

The Florida Senate
COMMITTEE MEETING EXPANDED AGENDA

JUDICIARY
Senator Flores, Chair
Senator Joyner, Vice Chair

MEETING DATE: Thursday, January 12, 2012

TIME: 10:15 a.m.—12:15 p.m.

PLACE: Toni Jennings Committee Room, 110 Senate Office Building

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

| TAB | BILL NO. and INTRODUCER | BILL DESCRIPTION and SENATE COMMITTEE ACTIONS | COMMITTEE ACTION |
|-----|--|---|----------------------------|
| 1 | SB 98 Siplin (Identical H 317) | Education; Authorizing district school boards to adopt resolutions that allow prayers of invocation or benediction at secondary school events; providing legislative intent; providing for severability, etc. ED 11/02/2011 Fav/1 Amendment JU 01/12/2012 Fav/CS RC | Fav/CS Yeas 5 Nays 1 |
| 2 | SB 378 Richter (Identical H 243) | Expert Testimony; Providing that a witness qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion as to the facts at issue in a case under certain circumstances; requiring the courts of this state to interpret and apply the principles of expert testimony in conformity with specified United States Supreme Court decisions; subjecting pure opinion testimony to such requirements; providing that facts or data that are otherwise inadmissible in evidence may not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that the probative value of the facts or data in assisting the jury to evaluate the expert's opinion substantially outweighs the prejudicial effect of the facts or data, etc. JU 01/12/2012 Favorable BC | Favorable Yeas 5 Nays 2 |
| 3 | CS/SB 504 Criminal Justice / Evers (Identical CS/H 173) | Department of Juvenile Justice; Deleting obsolete references; revising the types of diversified and innovative programs to provide rehabilitative treatment that may be developed or contracted for by the department, to include mother-infant programs and remove reference to an obsolete program; authorizing the department, at the secretary's discretion, to pay up to a specified amount toward the basic funeral expenses for a youth who dies while in the custody of the department and whose parents or guardians are indigent and for which no other funding is available, etc. CJ 11/17/2011 Fav/CS JU 01/12/2012 Favorable BC | Favorable Yeas 7 Nays 0 |

COMMITTEE MEETING EXPANDED AGENDA

Judiciary

Thursday, January 12, 2012, 10:15 a.m.—12:15 p.m.

| TAB | BILL NO. and INTRODUCER | BILL DESCRIPTION and SENATE COMMITTEE ACTIONS | COMMITTEE ACTION |
|-----|---|--|----------------------------|
| 4 | SB 486 Díaz de la Portilla (Identical H 917) | Jurisdiction of the Courts; Including as an additional basis for subjecting a person to the jurisdiction of the courts of this state provisions which state that a person submits to the jurisdiction of the courts of this state by entering into a contract that designates the law of this state as the law governing the contract and that contains a provision by which such person agrees to submit to the jurisdiction of the courts of this state; clarifying that an arbitral tribunal receiving a request for an interim measure to preserve evidence in a dispute governed by the Florida International Commercial Arbitration Act need consider only to the extent appropriate the potential harm that may occur if the measure is not awarded or the possibility that the requesting party will succeed on the merits of the claim; revising application dates of provisions relating to the jurisdiction of the courts, etc. CM 12/07/2011 Favorable JU 01/12/2012 Favorable BC | Favorable Yeas 7 Nays 0 |
| 5 | SB 752 Flores (Identical H 565) | Equitable Distribution of Marital Assets and Liabilities; Redefining the term "marital assets and liabilities" for purposes of equitable distribution in dissolution of marriage actions; providing that the term includes the paydown of principal of notes and mortgages secured by nonmarital real property and certain passive appreciation in such property under certain circumstances; providing formulas and guidelines for determining the amount of such passive appreciation; requiring security and interest relating to the installment payment of such assets; providing exceptions; permitting the court to provide written findings regarding any installment payments, etc. JU 01/12/2012 Fav/CS BI BC | Fav/CS Yeas 7 Nays 0 |

Other Related Meeting Documents

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 98

INTRODUCER: Judiciary Committee and Senator Siplin

SUBJECT: Education

DATE: January 13, 2012

REVISED: _____

| | ANALYST | STAFF DIRECTOR | REFERENCE | ACTION |
|----|----------|----------------|-----------|------------------------|
| 1. | Brown | Matthews | ED | Fav/1 amendment |
| 2. | O'Connor | Cibula | JU | Fav/CS |
| 3. | | | RC | |
| 4. | | | | |
| 5. | | | | |
| 6. | | | | |

Please see Section VIII. for Additional Information:

- | | | |
|------------------------------|--|---|
| A. COMMITTEE SUBSTITUTE..... | <input checked="checked" type="checkbox"/> | Statement of Substantial Changes |
| B. AMENDMENTS..... | <input type="checkbox"/> | Technical amendments were recommended |
| | <input type="checkbox"/> | Amendments were recommended |
| | <input type="checkbox"/> | Significant amendments were recommended |

I. Summary:

This bill permits district school boards to adopt resolutions that allow student volunteers to deliver inspirational messages, including but not limited to, prayers of invocation or benediction, at secondary school level gatherings, such as at commencements or other noncompulsory student assemblies.

If adopted, the resolution must provide that:

- The use of an inspirational message is at the discretion of the student government;
- All inspirational messages will be given by student volunteers, and the content of any inspirational message will be at the discretion of the student volunteer; and
- School personnel may not participate in, or otherwise influence any student in determining whether to use a prayer of invocation or benediction, participate in selecting the student volunteer, or influence the content of the inspirational message.

This bill creates an undesignated section of the Florida Statutes.

II. Present Situation:

On August 27, 2008, the American Civil Liberties Union filed a lawsuit in the United States District Court for the Northern District of Florida against the Santa Rosa County School District, alleging that prayers in school were state-sponsored and violative of the Establishment Clause and the no-aid provision of the state constitution.¹ On May 6, 2009, the parties entered a consent decree and the court issued an order which provided, in part, for permanent injunction against school officials from:

- Promoting, advancing, endorsing, or causing prayers in conjunction with school events;
- Planning, organizing, promoting, or sponsoring religious services;
- Holding school events at a religious venue when an alternative venue is reasonably suitable which is not a religious venue; and
- Permitting school officials to promote personal religious beliefs.

Subsequent to the issuance of the consent decree, a contempt order was issued by the court against two school officials for violation of the decree, with the possible punishment of jail time and fines.² On September 17, 2009, the court found the school officials not guilty.³ Plaintiff teachers and other staff challenged the consent decree in U.S. District Court, alleging violations of their First Amendment rights.⁴ On March 21, 2011, the court issued an order that granted, in part, a preliminary injunction enjoining the school board from enforcing school policies restricting employee participation in private religious services, including baccalaureate services. On July 5, 2011, the school board approved an agreement between the parties, which ended the case, and entered into an amended consent decree, effectively clarifying the original decree.⁵

The 2010 Legislature passed a bill that prohibits district school boards and administrative and instructional personnel from taking affirmative action, including entering into agreements that infringe First Amendment rights of personnel or students, unless waived in writing by any individual whose constitutional rights would be impacted.⁶

III. Effect of Proposed Changes:

This bill authorizes, but does not require, district school boards to adopt resolutions that allow student volunteers to deliver inspirational messages, including but not limited to prayers of invocation or benediction, at secondary school commencement exercises or other noncompulsory student assemblies.

If adopted, the resolution must provide that:

¹ *Doe v. School Board for Santa Rosa County, Florida* (N.D. Fla. 2008) (Case Number 3:08-cv-361/MCR/EMT).

² *Florida School Officials Get Jail Time* (Sept. 17, 2009), available at www.cnn.com/2009/CRIME/09/17/florida.school.prayer/index.html (last visited Jan. 3, 2012).

³ *Lay, Freeman Not Guilty In School Prayer Case* (Sept. 17, 2009), available at <http://www.northescambia.com/?p=10943>; (last visited Jan. 3, 2012).

⁴ *Mary E. Allen v. School Board for Santa Rosa County, Florida* (N.D. Fla. 2009) (Case Number 3:10-cv-00142-MCR-CJK).

⁵ Settlement Agreement, Waiver and Release, filed with the court on July 1, 2011.

⁶ Chapter 2010-214, L.O.F.; s. 1003.4505, F.S.

- The use of an inspirational message is at the discretion of the student government;
- All inspirational messages will be given by student volunteers, and the content of any inspirational message will be at the discretion of the student volunteer; and
- School personnel may not participate in, or otherwise influence any student in determining whether to use a prayer of invocation or benediction, participate in selecting the student volunteer, or influence the content of the inspirational message.

This bill identifies as its purpose the provision of the solemnization and memorialization of secondary school events and ceremonies, rather than to advance or endorse any religion or religious belief.

The bill provides an effective date of July 1, 2012.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. Other Constitutional Issues:

The First Amendment to the United States Constitution provides, in part:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof....

This first clause is typically referred to as the Establishment Clause.

Section 3, Article I, of the State Constitution provides:

There shall be no law respecting the establishment of religion or prohibiting or penalizing the free exercise thereof.... No revenue of the state or any political subdivision or agency thereof shall ever be taken from the public treasury directly or indirectly in aid of any church, sect, or religious denomination or in aid of any sectarian institution.

In 1962, the U.S. Supreme Court indicated that evidence of direct government compulsion is not required in an Establishment Clause case (as would generally be the case for Free Exercise claims.) In *Engel v. Vitale*, the court found impermissible daily prayer in schools, regardless of whether students

were specifically and individually required to participate, on the basis that prayer in elementary and secondary schools carries particular risk of indirect coercion.⁷

In 1971, the U.S. Supreme Court established the seminal test for Establishment Clause cases, in *Lemon v. Kurtzman*, which requires that the following be demonstrated for constitutionality:

- The statute must contain a secular purpose;
- The statute's principal or primary effect is one that neither advances nor inhibits religion; and
- The statute must not foster excessive government entanglement with religion.⁸

The last prong remains the critical focus of the test.⁹

In 1992, however, the Supreme Court did not apply the *Lemon* test to *Lee v. Weisman*, a case involving endorsement of nonsectarian prayer and emphasized, instead, indicia of whether government actions constituted a pervasive degree of involvement, commonly referred to as the Coercion Test.¹⁰ Here, that school officials decided themselves to have prayer at commencement, selected clergy, and influenced speech content by providing a pamphlet to the clergy with guidelines for nonsectarian prayer, the court determined, rose to the level of impermissible pervasive activity.¹¹ Although asserted that attendance was voluntary, the very monumental nature of a graduation made student participation mandatory.

In *Santa Fe Independent School District v. Doe*, the U.S. Supreme Court ruled that school district policy that authorized student-led, student-initiated invocations at football games did not constitute private speech.¹² In this case, the policy authorized student elections to determine whether invocations should be provided at games, and if so, who should deliver the invocation.¹³ The District Court limited the policy to nonsectarian, nonproselytizing prayer. In finding the lower court's modified policy unconstitutional, the Supreme Court applied a hybrid *Lemon/Lee* test and determined that a policy that expressly authorizes prayer at all promotes religion, constitutes unlawful coercion, and is therefore facially unconstitutional:

Indeed, the only type of message that is expressly endorsed in the [policy] is an "invocation," a term which primarily describes an appeal for divine assistance.

....

⁷ *Engel v. Vitale*, 370 U.S. 421, 430-31 (1962).

⁸ 403 U.S. 602, 612-13 (1971).

⁹ John P. Cronan, *A Political Process Argument for the Constitutionality of Student-Led, Student-Initiated Prayer*, 18 YALE L. & POL'Y REV. 503, 510 (2000).

¹⁰ 505 U.S. 577, 587 (1992).

¹¹ *Id.* at 587-88.

¹² 530 U.S. 290 (2000).

¹³ *Id.* at 297-98.

... Through its election scheme, the District has established a government mechanism that turns the school into a forum for religious debate. It further empowers the student body majority...to subject students of minority views to constitutionally improper messages.¹⁴

In 2001, in *Adler v. State*, the Eleventh Circuit Court of Appeals reviewed a Duval County school district policy that permitted a graduating student, elected by her class, to give a message unrestricted by the school,¹⁵ which policy specifically stated in part:

1. The use of a brief opening and/or closing message, not to exceed two minutes, at high school graduation exercises shall rest within the discretion of the graduating senior class;
2. The opening and/or closing message shall be given by a student volunteer, in the graduating senior class, chosen by the graduating senior class as a whole;
3. If the graduating senior class chooses to use an opening and/or closing message, the content of that message shall be prepared by the student volunteer and...not be monitored or...reviewed by Duval County School Board, its officers or employees;

The purpose of these guidelines is to allow students to direct their own graduation message *without monitoring or review by school officials*.¹⁶

Here, the court held that as this policy was neutral on-its-face and did not involve any degree of state control, it was facially constitutional.¹⁷

Although it is difficult to gauge how this bill may be implemented in practice, a Duval County-type policy, which authorizes a student message to be delivered at graduation but does not mention prayer, and prohibits school review of content, likely presents the strongest case for constitutionality. At the other end of the continuum, a school district policy that allows students to decide if they want a student-led prayer to be delivered at a school event similar to *Santa Fe* may be constitutionally suspect. Less certain outcomes exist for other factual combinations. The fact that this bill references only the secondary, rather than the K-12 setting, is likely inconsequential.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

¹⁴ *Id.* at 306-07, 316.

¹⁵ 250 F. 3d 1330 (11th Cir. 2001).

¹⁶ *Id.* at 1332.

¹⁷ *Id.* at 1333.

B. Private Sector Impact:

None.

C. Government Sector Impact:

This bill authorizes, but does not require, school boards to adopt policies addressing inspirational messages. Therefore, any fiscal impact related to policy drafting and adoption is expected to be insignificant.

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 Judiciary on January 12, 2012

The Committee Substitute:

- Provides that inspirational messages delivered by student volunteers may include, but are not limited to, prayers of invocation or benediction;
- Provides that the subject of the inspirational message will be at the discretion of the student volunteer;
- Removes language that the message must be nonsectarian and nonproselytizing; and
- Clarifies that school personnel may not influence the content of the inspirational message or the selection of the student volunteer.

B. Amendments:

None.



822392

LEGISLATIVE ACTION

| | | |
|------------|---|-------|
| Senate | . | House |
| Comm: RCS | . | |
| 01/13/2012 | . | |
| | . | |
| | . | |
| | . | |

The Committee on Judiciary (Simmons) recommended the following:

Senate Amendment (with title amendment)

Delete everything after the enacting clause
and insert:

Section 1. Any district school board may adopt a resolution allowing the use of an inspirational message, including, but not limited to, prayers of invocation or benediction, at secondary school commencement exercises or any other noncompulsory student assembly. The resolution must provide that:

(1) The use of an inspirational message is at the discretion of the student government.

(2) All inspirational messages will be given by student volunteers, and the content of any inspirational message will be



822392

at the discretion of the student volunteer.

(3) School personnel may not:

(a) Participate in, or otherwise influence any student in, determining whether to use a prayer of invocation or benediction as an inspirational message;

(b) Participate in selecting which student volunteer will give an inspirational message; or

(c) Influence the content of an inspirational message.

Section 2. The purpose of this act is to provide for the solemnization and memorialization of secondary school events and ceremonies, and this act is not intended to advance or endorse any religion or religious belief.

Section 3. If any provision of this act or its application to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of the act which can be given effect without the invalid provision or application, and to this end the provisions of this act are severable.

Section 4. This act shall take effect July 1, 2012.

===== 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 education; authorizing district school boards to adopt resolutions that allow inspirational messages, including, but not limited to, prayers of invocation or benediction, at secondary



822392

43 school events; providing requirements to be included
44 in the resolution; providing legislative intent;
45 providing for severability; providing an effective
46 date.

