

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: CS/SB 368

INTRODUCER: Judiciary Committee and Senator Baxley

SUBJECT: Elder-focused Dispute Resolution Process

DATE: March 17, 2021 REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Delia</u>	<u>Cox</u>	<u>CF</u>	Favorable
2.	<u>Ravelo</u>	<u>Cibula</u>	<u>JU</u>	Fav/CS
3.	<u> </u>	<u> </u>	<u>AP</u>	<u> </u>

Please see Section IX. for Additional Information:

COMMITTEE SUBSTITUTE - Substantial Changes

I. Summary:

CS/SB 368 creates an alternative dispute resolution process for persons 60 years of age and older who are involved in certain legal proceedings, such as guardianships. Specifically, the bill allows a court to appoint an eldercaring coordinator to assist in disputes that can impact an elder's safety and autonomy.

An eldercaring coordinator may be appointed for up to 2 years, although a court has discretion to extend or suspend the appointment as needed. In order to be appointed as an eldercaring coordinator, an applicant must:

- Meet a professional licensing requirement, such as membership in The Florida Bar or being a licensed nurse;
- Complete 3 years of post-licensing or certification practice;
- Receive training in family and elder mediation;
- Receive 28 hours in eldercare coordinator training, which will include topics such as elder, guardianship, and incapacity law; family dynamics, multicultural competency, and elder abuse, neglect, and exploitation;
- Successfully pass a background check; and
- Have not been a respondent in a final order granting an injunction for protection against domestic, dating, sexual, or repeat violence or stalking or exploitation of an elder or a disabled person.

The bill provides that an eldercaring coordinator may be removed or disqualified if the coordinator no longer meets the minimum qualifications or upon court order.

The bill prohibits a court from ordering parties to eldercaring coordination without first confirming the financial ability of the parties to pay relevant fees and costs. Further, the court is required to determine the allocation among the parties of fees and costs for eldercaring coordination and may make an unequal allocation based on the financial circumstances of each party after considering certain factors. If a court finds that a party is indigent, the bill prohibits the court from ordering the party to eldercaring coordination unless funds are available to pay the indigent party's allocated portion. Likewise, cases involving exploitation of an elder or domestic violence are ineligible for a referral without the consent of the parties involved.

The bill provides that all communications that meet specified requirements and are made during eldercaring coordination must be kept confidential. The bill provides that parties to the eldercaring coordination, including the coordinator, may not testify unless one of the enumerated exceptions applies.

The bill provides legislative findings and requires the Florida Supreme Court to establish minimum standards and procedures for training, qualifications, discipline, and education of eldercaring coordinators. The bill also defines a number of terms, including:

- “Action”;
- “Elder”;
- “Eldercaring coordination”;
- “Eldercaring coordination communication”;
- “Eldercaring coordinator”;
- “Eldercaring plan”;
- “Good cause”;
- “Legally authorized decisionmaker”;
- “Participant”; and
- “Party.”

The Office of State Courts Administrator states that the bill will have an indeterminate fiscal impact on the state court system and no impact on the private sector. See Section V. Fiscal Impact Statement.

The bill is effective July 1, 2021.

II. Present Situation:

Elder Population

As the country's “baby-boomer” population reaches retirement age and life expectancy increases, the nation's elder population is projected to increase from 49.2 million in 2016¹ to 77

¹ Press Release, U.S. Census Bureau, *The Nation's Older Population is Still Growing*, *Census Bureau Reports* (June 22, 2017), Release Number: CB17-100, available at <https://www.census.gov/newsroom/press-releases/2017/cb17-100.html> (last visited January 28, 2021).

million by 2034.² Florida has long been a destination state for senior citizens and has the highest percentage of senior residents in the entire nation.³ In 2018, individuals aged 65 and older represented approximately 20 percent of Florida's total population.⁴ By 2030, this number is projected to increase to 5.9 million, meaning the elderly will make up approximately one quarter of the state's population and it is estimated that individuals age 65 and older will account for approximately 47.9 percent of the state's population growth between 2010 and 2030.⁵

Mediation

Mediation is a process in which a neutral third person acts to facilitate the resolution of a lawsuit or other dispute between two or more parties.⁶ Various statutes currently authorize courts to use mediation to aid in resolving cases, but the statutes also provide that many of the procedural aspects of mediation are to be governed by the Florida Rules of Civil Procedure.⁷ Depending on the type of case, there are different circumstances under which a court would refer the matter to mediation. In a lawsuit for money damages, the court must refer the matter to mediation upon the request of a party if the party is willing and able to pay the costs of the mediation or the costs can be equitably divided between the parties.⁸ However, a court need not refer such a case to mediation if it involves:

- Medical malpractice or debt collection;
- A landlord-tenant dispute not involving personal injury;
- Disputes covered under the Small Claims Act; or
- One of the few other circumstances set forth in statute.⁹

Beyond these cases that a court *must* refer to mediation, the court *may*, in general, refer all or part of any other filed civil action to mediation.¹⁰

² Press Release, U.S. Census Bureau, *Older People Projected to Outnumber Children for First Time in U.S. History* (revised Oct. 8, 2019), available at <https://www.census.gov/newsroom/press-releases/2018/cb18-41-population-projections.html> (last visited January 28, 2021).

