

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



Executive Council Meeting

AGENDA

**The Ritz-Carlton, Amelia
Island**

4750 Amelia Island Parkway
Amelia Island, Florida 32034

**Saturday, February 8, 2014
8:30 a.m. - 11:30 a.m.**

BRING THIS AGENDA TO THE MEETING

Real Property, Probate and Trust Law Section
Executive Council Meeting
February 8, 2014
The Ritz-Carlton, Amelia Island
Amelia Island, Florida

AGENDA

- I. [Presiding](#) — *Margaret Ann Rolando, Chair*
- II. [Attendance](#) — *Andrew M. O'Malley, Secretary*
- III. [Minutes of Previous Meeting](#) — *Andrew M. O'Malley, Secretary*
Motion to Approve Minutes of November 23, 2013, The Ritz-Carlton, Sarasota, Florida **pp. 1**
- IV. [Chair's Report](#) — *Margaret Ann Rolando*
1. Recognition of guests
 2. Introduction and comments from sponsors of Executive Council lunch (The Florida Bar Foundation and U.S. Trust)
 3. Acknowledgment of Section sponsors **pp. 33**
 4. 2013 – 2014 RPPTL Section Executive Council Meeting Schedule **pp. 36**
- V. [Chair-Elect's Report](#) — *Michael A. Dribin*
2014 – 2015 RPPTL Section Executive Council Meeting Schedule **pp. 37**
- VI. [Report of Member Communications and Information Technology Committee](#) – *Nicole C. Kibert, Chair*
- VII. [Liaison with Board of Governors' Report](#) — *Andrew B. Sasso*
- VIII. [Treasurer's Report](#) — *S. Katherine Frazier*
2014 – 2015 proposed Budget **pp. 38**
- IX. [Director of At-Large Members' Report](#) — *Debra L. Boje*
- X. [CLE Seminar Coordination Report](#) — CLE Seminar Coordination – *Robert Freedman (Real Property) and Tae K. Bronner (Probate & Trust), Co-Chairs*
- XI. [Kids Committee Report](#) – *Steven Goodall, Chair; Laura Sundberg, Advisor*
Report on status of formation, committee leadership and participants, proposed activities.

XII [Probate and Trust Law Division](#) — *Deborah P. Goodall, Director*

Action Items:

1. Probate & Trust Litigation Committee – *Thomas Karr, Chair*

Motion to adopt as Section positions to (SUPPORT OR OPPOSE) the amendment of F.S. §733.106 (costs and attorney’s fees), F.S. §736.1005 (attorney’s fees for services to the trust), and F.S. §736.1006 (costs in trust proceedings) to provide a non-exclusive list of factors for trial courts to consider when exercising discretion whether and to what extent attorney’s fees and costs should be awarded against a particular part of an estate or trust and to create a uniform standard for making this determination in the courts of Florida; and finding that such legislative positions are within the purview of the RPPTL Section and to expend funds in support of the position. **pp. 42**

Information Items

1. Trust Law - *Shane Kelley, Chair*

Report on The Florida Banker Association’s proposed legislation dealing with limiting liability for excluded trustees when the terms of a trust provide for more than one trustee and the trust confers powers to one or more trustees, to the exclusion of others. (HB 405) **pp. 52**

XIII. [Real Property Law Division](#) — *Michael J. Gelfand, Real Property Law Division Director*

Action Items:

1. Commercial Real Estate Committee — *Art Menor, Chair*

Motion to adopt as a Section position to support issuance of separate property tax folio numbers for separately described portions of a multiple parcel building and provide for allocation of underlying land value among the separate building parcels, including an amendment of Chapter 193., F.S., to find that the position is in the Section’s purview; and to expend funds in support of the position. **pp. 54**

2. Condominium & Planned Development Committee — *Steven H. Mezer, Chair*

Motion to adopt as a Section position to support amendments to the Florida Condominium Act which set forth the rights and obligations of purchasers and lenders that acquire multiple units, but is not a creating developer of the condominium, including creating a Part VIII, and eliminating application of Part VII, of the Condominium Act to transactions recorded after the effective date July 1, 2016, to find that the position is in the Section’s purview; and to expend funds in support of the position. **pp. 64**

3. **Construction Law Committee** — *Hardy Roberts, Chair*

Motion: to adopt as a Section position, to oppose selective increase of recording expense to only construction claims of lien, to oppose adding additional filing requirements, and to oppose the conclusion that filing a lien beyond the statutory 90 day period is an act of fraud, including opposing amendments to s. 28.24, and s. 713.08, F.S., to find that the position is in the Section's purview; and to expend funds in support of the position. **pp. 96**

XIV. General Standing Committees — *Michael A. Dribin, Director and Chair-Elect*

Information Items:

1. **Ad Hoc Leadership Academy Committee** -- *Tae Kelley Bronner, Chair*

Report on status of current year Florida Bar Academy program and Section-sponsored Academy members and report of recommendation of new academy appointees to be supported by the RPPTL Section.

2. **Ad Hoc Trust Account Committee** -- *Jerry Aron and John Neukamm, Co-Chairs*

Report on behalf of Ad Hoc Trust Account Committee of RPPTL Section regarding presentation to January 24, 2014 Florida Bar Professional Ethics Committee regarding trust account audits by title insurers. **pp. 104.**

3. **Legislation Committee** – *Robert Swaine, Co-Chair (Real Property), William T. Hennessey, III, Co-Chair (Probate and Trust)*

- A. Report on behalf of Legislation Committee, pursuant to Article VIII, Section 4(c) of RPPTL bylaws, of action taken by unanimous vote of the Executive Committee of the RPPTL Section, due to time constraints, adopting the following legislative position: the RPPTL Section is opposed to passage of SB 412 which (i) would change the criteria and limit the discretion of the court in awarding fees in guardianship proceedings for services which benefit the ward, (ii) would seek to significantly change established guardianship laws and procedures concerning the qualification of examining committee members and the content and requirements of their reports, and (iii) would criminalize certain conduct in guardianship proceedings, including proposed amendments to F.S. 744.108, 744.331, and 744.4461; finding the legislative position to be within the purview of the RPPTL Section and authorizing the RPPTL Section to expend funds in support of this legislative position. Attached are Legislative Position Request Form, RPPTL Section White Paper, SB 412 and Elder Law Section letter of opposition to SB 412. **pp. 106**
- B. Report on behalf of Legislation Committee of efforts to consult with Sharon Bock, Clerk of the Circuit Court for Palm Beach County, with respect to concerns on the part of the RPPTL Section's Guardianship, Power of Attorney and Advance Directives Committee and the Trust Law Committee with respect to HB 635, which would significantly enhance the role of the Clerk's office with respect to guardianship accountings and the possibility of court-ordered accountings of trusts as to which the ward is a beneficiary but which are not otherwise under the control or administration of the guardian. **pp. 139**

- C. Presentation of “Legislation Approval and Education Process”, intended to improve the work product involving proposed legislation produced and submitted by our Probate and Trust Law Division and Real Property Law Division committees and subcommittees, reduce the number of corrective “glitch” bills, avoid legislative redrafting that inadvertently changes a proposal’s effect, to encourage collaboration among the Divisions of the RPPTL Section on legislative initiatives and to generally provide greater uniformity and consistency in the process of drafting the documentation associated with proposed legislation. **pp. 147**

4. Member Communications and Information Technology Committee – William A. Parady, Co-Vice Chair

Report on status of rollout of RPPTL Section’s new website, need for all Section committees to offer content and to maintain website pages.

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

1. **Ad Hoc Guardianship Law Revision Committee** - David Brennan, Chair; Sean W. Kelley, Charles F. Robinson and Sancha Brennan Whynot, Co-Vice Chairs
2. **Ad Hoc Study Committee on Creditors’ Rights to Non-Exempt, Non-Probate Assets** – Angela M. Adams, Chair
3. **Ad Hoc Study Committee on Estate Planning Conflict of Interest** - William T. Hennessey III, Chair; Paul Roman, Vice Chair
4. **Ad Hoc Study Committee on Jurisdiction and Service of Process** – Barry F. Spivey, Chair; Sean W. Kelley and Christopher Q. Wintter, Co-Vice Chairs
5. **Ad Hoc Study Committee on Personal Representative Issues** – Jack A. Falk, Jr., Chair
6. **Ad Hoc Study Committee on Treatment of Life Insurance Payable to Revocable Trust** – Richard R. Gans, Chair
7. **Asset Protection** – Brian C. Sparks, Chair; George Karibjanian, Vice-Chair
8. **Attorney/Trust Officer Liaison Conference** – Jack A. Falk, Jr., Chair; Sharon DaBrusco, Corporate Fiduciary Chair; Patrick Lannon, Deborah Russell and Laura Sundberg, Co-Vice Chairs
9. **Digital Assets and Information Study Committee** – Eric Virgil, Chair; S. Dresden Brunner and Travis Hayes, Co-Vice Chairs
10. **Elective Share Review Committee** – Lauren Detzel and Charles I. Nash, Co-Chairs; Robert Lee McElroy IV, Vice Chairs
11. **Estate and Trust Tax Planning** – Elaine M. Bucher, Chair; David Akins, Tasha Pepper-Dickinson and William Lane, Co-Vice Chairs

12. **Guardianship, Power of Attorney and Advanced Directives** – Sean W. Kelley, Chair; Seth A. Marmor, Tattiana Brenes-Stahl, Cynthia Fallon and David Brennan, Co-Vice Chairs
13. **IRA, Insurance and Employee Benefits** – L. Howard Payne and Lester Law, Co-Chairs
14. **Liaisons with ACTEC** – Michael Simon, Bruce Stone, and Diana S.C. Zeydel
15. **Liaisons with Elder Law Section** – Charles F. Robinson and Marjorie Wolasky
16. **Liaisons with Tax Section** – Harris L. Bonnette, Jr., Lauren Y. Detzel, William R. Lane, Jr., David Pratt, Brian C. Sparks and Donald R. Tescher
17. **Principal and Income** – Edward F. Koren, Chair; Pamela Price, Vice Chair
18. **Probate and Trust Litigation** – Thomas M. Karr, Chair; Jon Scuderi, James George, John Richard Caskey, Jerry Wells, Co-Vice Chairs
19. **Probate Law and Procedure** – John C. Moran, Chair; Sarah S. Butters, Michael Travis Hayes and Marsha G. Madorsky, Co-Vice Chairs
20. **Trust Law** – Shane Kelley, Chair; Angela M. Adams, Tami F. Conetta and Deborah L. Russell, Co-Vice Chairs
21. **Wills, Trusts and Estates Certification Review Course** – Richard R. Gans, Chair; Jeffrey S. Goethe, Linda S. Griffin, Laura Sundberg and Jerome L. Wolf, Co-Vice Chairs

XVI. [Real Property Law Division Reports](#) — *Michael J. Gelfand, Director*

1. **Ad Hoc Foreclosure Reform** – Jeffrey Sauer, Chair; Mark Brown, Burt Bruton and Alan Fields, Co-Vice Chairs.
2. **Commercial Real Estate** – Art Menor, Chair; Burt Bruton and Adele Stone, Co-Vice Chairs.
3. **Condominium and Planned Development** – Steven H. Mezer, Chair; Jane Cornett, Christopher Davies and Lisa Van Dien, Co-Vice Chairs.
4. **Construction Law** – Hardy Roberts, Chair; Lisa Colon Heron, Scott Pence and Lee Weintraub, Co-Vice Chairs.
5. **Construction Law Certification Review Course** – Lee Weintraub, Chair; Bruce Alexander, Deborah Mastin and Bryan Rendzio, Co-Vice Chairs.
6. **Construction Law Institute** – Reese Henderson, Chair; Sanjay Kurian, Diane Perera and Jason Quintero, Co-Vice Chairs.
7. **Development & Green Building** – Anne Pollack, Chair; Mike Bedke, Vinette Godelia, and Neil Shoter, Co-Vice Chairs.

8. **Landlord and Tenant** – Lloyd Granet, Chair; Rick Eckhard, Vice Chair.
9. **Legal Opinions** – Kip Thornton, Chair; Robert Stern, Vice-Chair.
10. **Liaisons with FLTA** – Norwood Gay and Alan McCall, Co-Chairs; Alan Fields and James C. Russick, Co-Vice Chairs.
11. **Property & Liability Insurance/Suretyship** – W. Cary Wright, Chair; Fred Dudley and Michael Meyer, Co-Vice Chairs.
12. **Real Estate Certification Review Course** – Raul Ballaga, Chair; Kip Thornton and Jennifer Tobin, Co-Vice Chairs.
13. **Real Estate Structures and Taxation** – Wilhelmina Kightlinger, Chair; Cristin C. Keane and Salome Zikakis, Co-Vice Chairs.
14. **Real Property Finance & Lending** – Jim Robbins, Chair; Homer Duval, III, Brenda Ezell and Bill Sklar, Co-Vice Chairs.
15. **Real Property Litigation** – Marty Awerbach, Chair; Manny Farach and Susan Spurgeon, Co-Vice Chairs.
16. **Real Property Problems Study** – W. Theodore “Ted” Conner, Chair; Mark A. Brown and Patricia J. Hancock, Co-Vice Chairs.
17. **Residential Real Estate and Industry Liaison** – Frederick W. Jones, Chair; Deborah Boyd and E. Ralph Tirabassi, Co-Vice Chairs.
18. **Title Insurance and Title Insurance Liaison** – Kristopher Fernandez, Chair; Raul Ballaga and Julie Horstkamp, Co-Vice Chairs.
19. **Title Issues and Standards** – Christopher W. Smart, Chair; Robert M. Graham, Patricia P. Jones and Karla J. Staker, Co-Vice Chairs.

XVII. General Standing Committee Reports — *Michael A. Dribin, Director and Chair-Elect*

1. **Ad Hoc Leadership Academy** – Tae Kelley Bronner, Chair
2. **Ad Hoc LLC Monitoring** – Lauren Y. Detzel and Ed Burt Bruton, Jr., Co-Chairs
3. **Ad Hoc Trust Account** – John B. Neukamm and Jerry E. Aron, Co-Chairs
4. **Alternative Dispute Resolution (ADR)** – Deborah Bovarnick Mastin and David R. Carlisle, Co-Chairs
5. **Amicus Coordination** – Robert W. Goldman, John W. Little, III, Kenneth B. Bell and Gerald B. Cope, Jr., Co-Chairs
6. **Budget** – S. Katherine Frazier, Chair; Andrew M. O’Malley, Pamela O. Price, Daniel L. DeCubellis, Lee Weintraub, and W. Cary Wright, Co-Vice Chairs

7. **CLE Seminar Coordination** – Robert Freedman (Real Property) and Tae K. Bronner (Probate & Trust), 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. **pp. 149**
8. **Convention Coordination** – Laura K. Sundberg, Chair; Marsha G. Madorsky, S. Dresden Brunner and Chris N. Davies, Co-Vice Chairs
9. **Fellows** – Marsha G. Madorsky, Chair; Brenda B. Ezell, Hung V. Nguyen and Benjamin B. Bush, Co-Vice Chairs
10. **Florida Electronic Filing & Service** – Patricia P. Jones and Rohan Kelley, Co-Chairs
11. **Homestead Issues Study** – Shane Kelley (Probate & Trust) and Patricia P. Jones (Real Property), Co-Chairs
12. **Legislation** – William T. Hennessey, III (Probate & Trust) and Robert S. Swaine (Real Property), Co-Chairs; Sara S. Butters (Probate & Trust) and Alan B. Fields (Real Property), Co-Vice Chairs
13. **Legislative Update (2014)** – Stuart H. Altman, Chair; Charles I. Nash, R. James Robbins, Brian F. Spivey, Stacy 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, David M. Silberstein and Deborah L. Russell
 - 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
 - e. **Florida Bankers Association** – Mark T. Middlebrook
 - f. **Judiciary** – Judge Linda R. Allan, Judge Herbert J. Baumann, Jr., Judge Melvin B. Grossman, Judge Hugh D. Hayes, Judge Claudia Rickert Isom, Judge Maria M. Korvick, Judge Lauren Laughlin, Judge Celeste H. Muir, Judge Robert Pleus, Jr., Judge Richard J. Suarez, Judge Morris Silberman, Judge Patricia V. Thomas and Judge Walter L. Schafer, Jr.
 - g. **Out of State Members** – Michael P. Stafford and John E. Fitzgerald, Jr.
 - h. **TFB Board of Governors** – Andrew Sasso
 - i. **TFB Business Law Section** – Gwynne A. Young
 - ii.
 - j. **TFB CLE Committee** – Robert S. Freedman

- k. **TFB Council of Sections** – Margaret A. Rolando and Michael Dribin
- l. **TFB Pro Bono Committee** – Tasha K. Pepper-Dickinson
- 15. **Long-Range Planning** – Michael Dribin, Chair
- 16. **Meetings Planning** – George Meyer, Chair
- 17. **Member Communications and Information Technology** – Nicole C. Kibert, Chair; S. Dresden Brunner, William A. Parady and Michael Travis Hayes, Co- Vice Chairs
- 18. **Membership and Inclusion** – Michael A. Bedke, Chair; Lynwood F. Arnold, Jr., (Diversity); Stacy O. Kalmanson (Law Schools), Phillip A. Baumann (Career Coaching), Navin R. Pasem (Diversity) and Guy S. Emerich (Career Coaching and 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; Scott P. Pence (Real Property), Shari Ben Moussa (Real Property), Navin R. Pasem (Real Property), Jane L. Cornett (At Large), Brian M. Malec (Probate & Trust), George D. Karibjanian (Probate & Trust), Hung V. Nguyen (Probate & Trust) and Lawrence J. Miller (Professionalism & Ethics), 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** – Kristen M. Lynch and Wilhelmina F. Kightlinger, Co-Chairs; J. Michael Swaine, Adele I. Stone, Deborah L. Russell, W. Cary Wright and Benjamin F. Diamond, Co-Vice Chairs
- 25. **Strategic Planning** – Margaret A. Rolando and Michael A. Dribin, Co-Chairs

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

EXECUTIVE COUNCIL MEETING

Saturday, November 23, 2013
The Ritz-Carlton – Sarasota, Florida

I. Call to Order - *Margaret Ann Rolando, Chair*

The meeting was held in the Grand Ballroom at the Ritz Carlton in Sarasota, Florida. Ms. Margaret A. Rolando called the meeting to order at 10:12 a.m.

II. Attendance — *Andrew M. O'Malley, Secretary*

Andrew O'Malley reminded members that the attendance roster was circulating to be initialed by council members in attendance at the meeting.

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

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

Mr. O'Malley moved:

To Approve Minutes of September 20, 2013, The Ritz Four Seasons Hotel, Lisbon, Portugal appearing on page 11 of the Agenda Materials¹.

The Motion was approved unanimously.

IV. Chair's Report — *Margaret Ann Rolando, Chair*

Ms. Rolando introduced the two sponsors of the Executive Council lunch – U.S. Trust and The Florida Bar Foundation. Ms. Rolando introduced Stacey Cole, Lila Miller and Jeff Kaiser from U.S. Trust. Mr. Kaiser noted that U.S. Trust serves families concerned with the intergenerational transfer of wealth and has wealth management educational services available to heirs to enable them to prudently handle their assets. They offer special programs focusing on philanthropy, needs unique to women and domestic partners.

Ms. Rolando then introduced John Patterson, President of The Florida Bar Foundation. Mr. Patterson praised the RPPTL Section for its financial support of over \$85,000.00 in the last year. He noted the crisis in access to civil legal justice due to dramatic reductions in IOLTA revenues declining from @ \$70,000,000.00 to @ \$7,000,000.00 between 2006 to 2012, and the Governor's veto of funding under the Florida Access to Civil Legal Justice Act. Ms. Rolando then introduced Mr. Patterson's spouse, Nora

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

Patterson, former Mayor of Sarasota and current county commissioner who welcomed the RPPTLs to Sarasota.

Ms. Rolando next announced that there were two items of unfinished business from William “Fletch” Belcher’s term as RPPTL Section Chair in 2012-2013 and introduced Mr. Belcher. Mr. Belcher announced that Michael Bedke was the recipient of the 2012-2013 John Arthur Jones Annual Service Award. Mr. Belcher noted that during his term as Chair of the Membership and Inclusion Committee, Mr. Bedke had transformed the Committee into one of the Sections most active and visible, had initiated the law student affiliate program and contributed to an increase of over one thousand RPPTL Section members. Mr. Belcher then announced that Pamela Price was the recipient of the 2012-2013 Robert C. Scott Memorial Award. Mr. Belcher noted Ms. Price’s long service to the Section in many capacities, including the Budget Committee, Land Trust, legislation, elective share issues, principal and income accounting and many other complex and difficult projects over the years. Mr. Belcher noted that Ms. Price is always available when needed, but never seeks recognition.

Ms. Rolando then noted that the contest to name the Section’s mascot chameleon had over 100 submissions and the winner was “DD Lex The Lizard Wizard”. He will pop up in response to questions on the RPPTL website.

1. Acknowledgment of Section sponsors:

The following sponsors were recognized and thanked for their support:

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 Battle / 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 - *Jane Curran*
Saturday Lunch

U.S. Trust - *Stacey Cole*
Saturday Lunch

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

FRIENDS OF THE SECTION

BB&T Bank - *Rob Frye*

Business Valuation Analysts, LLC - *Tim Bronza*

Guardian Trust - *Ashley Gonnelli*

Iberia Wealth Advisors

Wright Private Asset Management, LLC - *Diane Timpany*

COMMITTEE SPONSORS

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

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

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

Key Private Bank – *Kathleen A. Saigh*
Asset Protection Committee

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

Northern Trust – Brett Rees
Trust Law Committee

Nuview IRA, Inc. – Glen Mathers
IRA, Insurance & Employee Benefits Committee

Ms. Rolando introduced and welcomed James “Jamie” Spradlin as the new RPPTL Section Administrator and noted his background in intelligence with the United States Air Force.

V. Chair-Elect's Report — Michael A. Dribin

Mr. Dribin reviewed the meeting schedule for 2014-2015, in particular the plans for the RPPTL Section out of state meeting in Chicago, Illinois, that will include a reception at the Shedd Aquarium, a Chicago Cubs game, an Executive Council Meeting at Loyola University Law School and an architectural tour of Chicago via boat.

VI. Report of Member Communications and Information Technology Committee – Nicole C. Kibert, Chair

[Secretary’s Note: This item was taken out of order and presented immediately after the adoption of the minutes from the previous Executive Council Meeting but is reported in the order in which it was presented in the Agenda].

Ms. Kibert noted that a training and demonstration session for the RPPTL Section’s new and redesigned website had taken place on Thursday, November 21, 2013 at the Section’s Sarasota meeting with the website’s principal designer. There will be additional training sessions and a webinar to introduce RPPTL Section members to its design and features.

VII. Liaison with Board of Governors’ Report – Andrew B. Sasso

Mr. Sasso discussed the Board’s emphasis on professionalism and noted that complaints involving attorney professionalism can now be presented not only to local Bar Professionalism Committees for review but to the Florida Bar as well. He noted the recent Florida Supreme Court decision in The Florida Bar vs. Norkin, in which a Bar member received a two year suspension with public reprimand followed by 18 months probation for repeated and egregious violations of the Standards of Professionalism toward not only other members of the Bar but also before courts in which he appeared.

Mr. Sasso then noted the new changes to the rules pertaining to the E-Portal confirming that service of process can be performed via the E-Portal and noted that the Chief Justice of the Florida Supreme Court had recently issued an advisory order to that effect.

Lastly, Mr. Sasso noted that Ms. Rolando would be delivering the RPPTL Section’s report at the December Board of Governors Meeting.

VIII. Treasurer's Report — S. Katherine Frazier

Ms. Frazier noted that the Agenda does not include a financial summary but will in the future and stated that the most recent financial information she has indicates that revenues and expenses are tracking the approved budget and that member dues are ahead of budget. Ms. Frazier thanked the sponsors for their contributions to the RPPTL Section's finances.

2014 – 2015 proposed Budget

[Secretary's Note: The presentation of the proposed Budget was made during and is reported under the General Standing Committee reports.]

IX. Director of At-Large Member's Report — *Debra L. Boje*

Ms. Boje asked that information pertaining to upcoming RPPTL Section CLE seminars be sent to her so that they could be promoted by the At-Large members. Ms. Boje noted that the At-Large members are available to the Section's Committees for any special projects. Lastly, Ms. Boje announced that applications to become an At-Large Member will be emailed to RPPTL Section members with a list of criteria employed for selection.

X. CLE Seminar Coordination Report — *CLE Seminar Coordination – Robert Freedman (Real Property) and Tae K. Bronner (Probate & Trust), Co-Chairs*

Mr. Freedman reported that CLE live seminar attendance has declined generally throughout Bar seminars, including RPPTL Section seminars. It does not appear to be a quality issue but is likely related to the convenience of online offerings. Mr. Freedman asked that Committees promote their Seminars, especially through their listserves. Ms. Bronner noted the upcoming Probate Law Seminar.

XI. Kids Committee Report — *Steven P. Goodall, Chair; Laura Sundberg, Advisor*

Mr. Goodall described the events planned for Section member's children at the upcoming Amelia Island Executive Council Meeting in February 2014. He also stated that a survey will be emailed to Executive Council member parents to elicit their ideas for future activities.

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

Action Items:

- 1. Ad Hoc Study Committee on Creditors' Rights to Non-Exempt, Non-Probate Assets** – *Angela M. Adams, Chair*

Ms. Adams reviewed the history behind the Motion noting that the Executive Council Probate and Trust members voted unanimously at a previous meeting to study the issue and subsequently voted nearly unanimously to draft legislation. She discussed the current status of the law as detailed in the white paper, and noted that the proposed legislation generally followed the Uniform Probate Code with several "tweaks".

Ms. Adams moved on behalf of the Committee:

To adopt as Section positions to support the creation of an orderly process for the payment of enforceable claims of creditors from a decedent's interest in non-exempt, non-probate assets when the decedent's probate estate and any revocable trust as to

which the decedent was the grantor are insufficient to pay all enforceable claims including (a) the enactment of new F.S. §733.6075 (liability of non-probate transferees for enforceable claims); (b) the amendment of F.S. §733.607 (possession of estate) by the addition of new subsections (3), (4), and (5); (c) the amendment of F.S. §733.702(1) (limitations on presentation of claims); (c) the amendment of F.S. §733.705 (payment of and objection to claims) by the addition of a new subsection (12); and (d) the amendment of F.S. § 733.707 (order of payment of expenses and obligations) by the addition of a new subsection (4); and finding that such legislative positions are within the purview of the RPPTL Section and to expend funds in support of the positions.

A lengthy debate ensued with members expressing opinions both pro and con. Those opposed to the motion raised numerous issues, including: (i) that the legislation should provide for pro rata contribution of assets; and (ii) that real estate assets are excluded. On a show of hands vote, the motion yielded 68 yeas, 48 nays, which did not meet the requisite 2/3rds approval of those present and therefore was not approved.

Two informal “straw” votes were taken after unanimous approval of a motion to suspend the rules for that purpose. The first vote was to determine if the inclusion in the proposed Legislation of a pro rata contribution provision was viewed favorably by those who voted nay. The second vote was to determine if the inclusion of both pro rata contribution and real estate assets in the proposed Legislation was viewed favorably. Neither vote elicited sufficient support for passage.

2. Ad Hoc Study Committee on Creditors’ Rights to Non-Exempt, Non-Probate Assets –
Angela M. Adams, Chair

Ms. Adams explained the background of the motion proposed by the Committee and noted that it is essentially an amendment that would change the definition of “creditors” under Chapter 726 to include fiduciaries so as to enable them to bring an action for fraudulent conveyance against an estate. Ms. Adams noted that the Committee proposed amending the motion to delete the term “creditor’s representative” in lines 16 and 24 from the proposed amendment and to add in line 26 a reference to F.S. 222.30 immediately following references to F.S. 726. With those revisions, Ms. Adams moved on behalf of the Committee:

To adopt as Section positions to support the amendment of F.S. §726.102 (fraudulent transfers – definitions) and F.S. §733.607 (possession of estate) to clarify that a fiduciary of a decedent’s estate may bring an action under Florida’s fraudulent transfer and fraudulent conversion statutes for the benefit of the creditors of a decedent’s estate to recover assets transferred by the decedent during his or her lifetime, when there are otherwise insufficient assets to pay claims of valid creditors of the estate; and finding that such legislative positions are within the purview of the RPPTL Section and to expend funds in support of the positions.

