covered during or incidental to feeding.

Section 847.001(6), F.S., defines "harmful to minors" to mean:

> [A]ny reproduction, imitation, characterization, description, exhibition, presentation, or representation, of whatever kind or form, depicting nudity, sexual conduct, or sexual excitement when it:
> (a) Predominantly appeals to a prurient, shameful, or morbid interest;
> (b) Is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material or conduct for minors; and
> (c) Taken as a whole, is without serious literary, artistic, political, or scientific value for minors.
> A mother's breastfeeding of her baby is not under any circumstance "harmful to minors."

The transmission or distribution of multiple photographs or videos is a single offense if the photographs or videos were transmitted or distributed within the same 24-hour period. The possession of multiple photographs or videos that were transmitted or distributed by a minor is a single offense if the photographs or videos were transmitted or distributed in the same 24-hour period.

The bill provides the following graduated punishment schedule for a violation of sexting:

- A first sexting violation is a noncriminal violation, punishable by eight hours of community service or, if ordered by the court in lieu of community service, a $60 fine. The court may also order the minor to participate in suitable training or instruction[15] in lieu of, or in addition to, the community service or fine.
- A sexting violation that occurs after being found to have committed a noncriminal violation for sexting is a second-degree misdemeanor. A second-degree misdemeanor is punishable by a jail term of not more than 60 days and may include a fine of not more than $500.[16]
- A sexting violation that occurs after being found to have committed a second-degree misdemeanor violation for sexting is a first degree misdemeanor. A first-degree misdemeanor

[15] The bill does not define "suitable training or instruction," and it is unclear what type of training or instruction is anticipated under the bill.
[16] Sections 775.082 and 775.083, F.S.

is punishable by a jail term of not more than one year and may include a fine of not more than $1,000.[17]

- A sexting violation that occurs after being found to have committed a first-degree misdemeanor violation for sexting is an unranked third-degree felony. A third-degree felony is punishable by state imprisonment for not more than five years and may include a fine of not more than $5,000.[18] However, because the felony is unranked, the offender may be sentenced to a term of probation under supervision by the Department of Corrections.[19]

The bill defines the term "conviction." However the term "conviction" is not used in the text of the new section the bill creates. The definition actually appears to be applicable to the term "found to have committed."[20] (See the "Technical Deficiencies" section of this bill analysis for a discussion of this definition.)

Although the bill references the offense of possession of sexted photographs or videos in paragraph (1)(b), the bill does not set out an offense of possession of such photographs or videos anywhere in the bill.

Senate Bill 888 is substantially similar to a bill that passed the Senate last year (CS/SB 2560). According to an analysis prepared by the Florida Department of Law Enforcement (FDLE) on CS/SB 2560, because the first sexting violation is a noncriminal violation, the minor will not have an FDLE record. Therefore, if the offenses occur in different jurisdictions, prosecutors may be unaware of a previous noncriminal violation, and the minor may not be charged with the proper offense.[21]

Under the bill, the offense of sexting and its reduced penalties do not include the conduct of a minor who re-transmits a sexted photograph or video. Accordingly, the state attorney would continue to have discretion in the prosecution of such conduct.

The bill specifies that the sexting provisions do not prohibit the prosecution of a minor for conduct relating to material that includes the depiction of sexual conduct or sexual excitement, and does not prohibit the prosecution of a minor for stalking under s. 784.048, F.S.

The bill provides that it will take effect October 1, 2011.

[17] *Id*.
[18] *Id*.
[19] "Unranked" is a descriptive term for a noncapital felony that is not specifically ranked in the offense severity ranking chart in s. 921.0022, F.S. If the felony is not ranked in the chart, it is ranked pursuant to s. 921.0023, F.S., based on its felony degree. An unranked third-degree felony is a Level 1 offense. *Id.* A first-time offender convicted of only the unranked third-degree felony would score a nonprison sanction as the lowest permissible sentence. Section 921.0024, F.S. Further, in this first-time offender scenario, a non prison sanction would be required unless the sentencing court made written findings that this sanction could present a danger to the public. Section 775.082(10), F.S.
[20] A technical amendment traveling with the bill corrects the definition.
[21] Florida Department of Law Enforcement, Senate Bill 2560 Relating to Sexting (Mar. 17, 2010) (on file with the Senate Committee on Criminal Justice).

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:

The Criminal Justice Impact Conference, which provides the final, official estimate of the prison bed impact, if any, of criminal legislation, estimates that the bill will have an insignificant prison bed impact.[22] However, the bill creates new misdemeanor offenses, which could affect local jails, though the impact is unknown at this time.

VI. Technical Deficiencies:

The bill defines the term "conviction" at lines 62-66 of the bill to mean a determination of guilt that is the result of a plea or trial, or a finding of delinquency that is the result of a plea or an adjudicatory hearing, regardless of whether adjudication is withheld. However the term "conviction" is not used in the text of the new section the bill creates. The definition actually appears to be applicable to the term "found to have committed." Therefore, Senate professional staff suggests that the reference to "conviction" be changed to "found to have committed" to reflect the actual terminology used in the bill with conforming changes to the bill's title.[23]

VII. Related Issues:

None.

[22] Office of Economic and Demographic Research, Criminal Justice Impact Conference, *Conference Results, available at* http://edr.state.fl.us/Content/conferences/criminaljusticeimpact/index.cfm.
[23] A technical amendment traveling with the bill corrects the definition.

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:

Barcode 755604 by Criminal Justice on March 14, 2011:
Takes a definition in the bill and applies it to the term to which it was actually intended to apply: "found to have committed." This amendment addresses the problem raised in the "Technical Deficiencies" section of this bill analysis.

755604

LEGISLATIVE ACTION

Senate	.	House
Comm: FAV	.	
03/14/2011	.	
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The Committee on Criminal Justice (Dean) recommended the following:

Senate Amendment (with title amendment)

Delete line 62
and insert:
(4) As used in this section, the term "found to have committed" means a

================ T I T L E A M E N D M E N T ================
And the title is amended as follows:
Delete line 17
and insert:
term "found to have committed"; providing an effective

755604

date.

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 438
INTRODUCER:	Criminal Justice Committee and Senator Hill
SUBJECT:	Injunctions for Protection
DATE:	March 25, 2011 REVISED:

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Dugger	Cannon	CJ	**Fav/CS**
2.	Boland	Maclure	JU	**Pre-meeting**
3.			BC	
4.				
5.				
6.				

Please see Section VIII. for Additional Information:

A. COMMITTEE SUBSTITUTE.....	X	Statement of Substantial Changes
B. AMENDMENTS.....		Technical amendments were recommended
		Amendments were recommended
		Significant amendments were recommended

I. Summary:

The bill requires the Florida Association of Court Clerks and Comptrollers, subject to available funding, to develop an automated process by which a petitioner may request notification that a respondent has been served with a protective injunction against domestic violence, repeat violence, dating violence, or sexual violence. Such notification must be made within 12 hours after the sheriff or other law enforcement officer serves the protective injunction.

This bill amends sections 741.30 and 784.046, Florida Statutes

II. Present Situation:

Protective Injunctions

In 2005, it was estimated that more than 1.5 million adults in the United States are victims of domestic violence each year, and more than 85 percent of the victims are women.[1] In Florida,

[1] Margaret Graham Tebo, *When Home Comes to Work*, ABA JOURNAL (Sept. 2005), *available at* http://www.abajournal.com/magazine/when_home_comes_to_work/ (last visited Mar. 10, 2011) (citing statistics from Legal Momentum, an advocacy and research organization based in New York City); *see also* Nat'l Coalition Against Domestic

113,123 incidents of domestic violence were reported in 2008, which is 1.8 percent less than what was reported for the same period in 2007.[2] Additionally, statistics show that one in five high school girls has reported being physically or sexually abused by a dating partner, and females ages 16 through 24 are three times more vulnerable for partner violence than any other age group.[3]

An injunction for protection is a civil order that provides protection from abuse by certain people. An injunction can order the abuser to do certain things (such as moving out of the house), to not do certain things (such as contacting the victim), or it can give the victim certain rights (such as temporary custody of any children).[4] In 1979, the Florida Legislature created a cause of action for an injunction for protection against domestic violence, and in 1988 a cause of action for an injunction for protection against repeat violence, sexual violence, or dating violence was also created.[5]

A victim of domestic violence[6] 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.[7] Additionally, a victim of repeat violence,[8] sexual violence,[9] or dating violence[10] may seek protective injunctive relief.[11]

Florida law requires that within 24 hours after the court issues or modifies an injunction for protection against domestic violence, repeat violence, sexual violence, or dating violence, the

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Violence, *Domestic Violence Facts*, http://www.ncadv.org/files/DomesticViolenceFactSheet(National).pdf (last visited Mar. 10, 2011).

[2] Florida Dep't of Law Enforcement, *Crime in Florida* (Jan.-Dec. 2008), http://www.fdle.state.fl.us/Content/getdoc/4f6a6cd0-6479-4f4f-a5a4-cd260e4119d8/CIF_Annual08.aspx (last visited Mar. 10, 2011).

[3] American Bar Association, *Teen Dating Violence Facts* (2006), http://www.abanet.org/unmet/teendating/facts.pdf (last visited Mar. 3, 2010).

[4] *Injunctions for Protection Against Domestic Violence* (Feb. 3, 2010), http://www.womenslaw.org/laws_state_type.php?id=496&state_code=FL (last visited March 10, 2011).

[5] See chs. 79-402, s. 1, and 88-344, s. 1, Laws of Fla.

[6] Domestic violence is defined 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." Section 741.28(2), F.S.

[7] Section 741.30(1), F.S.

[8] 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."

[9] Sexual violence is defined 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. Section 784.046(1)(c), F.S.

[10] Dating violence is defined 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. Section 784.046(1)(d), F.S.

[11] Section 784.046(2), F.S.

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 following requirements must be followed when serving the injunction:

- The law enforcement officer must forward the written proof of service of process to the sheriff within 24 hours after service of process of a domestic violence protective injunction upon a respondent;
- The sheriff must make information relating to the injunction available to other law enforcement agencies by electronically transmitting such information to the Florida Department of Law Enforcement (FDLE) within 24 hours after the sheriff receives a certified copy of the protective injunction; and
- The sheriff must make such information relating to the service available to other law enforcement agencies by electronically transmitting such information to the FDLE within 24 hours after the sheriff or other law enforcement officer makes service upon the respondent and the sheriff has been so notified.[12]

Victim Notification

Section 960.001, F.S., provides guidelines for the fair treatment of victims and witnesses involved in the criminal and juvenile justice systems. Specifically, the purpose of the guidelines is to achieve specified objectives in the following categories:

- Information concerning services available to victims of adult and juvenile crime;
- Information for purposes of notifying victim or appropriate next of kin of victim or other designated contact of victim;
- Information concerning protection available to victim or witness;
- Notification of scheduling changes;
- Advance notification to victim or relative of victim concerning judicial proceedings; right to be present;
- Information concerning release from incarceration from a county jail, municipal jail, juvenile detention facility, or residential commitment facility;
- Consultation with victim or guardian or family of victim;
- Return of property to victim;
- Notification to employer and explanation to creditors of victim or witness;
- Notification of right to request restitution;
- Notification of right to submit impact statement;
- Local witness coordination services;
- Victim assistance education and training;
- General victim assistance;
- Victim's rights information card or brochure;
- Information concerning escape from a state correctional institution, county jail, juvenile detention facility, or residential commitment facility;
- Presence of victim advocate during discovery deposition; testimony of victim of a sexual offense;

[12] See ss. 741.30(8)(c)2.-4., and 784.046(8)(c)2.-4., F.S.

- Implementing crime prevention in order to protect the safety of persons and property, as prescribed in the State Comprehensive Plan;
- Attendance of victim at same school as defendant;
- Use of a polygraph examination or other truth-telling device with victim; and
- Presence of victim advocates during forensic medical examination.

Essentially, victims have the right to be informed, to be present, and to be heard when relevant, at all crucial stages of a criminal or juvenile proceeding, to the extent that this right does not interfere with constitutional rights of the accused.

Upon the request of the victim (or the appropriate next of kin or designated contact), the chief administrator of a county jail, municipal jail, juvenile detention facility, or residential commitment facility must make a reasonable attempt to notify the requestor prior to the defendant's or offender's release from incarceration. However, victims (or the appropriate next of kin or designated contact) of specified offenses[13] must be notified within four hours by the chief administrator about the release of an offender or defendant from incarceration in any of the above facilities or the release of an offender or defendant following sentencing, disposition, or furlough.[14]

If an offender escapes from a state correctional institution or any of the above facilities, then the institution of confinement must immediately notify the state attorney of the jurisdiction where the criminal charge arose and the judge who imposed the sentence. The state attorney must then make every effort to notify the victim, material witness, parents or legal guardian of a minor who is a victim or witness, or immediate relatives of a homicide victim of the escapee.[15]

The Department of Corrections (DOC or department) is required by law to notify, if requested, the state attorney, victim, or personal representative of the victim when an inmate has been approved for community work release within 30 days after the date of approval.[16] The department is also required to notify the victim six months before the release of an inmate from the custody of the department.[17] In addition, if an inmate is a sexual offender,[18] DOC is required, if requested, to notify the victim of the offense, the victim's parent or legal guardian if the victim is a minor, the lawful representative of the victim, or the next of kin if the victim is a homicide victim, within six months prior to the anticipated release of a sexual offender, or as soon as possible if the sexual offender is released earlier than anticipated.[19]

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[13] These offenses include homicide, sexual offense, an attempted murder or sexual offense, stalking, or domestic violence. See s. 960.001(1)(b), F.S.
[14] Section 960.001(1)(f), F.S.
[15] Section 960.001(1)(p), F.S.
[16] Section 944.605(6), F.S.
[17] Section 944.605(1), F.S.
[18] Section 944.606, F.S., defines "sexual offender" as "a person who has been convicted of committing, or attempting, soliciting, or conspiring to commit, any of the criminal offenses proscribed in the following statutes in this state or similar offenses in another jurisdiction: s. 787.01, s. 787.02, or s. 787.025(2)(c), where the victim is a minor and the defendant is not the victim's parent or guardian; s. 794.011, excluding s. 794.011(10); s. 794.05; s. 796.03; s. 796.035; s. 800.04; s. 825.1025; s. 827.071; s. 847.0133; s. 847.0135, excluding s. 847.0135(6); s. 847.0137; s. 847.0138; s. 847.0145; or s. 985.701(1); or any similar offense committed in this state which has been redesignated from a former statute number to one of those listed in this subsection."
[19] Section 944.606(3)(b), F.S.

III. Effect of Proposed Changes:

This bill requires (in addition to the notice requirements on law enforcement for serving an injunction for protection) that the Florida Association of Court Clerks and Comptrollers, subject to available funding, develop an automated process by which a petitioner may request notification that a respondent has been served with a protective injunction against domestic violence, repeat violence, dating violence, or sexual violence, as well as other court actions related to the injunction. The association must apply for any available grants to help fund the notification system. Notification must be made within 12 hours after the sheriff or other law enforcement officer has served the protective injunction. The notification must include, at a minimum, the location, date, and time that the protective injunction was served.

This bill provides an effective date of July 1, 2011.

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:

The bill requires the Florida Association of Court Clerks and Comptrollers to develop an automated process so that a petitioner may request notification of service of an injunction for protection. However, the bill specifies that the association is only required to develop the automated process if it has available funding. It is unclear how the determination will be made that sufficient funding is available for the association to comply with the bill's requirements. The association has stated that a determined funding amount and the source

of the funding need to be established in order for the association to comply with the bill.[20] In its agency analysis of the bill, the Florida Association of Court Clerks and Comptrollers found that the bill would have an indeterminate policy and fiscal impact on the office of the clerk.[21]

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 March 14, 2011:
The committee substitute:

- Updates the name of the Florida Association of Court Clerks to the Florida Association of Court Clerks and Comptrollers.
- Requires the association to apply for available grants to fund the notification system.

B. Amendments:

None.

[20] Correspondence from Fred Baggett, General Counsel, Fla. Ass'n of Court Clerks and Comptrollers, to Senator Anthony Hill (Mar. 25, 2010) (on file with the Senate Committee on Judiciary).
[21] Florida Association of Court Clerks and Comptrollers, Agency Analysis of SB 438, March 9, 2011 (on file with the Senate Committee on Judiciary).

556770

LEGISLATIVE ACTION

Senate . House

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The Committee on Judiciary (Richter) recommended the following:

Senate Amendment

Delete lines 57 - 59
and insert:
(a) That occurs more than 6 months after the declaration of the public health emergency pursuant to s. 381.00315 or state of emergency pursuant to s. 252.36, unless the emergency is extended as provided in those sections, in which case the

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 450
INTRODUCER:	Military Affairs, Space, and Domestic Security Committee and Senator Bennett
SUBJECT:	Emergency Management
DATE:	March 25, 2011 REVISED:

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Yune	Carter	MS	**Fav/CS**
2.	O'Connor	Maclure	JU	**Pre-meeting**
3.			RC	
4.				
5.				
6.				

Please see Section VIII. for Additional Information:

A. COMMITTEE SUBSTITUTE.....	X	Statement of Substantial Changes
B. AMENDMENTS.....		Technical amendments were recommended
		Amendments were recommended
		Significant amendments were recommended

I. Summary:

This bill provides immunity from civil liability to any person who gratuitously and in good faith provides temporary housing, food, water, or electricity to emergency first responders or the immediate family members of emergency first responders, during certain declared emergencies, unless the person acts in a manner that demonstrates a reckless disregard for the consequences of another. This bill provides specific requirements with regard to when the immunity applies and when it does not.

This bill creates section 252.515, Florida Statutes.

II. Present Situation:

Declarations of Emergency

Presently, s. 252.36(2), F.S., empowers the Governor to declare a state of emergency by executive order or proclamation if he or she finds that an emergency has occurred or that the threat of an emergency is imminent. An emergency is "any occurrence, or threat thereof, whether natural, technological, or manmade, in war or in peace, which results or may result in substantial

injury or harm to the population or substantial damage to or loss of property."[1] The state of emergency continues until the Governor finds that the threat or danger has been dealt with to the extent that the emergency conditions no longer exist, at which point he or she terminates the state of emergency by executive order or proclamation.[2] The state of emergency may only continue for up to 60 days, unless renewed by the Governor.[3] Additionally, s. 381.00315, F.S., empowers the State Health Officer to declare public health emergencies. A public health emergency is "any occurrence, or threat thereof, whether natural or manmade, which results or may result in substantial injury or harm to the public health from infectious disease, chemical agents, nuclear agents, biological toxins, or situations involving mass casualties or natural disasters."[4] A public health emergency may only last for up to 60 days, unless the Governor concurs in the renewal of the declaration.[5]

Negligence

"Negligence is the failure to use reasonable care, which is the care that a reasonably careful person would use under like circumstances. Negligence is doing something that a reasonably careful person would not do under like circumstances or failing to do something that a reasonably careful person would do under like circumstances."[6] A person injured by another's negligence may recover damages against the negligent party if the negligence was the legal cause of the injury.[7] Negligence actions are governed by common law and by ch. 768, F.S.

