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Evaluating Proviso in the State Budget

Is the Florida Legislature Complying with the Constitution?

By

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Each spring, the Florida Legislature convenes in accordance with the Florida Constitution to consider a myriad of legislation.[1] Of more than 3,000 bills filed each year, only one is constitutionally required to be acted upon by our citizen legislators: the General Appropriations Act.[2] No single measure has a broader reach in impacting the lives of every Floridian. In 2006, the legislature spent over $73 billion, providing detailed spending instructions (in the form of proviso language) for each tax dollar spent. Given the complexity of such a spending plan, the legislature occasionally, albeit inadvertently, goes beyond its constitutional authority by including within the General Appropriations Act some nonfiscal provisions which alter, repeal, or create substantive law.

Over the last several years, Florida Governor Jeb Bush has questioned the propriety of some proviso language in the General Appropriations Act. Within the 2004 constitutionally required letter to Florida's secretary of state outlining his annual line item vetoes, Gov. Bush expressed these concerns:

In the recent past, the executive branch has seen a gradual increase in the level of attempted legislative interference in the expenditure by the executive of funds already appropriated by the legislature. This attempted interference has no place once the budget process has been concluded. Although it is appropriate and legal for the legislature to exercise its oversight responsibilities during its approval of a budget, its attempts to direct the manner and timing by which the executive exercises its authority is inappropriate and an abuse of legislative power. It violates our constitutional concept of the separation of powers.... Because the proviso itself does

not constitute a specific appropriation, it is not subject to gubernatorial veto without also vetoing the funds to which the proviso is attached. However, it is important that I express my serious concerns regarding the legality of such proviso and reserve the right to seek an appropriate remedy in the future.[3]

The offensive language at issue in that veto letter involved requirements for ongoing consultation by the executive branch with the legislature as a prerequisite to the expenditure of appropriated funds.[4] This language is one example of budget proviso which the legislature uses to shape our laws and create public policy. This article assists the practitioner in evaluating proviso language found in a General Appropriations Act (or any corresponding appropriations implementing bills) against the constitutional restrictions placed on the legislature.

The power to appropriate funds from the state treasury is a duty assigned exclusively to the legislature by Article III of the Florida Constitution.[5] This "power of the purse" however, is not absolute and is tempered by two very basic restrictions. First, Article III, §6 states that all general laws must "embrace but one subject and matter properly connected therewith."[6] Although appropriations bills are not "general laws," many of the laws enacted in conjunction with, or to implement, the appropriations bills are, in fact, general laws and, thus, are subject to the single subject requirement for general laws.[7] Second, Article III, §12 prohibits the inclusion in appropriations bills of any subjects other than appropriations.[8] Collectively, these two sections are referred to as the "single subject requirement" governing the appropriations process.

Before embarking on an evaluation of the single subject boundaries as interpreted by Florida's courts, an overview of the policy behind the single subject requirement is necessary. In one of the first cases evaluating a single subject challenge to an appropriations bill, the Florida Supreme Court concluded that "the purpose of [the single subject requirement] is generally conceded to be to prevent including in bills appropriating money to carry on the government of the [s]tate, measures foreign to that purpose, and by taking advantage of the necessities of the [s]tate, force the legislature to adopt them, or stop the entire machinery of the government for want of funds to carry it on."[9] This practice, later referred to as "logrolling," has been denounced by the Florida Supreme Court as a vehicle for circumventing the veto power of the governor and as a means of "empire building" by the legislature.[10] The assurance sought by the court was that when an appropriation bill is up for consideration, the public should have confidence that its adoption is not prejudiced by the injection of any other matters, regardless of their merit.[11]

The seminal case evaluating the boundaries of the appropriations single subject requirement is *Brown v. Firestone*, 382 So. 2d 654, 664 (Fla. 1980). Writing for the Florida Supreme Court, Justice Alan Sundberg acknowledged that the legislature is not powerless to determine how appropriated funds may be used.[12] Speaking for the court, Justice Sundberg affirmed that the legislature may attach qualifications or restrictions to the use of appropriated funds.[13] These qualifications, known as "proviso," may be included within specific line items[14] of the General Appropriations Act or within free-standing provisions of general laws found in the various budget implementing bills.[15] Justice Sundberg stated that the Florida Constitution restricts the legislature's ability to use proviso and outlined two general principles to evaluate compliance with Article III, §§6 and 12.[16]

