BRING TO MEETING

REAL PROPERTY, PROBATE & TRUST LAW SECTION
(www.flabarrpptl.org)

Executive Council Meeting

AGENDA

Hilton Resort and Marina, Key West
Saturday, May 29, 2004
9:30 a.m. - 1:00 p.m.

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AGENDA INDEX

Real Property, Probate and Trust Law Section
EXECUTIVE COUNCIL MEETING
Hilton, Key West

Saturday, May 29, 2004

I. **Presiding** — Louis B. Guttmann, Section Chair

II. **Attendance** — John B. Neukamm, Secretary

III. **Minutes of Previous Meeting** — John Neukamm, Secretary
1. Approval of February 21, 2004 Executive Council Meeting Minutes, pp.1 - 6

IV. **Chair's Report** — Louis B. Guttmann
1. The Lewis "Lukie" Ansbacher Endowed Memorial Scholarship pp. 7 - 12

V. **Chair-Elect's Report** — Laird A. Lile
1. 2004-2005 Executive Council Meeting Dates p. 13

VI. **Liaison with Board of Governors Report** — Alan B. Bookman

VII. **Treasurer's Report** — Melissa Jay Murphy
1. Financial Summary: July 1, 2003 - April 30, 2004 pp. 14-15

VIII. **Circuit Representative's Report** - George Meyer, Director
- Morris Silberman — Circuit Representatives' Judicial Liaison
- Jeffrey T. Sauer — Northern District Director
- Hugh C. Umstead — Middle District Director
- Daniel L. Adams — Southern District Director

1. First Circuit -- Patricia C. Coffield; W. Christopher Hart; Jeffrey T. Sauer
2. Second Circuit — James C. Conner, Frederick R. Dudley; Russell D. Gautier; Victor L. Huszagh
3. Third Circuit — William Haley; Guy W. Norris, Clay A. Schnitker; Michael S. Smith
4. Fourth Circuit — Barry Ansbacher; Bill Blackard, Jr.; Randy Crabtree; Michael Fisher; Kevin Flood
5. Fifth Circuit — Franklin Town Gaylord
6. Sixth Circuit — Robert Altman; Joseph W. Fleece, Jr.; Joseph (Jay) W. Fleece, III; Linda Griffin; Roger A. Larson; Donald Peyton, Marilyn M. Polson; Hugh C. Umstead; Robert H. Willis
7. Seventh Circuit — E. Channing Coolidge; Michael A. Pyle
8. Eighth Circuit — Sam W. Boone, Jr.; James Daniels Salter
9. Ninth Circuit — David J. Akins; Sancha Brennan; Russell Divine; Fred W. Jones; Stacy Ossin; Pamela O. Price; Randy J. Schwartz; Laura Sundberg; Charles D. Wilder; G. Charles Wohlust
10. Tenth Circuit — Gregory R. Deal; J. Ross Macbeth; Robert S. Swaine

11. Eleventh Circuit — Stuart H. Altman; Carlos Battle; Michael A. Berke; F. Clay Craig; John Fitzgerald; Joseph P. George, Jr.; Nelson C. Keshen; Judge Maria Korvick; Silvia B. Rojas; Gary P. Simon; Donald W. Stobs, Jr.; Diana S. C. Zeydel

12. Twelfth Circuit — Tami F. Conetta; James M. Nixon; L. Howard Payne; Nick Rockwell; P. Allen Schofield; Barry F. Spivey

13. Thirteenth Circuit — Lynwood Arnold; Debra Boje; Thomas N. Henderson; William Platt; Marsha G. Rydberg; Judge Susan Sexton; Morris Silberman; Brian C. Sparks; Melissa Thalji; Gwynne Young

14. Fourteenth Circuit — Cora Nell Haggard; Henry Alan Thompson

15. Fifteenth Circuit — David G. Armstrong; John Banister; John W. Little, III; Glenn Mednick; Gary J. Nagle; Paul E. Roman; Eugene E. Shuey; Jerome L. Wolf

16. Sixteenth Circuit — Thomas D. Wright

17. Seventeenth Circuit — Daniel L. Adams; Marvin T. Bornstein; Robert B. Judd; Joseph L. Schwartz; Thomas K. Topor; Michelle G. Trca

18. Eighteenth Circuit — Jerry W. Allender; Richard S. Amari; Lawrence W. Carroll, Jr.; Keith Kromash; Robert William Wattwood

19. Nineteenth Circuit — J. Ernest Collins; Richard J. Dungey; Douglas Gonano

20. Twentieth Circuit — S. Dresden Brunner; Guy S. Emerich; Alan B. Fields; Charles R. Gehrke; William M. Pearson; Dennis R. White

IX **General Standing Committee Action Items**

1. Budget Committee
   a. Ratification of Executive Committee Approval of Budget Amendments p. 16

X. **Report of General Standing Committees**

Laird A. Lile, Director and Chair-elect

1. **Actionline** — Dresden Brunner, Chair; Patricia Hancock, Vice-Chair; Keith Kromash, V-Chair

2. **Amicus Coordination** — Bob Goldman, Co-Chair: John Little, Co-Chair
   1. RPPTL Response to Motions in Warburton Case pp. 17 - 30

3. **Ancillary Business, MDP and MSP** — Charles Robinson, Chair; Norwood Gay, Vice-Chair

4. **Budget** — Melissa Jay Murphy, Chair; Pamela O. Price, Vice-Chair

5. **CLE Seminar Coordination** — Patricia P. Jones, Chair; Mike Foreman, Vice-Chair; Lee Weintraub, Vice-Chair
   1. Report pp. 31 - 37

6. **2004 Convention Coordinator** — George J. Meyer, Co-Chair; Silvia Rojas, Co-Chair

7. **Florida Bar Journal** — Richard R. Gans, Co-Chair, Probate & Trust Coordinator; Bill Sklar, Co-Chair, Real Property Coordinator

8. **Florida Bar News** — Robert Swaine, Chair

9. **Florida Lawyer's Support Services, Inc. (FLSSI)**

10. **Legislative Review** — Sandra F. Diamond, Chair; Burt Bruton, Vice-Chair
    2. Report pp 38 - 43

11. **2004 Legislative Update Coordinators** — Silvia Rojas, Co-Chair; Laura Sundberg, Co-Chair; Sancha Brennan, Vice-Chair; Deborah Goodall, Vice-Chair

12. **Liaison Committees:**
    a. **ABA:** Ed Koren; George Meyer; Jay Zschau
    b. **American Resort Development Association (ARDA):** Larry Kinsolving
    b. **CLE Committee:** Patricia Jones
    c. **Clerks of the Circuit Court:** Joe George
    d. **Council of Sections**: Steve Hearn
    e. **Department of Revenue:** Timothy Flanagan; Charles Ian Nash
    f. **Environmental Law Section:** TBA
    g. **Florida Bankers:** Stewart Andrew Marshall
    h. **Judiciary:** Justice Kenneth Bell; Judge George W. Greer; Judge Melvin B. Grossman; Judge Hugh Hayes; Judge Maria Korvick; Judge Robert Pleus; Judge Susan G. Sexton; Judge Winifred Sharp; Judge Morris Silberman; Judge Patricia Thomas
    i. **Law Schools:** Phillip Baumann
       1. Report pp. 44 - 45
    J. **Out of State:** Mike Stafford; Pamela Stuart
    k. **Young Lawyer's Division:** TBA

13. **Model and Uniform Acts** - Charles Carver, Chair; Vice-Chair; J. Eric "Tate" Taylor, Vice-Chair

14. **Pro Bono** — Andrew O'Malley, Chair

15. **Public Awareness & Dignity in Law** - Julie Williamson and Bob Goldman, Co-Chairs

16. **Sponsor Coordinators** — George Meyer, Co-Chair; Peggy Rolando, Co-Chair; Deborah Goodall, Vice-Chair
    1. Report pp. 46 - 48

17. **Strategic Planning Meeting** — TBA

18. **Web Site-Information Technology** — Sam W. Boone, Chair; Silvia Rojas, Vice-Chair

XI. **Real Property Division Action Items**
1. Condominium Law Committee
   a. Amendment to 718.117 re: An Act Relating to Termination of Condominiums pp. 49 - 62

XII. **Report of Real Property Division Committees**
Julius J. Zschau, Division Director

1. **Affordable Housing** — Jaimie Ross, Chair; Glenn Claytor, Vice-Chair; Christian F. O'Ryan, Vice-Chair

2. **Bankruptcy, Creditor Rights, Real Estate** — Marsha Rydberg, Chair; Alberto Gomez-Vidal, Vice-Chair

3. **Condominium and Planned Development** — Michael Gelfand, Co-Chair Robert Schwartz, Co-

Chair; Robert S. Freedman, Vice-Chair, Steven Mezer, Vice-Chair

4. **Construction Law** — Michael Sasso, Chair; Bruce Alexander, Vice-Chair; Michelle Reddin, Vice Chair

5. **Development and Governmental Regulation of Real Estate** — William Sklar, Chair; Charles D. Brecker, Vice Chair; James Brown, Vice-Chair

6. **FAR/BAR Committee and Liaison to FAR** — Bill Haley, Chair; Tom Henderson, Vice-Chair

7. **Land Trusts and REITS** — Andrew O'Malley, Chair; Robert G. Stern, Vice-Chair

8. **Landlord and Tenant** — Lawrence Jay Miller, Chair; Arthur Menor, Vice-Chair

9. **Legal Opinions** — David Brittain, Co-Chair; Ruth Kinsolving, Co-Chair; Roger Larson, Vice-Chair; Kenneth E. Thornton, Vice-Chair

10. **Liaison with FLTA** — Alan McCall, Chair; Charles Birmingham, Vice-Chair; John S. Elzeer, Vice Chair; John LaJoie, Vice-Chair; Michael Moore, Vice-Chair

11. **Mobile Home and RV Parks** — David Eastman, Chair; Jonathan J. Damonte, Vice-Chair; Scott Gordon, Vice Chair

12. **Mortgages and Other Encumbrances** — Silvia B.Rojas, Co-Chair; Jeffrey T. Sauer Co-Chair; Ralph R. Crabtree, Vice-Chair; William McCaughan, Vice-Chair

13. **Property Rights in Real Property** — Richard J. Dungey, CoChair; Frederick van Vonno, Co-Chair; Susan Spurgeon, Vice-Chair

14. **Real Estate Certification Review Course** — Silvia B. Rojas, Chair; Victoria Carter, Vice-Chair; Robert Stern, Vice-Chair

15. **Real Property Forms** — Michael Pyle, Chair; Anthony C. Alfonso, Vice Chair

16. **Real Property Litigation** — Michael S. Smith, Chair; Lawrence Miller, Vice-Chair; Eugene E. Shuey, Vice-Chair

17. **Real Property Problems Study** — Robert Hunkapiller, Chair; Barry Ansbacher, Vice-Chair; Richard Taylor, Vice-Chair

18. **Real Property Professionalism** — Homer Duval, Chair; Ruth B. Kinsolving, Vice-Chair; Kenneth Thornton, Vice-Chair

19. **Title Insurance and Liaisons** — Norwood Gay, Chair; Burt Bruton, Vice-Chair

20. **Title Issues and Standards** — Patricia Jones, Chair; Robert Graham, Vice-Chair; Stephen Reynolds, Vice-Chair

XIII. **Probate and Trust Division Action Items**

1. Estate and Trust Tax Planning Committee
   a. Florida Uniform Disclaimer of Property Interests Act pp. 63 - 102
2. IRA and Employee Benefits Committee
   a. Amendment to F.S. 222.21(21)(a) pp. 103 - 112

XIV. **Report of Probate and Trust Law Division Committees**
Rohan Kelley, Division Director

1. **Ad Hoc Trust Code Revisions** - Brian F. Felcoski, Chair; Laird A. Lile, Vice-Chair
   1. Report pp. 113 - 115

2. **Charitable Organizations and Planning** — Barbara Landau, Chair; Michael P. Stafford, Co-Vice-Chair; Jerome Wolf, Co-Vice-Chair

3. **Electronic Court Filing** — Charles Robinson, Chair; Bruce Stone, Vice-Chair

4. **Estate and Trust Tax Planning** — Charles Ian Nash, Chair; Guy Emerich, Co-Vice-Chair; Jerome Wolf, Co-Vice-Chair

5. **Guardianship Law and Procedure** — Glenn Mednick, Chair; David Carlisle, Vice-Chair

6. **HIPAA** - Sam Boone, Chair
   1. Report pp. 116 - 118

7. **IRA's and Employee Benefits** — Richard Amari, Chair; Bill Horowitz, Vice-Chair Kristen Lynch

8. **Liaison with Corporate Fiduciaries** --- Michael A. Dribin, Chair; Stuart Altman, Vice-Chair; George Lange, Corporate Fiduciary Chair
   1. Attorney/Trust Officer Liaison Conference Brochure pp. 119 - 122

9. **Liaison with Elder Law Section** — Charles F. Robinson, Marjorie Ellen Wolansky
   Nursing Home Diversion Program

10. **Liaisons with Tax Section** — Lauren Detzel; Brian C. Sparks; Donald R. Tescher

11. **Power of Attorney & Advance Directive Law** — Sam Boone, Chair; James A. Herb,Vice-Chair

12. **Principal and Income Law** — Edward F. Koren, Chair; James Ridley, Co-Vice-Chair; Donald Tescher, Co-Vice-Chair

13. **Probate and Trust Litigation** — William F. Belcher, Chair; Jack A. Falk, Jr.,Vice-Chair

14. **Probate and Trust Professionalism and Ethics** — Joel Sharp, Chair; David M. Garten, Vice Chair
   1. Report pp. 123 - 125

15. **Probate Forms** — John Arthur Jones, Chair Emeritus; David Brennan, Chair; Donna Lee Roden,Vice-Chair

16. **Probate Law and Procedure** — Debra Boje, Chair, William F. Belcher, Co-Vice Chair; Dennis R. White, Co-Vice Chair

17. **Trust Law** — Brian J. Felcoski, Chair; Barry Spivey, Co-Vice-Chair; Laura Stephenson, Co-Vice-Chair

18. **Wills, Trusts and Estates Certification Review Course** — James A. Herb, Chair; David Armstrong, Vice-Chair

ADJOURN

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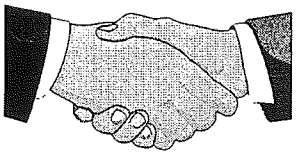

[Approved at the Executive Council meeting on]

MINUTES
of the
Real Property, Probate and Trust Law Section
EXECUTIVE COUNCIL MEETING
(February 21, 2004)
(Waikoloa Beach Marriott, Kona, Hawaii)

Louis B. Guttmann, Section Chair, presiding

The Section Chair, Louis B. Guttmann, called the meeting to order at 8:30 a.m.

I. Attendance – John Neukamm, Secretary.

The attendance roster was circulated by the Secretary to be initialed by Council members in attendance at the meeting. Attendance is shown cumulatively on circulated attendance rosters. It is the responsibility of the member to bring any corrections promptly to the attention of the Secretary.

II. Minutes of Previous Meeting – John Neukamm, Secretary.

The Minutes of the Executive Council Meeting of January 24, 2004, were included in agenda packet. The Secretary requested a motion to approve the Minutes and upon motion duly made, seconded and unanimously carried, the Minutes were approved, subject to an amendment to reflect Alan Bookman has been elected President-Elect (rather than Chair-Elect) of the Florida Bar.

III. Chair's Report – Louis B. Guttmann, Chair.

The Chair thanked our sponsors, as listed in the agenda package. He then asked the attendees to review the proposed Resolution honoring Lukie Ansbacher that was handed out immediately prior to the meeting. He noted he will miss Lukie's precision, humor and service to the Section. Upon motion duly made and seconded, the Resolution unanimously passed. Next, he asked the members to review the Adena Springs Resolution included in the agenda packet, and he thanked Mark Dunbar for coordinating that event. Upon motion duly made and seconded, the Resolution unanimously passed. Finally, he explained rooms for the Convention are going quickly and suggested Council members should make their reservations as soon as possible.

IV. Liaison with Board of Governors Report – Alan B. Bookman.

Alan reported on the status of Article V funding. He noted if the Courts are not adequately funded, consideration of business and property cases will have to be delayed since other cases, such as criminal cases, will take priority. Law libraries and legal aid will also receive very low priority with respect to funding. He asked Section members to contact their legislators to express the need for adequate funding.

V. Gene ral Action Items:

1. **Website Technology Information Committee** – Sylvia Rojas presented the Committee's request for additional website features that arose from the Committee's workshop in Ocala, as more fully described in the agenda packet. The Committee's motion for approval of that request passed unanimously. In addition, a request submitted by the Committee Chair, Sam Boone, via email concerning the new Internet service provider was submitted for consideration. A motion to waive the rules passed unanimously, after which the motion approving the new ISP passed unanimously.

2. **Amicus Coordination Committee** - Justice Bell had previously requested to be excused from the meeting during the discussion of this item, so discussion was deferred until the end of the meeting. After he left, the Chair explained the Executive Committee has authorized the Amicus Committee to file a brief in the *Warburton* case, which addresses homestead issues. That case is more fully addressed in the agenda package. The Committee's motion to ratify the Executive Committee's approval of the Section's appearance in that case was unanimously approved.

VI. Report of the General Standing Committees – Laird A. Lile, Director and Chair-Elect.

1. **Actionline** – Dresden Brunner, Chair; Patricia Hancock and Keith Kromash, Co-Vice Chairs. No report.

2. **Amicus Coordination** – John Little and Bob Goldman, Co-Chairs. No further report.

3. **Ancillary Business, MDP and MSP** – Charles Robinson, Chair; Norwood Gay, Vice Chair. No report.

4. **Budget** – Melissa Jay Murphy, Chair; Pamela O. Price, Vice Chair. No report.

5. **CLE Seminar Coordination** – Pat Jones, Chair; Mike Foreman and Lee Weintraub, Co-Vice Chairs. Pat reported on the seminar scheduled to take place immediately following the Council meeting. She also noted upcoming seminar brochures are included in the agenda package.

6. **Convention 2004 Coordinator** – George J. Meyer and Silvia Rojas, Co-Chairs. No report.

7. **Florida Bar Journal** – Richard R. Gans, Chair and Probate & Trust Coordinator; Bill Sklar, Co-Chair and Real Property Coordinator. No report.

8. **Florida Bar News** – Robert Swaine, Chair. No report.

9. **Florida Lawyer's Support Services, Inc. (FLSSI)** - No report.

10. **Legislative Review** – Sandra F. Diamond, Chair; Burt Bruton, Vice-Chair. A written

report is included in the agenda package. Pete Dunbar provided a status report on the Section's pending legislative requests. He also noted there is a new proposal concerning the Marketable Record Title Act, a proposal concerning residential disclosures and a proposal to remove the Court's rule-making authority under consideration by the Legislature.

11. **Legislative Update** – Silvia Rojas and Laura Sundberg, Co-Chairs; Sancha Brennan and Deborah P. Goodall, Co-Vice-Chairs. No report.

12. **Liaison Committees.**

    a. ABA: George Meyer, Ed Koren and Jay Zschau.

    b. CLE Committee: Patricia Jones.

    c. Clerks of the Circuit Court: Joe George.

    d. Council of Sections: Steve Hearn

    e. Department of Revenue: Timothy Flanagan and Charles Ian Nash.

    f. Environmental Law Section: TBA.

    g. Florida Bankers Association: Stewart Andrew Marshall, III.

    h. Judiciary: Justice Kenneth Bell, Judge Melvin B. Grossman, Judge Hugh Hayes, Judge Marva Korvick, Judge Robert Pleus, Judge Susan G. Sexton, Judge Winifred Sharp, Judge Morris Silberman, Judge Patricia Thomas, and Judge George W. Greer.

    i. Law Schools: Phillip Baumann.

    j. Out of State: Mike Stafford and Pamela Stuart.

    k. Time Share Association: Larry Kinsolving.

    l. Young Lawyers Divison: TBA.

13. **Model and Uniform Acts** – Charles Carver, Chair; J. Eric "Tate" Taylor, ViceChair. No report.

14. **Pro-Bono** – Andrew O'Malley, Chair. No report.

15. **Public Awareness & Dignity in Law** - Julie Williamson and Robert Goldman, Co-Chairs. No report.

16. **Sponsor Coordinators** – George Meyer and Peggy Rolando, Co-Chairs; Deborah Goodall, Vice Chair. No report.

17. **Strategic Planning** – TBA

18. **Web Site/Information Technology** – Sam W. Boone, Chair; Silvia Rojas; Vice Chair. No further report.

VII. Report of the Probate and Trust Law Division Committees – Rohan Kelley, Division Director.

1. **Ad Hoc Trust Code Revisions** – Brian F. Felcoski, Chair; Laird A. Lile, Vice Chair. No report.

2. **Charitable Organizations and Planning Committee** – Barbara Landau, Chair, Michael P. Stafford and Jerome Wolf, Co-Vice-Chairs. No report.

3. **Electronic Court Filing** – Charles Robinson, Chair; Bruce Stone, Vice-Chair. No report.

4. **Estate and Trust Tax Planning** – Charles Ian Nash, Chair; Jerome Wolf and Guy Emerich, Co-Vice-Chairs. No report.

5. **Guardianship Law and Procedure** – Glen Mendick, Chair; David Carlisle, Vice Chair. No report.

6. **IRA's and Employee Benefits** – Richard Amari, Chair; Bill Horowitz, Vice Chair. No report.

7. **Liaison with Corporate Fiduciaries** – Michael A. Dribin, Chair; Stuart Altman, Vice Chair; George Lange, Corporate Fiduciary Chair. No report.

8. **Liaison with Elder Law Section** – Charles F. Robinson and Marjorie Ellen Wolansky. No report.

9. **Liaison with Tax Section** – Lauren Detzel, Brian C. Sparks and Donald R. Tescher. No report.

10. **Power of Attorney & Advance Directive Law** – Sam Boone, Chair; James A. Herb, Vice-Chair. No report.

11. **Principal and Income Law** – Edward F. Koren, Chair; James Ridley and Donald Tescher, Co-Vice-Chairs. No report.

12. **Probate and Trust Litigation** – William F. Belcher, Chair; Jack A. Falk, Vice Chair. No report.

13. **Probate and Trust Professionalism and Ethics** – Joel Sharp, Chair; David M. Garten, Vice Chair. No report.

14. **Probate Forms** – John Arthur Jones, Chair Emeritus; David Brennan, Chair; Donna

Lee Roden, Vice Chair. No report.

15. **Probate Law and Procedure** – Deborah Boje, Chair; William F. Belcher and Dennis R. White, Co-Vice Chairs. No report.

16. **Trust Law** – Brian J. Felcoski, Chair; Barry Spivey and Laura Stephenson , Co-Vice Chairs. No report.

17. **Wills, Trusts and Estates Certification Review Course** – James A. Herb, Chair; David Armstrong, Vice-Chair. No report.

VIII. Real Property Division Action Items.

1. **Condominium Law Committee:** Silvia Rojas presented the Committee's request for approval of a proposed amendment to F.S. 718.112(2)(f)(4) regarding reserve funding for condominium associations, as more fully described in the agenda package. The Committee's motion passed unanimously. Motions to find the matter within the purview of the Section and to expend Section funds also passed unanimously.

2. **Legal Opinions Committee:** Ruth Kinsolving presented the Committee's updated report for consideration by the Council. She noted a "black-lined" version of the report, which reflects changes from the 1997 version of the report, is attached to the agenda package. The Committee's motion to approve the revised report passed unanimously.

IX. Report of the Real Property Division Committees – Julius J. Zschau, Division Director.

1. **Affordable Housing** – Marilyn Kershner, Chair; Christian O'Ryan, Vice Chair. No report.

2. **Bankruptcy, Creditor Rights and Real Estate** – Marsha Rydberg, Chair; Alberto Gomez-Vidal, Vice Chair. No report.

3. **Condominium and Planned Development** – Robert Schwartz and Michael Gelfand, Co-Chairs; Robert S. Freedman and Steven Mezer, Co-Vice-Chairs. A written report addressing proposed legislation concerning the termination of condominiums was included in the agenda package.

4. **Construction Law** – Michael Sasso, Chair; Bruce Alexander and Michelle Reddin, Co-Vice-Chairs. No report.

5. **Development and Governmental Regulation of Real Estate** – William Sklar, Chair; Charles D. Brecker and James Brown, Co-Vice-Chairs. No report.

6. **FAR/BAR Committee and Liaison to FAR** – Bill Haley, Chair; Tom Henderson, Vice Chair. No report.

7. **Land Trusts and REITS** – Andrew O'Malley, Chair; Robert G. Stern, Vice

Chair. No report.

8. **Landlord and Tenant** – Lawrence Jay Miller, Chair; Arthur Menor, Vice-Chair. No report.

9. **Legal Opinions** – David Brittain and Ruth Kinsolving, Co-Chairs; Kenneth E. Thornton and Roger Larson, Co-Vice Chairs. No further report.

10. **Liaison with FLTA** – Alan McCall, Chair; John S. Elzeer, Michael Moore, John LaJoie and Charles Birmingham, Co-Vice-Chairs. No report.

11. **Mobile Home and RV Parks** – David Eastman, Chair; Jonathan J. Damonte, Vice Chair. No report.

12. **Mortgages and Other Encumbrances** – Silvia B. Rojas and Jeffrey T. Sauer, Co-Chairs, William McCaughan and Ralph R. Crabtree Vice Chair No report.

13. **Property Rights in Real Property** – Richard J. Dungey and Frederick van Vonno, Co-Chairs; Susan Spurgeon, Vice Chair. No report.

14. **Real Estate Certification Review Courses** – Sylvia B. Rojas, Chair; Victoria Carter and Robert G. Stern, Co-Vice-Chairs. No report.

15. **Real Property Forms** – Michael Pyle, Chair. No report.

16. **Real Property Litigation** – Michael S. Smith, Chair; Lawrence Miller and Eugene E. Shuey, Co-Vice-Chairs. No report.

17. **Real Property Problems Study** – Robert Hunkapillar, Chair; Barry Ansbacher and Richard Taylor, Co-Vice-Chairs. No report.

18. **Real Property Professionalism** – Homer Duval, Chair; Ruth B. Kinsolving and Kenneth Thornton, Co-Vice Chairs. No report.

19. **Title Insurance and Liaisons** – Norwood Gay, Chair; Burt Burton, Vice-Chair. No report.

20. **Title Issues and Standards** – Patricia Jones, Chair; Robert Graham and Stephen Reynolds, Co-Vice-Chair. No report.

There being no further business, the meeting was adjourned at 9:00 a.m.

Respectfully Submitted,

John Neukamm,
Secretary

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April 19, 2004

Executive Council Members
Real Property, Probate & Trust Law Section
The Florida Bar

Re: Lukie Ansbacher

Dear Executive Council Members:

Most of you were unable to attend Lukie's service, which was a lovely celebration of his life. It was my honor to attend personally but also as a representative of the Executive Council for RPPTL. I had the opportunity to extend my sympathies to Sybil and other family members on your behalf.

Several of you have contacted me to find out how you can remember Lukie in a formal way. Since that time, I have been working with a dear friend of Lukie's, Phil Emmer, to come up with a fitting memorial to Lukie. It has been a joy to work with Phil in this endeavor.

A scholarship in Lukie's memory has been established at the University of Florida Law School. Phil and his wife, Barbara, have made an extremely generous contribution and have taken the lead to encourage others to do the same. Enclosed is a letter that Phil has sent out to many of Lukie's friends and colleagues, making them aware of this memorial and encouraging them to remember Lukie in this way. I think that the letter expresses many of the same thoughts that we have about Lukie and I cannot improve on it.

I hope you will consider making a contribution to this scholarship fund to honor Lukie. Please make your check payable to the UF Law Center Association and mail to: UF Levin College of Law; P. O. Box 14412; Gainesville, FL 32604-4412; Attn: Kerrie Mitchell. If you have any questions, please do not hesitate to call.

Sincerely,
SALTER, FEIBER, YENSER,
MURPHY & HUTSON, P.A.

