IN THE SUPREME COURT OF FLORIDA

CASE NO.: SC2024-1256

LINDA LOUMPOUS,
Petitioner,

v.

DOVE INVESTMENT CORP, ET AL
Respondent(s).

ON DISCRETIONARY REVIEW FROM THE DISTRICT COURT OF APPEAL, SECOND DISTRICT OF FLORIDA
Lower Tribunal Case Nos. 2D2022-3908; 522003SC002144XXSCSC

RESPONDENT DOVE INVESTMENT CORP'S APPENDIX TO ANSWER BRIEF

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TABLE OF CONTENTS

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on February 6, 2025, copies of the foregoing was electronically filed with the Clerk of the District Court through the Florida Courts' E-Filing Portal. I also certify that the foregoing document is being served this day via US Mail on all parties of record as follows:

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief is written in 14 point "Bookman Old Style" font.

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By Senator Berman

31-00330C-19 20191154__

A bill to be entitled

An act relating to decedents' property; creating s. 689.151, F.S.; defining the terms "ownership document," "personal property," and "record"; abolishing certain common law requirements relating to joint tenancies with right of survivorship and tenancies by the entirety; providing for the creation of joint tenancies with right of survivorship and tenancies by the entirety; specifying that there are certain rebuttable presumptions for personal property owned by both spouses and joint tenancies with right of survivorship; providing that the presumption may be overcome by a preponderance of the evidence or by clear and convincing evidence under certain circumstances; providing for the conclusive presumption of an intent to create a tenancy by the entirety; providing applicability; providing construction; providing retroactive application; creating s. 731.1065, F.S.; specifying that precious metals are tangible personal property for the purposes of the Florida Probate Code; providing for retroactive application; amending s. 731.301, F.S.; specifying that formal notice is not sufficient to invoke a court's personal jurisdiction over a person receiving such formal notice; providing applicability; amending s. 733.610, F.S.; expanding the list of sales or encumbrances that are voidable by interested persons under certain circumstances; amending s. 733.617, F.S.; specifying that certain attorneys and persons

are not entitled to compensation for serving as a personal representative unless the attorney or person is related to the testator or unless certain disclosures are made before a will is executed; requiring the testator to execute a written statement that acknowledges certain disclosures were made; providing requirements for the written statement; specifying when an attorney is deemed to have prepared or supervised the execution of a will; specifying how a person may be related to an individual; specifying when an attorney or person related to the attorney is deemed to have been nominated in a will; providing construction; providing applicability; amending s. 736.0708, F.S.; specifying that certain attorneys and persons are not entitled to compensation for serving as a trustee unless the attorney or person is related to the settlor or unless certain disclosures are made before the trust instrument is executed; requiring a settlor to execute a written statement that acknowledges certain disclosures were made; providing requirements for the written statement; specifying when an attorney is deemed to have prepared or supervised the execution of a trust instrument; specifying how a person may be related to an individual; specifying when an attorney or a person related to the attorney is deemed appointed in a trust instrument; providing construction; providing applicability; providing effective dates.

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

Section 1. Section 689.151, Florida Statutes, is created to read:

689.151 Tenancies by the entirety, joint tenancies with right of survivorship, and tenancies in common in personal property.—

(1) As used in this section:

(a) "Ownership document" means an instrument or a record of transfer or an instrument or a record evidencing ownership.

(b) "Personal property" means all property except real property, as defined in s. 192.001(12), and an interest in a trust to which chapter 736 applies.

(c) "Record" has the same meaning as in s. 605.0102.

(2) With respect to joint tenancies with right of survivorship and tenancies by the entirety in personal property, the common law requirements of unity of time and title are abolished.

(a) A joint tenancy with right of survivorship in personal property may be created in the existing owner and one or more other persons through a direct transfer by the existing owner.

(b) A tenancy by the entirety may be created in personal property owned by one spouse through a direct transfer to both spouses.

(3) With respect to joint tenancies with right of survivorship in personal property, the common law requirement of unity of interest is abolished and the shares or interests of joint tenants may be equal or unequal.

(4) There is a rebuttable presumption that:

(a) Personal property owned by both spouses is owned by the spouses as tenants by the entirety if:

1. An ownership document does not specify a form of ownership or does not expressly indicate that a tenancy by the entirety is not intended; or

2. There is a designation of joint tenancy with right of survivorship in an ownership document and no express indication that a tenancy by the entirety was not intended.

The rebuttable presumptions in this paragraph also apply when an owner of personal property adds the name of his or her spouse to such ownership document.

(b) Except as provided in paragraph (a), personal property is owned as joint tenants with right of survivorship when the owner designates or adds the name of one or more persons in an ownership document indicating that the owner and such persons own or hold the property as joint tenants with right of survivorship.

(c) The shares or interests held by joint tenants with right of survivorship or tenants in common in personal property are equal. Such presumption may be overcome by proving by a preponderance of the evidence the existence of fraud, undue influence, lack of capacity, or contrary intent.

(5) Unless otherwise stated, the rebuttable presumptions established in subsection (4) may be overcome by proving by a preponderance of the evidence the existence of fraud, undue influence, or lack of capacity or by proving by clear and convincing evidence that the presumed tenancy was not intended or created.

(6) The intent to create a tenancy by the entirety is conclusively presumed when such a tenancy is designated by spouses in an ownership document for personal property, or when an owner of personal property adds the name of his or her spouse to an ownership document with a designation of tenancy by the entirety, if the designation or addition was not the product of fraud, undue influence, or a lack of capacity.

(7) This section does not affect the application of s. 319.22, s. 655.78, s. 655.79, s. 655.80, s. 655.82, s. 689.115, or ss. 711.50-711.512.

(8) The common law of joint tenancies with right of survivorship and the common law of tenancies by the entirety supplement this section except to the extent modified by it.

(9) The presumptions under this section apply to all proceedings pending on or before October 1, 2019, and to all proceedings commenced on or after October 1, 2019.

(10) Subsections (2) and (3) are remedial in nature and apply to transactions occurring before October 1, 2019, to the extent that those transactions relate to the existence of a joint tenancy with right of survivorship or a tenancy by the entirety on October 1, 2019; however, such application may not impair any right acquired before October 1, 2019, if that right is confirmed in a judicial proceeding commenced within 2 years after October 1, 2019.

(11) This section does not impair the rights of any lienholder or creditor acquired before October 1, 2019.

Section 2. Effective July 1, 2019, section 731.1065, Florida Statutes, is created to read:

731.1065 Precious metals.—

(1) For the purposes of the code, precious metals in any tangible form, such as bullion or coins kept and acquired for their historical, artistic, collectable, or investment value apart from their normal use as legal tender for payment, are tangible personal property.

(2) This section is intended to clarify existing law and applies retroactively to all written instruments executed before, on, or after July 1, 2019, as well as all proceedings pending or commenced before, on, or after July 1, 2019, in which the disposition of precious metals in any tangible form has not been finally determined.

Section 3. Effective upon this act becoming a law, subsection (2) of section 731.301, Florida Statutes, is amended to read:

731.301 Notice.—

(2) In a probate proceeding, formal notice is sufficient to acquire jurisdiction over the person receiving formal notice to the extent of the person's interest in the estate or in the decedent's protected homestead. Formal notice is not sufficient to invoke the court's personal jurisdiction over the person receiving formal notice.

Section 4. The amendment made by this act to s. 731.301, Florida Statutes, applies to all proceedings pending on or before, or commenced after, the date this act becomes a law.