³ Pew Research Center, *Where Do the Oldest Americans Live?*, July 9, 2015, available at <https://www.pewresearch.org/fact-tank/2015/07/09/where-do-the-oldest-americans-live/> (last visited January 28, 2021).

⁴ U.S. Census Bureau, *Annual Estimates of the Resident Population for Selected Age Groups by Sex for the United States*, available at <https://www.census.gov/newsroom/press-releases/2020/65-older-population-grows.html> (last visited January 28, 2021).

⁵ The Office of Economic & Demographic Research (EDR), *Population Data: 2016, 2020, 2025, 2030, 2035, 2040, & 2045, County by Age, Race, Sex, and Hispanic Origin*, p. 89-90 and 269-70, available at http://edr.state.fl.us/Content/population-demographics/data/Medium_Projections_ARSH.pdf (last visited January 28, 2021); The EDR, *Econographic News: Economic and Demographic News for Decision Makers, 2019, Vol. 1*, available at <http://edr.state.fl.us/content/population-demographics/reports/econographicnews-2019v1.pdf> (last visited January 28, 2021).

⁶ Section 44.1011(2), F.S.; See also Fla. Jur. 2d, Arbitration and Award §113.

⁷ Section 44.102(1), F.S.

⁸ Section 44.102(2)(a), F.S.

⁹ *Id.*

¹⁰ Section 44.102(2)(b)-(d), F.S. Additionally, a court is required or authorized to refer certain family law and dependency matters to litigation, as specified in s. 44.102(2)(c) and (d), F.S.

Domestic Violence

Domestic violence means any criminal offense resulting in the physical injury or death of one family or household member^{11, 12} by another family or household member, including, but not limited to:

- Assault;¹³
- Aggravated assault;¹⁴
- Battery;¹⁵
- Aggravated battery;¹⁶
- Sexual assault;¹⁷
- Sexual battery;¹⁸
- Stalking;¹⁹
- Aggravated stalking;²⁰
- Kidnapping;²¹ or
- False imprisonment.²²

¹¹ Section 741.28(2), F.S.

¹² Section 741.28(3), F.S., defines “family or household member” to mean spouses, former spouses, persons related by blood or marriage, persons presently residing together as if a family or who have resided together in the past as a family, and persons who are parents of a child in common regardless of whether they have been married. With the exception of persons who have a child in common, the family or household members must be currently residing or have in the past resided together in the same single dwelling unit.

¹³ Section 784.011, F.S., defines “assault” to mean an intentional, unlawful threat by word or act to do violence to another, coupled with an apparent ability to do so, creating a well-founded fear in such other person that violence is imminent.

¹⁴ Section 784.021, F.S., defines “aggravated assault” means an assault with a deadly weapon without intent to kill or with intent to commit a felony.

¹⁵ Section 784.03, F.S., defines “battery” to mean the actual and intentional touching or striking of another against his or her will or intentionally causing bodily harm to another.

¹⁶ Section 784.045, F.S., defines “aggravated battery” to mean a battery in which the offender: intentionally or knowingly causes great bodily harm, permanent disability, or permanent disfigurement; uses a deadly weapon; or victimizes a person the offender knew or should have known was pregnant.

¹⁷ Although not specifically defined under Florida law, “sexual assault” generally has the same meaning as sexual battery. See University of South Florida, *USF Health in South Tampa Annual Security Report 2020*, p. 3-1, available at <https://health.usf.edu/-/media/3573942FF8E04B5F8B3FB4BF956BBC31.ashx>.

¹⁸ Section 794.011(1)(h), F.S., defines “sexual battery” to mean oral, anal, or vaginal penetration by, or in union with, the sexual organ of another or the anal or vaginal penetration of another by any object, but does not include an act done for a bona fide medical purpose.

¹⁹ Section 784.048(2), F.S., defines “stalking” to mean willfully, maliciously, and repeatedly following, harassing, or cyberstalking another. Section 784.048(1)(d), F.S., defines “cyberstalk” to mean to engage in a course of conduct to communicate, or to cause to be communicated, words, images, or language by or through the use of electronic mail or electronic communication, directed at a specific person; or to access, or attempt to access, the online accounts or Internet-connected home electronic systems of another person without that person’s permission, causing substantial emotional distress to that person and serving no legitimate purpose.

²⁰ Section 784.048(3), F.S., defines “aggravated stalking” to mean willfully, maliciously, and repeatedly following, harassing, or cyberstalking another and making a credible threat to that person.

²¹ Section 787.01(1), F.S., defines “kidnapping” to mean forcibly, secretly, or by threat confining, abducting, or imprisoning another against his or her will and without lawful authority with the intent to: hold for ransom or reward or as a shield or hostage; commit or facilitate a felony; inflict bodily harm upon or terrorize another; or interfere with the performance of any governmental or political function.