Melissa Jay Murphy

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Phone (352) 376-2444 ~ Fax (352) 376-2260 ~ www.emmergroup.com

March 22, 2004

Melissa Murphy, Esq.
3940 NW 16 Blvd.
Gainesville, FL 32605

Dear Melissa:

As you know, Lewis "Lukie" Ansbacher passed away on Saturday morning, February 7th, 2004 in Miami while attending a map show with his wife Sybil in Miami.

Lukie had been my attorney on issues dealing with real property for more than 30 years. He was much more than that. He was a friend and I loved him like the brother I never had. He will always be a shining light in my life and I have been well guided by his legal advice, but much more so by his character and his integrity; his wit and knowledge; his humility and warmth; his discipline and skills.

Barbara and I feel the need to do something to honor his memory. Lukie loved the **Law**, loved **Education**, and loved the **University of Florida** and it is fortunate that I can be a little help to combine these loves in a way that will honor his memory. A scholarship at the University of Florida Law School, possibly in the area of Real Property, would allow his name to live in perpetuity accomplishing three of the things he loved most: Law, Education and the University of Florida.

My wife Barbara and I have offered a gift of $25,000 to UF to set up an endowed scholarship named for Lukie Ansbacher in which it is my hope his name can live for generations to come. The only condition is that this gift be equaled by his friends in and out of the practice of law in amounts of $500 or more. It is likely that if this amount is exceeded, Barbara and I will match even more, possibly up to $50,000 to make this a more significant gift.

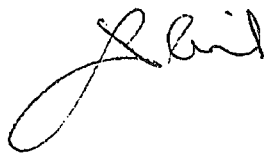
I should say at the outset that Barbara and I derive a great pleasure in gifting in which we do not try to dictate our desires to the recipient, so the decision on precisely how this money is used will be determined by others related to the University and lawyers who have worked with Lukie in his

passions with the Attorneys Title Insurance Fund and the Executive Council of the Real Property, Probate and Trust Law Committee of The Florida Bar.

I know there are many others in Florida who well recognize the amazing attributes of Lukie in his professional, business and family life. No one could ever possess a greater sense of ethical behavior. He never said a negative word about a "member of his union" (even though I could have). He carried his work ethic far beyond any other human being I've ever seen. (It was not unusual to receive an email message from him at 5:00am with these words "CALL ME"). It was only after his death that I learned of other generosities that he bestowed on others without ever saying a boastful word. I could go on, but we'll save that for another time.

Please respond to me to indicate your willingness to participate in this gift. Most everyone is talking about the need in our country to improve Education and here is one chance to match our needs with our deeds. If you want to make a contribution, please make your check payable to the UF Law Center Association and note on the check or an attached letter indicating your gift is for the "Lukie" Ansbacher Endowed Memorial Scholarship. Then mail to the UF Levin College of Law, Attn: Kerrie Mitchell, PO Box 14412, Gainesville, FL 32604-4412.

On behalf of the Ansbacher family and the ideals that Lukie represented, I thank you for your consideration.



The Lewis "Lukie" Ansbacher Endowed Memorial Scholarship at the University of Florida Levin College of Law will be awarded to a law student evidencing an interest and making a contribution to the transaction practice of real property. Phil and Barbara Emmer have pledged to match up to $50,000 to the scholarship. The amount of their match will be determined by the amount raised from family and friends of Lukie Ansbacher. Multi-year pledges are welcome. Please make checks payable to Law Center Association with a note of your intentions to direct your gift to the Lukie Ansbacher Memorial Scholarship.
Contributions can be mailed to:
University of Florida
c/o Kerrie Mitchell
Law Center Association, Inc.
PO Box 14412
Gainesville, FL 32604

Please contact Kerrie Mitchell, Assistant Director of UF Levin College of Law Alumni Affairs and Development, with any questions. She may be reached at 352-392-9296 or via email at mitchell@law.ufl.edu.

Resolution

Of the Executive Council of the Real Property, Probate & Trust Law Section
Of the Florida Bar
Recognizing the Service and Contributions of

Lewis "Lukie" Ansbacher

To the RPPTL Section, the Nation and his Community

Whereas, Lewis "Lukie" Ansbacher, a respected and deeply loved member of the Real Property, Probate & Trust Law Section of The Florida Bar, died at the age of 75 on February 7, 2004; and

Whereas, Lukie, who knew he wanted to be a lawyer since he was 10 years old, graduated from Lee High School in Jacksonville, Florida at the age of 15; and

Whereas, after graduating from the University of Florida, where he earned his undergraduate and law degrees and was a member of Florida Blue Key, Lukie served in the U.S. Army as a member of the JAG Corps during the Korean conflict; and

Whereas, during his service in the Army, Lukie earned his Master of Laws degree from George Washington University in Washington, D.C.; and

Whereas, after completing his service to his country in the mid-1950s, Lukie returned to Jacksonville, set up his law practice and married his wife, Sybil, with whom he raised three sons, Richard, Lawrence and Barry; and

Whereas, Lukie became an active member of the Jacksonville community, where he served as a director of three banks, as an officer of the Jacksonville Jewish Center, as President of the Jewish Family and Community Services organization, and as a member of several Gubernatorial Task Forces; and

Whereas, Lukie also served the Florida Bar and other legal organizations through his service as President of the Jacksonville Legal Aid Society, as a director of Attorneys' Title Insurance Fund, Inc., and as a member of the Executive Council of the Real Property, Probate & Trust Law Section of the Florida Bar; and

Whereas, Lukie's service to the RPPTL Section included his long-standing and dedicated service as the Chair and Vice Chair of the Real Property Division's Legal Forms Committee, and nearly all of the legal forms approved by the Section were originally drafted by Lukie; and

Whereas, one past Chair of the Section noted "Lukie will be missed; he always had such a fine perspective on the details of matters and insightful approaches to all he handled." Another former Chair recalls "He was one of our Council members to whom the Section meant a great deal, personally, as reflected in his attendance over the years and in his kindness to so many of us when we were new lawyers. I had a deal with him years ago; he was attentive to detail and really cared about his clients."

Whereas, the Executive Council of the Real Property, Probate & Trust Law Section of The Florida Bar recognizes the extraordinary dedication and service that Lukie has provided to his nation, his community and The Florida Bar, including the Real Property, Probate & Trust Law Section, during his lifetime and acknowledges that he will be sorely missed.

Now, Therefore, be it resolved by the Executive Council of the Real Property, Probate & Trust Law Section of the Florida Bar that the loss of Lewis "Lukie" Ansbacher is mourned, that his distinguished service and contributions are respected, appreciated and acknowledged, and that his rich contributions to the practice of law, particularly to the practice of real estate law, will be remembered forever.

Unanimously Adopted by the Executive Council of the Real Property, Probate & Trust Law Section of The Florida Bar this 21st day of February, 2004.

Louis B. Guttmann, III, Chair
Real Property, Probate & Trust Law Section of The Florida Bar

Executive Council Meetings
04-05

August 5 - 8, 2004
Legislative Update/Executive Council Meeting
The Breakers, Palm Beach
Group Rate: $149/night
Reservation Cut-Off Date: July 4, 2004
Reservation Number: 1-800-833-3141

October 28 - 31, 2004
Executive Council Meeting/FLEA Seminar
Hyatt Regency, Tampa
Group Rate: $159/single, $169/double/$179 triple/$189/quadruple
Reservtion Cut-Off Date: September 30, 2004
Rerservation Number: 813-225-1234 or 1-800-233-1234

December 1 - 5, 2004
Executive Council Meeting
Colonial Williamsburg, Williamsburg, VA
Group Rate: $115/$125 Woodlands Hotel; $199 Lodge Deluxe; $399 Williamsburg Inn
Reservation Cut-Off Date: November 5, 2004
Reservation Number: 1-800-261-9530

February 10 - 13, 2005
Executive Council Meeting
Tallahassee (hotel TBD)

May 26 - 29, 2005
Convention/Executive Council Meeting
Hyatt Regency, Coconut Point
Group Rate: $159/night
Reservation Cut-Off Date: May 2, 2005
Reservation Number:(239) 444-1234 or 800-233-1234

RPPTL FINANCIAL SUMMARY

July 1, 2003 through April 30, 2004

Revenue:	***$522,391***
Expenses:	***$512,791***
Net:	***$9,600***
Beginning Balance:	***$311,151***
Ending Balance:	***$320,751***

H

RPPTL Financial Summary Breakdown
As of April 30, 2004

General Budget

Revenue:	*$3370,963*
Expenses:	*$385,895*
Net:	*($14,932)*

Legislative Update

Revenue:	*$57,699*
Expenses:	*$55,636*
Net:	*$2,063*

Real Estate Certification Review Course

Revenue:	*$33,819*
Expenses:	*$21,294*
Net:	*$12,525*

Wills, Trusts & Estates Certification Review Course

Revenue:	*$42,546*
Expenses:	*$38,283*
Net:	*$4,263*

Convention

Revenue:	*$21,389*
Expenses:	*$6,446*
Net:	*$14,943*

Attorney / Trust Officer Liaison Conference

Revenue:	*$475*
Expenses:	*$4,977*
Net:	*($4,502)*

BUDGET AMENDMENT

☐ **BOARD OF GOVERNORS**
☐ **EXECUTIVE DIRECTOR**

Budget Amendment # _____
Prepared by/date _____
Dept. approval _____
Division approval _____
F & A _____
Executive Director _____

Fiscal Year 03-04 **Division** Programs

Fund Sections **Program** RPPTL Section

Alpha Unit	Account #	Account Description	Actual Through 4/15/04	Current Budget	Amendment	Proposed Budget
Use of Funds						
RPGNRL	84054	CLE Speaker Expense	$ 6,377	$ 1,500	$ 6,000	$ 7,500
RPGNRL	51101	Employee Travel	$ 4,927	$ 2,893	$ 2,107	$ 5,000
RPGNRL	84016	Scrivener	$ 2,730	$ 2,500	$ 5,500	$ 8,000
RPGNRL	84052	Meeting Travel	$ 161,207	$ 140,000	$ 40,000	$ 180,000
RPGNRL	84201	Board or Council	$ 27,708	$ 25,000	$ 8,000	$ 33,000
RPGNRL	84238	Council Meeting Recreation	$ 22,638	$ 20,000	$ 6,000	$ 26,000
RPGNRL	84241	Spouse Functions	$ 10,989	$ 10,000	$ 4,000	$ 14,000
Source of Funds						
Ending Fund Balance			$ 260,349	$ 350,967	$ (71,607)	$ 279,360

Explanation of Request

CLE Speaker Expense: unforseen expenses related to seminar present in conjunction w/RPPTL Exec. Council Meeting in Hawaii
Employee Travel: unforseen expenses related to Hawaii meeting travel
Scrivener: contract coverage for estate planning research
Meeting Travel: rising costs at hotels and increased attendance at Council meetings. Offset by revenue account: current balance: $41,522
Board or Council: rising costs at hotels; increase in AV equipment usage; increased attendance (F&B) at Exec. Council meetings.
Council Meeting Recreation: rising costs at hotels; increased attendance at Council meetings. Offset by revenue account: current balance $3,655.
Spouse Functions: rising costs at hotels and increased attendance. Offset by revenue account: current balance: $2,110.

Amendment Authority: $78,159;
Amendment Authority After Amendment: $6,552

Posted date	
Posted by	
Period	
Proofed	

17

IN THE DISTRICT COURT OF FLORIDA
FOURTH DISTRICT

CASE NO. 4D03-1954
(L.T. No. P 02-456)

PETER WARBURTON,
appellant,

v.

THOMAS MCKEAN and
JOHN MCKEAN, as co-
personal representatives of
the Estate of Henry Pratt McKean II,
appellees.

REAL PROPERTY PROBATE & TRUST LAW SECTION'S RESPONSE, AS *AMICUS CURIAE*, TO THE MOTIONS FOR REHEARING, REHEARING *EN BANC*, AND CERTIFICATION FILED BY THE APPELLEES AND THE MOTION FOR CLARIFICATION FILED BY THE APPELLANT

The Real Property Probate & Trust Law Section of The Florida Bar befriends the Court and responds to the post-decision motions filed by the appellees and appellant as follows.

INTRODUCTION

The leading cause of cerebral herniation among probate lawyers, real estate lawyers, and circuit court judges sitting in probate is the study of the "legal chameleon," also known as homestead.[1]

The perplexing homestead question before the Court in this case is: If homestead can be freely devised, is it property of the estate subject to division in accordance with the established classifications giving some gifts priority over others?

The answer is: it depends. If the devisee under a will is a person for whom homestead protection was intended, such as "heirs," then the homestead is "protected homestead" and is *not* part of the estate subject to use to pay other devises. If the devisee is not a person for whom the protection was intended or has not waived that protection, then the homestead property has lost its protective status and is simply part of the estate, subject to the payment of devises, creditors and other administration expenses.

[1] The "legal chameleon" moniker appears to stem from a thoughtful study by Harold B. Crosby and George John Miller entitled "Homestead exemption, a legal chameleon in Florida," which may be found beginning at 2 U.Fla.L.Rev. 12 (1949).

Section 731.201(29), Florida Statutes, defines "protected homestead." Section 733.607(1), Florida Statutes, exempts "protected homestead" from the estate and the personal representative's control. Section 733.608(1) (a), Florida Statutes, also exempts "protected homestead" from the probate estate. Section 733.805(1), Florida Statutes, provides the order in which assets abate in order to fund superior devises under a will. Abatement is allowed only with respect to "funds and property of estate," which the previously mentioned statutes indicate does *not* include "protected homestead."

These statutes, which are outcome determinative of the issue before you, were not addressed in the panel's original opinion.

THE FUNDAMENTALS OF HOMESTEAD LAW

As the Court noted in its original opinion, there are three kinds of homestead with one purpose, preserving the family home for its owner and "heirs." The purpose of homestead is accomplished through a tax exemption and the protections from certain devises and forced transfer. The homestead protection at issue here is a protection against forced transfer for use by an estate and is a creature of the Florida Constitution, article X, section 4. To clearly distinguish it in the Florida Probate Code from other forms of

homestead, the Legislature now refers to it as "protected homestead." §731.201(29), Fla. Stat.; 2001-226, Laws of Fla. § 11, eff. Jan. 1, 2002.

Homestead law is to be liberally construed in favor of maintaining the homestead protection. *Snyder v. Davis*, 699 So. 2d 999, 1002 (Fla. 1997)

Homestead vests on death and is not impacted by a later sale. *In re Estate of Hamel*, 821 So. 2d 1276 (Fla. 2d DCA 2002). Florida courts have uniformly held that homestead does not become a part of the probate estate regardless of whether it is devised in a will, unless a testamentary disposition is permitted and is made to someone *other than* a person to whom the benefit of homestead protection could inure. *See Clifton v. Clifton,* 553 So. 2d 192, 194 n. 3 (Fla. 5th DCA 1989) (noting, "[h]omestead whether devised or not, passes outside of the probate estate"); *Cavanaugh v. Cavanaugh,* 542 So. 2d 1345, 1352 (Fla. 1st DCA 1989) (holding transfer of probate jurisdiction to circuit court did not change law that homestead is not asset of probate estate); *Estate of Hamel*, 821 So. 2d at 1279. *See also* § 733.607(1), Fla. Stat. (2000) (requiring a personal representative to take control of all of the decedent's property "except the protected homestead")

"The test is not how title was devolved, but rather to whom it passed." *Bartelt v. Bartelt*, 579 So. 2d 282, 283 (Fla. 3d DCA 1991). If the transfer is

to a member of the protected class, the protection from forced transfer exists. *Id.*

Most of these homestead concepts are codified in The Florida Probate Code, sections 731.201(29), 733.607(1), 733.608(1) (a), and 733.805(1), Florida Statutes.

MOTION FOR REHEARING

Based on our review of the Court's initial opinion, it seems to stand for the proposition that a court can force the sale of protected homestead passing under a residuary clause of a will in order to satisfy general pecuniary devises.[2] To reach that conclusion the Court must have overlooked or misconstrued the legal significance of the controlling statutes. Further, the holding runs counter to the required, liberal and broad interpretation of the homestead law in favor of upholding a person's protection against loss of the homestead.

---

[2] In this case, the testator did not devise "all my real estate to Peter Warburton" or words like it that would have established a general devise of real estate. *See Estate of C.J. Lenahan*, 511 So. 2d 365, 374 (Fla. 1st DCA 1987) ("A general bequest may comprise land, money or intangibles, . . ."); *See Estate of Lindsey*, 300 N.E.2d 572, 573 (Ill. App. Ct. 1973)(The devise "I give and devise any and all other real estate owned by me at the time of my death, except such real estate as is held in joint tenancy, to my five children, * * *" is a general devise); *See Estate of Lansing v. State of New Jersey*, 6 N.J. Tax 137, 149 (N.J. Tax Ct. 1983)(The devise "I give and devise any and all interest which I may have in any real property at the time of my death to my wife, . . ." is a general devise). Hence, the real estate was in the residuary and the only issue is whether it abated to satisfy a general bequest.

This case is all about the abatement of assets passing under a will in order to satisfy superior devises. Section 733.805(1), Florida Statutes, provides the order in which assets abate in order to fund superior devises under a will:

> 1) Funds or property designated by the will shall be used to pay debts, family allowance, exempt property, elective share charges, expenses of administration, and devises, to the extent the funds or property is sufficient. If no provision is made or the designated fund or property is insufficient, *the funds and property of the estate* shall be used for these purposes, and to raise the shares of a pretermitted spouse and children, except as otherwise provided in subsections (3) and (4), in the following order:
>
> (a) Property passing by intestacy.
>
> (b) Property devised to the residuary devisee or devisees.
>
> (c) Property not specifically or demonstratively devised.
>
> (d) Property specifically or demonstratively devised.
>
> (2) Demonstrative devises shall be classed as general devises upon the failure or insufficiency of funds or property out of which payment should be made, to the extent of the insufficiency. Devises to the decedent's surviving spouse, given in satisfaction of, or instead of, the surviving spouse's statutory rights in the estate, shall not abate until other devises of the same class are exhausted. Devises given for a valuable consideration shall abate with other devises of the same class only to the extent of the excess over the amount of value of the consideration until all others of the same class are exhausted. Except as herein provided, devises shall abate equally and ratably and without preference or priority as between real and

> personal property. When property that has been specifically devised or charged with a devise is sold or used by the personal representative, other devisees shall contribute according to their respective interests to the devisee whose devise has been sold or used. The amounts of the respective contributions shall be determined by the court and shall be paid or withheld before distribution is made.

(Emphasis added).

Abatement is allowed *only* with respect to "funds and property of the estate." Section 731.201(12) defines "estate" as used in the Florida Probate Code and provides: "(12) 'Estate' means the property of a decedent that is the subject of administration." So, is "protected homestead" part of the "estate?" For the reasons presented below, the answer is "no."

Section 731.201(29), Florida Statutes, defines "protected homestead:"

> (29) "Protected homestead" means the property described in s. 4(a)(1), Art. X of the State Constitution on which at the death of the owner the exemption inures to the owner's surviving spouse or heirs under s. 4(b), Art. X of the State Constitution. For purposes of the code, real property owned as tenants by the entirety is not protected homestead.

Section 733.607(1), Florida Statutes, exempts "protected homestead" from the estate and the personal representative's control. Section 733.608(1)(a), Florida Statutes, also exempts protected homestead from the probate estate **and expressly from its use to "pay devises."** Further, as previously noted, Florida courts have uniformly held that homestead does not become a

part of the probate estate regardless of whether it is devised in a will, unless a testamentary disposition is permitted and is made to someone *other than* a person to whom the benefit of homestead protection could inure. *See Clifton v. Clifton,* 553 So. 2d at 194 n. 3; *Cavanaugh v. Cavanaugh,* 542 So. 2d at 1352; *Estate of Hamel,* 821 So. 2d at 1279.[3]

Based on the statutes, further supported by the case law, including the required liberal interpretation of the law in favor of the homestead protection, it appears that in this case the Court cannot properly unravel the homestead protection in order to satisfy other devises.

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[3] In the original opinion, the Court cited to *City Nat'l Bank of Fla. v. Tescher*, 578 So. 2d 701 (Fla. 1991) and *Estate of Hill*, 552 So. 2d 1133 (Fla. 3d DCA 1989) for the proposition that "[b]ecause homestead could be freely devised, it was property of the estate subject to division in accordance with the established classifications giving some gifts priority over others." It appears the Court overlooked or misapprehended the true holding in *Tescher*. In that case, as a result of the surviving spouse's waiver of homestead protection in an antenuptial agreement, the person receiving the residuary devise of the residence was not protected by article X, section 4, Florida Constitution. As a result, there was no protected homestead and the property passed as an estate asset. 578 So. 2d at 703. It also appears the Court overlooked or misapprehended the true holding in *Bartelt v. Bartelt*, 579 So. 2d 282 (Fla. 3d DCA 1991) and the significance of that court receding from *Estate of Hill*. *Estate of Hill* holds that a devise by will, rather than intestate transfer, of homestead property to a person other than a spouse or minor eliminates the homestead protection. If true, then, without the protection, the property is indeed part of the estate, as in *Tescher*. In *Bartelt*, the court recognized that the holding in *Hill* was erroneous to the extent a devise of homestead is made to a person who falls within the homestead protection, as we have in this case. 579 So. 2d at 284 ("However, we expressly recede from *Hill* to the extent it can be read to bar devisees who are also the decedent's heirs under Florida law from seeking the protection of Article X, Section 4, of the Florida Constitution upon inheriting the decedent's homestead property.").

Of course, the testator could have changed this result through the preparation of his will. Indeed, if the testator had mandated that the real estate be sold and the proceeds distributed, then we would not be dealing with "protected homestead" and the property would be part of the estate and abatement of the proceeds of the sale would be appropriate. *See Knadle v. Estate of Knadle,* 686 So. 2d 631 (Fla. 1st DCA 1996); *Estate of Price v. W. Fla. Hosp., Inc.,* 513 So. 2d 767 (Fla. 1st DCA 1987). If, however, the property is protected homestead at death and not required by will to be sold, but is later sold, as was done here, the proceeds retain the homestead protection. *See Estate of Hamel,* 821 So. 2d 1276 (Fla. 2d DCA 2002)

Finally, sections 733.608(1)(a) and 733.805 cannot be abrogated by some common law rule, if any, that might have a non-probate asset being employed to satisfy a devise in a will (which devises only probate assets). Indeed, in 733.608(1)(a), the Legislature expressly exempted the use of protected homestead to pay devises and, in 733.805, limited abatement to probate assets (which by definition excludes protected homestead). *See §2.01, Fla. Stat.* (statutes control over common law). And, of course, the common law cannot abrogate the Florida Constitution's protection of

homestead. *See Mathews v. McCain*, 125 Fla. 840, 170 So. 323, 327 (Fla. 1936).

REHEARING *EN BANC*

This case is of exceptional importance. Even the appellant must agree, as he prayed this Court would certify the case to the Supreme Court of Florida. *See* Motion suggesting certification, docketed July 7, 2003.

This Court noted the importance of homestead protections in *Bakst, Cloyd & Bakst v. Cole*, 750 So. 2d 676, 677 (Fla. 4th DCA 1999). Other Courts have also found questions involving homestead to be of exceptional significance. *See Snyder v. Davis*, 699 So. 2d 999 (Fla. 1997); *Public Health Trust of Dade County v. Lopez*, 531 So. 2d 946 (Fla. 1988)

Why is the homestead protection issue before you of exceptional importance? It impacts everyone owning a home and making a will, every lawyer trying to properly examine a title, as well as every lawyer trying to properly advise his or her client of the ramifications of his or her desired estate plan. Because of the statutes and case law previously discussed, we thought we understood the law of homestead regarding this isolated issue. If the law is as the *Warburton* panel indicated in its original decision, that will turn our understanding on its head and may require the immediate review of

many, many wills and titles to real estate. Before that happens, regardless of how the full court might decide the case, it should be reconsidered *en banc*.

For these reasons, I express a belief, based on a reasoned and studied professional judgment, that the panel decision is of exceptional importance.

Goldman Felcoski & Stone, P.A.
4933 Tamiami Trail North
Suite 203
Naples, FL 34103
239.436.1988

Robert W. Goldman, FBN339180

CERTIFICATION TO THE SUPREME COURT

Certification has been a means by which homestead issues have been finally resolved and kept uniform, which is necessary in order to protect Florida titles to property. *See Snyder v. Davis*, 699 So. 2d 999 (Fla. 1997); *Public Health Trust of Dade County v. Lopez*, 531 So. 2d 946 (Fla. 1988). Assuming the Court changes its opinion and follows the above-discussed Florida Statutes and cases, this case will simply fall in line with the balance of jurisprudence on this issue and certification would not be necessary. On the other hand, if the Court decides to break ranks with the statutes, *Bartelt*,

Estate of Hamel, *Cavanaugh*, and *Clifton*, we strongly favor certification in order to obtain uniformity, whether it be certification of conflict or as a matter of great public importance.

CLARIFICATION

The appellant, Peter Warburton, asks this Court to correct its opinion to hold that "protected homestead," as we have here, is *not* "property of the estate." Motion For Clarification at page 6. We agree with him in this regard and sincerely applaud his counsel's professionalism in bringing the point to the Court's attention. Mr. Warburton, however, suggests that this clarification can somehow be made without any further change to the Court's opinion. It seems Mr. Warburton has also overlooked the fact that only property of the estate, not "protected homestead," may be used to pay other devises in the will. Indeed, section 733.608(1) (a), Florida Statutes, very clearly states:

> (1) All real and personal property of the decedent, *except the protected homestead*, within this state and the rents, income, issues, and profits from it shall be assets in the hands of the personal representative:
>
> (a) For *the payment of devises*, family allowance, elective share, estate and inheritance taxes, claims, charges, and

> expenses of the administration and obligations of the decedent's estate.

(Emphasis added.). *See* 733.805(1), Fla. Stat. (abatement is allowed *only* with respect to "funds and property of the estate.").

CONCLUSION

For these reasons, the Real Property Probate & Trust Law Section of The Florida Bar requests that the Court grant rehearing and alter its opinion to conform to The Florida Probate Code, grant rehearing *en banc* for this same purpose, or certify the case to the Supreme Court of Florida as a matter of great public importance or based on conflict with *Estate of Hamel* and the cases cited within it.

Respectfully submitted,

Goldman Felcoski & Stone, P.A.
Counsel for RPP&TL Section
4933 Tamiami Trail North
Suite 203
Naples, FL 34103
239.436.1988

_____
Robert W. Goldman, FBN339180

CERTIFICATE OF SERVICE

I hereby certify that a true copy of this response was furnished by U.S. Mail to Bruce D. Barkett, Esquire, Collins, Brown, Caldwell, Barkett & Garavaglia, Chartered, 756 Beachland Blvd., Vero Beach, FL 32963, Attorney for Appellees, and Troy B. Hafner, Esquire, Gould, Cooksey, Fennell, et al., 979 Beachland Blvd., Vero Beach, FL 32963, Attorney for Appellant, this ____ day of April, 2004.

_____
Robert W. Goldman, FBN339180

REAL PROPERTY, PROBATE AND TRUST LAW SECTION

SEMINAR ATTENDANCE AND FINANCIAL RECORDS

~~1991-1992~~ THRU 2003-2004

2000 - 2001

2003-2004 (AS OF APRIL 30 – FISCAL YEAR NOT OVER)

CLE SEMINARS

Seminar	# of Locations	Attendance	Audio/Video/Books	Section Share	Bar Share*
Mortgage Law (Sept)	8 (canceled Ft. Laud)	154	134 / 23 / 34	$3,391	$5,112
Charitable Planning (October)	6 (canceled Ft. Laud, ORL, JAX)	50	65 / 3 / 16	1,490	2,991
Mobile Home (October)	1	55	41 / 3 / 22	0	-994
Estate Planning (Dec)	1 (canceled all but Tampa)	46	99 / 6 / 21	0	0
Governmental Regulation of Land Use	0 (canceled)	0	0 / 0 / 0	0	0
Probate Litigation (February)	9	406	128 / 14 / 52	0	0
Construction Law (March)	2 (canceled Ft. Laud)	71	75 / 9 / 27	0	0
Condominium Law (March)	1 (canceled all but ORL)	82	84 / 7 / 43	0	0
TOTALS	**28**	**864**	**626 / 65 / 215**	**$4,881**	**$7,109**

* Bar Share does not reflect overhead expenses, i.e, employee time, labels, word processing, typesetting, mailing, printing.

