

The Florida Senate
COMMITTEE MEETING EXPANDED AGENDA

JUDICIARY
Senator Diaz de la Portilla, Chair
Senator Ring, Vice Chair

MEETING DATE: Tuesday, February 3, 2015
TIME: 2:00 —4:00 p.m.
PLACE: *Toni Jennings Committee Room*, 110 Senate Office Building

MEMBERS: Senator Diaz de la Portilla, Chair; Senator Ring, Vice Chair; Senators Bean, Benacquisto, Brandes, Joyner, Simmons, Simpson, Soto, and Stargel

TAB	BILL NO. and INTRODUCER	BILL DESCRIPTION and SENATE COMMITTEE ACTIONS	COMMITTEE ACTION
1	SB 22 Bradley	Relief of Joseph Stewart and Audrey Stewart by the City of Jacksonville; Providing for the relief of Joseph Stewart and Audrey Stewart on behalf of their son, Aubrey Stewart, by the City of Jacksonville; providing for an appropriation to compensate Aubrey Stewart for injuries and damages sustained as a result of the negligence of the City of Jacksonville; providing a limitation on the payment of fees and costs; providing for repayment of Medicaid liens, etc.	SM 01/26/2015 Recommendation: Fav/1 Amendment JU 02/03/2015 CA FP
2	SB 46 Grimsley (Identical H 3509)	Relief of Clinton Treadway by the State of Florida; Providing for the relief of Clinton Treadway; providing an appropriation and certain benefits to compensate Clinton Treadway for being wrongfully incarcerated for 7 years and 25 days; requiring the Department of Legal Affairs and the Department of Law Enforcement to immediately expunge Clinton Treadway's criminal record arising from his wrongful incarceration; providing that certain benefits and the appropriation satisfies all present and future claims related to the wrongful incarceration of Clinton Treadway, etc.	SM 01/26/2015 Recommendation: Fav/3 Amendments JU 02/03/2015 ACJ AP

COMMITTEE MEETING EXPANDED AGENDA

Judiciary

Tuesday, February 3, 2015, 2:00 —4:00 p.m.

TAB	BILL NO. and INTRODUCER	BILL DESCRIPTION and SENATE COMMITTEE ACTIONS	COMMITTEE ACTION
3	SB 52 Negrón	Relief of the Estate of Manuel Antonio Matute by the Palm Beach County Sheriff's Office; Providing for the relief of Criss Matute, Christian Manuel Torres, Eddna Torres De Mayne, Lansky Torres, and Nasdry Yamileth Torres Barahona, as beneficiaries of the Estate of Manuel Antonio Matute, by the Palm Beach County Sheriff's Office; providing for an appropriation to compensate them for the wrongful death of their father, Manuel Antonio Matute, as a result of the negligence of an employee of the Palm Beach County Sheriff's Office; providing that the amount paid by the sheriff's office and the appropriation satisfy all present and future claims related to the negligent act; providing a limitation on the payment of fees and costs, etc.	SM 01/26/2015 Recommendation: Favorable JU 02/03/2015 CA FP
4	SB 54 Montford	Relief of Mark T. Sawicki and Sharon L. Sawicki by the City of Tallahassee; Providing for an appropriation to compensate them for injuries sustained by Mr. Sawicki as a result of the negligence of an employee of the City of Tallahassee; providing a limitation on the payment of fees and costs; providing that certain payments and the appropriation satisfy all present and future claims related to the negligent act, etc.	SM 01/26/2015 Recommendation: Favorable JU 02/03/2015 CA FP
5	SB 68 Legg (Identical H 3511)	Relief of Carl Abbott by the Palm Beach County School Board; Providing for the relief of Carl Abbott by the Palm Beach County School Board; providing for an appropriation to compensate Carl Abbott for injuries sustained as a result of the negligence of an employee of the Palm Beach County School District; providing a limitation on the payment of fees and costs, etc.	SM 01/26/2015 Recommendation: Favorable JU 02/03/2015 AED AP

COMMITTEE MEETING EXPANDED AGENDA

Judiciary

Tuesday, February 3, 2015, 2:00 —4:00 p.m.

TAB	BILL NO. and INTRODUCER	BILL DESCRIPTION and SENATE COMMITTEE ACTIONS	COMMITTEE ACTION
6	SB 34 Diaz de la Portilla	Relief of Asia Rollins by the Public Health Trust of Miami-Dade County; Providing an appropriation to compensate her for injuries and damages sustained as a result of the negligence of the Public Health Trust of Miami-Dade County; providing a limitation on the payment of fees and costs, etc.	SM 01/27/2015 Recommendation: Fav/1 Amendment JU 02/03/2015 AHS AP
7	SB 102 Hukill (Similar H 313)	Digital Assets; Creating the "Florida Fiduciary Access to Digital Assets Act"; authorizing a personal representative to have access to specified digital assets of a decedent under certain circumstances; authorizing a guardian to have access to specified digital assets of a ward under certain circumstances; providing the rights of a fiduciary relating to digital assets; providing requirements for compliance for a custodian, a personal representative, a guardian, an agent, a trustee, or another person that is entitled to receive and collect specified digital assets, etc.	JU 02/03/2015 FP RC
8	SB 150 Ring (Similar H 45)	Student Loans; Requiring the Justice Administrative Commission and the Office of the Attorney General to implement a student loan assistance program to assist a career assistant state attorney, assistant public defender, assistant attorney general, or assistant statewide prosecutor in the repayment of eligible student loans, etc.	JU 02/03/2015 ACJ AP
Consideration of Proposed Bill			
9	SPB 7016	OGSR/Minor Identifying Information; Amending provisions relating to an exemption from public record requirements for certain information that could identify a minor petitioning a court to waive parental notice requirements before terminating a pregnancy; saving the exemption from repeal under the Open Government Sunset Review Act, etc.	

Other Related Meeting Documents



THE FLORIDA SENATE
SPECIAL MASTER ON CLAIM BILLS

Location
402 Senate Office Building

Mailing Address
404 South Monroe Street
Tallahassee, Florida 32399-1100
(850) 487-5237

DATE	COMM	ACTION
12/15/14	SM	Fav/1 amendment
2/2/15	JU	Pre-meeting
	CA	
	FP	

December 15, 2014

The Honorable Andy Gardiner
President, The Florida Senate
Suite 409, The Capitol
Tallahassee, Florida 32399-1100

Re: **SB 22** – Senator Rob Bradley
Relief of Joseph and Audrey Stewart on behalf of their son, Aubrey
Stewart

SPECIAL MASTER'S FINAL REPORT

THIS IS AN UNOPPOSED EQUITABLE CLAIM FOR LOCAL FUNDS IN THE AMOUNT OF \$3.3 MILLION AGAINST THE CITY OF JACKSONVILLE FOR NEGLIGENCE IN CONNECTION WITH FAILURE TO REMEDY A DANGEROUS CONDITION CAUSED BY A TREE LIMB WHICH, ON JUNE 27, 2011, FELL AND INJURED AUBREY STEWART CAUSING SERIOUS AND PERMANENT PARALYSIS AND BODILY INJURY.

FINDINGS OF FACT:

On June 27, 2011, Aubrey Stewart, son of Joseph and Audrey Stewart, was struck and injured by a falling tree limb after briefly leaving his home to retrieve luggage from his car. His home, where he lives with his parents, is located at 1512 Dyal Street in Jacksonville, Florida. The tree from which the limb fell was located on a city right-of-way and was owned by the City of Jacksonville.

Leading up to the incident, the City had received several complaints about the dangerous conditions of trees in the area. On September 7, 2010, the Stewart's next door neighbor complained about "several trees along [Dyal] street that need to be trimmed due to falling limbs" and on

September 10, 2010, Joseph Stewart complained about a “dead tree on the City’s right-of-way needing to be checked for removal due to dropping large limbs along with a second [tree] next to it.” On January 6, 2011, a tree limb from one of the reported trees fell and struck a car and the City paid on a claim for the damage to the car. Finally, on May 13, 2011, one of the reported trees fell into the road and blocked traffic. The City responded and removed the downed tree, however, the City did not trim or remove the second tree which injured Aubrey.

The falling tree limb dealt a severe blow to Aubrey causing serious injuries. He was transported via ambulance to Shand’s Jacksonville, spent five months in the Shand’s Pediatric I.C.U., and spent one month at Brooks Rehabilitation Center. During that time, he underwent more than 10 surgeries and procedures. Presently, he is paralyzed from the waist down and confined to a wheel chair. He has permanent scars on his back, permanent hardware installed in his body, and requires the use of a catheter and colostomy bag.

At the time of the accident Aubrey Stewart was 15 years of age and a minor. He has since turned 19 years of age and still lives with his parents who care for him full time. Currently, Aubrey also requires the assistance of a home health aide who the family has hired for four hours a day, seven days a week.

Some other difficulties faced by the Stewart family include necessary and extensive modifications to their home to allow for Aubrey’s wheelchair to fit through doorways and to give Aubrey enough room to maneuver in his bedroom, the bathroom, and the kitchen. Some of these modifications have been completed, including modifications to Aubrey’s bedroom and the home’s kitchen. However some are still pending including a wheelchair ramp in the backyard.

It is also very difficult for Aubrey to travel since the family does not have a van with a wheelchair lift. This leaves Aubrey homebound most of the time and, when he is required to travel for doctor visits and other necessary trips, the family relies on public transportation that can have long wait times.

Total medical bills for Aubrey from Shands Jacksonville and Brooks Rehabilitation were \$1,647,937.57. Medicaid has paid

a portion of these medical bills and retains a lien. The parties involved in the litigation also hired Lawrence S. Forman, M.Ed., J.D., to create a continuum of care plan and Frederick A. Raffa, Ph.D., an economist, to create a life care plan for Aubrey. Dr. Raffa estimates that Aubrey's future life care needs will range from \$9,052,435 to \$10,763,383 above and beyond his current medical bills. To date, the city of Jacksonville has paid the statutory maximum amount of \$200,000. Of this amount, \$94,761.12 was used to pay for attorney's fees and case costs, \$27,000 is held in trust for the Medicaid lean pending the resolution of the claim, and \$78,238.88 was paid to the Stewarts.

The Stewarts have set up a special needs trust for Aubrey.

LITIGATION HISTORY:

On February 15, 2012, Joseph and Audrey Stewart filed a complaint against the City of Jacksonville on behalf of their son Aubrey Stewart. The complaint alleged that Aubrey's injuries were caused when a limb from a tree in a city owned right-of-way fell on him. The complaint also alleged that the City knew or should have known that the dangerous tree posed a hazard to the residents on Dyal Street and that the City breached its duty of care by failing to act.

The City and the Stewarts entered into a settlement agreement on June 28, 2013, which the Jacksonville City Council unanimously approved. The stipulated final judgment required the City to pay installment payments totaling a sum of \$3,500,000 to the Stewarts. On July 23, 2013, the City passed ordinance 2013-515-E, which stipulated to the City's responsibility for Aubrey Stewarts injuries. The ordinance also authorized an immediate payment of the statutory maximum of \$200,000 and to support a claim bill for the remaining amount to be paid in installments of \$1.2 million in year one, \$1 million in year two, \$600,000 in year three, and \$500,000 in year four after a claims bill is passed. These funds will be paid from the City's Risk Management Fund.

On March 26, 2014, the Jacksonville City Council passed emergency resolution 2014-231-A. The resolution fully supported and urged the passage of SB 30 (2014) and HB 3513 (2014). Senate Bill 30 is substantively identical to SB 22.

CONCLUSIONS OF LAW:

The City of Jacksonville had a duty of care to maintain city owned trees on Dyal street in a safe condition and to remedy any dangerous conditions that it knew or should have known existed. *City of Jacksonville v. Foster*, 41 So.2d 548, 549. The City was informed of the dangerous condition over a period of several months through multiple complaints by residents on Dyal Street. The City demonstrated knowledge of the dangerous condition by removing one of the two dangerous trees named in the complaints when that tree fell onto the road and by paying a claim for damage to an automobile which was caused by falling tree limbs. The City breached this duty by failing to remedy the second dangerous tree located on the city owned right-of-way on Dyal Street. This breach was the proximate cause of Aubrey's injuries.

ATTORNEYS FEES AND LOBBYIST'S FEES:

The Claimant's attorneys have agreed to limit their fees to 25 percent of any amount awarded by the Legislature in compliance with s. 768.28(8), F.S. Lobbyist's fees are included with the attorney's fees.

RECOMMENDATIONS:

The undersigned recommends that Senate Bill 22 be amended to direct payment of the funds, after deduction of costs and liens, to the special needs trust established for Aubrey Stewart. Otherwise, the undersigned recommends that Senate Bill 22 (2015) be reported FAVORABLY.

Respectfully submitted,

Daniel Looke
Senate Special Master

cc: Debbie Brown, Secretary of the Senate



112116

LEGISLATIVE ACTION

Senate

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House

The Committee on Judiciary (Simpson) recommended the following:

Senate Amendment

Delete lines 82 - 91

and insert:

appropriated and to draw a warrant in the sum of \$1.2 million,
less the amount paid for repayment of Medicaid liens, payable to
the Aubrey Javaris Stewart Special Needs Trust, by the first
November 1 after the passage of this act as compensation for
injuries and damages sustained as a result of the negligence of
the City of Jacksonville. In addition, the City of Jacksonville
is further authorized and directed to appropriate from funds of



112116

12 the city not otherwise appropriated and to draw a warrant in the
13 sum of \$1 million payable to the Aubrey Javaris Stewart Special
14 Needs Trust, 1 year from the first payment; the sum of

By Senator Bradley

7-00014-15

201522__

A bill to be entitled

An act for the relief of Joseph Stewart and Audrey Stewart on behalf of their son, Aubrey Stewart, by the City of Jacksonville; providing for an appropriation to compensate Aubrey Stewart for injuries and damages sustained as a result of the negligence of the City of Jacksonville; providing a limitation on the payment of fees and costs; providing for repayment of Medicaid liens; providing an effective date.

WHEREAS, on June 27, 2011, Aubrey Stewart, who was 15 years of age, briefly left his home at 1512 Dyal Street in Jacksonville, and

WHEREAS, the tree across the street from Aubrey Stewart's home, where he lives with his parents, Joseph and Audrey Stewart, was owned by the City of Jacksonville, and

WHEREAS, a large tree limb, extending across Dyal Street, fell from the tree and crushed Aubrey Stewart, resulting in life-threatening injuries and leaving him paralyzed, and

WHEREAS, the City of Jacksonville had received four complaints about the dangerous condition of the tree before the tree limb crushed Aubrey Stewart, yet failed to act, and

WHEREAS, the City of Jacksonville's records confirm that 9 months before the accident, on September 7, 2010, the Stewarts' neighbor complained to the city about several trees along Dyal Street which needed to be trimmed due to falling tree limbs, and

WHEREAS, the City of Jacksonville's records confirm that a few days later, Joseph Stewart also filed a complaint with the city about two trees in dangerous condition on Dyal Street, and

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

7-00014-15

201522__

WHEREAS, the City of Jacksonville's records confirm that the city received an additional complaint on January 6, 2011, about a falling tree limb that struck a car, and the city's Risk Management Division investigated the claim and subsequently paid for the damage to the car, but failed to address the dangerous trees, and

WHEREAS, the City of Jacksonville's records confirm that on May 13, 2011, a neighbor called the city and reported that one of the trees that was the subject of previous complaints had fallen in the road and was blocking traffic, and the city responded by removing only the fallen debris, failing to remedy the continued and known dangerous condition, and

WHEREAS, despite these four complaints, the City of Jacksonville took no action to address the dangerous tree on Dyal Street until almost a month after a limb from that tree crushed and critically injured Aubrey Stewart, and

WHEREAS, as a result of the foregoing incident, Aubrey Stewart sustained multiple injuries, including, but not limited to, multiple spinal fractures with a complete spinal cord injury, an open pelvic fracture wound, a complex anal laceration, a left lateral buttocks wound, a large perineal wound, and multiple abscesses, and

WHEREAS, Aubrey Stewart spent 5 months in the Shands' Pediatric Intensive Care Unit, where he underwent approximately a dozen surgeries to stabilize his condition, and spent an additional month at Brooks Rehabilitation, and

WHEREAS, Aubrey Stewart is now paralyzed and confined to a wheelchair, depends on others for many daily life activities, and must wear diapers and use a catheter and colostomy bag, and

Page 2 of 4

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

7-00014-15

201522__

59 WHEREAS, the City of Jacksonville recognizes the potential
60 for a sizeable jury verdict in favor of Aubrey Stewart, given
61 the liability and damages stemming from the city's negligence,
62 and

63 WHEREAS, during court-ordered mediation on May 8, 2013, the
64 City of Jacksonville agreed to pay \$200,000 under the statutory
65 limits of liability set forth in s. 768.28, Florida Statutes,
66 within 60 days and then \$3.3 million, to be paid in installments
67 in order to minimize any potential financial impact on the city,
68 and

69 WHEREAS, the negotiated settlement agreement was designed
70 with the claim bill process specifically in mind, is in the best
71 interest of all parties involved, and was passed unanimously by
72 the Jacksonville City Council on July 23, 2013, and

73 WHEREAS, the City of Jacksonville fully supports the
74 passage of this claim bill, NOW, THEREFORE,

75
76 Be It Enacted by the Legislature of the State of Florida:

77
78 Section 1. The facts stated in the preamble to this act are
79 found and declared to be true.

80 Section 2. The City of Jacksonville is authorized and
81 directed to appropriate from funds of the city not otherwise
82 appropriated and to draw a warrant in the sum of \$1.2 million
83 payable to Joseph and Audrey Stewart, as parents and guardians
84 of Aubrey Stewart, by the first November 1 after the passage of
85 this act as compensation for injuries and damages sustained as a
86 result of the negligence of the City of Jacksonville. In
87 addition, the City of Jacksonville is further authorized and

7-00014-15

201522__

88 directed to appropriate from funds of the city not otherwise
89 appropriated and to draw a warrant in the sum of \$1 million
90 payable to Joseph and Audrey Stewart, as parents and guardians
91 of Aubrey Stewart, 1 year from the first payment; the sum of
92 \$600,000, 1 year from the second payment; and the sum of
93 \$500,000, 1 year from the third payment, for a total of \$3.3
94 million as compensation for injuries and damages sustained as a
95 result of the negligence of the City of Jacksonville.

96 Section 3. The amount paid by the City of Jacksonville
97 pursuant to s. 768.28, Florida Statutes, and the amount awarded
98 under this act are intended to provide the sole compensation for
99 all present and future claims arising out of the factual
100 situation described in the preamble to this act which resulted
101 in the injuries and damages to Aubrey Stewart, and to release
102 the city from any further liability. The total amount paid for
103 attorney fees, lobbying fees, costs, and other similar expenses
104 relating to this claim may not exceed 25 percent of the amount
105 awarded under this act.

106 Section 4. The City of Jacksonville shall pay to the Agency
107 for Health Care Administration the amount due under s. 409.910,
108 Florida Statutes, before disbursing any funds to the claimant.
109 The amount due to the agency shall be equal to all unreimbursed
110 medical payments paid by Medicaid up to the date that this bill
111 becomes a law.

112 Section 5. This act shall take effect upon becoming a law.



THE FLORIDA SENATE
SPECIAL MASTER ON CLAIM BILLS

Location
402 Senate Office Building

Mailing Address
404 South Monroe Street
Tallahassee, Florida 32399-1100
(850) 487-5237

DATE	COMM	ACTION
12/16/14	SM	Fav/3 amendments
2/2/15	JU	Pre-meeting

December 16, 2014

The Honorable Andy Gardiner
President, The Florida Senate
Suite 409, The Capitol
Tallahassee, Florida 32399-1100

Re: **SB 46** – Senator Denise Grimsley
Relief of Clinton Treadway

SPECIAL MASTER'S FINAL REPORT

THIS IS AN EQUITABLE CLAIM IN THE AMOUNT OF \$350,000 FROM GENERAL REVENUE TO COMPENSATE CLINTON TREADWAY FOR HIS 7-YEAR WRONGFUL INCARCERATION.

FINDINGS OF FACT:

Clinton Treadway was arrested by the Polk County Sheriff's Office on July 2, 2005 and was subsequently convicted of four counts of uttering a forged instrument and four counts of grand theft. Uttering a forged instrument is a third degree felony offense as is grand theft. (*s. 831.02 and s. 812.014(2)(c), F.S.*)

The offenses were committed between March 3 and March 7, 2005 when four altered checks were passed for cash at three different branches of the MidFlorida Federal Credit Union in Polk County.

Mr. Treadway had a checking account at the Credit Union. His Florida driver's license was provided to the tellers at the Credit Union as identification in all four transactions. The transactions occurred at the drive-through lanes.

Two of the checks were made out to Clinton Treadway. The other two checks were made out to Clifton Treadway. The name (signature) "Clinton Treadway" appeared on the back of all four checks on the endorsement line. The total amount of cash stolen as a result of these transactions was \$2,365.

The checks were drawn on the MidFlorida Federal Credit Union account of Mr. Bonnie and Mrs. Leona Cameron. "Leona Cameron" appeared on the signature line of all four checks.

Mrs. Leona Cameron placed some checks in the outgoing mail in the Cameron's roadside mailbox on March 3, 2005. The checks were being mailed to pay various bills. Mr. Cameron noticed the mailbox flag was down later in the morning but the Camerons had not received any mail. Late that afternoon, however, there was mail for the Camerons in the box. It later became apparent that the outgoing mail, including the checks paying various bills, had been stolen from the mailbox.

Several days later Mrs. Cameron contacted two of the payees of the checks and found that neither had received the checks she had put out in the mailbox for them.

Mrs. Cameron contacted the Credit Union and discovered there was no money in the Cameron's account. With the help of a teller, she then completed a Claim of Forgery interview and form at the Credit Union on March 10.

The sworn statement on the forgery claim form indicates that Mrs. Cameron was able to pinpoint four checks that had been passed at the Credit Union for cash and four that were missing and not received by the payees as of March 10.

Mrs. Cameron reported the mail theft and was interviewed on March 11 by Inspector Watson from the U.S. Postal Inspection Service.

Inspector Watson passed the case to Detective Lyon of the Polk County Sheriff's Office on April 4 for investigation of forgery, uttering and grand theft.

Detective Lyon received checks, surveillance video and photographs from the drive-through lanes at the Credit Union branches, and teller affidavits from Inspector Watson.

Detective Lyon submitted six checks for fingerprint analysis but there were no latent prints on the checks.

Mr. Treadway's Trial

On January 11, 2006, Clinton Treadway was convicted of passing four of the missing Cameron checks for cash at the Credit Union branches. The only issue at the trial was the identity of the person who cashed the checks.

The check numbers, theft amounts, dates and approximate times the checks were passed, and the credit union branch at which the checks were passed are:

1576	\$ 375	March 3	6:46 PM	Auburndale
1577	625	March 7	4:50 PM	Central
1579	800	March 4	5:51 PM	Hollingsworth
1581	825	March 7	6:54 PM	Auburndale

At the trial of the matter, Mrs. Cameron testified as set forth above.

The four tellers who handled the drive-through transactions in the case explained the procedures and Credit Union rules for cashing checks that come through the drive-through. The Credit Union only cashes checks for drive-through customers who have accounts with the Credit Union, and then only with a photo identification. The drive-through tellers are expected to verify the customer's account and compare the face of the drive-through customer with the photo identification.

After the transaction is posted, the Credit Union account holder's account number, the teller's identification number, and the date and time of the transaction appear on the back of the cashed check.

If the photo identification number does not already appear on the check, tellers write the number on the check. In the case of the four checks in question the tellers wrote Mr. Treadway's driver's license number on the checks presented to them.

During the early stages of the investigation all four of the tellers filled out affidavits at the Credit Union. The affidavits memorialize the transactions from the teller's point of view including how they handled the checks.

Under the section of the affidavit "[t]his I know from having reviewed a copy of the check", is the question: Do you remember the transaction? Three tellers checked the "no" box. Regarding check #1579, the remaining teller wrote "I only remember the check."

On page two of the Credit Union affidavit is the question: Do you remember what the subject looked like who presented the check? All four tellers checked the "no" box.

All four tellers testified at trial that they had compared the driver's license photo with the person passing the checks and that they were the same person. Several testified that although they did not recall the particular transaction, they would not have cashed the check without positive identification. The tellers testified that the driver's license did not appear to be fraudulent or tampered with.

The teller who processed check #1579 testified as follows:

Q: Today, sitting here today do you remember anything about, physically, what the person looked like?

A: The only thing that I can remember, it was a young male, dark hair, with a slim face. (Trial transcript, pages 190-192.)

The teller's memory of the description of the person who passed check #1579 matches Mr. Treadway's looks.

This particular teller further testified that she remembered those physical features at the time she filled out the Credit Union affidavit but that her manager told her it "wasn't substantial...so not to write it down." (Trial transcript, pages 190-192.)

It should be noted that there is no video or still photo of this transaction (check #1579) in evidence. The other three transactions were captured on video from which some still photos were created.

None of the four tellers were asked if they could identify Mr. Treadway, from the witness stand, as being the person who cashed any of the four the checks. This is not surprising, at least as to three of the tellers.

However, the Special Master is left to wonder why the teller who handled check #1579 was not asked if she recognized anyone in the courtroom, and from where she recognized him.

Although it is mere speculation, one can only assume that she was unable to actually identify Mr. Treadway despite her seemingly good memory of the features of the person at her drive-through on March 4, 2005.

It is possible that during her preparation for trial she viewed a copy of Mr. Treadway's driver's license, which either refreshed or helped create a memory of the transaction. Perhaps the teller was not completely certain or comfortable with identifying Mr. Treadway in court regardless of her memory. At any rate, the teller's recollection of the features of the person who passed check #1759 must have carried great weight with the jury.

Testimony was offered at trial that what appears to be the same black pickup truck is seen in each of the three videos. It is not possible to see the truck tag in the videos.

The videos and some still photos from the transactions were admitted in evidence. The person cashing the checks is wearing a cap on his head and sunglasses on his face in some photos, in others there are no sunglasses.

Although he is not qualified as an expert in matters of identification or handwriting analysis, the Postal Inspector offered his opinion that the driver's license photograph matched the person in the videos. The Postal Inspector further opined that the signatures on the backs of the checks matched the signature on the driver's license. (Trial transcript, pages 140-148.)