By Senator Siplin

19-00013-12

201298__

1 A bill to be entitled
2 An act relating to education; authorizing district
3 school boards to adopt resolutions that allow prayers
4 of invocation or benediction at secondary school
5 events; providing legislative intent; providing for
6 severability; providing an effective date.
7
8 Be It Enacted by the Legislature of the State of Florida:
9
10 Section 1. Any district school board may adopt a resolution
11 allowing the use of an inspirational message, including prayers
12 of invocation or benediction, at secondary school commencement
13 exercises or any other noncompulsory student assembly. The
14 resolution must provide that:
15 (1) The use of a prayer of invocation or benediction is at
16 the discretion of the student government.
17 (2) All prayers of invocation or benediction will be given
18 by student volunteers.
19 (3) All prayers of invocation or benediction will be
20 nonsectarian and nonproselytizing in nature.
21 (4) School personnel may not participate in, or otherwise
22 influence any student in, the determination of whether to use
23 prayers of invocation or benediction.
24 Section 2. The purpose of this act is to provide for the
25 solemnization and memorialization of secondary school events and
26 ceremonies, and this act is not intended to advance or endorse
27 any religion or religious belief.
28 Section 3. If any provision of this act or its application
29 to any person or circumstance is held invalid, the invalidity

Page 1 of 2

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

19-00013-12

201298__

30 does not affect other provisions or applications of the act
31 which can be given effect without the invalid provision or
32 application, and to this end the provisions of this act are
33 severable.
34 Section 4. This act shall take effect July 1, 2012.

Page 2 of 2

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

THE FLORIDA SENATE
APPEARANCE RECORD

(Deliver BOTH copies of this form to the Senator or Senate Professional Staff conducting the meeting)

1/12/12
Meeting Date

Topic Senate Bill 98

Bill Number SB 98
(if applicable)

Name David Barkley

Amendment Barcode _____
(if applicable)

Job Title Religious Freedom Council

Address 621 NW 53rd St.
Boca Raton FL 33028
City State Zip

Phone 561-988-2912

E-mail dbarkley@afl-ora.org

Speaking: ☐ For ☒ Against ☐ Information

Representing Anti-Defamation League

Appearing at request of Chair: ☐ Yes ☐ No

Lobbyist registered with Legislature: ☒ Yes ☐ No

While it is a Senate tradition to encourage public testimony, time may not permit all persons wishing to speak to be heard at this meeting. Those who do speak may be asked to limit their remarks so that as many persons as possible can be heard.

This form is part of the public record for this meeting.

S-001 (10/20/11)

THE FLORIDA SENATE
APPEARANCE RECORD

(Deliver BOTH copies of this form to the Senator or Senate Professional Staff conducting the meeting)

1/12/11

Meeting Date

Topic

SB 98 - Education

Bill Number

98

(if applicable)

Name

Ron BILBAO

Amendment Barcode

(if applicable)

Job Title

Senior Legislative Associate

Address

4500 Biscayne #340

Phone

919-923-7288

Street

Miami

FL

33137

City

State

Zip

E-mail

rbilbao@aclufl.org

Speaking:

☐

For

☒

Against

☐

Information

Representing

ACLU of FL

Appearing at request of Chair:

☐

Yes

☒

No

Lobbyist registered with Legislature:

☒

Yes

☐

No

While it is a Senate tradition to encourage public testimony, time may not permit all persons wishing to speak to be heard at this meeting. Those who do speak may be asked to limit their remarks so that as many persons as possible can be heard.

This form is part of the public record for this meeting.

S-001 (10/20/11)

THE FLORIDA SENATE
APPEARANCE RECORD

(Deliver BOTH copies of this form to the Senator or Senate Professional Staff conducting the meeting)

1 / 12 / 2012

Meeting Date

Topic _____

Bill Number 98

(if applicable)

Name BRIAN PITTS

Amendment Barcode _____

(if applicable)

Job Title TRUSTEE

Address 1119 NEWTON AVENUE SOUTH

Street

Phone 727/897-9291

SAINT PETERSBURG

FLORIDA

33705

City

State

Zip

E-mail JUSTICE2JESUS@YAHOO.COM

Speaking: ☒ For ☐ Against ☒ Information

Representing JUSTICE-2-JESUS

Appearing at request of Chair: ☐ Yes ☒ No

Lobbyist registered with Legislature: ☐ Yes ☒ No

While it is a Senate tradition to encourage public testimony, time may not permit all persons wishing to speak to be heard at this meeting. Those who do speak may be asked to limit their remarks so that as many persons as possible can be heard.

This form is part of the public record for this meeting.

S-001 (10/20/11)

THE FLORIDA SENATE

COMMITTEE APPEARANCE RECORD

(Submit to Committee Chair or Administrative Assistant)

1-12-2012

Date

WAIVE TIME IN SUPPORT

374
SB 722

Bill Number

Barcode

Name STEPHEN R. WINN

Phone 878-7364

Address 2007 APALACHE PARKWAY

E-mail

Street

TALLAHASSEE,

FL

32301

City

State

Zip

Job Title EX. DIR.

Speaking:

☒

For

☐

Against

☐

Information

Appearing at request of Chair

☐

Subject

EXPERT TESTIMONY

Representing

FLORIDA OSTEOPATHIC MEDICAL ASSOCIATION

Lobbyist registered with Legislature:

☒

Yes

☐

No

Pursuant to s. 11.061, *Florida Statutes*, state, state university, or community college employees are required to file the first copy of this form with the Committee, unless appearance has been requested by the Chair as a witness or for informational purposes.

If designated employee:

Time:

from

____.m.

to

____.m.



138252

LEGISLATIVE ACTION

| | | |
|------------|---|-------|
| Senate | . | House |
| Comm: FAV | . | |
| 11/02/2011 | . | |
| | . | |
| | . | |
| | . | |

The Committee on Education Pre-K - 12 (Wise) recommended the following:

Senate Amendment

Delete lines 19 - 21
and insert:

(3) School personnel may not participate in, or otherwise

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 378

INTRODUCER: Senator Richter

SUBJECT: Expert Testimony

DATE: January 11, 2012

REVISED: _____

| | ANALYST | STAFF DIRECTOR | REFERENCE | ACTION |
|----|---------|----------------|-----------|--------------------|
| 1. | Munroe | Cibula | JU | Pre-meeting |
| 2. | | | BC | Favorable |
| 3. | | | | |
| 4. | | | | |
| 5. | | | | |
| 6. | | | | |

I. Summary:

The bill conforms the standards for the admission of expert testimony in Florida courts to the Federal Rules of Evidence.

The bill amends s. 90.702, F.S., to prohibit an expert witness from testifying in the form of an opinion or otherwise unless the testimony satisfies the following additional criteria:

- The testimony is based on sufficient facts or data;
- The testimony is the product of reliable principles and methods;
- The witness has applied the principles and methods reliably to the facts of the case.

As a result of the amendments, the effect of s. 90.702, F.S., is conformed to the effect of Federal Rule of Evidence 702.

The bill amends s. 90.704, F.S., to prohibit the disclosure of inadmissible facts or data to a jury by the proponent of an expert opinion or by inference unless the court determines that their probative value in assisting the jury's evaluation of the expert's opinion is substantially outweighed by their prejudicial effect. As a result of the amendments, the effect of s. 90.704, F.S., is conformed to the effect of Federal Rule of Evidence 703.

The bill further requires courts to interpret and apply ss. 90.702 and 90.704, F.S., in accordance with *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993) and several related federal cases.¹

¹ *General Electric Co. v. Joiner*, 522 U.S. 136 (1997), and *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999).

Currently, Florida courts employ the standard articulated in *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923), which requires the party who wants to introduce the expert opinion testimony into evidence to show that the methodology or principle has sufficient reliability. Under the bill, *Frye* and subsequent Florida decisions applying or implementing *Frye* will no longer apply to a court's determination of the admissibility of expert witness testimony in the form of opinion and a court's determination of the basis of the expert's opinion.

The bill provides an effective date of July 1, 2012.

This bill amends sections 90.702 and 90.704, Florida Statutes.

II. Present Situation:

Admission of Expert Testimony (*Daubert* or *Frye* Standard)

Expert testimony has been used to assist the trier of fact in both civil and criminal trials for a wide range of subjects, including polygraph examination, battered woman syndrome, child abuse cases, and serum blood alcohol. The Florida Rules of Civil Procedure define an "expert witness" as a person duly and regularly engaged in the practice of a profession who holds a professional degree from a university or college and has had special professional training and experience, or one possessed of special knowledge or skill about the subject upon which called to testify.² Courts use expert witness testimony when scientific, technical, or other specialized knowledge may assist the trier of fact in understanding evidence or determining facts in issue during litigation. The Florida Evidence Code provides that the facts or data upon which an expert bases an opinion or inference may be those perceived by, or made known to, the expert at or before trial. If the facts or data are of a type reasonably relied upon by experts in the subject to support the opinion expressed, the facts or data need not be admissible in evidence.³ The Florida Supreme Court has considered the issue of whether experts can testify on direct examination that they relied on the hearsay opinions of other experts in forming their opinions.⁴ The Court held that an expert is not permitted to testify on direct examination that the expert relied on consultations with colleagues or other experts in reaching his or her opinion because it impermissibly permits the testifying experts to bolster their opinions and creates the danger that the testifying experts will serve as conduits for the opinions of others who are not subject to cross-examination.⁵ The Court emphasized that its holding did not preclude experts from relying on facts or data that are not independently admissible if the facts or data are a type reasonably relied upon by experts in the subject.⁶

***Frye* Standard**

To admit scientific testimony into evidence, Florida courts currently use the standard governing the admissibility of scientific expert testimony imposed in *Frye v. United States*, 293 F. 1013

² Fla. R. Civ. P. 1.390(a).

³ Section 90.704, F.S.

⁴ *Linn v. Fossum*, 946 So. 2d 1032 (Fla. 2006).

⁵ *Id.* at 1033.

⁶ *Id.*

(D.C. Cir. 1923).⁷ If the subject matter involves new or novel scientific evidence, the *Frye* standard requires the party who wants to introduce the expert opinion into evidence to show that the methodology or principle has sufficient reliability. In *Frye*, the court held that the “principle or discovery” must be sufficiently established to “have gained general acceptance in the particular field in which it belongs.”⁸

The Florida Supreme Court imposes four steps in its articulation of the *Frye* test:

1. The trial judge must determine whether such expert testimony will assist the jury in understanding the evidence or in determining a fact in issue.
2. The trial judge must decide whether the expert’s testimony is based on a scientific principle or discovery that is “sufficiently established to have gained general acceptance in the particular field in which it belongs.”
3. The trial judge must determine whether a particular witness is qualified as an expert to present opinion testimony on the subject in issue.
4. The judge may then allow the expert to render an opinion on the subject of his or her expertise, and it is then up to the jury to determine the credibility of the expert’s opinion, which it may either accept or reject.⁹

The Florida Supreme Court noted that, under *Frye*, the court’s inquiry focuses only on the general acceptance of the scientific principles and methodologies upon which an expert relies to give his or her opinion.¹⁰ The *Frye* test is satisfied through the court’s finding of proof of general acceptance of the basis of an expert’s opinion.¹¹ Once the basis or foundation is established for an expert’s opinion, the finder of fact may then assess and weigh the opinion for its value.¹²

The *Frye* test is not applicable to all expert opinion proffered for admissibility into evidence. If the expert opinion is based solely on the expert’s experience and training, and the opinion does not rely on something that constitutes new or novel scientific tests or procedures, then it may be admissible without meeting the *Frye* standard.¹³ By example, Florida courts admit medical expert testimony concerning medical causation when based solely on the expert’s training and experience.¹⁴ One court in determining the admissibility of medical expert testimony noted that *Frye* was not applicable to medical testimony (pure opinion) because the expert relied on his analysis of medical records and differential diagnosis rather than a study, test, procedure, or methodology that constituted new or novel scientific evidence.¹⁵

⁷ *Stokes v. State*, 548 So. 2d 188 (Fla. 1989).

⁸ *Frye v. United States*, 293 F. 1013, 1014 (D.C. Cir. 1923).

⁹ *Ramirez v. State*, 651 So. 2d 1164, 1166-67 (Fla. 1995).

¹⁰ *Marsh v. Valyou*, 977 So. 2d 543, 549 (Fla. 2007).

¹¹ *Id.*

¹² *Id.*

¹³ *Id.* at 548. See also Charles W. Ehrhardt, *Florida Evidence*, s. 702.3 (2011 ed.).

¹⁴ See, e.g., *Cordoba v. Rodriguez*, 939 So. 2d 319, 322 (Fla. 4th DCA 2006); *Fla. Power & Light Co. v. Tursi*, 729 So. 2d 995, 996 (Fla. 4th DCA 1999).

¹⁵ *Gelsthorpe v. Weinstein*, 897 So. 2d 504, 510-11 (Fla. 2d DCA 2005); See also, *Marsh*, 977 So. 2d at 548-49.

Florida Rules of Evidence

The Florida Evidence Code is codified in ch. 90, F.S. Section 90.102, specifies that the chapter replaces and supersedes existing statutory or common law in conflict with its provisions. As previously noted, the Florida Supreme Court regularly adopts amendments to the Evidence Code as rules of court when it is determined that the matter is procedural rather than substantive. The Florida Evidence Code requires an expert to demonstrate knowledge, skill, experience, training, or education in the subject matter to qualify as an expert.¹⁶ In a concurring opinion, one justice has argued that the Florida Supreme Court has “never explained how *Frye* has survived the adoption of the rules of evidence.”¹⁷ Justice Anstead also noted that the Florida Supreme Court has continued to apply *Frye* in determining the admissibility of scientific expert opinion testimony after the adoption of the Florida Rules of Evidence, but has done so without any mention that the rules do not mention *Frye* or the test set out in *Frye*.¹⁸

Daubert Standard

The *Frye* standard was used in federal courts until 1993 when the U.S. Supreme Court issued its opinion in the case of *Daubert v. Merrell Dow Pharmaceuticals, Inc.*¹⁹ The U.S. Supreme Court held that Federal Rule of Evidence 702 had superseded the *Frye* test, and it announced a new standard for determining the admissibility of novel scientific evidence.²⁰ Under the *Daubert* test, when there is a proffer of expert testimony, the judge as a gatekeeper must make “a preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts in issue.”²¹ The Court announced other factors that a court may consider as part of its assessment under the *Daubert* test for the admissibility of expert scientific testimony:

- Whether the scientific methodology is susceptible to testing or has been tested;
- Whether the theory or technique has been subjected to peer review and publication;
- Whether in the case of a particular scientific technique, the court ordinarily should consider the known or potential rate of error; and
- The existence and maintenance of standards controlling the technique’s operation.²²

Federal Rule of Evidence 702 was amended in 2000 to reflect *Daubert* and other decisions applying *Daubert*.²³ In *General Electric Co. v. Joiner*, the U.S. Supreme Court held that abuse of discretion is the appropriate standard of review for an appellate court to apply when reviewing a trial court’s decision to admit or exclude evidence under *Daubert*.²⁴ In *Kumho Tire Co. v. Carmichael*, the Court held that a trial judge is not bound by the specific factors outlined in *Daubert*, but depending on the circumstances of the particular case at issue, the judge may

¹⁶ Section 90.702, F.S.

¹⁷ *Marsh*, 977 So. 2d at 551 (Anstead, J., concurring).

¹⁸ *Id.*

¹⁹ *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993).

²⁰ *Id.*

²¹ *Id.* at 592-93.

²² *Id.* at 592-94.

²³ Fed. R. Evid. 702, Advisory Committee Notes for 2000 Amendments.

²⁴ *General Electric Co. v. Joiner*, 522 U.S. 136, 139 (1997).

consider other factors in his or her assessment under *Daubert*.²⁵ Additionally, the Court in *Kumho Tire Co.* held that the trial judge's obligation to be a gatekeeper is not limited to scientific testimony but extends to all expert testimony.²⁶

The *Weisgram v. Marley Co.* case, a part of the *Daubert* progeny, was a wrongful death action against a manufacturer of heaters in which the plaintiff introduced expert testimony that the alleged heater defect caused a house fire.²⁷ The Court held that a federal appellate court may direct the entry of judgment as a matter of law when the court determines that evidence was erroneously admitted at trial and the remaining evidence that was properly admitted is insufficient to support the jury verdict.²⁸ The plaintiffs obtained a jury verdict based on the expert testimony that the heater was defective and that the heater's defect caused the fire.²⁹ The U.S. Supreme Court affirmed the Court of Appeals' reversal of the jury verdict, finding that the expert testimony offered by the plaintiff was speculation under Federal Rule of Evidence 702 as explicated in *Daubert* regarding the defectiveness of the heater.³⁰ The Court found the plaintiff's fears unconvincing that "allowing [federal] courts of appeals to direct the entry of judgment for defendants will punish plaintiffs who could have shored up their cases by other means had they known their expert testimony would be found inadmissible."³¹ The Court stated that *Daubert* put parties on notice regarding the exacting standards of reliability demanded of expert testimony.³²

III. Effect of Proposed Changes:

The bill conforms the standard for Florida courts to admit expert witness testimony to the Federal Rule of Evidence 702 and the standard articulated in *Daubert*. The requirements for a witness qualified as an expert by knowledge, skill, experience, training, or education to testify in the form of an opinion are revised to impose additional criteria for the admissibility of the testimony. Under the new criteria a court must consider whether:

- The testimony is based on sufficient facts or data;
- The testimony is the product of reliable principles and methods; and
- The witness has applied the principles and methods reliably to the facts of the case.