First, an appropriations bill must not change or amend existing laws on subjects other than appropriations; appropriations bills must deal only with appropriations and "matters properly connected therewith."[17] This first prong has a single corollary which relates to statutory funding formulas. Where a previous legislature has set forth in general law a formula or criteria governing a particular appropriations area (such as school funding or Medicaid reimbursements), a subsequent legislature may not deviate from these formulas via the appropriations bill.[18] This corollary, touched on by Justice Sundberg in *Brown* and followed by later courts, states that a legislature may provide additional funds via appropriations bills over and above statutory formulas and subject to contingencies other than those found in general law only if it does not upset the baseline statutory formulas.[19]

The second prong of the *Brown* test states that a qualification or restriction on a budget item is valid only if it is directly and rationally related to the purpose of the appropriation and is a major motivating factor behind the enactment of the appropriation.[20] This second prong asks whether the legislature determined the appropriation was worthwhile only if contingent upon a certain event or fact, or whether the qualification or restriction was merely being used as a device to further a legislative objective unrelated to the funds appropriated.[21]

A review of case law presents a fairly clear road map of permissible and impermissible proviso. Below are examples of proviso which have been upheld: Appropriations which are contingent upon the passage of other legislation or other rationally related occurrence;[22] supplementing recurring programs with funds over and above statutorily established funding formulas;[23] establishing priorities for funding of multiple projects provided it does not deviate or conflict with general law which also establishes funding priority;[24] creating funding incentives which are tied to performance goals.[25]

Conversely, using the *Brown* test, courts have warned against the following types of proviso: Mandating bureaucratic expansion or process;[26] reorganizing state agencies or creating new segments of state government;[27] raising or creating new fees or taxes;[28] mandating changes to public policy or amending general law;[29] departing from constitutional or statutory spending restrictions, priorities, or funding providers;[30] creating new capital projects out of funds for a recurring or existing program.[31]

To illustrate the restraint urged by Florida's Supreme Court, one need look no further than *Florida Department of Education v. Lewis*, 416 So. 2d 455, 460-61 (Fla. 1982). In Lewis, the legislature included proviso in the 1981-82 General Appropriations Act which provided, in part:

No funds appropriated herein shall be used to finance any state-supported public or private postsecondary educational institution that charters or gives official recognition or knowingly gives assistance to or provides meeting facilities for any group or organization that recommends or advocates sexual relations between persons not married to each other.[32]

In evaluating a constitutional challenge to this language, the Florida Supreme Court concluded that the proviso failed both prongs of the *Brown* test.[33] First, the proviso attempted to make substantive policy impacting a whole host of statutes pertaining to postsecondary institutions.[34] Additionally, the proviso was not rationally related to the general purpose of appropriating state

funds for use by postsecondary educational institutions.[35] The court admonished the legislature, stating that "an appropriations act is not the proper place for the enactment of general public policies on matters other than appropriations."[36]

In addition to its application to proviso found within general appropriations bills, the *Brown* single-subject test has been applied to the substantive bills which implement the budget.[37] Usually accompanying the passage of the General Appropriations Act, these "implementing bills" are intended to make one-time changes to taxing and spending statutes to effectuate revenue projections built into corresponding line items of the General Appropriations Act. These bills are generally titled "an act relating to implementing the (fiscal year) General Appropriations Act" and included within them are sunset provisions which eliminate these statutory changes at the end of the fiscal year. Occasionally, the legislature goes beyond the limited purposes of the implementing bill and incorporates changes to substantive law which are wholly unrelated to appropriations or "matters logically connected therewith."