²² Section 787.02(1), F.S., defines “false imprisonment” to mean forcibly, by threat, or secretly confining, abducting, imprisoning, or restraining another person without lawful authority and against his or her will.

In 2018, Florida law enforcement agencies received 104,914 domestic violence reports,²³ resulting in 64,573 arrests.²⁴ Additionally, Florida's 41 certified domestic violence shelters²⁵ admitted new 14,817 victims to a residential services program and 38,869 new victims to a non-residential services program in Fiscal Year 2018-19.²⁶

Exploitation of Vulnerable Adults

The "Adult Protective Services Act" (ch. 415, F.S.) defines abuse as "any willful act or threatened act by a relative, caregiver, or household member, which causes or is likely to cause significant impairment to a vulnerable adult's²⁷ physical, mental, or emotional health."²⁸ The Adult Protective Services program, located within the Department of Children and Families (DCF), is responsible for investigating allegations of abuse, neglect²⁹, or exploitation³⁰, as provided in the Adult Protective Services Act.³¹

Section 415.1034, F.S., requires any person who knows, or has reasonable cause to suspect, that a vulnerable adult has been or is being abused, neglected, or exploited to report suspected abuse to the central abuse hotline immediately.

Once a person reports to the central abuse hotline, the DCF must initiate a protective investigation within 24 hours.³² If a caregiver refuses to allow the DCF to begin a protective investigation or interferes with the investigation, the DCF may contact the appropriate law enforcement agency for assistance.³³

²³ Florida Department of Law Enforcement, *Florida's County and Jurisdictional Reported Domestic Violence Offenses, 2018*, p. 22, available at http://www.fdle.state.fl.us/FSAC/Documents/PDF/DV_OFF_JUR18.aspx (last visited February 2, 2021).

²⁴ Florida Department of Law Enforcement, *Florida's County and Jurisdictional Domestic Violence Related Arrests, 2018*, p. 21, available at http://www.fdle.state.fl.us/FSAC/Documents/PDF/DV_ARR_JUR18.aspx (last visited February 2, 2021).

²⁵ The Department of Children and Families ("The DCF") operates the statewide Domestic Violence Program, responsible for certifying domestic violence centers. Section 39.905, F.S., and ch. 65H-1, F.A.C., set forth the minimum domestic violence center certification standards. See The DCF, *Domestic Violence Program Overview*, available at <https://www.myflfamilies.com/service-programs/domestic-violence/overview.shtml>

²⁵ The DCF, *Domestic Violence Annual Report*, p. 2, available at <https://www.myflfamilies.com/service-programs/domestic-violence/docs/2018-2019%20DV%20Service%20Report.pdf> (last visited February 2, 2021).

²⁶ The DCF, *Domestic Violence Annual Report*, p. 2, available at <https://www.myflfamilies.com/service-programs/domestic-violence/docs/2018-2019%20DV%20Service%20Report.pdf> (last visited February 2, 2021).

²⁷ Section 415.102(28), F.S., defines "vulnerable adult" to mean a person 18 years of age or older whose ability to perform the normal activities of daily living or to provide for his or her own care or protection is impaired due to a mental, emotional, sensory, long-term physical, or developmental disability or dysfunction, or brain damage, or the infirmities of aging.

²⁸ Section 415.102(1), F.S.

²⁹ See s. 415.102(16), F.S.

³⁰ See s. 415.102(8), F.S., for the definition of "exploitation".

³¹ See ss. 415.101-415.113, F.S.

³² Section 415.104, F.S.

³³ *Id.*

Chapter 825, F.S., also provides criminal penalties for the abuse, neglect, and exploitation of elderly and disabled adults.³⁴ Section 825.103, F.S., provides that a person commits the offense of “exploitation of an elderly person³⁵ or disabled adult”³⁶ when he or she:

- Stands in a position of trust and confidence, or has a business relationship, with an elderly person or a disabled adult and knowingly obtains or uses, or endeavors to obtain or use, the elderly person’s or disabled adult’s funds, assets, or property with the intent to temporarily or permanently deprive that person of the use, benefit, or possession of the funds, assets, or property, or to benefit someone other than the elderly person or disabled adult;
- Obtains or uses, endeavors to obtain or use, or conspires with another to obtain or use an elderly person’s or disabled adult’s funds, assets, or property with the intent to temporarily or permanently deprive the elderly person or disabled adult of the use, benefit, or possession of the funds, assets, or property, or to benefit someone other than the elderly person or disabled adult, and he or she knows or reasonably should know that the elderly person or disabled adult lacks the capacity to consent;
- Breaches a fiduciary duty to the elderly person or disabled adult while acting as the person’s guardian, trustee, or agent under a power of attorney, and such breach results in an unauthorized appropriation, sale, or transfer of property;
- Misappropriates, misuses, or transfers without authorization money belonging to an elderly person or disabled adult from an account in which the elderly person or disabled adult placed the funds, owned the funds, and was the sole contributor or payee of the funds before the misappropriation, misuse, or unauthorized transfer; or
- Intentionally or negligently fails to effectively use an elderly person’s or disabled adult’s income and assets for the necessities required for that person’s support and maintenance while acting as a caregiver or standing in a position of trust and confidence with the elderly person or disabled adult.