The bill requires Florida courts to interpret and apply requirements for the admissibility of expert witness testimony and the determination of the basis of an expert's opinion, in accordance with *Daubert* and subsequent U.S. Supreme Court decisions applying *Daubert*.³³ *Frye* and subsequent Florida decisions applying or implementing *Frye* will no longer apply to a court's determination of the admissibility of expert witness testimony in the form of opinion and a court's determination of the basis of the expert's opinion.

²⁵ *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 147-52 (1999).

²⁶ *Id.*

²⁷ *Weisgram v. Marley Co.*, 528 U.S. 440 (2000).

²⁸ *Id.* at 445-46.

²⁹ *Id.*

³⁰ *Id.* at 445-47.

³¹ *Id.* at 455-56.

³² *Id.*

³³ *General Electric Co. v. Joiner*, 522 U.S. 136 (1997), and *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999).

The bill amends s. 90.704, F.S., to specify that facts or data that are otherwise inadmissible in evidence may not be disclosed to the jury by the proponent of an opinion or by inference unless the court determines that the probative value of the facts or data in assisting the jury to evaluate the expert's opinion substantially outweighs the prejudicial effect of the facts or data.³⁴ With the bill's amendment to s. 90.704, F.S., the language of the section tracks Federal Rule of Evidence 703.

Under the bill, all proposed expert testimony, including pure opinion testimony as described in *Marsh v. Valyou*, 977 So. 2d 543 (Fla. 2007) must comply with ss. 90.704 and 90.702, F.S., in accordance with *Daubert* and its progeny as interpreted by federal courts. Moreover, the bill provides that any facts or data that are otherwise inadmissible in evidence may not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that the probative value of the facts or data in assisting the jury to evaluate the expert's opinion substantially outweighs the prejudicial effect of the facts or data.

The bill provides an effective date of July 1, 2012.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. Other Constitutional Issues

There is a balance between enactments of the Legislature and the Florida Supreme Court on matters relating to evidence. The Legislature has enacted and continues to revise ch. 90, F.S., and the Florida Supreme Court tends to adopt these changes as rules. The Florida Supreme Court regularly adopts amendments to the Evidence Code as rules of court when it is determined that the matter is procedural rather than substantive. If the Florida Supreme Court views the changes in this bill as an infringement upon the Court's authority over practice and procedure, it may refuse to adopt the changes in the bill as a rule.³⁵

³⁴ *Linn*, 946 So. 2d at 1036-1037 (Florida Supreme Court acknowledging that s. 90.704, F.S., is modeled after Federal Rule of Evidence 703).

³⁵ See, e.g., *In re Florida Evidence Code*, 782 So. 2d 339 (Fla. 2000) (Florida Supreme Court adopting amendments to the Evidence Code to the extent procedural and rejecting a hearsay exception as a rule of court); compare with *In re Florida Evidence Code*, 372 So. 2d 1369 (Fla. 1979) (Florida Supreme Court adopting the Florida Evidence Code to the extent it is procedural); *In re Florida Evidence Code*, 376 So. 2d 1161 (Fla. 1979).

V. Fiscal Impact Statement:**A. Tax/Fee Issues:**

None.

B. Private Sector Impact:

Generally, in civil litigation such as negligence actions, the plaintiff has the burden of proof on issues essential to his or her cause of action.³⁶ The change in the new evidentiary standard may have a fiscal impact on the outcome of lawsuits or the number of such lawsuits.

It is difficult to quantify the fiscal impact of the bill's change in evidentiary standards for the admission of expert opinions. It may or may not result in a need for additional pre-trial hearings depending on the manner in which it is actually implemented by the courts.

C. Government Sector Impact:

The change in the standard to admit expert opinions in Florida courts may have an impact on the number of pre-trial hearings needed, but it is difficult to estimate due to the unavailability of data needed to quantify any increase or decrease in judicial workload.

In criminal proceedings, the state may incur additional costs in litigating the application and interpretation of the new standards supplied in this bill.

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.

³⁶ *Gooding v. Univ. Hosp. Bldg., Inc.*, 445 So. 2d 1015, 1018 (Fla. 1984). “On the issue of the fact of causation, as on other issues essential to his cause of action for negligence, the plaintiff, in general, has the burden of proof.”(quoting *Prosser, Law of Torts* § 41 (4th ed. 1971)). *Id.*

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

By Senator Richter

37-00133D-12

2012378__

A bill to be entitled

An act relating to expert testimony; amending s. 90.702, F.S.; providing that a witness qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion as to the facts at issue in a case under certain circumstances; requiring the courts of this state to interpret and apply the principles of expert testimony in conformity with specified United States Supreme Court decisions; subjecting pure opinion testimony to such requirements; amending s. 90.704, F.S.; providing that facts or data that are otherwise inadmissible in evidence may not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that the probative value of the facts or data in assisting the jury to evaluate the expert's opinion substantially outweighs the prejudicial effect of the facts or data; providing an effective date.

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

Section 1. Section 90.702, Florida Statutes, is amended to read:

90.702 Testimony by experts.—

(1) If scientific, technical, or other specialized knowledge will assist the trier of fact in understanding the evidence or in determining a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify about it in the form of an opinion, or

Page 1 of 3

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

37-00133D-12

2012378__

otherwise, if:

(a) The testimony is based upon sufficient facts or data;

(b) The testimony is the product of reliable principles and methods; and

(c) The witness has applied the principles and methods reliably to the facts of the case; however, the opinion is admissible only if it can be applied to evidence at trial.

(2) The courts of this state shall interpret and apply the requirements of subsection (1) and s. 90.704 in accordance with *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993); *General Electric Co. v. Joiner*, 522 U.S. 136 (1997); and *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137 (1999). *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923) and subsequent Florida decisions applying or implementing *Frye* no longer apply to subsection (1) or s. 90.704. All proposed expert testimony, including pure opinion testimony as discussed in *Marsh v. Valyou*, 977 So. 2d 543 (Fla. 2007), is subject to subsection (1) and s. 90.704.

Section 2. Section 90.704, Florida Statutes, is amended to read:

90.704 Basis of opinion testimony by experts.—The facts or data upon which an expert bases an opinion or inference may be those perceived by, or made known to, the expert at or before the trial. If the facts or data are of a type reasonably relied upon by experts in the subject to support the opinion expressed, the facts or data need not be admissible in evidence. Facts or data that are otherwise inadmissible shall not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the

Page 2 of 3

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37-00133D-12

2012378

59 jury to evaluate the expert's opinion substantially outweighs
60 their prejudicial effect.

61 Section 3. This act shall take effect July 1, 2012.

THE FLORIDA SENATE
APPEARANCE RECORD

(Deliver BOTH copies of this form to the Senator or Senate Professional Staff conducting the meeting)

1/12/12
Meeting Date

Topic Expert Witnesses

Bill Number 378
(if applicable)

Name Teye Reeves

Amendment Barcode _____
(if applicable)

Job Title Policy Director

Address 136 S. Bronough ST
Tallahassee FL
City State Zip

Phone 850-521-1235

E-mail teye@flchamber.com

Speaking: ☒ For ☐ Against ☐ Information

Representing FL Chamber of Commerce

Appearing at request of Chair: ☐ Yes ☒ No

Lobbyist registered with Legislature: ☒ Yes ☐ No

While it is a Senate tradition to encourage public testimony, time may not permit all persons wishing to speak to be heard at this meeting. Those who do speak may be asked to limit their remarks so that as many persons as possible can be heard.

This form is part of the public record for this meeting.

S-001 (10/20/11)

THE FLORIDA SENATE
APPEARANCE RECORD

(Deliver BOTH copies of this form to the Senator or Senate Professional Staff conducting the meeting)

11/21/12

Meeting Date

Topic Expert Evidence

Bill Number 378
(if applicable)

Name Tammy Perdue

Amendment Barcode _____
(if applicable)

Job Title General Counsel

Address 516 N. Adams St

Phone 850-224-7173

Street

Tallahassee

FL

32301

City

State

Zip

E-mail tperdue@aif.com

Speaking: ☒ For ☐ Against ☐ Information

Representing Associated Industries of Florida

Appearing at request of Chair: ☐ Yes ☒ No

Lobbyist registered with Legislature: ☒ Yes ☐ No

While it is a Senate tradition to encourage public testimony, time may not permit all persons wishing to speak to be heard at this meeting. Those who do speak may be asked to limit their remarks so that as many persons as possible can be heard.

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S-001 (10/20/11)

THE FLORIDA SENATE
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1-12-12
Meeting Date

Topic Expert Testimony

Bill Number 378
(if applicable)

Name Rebecca O'Hara

Amendment Barcode _____
(if applicable)

Job Title VP Govt Affairs

Address 113 College Ave
Street

Phone _____

Tall FL 32301
City State Zip

E-mail _____

Speaking: ☒ For ☐ Against ☐ Information

Representing Fla Medical Ass'n

Appearing at request of Chair: ☐ Yes ☒ No

Lobbyist registered with Legislature: ☒ Yes ☐ No

While it is a Senate tradition to encourage public testimony, time may not permit all persons wishing to speak to be heard at this meeting. Those who do speak may be asked to limit their remarks so that as many persons as possible can be heard.

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S-001 (10/20/11)

THE FLORIDA SENATE
APPEARANCE RECORD

will waive

(Deliver BOTH copies of this form to the Senator or Senate Professional Staff conducting the meeting)

1/12/12
Meeting Date

Topic EXPERT EVIDENCE

Bill Number 378
(if applicable)

Name GEORGE MERDS

Amendment Barcode _____
(if applicable)

Job Title GRAY/ROBINSON LAW FIRM

Address TALLA
Street

Phone 850 577-9090

City _____ State _____ Zip _____

E-mail _____

Speaking: ☒ For ☐ Against ☐ Information

Representing US CHAMBER

Appearing at request of Chair: ☐ Yes ☒ No

Lobbyist registered with Legislature: ☒ Yes ☐ No

While it is a Senate tradition to encourage public testimony, time may not permit all persons wishing to speak to be heard at this meeting. Those who do speak may be asked to limit their remarks so that as many persons as possible can be heard.

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S-001 (10/20/11)

THE FLORIDA SENATE
APPEARANCE RECORD

1

1-12-2012

Meeting Date

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Topic Expert Evidence

Bill Number SB 378
(if applicable)

Name Rebecca Womeldorf

Amendment Barcode _____
(if applicable)

Job Title Attorney, Hollingsworth LLP

Address 1350 I Street NW
Street

Phone 202 731 1435

Washington DC 20005
City State Zip

E-mail rwomeldorf@hollingsworthllp.com

Speaking: ☒ For ☐ Against ☐ Information

Representing Myself

Appearing at request of Chair: ☐ Yes ☐ No

Lobbyist registered with Legislature: ☐ Yes ☒ No

While it is a Senate tradition to encourage public testimony, time may not permit all persons wishing to speak to be heard at this meeting. Those who do speak may be asked to limit their remarks so that as many persons as possible can be heard.

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S-001 (10/20/11)

THE FLORIDA SENATE
APPEARANCE RECORD

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1/12/12

Meeting Date

Topic Expert Testimony

Bill Number 378
(if applicable)

Name Brad King

Amendment Barcode _____
(if applicable)

Job Title State Attorney, 5th Circuit

Address 110 NW 1st Ave Suite 5000
Street

Phone 352-671-5914

Ocala FL 34480
City State Zip

E-mail _____

Speaking: ☐ For ☒ Against ☐ Information

Representing Florida Prosecuting Attorneys Association

Appearing at request of Chair: ☐ Yes ☐ No

Lobbyist registered with Legislature: ☐ Yes ☒ No

While it is a Senate tradition to encourage public testimony, time may not permit all persons wishing to speak to be heard at this meeting. Those who do speak may be asked to limit their remarks so that as many persons as possible can be heard.

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S-001 (10/20/11)

THE FLORIDA SENATE
APPEARANCE RECORD

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1/12/2012
Meeting Date

Topic DAUBERT / EXPERT TESTIMONY Bill Number 378
(if applicable)

Name CAROLYN SALZMANN Amendment Barcode _____
(if applicable)

Job Title ATTORNEY

Address 701 E. WASHINGTON ST.
Street
ORLANDO FL 32801
City State Zip

Phone (407) 423-4500

E-mail carolyn@bflaw.com

Speaking: ☐ For ☒ Against ☐ Information

Representing SELF

Appearing at request of Chair: ☐ Yes ☒ No

Lobbyist registered with Legislature: ☐ Yes ☒ No

While it is a Senate tradition to encourage public testimony, time may not permit all persons wishing to speak to be heard at this meeting. Those who do speak may be asked to limit their remarks so that as many persons as possible can be heard.

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S-001 (10/20/11)

THE FLORIDA SENATE
APPEARANCE RECORD

2

JAN 12, '12
Meeting Date

(Deliver BOTH copies of this form to the Senator or Senate Professional Staff conducting the meeting)

Topic EXPERT EVIDENCE Bill Number SB 378
(if applicable)

Name THEODORE VAN ITALLIE Amendment Barcode _____
(if applicable)

Job Title FORMER HEAD OF LITIGATION, JOHNSON + JOHNSON

Address 35 BATTLE ROAD Phone 609-252-9455
Street
PRINCETON NJ 08540 E-mail fvanita@me.com
City State Zip

Speaking: ☒ For ☐ Against ☐ Information

Representing JOHNSON + JOHNSON

Appearing at request of Chair: ☐ Yes ☒ No Lobbyist registered with Legislature: ☐ Yes ☒ No

While it is a Senate tradition to encourage public testimony, time may not permit all persons wishing to speak to be heard at this meeting. Those who do speak may be asked to limit their remarks so that as many persons as possible can be heard.

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THE FLORIDA SENATE
APPEARANCE RECORD

(Deliver BOTH copies of this form to the Senator or Senate Professional Staff conducting the meeting)

Meeting Date

Topic EXPERT EVIDENCE Bill Number SB 378
(if applicable)

Name THOMAS ILES Amendment Barcode
(if applicable)

Job Title DIRECTOR STATE PUBLIC AFFAIRS

Address 801 17TH ST. NW. SUITE 200 Phone
Street
WASHINGTON, DC 20006 E-mail ILESTHOMASE@
City *State* *Zip* JOHN DEERE

Speaking: ☒ For ☐ Against ☐ Information

Representing JOHN DEERE

Appearing at request of Chair: ☐ Yes ☒ No Lobbyist registered with Legislature: ☐ Yes ☒ No

While it is a Senate tradition to encourage public testimony, time may not permit all persons wishing to speak to be heard at this meeting. Those who do speak may be asked to limit their remarks so that as many persons as possible can be heard.

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S-001 (10/20/11)

THE FLORIDA SENATE

COMMITTEE APPEARANCE RECORD

(Submit to Committee Chair or Administrative Assistant)

will waive

01.12.12

Date

378

Bill Number

Barcode

Name William Large

Phone 8502220170

Address 210 S. Monroe Street

E-mail william@justice.org

Tallahassee FL 32301
City State Zip

Job Title President

Speaking: ☒ For ☐ Against ☐ Information

Appearing at request of Chair ☐

Subject Expert Witness

Representing Florida Justice Reform Institute

Lobbyist registered with Legislature: ☒ Yes ☐ No

Pursuant to s. 11.061, *Florida Statutes*, state, state university, or community college employees are required to file the first copy of this form with the Committee, unless appearance has been requested by the Chair as a witness or for informational purposes.

If designated employee: Time: from _____ .m. to _____ .m.