ATTENDANCE BREAKDOWN

Mortgage Law		Charitable Planning		Mobile Home	
Tampa	66	Tampa	25	Tampa	43
Orlando	17	West Palm Beach	12		
Jacksonville	18	Tallahassee	1		
West Palm Beach	23	Sarasota	4		
Tallahassee	11	Pensacola	1		
Ft. Myers	8				
Sarasota	13				
Pensacola	11				

Estate Planning		Probate Litigation		Construction Law	
Tampa	46	Tampa	140	Tampa	71
		Orlando	36		
		Jacksonville	19		
		West Palm Beach	48		
		Tallahassee	4		
		Ft. Myers	18		
		Sarasota	39		
		Pensacola	90		
		Miami Lakes	12		

Condominium Law	
Orlando	82

SECTION SERVICE PROGRAMS

Program	# of Attendees	Audio/Book Sales	Section Share	Bar Share
Legislative Update (July)	370	0 / 0	$2,063	0
Wills, Trusts Cert Review (April)	138	0 / 0	9,900	0
Real Estate Cert Review (April)	106	0 / 0	3,625	0
Convention (May)	0	0 / 0	0	0
Attorney/Trust Conf (June)	0	0 / 0	0	0
TOTALS	**614**	**0 / 0**	**$15,588**	**$ 0**

2002-2003

CLE Seminars

Seminar	# of Locations	Attendance	Audio/Video/Books	Section Share	Bar Share*
Construction Law	1 (canceled Ft. Laud)	36	64 / 17 / 9	-$7,469	$0
Principal & Income Act	9 (canceled 1 video)	178	133 / 20 / 33	-3,299	0
Landlord Tenant	0 (canceled)	0	0 / 0 / 0	-4,165	0
Condominium Law	0 (canceled)	0	0 / 0 / 0	0	0
Real Property Litigation	10	237	155 / 16 / 31	5,177	7,515
Estate & Trust Litigation	8	321	139 / 21 / 46	9,564	19,774
Estate Planning	8	245	195 / 22 / 36	5,445	7,624
TOTALS	**36**	**1,017**	**686 / 96 / 155**	**$5,253**	**$34,913**

Audiotape, Videotape and Book Sales = $29,066 revenue for Section (in addition to "Section Share").
* Bar Share does not reflect overhead expenses, i.e, employee time, labels, word processing, typesetting, mailing, printing.

Attendance Breakdown

Construction Law		Principal & Income Act		Real Property Litigation	
Ft. Lauderdale	0 (canceled)	Ft. Lauderdale	38	Ft. Lauderdale	53
Tampa	38	Tampa	37	Tampa	50
		Jacksonville	15	Orlando	23
		Orlando	15	Jacksonville	10
		Pensacola	2	West Palm Beach	16
		West Palm Beach	25	Tallahassee	11
		Ft. Myers	14	Ft. Myers	19
		Sarasota	30	Sarasota	11
		Miami	0 (canceled)	Miami	15
				Pensacola	12

Estate & Trust Litigation		Estate Planning	
Miami	78	Ft. Lauderdale	82
Tampa	135	Tampa	72
Jacksonville	15	Jacksonville	13
Orlando	24	Orlando	25
Tallahassee	7	Tallahassee	6
West Palm Beach	42	Ft. Myers	19
Ft. Myers	27	Pensacola	7
Pensacola	10	Sarasota	21
Sarasota	0 (canceled)		

Section Service Programs

Program	# of Attendees	Audio/Book Sales	Section Share	Bar Share
Legislative Update	445	128 / 30	-$26,097	$0
Wills, Trusts Cert Review	114	62 / 49	11,818	3,214
Real Estate Cert Review	115	46 / 28	9,317	6,000
Convention	210	0 / 0	-21,803	0
Attorney/Trust Officer Conf	300	0 / 9	-84,302	0
TOTALS	**1,184**	**236 / 116**	**-$111,067**	**$9,214**

2001-2002

CLE Seminars

Seminar	# of Locations	Attendance	Audio/Video/Books	Section Share	Bar Share*
Prof. Powell Adv. Tax	1	24	46 / 6 / 52	-$6,006	$0
Survey Law	8	209	110 / 25 / 36	7,708	9,865
Mortgage Law	10	192	161 / 19 / 24	4,322	8,178
Estate Planning	6	213	177 / 22 / 42	3,898	6,335
Probate Litigation	9	252	171 / 31 / 31	9,435	14,124
Elective Share	10	350	268 / 30 / 68	10,107	13,130
Mobile Home	9	70	59 / 6 / 13	0	-4,264
Land Trust	8	73	91 / 17 / 47	634	364
Construction Law	2	111	88 / 18 / 17	3,527	2,327
TOTALS	**63**	**1,494**	**1,171 / 174 / 330**	**$33,625**	**$50,059**

Audiotape, Videotape and Book Sales = $46,136 revenue for Section (in addition to "Section Share").
* Bar Share does not reflect overhead expenses, i.e, employee time, labels, word processing, typesetting, mailing, printing.

Attendance Breakdown

Prof. Powell Adv. Tax		Survey Law		Mortgage Law	
Tampa	26	Tampa	105	Ft. Lauderdale	52
		Orlando	27	Tampa	46
		Jacksonville	34	Orlando	20
		Miami	6	Jacksonville	14
		Tallahassee	14	Miami	13
		Pensacola	5	Sarasota	20
		West Palm Beach	15	Tallahassee	4
		Ft. Lauderdale	21	West Palm Beach	12
		Sarasota	20	Pensacola	8
				Ft. Myers	15

Estate Planning		Probate Litigation		Elective Share	
Ft. Lauderdale	77	Ft. Lauderdale	84	Miami	90
Tampa	55	Tampa	51	Tampa	12
Tallahassee	7	Orlando	51	Jacksonville	22
Pensacola	4	Jacksonville	12	Sarasota	38
Jacksonville	16	Tallahassee	1	West Palm Beach	60
Sarasota	24	West Palm Beach	35	Tallahassee	7
Orlando	26	Pensacola	10	Pensacola	8
		Ft. Myers	12	Ft. Myers	17
		Sarasota	30		

Mobile Home		Land Trust		Construction Law	
Ft. Lauderdale	0	Tampa	32	Ft. Lauderdale	55
Tampa	40	Miami	0	Tampa	45
Pensacola	4	Jacksonville	10		
West Palm Beach	10	West Palm Beach	18		
Ft. Myers	3	Orlando	14		
Sarasota	0	Pensacola	5		
Orlando	10	Tallahassee	3		
Jacksonville	0	Ft. Myers	13		
Tallahassee	2				

2000-2001

CLE Seminars

Seminar	# of Locations	Attendance	Audio/Video/Books	Section Share	Bar Share*
Probate Litigation	11	360	160 / 38 / 58	$9,820	$23,458
Powell Probate Seminar	1	120	160 / 0 / 20	60	-1,908
Title Issues in Estate Planning	10	340	234 / 29 / 87	5,071	15,130
Ethics & Professionalism for Trust & Estate Lawyers	1	57	185 / 0 / 5	465	-3,068
Estate Planning in New Mill.	11	221	124 / 8 / 40	5,345	4,175
Land Use	10	131	85 / 7 / 23	2,525	3,817
Construction Law	2	96	40 / 3 / 10	1,095	-1,870
TOTALS	**46**	**1,325**	**988 / 85 / 243**	**$24,381**	**$39,734**

*Audiotape, Videotape and Book Sales = $38,097 revenue for Section (in addition to "Section Share".
Canceled Seminars: Fees in Estate Planning, Guardianship Law, Landlord Tenant, and Real Estate Litigation.

Attendance Breakdown

Probate Litigation		Powell Probate Seminar		Title Issues in Estate Planning	
Miami	80	Tampa	120	Miami	55
Tampa	107			Tampa	75
Ft. Lauderdale	31			West Palm Beach	33
Orlando	25			Sarasota	25
West Palm Beach	47			Jacksonville	19
Tallahassee	3			Ft. Lauderdale	31
Sarasota	9			Orlando	42
Jacksonville	17			Pensacola	10
Naples	3			Naples	14
Pensacola	6			Ft. Myers	14
Ft. Myers	16				

Ethics & Professionalism for Trust & Estate Lawyers		Estate Planning in New Millennium		Land Use Law Update	
Tampa	57	Miami	35	Miami	0
		Tampa	35	Tampa	38
		Jacksonville	20	Orlando	16
		Ft. Lauderdale	29	Ft. Lauderdale	11
		West Palm Beach	27	Sarasota	7
		Sarasota	20	Tallahassee	11
		Tallahassee	5	Jacksonville	13
		Naples	6	Naples	8
		Orlando	20	Pensacola	8
		Pensacola	6	Ft. Myers	10
		Ft. Myers	9	West Palm Beach	9

Construction Law	
Ft. Lauderdale	41
Tampa	40

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LEGISLATIVE REPORT

PRELIMINARY NUMERICAL INDEX SUMMARY OF 2004 LEGISLATIVE ISSUES

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RPPTL Legislative Counsel

The 2004 Regular Session of the Legislature produced a variety of changes that will affect the practice areas of RPPTL Section members, many of which were a part of the Section's legislative package. With the Session recently concluded, only one of the measures has been acted on by the Governor. The balance of legislation will now make its way to the Governor's desk for final action which will take until the middle of June. The full text of each enrolled bill and its status with the Governor's Office is available on the legislative website (www.leg.state.fl.us). A summary of each measure that passed follows below in numerical bill order.

CS/CS/SB 162 (Local Government Development Orders): The bill creates ss. 163.3167 providing that a local government development order may not be invalidated after the initial appeal period has expired based upon a deficiency in the approval standards. ***(Chapter 2004- , Laws of Florida.)***

HB 325 (Mobile Homes-Relocation Trust Fund): The bill makes a technical change to clarify that payments by the park owner when the use of the mobile home park are changed are to be made to Mobile Home Relocation Corporation. ***(Chapter 2004-13, Laws of Florida.)***

CS/CS/HB 461 (Commercial Broker's Lien): The bill provides for a broker's lien for commissions and other fees in commercial real estate transactions. ***(Chapter 2004 - , Laws of Florida.)***

HB 511 (Neighborhood Crime Watch Programs): The bill recognizes neighborhood crime watch programs and creates penalties for persons who harass, intimidate or threatened participants in the program. ***(Chapter 2004-18, Laws of Florida.)***

HB 529 (Conveyance of Real Property): The bill was supported as a Section initiative, and it clarifies section 689.07, confirming the generally accepted and broadly relied upon interpretation that conveyance of real property by a person identified as a trustee conveys the property held in trust if the trust or the date of the trust is identified. ***(Chapter 2004-19, Laws of Florida.)***

HB 539 (Developments of Regional Impact): The bill clarifies the guidelines in a multiuse developments of regional impact and modifies the extension of time provisions governing areawide DRIs. ***(Chapter 2004-10, Laws of Florida.)***

CS/CS/CS/CS/SB 700 (Baker Act-Involuntary Placement): The bill makes a series of changes to the Baker Act and creates new procedures for involuntary out-patient placement of patients. ***(Chapter 2004- , Laws of Florida.)***

CS/CS/SB 712 (Eminent Domain-Records Confidentiality): The bill provides confidentiality for property owner business documents and records in eminent domain proceedings involving business damages. ***(Chapter 2004- , Laws of Florida.)***

HB 1009 (Landlord/Tenant-Display of U.S. Flag): The bill adds ss. 83.67 (4) to provide that a landlord may not prohibit a tenant from displaying a United States flag that does not exceed 4 ½ feet by 6 feet in a respectful manner. ***(Chapter 2004- , Laws of Florida.)***

CS/CS/CS/SB 1184 (Community Associations): The bill is a comprehensive package of changes to condominium and homeowners' associations laws. Many of the changes also appear in **CS/CS/CS/SB 2984**. The bill contains two Section initiatives (correction to the reserve waiver provision for limited common elements and the revision to the disclosure requirements in residential real estate closings). By section the bill does the following ***(Chapter 2004- , Laws of Florida.)***:

Section 1 amends ss. 718.111 (12) and provides immunity from liability to the association for information provided to a prospective purchaser or lienholder if the person providing the information did so in good faith.

Section 2 amends ss. 720.303 (2) and requires at least 14-day written notice to all association members when an assessment will be levied or when rules regulating use of property in the community are being adopted, amended or revoked.

Section 3 amends ss. 768.1325 (3) and (4) and provides immunity from liability when a condominium or homeowners' association provides an automated external defibrillator device for its members and guests and provides for proper maintenance and training. It also provides that an insurer may not require the association to purchase medical malpractice insurance for maintaining the defibrillator.

Section 4 amends ss. 718.112 (1) and (2) by clarifying the voting requirements when waiving reserves (RPPTL initiative) and clarifies the voting procedures when an association seeks to waive the installation of fire sprinklers.
Section 5 creates s. 718.5015 re-establishing the Advisory Council on Condominiums.
Section 6 creates the office of Condominium Ombudsman.
Section 7 provides for the powers and duties of the Ombudsman.
Section 8 provides for the office location of the ombudsman.
Section 9 amends ss. 719.1055 and clarifies the voting procedures when an association seeks to waive the installation of fire sprinklers in a cooperative
Section 10 amends ss 718.503 (2) and reinstates the requirement for the delivery of the Frequently Asked Question and Answer Sheet when a condominium unit is resold.
Section 11 creates new ss. 720.401 (1) and (2) and establishes the public policy foundation and the purpose for the revival of the community covenants.
Section 12 creates new ss. 718.402 (1) and (2) providing that all communities that were previously governed by covenants which have now expired are eligible to use the process to revive the documents.
Section 13 creates new ss. 718.403 (1) through (6) establishing the process for providing notice to the residents, confirming the contents of the governing documents, and providing for a vote of the community.
Section 14 creates new ss. 718.404 (1) and (2) and provides that if a majority of the residents approve of the revival of the covenants, then a filing with the Department of Community Affairs will be made to confirm that the revival process has been correctly completed.
Section 15 creates new ss. 718.403 (1) through (5) and provides that once approved by the Department of Community Affairs, the covenants will be recorded with the Clerk of the Court, and that the covenants will be revived upon the recording.
Section 16 amends ss. 720.301 (5), (8) and (10) clarifying the membership definition in Chapter 720 and providing for consistent definitions for the new consumer protections in the bill.
Section 17 amends ss. 720.302 (2) and (3) to provide implementing authority for alternative dispute resolutions in mandatory homeowners' associations.
Section 18 amends ss. 720.303 (1), (2), (5), (7), (8) and (10) restricting small communities for enforcing amended restrictions; granting owners the right to attend and speak at board meetings; requiring notice of meetings where a special assessment will be considered; expanding the rights of owners to have access and copy association records; providing for annual financial reports; prohibiting the developer's use of association funds to defend civil or criminal actions; and providing for recall of members of the board of directors.
Section 19 amends ss. 720.304 (2), (4), (5) and (6) permitting parcel owners to fly service flags and the flag of Florida; prohibiting SLAPP suits against home owners; permitting owners to construct access ramps for residents with disabilities; and permitting owner to display a sign of a security service.

Section 20 amends ss. 720.305 (2) providing that a fine by the board of directors cannot be a lien.
Section 21 creates new ss. 720.3055 providing for bidding of association contracts.
Section 22 amends ss. 720.306 (5), (6) and (9) providing for 14-day notice for members meetings; granting the right to speak at all members meetings; and providing that election disputes must be submitted to arbitration.
Section 23 amends ss. 720.311 (1) and (2) providing for alternative dispute resolution procedures for disputes in mandatory homeowners' associations.
Section 24 creates ss. 718.110 (13) to provide that when amendments are made to rental restrictions in a condominium, the change does not apply to owners who do not approve the change until their units are sold.
Sections 25 through 27 create ss. 720.601 and 720.3086 and are the Section initiatives to clarify the required resale disclosures in mandatory homeowners' associations.
Section 28 creates ss. 720.602 (1) and (2) that prohibit the publication by false and misleading information by the developer of a mandatory homeowners subdivision.
Section 29 amends ss. 34.01 and extends county court jurisdiction to disputes in mandatory homeowners' associations.
Section 30 amends ss. 316.00825 to make a technical conforming change to the new definitions in the bill.
Section 31 amends ss. 558.002 (2) to make a technical conforming change to the new definitions in the bill.
Section 32 provides for naming of the new parts of the Chapter governing homeowners' associations.
Section 33 amends ss. 190.012 and provides for the enforcement of rules and covenants within a CDD under limited circumstances.
Section 34 amends ss. 190.046 (2) and (9) and provides that all financial obligations must be satisfied before a CDD is terminated.
Section 35 amends ss. 190.006 (1), (2) and (3) to provide for modified election procedures when homeowners are taking control of the board of directors of a CDD.
Section 36 amends ss. 718.5012 to provide for new election monitoring procedures under the office of the Condominium Ombudsman.

CS/SB 1208 (Timeshare Estates-Personal Property): The bill adds provisions to the Florida Timeshare Act to permit the timesharing of personal property, including ships, vessels, houseboats and recreational vehicles. ***(Chapter 2004- , Laws of Florida.)***

CS/CS/SB 1456 (Dedicated Roadways): SB 1456 is the Session's comprehensive transportation bill. Section 14 of the bill makes minor revisions to ss 95.361 (2) and (5) to exempt electric utility easements from the roadways that are continuous maintained by state, county or municipal governments. ***(Chapter 2004- , Laws of Florida.)***

CS/CS/SB 1712 (Agricultural Lands-Change in Land Use): The bill deals with several agricultural land planning issues. It creates a cause of action under the Bert Harris Private Property Rights Act when down-zoning occurs, it provides special protection for "agricultural enclaves," and permits agricultural uses under a lease to continue for the balance of the lease term when the property is sold. ***(Chapter 2004- , Laws of Florida.)***

SB 1728 (Condominiums-Waiver of Handrail Installation): The bill amends permits a senior adult condominium community to vote to waive the installation of guard rails. ***(Chapter 2004- , Laws of Florida.)***

CS/SB 1782 (Office of the Statewide Guardian): The bill deals primarily with the Office of Statewide Guardian. Sections 7 through 9 of the bill amend ss.393.063 (25), 393.12 (2), 744.102 (10) to provide for a guardian advocate for a person with developmental disabilities. Section 11 creates 744.3085 and provides that a guardian advocate may be appointed for a person with developmental disabilities without an adjudication of incapacity. ***(Chapter 2004- , Laws of Florida.)***

HB 1853 (Citrus Canker): The bill modifies the notice procedures in the Citrus Canker Eradication Program and reduces the compensation for homeowners from $100 per tree to $55 per tree. ***(Chapter 2004- , Laws of Florida.)***

HB 1899 (Construction Defects-Pre-suit Procedures): This bill revises the pre-suit procedures for construction defect claims on residential real properties. The bill was a Section initiative from the Construction Law Committee. ***(Chapter 2004- , Laws of Florida.)***

CS/SB 1970 (Mediation): The bill creates the Mediation Confidentiality and Privilege Act. ***(Chapter 2004- , Laws of Florida.)***

CS/SB 2188 (Land Planning and Redevelopment): The act revises procedures for rural land stewardship; encourages urban infill and transfer of development rights in the comprehensive planning process; creates an optional definition for "accessory dwelling unit" to encourage affordable housing; and expands the water supply planning component of local government comp plans. ***(Chapter 2004- , Laws of Florida.)***

CS/SB 2444 (Ad Valorem Taxes-Disclosure): Section 5 of the ad valorem tax bill creates new Section 689.261, F.S., requiring the delivery of an ad valorem tax disclosure summary in all residential real estate closings. The new disclosure takes effect on January 1, 2005. ***(Chapter 2004- , Laws of Florida.)***

HB 2484 (Citrus Canker): The bill creates a new agricultural warrant procedure under the Citrus Canker Eradication Program for the removal of diseased citrus trees. ***(Chapter 2004- , Laws of Florida.)***

CS/SB 2666 (Landlord/Tenant): The bill amends Section 83.575, F.S., requiring written notice by the landlord of fees and penalties for early termination of a lease for a specific duration. ***(Chapter 2004- , Laws of Florida.)***

CS/SB 2696 (Public Construction Projects-OCIPs): The bill restricts public agency owner-controlled insurance programs in construction projects and requires liability insurers to offer coverage from liability arising out of current or contemplated OCIP programs. ***(Chapter 2004- , Laws of Florida.)***

CS/CS/SB 2962 (Article V Revisors Bill-Timeshare Foreclosure Procedures): The bill makes final revisions to the Constitutional amendment revising Florida's court system. It also contains the Section's initiative simplifying the foreclosure of timeshare estates is Section 74 of the bill, and in Section 17 of the bill, the service charge on petitions seeking summary administration, guardianship, curatorship, and conservatorship is increased for $2.50 to $4.00. ***(Chapter 2004- , Laws of Florida.)***

CS/CS/SB 2984 (Community Associations, Condominiums and Revival of Covenants): The bill contains all of the same provisions that are found in **CS/CS/CS/SB 1184** except for those in Sections 5 through 8 and Section 36 of that bill. It also includes an amendment to ss. 718.103(16) exempting for governments who lease property from the definition of developer that is not included in CS/CS/CS/SB 1184. ***(Chapter 2004- , Laws of Florida.)***

CS/CS/SB 2994 (Mobile Home Parks, Unclaimed Property, Holocaust Survivors and Annuity Sales): The bill is a comprehensive package dealing with the Department of Financial Services. It also contains four sections of interest to Section members.

Section 13 of the bill amends ss. 501.212 (4) to exempt causes of action pertaining to certain commercial real estate (primarily mobile home parks) from the Deceptive and Unfair Practices Act.

Sections 110 through 144 make revisions to Florida's Unclaimed Property Act.

Section 145 of the bill was added by an amendment by Senator Klein creating ss. 732.103 (6) to allow heirs of a victim of the Holocaust to claim assets in an intestate estate though lineal descendants extend back to the level of great grandparents.

Section 146 creates new ss. 627.4554 to provide protections and disclosure for "senior consumers" purchasing annuity products.

(Chapter 2004- , Laws of Florida.)

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The 2003 – 2004 RPPTL Law School Liaison Meetings with Students

In order to further educate and hopefully interest future Florida lawyers to join the Real Property, Probate Trust Law Section of the Florida Bar, the RPPTL Law School Liaison Committee organized and held student meetings at eight Florida law schools this school year. The student meetings, held October 2003 through March 2004, were attended by more than 340 law school students. The RPPTL Law School Liaison student meetings introduced law school students to newly practicing real property, probate trust law attorneys, giving students the chance to learn about the transition from law school to law practice. Florida State University School of Law students got to learn about another transition as well: the one from real estate lawyer to Supreme Court Justice.

The open meetings allowed young attorney panelists, who have been practicing law for five or fewer years, to answer students' questions ranging from how to distinguish one's cover letter to how many hours of work students can expect in their first year of practice. Besides answering student questions, the attorney panelists also warned law students against typical first year of practice pit-falls and bantered back and forth amongst themselves regarding their area of practice. The panelists' diverse backgrounds gave students humorous and informative insight into life after law school.

The key presenter at the Florida State University School of Law was the newest Florida Supreme Court Justice Kenneth B. Bell, who spoke at the invitation of RPPTL Section Liaison Coordinator, Fred Dudley. Justice Bell also discussed the value of title insurance and his own role as a real estate attorney with First American Title Insurance Company.

Tampa attorney, Phillip A. Baumann, is the Chair of the RPPTL Section's Law School Liaison Committee. "These meetings were especially successful this year due to the animated support of all those involved," said Baumann. "We thank the law school administrators, who helped advertise and promote the events and are also grateful to the coordinators and panelists who organized and presented the meetings," he said.

The following are the names of attorney coordinators and panelists, all of whom enthusiastically presented the 2003 – 2004 RPPTL Law School Liaison effort:

Attorneys' Names	Schools of Law	Role
Adams, Christine T.	Florida Coastal	presenter
Bell, Kenneth B.	Florida State University	presenter
Bruce, Derek	Barry University & Florida A&M University	presenter
Burke, Anna Mae	Nova Southeastern University	presenter
Burket, Dale	Florida A&M University	presenter
Byrnes Jr., David	Barry University & Florida A&M University	presenter
Campo, John	University of Florida	presenter
Chung-de Cambre, Rhonda	University of Florida & University of Miami	coordinator
Copeland, Dan M.	Florida Coastal	presenter
Craig II, James M.	Florida Coastal	presenter
Dudley, Fred	Florida State University	coordinator
Dwyer, Marc E.	Florida Coastal	presenter
Eaton, Jennifer	University of Miami	presenter
Faehner, Michael	University of Florida	presenter
Foster, Joanne	University of Miami	presenter
Franco, Larry	Nova Southeastern University	presenter
Godat, Mickey	Barry University & Florida A&M University	presenter
Griffen, Jennifer L.	Stetson University	presenter
Jones, Teri M.	Barry University & Florida Coastal School of Law	coordinator
Jorge, Michelle	University of Miami	presenter
Joyner, Odessia	Florida A&M University	presenter
Kelly III, James Burnett	University of Florida	presenter
Kirwin, Michael	Florida A&M University	presenter
La Joie, John	Florida State University	presenter
Lash, Robert	University of Florida	presenter
Lent, Christine E.	Stetson University	presenter
McCoskey, Gregory	Stetson University	coordinator
Mendez, Celia	Barry University & Florida A&M University	presenter
October, Zinelle	Barry University	presenter
Ourednik IV, Karel	Florida Coastal	presenter
Parker, Jessica M.	Barry University	presenter
Pinnock, Duane	University of Miami	presenter
Rawls, Rodney	University of Miami	presenter
Reynolds, Heather M.	Florida Coastal	presenter
Richardson, Philip Wade	Barry University	presenter
Rieman, Alexandra	Nova Southeastern University	coordinator
Russo Hanley, Lydia	Florida Coastal	presenter
Seagle, Joseph E.	Barry University	presenter
Socarras, Raul	Barry University	presenter
Townsend, Nathan	Florida A&M University	presenter
Vasti, Peter J.	Stetson University	presenter
Walker, Glorimil R.	University of Florida	presenter

2003–2004 RPPTL Meeting Sponsors

Sponsors: / Exhibitors:

Executive Council Meeting/Legislative Update July 31 - August 3, 2003, The Breakers, Palm Beach
Total Received: $24,000, Exhibitor Revenue: $6,325

	Amount	Date Received
Section Suite		
LandAmerica (for year)	$2,000	8/12/03
Seminar Sponsor/Friday/Breakfast		
ATIF	$8,500	7/29/03
Welcome Reception		
Fidelity	$2,000	7/24/03
Friday Dinner		
First American	$2,500	8/5/03
Lowry Hill	$2,500	8/6/03
Real Property Roundtable Breakfast		
Chicago Title/Ticor Title	$2,000	8/11/03
Executive Council Lunch		
Stewart Title	$2,500	8/8/03
Saturday Reception		
AmSouth	$2,000	4/19/04

Executive Council Meeting/November 6 - 9, 2003, Hilton, Pensacola
Total: $18,000

Section Suite		
LandAmerica	$2,000	8/12/03
Breakfasts		
ATIF	$2,500	10/29/03
Welcome Reception		
Fidelity	$2,000	10/24/03
Friday Dinner		
First American	$2,500	10/21/03
Lowry Hill	$2,500	11/13/03
Real Property Roundtable Breakfast		
Chicago Title/Ticor Title	$2,000	4/7/04
Executive Council Lunch		
Stewart Title	$2,500	11/24/03
Saturday Reception		
AmSouth	$2,000	4/19/04

Executive Council Meeting/January 22 - 25, 2004, Hilton, Ocala
Total: $15,500

Section Suite		
LandAmerica	$2,000	8/12/03
Breakfasts		
ATIF	$2,500	1/28/04
Welcome Reception		

Fidelity	$2,000	1/12/04
Friday Dinner		
First American	$2,500	1/16/04
Lowry Hill	-	-
Real Property Roundtable Breakfast		
Chicago Title/Ticor Title	$2,000	4/7/04
Executive Council Lunch		
Stewart Title	$2,500	1/23/04
Saturday Reception		
AmSouth	$2,000	4/19/04

Executive Council Meeting/Waikoloa Marriott, Hawaii

Total: $26,000

OVERALL SPONSOR		
ATIF	$10,000	12/22/03
Section Suite		
LandAmerica	$2,000	8/12/03
Breakfasts		
ATIF	$2,500	2/11/04
Welcome Reception		
Fidelity	$2,000	2/10/04
Friday Dinner		
First American	$2,500	2/6/04
Lowry Hill	$2,500	3/3/04
Real Property Roundtable Breakfast		
Chicago Title/Ticor Title	$2,000	2/9/04
Executive Council Lunch		
Stewart Title	$2,500	11/24/03

Executive Council Meeting/CONVENTION, Hilton, Key West

Total:

Section Suite		
LandAmerica	$2,000	8/12/03
Breakfasts and Friday Luncheon		
ATIF	$8,500	4/28/04
Welcome Reception		
Fidelity	$2,000	4/23/04
Friday Dinner		
First American	$2,500	4/21/04
Real Property Roundtable Breakfast		
Chicago Title/Ticor Title	$2,000	5/3/04
Executive Council Lunch		
Stewart Title	-	-
Saturday Reception		
AmSouth	$2,000	5/3/04

Attorney Trust Conference, June 17 - 20, Ritz Carlton, Naples

Total:		
Bank of America	$6000	4/26/04
Mellon Bank	$1500	10/20/03
Mellon Bank	$1500	1/15/04
Sun Trust	$1500	4/14/04
Willmington Trust	$1500	4/14/04
U.S. Trust	$2500	4/19/04
Bessemer Trust	$2500	5/6/04
Northern Trust	$3000	2/12/04
Marsh Private Client Services	$3000	4/15/04
Wachovia Trust	$3500	4/7/04
Lowry Hill	$1500	4/19/04
Deutsche Bank	$1500	4/19/04
McCarthy Summers PA	$500	3/1/04
Greenberg Traurig	$500	3/3/04
Fowler White	$500	3/3/04
James Ridley	$500	3/5/04
Pressley & Pressley	$500	3/8/04
Proskauer Rose	$500	3/11/04
Tescher Gutter Chaves	$500	3/9/04
Landis Graham French	$500	4/2/04
Dunwody White & Landon	$500	4/5/04
Holland & Knight	$500	3/23/04
Blank Rome LLP	$500	3/23/04
Akerman Senterfitt	$500	3/24/04
Shutts & Bowen	$500	4/16/04
Laird Lile	$500	4/14/04
Greenspoon Marder	$500	4/12/04
Goldman & Felcoski	$500	4/8/04
Exhibitors		
Firstat	$500	3/31/04
Firstlantic Healthcare, Inc.	$500	3/23/04
Wachovia Bank/St. Joe Land Co.	$500	12/29/03

LEGISLATIVE POSITION REQUEST FORM

GOVERNMENTAL AFFAIRS OFFICE

Date Form Received _____

GENERAL INFORMATION

Submitted By The Condominium and Plan Development Committee of the Real Property Probate an Trust Law Section (Michael J. Gelfand, Vice Chair)

Address Michael J. Gelfand, %Gelfand & Arpe, P.A., Regions Bank Building, Suite 1220, 1555 Palm Beach Lakes Boulevard, West Palm Beach, FL 33401; (561) 655-6224.