A prime example of overstepping by the Florida Legislature in a budget implementing bill can be found in the case of *Moreau v. Lewis*, 648 So. 2d 124, 127 (Fla. 1995). In *Moreau*, the Florida Supreme Court was asked to look at language in a budget implementing bill which reinstated a pharmacy co-payment within the state's Medicaid plan.[38] The offending language was largely made up of provisions from a piece of substantive legislation which had failed during the regular legislative session. Once the substantive legislation was stalled in the legislative process, it was amended onto the appropriations implementing bill.[39] In applying the principles of *Brown*, the court concluded that "because an appropriations bill must not change or amend existing law on subjects other than appropriations, it follows that a bill designed to implement the appropriations also must not change or amend existing law on subjects other than appropriations."[40] The court ultimately invalidated the pharmacy co-payment on single subject grounds.

This precedent was applied in recent years by the Second Circuit Court in the case of *Gulfstream Park Racing Association, Inc. v. Jim Smith*, No. 02-2172 (Fla. 2d Cir. Ct. Dec. 20, 2002), which followed a similar fact pattern as *Moreau*. In *Gulfstream Park*, the legislature voted down substantive legislation amending the pari-mutuel statutes to assist an existing pari-mutuel permitholder and then later included the same substantive provisions in the budget implementing bill.[41] The trial court ruled that the inclusion of language within the implementing bill, which was the subject of a failed substantive bill, violated Article III, §6 of the Florida Constitution.[42] Both *Moreau* and *Gulfstream Park* provide clear guidance to the practitioner in evaluating implementing bill provisions: Language which amends substantive law and was the subject of independent legislation will likely fail under a single subject challenge.

Evaluating a claim and prosecuting a successful action invalidating offensive language in the General Appropriations Act or its companion implementing bills requires swift action by an attorney given the immediate impact of the budget on all levels of government via the policy mandates that the budget can impose. Depending on the severity of the impact of the language on one's client, the practitioner must evaluate whether to bring the action at the trial court, or via a petition, directly to the Florida Supreme Court. In either instance, precedent suggests that a mandamus action involving the secretary of state and any affected governmental entity is the appropriate remedy.[43] The state's chief financial officer, as the state's chief check writer, is also

a possible party if the goal is to restrain the expenditure of state funds in accordance with proviso at issue. However, regardless of the relief sought in the pleadings, Florida courts will treat the action as one seeking mandamus.[44]

In *Dickinson v. Stone*, 251 So.2d 268 (Fla. 1971), the Florida Supreme Court heard an original proceeding in mandamus brought by the state comptroller against the secretary of state, questioning the validity of certain proviso language.[45] Justice James Adkins, writing for the court, noted that under ordinary circumstances, the constitutionality of a law should first be considered by the circuit courts.[46] However, since this case dealt with a matter that could adversely affect the functions of government unless an immediate determination was made, original jurisdiction in mandamus was proper for the Florida Supreme Court.[47]

Unless a compelling and immediate effect on the operation of the state government can be alleged and demonstrated, a practitioner who wishes to test the validity of proviso language found in either the General Appropriations Act or one of its corresponding implementing bills should first seek review in the circuit courts.[48] No clear case law exists to aid the evaluation of counsel and Florida Supreme Court precedent is mixed on the matter.[49] However, the court seems to be more willing to take a direct petition when state officials are at odds over the application of the language and its impact on their ability to carry out their prescribed duties.

When seeking review of proviso language under a mandamus action, different rules apply depending on where the action is filed. If the action is filed in a circuit court, then the practitioner must apply the Florida Rules of Civil Procedure.[50] Conversely, if the action is filed in the Florida Supreme Court, then the Florida Rules of Appellate Procedure govern the action.[51] Also, since a mandamus action is governed by the same considerations regarding venue as govern other actions,[52] an action against a state official permits the state to assert its privilege of having the action heard in the county in which the state official resides, usually Leon County.[53] As such, a practitioner should initiate an action in the Second Judicial Circuit Court if a timely resolution of the matter is desired, thereby avoiding the delay of a venue motion.