Chapter 768, F.S., which governs negligence actions, provides several sections where a certain individual or group is immune from civil liability if the individual or group meets the statutory requirements. In these sections, Florida law provides immunity from negligence, but not reckless behavior. For example, the Good Samaritan Act provides that a health care provider that provides emergency services pursuant to certain statutes is immune from civil liability unless he or she acted with reckless disregard.[8] Reckless disregard is "such conduct that a health care provider knew or should have known, at the time such services were rendered, created an unreasonable risk of injury so as to affect the life or health of another, and such risk was substantially greater than that which is necessary to make the conduct negligent."[9] Also, s. 768.1315, F.S., provides that a state agency or subdivision that donates fire control or fire rescue equipment to a volunteer fire department is not liable for civil damages caused by a defect in the equipment which occurs after the donation. There is an exception to immunity under that section for actions that constitute "malice, gross negligence, recklessness, or intentional misconduct."[10]

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[1] Section 252.34(3), F.S.
[2] Section 252.36(2), F.S.
[3] *Id.*
[4] Section 381.00315(1)(b), F.S.
[5] *Id.*
[6] Florida Standard Jury Instructions in Civil Cases, 401.4, *available at* http://www.floridasupremecourt.org/civ_jury_instructions/instructions.shtml#401 (last visited Mar. 21, 2011).
[7] *See* Florida Standard Jury Instructions in Civil Cases, 401.12, 401.18, *available at* http://www.floridasupremecourt.org/civ_jury_instructions/instructions.shtml#401 (last visited Mar. 21, 2011).
[8] Section 768.13(2)(b)1., F.S.
[9] Section 768.13(2)(b)3., F.S.
[10] Section 768.1315(4)(a)1., F.S.

III. Effect of Proposed Changes:

This bill creates the "Postdisaster Relief Assistance Act." The bill provides that any person who gratuitously and in good faith provides temporary housing, food, water, or electricity to emergency first responders or the immediate family members of emergency first responders may not be held liable for any civil damages unless the person acts in a manner that demonstrates a reckless disregard for the consequences of another. The bill defines immediate family member as a parent, spouse, child, or sibling

This bill defines reckless disregard as "conduct that a reasonable person knew or should have known at the time such services were provided would be likely to result in injury so as to affect the life or health of another, taking into account the extent or serious nature of the prevailing circumstances."

The immunity from civil liability applies in emergency situations that are related to and that arise out of a public health emergency pursuant to s. 381.00315, F.S., or a state of emergency pursuant to s. 252.36, F.S.

This bill also provides that a person may register with a county emergency management agency as a temporary provider of housing, food, water, and electricity, if the county provides for such registration. If a person who provides the services registers with a county emergency management agency, he or she is presumed to have acted in good faith in providing such services.

The immunity provided to persons under this bill does not apply to damages as a result of any act or omission:

- That occurs more than 6 months after the declaration of an emergency by the Governor, unless the declared state of emergency is extended by the Governor, in which case the immunity continues to apply for the duration of the extension; or

- That is unrelated to the original declared emergency or any extension thereof.

The bill refers solely to the declaration of emergencies by the Governor. Because the liability provisions of the bill also apply to public health emergencies declared by the State Health Officer, the Legislature may wish to amend the 6-month timeframe provision to include reference to this type of emergency as well.

This bill has an effective date of July 1, 2011.

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:

To the extent persons who comply with the requirements of the bill enjoy immunity from liability, they may benefit economically by not incurring civil judgments.

C. Government Sector Impact:

The bill provides that a person who registers with the county as a provider of services to first responders is presumed to have acted in good faith. The bill does not require county emergency management agencies to establish such a registration function. To the extent counties choose to do so, they may experience costs related to registration.

The Division of Emergency Management (DEM) has provided that there is no fiscal impact to DEM.[11]

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 Military Affairs, Space, and Domestic Security on March 10, 2011:
The committee substitute:

- Provides that <u>any person</u>, rather than an individual, corporation, business entity, or employee thereof, who provides temporary housing, food, water, or electricity to

[11] Division of Emergency Management, *Senate Bill 450 Fiscal Analysis* (Feb. 7, 2011) (on file with the Senate Committee on Judiciary).

emergency first responders or the immediate family members of emergency first responders may not be held liable for any civil damages;

- Provides that the services must be provided "gratuitously and in good faith";
- Defines an "emergency first responder";
- Applies a uniform "reckless disregard" standard of conduct that will either permit or bar a provider of housing, food, water, or electricity from receiving immunity from civil damages and eliminates the "ordinary reasonably prudent person" standard of conduct; and
- Grants those providers who register with a county emergency management agency as a temporary provider of housing, food, water, or electricity the presumption that their actions are done in good faith.

B. Amendments:

None.

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 664
INTRODUCER:	Senator Benacquisto and others
SUBJECT:	Missing Person Investigations/Silver Alert
DATE:	March 25, 2011 REVISED:

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Erickson	Cannon	CJ	**Fav/1 amendment**
2.	O'Connor	Maclure	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 provides that the Florida Department of Law Enforcement (FDLE), other agencies, and specified entities and persons who are responsible for complying with a request to release Silver Alert information are immune from civil liability for damages for complying in good faith with the request and are presumed to have acted in good faith in recording, reporting, transmitting, displaying, or releasing Silver Alert information pertaining to the missing person.

The bill adds specific reference to a missing adult who meets the criteria for activation of the Silver Alert Plan to the definition of "missing endangered person" and adds reference to the Silver Alert Plan to several statutory provisions relevant to reporting information on missing endangered persons.

The bill also specifies that only a law enforcement agency having jurisdiction over the case may submit a Silver Alert report to the Missing Endangered Persons Information Clearinghouse involving a missing adult who is suspected by a law enforcement agency of meeting the criteria for activation of the Silver Alert Plan.

This bill substantially amends the following sections of the Florida Statutes: 937.0201, 937.021, and 937.022.

II. Present Situation:

Silver Alert

Florida's Silver Alert Plan was created by Executive Order Number 08-211, effective October 8, 2008.[1] The Florida Department of Law Enforcement (FDLE), the Department of Transportation, the Department of Highway Safety and Motor Vehicles' Highway Patrol, local law enforcement agencies, other agencies and entities, and the media collaborate on a standardized and coordinated response to implement the system, which is intended to aid local law enforcement in the rescue or recovery of a missing elderly person who suffers from irreversible deterioration of intellectual faculties.[2] The plan recognizes that the most effective response to a missing senior citizen leverages community resources for the search to augment the investigative response by the local law enforcement agency. The plan further acknowledges Silver Alerts should be activated through the investigating local law enforcement agency, which is in the best position to notify the media and disseminate the information through avenues such as neighborhood telephone alerts and other technologies the agency may have to communicate with its citizens.[3]

Under current law, the FDLE considers a person who meets the criteria for a state Silver Alert to be a "missing endangered adult," as defined in s. 937.021, F.S.,[4] though the definition does not specifically mention persons who meet Silver Alert criteria. The criteria for a Silver Alert are as follows:

- The missing person must be age 60 or older and present a clear indication that the individual has an irreversible deterioration of intellectual faculties, or under extraordinary circumstances when a person age 18 to 59 has irreversible deterioration of intellectual faculties and law enforcement has determined the individual lacks the capacity to consent, and that the use of dynamic message signs may be the only possible way to rescue the missing person;
- Local law enforcement has already activated a local or regional alert by contacting media outlets;
- The law enforcement agency's investigation has concluded that the disappearance poses a credible threat to the person's safety;
- A description of the vehicle and a tag number is available and has been verified by local law enforcement; and

[1] Press Release, Governor Charlie Crist, *Governor Crist Signs Executive Order Creating 'Silver Alert'* (Oct. 8, 2008), *available at* http://elderaffairs.state.fl.us/english/notices/Oct08/govsilveralert.pdf (last visited Mar. 23, 2011).
[2] Florida Missing Children's Day Foundation, Inc., *Foundation History*, *available at* http://www.fmcdf.org/foundation-history.htm (last visited Mar. 23, 2011).
[3] Except as otherwise indicated, most of the information regarding Silver Alert is from the following resources on the FDLE's website: http://www.fdle.state.fl.us/MCICSearch/SilverAlerts.asp, http://www.fdle.state.fl.us/Content/News/October-2008/Governor-Crist-Signs-Executive-Order-Creating-Silv.aspx, and http://www.fdle.state.fl.us/MCICSearch/Documents/SilverAlertFAQ.pdf (last visited Mar. 23, 2011).
[4] Florida Department of Law Enforcement, *Senate Bill 664 Analysis* (Mar. 4, 2011) (on file with the Senate Committee on Judiciary).

- The local law enforcement agency has entered the missing person into the Florida Crime Information Center and issued a statewide "Be On the Look Out" (BOLO) to other law enforcement/911 centers.

Only a law enforcement agency may activate a Silver Alert. Local law enforcement will take a report of a missing person, issue a Silver Alert if the criteria are met, and notify the FDLE if the person is driving a vehicle. The local law enforcement agency determines how long a Silver Alert remains activated.

Dynamic message signs are activated regionally or statewide when criteria are met. If road signs are used, they remain activated for a maximum of 6 hours, unless the missing elderly person is rescued or the Department of Transportation is otherwise instructed. To maintain integrity of the system and not dilute its effectiveness, the road signs will be used primarily for persons with irreversible deterioration of intellectual faculties 60 years and older. However, road signs may be used in rare instances when that is the only viable method to locate a missing person under the age of 60 who otherwise meets criteria.

The Emergency Alert System (EAS) is not used for Silver Alerts. The EAS is restricted to child abductions, and is not used for any other cases involving missing children. However, just like with Missing Child Alerts, television and radio stations are notified and the information can be broadcasted to the viewing or listening public. The local law enforcement agency is responsible for contacting local and regional media outlets. Media outlets have the option of whether or not to broadcast Silver Alert information.

According to the FDLE, since the program's inception, the department has issued 283 Silver Alerts with 42 direct recoveries as a result of the alerts.[5]

Missing Person Investigations/Chapter 937, F.S.

Chapter 937, F.S., covers missing person investigations. Terminology relevant to the chapter is defined in s. 937.0201, F.S. Section 937.021, F.S., addresses a number of matters relating to missing persons investigations such as requirements for written policies, filing and acceptance of reports, civil immunity from damages for good faith compliance with alert requests, etc. Section 937.022, F.S., creates a Missing Endangered Persons Information Clearinghouse and specifies its organization and duties, who may submit information, and type of information submitted. Other sections of the chapter deal with birth records, student records, fingerprints, and dental records of missing children.[6]

Section 937.0201(4), F.S., defines a "missing endangered person" as a missing child,[7] a missing adult[8] younger than 26 years of age, or a missing adult 26 years of age or older who is suspected

[5] E-mail from FDLE staff to staff of the Senate Committee on Criminal Justice, dated March 2, 2011.
[6] Respectively, ss. 937.024, 936.025, 937.028, and 937.071, F.S.
[7] A "missing child" is a person younger than 18 years of age whose temporary or permanent residence is in, or is believed to be in, this state, whose location has not been determined, and who has been reported as missing to a law enforcement agency. Section 937.021(3), F.S.

by a law enforcement agency of being endangered or the victim of criminal activity. The term has relevance to a "missing endangered person report," which is a report prepared on a form prescribed by the Florida Department of Law Enforcement (FDLE) by rule for use by the public and law enforcement agencies in reporting information to the Missing Endangered Persons Information Clearinghouse about a missing endangered person.[9] The definition of "missing endangered person" does not specifically mention a person who meets the criteria for activation of the Silver Alert Plan.

Section 937.021(5)(a), F.S., provides that, upon receiving a request to record, report, transmit, display, or release Amber Alert or Missing Child Alert information from a law enforcement agency having jurisdiction over the missing child, the FDLE as the state Amber Alert coordinator, any state or local law enforcement agency, and the personnel of these agencies; any media outlet; any dealer of communications services; or any agency, employee, individual, or entity is immune from civil liability for damages for complying in good faith with the request. There is a presumption of good faith in recording, reporting, transmitting, displaying, or releasing Amber Alert or Missing Child Alert information.

Section 937.021(5)(b), F.S., contains an immunity provision that is almost identical to s. 937.021(5)(a), F.S., but pertains to complying with a request to provide information on a missing adult. Compliance with a request to release Silver Alert information is not specifically mentioned in any immunity provision.

Section 937.021(5)(c), F.S., provides that the presumption of good faith in releasing information for an Amber Alert, Missing Child Alert, or missing adult, is not overcome if there is a technical or clerical mistake made by any agency, employee, individual, or entity acting at the request of the local law enforcement agency having jurisdiction. The presumption also remains intact if the information is incomplete or incorrect because the information received from the local law enforcement agency was incomplete or incorrect. Silver Alert information is not specifically referenced in paragraph (5)(c).

Section 937.021(5)(d), F.S., provides that there is no duty on the part of the agency, employee, individual, or entity to record, report, transmit, display, or release the Amber Alert, Missing Child Alert, or missing adult information received from local law enforcement. The decision to record, report, transmit, display, or release information is discretionary with the entity receiving the information. Silver Alert information is not specifically referenced in paragraph (5)(d).

III. Effect of Proposed Changes:

The bill amends the definition of "missing endangered person" in s. 937.0201, F.S., to specifically include within this definition a missing adult who meets the criteria for activation of a Silver Alert.[10]

[8] A "missing adult" is a person 18 years of age or older whose temporary or permanent residence is in, or is believed to be in, this state, whose location has not been determined, and who has been reported as missing to a law enforcement agency. Section 937.021(2), F.S.

[9] Section 937.021(5), F.S.

[10] The FDLE states that, "[w]hile the Department considers those who meet the criteria for activation of a Silver Alert covered under provisions for missing endangered adults as defined in [s. 937.0201(4)(c), F.S.], there is no objection to

The bill amends s. 937.021, F.S., to do the following:

- Provide that, upon receiving a request to record, report, transmit, display, or release Silver Alert information from the law enforcement agency having jurisdiction over the missing adult, the FDLE as the state Silver Alert coordinator, any state or local law enforcement agency, and the personnel of these agencies; any radio or television network, broadcaster, or other media representative; any dealer of communications services as defined in s. 202.11, F.S.; or any agency, employee, individual, or entity is immune from civil liability for damages for complying in good faith with the request and is presumed to have acted in good faith in recording, reporting, transmitting, displaying, or releasing Silver Alert information pertaining to the missing adult;
- Provide that the presumption of good faith is not overcome if a technical or clerical error is made by any agency, employee, individual, or entity acting at the request of the local law enforcement agency having jurisdiction, or if the Silver Alert information is incomplete or incorrect because the information received from the local law enforcement agency was incomplete or incorrect; and
- Provide that no provision of law creates a duty of the agency, employee, individual, or entity to record, report, transmit, display, or release the Silver Alert information received from the local law enforcement agency having jurisdiction. The decision to record, report, transmit, display, or release information is discretionary with the agency, employee, individual, or entity receiving the information.

The bill also amends s. 937.022, F.S., to provide that only the law enforcement agency having jurisdiction over the case may submit a Silver Alert report to the Missing Endangered Persons Information Clearinghouse involving a missing adult who is suspected by a law enforcement agency of meeting the criteria for activation of the Silver Alert Plan.

The bill provides an effective date of July 1, 2011.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

specific inclusion of these persons as an identified subset as proposed in SB 664. The Department has been named state Silver Alert coordinator (lines 66-67) and while appropriate, it should be noted that if federal legislation is passed that defines a Silver Alert coordinator, there may be additional responsibilities that the clearinghouse would have to take on to fulfill this role." Florida Department of Law Enforcement, *Senate Bill 664 Analysis* (Mar. 4, 2011) (on file with the Senate Committee on Judiciary).

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

Since there is already an existing Silver Alert program, it appears unlikely that the bill would have any additional impact on private entities involved in the alert, such as television and radio stations broadcasting the alert.

C. Government Sector Impact:

According to the Florida Department of Law Enforcement (FDLE), "[t]he proposed legislation would have little impact on the Department as statewide Silver Alerts have been issued since 2008," and will not impact state agencies for the same reason.[11]

VI. Technical Deficiencies:

The FDLE has indicated some concerns with language found at lines 121-125 of the bill. Those lines provide that only the law enforcement agency having jurisdiction over the case may submit a Silver Alert report to the Missing Endangered Persons Information Clearinghouse involving a missing adult who is suspected by a law enforcement agency of meeting the criteria for activation of the Silver Alert Plan.

The FDLE states:

> [T]he Department would recommend minor verbiage changes to ensure that the clear intent of the legislation is realized. While it is clear that this line is mirrored on the verbiage for submission of missing endangered persons reports, instructions for submissions of such cases is already covered in [s. 937.022(3)(b)3., F.S.]. Furthermore, "Silver Alert report" would be confusing nomenclature as the Department does not collect reports of Silver Alerts. Additionally, local law enforcement agencies can and do issue local Silver Alerts for persons who do not meet criteria for State activation, particularly for those travelling on foot who studies show can be expected to be located within a quarter-mile of where they were last seen, and when it is believed that community assistance will help to bring the person home safely. More precise phrasing, and a recommendation should the decision be made to keep this provision, would be to replace the words "submit a Silver Alert report to the clearinghouse" in line 122 with "make a request for the activation of a state Silver Alert to the clearinghouse[.]"[12]

VII. Related Issues:

None.

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[11] Florida Department of Law Enforcement, *Senate Bill 664 Analysis* (Mar. 4, 2011) (on file with the Senate Committee on Judiciary).
[12] *Id.*

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:

Barcode 901184 by Criminal Justice on March 9, 2011:
Provides that only a law enforcement agency having jurisdiction over the case may make a request to the Missing Endangered Persons Information Clearinghouse for activation of Silver Alert if criteria for activation are met.

The amendment addresses the issue raised in the "Technical Deficiencies" section of this bill analysis.

901184

LEGISLATIVE ACTION

Senate	.	House
Comm: FAV	.	
03/09/2011	.	
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The Committee on Criminal Justice (Dean) recommended the following:

Senate Amendment (with title amendment)

Delete lines 121 - 125
and insert:
4. Only the law enforcement agency having jurisdiction over the case may make a request to the clearinghouse for the activation of a state Silver Alert involving a missing adult if circumstances regarding the disappearance have met the criteria for activation of the Silver Alert Plan.

========== T I T L E A M E N D M E N T ==========
And the title is amended as follows:

901184

Delete line 14

and insert:

request that the clearinghouse activate a state Silver Alert

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 104
INTRODUCER:	Senator Ring
SUBJECT:	Misdemeanor Pretrial Substance Abuse Programs
DATE:	March 25, 2011
REVISED:	

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Cellon	Cannon	CJ	**Favorable**
2.	Boland	Maclure	JU	**Pre-meeting**
3.			BC	
4.				
5.				
6.				

I. Summary:

The bill expands the pool of people who are eligible for admission into a misdemeanor pretrial substance abuse education and treatment intervention program. It does so by removing the requirement that a person not have previously been admitted to a pretrial program in order to participate in such programs.

This bill substantially amends section 948.16, Florida Statutes.

II. Present Situation:

Section 948.16, F.S., specifies that a person who is charged with a misdemeanor for possession of a controlled substance or drug paraphernalia under ch. 893, F.S., and who has not previously been convicted of a felony nor been admitted to a pretrial program, is eligible for voluntary admission into a misdemeanor pretrial substance abuse education and treatment intervention program, including a treatment-based drug court program, for a period based on the program requirements and the treatment plan for the offender.