THE FLORIDA SENATE
APPEARANCE RECORD

(Deliver BOTH copies of this form to the Senator or Senate Professional Staff conducting the meeting)

1 / 12 / 2012

Meeting Date

Topic _____

Bill Number 378
(if applicable)

Name BRIAN PITTS

Amendment Barcode _____
(if applicable)

Job Title TRUSTEE

Address 1119 NEWTON AVENUE SOUTH
Street

Phone 727/897-9291

SAINT PETERSBURG FLORIDA 33705
City State Zip

E-mail JUSTICE2JESUS@YAHOO.COM

Speaking: ☐ For ☒ Against ☒ Information

Representing JUSTICE-2-JESUS

Appearing at request of Chair: ☐ Yes ☒ No

Lobbyist registered with Legislature: ☐ Yes ☒ No

While it is a Senate tradition to encourage public testimony, time may not permit all persons wishing to speak to be heard at this meeting. Those who do speak may be asked to limit their remarks so that as many persons as possible can be heard.

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S-001 (10/20/11)

THE FLORIDA SENATE
APPEARANCE RECORD

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1-12-12

Meeting Date

Topic EXPERT TESTIMONY

Bill Number 378
(if applicable)

Name TROY RAFFERTY

Amendment Barcode _____
(if applicable)

Job Title ATTORNEY

Address 316 S. BAYLOR

Phone 850 435 7163

PENSACOLA FL 32501
City State Zip

E-mail T.RAFFERTY@LEVINE.COM

Speaking: ☐ For ☒ Against ☐ Information

Representing FLA. JUSTICE ASSOCIATION

Appearing at request of Chair: ☐ Yes ☒ No

Lobbyist registered with Legislature: ☐ Yes ☒ No

While it is a Senate tradition to encourage public testimony, time may not permit all persons wishing to speak to be heard at this meeting. Those who do speak may be asked to limit their remarks so that as many persons as possible can be heard.

This form is part of the public record for this meeting.

S-001 (10/20/11)

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 504

INTRODUCER: Criminal Justice Committee and Senator Evers

SUBJECT: Juvenile Justice

DATE: January 11, 2012

REVISED: _____

| | ANALYST | STAFF DIRECTOR | REFERENCE | ACTION |
|----|---------|----------------|-----------|------------------|
| 1. | Dugger | Cannon | CJ | Fav/CS |
| 2. | Irwin | Cibula | JU | Favorable |
| 3. | | | BC | |
| 4. | | | | |
| 5. | | | | |
| 6. | | | | |

Please see Section VIII. for Additional Information:

- | | | |
|------------------------------|--|---|
| A. COMMITTEE SUBSTITUTE..... | <input checked="checked" type="checkbox"/> | Statement of Substantial Changes |
| B. AMENDMENTS..... | <input type="checkbox"/> | Technical amendments were recommended |
| | <input type="checkbox"/> | Amendments were recommended |
| | <input type="checkbox"/> | Significant amendments were recommended |

I. Summary:

The bill authorizes the Department of Juvenile Justice (DJJ) to develop or contract for mother-infant programs within its continuum of care. The bill also defines a “mother-infant program” as a residential program designed to serve the needs of juvenile mothers or expectant juvenile mothers who are committed as delinquents. A mother-infant program must be licensed as a childcare facility under s. 402.308, F.S.

The bill also allows the DJJ to pay up to \$5,000 toward basic funeral expenses for a youth who dies in the department’s custody, if the parents or guardians are indigent and unable to pay and there is no other funding source available to pay these expenses. This decision to pay funeral expenses will be made at the discretion of the secretary of the department.

Finally, the bill deletes provisions in numerous sections in chapters 984 and 985, F.S., which reference serious or habitual juvenile offenders and the serious or habitual juvenile offender programs (SHOPs). This change conforms the statutes to the repeals made by legislation passed during the 2011 Regular Session.

The bill substantially amends the following sections of the Florida Statutes: 984.03, 985.03, 985.14, 985.441, 985.601, 985.0301, 985.045, 985.688, and 985.721.

II. Present Situation:

Mother-Infant Commitment Program

Section 985.441, F.S., provides various juvenile commitment options for the court. The court may commit an adjudicated delinquent youth as follows: to a licensed child-caring agency willing to receive the youth; to the Department of Juvenile Justice for placement in a program at a restrictiveness level defined in s. 985.03, F.S.; to the DJJ for placement in a program for serious or habitual juvenile offenders; or to the DJJ for placement in a program for juvenile sexual offenders.

Section 985.601(3)(a), F.S., requires the DJJ to develop or contract for various programs to provide rehabilitative treatment for adjudicated delinquent youth, including in part, the following: early intervention and prevention, diagnostic and classification assessments, individual and family counseling, community-based mental health treatment services, community-based residential and nonresidential programs, and environmental programs.

Currently, the DJJ operates a 20-bed mother-infant program in Miami-Dade County; however, there is no statutory provision for programs designed for pregnant girls or mothers with infants. Women in Need of Greater Strength (WINGS) for Life was established in 2001 as a residential commitment program for females in an educational environment. On July 1, 2006, WINGS became a residential commitment treatment program for 20 pregnant or postpartum females and their babies. “The mission of the WINGS for Life program is to celebrate diversity and womanhood by working to enhance the quality of life for the young woman and her child.”¹

The objectives of the program are to provide a structured and supervised transition from residential placement to the community and to closely monitor the youth to ensure public safety. The goal is to return these youths back into the mainstream of their communities with the skills to lead productive lives and successfully parent their children. The WINGS for Life program currently has the capacity to serve 20 women ages 14 through 19.²

Funeral Expenses for Juveniles in the Custody of the DJJ

A youth died while in the custody of the DJJ at the juvenile detention center in West Palm Beach in July of this year. The DJJ tried to pay some of the funeral expenses, relying on its internal policy authorizing the department to pay up to a maximum of \$5,000 for funeral expenses when a youth dies in its custody and his or her parents are indigent and unable to pay. The Department of Financial Services denied the department’s payment because of the lack of express statutory authority allowing the DJJ to take such action.³

¹ Department of Juvenile Justice, WINGS for Life website, http://www.djj.state.fl.us/Residential/Facilities/south_facilities/WINGS_FOR_LIFE.html (last visited Dec. 19, 2011).

² *Id.*

³ Carol Marbin Miller, *Florida finance chief won’t pay for funeral of teen who died in lockup*, THE MIAMI HERALD, July 29, 2011, available at http://www.miamiherald.com/2011/07/29/2337038/florida_finance_chief_wont_pay.html (last visited on

According to the DJJ, when a state agency is responsible for the safety of a youth and that youth dies in the agency's custody, it may be beneficial to all concerned to offer, in some circumstances, financial assistance to parents who are unable to pay the youth's funeral expenses.⁴

Serious or Habitual Juvenile Offenders

The Legislature in 2011 passed legislation repealing numerous provisions relating to serious or habitual juvenile offenders and the serious or habitual offender programs.⁵ According to the DJJ, the SHOPS had a long history of being underused and the changes made by the 2011 Legislature more accurately reflected the practices of the DJJ.⁶

III. Effect of Proposed Changes:

The bill amends s. 985.601(3)(a), F.S., to authorize the Department of Juvenile Justice to develop or contract for mother-infant programs within its continuum of care. The bill also defines under s. 985.03, F.S., a "mother-infant program" as a residential program designed to serve the needs of juvenile mothers or expectant juvenile mothers who are committed as delinquents and which is operated or contracted by the DJJ. The mother-infant program must be licensed as a childcare facility under s. 402.308, F.S. It must also provide the necessary services and support to help the committed mother provide for her child's needs. If the mother agrees, the child may come with the mother into the program. This change will give express legislative authority for the current mother-infant program operating in Miami-Dade County and for any other future mother-infant programs.

The bill also amends s. 985.601, F.S., allowing the DJJ to pay up to \$5,000 toward basic funeral expenses for a youth who dies in the department's custody, if the parents or guardians are indigent and unable to pay and there is no other funding source available to pay these expenses. The decision to pay funeral costs will be at the discretion of the secretary of the department. This change will codify the DJJ's internal policy of paying funeral expenses under certain circumstances.

Finally, the bill deletes provisions in the following sections of chapters 984 and 985, F.S., which reference serious or habitual juvenile offenders and the serious or habitual juvenile offender programs: s. 984.03(48), F.S. (defines a SHOP); s. 985.14, F.S. (refers to assessment for placement in a SHOP); s. 985.441, F.S. (refers to juvenile placement in a SHOP); s. 985.601(3)(a), F.S. (refers to SHOPS); s. 985.0301, F.S. (refers to SHOPS); and s. 985.688(2), F.S. (refers to SHOPS). These changes conform the statutes with the repeals made by legislation

Dec. 19, 2011). See also the Department of Juvenile Justice, 2012 Legislative Analysis SB 504 (on file with the Senate Judiciary Committee).

⁴ Department of Juvenile Justice, 2012 Agency Proposal Juvenile Justice Reform (on file with the Senate Judiciary Committee).

⁵ CS/SB 618, ch. 2011-70, L.O.F.

⁶ 2011 Department of Juvenile Justice Legislative Priority Paper, updated Mar. 4, 2011 (on file with the Senate Judiciary Committee).

passed during the 2011 Regular Session. Technical changes are also made in s. 985.045, F.S., and s. 985.721, F.S., to conform statutory cross-references.

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:

Under certain circumstances, SB 504 will help parents or guardians defray up to \$5,000 in funeral costs for youth who die in the custody of the Department of Juvenile Justice.

C. Government Sector Impact:

According to the DJJ, there will be no fiscal impact upon the department because of the bill.

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 November 17, 2011:

- Adds a definition of “mother-infant program” in s. 985.03, F.S., and authorizes the Department of Juvenile Justice to develop or contract for such programs in

s. 985.601, F.S., rather than amending s. 985.441, F.S., to allow the court to commit an adjudicated delinquent mother or expectant mother to such program.

- Deletes additional sections that reference serious or habitual juvenile offenders and the serious or habitual offender programs in chapters 984 and 985, F.S.

B. Amendments:

None.

By the Committee on Criminal Justice; and Senator Evers

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A bill to be entitled

An act relating to the Department of Juvenile Justice; amending s. 984.03, F.S.; deleting obsolete references; amending s. 985.03, F.S.; creating and revising definitions; amending s. 985.14, F.S.; deleting obsolete references; amending s. 985.441, F.S.; deleting an obsolete provision; amending s. 985.601, F.S.; revising the types of diversified and innovative programs to provide rehabilitative treatment that may be developed or contracted for by the department, to include mother-infant programs and remove reference to an obsolete program; authorizing the department, at the secretary's discretion, to pay up to a specified amount toward the basic funeral expenses for a youth who dies while in the custody of the department and whose parents or guardians are indigent and for which no other funding is available; amending s. 985.0301, F.S.; deleting obsolete or unnecessary references and language; amending s. 985.045, F.S.; conforming a cross-reference; amending s. 985.688, F.S.; deleting obsolete references; amending s. 985.721, F.S.; conforming a cross-reference; providing an effective date.

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

Section 1. Subsections (49) through (56) of section 984.03, Florida Statutes, are renumbered as subsections (48) through (55), respectively, and present subsection (48) of that section

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

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is amended to read:

984.03 Definitions.—When used in this chapter, the term: ~~(48) "Serious or habitual juvenile offender program" means the program established in s. 985.47.~~

Section 2. Subsection (29) of section 985.03, Florida Statutes, is amended, subsections (37) through (57) of that section are renumbered as subsections (38) through (58), respectively, and a new subsection (37) is added to that section, to read:

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

(29) "Juvenile justice continuum" includes, but is not limited to, delinquency prevention programs and services designed for the purpose of preventing or reducing delinquent acts, including criminal activity by criminal gangs, and juvenile arrests, as well as programs and services targeted at children who have committed delinquent acts, and children who have previously been committed to residential treatment programs for delinquents. The term includes children-in-need-of-services and families-in-need-of-services programs; conditional release; substance abuse and mental health programs; educational and career programs; recreational programs; community services programs; community service work programs; mother-infant programs; and alternative dispute resolution programs serving children at risk of delinquency and their families, whether offered or delivered by state or local governmental entities, public or private for-profit or not-for-profit organizations, or religious or charitable organizations.

(37) "Mother-infant program" means a residential program designed to serve the needs of juvenile mothers or expectant

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juvenile mothers who are committed as delinquents, which is operated or contracted by the department. A mother-infant program facility must be licensed as a child care facility under s. 402.308 and must provide the services and support necessary to enable each juvenile mother committed to the facility to provide for the needs of her infants who, upon agreement of the mother, may accompany them in the program.

Section 3. Paragraph (a) of subsection (3) of section 985.14, Florida Statutes, is amended to read:

985.14 Intake and case management system.—

(3) The intake and case management system shall facilitate consistency in the recommended placement of each child, and in the assessment, classification, and placement process, with the following purposes:

(a) An individualized, multidisciplinary assessment process that identifies the priority needs of each individual child for rehabilitation and treatment and identifies any needs of the child's parents or guardians for services that would enhance their ability to provide adequate support, guidance, and supervision for the child. This process shall begin with the detention risk assessment instrument and decision, shall include the intake preliminary screening and comprehensive assessment for substance abuse treatment services, mental health services, retardation services, literacy services, and other educational and treatment services as components, additional assessment of the child's treatment needs, and classification regarding the child's risks to the community and, for a serious or habitual delinquent child, shall include the assessment for placement in a serious or habitual delinquent children program under s.

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985.47. The completed multidisciplinary assessment process shall result in the predisposition report.

Section 4. Subsection (1) of section 985.441, Florida Statutes, is amended to read:

985.441 Commitment.—

(1) The court that has jurisdiction of an adjudicated delinquent child may, by an order stating the facts upon which a determination of a sanction and rehabilitative program was made at the disposition hearing:

(a) Commit the child to a licensed child-caring agency willing to receive the child; however, the court may not commit the child to a jail or to a facility used primarily as a detention center or facility or shelter.

(b) Commit the child to the department at a restrictiveness level defined in s. 985.03. Such commitment must be for the purpose of exercising active control over the child, including, but not limited to, custody, care, training, monitoring for substance abuse, electronic monitoring, and treatment of the child and release of the child from residential commitment into the community in a postcommitment nonresidential conditional release program. If the child is not successful in the conditional release program, the department may use the transfer procedure under subsection (4).

~~(c) Commit the child to the department for placement in a program or facility for serious or habitual juvenile offenders in accordance with s. 985.47.~~

~~1. Following a delinquency adjudicatory hearing under s. 985.35 and a delinquency disposition hearing under s. 985.433 that results in a commitment determination, the court shall, on~~

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117 ~~its own or upon request by the state or the department,~~
 118 ~~determine whether the protection of the public requires that the~~
 119 ~~child be placed in a program for serious or habitual juvenile~~
 120 ~~offenders and whether the particular needs of the child would be~~
 121 ~~best served by a program for serious or habitual juvenile~~
 122 ~~offenders as provided in s. 985.47. The determination shall be~~
 123 ~~made under ss. 985.47(1) and 985.433(7).~~

124 ~~2. Any commitment of a child to a program or facility for~~
 125 ~~serious or habitual juvenile offenders must be for an~~
 126 ~~indeterminate period of time, but the time may not exceed the~~
 127 ~~maximum term of imprisonment that an adult may serve for the~~
 128 ~~same offense.~~

129 (c)(d) Commit the child to the department for placement in
 130 a program or facility for juvenile sexual offenders in
 131 accordance with s. 985.48, subject to specific appropriation for
 132 such a program or facility.

133 1. The child may only be committed for such placement
 134 pursuant to determination that the child is a juvenile sexual
 135 offender under the criteria specified in s. 985.475.

136 2. Any commitment of a juvenile sexual offender to a
 137 program or facility for juvenile sexual offenders must be for an
 138 indeterminate period of time, but the time may not exceed the
 139 maximum term of imprisonment that an adult may serve for the
 140 same offense.