Position Type RPPTL and Committee

CONTACTS

Board & Legislation Committee Appearance _____
(List name, address and phone number)

Appearances before Legislators _____
(List name and phone # of those appearing before House/Senate Committees)

Meetings with Legislators/staff _____
(List name and phone # of those having face to face contact with Legislators)

PROPOSED ADVOCACY

All types of partisan advocacy or nonpartisan technical assistance should be presented to the Board of Governors via this request form. All proposed legislation that has *not* been filed as a bill or a proposed committee bill (PCB) should be attached to this request in legislative format - Standing Board Policy 9.20(c). Contact the Governmental Affairs office with questions.

If Applicable, List The Following _____ (Bill or PCB #) _____ (Bill or PCB Sponsor)

Indicate Position XXX Support ____ Oppose ____ Technical Assistance Other _____

Proposed Wording of Position for Official Publication: Provides owners of parcels within a community a practical method to terminate on outdated condominium concept and to replace the condominium with a concept that is more apt to be sellable.

Reasons For Proposed Advocacy: The Florida Bar Condominium and Planned Development Committee proposes this amendment to further the legislature's policy of permitting owners a practical process to ensure the value of their property. Beginning with Hurricane Andrew and furthered by changing market conditions throughout the state a missing owner or an intragient owner can veto positive change, holding other owners hostage. This seeks to cure the situation by specifying a workable process for terminating a condominium.

PRIOR POSITIONS TAKEN ON THIS ISSUE

Please indicate any prior Bar or section positions on this issue to include opposing positions. Contact the Governmental Affairs office if assistance is needed in completing this portion of the request form.

Most Recent Position Last year the Section and the Bar approved the committee's recommendation.

Others
(May attach list if more than one)

_____
(Indicate Bar or Name Section) (Support or Oppose) (Date)

REFERRALS TO OTHER SECTIONS, COMMITTEES OR LEGAL ORGANIZATIONS

The Legislation Committee and Board of Governors do not typically consider requests for action on a legislative position in the absence of responses from all potentially affected Bar groups or legal organizations - Standing Board Policy 9.50(c). Please include all responses with this request form.

Referrals

1. _____
(Name of Group or Organization) (Support, Oppose or No Position)

2. _____
(Name of Group or Organization) (Support, Oppose or No Position)

3. _____
(Name of Group or Organization) (Support, Oppose or No Position)

Please submit completed Legislative Position Request Form, along with attachments, to the Governmental Affairs Office of The Florida Bar. Upon receipt, staff will further coordinate the scheduling for final Bar action of your request which usually involves separate appearances before the Legislation Committee and the Board of Governors unless otherwise advised. For information or assistance, please telephone (904) 561-5662 or 800-342-8060, extension 5662.

An act relating to termination of condominiums: amending s. 718.117; and, providing for an effective date.

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

Section 1. Section 718.117, Florida Statutes, is amended to read:

718.117. Termination

(1) Unless **(1) Except as provided in subsection (2), and unless** otherwise provided in the declaration, the condominium property may be removed from the provisions of this chapter only ~~by~~ **with the** consent of ~~all~~ **not less than 80% of the voting interests** of the unit owners, evidenced by a recorded instrument to that effect, and upon the written consent by all of the holders of recorded **mortgage** liens affecting any of the condominium parcels**, unless the plan of termination will result in the full satisfaction of the mortgage liens affecting a condominium parcel**. When the board of directors intends to terminate or merge the condominium, or dissolve or merge the association, the boards shall so notify the division before taking any **formal** action to terminate or merge the condominium or the association. Upon recordation of the ~~instrument evidencing consent of all of the unit owners~~ **plan of termination or certificate of merger, the association within 30 business days shall notify the division of the termination or merger and the date the document was recorded, the county where the document was recorded, and the book and page number of the public records where the document was recorded, and shall provide the division a copy of the recorded plan of termination or certificate of merger certified by the clerk.**

(2) (a) The condominium property may be removed from the provisions of this

chapter pursuant to a plan of termination approved by the lesser of the lowest percentage of voting interests necessary to amend the declaration or as expressly provided in the declaration for approval of termination whenever the total cost to complete reasonably necessary repairs to or reconstruction of existing improvements would exceed the total fair market value of all of the condominium units taken together after completion of the repairs or reconstruction, or whenever by virtue of the operation of land use regulations it becomes impossible to continue the operation of a condominium in its prior physical form. Approval of the plan shall not be subject to the requirements of s.718.110(4).

(b) Whenever a condominium is comprised of more than one residential structure, and the cost of repairs or reconstruction of a portion of the condominium property would exceed the total fair market value of all of the condominium units in that portion taken together after completion of the repairs or reconstruction, or whenever by virtue of the operation of land use regulations it becomes impossible to continue the operation of a portion of the condominium in its prior physical form, then the condominium may be partially terminated, and that portion of the condominium property may be removed from the condominium and the provisions of this chapter pursuant to a plan of termination, which shall constitute an amendment to the declaration, approved by the lesser of the lowest percentage of voting interests necessary to amend the declaration or as expressly provided in the declaration for approval of termination. Notwithstanding that the partial termination shall result in a change in the percentages or shares by which the remaining unit owners share

in the common expenses and own the remaining common elements and common surplus, approval of the plan shall not be subject to the requirements of s.718.110(4) so long as the remaining unit owners' shares or percentages remain unchanged in relation to each other.

(c) Notwithstanding anything to the contrary in the declaration or this chapter, approval of a plan of termination by the holders of recorded mortgage liens affecting any of the condominium parcels shall not be required unless the plan of termination will not result in the full satisfaction of the mortgage liens affecting a condominium parcel.

(d) When the board of directors intends to terminate the condominium and dissolve the association pursuant to subsection (a) or to partially terminate the condominium pursuant to subsection (b), the board shall notify the division before taking any formal action to so terminate the condominium or the association. Upon recordation of the plan of termination, the association within 30 business days shall notify the division of the termination and the date the document was recorded, the county where the document was recorded, and the book and page number of the public records where the document was recorded, and shall provide the division a copy of the recorded plan of termination ~~notice~~ certified by the clerk.

~~(2)~~(3) Following the approval of the plan of termination, the association shall continue in existence with all powers it had before termination. Notwithstanding any contrary provision in the declaration or the bylaws, the powers and duties of the directors, terminating trustee designated in the plan of termination or other person or persons appointed by the court

pursuant to subsection ~~(4)~~ (5) or (7), after the commencement of ~~a~~ the termination ~~proceeding~~ include, but are not limited to, the following acts in the name and on behalf of the association:

(a) To employ directors, agents, and attorneys to liquidate or wind up its affairs.

(b) To continue the conduct of the affairs of the association insofar as necessary for the disposal or winding up thereof.

(c) To carry out contracts and collect, pay, compromise, and settle debts and claims for and against the association.

(d) To defend suits brought against the association.

(e) To sue in the name of the association, for all sums due or owing to the association or to recover any of its property.

(f) To perform any act necessary to maintain, repair, or demolish unsafe and uninhabitable structures, or other condominium property in compliance with applicable codes.

(g) To sell at public or private sale, exchange, convey, or otherwise dispose of all or any part of the assets of the association for an amount deemed in the best interest of the association, and to execute bills of sale and deeds of conveyance in the name of the association.

(h) To collect and receive any and all rents, profits, accounts receivable, income, maintenance fees, special assessments, and insurance proceeds for the association.

(i) In general, to make contracts and to do any and all things in the name of the association which may be proper or convenient for the purposes of winding up, selling, and liquidating the affairs of the association.

~~(3)~~ **(4)** Unless the declaration or the bylaws provide otherwise, a vacancy in the board during a winding up proceeding, resulting from the resignation or expiration of term of any director, may be filled by a majority vote of the unit owners.

~~(4)~~ **(5)** If, after a natural disaster, the identity of the directors or their right to hold office is in doubt, or if they are dead or unable to act, or if they fail or refuse to act, or their whereabouts cannot be ascertained, any interested person may petition the circuit court to determine the identity of the directors, or, if determined to be in the best interest of the unit owners, to appoint a receiver to wind up the affairs of the association after hearing upon such notice to such persons as the court may direct. The receiver shall be vested with those powers as are given to the board ~~of directors~~ pursuant to the declaration and bylaws and subsection ~~(2)~~ **(3)** and such others which may be necessary to wind up the affairs of the association and set forth in the order of appointment. The appointment of the receiver shall be subject to such bonding requirements as the court may direct in the order of appointment. The order shall also provide for the payment of a reasonable fee for the services of the receiver from the sources identified in the order, which may include rents, profits, incomes, maintenance fees, or special assessments collected from the condominium property.

~~(5)~~ **(6) The agreement to terminate must be evidenced by a plan of termination or ratifications thereof executed in the same manner as a deed, by unit owners having the requisite percentage of voting interests to approve the plan of termination. A plan of termination and all ratifications thereof must be recorded in the public records of every county in which a portion of the**

condominium is located and is effective only upon recordation or such later date as is specified in the plan of termination. Upon recordation or such later date as is specified in the plan of termination, title to the condominium property shall become vested in the terminating trustee. The plan of termination shall specify at a minimum the following matters:

(a) The name of the terminating trustee and the powers of such trustee.

(b) A date after which the plan of termination will be void unless it is recorded before that date.

(c) The interest of the respective unit owners in the assets of the association which shall be the respective interests of the unit owners in the common elements immediately before the termination, unless otherwise provided in the plan of termination.

(d) The interest of the respective unit owners in any proceeds of sale of the condominium property. Unless the declaration or bylaws expressly addresses the distribution of the proceeds of sale of condominium property, the plan of termination may allocate the proceeds of sale of condominium property using any of the following methods: the respective interests of the unit owners as set forth in the declaration or bylaws following a termination; the respective interests of the unit owners in the common elements immediately before the termination; the respective interests of unit owners based on the fair market values of their units and any limited common elements immediately before the termination, as determined by one or more independent appraisers selected by the association or terminating trustee; the respective interests of unit owners, based on the most recent assessed value of the unit (excluding

exemptions) before the termination as set forth in the records of the county property appraiser; or such other method as agreed upon by the requisite percentage of voting interests required to approve the plan of termination. All liens shall be transferred to the proceeds of sale of the condominium property attributable to the unit originally encumbered by the liens in their same priority. The proceeds of any sale of the condominium property pursuant to a plan of termination shall not be deemed to be common surplus.

(e) If applicable, the interest of the respective unit owners in any insurance proceeds or condemnation proceeds which are not used for repair or reconstruction. Unless the declaration or bylaws expressly addresses the distribution of insurance proceeds or condemnation proceeds, the plan of termination may allocate insurance proceeds or condemnation proceeds using any of the following methods: the respective interests of the unit owners as set forth in the declaration or bylaws following a termination; the respective interests of the unit owners in the common elements immediately before the termination; the respective interests of unit owners based on the fair market values of their units and any limited common elements immediately before the termination, as determined by one or more independent appraisers selected by the association or terminating trustee; the respective interests of unit owners, based on the most recent assessed value of the unit (excluding exemptions) before the termination as set forth in the records of the county property appraiser; or such other method as agreed upon by the requisite percentage of voting interests required to approve the plan of termination. All liens shall be transferred to the insurance proceeds or condemnation proceeds

attributable to the unit originally encumbered by the liens in their same priority. The insurance proceeds or condemnation proceeds distributed pursuant to a plan of termination shall not be deemed to be common surplus.

(f) Unless otherwise specified in the plan of termination, as long as the terminating trustee holds title to the real estate, each unit owner and the unit owner's successors in interest have an exclusive right to occupancy of the portion of the real estate that formerly constituted the unit. During the period of that occupancy, each unit owner and the unit owner's successors in interest remain liable for all assessments and other obligations imposed on unit owners by s. 718.116 or the declaration.

(g) A plan of termination may provide that the termination is conditioned upon the occurrence of an event. The plan of termination may provide that all of the common elements and units of the condominium must be sold following termination. If, pursuant to the plan of termination, any real estate in the condominium property is to be sold following termination, the plan of termination may set forth the minimum terms of the sale. A conditional plan will not vest title in the terminating trustee unless and until the plan of termination is recorded together with a certificate executed by the association with the formalities of a deed confirming that the conditions set forth in the conditional plan of termination have been satisfied or waived by the requisite percentage of voting interests.

(7) In the event of termination pursuant to a plan of termination in accordance with the provisions of subsection (1) or (2), the unit owners' rights as tenants in common in undivided interests in the condominium property

and the ownership of the assets of the association shall vest in the terminating trustee named in the plan of termination and such unit owners shall thereafter become the beneficiaries of proceeds realized from the plan of termination, if any. The terminating trustee shall be the association or in the alternative a trustee appointed by the board. In the event that the association is unable or unwilling to serve as such trustee, or the board is unable or unwilling to appoint such trustee, any unit owner may petition the court for such appointment. The recordation of a plan of termination is effective to vest, and is hereby declared to have vested, in such terminating trustee full rights of ownership over the real property or interest therein, with full power and authority as granted and provided in the plan of termination to deal in and with the property or interest therein or any part thereof; provided, the plan of termination confers on the trustee the power and authority either to protect, conserve and to sell, or to manage and otherwise dispose of some or all of the condominium and association property, and such trust shall be deemed a Florida land trust under s. 689.071. The terminating trustee shall be vested with those powers as are given to the board of directors pursuant to the declaration and bylaws and subsection (3) and such others which may be necessary to wind up the affairs of the association and set forth in the plan of termination.

(8) The terminating trustee, on behalf of the unit owners, may contract for the sale of real estate in the condominium property, but the contract is not binding on the unit owners until approved pursuant to subsections (1) or (2).

(9) Following termination of the condominium, the proceeds of any sale of real estate, together with the assets of the association, shall be held by the terminating trustee named in the plan of termination or such person or persons appointed by the court, pursuant to subsection (5) or (7), as trustee for unit owners and holders of liens on the units in their order of priority.

(10) Following termination of a condominium, the proceeds of any sale of real estate, together with the assets of the association shall be distributed in the following priority:

(a) costs of carrying out the plan of termination, including demolition, removal and disposal fees, terminating trustee's fees and costs and attorney's fees and costs.

(b) liens recorded prior to recordation of the declaration.

(c) liens of the association which have been consented to as provided by s. 718.121.

(d) creditors of the association, as their interests may appear.

(e) to each unit owner in the shares specified in the plan of termination subject to satisfaction of liens on each unit in their order of priority.

(11) After determining that all known debts and liabilities of an association in the process of winding up have been paid or adequately provided for, the ~~board, or other~~ terminating trustee or such person or persons appointed by the court, pursuant to subsection ~~(4)~~ (5) or (7), shall distribute all the remaining assets in the manner set forth in ~~subsection (6)~~ the plan of termination. If the winding up is by court proceeding or subject to court

supervision, the distribution shall not be made until after the expiration of any period for the presentation of claims that has been prescribed by order of the court.

~~(6)~~ **(12)** Assets held by an association upon a valid condition requiring return, transfer, or conveyance, which condition has occurred or will occur, shall be returned, transferred, or conveyed in accordance with the condition. The remaining assets of an association shall be distributed ~~as follows:~~ **pursuant to subsection (10).**

~~(a) If the declaration or bylaws provides the manner of disposition the assets shall be disposed in that manner.~~

~~(b) If the declaration or bylaws do not provide the manner of disposition, the assets shall be distributed among the unit owners in accordance with their respective rights therein, as set forth in subsection (7).~~

~~(7) Unless otherwise provided in the declaration as originally recorded or as amended pursuant to ss. 718.110(5), upon removal of the condominium property from the provisions of this chapter, the condominium property is owned by the unit owners in the same shares as each owner previously owned in the common elements. All liens shall be transferred to the share in the condominium property attributable to the unit originally encumbered by the lien in its same priority.~~

~~(8)~~ **(13)** Distribution may be made either in money or in property or securities and either in installments from time to time or as a whole, if this can be done fairly and ratably and in conformity with the ~~declaration~~ **plan of termination** and shall be made as soon as reasonably consistent with the beneficial liquidation of the assets.

~~(9)~~ **(14)** An association that has been terminated nevertheless continues to exist for the purpose of winding up its affairs, prosecuting and defending actions by or against it, and enabling it to collect and discharge obligations, dispose of and convey its property, and collect and divide its assets, but not for the purpose of conducting its activities except so far as necessary for the winding up thereof.

~~(10)~~ **(15)** The termination of a condominium does not bar the creation of another condominium affecting all or any portion of the same property.

~~(11)~~ **(16)** This section does not apply to the termination of a condominium incident to a merger of that condominium with one or more other condominiums under ss. 718.110(7).

Section 2. This act shall take effect upon becoming a law.

62

LEGISLATIVE POSITION REQUEST FORM

GOVERNMENTAL AFFAIRS OFFICE

Date Form Received _____

GENERAL INFORMATION

Submitted By

The Real Property, Probate and Trust Law Section/The Estate and Trust Tax Planning Committee

(List name of the section, division, committee, bar group or individual)

Address Chair: Richard R. Gans, Fergeson Skipper, et. al.
P.O. Box 3018, Sarasota, Florida 34230-3018 – rgans@fsskbt.com –
phone: 941 957 1900; fax: 941 957 1800

(List street address and phone number)

Position Type

The Florida Bar Real Property, Probate and Trust Law Section/The Estate and Trust Tax Planning Committee

(Florida Bar, section, division, committee or both)

CONTACTS

Board & Legislation Committee Appearance Sandra F. Diamond, Legislative Chair
9075 Seminole Blvd., Seminole, FL 33772 phone: 727 398 3600

(List name, address and phone number)

Appearances before Legislators Sandra F. Diamond (727) 398-3600 Peter M. Dunbar (850) 222-3533

(List name and phone # of those appearing before House/Senate Committees)

Meetings with Legislators/staff Sandra F. Diamond (727) 398-3600 Peter M. Dunbar (850) 222-3533

(List name and phone # of those having face to face contact with Legislators)

PROPOSED ADVOCACY

All types of partisan advocacy or nonpartisan technical assistance should be presented to the Board of Governors via this request form. All proposed legislation that has *not* been filed as a bill or a proposed committee bill (PCB) should be attached to this request in legislative format - Standing Board Policy 9.20(c). Contact the Governmental Affairs office with questions.

If Applicable, List The Following _____

(Bill or PCB #) (Bill or PCB Sponsor)

Indicate Position _X_ Support ____ Oppose ____ Technical Assistance Other _____

Proposed Wording of Position for Official Publication: Supports the creation of a consolidated chapter for disclaimers of testamentary and non-testamentary property interests repealing section 689.21 and 732.801 of the Florida Statutes.

Reasons For Proposed Advocacy: Currently, disclaimers of testamentary interests are contained in F.S. 732.801 and the rules for non-testamentary disclaimers are found in F.S. 689.21. The proposed consolidated statute incorporates certain features of the Uniform Disclaimer of Property Interests Act which are necessary in order to improve and modernize the law of disclaimers for both testamentary and non-testamentary interests.

PRIOR POSITIONS TAKEN ON THIS ISSUE

Please indicate any prior Bar or section positions on this issue to include opposing positions. Contact the Governmental Affairs office if assistance is needed in completing this portion of the request form.

Most Recent Position _____

(Indicate Bar or Name Section) (Support or Oppose) (Date)

Others
(May attach list if more than one)

_____

(Indicate Bar or Name Section) (Support or Oppose) (Date)

REFERRALS TO OTHER SECTIONS, COMMITTEES OR LEGAL ORGANIZATIONS

The Legislation Committee and Board of Governors do not typically consider requests for action on a legislative position in the absence of responses from all potentially affected Bar groups or legal organizations - Standing Board Policy 9.50(c). Please include all responses with this request form.

Referrals

1. Tax Section, The Florida Bar
(Name of Group or Organization) (Support, Oppose or No Position)

2. Florida Banker's Association
(Name of Group or Organization) (Support, Oppose or No Position)

3. _____
(Name of Group or Organization) (Support, Oppose or No Position)

Please submit completed Legislative Position Request Form, along with attachments, to the Governmental Affairs Office of The Florida Bar. Upon receipt, staff will further coordinate the scheduling for final Bar action of your request which usually involves separate appearances before the Legislation Committee and the Board of Governors unless otherwise advised. For information or assistance, please telephone (904) 561-5662 or 800-342-8060, extension 5662.

Last Revised on May 5, 2004

FLORIDA UNIFORM DISCLAIMER OF PROPERTY INTERESTS ACT

739.101. Short Title. This chapter may be cited as the "Florida Uniform Disclaimer of Property Interests Act ."

739.102. Definitions. As used in this chapter:

(1) "Benefactor" means the creator of the interest that is subject to a disclaimer.

(2) "Beneficiary designation" means an instrument, other than an instrument creating or amending a trust, naming the beneficiary of:

(a) an annuity or insurance policy;

(b) an account with a designation for payment on death;

(c) a security registered in beneficiary form;

(d) a pension, profit-sharing, retirement, or other employment-related benefit plan; or

(e) any other nonprobate transfer at death.

(3) "Disclaimant" means the person to whom a disclaimed interest or power would have passed had the disclaimer not been made.

(4) "Disclaimed interest" means the interest that would have passed to the disclaimant had the disclaimer not been made.

(5) "Disclaimer" means the refusal to accept an interest in or power over property, and includes a renunciation.

(6) "Fiduciary" means a personal representative, trustee, agent acting under a power of attorney, guardian, or other person authorized to act as a fiduciary with respect to the property of another person.

(7) "Future interest" means an interest that takes effect in possession or enjoyment, if at all, later than the time of its creation.

(8) A person is "insolvent" if the sum of the person's debts is greater than all of the person's assets at fair valuation. A person is presumed to be "insolvent" if the person is generally not paying the person's debts as they become due.

(9) "Jointly held property" means property held in the names of two or more persons under an arrangement in which all holders have concurrent interests and under which the last surviving holder is entitled to the whole of the property. Jointly held property does not include tenants by the entirety property.

(10) "Person" includes individuals, ascertained and unascertained, living or not living, whether entitled to an interest by right of intestacy or otherwise, a government, governmental subdivision, agency, or instrumentality, and a public corporation.

(11) "Time of distribution" means the time when a disclaimed interest would have taken effect in possession or enjoyment.

(12) "Trust" means:

(A) an express trust (including an honorary trust or a trust under s. 737.116), charitable or noncharitable, with additions thereto, whenever and however created; and

(B) a trust created pursuant to a statute, judgment, or decree which requires the trust to be administered in the manner of an express trust.

As used in this chapter, the term "trust" does not include a constructive trust or a resulting trust.

739.103. Scope. This chapter applies to disclaimers of any interest in or power over property, whenever created. Except as provided in s.739.701, this chapter is the exclusive means by which a disclaimer may be made under Florida law.

739.104. Power To Disclaim; General Requirements; When Irrevocable.

(1) A person may disclaim, in whole or part, conditionally or unconditionally, any interest in or power over property, including a power of appointment. A person may disclaim the interest or power even if its creator imposed a spendthrift provision or similar restriction on transfer or a restriction or limitation on the right to disclaim. A disclaimer shall be unconditional unless the disclaimant explicitly provides otherwise in the disclaimer.

(2) With court approval, a fiduciary may disclaim, in whole or part, any interest in or power over property, including a power of appointment. Without court approval, a fiduciary may disclaim, in whole or in part, any interest in or power over property, including a power of appointment, if and to the extent that the instrument creating the fiduciary relationship explicitly grants the fiduciary the right to disclaim. In the absence of a court-appointed guardian, notwithstanding anything in ch. 744 to the contrary, without court approval, a natural guardian under s. 744.301 may disclaim on behalf of a minor child of the natural guardian, in whole or in part, any interest in or power over property, including a power of appointment, that the minor child is to receive solely as a result of another disclaimer, but only if the disclaimed interest or power does not pass to or for the benefit of the natural guardian as a result of the disclaimer.

(3) To be effective, a disclaimer must be in writing, declare the writing as a disclaimer, describe the interest or power disclaimed, be signed by the person making the disclaimer and witnessed and acknowledged in the manner provided for deeds of real estate to be recorded in Florida. In addition, to be effective, an original of the disclaimer must be delivered or filed in the manner provided in s.739.301.

(4) A partial disclaimer may be expressed as a fraction, percentage, monetary amount, term of years, limitation of a power, or any other interest or estate in the property.

(5) A disclaimer becomes irrevocable when any conditions to which the disclaimant has made the disclaimer subject are satisfied, and when the disclaimer is

delivered or filed pursuant to s.739.301 or when it becomes effective as provided in ss.739.201-739.207, whichever occurs later.

(6) A disclaimer made under this chapter is not a transfer, assignment, or release.