A discussion ensued as to whether the term “insolvent” should be removed from subparagraph 6 of the proposed bill text and the motion was amended to delete that reference. After further comments from the floor, the motion was tabled for further committee review. Ms. Adams requested that interested members send her their comments and questions.

3. Ad Hoc Study Committee on Estate Planning Conflict of Interest – William T. Hennessey, Chair

Ms. Hennessey explained why it was necessary to clarify the effective date of the legislation pertaining to gifts to lawyers and other disqualifiers. Ms. Hennessey moved on behalf of the Committee:

To adopt as a Section position to support the correction of F.S. §732.806 (gifts to lawyers and other disqualified persons) to include an effective date provision that was dropped when originally enacted in 2013; and finding that such legislative position is within the purview of the RPPTL Section and to expend funds in support of the position.

The motion was approved unanimously.

XIII. Real Property Law Division — Michael J. Gelfand, Real Property Law Division Director

Action Items:

1. Condominium & Planned Development Committee — Steven H. Mezer, Chair

Mr. Mezer moved on behalf of the Committee:

To adopt as a Section position to support the correction of the inadvertent impact of the 2010 amendment to s. 712.06, F.S. requiring the clerk to mail a copy of notice of preservation pursuant to Marketable Record Title Act or requiring publishing of a copy of the notice of preservation when preserving a covenant or restriction, to find that the position is in the Section’s purview; and to expend funds in support of the position.

The motion was approved unanimously.

2. Real Property Litigation Committee — Marty Awerbach, Chair

Mr. Awerbach noted that the Committee wished to amend its proposed bill text to substitute subparagraph 8, to wit: “Nothing in this section shall abrogate the common law authority of a court to appoint an ad litem”, in the bill published in the Agenda. With that amendment, Mr. Awerbach moved on behalf of the Committee:

To adopt as a Section position to support revision of the procedures to appoint attorneys ad litem, including amendments to 49.021, F.S., to find that the position is in the Section’s purview; and to expend funds in support of the position.

The motion was approved unanimously.

3. Real Property Problem Studies Committee — William Theodore “Ted” Conner, Chair

Mr. Connor moved on behalf of the Committee:

To adopt as a Section position, to support clarification that an otherwise valid power of attorney executed in compliance with the laws of the state of execution to convey or encumber Florida real property, applies to all Florida real property including homestead property, including amending 709.2106 F.S., to find that the position is in the Section’s purview; and to expend funds in support of the position.

The motion was approved unanimously.

4. Condominium & Planned Development Committee – Steven H. Mezer

[Secretary’s Note: This action item is contained in the Supplemental Agenda pp. 2-33]

Mr. Gelfand asked for a motion to suspend the rules to enable the Executive Council to consider the motion proposed by the Committee. The motion was made, seconded and approved unanimously.

Mr. Mezer discussed the background of the Distressed Condominium Relief Act, in particular part VII thereof, which if not amended would result in the Act lapsing in July, 2015. Mr. Mezer noted that in the Committee deliberations at its Sarasota meeting on November 27, 2013, the motion set forth in the Supplemental Agenda which, among other things, would create a part VIII in the Act that would provide for bulk unit purchase and 100 unit purchases provisions was not approved. A substitute Committee motion, approved at the Real Estate Division Roundtable on November 23, 2013 was proposed that simply extends part VII of the Act for one year. Mr. Gelfand noted that the substitute motion supersedes an existing Section position supporting a longer extension of time for part VII of the Act. Mr. Mezer introduced William Sklar of the Committee, who noted that the Committee anticipated presenting a revised motion similar to that in the Supplemental Agenda at the Executive Council Meeting in Amelia Island, Florida. Mr. Sklar then presented on behalf of the Committee, the following substitute motion:

To adopt as a Section position the extension of Part VII of the Florida Condominium Act for one (1) year, to find that the position is within the Section’s purview, and to expend funds in support of the position.

The motion was approved unanimously.

Information Items:

1. Condominium & Planned Development Committee — Steven H. Mezer, Chair

Mr. Mezer reported on the status of briefing regarding proposed Advisory Opinion FOA #2012-2 involving alleged UPL activities by Community Association Managers in the case of *In re: Activities of Community Association Managers*, Supreme Court of Florida Case No. SC13-889. Mr. Mezer noted that the Court has stricken several reply briefs which the Committee was happy to see. He also stated that the Florida House Civil Justice subcommittee met on November 5th to propose legislation defining what UPL would be, thus setting up a potential battle between the Legislature, Supreme Court and The Florida Bar.

2. Foreclosure Reform (Ad Hoc) - Jeffrey Sauer, Chair

Mr. Gelfand reported for the Chair on the status of the request by the Florida Legislature to the Florida Supreme Court to adopt rules implementing the procedural portions of the Foreclosure Reform Act. The Court has accepted the Legislature's request and the Florida Bar Civil Procedure Rules Committee has been working on implementation hereunder including a new mortgage foreclosure complaint form, Fla.R.Civ.P. Form 1.994. Mr. Gelfand asked that members with any comments concerning the rules direct the comments to Mr. Sauer.

XIV. General Standing Committees — Michael A. Dribin, Director and Chair-Elect

Action Items:

1. Budget Committee – S. Katherine Frazier, Chair

Ms. Frazier reported that the Committee was proposing two budget amendments. One would account for the anticipated expenses associated with the Strategic Planning Retreat in April of 2014. For the second proposed budget amendment, Ms. Frazier called on Robert Freedman, Co-Chair of the CLE Seminar Coordination Committee who noted that the second amendment merely corrected a typographical error in the budget line item for CLE revenues. Ms. Frazier moved on behalf of the Committee:

To approve the following changes to RPPTL Section budget for fiscal year 2013-2014: (a) to decrease revenue line item 32191, CLE Course, from \$175,000 to \$145,000 and, (b) to increase expense line item 84216, Strategic Planning, from \$5,000 to \$15,000. 2014.

The motion was approved unanimously.

2. Budget Committee – S. Katherine Frazier, Chair

Ms. Frazier presented the proposed budget and noted that it is a balanced budget with a projected ending fund balance for 2014-2015 in the same amount as the ending fund balance for the 2013-2014 budget. Ms. Frazier noted also that: (i) the reserves are artificially low by approximately \$91,000.00 due to the Bar mandated reserve, which has never been drawn upon; (ii) at every opportunity, the Committee under-estimated revenues and overestimated expenses; and (iii) the Committee is seeking ways to reduce meeting expenses without affecting the quality of the meeting experience and a survey seeking member's input into meeting amenities will be forthcoming. Ms. Frazier moved on behalf of the Committee:

To approve RPPTL Budget for fiscal year 2014-2015, as set forth in the Agenda page 143, 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.

3. Legislation Committee – Robert Swaine, Co-Chair (Real Property), William T. Hennessey, III, Co-Chair (Probate and Trust)

Bob Swaine reported for the Committee that Peter Dunbar had joined another law firm and the Committee recommended entering into a substitute contract with the new firm on the same terms as existed with Mr. Dribin’s previous firm, except for a shorter time period to account for the time elapsed with Mr. Dunbar’s prior law firm. Mr. Swaine moved on behalf of the Committee:

To approve a proposed contract between the RPPTL Section and Peter M. Dunbar of the law firm of Dean, Mead, Egerton, Bloodworth, Capouano & Bozarth, P.A. for the rendering of legislative consulting services to the RPPTL Section from December 1, 2013 to June 30, 2015.

The motion was approved unanimously.

4. Ad Hoc Committee Regarding Estate of Payne – Sarah Butters, Chair

Ms. Butters reviewed the background of the Committee’s deliberations as to whether Section should seek leave to file amicus brief with the Supreme Court of Florida in the case of Lee v. Estate of Payne, 38 Fla. L. Weekly D1969b (2nd DCA, September 18, 2013), and the position to be taken in any such brief. Ms. Butters noted that the Committee included members from both the Probate and Trust Division and Real Estate Division. The Payne case dealt with the validity of F.S. §732.502(2), which prohibits the admission to probate in Florida of a holographic will, even if the will was valid under the laws of the state or country where the will was executed. The 2nd DCA certified the following question of great public importance:

DO SECTIONS 732.502(2) AND 734.104(a) VIOLATE ARTICLE I, SECTION 2 OF THE FLORIDA CONSTITUTION BY CATEGORICALLY DEFEATING THE INTENT OF THE TESTATOR OF A HANDWRITTEN HOLOGRAPHIC WILL WITHOUT A RATIONAL RELATION TO THE FRAUD IT SEEKS TO CURE?

The Committee unanimously approved and Ms. Butters presented the following motion on behalf of the Committee:

The RPPTL Section will not request permission to file an amicus brief with the Supreme Court of Florida in the Payne case unless asked by the Supreme Court to do so. Should such a request be made, a brief will be filed, but such brief will not advocate a position on the merits, but shall educate the Supreme Court on the current purpose and policy of the statutes which are the subject of the certified question.

Mr. Dribin asked if there was discussion of the motion and Mr. Robert Goldman argued that the Section should request permission to intervene due to the very serious issues, including potential Federal constitutional questions of full faith and credit presented by the case. Mr. Goldman suggested that the Section’s intervention could potentially “steer” the court away from focusing on the constitutional questions of right to devise and the consequences that might arise if the Court went in that direction. Mr. Goldman moved to substitute the following:

The RPPTL Section will request permission to file an amicus brief with the Supreme Court of Florida in the Payne case. Should such a request be granted, a brief will be filed, but such brief will not advocate a position on the merits, but shall educate the Supreme Court on the current purpose and policy of the statutes which are the subject of the certified question.

The motion was seconded. Ms. Butters stated that the Committee had no objection to the amended motion.

The amended motion was approved unanimously.

5. Ad Hoc Committee Regarding Golden v. Jones – John C. Moran, Chair

Mr. Moran discussed the Committee's motion regarding Golden v. Jones, 38 Fla. L. Weekly D2259a (4th DCA, October 30, 2013), dealing with the timeliness of a claim filed in a probate estate by a known or reasonably ascertainable creditor who was not served with the notice to creditors. The 4th DCA held that such a creditor has until two years following the date of death to file a timely claim. The 1st DCA held previously that such a creditor must file within the 3 months claims period unless a motion to extend is filed and granted. Due to the conflict among the 1st and 4th DCAs, as to the appropriate time for such a claim to be filed, the 4th DCA certified the question to the Florida Supreme Court. Mr. Moran moved on behalf of the Committee:

Assuming the opinion becomes final and that the Florida Supreme Court accepts jurisdiction, the RPPTL Section shall seek leave to file an amicus brief in the Golden v. Jones case, subject to the input and guidance of the Section's Amicus Coordination Committee. If the Section is granted leave to file an amicus brief, the Section shall take a position in such brief consistent with the 4th DCA's holding in Golden v. Jones, to wit: if a known or reasonably ascertainable creditor is never served with a copy of the notice to creditors, the statute of limitations in s. 733.702(1) never begins to run and the creditor's claim is timely if it is filed within two years of the decedent's death, as provided in s. 733.710(1).

The motion was approved unanimously.

Information Items:

1. Ad Hoc Trust Account Committee – John B. Neukamm, Co-Chair, Jerry E. Aron, Co-Chair

Mr. Neukamm reported on the status of the Section's efforts to secure the issuance of an ethics opinion from The Florida Bar's Professional Ethics Committee which would confirm the Section's existing position (as enunciated in the Professional Ethics Committee's Advisory Opinion 93-5 and mandated in F.S. §626.8473(8)) that an attorney may continue to permit a title insurer to audit a special trust account used exclusively for transactions in which the attorney acts as a title or real estate settlement agent without obtaining informed client consent pursuant to Exception (c)(1) to Rule 4-1.6 (which permits an attorney to reveal information to the extent reasonably necessary to serve the client's interests).

Mr. Neukamm noted that there have been extensive discussions with the Bar's Professional Ethics Committee. He noted that Executive Council member Lynwood Arnold, as a member of that Committee, has been instrumental in expressing the Section's concerns over the original opinion and that the Professional Ethics Committee has become more receptive to the Section's position and issued a revised opinion, published on The Florida Bar News and included in the Agenda beginning on page 172. The Ad Hoc Trust Account Committee still believes the revised opinion does go far enough to protect a client's interests in trust account funds. The Committee believes it would always be in a client's best interest for a title insurer to have the right to audit a special trust account and feels that allowing an attorney's discretion to decide whether an audit would be in a client's best interest was provided in the revised opinion, would allow unscrupulous attorneys to use client confidentiality as a shield. Thus, the Committee prepared a letter to the Bar's Professional Ethics Committee, which Section Chair Margaret Rolando signed and sent, outlining 6 reasons why its in the client's best interest to require such audits. The Bar has responded that it will consider the Section's position, as expressed in Ms. Rolando's letter, at its next meeting.

Mr. Neukamm then reported on the The Florida Bar v. Roth/Russo disbarment case involving the procedures to be followed by lawyers in the event of a shortfall in their firm's trust account. The Committee reported at the Executive Council's meeting on June 27, 2013 in Palm Beach about its concerns over the very involved and cumbersome process that the Bar Ethics' hotline prescribes over a *de minimis* shortfall, which includes notifying every client of the shortfall, reporting the shortfall to the Bar, closing the account, returning available funds pro rata amongst the clients, making up the shortfall with the attorney's own funds, then opening a new trust account and inviting the clients to redeposit the funds in the new account. Mr. Neukamm noted that this process is inflexible and could apply to a nominal shortage for one client. Mr. Neukamm stated that he has expressed the Committee's concerns to the new chair of the Bar's Professional Ethics Committee, who was not aware of the hotline's advice and that the Bar's Professional Ethics Committee will be giving the issue further consideration.

2. Fellows Committee – Marsha G. Madorsky, Chair

Ms. Madorsky introduced the new class of RPPTL Section Fellows, Kim Smith, Josh Rosenberg, Shawn Leibowitz and Doug Christy. Mr. Dribin noted that they were selected from over fifty applicants. Ms. Madorsky stated that, among other responsibilities, the Fellows will be doing case updates for ActionLine and they are looking for other projects. Ms. Madorsky noted that the Committee will be taking applications in January 2014 for the next class of Fellows.

3. Member Communications and Information Technology – Nicole C. Kibert, Chair

Ms. Kibert reported on the status of rollout of RPPTL Section's new website, training session for committee chairs and vice-chairs and demonstration of website. [Secretary's Note: This item was taken out of order and has been reported previously in these minutes as Item VI.]

4. Liaison with Clerks of Circuit Court – Laird A. Lile, William Theodore "Ted" Conner

Mr. Lile reported on Electronic Service via the Florida Courts E-Filing Portal and the Supreme Court of Florida Administrative Order dated October 9, 2013 regarding same. Mr. Lile noted that there has been a lot of activity and progress with the E-Filing Portal. Mr. Lile recently attended the latest quarterly meeting of the Clerks of the Court, and observed that many of the Clerks are still "behind the curve" but the response time for addressing issues is shorter. There is a lack of consistency in the "pull down menus"

on the Clerks' websites for document searches used to find documents. The Clerks agree those menus should be uniform, and are working on it.

5. Professionalism and Ethics Committee – *Lawrence J. Miller, Chair*

Mr. Miller reported on The Florida Bar Ethics Inquiry regarding the use of “Skills and Expertise” designation areas on LinkedIn and similar issues with other social media. He addressed the new Rules in the Handbook reported on page 188 of the Agenda. The Committee believes those rules contribute to rather than resolve the confusion. Since the adoption of the Rules, a Florida Bar attorney has requested further guidance on the designation of specialty areas on LinkedIn. The attorney asked if the attorney’s law firm could list areas of specialty designation that did not correspond to areas in which attorneys in the firms were certified with the Bar. The Bar responded that doing so was violation of Rule 7.14. The attorney has appealed that decision and the Bar’s Standing Committee on Attorney Advertising elaborated further on how that practice violated the Rule. Mr. Miller noted that as matters stand, an attorney who lists a specialty area on LinkedIn that does not correspond to an area of certification is in violation of the Bar’s Rule but if a third party “endorses” an attorney in those areas that may not be a violation. Mr. Miller stated that his Committee will be preparing an article on the issue for publication in ActionLine and will be reporting on further developments at the Executive Council’s Meeting in Amelia Island in February 2014.

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

Section Chair Margaret Rolando announced that there were no additional reports from any Probate and Trust Law Division Committees.

1. **Ad Hoc Committee on Creditors’ Rights to Non-Exempt, Non-Probate Assets –*Angela M. Adams, Chair***
2. **Ad Hoc Guardianship Law Revision Committee – *David Brennan, Chair; Sancha Brennan Whynot, Sean W. Kelley and Charles F. Robinson, Co-Vice Chairs***
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 Estate Planning Conflict of Interest – *William T. Hennessey III, Chair; Paul Roman, Vice Chair***
5. **Ad Hoc Committee on Personal Representative Issues – *Jack A. Falk, Jr., Chair***
6. **Ad Hoc Committee on Treatment of Life Insurance Payable to Revocable Trust – *Richard R. Gans, Chair***
7. **Asset Protection – *Brian C. Sparks, Chair; George Karibjanian, Vice-Chair***
8. **Attorney/Trust Officer Liaison Conference – *Jack A. Falk, Jr., Chair; Sharon DaBrusco, Corporate Fiduciary Chair; Patrick Lannon, Deborah Russell and Laura Sundberg, Co-Vice Chairs***
9. **Digital Assets and Information Study Committee – *Eric Virgil, Chair; Travis Hayes and S. Dresden Brunner, Co-Vice Chairs***

10. **Elective Share Review Committee** – *Lauren Detzel, Chair; Charles I. Nash and Robert Lee McElroy IV, Co-Vice Chairs*
11. **Estate and Trust Tax Planning** – *Elaine M. Bucher, Chair; David Akins, Tasha Pepper-Dickinson and William Lane, Co-Vice Chairs*
12. **Guardianship, Power of Attorney and Advanced Directives** – *Sean W. Kelley, Chair; Seth A. Marmor, Tattiana Brenes-Stahl, Cynthia Fallon and David Brennan, Co-Vice Chairs*
13. **IRA, Insurance and Employee Benefits** – *L. Howard Payne and Lester Law, Co-Chairs*
14. **Liaisons with ACTEC** – *Michael Simon, Bruce Stone, and Diana S.C. Zeydel*
15. **Liaisons with Elder Law Section** – *Charles F. Robinson and Marjorie Wolasky*
16. **Liaisons with Tax Section** – *Lauren Y. Detzel, William R. Lane, Jr., David Pratt, Brain C. Sparks, Donald R. Tescher and Harris L. Bonnette, Jr.*
17. **Principal and Income** – *Edward F. Koren, Chair; Pamela Price, Vice Chair*
18. **Probate and Trust Litigation** – *Thomas M. Karr, Chair; Jon Scuderi, James George, J. Richard Caskey and Jerry Wells, Co-Vice Chairs*
19. **Probate Law and Procedure** – *John C. Moran, Chair; Sarah S. Butters, Michael Travis Hayes and Marsha G. Madorsky, Co-Vice Chairs*
20. **Trust Law** – *Shane Kelley, Chair; Angela M. Adams, Deborah L. Russell, and Tami F. Conetta, Co-Vice Chairs*
21. **Wills, Trusts and Estates Certification Review Course** – *Richard R. Gans, Chair; Jeffrey S. Goethe, Linda S. Griffin, Laura Sundberg and Jerome L. Wolf, Co-Vice Chairs*

XVI. Real Property Law Division Reports — *Michael J. Gelfand, Director*

Section Chair Margaret Rolando announced that there were no additional reports from any of the Real Property Law Division Committees.

1. **Ad Hoc Foreclosure Reform** – *Jeffrey Sauer, Chair; Mark Brown, Burt Bruton and Alan Fields, Co-Vice Chairs*
3. **Commercial Real Estate** – *Art Menor, Chair; Burt Bruton and Adele Stone, Co- Vice Chairs*
3. **Condominium and Planned Development** – *Steven H. Mezer, Chair; Jane Cornett, Christopher Davies and Lisa Van Dien, Co-Vice Chairs*

4. **Construction Law** – *Hardy Roberts, Chair; Lisa Colon Heron, Scott Pence and Lee Weintraub, Co-Vice Chairs*
5. **Construction Law Certification Review Course** – *Lee Weintraub, Chair; Bruce Alexander, Deborah Mastin and Bryan Rendzio, Co-Vice Chairs*
6. **Construction Law Institute** – *Reese Henderson, Chair; Sanjay Kurian, Diane Perera and Jason Quintero, Co-Vice Chairs*
7. **Development & Green Building** – *Anne Pollack, Chair; Mike Bedke, Vinette Godelia, and Neil Shoter, Co-Vice Chairs*
8. **Landlord and Tenant** – *Lloyd Granet, Chair; Rick Eckhard, Vice Chair*
9. **Legal Opinions** – *Kip Thornton, Chair; Robert Stern, Vice-Chair*
10. **Liaisons with FLTA** – *Norwood Gay and Alan McCall, Co-Chairs; Alan Fields and James C. Russick, Co-Vice Chairs*
11. **Property & Liability Insurance/Suretyship** – *W. Cary Wright, Chair; Fred Dudley and Michael Meyer, Co-Vice Chairs*
12. **Real Estate Certification Review Course** – *Raul Ballaga, Chair; Kip Thornton and Jennifer Tobin, Co-Vice Chairs*
13. **Real Estate Structures and Taxation** – *Wilhelmina Kightlinger, Chair; Cristin C. Keane and Salome Zikakis, Co-Vice Chairs*
14. **Real Property Finance & Lending** – *Jim Robbins, Chair; Homer Duval, III, Brenda Ezell and Bill Sklar, Co-Vice Chairs*
15. **Real Property Litigation** – *Marty Awerbach, Chair; Manny Farach and Susan Spurgeon, Co-Vice Chairs*
16. **Real Property Problems Study** – *W. Theodore “Ted” Conner, Chair; Mark A. Brown and Patricia J. Hancock, Co-Vice Chairs*
17. **Residential Real Estate and Industry Liaison** – *Frederick W. Jones, Chair; Deborah Boyd and E. Ralph Tirabassi, Co-Vice Chairs*
18. **Title Insurance and Title Insurance Liaison** – *Kristopher Fernandez, Chair; Raul Ballaga and Julie Horstkamp, Co-Vice Chairs*
19. **Title Issues and Standards** – *Christopher W. Smart, Chair; Robert M. Graham, Patricia P. Jones and Karla J. Staker, Co-Vice Chairs*

XVII. General Standing Committee Reports — *Michael A. Dribin, Director and Chair-Elect*

1. **Ad Hoc Leadership Academy** – *Tae Kelley Bronner, Chair*

Mr. Dribin noted that he attended a meeting of the Academy’s Southern Division and described the Section’s activities to them. Ms. Bronner noted that the Section’s members of the Academy have attended the Academy’s meetings.

2. **Ad Hoc LLC Monitoring** – *Lauren Y. Detzel and Ed Burt Bruton, Jr., Co-Chairs*

No report.

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

No report.

[Secretary’s Note: See General Standing Committee’s Information Item #1.]

4. **Alternative Dispute Resolution (ADR)** – *Deborah Bovarnick Mastin and David R. Carlisle, Co-Chairs*

Ms. Bovarnick reported that the Committee had a Webinar on the revisions to the Uniform Arbitration Act and is working on the rollout of its new website.

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

No report.

[Secretary’s Note: See General Standing Committee’s Action Items #4 and 5.]

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

No report.

[Secretary’s Note: See General Standing Committee’s Action Items #1 and 2.]

7. **CLE Seminar Coordination** – *Robert Freedman (Real Property) and Tae K. Bronner (Probate & Trust), 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*

No report.

[Secretary’s Note: See CLE Seminar Coordination report Item X.]

8. **Convention Coordination** – *Laura K. Sundberg, Chair; Marsha G. Madorsky, S. Dresden Brunner and Chris N. Davies, Co-Vice Chairs*

No report.

9. **Fellows** – *Marsha G. Madorsky, Chair; Brenda B. Ezell, Hung V. Nguyen and Benjamin B. Bush, Co-Vice Chairs*

No report.

[Secretary's Note: See General Standing Committee's Information Item #1.]

10. **Florida Electronic Filing & Service** – *Patricia P. Jones and Rohan Kelley, Co-Chairs*

No report.

[Secretary's Note: See General Standing Committee's Information Item #4.]

11. **Homestead Issues Study** – *Shane Kelley (Probate & Trust) and Patricia P. Jones (Real Property), Co-Chairs*

No report.

12. **Legislation** – *William T. Hennessey, III (Probate & Trust) and Robert S. Swaine (Real Property), Co-Chairs; Sara S. Butters (Probate & Trust) and Alan B. Fields (Real Property), Co-Vice Chairs*

No report. Mr. Dribin noted that the Committee is currently considering recommendations on streamlining the methods by which it considers and drafts Legislation and hopes to have a training session at the Executive Council's Meeting at Amelia Island in February 2014.

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

No report.

14. **Liaison with:**

- a. **American Bar Association (ABA)** – *Edward F. Koren and Julius J. Zschau*

Mr. Koren submitted a report noting that the Joint CLE meeting with the Tax Section in September in San Francisco was well attended. Mr. Koren also noted that the Fall Executive Council Meeting took place in early October in New Orleans and no major new projects are being undertaken.

- b. **Board of Legal Specialization and Education (BLSE)** – *Raul P. Ballaga, David M. Silberstein and Deborah L. Russell*

Mr. Dribin noted that David Silberstein had submitted a written report that certification applications are up 15% this year, a new certification in children's law is in process and a new peer review form is being proposed.

- c. **Clerks of Circuit Court** – *Laird A. Lile and William Theodore (Ted) Conner*

No report.

- d. **FLEA / FLSSI** – *David C. Brennan, John Arthur Jones and Roland “Chip” Waller*

No report.

- e. **Florida Bankers Association** – *Mark T. Middlebrook*

No report.

- f. **Judiciary** – *Judge Linda R. Allan, Judge Herbert J. Baumann, Jr., Judge Melvin B. Grossman, Judge Hugh D. Hayes, Judge Claudia Rickert Isom, Judge Maria M. Korvick, Judge Lauren Laughlin, Judge Celeste H. Muir, Judge Robert Pleus, Jr., Judge Richard J. Suarez, Judge Morris Silberman, Judge Patricia V. Thomas and Judge Walter L. Schafer, Jr.*

Mr. Dribin reported that Judge Grossman had experienced an illness but was back on the bench and the Section wished him well.

- g. **Out of State Members** – *Michael P. Stafford and John E. Fitzgerald, Jr.*

Mr. Dribin noted that the Section’s out-of-state meeting in Chicago in 2014 will seek to actively engage its Illinois members.

- h. **TFB Board of Governors** – *Andrew Sasso*

No report.

- i. **TFB Business Law Section** – *Gwynne A. Young*

No report.

- j. **TFB CLE Committee** – *Robert S. Freedman*

No report.

- k. **TFB Council of Sections** – *Margaret A. Rolando and Michael Dribin*

No report.

- l. **TFB Pro Bono Committee** – *Tasha K. Pepper-Dickinson*

No report.

15. **Long-Range Planning** – *Michael Dribin, Chair*

Mr. Dribin noted that the Committee will be meeting on February 25, 2014 in Tampa and thanked the Carlton Fields firm for making their offices available.

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

Mr. Dribin noted that Mr. Meyer had prepared an extensive protocol paper for planning and organizing meetings to provide a consistent structure for future leadership to follow.

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

No report.