Mr. Treadway did not testify at trial however a duly qualified handwriting expert demonstrated to the jury how he developed his opinion that the checks were not written or endorsed by Mr. Treadway.

The undersigned is not an expert in handwriting analysis any more than the Postal Inspector is such an expert. However, having performed a comparison of Mr. Treadway's "known" signature with the signatures on the backs of the Cameron checks, this Special Master is persuaded to a reasonable degree of certainty that Mr. Treadway did not make out or endorse the checks in question.

After the jury had begun its deliberations, the jury asked the judge to allow the jury members to review the video of the truck at the drive-through "with the close-up of the person". The review was done in the courtroom.

The jury found Mr. Treadway guilty on all eight counts, four of uttering and 4 of grand theft. He was sentenced on February 6, 2006 to 10 years in prison followed by 30-years probation. The statutory maximum possible sentence in the case was 40 years. The lowest permissible prison sentence as calculated on the Criminal Punishment Code Scoresheet was 12.3 months. Mr. Treadway's prior record is discussed below.

Statewide Prosecutor's Identity Theft Case

Unbeknownst to anyone involved in the Treadway case, on September 19, 2005 the Statewide Prosecutor filed an Identity Theft case against 4 co-defendants who had been operating in Polk and other counties.

One of the listed victims of identity theft in the case was Clinton Treadway.

The investigation of the case revealed that between December of 2004 and May of 2005, Keith Anderson, Wendell Anglin, Alesia Neely and Bridgette Yopp fraudulently used or possessed with the intent to fraudulently use the identification of at least 101 people.

The search of Anglin and Neely's house resulted in the recovery of Mr. Treadway's personal identification information along with approximately 100 others.

Keith Anderson admitted to investigators of the identity theft case that Wendell Anglin provided him with fraudulent checks and identification. Anderson also stated that Anglin recruited him to steal mail and to obtain bank account information.

The records provided from the Statewide Prosecutor's case do not mention the transactions at the Credit Union.

The undersigned has carefully reviewed the videotape and still photographs admitted in evidence against Clinton Treadway alongside Keith Anderson's booking photo. Having noted a striking dissimilarity to Mr. Treadway but an uncanny resemblance to Keith Anderson it is the conclusion of this Special Master that Keith Anderson actually made the transactions involving three of the four missing Cameron checks.

Mr. Treadway never received any victim notification of the existence of the Statewide Prosecutor's case, any related court dates, the recovery of his driver's license or other matters required by law.

Bridgette Yopp, one of the co-defendants in the Statewide Prosecutor's identity theft case, was sentenced to prison. When she was about to be released, the Department of Corrections sent Mr. Treadway notification of her approaching release because, according to the Department's records, he was a victim of the identity theft she and her co-defendants had committed.

Mr. Treadway's parents received the notice, dated December 13, 2010, and opened it. Mr. Treadway was serving his 10-year prison sentence at the time. His name on the notice and on the Statewide Prosecutor's case-related documentation was misspelled as "Tuadway".

Mr. Treadway's parents retained legal counsel to help their son.

Claimant's Evidence and Position

Mr. Treadway appeared with Counsel for the Special Master's hearing on the claim bill on October 27, 2014. During the hearing Mr. Treadway gave sworn testimony and presented evidence for consideration.

He explained that he had not testified at trial and did not speak up at sentencing because his trial counsel advised him not to do so. Mr. Treadway understood that at trial the fact of his prior felony convictions would become known to the jury and it would reflect poorly on him in the eyes of the jury. At

sentencing he was warned not to anger the judge by claiming innocence, so he just tried to keep his composure.

Mr. Treadway testified that he had either lost his driver's license or it had been stolen in late 2004. He was unsure exactly when he realized it was missing. He generally kept the license in his car. He did not report the license as "missing" to any law enforcement agency.

He explained in detail that his employer, the owner of a Beef O'Brady's restaurant in Lake Wales, had helped him order a replacement license on the office computer. The replacement was issued on November 19, 2004. Mr. Treadway presented a certified copy of his Driver Record verifying the issue date of the license.

Mr. Treadway provided vehicle title and registration information showing that Keith Anderson, the identity theft defendant who appears to be the person cashing three of the Cameron's checks, owned a Ford F-150 pickup truck during that time period. Anderson's truck was registered on October 24, 2004 and the registration was scheduled to expire on November 30, 2005.

Mr. Treadway testified that he was living and working two jobs in Lake Wales at the time the Cameron check-cashing crimes were committed. Mr. Treadway was employed at Beef O'Brady's and at a construction job. He was unable to provide an alibi for the specific dates and times the checks were cashed. During this time Mr. Treadway was driving a gold Acura and did not have access to a black pickup truck.

Additionally, Mr. Treadway testified that he had never met the 4 co-defendants in the Statewide Prosecutor's identity theft case, and he had no idea how they came into possession of his driver's license.

Since his release from the Department of Corrections in July of 2012, Mr. Treadway committed a relatively minor misdemeanor at a concert in Orlando. The charges were not filed by the Orange County State Attorney's office.

Mr. Treadway is currently employed by Bonnie Plants. He manages plant sales to over 30 stores. He indicates that he enjoys his job and that it is "more responsibility than he's ever

had.” He is renting his own home on several acres and has financed a four-wheeler which he enjoys riding in the woods.

Mr. Treadway denies any physical injuries from his time at the Department of Corrections, stating that his injuries were all mental.

Criminal History, Department of Corrections Disciplinary Records

At the Hearing on this claim, Mr. Treadway was candid about his criminal and disciplinary history. His testimony is borne out by the records reviewed by the undersigned.

Mr. Treadway began getting into trouble as an 11 or 12 year old and had several cases in the juvenile system.

Mr. Treadway indicates that in 2002, when he was 18 years of age, he was arrested in Polk County in possession of about 2 ounces of cannabis and was sentenced to 18-months probation.

Subsequently he was arrested twice in Putnam County in possession of cocaine. During the second arrest he “mule-kicked” one of the officers and was also charged with Battery on a Law Enforcement Officer. He pled guilty and was sentenced to 2 years community control and transported to Polk County where he admitted violating his probation on the cannabis charge. The Polk County court sentenced him to a year in the county jail with credit for the time he had served.

In April of 2005 Mr. Treadway was arrested in possession of a misdemeanor amount of cannabis and was sentenced to weekends in the county jail. On July 2, 2005 he was arrested on the case that is now the basis of this claim.

During the 7 years Mr. Treadway was in prison there seems to have been a pattern of misconduct. Reading the disciplinary reports, which describe unsophisticated non-violent conduct, one might conclude that Mr. Treadway “preferred” being in a segregation cell. Most of the disciplinary referrals involved possession of contraband, showing disrespect to correctional officers, theft, and having drugs in his system,

According to Mr. Treadway the only violent incident reflected in the records was a result of self-defense. The disciplinary report indicates that the other inmate would not cooperate in the investigation.

Pending Civil Lawsuit

Mr. Treadway has filed suit against the MidFlorida Federal Credit Union alleging negligence, false imprisonment and malicious prosecution. According to his attorney, the case is in the Discovery phase and will not likely be resolved for some time.

Postconviction Litigation; The State Attorney's Position

Counsel for Mr. Treadway filed a Motion for Postconviction Relief in the Polk County Circuit Court on June 29, 2012, based upon the evidence surrounding the Statewide Prosecutor's identity theft case. The Court vacated Mr. Treadway's convictions in the check-cashing case on July 3 and ordered a new trial.

On July 5, 2012, Mr. Treadway was released from the custody of the Department of Corrections.

To his credit, The State Attorney for the 10th Judicial Circuit, Mr. Jerry Hill, dismissed the charges on the same day the Court vacated Mr. Treadway's convictions which meant that the State would not pursue the matter further.

However, the State Attorney does not necessarily agree that Mr. Treadway was wrongfully incarcerated for crimes he did not commit.

The State Attorney correctly points out that Mr. Treadway's postconviction relief was based upon newly discovered evidence that would "probably produce an acquittal on retrial". (*Jones v. State*, 709 So.2d 512 (Fla. 1988)). Essentially this standard means that, given the evidence available to the prosecutor or to the defense, the State would not likely be able to present a case against Mr. Treadway that would result in a conviction.

The State Attorney acknowledges that the person driving the black pickup truck and cashing the checks on the three occasions with videos does not resemble Mr. Treadway.

However, Mr. Hill asserts that the teller's testimony regarding the remaining check #1579 weighs against a finding that Mr. Treadway's claims are fully backed by substantial and verifiable proof.

Again, the teller testified as follows:

Q: Today, sitting here today do you remember anything about, physically, what the person looked like?

A: The only thing that I can remember, it was a young male, dark hair, with a slim face. (Trial transcript, pages 190-192.)

The undersigned agrees with the State Attorney that the teller's trial testimony should weigh against Mr. Treadway's claims. The question is to what degree?

The undersigned finds it incredible to think that a teller at the drive-through of a credit union could recall the features of one person viewed for a few minutes during one transaction, even a few days later. The truth is more likely revealed in the teller's affidavit which states: "I only remember the check." (Check #1759)

Weightier is the fact that during the presentation of the teller's testimony, despite having given a general description of Mr. Treadway, she was never asked by the prosecutor whether she (the teller) saw anyone in the courtroom that she thought was the person who passed check # 1759. This indicates a level of uncertainty by the witness as to the issue of identity that perhaps the jury missed.

It is possible that the jury simply mistook the teller's testimony as an actual identification of Mr. Treadway. Hearing testimony is different than reading and reviewing a trial transcript. Whatever the case, it is obvious the prosecutor and the jury gave this teller's testimony great weight.

This Special Master has carefully considered the testimony of all the State's witnesses and the defense witness offered at trial.

The Special Master has many advantages in considering this claim that the prosecuting attorney did not have, however.

Evidence of the Statewide Prosecutor's identity theft case is known to the Special Master but it was not known to the prosecutor at the time the case against Mr. Treadway was filed.

The booking photo of identity theft defendant Keith Anderson, for comparison to the videos and photos offered as proof against Mr. Treadway, is an advantage to the Special Master not enjoyed by the State Attorney's Office at the time of Mr. Treadway's arrest and prosecution.

So, too, is the evidence that Mr. Treadway's driver's license had fallen into the hands of the identity theft ring—a fact known to the Special Master that was not known to the prosecutor.

The undersigned knows that the case against Mr. Treadway was a circumstantial case, no more and no less. These cases are especially hard to prove because no witness can identify a person they observed commit the criminal offense. Nonetheless, the case must be proven beyond a reasonable doubt, a high burden of proof for a prosecutor to meet.

Mr. Treadway's burden in a claim bill is a lower burden.

CONCLUSIONS OF LAW:

Generally the burden of proof for establishing liability for a claim bill is the preponderance of the evidence standard.

Chapter 961 of the Florida Statutes was created in 2008 to compensate wrongfully incarcerated persons who qualified for compensation under the law. The standard of proof under the statute is a higher burden of clear and convincing evidence.

If the prosecutor contests a person's petition for compensation, section 961.03(5), F.S. requires that:

Any questions of fact, the nature, significance or effect of the evidence of actual innocence, and the petitioner's eligibility for compensation under this act must be established by clear and convincing evidence by the petitioner before an administrative law judge.

One absolute statutory requirement is that the petitioner has no felony offense in his or her past, no felony was committed while incarcerated, or there was no concurrent felony sentence being served at the time of the wrongful incarceration. This requirement is often referred to as the “clean hands” provision. (s. 961.04, F.S.)

It cannot be said that Mr. Treadway approaches the Legislature with clean hands. His criminal history is discussed above. He would not qualify for redress under chapter 961. It is for this very reason that Mr. Treadway seeks the legislative grace of the passage of his claim bill.

Since the Legislature enacted chapter 961, a claim bill for the relief of William Dillon based upon a claim of wrongful incarceration was passed in 2012. Mr. Dillon had a felony in his criminal history so he did not meet the clean hands requirement of chapter 961.

The Special Master hearing the Dillon claim determined that if a person could seek redress for wrongful incarceration by meeting the lower preponderance of the evidence standard of proof in a claim bill and despite having prior felonies, there would be no incentive for a claimant to ever proceed under chapter 961.

This Special Master agrees with the Dillon Special Master as to the proper burden of proof in claim bills based upon wrongful incarceration. Utilizing the preponderance of the evidence standard would give this claimant an advantage over others who have clean hands and who should therefore follow the judicial procedures under chapter 961. The undersigned will not give Mr. Treadway such an advantage.

Having considered the evidence that is available at this time, the undersigned finds that Mr. Treadway's claim is supported by clear and convincing evidence as set forth in this report.

However, the undersigned is hesitant to recommend this claim bill favorably in the amount for which the bill is currently written. If the legislature passes the bill at the rate of \$50,000 for each year Mr. Treadway was wrongfully incarcerated (\$350,000) it is essentially awarding a claimant without clean hands at the same rate at which one who has clean hands is compensated under chapter 961.

The undersigned cannot ignore this incongruity. For this reason, it is suggested that Mr. Treadway be awarded at a lesser rate, perhaps the \$30,000 for each year of wrongful incarceration (\$210,000) as was suggested by the Dillon Special Master.

Recommended Amendments

This Special Master recommends that the “whereas clause” on lines 31-34 of the bill be deleted as it does not reflect State Attorney Hill’s position.

It is also suggested that the amount of the claim bill be reduced from \$350,000 to \$210,000 for the reasons explained above.

ATTORNEYS FEES:

Counsel for the claimant has submitted a somewhat confusing Contract for Legal Services. It appears that Mr. Treadway has agreed to pay the Firm the greater of two calculations; either 25% of the claimant’s gross recovery or any attorney’s fee awarded in the claim bill. “Gross recovery” may be interpreted to include the cost of the 120 hours tuition and fees in a Florida Career Center, college or state university awarded in Section 6 of the bill.

Given that the bill itself does not cap attorney’s fees the undersigned suggests that the bill be amended to incorporate the language from section 768.28(8), F.S. The inclusion of the statutory language should eliminate confusion on the matter of the amount of attorney’s fees that may be collected in the matter.

RECOMMENDATIONS:

For the reasons set forth above, the undersigned recommends that Senate Bill 46 be reported FAVORABLY but further recommends that the Senate consider the amendments suggested herein.

SPECIAL MASTER'S FINAL REPORT – SB 46

December 16, 2014

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Respectfully submitted,

Connie Cellon
Senate Special Master

cc: Debbie Brown, Secretary of the Senate

By Senator Grimsley

21-00055-15

201546__

A bill to be entitled

An act for the relief of Clinton Treadway; providing an appropriation and certain benefits to compensate Clinton Treadway for being wrongfully incarcerated for 7 years and 25 days; directing the Chief Financial Officer to draw a warrant for the purchase of an annuity; providing conditions for the purchase of the annuity; requiring the Department of Legal Affairs and the Department of Law Enforcement to immediately expunge Clinton Treadway's criminal record arising from his wrongful incarceration; waiving all fees related to the expunction of his criminal record; providing that the act does not waive certain defenses or increase the state's liability; providing that certain benefits and the appropriation satisfies all present and future claims related to the wrongful incarceration of Clinton Treadway; providing a limitation on the payment of fees and costs; providing that unused compensation provided under the act shall be revoked upon any future finding that Clinton Treadway is not innocent of the alleged crimes for which he was wrongfully incarcerated; providing that such unused compensation shall revert to the General Revenue Fund; providing an effective date.

WHEREAS, Clinton Treadway was arrested on June 11, 2005, and convicted on February 6, 2006, of four counts of uttering a forged instrument and four counts of grand theft, and

WHEREAS, Clinton Treadway has always maintained his

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innocence of the offenses, and

WHEREAS, based on new evidence in the case, the Office of the State Attorney in the 10th Judicial Circuit determined with certainty that Clinton Treadway did not participate in the offenses for which he was convicted, and

WHEREAS, on July 3, 2012, the Circuit Court in the 10th Judicial Circuit granted a motion for postconviction relief, vacated the judgment and sentence of Clinton Treadway as entered on February 6, 2006, and ordered a new trial, and

WHEREAS, the state filed a nolle prosequi as related to the retrial on July 3, 2012, and Clinton Treadway was released from physical confinement on July 5, 2012, and

WHEREAS, the Legislature acknowledges that the state's system of justice yielded an imperfect result that had tragic consequences in this case, and

WHEREAS, as a result of his physical confinement and the deprivation of the exercise of freedom to which all innocent citizens are entitled, Clinton Treadway suffered significant damages that are unique to him, and

WHEREAS, before his wrongful conviction for the aforementioned offenses, Clinton Treadway pled guilty to unrelated felonies, and

WHEREAS, because of his prior felony convictions, Clinton Treadway is ineligible for compensation under chapter 961, Florida Statutes, and

WHEREAS, the Legislature is providing compensation to Clinton Treadway to acknowledge the fact that he suffered significant damages that are unique to him, and

WHEREAS, the compensation provided by this act is the sole

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59 compensation from the state for any and all present and future
60 claims arising in connection with Clinton Treadway's wrongful
61 arrest, wrongful conviction, and wrongful incarceration, and

62 WHEREAS, Clinton Treadway may not seek future compensation
63 from the state or any agency, instrumentality, or political
64 subdivision thereof, or any other entity subject to s. 768.28,
65 Florida Statutes, in state or federal court, for any and all
66 present or future claims arising out of the facts in connection
67 with his wrongful arrest, wrongful conviction, and wrongful
68 incarceration, and

69 WHEREAS, the Legislature apologizes to Clinton Treadway on
70 behalf of the state, NOW, THEREFORE,

71
72 Be It Enacted by the Legislature of the State of Florida:

73
74 Section 1. The facts stated in the preamble to this act are
75 found and declared to be true.

76 Section 2. The sum of \$350,000 is appropriated from the
77 General Revenue Fund to the Department of Financial Services for
78 the relief of Clinton Treadway for the injuries and damages he
79 sustained.

80 Section 3. The Chief Financial Officer is directed to draw
81 a warrant in the sum of \$350,000 upon the funds of the
82 Department of Financial Services in the State Treasury, and to
83 pay the same out of such funds in the State Treasury to an
84 insurance company or other financial institution admitted and
85 authorized to issue annuity contracts in this state and selected
86 by Clinton Treadway, to purchase an annuity or annuities on
87 behalf of Clinton Treadway for a term of not less than 10 years.

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88 The terms of the annuity or annuities must provide that the
89 annuity or annuities may not be sold, discounted, or used as
90 security for a loan or mortgage by Clinton Treadway and must
91 contain beneficiary provisions for the continued disbursement of
92 the annuity or annuities in the event of the death of Clinton
93 Treadway. The Chief Financial Officer is directed to execute all
94 necessary agreements to implement this section and to maximize
95 the benefit of the annuity or annuities to Clinton Treadway.

96 Section 4. The Chief Financial Officer shall purchase the
97 annuity required by this act upon delivery by Clinton Treadway
98 to the Chief Financial Officer, the Department of Financial
99 Services, the President of the Senate, and the Speaker of the
100 House of Representatives of a release executed by Clinton
101 Treadway for himself and on behalf of his heirs, successors, and
102 assigns, fully and forever releasing and discharging the State
103 of Florida, and its agencies and subdivisions, as defined in s.
104 768.28(2), Florida Statutes, from any and all present or future
105 claims or declaratory relief that Clinton Treadway or any of his
106 heirs, successors, or assigns may have against the State of
107 Florida, and its agencies and subdivisions, as defined in s.
108 768.28(2), Florida Statutes, arising out of the factual
109 situation in connection with the wrongful arrest, wrongful
110 conviction, and wrongful incarceration for which compensation is
111 awarded under this act. Without limitation of the foregoing, the
112 release shall specifically release and discharge the Sheriff of
113 Polk County, Florida, in his official capacity, and any current
114 or former sheriffs, deputies, agents, or employees of the
115 Sheriff of Polk County, in their individual capacities, from all
116 claims, causes of action, demands, rights, and claims for

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117 attorney fees or costs, of whatever kind or nature, whether in
 118 law or equity, including, but not limited to, any claims
 119 pursuant to 42 U.S.C. s. 1983, which Clinton Treadway had, has,
 120 or might hereinafter have or claim to have, whether known or
 121 unknown, against the Sheriff of Polk County, Florida, and his
 122 assigns, successors in interest, predecessors in interest,
 123 heirs, employees, agents, servants, officers, directors,
 124 deputies, insurers, reinsurers, and excess insurers, in their
 125 official and individual capacities, which arise out of, are
 126 associated with, or are a cause of, the wrongful arrest,
 127 wrongful conviction, and wrongful incarceration for which
 128 compensation is awarded under this act, including any known or
 129 unknown loss, injury, or damage related to or caused by the same
 130 and which may arise in the future.

131 Section 5. Notwithstanding Section 4, this act does not
 132 prohibit Clinton Treadway from seeking declaratory action to
 133 obtain judicial expunction of his criminal record as related to
 134 the arrest and conviction of uttering a forged instrument and
 135 grand theft within a judicial or executive branch agency as
 136 otherwise provided by law. The Department of Legal Affairs and
 137 the Department of Law Enforcement shall immediately take all
 138 action necessary to administratively expunge Clinton Treadway's
 139 criminal record arising from his wrongful arrest, wrongful
 140 conviction, and wrongful incarceration. All fees related to the
 141 expunction process are waived.

142 Section 6. Tuition and fees for Clinton Treadway shall be
 143 waived for up to a total of 120 hours of instruction at any
 144 career center established under s. 1001.44, Florida Statutes,
 145 any Florida College System institution as defined in s.

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146 1000.21(3), Florida Statutes, or any state university as defined
 147 in s. 1000.21(6), Florida Statutes, if Clinton Treadway meets
 148 and maintains the regular admissions requirements of such career
 149 center, Florida College System institution, or state university;
 150 remains registered at such educational institution; and makes
 151 satisfactory academic progress as defined by the educational
 152 institution in which he is enrolled.

153 Section 7. The Legislature, by this act, does not waive any
 154 defense of sovereign immunity or increase the limits of
 155 liability on behalf of the state or any person or entity that is
 156 subject to s. 768.28, Florida Statutes, or any other law.

157 Section 8. This award is intended to provide the sole
 158 compensation for any and all present and future claims arising
 159 out of the factual situation in connection with Clinton
 160 Treadway's wrongful arrest, wrongful conviction, and wrongful
 161 incarceration. There shall be no further award to include
 162 attorney fees, lobbying fees, costs, or other similar expenses
 163 to Clinton Treadway by the state or any agency, instrumentality,
 164 or political subdivision thereof, or any other entity, including
 165 any county constitutional office, officer, or employee, in state
 166 or federal court.

167 Section 9. If a future factual finding determines, by DNA
 168 evidence or otherwise, that Clinton Treadway participated in any
 169 manner related to the four counts of uttering a forged
 170 instrument or four counts of grand theft, the unused benefits
 171 awarded to Clinton Treadway under this act, including any
 172 disbursements remaining under an annuity purchased on his
 173 behalf, shall be immediately revoked and all remaining sums
 174 shall revert to the General Revenue Fund.

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201546__

175

Section 10. This act shall take effect upon becoming a law.



THE FLORIDA SENATE
SPECIAL MASTER ON CLAIM BILLS

Location
402 Senate Office Building

Mailing Address
404 South Monroe Street
Tallahassee, Florida 32399-1100
(850) 487-5237

DATE	COMM	ACTION
12/16/14	SM	Favorable
2/2/15	JU	Pre-meeting
	CA	
	FP	

December 16, 2014

The Honorable Andy Gardiner
President, The Florida Senate
Suite 409, The Capitol
Tallahassee, Florida 32399-1100

Re: **SB 52** – Senator Negrón
Relief of Chriss Matute, Christian Manuel Torres, Eddna Torres De Mayne, Lansky
Torres, and Nasdry Yamileth Torres Barahona

SPECIAL MASTER'S FINAL REPORT

THIS IS AN UNOPPOSED CLAIM FOR \$371,850.98 IN LOCAL FUNDS BY EDDNA TORRES DE MAYNE, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF HER FATHER, MANUEL A. MATUTE. THE CLAIM IS BASED ON A COURT-APPROVED SETTLEMENT AGREEMENT BETWEEN DE MAYNE AND THE PALM BEACH SHERIFF'S OFFICE TO COMPENSATE THE ESTATE FOR MR. MATUTE'S DEATH, WHICH OCCURRED IN A CAR ACCIDENT CAUSED BY A PALM BEACH DEPUTY SHERIFF.

CURRENT STATUS:

On November 9, 2011, an administrative law judge from the Division of Administrative Hearings, serving as a Senate special master, held a de novo hearing on a previous version of this bill, SB 52 (2012). After the hearing, the judge issued a report containing findings of fact and conclusions of law and recommended that the bill be reported favorably. That report is attached as an addendum to this report.

Due to the passage of time since the hearing, the Senate President reassigned the claim to me, Tracy Sumner. My responsibilities were to review the records relating to the claim bill, be available for questions from the members, and

determine whether any changes have occurred since the hearing, which if known at the hearing, might have significantly altered the findings or recommendation in the previous report.

According to counsel for the parties, no changes have occurred since the hearing which might have altered the findings and recommendations in the report.

Additionally, the prior claim bill, SB 52 (2012), is effectively identical to claim bill filed for the 2015 Legislative Session.

Respectfully submitted,

Tracy Jeanne Sumner
Senate Special Master



THE FLORIDA SENATE
SPECIAL MASTER ON CLAIM BILLS

Location
402 Senate Office Building

Mailing Address
404 South Monroe Street
Tallahassee, Florida 32399-1100
(850) 487-5237

DATE	COMM	ACTION
11/9/11	SM	Favorable
2/23/12	RC	Favorable

November 9, 2011

The Honorable Mike Haridopolos
President, The Florida Senate
Suite 409, The Capitol
Tallahassee, Florida 32399-1100

Re: **SB 52 (2012)** – Senator Joe Negrón
Relief of Chriss Matute, Christian Manuel Torres, Eddna Torres De Mayne, Lansky
Torres, and Nasdry Yamileth Torres Barahona

SPECIAL MASTER'S FINAL REPORT

THIS IS AN UNOPPOSED CLAIM FOR \$371,850.98 IN LOCAL FUNDS BY EDDNA TORRES DE MAYNE, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF HER FATHER, MANUEL A. MATUTE. THE CLAIM IS BASED ON A COURT-APPROVED SETTLEMENT AGREEMENT BETWEEN DE MAYNE AND THE PALM BEACH SHERIFF'S OFFICE TO COMPENSATE THE ESTATE FOR MR. MATUTE'S DEATH, WHICH OCCURRED IN A CAR ACCIDENT CAUSED BY A PALM BEACH DEPUTY SHERIFF.