Section 5. Effective July 1, 2019, section 733.610, Florida Statutes, is amended to read:

733.610 Sale, encumbrance, or transaction involving conflict of interest.—Any sale or encumbrance to the personal representative or the personal representative's spouse, agent,

or attorney, or any corporation, other entity, or trust in which the personal representative, or the personal representative's spouse, agent, or attorney, has a substantial beneficial or ownership interest, or any transaction that is affected by a conflict of interest on the part of the personal representative, is voidable by any interested person except one who has consented after fair disclosure, unless:

(1) The will or a contract entered into by the decedent expressly authorized the transaction; or

(2) The transaction is approved by the court after notice to interested persons.

Section 6. Subsection (6) of section 733.617, Florida Statutes, is amended, and subsection (8) is added to that section, to read:

733.617 Compensation of personal representative.—

(6) Except as otherwise provided in this section, if the personal representative is a member of The Florida Bar and has rendered legal services in connection with the administration of the estate, then in addition to a fee as personal representative, there also shall be allowed a fee for the legal services rendered.

(8)(a) An attorney serving as a personal representative, or a person related to the attorney, is not entitled to compensation for serving as a personal representative if the attorney prepared or supervised the execution of the will that nominated the attorney or person related to the attorney as personal representative, unless the attorney or person nominated is related to the testator, or the attorney makes the following disclosures to the testator before the will is executed:

1. Subject to certain statutory limitations, most family members, regardless of their residence, and any other persons who are residents of Florida, including friends and corporate fiduciaries, are eligible to serve as a personal representative;

2. Any person, including an attorney, who serves as a personal representative is entitled to receive reasonable compensation for serving as a personal representative; and

3. Compensation payable to the personal representative is in addition to any attorney fees payable to the attorney or the attorney's firm for legal services rendered to the personal representative.

(b)1. The testator must execute a written statement acknowledging that the disclosures required under paragraph (a) were made prior to the execution of the will. The written statement must be in a separate writing from the will but may be annexed to the will. The written statement may be executed before or after the execution of the will in which the attorney or related person is nominated as the personal representative.

2. The written statement must be in substantially the following form:

I, ...(Name)..., declare that:

I have designated my attorney, an attorney employed in the same law firm as my attorney, or a person related to my attorney as a nominated personal representative in my will or codicil dated ...(insert date)....

Before executing the will or codicil, I was informed that:

1. Subject to certain statutory limitations, most family members, regardless of their residence, and any other individuals who are residents of Florida, including friends and corporate fiduciaries, are eligible to serve as a personal representative.

2. Any person, including an attorney, who serves as a personal representative is entitled to receive reasonable compensation for serving as a personal representative.

3. Compensation payable to the personal representative is in addition to any attorney fees payable to the attorney or the attorney's firm for legal services rendered to the personal representative.

...(Signature)...

...(Testator)...

...(Insert date)...

(c) For purposes of this subsection:

1. An attorney is deemed to have prepared or supervised the execution of a will if the preparation or supervision of the execution of the will was performed by an employee or attorney employed by the same firm as the attorney at the time the will was executed.

2. A person is "related" to an individual if, at the time the attorney prepared or supervised the execution of the will, the person is:

a. A spouse of the individual;

b. A lineal ascendant or descendant of the individual;

c. A sibling of the individual;

d. A relative of the individual or of the individual's spouse with whom the attorney maintains a close, familial relationship;

e. A spouse of a person described in subparagraphs b.-d.;

f. A person who cohabitates with the individual; or

g. An employee or attorney employed by the same firm as the attorney at the time the will is executed.

3. An attorney or a person related to the attorney is deemed to have been nominated in the will when the will nominates the attorney or the person related to the attorney as personal representative, co-personal representative, successor, or alternate personal representative in the event another person nominated is unable to or unwilling to serve, or provides the attorney or any person related to the attorney with the power to nominate the personal representative and the attorney or person related to attorney was nominated using that power.

(d) Other than compensation payable to the personal representative, this subsection does not limit any rights or remedies that any interested person may have at law or in equity.

(e) The failure to obtain an acknowledgment from the testator under this subsection does not disqualify a personal representative from serving and does not affect the validity of a will.

(f) This subsection applies to all nominations made pursuant to a will:

1. Executed by a resident of this state on or after October 1, 2019; or

2. Republished by a resident of this state on or after

October 1, 2019, if the republished will nominates the attorney who prepared or supervised the execution of the instrument that republished the will, or a person related to such attorney, as personal representative.

Section 7. Subsection (4) is added to section 736.0708, Florida Statutes, to read:

736.0708 Compensation of trustee.—

(4)(a) An attorney serving as a trustee or a person related to such attorney is not entitled to compensation for serving as trustee if the attorney prepared or supervised the execution of the trust instrument that appointed the attorney or person related to the attorney as trustee, unless the attorney or person appointed is related to the settlor or the attorney makes the following disclosures to the settlor before the trust instrument is executed:

1. Unless specifically disqualified by the terms of the trust instrument, any person, regardless of state of residence and including a family member, friend, or corporate fiduciary, is eligible to serve as a trustee;

2. Any person, including an attorney, who serves as a trustee is entitled to receive reasonable compensation for serving as trustee; and

3. Compensation payable to the trustee is in addition to any attorney fees payable to the attorney or the attorney's firm for legal services rendered to the trustee.

(b)1. The settlor must execute a written statement acknowledging that the disclosures required under paragraph (a) were made prior to the execution of the trust instrument. The written statement must be in a separate writing from the trust

instrument but may be annexed to the trust instrument. The written statement may be executed before or after the execution of the trust in which the attorney or related person is appointed as the trustee.

2. The written statement must be in substantially the following form:

I, ...(Name)..., declare that:

I have designated my attorney, an attorney employed in the same law firm as my attorney, or a person related to my attorney as a trustee in my trust instrument dated ...(insert date)....

Before executing the trust, I was informed that:

1. Unless specifically disqualified by the terms of the trust instrument, any person, regardless of state of residence and including family members, friends, and corporate fiduciaries, is eligible to serve as a trustee.

2. Any person, including an attorney, who serves as a trustee is entitled to receive reasonable compensation for serving as trustee.

3. Compensation payable to the trustee is in addition to any attorney fees payable to the attorney or the attorney's firm for legal services rendered to the trustee.

...(Signature)...

...(Settlor)...

...(Insert Date)...

(c) For purposes of this subsection:

1. An attorney is deemed to have prepared, or supervised the execution of, a trust instrument if the preparation, or supervision of the execution, of the trust instrument was performed by an employee or attorney employed by the same firm as the attorney at the time the trust instrument was executed.

2. A person is "related" to an individual if, at the time the attorney prepared or supervised the execution of the trust instrument, the person is:

a. A spouse of the individual;

b. A lineal ascendant or descendant of the individual;

c. A sibling of the individual;

d. A relative of the individual or of the individual's spouse with whom the attorney maintains a close, familial relationship;

e. A spouse of a person described in subparagraphs b.-d.;

f. A person who cohabitates with the individual; or

g. An employee or attorney employed by the same firm as the attorney at the time the trust instrument is executed.

3. An attorney or a person related to the attorney is deemed appointed in the trust instrument when the trust instrument appoints the attorney or the person related to the attorney as trustee, co-trustee, successor, or alternate trustee in the event another person nominated is unable to or unwilling to serve, or provides the attorney or any person related to the attorney with the power to appoint the trustee and the attorney or person related to attorney was appointed using that power.

(d) Other than compensation payable to the trustee, this subsection does not limit any rights or remedies that any

interested person may have at law or equity.

(e) The failure to obtain an acknowledgment from the settlor under this subsection does not disqualify a trustee from serving and does not affect the validity of a trust instrument.

(f) This subsection applies to all appointments made pursuant to a trust agreement:

1. Executed by a resident of this state on or after October 1, 2019; or

2. Amended by a resident of this state on or after October 1, 2019, if the trust agreement nominates the attorney who prepared or supervised the execution of the amendment or a person related to such attorney as trustee.