[Secretary's Note: See Standing Committee's Information Item #3.]

18. **Membership and Inclusion** – *Michael A. Bedke, Chair; Lynwood F. Arnold, Jr., (Diversity); Stacy O. Kalmanson (Law Schools), Phillip A. Baumann (Career Coaching), Navin R. Pasem (Diversity) and Guy S. Emerich (Career Coaching and Liaison to TFB's Scope program), Co-Vice Chairs*

Mr. Bedke noted that the career counseling coaches will be conducting mock interviews immediately after the Executive Council Meeting with 16 law students. He noted that RPPTL Section membership has increased from slightly over 9,000 members at the beginning of the current year and is nearly 11,000. The Committee has also been working with the At Large Members to gather information for a report detailing the demographics of the Section that will include a breakdown by circuit and county and also list the other Sections to which RPPTL Section members belong. Mr. Hung Nguyen then reported on the Miami Mentoring Picnic for which the Section was a sponsor. There were over 1,000 attendees and many in the Section leadership were in attendance.

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

Mr. Stone recommended Section involvement in several pending uniform acts, including the Powers of Appointment Act, Digital Access Act, Distributions Act, and an Act on Trust Protectors that is under initial consideration.

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

No report.

[Secretary's Note: See General Standing Committee's Information Item #5.]

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

No report.

22. **Publications (ActionLine)** – *Silvia B. Rojas, Chair; Scott P. Pence (Real Property), Shari Ben Moussa (Real Property), Navin R. Pasem (Real Property), Jane L. Cornett (At Large), Brian M. Malec (Probate & Trust), George D. Karibjanian (Probate & Trust), Hung V. Nguyen (Probate & Trust) and Lawrence J. Miller (Professionalism & Ethics), Co-Vice Chairs*

Ms. Rojas reported that the next submission deadline was January 31, 2014. She also reviewed the topics in the upcoming December edition.

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*

No report.

24. **Sponsor Coordination** – *Kristen M. Lynch and Wilhelmina F. Kightlinger, Co-Chairs; J. Michael Swaine, Adele I. Stone, Deborah L. Russell, W. Cary Wright and Benjamin F. Diamond, Co-Vice Chairs*

No report.

25. **Strategic Planning** – *Margaret A. Rolando and Michael A. Dribin, Co-Chairs*

Mr. Dribin noted that there will be a Strategic Planning Retreat in Tampa on April 25th and 26th. A steering committee has been appointed.

XVIII. Adjourn

There being no further business to come before the Executive Council, Ms. Rolando thanked those in attendance and a motion to adjourn was unanimously approved at 2:07 p.m.

Respectfully submitted,

Andrew M. O'Malley, Secretary

ADDENDUM "A"
ATTENDANCE ROSTER
REAL PROPERTY PROBATE & TRUST LAW SECTION
EXECUTIVE COUNCIL MEETINGS
2013-2014

Executive Committee	Division		Jul. 27 Palm Beach	Sept. 21 Lisbon, Portugal	Nov. 23 Sarasota	Feb. 8 Amelia Island	May 31 Captiva
	RP	P&T					
Rolando, Margaret A., Chair	√		X	X	X		
Dribin, Michael A., Chair- Elect		√	X		X		
Gelfand, Michael J., Real Property Law Div. Director	√		X	X	X		
Goodall, Deborah P., Probate and Trust Law Div. Director		√	X		X		
O'Malley, Andrew M., Secretary	√		X		X		
Frazier, S. Katherine, Treasurer	√		X		X		
Hennessey, William M., Legislation Co-Chair (P&T)		√	X		X		
Swaine, Robert S., Legislation Co-Chair (RP)	√		X		X		
Bronner, Tae K. Seminar Coordinator (P&T)		√	X		X		
Freedman, Robert S., Seminar Coordinator (RP)	√		X	X	X		
Boje, Debra L., Director of At-Large Members		√	X		X		
Belcher, William F., Immediate Past Chair		√	X		X		

Executive Council Members	Division		Jul. 27 Palm Beach	Sept. 21 Lisbon, Portugal	Nov. 23 Sarasota	Feb. 8 Amelia Island	May 31 Captiva
	RP	P&T					
Adams, Angela M.		√	X		X		
Adcock, Jr., Louie N., Past Chair		√					
Akins, David J.		√	X	X	X		
Alexander, Bruce G.	√						
Altman, Stuart H.		√	X		X		
Arnold, Jr., Lynwood F.	√	√	X		X		

Executive Council Members	Division		Jul. 27 Palm Beach	Sept. 21 Lisbon, Portugal	Nov. 23 Sarasota	Feb. 8 Amelia Island	May 31 Captiva
	RP	P&T					
Aron Jerry E. Past Chair	√		X		X		
Awerbach, Martin S.	√				X		
Bald, Kimberly A.	√		X		X		
Ballaga, Raul P.	√		X				
Banister, John R.	√						
Battle, Carlos A.		√	X		X		
Baumann, Honorable Herbert J.		√					
Baumann, Phillip A.		√	X	X	X		
Beales, III, Walter R. Past Chair	√						
Bedke, Michael A.	√		X		X		
Bell, Kenneth B.	√						
Bellew, Brandon D.		√	X		X		
Ben Moussa, Shari D.	√		X				
Bonnette, Jr., Harris L.		√	X		X		
Boyd, Deborah	√						
Bowser, Robert Wade	√						
Brenes-Stahl, Tattiana P.		√	X		X		
Brennan, David C. Past Chair		√	X				
Brittain, David R.	√				X		
Brown, Mark A.	√		X				
Brunner, S. Dresden		√	X		X		
Bruton, Jr., Ed Burt	√		X				
Bucher, Elaine M.		√	X		X		
Bush, Benjamin B.	√						

Executive Council Members	Division		Jul. 27 Palm Beach	Sept. 21 Lisbon, Portugal	Nov. 23 Sarasota	Feb. 8 Amelia Island	May 31 Captiva
	RP	P&T					
Butters, Sarah S.		√	X		X		
Buzby-Walt, Anne		√	X				
Carlisle, David R.		√	X		X		
Caskey, John R.		√	X		X		
Christiansen, Patrick T. Past Chair	√		X	X			
Cole, John P.		√	X		X		
Conetta, Tami F.		√	X				
Conner, W. Theodore	√		X		X		
Cope, Jr., Gerald B.	√		X				
Cornett, Jane L.	√		X		X		
Davies, Christopher	√		X		X		
DeCubellis, Daniel L.	√			X			
Detzel, Lauren Y.		√	X	X	X		
Diamond, Benjamin F.		√	X		X		
Diamond, Sandra F. Past Chair		√	X	X	X		
Dollinger, Jeffrey	√		X		X		
Dudley, Frederick R.	√		X		X		
Duvall, III, Homer	√		X		X		
Eckhard, Rick	√		X		X		
Ellison, Jason M.	√		X		X		
Emerich, Guy S.		√	X		X		
Ezell, Brenda B.	√		X		X		
Falk, Jr., Jack A.		√	X		X		
Fallon, Cynthia		√					

Executive Council Members	Division		Jul. 27 Palm Beach	Sept. 21 Lisbon, Portugal	Nov. 23 Sarasota	Feb. 8 Amelia Island	May 31 Captiva
	RP	P&T					
Farach, Manuel	√		X		X		
Felcoski, Brian J., Past Chair		√	X		X		
Fernandez, Kristopher E.	√		X		X		
Fields, Alan B.	√				X		
Fitzgerald, Jr., John E.		√	X		X		
Fleece, III, Joseph W.		√	X		X		
Flood, Gerard J.		√	X		X		
Foreman, Michael L.		√	X		X		
Galler, Jonathan		√	X				
Gans, Richard R.		√	X		X		
Gay, III, Robert Norwood	√		X	X	X		
George, James		√	X		X		
Godelia, Vinette D.	√		X		X		
Goethe, Jeffrey S.		√	X		X		
Goldman, Louis E. "Tray"	√				X		
Goldman, Robert W. Past Chair		√	X		X		
Graham, Robert M.	√		X		X		
Granet, Lloyd	√		X		X		
Griffin, Linda S.		√	X				
Grimsley, John G. Past Chair		√					
Grossman, Honorable Melvin B.		√	X				
Guttmann, III, Louis B. Past Chair	√		X		X		

Executive Council Members	Division		Jul. 27 Palm Beach	Sept. 21 Lisbon, Portugal	Nov. 23 Sarasota	Feb. 8 Amelia Island	May 31 Captiva
	RP	P&T					
Hamrick, Alexander H.		√	X		X		
Hancock, Patricia J.	√		X		X		
Hart, W.C.	√						
Hayes, Honorable Hugh D.		√	X		X		
Hayes, Michael Travis		√	X		X		
Hearn, Steven L. Past Chair		√	X		X		
Henderson, Jr., Reese J.	√		X		X		
Henderson, III, Thomas N.	√		X		X		
Heron, Lisa Colon	√		X				
Heuston, Stephen P.		√	X		X		
Horstkamp, Julie	√						
Isom, Honorable Claudia R.		√					
Isphording, Roger O. Past Chair		√	X	X	X		
Johnson, Amber Jade F.		√	X		X		
Jones, Darby		√	X		X		
Jones, Frederick W.	√		X	X	X		
Jones, Jennifer W.		√	X				
Jones, John Arthur Past Chair		√			X		
Jones, Patricia P.H.	√		X	X	X		
Judd, Robert B.		√	X		X		
Kalmanson, Stacy O.	√		X		X		
Karibjanian, George		√	X				
Karr, Thomas M.		√	X		X		
Kayser, Joan B. Past Chair		√			X		

Executive Council Members	Division		Jul. 27 Palm Beach	Sept. 21 Lisbon, Portugal	Nov. 23 Sarasota	Feb. 8 Amelia Island	May 31 Captiva
	RP	P&T					
Keane, Cristin C.	√		X		X		
Kelley, Rohan Past Chair		√	X		X		
Kelley, Sean W.		√	X				
Kelley, Shane		√	X		X		
Kibert, Nicole C.	√		X		X		
Kightlinger, Wilhelmina F.	√		X		X		
Kinsolving, Ruth Barnes Past Chair	√						
Koren, Edward F. Past Chair		√			X		
Korvick, Honorable Maria M.		√	X	X	X		
Kotler, Alan Stephen		√	X				
Kromash, Keith S.		√	X		X		
Kurian, Sanjay	√		X		X		
Kypreos, Theodore S.		√	X				
Lancaster, Robert L.		√	X		X		
Lane, Jr., William R.		√			X		
Lange, George		√	X	X	X		
Lannon, Patrick J.		√					
Larson, Roger A.	√		X				
Laughlin, Honorable Lauren C.		√					
Law, Lester		√			X		
Leebrick, Brian D.	√		X		X		
Lile, Laird A. Past Chair		√	X		X		
Little, III, John W.	√		X				
Lynch, Kristen M.		√	X				

Executive Council Members	Division		Jul. 27 Palm Beach	Sept. 21 Lisbon, Portugal	Nov. 23 Sarasota	Feb. 8 Amelia Island	May 31 Captiva
	RP	P&T					
Madorsky, Marsha G.		√	X	X	X		
Malec, Brian		√	X	X	X		
Marger, Bruce Past Chair		√	X		X		
Marmor, Seth A.		√	X				
Marshall, III, Stewart A.		√	X		X		
Mastin, Deborah Bovarnick	√		X		X		
McCall, Alan K.	√		X		X		
McElroy, IV, Robert Lee		√	X		X		
McRae, Ashley E.	√		X		X		
Menor, Arthur J.	√				X		
Meyer, George F. Past Chair	√		X	X	X		
Meyer, Michael	√		X		X		
Mezer, Steven H.	√		X		X		
Middlebrook, Mark T.		√	X		X		
Miller, Lawrence J.		√	X		X		
Moran, John C.		√	X		X		
Moule, Jr., Rex E.		√	X				
Muir, Honorable Celeste H.		√	X				
Murphy, Melissa J. Past Chair	√		X				
Nash, Charles I.		√	X	X	X		
Neukamm, John B. Past Chair	√		X		X		
Nice, Marina		√	X	X	X		
Nguyen, Hung V.		√	X		X		
Palmer, Margaret		√			X		

Executive Council Members	Division		Jul. 27 Palm Beach	Sept. 21 Lisbon, Portugal	Nov. 23 Sarasota	Feb. 8 Amelia Island	May 31 Captiva
	RP	P&T					
Parady, William A.		√	X	X	X		
Pasem, Navin	√						
Payne, L. Howard		√	X		X		
Pence, Scott P.	√		X		X		
Pepper-Dickinson, Tasha K.		√	X		X		
Perera, Diane	√						
Platt, William R.		√	X		X		
Pleus, Jr., Honorable Robert J.							
Pollack, Anne Q.	√		X	X	X		
Polson, Marilyn M.		√	X		X		
Pratt, David		√			X		
Price, Pamela O.		√			X		
Prince-Troutman, Stacey A.		√					
Pyle, Michael A.		√	X		X		
Quintero, Jason	√				X		
Rao, Tara		√		X			
Rendzio, Bryan	√		X		X		
Reynolds, Stephen H.	√				X		
Rieman, Alexandra V.		√			X		
Robbins, Jr., R.J.	√		X		X		
Roberts, III, Hardy L.	√		X	X	X		
Robinson, Charles F.		√			X		
Rojas, Silvia B.	√		X	X	X		
Roman, Paul E.		√	X	X			

Executive Council Members	Division		Jul. 27 Palm Beach	Sept. 21 Lisbon, Portugal	Nov. 23 Sarasota	Feb. 8 Amelia Island	May 31 Captiva
	RP	P&T					
Russell, Deborah L.		√	X		X		
Russick, James C.	√		X	X	X		
Rydberg, Marsha G.	√		X		X		
Sachs, Colleen C.	√		X				
Sasso, Andrew		√			X		
Sauer, Jeffrey T.	√		X		X		
Schafer, Jr., Honorable Walter L.		√					
Schnitker, Clay A.	√						
Schofield, Percy A.	√		X		X		
Schwartz, Robert M.	√				X		
Scuderi, Jon		√			X		
Sheets, Sandra G.		√	X		X		
Shoter, Neil B.	√		X		X		
Sibblies, Sharaine A.		√					
Silberman, Honorable Morris							
Silberstein, David M.		√	X		X		
Simon, Michael		√	X				
Sklar, William P.	√		X		X		
Smart, Christopher W.	√		X				
Smith, G. Thomas Past Chair	√		X	X			
Smith, Wilson Past Chair		√					
Sobien, Wayne J.	√						
Sparks, Brian C.		√	X		X		
Spivey, Barry F.		√	X		X		

Executive Council Members	Division		Jul. 27 Palm Beach	Sept. 21 Lisbon, Portugal	Nov. 23 Sarasota	Feb. 8 Amelia Island	May 31 Captiva
	RP	P&T					
Spurgeon, Susan K.	√		X		X		
Stafford, Michael P.		√	X	X	X		
Staker, Karla J.	√		X		X		
Stern, Robert G.	√		X		X		
Stone, Adele I.	√		X				
Stone, Bruce M. Past Chair		√			X		
Suarez, Honorable Richard J.							
Sundberg, Laura K.		√	X	X	X		
Swaine, Jack Michael Past Chair	√						
Taft, Eleanor W.	√		X		X		
Taylor, Richard W.	√		X		X		
Tescher, Donald R.		√	X		X		
Thomas, Honorable Patricia V.		√		X	X		
Thornton, Kenneth E.	√		X				
Tirabassi, Ralph	√						
Tobin, Jennifer S.	√		X		X		
Triggs, Matthew H.		√	X				
Udick, Arlene C.	√		X	X			
Van Dien, Lisa	√		X		X		
Virgil, Eric		√	X				
Waller, Roland D. Past Chair	√		X	X	X		
Walters, Hanton H.	√		X		X		
Weintraub, Lee A.	√		X		X		
Wells, Jerry B.		√	X				

Executive Council Members	Division		Jul. 27 Palm Beach	Sept. 21 Lisbon, Portugal	Nov. 23 Sarasota	Feb. 8 Amelia Island	May 31 Captiva
	RP	P&T					
White, Jr., Richard M.		√			X		
Whynot, Sancha B.		√	X		X		
Wilder, Charles D.		√		X			
Williamson, Julie Ann S. Past Chair	√		X	X			
Wintter, Christopher Q.		√	X		X		
Wohlust, Gary Charles		√	X	X	X		
Wolasky, Marjorie E.		√	X	X	X		
Wolf, Jerome L.		√	X				
Wright, William Cary	√		X	X	X		
Wright, Thomas D.	√		X		X		
Young, Gwynne A.		√	X	X	X		
Zeydel, Diana S.C.		√	X				
Zikakis, Salome J.	√		X	X	X		
Zschau, Julius J. Past Chair	√		X		X		

RPPTL Fellows	Division		Jul. 27 Palm Beach	Sept. 21 Lisbon, Portugal	Nov. 23 Sarasota	Feb. 8 Amelia Island	May 31 Captiva
	RP	P&T					
Christy, Doug					X		
Hoffman, Brian W.	√		X		X		
Khan, Nishad	√		X		X		
Lebowitz, Sean					X		
Melanson, Noelle M.		√	X	X	X		
Rao, Tara		√	X	X			
Rosenberg, Josh					X		
Smith, Kym					X		

Legislative Consultants	Division		Jul. 27 Palm Beach	Sept. 21 Lisbon, Portugal	Nov. 23 Sarasota	Feb. 8 Amelia Island	May 31 Captiva
	RP	P&T					
Adams, Howard Eugene		√	X				
DiNunzio, Ashely	√		X		X		
Dunbar, Peter M.				X	X		
Edenfield, Martha				X	X		



**The Florida Bar
Real Property, Probate & Trust Law Section**

Special Thanks to the

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 - Jane Curran
Saturday Lunch

U.S. Trust - Stacey Cole
Saturday Lunch

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



**The Florida Bar
Real Property, Probate & Trust Law Section**

Special Thanks to the

FRIENDS OF THE SECTION

BB&T Bank - *Rob Frye*

Business Valuation Analysts, LLC - *Tim Bronza*

Guardian Trust - *Ashley Gonnelli*

Iberia Wealth Advisors

Wright Private Asset Management, LLC - *Diane Timpany*



**The Florida Bar
Real Property, Probate & Trust Law Section**

Special Thanks to the

COMMITTEE SPONSORS

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

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

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

Key Private Bank – *Kathleen A. Saigh*
Asset Protection Committee

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

Northern Trust – *Brett Rees*
Trust Law Committee

Nuview IRA, Inc. – *Glen Mathers*
IRA, Insurance & Employee Benefits Committee

RPPTL 2013 - 2014
Executive Council Meeting Schedule

Peggy Rolando's YEAR

Date	Location
July 24 – 28, 2013	Executive Council Meeting & Legislative Update The Breakers Palm Beach, Florida Reservation Phone # 888-211-1669 www.thebreakers.com Room Rate: \$206.00 Cut-off Date: June 24, 2013
September 18 – 22, 2013	Executive Council Meeting/Out of State Four Seasons Hotel Ritz Lisbon Lisbon, Portugal Phone # 351 (21)381-1400 www.fourseasons.com/lisbon/ Room Rate: 245 Euros Cut-off Date: August 28, 2013
November 20 – 24, 2013	Executive Council Meeting Ritz Carlton Sarasota Sarasota, Florida Reservation Phone # 800-241-3333 http://www.ritzcarlton.com/sarasota Room Rate: \$205.00 Cut-off Date: October 21, 2013
February 6 – 9, 2014	Executive Council Meeting Ritz Carlton Amelia Island Amelia Island, Florida Reservation Phone # 800-241-3333 http://www.ritzcalton.com/amelia Room Rate: \$199.00 Cut-off Date: January 6, 2014
May 29 – June 1, 2014	Executive Council Meeting / RPPTL Convention South Seas Island Resort Captive, Florida http://www.southseas.com Reservation Phone # 877-597-9696 Room Rate \$165.00 Cut-off Date: May 7, 2014

RPPTL 2014 - 2015
Executive Council Meeting Schedule

Mike Dribin's YEAR

Date	Location
July 31 – August 3, 2014	Executive Council Meeting & Legislative Update The Breakers Palm Beach, Florida Reservation Phone # 561-655-6611 www.thebreakers.com Room Rate: \$206 Cut-off Date: June 30, 2014
September 18 – 21, 2014	Executive Council Meeting/Out of State Sofitel Chicago Water Tower Chicago, Illinois Reservation Phone # 877-813-7700 www.sofitel.com Room Rate: \$255 Cut-off Date: August 31, 2014
November 13 – 16, 2014	Executive Council Meeting Waldorf Astoria Naples Naples, Florida Reservation Phone # 800-548-8690 http://www.hilton.com Room Rate: \$179 Cut-off Date: October 23, 2014
March 19 - 22, 2015	Executive Council Meeting Ritz Carlton Grande Lakes Orlando, Florida Reservation Phone # 800-241-3333 http://www.ritzcalton.com Room Rate: \$269 Cut-off Date: February 27, 2015
June 4 - 7, 2015	Executive Council Meeting / RPPTL Convention Fontainebleau Florida Hotel Miami Beach, Florida Reservation Phone # 800-548-8886 Room Rate \$239 Cut-off Date: May 13, 2015



RPPTL Financial Summary from Separate Budgets
2013 – 2014 [July 1 - December 30¹]
YEAR TO DATE REPORT

General Budget

Revenue:	\$ 876,602
Expenses:	\$ 447,545
Net:	\$ 429,057

Legislative Update

Revenue:	\$ 52,996
Expenses:	\$ 83,057
Net:	(\$30,061)

Convention

Revenue:	\$ 1,250
Expenses:	\$ 7,522
Net:	(\$6,272)

Roll-up Summary (Total)

Revenue:	\$ 930,848
Expenses:	\$ 538,124
Net Operations:	\$ 392,724

Fund Balance (Reserve):	\$ 705,581
Current Fund Balance (YTD):	\$ 1,098,305

¹ This report is based on the tentative unaudited detail statement of operations dated 12/30/2013.

	December 2013 Actuals	YTD 13-14 Actuals	Budget	Percent Budget
Total Real Prop Probate & Trust				
31431 Sect Dues	840	579,450	560,040	103.47
31432 Affil Dues	0	3,420	3,000	114.00
31433 Admin Fee to TFB	-245	-170,556	-163,345	104.41
Total Dues Income-Net	595	412,314	399,695	103.16
32001 Registrations	0	-25	45,000	-0.06
32006 Webcast/Webinars	0	11,055	12,000	92.13
32010 Legal Span On-line	2,995	5,916	4,500	131.47
32191 CLE Courses	41,004	133,435	175,000	76.25
32205 Compact Disc	285	18,375	16,000	114.84
32207 DVD	0	1,000	7,500	13.33
32293 Sect Differential	2,860	14,308	30,000	47.69
32301 Course Materials	200	1,900	2,500	76.00
34704 Actionline Advertise	5,700	11,895	15,000	79.30
35101 Exhibit Fees	0	14,750	25,000	59.00
35201 Sponsorships	5,875	112,276	170,000	66.04
35603 Bd/Council Mtg Regis	38,720	142,822	160,000	89.26
38499 Investment Alloc	8,815	50,827	24,135	210.59
Other Income	106,454	518,534	686,635	75.52
Total Revenues	107,049	930,848	1,086,330	85.69
36998 Credit Card Fees	34	2,580	5,380	47.96
51101 Employee Travel	4,615	8,380	10,308	81.30
61201 Equip Rental	0	11,923	23,000	51.84
71001 Phone/Direct	397	691	1,944	35.55
71005 Internet Charges	0	0	660	0.00
75102 1st Class & Misc Mai	0	28	25	112.00
75401 Express Mail	6	336	300	112.00
81411 Promo Printing	0	0	50	0.00
84001 Postage	0	121	1,550	7.81
84002 Printing	0	500	280	178.57
84006 Newsletter	0	29,596	43,000	68.83
84009 Supplies	0	0	200	0.00
84010 Photocopying	5	35	150	23.33
84012 Registration Support	0	0	5,200	0.00
84015 Officers Conference	0	389	700	55.57
84016 Scrivener	0	0	3,000	0.00
84051 Officers Travel Exp	0	249	3,000	8.30
84054 CLE Speaker Exp	0	0	4,000	0.00
84061 Reception	0	0	12,100	0.00
84062 Luncheons	0	25,698	34,000	75.58
84069 Dinners	0	7,500	50,000	15.00
84101 Committee Exp	3,500	63,672	85,000	74.91
84102 Public Info & Websit	0	0	30,000	0.00
84106 Realtor Relations	0	2,000	4,000	50.00

	December 2013 Actuals	YTD 13-14 Actuals	Budget	Percent Budget
Total Real Prop Probate & Trust =====				
84107 Diversity Initiative	0	1,400	15,000	9.33
84111 At Large Member Prog	0	0	5,500	0.00
84115 Entertainment	0	0	8,000	0.00
84201 Board Or Council Mtg	1,374	250,602	475,000	52.76
84216 Strategic Planning	0	0	5,000	0.00
84239 Hospitality Suite	312	7,824	20,000	39.12
84253 Sleeping Rooms	0	-2,058	0	*
84254 Speaker Gifts	0	3,346	1,600	209.13
84258 Web Srvcs	0	3,095	5,000	61.90
84279 Council Members Hand	1,820	1,820	2,000	91.00
84310 Law School Liaison	4,410	4,410	5,000	8.20
84322 Fellowships-Exc Cou	4,991	7,382	20,000	36.91
84330 Leadrshp Acad	189	491	7,000	7.01
84422 Website	2,789	26,485	85,000	31.16
84501 Legis Consultant	27,500	27,500	110,000	25.00
84503 Legis Travel	4,927	4,927	20,000	24.64
84524 Memorial Tributes	0	0	500	0.00
84701 Council Of Sections	0	300	300	100.00
84998 Operating Reserve	0	0	87,128	0.00
84999 Miscellaneous	0	250	300	83.33
85064 Srvc Recognition	0	307	5,000	6.14
86327 IT Sys Support	0	989	0	*
86432 Time Taping Editing	0	3,424	4,500	76.09
88231 Spkrs Travel	0	229	0	*
88233 Spkrs Hotel	0	2,299	4,200	54.74
88239 Spkrs Oth Exp	0	125	200	62.50
88241 Outline Prt-Inhouse	0	12	400	3.00
88242 Outline Prt-Contract	0	9,400	8,600	109.30
88252 Course Credit Fee	0	75	150	50.00
88263 Mtg Hospitality	0	0	3,700	0.00
88265 Refreshment Breaks	0	9,867	11,200	88.10
88269 Breakfast	0	6,766	17,000	39.80
88281 A/V Ctr Dup/Prod	0	574	0	*
Total Operating Expenses	52,869	521,539	1,245,125	41.89
86431 Mtgs Admin	157	1,665	9,000	18.50
86532 Advertising News	0	0	1,500	0.00
86543 Graphics & Art	1,703	9,860	9,850	100.10
86623 Registrars	33	5,060	2,750	184.00
Total TFB Support Services	1,893	16,585	23,100	71.80
Total Expenses	54,762	538,124	1,268,225	42.43
Net Operations	52,287	392,724	-181,895	-215.91

	December 2013 Actuals	YTD 13-14 Actuals	Budget	Percent Budget
Total Real Prop Probate & Trust =====				
21001 Fund Balance	0	705,581	804,513	87.70
Total Current Fund Balance	52,287	1,098,305	622,618	176.40
	-----	-----	-----	-----

* * * * * End of listing * * * * *

LEGISLATIVE POSITION REQUEST FORM

GOVERNMENTAL AFFAIRS OFFICE

Date Form Received _____

GENERAL INFORMATION

Submitted By Thomas M. Karr, Chair, Probate & Trust Litigation Committee of the Real Property Probate & Trust Law Section (RPPTL Approval Date February ____, 2014)

Address Gunster, Yoakley & Stewart, P.A.
2 South Biscayne Boulevard, Suite 3400, Miami, Florida 33131
Telephone: (305) 376-6000

Position Type Probate & Trust Litigation Committee, RPPTL Section, The Florida Bar (Florida Bar, section, division, committee or both)

CONTACTS

Board & Legislation Committee Appearance

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Appearances

Before Legislators

(SAME)

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

Meetings with

Legislators/staff

(SAME)

(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

(Bill or PCB #)

(Bill or PCB Sponsor)

Indicate Position

Support _____

Oppose _____

Tech Asst. _____

Other _____

Proposed Wording of Position for Official Publication:

“Support legislation to provide a non exclusive list of factors for trial courts to use when exercising their discretion whether and to what extent attorney’s fees and costs should be assessed against a part of an estate or trust, including amendments to F.S. §§ 733.106, 736.1005, 736.1006.”