FINDINGS OF FACT:

On October 29, 2008, just before sunrise, Deputy Sheriff Gerald Ramirez was returning home after his shift, driving northbound on US highway 441. At the same time, travelling southbound on the same highway, Mr. Matute, age 60, was on his way to work as a maintenance man at a golf club. Deputy Ramirez fell asleep at the wheel and lost control of his police cruiser, allowing it to cross the raised concrete median, and crash head-on into Mr. Matute's van.

Mr. Matute was wearing his seatbelt at the time of the crash, but was killed in the collision. The collision caused Mr. Matute's van to hit a third vehicle driven by Orlando Cordova.

Mr. Cordova and his passenger, Dhalid Johnson, were injured in the collision. Mr. Matute's van also hit a fourth vehicle driven by Robert Morgan, who was not injured. All four vehicles were totaled or damaged.

Deputy Ramirez admitted to Fire Rescue and a Sergeant at the scene of the accident that he had fallen asleep while driving. He suffered minor injuries from the collision, and was ultimately disciplined. He remains employed with the Palm Beach Sheriff's Office.

Mr. Matute was the father of five children. Two adult daughters live in Honduras with their children. Two adult sons live in Palm Beach County, as well as a minor son, Chriss, age 15, who is a high school student.

LITIGATION HISTORY:

On July 21, 2009, in the circuit court for the Fifteenth Judicial Circuit, Claimant brought a wrongful death action against the Palm Beach Sheriff's Office. The complaint alleged that Palm Beach County was vicariously liable for Mr. Matute's fatal injuries sustained as a result of Deputy Ramirez's negligent operation of a Palm Beach Sheriff's Office vehicle.

On January 4, 2011, the parties successfully reached a mediated settlement in the amount of \$500,000.00. The Palm Beach Sheriff's Office admitted liability, and admitted that Mr. Matute was in no way responsible or comparatively negligent. Pursuant to the terms of the settlement, the Palm Beach Sheriff's Office agreed to tender \$128,149.02 to the Claimant upon the approval of the court. Palm Beach Sheriff's Office further agreed not to oppose a claim bill in the amount of \$371,850.98.

The Palm Beach Sheriff's Office also settled claims that had been filed by Mr. Cordova, Mr. Johnson, and Mr. Morgan. Mr. Cordova received \$40,000.00, Mr. Johnson received \$22,000.00, and Mr. Morgan received \$9,850.98.

Following the approval of the settlement agreement by the circuit court, Palm Beach Sheriff's Office tendered \$128,149.02 to Claimant. Twenty-five percent of the amount paid was deducted for attorney's fees and costs.

CLAIMANT'S POSITION: The Palm Beach Sheriff's Office is vicariously liable for the negligence of its employee, who negligently operated a Palm Beach Sheriff's Office vehicle.

RESPONDENT'S POSITION: The Palm Beach Sheriff's Office accepts full responsibility for the fatal crash. Palm Beach Sheriff's Office does not support or object to the passage of this claim bill.

CONCLUSIONS OF LAW: The claim bill hearing was a de novo proceeding for the purpose of determining, based on the evidence presented to the Special Master, whether the Palm Beach Sheriff's Office was liable in negligence for the death of Mr. Matute and, if so, whether the amount of the claim is reasonable.

The evidence clearly demonstrates that Deputy Ramirez lost control of his police cruiser, crashed head-on into Mr. Matute's van, and caused Mr. Matute's fatal injuries.

The Palm Beach Sheriff's Office, as Deputy Ramirez's employer, is liable for his negligent act. *Mercury Motors Express v. Smith*, 393 So. 2d 545, 549 (Fla. 1981) (holding that an employer is vicariously liable for compensatory damages resulting from the negligent acts of employees committed within the scope of their employment); see also *Aurbach v. Gallina*, 753 So. 2d 60, 62 (Fla. 2000) (holding that the dangerous instrumentality doctrine "imposes strict vicarious liability upon the owner of a motor vehicle who voluntarily entrusts that motor vehicle to an individual whose negligent operation causes damage to another").

The undersigned concludes that the sum the Palm Beach Sheriff's Office has agreed to pay the Claimant is both reasonable and fair.

ATTORNEYS FEES: The Claimant's attorneys have agreed to limit their fees to 25 percent of any amount awarded by the Legislature in compliance with s. 768.28(8), Florida Statutes. No lobbyist fees will be paid.

RECOMMENDATIONS: For the reasons set forth above, the undersigned recommends that Senate Bill 52 (2012) be reported FAVORABLY.

Respectfully submitted,

Jessica Enciso Varn
Senate Special Master

By Senator Negrón

32-00040A-15

201552__

1 A bill to be entitled
 2 An act for the relief of Criss Matute, Christian
 3 Manuel Torres, Eddna Torres De Mayne, Lansky Torres,
 4 and Nasdry Yamileth Torres Barahona, as beneficiaries
 5 of the Estate of Manuel Antonio Matute, by the Palm
 6 Beach County Sheriff's Office; providing for an
 7 appropriation to compensate them for the wrongful
 8 death of their father, Manuel Antonio Matute, as a
 9 result of the negligence of an employee of the Palm
 10 Beach County Sheriff's Office; providing that the
 11 amount paid by the sheriff's office and the
 12 appropriation satisfy all present and future claims
 13 related to the negligent act; providing a limitation
 14 on the payment of fees and costs; providing an
 15 effective date.
 16
 17 WHEREAS, on October 29, 2008, Manuel Antonio Matute, age
 18 60, was hit head-on by a vehicle owned by the Palm Beach County
 19 Sheriff's Office and driven by a Palm Beach County deputy
 20 sheriff, after the deputy sheriff lost control of the vehicle on
 21 U.S. Highway 441 in Palm Beach County, and
 22 WHEREAS, Mr. Matute was killed as a result of the accident,
 23 and
 24 WHEREAS, one of Mr. Matute's surviving children, Eddna
 25 Torres De Mayne, brought a wrongful-death action against the
 26 Palm Beach County Sheriff's Office seeking damages for herself
 27 and her siblings, Criss Matute, Christian Manuel Torres, Lansky
 28 Torres, and Nasdry Yamileth Torres Barahona, for their anguish
 29 and mental pain and suffering due to the tragic death of their

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32-00040A-15

201552__

30 father, and
 31 WHEREAS, on January 4, 2011, the Palm Beach County
 32 Sheriff's Office offered to settle the claim for the amount of
 33 \$500,000 and Ms. Torres De Mayne, as personal representative of
 34 the Estate of Manuel Antonio Matute, accepted the Sheriff's
 35 offer on or about January 9, 2011, and
 36 WHEREAS, in May 2011, the Palm Beach County Sheriff's
 37 Office tendered to Ms. Torres De Mayne, as personal
 38 representative of the Estate of Manuel Antonio Matute, a payment
 39 of \$128,149.02 in accordance with the remaining statutory limits
 40 of liability set forth in s. 768.28, Florida Statutes, and
 41 WHEREAS, Ms. Torres De Mayne, as personal representative of
 42 the Estate of Manuel Antonio Matute, seeks satisfaction of the
 43 balance of the settlement agreement, which is \$371,850.98, NOW,
 44 THEREFORE,
 45
 46 Be It Enacted by the Legislature of the State of Florida:
 47
 48 Section 1. The facts stated in the preamble to this act are
 49 found and declared to be true.
 50 Section 2. The Palm Beach County Sheriff's Office is
 51 authorized and directed to appropriate from funds of the county
 52 not otherwise appropriated and to draw a warrant in the sum of
 53 \$371,850.98 to Eddna Torres De Mayne, as personal representative
 54 of the Estate of Manuel Antonio Matute, as compensation for the
 55 wrongful death of Mr. Matute as a result of the negligence of an
 56 employee of the sheriff's office.
 57 Section 3. The amount paid by the Palm Beach County
 58 Sheriff's Office pursuant to s. 768.28, Florida Statutes, and

Page 2 of 3

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

32-00040A-15

201552__

59 the amount awarded under this act are intended to provide the
60 sole compensation for all present and future claims arising out
61 of the factual situation described in this act which resulted in
62 the death of Mr. Matute. The total amount paid for attorney
63 fees, lobbying fees, costs, and other similar expenses relating
64 to this claim may not exceed 25 percent of the amount awarded
65 under this act.

66 Section 4. This act shall take effect upon becoming a law.



THE FLORIDA SENATE
SPECIAL MASTER ON CLAIM BILLS

Location
402 Senate Office Building

Mailing Address
404 South Monroe Street
Tallahassee, Florida 32399-1100
(850) 487-5237

DATE	COMM	ACTION
12/31/14	SM	Favorable
2/2/15	JU	Pre-meeting

December 31, 2014

The Honorable Andrew Gardiner
President, The Florida Senate
Suite 409, The Capitol
Tallahassee, Florida 32399-1100

Re: **SB 54** – Senator Montford
Relief of Mark. T. Sawicki and Sharon L. Sawicki

SPECIAL MASTER'S FINAL REPORT

THIS IS AN UNCONTESTED CLAIM FOR \$700,000, TO BE PAYABLE IN A LUMP SUM, BASED ON A STIPULATED FINAL JUDGMENT BETWEEN MARK T. SAWICKI AND SHARON L. SAWICKI AND THE CITY OF TALLAHASSEE. THE FINAL JUDGMENT RESOLVED A CIVIL ACTION ARISING FROM THE NEGLIGENT OPERATION OF A CITY OF TALLAHASSEE TRUCK WHICH INJURED MARK T. SAWICKI.

FINDINGS OF FACT:

This claim arises out of an accident involving a truck owned by the City of Tallahassee and a bicyclist, Mark Sawicki, which occurred on October 2, 2009, in Tallahassee, Florida. The city truck struck and ran over Mr. Sawicki as the truck driver turned north onto Monroe Street from Call Street. The intersection is controlled by a traffic signal, and has cross walks and stop bars on each road. Call Street does not have a dedicated bicycle lane. Call Street does, however, have painted symbols of a bicycle with two chevrons on top, informing drivers that the roadway is shared with bicycles.

On the morning of the accident, Mr. Paul Hudson was working as a commercial truck driver for the City of Tallahassee. The truck he was driving had a hydraulic arm attached to its right side which would allow Mr. Hudson to

load and unload containers on and off the truck. Also on that morning, Mr. Sawicki, an engineer for Florida State University, left his home by bicycle and headed to work. Mr. Sawicki and his bicycle were equipped with various forms of safety gear, including front and rear bicycle lights, a backpack with reflective stripes, and a helmet.

At about 7 a.m. that morning, Mr. Sawicki, on a bicycle, and Paul Hudson, driving the city truck, each headed West on Call Street approaching Monroe Street. It was still relatively dark, as sunrise did not occur until 7:31 a.m. on that day. Mr. Hudson in his truck reached the intersection first. Mr. Sawicki pulled up to the intersection within the crosswalk, to the right of the truck, believing Mr. Hudson to have turned on his left turn signal. As stated by Mr. Hudson in deposition, Mr. Hudson did not look before attempting to turn right on a red light from Call Street to North Monroe Street. Additionally, Officer B. Davis of the Tallahassee Police Department noted in the Florida Traffic Crash Report that Mr. Hudson turned right on red when it was not clear to do so.

As the truck made a right turn, its hydraulic arm struck Mr. Sawicki in the back of his head, causing him to fall and be pulled under the truck as the truck continued moving. As Mr. Hudson continued to drive forward, the rear tire of the truck ran over Mr. Sawicki's body.

Mr. Sawicki suffered a crushed pelvis, broken right leg, and twisted ankle. Upon transport to the hospital by ambulance, Mr. Sawicki remained there for 32 days. Since the accident, Mr. Sawicki endured three surgeries, including major pelvis reconstructive surgery. He also experienced complications from surgery, consisting of repeated Methicillin-resistant staphylococcus aureus (MRSA) infections.

Mr. Sawicki's medical bills to date total \$250,000, of which Mr. Sawicki owes \$23,566.66 through a subrogation lien. The subrogation lien is a contingent liability which is due and payable only if the Legislature approves the settlement.

FUTURE SERVICES REPORT: Dr. John McKay, a rehabilitation consultant, prepared a Future Services Report at the request of the claimant. The report describes how the injuries from the accident have affected Mr. Sawicki's lifestyle and limited his abilities. The

report also specifies and calculates the cost of future medical needs resulting from the accident.

Before the accident, Mr. Sawicki was a competitive triathlete, marathoner, and cyclist. Since the accident and recovery to date, Mr. Sawicki struggles to stand for lengthy periods of time. He is no longer able to run more than a very short distance, much less compete in triathlons or other races.

Mr. Sawicki did not return to work from the date of the accident, October 2, 2009, until January 1, 2010. For this and other medical reasons, Mr. Sawicki depleted his sick leave and annual leave. The report, however, does not place a specific monetary value on the loss of leave time.

Mr. Sawicki continues to suffer from chronic pain, a dropped foot, sexual dysfunction, and intermittent bladder incontinence. Due to these continuing conditions, he will incur ongoing costs for physician services, medication, diagnostic tests, and physical therapy.

Mr. Sawicki previously performed numerous personal services around his house, including home repairs, yard work, and mechanical repairs. Due to physical limitations from his injuries, such as restricted climbing, standing, and walking, height restrictions, and light lifting only, he is unable to resume this work, and must rely on hiring outside help.

The report assumes that Mr. Sawicki will have a normal life expectancy but does not specify what that is. Although approximate costs are included in the report, as detailed in the table below, the report did not calculate the present value of the future medical costs. Additionally, Mr. Sawicki remains at risk for medical complications.

Still, future medical and personal services costs are estimated at several thousand dollars per year:

Cost	First Year	2nd thru 10th Year	11th Year +
Analgesics	\$30	\$30	\$30
Orthopedist	\$58	\$58	\$58
Urologist	\$98	\$98	\$98
Medical Care for Pain	\$90	\$90	\$90
Pills for Functioning	\$1,920	\$1,920	\$1,920
X-rays	\$42	\$42	\$21
Urology Tests	\$67	\$67	\$67
Physical Therapy	\$2,080	\$130	\$130
Exercise Mat	\$90	\$90	\$90
Exercise Equipment	\$100	\$100	\$100
Mileage Reimbursement	\$120	\$120	\$120
Personal Services	\$1,560	\$1,560	\$1,560
Total	\$6,255	\$4,305	\$4,284

The orthopedic surgeon who performed the reconstructive surgery on Mr. Sawicki’s pelvis expects that Mr. Sawicki will have to have hip surgery sometime in the future. The cost of the hip surgery is not included in the table, but is estimated at \$62,000.

Florida State University has employed Mr. Sawicki as a mechanical engineer continuously since 1987. The claimant intends to retire three years early due to the accident. The report estimates this loss at about \$200,000 in present value.

LITIGATION HISTORY:

On June 3, 2010, Mr. and Mrs. Sawicki filed a Complaint for Damages against the City of Tallahassee in the Leon County Circuit Court. The complaint alleged that Mr. Hudson negligently operated his truck which caused Mr. Sawicki to have permanent injuries, suffer mental anguish, and incur considerable medical costs. The complaint also asserted that the accident caused Mrs. Sawicki to suffer from loss of companionship, society, and consortium.

After the plaintiffs filed complaint, the parties engaged in discovery, exchanged interrogatories and took depositions. Eventually, the Sawicki’s and the City of Tallahassee entered into a Mediation Contingent Settlement Agreement. The city agreed to pay the Sawicki’s \$900,000, of which the city would pay \$200,000 upfront. The agreement provided for the

remainder to be paid upon the approval of a claim bill by the Legislature. The agreement also provides that the Sawicki's are responsible for their own attorneys' fees and costs, and states that the city agrees to support the claim bill.

The court issued an order approving the settlement and final judgment on February 12, 2012.

The city paid the \$200,000 on or about March 1, 2012. The remaining \$700,000 is sought through the underlying claim bill.

CLAIMANT'S POSITION:

To prove a claim of negligence, a plaintiff must show that a defendant had a duty to the plaintiff, the defendant breached that duty, the defendant's action or inaction caused the plaintiff's injury, and the plaintiff incurred damages. The claimant argues each of these elements as follows. Mr. Hudson had a duty to Mr. Sawicki to safely operate his motor vehicle. Mr. Hudson breached that duty by turning right on a red light without looking to the right. Had Mr. Hudson looked to the right before making a right turn on a red light, he would have seen Mr. Sawicki and known to avoid running over him, as it was foreseeable that he could have hit someone. Therefore, Mr. Hudson caused the accident and the resulting damages to the Sawickis'.

Mr. Sawicki suffered considerable physical damage from the accident. In addition to being required to have had three major surgeries and a liposuction, substantial rehabilitation, and long-term antibiotics for repeated MRSA infections, Mr. Sawicki is permanently injured. He continues to suffer from intermittent bladder incontinence. He will also most likely need a hip replacement surgery. He intends to shorten his career by retiring 3 years early, down from 66, to 63 years of age at retirement. His injuries now prevent him from participating altogether in activities he previously enjoyed, including triathlons, running events, and competitions. Walking, bicycling, and contributing to physical household tasks are now severely limited.

Mrs. Sawicki has suffered, and continues to suffer from loss of consortium as Mr. Sawicki has permanent sexual dysfunction.

RESPONDENT'S POSITION: The City of Tallahassee admits liability and fully supports this claim.

CONCLUSIONS OF LAW: Section 768.28 (2009), F.S., governs this matter. That statute generally allows injured parties to sue the state or local governments for damages caused by their negligence or the negligence of their employees. However, the statute limits the amount of damages that a plaintiff can collect from a judgment against or settlement with a government entity to \$100,000 per person and \$200,000 for all claims or judgments arising out of the same incident. Funds can be paid in excess of these limits only upon the approval of a claim bill by the Legislature. Thus, the Sawickis will not receive the full benefit of their settlement agreement with the City of Tallahassee unless the Legislature approves a claim bill authorizing the additional payment.

In a negligence action, a plaintiff bears the burden of proof to establish the four elements of negligence. These elements are duty, breach, causation, and damage. *Charron v. Birge*, 37 So. 3d 292, 296 (Fla. 5th DCA 2010).

The driver of a motor vehicle has a duty to use reasonable care, in light of the attendant circumstances, to prevent injuring persons within the vehicle's path. *Gowdy v. Bell*, 993 So. 2d 585, 586 (Fla. 1st DCA 2008). Reasonable care is the degree of care a reasonably careful person would have used under like circumstances. *Foster v. State*, 603 So. 2d 1312, 1316 (Fla. 1st DCA 1992). Mr. Hudson failed to use reasonable care by not looking to the right before turning his vehicle onto Monroe Street at a red light. Had Mr. Hudson looked properly, he would have seen Mr. Sawicki to the right of him, and avoided striking him with his vehicle.

Due to Mr. Hudson's breach of his duty of care, he caused the accident and the Sawicki's damages.

Florida's dangerous instrumentality doctrine imposes strict vicarious liability on an owner of a dangerous instrumentality who entrusts the instrument to a person who operates it negligently. *Aurbach v. Gallina*, 753 So. 2d 60, 62 (Fla. 2000). Trucks in operation are considered to be dangerous instrumentalities. *Meister v. Fisher*, 462 So. 2d 1071, 1072 (Fla. 1985).

Municipalities are subject to the dangerous instrumentality doctrine. “When a municipality owns a motor truck, a dangerous instrumentality when in operation, that is being operated with the knowledge and consent of the municipality through its officers or employees and used on the other streets for lawful street, sewer or other corporate purposes, the municipality may be liable for injuries ... caused by negligence of the truck driver in operating the truck” *Barth v. City of Miami*, 1 So. 2d 574, 577 (Fla. 1941).

The long-standing doctrine of respondeat superior provides that an employer is liable for an employee’s acts committed within the course and scope of employment. *City of Boynton Beach v. Weiss*, 120 So. 3d 606, 611 (Fla. 4th DCA 2013).

The City of Tallahassee employed Mr. Hudson at the time of the accident. On that day, Mr. Hudson drove a truck owned by the City of Tallahassee during the course of his normal workday. Therefore, the City of Tallahassee is liable for the negligence of Mr. Hudson and the damages caused to Mr. and Mrs. Sawicki.

The claimant has demonstrated significant economic damages. Mr. Sawicki owes \$23,566.66 in medical bills through a subrogation lien for past medical costs. As stated above, Mr. Sawicki has lost considerable leave time due to the accident. Expected costs for medical and personal services total, on average, a minimum of \$4,300 a year for the rest of his life. Mr. Sawicki is expected to undergo hip replacement, estimated at \$62,000. Mr. Sawicki’s career is expected to be shortened by 3 years, which will cause him to lose about \$200,000 in income.

Noneconomic damages have not been calculated but clearly exist for both Mr. Sawicki and Mrs. Sawicki.

Additionally, should this case have proceeded to trial, Mr. Sawicki appears by all accounts to have presented as a sympathetic plaintiff and one who, if anything, achieved the positive physical recovery he had largely due to his own efforts and fit state preceding the accident.

For these reasons, the undersigned concludes that the settlement is both fair and reasonable.

LEGISLATIVE HISTORY:

Senator Montford, sponsor for the claim bill, also sponsored this bill in 2013 and 2014. The Senate did not hear the bill or any other claim bill in any committee of reference in either year.

ATTORNEYS FEES:

The Sawickis' attorney has agreed to limit his fees to 25 percent of any amount awarded by the Legislature in compliance with s. 768.28(8), F.S. The bill provides that the total amount paid for lobbying fees, costs, and other similar expenses relating to the claim are included in the 25 percent limit.

FISCAL IMPACT:

The City of Tallahassee is self-insured. If approved by the Legislature, the \$700,000 will be paid from the city's self-insurance fund. The city represents that they have reserved this amount for the claim.

RECOMMENDATIONS:

For the reasons set forth above, the undersigned recommends that Senate Bill 54 (2015) be reported FAVORABLY.

Respectfully submitted,

Cindy M. Brown
Senate Special Master

cc: Senator Montford
Debbie Brown, Secretary of the Senate
Counsel of Record

By Senator Montford

3-00034A-15

201554__

1 A bill to be entitled
 2 An act for the relief of Mark T. Sawicki and his wife,
 3 Sharon L. Sawicki, by the City of Tallahassee;
 4 providing for an appropriation to compensate them for
 5 injuries sustained by Mr. Sawicki as a result of the
 6 negligence of an employee of the City of Tallahassee;
 7 providing a limitation on the payment of fees and
 8 costs; providing that certain payments and the
 9 appropriation satisfy all present and future claims
 10 related to the negligent act; providing an effective
 11 date.
 12
 13 WHEREAS, on the morning of October 2, 2009, Mark T. Sawicki
 14 was riding his bicycle on his way to Florida State University in
 15 Tallahassee, where he works as an engineer, and
 16 WHEREAS, Mark T. Sawicki was stopped at the intersection of
 17 Call Street and North Monroe Street while waiting to cross the
 18 street, and
 19 WHEREAS, a solid waste collection vehicle, owned by the
 20 City of Tallahassee and operated by a city employee, was making
 21 a right-hand turn and ran over Mark T. Sawicki, and
 22 WHEREAS, as a result of the foregoing incident, Mark T.
 23 Sawicki sustained multiple fractures, including, but not limited
 24 to, fractures to his right and left pelvic region, right femur,
 25 right acetabulum pubic ramus, and sacrum; a torn urethra;
 26 multiple abrasions and lacerations to his right thigh and upper
 27 and lower extremities; and neurological damage to his right
 28 lower extremities, resulting in a dropped foot, and
 29 WHEREAS, on June 7, 2010, a complaint was filed on behalf

Page 1 of 3

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

3-00034A-15

201554__

30 of Mark T. Sawicki and his wife, Sharon L. Sawicki, against the
 31 City of Tallahassee in the Circuit Court for Leon County, Case
 32 No. 2010-CA-1984, to recover damages for the injuries sustained
 33 by Mark T. Sawicki as a result of the negligence of the City of
 34 Tallahassee employee, and
 35 WHEREAS, the City of Tallahassee, Mark T. Sawicki, and his
 36 wife, Sharon L. Sawicki, reached a settlement of the case that
 37 includes a lump-sum payment in the amount of \$900,000, and
 38 WHEREAS, the City of Tallahassee paid \$200,000 of the
 39 settlement pursuant to the statutory limits of liability set
 40 forth in s. 768.28, Florida Statutes, and
 41 WHEREAS, the City of Tallahassee fully supports the passage
 42 of this claim bill, NOW, THEREFORE,
 43
 44 Be It Enacted by the Legislature of the State of Florida:
 45
 46 Section 1. The facts stated in the preamble to this act are
 47 found and declared to be true.
 48 Section 2. The City of Tallahassee is authorized and
 49 directed to appropriate from funds of the city not otherwise
 50 appropriated and to draw a warrant, payable to Mark T. Sawicki
 51 and his wife, Sharon L. Sawicki, for the total amount of
 52 \$700,000 as compensation for injuries and damages sustained as a
 53 result of the negligence of an employee of the City of
 54 Tallahassee.
 55 Section 3. The total amount paid for attorney fees,
 56 lobbying fees, costs, and other similar expenses relating to
 57 this claim may not exceed 25 percent of the amount awarded under
 58 this act.

Page 2 of 3

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

3-00034A-15

201554__

59 Section 4. The amount paid by the City of Tallahassee
60 pursuant to s. 768.28, Florida Statutes, and the amount awarded
61 under this act is intended to provide the sole compensation for
62 all present and future claims arising out of the factual
63 situation described in this act which resulted in the injuries
64 to Mark T. Sawicki.

