

## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** CS/CS/CS/HB 107 Disturbing the Contents of a Grave or Tomb  
**SPONSOR(S):** Judiciary Committee; Local, Federal & Veterans Affairs Subcommittee; Criminal Justice Subcommittee; Cortes, B.  
**TIED BILLS:** IDEN./SIM. **BILLS:** CS/SB 844

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Criminal Justice Subcommittee	14 Y, 0 N, As CS	Merlin	White
2) Local, Federal & Veterans Affairs Subcommittee	14 Y, 0 N, As CS	Darden	Miller
3) Judiciary Committee	16 Y, 0 N, As CS	Merlin	Camechis

### SUMMARY ANALYSIS

Currently, s. 872.02, F.S., provides that it is a third degree felony to willfully and knowingly damage or remove a tomb, monument, or other specified structure and a second degree felony to willfully and knowingly disturb the contents of a tomb. These offenses, however, do not apply to a:

- Person acting under the direction of the Division of Historical Resources of the Department of State;
- Cemetery regulated by the Department of Financial Services (DFS) under ch. 497, F.S.; or
- Person otherwise authorized by law to disturb a tomb, monument, or other specified structure.

On occasion, a cemetery may seek to remove or relocate the contents of a tomb for a legitimate purpose such as maintenance, expansion, or modernization. Currently, a cemetery regulated by DFS may remove or relocate the contents of a tomb only after receiving written authorization from a legally authorized representative of the decedent or a court. For cemeteries that are exempt from DFS regulation, there are no statutorily-specified requirements for the removal or relocation of the contents of a tomb.

Theoretically, an exempt cemetery that relocates the contents of a tomb could be in violation of the criminal offenses specified in s. 872.02, F.S.; however, in a recent case involving the relocation of a tomb by an exempt cemetery, which was not authorized by a representative of the decedent or the court, law enforcement authorities declined to prosecute due to a belief that the criminal offenses apply only to someone entering a cemetery without permission to commit a criminal act.

The bill amends s. 872.02, F.S., to:

- Clarify that the second degree felony offense of disturbing the contents of a tomb includes conduct such as excavation, exposure, movement, or removal of the contents of a tomb.
- Provide an exemption from the section's criminal offenses for an exempt cemetery that:
  - Conducts ordinary maintenance that does not relocate the tomb;
  - Obtains written authorization for the relocation from a legally authorized person or a court;
  - Relocates a tomb if the relocation is necessitated by damage from a natural disaster; or
  - Publishes a notice of the relocation of tomb that is more than 75 years old in a newspaper in the relevant county and does not receive an objection or, if an objection is received, is granted approval for the relocation by the local governing body.

The Criminal Justice Impact Conference determined that the bill will have a positive insignificant impact on prison beds, meaning an increase of ten or fewer prison beds. The bill may also have a fiscal impact on local government entities for hearings authorized in specified circumstances and on exempt cemeteries that publish notice in a newspaper for certain tomb relocations.

This document does not reflect the intent or official position of the bill sponsor or House of Representatives.

STORAGE NAME: h0107e.JDC

DATE: 3/16/2017

The bill provides an effective date of October 1, 2017.

## FULL ANALYSIS

### I. SUBSTANTIVE ANALYSIS

#### A. EFFECT OF PROPOSED CHANGES:

##### Current Situation

##### Criminal Offenses Concerning Dead Bodies and Graves under Chapter 872, F.S.

In Florida, criminal offenses concerning dead bodies and graves are governed by Chapter 872, F.S.<sup>1</sup> Within that chapter are a number of statutory prohibitions and limitations.<sup>2</sup> In part relevant to this bill, s. 872.02(1) and (2), F.S., make it a:

- Third degree felony<sup>3</sup> for a person to willfully and knowingly destroy, mutilate, deface, injure, or remove any:
  - Tomb, monument, gravestone, burial mound, earthen or shell monument containing human skeletal remains or associated burial artifacts, or other structure or thing placed or designed for a memorial of the dead; or
  - Fence, railing, curb, or other thing intended for the protection or ornamentation of any tomb, monument, gravestone, burial mound, earthen or shell monument containing human skeletal remains or associated burial artifacts, or structure or thing placed or designed for a memorial of the dead or for any enclosure for the burial of the dead.
- Third degree felony for a person to willfully destroy, mutilate, remove, cut, break, or injure any tree, shrub, or plant placed or being within any enclosure for the burial of the dead.
- Second degree felony<sup>4</sup> to willfully and knowingly disturb the contents of a tomb or grave.<sup>5</sup>