Reasons For Proposed Advocacy:

The proposed amendments to F.S. §§733.106, 736.1005, and 736.1006 will provide trial courts with a non exclusive list of factors to consider when exercising their discretion whether and to what extent attorney’s fees and costs should be awarded against a particular part of an estate or trust and create a uniform standard for making this determination in the courts of Florida. At present, there is a split of authority on the factors that courts may consider.

LEGISLATIVE WHITE PAPER

PROPOSED F.S 733.106(4), 736.1005(2), 736.1006(2)

I. SUMMARY

This legislation provides guidance and factors for courts to consider when exercising discretion to assess attorneys' fees and costs against a person's part of an estate or trust, particularly when disputes arise in the administration of an estate or trust. The bill does not have a fiscal impact on state funds.

II. CURRENT SITUATION

Our statutes currently allow the Court to exercise discretion to assess attorneys' fees and costs awarded from the estate or trust from a part of the estate or trust. Section 733.106 (3), Florida Statutes, provides that "[a]ny attorney who has rendered services to an estate may be awarded reasonable compensation from the estate." Subsection (4) provides as follows:

"When costs and attorneys' fees are to be paid from the estate, the court may direct from what part of the estate they shall be paid."

Similarly, section 736.1005(1), provides that "[a]ny attorney who has rendered services to a trust may be awarded reasonable compensation from the trust." Subsection (2) provides as follows:

"Whenever attorneys' fees are to be paid out of the trust, the court, in its discretion, may direct from what part of the trust the fees shall be paid."

Case law applying the probate statute is in conflict. The Fourth District Court of Appeal has construed the statute to require that the trial court must find wrongful conduct, bad faith or frivolousness to assess attorneys' fees and costs against a part of the estate. *Levin v. Levin*, 67 So. 3d 429 (Fla. 4th DCA 2011); *Geary v. Butzel Long, P.C.*, 13 So. 3d 149 (Fla. 4th DCA 2009); *In re Estate of Lane*, 562 So. 2d 352 (Fla. 4th DCA 1990). The Fifth District Court of Appeal does not require a finding of frivolousness to assess attorneys' fees and costs against a part of the estate. *Williams v. King*, 711 So. 2d 1285 (Fla. 5th DCA 1998).

The Supreme Court of Florida in *Carman v. Gilbert*, 641 So. 2d 1323, 1326 (Fla. 1994), commented on the assessment of fees against an

unsuccessful will contestant's part of the estate. The case centered on the effect of the contestant's qualified renunciation under the will. The Court commented that section 733.106(3) gave the trial court discretion to assess fees against an unsuccessful contestant's part of the estate. The Court did not say that a finding of bad faith, wrongdoing, or frivolousness was required. The Court in *Carman* observed as follows:

“However, we caution that the attacker of a will should not be permitted to ‘have the cake and eat it, too.’ In *Barnett National Bank*, this Court stated that a beneficiary must ‘do equity’ by renouncing the right to property under an instrument as a condition to contesting the instrument. 49 So.2d at 537. The Court charged the contestant with a number of equitable obligations, including showing ‘that the rights of claimants under the trust instrument have not been adversely and injuriously affected.’ *Id.* at 538. It would be contrary to this equitable duty to allow a contesting beneficiary to deplete the assets of the estate through an unsuccessful proceeding to revoke probate and still take an undiminished share under the will. Under such circumstances, the court has the discretion to direct that the resulting costs and attorney fees be charged against the contestant's bequest under the will.” *Id.*

It would undoubtedly help litigants, judges and lawyers to have a standard articulated in our statutes for the assessment of fees and costs. A detailed but flexible standard will achieve a better degree of consistency and predictability, while retaining the flexibility ordinarily and historically accorded to courts adjudicating equitable matters. The Fourth District's judicially created standard applied in cases finds no textual support in the statute and imposes a standard for the assessment of fees that is inconsistent with comments made in *Carmen*.

The absence of detailed factors in the statutes for courts to consider in exercising discretion to assess attorneys' fees and costs creates inconsistent results. It also inhibits courts from applying the statutes where appropriate because there is no guidance in exercising the discretion. While the courts will no doubt benefit from detailed factors to consider, the variety of factual situations presented requires that the courts retain flexibility to consider all facts and circumstances when deciding whether to assess attorneys' fees and costs against a part of an estate or trust.

III. EFFECT OF PROPOSED CHANGES

A. GENERALLY

The amended subsections provide factors for the courts to consider when exercising discretion to assess attorneys' fees and costs against a part of an estate or trust. The proposed changes also permit courts to assess fees and costs against a part of a trust into which the estate pours over. This is authorized if the matter about which the fees or costs were incurred in the estate is interrelated with the trust. The amended statutes provide that courts may consider not only the specific factors listed in the statutes, but any other relevant fact, circumstance or equity. The amended statutes negate any requirement that courts find that a person engaged in bad faith, wrongdoing or frivolousness when assessing attorneys' fees and costs against a person's part of an estate or trust. The factors are designed to focus the attention of courts on the fairness to all shares involved when making an assessment. This is in contrast to focusing solely on whether a party whose part is to be assessed acted in bad faith, wrongfully or frivolously.

B. SECTION BY SECTION ANALYSIS

Section 733.106(4) makes explicit that courts have discretion to assess attorneys' fees and costs awarded from the estate to attorneys for a personal representative or beneficiary against a part of the estate. It also provides that if the court directs an assessment against a person's part of the estate and that part is insufficient to fully pay the assessment, the court may direct payment from the person's part of the trust if a pour over will into a trust is involved and the matter is interrelated with the trust. The subsection provides that all or any part of the fees and costs to be paid from the estate may be assessed in such proportions as the court finds just and proper. It also provides that the court in its discretion may consider several factors including the impact on the value of each person's part of the estate. The subsection specifically permits courts to assess attorneys' fees and costs against a person's part of the estate without finding that the person engaged in bad faith, wrongdoing or frivolousness.

Section 736.1005(2) is nearly identical to section 733.106(4) but applies to the assessment of attorneys' fees awarded to attorneys for a trustee or beneficiary from a trust. The subsection cross references the power of courts in an estate proceeding to make an assessment against a part of a trust when there are insufficient assets in the estate to provide authority to assess such fees and costs against a person's part of the trust when an estate pours over to a trust.

Section 736.1006(2) provides for the assessment of costs against a person's part of a trust in the same manner as section 736.1005(2) provides for the assessment of attorneys' fees against a person's part of a trust. Section 736.1006(2) cross references the factors set forth in section 736.1005(2) and makes them applicable to the assessment of costs.

IV. FISCAL IMPACT ON STATE AND LOCAL GOVERNMENTS

The proposal does not have a fiscal impact on state or local governments.

V. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR

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

VI. CONSTITUTIONAL ISSUES

There appear to be no constitutional issues raised by this proposal.

VII. OTHER INTERESTED PARTIES

None are known at this time.

1 A bill to be entitled

2 An act relating to awarding attorney's fees and costs in probate
3 and trust proceedings; amending ss. 733.106, 736.1005 and
4 736.1006, F.S.; providing an effective date.

5 Be it Enacted by the Legislature of the State of Florida:

6 Section 1. Subsection (4) of Section 733.106, Florida
7 Statutes, shall be amended to read:

8 733.106; Costs and attorney's fees.-

9 (4) When costs and attorney's fees are to be paid from the
10 estate under subsections (1), (2) or (3), s. 733.6171(4), s.
11 736.1005 or s. 736.1006, the court, in its discretion, may
12 direct from what part of the estate they shall be paid. If the
13 court directs an assessment against a person's part of the
14 estate and that part is insufficient to fully pay the
15 assessment, the court may direct payment from the person's part
16 of a trust, if any, if a pourover will is involved and the
17 matter is interrelated with the trust. All or any part of costs
18 and attorney's fees to be paid from the estate may be assessed
19 against one or more person's part of the estate in such
20 proportions as the court finds to be just and proper. The court
21 in the exercise of its discretion may consider the following
22 factors: (a) the relative impact of an assessment on the
23 estimated value of each person's part of the estate; (b) the
24 amount of costs and attorney's fees to be assessed against a

25 person's part of the estate; (c) the extent to which a person
26 whose part of the estate is to be assessed, individually or
27 through counsel, actively participated in the proceeding; (d)
28 the potential benefit or detriment to a person's part of the
29 estate expected from the outcome of the proceeding; (e) the
30 relative strength or weakness of the merits of the claims,
31 defenses, or objections, if any, asserted by a person whose part
32 of the estate is to be assessed; (f) whether a person whose part
33 of the estate is to be assessed was a prevailing party with
34 respect to one or more claims, defenses or objections; (g)
35 whether a person whose part of the estate is to be assessed
36 unjustly caused an increase in the amount of attorney's fees and
37 costs incurred by the personal representative or other
38 interested persons in connection with the proceeding; and (h)
39 any other relevant fact, circumstance or equity. The court may
40 assess a person's part of the estate without finding that the
41 person engaged in bad faith, wrongdoing or frivolousness.

42 Section 2. Subsection (2) of Section 736.1005, Florida
43 Statutes, shall be amended to read:

44 736.1005; Attorney's fees for services to the trust.-

45 (2) ~~Whenever~~When attorney's fees are to be paid ~~out of~~
46 from the trust under subsection (1), s. 736.1007(5)(a), or when
47 the court assesses attorney's fees against a person's part of an
48 estate under s. 733.106(4) involving a pourover will and the

49 matter is interrelated with the trust but the person's part of
50 the estate is insufficient to fully pay the assessment, the
51 court, in its discretion, may direct from what part of the trust
52 the fees shall be paid. All or any part of attorney's fees to
53 be paid from the trust may be assessed against one or more
54 persons' part of the trust in such proportions as the court
55 finds to be just and proper. The court in the exercise of its
56 discretion may consider the following factors: (a) the relative
57 impact of an assessment or not on the estimated value of each
58 person's part of the trust; (b) the amount of attorney's fees to
59 be assessed against a person's part of the trust (c) the extent
60 to which a person whose part of the trust is to be assessed,
61 individually or through counsel, actively participated in the
62 proceeding; (d) the potential benefit or detriment to a person's
63 part of the trust expected from the outcome of the proceeding;
64 (e) the relative strength or weakness of the merits of the
65 claims, defenses, or objections, if any, asserted by a person
66 whose part of the trust is to be assessed; (f) whether a person
67 whose part of the trust is to be assessed was a prevailing party
68 with respect to one or more claims, defenses or objections; (g)
69 whether a person whose part of the trust is to be assessed
70 unjustly caused an increase in the amount of attorney's fees
71 incurred by the trustee or other persons in connection with the
72 proceeding; and (h) any other relevant fact, circumstance or

73 equity. The court may assess a person's part of the trust
74 without finding that the person engaged in bad faith, wrongdoing
75 or frivolousness.

76 Section 3. Subsection (2) of Section 736.1006, Florida
77 Statutes, shall be amended to read:

78 736.1006; Costs in trust proceedings.-

79 (2) ~~Whenever~~ When costs are to be paid ~~out of~~ from the
80 trust under subsection (1), or when the court assesses costs
81 against a person's part of an estate under s. 733.106(4)
82 involving a pourover will and the matter is interrelated with
83 the trust but that person's part of the estate is insufficient
84 to fully pay the assessment, the court, in its discretion, may
85 direct from what part of the trust the costs shall be paid. All
86 or any part of costs to be paid from the trust may be assessed
87 against one or more persons' part of the trust in such
88 proportions as the court finds to be just and proper. The court
89 in the exercise of its discretion may consider the factors set
90 forth in s. 736.1005(2) as they relate to costs to be paid from
91 the trust.

92 Section 4. This act shall take effect on July 1, 2014 and
93 shall apply to all proceedings filed on or after that date. The
94 law in effect prior to July 1, 2014 shall apply to proceedings
95 filed before July 1, 2014.

1 A bill to be entitled
 2 An act relating to trusts; amending ss. 736.0703 and
 3 736.1011, F.S.; limiting the liability of excluded
 4 trustees; providing an exception; authorizing trusts
 5 to provide for exculpation of excluded trustees under
 6 certain circumstances; providing an effective date.

7
 8 Be It Enacted by Legislature of State of Florida:

9
 10 Section 1. Subsection (9) of section 736.0703, Florida
 11 Statutes, is amended to read:

12 736.0703 Cotrustees.—

13 (9) If the terms of a trust ~~instrument~~ provide for the
 14 appointment of more than one trustee but confer upon one or more
 15 of the trustees, to the exclusion of the others, the power to
 16 direct or prevent specified actions of the trustees, the
 17 excluded trustees shall act in accordance with the exercise of
 18 the power. ~~Except in cases of willful misconduct on the part of~~
 19 ~~the trustee with the authority to direct or prevent actions of~~
 20 ~~the trustees of which the excluded trustee has actual knowledge,~~
 21 An excluded trustee is not liable, individually or as a
 22 fiduciary, for any consequence that results from compliance with
 23 the exercise of the power, regardless of the information
 24 available to the excluded trustee, unless with respect to the
 25 exercise of such power the excluded trustee has actual knowledge
 26 of willful misconduct by the trustee entrusted with the power to

27 direct or prevent actions of the excluded trustees. To the
 28 extent provided by terms of the trust, an excluded trustee may
 29 be exculpated from that liability even if the excluded trustee
 30 has actual knowledge of willful misconduct by the trustee
 31 entrusted with the power to direct or prevent actions of the
 32 excluded trustees. An excluded trustee has no duty or trustees.
 33 ~~The excluded trustees are relieved of any~~ obligation to review,
 34 inquire, investigate, or make recommendations or evaluations
 35 with respect to the exercise of the power. The trustee entrusted
 36 with ~~or trustees having~~ the power to direct or prevent actions
 37 of the excluded trustees shall be liable to the beneficiaries
 38 with respect to the exercise of the power as if the excluded
 39 trustees were not in office and shall have the exclusive
 40 obligation to account to and to defend any action brought by the
 41 beneficiaries with respect to the exercise of the power. This
 42 subsection does not exculpate an excluded trustee from liability
 43 arising from his or her willful misconduct.

44 Section 2. Subsection (3) is added to section 736.1011,
 45 Florida Statutes, to read:

46 736.1011 Exculpation of trustee.—

47 (3) This section does not apply to terms of a trust which
 48 exculpate an excluded trustee from liability for any consequence
 49 that results from compliance with the exercise of a power
 50 described in s. 736.0703(9).

51 Section 3. This act shall take effect July 1, 2014.

LEGISLATIVE POSITION
REQUEST FORM

GOVERNMENTAL AFFAIRS OFFICE

Date Form Received _____

GENERAL INFORMATION

Submitted By Real Property, Probate and Trust Law Section, Commercial Real Estate Committee
Burt Bruton, Vice Chair

Position Level The Florida Bar, RPPTL Section and Committee

CONTACTS

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Martha J. Edenfield, Dean Mead, 215 S. Monroe Street, Suite 815,

Board & Legislation Tallahassee, FL 32301 (850) 999-4100

Committee Appearance _____
Contacts Above

(List name, address and phone number)

Appearances

Before Legislators _____
Contacts Above

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

**Meetings with
Legislators/staff**

Contacts Above

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

PROPOSED ADVOCACY

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

If Applicable,

List The Following _____

(Bill or PCB#)

Indicate Position X Support

Oppose

(Bill or PCB Sponsor)

Technical Assistance Other _____

Proposed Wording of Position for Official Publication: Support issuance of separate property tax folio numbers for separately described portions of a multiple parcel building and provide for allocation of underlying land value among the separate building parcels, including an amendment of F.S. Chapter 193.

Reasons for Proposed Advocacy: As buildings with multiple parcels (each parcel designed to have a separate owner) become more common in urban areas in Florida, a recurring problem has been the inability of the separate parcel owners to obtain a separate tax folio number for each separately owned parcel and for the value of the underlying land to be properly allocated among the parcels. The process of separate tax folio numbers and allocation of underlying land value has been successfully implemented for decades in a similar context,

issuance of tax folio numbers for separate condominium units located in one condominium with allocation of underlying land values.

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

Others

(May attach list if
More than one)

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

REFERRALS TO OTHER SECTIONS, COMMITTEES OR LEGAL ORGANIZATIONS

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

Referrals

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

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

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

Please submit completed Legislative Position Request Form, along with attachments, to the Governmental Affairs Office of The Florida Bar. Upon receipt, staff will further coordinate the scheduling for final Bar action of your request which usually involves separate appearances before the Legislation Committee and the Board of Governors unless otherwise advised.

1 A bill to be entitled
2 An act relating to ad valorem taxation of multiple parcel
3 buildings; creating s. 193.0237, F.S.; providing an
4 effective date.

5
6 Be It Enacted by the Legislature of the State of Florida:

7
8 Section 1. Section 193.0237, Florida Statutes, is created
9 to read:

10 193.0237 Assessment of multiple parcel buildings.--

11 (1) An ad valorem tax or non-ad valorem assessment,
12 including a tax or assessment imposed by a county, municipality,
13 special district, or water management district, may not be
14 assessed separately against the land upon which a multiple parcel
15 building is located. The value of the land containing a multiple
16 parcel building, regardless of ownership, shall not be separately
17 assessed by the property appraiser but shall be allocated among
18 and included in the assessment of all the parcels in the multiple
19 parcel building.

20 (2) As used in this section, the term:

21 (a) "Multiple parcel building" means a building, other than
22 a condominium or cooperative, that contains separate parcels that
23 are vertically located, in whole or in part, on or over the same
24 land.

25 (b) "Parcel" means a portion of a multiple parcel building,
26 which portion is identified in a recorded instrument by a legal
27 description that is sufficient for record ownership and
28 conveyance by deed separately from any other portion of the
29 building.

30 (c) "Recorded instrument" means a declaration, covenant,
31 easement, deed, plat, agreement or other legal instrument, other

32 than a lease or mortgage or lien, describing one or more parcels
33 in a multiple parcel building and recorded in the public records
34 of the county in which the multiple parcel building is located.

35 (3) If a recorded instrument for a multiple parcel building
36 provides a method for allocating all of the land value to the
37 assessed values of the parcels in the building, then the property
38 appraiser shall allocate the land value among the parcels for
39 assessment purposes as provided in the recorded instrument. If a
40 land value allocation method is not provided in a recorded
41 instrument, then the property appraiser shall allocate all of the
42 land value among the parcels in a multiple parcel building for
43 assessment purposes in accordance with the relative vertical and
44 horizontal size each parcel bears to the size of the entire
45 multiple parcel building.

46 (4) A condominium or cooperative may be created within a
47 parcel in a multiple parcel building, and any land value
48 allocated to the assessed value of that parcel in accordance with
49 this section shall be further allocated among the condominium
50 units in that parcel in the manner required in s. 193.023(5), or
51 among the cooperative units in the manner required in s. 719.114.

52 (5) Each parcel in a multiple parcel building shall be
53 assigned a separate tax folio number, except to the extent that a
54 condominium or cooperative is created within any such parcel, in
55 which case a separate tax folio number shall be assigned to each
56 condominium unit or cooperative unit rather than to the parcel in
57 which they were created.

58 (6) The separate assessed valuations of each of the parcels
59 in a multiple parcel building shall not, in the aggregate, exceed
60 the just valuation, as required by s.4, Art. VII of the State
61 Constitution, of the building and the land upon which it is

62 | located as if such land and building constituted a single
63 | property for purposes of taxation.

64 | (7) This section applies to any land on which a multiple
65 | parcel building is substantially completed as of January 1 of the
66 | respective assessment year.

67 | Section 2. This act applies to assessments for the calendar
68 | year 2015 and subsequent years.

69 | Section 3. This act shall take effect upon becoming a law.

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

WHITE PAPER

**SEPARATE AD VALOREM TAXATION
OF A MULTIPLE PARCEL BUILDING**

I. SUMMARY

This proposed legislation provides for the separate assessment of separate portions of a multiple parcel building, which portions are vertically located, in whole or in part, on or over the same land. The proposed legislation directs county property appraisers to apportion the value of the underlying land and include the value of the underlying land in the assessed values of the separate parcels in the multiple parcel building.

II. CURRENT SITUATION

When multiple parcel owners share a single tax folio number, each owner's parcel is at risk of being lost as the result of a tax deed sale unless someone pays the entire single tax bill. Even if all of the parcels are vested in one owner, the same issue arises if the parcels have different mortgages, each mortgage lien on each parcel is at risk of being extinguished by the superior lien of real estate taxes unless the entire tax bill is paid. The primary purpose of this proposed legislation is to enable county property appraisers to assign separate tax folio numbers for each parcel in a multiple parcel building and to eliminate this concern.

Under current law (FS §193.023), the value of common elements or common areas in a condominium or cooperative is not separately assessed for ad valorem taxes or other governmental assessments; rather, the value of such property is included in the assessment of each unit. Similarly, FS §193.0235 provides that common elements in a subdivision are not separately assessed but the value of such property is included in the assessments for the subdivision lots. These provisions are exceptions to the general rule that the property appraiser's assessment roll must include certain land characteristic details, including the land value (FS §193.114(2)(j)).

There is no statute in Florida prohibiting the vertical subdivision of real property, and a number of multiple parcel buildings in Miami-Dade County have been developed or are currently being developed without utilizing a condominium regime. Typically, the separate parcels are described by using vertical elevation information and are based on the dimensions of as-built improvements. Some of the parcels may include a portion of the underlying land, but the common characteristic of these projects is the vertical sharing of the land, in whole or in part, by two or more portions of the improvements located on or above the same land.

The Florida Statutes do not guide the county property appraisers in assigning separate tax folio numbers for the separately owned parcels or (unlike the condominium and subdivision

exceptions noted above) in allocating the value of the underlying land among those parcels located on or above the same land. Because of this statutory silence, Joseph Ruiz, the general counsel for the Miami-Dade Property Appraiser, reached out for RPPTL Section help in addressing the need for separate assessments for such multiple parcel buildings.

Quoting from Mr. Ruiz's email: "[T]he issue of air rights/ vertical subdivisions has become a hot topic, especially in light of the upswing in construction in South Florida. By way of background, where there is a divided-ownership structure, the Miami-Dade County Property Appraiser's Office does not issue separate folio numbers for each ownership interest, absent the use of a condominium structure. As a result, multiple owners and properties within a single structure are issued a single ad valorem tax bill. While I can only speak for MDC, I am almost sure the same goes for all counties throughout the state. This can become burdensome for mixed-use high rise developments who choose not to avail themselves of a condominium structure, which may not provide them the flexibility required for that type of use."

As an example, the existing Four Seasons Hotel project on Brickell Avenue in Miami is encumbered by a recorded document that establishes a separate hotel parcel, office parcel, spa parcel, and two separate condominium parcels (one for the residences and one for condominium hotel units), with each parcel having separate ownership, notwithstanding that they are all contained in a single structure. Although separate tax folios were created for the condominium units, the other separately owned parcels of the structure share a single tax folio. Other existing and proposed projects in Miami-Dade County involve structures combining multiple uses - retail, hotel, office, parking, residential etc., each of which should be capable of separate ownership and entitled to their own tax folio assignment.

III. EFFECT OF PROPOSED CHANGES

A. General Overview

This proposed legislation is intended to help county property appraisers respond to the market demand for separate tax folio numbers for the separate parcels located in a multiple parcel building. It is modeled on the similar existing statutory provisions dealing with the taxation of common elements and common areas in condominium projects and horizontal lot subdivisions (FS §193.023 and §193.0235).

B. Point by Point Analysis

1. Allocation of land value among parcels.

Proposed new subsection 193.0237(1) would provide that the value of the land underlying a mixed parcel building is not separately assessable, but must be apportioned among the various parcels in the building and included in their assessed values. Under subsection (3), the allocation of land value would follow the apportionment scheme in the recorded instrument that describes the separate parcels, by analogy to the existing method of distributing common element value among condominium units in accordance with their respective percentages established in the recorded

declaration of condominium. If no apportionment scheme is provided in a recorded instrument, then this statute directs the property appraiser to allocate the land value among the parcels in proportion to their vertical and horizontal size (i.e., the amount of “airspace”) relative to the building as a whole. Either way, this statute directs that ALL of the land value must be allocated among the parcels, so there is no opportunity for lost tax revenue from undervaluing the land in the final aggregate assessed parcel values.

2. Separate tax folio numbers.

Separate taxation is a key concern when different owners own different parcels within a multiple parcel building. Subsection (5) provides that each parcel in a multiple parcel building must be assigned its own tax folio number. If a condominium or cooperative is created within any such parcel, then the respective condominium or cooperative units (rather than the parcel) would receive the separate folio number. Subsection (4) provides that the land value apportioned to a parcel containing a condominium or cooperative is to be further apportioned among the units in accordance with existing law. Subsection (6) provides that the aggregate of the assessed parcel values cannot exceed the land and building value that would be assigned if the building did not comprise multiple parcels.

3. Definitions.

Subsection (2) of the proposed statute defines certain key terms. The term “multiple parcel building” means a building, other than a condominium or a cooperative, that contains separate “parcels” that are vertically located, in whole or in part, over the same land. The term “parcel” means a portion of such a building, which portion is identified in a “recorded instrument” by a legal description that is sufficient for record ownership and conveyance by deed separately from any other portion of the building. The term “recorded instrument” means a declaration, covenant, easement, deed, plat, agreement or other legal instrument, other than a lease or mortgage or lien, describing one or more parcels in a multiple parcel building and recorded in the county where the building is located.

These definitions embody some key concepts. One is that the statute excludes condominiums and cooperatives. Another is that the statute applies only if two or more portions of the building share, at least in part, a vertical location on or over the same land. Townhouse developments, therefore, would not fall under this definition because each unit sits on its own parcel.

The definition of “recorded instrument” encompasses a variety of instruments that are typically recorded in connection with a multiple parcel building, such as a declaration of easements and/or covenants governing the operation of the project. The recorded instrument could be as simple, however, as a deed conveying “air space” with defined elevations. Instruments such as leases, mortgages or liens are excluded from the definition, however, as they typically do not contemplate separate ownership of the parcels and could impose an unnecessary burden on property appraisers. Although this proposed solution for separate tax folios will be favored by mortgage holders, it will take more than a mortgage to produce a separate tax folio number for the lender’s benefit (say, a mortgage PLUS a declaration of covenants).

Another key concept is that the recorded instrument need not actually create separate ownership of the separate parcels; rather, it must contain a sufficient legal description for separate ownership of one or more parcels. In this regard, the definition contemplates that the recorded instrument will result in separate tax folio numbers much like a condominium declaration or subdivision plat, even though the developer initially owns all of the units. Unlike a condominium declaration or subdivision plat, however, the recorded instrument will not result in discrete unit or lot identification numbers that are sufficient for a short form of legal description. Someday Florida may adopt three-dimensional subdivision platting, but that will not result from this proposed legislation. If three-dimensional platting is ever adopted in Florida, however, this proposed tax assessment statute will still work because it contemplates that a plat can be a “recorded instrument.”

4. Timing.

Under existing law, improvements are not included in the assessed value of real property until they are substantially completed. Similarly, this separate folio statute does not apply in a particular assessment year unless the multiple parcel building is substantially completed on January 1 of the assessment year. As a practical matter, most multiple ownership buildings are completed before any document containing as-built legal descriptions are recorded. As a result, this proposed legislation will not require property appraisers to assign tax folio numbers for pure “air space” parcels containing no completed improvements.