An elderly person or disabled adult “lacks capacity to consent” when suffering from impairment by reason of mental illness, developmental disability, organic brain disorder, physical illness or disability, chronic use of drugs, chronic intoxication, short-term memory loss, or other cause, causing the elderly person or disabled adult to lack sufficient understanding or capacity to make or communicate reasonable decisions concerning their person or property.³⁷

Parenting Coordination

In 2009, the Florida Legislature established a statutory framework for a form of child-focused mediation known as parenting coordination.³⁸ Parenting coordinators are appointed by the court to assist parents in developing, implementing, or resolving disputes in a parenting plan. The

³⁴ See ss. 825.101-106, F.S.

³⁵ Section 825.101(4), F.S., defines “elderly person” to mean a person 60 years of age or older who is suffering from the infirmities of aging as manifested by advanced age or organic brain damage, or other physical, mental, or emotional dysfunctioning, to the extent that the ability of the person to provide adequately for the person’s own care or protection is impaired.

³⁶ Section 825.101(3), F.S., defines “disabled adult” to mean a person 18 years of age or older who suffers from a condition of physical or mental incapacitation due to a developmental disability, organic brain damage, or mental illness, or who has one or more physical or mental limitations that restrict the person’s ability to perform the normal activities of daily living.

³⁷ Section 825.101(8), F.S.

³⁸ Chapter 2009-180, s. 2, L.O.F. (creating s. 61.125, F.S., effective October 1, 2009).

parenting coordinators help parents to resolve disputes by providing education, making recommendations, and making limited decisions within the scope of the court's order of referral.³⁹ To be a qualified parenting coordinator, a person must complete various training requirements and must be a:

- Licensed mental health professional;
- Licensed physician with certification by the American Board of Psychiatry and Neurology;
- Certified family law mediator with a master's degree related to mental health; or
- Member of The Florida Bar.⁴⁰

Additionally, a parenting coordinator must complete all of the following:

- Three years of post-licensure or post-certification practice.
- A family mediation training program certified by the Florida Supreme Court.
- A minimum of 24 hours of parenting coordination training.⁴¹
- A minimum of 4 hours of training in domestic violence and child abuse which is related to parenting coordination.⁴²

Eldercaring Coordination

As parenting coordination became recognized as a viable method of dispute resolution in contentious child custody and visitation matters, courts and legal professionals used the concept as a model to develop a similar option for disputes involving elders.⁴³

Eldercaring coordination emphasizes improving relationships between elders, family members, and others in supportive roles so that all parties are able to collaborate successfully with professionals in making difficult decisions and adapting to changing circumstances.⁴⁴ The Association for Conflict Resolution defines eldercaring coordination as, "a dispute resolution process during which an eldercaring coordinators assists elders, legally authorized decision-makers, and others who participate by court order or invitation, to resolve disputes with high conflict levels in a manner that respects the elder's need for autonomy and safety."⁴⁵

Eldercaring coordination is used to complement other services, such as obtaining legal information or representation; individual or family therapy; and medical, psychological, or psychiatric evaluation or mediation.⁴⁶ Eldercaring coordination may also prove efficient in:

- Resolving non-legal issues outside of court;

³⁹ Section 61.125(2) and (3), F.S.

⁴⁰ Section 61.152(5)(a)1., F.S.

⁴¹ The topics include parenting coordination concepts and ethics, family systems theory and application, family dynamics in separation and divorce, child and adolescent development, the parenting coordination process, parenting coordination techniques, and Florida family law and procedure. Section 61.125(5)(a)2.c., F.S.

⁴² Section 61.125(5)(a)2., F.S.

⁴³ The Association for Conflict Resolution, *Guidelines for Eldercare Coordination*, p. 2, (October 2014), available at <https://ncpj.files.wordpress.com/2017/05/m4-fieldstone-morley-acr-guidelines-for-eldercaring-coordination.pdf> (last visited January 28, 2021) (hereinafter "ACR Guidelines").

⁴⁴ Sue Bronson & Linda Fieldstone, *From Friction to Fireworks to Focus: Eldercaring Coordination Sheds Light in High-Conflict Cases*, 24 Experience 29, p. 2, American Bar Association, Fall/Winter 2015 (on file with the Senate Committee on Children, Families, and Elder Affairs).