Section 8. Except as otherwise expressly provided in this act and except for this section, which shall take effect upon this act becoming a law, this act shall take effect October 1, 2019.

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 1154
INTRODUCER:	Senator Berman
SUBJECT:	Decedents' Property
DATE:	March 15, 2019
REVISED:	

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Stallard	Cibula	JU	**Pre-meeting**
2.			CF	
3.			RC	

I. Summary:

SB 1154 amends several sections of the probate code relating to compensation of attorneys who serve as personal representatives, conflicts of interest by personal representatives, and notice in probate proceedings. The bill also amends the trust code regarding compensation of attorneys who serve as trustees. Additionally, the bill makes various changes relating to co-owned personal property.

More specifically, the bill:

- Prohibits an attorney who prepared or supervised the preparation of a will from being compensated as a personal representative of the estate unless the attorney is a relative of the decedent or makes specified disclosures to the testator before the will is prepared;
- Provides a similar prohibition regarding an attorney who drafts a trust and serves as a trustee;
- Brings more types of transactions involving a personal representative's conflict of interest under the statute that renders these transactions voidable by an interested person;
- Attempts to clarify what constitutes sufficient notice for a court to exercise personal jurisdiction over a person in a probate proceeding;
- Eliminates the requirement that personal property held in a tenancy by the entirety or a joint tenancy with right of survivorship must be acquired by its co-owners at the same time and through the same instrument;
- Eliminates the requirement that personal property held in a joint tenancy with right of survivorship be held in equal shares or interests; and
- Creates a rebuttable presumption that an item of personal property owned by two spouses is owned in a tenancy by the entirety if the ownership document does not clearly indicate otherwise, the ownership document designates joint tenancy with right of survivorship and does not indicate that a tenancy by the entirety was not intended, or a spouse adds the other spouse's name to an ownership document;

- Creates a rebuttable presumption that an item of personal property is owned by joint tenants with right of survivorship if none of the above presumptions apply and the owner adds or designates another person's name in an ownership document indicating a joint tenancy with right of survivorship; and
- Categorizes as tangible property bullion and coins, such as collectible coins, that are not used as money.

II. Present Situation:

Conflict of Interests by Personal Representatives

Several types of transactions that involve a conflict of a personal representative's interests are voidable by an interested person, except one who has consented after fair disclosure.[1] However, transactions that involve a conflict of the personal representative's interests are not voidable if the will or a contract entered into by the decedent expressly authorized the transaction, or if it is authorized by a court after notice to interested persons.[2]

Compensation of Attorney Who Also Serves as Personal Representative or Trustee

An attorney licensed by the Florida Bar who serves as a personal representative of an estate and has rendered legal services in connection with the administration of the estate is allowed a fee for the legal services in addition to his or her fee as personal representative.[3] However, the fee for legal services must be taken into account when determining the attorney's compensation for non-legal services as personal representative.[4]

Similarly, an attorney who provides legal services in his or her administration of the trust may accept reasonable compensation for the legal services in addition to his or her reasonable compensation as a trustee.[5]

Notice to Interested Persons in a Probate Proceeding

Section 731.301(2), F.S., provides that, in a probate proceeding, "formal notice is sufficient to acquire jurisdiction over the person receiving formal notice to the extent of the person's interest in the estate or in the decedent's protected homestead." The courts have interpreted this to include jurisdiction over a person in an adversarial proceeding, including one in which an out-of-state law firm providing legal services for a Florida estate may be forced to pay money back to the estate.[6]

However, the Real Property, Probate and Trust Law Section of The Florida Bar asserts that the personal jurisdiction contemplated in s. 731.301(2), F.S., does not include this type of

[1] Section 733.610, F.S.
[2] *Id*.
[3] Section 733.617, F.S.
[4] Section 733.612(19), F.S.
[5] Section 733.0708(3), F.S.
[6] *See, e.g., Rogers and Wells v. Winston*, 662 So. 2d 1303 (Fla. 4th DCA 1995).

proceeding.[7] Rather, the Section asserts that formal notice is sufficient for the court to acquire jurisdiction over a person for the purpose of determining the person's rights to estate property.[8]

Co-tenancy

An item of personal property, such as brokerage account or an automobile, may be owned by multiple people in one of a few arrangements, including "tenancy by the entirety" and "joint tenancy with right of survivorship."[9] Although these forms of co-ownership are substantially similar, one key difference between them is that a tenancy by the entirety may be used only by two married people.[10]

Joint Tenancy with Right of Survivorship

A joint tenancy with right of survivorship requires five "unities" as to an item of property, which are the unities of:

- Possession (joint ownership and control);
- Interest (the interests must be the same);
- Title (the interests must originate in the same instrument);
- Time (the interests must commence simultaneously); and
- Survivorship (both spouses take property outright upon the other's death).[11]

Tenancy by the Entirety

A tenancy by the entirety requires an additional unity, the unity of marriage.[12] This means the co-owners of the property must be married at the time the property became titled in their joint names.

Due to the unities of time and title, a person may not create either of these forms of co-ownership by directly granting an interest in an item of property to another person. For example, a husband who is the sole owner of a brokerage account may not create a tenancy by the entirety in it with his wife by adding her name to the account—their interests in the account would have originated at different times and through different instruments.[13]

Presumptions regarding a Tenancy by the Entirety or a Joint Tenancy with Right of Survivorship

Beginning with the Florida Supreme Court in 2001, several courts have stated that personal property is presumed to be held as a tenancy by the entirety if it is owned:

- By two people who are married to each other; and

[7] Real Property, Probate and Trust Law Section of The Florida Bar, *White Paper: Proposed amendment of § 731.301 to provide that service of formal notice does not confer in personam jurisdiction over the recipient* (2019) (on file with the Senate Committee on Judiciary).
[8] *Id*.
[9] *See generally*, *Beal Bank, SSB v. Almand and Associates*, 780 So. 2d 45, 52 (Fla. 2001).
[10] *Id*.
[11] *See Sitomer v. Orlan*, 660 So. 2d 1111, 1113 (Fla. 4th DCA 1995).
[12] *See Beal Bank, SSB v. Almand and Associates*, 780 So. 2d 45, 52 (Fla. 2001).
[13] Nonetheless, a husband or wife *may* create a tenancy by the entirety in real property (e.g., homes, land) by directly granting an interest to his or her spouse. *See* s. 689.11, F.S.

- In accordance with the six unities required for a tenancy by the entirety.[14]

The 2001 Supreme Court case addressed a bank account co-owned by a husband and wife. The court acknowledged that the law had long provided for a presumption of a tenancy by the entirety regarding *real property* held by a husband and wife. And the Court spoke in broad terms of extending this presumption of a tenancy by the entirety, not just to bank accounts, but to *personal property in general*. Though this language may be *dicta*, other courts have adopted it as law, applying it to other types of personal property, such as stock certificates.[15]

The holding of the 2001 Supreme Court case regarding bank accounts was codified in s. 655.79(1), F.S., which provides that "any deposit or account made in the name of two persons who are husband and wife shall be considered a tenancy by the entirety unless otherwise specified in writing."[16] The presumption may be overcome "only by proof of fraud or undue influence or clear and convincing proof of a contrary intent."[17]

As with personal property held jointly by two people who are married to each other, the Florida Statutes do not provide a presumption that all items of personal property co-owned by multiple *non-married* people are held as a joint tenancy with right of survivorship. However, s. 655.79(1), F.S., provides a presumption that the co-owners have a right of survivorship in a bank account. As with tenancies by the entirety in bank accounts, the presumption may be overcome "only by proof of fraud or undue influence or clear and convincing proof of a contrary intent."[18]

Precious Metals and Collectible Coins as Probate Assets

Florida law does not specify whether bullion or coins that are not commonly used as currency constitute tangible personal property. And according to the Real Property, Probate and Trust Law Section of The Florida Bar, there is a lack of consensus among practitioners regarding this issue.[19] Accordingly, it is unclear whether certain directions given in a will would apply to collectible coins and bullion. Moreover, it is unclear whether certain provisions of law apply to these items. For example, s. 732.515, F.S., requires that "items of tangible property" be "specifically disposed of" by the will or by a separate writing. Because it is unclear whether bullion and collectable coins are tangible property, it is unclear whether they must be specifically disposed of pursuant to this statute.