141 Section 5. Paragraph (a) of subsection (3) of section
 142 985.601, Florida Statutes, is amended, and subsection (11) is
 143 added to that section, to read:

144 985.601 Administering the juvenile justice continuum.—

145 (3) (a) The department shall develop or contract for

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146 diversified and innovative programs to provide rehabilitative
 147 treatment, including early intervention and prevention,
 148 diversion, comprehensive intake, case management, diagnostic and
 149 classification assessments, individual and family counseling,
 150 shelter care, diversified detention care emphasizing
 151 alternatives to secure detention, diversified probation, halfway
 152 houses, foster homes, community-based substance abuse treatment
 153 services, community-based mental health treatment services,
 154 community-based residential and nonresidential programs, mother-
 155 infant programs, and environmental programs, ~~and programs for~~
 156 ~~serious or habitual juvenile offenders.~~ Each program shall place
 157 particular emphasis on reintegration and conditional release for
 158 all children in the program.

159 (11) At the secretary's discretion, the department is
 160 authorized to pay up to \$5,000 toward the basic funeral expenses
 161 for a youth who dies while in the custody of the department and
 162 whose parents or guardians are indigent and unable to pay such
 163 expenses and for which there is no other source of funding
 164 available.

165 Section 6. Subsection (5) of section 985.0301, Florida
 166 Statutes, is amended to read:

167 985.0301 Jurisdiction.—

168 (5) (a) Notwithstanding ss. 743.07, 985.43, 985.433,
 169 985.435, 985.439, and 985.441, and except as provided in ss.
 170 985.461 and, 985.465, ~~and 985.47~~ and paragraph (f), when the
 171 jurisdiction of any child who is alleged to have committed a
 172 delinquent act or violation of law is obtained, the court shall
 173 retain jurisdiction, unless relinquished by its order, until the
 174 child reaches 19 years of age, with the same power over the

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child which the court had before the child became an adult. For the purposes of s. 985.461, the court may retain jurisdiction for an additional 365 days following the child's 19th birthday if the child is participating in transition-to-adulthood services. The additional services do not extend involuntary court-sanctioned residential commitment and therefore require voluntary participation by the affected youth.

(b) Notwithstanding ss. 743.07 and 985.455(3), ~~and except as provided in s. 985.47,~~ the term of any order placing a child in a probation program must be until the child's 19th birthday unless he or she is released by the court on the motion of an interested party or on his or her own motion.

(c) Notwithstanding ss. 743.07 and 985.455(3), ~~and except as provided in s. 985.47,~~ the term of the commitment must be until the child is discharged by the department or until he or she reaches the age of 21 years. Notwithstanding ss. 743.07, 985.435, 985.437, 985.439, 985.441, 985.455, and 985.513, and except as provided in this section ~~and s. 985.47,~~ a child may not be held under a commitment from a court under s. 985.439, s. 985.441(1)(a) or (b), or s. 985.455 after becoming 21 years of age.

(d) The court may retain jurisdiction over a child committed to the department for placement in a juvenile prison or in a high-risk or maximum-risk residential commitment program to allow the child to participate in a juvenile conditional release program pursuant to s. 985.46. The jurisdiction of the court may not be retained after the child's 22nd birthday. However, if the child is not successful in the conditional release program, the department may use the transfer procedure

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under s. 985.441(4).

(e) The court may retain jurisdiction over a child committed to the department for placement in an intensive residential treatment program for 10-year-old to 13-year-old offenders, in the residential commitment program in a juvenile prison or in a residential sex offender program, ~~or in a program for serious or habitual juvenile offenders as provided in s. 985.47 or s. 985.483~~ until the child reaches the age of 21. If the court exercises this jurisdiction retention, it shall do so solely for the purpose of the child completing the intensive residential treatment program for 10-year-old to 13-year-old offenders, in the residential commitment program in a juvenile prison, or in a residential sex offender program, ~~or the program for serious or habitual juvenile offenders.~~ Such jurisdiction retention does not apply for other programs, other purposes, or new offenses.

(f) The court may retain jurisdiction over a child committed to a juvenile correctional facility or a juvenile prison until the child reaches the age of 21 years, specifically for the purpose of allowing the child to complete such program.

~~(g) 1. Notwithstanding ss. 743.07 and 985.455(3), a serious or habitual juvenile offender shall not be held under commitment from a court under s. 985.441(1)(c), s. 985.47, or s. 985.565 after becoming 21 years of age. This subparagraph shall apply only for the purpose of completing the serious or habitual juvenile offender program under this chapter and shall be used solely for the purpose of treatment.~~

~~2. The court may retain jurisdiction over a child who has been placed in a program or facility for serious or habitual~~

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~~juvenile offenders until the child reaches the age of 21, specifically for the purpose of the child completing the program.~~

~~(g) (h)~~ The court may retain jurisdiction over a juvenile sexual offender who has been placed in a program or facility for juvenile sexual offenders until the juvenile sexual offender reaches the age of 21, specifically for the purpose of completing the program.

~~(h) (i)~~ The court may retain jurisdiction over a child and the child's parent or legal guardian whom the court has ordered to pay restitution until the restitution order is satisfied. To retain jurisdiction, the court shall enter a restitution order, which is separate from any disposition or order of commitment, on or prior to the date that the court's jurisdiction would cease under this section. The contents of the restitution order shall be limited to the child's name and address, the name and address of the parent or legal guardian, the name and address of the payee, the case number, the date and amount of restitution ordered, any amount of restitution paid, the amount of restitution due and owing, and a notation that costs, interest, penalties, and attorney ~~attorney's~~ fees may also be due and owing. The terms of the restitution order are subject to s. 775.089(5).

~~(i) (j)~~ This subsection does not prevent the exercise of jurisdiction by any court having jurisdiction of the child if the child, after becoming an adult, commits a violation of law.

Section 7. Subsection (5) of section 985.045, Florida Statutes, is amended to read:

985.045 Court records.—

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(5) This chapter does not prohibit a circuit court from providing a restitution order containing the information prescribed in s. 985.0301(5)(h) ~~985.0301(5)(i)~~ to a collection court or a private collection agency for the sole purpose of collecting unpaid restitution ordered in a case in which the circuit court has retained jurisdiction over the child and the child's parent or legal guardian. The collection court or private collection agency shall maintain the confidential status of the information to the extent such confidentiality is provided by law.

Section 8. Subsection (2) of section 985.688, Florida Statutes, is amended to read:

985.688 Administering county and municipal delinquency programs and facilities.—

(2) A county or municipal government may develop or contract for innovative programs that provide rehabilitative treatment with particular emphasis on reintegration and conditional release for all children in the program, including halfway houses and community-based substance abuse treatment services, mental health treatment services, residential and nonresidential programs, and environmental programs, ~~and programs for serious or habitual juvenile offenders.~~

Section 9. Subsection (2) of section 985.721, Florida Statutes, is amended to read:

985.721 Escapes from secure detention or residential commitment facility.—An escape from:

(2) Any residential commitment facility described in s. 985.03(46) ~~985.03(45)~~, maintained for the custody, treatment, punishment, or rehabilitation of children found to have

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291 committed delinquent acts or violations of law; or

292

293 constitutes escape within the intent and meaning of s. 944.40

294 and is a felony of the third degree, punishable as provided in

295 s. 775.082, s. 775.083, or s. 775.084.

296 Section 10. This act shall take effect July 1, 2012.

THE FLORIDA SENATE
APPEARANCE RECORD

(Deliver BOTH copies of this form to the Senator or Senate Professional Staff conducting the meeting)

1 / 12 / 2012

Meeting Date

Topic _____

Bill Number 504
(if applicable)

Name BRIAN PITTS

Amendment Barcode _____
(if applicable)

Job Title TRUSTEE

Address 1119 NEWTON AVENUE SOUTH
Street

Phone 727/897-9291

SAINT PETERSBURG FLORIDA 33705
City State Zip

E-mail JUSTICE2JESUS@YAHOO.COM

Speaking: ☒ ^{in part} For ☐ Against ☒ Information

Representing JUSTICE-2-JESUS

Appearing at request of Chair: ☐ Yes ☒ No

Lobbyist registered with Legislature: ☐ Yes ☒ No

While it is a Senate tradition to encourage public testimony, time may not permit all persons wishing to speak to be heard at this meeting. Those who do speak may be asked to limit their remarks so that as many persons as possible can be heard.

This form is part of the public record for this meeting.

S-001 (10/20/11)

THE FLORIDA SENATE
APPEARANCE RECORD

(Deliver BOTH copies of this form to the Senator or Senate Professional Staff conducting the meeting)

1/10/2012
Meeting Date

Topic _____

Bill Number SB504
(if applicable)

Name Ara Sanchez

Amendment Barcode _____
(if applicable)

Job Title Legislative Affairs Dir.

Address 2737 Centerville Dr

Phone 850-410-1097

Tallahassee FL 32399
City State Zip

E-mail ~~ara.sanchez@flhouse.gov~~
anamaria.sanchez@djj.state.fl.us

Speaking: ☒ For ☐ Against ☐ Information

Representing DJJ

Appearing at request of Chair: ☐ Yes ☒ No

Lobbyist registered with Legislature: ☒ Yes ☐ No

While it is a Senate tradition to encourage public testimony, time may not permit all persons wishing to speak to be heard at this meeting. Those who do speak may be asked to limit their remarks so that as many persons as possible can be heard.

This form is part of the public record for this meeting.

S-001 (10/20/11)

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 486

INTRODUCER: Senator Diaz de la Portilla

SUBJECT: Jurisdiction of the Courts

DATE: January 11, 2012

REVISED: _____

| | ANALYST | STAFF DIRECTOR | REFERENCE | ACTION |
|----|----------|----------------|-----------|------------------|
| 1. | Juliachs | Hrdlicka | CM | Favorable |
| 2. | White | Cibula | JU | Favorable |
| 3. | | | BC | |
| 4. | | | | |
| 5. | | | | |
| 6. | | | | |

I. Summary:

Senate Bill 486 amends Florida's long-arm, choice-of-law, and forum-selection statutes, as well as provisions of the Florida Enforcement of Foreign Judgment Act and Florida International Commercial Arbitration Act.

Specifically, the bill amends s. 48.193, F.S., commonly referred to as the long-arm statute, by including language that extends the court's jurisdiction to individuals entering into a contract that complies with Florida's forum-selection statute. The bill also amends s. 685.101, F.S., by removing statutory language that prevents the enforcement of choice-of-law provisions found in contracts where each party is a nonresident. As such, the bill expands the jurisdiction of the courts of this state to hear actions that do not bear a substantial or reasonable relation to this state or that do not involve a party who is resident of this state or incorporated in this state. The amendments to ss. 685.101 and 685.102, F.S., will apply to contracts entered into on or after July 1, 2012.

Additionally, the term "foreign judgment" found in s. 55.502, F.S., of the Florida Enforcement of Foreign Judgment Act is amended to mean "any judgment, decree, or order of a court which is entitled to full faith and credit in this state."

Lastly, provisions from the Florida International Commercial Arbitration Act, ch. 689, F.S., are amended to correct cross-references within the act in order to conform exactly to the UNCITRAL Model Law on Commercial Arbitration.

This bill substantially amends the following sections of the Florida Statutes: 48.193, 55.502, 684.0019, 684.0026, 685.101, and 685.102.

II. Present Situation:

Jurisdiction

The ability of a court to assert personal jurisdiction over a nonresident is subject to the constitutional requirements of the Due Process Clause of the Fourteenth Amendment.¹ The test for determining whether a court is able to assert personal jurisdiction over a nonresident is whether the nonresident has “minimum contacts” in the forum such that the commencement of a proceeding against that individual does “not offend traditional notions of fair play and justice.”² Foreseeability is key; thus, the principal inquiry is whether the nonresident’s conduct and connection with the forum state would lead him or her to believe that they could “reasonably anticipate being haled into court.”³

Florida Long-Arm Statute

The second limitation on a court’s ability to assert personal jurisdiction is derived from a state’s long-arm statute. Such statutes can be drafted broadly⁴ to reach the maximum bounds of the Due Process Clause or narrowly by enumerating specific acts or activities that would allow for a court to assume personal jurisdiction in a particular case. Florida’s statute falls in the latter category.

In *Venetian Salami Co. v. J.S. Parthenais*, the Florida Supreme Court described the interplay between Florida’s long-arm statute and the due process requirements of the Fourteenth Amendment as follows:

By enacting section 48.193, the legislature has determined the requisite basis for obtaining jurisdiction over nonresident defendants as far as Florida is concerned. It has not specifically addressed whether the federal constitutional requirement of minimum contacts has been met. As a practical matter, it could not do so because each case will depend upon the facts.⁵

Therefore, two inquiries must be satisfied. The first is whether there is a jurisdictional basis under the Florida long-arm statute to assert personal jurisdiction; and if so, whether the necessary minimum contacts exist.⁶

¹ U.S. Const. amend. XIV, s. 2 (“No state shall . . . deprive any person of life, liberty, or property without due process of law . . .”); See *International Shoe Co. v. Washington, Office of Unemployment Comp. and Placement*, 326 U.S. 310, 316 (1945).

² *International Shoe*, 326 U.S. at 316.

³ *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 474 (1985) (quoting *World-Wide Volkswagen Co. v. Woodson*, 444 U.S. 286, 297 (1980)).

⁴ An example of a broad long-arm statute can be found in Cal. Civil Code s. 410.10 (2011), which states: “A court of this state may exercise jurisdiction on any basis not inconsistent with the Constitution of this state or of the United States.”

⁵ *Venetian Salami Co. v. J.S. Parthenais*, 554 So. 2d 499, 500 (Fla. 1989).

⁶ *Jetbroadband WV, LLC v. Mastec North America, Inc.*, 13 So. 3d 159, 161 (Fla. 3rd DCA 2009).

Florida' Choice-of-Law and Forum-Selection Statutes

Florida's choice-of-law and forum selection statutes, adopted in 1989, allow parties to a contract to choose Florida law to govern disputes relating to the contract and to select this state's courts as the forum for the resolution of any disputes. These statutes are based on a recommendation of the International Banking and Trade Study Commission which was created by the Legislature in 1988 to "advise on possible measures to reduce impediments to commerce in Florida."⁷ The House Staff Analysis for the legislation creating the statutes stated that the bill would "enhance Florida's attractiveness as an international commercial center."⁸

Choice-of-Law Statute

Florida's choice-of-law statute is drafted as a limitation on the power of persons to enter into contracts. However, the provision acts as a limitation on the power of a court to enforce a contractual provision designating Florida law as the law that will govern disputes relating to a contract.

Section 685.101(1), F.S., effectively grants broad authority to courts to enforce "to the extent permitted under the United States Constitution" a contractual provision designating Florida law as the law that will govern a contract valued at not less than \$250,000. Section 685.101(2), F.S., provides a list of exceptions to the broad grant of authority. Specifically, under s. 685.101(2)(a), F.S., the authority of a court to enforce a choice of law provision:

does not apply to any contract, agreement, or undertaking:

(a) Regarding any transaction which does not bear a substantial or reasonable relation to this state in which every party is either or a combination of:

1. A resident and citizen of the United States, but not of this state; or
2. Incorporated or organized under the laws of another state and does not maintain a place of business in this state

In interpreting s. 685.101, F.S., the court in *Jetbroadband WV, LLC v. MasTec North America, Inc.*, stated that the section only applies if: "1) the contract bears a substantial or reasonable relation to Florida, or 2) at least one of the parties is either a resident or citizen of Florida (if a person), or is incorporated or organized under the laws of Florida or maintains a place of business in Florida (if a business)."⁹

Additionally, the choice-of-law statute does not apply to contracts for labor, employment or relating to any transaction for personal, family, or household purposes.¹⁰

⁷ Fla. H. R. Comm. on Commerce, SB 109 (1989) Staff Analysis (June 27, 1989).

⁸ *Id.*

⁹ *Jetbroadband WV, LLC v. MasTec North America, Inc.*, 13 So. 3d 159, 162 (Fla. App. 3d DCA 2009) (quoting Edward M. Mullins & Douglas J. Giuliano, *Contractual Waiver of Personal Jurisdiction Under F.S. § 685.102: The Long-Arm Statute's Little-Known Cousin*, 80 FLA Bar J. 36, 37 (May 2006)).

¹⁰ Section 685.101(2)(b), and (c), F.S.

Forum-Selection Statute

The forum-selection statute, s. 685.102, F.S., was also adopted in 1989 along with its counterpart, the Florida choice-of-law statute. The forum-selection statute grants Florida courts jurisdiction to hear cases relating to any contracts that have been made consistent with s. 685.101, F.S., which with some exceptions, authorizes parties to choose Florida law to govern a contract.