The effective date of the legislation need not be as early as “upon becoming a law” as indicated in this draft, and it would apply to tax years beginning in 2015. If the legislation is not adopted in 2014, then the first applicable tax year would move back accordingly.

IV. FISCAL IMPACT ON STATE AND LOCAL GOVERNMENTS

The proposal does not have a fiscal impact on state or local governments because it does not increase or reduce the assessed values of any property that would otherwise apply if a building is not a multiple parcel building. Implementation costs should not be material, as there are only a limited number of such projects existing now, and most if not all are already known to the county property appraisers because the developers have previously requested separate tax numbers.

V. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR

This legislation benefit the private sector by encouraging and facilitating the development of multiple parcel buildings, making more efficient usage of limited land resources in urbanized areas.

VI. CONSTITUTIONAL ISSUES

It is anticipated that this legislation will not raise constitutional issues.

V. OTHER INTERESTED PARTIES

Property Appraisers
Tax Collectors
Florida Board of Realtors,
Department of Revenue
Florida Land Title Association and its agents,
Florida Bankers Association

LEGISLATIVE POSITION
REQUEST FORM

GOVERNMENTAL AFFAIRS OFFICE

Date Form Received _____

GENERAL INFORMATION

Submitted By Real Property, Probate and Trust Law Section, Condominium and Planned Development Committee
Steven H. Mezer, 1801 N. Highland Avenue, Tampa, FL 33602

Position Level The Florida Bar, RPPTL Section and Committee

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Committee Appearance _____ Contacts Above
(List name, address and phone number)

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

Meetings with Legislators/staff _____ Contacts Above
(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 _____

Indicate Position (Bill or PCB#) _____ Support Oppose (Bill or PCB Sponsor) Technical Assistance Other _____

Proposed Wording of Position for Official Publication: Support amendments to the Florida Condominium Act which set forth the rights and obligations of purchasers and lenders that acquire multiple units, but is not a creating developer of the condominium, including creating a Part VIII, and eliminating application of Part VII, of the Condominium Act to transactions recorded after the effective date July 1, 2016.

Reasons for Proposed Advocacy:

Lessons learned from the temporary provisions of Part VII of the Condominium Act which successfully assisted in saving “distressed condominiums” when a developer fails to continue to sell units, by encouraging buyers to

acquire the unsold units, are incorporated into a permanent proposal which also seeks to cure the issues arising when buyers who are not traditional developers acquire many units including liability for construction warranties, assessments and transition obligations.

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: The Bar previously supported extension of the termination date of Part VII of the Condominium Act to allow for the consideration of this proposed legislation.

Others

(May attach list if
More than one)

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

REFERRALS TO OTHER SECTIONS, COMMITTEES OR LEGAL ORGANIZATIONS

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

Referrals

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

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

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

Please submit completed Legislative Position Request Form, along with attachments, to the Governmental Affairs Office of The Florida Bar. Upon receipt, staff will further coordinate the scheduling for final Bar action of your request which usually involves separate appearances before the Legislation Committee and the Board of Governors unless otherwise advised.

1 Section 718.103 of the Florida Statute is amended to read as
2 follows:

3
4 718.103 Definitions.—As used in this chapter, the term:

5 (1) "Assessment" means a share of the funds which are
6 required for the payment of common expenses, which from time
7 to time is assessed against the unit owner.

8 (2) "Association" means, in addition to any entity
9 responsible for the operation of common elements owned in
10 undivided shares by unit owners, any entity which operates or
11 maintains other real property in which unit owners have use
12 rights, where membership in the entity is composed
13 exclusively of unit owners or their elected or appointed
14 representatives and is a required condition of unit
15 ownership.

16 (3) "Association property" means that property, real and
17 personal, which is owned or leased by, or is dedicated by a
18 recorded plat to, the association for the use and benefit of
19 its members.

20 (4) "Board of administration" or "board" means the board
21 of directors or other representative body which is
22 responsible for administration of the association.

23 (5) "Bulk Unit purchaser" means a person who acquires
24 title to the greater of (a) eight units or (b) 20% of the
25 units, that will be operated ultimately by the same
26 association. An acquirer of condominium units is not a bulk
27 unit purchaser if any transfer to such acquirer was made:

28 (a) Before July 1, 2015;

29 (b) With the intent to defraud or materially harm any
30 purchaser, unit owner, or the association;

31 (c) To a person or limited liability company who
32 would be an insider of the bulk unit purchaser or the
33 developer under s. 726.102; or

34 (d) As a fraudulent transfer under ch. 726.

35 (~~65~~) "Buyer" means a person who purchases a condominium
36 unit. The term "purchaser" may be used interchangeably with
37 the term "buyer."

38 (~~76~~) "Bylaws" means the bylaws of the association as they
39 are amended from time to time.

40 (~~87~~) "Committee" means a group of board members, unit
41 owners, or board members and unit owners appointed by the
42 board or a member of the board to make recommendations to the
43 board regarding the proposed annual budget or to take action
44 on behalf of the board.

45 (~~98~~) "Common elements" means the portions of the
46 condominium property not included in the units.

47 (~~109~~) "Common expenses" means all expenses properly incurred
48 by the association in the performance of its duties,
49 including expenses specified in s. 718.115.

50 (~~110~~) "Common surplus" means the amount of all receipts or
51 revenues, including assessments, rents, or profits, collected
52 by a condominium association which exceeds common expenses.

53 (~~121~~) "Condominium" means that form of ownership of real
54 property created pursuant to this chapter, which is comprised
55 entirely of units that may be owned by one or more persons,
56 and in which there is, appurtenant to each unit, an undivided
57 share in common elements.

58 (~~132~~) "Condominium parcel" means a unit, together with the
59 undivided share in the common elements appurtenant to the
60 unit.

61 (~~143~~) "Condominium property" means the lands, leaseholds,
62 and personal property that are subjected to condominium
63 ownership, whether or not contiguous, and all improvements
64 thereon and all easements and rights appurtenant thereto
65 intended for use in connection with the condominium.

66 (154) "Conspicuous type" means bold type in capital letters
67 no smaller than the largest type, exclusive of headings, on
68 the page on which it appears and, in all cases, at least 10-
69 point type. Where conspicuous type is required, it must be
70 separated on all sides from other type and print. Conspicuous
71 type may be used in a contract for purchase and sale of a
72 unit, a lease of a unit for more than 5 years, or a
73 prospectus or offering circular only where required by law.

74 (165) "Declaration" or "declaration of condominium" means
75 the instrument or instruments by which a condominium is
76 created, as they are from time to time amended.

77 (176) "Developer" means a person who creates a condominium
78 or offers condominium parcels for sale in the ordinary course
79 of business, but does not include:

80 (a) An owner or lessee of a condominium or
81 cooperative unit who has acquired the unit for his or her
82 own occupancy;

83 (b) A cooperative association that creates a
84 condominium by conversion of an existing residential
85 cooperative after control of the association has been
86 transferred to the unit owners if, following the
87 conversion, the unit owners are the same persons who were
88 unit owners of the cooperative and no units are offered for
89 sale or lease to the public as part of the plan of
90 conversion;

91 (c) A bulk unit purchaser~~assignee or bulk buyer~~ as
92 defined in s. 718.1703(5);

93 (d) A lender unit purchaser as defined in s.
94 718.103(20);

95 (e) A person who acquires title to seven or fewer
96 units operated by the same association consisting of 40 or
97 fewer units or less or who acquires title to less than 20%
98 of the units operated by the same association consisting of

99 more than 40 units, whether or not that person or entity
100 offers any of those units for sale; or

101 (~~f~~) A state, county, or municipal entity acting as a
102 lessor and not otherwise named as a developer in the
103 declaration of condominium.

104 (187) "Division" means the Division of Florida Condominiums,
105 Timeshares, and Mobile Homes of the Department of Business
106 and Professional Regulation.

107 (198) "Land" means the surface of a legally described parcel
108 of real property and includes, unless otherwise specified in
109 the declaration and whether separate from or including such
110 surface, airspace lying above and subterranean space lying
111 below such surface. However, if so defined in the
112 declaration, the term "land" may mean all or any portion of
113 the airspace or subterranean space between two legally
114 identifiable elevations and may exclude the surface of a
115 parcel of real property and may mean any combination of the
116 foregoing, whether or not contiguous, or may mean a
117 condominium unit.

118 (20) "Lender unit purchaser" means any person, or its
119 successors or assigns, which held a mortgage from a developer
120 or from a bulk unit purchaser, on the greater of (a) eight
121 units or (b) 20% of the units that will be operated
122 ultimately by the same association, and subsequently obtained
123 title to such units through foreclosure or deed in lieu of
124 foreclosure of such mortgage. However, a mortgagee that
125 acquires and sells units to one or more bulk unit purchasers
126 is not a developer or a lender unit purchaser with respect to
127 such sale.

128 (2119) "Limited common elements" means those common elements
129 which are reserved for the use of a certain unit or units to
130 the exclusion of all other units, as specified in the
131 declaration.

132 (220) "Multicondominium" means a real estate development
133 containing two or more condominiums, all of which are
134 operated by the same association.

135 (231) "Operation" or "operation of the condominium" includes
136 the administration and management of the condominium
137 property.

138 (242) "Rental agreement" means any written agreement, or
139 oral agreement if for less duration than 1 year, providing
140 for use and occupancy of premises.

141 (253) "Residential condominium" means a condominium
142 consisting of two or more units, any of which are intended
143 for use as a private temporary or permanent residence, except
144 that a condominium is not a residential condominium if the
145 use for which the units are intended is primarily commercial
146 or industrial and not more than three units are intended to
147 be used for private residence, and are intended to be used as
148 housing for maintenance, managerial, janitorial, or other
149 operational staff of the condominium. With respect to a
150 condominium that is not a timeshare condominium, a
151 residential unit includes a unit intended as a private
152 temporary or permanent residence as well as a unit not
153 intended for commercial or industrial use. With respect to a
154 timeshare condominium, the timeshare instrument as defined in
155 s. 721.05(35) shall govern the intended use of each unit in
156 the condominium. If a condominium is a residential
157 condominium but contains units intended to be used for
158 commercial or industrial purposes, then, with respect to
159 those units which are not intended for or used as private
160 residences, the condominium is not a residential condominium.
161 A condominium which contains both commercial and residential
162 units is a mixed-use condominium and is subject to the
163 requirements of s. 718.404.

164 (264) "Special assessment" means any assessment levied
165 against a unit owner other than the assessment required by a
166 budget adopted annually.

167 (275) "Timeshare estate" means any interest in a unit under
168 which the exclusive right of use, possession, or occupancy of
169 the unit circulates among the various purchasers of a
170 timeshare plan pursuant to chapter 721 on a recurring basis
171 for a period of time.

172 (286) "Timeshare unit" means a unit in which timeshare
173 estates have been created.

174 (297) "Unit" means a part of the condominium property which
175 is subject to exclusive ownership. A unit may be in
176 improvements, land, or land and improvements together, as
177 specified in the declaration.

178 (3028) "Unit owner" or "owner of a unit" means a record owner
179 of legal title to a condominium parcel.

180 (3129) "Voting certificate" means a document which designates
181 one of the record title owners, or the corporate,
182 partnership, or entity representative, who is authorized to
183 vote on behalf of a condominium unit that is owned by more
184 than one owner or by any entity.

185 (320) "Voting interests" means the voting rights distributed
186 to the association members pursuant to s. 718.104(4). In a
187 multicondominium association, the voting interests of the
188 association are the voting rights distributed to the unit
189 owners in all condominiums operated by the association. On
190 matters related to a specific condominium in a
191 multicondominium association, the voting interests of the
192 condominium are the voting rights distributed to the unit
193 owners in that condominium.

194 Section 718.112(2)(f)(2) is amended to read as follows:

195 (2) (a) In addition to annual operating expenses, the
196 budget must include reserve accounts for capital expenditures
197 and deferred maintenance. These accounts must include, but
198 are not limited to, roof replacement, building painting, and
199 pavement resurfacing, regardless of the amount of deferred

200 maintenance expense or replacement cost, and for any other
201 item that has a deferred maintenance expense or replacement
202 cost that exceeds \$10,000. The amount to be reserved must be
203 computed using a formula based upon estimated remaining
204 useful life and estimated replacement cost or deferred
205 maintenance expense of each reserve item. The association may
206 adjust replacement reserve assessments annually to take into
207 account any changes in estimates or extension of the useful
208 life of a reserve item caused by deferred maintenance. This
209 subsection does not apply to an adopted budget in which the
210 members of an association have determined, by a majority vote
211 at a duly called meeting of the association, to provide no
212 reserves or less reserves than required by this subsection.
213 ~~However, prior~~

214 (b) Prior to turnover of control of an association by a
215 developer to unit owners other than a developer pursuant to
216 s. 718.301, the developer may vote the voting interests
217 allocated to its units to waive the reserves or reduce the
218 funding of reserves through the period expiring at the end
219 of the second fiscal year after the fiscal year in which
220 the certificate of a surveyor and mapper is recorded
221 pursuant to s. 718.104(4)(e) or an instrument that
222 transfers title to a unit in the condominium which is not
223 accompanied by a recorded assignment of developer rights in
224 favor of the grantee of such unit is recorded, whichever
225 occurs first, after which time reserves may be waived or
226 reduced only upon the vote of a majority of all
227 nondeveloper voting interests voting in person or by
228 limited proxy at a duly called meeting of the association.
229 If a meeting of the unit owners has been called to
230 determine whether to waive or reduce the funding of
231 reserves, and no such result is achieved or a quorum is not
232 attained, the reserves included in the budget shall go into
233 effect. After the turnover, the developer may vote its
234 voting interest to waive or reduce the funding of reserves.

235 (c) Each bulk unit purchaser or lender unit purchaser may
236 vote the voting interests allocated to its units to waive
237 reserves or reduce the funding of reserves for the first
238 two fiscal years following the first conveyance of a unit
239 to the bulk unit purchaser or lender unit purchaser. After
240 these two fiscal years, each bulk unit purchaser or lender
241 unit purchaser shall not vote its voting interests to waive
242 reserves or reduce the funding of reserves unless or until
243 the bulk unit purchaser or lender unit purchaser then holds
244 less than a majority of the voting interests in the
245 association.

246 (d) A bulk unit purchaser or lender unit purchaser shall
247 not be permitted to transfer its right to vote to waive
248 reserves or reduce the funding of reserves to other bulk
249 unit purchasers or lender unit purchasers in an effort to
250 extend the time period in paragraph 2(c).

251 (e) There may be multiple bulk unit purchaser members of
252 an association simultaneously or successively. There may
253 be one or more bulk unit purchasers while the developer
254 still owns units operated by the association.

255 Section 718.116(12) of the Florida Statute is added as
256 follows:

257 (12) Bulk Unit Purchaser and Lender Unit Purchaser
258 Assessment Liability

259 (A) A bulk unit purchaser is liable for all assessments on
260 its units which come due while the bulk unit purchaser holds
261 title to such units. Additionally, the bulk unit purchaser is
262 jointly and severally liable with the previous owner for all
263 unpaid regular periodic assessments and special assessments
264 which became due prior to the acquisition of title, all other
265 monetary obligations accrued which are secured by the
266 association's lien, and all costs advanced by the association
267 for the maintenance and repair of the units acquired by the
268 bulk unit purchaser.

269 (B) The liability of a lender unit purchaser or its
270 successors or assignees for units it owns is limited to the
271 lesser of the unit's unpaid common expenses and regular
272 periodic assessments which accrued or came due during the 12
273 months immediately preceding the lender unit purchaser's
274 acquisition of title and for which payment in full has not
275 been received by the association or one percent of the
276 original mortgage debt. The lender unit purchaser acquiring
277 title shall comply with s. 718.116(1)(c).

278 (C) A director who has been elected or appointed by a bulk
279 unit purchaser shall be automatically suspended from board
280 service thirty days following the failure of the bulk unit
281 purchaser to timely pay any monetary obligations on any of
282 the units it owns. The remaining director or directors shall
283 be entitled to temporarily fill the vacancies created by the
284 suspension of directors. Once the bulk unit purchaser has
285 cured all outstanding delinquencies on any units it owns, the
286 suspended director(s) elected or appointed by the bulk unit
287 purchaser shall resume service on the board for the unexpired
288 term(s) and the person temporarily appointed shall no longer
289 serve.

290 Section 718.301 of the Florida Statute is amended to read as
291 follows:

292 718.301 Transfer of association control; claims of defect
293 by association.-

294 (1) If unit owners other than the developer own 15 percent
295 or more of the units ~~in a condominium~~ that will be operated
296 ultimately by an association, the unit owners other than the
297 developer are entitled to elect at least one-third of the
298 members of the board of administration of the association.
299 Unit owners other than the developer are entitled to elect at
300 least a majority of the members of the board of
301 administration of an association, upon the first to occur of
302 any of the following events:

303 (a) Three years after 50 percent of the units that will be
304 operated ultimately by the association have been conveyed to
305 purchasers, including conveyances to bulk unit purchasers;

306 (b) Three months after 90 percent of the units that will
307 be operated ultimately by the association have been conveyed
308 to purchasers, including conveyances to bulk unit purchasers;

309 (c) When all the units that will be operated ultimately by
310 the association have been completed, some of them have been
311 conveyed to purchasers, including conveyances to bulk unit
312 purchasers, and none of the others are being offered for sale
313 by the developer and any bulk unit purchaser in the ordinary
314 course of business;

315 (d) When some of the units have been conveyed to
316 purchasers, including conveyances to bulk unit purchasers,
317 and none of the others are being constructed or offered for
318 sale by the developer in the ordinary course of business;

319 (e) When the developer files a petition seeking protection
320 in bankruptcy;

321 (f) When a bulk unit purchaser owning a majority of the
322 units that will be operated ultimately by the same
323 association files a petition seeking protection in
324 bankruptcy;

325 (~~g~~) When a receiver for the developer is appointed by a
326 circuit court and is not discharged within 30 days after such
327 appointment, unless the court determines within 30 days after
328 appointment of the receiver that transfer of control would be
329 detrimental to the association or its members; or

330 (h) When a receiver for a bulk unit purchaser owning a
331 majority of the units that will be operated ultimately by an
332 association is appointed by a circuit court and is not
333 discharged within 30 days after such appointment, unless the
334 court determines within 30 days after appointment of the

335 receiver that transfer of control would be detrimental to the
336 association or its members; or

337 (i) Five years after the date of recording of the first
338 conveyance to a bulk unit purchaser owning a majority of the
339 units that will be operated ultimately by an association.
340 Notwithstanding that unit owners other than the developer
341 have elected a majority of the members of the board of
342 administration and s. 718.112(2)(f)2, five years after the
343 date of recording of the first conveyance of a unit to a bulk
344 unit purchaser owning a majority of the units, a bulk unit
345 purchaser may exercise the right to vote for each unit owned
346 by the bulk unit purchaser in the same manner as any other
347 unit owner, except for the purposes of reacquiring control of
348 the association or electing or appointing a majority of
349 members of the board of administration.

350 (jg) Seven years after the date of the recording of the
351 certificate of a surveyor and mapper pursuant to s.
352 718.104(4)(e) or the recording of an instrument that
353 transfers title to a unit in the condominium which is not
354 accompanied by a recorded assignment of developer rights in
355 favor of the grantee of such unit, whichever occurs first;
356 or, in the case of an association that may ultimately operate
357 more than one condominium, 7 years after the date of the
358 recording of the certificate of a surveyor and mapper
359 pursuant to s. 718.104(4)(e) or the recording of an
360 instrument that transfers title to a unit which is not
361 accompanied by a recorded assignment of developer rights in
362 favor of the grantee of such unit, whichever occurs first,
363 for the first condominium it operates; or, in the case of an
364 association operating a phase condominium created pursuant to
365 s. 718.403, 7 years after the date of the recording of the
366 certificate of a surveyor and mapper pursuant to s.
367 718.104(4)(e) or the recording of an instrument that
368 transfers title to a unit which is not accompanied by a
369 recorded assignment of developer rights in favor of the
370 grantee of such unit, whichever occurs first.

371 ⁴The developer is entitled to elect at least one member of the
372 board of administration of an association as long as the
373 developer holds for sale in the ordinary course of business
374 at least 5 percent, in condominiums with fewer than 500
375 units, and 2 percent, in condominiums with more than 500
376 units, of the units in a condominium operated by the
377 association. After the developer relinquishes control of the
378 association, the developer may exercise the right to vote any
379 developer-owned units in the same manner as any other unit
380 owner except for purposes of reacquiring control of the
381 association or selecting the majority members of the board of
382 administration.

383 (2) If a bulk unit purchaser elected a majority of the
384 board of administration and thereafter unit owners elected a
385 majority as provided by this section, the bulk unit purchaser
386 must deliver to the association all of the items listed in s.
387 718.301(4). However, the bulk unit purchaser is not required
388 to deliver items that were never in the possession of the
389 bulk unit purchaser. In conjunction with the acquisition of
390 units, a bulk unit purchaser shall undertake a good faith
391 effort to obtain the items that must be delivered to the
392 association pursuant to s. 718.301(4). If the bulk unit
393 purchaser is not able to obtain such items, the bulk unit
394 purchaser must deliver a certificate in writing to the
395 association that names or describes the items that were not
396 obtainable by the bulk unit purchaser and the good faith
397 efforts that were undertaken to obtain the items. Delivery
398 of the certificate relieves the bulk unit purchaser of
399 responsibility for delivering the documents and materials
400 referenced in the certificate as otherwise required by s.
401 718.301. The responsibility of the bulk unit purchaser for
402 an audit required by s. 718.301(4)(c) commences as of the
403 date on which the bulk unit purchaser elected or appointed a
404 majority of the members of the board of administration and
405 ends as of the date the bulk unit purchaser no longer
406 controls the board.

407 (32) Within 75 days after the unit owners other than the
408 developer are entitled to elect a member or members of the
409 board of administration of an association, the association
410 shall call, and give not less than 60 days' notice of an
411 election for the members of the board of administration. The
412 election shall proceed as provided in s. 718.112(2)(d). The
413 notice may be given by any unit owner if the association
414 fails to do so. Upon election of the first unit owner other
415 than the developer to the board of administration, the
416 developer shall forward to the division the name and mailing
417 address of the unit owner board member.

418 (43) If a developer holds units for sale in the ordinary
419 course of business, none of the following actions may be
420 taken without approval in writing by the developer:

421 (a) Assessment of the developer as a unit owner for
422 capital improvements.

423 (b) Any action by the association that would be
424 detrimental to the sales of units by the developer.
425 However, an increase in assessments for common expenses
426 without discrimination against the developer shall not be
427 deemed to be detrimental to the sales of units.

428 (54) At the time that unit owners other than the developer
429 elect a majority of the members of the board of
430 administration of an association, the developer shall
431 relinquish control of the association, and the unit owners
432 shall accept control. Simultaneously, or for the purposes of
433 paragraph (c) not more than 90 days thereafter, the developer
434 shall deliver to the association, at the developer's expense,
435 all property of the unit owners and of the association which
436 is held or controlled by the developer, including, but not
437 limited to, the following items, if applicable, as to each
438 condominium operated by the association:

439 (a) 1. The original or a photocopy of the recorded
440 declaration of condominium and all amendments thereto. If a

441 photocopy is provided, it must be certified by affidavit of
442 the developer or an officer or agent of the developer as
443 being a complete copy of the actual recorded declaration.

444 2. A certified copy of the articles of incorporation
445 of the association or, if the association was created prior
446 to the effective date of this act and it is not
447 incorporated, copies of the documents creating the
448 association.

449 3. A copy of the bylaws.

450 4. The minute books, including all minutes, and
451 other books and records of the association, if any.

452 5. Any house rules and regulations that have been
453 promulgated.

454 (b) Resignations of officers and members of the board of
455 administration who are required to resign because the
456 developer is required to relinquish control of the
457 association.

458 (c) The financial records, including financial statements
459 of the association, and source documents from the
460 incorporation of the association through the date of
461 turnover. The records must be audited for the period from
462 the incorporation of the association or from the period
463 covered by the last audit, if an audit has been performed
464 for each fiscal year since incorporation, by an independent
465 certified public accountant. All financial statements must
466 be prepared in accordance with generally accepted
467 accounting principles and must be audited in accordance
468 with generally accepted auditing standards, as prescribed
469 by the Florida Board of Accountancy, pursuant to chapter
470 473. The accountant performing the audit shall examine to
471 the extent necessary supporting documents and records,
472 including the cash disbursements and related paid invoices
473 to determine if expenditures were for association purposes

474 and the billings, cash receipts, and related records to
475 determine that the developer was charged and paid the
476 proper amounts of assessments.

477 (d) Association funds or control thereof.

478 (e) All tangible personal property that is property of the
479 association, which is represented by the developer to be
480 part of the common elements or which is ostensibly part of
481 the common elements, and an inventory of that property.

482 (f) A copy of the plans and specifications utilized in the
483 construction or remodeling of improvements and the
484 supplying of equipment to the condominium and in the
485 construction and installation of all mechanical components
486 serving the improvements and the site with a certificate in
487 affidavit form of the developer or the developer's agent or
488 an architect or engineer authorized to practice in this
489 state that such plans and specifications represent, to the
490 best of his or her knowledge and belief, the actual plans
491 and specifications utilized in the construction and
492 improvement of the condominium property and for the
493 construction and installation of the mechanical components
494 serving the improvements. If the condominium property has
495 been declared a condominium more than 3 years after the
496 completion of construction or remodeling of the
497 improvements, the requirements of this paragraph do not
498 apply.

499 (g) A list of the names and addresses of all contractors,
500 subcontractors, and suppliers utilized in the construction
501 or remodeling of the improvements and in the landscaping of
502 the condominium or association property which the developer
503 had knowledge of at any time in the development of the
504 condominium.

505 (h) Insurance policies.

- 506 (i) Copies of any certificates of occupancy that may have
507 been issued for the condominium property.
- 508 (j) Any other permits applicable to the condominium
509 property which have been issued by governmental bodies and
510 are in force or were issued within 1 year prior to the date
511 the unit owners other than the developer took control of
512 the association.
- 513 (k) All written warranties of the contractor,
514 subcontractors, suppliers, and manufacturers, if any, that
515 are still effective.
- 516 (l) A roster of unit owners and their addresses and
517 telephone numbers, if known, as shown on the developer's
518 records.
- 519 (m) Leases of the common elements and other leases to
520 which the association is a party.
- 521 (n) Employment contracts or service contracts in which the
522 association is one of the contracting parties or service
523 contracts in which the association or the unit owners have
524 an obligation or responsibility, directly or indirectly, to
525 pay some or all of the fee or charge of the person or
526 persons performing the service.
- 527 (o) All other contracts to which the association is a
528 party.
- 529 (p) A report included in the official records, under seal
530 of an architect or engineer authorized to practice in this
531 state, attesting to required maintenance, useful life, and
532 replacement costs of the following applicable common
533 elements comprising a turnover inspection report:
- 534 1. Roof.
 - 535 2. Structure.
 - 536 3. Fireproofing and fire protection systems.

- 537 4. Elevators.
- 538 5. Heating and cooling systems.
- 539 6. Plumbing.
- 540 7. Electrical systems.
- 541 8. Swimming pool or spa and equipment.
- 542 9. Seawalls.
- 543 10. Pavement and parking areas.
- 544 11. Drainage systems.
- 545 12. Painting.
- 546 13. Irrigation systems.

547 (q) A copy of the certificate of a surveyor and mapper
548 recorded pursuant to s. 718.104(4)(e) or the recorded
549 instrument that transfers title to a unit in the
550 condominium which is not accompanied by a recorded
551 assignment of developer rights in favor of the grantee of
552 such unit, whichever occurred first.

553 (65) If, during the period prior to the time that the
554 developer relinquishes control of the association pursuant to
555 subsection (6), any provision of the Condominium Act or any
556 rule promulgated thereunder is violated by the association,
557 the developer is responsible for such violation and is
558 subject to the administrative action provided in this chapter
559 for such violation or violations and is liable for such
560 violation or violations to third parties. This subsection is
561 intended to clarify existing law.