65 Section 5. This act shall take effect upon becoming a law.



THE FLORIDA SENATE

SPECIAL MASTER ON CLAIM BILLS

Location
402 Senate Office Building

Mailing Address
404 South Monroe Street
Tallahassee, Florida 32399-1100
(850) 487-5237

DATE	COMM	ACTION
12/29/14	SM	Favorable
2/2/15	JU	Pre-meeting
	AED	
	AP	

December 29, 2014

The Honorable Andy Gardiner
President, The Florida Senate
Suite 409, The Capitol
Tallahassee, Florida 32399-1100

Re: **SB 68** – Senator Legg
Relief of Carl Abbott

SPECIAL MASTER'S FINAL REPORT

THIS IS AN UNOPPOSED EQUITABLE CLAIM FOR \$1.9 MILLION, IN LOCAL FUNDS, AGAINST THE PALM BEACH COUNTY SCHOOL BOARD FOR THE NEGLIGENCE OF A BUS DRIVER WHO STRUCK AND SERIOUSLY INJURED CARL ABBOTT AS HE WAS ATTEMPTING TO WALK ACROSS A ROADWAY WITHIN A MARKED PEDESTRIAN CROSSWALK.

CURRENT STATUS:

On December 15, 2010, an administrative law judge from the Division of Administrative Hearings, serving as a Senate special master, held a de novo hearing on a previous version of this bill, SB 54 (2012). After the hearing, the judge issued a report containing findings of fact and conclusions of law and recommended that the bill be reported favorably. That report is attached as an addendum to this report.

Due to the passage of time since the hearing, the Senate President reassigned the claim to me, Jason Hand. My responsibilities were to review the records relating to the claim bill, be available for questions from the members, and determine whether any changes have occurred since the hearing, which if known at the hearing, might have significantly altered the findings or recommendation in the previous report.

According to counsel for the parties, Carl Abbott passed away in June, 2014. The bill may need to be amended to reflect Mr. Abbott's death. The bill anticipates Carl Abbott's death, and provides that David Abbott, as guardian of Carl Abbott, is guaranteed a minimum payment of \$633,333.33 (via three annual payments of \$211,111.11) if Carl Abbott dies "within 3 years after the effective date of the act." In light of Carl Abbott's death before the effective date, the bill may need to be amended to clarify David Abbott's ability to receive the referenced payments. No other changes have occurred since the hearing which might have altered the findings and recommendations in the report.

Additionally, the prior claim bill, SB 54 (2012), is effectively identical to claim bill filed for the 2015 Legislative Session.

Respectfully submitted,

Jason Hand
Senate Special Master

cc: Debbie Brown, Secretary of the Senate



THE FLORIDA SENATE

SPECIAL MASTER ON CLAIM BILLS

Location

402 Senate Office Building

Mailing Address

404 South Monroe Street
Tallahassee, Florida 32399-1100
(850) 487-5237

DATE	COMM	ACTION
12/2/11	SM	Favorable

December 2, 2011

The Honorable Mike Haridopolos
President, The Florida Senate
Suite 409, The Capitol
Tallahassee, Florida 32399-1100

Re: **SB 54 (2012)** – Senator Joe Negron
Relief of Carl Abbott

SPECIAL MASTER'S FINAL REPORT

THIS IS AN UNOPPOSED EQUITABLE CLAIM FOR \$1.9 MILLION, IN LOCAL FUNDS, AGAINST THE PALM BEACH COUNTY SCHOOL BOARD FOR THE NEGLIGENCE OF A BUS DRIVER WHO STRUCK AND SERIOUSLY INJURED CARL ABBOTT AS HE WAS ATTEMPTING TO WALK ACROSS A ROADWAY WITHIN A MARKED PEDESTRIAN CROSSWALK.

FINDINGS OF FACT:

On June 30, 2008, at about 2:00 p.m., Carl Abbott, then 68 years old, started to walk across U.S. Highway 1 at the intersection with South Anchorage Drive in North Palm Beach, Florida. Mr. Abbott was heading west from the northeast quadrant of the intersection, toward the intersection's northwest quadrant. To get to the other side of U. S. Highway 1, which runs north and south, Mr. Abbott needed to cross the highway's three northbound lanes, a median, the southbound left turn lane, and the three southbound travel lanes. Mr. Abbott remained within the marked pedestrian crosswalk. (See diagram below.)

At the time Mr. Abbott began to cross U. S. Highway 1, a school bus was idling in the eastbound left-turn lane on South Anchorage Drive, waiting for the green light. The bus driver, Generia Bedford, intended to turn left and proceed

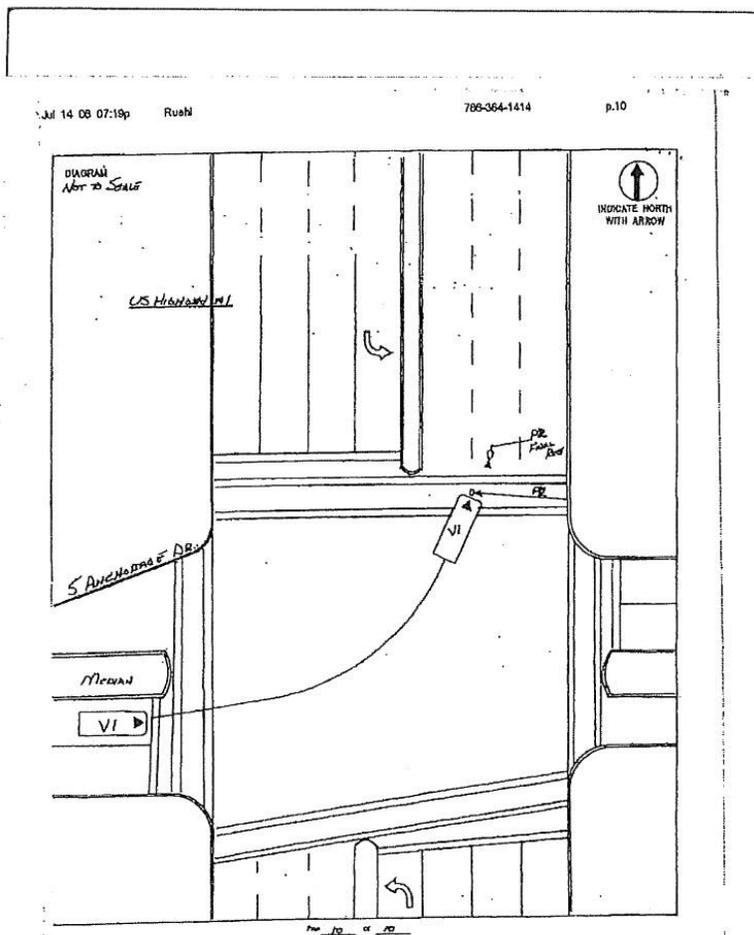
north on U. S. Highway 1. When the light changed, Ms. Bedford drove the bus eastward through the intersection and turned left, as planned, heading northward. She did not see Mr. Abbott, who was in the center northbound lane of U. S. Highway 1, until it was too late. The school bus struck Mr. Abbott and knocked him to the ground. He sustained a serious, traumatic brain injury in the accident.

Mr. Abbott received cardiopulmonary resuscitation (CPR) at the scene and was rushed to St. Mary's Medical Center, where he was placed on a ventilator. A cerebral shunt was placed to decrease intracranial pressure. After two months, Mr. Abbott was discharged with the following diagnoses: traumatic brain injury, pulmonary contusions, intracranial hemorrhage, subdural hematoma, and paralysis.

Mr. Abbott presently resides in a nursing home. As a result of the brain injury, he is unable to talk, walk, or take care of himself. He is alert but has significant cognitive impairments. Mr. Abbott has neurogenic bladder and bowel and hence is incontinent. He cannot perform any activities of daily living and needs constant, total care. His condition is not expected to improve.

Based on the Life Care Plan prepared by Stuart B. Krost, M.D., Mr. Abbott's future medical needs, assuming a life expectancy of 78 years, are projected to cost about \$4 million, before a reduction to present value. Based on the evidence presented, the undersigned is unable to determine the approximate amount of Mr. Abbott's past medical expenses, but it appears to be a sum between, very roughly, \$200,000 and \$775,000.

DIAGRAM:



LEGAL PROCEEDINGS:

In 2008, Mr. Abbott's son David, as guardian, brought suit on Mr. Abbott's behalf against the School Board of Palm Beach County. The action was filed in the Circuit Court in and for Palm Beach County, Florida.

Before trial the parties attended a mediation conference and agreed to settle the case for \$2 million, \$100,000 of which the School Board paid immediately. Pursuant to the settlement agreement, the \$1.9 million balance will be paid, if this claim bill is enacted, in eight yearly installments of \$211,111.11, plus a ninth and final annual payment of \$211,111.12. These yearly payments will commence, if at all, on the effective date of the claim bill, should it become law, and continue for nine years, or until Mr. Abbott's death, whichever first occurs. The School Board has agreed, however, to make at least three years' worth of payments,

guaranteeing a minimum payout of \$633,333.33 (if this claim bill passes).

Out of the \$100,000 settlement proceeds he has already received, Mr. Abbott paid \$25,000 in attorney's fees and, after paying some expenses, netted \$51,905.65. This amount was paid to Mr. Abbott's guardian, David Abbott.

CLAIMANT'S ARGUMENTS:

The Palm Beach County School Board is vicariously liable for the negligence of its employee, who breached the duty of a motorist to use reasonable care toward a pedestrian by failing to yield the right-of-way to Mr. Abbott as he crossed U. S. Highway #1 on foot within a marked crosswalk.

RESPONDENT'S POSITION:

The Palm Beach County School Board does not oppose the enactment of this claim bill. It is self-insured, however, and would pay the balance of the agreed sum out of its General Fund, which was the source of revenue used to satisfy the initial commitment of \$100,000. The School Board notes that payment of the \$1.9 million sought in this bill would be difficult, given budgetary constraints, but it stops short of urging that the bill be rejected on this basis.

CONCLUSIONS OF LAW:

As provided in s. 768.28, Florida Statutes (2010), sovereign immunity shields the School Board against tort liability in excess of \$200,000 per occurrence.

A school board is liable for any negligent act committed by a public school bus driver whom it employs, provided the act is within the scope of the driver's employment. Hollis v. School Board of Leon Cnty., 384 So. 2d 661, 665 (Fla. 1st DCA 1980). Ms. Bedford was the School Board's employee and was clearly acting within the scope of her employment at the time of the accident in question. Accordingly, the negligence of Ms. Bedford is attributable to the School Board.

Like any motorist, a school bus driver has a duty to look out for pedestrians and to avoid creating hazardous situations. See Resnick v. National Car Rental Systems, Inc., 266 So. 2d 74, 75 (Fla. 3d DCA 1972). While "the rights of motorists and pedestrians on highways are reciprocal," the motorist "must exercise ordinary reasonable and due care toward a pedestrian." Edwards v. Donaldson, 103 So. 2d 256, 259 (Fla. 2d DCA 1958).

Here, the applicable traffic regulations required that Ms. Bedford yield to Mr. Abbott because he was crossing the road within a marked crosswalk. See § 316.130(7), Fla. Stat.; see also, § 316.075(1)(a)1., Fla. Stat. ("[V]ehicular traffic, including vehicles turning right or left, shall yield the right-of-way to other vehicles and to pedestrians lawfully within the intersection or an adjacent crosswalk at the time such [green] signal is exhibited.") Ms. Bedford breached the duty to use reasonable care for the safety of Mr. Abbott. Her negligence was the direct and proximate cause of Mr. Abbott's serious and irreversible brain injury.

The sum that the School District has agreed to pay Mr. Abbott (\$2 million) is both reasonable and responsible, given the nature and permanence of the injury and the Mr. Abbott's substantial and continuing medical needs.

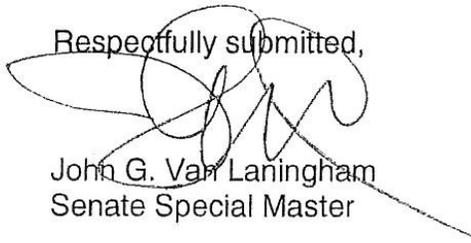
ATTORNEYS FEES:

Section 768.28(8), Florida Statutes, provides that "[n]o attorney may charge, demand, receive, or collect, for services rendered, fees in excess of 25 percent of any judgment or settlement." Mr. Abbott's attorney, Joseph R. Johnson, Esquire, has submitted an affidavit attesting that all attorney's fees, lobbying fees, and costs will be paid in accordance with the limitations specified in the claim bill.

RECOMMENDATIONS:

For the reasons set forth above, I recommend that Senate Bill 54 (2012) be reported FAVORABLY.

Respectfully submitted,



John G. Van Laningham
Senate Special Master

cc: Senator Joe Negron
Debbie Brown, Interim Secretary of the Senate
Counsel of Record



108864

LEGISLATIVE ACTION

Senate

.
. .
. .
. .
. .

House

The Committee on Judiciary (Simpson) recommended the following:

Senate Amendment (with title amendment)

Delete lines 43 - 47

and insert:

County School District. The payments were scheduled to cease upon the death of Carl Abbott if he died before the last payment was made. However, David Abbott, as guardian of Carl Abbott, is guaranteed a total payment amount of \$633,333.33 since Carl Abbott died before or within 3 years after the effective date of this act.



108864

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

13 And the title is amended as follows:

14 Delete lines 18 - 29

15 and insert:

16 WHEREAS, as a result of his injuries, Carl Abbott had
17 to reside in a nursing home, suffered from loss of
18 cognitive function, right-sided paralysis, immobility,
19 urinary incontinence, bowel incontinence, delirium,
20 and an inability to speak, and had to obtain nutrition
21 through a feeding tube, and

22 WHEREAS, the Palm Beach County School Board
23 unanimously passed a resolution in support of settling
24 the lawsuit that was filed in this case, tendered
25 payment of \$100,000 to Carl Abbott in accordance with
26 the statutory limits of liability set forth in s.
27 768.28, Florida Statutes, and does not oppose the
28 passage of this claim bill in favor of Carl Abbott in
29 the amount of \$1.9 million, as structured, and

30 WHEREAS, Carl Abbott passed away in June 2014,
31 NOW, THEREFORE,

By Senator Legg

17-00036-15

201568__

A bill to be entitled

An act for the relief of Carl Abbott by the Palm Beach County School Board; providing for an appropriation to compensate Carl Abbott for injuries sustained as a result of the negligence of an employee of the Palm Beach County School District; providing a limitation on the payment of fees and costs; providing an effective date.

WHEREAS, on June 30, 2008, 67-year-old Carl Abbott was struck by a school bus driven by an employee of the Palm Beach County School District while Mr. Abbott was crossing the street in a designated crosswalk at the intersection of South Anchorage Drive and U.S. 1 in Palm Beach County, and

WHEREAS, as a result of the accident, Carl Abbott suffered a closed head injury, traumatic brain injury, subdural hematoma, and subarachnoid hemorrhage, and

WHEREAS, as a result of his injuries, Carl Abbott must now reside in a nursing home, suffers from loss of cognitive function, right-sided paralysis, immobility, urinary incontinence, bowel incontinence, delirium, and an inability to speak, and must obtain nutrition through a feeding tube, and

WHEREAS, the Palm Beach County School Board unanimously passed a resolution in support of settling the lawsuit that was filed in this case, tendered payment of \$100,000 to Carl Abbott in accordance with the statutory limits of liability set forth in s. 768.28, Florida Statutes, and does not oppose the passage of this claim bill in favor of Carl Abbott in the amount of \$1.9 million, as structured, NOW, THEREFORE,

Page 1 of 3

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

17-00036-15

201568__

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

Section 1. The facts stated in the preamble to this act are found and declared to be true.

Section 2. The Palm Beach County School Board is authorized and directed to appropriate from funds of the school board not otherwise appropriated and to draw warrants in the amount of \$211,111.11 each fiscal year beginning in 2015 through 2022, inclusive, and \$211,111.12 in the 2023-2024 fiscal year for a total of \$1.9 million, payable to David Abbott, as guardian of Carl Abbott, as compensation for injuries and damages sustained as a result of the negligence of an employee of the Palm Beach County School District. The payments shall cease upon the death of Carl Abbott if he dies before the last payment is made. However, David Abbott, as guardian of Carl Abbott, shall be guaranteed a minimum payment amount of \$633,333.33 if Carl Abbott dies within 3 years after the effective date of this act. This amount represents three annual payments and shall be payable on the annual due dates.

Section 3. The amount paid by the Palm Beach County School Board pursuant to s. 768.28, Florida Statutes, and the amount awarded under this act are intended to provide the sole compensation for all present and future claims against the Palm Beach County School District arising out of the factual situation that resulted in the injuries to Carl Abbott as described in the preamble to this act. The total amount paid for attorney fees, lobbying fees, costs, and other similar expenses relating to this claim may not exceed 25 percent of the total

Page 2 of 3

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17-00036-15

201568__

59 amount awarded under this act.

60 Section 4. This act shall take effect upon becoming a law.



THE FLORIDA SENATE

SPECIAL MASTER ON CLAIM BILLS

Location
402 Senate Office Building

Mailing Address
404 South Monroe Street
Tallahassee, Florida 32399-1100
(850) 487-5237

DATE	COMM	ACTION
12/31/14	SM	Fav/1 amendment
2/2/15	JU	Pre-meeting
	AHS	
	AP	

December 31, 2014

The Honorable Andy Gardiner
President, The Florida Senate
Suite 409, The Capitol
Tallahassee, Florida 32399-1100

Re: **SB 34** – Senator Miguel Diaz de la Portilla
Relief of Asia Rollins

SPECIAL MASTER'S FINAL REPORT

THIS IS AN EQUITABLE CLAIM FOR \$699,999, BASED ON A PRESUIT SETTLEMENT OF A MEDICAL MALPRACTICE CLAIM, AGAINST THE MIAMI-DADE PUBLIC HEALTH TRUST, WHICH OPERATES JACKSON MEMORIAL HOSPITAL. ASIA ROLLINS, THE CLAIMANT, HAS SEVERE BRAIN INJURIES AND IS DEPENDENT ON OTHERS FOR HER BASIC NEEDS BECAUSE THE HOSPITAL FAILED TO TIMELY INTUBATE HER.

FINDINGS OF FACT:

On October 26, 2011, 3 year old Asia Rollins, who had history of epileptic seizures, had a seizure at daycare. The daycare providers gave her medicine and sent her to Jackson Memorial Hospital by ambulance. Upon arrival at the hospital's emergency room, Asia was breathing poorly. To help Asia breathe, the hospital's physicians decided to intubate her.

The staff mal-intubated Asia three times with several minutes elapsing between intubations. The delays deprived Asia of oxygen for extended time periods. Eventually, Asia's oxygen levels and heart rate decreased until she went into asystole, meaning her heart stopped. By the time Asia was breathing again, she had suffered a global ischemic brain injury,ⁱ which is a brain injury caused by the lack of blood flow.

Later, Asia's neurologist, Dr. Ian Miller of Miami Children's Hospital, diagnosed Asia as having hypoxic ischemic encephalopathy,ⁱⁱ a condition in which the brain does not receive enough oxygen. She was also diagnosed as having cortical blindness,ⁱⁱⁱ a type of blindness caused by a brain injury.

Currently, Asia is 6 years old and she is completely dependent on others.^{iv} She cannot dress herself, talk, or walk. She is wheelchair bound. She cannot feed herself and must be fed through a gastrostomy tube. Asia's breathing must be monitored and her airways must be suctioned regularly to prevent the accumulation of mucus. Asia also receives regular physical therapy to prevent or minimize muscle stiffness.

Asia has many disabilities and few abilities. According to her mother's comments, which were recorded in Asia's medical records, Asia looks around when her name is called.^v She smiles, laughs, and enjoys petting her dog.

Asia's current condition is not likely to significantly improve, and she will need full-time care for the rest of her life.

CONCLUSIONS OF LAW:

Jackson Memorial Hospital is a public hospital that is operated by the Miami-Dade Public Health Trust.^{vi} Additionally, the hospital or trust, under the doctrine of *respondeat superior*, is responsible for the medical negligence of its doctors.^{vii}

Under Florida law, to establish the liability of a physician in a medical malpractice action, the plaintiff has a burden of proving that (1) the physician had a duty to the patient, (2) the physician breached the duty, and (3) the breach of the duty caused the plaintiff's damages.^{viii} The Florida Supreme Court has explained these elements as follows:

The duty element requires a physician to act within the standard of professional care. See § 766.102, Fla. Stat. (2013). The standard of professional care is a level of care, skill, and treatment that, in consideration of all surrounding circumstances, is recognized as acceptable and appropriate by similar and reasonably prudent health care providers. In short, it is to provide the care that a reasonably prudent physician would provide. A physician breaches that duty when he or she does not provide the care that a reasonably prudent

physician would provide. See § 766.102, Fla. Stat. (2013). Therefore, in a medical malpractice action, the burden is on the plaintiff to establish that the care provided by the physician was not that of a *reasonably prudent physician*.^{ix}

During the special master proceeding, the claimant proved the elements of its medical malpractice claim through the use of a Verified Medical Opinion by Dr. Anthony C. Mustalish.^x According to the opinion, Dr. Mustalish practices emergency medicine and, among other credentials related to the practice of emergency medicine, was certified by the American Board of Emergency Medicine in 1990 and 1999. The hospital had no objection to the opinion and did not offer any evidence contradicting the opinion.

According to the Verified Medical Opinion, the hospital deviated from the standard of care for reasonably prudent similar providers by:

- Failing to provide proper care and treatment to the patient;
- Failing to properly intubate the patient;
- Failing to properly have and maintain an adequate airway for the patient;
- Failing to properly insure the patient was properly oxygenated;
- Failing to timely recognize an inappropriate intubation;
- Failing to timely and properly correct an inappropriate intubation;
- Improperly allowing the patient to suffer a prolonged period of anoxia, which is oxygen deprivation;
- Improperly allowing the patient to suffer cardiac arrest; and
- Inappropriately causing the patient to suffer a severe hypoxic ischemic injury.

The Verified Medical Opinion concluded with a finding that “within a reasonable degree of medical certainty, the . . . deviations from the standard of care caused or contributed to Asia Rollins’ injuries.”^{xi}

As a result of s. 768.28(5), F.S., the hospital’s liability for medical malpractice claims or judgments is limited to \$200,000 per claim or judgment and \$300,000 for all claims or judgments arising out of the same incident. Amounts in excess of these limits may be paid only if authorized by the Legislature in a claim bill. Thus, Asia Rollins will not receive

the full amount of the settlement with the hospital unless the Legislature approves a claim bill for her benefit.

SETTLEMENT AGREEMENT:

The parties to the claim bill settled the claim without resorting to a lawsuit, pursuant to the presuit procedures in chapter 766, F.S.^{xii} Under the terms of the settlement, the parties agreed to settle the medical negligence claim for \$999,999. Of that amount, \$300,000^{xiii} has been paid and \$699,999 remains unpaid. The agreement further provides that the hospital supports a claim bill in the amount of \$699,999. The hospital will oppose a claim bill that exceeds the amount of the settlement.

Because the amount of the settlement in this matter exceeds certain statutory thresholds, the settlement agreement had to be approved by a court, and the court had to appoint a guardian *ad litem* to represent Asia's interests.^{xiv} Asia's guardian *ad litem*, attorney Stephen F. Cain, reviewed the settlement agreement and issued a report to the court recommending that the settlement be approved.^{xv} In its order approving the settlement, the court ordered that the funds from the settlement be deposited into a special needs trust for the benefit of Asia Rollins.

SPECIAL NEEDS TRUST:

A special needs trust is a mechanism authorized by federal law that prevents a beneficiary, like Asia Rollins, from being disqualified from government benefits like Medicaid.^{xvi} Thus, the funds in Asia's special needs trust will supplement, not supplant the government benefits she is receiving. However, federal law also requires that any funds remaining in a special needs trust after the death of the beneficiary be used to reimburse the state providing the benefits.

Typically, in claim bills for the benefit of individuals like Asia Rollins, the Legislature expressly requires that the proceeds of a claim bill be paid into a special needs trust.^{xvii} This claim bill, however, does not contain the typical requirement for a special needs trust. Instead, the bill requires that funds be paid directly to Asia Rollins. To avoid any argument that the court order approving the settlement agreement applies only to the amounts already paid by the hospital, the Legislature should amend the claim bill to expressly require that the proceeds be placed in a special needs trust.

ATTORNEYS FEES:

Claim bills can raise several related attorney fee issues. The first issue is whether the claimant's attorney has complied with the 25 percent limit on attorney fees in s. 768.28(8), F.S., or will comply with the limit on attorney fees in the bill. In this matter, a closing statement submitted by Stuart Ratzan, the attorney for the claimant, shows that he or his firm was paid \$75,000 in attorney fees from the initial \$300,000 from Jackson Memorial Hospital. Thus, the payment for attorney fees is consistent with the 25 percent limit on attorney fees in s. 768.28(8), F.S. Additionally, Mr. Ratzan submitted an affidavit stating that the attorney fees related to the bill will be limited to 25 percent of the amount awarded.

The second issue relating to attorney fees is whether the claim bill contains a fee limitation and whether that limitation is appropriate. This issue arises in the underlying claim bill because it contains an unusual fee limitation. Since 2008, most claim bills passed by the Legislature expressly limit the amount of proceeds available to pay attorney fees, lobbying fees, and related costs to 25 percent of the proceeds. In contrast, if the facts of this claim bill related to a nongovernmental defendant, Florida Rule of Professional Conduct 4-1.5(f)(4)(B), would have limited the attorney fee to 33 1/3 percent of the proceeds.

This bill limits the amount of the proceeds available to pay attorney fees, lobbying fees, and related cost to 15 percent of the proceeds unless the claimant, meaning Asia's mother, executes a waiver agreeing to a 25 percent fee limit. Perhaps the Legislature should decide the appropriate fee limit instead of Asia's mother.

Weighing in favor of a lower amount of fees, the claim was settled without the time and expense of litigation, and Asia Rollins has suffered severe injuries and has great needs.^{xviii} Weighing in favor of the higher amount, the 25 percent fee limit is consistent with past practices of the Legislature and is significantly lower than the 33 1/3 percent authorized by The Florida Bar rule regulating contingency fees.

RECOMMENDATIONS:

For the reasons set forth above, the undersigned recommends that Senate Bill 34 (2015) be reported FAVORABLY, AS AMENDED.

Respectfully submitted,

Thomas C. Cibula
Senate Special Master

Attachment



544480

LEGISLATIVE ACTION

Senate

House

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The Special Master on Claim Bills recommended the following:

1 **Senate Amendment**

2

3 Delete line 48

4 and insert:

5 warrant in the sum of \$699,999, payable to the Supplemental
6 Care Trust for the Benefit of Asia Rose Rollins or other special
7 needs trust for the exclusive use and benefit of Asia Rollins.