[14] *See Beal Bank, SSB v. Almand and Associates*, 780 So. 2d 45, 52 (Fla. 2001); *Cacciatore v. Fisherman's Wharf Realty Ltd. Partnership ex rel. Emalfarb Investment Corp*., 821 So. 2d 1251 (Fla. 4th DCA 2002); *Gibson v. Wells Fargo Bank, N.A*. 255 So. 3d 944, (Fla. 2nd DCA 2018).
[15] *See generally, Cacciatore v. Fisherman's Wharf Realty Ltd. Partnership ex rel. Emalfarb Investment Corp*., 821 So. 2d 1251 (Fla. 4th DCA 2002).
[16] Also, see *Wexler v. Rich*, 80 So. 3d 1097, 1101 (Fla. 4th DCA 2012), for a discussion of the common law rule that preceded the current version of s. 655.79(1), F.S.
[17] Section 655.79(2), F.S.
[18] Section 655.79(2). F.S.
[19] Probate Law and Procedure Committee, Real Property, Probate and Trust Law Section of the Florida Bar, *White Paper: Proposed Addition of § 731.1065, Florida Statutes* (2019) (on file with the Senate Committee on Judiciary).

III. Effect of Proposed Changes:

Fewer Requirements for a Tenancy by the Entirety or Joint Tenancy with Right of Survivorship

The bill abolishes the "unities" of time and title as requirements for a joint tenancy with right of survivorship or a tenancy by the entirety in personal property. As such, the persons who own an item of personal property need not have acquired their interests at the same time or through the same instrument in order to own the property in one of these tenancies. The bill also abolishes the unity of interest as a requirement for a joint tenancy with right of survivorship in personal property, which means owners do not need to have equal ownership interests.

Rebuttable Presumptions

Tenancy by the Entirety

The bill provides that there is a rebuttable presumption that personal property owned by both spouses is owned in a tenancy by the entirety if:

- An ownership document does not specify a different intent, either by "expressly indicating" that a tenancy by the entirety is not intended or by specifying a different form of ownership;
- There is a designation of joint tenancy with right of survivorship in an ownership document and no express indication that a tenancy by the entirety was not intended; or
- The co-ownership was created by a spouse adding his or her spouse's name to an ownership document.

The *intent* to create a tenancy by the entirety in personal property is *conclusively* presumed when spouses designate this tenancy in an ownership document. This intent is also conclusively presumed when an owner adds the name of his or her spouse to an ownership document that designates a tenancy by the entirety, if the designation or addition was not the product of fraud, undue influence, or a lack of capacity.

Joint Tenancy with Right of Survivorship

The bill provides that there is a rebuttable presumption that personal property is owned in a joint tenancy with right of survivorship if the owner designates or adds the name of at least one other person in an ownership document. However, the document must indicate that the property is owned by these people in a joint tenancy with right of survivorship.

Overcoming the Rebuttable Presumptions of a Joint Tenancy with Right of Survivorship or a Tenancy by the Entirety

The rebuttable presumptions that personal property is owned in a tenancy by the entirety or a joint tenancy with right of survivorship may be overcome by proving:

- By a preponderance of the evidence the existence of fraud, undue influence, or lack of capacity; or
- By clear and convincing evidence that the presumed tenancy was not intended or created.

Equal Interests in a Tenancy in Common or a Joint Tenancy with Right of Survivorship

A third rebuttable presumption created by the bill is that the interests held by joint tenants with right of survivorship or tenants in common hold equal interests in personal property. This presumption may be overcome by proving by a preponderance of the evidence the existence of fraud, undue influence, lack of capacity, or contrary intent.

Precious Metals

The bill provides that for the purposes of the probate code, precious metals in any tangible form, including bullion or coins kept for purposes such as collecting and not for use as legal tender for payment are tangible personal property. The bill provides that this clarifies current law, which does not clearly categorize these items. Accordingly, the bill states that these provisions apply to all written instruments, as well as to all probate proceedings except those in which a disposition of these items has not been finally determined.

Notice in a Probate Proceeding

Current s. 731.301(2), F.S., states, "In a probate proceeding, formal notice is sufficient to acquire jurisdiction over the person receiving formal notice to the extent of the person's interest in the estate or in the decedent's protected homestead." Following this sentence, the bill adds: "Formal notice is not sufficient to invoke the court's personal jurisdiction over the person receiving formal notice." Accordingly, the bill with existing law provides that formal notice gives a court "jurisdiction over the person," but not "personal jurisdiction." Because jurisdiction over the person and personal jurisdiction appear to be the same concept, the effect of the new sentence is not clear.

According to the Real Property Probate and Trust Law Section of The Florida Bar, the added sentence is intended to limit the court's jurisdiction under the first sentence. The added sentence, according to the Section, will also require service of process to give a court personal jurisdiction with respect to matters beyond a person's interest in the estate. To avoid the potential for uncertainty, the Legislature may wish to revise the second sentence to clarify the circumstances under which a method other than "formal notice" is required to give a court personal jurisdiction in probate proceedings or to specify what constitutes an "interest in the estate."[20]

Personal Representative's Conflict of Interest

The bill renders voidable more types of sales, transactions, and encumbrances that involve a personal representative's conflict of interest than current law. Subject to exceptions, current law renders voidable a sale or encumbrance of estate assets to any corporation or trust in which the personal representative has a substantial beneficial interest. The bill also renders voidable any sale or encumbrance to a corporation, trust, *or other entity* in which the personal representative or his or her *spouse, agent, or attorney* has a substantial beneficial or *ownership* interest.

[20] According to the RPPTL Section, the sentence added to s. 731.301(2), F.S., is intended to overrule *Rogers and Wells v. Winston*, 662 So. 2d 1303 (Fla. 4th DCA 1995) in which the Fourth DCA found that formal notice to a New York law firm handling Florida probate proceedings gave the trial court jurisdiction over the firm with respect to a payment dispute. The law firm objected to the trial court's assertion of jurisdiction because it had not been served with process. Implicit in the appellate court opinion is a finding that the payments from a decedent's estate to a firm are also an "interest in the estate."

Compensation of a Personal Representative or Trustee Who is also an Attorney

The bill prohibits an attorney from being compensated as a personal representative if the attorney prepared or supervised the execution of a will that nominated the attorney or person related to the attorney as personal representative. However, the prohibition does not apply if the attorney or person nominated is related to the testator. The prohibition also does not apply if the attorney discloses the following things prior to the execution of the will:

- Subject to certain statutory limitations, most family members, regardless of their residence, and any other persons who are residents of Florida, including friends and corporate fiduciaries, are eligible to serve as a personal representative;
- Any person, including an attorney, who serves as a personal representative is entitled to receive reasonable compensation for serving as a personal representative; and
- Compensation payable to the personal representative is in addition to any attorney fees payable to the attorney or the attorney's firm for legal services rendered to the personal representative.