562 (76) Prior to the developer relinquishing control of the
563 association pursuant to subsection (6), actions taken by
564 members of the board of administration designated by the
565 developer are considered actions taken by the developer, and

566 the developer is responsible to the association and its
567 members for all such actions.

568 (87) In any claim against a developer by an association
569 alleging a defect in design, structural elements,
570 construction, or any mechanical, electrical, fire protection,
571 plumbing, or other element that requires a licensed
572 professional for design or installation under chapter 455,
573 chapter 471, chapter 481, chapter 489, or chapter 633, such
574 defect must be examined and certified by an appropriately
575 licensed Florida engineer, design professional, contractor,
576 or otherwise licensed Florida individual or entity.

577 (98) The division has authority to adopt rules pursuant to
578 the Administrative Procedure Act to ensure the efficient and
579 effective transition of an Association from developer or bulk
580 unit purchaser to the establishment of a unit owner
581 controlled association.

582 Section 718.302 is amended to read as follows:

583 718.302 Agreements entered into by the association.—

584 (1) Any grant or reservation made by a declaration, lease,
585 or other document, and any contract made by an association
586 prior to assumption of control of the association by unit
587 owners other than the developer, a bulk unit purchaser, or a
588 lender unit purchaser, that provides for operation,
589 maintenance, or management of a condominium association or
590 property serving the unit owners of a condominium shall be
591 fair and reasonable, and such grant, reservation, or contract
592 may be canceled by unit owners other than the developer, or a
593 bulk unit purchaser, provided that a lender unit purchaser
594 may not vote on cancellation of a grant, reservation, or
595 contract made by an association while under control of that
596 lender unit purchaser.

597 (a) If the association operates only one condominium and
598 the unit owners other than the developer, a bulk unit

599 purchaser, or a lender unit purchaser, have assumed control
600 of the association, or if unit owners other than the
601 developer, a bulk unit purchaser, or a lender unit
602 purchaser, own not less than 75 percent of the voting
603 interests in the condominium, the cancellation shall be by
604 concurrence of the owners of not less than 75 percent of
605 the voting interests other than the voting interests owned
606 by the developer, a bulk unit purchaser, and a lender unit
607 purchaser. If a grant, reservation, or contract is so
608 canceled and the unit owners other than the developer or a
609 bulk unit purchaser have not assumed control of the
610 association, the association shall make a new contract or
611 otherwise provide for maintenance, management, or operation
612 in lieu of the canceled obligation, at the direction of the
613 owners of not less than a majority of the voting interests
614 in the condominium other than the voting interests owned by
615 the developer, a bulk unit purchaser, and a lender unit
616 purchaser.

617 (b) If the association operates more than one condominium
618 and the unit owners other than the developer, a bulk unit
619 purchaser, or a lender unit purchaser have not assumed
620 control of the association, and if unit owners other than
621 the developer or a bulk unit purchaser own at least 75
622 percent of the voting interests in a condominium operated
623 by the association, any grant, reservation, or contract for
624 maintenance, management, or operation of buildings
625 containing the units in that condominium or of improvements
626 used only by unit owners of that condominium may be
627 canceled by concurrence of the owners of at least 75
628 percent of the voting interests in the condominium other
629 than the voting interests owned by the developer, a bulk
630 unit purchaser, provided that a lender unit purchaser may
631 not vote on cancellation of a grant, reservation, or
632 contract made by an association while under control of that
633 lender unit purchaser. No grant, reservation, or contract
634 for maintenance, management, or operation of recreational
635 areas or any other property serving more than one

636 condominium, and operated by more than one association, may
637 be canceled except pursuant to paragraph (d).

638 (c) If the association operates more than one condominium
639 and the unit owners other than the developer, a bulk unit
640 purchaser, or a lender unit purchaser, have assumed control
641 of the association, the cancellation shall be by
642 concurrence of the owners of not less than 75 percent of
643 the total number of voting interests in all condominiums
644 operated by the association other than the voting interests
645 owned by the developer and any bulk unit purchaser,
646 provided that a lender unit purchaser may not vote on
647 cancellation of a grant, reservation, or contract made by
648 an association while under control of that lender unit
649 purchaser.

650 (d) If the owners of units in a condominium have the right
651 to use property in common with owners of units in other
652 condominiums and those condominiums are operated by more
653 than one association, no grant, reservation, or contract
654 for maintenance, management, or operation of the property
655 serving more than one condominium may be canceled until
656 unit owners other than the developer, a bulk unit
657 purchaser, or a lender unit purchaser, have assumed control
658 of all of the associations operating the condominiums that
659 are to be served by the recreational area or other
660 property, after which cancellation may be effected by
661 concurrence of the owners of not less than 75 percent of
662 the total number of voting interests in those condominiums
663 other than voting interests owned by the developer, bulk
664 unit purchaser, or a lender unit purchaser, provided that a
665 lender unit purchaser may not vote on cancellation of a
666 grant, reservation, or contract made by an association
667 while under control of the lender unit purchaser.

668 (2) Any grant or reservation made by a declaration, lease,
669 or other document, or any contract made by the developer or
670 association prior to the time when unit owners other than the

671 developer, a bulk unit purchaser, provided that a lender unit
672 purchaser may not vote on cancellation of a grant,
673 reservation, or contract made by an association while under
674 control of that lender unit purchaser, elect a majority of
675 the board of administration, which grant, reservation, or
676 contract requires the association to purchase condominium
677 property or to lease condominium property to another party,
678 shall be deemed ratified unless rejected by a majority of the
679 voting interests of unit owners other than the developer
680 within 18 months after unit owners other than the developer
681 elect a majority of the board of administration. This
682 subsection does not apply to any grant or reservation made by
683 a declaration whereby persons other than the developer or the
684 developer's heirs, assigns, affiliates, directors, officers,
685 or employees are granted the right to use the condominium
686 property, so long as such persons are obligated to pay, at a
687 minimum, a proportionate share of the cost associated with
688 such property.

689 (3) Any grant or reservation made by a declaration, lease,
690 or other document, and any contract made by an association,
691 whether before or after assumption of control of the
692 association by unit owners other than the developer, a bulk
693 unit purchaser, or a lender unit purchaser, that provides for
694 operation, maintenance, or management of a condominium
695 association or property serving the unit owners of a
696 condominium shall not be in conflict with the powers and
697 duties of the association or the rights of the unit owners as
698 provided in this chapter. This subsection is intended only as
699 a clarification of existing law.

700 (4) Any grant or reservation made by a declaration, lease,
701 or other document, and any contract made by an association
702 prior to assumption of control of the association by unit
703 owners other than the developer, a bulk unit purchaser, or a
704 lender unit purchaser, shall be fair and reasonable.

705 (5) It is declared that the public policy of this state
706 prohibits the inclusion or enforcement of escalation clauses
707 in management contracts for condominiums, and such clauses
708 are hereby declared void for public policy. For the purposes
709 of this section, an escalation clause is any clause in a
710 condominium management contract which provides that the fee
711 under the contract shall increase at the same percentage rate
712 as any nationally recognized and conveniently available
713 commodity or consumer price index.

714 (6) Any action to compel compliance with the provisions of
715 this section or of s. 718.301 may be brought pursuant to the
716 summary procedure provided for in s. 51.011. In any such
717 action brought to compel compliance with the provisions of s.
718 718.301, the prevailing party is entitled to recover
719 reasonable attorney's fees.

720 Part VIII of Chapter 718 of the Florida Statutes is created
721 as follows:

722 718.801 Acquisitions of Title Under the Distressed
723 Condominium Relief Act, Part VII of this Chapter. The
724 Distressed Condominium Relief Act, Part VII of this Chapter,
725 is deleted but governs acquisitions of title that were
726 recorded while Part VII was in effect.

727 718.802(1) Exercise of Rights. A bulk unit purchaser may only
728 exercise the following developer rights, provided such rights
729 are contained in the declaration:

730 (a) The right to conduct sales, leasing, and marketing
731 activities within the condominium, including utilizing the
732 sales and leasing office;

733 (b) The right to assign limited common elements and use
734 rights to common elements and association property as
735 provided in the declaration which were not assigned prior
736 to the bulk unit purchaser acquiring title to the units.
737 Such rights may include, without limitation, garages,

738 parking spaces, storage areas and cabanas. In the event
739 there are multiple bulk unit purchasers, this right must be
740 set forth in a written assignment from the developer which
741 specifies which bulk unit purchaser has such right and as
742 to which limited common elements, common elements and
743 association property; and

744 (c) The right to add phases to the condominium in a phase
745 condominium.

746 (2) A bulk unit purchaser may not exercise any other
747 developer rights; however in the event the initial purchaser
748 of a unit from the developer was required to make a working
749 capital contribution to the association, a bulk unit
750 purchaser is obligated to pay a working capital contribution
751 to the association calculated in the same manner for each
752 unit acquired upon the earlier of (a) sale of a unit by the
753 bulk unit purchaser to a third party purchaser other than a
754 bulk unit purchaser, or (b) five years from the date of
755 acquisition of title to a unit by a bulk unit purchaser.

756 (3) In the event a bulk unit purchaser exercises any
757 developer rights other than those described in subsection
758 (1), the bulk unit purchaser shall no longer qualify as a
759 bulk unit purchaser.

760 (4) Except as set forth in this Part VIII, a lender unit
761 purchaser may exercise any developer rights the lender unit
762 purchaser acquires.

763 718.803 Filing. A bulk unit purchaser and a lender unit
764 purchaser shall comply with all applicable requirements of s.
765 718.202 and Part V of the Condominium Act in connection with
766 units it owns and sells.

767 718.804(1) Amendments and Material Alterations. A majority of
768 the unit owners who are not the developer, (a) a bulk unit
769 purchaser or a lender unit purchaser must approve any
770 amendment described in s. 718.110(4) or (8), (b) any

771 amendment creating, terminating or otherwise changing leasing
772 restrictions, (c) the provisions of the declaration
773 pertaining to the condominium's status as housing for older
774 persons, (d) any amendment pursuant to s. 718.110(14) or
775 otherwise reclassifying any portion of the common elements as
776 a limited common element or authorizing the association to
777 change the limited common elements assigned to any unit, or
778 (e) material alterations and substantial additions to the
779 common elements and association property, any time the
780 percentage of voting interests otherwise required to approve
781 such amendments is owned by:

782 (a) A bulk unit purchaser;

783 (b) A lender unit purchaser;

784 (c) The developer and the bulk unit purchaser combined;

785 (d) The developer and the lender unit purchaser combined;

786 or

787 (e) The bulk unit purchaser and the lender unit purchaser
788 combined.

789 (2) Notwithstanding subsection (1) of this section,
790 consent of the bulk unit purchaser, lender unit purchaser or
791 developer is required to any amendment which would otherwise
792 require the approval of such voting interests based upon the
793 requirements of the declaration, articles of incorporation or
794 by-laws, s. 718.110 or s. 718.113.

795 718.805 Warranties and Disclosures.

796 (1) A bulk unit purchaser shall be deemed to have granted
797 to the purchaser of each unit it sells an implied warranty of
798 fitness and merchantability for a period of three years
799 commencing with the completion of any repairs or improvements
800 which the bulk unit purchaser made to the unit, common
801 elements or limited common elements. The bulk unit purchaser
802 is deemed to have granted no warranties on improvements,

803 repairs or alterations to the condominium which it did not
804 undertake.

805 (2) While the bulk unit purchaser appoints or elects a
806 majority of the board of administration, the statutes of
807 limitations provided in ss. 718.203 or 718.616 shall be
808 tolled.

809 (3) A bulk unit purchaser must include the following
810 disclosure in conspicuous type on the first page of the sales
811 contract to its purchaser:

812 SELLER IS A BULK UNIT PURCHASER UNDER THE FLORIDA
813 CONDOMINIUM ACT AND IS NOT AND SHALL NOT BE CONSIDERED TO BE
814 THE DEVELOPER OF THE CONDOMINIUM FOR ALL PURPOSES UNDER THE
815 FLORIDA CONDOMINIUM ACT.

816 (4) A mortgagee that acquires units may elect to become a
817 lender unit purchaser by written notice to the association,
818 addressed to the registered agent for the association at the
819 address disclosed by the records of the Florida Department of
820 State, delivered within the time period ending upon the
821 earlier of (a) such date as the mortgagee exercises any
822 developer rights other than the developer rights described in
823 ss. 718.801(1)(a), (b) before the sale of a unit by the
824 mortgagee or (c) 180 days from the recording of the
825 certificate of title or deed in lieu of foreclosure pursuant
826 to which the mortgagee acquired the units.

827 (5) A lender unit purchaser must include the following
828 disclosure in conspicuous type on the first page of the sales
829 contract to its purchaser:

830 SELLER (1) IS A LENDER UNIT PURCHASER UNDER THE FLORIDA
831 CONDOMINIUM ACT, (2) IS NOT AND SHALL NOT BE CONSIDERED TO BE
832 THE DEVELOPER OF THE CONDOMINIUM FOR ALL PURPOSES UNDER THE
833 FLORIDA CONDOMINIUM ACT, AND (3) WAS THE LENDER AND TOOK
834 TITLE TO THE UNIT(S) BEING SOLD TO PURCHASER BY FORECLOSURE
835 OR DEED IN LIEU OF FORECLOSURE.

836 (6) (a) At or prior to the signing of a contract to sell
837 a unit, both a bulk unit purchaser and a lender unit
838 purchaser must provide a condition report which complies with
839 the requirements set forth in s. 718.616 in addition to the
840 requirements set forth in this section to its prospective
841 purchaser and shall obtain verification of delivery of such
842 condition report. A condition report is not required in
843 connection with sale to a bulk unit purchaser, or, in
844 connection with deed in lieu of foreclosure to a lender unit
845 purchaser. A mortgagee is not required to deliver to a bulk
846 unit purchaser a condition report as defined in s. 718.805
847 even if the mortgagee acquires and transfers developer rights
848 to such bulk unit purchaser.

849 (b) The condition report must contain the disclosures
850 required by ss. 718.616(2) and 718.616 (3), and shall
851 include a description of the repairs or replacements
852 necessary to cure defective construction identified in the
853 condition report in reasonable detail.

854 (c) During the course of preparing the condition report,
855 if the architect or engineer becomes aware of a component
856 which violates applicable building code, federal or state
857 law or which deviates from the building plans approved by
858 the permitting authority, the architect or engineer shall
859 disclose such information in the condition report. As part
860 of its preparation of the condition report, the architect
861 or engineer shall make written inquiry of the applicable
862 local governmental authority of any building code
863 violations, and the response, if any, or the failure of the
864 authority to respond, shall be included in the report.

865 (d) The condition report must be prepared prior to the
866 bulk unit purchaser or the lender unit purchaser entering
867 into its first contract for sale but in no event shall a
868 condition report be prepared 6 months earlier than the
869 first contract entered into by a bulk unit purchaser or a
870 lender unit purchaser to sell a unit. Provided that the

871 bulk unit purchaser or lender unit purchaser is selling
872 units at the time, the condition report shall be updated
873 not later than one year after the closing of the first
874 contract of sale and every year thereafter.

875 (e) A bulk unit purchaser or lender unit purchaser who
876 fails to provide the condition report in accordance with
877 the requirements of this section shall not be entitled to
878 limit its liability for implied warranties only to
879 construction, improvements or repairs it undertakes to the
880 units, common elements or limited common elements.

881 718.806 Joint and Several Liability. For purposes of the
882 Condominium Act, if there are multiple bulk unit purchasers
883 within the same association, the units owned by the multiple
884 bulk unit purchasers and the rights of the bulk purchaser
885 shall be aggregated as if there were only one bulk unit
886 purchaser. Each bulk unit purchaser is jointly and severally
887 liable with its predecessors bulk unit purchaser for
888 compliance with the Condominium Act.

889 718.807 Construction Disputes. A board of administration
890 comprised of a majority of directors elected or appointed by
891 a bulk unit purchaser shall not be entitled to resolve any
892 construction disputes which are subject to ch. 558 unless
893 such resolution is approved by a majority of the votes cast
894 by the non-developer and non-bulk unit purchaser voting
895 interests.

896 718.808 Noncompliance. Failure of a bulk unit purchaser or a
897 lender unit purchaser to substantially comply with all
898 requirements of the Condominium Act pertaining to the
899 obligations and rights of bulk unit purchasers and lender
900 unit purchasers results in the loss of any and all
901 protections or exemptions provided under the Condominium Act
902 for such bulk unit purchasers or lender unit purchasers.

903 This Act shall take effect on July 1, 2015.

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

WHITE PAPER

ADDRESSING BULK AND LENDER USER PURCHASERS OF CONDOMINIUM UNITS

I. SUMMARY

This proposed legislation creates a “bulk unit purchaser” and “lender unit purchaser” concept to facilitate the acquisition of condominium units by purchasers who can restore the units to marketable condition. Such purchasers are obligated to pay assessments and may either sell or lease such units subject to specific rights and obligations. This proposed legislation is intended to replace Part VII of the Condominium Act when it is scheduled to “sunset” on July 1, 2016.

II. CURRENT SITUATION.

Chapter 718, the Condominium Act, was amended in 2010 to create Part VII, referred to as the Distressed Condominium Relief Act. Part VII was designed to encourage bulk purchasers (including mortgage lenders), to acquire unsold condominium units and thus save “distressed condominiums” from failure. Part VII has been extremely successful and has been one of the main reasons that the distressed condominiums have been saved in relatively rapid fashion. Part VII has had a very favorable impact on the condominium market, on the finances of formerly distressed condominium associations and has encouraged new entrants into the condominium market in Florida.

No unintended consequences have been discovered from the use of Part VII and there have been no reports of any negative effect resulting from Part VII. On the contrary, all reports regarding the consequences of Part VII have been extremely positive.

Since the adoption of the Part VII of the Condominium Act bulk buyers and bulk assignees have played a major part in revitalizing the residential condominium market. Part VII is scheduled to “sunset” on July 1, 2016. Although Part VII has worked very well and no unintended or adverse consequences have been discovered, there is a growing desire to ensure that the concept of assisting distressed communities has a longer lifespan than originally provided by Part VII. The changes to Chapter 718 described below accomplishes this by creating a more balanced approach which incentivizes purchasers while also protecting Florida real property consumers both in distressed and non-distressed market cycles.

III. ANALYSIS

A. 718.103. The terms “bulk unit purchaser” and “lender unit purchaser” have been added to this definition Section of the Act. The definition of “developer” has been modified to take into account the new terms “bulk unit purchaser” and “lender unit purchaser”. A person who leases condominium units has also been excluded from the definition of “developer”.

B. Section 718.112(2)(f)(2). This Section has been amended to place a limitation on the time a bulk unit purchaser or a lender unit purchaser may vote to waive reserves.

C. Section 718.116(12). A new subsection 12 has been added to 718.116 to make a bulk unit purchaser liable for all assessments on its units like any other unit owner. A lender unit purchaser will be liable for assessments on units it owns and which accrued or came due during the 12 months immediately preceding its acquisition of title or 1% of the original mortgage debt, whichever is less. A director elected or appointed by a bulk unit purchaser will be automatically suspended from the Board thirty (30) days following the failure of the bulk unit purchaser to timely pay all monetary obligations to the association.

D. Section 718.301. This Section has been amended to address turnover of control of the board of directors when a bulk unit purchaser owns a majority of the units operated by the same association and limits to five years the time a bulk unit purchaser can control the board of directors. This Section as amended also protects a bulk unit purchaser with respect to the documentation it is required to deliver to the association.

E. Section 718.302. This Section has been amended to include a bulk unit purchaser along with the developer with respect to actions that a developer or a bulk unit purchaser is permitted to take while either is in control of the association.

F. Part VIII of Chapter 718. This new part is being created to deal with the developer rights which a bulk unit purchaser is entitled to receive and still be considered to be a bulk unit purchaser, thereby having the protections as provided for in these changes to 718.

1. 718.802 requires a bulk unit purchaser and a lender unit purchaser to comply with 718.202 and Part V of the Condominium Act in connection with units such entity is offering for sale.

2. 718.803 has been created to limit the types of amendments which a bulk unit purchaser or a lender unit purchaser may make to the condominium documents.

3. 718.804 has been created to limit the types of alterations and additions which a bulk unit purchaser or a lender unit purchaser may make without the approval of other unit owners.

4. 718.805 has been created to establish warranties that are to be given by a bulk unit purchaser; creates a tolling period on the statute of limitations in 718.203 or 718.616 for construction warranties; requires a bulk unit purchaser to make certain disclosures in conspicuous type; and requires that a bulk unit purchaser and a lender unit purchaser provide a condition report which complies with and exceeds the requirements of 718.616 and deliver such report to its prospective purchasers.

5. 718.805 provides that each bulk unit purchaser is jointly and severally responsible with its predecessor and successor bulk unit purchaser for compliance with the Condominium Act and provides the same for lender unit purchasers.

6. 718.806 prohibits a bulk unit purchaser controlled board from resolving construction disputes unless the resolution is approved by a majority of the other non-developer and non-bulk unit purchaser voting interests.

7. 718.807 provides that a bulk unit purchaser or a lender unit purchaser that fails to substantially comply with the requirements of the Act results in a loss of any and all protections or exemptions provided to them under the Act.

IV. FISCAL IMPACT ON STATE AND LOCAL GOVERNMENTS

This proposal does not have a fiscal impact on state or local governments.

V. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR

This proposal has a positive economic impact on the private sector since new owners of distressed condominium units will be restoring them to marketable condition and restoring lawful operation of condominium associations in situations where those operations have been compromised due to prevailing economic conditions in that condominium, thereby improving property values. The new owners will be contributing to and lessening the assessment burden, thus benefiting the other unit owners.

VI. CONSTITUTIONAL ISSUES

It is not anticipated that any constitutional issues will arise as a result of this proposal.

VII. OTHER INTERESTED PARTIES

Florida Board of Realtors, the Department of Business and Professional Regulation, Florida Land Title Association and its agents, Florida Bankers Association.

LEGISLATIVE POSITION
REQUEST FORM

GOVERNMENTAL AFFAIRS OFFICE

Date Form Received _____

GENERAL INFORMATION

Submitted By Real Property, Probate and Trust Law Section, Construction Law Committee
Scott P. Pence, Co-Vice Chair and Hardy L. Roberts, III, Chair

Position Level The Florida Bar, RPPTL Section and Committee

CONTACTS

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Martha J. Edenfield, Dean Mead, 215 S. Monroe Street, Suite 815,
Tallahassee, FL 32301 (850) 999-4100

Board & Legislation

Committee Appearance _____ **Contacts Above**
(List name, address and phone number)

Appearances

Before Legislators _____ **Contacts Above**
(List name and phone # of those appearing before House/Senate Committees)

**Meetings with
Legislators/staff**

_____ **Contacts Above**
(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 SB 460 _____ Senator Simpson
(Bill or PCB#) (Bill or PCB Sponsor)
Indicate Position Support X Oppose Technical Assistance Other _____

Proposed Wording of Position for Official Publication: Oppose selective increase of recording expense to only construction claims of lien, adding additional filing requirements, and concluding that filing a lien beyond the statutory 90 day period is an act of fraud, including opposing amendments to s. 28.24, and s. 713.08, F.S.

Reasons for Proposed Advocacy:

Selectively increasing the cost of recording a claim of lien places an unjustified burden on contractors, mostly small businesses. Florida’s Construction Lien Law currently protects property owners from the recording of an improper, invalid or even fraudulent construction claim of lien, including civil damages, monetary and criminal

penalties, forfeiture of lien rights, payment of damages and attorneys' fees. The proposed penalty for fraud does not require an element of intent. Additional lien perfection requirements significantly increase the clerks of court workload and act as traps for the unwary and unsophisticated lienor which will increase the cost of doing business which disproportionately will fall on the small businessperson.

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

Others

(May attach list if
More than one)

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

REFERRALS TO OTHER SECTIONS, COMMITTEES OR LEGAL ORGANIZATIONS

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

Referrals

1. Associated Builders and Contractors Oppose
(Name of Group or Organization) (Support, Oppose or No Position)

2. The Associate General Contractors of America Oppose
(Name of Group or Organization) (Support, Oppose or No Position)

3. Clerks of Court Unknown
(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.

30 claim of lien pursuant to part I of chapter 713 50.00

31 Section 2. Subsection (5) of section 713.08, Florida
32 Statutes, is amended, and subsection (6) is added to that
33 section, to read:

34 713.08 Claim of lien.—

35 (5) The claim of lien may be recorded at any time during
36 the progress of the work or thereafter but not later than 90
37 days after the final furnishing of the labor, ~~or~~ services, or
38 materials by the lienor. However, if the original contract is
39 terminated under s. 713.07(4), a claim for a lien attaching
40 before ~~prior to~~ such termination may not be recorded more than
41 after 90 days after ~~following~~ the date of such termination or 90
42 days after the final furnishing of labor, services, or materials
43 by the lienor, whichever occurs first. Recording a claim of lien
44 after the 90-day period is an act of fraud, punishable as
45 provided under s. 713.31.

46 (a) The claim of lien shall be recorded in the clerk's
47 office. If the ~~such~~ real property is situated in two or more
48 counties, the claim of lien shall be recorded in the clerk's
49 office in each of such counties. The recording of the claim of
50 lien shall be constructive notice to all persons of the contents
51 and effect of such claim.

52 (b) The validity of the lien and the right to record a
53 claim of lien is ~~therefor shall~~ not be affected by the
54 insolvency, bankruptcy, or death of the owner before the claim
55 of lien is recorded.

56 (6) (a) A claim of lien may not be recorded until the lienor
57 provides the clerk with a copy of one of the following:

58 1. The notice of commencement.

59 2. The building permit for the real property at issue.

60 3. An affidavit or contract signed under penalty of perjury
61 which attests that the labor or materials were furnished for the
62 real property at issue.

63 (b) The clerk of court shall attach the copy provided
64 pursuant to paragraph (a) to the claim of lien before recording
65 the claim.

66 Section 3. This act shall take effect July 1, 2014.

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

WHITE PAPER

**PROPOSED NEW BURDENS TO RECORD CONTRACTOR LIENS
(2014 SB 460¹ - SECTIONS 28.24 AND 713.08, F.S.)**

I. SUMMARY

Without any justification known to the CLC, SB 460 would increase the cost of recording a claim of lien. SB 460 would expose a lienor to extremely harsh penalties that could be imposed even when the element of intent normally required for a finding of fraud is not present. Finally, SB 460 would unnecessarily create additional conditions to be satisfied by lienors in order to record a claim of lien.

As currently drafted, Florida's Construction Lien Law² already contains appropriate remedies to protect property owners from the recording of an improper or invalid claim of lien and there are already sufficient risks to prevent lienors from doing so. For these reasons, the Florida Bar, Rpppl Section, Construction Law Committee³ opposes proposed SB 460.

II. CURRENT SITUATION

Current Protections to Property Owners. When a claim of lien is recorded, existing law provides several mechanisms available to property owners under Florida's Construction Lien Law designed to protect owners against the recording of improper liens. The owner of the property against which a claim of lien is recorded may file a complaint under Section 713.21 (4)⁴ requiring the lienor to show cause within 20 days why his or her lien should not be enforced by action or vacated and canceled of record. If the lienor fails to do so, the court is required to order cancellation of, and discharge, the lien. A lienor who records an improper lien would likely be unable to satisfy this requirement, requiring the court to cancel and discharge the lien.

Additionally, the property owner can record a "notice of contest of lien" under Section 713.22 (2) requiring the lienor to institute suit to enforce his or her lien within 60 days of such notice. After that notice is recorded, if the lienor fails to bring suit within the 60 days, the lien is extinguished automatically. Therefore, even if the lienor is able to satisfy the conditions to show

¹ As of the date of this White Paper, no companion bill has been introduced in the House.

² Florida's Construction Lien Law is contained within Chapter 713, Florida Statutes.