The section provides that a “tomb” includes any mausoleum, columbarium, or belowground crypt.”<sup>6</sup>

Finally, the section specifies that the offenses described above do not apply to:

- Any person acting under the direction or authority of the Division of Historical Resources of the Department of State;<sup>7</sup>
- Cemeteries operating under ch. 497, F.S.; or
- Any person otherwise authorized by law to remove or disturb a tomb, monument, gravestone, burial mound, or similar structure, or its contents.”<sup>8</sup>

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<sup>1</sup> Ch. 872, F.S. is entitled, “Offenses Concerning Dead Bodies and Graves.”

<sup>2</sup> This includes selling or trafficking in dead bodies; injuring or removing a tomb or monument; disturbing the contents of a grave or tomb; cremating human bodies less than 48 hours after death; performing autopsies without consent; discovering human remains; and abusing dead bodies. *See* ss. 872.01-872.06, F.S.

<sup>3</sup> A third degree felony is punishable by up to five years imprisonment and a \$5,000 fine. ss. 775.082, 775.083, and 775.084, F.S.

<sup>4</sup> A second degree felony is punishable by up to 15 years imprisonment and a \$10,000 fine. ss. 775.082, 775.083, and 775.084, F.S.

<sup>5</sup> Violations of s. 872.02, F.S., are not frequently charged. According to data from the Florida Department of Law Enforcement, there were 158 arrests for a violation of s. 872.02, F.S., during the 11-year period between 2006 and 2016, i.e., less than an average of 15 arrests per year. Email from Ronald Draa, Director of External Affairs, Florida Department of Law Enforcement (January 17, 2017) (on file with the Florida House of Representatives, Criminal Justice Subcommittee).

<sup>6</sup> Section 872.02(4), F.S.

<sup>7</sup> The powers and duties of the Division of Historical Resources of the Department of State are set forth in s. 267.031, F.S. Subject to some limitations, a State Archaeologist, as employed by the Division, may assume jurisdiction over an unmarked human burial site in order to initiate efforts for the proper protection of the burial and the human skeletal remains and associated burial artifacts. *See* ss. 872.05(4), (5), and (6), F.S.

<sup>8</sup> Section 872.02(3), F.S. Few appellate cases in Florida reference s. 872.02, F.S. Only one case has discussed the interpretation of s. 872.02, F.S., and that case involved interpretation of language that has since been amended. *See Newman v. State*, 174 So. 2d 479 (Fla.

## **Cemetery Regulation under Chapter 497, F.S.**

As referenced above, one of the statutory exceptions to the criminal offenses established in s. 872.02, F.S., is for “cemeteries operating under ch. 497.” Chapter 497, F.S., is entitled the Florida Funeral, Cemetery, and Consumer Services Act (“the Act”).<sup>9</sup> The Act authorizes the Board of Funeral, Cemetery, and Consumer Services (“the Board”) within the Department of Financial Services (“DFS”) to regulate cemeteries,<sup>10</sup> columbaria,<sup>11</sup> cremation services and practices, cemetery companies, dealers and monument builders, funeral directors, and funeral establishments.<sup>12</sup>

The Act specifically exempts, however, certain types of cemeteries from its regulations. To be exempt, a cemetery must be a:

- Religious institution cemetery of less than five acres which provide only single-level ground burial;
- County or municipal cemetery;
- Community and nonprofit association cemetery that provides only single-level ground burial and does not sell burial spaces or burial merchandise;
- Cemetery owned and operated or dedicated by a religious institution before June 23, 1976;
- Cemetery beneficially owned and operated since July 1, 1915, by a fraternal organization or its corporate agent;
- Columbarium consisting of less than one-half acre contiguous to and owned by an existing religious institution subject to local government zoning;
- Family cemetery of less than two acres not selling burial spaces or merchandise;
- A mausoleum of two acres or less contiguous to and owned by a religious institution subject to local government zoning, incorporated at least 25 years and possessing sufficient funds in an endowment fund to construct the mausoleum; or
- Columbarium consisting of five acres or less which is located on the main campus of a state university.<sup>13</sup>

