REAL PROPERTY, PROBATE & TRUST LAW SECTION
www.rpptl.org

Executive Council Meeting

AGENDA

Ritz Carlton Grande Lakes
Orlando, Florida

Saturday, March 21, 2015
10:00 a.m.

BRING THIS AGENDA TO THE MEETING

Real Property, Probate and Trust Law Section
Executive Council Meeting

Ritz Carlton Grande Lakes
Orlando, Florida
March 21, 2015

AGENDA

I. **Presiding** — *Michael A. Dribin, Chair*

II. **Attendance** — *Debra Boje, Secretary*

III. **Minutes of Previous Meeting** — *Debra Boje, Secretary*

Motion to approve minutes of November 17, 2014 meeting of Executive Council held at Naples Grande Beach Resort (formerly, the Waldorf Astoria Naples), Naples, Florida **pp. 11-42**

IV. **Chair's Report** — *Michael A. Dribin*

1. Recognition of guests

2. Introduction of speaker on behalf of The Florida Bar Foundation

3. Recognition of General Sponsors and Friends of the Section, **pp. 43-45**

4. Remarks about plans for Section Convention, June 4-7, and tentative schedule, **pp. 46-47**

5. Letter to John Kozyak, Esq., in recognition of the award to him of the Tobias Simon *pro bono* service award, **pp. 48-49**

V. **Chair-Elect's Report** — *Michael J. Gelfand*

RPPTL 2015-2016 Executive Council Meeting Schedule, **pp. 50-51**

VI. **Liaison with Board of Governors Report** **--** *Andrew B. Sasso*

VII. **Treasurer's Report** — *S. Katherine Frazier*

Statement of Current Financial Conditions **p. 52**

VIII. **Director of At-Large Members Report** *-- Shane Kelley*

IX. **CLE Seminar Coordination Report** – *Tae Kelley Bronner (Probate & Trust), Robert Swaine (Real Property) Co-Chairs* **p. 53**

X. **Kids Committee Report** -- *Steven Goodall, Chair; Laura Sundberg, Advisor*

XI. **Probate and Trust Law Division Report**—*Deborah P: Goodall, Director*

Action Item

1. **Trust Law Committee -** Angela Adams, Chair

   Committee motion to: (A) adopt as legislative positions of the Section amendments to existing statutes to provide that nonjudicial modification is not permitted during the first 90 years of the trust term unless the terms of the trust provide otherwise, and, (B) find that such legislative positions are within the purview of the RPPTL Section* **pp. 54-60**

***If the proposed legislative positions are approved by the Executive Council, an additional committee motion will be presented seeking authorization for the RPPTL Section to expend Section funds in support of the proposed legislative positions.**

Information Item:

1. **Guardianship, Power of Attorney and Advanced Directives** – Hung Nguyen, Chair

   Report on the Committee's review of pending legislative initiatives containing proposed revisions to chapter 744. **pp. 61-80**

XII. **Real Property Law Division Report**—*Andrew M. O'Malley, Director*

Information Item:

1. **Real Property Litigation Committee** --- *Susan K. Spurgeon, Chair*

   Report on Section comments submitted to Supreme Court of Florida, proposed amendments to Florida Rules of Civil Procedure No. SC13-2384, released December 14, 2014, dealing generally with foreclosure forms and procedures, **pp. 81-113**.

XIII. **General Standing Division Report** — *Michael J. Gelfand, General Standing Division Chair and Chair- Elect*

Action Items:

1. **Integrity Awareness and Coordination Committee** --- *Jerry Aron, Co-Chair; Sandra Diamond, Co-Chair*

   Committee motion to:

A. Approve final committee report of recommendations in response to charge to "preserve the Section's reputation for integrity by: promoting awareness and understanding of applicable conflict of interest principles and bylaw provisions among components of the Section; coordinating the uniform and consistent application of these principles and provisions within components of the Section; and, other appropriate means."; **pp. 114-122** and

B. Approve proposed amendments to the RPPTL By-Laws in furtherance of implementation of Final Committee Report. **pp. 123-133**

2. By-Laws Amendments --- *William Fletcher Belcher*

Motion to approve, and recommend to the Board of Governors of The Florida Bar, amendments to the Section Bylaws to: (i) make affiliate section membership available to qualified law students enrolled in any accredited law school by eliminating the existing Florida law school restriction set forth in Article II, Section 1(b); (ii) restrict affiliate section membership available to qualified law school graduates, as set forth in Article II, Section 1(b), to graduates of an accredited law school; (iii) clarify that, in reference to section committees, the term "chair" includes co-chairs (Article VI, Section 2); (iv) clarify that the section legislation committee may include a co-chair for real property and a co-chair for probate and trust (Article VIII, Section 3); and (v) clarify that, in the event the section CLE seminar coordination committee and/or the section legislation committee have a co-chair for the real property law division and a co-chair for the probate and trust law division, each such co-chair shall be a member of the executive committee and entitled to one vote (Article IV, Section 3). **pp. 134-136**

Information Items:

1. ActionLine – *Silvia Rojas, Chair*

A. Production: Report on outsourcing layout.

B. Articles: Report on supply of editorial content, advertising rates, Article cover sheet and writer's guidelines. **pp. 137-139**

2. Ad Hoc Committee on Same-Sex Marriage Implications --- *Jeffrey Ross Dollinger, Co-Chair (Real Property); George Daniel Karibjanian, Co-Chair (Probate & Trust)*

Discussion, of committee report recommending as legislative positions proposed amendments to F.S. 1.01(20)(b), 193.155(3)(a)2 and (8), 196.12(12), 689.11(2), 689.111(2), 689.115, 713.12, and 718.112(2)(i), and creating F.S. 689.11, to substitute gender neutral terminology, providing for an effective date of January 5, 2015, and finding that the proposed position is within the purview of the RPPTL Section. **pp. 140-163**

3. **Amicus Coordination** – *Robert W. Goldman, John W. Little, III, Kenneth B. Bell and Gerald B. Cope, Jr., Co-Chairs*

A. Report on the status of the Section's *amicus* position in the Supreme Court of Florida, reviewing Golden v. Jones, 126 So. 3d 390 (Fla. 4th DCA, 2013). **pp. 164-193**

ex

B. Report on the status of the Section's *amicus* position in the Supreme Court of Florida, answering certified questions in Rogers v. U.S., SC14-1465. **pp. 194-269**

C. Report on decision by Executive Committee to accept request from Fourth District Court of Appeal in Saadeh v. Connors, Meyer, etal., Case No. 4D13-4831, to brief the following issue:

> In light of Florida Statute Section 744.331(2)(b) and 744.3031(1), which requires the court to appoint an attorney to represent an alleged incapacitated person, does the attorney for the guardian owe a duty of care to the alleged incapacitated person?

Further report on the Executive Committee's decision to answer the question in the affirmative, based, in part, on the analysis appearing in opinion of Attorney General Robert A. Butterworth, AGO 96-94 (1996). **p. 270-274**

4. **Legislation** --- *William T. Hennessey, III (Probate & Trust) and Robert S. Freedman (Real Property), Co-Chairs*

A. Pending Legislative Positions.

B. 2016 Legislative Session Timetable. **p. 275**

C. Legislation Committee Website.

5. **Member Communications and Information Technology** ---- *William A. Parady, Chair*

Report on Integrating Suggestions into Website Updates.

6. **Professionalism and Ethics** --- *Lawrence J. Miller, Chair*

A. Report on status of Section position opposing proposed amendments to the *Rules Regulating the Florida Bar*, Rule 4-4.2. **pp. 276-290**

B. www.RPPTL.org Ethics Data Base Update.

C, Professionalism and Ethics presentation

7. **Sponsorship** --- *Wilhelmina Kightlinger, Chair*

Report on Executive Committee approval of recommendations on benefits extended to Section Committee Sponsors. **p. 291**

XIV. **Probate and Trust Law Division Committee Reports** — *Deborah P. Goodall, Director*

1. **Ad Hoc Guardianship Law Revision Committee** – David Brennan, Chair; Sancha Brennan Whynot, Hung Nguyen and Charles F. Robinson, Co-Vice Chairs

2. **Ad Hoc Study Committee on Estate Planning Conflict of Interest** - William T. Hennessey III, Chair; Paul Roman, Vice Chair

3. **Ad Hoc Study Committee on Jurisdiction and Service of Process** – Barry F. Spivey, Chair; Sean W. Kelley and Christopher Q. Wintter, Co-Vice Chairs

4. **Ad Hoc Study Committee on Personal Representative Issues** – Jack A. Falk, Jr., Chair

5. **Ad Hoc Study Committee on Spendthrift Trust Issues** – Lauren Detzel and Jon Scuderi, Co-Chairs

6. **Asset Protection** – Brian C. Sparks, Chair; George Karibjanian, Vice-Chair

7. **Attorney/Trust Officer Liaison Conference** – Laura K. Sundberg, Chair; Stacey Cole, Co-Vice Chair (Corporate Fiduciary) and Deborah Russell Co-Vice Chair

8. **Digital Assets and Information Study Committee** – Eric Virgil, Chair; Travis Hayes and S. Dresden Brunner, Co-Vice Chairs

9. **Elective Share Review Committee** – Lauren Detzel and Charles I. Nash, Co-Chairs; Robert Lee McElroy IV, Vice-Chair

10. **Estate and Trust Tax Planning** – Elaine M. Bucher, Chair; David Akins, Tasha Pepper-Dickinson and William Lane, Co-Vice Chairs

11. **Guardianship, Power of Attorney and Advanced Directives** – Hung Nguyen, Chair, Tattiana Brenes-Stahl, David Brennan and Eric Virgil, Co-Vice Chairs

12. **IRA, Insurance and Employee Benefits** – L. Howard Payne and Lester Law, Co-Chairs

13. **Liaisons with ACTEC** – Michael Simon, Bruce Stone, and Diana S.C. Zeydel

14. **Liaisons with Elder Law Section** – Charles F. Robinson and Marjorie Wolasky

15. **Liaisons with Tax Section** – Harris L. Bonnette, Jr., Lauren Y. Detzel, William R. Lane, Jr., Brian C. Sparks and Donald R. Tescher

16. **Principal and Income** – Edward F. Koren, Chair; Pamela Price, Vice Chair

17. **Probate and Trust Litigation** – Thomas M. Karr, Chair; John Richard Caskey, James George, Jon Scuderi and Jerry Wells, Co-Vice Chairs

18. **Probate Law and Procedure** – John C. Moran, Chair; Sarah S. Butters, Michael Travis Hayes and Sean Kelley, Co-Vice Chairs

19. **Trust Law** – Angela M. Adams, Chair; Tami F. Conetta, Jack A. Falk and Deborah Russell, Co-Vice Chairs

20. **Wills, Trusts and Estates Certification Review Course – Richard R. Gans,** Chair; Jeffrey S. Goethe, Linda S. Griffin, Seth Marmor and Jerome L. Wolf, Co-Vice Chairs

XV. Real Property Law Division Reports — Andrew M. O'Malley*, Director*

1. **Commercial Real Estate** – Art Menor, Chair; Burt Bruton and Adele Stone, Co- Vice Chairs.

2. **Condominium and Planned Development** – Steven H. Mezer, Chair; Christopher Davies and Alex Dobrev, Co-Vice Chairs.

3. **Construction Law** – Hardy Roberts, Chair; Scott Pence and Lee Weintraub, Co-Vice Chairs.

4. **Construction Law Certification Review Course** – Deborah Mastin and Bryan Rendzio, Co-Chairs; Melinda Gentile, Vice Chair.

5. **Construction Law Institute** – Reese Henderson, Chair; Sanjay Kurian, Diane Perera and Jason Quintero, Co-Vice Chairs.

6. **Development & Land Use Planning** – Vinette Godelia, Chair; Mike Bedke and Neil Shoter, Co-Vice Chairs.

7. **Foreclosure Reform (Ad Hoc)** - Jeffrey Sauer, Chair; Mark Brown, Burt Bruton and Alan Fields, Co-Vice Chairs.

8. **Landlord and Tenant** – Lloyd Granet, Chair; Rick Eckhard and Brenda Ezell, Co-Vice Chairs.

9. **Legal Opinions** – Kip Thornton, Chair; Robert Stern, Vice-Chair.

10. **Liaisons with FLTA** – Norwood Gay and Alan McCall, Co-Chairs; Alexandra Overhoff and James C. Russick, Co-Vice Chairs.

11. **Insurance & Surety** – W. Cary Wright and Fred Dudley, Co-Chairs; Scott Pence and Michael Meyer, Co-Vice Chairs.

12. **Real Estate Certification Review Course** – Jennifer Tobin, Chair; Manual Farach and Martin Awerbach, Co-Vice Chairs.

13. **Real Estate Structures and Taxation** – Cristin C. Keane, Chair; Michael Bedke and Deborah Boyd, Co-Vice Chairs.

14. **Real Property Finance & Lending** – Jim Robbins, Chair; Homer Duval, III, Richard S. McIver and Bill Sklar, Co-Vice Chairs.

15. **Real Property Litigation** – Susan Spurgeon, Chair; Manny Farach, Vice Chair.

16. **Real Property Problems Study** – W. Theodore "Ted" Conner, Chair; Mark A. Brown, Jeff Dollinger, Stacy Kalmanson and Patricia J. Hancock, Co-Vice Chairs.

17. **Residential Real Estate and Industry Liaison** – Salome Zikakas, Chair; Trey Goldman and Nishad Khan, Co-Vice Chairs.

18. **Title Insurance and Title Insurance Liaison** – Raul Ballaga, Chair; Alan Fields and Brian Hoffman, Co-Vice Chairs.

19. **Title Issues and Standards** – Christopher W. Smart, Chair; Robert M. Graham, BrianHoffman and Karla J. Staker, Co-Vice Chairs.

XVI. General Standing Committee Reports — *Michael J. Gelfand, Director and Chair-Elect*

1. **Ad Hoc Leadership Academy** – Tae Kelley Bronner and Kris Fernandez, Co-Chairs

2. **Ad Hoc Study Committee on Same Sex Marriage Issues**–- Jeffrey Ross Dollinger and George Daniel Karibjanian, Co-Chairs

3. **Ad Hoc Trust Account** – John B. Neukamm and Jerry E. Aron, Co-Chairs

4. **Amicus Coordination** – Robert W. Goldman, John W. Little, III, Kenneth B. Bell and Gerald B. Cope, Jr., Co-Chairs

5. **Budget** – S. Katherine Frazier, Chair; Andrew M. O'Malley, Pamela O. Price, Daniel L. DeCubellis, Lee Weintraub and W. Cary Wright, Co-Vice Chairs

6. **CLE Seminar Coordination** – Robert S. Swaine and Tae Kelley Bronner, Co-Chairs; Laura K. Sundberg (Probate & Trust), Sarah S. Butters (Probate & Trust), Lawrence J. Miller (Ethics), Jennifer S. Tobin (Real Property) and Hardy L. Roberts, III (General E-CLE), Co-Vice Chairs**.**

7. **Convention Coordination** – Laura K. Sundberg and Stuart Altman, Co-Chairs; Marsha G. Madorsky, Raul Ballaga and Jennifer Jones, Co-Vice Chairs

8. **Fellows** – Brenda B. Ezell and Hung V. Nguyen, Co-Chairs; Benjamin Diamond and Ashley McCrae, Co-Vice Chairs

9. **Florida Electronic Filing & Service** – Rohan Kelley, Chair

10. **Homestead Issues Study** – Shane Kelley (Probate & Trust) and Patricia P. Jones (Real Property), Co-Chairs; J. Michael Swaine and Charles Nash, Co-Vice Chairs

11. **Legislation** – William T. Hennessey, III (Probate & Trust) and Robert S. Freedman (Real Property), Co-Chairs; Sarah S. Butters (Probate & Trust), and Alan B. Fields and Steven Mezer (Real Property), Co-Vice Chairs

12. **Legislative Update (2014)** – Stuart H. Altman, Chair; Charles I. Nash, R. James Robbins, Barry F. Spivey, Stacy O. Kalmanson, and Jennifer S. Tobin, Co-Vice Chairs

13. **Legislative Update (2015)** – R. James Robbins, Chair; Charles I. Nash, Barry F. Spivey, Stacy O. Kalmanson and Jennifer S. Tobin, Co-Vice Chairs

14. **Liaison with:**

    a. **American Bar Association (ABA)** – Edward F. Koren and Julius J. Zschau
    b. **Board of Legal Specialization and Education (BLSE)** – Raul P. Ballaga, Jennifer S. Tobin, William Cary Wright, and Richard Gans
    c. **Clerks of Circuit Court** – Laird A. Lile and William Theodore (Ted) Conner
    d. **FLEA / FLSSI** – David C. Brennan, John Arthur Jones and Roland "Chip" Waller Co-Vice Chairs
    e. **Florida Bankers Association** – Mark T. Middlebrook
    f. **Judiciary** – Judge Linda R. Allan, Judge Jack St. Arnold, Judge Herbert J. Baumann, Judge Melvin B. Grossman, Judge Hugh D. Hayes, Judge Claudia Rickert Isom, Judge Maria M. Korvick, Judge Lauren Laughlin, Judge Norma S. Lindsey, Judge Celeste H. Muir, Judge Robert Pleus, Jr., Judge Walter L. Schafer, Jr., Judge Morris Silberman, Judge Richard J. Suarez, and Judge Patricia V. Thomas
    g. **Out of State Members** – Michael P. Stafford, John E. Fitzgerald, Jr., and Nicole Kibert
    h. **TFB Board of Governors** – Andrew Sasso
    i. **TFB Business Law Section** – Gwynne A. Young
    j. **TFB CLE Committee** – Robert S. Freedman and Tae Kelley Bronner
    k. **TFB Council of Sections** –Michael A. Dribin and Michael J. Gelfand
    l. **TFB Pro Bono Committee** – Tasha K. Pepper-Dickinson

15. **Long-Range Planning** – Michael J. Gelfand, Chair

16. **Meetings Planning** – George J. Meyer, Chair

17. **Member Communications and Information Technology** – William A. Parady, Chair; S. Dresden Brunner, Michael Travis Hayes, and Tattiana Brenes-Stahl, Co-Vice Chairs

18. **Membership and Inclusion** –Lynwood F. Arnold, Jr. and Jason M. Ellison, Co-Chairs, Phillip A. Baumann~~,~~ (Career Coaching)~~.~~ Navin R. Pasem (Diversity), and Guy S. Emerich (Career Coaching an Liaison to TFB's Scope Program), Co-Vice Chairs

19. **Model and Uniform Acts** – Bruce M. Stone and S. Katherine Frazier, Co-Chairs

20. **Professionalism and Ethics--General** – Lawrence J. Miller, Chair; Tasha K. Pepper-Dickinson, Vice Chair

21. **Professionalism and Ethics—Special Subcommittee on Integrity Awareness and Coordination** – Jerry Aron and Sandra Diamond, Co-Chairs

22. **Publications (ActionLine)** – Silvia B. Rojas, Chair (Editor in Chief); Shari Ben Moussa (Advertising Coordinator), Navin R. Pasem (Real Property Case Review), Jane L. Cornett~~,~~ (Features Editor), Brian M. Malec (Probate & Trust), George D. Karibjanian (Editor, National Reports), Lawrence J. Miller (Editor, Professionalism & Ethics), Arlene Udick and Lee Weintraub, Co-Vice Chairs

23. **Publications (Florida Bar Journal)** – Kristen M. Lynch (Probate & Trust), and David R. Brittain (Real Property), Co-Chairs; Jeffrey S. Goethe (Editorial Board – Probate & Trust), Linda Griffin (Editorial Board – Probate & Trust), Michael A. Bedke (Editorial Board – Real Property) and William T. Conner (Editorial Board – Real Property), Co-Vice Chairs

24. **Sponsor Coordination** –Wilhelmena F. Kightlinger, Chair; J. Michael Swaine, Deborah L. Russell, W. Cary Wright, Benjamin F. Diamond, John Cole, Co-Vice Chairs

25. **Strategic Planning** –Michael A. Dribin and Michael J. Gelfand, Co-Chairs

XVII. Adjourn

107481-3

Minutes of the
Real Property, Probate and Trust Law Section
Executive Council Meeting[1]
November 15, 2014
Naples Grande Beach Resort, Naples, Florida

I. Call to Order — *Michael A. Dribin, Chair*

The meeting was held in the Royal Palm Room at Naples Grande Beach Resort, Naples, Florida. Michael A. Dribin, Chair, called the meeting to order at 9:00 am.

II. Attendance — *Debra L. Boje, Secretary*

Debra L. Boje reminded members that the attendance roster was circulating to be initialed by council members in attendance at the meeting. Members were asked to confirm that their names were spelled correctly and that the proper designation was made as to which Division they were most closely associated.

[Secretary's Note: The roster showing members in attendance is attached as Addendum "A"]

III. Minutes of Previous Meeting — *Andrew M. O'Malley, Acting Secretary*

Andrew M. O'Malley moved to approve the Minutes of the September 20, 2014 meeting of the Executive Council held at Loyola University of Chicago School of Law, Chicago, Illinois, found on pages 10-28 of the Agenda.

The Motion was approved without opposition.

IV. Chair's Report — *Michael A. Dribin*

1. Welcome

Mr. Dribin welcomed Council members and Section members in attendance.

2. Recognition of guests

Mr. Dribin recognized the following Board of Governors members who are present at our meeting today: Sandra Diamond, Laird Lile and our liaison to the Board, Andrew Sasso.

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[1] References in these minutes to Agenda pages are to the Executive Council meeting Agenda and Supplemental Agenda posted at www.RPPTL.org.

Mr. Dribin also noted that Bill Schifino who is candidate for President Elect of the Florida Bar and Kathy Sherby, President of American College of Trust and Estate Counsel were present at various meetings and events the past two days.

3. Introduction and comments from sponsor of Executive Council lunch (The Florida Bar Foundation).

Mr. Dribin thanked The Florida Bar Foundation for their continued relationship with the Section.

4. Acknowledgment of Section sponsors

Mr. Dribin recognized and thanked following the General Sponsors and Friends of the Section for their continued support to the Section:

General Sponsors

Attorneys' Title Fund Services, LLC, - *Ted Conner*
Overall Sponsors – Legislative Update & Convention & Spouse Breakfast

BMO Private Bank – *Joan Kayser*
Probate Roundtable

Fidelity National Title Group – *Pat Hancock*
Real Property Roundtable

First American Title Insurance Company – *Alan McCall*
Friday Night Dinner

JP Morgan – *Carlos Batlle / Alyssa Feder*
Thursday Night Reception

Management Planning, Inc., - *Roy Meyers / Joe Gitto*
Thursday Lunch

Old Republic National Title Insurance Company – *Jim Russick*
Thursday Night Reception

Regions Private Wealth Management – *Margaret Palmer*
Friday Night Dinner

SRR (Stout Risius Ross Inc.) – *Garry Marshall*
Probate Roundtable

SunTrust Bank – *Debbie Smith Johnson*
Saturday Night Reception and Dinner

The Florida Bar Foundation – *Bruce Blackwell*
Saturday Lunch

Wells Fargo Private Bank – *Mark Middlebrook / George Lange / Alex Hamrick*
Friday Night Reception

Friends of the Section

Bunsiness Valuation Analysts, LLC – *Tim Bronza*

Guardian Trust – *Ashley Gonnelli*

Kravit, The Estate Department – *Van Stillman*

North American Title Insurance Company – *Geoffrey B. Ginn, Geoff Harris*

Valuation Services, Inc. – *Jeff Bae, JD, CVA*

Wilmington Trust – *David Fritz*

Wright Private Asset Management, LLC – *Ted Roman*

Mr. Dribin reminded the Council how important the support of our Sponsors is to the Section. Mr. Dribin advised that Mr. Andrew O'Malley and Ms. Deborah Goodall would each introduce the Committee Sponsors from their respective Divisions as part of their reports.

5. Remaining 2014 – 2015 RPPTL Section Executive Council Meeting Schedule

Mr. Dribin reviewed the Schedule of upcoming Executive Council Meetings, appearing at page 32 of the agenda materials.

6. Tentative Committee meeting schedule for March 19-21, 2015 Executive Council meeting, Ritz Carlton Grande Lakes, Orlando, Florida.

Mr. Dribin announced that the tentative committee meeting scheduled for the March 19-21, 2015 meeting in Orlando could be found in the Agenda at pages 33-36. The committee chairs were requested to review the schedule and notify him of any changes so the schedule could be finalized and circulated. Mr. Dribin asked that committee chairs also carefully look at their AV equipment needs. The Section is happy to provide equipment that is necessary to properly conduct meetings but expense should be kept in mind when requesting equipment.

Mr. Dribin advised that exciting events were being planned for the Section Convention in June. A continue legal education program is being planned by the Ad Hoc

Same-Sex Marriage Committee. The CLE will focus on the committee's final report and recommendations which it is anticipated will be voted upon at the March meeting in Orlando.

7. Remember John Arthur Jones and presentation of Section Resolution

Mr. Dribin informed the Council and guests that the Section's past Chair, John Arthur Jones, passed away on August 12, 2014. Mr. Dribin noted that John Arthur Jones influenced a great many lawyers throughout his long career. Mr. Dribin advised that he could have invited hundreds of lawyers today to speak about the role John Arthur played in their lives and how he helped develop the practice of probate in Florida but instead he chose to asked just three lawyers who are all past Section Chairs and were close personal friends of John Arthur Jones to speak. Mr. Dribin directed everyone's attention to a slide show highlighting moments of the life of Mr. Jones. Following the slide show, a pre-recorded video of Past Chair Steven L. Hearn was played. Following the video of Steven L. Hearn, Past Chairs Bruce Stone and Edward Koren were invited to the podium to speak about Mr. Jones life, contributions to the practice of law and their own personal memories of Mr. Jones. Mr. Koren advised at the end of his tribute that he and Mr. Stone were working on setting up an endowment at the University of Florida to be known as the John Arthur Jones Memorial Fund and Endowment. The endowment would be jointly supervised by the University of Florida Foundation and the Florida Legal Education Association more commonly known to Section members as "FLEA."

Mr. Dribin invited Darby Jones, fellow Council member and daughter of John Arthur Jones, and her son Charlie to come to the podium so he could present the Section's Resolution honoring Mr. Jones. As Darby Jones and Charlie walked to the podium Mr. Dribin noted that John Arthur would be particularly proud to know that his grandson, Charlie, yesterday was accepted to officer training for the Marine Corp. Mr. Dribin read the Section's resolution and presented Darby Jones with a framed plaque of the resolution. The Council members gave a standing ovation. Ms. Jones thanked the Council and the Section and spoke about how important the Section meant to her father and the role it played in his life and the life of her family.

8. Yvonne Sherron's Mother

Mr. Dribin advised that on July 11, 2014, our past Section Administrator, Yvonne Sherron's mother passed away and that contact information is available for those who would like to express their condolences to Yvonne and her family.

V. **Chair-Elect's Report** — *Michael J. Gelfand, Chair-Elect*

Mr. Gelfand advised that the meeting schedule for the 2015-2016 year can be found on pages 122-123 of the Agenda and he continues to work on the option of internet registration. Mr. Gelfand noted that the Hotel room block out-of-state meeting in Berlin, September 30, 2015 – October 4, 2015 is sold out but that those wanting rooms in the block could put their names on a waiting list.

VI. Liaison with Board of Governors' Report — *Andrew B. Sasso*

Mr. Andrew Sasso presented his report. Mr. Sasso advised the Board of Governors met on October 24, 2014. The area of discipline is one of the hardest areas for The Florida Bar to address. Attorney trust accounting is particularly a difficult issue. Mr. Sasso reminded the Council that the Florida Bar revised rule 5-1.2(c) effective June 1, 2014. This rule requires a written trust account plan for law firms with two or more lawyers. The Florida Bar has provided guides for the forms. The forms can be found in the May 1, 2014 edition of the The Florida Bar News which is posted on The Florida Bar website.

Mr. Sasso advised that a new Special Committee to Study Unethical and Illegal Solicitation of Legal Business was approved to review public and attorney complaints and perform a comprehensive analysis of any trending unethical or illegal activities. A report and recommendations are to be submitted to The Florida Bar Board of Governors by January 2016. The president will appoint 10-15 members to the special committee including representatives from the state attorney's and public defender's offices, an attorney who currently serves as counsel to lawyers in grievance matters, and a non-lawyer member of a Florida Bar grievance committee. The special committee will review complaints in the personal injury area as well as other areas of law practice.

Mr. Sasso advised that a discussion was held on changes to proposed amendments to the comment to Rule 4-4.2 by the Government Lawyer and City, County and Local Government Law Sections. The rule governs lawyers contacting parties representing attorneys, including when those parties are government officials. President Greg Coleman said the board likely will devote considerable time at its December 12 meeting to discuss the amendments, which have generated considerable controversy among various Bar committees and sections. Mr. Sasso advised that he will be assisting the Section in expressing its concerns regarding this issue.

VII. Treasurer's Report — *S. Katherine Frazier*

Ms. Katherine Frazier reported the Section financials currently track budget and is ahead in some areas and that the Section is closely monitoring expenses. Ms. Frazier thanked Section sponsors for their financial contributions to the Section.

VIII. Director of At-Large Members' Report — *Shane Kelley*

Mr. Shane Kelley advised that re-nomination forms for current ALMS were due December 15, 2014. The form can be found on the ALMS webpage. He is working on converting the form from a PDF to a fill in the blank form. The ALMS continue to work on creating a page on the RPPTL website listing all of the certified mediators who are members of the RPPTL section and provide an indication as to whether they are a member of the death or dirt side as a resource to the section members. Mr. Kelley thanked the lead ALMS for their continuing efforts in marketing CLE seminars.

IX. CLE Seminar Coordination Report — *CLE Seminar Coordination – Tae Kelley Bronner (Probate & Trust), Robert Swaine (Real Property) Co-Chairs*

Ms. Bronner reported that CLE is off to a good start this year. Thanks to Norwood Gay, the Section put on a very profitable Dodd Frank webinar. Laird Lile and Sandra Diamond presented an equally successful ethics webinar. There were over 250 people in attendance at both webinars. On December 12, 2014 there will be a Probate Law Seminar and on December 3, 2014 there will be a CLE on real estate at Stetson Law School. Ms. Bronner advised that they are in the process of rescheduling two seminars.

X. Kids Committee Report – *Steven Goodall, Chair; Laura Sundberg, Advisor*

Mr. Steven Goodall reported that the committee is currently assessing how many kids will be attending the Orlando meeting to determine whether kids events should be scheduled.

XI. Real Property Law Division — *Andrew M. O'Malley, Real Property Law Division Director*

Action Items:

1. **Condominium and Planned Development Committee ---** *Steven H. Mezer, Chair*

As Committee chair, Mr. Mezer provided a brief background as to the need for the proposed legislation. The following Committee's motion, based on the materials appearing at pages 41-60 of the agenda, was made:

To (A) approve legislative positions amending F.S. Section 718.117, regarding termination of condominium status so as to: (1) provide protection for residential condominium unit owners who have homesteaded their units and are current in their related monetary obligations; (2) assure the option to rent after termination and to provide minimum compensation based on purchase price and fair market value; (3) create a requirement of review of the termination plan by the Division of Land Sales for statutory compliance; (4) clarify procedural and substantive elements of optional termination and clarify the role of the termination trustee; (5) amend procedural aspects of F.S. Section 718.1265 regarding termination of condominium status after a natural disaster; and, (6) provide an effective date; and (B) find that such legislative position was within the purview of the Section:

The Motion was approved unanimously

Next a Motion was made to expend Section funds in support of the proposed legislative position.

The Motion was approved unanimously.

Recognition of Committee Sponsors:

Mr. Andrew O'Malley next recognized the following Real Property Division Committee Sponsors:

Attorneys' Title Fund Services, LLC – *Ted Conner*
Commercial Real Estate Committee

First American Title Insurance Company – *Alan McCall*
Condominium & Planned Development Committee

First American Title Insurance Company – *Wayne Sobien*
Real Estate Structure and Taxation Committee

Information Items:

1. **Residential Real Estate & Industry Liaison Committee** --- *Salome J. Zikakis, Chair*

Ms. Salome J. Zikakis reported that a special task force was formed with members of the Commercial Real Estate Committee and Title Insurance & Industry Liaison Committee to review the impact of the ALTA Best Practices Program on attorney settlement agents, both residential and commercial, so as to keep Section members informed and address potential issues.

2. **Real Property Litigation Committee** --- *Susan K. Spurgeon, Chair*

Ms. Susan K. Spurgeon reported that a joint committee was formed with members from the Real Probate Finance & Lending Committee and the Real Property Litigation Committee to study possible revisions to (i) the Florida Evidence Code (F.S. 90) concerning requirement of filing certified copies of documents; (ii) F.S. 95.281, the Statute of Repose; and (iii) F.S. 56.29, Proceedings Supplementary. The Committee will also be working with the Business Law Section with respect to the Proceedings Supplementary. The Committee hopes to have its report concluded for the March meeting in Orlando.

XII. Probate and Trust Law Division — *Deborah P. Goodall, Director*

Ms. Deborah Goodall began by recognize the following Probate and Trust Law Division's Friends of the Section and Committee Sponsors:

Committee Sponsors

BNY Mellon Wealth Management – *Joan Crain*
IRA, Insurance & Employee Benefits Committee
&
Probate Law and Procedure Committee

Business Valuation Analysts – *Tim Bronza*
Trust Law Committee

Coral Gables Trust – *John Harris*
Probate and Trust Litigation Committee

Guardian Trust – *Ashley Gonnelli*
Guardianship, Power of Attorney & Advance Directives Committee

Iberia Wealth Advisors – *Jessica Urloanski*
Estate & Trust Tax Planning Committee

Kravit Estate Appraisals – *Bianco Morabito*
Estate & Trust Tax Planning Committee

Life Audit Professionals – *Stacy Tacher*
IRA, Insurance & Employee Benefits Committee

Management Planning, Inc. – *Roy Meyers / Joe Gitto*
Estate & Trust Tax Planning Committee

Northern Trust – *Brett Rees*
Trust Law Committee

Action Items:

1. **Estate and Trust Tax Planning Committee** – *Elaine M. Bucher, Chair*

Mr. Richard Gans moved on behalf of the Committee:

To (A) adopt as legislative positions of the Section amendments to F.S. §§710.105, 710.111 and 710.123; Chapter 710, Florida Statutes ("Transfers to Minors") so as to permit a donor or a holder of a power of appointment created as a Uniform Transfer to Minor to provide in the instrument creating the transfer that the custodial relationship does not terminate until the minor attains the age 25; and (B) find that such legislative position is within the purview of the RPPTL Section.

The Motion was approved unanimously.

Next a Motion was made to expend Section funds in support of the proposed legislative position.

The Motion was approved unanimously.

XIII. General Standing Committees — *Michael J. Gelfand, General Standing Division Chair and Chair-Elect*

Action Items:

1. **Budget Committee** --- *S. Katherine Frazier, Treasurer, Chair*

Ms. Frazier presented the proposed budget and noted that it is a balanced budget with a projected ending fund balance that is artificially low by approximately $100,000 due to the Bar mandated reserve, which has never been drawn upon. Ms. Frazier also noted that (i) at every opportunity, the Committee under-estimated revenues and overestimated expense; and (ii) the Committee is seeking ways to reduce meeting expense without affecting the quality of the meeting experience. Ms. Frazier moved on behalf of the Committee:

> To approve RPPTL Budget for fiscal year 2015-2016, as set forth in the Agenda, and to delegate to the Executive Committee the authority to determine the most appropriate categorization of the ATO and CLI programs to account for how the Bar's policies may affect their successful and profitable operation.

The motion was approved unanimously.

Ms. Frazier concluded by thanking the Budget Committee members and Mary Ann Obos for their hard work.

Information Items:

1. **Integrity Awareness and Coordination Committee** --- *Jerry Aron, Co-Chair; Sandra Diamond, Co-Chair*

Mr. Gelfand reminded the Council that when Fletcher Belcher was chair he formed the Integrity Awareness and Coordination Committee. This Committee was charged with the task of studying and, if necessary, recommending bylaw changes to reflect the transparency and uphold the integrity of the Section. The Committee's proposal is presented at this meeting for discussion only, and if appropriate for consideration at the next Orlando meeting. Mr. Gelfand asked Co-Chair Jerry Aron to come forward to present the Committee's Preliminary Report and recommended bylaws changes which are found at **pp. 77-95** of the agenda.

Mr. Jerry Aron began by explaining that during Mr. Belcher's year as Chair the Section was confronted with a very controversial matter concerning mortgage foreclosure. A group of lawyers submitted a long letter to The Florida Bar accusing the Section of having a conflict. As a result of that controversy the Committee was formed to ensure that the Section's long standing commitment to integrity continues to be upheld.

Mr. Aron advised that the Committee is interested in receiving comments from Council members. The Committee will consider all comments before finalizing and presenting its report at the March meeting.

Mr. Aron requested Co-Chair Sandra Diamond to present a slideshow prepared by the Committee. Ms. Diamond explained that the Committee started by reviewing Article 10, Section I of the current bylaws. The Committee quickly realized changes needed to be made. The Committee began by looking at various sources including conflict policies of other not-for-profit organizations and materials provided by The Florida Bar. The Committee recognized rather quickly that our Section was not the same as other organizations. We are a deliberate body organized to study, teach and provide information and input to others in the state and when necessary propose legislation to better the practice of probate and real estate law in the State of Florida. When addressing issues our Section needs and solicits input from all groups to enable us to come up with a product and solution that best serves the needs of the citizens of the State of Florida. Potential conflicts can arise in a variety of circumstances. Some of us are employed by institutions that have a direct interest in the legislation we are discussing. Some of us may have direct client conflicts in which the legislation may impact a client we represent.

The Committee began by trying to define what a conflict of interest was in the first place. After much deliberation the Committee realized it was impossible to define a "conflict of interest" that would address all of the situations we confront. Instead the Committee concluded it needed to come up with a process for addressing a conflict of interest. It was agreed that the process should not prevent anyone from presenting a point of view or in most cases debating a point of view. It was essential that all issues be considered. What was important was that participants disclose any conflict or potential conflict or stake they may have on an issue and not vote on the solution.

Sandra Diamond returned the floor to Jerry Aron to provide an overview of the Committee's answers to the specific questions presented to the Committee in Fletcher Belcher's initial letter to the Committee. The questions are in essence broken down into four main categories: (1) should preference or special consideration should be given to sponsors; (2) involvement/participation of industry lobbyists or representatives; (3) involvement/participation of officers or employees of industry companies; and (4) duty to disclose.

Mr. Aron then turned the floor over to Sandra Diamond who presented the Committee's conclusions and procedural recommendations found at pages 84 and 85 of the Agenda material.

Mr. Aron concluded the Committee's report by again asking Council members to provide Committee members with any comments or questions they may have.

2. **Professionalism and Ethics** --- *Lawrence Miller, Chair*

As Lawrence Miller was working his way to the microphone, Mr. Gelfand gave a special thanks to Mr. Miller and his Committee for the last minute drafting the Committee had to do in order to prepare the white paper and materials that were sent to The Florida Bar addressing the proposed amendment to Comment on Rules Regulating The Florida Bar, Rule 4-4.2, Communication with Person Represented by Counsel." Mr. Gelfand reminded the Council that the white paper and materials were contained in a supplemental e-mail that was circulated to members prior to the meeting and are posted on the Section's website.

Mr. Lawrence Miller presented his Committee's report. Mr. Miller explained the longstanding bedrock ethical principal that an attorney cannot communicate with a party that is represented by counsel without the consent of the party's counsel. But this concept gets skewed when dealing with a governmental entity that has counsel. Article V of the Florida Constitution and Article I of the U.S. Constitution guarantees all citizens the right to petition the government and redress issues they may have directly with the government. This issue presents an even bigger problem in a regulatory or non-litigation context were it is customary to deal directly with government representatives.

Mr. Miller advised that The Florida Bar, over the years and most recently in 2009, has tried to define what is permitted when dealing with a governmental entity. This issue however, came to a head in the case of *The Florida Bar v. Tobin* in which Judge King was acting as a referee. In this case, counsel who was dealing with a regulatory issue for a client was also at the same time litigating with a governmental entity for the same client. Some of the issues in the regulatory process overlapped with issues in the litigation but they were not identical. Counsel was dealing directly with representatives of the entity in the regulatory process though litigating with that entity and its counsel on a related matter in court. Counsel for the client was then brought up on ethics charges by The Florida Bar. Judge King noting the commentary to Rule 4-4.2 found that there was independent justification for the communication, thus counsel had the right to communicate directly with the governmental representatives regarding the regulatory matter. The Florida Bar did not appeal the decision.

The City, County and Local Government Law Section of The Florida Bar took exception to this decision. The issue came before The Florida Bar Board of Governors Professional Ethics Committee and is under consideration. The "fix" being proposed by the Local Government Law Section is to amend the Commentary to the Rule 4-4.2 to prohibit communication directly with a representative of a governmental entity if there is litigation pending or threatened litigation. Mr. Miller advised that the Section has taken the formal position of opposing the amendment to the Commentary. The white paper for the Section explains the Section's position that the "fix" proposed is far greater than the problem. The problem in Tobin was that there was pending litigation at the same time as

there were regulatory issues. The white paper opines that this and only this problem should be addressed in the commentary.

3. **Same Sex Marriage Implications *Ad Hoc* Committee** --- *Jeffrey Ross Dollinger, Co-Chair (Real Property); George Daniel Karibjanian, Co-Chair (Probate & Trust)*

Co-Chairs Jeffrey Dollinger and George Karibjanian provided a brief report as to status of their committee's deliberations. Mr. Dollinger advised that the committee was seeking to resolve how to address the issue of whether any change in the law should be applied retroactively or prospectively if the DOMA provision in the Florida Constitution is found unconstitutional. From a title prospective there could be issues if the law were applied retroactively. For example, what would happen if homestead property was titled in the name of one spouse and the other spouse did not join in the deed of conveyance? If the law is applied retroactively the conveyance may not have been valid. Mr. Karibjanian provided equally troubling issues from the probate side. For example, if a same sex couple was validly married in New York and moved to Florida and one spouse had minor children from a previous marriage and died, under existing law the children would be entitled to the deceased spouse's entire interest in the homestead property. If the law changes should we go back in time to ensure the surviving spouse received their interest in the homestead? Do we go back and allow the surviving spouse to claim an elective share? What if more than two years have passed? The committee is trying to address these and other issues. The committee hopes to present its report at the Orlando meeting. The committee will also be presenting a seminar at the Convention in June.

4. **Amicus Coordination** – *Robert W. Goldman, John W. Little, III, Kenneth B. Bell and Gerald B. Cope, Jr., Co-Chairs*

Robert W. Goldman reported on the filing of an *amicus curiae* brief in the Supreme Court of Florida, SC13-2536, reviewing *Golden v. Jones*, 126 So. 3d 390 (Fla. 4th DCA, 2013). The case addresses the issue of creditor claims and basic due process. The First, Second and Fifth District Courts of Appeal citing *Pope* found that claims of a reasonably ascertainable creditor who did not receive actual notice could be barred by the statute of limitations. The Fourth District Court of Appeal found that under *Pope* that claims of a reasonably ascertainable creditor who did not receive notice could only be barred if they brought their claim after the statute of repose expired. The Section authorized a position seeking the affirmance of the Fourth District Court of Appeal and filed a brief.

In another matter, Mr. Goldman announced that the Fourth District Court of Appeal in the *Stone* case just asked the Section to answer one discrete question in the case. They did not ask us to address a waiver question on homestead involving deeds. When we answered the specific question the Court asked us to address we did note that should the Court want us to address the question of waiver we will be happy to do so. The Court did not ask us for further input. The Court just issued its opinion and agreed with the Section's position regarding the issue briefed.

In a third matter, Mr. Goldman advised that the United States Eleventh Circuit Court of Appeals certified a question to the Supreme Court of Florida that dealt with eminent domain and deed issues. The Amicus Committee requested Council member Brian Hoffman to provide further explanation. In essence, at the heart of the issue is whether parole evidence may be introduced to contradict unambiguous language in a deed.

Mr. Goldman advised that a brief will be due in early December. Mr. Gelfand asked Mr. Hoffman to summarize the position being requested of the Council on behalf of the Title Issues and Standards Committee. Mr. Hoffman stated the Committee's motion as follows: (A) to authorize the Section to file an amicus brief to address how parole evidence should be utilized in interpreting an unambiguous deed; and (B) to allow the executive committee to address any other real property issues that the Amicus Committee deems appropriate.

A motion was made to suspend the rules to hear the matter. The motion was seconded and approved unanimously.

The Committee's motion was called and was approved unanimously.

5. **Legislation Committee** — *William T. Hennessey III, Co-Chair (Probate & Trust) and Robert Freedman, Co-Chair (Real Property)*

6. **Formation of Ad Hoc Study Committee to Consider Same Sex Marriage Issues** -*Jeffrey Ross Dollinger, Co-Chair (Real Property); George Daniel Karibjanian, Co-Chair (Probate & Trust)*

7. **Amicus Coordination** – *Robert W. Goldman, John W. Little, III, Kenneth B. Bell and Gerald B. Cope, Jr., Co-Chairs*

8. **Ad Hoc Trust Account** – *John B. Neukamm and Jerry E. Aron, Co-Chairs*

XIV. <u>Real Property Law Division Reports</u> — *Andrew M. O'Malley, Director*

1. **Commercial Real Estate** – Art Menor, Chair; Burt Bruton and Adele Stone, Co-Vice Chairs.

2. **Condominium and Planned Development** – Steven H. Mezer, Chair; Christopher Davies and Alex Dobrev, Co-Vice Chairs.

3. **Construction Law** – Hardy Roberts, Chair; Scott Pence and Lee Weintraub, Co-Vice Chairs.

4. **Construction Law Certification Review Course** – Deborah Mastin and Bryan Rendzio, Co-Chairs; Melinda Gentile, Vice Chair.

5. **Construction Law Institute** – Reese Henderson, Chair; Sanjay Kurian, Diane Perera and Jason Quintero, Co-Vice Chairs.

6. **Development & Land Use Planning** – Vinette Godelia, Chair; Mike Bedke and Neil Shoter, Co-Vice Chairs.

7. **Foreclosure Reform (Ad Hoc)** - Jeffrey Sauer, Chair; Mark Brown, Burt Bruton and Alan Fields, Co-Vice Chairs.

8. **Landlord and Tenant** – Lloyd Granet, Chair; Rick Eckhard and Brenda Ezell, Co-Vice Chairs.

9. **Legal Opinions** – Kip Thornton, Chair; Robert Stern, Vice-Chair.

10. **Liaisons with FLTA** – Norwood Gay and Alan McCall, Co-Chairs; Alexandra Overhoff and James C. Russick, Co-Vice Chairs.

11. **Insurance & Surety** – W. Cary Wright and Fred Dudley, Co-Chairs; Scott Pence and Michael Meyer, Co-Vice Chairs.

12. **Real Estate Certification Review Course** – Jennifer Tobin, Chair; Manual Farach and Martin Awerbach, Co-Vice Chairs.

13. **Real Estate Structures and Taxation** – Cristin C. Keane, Chair; Michael Bedke and Deborah Boyd, Co-Vice Chairs.

14. **Real Property Finance & Lending** – Jim Robbins, Chair; Homer Duval, III, Richard S. McIver and Bill Sklar, Co-Vice Chairs.

15. **Real Property Litigation** – Susan Spurgeon, Chair; Manny Farach, Vice Chair.

16. **Real Property Problems Study** – W. Theodore "Ted" Conner, Chair; Mark A. Brown, Jeff Dollinger, Stacy Kalmanson and Patricia J. Hancock, Co-Vice Chairs.

17. **Residential Real Estate and Industry Liaison** – Salome Zikakas, Chair; Trey Goldman and Nishad Khan, Co-Vice Chairs.

18. **Title Insurance and Title Insurance Liaison** – Raul Ballaga, Chair; Alan Fields and Brian Hoffman, Co-Vice Chairs.

19. **Title Issues and Standards** – Christopher W. Smart, Chair; Robert M. Graham, Brian Hoffman and Karla J. Staker, Co-Vice Chairs.

XV. <u>Probate and Trust Law Division Committee Reports</u> — *Deborah P. Goodall, Director*

1. **Ad Hoc Guardianship Law Revision Committee** – David Brennan, Chair; Sancha Brennan Whynot, Hung Nguyen and Charles F. Robinson, Co-Vice Chairs

2. **Ad Hoc Study Committee on Estate Planning Conflict of Interest** - William T. Hennessey III, Chair; Paul Roman, Vice Chair

3. **Ad Hoc Study Committee on Jurisdiction and Service of Process** – Barry F. Spivey, Chair; Sean W. Kelley and Christopher Q. Wintter, Co-Vice Chairs

4. **Ad Hoc Study Committee on Personal Representative Issues** – Jack A. Falk, Jr., Chair

5. **Ad Hoc Study Committee on Spendthrift Trust Issues** – Lauren Detzel and Jon Scuderi, Co-Chairs

6. **Asset Protection** – Brian C. Sparks, Chair; George Karibjanian, Vice-Chair

7. **Attorney/Trust Officer Liaison Conference** – Laura K. Sundberg, Chair; Stacey Cole, Co-Vice Chair (Corporate Fiduciary) and Deborah Russell Co-Vice Chair

8. **Digital Assets and Information Study Committee** – Eric Virgil, Chair; Travis Hayes and S. Dresden Brunner, Co-Vice Chairs

9. **Elective Share Review Committee** – Lauren Detzel and Charles I. Nash, Co-Chairs; Robert Lee McElroy IV, Vice-Chair

10. **Estate and Trust Tax Planning** – Elaine M. Bucher, Chair; David Akins, Tasha Pepper-Dickinson and William Lane, Co-Vice Chairs

11. **Guardianship, Power of Attorney and Advanced Directives** – Hung Nguyen, Chair, Tattiana Brenes-Stahl, David Brennan and Eric Virgil, Co-Vice Chairs

12. **IRA, Insurance and Employee Benefits** – L. Howard Payne and Lester Law, Co-Chairs

13. **Liaisons with ACTEC** – Michael Simon, Bruce Stone, and Diana S.C. Zeydel

14. **Liaisons with Elder Law Section** – Charles F. Robinson and Marjorie Wolasky

15. **Liaisons with Tax Section** – Harris L. Bonnette, Jr., Lauren Y. Detzel, William R. Lane, Jr., Brian C. Sparks and Donald R. Tescher

16. **Principal and Income** – Edward F. Koren, Chair; Pamela Price, Vice Chair

17. **Probate and Trust Litigation** – Thomas M. Karr, Chair; John Richard Caskey, James George, Jon Scuderi and Jerry Wells, Co-Vice Chairs

18. **Probate Law and Procedure** – John C. Moran, Chair; Sarah S. Butters, Michael Travis Hayes and Sean Kelley, Co-Vice Chairs

19. **Trust Law** – Angela M. Adams, Chair; Tami F. Conetta, Jack A. Falk and Deborah Russell, Co-Vice Chairs

20. **Wills, Trusts and Estates Certification Review Course** – Richard R. Gans, Chair; Jeffrey S. Goethe, Linda S. Griffin, Seth Marmor and Jerome L. Wolf, Co-Vice Chairs

XVI. **General Standing Committee Reports** — *Michael J. Gelfand, Director and Chair-Elect*

1. **Ad Hoc Leadership Academy** – Tae Kelley Bronner and Kris Fernandez, Co-Chairs

2. **Ad Hoc Study Committee on Same Sex Marriage Issues**– Jeffrey Ross Dollinger and George Daniel Karibjanian, Co-Chairs

3. **Ad Hoc Trust Account** – John B. Neukamm and Jerry E. Aron, Co-Chairs

4. **Amicus Coordination** – Robert W. Goldman, John W. Little, III, Kenneth B. Bell and Gerald B. Cope, Jr., Co-Chairs

5. **Budget** – S. Katherine Frazier, Chair; Andrew M. O'Malley, Pamela O. Price, Daniel L. DeCubellis, Lee Weintraub and W. Cary Wright, Co-Vice Chairs

6. **CLE Seminar Coordination** – Robert S. Swaine and Tae Kelley Bronner, Co-Chairs; Laura K. Sundberg (Probate & Trust), Sarah S. Butters (Probate & Trust), Lawrence J. Miller (Ethics), Jennifer S. Tobin (Real Property) and Hardy L. Roberts, III (General E-CLE), Co-Vice Chairs **p. 217**

7. **Convention Coordination** – Laura K. Sundberg and Stuart Altman, Co-Chairs; Marsha G. Madorsky, Raul Ballaga and Jennifer Jones, Co-Vice Chairs

8. **Fellows** – Brenda B. Ezell and Hung V. Nguyen, Co-Chairs; Benjamin Diamond and Ashley McCrae, Co-Vice Chairs

9. **Florida Electronic Filing & Service** – Rohan Kelley, Chair

10. **Homestead Issues Study** – Shane Kelley (Probate & Trust) and Patricia P. Jones (Real Property), Co-Chairs; J. Michael Swaine and Charles Nash, Co-Vice Chairs

11. **Legislation** – William T. Hennessey, III (Probate & Trust) and Robert S. Freedman (Real Property), Co-Chairs; Sarah S. Butters (Probate & Trust), and Alan B. Fields and Steven Mezer (Real Property), Co-Vice Chairs

12. **Legislative Update (2014)** – Stuart H. Altman, Chair; Charles I. Nash, R. James Robbins, Barry F. Spivey, Stacy O. Kalmanson, and Jennifer S. Tobin, Co-Vice Chairs

13. **Legislative Update (2015)** – R. James Robbins, Chair; Charles I. Nash, Barry F. Spivey, Stacy O. Kalmanson and Jennifer S. Tobin, Co-Vice Chairs

14. **Liaison with:**

    a. **American Bar Association (ABA)** – Edward F. Koren and Julius J. Zschau
    b. **Board of Legal Specialization and Education (BLSE)** – Raul P. Ballaga, Jennifer S. Tobin, William Cary Wright, and Richard Gans
    c. **Clerks of Circuit Court** – Laird A. Lile and William Theodore (Ted) Conner
    d. **FLEA / FLSSI** – David C. Brennan, John Arthur Jones and Roland "Chip" Waller Co-Vice Chairs
    e. **Florida Bankers Association** – Mark T. Middlebrook
    f. **Judiciary** – Judge Linda R. Allan, Judge Jack St. Arnold, Judge Herbert J. Baumann, Judge Melvin B. Grossman, Judge Hugh D. Hayes, Judge Claudia Rickert Isom, Judge Maria M. Korvick, Judge Lauren Laughlin, Judge Norma S. Lindsey, Judge Celeste H. Muir, Judge Robert Pleus, Jr., Judge Walter L. Schafer, Jr., Judge Morris Silberman, Judge Richard J. Suarez, and Judge Patricia V. Thomas
    g. **Out of State Members** – Michael P. Stafford, John E. Fitzgerald, Jr., and Nicole Kibert
    h. **TFB Board of Governors** – Andrew Sasso
    i. **TFB Business Law Section** – Gwynne A. Young
    j. **TFB CLE Committee** – Robert S. Freedman and Tae Kelley Bronner
    k. **TFB Council of Sections** –Michael A. Dribin and Michael J. Gelfand
    l. **TFB Pro Bono Committee** – Tasha K. Pepper-Dickinson

15. **Long-Range Planning** – Michael J. Gelfand, Chair

16. **Meetings Planning** – George J. Meyer, Chair

17. **Member Communications and Information Technology** – William A. Parady, Chair; S. Dresden Brunner, Michael Travis Hayes, and Tattiana Brenes-Stahl, Co-Vice Chairs

18. **Membership and Inclusion** –Lynwood F. Arnold, Jr. and Jason M. Ellison, Co-Chairs, Phillip A. Baumann - (Career Coaching), Navin R. Pasem (Diversity), and

Guy S. Emerich (Career Coaching an Liaison to TFB's Scope Program), Co-Vice Chairs

19. **Model and Uniform Acts** – Bruce M. Stone and S. Katherine Frazier, Co-Chairs

20. **Professionalism and Ethics--General** – Lawrence J. Miller, Chair; Tasha K. Pepper-Dickinson, Vice Chair

21. **Professionalism and Ethics—Special Subcommittee on Integrity Awareness and Coordination** – Jerry Aron and Sandra Diamond, Co-Chairs

22. **Publications (ActionLine)** – Silvia B. Rojas, Chair (Editor in Chief); Shari Ben Moussa (Advertising Coordinator), Navin R. Pasem (Real Property Case Review), Jane L. Cornett, (Features Editor), Brian M. Malec (Probate & Trust), George D. Karibjanian (Editor, National Reports), Lawrence J. Miller (Editor, Professionalism & Ethics), Arlene Udick and Lee Weintraub, Co-Vice Chairs

23. **Publications (Florida Bar Journal)** – Kristen M. Lynch (Probate & Trust), and David R. Brittain (Real Property), Co-Chairs; Jeffrey S. Goethe (Editorial Board – Probate & Trust), Linda Griffin (Editorial Board – Probate & Trust), Michael A. Bedke (Editorial Board – Real Property) and William T. Conner (Editorial Board – Real Property), Co-Vice Chairs

24. **Sponsor Coordination** –Wilhelmena F. Kightlinger, Chair; J. Michael Swaine, Deborah L. Russell, W. Cary Wright, Benjamin F. Diamond, John Cole, Co-Vice Chairs

25. **Strategic Planning** –Michael A. Dribin and Michael J. Gelfand, Co-Chairs

XVII. Adjourn

There being no further business to come before the Executive Council, Mr. Dribin thanked those in attendance and a motion to adjourn was unanimously approved and the meeting concluded at 12:15 p.m.