Regarding enforceability, the United States Supreme Court has held that a forum-selection clause should be upheld, unless it can be shown that its enforcement would be unreasonable or unjust, or that the clause was invalid as a result of fraud or overreaching.¹¹ As it relates to personal jurisdiction and the minimum contacts analysis, the United States Supreme Court has also held that the minimum contacts standard is met if a forum-selection clause exists that is freely negotiated and is not unreasonable and unjust.

Interaction of the Choice-of-Law and Forum-Selection Statutes

Read together, the choice-of-law and forum-selection statutes:

stand for the proposition that, if certain requirements are met, parties may, by contract alone, confer personal jurisdiction on the courts of Florida. To satisfy the statutory requirements, the contract, agreement, or undertaking must (1) include a choice of law provision designating Florida Law as the governing law, (2) include a provision whereby the non-resident agrees to submit to the jurisdiction of the courts of Florida, (3) involve consideration of not less than \$250,000, (4) not violate the United States Constitution, and (5) either bear a substantial or reasonable relation to Florida or have at least one of the parties be a resident of Florida or incorporated under its laws. Thus, as long as one of the parties is a resident of Florida or incorporated under its laws, and the other statutory requirements are met, sections 685.101-.102 operate irrespective of whether the underlying contract bears any relation to Florida and notwithstanding any law to the contrary.¹²

Modern Trends Regarding Choice-of-Law Clauses

In an effort to promote predictability and certainty in commercial relation disputes, the use of choice-of-law provisions in contracts has increased significantly. As such, the judicial enforcement of choice-of-law clauses has now become the norm.¹³ As one writer comments, there is evidence that states do compete for law business by enforcing contractual choice-of-law.¹⁴ His findings are summarized below:

First, there is evidence of the existence of a market for contractual choice. Many relatively large companies use choice-of-law clauses, thereby suggesting that there is a significant demand for enforcement. The University of Missouri's

¹¹ *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 15 (1972).

¹² *Jetbroadband*, at 162 (footnote omitted).

¹³ Larry E. Ribstein, *From Efficiency to Politics in Contractual Choice of Law*, 37 GA. L. REV. 363, 382 (Winter 2003).

¹⁴ *Id.* at 431.

Contracting and Organizations Research Institute (CORI) has collected such contracts from publicly traded companies that disclose contracts in filings with the Securities and Exchange Commission A search of CORI's web database indicates that 4,507 of 8,583 contracts of various types had choice-of-law clauses. Second, a further indication of the existence of a choice-of-law market is that parties often contract for the law of one of a relatively small group of states, indicating that they are not choosing a party's domicile or the jurisdiction where the particular transaction is based. Eighty-nine percent of the contracts with choice-of-law clauses select the law of only ten states, seventy-two percent select the law of four states, and twenty-six percent select the law of Delaware, one of the smaller states.

....

Fourth, and most importantly for present purposes, the parties tend to choose states that have signaled their intent to compete in the choice-of-law market. The top five states, with a combined eighty percent market share -- Delaware, New York, California, Texas, and Illinois - all have adopted statutes providing for enforcement of contractual choice of law in relatively large contracts, with the remaining statute state, Florida, in eighth place¹⁵

In addition, the cited benefits enjoyed by jurisdictions that have adopted statutes to authorize the enforcement of choice-of-law provisions found in contracts include the attraction of business activity into the forum state, as well as increased tourism.^{16, 17} Moreover, some propose that choice-of-law clauses reduce parties' litigation costs seeing that fewer resources will be devoted to presenting conflict-of-law arguments before the courts in an effort to determine which state law is applicable in the absence of a choice-of-law provision that designates the governing law.¹⁸

The American Law Institute has promulgated the Restatement (2d) of Conflict of Laws.¹⁹ Section 187 begins with the presumption that a contract's choice-of-law provision will be enforced, but sets out two exceptions referred to as the "nexus test" and the "fundamental policy test."²⁰ Under the nexus test, choice-of-law clauses will not be enforced if the chosen jurisdiction bears "no substantial relationship" to the parties or transaction, and there is "no other reasonable basis" for the choice.²¹ Under the fundamental policy test, choice-of-law clauses will not be enforced if the application of the chosen law would offend "the fundamental policy of a state"

¹⁵ *Id.* at 432-434.

¹⁶ Garrett L. Pendleton & Michael A. Tessitore, *Foreign Litigants Seek Forum to Litigate – Is Florida Open for Business?*, 79 FLA. BAR J., 20, 24 (Mar. 2005).

¹⁷ *But see*, Ribstein *supra* note 13, at 429. ("States have incentives not only to avoid repelling firms, but also to encourage them to establish significant local contacts, such as headquarters. The relevance of this factor depends on whether the rule regarding enforcement of contractual choice requires significant contacts in a state as a prerequisite to enforcing a contract applying that state's law. This depends on states' willingness not only to apply their own law where it is designated in the contract, but also to apply another state's law where it is designated and the state has contacts with the contracting parties, and to refuse to apply their own state's law where it is designated in the contract but where the state lacks significant contacts with the parties.").

¹⁸ *Id.* at 403.

¹⁹ Restatement Second of Conflict of Laws (1971).

²⁰ Richard T. Franch, et. al., *Choice of law and choice of forum are both crucial: Parties to international agreement should give careful thought to each*, The Nat'l Law J., Feb. 2002.

²¹ Restatement Second of Conflict of Laws at s. 187(2)(a)

with an interest in the transaction materially greater than that of the chosen jurisdiction and whose law would apply “in the absence of an effective choice-of-law by the parties.”²²

Although persuasive and instructive, it should be noted that a Restatement is not considered to be a primary source of law, but serves as general resource for understanding and researching a specific area of the law. As such, several jurisdictions, including New York, Delaware, California, and Illinois, have removed the substantial relationship requirement from their choice-of-law statutes.²³

Florida Enforcement of Foreign Judgments Act

Article IV, clause 1 of the United States Constitution provides that “Full Faith and Credit shall be given in each State to the public Acts, Records, and Judicial Proceedings of every other State.”²⁴ Accordingly, under the Florida Enforcement of Foreign Judgments Act (act), ss. 55.501-55.509, F.S., foreign judgments from sister jurisdictions may be enforced in Florida upon being recorded in the office of the clerk of the circuit court of any county.²⁵

In its current statutory form, the foreign judgments that may be enforced under the act include “any judgment, decree, or order of a court of any other State or of the United States if such judgment, decree, or order is entitled to full faith and credit in this State.”²⁶ Absent from this definition is any reference to territories or possessions of the United States that are also entitled to full faith and credit under federal law.²⁷

In *Rodriguez v. Nasrallah*,²⁸ a Florida court held that “[j]udgments of courts in Puerto Rico are entitled to full faith and credit in the same manner as judgments from courts of sister States.” As a result, the court permitted the enforcement of a Puerto Rican judgment in Florida. However, taken literally, a judgment from a Puerto Rican court would not qualify as a judgment from a *state court* under s. 55.502(1), F.S.

Florida International Commercial Arbitration Act

Chapter 2010-60, L.O.F., repealed the then current law relating to international commercial arbitration and adopted instead the United Nations Commission on International Trade Law Model Law on International Commercial Arbitration (UNCITRAL Model Law) as amended in 2006 by the General Assembly.

²² *Id.* at s. 187 (2)(b)

²³ N.Y. GEN OBLIG. LAW ss. 5-1401, 1402 (2011); DEL. CODE ANN. Tit. 6, s. 2708(a) (2011), CAL. CIVIL CODE s. 1646.5 (2011), 735 IL COMP. STAT. ANN. 105/5-5 (2011).

²⁴ U.S. CONST. art. IV, cl 1.

²⁵ Section 55.503, F.S.

²⁶ Section 55.502(1), F.S.

²⁷ See 28 U.S.C. s. 1738 (“The records and judicial proceedings of any court of any such State, Territory or Possession, or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Possessions by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the said attestation is in proper form.”).

²⁸ *Rodriguez v. Nasrallah*, 659 So. 2d 437, 439 (Fla. 1st DCA 1995).

Chapter 684, F.S., in accordance with the UNCITRAL Model Law, applies to any international commercial arbitration subject to an agreement between the United States of America and any other country. The law provides definitions, principles under which the law is to be interpreted, procedural requirements, discovery and evidentiary requirements, as well as arbitral tribunal powers and immunity.

Presently, two of the statutes in the Florida Commercial Arbitration Act contain inadvertent clerical errors as they relate to cross-references. As such, in its current form, the statute does not conform exactly to the UNCITRAL Model Law.

III. Effect of Proposed Changes:

Jurisdiction (Sections 1, 5, and 6)

The bill amends s. 48.193, F.S., to provide an express jurisdictional basis for Florida courts to assert personal jurisdiction over a nonresident who enters into a contract that complies with s. 685.102, F.S.²⁹ As a result, courts may have personal jurisdiction in contracts cases involving only nonresidents if they enter into a contract where the parties agree to designate Florida law as governing the contract, and contractually agree to personal jurisdiction in this state.

The bill amends s. 685.101, F.S., by deleting the following italicized language from the choice-of-law statute:

- (2) This section does not apply to any contract, agreement, or undertaking:
 - (a) *Regarding any transaction which does not bear a substantial or reasonable relation to this state in which every party is either or a combination of:*
 - 1. *A resident and citizen of the United States, but not of this state; or*
 - 2. *Incorporated or organized under the laws of another state and does not maintain a place of business in this state;*³⁰

This language was interpreted in *Jetbroadband WV, LLC v. MasTec North America, Inc.*, to limit the jurisdiction of Florida courts to hear certain contractual disputes to those that “bear a substantial or reasonable relation to Florida or have at least one of the parties be a resident of Florida or incorporated under its laws.”³¹ As such, the deletion of the limitation appears to expand the jurisdiction of the courts of this state accordingly.

The changes to the choice-of-law and forum-selection statutes apply to contracts entered into on or after July 1, 2012.

²⁹ Several other jurisdictions have similar language in their respective long-arm statutes. MICH. COMP. LAWS s. 600.705 (2011); MONT. CODE ANN. s. 25-20-4(b)(1)(E) (2011); S.D. CODIFIED LAWS s. 15-7-2(5) (2011); TENN CODE ANN. s. 20-2-214 (2011) (“Entering into a contract for services to be rendered or for materials to be furnished in [this state] by such person.”).

³⁰ Section 685.101(2)(a), F.S.

³¹ *Jetbroadband*, at 162.

Florida Enforcement of Foreign Judgments Act (Section 2)

The bill amends s. 55.502, F.S., to define a foreign judgment as any “*judgment, decree, or order of a court which is entitled to full faith and credit.*” Accordingly, by removing from the definition of “foreign judgment” any reference to only those orders from the 50 states that comprise the Union, it will allow for the judgments, orders, and decrees from U.S. territories, such as Puerto Rico, to be recognized.

Florida International Commercial Arbitration Act (Sections 3 and 4)

The bill amends ss. 684.0019 and 684.0026, F.S., to correct cross-references to conform the Florida International Commercial Arbitration Act to the UNCITRAL Model Law on Commercial Arbitration.

Effective Date (Section 7)

The bill provides that it will take effect on July 1, 2012.

IV. Constitutional Issues:**A. Municipality/County Mandates Restrictions:**

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. Other Constitutional Issues³²

With respect to choice-of-law conflicts, the United States Supreme Court, in *Hague v. Allstate Insurance Company*, held that “for a State’s substantive law to be selected in a constitutionally permissible manner, the State must have significant contact or a significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair.”³³ Accordingly, the removal of the requirement of “significant contacts” or “reasonable relationship” from a state’s choice-of-law statute could potentially trigger a due process challenge under the Fourteenth Amendment. However, it should be noted that when the Supreme Court rendered its holding in *Hague*, the facts presented in that case did not include a contract whereby the parties agreed to be governed by a specific state’s law. Instead, the question before the Court was which state law applied in the absence of an agreement that designated any state’s law as governing.

³² The constitutional analysis was adapted, in part, from Pendleton, *supra* note 16.

³³ *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 312-313 (1981).

To date, committee staff is unaware of any constitutional challenges to the New York choice-of-law statute, which is the model for the amendments in SB 486. In any event, ss. 685.101 and 685.102, F.S., will continue to preserve existing language that limits the application of the statutes “*to the extent permitted under the United States Constitution.*”³⁴

Furthermore, it has been stated that the “choice of the law of an unrelated jurisdiction will often stand the best chance of being honored if it is reinforced with a forum-selection clause designating the same jurisdiction.”³⁵ Sections 685.101 and 685.102, F.S., as amended by this bill, under the statutes will have that effect, allowing them to stand on stronger constitutional ground.

Lastly, the United States Supreme Court has already stated that in the commercial context the minimum contacts standard is met if a forum-selection clause exists that is freely negotiated and is not unreasonable and unjust.³⁶

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

The private sector impact of SB 486 cannot be accurately determined. According to The Florida Bar, International Law Section, the bill enhances the business climate in Florida by clarifying and streamlining existing legislation related to international law matters in order to increase Florida’s attractiveness as a business friendly state.³⁷

C. Government Sector Impact:

The government sector impact of SB 486 cannot be accurately determined. According to the Office of the State Courts Administrator’s 2012 Judicial Impact Statement, SB 486 could increase the number of contract actions filed in circuit court.³⁸ While the bill would likely impact workload, the office was unable to quantify to what extent.

³⁴ Sections 685.101 and 685.102, F.S.

³⁵ Franch, *supra*, note 20 (“This is especially true in jurisdictions such as New York where the courts give substantial recognition to the parties’ freedom to contract.”).

³⁶ *Burger King*, 471 U.S. at 473, n. 14; *See also, Elandia International, Inc. v. Koy, et al.*, 690 F. Supp. 2d 1317, 1340 (S.D. Fla. 2010).

³⁷ Eduardo Palmer, Summary of Proposed Legislation Submitted on Behalf of The Florida Bar International Law Section Addressing Legal Actions. (Nov. 2011) (on file with the Senate Committee on Judiciary).

³⁸ Office of the State Court Administrator, 2012 Judicial Impact Statement for SB 486 (Oct. 17, 2011) (on file with the Senate Committee on Judiciary).

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.

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

By Senator Diaz de la Portilla

36-00020A-12

2012486

1 A bill to be entitled
 2 An act relating to the jurisdiction of the courts;
 3 amending s. 48.193, F.S.; including as an additional
 4 basis for subjecting a person to the jurisdiction of
 5 the courts of this state provisions which state that a
 6 person submits to the jurisdiction of the courts of
 7 this state by entering into a contract that designates
 8 the law of this state as the law governing the
 9 contract and that contains a provision by which such
 10 person agrees to submit to the jurisdiction of the
 11 courts of this state; amending s. 55.502, F.S.;
 12 revising the definition of the term "foreign judgment"
 13 for purposes of the Florida Enforcement of Foreign
 14 Judgments Act; amending s. 684.0019, F.S.; clarifying
 15 that an arbitral tribunal receiving a request for an
 16 interim measure to preserve evidence in a dispute
 17 governed by the Florida International Commercial
 18 Arbitration Act need consider only to the extent
 19 appropriate the potential harm that may occur if the
 20 measure is not awarded or the possibility that the
 21 requesting party will succeed on the merits of the
 22 claim; amending s. 684.0026, F.S.; correcting a cross-
 23 reference in the Florida International Commercial
 24 Arbitration Act; amending s. 685.101, F.S.; deleting a
 25 restriction on the jurisdiction of the courts of this
 26 state to transactions bearing a substantial relation
 27 to this state; revising application dates of
 28 provisions relating to the jurisdiction of the courts;
 29 amending s. 685.102, F.S.; revising application dates

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

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30 of provisions relating to the jurisdiction of the
 31 courts; providing an effective date.
 32
 33 Be It Enacted by the Legislature of the State of Florida:
 34
 35 Section 1. Subsection (1) of section 48.193, Florida
 36 Statutes, is amended to read:
 37 48.193 Acts subjecting person to jurisdiction of courts of
 38 state.—
 39 (1) Any person, whether or not a citizen or resident of
 40 this state, who personally or through an agent does any of the
 41 acts enumerated in this subsection thereby submits himself or
 42 herself and, if he or she is a natural person, his or her
 43 personal representative to the jurisdiction of the courts of
 44 this state for any cause of action arising from ~~the doing of~~ any
 45 of the following acts:
 46 (a) Operating, conducting, engaging in, or carrying on a
 47 business or business venture in this state or having an office
 48 or agency in this state.
 49 (b) Committing a tortious act within this state.
 50 (c) Owning, using, possessing, or holding a mortgage or
 51 other lien on any real property within this state.
 52 (d) Contracting to insure any person, property, or risk
 53 located within this state at the time of contracting.
 54 (e) With respect to a proceeding for alimony, child
 55 support, or division of property in connection with an action to
 56 dissolve a marriage or with respect to an independent action for
 57 support of dependents, maintaining a matrimonial domicile in
 58 this state at the time of the commencement of this action or, if

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the defendant resided in this state preceding the commencement of the action, whether cohabiting during that time or not. This paragraph does not change the residency requirement for filing an action for dissolution of marriage.