## **Cemeteries Seeking to Remove or Relocate a Tomb or Grave**

On occasion, a cemetery may seek to remove or relocate the contents of a tomb or grave for a legitimate purpose such as maintenance, expansion, or modernization. Currently, a cemetery operating under ch. 497, F.S., may disinter or reinter human remains only after receiving written authorization from a legally authorized representative<sup>14</sup> or written authorization from a court of competent jurisdiction. Failure to comply with such requirements subjects the cemetery to discipline by the Board.<sup>15</sup>

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2d DCA 1965) (reversing a conviction for wantonly and maliciously disturbing the contents of a tomb or grave under a prior version of s. 872.02, F.S., where there was no evidence that the grave was on Native American land; the grave was open without any fencing or warning; the skull found by the defendant was not attached to the body; the defendant never made any attempt to conceal the fact that he took the skull; and defendant testified that he did not intend to commit a moral wrong).

<sup>9</sup> s. 497.001, F.S.

<sup>10</sup> Section 497.005(11), F.S., defines a “cemetery” as comprising one of the following: “land or earth interment; mausoleum, vault, or crypt interment; a columbarium, ossuary, scattering garden, or other structure or place used or intended to be used for the interment or disposition of cremated remains; or any combination of one or more of such structures or places.”

<sup>11</sup> Section 497.005(16), F.S., defines a “columbarium” as “a structure or building that is substantially above the ground and that is intended to be used for the inurnment of cremated remains.”

<sup>12</sup> Section 497.103(1) and (2), F.S.

<sup>13</sup> Section 497.260(1), F.S. All cemeteries in this state, whether exempt or subject to regulation under ch. 497, F.S., must comply with the regulations specified in ss. 497.276(1), 497.152(1)(d), 497.164, 497.2765, 497.278, 497.280, and 497.284, F.S. s. 497.260(2), F.S. Regulations imposed under these sections of law include requirements for the maintenance of burial records and solicitation of certain sales and prohibitions against discrimination based on race, color, creed, marital status, sex, or national origin. These regulations do not address the removal or relocation of the contents of a tomb.

<sup>14</sup> Section 497.005(43), F.S., defines “legally authorized person” as meaning, in the priority listed: (a) the decedent, when written inter vivos authorizations and directions are provided by the decedent; (b) the person designated by the decedent as authorized to direct disposition pursuant to specified federal laws; (c) the surviving spouse, unless the spouse has been arrested for committing against the deceased an act of domestic violence as defined in s. 741.28 that resulted in or contributed to the death of the deceased; (d) a son or

There are no statutorily-specified requirements for the disinterment or reinterment of human remains by a cemetery that is exempt from regulation by the Board. Accordingly, an exempt cemetery is not expressly required by law to first obtain the approval of a legally authorized representative of the decedent for such conduct. Theoretically, an exempt cemetery engaging in such conduct could be in violation of the criminal offenses specified in s. 872.02, F.S., proscribing the removal of a tomb, monument, and other specified items and proscribing the disturbance of the contents of a tomb or grave; however, based on an incident that occurred in 2013, it appears law enforcement authorities may be reluctant at times to prosecute such cases under the current language of s. 872.02, F.S.<sup>16</sup>

In December 2013, a complaint was filed with DFS in which it was alleged that an exempt cemetery in Casselberry, Florida relocated a grave without prior authorization from family members of the decedent. The matter was reviewed by DFS investigators and it was determined that the cemetery had moved the grave approximately three feet away from its former location.<sup>17</sup> The cemetery owner admitted moving and lowering the grave as necessary for the cemetery's redevelopment plan and would reduce the risk of damage to the exposed grave vault by vandals or storms. The family, upset by the relocation, reported the matter to local law enforcement and DFS, but neither agency believed action could be taken against the cemetery. DFS was without jurisdiction in the matter because the cemetery was exempt from regulation under ch. 497, F.S. Further, DFS noted that in a previous report regarding an alleged unauthorized grave relocation that law enforcement had stated that s. 872.02, F.S. "is for 'grave robbers' or someone entering onto a cemetery without permission to commit a criminal act and does not relate to this . . . scenario" involving an exempt cemetery. DFS agreed with this finding.<sup>18</sup>

### Effect of the Bill

The bill amends s. 872.02(1), F.S., to create definitions for the terms used in the statute. Under the bill:

- An "exempt cemetery" means a cemetery that is exempt from regulation pursuant to s. 497.260(1), F.S., i.e., a cemetery that is not subject to regulation by the Board.
- A "legally authorized person" has the same meaning as provided in s. 497.005, F.S.
- A "memorial" means a structure or thing placed or designed for a memorial of the dead, including a monument or gravestone.
- An "operator" means an owner, officer, employee, or agent.