Respectfully submitted,

Debra L. Boje, Secretary

ADDENDUM "A"

ATTENDANCE ROSTER
REAL PROPERTY PROBATE & TRUST LAW SECTION
EXECUTIVE COUNCIL MEETINGS
2014-2015

Executive Committee	Division		Aug. 2 Palm Beach	Sept. 20 Chicago, Illinois	Nov. 15 Naples	Mar. 20 Orlando	Jun. 6 Miami Beach
	RP	P&T					
Dribin, Michael A., Chair	√		√	√	√		
Gelfand, Michael J., Chair-Elect		√	√	√	√		
O'Malley, Andrew M., Real Property Law Div. Director	√		√	√	√		
Goodall, Deborah P., Probate and Trust Law Div. Director		√	√	√	√		
Boje, Debra L., Secretary		√	√		√		
Frazier, S. Katherine, Treasurer	√		√	√	√		
Hennessey, William M., Legislation Co-Chair (P&T)		√	√	√	√		
Freedman, Robert S., Legislation Co-Chair (RP)	√		√	√	√		
Bronner, Tae K. Seminar Coordinator (P&T)		√	√		√		
Swaine, Robert S Seminar Coordinator (RP)	√		√	√	√		
Kelley, Shane, Director of At-Large Members		√	√	√	√		
Rolando, Margaret A., Immediate Past Chair	√		√	√	√		

Executive Council Members	Division		Aug. 2 Palm Beach	Sept. 20 Chicago, Illinois	Nov. 15 Naples	Mar. 20 Orlando	Jun. 6 Miami Beach
	RP	P&T					
Adams, Angela M.		√	√	√	√		
Adcock, Jr., Louie N., **Past Chair**		√					
Akins, David J.		√	√		√		

Executive Council Members	Division		Aug. 2 Palm Beach	Sept. 20 Chicago, Illinois	Nov. 15 Naples	Mar. 20 Orlando	Jun. 6 Miami Beach
	RP	P&T					
Allan, Honorable Linda		√			√		
Altman, Stuart H.		√	√	√	√		
Archbold, J. Allison		√	√		√		
Arnold, Jr., Lynwood F.	√	√	√		√		
Aron Jerry E. **Past Chair**	√		√		√		
Awerbach, Martin S.	√		√				
Bald, Kimberly A.	√				√		
Ballaga, Raul P.	√		√		√		
Batlle, Carlos A.		√	√		√		
Baumann, Honorable Herbert J.		√					
Baumann, Phillip A.		√	√	√	√		
Beales, III, Walter R. **Past Chair**	√		√				
Bedke, Michael A.	√		√	√	√		
Belcher, William F. **Past Chair**		√	√		√		
Bell, Kenneth B.	√						
Beller, Amy		√	√	√	√		
Bellew, Brandon D.		√	√		√		
Ben Moussa, Shari D.	√						
Bonevac, Judy B.		√	√	√	√		
Bonnette, Jr., Harris L.		√	√				
Boyd, Deborah	√				√		
Bowser, Robert Wade	√						

Executive Council Members	Division		Aug. 2 Palm Beach	Sept. 20 Chicago, Illinois	Nov. 15 Naples	Mar. 20 Orlando	Jun. 6 Miami Beach
	RP	P&T					
Brenes-Stahl, Tattiana P.		√	√		√		
Brennan, David C. **Past Chair**		√	√				
Brittain, David R.	√				√		
Brown, Mark A.	√		√	√			
Brunner, S. Dresden		√	√		√		
Bruton, Jr., Ed Burt	√		√		√		
Bucher, Elaine M.		√	√		√		
Butters, Sarah S.		√			√		
Callahan, Charles III		√	√				
Carlisle, David R.		√			√		
Caskey, John R.		√	√		√		
Christiansen, Patrick T. **Past Chair**	√		√				
Cole, John P.		√	√	√			
Cole, Stacey L.		√	√	√			
Conetta, Tami F.		√	√	√	√		
Conner, W. Theodore	√		√				
Cope, Jr., Gerald B.	√		√				
Cornett, Jane L.	√						
Davies, Christopher	√		√		√		
DeCubellis, Daniel L.	√						
Detzel, Lauren Y.		√	√				
Diamond, Benjamin F.		√	√	√	√		

Executive Council Members	Division		Aug. 2 Palm Beach	Sept. 20 Chicago, Illinois	Nov. 15 Naples	Mar. 20 Orlando	Jun. 6 Miami Beach
	RP	P&T					
Diamond, Sandra F. **Past Chair**		√	√		√		
Dobrev, Alex	√		√		√		
Dollinger, Jeffrey	√		√		√		
Dudley, Frederick R.	√						
Duvall, III, Homer	√				√		
Eckhard, Rick	√		√				
Ellison, Jason M.	√		√	√			
Emerich, Guy S.		√	√		√		
Ertl, Christene M.	√		√				
Ezell, Brenda B.	√		√				
Falk, Jr., Jack A.		√	√		√		
Fallon, Cynthia		√					
Farach, Manuel	√		√	√	√		
Felcoski, Brian J., **Past Chair**		√	√		√		
Fernandez, Kristopher E.	√		√		√		
Fields, Alan B.	√		√		√		
Fitzgerald, Jr., John E.		√	√		√		
Flood, Gerard J.		√	√	√	√		
Foreman, Michael L.		√	√		√		
Galler, Jonathan		√	√		√		
Gans, Richard R.		√	√		√		
Gault, Doug		√					

Executive Council Members	Division		Aug. 2 Palm Beach	Sept. 20 Chicago, Illinois	Nov. 15 Naples	Mar. 20 Orlando	Jun. 6 Miami Beach
	RP	P&T					
Gay, III, Robert Norwood	√		√		√		
George, James		√	√		√		
Godelia, Vinette D.	√				√		
Goethe, Jeffrey S.		√	√		√		
Goldman, Louise "Trey"	√		√	√	√		
Goldman, Robert W. **Past Chair**		√	√		√		
Graham, Robert M.	√		√	√	√		
Granet, Lloyd	√		√		√		
Griffin, Linda S.		√	√		√		
Grimsley, John G. **Past Chair**		√					
Grossman, Honorable Melvin B.		√					
Guttmann, III, Louis B. **Past Chair**	√						
Hamrick, Alexander H.		√	√		√		
Hancock, Patricia J.	√		√		√		
Hart, W.C.	√				√		
Hayes, Honorable Hugh D.		√					
Hayes, Michael Travis		√	√		√		
Hearn, Steven L. **Past Chair**		√	√	√			
Henderson, Jr., Reese J.	√		√				
Henderson, III, Thomas N.	√		√	√	√		
Heron, Lisa Colon	√						
Heuston, Stephen P.		√	√		√		

Executive Council Members	Division		Aug. 2 Palm Beach	Sept. 20 Chicago, Illinois	Nov. 15 Naples	Mar. 20 Orlando	Jun. 6 Miami Beach
	RP	P&T					
Hoffman, Brian W.	√		√		√		
Isom, Honorable Claudia R.		√					
Isphording, Roger O. **Past Chair**		√	√	√	√		
Johnson, Amber Jade F.		√	√	√	√		
Jones, Darby		√	√		√		
Jones, Frederick W.	√		√	√	√		
Jones, Jennifer W.		√	√	√			
Jones, John Arthur **Past Chair**		√					
Jones, Patricia P.H.	√		√	√	√		
Judd, Robert B.		√	√		√		
Khan, Nishad	√		√	√	√		
Kalmanson, Stacy O.	√		√		√		
Karibjanian, George		√			√		
Karr, Thomas M.		√	√		√		
Kayser, Joan B. **Past Chair**		√		√	√		
Keane, Cristin C.	√				√		
Kelley, Rohan **Past Chair**		√	√	√	√		
Kelley, Sean W.		√	√	√	√		
Kibert, Nicole C.	√		√		√		
Kightlinger, Wilhelmina F.	√		√		√		
Kinsolving, Ruth Barnes **Past Chair**	√				√		
Koren, Edward F. **Past Chair**		√	√		√		

Executive Council Members	Division		Aug. 2 Palm Beach	Sept. 20 Chicago, Illinois	Nov. 15 Naples	Mar. 20 Orlando	Jun. 6 Miami Beach
	RP	P&T					
Korvick, Honorable Maria M.		√	√	√	√		
Kotler, Alan Stephen		√	√		√		
Kromash, Keith S.		√	√		√		
Kurian, Sanjay	√		√		√		
Kypreos, Theodore S.		√	√	√	√		
Lancaster, Robert L.		√	√		√		
Lane, Jr., William R.		√			√		
Lange, George		√	√	√	√		
Larson, Roger A.	√		√		√		
Laughlin, Honorable Lauren C.		√					
Law, Lester		√					
Leebrick, Brian D.	√			√	√		
Lile, Laird A. **Past Chair**		√	√		√		
Lindsey, Honorable Norma S.	√		√		√		
Little, III, John W.	√		√		√		
Lynch, Kristen M.		√			√		
Madorsky, Marsha G.		√	√	√	√		
Malec, Brian		√	√		√		
Marger, Bruce **Past Chair**		√	√	√			
Marmor, Seth A.		√	√		√		
Marshall, III, Stewart A.		√	√				
Mastin, Deborah Bovarnick	√		√				

Executive Council Members	Division		Aug. 2 Palm Beach	Sept. 20 Chicago, Illinois	Nov. 15 Naples	Mar. 20 Orlando	Jun. 6 Miami Beach
	RP	P&T					
McCall, Alan K.	√		√	√			
McElroy, IV, Robert Lee		√	√				
McIver, Richard	√		√		√		
McRae, Ashley E.	√		√				
Melanson, Noelle		√			√		
Menor, Arthur J.	√				√		
Meyer, George F. **Past Chair**	√		√		√		
Meyer, Michael	√		√		√		
Mezer, Steven H.	√		√	√	√		
Middlebrook, Mark T.		√	√	√	√		
Miller, Lawrence J.		√	√	√	√		
Mize, Patrick		√	√		√		
Moran, John C.		√	√		√		
Moule, Jr., Rex E.		√	√		√		
Muir, Honorable Celeste H.		√	√	√	√		
Murphy, Melissa J. **Past Chair**	√		√	√			
Nash, Charles I.		√	√	√	√		
Neukamm, John B. **Past Chair**	√		√	√	√		
Nice, Marina		√	√		√		
Overhoff, Alex	√		√		√		
Nguyen, Hung V.		√	√		√		
Palmer, Margaret		√					

Executive Council Members	Division		Aug. 2 Palm Beach	Sept. 20 Chicago, Illinois	Nov. 15 Naples	Mar. 20 Orlando	Jun. 6 Miami Beach
	RP	P&T					
Parady, William A.		√	√	√	√		
Pasem, Navin	√						
Payne, L. Howard		√	√		√		
Pence, Scott P.	√		√		√		
Pepper-Dickinson, Tasha K.		√	√		√		
Perera, Diane	√						
Petrino, Bradford	√						
Pilotte, Frank		√	√		√		
Platt, William R.		√	√		√		
Pleus, Jr., Honorable Robert J.							
Pollack, Anne Q.	√				√		
Polson, Marilyn M.		√			√		
Price, Pamela O.		√	√				
Prince-Troutman, Stacey A.		√					
Pyle, Michael A.		√	√	√			
Quintero, Jason	√		√	√			
Rao, Tara		√	√		√		
Redding, John N.	√		√	√			
Reiser, Alyse		√	√		√		
Rendzio, Bryan	√		√				
Reynolds, Stephen H.	√		√		√		
Rieman, Alexandra V.		√	√		√		

Executive Council Members	Division		Aug. 2 Palm Beach	Sept. 20 Chicago, Illinois	Nov. 15 Naples	Mar. 20 Orlando	Jun. 6 Miami Beach
	RP	P&T					
Robbins, Jr., R.J.	√		√				
Roberts, III, Hardy L.	√			√	√		
Robinson, Charles F.		√	√		√		
Rojas, Silvia B.	√		√	√	√		
Roman, Paul E.		√	√	√	√		
Russell, Deborah L.		√	√	√	√		
Russick, James C.	√		√		√		
Rydberg, Marsha G.	√			√			
Sachs, Colleen C.	√				√		
Sasso, Andrew		√	√		√		
Sauer, Jeffrey T.	√						
Schafer, Jr., Honorable Walter L.		√					
Schnitker, Clay A.	√						
Schofield, Percy A.	√		√		√		
Schwartz, Robert M.	√		√		√		
Scuderi, Jon		√			√		
Seaford, Susan	√		√				
Sheets, Sandra G.		√			√		
Shoter, Neil B.	√		√	√	√		
Silberman, Honorable Morris							
Silberstein, David M.		√	√		√		
Simon, Michael		√	√				

Executive Council Members	Division		Aug. 2 Palm Beach	Sept. 20 Chicago, Illinois	Nov. 15 Naples	Mar. 20 Orlando	Jun. 6 Miami Beach
	RP	P&T					
Sklar, William P.	√		√		√		
Smart, Christopher W.	√				√		
Smith, G. Thomas **Past Chair**	√		√				
Smith, Wilson **Past Chair**		√					
Sparks, Brian C.		√	√		√		
Speiser, Honorable Mark A.							
Spivey, Barry F.		√	√	√	√		
Spurgeon, Susan K.	√		√	√	√		
Stafford, Michael P.		√	√		√		
Staker, Karla J.	√		√		√		
Stern, Robert G.	√		√				
Stone, Adele I.	√				√		
Stone, Bruce M. **Past Chair**		√			√		
Suarez, Honorable Richard J.							
Sundberg, Laura K.		√	√	√			
Swaine, Jack Michael **Past Chair**	√		√	√			
Taft, Eleanor W.	√				√		
Taylor, Richard W.	√		√				
Tescher, Donald R.		√	√		√		
Thomas, Honorable Patricia V.		√	√	√			
Thornton, Kenneth E.	√		√	√			
Tobin, Jennifer S.	√		√				

Executive Council Members	Division		Aug. 2 Palm Beach	Sept. 20 Chicago, Illinois	Nov. 15 Naples	Mar. 20 Orlando	Jun. 6 Miami Beach
	RP	P&T					
Triggs, Matthew H.		√	√		√		
Udick, Arlene C.	√		√				
Virgil, Eric		√	√				
Waller, Roland D. **Past Chair**	√		√	√	√		
Walters, Hanton H.	√						
Wartenberg, Stephanie Harriet		√	√		√		
Weintraub, Lee A.	√		√	√	√		
Wells, Jerry B.		√	√		√		
White, Jr., Richard M.		√			√		
Whynot, Sancha B.		√			√		
Wilder, Charles D.		√	√		√		
Williamson, Julie Ann S. **Past Chair**	√		√				
Wintter, Christopher Q.		√	√	√	√		
Wohlust, Gary Charles		√	√	√	√		
Wolasky, Marjorie E.		√	√		√		
Wolf, Jerome L.		√	√	√	√		
Wright, William Cary	√		√	√			
Young, Gwynne A.		√	√				
Zeydel, Diana S.C.		√	√		√		
Zikakis, Salome J.	√		√	√	√		
Zschau, Julius J. **Past Chair**	√		√				

RPPTL Fellows	Division		Aug. 2 Palm Beach	Sept. 20 Chicago, Illinois	Nov. 15 Naples	Mar. 20 Orlando	Jun. 6 Miami Beach
	RP	P&T					
Christy, Doug	√		√		√		
Costello, John Truman Jr.		√	√		√		
Jennison, Julia Lee	√		√		√		
Lebowitz, Sean		√	√		√		
Rosenberg, Josh		√	√	√	√		
Smith, Kym	√		√		√		
Sneeringer, Michael Alan		√	√		√		
VanSickle, Melissa	√		√		√		

Legislative Consultants	Division		Aug. 2 Palm Beach	Sept. 20 Chicago, Illinois	Nov. 15 Naples	Mar. 20 Orlando	Jun. 6 Miami Beach
	RP	P&T					
Adams, Howard Eugene		√					
DiNunzio, Ashely	√		√	√			
Dunbar, Peter M.			√		√		
Edenfield, Martha			√	√	√		

Guests	Division		Aug. 2 Palm Beach	Sept. 20 Chicago, Illinois	Nov. 15 Naples	Mar. 20 Orlando	Jun. 6 Miami Beach
	RP	P&T					
Gentile, Mindy			√				
Solomon, Marty	√		√		√		
Horstkamp, Julie			√				
Barker, Erin	√		√		√		
Duz, Ashley			√				
Frazier, Nathan			√				
Butler, Johnathan			√				
Braun, Keith			√				
Gunther, Eamonn			√				
Brawn, Shawn			√				

Guests	Division		Aug. 2 Palm Beach	Sept. 20 Chicago, Illinois	Nov. 15 Naples	Mar. 20 Orlando	Jun. 6 Miami Beach
	RP	P&T					
Evans, Kara				√			
Coleman, Greg				√			
White, Dennis R					√		
Miller, Erin					√		
Leathe, Jeremy		√			√		

The Florida Bar
Real Property, Probate & Trust Law Section

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Friday Night Dinner
First American Title Insurance Company - *Alan McCall*

Regions Private Wealth Management - *Margaret Palmer*

Hospitality Suite
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BMO Private Bank - *Joan Kayser*

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Fidelity National Title Group - *Pat Hancock*

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Real Property, Probate & Trust Law Section

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Kravit, The Estate Department – *Van Stillman*

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Valuation Services, Inc. - *Jeff Bae, JD, CVA*

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The Florida Bar
Real Property, Probate & Trust Law Section

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Business Valuation Analysts – *Tim Bronza*
Trust Law Committee

Coral Gables Trust – *John Harris*
Probate and Trust Litigation Committee

First American Title Insurance Company – *Alan McCall*
Condominium & Planned Development Committee

First American Title Insurance Company – *Wayne Sobien*
Real Estate Structures and Taxation Committee

Guardian Trust – *Ashley Gonnelli*
Guardianship, Power of Attorney & Advance Directives Committee

Kravit Estate Appraisal – *Bianca Morabito*
Estate and Tax Planning Committee

Life Audit Professionals – Nicole Newman
IRA, Insurance & Employee Benefits Committee

Management Planning, Inc. – *Roy Meyers / Joe Gitto*
Estate & Trust Tax Planning Committee

Northern Trust – *Tami Conetta*
Trust Law Committee

Real Property, Probate Trust Law Section / Executive Council Meeting Schedule
Annual Convention- Fountainebleau Miami Beach

Date/Time	Committee / Event:	Set	# at Table	# perimeter chairs	Equipment	Room Assignment
Wednesday	**June 3, 2015**					
3:00 pm – 6:00 pm	**Registration Desk Hours**					
7:00 pm – 9:30 pm	**Executive Committee Dinner****	20	15			
Thursday	**June 4, 2015**					
7:30 am – 5:00 pm	**Registration Desk Hours**					
8:00 am – 11:00 am	**Executive Committee ****	Conf	12	0		
8:00 am – 9:30 am	**Asset Protection**	H/S	60	40	microphones, podium	
8:00 am – 9:30 am	**Legal Opinions Committee**	Conf	14	5	speakerphone	
9:30 am – 11:00 am	**Development and Land Use**	Conf	14	none	speakerphone	
9:30 am – 11:00 am	**Residential Real Estate & Industry Liaison Committee**	H/S	40	20	microphones, podium, speakerphone	
9:30 am – 11:30 am	**Trust Law**	H/S	60	60	microphones, podium	
10:30 am – 12:00 pm	**Homestead Problem Study ***	H/S	20	10		
11:00 am – 12:30 pm	**Sponsorship Committee**	Conf	10	none	none	
11:00 am – 12:30 pm	**Digital Assets and Information Study Committee**	H/S	40	10		
11:00 am – 12:30 pm	**Ad Hoc Study on Spendthrift Trust Issues Committee ***	H/S	20	10		
11:00 am – 12:30 pm	**Construction Law**	H/S	20	10	speakerphone, microphones, podium	
11:00 am – 12:30 pm	**Ad Hoc Study on Same Sex Marriage Issues ***	H/S	20	10		
11:30 pm – 1:00 pm	**Ad Hoc Decanting***					
11:30 am – 1:30 pm	**Working Buffet Lunch**	***Pre-Registration and Ticket Required***				
11:30 pm – 1:30 pm	**Probate & Trust Litigation**	H/S	60	60	microphones, podium	
12:30 pm – 2:00 pm	**Real Property Finance & Lending**	H/S	40	20	microphones, podium, speaker phone	
12:30 pm – 2:00 pm	**Condominium and Planned Development**	H/S	60	60	microphones, podium	
12:30 pm – 2:00 pm	**Member Communication and Information Technology**	Conf	10	5		
2:00 pm – 4:00 pm	**Real Property Problem Study**	H/S	20	10	speakerphone	
2:00 pm – 4:00 pm	**Guardianship, Power of Attorney & Advanced Directives**	H/S	45	15	microphones podium	
2:30 pm – 4:00 pm	**Construction Law Institute**	H/S	20		speakerphone	
2:30 pm – 4:00 pm	**Landlord & Tenant**	Conf	10		speakerphone	
2:30 pm – 4:00 pm	**Attorney Trust Officer**	Conf	14	10	speakerphone	
2:30 pm – 4:00 pm	**Legislative Update**	Conf	14	10		
4:00 pm – 5:00 pm	**IRA, Insurance & Employee Benefits**	H/S	30	15	microphones	
4:00 pm – 5:00 pm	**At Large Members**	rounds	80		microphone, podium/beer & wine	
4:00 pm – 5:00 pm	**Elective Share Review Committee ***	conf	15			
4:00 pm – 5:00 pm	**ALTA Best Practices Task Force**	conf	15			
4:00 pm – 5:00 pm	**Fellows and Mentoring**	H/S	20	10		
5:00 am – 6:00 pm	**General Sponsor Reception ****	special	50		beer, wine, light apps	
6:30 pm – 7:00 pm	**Busses depart for Reception**					
7:00 pm – 9:00 pm	**Welcome Reception at PAMM**	***Pre-Registration and Ticket Required***				
9:30 pm – 11:30 pm	**Hospitality Suite**	`				
Friday	**June 5, 2015**					
6:30 am	**Reptiles Run**					
7:30 am – 9:00 am	**Continental Breakfast (GRAB AND GO)**	***Pre-Registration and Ticket Required***				
8:00 am – 11:20 am	**SEMINAR: BURSTING THROUGH THE TECHNOLOGY BARRIER**	*class w/ riser*	*100*		*microphone at podium*	
11:30 am – 1:15 pm	**Annual Membership Luncheon**	***Pre-Registration and Ticket Required***				
1:30 pm – 2:30 pm	**Estate & Trust Tax Planning**	H/S	60	20	microphones, podium	

1:30 pm – 3:00 pm	**Real Estate Structures and Taxation**	H/S	30	15	microphones, podium	
1:30 pm – 3:00 pm	**Real Property Litigation**	H/S	30	10	speakerphone, microphones, podium	
2:00 pm – 4:00 pm	**Membership and Inclusion**	H/S	25	5		
2:30 pm – 4:00 pm	**Probate Law & Procedure**	H/S	60	60	microphones, podium	
2:30 pm – 4:00 pm	**Commercial Real Estate**	H/S	25	15	speakerphone	
3:00 pm – 4:00 pm	**Insurance & Surety**	H/S	40	20	microphones, podium, speakerphone	
3:00 pm – 4:00 pm	**Ad Hoc Jurisdiction/Service Process***	Conf	15			
3:00 pm – 4:00 pm	**Title Insurance & Title Insurance Liaison**	H/S	45	15	speakerphone microphones podium	
4:00 pm – 5:00 pm	**Training Session for Committee Chairs**					
5:00 pm – 6:00 pm	**PAC**	Rounds	100		microphones, podium	
7:00 pm – 10:00 pm	**Reception and Dinner**	***Pre-Registration and Ticket Required***				
10:00 pm – 12:00 am	**Hospitality Suite**					
Saturday	**June 6, 2015**					
6:00 am	**Reptiles Run**					
8:00 am - 10:00 am	**Spouse/Guest Breakfast**	***Pre-Registration and Ticket Required- Breakfast is***				
8:00 am - 10:00 am	**Real Property Law Division Roundtable Breakfast**	rounds	100		microphones, podium	
8:00 am - 10:00 am	**Probate and Trust Law Division Roundtable Breakfast**	rounds	140		microphones, podium	
10:00 am – 1:30 pm	**Executive Council Meeting and Lunch**	class w/ riser	250	50	two screens,podium, microphones, two standing microphones down each aisle	
1:30 pm – 3:30 pm	**Career Coaching Session**	special	10			
7:00 pm – 9:30 pm	**Dinner at Smith and Wolenskys**	***Pre-Registration and Ticket Required***				

***Participation in deliberations and voting is limited to committee members only**

**** Attendance by invitation only**

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Albert & Dribin LLP
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REAL PROPERTY, PROBATE & TRUST LAW SECTION

THE FLORIDA BAR

www.RPPTL.org

February 19, 2015

John W. Kozyak, Esq.
Kozyak Tropin & Throckmorton
2525 Ponce De Leon Blvd.
9th Floor
Miami, FL 33134-6037

Dear John:

On behalf of the Real Property, Probate and Trust Law Section of the Florida Bar, I am pleased to congratulate you on your most prestigious recognition in being selected to receive the Tobias Simon award for pro bono service. The ever growing success of the Kozyak Minority Mentoring Picnic is evidence of a great need, which the Picnic helps to fulfill. The success of the Picnic is further evidenced by its replication in concept (but not in size) in other parts of Florida.

As you know, the RPPTL Section, under the auspices of our Membership and Inclusion Committee, has had a booth at the Kozyak Minority Mentoring Picnics for many years. In fact, I am enclosing a copy of an article which appeared in our recent edition of our quarterly publication, ActionLine, which describes our participation in the 2014 Kozyak Minority Mentoring Picnic.

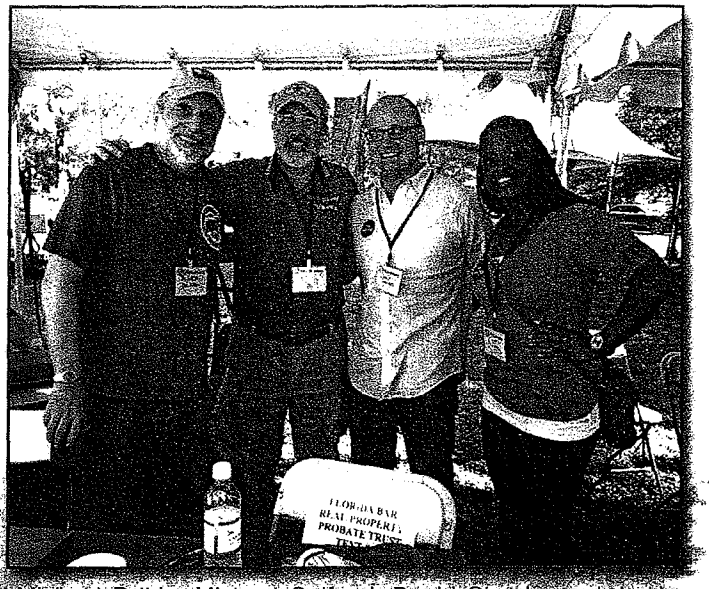
On behalf of our entire Section and, particularly, our Chair-Elect, Michael J. Gelfand and the Co-Chairs of our Membership and Inclusion Committee, Lynwood F. Arnold, Jr. and Jason M. Ellison, I warmly congratulate you and wish you many more years of good health and continued good work. Our Section stands ready to continue supporting your efforts to mentor minority lawyers and law students.

Most sincerely yours,

Michael A. Dribin, Chair

Cc: Michael J. Gelfand, Chair-Elect
Lynwood F. Arnold, Jr., Co-Chair, RPPTL Section Membership and Inclusion Committee
Jason M. Ellison, Co-Chair, RPPTL Section Membership and Inclusion Committee

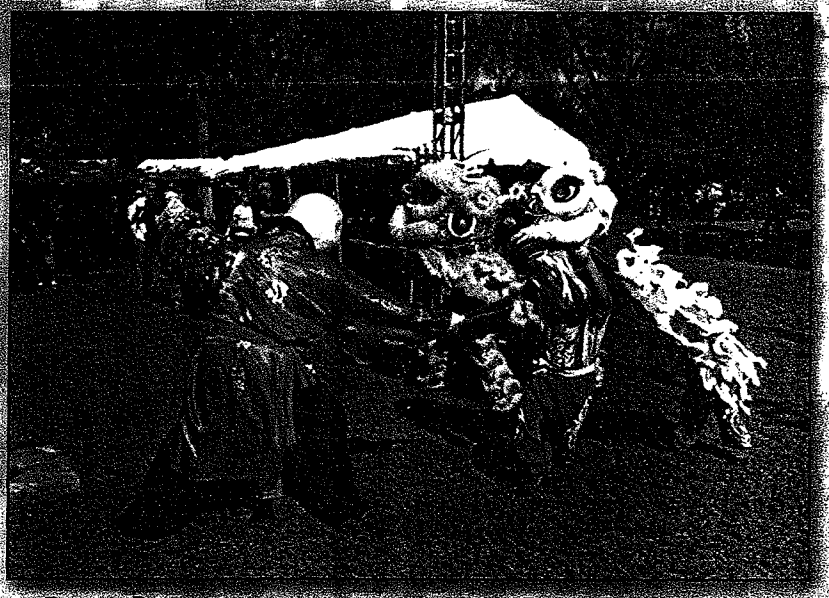
The Annual Kozyak Minority Mentoring Picnic was a Huge Success!



Michael Dribin, Michael Gelfand, David Shanks and Jorra Williams at the Section booth

The Kozyak Minority Mentoring Picnic took place on Saturday, November 1, 2014 at Amelia Earhart Park in Hialeah, Florida. The RPPTL Section was one of the event's sponsors and had a tent at the Picnic. Section Member Hung Nguyen took care of all the details in setting up the supplies at our booth and enlisting volunteers from the Section. RPPTL Section members, including Section chair, Michael Dribin, and chair-elect, Michael Gelfand, were in attendance at the Section table. For the price of $10 parking, Section members and their families as well as others attending the event enjoyed networking, activities (including rock climbing walls, ring toss, games and face painting for the children; dominoes and volleyball for the adults; even an entertaining and elaborate Dragon Dance) and a diverse selection of food and beverages. The event was a huge success with lawyers and law students engaging Section members in discussions regarding the Section's activities and the Section's commitment to mentoring and diversity. A handful of attorneys and law students also signed up to join the Section. The Section extends a big thank you to everyone who came out to support us and the Picnic!

By Michael Sneeringer



Dragon Dance performers courtesy of Asian Pacific Bar Association

RPPTL 2015 - 2016

Executive Council Meeting Schedule

Michael J. Gelfand's YEAR

Date	Location
July 30, 2015- August 1, 2015	**Executive Council Meeting & Legislative Update** The Breakers Palm Beach, Florida Reservation Link: https://resweb.passkey.com/go/FLBAR15 Room Rate: $218 Note: The group rate is no longer available for the nights of 7/30, 7/31 and 8/01. Email meeting.reservations@thebreakers.com to be added to a waitlist for this event.
September 30, 2015 – October 4, 2015	**Executive Council Meeting/Out of State** The Ritz Carlton Berlin, Germany Reservation Phone # +49 (0)30-33 777- 5555 Reservation Link: http://www.ritzcarlton.com/en/Properties/Berlin/Reservations/Default.htm?nr-1%26ng=1%26gc=tfbtfba Room Rate: €210 Conference Code: tfbtfba Please note: This room block is full. To be added to the waitlist, please email mobos@flabar.org.
November 11-15, 2015	**Executive Council Meeting** Boca Raton Resort and Club Boca Raton, FL Room Rates[1]: Cloister Estate Room: $220.00 Cloister Suite: $475.00 Yacht Club Waterway Room: $275.00 Tower Room: $220.00 Tower Junior Suite: $260.00 Cut-off Date: October 21, 2015 Reservation Phone: 1-888-557-6375 Reservation Ref Code: Florida Bar Real Property, Probate & Trust Section Reservation Link: https://resweb.passkey.com/Resweb.do?mode=welcome_ei_new&eventID=13452248

1 Boca Raton Hotel & Resort Requested Information and Further Notes: $20.00 daily resort fee separate and distinct from the sleeping room rate and applicable taxes. Resort fee includes: Round trip Bellman Gratuities; Wireless Internet in Guest Rooms and Public Space (Not Meeting Rooms)· Local 800 & Domestic Long Distance Phone Calls; Beach Umbrellas at the Boca Beach Club; Specialty Fitness Center classes including yoga and Pilates; and Unlimited Driving Range Usage and Golf Club Storage. Guests wishing to avoid an early checkout fee should advise the Hotel at or before check-in of any change in planned length of stay. Guests should check with the Hotel to make certain all incidental charges are paid prior to departure.

February 25, 2016- February 28, 2016	**Executive Council Meeting** Marriott Tampa Waterside Tampa, Florida Room Rate: $224 Cut-off Date: January 13, 2016 Reservation Phone: 1-813-221-4900 Reservation Ref. Code: The Florida Bar Real Property Executive Council Meeting Reservation: https://resweb.passkey.com/go/FloridaBarRealProperty
June 1-5, 2016	**Executive Council Meeting / RPPTL Convention** Loews Portofino Bay Hotel Orlando, Florida Room Rate $219 Cut-off Date: May 2, 2016 Reservation Phone: Reservation Ref. Code: Reservation Link: http://uo.loewshotels.com/en/Portofino-Bay-Hotel/GroupPages/FLBar2016

RPPTL Financial Summary from Separate Budgets

2014 – 2015 [July 1 – January 31[1]]

YEAR TO DATE REPORT

General Budget	YTD
Revenue:	$ 1,008,237
Expenses:	$ 713,725
Net:	$ 294,512

Trust Officer Conf

Revenue:	$ 5,368
Expenses:	$ 881
Net:	$ 4,487

Legislative Update

Revenue:	$ 53,859
Expenses:	$ 91,396
Net:	$ (37,537)

Convention

Revenue:	$ 0
Expenses:	$ 500
Net:	$ (500)

Roll-up Summary (Total)

Revenue:	$ 1,067,464
Expenses:	$ 806,502
Net Operations:	$ 260,962

Beginning Fund Balance:	$ 892,279
Current Fund Balance (YTD):	$ 1,153,241
Budgeted June 2015 Fund Balance	$ 629,752

[1] This report is based on the **tentative unaudited** detail statement of operations dated 2/12/15.

Upcoming CLE Programs

April 1, 2015	Real Property Litigation: What you need to know for 2015 (WEBCAST ONLY)
April 10 - 11, 2015	Wills and Trust Certification Review, Hyatt, Orlando Airport Live Presentation and Webinar
April 10, 2015	Condominium and Planned Development, Tampa, FL Live Presentation and Webinar
June 5, 2015	Out of State Webinar (Fontainebleau Hotel, Miami) Webinar ONLY
June 6, 2015	Convention seminar – Same Sex Marriage, The Fontainebleau Hotel, Miami Live Presentation and Webinar
July 15, 2015	Cyber Breach ECLE
July 31, 2015	Legislative Update, The Breakers, Palm Beach Live Presentation and Webinar
August 27, 2015	Attorney Trust Office Liaison Conference, The Breakers, Palm Beach Live Presentation Only

LEGISLATIVE POSITION REQUEST FORM

GOVERNMENTAL AFFAIRS OFFICE

Date Form Received _____

GENERAL INFORMATION

Submitted By Angela Adams, Chair, Trust Law Committee of the Real Property, Probate & Trust Law Section

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Position Type Trust Law Committee, Real Property, Probate & Trust Law Section of The Florida Bar

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Appearances before Legislators N/A at this time
(List name and phone # of those appearing before House/Senate Committees)

Meetings with Legislators/staff N/A at this time
(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 N/A at this time

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

Indicate Position Support [X] Oppose [ ] Technical Assistance [ ] Other [ ]

Proposed Wording of Position for Official Publication:

Support proposed legislation which would prohibit nonjudicial modification of irrevocable trusts during

the first 90 years after creation, unless the trust expressly permits nonjudicial modification within the first 90 years, including amendments to §§736.0412(4) and 736.0105(2)(k), Florida Statues.

Reasons For Proposed Advocacy:

The proposed amendments will: (i) eliminate the inconsistent and unintended difference in the treatment of irrevocable trusts subject to the 90-year rule against perpetuities and those subject to the 360-year rule against perpetuities for purposes of nonjudicial modification within the first 90 years of creation; and (ii) prevent abuses by trustees and beneficiaries who are currently able to nonjudicially modify a trust subject to the 360-year rule against perpetuities immediately after the settlor's death.

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

None

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

Others
(May attach list if more than one)

None

(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

None

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

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

(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 (850) 561-5662 or 800-342-8060, extension 5662.

WPB_ACTIVE 6284067.1

A bill to be entitled

An act restricting nonjudicial modification of irrevocable trusts during the first 90 years unless the trust specifically permits it; amending s. 736.0412(4); amending s. 736.0105(2)(k), and providing an effective date.

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

Section 1. Section 736.0412, Florida Statutes, is amended to read:

736.0412 Nonjudicial modification of irrevocable trust.

(1) After the settlor's death, a trust may be modified at any time as provided in s. 736.04113(2) upon the unanimous agreement of the trustee and all qualified beneficiaries.

(2) Modification of a trust as authorized in this section is not prohibited by a spendthrift clause or by a provision in the trust instrument that prohibits amendment or revocation of the trust.

(3) An agreement to modify a trust under this section is binding on a beneficiary whose interest is represented by another person under part III of this code.

(4) This section shall not apply to any trust:

(a) ~~Any Trust~~ created prior to January 1, 2001~~.~~;

(b) ~~Any Trust~~ created after December 31, 2000 and prior to July 1, 2016, if, under the terms of the trust, all beneficial interests in the trust must vest or terminate within the period prescribed by the rule against perpetuities in s. 689.225(2), notwithstanding s. 689.225(2)(f), unless the terms of the trust expressly authorize nonjudicial modification~~.~~;

(c) created after July 1, 2016, during the first 90 years after it is created, unless the terms of the trust expressly authorize nonjudicial modification under this section; or,

~~(c)~~ (d) ~~Any Trust~~ for which a charitable deduction is allowed or allowable under the Internal Revenue Code until the termination of all charitable interests in the trust.

(5) For purposes of subsection (4), a revocable trust shall be treated as created when the right of revocation terminates.

(6) The provisions of this section are in addition to, and not in derogation of, rights under the common law to modify, amend, terminate, or revoke trusts.

Section 2. Section 736.0105(2)(k), Florida Statutes, is amended to read:

736.0105 Default and mandatory rules.

. . . .

(2) The terms of a trust prevail over any provisions of this code except:

. . . .

(k) The ability to modify a trust under s. 736.0412, except as provided in s. 736.0412(4)(b) and (c).

Section 3. This act shall take effect on July 1, 2016.

WPB_ACTIVE 6284054.1

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

Proposed Amendments to §§736.0412(4) and 736.0105(2)(k), Florida Statutes, restricting nonjudicial modification of irrevocable trusts during the first 90 years unless the trust specifically permits it

I. SUMMARY

The proposed legislation would amend §§736.0412(4) and 736.0105(2)(k), Florida Statutes, so that all irrevocable trusts are treated the same with regard to whether nonjudicial modification is available during the first 90 years after the trust is created. More specifically, all irrevocable trusts will be restricted to judicial modification during the first 90 years after creation, unless the trust expressly permits nonjudicial modification within the first 90 years.

II. CURRENT SITUATION:

Florida Statute §689.225 (Statutory rule against perpetuities) establishes three periods within which a property interest must vest or terminate:

1. Within 21 years after the death of an individual then alive (§689.225(2)(a)1.);

2. Within 90 years after the property interest is created (§689.225(2)(a)2.); or

3. As to any trust created after December 31, 2000, within 360 years after the property interest is created (unless the trust requires that all beneficial interests vest or terminate within a lesser period) (§689.225(2)(f)).

The first two periods described above are generally collectively referred to as the "90-year" period, and the third period is generally referred to as the "360-year" period.

Florida Statute §736.0412 currently permits an irrevocable trust subject to the 360-year rule against perpetuities to be nonjudicially modified at any time after the settlor's death. Nonjudicial modification allows the trustee (who may also be a beneficiary) and all qualified beneficiaries to agree to modify an otherwise irrevocable trust. This can be done without a court proceeding, without an impartial judge, without any evidence, and regardless of whether or not a settlor expressed a contrary intent in her or his trust document. The nonjudicial modification could even include terminating the trust or accelerating distribution.

However, §736.0412(4) prohibits the use of nonjudicial modification for an irrevocable trust subject to the 90-year rule against perpetuities, unless the terms of the trust expressly authorize nonjudicial modification.

While flexibility and ease of modification may be desirable for 360-year trusts in order to accommodate unforeseen changes in circumstances over hundreds of years, there is no logical reason to treat irrevocable trusts differently during the first 90 years. Moreover, permitting 360-year trusts to be nonjudicially modified immediately after the settlor's death, invites abuse.

From a historical perspective, when Florida's "Rule Against Perpetuities" was extended from 90 years to 360 years, a debate arose among statutory drafters. One camp believed settlors know what is in the best interests of their beneficiaries and hard-earned assets should not be received easily. This camp wanted to protect the terms of the trust controlling distributions to beneficiaries. The other camp believed settlors should not be permitted to control assets long after their demise. They felt this was especially true given Florida's then newly-extended rule against perpetuities.

Although a settlor's intent has traditionally been the polestar of trust interpretation, that intent has always been tempered somewhat by certain policies like the rule against perpetuities. The following compromise was reached among the drafters:

During the first 90 years after a trust becomes irrevocable, only judicial modification was to be applicable. That was to be the default position, but a settlor was to be permitted to remove this limitation and permit nonjudicial modification within the first 90 years by expressly authorizing nonjudicial modification in the trust agreement. After the first 90 years, nonjudicial modification would be available, although nothing would prevent beneficiaries and the trustee(s) from employing judicial modification.

Recently, a statutory glitch became apparent. The "judicial" only modification limitation is applicable only to irrevocable trusts subject to the 90-year rule against perpetuities. For irrevocable trusts in which all interests do not vest or terminate in the 90-year period, they can be nonjudicially modified the day after the settlor dies. This was not the drafters' original intent described in the compromise above.

III. EFFECT OF THE PROPOSED CHANGES

A. The proposed creation of §736.0412(4)(c) would treat all irrevocable trusts the same with regard to nonjudicial modification by providing that all irrevocable trusts (regardless of whether the vesting period is 90 or 360 years) will be restricted to judicial modification during the first 90 years after creation, unless the trust expressly permits nonjudicial modification within the first 90 years. This change also corrects a statutory glitch by making it consistent with the intent of the original statutory drafters. Moreover, a settlor may permit nonjudicial modifications, even during the first ninety (90) years, if she or he expressly authorizes nonjudicial modification in the terms of the trust.

B. The proposed amendment to §736.0412(4)(b) recognizes that there is no authority upon which to make the new restrictions retroactive and that it could impact existing trusts. Therefore, the changes in the statute will only apply to irrevocable trusts that are created after the effective date of the legislation.

C. Proposed amendments to §736.0412(4)

736.0412 Nonjudicial modification of irrevocable trust.

(1) After the settlor's death, a trust may be modified at any time as provided in s. 736.04113(2) upon the unanimous agreement of the trustee and all qualified beneficiaries.

(2) Modification of a trust as authorized in this section is not prohibited by a spendthrift clause or by a provision in the trust instrument that prohibits amendment or revocation of the trust.

(3) An agreement to modify a trust under this section is binding on a beneficiary whose interest is represented by another person under part III of this code.

(4) This section shall not apply to any trust:

(a) ~~Any Trust c~~Created prior to January 1, 2001~~.~~;

(b) ~~Any Trust c~~Created after December 31, 2000 and prior to [the effective date of this legislation], if, under the terms of the trust, all beneficial interests in the trust must vest or terminate within the period prescribed by the rule against perpetuities in s. 689.225(2), notwithstanding s. 689.225(2)(f), unless the terms of the trust expressly authorize nonjudicial modification~~.~~;

(c) Created after [effective date of this legislation], during the first 90 years after it is created, unless the terms of the trust expressly authorize nonjudicial modification under this section; or,

~~(c)~~ (d) ~~Any Trust f~~For which a charitable deduction is allowed or allowable under the Internal Revenue Code until the termination of all charitable interests in the trust.

(5) For purposes of subsection (4), a revocable trust shall be treated as created when the right of revocation terminates.

(6) The provisions of this section are in addition to, and not in derogation of, rights under the common law to modify, amend, terminate, or revoke trusts.

D. For consistency, it is also proposed that §736.0105(2)(k), Florida Statutes, be amended to add new 736.0412(4)(c) as follows:

736.0105 Default and mandatory rules.

. . . .

(2) The terms of a trust prevail over any provisions of this code except:

. . . .

(k) The ability to modify a trust under s. 736.0412, except as provided in s. 736.0412(4)(b) and (c).

IV. FISCAL IMPACT ON STATE AND LOCAL GOVERNMENT

The proposal does not have a fiscal impact on state or local governments. Although the proposal requires judicial modification within the first 90 years of the creation of an irrevocable trust, it is not anticipated that a significant number of judicial proceedings will result. Rather, it is anticipated that abusive nonjudicial modifications will be curtailed.

V. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR

The proposal will not have a direct economic impact on the private sector.

VI. CONSTITUTIONAL ISSUES

There are no constitutional issues raised by this proposal. The proposed legislation will not apply to vested interests or existing irrevocable trusts. Instead, the new provisions will apply only to irrevocable trusts after the effective date of this legislation.

VII. OTHER INTERESTED PARTIES

None.

A bill to be entitled

An act relating to guardianship proceedings; creating s. 744.1065, F.S.; authorizing a court to refer guardianship matters to mediation or alternative dispute resolution under certain circumstances; amending ss. 744.107 and 744.1075, F.S.; authorizing a court to appoint the office of criminal conflict and civil regional counsel as a court monitor in guardianship proceedings; amending s. 744.108, F.S.; providing that fees and costs incurred by an attorney who has rendered services to a ward in compensation proceedings are payable from guardianship assets; providing that expert testimony is not required in proceedings to determine compensation for an attorney or guardian; requiring a person offering expert testimony to provide notice to interested persons; providing that expert witness fees are recoverable by the prevailing interested person; amending s. 744.3025, F.S.; providing that a court may appoint a guardian ad litem to represent a minor if necessary to protect the minor's interest in a settlement; providing that a settlement of a minor's claim is subject to certain confidentiality provisions; amending s. 744.3031, F.S.; requiring notification of an alleged incapacitated person and such person's attorney of a petition for appointment of an emergency

temporary guardian before a hearing on the petition commences; amending s. 744.309, F.S.; providing that a business entity may act as guardian of a person; amending s. 744.3115, F.S.; directing the court to specify authority for health care decisions with respect to a ward's advance directive; amending s. 744.312, F.S.; prohibiting a court from giving preference to the appointment of certain persons as guardians; providing requirements for the appointment of professional guardians; amending s. 744.331, F.S.; directing the court to consider certain factors when determining incapacity; requiring that the examining committee be paid from state funds as court-appointed expert witnesses if a petition for incapacity is dismissed; requiring that a petitioner reimburse the state for such expert witness fees if the court finds the petition to have been filed in bad faith; amending s. 744.344, F.S.; providing conditions under which the court is authorized to appoint an emergency temporary guardian; amending s. 744.345, F.S.; revising provisions relating to letters of guardianship; creating s. 744.359, F.S.; prohibiting abuse, neglect, or exploitation of a ward by a guardian; requiring reporting thereof to the Department of Children and Families central abuse hotline; providing for interpretation; amending s. 744.361, F.S.; providing

additional powers and duties of a guardian; amending s. 744.367, F.S.; revising the period during which a guardian must file an annual guardianship plan with the court; amending s. 744.369, F.S.; providing for the continuance of a guardian's authority to act under an expired annual report under certain circumstances; amending s. 744.3715, F.S.; providing that an interested party may petition the court regarding a guardian's failure to comply with the duties of a guardian; amending s. 744.464, F.S.; establishing the burden of proof for determining restoration of capacity of a ward in pending guardianship cases; requiring a court to advance such cases on the calendar; providing applicability; providing an effective date.

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

Section 1. Section 744.1065, Florida Statutes, is created to read:

744.1065 Mediation; alternative dispute resolution.—At any time, the court may, upon its own motion or the motion of an interested person, refer a matter under the jurisdiction of this chapter to mediation or alternative dispute resolution if the court finds that mediation or alternative dispute resolution is in the best interests of the alleged incapacitated person, ward,

or minor.

Section 2. Subsection (5) is added to section 744.107, Florida Statutes, to read:

744.107 Court monitors.—

(5) The court may appoint the office of criminal conflict and civil regional counsel as monitor if the ward is indigent.

Section 3. Subsection (6) is added to section 744.1075, Florida Statutes, to read:

744.1075 Emergency court monitor.—

(6) The court may appoint the office of criminal conflict and civil regional counsel as monitor if the ward is indigent.

Section 4. Subsections (5) and (8) of section 744.108, Florida Statutes, are amended, and subsection (9) is added to that section, to read:

744.108 Guardian ~~Guardian's~~ and attorney ~~attorney's~~ fees and expenses.—

(5) All petitions for guardian ~~guardian's~~ and attorney ~~attorney's~~ fees and expenses must be accompanied by an itemized description of the services performed for the fees and expenses sought to be recovered.

(8) When court proceedings are instituted to review or determine a guardian's or an attorney's fees under subsection (2), such proceedings are part of the guardianship administration process and the costs, including costs and attorney fees for the guardian's attorney, an attorney appointed under s. 744.331(2), or an attorney who has rendered services to

the ward, shall be determined by the court and paid from the assets of the guardianship estate unless the court finds the requested compensation under subsection (2) to be substantially unreasonable.

(9) The court may determine that a request for compensation by the guardian, the guardian's attorney, a person employed by the guardian, an attorney appointed under s. 744.331(2), or an attorney who has rendered services to the ward, is reasonable without receiving expert testimony. A person or party may offer expert testimony for or against a request for compensation after giving notice to interested persons. Reasonable expert witness fees shall be awarded by the court and paid from the assets of the guardianship estate to the prevailing interested person.

Section 5. Section 744.3025, Florida Statutes, is amended to read:

744.3025 Claims of minors.—

(1)(a) The court may appoint a guardian ad litem to represent the minor's interest before approving a settlement of the minor's portion of the claim in a ~~any~~ case in which a minor has a claim for personal injury, property damage, wrongful death, or other cause of action in which the gross settlement of the claim exceeds $15,000 if the court believes a guardian ad litem is necessary to protect the minor's interest.

(b) Except as provided in paragraph (e), the court shall appoint a guardian ad litem to represent the minor's interest

before approving a settlement of the minor's claim in a ~~any~~ case in which the gross settlement involving a minor equals or exceeds $50,000.

(c) The appointment of the guardian ad litem must be without the necessity of bond or notice.

(d) The duty of the guardian ad litem is to protect the minor's interests as described in the Florida Probate Rules.

(e) A court need not appoint a guardian ad litem for the minor if a guardian of the minor has previously been appointed and that guardian has no potential adverse interest to the minor. ~~A court may appoint a guardian ad litem if the court believes a guardian ad litem is necessary to protect the interests of the minor.~~

(2) Unless waived, the court shall award reasonable fees and costs to the guardian ad litem to be paid out of the gross proceeds of the settlement.

(3) A settlement of a claim pursuant to this section is subject to the confidentiality provisions of this chapter.

Section 6. Subsections (2) through (8) of section 744.3031, Florida Statutes, are renumbered as subsections (3) through (9), respectively, and a new subsection (2) is added to that section, to read:

744.3031 Emergency temporary guardianship.—

(2) Notice of filing of the petition for appointment of an emergency temporary guardian and a hearing on the petition must be served on the alleged incapacitated person and on the alleged

incapacitated person's attorney at least 24 hours before the hearing on the petition is commenced, unless the petitioner demonstrates that substantial harm to the alleged incapacitated person would occur if the 24-hour notice is given.

Section 7. Paragraph (a) of subsection (1) of section 744.309, Florida Statutes, is amended to read:

744.309 Who may be appointed guardian of a resident ward.—

(1) RESIDENT.—

(a) Any resident of this state who is sui juris and is 18 years of age or older, or a business entity that has met the registration requirements of s. 744.1083, is qualified to act as guardian of a ward.

Section 8. Section 744.3115, Florida Statutes, is amended to read:

744.3115 Advance directives for health care.—In each proceeding in which a guardian is appointed under this chapter, the court shall determine whether the ward, prior to incapacity, has executed any valid advance directive under chapter 765. If any advance directive exists, the court shall specify in its order and letters of guardianship what authority, if any, the guardian shall exercise over the ward with regard to health care decisions and what authority, if any, the surrogate shall continue to exercise over the ward with regard to health care decisions ~~surrogate~~. Pursuant to the grounds listed in s. 765.105, the court, upon its own motion, may, with notice to the surrogate and any other appropriate parties, modify or revoke

the authority of the surrogate to make health care decisions for the ward. For purposes of this section, the term "health care decision" has the same meaning as in s. 765.101.

Section 9. Section 744.312, Florida Statutes, is reordered and amended to read:

744.312 Considerations in appointment of guardian.—

(1) ~~(4)~~ If the person designated is qualified to serve pursuant to s. 744.309, the court shall appoint any standby guardian or preneed guardian, unless the court determines that appointing such person is contrary to the best interests of the ward.

(2) ~~(1)~~ If a guardian cannot be appointed under subsection (1) ~~Subject to the provisions of subsection (4)~~, the court may appoint any person who is fit and proper and qualified to act as guardian, whether related to the ward or not.

~~(2)~~ The court shall give preference to the appointment of a person who:

(a) Is related by blood or marriage to the ward;

(b) Has educational, professional, or business experience relevant to the nature of the services sought to be provided;

(c) Has the capacity to manage the financial resources involved; or

(d) Has the ability to meet the requirements of the law and the unique needs of the individual case.

(3) The court shall also:

(a) Consider the wishes expressed by an incapacitated

person as to who shall be appointed guardian.~~:~~

(b) Consider the preference of a minor who is age 14 or over as to who should be appointed guardian.~~:~~

(c) Consider any person designated as guardian in any will in which the ward is a beneficiary.

(4) The court may not give preference to the appointment of a person under subsection (2) solely based on the fact that such person was appointed by the court to serve as an emergency temporary guardian. This limitation applies only when an interested person objects to appointment of the emergency temporary guardian as a permanent guardian. This limitation does not apply to a standby guardian or to a preneed guardian.

(5) Appointment of professional guardians by the court shall be on a rotating basis of professional guardians deemed qualified by the chief judge of the circuit. However, the court may appoint a professional guardian without reference to the rotation when the special requirements of the guardianship demand that the court appoint a guardian with special talent or specific prior experience. The court must make specific findings of fact that justify a finding that there are special requirements requiring an appointment without reference to the rotation.

(6) An emergency temporary guardian who is a professional guardian may not be appointed as the permanent guardian of a ward. This limitation applies only when an interested person objects to appointment of the emergency temporary guardian as a

permanent guardian. This limitation does not apply to a standby guardian or to a preneed guardian. The court may waive this limitation only when the special requirements of the guardianship demand that the court appoint that professional guardian because he or she has special talent or specific prior experience. The court must make specific findings of fact that justify a finding that there are special requirements requiring an appointment without reference to this limitation.

Section 10. Subsection (6) and paragraph (c) of subsection (7) of section 744.331, Florida Statutes, are amended to read:

744.331 Procedures to determine incapacity.—

(6) ORDER DETERMINING INCAPACITY.—If, after making findings of fact on the basis of clear and convincing evidence, the court finds that a person is incapacitated with respect to the exercise of a particular right, or all rights, the court shall enter a written order determining such incapacity. In determining incapacity, the court shall consider the person's unique needs and abilities and may only remove those rights that the court finds the person is incapable of exercising. A person is determined to be incapacitated only with respect to those rights specified in the order.

(a) The court shall make the following findings:

1. The exact nature and scope of the person's incapacities;

2. The exact areas in which the person lacks capacity to make informed decisions about care and treatment services or to

meet the essential requirements for her or his physical or mental health or safety;

3. The specific legal disabilities to which the person is subject; and

4. The specific rights that the person is incapable of exercising.

(b) When an order determines that a person is incapable of exercising delegable rights, the court must consider and find whether there is an alternative to guardianship that will sufficiently address the problems of the incapacitated person. ~~A guardian must be appointed to exercise the incapacitated person's delegable rights unless the court finds there is an alternative.~~ A guardian may not be appointed if the court finds there is an alternative to guardianship which will sufficiently address the problems of the incapacitated person. If the court finds there is not an alternative to guardianship that sufficiently addresses the problems of the incapacitated person, a guardian must be appointed to exercise the incapacitated person's delegable rights.

(c) In determining that a person is totally incapacitated, the order must contain findings of fact demonstrating that the individual is totally without capacity to care for herself or himself or her or his property.

(d) An order adjudicating a person to be incapacitated constitutes proof of such incapacity until further order of the court.

(e) After the order determining that the person is incapacitated has been filed with the clerk, it must be served on the incapacitated person. The person is deemed incapacitated only to the extent of the findings of the court. The filing of the order is notice of the incapacity. An incapacitated person retains all rights not specifically removed by the court.

(f) Upon the filing of a verified statement by an interested person stating:

1. That he or she has a good faith belief that the alleged incapacitated person's trust, trust amendment, or durable power of attorney is invalid; and

2. A reasonable factual basis for that belief,

the trust, trust amendment, or durable power of attorney shall not be deemed to be an alternative to the appointment of a guardian. The appointment of a guardian does not limit the court's power to determine that certain authority granted by a durable power of attorney is to remain exercisable by the agent ~~attorney in fact~~.

(7) FEES.—

(c) If the petition is dismissed or denied:~~.~~

1. The fees of the examining committee shall be paid upon court order as expert witness fees under s. 29.004(6).

2. Costs and attorney ~~attorney's~~ fees of the proceeding may be assessed against the petitioner if the court finds the petition to have been filed in bad faith. The petitioner shall

also reimburse the state courts system for any amounts paid under subparagraph 1. upon such a finding.

Section 11. Subsection (4) of section 744.344, Florida Statutes, is amended to read:

744.344 Order of appointment.—

(4) If a petition for the appointment of a guardian has not been filed or ruled upon at the time of the hearing on the petition to determine capacity, the court may appoint an emergency temporary guardian in the manner and for the purposes specified in s. 744.3031.

Section 12. Section 744.345, Florida Statutes, is amended to read:

744.345 Letters of guardianship.—Letters of guardianship shall be issued to the guardian and shall specify whether the guardianship pertains to the person, or the property, or both, of the ward. The letters must state whether the guardianship is plenary or limited, and, if limited, the letters must state the powers and duties of the guardian. ~~If the guardianship is limited,~~ The letters shall state whether or not and to what extent the guardian is authorized to act on behalf of the ward with regard to any advance directive previously executed by the ward.

Section 13. Section 744.359, Florida Statutes, is created to read:

744.359 Abuse, neglect, or exploitation by a guardian.—

(1) A guardian may not abuse, neglect, or exploit a ward.

(2) A guardian has committed exploitation when the guardian:

(a) Commits fraud in obtaining appointment as a guardian.

(b) Abuses his or her powers.

(c) Wastes, embezzles, or intentionally mismanages the assets of the ward.

(3) A person who believes that a guardian is abusing, neglecting, or exploiting a ward shall report the incident to the central abuse hotline of the Department of Children and Families.

(4) This section shall be interpreted in conformity with s. 825.103.

Section 14. Section 744.361, Florida Statutes, is amended to read:

744.361 Powers and duties of guardian.—

(1) The guardian of an incapacitated person is a fiduciary and may exercise only those rights that have been removed from the ward and delegated to the guardian. The guardian of a minor shall exercise the powers of a plenary guardian.

(2) The guardian shall act within the scope of the authority granted by the court and as provided by law.

(3) The guardian shall act in good faith.

(4) A guardian may not act in a manner that is contrary to the ward's best interests under the circumstances.

(5) A guardian who has special skills or expertise, or is appointed in reliance upon the guardian's representation that

the guardian has special skills or expertise, shall use those special skills or expertise when acting on behalf of the ward.

(6) ~~(2)~~ The guardian shall file an initial guardianship report in accordance with s. 744.362.

(7) ~~(3)~~ The guardian shall file a guardianship report annually in accordance with s. 744.367.

(8) ~~(4)~~ The guardian of the person shall implement the guardianship plan.

(9) ~~(5)~~ When two or more guardians have been appointed, the guardians shall consult with each other.

(10) ~~(6)~~ A guardian who is given authority over any property of the ward shall:

(a) Protect and preserve the property and invest it prudently as provided in chapter 518, apply it as provided in s. 744.397, and keep clear, distinct, and accurate records of the administration of the ward's property ~~account for it faithfully~~.

(b) Perform all other duties required of him or her by law.

(c) At the termination of the guardianship, deliver the property of the ward to the person lawfully entitled to it.

(11) ~~(7)~~ The guardian shall observe the standards in dealing with the guardianship property that would be observed by a prudent person dealing with the property of another~~, and, if the guardian has special skills or is named guardian on the basis of representations of special skills or expertise, he or she is under a duty to use those skills~~.

(12) ~~(8)~~ The guardian, if authorized by the court, shall take possession of all of the ward's property and of the rents, income, issues, and profits from it, whether accruing before or after the guardian's appointment, and of the proceeds arising from the sale, lease, or mortgage of the property or of any part. All of the property and the rents, income, issues, and profits from it are assets in the hands of the guardian for the payment of debts, taxes, claims, charges, and expenses of the guardianship and for the care, support, maintenance, and education of the ward or the ward's dependents, as provided for under the terms of the guardianship plan or by law.

(13) Recognizing that every individual has unique needs and abilities, a guardian who is given authority over a ward's person shall, as appropriate under the circumstances:

(a) Consider the expressed desires of the ward as known by the guardian when making decisions that affect the ward.

(b) Allow the ward to maintain contact with family and friends unless the guardian believes that such contact may cause harm to the ward.

(c) Not restrict the physical liberty of the ward more than reasonably necessary to protect the ward or another person from serious physical injury, illness, or disease.

(d) Assist the ward in developing or regaining his or her own capacity, if medically possible.

(e) Notify the court if the guardian believes that the ward has regained capacity and that one or more of the rights

that have been removed should be restored to the ward.

(f) To the extent applicable, make provision for the medical, mental, rehabilitative, or personal care services for the welfare of the ward.

(g) To the extent applicable, acquire a clear understanding of the risks and benefits of a recommended course of health care treatment before making a health care decision.

(h) Evaluate the ward's medical and health care options, financial resources, and desires when making residential decisions that are best suited for the current needs of the ward.

(i) Advocate on behalf of the ward in institutional and other residential settings.

(14)~~(9)~~ A professional guardian must ensure that each of the guardian's wards is personally visited by the guardian or one of the guardian's professional staff at least once each calendar quarter. During the personal visit, the guardian or the guardian's professional staff person shall assess:

(a) The ward's physical appearance and condition.

(b) The appropriateness of the ward's current living situation.

(c) The need for any additional services and the necessity for continuation of existing services, taking into consideration all aspects of social, psychological, educational, direct service, health, and personal care needs.

(d) The nature and extent of visitation and communication

with the ward's family and friends.

This subsection does not apply to a professional guardian who has been appointed only as guardian of the property.

Section 15. Subsection (1) of section 744.367, Florida Statutes, is amended to read:

744.367 Duty to file annual guardianship report.—

(1) Unless the court requires filing on a calendar-year basis, each guardian of the person shall file with the court an annual guardianship plan at least 60 days, but no more than ~~within~~ 90 days, before ~~after~~ the last day of the anniversary month that the letters of guardianship were signed, and the plan must cover the coming fiscal year, ending on the last day in such anniversary month. If the court requires calendar-year filing, the guardianship plan for the forthcoming calendar year must be filed on or after September 1 but no later than December 1 of the current year ~~before April 1 of each year~~.

Section 16. Subsection (8) of section 744.369, Florida Statutes, is amended to read:

744.369 Judicial review of guardianship reports.—

(8) The approved report constitutes the authority for the guardian to act in the forthcoming year. The powers of the guardian are limited by the terms of the report. The annual report may not grant additional authority to the guardian without a hearing, as provided for in s. 744.331, to determine that the ward is incapacitated to act in that matter. Unless the

court orders otherwise, the guardian may continue to act under authority of the last-approved report until the forthcoming year's report is approved.

Section 17. Subsection (1) of section 744.3715, Florida Statutes, is amended to read:

744.3715 Petition for interim judicial review.—

(1) At any time, any interested person, including the ward, may petition the court for review alleging that the guardian is not complying with the guardianship plan, ~~or~~ is exceeding his or her authority under the guardianship plan, is acting in a manner contrary to s. 744.361, is denying visitation between the ward and his or her relatives in violation of s. 744.361(13), or ~~and the guardian~~ is not acting in the best interest of the ward. The petition for review must state the nature of the objection to the guardian's action or proposed action. Upon the filing of any such petition, the court shall review the petition and act upon it expeditiously.