Admission may be based upon motion of either party or the court except, if the state attorney believes the facts and circumstances of the case suggest the defendant is involved in dealing and selling controlled substances, the court shall hold a preadmission hearing. If the state attorney establishes, by a preponderance of the evidence at such hearing, that the defendant was involved in dealing or selling controlled substances, the court shall deny the defendant's admission into the pretrial intervention program.

Participants in the program are subject to a coordinated strategy developed by a drug court team under s. 397.334(4), F.S., which may include a protocol of sanctions that may be imposed upon the participant for noncompliance with program rules. The protocol of sanctions may include, but is not limited to, placement in a substance abuse treatment program offered by a licensed service provider or in a jail-based treatment program or serving a period of incarceration within the time limits established for contempt of court.

At the end of the pretrial intervention period, the court must:

- Consider the recommendation of the treatment program;
- Consider the recommendation of the state attorney as to disposition of the pending charges; and
- Determine, by written finding, whether the defendant successfully completed the pretrial intervention program.

If the court finds that the defendant has not successfully completed the pretrial intervention program, the court may order the person to continue in education and treatment or return the charges to the criminal docket for prosecution. The court must dismiss the charges upon finding that the defendant has successfully completed the pretrial intervention program.

Research indicates that pretrial diversion programs, such as the misdemeanor pretrial substance abuse education and treatment intervention program, have proven themselves to be effective alternatives to traditional case proceedings. A 2007 study conducted by the National Association of Pretrial Services Agencies[1] found that, although data on recidivism rates for these programs was sparse, the available data indicated low rates (between 1 percent and 12 percent depending on the type of crime) of recidivism for offenders that complete pre-trial diversion programs.[2] The low rate of recidivism for offenders in these programs may be due to the nature of the programs. The Pretrial Justice Institute[3] states that pretrial diversion programs "operate under the theory that if the underlying problems are addressed the individual is less likely to recidivate. This, in turn, will lead to less crime and less future costs to the criminal justice system."[4] Since their beginnings in the 1960's pretrial diversion programs have been continually expanded. In an article published by the National Association of Pretrial Services Agencies, the author states:

> The consistent record of accomplishment of Dade County Pretrial Intervention from that time forward led not only to the proliferation of diversion programs in the State of Florida – far in excess of the number anywhere else in the south – but

[1] Incorporated in 1973 as a not-for-profit corporation, the National Association of Pretrial Services Agencies, NAPSA, is the national professional association for the pretrial release and pretrial diversion fields. More information can be found at http://www.napsa.org/mission.htm.
[2] Kennedy, Spurgeon et al. *Promising Practices in Pretrial Diversion*, 16 (2007), http://www.pretrial.org/Docs/Documents/PromisingPracticeFinal.pdf.
[3] In 1976 the U.S. Department of Justice funded the Pretrial Justice Institute at the request of NAPSA, and it is the nation's only non-profit organization dedicated to ensuring informed pretrial decision-making for safe communities. More information can be found at http://www.pretrial.org/AboutPJI/Pages/default.aspx.
[4] Clark, John. Pretrial Justice Institute, *The Role of Traditional Pretrial Diversion in the Age of Specialty Treatment Courts: Expanding the Range of Problem-Solving Options at the Pretrial Stage*, 7 (October 2007), http://www.pretrial.org/Docs/Documents/Role%20of%20Traditional%20Pretrial%20Diversion%20in%20the%20Age%20of%20Speciality%20Treatment%20Courts.pdf.

to the adoption of a state diversion statute and to state-level standards and goals for diversion promulgated by a governor's crime commission.[5]

III. Effect of Proposed Changes:

Under current law only persons who have been charged with a misdemeanor for possession of a controlled substance or drug paraphernalia under ch. 893, F.S., and who have not previously been convicted of a felony nor been admitted to a pretrial program, are eligible for voluntary admission into a misdemeanor pretrial substance abuse education and treatment intervention program.

The bill expands the pool of people who are eligible for admission into a misdemeanor pretrial substance abuse education and treatment intervention program. It does so by removing the condition that, in order to participate in a pretrial program, a person must not have been admitted to such a program previously.

The bill provides an effective date of July 1, 2011.

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:

The bill as written could expand the number of potential participants in county-funded misdemeanor pretrial substance abuse education and treatment intervention programs.

[5] Bellassai, John P. *A Short History of the Pretrial Diversion of Adult Defendants from Traditional Criminal Justice Processing Part One: The Early Years*, 5, *available at* http://www.napsa.org/publications/diversionhistory.pdf.

Although no potential fiscal impact has been brought to the attention of professional staff of the committee, it is conceivable that the counties may decide to increase program capacity, which would result in increased expenditures.

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.

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 1300
INTRODUCER:	Criminal Justice Committee and Senator Storms
SUBJECT:	Juvenile Civil Citation Programs
DATE:	March 25, 2011 REVISED:

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Dugger	Cannon	CJ	**Fav/CS**
2.	O'Connor	Maclure	JU	**Pre-meeting**
3.			BC	
4.				
5.				
6.				

Please see Section VIII. for Additional Information:

A. COMMITTEE SUBSTITUTE.....	X	Statement of Substantial Changes
B. AMENDMENTS.....		Technical amendments were recommended
		Amendments were recommended
		Significant amendments were recommended

I. Summary:

This bill requires juvenile civil citation programs or other similar diversion programs to be established at the local level. Currently, these local diversion programs are discretionary. The bill specifies that they may be operated by any number of entities, including law enforcement, the Department of Juvenile Justice (DJJ), a juvenile assessment center, the county or city, or an entity selected by the county or city. Unlike current law, only first-time juvenile misdemeanants will be eligible to participate in a civil citation program. Current law allows second-time juvenile misdemeanants to participate. The bill also provides that intervention services will be required during the civil citation program if a needs assessment determines such services are necessary.

Finally, the DJJ is required to encourage and assist with the implementation and improvement of civil citation programs or other similar diversion programs around the state. The DJJ must also develop guidelines for the civil citation program which include intervention services. The guidelines must be based on proven civil citation programs or other similar programs within Florida.

This bill substantially amends section 985.12, Florida Statutes.

II. Present Situation:

Statutory Requirements for Civil Citation Programs

Currently, juvenile civil citation programs provide an efficient and innovative alternative to the Department of Juvenile Justice's (DJJ) custody. They provide swift and appropriate consequences for youth who commit nonserious delinquent acts. A law enforcement officer is authorized to issue a civil citation to a youth who admits having committed a misdemeanor.[1]

The programs are discretionary under the authorizing statute. They exist at the local level with the concurrence of the chief judge of the circuit, state attorney, public defender, and the head of each local law enforcement agency involved.[2] Civil citation programs require the youth to complete no more than 50 community service hours, and may require participation in intervention services appropriate to the identified needs of the youth, including family counseling, urinalysis monitoring, and substance abuse and mental health treatment services.[3]

Upon issuance of a citation, the local law enforcement agencies are required to send a copy of the citation to the DJJ so that the department can enter the appropriate information into the Juvenile Justice Information System (JJIS).[4] A copy must also be sent by law enforcement to the sheriff, state attorney, the DJJ's intake office, the community service performance monitor, the youth's parent, and the victim.[5] At the time a civil citation is issued, the law enforcement officer must advise the youth that he or she has the option of refusing the civil citation and of being referred to the DJJ. The youth may refuse the civil citation at any time before completion of the work assignment.[6]

The youth is required to report to a community service performance monitor within seven working days after the civil citation has been issued. The youth must also complete at least five community service hours per week. The monitor reports to the DJJ information regarding the youth's service hour completion and the expected completion date.[7] If the youth fails to timely report or complete a work assignment, fails to timely comply with assigned intervention services, or commits a third or subsequent misdemeanor, the law enforcement officer must issue a report to the DJJ alleging that the youth has committed a delinquent act, thereby initiating formal judicial processing.[8]

[1] Section 985.12(1), F.S.
[2] *Id.*
[3] *Id.*
[4] *Id.*
[5] Section 985.12(2), F.S.
[6] Section 985.12(5), F.S.
[7] Section 985.12(3), F.S.
[8] Section 985.12(4), F.S.

Input from Local Civil Citation Programs

Last summer, 21 local civil citation programs around the state received a questionnaire about their civil citation expungement procedures.[9] Out of that number, 18 responses were received.[10] One of these programs ended on June 30, 2010, because of inadequate funding.[11] Similarly, one of the three program recipients that did not complete the questionnaire also indicated that its program ended then for the same reason.[12] (Nine of the 21 civil citation programs were funded through the DJJ until the end of June when the 3-year grant funding stopped.[13]) Another of the program respondents indicated that its civil citation program was discontinued last year by choice, and instead, a local diversion program was developed in its place.[14]

About half of these programs are run through the local sheriff,[15] and the rest are run through the local DJJ or a youth services organization,[16] the state attorney,[17] or the city or court administrator.[18] Program lengths range anywhere from one month to six months, with a length of two or three months being the most typical.

Several programs specified the following misdemeanors as being "acceptable" for admission into their respective programs:[19]

- Petit theft;
- Criminal mischief;
- Trespassing;
- Simple assault/battery;
- Disruption of a school function;
- Disorderly conduct; and
- Breach of the peace.

Although program admission eligibility requirements varied from circuit to circuit, the majority of programs seemed consistent with their general requirements, including:[20]

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[9] *Senate Criminal Justice Committee Interim Report 2011-113* (October 2010), *available at* http://archive.flsenate.gov/data/Publications/2011/Senate/reports/interim_reports/pdf/2011-113cj.pdf (last visited Mar. 25, 2011).

[10] The following judicial circuits have (or had) at least one such program: judicial circuit 1 (program ended June 2010); judicial circuit 2 (2 of 3 programs responded); judicial circuits 4, 5, and 6 (program ended but started a similar diversion program); judicial circuit 7 (2 of 3 programs responded); judicial circuit 8 (program ended June 2010); and judicial circuits 9, 11, 13, 16, 17, 18, 19, and 20.

[11] Judicial circuit 8.

[12] Judicial circuit 1.

[13] Judicial circuits 1, 4, 5, 8, 11, 13, 17, 19, and 20.

[14] Judicial circuit 6. The program is called "Juvenile Arrest Avoidance Program," and its purpose is to prevent first time juvenile misdemeanants in Pinellas County from having a juvenile record. Everything about the program is kept local, including the youth's record. (Palm Beach County also has a diversion program that is handled completely on the local level, according to the state attorney's office in the 15th judicial circuit.)

[15] Judicial circuits 2, 5, 7 (has several programs), 16, 17, and 20 (has a few programs).

[16] Judicial circuits 6, 9, 11 are DJJ operated and Circuits 1, 2, 13, and 18 are operated by a youth services organization.

[17] Judicial circuit 20.

[18] Judicial circuits 4 and 19.

[19] *Senate Criminal Justice Committee Interim Report 2011-113, supra* note 9.

[20] *Id.*

- Must not have a prior criminal history (some programs specify no prior felony arrests, but will allow one prior misdemeanor);
- Must be between 10 and 17 years of age (some programs do not specify a minimum age, but specify the maximum age to be 17 years);
- Must not have participated in a prior diversion program, including civil citation, or be on any form of court-ordered supervision;
- Must be a first-time misdemeanor offense (some programs require there be no restitution issues, or some specify that it must be a nonviolent misdemeanor);
- Must not have committed a domestic violence offense, traffic offense, sexual crime, hate crime, or malicious act of violence;
- Must be a resident of the applicable county; and
- Must have a written agreement among the youth, the victim, and the parents.

III. Effect of Proposed Changes:

This bill requires juvenile civil citation programs or other similar diversion programs to be established at the local level. Currently, these local diversion programs are discretionary. The bill specifies that they may be operated by any number of entities, including law enforcement, the Department of Juvenile Justice (DJJ), a juvenile assessment center, the county or city, or an entity selected by the county or city. However, the state attorney and local law enforcement agencies must be in agreement with the selected entity.

The bill deletes the county sheriff and the victim as entities that are required to receive a copy of the issued citation. The bill also provides that intervention services will be required during the civil citation program if a needs assessment determines that such services are necessary. Unlike current law, only first-time juvenile misdemeanants will be eligible to participate in a civil citation program. The statute currently allows second-time juvenile misdemeanants to participate.

Upon program completion, the agency operating the program must report the outcome to the DJJ. The bill also states that the issuance of a civil citation will not be considered a referral to the DJJ, meaning it will not initiate formal judicial processing. However, if the youth fails to comply, the juvenile probation officer must process the original delinquent act as a referral to the DJJ and send the report to the state attorney for review.

Finally, the DJJ is required to encourage and assist with the implementation and improvement of civil citation programs or other similar diversion programs around the state. The DJJ must also develop guidelines for the civil citation program which include intervention services. Furthermore, the guidelines must be based on proven civil citation programs or other similar programs in Florida.

The bill provides an effective date of July 1, 2011.

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:

The expansion of juvenile civil citation programs or other similar diversion programs in Florida may result in more eligible youth benefiting from this diversion program, especially as it relates to future opportunities for employment since these youth will not have to deal with the obstacle of having an arrest record.

C. Government Sector Impact:

By requiring the local establishment of civil citation programs or other similar diversion programs, the bill may result in an indeterminate fiscal impact on those jurisdictions that do not have adequate diversion resources available.

On the other hand, to the extent that youth are increasingly diverted from the more costly juvenile justice system, the greater the potential cost savings will be to Florida.

According to the Office of the State Courts Administrator, the bill will have an indeterminate effect on judicial workload.[21]

VI. Technical Deficiencies:

None.

[21] Office of the State Courts Administrator, *Senate Bill 1300 Fiscal Analysis* (Mar. 4, 2011) (on file with the Senate Committee on Judiciary).

VII. Related Issues:

This bill is one of the criminal and juvenile justice cost saving proposals recommended by Florida Tax Watch.[22]

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 March 22, 2011:
The committee substitute:

- Requires the DJJ to encourage and assist with the implementation and improvement of civil citation programs or other similar diversion programs around the state.
- Requires the DJJ to develop guidelines for the civil citation program which include intervention services.
- Requires the civil citation guidelines to be based on proven civil citation programs or other similar diversion programs within Florida.
- Provides that the state attorney and local law enforcement agencies must be in agreement with whatever entity is selected to operate the local civil citation or other similar diversion program.

B. Amendments:

None.

[22] Florida Tax Watch, *Cost-Savings Recommendations for the Criminal and Juvenile Justice System*, presented to the Senate Committee on Criminal Justice, January 11, 2011 (on file with the Senate Committee on Criminal Justice).

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LEGISLATIVE ACTION

Senate . House

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. .

The Committee on Judiciary (Simmons) recommended the following:

Senate Amendment (with title amendment)

Delete everything after the enacting clause and insert:

Section 1. Subsections (3), (4), (5), (6), (11), and (13) of section 70.001, Florida Statutes, are amended to read:

70.001 Private property rights protection.—

(3) For purposes of this section:

(a) The existence of a "vested right" is to be determined by applying the principles of equitable estoppel or substantive due process under the common law or by applying the statutory law of this state.

(b) The term "existing use" means:

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1. An actual, present use or activity on the real property, including periods of inactivity which are normally associated with, or are incidental to, the nature or type of use; or

2. An activity or such reasonably foreseeable, nonspeculative land uses which are suitable for the subject real property and compatible with adjacent land uses and which have created an existing fair market value in the property greater than the fair market value of the actual, present use or activity on the real property.

(c) The term "governmental entity" includes an agency of the state, a regional or a local government created by the State Constitution or by general or special act, any county or municipality, or any other entity that independently exercises governmental authority. The term does not include the United States or any of its agencies, or an agency of the state, a regional or a local government created by the State Constitution or by general or special act, any county or municipality, or any other entity that independently exercises governmental authority, when exercising the powers of the United States or any of its agencies through a formal delegation of federal authority.

(d) The term "action of a governmental entity" means a specific action of a governmental entity which affects real property, including action on an application or permit.

(e) The terms "inordinate burden" and ~~or~~ "inordinately burdened" mean that an action of one or more governmental entities has directly restricted or limited the use of real property such that the property owner is permanently unable to attain the reasonable, investment-backed expectation for the

existing use of the real property or a vested right to a specific use of the real property with respect to the real property as a whole, or that the property owner is left with existing or vested uses that are unreasonable such that the property owner bears permanently a disproportionate share of a burden imposed for the good of the public, which in fairness should be borne by the public at large. The terms "inordinate burden" and ~~or~~ "inordinately burdened" do not include temporary impacts to real property; impacts to real property occasioned by governmental abatement, prohibition, prevention, or remediation of a public nuisance at common law or a noxious use of private property; or impacts to real property caused by an action of a governmental entity taken to grant relief to a property owner under this section. However, a moratorium on development, as defined in s. 380.04, which is in effect for longer than 1 year may, depending upon the circumstances, constitute an inordinate burden as provided in this paragraph.

(f) The term "property owner" means the person who holds legal title to the real property at issue. The term does not include a governmental entity.

(g) The term "real property" means land and includes any appurtenances and improvements to the land, including any other relevant real property in which the property owner had a relevant interest.

(4)(a) Not less than 120 ~~180~~ days before ~~prior to~~ filing an action under this section against a governmental entity, a property owner who seeks compensation under this section must present the claim in writing to the head of the governmental entity, except that if the property is classified as

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agricultural pursuant to s. 193.461, the notice period is 90 days. The property owner must submit, along with the claim, a bona fide, valid appraisal that supports the claim and demonstrates the loss in fair market value to the real property. If the action of government is the culmination of a process that involves more than one governmental entity, or if a complete resolution of all relevant issues, in the view of the property owner or in the view of a governmental entity to whom a claim is presented, requires the active participation of more than one governmental entity, the property owner shall present the claim as provided in this section to each of the governmental entities.

(b) The governmental entity shall provide written notice of the claim to all parties to any administrative action that gave rise to the claim, and to owners of real property contiguous to the owner's property at the addresses listed on the most recent county tax rolls. Within 15 days after the claim being presented, the governmental entity shall report the claim in writing to the Department of Legal Affairs, and shall provide the department with the name, address, and telephone number of the employee of the governmental entity from whom additional information may be obtained about the claim during the pendency of the claim and any subsequent judicial action.

(c) During the 90-day-notice period or the <u>120-day-notice</u> ~~180-day-notice period~~, unless extended by agreement of the parties, the governmental entity shall make a written settlement offer to effectuate:

1. An adjustment of land development or permit standards or other provisions controlling the development or use of land.

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2. Increases or modifications in the density, intensity, or use of areas of development.

3. The transfer of developmental rights.

4. Land swaps or exchanges.

5. Mitigation, including payments in lieu of onsite mitigation.

6. Location on the least sensitive portion of the property.

7. Conditioning the amount of development or use permitted.

8. A requirement that issues be addressed on a more comprehensive basis than a single proposed use or development.

9. Issuance of the development order, a variance, special exception, or other extraordinary relief.

10. Purchase of the real property, or an interest therein, by an appropriate governmental entity or by payment of compensation.

11. No changes to the action of the governmental entity.

If the property owner accepts the settlement offer, the governmental entity may implement the settlement offer by appropriate development agreement; by issuing a variance, special exception, or other extraordinary relief; or by other appropriate method, subject to paragraph (d).

(d)1. Whenever a governmental entity enters into a settlement agreement under this section which would have the effect of a modification, variance, or a special exception to the application of a rule, regulation, or ordinance as it would otherwise apply to the subject real property, the relief granted shall protect the public interest served by the regulations at issue and be the appropriate relief necessary to prevent the

governmental regulatory effort from inordinately burdening the real property.