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daughter who is 18 years of age or older; (e) a parent; (f) a brother or sister who is 18 years of age or older; (g) a grandchild who is 18 years of age or older; (h) a grandparent; or (i) any person in the next degree of kinship. The term may also include, if no family member exists or is available, the guardian of the dead person at the time of death; the personal representative of the deceased; the attorney in fact of the dead person at the time of death; the health surrogate of the dead person at the time of death; a public health officer; the medical examiner, county commission, or administrator acting under part II of chapter 406 or other public administrator; a representative of a nursing home or other health care institution in charge of final disposition; or a friend or other person not listed in this subsection who is willing to assume the responsibility as the legally authorized person.

<sup>15</sup> See s. 497.384(3), F.S. ("The funeral director shall obtain written authorization from a legally authorized person or a court of competent jurisdiction prior to the disinterment and reinterment of a dead human body."); see also s. 497.152, F.S. (imposing discipline or other enforcement action against a licensee for specified conduct which includes "[f]ailing to obtain written authorization from a legally authorized person before entombment, interment, disinterment, disintombment, or disinurnment of the remains of any human being."); and Rule 69K-6.007(4)(a)-(c), F.A.C. (requiring cemeteries regulated by DFS to obtain all required permits and specified written authorization or a court order before performing a disinterment).

<sup>16</sup> See "Report: Casselberry Cemetery Cleared of Wrongdoing After Moving Grave," WFTV 9 (April 25, 2014), available at <http://www.wftv.com/news/local/report-casselberry-cemetery-cleared-wrongdoing-aft/106726697> (last viewed on Feb. 13, 2017).

<sup>17</sup> Kurt Schuller, Investigator, Florida Department of Financial Services, Report of Investigation, Case No. ATN-21993, at \*2-3 (April 10, 2014) (on file with the House Subcommittee on Criminal Justice).

<sup>18</sup> *Id.*

- A “tomb” includes a grave space,<sup>19</sup> mausoleum,<sup>20</sup> columbarium,<sup>21</sup> or belowground crypt,<sup>22</sup> as those terms are defined in s. 497.005, F.S., and a burial mound or earthen or shell monument containing human skeletal remains or associated burial artifacts.

The bill also amends:

- Section 872.02(2), F.S., to make technical changes for purposes of eliminating redundancies, using consistent terminology, and clarifying the language.
- Section 872.02(3), F.S., to clarify that the second degree felony offense of disturbing the contents of a tomb includes conduct such as excavation, exposure, movement, and removal of the contents of a tomb.

Finally, the bill adds exceptions providing that the law’s criminal offenses do not apply to an operator of an exempt cemetery:

- Who is conducting ordinary maintenance if such maintenance does not relocate the memorial, tomb, or contents of a tomb to another plot or site; or
- Who relocates a memorial, tomb, or contents of a tomb to another plot or site if:
  - Before the relocation, the operator obtains written authorization for the relocation from a legally authorized person or a court order authorizing the relocation;
  - A natural disaster causes damage to the exempt cemetery which necessitates the relocation; or
  - More than 75 years have elapsed since the interment, entombment, or inurnment<sup>23</sup> at the exempt cemetery and the operator of the exempt cemetery publishes a public notice, once a week for 4 consecutive weeks, in a newspaper of general circulation within the county in which the exempt cemetery is located.

The bill provides that a written and signed contract between the operator and a legally authorized person permitting relocation may serve as a written authorization for relocation.

The bill specifies that the public notice must include the:

- Name of the exempt cemetery;
- Name, address, and telephone number of the cemetery representative with whom written objections may be filed;
- Reason and necessity for the relocation;
- Name of the deceased person interred, entombed, or inurned;
- Date of initial interment, entombment, or inurnment;
- Proposed site of relocation; and
- Proposed date of relocation, which may not be less than 30 days from the last date of publication.