When seeking a writ of mandamus in a circuit court to compel the secretary of state to remove invalid proviso from a General Appropriations Act that has been signed by the governor, a practitioner must first file a complaint which contains the facts on which the plaintiff relies for relief and a request for the particular relief sought.[54] The plaintiff may also include arguments which support the petition with proper citations and exhibits that illustrate the legislature's failure to comply with its single subject constitutional mandate.[55] Case law suggests that the relief sought should be a writ of mandamus directing the Florida secretary of state in his or her ministerial capacity as the keeper of the official state records to remove the offensive language from official laws of Florida.[56] As such, the Florida secretary of state is an indispensable party to the action. The complaint should include as much of the legislative record, if one is available, as possible which can be found through the services offered by the secretary of the Florida Senate, clerk of the Florida House of Representatives, or their legislative library.[57] Further, in seeking the enforcement of a public right (i.e., invalidation of an unconstitutional statute), the plaintiff need not show a legal or special interest in the result; it is sufficient that the plaintiff-citizen is merely interested in having valid laws.[58] Once, the complaint is filed, the respective rules of procedure govern the remainder of the mandamus action.[59]

When seeking to invoke the original jurisdiction of the Florida Supreme Court in a mandamus action, a practitioner must file a petition with that court.[60] The petition cannot be more than 50 pages in length and must state the basis for invoking the jurisdiction of the court, the facts on which the petitioner relies, the nature of the relief sought, and a properly cited argument in support of the petition.[61]

Costs and attorneys' fees are always an issue for the practitioner to consider when filing any action. In mandamus proceedings, costs and fees have been awarded to the petitioner upon the petitioner's success and against the petitioner upon the respondent's success.[62] However, fees and costs are not a matter of right should the client prove successful in such actions. A practitioner should be aware that F.S. §57.105(1) (2005) is applicable in mandamus proceedings.[63]

Like other final judgments, final judgments in mandamus are generally reviewable by appeal.[64] The proper appeal to be taken from the denial of a petition for a writ of mandamus at the circuit court level is the district court of appeal, not the Florida Supreme Court.[65] However, since the issuance of a writ of mandamus is discretionary, an appellate court is unlikely to reverse a lower court's judgment.[66] Thus, an appellate court may make every presumption in favor of the correctness of the lower court's decision.[67] The burden is on the appellant to show reversible error.[68]

In conclusion, when reviewing potentially offensive proviso in the General Appropriations Act or one of its implementing bills for adherence to the constitutional single subject requirement, an attorney should determine whether a claim can be supported that the language fails either of two basic tests from *Brown*. First, does the proviso alter, repeal, or create substantive law? Second, is the proviso directly and rationally related to the purpose of appropriating state funds? If the language fails, a possible action in mandamus may be available to your client to challenge its validity. Quickly prosecuted, such an action could mean the difference between toiling under an oppressive policy mandate and maintaining the operational or regulatory status quo. Finally, such an action will also help preserve the basic balance of powers of Florida's governmental structure and the integrity of the constitutional foundation governing the legislature's "power of the purse."