2. Whenever a governmental entity enters into a settlement agreement under this section which would have the effect of contravening the application of a statute as it would otherwise apply to the subject real property, the governmental entity and the property owner shall jointly file an action in the circuit court where the real property is located for approval of the settlement agreement by the court to ensure that the relief granted protects the public interest served by the statute at issue and is the appropriate relief necessary to prevent the governmental regulatory effort from inordinately burdening the real property.

(5)(a) During the 90-day-notice period or the 120-day-notice ~~180-day-notice period~~, unless a settlement offer is accepted by the property owner, each of the governmental entities provided notice pursuant to paragraph (4)(a) shall issue a written statement of allowable uses ~~ripeness decision~~ identifying the allowable uses to which the subject property may be put. The failure of the governmental entity to issue a written statement of allowable uses ~~ripeness decision~~ during the applicable 90-day-notice period or 120-day-notice ~~180-day-notice~~ period shall be deemed a denial for purposes of allowing a property owner to file an action in the circuit court under this section. If a written statement of allowable uses is issued, it ~~to ripen the prior action of the governmental entity, and shall operate as a ripeness decision that has been rejected by the property owner. The ripeness decision, as a matter of law,~~ constitutes the last prerequisite to judicial review~~, and the~~

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~~matter shall be deemed ripe or final~~ for the purposes of the judicial proceeding created by this section, notwithstanding the availability of other administrative remedies.

(b) If the property owner rejects the settlement offer and the statement of allowable uses ~~ripeness decision~~ of the governmental entity or entities, the property owner may file a claim for compensation in the circuit court, a copy of which shall be served contemporaneously on the head of each of the governmental entities that made a settlement offer and a ripeness decision that was rejected by the property owner. Actions under this section shall be brought only in the county where the real property is located.

(6)(a) The circuit court shall determine whether an existing use of the real property or a vested right to a specific use of the real property existed and, if so, whether, considering the settlement offer and statement of allowable uses ~~ripeness decision~~, the governmental entity or entities have inordinately burdened the real property. If the actions of more than one governmental entity, considering any settlement offers and statements of allowable uses ~~ripeness decisions~~, are responsible for the action that imposed the inordinate burden on the real property of the property owner, the court shall determine the percentage of responsibility each such governmental entity bears with respect to the inordinate burden. A governmental entity may take an interlocutory appeal of the court’s determination that the action of the governmental entity has resulted in an inordinate burden. An interlocutory appeal does not automatically stay the proceedings; however, the court may stay the proceedings during the pendency of the

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interlocutory appeal. If the governmental entity does not prevail in the interlocutory appeal, the court shall award to the prevailing property owner the costs and a reasonable attorney fee incurred by the property owner in the interlocutory appeal.

(b) Following its determination of the percentage of responsibility of each governmental entity, and following the resolution of any interlocutory appeal, the court shall impanel a jury to determine the total amount of compensation to the property owner for the loss in value due to the inordinate burden to the real property. The award of compensation shall be determined by calculating the difference in the fair market value of the real property, as it existed at the time of the governmental action at issue, as though the owner had the ability to attain the reasonable investment-backed expectation or was not left with uses that are unreasonable, whichever the case may be, and the fair market value of the real property, as it existed at the time of the governmental action at issue, as inordinately burdened, considering the settlement offer together with the statement of allowable uses ~~ripeness decision~~, of the governmental entity or entities. In determining the award of compensation, consideration may not be given to business damages relative to any development, activity, or use that the action of the governmental entity or entities, considering the settlement offer together with the statement of allowable uses ~~ripeness decision~~ has restricted, limited, or prohibited. The award of compensation shall include a reasonable award of prejudgment interest from the date the claim was presented to the governmental entity or entities as provided in subsection (4).

(c)1. In any action filed pursuant to this section, the property owner is entitled to recover reasonable costs and attorney fees incurred by the property owner, from the governmental entity or entities, according to their proportionate share as determined by the court, from the date of the filing of the circuit court action, if the property owner prevails in the action and the court determines that the settlement offer, including the statement of allowable uses ~~ripeness decision~~, of the governmental entity or entities did not constitute a bona fide offer to the property owner which reasonably would have resolved the claim, based upon the knowledge available to the governmental entity or entities and the property owner during the 90-day-notice period or the 120-day-notice ~~180-day-notice~~ period.

2. In any action filed pursuant to this section, the governmental entity or entities are entitled to recover reasonable costs and attorney fees incurred by the governmental entity or entities from the date of the filing of the circuit court action, if the governmental entity or entities prevail in the action and the court determines that the property owner did not accept a bona fide settlement offer, including the statement of allowable uses ~~ripeness decision~~, which reasonably would have resolved the claim fairly to the property owner if the settlement offer had been accepted by the property owner, based upon the knowledge available to the governmental entity or entities and the property owner during the 90-day-notice period or the 120-day-notice ~~180-day-notice~~ period.

3. The determination of total reasonable costs and attorney fees pursuant to this paragraph shall be made by the court and

not by the jury. Any proposed settlement offer or any proposed statement of allowable uses ~~ripeness decision~~, except for the final written settlement offer or the final written ripeness decision, and any negotiations or rejections in regard to the formulation either of the settlement offer or the statement of allowable uses ~~ripeness decision~~, are inadmissible in the subsequent proceeding established by this section except for the purposes of the determination pursuant to this paragraph.

(d) Within 15 days after the execution of any settlement pursuant to this section, or the issuance of any judgment pursuant to this section, the governmental entity shall provide a copy of the settlement or judgment to the Department of Legal Affairs.

(11) A cause of action may not be commenced under this section if the claim is presented more than 1 year after a law or regulation is first applied by the governmental entity to the property at issue. For purposes of this section, enacting a law or adopting a regulation does not constitute the application of the law or regulation to a property. If an owner seeks relief from the governmental action through lawfully available administrative or judicial proceedings, the time for bringing an action under this section is tolled until the conclusion of such proceedings.

(13) This section waives sovereign immunity solely to the extent provided herein; however, this section does not otherwise affect the sovereign immunity of government.

Section 2. The amendments to s. 70.001, Florida Statutes, made by this act apply prospectively only and do not apply to any claim or action filed under s. 70.001, Florida Statutes,

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which is pending on the effective date of this act.

Section 3. This act shall take effect July 1, 2011.

========== 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 property rights; amending s. 70.001, F.S.; redefining the terms "inordinate burden" and "inordinately burdened" as they relate to the Bert J. Harris, Jr., Private Property Rights Protection Act" to specify that a moratorium on development in effect for longer than a specified period constitutes an inordinate burden; revising the time within which a property owner who seeks compensation must present the claim in writing to the head of the governmental entity; revising the time within which a governmental entity must make a written settlement offer to a claimant; revising the time within which a governmental entity that has provided notice must issue a written statement of allowable uses, rather than a ripeness decision, which identifies the allowable uses to which the subject property may be put; providing that the failure of the governmental entity to issue a written statement of allowable uses during the applicable revised notice requirement is deemed a denial for purposes of allowing a property owner to file an action in the circuit court;

providing that if a written statement of allowable uses is issued, it constitutes the last prerequisite to judicial review; conforming terminology to changes made by the act; providing that enacting a law or adopting a regulation does not constitute the application of the law or regulation to a property; providing for application of sovereign immunity; providing for application of the act; providing an effective date.

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 998
INTRODUCER:	Senator Simmons and others
SUBJECT:	Property Rights
DATE:	March 25, 2011
REVISED:	

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Wolfgang	Yeatman	CA	**Favorable**
2.	Munroe	Maclure	JU	**Pre-meeting**
3.			BC	
4.				
5.				
6.				

I. Summary:

This bill amends the Bert Harris Act to make the following changes to Florida's statutory protections on real property rights. The bill:

- specifies that a moratorium on a development that is in effect for longer than one year is not a temporary impact to real property and may constitute an "inordinate burden";
- changes a notification period from 180 days to 120 days;
- deletes the term "ripeness" and replaces it with language specifying when the prerequisites for judicial review are met;
- specifies that enacting a law or adopting a regulation does not constitute applying the law or regulation to a property; and
- specifies that sovereign immunity is waived for purposes of the Bert Harris Act.

This bill substantially amends section 70.001, Florida Statutes.

II. Present Situation:

Takings

The Fifth Amendment to the United States Constitution guarantees that citizens' private property shall not be taken for public use without just compensation. The "takings" clause of the Fifth Amendment is applicable to the states through the Fourteenth Amendment, which provides that "[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property,

without due process of law . . . ." The government may acquire private property through the power of eminent domain, provided the property owner is compensated.[1]

Article I, s. 2 of the State Constitution also guarantees all natural persons the right to "acquire, possess and protect property" and the State Constitution further provides that no person will be deprived of property without due process of law.[2] Article X, s. 6 of the State Constitution is complimentary to the Fifth and Fourteenth Amendments to the United States Constitution. It provides that "[n]o private property shall be taken except for a public purpose and with full compensation therefor paid to each owner."[3]

In addition to actually physically infringing upon the property, certain regulations on property can constitute a taking. Where a governmental regulation results in permanent physical occupation of the property or deprives the owner of "all economically productive or beneficial uses" of the property, a "per se" taking is deemed to have occurred, thereby requiring full compensation for the property.[4] Additionally, where the regulation does not substantially advance a legitimate state interest, it is invalid[5] and the property owner may recover compensation for the period during which the invalid regulation deprived all use of the property.[6]

In other "takings" cases, courts have used a multi-factor, "ad hoc" analysis to determine whether a regulation has adversely affected the property to such an extent as to require government compensation. Some of the factors considered by the courts include:

- the economic impact of the regulation on the property owner;
- the extent to which the regulation interferes with the property owner's investment-backed expectations;
- whether the regulation confers a public benefit or prevents a public harm (the nature of the regulation);
- whether the regulation is arbitrarily and capriciously applied; and
- the history of the property, history of the development, and history of the zoning and regulation.[7]

The Supreme Court, in *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, rejected property owners' contentions that a three-year moratorium on development constituted a per se taking of property requiring compensation under the Takings Clause.[8] The court recognized that there are a wide range of "moratoria" that occur as a regular part of land use regulation, such as "normal delays in obtaining building permits, changes in zoning

[1] Chapters 73 and 74, F.S.
[2] Art. I, s. 9, Fla. Const.
[3] Art. X, s. 6(a), Fla. Const.
[4] *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1030 (1992). *See also First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 321 (1987).
[5] *See Nollan v. California Coastal Comm'n*, 483 U.S. 825, 834 (1987) (citing *Agins v. Tiburon*, 447 U.S. 255, 260 (1980)).
[6] *See First English Evangelical Lutheran Church of Glendale, supra* note 4.
[7] *See Reahard v. Lee County*, 968 F.2d 1131, 1136 (11th Cir. 1992). *See also Keystone Bituminous Coal Assn. v. DeBenedictis*, 480 U.S. 470, 485-98 (1987); *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 130-31 (1978); *Graham v. Estuary Properties*, 399 So. 2d 1374, 1380-81 (Fla. 1981).
[8] 535 U.S. 302, 342-43 (2002).

ordinances, variances, and the like."[9] The court ultimately determined that the length of time that a parcel of property was undevelopable was one of the many factors to be considered when determining whether a taking has occurred.[10]

The Bert Harris Act

In 1995, the Bert Harris Act was enacted by the Legislature to provide a new cause of action for private property owners whose property has been "inordinately burdened" by state and local government action that may not rise to the level of a "taking" under the State or Federal Constitution.[11] The inordinate burden applies either to an existing use of real property or a vested right to a specific use.[12]

Under the Bert Harris Act, the term "existing use" means:

> an actual, present use or activity on the real property, including periods of inactivity which are normally associated with, or are incidental to, the nature or type of use or activity or such reasonably foreseeable, nonspeculative land uses which are suitable for the subject real property and compatible with adjacent land uses and which have created an existing fair market value in the property greater than the fair market value of the actual, present use or activity on the real property.[13]

In *City of Jacksonville v. Coffield*, the First District Court of Appeal held that a city's closure of a public road did not inordinately burden an existing use or a vested right to use of the property under the Bert Harris Act.[14] The court held that the property owner's planned development was not an existing use to the property, nor did he have a vested right to develop the property prior to the city's closing the public road near the property.[15] Specifically, the court stated that once the property owner "learned that an application had been filed to close the only roadway providing ingress and egress to the property, development of the property into eight single-family lots was, if still a possibility, by no means a 'reasonably foreseeable, nonspeculative,' use of the property."[16] Furthermore the court stated that:

> Determinations under the Act that a claimant has "an existing use of the real property or a vested right to a specific use of the real property" and that government action has permanently precluded the claimant from attaining "the reasonable, investment-backed expectation for the existing use of the real property or a vested right to a specific use of the real property" are conclusions of law.[17]

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[9] *See id.* at 329 (quoting *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 321 (1987)).
[10] *Id.* at 318-19.
[11] Section 70.001(1) and (9), F.S.
[12] Section 70.001(2)-(3)(a), F.S.
[13] Section 70.001(3)(b), F.S.
[14] 18 So. 3d 589, 599 (Fla. 1st DCA 2009).
[15] *Id*.
[16] *Id.* at 596.
[17] *Id*. at 594.

The court then proceeded to review the conclusions of law in the case *de novo*.[18] "The existence of a 'vested right' is to be determined by applying the principles of equitable estoppel or substantive due process under the common law or by applying the statutory law of this state."[19] The common law doctrine of equitable estoppel limits the government in the exercise of its power over real property when "a property owner (1) relying in good faith (2) upon some act or omission of the government (3) has made such a substantial change in position or incurred such excessive obligations and expenses that it would be highly inequitable and unjust to destroy the rights he has acquired."[20]

An often quoted Second District Court of Appeal case said, "the theory of estoppel amounts to nothing more than an application of the rules of fair play."[21] Equitable estoppel applies against a governmental entity "only in rare instances and exceptional circumstances;" the government's act must "go beyond mere negligence."[22]

In addition to the elements of equitable estoppel, the landowner's knowledge of future changes to a zoning ordinance is an important consideration in determining whether the landowner has obtained a vested right. A series of cases from the Florida Supreme Court have emphasized that the doctrine of equitable estoppel may not be invoked where "the party claiming to have been injured by relying upon an official determination had good reason to believe before or while acting to his detriment that the official mind would soon change."[23] *Sakolsky v. City of Coral Gables* (*Sakolsky*)[24] clarified the rule, stating that "[n]otice or knowledge of mere equivocation independent of actual infirmities or pending official action cannot operate to negative or prevent reliance on the official act."[25]

An inordinate burden is a government action that has directly restricted or limited the use of real property such that the property owner is permanently unable to attain the reasonable, investment-backed expectation for:

- the existing use of the real property;
- a vested right to a specific use of the real property with respect to the real property as a whole; or

[18] *Id*.
[19] Section 70.001(3)(a), F.S.
[20] *Smith v. City of Clearwater*, 383 So. 2d 681, 686 (Fla. 2d DCA 1980). *See also Coral Springs Street Systems, Inc. v. City of Sunrise*, 371 F.3d 1320, 1334 (11th Cir. 2004).
[21] *Town of Largo v. Imperial Homes Corp*., 309 So. 2d 571, 573 (Fla. 2d DCA 1975). *See also Equity Resources Inc. v. County of Leon*, 643 So. 2d 1112, 1119-20 (Fla. 1st DCA 1994); *Branca v. City of Miramar*, 634 So. 2d 604, 606 (Fla. 1994).
[22] *Villas of Lake Jackson, Ltd. v. Leon County*, 884 F. Supp. 1544, 1568 (N.D. Fla. 1995), *aff'd*, 121 F.3d 610 (11th Cir. 1997) (internal citations omitted) (finding that although fact questions existed on issue of equitable estoppel and vested property right, rational basis for rezoning precluded due process claims).
[23] *Sharrow v. City of Dania*, 83 So. 2d 274, 276 (Fla. 1955); *Gross v. City of Miami*, 62 So. 2d 418 (Fla. 1953); *City of Ft. Lauderdale v. Lauderdale Industrial Sites*, 97 So. 2d 47, 50 (Fla. 2d DCA 1957); *City of Miami v. State ex rel. Ergene, Inc.*, 132 So. 2d 474, 476 (Fla. 3d DCA 1961) (*per curiam*) ("It would appear childish to assert that the permittees were without knowledge of these undisputed facts and for the respondents to wholly disregard them and simultaneously incur financial obligations incidental to the construction of the building under the questioned permit, shows that they acted while red flags were flying and cannot complain of lack of notice."(quoting *Miami Shores Village v. Wm. N. Brockway Post*, 24 So.2d 33, 36 (Fla. 1945)).
[24] 151 So. 2d 433 (Fla. 1963).
[25] *Id.* at 435-36.

- when the property owner is left with existing or vested uses that are unreasonable such that the property owner bears permanently a disproportionate share of a burden imposed for the good of the public, which in fairness should be borne by the public at large.[26]

The terms "inordinate burden" or "inordinately burdened" do not include:

- temporary impacts to real property;
- impacts to real property occasioned by governmental abatement;
- prohibition, prevention, or remediation of a public nuisance at common law or a noxious use of private property; or
- impacts to real property caused by an action of a governmental entity taken to grant relief to a property owner.[27]

Under s. 70.001, F.S., a property owner seeking compensation must present a written claim to the head of the governmental agency whose action caused the inordinate burden 180 days (90 days for agriculture) prior to bringing a suit.[28] The written notice must be accompanied by a valid appraisal that shows the loss of the fair market value.[29] The property owner must commence his or her cause of action within one year of the date the "law or regulation is first applied by the governmental entity."[30] This has been interpreted as starting the running of the time limitation when the legislative or quasi-legislative restriction is adopted.[31]

The governmental entity must make a written settlement offer within the 180-day-notice period that may include:

- An adjustment of land development or permit standards or other provisions controlling the development or use of the land;
- Increases or modifications in the density, intensity, or use of areas of development;
- The transfer of development rights;
- Land swaps or exchanges;
- Mitigation, including payments in lieu of on-site mitigation;
- Location of the least sensitive portion of the property;
- Conditioning the amount of development permitted;
- A requirement that issues be addressed on a more comprehensive basis than a single proposed use or development;
- Issuance of the development order, a variance, special exception, or other extraordinary relief;
- Purchase of the real property, or an interest therein, by an appropriate governmental agency; or
- No changes to the action of the governmental entity.[32]

[26] Section 70.001(3)(e), F.S.
[27] *Id.*
[28] Section 70.001(4)(a), F.S.
[29] *Id.*
[30] Section 70.001(11), F.S.
[31] *See Citrus County v. Halls River Development, Inc*., 8 So. 3d 413, 422-24 (Fla. 5th DCA 2009).
[32] Section 70.001(4)(c), F.S.