If a written objection to the relocation is not received from a legally authorized person within 30 days after the last date of publication of the notice, the exempt cemetery may proceed with the relocation.

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<sup>19</sup> Section 497.005(40), F.S., defines a “grave space” as “a space of ground in a cemetery intended to be used for the interment in the ground of human remains.”

<sup>20</sup> Section 497.005(46), F.S., defines a “mausoleum” as “a structure or building that is substantially exposed above the ground and that is intended to be used for the entombment of human remains.”

<sup>21</sup> See Footnote 11.

<sup>22</sup> Section 497.005(4), F.S., defines “belowground crypts” as “interment space in preplaced chambers, either side by side or multiple depth, covered by earth and sod and known also as ‘lawn crypts,’ ‘westminsters,’ or ‘turf-top crypts.’”

<sup>23</sup> The word “inurn” means “1. Entomb; 2. To place (as cremated remains) in an urn.” The noun form of “inurn” is “inurnment.” See <https://www.merriam-webster.com/dictionary/inurn> (last viewed Jan. 30, 2017).

If such objection is received, a public hearing may be held before the city council if the exempt cemetery is located in a municipality or before the applicable county commission if the exempt cemetery is not located within a municipality. If a public hearing is held, the interested parties must have an opportunity to be heard and introduce testimony. The council or commission must determine whether to grant or deny the request for the relocation. If granted, the exempt cemetery may proceed with the relocation.

The bill takes effect on October 1, 2017.

**B. SECTION DIRECTORY:**

Section 1. Amends s. 872.02, F.S., relating to injuring or removing tomb or monument; disturbing contents of grave or tomb; penalties; exceptions.

Section 2. Provides an effective date of October 1, 2017.

**II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT**

**A. FISCAL IMPACT ON STATE GOVERNMENT:**

1. Revenues:

The bill does not appear to have any impact on state revenues.

2. Expenditures:

The Criminal Justice Impact Conference (CJIC) considered this bill on March 2, 2017. The CJIC determined that the bill will have a positive insignificant impact on prison beds, meaning an increase of ten or fewer prison beds.

**B. FISCAL IMPACT ON LOCAL GOVERNMENTS:**

1. Revenues:

The bill does not appear to have any impact on local government revenues.

2. Expenditures:

A city council or county commission could incur expenses to hold hearings regarding relocations unless the council or commission assesses fees from the parties for such expenses.

**C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:**

There will be a fiscal impact to the operator of a cemetery who chooses to publish notice regarding a proposed relocation in a newspaper of general circulation.

**D. FISCAL COMMENTS:**

None.

**III. COMMENTS**

**A. CONSTITUTIONAL ISSUES:**

1. Applicability of Municipality/County Mandates Provision:

This bill appears to be exempt from the requirements of Article VII, Section 18 of the Florida Constitution because it is a criminal law. Additionally, it is anticipated that any fiscal impact of the bill

on a municipality or county as a result of the bill's requirement for a hearing in specified circumstances would be insignificant.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

The bill does not appear to create a need for rulemaking or rulemaking authority.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

#### **IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES**

On February 8, 2017, the Criminal Justice Subcommittee adopted a proposed committee substitute and reported the bill favorably as a committee substitute (CS). The CS differs from the bill as filed in that the CS:

- Added definitions for the terms used in the statute and made technical changes to create clearer and more consistent language.
- Provided that the offense of disturbing the contents of a tomb includes conduct such as excavation, exposure, movement, and removal of the contents of a tomb.
- Added exceptions for the operators of exempt cemeteries who conduct ordinary maintenance without relocating a memorial, tomb, or its contents or who conduct relocation or removal with a court order.
- Increased the amount of time that an exempt cemetery is must publish notice of its intent to relocate a memorial, tomb, or its contents from two weeks to four weeks.

On February 22, 2017, the Local, Federal & Veterans Affairs Subcommittee adopted an amendment and reported the bill favorably as a committee substitute. The amendment clarifies that a written and signed contract between the operator and a legally authorized person which permits relocation serves as a written authorization for relocation.

On March 16, 2017, the Judiciary Committee adopted one amendment and reported the bill favorably as a committee substitute (CS). The CS provides that a hearing may, rather than shall, be held before the city council or county commission under s. 872.02(4)(c)3.b., F.S.

This analysis is drafted to the CS as passed by the Judiciary Committee.