However, for these disclosures to be sufficient, the testator must execute a written statement acknowledging that the disclosures were made before the will was executed. And the written statement must substantially be in the form set forth in the bill.

The bill provides virtually identical requirements regarding an attorney who serves as a trustee and desires to be compensated both in his or her role as attorney and as a trustee.

The bill takes effect October 1, 2019, except as otherwise provided.

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:

The bill includes several provisions that are expressly intended to apply retroactively. In all but one of these instances, the provision is described in the bill as remedial or clarifying.

The Florida Supreme Court has developed a two-prong analysis for determining whether a statute may be applied retroactively.[21] First, there must be "clear evidence of legislative intent to apply the statute retrospectively."[22] If so, then the court moves to the second prong, "which is whether retroactive application is constitutionally permissible."[23] Retroactive application is unconstitutional if deprives a person of due process by impairing vested rights or imposing new obligations to previous conduct:

> A retrospective provision of a legislative act is not necessarily invalid. It is so only in those cases wherein vested rights are adversely affected or destroyed or when a new obligation or duty is created or imposed, or an additional disability is established, on connection with transactions or considerations previously had or expiated.[24]

Accordingly, a "remedial" or "procedural" statute may be applied retroactively, because these statutes do not create or destroy rights or obligations.[25] Instead, a remedial statute "operates to further a remedy or confirm rights that already exist" and a procedural statute provides the "means and methods for the application and enforcement of existing duties and rights."[26] Finally, the Legislature's labeling of a law as remedial or procedural does not make it so.[27]

The bill's provisions that are intended for retroactive application do not appear to be likely to impair vested rights. However, this analysis is inherently fact-specific, and therefore difficult to perform in the abstract. Accordingly, as these provisions are applied to myriad unique circumstances, it is possible that a court may find that one or more of the provisions has destroyed a vested right in a given case, and therefore cannot be applied retroactively in that case.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

[21] *See, e.g., Florida Ins. Guar. Ass'n., Inc. v. Devon Neighborhood Ass'n, Inc*., 67 So. 3d 187, 194 (Fla. 2011).
[22] *Metropolitan Dade County v. Chase Federal Housing Corp.*, 737 So. 3d 494 (Fla. 1999).
[23] *Id*.
[24] *Id*. at 503 (*citing McCord v. Smith*, 43 So. 2d 704, 708-09 (Fla. 1949).
[25] *See State Farm Mut. Auto. Ins. Co. v. Laforet*, 658 So. 2d 55, 61 (Fla. 1995).
[26] *Maronda Homes, Inc. of Fla. v. Lakeview Reserve Homeowners Ass'n., Inc*., 127 So. 3d 1258, 1272 (Fla. 2013) (*citing Alamo Rent-A-Car, Inc. v. Mancusi*, 632 So. 2d 1352, 1358 (Fla. 1994); *City of Lakeland v. Catinella*, 129 So. 2d 133, 136 (Fla. 1961)).
[27] *See State Farm Mut. Auto. Ins. Co. v. Laforet*, 658 So. 2d 55, 61 (Fla. 1995).

C. Government Sector Impact:

None.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill substantially amends the following sections of the Florida Statutes: 731.301, 733.610, 733.617, and 736.0708.

This bill creates the following sections of the Florida Statutes: 689.151 and 731.1065.

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.

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 General Government Appropriations Committee

BILL:	CS/CS/SB 818
INTRODUCER:	General Government Appropriations Committee, Banking and Insurance Committee, and Senator Bennett
SUBJECT:	Financial Services
DATE:	April 11, 2008 REVISED: 4/21/08

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Knudson	Deffenbaugh	BI	**Fav/CS**
2.	Pugh	Cooper	CM	**Favorable**
3.	Kynoch	DeLoach	GA	**Fav/CS**
4.				
5.				
6.				

Please see Section VIII. for Additional Information:

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

I. Summary:

The bill addresses a number of issues related to the Department of Financial Services, banking, insurance, and financial instruments, as follows.

Requires that the appointment of the Director of the Office of Financial Regulation and the Director of the Office of Insurance Regulation be subject to a vote of reaffirmation on a biennial basis, by a majority vote of the Financial Services Commission (Governor and Cabinet).

Authorizes the sale of optional guaranteed asset protection (GAP) products in conjunction with a motor vehicle installment contract or loan, specifies who may sell them, and establishes requirements for such products. The bill specifies that GAP products are not insurance for purposes of the Florida Insurance Code.

Defines "debt cancellation product" and specifies that such products may be sold by financial institutions, their subsidiaries, and other business entities authorized by law.

Defines insurance purchased by a creditor for debt cancellation products as a form of casualty insurance.

Eliminates the $50,000 limit on insurance that may be procured on the life of a debtor under a debtor group contract, or pursuant to a credit life insurance policy. Instead, the limit would be the amount of the person's indebtedness to the creditor. The bill also allows the term of credit disability insurance to extend for the term of the indebtedness, rather than the current 10-year time limitation.

Specifies that a deposit or account made in the name of two persons who are husband and wife is considered a "tenancy by the entirety" unless otherwise specified in writing.

Raises the minimum proposed capitalization for any proposed bank to $8 million and deletes the differing capitalization for banks in metropolitan areas and those in rural counties. The bill also raises the minimum total capital accounts at opening for a trust company from $2 million to $3 million and sets differing capitalization standards for banks owned by single-bank holding companies and banks owned by multi-bank holding companies.

Eliminates the requirement for a bank or trust company to obtain approval from the Office of Financial Regulation (OFR) in order to increase its capital, instead requiring that the OFR be notified in writing 15 days before the increase goes into effect.

Deletes the current prohibition against a bank or trust company issuing capital stock that has a par value greater than $100, thus giving these institutions more flexibility.

Prohibits financial institutions from issuing or selling stock of the same class that creates different rights, options, warrants, or benefits among the purchasers or stockholders of that class of stock. However, the financial institution may create uniform restrictions on the transfer of stock as permitted in s. 607.0627, F.S.

Clarifies who can assert dissenter's rights pursuant to the approval of the sale of stock by a state bank or trust company. The fair value of the shares of stock will be determined using the procedures in s. 607.1326, F.S., and s. 607.1331, F.S. – the same as is applied to corporations.

The bill substantially amends the following sections of the Florida Statutes: 520.02, 520.07, 624.605, 627.553, 627.679, 627.681, 655.005, 655.79, 655.947, 655.954, 655.967, 658.21, 658.34, 658.36, and 658.44.

II. Present Situation:

Appointment of the Director of Financial Regulation and the Director of Insurance Regulation

In 1998, Florida voters approved an amendment to the State Constitution abolishing the offices of the Treasurer and the Comptroller and merging their duties into the office of the Chief Financial Officer, effective January 7, 2003.[1] Legislation enacted in 2002 reassigned the statutory duties of the Comptroller and Treasurer to the newly created Department of Financial Services (department), headed by the Chief Financial Officer (CFO) and to the Financial Services Commission (commission), whose members are the Governor and Cabinet, effective January 7, 2003.[2] Section 20.121, F.S., created by the 2002 act, prescribes the organizational structure and regulatory duties of the department and commission. The commission consists of

[1] Art. IV, s. 4 of the State Constitution.

[2] Chapter 2002-404, L.O.F. (HB 3-E, passed in the 2002 Special Session "E," and signed by Governor Bush on June 12, 2002).

the Governor, the Attorney General, the CFO, and the Commissioner of Agriculture, i.e., the Governor and Cabinet, as constituted on January 7, 2003. Three votes are required for any commission action.