⁴⁵ ACR Guidelines, p. 15

⁴⁶ *Id.*

- Fostering a need for self-determination among both elders and family members;
- Monitoring high-risk situations for signs of elder abuse, neglect, or exploitation;
- Offering an additional source of support during times of transition.⁴⁷

Currently, fourteen jurisdictions in five states have eldercare coordination pilot programs.⁴⁸

Eldercaring Coordination in Florida

While parenting coordination is used throughout Florida in many cases involving issues related to children, there is no statewide alternative dispute resolution in place to address cases involving the elderly.⁴⁹ In March 2013, the Florida Chapter of the Association of Family and Conciliation Courts (FLAFCC) created a task force known as the Task Force on Eldercaring Coordination (FLAFCC Task Force), which sought to develop a dispute resolution model for contentious cases involving elders, their family members, and other participants.⁵⁰

The FLAFCC Task Force worked collaboratively with the Association for Conflict Resolution's Task Force on Eldercaring Coordination (ACR Task Force), which provided general, non-state specific guidance and suggestions on the practice of eldercaring coordination.⁵¹ The ACR Guidelines for Eldercaring Coordinators were developed, and on November 6, 2014, these guidelines were adopted by the Association of Family and Conciliation Courts.⁵² Subsequently, on November 10, 2014, the FLAFCC Board of Directors approved their own, Florida-specific guidelines, which are utilized by eldercare coordinators in Florida.⁵³

In 2015, eight of Florida's twenty judicial circuits were chosen to participate in a pilot program intended to provide eldercare coordination services: the Fifth, Seventh, Ninth, Twelfth, Thirteenth, Fifteenth, Seventeenth, and Eighteenth Circuits.⁵⁴ Court administrators representing the First, Sixth, Eighth, and Eleventh circuits have since expressed interest in becoming a part of the pilot.⁵⁵ Pilot programs were also created in four other states: Idaho, Indiana, Ohio, and Minnesota.⁵⁶ The pilot programs⁵⁷ function by having eldercaring coordinators assigned to elder

⁴⁷ *Id.*

⁴⁸ Karen Campbell, *Dispute Resolution Tactics Emerge to Aid the Elderly*, 27 *Experience* 2, 13, American Bar Association, July 2017. (On file with the Senate Committee on Children, Families, and Elder Affairs).

⁴⁹ Florida Chapter of the Association of Family and Conciliation Courts Task Force on Eldercaring Coordination, *Guidelines for Eldercaring Coordinators*, p. 3 (October 2014), available at https://flafcc.org/wp-content/uploads/2020/08/flafcc_guidelines_for_eldercaring_coordination_website.pdf (last visited January 28, 2021).

⁵⁰ *Id.*

⁵¹ *Id.* at 4.

⁵² *Id.*

⁵³ *Id.*

⁵⁴ Jim Ash, 'Eldercaring' Program Serves the Courts and Florida's Aging Citizens, *The Florida Bar News*, October 15, 2018, available at <https://www.floridabar.org/the-florida-bar-news/eldercaring-program-serves-the-courts-and-floridas-aging-citizens/> (last visited January 28, 2021) (hereinafter cited as "Florida Bar News").

⁵⁵ *Id.*; see also The Office of the State Courts Administrator (OSCA), *Judicial Branch 2021 Legislative Agenda*, p. 18-19, (2021) (On file with the Senate Committee on Children, Families, and Elder Affairs.).

⁵⁶ *Id.*; see also OSCA *Judicial Branch 2021 Legislative Agenda*, p. 18-19 (2021) (On file with the Senate Committee on Children, Families, and Elder Affairs)(hereinafter cited as "Judicial Branch 2021 Legislative Agenda").

⁵⁷ "Pilot site" is defined as: "One judge or group of judges or magistrates that refer at least six cases for eldercaring coordination, or a group of attorneys that initiate at least six cases for eldercaring coordination through agreed order, where

law cases involving typical indicators of family discord.⁵⁸ A total of approximately 75 cases have been referred to the eight Florida sites since their inception.⁵⁹

According to the FLAFCC Elder Justice Initiative on Eldercaring Coordination (Initiative), judges from the Probate and Guardianship Divisions of courts from each pilot site first evaluated and selected individuals to be trained as eldercaring coordinators.⁶⁰ Judges, eldercaring coordinators, and administrators were then trained on eldercaring coordination.⁶¹ Cases were referred and the FLAFCC has since reported the following findings from cases at the pilot sites:

- Fewer motions;
- Shorter, more efficient hearings;
- Reduced levels of family conflict, leading to minimized abuse, neglect, and exploitation of elders;
- A reduced need for guardianships and a reduced number of cases in need of final determinations of capacity; and
- An increased ability of elders and family members to respond to issues efficiently and without needing further judicial intervention.⁶²

III. Effect of Proposed Changes:

The bill creates s. 44.407, F.S., allowing eldercaring coordination as an alternative dispute resolution process for elders, their family members, and their legally authorized decision makers engaged in disputes involving an elder's wants, needs, and best interests.

Definitions

The bill provides a number of definitions, including:

- "Action," which is defined as a proceeding in which a party sought or seeks a judgment or an order from the court to:
 - Determine if someone is or is not incapacitated pursuant to s. 744.331, F.S.
 - Appoint or remove a guardian.
 - Undertake an investigation pursuant to s. 415.104, F.S.
 - Audit an annual guardianship report.
 - Review a proxy's decision pursuant to s. 765.105, F.S.
 - Appoint a guardian advocate pursuant to s. 393.12, F.S.
 - Enter an injunction for the protection of an elder under s. 825.1035, F.S.
 - Follow up on a complaint made to the Office of Public and Professional Guardians pursuant to s. 744.2004, F.S.
 - Address advice received by the court from the clerk of the court pursuant to s. 744.368(5), F.S.

those families choose to participate in the independent research of the process." Judicial Branch 2021 Legislative Agenda, p. 19.