³ The Construction Law Committee ("CLC") of the Real Property Probate and Trust Law Section of the Florida Bar is comprised of construction law practitioners representing every facet of the construction industry, including owners, contractors, subcontractors and suppliers.

⁴ References to specific statutory sections within this white paper are deemed to refer to current Florida Statutes, unless expressly stated otherwise.

cause under Section 713.21, the property owner has a mechanism under the current law to speed up the process of determining the validity of that lien.

Further still, Section 713.29 entitles the prevailing party in any action to enforce a lien under Florida's Construction Lien Law to recover its reasonable attorneys' fees from the other party. Therefore, if the property owner is able to prove the lien is invalid, they would be entitled to recover their reasonable attorneys' fees in defending the claim of lien.

Finally, under Section 713.31, the filing of a fraudulent lien, as defined in Section 713.31 (also see below), is a complete defense any action to enforce a lien. In that event, pursuant to Section 713.31, (1) the court is required to declare the lien unenforceable, (2) the lienor forfeits his or her right to any lien on that property, and (3) the property owner has a cause of action against the lienor for damages as a result of that lienor filing of a fraudulent lien. Therefore, if a lienor files a fraudulent lien, the property owner has sufficient protections and remedies under the current law.

Current Risks to Lienors. There are several provisions within Florida's Construction Lien Law designed to impose risk and ultimately prevent lienors from recording an improper or invalid claim of lien. As noted above, a lienor will be responsible for paying the prevailing party's attorneys' fees under Section 713.29 if it is determined the claim of lien was invalid.

Additionally, a lienor faces potential criminal liability for recording a fraudulent lien. Under Section 713.31(2)(a), a lienor's lien is deemed a fraudulent lien if a lienor has (1) willfully exaggerated the amount for which a claim of lien is asserted, (2) willfully included a claim for work not performed upon or materials not furnished for the property upon which he or she seeks to lien, or (3) compiled his or her claim with such willful and gross negligence as to amount to a willful exaggeration. As noted above, this provides a complete defense to a property owner rendering the lien unenforceable and the lienor forfeits his or her right to any lien on the property to be liened. It also exposes the lienor to a cause of action by the property owner and any contractor or subcontractor for damages as a result of filing that fraudulent lien. This coupled with the potential criminal liability imposes a tremendous amount of risk on a lienor if it records a fraudulent lien.

III. EFFECT OF PROPOSED CHANGES

Recording Expense. SB 460 would increase the cost of recording a claim of lien under Section 28.24(12)(f). The cost increase is selective. Unless the reason for doing so is based on a study showing the need for such an increase, doing so is unjustified and inappropriate.

Penalties. The proposed amendments to Section 713.08(5) would effectively create a penalty of fraud *per se*, by removing the element of intent normally required in order to prove fraud. This raises constitutional due process issues that also make the bill problematic. If a lienor records a claim of lien after the 90-day period established in Section 713.08, the lienor would automatically be exposed to very harsh penalties and potential criminal liability even if it

did so without knowledge or intent normally required for a finding of fraud.⁵ This is unfair and would not serve to make Florida's Construction Lien Law better.

Perfection. Finally, the proposed creation of a new Section 713.08(6) would create additional requirements for lienors to satisfy in order to record a claim of lien. There is no justification known to the CLC for imposing these additional requirements that likely will serve only to (1) unnecessarily create more work for the clerks of court, (2) act as traps for the unwary lienor, (3) require more staff, and (4) require more legal advice.

IV. FISCAL IMPACT ON STATE AND LOCAL GOVERNMENTS

The proposed changes in SB 460 will create additional work for the clerks of court required to enforce these requirements. The effect of this will be to either require the hiring of additional staff, which is likely not a possibility in most cases, or a reduction in overall court efficiency.

V. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR

This bill would hurt small businesses. The additional risk presented to lienors will result in increased construction costs, including additional fees for staff and legal costs, especially for smaller contractors and subcontractors who don't already have the staff to address the additional risk and liability presented by these changes. Many contractors and subcontractors without the financial wherewithal to address these risks likely will be forced to cease business operations, resulting in an overall reduction in competition within the construction industry. The increased recording fees will also have a direct effect of increasing costs.

VI. CONSTITUTIONAL ISSUES

Due process concerns are implicated by the bill's alteration of the traditional elements required to find fraud.

VII. OTHER INTERESTED PARTIES

1. Associated Builders and Contractors.
2. The Associate General Contractors of America.
3. Clerks of Court.
4. Florida Land Title Association.

⁵ References to specific statutory sections within this white paper are deemed to refer to current Florida Statutes, unless expressly stated otherwise.

RPPTL Section Presentation to January 24, 2014, PEC Committee Meeting

Good morning, ladies and gentlemen! As a Co-Chair of The Florida Bar's Real Property, Probate & Trust Law Section's Ad Hoc Committee on Trust Account Issues, I appreciate this opportunity to comment upon your Committee's *Proposed Advisory Opinion 12-4* addressing audits of trust accounts by title insurers that was published in the September 1, 2013, issue of *The Florida Bar News*. In response to that proposed advisory opinion, the RPPTL Section's Chair, Peggy Rolando, provided your Committee with a suggested slight revision to the proposed advisory opinion in her September 30, 2013, letter to The Florida Bar's Ethics Counsel, Elizabeth Tarbert. Both the members of the RPPTL Section and I hope that your Committee will adopt the recommended revision, which we believe simply continues to affirm the importance of trust account audits by title insurers and will provide attorneys relying upon the advisory opinion with a reasonable degree of certainty that such audits continue to qualify for the "client's interests" exception enunciated in Subsection (c)(1) of *Rule 4-1.6* of the Florida Bar's *Rules of Professional Conduct*.

Specifically, we have recommended the inclusion of the following additional sentence in the Advisory Opinion:

"Of course, in recognition of the value of title insurance underwriter audits in assuring the safety and proper disbursement of funds deposited into a special trust account, it would certainly be reasonable for an attorney to conclude that such an audit would be reasonably necessary to serve the affected clients' interests."

In *Advisory Opinion 93-5*, your Committee previously recognized that "audits by title insurance underwriters are necessary to ensure the safety of the funds deposited in the special trust account and thus facilitate a satisfactory conclusion for those whose funds are placed in the account."

In her response on behalf of the RPPTL Section, Ms. Rolando enunciated six reasons why our Section actually believes that it will **always** be in the client's best interest to permit title insurers to audit special trust accounts maintained by attorneys solely with respect to transactions in which the attorney acts as the title or real estate settlement agent. Since I assume you've reviewed her letter, I will not restate those reasons during the brief period of time that has been allotted to make this presentation, but I'll be happy to address any questions that you may have concerning our Section's position.

As will be noted in presentations by representatives of Attorneys' Title Fund Services, Inc. (or *Old Republic National Title Insurance Company*) and the Florida Land Title Association, real estate lawyer defalcations are a serious problem in Florida, and our Section

strongly believe that The Florida Bar should do everything possible to protect client's funds. In addition, such audits frequently disclose innocent errors that can easily be addressed if such errors are timely discovered. Thus, both the members of the RPPTL Section and I believe that the inclusion of the suggested language is critically important in assuring that the Advisory Opinion will provide appropriate guidance to attorneys confronted with requests for audits by title insurers. Furthermore, such language will make it more difficult for unethical lawyers to attempt to utilize the Advisory Opinion as a "shield" to prevent title insurers from uncovering defalcations of trust account funds.

Again, we have appreciated the opportunity to meet with you today and hope that you will agree that the suggested language should be incorporated into the Advisory Opinion. Of course, if any of you have any questions or concerns, I'll be happy to attempt to address those questions or concerns.

LEGISLATIVE POSITION REQUEST FORM

GOVERNMENTAL AFFAIRS OFFICE

Date Form Received _____

GENERAL INFORMATION

Submitted By Sean W. Kelley, Chairman, Guardianship, Durable Power of Attorney and Advance Directives Committee of the Real Property Probate & Trust Law Section

Address Sean W. Kelley, Kelley & Kelley, P.L., 43 Cincinnati Ave., St. Augustine, FL 32084, Telephone: (904) 819-9706

Position Type Real Property, Probate and Trust Law Section, The Florida Bar (Florida Bar, section, division, committee or both)

CONTACTS

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Martha J. Edenfield, Dean Mead, 215 S. Monroe Street, Suite 815, Tallahassee, Florida 32301, Telephone (850) 577-0095
(List name, address and phone number)

Appearances

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

Meetings with Legislators/staff (SAME)
(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 SB 412
(Bill or PCB #) (Bill or PCB Sponsor)

Indicate Position Support Oppose Tech Asst. Other

Proposed Wording of Position for Official Publication:

Oppose amendments to guardianship statutes which (a) would change the criteria and limit the discretion of the court in awarding fees in guardianship proceedings for services which benefit the ward, (b) seek to significantly change established guardianship laws and procedures concerning the qualification of examining committee members and the content and requirements of their reports, and (c) would criminalize certain conduct in guardianship proceedings, including proposed amendments to F.S. 744.108, 744.331, and 744.4461

Reasons For Proposed Advocacy:

The proposed amendments seek to dramatically alter long-standing statutes and case law governing determinations of incapacity and compensation in guardianships. The proposed changes are detrimental to the guardianship process, harmful to the alleged incapacitated person or ward, and will result in a significant increase in the fees and costs incurred by both the State of Florida and the Ward. Furthermore, the proposed criminalization of unspecified conduct in a guardianship proceeding and subjecting the guardian and attorney to the forfeiture statutes is unnecessary and inappropriate. There exists adequate remedies for inappropriate actions by both guardians and attorneys, and existing Chapter 825 adequately criminalizes improper behavior by guardians and attorneys.

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 Real Property Probate and Trust Law N/A
 (Indicate Bar or Name Section) (Support or Oppose) (Date)

Others

(May attach list if more than one)

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

REFERRALS TO OTHER SECTIONS, COMMITTEES OR LEGAL ORGANIZATIONS

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

Referrals

Elder Law Section of the Florida Bar Oppose SB 412
 (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 (904) 561-5662 or 800-342-8060, extension 5662.

WPB_ACTIVE 5764059.1

OPPOSITION TO SB 412

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

GUARDIANSHIP, POWER OF ATTORNEY AND ADVANCE DIRECTIVES COMMITTEE

I. SUMMARY

The Guardianship, Power of Attorney and Advance Directives Committee has reviewed proposed Senate Bill 412 (SB 412) and unanimously voted to formally oppose the legislation. The Committee found the proposed legislation to be detrimental to the guardianship process, harmful to the incapacitated citizens the Florida Guardianship Code seeks to protect and would result in a significant increase in fees and costs incurred by the State of Florida and the Ward.

The legislation seeks to alter the long-standing criteria for compensation in ways contrary with the Rules Regulating The Florida Bar and contrary to the established standards set by landmark Florida Supreme Court cases. It would impose an ambiguous standard and require an attorney or guardian to establish that they provided a “monetary benefit” to the ward. In addition to dramatically altering the well-established framework and criteria used by the courts since 1989 (without any explanation for why such dramatic change is necessary), this requirement completely ignores the existence of a guardian of the person, who does not manage or otherwise impact the assets of the ward. A guardian of the person is charged with the physical and mental well-being of the ward, not with providing monetary benefits. Under this new statutory scheme, guardians of the person would not be entitled to fees for their services.

The proposed legislation also seeks to give automatic standing to family members (or next of kin) to receive notice in guardianship proceedings. Additionally, other “interested parties” may “submit instructions” to receive notice of guardianship proceedings. This is contrary to common sense and firmly established law. Not all family members have the best interest of the ward at heart, and requiring confidential and sensitive financial information to be served on anyone who requests information, regardless of their motive or actual interest, flies in the face of equity and logic.

The heightened requirements for Examining Committee members proposed in the legislation are unduly burdensome and practically unworkable. The proposed changes to F.S. § 744.331 would exclude the majority of licensed physicians from serving on an examining committee. Additionally, the proposal would prevent most nurses, most gerontologists, and all social workers from serving on the examining committee. In counties which already have a very limited pool of potential examiners, these requirements would make it impossible to find competent members who would be willing to serve. These proposed changes, while perhaps

well-intentioned and good-theoretical improvements, are totally impractical and will not work if there is not additional funding provided by the legislature for the fees of the examining committee (to actually attract doctors with advanced degrees to serve on the committees) and to fund the additional testing and examination proposed.

The additional requirements in the proposed legislation would result in significantly increased costs of guardianship administration to both the State of Florida and the ward. For example, the clerk of court will have increased audit responsibility and be responsible for making determinations regarding the monetary benefit provided to the ward's assets. The proposed changes also increase the amount of work required of attorneys and guardians in seeking compensation, which will increase guardians' fees and attorneys' fees since that additional work is compensable under the statutes. The proposed legislation will also increase the amount of contested matters in guardianships causing additional guardian and attorney fees, and consuming more of the Court's time.

Finally, the legislation seeks to make acts such as "improper billing" by an attorney or guardian a third degree felony and subject to the forfeiture statutes. Aside from a host of constitutional issues (such as vagueness), it is unclear why the legislature would want to create a disincentive to would be guardians and attorneys. The Courts already have adequate penalties at their disposal to deal with improper behavior by guardians and attorneys. Furthermore, Chapter 825 of the Florida Statutes already sets forth criminal penalties for financial exploitation of an elderly citizen, and specifically applies to court appointed guardians. This type of proposed legislation would at the very least need to be vetted by other interested sections of public and the Florida Bar, such as the statewide prosecutors association, statewide public defenders association, the Criminal Law Section of the Florida Bar, and Trial Lawyers Section of the Florida Bar.

II. COMMENT AND ANALYSIS ON PROPOSED CHANGES TO F.S. 744.108

A. Current Law with Regard to Compensation of Guardians and Attorneys.

In guardianship proceedings, the overwhelming public policy is the protection of the ward. See *Hayes v. Guardianship of Thompson*, 952 So. 2d 498 (Fla. 2006); F.S. § 744.1012. The Florida Legislature, through the guardianship statutes established under Chapter 744, emphasize that the best interests of the Ward, not the interests of next of kin or the Ward's relatives, come first. See *In re Guardianship of Stephens*, 965 So.2d 847 (Fla. 2d DCA 2007). Family member interests in the administration of the Ward's guardianship are secondary, and the Legislature and courts have agreed that family members do not have absolute and automatic rights to be heard with regard to compensation of the Ward's guardian and guardian's attorney. See *Hayes v. Guardianship of Thompson*, 952 So. 2d 498 (Fla. 2006); F.S. § 744.108.

Unlike most other types of cases that arise in Florida's circuit courts, guardianship proceedings are not inherently adversarial and are governed by a comprehensive statutory code (Chapter 744 of the Florida Statutes) and set of procedural rules (the Florida Probate Rules, which also relate to guardianship matters). Chapter 744 and the Florida Probate Rules

complement one another. The guardianship statutes set forth the substantive law in this area and the rules set forth “the procedure in all probate and guardianship proceedings.” *Hayes* at 506.

With regard to guardians and their attorneys, the key statute on fees and expenses is F.S. § 744.108. The criteria for determining reasonable fees are set forth in F.S. §. 744.108(2). As it stands now, those criteria are substantially consistent with Rule 4-1.5(B) of the Rules Regulating The Florida Bar and with long-standing Florida Supreme Court precedent with regard to computation of reasonable fees. See *Florida Patient's Compensation Fund v. Rowe*, 472 So.2d 1145 (Fla. 1985). Attorneys, guardians, and the judiciary have been applying these criteria since 1989 and are familiar with this legal framework. This legal framework is very similar to that in place for determination of reasonable fees for personal representatives and attorneys in the probate context. See F.S. §§ 733.617 and 733.6171. More particularly, with regard to fees, “[T]here is no specific guardianship rule that provides for . . . guardian’s or attorney’s fees beyond what is provided in section 744.108.” *Hayes* at 506.

1. Guardian’s Fees.

A guardian “is entitled to a reasonable fee for services rendered and reimbursement for costs incurred on behalf of the ward.” F.S. § 744.108(1).

In seeking such fees, the guardian has the burden to establish through appropriate proof that the services claimed were actually performed and that the fees claimed for those services are reasonable. . . . Based on that proof, the probate court has the discretion to determine the amount of the fees to which the guardian is reasonably entitled. . . . This discretion includes the ability to rely on common sense and experience to adjust the time claimed for common or routine tasks. . . .

However, the probate court’s discretion to award guardian’s fees is not unbridled. While the probate court has both the duty and the right to protect the interests of the ward, . . . the probate court is not “at liberty to award anything more or less than fair and reasonable compensation for the services rendered or monies expended in each individual case.”

In re Guardianship of Shell, 978 So.2d 885, 889 to 890 (Fla. 2d DCA 2008) (citations omitted).

The statute appears to presuppose that a guardian's services benefit the ward or the ward's estate. . . . To the extent that the services of a guardian are unnecessary or unproductive, the circuit court may reduce the requested compensation based on the factors listed in section 744.108(2) but may not deny compensation altogether. . . .

There are some exceptions to the general rule entitling a guardian to payment for services rendered, but these exceptions are limited. We briefly mention three such exceptions. First, a guardian cannot expect to be compensated for services rendered outside the scope of his or her appointment. . . .Second, a guardian guilty of theft or other breach of duty may forfeit the right to compensation. . . . Third, on occasion, usually when a family member is appointed, a guardian may agree to serve without compensation.

Thorpe v. Myers, 67 So.3d 338, 343 (Fla. 2d DCA 2011) (citations omitted).

2. Attorney's Fees.

Fla.Prob.R. 5.030(a) requires a guardian to retain an attorney. An attorney who has rendered services to a ward, or to a guardian on behalf of the ward, is entitled to a reasonable fee payable from the assets of the guardianship estate. *See* F.S. § 744.108(1). Florida Statute § 744.108 governs attorneys' fee awards and sets forth the criteria which the court must consider when determining an award of reasonable attorney fees. The time spent by an attorney applying for and obtaining an award of fees is compensable under the statute governing fees. F.S. § 744.108(8).

3. Notice and Standing with Regard to Fee Petitions by Attorneys and Guardians.

With regard to fee petitions in guardianships, the Florida Supreme Court clarified the meaning of "standing" and "interested persons" in the case of *Hayes v. Guardianship of Thompson*, 952 So.2d 498 (Fla. 2006). Under *Hayes*, a person has standing in a guardianship proceeding if a statute or rule either requires notice to that person or grants an entitlement to object. F.S. § 744.108 requires notice to the guardian and ward, and therefore those persons have automatic standing. A person who has requested notice under *Fla.Prob.R.* 5.060 may also have standing. "Although section 744.108 does not specifically require that an 'interested person' receive notice, a person is nonetheless entitled to notice pursuant to rule 5.060 as long as the requirements of the rule have been satisfied and the trial court agrees that the person does in fact qualify as an 'interested person'." *Hayes*, 952 So.2d at 507.

Family members do not have automatic standing since they may have interests, or have already taken actions, contrary to the best interests of the ward. *Hayes* does not draw a bright line regarding "interested persons" and, more importantly, does not grant automatic standing to any persons other than the guardian and ward. "[B]ecause the question of who is an "interested person" may vary as the circumstances of the guardianship change, we cannot provide strict guidelines for the lower courts to follow." *Id.* at 508.

Hayes expressly approved the concept set forth in lower court decisions that family with unclean hands (due to mistreatment of the ward, abusive conduct, or other actions contrary to the Ward's interests such as misappropriation of funds) do not have standing even if they had filed a *Rule* 5.060 notice. As the court noted with regard to one group of family members seeking

standing, “[T]heir involvement in guardianship proceedings that were necessitated by their own mistreatment of the ward and misappropriation of her funds does not entitle them to participate in” the fee proceedings. *Hayes*, 952 So.2d at 508.

Since the courts must have the ability to protect wards from family members with adverse interests, or unclean hands, *Hayes* gives the guardianship judge authority to determine standing on a case by case basis. Under *Hayes*, trial courts may entertain challenges to *Rule* 5.060 notices, and that these notices do not confer automatic standing.

The courts are also charged with protecting the privacy of the ward and the confidentiality of the ward’s protected health and financial information. When making determinations of who is an interested person in a guardianship proceeding, these considerations have to be weighed against the desire and motives of third parties to receive this type of information.

B. Specific Comments on Proposed Changes to F.S. 744.108

1. Change to 744.108(1).

The proposed changes ignore the difference in role between guardians of the person (who are responsible for the Ward’s physical and mental well-being) and guardians of the property (who are responsible for the Ward’s financial and legal matters). The proposed changes would eliminate a guardian of the person’s right to compensation unless the guardian could show that their care somehow accrued a monetary benefit to the Ward. This change wholly ignores that a guardianship of the person does not “accrue” monetary benefits to a ward, and would completely eliminate fees for guardians of the person. Further, the change would overturn existing Florida case law, such as *Thorpe*, and create uncertainty and opportunities for fee litigation over the concept of “monetary benefit.”

Not all actions of a guardian which are beneficial to a ward accrue a monetary benefit. A guardian and his or her attorney are statutorily mandated to perform a host of duties which may or may not accrue a monetary benefit to the ward’s assets. Statutorily requiring guardians and attorneys to perform services without allowing them compensation is unreasonable, unconstitutional and will result in guardians and attorneys refusing to serve. Without guardians and attorneys willing to serve, the burden will fall upon an already budget strapped Adult Protective Services and Offices of the Public Guardian. There are not ready and willing volunteers lining up to serve as guardians without compensation.

2. Changes to 744.108(2).

The proposed changes alter the long-standing criteria for compensation in ways contrary with the Rules Regulating The Florida Bar and contrary to the established standards set by landmark Florida Supreme Court cases. As it stands now, those criteria are substantially consistent with rule 4-1.5(B) of the Rules Regulating The Florida Bar and cases such as *Florida Patient's Compensation Fund v. Rowe*, 472 So.2d 1145 (Fla. 1985). Attorneys, guardians, and

the judiciary have been applying these criteria since 1989 and are familiar with this legal framework. This legal framework is very similar to that in place for determination of reasonable fees for personal representatives and attorneys in the probate context. *See* F.S. §§ 733.617 and 733.6171.

The proposed changes to F.S. § 744.108(2) dramatically alter the well-established framework and criteria used by the courts since 1989 without any explanation for why such dramatic change is necessary. The changes to the compensation criteria away from long-standing practice and precedent will create new opportunities for fee litigation and further drive up guardianship fees and costs.

3. Changes to 744.108(3).

The proposed changes do not seem to understand that the provision is intended to address the situation where an attorney is also serving as a guardian (“attorney guardians”). A guardian who is a member of The Florida Bar can serve as his or her own counsel, and receive a fee for services rendered in each capacity. *See Fla.Prob.R.* 5.030(a) and F.S. § 744.108(3). Under subsection (3) of F.S. § 744.108, the court must distinguish between the fees and expenses awarded for legal services and those awarded for guardian services, and must determine that no conflict of interest exists. *Id.* The proposed change creates confusion with regard to this concept by applying conflict of interest language in a broad and unspecified way contrary to the existing statute and law.

4. Changes to 744.108(5).

The proposed legislation would add this phrase to F.S. § 744.108(5) - “and an accounting of the monetary benefit accrued to the ward by the actions of the person requesting the fees and expenses.” As noted above, this change would eliminate fees for guardians of the person. Further, the requirement to provide an “accounting of the monetary benefit” creates a whole new undefined guardianship accounting requirement that will add to the fees charged by attorneys and guardians.

It is unclear why there should be an additional “accounting” required on top of the accounting requirements already provided in Chapter 744. The proposed changes will increase costs of guardianship administration to the State of Florida since courts and the Clerk of Court will be required to audit and administer duplicative and confusing accounting procedures related to fee proceedings on top of Chapter 744’s existing accounting procedures. The proposed changes will increase the amount of work required of attorneys and guardians in seeking compensation, which will increase guardians’ fees and attorneys’ fees since that additional work is compensable. This added requirement will have the opposite effect intended by this new requirement – it will result in a monetary detriment to the ward by increased fees and expenses without creating any monetary benefit to the ward’s assets (whatever the term “monetary benefit” means).

Under existing guardianship law, all services performed need to benefit the ward in order to be compensable. *See Shell and Thorpe*, supra. The court has the discretion to determine whether the services provided benefited the ward and the reasonableness of the compensation requested. Adding this ambiguous and restrictive requirement is not merited.

5. Changes to 744.108(6).

The changes to F.S. § 744.108(6) would require notice to persons who “submit instructions” and grant automatic “interested person” status to family members and next of kin listed in the initial guardianship petition. What “instructions” are, and what form they might take is unclear.

The Florida Probate Rules already provide an express procedure for parties to request notice in guardianship proceedings under Rule 5.060. This proposed change is not advisable as was discussed in the review of existing Florida law above. With regard to notice and standing, the Florida Supreme Court clarified the meaning of “standing” and “interested persons” in the case of *Hayes v. Guardianship of Thompson*, 952 So.2d 498 (Fla. 2006). “Although section 744.108 does not specifically require that an ‘interested person’ receive notice, a person is nonetheless entitled to notice pursuant to rule 5.060 as long as the requirements of the rule have been satisfied and the trial court agrees that the person does in fact qualify as an ‘interested person.’” *Hayes*, 952 So.2d at 507.

Family members do not (and should not) have automatic standing since they may have interests, or have already taken actions, contrary to the best interests of the ward. Existing law gives the guardianship judge authority to determine standing on a case by case basis, which is in the best interests of the ward. *See Hayes*. The rights of family members is secondary to protecting the best interests of the ward, and granting any person who “submits instructions” interested person status flies in the face of experience and simple common sense. Allowing this fundamental change in the law would remove the courts ability to protect the ward from family members with unclean hands (due to mistreatment of the ward, abusive conduct, or other actions contrary to the Ward’s interests such as misappropriation of funds).

6. Changes to 744.108(7).

The phrase “all parties” would be added to § 744.108(7) and “petitioner” would be stricken. This will create additional attorneys’ fee and costs under § 744.108(8), since a petitioner would have to go back and review the attorney file and court file, add up all previous fee petitions (including those of prior counsel, prior guardians and third parties who have been awarded fees), and put all these amounts in the petition. This additional time would result in higher attorney fees, which are compensable under the applicable statute.

7. Changes to 744.108(8).

Proposed changes to F.S. § 744.108(8) would add a new phrase at the end - “or ineffective in protecting the assets of the ward.” F.S. § 744.108(8) provides compensation for

the fees incurred in seeking fees when a court hearing is required. Fees incurred in determining fees are compensable from the guardianship estate. This provision is similar to the concept that exists in probate estate administration pursuant to F.S. § 733.6175(2). The existing statutory provision and case law interpreting it and F.S. § 733.6175(2) provide the court with ample guidance in determining whether such fees should be denied. The proposed language would create an automatic tension since granting fees is always going to be at the expense of the assets of the ward. This automatic tension will just lead to new venues for litigation and will drive up the costs of guardianship fee proceedings.

III. COMMENT AND ANALYSIS ON PROPOSED CHANGES TO F.S. 744.331

A. Current law with Regard to Procedures to Determine Incapacity.

Presently, F.S. § 744.331 governs the procedures to determine the incapacity of an alleged incapacitated person. Subsection (3) details the appointment of the examining committee and the qualifications of the persons who are able to serve. It is an unfortunate reality that in many circuits, there are very few qualified professionals who are willing or able to serve on these committees. The present statute requires that the committee consist of at least one psychiatrist or other physician. The remaining members must consist of a psychologist, gerontologist, another psychiatrist, other physician, registered nurse, nurse practitioner, licensed social worker, and a person with advanced degree in gerontology from an accredited institution of higher education. F.S. § 744.331(3).

When this statute was revised by the statewide Guardianship Task Force in 1989, each category of potential members was thoroughly discussed and considered. An additional category was provided as a mechanism for the Court to field an examining committee in those circuits where there were not enough willing participants with the above described qualifications. This provision allows the Court to appoint someone “who by knowledge, skill, experience, training, or education may, in the court’s discretion, advise the court in the form of an expert opinion.” *Id.*

One of the examining committee members must have the knowledge of the type of incapacity alleged. Under present law, the attending or family physician may not serve on the examining committee, unless good cause is shown, although the examining committee members are required to consult with the primary physician if available.