Section 18. Paragraphs (a) and (b) of subsection (3) of section 744.464, Florida Statutes, are amended, and subsection (4) is added to that section, to read:

744.464 Restoration to capacity.—

(3) ORDER OF RESTORATION.—

(a) If no objections are filed, and the court is satisfied that ~~with~~ the medical examination establishes by a preponderance of the evidence that restoration of all or some of the ward's rights is appropriate, the court shall enter an order of

restoration of capacity, restoring all or some of the rights which were removed from the ward in accordance with those findings. ~~The order must be issued within 30 days after the medical report is filed.~~

(b) At the conclusion of a hearing, conducted pursuant to s. 744.1095, the court shall make specific findings of fact and, based on a preponderance of the evidence, enter an order either denying the suggestion of capacity or restoring all or some of the rights which were removed from the ward. The ward has the burden of proving by a preponderance of the evidence that the restoration of capacity is warranted.

(4) TIMELINESS OF HEARING.—The court shall give priority to any suggestion of capacity and shall advance the cause on the calendar.

Section 19. The amendments made by this act apply to all proceedings pending on the effective date of this act.

Section 20. This act shall take effect upon becoming a law.

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February 9, 2015

Chief Justice Jorge Labarga
Florida Supreme Court
500 South Duval Street
Tallahassee FL 32399-1927

Re: Amendments to the Florida Rules of Civil Procedure.
No. SC13-2384

Dear Justice Labarga:

On behalf of the Real Property, Probate and Trust Law Section of The Florida Bar (the "Section"), I am submitting comments regarding the Amendments to the Florida Rules of Civil Procedure. No. SC13-2384, Released December 11, 2014.

The Section is a group of over 10,000 Florida lawyers who practice in the areas of real estate, probate, trust and estate law, and who are dedicated to serving all Florida lawyers and the public in these fields of practice. We produce educational materials and seminars, assist the public pro bono, draft legislation, draft rules of procedure, and occasionally offer advice to the judicial, legislative and executive branches to assist on issues related to our fields of practice.

The Section feels that commenting on these proposed rules and forms is appropriate because of our members' substantial, institutional history and perspective involving foreclosures. Our members represent virtually every segment of residential real estate foreclosures, including homeowners defending foreclosures, residential tenants, lenders, subordinate lienholders, construction lien claimants and condominium and home owners associations.

The Section also believes it can offer a unique perspective in that one of its committees worked closely with Representative Kathleen Passidomo in drafting the foreclosure reform bill which was signed into law as Ch. 2013-137, Laws of Florida (the "Foreclosure Reform Law"). As such, we believe we can offer some insight into the underlying vision of how this law would be implemented in practice.

So, we appreciate the opportunity to submit our comments and suggestions. We have divided those into "substantive" comments explained in the body of this letter and a redline of suggested changes to the draft Rule and Forms

which incorporates both the substantive comments and some technical, stylistic and other suggestions.

1. Rule 1.115 – Clarify that Rule Does not Apply to Non-Note Foreclosures

Section 702.015 was intended to apply to the foreclosure of mortgages and liens securing a promissory note. It was not intended to apply to foreclosure of condominium, HOA, construction or any other type of lien which does not secure a promissory note. In fact, §702.015 makes little sense other than in that context. Through a less than artful placement of the phrase "which secures a promissory note" in the statute – a placement which was carried forward into the draft rule -- we received multiple comments suggesting that Rule 1.115 might apply to the foreclosure of other types of liens. To reduce the potential for misinterpretation, we have suggested moving the clause "which secures a promissory note" to a position where it is more clearly modifying the phrase "mortgage or other lien."

We would further point out that the use of the term "Claimant" in Rule 1.115, rather than "Plaintiff," introduces another opportunity for drawing an unintended distinction between the party bringing the foreclosure lawsuit and the "claimant" of the ultimate ownership of the promissory note and obligation. While subsection (b) of the Rule, requiring disclosure of any delegation of authority to bring the foreclosure suit is well written and accurately stated, the common meaning of "claimant" could potentially result in misinterpretations or confusion.

We would point out that Rule 1.115 is one of the few places in the Rules of Civil Procedure where the term "Claimant" appears. When used elsewhere in the Rules, it is in contexts where the term "Plaintiff" might be inappropriate or inaccurate.[1]

2. Form 1.944(a) Certification of Possession of Original Note

As phrased, the proposed certification appears to call for one person to physically locate the original promissory note and confirm possession and for another person to give the certification. The Foreclosure Reform Law was drafted in light of disturbing allegations about "Robo-signing" and the submission of fraudulent documents to our courts, allegations of plaintiffs foreclosing on notes that hadn't been properly assigned, were not in their possession and of assorted other unethical and illegal practices.

The statutory provision requiring certification of the plaintiff's possession and to provide "up front" copies of the note, were intended to speed foreclosures by requiring foreclosure counsel to properly research a case before filing. It was also intended to enable homeowner defendants to determine basic facts concerning their obligations and potential defenses without the need for an initial round of discovery. Simply put, the drafters of the Foreclosure Reform Law wanted to eliminate the "sloppy" practices of certain lenders and foreclosure firms and apparent expectation that few homeowner defendants would question their blanket (and sometimes false) assertions.

[1] In Rule 1.240, governing interpleader, "claimant" is used in the context of multiple claimants to the same asset. The word appears in Rule 1.510, in reference to the party filing a motion for summary judgment – which may be any party to the suit. "Claimant" is also used in Rule 1.650 concerning Medical Malpractice Presuit Screening to refer to the potential Plaintiff before suit is filed.

For those reasons, and because it is impossible for a second person to verify the actions of another "based on personal knowledge" (unless they were also present and verified), we are suggesting the form be amended to unambiguously have the same person confirm possession of the original note, attach the copies and verify they have done it.

3. Form 1.944(b) Requested Relief Should Include Re-establishment of the Lost Note and Finding of Adequate Protection.

While the language of §673.3091 of the Uniform Commercial Code, regarding the enforcement of a lost, destroyed or stolen instrument, is not as clear as to procedural elements as one might like, the Section believes that the better practice is both to plead the elements required for re-establishing the lost note AND to include a prayer for the re-establishment of the lost note.

A great many foreclosure cases proceed to judgment following the entry of defaults as to one or all defendants. While Rule 1.190(b) allows the judgment to address matters tried by "express or implied consent" of the parties, whether or not those matters were properly raised by the pleadings, there are constitutional questions as to whether relief that wasn't requested in the served complaint may be granted against a defaulted defendant.

With regard to adequate protections, §673.3091 requires a "finding."[2] This concept is carried forward in §702.11(1) which states: "In connection with a mortgage foreclosure, the following constitute reasonable means of providing adequate protection under s. 673.3091, if so found by the court:" (emphasis added). The contemplation in drafting §702.11 was that the court would set the amount and nature of the adequate protections to be provided. Accordingly, we suggest that a request to set the amount and nature of adequate protections be included in the prayer for relief.

We would point out that there is a complex interplay between §702.036 regarding the finality of a mortgage foreclosure, §673.391 enforcing a lost note, and §702.11, applying and slightly modifying the adequate protection remedies. As between the former homeowner who might later discover improprieties or fraud in the foreclosure and the wholly innocent purchaser of a foreclosed property[3], we believe the Legislature struck the appropriate balance. It protected the ownership rights of the post-foreclosure purchaser, while allowing an improperly foreclosed homeowner to pursue a full range of damages against the party wrongly foreclosing. This necessarily includes protecting the purchaser against claims of a "rightful" holder of the note appearing after someone else, "wrongfully" foreclosed the mortgage (presumably based on false evidence of ownership and loss of the note).

There is, of course, a Constitutional concern in depriving the "rightful" noteholder (who was not party to the completed foreclosure action) of a remedy and opportunity to foreclose "their" collateral. The concept of adequate protections under the U.C.C. was developed to protect the maker of the note from double payment. In the Foreclosure Reform Law, the adequate protection concept was expanded to also support the finality of the post-foreclosure sale. Section 702.11(2) statutorily creates a right for the "rightful" note holder to recover from the one who wrongly foreclosed, and makes the judicially determined adequate protections directly

[2] In pertinent part, it reads "The court may not enter judgment in favor of the person seeking enforcement unless it finds that the person required to pay the instrument is adequately protected." (emphasis added)

[3] Finality under this provision is predicated on proper service, a final judgment of foreclosure, and completion of any appeals, and then only applies as to a purchaser not affiliated with the foreclosing lender or foreclosed owner who acquires the property for value. §702.036(1)(a)

available to the "rightful" noteholder. They would also retain their right to pursue recovery directly against the maker of the note (as an indirect means of reaching the adequate protections).

There were extensive discussions of the constitutional issue in drafting the finality provision of §702.036. The drafters concluded there was no taking in altering the procedural elements and substituting a judicially determined adequate protection for an opportunity to foreclose on the property. This is analogous to the bonding off of a lien.

4. Form 1.944(b) Complaint with Lost Note. Delegation of Authority is not an element of re-establishing a lost note.

Section 5 of the form complaint begins "(select a, b, c, or d)." The first three subparagraphs allege that at the time of loss, the plaintiff was holder of the note, was entitled to enforce the note or had acquired ownership from a person entitled to enforce the note. Each of those are elements necessary to the re-establishment of a lost note under §673.3091. Subparagraph (d) concerns the delegation of authority to bring suit on behalf of another. This too is a required provision under the Foreclosure Reform Law, §702.015(3), but one unrelated to re-establishing a lost note.

We suggest changing this to "(select a, b, or c)"; Modifying the text of subparagraphs (a), (b) and (c) to refer to either plaintiff or the party delegating authority (as appropriate); and renumbering and moving (d) as a completely separate and optional allegation.

5. Form 1.944(c) and (d) – Order to Show Cause is available for residential and homestead property.

Both the form Motion for Order to Show Cause and the form Order to Show Cause include a statement that this is not residential property for which homestead exemption has been claimed. This is based on a misinterpretation sometimes made of the original §702.10(1), which we attempted to clarify in the Foreclosure Reform Law.

Section 702.10(1) allows the issuance of an order to show cause why a final judgment of foreclosure should not be entered in ANY foreclosure, without regard to its homestead or residential status. The more stringent §702.10(2), which results in an order for interim payments or to vacate the property, is NOT available for an owner-occupied residential property.

In support of this conclusion we would point out the operative provision of §702.10(2), which reads:

> (2) Except as provided in paragraph (i), in any action for foreclosure, <u>other than owner-occupied residential real estate</u>, in addition to any other relief that the court may award, the plaintiff may request that the court enter an order directing the mortgagor defendant to show cause why an order to make payments during the pendency of the foreclosure proceedings or an order to vacate the premises should not be entered.

(emphasis added)

The referenced paragraph (i), reiterates that "this subsection" [which would be subsection (2) of section 702.10] does not apply to an owner-occupied residence, and then provides a rebuttable presumption based on homestead tax exemption status.

> (i) This subsection does not apply to foreclosure of an owner-occupied residence. For purposes of this paragraph, there is a rebuttable presumption that a residential property for which a homestead exemption for taxation was granted according to the certified rolls of the latest assessment by the county property appraiser, before the filing of the foreclosure action, is an owner-occupied residential property.

(emphasis added)

Since it is not applicable to a show cause order under §702.10(1), the references to residential property and homestead tax exemptions should be removed from both Show Cause forms.

6. Form 1.994(c) and (d). The Show Cause Mechanism was designed to also be used by Condominium & HOA Associations and other subordinate lienholders to force completion of someone else's foreclosure.

The show cause mechanism of the Foreclosure Reform Law was designed not only to provide a mechanism for the plaintiff to move a foreclosure through the process more quickly, but also to permit any lienholder, not just the plaintiff in the lawsuit, to move for the show cause hearing. To achieve this result, §702.10(1) defines "lienholder" to include the plaintiff, named parties defendant holding a lien, and any condominium association, cooperative association or homeowners' association which "may file a lien" against the property.

Under §§718.116 and 720.3085, the amounts owed by a foreclosing first mortgage holder with regard to Condominium and Homeowners Association assessments are statutorily capped at the lesser of 12 months regular assessments or one percent of the original mortgage debt. Once the foreclosure is completed, a foreclosing first mortgage lender must pay assessments going forward. This led to a "free rider" problem, where some lenders appear to have made the tactical decision to delay completing certain foreclosures, so as to minimize their carrying costs, while leaving other owners in the condominium paying for maintenance, insurance and the like through their assessments. We suggest this is one of the factors leading to the long average times to resolve a foreclosure case.

The Section's drafting committee felt that where an association had obtained a show cause order and no adequate defenses were presented, the courts had inherent authority to order the foreclosing plaintiff to submit the original note, affidavits as to fees and amounts due and other matters necessary for the entry of a final judgment within a set period of days. Thus, the Foreclosure Reform Law did not specifically address such requirements.[4] Our members have reported instances when courts expressed reluctance or a lack of authority to direct a plaintiff to move forward with the foreclosure action even in the absence of defenses.

Lest the forms lead to a misunderstanding of the broader scope of the potential uses for the Show Cause mechanism under §702.10, we would suggest a minor change to the forms to give the drafter the alternative of describing the party as "[Movant/Plaintiff]" We would also suggest the comment to Form 1.944(c) could appropriately refer to the broader class of lienholders and the inherent authority of the courts.

[4] In fact, such a direction might have crossed the line into procedural matters within the exclusive purview of the court.

7. Form 1.996(a) and (b) Final Judgment Forms should include Recitation of Service, Non-Military Affidavits and Delivery of Original Note.

A valid foreclosure has always required proper service on the parties. Diligent search and inquiry are conditions precedent to the use of service by publication. Additional protections are provided for those serving in the military under the Servicemembers Civil Relief Act. 50 App. U.S.C.A. 501 et seq. Among the additional protections is the requirement that "the court, before entering judgment for the plaintiff, shall require the plaintiff to file with the court an affidavit ... stating whether or not the defendant is in Military Service and showing necessary facts to support the affidavit." *Id.* at §521.

Conscientious judges have long confirmed service on each defendant and that the file contained necessary non-military affidavits before entering final judgment. Justifiably or not, along with the allegations of "Robo-Signing" and fraudulent documents, there were also highly publicized allegations as to improper and inadequate service of process and failure to follow procedural requirements and safeguards.

Because it encourages better practices, serves as a last check, and might head off some unwarranted criticism, we suggest that the judgment forms include a recitation (not a finding) listing those defendants who have been served personally, those who have been served by publication, and reciting that the court file contains the required affidavits of diligent search; and non-military affidavits for parties who have been defaulted.

We anticipate these details will be compiled by plaintiff's counsel when submitting a proposed final judgment, and then spot checked by the court, so the burden on the judiciary will be minimal.

Also in the spirit of using the forms to remind as to legal requirements, we would add a recitation confirming that the original note has been filed with the court, as that is a condition precedent to the entry of the judgment of foreclosure, §702.015(4), that it is merged into the final judgment and marked as cancelled to prevent the unauthorized return of a negotiable instrument to the stream of commerce.

We would stress, that other than in response to specific challenges and motions, formal findings as to proper service and military status are not required for the validity of a foreclosure judgment. That is not what we advocate; nor is any suggestion made that evidence be required beyond a quick review of the court file.

There is an added benefit to reciting such matters in the final judgment. Foreclosures affect title to real property, and become a permanent part of the chain of title. However, many parts of a foreclosure file, other than the final judgment and docket, (and items recorded in the separate land records such as the Certificate of Title), are subject to eventual destruction under Rule 2.430, Fla. Rules Jud.Admin. Reciting that the court file once documented proper service, compliance with the Servicemembers Civil Relief and the like provides a permanent secondary reference for these important and often jurisdictional matters.

8. Form 1.996(b) Expand Final Judgment as to Adequate Protections.

In point 3, above, we discussed the complex interplay between the finality provisions of §702.036 and the provision of adequate protection, and the importance of a judicial

determination of the amount and nature of adequate protections to be provided. We will not recount those here, other than to suggest that the court should set the amount and nature of adequate protections as part of the final judgment re-establishing a lost note, and make an express finding as to the adequacy under §§ 673.3091 and 702.11.

While perhaps not a subject appropriate for inclusion in the forms, we expect a written indemnification agreement will be the most common means by which institutional mortgage holders propose to meet the adequate protection requirement. There is a statutory requirement that the party giving the indemnification is "a person reasonably believed sufficiently solvent to honor such an obligation." §702.11(1)(a). That standard requires the introduction of some evidence, and may often not be satisfied by an indemnification given by a large bank in their capacity as trustee of a securitized mortgage pool. In most cases, substantially all of the assets of those trusts were pledged to the holders of bonds having face amounts exceeding the current value of the trust assets. On the other hand, an indemnification from the same bank, in its own name, would almost certainly meet the statutory standard.

9. Form 1.996(a) & (b) – Specifically identify the Mortgage Being Foreclosed in the Final Judgment.

While it has rarely proven to be an issue, given the common failure to record complete chains of assignments of mortgages, and the past (and perhaps returning) practice of first and second mortgage loans being made simultaneously by the same lender, a review of a final judgment of foreclosure may not always clearly indicate which mortgage was, in fact, foreclosed. While that detail should be ascertainable from a careful review of the complete court file, many parts of a foreclosure file, other than the final judgment and docket, are subject to eventual destruction under Rule 2.430, Fla. Rules Jud.Admin.

A simple solution to this is to include the recording information of the foreclosed mortgage in the Final Judgment.

Thank you for the opportunity to offer our thoughts and insights. If we may provide further clarification or perspective, please do not hesitate to call on the Section.

Sincerely,

REAL PROPERTY, PROBATE AND TRUST LAW SECTION OF THE FLORIDA BAR

Michael A. Dribin, Chair

CERTIFICATE OF SERVICE

I certify that a copy hereof has been furnished to:

Kevin B. Cook
Chair, Civil Procedure Rules Committee
Rogers Towers, P.A.
818 A1A N. Suite 208
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Ellen Sloyer
Bar Staff Liaison
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by e-mail and U.S. Mail on February ____, 2015.

Michael A. Dribin
Florida Bar No. 205656

APPENDIX RULE 1.110.

GENERAL RULES OF PLEADING

(a) [No change]

(b) Claims for Relief. A pleading which sets forth a claim for relief, whether an original claim, counterclaim, crossclaim, or third-party claim must state a cause of action and shall contain (1) a short and plain statement of the grounds upon which the court's jurisdiction depends, unless the court already has jurisdiction and the claim needs no new grounds of jurisdiction to support it, (2) a short and plain statement of the ultimate facts showing that the pleader is entitled to relief, and (3) a demand for judgment for the relief to which the pleader deems himself or herself entitled. Relief in the alternative or of several different types may be demanded. Every complaint shall be considered to pray for general relief.

~~When filing an action for foreclosure of a mortgage on residential real property the complaint shall be verified. When verification of a document is required, the document filed shall include an oath, affirmation, or the following statement:~~

~~"Under penalty of perjury, I declare that I have read the foregoing, and the facts alleged therein are true and correct to the best of my knowledge and belief."~~

(c) – (h) [No change]

Committee Notes

1971 Amendment. Subdivision (h) is added to cover a situation usually arising in divorce judgment modifications, supplemental declaratory relief actions, or trust supervision. When any subsequent proceeding results in a pleading in the strict technical sense under rule 1.100(a), response by opposing parties will follow in the same course as though the new pleading were the initial pleading in the action. The time for answering and authority for defenses under rule 1.140 will apply. The last sentence exempts post judgment motions under rules 1.480(c), 1.530, and 1.540, and similar proceedings from its purview.

2014 Amendment. The last two paragraphs of rule 1.110(b) regarding pleading requirements for certain mortgage foreclosure actions were deleted and incorporated in new rule 1.115.- 5 -

RULE 1.115.

PLEADING MORTGAGE FORECLOSURES

(a) Claim for Relief. A claim for relief that seeks to foreclose a mortgage or other lien, securing a promissory note on residential real property, including individual units of condominiums and cooperatives designed principally for occupation by one to four families ~~which secures a promissory note,~~ must: (1) contain affirmative allegations expressly made by the ~~claimant~~plaintiff at the time the proceeding is commenced that the ~~claimant~~plaintiff is the holder of the original note secured by the mortgage; or (2) allege with specificity the factual basis by which the ~~claimant~~plaintiff is a person entitled to enforce the note under section 673.3011, Florida Statutes.

(b) Delegated Claim for Relief. If a ~~claimant~~plaintiff has been delegated the authority to institute a mortgage foreclosure action on behalf of the person entitled to enforce the note, the claim for relief shall describe the authority of the ~~claimant~~plaintiff and identify with specificity the document that grants the ~~claimant~~plaintiff the authority to act on behalf of the person entitled to enforce the note. The term "original note" or "original promissory note" means the signed or executed promissory note rather than a copy of it. The term includes any renewal, replacement, consolidation, or amended and restated note or instrument given in renewal, replacement, or substitution for a previous promissory note. The term also includes a transferrable record, as defined by the Uniform Electronic Transaction Act in section 668.50(16), Florida Statutes.

(c) Possession of Original Promissory Note. If the ~~claimant~~plaintiff is in possession of the original promissory note, the ~~claimant~~plaintiff must file under penalty of perjury a certification contemporaneously with the filing of the claim for relief for foreclosure that the ~~claimant~~plaintiff is in possession of the original promissory note. The certification must set forth the location of the note, the name and title of the individual giving the certification, the name of the person who personally verified such possession, and the time and date on which the possession was verified. Correct copies of the note and all allonges to the note must be attached to the certification. The original note and the allonges must be filed with the court before the entry of any judgment of foreclosure or judgment on the note.

(d) Lost, Destroyed, or Stolen Instrument. If the ~~claimant~~plaintiff seeks to enforce a lost, destroyed, or stolen instrument, an affidavit executed under penalty of perjury must be attached to the claim for relief. The affidavit must: (1) detail a clear chain of all endorsements, transfers, or assignments of the promissory note that is the subject of the action; (2) set forth facts showing that the ~~claimant~~plaintiff is entitled to enforce a lost, destroyed, or stolen instrument pursuant to section- 6 - 673.3091, Florida Statutes; and (3) include as exhibits to the affidavit such copies of the note and the allonges to the note, audit reports showing receipt of the original note, or other evidence of the acquisition, ownership, and possession of the note as may be available to the ~~claimant~~plaintiff. Adequate protection as required under section 673.3091(2), Florida Statutes, shall be provided before the entry of final judgment.

(e) Verification. When filing an action for foreclosure on a mortgage for residential real property the claim for relief shall be verified by the ~~claimant~~plaintiff seeking to foreclose the mortgage. When

verification of a document is required, the document filed shall include an oath, affirmation, or the following statement:

"Under penalties of perjury, I declare that I have read the foregoing, and the facts alleged therein are true and correct to the best of my knowledge and belief."

FORM 1.944(a).

MORTGAGE FORECLOSURE (When location of original note known)

COMPLAINT

Plaintiff, A. B., sues defendant, C. D., and alleges:

1. This is an action to foreclose a mortgage on real property in ..... County, Florida.

2. On .....(date)....., defendant executed and delivered a promissory note and a mortgage securing payment of the note to .....(plaintiff or plaintiff's predecessor.....The mortgage was recorded on .....(date)....., in Official Records Book ..... at page ..... of the public records of ..... County, Florida, and mortgaged the property described in the mortgage then owned by and in possession of the mortgagor, a copy of the mortgage containing a copy of and the note being attached.

[#.~~(c)~~ [Add if appropriate] Plaintiff has been delegated the authority to institute a mortgage foreclosure action on behalf of the person entitled to enforce the note (the "Enforcing Party"). The document(s) that grant(s) plaintiff the authority to act on behalf of the ~~person entitled to enforce the note~~ Enforcing Party is/are as follows .....]

3. (Select a, or b~~, or c~~)

(a) [Plaintiff/Enforcing Party] is the holder of the original note secured by the mortgage.

(b) [Plaintiff/Enforcing Party] is a person entitled to enforce the note under applicable law because .....(allege specific facts).....

~~(c) Plaintiff has been delegated the authority to institute a mortgage foreclosure action on behalf of the person entitled to enforce the note. The document(s) that grant(s) plaintiff the authority to act on behalf of the person entitled to enforce the note is/are as follows .....~~

4. The property is now owned by defendant who holds possession.

5. Defendant has defaulted under the note and mortgage by failing to pay the payment due .....(date)....., and all subsequent payments .....(allege other defaults as applicable).....

6. [~~-~~Plaintiff/Enforcing Party] declares the full amount payable under the note and mortgage to be due.

7. Defendant owes [plaintiff/Enforcing Party] $..... that is due on principal on the note and mortgage, interest from .....(date)....., and title search expense for ascertaining necessary parties to this action.

8. Plaintiff is obligated to pay plaintiff's attorneys a reasonable fee for their services. Plaintiff is entitled to recover its attorneys' fees under .....(allege statutory and/or contractual bases, as applicable).....

WHEREFORE, plaintiff demands judgment foreclosing the mortgage, for costs (and, when applicable, for attorneys' fees), and, if the proceeds of the sale are insufficient to pay plaintiff's claim, a deficiency judgment.

NOTE: An action for foreclosure of a mortgage on residential real property must contain an oath, affirmation, or the following statement as required by rule 1.115(e).

VERIFICATION

Under penalty of perjury, I declare that I have read the foregoing, and the facts alleged therein are true and correct to the best of my knowledge and belief. Executed on this .....(date).....

_____

[Person Signing Verification]

CERTIFICATION OF POSSESSION OF ORIGINAL NOTE

The undersigned hereby certifies:

1. That [plaintiff or party which has delegated authority to enforce] is in possession of the original promissory note upon which this action is brought.

2. The location of the original promissory note is: .....(location).....

3. The name and title of the person giving the certification is: .....(name and title).....

4. The ~~name of the person who~~ undersigned personally verified such possession ~~is: .....(name).....~~.

5. The time and date on which possession was verified were: .....(time and date).....

6. Correct copies of the note (and, if applicable, all endorsements, transfers, allonges, or assignments of the note) are attached to this certification.

7. I give this statement based on my personal knowledge.

Under penalties of perjury, I declare that I have read the foregoing Certification of Possession of Original Note and that the facts stated in it are true.

Executed on .....(date).....

_____

[Person Signing Certification]

NOTE: This form is for installment payments with acceleration. It omits allegations about junior encumbrances, unpaid taxes, unpaid insurance premiums, other nonmonetary defaults, and for a receiver. They must be added when proper appropriate.

A copy of the note and mortgage must be attached. This form may require modification. This form is designed to incorporate the pleading requirements of section 702.015, Florida Statutes (2013) and rule 1.115. It is also designed to conform to section 673.3011, Florida Statutes (2013), except that part of section 673.3011, Florida Statutes, which defines a person entitled to enforce an instrument under section 673.3091, Florida Statutes. See form 1.944(b). Pursuant to section 702.015, Florida Statutes (2013), a certification of possession of the original promissory note must be filed contemporaneously with the Complaint (form 1.944(a)) or, in the event that the plaintiff seeks to enforce a lost, destroyed, or stolen instrument, an affidavit setting forth the facts required by law must be attached to the complaint (form 1.944(b)).- 10 -

FORM 1.944(b).

MORTGAGE FORECLOSURE (When location of original note unknown)

COMPLAINT

Plaintiff, ABC, sues defendant, XYZ, and states:

1. This is an action to foreclose a mortgage on real property in ..... County, Florida.

2. On .....(date)....., defendant executed and delivered a promissory note and a mortgage securing the payment of said note to .....(plaintiff or plaintiff's predecessor).....

3. The mortgage was recorded on .....(date)....., in Official Records Book ..... at page ..... of the public records of ..... County, Florida, and mortgaged the property described therein which was then owned by and in possession of the mortgagor.

4. A copy of the mortgage and note are attached to the affidavit which is attached hereto as Composite Exhibit "1"~~; the contents of the affidavit are specifically incorporated by reference.~~

[#.[Add if appropriate] The person entitled to enforce the note is .... Plaintiff has been delegated the authority to institute a mortgage foreclosure action on behalf of the person entitled to enforce the note (the "Enforcing Party"). The document(s) that grant(s) plaintiff the authority to act on behalf of the Enforcing Party is/are as follows .....] (attach documents if not already attached).

Comment [AF1]: F.S. 702.015 requires the affidavit to be attached to the complaint, not incorporated by reference. Since the Affidavit significantly overlaps the complaint, incorporation requires duplicate and sometimes confusing responses in the answer.

5~~3~~. [Plaintiff/Enforcing Party] is not in possession of the note but is entitled to enforce it.

6~~4~~. (select a, b, c, and/or d) Plaintiff cannot reasonably obtain possession of the note because

(a) the note was destroyed.
(b) the note is lost.
(c) the note is in the wrongful possession of an unknown person.
(d) the note is in the wrongful possession of a person that cannot be found or is not amenable to service of process.

7~~5~~. (select a, b, or c~~, or d~~)

(a) At the time the original note was lost, [plaintiff/Enforcing Party] was the holder of the original note secured by the mortgage.

(b) At the time the original note was lost, [plaintiff/Enforcing Party] was a person entitled to enforce the note under applicable law because .....(allege specific facts).....-

(c) [Plaintiff/Enforcing Party] has directly or indirectly acquired ownership of the note from a person who was entitled to enforce the note when loss of possession occurred as follows: .....(allege facts as to transfer of ownership).....

~~(d) Plaintiff has been delegated the authority to institute a mortgage foreclosure action on behalf of the person entitled to enforce the note, and the document(s) that grant(s) plaintiff the authority to act on behalf of the person entitled to enforce the note is/are as follows .....(attach documents if not already attached).~~

~~6~~7. [Plaintiff/Enforcing Party] did not transfer the note or lose possession of it as the result of a lawful seizure.

7. The property is now owned by defendant who holds possession.

8. Defendant has defaulted under the note and mortgage by failing to pay the payment(s) due .....(date(s))..... , and all subsequent payments ..... (identify other defaults as applicable).....

9. Plaintiff declares the full amount payable under the note and mortgage to be due.

10. Defendant owes plaintiff $..... that is due on principal on the note and mortgage, interest from .....(date)..... , and title search expense for ascertaining necessary parties to this action.

11. Plaintiff is obligated to pay its attorneys a reasonable fee for their services. Plaintiff is entitled to recover its attorneys' fees for prosecuting this claim pursuant to .....(identify statutory and/or contractual bases, as applicable).....

WHEREFORE, Plaintiff demands judgment re-establishing the lost, stolen or destroyed promissory note, determining the amount and nature of adequate protection to be required under Fla. Stat. §§673.3091 and 702.11, foreclosing the mortgage, for costs (and, where applicable, for attorneys' fees), and if the proceeds of the sale are insufficient to pay plaintiff's claim, a deficiency judgment.

NOTE: An action for foreclosure of a mortgage on residential real property must contain an oath, affirmation, or the following statement as required by rule 1.115(e).

VERIFICATION~~-12--~~

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Under penalty of perjury, I declare that I have read the foregoing, and the facts alleged therein are true and correct to the best of my knowledge and belief.

Executed on .....(date).....

_____

(Person Signing Verification)

AFFIDAVIT OF COMPLIANCE

STATE OF FLORIDA

COUNTY OF .....

BEFORE ME, the undersigned authority, personally appeared .....(name)....., who, after being first duly sworn, deposes and states, under penalty of perjury:

1. I am the plaintiff (or plaintiff's .....) (identify relationship to plaintiff).

2. I am executing this affidavit in support of plaintiff's Complaint against defendant and I have personal knowledge of the matters set forth herein.

3. On .....(date)..... , the public records reflect that defendant executed and delivered a mortgage securing the payment of the note to .....(plaintiff/plaintiff's predecessor)..... The mortgage was recorded on .....(date)..... , in Official Records Book ..... at page ..... of the public records of ..... County, Florida, and mortgaged the property described therein, which was then owned by ~~and in possession of the mortgagor~~, a copy of the mortgage and the note being attached.

Comment [AF2]: Public record will reflect ownership, but not possession

4. [Plaintiff/Enforcing Party] is a person entitled to enforce the note.

54. (select a, b, c, and/or d) Plaintiff cannot reasonably obtain possession of the note because

(a) the note was destroyed.

(b) the note is lost.

(c) the note is in the wrongful possession of an unknown person.

(d) the note is in the wrongful possession of a person who cannot be found or is not amenable to service of process.

5. (select a, b, c, or d)

(a) At the time the original note was lost, [plaintiff/Enforcing Party] was the holder of the original note secured by the mortgage .....(allege facts showing plaintiff was holder) .

(b) At the time the original note was lost, [plaintiff/enforcing party] was a person entitled to enforce the note under applicable law because .....(allege specific facts as to who was holder of note and how plaintiff became entitled to enforce).....

(c) Since the note was lost, [plaintiff/enforcing party] has directly or indirectly acquired ownership of the note from a person who was entitled to enforce the note when loss of possession occurred as follows: .....(allege facts regarding transfer of ownership).....

~~(d) Plaintiff has been delegated the authority to institute a mortgage foreclosure action on behalf of the person entitled to enforce the note, and the document(s) that grant(s) plaintiff the authority to act on~~

~~behalf of the person entitled to enforce the note is/are as follows ..... (attach copy of document(s) or relevant portion(s) of the document(s)).~~

Comment [AF3]: This provision is required in the complaint, not in the affidavit.

6. Below is the clear chain of the endorsements, transfers, allonges or assignments of the note and all documents that evidence same as are available to Plaintiff: .....(identify in chronological order all endorsements, transfers, assignments of, allonges to, the note or other evidence of the acquisition, ownership and possession of the note)..... Correct copies of the foregoing documents are attached to this affidavit.

7. [Plaintiff/Enforcing Party] did not transfer the note or lose possession of it as the result of a lawful seizure.

FURTHER, AFFIANT SAYETH NAUGHT.

[signature]

[typed or printed name of affiant]

STATE OF FLORIDA

COUNTY OF .....

BEFORE ME, the undersigned authority appeared .....(name of affiant)....., who .....is personally known to me or ..... produced identification ..... and acknowledged that he/she executed the foregoing instrument for the purposes expressed therein and who did take an oath.

WITNESS my hand and seal in the State and County aforesaid, this .....(date).....

NOTARY PUBLIC,

State of Florida

Print Name: .....

Commission Expires: .....

Committee Note

2014 Adoption. This form is for installment payments with acceleration. It omits allegations about junior encumbrances, unpaid taxes, unpaid insurance premiums, other nonmonetary defaults, and for a receiver. Allegations must be added when appropriate. This form may require modification. This form is designed to incorporate the pleading requirements of section 702.015, Florida Statutes (2013), and rule 1.115. It is also designed to comply with section 673.3091, Florida Statutes (2013). Adequate protection as required by sections 702.11 (2013) and 673.3091(2), Florida Statutes (2013), must be provided before

the entry of final judgment.- 15 -

FORM 1.944(c)

MOTION FOR ORDER TO SHOW CAUSE

~~PLAINTIFF'S~~ MOTION FOR ORDER TO SHOW CAUSE FOR ENTRY OF FINAL JUDGMENT OF FORECLOSURE

1. [Plaintiff/Movant] [is a lienholder of real property located at .....(address)..... /~~or~~ is a .....Condominium Association/Cooperative Association/Homeowner's Association as to the real property located at [address.....].

2. The plaintiff has filed a verified complaint in conformity with applicable law, which is attached.

3. The [plaintiff/movant] requests this court issue an order requiring defendant(s) to appear before the court to show cause why a final judgment of foreclosure should not be entered against defendant(s).

4. The date of the hearing may not occur sooner than the later of 20 days after service of the order to show cause or 45 days after service of the initial complaint.

OR

COMMENT: Use the following when service is by publication:

4. When service is obtained by publication, the date for the hearing may not be set sooner than 30 days after the first publication.

5. The accompanying proposed order to show cause affords defendant(s) all the rights and obligations as contemplated by applicable law.

6. Upon the entry of the order to show cause, [plaintiff/movant] shall serve a copy of the executed order to show cause for entry of final judgment as required by law.

~~7. This is not a residential property for which a homestead exemption for taxation was granted according to the rolls of the latest assessment by the County Property Appraiser. Plaintiff requests the court review this complaint and grant this motion for order to show cause for entry of final judgment of foreclosure, and grant such further relief as may be awarded at law or in equity.~~

-Plaintiff Certificate of Service

Committee Note

2014 Adoption. This form is designed to comply with section 702.10, Florida Statutes (2013). Section 702.10 was drafted to permit Condominium Associations, Cooperative Associations, Homeowner's Associations and other subordinate lienholders to request an order to show cause in order to move a foreclosure to final judgment and sale. In such a case, and where otherwise appropriate, the trial court has the inherent authority to order the foreclosing plaintiff to submit the original note, affidavits of amounts due and other matters necessary for the entry of a final judgment and to set a time frame for compliance.

Comment [AF4]: An order to show cause for a final judgment of foreclosure under 702.10(1) is available for residential and non-residential foreclosures. On the other hand, a show cause order for the payment of rent

FORM 1.944(d)

ORDER TO SHOW CAUSE

ORDER TO SHOW CAUSE

THIS CAUSE has come before the court on .....plaintiff's/lien holder's..... motion for order to show cause for entry of final judgment of mortgage foreclosure and the court having reviewed the motion and the verified complaint, and being otherwise fully advised in the circumstances, finds and it is

ORDERED AND ADJUDGED that:

1. The defendant(s) shall appear at a hearing on foreclosure on .....(date)..... at .....(time)..... before the undersigned judge, in the .....(county)..... Courthouse at .....(address)....., to show cause why the attached final judgment of foreclosure should not be entered against the defendant(s) in this cause. This hearing referred to in this order is a "show cause hearing."

2. This ORDER TO SHOW CAUSE shall be served on the defendant(s) in accordance with the Florida Rules of Civil Procedure and applicable law as follows:

a. If the defendant(s) has/have been served under Chapter 48, Florida Statutes, with the verified complaint and original process has already been effectuated, service of this order may be made in the manner provided in the Florida Rules of Civil Procedure; or, if the other party is the plaintiff in the action, service of the order to show cause on that party may be made in the manner provided in the Florida Rules of Civil Procedure.

b. If the defendant(s) has/have not been served under Chapter 48, Florida Statutes, with the verified complaint and original process, the order to show cause, together with the summons and a copy of the verified complaint, shall be served on the party in the same manner as provided by law for original process.

3. The filing of defenses by a motion or verified answer at or before the show cause hearing constitutes cause for which the court may not enter the attached final judgment.

4. Defendant(s) has/have the right to file affidavits or other papers at the time of the show cause hearing and may appear at the hearing personally or by an attorney.

5. If defendant(s) file(s) motions, they may be considered at the time of the show cause hearing.

6. Defendant(s)' failure to appear either in person or by an attorney at the show cause hearing or to file defenses by motion or by a verified or sworn answer, affidavits, or other papers which raise a genuine issue of material fact which would preclude entry of summary judgment or which would otherwise constitute a legal defense to foreclosure, after being served as provided by law with the order to show cause, will be deemed presumptively a waiver of the right to a hearing. In such case, the court may enter a final judgment of foreclosure ordering the clerk of the court to conduct a foreclosure sale. An order requiring defendant(s) to vacate the premises may also be entered.

7. If the mortgage provides for reasonable attorneys' fees and the requested fee does not exceed 3% of the principal amount owed at the time the complaint is filed, the court may not need to hold a hearing to adjudge the requested fee to be reasonable.

8. Any final judgment of foreclosure entered under section 702.10(1) Florida Statutes, shall be only for in rem relief; however, entry of such final judgment of foreclosure shall not preclude entry of an in personam money damages judgment or deficiency judgment where otherwise allowed by law.

9. A copy of the proposed final judgment is attached and will be entered by the court if defendant(s) waive(s) the right to be heard at the show cause hearing.

10. The court finds that this is not a residential property for which a homestead exemption for taxation was granted according to the rolls of the latest assessment by the county property appraiser.

DONE AND ORDERED at .....(county)....., Florida .....(date).....

_____

CIRCUIT JUDGE

Copies to:

Committee Note

2014 Adoption. This form is designed to comply with section 702.10(1), Florida Statutes (2013).- 20 -

FORM 1.996(a).

FINAL JUDGMENT OF FORECLOSURE

FINAL JUDGMENT

This action was tried before the court. On the evidence presented

IT IS ADJUDGED that:

1. The court file reflects

a. Affidavits as to Military Service as to the following defendants: [List]
b. Returns of personal service, in accord with Chapter 48, Fla. Stat. on the following defendants: [List]
c. Sworn statements as required by §§ 49.031-49.071, and constructive service, in accord with Chapter 49, Fla. Stat. on the following defendants: [List]
d. The original promissory note and allonges thereto have been filed, are merged into this judgment and are cancelled. The clerk if authorized to mark the original note as cancelled and include reference to this final judgment on the face of the original note.

Formatted: List Paragraph, Numbered + Level: 2 + Numbering Style: a, b, c, ... + Start at: 1 + Alignment: Left + Aligned at: 0.75" + Indent at: 1"

~~1~~2. Amounts Due. Plaintiff, ...(name and address)....., is due

Principal $.....

Interest to date of this judgment .....

Title search expenses .....

Taxes .....

Attorneys' fees .....

Finding as to reasonable number of hours: .....

Finding as to reasonable hourly rate: .....

Other: .....

(*The requested attorneys' fees are a flat rate fee that the firm's client has agreed to pay in this matter. Given the amount of the fee requested and the labor expended, the Court finds that a lodestar analysis is not necessary and that the flat fee is reasonable.)

Attorneys' fees total .....

Court costs, now taxed .....-

Other: ....

Subtotal $.....

LESS: Escrow balance .....

LESS: Other .....

TOTAL $.....

That shall bear interest at a rate of 7% per year.

2. Lien on Property. Plaintiff holds a lien for the total sum superior to all claims or estates of defendant(s), pursuant to the foreclosure of the mortgage recorded on _____ in Official Records Book .... at Page ... of the public records of .... County, Florida, on the following described property in ..... County, Florida: (describe property)

3. Sale of Property. If the total sum with interest at the rate described in paragraph 1 and all costs accrued subsequent to this judgment are not paid, the clerk of this court shall sell the property at public sale on .....(date)....., to the highest bidder for cash, except as prescribed in paragraph 4, at the courthouse located at ....(street address of courthouse).... in ..... County in .....(name of city)....., Florida, in accordance with section 45.031, Florida Statutes (2013), using the following method (CHECK ONE):

□..... At .....(location of sale at courthouse; e.g., north door)....., beginning at .....(time of sale)..... on the prescribed date.

□ ..... By electronic sale beginning at .....(time of sale)..... on the prescribed date at .....(website).....

4. Costs. Plaintiff shall advance all subsequent costs of this action and shall be reimbursed for them by the clerk if plaintiff is not the purchaser of the property for sale, provided, however, that the purchaser of the property for sale shall be responsible for the documentary stamps payable on the certificate of title. If plaintiff is the purchaser, the clerk shall credit plaintiff's bid with the total sum with interest and costs accruing subsequent to this judgment, or such part of it as is necessary to pay the bid in full.

5. Distribution of Proceeds. On filing the certificate of title the clerk shall distribute the proceeds of the sale, so far as they are sufficient, by paying: first, all of plaintiff's costs; second, documentary stamps affixed to the certificate; third, plaintiff's attorneys' fees; fourth, the total sum due to plaintiff, less the items paid, plus interest at the rate prescribed in paragraph 1 from this date to the date of the sale; and by retaining any remaining amount pending further order of this court.

6. Right of Redemption/Right of Possession. On filing the certificate of sale, defendant(s) and all persons claiming under or against defendant(s) since the filing of the notice of lis pendens shall be foreclosed of all estate or claim in the property and defendant's right of redemption as prescribed by section 45.0315,

Florida Statutes (2013) shall be terminated, except as to claims or rights under chapter 718 or chapter 720, Florida Statutes, if any. Upon the filing of the certificate of title, the person named on the certificate of title shall be let into possession of the property.

7. Attorneys' Fees. [If a default judgment has been entered against the mortgagor] Because a default judgment has been entered against the mortgagor and because the fees requested do not exceed 3% of the principal amount owed at the time the complaint was filed, it is not necessary for the court to hold a hearing or adjudge the requested attorneys' fees to be reasonable. [If no default judgment has been entered against the mortgagor] The court finds, based upon the affidavits/testimony presented and upon inquiry of counsel for the plaintiff that ___ hours were reasonably expended by plaintiff's counsel and that an hourly rate of $_____ is appropriate. Plaintiff's counsel represents that the attorneys' fees awarded does not exceed its contract fee with the plaintiff. The court finds that there is/are no reduction or enhancement factors for consideration by the court pursuant to Florida Patients Compensation Fund v. Rowe, 472 So. 2d 1145 (Fla. 1985). (If the court has found that there are reduction or enhancement factors to be applied, then such factors must be identified and explained herein). [If the fees to be awarded are a flat fee]

The requested attorneys' fees are a flat rate fee that the firm's client has agreed to pay in this matter. Given the amount of the fee requested and the labor expended, the court finds that a lodestar analysis is not necessary and that the flat fee is reasonable.

8. Jurisdiction Retained. Jurisdiction of this action is retained to enter further orders that are proper including, without limitation, a deficiency judgment.

IF THIS PROPERTY IS SOLD AT PUBLIC AUCTION, THERE MAY BE ADDITIONAL MONEY FROM THE SALE AFTER PAYMENT OF PERSONS WHO ARE ENTITLED TO BE PAID FROM THE SALE PROCEEDS PURSUANT TO THE FINAL JUDGMENT. IF YOU ARE A SUBORDINATE LIENHOLDER CLAIMING A RIGHT TO FUNDS REMAINING AFTER THE SALE, YOU MUST FILE A CLAIM WITH THE CLERK NO LATER THAN 60 DAYS AFTER THE SALE. IF YOU FAIL TO FILE A CLAIM, YOU WILL NOT BE ENTITLED TO ANY REMAINING FUNDS.

[If the property being foreclosed on has qualified for the homestead tax exemption in the most recent approved tax roll, the final judgment shall additionally contain the following statement in conspicuous type:]

IF YOU ARE THE PROPERTY OWNER, YOU MAY CLAIM THESE FUNDS YOURSELF. YOU ARE NOT REQUIRED TO HAVE A LAWYER OR ANY OTHER REPRESENTATION AND YOU DO NOT HAVE TO ASSIGN YOUR RIGHTS TO ANYONE ELSE IN ORDER FOR YOU TO CLAIM ANY MONEY TO WHICH YOU ARE ENTITLED. PLEASE CONTACT THE CLERK OF THE COURT, (INSERT INFORMATION FOR APPLICABLE COURT) WITHIN 10 DAYS AFTER THE SALE TO SEE IF THERE IS ADDITIONAL MONEY FROM THE FORECLOSURE SALE THAT THE CLERK HAS IN THE REGISTRY OF THE COURT. IF YOU DECIDE TO SELL YOUR HOME OR HIRE SOMEONE TO HELP YOU CLAIM THE ADDITIONAL MONEY, YOU SHOULD READ VERY CAREFULLY ALL PAPERS YOU ARE REQUIRED TO SIGN, ASK SOMEONE ELSE, PREFERABLY AN ATTORNEY WHO IS NOT RELATED TO THE PERSON OFFERING TO HELP YOU, TO MAKE SURE THAT YOU UNDERSTAND WHAT YOU ARE SIGNING AND THAT YOU ARE NOT TRANSFERRING YOUR PROPERTY OR THE EQUITY IN YOUR PROPERTY

WITHOUT THE PROPER INFORMATION. IF YOU CANNOT AFFORD TO PAY AN ATTORNEY, YOU MAY CONTACT (INSERT LOCAL OR NEAREST LEGAL AID OFFICE AND TELEPHONE NUMBER) TO SEE IF YOU QUALIFY FINANCIALLY FOR THEIR SERVICES. IF THEY CANNOT ASSIST YOU, THEY MAY BE ABLE TO REFER YOU TO A LOCAL BAR REFERRAL AGENCY OR SUGGEST OTHER OPTIONS. IF YOU CHOOSE TO CONTACT (NAME OF LOCAL OR NEAREST LEGAL AID OFFICE AND TELEPHONE NUMBER) FOR ASSISTANCE, YOU SHOULD DO SO AS SOON AS POSSIBLE AFTER RECEIPT OF THIS NOTICE.

ORDERED at ....., Florida, on .....(date).....

_____

Judge

NOTE: Paragraph 1 must be varied in accordance with the items unpaid, claimed, and proven. The form does not provide for an adjudication of junior lienors' claims nor for redemption by the United States of America if it is a defendant. The address of the person who claims a lien as a result of the judgment must be included in the judgment in order for the judgment to become a lien on real estate when a certified copy of the judgment is recorded. Alternatively, an affidavit with this information may be simultaneously recorded. For the specific requirements, see section 55.10(1), Florida Statutes; Hott Interiors, Inc. v. Fostock, 721 So. 2d 1236 (Fla. 4th DCA 1998).

Committee Notes

1980 Amendment. The reference to writs of assistance in paragraph 7 is changed to writs of possession to comply with the consolidation of the 2 writs. 2010 Amendment. Mandatory statements of the mortgagee/property owner's rights are included as required by the 2006 amendment to section 45.031, Florida Statutes. Changes are also made based on 2008 amendments to section 45.031, Florida Statutes, permitting courts to order sale by electronic means. Additional changes were made to bring the form into compliance with chapters 718 and 720 and section 45.0315, Florida Statutes, and to better align the form with existing practices of clerks and practitioners. The breakdown of the amounts due is now set out in column format to simplify calculations. The requirement that the form include the address and social security number of all defendants was eliminated to protect the privacy interests of those defendants and in recognition of the fact that this form of judgment does not create a personal final money judgment against the defendant borrower, but rather an in rem judgment against the property. The address and social security number of the defendant borrower should be included in any deficiency judgment later obtained against the defendant borrower.

2014 Amendment. These amendments added titles, updated statutory reference to time for right of redemption, and added a paragraph on attorneys' fees.- 26 -

FORM 1.996(b).

FINAL JUDGMENT OF FORECLOSURE FOR REESTABLISHMENT OF LOST NOTE

FINAL JUDGMENT

This action was tried before the court.

On the evidence presented

IT IS ADJUDGED that:

1. The court file reflects

a. Affidavits as to Military Service as to the following defendants: [List]
b. Returns of personal service, in accord with Chapter 48, Fla. Stat. on the following defendants: [List]
c. Sworn statements as required by §§ 49.031-49.071, and constructive service, in accord with Chapter 49, Fla. Stat. on the following defendants: [List]
d. The original promissory note and allonges thereto have been filed, are merged into this judgment and are cancelled. The clerk if authorized to mark the original note as cancelled and include reference to this final judgment on the face of the original note.

~~1~~2. Amounts Due. Plaintiff, ... (name and address) ....., is due

Principal $.....

Interest to date of this judgment .....

Title search expenses .....

Taxes .....

Attorneys' fees total .....

Court costs, now taxed .....

Other: ....

Subtotal $.....

LESS: Escrow balance .....

LESS: Other .....

TOTAL $.....

~~3~~. Lien on Property. Plaintiff holds a lien for the total sum superior to all claims or estates of defendant(s), pursuant to the foreclosure of the mortgage recorded on _____ in Official Records Book ... at Page .. of the public records of ... County, Florida, on the following described property ..... County, Florida: (describe property)

~~4~~. Sale of Property. If the total sum with interest at the rate described in paragraph 1 and all costs accrued subsequent to this judgment are not paid, the clerk of this court shall sell the property at public sale on .....(date)....., to the highest bidder for cash, except as prescribed in paragraph 4, at the courthouse located at ....(street address of courthouse).... in ..... County in .....(name of city)....., Florida, in accordance with section 45.031, Florida Statutes (2013), using the following method (CHECK ONE): At .....(location of sale at courthouse; e.g., north door)....., beginning at .....(time of sale)..... on the prescribed date. By electronic sale beginning at .....(time of sale)..... on the prescribed date at .....(website).....

~~5~~. Costs. Plaintiff shall advance all subsequent costs of this action and shall be reimbursed for them by the clerk if plaintiff is not the purchaser of the property for sale, provided, however, that the purchaser of the property for sale shall be responsible for the documentary stamps payable on the certificate of title. If plaintiff is the purchaser, the clerk shall credit plaintiff's bid with the total sum with interest and costs accruing subsequent to this judgment, or such part of it as is necessary to pay the bid in full.

~~6~~. Distribution of Proceeds. On filing the certificate of title the clerk shall distribute the proceeds of the sale, so far as they are sufficient, by paying: first, all of plaintiff's costs; second, documentary stamps affixed to the certificate; third, plaintiff's attorneys' fees; fourth, the total sum due to plaintiff, less the items paid, plus interest at the rate prescribed in paragraph 1 from this date to the date of the sale; and by retaining any remaining amount pending further order of this court.

~~7~~. Right of Redemption/Right of Possession. On filing the certificate of sale, defendant(s) and all persons claiming under or against defendant(s) since the filing of the notice of lis pendens shall be foreclosed of all estate or claim in the property and defendant's right of redemption as prescribed by section 45.031, Florida Statutes (2013) shall be terminated, except as to claims or rights under chapter 718 or chapter 720, Florida Statutes, if any. Upon the filing of the certificate of title, the person named on the certificate of title shall be let into possession of the property.

~~8~~. Attorneys' Fees. [If a default judgment has been entered against the mortgagor] Because a default judgment has been entered against the mortgagor and because the fees requested do not exceed 3% of the principal amount owed at the time the complaint was filed, it is not necessary for the court to hold a hearing or adjudge the requested attorneys' fees to be reasonable. [If no default judgment has been entered against the mortgagor]

The court finds, based upon the affidavits/testimony presented and upon inquiry of counsel for the plaintiff that ___ hours were reasonably expended by plaintiff's counsel and that an hourly rate of $_____ is appropriate. Plaintiff's counsel represents that the attorney fee awarded does not exceed its contract fee with the plaintiff. The court finds that there are no reduction or enhancement factors for

consideration by the court pursuant to Florida Patients Compensation Fund v. Rowe, 472 So. 2d 1145 (Fla. 1985).

(If the court has found that there are reduction or enhancement factors to be applied, then such factors must be identified and explained herein).

[If the fees to be awarded are a flat fee] The requested attorneys' fees are a flat rate fee that the firm's client has agreed to pay in this matter. Given the amount of the fee requested and the labor expended, the court finds that a lodestar analysis is not necessary and that the flat fee is reasonable.

89. Re-establishment of Lost Note. The court finds that the plaintiff has re-established the terms of the lost note and its right to enforce the instrument as required by applicable law. Judgment is hereby entered in favor of the plaintiff as to its request to enforce the lost note.

10. Adequate Protections. Plaintiff shall hold the defendant(s) maker of the note harmless and shall indemnify defendant(s) for any loss defendant(s) may incur by reason of a claim by any other person to enforce the lost note. Adequate protection ~~has been~~shall be provided ~~as required by law~~ by the following means: .....(identify means of security under applicable law: a written indemnification agreement, a surety bond, include specific detail) in the amount of $..... In accord with §702.11(2)(a). Any person seeking to enforce the lost note may proceed directly against Plaintiff and the adequate protection given. The court finds that the foregoing adequately protects the defendant(s), maker of the note, against loss that might occur by reason of a claim by another person to enforce the instrument.

~~Judgment is hereby entered in favor of the plaintiff as to its request to enforce the lost note.~~

911. Jurisdiction Retained. Jurisdiction of this action is retained to enforce the adequate protection ordered and to enter further orders that are proper including, without limitation, a deficiency judgment.

IF THIS PROPERTY IS SOLD AT PUBLIC AUCTION, THERE MAY BE ADDITIONAL MONEY FROM THE SALE AFTER PAYMENT OF PERSONS WHO ARE ENTITLED TO BE PAID FROM THE SALE PROCEEDS PURSUANT TO THE FINAL JUDGMENT. IF YOU ARE A SUBORDINATE LIENHOLDER CLAIMING A RIGHT TO FUNDS REMAINING AFTER THE SALE, YOU MUST FILE A CLAIM WITH THE CLERK NO LATER THAN 60 DAYS AFTER THE SALE. IF YOU FAIL TO FILE A CLAIM, YOU WILL NOT BE ENTITLED TO ANY REMAINING FUNDS.

[If the property being foreclosed on has qualified for the homestead tax exemption in the most recent approved tax roll, the final judgment shall additionally contain the following statement in conspicuous type:] IF YOU ARE THE PROPERTY OWNER, YOU MAY CLAIM THESE FUNDS YOURSELF. YOU ARE NOT REQUIRED TO HAVE A LAWYER OR ANY OTHER REPRESENTATION AND YOU DO NOT HAVE TO ASSIGN YOUR RIGHTS TO ANYONE ELSE IN ORDER FOR YOU TO CLAIM ANY MONEY TO WHICH YOU ARE ENTITLED. PLEASE CHECK WITH THE CLERK OF THE COURT, (INSERT INFORMATION FOR APPLICABLE COURT) WITHIN 10 DAYS AFTER THE SALE TO SEE IF THERE IS ADDITIONAL MONEY FROM THE FORECLOSURE SALE THAT THE CLERK HAS IN THE REGISTRY OF THE COURT. IF YOU DECIDE TO SELL YOUR HOME OR HIRE SOMEONE TO HELP YOU CLAIM THE ADDITIONAL MONEY, YOU SHOULD READ VERY CAREFULLY ALL PAPERS YOU ARE REQUIRED TO SIGN, ASK SOMEONE ELSE, PREFERABLY AN

ATTORNEY WHO IS NOT RELATED TO THE PERSON OFFERING TO HELP YOU, TO MAKE SURE THAT YOU UNDERSTAND WHAT YOU ARE SIGNING AND THAT YOU ARE NOT TRANSFERRING YOUR PROPERTY OR THE EQUITY IN YOUR PROPERTY WITHOUT THE PROPER INFORMATION. IF YOU CANNOT AFFORD TO PAY AN ATTORNEY, YOU MAY CONTACT (INSERT LOCAL OR NEAREST LEGAL AID OFFICE AND TELEPHONE NUMBER) TO SEE IF YOU QUALIFY FINANCIALLY - 30 - FOR THEIR SERVICES. IF THEY CANNOT ASSIST YOU, THEY MAY BE ABLE TO REFER YOU TO A LOCAL BAR REFERRAL AGENCY OR SUGGEST OTHER OPTIONS. IF YOU CHOOSE TO CONTACT (NAME OF LOCAL OR NEAREST LEGAL AID OFFICE AND TELEPHONE NUMBER) FOR ASSISTANCE, YOU SHOULD DO SO AS SOON AS POSSIBLE AFTER RECEIPT OF THIS NOTICE.

ORDERED at ....., Florida, on .....(date).....

_____

Judge

NOTE: Paragraph 1 must be varied in accordance with the items unpaid, claimed, and proven. The form does not provide for an adjudication of junior lienors' claims or for redemption by the United States of America if it is a defendant. The address of the person who claims a lien as a result of the judgment must be included in the judgment in order for the judgment to become a lien on real estate when a certified copy of the judgment is recorded. Alternatively, an affidavit with this information may be simultaneously recorded. For the specific requirements, see section 55.10(1), Florida Statutes; Hott Interiors, Inc. v. Fostock, 721 So. 2d 1236 (Fla. 4th DCA 1998). Committee Note 2014 Amendment. This new form is to be used when the foreclosure judgment re-establishes a lost note.

FORM 1.996(bc).

MOTION TO CANCEL AND RESCHEDULE FORECLOSURE SALE

Plaintiff moves to cancel and reschedule the mortgage foreclosure sale because:

1. On .....(date)..... this Court entered a Final Judgment of Foreclosure pursuant to which a foreclosure sale was scheduled for , 20 .....(date).....

2. The property is is not (check one) subject to a community association governed by Chapter 718, Chapter 719, Chapter 720 or Chapter 721. (if subject to a community association) [Counsel for the community association has been notified of this motion and (consents / objects) to rescheduling the sale.]

32. The sale needs to be canceled for the following reason(s):

a. Plaintiff and Defendant are continuing to be involved in loss mitigation;

b. Defendant is negotiating for the sale of the property that is the subject of this matter and Plaintiff wants to allow the Defendant an opportunity to sell the property and pay off the debt that is due and owing to Plaintiff.

c. Defendant has entered into a contract to sell the property that is the subject of this matter and Plaintiff wants to give the Defendant an opportunity to consummate the sale and pay off the debt that is due and owing to plaintiff.

d. Defendant has filed a ~~Chapter~~ Petition for Relief under the Federal Bankruptcy Code on , 20...., as case number in the (identify bankruptcy court), and relief from the automatic stay [ ] has [ ] has not (check one) been granted by the bankruptcy court;

e. Plaintiff has ordered but has not received a statement of value/appraisal for the property;

f. Plaintiff and Defendant have entered into a Forbearance Agreement;

g. Other

4. The foreclosure sale has been previously cancelled on prior occasions.

a. List dates and reasons for prior cancellation(s):

53. If this Court cancels the foreclosure sale, Plaintiff moves that it be rescheduled.

I hereby certify that a copy of the foregoing ~~M~~motion has been furnished by U.S. mail postage prepaid, facsimile or hand delivery.....(method of service).... to .....(name(s))..... this day of , 20 on .....(date).....