8

ⁱ Columbia Neurosurgeons, Department of Neurosurgery, Columbia University Medical Center, *Cerebral Ischemia*, <http://www.columbianeurosurgery.org/conditions/cerebral-ischemia/> (last visited December 9, 2014).



544480

- ⁱⁱ Diana Kohnle, NYU Langone Medical Center, *Hypoxic Ischemic Encephalopathy*, <http://www.med.nyu.edu/content?ChunkIID=230598> (last editorial review May 2014).
- ⁱⁱⁱ MedicineNet.com, *Definition of Cortical Blindness*, <http://www.medicinenet.com/script/main/art.asp?articlekey=23943> (last editorial review June 6, 2012).
- ^{iv} Asia was born in May 2008.
- ^v Sayed Naqvi, M.D., Neurology Note for Asia Rollins (June 16, 2014).
- ^{vi} *Bylaws of the Board of Trustees of the Public Health Trust of Miami-Dade, County, Florida*, available at <http://www.jacksonhealth.org/library/trust/public-health-trust-bylaws-2013.pdf>.
- ^{vii} *Roessler v. Novak*, 858 So. 2d 1158, 1161 (Fla. 2d DCA 2003).
- ^{viii} *Saunders v. Dickens*, 2014 WL 3361813, *6 (Fla. 2014).
- ^{ix} *Id.* (citations omitted).
- ^x Anthony Mustalish, M.D., Verified Medical Opinion (November 7, 2012). The opinion was likely prepared to show that the claimant conducted a presuit investigation of a medical negligence claim, which is a prerequisite to filing a medical malpractice lawsuit under chapter 766, F.S.
- ^{xi} *Id.*
- ^{xii} The presuit procedures in chapter 766, F.S., require claimants and prospective defendants to a medical malpractice action to investigate medical malpractice claims before the claimant may file a lawsuit.
- ^{xiii} If the matter in this claim bill proceeded to trial, there likely would have been two plaintiffs, Asia Rollins and her mother, Indya Marc. Each would have asserted a different injury resulting from the hospital's negligence. As such, the \$300,000 payment is consistent with the limits of \$200,000 per claim and \$300,000 per incident in s 768.28(5), F.S.
- ^{xiv} Sections 744.3025 and 744.387, F.S.
- ^{xv} Report of Guardian *Ad Litem*, In Re: Guardianship of Asia Rollins, No. 13-3642 (Fla. 11th Cir. Ct. December 3, 2013).
- ^{xvi} See 42 U.S.C. 1396p(d)(4).
- ^{xvii} A review of previously enacted claim bills shows that the Legislature occasionally requires all of the proceeds of a special needs trust to revert to the payor upon the death of the beneficiary. Such a requirement may make sense if the claim bill awards an unusually large amount of funds or the claimant's life expectancy or the cost of the claimant's future medical care is unknown or in dispute.
- ^{xviii} Asia's guardian *ad litem*, attorney Stephen F. Cain, explained the financial magnitude of Asia's damages as follows: "A reasonable estimate of the full damages in this case would likely exceed \$35,000,000." Report of Guardian *Ad Litem*, *supra* note xv.



115226

LEGISLATIVE ACTION

Senate

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House

The Committee on Judiciary (Diaz de la Portilla) recommended the following:

Senate Amendment

Delete lines 55 - 60
and insert:

Section 4. The total amount paid for attorney fees, lobbying fees, costs, and other similar expenses relating to this claim may not exceed 25 percent of the amount awarded under this act.

By Senator Diaz de la Portilla

40-00054-15

201534__

1 A bill to be entitled
 2 An act for the relief of Asia Rollins by the Public
 3 Health Trust of Miami-Dade County, d/b/a Jackson
 4 Memorial Hospital; providing an appropriation to
 5 compensate her for injuries and damages sustained as a
 6 result of the negligence of the Public Health Trust of
 7 Miami-Dade County; providing a limitation on the
 8 payment of fees and costs; providing an effective
 9 date.

10

11 WHEREAS, on October 26, 2011, 3-year-old Asia Rollins
 12 suffered a seizure at her day care center and was taken by
 13 emergency medical personnel to Jackson Memorial Hospital, and
 14 WHEREAS, at the hospital, Asia Rollins experienced
 15 difficulty breathing and was electively intubated a total of
 16 four times, during the third of which vomit was expelled from
 17 her endotracheal tube, and
 18 WHEREAS, the delay between the intubations deprived Asia
 19 Rollins of oxygen for extended periods, causing her oxygen
 20 levels and heart rate to decrease, and
 21 WHEREAS, as a result of her depleted oxygen levels and
 22 decreased heart rate, Asia Rollins went into asystole, and
 23 WHEREAS, by the time cardiopulmonary resuscitation was
 24 completed Asia Rollins suffered a global ischemic brain injury
 25 and was subsequently diagnosed with hypoxic ischemic
 26 encephalopathy and cortical blindness, and
 27 WHEREAS, Asia Rollins, now 6 years old, is unable to walk
 28 or talk and will never be able to live an independent life, and
 29 WHEREAS, Asia Rollins's neurologist recommends that she

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40-00054-15

201534__

30 receive 24-hour care for the rest of her life, and
 31 WHEREAS, Asia Rollins needs assistive devices for
 32 ambulation and is unable to dress or feed herself or get around
 33 her home, which requires modification to accommodate the
 34 required assistive and therapy devices, and
 35 WHEREAS, the Public Health Trust of Miami-Dade County
 36 agreed to settle Asia Rollins's claim for \$999,999, and
 37 WHEREAS, \$300,000, has been paid pursuant to the statutory
 38 limits of liability in s. 768.28, Florida Statutes, and \$699,999
 39 remains to be paid, NOW, THEREFORE,
 40
 41 Be It Enacted by the Legislature of the State of Florida:
 42
 43 Section 1. The facts stated in the preamble to this act are
 44 found and declared to be true.
 45 Section 2. The Public Health Trust of Miami-Dade County,
 46 d/b/a Jackson Memorial Hospital, is authorized and directed to
 47 appropriate from funds not otherwise encumbered and to draw a
 48 warrant in the sum of \$699,999, payable to Asia Rollins.
 49 Section 3. The amount paid by the Public Health Trust of
 50 Miami-Dade County pursuant to s. 768.28, Florida Statutes, and
 51 the amount awarded under this act are intended to provide the
 52 sole compensation for all present and future claims arising out
 53 of the factual situation described in this act which resulted in
 54 the injuries and damages to Asia Rollins.
 55 Section 4. The total amount paid for attorney fees,
 56 lobbying fees, and related costs may not exceed 15 percent of
 57 the amount awarded under this act, absent a waiver of this fee
 58 limitation executed by the claimant, and in such event, the fee

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40-00054-15

201534__

59 may not exceed 25 percent of the total amount awarded under this
60 act.

61 Section 5. This act shall take effect upon becoming a law.

The Florida Senate
BILL ANALYSIS AND FISCAL IMPACT STATEMENT

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

Prepared By: The Professional Staff of the Committee on Judiciary

BILL: SB 102

INTRODUCER: Senator Hukill and others

SUBJECT: Digital Assets

DATE: February 2, 2015

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Davis</u>	<u>Cibula</u>	<u>JU</u>	<u>Pre-meeting</u>
2.	_____	_____	<u>FP</u>	_____
3.	_____	_____	<u>RC</u>	_____

I. Summary:

SB 102 is a state adaptation of the Uniform Fiduciary Access to Digital Assets Act developed by the Uniform Law Commission, also known as the National Conference of Commissioners on Uniform State Laws. The bill vests personal representatives of a decedent, agents under a power of attorney, guardians, and trustees with the ability to access the digital assets of an account holder as if these fiduciaries were the account holder. Digital assets include electronic communications and records such as emails, text messages, online photographs, documents stored on the cloud, electronic bank statements, and other electronic communications or records.

The bill expressly states that the fiduciaries are authorized users for purposes of criminal laws prohibiting unauthorized access to electronic accounts. For purposes of privacy laws prohibiting email service providers and similar entities from disclosing an account holder's records without the account holder's consent, the bill provides that the fiduciaries are deemed to have the lawful consent of the account holders.

II. Present Situation:

Technology has dramatically transformed how people communicate, receive and store information, and transact business. Before the Internet was developed, most information and correspondence existed in tangible forms. The news was printed on paper and delivered by the paperboy, correspondence was delivered by the postal carrier to mailboxes, and music was played from vinyl records. To retain items, photographs were glued into photo albums and correspondence was filed in metal filing cabinets.¹ When someone died or became incapacitated, most of his or her personal information could be located by a family member, personal representative, or guardian who sifted through the paper records in the person's home. Incoming

¹ The National Conference of Commissioners on Uniform State Laws, *Legislative Fact Sheet – Fiduciary Access to Digital Assets*, <http://www.uniformlaws.org/Act.aspx?title=Fiduciary%20Access%20to%20Digital%20Assets> (last visited Jan. 23, 2015).

mail would eventually divulge where the person banked and what bills needed to be paid. The quest to identify and access someone's assets, however, is changing with the advent of digital communications.

Many assets that once existed in a tangible form are being replaced by digital assets² that are intangible and not readily discoverable or accessible. Substantial amounts of valuable electronic data and digital assets are acquired and stored in cell phones, laptops, personal computers, online accounts, and other devices.³ Accordingly, a family member or personal representative often faces substantial challenges when trying to identify, locate, or access the online accounts and digital assets of a deceased or incapacitated person. One recent report stated that millions of Internet accounts "belong" to deceased people.⁴

Upon an account holder's death or incapacity, how does someone in a fiduciary⁵ relationship identify and locate that person's digital assets? Who then has control or ownership? How is an account accessed when no one has the decedent's password? Does the original term of service agreement control whether a successor may gain access to an account?

Resolution of these legal issues is pitting the fiduciary's duty to identify and access the digital assets against the Internet service provider's duty to protect the original account holder's privacy interest and not illegally divulge information that could be a violation of state and federal computer security laws. An additional barrier for guardians exists in the conditions of the terms of service agreement that the original account holder agreed to when initiating a contract with the service provider.

Criminal Laws

Federal Law

Federal and state laws prohibit the unauthorized access of both computer systems and certain types of protected data. The most relevant federal laws, passed in 1986, are the Stored Communications Act⁶ and the Computer Fraud and Abuse Act.⁷ The Stored Communications Act, which was part of the Electronic Communications Privacy Act,⁸ establishes privacy rights and prohibits certain electronic communication services or remote computing services from knowingly divulging the contents of certain electronic communications and files. These privacy protections are viewed by some as being substantial barriers for family members and fiduciaries

² Some examples of digital assets are e-mail, photos, projects, online bank accounts, personal records, digital music, entertainment, presentations, domain names, intellectual property, and client lists. The assets are generally important because of their sentimental or financial value.

³ James D. Lamm, Digital Passing: Estate Planning for Passwords and Digital Property, *Video Clip: Family Wants Access to Son's Digital Data After Death* (Sept. 10, 2014), <http://www.digitalpassing.com/2014/09/10/video-clip-family-access-sons-digital-data-death/> (last visited Jan. 23, 2015).

⁴ The National Conference of Commissioners on Uniform State Laws, *Uniform Fiduciary Access to Digital Assets Act* (June 6, 2014) http://www.uniformlaws.org/shared/docs/Fiduciary%20Access%20to%20Digital%20Assets/2014am_ufadaa_draft.pdf.

⁵ A fiduciary is defined as someone who owes to another person a duty to act in good faith and trust. BLACK'S LAW DICTIONARY (9th ed. 2009).

⁶ 18 U.S.C. s. 2701 *et seq.*

⁷ 18 U.S.C. s. 1030 *et seq.*

⁸ 18 U.S.C. s. 2510, *et seq.*

who seek to access the contents of a deceased or incapacitated user's online accounts. The service providers see them as restrictions on their ability to disclose electronic communications to anyone, unless certain exceptions are met. Their reasoning is that, if the Stored Communications Act applies, the online account service provider is prohibited by law from disclosing the contents of the communications and files.⁹

The Computer Fraud and Abuse Act is a computer security law that outlaws conduct that victimizes computer systems. The law is designed to protect computers in which there is a federal interest and shields them from certain threats and forms of espionage and from being corruptly used as vehicles to commit fraud.¹⁰ The law imposes penalties for the unauthorized access of stored data, devices, and computer hardware.¹¹ The U.S. Department of Justice has stated that the Computer Fraud and Abuse Act is broad enough in scope to permit the federal government to prosecute someone if the person exceeds his or her authorized access by violating the access terms of a web site's terms of service agreement or usage policies.¹²

State Law

Two chapters in the *Florida Statutes* address computer related crimes and the security of communications and are modeled after the federal Stored Communications Act. Chapter 815 is the "Florida Computer Crimes Act" and Chapter 934 is entitled "Security of Communications; Surveillance." Neither chapter addresses the ability of a fiduciary to legally access, duplicate, or control digital assets.¹³

Terms of Service Agreements

Terms of service agreements, the conditions controlling the relationship between the account holder and the service provider, are not uniform among Internet services providers. While some Internet service providers publish explicit policies detailing what will occur to digital assets when an individual dies, other providers do not. Some providers' policies state that upon the death of the account holder, the account will terminate, thereby prohibiting access to the account by anyone. Providers often publish their policies in the terms of service agreements but the terms are frequently ignored as readers quickly move past the language to progress to the end of the document.

⁹ James D. Lamm, *Digital Passing: Your Client is Six Feet Under, But His Data is in the Cloud*, Nov. 2014 (on file with the Senate Committee on Judiciary).

¹⁰ Charles Doyle, Congressional Research Service, *Cybercrime: A Sketch of 18 U.S.C. 1030 and Related Federal Criminal Laws* (Feb. 25, 2008).

¹¹ William Bissett and David Kauffman, *Surf the Evolving Web of Laws Affecting Digital Assets*, 41 *Estate Planning* No. 4 (Apr. 2014).

¹² Lamm, *supra* note 9, at 10.

¹³ The Real Property, Probate, & Trust Law Section of The Florida Bar, *White Paper: Proposed Enactment of Chapter 740, Florida Statutes* (2014) (on file with the Senate Committee on Judiciary).

A Model Uniform Law

Believing that legislation was needed to ensure that account holders or their guardians retain control of digital property, the Uniform Law Commission¹⁴ developed and adopted the Uniform Fiduciary Access to Digital Assets Act in July, 2014, to address these issues. The Real Property, Probate and Trust Law Section of The Florida Bar has modified the uniform law and drafted Senate Bill 102 to enable fiduciaries to access the digital assets of decedents, wards, principals, and settlors of a trust who are or were, prior to death, residents of Florida.

III. Effect of Proposed Changes:

Purpose

This legislation creates the “Florida Fiduciary Access to Digital Assets Act.” According to the Real Property, Probate and Trust Law Section (RPPTL) of The Florida Bar, the goal of the act is two-fold:

- To remove barriers that impede a fiduciary’s ability to access electronic communications and records; and
- Leave unchanged any existing law governing fiduciary, probate, trust, banking, security, and agency law.

Limited Application

According to the RPPTL, the act is limited in its scope and applies only to fiduciaries who are already bound to act in compliance with their fiduciary duties and powers. It does not extend to family members or other people who seek access to the digital assets unless they are also fiduciaries. Moreover, the ability of a fiduciary to access a digital asset does not entitle the fiduciary to own the asset or make transactions with the asset.

The act is further limited by the definition of “digital assets.” The act’s only application is to an electronic record, which includes electronic communications, and does not apply to the underlying asset or liability unless the asset or liability is itself an electronic record.

Definitions (Section 3)

Section 3 of the bill defines 24 terms used in the act. The majority of those terms are found in the Florida Probate Code and the Florida Powers of Attorney Act, while others are adapted from federal statutes or the Uniform Fiduciary Access to Digital Assets Act. Some of the most frequently used terms in this act are listed below.

An “account holder” is defined as a person who has entered into a terms-of-service agreement with a custodian as well as the fiduciary for that person. It also includes a deceased person who entered into the agreement during the individual’s life time. Under this provision, the fiduciary steps into the shoes of the original account holder.

¹⁴ According to its website, the Uniform Law Commission was established in 1892 and is made up of lawyers who are appointed by state governments. Its purpose is to research, draft, and promote the enactment of non-partisan uniform state legislation.

“Catalogue of electronic communications” means information that identifies each person with which an account holder has had an electronic communication, the time and date of the communication, and the electronic address of the person.

“Content of an electronic communication” is defined to mean information not readily accessible to the public concerning the substance or meaning of an electronic communication.

A “custodian” is defined as a person that carries, maintains, processes, receives, or stores a digital asset of an account holder.

A “digital asset” is defined as an electronic record but does not include the underlying asset or liability unless the asset or liability is an electronic record.

“Electronic communication” is defined as a digital asset stored by an electronic communication service or carried or maintained by a remote computing service and includes the catalogue and content of an electronic communication.

“Electronic communication service” means a custodian that provides to the public the ability to send or receive an electronic communication, an example of which would be Internet service providers.

Four Types of Fiduciaries Covered (Sections 4-7)

Under the bill, a fiduciary who is authorized to access another’s digital assets must be a personal representative of a decedent, a guardian of a ward, an agent for a principal under a power of attorney, or a trustee of a trust. The authority applies whether the fiduciary is the original, additional, or successor fiduciary.

In essence, the bill provides that the fiduciary steps into the shoes of the person he or she is representing through this grant of authority to manage their digital assets.

Each of the four types of fiduciaries are *generally* given the right to access:

- The content of an electronic communication sent or received by the decedent, ward, principal, or held in trust *if* the electronic communication service or remote computing service is authorized to disclose the content under the Electronic Communications Privacy Act. The “content” is defined in the act as being information not readily accessible to the public concerning the substance or meaning of an electronic communication. In lay terms, it is generally understood to be the subject line of an e-mail or the body of an e-mail or the body of other types of electronic communications that are protected by the Stored Communications Act.¹⁵

¹⁵ According to James Lamm, an expert in this area of law, the Stored Communications Act does not protect the content of all electronic communications, and the Stored Communications Act does not protect all records held in electronic storage by storage providers. The Act only protects the content of an electronic communication if the content is held in electronic storage by a service provider, the service provider holding the content provides an electronic communication service or remote computing service to the public, and access to the content is restricted in a manner so that it is not completely public.

- The “catalogue” of electronic communications sent or received by the decedent. The “catalogue” is understood in lay terms to be the non-content records that a service provider holds such as the sender’s and recipient’s name and address, and the date and time of the e-mail message; and
- Any other digital asset that the decedent had a right or interest in at his or her death. The digital assets include both the content and the catalog of an electronic communication.

The authority of a personal representative or trustee to access a decedent’s or settlor’s digital assets can be restricted by court order, the terms of a trust or will, or by agreement between a service provider and the account holder decedent or trust settlor to restrict a fiduciary’s access to the digital assets.¹⁶ With respect to guardians, a guardian is not authorized to access a ward’s digital assets unless authorized by court order after a hearing.

Section 7 of the bill, regarding the control of digital assets by a trustee, is structured slightly differently than the provisions relating to other types of fiduciaries. The bill makes distinctions between a trustee who is an original account holder and a trustee who is not an original account holder. It states that unless it is otherwise provided by the court or the terms of the trust, a trustee or a successor of a trustee that is the original account holder has the right to access each digital asset held in trust, including the catalogue of electronic communications sent or received and the content of an electronic communication. The language then provides, like the other fiduciaries, that the trustee or successor of a trust that is not an original account holder has the right to access the catalogue of electronic communications. The trustee will have access to the content of the settlor’s communications *if* the electronic communication service or remote computing services is authorized to disclose them under federal law.

A Fiduciary’s Access and Authority Over the Digital Assets (Section 8)

Section 8 of the bill establishes the fiduciary’s access to, and authority over, the digital assets of the account holder. The fiduciary remains subject to the duties and obligations of existing law and is liable if a breach of those duties occurs. If an asset was illegally obtained by the account holder, the fiduciary does not have any power over that asset.

The section provides that a fiduciary that is an account holder or has the right to access a digital asset:

- May take any action regarding the digital asset to the extent the account holder had that authority, subject to terms of a service agreement and copyright laws. However, if the original account holder chose to limit a fiduciary’s authority to access an account in a term of service agreement, that limitation prevails.
- Is deemed to have the consent of the account holder for the custodian to divulge the content of an electronic communication under applicable privacy laws.
- Is an authorized user under applicable computer fraud and unauthorized access laws. By defining the fiduciary as an authorized user, this section clarifies that the fiduciary is legally

Email from James D. Lamm, Attorney, to Judiciary Committee staff (Jan. 30, 2015) (on file with the Senate Committee on Judiciary).

¹⁶ See sections 4 and 7 of the bill.

authorized to access the digital information and is not in violation of the federal or state laws prohibiting unauthorized access.

Provisions in Terms-of-Service Agreements and Access to Tangible Personal Property (Sections 8 & 9)

Section 740.601(2), F.S., which is created by the bill, addresses terms of service agreements. If a terms-of-service agreement limits a fiduciary's access to a digital asset of an account holder, the bill declares the provision as against the public policy of the state unless the account holder agreed to the provision after July 1, 2015, the effective date of this legislation. Additionally, the bill requires that the account holder affirmatively agree to the limits on access in an agreement that is separate from the account holder's agreement to other provisions of the term-of-service agreement. Thus, under the bill, account holders effectively consent to the disclosure of their digital assets to a fiduciary unless they affirmatively act to opt out of disclosing their digital assets.

Section 740.601(3), F.S., addresses choice of law provisions in terms-of-service agreements by declaring that a choice-of-law provision is unenforceable if the provision designates a law that limits a fiduciary's access to a digital asset.

Section 740.601(4), F.S., clarifies that a fiduciary is authorized to access digital assets stored on equipment of the decedent, ward, principal, or settlor. This provision supersedes state criminal laws on unauthorized access to equipment. For criminal law purposes, this language makes clear that a fiduciary has authorization to access the account holder's digital assets that are held locally or remotely.

Section 740.701(5), F.S., which is created by the bill, provides that the fiduciary has the right to access the decedent's, ward's, principal's, or settlor's tangible personal property, such as a computer or cell phone, that receives, stores, processes, or sends digital assets and the digital assets stored on the device and is an authorized user for purposes of applicable computer fraud and unauthorized access laws.

Compliance (Sections 9 & 10)

Section 9 of the bill specifies procedures for a fiduciary to request access to, control of, or a copy of an account holder's digital assets, and requires the custodian's compliance with the fiduciary's request if:

- A personal representative with the right of access submits with the request a certified copy of the letters of administration or other specified document; A guardian having the right of access submits an accompanying certified copy of letters of plenary guardianship or a court order giving the guardian authority over the asset; An agent having the right of access submits with the request an original or copy of the power of attorney and a certification of the agent, under penalty of perjury, that the power of attorney is in effect;
- A trustee having the right of access submits a request accompanied by a certified copy of the trust instrument or a certification of trust authorizing the trustee to exercise authority over the asset; or

- A person entitled to receive and collect specified digital assets submits a request accompanied by a certified copy of an order of summary administration.

The custodian is required to comply with a request within 60 days after receipt of the request.

A custodian who relies on a certification of trust and does not know that certain representations in the trust or amendments are incorrect is not liable for acting in reliance on those documents. However, if the custodian demands additional documentation regarding the trust or amendments, he or she is liable for damages if a court determines that the custodian did not act in good faith when demanding the trust instrument. As provided in s. 740.801, F.S., which is created by the bill, a custodian is immune from liability if it acts in good faith in compliance with the bill.

Electronic Signatures in Global and National Commerce Act (Section 11)

Section 740.901, F.S., which is created by the bill establishes the relationship between this act and the Electronic Signatures in Global and National Commerce Act, noting where this act does and does not modify the federal law.

Application of the Bill (Section 12)

Section 740.011, F.S., created by the bill, provides that the power granted by the act to personal representatives, guardians, trustees, and agents applies to these fiduciaries regardless of whether their authority arose on, before, or after July 1, 2015, the effective date of the bill.¹⁷ Additionally, the bill does not apply to a digital asset of an employer used by an employee in the ordinary course of the employ's business.

Effective Date (Section 13)

The bill takes effect July 1, 2015.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

¹⁷ By allowing the bill to apply retroactively to the digital assets of individuals who died or became incapacitated before the bill takes effect, the bill effectively assumes that given the choice, these individuals would not have acted to restrict access to their digital assets.

D. Other Constitutional Issues:

The federal preemption doctrine is a principle of law which holds that federal laws take precedence over state laws, and as such, states may not enact laws that are inconsistent with the federal law. Under the Electronic Communications Privacy Act, a service provider, with few exceptions, may not divulge the contents of a communication without the “lawful consent” of the originator or addressee or intended recipient or the subscriber.¹⁸ There is no case law directly on point which explains whether a state statute can deem that a decedent, settler, principal, or ward lawfully consents to the release of his or her communications to a fiduciary. Additionally, committee staff is not aware of any case law indicating whether a state statute can define who is an authorized user of an account for purposes of federal laws that prohibit the unauthorized access to certain electronic data. Thus, arguments exist that federal law preempts the access to digital assets authorized by the bill. However, fiduciaries are generally understood to stand in the shoes of those they represent and this bill seems consistent with the traditional functions of fiduciaries.

Notwithstanding the foregoing, the bill, because of its word choice, arguably might not conflict with federal law at all. Specifically, the bill provides fiduciaries with access to an account holder’s electronic communication *if* authorized by federal law. Thus, the bill could be read to reserve to the courts, the duty of defining what access is authorized under federal law.

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

None.

B. Private Sector Impact:

This bill may help fiduciaries identify assets and bank accounts belonging to those who have died or become incapacitated. The custodians of digital assets, such as email service providers, however, will incur costs in reviewing requests for access to digital assets and then making those assets available.

C. Government Sector Impact:

None

VI. Technical Deficiencies:

None.

¹⁸ 18 U.S.C. 2702(b)(3).

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill creates the following sections of the Florida Statutes: 740.001, 740.101, 740.201, 740.301, 740.401, 740.501, 740.601, 740.701, 740.801, 740.901, and 740.911.

IX. Additional Information:**A. Committee Substitute – Statement of 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.