If the property owner accepts the settlement offer, then the government implements it pursuant to s. 70.001(4)(d), F.S. If the settlement offer is declined, the government must issue within the 180-day period a written ripeness decision, which must contain identification of allowable uses on the affected land.[33] This ripeness decision serves as the last prerequisite to judicial review, thus allowing the landowner to file a claim in circuit court.[34]

Under s. 70.001(6)(a), F.S., the court decides if there was an existing use of the property or a vested right to a specific use, and if so, whether the governmental action inordinately burdened the property. Private property is inordinately burdened when a government action has directly restricted or limited the use of the property so that the owner is unable to attain reasonable, investment-backed expectations for the existing use, or a vested right in the existing use, of the property as a whole.[35] Alternatively, property is inordinately burdened if the owner is left with existing or vested uses which are unreasonable such that the owner would permanently bear a disproportionate share of a burden imposed for the public good which should be borne by the public at large.[36]

If the court finds the governmental action has inordinately burdened the subject property, the court will apportion the percentage of the burden if more than one governmental entity is involved.[37] The court then impanels a jury to decide the monetary value, pursuant to s. 70.001(6)(b), F.S., based upon the loss in fair market value attributable to the governmental action. The prevailing party is entitled to reasonable costs and attorney's fees, pursuant to s. 70.001(6)(c), F.S., if the losing party did not make, or reject, a bona fide settlement offer.

Citrus County v. Halls River Development held that the one-year limitation period applicable under the Bert Harris Act accrued on the date the statute was amended and first impacted the land in question by changing its zoning designation from mixed use to low intensity coastal and lakes.[38] In *Citrus County*, the Fifth District Court of Appeal rejected a equitable estoppel argument by the developer's that the Bert Harris Act should be liberally construed to permit the developer access to the Act's remedies for aggrieved property owners where the developer and local government both misperceived the legal significance in determining the timeliness of the developer's claim.[39]

However *M & H Profit, Inc. v. Panama City*, stated that the clear and unambiguous language of the Bert Harris Act establishes that the law is limited to "as-applied" challenges not facial challenges based on the mere enactment of a new ordinance or regulation.[40] The First District Court of Appeal in *M &H Profit*, found that the "language of the Bert Harris Act does not contemplate facial challenges to general, health, safety, and welfare ordinances of a municipality."[41] The court found that "an interpretation of state statutes which would impede the

[33] Section 70.001(5)(a), F.S.
[34] *Id.*
[35] Section 70.001(3)(e), F.S.
[36] *Id.*
[37] Section 70.001(6)(a), F.S.
[38] *Citrus*, 8 So. 3d at 422-24.
[39] *Id.*
[40] 28 So. 3d 71, 75-76 (Fla. 1st DCA 2010).
[41] *Id.* at 73.

ability of local government to protect the health and welfare of its citizens should be rejected unless the Legislature has clearly expressed the intent to limit or constrain local government action."[42]

Sovereign Immunity

The term "sovereign immunity" originally referred to the English common law concept that the government may not be sued because "the King can do no wrong." Sovereign immunity bars lawsuits against the state or its political subdivisions for the torts of officers, employees, or agents of such governments unless the immunity is expressly waived.[43] This blanket of immunity applies to all subdivisions of the state including its agencies, counties, municipalities, and school boards; however, Article X, s. 13 of the State Constitution, provides that sovereign immunity may be waived through an enactment of general law.

The Legislature, in s. 768.28, F.S., has expressly waived sovereign immunity in tort actions for claims against its agencies and subdivisions resulting from the negligent or wrongful act or omission of an employee acting within the scope of employment, but established limits on the amount of liability. A claim or judgment by any one person may not exceed $100,000, and may not exceed $200,000 paid by the state or its agencies or subdivisions for claims arising out of the same incident or occurrence.[44] Notwithstanding this limited waiver of sovereign immunity, certain discretionary governmental functions remain immune from tort liability.[45]

The Bert Harris Act provides a process for claims against a governmental entity for certain actions. Specifically, the provisions of the Act operate as a separate and distinct cause of action from the law of takings to provide "for relief, or payment of compensation, when a new law, rule, regulation, or ordinance of the state or a political entity in the state, as applied, unfairly affects real property."[46]

Section 70.001(13), F.S., provides that, "This section does not affect the sovereign immunity of government." In 2003, the Third District Court of Appeal in *Royal World Metropolitan, Inc. v. City of Miami Beach* overturned a trial court's decision that subsection (13) serves to bar a cause of action against a governmental entity.[47] Specifically, the court found s. 70.001, F.S., "evinces a sufficiently clear legislative intent to waive sovereign immunity as to a private property owner whose property rights are inordinately burdened, restricted or limited by governmental regulation does not rise to the level of taking under the Florida and United States Constitutions."[48]

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[42] *Id.* at 77.
[43] See generally, Wetherington and Pollock, *Tort Suits Against Governmental Entities in Florida*, 44 Fla. L. Rev. 1 (1992).
[44] Section 1, ch. 2010-26, Laws of Florida, amended s. 768.28(5), F.S., effective October 1, 2011, to increase the limits to $200,000 for one person for one incident and $300,000 for all recovery related to one incident, to apply to claims arising on or after that effective date.
[45] *See Commercial Carrier Corp., v. Indian River County*, 371 So. 2d 1010, 1019 (Fla. 1979), *citing Evangelical United Brethren Church v. State*, 67 Wash. 2d 246, 407 P.2d 440, 444-45 (1965).
[46] Section 70.001(1), F.S. Section 70.001(13), F.S., provides that "section does not affect the sovereign immunity of government".
[47] *Royal World Metropolitan, Inc. v. City of Miami Beach*, 863 So. 2d 320, 322-23 (Fla. 3rd DCA 2003).
[48] *Id.* at 322.

III. Effect of Proposed Changes:

The bill contains a number of "whereas" clauses articulating the reasons for the amendments to the Bert Harris Act.

Section 1 amends s. 70.001, F.S. The bill restructures the definition of existing use to make it clearer that the term "existing use" has two separate definitions:

(1) an actual, present use or activity on the real property, including periods of inactivity which are normally associated with, or are incidental to, the nature or type of use or activity *or*
(2) such reasonably foreseeable, nonspeculative land uses which are suitable for the subject real property and compatible with adjacent land uses and which have created an existing fair market value in the property greater than the fair market value of the actual, present use or activity on the real property.

The bill clarifies that both "inordinate burden" *and* "inordinately burdened" mean the same thing.

The bill specifies that a moratorium on a development[49] that is in effect for longer than one year is not a temporary impact to real property and may constitute an "inordinate burden."

The bill changes the requirement that property owners who seek compensation under the Bert Harris Act present the claim in writing to the head of the governmental entity 180 days prior to filing an action to make it 120 days prior to an action. The bill specifies that payment of compensation can be part of a settlement offer from the local government.

The bill deletes the term "ripeness" but leaves the language requiring the local government to provide a written decision identifying the allowable uses to which the subject property may be put. The bill clarifies that the failure of the local government to issue the decision within the notice period constitutes the local government's final decision identifying the uses for the subject property. For the purposes of fulfilling the prerequisites to judicial review on the merits, the issuance or failure to issue the written decision operates as a final decision that has been rejected by the property owner.

The bill specifies that enacting a law or adopting a regulation does not constitute applying the law or regulation to a property. This provision should allow property owners to sue when the restrictions are applied to their property without being excluded by the statute of limitations even if the law or regulation was enacted more than a year before it is applied to the property.

The bill deletes the section that states that s. 70.001, F.S., does not affect the sovereign immunity of government and replaces it with language that waives sovereign immunity for causes of action under s. 70.001, F.S. This is consistent with how the section of law was interpreted by the courts in *Royal World Metropolitan, Inc. v. City of Miami Beach.*[50]

[49] Development, as defined in s. 380.04, F.S., means the carrying out of any building activity or mining operation, the making of any material change in the use or appearance of any structure or land, or the dividing of land into three or more parcels.
[50] *Royal World Metropolitan, Inc.*, 863 So. 2d at 322-23.

Section 2 states that the act is applied prospectively and does not affect pending litigation.

Section 3 provides an effective date of July 1, 2011.

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:

The bill expands the options for private property owners to obtain compensation or another remedy for governmental action that inordinately burdens real property by making it clear that certain moratoria lasting more than one year are not necessarily "temporary" so as to be excluded from the definition of inordinate burden.

C. Government Sector Impact:

The bill reduces the timeframe for the governmental entity to respond to the claim, and expressly waives sovereign immunity for claims under the Bert Harris Act.

VI. Technical Deficiencies:

None.

VII. Related Issues:

Although the second "whereas" clause states that it intends to clarify that certain determinations under the Bert Harris Act are questions of law and fact, none of the bill language seems to do anything to change the decision of the court in *City of Jacksonville v. Coffield* that the issues discussed are questions of law.[51]

[51] 18 So. 3d 589 (Fla. 1st DCA 2009).

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.

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 1152
INTRODUCER:	Senator Simmons
SUBJECT:	Limited Liability Companies
DATE:	March 25, 2011 REVISED:

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Hrdlicka	Cooper	CM	**Favorable**
2.	O'Connor	Maclure	JU	**Pre-meeting**
3.			BI	
4.				
5.				
6.				

I. Summary:

In response to a Florida Supreme Court holding about remedies available to a judgment creditor of a single-member limited liability company, SB 1152 amends s. 608.433, F.S. The bill clarifies that the general application of the decision in *Olmstead v. Federal Trade Commission*[1] to single-member limited liability companies does not apply to multiple-member limited liability companies.

The bill provides, with one exception, that a charging order is the "sole and exclusive remedy" by which a judgment creditor of a member or member's assignee may satisfy a judgment from a judgment debtor's interest in a limited liability company or rights to distributions from a limited liability company. The exception arises in situations in which a limited liability company has only one member. The bill provides that the court may order the sale of a member's interest in a single-member limited liability company if the judgment creditor shows that distributions under a charging order will not satisfy the judgment in a reasonable time.

The bill provides that the amendments made to s. 608.433, F.S., are clarifying and apply retroactively.

This bill substantially amends section 608.433, Florida Statutes.

[1] *Olmstead v. Federal Trade Commission*, 44 So. 3d 76 (Fla. 2010),

II. Present Situation:

Limited Liability Companies

Sections 608.401-608.705, F.S., comprise the "Florida Limited Liability Company Act." A limited liability company, or LLC, is a statutorily recognized, "hybrid business entity that offers all of its members limited liability as if they were shareholders of a corporation but treats the entity and its members as a partnership for tax purposes. In other words, a limited liability company is a form of legal entity that has the attributes of both a corporation and a partnership but is not formally characterized as either one."[2]

Members and managers of an LLC are separate from the company itself. Generally, the members and managers of an LLC are not liable, solely by reason of being a member or serving as a manager or managing member, under a judgment, decree, or order of a court, or in any other manner, for a debt, obligation, or liability of the limited liability company. However, this may be expanded or restricted by the provisions of the LLC's articles of organization or operating agreement.[3] Florida law permits single-member LLCs.

Generally, except as otherwise provided in the LLC's articles of organization or operating agreement, no person may be admitted as a member unless a majority-in-interest of the current members consent.[4] A member may assign his or her interest in the LLC, either the whole or a part, but the same general rule for becoming a member applies to the assignee as well.[5] An assignee has no right to participate in the management of the business except as provided in the articles of organization or operating agreement and upon approval of all the members of the LLC, excluding the assigning member. An assignee's interest generally only allows him or her to share in the profits and losses and receive distributions from the LLC.[6]

An assignee may become a member of the LLC only if all the members of the LLC, excluding the assigning member, consent, unless the articles of organization or operating agreement provide otherwise.[7]

According to the Division of Corporations of the Department of State, there are 548,893 active LLCs in Florida.[8] The number of LLC filings has generally increased over the last 10 years. There were 25,566 new business entity filings related to LLCs in 2001, while 138,287 such documents were filed in 2010.

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[2] AMJUR LIMLIACO §1

[3] Section 608.4227, F.S. See also s. 608.4228, F.S., which states that a member or manager shall not be personally liable for monetary damages to the LLC.

[4] Section 608.4232, F.S.

[5] Section 608.432, F.S.

[6] The provisions related to assignments are the same as provisions related to partnerships, whereby if a partner transfers his or her interest, the remaining partners are not required to accept the new partner as an equal for management and voting purposes.

[7] Section 608.433, F.S.

[8] Division of Corporations, Department of State, "Yearly Filings," *available at* http://www.sunbiz.org/corp_stat.html (last visited Mar. 12, 2011). The filing numbers reflect the number of new documents filed beginning January 1 and ending December 31 of each year.

Judgments and Limited Liability Companies

A judgment is an order of the court creating an obligation, such as a debt. Chapter 56, F.S., provides mechanisms for execution of judgments. Section 56.061, F.S., provides that various categories of real and personal property, including stock in corporations, are subject to levy and sale under execution of a court's order or judgment. A member's own interest in an LLC is considered personal property, and is "reasonably understood to fall within the scope of 'corporate stock.'"[9]

Section 608.433(4), F.S., provides for a judgment creditor to apply to a court to charge the LLC membership interest of a member with payment of an unsatisfied amount of judgment owed to the creditor, with interest (otherwise known as a "charging order").[10] "To the extent so charged, the judgment creditor has only the rights of an assignee of such interest."[11] However, the statute also provides that it "does not deprive any member of the benefit of any exemption laws applicable to the member's interest."[12]

A charging order does not give the judgment creditor governance rights with respect to the LLC, because an assignee has no right to participate in the management of the business, unless the articles of organization or operating agreement states otherwise. A judgment creditor, then, would only be able to share in the profits and receive distributions from the LLC.

The theory behind the charging order is that a judgment creditor can be paid from the profits or distributions from the LLC without the disruption of the business caused by inserting another member into the group or the damage caused to other members if the business, or portions of it, was sold to pay the judgment creditor.[13] As a federal bankruptcy court has explained, "a charging order protects the autonomy of the original members, and their ability to manage their own enterprise."[14]

The charging order is not unique to the LLC business structure. Florida's Revised Uniform Partnership Act of 1995, ss. 620.81001-620.9902, F.S., and Florida's Revised Uniform Limited Partnership Act of 2005, ss. 620.1101-620.2205, F.S., similarly provide charging order remedies in partnership and limited partnership law.

A limitation of the charging order remedy is that a creditor cannot recover unless the voting members of the LLC distribute profits. If the LLC does not make a distribution, the judgment creditor is not paid. Particular issues arise when a member of an LLC enters into bankruptcy, is subject to an adjudication of insolvency or appointment of a receiver, or makes an assignment of

[9] *Olmstead v. Federal Trade Commission*, 44 So. 3d 76, 80 (Fla. 2010).
[10] A "judgment creditor" is a person having a legal right to enforce execution of a judgment for a specific sum of money. Black's Law Dictionary, "judgment creditor" (9th Ed. 2010).
[11] Section 608.433(4), F.S.
[12] *Id.*
[13] *See, generally, City of Arkansas City v. Anderson*, 752 P.2d 673, 681-84 (Kansas 1988) (discussing the charging order at common law and under the Uniform Partnership Act).
[14] *In Re: First Protection, Inc.*, 440 B.R. 821, 830 (9th Cir. BAP (Ariz.) 2010) (citations omitted).

interest for the benefit of creditors.[15] Section 608.4327, F.S., states that a person ceases to be a member of an LLC when these situations arise. This is because the economic interests of a creditor or receiver for an insolvent member would not be aligned with the best interest of the LLC.[16] In the case of single-member LLC, there is tension between the interests of the creditors and employees of the LLC and the interests of the judgment creditor of the single member.

Olmstead v. Federal Trade Commission

In *Olmstead v. Federal Trade Commission*, 44 So. 3d 76 (Fla. 2010), the Florida Supreme Court held that Florida's statutory charging order provision is not the exclusive means for a judgment creditor to execute a judgment against the owner of a single-member LLC. The Court held that "a court may order a judgment debtor to surrender all right, title, and interest in the debtor's single-member LLC to satisfy an outstanding judgment."[17]

While the court's holding does not specifically apply to limited liability companies with more than one member, the court's reasoning would likely apply to all limited liability companies.

The Decision in Olmstead

In *Olmstead*, a federal court asked the Florida Supreme Court whether, under Florida law, a court may order a judgment debtor to surrender all "right, title, and interest" in the debtor's single-member LLC to satisfy an outstanding judgment. In the case, the Federal Trade Commission (FTC) alleged Olmstead was operating an "advance-fee credit card scam" and sued for unfair and deceptive trade practices.[18] The FTC prevailed and obtained an order directing Olmstead to surrender all right, title, and interest in his LLC. Olmstead, the judgment debtor and sole member of an LLC, argued that a charging order under s. 608.433(4), F.S., was the sole and exclusive remedy available against his ownership interest in the LLC. He argued that no other remedy was applicable. The FTC argued that other remedies were available under Florida law – and that finding that the statutory charging order was the sole remedy for a single-member LLC would produce absurd results.[19]

The court held that a charging order under s. 608.433(4), F.S., was not the exclusive remedy. The court noted that s. 56.061, F.S., provides that stock in corporations is subject to sale and execution to satisfy a judgment and that because an LLC is a "type of corporate entity," an ownership interest in an LLC is reasonably understood to be corporate stock and subject to execution under the statute.[20] The court rejected arguments that s. 608.433(4), F.S., displaced s. 56.061, F.S. It noted that Florida's partnership and limited partnership statutes contain similar charging order provisions but those provisions provide that the charging order is the exclusive

[15] At common law, the purpose of the charging order was to protect non-debtor partners from being forced into partnership with a judgment partner's creditor.
[16] Davis, Gardner, and Mary Kendrick, *Single-Member LLC Will Not Shield Debtor's Assets from Judgment Creditor*, 29-Oct Am. Bankr. Inst. J. 52 (2010).
[17] *Olmstead*, 44 So. 3d at 83.
[18] *See Olmstead*, 44 So. 3d at 78.
[19] *See Olmstead*, 44 So. 3d at 77-78.
[20] *Olmstead*, 44 So. 3d at 80.

remedy and that specific language relating to an exclusive remedy is not present in the LLC statute.[21] Accordingly, the court said:

> Specifically, we conclude that there is no reasonable basis for inferring that the provision authorizing the use of charging orders under section 608.433(4) establishes the sole remedy for a judgment creditor against a judgment debtor's interest in a single-member LLC… Section 608.433(4) does not displace the creditor's remedy available under section 56.061 with respect to a debtor's ownership interest in a single-member LLC.[22]

Olmstead followed a similar holding from a Colorado court in 2003 – *In re Albright*, 291 B.R. 538 (Bkrtcy.D.Colo. 2003). In *Albright*, "the sole-member of a Colorado LLC filed bankruptcy, and the court held that the Chapter 7 trustee became a 'substituted member' and could cause the LLC to sell its real property and distribute the proceeds to the estate."[23] The court stated that the Colorado LLC laws exist to:

> …protect other members of an LLC from having involuntarily to share governance responsibilities with someone they did not choose, or from having to accept a creditor of another member as a co-manager. A charging order protects the autonomy of the original members, and their ability to manage their own enterprise. In a single-member entity, there are no non-debtor members to protect. The charging order limitation serves no purpose in a single member limited liability company, because there are no other parties' interests affected.[24]

However, the Colorado bankruptcy court specifically stated in a footnote that the holding would have been different if there had been other members in the LLC.[25] Colorado's statute on charging orders is similar to the law in Florida.