NOTE. This form is used to move the court to cancel and reschedule a foreclosure sale.

REAL PROPERTY, PROBATE AND TRUST LAW
INTEGRITY AWARENESS AND COORDINATION COMMITTEE

Real Property, Probate and Trust Law
Integrity Awareness and Coordination Committee

I. Purpose and Scope

For over fifty years the Real Property, Probate and Trust Law Section of The Florida Bar has served the members of the Section, the lawyers and the citizens of Florida by providing an organized forum to discuss and advance the law of Florida in the areas of real property, probate, trust and guardianship law. The Section now numbers over 60 substantive committees that provide in depth analysis of a widening area of issues. The work of these committees is the basis of the actions by the Section's Executive Council.

The Section's ability to effectively discharge its mission requires that the procedures it utilizes and the positions that it adopts are principled and not motivated by personal or professional gain. The Section's reputation for substantive credibility is essential to its ability to participate effectively in shaping the laws and best practices within our practice areas.

The approximately 10,000 members of the RPPTL Section, as well as the 250 members of the Executive Council, represent a cross section of Florida's legal profession. Large national firms, modest regional firms, and many small and solo practitioners make up the Section and its Executive Council. These attorneys represent thousands of individuals: some members of the Executive Council are employed by or represent banks, trust companies, title companies, condominium associations, developers and others who have specific issues which are considered by the Executive Council.

In June 2013, the then RPPTL Section Chair, William Fletcher Belcher, appointed the Integrity Awareness and Coordination Committee to review how the Section deals with actual and perceived conflict issues ("Committee")[1]. The creation of this special committee was partially in response to public criticism which was levied at the Section as a result of the Section's involvement in foreclosure reform legislation. Additionally, contentious debates on several trust related matters evidenced the need for a thoughtful examination of how the Section is dealing with actual and perceived conflicts of interest. The Chair's charge to the Committee was to "preserve the Section's reputation for integrity by:

[1] The Committee is composed of Jerry Aron and Sandra Diamond, Co-Chairs; Gwynne Young, Michael Swaine, and Andrew Sasso.

- Promoting awareness and understanding of applicable conflict of interest principles and bylaw provisions among components of the Section.
- Coordinating the uniform and consistent application of these principles and provisions within components of the Section; and,
- Other appropriate means."

The task of the Committee includes the consideration of a series of specific questions which posed potential conflict of interest dilemmas or situations which had been encountered or might be encountered within the normal functions of the Section's committees or the deliberation of the RPPTL Executive Council.

II. Review Process

The Committee began its endeavors with a review of Article IX Section 1 of the Section's Bylaws which states:

Section 1. Integrity of Section Proceedings - Disclosure of Conflict and Recusal. *A member of the executive council or any section committee shall not participate in a section matter if circumstances exist that may reasonably be expected to cause that participation to undermine confidence in the integrity of the section, executive council, or section committee. Where any fact or circumstance exists that may reasonably bring into question an accusation of bias, prejudice, or conflict of interest on the part of a member while participating in a section matter, it is the duty and responsibility of any member having knowledge of such fact or circumstance to make full disclosure of such fact or circumstance to the executive council or section committee. A bias, prejudice, or conflict of interest may arise from a member's personal interests, employment, or client relationships. When such an issue arises, the chair or other person presiding over the proceeding may request the member to voluntarily refrain from participation and voting with respect to the matter. In addition, recusal may be ordered by 2/3 of the members present of the executive council or section committee. Upon recusal, the member may not vote or otherwise participate in proceedings concerning the matter. If recusal should have occurred but did not, the integrity of section proceedings and the validity of its actions shall not be adversely affected.*

We reviewed the conflict of interest and integrity provisions of The Florida Bar Board of Governors, the ABA RPTE Section as well as the conflict of interest policies of several nonprofit organizations for guidance. The Committee also reviewed and discussed several scholarly articles on conflict of interest including a comparative analysis of how different professions address conflicts of interest.

Our discussions and deliberations lead us to general consensus on several issues:

1. The Section should encourage the input of a wide range of views in order to understand the actual and potential consequences of each of its decisions. All members (including stakeholders) should be welcomed at the committee

tables and be encouraged to present their views within the debates of the Executive Council.

2. Consultation with other Florida Bar groups as well as representatives from industries and sectors that are impacted by legislation or issues under consideration results in stronger proposals and facilitates consensus among opposing positions.

3. If a member is not exercising independent judgment on an issue they have a duty to disclose the conflict and shall not vote on the issue.

4. The committees of the Section and the Executive Council must be diligent to avoid favoritism and the improper influence of any industries and enterprises.

It should be noted that we have not attempted to define 'conflict of interest" As one author pointed out it is a term of art designated to label a phenomenon lacking a suitable name.[2] As lawyers, we are familiar with typical client conflicts and are sensitive to our professional rules which give us guidance on how to address those conflicts. But as participants in the RPPTL Executive Council or its committees we have no direct client who with informed consent could waive a conflict. We instead are acting to review, debate, teach and advocate issues in the areas of real property, probate and trusts. The Executive Council has a duty to serve the members of the Section and the general public with fairness and candor, free from improper personal or financial influences. We can only accomplish these goals and maintain our credibility if our processes are transparent and free from the appearance of conflicts of interest.

Inevitably, Section members will have personal interests that could impair or reasonably appear to impair a member's independent and unbiased judgment in the fulfillment of the member's professional duties. And, Section members must strive to insure that their personal interest do not conflict with their duties as Section members. However, the Committee also realizes there are issues of common interest among a substantial segment of the membership of the Section (e.g. attorney's fees) that should not require disclosure or recusal of members of the Section.

Finally, the Committee recognized that to continue to maintain the integrity of the Section the members must be ever vigilant to their professional duties and the purpose, *inter alia*, of the Section "to inculcate in its members the principles of duty and service to the public" and "to serve the public and its members by improving the administration of justice and advancing jurisprudence." Section members should be dissuaded from making comments or taking positions, even in an apparent humorous tone, that appear to advocate a position or result that does not fulfill the purpose of the Section or pass the "front-page test."

III. Response to Specific Questions Presented.

[2] Michael Davis and Josephine Johnson, "Conflict of Interest in Four Professions: A Comparative Analysis": 304, in conflict of interest in medical research, education and practice (National Academies Press, 2009)

Chairman, William Fletcher Belcher, charged the Committee with responding to a series of specific questions which attempted to define the issue of integrity within the Section.

1. Should officers or employees of industry and companies who provide financial sponsorship to the Section and who are active members of The Florida Bar in good standing be given any preference or special consideration in appointment to any position that results in Executive Council membership?

   No preference or special consideration should be given to any member of The Florida Bar who is an officer or employee of a company or industry providing financial sponsorship to the Section. However, the Committee does not feel that employment by a private group or industry should in and of itself act to prohibit membership on a committee. The Section should have reasonable balance of all interests on its committees. Some limitations may be appropriate on smaller committees, but generally diversity of views will provide vigorous debate and strengthen committee recommendations.

2. Should industry lobbyists or representatives be permitted to:

   a. Hold a leadership position on a substantive committee that deals with matters in which their industry has a particular interest?

      The Section in recent years has tried to avoid the appointment of lawyers who are also industry lobbyists or representatives as chairs of substantive committees that deal with matters in which their industry has a particular interest. However, the size of the committee, the nature of the committee's task, the specific background and leadership skills of the individual should be considered. These appointments need to balance the scope of the committee's work with potential for conflict or appearance of conflict. Such situations warrant careful monitoring by the Division Director.

   b. Draft legislation (typically as or on a subcommittee) to be advanced by the Section on matters in which their industry has a particular interest. If so, should their industry connection and the industry's interest in the matter be fully disclosed to each component of the Section that takes any action on the legislation?

      There is value to the participation of industry lobbyists or representatives in shaping proposed legislation. Their knowledge of the substantive area and ability to act as a liaison with their particular industry can be a significant contribution to the process. However, the industry's connection and interest in the matter should be fully disclosed at each step of the process.

   c. Participate in debate in committee and Executive Council meetings

on matters in which their industry has a particular interest without making full disclosure of their employment or industry relationship and in the industry's interest in the matter. Although many persons attending those meetings are aware of those matters, some are not.

Members of the Section who are industry lobbyists or representatives should be encouraged to participate in debate at all levels of Section activity. The industry connection and/or interest must be disclosed unless apparent in the judgment of the committee chair or other presiding officer. The manner of that disclosure should be appropriate for the discussion.

d. Vote on matters in which their industry has a particular interest? If so, should their industry connection and the industry's interest in the matter be fully disclosed?

When participating in any Section activity or debate in which a member of the council has a particular interest or a potential conflict of interest, whether that particular interest or potential conflict comes as a result of their connection to a specific industry group or from the representation of a specific client, the effected Executive Council member should appropriately disclose that interest. The member must voluntarily refrain from voting on any matter in which a direct conflict of interest may prevent them from exercising independent judgment.

3. Should officers or employees of industry companies be permitted to:

a. Hold a leadership position on a substantive committee that deals with matters in which their industry has a particular interest?

The Section should use reasonable means to avoid the appearance of bias or conflict of interest. Thus, as a general rule, officers and employees of industry companies should not hold leadership positions on a committee that deals with the matter in which their industry has a particular interest. However, the size of the committee, the nature of the committee's task, the specific background and leadership skills of the individual should be considered. These appointments need to balance the scope of the committee's work and potential for conflict or appearance of conflict. Such situations warrant careful monitoring by the Division Directors.

b. Draft legislation (typically as or on a subcommittee) to be advanced by the Section on matters in which their industry has a particular interest. If so, should their industry connection and the industry's interest in the matter be fully disclosed to each component of the Section that takes any action on the legislation?

The participation of officers or employees of industries can facilitate the drafting of legislation by increasing the awareness of the committee in regard to the practical impact of the proposed legislation and by providing substantive expertise to the process. However, the committee members need to ensure that their connection is disclosed to the committee at all steps of the process.

c. Participating in debate or discussion in Section meetings on matters in which their industry has a particular interest without making full disclosure of their industry employment relationship and the industry's interest in the matter?

Members of the Section who are officers or employees of industries or companies should be encouraged to participate in the debate at all levels of Section activity. The industry connection and/or interest should be disclosed. The manner of that disclosure should be appropriate for the discussion.

d. Vote on matters in which their industry has a particular interest? If so, should their industry employment relationship and the industry's interest in the matter be fully disclosed?

When participating in any Section activity or debate in which a member of the council has a particular interest or a potential conflict of interest, whether that particular interest or potential conflict comes as a result of their connection to a specific industry group or whether that conflict results from the representation of a specific client, the affected Executive Council member must appropriately disclose that interest. The member should voluntarily refrain from voting on any matter in which a direct conflict of interest may prevent them from exercising independent judgment.

4. When full disclosure of a matter is required by a member, does the fact that the member believes that other members participating in the matter are already aware of the matter that is required to be disclosed excuse the member from making disclosure?

The manner and the frequency of the disclosure will of necessity be driven by the context of the discussion and may vary depending on the size of the committee or whether the discussion is taking place on the floor of the Executive Council. In a very small committee, it may be unnecessary for an individual to disclose their relationship or employment more than one time and have that information noted in the committee minutes. However, in a larger committee it may be necessary for the individual to disclose their relationship at the beginning of each committee meeting or the first time that individual rises to address the committee. Our council and committee structure has

shown substantial growth. There are many new members on our committees. The affiliation of industry representatives and employers changes with frequency. Even if we have known a specific committee member or Executive Council member for many years the other members of the committee may be unaware or simply have forgotten the speaker's relationship or connection to a specific industry. There are also instances in which an individual member of a committee or the Executive Council is representing a specific client who would be impacted by a pending proposal. Council members have historically disclosed those individual representations in a general sense without violating client confidentiality and should continue to do so.

5. When full disclosure of a matter is required, should the disclosure always be reflected in the minutes of the meeting?

The integrity of the Section requires open discussion and transparency. The best practice would be for any disclosures or potential conflicts of interest to be noted in the minutes of the meeting. The minutes should note any individuals who recuse themselves from participation in a discussion or a vote on specific matter.

IV. Conclusions and Procedural Recommendation to Facilitate RPPTL Integrity Awareness.

All members of the RPPTL Executive Council and the Section need to be committed to promoting the integrity of the Section and to avoid bias, prejudice and conflicts of interest which may arise from a member's personal interest, employment or client relationships. The strength of the Section lies in the diversity of its members, their expertise and their points of view. Some of our members represent specific clients or groups of clients that will be affected by Section positions. Other members may be employed by or affiliated with industries or institutions impacted by our actions. As the Executive Council grows and as committee participation expands, we cannot assume that professional relationships, much less individual client relationships will be apparent or known. Thus we offer the following suggestions:

- Encouragement by each committee chair and Division Director that those rising to address an issue during debate shall state any employed relationship which might be perceived to be a conflict of interest or to otherwise make a declaration of client relationship which would have the appearance of impacting the speaker's position.

- Prior to each committee or Executive Council vote, the chair or the presiding officer shall first ask for abstentions which shall be noted in the minutes.

- The committee chair or other presiding officer may request a member to voluntarily refrain from voting with respect to a specific matter.

- In addition, recusal may be ordered by 2/3 of the members present and voting.

- The RPPTL Bylaws should be modified to ensure that an abstention or failure to cast a vote shall not skew the totals necessary for approval of any matter. The Committee has proposed changes to the RPPTL Bylaws, which are attached.

BYLAWS

View Section Bylaws PDF

BYLAWS OF THE REAL PROPERTY, PROBATE AND TRUST LAW SECTION

Article I

NAME AND PURPOSES

Section 1. Name. The name of this organization is "The Real Property, Probate and Trust Law Section of The Florida Bar" ("section").

Section 2. Purposes. The purposes of the section are:

(a) To provide an organization within The Florida Bar open to persons having an interest in real property (including construction), probate, trust, or related fields of law, that furthers the knowledge and practices of members in those areas;

(b) To inculcate in its members the principles of duty and service to the public; and

(c) To serve the public and its members by improving the administration of justice and advancing jurisprudence in the fields of real property (including construction), probate, trust, and related fields of law, through all appropriate means, including the development and implementation of legislative, administrative, and judicial positions; continuing legal education programs; standards for ethical and competent practice by lawyers; and professional relationships between real property (including construction), probate, and trust lawyers, and other lawyer and nonlawyer groups.

Article II

SECTION MEMBERSHIP

Section 1. Membership Types. The membership of the section shall be the active members ("active section member"), affiliate members ("affiliate section member"), and honorary members ("honorary section member") hereafter described:

(a) *Active Section Member.* Any member of The Florida Bar in good standing may become an active section member by applying for such membership and paying the section's annual dues. Any person who is an active section member who ceases to be a member of The Florida Bar in good standing also ceases to be a member of the section. Reinstatement as a member of The Florida Bar in good standing shall automatically reinstate the person as an active section member, provided that the member is current in the payment of section dues.

(b) *Affiliate Section Member.* The Executive Council of the section ("executive council") may, in its discretion (after review and approval of the applicant's qualifications for membership), enroll as an affiliate section member, any person who has shown the dual capacity of interest in and contribution to the section's activities and who is either a law student enrolled in an accredited Florida law school, a graduate of any law school, or a legal assistant, as defined below. Affiliate section members shall pay the annual dues prescribed by the executive council and shall have all the privileges of active section members, except that they may not vote or hold any office or position in the section. The number of affiliate section members shall not exceed 1/3 of the number of active section members.

For purposes of this Article, a legal assistant is a person who assists a member of The Florida Bar in the delivery of legal services in the area of real property (including construction), probate, trust, or related fields of law, and who has satisfied the following minimum requirements:

1. Successful completion of the certified legal assistant (CLA) examination of the National Association of Legal Assistants, Inc.;

2. Graduation from an ABA-approved program of study for legal assistants or graduation from any accredited law school;

3. Graduation from a course of study for legal assistants which is institutionally accredited, but not ABA-approved, and which requires not less than the equivalent of 60 semester hours of classroom study;

4. Graduation from a course of study for legal assistants, other than those set forth in 2 and 3, above, plus not less than 6 months of in-house training as a legal assistant;

5. A bachelor degree in any field, plus not less than 1 year of in-house training as a legal assistant; or

6. Five years of in-house training as a legal assistant.

(c) *Honorary Section Member.* Any person whom the executive council shall find to have made outstanding contributions in the fields of real property (including construction), probate, trust, or related fields of law, may be made an honorary section member by the executive council. An honorary section member shall have no vote at section meetings, shall not be entitled to hold any office or position in the section, and shall not be required to pay dues.

Section 2. Membership Year. The membership year of the section runs concurrently with the membership year of The Florida Bar.

Section 3. Dues. The executive council shall establish the amount of annual section dues for each type of section membership, subject to approval by the Board of Governors of The Florida Bar ("board of governors"). Annual section dues shall be payable in advance of each year of section membership. There will be no proration of annual section dues.

(a) The Florida Bar shall bill active members of the section for annual section dues simultaneously with billing for regular membership dues of The Florida Bar. Members of The Florida Bar who become active section members shall not be required to pay annual section dues for the first fiscal year following their admission to The Florida Bar.

(b) Annual section dues for affiliate members of the section shall initially accompany applications for affiliate section membership and shall thereafter be paid by the date that membership dues for The Florida Bar become due.

(c) Any member of the section whose annual section dues are not paid by the date Florida Bar membership dues become delinquent ceases to be a member of the section.

Section 4. Membership Standards. All members of the section shall be required to observe the standards of professionalism and ethical conduct expected of members of The Florida Bar, and legal assistants who are affiliate section members shall also be required to observe and adhere to the Code of Ethics and Professional Responsibility established by the National Association of Legal Assistants, Inc. The executive council, by 2/3 vote of the members present **and voting** at a meeting, may terminate section membership for misconduct involving moral turpitude or the failure to observe the standards of conduct established by these bylaws. Any proposed termination of section membership by the executive council shall be an agenda

item at an in-state meeting, and the affected member shall be given reasonable notice of the basis for the proposed termination and an opportunity to be heard at that meeting.

Article III
ORGANIZATION

The section is divided into 2 divisions, "the real property law division" and "the probate and trust law division". The section and its real property law division shall be served by committees and section liaisons that operate under the supervision of the real property law division director. The section and its probate and trust law division shall be served by committees and section liaisons that operate under the supervision of the probate and trust law division director. The section shall also be served by general standing committees and section liaisons that operate under the supervision of the chair-elect.

Article IV
OFFICERS, ELECTED POSITIONS, AND EXECUTIVE COMMITTEE

Section 1. Officers. The officers of the section are the section chair, the chair-elect, the secretary, the treasurer, the real property law division director, the probate and trust law division director, the immediate past section chair, and the at-large members director ("section officers"). The section officers, the representatives for out-of-state members of the section, and the at-large- members, shall be selected in the manner set forth in this Article IV.

Section 2. Qualifications. No person may serve as a section officer or in a position as representative for out-of-state members or at-large-members unless they are an active section member, and the loss of that status shall cause the office or position to be vacant. If status as an active section member ceases because of a loss of status as a member of The Florida Bar in good standing that is solely attributable to a delinquency in:

(i) the payment of membership fees or dues; or

(ii) completing continuing legal education requirements,

reinstatement as a member of The Florida Bar in good standing and as an active section member shall automatically reinstate the member to the vacant office or position if it has not been filled.

Section 3. Executive Committee. The section officers, together with the chairs of the section CLE seminar coordination committee and legislation committee, shall serve as the executive committee of the section ("executive committee"), which shall be the planning agency for the executive council. The executive committee shall also have the full power and authority to exercise the function of the executive council when and to the extent authorized by the executive council with respect to a specific matter, and on any other matter which the executive committee reasonably determines requires action between meetings of the executive council. All action taken by the executive committee on behalf of the executive council shall be reported to the executive council at its next meeting. The executive committee shall not take any action that conflicts with the policies and expressed wishes of the executive council. The executive committee shall also:

(i) make recommendations for consideration by the chair-elect in appointing chairs and vice chairs of section committees and section liaisons;

(ii) make recommendations for consideration by the section's long-range planning committee ("long-range planning committee") in submitting nominees for at-large- members; and (iii) perform such other duties as may be directed by the executive council or prescribed in these bylaws.

Section 4. Nominating Procedure.

(a) The long-range planning committee, which shall consist of all past section chairs who are members of the executive council and be chaired by the chair-elect, shall submit nominees to the section for election to the offices of chair-elect, secretary, real property law division director, probate and trust law division director, treasurer, at-large-members director, and the positions of representatives for out-of-state members and at-large members. If the office of chair-elect becomes vacant during the year, the nominations submitted by the long-range planning committee for the following year shall include a nominee for the office of section chair. The long-range planning committee shall notify the members of the section of the names of the nominees no later than 60 days prior to the section's annual meeting ("election meeting"). In submitting nominations for at-large-members, the long-range planning committee shall consider recommendations from the at-large-members director and the executive committee.

(b) No nominations for any elected office or position other than those made by the long- range planning committee will be permitted, except that nominations may be made by a written nominating petition signed by 25 or more active section members and submitted to the section chair not less than 30 days prior to the election meeting. If more than one person is nominated for any elected office or position, the section chair, assisted by such special committees as the section chair may appoint, will announce the procedures to be followed for that election.

(c) Each nominee will be permitted to prepare a statement of no more than 500 words, containing such information about the nominee as the nominee may choose, to be reproduced and distributed by the section to its members, either as an article in the section's publication, Action Line, or separately. Any such statement shall also be distributed at the election meeting.

Section 5. Election and Term of Offices and Positions.

(a) The section officers, the representatives for out-of-state members, and the at-large- members, shall be elected by majority vote of the active section members in physical attendance **and voting** at the election meeting, which shall be held prior to July 1 of each year. Voting by proxy shall not be permitted. At the election meeting the section chair, chair-elect, and secretary shall determine the number of active section members in physical attendance and ~~entitled to vote~~ **voting**; and voting will be by written, secret ballot prepared in advance. If no nominee receives a majority vote for an office or position, additional balloting will take place between the 2 nominees receiving the greatest number of votes until the required majority is obtained. Results of the election will be immediately announced by the section chair.

(b) The nominees so elected shall serve for a period of 1 year, beginning on July 1. The chair-elect shall automatically become section chair upon expiration of the term as chair-elect or upon the death, resignation, or removal of the section chair.

Section 6. Duties of Officers.

(a) *Section Chair.* The section chair shall be the chief executive officer and principal representative of the section, and shall preside at all meetings of the section, the executive council, and the executive committee. The section chair shall also be responsible for reports to The Florida Bar or the board of governors and for performing such other duties as may be prescribed in these bylaws or which customarily pertain to the office of section chair. The section chair is an ex-officio member of all section committees.

(b) *Chair-elect.* The chair-elect shall be responsible for: (i) the general standing committees and any projects assigned to them, including the preparation and submission of any required reports; (ii)

such duties as the section chair, the executive council, or the executive committee may designate; and (iii) performing such other duties as may be prescribed in these bylaws or customarily pertain to the office of chair-elect. In addition, in the case of the temporary disability or absence of the section chair, the chair-elect shall serve as acting section chair, but only for the duration of the section chair's disability or absence. Any issue concerning the disability or absence of the section chair shall be determined by the executive committee, subject to review by the executive council.

(c) *Secretary.* The secretary shall make and record: (i) minutes of meetings of the executive council (including record of attendance); (ii) significant actions taken by the executive committee, including all actions which exercise any function of the executive council; and (iii) the election results at the election meeting, and shall file all of those records with the permanent records of the section at The Florida Bar headquarters in Tallahassee. The secretary shall also report and keep a record of all policies adopted by the section as a separate record.

(d) *Division Directors.* The real property law division director and the probate and trust law division director shall be responsible for the section committees within their respective divisions, and for the projects assigned to them, including the preparation and submission of reports of such section committees as may be required.

(e) *Treasurer.* The treasurer and the appropriate staff of The Florida Bar shall make certain that the financial affairs of the section are administered in a manner authorized by the section's budget and in accordance with the standing policies of the board of governors. The treasurer shall monitor and review for correctness all accounts, reports and other documents pertaining to section funds, revenues and expenditures that are furnished by the staff of The Florida Bar. No reimbursement may be made to any member of the section without approval of the treasurer, and any reimbursement to the treasurer must be approved by the section chair or chair-elect. The treasurer shall: (i) work with the chair-elect to prepare and submit a projected budget to the executive council; (ii) report from time to time on the section's present and projected financial condition, advising the executive committee and the executive council as to the financial impact of any proposed action that might have a significant impact on the financial condition of the section; and (iii) prepare such other recommendations and special reports of financial affairs of the section as may be requested by the section chair.

(f) *At-Large-Members Director.* The at-large-members director shall:

(i) in consultation with the executive committee, define any responsibilities of the at-large-members;

(ii) be responsible to the section for the at-large-members;

(iii) evaluate the performance of the at-large-members on an annual basis; and

(iv) provide recommendations for consideration by the long-range planning committee in submitting nominees for at-large-members.

(g) *Immediate Past Section Chair.* The immediate past section chair shall provide counsel, guidance and advice to the executive committee.

Section 7. Vacancies.

(a) If the office of section chair becomes vacant, the chair-elect shall immediately assume the office of section chair, and shall serve as section chair for the remainder of the unexpired term, as well as for the following term for which the chair-elect was elected to serve as section chair.

(b) If the office of chair-elect becomes vacant, the section chair shall assume the duties of the office of chair-elect for the remainder of the unexpired term. In that event, at the next election meeting, a section chair shall be nominated and elected in the manner provided in these bylaws.
(c) If the offices of section chair and chair-elect both become vacant, the long-range planning committee shall convene an emergency meeting and select a qualified person to serve as section chair for the remainder of the unexpired term. In that event, the person selected as section chair shall also assume the duties of the office of chair-elect for the remainder of the unexpired term and, at the next election meeting, a section chair shall be nominated and elected in the manner provided in these bylaws.
(d) If any office other than section chair or chair-elect becomes vacant within 6 weeks of the next scheduled in-state meeting of the executive council, the vacancy shall be filled for the remainder of the unexpired term by the executive council at that meeting. If no in-state meeting is scheduled within 6 weeks following the creation of such a vacancy, it shall be filled for the remainder of the unexpired term by the executive committee.
(e) Vacancies in the positions of representative for out-of-state members and at-large- members shall be filled by the section chair.

Article V
EXECUTIVE COUNCIL

Section 1. Power and Duties. The executive council is the governing body of the section and shall have the power and duty to fully administer these bylaws, including the power to exercise all authority expressed or implied in these bylaws and to employ necessary personnel on behalf of the section.

Section 2. Membership. The executive council shall consist of the section chair, the chair-elect, the real property law division director, the probate and trust law division director, the treasurer, the secretary, the at-large-members director, the chairs and vice chairs of section committees, the section liaisons , the member of the board of governors appointed as its liaison representative to the section, the at-large-members, the past section chairs, and the representatives for out-of-state members of the section.

Section 3. At-Large-Members and Regional Representation. The existence of the at- large-members category is intended to help the section achieve the goal of maintaining active, productive members on the executive council, while preserving regional representation. To be considered for such a position, a prospective at-large-member must demonstrate the willingness and ability, through previous committee leadership or otherwise, to assist the section with its needs. To the extent that the section officers, chairs and vice chairs of section committees, section liaisons, and representatives for out-of-state members of the section serving on the executive council do not include geographical representation from each judicial circuit and outside of Florida, the at-large-members should include such representation when reasonably practicable.

Section 4. Attendance. Regular attendance by executive council members at executive council meetings is requisite to the proper performance of their duties and responsibilities. Accordingly, if any past section chair is absent from 10 consecutive in-state executive council meetings, or if any other member of the executive council is absent from 3 consecutive in-state executive council meetings in any membership year, such member shall be deemed to have resigned from the executive council, and any section office or position held by that person shall be deemed vacant. In

such event, the resigned member shall not be eligible for election to or membership on the executive council for the next succeeding membership year unless: (i) the executive committee, upon a showing of good cause for the absences, waives the attendance requirement for the membership year involved; and (ii) the waiver is announced at a formal meeting of the executive council and duly recorded in the minutes of the meeting. Any vacancy created by the absence of a member as herein provided shall be filled as provided in these bylaws.

Article VI
SECTION COMMITTEES AND LIAISONS

Section 1. Committees. The section chair shall have the authority to establish and dissolve such committees and liaison positions as the section chair deems necessary or advisable, except that the section chair may not dissolve the section legislation committee or the CLE seminar coordination committee. The section chair shall promptly report such changes to the executive council, and they shall be effective until and unless disapproved by the executive council.

Section 2. Section Committee Chairs and Liaisons. Prior to July 1 of each year, after considering the recommendations of the executive committee, the chair-elect shall make the following appointments for the coming year: (i) chairs of the section's real property law division committees, and such vice chairs of those committees as the chair-elect deems necessary; (ii) chairs of the section's probate and trust law division committees, and such vice chairs of those committees as the chair-elect deems necessary; (iii) chairs of the section's general standing committees, and such vice chairs of those committees and as the chair-elect deems necessary; and, (iv) section liaisons to other sections and groups. The section chair shall have the power to remove chairs and vice chairs of section committees and section liaisons if the section chair believes that it is in the best interest of the section to do so, and to fill vacancies in those positions (including vacancies resulting from the section chair's creation of new section committees or liaison positions).

Section 3. Committee Members. The chair of each section committee may appoint and remove members to and from that committee, except that a committee chair may not remove a vice chair of the committee.

Section 4. Section Membership Requirement. No person may serve as a member of any section committee unless they are a member of the section. No person may serve as a: (i) chair, vice chair, or voting member of any section committee; or (ii) section liaison, unless they are an active section member, and the loss of that status shall cause the position to be vacant. If status as an active section member ceases because of a loss of status as a member of The Florida Bar in good standing that is solely attributable to a delinquency in: (i) the payment of membership fees or dues; or (ii) completing continuing legal education requirements, reinstatement as a member of The Florida Bar in good standing and as an active section member shall automatically reinstate the member to the vacant position if it has not been filled.

Section 5. Committee Reports. The chair of each section committee shall submit a written annual report of the committee's activities during the year to the executive committee by the date requested by the section chair. All recommendations contained in such reports are confidential and shall not be disclosed outside the executive committee without approval of the section chair.

Article VII MEETINGS

Section 1. Annual/Election Meeting of the Section. The section chair shall designate the annual meeting of the section each year, which shall be the election meeting and be held prior to July 1. The

executive council may call special meetings of the section provided at least 30 days notice thereof shall be given. The active section members in physical attendance at any meeting of the section shall constitute a quorum for the transaction of business and a majority vote of those in physical attendance **and voting** will be binding. Voting by proxy shall not be permitted.

Section 2. Executive Council Meetings. There shall be no fewer than 3 in-state meetings of the executive council each year. The executive council may act or transact business herein authorized, without meeting, by written or electronic approval of the majority of its members. The section chair may call meetings of the executive council by giving no less than 15 days notice to its members. Those present at a meeting of the executive council duly called will constitute a quorum and a majority vote of those present **and voting** will be binding, unless a greater majority is required by these bylaws for a particular matter. Voting by proxy shall not be permitted.

Section 3. Executive Committee Meetings. The executive committee shall meet as directed by the section chair, and shall hold an organizational meeting prior to each membership year at a time, date, and place selected by the section chair. The section chair shall fix the date and location of each meeting and shall give written, electronic, or oral notice of such date and location to each executive committee member at least 7 days prior to the meeting. A majority of the executive committee may exercise its powers unless a greater majority is required by these bylaws for a particular matter, and it is not necessary that a formal meeting be held for action, action by mail, e-mail, or telephone being sufficient. Voting by proxy shall not be permitted.

Section 4. Conduct of Meetings. The current edition of Robert's Rules of Order shall govern the conduct of all meetings of the section and its subdivisions, except that provisions contained in these bylaws shall prevail over any conflicting provision in those Rules. The section chair may appoint a parliamentarian to advise and assist the section chair or any other person presiding over a meeting of the section or any of its subdivisions in connection with any procedural issues that may arise. Non-members of the executive council may address the executive council with the permission of the section chair or upon 2/3 vote of the members of the executive council present **and voting** (without debate).

Article VIII
LEGISLATIVE, ADMINISTRATIVE, AND JUDICIAL POSITIONS

Section 1. Authority. The section may be involved in legislative, administrative, and judicial (including amicus curiae and court rule) activities that are within the purview of the section. Activities are within the purview of the section if they are significant to the judiciary, the administration of justice, the fundamental legal rights of the public, or the interests of the section, provided they are consistent with the purposes of the section and the policies promulgated by the board of governors, including the requirements that:

(a) the issue involved is within the substantive areas of real property (including construction), probate, trust, or related fields of law;

(b) the issue is beyond the scope of permissible legislative activity of The Florida Bar, or is within the permissible scope of legislative activity of The Florida Bar, but the proposed section position is not inconsistent with an official position of The Florida Bar on that issue; and

(c) the issue is not one that carries the potential of deep philosophical or emotional division among a substantial segment of the membership of The Florida Bar.

Section 2. Section Positions. A "section position" is a legislative, administrative, or judicial (including amicus curiae and court rule) position that complies with Section 1 of this Article and has been adopted by the section in accordance with this Article. A section position, which may be expressed as a concept, may either support or oppose a matter. Any advocacy by the section shall be based upon a section position and comply with the requirements of this Article.

Section 3. Legislation Committee. The section legislation committee shall consist of a chair, a vice chair for real property, a vice chair for probate and trust, the section chair, the chair- elect, the director of the real property law division, the director of the probate and trust law division, and such other members of the executive council as are appointed by the chair of the section legislation committee with the approval of the section chair. The section legislation committee shall coordinate the legislative activities of the section and act as a liaison between: (i) the executive council (or its executive committee); and (ii) the section lobbyist and legislative and administrative bodies.

Section 4. Procedures for Adopting and Reporting Section Positions.

(a) A proposed section position shall be an agenda item and supporting documentation shall be distributed to the executive council at least one week prior to the executive council meeting unless those requirements are waived by 2/3 of the members of the executive council present at that meeting.

(b) A section position may be proposed by a section committee.

(c) To adopt a section position, the executive council must, by a 2/3 vote of the members present **and voting**: (i) find that the proposal is within the purview of the section, as defined in Section 1 of this Article; and (ii) approve the proposal. Voting by proxy shall not be permitted. Whenever, because of time constraints, the executive council cannot meet to adopt a section position prior to the time when legislative, administrative, or judicial action is required, the executive committee may, by a 2/3 vote of its members **present and voting**, adopt a section position. Any section position adopted by the executive committee must be reported to the executive council at its next meeting.

(d) Written notice of the adoption of a section position shall be promptly given to The Florida Bar, and it shall be circulated for comment to all divisions, sections, and committees of The Florida Bar that are believed to be interested in the matter.

(e) A section position may not be advanced unless it has been submitted to, and not disapproved by, the board of governors. A section position shall remain in force for the current biennial legislative session unless rescinded by the board of governors.

(f) In even-numbered years, the section legislation committee shall recommend those section positions to be renewed at the executive council meeting held in conjunction with the election meeting of the section.

(g) The section shall not participate as an amicus curiae without the consent of the board of governors.

(h) Section positions shall be clearly identified as positions of the section, and not those of The Florida Bar.

Section 5. Expenses Incurred in Advancing Section Positions. If the section lobbyist or section chair requests the appearance of a section member to advance a section position, the member's reasonable expenses shall be paid by the section in accordance with its budgetary policies.

Section 6. Section Lobbyist. Subject to the approval of the board of governors, the section may retain a lobbyist to assist the section in its legislative activities or matters.

Article IX MISCELLANEOUS

Section 1. Integrity of Section Proceedings - Disclosure of Conflict and Recusal. The section's **ability to effectively discharge its mission requires that the procedures it utilizes and the positions that it adopts are principled and not motivated by personal or professional gain. The section seeks to encourage the input of a wide range of views in order to understand the actual and potential consequences of each of its decisions. All members are welcome to present their views within the debates of the executive council and its committees** However,a member of the executive council or any section committee shall not ~~participate in~~ vote on a section matter if circumstances exist that may reasonably be expected to cause that vote ~~participation~~ to undermine confidence in the integrity of the section, executive council, or section committee. Where any fact or circumstance exists that may reasonably bring into question an accusation of bias, prejudice, or conflict of interest on the part of a member while participating in a section matter, it is the duty and responsibility of any member having knowledge of such fact or circumstance to make full disclosure of such fact or circumstance to the executive council or section committee. A bias, prejudice, or conflict of interest may arise from a member's personal interests, employment, or client relationships. When such an issue arises, the chair or other person presiding over the proceeding may request the member to voluntarily refrain from ~~participation and~~ voting with respect to the matter. In addition, recusal may be ordered by 2/3 of the members ~~present~~ of the executive council or section committee who are present and voting. Upon recusal, the member may not vote ~~or otherwise participate~~ in proceedings concerning the matter. If recusal should have occurred but did not, ~~the integrity of section proceedings and~~ the validity of its actions shall not be adversely affected.

Section 2. Action of The Florida Bar. No action of the section shall be represented or construed as the action of The Florida Bar until it has been approved by The Florida Bar.

Section 3. Compensation and Expenses. No salary or other compensation may be paid to any member of the section for performance of services to the section, but members of the section may be reimbursed for such reasonable and necessary telephone expenses, reproduction expenses and other similar out-of-pocket expenses that such member incurs in the performance of services for the section.

Section 4. Policies of the Section. Policies adopted by the executive council, including section policies, shall be maintained in a separate journal at The Florida Bar Headquarters in Tallahassee, Florida together with the other official records of the section.

Section 5. Amendments. These bylaws may be amended only with the consent of the board of governors upon recommendation made by the executive council.

Section 6. Notice. Any requirement in these bylaws that notice (whether written or otherwise), information, or materials be furnished may be satisfied by: (i) any method of delivery specified in the requirement; (ii) transmitting the notice, information or materials by e-mail to any e-mail address provided by the recipient to The Florida Bar; or (iii) posting the notice, information, or materials to the section's website and notifying the member of the posting by e- mail to any e-mail address provided by the recipient to The Florida Bar.

Section 7. Effective Date. These bylaws shall be effective as of July 1, 2010, or upon their adoption by the executive council, or upon their approval by the board of governors, whichever occurs later.

Upon the effective date of these bylaws and for the remainder of the term for which they were elected, each existing circuit representative shall automatically become an at-large-member, and the existing circuit representatives director shall automatically become the at-large-members director.

NOTE: These bylaws were approved by the Board of Governors on May 27, 2011, and by the Executive Council on May 28, 2011.

PROPOSED 2015 RPPTL SECTION BYLAW AMENDMENTS

The proposed bylaw amendments are summarized as follows:

1. Elimination of the Florida law school restriction for affiliate section membership by law students enrolled in an accredited law school. The purpose of this proposed amendment is to broaden the base of law students who may become affiliate section members.

2. Clarification that: (i) section committees may have co-chairs; and (ii) the section legislation committee and the section CLE seminar coordination committee may have co-chairs for each of the section's divisions, which co-chairs are voting members of the executive committee.

BYLAWS
REAL PROPERTY, PROBATE AND TRUST LAW SECTION

* * * *

Article II
SECTION MEMBERSHIP

Section 1. Membership Types. The membership of the section shall be the active members ("active section member"), affiliate members ("affiliate section member"), and honorary members ("honorary section member") hereafter described:

* * * *

(b) *Affiliate Section Member.* The Executive Council of the section ("executive council") may, in its discretion (after review and approval of the applicant's qualifications for membership), enroll as an affiliate section member, any person who has shown the dual capacity of interest in and contribution to the section's activities and who is either a law student enrolled in an accredited ~~Florida~~ law school, a graduate of any law school, or a legal assistant, as defined below. Affiliate section members shall pay the annual dues prescribed by the executive council and shall have all the privileges of active section members, except that they may not vote or hold any office or position in the section. The number of affiliate section members shall not exceed 1/3 of the number of active section members.

* * * *

Article IV
OFFICERS, ELECTED POSITIONS, AND EXECUTIVE COMMITTEE

* * * *

Section 3. Executive Committee. The section officers, together with the chairs of the section CLE seminar coordination committee and legislation committee, shall serve as the executive committee of the section ("executive committee"), which shall be the planning agency for the executive council. In the event that the section CLE seminar coordination committee and/or the section legislation committee have a co-chair for the real property law division and a co-chair for the probate and trust law division, each such co-chair shall be a member of the executive committee and entitled to one vote. The executive committee shall also have the full power and authority to exercise the function of the executive council when and to the extent authorized by the executive council with respect to a specific matter, and on any other matter which the executive committee reasonably determines requires action between meetings of the executive council. All action taken by the executive committee on behalf of the executive council shall be reported to the executive council at its next meeting. The executive committee shall not take any action that conflicts with the policies and expressed wishes of the executive council. The executive committee shall also:

(i) make recommendations for consideration by the chair-elect in appointing chairs and vice chairs of section committees and section liaisons;
(ii) make recommendations for consideration by the section's long-range planning committee ("long-range planning committee") in submitting nominees for at-large-members; and
(iii) perform such other duties as may be directed by the executive council or prescribed in these bylaws.

* * * *

Article VI
SECTION COMMITTEES AND LIAISONS

* * * *

Section 2. Section Committee Chairs and Liaisons. Prior to July 1 of each year, after considering the recommendations of the executive committee, the chair-elect shall make the following appointments for the coming year: (i) chairs of the section's real property law division committees, and such vice chairs of those committees as the chair-elect deems necessary; (ii) chairs of the section's probate and trust law division committees, and such vice chairs of those committees as the chair-elect deems necessary; (iii) chairs of the section's general standing committees, and such vice chairs of those committees and as the chair-elect deems necessary; and, (iv) section liaisons to other sections and groups. The section chair shall have the power to remove chairs and vice chairs of section committees and section liaisons if the section chair believes that it is in the best interest of the section to do so, and to fill vacancies in those positions (including vacancies resulting from the section chair's creation of new section committees or liaison positions). As used in these bylaws in reference to section committees, the term "chair" shall include co-chairs.

* * * *

Article VIII
LEGISLATIVE, ADMINISTRATIVE, AND JUDICIAL POSITIONS

Section 3. Legislation Committee. The section legislation committee shall consist of a chair, a vice chair for real property, and a vice chair for probate and trust, or a co-chair for real property and a co-chair for probate and trust; the section chair~~,~~; the chair-elect~~,~~; the director of the real property law division~~,~~; the director of the probate and trust law division~~,~~; and such other members of the executive council as are appointed by the chair of the section legislation committee with the approval of the section chair. The section legislation committee shall coordinate the legislative activities of the section and act as a liaison between: (i) the executive council (or its executive committee); and (ii) the section lobbyist and legislative and administrative bodies.

* * * *

RATES AND MULTIPLE PUBLICATION DISCOUNT

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Full-page	$1,200.00	$2,160.00	$3,060.00	$3,600.00
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Rev. 7/18/2013

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As an author, you may send an email query (article proposal) to an editor of ActionLine (see list of editors on the committee directory) if the article is not yet written.

Contents of query: title, author, summary of article, approximate length of article (i.e. usually between 1,000-3,000 words) and timing of submission. If you wish the article to be published in a particular issue (spring, summer, fall or winter), please state. Also include your contact information. The editor will contact you upon receipt to discuss the article.

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- Also add end notes, as necessary, to not impede the flow of the article with extraneous but important notations.
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The article should be sent to the editor that solicited the article or if none, to the email address shown on the cover sheet. If It will be reviewed and corrected, as necessary, for punctuation, grammar and minor changes in syntax. It will be sent back to the author if corrections are required for content, flow or substantial changes in syntax. All articles are subject to approval by editorial staff as to content and placement. If the article is chosen to appear in an issue of ActionLine, the editor to whom you submitted the article will contact you with the specifics.

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Spring 1/31
Summer 4/30
Fall 7/31
Winter 10/31

Rev. 7/18/2013

CHANGES TO THE FLORIDA STATUTES THAT ARE NEEDED WHEN SAME SEX MARRIAGES OCCUR OR ARE RECOGNIZED IN FLORIDA

UPDATED TUESDAY, FEBRUARY 17, 2015

§1.01 Definitions.[i], [ii]—

(20) Gender Neutrality of Certain Marriage Terms.--

(a) As of the "Effective Date,"

1. The word "marriage" shall defined as a marriage between persons of either the opposite-sex or the same-sex, regardless of the jurisdiction in which the marriage between such persons occurred and the date upon which such marriage occurred.

2. The words "spouse," "husband" and "wife" shall be defined as general neutral and shall each apply to a married person regardless of such person's gender.

(b) It is the intent of the Legislature that this section govern the application of the determination that Florida's statutory and constitutional bans on same sex marriage are unconstitutional and to provide for the prospective application of that determination as of the Effective Date. Therefore, for purposes of subsection (a) of this section, the "Effective Date" shall be January 5, 2015.[iii]

§689.11 Conveyances between ~~husband and wife~~ spouses direct; homestead.—

(1) A conveyance of real estate, including homestead, made by one spouse to the other shall convey the legal title to the grantee spouse in all cases in which it would be effectual if the parties were not married, and the grantee need not execute the conveyance. An estate by the entirety may be created by the action of the spouse holding title:

(a) Conveying to the other by a deed in which the purpose to create the estate is stated; or

(b) Conveying to both spouses.

(2) All deeds heretofore made by ~~a husband direct to his wife or by a wife direct to her husband~~ one spouse direct to the other spouse are hereby validated and made as effectual to convey the title as they would have been were the parties not married;

(3) Provided, that nothing herein shall be construed as validating any deed made for the purpose, or that operates to defraud any creditor or to avoid payment of any legal debt or claim; and

(4) Provided further that this section shall not apply to any conveyance heretofore made, the validity of which shall be contested by suit commenced within 1 year of the effective date of this law.

History.—s. 1, ch. 5147, 1903; GS 2457; RGS 3797; CGL 5670; s. 6, ch. 20954, 1941; s. 1, ch. 23964, 1947; s. 1, ch. 71-54.

§689.111 Conveyances of homestead; power of attorney.—

(1) A deed or mortgage of homestead realty owned by an unmarried person may be executed by virtue of a power of attorney executed in the same manner as a deed.

(2) A deed or mortgage of homestead realty owned by a married person, or owned as an estate by the entirety, may be executed by virtue of a power of attorney executed solely by one spouse to the other, or solely by one spouse or both spouses to a third party, provided the power of attorney is executed in the same manner as a deed. Nothing in this section shall be construed as

dispensing with the requirement that ~~husband and wife~~ both spouses join in the conveyance or mortgage of homestead realty, but the joinder may be accomplished through the exercise of a power of attorney~~.~~; except that any deed or mortgage, including any deed or mortgage of homestead realty, made by virtue of a power of attorney of one spouse of a same sex marriage lawfully married at the time of the execution of the deed or mortgage, that was made on or before January 4, 2015, shall have been made as if the spouses were not married; provided that this sub-section shall apply to any conveyance heretofore made except to the extent the status of deed, mortgage, or power of attorney shall be contested by suit commenced within one year of the effective date of this law.

History.—s. 1, ch. 71-27.

§689.114 Conveyances creating estate by the entirety; homestead.—

(1) Any conveyance of real estate made to both spouses who were lawfully married to each other at the time of the conveyance creates an estate by the entirety unless a contrary intention is stated; except that any conveyance of real estate made to both spouses of a same sex marriage who were lawfully married at the time of the conveyance that occurred on or before January 4, 2015, including a conveyance of the homestead of the spouses, conveyed title to the spouses of the same sex marriage as if the spouses were not married.

(2) Any conveyance of real estate made by one or both spouses of a same sex marriage who were lawfully married to each other at the time of the conveyance, including a conveyance of the homestead, that occurred on or before January 4, 2015, conveyed the title of the spouses of the same sex marriage as if the spouses were not married.

(3) Provided that this section shall apply to any conveyance heretofore made except to the extent the status of title shall be contested by suit commenced within one year of the effective date of this law.

(4) Provided, that nothing herein shall be construed as validating any deed made for the purpose, or that operates to defraud any creditor or to avoid payment of any legal debt or claim.

§689.115 Estate by the entirety in mortgages made by, or mortgages made or assigned to, ~~husband and wife~~ both spouses.; homestead—

(1) Any mortgage encumbering real property, including homestead, made by one or both spouses of a same sex marriage who were lawfully married to each other at the time of the mortgage, that was made on or before January 4, 2015, was made as if the spouses of the same sex marriage were not married; provided that this sub-section shall apply to any mortgage heretofore made except to the extent the status of the mortgage shall be contested by suit commenced within one year of the effective date of this law.

~~(1)~~(2) Any mortgage encumbering real property, or any assignment of a mortgage encumbering real property, made to two persons who are ~~husband and wife~~ married, heretofore or hereafter made, creates an estate by the entirety in such mortgage and the obligation secured thereby unless a contrary intention appears in such mortgage or assignment.; except that any mortgage encumbering real property made to both spouses of a same sex marriage who were lawfully married to each other at the time of the mortgage, or any assignment of a mortgage encumbering real property to both spouses of a same sex marriage who were lawfully married to each other at the time of the assignment, that were made or assigned on or before January 4, 2015, were made

or assigned as if the spouses of the same sex marriage were not married; provided that this subsection shall apply to any mortgage or assignment heretofore made except to the extent the status of the mortgage or assignment shall be contested by suit commenced within one year of the effective date of this law.

History.—s. 1, ch. 86-29; s. 21, ch. 91-110.

§713.12. Liens for improving real property under contract with ~~husband or wife~~ one spouse on property of the other or of both spouses.

When the contract for improving real property is made with ~~a husband or wife~~ one spouse who is not separated and living apart from ~~his or her~~ the other spouse and the property is owned by the other or by both, the spouse who contracts shall be deemed to be the agent of the other to the extent of subjecting the right, title, or interest of the other in said property to liens under this part unless such other shall, within 10 days after learning of such contract, give the contractor and record in the clerk's office, notice of his or her objection thereto.

§718.112(2)(i) Bylaws.— Required Provisions

(2) REQUIRED PROVISIONS.—The bylaws shall provide for the following and, if they do not do so, shall be deemed to include the following:

(i) *Transfer fees.*—No charge shall be made by the association or any body thereof in connection with the sale, mortgage, lease, sublease, or other transfer of a unit unless the association is required to approve such transfer and a fee for such approval is provided for in the

declaration, articles, or bylaws. Any such fee may be preset, but in no event may such fee exceed $100 per applicant other than ~~husband/wife~~ spouses or parent/dependent child, which are considered one applicant. However, if the lease or sublease is a renewal of a lease or sublease with the same lessee or sublessee, no charge shall be made. The foregoing notwithstanding, an association may, if the authority to do so appears in the declaration or bylaws, require that a prospective lessee place a security deposit, in an amount not to exceed the equivalent of 1 month's rent, into an escrow account maintained by the association. The security deposit shall protect against damages to the common elements or association property. Payment of interest, claims against the deposit, refunds, and disputes under this paragraph shall be handled in the same fashion as provided in part II of chapter 83.

§196.012 Definitions.—For the purpose of this chapter, the following terms are defined as follows, except where the context clearly indicates otherwise:

(12) "Couple" means a husband and wife legally married under the laws of any state or territorial possession of the United States or of any foreign country. After January 4, 2015, the terms "couple", "husband", "wife", and "spouse" shall include the parties to a marriage between members of the same sex.

§193.155 Homestead assessments.—Homestead property shall be assessed at just value as of January 1, 1994. Property receiving the homestead exemption after January 1, 1994, shall be

assessed at just value as of January 1 of the year in which the property receives the exemption unless the provisions of subsection (8) apply.

(1) No change.

(2) No change.

(3)(a) Except as provided in this subsection or subsection (8), property assessed under this section shall be assessed at just value as of January 1 of the year following a change of ownership. Thereafter, the annual changes in the assessed value of the property are subject to the limitations in subsections (1) and (2). For the purpose of this section, a change of ownership means any sale, foreclosure, or transfer of legal title or beneficial title in equity to any person, except if:

1. No change.

a. No change.

b. No change.

c. No change.

d. No change.

2. Legal or equitable title is changed or transferred between ~~husband and wife,~~ spouses, including a change or transfer to a surviving spouse or a transfer due to a dissolution of marriage;

3. No change.

4. No change.

(b) No change.

(4) No change.

(5) No change.

(6) No change.

(7) No change.

(8) Property assessed under this section shall be assessed at less than just value when the person who establishes a new homestead has received a homestead exemption as of January 1 of either of the 2 immediately preceding years. A person who establishes a new homestead as of January 1, 2008, is entitled to have the new homestead assessed at less than just value only if that person received a homestead exemption on January 1, 2007, and only if this subsection applies retroactive to January 1, 2008. For purposes of this subsection, ~~a husband and wife~~ spouses who owned and both permanently resided on a previous homestead shall each be considered to have received the homestead exemption even though only ~~the husband or the wife~~ one of the two spouses applied for the homestead exemption on the previous homestead. The assessed value of the newly established homestead shall be determined as provided in this subsection.

(a) No change.

(b) No change.

(c) No change.

(d) If two or more persons abandon jointly owned and jointly titled property that received a homestead exemption as of January 1 of either of the 2 immediately preceding years, and one or more such persons who were entitled to and received a homestead exemption on the abandoned property establish a new homestead that would otherwise be eligible for assessment under this subsection, each such person establishing a new homestead is entitled to a reduction from just value for the new homestead equal to the just value of the prior homestead minus the assessed value of the prior homestead divided by the number of

owners of the prior homestead who received a homestead exemption, unless the title of the property contains specific ownership shares, in which case the share of reduction from just value shall be proportionate to the ownership share. In the case ~~of a husband and wife~~ both spouses ~~abandoning~~ jointly titled property, ~~the husband and wife~~ the spouses may designate the ownership share to be attributed to each spouse by following the procedure in paragraph (f). To qualify to make such a designation, the ~~husband and wife~~ the spouses must be married on the date that the jointly owned property is abandoned. In calculating the assessment reduction to be transferred from a prior homestead that has an assessment reduction for living quarters of parents or grandparents pursuant to s. 193.703, the value calculated pursuant to s. 193.703(6) must first be added back to the assessed value of the prior homestead. The total reduction from just value for all new homesteads established under this paragraph may not exceed $500,000. There shall be no reduction from just value of any new homestead unless the prior homestead is reassessed at just value or is reassessed under this subsection as of January 1 after the abandonment occurs.

(e) No change.

(f) ~~A husband and wife~~ Spouses abandoning jointly titled property who wish to designate the ownership share to be attributed to each person for purposes of paragraph (d) must file a form provided by the department with the property appraiser in the county where such property is located. The form must include a sworn statement by each person designating the ownership share to be attributed to each person for purposes of paragraph (d) and must be filed prior to either person filing the form required under paragraph (h) to have a parcel of property assessed under this subsection. Such a designation, once filed with the property appraiser, is irrevocable.

208 (f) – (l). No change for subsections (f) through (l).

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[i] The Ad Hoc Committee also considered the following statutory change, which was rejected and proposed §1.01(20) instead, to wit:

> §**1.01 Definitions.—**
> (2) Gender-specific language includes ~~the other~~ either gender and neuter. After January 4, 2015, the terms "husband", "wife", and "spouse" shall include the parties to a marriage between members of the same sex.

[ii] The Ad Hoc Committee did not attempt to propose any changes to any of the following:

> **§741.212 Marriages between persons of the same sex.--**
> (1) Marriages between persons of the same sex entered into in any jurisdiction, whether within or outside the State of Florida, the United States, or any other jurisdiction, either domestic or foreign, or any other place or location, or relationships between persons of the same sex which are treated as marriages in any jurisdiction, whether within or outside the State of Florida, the United States, or any other jurisdiction, either domestic or foreign, or any other place or location, are not recognized for any purpose in this state.
> (2) The state, its agencies, and its political subdivisions may not give effect to any public act, record, or judicial proceeding of any state, territory, possession, or tribe of the United States or of any other jurisdiction, either domestic or foreign, or any other place or location respecting either a marriage or relationship not recognized under subsection (1) or a claim arising from such a marriage or relationship.
> (3) For purposes of interpreting any state statute or rule, the term "marriage" means only a legal union between one man and one woman as husband and wife, and the term "spouse" applies only to a member of such a union.
> History.--s. 1, ch. 97-268.

> **§741.04 Marriage license issued.--**
> (1) ***No county court judge or clerk of the circuit court in this state shall issue a license for the marriage of any person*** unless there shall be first presented and filed with him or her an affidavit in writing, signed by both parties to the marriage, providing the social security numbers or any other available identification numbers of each party, made and subscribed before some person authorized by law to administer an oath, reciting the true and correct ages of such parties; unless both such parties shall be over the age of 18 years, except

as provided in s. 741.0405; and ***unless one party is a male and the other party is a female.*** Pursuant to the federal Personal Responsibility and Work Opportunity Reconciliation Act of 1996, each party is required to provide his or her social security number in accordance with this section. The state has a compelling interest in promoting not only marriage but also responsible parenting, which may include the payment of child support. Any person who has been issued a social security number shall provide that number. Disclosure of social security numbers or other identification numbers obtained through this requirement shall be limited to the purpose of administration of the Title IV-D program for child support enforcement. Any person who is not a citizen of the United States may provide either a social security number or an alien registration number if one has been issued by the United States Immigration and Naturalization Service. Any person who is not a citizen of the United States and who has not been issued a social security number or an alien registration number is encouraged to provide another form of identification. Nothing in this subsection shall be construed to mean that a county court judge or clerk of the circuit court in this state shall not issue a marriage license to individuals who are not citizens of the United States if one or both of the parties are unable to provide a social security number, alien registration number, or other identification number. (***emphasis added***).

[iii] On January 5, 2015, Judge Zabel issued an order releasing the stay in *Pareto et. al. v. Ruvin et. al.*, allowing issuance of marriage licenses in Miami-Dade County to same-sex individuals and allowing the performance of same-sex marriages in Miami-Dade County. The effective date for the change in Florida law could also be one of the following dates:

a. August 21, 2014: the date of Judge Hinkle's Order.
b. January 6, 2015: the first day after the Stay on Judge Hinkle's Order expired.
c. The date that the USSC or the FSC renders an opinion dispositive of this issue.
d. The date that the 11th Circuit Court of Appeal or a Florida Court of Appeal renders an opinion dispositive of this issue.
e. The date the new legislation is passed.

The Ad Hoc Study Committee on Same-sex Marriage Issues
Real Property, Probate and Trust Law Section
The Florida Bar

Real Property Law
Jeffrey R. Dollinger, Co-Chair
Patricia J. Hancock
Wilhelmina F. Kightlinger
Christopher Smart

Probate and Trust Law
George D. Karibjanian, Co-Chair
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William Fletcher Belcher
Benjamin F. Diamond

February 17, 2015

re: ***EXECUTIVE SUMMARY***
Ad Hoc Committee Studying Same-sex Marriage Issues
Proposals to consider for statutory changes to Florida law
Impact of the recognition of same-sex marriage on Florida law

A. Timeline

- 1997 in Florida: enactment of Statute Section 741.212 prohibiting same-sex marriage.
- 2006 in Florida: voter initiative resulted in the addition of Article I, Section 27 to the Florida Constitution which provides that a marriage is the legal union of one man and one woman as husband and wife.
- 2012: Connecticut, Iowa, Massachusetts, New Hampshire, New York, Vermont and the District of Columbia recognized same-sex marriage, and Maine, Maryland and Washington pass referenda approving same-sex marriage.
- June 2013: *Windsor*[1] and *Perry*[2] decisions by the United States Supreme Court.
- 2013: Delaware, Minnesota and Rhode Island legislatively approve same-sex marriage
- January 5, 2015 in Florida: Judge Zabel from the Circuit Court in and for Miami-Dade County issued an order releasing the stay to the decision in *Pareto et. al. v. Ruvin et. al.*, allowing

[1] *United States v. Windsor*, 133 S. Ct. 2675 (2013).

[2] *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013).

issuance of marriage licenses in Miami-Dade County to same-sex individuals and allowing the performance of same-sex marriages in Miami-Dade County.[3]

- January 6, 2015 in Florida: Stay of *Brenner*[4] Order ended and Florida Clerks of Court began issuing marriage licenses for same sex marriages.

- January 16, 2015: The Supreme Court of the United States accepts Certiorari of decisions from the 6th Circuit Court of Appeal.[5]

- **Summary**: 12 states and the District of Columbia recognize same-sex marriage, and an additional 24 states – including Florida – have authorize and/or recognized same-sex marriage, whether through referenda or judicial decision, in the 19 months since the *Windsor* and *Perry* decisions, raising the total of the "recognition" states to 36 plus the District of Columbia.

B. Issues Affecting Florida Real Property Laws

- Today in Florida there are spouses of same-sex marriages who already own and hold title to Florida real property, and it should be expected that spouses of same-sex marriages will continue to purchase, sell, mortgage, and otherwise encumber Florida real property.

- Goal is to assure the marketability of titles to Florida real property and to assure the intentions of parties to transactions involving Florida real property will not be adversely impacted by a change in Florida law by the recognition of same-sex marriages.