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[1] See Fla. Const., art. III §3.
[2] See Fla. Const., art. III §19.
[3] Veto of Fla. HB 1835 (2004) (letter from Gov. Bush to Secretary of State Glenda Hood, May 28, 2004) (on file with Sec'y of State, The Capitol, Tallahassee, FL).
[4] See id.
[5] See Fla. Const., art. VII §1(c).
[6] See Fla. Const., art. III §6.
[7] See id.
[8] See Fla. Const., art. III §12.
[9] See Amos v. Mosley, 77 So. 619, 624 (Fla. 1917).
[10] See Dep't of Administration v. Horne, 269 So. 2d 659, 662 (Fla. 1972); for a general discussion on logrolling, see also Brown v. Firestone, 382 So. 2d 654, 663-664 (Fla. 1980); and Green v. Rawls, 122 So. 2d 10, 13 (Fla.1960).
[11] See Lee v. Jenkins, 19 So. 2d 570, 571 (Fla. 1944).
[12] Brown v. Firestone, 382 So. 2d at 663.
[13] For a discussion on what an appropriation item is see Lee v. Dowda, 19 So. 2d 570 (Fla. 1944); Green v. Rawls, 122 So. 2d 10 (Fla.1960); Martinez v. Fla. Legislature, 542 So. 2d 358 (Fla. 1989); and Fla. House of Representatives v. Martinez, 555 So. 2d 938 (Fla. 1990).
[14] See Green, 122 So. 2d 10 (Fla. 1960).
[15] See Brown, 382 So 2d. at 654.
[16] See id. at 663-64.
[17] See id. at 664.
[18] See id.
[19] See id.
[20] See id.
[21] See id.
[22] See id.; see also Gindl v. Department of Education, 396 So. 2d 1105, 1107 (Fla. 1981).
[23] See Dep't of Education v. Collier County School Board, 394 So. 2d 1010, 1012 (Fla. 1981).
[24] See Gindl, 396 So. 2d at 1107.
[25] See id.; Collier County School Board, 394 So. 2d 1010, 1012 (Fla. 1981); and Chiles v. Milligan, 659 So. 2d 1055 (Fla. 1995).
[26] See Lee v. Dowda, 19 So. 2d 570 (Fla. 1944).
[27] See Dickinson v. Stone, 251 So.2d 268 (Fla. 1971).
[28] See Dept. of Administration v. Horne, 269 So. 2d 659, 662 (Fla. 1972); Moreau v. Lewis, 648 So. 2d 124, 127 (Fla. 1995); Murray v. Lewis, 576 So. 2d 264 (Fla. 1990).
[29] See Dep't of Education v. Lewis, 416 So. 2d 455, 459-60 (Fla. 1982).
[30] See City of North Miami v. Florida Defenders of the Environment, 481 So. 2d 1196, 1196 (Fla. 1985).
[31] Brown, 382 So. 2d at 669.
[32] See Lewis, 416 So. 2d at 458.
[33] See id. at 460.
[34] See id.
[35] See id.
[36] See id at 459.
[37] See Moreau, 648 So. 2d 124, 127 (Fla. 1995); and Murray, 576 So. 2d 264 (Fla. 1990).
[38] See Moreau, 648 So. 2d at 125-26.
[39] See id at 127.
[40] See id.
[41] See id.
[42] See id.
[43] See Brown, 382 So. 2d at 662; Dickinson, 251 So. 2d at 270; Division of Bond Finance v. Smathers, 337 So. 2d 805, 807 (Fla. 1976).
[44] See Fla. R. App. P. 9.040(c).
[45] See Dickinson, 251 So. 2d at 270.
[46] See id at 271.
[47] See id.
[48] See id.; Florida Senate v. Harris, 750 So. 2d 626, 631 (Fla. 1999).
[49] Contrast Martinez, 542 So. 2d 358 (Fla. 1989); and Chiles, 659 So. 2d 1055 (Fla. 1995).
[50] See Porter v. Florida Parole & Prob. Comm'n, 603 So. 2d 31, 32 (Fla. 1st D.C.A. 1992).
[51] See Fla. R. App. P. 9.010; 9.100.
[52] See Florida Real Estate Com'n v. State, 75 So. 2d 290, 291 (Fla. 1954).
[53] See Singletary v. Powell, 602 So. 2d 969, 970 (Fla. 1st D.C.A. 1992); see also Dugger v. Grooms, 582 So. 2d 136, 136 (Fla. 1st D.C.A. 1991).
[54] See Fla. R. Civ. P. 1.630(b).
[55] See id.
[56] See State ex rel. Stewart v. Mayo, 35 So.2d 13, 14 (Fla. 1948).
[57] See Fla. R. Civ. P. 1.630(b).
[58] See Brown, 382 So. 2d at 662.
[59] See Fla. R. Civ. P. 1.010; 1.630(a).
[60] See Fla. R. App. P. 9.100(b).
[61] See id. at 9.100(g).
[62] See Vassar v. State ex rel. Gleason, 190 So. 434 (Fla. 1939); see also Florida Nat. Bldg. Corp. v. Miami Beach First Nat. Bank, 10 So. 2d 311 (Fla. 1942).
[63] See City of Jacksonville v. Ortega Utility Co., 531 So. 2d 370, 372 (Fla. 1st D.C.A. 1988).
[64] See Warren v. State ex rel. Four Forty, Inc. 76 So. 2d 485, 486 (Fla. 1954).
[65] See Sheley v. Florida Parole Comm'n, 703 So. 2d 1202, 1205 (Fla. 1st D.C.A. 1997).
[66] See La Gorce Country Club v. Cerami, 74 So. 2d 95, 99 (Fla. 1954).
[67] See State v. Cornelius, 129 So. 752, 758 (Fla. 1930).
[68] See id.

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