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LEGISLATIVE ACTION

Senate

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House

The Committee on Judiciary (Simpson) recommended the following:

Senate Amendment (with title amendment)

Delete everything after the enacting clause
and insert:

Section 1. The Division of Law Revision and Information is directed to create chapter 740, Florida Statutes, consisting of ss. 740.001-740.911, Florida Statutes, to be entitled "Fiduciary Access to Digital Assets."

Section 2. Section 740.001, Florida Statutes, is created to read:

740.001 Short title.—This chapter may be cited as the



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12 "Florida Fiduciary Access to Digital Assets Act."

13 Section 3. Section 740.101, Florida Statutes, is created to
14 read:

15 740.101 Definitions.—As used in this chapter, the term:

16 (1) "Account holder" means a person that has entered into a
17 terms-of-service agreement with a custodian or a fiduciary for
18 such person. The term includes a deceased individual who entered
19 into the agreement during the individual's lifetime.

20 (2) "Agent" means a person that is granted authority to act
21 for a principal under a durable or nondurable power of attorney,
22 whether denominated an agent, an attorney in fact, or otherwise.
23 The term includes an original agent, a co-agent, and a successor
24 agent.

25 (3) "Carry" means to engage in the transmission of
26 electronic communications.

27 (4) "Catalogue of electronic communications" means
28 information that identifies each person with which an account
29 holder has had an electronic communication, the time and date of
30 the communication, and the electronic address of the person.

31 (5) "Content of an electronic communication" means
32 information concerning the substance or meaning of the
33 communication which:

34 (a) Has been sent or received by the account holder;

35 (b) Is in electronic storage by a custodian providing an
36 electronic communication service to the public or is carried or
37 maintained by a custodian providing a remote computing service
38 to the public; and

39 (c) Is not readily accessible to the public.

40 (6) "Court" means a circuit court of this state.



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41 (7) "Custodian" means a person that carries, maintains,
42 processes, receives, or stores a digital asset of an account
43 holder.

44 (8) "Digital asset" means an electronic record. The term
45 does not include an underlying asset or liability to which an
46 electronic record refers, unless the asset or liability is
47 itself an electronic record.

48 (9) "Electronic" means technology having electrical,
49 digital, magnetic, wireless, optical, electromagnetic, or
50 similar capabilities.

51 (10) "Electronic communication" has the same meaning as
52 provided in 18 U.S.C. s. 2510(12).

53 (11) "Electronic communication service" means a custodian
54 that provides to an account holder the ability to send or
55 receive an electronic communication.

56 (12) "Fiduciary" means a person that is an original,
57 additional, or successor personal representative, guardian,
58 agent, or trustee.

59 (13) "Guardian" means a person who is appointed by the
60 court as guardian of the property of a minor or an incapacitated
61 individual. The term includes a person appointed by the court as
62 an emergency temporary guardian of the property.

63 (14) "Information" means data, text, images, videos,
64 sounds, codes, computer programs, software, databases, or the
65 like.

66 (15) "Person" means an individual, estate, trust, business
67 or nonprofit entity, public corporation, government or
68 governmental subdivision, agency, or instrumentality, or other
69 legal entity.



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70 (16) "Personal representative" means the fiduciary
71 appointed by the court to administer the estate of a deceased
72 individual pursuant to letters of administration or an order
73 appointing a curator or administrator ad litem for the estate.

74 (17) "Power of attorney" means a record that grants an
75 agent authority to act in the place of a principal pursuant to
76 chapter 709.

77 (18) "Principal" means an individual who grants authority
78 to an agent in a power of attorney.

79 (19) "Record" means information that is inscribed on a
80 tangible medium or that is stored in an electronic or other
81 medium and is retrievable in perceivable form.

82 (20) "Remote computing service" means a custodian that
83 provides to an account holder computer processing services or
84 the storage of digital assets by means of an electronic
85 communications system as defined in 18 U.S.C. s. 2510(14).

86 (21) "Terms-of-service agreement" means an agreement that
87 controls the relationship between an account holder and a
88 custodian.

89 (22) "Trustee" means a fiduciary that holds legal title to
90 a digital asset pursuant to an agreement, declaration, or trust
91 instrument that creates a beneficial interest in the settlor or
92 others.

93 (23) "Ward" means an individual for whom a guardian has
94 been appointed.

95 (24) "Will" means an instrument admitted to probate,
96 including a codicil, executed by an individual in the manner
97 prescribed by the Florida Probate Code, which disposes of the
98 individual's property on or after his or her death. The term



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99 includes an instrument that merely appoints a personal
100 representative or revokes or revises another will.

101 Section 4. Section 740.201, Florida Statutes, is created to
102 read:

103 740.201 Authority of personal representative over digital
104 assets of a decedent.—Subject to s. 740.601(2) and unless
105 otherwise provided by the court or the will of a decedent, a
106 personal representative has the right to access:

107 (1) The content of an electronic communication that the
108 custodian is permitted to disclose under the Electronic
109 Communications Privacy Act, 18 U.S.C. s. 2702(b);

110 (2) The catalogue of electronic communications sent or
111 received by the decedent; and

112 (3) Any other digital asset in which the decedent had a
113 right or interest at his or her death.

114 Section 5. Section 740.301, Florida Statutes, is created to
115 read:

116 740.301 Authority of guardian over digital assets of a
117 ward.—The court, after an opportunity for hearing, may grant a
118 guardian the right to access:

119 (1) The content of an electronic communication that the
120 custodian is permitted to disclose under the Electronic
121 Communications Privacy Act, 18 U.S.C. s. 2702(b);

122 (2) The catalogue of electronic communications sent or
123 received by the ward; and

124 (3) Any other digital asset in which the ward has a right
125 or interest.

126 Section 6. Section 740.401, Florida Statutes, is created to
127 read:



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128 740.401 Control by agent of digital assets.-
129 (1) To the extent that a power of attorney expressly grants
130 an agent authority over the content of an electronic
131 communication of the principal, and subject to s. 740.601(2),
132 the agent has the right to access the content of an electronic
133 communication that the custodian is permitted to disclose under
134 the Electronic Communications Privacy Act, 18 U.S.C. s. 2702(b).
135 (2) Except as provided in subsection (1) and unless
136 otherwise provided by a power of attorney or a court order, an
137 agent has the right to access:
138 (a) The catalogue of electronic communications sent or
139 received by the principal; and
140 (b) Any other digital asset in which the principal has a
141 right or interest.
142 Section 7. Section 740.501, Florida Statutes, is created to
143 read:
144 740.501 Control by trustee of digital assets.-Subject to s.
145 740.601(2) and unless otherwise provided by the court or the
146 terms of a trust:
147 (1) A trustee or a successor of a trustee who is an
148 original account holder has the right to access each digital
149 asset held in trust, including any catalogue of electronic
150 communications sent or received and the content of an electronic
151 communication; or
152 (2) A trustee or a successor of a trustee who is not an
153 original account holder has the right to access the following
154 digital assets held in trust:
155 (a) The catalogue of electronic communications sent or
156 received by the account holder;



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157 (b) The content of an electronic communication that the
158 custodian is permitted to disclose under the Electronic
159 Communications Privacy Act, 18 U.S.C. s. 2702(b); and

160 (c) Any other digital asset in which the account holder or
161 any successor account holder has a right or interest.

162 Section 8. Section 740.601, Florida Statutes, is created to
163 read:

164 740.601 Fiduciary access and authority.—

165 (1) A fiduciary that is an account holder or that has the
166 right under this chapter to access a digital asset of an account
167 holder:

168 (a) May take any action concerning the digital asset to the
169 extent of the account holder's authority and the fiduciary's
170 powers under the laws of this state, subject to the terms-of-
171 service agreement and copyright or other applicable law;

172 (b) Has, for the purpose of applicable electronic privacy
173 laws, the lawful consent of the account holder for the custodian
174 to divulge the content of an electronic communication to the
175 fiduciary; and

176 (c) Is an authorized user under applicable computer fraud
177 and unauthorized access laws.

178 (2) Unless an account holder, after June 30, 2015, agrees,
179 by an affirmative act separate from the account holder's assent
180 to other provisions of the terms of the service agreement, to a
181 provision in the service agreement which limits a fiduciary's
182 access to a digital asset of the account holder:

183 (a) The provision is void as against the public policy of
184 this state; and

185 (b) The fiduciary's access under this chapter to a digital



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186 asset does not violate the terms of the service agreement even
187 if the agreement requires notice of a change in the account
188 holder's status.

189 (3) A choice-of-law provision in a terms-of-service
190 agreement is unenforceable against a fiduciary acting under this
191 chapter to the extent the provision designates a law that
192 enforces a limitation on a fiduciary's access to a digital asset
193 which is void under subsection (2).

194 (4) As to tangible personal property capable of receiving,
195 storing, processing, or sending a digital asset, a fiduciary
196 with authority over the property of a decedent, ward, principal,
197 or settlor has the right to access the property and any digital
198 asset stored in it and is an authorized user for purposes of any
199 applicable computer fraud and unauthorized access laws,
200 including the laws of this state.

201 Section 9. Section 740.701, Florida Statutes, is created to
202 read:

203 740.701 Compliance.—

204 (1) If a fiduciary that has a right under this chapter to
205 access a digital asset of an account holder complies with
206 subsection (2), the custodian shall comply with the fiduciary's
207 request for a record for:

208 (a) Access to the digital asset;
209 (b) Control of the digital asset; and
210 (c) A copy of the digital asset to the extent authorized by
211 copyright law.

212 (2) If a request under subsection (1) is made by:

213 (a) A personal representative who has the right of access
214 under s. 740.201, the request must be accompanied by a certified



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215 copy of the letters of administration of the personal
216 representative, an order authorizing a curator or administrator
217 ad litem, or other court order;

218 (b) A guardian that has the right of access under s.
219 740.301, the request must be accompanied by a certified copy of
220 letters of plenary guardianship of the property or a court order
221 that gives the guardian authority over the digital asset;

222 (c) An agent that has the right of access under s. 740.401,
223 the request must be accompanied by an original or a copy of the
224 power of attorney which authorizes the agent to exercise
225 authority over the digital asset and a certification of the
226 agent, under penalty of perjury, that the power of attorney is
227 in effect;

228 (d) A trustee that has the right of access under s.
229 740.501, the request must be accompanied by a certified copy of
230 the trust instrument, or a certification of trust under s.
231 736.1017, which authorizes the trustee to exercise authority
232 over the digital asset; or

233 (e) A person that is entitled to receive and collect
234 specified digital assets, the request must be accompanied by a
235 certified copy of an order of summary administration issued
236 pursuant to chapter 735.

237 (3) A custodian shall comply with a request made under
238 subsection (1) not later than 60 days after receipt. If the
239 custodian fails to comply, the fiduciary may apply to the court
240 for an order directing compliance.

241 (4) A custodian that receives a certification of trust may
242 require the trustee to provide copies of excerpts from the
243 original trust instrument and later amendments which designate



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244 the trustee and confer on the trustee the power to act in the
245 pending transaction.

246 (5) A custodian that acts in reliance on a certification of
247 trust without knowledge that the representations contained in it
248 are incorrect is not liable to any person for so acting and may
249 assume without inquiry the existence of facts stated in the
250 certification.

251 (6) A custodian that enters into a transaction in good
252 faith and in reliance on a certification of trust may enforce
253 the transaction against the trust property as if the
254 representations contained in the certification were correct.

255 (7) A custodian that demands the trust instrument in
256 addition to a certification of trust or excerpts under
257 subsection (4) is liable for damages if the court determines
258 that the custodian did not act in good faith in demanding the
259 trust instrument.

260 (8) This section does not limit the right of a person to
261 obtain a copy of a trust instrument in a judicial proceeding
262 concerning the trust.

263 Section 10. Section 740.801, Florida Statutes, is created
264 to read:

265 740.801 Immunity.—A custodian and its officers, employees,
266 and agents are immune from liability for any action done in good
267 faith in compliance with this chapter.

268 Section 11. Section 740.901, Florida Statutes, is created
269 to read:

270 740.901 Relation to Electronic Signatures in Global and
271 National Commerce Act.—This chapter modifies, limits, or
272 supersedes the Electronic Signatures in Global and National



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273 Commerce Act, 15 U.S.C. ss. 7001 et seq., but does not modify,
274 limit, or supersede s. 101(c) of that act, 15 U.S.C. s. 7001(c),
275 or authorize electronic delivery of the notices described in s.
276 103(b) of that act, 15 U.S.C. s. 7003(b).

277 Section 12. Section 740.911, Florida Statutes, is created
278 to read:

279 740.911 Applicability.-

280 (1) Subject to subsection (2), this chapter applies to:

281 (a) An agent acting under a power of attorney executed
282 before, on, or after July 1, 2015;

283 (b) A personal representative acting for a decedent who
284 died before, on, or after July 1, 2015;

285 (c) A guardian appointed through a guardianship proceeding,
286 whether pending in a court or commenced before, on, or after
287 July 1, 2015; and

288 (d) A trustee acting under a trust created before, on, or
289 after July 1, 2015.

290 (2) This chapter does not apply to a digital asset of an
291 employer used by an employee in the ordinary course of the
292 employer's business.

293 Section 13. This act shall take effect July 1, 2015.

294
295 ===== T I T L E A M E N D M E N T =====

296 And the title is amended as follows:

297 Delete everything before the enacting clause
298 and insert:

299 A bill to be entitled
300 An act relating to digital assets; providing a
301 directive to the Division of Law Revision and



302 Information; creating s. 740.001, F.S.; providing a
303 short title; creating s. 740.101, F.S.; defining
304 terms; creating s. 740.201, F.S.; authorizing a
305 personal representative to have access to specified
306 digital assets of a decedent under certain
307 circumstances; creating s. 740.301, F.S.; authorizing
308 a guardian to have access to specified digital assets
309 of a ward under certain circumstances; creating s.
310 740.401, F.S.; authorizing an agent to have access to
311 specified digital assets of a principal under certain
312 circumstances; creating s. 740.501, F.S.; authorizing
313 a trustee to have access to specified digital assets
314 held in trust under certain circumstances; creating s.
315 740.601, F.S.; providing the rights of a fiduciary
316 relating to digital assets; providing that specified
317 provisions in a terms of service agreement are
318 unenforceable or void as against the public policy of
319 this state under certain circumstances; creating s.
320 740.701, F.S.; providing requirements for compliance
321 for a custodian, a personal representative, a
322 guardian, an agent, a trustee, or another person that
323 is entitled to receive and collect specified digital
324 assets; providing for damages if a demand for the
325 trust instrument is not made in good faith by a
326 custodian; providing applicability; creating s.
327 740.801, F.S.; providing immunity for a custodian and
328 its officers, employees, and agents for any action
329 done in good faith and in compliance with ch. 740,
330 F.S.; creating s. 740.901, F.S.; clarifying the



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331 relationship of ch. 740, F.S., to the Electronic
332 Signatures in Global and National Commerce Act;
333 creating s. 740.911, F.S.; providing applicability;
334 providing an effective date.



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LEGISLATIVE ACTION

Senate

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House

The Committee on Judiciary (Ring) recommended the following:

Senate Amendment (with title amendment)

Delete everything after the enacting clause
and insert:

Section 1. The Division of Law Revision and Information is directed to create chapter 740, Florida Statutes, consisting of ss. 740.001-740.701, Florida Statutes, to be entitled "Privacy Expectation Afterlife and Choices Act."

Section 2. Section 740.001, Florida Statutes, is created to read:

740.001 Short title.—This chapter may be cited as the



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12 "Privacy Expectation Afterlife and Choices Act."

13 Section 3. Section 740.101, Florida Statutes, is created to
14 read:

15 740.101 Definitions.—As used in this chapter, the term:

16 (1) "Contents," when used with respect to any wire, oral,
17 or electronic communication, includes any information concerning
18 the substance, purport, or meaning of that communication, as
19 defined in 18 U.S.C. s. 2510(8), and includes the subject line
20 of a communication.

21 (2) "Electronic communication" means any transfer of signs,
22 signals, writing, images, sounds, data, or intelligence of any
23 nature transmitted in whole or in part by a wire, radio,
24 electromagnetic, photoelectronic, or photooptical system that
25 affects interstate or foreign commerce. The term does not
26 include:

27 (a) A wire or oral communication;

28 (b) A communication made through a tone-only paging device;

29 (c) A communication from a tracking device; or

30 (d) Electronic funds transfer information stored by a
31 financial institution in a communications system used for the
32 electronic storage and transfer of funds, as defined in 18
33 U.S.C. s. 2510(12).

34 (3) "Electronic communication service" means any service
35 that provides to the service users the ability to send or
36 receive wire or electronic communications, as defined in 18
37 U.S.C. s. 2510(15).

38 (4) "Electronic communications system" means any wire,
39 radio, electromagnetic, photooptical, or photoelectronic
40 facilities for the transmission of wire or electronic



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41 communications, and any computer facilities or related
42 electronic equipment for the electronic storage of such
43 communications, as defined in 18 U.S.C. s. 2510(14).

44 (5) "Provider" means an entity that provides an electronic
45 communications service or remote computing service as defined in
46 18 U.S.C. s. 2510 or s. 2711.

47 (6) "Record or other information pertaining to a user" has
48 the same meaning as in 18 U.S.C. s. 2702(c).

49 (7) "Remote computing service" means the provision to the
50 public of computer storage or processing services by means of an
51 electronic communications system, as defined in 18 U.S.C. s.
52 2711(2).

53 (8) "User" means a person that:

54 (a) Uses an electronic communication service; and

55 (b) Is authorized by the provider of such service to engage
56 in such use, as defined in 18 U.S.C. s. 2510(13).

57 Section 4. Section 740.201, Florida Statutes, is created
58 to read:

59 740.201 Powers granted to a personal representative.—

60 (1) A probate court with jurisdiction of the estate of a
61 deceased user shall order the deceased user's provider to
62 disclose to the personal representative of such estate a record
63 or other information pertaining to the deceased user, not
64 including the contents of communications or stored contents, if
65 the court makes the following findings of facts:

66 (a) The user is deceased;

67 (b) The deceased user was the subscriber to or customer of
68 the provider's service;

69 (c) The account belonging to the deceased user has been



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70 identified with specificity, including a unique identifier
71 assigned by the provider;

72 (d) There are no other authorized users or owners of the
73 deceased user's account;

74 (e) Disclosure is not in violation of 18 U.S.C. ss. 2701 et
75 seq., 47 U.S.C. s. 222, or other applicable law;

76 (f) The request for disclosure is narrowly tailored to
77 effect the purpose of the administration of the estate;

78 (g) The personal representative demonstrates a good faith
79 belief that account records are relevant to resolve fiscal
80 assets of the estate;

81 (h) The request seeks information spanning no more than 1
82 year before the date of death; and

83 (i) The request is not in conflict with the deceased user's
84 will or testament.

85 (2) A provider shall disclose to the personal
86 representative of the estate of a deceased user the contents of
87 the deceased user's account to the extent reasonably available
88 only if the personal representative gives the provider all of
89 the following:

90 (a) A written request for the contents of the deceased
91 user's account;

92 (b) A copy of the death certificate of the deceased user;
93 and

94 (c) An order of the court of probate having by law
95 jurisdiction of the estate of the deceased user which requires
96 the estate to first indemnify the provider from all liability in
97 complying with the order and which finds that:

98 1. The user is deceased;



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99 2. The deceased user was the subscriber to or customer of
100 the provider's service;

101 3. The account belonging to the deceased user has been
102 identified with specificity, including a unique identifier
103 assigned by the provider;

104 4. There are no other authorized users or owners of the
105 deceased user's account;

106 5. In the deceased user's will or by the setting within the
107 product of service regarding how the account's contents may be
108 treated after a set period of inactivity or other event, the
109 deceased user expressly consented to the disclosure of the
110 contents of the deceased user's account by the executor or
111 administrator of the estate of the deceased user; and

112 6. Disclosure of the contents is not in violation of 18
113 U.S.C. ss. 2701 et seq., 47 U.S.C. s. 222, or other applicable
114 law.

115 Section 5. Section 740.301, Florida Statutes, is created to
116 read:

117 740.301 Undue burden restriction.—A court that has issued
118 an order to a provider to disclose a record or other information
119 pertaining to a deceased user to the personal representative of
120 the deceased user's estate pursuant to s. 740.201 shall quash or
121 modify such order on a motion made promptly by the provider if
122 compliance with such order would cause an undue burden on the
123 provider or if any requirement in s. 740.201 is not satisfied.

124 Section 6. Section 740.401, Florida Statutes, is created to
125 read:

126 740.401 Respecting user choices and applicable laws.—
127 (1) Notwithstanding s. 740.201, a provider may not be



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128 compelled to disclose any record or other information pertaining
129 to a deceased user if:

130 (a) The deceased user expressed a different intent through:

131 1. Deletion of the records or contents during the user's
132 lifetime; or

133 2. Affirmatively indicating through a setting within the
134 product or service regarding how the user's records or contents
135 may be treated after a set period of inactivity or other event;

136 (b) The provider is aware of any indication of lawful
137 access to the account after the date of the deceased user's
138 death or that the account is not that of the deceased user; or

139 (c) Disclosure violates other applicable law.

140 (2) This chapter does not confer upon the recipient any
141 greater rights in the contents than those held by the deceased
142 user.

143 Section 7. Section 740.501, Florida Statutes, is created to
144 read:

145 740.501 Right to notify of a request.—A provider may send a
146 notice to an account that a request for information was made
147 pursuant to s. 740.201 and may provide any current user of the
148 account a reasonable period of time to object to disclosure,
149 during which a disclosure may not be made. If a user notifies
150 the provider that he or she objects within the provided period
151 of time, a disclosure may not be made.

152 Section 8. Section 740.601, Florida Statutes, is created to
153 read:

154 740.601 Limiting posting as the deceased.—A provider is not
155 required to allow a party requesting a record or other
156 information pertaining to a deceased user of the provider's



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157 service to assume control of the deceased user's account.

158 Section 9. Section 740.701, Florida Statutes, is created
159 to read:

160 740.701 Compliance in good faith liability protection.—A
161 provider may not be held liable in any civil or criminal action
162 for compliance in good faith with a court order issued pursuant
163 to this act.

164 Section 10. This act shall take effect July 1, 2015.

165
166 ===== T I T L E A M E N D M E N T =====

167 And the title is amended as follows:

168 Delete everything before the enacting clause
169 and insert:

170 A bill to be entitled
171 An act relating to digital assets; providing a
172 directive to the Division of Law Revision and
173 Information; creating s. 740.001, F.S.; providing a
174 short title; creating s. 740.101, F.S.; defining
175 terms; creating s. 740.201, F.S.; requiring a probate
176 court with jurisdiction over the estate of a deceased
177 user to order certain entities to disclose specified
178 information pertaining to the deceased user to the
179 personal representative of the estate of the user
180 under certain circumstances; providing exceptions;
181 requiring a provider to disclose to the personal
182 representative the contents of the deceased user's
183 account only if the personal representative provides
184 specific information; creating s. 740.301, F.S.;

185 requiring a court issuing a certain order, upon a



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186 motion by the provider, to quash or modify such order
187 if compliance with the order would cause an undue
188 burden on the provider; creating s. 740.401, F.S.;
189 prohibiting a provider from being compelled to
190 disclose any record or any contents of communications
191 under certain circumstances; providing that no greater
192 rights are conferred upon the recipient than those
193 held by the deceased user; creating s. 740.501, F.S.;
194 authorizing a provider to notify an account user that
195 a request for information was made and to provide any
196 current user of the account a reasonable amount of
197 time to object to disclosure; prohibiting the provider
198 from making a disclosure during such time; prohibiting
199 the provider from making a disclosure if the user
200 notifies the provider that he or she objects to
201 disclosure; creating s. 740.601, F.S.; providing that
202 a provider is not required to allow a requesting party
203 to assume control of the deceased user's account;
204 creating s. 740.701, F.S.; prohibiting a provider from
205 being liable in any civil or criminal action for good
206 faith compliance with a court order; providing an
207 effective date.

By Senator Hukill

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1 A bill to be entitled
 2 An act relating to digital assets; providing a
 3 directive to the Division of Law Revision and
 4 Information; creating s. 740.001, F.S.; providing a
 5 short title; creating s. 740.101, F.S.; defining
 6 terms; creating s. 740.201, F.S.; authorizing a
 7 personal representative to have access to specified
 8 digital assets of a decedent under certain
 9 circumstances; creating s. 740.301, F.S.; authorizing
 10 a guardian to have access to specified digital assets
 11 of a ward under certain circumstances; creating s.
 12 740.401, F.S.; authorizing an agent to have access to
 13 specified digital assets of a principal under certain
 14 circumstances; creating s. 740.501, F.S.; authorizing
 15 a trustee to have access to specified digital assets
 16 held in trust under certain circumstances; creating s.
 17 740.601, F.S.; providing the rights of a fiduciary
 18 relating to digital assets; providing that specified
 19 provisions in a terms-of-service agreement are
 20 unenforceable or void as against the strong public
 21 policy of this state under certain circumstances;
 22 creating s. 740.701, F.S.; providing requirements for
 23 compliance for a custodian, a personal representative,
 24 a guardian, an agent, a trustee, or another person
 25 that is entitled to receive and collect specified
 26 digital assets; providing for damages if a demand for
 27 the trust instrument is not made in good faith by a
 28 custodian; providing applicability; creating s.
 29 740.801, F.S.; providing immunity for a custodian and

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30 its officers, employees, and agents for any action
 31 done in good faith and in compliance with ch. 740,
 32 F.S.; creating s. 740.901, F.S.; clarifying the
 33 relationship of ch. 740, F.S., to the Electronic
 34 Signatures in Global and National Commerce Act;
 35 creating s. 740.911, F.S.; providing applicability;
 36 providing an effective date.
 37

38 Be It Enacted by the Legislature of the State of Florida:
 39

40 Section 1. The Division of Law Revision and Information is
 41 directed to create chapter 740, Florida Statutes, consisting of
 42 sections 740.001-740.911, Florida Statutes, to be entitled
 43 "Fiduciary Access to Digital Assets."

44 Section 2. Section 740.001, Florida Statutes, is created to
 45 read:

46 740.001 Short title.—This chapter may be cited as the
 47 "Florida Fiduciary Access to Digital Assets Act."