- Issue #1: Whether a change in Florida law would impact title to Florida real property owned by or previously owned by spouses in a same-sex marriage and whether they hold or have held title to Florida real property in an estate by the entirety.

    - An Estate by the Entirety is automatically created under Florida law when spouses who were lawfully married to each other at the time they acquire title to real property, provided they were both named as Grantees in the same deed.

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[3] Order on Defendant Harvey Rubin's Motion for Clarification and Motion to Expedite as issued in *Pareto et. al. v. Ruvin et. al.*, Miami-Dade Circuit Court Case No. 2014-1661-CA-01, filed for the record at 11:37AM on January 5, 2015.

[4] *Brenner*, 999 F. Supp. 2d at 1278. Within Florida, the current status is that four trial level courts (in Monroe, Miami-Dade, Broward and Palm Beach Counties) and the Northern District of Florida have all held Florida's laws prohibiting same-sex marriage to be unconstitutional as a violation of the 14th Amendment to the United States Constitution.

[5] The United States Supreme Court granted petitions for writs of certiorari from the Sixth Circuit November 6, 2014 opinion in the following Cases: *Bourke v. Beshear,* Case No. 14-5291 (6th Cir. 2014); *Obergefell v. Hodges,* Case No. 14-3057 (6th Cir. 2014); *Tanco v. Haslam,* 14-5297 (6th Cir. 2014); *DeBoer v. Snyder,* Case No. 14-1341 (6th Cir. 2014); *Love v. Beshear*, Case No. 14-5818 (6th Cir. 2014); *Henry v. Hodges*, Case No. 14-3464 (6th Cir. 2014).

- What is the status of title to real property that was already owned by both spouses in a same sex marriage, who were lawfully married to each other in another state or country prior to acquiring their joint interest in Florida real property, prior to a determination that Florida law is unconstitutional and cannot be enforced – does the change in Florida law retroactively create an estate by the entirety or does title remain as tenants in common or joint tenants with right of survivorship as initially intended on the date of the conveyance.

- Issue #2: Whether a change in Florida law would impact the application of spousal joinder requirement expressed in Article X, Section 4(c) of the Florida Constitution in prior conveyances, mortgage loan transactions, and contracted interests.

    - The Ad Hoc Committee has determined this issue will need to be addressed by the Florida Supreme Court or an amendment to the Florida Constitution, not by legislation

    - The law of estoppel may need to be applied to assure the marketability of such titles prevent a retroactive application of the change in Florida so that the change in law does not apply to conveyances, mortgage loan transactions, and contracted interests that occurred prior to the date the change in law was known..

- Based upon the discussions between committee members[6], it is clear that a retroactive application of a change in Florida law could adversely impact marketability of title of Florida real property and could also undermine the intentions of the parties to transactions involving Florida real property in ways that are too numerous to quantify or predict.

    - A change in Florida law should not impact prior conveyances, mortgage loan transactions, and contracted interests.

    - Proposed change in definitional Florida Statute: Add new definitional Florida Statute Section 1.01(20) to clarify the inclusion of same-sex marriages within Florida law.

        - This change will impact more than just the real property statutes and the probate and trust statutes, and may limit the changes that may be needed to the real property statutes.

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[6] At the November 2014 RPPTL Section Meeting in Naples, the Title Insurance Committee unanimously voted to support legislation that would prevent retro-active application of a change in Florida law. At the same Section Meeting, the Problem Study Committee also voted to support legislation that would prevent retro-active application of a change in Florida law, with three of its members voting against such legislation.

- Adopt January 5, 2015 as the legislatively specified date for the prospective application only this change in definition, and the statutes would use an ending date of "on or before January 4, 2015" for the application of prior law.[7]

- Proposed change to real property specific Florida Statutes:

  - Revise the terminology and remove the use of the terms "husband" and "wife."

  - Add provisions to prevent the retroactive application of any change in Florida law to prevent impact to conveyances, mortgage loan transactions, and contracted interests that occurred prior to the date the change in law was known.

  - Adopt January 5, 2015 as the legislatively specified date for the prospective application only of the change in Florida law, and the statutes would use an ending date of "on or before January 4, 2015" for the application of prior law.[8]

  - Statutory changes include a provision that provides a one-year period for parties-in-interest to bring a civil action requesting a judge to determine the intentions of the parties to a particular transaction involving Florida real property that occurred prior to the change in the Florida law, to protect the rights and the intentions of parties owning or having an interest in Florida real property prior to the change in Florida law.[9]

C. Issues Affecting Florida Probate and Trust Laws

- Many areas of the Florida Statutes attributable to the probate, trust and estate planning practice are affected by the potential unconstitutionality of Florida's prohibition on same-sex marriage.

- These include any statute that refers to "marriage," "spouse," "husband" and "wife."

- Statutes affected include the Florida elective share within Sections 731.201 through 732.2155; the Florida provisions for the devise and passage of homestead property within

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[7] On January 5, 2015, Judge Zabel in the Circuit Court in and for Miami-Dade County issued an order releasing the stay of his decision in *Pareto et. al. v. Ruvin et. al.*, allowing issuance of marriage licenses in Miami-Dade County to same-sex individuals and allowing the performance of same-sex marriages in Miami-Dade County. Additionally, subsequent to midnight, January 6, 2015, the intentions of parties to real property transactions involving Florida real property and involving spouses of a same-sex marriage were undertaken with notice of Judge Hinkle's Order in *Brenner* and the ending of the stay of that Order.

[8] See footnote 7.

[9] This provision was taken from Subparagraphs 3 and 4 of Section 689.11 as already enacted.

Sections 732.401 and 732.4015; and the intestacy provisions within Sections 732.101 and 732.102.

- Other statutes include various statutes affecting the probate and trust practice within Chapters 709, 710, 731, 732, 733, 734, 735, 736, 738, 739 and 744.

- Example #1 – Elective Share

    - If a same-sex spouse died a Florida resident on January 1, 2014 with an elective estate of $30,000,000 and his or her testamentary documents only provided for a $1,000,000 bequest to his or her same-sex spouse, even though the time period for the surviving spouse to have filed a claim for the elective share has passed, because the surviving spouse is now recognized as a "spouse" under Florida law, the issue is whether the spouse be able to retroactively claim the elective share.

- Example #2 – Descent of Homestead

    - If, under the same facts, assume that the deceased spouse owned the couple's primary residence in Florida and was survived by two minor descendants.

    - Pursuant to the application of Art. I, Sec. 27 and Section 741.212(2), the same-sex marriage would not have been recognized in Florida, so the surviving spouse would not be deemed to be a "spouse" for purposes of Florida law.

    - Because the deceased spouse was survived only by minor children, pursuant to Section 732.4015(1), title would pass directly to the minor children.

    - The issue becomes whether the surviving spouse, now recognized as a spouse, is able to retroactively claim his or her homestead rights in the property or elect pursuant to Section 732.401(2) to receive a one-half share in the homestead as a tenant-in-common.

- The probate practitioners on the Ad Hoc Committee (the "probate practitioners") believe that the most direct way to correct all affected statutes is to change the definition of "marriage," "spouse," "husband" and "wife" to gender-neutral terms, which is best accomplished through an addition within Section 1.01 to define such terms as gender-neutral.

- After debate as to when to establish the effective date for the new statute, the probate practitioners agreed with the real estate practitioners from the Ad Hoc Committee that the default date should be January 5, 2015, the date of the issuance of the first valid same-sex marriage license in Miami-Dade County and the performance of the first valid same-sex marriage in Miami-Dade County, and consequently, the statutes would use an ending date of "on or before January 4, 2015" for the application of prior law.

The Ad Hoc Study Committee on Same-Sex Marriage Issues
Real Property, Probate and Trust Law Section
The Florida Bar

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Jeffrey R. Dollinger, Co-Chair
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February 17, 2015

Michael A. Dribin, Esq.
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Suite 800
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re: Ad Hoc Committee Studying Same-Sex Marriage Issues
Proposals to Consider for Statutory Changes to Florida law

Dear Chairman Dribin:

As you know, the Ad Hoc Committee Studying Same-Sex Marriage Issues has been diligently studying and discussing the impact of the recognition of same-sex marriage on Florida law.[1] This study was undertaken because recent decisions by Florida Courts have found the Florida Constitution and the Florida Statutes which prohibit the recognition of same-sex marriages unconstitutional and thus unenforceable.[2] The study of this issue was accelerated when the Clerks of Courts in Florida were

[1] Students at the University of Florida Levin College of Law were assigned to research four issues to be studied by the Ad Hoc Committee and the results of that research were distributed to the Ad Hoc Committee membership for consideration. *Alexandra Paez*, *Aubrey Burris* and *Jared Gaylord* researched and identified the real property, probate, and estate planning interests that have been addressed or that have been identified in each of the recent trial court and appellate court decisions on same sex marriage; *Marshall McDonald*, *Scott Tankel* and *Jamal Smith* researched the issue of whether the United States Supreme Court or the Florida Supreme Court holding that a state law or state constitutional provision is unconstitutional would be applied retroactively as if the law never existed; *Jose Leon* researched the issue of whether the United States Supreme Court or the Florida Supreme Court defined vested interests or vested rights, and whether those rights are protected from impact or change by court rulings that address constitutional rights on related matters; and *Bonie Montalvo* and *Gennaro Scibelli* identified the Florida Statutes that address ownership, devise, or descent of real property within the Florida Statutes to determine if there would be an impact to any of those statutes if Florida's same-sex marriage prohibition laws was held to be unconstitutional.

[2] *Brenner v. Scott*, 999 F. Supp. 2d 1278 (N.D. Fla. 2014); *Huntsman et. al. v. Heavilin et. al.*, Monroe County Circuit Court, Case No. 442014CA000305A001KW (July 17, 2014); *Pareto et. al. v. Ruvin et. al.*, Miami-Dade County Circuit Court, Case No. 2014-1661-CA-01 (July 25, 2014); *Grimsley et. al. v. Scott et. al.*, N.D. Fla., Case No. 4:14cv138-RH/CAS

required to issue marriage licenses for same-sex marriages on January 6, 2015, after the lifting of the stay in the *Brenner v. Scott* decision issued by the Federal District Court for the Northern District of Florida.[3] In anticipation of the release of the stay in the *Brenner* decision, on January 5, 2015, Judge Zabel from the Circuit Court in and for Miami-Dade County issued an order releasing the stay to the decision in *Pareto et. al. v. Ruvin et. al.*, thereby allowing the immediate issuance of marriage licenses in Miami-Dade County to same-sex individuals and the performance of same-sex marriages in Miami-Dade County.[4]

For background, Florida law prohibiting same-sex marriage began in 1997 with the enactment of Section 741.212.[5] In 2006, a voter initiative resulted in the addition of Article I, Section 27 to the Florida Constitution which provides that a marriage is the legal union of one man and one woman as husband and wife. On a national level, as of May 2012, six states (Connecticut, Iowa, Massachusetts, New Hampshire, New York and Vermont) and the District of Columbia recognized same-sex marriage. After the 2012 general elections, Maine, Maryland and Washington passed referenda recognizing and authorizing same-sex marriages within their respective states. By the time of the *Windsor*[6] and *Perry*[7] decisions by the United States Supreme Court in June 2013, three more states – Delaware, Minnesota and Rhode Island – had legislatively approved same-sex marriage, thus raising the total to 12 states and the District of Columbia. In the 19 months since the issuance of the *Windsor* and *Perry* decisions, whether through referenda or judicial decision, an additional 24 states – including Florida - currently authorize and recognize same-sex marriage, raising the total of the "recognition" states to 36 plus the District of Columbia.

Within Florida, the current status is that four trial level courts (in Monroe, Miami-Dade, Broward and Palm Beach Counties) and the Northern District of Florida[8] have all held Florida's laws prohibiting same-sex marriage to be unconstitutional as a violation of the 14th Amendment to the United States Constitution. Although, from a Federal perspective, the *Brenner* decision is currently binding throughout Florida, it is currently on appeal to the 11th Circuit Court of Appeals. When combined with the acceptance of Certiorari by the United States Supreme Court of decisions from the 6th Circuit Court of Appeals (the "6th Circuit Appeals"),[9] the earliest that the status of Florida law may

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(August 20, 2014); *Brassner v. Lade*, Broward County Circuit Court, No. 13-012058 (37) (August 4, 2014); *Estate of Bangor*, Palm Beach County Circuit Court. Case No. 502014CP001851XXXXMB (August 5, 2014).

[3] *Brenner*, 999 F. Supp. 2d at 1278.

[4] Order on Defendant Harvey Rubin's Motion for Clarification and Motion to Expedite as issued in *Pareto et. al. v. Ruvin et. al.*, Miami-Dade Circuit Court Case No. 2014-1661-CA-01, filed for the record at 11:37AM on January 5, 2015.

[5] Unless otherwise indicated, references to "Section" or "Sections" shall be references to the Florida Statutes.

[6] *United States v. Windsor*, 133 S. Ct. 2675 (2013).

[7] *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013).

[8] *See footnote 2.*

[9] On Friday January 16, 2015, the United States Supreme Court granted petitions for writs of certiorari from the Sixth Circuit November 6, 2014 opinion in the following Cases: *Bourke v. Beshear,* Case No. 14-5291 (6th Cir. 2014); *Obergefell v. Hodges,* Case No. 14-3057 (6th Cir. 2014); *Tanco v. Haslam,* 14-5297 (6th Cir. 2014); *DeBoer v. Snyder,* Case No. 14-

be finally settled is June 2015, which is when the United States Supreme Court is anticipated to issue its decision on the 6th Circuit Appeals.

Based on your appointments, the Ad Hoc Committee is comprised of two groups of practitioners, the real property practitioners (the "real property practitioners") and the probate and trust practitioners (the "probate practitioners"). Each group of practitioners, through its meetings and communications, have reviewed the laws in Florida within their respective areas of expertise and have proposed changes to those laws. While the suggested and proposed changes are recommendations from the Ad Hoc Committee as a whole, the proposed changes have been divided into those for the real property laws and those for the probate and trust laws. The discussion that follows is therefore divided into a discussion about Florida real property law followed by a discussion about Florida probate and trust law.

As to Issues Affecting Florida Real Property Laws

Today in Florida there are spouses of same-sex marriages who already own and hold title to Florida real property, and it should be expected that spouses of same-sex marriages will continue to purchase, sell, mortgage, and otherwise encumber Florida real property. Therefore, to assure the marketability of titles to Florida real property and to assure the intentions of parties to transactions involving Florida real property will not be adversely impacted by a change in Florida law by the recognition of same-sex marriages, the real property practitioners have prepared a suggestion of changes to Florida real property law.

One of the first issues studied by the real property practitioners is the ability of spouses in a same-sex marriage to hold title to Florida real property in an estate by the entirety. The present versions of the Florida Constitution and Florida Statutes expressly prohibit the recognition of same-sex marriages, and prior to the recent Orders in several Florida Courts,[10] it was clear that spouses of same-sex marriages who jointly own Florida real property could not own their property in an estate by the entirety. The real property practitioners studied the impact to the titles to Florida real property jointly owned by spouses of a same-sex marriage caused by a change in Florida law, including the impact if the change in Florida law were to be retroactively applied to a date prior to the date of the change in law was known. The real property practitioners prepared suggested changes and additions to the Florida Statutes to assure the marketability of such titles.

A second issue studied by the real property practitioners is the timing of when the spousal joinder requirement expressed in Article X, Section 4(c) of the Florida Constitution would first be imposed upon a non-title holding spouse of a same-sex marriage in a transaction involving Florida homestead real property, presuming there was a change in Florida law. Because the Florida Constitution expressly prohibits the recognition of same-sex marriages, the spousal joinder requirement has not been imposed upon a non-title spouse of a same-sex marriage in a transaction involving Florida homestead real property. The real property practitioners studied the impact to the titles to Florida homestead real property owned by one spouse of a same-sex marriage caused by a

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1341 (6th Cir. 2014); *Love v. Beshear*, Case No. 14-5818 (6th Cir. 2014); *Henry v. Hodges*, Case No. 14-3464 (6th Cir. 2014).

[10] *See footnote 2.*

change in Florida law, including the impact if the change in Florida law would be applied retroactively to a date prior to the date of the change in law was known. The real property practitioners determined this issue will need to be addressed by the Florida Supreme Court or an amendment to the Florida Constitution, not by the Committee, and that the law of estoppel may need to be applied to assure the marketability of such titles.

As part of the study of the issues identified above, the real property practitioners also studied the issue of whether a change in Florida law should have a retroactive and prospective application or should have a prospective application only, when impacting titles to Florida real property. The real property practitioners studied this issue to assure that marketability of titles to Florida real property and to assure that the intentions of parties to transactions involving Florida real property will not be impacted by the change in Florida law and the recognition of same-sex marriages. The issue arises if the change in Florida law and the recognition of same-sex marriages is applied to titles to Florida real property and to transactions involving Florida real property on a date prior to the date the change in law was known.

The concern of the real property practitioners, as well as the entire Ad Hoc Committee, is that a retroactive application of any change in Florida law could unintentionally impact the marketability of titles to Florida real property previously acquired, conveyed, mortgaged, or otherwise encumbered, or may impact a transaction involving Florida real property in any way not intended by the parties to the transaction. To avoid such unintended consequences caused by a change in Florida law, the Ad Hoc Committee has unanimously concluded the better approach to a change in Florida law would be to provide a prospective application only and prevent any retroactive application. Based upon the discussions between all Ad Hoc Committee members, it is clear that a retroactive application of a change in Florida law could adversely impact marketability of title of Florida real property and could also undermine the intentions of the parties to transactions involving Florida real property in ways that are too numerous to quantify or predict.

Accordingly, based upon the work of the Ad Hoc Committee, enclosed with this letter you will find the proposed changes to Florida Statutes that could be considered for purposes of having Florida law assure a minimal impact, if any, to prior transactions involving title to Florida real property owned, conveyed, mortgaged, or otherwise encumbered by one or both spouses of a same-sex marriage.

The first suggested change is to add new definitional Florida Statute Section 1.01(20) to clarify the inclusion of same-sex marriages within Florida law. It should be noted that this change will impact more than just the real property statutes and the probate and trust statutes and may limit the changes that may be needed to the real property statutes. The remaining suggested changes have been made to statutes specifically addressing Florida real property law.

As to the real property specific statutes, many of the proposed statutory changes revise the terminology and remove the use of the terms "husband" and "wife." Many of the other added provisions are for the purpose of preventing the retroactive application of any change in Florida law. In several of the proposed changes, there is a blank line for inserting the last date before the change in the real property portion of Florida law becomes effective. Endnote #1 following the proposed statutory changes sets forth several potential dates that could be used as the last date before the change in the real property portion of Florida law. The real property practitioners considered various dates

that could be used and reached a consensus that the last date before the change in the real property portion of Florida law should be January 4, 2015.[11] This date was selected as it is the last date before the issuance of the first valid same-sex marriage license in Florida as well as the performance of the first valid same-sex marriage in Florida. As a result, it is presumed that that subsequent to midnight, January 4, 2015, the intentions of parties to real property transactions involving Florida real property and involving spouses of a same-sex marriage were undertaken with notice of the recognition of same-sex marriages. This issue is addressed further in the Probate and Trust Law discussion and in the Conclusion below.

Because the proposed statutory changes are intended to prevent a retroactive application of a change in Florida law, those statutory changes include a provision that provides a one-year period for parties-in-interest to bring a civil action requesting a judge to determine the intentions of the parties to a particular transaction involving Florida real property that occurred prior to the change in the Florida law. This provision is intended to protect the rights and the intentions of parties owning Florida real property prior to the change in Florida law and to protect the rights and intentions of parties to a transaction that occurred prior to a change in Florida law. This provision provides a procedure for a party-in-interest to request a declaration to enforce the original rights and intentions of the property owners or of the parties to a particular transaction. This language used in this provision was taken from Subparagraphs 3 and 4 of Section 689.11 as already enacted.

As to Issues Affecting Florida Probate and Trust Laws

Many areas of the Florida Statutes attributable to the probate, trust and estate planning practice are affected by the potential unconstitutionality of Florida's prohibition on same-sex marriage. These include any statute that refers to "marriage," "spouse," "husband" and "wife." Included in the long list of statutes affected by the use of these terms are the procedures for the invocation of the Florida elective share within Sections 731.201 through 732.2155; the Florida provisions for the devise and passage of homestead property within Sections 732.401 and 732.4015; and the intestacy provisions within Sections 732.101 and 732.102.

By way of examples, with respect to the elective share, under Section 732.2065, a surviving spouse is entitled to receive an "elective share" equal to 30% of the deceased spouse's "elective estate." If a same-sex spouse died a Florida resident on January 1, 2014 with an elective estate of $30,000,000 and his or her testamentary documents only provided for a $1,000,000 bequest to his or her same-sex spouse, even though the time period for the surviving spouse to have filed a claim for the elective share has passed, because the surviving spouse is now recognized as a "spouse" under Florida law, the issue is whether the spouse should be able to retroactively claim the elective share.

A second issue involves the descent and devise of homestead property. If, under the same facts, assume that the deceased spouse owned the couple's primary residence in Florida and was survived by two minor descendants. Pursuant to the application of Art. I, Sec. 27 and Section 741.212(2), the same-sex marriage would not have been recognized in Florida, so the surviving spouse

[11] Although the stay imposed by Judge Hinkle in the *Brenner* decision expired at midnight January 6, 2015, the Miami-Dade County stay in the *Pareto* case expired on January 5, 2015, upon which the first valid same-sex marriage license and wedding ceremony were performed.

would not be deemed to be a "spouse" for purposes of Florida law. Because the deceased spouse was survived only by minor children, pursuant to Section 732.4015(1), title would pass directly to the minor children. The issue becomes whether the surviving spouse, now recognized as a spouse, is able to retroactively claim his or her homestead rights in the property or elect pursuant to Section 732.401(2) to receive a one-half share in the homestead as a tenant-in-common.

As stated above, the probate practitioners agree with the real estate practitioners that Florida law should be modified to adopt a prospective approach to the recognition of same-sex marriage. Where the probate practitioners initially differed from the real property practitioners is the date for prospective application. There was debate within the probate practitioners that such laws with the probate and trust realm must be effective as of the effective date of the *Brenner* decision, which is August 21, 2014. While the stay on the decision expired at the end of January 5, 2015, the effect of the stay was to delay the enforcement of provisions under the decision, such as the issuance of marriage licenses to same-sex individuals. As, within the probate and trust practice, no overt act (such as applying for a marriage license) is required for the application of many of the practice's statutes and rules, some of the probate practitioners were of the opinion that enforcement must begin with the date of the issuance of the decision and not the date of the release of the stay.

After an ensuing discussion, a vote was taken of the probate practitioners with a majority ultimately siding with the real property practitioners that, despite the technical effective date of the *Brenner* decision, a more practical prospective application would be to set the effective date as of January 4, 2015.

After a review of many of the probate, trust and related statutes containing references to "marriage," "spouse," "husband" and "wife," the probate practitioners believe that the easiest way to correct all affected statutes is to add a statute to the main definitional provision within the Florida Statutes that changes the definition of "marriage," "spouse," "husband" and "wife" to gender-neutral terms. As with the real property practitioners, the probate practitioners believe that this should be best accomplished through an addition within Section 1.01 to define such terms as gender-neutral (the "definitional statute").

Based on the discussion regarding the effective date, the probate practitioners sought a slightly different application of the definitional statute initially supported by the real property practitioners. The probate practitioners preferred to see the definitional statute contain a separate subsection referencing the "effective date" to which other statutes can refer. January 4, 2015 would be established as the "default date," but if any other practice area sought a different "effective date," any other statute or group of statutes under the Florida Statutes could be modified by cross-referencing the "effective date" subsection with the different "effective date." For example, if the Criminal Bar were to determine that the spousal immunity provisions under Section 90.504 should relate back to August 21, 2014, all that would be required is the addition of a new subsection (4) stating that "For all purposes of this statute, the 'effective date' as defined in Section 1.01(20) shall be 'August 21, 2014.'"

After some discussion, the real property practitioners and probate practitioners agreed to model proposed Florida Statutes Section 1.01(20) in this manner.

Conclusion

Several of the suggested changes to the statutes have been proposed for the purpose of preventing the retroactive application of any change in Florida law to prior real property transactions and prior probate and trust matters that may have occurred before certain dates applying to the recent decisions on the constitutional challenges to Florida's law banning the recognition of same sex marriages. While the Ad Hoc Committee considered various dates that could be used as the last date before the prospective application date, two dates were discussed most often: August 21, 2014 (the date of Judge Hinkle's initial Order[12] and with the new law to apply to all matters on and after August 21, 2014) and January 4, 2015 (the last day prior to the ending of the judicial stay in Miami-Dade County's *Pareto* decision and the issuance of the first valid same-sex marriage certificate and the performance of the first valid same-sex marriage). The latter date was considered based upon the presumption that, subsequent to January 4, 2015, the intentions of parties to transactions involving Florida real property and involving spouses of a same-sex marriage were undertaken with notice that the Miami-Dade County decision in *Pareto* (and, as to the next day, Judge Hinkle's Order in *Brenner*) was no longer stayed.[13] After full consideration and by majority vote of the Ad Hoc Committee, the Ad Hoc Committee members propose that January 4, 2015 should be used at the last date before the change in Florida law, with the new law to apply to all matters on and after midnight, January 4, 2015.

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[12] *Brenner*, 999 F. Supp. 2d 1278.

[13] *See footnotes 4 and 11;* Id.

Please accept the enclosures as the proposed statutory changes to the Florida Statutes as suggested by this Ad Hoc Committee. These provisions are not intended as a political statement of the Ad Hoc Committee or of the RPPTL Section, and are only intended as a suggestion on the changes to Florida law that could be considered in the event there is a change in Florida law by the recognition of same-sex marriages. Thank you for your consideration.

Respectfully submitted,

_____

Jeffrey R. Dollinger
as Co-Chair of the Ad Hoc Committee (Real Property)

and

_____

George D. Karibjanian
as Co-Chair of the Ad Hoc Committee (Probate & Trust)

encl: Proposed Statutory Changes of the Florida Statutes
Executive Summary

cc: Michael J. Gelfand, Chair Elect Real Property, Probate & Trust Law Section
The Membership of the Ad Hoc Committee

126 So.3d 390 (2013)

Edward I. GOLDEN as Curator of the Estate of Katherine Jones, Appellant,

v.

Carol Ann JONES, as Personal Representative of the Estate of Harry Bruce Jones, Appellee.

No. 4D12-2094.

District Court of Appeal of Florida, Fourth District.

October 30, 2013.
Rehearing Denied December 11, 2013.

William H. Glasko, of **Golden** & Cowan, P.A., Miami, for appellant.

Michael E. **Jones** of Michael Edward **Jones**, P.A., Fort Lauderdale, and Robin F. Hazel of the Hazel Law, P.A., Pembroke Pines, for appellee.

TAYLOR, J.

Appellant Edward **Golden**, the curator of the Estate of Katherine **Jones**, appeals a final order striking a claim filed against the Estate of Harry Bruce **Jones**. We reverse, because the trial court erred in determining that the claim was untimely without first determining whether the claimant was a known or reasonably ascertainable creditor. We hold that if a known or reasonably ascertainable creditor is never served with a copy of the notice to creditors, the statute of limitations set forth in section 733.702(1), Florida Statutes, never begins to run and the creditor's claim is timely if it is filed within two years of the decedent's death.

By way of background, Harry **Jones** died in February 2007 and his estate was opened in April 2007. In June 2007, a notice to creditors was first published.

In 2008, a court appointed a guardian for Harry's former wife, Katherine **Jones**, because she had been adjudicated to lack capacity. It is undisputed that neither Katherine, nor her guardian, was ever served with a copy of the notice to creditors.

In January 2009, less than two years after Harry's death, Katherine's guardian filed a Statement of Claim in the probate court. The basis for the claim was that Harry's estate owed Katherine money pursuant to a Marital Settlement Agreement that Harry and Katherine executed in 2002.

391 *391 Katherine died in 2010. Following Katherine's death, appellant Edward **Golden** was appointed as the curator of Katherine's estate.

In March 2012, more than five years after Harry's death, appellant filed a Petition for Order Declaring Statement of Claim Timely Filed and/or for Enlargement of Time to File Statement of Claim, Nunc Pro Tunc. Appellant alleged that the guardianship was a known or reasonably ascertainable creditor of

Harry's estate and sought a determination to that effect.

The personal representative of Harry's estate filed a response to appellant's petition, asserting in relevant part that the claim was time-barred under sections 733.702 and 733.710, Florida Statutes. The personal representative of Harry's estate also asserted as an affirmative defense that Katherine was not a reasonably ascertainable creditor.

The personal representative later filed an amended motion to strike the statement of claim. After a hearing on the motion, the trial court entered its Order Striking Untimely Filed Claim, ruling that the statement of claim was untimely under sections 733.702 and 733.710, Florida Statutes, and established case law. In support of its decision, the trial court cited, among other cases, *Lubee v. Adams*, 77 So.3d 882 (Fla. 2d DCA 2012), and *Morgenthau v. Estate of Andzel*, 26 So.3d 628 (Fla. 1st DCA 2009). This appeal followed.

On appeal, appellant argues that if the notice to creditors is not served on a known or reasonably ascertainable creditor, then the applicable limitations period of section 733.702(1) never begins to run and the known or reasonably ascertainable creditor is bound only by section 733.710's two-year statute of repose. We agree.

Generally, a probate court's decision on whether to strike a claim is reviewed for an abuse of discretion. *Strulowitz v. The Cadle Co., II, Inc.*, 839 So.2d 876, 879 (Fla. 4th DCA 2003). However, to the extent this issue turns on a question of statutory interpretation, the standard of review is de novo. *W. Fla. Reg'l Med. Ctr., Inc. v. See*, 79 So.3d 1, 8 (Fla.2012).

Under section 733.2121(3)(a), Florida Statutes (2006), the personal representative of an estate "shall promptly make a diligent search to determine the names and addresses of creditors of the decedent who are reasonably ascertainable . . . and shall promptly serve a copy of the notice on those creditors."

To preserve a claim against a decedent's estate in Florida, a creditor must file a written statement of the claim within the statutorily prescribed time periods. *See* §§ 733.702, 733.710, Fla. Stat. (2006). Section 733.702 is a statute of limitations that cannot be waived in a probate proceeding by failure to object to a claim on timeliness grounds, while section 733.710 is a jurisdictional statute of nonclaim that is not subject to waiver or extension in a probate proceeding. *See May v. Illinois Nat'l Ins. Co.*, 771 So.2d 1143, 1145 (Fla.2000).

Section 733.702, Florida Statutes (2006),[1] provides in relevant part:

> (1) If not barred by s. 733.710, no claim or demand against the decedent's estate that arose before the death of the decedent. . . is binding on the estate, on the personal
> 392 representative, or on any beneficiary *unless filed in the probate proceeding* 392 *on or before the later of the date that is 3 months after the time of the first publication of the notice to creditors or, as to any creditor required to be served with a copy of the notice to creditors, 30 days after the date of service on the creditor,* even though the personal representative has recognized the claim or demand by paying a part of it or interest on it or otherwise. . . .

* * *

> (3) Any claim not timely filed as provided in this section is barred even though no objection to the claim is filed unless the court extends the time in which the claim may be filed. An extension may be granted only upon grounds of fraud, estoppel, or insufficient notice of the claims period. . . .
>
> * * *
>
> (6) Nothing in this section shall extend the limitations period set forth in s. 733.710.

(emphasis added).

Section 733.710, Florida Statutes (2006), provides in relevant part:

> (1) Notwithstanding any other provision of the code, 2 years after the death of a person, neither the decedent's estate, the personal representative, if any, nor the beneficiaries shall be liable for any claim or cause of action against the decedent, whether or not letters of administration have been issued, except as provided in this section.
>
> (2) This section shall not apply to a creditor who has filed a claim pursuant to s. 733.702 within 2 years after the person's death, and whose claim has not been paid or otherwise disposed of pursuant to s. 733.705.

This court has held that under sections 733.702 and 733.710, any claims of known or reasonably ascertainable creditors, though filed after the three-month period following publication of notice of administration, should not be stricken as untimely if filed prior to the earlier of 30 days after service of notice of administration or two years after the decedent's death. *See* *In re Estate of Puzzo*, 637 So.2d 26, 27 (Fla. 4th DCA 1994).

In *Puzzo,* the creditors appealed an order denying a petition to extend the time for filing a claim against the estate and granting the estate's motion to strike the creditors' claims as untimely. Explaining that the personal representative was on notice of at least one of the claims and that there was no proof that the creditors had been served with notice of administration, we reversed the order on appeal. We stated:

> Due process considerations require that Appellants be furnished notice so that they can determine that the time for filing claims has commenced. However, regardless of whether or not the claimants had actual notice, section 733.702(1), Florida Statutes, does not bar the claim of a creditor required to be served with a copy of the notice of administration, unless barred by section 733.710, until the *later* of the 3-month period following publication or *30 days after service of notice on the creditor.* The latter period had not begun to run at the time Appellants' claims were filed.
>
> We remand for the trial court to determine as to which of Appellant[s'] claims they were known or ascertainable creditors. Any such claims, though filed after the 3-month period, should not have been stricken as untimely if filed prior to the earlier of 30 days after

service of notice of administration or 2 years after the decedent's death.

Id. at 27 (citation omitted).

393 Our decision in *Puzzo* is consistent with the plain language of sections 733.702 and *393 733.710. Under *Puzzo,* if Katherine or the guardian was a known or reasonably ascertainable creditor, appellant's claim was timely if it was filed prior to the earlier of 30 days after service of notice to creditors or two years after the decedent's death. This is true regardless of whether the claim was filed after the three-month period following publication of the notice to creditors. Although the creditors in *Puzzo* did file a motion for extension of time, that is a distinction without a difference. The holding of *Puzzo* makes clear that a claim of a reasonably ascertainable creditor, who was never served with notice to creditors, is timely if it is filed within two years of the decedent's death. Because such a claim is timely under section 733.702(1), it would be unnecessary for a reasonably ascertainable creditor to file a motion for extension of time under section 733.702(3).

Here, it is undisputed that the personal representative never served Katherine or Katherine's guardian with a notice to creditors. Furthermore, less than two years after the decedent's death, Katherine's guardian filed a statement of claim in the probate court. Finally, appellant alleged that the guardianship was a known or reasonably ascertainable creditor of Harry's estate. Under these circumstances, the trial court erred in determining that the claim was untimely without first determining whether Katherine was a known or reasonably ascertainable creditor. If the trial court determines that the claimant was a known or reasonably ascertainable creditor, then appellant's claim was timely, as it was filed prior to the earlier of 30 days after service of notice to creditors (which never occurred) or two years after the decedent's death.

The First and Second Districts have reached a contrary conclusion, ruling that even a reasonably ascertainable creditor who was not served with a notice to creditors is required to file a claim within the publication period of three months unless the creditor files a motion for an extension of time under section 733.702(3) within the two-year repose period of section 733.710. *See* Lubee, 77 So.3d at 884; *Morgenthau,* 26 So.3d at 632-33. For example, in *Lubee,* the creditor, Mr. Lubee, filed a claim outside the three-month publication period, but prior to the expiration of the two-year statute of repose provided in section 733.710. The Second District held that his claim was untimely and that the issue of whether Mr. Lubee was a reasonably ascertainable creditor was immaterial:

> *Because he was not served with a copy of the notice to creditors,* Mr. Lubee was required to file his claim in the probate proceeding within the three-month window following publication. Alternatively, Mr. Lubee could seek an extension from the probate court pursuant to section 733.702(3) within the two-year window of section 733.710. It is undisputed that he did neither. . . . Mr. Lubee's claim in the probate proceeding was untimely and therefore barred. As a result, the issue of whether or not Mr. Lubee was a readily ascertainable creditor was immaterial.

77 So.3d at 884 (citations omitted) (emphasis added).

Unlike *Puzzo, Lubee* and *Morgenthau* are inconsistent with the plain language of section 733.702(1). As one commentator has noted, the Second District's analysis in *Lubee* "misses the point of the

statute, because it is not the fact of *service* that makes the publication date inapplicable to the beginning of the period to bar claims, it is the *entitlement* to service that is relevant." *See* Rohan Kelley, Probate Litigation, Practice Under Florida Probate Code § 21.40 (Fla. Bar CLE 7th ed. 2012). Similarly, 394 the flaw in the court's reasoning in *Morgenthau* "is that the court *begins* *394 with the conclusion that the claim, filed after three months from the first publication by a known creditor who was not noticed, was untimely." *Id.*

We reverse and remand for the trial court to determine whether Katherine or the guardianship was a known or reasonably ascertainable creditor. If so, then appellant's claim "though filed after the 3-month period, should not have been stricken as untimely if filed prior to the earlier of 30 days after service of notice of administration or 2 years after the decedent's death." *Puzzo*, 637 So.2d at 27. We certify conflict with *Lubee* and *Morgenthau.*

Reversed and Remanded; *conflict certified.*

DAMOORGIAN, C.J., and KLINGENSMITH, J., concur.

[1] The 2006 versions of sections 733.702 and 733.710 are applicable in this case because they were in effect at the time of Harry's death on February 16, 2007. *See May*, 771 So.2d at 1150 n. 7 (using decedent's date of death to determine applicable version of the statute).

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IN THE SUPREME COURT OF FLORIDA

CASE NO: SC13-2536
DCA Case No.: 4D12-2094

CAROL ANN JONES,
petitioner,

v.

EDWARD I. GOLDEN,
respondent.

ON DISCRETIONARY REVIEW FROM THE
DISTRICT COURT OF APPEAL OF FLORIDA, FOURTH DISTRICT

AMICUS CURIAE BRIEF
OF
THE REAL PROPERTY, PROBATE & TRUST LAW SECTION OF THE FLORIDA BAR

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IDENTITY AND INTEREST

The Real Property Probate & Trust Law Section of The Florida Bar ("Section") is a group of Florida lawyers who practice in the areas of real estate, trust and estate law. The Section is dedicated to serving all Florida lawyers and the public in these fields of practice. We produce educational materials and seminars, assist the public *pro bono*, draft legislation, draft rules of procedure, and occasionally serve as a friend of the court to assist on issues related to our fields of practice.[1] Our Section has over 10,000 members.

Pursuant to Section bylaws, the Executive Council of the Section voted unanimously to appear in this case if permitted by the Court. The Florida Bar approved the Section's involvement in this case. [2]

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[1] For example, see *North Carillon, LLC, v. CRC 603, LLC,* 135 So. 3d 274 (Fla. 2014; *Aldrich v. Basile*, 136 So. 3d 530 (Fla. 2014); *Chames v. DeMayo*, 972 So. 2d 850, 854-55 (Fla. 2007); *McKean v. Warburton,* 919 So. 2d 341 (Fla. 2005); *May v. Illinois Nat. Ins. Co.*, 771 So. 2d 1143 (Fla. 2000); *Friedberg v. SunBank/Miami*, 648 So. 2d 204 (Fla. 3d DCA 1994).

[2] The Executive committee of the Section approved the filing of this brief, which was subsequently approved by the Section's Executive Council. Pursuant to Standing Board Policy 8.10, the Board of Governors of The Florida Bar (typically through its Executive Committee) must review a Section's amicus brief and grant approval before the brief can be filed with the Court. Although reviewed by the Board of Governors, the amicus brief will be submitted solely by the Section and supported by the separate resources of this voluntary organization---not in the name of The Florida Bar, and without implicating the mandatory membership dues paid by Florida Bar licensees. The Florida Bar approved our filing of this brief.

Kenneth B. Bell, Gerald B. Cope, Jr., Robert W. Goldman, and John W. Little III, are the four co-chairs of the amicus committee of the Section, which is charged with preparing amicus briefs for the Section.

The Section's interest in this case stems from the Section's expertise and experience with the Florida Probate Code and creditor claims in probate proceedings and the impact this case will have on creditor rights in probate proceedings.

SUMMARY OF ARGUMENT

Underlying the creditor claim laws in probate is the Legislature's effort to strike a balance between the fundamental policies of promptly closing estates and the due process rights of creditors of an estate.

Not all creditors are due the same amount of process. Indeed, there are two types of creditors of an estate: those who are reasonably ascertainable and those who are not. A reasonably ascertainable creditor is entitled to a notice to creditors, the service of which begins the running of a statute of limitation (ending on the later of 30 days from service of the notice to creditors or 3 months from first publication of notice to creditors). The statute of limitation for creditors who are not reasonably ascertainable begins to run upon first publication of the notice to

creditors (ending 3 months from first publication). The claims of all creditors of an estate are barred if not filed within two years from the death of the decedent.

Therefore, assuming there is a reasonably ascertainable creditor of a decedent's estate and assuming the personal representative of that decedent's estate never served that reasonably ascertainable creditor with a notice to creditors, the limitation period for that creditor to file a claim against the estate is governed by the two-year statute of repose, not the 3-month limitations period for claims filed after publication of the notice to creditors. §§733.702, 733.710 Fla. Stat. (2006).

ARGUMENT

Florida, like most states, has a strong and unwavering public policy in favor of settling and closing estates in a speedy manner. *In re Jeffries' Estate*, 136 Fla. 410, 181 So. 833 (Fla. 1938); *Estate of Brown,* 117 So. 2d 478 (Fla. 1960); *Barnett Bank v. Estate of Read*, 493 So. 2d 447 (Fla. 1986); *May v. Illinois Nat'l Ins.*, 771 So. 2d 1143 (Fla. 2000).

While mindful of the rights of creditors, the Legislature's enthusiastic embrace of this policy originally caused it to develop a "one size fits all" approach to processing creditor claims in probate. See §733.702, Fla. Stat. (Supp. 1988), and pre-1988 versions of the statute.

But, what this claim process offered in simplicity and speed, it lacked in due process for those creditors reasonably ascertainable to the personal representative. *See Tulsa Professional Collection Services v. Pope*, 485 U.S. 478 (1988). In *Pope*, the Supreme Court of the United States considered a probate claims process substantially identical to our own as of that time. As in Florida, the Oklahoma statute involving probate claims was *not* self-executing. It required the opening of a probate proceeding by a court and the appointment of a personal representative by the court before any notice was required and before a limitation period could commence. The law also required that notice of publication of the notice to creditors, and an affidavit indicating publication had occurred, be filed with the clerk of court. 485 U.S. at 487. A very similar process was followed in Florida (§§733.202; 733.2121; Fla. P. R. 5.200, 5.235, 5.241) and, like Florida, the entire probate process in Oklahoma was supervised by the probate court. The Supreme Court held:

> This involvement is so pervasive and substantial that it must be considered state action subject to the restrictions of the Fourteenth Amendment.

Id. Self-executing claim statutes, on the other hand, that simply ran from date of death until a date certain, did not involve state action and were not restricted by the Fourteenth Amendment. 485 U.S. at 485-86.

The Supreme Court in *Pope* grappled with the obvious limitations on a creditor getting the needed information through a publication of notice in a newspaper and a state's "legitimate interest in the expeditious resolution of probate proceedings. Death transforms the decedent's legal relationships and a State could reasonably conclude that swift settlement of estates is so important that it calls for very short time deadlines for filing claims." 485 U.S. at 489. The Supreme Court made clear that actual notice to "reasonably ascertainable creditors" was required in order to satisfy due process. 485 U.S. at 490. Further, as the Supreme Court had already held in *Mennonite Board of Missions v. Adams,* 462 U.S. 791, 798, n.4 (1983), impractical and extended searches by the estate's representative were not required. 485 U.S. at 491. The Supreme Court also held that actual notice by U.S. mail was sufficient to satisfy due process for "reasonably ascertainable creditors." 485 U.S. at 490. The Supreme Court concluded:

> On balance then, a requirement of actual notice to known or reasonably ascertainable creditors is not so cumbersome as to unduly hinder the dispatch with which probate proceedings are conducted.

Id. Actual notice was not required for creditors "with mere 'conjectural' claims." *Id., citing to and quoting, Mullane v. Central Hanover Bank & Trust Co.,* 339 U.S. 306, 317 (1950).

In response to *Pope*, and with some assistance from the Section, the Legislature amended the Florida Probate Code to address the due process issue.[3] These amendments were adopted over the ensuing few years culminating in statutes we believe are germane to this Court's resolution of this appeal: sections 733.2121, 733.702 and 733.710, Florida Statutes (2006).[4]

In pertinent part, section 733.2121 provides:

> (1) Unless creditors' claims are otherwise barred by s. 733.710, the personal representative shall promptly publish a notice to creditors. The notice shall contain the name of the decedent, the file number of the estate, the designation and address of the court in which the proceedings are pending, the name and address of the personal representative, the name and address of the personal representative's attorney, and the date of first publication. The notice shall state that

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[3] This Court also reacted promptly to *Pope* and issued rules, which were subsequently codified in Florida Statutes as well. *The Florida Bar. In re Rules of Probate and Guardianship Procedure*, 537 So. 2d 500 (Fla. 1988). One of these rules, 5.495, was repealed by this Court after statutory amendments made it unnecessary. *In re Amendments to the Florida Probate Rules*, 584 So. 2d 964 (Fla. 1991). Rule 5.240 was amended and a new rule 5.241 was adopted in 2002 in order to separate the notice to creditors from a notice of administration in a manner consistent with the Legislature's adoption of section 733.2121, Florida Statutes in 2001. *Amendments to the Florida Probate Rules*, 824 So. 2d 849 (Fla. 2002). These rules do not appear to have an impact on the resolution of this case, but are identified for the Court's consideration. The language of rule 5.241 is not inconsistent with our analysis of the relevant statutory law and the *Pope* decision.

[4] We understand that the 2006 versions of the statutes pertain to this case. *Golden v. Jones*, 126 So. 3d 390, 394, n.1 (Fla. 4th DCA 2013) ("The 2006 versions of sections 733.702 and 733.710 are applicable in this case because they were in effect at the time of Harry's death on February 16, 2007. *See May,* 771 So.2d at 1150 n. 7 (using decedent's date of death to determine applicable version of the statute).").

creditors must file claims against the estate with the court during the time periods set forth in s. 733.702, or be forever barred.

(2) Publication shall be once a week for 2 consecutive weeks, in a newspaper published in the county where the estate is administered or, if there is no newspaper published in the county, in a newspaper of general circulation in that county.

(3)(a) *The personal representative shall promptly make a diligent search to determine the names and addresses of creditors of the decedent who are reasonably ascertainable, even if the claims are unmatured, contingent, or unliquidated, and shall promptly serve a copy of the notice on those creditors. Impracticable and extended searches are not required.* Service is not required on any creditor who has filed a claim as provided in this part, whose claim has been paid in full, or whose claim is listed in a personal representative's timely filed proof of claim.

(b) The personal representative is not individually liable to any person for giving notice under this section, even if it is later determined that notice was not required. The service of notice to creditors in accordance with this section shall not be construed as admitting the validity or enforceability of a claim.

(c) If the personal representative in good faith fails to give notice required by this section, the personal representative is not liable to any person for the failure. Liability, if any, for the failure is on the estate.

...

(4) Claims are barred as provided in ss. 733.702 and 733.710.

(Emphasis added.).

Section 733.702, in pertinent part, provides:

(1) If not barred by s. 733.710, no claim or demand against the decedent's estate that arose before the death of the decedent, including claims of the state and any of its political subdivisions, even if the claims are unmatured, contingent, or unliquidated; no claim for

funeral or burial expenses; no claim for personal property in the possession of the personal representative; and no claim for damages, including, but not limited to, an action founded on fraud or another wrongful act or omission of the decedent, is binding on the estate, on the personal representative, or on any beneficiary unless filed in the probate proceeding *on or before the later of the date that is 3 months after the time of the first publication of the notice to creditors or, as to any creditor required to be served with a copy of the notice to creditors, 30 days after the date of service on the creditor,* even though the personal representative has recognized the claim or demand by paying a part of it or interest on it or otherwise. The personal representative may settle in full any claim without the necessity of the claim being filed when the settlement has been approved by the interested persons.

(2) No cause of action, including, but not limited to, an action founded upon fraud or other wrongful act or omission, shall survive the death of the person against whom the claim may be made, whether or not an action is pending at the death of the person, unless a claim is filed within the time periods set forth in this part.

(3) *Any claim not timely filed as provided in this section* is barred even though no objection to the claim is filed unless the court extends the time in which the claim may be filed. An extension may be granted only upon grounds of fraud, estoppel, or insufficient notice of the claims period. No independent action or declaratory action may be brought upon a claim which was not timely filed unless an extension has been granted by the court. If the personal representative or any other interested person serves on the creditor a notice to file a petition for an extension, the creditor shall be limited to a period of 30 days from the date of service of the notice in which to file a petition for extension.

Section 733.710, in pertinent part, provides:

(1) *Notwithstanding any other provision of the code, 2 years after the death of a person, neither the decedent's estate, the personal*

> *representative, if any, nor the beneficiaries shall be liable for any claim or cause of action against the decedent, whether or not letters of administration have been issued, except as provided in this section.*
>
> (2) *This section shall not apply to a creditor who has filed a claim pursuant to s. 733.702 within 2 years after the person's death, and whose claim has not been paid or otherwise disposed of pursuant to s. 733.705.*

(Emphasis added.). These three statutes are clear on their face at least as to the issue before this Court.

Section 733.2121(3) (a) outlines the duty of a personal representative to serve a notice to creditors on reasonably ascertainable creditors. The Legislature provided that if the claims of these reasonably ascertainable creditors are unmatured, contingent or unliquidated claims they still must be served with the notice to creditors. But, the personal representative need not turn over every stone and look in every nook and cranny for this species of creditor. *See Pope,* 485 U.S. at 491; *see* §733.2121 (3) (a), Fla. Stat. (2006); *Estate of Vickery*, 584 So. 2d 555, 558 (Fla. 4th DCA 1990); *Jones v. Sun Bank/Miami, N.A.*, 609 So. 2d 98, 102-03 (Fla. 3d DCA 1992).

As the Court will no doubt recognize, intuitively or after evaluating the applicable case law, the definition of a reasonably ascertainable creditor is hard to articulate in such a way as to capture all possible examples and circumstances. *See* Medlin, Alan S., "Claims-Barring Due Process Concerns, *Probate Practice Reporter*, Vol. 26, no. 8, pg. 3 (August 2014) ("For the state to anticipate every

category of known or reasonably ascertainable creditor that could arise in any particular fact pattern would be problematic, if not impossible."). It is not enough to identify a potential creditor, it is the nature of the claim and whether it was reasonably ascertainable that also matter. *See Simpson v. Estate of Simpson*, 922 So. 2d 1027, 1029 (Fla. 5th DCA 2006); *Jones*, 609 So. 2d at 102. The potential difficulties in this determination are highlighted in *Strulowitz v. Cadle Company, II, Inc.*, 839 So. 2d 876 (Fla. 4th DCA 2003) and other cases. *See Jones, Id*; *U.S. Trust Co. of Florida Sav. Bank v. Haig*, 694 So. 2d 769 (Fla. 4th DCA 1997); *Miller v. Estate of Baer*, 837 So. 2d 448 (Fla. 4th DCA 2003); *Faerber v. D.G.*, 928 So. 2d 517 (Fla. 2d DCA 2006).[5]

Strulowitz, for example, involved the decedent's settlement of a dispute over a promissory note and the decedent's indebtedness to the Cadle Company. 839 So. 2d at 877. The personal representative was the decedent's son, who testified he knew nothing of the creditor or the debt until an employee of Cadle called him in 2001, months after the 3 month time limitation passed. 839 So. 2d at 878. The personal representative testified about the nature of his diligent search for creditors:

> My diligent search included the following: I went through all my father's personal and business files. I went through the decedent's checkbook for

[5] Some of these cases might have been decided differently after the adoption of section 733.2121 in 2001, effective 2002 (service of notice to creditors is required even if their claims are "unmatured, contingent, or unliquidated....").

> the year 2000. I spoke with my brother regarding my father's debts. I went through my father's bills and correspondence to determine creditors.

Id. He served approximately 19 creditors with a notice to creditors. *Id.* In a somewhat unusual move, the circuit court appointed an "attorney ad litem" to investigate and report on whether the Cadle claim was reasonably ascertainable. *Id.* In the ad litem's report opining that Cadle was reasonably ascertainable, he "acknowledged the difficulty he had tracking down the company and the debt. He noted that Cadle did not send a payment book to the decedent, record the settlement, or send out a delinquency notice after failing to receive the June 2000 payment." *Id.* The ad litem said he did find some legible, historical entries of check payments in the decedent's check register, but then reported:

> I checked the local Broward County phone book to find a listing for Cadle. I was unsuccessful so I called information and I was told that there was no listing for Cadle in the State of Florida. I asked about other states and I was told that I would have to call every state in the union. This alone I believe was impracticable for a personal representative to act on.
>
> ...
>
> I made one final query when I called the operator to learn if a toll free number for Cadle existed. The operator provided [me] with a toll free number for Cadle.
>
> ...
>
> I called the number and read the number listed on the bottom of the check. The individual could not locate the number and asked me if it was an old account. She then asked me for a Social Security number and I gave her the decedent's social security number. She ***879** found the account and transferred my call.

839 So. 2d at 878-79. The circuit court determined that under the totality of circumstances the personal representative's search was inadequate and that the Cadle claim was reasonably ascertainable. 839 So. 2d at 881. The personal

representative argued there was no legal authority requiring him to do more than he did. To that the appellate court noted:

> In so arguing, the personal representative highlights a concern that makes his appeal problematic: the absence of any written rules or guidelines on specific steps that an estate administrator must take during the course of a diligent search.

Reviewing that decision on an "abuse of discretion" standard, the appellate court affirmed. *Id.* The district court of appeal, in obvious frustration, asked this Section to develop a rule to assist personal representatives in making an appropriate search and in identifying reasonably ascertainable creditor claims. *Id* at n. 3. The Section was no less frustrated in its effort to satisfy the court's request, worked on the issue for at least two years, and gave up trying, at least for now....[6] Obviously the trial court must decide this question on a case by case basis.

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[6] A list of "items constituting a diligent search" is offered at 18 Fla. Jur. 2d, Decedent's Property, §624. The list, however, is ambiguous (eg "examining all bills" could mean dating back a lifetime; in *Sturlowitz,* 17 months was not enough), and certainly would not be sufficient in all cases, and might take over 2 years in other cases, and would no doubt be expensive. Oklahoma, the state directly involved in *Pope* has a statute that defines an appropriate search as: "If reasonable under the circumstances, such efforts shall include the personal representative's conducting a search after the decedent's death and prior to the filing of the notice to creditors, of the personal effects of the decedent." 58 OKLA. STAT. § 331.1 (Supp. 1989). This might be misread by many to suggest that a mere search of the decedent's personal effects is enough. That would be an error. *See Estate of Vann*, 925 P.2d 80, 81 (Ct. App. Okla. 1996) ("By statute, the diligent effort by the personal representative to determine the identity of creditors 'shall include ... a search ... of the personal effects of the decedent,' but is not limited to such search.

Assuming for now, that the personal representative can readily discern the reasonably ascertainable creditors he, she or it must serve, the applicable statute of limitation is clearly expressed in 733.702(1): the later of 3 months from first publication of the notice to creditors or 30 days after service of the notice by the personal representative. Assuming no service by the personal representative, the creditor *must* file a claim within two years of the decedent's date of death. §733.710, Fla. Stat. There are no exceptions. Section 733.710 is a statute of repose. *May v. Illinois Nat. Ins. Co.*, 771 So. 2d at 1155-56.

The law seems clear that a personal representative must serve a reasonably ascertainable creditor and the statute of limitation in 733.702(1) does not begin to run until the personal representative perfects that service. Because the law is clear on these points, it is not subject to interpretation. *See Pewtty v. Florida Insurance Guaranty Ass'n*, 80 So. 3d 313, 316, n.3 (Fla. 2012); *Kephart v. Hadi*, 932 So. 2d 1086, 1091 (Fla. 2006); *May v. Illinois Nat'l. Ins. Co.*, 771 So. 2d at 1156. That said, if the law as to these points is subject to interpretation, then, if possible, it must be interpreted in a manner that would make the law constitutional. *See State*

The effort must generally be 'reasonable under the circumstances.'"). We made a reasonable, but not exhaustive, search of cases, statutes, rules and treatises and found nothing the Section might offer that would serve as a useful rule for practitioners and all other Floridians beyond what we already have, but the Section will continue to consider the issue.

v, Jefferson, 758 So. 2d 661, 664 (Fla. 2000); *Murray v. Mariner Health*, 994 So. 2d 1051, 1057 (Fla. 2008). Except in the case of the statute of repose, which is self-executing, it would seem that requiring a reasonably ascertainable creditor to take steps to preserve a claim absent service on that creditor of a notice to creditors would disregard the creditor's entitlement to notice and the personal representative's obligation to give it, and would violate the Fourteenth Amendment to the United States Constitution as explained in *Pope*. *See Estate of Puzzo*, 637 So. 2d 26 (Fla. 4th DCA 1994).

In light of these points, how did the courts in *Morgenthau v. Estate of Andzel,* 26 So. 3d 628 (Fla. 1st DCA 2009); *Lubee v. Adams,* **77** So. 3d 882 (Fla. 2d DCA 2012); and *Souder v. Malone*, 2014 WL 3756356 (Fla. 5th DCA, August 1, 2014) reach a result in conflict with the Section's analysis and in conflict with *Golden v. Jones*, 126 So. 3d 390 (Fla. 4th DCA 2013) and *Puzzo*?

It appears that all three appellate courts were distracted by Section 733.702 (3), Florida Statutes (2006), so we should examine that provision closely and how it is in harmony with 733.2121 (3) and 733.702 (1) in a constitutionally sound way.

Section 733.702 (3) begins with the provision that a claim *not timely filed* under 733.702 (1) is barred even though no objection to a tardy claim is filed. So, as long as the personal representative met its obligations to publish notice to

creditors and to serve the reasonably ascertainable creditors, then the personal representative need do nothing more, even if a creditor files a tardy claim.[7]

The problem is: what certainty does the personal representative have in a situation where the potentially tardy creditor was not served with a notice to creditors other than by publication? Is the claim really tardy or was the claim reasonably ascertainable, requiring actual service on the creditor by the personal representative? If the personal representative has identified this would-be creditor and desires clarity on this issue, section 733.702(3) permits the personal representative to serve a notice to petition for extension of time on the would-be creditor, which requires a response in 30 days. In this way the personal representative has not committed to the creditor being reasonably ascertainable. The personal representative has only committed to getting the issue of whether the creditor's claim was reasonably ascertainable resolved by the court.

From the creditor's standpoint in this scenario, how can the creditor be sure it was reasonably ascertainable and entitled to service of the notice to creditors? The creditor can respond to the personal representative's notice to petition for extension of time or, independently, serve a petition for extension of time based on insufficient notice, as contemplated by 733.702 (3). Assuming the two-year statute

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[7] Before the adoption of 733.702 (3) in 1988 (88-340, Laws of Florida), a personal representative had to move to strike a tardy claim or otherwise object to it on the ground of tardiness. *See Barnett Bank v. Estate of Read*, 493 So. 2d 447, 449 (Fla. 1986).

of repose is fast upon the would-be creditor, that creditor would wisely also file a creditor's claim.

We have already discussed the fact that oftentimes there is no clear answer to which creditor claims are reasonably ascertainable and it is a case-by-case analysis for the judge sitting in probate. Section 733.702 (3) offers the creditor, personal representative, and other interested persons the option of seeking clarity on these issues and speeding up the determination, nothing more. *See* Pilotte, Frank, *Practice Under The Florida Probate Code*, §8.7, pgs. 8-16 and 8-17 (7th Ed. 2012). Indeed, the anxiety and slothful resolution of estates that the first sentence of 733.702(3) might cause, generated the amendments to 733.702(3) to permit the optional processes for would-be creditors and personal representatives described above. *See* 89-340, §5, Laws of Fla.

A reasonably ascertainable creditor, however, need not avail itself of the option offered in 733.702(3) and can rely on the belief that it was reasonably ascertainable, was not properly served, and filed its claim before the two-year statute of repose foreclosed its claim. Similarly, a personal representative can do nothing and hope a lack of actual service of a notice to creditors on a creditor was appropriate or that two years will pass without a claim being filed.[8]

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[8] Under this scenario, the personal representative will be inclined to wait to distribute assets to the beneficiaries and creditors with valid claims until after the two year statute of repose in 733.710 has run or it will require a refunding

The *Morgenthau* decision, on which its sister courts rely in *Lubee* and *Souder,* also seemed to base its decision, in part, on language in section 733.705 (6), Florida Statutes (2006), which provides:

> (6) A claimant may bring an independent action or declaratory action upon a claim which was not timely filed pursuant to s. 733.702(1) only if the claimant has been granted an extension of time to file the claim pursuant to s. 733.702(3).

26 So. 3d at 630. But, the quoted language only begs the question of whether a claim was timely filed under 733.702 (1). The language does not answer the question other than to send us back to the clear limitation language of 733.702 (1), which provides that a reasonably ascertainable creditor who is not served with notice to creditors is not barred from filing a claim by that statute. The creditor will only be barred under that circumstance by the two-year statute of repose, 733.710, if the creditor fails to file its claim within the two year limitation period. *Puzzo*, 637 So. 2d at 27.