739.201. Disclaimer Of Interest In Property.

Except for a disclaimer governed by ss.739.202, 739.203 or 739.204, the following rules apply to a disclaimer of an interest in property:

(1) The disclaimer takes effect as of the time the instrument creating the interest becomes irrevocable, or, if the interest arose under the law of intestate succession, as of the time of the intestate's death.

(2) The disclaimed interest passes according to any provision in the instrument creating the interest providing explicitly for the disposition of the interest, should it be disclaimed, or of disclaimed interests in general.

(3) If the instrument does not contain a provision described in subsection (2), the following rules apply:

(a) If the disclaimant is an individual, the disclaimed interest passes as if the disclaimant had predeceased the benefactor, unless the disclaimed interest is a remainder contingent on surviving to the time of distribution, in which case the disclaimed interest passes as if the disclaimant had died immediately before the time for distribution. However, if, by law or under the instrument, the descendants of the disclaimant would share in the disclaimed interest by any method of representation had

the disclaimant died before the time of distribution, the disclaimed interest passes only to the descendants of the disclaimant who survive the time of distribution.

(b) If the disclaimant is not an individual, the disclaimed interest passes as if the disclaimant did not exist.

(c) Upon the disclaimer of a preceding interest, a future interest held by a person other than the disclaimant takes effect as if the disclaimant had died or ceased to exist immediately before the time of distribution, but a future interest held by the disclaimant is not accelerated in possession or enjoyment as a result of the disclaimer.

739.202. Disclaimer Of Rights Of Survivorship In Jointly Held Property.

(1) Upon the death of a holder of jointly held property:

(a) If, during the deceased holder's lifetime, the deceased holder could have unilaterally regained a portion of the property attributable to the deceased holder's contributions without the consent of the other holder(s), another holder may disclaim, in whole or in part, a fractional share of that portion of the property attributable to the deceased holder's contributions determined by dividing the number one by the number of joint holders alive immediately after the death of the holder to whose death the disclaimer relates.

(b) For all other jointly held property, another holder may disclaim, in whole or in part, a fraction of the whole of the property the numerator of which is one and the denominator of which is the product of (i) the number of joint holders alive immediately before the death of the holder to whose death the disclaimer relates;

multiplied by (ii) the number of joint holders alive immediately after the death of the holder to whose death the disclaimer relates.

(2) A disclaimer under subsection (1) takes effect as of the death of the holder of jointly held property to whose death the disclaimer relates.

(3) An interest in jointly held property disclaimed by a surviving holder of the property passes as if the disclaimant predeceased the holder to whose death the disclaimer relates.

739.203. Disclaimer Of Tenants By The Entirety Property.

(1) The survivorship interest in tenants by the entirety property to which the survivor succeeds by operation of law upon the death of the co-tenant may be disclaimed as provided in this chapter. For purposes of this chapter only, the deceased tenant's interest in tenants by the entireties property shall be deemed to be an undivided one-half interest.

(2) A disclaimer under subsection (1) takes effect as of the death of the deceased tenant to whose death the disclaimer relates.

(3) The survivorship interest in tenants by the entireties property disclaimed by the surviving tenant passes as if the disclaimant had predeceased the tenant to whose death the disclaimer relates.

(4) A disclaimer of an interest in real property held as tenants by the entirety shall not cause the disclaimed interest to be homestead property for purposes of descent and distribution under ss. 732.401 and 732.4015.

739.204. Disclaimer Of Interest By Trustee. If a trustee having the power to disclaim under the instrument creating the fiduciary relationship or pursuant to court order disclaims an interest in property that otherwise would have become trust property, the interest does not become trust property.

739.205. Disclaimer Of Power Of Appointment Or Other Power Not Held In Fiduciary Capacity. If a holder disclaims a power of appointment or other power not held in a fiduciary capacity, the following rules apply:

(1) If the holder has not exercised the power, the disclaimer takes effect as of the time the instrument creating the power becomes irrevocable.

(2) If the holder has exercised the power and the disclaimer is of a power other than a presently exercisable general power of appointment, the disclaimer takes effect immediately after the last exercise of the power.

(3) The instrument creating the power is construed as if the power expired when the disclaimer became effective.

739.206. Disclaimer By Appointee, Object, Or Taker In Default Of Exercise Of Power Of Appointment.

(1) A disclaimer of an interest in property by an appointee of a power of appointment takes effect as of the time the instrument by which the holder exercises the power becomes irrevocable.

(2) A disclaimer of an interest in property by an object, or taker in default of an exercise of a power of appointment takes effect as of the time the instrument creating the power becomes irrevocable.

739.207. Disclaimer Of Power Held In Fiduciary Capacity.

(1) If a fiduciary disclaims a power held in a fiduciary capacity which has not been exercised, the disclaimer takes effect as of the time the instrument creating the power becomes irrevocable.

(2) If a fiduciary disclaims a power held in a fiduciary capacity which has been exercised, the disclaimer takes effect immediately after the last exercise of the power.

(3) A disclaimer under this section is effective as to another fiduciary if the disclaimer so provides and the fiduciary disclaiming has the authority to bind the estate, trust, or other person for whom the fiduciary is acting.

739.301. Delivery Or Filing.

(1) Subject to subsections (2) through (12), delivery of a disclaimer may be effected by personal delivery, first-class mail, or any other method that results in its receipt. A disclaimer sent by first-class mail shall be deemed to have been delivered on

the date it is postmarked. Delivery by any other method shall be effective upon receipt by the person to whom the disclaimer is to be delivered under this section.

(2) In the case of a disclaimer of an interest created under the law of intestate succession or an interest created by will, other than an interest in a testamentary trust:

(a) the disclaimer must be delivered to the personal representative of the decedent's estate; or

(b) if no personal representative is serving when the disclaimer is sought to be delivered, the disclaimer must be filed with the clerk of the court in any county where venue of administration would be proper.

(3) In the case of a disclaimer of an interest in a testamentary trust:

(a) the disclaimer must be delivered to the trustee serving when the disclaimer is delivered, or, if no trustee is then serving, to the personal representative of the decedent's estate; or

(b) if no personal representative is serving when the disclaimer is sought to be delivered, the disclaimer must be filed with the clerk of the court in any county where venue of administration of the decedent's estate would be proper.

(4) In the case of a disclaimer of an interest in an inter vivos trust:

(a) the disclaimer must be delivered to the trustee serving when the disclaimer is delivered;

(b) if no trustee is then serving, it must be filed with the clerk of the court in any county where the filing of a notice of trust would be proper; or

(c) if the disclaimer is made before the time the instrument creating the trust becomes irrevocable, the disclaimer must be delivered to the grantor of the revocable trust or the transferor of the interest, or to such person's legal representative.

(5) In the case of a disclaimer of an interest created by a beneficiary designation made before the time the designation becomes irrevocable, the disclaimer must be delivered to the person making the beneficiary designation, or to such person's legal representative.

(6) In the case of a disclaimer of an interest created by a beneficiary designation made after the time the designation becomes irrevocable, the disclaimer must be delivered to the person obligated to distribute the interest.

(7) In the case of a disclaimer by a surviving holder of jointly held property, or by the surviving tenant in tenants by the entirety property, the disclaimer must be delivered to the person to whom the disclaimed interest passes or, if such person cannot reasonably be located by the disclaimant, the disclaimer must be delivered as provided in subsection (2).

(8) In the case of a disclaimer by an object, or taker in default of exercise, of a power of appointment at any time after the power was created:

(a) the disclaimer must be delivered to the holder of the power or to the fiduciary acting under the instrument that created the power; or

(b) if no fiduciary is serving when the disclaimer is sought to be delivered, the disclaimer must be filed with a court having authority to appoint the fiduciary.

(9) In the case of a disclaimer by an appointee of a nonfiduciary power of appointment:

(a) the disclaimer must be delivered to the holder, the personal representative of the holder's estate or to the fiduciary under the instrument that created the power; or

(b) if no fiduciary is serving when the disclaimer is sought to be delivered, the disclaimer must be filed with a court having authority to appoint the fiduciary.

(10) In the case of a disclaimer by a fiduciary of a power over a trust or estate, the disclaimer must be delivered as provided in subsection (2), (3), or (4), as if the power disclaimed were an interest in property.

(11) In the case of a disclaimer of a power exercisable by an agent (other than a power exercisable by a fiduciary over a trust or estate), the disclaimer must be delivered to the principal or the principal's representative.

(12) Notwithstanding subsection (1), delivery of a disclaimer of an interest in or relating to real estate shall be presumed upon the recording of the disclaimer in the office of the clerk of the court of the county or counties where the real estate is located.

(13) No fiduciary or other person having custody of the disclaimed interest shall be liable for any otherwise proper distribution or other disposition made without actual notice of the disclaimer, or, if the disclaimer is barred under s.739.402, for any otherwise proper distribution or other disposition made in reliance on the disclaimer, if the distribution or disposition is made without actual knowledge of the facts constituting the bar of the right to disclaim.

739.401. When Disclaimer Is Permitted. A disclaimer may be made at any time unless barred under s.739.402.

739.402. When Disclaimer Barred Or Limited.

(1) A disclaimer is barred by a written waiver of the right to disclaim.

(2) A disclaimer of an interest in property is barred if any of the following events occur before the disclaimer becomes effective:

(a) the disclaimant accepts the interest sought to be disclaimed;

(b) the disclaimant voluntarily assigns, conveys, encumbers, pledges, or transfers the interest sought to be disclaimed, or contracts to do so;

(c) the interest sought to be disclaimed is sold pursuant to a judicial sale; or

(d) the disclaimant is insolvent when the disclaimer becomes irrevocable.

(3) A disclaimer, in whole or part, of the future exercise of a power held in a fiduciary capacity is not barred by its previous exercise.

(4) A disclaimer, in whole or part, of the future exercise of a power not held in a fiduciary capacity is not barred by its previous exercise unless the power is exercisable in favor of the disclaimant.

(5) A disclaimer of an interest in, or a power over, property which is barred by this section is ineffective.

739.501. Tax Qualified Disclaimer. Notwithstanding any other provision of this chapter, if, as a result of a disclaimer or transfer, the disclaimed or transferred interest is treated pursuant to the provisions of Section 2518 of the Internal Revenue Code of 1986 as never having been transferred to the disclaimant, then the disclaimer or transfer is effective as a disclaimer under this chapter.

739.601. Recording Of Disclaimer Relating To Real Estate.

(1) A disclaimer of an interest in or relating to real estate shall not provide constructive notice to all persons unless the disclaimer contains a legal description of the real estate to which the disclaimer relates and unless the disclaimer is filed for recording in the office of the clerk of the court in the county or counties where the real estate is located.

(2) An effective disclaimer meeting the requirements of subsection (1) shall constitute constructive notice to all persons from the time of filing Failure to record the disclaimer does not affect its validity as between the disclaimant and persons to whom the property interest or power passes by reason of the disclaimer.

739.701. Application To Existing Relationships. Except as otherwise provided in s.739.402, an interest in or power over property existing on the effective date of this chapter as to which the time for delivering or filing a disclaimer under law superseded by this chapter has not expired may be disclaimed after the effective date of this chapter.

TAG-ALONG CHANGE TO 731.201

731.201. General Definitions. Subject to additional definitions in subsequent chapters that are applicable to specific chapters or parts, and unless the context otherwise requires, in this code, in s. 409.9101, and in chapters 737, 738, 739 and 744:

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80

Last Revised on May 5, 2004

Real Property, Probate and Trust Law Section of The Florida Bar

White Paper on Proposed Florida Disclaimer of Property Interests Act

New Florida Statutes Chapter 739

I. SUMMARY

The legislative proposal (the "Act") repeals Florida's existing statutory disclaimer statutes, Florida Statutes Section 689.21 (governing disclaimers of non-testamentary property interests) and Section 732.801 (governing disclaimers of testamentary property interests). The Act contains, in one chapter, the exclusive mechanism under Florida law for disclaiming an interest in a variety of testamentary and non-testamentary property interests.

The Act is based on the 1999 Uniform Disclaimer of Property Interests Act ("UDPIA") as promulgated by NCCUSL. The Estate and Trust Tax Planning Committee of the Real Property, Probate and Trust Section of The Florida Bar (the "Committee") has made revisions to the UDPIA in order to retain certain desirable features of current Florida statutory disclaimer law not present in the UDPIA. The Committee has also modified certain provisions of the UDPIA that were not consistent with Florida law or which, in the Committee's opinion, required modification in order to produce a superior statute.

The comments on the sections of the Act are from NCCUSL to the extent that the Committee has retained provisions of the UDPIA verbatim or largely intact. References in the NCCUSL comments to sections of the uniform act have been changed to refer to sections within proposed Chapter 739.

NCCUSL comments are in regular type. *The Committee's comments are in italics.*

II. EFFECT OF PROPOSED CHANGES (SECTION-BY-SECTION ANALYSIS)

Section 739.101

No comment.

Section 739.102

The definition of "disclaimant" limits the term to the person who would have received the disclaimed property or power if the disclaimer had not been made. The disclaimant is not necessarily the person making the disclaimer; instead, the person making the disclaimer may be a guardian, custodian, or other fiduciary acting for the disclaimant or the personal representative of the disclaimant's estate.

The term "disclaimed interest" refers to the subject matter of a disclaimer of an interest in property and provides a compact term the use of which simplifies the drafting of Section 739.201.

The definition of "disclaimer" expands previous definitions. Prior Uniform Acts provided for a disclaimer of "the right of succession to any property or interest therein" *(Current Section 732.801 is based on the 1978 Uniform Act and uses this terminology).* These previously authorized types of disclaimers are continued by the present language referring to "an interest in . . . property." The language referring to "power over property" broadens the permissible scope of disclaimers to include any power over property that gives the power-holder a right to control property, whether it be cast in the form of a power of appointment or a fiduciary's management power over property or discretionary power of distribution over income or corpus.

The term "insolvency" has the same meaning in the Act as in the Florida Uniform Fraudulent Transfer Act, Chapter 726 of the Florida Statutes. Existing Florida disclaimer statutes, while barring disclaimers by insolvent disclaimants, did not define the term.

The term "future interest," is used in Section 739.201(3)(c) in connection with the acceleration rule in that provision.

The term "jointly held property" includes not only a traditional joint tenancy but also other property that is "held," but may not be "owned," by two or more persons with a right of survivorship. One form of such property is a joint bank account between parties who are not married to each other which, under the laws of many states, is owned by the parties in proportion to their deposits. This "holding" concept, as opposed to "owning," may also be true with joint brokerage accounts under the law of some states. *See* Treas. Regs. § 25.2518-2(c)(4). *Tenants by the entirety property is excluded from the definition of "jointly held property." Section 739.203 deals exclusively with tenants by the entirety property.*

The term "time of distribution" is used in determining to whom the disclaimed interest passes as provided in 739.201. Possession or enjoyment is a term of art and means that time at which it is certain to whom the property belongs. It does not mean that the person actually has the property in hand. For example, the time of distribution of present interests created by will and all interests arising under the law of intestate succession is the death of the decedent. At that moment the heir or devisee is entitled to his or her devise or share, and it is irrelevant that time will pass before the will is admitted to probate and that actual receipt of the gift may not occur until the administration of the estate is complete. The time of distribution of present interests created by non-testamentary instruments generally depends on when the instrument becomes irrevocable. Because the recipient of a present interest is entitled to the property as soon as the gift is made, the time of distribution occurs when the creator of the interest can no longer take it back. The time of distribution of a future interest is the time when it comes into possession and the owner of the future interest becomes the owner of a present interest. For example, If B is the owner of the remainder interest in a trust which is to pay income to A for life, the time of distribution of

B's remainder is A's death. At that time the trust terminates and B's ownership of the remainder becomes outright ownership of the trust property.

The term "trust" means an express trust, whether private or charitable, including a trust created by statute, court judgment or decree which is to be administered in the manner of an express trust. Excluded from the Act's coverage are resulting and constructive trusts, which are not express trusts but remedial devices imposed by law. The Act is directed primarily at express trusts which arise in an estate planning or other donative context, but the definition of "trust" is not so limited. A trust created pursuant to a divorce action would be included, even though such a trust is not donative but is created pursuant to a bargained for exchange. The extent to which even more commercially-oriented trusts are subject to the Act will vary depending on the type of trust and the laws, other than this Act, under which the trust is created. Commercial trusts come in various forms, including trusts created pursuant to a state business trust act and trusts created to administer specified funds, such as to pay a pension or to manage pooled investments. *See* John H. Langbein, "The Secret Life of the Trust: The Trust as an Instrument of Commerce," 107 Yale L.J. 165 (1997).

Section 739.103

The Act provides the ***exclusive*** *avenue for disclaiming a power or interest in property. This is different from 689.21 and 732.801, and the UDPIA, all of which provide that the statute does not abridge any common law right to disclaim. NCCUSL included the provision in UDPIA invoking common law to permit adopting states to preserve their common-law bars on disclaimers by insolvent beneficiaries. See Hirsch, "Revisions in Need of Revising: The Uniform Disclaimer of Property Interests Act," 29 Fla. St. Law Rev. 109,115, fn.29. This is not necessary in the Act, which, as in existing Sections 689.21 and 732.801 of the Florida Statutes, explicitly denies insolvents the right to disclaim.*

Incorporation of the common law into the Act, in the manner of the UDPIA, would decodify the statute; to enact the UDPIA would be to enact the common law. That is what Florida's statutes currently do. However, the Committee believes that to continue this approach would be an inadvisable preservation of an element of substantial uncertainty. Especially because disclaimers under the Act are not time-barred, the Committee believes that the Act should be the exclusive means of disclaimers in Florida.

Section 739.104

Subsections (1) and (2) give persons a broad power to disclaim both interests in and powers over property. The ability to disclaim interests is comprehensive; it does not matter whether the disclaimed interest is vested, either in interest or in possession. For example, Father's will creates a testamentary trust which is to pay income to his descendants and after the running of the traditional perpetuities period is to terminate and be distributed to his descendants then living by representation. If at any time there are no descendants, the trust is to terminate and be distributed to collateral relatives. At the time of Father's death he has many descendants and the possibility of his line dying out and the collateral relatives taking under the trust is remote in the extreme. Nevertheless, under the Act the collateral relatives may disclaim their contingent remainders. (In

order to make a qualified disclaimer for tax purposes, however, they must disclaim them within 9 months of Father's death.) Every sort of power may also be disclaimed.

Subsection (1) continues the provisions of current law *(and of current Florida law (see F.S. 689.21(7) and 732.802(7)))* by making ineffective any attempt to limit the right to disclaim which the creator of an interest or non-fiduciary power seeks to impose on a person. This provision follows from the principle behind all disclaimers - no one can be forced to accept property - and extends that principle to powers over property.

Subsection (1) explicitly permits conditional disclaimers. Neither F.S. 689.21 nor F.S. 732.801 contains any explicit provisions either permitting or prohibiting conditional disclaimers.

A conditional disclaimer could be useful when, for example, several persons must all disclaim in order to achieve a desired result, and any one of them would not disclaim unless joined by others. The Act (739.104(2), discussed below) continues present Florida law by not permitting trustees and other fiduciaries to make disclaimers without prior court authorization (assuming that the trust agreement does not grant the trustee this power). Permitting multiple beneficiaries of a trust to arrange among themselves for a series of inter-related disclaimers subject to conditions makes it less important that a trustee have the ability to make a single disclaimer that would have the same result.

A disclaimant might want to condition his or her disclaimer on a desired tax or non-tax outcome. Finally, the general thrust of the Act to increase the flexibility of the disclaimer technique; permitting conditional disclaimers is consonant with this goal.

To qualify under Code Section 2518, a disclaimer must be an "irrevocable and unqualified refusal by a person to accept an interest in property . . . ." Internal Revenue Code (hereafter, the "Code") §2518(b). It could be argued that a conditional disclaimer would not constitute an "unqualified" refusal to accept the interest sought to be disclaimed, so that a conditional disclaimer cannot be tax-qualified.

If by "disclaimer" the Code refers exclusively to the written document evidencing the decision not to accept an interest in property, the inclusion of any condition in the document would disqualify the disclaimer. However, if by "disclaimer" the Code refers to the rejection of the property interest, then a conditional disclaimer need not necessarily fail under Section 2518. As long as the refusal to accept the interest is irrevocable and unconditional upon satisfaction of the condition, the presence of a condition should not, by itself, disqualify the disclaimer. The Committee is, however, unaware of any guidance from the Internal Revenue Service or the courts on this point.

Section 739.104(5) of the Act provides that a conditional disclaimer does not become irrevocable until the condition specified by the disclaimant is satisfied. If the condition is satisfied within the time required by the Code and Regulations, and assuming that the disclaimer otherwise qualifies, the disclaimer should, at that point, be tax-qualified because it would be irrevocable, as required by the statute.

Practitioners who want to be sure that a disclaimer is unquestionably tax-qualified might not want to take the risk of making the disclaimer conditional. In this regard, Section 739.104(1) provides that a disclaimer is unconditional unless the disclaimant explicitly provides otherwise in the disclaimer. On the other hand, for those situations where tax concerns are secondary or are not relevant, explicitly providing for conditional disclaimers makes the disclaimer technique even more flexible.

Subsection (2) permits fiduciaries to disclaim interests in or powers over property under certain circumstances discussed below. The Act is less restrictive than current Florida law, but more restrictive than the UDPIA.

Under the currently-effective Florida disclaimer statutes, a disclaimer of an interest in property may be made for a minor, incompetent or deceased beneficiary only if the court finds that the proposed disclaimer meets the following three-part test:

(a) the disclaimer is in the best interests of those interested in the estate of the beneficiary for whom the disclaimer is to be made;

(b) the disclaimer is in the best interests of those who take the beneficiary's interest by virtue of the disclaimer; and

(c) the disclaimer is not detrimental to the best interests of the beneficiary.

It has been the experience of many practitioners that obtaining court approval for a disclaimer for a minor or incapacitated beneficiary under existing law can be difficult. It can reasonably be argued that a disclaimer is usually detrimental to the best interests of the person on whose behalf the disclaimer is sought to be made since the effect of the disclaimer is to divest the person of funds he or she would receive if the disclaimer were not made. The barriers to securing a court-authorized disclaimer for a minor or incapacitated beneficiary on a timely and cost-efficient basis compromises the flexibility of the disclaimer technique. In many cases, it is only through a series of carefully orchestrated disclaimers that otherwise disastrous estate and post-mortem income taxes are avoided.

(Under current Florida law, which ties the effectiveness of the disclaimer to a strict 12-month or 9-month post-mortem timeline, the ability under Code Section 2518(b)(2)(B) to extend the time for disclaiming until the disclaimant attains age 21 is unavailable. But see Section 739.401, which specifically removes the time bar for disclaimers .)

Subsection (2) of the Act changes Florida law to make it easier for fiduciaries to disclaim. The Act does not adopt the extremely open-ended approach to fiduciary disclaimers adopted by the UDPIA: fiduciaries can disclaim subject only to the limitations imposed by generally-applicable fiduciary duties.

Under the Act, to the extent that the instrument creating the fiduciary relationship (i.e., the trust instrument or durable power of attorney) explicitly confers upon the fiduciary the power to

disclaim, the fiduciary has the power to disclaim an interest in or power over property within the confines of the governing instrument.

For other fiduciaries proceeding under the Act (i.e., a trustee where the trust instrument is silent), the fiduciary may seek a court order permitting a disclaimer. ***The Act intentionally does not incorporate a standard for use in determining whether or not the court should permit the fiduciary to disclaim.*** *The absence of a specific standard in the statute is intended to give courts more elbow room to allow disclaimers that might not meet the narrowly-drawn standards in the currently-effective Florida disclaimer statutes, but that would be advisable under the totality of the circumstances.*

A guardian acting on behalf of a ward can only disclaim with court approval. See F.S. 744.441(20). Except in one instance, the proposed statute does not change this requirement. Under the Act, where the interest that a minor child is to receive comes to the child only as a result of another's disclaimer, the proposed statute permits the minor's natural parent to disclaim on behalf of the minor, ***without court approval****, but only if, as a result of the disclaimer, the disclaimed interest does not pass to the parent. Even so, this provision is in applicable if there is a court-appointed guardian serving as to the minor; in that case, chapter 744 would require court approval in order to make the disclaimer on behalf of the minor.*

Subsection (3) sets forth the formal requirements for a disclaimer. *The Act departs from current Florida law to provide that disclaimers do not need to be recorded to be valid under state law. But see §§739.301(6) and 739.601 discussed below. To permit the easy recording of disclaimers, however, the written document of disclaimer must be signed, witnessed and acknowledged in the manner of deeds to real estate in Florida. These requirements also effectively preclude the use of email disclaimers, which are permitted by the Act but which the Committee rejects.*

Subsection (4) specifically allows a partial disclaimer of an interest in property or of a power over property, and gives the disclaimant wide latitude in describing the portion disclaimed. For example, a residuary beneficiary of an estate may disclaim a fraction or percentage of the residue or may disclaim specific property included in the residue (all the shares of X corporation or a specific number of shares). A devisee or donee may disclaim specific acreage or an undivided fraction or carve out a life estate or remainder from a larger interest in real or personal property. However, a disclaimer by a devisee or donee which seeks to "carve out" a remainder or life estate is not a "qualified disclaimer" for transfer tax purposes, Treas. Reg. § 25.2518-3(b).

Subsection (5) makes the disclaimer irrevocable *both on the satisfaction of any conditions to which the disclaimant makes it subject (see 739.104(1),* and upon the later to occur of (i) delivery or filing or (ii) its becoming effective under the section governing the disclaimer of the particular power or interest. A disclaimer must be "irrevocable" in order to be a qualified disclaimer for tax purposes. Since a disclaimer under this Act becomes effective at the time significant for tax purposes, a disclaimer under this Act will always meet the irrevocability requirement for tax qualification. The interaction of the Act and the requirements for a tax qualified disclaimer can be illustrated by analyzing a disclaimer of an interest in a revocable lifetime trust.

Example 1. G creates a revocable lifetime trust which will terminate on G's death and distribute the trust property to G's surviving descendants by representation. G's son, S, determines that he would prefer his share of G's estate to pass to his descendants and executes a disclaimer of his interest in the revocable trust. The disclaimer is then delivered to G. The disclaimer is not irrevocable at that time, however, because it will not become effective until G's death when the trust becomes irrevocable. Because the disclaimer will not become irrevocable until it becomes effective at G's death, S may recall the disclaimer before G's death and, if he does so, the disclaimer will have no effect.

Subsection (6) restates the long standing rule that a disclaimer is a true refusal to accept and not an act by which the disclaimant transfers, assigns, or releases the disclaimed interest. This subsection states the effect and meaning of the traditional "relation back" doctrine of prior Acts. It also makes it clear that the disclaimed interest passes without direction by the disclaimant, a requirement of tax qualification.

Section 739.201

Subsection (1) makes a disclaimer of an interest in property effective as of the time the instrument creating the interest becomes irrevocable or at the decedent's death if the interest is created by intestate succession. A will and a revocable trust are irrevocable at the testator's or settlor's death. Inter vivos trusts may also be irrevocable at their creation or may become irrevocable before the settlor's death. A beneficiary designation is also irrevocable at death, unless it is made irrevocable at an earlier time. This provision continues the provision of Uniform Acts *(and of current Florida law)* on this subject, but with different wording. Previous Acts have stated that the disclaimer "relates back" to some time before the disclaimed interest was created. The relation back doctrine gives effect to the special nature of the disclaimer as a refusal to accept. Because the disclaimer "relates back," the disclaimant is regarded as never having had an interest in the disclaimed property. A disclaimer by a devisee against whom there is an outstanding judgment will prevent the creditor from reaching the property the debtor would otherwise inherit.

This Act continues the effect of the relation-back doctrine, not by using the specific words, but by directly stating what the relation back doctrine has been interpreted to mean. The definition of "disclaimers" in 739.102(5) and 739.104(6) taken together define a disclaimer as a refusal to accept which is not a transfer or release, and subsection (1) makes the disclaimer effective as of the time the creator cannot revoke the interest.