Two offices are created under the commission:

The Office of Insurance Regulation (OIR)
The Office of Financial Regulation (OFR)

Each office is headed by a director who is appointed by, and serves at the pleasure of, the commission, with a requirement that both the Governor and the CFO must concur in appointment and removal. On January 9, 2003, the commission appointed directors for each of these two offices. The commission and the directors of each office share responsibility for final agency action. The commission acts as agency head for purposes of rulemaking under ss. 120.536-120.565, F.S., while the directors are each agency head for other final agency actions under ch. 120, F.S., for all areas within the regulatory authority of their office.[3]

Debt Cancellation Products

Federal regulation defines a debt cancellation contract (DCC) or debt suspension agreement[4] (DSA) as a loan term or contractual agreement whereby a bank agrees to cancel or suspend all or part of a customer's obligation to repay an extension of credit upon the occurrence of a specified event.[5] Generally, a bank customer agrees to pay a fee[6] to the bank in exchange for the DCC or DSA.[7] For consumers, the arrangement provides a convenient method of extinguishing debt during times of financial or personal hardship. The fee provides compensation to the bank for potentially releasing borrowers from loan obligations. Additionally, the agreement allows the bank to avoid the time and expense of collecting the balance of a loan from a borrower's estate if the borrower should die, or upon other circumstances.

National banks and federally chartered credit unions are authorized by federal law and regulation to enter into a DCC or DSA with customers. The U.S. Office of Comptroller of Currency (OCC) and the National Credit Union Administration (NCUA) have each stated that such activities are incidental to the lending powers of the financial institutions.[8] As such, they are exempt from state insurance regulation due to federal pre-emption of state law.

The Florida Statutes do not define or reference debt cancellation products. However, the OFR issued an Order of General Application on February 1, 2006, to declare whether a Florida-chartered financial institution may authorize such products pursuant to their lending powers. The

[3] Section 20.121(3)(c), F.S.
[4] A debt suspension agreement does not include loan payment deferral arrangements under which payments are deferred upon the borrower's unilateral election to defer repayment, or a bank's unilateral decision to allow a deferral.
[5] *See* 12 C.F.R. s. 37.2.
[6] The fee may be a lump sum payment due at the outset of a loan that is possibly financed over the loan's term, or the fee may be assessed via a monthly or other periodic charge.
[7] See Part 37 final rules, 67 Fed. Reg. 58,962 (2003). Statement by the U.S. Office of the Comptroller of Currency which explains some of the purposes and benefits of DCCs and DSAs.
[8] See 12 C.F.R. Part 37 (OCC rules); 12 C.F.R. Part 721 (NCUA rules).

OFR stated that Florida-chartered institutions do have the authority to enter into such agreements with their customers, subject to various requirements. One such requirement is that the financial institution "establish and maintain an effective risk management program to ensure the financial institution's safety and soundness concerning Debt Cancellation Products, as is required for a national bank."[9] Representatives from the OFR have indicated that an institution could meet this requirement either by maintaining sufficient reserves to cover anticipated losses from such products or purchasing insurance to cover such losses.[10] However, Florida currently does not authorize the sale of such a product under the Florida Insurance Code.

A form of debt cancellation product is a Guaranteed Asset Protection (GAP) product. GAPs are generally sold in conjunction with an automobile loan and state that the lending institution for the loan will waive the difference between the value of the vehicle and the outstanding balance of the loan or lease, if the loan or lease balance is greater than the vehicle value. The product is not insurance if the party that made the loan is the one that agrees to waive the difference, according to an Office of Insurance Regulation informational memorandum issued August 15, 2002.[11] However, if a third party (one who is not a named party to the loan or lease) offers to indemnify the borrower pursuant to a GAP product, then the transaction would be considered insurance, and the third party would be required to be licensed as a property and casualty insurer in Florida. Thus, a financing company that sells a GAP product may do so without being licensed as a property and casualty insurer, but an automobile dealer or other third party that is not a party to the loan or lease contract could not sell the product without a license to transact insurance.

Representatives from the Office of Insurance Regulation have opined that debt cancellation contracts and debt suspension agreements meet the definition of insurance contained in s. 624.02, F.S. Because of this, the office has not authorized direct insurance of DCCs and DSAs, asserting that the proper insurance product to provide coverage to a financial institution that sells such services is reinsurance.[12]

Credit Life and Credit Disability Insurance

Credit life insurance is insurance on the life of a debtor in connection with a loan or other credit transaction.[13] Credit disability insurance protects a borrower of money or lessee of goods connected with a loan or credit transaction against loss of time resulting from accident or sickness.[14] For each of these insurance products, regulated under part IX of ch. 627, F.S., the creditor/consumer is directly covered by an insurer, which pays the financial institution upon death or disability of the debtor, respectively. Under Florida law, the amount of insurance that may be procured upon the life of any particular debtor is limited to $50,000.[15] Credit disability insurance or credit life insurance may not exceed a term of 10 years, with credit life insurance

[9] Office of Financial Regulation, In re: Debt Cancellation Products, OFR No. 0255-B-11/0 (February 1, 2006).
[10] Letter from the Office of Financial Regulation to the House Committee on Insurance dated March 30, 2006. The letter is on file with the Senate Banking and Insurance Committee.
[11] *See* Florida Department of Insurance Informational Memorandum 02-059M (August 15, 2002).
[12] Letter from Steven Parton, General Counsel of the Office of Insurance Regulation, to Kenneth Levine (June 30, 2004), on file with the Senate Banking and Insurance Committee.
[13] Section 627.677(1), F.S.
[14] Section 627.677(2), F.S.
[15] Section 627.679(1)(b), F.S.

having the additional requirement that a term may not extend more than 15 days beyond the term of the indebtedness.[16]

Banks and Trust Companies—Capital Requirements and Regulations Regarding Stocks

Chapter 658, F.S., contains various requirements for banks and trust companies, including the financial requirements for the formation of a bank or trust company as well as ongoing regulations regarding the issuance or sale of stock by a state bank or trust company. Section 658.21, F.S., contains findings that the OFR must make before it approves an application to organize a bank or trust company. There are six requirements, one of which is that the proposed capitalization for a bank must be deemed adequate by the OFR, and cannot be less than $6 million if the proposed bank is located in a metropolitan area, or $4 million if located in other counties. The total capitalization of a trust company must be at least $2 million. Additionally, 25 percent of the capital for a proposed bank must be directly owned or controlled by the organizing directors of the bank. Directors of banks owned by single-bank holding companies must have direct ownership or control of at least 25 percent of the bank holding companies' capital assets. However, current law does not specify a standard for the directors of a proposed bank that is to be owned by a multi-bank holding company.

Another requirement placed on state-chartered banks or trust companies is that when issuing its capital stock (the total stock authorized to be issued by a company's charter), it must have a par value greater than $1 per share, but no more than $100 per share, pursuant to s. 658.34, F.S. Additionally, only with OFR approval may a bank or trust company issue less than all the number of shares of any of its capital stock. Such authorized but unissued shares may be issued only to provide for stock options, to declare or pay a stock dividend, or—if the OFR grants approval—to increase the capital of the bank or trust company. Current law, s. 658.36, F.S., also prohibits a state bank or trust company from reducing or increasing its outstanding capital stock without first obtaining the approval of the OFR.

In the event of a merger that would result in the creation of a state bank or trust company, the merger must be approved by the stockholders of each constituent national or state bank. For constituent national banks, the approval must be made pursuant to federal law, while for a constituent state bank or trust company, the holders of a majority of the voting shares of each state bank or trust company must vote in the affirmative for a certificate of merger to be issued by the OFR. Stockholders who dissent must be notified that they are entitled to payment in cash of the value of the shares held by such stockholders.