(f) Causing injury to persons or property within this state arising out of an act or omission by the defendant outside this state, if, at or about the time of the injury, either:

1. The defendant was engaged in solicitation or service activities within this state; or

2. Products, materials, or things processed, serviced, or manufactured by the defendant anywhere were used or consumed within this state in the ordinary course of commerce, trade, or use.

(g) Breaching a contract in this state by failing to perform acts required by the contract to be performed in this state.

(h) With respect to a proceeding for paternity, engaging in the act of sexual intercourse within this state with respect to which a child may have been conceived.

(i) Entering into a contract that complies with s. 685.102.

Section 2. Subsection (1) of section 55.502, Florida Statutes, is amended to read:

55.502 Construction of act.—

(1) As used in ss. 55.501-55.509, the term "foreign judgment" means any judgment, decree, or order of a court which ~~of any other state or of the United States if such judgment, decree, or order~~ is entitled to full faith and credit in this state.

Section 3. Section 684.0019, Florida Statutes, is amended

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to read:

684.0019 Conditions for granting interim measures.—

(1) The party requesting an interim measure under s. 684.0018 must satisfy the arbitral tribunal that:

(a) Harm not adequately reparable by an award of damages is likely to result if the measure is not ordered, and such harm substantially outweighs the harm that is likely to result to the party against whom the measure is directed if the measure is granted; and

(b) A reasonable possibility exists that the requesting party will succeed on the merits of the claim. The determination on this possibility does not affect the discretion of the arbitral tribunal in making any subsequent determination.

(2) With regard to a request for an interim measure under s. 684.0018(4) ~~s. 684.0018~~, the requirements in subsection (1) apply only to the extent the arbitral tribunal considers appropriate.

Section 4. Section 684.0026, Florida Statutes, is amended to read:

684.0026 Recognition and enforcement.—

(1) An interim measure issued by an arbitral tribunal shall be recognized as binding and, unless otherwise provided by the arbitral tribunal, enforced upon application to the competent court, irrespective of the country in which it was issued, subject to s. 684.0027 ~~s. 684.0019(1)~~.

(2) The party who is seeking or has obtained recognition or enforcement of an interim measure shall promptly inform the court of the termination, suspension, or modification of the interim measure.

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(3) The court where recognition or enforcement is sought may, if it considers it proper, order the requesting party to provide appropriate security if the arbitral tribunal has not already made a determination with respect to security or if such a decision is necessary to protect the rights of third parties.

Section 5. Section 685.101, Florida Statutes, is amended to read:

685.101 Choice of law.—

(1) The parties to any contract, agreement, or undertaking, contingent or otherwise, in consideration of or relating to any obligation arising out of a transaction involving in the aggregate at least not less than \$250,000, the equivalent thereof in any foreign currency, or services or tangible or intangible property, or both, of equivalent value, including a transaction otherwise covered by s. 671.105(1), may, to the extent permitted under the United States Constitution, agree that the law of this state will govern such contract, agreement, or undertaking, the effect thereof and their rights and duties thereunder, in whole or in part, whether or not such contract, agreement, or undertaking bears any relation to this state.

(2) This section does not apply to any contract, agreement, or undertaking:

~~(a) Regarding any transaction which does not bear a substantial or reasonable relation to this state in which every party is either or a combination of:~~

~~1. A resident and citizen of the United States, but not of this state; or~~

~~2. Incorporated or organized under the laws of another state and does not maintain a place of business in this state;~~

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(a) ~~(b)~~ For labor or employment;

(b) ~~(c)~~ Relating to any transaction for personal, family, or household purposes, unless such contract, agreement, or undertaking concerns a trust at least one trustee of which resides or transacts business as a trustee in this state, in which case this section applies;

(c) ~~(d)~~ To the extent provided to the contrary in s.

671.105(2); or

(d) ~~(e)~~ To the extent such contract, agreement, or undertaking is otherwise covered or affected by s. 655.55.

(3) This section does not limit or deny the enforcement of any provision respecting choice of law in any other contract, agreement, or undertaking.

(4) This section applies to:

~~(a)~~ contracts entered into on or after July 1, 2012 ~~June 27, 1989~~; and

~~(b) Contracts entered into prior to June 27, 1989, if an action or proceeding relating to such contract is commenced on or after June 27, 1989.~~

Section 6. Section 685.102, Florida Statutes, is amended to read:

685.102 Jurisdiction.—

(1) Notwithstanding any law that limits the right of a person to maintain an action or proceeding, any person may, to the extent permitted under the United States Constitution, maintain in this state an action or proceeding against any person or other entity residing or located outside this state, if the action or proceeding arises out of or relates to any contract, agreement, or undertaking for which a choice of the

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law of this state, in whole or in part, has been made consistent
with ~~pursuant to~~ s. 685.101 and which contains a provision by
which such person or other entity residing or located outside
this state agrees to submit to the jurisdiction of the courts of
this state.

(2) This section does not affect the jurisdiction of the
courts of this state over any action or proceeding arising out
of or relating to any other contract, agreement, or undertaking.

(3) This section applies to:

~~(a)~~ contracts entered into on or after July 1, 2012 ~~June~~
~~27, 1989; and~~

~~(b) Contracts entered into prior to June 27, 1989, if an~~
~~action or proceeding relating to such contract is commenced on~~
~~or after June 27, 1989.~~

Section 7. This act shall take effect July 1, 2012.

THE FLORIDA SENATE
APPEARANCE RECORD

(Deliver BOTH copies of this form to the Senator or Senate Professional Staff conducting the meeting)

1/12/12

Meeting Date

Topic Jurisdiction

Bill Number 486
(if applicable)

Name Tammy Perdue

Amendment Barcode _____
(if applicable)

Job Title General Counsel

Address 516 N. Adams St

Phone 850-224-7173

Tallahassee FL 32301
City State Zip

E-mail tperdue@aif.com

Speaking: ☒ For ☐ Against ☐ Information

Representing Associated Industries of Florida

Appearing at request of Chair: ☐ Yes ☒ No

Lobbyist registered with Legislature: ☒ Yes ☐ No

While it is a Senate tradition to encourage public testimony, time may not permit all persons wishing to speak to be heard at this meeting. Those who do speak may be asked to limit their remarks so that as many persons as possible can be heard.

This form is part of the public record for this meeting.

S-001 (10/20/11)

THE FLORIDA SENATE
APPEARANCE RECORD

(Deliver BOTH copies of this form to the Senator or Senate Professional Staff conducting the meeting)

1/12/12
Meeting Date

Topic Jurisdiction of CTs

Bill Number 486
(if applicable)

Name Teye Reeves

Amendment Barcode _____
(if applicable)

Job Title Policy Director

Address 136 S. Bronough ST
Street City State Zip
32301

Phone 850-521-1235

E-mail teye@flchamber.com

Speaking: ☒ For ☐ Against ☐ Information

Representing FL Chamber of Commerce

Appearing at request of Chair: ☐ Yes ☒ No

Lobbyist registered with Legislature: ☒ Yes ☐ No

While it is a Senate tradition to encourage public testimony, time may not permit all persons wishing to speak to be heard at this meeting. Those who do speak may be asked to limit their remarks so that as many persons as possible can be heard.

This form is part of the public record for this meeting.

S-001 (10/20/11)

THE FLORIDA SENATE
APPEARANCE RECORD

(Deliver BOTH copies of this form to the Senator or Senate Professional Staff conducting the meeting)

1 / 12 / 2012

Meeting Date

Topic _____

Bill Number 486
(if applicable)

Name BRIAN PITTS

Amendment Barcode _____
(if applicable)

Job Title TRUSTEE

Address 1119 NEWTON AVENUE SOUTH

Phone 727/897-9291

Street

SAINT PETERSBURG FLORIDA 33705

City

State

Zip

E-mail JUSTICE2JESUS@YAHOO.COM

Speaking: ☒ ^{in part} For ☐ Against ☒ Information

Representing JUSTICE-2-JESUS

Appearing at request of Chair: ☐ Yes ☒ No

Lobbyist registered with Legislature: ☐ Yes ☒ No

While it is a Senate tradition to encourage public testimony, time may not permit all persons wishing to speak to be heard at this meeting. Those who do speak may be asked to limit their remarks so that as many persons as possible can be heard.

This form is part of the public record for this meeting.

S-001 (10/20/11)

THE FLORIDA SENATE
APPEARANCE RECORD

(Deliver BOTH copies of this form to the Senator or Senate Professional Staff conducting the meeting)

Meeting Date _____

Topic Transduction Bill Number SB 486
(if applicable)

Name Todd Kocourek Amendment Barcode _____
(if applicable)

Job Title Past Chair, International Law Section, FL Bar

Address 1351 N. Gadsden Phone 850/681-3601
Street

Tallahassee FL 32303 E-mail todd@FFCFC.com
City State Zip

Speaking: ☒ For ☐ Against ☐ Information

Representing _____

Appearing at request of Chair: ☐ Yes ☒ No

Lobbyist registered with Legislature: ☐ Yes ☒ No

While it is a Senate tradition to encourage public testimony, time may not permit all persons wishing to speak to be heard at this meeting. Those who do speak may be asked to limit their remarks so that as many persons as possible can be heard.

This form is part of the public record for this meeting.

S-001 (10/20/11)

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 752

INTRODUCER: Judiciary Committee and Senator Flores

SUBJECT: Equitable Distribution of Marital Assets and Liabilities

DATE: January 13, 2012

REVISED: _____

| | ANALYST | STAFF DIRECTOR | REFERENCE | ACTION |
|----|---------|----------------|-----------|--------|
| 1. | Munroe | Cibula | JU | Fav/CS |
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Please see Section VIII. for Additional Information:

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|------------------------------|--|---|
| A. COMMITTEE SUBSTITUTE..... | <input checked="checked" type="checkbox"/> | Statement of Substantial Changes |
| B. AMENDMENTS..... | <input type="checkbox"/> | Technical amendments were recommended |
| | <input type="checkbox"/> | Amendments were recommended |
| | <input type="checkbox"/> | Significant amendments were recommended |

I. Summary:

The bill establishes formulas for a court to use in determining the value of the marital portion of nonmarital real property which is subject to equitable distribution in a divorce proceeding. Under the bill, the value of the marital portion of nonmarital real property is comprised of the following:

- The mortgage principal paid during the marriage from marital funds.
- A portion of the passive appreciation of the property which is related to the amount of marital funds used to pay the mortgage.
- Any active appreciation of the property resulting from the efforts or contributions of either party during the marriage.

Additionally, the bill authorizes the court to require a person who is ordered to make installment payments as part of the equitable distribution of marital assets and liabilities to provide security and a reasonable rate of interest, or otherwise recognize the time value of money in determining the amount of the installments. If a court requires security or interest, the court must make written findings relating to any deferred payments, the amount of any security required, and the interest. The bill does not preclude the intended recipient of the installment payments from

taking action under the procedures to enforce a judgment, in chapter 55, F.S., to collect any funds from a person who fails to make the court-ordered payments.

This bill creates section 61.0765, Florida Statutes.

This bill amends section 61.075, Florida Statutes.

II. Present Situation:

Statutory Framework for the Equitable Distribution of Marital Assets and Liabilities

Chapter 61, F.S., governs proceedings for the dissolution of marriage in Florida. Under s. 61.075, F.S., a court must distribute the marital assets and liabilities based on the premise that the distribution be equal.¹ The court must do so unless justification exists for an unequal distribution based on relevant factors specified in s. 61.075(1), F.S. In a contested marital dissolution in which a stipulation and agreement has not been entered and filed, the distribution of marital assets or liabilities must be supported by factual findings in the court order based on competent substantial evidence with reference to the relevant statutory factors. The court's findings must identify which assets are nonmarital and those that are marital.²

“Marital assets and liabilities” generally include:

- Assets acquired and liabilities incurred during the marriage, individually by either spouse or jointly by them.³
- The enhancement in value and appreciation of nonmarital assets resulting from the efforts of either party during the marriage or from the contribution to or expenditure thereon of marital funds or other forms of marital assets, or both.⁴
- Interspousal gifts during the marriage.⁵
- All vested and nonvested benefits, rights, and funds accrued during the marriage in retirement, pension, profit-sharing, annuity, deferred compensation, and insurance plans and programs.⁶
- Real property held by the parties as tenants by the entireties.⁷
- All personal property titled jointly by the parties as tenants by the entireties.⁸

“Nonmarital assets and liabilities” generally include:

- Assets acquired and liabilities incurred by either party prior to marriage, and assets acquired and liabilities incurred in exchange for such assets and liabilities.⁹
- Assets acquired separately by either party by noninterspousal gift, bequest, devise, or descent, and assets acquired in exchange for such assets.¹⁰

¹ Section 61.075(1), F.S.

² Section 61.075(3)(a) and (b), F.S.

³ Section 61.075(6)(a)1.a., F.S.

⁴ Section 61.075(6)(a)1.b., F.S.

⁵ Section 61.075(6)(a)1.c., F.S.

⁶ Section 61.075(6)(a)1.d., F.S.

⁷ Section 61.075(6)(a)2., F.S.

⁸ Section 61.075(6)(a)3., F.S.

⁹ Section 61.075(6)(b)1., F.S.

- All income derived from nonmarital assets during the marriage unless the income was treated, used, relied upon by the parties as a marital asset.¹¹
- Assets and liabilities excluded from marital assets and liabilities by valid written agreement of the parties, and assets acquired and liabilities incurred in exchange for such assets and liabilities.¹²
- Any liability incurred by forgery or unauthorized signature by one spouse signing the name of the other spouse. Any such liability shall be a nonmarital liability only of the party having committed forgery or having affixed the unauthorized signature.¹³

Equitable Distribution of Marital Assets and Liabilities under *Kaaa v. Kaaa*¹⁴

In *Kaaa v. Kaaa*, the Florida Supreme Court held that “passive appreciation of the marital home that accrues during the marriage is subject to equitable distribution even though the home itself is a nonmarital asset.”¹⁵ Payment of a mortgage for real property with marital funds subjects the passive appreciation in the value of the real property to equitable distribution.¹⁶ The Court recognized that the marital portion of nonmarital property encumbered by a mortgage paid down with marital funds includes two components: (1) a portion of the enhancement value of the marital asset resulting from the contributions of the nonowner spouse and (2) a portion of the value of the passive appreciation of that asset that accrued during the marriage.¹⁷

In *Kaaa*, the Supreme Court provided a methodology for courts to use in determining the value of the passive appreciation of nonmarital real property to be equitably distributed and in allocating that value to both owner and nonowner spouse.¹⁸ Pursuant to the methodology, a court must make several steps:

First, the court must determine the overall current fair market value of the home. Second, the court must determine whether there has been a passive appreciation in the home's value. Third, the court must determine whether the passive appreciation is a marital asset under section 61.075(5)(a)(2)[, F.S.]. This step must include findings of fact by the trial court that marital funds were used to pay the mortgage and that the nonowner spouse made contributions to the property. Moreover, the trial court must determine to what extent the contributions of the nonowner spouse affected the appreciation of the property. Fourth, the trial court must determine the value of the passive appreciation that accrued during the marriage and is subject to equitable distribution. Fifth, after the court determines the value

¹⁰ Section 61.075(6)(b)2., F.S.

¹¹ Section 61.075(6)(b)3., F.S.

¹² Section 61.075(6)(b)4., F.S.

¹³ Section 61.075(6)(b)5., F.S.

¹⁴ *Kaaa v. Kaaa*, 58 So. 3d 867 (Fla. 2010).

¹⁵ *Kaaa*, 58 So. 3d at 868.