Subsection (2) allows the creator of the instrument to control the disposition of the disclaimed interest by express provision in the instrument. The provision may apply to a particular interest. "I give to my cousin A the sum of ten thousand dollars ($10,000) and should he disclaim any part of this gift, I give the part disclaimed to my cousin B." The provision may also apply to all disclaimed interests. A residuary clause beginning "I give my residuary estate, including all disclaimed interests to . . . ." is such a provision.

Subsection (3)(a) applies if Subsection (2) does not and if the disclaimant is an individual.

Because "disclaimant" is defined as the person to whom the disclaimed interest would have passed had the disclaimer not been made, this paragraph would apply to disclaimers by fiduciaries on behalf of individuals. The rule is that the disclaimed interest passes as if the disclaimant had died immediately before the time of distribution defined in Section 739.102. The working of this subsection for present interests given to named individuals is illustrated by the following examples:

Example 1(a). T's will devised "ten thousand dollars ($10,000) to my brother, B." B disclaims the entire devise. B is deemed to have predeceased T, and, therefore B's gift has lapsed. If the state's antilapse statute applies *(732.603 will apply)*, it will direct the passing of the disclaimed interest.

Example 1(b). T's will devised "ten thousand dollars ($10,000) to my friend, F." F disclaims the entire devise. F is deemed to predecease T and the gift has lapsed. Few antilapse statutes apply to devises to non-family members *(732.603 will not apply)*.

Example 1(c). T's will devised "ten thousand dollars ($10,000) to my brother, B, but if B does not survive me, to my children." If B disclaims the devise, he will be deemed to have predeceased T and the alternative gift to T's children will dispose of the devise.

Present interests are also given to the surviving members of a class or group of persons. Perhaps the most common example of this gift is a devise of the testator's residuary estate "to my descendants who survive me by representation." Under the system of distribution among multi-generational classes used in common statutes *(including Florida's applicable statutes; see 732.611)*, division of the property to be distributed begins in the eldest generation in which there are living people. The following example illustrates a problem that can arise.

Example 2(a). T's will devised "the rest, residue, and remainder of my estate to my descendants who survive me by representation." T is survived by son S and daughter D. Son has two living children and D has one. S disclaims his interest. The disclaimed interest is one-half of the residuary estate, the interest S would have received had he not disclaimed, and it passes as if S had predeceased T. If the one-half the residue passed as if S predeceased, however, his children would take one-half the disclaimed interest and D would take the other half under every system of "representation" that commonly exists. S's disclaimer should have the effect of passing what he would have taken to his children. The second sentence of Subsection (3)(a) solves the problem. It provides that the entire disclaimed interest passes only to S's descendants because they would share in the interest had S truly predeceased T.

This provision also solves a problem that exists when the disclaimant is the only representative of an older generation.

Example 2(b). Assume the same facts as **Example 2(a)**, but D has predeceased T. T is survived, therefore, by S, S's two children, and D's child. S disclaims. Again, the disclaimed interest is one-half the residuary estate and it passes as if S had predeceased T. Had S actually predeceased T, the three grandchildren of T would have shared equally in T's residuary estate because they are all in the same generation. Were the three grandchildren to share equally in the disclaimed

interest, S's two children would each receive one-third of the one-half while D's child would receive one-third the one-half in addition to the one-half of the residuary estate received as the representative of his or her late parent. The second sentence of Subsection (3)(a) again applies to insure that S's children receive one-half the residue, exactly the interest S would have received but for the disclaimer.

The disclaimer of future interests created by will leads to a different problem. The effective date of the disclaimer of the future interest, the testator's death, is earlier in time than the distribution date. This in turn leads to a possible anomaly illustrated by the following example.

Example 3. Father's will creates a testamentary trust for Mother who is to receive all the income for life. At her death, the trust is to be distributed to Father and Mother's surviving descendants by representation. Mother is survived by son S and daughter D. Son has two living children and D has one. Son decides that he would prefer his share of the trust to pass to his children and disclaims. The disclaimer must be made within nine months of Father's death if it is to be a qualified disclaimer for tax purposes. Under prior Acts, the interest passes as if Son had predeceased Father. A problem can arise if at Mother's death, one or more of S's children living at that time have been born after Father's death. It is possible to argue that had S predeceased Father the afterborn children would not exist and that D and S's two children living at the time of Father's death are entitled to all of the trust property.

The problem illustrated in **Example 3** is solved by the first sentence of Subsection (3)(a). The disclaimed interest would have taken effect in possession or enjoyment, that is, Son would be entitled to receive one-half the trust property, at Mother's death. Under Subsection (3)(a) Son is deemed to have died immediately before Mother's death even though under Subsection (1) the disclaimer is effective as of Father's death. There is no doubt, therefore, that S's children living at the distribution date, whenever born, are entitled to the share of the trust property he would have received and, as **Examples 2(a)** and **2(b)** show, they will take exactly what S would have received but for the disclaimer. Had S actually died before Mother, he would have received nothing at Mother's death whether or not the disclaimer had been made. There is nothing to pass to S's children and they take as representatives of S under the representational scheme in effect.

*The Act does not work a change to Florida law in this regard. Under both 689.21 and 732.801, the disclaimed interest passes as if the disclaimant had died immediately before the death of the death of the benefactor, or immediately before any other event which causes the disclaimant's interest to be indefeasibly fixed in quality or quantity. In **Example 3**, mother's death is the event which causes son's interest to be indefeasibly fixed in quality or quantity.*

Interests created by revocable lifetime trusts are future interests when created, but may or may not be conditioned on surviving the termination of the trust, typically at the Grantor's death. The following examples illustrate disclaimers of interests not expressly conditioned on survival of the Grantor.

Example 4(a). G's revocable trust directs the trustee to pay "ten thousand dollars ($10,000) to the grantor's brother, B" at the termination of the trust on G's death. B disclaims the entire gift immediately after G's death. B is deemed to have predeceased G because it is at G's death that

89

the interest given B will come into possession and enjoyment. Had B not disclaimed he would have received $10,000 at that time. The recipient of the disclaimed interest will be determined by the law that applies to gifts of future interests to persons who die before the interest comes into possession and enjoyment. Traditional analysis (but see next paragraph) would regard the gift to B as a vested interest subject to divestment by G's power to revoke the trust. So long as G has not revoked the gift, the interest will pass through B's estate and should pass to B's heirs determined as of G's death.

For trusts to which 737.6035 applies (i.e., for all inter vivos trusts and amendments thereto executed on or after June 12, 2003), the "traditional analysis" referred to above would not apply. If 737.6035 applied to ***Example 4****, brother's descendants would take the distribution per stirpes.*

Example 4(b). G's revocable trust directed that on his death the trust property is to be distributed to his three children, A, B, and C. A disclaims immediately after G's death and is deemed to predecease the distribution date, which is G's death. The traditional analysis applies exactly as it does in **Example 4(a)**. The only condition on A's gift is G's not revoking the trust. A is not explicitly required to survive G. (*See First National Bank of Bar Harbor v. Anthony*, 557 A.2d 957 (Me. 1989).) The interest passes to A's heirs. *737.6035, if it applies, would pass the interest per stirpes to A's descendants.*

If the gift under the revocable trust is conditioned on surviving the grantor, the result of the disclaimer is the same as that of a disclaimer of a gift under a will. For example, the result of a disclaimer of an interest in the gift of the residuary estate by representation to the testator's descendants who survive the testator illustrated by **Examples 2(a)** and **(b)** are the same for a gift of the residue of the trust estate by representation to the descendants of the grantor who survive the grantor. Both gifts require survival to the time of distribution (the death of the testator or grantor). In both cases the disclaimant is deemed to predecease the distribution date, and therefore has no gift. The disclaimed interest passes under the second sentence of Subsection (3)(a) only to the disclaimant's descendants. If the distribution date of a gift under a revocable trust is not the Grantor's death but some future time, for example, termination of the trust on the death of a surviving spouse, the situation illustrated by **Example 3** can arise, and the result is the same.

If the designated beneficiary of a life insurance policy disclaims the policy proceeds, he or she will be deemed to have predeceased the insured because the time of distribution is the insured's death. If a contingent beneficiary has been named, the contingent beneficiary will take the proceeds. If a contingent beneficiary has not been named, the traditional rule (subject, of course, to the terms of the particular policy) is that the proceeds will pass to the insured's estate.

Subsection (3)(b) provides a rule for the passing of property interests disclaimed by persons other than individuals. Because 739.204 applies to disclaimers by trustees of property that would otherwise pass to the trust, Subsection (3)(b) principally applies to disclaimers by corporations, partnerships, and the other entities listed in the definition of "person" in Section 739.102(10). A charity, for example, might wish to disclaim property the acceptance of which would be incompatible with its purposes.

Subsection (3)(c) continues the provision of prior Uniform Acts *(and the rule in Florida, although not explicitly set forth in Florida's existing disclaimer statutes)* on this subject providing for the acceleration of future interests on the making of the disclaimer, except that future interests in the disclaimant do not accelerate. The workings of Subsection (3)(c) are illustrated by the following examples.

Example 5(a). Father's will creates a testamentary trust to pay income to his son S for his life, and on his death to pay the remainder to S's descendants then living, by representation. If S disclaims his life income interest in the trust, he will be deemed to have died immediately before Father's death. The disclaimed interest, S's income interest, came into possession and enjoyment at Father's death as would any present interest created by will (*see* **Examples 1(a), (b),** and **(c)**), and, therefore, the time of distribution is Father's death. If the income beneficiary of a testamentary trust does not survive the testator, the income interest is not created and the next interest in the trust comes takes effect. Since the next interest in Father's trust is the remainder in S's descendants, the trust property will pass to S's descendants who survive Father by representation. It is immaterial under the statute that the actual situation at the S's death might be different with different descendants entitled to the remainder.

Example 5(b). Mother's will creates a testamentary trust to pay the income to her daughter D until she reaches age 35 at which time the trust is to terminate and the trust property distributed in equal shares to D and her three siblings. D disclaimers her income interest. The remainder interests in her three siblings accelerate and they each receive one-fourth of the trust property. D's remainder interest does not accelerate, however, and she must wait until she is 35 to receive her fourth of the trust property.

As detailed above, Subsection (3)(c) accelerates future interests in possession after a disclaimer (other than future interests held by the disclaimant). The current Florida statutes are silent on this point. Sections 689.21 and 732.801 do provide that a disclaimer relates back "for all purposes" to the death of the benefactor or to the event which causes the disclaimant's interest to become indefeasibly fixed as to quality and quantity. Presumably, "for all purposes" means for purposes of determining when the future interest intended to follow in time the disclaimed interest will take effect in possession.

This interpretation of the current Florida statutory provisions is borne out by Weinstein v. Mackey, 408 So. 2d 849 (3 DCA 1982), in which the court adopted what it referred to as the "general rule." The court stated the rule as follows:

> *[A] disclaimer of the prior interest indeed accelerates the remainder interest of the existing class members, and, most significantly, 'closes the class' as of that time, eliminating the right of the unborn.*

Section 739.202

The various forms of ownership in which "joint property," as defined in Section 739.102, can be held include common law joint tenancies and any statutory variation that preserves the right of

survivorship. The common law was unsettled whether a surviving joint tenant had any right to renounce his interest in jointly-owned property and if so to what extent. See Casner, Estate Planning, 5th ed. §10.7. Specifically, if A and B owned real estate or securities as joint tenants with right of survivorship and A died, the problem was whether B might disclaim what was given to him originally upon creation of the estate, or, if not, whether he could nevertheless reject the incremental portion derived through the right of survivorship. There was also a question of whether a joint bank account should be treated differently from jointly-owned securities or real estate for the purpose of disclaimer.

This common law of disclaimers of jointly held property must be set against the rapid developments in the law of tax qualified disclaimers of jointly held property. Since the previous Uniform Acts *(and Florida's two existing disclaimer statutes)* were drafted, the law regarding tax qualified disclaimers of joint property interests has been clarified. Courts have repeatedly held that a surviving joint tenant may disclaim that portion of the jointly held property to which the survivor succeeds by operation of law on the death of the other joint tenant so long as the joint tenancy was severable during the life of the joint tenants (*Kennedy v. Commissioner*, 804 F.2d 1332 (7th Cir 1986), *McDonald v. Commissioner*, 853 F.2d 1494 (9th Cir 1988), *Dancy v. Commissioner*, 872 F.2d 84 (4th Cir 1989). On December 30, 1997 the Service published T.D. 8744 making final proposed amendments of the Regulations under IRC § 2518 to reflect the decisions regarding disclaimers of joint property interests.

The amended final Regulations, § 25.2518-2(c)(4)(i), allow a surviving joint tenant or tenant by the entireties to disclaim that portion of the tenancy to which he or she succeeds upon the death of the first joint tenant (½ where there are two joint tenants) whether or not the tenancy could have been unilaterally severed under local law and regardless of the proportion of consideration furnished by the disclaimant. The Regulations also create a special rule for joint tenancies between spouses created after July 14, 1988, where the spouse of the donor is not a United States citizen. In that case, the donee spouse may disclaim any portion of the joint tenancy includible in the donor spouse's gross estate under IRC § 2040, which creates a contribution rule. Thus the surviving non-citizen spouse may disclaim all of the joint tenancy property if the deceased spouse provided all the consideration for the tenancy's creation.

The amended final Regulations, § 25.2518-2(c)(4)(iii), also recognize the unique features of joint bank accounts, and allow the disclaimer by a survivor of that part of the account contributed by the decedent, so long as the decedent could have regained that portion during life by unilateral action, bar the disclaimer of that part of the account attributable to the survivor's contributions, and explicitly extend the rule governing joint bank accounts to brokerage and other investment accounts, such as mutual fund accounts, held in joint names.

These developments in the tax law of disclaimers are reflected in this section of the UDPIA. The provision in the UDPIA allows a surviving holder of jointly held property tenant to disclaim the *greater* of the accretive share, the part of the jointly held property which augments the survivor's interest in the property, and all of the property that is not attributable to the disclaimant's contribution to the jointly held property. ***As discussed below, the Act rejects the UDPIA's approach in this area.***

In the usual joint tenancy or tenancy by the entireties between husband and wife, the survivor will always be able to disclaim one-half the property. If the disclaimer conforms to the requirements of IRC § 2518, it will be a qualified disclaimer. In addition the surviving spouse can disclaim all of the property attributable to the decedent's contribution, a provision which will allow the non-citizen spouse to take advantage of the contribution rule of the final Regulations. The contribution rule of subsection (a)(2) will also allow surviving holders of joint property arrangements other than joint tenancies to make a tax qualified disclaimer under the rules applicable to those joint arrangements. For example, if A contributes 60% and B contributes 40% to a joint bank account and they allow the interest on the funds to accumulate, on B's death A can disclaim 40% of the account; on A's death B can disclaim 60% of the account. If the account belonged to the parties during their joint lives in proportion to their contributions, the disclaimers in this example can be tax qualified disclaimers if all the requirements of IRC § 2518 are met.

F.S. 689.21 does not explicitly address disclaimers of jointly-held assets; instead, it simply authorizes a disclaimer of any property that would pass to a beneficiary under any "nontestamentary instrument of conveyance or transfer."

Section 739.202 of the Act sets forth detailed rules as to what portion of jointly-held property may disclaimed by the surviving joint tenant or tenants. The Committee does not believe that Section 739.202 departs from current Florida law. The provisions of the Act are much more detailed than the current Florida statutes; the new provisions are intended as a guide to practitioners in planning and structuring disclaimers of jointly-held property. They are also intended to distance the Act from the joint-tenancy property disclaimer provisions in the UDPIA

The undesirable results reached by the UDPIA can be illustrated through the following examples.

Fact Pattern I

> *A and B own a bank account as joint tenants with right of survivorship. Under the terms of the account arrangement, each of them may unilaterally withdraw her contribution without the consent of the other. A contributes $999 to the account, and B contributes $1. B dies, and A disclaims her survivorship interest in the account.*

Fact Pattern II

> *A, B and C own Blackacre as joint tenants with right of survivorship. A furnished all of the consideration to acquire the property but cannot unilaterally retake Blackacre. Under Florida law, during the lifetimes of the co-tenants, each joint tenant is deemed to own one-third of the property. B dies, and both A and C disclaim their respective survivorship interests.*

The UDPIA reaches a very counterintuitive, almost metaphysical, result in the above scenarios. These results are avoided under the Act.

*In **Fact Pattern I**, under the UDPIA, A can disclaim the greater of (i) one-half of the account; or (ii) all of the account, minus the portion attributable to A's contribution. Because, under the assumed facts, the amount under (i) is the greater, A can disclaim one-half of the account, even though she will be disclaiming property that she already owns.*

*The UDPIA also reaches a bizarre result in **Fact Pattern II.**, as set forth in the following example from NCCUSL's comments:*

Example 1. A, B, and C are joint tenants with right of survivorship in Blackacre. A dies. B then disclaims 1/3 of the property under subsection (a)(1) (one divided by three, the number of joint holders immediately before A's death). B is deemed to have predeceased A, which would leave A and C as the surviving joint owners of the 1/3 disclaimed. Since A is now dead, C is the sole owner of the 1/3 B disclaimed and C and the joint tenancy as an entity are tenants in common in Blackacre. If B predeceases C, C will be the sole owner of Blackacre in fee simple. If C predeceases B, B will own 2/3 of Blackacre outright and 1/3 of Blackacre will pass through C's estate. *See, Cortelyou v. Dinger*, 62 Misc.2d 1007, 310 N.Y.S.2d 764 (1970); 2 American Law of Property, § 6.2.

Under the UDPIA, A can disclaim the greater of (i) one-third of Blackacre; or (ii) all of the property, less what A contributed to acquire it. Because (i) is the greater, A can disclaim one-third of the property. This is so notwithstanding that A would receive only a one-sixth interest in Blackacre (one-half of B's one-third) if A did not disclaim.

*Again under a UDPIA disclaimer in **Fact Pattern II**, if both **A** and **C** were to disclaim their interests in Blackacre, after the disclaimers they would, together, own one-third of the property, and each of them would own one-sixth. The other two-thirds of the property will pass to **B**'s estate. It is hard to see how **A** and **C** would not be treated as having made a gift to **B**'s estate if, as a result of the disclaimer, each of them has less than when they started.*

*As to **Fact Pattern I**, Treasury Regulations §25.2518-2(c)(4)(iii) provides as follows:*

> *In the case of a transfer to a joint bank, brokerage, or other investment account (e.g., an account held in a mutual fund), if a transferor may unilaterally regain the transferor's own contribution of the account without the consent of the other co-tenant, such that the transfer is not a completed gift under Section 25.2511-1(h)(4), the transfer creating the survivor's interest in the decedent's share of the account occurs on the death of the deceased co-tenant . . . .* ***The surviving joint tenant may not disclaim any portion of the joint account attributable to consideration furnished by that surviving joint tenant.*** *(emphasis added)*

See also Treasury Regulations §25.2518-2(c)(5), Examples (12) and (13).

Subsection (2) provides that the disclaimer is effective as of the death of the joint holder which triggers the survivorship feature of the joint property arrangement. The disclaimant, therefore, has no interest in and has not transferred the disclaimed interest.

Subsection (3) provides that the disclaimed interest passes as if the disclaimant had predeceased

the holder to whose death the disclaimer relates. Where there are two joint holders, a disclaimer by the survivor results in the disclaimed property passing as part of the deceased joint holder's estate because under this subsection, the deceased joint holder is the survivor as to the portion disclaimed.

If a married couple owns the family home in joint tenancy, therefore, a disclaimer by the survivor under subsection (1) results in one-half the home passing through the decedent's estate *(subject to special provisions necessary in Florida because of the status of the property as "homestead; see Section 739.203, discussed below).* The surviving spouse and whoever receives the interest through the decedent's estate are tenants in common in the house. In the proper circumstances, the disclaimed one-half could help to use up the decedent's unified credit. Without the disclaimer, the interest would automatically qualify for the marital deduction, perhaps wasting part of the decedent's applicable exclusion amount. *The result is the same under the special tenants by the entireties Section, 739.203.*

Section 739.203

This section preserves the changes made to 689.21, effective May 6, 2002, that clarified both the ability of a surviving spouse to disclaim a survivorship interest in tenants by the entireties property and the special features of a disclaimer of tenants by the entireties homestead property.

Section 739.204

Section 739.204 deals with disclaimer of a right to receive property into a trust, and thus applies only to trustees. (A disclaimer of a right to receive property by a fiduciary acting on behalf of an individual, such as a personal representative, conservator, guardian, or agent is governed by the section of the statute applicable to the type of interest being disclaimed.) The instrument under which the right to receive the property was created may govern the disposition of the property in the event of a disclaimer by providing for a disposition when the trust does not exist. When the instrument does not make such a provision, the doctrine of resulting trust will carry the property back to the donor. The effect of the actions of co-trustees will depend on the state law governing the action of multiple trustees.

Pursuant to 739.104(2), a trustee may only disclaim property to be received by a trust if the governing instrument permits or if the trustee obtains a court order authorizing the disclaimer.

Section 739.205

Section 739.205 provides rules for disclaimers of powers which are not held in a fiduciary capacity.

The most common non-fiduciary power is a power of appointment. Section 739.104(1) also authorizes the partial disclaimer of a power as well as of an interest. For example, the disclaimer could be of a portion of the power to appoint one's self, while retaining the right to appoint to others. The effect of a disclaimer of a power under Section 739.205 depends on whether or not the holder has exercised the power and on what sort of power is held. If a holder disclaims a

power before exercising it, the power expires and can never be exercised. If the power has been exercised, the power is construed as having expired immediately after its last exercise by the holder. The disclaimer effects only the holder of the power and will not effect other aspects of the power.

Example 1. T creates a testamentary trust to pay the income to A for life, remainder as A shall appoint by will among her descendants living at A's death and four named charities. If A does not exercise her power, the remainder passes to her descendants living at her death by representation. A disclaims the power. The power can no longer be exercised and on A's death the remainder will pass to the takers in default.

Section 739.206

Section 739.206 governs disclaimers by those who may or do receive an interest in property through the exercise of a power of appointment.

At the time of the creation of a power of appointment, the creator of the power, besides giving the power to the holder of the power, can also limit the objects of the power (the permissible appointees of the property subject to the power) and also name those who are to take if the power is not exercised, persons referred to as takers in default.

Section 739.206 provides rules for disclaimers by all of these persons: subsection (1) is concerned with a disclaimer by a person who actually receives an interest in property through the exercise of a power of appointment, and subsection (2) recognizes a disclaimer by a taker in default or permissible appointee before the power is exercised. These two situations are quite different. An appointee is in the same position as any devisee or beneficiary of a trust. He or she may receive a present or future interest depending on how the holder of the power exercises it. Subsection (1) therefore, makes the disclaimer effective as of the time the instrument exercising the power-giving the interest to the disclaimant-becomes irrevocable. If the holder of the power created an interest in the appointee, the effect of the disclaimer is governed by Section 739.201. If the holder created another power in the appointee, the effect of the disclaimer is governed by Section 739.205.

Example 1. Mother's will creates a testamentary trust for daughter D. The trustees are to pay all income to D for her life and have discretion to invade principal for D's maintenance. On D's death she may appoint the trust property by will among her then living descendants. In default of appointment the property is to be distributed by representation to D's descendants who survive her. D is the donee, her descendants are the permissible appointees and the takers in default. D exercises her power by appointing the trust property in three equal shares to her children A, B, and C. The three children are the appointees. A disclaims. Under subsection (1) A's disclaimer is effective as of D's death (the time at which the will exercising the power became irrevocable). Because A disclaimed an interest in property, the effect of the disclaimer is governed by Section 739.201(1). If D's will makes no provisions for the disposition of the interest should it be disclaimed or of disclaimed interests in general (Section 739.201(2)), the interest passes as if A predeceased the time of distribution which is D's death. An appointment to a person who is dead at the time of the appointment is ineffective except as provided by an antilapse statute. *See*

Restatement, Second, Property (Donative Transfers) § 18.5. The Restatement, Second, Property (Donative Transfers), §18.6 suggests that any requirement of the antilapse statute that the deceased devisee be related in some way to the testator be applied as if the appointive property were owned either by the donor or the holder of the power. Since antilapse statutes usually apply to devises to children and grandchildren, the disclaimed interest would pass to A's descendants by representation.

A taker in default or a permissible object of appointment is traditionally regarded as having a type of future interest. *See* Restatement, Second, Property (Donative Transfers) §11.2, *Comments c* and *d*. The future interest will come into possession and enjoyment when the question of whether or not the power is to be exercised is resolved. For testamentary powers that time is the death of the holder.

Subsection (2) provides that a disclaimer by an object or taker in default takes effect as of the time the instrument creating the power becomes effective. Because the disclaimant is disclaiming an interest in property, albeit a future interest, the effect of the disclaimer is governed by Section 739.201. The effect of these rules is illustrated by the following examples.

Example 2(a). The facts are the same as **Example 1**, except A disclaims before D's death and D's will does not exercise the power. Under subsection (2) A's disclaimer is effective as of Mother's death which is the time when the instrument creating the power, Mother's will, became irrevocable. Because A disclaimed an interest in property, the effect of the disclaimer is governed by Section 739.201(1). If Mother's will makes no provision for the disposition of the interest should it be disclaimed or of disclaimed interests in general (Section 739.201(2)), the interest passes and under Section 739.201(3) and A is deemed to have died immediately before D's death which is the time of distribution. If A actually survives D, the disclaimed interest is one-third of the trust property; it will pass as if A predeceased D, and the result is the same as in **Example 1**. If A does predecease D, he would have received nothing and there is no disclaimed interest. The disclaimer has no effect on the passing of the trust property.

Example 2(b). The facts are the same as in **Example 2(a)** except D does exercise her power of appointment to give one-third of the trust property to each of her three children, A, B, and C. A's disclaimer means the disclaimed interest will pass as if she predeceased D and the result is the same as in **Example 1**.

In addition, if all the objects and takers in default disclaim before the power is exercised the power of appointment is destroyed. *See* Restatement, Second, Property (Donative Transfers) § 12.1, *Comment g*.

Section 739.207

Section 739.207 governs disclaimers by fiduciaries of powers held in their fiduciary capacity.

Examples include a right to remove and replace a trustee or a trustee's power to make distributions of income or principal. Such disclaimers have not been specifically dealt with in prior Uniform Acts although they could prove useful in several situations. A trustee who is also a beneficiary may want to disclaim a power to invade principal for himself for tax purposes. (But

see 737.402(4)(a)). A trustee of a trust for the benefit for a surviving spouse who also has the power to invade principal for the decedent's descendants may wish to disclaim the power in order to qualify the trust for the marital deduction. (The use of a disclaimer in just that situation was approved in *Cleaveland v. U.S.*, 62 A.F.T.R.2d 88-5992, 88-1 USTC ¶ 13,766 (C.D.Ill. 1988).)

The section refers to fiduciary in the singular. It is possible, of course, for a trust to have two or more co-trustees and an estate to have two or more co-personal representatives. This Act leaves the effect of actions of multiple fiduciaries to the general rules in effect in each state relating to multiple fiduciaries. For example, if the general rule is that a majority of trustees can make binding decisions, a disclaimer by two of three co-trustees of a power is effective. A dissenting co-trustee could follow whatever procedure state law prescribes for disassociating him or herself from the action of the majority. A sole trustee burdened with a power to invade principal for a group of beneficiaries including him or herself who wishes to disclaim the power, but yet preserve the possibility of another trustee exercising the power, would seek the appointment of a disinterested co-trustee to exercise the power and then disclaim the power for him or herself. The subsection thus makes the disclaimer effective only as to the disclaiming fiduciary unless the disclaimer states otherwise. If the disclaimer does attempt to bind other fiduciaries, be they co-fiduciaries or successor fiduciaries, the effect of the disclaimer will depend on local law.

Under Section 739.104(2), a fiduciary disclaimer under this Section can, absent authorization in the instrument creating the fiduciary relationship, occur only with prior court approval.

Section 739.301

The rules set forth in Section 739.301 are designed so that anyone who has the duty to distribute the disclaimed interest will be notified of the disclaimer. For example, a disclaimer of an interest in an decedent's estate must be delivered to the personal representative of the estate. A disclaimer is required to be filed in court only when there is no one person or entity to whom delivery can be made.