Once a merger is completed, the resulting state bank or trust company is permitted to fix an amount which it considers to be not more than the fair market value of the shares of the new company, and which it will pay to the holders of dissenting shares. If the owner of a dissenting share surrenders the stock certificate within 30 days of the merger's effective date, she or he is paid the amount the bank or trust company calculated as the fair market value. If the owner of the dissenting share does not accept the offer, then the value of the shares is determined by the panel of three appraisers, one selected by the board of directors of the resulting state bank, one selected by the owners of at least two-thirds of the dissenting shares, and a third by the other two

[16] Section 627.681, F.S.

appraisers. The value determined by the appraisers is controlling and binding on all parties. If the appraisers fail to determine a value, or one of the appraisers is not selected, then the OFR shall cause an appraisal of the dissenting shares that is binding on the parties.

Tenancy by the Entireties

A "tenancy by the entireties" is a form of property ownership that is unique to married couples where the property is held by a husband and wife with unity of possession (joint ownership and control). The married couple must have unity of interest (the interest in the account must be identical), unity of title (interests must originate in the same instrument), and unity of time (the interests must commence at the same time). Also, each party must have a right of survivorship. Tenancy by the entireties is not the only means by which a married couple may hold property jointly. Other forms of joint ownership include a tenancy in common or a joint tenancy.

In *Beal Bank v. Almand and Associates,*[17] the Florida Supreme Court was confronted with the question of what type of ownership applies to the bank account of a married couple that does not specify the type of ownership by which the property is held. The case dealt with creditors of a husband attempting to attach the bank accounts. The court noted that in a tenancy by the entireties, the property is not owned by either party individually, but rather both parties own the entire property. This is in contrast to a joint tenancy with right of survivorship, where each person owns his or her separate share. Thus, a creditor may reach the joint tenant's portion of property to recover that joint tenant's individual debt. However, when property is held in a tenancy by the entireties, only the creditors of both the husband and wife jointly may reach the property because it is not divisible on behalf of one spouse alone.

Under current Florida law, real property titled in the name of both spouses is presumed to be a tenancy by the entireties, but personal property is only considered to be held in a tenancy by the entireties if it can be proven that the parties intended to hold the personal property in that form. In *Beal Bank,* the court stated that the requirement that personal property is not presumed a tenancy by the entireties has created confusion and litigation, and recommended that such property (such as a financial accounts) be presumed to be held in a tenancy by the entireties unless the terms and conditions specify otherwise.

III. Effect of Proposed Changes:

Section 1 amends s. 20.121, F.S., relating to the Department of Financial Services. The bill requires that the appointment of the Director of the Office of Financial Regulation and the Director of the Office of Insurance Regulation be subject to a vote of reaffirmation on a biennial basis, by a majority vote of the Financial Services Commission (Governor and Cabinet). This would differ from current law which requires that both the Governor and the CFO must be in the majority (of the required three out of four votes) for any vote to appoint or remove either one of these directors. The bill's requirement for a "reaffirmation" every two years, would still require a majority vote of three out of four, but the Governor and CFO would not be required to both be in the majority. This enables any two members of the Financial Services Commission to prevent

[17] 780 So.2d 45 (Fla. 2001).

reaffirmation, since a majority of three is required. This also differs from current law by requiring a vote of reaffirmation every two years. (See Section 2 below.)

Section 2 requires that the vote of reaffirmation by the Financial Services Commission, required by Section 1 of the bill, must occur by October 1, 2008 (and every two years thereafter, as required by Section 1).

Section 3 amends s. 520.02, F.S. The section defines "guaranteed asset protection products" for purposes of The Motor Vehicle Retail Sales Finance Act as a contract term, modification, or addenda to a loan, lease or retail installment contract under which a creditor agrees to waive a customer's liability for payment for some or all of the amount by which the debt exceeds the value of the collateral. The definition states that GAP products are not insurance for purposes of the Florida Insurance Code. This definition will be retroactively applied to GAP products issued prior to the bill's effective date of October 1, 2008.

Section 4 creates a new subsection (11) in s. 520.07, F.S. The section authorizes GAP products to be sold in conjunction with entering into a new motor vehicle retail installment contract or loan. The GAP product could be sold by motor vehicle retail installment sellers, sales finance companies, retail lessors, and their assignees.

The section also specifies the requirements that a GAP product must comply with in order to be offered. The requirements are:

Purchase of a GAP product cannot be a condition for making a loan.
The cost of a GAP product may not exceed the amount of indebtedness it is protecting against.
All contracts or agreements pertaining to a GAP product are governed by this section.
A GAP product is an obligation of a person who purchases or acquires the loan contract covering the GAP product.
Entities providing GAP products shall provide readily understandable disclosure that detail eligibility requirements, conditions, refunds, and exclusions. The disclosures must state that the purchase of the product is optional. The disclosure must be in plain language and in a type-face and size that are easy to read.
A copy of the executed GAP product must be provided to the buyer. The party selling the GAP product has the burden of proving it provided a copy to the buyer.
A GAP product that allows the seller to unilaterally modify the contract may not be offered for sale unless:

- The modification is favorable to the buyer and is made without an additional charge to the buyer; or
- The buyer is notified of the proposed change and provided a reasonable opportunity to cancel the contract without penalty before the change takes effect.

If a GAP contract is terminated, unearned fees must be refunded to the buyer if the contract is silent on the issue. However, a GAP contract that specifically does not provide a refund to the buyer may only be offered for sale if that entity also offers the buyer a bona fide option to purchase a comparable GAP contract that provides for a refund. In order to receive a refund, the buyer must notify the entity of the event terminating the contract and request a refund

within 90 days after the termination event. A refund is not due to a consumer who receives a benefit under the GAP product.

Section 5 amends s. 624.605, F.S. The bill specifies that insurance for debt-cancellation products is to be considered a form of casualty insurance. Insurance on debt-cancellation products is defined as insurance that a creditor purchases against the risk of financial loss from the use of debt-cancellation products with consumer loans, leases, or retail installment contracts. This type of insurance would be considered "credit insurance" for purposes of the Florida Insurance Guaranty Association (FIGA), which means that there would be no coverage from FIGA for claims (by a creditor who sells debt cancellation products) against an insolvent insurer for insurance purchased for the debt cancellation products, since credit insurance is currently exempt from FIGA coverage.

The section also contains a definition of "debt-cancellation product" as a contract term or modification to a loan, lease or retail installment contract whereby a creditor agrees to cancel or suspend all or part of a customer's obligation to make payments upon the occurrence of specified events. It can include debt-cancellation contracts, debt suspension agreements, and guaranteed asset-protection contracts, but does not include title insurance. Such products are not insurance for purposes of the Florida Insurance Code. The section authorizes financial institutions, insured depository institutions, their subsidiaries, and other entities specifically authorized by law to sell debt-cancellation products.

Section 6 amends s. 627.553(3), F.S., to eliminate the $50,000 limit on insurance that may be procured on the life of a debtor under a debtor group contract. A debtor group contract insures the lives of a group of individuals who are debtors of a creditor, with the creditor as the beneficiary. The change would allow each individual in the group to be insured up to the amount of his or her indebtedness to the creditor.

Section 7 amends s. 627.679(1)(b), F.S., to eliminate the $50,000 limit of credit life insurance on the life of any particular debtor regarding loans covered in one or more insurance policies. The change would allow the total amount of credit life insurance on the life of a debtor to be up to the amount of his or her indebtedness to the creditor.

Section 8 amends s. 627.681, F.S., to allow for the term of credit disability insurance to extend for the term of the indebtedness, rather than the current 10-year time limitation.