⁵⁸ The Florida Bar News.

⁵⁹ *Id.*

⁶⁰ Judicial Branch 2021 Legislative Agenda, p. 19.

⁶¹ *Id.*

⁶² Judicial Branch 2021 Legislative Agenda, p. 19-20.

- At the discretion of the presiding judge, address other matters pending before the court which involve the care or safety of an elder or the security of an elder's property.
- "Elder," which is defined as a person 60 years of age or older who is alleged to be suffering from the infirmities of aging as manifested by a physical, a mental, or an emotional dysfunction to the extent that the elder's ability to provide adequately for the protection or care of his or her own person or property is impaired.
- "Eldercaring coordination," which is defined as an elder-focused dispute resolution process during which an eldercaring coordinator assists an elder, legally authorized decisionmakers, and others who participate by court order or by invitation of the eldercaring coordinator, in resolving disputes regarding the care and safety of an elder by:
 - Facilitating more effective communication and negotiation and the development of problem-solving skills.
 - Providing education about eldercare resources.
 - Facilitating the creation, modification, or implementation of an eldercaring plan and reassessing it as necessary to reach a resolution of ongoing disputes concerning the care and safety of the elder.
 - Making recommendations for the resolution of disputes concerning the care and safety of the elder.
 - With the prior approval of the parties to an action or of the court, making limited decisions within the scope of the court's order of referral.
- "Eldercaring coordination communication," which is defined to mean an oral or a written statement or nonverbal conduct intended to make an assertion by or to an eldercaring coordinator or individuals involved in eldercaring coordination made during an eldercaring coordination activity, or before the activity if made in furtherance of eldercaring coordination.⁶³
- "Eldercaring coordinator," which is defined to mean an impartial third person who is appointed by the court or designated by the parties and who meets the requirements of of the bill.⁶⁴
- "Eldercaring plan" to mean a continually reassessed plan for the items, tasks, or responsibilities needed to provide for the care and safety of an elder which is modified throughout eldercaring coordination to meet the changing needs of the elder and which takes into consideration the preferences and wishes of the elder. The plan is not a legally enforceable document, but is meant for use by the parties and participants.
- "Good cause" to mean a finding that the eldercaring coordinator:
 - Is not fulfilling the duties and obligations of the position;
 - Has failed to comply with any order of the court, unless the order has been superseded on appeal;
 - Has conflicting or adverse interests that affect his or her impartiality;
 - Has engaged in circumstances that compromise the integrity of eldercaring coordination;
 - or

⁶³ The definition goes on to state that the term does not include statements made during eldercaring coordination which involve the commission of a crime, the intent to commit a crime, or ongoing abuse, exploitation, or neglect of a child or vulnerable adult.

⁶⁴ The definition further states that the role of the eldercaring coordinator is to assist parties through eldercaring coordination in a manner that respects the elder's need for autonomy and safety.

- Has had a disqualifying event occur.⁶⁵
- “Legally authorized decisionmaker,” which is defined to mean an individual designated, either by the elder or by the court, pursuant to ch. 709, F.S. (relating to powers of attorney), ch. 744, F.S. (relating to guardianships), ch. 747, F.S. (relating to conservatorships), or ch. 765, F.S. (relating to health care advance directives) who has the authority to make specific decisions on behalf of the elder who is the subject of an action.
- “Participant,” which is defined to mean an individual who joins eldercaring coordination by invitation of or with the consent of the eldercaring coordinator but who has not filed a pleading in the action from which the case was referred to eldercaring coordination.
- “Party,” which is defined to include the elder who is the subject of an action and any other individual over whom the court has jurisdiction.

Referral Process

The bill allows a court to appoint an eldercaring coordinator and refer the parties to eldercaring coordination upon agreement of the parties, the court’s own motion, or the motion of any party. The bill prohibits the court from referring parties with a history of domestic violence or exploitation of an elder to eldercaring coordination absent the consent of all parties, including the elder. Further, the court must offer each party a chance to consult with either an attorney or a domestic violence advocate prior to accepting consent of the referral and the court is required to determine whether or not each of the parties has given their consent freely and voluntarily.

When a court is determining whether to refer parties who may have an above-mentioned history that would otherwise preclude the referral, the court must consider:

- Whether a party has committed a violation of an act of exploitation as defined in s. 415.102(8), F.S., or s. 825.103(1), F.S., or domestic violence as defined in s. 741.28, F.S. against another party or any member of another party’s family;
- Engaged in a behavioral pattern where power and control are used against another party and that could jeopardize another party’s ability to negotiate fairly; or
- Behaved in a way that leads another party to reasonably believe that they are in imminent danger of becoming a victim of domestic violence.