The *Morgenthau* court's analysis may have been hampered by the appellant's apparent concession in that case that his claim was untimely. *Morgenthau*, 26 So. 3d at 630. Given that concession, the *Morgenthau* court may have reached the correct result, *albeit* for the wrong reasons.

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agreement or rely on section 733.812, Florida Statutes (2006) for the return of improper distributions. *See* 733.802, Fla. Stat. (2006); 733.705 (1), Fla. Stat. (2006).

Bottom line, the *Morgenthau*, *Lubee*, *Souder* trilogy appear to miss the fundamental point clear in Florida law and under the United States Constitution after *Pope*, that the reasonably ascertainable creditor is *entitled* to actual notice as a matter of due process. *See Puzzo*, 637 So. 2d at 27. A personal representative is obligated to provide that actual notice. §733.2121(3)(a), Fla. Stat. (2006). And, if the personal representative fails to give that notice, only the two-year statute of repose can bar the creditor's claim. §733.710, Fla. Stat. (2006). Any appellate decision reading our law in a way that emasculates the personal representative's *duty* to give, and the reasonably ascertainable creditor's *right* to receive, actual notice, is contrary to Florida law and the Fourteenth Amendment to the United States Constitution, and, therefore, should be overruled.

The Uniform Probate Code addresses the *Pope* due process concerns in certain ways that differ from Florida's approach. But in some ways the U.P.C. and Florida approaches are almost identical except the time periods are different: 4 months instead of Florida's 3 months on publication, 60 days instead of Florida's 30 for creditors served with a notice to creditors, and a 1 year statute of repose, instead of Florida's 2 years. *See* U.P.C. §§3-803, 3-801. Interpreting the nearly identical UPC time bar scheme for creditors, Professor Alan Medlin, University of South Carolina College of Law, concludes:

> Thus, under the post-*Tulsa* [*Pope*] UPC process, if the personal representative does not provide actual notice, the known creditor will

> not be barred by the time period commenced by notice because the 60 days from actual notice time period was never triggered. However, the other time period, ending one year from date of death, applies even to known creditors. So if the creditor fails to present a claim within that one-year period, the claim is barred.

Medlin, Alan S., *Id.*, at pg. 4. *See Estate of Kotowski*, 704 N.W.2d 522, 527 (Minn. Ct. App. 2005); *In re Estate of Emery,* 258 Neb.789, 606 N.W.2d 750, 755-56 (2000); *In re Estate of Russo,* 994 P.2d 491, 495 (Colo.Ct.App.1999); *In re Estate of Anderson,* 821 P.2d 1169, 1172 (Utah 1991) (all interpreting UPC same as professor Medlin and consistent with the Section's analysis of Florida law).

CONCLUSION

For the reasons expressed in this brief, we believe the legal reasoning in *Morgenthau, Lubee, and Souder* should be rejected by this Court. The legal reasoning of the appellate court below seems to be consistent with Florida law and *Pope*. As is our practice, the Section offers no opinion about the appropriate outcome for the litigants in this case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I CERTIFY that a true copy of this brief was served through the e-portal on William H. Glasko, Golden & Cowan, P.A., counsel for respondent, bill@palmettobaylaw.com; Robin F. Hazel, Hazel Law, P.A., counsel for petitioner, robinhazel_esq@yahoo.com, hazellawpa@gmail.com this 9th day of September, 2014.

/s/ Robert W. Goldman, FBN339180

CERTIFICATE OF FONT COMPLIANCE

I certify that this brief complies with the font requirement of rule 9.210 (a) (2), Florida Rules of Appellate Procedure.

/s/ Robert W. Goldman, FBN339180

IN THE SUPREME COURT OF FLORIDA

CASE NO. SC14-1465
FED. T. NO. 2013-5098-5102

Stephen Rogers, Et al.,
appellants,

vs.

The United States of America,
appellee.

UNOPPOSED
MOTION FOR LEAVE TO SUBMIT BRIEF
AS *AMICUS CURIAE*

The REAL PROPERTY, PROBATE & TRUST LAW SECTION OF THE FLORIDA BAR moves to appear in this case as a friend of the Court, and says:

1. The Section is a group of Florida lawyers who practice in the areas of real estate, trust and estate law, and who are dedicated to serving all Florida lawyers and the public in these fields of practice. We produce educational materials and seminars, assist the public *pro bono*, draft legislation, draft rules of procedure, and

occasionally appear as *amicus curiae* to assist courts on issues related to our fields of practice.[1] Our Section has over 10,200 members.

2. The question certified to this Court by the federal appellate court includes a fundamental issue with a potentially significant impact on real property transactions, ownership and title in Florida:

> Assuming that a deed, on its face, conveys a strip of land in fee simple from a private party to a railroad corporation in exchange for stated consideration, does Fla. Stat. § 2241 (1892) (recodified at Fla. Stat. § 4354 (1920); Fla. Stat. § 6316 (1927); Fla. Stat. § 360.01 (1941)), state policy, or factual considerations—such as whether the railroad surveys property, or lays track and begins to operate trains prior to the conveyance of a deed—limit the railroad's interest in the property, regardless of the language of the deed?

3. The Section represents practitioners in the real estate field who work with individual and corporate clients and title companies who regularly address issues involving deeds and ownership of real property. In addition to our practical, daily involvement with real property interests, we generally serve as stewards of the Florida real estate law, offering advice, commentary and drafting suggestions to the Legislature. The perspective of the Section is oftentimes broader and more independent than that of the individual litigants and may assist the Court in

[1] For example, see *Aldrich v. Basile*, 136 So. 3d 530 (Fla. 2014); *North Carillon, LLC, v. CRC 603, LLC,* 135 So. 3d 274 (Fla. 2014); *Raborn v. Menotte*, 974 So. 2d 328 (Fla. 2008); *Chames v. DeMayo,* 972 So. 2d 850 (Fla.2007).

navigating through the law and important policies that have an impact far beyond the litigants in this case.

4. The Section has no interest in the underlying issues of the parties involved in the case, only fundamental property issues imbedded in the certified question. The Section is concerned with the certified question, because the answer to it could significantly impact the practice of real property law, transfer of real property by Floridians, title to real property and consumer transactions involving real property. The Section believes that as a policy matter, courts should not be able to add words and modify the intent of parties to a deed and that the interpretation of an unambiguous deed is not permissible. In extraordinary circumstances parole evidence may be used to interpret an ambiguous deed, but not change the terms or parties' intent. To establish a new policy to the contrary would make deeds merely a starting point for the parties involved. Imagine the ensuing chaos. The concept of owning "good title" to property would be a misnomer and trap for the unwary. A note and mortgage secured by real property offered after traditional notions of due diligence, would simply be an entrée to future litigation over the meaning of the deeds thought to establish ownership.

5. The executive council of the Section voted unanimously, and in accordance with its bylaws, to appear in this case if permitted by the Court. Pursuant

to Standing Board Policy 8.10, the Board of Governors of The Florida Bar (typically through its Executive Committee) must review a Section's amicus brief and grant approval before the brief can be filed with the Court. Although reviewed by the Board of Governors, the amicus brief, if permitted by this Court, will be submitted solely by the Real Property Probate & Trust Law Section and supported by the separate resources of this voluntary organization---not in the name of The Florida Bar, and without implicating the mandatory membership dues paid by Florida Bar licensees. The Florida Bar approved our filing of this motion.

6. The Section's counsel certifies that it has contacted counsel for the parties in this case. Counsel for the United States of America consents to the Sections request to submit an *amicus* brief. Counsel for the appellants also consents to our submission of an *amicus* brief on the legal points summarized above.

WHEREFORE, the Real Property, Probate & Trust Law Section of The Florida Bar requests that this Court grant leave to file and serve an amicus brief in this matter not later than 10 days after the initial brief is served, which we believe will be December 11.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I CERTIFY that a true copy of this motion was served by Florida e-portal on MARK F. (THOR) HEARNE, II, thor@arentfox.com, counsel for appellants, and LANE N. MCFADDEN, Lane.mcfadden@usdoj.gov, counsel for the United States of America, this 25th day of November, 2014.

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IN THE SUPREME COURT OF FLORIDA

CASE NO. SC14-1465
FED. T. NO. 2013-5098-5102

STEPHEN ROGERS, ET AL.,
appellants,

vs.

THE UNITED STATES OF AMERICA,
appellee.

ON CERTIFIED QUESTION FROM THE UNITED STATES CIRCUIT COURT OF APPEALS, FEDERAL CIRCUIT

BRIEF OF THE REAL PROPERTY, PROBATE AND TRUST LAW SECTION OF THE FLORIDA BAR, AS *AMICUS CURIAE*

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IDENTITY OF INTEREST

The Real Property Probate & Trust Law Section of The Florida Bar ("Section") is a group of Florida lawyers who practice in the areas of real estate, trust and estate law, and who are dedicated to serving all Florida lawyers and the public in these fields of practice. We produce educational materials and seminars, assist the public *pro bono*, draft legislation, draft rules of procedure, and occasionally appear as *amicus curiae* to assist courts on issues related to our fields of practice.[1] Our Section has over 10,200 members.

Pursuant to Section bylaws, the Executive Council of the Section voted unanimously to appear in this case if permitted by the Court. The Florida Bar approved the Section's involvement in this case. [2]

Kenneth B. Bell, Gerald B. Cope, Jr., Robert W. Goldman, and John W. Little III, are the four co-chairs of the *amicus* committee of the Section, which is charged with preparing *amicus* briefs for the Section. In order to avoid even an

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[1] For example, see *Aldrich v. Basile*, 136 So. 3d 530 (Fla. 2014); *North Carillon, LLC, v. CRC 603, LLC,* 135 So. 3d 274 (Fla. 2014); *Raborn v. Menotte*, 974 So. 2d 328 (Fla. 2008); *Chames v. DeMayo,* 972 So. 2d 850 (Fla.2007).

[2] Pursuant to Standing Board Policy 8.10, the Board of Governors of The Florida Bar (typically through its Executive Committee) must review a Section's amicus brief and grant approval before the brief can be filed with the Court. Although reviewed by the Board of Governors, the amicus brief will be submitted solely by the Section and supported by the separate resources of this voluntary organization---not in the name of The Florida Bar, and without implicating the mandatory membership dues paid by Florida Bar licensees. The Florida Bar approved our filing of this brief.

appearance of a conflict, Robert W. Goldman is the only co-chair participating in this case on behalf of the Section.

The Section's interest in this case stems from the Section's expertise and experience with Florida real estate law and the potential impact this case could have on fundamental principles of Florida real estate law.

SUMMARY OF ARGUMENT

The United States Circuit Court of Appeals, Federal Circuit, certified the following question to this Court:

> Assuming that a deed, on its face, conveys a strip of land in fee simple from a private party to a railroad corporation in exchange for stated consideration, does Fla. Stat. § 2241 (1892) (recodified at Fla. Stat. § 4354 (1920); Fla. Stat. § 6316 (1927); Fla. Stat. § 360.01 (1941)), state policy, or factual considerations—such as whether the railroad surveys property, or lays track and begins to operate trains prior to the conveyance of a deed—limit the railroad's interest in the property, regardless of the language of the deed?

There are no doubt pure eminent domain policy issues implicated in answering the certified question, which the Section believes are best addressed by the litigants and perhaps other friends of the Court. The Section's concern here is the potentially broader implications this Court's decision may have on real property jurisprudence. Indeed, the case has the potential to unsettle Florida law regarding the construction and enforcement of deeds if the Court generally

concludes that public policy or factual considerations limit an interest in land despite a deed's unambiguous language.

The following principles of Florida law are unbending and inveterate and stabilize Florida's real property law and the attendant commerce related to it.

Under Florida law, the intention of the parties recited in a deed governs the meaning of that deed. If there is no ambiguity in the language employed in a deed, then the intention of the parties must be ascertained from that language. In very limited circumstances, parol evidence may be employed to resolve an ambiguity in a deed. But, parol evidence may not be used to modify or otherwise change the meaning of the terms of a deed, including terms involving the nature of the interest conveyed and consideration. Further, parol evidence may not be used to create an ambiguity where none existed.

In addition, if a deed provides for valid consideration expressed as $1.00 or $10.00, the grantee of the deed is under no obligation to present parol evidence to demonstrate said consideration was valid and amounted to more than nominal consideration. If such parol evidence was required, then virtually every Florida property owner that obtained title through a statutory warranty deed referencing $1.00 or $10.00 consideration would have to prove via parol evidence that it was valid consideration and not nominal consideration.

If deeds are merely a starting point for the parties involved, then imagine the chaos. The concept of owning "good title" to property would be a misnomer and trap for the unwary. Mortgages offered after traditional title searches would simply be an entrée to future litigation over the meaning and validity of the underlying deeds, which in some instances could result in parol evidence literally interpreting and altering a warranty deed to have limited or no meaning at all.

ARGUMENT

I. Fundamental Principles Involving Deeds

Unambiguous deeds are not subject to interpretation by a court. *See Thompson v. Ruff*, 78 So. 489 (Fla. 1918); *Pathare v. Goolsby*, 602 So. 2d 1345, 1346 (Fla. 5th DCA 1992); *Saltzman v. Ahern*, 306 So. 2d 537, 539 (Fla. 1st DCA 1975); s*ee also Gendzier v. Bielecki,* 97 So. 2d 604, 608 (Fla.1957) ("The test of the meaning and intention of the parties is the content of the written document."). Further, section 689.10, Florida Statutes (2014) provides:

> Where any real estate has heretofore been conveyed or granted or shall hereafter be conveyed or granted without there being used in the said deed or conveyance or grant any words of limitation, such as heirs or successors, or similar words, such conveyance or grant, whether heretofore made or hereafter made, shall be construed to vest the fee simple title or other whole estate or interest which the grantor had power to dispose of at that time in the real estate conveyed or granted, unless a contrary intention shall appear in the deed, conveyance or grant.

This law has been a part of our statutes since 1903. *See* Ch. 5145, §1, Laws of Fla. (1903).[3]

In very limited circumstances parol evidence may be used to assist a court in interpreting an ambiguous deed. Parol evidence is actually not a procedural rule of evidence, but is a matter of substantive law. Generally, the rule is that parol evidence may not be used to interpret or alter a written obligation such as a deed. The rule rests on a foundation of "experience and policy and is essential to the certainty and stability of written obligations." *Atkins v. Bianchi*, 162 So. 2d 694, 697 (Fla. 1st DCA 1964).

Where a deed does not contain or refer to a limitation on the use of real property, parol evidence is not admissible to impair the rights of the grantee or user of the property. *See Jackson v. Parker*, 15 So. 2d 451, 459 (Fla. 1943). That is true even if a separate contractual limitation or obligation may be proven through parol evidence. *Florida Moss Products Co. v. City of Leesburg*, 112 So. 572, 574-75 (Fla. 1927). Parol evidence may be used to establish the true character of consideration where a deed recites consideration of money "and other valuable consideration." Parol evidence, however, may **not** be used even in that instance to add terms to a deed that are inconsistent with the terms and obligations and interests recited in the deed, even though that parol evidence is part of the

[3] Title to real property passes upon delivery of the deed to the grantee and the grantee's acceptance of the deed. *See Parken v. Jafford*, 37 So. 567, 569 (1904).

consideration for the transaction resulting in the deed. 112 So. at 660-61. A good example of the interplay of consideration and the parol evidence rule may be found in *Mason v. Roser*, 588 So. 2d 622, 624 (Fla. 1st DCA 1991). In *Roser*, the recited consideration was "love and affection." Perhaps the court was unwilling to risk the potential, personal consequences of holding that "love and affection" is ambiguous. But, legally that holding was simply unnecessary:

> However, resolution of this issue does not require us to delve into that realm because whether the recited consideration is or is not ambiguous enough to permit parol evidence to test its character, "[w]hen the purpose and effect of parol evidence is to alter, impair or defeat the operation and effect of the deed, such evidence is not embraced within the exception ... admitting parol evidence for the purpose of showing the true consideration for a deed." *Florida Moss Products Co. v. City of Leesburg, supra.* Below, the testimony that Mrs. Reese did not possess love and affection for appellant was used to attack the recited consideration for the deed in question, thereby defeating its operation and legal effect. In admitting such testimony, we find that the trial court reversibly erred.[4]

If a deed can be construed, "[a] deed is to be construed most strongly against the grantor and most beneficially for the party to whom it is made. *Reid v. Barry*, 112 So. 846 (Fla. 1927). Where a deed permits more than one interpretation, the one most favorable to the grantee should be adopted. *Thompson v. Ruff*, 78 So. 489 (Fla. 1918); *Central and Southern Florida Flood Control Dist. V. Surrency*, 302

[4]A warranty deed reciting a dollar amount of any sum (only) as consideration is not ambiguous. *See* §§689.02, 689.03, Fla. Stat. (2013). In any event, consideration is no longer required in order to have a valid and effective deed. *Chase Federal Savings And Loan Assoc. v. Schreiber*, 479 So. 2d 90, 101-02 (Fla. 1985).

So. 2d 488, 490 (Fla. 2d DCA 1974); *Pathare v. Goolsby*, 602 So. 2d at 1346 (rule is based on the idea that the language in a deed is presumed to be chosen by the grantor and the grantor had the power to make the deed plain and intelligible).

The certified question may also implicate Florida's Marketable Record Title Act, chapter 712, Florida Statutes (2014) ("MRTA"). MRTA was intended to simplify and facilitate land title transactions "by allowing persons to rely on a record title . . . subject only to such limitations as appear in [the exceptions listed in] section 712.03." §712.10, Fla. Stat. (2014); *Blanton v. City of Pinellas Park*, 887 So.2d 1224, 1232 (Fla. 2004). MRTA is to be liberally construed to effectuate the purpose of the Act. §712.10, Fla. Stat. (2014).

For example, even if appellants retained fee title subject to an easement to the railroad or their original deed was somehow invalid as lacking consideration, the effect of MRTA may be to eliminate the appellants' entire interest. This result would come about under MRTA if there was an intervening deed or conveyance of the railroad property that has been of record for at least 30 years (a "Root of Title"), and no subsequent recorded instrument (a "muniment of title") recorded within the 30 years following the Root of Title recited the interests of appellants (the easement or invalidity for lack of consideration).[5]

[5] As a friend of the Court, the Section takes no position on the facts of the case or merits of the parties' positions.

There are a number of potentially applicable exceptions to MRTA contained in section 712.03, each of which must be evaluated based on a careful examination of the applicable real estate records. One exception merits special comment. Section 712.03(5) provides:

> Such marketable record title shall not affect or extinguish the following rights:
>
> (5) Recorded or unrecorded easements or rights, interest or servitude in the nature of easements, rights-of-way and terminal facilities, including those of a public utility or of a governmental agency, so long as the same are used and the use of any part thereof shall except from the operation hereof the right to the entire use thereof. ...

This exception does not appear to apply if the appellants are claiming they have a *fee interest* underlying the easement interest of the railroad. While this exception might prevent the railroad's interest (if it was an easement interest rather than a fee interest) from being extinguished by MRTA, it will not prevent the underlying fee interest (if any) from being eliminated.

II. The Consequences Of Altering Fundamental Principles Involving Deeds

The needed certainty in real property conveyances is underscored by the requirement that real property be conveyed through a written deed executed with proper formalities. §689.01, (Fla. Stat. (2014); *see Skinner Manufacturing Co., v. Wright*, 47 So. 931 (Fla. 1909) ("In this state a conveyance of the legal title to land is made by the execution of a deed...".).

The potential impact of eroding the above-stated legal principles cannot be over-stated. Indeed, for average Floridians, the purchase and sale of real property are the most important financial transactions of their lives. Commerce in Florida regularly involves the transfer of real property and the securitization of loans with real property. By some estimates, even during the recent difficult economic years, real estate related industries generated approximately 16% of Florida's Gross Domestic Product.[6]

All of these transactions involve the delivery and acceptance of deeds that, among other things, define the nature of the interest being transferred and the title to real property. The deed is paramount to insurers insuring title to property.

So, if deeds do not necessarily mean what they say, then when any Floridian, natural person or corporation, is asked whether he, she or it owns real property, the

[6] Regional Perspectives: Florida Economic Outlook, JP Morgan/Chase, page 3 (June 2, 2014) available online at https://www.chase.com/content/dam/chasecom/en/commercial-bank/documents/florida-economy.pdf.

answer (even looking directly at the words on the deed), would have to be "I do not know." Title to property could not be insured, at least not without a judicial declaration, which suggests an unwanted adaptation to an old saying: "No good deed goes unlitigated."

CONCLUSION

The parties to this litigation will no doubt make thoughtful arguments worthy of this Court's consideration. The Section, as a friend of the Court, only asks that those arguments be considered in light of the fundamental principles of real property law explained above. An argument that erodes any of these principles should be rejected.

Respectfully submitted,

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I CERTIFY that a true copy of this motion was served by Florida e-portal on Mark F. (THOR) Hearne, II, thor@arentfox.com, counsel for appellants, and Lane N. McFadden, Lane.mcfadden@usdoj.gov, counsel for the United States of America, this 11th day of December, 2014.

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IN THE SUPREME COURT OF FLORIDA

CASE NO. SC14-1465
FED. T. NO. 2013-5098-5102

STEPHEN ROGERS, ET AL.,
appellants,

vs.

THE UNITED STATES OF AMERICA,
appellee.

AMENDED CERTIFICATE OF SERVICE

I CERTIFY that a true copy of the *Amicus* Brief of the Real Property Probate and Trust Law Section of The Florida Bar was served by Florida e-portal on Mark F. (THOR) Hearne, II, thor@arentfox.com, counsel for appellants, Lane N. McFadden, Lane.mcfadden@usdoj.gov, counsel for the United States of America, and the following recipients this 11th day of December, 2014.

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In the United States Court of Federal Claims

Nos. 07-273 L, 07-426 L, 08-198 L,
10-187 L, and 10-200 L

STEPHEN J. ROGERS, et al.

JUDGMENT

v.

THE UNITED STATES

Pursuant to the court's Order, filed May 10, 2013, directing the entry of partial final judgment pursuant to Rule 54(b), there being no just reason for delay,

IT IS ORDERED AND ADJUDGED this date, pursuant to Rule 58, that partial final judgment on liability is entered in favor of defendant on the claim of Bird Bay Executive Golf Club, Inc..

Hazel C. Keahy
Clerk of Court

May 24, 2013 By: s/ Debra L. Samler

Deputy Clerk

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JA 000001

In the United States Court of Federal Claims

No. 07-273L
No. 07-426L
No. 08-198L
(Filed: June 28, 2010)

STEPHEN J. ROGERS, et al.,	*	
	*	
Plaintiffs,	*	**Rails-to-Trails; Takings; Fee Simple; Easement; Florida Law; Deed Interpretation; Extrinsic Evidence; Consideration; Chain of Title.**
	*	
v.	*	
	*	
THE UNITED STATES,	*	
	*	
Defendant.	*	
	*	
BIRD BAY EXECUTIVE GOLF CLUB, INC., et al.,	*	
	*	
Plaintiffs,	*	
	*	
v.	*	
	*	
THE UNITED STATES,	*	
	*	
Defendant.	*	
	*	
BAY PLAZA PROPERTIES, LLC, et al.	*	
	*	
Plaintiffs,	*	
	*	
v.	*	
	*	
THE UNITED STATES,	*	
	*	
Defendant.	*	
	*	

Mark F. (Thor) Hearne, II, Lindsay S.C. Brinton and Meghan S. Largent, Arent Fox LLP, 112 S. Hanley Drive, Suite 200, Clayton, MO 6310, for Plaintiffs.

Kelle S. Acock and William Shapiro, Natural Resources Section, Environmental and

Natural Resources Division, U.S. Department of Justice, P.O. Box 663, Washington DC, for Defendant.

OPINION AND ORDER

WILLIAMS, Judge

In these consolidated "rails-to-trails" actions, Plaintiffs claim that the Government effected a taking of their properties when it converted an inactive railroad right-of-way stretching from Sarasota to Venice, Florida, to a recreational trail, pursuant to the National Trails System Act Amendments of 1983 ("Trails Act"). This is the Court's second opinion addressing the parties' cross-motions for partial summary judgment on liability. On November 23, 2009, the Court granted, in part, Plaintiffs' motions for partial summary judgment in the Rogers (No. 07-273) and Bird Bay (No. 07-426) actions, except with respect to Plaintiffs Mission Estates Homeowners Association, Inc. ("Mission Estates") and Bird Bay Executive Golf Club ("Bird Bay"). Rogers v. United States, 90 Fed. Cl. 418, 434 (2009).[1] Currently before the Court are the parties' cross motions for partial summary judgment regarding Plaintiff Bird Bay.

In its November 23, 2009 Opinion, the Court denied the parties' cross-motions for summary judgment regarding Plaintiff Bird Bay because it was "not clear to the Court, specifically, as a matter of Florida law," whether Seaboard Air Line Railway ("Seaboard")[2] obtained a fee simple estate in the railroad corridor, or an easement over land presently owned by Bird Bay. Rogers, 90 Fed. Cl. at 434. The Court requested that the parties submit supplemental briefing on matters of Florida law.[3]

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[1] On February 2, 2010, the Court granted Plaintiffs' motion for partial summary judgment with regard to Mission Estates after Plaintiffs submitted additional evidence demonstrating Mission Estates' ownership interests as of April 2, 2004.

[2] Seaboard is the railroad company that operated rail service along the subject railway corridor in the early- to mid-twentieth century. It is the predecessor in interest to CSX and the Seminole Gulf Railway, which, in 2003, petitioned to abandon the railway corridor. 90 Fed. Cl. at 421.

[3] The Court requested that the parties address the following issues, under Florida law:

a. Whether B.L.E. obtained clear fee simple title to the right-of-way vis-à-vis the August 31, 1926 quitclaim and trustee deeds from the prior possessors;

b. Whether Venice-Nokomis obtained clear fee simple title to the right-of-way as a result of the foreclosure proceedings against B.L.E.;

For the reasons set forth below, the Court concludes that Seaboard obtained fee simple title in the railroad corridor abutting Bird Bay's property. As such, Plaintiff Bird Bay has no right or interest in the corridor, and has no claim for a taking related to the corridor. See Preseault v. United States, 100 F.3d 1525, 1533 (Fed. Cir. 1996) ("Clearly, if the Railroad obtained fee simple title to the land over which it was to operate, and that title inures, as it would, to its successors, the [adjoining landowners] today would have no right or interest in those parcels and could have no claim related to those parcels for a taking.").

Background[4]

On December 15, 2003, Seminole Gulf Railway, L.P. ("SGLR"), filed a petition with the Surface Transportation Board ("STB") to abandon an approximately 12.43 mile portion of its railway corridor between Sarasota and Venice, Florida. On April 2, 2004, the STB issued a Decision and Notice of Interim Trail Use of Abandonment ("NITU") wherein SGLR and CSX Corporation ("CSX") -- as successors and assigns of Seaboard -- granted the Trust for Public Land ("the Trust"), a national, nonprofit, land conservation organization, an option to acquire the railway right-of-way for conversion to a trail. On January 13, 2005, CSX and the Trust executed a quitclaim deed to effect the conversion of the railroad corridor to a recreational trail. See Rogers, 90 Fed. Cl. at 421.

Bird Bay owns a 31-acre parcel of land, a portion of which runs alongside the subject corridor. Bird Bay's western border abuts 975 feet of the corridor. The property is bordered by Curry Creek to the North, by a condominium development to the East, and by another development to the South. Bird Bay's property is wholly located within Section Six, Township 39 South, Range 19 East of Sarasota County, Florida. See Rogers, 90 Fed. Cl. at 422-23.

As the Court noted in its previous Opinion, the ownership history of the corridor as it relates to Bird Bay's property has been difficult to reconstruct. The instrument that originally established Seaboard's interests in the right-of-way running along Bird Bay's property is either

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> c. Whether, and to what extent, the property interests or possessory rights conveyed to Seaboard in the B.L.E. and Venice deeds were affected by Seaboard's status as a railroad company;
>
> d. Whether, to what extent, and how, the amount of consideration is relevant in interpreting the instruments; and
>
> e. Whether it would be appropriate for the Court to consider extrinsic evidence in determining the intent of the parties to the instruments. If so, what extrinsic evidence would each party rely upon and what further proceedings, if any, are warranted?

90 Fed. Cl. at 434.

[4] This background is derived from the Court's November 23, 2009 Opinion and Order and the attachments and exhibits to the parties' motion papers.

lost or never existed. The chain of title spans more than 100 years and involves almost 50 recorded documents. The pertinent land transfers concerning this portion of the subject corridor and Bird Bay's property are described below.[5]

Parcels Acquired by Sarasota-Venice Company

On May 31, 1910, J. H. Lord and Frane W. Lord conveyed an undivided one-third interest in 9,750 acres to Adrian Honore. Jt. Chain of Title, Tab 1. This conveyance included the land that was owned by Bird Bay on the day the NITU was issued. There is no mention of Seaboard or the railroad corridor.[6]

On October 2, 1911, Adrian Honore conveyed an undivided one-half interest in this land to Sarasota-Venice Company ("Sarasota-Venice"), a land development company run by Honore and Bertha Palmer. Id. Tab 2; Pls.' Suppl. Br. in Resp. to Jan. 15, 2009 Order at 9. That same day, Sarah O. Webber conveyed an undivided one-half interest in this land to Sarasota-Venice. Jt. Chain of Title, Tab 3. Both instruments conveyed the land to Sarasota-Venice "[t]ogether with all and singular the tenements, hereditaments and appurtenances [of the grantor] . . . . [t]o have and hold . . . forever in fee simple." Id. Tabs 2 & 3. The land conveyed included the land presently owned by Bird Bay. Id. (describing the parcel encompassing Bird Bay's land as "the south half of the northwest quarter, the southeast quarter of the southeast quarter, and lots two (2) and three (3) in Section six (6)"). Neither of the two instruments associated with these transfers mentioned Seaboard or the railroad corridor.

The Interstate Commerce Commission ("ICC") Valuation Table

According to an ICC valuation table dated June 30, 1918, multiple sections of Seaboard's railway corridor as they existed in 1918, including a section adjacent to Bird Bay's property, had been held or used "by possession." Def.'s Cross-mot. for Summ. J., Jun. 6, 2008, Ex. 1. The ICC valuation table concerns "lands owned or used for purposes of a common carrier." Id.

Sarasota-Venice Company to Palmer

The railway corridor is first mentioned in a conveyance dated June 20, 1921. Jt. Chain of Title, Tab 4. On that date, Adrian Honore, as president of Sarasota-Venice Company, conveyed 6,594 acres of the company's property to Honore Palmer and Potter Palmer as trustees of the

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[5] As a result of the relocation of the railroad tracks during the 1920s, there are two corridors in the area adjacent to Bird Bay's property. A portion of the corridor was established prior to this relocation. Conveyances that reference the corridor adjacent to the Bird Bay property after the relocation of the tracks refer to both the old right-of-way and the right-of-way created after the relocation, as the two overlap. See Notice of Filing of Exhibits 10 and 11 to Def.'s Reply Mem., Ex. 11; Pls.' Suppl. Br. in Resp. to Jan. 15, 2009 Order, Ex. F.

[6] Historical accounts indicate that Seaboard began running trains between Sarasota and Venice, Florida in 1911. See Pls.' Suppl. Br. in Resp. to Jan. 15, 2009 Order at 12 (citing George E. Youngberg and W. Earl Aumann, Venice and the Venice Area (Feather Fables Publishing Co.) (1969)).

testamentary trust established under Bertha Honore Palmer's will. Id. The conveyance included portions in Section Six of Township 39 South, Range 19 East -- the plat upon which Bird Bay is now located. In conveying portions of Section Six, the deed expressly "except[ed] Seaboard Air Line Railroad right-of-way, Section Six (6)." Id.

On the following day, June 21, 1921, Sarasota-Venice Company executed a quitclaim deed ("the 1921 quitclaim deed") remitting to Potter Palmer all interest Sarasota-Venice had in Seaboard's right-of-way, as well as land used by Seaboard for the purpose of operating the railway. This instrument stated:

> That the said party of the first part [Sarasota-Venice Company] for and in consideration of the sum of One Dollar and other valuable consideration in hand paid by the said party of the second part [Potter Palmer], the receipt whereof is hereby acknowledged, has remised, released and quitclaimed, and by the presents does remise, release, and quit-claim unto the said party of the second part, and his heirs and assigns, forever, all the right, title, interest, claim and demand which the said party of the first part has in and to the following described lot, piece or parcel of land to wit: The right of way of the Seaboard Air Line Railway Company in the Southeast quarter of Southwest quarter of Section Six (6); East Half of Northwest Quarter and the East Half of Southwest Quarter of Section Seven (7), Township Thirty-nine (39) South, Range Nineteen (19), being more particularly described as a strip of land one hundred (100) feet in width, being fifty (50) feet wide on each side of the center line of railroad of the Seaboard Air Line Railway Company, as the same is now located and constructed, and extending from the South shore of Curry Creek in the Southeast Quarter of Southwest Quarter of Section Six (6), Township Thirty-nine South, Range Nineteen East, to the present terminus of the railroad of said Seaboard Air Line Railway Company in the Southwest Quarter of Section Seven (7) Township Thirty-nine South, Range Nineteen East. Also, the lands now used and occupied by the said Seaboard Air Line Railway Company for station grounds, yards, Y tracks and terminals.
>
> . . . .

Id. Tab 5 (emphasis added). This instrument does not further describe the nature of Seaboard's right-of-way or purport to limit the right-of-way to use for railroad purposes. See id.

Palmer to Albee

On August 15, 1925, Honore Palmer and Potter Palmer, as trustees under the trust established in Bertha Honore Palmer's will, conveyed 1,468.55 acres of land to Fred H. Albee. Jt. Chain of Title, Tab 6. Among other lands, this deed conveyed land in Section Six, Township 39 South, Range 19 East:

> Beginning at SE Cor. of SE1/4 of said sec. 6, thence N 1638.5 ft to waters of Curry Creek; thence SW along shore of Curry Creek to E line of right-of-way of Seaboard Air Line Railroad; thence S along said right-of-way line to S Line of SW1/4 of Sec. 6, thence E 384.7 ft. to point of beginning, containing 10.38 acres, more or less.
>
> Also NE1/4 of SE1/4 of NE1/4, W1/2 of SE1/4 & NE1/4 of SE1/4 of SW1/4 of NE1/4, Sec. 6, Twp 39 South, Range 19 East, containing 35 acres more or less.

Id. (emphasis added). This conveyance included the land presently owned by Bird Bay and referenced the Seaboard Air Line Railroad right-of-way twice. Id. In particular, the deed conveyed the land adjacent to the east line of Seaboard's right-of-way, but did not purport to convey any interest in the right-of-way itself as a distinct piece of property. The Section Six conveyance stretched from the shore of Curry Creek to the southern boundary of Section Six. In other words, this conveyance included all of Bird Bay's property running alongside the railroad right-of-way.

Land Transfers to B.L.E. Realty Corporation

In the mid-to-late 1920s, B.L.E. Realty Corporation ("B.L.E.") acquired through various deeds and indentures:

> 1) 1,468.55 acres of land from Fred Albee and Louella B. Albee on October 6, 1925;
>
> 2) an interest in tracks of land from Joseph H. Lord and Frane Lord on March 8, 1926;
>
> 3) any interest that Honore Palmer and Potter Palmer, as trustees of the testamentary trust established under Bertha Honore Palmer's will, had in the 1,468.55 acres of land that B.L.E. Realty Corporation previously acquired from Fred Albee and Louella B. Albee on March 22, 1926;
>
> 4) the parcel of land "over which the Seaboard Air Line Railway Company has exercised its right-of-way in the Southeast Quarter of Section Six . . . as the same is now located and constructed, and extending from the South shore of Curry Creek" as well as "the lands now used and occupied by the said Seaboard Air Line Railway Company for station grounds, yards, Y tracks and terminals" from Honore Palmer, Potter Palmer, and their wives via a quitclaim deed as well as any interest that Honore Palmer and Potter Palmer, as trustees of the testamentary trust established under Bertha Honore Palmer's will, had in this land on August 31, 1926.

Jt. Chain of Title, Tabs 7-11 (emphasis added).

Among the lands included in the October 6, 1925 deed between Fred and Louella Albee and B.L.E. was a parcel described as:

> Beginning at the Southeast Corner of the Southwest Quarter of said Section Six, thence North __ feet to the waters of ___ Creek; thence ____ along the shore of ___ Creek to the East line of the right-of-way of the ___ Air Line Railroad; thence Southerly along the said right-of-way to the South line of the Southwest Quarter of Section Six; thence East ___ feet to the point of beginning, containing ___ acres, more or less.

Id. Tab 7.[7] In addition, "THIS DEED [was] made subject to a first mortgage on said lands made and executed by Fred N. Albee to Honore Palmer and Potter Palmer, Trustees under the will of Bertha Honore Palmer, deceased, dated the 15th day of August A.D. 1925." Id.[8] The railroad corridor -- as the distinct parcel of land described in prior conveyances -- was not among the properties included in this deed. Compare id. Tab 7 with Tab 5.

Two quitclaim deeds conveyed interests in the subject corridor to B.L.E., and both were executed on August 31, 1926. Id. Tabs 10-11. The first was a quitclaim deed from Honore Palmer and Potter Palmer and their wives conveying "[t]hat certain parcel of land over which the Seaboard Air Line Railway Company has exercised its right-of-way" to B.L.E. Id. Tab 10. In this deed, the Palmers quitclaimed "all the right, title, interest, claim and demand which [the Palmers] have in and to the" right-of-way as described above in the 1921 Quitclaim Deed. The second deed -- a trustee's deed concerning the estate of Bertha Palmer -- conveyed "all the estate, right, title, interest, claim and demand whatsoever in law or in equity which the said Bertha Honore Palmer, Testatrix, had at the time of her death." Id. Tab 11. This trustee's deed used identical descriptions to convey the same strip of land as the 1921 and 1926 quitclaim deeds. Id. Tab 11.

B.L.E. Realty Corporation to Seaboard Air Line Railway Corporation

On April 4, 1927, B.L.E. executed an indenture to the Seaboard Air Line Railway Company, in which B.L.E "grant[s], bargain[s], convey[s], alien[s], remise[s] and release[s] . . . all of its right, title, and interest" in three parcels of land:

> 1) a "strip of land 100 feet wide, that is, fifty feet on each side of center line of railway as located and constructed through the lands of the grantor in Sections 6, 7, 16 and 17 of Township 39 South, Range 19 East, Sarasota County, Florida;"
>
> 2) a "tract of land 200 feet by 1607 feet, more or less . . . ;"

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[7] Portions of the instruments that are illegible are indicated with a "__."

[8] None of the other instruments conveying property interests to B.L.E. were made subject to an existing mortgage.

> 3) and a "certain tract of land . . . lying between two lines fifty feet distant from and parallel to the center lines of wye track to be constructed."

Id. Tab 12 (emphasis added). The strip of land in this deed -- the first parcel listed -- extended from the "the center line of existing railroad where said center line crosses the channel of Curry Creek . . . to a point on the south line of Section 17." Id. This land began at Curry Creek and stretched far south of Section Six, and, thus, encompassed the entirety of Bird Bay's property abutting the corridor. This indenture (the "B.L.E. Deed") stated that B.L.E. granted Seaboard the property at issue "together with the rights, members and appurtenances thereunto belonging or appertaining, unto . . . [Seaboard], its successors and assigns in fee simple, forever." Id. (emphasis added). The deed also stated that the grantor, B.L.E., "fully warrant[ed] the title to the said lands and would defend the same against the lawful claims of all persons whomsoever." Id. (emphasis added).

The Foreclosure Sales

On February 27, 1933, the Circuit Court of the 27th Judicial Circuit of Florida in Sarasota County ("the Circuit Court"), found that B.L.E. had been in default on its mortgage since July 31, 1929, in a case concerning the priority of a crop lien ("first foreclosure"). Id. Tab 13 (Knight v. B.L.E. Realty Corp., No. 2737, (Fl. Sarasota County Ct. Feb. 27, 1933)). The portion of the land subject to the mortgage in default included property that is currently owned by Bird Bay, but did not include the portion of Bird Bay's land running alongside the railroad corridor. See id.[9] Seaboard's section of the corridor, as described in the above-mentioned deeds, was not listed among the mortgaged properties in the decree. Id.

On September 3, 1934, the Circuit Court issued a final decree in a second foreclosure action, and foreclosed on the mortgage that Fred H. Albee held on property that he previously had transferred to B.L.E. on October 6, 1925 ("second foreclosure"). Id. Tab 15; see also id. Tab 7. This affected property included the portion of Bird Bay's land running alongside the railroad corridor. See id. Tab 15 (describing land as located within the southwest quarter of section six up to, and running alongside, "the East line of the right-of-way of the Seaboard Air Line Railroad"). The Circuit Court appointed a special master and ordered the sale of the land at public auction. Id. The lands subject to the public auction were expressly limited to the lands listed in the court's 1934 final decree, which included Bird Bay's land adjacent to the right-of-way, but not the right-of-way itself as a distinct piece of property. Thus, while the lands abutting the corridor were included, the corridor itself was not included among the foreclosed properties. The decree stated:

> Beginning at the Southeast Corner of the Southwest Quarter of said Section Six, thence North 1638.5 feet to the waters of Curry Creek; thence Southwesterly along the shore of Curry Creek to the East line of the right-of-way of the Seaboard Air Line Railroad; thence Southerly along the said right-of-way line to

[9] The land subject to this foreclosure was located exclusively within the southeast quarter of section six. Other instruments demonstrate that the railroad corridor runs alongside Bird Bay's property in the southwest quarter of section six. See Joint Chain of Title, Tabs 7, 9, 15.

> the South line of the Southwest Quarter of Section Six; thence East 384.7 feet to the point of beginning, containing 10.38 acres, more or less.

Id. The final decree provided that B.L.E. and all other defendants to that action were barred "from the equity of redemption"[10] and from claiming interest in the mortgaged property. Id. Following a public auction, the subject property was ultimately assigned via deed to the Venice-Nokomis Holding Corporation on December 10, 1934. Id. Tab 16.

Venice-Nokomis Holding Corporation to Seaboard Air Line Railway - The Venice Deed

Approximately seven years after the public auction, on November 10, 1941, the Venice-Nokomis Holding Corporation conveyed to Seaboard via a deed, the same three parcels described in the 1927 deed from B.L.E. The granting clauses stated that Venice-Nokomis:

> [D]oes by these presents grant, bargain, sell and convey, unto [Seaboard] its successors and assigns, to be held, used and disposed of as a part of the receivership estate and in accordance with such further orders and decrees as may be entered by the United States District Court in the Consolidated Cause of Guaranty Trust Company of New York and Merrel P. Callaway, as Trustees, et al. against [Seaboard] the following real estate...

Id. Tab 17. Like B.L.E. in 1927, Venice-Nokomis in 1941 conveyed interests in, inter alia:

> A strip of land 100 feet wide, that is, fifty feet on each side of center line of railway as now located and constructed through the lands of the grantor in Sections 6, 7, 16 and 17 of Township 39 South, Range 19 East, Sarasota County, Florida.
>
> . . . .
>
> Beginning at the center line of the main track of Seaboard Air Line Railway Company where said center line crosses the channel of Curry Creek . . . to a point on the south line of Section 17.

Id. (emphasis added). This strip of land encompassed the entire stretch of track running next to Bird Bay's property. This strip of land had not been expressly included among the parcels in the 1934 indenture by the Circuit Court's special master to Venice-Nokomis. Nevertheless, Venice-Nokomis purportedly conveyed the property, via quitclaim, to Seaboard:

> TO HAVE AND TO HOLD, together with all and singular the rights, members, hereditaments and appurtenances thereunto belonging or in any [illegible] incident or appertaining, unto the party of the second part, its

[10] Under Florida law, "[t]he right of redemption is the mortgagor's valued and protected equitable right to reclaim her estate in foreclosed property." Sudhoff v. Fed. Nat'l Mortgage Ass'n, 942 So. 2d 425, 428 (Fla. Dist. Ct. App. 2006) (citations omitted).

successors and assigns, in fee simple forever, but subject to be held, used and disposed of as a part of the receivership estate as aforesaid.

Id. (emphasis added); see also id. Tab 12.

Ultimately, Bird Bay obtained the property adjacent to the railroad corridor at issue here. See Jt. Chain of Title, Tabs 18-33.

Discussion

Summary Judgment Standard

Summary judgment is appropriate where the evidence demonstrates that there is "no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(c)(1) of the Rules of the United States Court of Federal Claims ("RCFC"); see also Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247 (1986). A genuine issue is one that "may reasonably be resolved in favor of either party." Liberty Lobby, 477 U.S. at 250. A fact is material if it "might affect the outcome of the suit." Id. at 248. The moving party bears the burden of establishing the absence of any material fact, and any doubt over factual issues will be resolved in favor of the non-moving party. Mingus Constructors, Inc. v. United States, 812 F.2d 1387, 1390 (Fed. Cir. 1987) (citing United States v. Diebold, Inc., 369 U.S. 654, 655 (1962) and SRI Int'l v. Matsushita Elec. Corp., 775 F.2d 1107, 1116 (Fed. Cir.1985)). Once this burden is met, the onus shifts to the non-movant to point to sufficient evidence to show a dispute over a material fact that would allow a reasonable finder of fact to rule in its favor. Liberty Lobby, 477 U.S. at 256.

A court does not weigh each side's evidence when considering a motion for summary judgment, but "'the inferences to be drawn from the underlying facts . . . must be viewed in the light most favorable to the party opposing the motion.'" Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986) (quoting Diebold, 369 U.S. at 655).

When opposing parties both move for summary judgment, the Court reviews the motions under the same standard. First Annapolis Bancorp, Inc. v. United States, 75 Fed. Cl. 263, 275 (2007) (citation omitted). In such instances, "the court must evaluate each party's motion on its own merits, taking care in each instance to draw all reasonable inferences against the party whose motion is under consideration." Mingus, 812 F.2d at 1391.

Rails-to-Trails Takings Actions

When private property interests are taken by the Government pursuant to the Trails Act, the property owners may be entitled to just compensation as guaranteed by the Fifth Amendment. Preseault v. Interstate Commerce Comm'n, 494 U.S. 1, 13 (1990) ("Preseault I"). In a rails-to-trails case, a taking, if any, occurs when "state law reversionary interests are effectively eliminated in connection with a conversion of a railroad right-of-way to trail use." Caldwell v. United States, 391 F.3d 1226, 1228 (Fed. Cir. 2004). The Trails Act, by converting a railway to a recreational trail, prevents state law reversionary interests from vesting. Id. at

1229; see also Barclay v. United States, 443 F.3d 1368, 1373 (Fed. Cir. 2006) ("Abandonment is suspended and the reversionary interest is blocked 'when the railroad and trail operator communicate to the STB their intention to negotiate a trail use agreement and the agency issues an NITU' . . . . Thus, a Trails Act taking begins and a takings claim accrues, if at all, on issuance of the NITU.") (quoting Caldwell, 391 F.3d at 1233-34).

In another sense -- the dominant consideration in these types of taking cases -- the taking occurs when the government, pursuant to the Trails Act, creates a new easement for a new use over land that was encumbered by an easement limited to railroad purposes. See Preseault v. Interstate Commerce Comm'n, 100 F.3d 1525, 1550 (Fed. Cir. 1996) ("Preseault II") (describing the conversion of a railroad easement to a recreational trail as "a new easement for [a] new use"). The statutory imposition of this second easement -- which otherwise had not been granted -- is a taking.

In Preseault II, the Federal Circuit explained that whether a plaintiff is entitled to compensation under the Tucker Act in a rails-to-trails case depends on three issues:

> (1) who owned the strips of land involved, specifically did the Railroad . . . acquire only easements, or did it obtain fee simple estates; (2) if the Railroad acquired only easements, were the terms of the easements limited to use for railroad purposes, or did they include future use as public recreational trails; and (3) even if the grants of the Railroad's easements were broad enough to encompass recreational trails, had these easements terminated prior to the alleged taking so that the property owners at that time held fee simples unencumbered by the easements.

Preseault II, 100 F.3d at 1533. For Plaintiff Bird Bay, the first issue -- whether the railroad obtained an easement or a fee simple estate -- is dispositive.

Property interests, such as estates in fee and easements, "are not created by the Constitution," but "are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law." Bd. of Regents of State Colls. v. Roth, 408 U.S. 564, 577 (1972). Here, Florida law governs whether the railroad obtained a fee simple estate in, or an easement over, the land abutting Bird Bay's property. Rogers, 90 Fed. Cl. at 427.[11]

[11] This Court considered the possibility of referring this issue to a state court in Florida, but Florida rules do not authorize such a referral. See Florida Rules of App. Proc., Rule 9.150(a) (providing that only the Supreme Court of the United States and a United States court of appeals may certify a question of law to the Supreme Court of Florida).

Florida Law

Interpreting Deeds of Conveyance

Under Florida law, a court should "consider the language of the entire instrument in order to discover the intent of the grantor, both as to the character of the estate and the property attempted to be conveyed, and to so construe the instrument as, if possible, to effectuate such intent." Reid v. Berry, 112 So. 846, 852 (Fla. 1927); see also Thrasher v. Arida, 858 So.2d 1173, 1175 (Fla. Dist. Ct. App. 2003) ("[T]the intention of the parties . . . governs the interpretation of a document."); 19 Fla. Jur. 2d Deeds § 108 ("The primary consideration in the construction of a deed is the intention of the parties thereto.").

"If there is no ambiguity in the language employed then the intention of the grantor must be ascertained from that language." Saltzman v. Ahern, 306 So. 2d 537, 539 (Fla. Dist. Ct. App. 1975) (citing Thompson v. Ruff, 78 So. 489 (Fla. 1918)); see also Gendzier v. Bielecki, 97 So. 2d 604, 608 (Fla. 1957) ("The test of the meaning and intention of the parties is the content of the written document."); 19 Fla. Jur. 2d Deeds § 108. Thus, when interpreting a deed under Florida law, a court does not endeavor to discover the intent of the parties based on circumstances allegedly surrounding the deed's enactment, and then interpret the deed's text in such a way as to effectuate that perceived intent. On the contrary, "[t]he Court's function in interpreting and enforcing a contract is to determine the parties' intent from the express text of the Contract." Fin. Healthcare Assoc. v. Public Health Trust, 488 F. Supp. 2d 1231, 1239 (S.D. Fla. 2007) (interpreting Florida law); Mason v. Roser, 588 So. 2d 622, 624 (Fla. Dist. Ct. App. 1991) ("With respect to deeds of conveyance, the general rule is that if there is no ambiguity in the language employed then the intention of the grantor must be ascertained from that language.") (citing Saltzman, 306 So. 2d at 539) (emphasis added).

Seaboard Obtained Fee Simple Title to the Portion of the Railroad Corridor Bordering Bird Bay's Property

Since at least 1921, the instruments conveying interests in the railway corridor running south of Curry Creek[12] and the instruments conveying the lands abutting the corridor have treated the corridor as a separate parcel of land, separate and distinct from the larger parcels bordering the corridor. In this regard, parties in the chain of title have conveyed fee title to the corridor, rather than rights or easements to use the corridor. First, the June 20, 1921 warranty deed between Sarasota-Venice and Honore and Potter Palmer specifically excepted the "Seaboard Air Line Railroad right-of-way" as it ran though section six. Jt. Chain of Title, Tab 4. The "right-of-way" was not excepted as an easement, but as land withheld from the conveyance. The next day, June 21, 1921, Sarasota-Venice quitclaimed its title to the corridor and lands "used and occupied by" Seaboard to Potter Palmer. Id. Tab 5. This conveyance did not convey an easement or a right to use the corridor. Rather, this indenture conveyed fee title to the corridor. Id. In 1926, Potter Palmer, holding title to the corridor as a distinct piece of property, subsequently passed that title to B.L.E. Id. Tabs 10-11. The year prior, B.L.E. had obtained title to the adjacent lands from Dr. Albee through a separate instrument encumbered by a mortgage. Id. Tab 7. Thus, B.L.E. held title to both the corridor and the lands abutting the corridor when it

[12] This includes the original corridor and the corridor as it was relocated.

and Seaboard executed the B.L.E. Deed in 1927. The lands abutting the corridor were encumbered by a mortgage held by Dr. Albee. Id.

Though the record is replete with instruments conveying interests in the railroad corridor and the lands bordering the corridor, the Court's interpretations of two deeds -- the 1927 B.L.E. Deed and the 1941 Venice Deed -- are determinative of whether Bird Bay has a claim related to the corridor for a taking.[13] These deeds are determinative because they both purport to convey interests in the subject corridor -- as it passed down the chain of title as a distinct parcel of land -- to the Seaboard Railroad. These are the same interests that Seaboard's successors-in-interest, SGLR and CSX, possessed over the corridor bordering Bird Bay's property when the STB issued the NITU on April 2, 2004.

The B.L.E. Deed Unambiguously Conveyed Fee Simple Title to the Corridor to Seaboard

The parties agree that B.L.E. held fee simple title to the lands conveyed to Seaboard on April 4, 1927. Pls.' Suppl. Br., Feb. 11, 2010, at 6; Def.'s Suppl. Br., Feb. 11, 2010, at 6-10. Based on the plain language of the B.L.E. Deed, the grantor intended to convey its entire present interest in the three described parcels of land to Seaboard. The granting clause of the B.L.E. Deed dated April 4, 1927, demonstrates that B.L.E., after acknowledging receipt of consideration, intended to transfer full title in the land to Seaboard. The clause states: "[B.L.E.] grant[s], bargain[s], convey[s], alien[s], remise[s] and release[s], unto [Seaboard and its successors and assigns], forever, all of its right, title and interest in and to the following real estate . . . ." Jt. Chain of Title, Tab 12. Because B.L.E. held the lands in fee simple and transferred "all of its right, title and interest" to Seaboard, it conveyed fee simple title. The granting clause does not contain language limiting the interests conveyed to certain uses or purposes, nor does it reference an easement. This unambiguous language is in stark contrast to the Honore conveyance discussed in this Court's prior Opinion, in which the grantor transferred to Seaboard an easement, described as "a right of way for railroad purposes over and across the following described parcels of land." Rogers, 90 Fed. Cl. at 429.

In addition, the descriptions of the three conveyed parcels reference a "strip of land," and two "tract[s] of land." Jt. Chain of Title, Tab 12. Beyond the metes and bounds of the parcels, the descriptions contain no language that describes or refers to the lands in terms of certain restricted or enumerated uses or purposes.[14] This is further indication that the parties intended to

[13] The parties agree that these two deeds are dispositive. See, e.g., Pls.' Suppl. Br. in Resp. to Jan. 15, 2009 Order at 38-39 ("Thus, the [1927] B.L.E. Realty Indenture and the 1941 Venice-Nokomis Instrument are the only recorded instruments by which Seaboard may claim an interest in the land upon which the original or the relocated railway was located."); Tr. 51, Jun. 10, 2010 (Ms. Acock) ("[It] seems like we all agree that the 1927 B.L.E. conveyance and the 1941 Venice-Nokomis conveyance are the two really controlling conveyances here.").

[14] The description of the third parcel makes reference to a "wye track to be constructed." Jt. Chain of Title, Tab 12. This language is descriptive as it refers to the "proposed" wye track to identify the "tract of land" being conveyed. It does not limit or restrict the grantee's use of the parcel.

convey land, rather than a right to use or control land for a limited purpose. See, e.g., A.E. Korpela, Deed to railroad company as conveying fee or easement, 6 A.L.R. 3d 973, § 4 ("Deeds purporting to convey to railroads a strip, piece, parcel or tract of 'land,' which do not contain additional language describing or otherwise referring to the land in terms of the use or purpose to which it is to be put . . . are generally construed as passing an estate in fee.").[15]

Finally, the habendum clause, the purpose of which "is 'to define the estate which the grantee is to take in the property conveyed, whether a fee, life estate, or other interest,'" Reid v. Barry, 112 So. 846, 851 (Fla. 1927) (citing Devlin on Deeds (3d ed.) §§ 213, 220), characterizes the estate conveyed to Seaboard and its successors and assigns as one in "fee simple, forever." Jt. Chain of Title, Tab 12. Like the other parts of the deed, the habendum clause does not contain language which would limit or restrict the grantee's use of the lands. In addition, the clause is followed by covenants of title, in which B.L.E. "fully warrant[ed] the title to the said lands and will defend the same against the lawful claims of all persons whomsoever." Id. It is again useful to compare this warranty deed to the Honore conveyance construed in the Court's first opinion. In the habendum clause to the Honore conveyance, the grantor conveyed the "right of way" to Seaboard for its "own proper use, benefit and behoof forever for railroad purposes." See Def.'s Cross-mot. for Summ. J., Jun. 6, 2008, Ex. 7 (emphasis added). And, rather than being followed by covenants of title such as those in the B.L.E. Deed, the Honore conveyance's habendum clause is followed by a clause expressly conditioning the conveyance upon Seaboard's use of the premises for railroad purposes. Id.

Plaintiffs maintain that the B.L.E. Deed granted Seaboard only an easement, but they do not parse the language of the deed and instead argue that foreclosure proceedings against B.L.E. in 1934 extinguished the property interests that Seaboard had obtained in the 1927 B.L.E. Deed. See, e.g., Pls.' Suppl. Br., Feb. 11, 2010, at 5-7. According to Plaintiffs, the subject corridor was included within the 1,468.55 acres that Fred and Louella Albee had conveyed via deed to B.L.E. on October 6, 1925. This deed was subject to a first mortgage from Fred Albee. From this, Plaintiffs contend that, when the Circuit Court foreclosed the Albee mortgage against B.L.E. in 1934 -- the second foreclosure[16] -- it extinguished any interests Seaboard had obtained in the subject corridor in the 1927 B.L.E. Deed. Pls.' Suppl. Br., Feb. 11, 2010, at 6 (citing Jt. Chain of Title, Tab 15). However, the record does not demonstrate that the railway corridor was subject to those foreclosure proceedings. According to the Circuit Court's decree, the foreclosure proceedings were limited to the properties specifically described in that decree. Jt. Chain of Title, Tab 15. The court's decree included Bird Bay's property (i.e. the land adjacent to the corridor) but it did not mention the subject corridor, as the separate piece of property described in the B.L.E. Deed and in earlier instruments.

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[15] So too, the fact that a station was sited on one of the three tracts and the wye track expanse located on another – both to be owned and operated by the railroad – is indicative of an intent to convey land outright.

[16] There is no dispute that the first foreclosure did not include the portion of the corridor abutting Bird Bay's property. Rogers, 90 Fed. Cl. at 425 n.14; Pls.' Suppl. Resp., Mar. 2, 2010, at 8.

Plaintiffs contend that the court's decree's reference to the "right-of-way of the Seaboard Air Line Railroad" in Section six is evidence that the corridor was among the foreclosed properties. Pls.' Suppl. Resp., Mar. 2, 2010, at 8. However, the decree described the foreclosed property in section six as extending southwest "to the East line of the right-of-way" and south "along said right-of-way." Id. (emphasis added). Contrary to Plaintiffs' contention, this language suggests that the foreclosed properties bordered the corridor, but did not include it. In addition, B.L.E. did not obtain title to the subject corridor from Dr. Albee, but from the Palmers, via two quitclaim deeds executed on August 31, 1926. Jt. Chain of Title, Tabs 10 & 11. Unlike the Albee deed, the Palmer deeds were not made subject to mortgages. Id. Furthermore, the B.L.E. Deed of April 4, 1927, had conveyed fee title interest in the relocated corridor to Seaboard, free and clear of any mortgages, seven years prior to the court's final decree. See id. Tab 12. Plaintiffs have not demonstrated how a foreclosure proceeding affecting specifically described lands owned by B.L.E. in 1934 could somehow "extinguish" the ownership rights of Seaboard (a third party), which had obtained title in 1927 -- seven years earlier -- to a parcel not included among the foreclosed properties.[17]

In sum, B.L.E.'s fee simple title to the subject corridor was free and clear of any mortgage. B.L.E.'s subsequent transfer of title to Seaboard in 1927 was neither encumbered by the Albee mortgage nor otherwise affected by the 1934 foreclosures.

Plaintiffs' Reliance on the Venice Deed is Erroneous

Plaintiffs contend that the 1934 foreclosure proceedings extinguished the ownership rights obtained by Seaboard via the 1927 B.L.E. Deed and that "Venice-Nokomis obtained clear fee simple title to the right-of-way" when the Circuit Court's Special Master, following the foreclosure, auctioned the land and conveyed title to Venice-Nokomis. Pls.' Suppl. Br., Feb. 11, 2010, at 6 (citing Jt. Chain of Title, Tabs 15 & 16). From there, Plaintiffs argue that Venice-Nokomis conveyed an easement to Seaboard when it executed the Venice Deed on November 10, 1941 based on the language of the deed and extrinsic evidence surrounding the deed's execution. Pls.' Suppl. Br., Feb. 11, 2010, at 16-17. As explained above, Plaintiffs' argument that the foreclosure proceedings extinguished Seaboard's title to the corridor is not supported by the record. Seaboard's interest was not extinguished in 1934, and it is this Court's holding that, in 1941, Seaboard already held title to the corridor via the 1927 B.L.E. Deed. Nevertheless, Plaintiffs' interpretation of the Venice Deed -- that it only conveyed an easement to Seaboard -- is also erroneous. The 1941 Venice Deed -- a quitclaim deed, perhaps redundant given that Seaboard already held title -- conveyed fee simple title to the described lands to Seaboard, including title to the corridor.