48 Section 3. Section 740.101, Florida Statutes, is created to
 49 read:

50 740.101 Definitions.—As used in this chapter, the term:

51 (1) "Account holder" means a person that has entered into a
 52 terms-of-service agreement with a custodian and a fiduciary for
 53 such person. The term includes a deceased individual who entered
 54 into the agreement during the individual's lifetime.

55 (2) "Agent" means a person that is granted authority to act
 56 for a principal under a durable or nondurable power of attorney,
 57 whether denominated an agent, an attorney in fact, or otherwise.
 58 The term includes an original agent, a co-agent, and a successor

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59 agent.

60 (3) "Carry" means to engage in the transmission of
61 electronic communications.

62 (4) "Catalogue of electronic communications" means
63 information that identifies each person with which an account
64 holder has had an electronic communication, the time and date of
65 the communication, and the electronic address of the person.

66 (5) "Content of an electronic communication" means
67 information not readily accessible to the public concerning the
68 substance or meaning of an electronic communication.

69 (6) "Court" means a circuit court of this state.

70 (7) "Custodian" means a person that carries, maintains,
71 processes, receives, or stores a digital asset of an account
72 holder.

73 (8) "Digital asset" means an electronic record. The term
74 does not include an underlying asset or liability to which an
75 electronic record refers, unless the asset or liability is
76 itself an electronic record.

77 (9) "Electronic" means technology having electrical,
78 digital, magnetic, wireless, optical, electromagnetic, or
79 similar capabilities.

80 (10) "Electronic communication" means a digital asset
81 stored by an electronic communication service or carried or
82 maintained by a remote computing service. The term includes the
83 catalogue of electronic communications and the content of an
84 electronic communication.

85 (11) "Electronic communication service" means a custodian
86 that provides to the public the ability to send or receive an
87 electronic communication.

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88 (12) "Fiduciary" means a person that is an original,
89 additional, or successor personal representative, guardian,
90 agent, or trustee.

91 (13) "Guardian" means a person that has been appointed by
92 the court as guardian of the property of a minor or
93 incapacitated individual. The term includes a person that has
94 been appointed by the court as an emergency temporary guardian
95 of the property.

96 (14) "Information" means data, text, images, videos,
97 sounds, codes, computer programs, software, databases, or the
98 like.

99 (15) "Person" means an individual, estate, trust, business
100 or nonprofit entity, public corporation, government or
101 governmental subdivision, agency, or instrumentality, or other
102 legal entity.

103 (16) "Personal representative" means the fiduciary
104 appointed by the court to administer the estate of a deceased
105 individual pursuant to letters of administration or an order
106 appointing a curator or administrator ad litem for the estate.

107 (17) "Power of attorney" means a record that grants an
108 agent authority to act in the place of a principal pursuant to
109 chapter 709.

110 (18) "Principal" means an individual who grants authority
111 to an agent in a power of attorney.

112 (19) "Record" means information that is inscribed on a
113 tangible medium or that is stored in an electronic or other
114 medium and is retrievable in perceivable form.

115 (20) "Remote computing service" means a custodian that
116 provides to the public computer processing services or the

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117 storage of digital assets by means of an electronic
 118 communications system as defined in 18 U.S.C. s. 2510(14).

119 (21) "Terms-of-service agreement" means an agreement that
 120 controls the relationship between an account holder and a
 121 custodian.

122 (22) "Trustee" means a fiduciary that holds legal title to
 123 a digital asset pursuant to an agreement, declaration, or trust
 124 instrument that creates a beneficial interest in the settlor or
 125 others.

126 (23) "Ward" means an individual for whom a guardian has
 127 been appointed.

128 (24) "Will" means an instrument admitted to probate,
 129 including a codicil, executed by an individual in the manner
 130 prescribed by the Florida Probate Code, which disposes of the
 131 individual's property on or after his or her death. The term
 132 includes an instrument that merely appoints a personal
 133 representative or revokes or revises another will.

134 Section 4. Section 740.201, Florida Statutes, is created to
 135 read:

136 740.201 Authority of personal representative over digital
 137 assets of a decedent.—Subject to s. 740.601(2) and unless
 138 otherwise provided by the court or the will of a decedent, a
 139 personal representative has the right to access:

140 (1) The content of an electronic communication sent or
 141 received by the decedent if the electronic communication service
 142 or remote computing service is authorized to disclose the
 143 content under the Electronic Communications Privacy Act, 18
 144 U.S.C. s. 2702(b);

145 (2) The catalogue of electronic communications sent or

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146 received by the decedent; and

147 (3) Any other digital asset in which the decedent had a
 148 right or interest at his or her death.

149 Section 5. Section 740.301, Florida Statutes, is created to
 150 read:

151 740.301 Authority of guardian over digital assets of a
 152 ward.—The court, after an opportunity for hearing, may grant a
 153 guardian the right to access:

154 (1) The content of an electronic communication sent or
 155 received by the ward if the electronic communication service or
 156 remote computing service is authorized to disclose the content
 157 under the Electronic Communications Privacy Act, 18 U.S.C. s.
 158 2702(b);

159 (2) The catalogue of electronic communications sent or
 160 received by the ward; and

161 (3) Any other digital asset in which the ward has a right
 162 or interest.

163 Section 6. Section 740.401, Florida Statutes, is created to
 164 read:

165 740.401 Control by agent of digital assets.—

166 (1) To the extent a power of attorney expressly grants
 167 authority to an agent over the content of an electronic
 168 communication of the principal, the agent has the right to
 169 access the content of an electronic communication sent or
 170 received by the principal if the electronic communication
 171 service or remote computing service is authorized to disclose
 172 the content under the Electronic Communications Privacy Act, 18
 173 U.S.C. s. 2702(b).

174 (2) Except as provided in subsection (1) and unless

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175 otherwise provided by a power of attorney or a court order, an
 176 agent has the right to access:

177 (a) The catalogue of electronic communications sent or
 178 received by the principal; and

179 (b) Any other digital asset in which the principal has a
 180 right or interest.

181 Section 7. Section 740.501, Florida Statutes, is created to
 182 read:

183 740.501 Control by trustee of digital assets.--Subject to s.
 184 740.601(2) and unless otherwise provided by the court or the
 185 terms of a trust, a trustee or a successor of a trustee that is:

186 (1) An original account holder has the right to access each
 187 digital asset held in trust, including the catalogue of
 188 electronic communications sent or received and the content of an
 189 electronic communication; or

190 (2) Not an original account holder has the right to access
 191 the following digital assets held in trust:

192 (a) The catalogue of electronic communications sent or
 193 received by the account holder;

194 (b) The content of an electronic communication sent or
 195 received by the account holder if the electronic communication
 196 service or remote computing service is authorized to disclose
 197 the content under the Electronic Communications Privacy Act, 18
 198 U.S.C. s. 2702(b); and

199 (c) Any other digital asset in which the account holder or
 200 any successor account holder has a right or interest.

201 Section 8. Section 740.601, Florida Statutes, is created to
 202 read:

203 740.601 Fiduciary access and authority.--

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204 (1) A fiduciary that is an account holder or has the right
 205 under this chapter to access a digital asset of an account
 206 holder:

207 (a) May take any action concerning the digital asset to the
 208 extent of the account holder's authority and the fiduciary's
 209 powers under the laws of this state, subject to the terms-of-
 210 service agreement and copyright or other applicable law;

211 (b) Is deemed to have the lawful consent of the account
 212 holder for the custodian to divulge the content of an electronic
 213 communication to the fiduciary under applicable electronic
 214 privacy laws; and

215 (c) Is an authorized user under applicable computer fraud
 216 and unauthorized access laws.

217 (2) If a provision in a terms-of-service agreement limits a
 218 fiduciary's access to a digital asset of the account holder, the
 219 provision is void as against the strong public policy of this
 220 state unless the account holder agreed to the provision after
 221 July 1, 2015, by an affirmative act separate from the account
 222 holder's assent to other provisions of the terms-of-service
 223 agreement.

224 (3) A choice-of-law provision in a terms-of-service
 225 agreement is unenforceable against a fiduciary acting under this
 226 chapter to the extent the provision designates a law that
 227 enforces a limitation on a fiduciary's access to a digital asset
 228 which is void under subsection (2).

229 (4) Except as provided in subsection (2), a fiduciary's
 230 access to a digital asset under this chapter does not violate a
 231 terms-of-service agreement, notwithstanding a provision of the
 232 agreement, which limits third-party access or requires notice of

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233 change in the account holder's status.

234 (5) As to tangible personal property capable of receiving,
 235 storing, processing, or sending a digital asset, a fiduciary
 236 with authority over the property of a decedent, ward, principal,
 237 or settlor has the right to access the property and any digital
 238 asset stored in it and is an authorized user for purposes of any
 239 applicable computer fraud and unauthorized access laws,
 240 including the laws of this state.

241 Section 9. Section 740.701, Florida Statutes, is created to
 242 read:

243 740.701 Compliance.—

244 (1) If a fiduciary that has a right under this chapter to
 245 access a digital asset of an account holder complies with
 246 subsection (2), the custodian shall comply with the fiduciary's
 247 request for a record for:

248 (a) Access to the digital asset;

249 (b) Control of the digital asset; and

250 (c) A copy of the digital asset to the extent authorized by
 251 copyright law.

252 (2) If a request under subsection (1) is made by:

253 (a) A personal representative who has the right of access
 254 under s. 740.201, the request must be accompanied by a certified
 255 copy of the letters of administration of the personal
 256 representative, an order authorizing a curator or administrator
 257 ad litem, or other court order;

258 (b) A guardian that has the right of access under s.
 259 740.301, the request must be accompanied by a certified copy of
 260 letters of plenary guardianship of the property or a court order
 261 that gives the guardian authority over the digital asset;

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262 (c) An agent that has the right of access under s. 740.401,
 263 the request must be accompanied by an original or a copy of the
 264 power of attorney which authorizes the agent to exercise
 265 authority over the digital asset and a certification of the
 266 agent, under penalty of perjury, that the power of attorney is
 267 in effect;

268 (d) A trustee that has the right of access under s.
 269 740.501, the request must be accompanied by a certified copy of
 270 the trust instrument, or a certification of trust under s.
 271 736.1017, which authorizes the trustee to exercise authority
 272 over the digital asset; or

273 (e) A person that is entitled to receive and collect
 274 specified digital assets, the request must be accompanied by a
 275 certified copy of an order of summary administration issued
 276 pursuant to chapter 735.

277 (3) A custodian shall comply with a request made under
 278 subsection (1) not later than 60 days after receipt. If the
 279 custodian fails to comply, the fiduciary may apply to the court
 280 for an order directing compliance.

281 (4) A custodian that receives a certification of trust may
 282 require the trustee to provide copies of excerpts from the
 283 original trust instrument and later amendments which designate
 284 the trustee and confer on the trustee the power to act in the
 285 pending transaction.

286 (5) A custodian that acts in reliance on a certification of
 287 trust without knowledge that the representations contained in it
 288 are incorrect is not liable to any person for so acting and may
 289 assume without inquiry the existence of facts stated in the
 290 certification.

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291 (6) A custodian that enters into a transaction in good
 292 faith and in reliance on a certification of trust may enforce
 293 the transaction against the trust property as if the
 294 representations contained in the certification were correct.

295 (7) A custodian that demands the trust instrument in
 296 addition to a certification of trust or excerpts under
 297 subsection (4) is liable for damages if the court determines
 298 that the custodian did not act in good faith in demanding the
 299 trust instrument.

300 (8) This section does not limit the right of a person to
 301 obtain a copy of a trust instrument in a judicial proceeding
 302 concerning the trust.

303 Section 10. Section 740.801, Florida Statutes, is created
 304 to read:

305 740.801 Immunity.—A custodian and its officers, employees,
 306 and agents are immune from liability for any action done in good
 307 faith in compliance with this chapter.

308 Section 11. Section 740.901, Florida Statutes, is created
 309 to read:

310 740.901 Relation to Electronic Signatures in Global and
 311 National Commerce Act.—This chapter modifies, limits, or
 312 supersedes the Electronic Signatures in Global and National
 313 Commerce Act, 15 U.S.C. ss. 7001 et seq., but does not modify,
 314 limit, or supersede s. 101(c) of that act, 15 U.S.C. s. 7001(c),
 315 or authorize electronic delivery of the notices described in s.
 316 103(b) of that act, 15 U.S.C. s. 7003(b).

317 Section 12. Section 740.911, Florida Statutes, is created
 318 to read:

319 740.911 Applicability.—

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320 (1) Subject to subsection (2), this chapter applies to:

321 (a) An agent acting under a power of attorney executed
 322 before, on, or after July 1, 2015;

323 (b) A personal representative acting for a decedent who
 324 died before, on, or after July 1, 2015;

325 (c) A guardian appointed through a guardianship proceeding,
 326 whether pending in a court or commenced before, on, or after
 327 July 1, 2015; and

328 (d) A trustee acting under a trust created before, on, or
 329 after July 1, 2015.

330 (2) This chapter does not apply to a digital asset of an
 331 employer used by an employee in the ordinary course of the
 332 employer's business.

333 Section 13. This act shall take effect July 1, 2015.

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 Committee on Judiciary

BILL: SB 150

INTRODUCER: Senator Ring

SUBJECT: Student Loans

DATE: February 2, 2015

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Brown	Cibula	JU	Pre-meeting
2.			ACJ	
3.			AP	

I. Summary:

SB 150 creates a student loan repayment assistance program to benefit lawyers who work in designated public sector jobs. Assistant state attorneys, assistant public defenders, assistant attorney generals, and assistant statewide prosecutors are eligible for assistance in repaying law student loans, provided:

- Loans are secured for a law school education;
- Loans are not in default; and
- Loans are government-held.

Loan assistance payments are contingent upon a specific appropriation in the General Appropriations Act. No funds are appropriated by the bill.

The bill designates the Justice Administrative Commission and the Office of the Attorney General as the administering bodies responsible for processing applications for assistance and making loan payments.

To qualify for loan assistance, an attorney must work at least 3 years in one, or a combination of the eligible positions. The bill authorizes up to \$3,000 in loan payments annually for the benefit of eligible career attorneys with at least 3 and up to 6 years of employment. When an attorney reaches 6 years of employment, the amount authorized increases to \$5,000. When the attorney completes 12 years of service, loan payments cease.

Applicants must annually apply for loan repayment assistance. Total payments are capped at \$44,000 per eligible career attorney.

II. Present Situation:

The Higher Education Act of 1965

Title IV of the Higher Education Act of 1965 established a federal loan program for eligible student and parent borrowers.¹ The program is known as the William D. Ford Federal Direct Loan Program (Direct Loan program).²

Today, the U.S. Department of Education oversees a variety of loan programs within the Direct Loan program.³ These programs include the following offerings:

- Federal Perkins Loan, a loan made by the recipient’s school, for undergraduate and graduate students who qualify based on financial need. Total loan amounts are capped.
- Direct Subsidized Loan, a loan available to undergraduate students enrolled at least half-time and with demonstrated financial need. Students are not charged interest during certain periods, such as while they are attending school.
- Direct Unsubsidized Loan, a loan available to undergraduate and graduate students who are enrolled at least half-time. Financial need is irrelevant. Interest accrues regularly.
- Direct PLUS Loan, a loan for parent borrowers of dependent students attending as undergraduate or graduate-level students. Interest accrues regularly.
- Direct Consolidation Loan, an option to the borrower to combine one or more federal student loans into one new loan, to streamline billing into a single monthly payment.
- Federal Family Education Loan Program (FFEL), a program in which private lenders provided students loans that the federal government guaranteed. These loans included subsidized Federal Stafford Loans, unsubsidized Federal Stafford Loans, FFEL PLUS Loans, and FFEL Consolidation Loans. In 2010, Congress passed the Health Care and Education Reconciliation Act. The Act effectively ended the FFEL, and therefore the practice of the government providing guaranteed loans.⁴ As of July 1, 2010, no new FFEL Program loans were made. Still, some loans taken out before this date continue in repayment.⁵

Law School Costs and Debt

Many law school students in Florida graduate with considerable debt. The table below details debt of recent law school graduates by public and private school attended in Florida.⁶ The report from which the information is detailed below does not expressly indicate whether the amount of debt identified includes debt incurred for undergraduate or education other than for law school.

Name of Institution	Average Indebtedness of 2013 Graduates
---------------------	--

¹ Pub. L. 89-329 (Nov. 8, 1965).

² Federal Student Aid, U.S. Department of Education, *Public Service Loan Forgiveness*, <https://studentaid.ed.gov/repay-loans/forgiveness-cancellation/charts/public-service> (last visited Jan. 27, 2015).

³ Federal Student Aid, U.S. Department of Education, *About Us*, <https://studentaid.ed.gov/about> (last visited Jan. 27, 2015).

⁴ Federal Student Aid, U.S. Department of Education, *Federal Family Education Loan Program Lender and Guaranty Agency Reports*, <https://studentaid.ed.gov/about/data-center/lender-guaranty> (last visited Jan. 27, 2015).

⁵ Federal Student Aid, U.S. Department of Education, *Subsidized and Unsubsidized Loans*, <https://studentaid.ed.gov/types/loans/subsidized-unsubsidized#eligibility> (last visited Jan. 27, 2015).

⁶ U.S. NEWS & WORLD REPORT GRAD COMPASS, *Which law school graduates have the most debt?*, <http://grad-schools.usnews.rankingsandreviews.com/best-graduate-schools/top-law-schools/grad-debt-rankings/> (last visited Dec. 11, 2014).

Barry University	\$148,372 (88 percent of graduates)
Nova Southeastern University	\$133,643 (84 percent of graduates)
Florida A&M University	Unknown
Florida Coastal School of Law	\$150,360 (91 percent of graduates)
Florida International University	\$97,862 (88 percent of graduates)
Florida State University	\$79,428 (90 percent of graduates)
St. Thomas University	\$150,166 (91 percent of graduates)
University of Florida	\$81,944 (81 percent of graduates)
University of Miami	\$148,513 (79 percent of graduates)

In fact, three Florida law schools rank in the top ten in the country for highest average indebtedness of 2013 graduates. These are the Florida Coastal School of Law, St. Thomas University, and the University of Miami.⁷

Loan Assistance and Forgiveness Programs

Federal Program

Congress created the Public Service Loan Forgiveness (PSLF) Program to encourage individuals to commit to service in public service fields, typically known for lower pay. The federal government provides loan forgiveness to applicants who work in certain public service jobs, including government organizations at the federal, state, or local level and private, not-for-profit organizations that provide public interest law services.

Loan forgiveness is only available for government-held loans not in default. Additionally, the applicant must have made 120 monthly payments to qualify. The 120 month payment period started on October 1, 2007, so that the first loans will not be cancelled until October 1, 2017.⁸

Additionally, parents who received a Direct PLUS loan (on behalf of their child's education) may be eligible for loan forgiveness if the parent borrower works for a public service organization.⁹

Florida Bar Foundation Loan Repayment Assistance Program (LRAP)

The Florida Bar Foundation operates a Loan Repayment Assistance Program (LRAP) for attorneys employed at Florida legal aid and legal services organizations. The LRAP serves organizations that receive general support funding from the Florida Bar Foundation. Money is available to assist attorneys with student loan payments through proceeds on the Bar's "Interest on Trust Accounts," or IOTA program. Staff attorneys who qualify for the benefit receive a \$5,000 annual loan to pay down student loan debt. The annual loan issued by the Florida Bar is then forgiven, provided that the attorneys remain employed at qualifying organizations for a minimum of 12 months full-time or part-time (at least 50 percent of the full-time hours).¹⁰

⁷ *Id.*

⁸ Federal Student Aid, *supra* note 1.

⁹ *Id.*

¹⁰ The Florida Bar Foundation, *General Grant Support Program*, <http://www.flabarfdn.org/grant-programs/lap/loan.aspx> (last visited Jan. 27, 2015).

Legislation in Other States

A total of 7 states have adopted legislation that offers loan assistance to lawyers working in certain public sector jobs. These states are California, Georgia, Illinois, Maryland, Nebraska, New Mexico, and Texas. Of these, only Maryland and New Mexico have funded their programs.¹¹

Law Schools

Many law schools offer loan assistance to law school graduates working in the public interest sector. Pursuant to a survey request, 133 law schools responded that they have a loan repayment assistance program. Of the law schools in Florida, only the St. Thomas University School of Law responded affirmatively.¹²

Assistant Public Defenders and Assistant State Attorneys

Florida has 20 judicial circuits.¹³ Each circuit elects a state attorney and a public defender. The annual minimum salary for assistant state attorneys and assistant public defenders is currently set at \$39,084.¹⁴ Both positions are considered senior management service for retirement purposes.¹⁵

Justice Administrative Commission (JAC)

The Justice Administrative Commission (JAC) serves in an administrative capacity for 49 judicial-related entities. These entities are the Offices of the State Attorney, Offices of the Public Defender, Offices of Capital Collateral Regional Counsel, Offices of Criminal Conflict and Civil Regional Counsel, and the Statewide Guardian ad Litem Program.¹⁶ In its administrative role, the JAC provides services to these entities in accounting, budget, financial services, and human resources.

III. Effect of Proposed Changes:

Senate Bill 150 creates a student loan assistance program for eligible attorneys who work in qualifying public sector positions. The program may attract more attorneys to public service, and help specified government agencies retain attorneys, thereby reducing turnover.

The program is contingent upon, and funded entirely through appropriations from the General Revenue Fund. As such, even if the bill passes, the program cannot be implemented without funding.

¹¹ American Bar Association, *State Loan Repayment Assistance*, http://www.americanbar.org/groups/legal_aid_indigent_defendants/initiatives/loan_repayment_assistance_programs/state_loan_repayment_assistance_programs.html (last visited Jan. 27 2015).

¹² Equal Justice Works, *Law School LRAPS*, <http://www.equaljusticeworks.org/ed-debt/students/loan-repayment-assistance-programs/school-LRAPs/law-school-list> (last visited Jan. 27, 2015).

¹³ Florida Courts, *Trial Courts – Circuit*, <http://www.flcourts.org/florida-courts/trial-courts-circuit.stml> (last visited Jan. 27, 2015).

¹⁴ Public Defender Salary Schedule (Effective July 1, 2013, Oct. 1, 2013); State Attorney Salary Schedule (Effective Jan. 1, 2015).

¹⁵ Section 121.055(1)(h)1., F.S.

¹⁶ Justice Administrative Commission, <http://www.justiceadmin.org/> (last visited Jan. 27, 2015).

Eligible Career Attorneys

Attorneys who are eligible for loan assistance are:

- Assistant state attorneys;
- Assistant public defenders;
- Assistant attorney generals; and
- Assistant statewide prosecutors.

Attorneys in other low-paid public sector positions, such as those employed by legal aid offices, the guardian ad litem, and the office of regional conflict counsel are not included in this bill. However, some of these attorneys may get assistance through the Florida Bar Foundation Loan Repayment Assistance Program.

Attorneys are considered to be eligible career attorneys if they have completed at least 3 years but not more than 12 years of employment in qualifying positions. If an attorney reaches 12 years of employment, and payments cease, the attorney may then have the remainder of loans cancelled through the federal loan forgiveness program.

Qualifying Loans and Payments

A qualifying loan must be a government-held loan that is not in default and which was secured for a law school education.

Loans that are privately-held do not qualify. This restriction may make it easier for administering bodies to make payment as they will submit payments to one place, the Direct Loan Servicing Center through the U.S. Department of Education.

The bill provides that the loan repayment assistance is for loans used to fund law school educations. If the intent of the bill is to assist payment on loans strictly incurred for law school, how the administering bodies will segregate law school loans that have been consolidated with other education loans is unknown.

The annual allowance for payment is:

- \$3,000 if the attorney has more than 3, and up to 6 years of employment as an eligible career attorney; and
- \$5,000 if the attorney has more than 6, but no more than 12 years of employment as an eligible career attorney.

Total loan repayments are capped at \$44,000 per eligible attorney.

Process for Application and Payment

An administering body, either the Justice Administrative Commission (JAC) for assistant state attorneys and assistant public defenders or the Office of the Attorney General for assistant attorney generals or assistant statewide prosecutors, will make payment on the loans.

To initiate the process, an attorney must submit a certification affidavit to his or her employer within 30 days after the employment anniversary. The affidavit must certify that the attorney is an eligible career attorney with one or more eligible student loans as of his or her last employment anniversary. Within 60 days after the most recent employment anniversary, the employer must submit the affidavit to the administering body.

The Legislature may choose not to fund the program or to underfund the program. If funds appropriated are insufficient for full payment, an administering body will uniformly prorate payments. The administering body will make payments on a fiscal year schedule, to begin July 1 of the following year. This fiscal year runs identical to that of the General Appropriations Act.

The bill takes effect July 1, 2015.

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:

Increasing payments based on years of service rewards those attorneys who demonstrate a long-term commitment to public service. The Florida Public Defender Association, Inc., indicates that 3 years of employment is a critical time for lawyers to stay or move on to more lucrative employment with valuable experience gained from trial work.¹⁷

Eligible career attorneys who work as assistant state attorneys, assistant public defenders, assistant attorney generals, and assistant statewide prosecutors will benefit financially by getting assistance with paying off loans incurred for law school. Although loan assistance ends under this bill after 12 years of employment or when \$44,000 in payments have been made, the loans may be cancelled at that time under the federal program if the borrower has made at least 120 months of payments.

¹⁷ Florida Public Defender Association, Inc., *Student Loan Repayment Assistance*, Jan. 23, 2015.

C. Government Sector Impact:

This bill establishes a loan repayment assistance program that is subject to funding from the General Revenue Fund.

The Office of the Attorney General estimates that the Office has 97 eligible career attorneys who would meet the criteria in the bill of between 3 and 12 years of service.¹⁸ Assuming that all of these attorneys have current loans incurred for law school, if the Legislature wished to pay the loan payments due in the coming fiscal year, the Legislature would need to appropriate \$380,000.¹⁹

The Justice Administrative Commission (JAC) identifies 228 assistant public defenders and 298 assistant state attorneys with 3 to 6 years of continuous service, and 341 assistant public defenders and 447 assistant state attorneys with 6 to 12 years of service as of December 11, 2014. The JAC also assumes that all of these attorneys have outstanding loans and that the loans qualify for assistance under the program.