The bill also requires the court to consider all relevant factors, including, but not limited to, those listed in s. 741.30(6)(b), F.S.

The court is required to order necessary precautions to protect the safety of all parties to the proceeding, all participants, the elder and their property if it refers a case that involves a party who has any history of domestic violence or exploitation of an elder. These precautions may include adherence to all provisions of an injunction for protection or conditions of bail, probation, a criminal sentence, and other relevant precautions.

⁶⁵ The bill provides that the term does not include a party’s disagreement with the eldercaring coordinator’s methods or procedures.

Appointment and Qualifications of the Eldercaring Coordinator

The bill provides that the court's appointment of an eldercaring coordinator is for a term of up to 2 years. The court must conduct review hearings intermittently to determine whether it is appropriate to conclude or extend the term of the appointment. The bill prescribes the qualifications of eldercaring coordinators and also identifies factors that disqualify individuals from serving as eldercaring coordinators. Specifically, the bill requires eldercaring coordinators to be in good standing or in clear and active status with all professional licensing authorities or certification boards and to meet at least one of the following requirements related to professional training:

- Be a licensed mental health professional under ch. 491, F.S., and hold a master's degree (or a higher degree) in their field;
- Be a licensed psychologist under ch. 490, F.S.;
- Be a licensed physician under ch. 458 or 459, F.S.;
- Be a licensed nurse under ch. 464, F.S., and hold a master's degree or a higher degree;
- Hold a family mediator certification from the Florida Supreme Court and a master's degree or a higher degree;
- Be a member in good standing of The Florida Bar; or
- Serve as a professional guardian as defined in s. 744.102(17), F.S., and hold a master's degree or a higher degree.

The bill also requires eldercaring coordinators to complete all of the following:

- Three years of post-licensure or post-certification practice;
- A Florida Supreme Court-certified family mediation training program;
- An elder mediation training program which adheres to the standards of the Florida Supreme Court; however, if the Florida Supreme Court has not yet adopted such standards, then the eldercaring coordinator must complete a program which adhered to the standards for elder mediation training adopted by the Association for Conflict Resolution; and
- Eldercaring coordinator training, which totals 28 or more hours and includes:
 - Eldercaring coordination;
 - Elder, guardianship, and incapacity law and procedures and less restrictive alternatives to guardianship relating to eldercaring coordination;
 - A minimum of four hours on the implications of elder abuse, neglect, and exploitation along with other safety issues relevant to eldercaring coordination;
 - The role of the elder in eldercaring coordination;
 - Family dynamics pertaining to eldercaring coordination;
 - Eldercaring coordination skills and techniques;
 - Multicultural competence and its use in eldercaring coordination;
 - A minimum of two hours of ethical considerations related to eldercaring coordination;
 - The use of technology in eldercaring coordination; and
 - Court-specific eldercaring coordination procedures.

Further, qualified eldercaring coordinators must:

- Pass a Level 2 background screening pursuant to s. 435.04(2) and (3), F.S., or be exempt from disqualification under s. 435.07, F.S.;

- Have not had a final order granting an injunction for protection against domestic, dating, sexual, or repeat violence or stalking or exploitation of an elder or a disabled person filed against them;
- Meet any additional qualifications required by the court to address party-specific issues.

If an eldercaring coordinator no longer meets the minimum qualifications to serve as such or one of the disqualifying circumstances occurs, the bill provides that an eldercaring coordinator must resign and promptly notify the court. Further, the bill requires the court to remove an eldercaring coordinator upon their resignation or disqualification, or upon a finding of good cause.

Upon a motion of the court or any party, the court is permitted to suspend the authority of an eldercaring coordinator pending a hearing on the motion for removal. Notice of such a hearing must be timely served on the eldercaring coordinator and all other parties to the action.

If it is shown that a motion was made in bad faith, the court has discretion to award reasonable attorney fees and costs to a party or an eldercaring coordinator who prevails on a motion for removal, in addition to any other legal remedy.

The bill provides that whenever an eldercaring coordinator resigns, is removed, or is suspended from an appointment, the court must then appoint a successor qualified eldercaring coordinator agreed to by all parties to the action, or another qualified eldercaring coordinator to serve for the remainder of the original term if the parties are unable to come to an agreement on a successor.

Fees and Costs for Eldercaring Coordination

The court is prohibited from ordering the parties to eldercaring coordination without the parties' consent unless the court determines that the parties have the financial ability to pay the eldercaring coordination fees and costs. The bill provides that the court must determine the allocation of fees and costs of eldercaring coordination between the parties and that a party who is asserting that he or she is unable to pay the eldercaring coordination fees and costs must complete an approved financial affidavit form. The court is required to consider specified factors for determining whether a non-indigent party has the ability to pay, including:

- Income;
- Assets and liabilities;
- Financial obligations; and
- Resources, including, but not limited to, whether the party can receive or is receiving trust benefits, whether the party is represented by and paying a lawyer, and whether paying the fees and costs of eldercaring coordination would create a substantial hardship.