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[17] Plaintiffs intimate that the relocated corridor was completed in 1926, and that this new corridor was included among the lands subject to the 1934 foreclosure proceedings. Tr. 22-23, Jun. 10, 2010 (Mr. Hearne). However, the record does not support such a finding. The foreclosure proceedings were limited to lands explicitly described in the Circuit Court's decree. Not only is the relocated corridor not among the parcels described in the decree, but the decree includes land "to" and "along" the right-of-way, rather than land including the right-of-way.

Like the B.L.E. Deed, the Venice Deed is unambiguous, and, thus, the Court must ascertain the parties' intent from the face of the deed. See, e.g., Saltzman v. Ahern, 306 So. 2d 537, 539 (Fla. Dist. Ct. App. 1975). The granting clause of the Venice Deed states that, in exchange for consideration, the grantor, Venice-Nokomis, "granted, bargained, sold and conveyed . . . the following real estate situated in Sarasota County, Florida." Jt. Chain of Title, Tab 17. The granting clause does not restrict the transfer of such lands for use as a railroad or for railroad purposes. Nor does the clause indicate the parties' intent to transfer a right of use. On the contrary, the deed conveys "real estate." The descriptions of the three parcels are identical to the descriptions in the B.L.E. Deed and, as they did in the B.L.E. Deed, these descriptions evidence the parties' intent to convey land, rather than a right to use the land for railroad purposes. Id. Like the B.L.E. Deed, the habendum clause to the Venice Deed defines the interests in the lands conveyed to Seaboard, its successors, and assigns, as interests in "fee simple forever." Id. There is no language indicating that the parties intended to convey anything less than title to the lands in fee simple. Thus, even assuming Plaintiffs are correct that Seaboard did not already have fee title in 1941 and that Venice-Nokomis held title to the corridor following the 1934 foreclosure proceeding, Venice-Nokomis transferred its title to Seaboard via the Venice Deed in 1941.

Plaintiffs isolate two provisions in the Venice Deed to argue that this deed conveyed an easement over the subject corridor.[18] First, Plaintiffs contend that the deed's language "expressly states that [the deed] was created to grant Seaboard a right to use a strip of land 'through the lands of the grantor.'" Pls.' Suppl. Reply, Mar. 16, 2010, at 8. According to Plaintiffs, the use of the clause "through the lands of the grantor" demonstrates the parties' intention to limit the interest conveyed to an easement. Contrary to Plaintiffs' interpretation, the Venice Deed did not grant Seaboard merely a right to use a strip of land "through the lands of the grantor." Rather, the deed conveyed to Seaboard all of the rights and title that Venice-Nokomis possessed in three specific parcels of land – one of which was the subject corridor. The language "through the lands of the grantor" in the deed merely describes the location of the strip of land conveyed to Seaboard and does not define or characterize the nature of the property interest conveyed to Seaboard. See Jt. Chain of Title, Tab 17 (conveying "real estate" including "[a] strip of land 100 feet wide, that is, fifty feet on each side of center line of railway as now located and constructed through the lands of the grantor in Sections 6, 7, 10 and 17. . . "). This language in no way qualifies or limits the property interests the parties intended to convey. Moreover, the language "through the lands of the grantor," which is used to describe just one of the three parcels conveyed -- the strip of land abutting Bird Bay's land -- cannot be read to change or contradict the parties' intent as it is reflected throughout the instrument, especially as their intent to convey fee simple title is evident in the habendum clause.[19]

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[18] One of these provisions -- the provision regarding Seaboard's receivership estate -- appears once in the granting clause of the Venice Deed and again in the habendum clause. Jt. Chain of Title, Tab 17.

[19] Plaintiffs state, but do not develop, the same argument regarding the phrase "through the lands of the grantor" as it appears in the B.L.E. Deed. The Court's finding with regard to the language "through the lands of the grantor" as it appears in the Venice Deed is also applicable to the B.L.E. Deed.

Second, Plaintiffs argue that the language in the granting and habendum clauses of the Venice Deed stating that the conveyed lands are "to be held, used and disposed of as a part of the receivership estate and in accordance with such further orders and decrees as may be entered" by Seaboard's bankruptcy court limits the interest conveyed in the Venice Deed to an easement over the subject corridor, rather than a fee estate. See, e.g., Pls.' Suppl. Br., Feb. 11, 2010, at 13. Arguing that railroads in Florida should "only acquire the interest in land necessary to achieve the lawful purpose for which they were established," id. at 6, Plaintiffs contend that "Seaboard could use its assets for only those limited purposes necessary to operate a railroad." Pls.' Suppl. Br., Feb. 11, 2010, at 17; Tr. 30, Jun. 10, 2010 (Mr. Hearne) ("There was no need -- and we cited both Dean and MCI v. Davis -- as Florida law say[s], that all the railroad needed -- all that Seaboard needed at this time to do -- to accomplish its purpose as a railroad, to continue operating a rail line, was an easement. So because it's in receivership, we wouldn't want to infer that it's trying to acquire this property for some other purpose.").

However, the language in the Venice Deed limiting the conveyance "to be held, used and disposed of as part of [Seaboard's] receivership estate" does not, as Plaintiffs argue, limit the property interest conveyed to an easement. Plaintiffs suggest that "an instrument with limiting conditions conveys less than fee simple title." Pls.' Suppl. Reply, Mar. 16, 2010, at 8. In other words, in Plaintiffs' view, because the Venice Deed contains language conveying the land to be used as part of Seaboard's receivership estate, it should not be read to convey fee simple title to Seaboard. This argument has no basis in law, and Plaintiffs have not tried to support it with any. This language merely acknowledges that the grantee is in receivership and limits the grantee's ability to dispose of the property outside of the context of the receivership estate, but does not constitute a limitation on the estate conveyed. It has no effect upon the intent of the grantor to convey all of its interests in the properties to the grantee. The grantor's intent to convey all of its interests in three parcels is clear throughout the deed. Accordingly, the Venice-Nokomis Deed unambiguously conveyed fee simple title to Seaboard.

That there are two instruments -- the B.L.E. Deed and the Venice Deed --conveying fee simple title to Seaboard does not alter the Court's conclusion that Seaboard obtained title to the corridor. If, as the Court finds here, Seaboard's fee simple interest conveyed in the B.L.E. Deed survived the foreclosure proceedings, then Venice-Nokomis had no interest to quitclaim to Seaboard because Seaboard already owned fee simple title to the subject corridor. Plaintiffs endeavor to refute the contention that Seaboard already held fee title to the corridor in 1941 by contending that, under this scenario, the Venice Deed would be a "meaningless and futile nullity," which is something "sophisticated" parties would never have executed. Pls.' Suppl. Resp., Mar. 2, 2010, at 10. However, it is well established that: "[q]uite often the release by quitclaim is sought simply to put to rest a dormant or doubtful claim." Thompson on Real Property, § 94.07(b)(3)(i) (Thomas ed. 2002). Thus, while the Venice Deed may have been redundant, it was not a legal nullity and confirmed Seaboard's title to the corridor.

The Fact that the Grantee – Seaboard – Was a Railroad Does Not Inhibit Its Right to Acquire Fee Title to Corridor

The fact that Seaboard was a railroad, which may or may not have possessed the power of eminent domain, does not, as Plaintiffs argue, inhibit its right to acquire fee simple title to

lands, even when it was in receivership. Under Florida law, railroad companies may acquire land over which to construct rails and operate locomotive trains either as an estate in fee or they may acquire a right to cross over such land with an easement. Compare Atl. Coast Line. R. Co. v. Duval Cty., 154 So. 331, 332 (Fla. 1934) ("Like other property [a railroad right of way is] acquired by purchase or condemnation and vests a fee in the company acquiring it which cannot be divested except as the law provides.") with Cohen v. Pan Am. Aluminum Corp., 363 So. 2d 59, 60 (Fla. Dist. Ct. App. 1978) (finding that a railroad obtained a right-of-way in the form of an easement). In Florida, the term right-of-way, as it relates to railroads, can refer either to a "right of crossing" -- an easement -- or to "a strip of land which a railroad takes, upon which to construct its railroad" -- an estate in fee. 43 Fla. Jur. 2d Railroads § 32. Whether the railroad obtains a "right" or "land" depends on the intent of the parties as reflected by the deed of conveyance. As explained above, the B.L.E. and Venice-Nokomis deeds conveyed title to land to Seaboard.

In Preseault II, the Federal Circuit interpreted a warranty deed as conveying only an easement to a railroad, even though the deed "appear[ed] to be the standard form used to convey a fee simple title from a grantor to [the railroad]." 100 F.3d at 1535-36. However, that ruling was limited to a situation where a railroad exercised eminent domain under principles of Vermont law. Id. Under these principles, a condemning authority exercising eminent domain is not permitted to acquire a greater property interest than necessary to serve the public purpose for which the property is acquired. Id. Plaintiffs argue that Florida law recognizes these same principles and, from that, contend that the operative deeds should be construed to give the railroad only the interest it needed – an easement over which to operate a rail line. Pls.' Suppl. Reply, Mar. 16, 2010, at 6. According to Plaintiffs, "the Federal Circuit held that because a railroad possessed the power of eminent domain, even a voluntary conveyance of land to the railroad 'retained its eminent domain flavor, and the railroad acquired only that [interest] which it needed, an easement.'" Id. at 5 (citing Preseault II, 100 F.3d at 1537.

In Preseault II, unlike in the instant case, it was the actual exercise of the railroad's eminent domain power that resulted in a limitation of the interests conveyed in the warranty deed, and not the railroad's mere possession of such power, as Plaintiffs argue. According to the court, "the act of survey and location [was] the operative determinant, and not the particular form of transfer." Preseault II, 100 F.3d at 1537. Indeed, the Federal Circuit concluded that the warranty deed at issue in Preseault II simply confirmed and memorialized the railroad's action in exercising its eminent domain powers. Id.

In this regard, Florida law is consistent with Vermont law, but only to the extent that Florida adheres to the unremarkable principle of eminent domain law that the condemnor only acquires interests sufficient to satisfy the purpose of the taking. See Robertson v. Brookville & Inverness Ry., 129 So. 582, 584 (Fla. 1930); Trailer Ranch, Inc. v. City of Pompano Beach, 500 So. 2d 503, 507 (Fla. 1986) ("A condemning authority exercising the power of eminent domain is not permitted to acquire a greater quantity of property or interest therein than is necessary to serve the public purpose for which the property is acquired."). In Preseault II, the land was acquired by the railroad via its compulsory power of eminent domain derived under Vermont law and not via an arms-length transaction reflected in a bargained-for deed. In contrast, there is no evidence in this record that Seaboard acquired the corridor by exercising eminent domain

derived under Florida law. As such, the terms of the deeds are controlling and not the context in which the property was acquired. Because there is no evidence that Seaboard, acting as a public authority, exercised eminent domain in acquiring the corridor at issue, Florida law does not limit the interest in property that the railroad acquired to that of a de jure easement.

It is also important that, in addition to the 100 feet wide strip of land abutting Bird Bay's property, the dispositive instruments here, the B.L.E. Deed and the Venice Deed, conveyed two other pieces of real estate to Seaboard -- one the railroad used for a wye track and another upon which the railroad sited a train depot. See Tabs 12 & 17; Pls.' Suppl. Br. in Resp. to Jan. 15, 2009 Order at 23. Even the court in Davis v. MCI Telecommunications Corporation, 606 So. 2d 734 (Fla. App. 1992), which Plaintiffs cite to support their argument that a railroad in Florida would not acquire more interest than it needed to operate its line, noted that fee simple title would be appropriate "to site a station house or similar land use." 606 So.2d at 738. The B.L.E. and Venice deeds did not simply convey lands over which Seaboard would run track. On the contrary, Seaboard obtained parcels upon which to site a train depot and operate a wye track. As Florida law recognizes, it would have been appropriate for Seaboard to obtain these two parcels in fee simple, rather than via an easement over such parcels. Interpreting the language of conveyance in the B.L.E. and Venice deeds as conveying fee simple title in two of the parcels, but only an easement over the third would be incongruous.

The Amount of Consideration Does Not Inform the Interpretation of the Deeds

Plaintiffs contend that the amount of consideration in the B.L.E. Deed and the Venice Deed is relevant because "it is a factor which informs us what interest the grantor intended to convey." Pls.' Suppl. Br., Feb. 11, 2010, at 11. Plaintiffs argue that the allegedly nominal consideration included in the two deeds demonstrates that the grantors intended to convey easements, rather than estates in fee because "'the acquiring of easements . . . would be less expensive than acquiring title to land.'" Pls.' Suppl. Reply, Mar. 16, 2010, at 10 (quoting Florida Power Corp. v. McNeely, 125 So. 2d 311, 317 (Fla. App. 1960)).

With regard to whether the amount of consideration is relevant to determining whether a deed conveys an estate in fee or an easement, Florida law is clear. "It is fundamental that the law will not consider the adequacy or the sufficiency of the consideration given for a conveyance or transaction." Venice East, Inc. v. Manno, 186 So. 2d 71, 75 (Fla. Dist. App. 1966). Indeed, "the consideration clause in a deed of conveyance is conclusive for the purpose of giving effect to the operative words of a deed creating a right or extinguishing a title." Fla. Moss Prods. Co. v. City of Leesburg, 112 So. 572, 574 (Fla. 1927) (emphasis added). Extrinsic evidence as to the adequacy of consideration offered to challenge the "operation and effect" of a deed is not appropriate. Id. In Florida, "[e]ven nominal consideration will support a deed." Kingsland v. Godbold, 456 So. 2d 501, 502 (Fla. Dist. App. 1984) (reversing the trial court's decision to void a deed for lack of consideration where the deed recited consideration of $10.00 for title to a condominium unit); Naseer v. Mirabella Foundation, 2008 WL 4853623, n.1 (M.D. Fla. 2008). Both the B.L.E. Deed and the Venice-Nokomis Deed include consideration clauses and are unambiguous on their faces. Contrary to Plaintiffs' argument here, the amount of consideration may not inform the Court as to the parties' intentions, especially if that evidence varies, alters, or contradicts the face of the documents. See Fla. Moss Prods. Co., 112 So. at 574-74.

Extrinsic Evidence May Not Be Used to Interpret the Unambiguous Deeds

Plaintiffs also offer extrinsic evidence that they argue shows that the parties to the B.L.E. Deed and the Venice-Nokomis Deed understood that these conveyances transferred an easement to Seaboard. Specifically, Plaintiffs offer evidence that deals with, inter alia, Seaboard's status as a railroad, the interrelationships among the parties to the deeds, the manner in which Seaboard's right-of-way is described in subsequent instruments, and the economic circumstances under which the deeds were executed.

Under Florida law, a court may not look beyond the four corners of a deed if the deed is "clear and certain in meaning and the grantor's intention is reflected by the language employed." Saltzman, 306 So. 2d at 539. Indeed, "[r]ules of construction will be utilized only where the meaning or effect of the deed is doubtful." Id. Similarly, as both parties recognize, extrinsic evidence may not be used by a court "to vary, contradict, or defeat the terms of a complete and unambiguous written instrument." Fla. Moss Prods. Co., 112 So. at 573; Pls.' Suppl. Br., Feb. 11, 2010, at 14; Def.'s Suppl. Resp., Mar. 1, 2010, at 3.

The Supreme Court of Florida has recognized narrow exceptions to its parol evidence rule. A court may examine extrinsic evidence where the written instrument does not represent the entire agreement between the parties, and in circumstances where the character of the consideration cannot be discerned from the face of the instrument (e.g. a deed that purports to convey "other valuable considerations"). Fla. Moss Prods. Co., 112 So. 573-74. Florida courts have also admitted separate and contemporaneous deeds or instruments in order to discern the real intent of an otherwise ambiguous instrument. Nourachi v. United States, 632 F. Supp. 2d 1101, 1110 (M.D. Fla. 2009); Kach v. Cooley, 201 So. 2d 254, 255 (Fla. Dist. Ct. App. 1967); 19 Fla. Jur. 2d Deeds § 110.

In addition, Florida courts have recognized, as Plaintiffs point out, that "[w]henever a party presents an arguable claim that a document contains a latent ambiguity, the court is obliged to consider the extrinsic evidence, at least to the extent necessary to determine whether the claimed latent ambiguity actually exists." Bd. of Trs. of Internal Improvement Trust Fund v. Lost Tree Vill. Corp., 805 So. 2d 22, 26 (Fla. Dist. Ct. App. 2001); Landis v. Mears, 329 So. 2d 323, 325-26 (Fla. Dist. Ct. App. 1976). "A latent ambiguity in a deed description is said to exist when the deed, clear on its face, is shown by some extraneous fact to present an equivocation by being susceptible to two or more possible meanings." Lost Tree Vill. Corp., 805 So. 2d at 25. See also Black's Law Dictionary (8th ed. 2004) (defining a latent ambiguity as "an ambiguity that does not readily appear in language of a document, but instead arises from a collateral matter when the document's terms are applied or executed"). The extrinsic evidence is allowable to the extent it "removes" or clarifies the ambiguity, but it may not be used to "vary, alter, or contradict a written instrument." Whitfield v. Webb, 131 So. 786, 788 (Fla. 1931) ("This rule does not violate, but is complementary to, the general rule that parol evidence is not admissible to vary, alter, or contradict a written instrument.").

The exceptions to Florida's parol evidence rules are inapplicable here. There is no evidence that the B.L.E. Deed or the Venice-Nokomis Deed do not comprise the entire agreement between the parties, and the Court need not resort to extrinsic evidence to discern the

"real intent" of the parties. In addition, Plaintiffs have not identified any latent ambiguity that would require the Court resort to extrinsic evidence. Once again, the B.L.E. Deed and the Venice Deed are unambiguous on their faces. They both conveyed fee simple title to the portion of the railroad corridor abutting Bird Bay's property to Seaboard. Neither of the deeds conveyed easements. Because the instruments are unambiguous, the Court will not consider the extrinsic evidence proffered by Plaintiffs.

Conclusion

Under Florida law, Seaboard obtained fee simple title in the railroad corridor abutting Bird Bay's property. As such, Plaintiff Bird Bay has no right or interest in the corridor, and has no claim related to the corridor for a taking. See Preseault v. United States, 100 F.3d 1525, 1533 (Fed. Cir. 1996). Accordingly, Defendant's motion for partial summary judgment regarding Plaintiff Bird Bay is **GRANTED.**

s/Mary Ellen Coster Williams
MARY ELLEN COSTER WILLIAMS
Judge

In the United States Court of Federal Claims

No. 07-273L
No. 08-198L
(Filed: September 25, 2012)

STEPHEN J. ROGERS, et al.,	*	**Motion for Partial Summary Judgment; RCFC 56; Class Action; Fifth Amendment Takings; Rails-to-Trails Act, 16 U.S.C. §§ 1241-51 (2006); Florida Law; Fee Simple; Right-of-Way; Easement Under Florida Law; Fee Simple Determinable; Prescriptive Easement; Adverse Possession.**
Plaintiffs,	*	
v.	*	
THE UNITED STATES,	*	
Defendant.	*	

Mark (Thor) Hearne, II, Lindsay Brinton, Meghan Largent, Debra Albin-Riley, and Joseph Cavinato, Arent Fox LLP, 112 S. Hanley Drive, Suite 200, Clayton, MO 63105, for Plaintiffs.

Ignacia S. Moreno and Kristine S. Tardiff, United States Department of Justice, Environment & Natural Resources Division, 53 Pleasant Street, 4th Floor, Concord, NH 03301, for Defendant.

OPINION AND ORDER

WILLIAMS, Judge.

In these consolidated "rails-to-trails" actions, Plaintiffs claim that the Government effected a taking of their properties when, pursuant to the National Trails System Act Amendments of 1983 ("Trails Act"), it converted a 12.43-mile railroad right-of-way, extending from Sarasota to Venice, Florida, into a recreational trail.[1] This matter comes before the Court on the parties' cross-motions for partial summary judgment on liability.

In two prior opinions, this Court resolved issues of liability with respect to a majority of the named Plaintiffs. At issue in this opinion are the claims of 55 landowners in Rogers v.

[1] The Court uses the term "right-of-way" to describe this strip of land for convenience and not as a legal determination of the parties' property interests or rights.

United States, No. 07-273L, and Bay Plaza Properties, LLC v. United States, No. 08-198L. These landowners seek just compensation for the Government's alleged taking of property subject to five written conveyances -- the Palmer, Blackburn, Frazer, Knight, and Phillips conveyances -- as well as property for which no written conveyance has been found to exist. For the reasons described below, the Court grants Defendant's motion for partial summary judgment with respect to the alleged taking of property subject to the Phillips, Frazer, Blackburn, and Knight conveyances. The Court grants Plaintiffs' motion for partial summary judgment with respect to claims arising from the taking of property subject to the Palmer conveyance. The Court denies the parties' cross-motions for summary judgment concerning property for which no written conveyance has been found to exist.

Background[2]

The Seaboard Right-of-Way

Beginning in 1910, the Seaboard Air Line Railway ("Seaboard") acquired the right to operate a railroad line between the cities of Sarasota and Venice, Florida, via a series of conveyances with multiple landowners.[3] The railroad line was used for, among other things, the operation of trains for the Ringling Brothers Circus. No railroad traffic has moved over this railroad line since March 2002.

On April 2, 2004, the Surface Transportation Board ("STB") issued a Notice of Interim Trail Use or Abandonment ("NITU"). Under the terms of the NITU, Seminole Gulf Railway and CSX -- as successors and assigns of Seaboard -- granted the Trust for Public Land ("the Trust"), a national, nonprofit, land conservation organization, an option to acquire the railway right-of-way for conversion to a trail. The Trust agreed to work with Sarasota County to convert the right-of-way into a public access recreational trail. On January 13, 2005, CSX and the Trust, in reliance upon the NITU, executed a quitclaim deed stating that the premises covered by the deed "remain subject to the jurisdiction of the STB for purposes of reactivating rail service." Pls.' Proposed Findings of Uncontroverted Fact ("PFUF"), Exs. D, L, & M (STB Docket No. AB-400 (Sub No. 3X)).

Over 100 landowners subsequently filed complaints alleging that the NITU preempted their reversionary interests in the Seaboard right-of-way.[4] Some of these landowners trace their titles to one of several grantors who, in the early twentieth century, conveyed Seaboard an

[2] This background is derived from the Court's November 23, 2009 and June 28, 2010 opinions, and the attachments and exhibits to the motion papers.

[3] Seaboard is the railroad company that operated rail service along the subject railway corridor in the early-to-mid-twentieth century. It is the predecessor in interest to CSX and the Seminole Gulf Railway, which, in 2003, petitioned to abandon the railway corridor. Rogers, 90 Fed. Cl. at 421.

[4] Consistent with Federal Circuit precedent, the Court uses the term "reversionary interest" to refer to "a fee simple burdened by an easement." Preseault v. United States, 100 F.3d 1525, 1533-34 (Fed. Cir. 1996) (en banc) ("Preseault II").

interest in the right-of-way. Because these parcels were conveyed to the railroad via several different instruments, the Court examines each instrument to determine what interest the railroad held in the right-of-way. Other landowners do not trace their titles to these deeds. Instead, Seaboard constructed the right-of-way across these parcels without a recorded conveyance.

The two prior opinions regarding liability for takings involving the Seaboard right-of-way addressed a single conveyance. In Rogers v. United States, 90 Fed. Cl. 418 (2009) ("Rogers"), the Court interpreted a 1910 deed from Adrian C. Honore to Seaboard ("Honore conveyance"), stating in pertinent part:

> ADRIAN C. HONORE . . . does hereby remise, release, and forever quit claim unto the SEABOARD AIR LINE RAILWAY . . . a right of way for railroad purposes over and across the following described parcels of land . . . .
> . . .
> This conveyance is made upon the express condition, however that if the Seaboard Air Line Railway shall not construct upon said land and commence the operation thereon [within] one year of the date hereof of a line of railroad, or, if at any time thereafter the said Seaboard Air Line Railway shall abandon said land for railroad purposes then the above described pieces and parcels of land shall *ipso facto* revert to and again become the property of the undersigned, his heirs, administrators and assigns.

Rogers, 90 Fed. Cl. at 422. The Court read the conveyance as granting Seaboard an easement solely for rail use, and therefore found that Plaintiffs whose land was subject to the Honore deed would have obtained fee simple estates in the corridor upon discontinuance of railroad use if the taking had not occurred. Id. at 429-33.

In the second opinion, Rogers v. United States, 93 Fed. Cl. 607 (2010) ("Bird Bay"), the Court interpreted a conveyance to Seaboard from B.L.E. Realty Corporation ("B.L.E. conveyance") as granting Seaboard a fee simple in the right-of-way, and because the abutting landowners had no property interest in the corridor, denied liability for a taking. Id. at 621. The Court therefore entered summary judgment on liability in Defendant's favor with respect to the B.L.E. conveyance. Id. at 625.

At issue in this opinion is the Government's liability with respect to two additional categories of landowners abutting the rail corridor. Both categories of landowners claim they acquired their parcels before the STB issued the NITU on April 2, 2004.

Property Seaboard Obtained Via Deed

Landowners in the first category possess property with rights-of-way that Seaboard acquired from one of five grantors. The parties agree that these landowners can trace their title to the same five grantors: (i) Pauline and Potter Palmer, Jr.; (ii) A.E. and Mollie Blackburn; (iii) Lula and Clement Phillips; (iv) H.M. and Bertie Frazer; and (v) Jesse and F.R. Knight. See Joint Status Reports Feb. 17, 2010, Apr. 21, 2010, and May 19, 2010. The Palmer conveyance was

executed on November 10, 1910, the Knight conveyance on September 3, 1910, and the remaining three conveyances on September 5, 1910. Deeds for four of the conveyances -- Knight, Blackburn, Phillips, and Frazer -- contain the same operative language.[5] The Palmer deed uses the same language as the Honore deed, which was the subject of Rogers. 90 Fed. Cl. at 422. These deeds are determinative because they convey the property interest in the subject corridor to Seaboard that Seaboard's successors-in-interest possessed when the STB issued the NITU.

These five grantors owned the underlying land in fee simple at the time they executed conveyances to Seaboard. Ultimately, Plaintiffs claim that 31 of the properties at issue were obtained based on chains of title that originate with these deeds.[6] The parties dispute whether the instruments conveyed an easement or a fee simple to the railroad. Additionally, Plaintiffs' claims involve 19 tracts of land that Defendant argues the railroad obtained via adverse possession. See id. Whether Plaintiffs have a present property interest in the land underlying the right-of-way depends upon the nature of the original conveyance. Preseault II, 100 F.3d at 1532-33 (citing Preseault v. Interstate Commerce Comm'n, 494 U.S. 1, 16, 20 (1990) ("Preseault I")).

Property Seaboard Obtained By Possession

The second category of landowners possess property with rights-of-way that Seaboard acquired "by possession." Defendant submitted three pieces of evidence to support its claim that Seaboard possessed the portions of Plaintiffs' land that are encumbered by the corridor. First, Defendant submitted a table prepared by the Interstate Commerce Commission ("ICC") in 1918, which states that Seaboard "owned or used" multiple sections of its railway corridor as they existed at that time, including a section crossing several of Plaintiffs' properties.[7] Def.'s Cross-Mot. for Partial Summ. J., Opp'n to Pls.' Mot. for Partial Summ. J., and Mem. in Supp. Thereof ("Def.'s Mot."), Ex. F. The ICC valuation table concerns "lands owned or used for purposes of a common carrier." Id. No written instruments conveying these rights-of-way to Seaboard have been located. Second, Defendant submitted a 1916 map of Seaboard's railway system. Def.'s Supp. Br., Ex. I, June 13, 2012. Finally, Defendant offered an excerpt from the 1921 edition of Poor's Manual, which provides information about the history of Seaboard, its financial operations, and its routes.[8] Def.'s Supp. Br., Ex. J, June 13, 2012. Plaintiffs did not submit any

[5] The precise language of the deeds is quoted below in the Discussion.

[6] Plaintiffs submitted a table indicating the conveyance to which each Plaintiff traces his or her title. See Pls.' Supp. Br., Ex. A, June 13, 2012. The table also identifies parcels where Plaintiffs allege the railroad held a prescriptive easement.

[7] The ICC was the predecessor of the Surface Transportation Board. See Barclay v. United States, 443 F.3d 1368, 1371 n.1 (Fed. Cir. 2006).

[8] Poor's Manual, written by Henry Poor -- a founder of Standard & Poor's Corporation, contains a report on the financial and operational details of railroads in the United States. Pls.' Supp. Br. 19 (citing A History of Standard & Poor's: 1860-1940 Beginnings, Standardandpoors.com, http://www.standardandpoors.com/about-sp/timeline/en/us/ (last visited Sept. 18, 2012)).

evidence concerning the extent or characteristics of Seaboard's use or possession of the land. With respect to property acquired absent a written conveyance, the parties dispute whether Seaboard obtained an easement by prescription or, instead, a fee simple via adverse possession.

Discussion

Summary Judgment Standard

Summary judgment is appropriate where the evidence demonstrates that there is "no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Rule 56(a) of the Rules of the United States Court of Federal Claims ("RCFC"); see also Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48 (1986). A genuine dispute is one that "may reasonably be resolved in favor of either party." Liberty Lobby, 477 U.S. at 250. A fact is material if it "might affect the outcome of the suit." Id. at 248.

The moving party bears the burden of establishing the absence of any material fact, and any doubt over factual disputes will be resolved in favor of the non-moving party. Mingus Constructors, Inc. v. United States, 812 F.2d 1387, 1390 (Fed. Cir. 1987). Once this burden is met, the onus shifts to the non-movant to point to sufficient evidence to show a dispute over a material fact that would allow a reasonable finder of fact to rule in its favor. Liberty Lobby, 477 U.S. at 256-57. A court does not weigh each side's evidence when considering a motion for summary judgment, but "the inferences to be drawn from the underlying facts . . . must be viewed in the light most favorable to the party opposing the motion." United States v. Diebold, Inc., 369 U.S. 654, 655 (1962) (per curiam). When opposing parties both move for summary judgment, "the court must evaluate each party's motion on its own merits, taking care in each instance to draw all reasonable inferences against the party whose motion is under consideration." Mingus Constructors, 812 F.2d at 1391. In adjudicating a motion for summary judgment, "the Court may neither make credibility determinations nor weigh the evidence and seek to determine the truth of the matter. Further, summary judgment is inappropriate if the factual record is insufficient to allow the Court to determine the salient legal issues." Mansfield v. United States, 71 Fed. Cl. 687, 693 (2006) (citation omitted). Cross-motions for summary judgment "are not an admission that no material facts remain at issue." Massey v. Del Labs., Inc., 118 F.3d 1568, 1573 (Fed. Cir. 1997) (citing United States v. Fred A. Arnold, Inc., 573 F.2d 605, 606 (9th Cir. 1978)). "Each party carries the burden on its own motion to show entitlement to judgment as a matter of law after demonstrating the absence of any genuine disputes over material facts." Id.

Takings Claims Under the Rails to Trails Act

Congress enacted the Trails Act to preserve shrinking rail trackage by converting unused rights-of-way to recreational trails. Preseault I, 494 U.S. at 5. The operation of the Trails Act is subject to the Fifth Amendment to the United States Constitution, which provides that private property shall not "be taken for public use, without just compensation." U.S. Const. amend. V. Accordingly, when private property interests are taken by the Government pursuant to the Trails Act, the property owners are entitled to just compensation. See Preseault I, 494 U.S. at 12. Because property rights arise under state law, Florida law governs whether the landowners in this case have a compensable property interest. See Ruckelshaus v. Monsanto Co., 467 U.S. 986,

1001 (1984) (citing Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 151, 161 (1980)); Preseault I, 494 U.S. at 20-25 (O'Connor, J., concurring).

In a rails-to-trails case, a taking, if any, occurs when "state law reversionary interests are effectively eliminated in connection with a conversion of a railroad right-of-way to trail use." Caldwell v. United States, 391 F.3d 1226, 1228 (Fed. Cir. 2004). The Trails Act prevents a common law abandonment of the railroad right-of-way from being effected, thus precluding state law reversionary interests from vesting. Id. at 1229. Stated in traditional property law parlance, upon abandonment or termination of a railroad easement, "the burden of the easement would simply be extinguished, and the landowner's property would be held free and clear of any such burden." Toews v. United States, 376 F.3d 1371, 1376 (Fed. Cir. 2004). By preventing the abandonment and concomitant restoration of a fee simple unburdened by the easement, the Trails Act effects a taking. See Barclay v. United States, 443 F.3d 1368, 1371 (Fed. Cir. 2006). As the Federal Circuit has explained, the taking occurs when the Surface Transportation Board ("STB"), the regulatory body that oversees construction, operation, and abandonment of most railroad lines in the United States, issues a Notice of Interim Trail Use or Abandonment ("NITU"):

> Abandonment is suspended and the reversionary interest is blocked "when the railroad and trail operator communicate to the STB their intention to negotiate a trail use agreement and the agency issues an NITU that operates to preclude abandonment under section 8(d)" of the Trails Act. We concluded [in Caldwell] that "[t]he issuance of the NITU is the only government action in the railbanking process that operates to prevent abandonment of the corridor and to preclude the vesting of state law reversionary interests in the right of way." Thus, a Trails Act taking begins and a takings claim accrues, if at all, on issuance of the NITU.

Barclay, 443 F.3d at 1373 (quoting Caldwell, 391 F.3d at 1233-34) (emphasis in original) (citations spacing omitted).

In another sense -- the dominant consideration in these types of taking cases -- the taking occurs when the government, pursuant to the Trails Act, creates a new easement for a recreational use over land that had been encumbered by an easement limited to railroad purposes. See Preseault II, 100 F.3d at 1550 (describing the conversion of a railroad easement to a recreational trail as "a new easement for [a] new use, constituting a physical taking of the right of exclusive possession that belonged to the [owners of the servient estates]"). The statutory imposition of this recreational easement, which otherwise had not been granted, is a taking.

Whether a plaintiff possesses a compensable property interest in a rails-to-trails case depends on three determinative issues:

> (1) who owned the strips of land involved, specifically did the Railroad . . . acquire only easements, or did it obtain fee simple estates; (2) if the Railroad acquired only easements, were the terms of the easements limited to use for railroad purposes, or did they include future use as public recreational trails; and (3) even if the grants of the Railroad's easements were broad enough to

> encompass recreational trails, had these easements terminated prior to the alleged taking so that the property owners at that time held fee simples unencumbered by the easements.

Preseault II, 100 F.3d at 1533.

Principles of Deed Construction under Florida Law

Whether Plaintiffs possessed a property interest at the time of the NITU depends upon the nature of the original conveyance that established the railroad's right to operate a railroad on the property at issue. See Ellamae Phillips Co. v. United States, 564 F.3d 1367, 1373-74 (Fed. Cir. 2009); Toews, 376 F.3d at 1375-76.

Under Florida law, "the intention of the parties . . . governs the interpretation of a document." Thrasher v. Arida, 858 So. 2d 1173, 1175 (Fla. Dist. Ct. App. 2003). A court should "consider the language of the entire instrument in order to discover the intent of the grantor, both as to the character of [the] estate and the property attempted to be conveyed, and to so construe the instrument as, if possible, to effectuate such intent." Reid v. Berry, 112 So. 846, 852 (Fla. 1927); see also 19 Fla. Jur. 2d Deeds § 107 (2012) ("The primary consideration in the construction of a deed is the intention of the parties thereto.").

"If there is no ambiguity in the language employed then the intention of the grantor must be ascertained from that language." Saltzman v. Ahern, 306 So. 2d 537, 539 (Fla. Dist. Ct. App. 1975); see also Gendzier v. Bielecki, 97 So. 2d 604, 608 (Fla. 1957) ("The test of the meaning and intention of the parties is the content of the written document."). When interpreting a deed under Florida law, "[t]he Court's function in interpreting and enforcing a contract is to determine the parties' intent from the express text of the Contract." Fin. Healthcare Assocs., Inc. v. Pub. Health Trust, 488 F. Supp. 2d 1231, 1239 (S.D. Fla. 2007) (interpreting Florida law); see also Mason v. Roser, 588 So. 2d 622, 624 (Fla. Dist. Ct. App. 1991) ("With respect to deeds of conveyance, the general rule is that if there is no ambiguity in the language employed then the intention of the grantor must be ascertained from that language.").

Seaboard Obtained an Easement via the Palmer Conveyance

The Palmer deed granted Seaboard:

> [A] right-of-way for railroad purposes over and across the following described parcel of land . . . A strip of land one hundred (100) feet wide, being fifty (50) feet on each side of the center line of the Seaboard Air Line Railway as located across lands owned by said grantors herein . . . .
>
> THIS conveyance is made upon the express condition, however, that . . . if the Seaboard Air Line Railway shall not construct upon said land and commence operation thereon within one year from the date hereof, a line of railroad, or if at any time thereafter the said Seaboard Air Line Railway shall abandon said land for railroad purposes, then the above described piece and parcel of land shall ipso

> facto revert to and again become the property of the undersigned, their heirs, administrators, and assigns.

Pls.' PFUF Ex I. In Rogers, this Court construed identical language in the Honore conveyance and held that Seaboard obtained an easement. 90 Fed. Cl. at 431.[9] As this Court explained:

> The Honore conveyance does not refer to the outright transfer of land; it refers to "a right of way for railroad purposes over and across the . . . parcels of land," thereby indicating that the grantor retained an interest in the land referenced in the conveyance and granted an easement to Seaboard. See Trailer Ranch, Inc. v. City of Pompano Beach, 500 So. 2d 503, 506 (Fla. 1986) (explaining that the words "across, over, and under" in a conveyance were indicative of an easement, not a fee simple estate); Irv Enterprises, Inc. v. Atl. Island Civic Ass'n, 90 So. 2d 607, 609 (Fla. 1956) (construing deed as granting an easement where deed contained restrictions on use and stipulated reversion upon discontinuance of said use).
>
> . . .
>
> Here, the words of the Honore conveyance indicate that the parties intended to create an easement. The Honore conveyance transferred a "right of way for railroad purposes over and across the . . . described parcels of land." Def. Mot. Ex. 7. Further, like the deed in Irv Enterprises, the Honore conveyance placed an explicit limitation on the use of the property interest conveyed and contained an unequivocal stipulation that title would revert to the grantor upon discontinuance of the use of the parcel for its intended railroad purpose. See Irv Enters., 90 So. 2d at 609. The Honore conveyance has no language that suggests that title to described parcel was conveyed outright, i.e. that the transfer was made "in fee simple."

Id. at 429-31.

As such, for the reasons stated in this Court's November 23, 2009 opinion construing the identical Honore language, Seaboard obtained an easement under the Palmer deed. Moreover, as in Rogers, the Palmer deed limited the terms of the easement to railroad purposes -- and provided that title to the property would revert to the grantor if such use terminated. As the Federal Circuit explained, when examining a right-of-way acquired in the original conveyance, the usage of a right-of-way as a recreational trail is "clearly different" from the usage of the same parcel of land as a railroad corridor. Preseault II, 100 F.3d at 1542. Here, as in Rogers, the use of the right-of-way as a recreational trail while preserving the right-of-way for future railroad activity was not contemplated by the original parties when the Palmer deed was signed. Thus, the governmental action converting the railroad right-of-way to a public trail right-of-way imposed a new easement on the landowners and effected a Fifth Amendment taking of their property. Id. at

[9] Other than the location of the strip of railroad right-of-way, the Palmer conveyance contains language identical to that of the Honore conveyance. Pls.' PFUF ¶ 29 & Ex. I.

1550. The Court therefore grants Plaintiffs' motion for partial summary judgment as to claims arising from property subject to the Palmer conveyance.

Seaboard Obtained Fee Simple Title via the Frazer, Blackburn, and Phillips Conveyances

The Frazer, Blackburn, and Phillips conveyances are identical except for the descriptions of the grantors, grantees, dates, consideration paid, and locations of the parcels of land. The granting provision of the Blackburn conveyance, which is substantively identical to those in the Phillips and Frazer conveyances, reads:

> THIS DEED, Made this fifth day of September 1910, between A.E. BLACKBURN AND WIFE, parties of the first part, and Seaboard Air Line Railway, party of the second part,
>
> WITNESSETH, That for and in consideration of the sum of Two Hundred Dollars ($200.00) in hand paid, the receipt whereof is hereby acknowledged, and other valuable considerations, the parties of the first part hereby grant, bargain, sell and convey unto the party of the second part, all their right, title and interest, of any nature whatsoever, in and to the following property, to wit:
>
> All those certain pieces or parcels of land, lying and being in the County of Manatee and State of Florida, and being described as follows:
>
> A strip of land one hundred (100) feet wide, being fifty (50) feet on each side of the center line of the Seaboard Air Line Railway as located across lands owned by the said parties of the first part . . . .
> . . .
>
> Said strip of land contains 3.15 acres, more or less.
>
> TOGETHER WITH all and singular the tenements, heriditaments, and appurtenances thereunto belonging or appertaining, and every right, title or interest, legal or equitable, of the said party of the first part in and to the same. . . .

Pls.' PFUF, Ex. E; see also Pls.' PFUF, Ex. F, G.[10] There is no dispute that the grantors held fee simple title to the lands conveyed to Seaboard in 1910. The Phillips signed their deed on September 5th for consideration of $100 and the Blackburns signed their deed on September 5th for consideration of $200. Because the conveyances are unambiguous, the Court must ascertain

[10] The Frazer conveyance omits the phrase "the parties of the first part hereby grant, bargain," from the second paragraph. Despite this omission, the Frazer deed is substantively the same as the other deeds because the property is still conveyed to Seaboard. The first paragraph of the conveyance identifies the Frazers as the parties to the first part and Seaboard as the party to the second part. The second paragraph states that "all their right, title, and interest, of any nature whatsoever" is conveyed unto "the party of the second part." From the face of the instrument, it is unambiguous that "their right, title, and interest" refers to the Frazers' right, title and interest.

the parties' intent from the face of the deeds. See Saltzman, 306 So. 2d at 539 ("there is no room for judicial construction of the language nor interpretation of the words used" when the deed's wording is clear). Based on the plain language of the conveyances, the Frazers, Blackburns, and Phillips intended to convey fee simple title in their respective parcels of land to Seaboard.

The deeds' granting clauses, which purport to convey a strip of land outright to the railroad without limitation state: "the parties of the first part hereby grant, bargain, sell and convey unto the party of the second part, all their right, title and interest, of any nature whatsoever, in and to the following property. . . ." Def.'s Mot., Ex. B, C, D (emphasis added). The language could not be clearer -- the property owners were conveying all of their interest. As this Court held in Bird Bay, this language, granting all rights, conveys a fee title. 93 Fed. Cl. at 619. The language used in these three conveyances differs substantially from the Honore conveyance at issue in Rogers. In Rogers, the Honore deed granted a "right of way for railroad purposes," and provided that if Seaboard failed to construct a railway and commence operations, the property would revert to the grantor. See Rogers, 90 Fed. Cl. at 422. The Frazer, Blackburn, and Phillips conveyances do not reference an easement or a right-of-way. Rather, the deeds describe the corridor as a "strip of land" and set forth its dimensions, and do not contain any language that limits or restricts the interests conveyed as is typical with easements.

Moreover, the Frazer, Blackburn, and Phillips conveyances do not contain a reversionary clause, as the Honore deed did. The Honore conveyance stated that if a railroad was not built and its operation was not commenced within one year from the date of the deed, or if Seaboard abandoned the land for "railroad purposes," "then the [conveyed] pieces and parcels of land [would] ipso facto revert to and again become the property of [the Honores]." Rogers, 90 Fed. Cl. at 422. Imposing an express limit on how the property can be used suggests an intent to create an easement or convey something less than a fee estate. See Irv Enters., Inc. v. Atl. Island Civic Ass'n, 90 So. 2d 607, 609 (Fla. 1956) (interpreting a deed with restrictions on use and a reversion provision as granting an easement). Here, as in Bird Bay, the lack of reversionary clauses, in conjunction with the expansive granting clauses -- granting all right, interest and title -- unambiguously indicate that the Frazer, Blackburn, and Phillips conveyances intended to grant fee simple title to Seaboard. See 93 Fed. Cl. at 612.

Plaintiffs' argument that the conveyors granted an easement to the railroad is unpersuasive. First, Plaintiffs note that the deeds convey "strip[s] of land . . . as located across lands owned by said parties of the first part . . . ." Citing Rogers, Plaintiffs argue that a conveyance of land "across" a second parcel of land shows that the grantors intended to convey an easement. However, in Rogers, this Court found that other language in the Honore conveyance -- the phrases "a right of way" and "for railroad purposes" -- as well as "over and across . . . the parcels of land," reflected the grantor's intent to convey an easement. 90 Fed. Cl. at 429-31. In Bird Bay, this Court rejected the plaintiffs' contention that the phrase "through the lands of the grantor," without more, demonstrated intent to convey an easement. 93 Fed. Cl. at 621 (emphasis added). This Court held instead that "through the lands of the grantor" merely described the location of the strip of land conveyed, and did not define, characterize, qualify, or limit the nature of the property interest conveyed. Id. at 621-22. The Blackburn, Frazer, and Phillips conveyances purport to convey a "strip of land . . . as located across lands owned by said parties of the first part . . . ." Pls.' PFUF Ex. E-G (emphasis added). The word "across," in conjunction with the words "as located," merely describes the location of the subject parcel and

does not qualify or limit the property interest the grantors conveyed. As in Bird Bay, the deeds specify the location of the land conveyed and contain no limitations on the use of the land -- such as "for railroad purpose" -- and do not characterize the conveyance as a "right of way." See also Whispell Foreign Cars, Inc. v. United States, 97 Fed. Cl. 324, 337 (2011) (amended on reconsideration in non-relevant part by, 100 Fed. Cl. 529 (2011)) (applying Florida law and interpreting conveyance as an estate in fee because the deed conveyed land, warranted title, and did not have any use restrictions).

Plaintiffs also argue that because many jurisdictions prohibit railroads from acquiring fee simple title in property, Seaboard could not have been granted a fee simple estate in the corridor. This Court squarely rejected this identical argument in Rogers and Bird Bay. The Rogers court quoted Florida Power Corporation v. McNeely, which acknowledged that a railroad could be granted an easement, stating: "[t]his is not to say that a railroad by arrangement or otherwise could not under any circumstances operate by virtue of an easement." 90 Fed. Cl. at 430 (quoting 125 So. 2d. 311, 317 (Fla. Dist. Ct. App. 1960)). In Bird Bay, this Court again held that under Florida law a railroad could acquire fee simple title to the strip of land on which it operates, stating:

> The fact that Seaboard was a railroad, which may or may not have possessed the power of eminent domain, does not, as Plaintiffs argue, inhibit its right to acquire fee simple title to lands, even when it was in receivership. Under Florida law, railroad companies may acquire land over which to construct rails and operate locomotive trains either as an estate in fee or they may acquire a right to cross over such land with an easement. In Florida, the term right-of-way, as it relates to railroads, can refer either to a "right of crossing" -- an easement -- or to "a strip of land which a railroad takes, upon which to construct its railroad" -- an estate in fee. Whether the railroad obtains a "right" or "land" depends on the intent of the parties as reflected by the deed of conveyance.

93 Fed. Cl. at 622-23 (citations omitted). As in Bird Bay, the intent of the parties in the Frazer, Blackburn, and Phillips conveyances is clear. The deeds conveyed a "strip of land . . . and every right, title or interest" -- not a right-of-way. Moreover, the deeds did not limit Seaboard's use of the land to railroad purposes. Railroads were permitted to obtain fee estates under Florida law in 1910, and the Frazer, Blackburn, and Phillips deeds unambiguously conveyed fee estates.

In sum, Seaboard acquired a fee simple title in the portions of the right-of-way subject to the Frazer, Blackburn, and Phillips conveyances. As the adjoining landowners never possessed a property interest in the subject corridor, no taking has occurred. Defendant's motion for partial summary judgment is granted as to the claims relating to the Frazer, Blackburn, and Phillips conveyances.

The Knight Deed Conveyed a Fee Simple Title to the Right-of-Way

The Knight conveyance is identical in almost all respects to the Frazer, Blackburn, and Phillips conveyances. The Knight conveyance warrants a separate discussion, however, because it contains a hand-written notation nullifying the grant unless a railroad were built within five

years. The Knight deed, including this handwritten notation, which is in bold and bracketed, reads:

> THIS DEED, Made this third day of September 1910, between JESSE KNIGHT, WIDOWER, and F.R. KNIGHT unmarried, parties of the first part, and Seaboard Air Line Railway, party of the second part.
>
> WITNESSETH, That for and in consideration of the sum of Ten Dollars ($10.00) in hand paid, the receipt whereof is hereby acknowledged, and other valuable considerations, the parties of the first part hereby grant, bargain, sell and convey unto the party of the second part, all their right, title and interest, of any nature whatsoever, in and to the following property, to wit:
>
> All those certain pieces or parcels of land, lying and being in the County of Manatee and State of Florida, and being described as follows:
>
> A strip of land one hundred (100) feet wide, being fifty (50) feet on each side of the center line of the Seaboard Air Line Railway as located across lands owned by the said parties of the first part . . . .
>
> ...
>
> Said strip of land contains 6.3 acres, more or less. **[Provided the said railroad is built within five years from [the] date hereof, otherwise this deed becomes null [and] void.]**
>
> TOGETHER WITH all and singular the tenements, heriditaments, and appurtenances thereunto belonging or appertaining, and every right, title or interest, legal or equitable, of the said parties of the first part in and to the same.
>
> . . .

Pls.' PFUF Ex. H; see also Def.'s Mot., Ex E.

Defendant interprets the deed coupled with the handwritten language as creating a fee simple subject to a condition subsequent. Plaintiffs claim that the handwritten note's language is instead evidence that the Knights conveyed an easement. Plaintiffs argue that the "null and void" language in the handwritten note contemplates a process akin to an extinguishment of an express easement, rather than a reversion of a fee simple. Specifically, Plaintiffs contend:

> A condition rendering a fee estate "null and void" is inconsistent with the very nature of a fee conveyance. And, while such a 'null and void' provision is contrary to the very nature of a conveyance, such a provision is commonly found in a grant of an easement.

Pls.' Supp. Br. 23 (Jan. 19, 2011). From this premise, Plaintiffs argue that the Knight conveyance could not have established a fee estate, relying primarily on Dean v. MOD Properties, 528 So. 2d 432 (Fla. Dist. Ct. App. 1988). Plaintiffs claim that in Dean, "[t]he court noted that the lack of any right of reversion eliminated the possibility that a defeasible fee simple estate was created, and instead, found, the terminating language more consistent with an

easement." Pls.' Supp. Br. 25 (Jan. 19, 2011). However, the mere presence of "terminating language" did not drive the Dean Court's finding that the conveyance there was an easement. Rather, the Dean Court found the use of the words "reversion of reversions thereof," "inept" in the conveyance at issue because they implied conveyance of a fee simple title. The Dean Court explained:

> The draftsman of the "road right-of-way easement" to the City of Sanford in 1974 was certainly not clear as to the legal differences and distinctions as to landed estates, easements, and licenses. However, the implication of a conveyance of the fee simple title raised by the inept words "the reversion or reversions thereof" is, in our opinion, clearly overwhelmed by the repeated qualified phrases limiting the interest conveyed to be for the "purpose of road right-of-way" and "for public road right-of-way purposes," as well as the title of the document, and constituted the creation and granting to the City of Sanford of an easement for a right-of-way for a public road and did not convey the fee simple title, nor did it convey a conditional, qualified, or determinable fee estate subject to any right of reverter in the grantor MOD.

Thus, Dean does not stand for the proposition that mention of a right of reversion eliminates the possibility of conveyance of a defeasible fee simple estate. Rather, Dean held that a conveyance of a "road right-of-way easement" for the "purpose of road right-of-way" and "for public road right-of-way purposes" conveyed an easement and not a fee simple. Id. at 434.

Contrary to Plaintiffs' argument, it is well recognized that a fee estate may be limited by a proviso that the estate shall expire upon a specified occurrence. See e.g. Restatement (First) of Property, § 44 (1936). The Restatement defines a fee simple determinable as a conveyance "created by any limitation which, in an otherwise effective conveyance of land, (a) creates an estate in fee simple; and (b) provides that the estate shall automatically expire upon the occurrence of a stated event." Id. Florida courts have long recognized the property interest known as a fee simple determinable. See Richardson v. Holman, 33 So. 2d 641, 642 (Fla. 1948) (in "a fee simple determinable . . . the words creating it limit the continuation of the estate to the time preceding the happening of the contingency").

Analyzing the language of the Knight conveyance leads to the conclusion that the deed conveyed a fee simple determinable. Like the Frazer, Blackburn, and Phillips deeds, the original language of the Knight conveyance in its entirety indicates an intent to transfer a fee simple. The addition of the handwritten phrase -- "Provided the said railroad is built within five years from [the] date hereof, otherwise this deed becomes null [and] void" -- does not alter the fundamental character of the property interest -- the fee conveyance. Rather, while the notation defined an event that would terminate Seaboard's fee -- failure to build a railroad within five years -- the notation did not change the nature of the fee or somehow convert the fee estate into an easement. As in the Blackburn, Phillips, and Frazer conveyances, the granting clause of the Knight deed conveyed "the tenements, hereditaments, and appurtenances thereunto belonging or appertaining, and every right, title or interest, legal or equitable" in the corridor -- not a right-of-way limited to certain enumerated uses. Unlike the conveyances in Dean and Rogers, the Knight conveyance contains no references to easements, rights-of-way, or any purposes.

Because Seaboard built a railroad within five years of the conveyance, at the time of the NITU, CSX held the strip of land at issue in fee simple absolute, and the abutting landowners had no interest in the right-of-way. The Court therefore grants Defendant's motion for partial summary judgment with respect to the Knight conveyance.

Property Acquired "By Possession"

Plaintiffs claim that "for land upon which Seaboard built and operated the rail line without any conveyance from the land owner, the greatest interest Seaboard could have obtained was a prescriptive easement." Pl.'s Resp. at 3, Oct. 12, 2010. Defendant claims that Seaboard satisfied the requirements for adverse possession in effect in 1910, thus acquiring a fee simple estate, and that nothing in Florida law prohibited a railroad from obtaining title through adverse possession.

A Railroad Can Acquire Fee Simple Title by Adverse Possession

Seaboard built its rail corridor in 1910, but for multiple portions of the corridor, there was no written conveyance granting the right to construct and operate a railbed. According to an "ICC Valuation Table" dated June 30, 1918, multiple sections of Seaboard's railway corridor as they existed in 1918 had been "held or used" "by possession." Def.'s Cross-Mot. for Partial Summ. J, Ex. F. The Table does not indicate whether the nature of Seaboard's interest was a fee simple estate acquired by adverse possession or an easement acquired by prescription.

The Florida Supreme Court, in Downing v. Bird, 100 So. 2d 57, 64-65 (Fla. 1958) (citations omitted), elaborated on the difference between establishing title by adverse possession and acquiring an easement by prescription:

> The establishment of a public highway by prescription, or long user, is based on the presumption of a prior grant. A prescriptive right is an incorporeal hereditament in land.
>
> The establishment of title by adverse possession is based on the theory that the owner has abandoned the land to the adverse possessor. Title so acquired is a corporeal right, and it is the nature of the right acquired which marks the principal difference between a prescriptive right and title by adverse possession.
>
> The trend of modern authorities is to abandon the theory that prescriptive rights are based on the presumption of a prior grant, and to treat the acquisition thereof as being rights acquired by methods substantially similar to those by which title is acquired by adverse possession. We agree with these authorities.
>
> In either prescription or adverse possession, the right is acquired only by actual, continuous, uninterrupted use by the claimant of the lands of another, for a prescribed period. In addition the use must be adverse under claim of right and must either be with the knowledge of the owner or so open, notorious, and visible that knowledge of the use by and adverse claim of the claimant is imputed to the owner. In both rights the use or possession must be inconsistent with the owner's

> use and enjoyment of his lands and must not be a permissive use, for the use must be such that the owner has a right to a legal action to stop it, such as an action for trespass or ejectment.
>
> Further in either prescription or adverse possession, the use or possession is presumed to be in subordination to the title of the true owner, and with his permission and the burden is on the claimant to prove that the use or possession is adverse. This essential element as well as all others must be proved by clear and positive proof, and cannot be established by loose, uncertain testimony which necessitates resort to mere conjecture.
>
> . . . .
>
> While there are slight differences in the essentials of the two actions, they are not great. In acquiring title by adverse possession, there must of course be 'possession'. In acquiring a prescriptive right this element is use of the privilege, without actual possession. Further, to acquire title the possession must be exclusive, while with a prescriptive right the use may be in common with the owner, or the public.

Adverse possession during the period in question -- 1910 -- was governed by General Statutes of Florida § 1722 (1906), titled "Adverse possession without color of title." 1910 is the relevant year because Seaboard began building the railroad in that year, and the law in effect when an adverse possession claim begins to run governs the claim.[11] Baugher v. Boley, 58 So. 980, 982 (Fla. 1912). The pertinent Florida adverse possession statute provides:

> 1. To Be Land in Actual Occupation Only. -- Where it shall appear that there has been an actual continued occupation for seven years of premises under a claim of title exclusive of any other right, but not founded upon a written instrument, or a judgment or decree, the premises so actually occupied, and no other, shall be deemed to have been held adversely.
>
> 2. Definition of Occupation and Possession Required. -- For the purpose of constituting an adverse possession by a person claiming title not founded upon a written instrument, judgment or decree, land shall be deemed to have been possessed and occupied in the following cases only: 1. Where it has been protected by a substantial enclosure, or 2., where it has been usually cultivated or improved.

---

[11] There is no dispute that "work on a sixteen-mile extension of the Seaboard railroad line began in January 1910 and the project was completed in full by 1911." Def.'s Supp. Br. 6, Jan. 19, 2011; see also Pls.' Resp. 1, Oct. 12, 2010 ("The present motion requires this Court to apply this analysis to land upon which the Seaboard Air Line Railway ("Seaboard") built a railway in 1910.").

Gen. Stat. Fla. § 1722 (1906).[12] See also Baugher v. Boley, 58 So. at 984 (upholding finding of adverse possession under General Statutes of Florida § 1722 where there was "conspicuous effort to maintain a fence" around uncultivated land for the full seven-year period). There was no similar statute governing prescriptive easements in effect at this time. However, at common law, 20 years of continuous and uninterrupted use established an easement by prescription. Zetrouer v. Zetrouer, 103 So. 625, 626-27 (Fla. 1925) (en banc) ("Where the common law obtains, 20 years' continuous and uninterrupted use has always created a prescriptive right as well in the public as private individuals.").

Plaintiffs argue that General Statutes of Florida § 1722 is inapposite because, in several jurisdictions, railroads may not acquire rights-of-way in fee simple through adverse possession. "[O]rdinary [railroad] right of way use creates an easement by prescription only" and not "fee title by adverse possession." 10 Thompson on Real Property, 2d Thomas Ed., § 87.17 (1998). "The principal reason advanced in support of the rule is that the nature of the user by the railroad requires no more than an easement in the right of way and does not, therefore, amount to an occupancy adverse to the claim of another to the fee." Md. & Pa. R.R. Co. v. Mercantile-Safe Deposit & Trust Co., 166 A.2d 247, 249 (Md. 1960); see also People v. Ocean Shore R.R., 196 P.2d 570, 577 (Cal. 1948) ("usually there is no user beyond the purposes of a right of way and no notice to the owner that any greater right is claimed"); see generally Penn Cent. Corp. v. U.S. R.R. Vest Corp., 955 F.2d 1158, 1160 (7th Cir. 1992) (explaining economic benefits resulting from presumption that railroad acquires an easement instead of fee simple).

Florida law, however, does not follow the majority rule. At least two Florida courts have upheld findings that a railroad obtained title to a right-of-way through adverse possession. See Seaboard Air Line Ry. Co. v. Atl. Coast Line R.R. Co., 158 So. 459 (Fla. 1935) (en banc) ("Seaboard"); Tassapoulos v. Seaboard Coastline R.R. Co., 353 So. 2d 867 (Fla. Dist. Ct. App. 1977). In Seaboard Air Line, Atlantic Coast Line brought an action to quiet title to the land where its right of-way crossed that of Seaboard. The chancellor found that Atlantic had acquired the right-of-way via adverse possession under color of title, and the Florida Supreme Court affirmed. Seaboard, 158 So. at 461. The Seaboard Court provided no description of the evidence for Atlantic Coast Line's "actual and notorious possession" other than to say there was a "great amount." Id.

In Tassapoulos, the Florida Court of Appeals issued the following opinion, quoted below in its entirety:

> The record titleholders to certain land in Clay County appeal from a judgment holding that the appellee railroad obtained title by adverse possession, without color of title, to a strip along one boundary of the tract. While the record supports the trial court's judgment concerning a small parcel actually occupied by the railroad's roadbed, the record does not support the railroad's claim to a wider strip parallel to its track, the boundary of which is marked not by a substantial enclosure but only by power poles and lines on appellants' land. Section 95.18, Florida Statutes (1975); Downing v. Bird, 100 So. 2d 57 (Fla. 1958). The case will be remanded for entry of a conforming judgment.