¹⁶ *Id.* at 869.

¹⁷ *Id.* at 871-872.

¹⁸ *Id.* at 872

of the passive appreciation to be equitably distributed, the court's next step is to determine how the value is allocated.¹⁹

The Supreme Court adopted the following formula used in *Stevens v. Stevens*, for the allocation of the appreciated value of nonmarital real property:

If a separate asset is unencumbered and no marital funds are used to finance its acquisition, improvement, or maintenance, no portion of its value should ordinarily be included in the marital estate, absent improvements effected by marital labor. If an asset is financed entirely by borrowed money which marital funds repay, the entire asset should be included in the marital estate. In general, in the absence of improvements, *the portion of the appreciated value of a separate asset which should be treated as a marital asset will be the same as the fraction calculated by dividing the indebtedness with which the asset was encumbered at the time of the marriage by the value of the asset at the time of the marriage.*²⁰

Passive appreciation of a nonmarital asset that is unencumbered is not subject to equitable distribution, absent the use of any marital funds or marital labor for its acquisition, improvement, or maintenance.²¹

Family Law Section's Concern with *Kaaa v. Kaaa*

The Family Law Section of The Florida Bar believes that “the formula adopted by the Supreme Court to quantify the marital portion of the passive appreciation is flawed because there is no relationship between the amount of marital funds utilized to pay down the mortgage during the marriage and the passive appreciation of the subject property.”²² According to the Family Law Section of The Florida Bar, “the formula adopted by the Florida Supreme Court in *Kaaa*, if applied to certain factual scenarios, would result in grossly inequitable results.”²³

The Family Law Section of The Florida Bar additionally argues that the *Kaaa* decision is inconsistent with s. 61.075(6)(a)1.b., F.S., by requiring a nonowner spouse to have made contributions to the property as a prerequisite to sharing in the passive appreciation of the property.²⁴ Section 61.075(6)(a)1.b., F.S., states that marital assets and liabilities include “the enhancement in value and appreciation of nonmarital assets resulting either from the efforts of either party during the marriage *or* from the contribution to or expenditure thereon of marital funds or other forms of marital assets, or both.”²⁵

¹⁹ *Id.*

²⁰ *Kaaa*, 58 So. 3d at 872 (quoting *Stevens v. Stevens*, 651 So. 2d 1306, 1307-08 (Fla. 1st DCA 1995)).

²¹ *Stevens v. Stevens*, 651 So. 2d 1306, 1307 (Fla. 1st DCA 2006); Dawn D. Nichols and Sean K. Ahmed, *Nonmarital Real Estate: Is the Appreciation Marital, Nonmarital, or a Combination of Both?*, 81 FLA. B.J. 75, 75 (Oct. 2007).

²² Correspondence to committee staff from David Manz, Chairman of Family Law Section, Florida Bar and John W. Foster, Sr., Chairman of Equitable Distribution Committee, Family Law Section, Florida Bar, (Dec. 19, 2011) (on file with the Senate Committee on Judiciary).

²³ *Id.*

²⁴ *Id.*

²⁵ (Emphasis added).

Security and Interest for Installment payments

In equitably distributing marital assets and liabilities, pursuant to s. 61.075(10), F.S., a court may order a party to pay a monetary payment in a lump sum or in installments paid over a fixed period. Section 61.075(10), F.S., does not currently give courts the discretion to require the payor to provide security or pay a reasonable rate of interest if installments are ordered.

III. Effect of Proposed Changes:

The bill establishes formulas for a court to use in determining the value of the marital portion of nonmarital real property which is subject to equitable distribution in a divorce proceeding. Under the bill, the value of the marital portion of nonmarital real property is comprised of the following:

- The mortgage principal paid during the marriage from marital funds.
- A portion of the passive appreciation of the property which is related to the amount of marital funds used to pay the mortgage.
- Any active appreciation of the property resulting from the efforts or contributions of either party during the marriage.

Under the formula, the passive appreciation in the marital property which is subject to equitable distribution must be determined by multiplying the marital fraction by the passive appreciation of the property during the marriage.

The passive appreciation is determined by subtracting the gross value of the property on date of the marriage or the date of acquisition of the property, whichever is later, from the value of the property on the valuation date in the dissolution action, less any active appreciation of the property during the marriage and less any additional debts secured by the property during the marriage.

The numerator of the marital fraction consists of the amount of mortgage principal paid on any mortgage on the property from marital funds. The denominator consists of the value of the real property on the date of marriage, the date of acquisition of the property, or the date the property was first encumbered by a mortgage on which principal was paid from marital funds, whichever is later.

The value of the marital portion of nonmarital real property may not exceed the total net equity of the property on the valuation date in the dissolution action.

The bill permits a party to argue to a court that the formula would be inequitable, and therefore should not apply to the particular circumstances of the case.

Additionally, the bill authorizes the court to require a person who is ordered to make installment payments as part of the equitable distribution of marital assets and liabilities to provide security and a reasonable rate of interest, or otherwise recognize the time value of money in determining the amount of the installments. If a court requires security or interest, the court must make written findings relating to any deferred payments, the amount of any security required, and the

interest. The bill does not preclude the intended recipient of the installment payments from taking action under the procedures to enforce a judgment, in chapter 55, F.S., to collect any funds from a person who fails to make the court-ordered payments.

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 Office of the State Courts Administrator reports that the trial court's task in determining the passive appreciation of real property characterized as a marital asset will continue to be an extremely fact-intensive one. Significant judicial time will be expended in both the determination of the facts and use of the mathematical calculation. The fiscal impact on expenditures of the State Courts System cannot be accurately determined due to the unavailability of data needed to quantify any increase in judicial workload.

VI. Technical Deficiencies:

None.

VII. Related Issues:

Section 61.075(6)(a)1.b., F.S., states that marital assets and liabilities include “the enhancement in value and appreciation of nonmarital assets resulting either from the efforts of either party during the marriage *or* from the contribution to or expenditure thereon of marital funds or other forms of marital assets, or both.”²⁶ The provision, however, appears to have been interpreted by

²⁶ (Emphasis added).

the Florida Supreme Court to require “that marital funds were used to pay the mortgage *and* that the nonowner spouse made contributions to the property” as a prerequisite to entitlement to a share of the passive appreciation of nonmarital real property.²⁷ The Legislature may wish to amend the bill to clarify what conditions specified in s. 61.075(6)(a)1.b., F.S., must be satisfied to establish entitlement to a share of the passive appreciation of a nonmarital asset.

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 Judiciary on January 12, 2012:

The committee substitute makes technical changes to reorganize and clarify concepts in the formulas for a court to use in determining the value of the marital portion of nonmarital real property which is subject to equitable distribution in a divorce proceeding.

- B. **Amendments:**

None.

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

²⁷ *Kaaa*, 58 So. 3d at 872.



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LEGISLATIVE ACTION

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| Senate | . | House |
| Comm: RCS | . | |
| 01/13/2012 | . | |
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The Committee on Judiciary (Flores) recommended the following:

Senate Amendment (with title amendment)

Delete everything after the enacting clause
and insert:

Section 1. Paragraph (a) of subsection (6) and subsection
(10) of section 61.075, Florida Statutes, are amended to read:
61.075 Equitable distribution of marital assets and
liabilities.—

(6) As used in this section:

(a)1. "Marital assets and liabilities" include:

a. Assets acquired and liabilities incurred during the
marriage, individually by either spouse or jointly by them.

b. The enhancement in value and appreciation of nonmarital



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assets resulting either from the efforts of either party during the marriage or from the contribution to or expenditure thereon of marital funds or other forms of marital assets, or both.

c. The value of the marital portion of the passive appreciation of nonmarital real property as provided in s. 61.0765(2).

d.e. Interspousal gifts during the marriage.

e.d. All vested and nonvested benefits, rights, and funds accrued during the marriage in retirement, pension, profit-sharing, annuity, deferred compensation, and insurance plans and programs.

2. All real property held by the parties as tenants by the entirety, whether acquired before ~~prior to~~ or during the marriage, shall be presumed to be a marital asset. If, in any case, a party makes a claim to the contrary, the burden of proof shall be on the party asserting the claim that the subject property, or some portion thereof, is nonmarital.

3. All personal property titled jointly by the parties as tenants by the entirety, whether acquired before ~~prior to~~ or during the marriage, shall be presumed to be a marital asset. In the event a party makes a claim to the contrary, the burden of proof shall be on the party asserting the claim that the subject property, or some portion thereof, is nonmarital.

4. The burden of proof to overcome the gift presumption shall be by clear and convincing evidence.

(10) (a) To do equity between the parties, the court may, in lieu of or to supplement, facilitate, or effectuate the equitable division of marital assets and liabilities, order a monetary payment in a lump sum or in installments paid over a



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fixed period of time.

(b) If installment payments are ordered, the court may require security and a reasonable rate of interest, or otherwise recognize the time value of money in determining the amount of the installments. If security or interest is required, the court shall make written findings relating to any deferred payments, the amount of any security required, and the interest. This paragraph does not preclude the application of chapter 55, relating to judgments, to any subsequent default.

Section 2. Section 61.0765, Florida Statutes, is created to read:

61.0765 Valuation of marital portion of nonmarital real property.—

(1) (a) The total value of the marital portion of nonmarital real property consists of the sum of the following:

1. The value of the active appreciation of the property as described in s. 61.075(6)(a)1.b.

2. The amount of the mortgage principal paid from marital funds.

3. A portion of any passive appreciation of the property, if the mortgage principal was paid from marital funds.

(b) The value of the marital portion of nonmarital real property may not exceed the total net equity of the property on the valuation date in the dissolution action.

(2) The marital portion of the passive appreciation as provided in subparagraph (1)(a)3. is calculated by multiplying the passive appreciation of the property by the marital fraction.

(a) The passive appreciation of the property is calculated



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by subtracting all of the following from the value of the property on the valuation date in the dissolution action:

1. The gross value of the property on the date of the marriage or on date the property was acquired, whichever is later.

2. The value of the active appreciation of the property during the marriage as described in s. 61.075(6) (a)1.b.

3. The amount of any additional debts secured by the property during the marriage.

(b) The numerator of the marital fraction consists of the amount of the mortgage principal paid on any mortgage on the property from marital funds. The denominator consists of the value of the property on the date of the marriage, the date of acquisition of the property, or the date the property was first encumbered by a mortgage on which principal was paid from marital funds, whichever is later.

(3) The court in a dissolution action must apply the formulas provided in this section to determine the value of the marital portion of nonmarital real property subject to equitable dissolution unless a party presents sufficient evidence to establish that the application of these formulas is not equitable under the particular circumstances of the case.

Section 3. This act shall take effect July 1, 2012.

===== 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



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An act relating to equitable distribution of marital assets and liabilities; amending s. 61.075, F.S.; redefining the term "marital assets and liabilities" to include the value of the marital portion of the passive appreciation of nonmarital real property; authorizing a court to require security and the payment of a reasonable rate of interest if installment payments are required for the distribution of marital assets and liabilities; requiring the court to provide written findings regarding any installment payments; creating s. 61.0765, F.S.; providing formulas for the calculation of the value of the marital portion of nonmarital real property subject to equitable distribution; requiring the court in the dissolution action to use the formulas unless sufficient evidence is presented showing that the application of the formulas is not equitable; providing an effective date.

By Senator Flores

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A bill to be entitled

An act relating to equitable distribution of marital assets and liabilities; amending s. 61.075, F.S.; redefining the term "marital assets and liabilities" for purposes of equitable distribution in dissolution of marriage actions; providing that the term includes the paydown of principal of notes and mortgages secured by nonmarital real property and certain passive appreciation in such property under certain circumstances; providing formulas and guidelines for determining the amount of such passive appreciation; requiring security and interest relating to the installment payment of such assets; providing exceptions; permitting the court to provide written findings regarding any installment payments; providing an effective date.

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

Section 1. Paragraph (a) of subsection (6) and subsection (10) of section 61.075, Florida Statutes, are amended to read:
61.075 Equitable distribution of marital assets and liabilities.—

(6) As used in this section:

(a)1. "Marital assets and liabilities" include:

- a. Assets acquired and liabilities incurred during the marriage, individually by either spouse or jointly by them.
- b. The enhancement in value and appreciation of nonmarital assets resulting ~~either~~ from the efforts of either party during

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the marriage or from the contribution to or expenditure thereon of marital funds or other forms of marital assets, or both.

c. The paydown of principal of a note and mortgage secured by nonmarital real property and a portion of any passive appreciation in the property, if the note and mortgage secured by the property are paid down from marital funds during the marriage. The portion of passive appreciation in the property characterized as marital and subject to equitable distribution shall be determined by multiplying a coverture fraction by the passive appreciation in the property during the marriage.

(I) The passive appreciation shall be determined by subtracting the gross value of the property on the date of the marriage or the date of acquisition of the property, whichever is later, from the value of the property on the valuation date in the dissolution action, less any active appreciation of the property during the marriage, as defined in sub-subparagraph b., and less any additional encumbrances secured by the property during the marriage in excess of the first note and mortgage on which principal is paid from marital funds.

(II) The coverture fraction shall consist of a numerator, defined as the total paydown of principal from marital funds of all notes and mortgages secured by the property during the marriage, and a denominator, defined as the value of the subject real property on the date of the marriage, the date of acquisition of the property, or the date the property was encumbered by the first note and mortgage on which principal was paid from marital funds, whichever is later.

(III) The passive appreciation shall be multiplied by the coverture fraction to determine the marital portion of the

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passive appreciation in the property.

(IV) The total marital portion of the property shall consist of the marital portion of the passive appreciation, as defined in subparagraph 3., the mortgage principal paid during the marriage from marital funds, and any active appreciation of the property, as defined in sub-subparagraph b., not to exceed the total net equity in the property at the date of valuation.

(V) The court shall apply this formula unless a party shows circumstances sufficient to establish that application of the formula would be inequitable under the facts presented.

~~d.e.~~ Interspousal gifts during the marriage.

~~e.d.~~ All vested and nonvested benefits, rights, and funds accrued during the marriage in retirement, pension, profit-sharing, annuity, deferred compensation, and insurance plans and programs.

2. All real property held by the parties as tenants by the entireties, whether acquired prior to or during the marriage, shall be presumed to be a marital asset. If, in any case, a party makes a claim to the contrary, the burden of proof shall be on the party asserting the claim that the subject property, or some portion thereof, is nonmarital.

3. All personal property titled jointly by the parties as tenants by the entireties, whether acquired prior to or during the marriage, shall be presumed to be a marital asset. In the event a party makes a claim to the contrary, the burden of proof shall be on the party asserting the claim that the subject property, or some portion thereof, is nonmarital.

4. The burden of proof to overcome the gift presumption shall be by clear and convincing evidence.

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(10)(a) To do equity between the parties, the court may, in lieu of or to supplement, facilitate, or effectuate the equitable division of marital assets and liabilities, order a monetary payment in a lump sum or in installments paid over a fixed period of time.

(b) If installment payments are ordered, the court may require security and a reasonable rate of interest, or otherwise recognize the time value of money in determining the amount of the installments. If security or interest is required, the court shall make written findings relating to any deferred payments, the amount of any security required, and the interest. This subsection does not preclude the application of chapter 55 to any subsequent default.

Section 2. This act shall take effect July 1, 2012.

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

THE FLORIDA SENATE
APPEARANCE RECORD

(Deliver BOTH copies of this form to the Senator or Senate Professional Staff conducting the meeting)

Meeting Date _____

Topic EQUITABLE DISTRIBUTION OF MARITAL ASSETS Bill Number SB 752
(if applicable)

Name DAVID L. MANZ Amendment Barcode _____
(if applicable)

Job Title CHAIR - FLORIDA BAR FAMILY LAW SECTION

Address Suite 40 5800 O/S Hwy Phone 305.731.3600
Street
Marathon FL 33050
City *State* *Zip*

Speaking: ☒ For ☐ Against ☐ Information

Representing FLORIDA BAR FAMILY LAW SECTION

Appearing at request of Chair: ☐ Yes ☐ No

Lobbyist registered with Legislature: ☐ Yes ☐ No

While it is a Senate tradition to encourage public testimony, time may not permit all persons wishing to speak to be heard at this meeting. Those who do speak may be asked to limit their remarks so that as many persons as possible can be heard.

This form is part of the public record for this meeting.

S-001 (10/20/11)