If a party is found to be indigent pursuant to s. 57.082, F.S., which provides for the appointment of an attorney in certain civil cases, the court may not order eldercaring coordination unless public funds are available to pay the indigent party's portion or a non-indigent party agrees to pay all of the fees and costs.

Confidentiality of Eldercaring Coordination Communications

The bill protects the confidentiality of all communications by, between, or among the parties and the eldercaring coordinator during eldercaring coordination, and precludes the eldercaring coordinator from testifying or offering evidence, except in specified circumstances, as follows:

- The relevant communications are needed to identify, authenticate, confirm, or deny a written and signed agreement which the parties entered into during the course of eldercaring coordination.
- The relevant communications are needed in order to identify an issue to be resolved by the court without disclosing any other communications made by any party or the eldercaring coordinator.
- The relevant communications are limited to the subject of a party's compliance with the order of referral to eldercaring coordination, orders for psychological evaluation, court orders or health care provider recommendations for counseling, or court orders for substance abuse testing or treatment.
- The relevant communications are needed in order to determine whether the eldercaring coordinator is sufficiently qualified or to determine the immunity and liability of an eldercaring coordinator shown to have acted in bad faith or with malicious purpose or in a manner exhibiting wanton and willful disregard for the rights, safety, or property of the parties.
- The parties mutually agree that the communications can be disclosed.
- The relevant communications are needed in order to protect a person from future acts which would constitute domestic violence under ch. 741, F.S.; child abuse, neglect, or abandonment under ch. 39, F.S.; or abuse, neglect, or exploitation of an elderly or disabled adult under ch. 415, F.S., or ch. 825, F.S., or are required in an investigation conducted pursuant to s. 744.2004, F.S., or a review pursuant to s. 744.368(5), F.S.
- The relevant communications are offered to report, prove, or disprove professional misconduct alleged to have occurred during eldercaring coordination, solely for the internal use of the body conducting the investigation of such misconduct.
- The relevant communications are offered to report, prove, or disprove professional malpractice alleged to have occurred during eldercaring coordination, solely for the professional malpractice proceeding.
- The relevant communications were deliberately used to plan a crime, commit or attempt to commit a crime, conceal ongoing criminal activity, or threaten violence.

The bill requires an eldercaring coordinator to inform the court of any emergency situation, and defines an emergency situation as follows:

- An eldercaring coordinator has made, or intends to make, a report pursuant to ch. 39, F.S., or ch. 415, F.S., related to child abuse or elder abuse; or
- Any party, or a person acting on their behalf, is threatening to, or is believed to be planning to, kidnap an elder as defined in s. 787.01, F.S., or wrongfully removes or is removing the elder from the jurisdiction of the court absent court approval or compliance with the relevant requirements of s. 744.1098, F.S.⁶⁶

⁶⁶ The bill further provides that where an eldercaring coordinator believes that a party or family member has relocated an elder within the state in order to safeguard the elder from domestic violence, the eldercaring coordinator is not permitted to disclose the location of the elder unless required to do so by the court.

The bill also limits the civil liability of an eldercaring coordinator who acts in good faith, and requires the Florida Supreme Court to establish minimum standards and procedures for the training, ethical conduct, and discipline of eldercaring coordinators. The bill allows the Court to employ or appoint personnel as necessary to assist in carrying out these functions.

The bill also provides a number of legislative findings.

The bill is effective July 1, 2021.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. State Tax or Fee Increases:

None.

E. Other Constitutional Issues:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

CS/SB 368 may reduce litigation costs to participants in eldercaring coordination.

C. Government Sector Impact:

The Office of the State Courts Administrator (OSCA) anticipates that the bill will lead to a decreased workload for courts because cases that use eldercaring coordination generally have fewer motions filed, shorter hearings, and very few require emergency hearings.⁶⁷

⁶⁷ The OSCA, *Senate Bill 368 Judicial Impact Statement*, p. 2 (February 1, 2021) (on file with the Senate Committee on Children, Families, and Elder Affairs).

The fiscal impact to the state is indeterminate because there is currently insufficient data to reliably calculate the effect of the bill on judicial workload.⁶⁸ However, some level of costs are anticipated in order to implement eldercaring coordination throughout the state.⁶⁹

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Statutes Affected:

The bill creates section 44.407, Florida Statutes.

IX. Additional Information:

A. Committee Substitute – Statement of Substantial Changes:

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

CS by Judiciary on Mar 15, 2021.

The Committee Substitute differs from the underlying bill by:

- Adding physicians licensed under chapter 459 (Osteopathic medicine) to the list of qualified individuals who may serve as an elder caring coordinator.
- Specifying how fingerprints are to be processed for the level 2 background screening conducted for a person appointed to serve as an eldercaring coordinator.

B. Amendments:

None.

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

⁶⁸ The OSCA, *Senate Bill 368 Judicial Impact Statement*, p. 3 (February 1, 2021) (on file with the Senate Committee on Children, Families, and Elder Affairs).

⁶⁹ *Id.*