Assistant Public Defenders and Assistant State Attorneys

		Maximum Amount Authorized Annually per Attorney	Total Amount to Fully Fund in First Year
Number of Eligible Attorneys with 3 to 6 years of service	526	\$3,000	\$1.578 million
Number of Eligible Attorneys with 6 to 12 years of service	788	\$5,000	\$3.94 million
Total Amount			\$5.518 million

Adding together the estimates from the Office of the Attorney General and the JAC, to cover all of the payments at the maximum amounts authorized per year, the Legislature would need to appropriate \$5.898 million in the first year to fully fund the bill.

Additionally, the JAC requests that the Legislature approve 1.0 FTE to administer the program. The position would require \$71,000 in recurring revenue (of which \$46,500 is salary rate) and \$3,882 in non-recurring revenue.²⁰

¹⁸ This number includes assistant statewide prosecutors.

¹⁹ Office of the Attorney General, Department of Legal Affairs, *Legislative Bill Analysis*, (Jan. 20, 2015) (on file with the Senate Committee on Judiciary).

²⁰ Justice Administrative Commission, *2015 Legislative Session Bill Analysis for SB 150* (on file with the Senate Committee on Judiciary). The non-recurring portion is for start-up costs associated with the position, such as for a computer and other equipment, Phone conference with Rip Colvin, Justice Administrative Commission (Jan. 28, 2015).

VI. Technical Deficiencies:

None.

VII. Related Issues:

Although the Federal Family Education Loan Program (FFEL) no longer exists, some applicants for loan assistance under the bill may have received private loans through the FFEL, which were then consolidated into a Direct Loan. The bill provides that only loans issued through the Higher Education Act (Direct Loan program) qualify for assistance. The Higher Education Act created the FFEL. Therefore, under this bill, borrowers may receive loan assistance for loans that were initially privately-held.

The 2014 Legislature approved salary increases for assistant state attorneys and assistant public defenders. The General Appropriations Act provided \$10.9 million in funding for pay increases.²¹

VIII. Statutes Affected:

This bill creates section 43.45, Florida Statutes.

IX. Additional Information:**A. Committee Substitute – Statement of 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.

²¹ 2014-2015 G.A.A.

By Senator Ring

29-00048-15

2015150__

1 A bill to be entitled
 2 An act relating to student loans; creating s. 43.45,
 3 F.S.; providing definitions; requiring the Justice
 4 Administrative Commission and the Office of the
 5 Attorney General to implement a student loan
 6 assistance program to assist a career assistant state
 7 attorney, assistant public defender, assistant
 8 attorney general, or assistant statewide prosecutor in
 9 the repayment of eligible student loans; establishing
 10 requirements for the administration of the program;
 11 requiring the administering body to make payments
 12 based on the length of employment of the eligible
 13 career attorney and availability of funds; providing
 14 funding; requiring the Justice Administrative
 15 Commission and the Office of the Attorney General to
 16 develop procedures to administer the program;
 17 providing an effective date.

18
 19 Be It Enacted by the Legislature of the State of Florida:

20
 21 Section 1. Section 43.45, Florida Statutes, is created to
 22 read:

23 43.45 Student loan assistance program; administration.-

24 (1) As used in this section, the term:

25 (a) "Administering body" means:

26 1. The Justice Administrative Commission if the eligible
 27 career attorney is employed as an assistant state attorney or
 28 assistant public defender.

29 2. The Office of the Attorney General if the eligible

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30 career attorney is employed as an assistant attorney general or
 31 assistant statewide prosecutor.

32 (b) "Eligible attorney" means an assistant state attorney,
 33 assistant public defender, assistant attorney general, or
 34 assistant statewide prosecutor.

35 (c) "Eligible career attorney" means an eligible attorney
 36 who has completed at least 3 years, but not more than 12 years,
 37 of continuous service as an eligible attorney, regardless of
 38 whether the eligible attorney had a break in employment of less
 39 than 2 weeks while transferring to another employer of eligible
 40 attorneys.

41 (d) "Eligible student loan" means a loan that is not in
 42 default and that was issued pursuant to the Higher Education Act
 43 of 1965, 20 U.S.C. ss. 1001 et seq., as amended, to an eligible
 44 career attorney to fund his or her law school education.

45 (e) "Employment anniversary" means the anniversary of the
 46 date that an eligible career attorney commenced employment as an
 47 eligible attorney.

48 (2) The administering body shall implement a student loan
 49 assistance program for eligible career attorneys. The purpose of
 50 the program is to provide financial assistance to eligible
 51 career attorneys for the repayment of eligible student loans.

52 (3) The student loan assistance program is administered in
 53 the following manner:

54 (a) Within 30 days after the employment anniversary of an
 55 eligible career attorney, such attorney must submit to his or
 56 her employer a certification affidavit on a form authorized by
 57 the administering body, which certifies that the eligible career
 58 attorney was an eligible career attorney with one or more

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59 eligible student loans as of his or her last employment
 60 anniversary. If the employer signs the certification affidavit,
 61 the employer shall submit the affidavit to the administering
 62 body within 60 days after the most recent employment anniversary
 63 of the eligible career attorney.

64 (b) Upon receipt of a certification affidavit, the
 65 administering body shall make a maximum payment of:

66 1. Three thousand dollars if the eligible career attorney
 67 has at least 3 years, but not more than 6 years, of continuous
 68 service as an eligible career attorney.

69 2. Five thousand dollars if the eligible career attorney
 70 has more than 6 years, but not more than 12 years, of continuous
 71 service as an eligible career attorney.

72
 73 If funds appropriated are insufficient to provide the maximum
 74 payment for each eligible career attorney, the administering
 75 body shall prorate payments by an equal percentage reduction.

76 (c) A payment under paragraph (b) shall be made by the
 77 administering body:

78 1. To the lender of the eligible student loan;

79 2. Between July 1 and July 31 of the next fiscal year
 80 following receipt of the certification affidavit by the
 81 administering body;

82 3. For the benefit of the eligible career attorney named in
 83 the certification affidavit and for the purpose of satisfying
 84 his or her eligible student loan obligation; and

85 4. For the eligible student loan that has the highest
 86 current interest rate if the eligible career attorney holds more
 87 than one eligible student loan.

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88 (d) Payments under paragraph (b) cease upon totaling
 89 \$44,000 per eligible career attorney or upon full satisfaction
 90 of the eligible student loan, whichever occurs first.

91 (4) The student loan assistance program may be funded
 92 annually contingent upon a specific appropriation in the General
 93 Appropriations Act for the student loan assistance program.

94 (5) The Justice Administrative Commission and the Office of
 95 the Attorney General shall develop procedures to administer this
 96 section.

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

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

The Florida Senate
BILL ANALYSIS AND FISCAL IMPACT STATEMENT

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

Prepared By: The Professional Staff of the Committee on Judiciary

BILL: SPB 7016

INTRODUCER: For consideration by the Judiciary Committee

SUBJECT: OGSR/Minor Identifying Information

DATE: February 2, 2015

REVISED: _____

ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1. <u>Davis</u>	<u>Cibula</u>	_____	Pre-meeting

I. Summary:

SPB 7016 reenacts and continues an existing public record exemption. The exemption protects certain information that might be used to identify a minor petitioning for a judicial waiver of parental notice under the Parental Notice of Abortion Act. The exemption protects from disclosure any identifying information held by the office of criminal conflict and civil regional counsel or the Justice Administrative Commission. These offices are in possession of the information when either the office of criminal conflict and civil regional counsel represents the minor in a court proceeding or the Justice Administrative Commission processes payments for a court-appointed private attorney who represents the minor.

Additionally, the U.S. Supreme Court has consistently held that:

- Parental notification laws for minors seeking an abortion must contain judicial bypass procedures; and
- The confidentiality and identity of minors must be protected at each level of court proceedings for a parental notification statute to be constitutional.

Therefore, it is essential that any identifying information of a minor held by either of these agencies be exempted from public disclosure or the current statute will not meet constitutional requirements.

The original exemption was enacted in 2010 and is scheduled for repeal on October 2, 2015, unless saved through reenactment by the Legislature.

II. Present Situation:

Public Records and Open Meetings Requirements

The Florida Constitution

Under the Florida Constitution, the public is guaranteed the right of access to government records and meetings. The public may inspect or copy any public record made or received in connection with the official business of any public body, officer, or employee of the state, or persons acting on their behalf, unless the record is exempted or specifically made confidential.¹

The public is also guaranteed the right to be notified and have access to meetings of any collegial public body of the executive branch of state government or of any local government.² The Legislature's meetings must also be open and noticed to the public, unless an exception is provided for in the Constitution.³

The Florida Statutes

Similarly, the *Florida Statutes* specify conditions under which public access must be provided to government records and meetings. Chapter 119, F.S., which deals with public records access, guarantees every person's right to inspect and copy any state or local government public record.⁴ Section 286.011, F.S., which is often referred to as the state's sunshine law, requires all meetings of any board or commission of any state or local agency or authority at which official acts are to be taken to be noticed and open to the public.⁵

¹ FLA. CONST., art. I, s. 24(a).

² FLA. CONST., art. I, s. 24(b).

³ *Id.*

⁴ Section 119.011(12), F.S., defines "public record" to mean "all documents, papers, letters, maps, books, tapes, photographs, films, sound recordings, data processing software, or other material, regardless of the physical form, characteristics, or means of transmission, made or received pursuant to law or ordinance or in connection with the transaction of official business by any agency." Section 119.011(2), F.S., defines "agency" to mean "any state, county, district, authority, or municipal officer, department, division, board, bureau, commission, or other separate unit of government created or established by law including, for the purposes of this chapter, the Commission on Ethics, the Public Service Commission, and the Office of Public Counsel, and any other public or private agency, person, partnership, corporation, or business entity acting on behalf of any public agency." The public records chapter does not apply to legislative records. *Locke v. Hawkes*, 595 So. 2d 32 (Fla. 1992). The Legislature's records are public pursuant to s. 11.0431, F.S.

⁵ Section 286.011(1) and (2), F.S. The Sunshine Law does not apply to the Legislature; rather, open meetings requirements for the Legislature are set out in the Florida Constitution. Article III, section 4(e) of the Florida Constitution provides that legislative committee meetings must be open and noticed to the public. In addition, prearranged gatherings, between more than two members of the Legislature, or between the Governor, the President of the Senate, or the Speaker of the House of Representatives, the purpose of which is to agree upon or to take formal legislative action, must be reasonably open to the public.

The Legislature may create an exemption to public records or open meetings requirements.⁶ An exemption must specifically state the public necessity justifying the exemption and must be tailored to accomplish the stated purpose of the law.⁷

Open Government Sunset Review Act

The Open Government Sunset Review Act prescribes a legislative review process for newly created or substantially amended public records or open meetings exemptions.⁸ The act provides that an exemption automatically repeals on October 2nd of the fifth year after creation or substantial amendment. However, in order to save an exemption from repeal, the Legislature must reenact the exemption before it expires.⁹

The Sunset Review Act provides that a public record or open meeting exemption may be created or maintained only if it serves an identifiable public purpose and is written no broader than is necessary.¹⁰ An exemption serves an identifiable purpose if it meets one of the stated requirements below *and* the Legislature finds that the purpose of the exemption outweighs open government policy and cannot be accomplished without the exemption. The exemption must:

- Allow the state or its political subdivisions to effectively and efficiently administer a program, which administration would be significantly impaired without the exemption;¹¹
- Protect sensitive personal information that would be defamatory or damaging to someone's reputation or would jeopardize an individual's safety. If this public purpose is cited as the basis of an exemption, however, only personal identifying information is exempt;¹² or
- Protect confidential information of entities including trade or business secrets.¹³

The act also requires specified questions to be considered during the review process.¹⁴ In examining an exemption, the act directs the Legislature to carefully question the purpose and necessity of reenacting the exemption.

⁶ FLA. CONST., art. I, s. 24(c). There is a difference between records the Legislature designates as exempt from public records requirements and those the Legislature designates *confidential* and exempt. A record classified as exempt from public disclosure may be disclosed under certain circumstances. *Williams v. City of Minneola*, 575 So. 2d 687 (Fla. 5th DCA 1991). If the Legislature designates a record as confidential, such record may not be released, to anyone other than the persons or entities specifically designated in the statutory exemption. *WFTV, Inc. v. The School Board of Seminole*, 874 So. 2d 48 (Fla. 5th DCA 2004).

⁷ FLA. CONST., art. I, s. 24(c).

⁸ Section 119.15, F.S. Section 119.15(4)(b), F.S., provides that an exemption is considered to be substantially amended if it is expanded to include more information or to include meetings. The OGSR does not apply to an exemption that is required by federal law or that applies solely to the Legislature or the State Court System pursuant to s. 119.15(2), F.S.

⁹ Section 119.15(3), F.S.

¹⁰ Section 119.15(6)(b), F.S.

¹¹ Section 119.15(6)(b)1., F.S.

¹² Section 119.15(6)(b)2., F.S.

¹³ Section 119.15(6)(b)3., F.S.

¹⁴ Section 119.15(6)(a), F.S. The specified questions are:

- What specific records or meetings are affected by the exemption?
- Whom does the exemption uniquely affect, as opposed to the general public?
- What is the identifiable public purpose or goal of the exemption?
- Can the information contained in the records or discussed in the meeting be readily obtained by alternative means? If so, how?
- Is the record or meeting protected by another exemption?

If, in reenacting an exemption, the exemption is expanded, then a public necessity statement and a two-thirds vote for passage are required.¹⁵ If the exemption is reenacted without substantive changes or if the exemption is narrowed, then a public necessity statement and a two-thirds vote for passage are *not* required. If the Legislature allows an exemption to sunset, the previously exempt records will remain exempt unless provided for by law.¹⁶

Parental Notice of Abortion Act

The Legislature first enacted a Parental Notice of Abortion Act in 1999. As its name indicates, the Act required that a parent be given advance notice of a child's intent to have an abortion.¹⁷ The statute was challenged in court on the basis that the law violated a person's right to privacy under the Florida Constitution.¹⁸ The Florida Supreme Court determined that the law violated the state's constitutional right to privacy because the minor was not given a method to "bypass" the parental notification provision when certain circumstances existed.¹⁹ In response to the Florida Supreme Court's decision, the Legislature proposed a constitutional amendment that authorized the Legislature, notwithstanding a minor's right to privacy under the State Constitution, to require a physician to notify a minor's parent or guardian prior to the abortion. The amendment was ratified by the voters in 2004.²⁰

In response to the adoption of the proposed amendment, the Legislature passed another Parental Notice of Abortion Act.²¹ In its current version, the statute requires an attending physician to give actual notice, in person or by phone, to a parent or legal guardian of the minor, at least 48 hours before the inducement or performance of a termination of a pregnancy on the minor.²² If actual notice is not possible after a reasonable effort, the physician performing or inducing the termination of the pregnancy or the referring physician must give constructive notice.²³ Parental notice is not required under the act if certain circumstances are present.²⁴

- Are there multiple exemptions for the same type of record or meeting that it would be appropriate to merge?

¹⁵ FLA. CONST., art. I, s. 24(c).

¹⁶ Section 119.15(7), F.S.

¹⁷ Chapter 99-322, Laws of Fla. (Creating s. 390.01115, F.S., effective July 1, 1999. A companion measure, the public records exemption bill that would shield identifying information of the minor, was passed that same session and became Chapter 99-321, Laws of Fla.)

¹⁸ FLA. CONST., art. I s. 23.

¹⁹ *North Florida Women's Health and Counseling Services v. State*, 866 So. 2d 612 (Fla. 2003).

²⁰ FLA. CONST. art. X. s. 22. The amendment states:

The Legislature shall not limit or deny the privacy right guaranteed to a minor under the United States Constitution as interpreted by the United States Supreme Court. Notwithstanding a minor's right of privacy provided in Section 23 of Article I, the Legislature is authorized to require by general law for notification to a parent or guardian of a minor before the termination of the minor's pregnancy. The Legislature shall provide exceptions to such requirement for notification and shall create a process for judicial waiver of the notification.

²¹ Chapter 2005-52, s. 2., Laws of Fla.

²² Section. 390.01114(3)(a), F.S. and s. 390.01114(2)(a), F.S.

²³ Section 390.01114(3)(a), F.S. Constructive notice is defined to mean notice given in writing, signed by the physician, and mailed at least 72 hours before the procedure to the last known address of the parent or legal guardian of the minor, by first-class mail and by certified mail, return receipt requested with delivery restricted to the parent or legal guardian. Notice is deemed to have occurred after 72 hours have passed pursuant to s. 390.01114(2)(c). F.S.

²⁴ Parental notice is not necessary under s. 390.01114(3)(b), F.S., if: In the good faith clinical judgment of the physician, a medical emergency exists and there is insufficient time for the attending physician to comply with the notification

Judicial Waiver of Parental Notice or the Judicial Bypass Proceeding

The Parental Notice of Abortion Act provides that a minor may petition the circuit court where she resides for a waiver of the notice requirements under the act.²⁵ To initiate the process, she may file the petition under a pseudonym or by using initials, as provided by court rule. The petition must contain a statement that the petitioner is pregnant and notice has not been waived. The court must advise the petitioner that she has a right to court-appointed counsel and must provide her with counsel, if she requests, at no cost to the young woman.²⁶

Once a petition is filed, the court must rule and issue written findings of fact and conclusions of law within 3 business days after the petition is filed. This time period may be extended at the request of the minor.²⁷

If the circuit court determines, by clear and convincing evidence, that the minor is sufficiently mature to decide whether to terminate her pregnancy, the court must issue an order authorizing the minor to consent to the abortion without the notification of a parent or guardian. If the court finds that the minor does not possess the requisite maturity to make that determination, it must dismiss the petition.²⁸ If the court determines by a preponderance of the evidence, that the minor is a victim of child abuse or sexual abuse inflicted by her parent or guardian, or if the court determines by clear and convincing evidence that the notification of a parent or guardian is not in her best interest, the court must issue an order authorizing the minor to consent to the performance or inducement of a termination of the pregnancy without the notification of a parent or guardian.²⁹

Court Records Exemption for Judicial Bypass Cases

When the current Florida Parental Notice of Abortion Act was passed in 2005, the Legislature created a corresponding public records exemption that prohibited public access to judicial records pertaining to parental notification bypass proceedings. Any information contained in documents related to the petition, which could be used to identify the minor, were made confidential and exempt from the disclosure requirements in the *Florida Statutes* and Florida Constitution.³⁰ The Florida Rules of Juvenile Procedure³¹ provide that “any information

requirements; notice is waived in writing by the person entitled to notice and the waiver is notarized; notice is waived by the minor who is or has been married or has had the disability of nonage removed in compliance with law; notice is waived by the patient because she has a minor child dependent on her; or notice is waived by a circuit court in a judicial bypass proceeding according to statute.

²⁵ Section 390.01114(4)(a), F.S.

²⁶ *Id.*

²⁷ Section 390.01114(4)(b)1., F.S. If the court does not rule within the required 3 business days and the minor has not requested an extension, the minor may immediately petition for a hearing with the chief judge of the circuit. The chief judge is responsible for guaranteeing that a hearing is held within 48 hours after the receipt of the minor’s petition and an order must be entered within 24 hours after the hearing. If the circuit court does not grant a judicial waiver of the required parental notice, the minor has a right to appeal and that ruling must be issued within 7 days after receipt of the appeal. Section 390.01114(4)(b) 2., F.S.

²⁸ Section 390.01114(4)(c), F.S.

²⁹ Section 390.01114(4)(d), F.S.

³⁰ Chapter 2005-104, Laws of Fla. (amending s. 390.01116, F.S.).

³¹ FLA. R. JUV. P. 8.835.

including the petition, documents, transcripts, recording of cases, and any other information that” might be used to identify the young woman are confidential and exempt. Additionally, to ensure that the minor’s identity remains anonymous, the court file must be sealed unless otherwise ordered by the court.³²

The public records exemption, enacted in 2005, was set to be repealed on October 2, 2010, but the Legislature reviewed and saved the exemption from repeal.³³ Accordingly, all information held by a circuit court or an appellate court remains confidential and exempt.

Expansion of the Initial Exemption

When reenacted in 2010, the public records exemption was expanded to include records in possession of additional entities – the offices of criminal conflict and civil regional counsel and the Justice Administrative Commission. Section 390.01116(2)(a), F.S. provides that any information that can be used to identify a minor petitioning a circuit court for a judicial waiver is confidential and exempt if held by the office of criminal conflict and civil regional counsel or the Justice Administrative Commission.

The exemption for those two agencies was made subject to the Open Government Sunset Review Act in accordance with statute and will stand repealed on October 2, 2015, unless reviewed and saved from repeal through reenactment by the Legislature.

In the statement of public necessity³⁴ detailing the need to create the exemption for information held by the office of criminal conflict and civil regional counsel or the Justice Administrative Commission, the Legislature recognized that:

The information contained in these records is of a sensitive, personal nature regarding a minor petitioner, the release of which could harm the reputation of the minor, as well as jeopardize her safety. Disclosure of this information could jeopardize the safety of the minor in instances in which child abuse or child sexual abuse against her is present by exposing her to further acts of abuse from an abuser who, without the public record exemption, could learn of the minor’s pregnancy, her plans to terminate the pregnancy, and her petition to the court. The Legislature further finds that it is a public necessity to keep this identifying information in records held by the office of criminal conflict and civil regional counsel or the Justice Administrative Commission confidential and exempt in order to protect the privacy of the minor.

Additionally, the Legislature took notice of the constitutional requirements expressed through case law in the statement of public necessity. After acknowledging that the State Constitution contains an express right of privacy it noted that:

³² *Id.*

³³ Chapter 2010-41, Laws of Fla. The measure made an editorial change and the statute now provides that identifying information that can be used to identify a minor seeking a judicial bypass is confidential and exempt only from s. 24(a), art. I of the State Constitution. The previous reference to an exemption pursuant to s. 119.07(1), F.S., was deleted because that provision pertains to agencies, and the court is not deemed to fall within the definition of an agency.

³⁴ Chapter 2010-41, s. 2, Laws of Fla.

the United States Supreme Court has repeatedly required parental-notification laws to contain judicial-bypass procedures and to preserve confidentiality at every level of court proceedings in order to protect the privacy rights of the minor. Without the public record exemption provided in this act, the disclosure of personal identifying information would violate the right of privacy of the minor. Further, without the confidential and exempt status for this information, the constitutionality of the state's program providing for notification of a minor's termination of pregnancy, and the judicial-bypass procedure in particular, would be in question. Thus, the public record exemption provided in this act is necessary for the effective administration of the state's program, which administration would be impaired without the exemption.³⁵

Roles of the office of criminal conflict and civil regional counsel and the Justice Administrative Commission

When a minor initiates a judicial bypass proceeding in the circuit court, a private court-appointed attorney is available to represent her should she request counsel.³⁶ The statute is clear that private court-appointed counsel approved for this type of work are to be used first for minors who request counsel, but if no attorney is available through the clerk's list of attorneys, then the office of criminal conflict and civil regional counsel in that area will supply an attorney for the proceedings.³⁷ Court precedent interpreting the U.S. Constitution says it is essential that the office's records be exempt from public access.

The Justice Administrative Commission serves in the capacity of paying the invoices for the attorneys who volunteer for these cases through the clerk of court's list of attorneys. Similarly, their records which could identify a minor should be exempt from public disclosure. It should be noted that the Justice Administrative Commission records do not contain the full name of the minor, but only her initials or a pseudonym.

The public records exemption will stand repealed on October 2, 2015, unless reviewed and reenacted by the Legislature under the Open Government Sunset Review Act.³⁸

Data Obtained from the Office of the State Courts Administrator

The Florida Supreme Court, through the Office of the State Courts Administrator, is required to report by February 1 of each year to the Governor, the President of the Senate, and the Speaker of the House of Representatives the number of petitions filed for judicial bypass waivers in the previous year for each circuit court. The report must also contain the timing and manner of disposal of the petitions by each circuit.³⁹ Below is a statewide summary of the number of petitions filed in recent years.

³⁵ *Id.*

³⁶ The chief judge of the circuit maintains a list of qualified attorneys in private practice, by county and by category of cases, and provides the list to the clerk of court in each county. Section 27.40(3)(a), F.S.

³⁷ Section 27.511(6)(a), F.S.

³⁸ Chapter 2010-41, s. 1, Laws of Fla.

³⁹ Section 390.01114(6), F.S.

<u>Year</u>	<u>Total Petitions Filed</u>
2013	319
2012	353
2011	391
2010	381
2009	476 ⁴⁰

Judiciary Committee's Open Government Sunset Review

Based upon a review of this public record exemption under the Open Government Sunset Review Act and discussions with the different offices of criminal conflict and civil regional counsel and the Justice Administrative Commission, the professional staff of the Judiciary Committee recommends that the Legislature retain the public records exemption established in s. 390.01116(2)(a), F.S. The exemption is necessary to comply with the requirements of the decisions of the U.S. Supreme Court. The identifying information held by either of these two entities must remain confidential at every level of court proceedings to protect the privacy rights of the minor seeking to bypass parental notification. If this exemption did not remain in statute, the disclosure of the identifying information would violate the right of privacy of the minor and the constitutionality of the state's program would be in jeopardy.

Staff has concluded that, in addition to ensuring the privacy of the minor, the exemptions are necessary to administer the Parental Notice of Abortion Act and are also essential to the constitutionality of the act.

III. Effect of Proposed Changes:

This legislation reenacts and continues a public record exemption that was created in 2010 and is subject to repeal on October 2, 2015, if not reenacted. The exemption protects from disclosure any identifying information of a minor seeking a judicial bypass under the Parental Notice of Abortion Act if the information is held by the office of criminal conflict and civil regional counsel or by the Justice Administrative Commission.

Section 1 amends s. 390.01116(2)(b), F.S., to remove the scheduled repeal of the public records exemption for identifying information held by the office of criminal conflict and civil regional counsel or the Justice Administrative Commission.

Section 2 provides that the bill takes effect on October 1, 2015.

⁴⁰ Florida Office of the State Court Administrator, *Fiscal Years 2009-2013, Parental Notice of Abortion Act, Petitions Filed and Disposed by Circuit and County, January through December* (on file with the Senate Committee on Judiciary).

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

The office of criminal conflict and civil regional counsel and the Justice Administrative Commission will need to redact confidential information from their records if the records are disclosed to the public. This is their current practice and will not impose an additional burden on them.

C. Government Sector Impact:

None.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill substantially amends s. 390.01116, F.S.

IX. Additional Information:

A. Committee Substitute – Statement of 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.