Criticism of Olmstead

In dissent, Justice Lewis argued that the majority opinion was rewriting the LLC Act to create a remedy not contemplated by the Legislature. He said that a reading of all of ch. 608, F.S., and not merely the provisions cited by the majority, makes clear that the LLC Act displaces ch. 56, F.S.[26] Justice Lewis warned:

> This is extremely important and has far-reaching impact because the principles used to ignore the LLC statutory language under the current factual circumstances apply with equal force to multimember LLC entities and, in essence, today's decision crushes a very important element for all LLCs in Florida. If the remedies available under the LLC Act

[21] *See Olmstead*, 44 So. 3d at 81-82.
[22] *Olmstead*, 44 So. 3d at 83.
[23] Miller, Elizabeth, *Are the Courts Developing a Unique Theory of Limited Liability Companies or Simply Borrowing from Other Forms?*, 42 Suffolk U. L. Rev. 617, 641-44 (2009).
[24] *In Re Albright*, 291 B.R. at 541 n.7.
[25] *In Re Albright*, 291 B.R. at 540.
[26] *Olmstead*, 44 So. 3d at 83-84 (Lewis, J., dissenting).

> do not apply here because the phrase "exclusive remedy" is not present, the same theories apply to multimember LLCs and render the assets of all LLCs vulnerable.[27]

The provisions of the LLC Act apply uniformly to all Florida LLCs, regardless of whether the LLC is a single-member LLC or a multiple-member LLC.

Commenters have explained the concern of some business law practitioners:

> As a result of the dissenting opinion, many practitioners are concerned that a multiple-member Florida LLC arrangement may not provide charging order protection, although that is not what the majority held. … [T]here is a good chance that there will be legislative clarification of this court-created "uncertainty by implication." In the interim, advisors should alert their clients to the exposure and consider bifurcating Florida LLC membership interests into voting and nonvoting interests, converting Florida LLCs to limited partnerships or limited liability limited partnerships, moving Florida LLCs to jurisdictions that have a more stable charging order protection law, or implementing other divestment of management control strategies.[28]

III. Effect of Proposed Changes:

In response to a Florida Supreme Court holding about remedies available to a judgment creditor of a single-member limited liability company, SB 1152 amends s. 608.433, F.S. The bill clarifies that the general application of the *Olmstead* decision to single-member LLCs does not apply to multiple-member LLCs.

Section 1 amends s. 608.433, F.S.

The bill defines a "charging order" as a lien on a judgment debtor's LLC interest or assignee rights. A judgment creditor has only the rights of an assignee of an LLC interest to receive any distributions that the judgment debtor would otherwise have been entitled to, limited to the extent of the judgment including interest.

The bill provides, with one exception, that a charging order is the "sole and exclusive remedy" by which a judgment creditor of a member or member's assignee may satisfy a judgment from a judgment debtor's interest in an LLC or rights to distributions from an LLC. The exception arises in situations in which an LLC has only one member. The bill provides that the court may order the sale of a member's interest in a single-member LLC if the judgment creditor shows that distributions under a charging order will not satisfy the judgment in a reasonable time.

Upon such a showing, the court may order the sale of the interest in the LLC pursuant to a foreclosure sale. The bill provides that the judgment creditor may make such a showing within a reasonable time after entry of the judgment and may do so at the time the judgment creditor applies for entry of the charging order. If the court orders a foreclosure sale, the purchaser at the

[27] *Olmstead*, 44 So. 3d at 84 (Lewis, J., dissenting).
[28] Gassman, Alan S., and Christopher J. Denicolo, David L. Koche, and Thomas O. Wells, *After Olmstead: Will a Multiple-Member LLC Continue to Have Charging Order Protection*?, 84-DEC Fla. B.J. 8, 10 (2010).

sale obtains the member's entire interest in the LLC, the purchaser becomes the member of the LLC, and the person whose interest is sold ceases to be a member of the LLC.

Section 2 states that the amendments made to s. 608.433, F.S., are clarifying and apply retroactively.

Section 3 provides that the act takes 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:

This bill provides that it is intended to be clarifying and remedial in nature and shall apply retroactively (see Section 2). Retroactive application of legislation can implicate the due process provisions of the constitution.[29] As a general matter, statutes that do not alter vested rights but relate only to remedies or procedure can be applied retroactively.[30]

The Florida Supreme Court has ruled that statutes enacted soon after a controversy over the meaning of legislation may be considered a legislative interpretation of the original law and not substantive change:

> When, as occurred here, an amendment to a statute is enacted soon after controversies as to the interpretation of the original act arise, a court may consider that amendment as a legislative interpretation of the original law and not as a substantive change thereof. This Court has recognized the propriety of considering subsequent legislation in arriving at the proper interpretation of the prior statute.[31]

[29] *See State Department of Transportation v. Knowles*, 402 So. 2d 1155 (Fla. 1981).
[30] *See Metropolitan Dade County v. Chase Federal Housing Corporation*, 737 So.2d. 494 (Fla. 1999). *See also City of Orlando v. Desjardins*, 493 So. 2d 1027, 1028 (Fla. 1986) (citations omitted) ("If a statute is found to be remedial in nature, it can and should be retroactively applied in order to serve its intended purposes.").
[31] *Lowry v. Parole and Probation Commission*, 473 So. 2d 1248, 1250 (Fla. 1985) (internal citations omitted).

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

The bill would benefit businesses by providing certainty and predictability to those establishing and maintaining multiple-member LLCs in Florida. Without such a change, businesses may move or create their LLCs in other states where certainty exists. It is not known how many, if any, businesses would relocate or not locate in Florida because of the *Olmstead* decision and without this bill becoming law. Also, it is not known how many Florida LLCs, if any, would incur additional costs and change to a different business partnership structure.

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.

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:	SJR 1664
INTRODUCER:	Senators Bogdanoff and Gaetz
SUBJECT:	Senate Confirmation/Appointments to Supreme Court
DATE:	March 21, 2011 REVISED:

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	O'Connor	Maclure	JU	**Pre-meeting**
2.			GO	
3.			RC	
4.				
5.				
6.				

I. Summary:

This joint resolution proposes an amendment to the State Constitution to provide that each appointment of a justice of the Supreme Court is subject to confirmation by the Senate. If the Senate votes to not confirm the appointment, the judicial nominating commission (JNC) will reconvene to nominate new potential appointees to the Governor. The JNC will be barred from renominating a person whose prior appointment to fill the same vacancy was not confirmed.

This joint resolution amends section 11, Article V of the Florida Constitution.

II. Present Situation:

History of Senate Confirmation of Supreme Court Justices in Florida

Florida's 1868 Constitution provided for a Supreme Court with a chief justice and two associate justices.[1] Similar to analogous provisions in the U.S. Constitution,[2] justices were appointed by the Governor and confirmed by the Senate for life terms during good behavior.[3] The practice of Senate confirmation was thoroughly debated by the judicial article committee at the 1885 constitutional convention, but was ultimately not adopted in the 1885 revision of the State Constitution.[4] The practice of Senate confirmation was replaced by provisions requiring election of Supreme Court justices.[5]

[1] FLA. CONST. art. VI, s. 3 (1868).
[2] U.S. CONST., art. 2, s. 2, cl. 2; U.S. CONST., art. 3, s. 1.
[3] FLA. CONST. art. VI, s. 3 (1868).
[4] Walter W. Manley, et al., THE SUPREME COURT OF FLORIDA AND ITS PREDECESSOR COURTS, 1821-1917, 273 (1997).
[5] FLA. CONST. art. V, s. 2 (1885).

Current Florida Supreme Court Appointment Process

Judicial Nominating Commission

Currently in Florida, appellate judgeships[6] are filled through a process of nomination and appointment that divides power between the Governor and constitutionally created judicial nominating commissions (JNCs).[7] There is a separate JNC for the Supreme Court and each district court of appeal, but the current appointment process for both judgeships is the same.[8] Although the JNCs are created by the Constitution, the details of their composition are provided in statute.[9]

Section 43.291, F.S., provides the following direction for the membership of each JNC:

- Four members of the Florida Bar, appointed by the Governor. These positions are filled by the Governor from a list submitted by the Board of Governors of The Florida Bar containing three nominees recommended for each position. The Governor has the option to reject all of the nominees recommended for a position and request a new list of nominees who have not been previously recommended for the same position; and[10]
- Five members appointed by the Governor, at least two of whom are practicing members of The Florida Bar.[11]

Vacancies on the Supreme Court

In order to appoint a new justice to the Supreme Court, the Governor is required to choose one person from a list containing between three and six potential nominees provided by the appropriate JNC.[12] Under the current system, once the Governor chooses from the JNC's list, that person is officially appointed to the Supreme Court, without requirement for Senate confirmation.

A vacancy on the Supreme Court triggers the Governor's duty to fill the vacancy by appointing one person from the list of candidates provided by the JNC.[13] The term for the Governor's appointee ends "on the first Tuesday after the first Monday in January of the year following the next general election occurring at least one year after the date of the appointment."[14] In the next general election at least one year after the appointment, the justice must qualify for retention by a

[6] The Governor also fills vacancies on a circuit or county court where judges are elected by a majority vote of the electors in a similar manner. FLA. CONST. art. V, s. 11(b).
[7] FLA. CONST. art. V, s. 11.
[8] FLA. CONST. art. V, s. 11(d).
[9] Section 43.291, F.S.
[10] Section 43.291(1)(a), F.S.
[11] Section 43.291(1)(b), F.S.
[12] FLA. CONST. art. V, s. 11(a).
[13] FLA. CONST. art. V, s. 11(a).
[14] *Id.*

vote of the majority of qualified voters.[15] Once elected for retention, the justice serves a term of six years.[16]

Florida Senate Confirmation of Other Appointments

The State Constitution currently provides for Senate confirmation of certain appointees. For example, under article IV, section 6 of the State Constitution, when provided by law, Senate confirmation or the approval of three members of the cabinet shall be required for appointment to any designated executive statutory office. In turn, the Florida Statutes contain numerous references to Senate confirmation of heads of state agencies and other positions. For example, s. 20.05, F.S., specifies that gubernatorial appointment of a department secretary must be confirmed by the Senate.

Section 114.05, F.S., prescribes the procedures employed when a vacancy in office is filled by appointment that requires Senate confirmation. When an appointment is made, the Governor is required to transmit a letter of appointment to the Secretary of State. The letter sets forth the legal authority for the appointment, the office, the name and address of the appointee, the term of the office, and the effective date of the appointment. Upon receipt of the letter of appointment, the Secretary of State transmits to the appointee an oath of office, questionnaire for executive appointment, and a bond form, when required. Once the appropriate paperwork is completed by the appointee and returned to the Secretary of State, a certificate is issued by the Secretary of State and sent to the appointee. A copy of the certificate and the completed questionnaire are then sent to the Senate for confirmation consideration. Once received by the Senate, the President lays the appointment before the Senate for confirmation "in accordance with this section and the applicable Senate rules."[17]

Senate Confirmation of U.S. Supreme Court Justices

The U.S. Constitution empowers the President to nominate Supreme Court justices for appointment, "by and with the Advice and Consent of the Senate."[18] After the President formally selects a nominee, the "advice and consent" requirement is fulfilled by a confirmation vote in the Senate, which requires a simple majority.[19] In between presidential nomination and final Senate confirmation, the nominee is referred to and considered by the Judiciary Committee before being acted on by the full Senate. The constitutionally prescribed federal model for Supreme Court appointments represents a sharing of power between the executive and legislative branches.[20] U.S. Supreme Court justices serve lifetime appointments, as long as they exhibit good behavior.[21]

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[15] FLA. CONST. art. V, s. 10(a).
[16] *Id.*
[17] Section 114.05(1), F.S.
[18] U.S. CONST., art. 2, s. 2, cl. 2.
[19] Congressional Research Service, *Supreme Court Appointment Process: Roles of the President, Judiciary Committee, and Senate,* 2 (Feb. 19, 2010), *available at* http://www.fas.org/sgp/crs/misc/RL31989.pdf (last visited Mar. 15, 2011).
[20] *Id.*
[21] U.S. CONST., art. 3, s. 1.

Constitutional Amendments

Section 1, Article X of the State Constitution authorizes the Legislature to propose amendments to the State Constitution by joint resolution approved by a three-fifths vote of the membership of each house. The amendment must be placed before the electorate at the next general election held after the proposal has been filed with the Secretary of State's office, or at a special election held for that purpose. Section 5(e), Article XI of the State Constitution requires 60-percent voter approval for a constitutional amendment to take effect. An approved amendment will be effective on the first Tuesday after the first Monday in January following the election at which it is approved, or on such other date as may be specified in the amendment or revision.[22]

III. Effect of Proposed Changes:

This joint resolution proposes a constitutional amendment to add an additional step to the appointment of justices to the Florida Supreme Court by creating the requirement for Senate confirmation of the Governor's appointments. If the Senate votes to not confirm the appointment, the judicial nominating commission (JNC) will reconvene to nominate new potential appointees to the Governor as though a new vacancy had occurred. The JNC will be barred from renominating a person whose prior appointment to fill the same vacancy was not confirmed. This measure in effect adds a level of legislative oversight to a process that is currently carried out within the executive branch and the JNC, which is a constitutional entity whose membership the Governor has a role in selecting. It also has the effect of distinguishing the appointment of Supreme Court justices from other appellate judgeships in the state. The joint resolution specifies that the appointment of a justice is effective on the date of Senate confirmation.

The joint resolution provides four different ballot summaries. The first ballot summary directs that it will be placed on the ballot, and each subsequent ballot summary provides that it will be placed on the ballot in the event that a court declares the preceding ballot summary defective and the decision of the court is not reversed. This feature appears to have the effect of allowing the proposed amendment to survive up to three successful challenges to the amendment for a defective ballot summary.

An effective date for the amendment is not specified. Therefore, the amendment, if approved by the voters, will take effect on the first Tuesday after the first Monday in January following the election at which it is approved.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

[22] FLA. CONST. art. XI, s. 5(e).

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

If the joint resolution is passed by the Legislature, the Department of State will bear the costs associated with publishing notice of the proposed amendment and the date of the election at which it will be submitted to electors in one newspaper of general circulation in each county where a newspaper is published.[23]

There could also potentially be some cost associated with additional meetings of the Senate to confirm appointees if a vacancy occurs on the Supreme Court at a time when the Legislature would not otherwise be meeting.

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.

[23] FLA. CONST. art. XI, s. 5(d).

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:	SJR 1672
INTRODUCER:	Senator Flores
SUBJECT:	Retention of Justices or Judges
DATE:	March 25, 2011
REVISED:	

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Munroe	Maclure	JU	**Pre-meeting**
2.			EE	
3.			RC	
4.			BC	
5.				
6.				

I. Summary:

The joint resolution proposes an amendment to the Florida Constitution to increase the vote required to retain a justice or judge in judicial office and to provide for an increased vote requirement to apply beginning with retention elections during the 2012 General Election. The joint resolution would require a vote of at least 60 percent rather than a majority of the qualified electors voting within the territorial jurisdiction of the court to vote to retain a justice or judge. If more than 40 percent of the qualified electors voting within the territorial jurisdiction of the court vote to not retain, a vacancy shall exist in that office upon the expiration of the term being served by the justice or judge.

This joint resolution amends section 10, Article V of the Florida Constitution.

This joint resolution creates section 32, Article XII of the Florida Constitution.

II. Present Situation:

Retention of Justices or Judges

Currently in Florida, justices of the Florida Supreme Court and judges of the district courts of appeal hold office through a system of merit selection and retention, under which the Governor appoints justices and appellate judges from nominations submitted by judicial nominating commissions, and the justices and judges face a retention vote after an initial term of at least one

year and thereafter every six years.[1] Under the constitution, any justice or judge may qualify for retention by a vote of the electors in the general election next preceding the expiration of the justice's or judge's term in the manner prescribed by law.[2] If a justice or judge is ineligible or fails to qualify for retention, a vacancy shall exist in that office upon the expiration of the term being served by the justice or judge.[3]

If a majority of the qualified electors voting within the territorial jurisdiction of the court vote to retain, the justice or judge shall be retained for a term of six years.[4] The term of the justice or judge retained commences on the first Tuesday after the first Monday in January following the general election. If a majority of the qualified electors voting within the territorial jurisdiction of the court vote to not retain, a vacancy shall exist in that office upon the expiration of the term being served by the justice or judge.[5]

Meanwhile in Florida, county and circuit judges currently are elected to judicial office. Under the constitution, the election of county judges is preserved unless a majority of those voting in the in the jurisdiction of that county approve a local option to select county judges by merit selection and retention rather than by election.[6] Similarly, the election of circuit judges is preserved unless a majority of those voting in the jurisdiction of that circuit approve a local option to select circuit judges by merit selection and retention rather than by election.[7] The election of circuit judges or county court judges shall be by a vote of the qualified electors within the territorial jurisdiction of the court.[8] Thus far, no circuit or county has approved changing from election to merit selection and retention.[9]

Constitutional Amendments

Section 1, Article XI, of the Florida Constitution authorizes the Legislature to propose constitutional amendments by joint resolution approved by a three-fifths vote of the membership of each house. The amendment must be placed before the electorate at the next general election held after the proposal has been filed with the Secretary of State's office, or at a special election held for that purpose.[10] Section 5(e), Article XI, of the Florida Constitution requires 60-percent voter approval for a constitutional amendment to take effect. An approved amendment will be effective on the first Tuesday after the first Monday in January following the election at which it is approved, or on such other date as may be specified in the amendment or revision.[11]

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[1] The Florida Bar, Bar Issue Paper, *Merit Selection and Retention* (revised October 2008), *available at* http://www.floridabar.org/DIVCOM/PI/BIPS2001.nsf/BIP+List?OpenForm (last visited Mar. 25, 2011).
[2] FLA. CONST. art. V, s. 10(a).
[3] *Id.*
[4] *Id.*
[5] *Id.*
[6] FLA. CONST. art. V, s. 10(b)(2).
[7] FLA. CONST. art. V, s. 10(b)(1).
[8] FLA. CONST. art. V, s. 10(b)(1) and (2).
[9] *See* The Florida Bar, *supra* note 1.
[10] FLA. CONST. art. XI, s. 5(a).
[11] FLA. CONST. art. XI, s. 5(e).

III. Effect of Proposed Changes:

The joint resolution modifies the requirements for retaining justices and judges in the Florida Constitution and provides for an increased vote requirement to apply beginning with retention elections during the 2012 General Election. Under the joint resolution, it would require a vote of at least 60 percent rather than a majority of the qualified electors voting within the territorial jurisdiction of the court to vote to retain a justice or judge. If more than 40 percent of the qualified electors voting within the territorial jurisdiction of the court vote to not retain, a vacancy shall exist in that office upon the expiration of the term being served by the justice or judge. The requirement for a 60-percent vote to retain will also apply to circuit and county judges if the circuit or county changes its method of selecting judges from a direct election to a merit selection and retention system.

The joint resolution amends the schedule to the Florida Constitution, Article XII, to provide that the proposed 60-percent threshold for retaining a justice or judge takes effect upon approval by the voters and applies to any retention vote during the same general election in 2012. Thus, the increased threshold for retaining a justice or judge would have immediate effect.

The joint resolution provides four different ballot summaries. The first ballot summary directs that it will be placed on the ballot, and each subsequent ballot summary provides that it will be placed on the ballot in the event that a court declares the preceding ballot summary defective and the decision of the court is not reversed. This feature appears to have the effect of allowing the proposed amendment to survive up to three successful challenges to the amendment for a defective ballot summary.

The amendment takes effect upon approval by the electors and applies beginning with any retention vote during the 2012 general election.

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:

The Department of State Division of Elections (department) is required to publish the proposed constitutional amendment twice in a newspaper of general circulation in each county. The average cost per word to advertise an amendment is $106.14 according to the department. If the joint resolution passes and the proposed constitutional amendment is placed on the ballot, the department will incur costs of $85,018.14 to advertise the proposed amendment.[12]

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.