Because delivery, and not recording, is required in order to effectively disclaim, the Act adopts a "mailbox rule" for the effectiveness of delivery of disclaimers delivered via first class mail. Actual receipt is required for the effectiveness of a delivery of a disclaimer delivered in any other fashion (i.e., hand delivery).

As noted above, the Committee explicitly rejects the UDPIA's authorization of e-mail or other electronic disclaimers. Under 739. 301(12), delivery will be presumed as to a properly-recorded disclaimer of an interest in real estate. This is to enable those interested in the disclaimed interest to rely on the disclaimer without having to prove effective delivery under another provision of this section.

Section 739.401

The 1978 Act *(and 732.801, which is based on the 1978 Act)* required that an effective disclaimer be made within nine months of the event giving rise to the right to disclaim (e.g., nine months from the death of the decedent or donee of a power or the vesting of a future

interest). The nine month period corresponded in some situations with the Internal Revenue Code provisions governing qualified tax disclaimers. Under the common law an effective disclaimer had to be made only within a "reasonable" time.

This Act specifically rejects a time requirement for making a disclaimer *(emphasis added)*. Recognizing that disclaimers are used for purposes other than tax planning, a disclaimer can be made effectively under the Act so long as the disclaimant is not barred from disclaiming the property or interest or has not waived the right to disclaim. Persons seeking to make tax qualified disclaimers will continue to have to conform to the requirements of the Internal Revenue Code.

Section 739.402

The events resulting in a bar to the right to disclaim set forth in this section are similar to those found in the 1978 Acts, *and those in 689.21 and 732.801*. Subsection (1) provides that a written waiver of the right to disclaim is effective to bar a disclaimer. Such a waiver might be sought, for example, by a creditor who wishes to make sure that property acquired in the future will be available to satisfy the debt.

Whether particular actions by the disclaimant amount to accepting the interest sought to be disclaimed within the meaning of subsection (2)(a) will necessarily be determined by the courts based upon the particular facts. (*See Leipham v. Adams*, 77 Wash.App. 827, 894 P.2d 576 (1995); *Matter of Will of Hall*, 318 S.C. 188, 456 S.E.2d 439 (Ct.App. 1995); *Jordan v. Trower*, 208 Ga.App. 552, 431 S.E.2d 160 (1993); *Matter of Gates*, 189 A.D.2d 427, 595 N.Y.S.2d 194 (3d Dept. 1993); "What Constitutes or Establishes Beneficiary's Acceptance or Renunciation of Devise or Bequest," 93 ALR 2d 8).

The addition in this Act of the word "voluntary" to the list of actions barring a disclaimer which also appears in the earlier Acts reflects the numerous cases holding that only actions by the disclaimant taken after the right to disclaim has arisen will act as a bar. (*See Troy v. Hart*, 116 Md.App. 468, 697 A.2d 113 (1997), *Estate of Opatz*, 554 N.W.2d 813 (N.D. 1996); *Frances Slocum Bank v. Martin*, 666 N.E.2d 411 (Ind.App. 1996); *Brown v. Momar, Inc.*, 201 Ga.App. 542, 411 S.E.2d 718 (1991); *Tompkins State Bank v. Niles*, 127 Ill.2d 209, 130 Ill.Dec. 207, 537 N.E.2d 274 (1989)). *Sections 689.21 and 732.801 already refer to "voluntary" actions.* An existing lien, therefore, will not prevent a disclaimer, although the disclaimant's actions before the right to disclaim arises may work an estoppel. *See Hale v. Bardouh*, 975 S.W.2d 419 (Tex.Ct.App. 1998). With regard to joint property, the event giving rise to the right to disclaim is the death of a joint holder, not the creation of the joint interest, and any benefit received during the deceased joint tenant's life is ignored.

The reference to judicial sale in subsection (2)(c) continues a provision from the earlier Acts *(and in current Florida law)* and ensures that title gained from a judicial sale by a personal representative will not be clouded by a possible disclaimer.

Subsection (3) rephrases the rules of Section 739.207 governing the effect of disclaimers of powers held in a fiduciary capacity.

Subsection (4) is applicable to powers of appointment which can be disclaimed under Section 739.205. It bars the disclaimer of a general power of appointment once it has been exercised. A general power of appointment allows the holder to take the property subject to the power for him or herself, whether outright or by using it to pay his or her creditors (for estate and gift tax purposes, a general power is one that allows the holder to appoint to himself, his estate, his creditors, or the creditors of his estate). The power is presently exercisable if the holder need not wait to some time or for some event to occur before exercising the power. If the holder has exercised such a power, it can no longer be disclaimed.

Subsection (5) provides a rule stating what happens if an attempt is made to disclaim a power or property interest whose disclaimer is barred by this section. ***(The Committee did not adopt the UDPIA provision)***. Under the UDPIA, a disclaimer of a power is ineffective, but the attempted disclaimer of the property interest, although invalid as a disclaimer, will operate as a transfer of the disclaimed property interest to the person or persons who would have taken the interest had the disclaimer not been barred. Whoever has control of the property will know to whom to deliver it and the person attempting the disclaimer will bear any transfer tax consequences.

Neither F.S. 689.21 nor F.S. 732.801 explicitly addresses the effect of a barred disclaimer. Both statutes bar the right to disclaim under certain circumstances; this suggests, but does not clearly provide, that a disclaimer that is attempted under circumstances when a disclaimer is barred is void ab initio.

Both current Florida statutes contain provisions exculpating the fiduciary or other person in custody of the property from liability from acting in reliance on a barred disclaimer unless the fiduciary or other person has actual knowledge of the facts giving rise to the bar. Presumably, these provisions merely protect the trustee from liability, and do not touch on the rights inter se of the barred disclaimant and the person to whom the trustee distributes the "disclaimed" property.

The UDPIA provision, while perhaps resolving questions relative to the disposition of an interest subject of a botched disclaimer more clearly than the Florida statutes, is something of a double whammy: not only did the disclaimant screw up the disclaimer, as a penalty for his transgressions he is also forced into making a transfer that could have negative and unintended transfer tax consequences to him.

The Committee believes that its changes to the UDPIA both bring clarity to Florida law and work a more equitable result. The proposed provision explicitly states that a botched (or "barred") disclaimer is ineffective, a nullity. The failed disclaimer does not automatically result in a taxable transfer; instead, the would-be disclaimant retains the property sought to be disclaimed. This is consistent with the Treasury Regulation §25.2518-1(b), which provides as follows:

> *If the disclaimer is not a qualified disclaimer, for purposes of the federal estate, gift and generation-skipping transfer tax provisions, the disclaimer is disregarded and the disclaimant is treated as having received the interest.*

The disclaimant now has a choice: he can choose to keep the property that he sought to disclaim, or if he chooses, he may make the transfer anyway and bear the tax consequences. Under the UDPIA, the disclaimant is denied this choice.

The proposed statute includes, largely verbatim, the exculpatory provisions presently in the Florida statutes. The UDPIA has no exculpatory provisions for fiduciaries acting in reliance on disclaimers that later turn out to be barred. The "automatic transfer" provisions of the UDPIA arguably make such provisions less important, which may explain why they were omitted form the uniform act.

Section 739.501

This section coordinates the Act with the requirements of a qualified disclaimer for transfer tax purposes under IRC § 2518. Any disclaimer which is qualified for estate and gift tax purposes is a valid disclaimer under this Act even if it does not otherwise meet the Act's more specific requirements.

Section 739.601

Disclaimers, even those touching on real estate, no longer need to be recorded to be effective ***as between the disclaimant and those taking the disclaimed interest.*** *However, an un-recorded disclaimer affecting an interest in real estate will not provide constructive notice to any persons outside of the disclaimer.*

Section 739.701

This section deals with the application of the Act to existing interests and powers. It insures that disclaimers barred by the running of a time period under prior law will not be revived by the Act. For example, assume prior law, like the prior Uniform Acts, allow the disclaimer of present interests within nine months of their creation and the disclaimer of future interests nine months after they are indefeasibly vested. *(732.801 so provides.)* Under T's will, X receives an outright devise of a sum of money and also has a contingent remainder in a trust created under the will. The Act is effective in the jurisdiction governing the administration of T's estate ten months after T's death. X cannot disclaim the general devise, irrespective of the application of Section 739.402 of the Act, because the nine months allowed under prior law have run. The contingent remainder, however, may be disclaimed so long as it is not barred under Section 739.402 without regard to the nine month period of prior law.

Section 731.201

The proposed change to this Section is simply to add new chapter 739 of the Florida Statutes to the chapters to which the general definitions of Section 731.201 apply.

IV. FISCAL IMPACT ON STATE AND LOCAL GOVERNMENTS

Adoption of this legislative proposal (i.e., the Act) by the Florida Legislature should not have a fiscal impact on state and local governments; rather, it should be revenue neutral.

V. DIRECT IMPACT ON PRIVATE SECTOR

Adoption of this legislative proposal (i.e., the Act) by the Florida Legislature should not have a direct impact on the private sector.

VI. CONSTITUTIONAL ISSUES

The legislative proposal does not violate any of the provisions of the Constitution of the State of Florida or of the United States Constitution. The Act will provide a clearer, better organized and more flexible framework governing the ability of Florida residents to make disclaimers of property interests and powers.

VII. OTHER INTERESTED PARTIES

Other groups which may have an interest in the legislative proposal would include the Tax Section of The Florida Bar, the Florida Institute of Certified Public Accountants, and the Trust Division of the Florida Bankers Association.

305096

LEGISLATIVE POSITION REQUEST FORM

GOVERNMENTAL AFFAIRS OFFICE

Date Form Received _____

GENERAL INFORMATION

Submitted By

The Real Property, Probate and Trust Law Section/IRA and Employee Benefits Committee

(List name of the section, division, committee, bar group or individual)

Address Chair: Richard S. Amari, Amari & Theriac, P.A.
P.O. Box 1807, Cocoa, Florida 32923-1807 – ramari@amaritheriac.com – phone: 321 639 1320; fax: 321 639 6690

(List street address and phone number)

Position Type

The Florida Bar Real Property, Probate and Trust Law Section/The IRA and Employee Benefits Committee

(Florida Bar, section, division, committee or both)

CONTACTS

Board & Legislation Committee Appearance Sandra F. Diamond, Legislative Chair
9075 Seminole Blvd., Seminole, FL 33772 phone: 727 398 3600

(List name, address and phone number)

Appearances before Legislators Sandra F. Diamond (727) 398-3600 Peter M. Dunbar (850) 222-3533

(List name and phone # of those appearing before House/Senate Committees)

Meetings with Legislators/staff Sandra F. Diamond (727) 398-3600 Peter M. Dunbar (850) 222-3533

(List name and phone # of those having face to face contact with Legislators)

PROPOSED ADVOCACY

All types of partisan advocacy or nonpartisan technical assistance should be presented to the Board of Governors via this request form. All proposed legislation that has *not* been filed as a bill or a proposed committee bill (PCB) should be attached to this request in legislative format - Standing Board Policy 9.20(c). Contact the Governmental Affairs office with questions.

If Applicable, List The Following _____

(Bill or PCB #) (Bill or PCB Sponsor)

Indicate Position _X_ Support ____ Oppose ____ Technical Assistance Other _____

Proposed Wording of Position for Official Publication: Support revision to F.S. 222.21(21)(a) to strengthen exemption from creditor's claims for IRA's and employee benefit funds or accounts exempt from taxation under the Internal Revenue Code of 1986.

Reasons For Proposed Advocacy: To eliminate confusion as to whether IRA's and employee benefit funds are exempt from creditor's claims. See attached white paper for full discussion.

PRIOR POSITIONS TAKEN ON THIS ISSUE

Please indicate any prior Bar or section positions on this issue to include opposing positions. Contact the Governmental Affairs office if assistance is needed in completing this portion of the request form.

Most Recent Position _____

(Indicate Bar or Name Section) (Support or Oppose) (Date)

Others
(May attach list if more than one)

_____

(Indicate Bar or Name Section) (Support or Oppose) (Date)

REFERRALS TO OTHER SECTIONS, COMMITTEES OR LEGAL ORGANIZATIONS

The Legislation Committee and Board of Governors do not typically consider requests for action on a legislative position in the absence of responses from all potentially affected Bar groups or legal organizations - Standing Board Policy 9.50(c). Please include all responses with this request form.

Referrals

1. Tax Section, The Florida Bar
   (Name of Group or Organization) (Support, Oppose or No Position)

2. Business Law Section, The Florida Bar
   (Name of Group or Organization) (Support, Oppose or No Position)

3. _____
   (Name of Group or Organization) (Support, Oppose or No Position)

Please submit completed Legislative Position Request Form, along with attachments, to the Governmental Affairs Office of The Florida Bar. Upon receipt, staff will further coordinate the scheduling for final Bar action of your request which usually involves separate appearances before the Legislation Committee and the Board of Governors unless otherwise advised. For information or assistance, please telephone (904) 561-5662 or 800-342-8060, extension 5662.

REAL PROPERTY, PROBATE, AND TRUST LAW SECTION OF THE FLORIDA BAR
WHITE PAPER
ON
A PROPOSED BILL TO AMEND FLORIDA STATUTE § 222.21(2)(a)

I. SUMMARY.

This proposal is intended to strengthen the exemption from creditors' claims provided by Fla. Stat. § 222.21(2)(a) for individual retirement accounts and employee benefit funds or accounts exempt from taxation under the Internal Revenue Code of 1986, as amended ("Code").

II. CURRENT SITUATION.

Fla. Stat. § 222.21(2)(a) currently exempts from creditors' claims any money or other assets payable to a participant or beneficiary from, or any interest of any participant or beneficiary in, a retirement or profit sharing plan that is qualified under §§ 401(a), 403(a), 403(b), 408, 408A or 409 of the Code. A plan that is "qualified" under any of these Code sections is exempt from Federal income taxation.

Typically, a qualified plan is maintained in accordance with a model or prototype plan, trust or agreement approved by the Internal Revenue Service or has received a favorable determination letter under § 7805 of the Code which determines the plan has met the qualification requirements which are a necessary prerequisite to the plan's exemption from taxation. Tax qualification for employee benefit plans is an incredibly complex subject dealt with by the Code. It is an area subject to constant change. The IRS can "disqualify" a plan retroactively to the year in which the plan fails to meet a qualification requirement. A plan may be disqualified for failure to contain a required provision, failure to timely adopt an amendment required by new legislation, failure to comply with a plan provision, and for misuse or mismanagement of plan funds.

Due in large part to the harsh effects of plan disqualification, Congress provided different relief mechanisms for employers to avoid the undesirable results of failing to maintain or operate a plan in accordance with the Code. A comprehensive system of correction programs, known as "Employee Plans Compliance Resolution System," provides a graduated series of fees and sanctions to provide employers with an incentive to make prompt corrections and to provide a consistent and uniform administration of sanctions. Loss of tax-exempt status is the most severe sanction and is saved for the most egregious violations.

The Employee Retirement Income Security Act ("ERISA") was enacted in 1974 to regulate employee welfare benefit plans and employee pension benefit plans. ERISA was enacted in four titles. Title I provides for substantive rules for protection of employee benefit rights through provisions for reporting and disclosure, participation and vesting, funding, fiduciary responsibility and administration and enforcement. Title II provides for amendments to the Code that establish the qualification rules for tax-favored treatment. Title III deals with jurisdiction, administration and

enforcement. Title IV creates plan termination insurance requirements. Most employee benefit plans established or maintained by an employer are subject to, or "covered by," all of Title I of ERISA. Individual retirement accounts and most simplified employee plans are not covered at all by Title I of ERISA. Certain employee benefit plans, such as top hat plans and funded excess benefit plans, are covered by some, but not all, of Title I of ERISA. Plans maintained by sole proprietors and partnerships for their owners and plans maintained by corporations for their shareholders, although not covered by Part 2 of Title I of ERISA, may arguably be covered by Part 5 of Title I of ERISA. This issue has caused much confusion among the courts that have questioned it. As will be discussed below, the question of which part or parts of ERISA may cover a plan has been a determinative factor in several courts' decisions regarding whether a plan's assets are exempt from creditors' claims.

The question of whether assets in an employee benefit plan are exempt from creditors' claims requires consideration of state spendthrift laws, Federal bankruptcy laws and Federal spendthrift laws. In Florida, the issue of creditors' claims exemption of individual retirement accounts and tax-exempt, or "qualified," plans will be controlled by Fla. Stat. § 222.21(2)(a), the Federal spendthrift provisions found in Part 2 of Title I of ERISA and the exclusionary and exemption provisions found in §§ 541(c) and 522 of the Bankruptcy Code.

Section 541(c)(2) of the Bankruptcy Code excludes from the debtor's bankruptcy estate any beneficial interest of a debtor in a trust that is subject to a restriction or transfer enforceable under "applicable non-bankruptcy law." In the landmark decision of *Patterson v. Shumate*, 504 U.S. 753 (1992), cert. denied, 505 U.S. 1239 (1992), the Supreme Court ruled that the antialienation provisions of Part 2 of Title I of ERISA contain a restriction on transfers enforceable under applicable non-bankruptcy law within the meaning of § 541(c)(2) of the Bankruptcy Code. Thus, the *Shumate* decision has determined that an "ERISA Qualified" plan is excluded from the debtor's estate under § 541(c)(2). In reaching this decision, however, the Supreme Court failed to define "ERISA-qualified," a term that is not otherwise defined in the Internal Revenue Code or the Bankruptcy Code. The post-*Shumate* decisions have adopted two divergent meanings of what is meant by ERISA-qualified. One line of cases has held that the term means a plan that (1) is covered by Part 2 of Title I of ERISA, and (2) contains the required non-alienation clause. [See *In re Hanes*, 162 B.R. 733 (Bankr. E.D. Va. 1994); *SEC v. Johnston*, 922 F.Supp. 1220 (E.D. Mich. 1996); *In re Craig*, 204 B.R. 756 (Bankr. B.N.P. 1997); *In re Bennett*, 185 B.R. 4 (Bankr. E.D. NY 1995)]. The second line, which has been adopted by the Florida courts, holds that for a plan to be "ERISA-qualified" it must (1) be subject to Part 2 of Title I of ERISA, (2) contain the required antialienation clause, and (3) be tax qualified under § 401(a) of the Code. [See *In re Harris*, 188 B.R. 144 (Bankr. M.D. Fla. 1995); *In re Fernandez*, 236 B.R. 483 (Bankr. M.D. Fla. 1999)].

As a result of the definition of "ERISA-qualified" adopted by the Florida courts, most cases that have considered whether a plan is excluded under Bankruptcy Code § 542(c)(2) have looked at the issue of whether the plan is "tax qualified." Because exemption under Fla. Stat. § 222.21(2)(a) likewise depends on a plan's tax exemption, the issue is the same for exemption under the statute. The resulting case law has found the courts, creditors and debtors arguing over whether a plan was

tax qualified from the beginning, or even if so, whether it may have lost its qualified status due to a documentation failure or operational failure.

The question of whether tax qualification status may be tested in the forum in which the exemption is being tested has also resulted in two divergent lines of authority. The Fifth Circuit in *In the Matter of William Youngblood*, 29 F.3d. 225 (5th Cir. 1994), ruled that the bankruptcy court must defer to the IRS on the issue of determining tax qualification. Despite the complexities and difficulties of this subject matter, and ignoring the Comprehensive Employee Plan Compliance Resolution System put in place to avoid the harsh results of plan disqualification, the Florida courts have rejected the *Youngblood* approach and have allowed the creditors to attack the tax-qualified status of a plan that has never been disqualified by the IRS. [See *In re Harris*, 188 B.R. 44 (Bankr. M.D. Fla. 1995); *In re Sutton*, 272 B.R. 802 (Bankr. M.D. Fla. 2002)].

As a result of the post-*Shumate* case law in Florida, many employee benefit plans considered protected by most planners can be challenged de novo, even if the plan has received a favorable determination letter, resulting in a loss of exemption from creditors' claims.

Another problem area deals with plans that are not covered by Part 2 of Title I of ERISA. An example includes plans that cover owners of a partnership or corporation. Plans that cover only owners or owners and their spouses are administratively excluded from the coverage of Part 2 of Title 1 of ERISA. Because these plans are not covered by Part 2 of Title I of ERISA, they are not protected from creditors' claims by reason of the spendthrift provisions of that part of ERISA. In other words, they fail the "ERISA-qualified" requirement of *Shumate* for exclusion under § 541(c)(2) of the Bankruptcy Code. This being the case, however, § 522(b) of the Bankruptcy Code should pick up the § 222.21(2)(a) exemption to provide an exemption for these assets in the debtor's bankruptcy estate. A literal reading of § 222.21(2)(a) merely requires the plan to be qualified under § 401(a) (or one of the other cited Code sections). The fact that the plan is not "ERISA-qualified" is not a statutory prerequisite to exemption under § 222.21(2)(a). Although at least one Florida case correctly ruled on this issue [see *In re Luttge*, 204 B.R. 259 (Bankr. S.D. Fla. 1997)], several others get it wrong by denying exemption under § 222.21(2)(a) for plans not covered by Part 2 of Title I of ERISA. [See, e.g., *In re Harris*, 188 B.R. 444 (Bankr. M.D. Fla. 1995) and *In re Fernandez*, 236 B.R. 483 (Bankr. M.D. Fla. 1999)].

It has been argued that plans covered by Part 5 of Title I of ERISA but not covered by Part 2 of Title I (e.g., plans that cover only owners) cannot be protected by state "shield laws," such as § 222.21(2)(a), because the state shield laws are preempted by Part 5 of Title I. Although this argument has been accepted by the Sixth and Ninth Circuits, the Eleventh Circuit has flatly rejected this proposition holding § 222.21(2)(a) is not preempted by ERISA. [See *In re Schlein*, 8 F.3rd 745 (11th Cir. 1993)]. Unless and until this ruling is overturned by the Supreme Court, § 222.21(2)(a) may continue to protect "tax qualified" plans that are not "ERISA qualified."

Paragraph (d) of §222.21(2) provides that plan assets are not exempt from claims of an alternate payee under a qualified domestic relations order. Because claims of a spouse or former

spouse under a divorce or separation instrument are provided for under §408(d)(6) rather than §414(p), and because §408(d)(6) does not use the term "alternate payee," it is not clear that an IRA is not exempt from claims of a spouse or former spouse under a divorce or separation instrument.

III. EFFECT OF PROPOSED CHANGES.

The proposed legislation is designed to shore up the erosion of the creditor protection intended for individual retirement accounts and tax qualified employee benefit plans intended by Fla. Stat. § 222.21(2)(a) in the following ways:

A. Clarification of Protected Persons.

The term "owner" is added to the terms "participant" and "beneficiary" to clarify that the owner of a tax-exempt account is protected. This change is necessary because an owner of an individual retirement account is technically neither a beneficiary nor a participant of the account.

B. Addition of Code Sections Qualifying for Exemption.

Funds or accounts exempt from taxation under Code §§ 414, 457 and 501(a) are added. These would include governmental and church plans. This addition makes the list of Code sections which will qualify an account or fund as tax exempt, and thus creditor exempt under § 222.21(2)(a), consistent with new bankruptcy exemptions that would be added by the Bankruptcy Abuse and Consumer Protection Act (H.R. 975) which was approved by the House on March 19, 2003 ("Bankruptcy Reform Act").

C. Substitution of Terms.

The terms "fund or account" and "exempt from taxation" are substituted for terms "retirement or profit sharing plan" and "qualified." These changes will adopt language consistent with changes proposed by the Bankruptcy Reform Act and will avoid the use of terms (i.e., "qualified") that have caused disagreement among the courts.

D. Basis For Exemption Changed

A debtor need no longer prove that the fund or account which is sought to be protected is exempt from tax. The proposal rejects the Harris line of cases and adopts the Youngblood approach that the proper jurisdiction for determining tax compliance is with the Internal Revenue Service and the Tax Courts. To accomplish this result, the basis of creditor exemption is changed from a plan that is tax exempt to a plan that is described under paragraph 2(a) of the statute. A plan is described under paragraph 2(a) if it is

1. a master plan, volume submitter plan, prototype plan or any other plan that has been pre-approved by the IRS as exempt from taxation under the appropriate Code section, unless it has been subsequently determined that the plan is not tax exempt in a proceeding that is final and non-appealable;

2. a plan that has received an IRS determination letter as exempt from taxation under the appropriate Code section, unless it has been subsequently determined that the plan is not tax exempt in a proceeding that is final and non-appealable; or

3. a plan that is not a master plan volume submitter plan, prototype or other pre-approved plan, or which has not received a favorable determination letter, if the person claiming creditor exemption proves by a preponderance of the evidence that:

   (a) the plan substantially complies with the applicable Code qualification requirements, or

   (b) although the plan fails to qualify under the applicable Code section, it would have, but for the negligent or wrongful conduct of a person or persons other than the person who is claiming the creditor exemption.

The proposal recognizes that if a plan has previously received a favorable determination by the IRS as a qualified plan (whether a master, volume submitter, prototype or individual plan), then such plan has initially been determined by the IRS to be tax qualified. Following the Youngblood approach, the creditor cannot challenge the tax qualified status of such a plan in the creditor proceedings unless the creditor can prove that the plan's qualified status has been revoked in a proceeding that has become final and non-appealable. Such a plan will automatically qualify for creditor exemption.

The proposal also recognizes that a plan which substantially complies with the qualification requirements of the Code, but has not received preapproval by the IRS, may nevertheless establish creditor exemption by proving compliance with the applicable Code section. Although not qualifying for "automatic creditor exemption," the debtor may submit proof that the plan qualifies as tax-exempt and thus is creditor exempt. The measure of proof is a preponderance of the evidence. Finally, even if a plan fails to meet the qualification rules, the proposal allows a person to exempt assets in the plan if the plan would have qualified, but for the negligence or wrongful conduct of another person or other persons. Again, the standard of proof is a preponderance of the evidence.

E. CLARIFICATION THAT ERISA-QUALIFICATION NOT REQUIRED

The proposal is intended to clarify the current intent of the statute, as construed by *In re Luttge*, that "tax-qualification" alone is sufficient to qualify for creditor exemption and it is not necessary for the fund or account to be "ERISA qualified" to be exempt from creditors' claims under the statute.

F. TRANSFER OR ROLLOVER OF EXEMPT ASSETS.

The proposal incorporates a provision in the Bankruptcy Reform Act to provide that money or assets exempt under Fla. Stat. § 222.21(2)(a) will not lose exemption by reason of a direct transfer or rollover to another exempt plan or a distribution, so long as such money or assets are not co-mingled with other money or assets that are not exempt from creditors' claims under § 222.21(2)(a).

G. TREATMENT OF IRA'S INCIDENT TO DIVORCE.

The proposal amends paragraph (d) to clarify that an IRA is not exempt from claims of a spouse or former spouse under a divorce or separation instrument.

IV. FISCAL IMPACT ON STATE OR LOCAL GOVERNMENTS.

The proposal will not have any fiscal impact on state or local governments.

V. CONSTITUTIONAL ISSUES.

No constitutional issues are expected to arise under the proposal.

Suggested amendment to Fl. Stat. Sec. 222.21

222.21 . Exemption of pension money and ~~retirement or profit-sharing benefits~~ certain tax exempt funds or accounts from legal process

(1) Money received by any debtor as pensioner of the United States within 3 months next preceding the issuing of an execution, attachment, or garnishment process may not be applied to the payment of the debts of the pensioner when it is made to appear by the affidavit of the debtor or otherwise that the pension money is necessary for the maintenance of the debtor's support or a family supported wholly or in part by the pension money. The filing of the affidavit by the debtor, or the making of such proof by the debtor, is prima facie evidence; and it is the duty of the court in which the proceeding is pending to release all pension moneys held by such attachment or garnishment process, immediately, upon the filing of such affidavit or the making of such proof.