[12] The 1906 version of § 1722 remained in effect until 1918.

353 So. 2d at 867.[13] A dissenting opinion reads, in its entirety:

> In my opinion, there was competent, substantial evidence to support the trial judge's finding that appellee Seaboard acquired the disputed property by adverse possession. Kiser v. Howard, 133 So. 2d 746 (Fla. Dist. Ct. App. 1961).

Id.

Tassapoulos, like Seaboard Air Line, indicates that under Florida law, a railroad can acquire fee simple title to a right-of-way through adverse possession. So too does the Fifth Circuit's decision in Dunscombe v. Loftin, 154 F.2d 963, 967 (5th Cir. 1946) ("Under Florida law, a railroad, having the power of eminent domain, can also acquire title by adverse possession."). Accord Whispell Foreign Cars, Inc. v. United States, 100 Fed. Cl. 529, 543-45 (2011). This proposition is further supported by Florida Power Corp., 125 So. 2d at 311. In Florida Power, the court considered whether the power company had obtained an easement and contrasted the power company's use of the corridor with that of a railroad:

> By comparative analysis of physical aspects of a railroad right of way and the ordinary power line easement as these aspects lend themselves to use of lands, we perceive a difference. By the construction of its road bed, the installation of its ties and tracks, and through its railroading operations, a railroad adversely using land excludes the owner from and prevents his use of that land, and so exercises dominion over it and has possession. This is not to say that a railroad by arrangement or otherwise could not under any circumstances operate by virtue of an easement; but for the reasons stated, the usual adverse situation negates mere user. On the other hand, a power line principally utilitizes a space-way and is not terrestrially located as is a railroad right of way. Beneath the suspended power line many activities entirely consistent with use by the power company may be carried on. These activities may be of a productive nature; ordinary observation discloses a variety of instances wherein the lands beneath power lines are utilized for purposes of the owners of the lands involved. The nature of an easement depends upon its purpose, and the right to use the land beneath a power line for other purposes not conflicting nor interfering with the easement of the power corporation remains with the landowner.

Id. at 316-17 (emphasis added) (citing Annotation, 6 A.L.R. 2d (205)). Thus, the Florida Power Court found that the power company had used the land in concert with the property owners -- as opposed to in exclusion of them -- because the power company and the line did not occupy the land except for occasional inspections and infrequent clearing. Id. at 317. The court observed that unlike a power line, the presence of an active railway could prevent a landowner from using the occupied land, and such exclusive use would indicate a fee interest by adverse possession.

[13] The Tassapoulos court upheld a finding of adverse possession under Florida General Statutes 95.18 (1975). The only significant difference between that statute and Florida General Statutes § 1722 (1906), was the requirement in Florida General Statutes 95.18 that the adverse possessor begin paying property taxes within one year after taking possession of the property and continue to do so throughout the period of possession.

See also 2 Fla. Jur. 2d Adverse Possession § 56 (2011) (citing Dunscombe, 154 F.3d at 967). As such, Florida precedent does not foreclose the possibility of a railroad acquiring a fee interest via adverse possession.

Plaintiffs argue that the weight of Florida cases equate open and notorious seizure of rights-of-way with prescriptive easements. Even if this observation were true, this does not mean that the property interest that Seaboard acquired in 1910 "by possession" must necessarily be legally defined as a prescriptive easement. Rather, as the Florida Supreme Court recognized in Downing v. Bird, the critical difference between adverse possession and prescriptive easement is whether the railroad actually possessed the property for the requisite period, indicating adverse possession, or merely used it, giving rise to a prescriptive easement for the purpose of railroad use. 100 So. 2d at 64-65. Whether a user of land meets the requirements for adverse possession or prescriptive easement is a fact intensive inquiry. Either property right must be proved by the claimant "by clear and positive proof." Id. at 65. The cases Plaintiffs cite do not persuade the Court that the property interest Seaboard obtained in 1910 was necessarily a prescriptive easement as a matter of law. See Pls.' Supp. Br. 15-19, June 13, 2012. Plaintiffs have not identified any Florida case holding that a railroad cannot obtain fee title through adverse possession, while Dunscombe, Seaboard Air Line, and Tassapoulos indicate a railroad can obtain fee ownership through adverse possession.

Summary Judgment Is Inappropriate

"The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." RCFC 56(a). "[S]ummary judgment is inappropriate if the factual record is insufficient to allow the Court to determine the salient legal issues." Mansfield v. United States, 71 Fed. Cl. 687, 693 (2006); see also Blue Lake Forest Products, Inc. v. United States, 86 Fed. Cl. 366, 381-82 (2009) (denying cross-motions for summary judgment when the record did not contain clear evidence regarding the motives of decision-makers or the evidence of their decisions).

In this case, neither party has met its burden. To establish title through adverse possession, Defendant must meet the requirements of Florida General Statutes § 1722, which provides: there has been an actual continued occupation for seven years of premises under a claim of title exclusive of any other right and land shall be deemed to have been possessed and occupied in the following cases only: (1) where it has been protected by a substantial enclosure, or (2) where it has been usually cultivated or improved.

On the current record, Defendant has not offered clear and positive proof that Seaboard continually occupied the land underlying the right-of-way for seven years or that it made the requisite enclosures or improvements on the land. Defendant has submitted a 1916 map of the southeastern United States depicting Seaboard's railroad network, with an inset providing a detailed map for the routes radiating from Tampa. Def.'s Supp. Br., Ex. I, June 13, 2012. The inset map shows a route running from Tampa south to Venice -- and through Sarasota. Defendant also submitted an excerpt from Poor's Manual indicating that Seaboard operated a rail line over from Fruitvale to Venice, for a total of 16.53 miles in 1921. Def.'s Supp. Br., Ex. J, June 13, 2012 (listing the Fruitvale to Venice branch as one of the rail lines Seaboard operated as of December 31, 1921). Poor's Manual provides a list of the routes where Seaboard provided

service and the mileage of those routes. Poor's Manual does not contain any detailed maps or routes to establish whether the Fruitvale to Venice route occupied the entire corridor at issue. While these materials indicate that Seaboard owned some type of rail service network in the area in 1916 and in 1921, the materials do not provide details showing that Seaboard operated continuous, open, and notorious rail service for seven years as required under Florida law. Even, assuming arguendo, that Defendant has established that Seaboard maintained and operated a railroad in 1916, and 1921, such a showing does not meet the strict requirements necessary to prove adverse possession under Florida law. See Drawdy Inv. Co. v. Leonard, 29 So. 2d 198, 203 (Fla. 1947) (holding that barbed wire fence and natural barriers enclosing grazing land "fails entirely to show such an actual continued, open and notorious possession of the lands under a claim of right by the plaintiff"); Tassapoulos, 353 So. 2d at 867 (overturning the trial court's determination that the railroad had adversely possessed land parallel to the railbed "marked not by a substantial enclosure but only by power poles and lines on appellants' land."). Further, Defendant has not articulated the dimensions of the area on each parcel to which it claims Seaboard obtained a fee interest.

Similarly, in order to demonstrate that Seaboard acquired a prescriptive easement by possession, Plaintiffs must demonstrate by clear and positive proof that the railroad's use was adverse, open, and notorious for a 20 year period -- and must demonstrate the location and dimensions of the property. Zetrouer v. Zetrouer, 103 So. at 626-27; Downing, 100 So. 2d at 65. Here, Plaintiffs did not offer such proof. Rather, they merely attempted to rebut Defendant's claims of adverse possession by citing chains of title that show the landowners did not record any conveyances to Seaboard. Pls.' Supp. Br. 12, June 13, 2012 ("The chain of title confirms that for certain segments of the right-of-way, the railroad did not obtain any recorded interest in the land. . . . Numerous state courts have reached the prevailing conclusion that a railroad acquires only a prescriptive easement, rather than an estate in fee in circumstances such as these."). Plaintiffs' allegations are insufficient to establish a prescriptive easement.

While Plaintiffs are correct that Defendant must show that Seaboard satisfied the statutory requirements to obtain fee title via adverse possession, Plaintiffs fail to acknowledge that a party claiming a prescriptive easement must also show actual, continuous, uninterrupted, and adverse use for the requisite period. J.C. Vereen & Sons, Inc. v. Houser, 167 So. 45, 48 (Fla. 1936) (finding no prescriptive easement when the claimant could not show use of property for the full prescriptive period); Guerard v. Roper, 385 So. 2d 718, 720 (Fla. Dist. Ct. App. 1980) (while appellee showed continuous use for 20 years, court found no prescriptive easement because there was no evidence to support adversity). It is fundamental that Plaintiffs must establish their property rights because in any takings case, "only persons with a valid property interest at the time of the taking are entitled to compensation." Wyatt v. United States, 271 F.3d 1090, 1096 (Fed. Cir. 2001).

Neither party has set forth sufficient evidence on whether Seaboard obtained a fee simple via adverse possession or a prescriptive easement by open and notorious use. Both parties' briefs contain bare assertions of fact without any evidentiary support. See Whispell Foreign Cars, 100 Fed. Cl. at 546 (holding neither the plaintiff landowners nor the defendant set forth sufficient evidence on the issue of whether a Florida railroad met the statutory requirements to obtain title via adverse possession). On this record, the Court cannot determine whether Seaboard acquired

fee simple title via adverse possession to the property acquired "by possession" or a prescriptive easement.

Conclusion

1. Defendant's motion for partial summary judgment is **GRANTED** on the claims relating to the portion of the railroad corridor subject to the Blackburn, Frazer, Knight, and Phillips conveyances, and Plaintiffs' motion is **DENIED**.

2. Plaintiffs' motion for partial summary judgment on the claims relating to the portion of the railroad subject to the Palmer conveyance is **GRANTED**, and Defendant's motion is **DENIED**.

3. Based on the current record, the Court **DENIES** Plaintiffs' and Defendant's cross-motions for summary judgment on the claims of the Plaintiffs whose land abuts the railroad corridor where Seaboard acquired its property interest "by possession."

On or before **October 15, 2012**, the parties shall file a joint status report and propose further proceedings to resolve the claims relating to property interests Seaboard acquired by possession.

s/Mary Ellen Coster Williams
MARY ELLEN COSTER WILLIAMS
Judge

NOTE: This order is nonprecedential.

United States Court of Appeals for the Federal Circuit

STEPHEN J. ROGERS, LINDA L. ROGERS, DONALD E. DURAN, JUDITH DURAN, DENISE RIZZO, DEBORAH CHILDERS, NATHAN CHILDERS, CHESHIRE HUNT, MCCANN HOLDINGS, LTD., MISSION VALLEY GOLF AND COUNTRY CLUB, INC., PALMER RANCH HOLDINGS, INC., WYNNSTAY HUNT, INC., BEE RIDGE, LLC, CALUSA LAKES COMMUNITY ASSOCIATION, INC., FLORIDA BROADACRE TRAILER LODGE, INC., FLORIDA ROCK CONCRETE, INC., PINE RANCH EAST OWNERS ASSOCIATION, INC., POST OFFICE PROPERTIES, PUTLE HOME CORPORATION, SARASOTA INVESTMENT COMPANY, INC., STONEYBROOK GOLF & COUNTRY CLUB OF SARASOTA, INC., TOURNAMENT PLAYERS CLUB AT PRESTANCIA, INC., TRINITY CHAPEL OF SARASOTA, INC., LOUIS L. ALDERMAN, ALEXANDRINE BOSWELL, ANN CONVERSE, SUSAN BELTRAN, CATHY C. SIANO, SANY CHESTNUT, MARK T. ENTWISTLE, ROSEANN M. ENTWISTLE, CHRISTOPHER H. HERZONG, TRACY A. HERZOG, J. WATT, VIRGINIA GRAY SHROYER, ALSIE T. MARTIN, AND MARY K. MARTIN,
Plaintiffs,

AND

COUNTRY CLUB ESTATES COOPERATIVE, INC., WILLIAM J. GILL, SARA S. GILL, HANSON PIPE &

PRODUCTS SOUTHEAST, INC., HATCHETT CREEK CORPORATION, CAROLE A. MADDEN, DAVID J. MARTINI, ROSE MARIE MARTINI, ALAN H. MORTIMER, LEE MORTIMER, VENICE LAND COMPANY, AUDREY ROSE ALLEN-WORDELL, JUDITH BADAMS, BATES SHOW SALES STAFF, INC., JEAN E. BECHTEL, RICHARD L. BUONPANE, DONALD CHAPMAN, DARBY SOUTH BUICK-PONTIAC-GMC, INC., ESTATE LANDS EXCAVATORS, INC., TRIMBLE B. GAILBREATH, DIANA J. GAILBREATH, TERRY L. GARNER, KATHY GARNER, LANNING TIRE SALES, INC., CARL E. LONGWELL, MARY ELLEN LONGWELL, DONALD GREY LOWRY, SAMUEL LUBUS, as Trustee of the Samuel Lubus Revocable Trust Agreement, GLENN LEE MCMURPHY, SANDRA KAY MCMURPHY, JACK MIDKIFF, AVONA MIDKIFF, MILFORD ENTERPRISES, INC., MARGARET L. MORAN, MARY JO PATTISON, as Trustee of the Mary Jo Pattison Revocable Trust, MARK RICHMOND, Trustee of the Mark Richmond Revocable Trust, WILLIAM R. SAUTTER, III, THOMAS H. LEWIS, JR., RICHARD SERINO, JOYCE SERINO, SPERRY MARKETING GROUP, INC., JAMES R. STEWART, SHIRLEY A. STEWART, ROBIN E. STUART, Trustee of the Revocable Trust, VICTOR D. VIRZI, LEONA VIRZI, WALGREEN CO., RICHARD M. WILLIAMSON, PATRICIA WILLIAMSON, DELL WILLMAN, CAROL J. WILLMAN, SUBURBAN PROPANE, L.P., BAY PLAZA PROPERTIES, LLC, CRAMER MOTORS, INC., PUBLIC STORAGE, SOUTHERN SPRING & STAMPING, INC., TRIPLE DIAMOND COMMERCIAL PROPERTIES LLC, VENICE PLAZA LTD., WEST COAST INLAND NAVIGATION DISTRICT, DEE A. DEATERLY, KELLY A. GLAUSMAN, WILLIAM BREDA AND ANGELYN P. BREDA (also known as CFG Properties), THOMAS

MAYHALL AND KATHY MAYHALL (also known as Nekaro, LLC), DOUGLASR. MURPHY, JR., SALLY M. BERRYMAN, SUSAN M. WEST, BIRD BAY EXECUTIVE GOLF CLUB, FAYE HOWARD, ROBERT WILLIAMS, KIMAL LUMBER, SEAN PATRICK HILL, ALFRED ART, BARBARA ART, JAMES BATTAGLIA, KATHRYN BATTAGLIA, J. SCOTT BOYKIN, NADENE BOYLE, DALE BROWN, SCOTT BROWN, MARTIN CROCE, MELINDA CROCE, MARGARET DEWEY, DEBORAH FOCHT, TIMOTHY GEORGE, CHARLES GRIMM, MELINDA GRIMM, ROBERT HARRIS, BILLIE HARRIS, RAYMOND LANE, BETH LANE, DONALD LANE, II, KEVIN LYMAN, LLOYD MEADOR, SANDRA SANZONE, DOROTHY THOMAS, JENNY TROYER-CURTIS, EDWIN VAN PELT, SR., JOYCE VAN PELT, ROSS WALKUP, SUSAN WALKUP, CINDY WATSON, ABSOLUTE MANAGEMENT ENTERPRISES, INC., P&S PROPERTIES, INC., PRECISION FABRICATION CORP., AND SIGNTIST, INC.,
Plaintiffs-Appellants,

v.

UNITED STATES,
Defendant-Appellee.

2013-5098, -5102

Appeals from the United States Court of Federal Claims in Nos. 07-CV-0273, 07-CV-0426, 08-CV-0198, 10-CV-0187, and 10-CV-0200, Judge Mary Ellen Coster Williams.

CERTIFICATION ORDER

Before MOORE, O'MALLEY, and WALLACH, *Circuit Judges.*

PER CURIAM.

O R D E R

This action asks whether, under Florida law, a railroad that receives a deed which appears on its face to transfer fee simple ownership may hold the property in fee simple or is limited to possession of an easement or limited right-of-way, either by Fla. Stat. § 2241 (1892) (recodified at Fla. Stat. § 4354 (1920); Fla. Stat. § 6316 (1927); Fla. Stat. § 360.01 (1941)), or by state policy limiting the rights of railroad corporations to hold property. The answer to this question will be determinative of the Appellants' claims in this matter, specifically whether Appellants Rogers, et al. could be entitled to compensation from the United States for a taking under the Fifth Amendment of the United States Constitution, because railroad corridors traversing their properties were converted into a public trail pursuant to the National Trails System Act Amendments of 1982 ("Trails Act"), 16 U.S.C. § 1247(d) (2012). Later actions and appeals to this court may also be determined by resolution of this state law question.

It appears to the parties, the United States Court of Federal Claims, and this court that there is no controlling precedent in the existing decisions of the Florida Supreme Court regarding a railroad's right to hold property in fee simple where the purpose of the property transfer is to permit the railroad to build or operate a rail corridor. Accordingly, following oral argument in this case on July 10, 2014, this court decided to certify the following question of law to the Florida Supreme Court pursuant to Florida Constitution Art. V § 3(b)(6), and Rule 9.150 of the Florida Rules of Appellate Procedure:

A. THE QUESTION OF LAW TO BE ANSWERED

Assuming that a deed, on its face, conveys a strip of land in fee simple from a private party to a railroad corporation in exchange for stated consideration, does Fla. Stat. § 2241 (1892) (recodified at Fla. Stat. § 4354 (1920); Fla. Stat. § 6316 (1927); Fla. Stat. § 360.01 (1941)), state policy, or factual considerations—such as whether the railroad surveys property, or lays track and begins to operate trains prior to the conveyance of a deed—limit the railroad's interest in the property, regardless of the language of the deed?[1]

B. A STATEMENT OF ALL FACTS RELEVANT TO THE QUESTIONS CERTIFIED

The property at issue involves, in part, a 12.43 mile long, 100 foot wide strip of land between Sarasota and Venice in Sarasota County, Florida. The Seaboard Air Line Railway ("Seaboard") received property interests for the land underlying its railway through a series of transactions from 1910 through 1941. In the early 1900s, Seaboard surveyed the property it intended to use for its rail way. In a series of four deeds (the Blackburn, Phillips, Frazer, and Knight deeds), property owners conveyed their interests in the northern corridor of the rail way to Seaboard in September 1910. Those deeds appear, on their face, to unambiguously convey a fee simple interest to Seaboard. After receiving these deeds, Seaboard laid track and began to operate trains along the entire corridor as of November 1911. At this time, Seaboard had not received any deed corresponding to the southern portion

---

[1] While the Appellants dispute whether the deeds appear on their face to transfer a fee simple interest in the properties at issue, like the Court of Federal Claims before us, we conclude that they do.

of the rail corridor, but still operated trains along the entire corridor.

In 1926–27, Seaboard relocated the southern portion of its rail corridor a quarter mile to the east. On April 1, 1927, trains began to run along the relocated rail corridor. Then, on April 4, 1927, Seaboard received a deed from the Brotherhood of Locomotive Engineers pension fund ("BLE") that appears, on its face, to unambiguously convey a fee simple interest in the property corresponding to the relocated southern portion of the rail corridor.[2] Seaboard continued to operate trains along the entirety of the rail corridor.

In 2003, a successor operator of the rail corridor, Seminole Gulf, sought an exemption from continuing to operate the rail line. The Surface Transportation Board granted Seminole Gulf's petition for an exemption, which allowed Seminole Gulf and Sarasota County the opportunity to negotiate a railbanking and interim trail use agreement. Seminole Gulf and Sarasota County reached an agreement, and CSX Corporation ("CSX"), the owner of the rail corridor, quitclaimed its interest in the property to the Trust for Public Land. CSX then removed its track, and the Trust converted the property into the Legacy Trail.

In addition to these facts, attached hereto are the following documents from the parties' Appendix on Appeal:[3]

1. Court of Federal Claims's Partial Final Judgment, entered May 10, 2013 (A1);

---

[2] Seaboard also received a deed from the Venice-Nokomis Holding Corporation on November 10, 1941 that purported to transfer the same property that BLE transferred to Seaboard in the 1927 BLE deed.

[3] A complete Appendix can be furnished upon request.

2. Court of Federal Claims's Opinion and Order, entered June 28, 2010 (A2-22);

3. Court of Federal Claims's Opinion and Order, entered September 25, 2012 (A23-42).

C. STYLE OF THE CASE

The present dispute arises from multiple suits filed in the Court of Federal Claims by landowners who argue that the conversion of the entire rail corridor, including the portion at issue in this appeal, to a public trail resulted in a compensable taking of their property interests. Under the Trails Act, *Preseault v. I.C.C.*, 494 U.S. 1 (1990), and *Preseault v. United States*, 100 F.3d 1525 (Fed. Cir. 1996) (en banc), the landowners would have no compensable interest in the property if the deeds at issue conveyed a fee simple interest to Seaboard. If the deeds, however, conveyed only an easement or limited right-of-way—either on their face or by operation of law—the landowners would have an interest in the property which could be compensable upon termination of the easement.

The Court of Federal Claims consolidated all claims into three separate actions, resulting in three separate opinions. Two of those opinions, *Rogers v. United States* ("*Bird Bay*"), 93 Fed. Cl. 607 (2010) and *Rogers v. United States* ("*Rogers*"), 107 Fed. Cl. 387 (2012), are at issue in the present appeal. In both cases, the plaintiffs asserted that they retained a compensable interest in the property because Florida law limits a railroad's ability to hold an interest in property used for a rail corridor. The government argued that the plain language of the deeds conveyed a fee simple interest to the railroad, and that neither the Florida Supreme Court nor the Florida legislature has expressed a policy preventing a railroad from receiving title in fee simple, regardless of the uses for which the property is conveyed or the circumstances surrounding the execution of the deed.

In *Bird Bay*, the Court of Federal Claims found that the 1927 BLE deed for the southern portion of the railroad corridor conveyed a fee simple interest to Seaboard. In *Rogers*, the Court of Federal Claims similarly held that the 1910 Blackburn, Phillips, Frazer, and Knight deeds conveyed a fee simple interest to Seaboard for the northern portion of the railroad corridor. The Court of Federal Claims concluded, accordingly, that those plaintiffs—the present Appellants—had no compensable property interest for which they could be entitled to compensation upon its taking. Although, the Court of Federal Claims rejected the plaintiffs' argument that Seaboard's status as a railroad prevented it from holding title in fee simple under Florida law, it lamented its inability to certify the question to the Florida Supreme Court. *Bird Bay*, 93 Fed. Cl. at 618 n. 11, 622-24. In an earlier takings case under the Trails Act applying Florida law, the Court of Federal Claims also found that the Florida Supreme Court had not yet addressed when and how a private party could convey property to a railroad in fee simple, and similarly expressed a desire to seek resolution of that question directly from the Florida Supreme Court. *Whispell Foreign Cars, Inc. v. United States*, 97 Fed. Cl. 324, 331-34 & n.6 (2011).

On appeal, the Appellants challenge the Court of Federal Claims's determination that Seaboard received a fee simple interest in the property-at-issue. Relevant to the certified question, the Appellants dispute if a railroad in Florida can receive fee simple title in a transfer by a private party after the railroad has surveyed the property or after the railroad has surveyed the property, laid track on the property, and begun to operate trains on the property. Accordingly, we find that the answer to the above-certified question of law is determinative of one of the issues in this appeal.

It appears, moreover, that resolution of the certified question could impact additional actions before the Court

of Federal Claims and additional appeals before this Court. There are additional unused portions of railroad track in the State of Florida which may well be converted to public trails; those conversions may prompt adjacent property owners to seek compensation for the conversion of those corridors.

D. THE PARTY OR PARTIES

Plaintiff-Appellant	Stephen J. Rogers, et. al Mark F. (Thor) Hearne, II Lindsay S.C. Brinton Meghan S. Largent Stephen S. Davis Arent Fox, LLP 1717 K Street, NW Washington, DC 20036-5342 (202) 857-6000 thor@arentfox.com
Defendant-Appellee	United States Robert G. Dreher Lane N. McFadden U.S. Department of Justice Environment & Natural Resources Division PO Box 7415, Ben Franklin Station Washington, DC 20044 (202) 352-9022 Lane.mcfadden@usdoj.gov

IT IS ORDERED THAT:

The question of law set forth above is hereby certified to the Florida Supreme Court.

FOR THE COURT

July 21, 2014
Date

/s/ Daniel E. O'Toole
Daniel E. O'Toole
Clerk of Court

cc: Clerk of Court, Florida Supreme Court
Mark F. Hearne II
Lane N. McFadden

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT, 1525 PALM BEACH LAKES BLVD., WEST PALM BEACH, FL 33401

February 12, 2015

CASE NO.: 4D13-4831
L.T. No.: 502010CA008347AA

KARIM H. SAADEH v. MICHAEL CONNORS, COLETTE MEYER, ET AL.

Appellant / Petitioner(s) Appellee / Respondent(s)

BY ORDER OF THE COURT:

THIS COURT *sua sponte* requests an amicus brief from the Real Property, Probate & Trust Law Section of the Florida Bar on the issue below:

> In light of Florida Statute Section 744.331(2)(b) and 744.3031(1), which requires the court to appoint an attorney to represent an alleged incapacitated person, does the attorney for the guardian owe a duty of care to the alleged incapacitated person?
>
> We request that the amicus brief be filed within sixty (60) days of the date of this order.

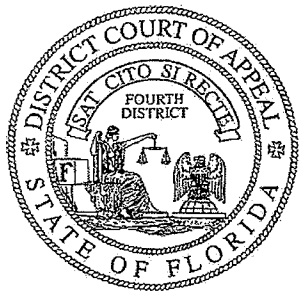
Served:

cc: John Scarola
Irwin R. Gilbert
Colette K. Meyer
William J. Berger
Bryan J. Yarnell
Real Property, Probate & Trust
David Joseph Sales
Kenneth S. Pollock

kb

Lonn Weissblum

LONN WEISSBLUM, Clerk
Fourth District Court of Appeal



Fla. AGO 96-94 (Fla.A.G.), 1996 WL 680981

Office of the Attorney General

State of Florida
AGO 96-94
November 20, 1996

RE: ATTORNEYS--GUARDIANSHIP--attorney for guardian owes duty of care to ward as intended beneficiary. Ch. 744, Fla. Stat.

*1 The Honorable Thomas E. Penick, Jr.
Circuit Court Judge
Sixth Judicial Circuit
The Judicial Building, Room 300
545 First Avenue North
St. Petersburg, Florida 33701

Dear Judge Penick:
You ask the following question:
Does an attorney representing a guardian of a person adjudicated incapacitated and who is compensated from the ward's estate for such services assume a duty to the ward as well as to the guardian?

In sum:
Since the ward is the intended beneficiary of the guardianship, an attorney who represents a guardian of a person adjudicated incapacitated and who is compensated from the ward's estate for such services owes a duty of care to the ward as well as to the guardian.

Generally an attorney's duty of care in the performance of his professional duties, and thus his liability for negligently performing such duties, is to the client with whom the attorney shares privity of contract.[1] In a legal context, the term "privity" is a term of art derived from the common law of contracts and is used to describe the relationship of persons who are parties to a contract.[2]

Some jurisdictions have used a balancing of factors test to determine third-party liability.[3] For example, California in Biakanja v. Irving,[4] established the following test:
The determination whether in a specific case the defendant will be held liable to a third person

not in privity is a matter of policy and involves the balance of various factors, among which are the extent to which the transaction was intended to affect the plaintiff, the foreseeability of harm to him, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury suffered, the moral blame attached to the defendant's conduct, and the policy of preventing future harm.[5]

In Angel, Cohen and Rogovin v. Oberon Investment, N.V.,[6] however, the Supreme Court of Florida expressly rejected the California balancing of factors test. The Court stated:
Florida courts have uniformly limited attorneys" liability for negligence in the performance of their professional duties to clients with whom they share privity of contract. . . . The only instance in Florida where this rule of privity has been relaxed is where it was the apparent intent of the client to benefit a third person. . . . Florida courts have refused to expand this exception to include incidental third-party beneficiaries.[7]

While the Court in Angel was concerned with an attorney's negligence in drafting wills, subsequent court decisions have stated that the exception to the privity requirement is not limited solely to that area.[8] Thus, the courts have extended liability to those situations where a duty of care exists between a third party and a professional, despite the lack of direct contractual privity. For example, the Supreme Court in Baskerville-Donovan Engineers, Inc.,[9] stated:
***2** Third-party beneficiary principles have been employed recently in tort law to expand liability where a duty of care exists between a third party and a professional, again despite the lack of direct contractual privity. However, this Court has clearly distinguished between privity and duty of care as separate means of proving a professional's liability. Clearly, privity between the parties may create a duty of care providing the basis for recovery in negligence. . . . However, lack of privity does not necessarily foreclose liability if a duty of care is otherwise established.

Thus, in Florida, a person seeking to bring a legal malpractice action must either be in privity with the attorney or, alternatively, the person must be an intended third-party beneficiary of the attorney's actions.[10]

The courts have recognized a duty of care with respect to the intended beneficiaries of wills.[11] In addition, the Fourth District Court of Appeal in Rushing v. Bosse[12] held that the attorney for adoptive parents also owed a duty to the child who was the subject of the adoption. The court concluded that the child was the intended beneficiary of the adoption proceeding and that it was the intent of the adoptive parents to benefit the child by adopting her. Since adoption proceedings are intended to serve the best interests of the child, the court found that the attorney, although in privity with the adoptive parents and not the child, owed a duty of care to the child to be adopted. Thus, a negligence action could be maintained on behalf of the child against the attorney since the child was the intended beneficiary of the proceedings.

Under the state's guardianship statutes, it is clear that the ward is the intended beneficiary of the proceedings.[13] Section 744.108, Florida Statutes, authorizes the payment of attorney's fees to an attorney who "has rendered services to the ward or to the guardian on the ward's behalf." Thus, the statute itself recognizes that the services performed by an attorney who is compensated from the ward's estate are performed on behalf of the ward even though the services are technically provided to the guardian.[14] The relationship between the guardian and the ward is such that the ward must be considered to be the primary or intended beneficiary and cannot be considered an "incidental third-party beneficiary."

Accordingly, I am of the opinion that as the ward is the intended beneficiary of the guardianship, an attorney who represents a guardian of a person adjudicated incapacitated and who is compensated from the ward's estate for such services owes a duty of care to the ward as well as to the guardian.

Sincerely,

Robert A. Butterworth
Attorney General

Footnotes

1 See, Brennan v. Ruffner, 640 So. 2d 143 (Fla. 4th DCA 1994).

2 See, Baskerville-Donovan Engineers, Inc. v. Pensacola Executive House Condominium Association, Inc., 581 So. 2d 1301 (Fla. 1991); Espinosa v. Sparber, Shevin, Shapo, Rosen and Heilbronner, 612 So. 2d 1378 (Fla. 1993).

3 See, e.g., Fickett v. Superior Court of the State of Arizona, 558 P. 2d 988 (Ariz. Ct. App. 1976); Schick v. Bach, 238 Cal. R. 902 (Cal. 2d DCA 1987); Denison State Bank v. Madeira, 640 P. 2d 1235 (Kan. 1982). And see, Arpadi v. First MSP Corporation, 68 Ohio St. 3d 453 (1994), in which the court concluded that those persons to whom a fiduciary duty is owed are in privity with the fiduciary such that an attorney-client relationship established with the fiduciary extends to those in privity therewith regarding matters to which the fiduciary duty relates.

4 320 P. 2d 16 (Cal. 1958).

5 See also, Albright v. Burns, 503 A. 2d 386 (N.J. App. Ct. 1986).

6 512 So. 2d 192 (Fla. 1987).

7 Id. at 194.

8 See, Greenberg v. Mahoney Adams & Criser, P.A., 614 So. 2d 604 (Fla. 1st DCA 1993), review denied, 624 So. 2d 267 (Fla. 1993); Rushing v. Bosse, supra.

9 581 So. 2d 1301, 1303 (Fla. 1991).

10 Espinosa v. Sparber, Shevin, Shapo, Rosen and Heilbronner,supra at 1380.

11 See, e.g., Angel, Cohen and Rogovin v. Oberon Investment, N.V., supra.

12 652 So. 2d 869 (Fla. 4th DCA 1995).

13 See, s. 744.1012, Fla. Stat., setting forth legislative intent for the Florida Guardianship Law, Ch. 744, Fla. Stat.; ss. 744.441, 744.444, and 744.361 Fla. Stat., setting forth the powers of a guardian.

14 Cf., Sun Bank and Trust Company v. Jones, 645 So. 2d 1008 (Fla. 5th DCA 1994) (guardian and attorney representing guardian cannot charge ward fees for unauthorized services which they have rendered); Lucom v. Atlantic Nat. Bank of West Palm Beach, 97 So. 2d 478 (Fla. 1957). And see, Centrust Savings Bank v. Barnett Banks Trust Company, 483 So. 2d 867, 869 (Fla. 5th DCA 1986) (principle that it is wrong to knowingly participate or assist a trustee in a breach of trust applies to those who assist anyone in the breach of his fiduciary duties and the term fiduciary includes not only court appointed guardians, executors, and administrators but every person acting in a fiduciary capacity).

Fla. AGO 96-94 (Fla.A.G.), 1996 WL 680981

End of Document

2016 SESSION DATES

August	1, 2015	Deadline for filing claim bills (Rule 4.81(2))
January	12, 2016	Regular Session convenes (Article III, section 3(b), Constitution)
January	12, 2016	12:00 noon, deadline for filing bills for introduction (Rule 3.7(1))
March	1, 2016	50th day—last day for regularly scheduled committee meetings (Rule 2.9(2))
March	7, 2016	All bills are immediately certified (Rule 6.8) Conference Committee Reports require only one reading (Rule 4.5(1)) Motion to reconsider made and considered the same day (Rule 6.4 (4))
March	11, 2016	60th day—last day of Regular Session (Article III, section 3(d), Constitution)

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REAL PROPERTY, PROBATE & TRUST LAW SECTION

THE FLORIDA BAR

www.RPPTL.org

November 7, 2014

Via Email and U.S. Mail
Email: eto@flabar.org

Elizabeth C. Tarbert, Esq.
The Florida Bar
651 E. Jefferson Street
Tallahassee, Florida 32399-2300

Dear Ms. Tarbert:

Re: Proposed Amendment to Comment on Fla. Bar Rule 4-4.2 Regarding Communications with Governmental Agencies Represented By Counsel

Dear Ms. Tarbert:

The members of the Real Property, Probate & Trust Law Section of the Florida Bar (the "RPPTL Section") represent owners, buyers, sellers, lenders, developers, title agents and others involved in all facets of real property transactions. The RPPTL Section is the largest section of the Florida Bar, having over 10,000 members practicing in the areas of real estate, construction, probate, trust and estate law. Our members are dedicated to serving the public in these fields of practice. The RPPTL Section produces educational materials and seminars, assists the public *pro bono*, drafts legislation and rules of procedure, and occasionally offers advice to the judicial, legislative and executive branches to assist on issues related to our fields of practice.

Thus, the RPPTL Section, with a large number of members integrally involved in the process of seeking entitlements associated with the ownership, and at times, development of real estate across Florida, respectfully submits the following comments with regard to the proposed amendment to the Comment on Florida Bar Rule 4-4.2 regarding

communications with governmental agencies represented by counsel ("Proposed Amendment").[1]

The Proposed Amendment seeks to overturn the decision in *Florida Bar v. Tobin*, Florida Bar Case No. 70,451B (October 21, 2013) which interpreted the comments to Florida Bar Rule 4-4.2 regarding communications with persons represented by counsel. Without a lengthy discussion of the merits of the opinion rendered in *Tobin*, the decision was perceived by some practitioners as an extension of the independent justification exception to Rule 4-4.2, to a degree that the exception swallowed the rule. In response, however, an amendment is proposed which has the effect of overhauling the current landscape and would significantly limit the ability of a citizen represented by counsel to communicate and interact with elected and appointed officials, local and state agencies and all of their staff, in connection with matters before those governmental bodies or agencies. In addition the Proposed Amendment creates traps for the practitioner, tips the balance of communications in favor of those with greater resources, infringes upon the constitutionally protected right to petition government and proposes drawing lines that are confusing and impractical.

The Section recommends that the Proposed Amendment be rejected. An executive summary of our attached white paper follows.

The Independent Justification Exception

As currently drafted, the Comment to Rule 4-4.2 recognizes the special place in American jurisprudence protecting against and disfavoring barriers to communications between citizens and their government, by providing an independent justification exception from the Rule:

> Also, a lawyer having independent justification for communicating with the other party is permitted to do so. **Permitted communications include, for example, the right of a party to a controversy with a government agency to speak with government officials about the matter.**

(Emphasis added). Thus, a citizen who does not believe that he or she has the ability to communicate effectively with a governmental body or agency is not disadvantaged by retaining counsel as compared to an opposing party who either has confidence in his or her communication skills or has the resources to retain lobbyists and others (land planners, engineers, environmental consultants and the like) to communicate directly with a governmental body or agency.

---

[1] The Section's response and recommendation analyzes what we understand to be the most recent version of the proposed changes to the Comment to Rule 4-4.2 submitted after the Board of Governor's July, 2014 meeting. In this regard, representatives of the RPPTL Section communicated our concerns to the City, County and Local Government Section, and while we were not able to reach agreement, the RPPTL Section appreciates the opportunity for professional dialogue with members from our fellow Section.

The Proposed Amendment

The version of the Proposed Amendment which is the basis of the Section's Comments is the following version which seeks to limit the independent justification exception by revising the Comment to provide as follows:

> This rule ~~Nor~~ does not ~~this rule~~ preclude communication with a represented person who is seeking advice from a lawyer who is not otherwise representing a client in the matter. A lawyer may not make a communication prohibited by this rule through the acts of another. See rule 4-8.4(a). Parties to a matter may communicate directly with each other, and a lawyer is not prohibited from advising a client concerning a communication that the client is legally entitled to make, provided that the client is not used to indirectly violate the Rules of Professional Conduct. Also, a lawyer having independent justification for communicating with the other party is permitted to do so as set forth in subdivision (a). Permitted communications include, for example, the right of a lawyer who is a party to a dispute ~~controversy~~ with a government agency to speak with government officials about the matter. This rule does not preclude routine communications with government officials on strictly procedural matters, or on general policy issues or other administrative matters that are not involving a legal matter, claim or threatened or pending litigation. Also in representing a client who has a dispute in a matter with a government agency, a lawyer may communicate with the elected officials who have authority over such agency and who are represented by a lawyer in the matter only under the following circumstances: 1) in writing, if a copy of the writing is contemporaneously delivered to the government attorney who represents said officials; 2) orally, upon adequate and meaningful prior notice to the government attorney who represents said officials; or 3) as part of a public hearing when an administrative or quasi-judicial matter is pending before that agency as permitted by rules 4-3.5 and 4-3.9.

[strikethrough/underlined language represents the proposed revisions to the Comments.]

The Impact of the Proposed Amendment

The Proposed Amendment creates numerous substantive and procedural concerns, each of which provides a separate and independent justification for its rejection.

- The "independent justification" exception is limited without a full analysis.
- The Proposed Amendment does not acknowledge that in dealing with governmental bodies or agencies it is common to seek administrative, judicial and legislative remedies at the same time and access to other remedies may be limited by the Proposed Amendment.

- The Proposed Amendment does not balance the need to protect the attorney-client relationship with the rights of citizens (through their lawyers) to engage their elected and appointed officials and does not acknowledge Florida's open government system.
- A narrow interpretation of the Proposed Amendment could interfere with a represented party's ability to interact with governmental or agency staff on issues before they rise to the level of contention much less litigation.
- The Proposed Amendment is overkill to address the facts of one problematic case.
- The Proposed Amendment includes terms that are not adequately defined.
- Ultimately, the Proposed Amendment limits access to elected officials.

In addition, the Section believes the Proposed Amendment will have the following significant impacts:

Constitutionality. Modifying the Comments to the Rule will impede the normal interplay between citizens and the government, in which citizens (with and without legal representation) play an integral and fundamental role. Specifically, the Proposed Amendment paves the way for required government lawyer involvement in the daily non-judicial dialogue and resolution of administrative, regulatory and related governmental matters. The legislative, regulatory and other executive branch/governmental functioning will be heavily "chilled" by inhibiting the free, efficient and normal discussion between a citizen participating in the process of "governing" (e.g., a zoning matter) and the governmental body or agency charged with oversight responsibility. Delay, expense and inefficiency will be unnecessarily introduced into a process that has worked and continues to work. And, most importantly, the Proposed Amendment casts an unduly large net by introducing an overlay of legal formality that substantially inhibits the right of Florida citizens to petition government and redress their grievances.

Fiscal Impact on State and Local Governments. The Proposed Amendment would have an immediate and substantial adverse fiscal impact, requiring governmental bodies and agencies to allocate significant resources to legal departments because seemingly every communication by a citizen's counsel to the governmental body or agency will, if nothing else but in caution, be routed through the governmental legal department. In addition to the direct personnel expenses, handling citizen communications and decision making will take immeasurably longer, further raising the cost. Moreover, it is highly likely that many compromises previously achieved as part of the normal give and take process that one encounters going through governmental proceedings will be thwarted by the Proposed Amendment, thereby increasing the chances of the need for subsequent litigation and the attendant costs for both the public and private sectors.

Direct Economic Impact on Private Sector. The Proposed Amendment and subsequent interpretation and application would have an adverse economic impact on the private sector, in that involvement of attorneys for the governmental bodies or agencies could extend the time needed to seek a remedy, thus causing the private sector to spend more money.

RPPTL Section Recommendation

The RPPTL Section recommends that the Proposed Amendment be rejected. While protecting government officials and employees from overreaching attorneys may be an important goal, the decision which is the basis of the Proposed Amendment is insufficient to warrant the proposed substantial and far reaching overhaul of the law in light of the practical, political and constitutional implications it raises. The old adage, "bad facts make bad law" comes to mind in this situation. If the Proposed Amendment is not rejected outright, other possible alternatives should be considered because the Proposed Amendment, as written, puts any client that is represented by legal counsel and does not have resources to retain lobbyists and other communicators at a significant disadvantage. At the very least, instead of approaching amendments to the Comments in a piecemeal fashion, a separate committee should be created to consider whether the Rule itself should be amended and/or whether amending and clarifying the Comments section in a holistic manner is more appropriate.

If you have questions or need additional information regarding these positions, please do not hesitate to contact me.

Very truly yours,

Michael A. Dribin

Cc: (w/enclosures)
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Ramon A. Abadin, Esq. (via email)
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REAL PROPERTY, PROBATE & TRUST LAW SECTION

WHITE PAPER
IN OPPOSITION TO
PROPOSED AMENDMENT TO COMMENT ON FLA. BAR RULE 4-4.2
(Regarding Communications With Governmental Agencies Represented By Counsel)

I. SUMMARY

The Proposed Amendment seeks to overturn the decision in *Florida Bar v. Tobin*, Florida Bar Case No. 70,451B (October 21, 2013) which interpreted the comments to Florida Bar Rule 4-4.2 regarding communications with persons represented by counsel. The stated justification for the Proposed Amendment is:

> ... a lawyer communicated directly with government officials, citing to the comment which states "Also, a lawyer having independent justification for communicating with the other party is permitted to do so. Permitted communications include, for example, the right of a party to a controversy with a government agency to speak with government officials about the matter."

In summary, the Proposed Amendment would significantly limit the ability of a citizen represented by counsel to communicate and interact with elected and appointed officials local and state agencies and all of their staff, in connection with matters before those elected governmental bodies or agencies. The Proposed Amendment creates traps for the practitioner, tips the balance of communications in favor of those with greater resources, infringes upon the constitutionally protected right to petition government, and proposes drawing lines that are confusing and impractical.

II. CURRENT STATUS OF RULE

A. Rule 4-4.2 of the Florida Bar

Rule 4-4.2(a) of the Rules Regulating the Florida Bar provides:

> In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer. Notwithstanding the foregoing, an attorney may, without such prior consent, communicate with another's client in order to meet the requirements of any court rule, statute or contract requiring notice or service of process directly on an adverse party, in which event the communication shall be strictly restricted to that required by the court rule, statute or contract, and a copy shall be provided to the adverse party's attorney.

Undoubtedly recognizing the special place in American jurisprudence disfavoring barriers to communications between citizens and their government, - - twice encapsulated, at the start of the Bill of Rights (right "...to petition the Government for a redress of grievances." U.S. Const., Amend 1) and the Declaration of Rights (right "... to petition for redress of grievances." Fla. Const, §5), - - the Comment to this Rule which is the subject of the Proposed Amendment currently provides:

> This rule does not prohibit communication with a represented person, or an employee or agent of such a person, concerning matters outside the representation. For example, the existence of a controversy between a government agency and a private party, or between 2 organizations, does not prohibit a lawyer for either from communicating with nonlawyer representatives of the other regarding a separate matter. Nor does this rule preclude communication with a represented person who is seeking advice from a lawyer who is not otherwise representing a client in the matter. A lawyer may not make a communication prohibited by this rule through the acts of another. See rule 4-8.4(a). Parties to a matter may communicate directly with each other, and a lawyer is not prohibited from advising a client concerning a communication that the client is legally entitle to make, provided that the client is not used to indirectly violate the Rules of Professional Conduct. Also, a lawyer having independent justification for communicating with the other party is permitted to do so. Permitted communications include, for example, the right of a party to a controversy with a government agency to speak with government officials about the matter.

(Emphasis added). Thus, a citizen who does not believe that he or she has the ability to communicate effectively with an elected body or governmental agency is not disadvantaged by retaining counsel as compared to an opposing party who either has confidence in his or her communication skills or has the resources to retain lobbyists or other professionals (land planners, engineers, environmental consultants, etc.) to communicate directly with a governmental body or agency.

B. Opinions Interpreting/Applying the Rule

Four Florida Bar Ethics Opinions frame this discussion.

1. Florida Bar Ethics Opinion 78-4

Approaching the issue generally, in a corporate rather than governmental context, Opinion 78-4 made findings relative to when representation of a party commences, specifically whether litigation must have commenced, and who in the corporate structure is considered to be a party within the meaning of the Rule, finding:

a. representation of party commences whenever an attorney-client relationship has been established with regard to the matter in question, regardless of whether or not litigation has commenced. In the opinion of

the majority of the Committee, in the case of even an individual or corporation that has general counsel representing the individual or corporation in all legal matters, the DR would require communication on the matter to be with the party's attorney, and

b. in the opinion of the majority of the Committee, the rule will apply to officers, directors, or managing agents of the corporation but will not apply to other employees of the corporation unless they have been directly involved in the incident or matter giving rise to the investigation or litigation.

2. **Florida Bar Ethics Opinion 87-2**

Narrowing the issue, Opinion 87-2, discussed the Rule as applied to a government agency represented by counsel, finding:

> [w]hen the opposing party is a government agency represented by counsel, an attorney may not communicate concerning the matter with the agency's management or any other employee whose act or omission in connection with the matter may be imputed to the agency or whose statement may constitute an admission on the party of the agency, unless consent of the agency's counsel is obtained.

3. **Florida Bar Ethics Opinion, 09-1**

Further narrowing, and seeking to address thresholds, Opinion 09-1 interpreted the Rule, providing answers to three specific questions:

a. Are all persons within an organization represented by the organization's counsel for the purposes of the rule?

Consent is required before communicating with State Agency's officers, directors or managers, or employees who are directly involved in the matter, or with public officials or employees whose acts or omissions in connection with the matter can be imputed to State Agency.

b. When does the prohibition arise?

Rule 4-4.2 is not limited to matters in litigation and may extend to matters on which litigation has not yet commenced, as well as to specific transactional or non-litigation matters on which the agency's lawyer is providing representation. Pursuant to the language of the Comment, however, direct communications with represented persons, including protected employees, on matters other than specific matters for which the agency lawyer is providing representation are permissible.

c. Does general counsel effectively represent the agency on all matters, merely by virtue of being in the continuous employ of the agency, thus preventing all communications with the State Agency's public officials and employees on all subjects?

The Comments suggest that this is not the intent of the Rule. The Comments expressly recognize that lawyers with an "independent justification" may communicate with a represented party. The Rule does not prohibit a lawyer from communicating with other agency employees who do not fall within the above categories, nor does it prohibit a lawyer from communicating with employees who are considered represented by State Agency's lawyer for purposes of this rule on subjects unrelated to those matters in which the agency lawyer is actually known to be providing representation.

4. The Tobin Case

The Florida Bar v. Tobin, Florida Bar Case No. 70,451B. (October 21, 2013), involved a land use attorney seeking redress from a county government for a client and at the same time representing the client in a circuit court action against the county. Essentially, there were two forums in which Tobin was advocating for his client, both with overlapping subject matter. Tobin was alleged to violate the Rule when Tobin met with the County Commission and, because of the overlapping nature of the issues, some of the conversations that occurred pertained to the pending Circuit Court litigation.

Tobin clarifies the distinction made in Opinion 09-1 seeking to define thresholds for when communication is, or is not, appropriate, by example. Expressly differentiating litigation communications from other circumstances of traditional citizen redress or petitioning government, the Referee found no violation stating:

> Respondent's communications were **independently justified** as contemplated by the above referenced comment. The issues raised in Respondent's communications were squarely part of his efforts to convince county officials to grant his client administrative relief, or to reconsider previous action that was adverse to his client, and were, therefore, permitted communications. Even if some of his communications to county officials were also related to the subject matter of the lawsuit, **the Comment to Rule 4-4.2 permits the communication with a government agency if the communication is independently justified**.

The Florida Bar v. Tobin, Fla. Bar Case No. 70,451B. (Oct. 21, 2013). (Emphasis added).

The Referee continued, discussing Ethics Opinion 09-1 and expressly distinguishing *Tobin* from that Opinion, stating that:

> [t]he Florida Bar's reliance on Ethics Opinion 09-1, does not change the analysis or conclusions herein because the circumstances set forth in that Opinion are different than the matter at hand. In the context of representing a client in a local zoning dispute, as Respondent was doing here, attorneys may be required to participate in the formal or informal administrative arena (to gather information, to make a record and to exhaust administrative remedies), the quasi-judicial arena, and in litigation, all at the same time. **These are precisely the types of parallel proceedings that are squarely addressed in the Comment to Rule 4-4.2 and are not construed in Opinion 09-1.**"

(Emphasis added.) Thus, the Referee recognized the multi-faceted, and historically appropriate role of counsel directly communicating with a governmental agency, even when the agency is represented by counsel.

III. EFFECT OF PROPOSED CHANGES

A. The Proposed Amendment to Rule 4-4.2 Comment

The Proposed Amendment to the Comment in Florida Bar Rule 4-4.2 (regarding communications with persons represented by counsel), came about because of concern over *Tobin*, a disciplinary proceeding, and its interpretation of the **independent justification exception** provided in the Comments to the Rule. The current version of the Proposed Amendment seeks to limit the independent justification exception by separating existing paragraph 4 into two paragraphs and revising it to provide as follows:

> This rule ~~Nor~~ does not ~~this rule~~ preclude communication with a represented person who is seeking advice from a lawyer who is not otherwise representing a client in the matter. A lawyer may not make a communication prohibited by this rule through the acts of another. See rule 4-8.4(a). Parties to a matter may communicate directly with each other, and a lawyer is not prohibited from advising a client concerning a communication that the client is legally entitled to make, provided that the client is not used to indirectly violate the Rules of Professional Conduct. Also, a lawyer having independent justification for communicating with the other party is permitted to do so as set forth in subdivision (a). Permitted communications include, for example, the right of a lawyer who is a party to a dispute ~~controversy~~ with a government agency to speak with government officials about the matter. This rule does not preclude routine communications with government officials on strictly procedural matters, or on general policy issues or other administrative matters that are not involving a legal matter, claim or threatened or pending litigation. Also in representing a client who has a dispute in a matter with a government agency, a lawyer may communicate with the elected officials who have authority over such agency and who are represented by a lawyer in the

matter only under the following circumstances: 1) in writing, if a copy of the writing is contemporaneously delivered to the government attorney who represents said officials; 2) orally, upon adequate and meaningful prior notice to the government attorney who represents said officials; or 3) as part of a public hearing when an administrative or quasi-judicial matter is pending before that agency as permitted by rules 4-3.5 and 4-3.9.

[strikethrough/underlined language represents the proposed revisions to the Comments.][1]

B. Argument in Support

Proponents of the Proposed Amendment argue that the *Tobin* decision conflicts with certain provisions in Opinion 09-1, that *Tobin* effectively modified Opinion 09-1 and inappropriately extended the independent justification exception in the Rule. Proponents assert that Opinion 09-1 correctly applies Rule 4-4.2. Thus, the Proposed Amendment would codify that interpretation, limiting the independent justification exception as construed by the Referee, so that the exception does not swallow the rule:

> ...if such direct communications [as in Fla. Bar v. Tobin] with represented persons are allowed by the "independent justification" language from the Comment to Rule 4-4.2, there is no meaningful prohibition of direct contact. Within the context of represented government officials and employees, even direct questioning of those officials pertaining to matters in litigation without notice to the government counsel appears to be acceptable.

Florida Association of County Attorneys ("FACA") Letter Re: Rule 4-4.2 (February 20, 2014). FACA argues that the proposed amendment protects government clients from over-reaching attorneys who contact government employees in an attempt to influence ongoing litigation.

C. Argument in Opposition/Potential Issues Created by the Amendment

The Proposed Amendment does not recognize the distinction between an attorney representing a client before an elected body (i.e. city commission), appointed body (i.e. zoning board) or agency in matters such as a comprehensive plan amendment, rezoning request, site plan or other permit application, as opposed to an attorney representing a client in a clearly declared dispute. In fact, the Proposed Amendment muddies the distinction, making it less clear as to when an attorney may interact with governmental staff.

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[1] The Section's response and recommendation analyzes what we understand to be the most recent version of the proposed changes to the Comment to Rule 4-4.2 submitted after the Board of Governor's July, 2014 meeting. In this regard, representatives of the RPPTL Section communicated our concerns to the City, County and Local Government Section, and while we were not able to reach agreement, the RPPTL Section appreciates the opportunity for professional dialogue with members from our fellow Section.

While it is clear that the Rule applies to instances beyond litigation (*See* Ethics Opinion 87-2), when a governmental entity is involved, communications with elected and appointed officials should not be hampered. Moreover, it is in the context of these separate informational meetings with elected officials, which are then disclosed on the record in the public hearing as "ex parte communications" under the rule established in Jennings v. Dade County, 589 So.2d 1337 (Fla. 3d DCA 1991), that information is shared so that in the subsequent public meeting the elected officials can make informed decisions. Furthermore, it is these types of information exchanges that frequently allow compromises to be reached in the public hearings, thereby avoiding the need for judicial redress or continued litigation on another front. Finally, the loss of this access to elected officials and agency personnel by citizens represented by counsel would affect both proponents *and* opponents of the particular comprehensive plan, rezoning, site plan or other permit application.

The *Tobin* decision was fact specific, and expressly distinguished Opinion 09-1; therefore the current situation does not require an amendment to the Comments.

D. Constitutional Overtones

Modifying the Rule will impede the normal interplay between citizens and their government in which citizens (with and without representation) play an integral and fundamental role. Specifically, the Proposed Amendment paves the way for required government lawyer involvement in the daily non-judicial dialogue and resolution of administrative, regulatory and related governmental matters. The legislative, regulatory and other executive branch/governmental functioning will be heavily "chilled" by inhibiting the free, efficient and normal discussion between a citizen participating in the process of "governing" (e.g., a zoning matter) and the governmental body or agency charged with oversight responsibility. Delay, expense and inefficiency will be unnecessarily introduced into a process that has worked and continues to work. And, most importantly, the Proposed Amendment casts an unduly large net by introducing an overlay of legal formality that substantially inhibits the right of Florida citizens to petition government and redress their grievances.

1. Florida's Constitutional Framework

a. Article 1, Section 5: Right to Assemble. "The people shall have the right to peaceably assemble, to instruct their representatives and to petition for redress of grievances."

b. Article 1, Section 24: Access to Public Records and Meetings.

"(a.) Every person has the right to inspect or copy any public record made or received in connection with the official business of any public body, officer, or employee of the state, or persons acting on their behalf, except with respect to records exempted pursuant to this section or specifically made confidential by this Constitution. This section specifically includes the legislative, executive, and judicial branches of

government and each agency or department created thereunder; counties, municipalities, and districts; and each constitutional officer, board, and commission, or entity created pursuant to law or this Constitution.

(b.) All meetings of any collegial public body of the executive branch of state government or of any collegial public body of a county, municipality, school district, or special district, at which official acts are to be taken or at which public business of such body is to be transacted or discussed, shall be open and noticed to the public and meetings of the legislature shall be open and noticed as provided in Article III, Section 4(e), except with respect to meetings exempted pursuant to this section or specifically closed by this Constitution."

2. Federal Constitutional Provisions

a. First Amendment

"Congress shall make no law . . . .prohibiting . . . or inhibiting the right of the people peaceably to assemble, and to petition the government for a redress of grievances."

The provisions of the First Amendment concerning redress of grievances have been applied to the states under the Fourteenth amendment. *DeJonge v. Oregon*, 299 U.S. 242 (1937). From its original parameters, the right to redress grievances and to "petition" has been expanded to include the "approach of citizens or groups of them to administrative agencies. . . and to courts . . . Certainly the right to petition extends to all departments of the Government. . ." *Eastern R.R. Presidents Conference v. Trucking Unlimited*, 404 U.S. 508, 510 (1972). See, *NAACP v. Claiborne Hardware, Co.*, 458 U.S.886, 913-15 (1982). Later cases have seemingly merged the rights to petition government and redress grievances with the rights of assembly, speech and press, thereby heightening their constitutional import even more. By chilling or burdening free government access with unnecessary formality in areas of everyday regulation, discussion and resolution, the Proposed Amendment threatens interference with the most fundamental of citizens' rights, guaranteed by both the Federal and Florida Constitutions and dating back to Magna Carta (1215). See, C. Stephenson & F. Marcham, *Sources of English Constitutional History* 125 (1937). Certainly, less restrictive alternatives abound to address any perceived or actual concerns.

E. Summary of Issues and Concerns

In summary, the Proposed Amendment creates numerous substantive and procedural concerns that militate towards rejection:

- The "independent justification" provision is limited without a full analysis.
- Access to an administrative remedy that does not involve a public hearing may be limited by the Proposed Amendment (for the above-stated reasons).
- The Proposed Amendment does not acknowledge that in dealing with governmental agencies it is common to seek administrative, judicial and legislative remedies all at the same time.
- The Proposed Amendment does not balance the need to protect the attorney-client relationship with the rights of citizens (through their lawyers) to engage their elected and appointed officials and does not acknowledge Florida's open government system.
- A narrow interpretation of the Proposed Amendment could interfere with a represented party's ability to interact with agency staff on issues before they arise to the level of litigation.
- If the Proposed Amendment is adopted, what rules apply when an attorney is acting as a registered lobbyist before the governmental body or agency?
- The Proposed Amendment is overkill to address the facts of one problematic case.
- The Proposed Amendment includes terms that are not adequately defined.
- The Proposed Amendment limits access to elected officials.

IV. RECOMMENDATIONS

- The Proposed Amendment should be rejected. While protecting government officials and employees from overreaching attorneys may be an important goal, the decision which is the basis of the Proposed Amendment is insufficient to warrant the substantial and far reaching overhaul of the law in light of the practical, political and constitutional implications it raises. The old adage "bad facts make bad law" comes to mind in this situation.
- If the Proposed Amendment is not rejected outright, other possible alternatives should be considered because the Proposed Amendment, as written, puts any client that is represented by legal counsel and does not have resources to retain lobbyists and other communicators at a significant disadvantage.
- At the very least, instead of approaching amendments to the Comments in a piecemeal fashion, a separate committee should be created to consider whether the Rule itself should be amended and/or whether amending and clarifying the Comments section in a holistic manner is more appropriate.

V. FISCAL IMPACT ON STATE AND LOCAL GOVERNMENTS

The Proposed Amendment would have an immediate and substantial adverse fiscal impact, requiring governmental bodies and agencies to allocate significant resources to legal departments because seemingly every communication by a citizen's counsel to the governmental body or agency will, if nothing else but in caution, be routed through the agencies legal department. In addition to the direct personnel expenses, handling citizen communications and decision making will take immeasurably longer, further raising the cost. Moreover, it is highly likely that many compromises previously achieved as part of the normal give and take process that one encounters going through governmental proceedings will be thwarted by the Proposed Amendment, thereby increasing the chances of the need for subsequent litigation and the attendant costs for both the public and private sectors.

VI. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR

The Proposed Amendment and subsequent interpretation and application would have an adverse economic impact on the private sector, in that involvement of attorneys for the governmental bodies and agencies could extend the time needed to seek a remedy, thus causing the private sector to spend more money.

VII. CONSTITUTIONAL ISSUES

By chilling or burdening free government access with unnecessary formality in areas of everyday regulation, discussion and resolution, the proposed amendments to Rule 4-4.2 threaten interference with the most fundamental of citizens' rights, guaranteed by both the Federal and Florida Constitutions.

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FLORIDA BAR RPPTL

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