[12] See Fiscal Note on SJR 1672 prepared by the Florida Department of State (March 9, 2011).

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:	SJR 1704
INTRODUCER:	Senator Hays
SUBJECT:	Judicial Qualifications Commission
DATE:	March 25, 2011 REVISED:

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Munroe	Maclure	JU	**Pre-meeting**
2.			GO	
3.			RC	
4.				
5.				
6.				

I. Summary:

The joint resolution amends provisions of the Florida Constitution relating to the Judicial Qualifications Commission, to require that upon the finding of probable cause and the filing of formal charges, a determination that formal charges will not be filed, or the entry of a stipulation or other settlement agreement before the investigative panel determines whether to file formal charges, all further proceedings before the Judicial Qualifications Commission shall be open to the public, and all records and materials of the commission relating to the complaint against the justice or judge shall be open to the public for inspection or copying. However, information that is otherwise confidential or exempt shall retain its status. The records and materials shall be accessible to the public regardless of whether they were received or created while the proceedings were confidential or open to the public.

The joint resolution requires the Judicial Qualifications Commission to notify the Speaker of the Florida House of Representatives of all complaints received or initiated, all investigations conducted, and all complaints dismissed, settled, or otherwise concluded.

This joint resolution also includes a ballot summary, and three contingent summaries, which outline the provisions of the joint resolution.

This joint resolution proposes an amendment to section 12, Article V of the Florida Constitution.

II. Present Situation:

Judicial Qualifications Commission

The Judicial Qualifications Commission is created under Article V, section 12, of the Florida Constitution. The Judicial Qualifications Commission is vested with jurisdiction to investigate and recommend to the Florida Supreme Court the discipline, including the removal from office, or any justice or judge whose conduct demonstrates a present unfitness to hold office or warrants discipline.[1] "For purposes of this section, discipline is defined as any or all of the following: reprimand, fine, suspension with or without pay, or lawyer discipline."[2] The commission shall have jurisdiction over justices and judges regarding allegations that misconduct occurred before or during service as a justice or judge if a complaint is made no later than one year following service as a justice or judge.[3]

The Judicial Qualifications Commission is comprised of:

- Two judges from the district courts of appeal (selected by judges of the district courts of appeal);
- Two judges from the circuit courts (selected by judges of the circuit courts);
- Two judges from the county courts (selected by judges of the county courts);
- Four electors who are Florida residents and members of the Florida Bar (selected by the governing body of the Florida Bar); and
- Five electors who are Florida residents who have never held judicial office or been members of the Florida Bar and who are selected by the Governor.[4]

The members of the Judicial Qualifications Commission serve staggered terms not to exceed six years as prescribed by general law.[5] No member of the Judicial Qualifications Commission shall hold office in a political party or participate in any campaign for judicial office or hold public office; provided that a judge may campaign for judicial office and hold that office.[6] The commission shall elect one of its members as its chairperson.[7]

The Judicial Qualifications Commission is divided into an investigative panel and a hearing panel as established by rule of the commission.[8] The investigative panel has jurisdiction to receive or initiate complaints, conduct investigations, dismiss complaints, and upon a vote of a simple majority of the panel submit formal charges to the hearing panel.[9] The hearing panel has the authority to receive and hear formal charges from the investigative panel and upon a two-thirds vote of the panel recommend to the Florida Supreme Court the removal of a justice or judge or the involuntary retirement of a justice or judge for any permanent disability that

[1] FLA. CONST. art. V, s. 12(a)(1).
[2] *Id.*
[3] *Id.*
[4] *Id.*
[5] FLA. CONST. art. V, s. 12(a)(2).
[6] *Id.*
[7] *Id.*
[8] FLA. CONST. art. V, s. 12(b).
[9] *Id.*

seriously interferes with the performance of judicial duties.[10] Upon a simple majority vote of the membership of the hearing panel, the panel may recommend to the Florida Supreme Court that the justice or judge be subject to appropriate discipline.[11]

Confidentiality of Proceedings of the Judicial Qualifications Commission

Until formal charges against a justice or judge are filed by the investigative panel with the clerk of the Supreme Court of Florida, all proceedings by or before the commission shall be confidential; provided, however, upon a finding of probable cause and the filing by the investigative panel with the clerk of the formal charges against a justice or judge, the charges and all further proceedings before the commission shall be public.[12]

The constitutional provisions authorizing the Judicial Qualifications Commission do not address the extent to which records related to a disciplinary investigation by the commission are subject to disclosure. However, the rules of the commission provide that "[a]ll notices, papers and pleadings mailed to a judge prior to formal charges being instituted shall be enclosed in a cover marked '"confidential."'"[13] The rules further provide that:

> (a) Upon the filing of the Notice of Formal Charges against a judge with the Clerk of the Supreme Court of Florida, the Notice of Formal Charges and all subsequent proceedings before the Hearing Panel shall be public.
>
> (b) The original of all pleadings *subsequent to* the Notice of Formal Charges shall be filed with the Clerk of the Supreme Court of Florida, which office is designated by the Commission for receiving, docketing, filing and making such records available for public inspection.[14]

The commission's rules also specify that – on request of the Speaker of the House of Representatives or the Governor – the commission shall make available all information in possession of the commission for use in consideration of impeachment or suspension, respectively.[15]

The Florida Supreme Court articulated a rationale for confidentiality of complaints concerning the judiciary in the following statement:

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[10] *Id.*
[11] *Id.*
[12] FLA. CONST. art. V, s. 12(a)(4). *Accord* ss. 456.073(10) and 455.225(10), F.S. (Providing that the complaint and all information obtained pursuant to a disciplinary complaint filed against a professional licensed by the Department of Health or Department of Business and Professional Regulation are confidential until 10 days after probable cause is found to exist by the probable cause panel, but if confidentiality is not waived, or probable cause is not found, the complaint and all information are not available to the public). *But see* s 106.25(7), F.S., under which sworn complaints and investigative reports filed under ch. 106, F.S., with the Elections Commission are confidential with specified exceptions that include, upon a determination of probable cause or no probable cause by the Elections Commission.
[13] Fla. Jud. Qual. Comm'n Rule 23.
[14] Fla. Jud. Qual. Comm'n Rule 10.
[15] Fla. Jud. Qual. Comm'n Rule 6(e).

> The purpose is to process complaints concerning the judiciary from any and all sources, while requiring confidentiality as a means to protect both the complainant from possible recriminations and the judicial officer from unsubstantiated charges. Confidentiality is also necessary for the Commission to carry out its responsibility to make suitable recommendations concerning judicial personnel problems that affect court efficiency. Eliminating the confidentiality of these proceedings would also eliminate many sources of information and complaints received by the Commission not only from lay citizens and litigants but also from lawyers and judges within the system.[16]

Constitutional Amendments

Section 1, Article XI, of the Florida Constitution, authorizes the Legislature to propose constitutional amendments by joint resolution approved by a three-fifths vote of the membership of each house. The amendment must be placed before the electorate at the next general election held after the proposal has been filed with the Secretary of State's office, or at a special election held for that purpose.[17] Section 5(e), Article XI, of the Florida Constitution requires 60-percent voter approval for a constitutional amendment to take effect. An approved amendment will be effective on the first Tuesday after the first Monday in January following the election at which it is approved, or on such other date as may be specified in the amendment or revision.[18]

III. Effect of Proposed Changes:

The joint resolution amends Art. V, s. 12(a)(4) of the Florida Constitution, relating to the Judicial Qualifications Commission, to require that upon the finding of probable cause and the filing of formal charges, a determination that formal charges will not be filed, or the entry of a stipulation or other settlement agreement before the investigative panel determines whether to file formal charges, all further proceedings before the Judicial Qualifications Commission shall be open to the public, and all records and materials of the commission relating to the complaint against the justice or judge shall be open to the public for inspection or copying. However, information that is otherwise confidential or exempt shall retain its status. The records and materials shall be accessible to the public regardless of whether they were received or created while the proceedings were confidential or open to the public.

The joint resolution also amends Art. V, s. 12(a)(5) of the Florida Constitution to require the Judicial Qualifications Commission to notify the Speaker of the Florida House of Representatives of all complaints received or initiated, all investigations conducted, and all complaints dismissed, settled, or otherwise concluded.

The joint resolution provides four different ballot summaries. The first ballot summary directs that it will be placed on the ballot, and each subsequent ballot summary provides that it will be placed on the ballot in the event that a court declares the preceding ballot summary defective and the decision of the court is not reversed. This feature appears to have the effect of allowing the

[16] See *Forbes v. Earle*, 298 So. 2d 1, 4 (Fla. 1974).
[17] FLA. CONST. art. XI, s. 5(a).
[18] FLA. CONST. art. XI, s. 5(e).

proposed amendment to survive up to three successful challenges to the amendment for a defective ballot summary.

Because the resolution does not specify an alternate date, if approved by the electors, the amendment will take effect on the first Tuesday after the first Monday in January following the election at which it is approved.[19]

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:

The Department of State Division of Elections (department) is required to publish the proposed constitutional amendment twice in a newspaper of general circulation in each county. The average cost per word to advertise an amendment is $106.14 according to the department. If the joint resolution passes and the proposed constitutional amendment is placed on the ballot, the department will incur costs to advertise the proposed amendment.[20]

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

[19] FLA. CONST. art. XI, s. 5(e).
[20] See, e.g., Fiscal Note on SJR 2 prepared by the Florida Department of State (January 4, 2011).

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.

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:	SPB 7076
INTRODUCER:	For consideration by the Judiciary Committee
SUBJECT:	Repeal of Supreme Court Rule by General Law
DATE:	March 21, 2011 REVISED:

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Boland/Maclure	Maclure		**Pre-meeting**
2.				
3.				
4.				
5.				
6.				

I. Summary:

Currently under the State Constitution, the power to make rules of practice and procedure in all courts lies solely with the Supreme Court. The one caveat to that power is that the Legislature may, by a two-thirds vote of each house of the Legislature, enact general laws that repeal rules of court. This joint resolution proposes an amendment to the State Constitution to delete the provision requiring a vote of "two-thirds of each house of the legislature." The proposed amendment allows rules of court to be repealed by general law and further provides that the Supreme Court may not readopt a rule within three years after the rule has been repealed by general law.

The joint resolution amends section 2, Article V of the Florida Constitution.

II. Present Situation:

Rules for Practice and Procedure

Section 2, Article V the Florida Constitution provides that the Supreme Court shall adopt rules for the practice and procedure in all courts including the time for seeking appellate review, the administrative supervision of all courts, the transfer to the court having jurisdiction of any proceeding when the jurisdiction of another court has been improvidently invoked, and a requirement that no cause shall be dismissed because an improper remedy has been sought.

Committees of The Florida Bar frequently draft, and propose to the Supreme Court, amendments to court rules of procedure. However, the Court has the sole power to adopt rules of the court for the practice and procedure of law. A Florida statute states that when a rule is adopted by the

Supreme Court concerning practice and procedure, and such rule conflicts with a statute, the rule supersedes the statutory provision.[1] Furthermore, the Florida Supreme Court has held that the Court has the exclusive power to create rules of practice and procedure and statutes that encroach on that power, if not merely incidental to substantive legislation, are unconstitutional under the notion of separation of powers.[2]

The Florida Supreme Court has defined substantive law as follows:

> Substantive law has been defined as that part of the law which creates, defines, and regulates rights, or that part of the law which courts are established to administer. It includes those rules and principles which fix and declare the primary rights of individuals with respect towards their persons and property.[3]

The Court has defined practice and procedure as follows:

> Practice and procedure encompass the course, form, manner, means, method, mode, order, process or steps by which a party enforces substantive rights or obtains redress for their invasion. "Practice and procedure" may be described as the machinery of the judicial process as opposed to the product thereof.
>
> Examination of many authorities leads me to conclude that substantive law includes those rules and principles which fix and declare the primary rights of individuals as respects their persons and their property. As to the term "procedure," I conceive it to include the administration of the remedies available in cases of invasion of primary rights of individuals. The term "rules of practice and procedure" includes all rules governing the parties, their counsel and the Court throughout the progress of the case from the time of its initiation until final judgment and its execution.[4]

Repeal of Court Rules by General Law

Article V, section 2 of the State Constitution articulates a check and balance on the Supreme Court's power to make rules of practice and procedure. Specifically, it provides that rules of court may be repealed by general law enacted by two-thirds vote of the membership of each house of the legislature. The provision is silent, however, on Supreme Court readoption of a rule repealed by general law.

Constitutional Amendments

Section 1, Article X of the State Constitution authorizes the Legislature to propose amendments to the State Constitution by joint resolution approved by a three-fifths vote of the membership of each house. The amendment must be placed before the electorate at the next general election held after the proposal has been filed with the Secretary of State's office, or at a special election

[1] Section 25.371, F.S.
[2] *Massey v. David*, 979 So. 2d 931, 937 (Fla. 2008).
[3] *Haven Fed. Sav. & Loan Ass'n v. Kirian*, 579 So. 2d 730, 732 (Fla. 1991) (internal citation omitted).
[4] *Allen v. Butterworth*, 756 So. 2d 52, 60 (Fla. 2000) (quoting *In re Florida Rules of Criminal Procedure*, 272 So. 2d 65, 66 (Fla. 1972) (Adkins, J., concurring)).

held for that purpose. Section 5(e), Article XI of the State Constitution requires 60-percent voter approval for a constitutional amendment to take effect. An approved amendment will be effective on the first Tuesday after the first Monday in January following the election at which it is approved, or on such other date as may be specified in the amendment or revision.[5]

III. Effect of Proposed Changes:

The joint resolution proposes an amendment to Article V, section 2 of the Florida Constitution. The proposed amendment would eliminate the current constitutional requirement that a general law repealing a rule of court must be enacted by a two-thirds vote of the membership of each house of the legislature. Furthermore, the proposed amendment adds a provision to the end of Article V, subsection 2(a) which would prohibit the Supreme Court from readopting a rule within three years after the rule has been repealed by general law.

The joint resolution provides four different ballot summaries. The first ballot summary directs that it will be placed on the ballot, and each subsequent ballot summary provides that it will be placed on the ballot in the event that a court declares the preceding ballot summary defective and the decision of the court is not reversed. This feature appears to have the effect of allowing the proposed amendment to survive up to three successful challenges to the amendment for a defective ballot summary.

An effective date for the amendment is not specified. Therefore, the amendment, if approved by the voters, will take effect on the first Tuesday after the first Monday in January following the election at which it is approved.

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.

[5] FLA. CONST. art. XI, s. 5(e).

B. Private Sector Impact:

None.

C. Government Sector Impact:

If the joint resolution is passed by the Legislature, the Department of State will bear the costs associated with twice publishing the proposed amendment and notice of the date of the election at which it will be submitted to electors in one newspaper of general circulation in each county in which a newspaper is published.[6]

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.

[6] FLA. CONST. art. XI, s. 5(d).

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:	SPB 7222
INTRODUCER:	For consideration by the Judiciary Committee
SUBJECT:	Judicial Nominating Commissions
DATE:	March 25, 2011 REVISED:

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Boland	Maclure		**Pre-meeting**
2.				
3.				
4.				
5.				
6.				

I. Summary:

Currently, vacancies in judgeships are filled by appointment of the Governor, as directed by the Florida Constitution. The Governor makes these appointments from a list of not fewer than three and not more than six persons nominated by a judicial nominating committee. The membership of each judicial nominating committee is a creature of statute and has varied throughout Florida's history. Presently, each judicial nominating committee is composed of nine members, and five of those members are appointed to the commission at the sole discretion of the Governor. The remaining four commission positions are also appointed by the Governor; however, the Governor must make his appointment for each of those four positions from a list of nominees recommended to the Governor by the Board of Governors of The Florida Bar. The Board of Governors of the Florida Bar recommends three people for each position on the judicial nominating commission, and the Governor must make his selection from that list of three or reject all three recommendations and request that a new list of three be provided.

The bill amends the current statute controlling the appointment process for members of judicial nominating commissions. Specifically, the bill eliminates the role of The Florida Bar in the appointment of members to the commissions by removing statutory direction for the Board of Governors of The Bar to make recommendations to the Governor for the appointment of four members of each commission. Instead, the bill vests the authority to make recommendations for these four positions with the Attorney General. Furthermore, the bill amends the current statute to provide that the terms of all current members of a judicial nominating commission are terminated, and the Governor shall appoint two new members for terms ending July 1, 2012 (one of which shall be an appointment selected from nominations by the Attorney General), two new members for terms ending July 1, 2013, and two new members for terms ending July 1, 2014.

This bill substantially amends section 43.291, Florida Statutes.

II. Present Situation:

When there is a vacancy on an appellate or trial court, the State Constitution directs the Governor to fill the vacancy by appointing one person from no fewer than three and no more than six persons nominated by a judicial nominating commission.[1] The commission shall offer recommendations within 30 days of the vacancy, unless the period is extended for no more than 30 days by the Governor, and the Governor shall make the appointment within 60 days of receiving the nominations.[2]

Article V, section 11(d) of the Florida Constitution provides for a separate judicial nominating commission, as provided by general law, for the Supreme Court, each district court of appeal, and each judicial circuit for all trial courts within the circuit. The nine-member composition of each judicial nominating commission is a creature of statute.[3] The statute provides for the Governor to make all nine appointments. However, four of those appointments are based on nominees from The Florida Bar, while five are within the Governor's sole appointment discretion. The four commission members recommended by the Bar must be members of The Florida Bar, must be engaged in the practice of law, and must reside in the territorial jurisdiction where they are appointed. In that same regard, the Board of Governors of The Florida Bar submits three recommended nominees for each open position to the Governor. The Governor has the authority to reject all the nominees and request a new list of recommended nominees who have not been previously recommended. Of the five commission members appointed by the Governor under his or her sole discretion, at least two must be members of The Florida Bar engaged in the practice of law, and all must reside in the territorial jurisdiction where they are appointed. Members serve four-year terms and may be suspended for cause by the Governor.[4]

The Legislature enacted the current statutory framework governing membership of the judicial nominating commissions in 2001.[5] Immediately prior to that change, the Board of Governors of The Florida Bar had authority to directly appoint members of each commission. Specifically, prior to the 2001 changes:

- Three members were appointed by the Board of Governors of the Florida Bar, each of whom had to be a member of the Florida Bar and actively engaged in the practice of law in the applicable territorial jurisdiction;
- Three members were appointed by the Governor, each of whom had to be a resident of the applicable territorial jurisdiction; and
- Three members were appointed by majority vote of the other six members, each of whom had to be an elector who resided in the applicable territorial jurisdiction.[6]

[1] FLA. CONST. art. V, s. 11(a).
[2] FLA. CONST. art. V, s. 11(c).
[3] Section 43.291, F.S.
[4] *Id*.
[5] Chapter 2001-282, s. 1, Laws of Fla.
[6] See s. 43.29, F.S. (2000) (repealed by ch. 2001-282, s. 3, Laws of Fla.)

III. Effect of Proposed Changes:

The bill eliminates The Florida Bar's statutory role in the recommendation of members of a judicial nominating commission and vests that function in the Attorney General. The bill provides that, in regard to four positions on each judicial nominating commission, the Attorney General 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 Attorney General submit a new list of three different recommended nominees for that position who have not been previously recommended by the Attorney General. The bill retains the provisions in current law under which the Governor is directed to appoint five additional members of each judicial nominating commission and each of those appointments remains within the Governor's sole discretion.