(2)(a) Except as provided in subparagraph ~~(b)~~ (d), any money or other assets payable to an owner, a participant or beneficiary from, or any interest of any owner, participant or beneficiary in, a ~~retirement or profit sharing plan~~ fund or account that is ~~qualified under s. 401(a), s. 403(a), s. 403(b), s 408, s. 408A, or s. 409 of the Internal Revenue Code of 1986, [FN1] as amended,~~ described in this subparagraph (2)(a) is exempt from all claims of creditors of the owner, beneficiary or participant. A fund or account is described in this subparagraph (2)(a) if it is either:

1. a fund or account that is maintained in accordance with a master plan, volume submitter plan, prototype plan, or any other plan or governing instrument that has been pre-approved by the Internal Revenue Service as exempt from taxation under s. 401(a), s. 403(a), s. 403(b), s. 408, s. 408A, s. 409, s. 414, s. 457(b), or s. 501(a) of the Internal Revenue Code of 1986, unless it has been subsequently determined that the plan or governing instrument is not exempt from taxation in a proceeding that has become final and non-appealable;

2. a fund or account that is maintained in accordance with a plan or governing instrument that has been determined by the Internal Revenue Service to be exempt from taxation under s. 401(a), s. 403(a), s. 403(b), s. 408, s. 408A, s. 409, s. 414, s. 457(b), or s. 501(a) of the Internal Revenue Code of 1986, unless it has been subsequently determined that the plan or governing instrument is not exempt from taxation in a proceeding that has become final and non-appealable; or

3. a fund or account that is not maintained in accordance with a plan or governing instrument described in clause 1 or 2 of this subparagraph (2)(a) if:

(i) the person claiming exemption under this subparagraph (2)(a) proves by a preponderance of the evidence that either:

(I) the fund or account is maintained in accordance with a plan or

governing instrument that is in substantial compliance with the applicable requirements for tax exemption under s. 401(a), s. 403(a), s. 403(b), s 408, s. 408A, s. 409, s. 414, s. 457(b), or s. 501(a) of the Internal Revenue Code of 1986; or

(II) the fund or account is maintained in accordance with a plan or governing instrument that would have been in substantial compliance with the applicable requirements for tax exemption under s. 401(a), s. 403(a), s. 403(b), s 408, s. 408A, s. 409, s. 414, s. 457(b), or s. 501(a) of the Internal Revenue Code of 1986, but for the negligent or wrongful conduct of a person or persons other than the person who is claiming the exemption under this section.

(b) It is not necessary that a fund or account that is described in subparagraph (2)(a) be maintained in accordance with a plan or governing instrument that is covered by any part of the Employee Retirement Income Security Act for money or assets payable from or any interest in that fund or account to be exempt from claims of creditors under that subparagraph.

(c) Any money or other assets that are exempt from claims of creditors under subparagraph (2)(a) shall not cease to qualify for exemption by reason of a direct transfer or eligible rollover that is excluded from gross income under s. 402(c) of the Internal Revenue Code of 1986, or by distribution from any such fund or account so long as such money or assets are not co-mingled with other money or assets that are not exempt from claims of creditors under that paragraph.

~~(b)~~ (d) Any ~~plan or arrangement~~ fund or account described in subparagraph (2)(a) is not exempt from the claims of an alternate payee under a qualified domestic relations order, or from the claims of a spouse or former spouse pursuant to a divorce or separation instrument. However, the interest of any alternate payee under a qualified domestic relations order or of a spouse or former spouse pursuant to a divorce or separation instrument is exempt from all claims of any creditor, other than the Department of Children and Family Services, of the alternate payee. As used in this paragraph, the terms "alternate payee" and "qualified domestic relations order" have the meanings ascribed to them in s. 414(p) of the Internal Revenue Code of 1986, and the term "divorce or separation instrument" has the meaning ascribed to it in s. 408(d)(6) of the Internal Revenue Code of 1986. [FN2]

~~(c)~~ (e) The provisions of ~~paragraphs (a) and (b)~~ this paragraph (2) apply to any proceeding that is filed on or after ~~October 1, 1987~~ (insert the effective date of the bill).

* From the Claims of a Surviving Spouse ...

FLORIDA BANKERS ASSOCIATION

April 2, 2004

Mr. Louis B. Guttmann, III
Chair, Real Property, Probate & Trust Law Section
PO Box 628600
Orlando, FL 32862-8600

Dear Lou:

The Florida Bankers Association thanks the Real Property, Probate and Trust Law Section for the opportunity to participate on the Uniform Trust Code (UTC) subcommittee and commends the Section for initiating a discussion on important issues that impact both our industries. I am writing to clarify my understanding of the committee's objectives and to share the FBA's preliminary position on a few basic points.

First, please let us know if the Section's leadership currently anticipates adopting the UTC with selective changes, in place of the existing Chapter 737, rather than enacting individual sections of the UTC to integrate into our present trust code.

We believe Florida currently has some of the best trust laws in the country, which the FBA and the Section have developed cooperatively over the last several years. The Trust Law Committee's analysis of the UTC is an excellent starting point for discussions; however, it would be helpful if it were expanded to include a compilation of Florida provisions not included in the UTC. An issue-by-issue comparison of the differences could then be created, which would serve as a framework for further discussion as to the best approach to improve Florida trust law. The FBA strongly supports adopting only those provisions of the UTC that are necessary to improve existing Florida law, rather than adopting the UTC in its entirety.

Also, while the FBA and the Section agree on a number of issues, we understand that there will be differences between our respective organizations. The FBA is conducting its own review of the UTC and anticipates sharing its conclusions with the Section when that review is complete. While we appreciate having a seat on the Section's ad hoc committee, we reserve our right to oppose any issue on which the FBA and the Section are unable to agree, regardless of the outcome of the ad hoc committee's votes.

Thank you for your consideration and I look forward to hearing from you. If I can be of any assistance, please let me know.

Sincerely,

Richard Jackson
Trust Division Legislative Chair
President, Bank of New York Trust Company

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REAL PROPERTY, PROBATE & TRUST LAW SECTION **THE FLORIDA BAR**

www.flabarRPPTL.org

Mr. Richard Jackson
Trust Division Legislative Chair
Florida Bankers Association
1001 Thomasville Road, Suite 201
P.O. Box 1360
Tallahassee, FL 32302-1360

Dear Dick:

This letter is in response to yours of April 2, 2004 on behalf of the Florida Bankers Association to Lou Guttmann, in his capacity as chair of the Real Property, Probate and Trust Law Section. I am responding on behalf of Lou and the Section, in my capacity as Chair-Elect of the Section and as a Co-Chair of the particular Committee about which you write.

Certainly some clarification is in order, as is evidenced by your reference to the Committee as the "Uniform Trust Code" committee. In fact, the name of this Committee is the Ad Hoc Trust Code Revision Committee. The lack of reference to the Uniform Trust Code in the name of the Committee was intentional. The Section leadership specifically considered, and rejected, pursuing the wholesale adoption of the Uniform Trust Code. Instead, this Committee is charged with developing a recommendation for a comprehensive re-write of the trust law of Florida. The beginning point of this significant undertaking is the existing Florida trust law, both statutory and judicial. The next component of this process is the Uniform Trust Law as promulgated by the National Conference of Commissioners on Uniform State Law. I expect the final result to (i) follow the format the of the Uniform Trust Code, (ii) retain the substance of the well-developed Florida law and (iii) include a restrained sprinkling of new provisions modeled after Uniform Trust Code provisions.

The Committee is structuring its recommendation in a format consistent with the Uniform Trust Code. This decision was for organizational reasons and does not carry with it any mandate for adoption of provisions of the Uniform Trust Code. In fact, based upon the Committee's deliberations to date, I expect few Uniform Trust Code provisions will be recommended without some changes and many of the existing law of Florida will be recommended to be retained with no substantive change.

The participation by the FBA in this project has been helpful and we appreciate the comments made by its representatives. The insight of

the FBA has been important to us during our deliberations. We look forward to the continuation of the FBA's involvement.

We recognize that the FBA may decide against supporting the final work product of the Committee. The Executive Council of the Section may do likewise. And, of course, the Legislature may decline to enact any of these recommendations. Having said that, we are hopeful the FBA continues to articulate its concerns during the Committee deliberations to provide the opportunity to address those issues during this process. The Committee can only pledge to deliberate thoughtfully, work diligently and produce the optimal recommendation for the advancement of the trust law in Florida. To that, you and the FBA have my personal assurance.

In closing, we stand ready to meet with the FBA representatives on this or any other subject. In addition, please know that we would welcome you at any meeting of the Committee.

Respectfully,

Laird A. Lile
Co-Chair, Ad Hoc Trust Code Revision Committee
Chair-Elect of the Section

Cc: Louis B. Guttmann, III, Chair of the Section
Brian J. Felcoski, Co-Chair of the Ad Hoc Trust Code Revision Committee
Rohan Kelley, Probate and Trust Division Director of the Section

NAME: RPPTL AD HOC HIPAA STUDY COMMITTEE

DURATION: The initial duration of the committee is 6 months -- which may be extended if necessary.

CHAIR: Sam Boone will chair the committee. Sam will appoint a vice chair or two. He will try to get the committee members and vice chair(s) designated (and accepted) in order to report we are ready to begin work by the Key West council meeting May 27, 2004.

CONSTITUTED:

- The chairs of the following listed committees are requested to appoint UP TO 3 members from their committee to the HIPAA committee (they may appoint themselves or others on their committee):
  - Power of Attorney and Advance Directive Law
  - Probate Law and Procedure
  - Trust Law
  - Guardianship Law and Procedure
  - Fletcher -- please appoint one member from the litigation committee to this committee. I believe HIPAA may have implications regarding discoverability of medical records for decedents and incapacitated persons.
  - Our Elder Law liaisons are requested to invite that section to appoint up to 3 members to serve on the committee.

CHARGE: Study HIPAA and its implications to various areas of our practice. Obvious issues are:

- implementing trustee substitution provisions by getting a doctor to certify that a serving trustee is not capable of continuing to perform the duties;
- Health Care Surrogates gaining access to medical records to make health care decisions;
- obtaining medical information to implement life support termination;
- production and discovery of medical records;
- drafting implications.

There are certainly many more implications and issues which you will identify and resolve.

- Recommend sample language to deal with or overcome the statutory impediments. This will be posted on the web site.
- A final report, together with the suggested forms, will be published in ActionLine.
- Recommend any necessary legislation -- state or federal, keeping in mind issues of preemption.
- Plan a seminar when you conclude your work.

RATIONALE: There are serious issues with HIPAA and advance directives, powers of attorney, health care surrogates and trustee substitution where a trustee has become mentally or physically incapable of functioning in that capacity.

HIPAA is a federal law, and may in some instances (and may not in some instances) pre-empt state law. We need to look at the legislation and consider our need as practitioners and the needs of our client for access to medical information of another person (generally a person who is affiliated in some way).

We will address:

- the legal issues,
- the need for legislation,
- production of form clauses to address drafting issues and other related solutions which can be disseminated to our members.

Our end product will be circulated by an email to our members, with a link to the members side of our website where we should provide additional information as well as drafting solutions. For example, the Spring 2004 issue of the ACTEC Journal has an article titled "Planning for the HIPPA Privacy Rule" and the ACTEC website has several posted items on the subject.

We will be prepared to discuss this at Key West -- we'll take some time at the probate roundtable breakfast to do so. PLPC, GLPC, TLC and POA&ADC chairs/vice chairs, please be sufficiently familiar with HIPAA to participate in the discussion. Sam Boone or Jim Herb will lead the discussion. Sam will attempt to find a good HIPAA summary to distribute that at the roundtable.

HIPPA Committee Appointments

1. Guardianship Law and Procedure
    a. David Russell Carlisle, Akerman Senterfitt & Eidson, 1 S.E. 3rd Avenue, Floor 28, Miami, FL 33131-1715; (305) 374-5600; (305) 374-5095; dcarlisle@akerman.com
    b. Joan Nelson Hook P.A., 4918 Floramar Terrace, Gulf Harbors, New Port Richey, FL. 34652; (727)842-1001; FAX: (727)848-0602; joan.hook@elderlawcenter.com
    c. Joseph Paul George, Jr., Law Offices of Joseph P. George, Dadeland Tower South, 9400 South Dadeland Boulevard, Penthouse 5, Miami, Florida 33156; (305) 670-6706; Fax: (305) 670-2048; joepgeorge@aol.com
2. Power of Attorney and Advance Directive Law
    a. Sam W. Boone, Jr., Sam W. Boone, Jr., P.A., 605 NE 1st Street, Suite "E", Gainesville, FL 32601; (352) 374-8308; (352) 375-2283; sboone@boonelaw.com
    b.
3. Trust Law
    a. Ms. Diana S. C. Zeydel, Greenberg Traurig, P.A., 1221 Brickell Ave., Miami, Florida 33131-3224; (305)579-0575; Fax: (305)579-0717; zeydeld@gtlaw.com
    b. Mr. William Torbert Muir, Dunwody White & Landon, P.A., 550 Biltmore Way, , Ste. 810, Coral Gables, Florida 33134-5730; (305)529-1500; Fax: (305)529-8855; Email: wmuir@dwl law.com
    c. Mr. Stephen Paul Heuston, Frese Nash & Torpy, 930 S. Harbor City Blvd., # 505, Melbourne, Florida 32901-1967; (321)984-3300; Fax: (321)951-3741; sheuston@fnhlaw.com
4. Elder Law Section
    a. Marjorie E. Wolasky, Marjorie E. Wolasky, P.A., 9400 S. Dadeland Blvd., Suite 300, Miami, Florida 33156; Phone: 305-670-7005; Fax: 305-670-4847; MWolasky@wolasky.com
5. Probate Law and Procedure
6. Probate and Trust Litigation

The Liaison with Corporate Fiduciaries Committee of the
Real Property, Probate and Trust Law Section of The Florida Bar
in cooperation with Members of the Trust Division of the
Florida Bankers Association present:

THE FLORIDA BAR

23rd Annual Attorney/Trust Officer Liaison Conference

"East Meets West - Attorneys and Trust Officers at Their Best"

June 17 - June 20, 2004
The Ritz-Carlton Golf Resort
Naples, Florida

Program Chair:
Michael A. Dribin, Miami

Program Vice Chair:
Stuart H. Altman, Miami

Fiduciary Chair:
George W. Lange, Jr., Naples

Sponsorship Coordinator:
Elizabeth D. Fletcher, Boca Raton

Speakers Coordinator:
Joan K. Crain, Fort Lauderdale

Course No. 39004

2004 Attorney/Trust Officer Liaison Program Outline

East Meets West – Attorneys and Trust Officers at Their Best

Thursday, June 17

11:30 a.m. – 4:00 p.m. **Fifteenth Annual Scramble Golf Tournament and Lunch**
Hosted by Wachovia Trust

3:00 p.m. – 5:00 p.m. **Registration**

6:00 p.m. – 7:30 p.m. **Reception** (Spouses Welcome)
Hosted by Bank of America Private Client Group Florida

Friday, June 18

7:30 a.m. – 8:30 a.m. **Breakfast**
Hosted by U.S. Trust Company, N.A.

8:30 a.m. – 8:45 a.m. **Welcome and Announcements**
Michael A. Dribin, Broad and Cassel, Miami, Chair,
Stuart H. Altman, Fowler White Burnett P.A., Miami, Vice-Chair,
George W. Lange, Jr., AmSouth Bank, Naples, Florida., Fiduciary Chair,
Liaison with Corporate Fiduciaries Committee, Real Property, Probate & Trust Law Section of The Florida Bar

8:45 a.m. – 9:45 a.m. **"Trusts as Beneficiaries of Individual Retirement Accounts"**
Jere Doyle, Mellon, Florida

9:45 a.m. – 10:30 a.m. **"Homestead Update"**
Rohan Kelley, The Kelley Law Firm, Fort Lauderdale

10:30 a.m. – 10:45 a.m. **Break**
Sponsored by Fowler White Boggs Banker, P.A.

10:45 a.m. – 12:15 p.m. **"Minimizing Trustee Liability"**
Panel Discussion
George W. Lange, Jr., AmSouth Bank, Naples, Chair
Jack A. Falk, Jr., Dunwody, White, & Landon, P. A., Coral Gables
Nicholas Rockwell, Northern Trust Bank, Sarasota
E. Kent Lytle, AmSouth Bank, Birmingham, Alabama
Brian J. Felcoski, Goldman Felcoski & Stone, P.A., Miami

12:15 p.m. – 2:00 p.m. **Lunch/Group Discussions**
Hosted by Northern Trust Bank of Florida, N.A.
Arne Themmen, Northern Trust Bank, Coral Gables, Coordinator

2:00 p.m. – 3:00 p.m. **"Drafting Issues"**
David Hirschey, The Northern Trust Company, Chicago

3:00 p.m. – 3:20 p.m. **Break**
Sponsored by Fowler White Boggs Banker, P.A.

3:20 p.m. – 3:30 p.m. **Announcements**

3:30 p.m. – 4:00 p.m. **"Alternative Dispute Resolution"**
Steven L. Hearn, Steven L. Hearn, P.A., Tampa

4:00 p.m. – 5:00 p.m. **"Asset Protection, Including Ethical Considerations"**
Barry A. Nelson, Nelson & Levine, P.A., Miami

5:30 p.m. - 7:00 p.m. **Reception (Spouses Welcome)**
Hosted by Marsh Private Client Services and Mellon

Saturday, June 19

7:30 a.m. – 8:45 a.m. **Breakfast**
Hosted by Bessemer Trust

8:45 a.m. – 9:30 a.m. **"Investment Outlook and Asset Allocation"**
Thaddeus "Thad" Shelly, Bessemer Trust, Miami

9:30 a.m. – 10:45 a.m. **"Recent Tax Developments"**
Jeffrey N. Pennell, Emory University School of Law

10:45 a.m. – 11:00 a.m. **Break**
Sponsored by Fowler White Boggs Banker, P.A.

11:00 a.m. – 11:30 a.m. **"Statutory Update"**
Sandra Fascell Diamond, Williamson, Diamond & Caton, P.A., Seminole

11:30 a.m. – 12:45 p.m. **"Recent Florida Case Law Developments"**
Clay Craig, Steel, Hector & Davis, LLP, Miami

12:45 p.m. – 2:00 p.m. **"Questions and Answers and Lunch – ('Munch and Stump the Chumps')"**
Hosted by AmSouth Bank, Naples
Laird A. Lile, Of Counsel, Steel, Hector & Davis, LLP, Naples, Chair
Sandra Fascell Diamond, Williamson, Diamond & Caton, Seminole
Jeffrey N. Pennell, Emory University School of Law
E. Kent Lytle, AmSouth Bank, Birmingham, Alabama
Steven L. Hearn, Steven L. Hearn, P.A., Tampa

6:30 p.m. – 8:30 p.m. **Reception (Spouses Welcome)**
Hosted by the following law firms:
Akerman Senterfitt; Blank Rome LLP; Broad and Cassel; Dunwody White & Landon, P.A., Fowler White Burnett P.A.; Goldman Felcoski & Stone, P.A.; Greenberg Traurig, LLP; Greenspoon, Marder, Hirschfeld, Rafkin, Ross & Berger; Gunster Yoakley; Holland & Knight LLP; James I Ridley, P. A.; Kramer, Sopko & Levenstein, P.A.; Laird A. Lile, P.A.; Landis Graham French, P.A.; McCarthy, Summers, Bobko, Wood, Sawyer & Perry, P. A.; Pressly & Pressly, P.A.; Proskauer Rose LLP; Shutts & Bowen LLP; Tescher Gutter Chaves Josepher Rubin Ruffin and Forman, P.A.

Sunday, June 20

9:00 a.m. - 10:30 a.m. **Breakfast: "Post Conference Discussion"**
Hosted by Conference Steering Committee, Liaison with Corporate Fiduciaries Committee, Real Property, Probate & Trust Law Section of The Florida Bar.
Michael A. Dribin, Broad and Cassel, Miami, Chair,
Stuart H. Altman, Fowler White Burnett P.A., Miami, Vice-Chair,
George W. Lange, Jr., AmSouth Bank, Naples, Florida., Fiduciary Chair, Liaison with Corporate Fiduciaries Committee, Real Property, Probate & Trust Law Section of The Florida Bar

10:30 a.m. **Adjournment**

Sponsorship Coordinator: Elizabeth D. Fletcher, U.S. Trust Company, N.A., Boca Raton

Speakers Coordinator: Joan Crain, Mellon, Fort Lauderdale

General Sponsors: AmSouth Bank; Bank of America Private Client Group Florida; Bessemer Trust; The Citigroup Private Bank; Deutsche Bank of Florida; Fowler White Boggs Banker, P.A.; Lowry Hill; Marsh Private Client Services; Mellon; Northern Trust Bank of Florida, N.A.; SunTrust; U. S. Trust Company, N.A.; Wachovia Trust; Wilmington Trust

Continuing Legal Education Requirement Credit
(Maximum 15.0 hours)
General: 15.0 hours
Ethics: 1.0 hour

Certification Credit
(Maximum 11.0 hours)
Tax: 11.0 hours
Wills, Trusts & Estates: 11.0 hours

Hotel Reservation Information

To reserve a sleeping room with the Ritz-Carlton Golf Resort in Naples (2600 Tiburon Drive), please call 1-800-241-3333 or (239) 593-2000. The Florida Bar group rate of $150/night is guaranteed on May 9, or until the room block is sold.

2004 Attorney Trust/Officer Liaison Conference

Program Registration Form

Please Print or Type

Mail Program Registration Form and check (payable to The Florida Bar) to The Florida Bar, 651 East Jefferson Street, Tallahassee, Florida 32399-2300, Attn: Ms. Brooke Smith, MEETINGS DEPARTMENT.

Name _____ Attorney Number _____
Last First Required for CLE Credit

Name to be Used on Badge _____ Name to be Used on Spouse's Badge _____

Address _____

City _____ State _____ ZIP Code _____

Phone Number _____ Email Address _____

Registration and Refund Policy:

- Refunds will be honored [less $15.00 cancellation fee] if postmarked by 6/11/04.
- Registrations will be accepted on a first-registered basis at The Florida Bar through 6/11/04, or until full.
- No telephone or faxed registrations accepted.
- No telephone cancellations accepted [faxed cancellations will be accepted (850-561-5612)].
- On-Site registrations accepted on a space-available basis. NO GUARANTEE SPACE WILL BE AVAILABLE.
- ON-SITE REGISTRATION, ADD $25. On-site registration is by check/cash only.
- ONE REGISTRANT PER FORM/ONE CHECK PER REGISTRANT (Copies accepted).

Conference Registration:

____ [101] Attorney Registrant $250.00
____ [102] Trust Officer Registrant $250.00
____ [103] Attorney Registrant (6/7/04 or AFTER) $275.00
____ [104] Trust Office Registrant (6/7/04 or AFTER) $275.00

Conference Events for Registrant:

Course materials and the following Conference Events are included in registration fee. Please check the events you plan to attend.

Thursday, June 17
____ [200] Reception

Friday, June 18
____ [201] Continental Breakfast
____ [202] Luncheon
____ [203] Reception

Saturday, June 19
____ [204] Continental Breakfast
____ [205] Luncheon
____ [206] Reception

Sunday, June 20
____ [207] Breakfast

Conference Events for Spouses:

The following events are open to spouses. Check the events your spouse plans to attend. An additional fee applies where indicated.

Thursday, June 17
____ [208] Reception

Friday, June 18
____ [209] Continental Breakfast $18 [$16.74 plus tax]
____ [210] Reception

Saturday, June 19
____ [211] Continental Breakfast $18 [$16.74 plus $1.26 tax]
____ [212] Reception

Sunday, June 20
____ [213] Breakfast $18 [$16.74 plus $1.26 tax]

Thursday, June 17 – Scramble Golf Tournament (Sponsored by Wachovia Bank, N.A.):

NOTE: An additional fee applies to both registrants and spouses. (Please provide us with your Handicap or Average Score)
____ [214] Golf $50 [$46.50 plus $3.50 tax] Handicap or Average Score _____
____ [215] Golf - Spouse $50 [$46.50 plus $3.50] Handicap or Average Score _____

Course Materials (One (1) set Included in Conference Registration Fee):

[216] Additional copy of materials or materials without Registration $50 [$46.50 plus $3.50 tax]

Total Amount Enclosed $_____

cc to RA + DG

The Florida Bar

JOHN F. HARKNESS, JR.
EXECUTIVE DIRECTOR

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TALLAHASSEE, FLORIDA 32399-2300

850/561-5600
WWW.FLABAR.ORG

March 17, 2004

Mr. Joel H. Sharp
Baker & Hostetler, LLP
P.O. Box 112
Orlando, Florida 32802-0112

Re: Special Committee to Review the ABA Model Rules 2002
Comments on Proposed Changes to the Rules of Professional Conduct

Dear Mr .Sharp:

I received your March 16, 2004 comments on behalf of the Real Property, Probate & Trust Law Section regarding the proposed changes to the Rules Regulating The Florida Bar recommended in the Special Committee to Review the ABA Model Rules 2002 final report.

Copies of your comments will be provided to The Florida Bar Board of Governors with the backup for their April 2, 2004 meeting in Pensacola, Florida.

Thank you for your interest and your input in this issue. If you have any questions, please call me at (850) 561-5780.

Sincerely,

Elizabeth Clark Tarbert
Ethics Counsel

cc: Ms. Adele I. Stone, Chair, Special Committee to Review the ABA Model Rules 2002

K:\Model Rules 2002 Committee\25323.wpd

JOEL H. SHARP, JR.
WRITER'S DIRECT DIAL NUMBER (407) 649-4019
E-MAIL: JSHARP@BAKERLAW.COM

March 16, 2004

Elizabeth Clark Tarbert, Esq.
Ethics Counsel
The Florida Bar
651 East Jefferson Street
Tallahassee, FL 32399-2300

Dear Ms. Tarbert:

In follow up on the request of the Florida Bar to the Sections with respect to comments on the Florida Bar implementation of ABA Ethics Update, accompanying herewith is a set of recommendations made to proposed Rule 4.14, "Client with Diminished Capacity" after consideration by this Committee and additional implementation by the Executive Committee of the Executive Council of the Real Property, Probate & Trust Law Section.

1. Paragraph [4]: Delete the last sentence (lines 3177 - 3179); this sentence is not appropriate for an ethical rule.

2. Add the following to paragraph [6], line 3197: ";whether the decision is irreversible;". Suggest wording be changed to "the potential to reverse the decision."

3. Add a new paragraph [11] titled "Testamentary Capacity" at the end of the Comment section of the Rule. [**Note this is still under consideration by the Committee.**]

4. In paragraph [5] at lines 3187 and 3188, delete "using voluntary surrogate decision making tools such as durable powers of attorney". Paragraph [5] presupposes that the "client lacks sufficient capacity to communicate or make adequately considered decisions . . .". In this context, this might imply that the attorney should prepare a power of attorney when to do so would be totally inappropriate. Deleting the suggested phrase would prevent misleading attorney's who don't understand.

5. In paragraph [7], delete the word, "conservator" at line 3201. Florida does not have provision for appointment of a conservator for an incapacitated person (as opposed to a missing or absent person).

6. In paragraph [7], at line 3203, add after "substantial property that" the words "should be protected or preserved or".

7. In paragraph [7], at line 3206 change "general" to "legal".

8. In paragraph [7], at line 3208 change "such" to "these".

9. In paragraph [8], at lines 3215 and 3216, delete the sentence, "For example, raising the question of diminished capacity could, in some circumstances, lead to proceedings for involuntary commitment." First, one should not properly equate appointment of a guardian with involuntary commitment. Secondly, that could occur only after a judge had found proper cause and finally, that may be what the client needs and is in his/her best interests. The sentence implies that involuntary commitment would be an adverse consequence of the revelation, not a beneficial one.

10. Paragraph [9], at line 3229 should be amended to add after the last word at the end of the line, "may", the words "but shall not be required to". This refers to one who is not a client and the sentence should be clear that the lawyer has no duty to act for that person.

Please contact the undersigned or David Garten at Gartenlaw@aol.com or Rohan Kelly at Rohan@estatelaw.com for any follow up. In fact, any responsive commentary should be sent to all three of us.

Sincerely,

*

Joel H. Sharp, Jr., Chair
Ethics and Professionalism

JHSharp, Jr./cc

*Dictated but not read by Joel H. Sharp, Jr.
to avoid delay.

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125