Section 9 amends s. 655.005, F.S. This section revises the definition of "financial institution" to include various entities referenced in the financial institutions codes. The definition of "federal financial institution" is amended to refer to the newly amended definition of "financial institution." This section also adds a definition of "debt-cancellation products" to the financial institutions codes. A debt-cancellation product is a loan, lease, or retail installment contract term or modification or addenda to a contract. Under a debt-cancellation product, a creditor agrees to cancel or suspend all or part of a customer's obligation to make payments if specified events occur. The term includes, but is not limited to debt-cancellation contracts, debt-suspension agreements, and GAP products offered by financial institutions and their subsidiaries.

Section 10 amends s. 655.79, F.S., to specify that a deposit or account made in the name of two persons who are husband and wife is considered a tenancy by the entirety, unless otherwise specified in writing. A tenancy by the entirety is a form of ownership where a husband and wife have the right to own the entire property. Only a creditor that is a creditor of both spouses jointly may reach property held as a tenancy by the entirety. Upon the death of one spouse, the other has a right of survivorship and obtains the title. The change was recommended by the Florida Supreme Court in *Beal Bank v. Almand and Associates*, 780 So.2d 45 (Fla. 2001).

Section 11 amends s. 655.947, F.S., to authorize financial institutions and their subsidiaries to offer and charge a fee for debt cancellation products. Financial institutions must prudently and soundly manage the risks associated with such products and establish and maintain specified risk management and control processes. The Financial Services Commission is required to adopt rules to administer this section that are consistent with the federal regulations for debt cancellation contracts and debt suspension agreements. The section also specifies that a periodic payment option is not required to be offered.

Section 12 amends s. 655.954, F.S., to authorize the sale of debt cancellation products by financial institutions in conjunction with a loan, line of credit, or loan extension. The financial institution may not require a person to purchase a debt cancellation product as a condition for a loan, line of credit, or loan extension.

Section 13 creates s. 655.967, F.S., allowing state-mandated endowments funded by a general appropriations act prior to 1990 to be maintained in trust accounts in financial institutions as defined in s. 655.005, F.S. This would include both state and federal financial institutions. This is intended to override a provision in the 1989 General Appropriations Act (line-item #344A in ch. 89-253, L.O.F.) that required funds appropriated for the Cuban-American National Foundation to be kept in a national bank located in Florida.

Section 14 amends s. 658.21(2), F.S., regarding the approval of an application to organize a bank. OFR staff has indicated that the requirements of this bill conform to the capitalization levels the OFR currently requires. This section raises the minimum proposed capitalization for a proposed bank to $8 million and deletes the distinction between banks in a metropolitan area (currently $6 million capitalization) and those in other counties (currently $4 million capitalization).

This section also raises the minimum total capital accounts at opening for a trust company from $2 million to $3 million. It also requires that the organizing directors own or control 25 percent of the total capital accounts at opening or $3 million (instead of the current $2 million) whichever is less. This requirement is less stringent than the requirement under current law that the organizing directors control at least 25 percent of the bank’s total capital accounts.

If the bank will be owned by an existing multi-bank holding company, the proposed directors must have a substantial capital investment in the holding company, to be determined by the OFR, but may not exceed the amount required for a single bank holding company application specified above. Current law does not contain a standard for multilane holding companies.

Finally, this section also requires that the proposed stock offering pursuant to the bank application must comply with ss. 658.23-658.25, F.S., and ss. 658.34-658.37, F.S.

Section 15 amends s. 658.34, F.S., related to shares of capital stock. This section eliminates the need for a bank or trust company to obtain approval from the OFR in order to increase its capital. However, s. 658.36, F.S., as amended by **section 14** of the bill, requires that advance notice be provided to the OFR, if such an increase is imminent. The prohibition against a bank or trust company issuing capital stock with a par value of over $100 per share is deleted.

This section also provides that a financial institution may not issue or sell stock of the same class which creates different rights, options, warrants, or benefits among the purchasers or stockholders of that class of stock. However, the financial institution may create uniform restrictions on the transfer of stock as permitted in s. 607.0627, F.S.

Section 16 amends s. 658.36, F.S., to require a state bank or trust company to notify the OFR in writing 15 days before increasing its capital stock. Currently, the approval of the OFR is required before the bank or trust company can increase its capital.

Section 17 amends s. 658.44, F.S., to clarify who can assert dissenter's rights pursuant to the approval of the sale of stock by a state bank or trust company. This section states that the fair value of the shares of stock will be determined using the procedures in ss. 607.1326-607.1331, F.S. The new procedure would be the same as is applied to corporations. It requires a shareholder who is dissatisfied with a corporation's offer to provide written notice of the shareholder's estimate of the fair value of the shares to the corporation before the vote on the offer is taken, or, if the action is to be taken without a shareholder meeting, within 20 days after receiving notice of appraisal rights. The value of the shares will be determined under a court proceeding. Under current law, a panel of three appraisers is retained and determines the value of the shares by majority vote, and if the appraisers cannot agree as to value, then the OFR makes the determination.

Section 18 provides an effective date of October 1, 2008.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

The bill allows state-chartered financial institutions to more readily sell debt cancellation contracts or debt suspension agreements to their customers, by explicitly providing that such contracts are not insurance and by explicitly allowing the financial institutions to purchase insurance (from an insurance company) against the risk of financial loss from the use of debt cancellation products.

While state chartered financial institutions that maintain sufficient reserves to cover anticipated losses from DCCs and DSAs already can offer these products, state chartered financial institutions that would prefer to insure such losses through insurance cannot purchase debt cancellation insurance in the state of Florida to cover the institutions' losses. Allowing for this insurance would authorize state chartered financial institutions to sell such agreements as readily as federally chartered institutions. Customers may benefit from being able to purchase a product that would, in certain circumstances, protect the borrower when he or she cannot meet incurred financial obligations. Insurers will benefit from being enabled to sell this insurance product (debt cancellation insurance) to creditors.

The bill also allows motor vehicle retail installment sellers and related parties to sell optional guaranteed asset protection, which provides an economic benefit to such sellers, and also establishes requirements for the sale of such products, which help protect consumers.

The bill will likely limit the ability of creditors to reach the property of a married couple, in a situation where a bank account does not specifically state the type of ownership under which the property is being held. Because such property will be considered a tenancy by the entireties, only creditors of both spouses jointly would be able to reach such property.

C. Government Sector Impact:

There is no fiscal impact to the collection of premium tax revenues.

VI. Technical Deficiencies:

None.

VII. Related Issues:

The bill is substantially similar to CS/SB 2084 and HB 7087, legislation passed during the 2007 Legislative Session, but vetoed by the governor because of a provision that raised the maximum

delinquency charge on retail installment contracts from $10 to $25. That provision is not in this bill.

VIII. Additional Information:

A. Committee Substitute – Statement of Substantial Changes:

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

CS/CS by General Government Appropriations on April 10, 2008

The committee substitute:

- Requires that the Financial Services Commission take a vote by October 1, 2008, and every two years thereafter, to reaffirm the appointment of the Director of the Office of Financial Regulation and the Director of the Office of Insurance Regulation, subject to a majority vote (three out of four).
- Specifies that insurance sold to creditors to cover debt cancellation products would be considered "credit insurance" for purposes of the Florida Insurance Guaranty Association (FIGA), which means that there would be no coverage from FIGA for claims against an insolvent insurer.
- Revises the provision on state endowments to allow state-mandated endowments funded by a general appropriations act prior to 1990 to be maintained in trust accounts in financial institutions as defined in s. 655.005, F.S.

CS by Banking and Insurance on March 4, 2008:

The only difference between the bill as filed and the committee substitute is a corrected reference to the Federal Truth in Lending Act in Section 10, to incorporate the regulations in effect as of January 31, 2008, rather than as of June 30, 2007. The OFR recommended the amendment to incorporate the most recent version of the federal act.

B. Amendments:

None.