The bill removes the provision, currently in statute, that current members of a judicial nominating commission appointed directly by the Board of Governors of The Florida Bar shall serve the remainder of their terms. The bill provides that all current members of a judicial nominating commission are hereby terminated, and the Governor shall appoint new members to each judicial nominating commission in the following manner:

- Two appointments for terms ending July 1, 2012, one of which shall be an appointment selected from nominations submitted by the Attorney General;
- Two appointments for terms ending July 1, 2013; and
- Two appointments for terms ending July 1, 2014.

In setting the terms as shown above, the bill staggers the terms of six of the members of each judicial nominating commission. The bill maintains those staggered terms by providing that each expired term or vacancy shall be filled by appointment in the same manner as the member whose position is being filled. Additionally, it should be noted that the statute only enumerates conditions for the terms of six appointments on each judicial nominating commission, and only one of those appointments must be selected from nominations submitted by the Attorney General. Due to the bill's prior mandate that each judicial nominating commission be composed of nine members, four of which must be selected from nominations submitted by the Attorney General, each of the three subsequent appointments must be selected from nominations submitted by the Attorney General. The bill provides that each subsequent appointment, except an appointment to fill a vacant, unexpired term, shall be for four years.

The bill provides that this act shall take 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:

None.

C. Government Sector Impact:

This bill could have an impact on the Attorney General's office to the extent that the duty to recommend nominees to the Governor for appointment to judicial nominating commissions creates additional workload or expenses for the Attorney General or her or his staff.

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.

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 978
INTRODUCER:	Senator Flores
SUBJECT:	Individual Retirement Accounts
DATE:	March 25, 2011
REVISED:	

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Matiyow	Burgess	BI	**Favorable**
2.	O'Connor	Maclure	JU	**Pre-meeting**
3.			BC	
4.				
5.				
6.				

I. Summary:

The bill provides that an Individual Retirement Account (IRA), exempt from creditors under current statute, would continue to be exempt if the original IRA were transferred into an inherited IRA. The bill provides that the amendments it makes are clarifying and apply retroactively.

The bill substantially amends section 222.21, Florida Statutes.

II. Present Situation:

Individual Retirement Accounts

An Individual Retirement Account (IRA) is a retirement savings account that provides tax benefits to the owner.[1] An IRA is defined as "... a trust created or organized in the United States for the exclusive benefit of an individual or his beneficiaries."[2] The tax advantages of an IRA are that the contributions made to the IRA may be fully or partially deductable, and amounts in the IRA are either not taxed until distributed or not taxed at all.[3] There are two different types of IRAs: the traditional IRA and the Roth IRA. The traditional IRA allows the owner of the account to make tax deductable contributions to the account and defer paying taxes on the income until withdrawals are made from the IRA after retirement.[4] The Roth IRA allows an

[1] *See Internal Revenue Service Publication 590*: *Individual Retirement Arrangements (IRAs)* at 3 (2010), *available at* http://www.irs.gov/pub/irs-pdf/p590.pdf (last visited Mar. 24, 2011).
[2] 26 U.S.C. s. 408(a).
[3] *IRS Publication 59*, *supra* note 1, at 3.
[4] *Id.* at 7.

owner of the account to make non-tax deductible contributions into the account and make tax-free withdrawals from the account upon retirement.[5]

When the owner of an IRA dies, the IRA may be transferred to a named beneficiary.[6] If the beneficiary is the owner's spouse, the IRA is treated the same as the original account. However, if the beneficiary is someone other than the owner's spouse, the account is considered an Inherited IRA.[7] The benefactor has two options when inheriting an IRA: withdraw all of the funds from the original IRA within five years of the original owner's death; or transfer the funds to an inherited IRA and receive annual distributions over the remaining lifespan of the beneficiary.[8] The beneficiary of an Inherited IRA may not make contributions to the account, must make minimum withdrawals regardless of his or her age, and, unlike the original IRA, there is no penalty for making early withdrawals from the account.[9]

IRA Asset Protection

Although IRAs and other types of tax-deferred plans are established in accordance with the federal tax code, state laws may still affect these accounts.[10] State laws can affect IRAs, for example, in cases such as those involving trusts, real estate, or bankruptcy exemption.[11] The decision as to which state's law applies depends on the specific issue and whether it is based on the domicile of the IRA owner, the IRA beneficiary, or state law specified in the IRA agreement.[12]

Section 222.21(2)(a), F.S., provides protection from creditors for various assets, including IRAs. These protections also extend to bankruptcy proceedings. The applicable portion of the statute provides:

> (2)(a) Except as provided in paragraph (d), any money or other assets payable to an owner, a participant, or a beneficiary from, or any interest of any owner, participant, or beneficiary in, a fund or account is exempt from all claims of creditors of the owner, beneficiary, or participant if the fund or account is:
>
> 1. Maintained in accordance with a master plan, volume submitter plan, prototype plan, or any other plan or governing instrument that has been preapproved by the Internal Revenue Service as exempt from taxation under s. 401(a), s. 403(a), s. 403(b), s. 408, s. 408A, s. 409, s. 414, s. 457(b), or s. 501(a) of the Internal Revenue Code of 1986, as amended, unless it has been subsequently determined that the plan or governing instrument is not exempt from taxation in a proceeding that has become final and nonappealable;

[5] *Id.* at 57.
[6] 26 U.S.C. s. 408(d)(3)(C)(ii).
[7] *Id.*
[8] 26 U.S.C. s. 401(a)(9).
[9] *IRS Publication 590*, *supra* note 1.
[10] Kristen M. Lynch and Linda Suzzanne Griffin, *The Robertson Case: A Beneficiary by Any Other Name is Still a Beneficiary*, The Florida Bar Journal, April 2010, Vol. 84, No. 4.
[11] *Id.*
[12] *Id.*

> **2.** Maintained in accordance with a plan or governing instrument that has been determined by the Internal Revenue Service to be exempt from taxation under s. 401(a), s. 403(a), s. 403(b), s. 408, s. 408A, s. 409, s. 414, s. 457(b), or s. 501(a) of the Internal Revenue Code of 1986, as amended, unless it has been subsequently determined that the plan or governing instrument is not exempt from taxation in a proceeding that has become final and nonappealable;…

As discussed in detail below, the Second District Court of Appeal recently held that the protections provided in s. 222.21(2)(a), F.S., do not extend to inherited IRAs.

Robertson v. Deeb

In 2009, the Second District Court of Appeal held in *Robertson v. Deeb* that an inherited IRA was a separate account from the original IRA and was thus not exempt from garnishment by a judgment creditor.[13]

In *Robertson*, a creditor had obtained a judgment against Robertson and served a writ of garnishment on the trustee of Robertson's inherited IRA, as he was the named beneficiary of his late father's IRA. Upon his father's death, Robertson was given the option of keeping the IRA in his father's name and withdrawing all the proceeds over the next five years, or transferring the funds into an inherited IRA and taking mandatory annual withdrawals for the remainder of his life expectancy. Robertson chose the latter. Robertson claimed that his beneficial interest in the IRA was exempt from garnishment pursuant to s. 222.21(2)(a), F.S., "because he is a 'beneficiary' of the 'fund or account' that qualified as an IRA when his father was alive."[14] The court ruled that section 222.21(2)(a), F.S., does not apply to inherited IRAs:

> ...because the plain language of that section references only the original 'fund or account' and the tax consequences of inherited IRAs render them completely separate funds or accounts.[15]

The court reasoned that since the inherited IRA was a brand new account different from the original IRA and an inherited IRA's tax status and structure is different from a traditional IRA, the exceptions in s. 222.21(2)(a), F.S., did not apply.

The decision in *Robertson* has been further applied in federal bankruptcy court in *In re: Ard*.[16] In the *Ard* case, the debtor had an inherited IRA similar to that in *Robertson*. The court noted that the outcomes involving inherited IRAs "turned on the particular language of each state's law applicable to the exemption of IRAs."[17] The bankruptcy court, pursuant to the decision in *Robertson*, ruled that s. 222.21(2)(a), F.S., did not apply to an inherited IRA and thus the inherited IRA was not exempt in federal bankruptcy proceedings.[18] The debtor was therefore required to turn the IRA over to the bankruptcy trustee.

[13] *Robertson v. Deeb*, 16 So. 3d 936 (Fla. 2nd DCA 2009).
[14] *Id*. at 938.
[15] *Id*.
[16] *In re: Ard*, 435 B.R. 719 (M.D. Fla. 2010).
[17] *Id*. at 722.
[18] *Id*. at 722.

III. Effect of Proposed Changes:

The bill contains "whereas" clauses to express the Legislature's intent that an inherited IRA, as defined in Internal Revenue Code of 1986, was intended to be exempt from the claims of creditors and that the decisions in *Robertson* and *In re: Ard* are contrary to the Legislature's intent in 2005.[19]

The bill amends s. 222.21(2)(c), F.S., to provide that an IRA exempt from creditors under s. 222.21(2)(a), F.S., would continue to be exempt if the original IRA were transferred into an inherited IRA. Under the proposed changes, when an owner of an IRA passes away, his or her named beneficiary would continue to enjoy the protection from creditors that the original owner enjoyed under s. 222.21(2)(a), F.S. This protection would most likely extend to protection in bankruptcy proceedings as well.

The bill contains language indicating the provisions are clarifying and shall apply retroactively to all inherited IRAs regardless of when an inherited IRA was created.

The bill provides that it 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.

D. Other Constitutional Issues:

This bill provides that it is intended to be clarifying and remedial in nature and shall apply retroactively. Retroactive application of legislation can implicate the due process provisions of the constitution.[20] As a general matter, statutes that do not alter vested rights but relate only to remedies or procedure can be applied retroactively.[21]

[19] In 2005, the Legislature amended s. 222.21, F.S., to add provisions exempting certain accounts and funds from claims of creditors. Chapter 2005-101, s. 1, Laws of Fla.
[20] *See State Department of Transportation v. Knowles*, 402 So. 2d 1155 (Fla. 1981).
[21] *See Metropolitan Dade County v. Chase Federal Housing Corporation*, 737 So. 2d. 494 (Fla. 1999). *See also City of Orlando v. Desjardins*, 493 So. 2d 1027, 1028 (Fla. 1986) (citations omitted) ("If a statute is found to be remedial in nature, it can and should be retroactively applied in order to serve its intended purposes.").

The Florida Supreme Court has ruled that statutes enacted soon after a controversy over the meaning of legislation may be considered a legislative interpretation of the original law and not substantive change:

> When, as occurred here, an amendment to a statute is enacted soon after controversies as to the interpretation of the original act arise, a court may consider that amendment as a legislative interpretation of the original law and not as a substantive change thereof. This Court has recognized the propriety of considering subsequent legislation in arriving at the proper interpretation of the prior statute.[22]

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

The bill removes a source for creditors to collect to satisfy a debt owed.

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.

[22] *Lowry v. Parole and Probation Commission*, 473 So. 2d 1248, 1250 (Fla. 1985) (internal citations omitted).

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:	SM 1344
INTRODUCER:	Senator Flores
SUBJECT:	U.S. Treasury/Deposits by Nonresident Aliens
DATE:	March 25, 2011 REVISED:

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Arzillo	Burgess	BI	**Favorable**
2.	Boland	Maclure	JU	**Pre-meeting**
3.				
4.				
5.				
6.				

I. Summary:

The memorial urges the United States Congress to direct the Department of Treasury to withdraw a proposed Internal Revenue Service (IRS) regulation that would require banks to report to the IRS all interest paid on deposit accounts held by any nonresident alien. Current IRS regulations only require that financial institutions report the interest paid on deposit accounts held by U.S. and Canadian citizens. Further, the memorial urges the United States Congress to hold hearings to examine the possible negative economic effects and costs of the proposed regulation on the United States, Florida, and financial institutions.

Copies of the memorial are to be provided to the President of the United States, the President of the United States Senate, the Speaker of the United States House of Representatives, and each member of the Florida delegation to the United States Congress.

II. Present Situation:

Current Federal Regulation of Nonresident Alien Deposits

Regulation 26 C.F.R. s. 1.6049-4 governs the authority of the Internal Revenue Service (IRS) to obtain reports of interest earned on bank deposits. Currently, the only nonresident aliens[1] subject to reporting interest earned on deposit accounts held in the United States are Canadians.[2] The

[1] The IRS defines a nonresident alien as "an individual who is not a U.S. citizen or a resident alien. A resident of a foreign country under the residence article of an income tax treaty is a nonresident alien individual for purposes of withholding." http://www.irs.gov/businesses/small/international/article/0,,id=102319,00.html (last visited Mar. 25, 2011).

[2] *See* 26 C.F.R. s. 1.6049-8(a) ("[I]nterest means interest paid to a Canadian nonresident alien individual . . . with respect to a deposit maintained at an office within the United States.").

report requires the U.S. financial institution disbursing the interest earned on the deposit account to submit a 1042-S form, "Foreign Person's U.S. Source Income Subject to Withholding," each year interest is paid.[3] When a 1042-S form is submitted to the IRS, the financial institution is required to send a copy to the Canadian account holder giving notice that the form has been submitted to the IRS.[4] The interest paid to a Canadian nonresident alien is not subject to tax under 26 C.F.R. s. 3406.[5]

In 2002, the IRS attempted to broaden the nonresident alien depositors subject to the reporting requirement to 15 countries.[6] The 2002 proposed regulation also allowed for the reporting of all nonresident alien interest earnings, regardless of country of origin, if the financial institution desired.[7] This change in the regulations met with considerable opposition. A study estimated that $88 billion would be removed from U.S. financial institutions upon the approval of this regulation.[8] Ultimately, the IRS did not make any changes to the regulation.

Proposed Changes to Regulation of Nonresident Alien Deposits

In February of 2011, the IRS proposed a new set of changes to the regulations, which would withdraw the 2002 regulation. The 2011 proposed regulation would apply to interest earned on deposit accounts held by citizens of any foreign country. Therefore, financial institutions in all 50 states would be required to report all the interest earned on deposit accounts, $10 or more, to the IRS using the 1042-S form, effective December 31 of the year of enactment.[9] Inasmuch as financial institutions are already required to report this information for deposit accounts held by U.S. and Canadian citizens, the same requirements for reporting to the IRS would be applied to deposit accounts held by all nonresident aliens, regardless of country of origin.[10] Additionally the proposed regulation would require the financial institution to furnish (either in person or by sending it to the person's last known address) a copy of the 1042-S form to the recipient for interest paid on deposits maintained at a bank's office within the United States.[11]

The IRS states several reasons for the regulatory change. First, the IRS states that there is a growing consensus among foreign countries to cooperate in information sharing for taxation purposes, including entering into agreements. The IRS believes that the proposed regulation signals to other countries that the United States will not withhold this tax information through

[3] *See* 26 C.F.R. s. 1.6049-4(b)(5).
[4] *See* 26 C.F.R. s. 1.6-49-6(e)(4).
[5] *See* 26 C.F.R. s. 31.3406(g)-1(d) ("A payment of interest made to a Canadian nonresident alien individual under section 1.6049-8(a) of this chapter is not subject to withholding under section 3406.")
[6] The countries subject to the 2002 proposed regulation were Australia, Denmark, Finland, France, Germany, Greece, Ireland, Italy, the Netherlands, New Zealand, Norway, Portugal, Spain, Sweden, and the United Kingdom. KPMG Tax News Flash, *Proposed Regulations on Reporting of Deposit Interest Paid to Nonresident Aliens; Prior Proposed Regulations Are Withdrawn—Again*, January 6, 2011, TaxNewsFlash No. 2011-12, http://www.us.kpmg.com/microsite/taxnewsflash/2011/Jan/1112.html.
[7] *Id*.
[8] Kenric Ward, *Florida Bankers Assail IRS Reporting Rule for Nonresident Aliens*, http://sunshinestatenews.com/blog/florida-bankers-assail-irs-reporting-rule-nonresident-aliens (last visited Mar. 24, 2011).
[9] *See* Internal Revenue Bulletin: 2011-8, REG-146097-09, *Notice of Proposed Rulemaking; Notice of Public Hearing; and Withdrawal of Previously Proposed Rulemaking Guidance on Reporting Interest Paid to Nonresident Aliens*, http://www.irs.gov/irb/2011-08_IRB/ar13.html (last visited Mar. 24, 2011).
[10] *Id*.
[11] *Id*.

bank secrecy, or due to a lack of taxable incentives. Also, the IRS states that the new regulations will strengthen the United States exchange of information program, and the IRS believes that the new requirement will limit U.S. taxpayer evasion of taxes. Presently, such evasion could occur if a U.S. citizen makes a false claim of foreign status when establishing such a deposit account.[12]

These changes have been met with strong opposition. Congressman Bill Posey (Fla. 15th) has collected the signatures of the entire Florida delegation of U.S. Congressmen on a letter stating that the delegation is opposed to the change in the regulatory scheme. One principal concern expressed in the letter is the loss of foreign deposits. The letter states that the proposed regulation may lead to an exodus of nonresident alien depositors that could amount to the loss of hundreds of billions of dollars in foreign deposits for financial institutions.[13] Additionally, the letter points out that the withdrawal of funds by multiple investors at once might affect the solvency of financial institutions that rely heavily on these nonresident alien depositors.[14] Finally, the letter cites an explicit congressional intent to attract and retain capital in the U.S. economy and states that the United States' competitive advantage will be weakened because nonresident aliens are likely to remove their deposits from U.S. financial institutions and will redeposit those monies in foreign financial institutions.[15]

III. Effect of Proposed Changes:

Whereas current Internal Revenue Service (IRS) regulations only require that financial institutions report the interest paid on deposit accounts held by U.S. and Canadian citizens, recently proposed regulations would require that financial institutions report, to the IRS, interest paid on deposit accounts held by a citizen of any country. This memorial urges the United States Congress to direct the Department of Treasury to withdraw proposed IRS regulation REG-146097-09, and to hold hearings to examine the possible negative effects and costs of the proposed regulation on the United States, Florida, and financial institutions. The memorial provides that it will be sent to the President of the United States, the President of the U.S. Senate, the Speaker of the U.S. House of Representatives, and to each member of the Florida delegation to the U.S. Congress. The memorial's "whereas" clauses assert that:

- Florida is the "Gateway to the Americas," and has promoted international trade and finance;
- The United States has a longstanding policy of encouraging nonresident aliens to deposit their funds in U.S. financial institutions, which fosters economic development in the United States and Florida;
- Federal law does not permit taxation of nonresident alien deposits;
- Nonresident aliens have deposited nearly $3 trillion in banks and with securities brokers in the United States;
- Nonresident aliens have deposited tens of billions of dollars in financial institutions in Florida;
- Many of the nonresident aliens who have deposited funds in Florida financial institutions are Latin Americans who do not trust the privacy of the institutions in their home countries, and

[12] *Id*.
[13] Letter sent to President Obama from the Florida Delegation in Washington, D.C., March 2, 2011, *available at* http://posey.house.gov/UploadedFiles/IRS-DelegationLetter-March3-2011.pdf (last visited Mar. 24, 2011).
[14] *Id*.
[15] *Id*.

fear kidnapping, extortion, and financial instability when their funds are domestically deposited;
- The proposed Treasury rule would place U.S. and Florida financial institutions at a competitive disadvantage; and
- Removal of nonresident alien deposits would drive job-creating capital out of Florida.

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:

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.