The statute goes on to provide the training requirements for members of an examining committee, the procedure for examining the alleged incapacitated person, and the content, preparation and submission of the reports. *See* F.S. § 744.331(3)(a) to (h).

Under present law, if a majority of the examining committee members conclude that the alleged incapacitated person is not incapacitated, the court is required to dismiss the petition. F.S. § 744.331(4).

The statute also contains a provision stating that upon the filing of a verified statement by an interested person stating 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 that they have a reasonable factual basis for that belief, the document in question shall not be deemed an alternative to guardianship. F.S. § 744.331(7). This provision is intended to prevent an invalid trust, trust amendment or durable power of attorney from serving as a less restrictive alternative to guardianship. It is also intended to limit the amount of litigation that occurs over the validity of these documents in an incapacity proceeding. It is not in the best interest of the ward to allow the guardianship proceeding to serve as a forum to litigate the validity of durable powers of attorney or trust documents prior to the ward's death. Allowing extensive litigation over these issues would only serve the interested parties and deplete the ward's assets, which will likely be needed to support the ward during his or her remaining life.

B. Specific Comments on Proposed Changes to F.S. 744.331.

1. Change to 744.331(1)(d).

The proposed changes remove date references from the statute which are no longer required. This is a housekeeping matter and the change is not objectionable.

2. Changes to 744.331(3)(a) to (d) – Qualifications of the Examining Committee.

The proposed legislation seeks to make significant changes to the qualifications of the examining committee members. These changes are unduly burdensome and exclude most licensed Florida psychiatrists from serving on the committee. Under the proposal a psychiatrist can only serve if he or she is "board-certified." The proposal prohibits physicians from serving on the committee unless they are "physician-specialists." In addition, any psychologist serving must be a clinical psychologist; any gerontologist serving must be "board-certified;" and any physicians who serve on the committee are required to have board certification or specialization.

The proposal will prevent most nurses, most gerontologists, and all social workers from serving on the examining committee. In counties which already have a very limited pool of potential examiners, these requirements make it even more difficult to find competent members who would be willing to serve. It also requires that all three of the examining committee members have knowledge and experience in evaluating the type of incapacity alleged in the petition. These changes, perhaps well-intentioned and good-theoretical improvements, are totally impractical and will not work unless additional funding is provided for the fees of the examining committee members (to actually attract doctors with advanced degrees to serve on the committees).

In addition, it is highly likely that in many smaller circuits, the court would not be able to field a qualified examining committee. The guardianship system in these circuits will grind to a halt and there will be no last resort mechanism to protect vulnerable incapacitated persons from financial and physical abuse. As mentioned above, additional funding to lure qualified board certified professionals to travel and serve on these committees would likely be the only solution.

The current statute prohibits the primary physician from serving as a member of the examining committee. The proposed legislation overrides this prohibition and requires that the primary physician may be appointed to the examining committee. The Committee believes this is a conflict of interest that has the potential to damage the doctor / patient relationship. For instance, if the alleged incapacitated person learns that his or her family physician recommended a guardianship for that individual, the relationship would be permanently damaged.

3. Changes to 744.331(3)(e) to (g) – Examination of Alleged Incapacitated Person and Report of Examining Committee.

The proposal changes § 744.331(e) to require that each member of the examining committee perform a comprehensive evaluation, including a physical evaluation. The proposal also prohibits the committee members from consulting with each other when preparing their report. The proposal also changes § 744.331(f) to require that the examination include neurological findings, and a neurological imaging study, if required.

If any aspect of the report cannot be accomplished, the report is void. This is a significant deviation from the current statute, which requires the report to explain why the aspect could not be accomplished if the examining committee member was unable to do so.

Finally, the proposed legislation would authorize a family member or caregiver to be present during the examination. Video or other recordings of the examinations may be made by family members and interested persons without limitation.

While some of these additional requirements are admirable in theory, without additional funding they are not feasible. It is also important to remember that we are subjecting the alleged incapacitated person to an involuntary examination. The Committee has reservations about requiring someone to involuntarily submit to a comprehensive physical examination by three examining committee members who he or she has never met. This seems to be a violation of the person's dignity, if not their constitutional rights. Certainly, it is not keeping with the legislature's mandate that guardianship be implemented using the least restrictive means available.

Allowing family members to be present during the examinations and authorizing the examination to be videotaped without reservation is illegal, directly violates the constitutional privacy protections of the alleged incapacitated person and borders on ludicrous. This process should endeavor to preserve the dignity and rights of the alleged incapacitated person to the greatest extent possible. These evaluations necessarily discuss mental health issues, substance abuse issues and intimate personal history. Turning the examination of the alleged incapacitated person into a spectator sport hardly achieves that goal.

4. Changes to 744.331(4).

The proposal seeks to significantly change existing law by requiring the dismissal of the petition if any of the examining committee members concludes that person is not incapacitated. This completely removes the discretion of the court to make a determination regarding incapacity. Many feel that the existing statute, which requires dismissal if a majority of the examining committee members find capacity, to violate the discretion of the court. Requiring the court to dismiss the petition if any of the examining committee members find incapacity is an unwarranted change in the law and unnecessarily encroaches on the role of the court.

5. Changes to 744.331(7).

The final proposed change to § 744.331 seeks to amend subsection (7). Currently, this subsection provides that upon the filing of a verified statement by an interested person stating 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 that they have a reasonable factual basis for that belief, the document in question shall not be deemed an alternative to guardianship. F.S. § 744.331(f).

This provision is intended to prevent an invalid trust, trust amendment or durable power of attorney from serving as a less restrictive alternative to guardianship. It is also intended to limit the amount of litigation that occurs over the validity of these documents in an incapacity proceeding. It is not in the best interest of the ward to allow the guardianship proceeding to serve as a forum to litigate the validity of durable powers of attorney or trust documents prior to the ward's death. Allowing extensive litigation over these issues would only serve the interests of third parties and deplete the ward's assets. In most instances, these assets are better preserved to support the ward during his or her remaining life.

Requiring that there be imminent danger of physical or financial harm makes no sense. The requirement to report the danger to the Department of Children and Families also does not make any sense. The proposed revision then attempts to strike the provision discussed above (the trust or durable power of attorney shall not be deemed an alternative to the appointment of a guardian). Instead, this concept is replaced by language purporting the "suspend" the trust, trust amendment or durable power of attorney.

First, if the provision of the statute finding that these documents are not deemed to be an alternative to the appointment of a guardian is removed, there will be endless litigation over the validity of trusts, trust amendments and durable powers of attorney in guardianship proceedings. The court will be required to litigate these issues prior to the appointment of a guardian. The court is required by statute to "consider and find whether there is an alternative to guardianship that will sufficiently address the problems of the incapacitated person." F.S. § 744.331(b). "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." *Id.* Without this provision in the statute, the court will be forced to litigate the validity of the documents during the life of the ward to determine whether they are a valid alternative to guardianship. The additional costs to not only the State of Florida, but also to the ward, will be significant. This is the reason F.S. § 744.331(7) was enacted in the first place.

Next, the court is not able to “suspend” a trust or trust amendment. The trust and its assets are outside of the jurisdiction of the guardianship court. This proposed revision is directly contrary to the public policy underlying Florida’s Guardianship Statute. Guardianship should be a matter of last resort and should be the least restrictive alternative. Revocable Trusts are routinely employed by Florida residents for the express purpose of avoiding the realm of guardianship over those assets. Assets in a trust are not within the purview or power of the guardianship court, so to propose the “suspension” of a trust amounts to an unconstitutional incursion into an arena which includes denial of due process.

With regard to durable powers of attorney, Chapter 709 of the Florida Statutes controls. F.S. § 709.2109(3) already provides for the suspension of power of attorney when a person initiates a proceeding to determine the principal’s incapacity. That suspension remains in place until the petition is dismissed, or the court enters an order authorizing the agent to exercise one or more powers granted under the power of attorney. F.S. § 709.2109(3). There are also provisions to deal with emergency situations and an agent’s ability to continue to make health care decisions under a health care power of attorney. There is no need for this statutory revision and the issue is already addressed in a thoughtful and comprehensive way in Chapter 709.

IV. COMMENT AND ANALYSIS ON PROPOSED NEW F.S. 744.4461 AND ADDITION TO F.S. 932.701

This is a new legislative proposal which seeks to make certain conduct in guardianship proceedings a class three felony. The proposal would enact a wholly new statute, and would subject violations of this statute to the Florida Contraband Forfeiture Act. There are a host of constitutional issues present in this proposal, including inherent vagueness. Proposed F.S. § 744.4461 does not adequately put anyone on notice of what conduct constitutes a violation. Furthermore, there are adequate remedies available to the court to address wrongdoing by guardians and attorneys. Fees are not available to a guardian or an attorney unless they are awarded by the court. If a guardian steals or otherwise misappropriates guardianship assets, they are subject to the existing criminal statutes for theft, fraud and conversion. If an attorney commits a theft or otherwise misappropriates guardianship assets, he or she is subject to not only those criminal sanctions, but also discipline and potential disbarment by the Florida Bar.

Furthermore, existing Chapter 825 of the Florida Statutes deals extensively with financial and physical abuse of the elderly in a thoughtful and comprehensive manner. The Chapter specifically covers a breach of fiduciary duty by a court appointed guardian, and results in a first, second or third degree felony depending on the value of the offense. *See* F.S. § 825.103. The chapter provides definitions, is well written and puts guardians and attorneys on notice of what improper conduct is covered by the statute.

It is unclear why the legislature would want to create a disincentive for qualified guardians and attorneys from serving in that capacity. Enacting a broad, vague and ambiguous statute, and attempting to criminalize such ambiguous conduct as “improper billing” (whatever that means), is chilling. Disgruntled family members will threaten and pursue innocent guardians and attorneys with such a vague statute. It is unnecessary, poorly drafted, conflicts

with existing criminal statutes, and at a minimum should be vetted by the proper stakeholders, including the statewide prosecutors association, statewide public defenders association, the Criminal Law Section of the Florida Bar, and Trial Lawyers Section of the Florida Bar.

The proposed changes to F.S. § 932.701, while mostly within the realm of the criminal bar and their expertise in criminal defense and prosecution, nonetheless bear skeptical scrutiny from this Committee. One primary intention of the forfeiture laws, which act in addition to a criminal prosecution and which upon appropriate civil process can disgorge a criminal of various items and properties, was to discourage unsavory persons from engaging in unsavory professions, such as drug trafficking and gambling. Florida's forfeiture laws are designed to remove the 'tools of the trade' from drug traffickers and gamblers and a growing list of other criminals. Discouraging an entire class of lawful conduct, such as being a guardian or a guardian's attorney, or an agent of either, was never the purpose of the forfeiture statutes. There are currently twelve subsections to F.S. § 932.701 which each have a nexus to the underlying crime. Motor fuel, upon which tax was not paid, can be forfeited; pornographic material in commission of pornography crimes can be forfeited; gambling paraphernalia used for gambling can be forfeited. This proposal would introduce remarkably vague language as a thirteenth subsection: "Any vehicle, machinery, equipment, or other item of personal property used in connection with the financial exploitation of a ward." There is not even the slightest attempt to establish a nexus between the property sought to be forfeited and the crime alleged in this proposed new subsection.

V. CONCLUSION

This opposition paper has expressed many of the primary concerns with this proposed legislation, although certainly not all of the concerns. The Guardianship, Power of Attorney and Advance Directives Committee of the Real Property, Probate and Trust Law Section of the Florida Bar unanimously opposes this legislation in its entirety. For the reasons stated herein, the proposed revisions to the Florida Guardianship Code would be detrimental to the guardianship process, harmful to the incapacitated citizens the guardianship process seeks to protect and would result in a significant increase in fees and costs incurred by the State of Florida and the Ward. The legislation completely disregards the welfare of the Ward, and seeks to create a forum for family members to engage in endless litigation over guardian and attorney fees and the assets of the ward.

The law presently favors family members as guardians, and certainly the courts prefer to appoint family members as guardians where appropriate. In many cases, however, the actions of the family members themselves creates the necessity of the guardianship. Allowing these family members to continue to receive notice of guardianship petitions and endlessly litigate in the guardianship proceeding is detrimental to the ward and his or her remaining assets.

While we must exhibit the utmost diligence, due process and respect when depriving an individual of his or her civil and legal rights, the legislature must necessarily consider the practical application of the law and create a system that allows the court to perform its duty to protect our most vulnerable citizens.

VI. FISCAL IMPACT ON STATE AND LOCAL GOVERNMENT. The proposal will increase the certification requirements and experience required for examining committee members ultimately leading to an increase in the cost of empanelling the examining committee. In some instances, these costs will be paid from court funds. The impact on state funds is presently unknown. There is no funding mechanism for these costs in the statute.

VII. FISCAL IMPACT ON PRIVATE SECTOR – This proposal will discourage competent guardians and lawyers from serving in guardianship proceedings. It will create unnecessary and costly litigation.

VIII. CONSTITUTIONAL ISSUES – None.

IX. OTHER INTERESTED PARTIES – Elder Law Section, Clerks of Court, public and private guardians.

WPB_ACTIVE 5766141.1

By Senator Diaz de la Portilla

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1 A bill to be entitled
2 An act relating to guardians and wards; amending s.
3 744.108, F.S.; providing that a guardian or attorney
4 is entitled to a reasonable fee for services and costs
5 if there is a proven benefit to the ward by the
6 actions of the guardian or the attorney; revising
7 criteria for award of fees for a guardian or attorney;
8 prohibiting fee awards when a conflict of interest
9 exists; providing that fees for legal services may
10 include reasonable charges for work performed by
11 paralegals; revising requirements for petitions for
12 guardian fees and attorney fees; amending s. 744.331,
13 F.S.; deleting obsolete language; revising the
14 requirements for the composition and appointment of an
15 examining committee; providing that the attending or
16 family physician may be appointed to the committee
17 unless good cause is shown; revising the requirements
18 for examinations and reports; authorizing family
19 members and caregivers to observe and record
20 evaluations; requiring that the court dismiss a
21 petition if an examining committee member concludes
22 that the alleged incapacitated person is not
23 incapacitated; revising provisions relating to
24 suspension of a trust, trust amendment, or durable
25 power of attorney in certain circumstances; creating
26 s. 744.4461, F.S.; defining the term "undue
27 influence"; prohibiting financial exploitation of a
28 ward; providing criminal penalties; amending s.
29 932.701, F.S.; redefining the term "contraband

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30 article" to include the forfeiture of personal
31 property used in connection with the financial
32 exploitation of a ward; providing an effective date.

33
34 Be It Enacted by the Legislature of the State of Florida:

35
36 Section 1. Section 744.108, Florida Statutes, is amended to
37 read:

38 744.108 Guardian ~~Guardian's~~ and attorney ~~attorney's~~ fees
39 and expenses.—

40 (1) A guardian, or an attorney who has rendered services to
41 the ward or to the guardian on the ward's behalf, is entitled to
42 a reasonable fee for services rendered and reimbursement for
43 costs incurred on behalf of the ward if there is a monetary
44 benefit accrued to the ward by the actions of the guardian or
45 attorney.

46 (2) When fees for a guardian or an attorney are submitted
47 to the court for determination, the court shall consider the
48 following criteria:

49 (a) The time and labor required;

50 (b) The novelty and difficulty of the questions involved
51 and the skill required to perform the services properly;

52 ~~(c) The likelihood that the acceptance of the particular~~
53 ~~employment will preclude other employment of the person;~~

54 (c) ~~(d)~~ The fee customarily charged in the locality for
55 similar services;

56 ~~(e) The nature and value of the incapacitated person's~~
57 ~~property, the amount of income earned by the estate, and the~~
58 ~~responsibilities and potential liabilities assumed by the~~

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~~person;~~

~~(d)(f)~~ The results obtained;

~~(g) The time limits imposed by the circumstances;~~

~~(h) The nature and length of the relationship with the
incapacitated person; and~~

~~(e)(i)~~ The experience, reputation, diligence, and ability
of the person performing the service.

(3) In awarding fees to ~~attorney~~ guardians or attorneys,
the court must clearly distinguish between fees and expenses for
legal services and fees and expenses for guardian services and
must have determined that no conflict of interest exists. If a
conflict of interest exists, the guardian fees and attorney fees
may not be awarded.

(4) Fees for legal services may include customary and
reasonable charges for work performed by legal assistants or
paralegals employed by or ~~and~~ working under the direction of the
attorney.

(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 and an accounting of the monetary benefit
accrued to the ward by the actions of the person requesting the
fees and expenses.

(6) A petition for fees or expenses may not be approved by
the court without 20 days' prior notice to the guardian and to
all family members, or next of kin, of the ward who are listed
in the petition to initiate the proceedings ~~the ward, unless the~~
~~ward is a minor or is totally incapacitated.~~ Other family
members of the ward or next of kin not listed in the petition to

40-00147-14

2014412

88 initiate proceedings or other interested parties may submit
89 instructions to be placed on the notice and may provide a
90 mailing address or an e-mail address to which the notice shall
91 be sent.

92 (7) A petition for fees must ~~shall~~ include the period
93 covered and the total amount of all prior fees paid or costs
94 awarded to all parties ~~the petitioner~~ in the guardianship
95 proceeding currently before the court.

96 (8) When court proceedings are instituted to review or
97 determine guardian fees ~~a guardian's~~ or attorney ~~an attorney's~~
98 fees under subsection (2), such proceedings are part of the
99 guardianship administration process and the costs, including
100 fees for the guardian's attorney, shall be determined by the
101 court and paid from the assets of the guardianship estate unless
102 the court finds the requested compensation under subsection (2)
103 to be substantially unreasonable or ineffective in protecting
104 the assets of the ward.

105 Section 2. Paragraph (d) of subsection (2), paragraphs (a),
106 (c), (d), (e), (f), and (g) of subsection (3), subsection (4),
107 and paragraph (f) of subsection (6) of section 744.331, Florida
108 Statutes, are amended to read:

109 744.331 Procedures to determine incapacity.—

110 (2) ATTORNEY FOR THE ALLEGED INCAPACITATED PERSON.—

111 (d) ~~Effective January 1, 2007,~~ An attorney seeking to be
112 appointed by a court for incapacity and guardianship proceedings
113 must have completed a minimum of 8 hours of education in
114 guardianship. A court may waive the initial training requirement
115 for an attorney who has served as a court-appointed attorney in
116 incapacity proceedings or as an attorney of record for guardians

40-00147-14

2014412

117 for at least ~~not less than~~ 3 years. ~~The education requirement of~~
118 ~~this paragraph does not apply to the office of criminal conflict~~
119 ~~and civil regional counsel until July 1, 2008.~~

120 (3) EXAMINING COMMITTEE.—

121 (a) Within 5 days after a petition for determination of
122 incapacity has been filed, the court shall appoint an examining
123 committee consisting of three members. The appointments shall be
124 made from a list of persons qualified to be members of the
125 examining committee prepared and published by the chief judge of
126 the circuit. One member must be a board-certified psychiatrist
127 or other physician-specialist, and each of ~~physician~~ the
128 remaining members must be ~~either~~ a clinical psychologist, a
129 board-certified gerontologist, an advanced registered nurse
130 practitioner, a board-certified ~~another~~ psychiatrist, or other
131 board-certified physician, ~~a registered nurse, nurse~~
132 ~~practitioner, licensed social worker, a person with an advanced~~
133 ~~degree in gerontology from an accredited institution of higher~~
134 ~~education, or other person who by knowledge, skill, experience,~~
135 ~~training, or education may, in the court's discretion, advise~~
136 ~~the court in the form of an expert opinion.~~ Each member One of
137 the examining three members of the committee must have
138 professional knowledge and experience in evaluating ~~of~~ the type
139 of incapacity alleged in the petition. Unless good cause is
140 shown, the attending or family physician may ~~not~~ be appointed to
141 the committee. If the attending or family physician is not
142 appointed to the committee, but available for consultation, the
143 committee must consult with the physician and review pertinent
144 findings. Each committee member must include such review in his
145 or her individual report. Members of the examining committee may

40-00147-14

2014412

146 not be related to or associated with one another, with the
147 petitioner, with counsel for the petitioner or the proposed
148 guardian, or with the person alleged to be totally or partially
149 incapacitated. A member may not be employed by any private or
150 governmental agency that has custody of, or furnishes, services
151 or subsidies, directly or indirectly, to the person or the
152 family of the person alleged to be incapacitated or for whom a
153 guardianship is sought. A petitioner may not serve as a member
154 of the examining committee. Members of the examining committee
155 must be able to communicate, ~~either~~ directly or through an
156 interpreter, in the language that the alleged incapacitated
157 person speaks or to communicate in a medium understandable to
158 the alleged incapacitated person if she or he is able to
159 communicate. The clerk of the court shall send notice of the
160 appointment to each person appointed no later than 3 days after
161 the court's appointment.

162 (c) Each person appointed to an examining committee must
163 file an affidavit with the court every 12 months stating that he
164 or she has completed all the required courses and holds a
165 current, valid license to practice in this state ~~or will do so~~
166 ~~no later than 4 months after his or her initial appointment.~~
167 Each year, the chief judge of the circuit must prepare a list of
168 persons qualified to be members of an examining committee.

169 (d) A member of an examining committee must complete a
170 minimum of 4 hours of initial training. The person must complete
171 2 hours of continuing education during each 2-year period after
172 the initial training. The initial training and continuing
173 education program must be developed under the supervision of the
174 Statewide Public Guardianship Office, in consultation with the

40-00147-14

2014412__

175 Florida Conference of Circuit ~~Court~~ Judges; the Elder Law and
176 the Real Property, Probate and Trust Law sections of The Florida
177 Bar; the Florida State Guardianship Association; ~~and~~ the Florida
178 Guardian Ad Litem Guardianship Foundation; and the Florida
179 Medical Association. The court may waive the initial training
180 requirement for a person who has served for at least ~~not less~~
181 ~~than~~ 5 years on examining committees. If a person wishes to
182 obtain his or her continuing education on the Internet or by
183 watching a video course, the person must first obtain the
184 approval of the chief judge before taking an Internet or video
185 course.

186 (e) Each member of the examining committee shall perform a
187 comprehensive evaluation, including a physical examination, of
188 the alleged incapacitated person ~~examine the person~~. Each
189 examining committee member must determine the alleged
190 incapacitated person's ability to exercise those rights
191 specified in s. 744.3215. In addition to the evaluation
192 ~~examination~~, each examining committee member must have access
193 to, ~~and may~~ consider the person's health status at the time of
194 the evaluation, the appropriateness of the timing of the
195 evaluation, previous evaluations ~~examinations~~ of the person,
196 including, but not limited to, habilitation plans, school
197 records, and psychological and psychosocial reports voluntarily
198 offered for use by the alleged incapacitated person or his or
199 her attorney. Each member of the examining committee must submit
200 an independent ~~a~~ report within 15 days after appointment without
201 consultation with the other committee members.

202 (f) The examination of the alleged incapacitated person
203 must include a comprehensive evaluation ~~examination~~, a report of

40-00147-14

2014412__

204 which shall be filed by each examining committee member as part
 205 of his or her written report. The comprehensive evaluation
 206 ~~examination~~ report should be an essential element, but not
 207 necessarily the only element, used in making a capacity and
 208 guardianship decision. The comprehensive evaluation examination
 209 must include, ~~if indicated~~:

- 210 1. A physical examination, including neurologic findings;
- 211 2. A comprehensive, objective mental health examination;
- 212 and
- 213 3. A functional assessment; and
- 214 4. A neurological imaging study, if required.

215

216 If any aspect of these three aspects of the evaluation
 217 ~~examination is not indicated or~~ cannot be accomplished for any
 218 reason, the written report must explain the reasons for its
 219 omission, or the report is null and void.

220 (g) Each committee member's written report must include:

- 221 1. To the extent possible, a clinical diagnosis and
 222 prognosis for recovery, ~~and recommended course of treatment~~.
- 223 2. An evaluation of the alleged incapacitated person's
 224 ability to retain his or her ~~her or his~~ rights, including,
 225 without limitation, the rights to marry, + vote, + contract, +
 226 manage or dispose of property, + have a driver ~~driver's~~ license, +
 227 determine his or her ~~her or his~~ residence, + consent to medical
 228 treatment, + and make decisions affecting his or her ~~her or his~~
 229 social environment.

230 3. The results of the comprehensive evaluation examination
 231 and the committee member's assessment of information provided by
 232 the attending or family physician or the alleged incapacitated

40-00147-14

2014412__

233 person's attorney, if any.

234 4. A description of any matters with respect to which the
235 person lacks the capacity to exercise rights, the extent and
236 expected duration of that incapacity, and the objective factual
237 basis for the determination that the person lacks that capacity.

238 5. The names of all persons present during the time the
239 committee member conducted his or her evaluation examination. If
240 a person other than the person who is the subject of the
241 evaluation examination supplies answers posed to the alleged
242 incapacitated person, the report must include the response and
243 the name of the person supplying the answer. Absent objection
244 from the alleged incapacitated person, a family member or
245 caregiver may not be barred from observing the evaluation. Video
246 or other recordings of the evaluation may be made by family
247 members and interested parties without limitation.

248 6. The signature of the committee member and the date and
249 time the member conducted his or her evaluation examination.

250 (4) RULING ON DISMISSAL OF PETITION.—If any a majority of
251 the examining committee members concludes conclude that the
252 alleged incapacitated person is not incapacitated in any
253 respect, the court shall dismiss the petition.

254 (6) ORDER DETERMINING INCAPACITY.—If, after making findings
255 of fact on the basis of clear and convincing evidence, the court
256 finds that a person is incapacitated with respect to the
257 exercise of a particular right, or all rights, the court shall
258 enter a written order determining such incapacity. A person is
259 determined to be incapacitated only with respect to those rights
260 specified in the order.

261 (f) Upon the filing of a verified sworn statement by an

40-00147-14

2014412__

262 interested person stating:

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

266 2. A reasonable factual basis for that belief; and

267 3. That there exists an imminent danger of physical or
 268 financial harm to the alleged incapacitated person and that such
 269 person has reported the danger to the Department of Children and
 270 Families or the state attorney,

271

272 the trust, trust amendment, or durable power of attorney is
 273 suspended until such time as a court hearing can be held, at
 274 which time such documents may be reinstated at the discretion of
 275 the court ~~shall not be deemed to be an alternative to the~~
 276 ~~appointment of a guardian.~~ The appointment of a guardian does
 277 not limit the court's power to determine that certain authority
 278 granted by a durable power of attorney remains ~~is to remain~~
 279 exercisable by the attorney in fact.

280 Section 3. Section 744.4461, Florida Statutes, is created
 281 to read:

282 744.4461 Financial exploitation of wards; penalties.-

283 (1) As used in this section, the term "undue influence"
 284 means domination, intimidation, force, coercion, or legal
 285 manipulation exercised by another person to the extent that a
 286 ward is harmed.

287 (2) A guardian or his or her agent or an attorney or his or
 288 her agent may not knowingly, from the date the incapacity is
 289 adjudicated, dissipate, use, obtain, convert, or take control of
 290 or endeavor to dissipate, use, obtain, convert, or take control

40-00147-14

2014412__

291 of any of a ward's property by improper billing, fraud upon the
 292 court, deception, intimidation, undue influence, coercion,
 293 harassment, duress, or misrepresentation with the intent or
 294 result of permanently depriving the ward of the use, benefit, or
 295 possession of the property.

296 (3) A person who violates this section commits a felony of
 297 the third degree, punishable as provided in s. 775.082, s.
 298 775.083, or s. 775.084.

299 Section 4. Paragraph (a) of subsection (2) of section
 300 932.701, Florida Statutes, is amended to read:

301 932.701 Short title; definitions.-

302 (2) As used in the Florida Contraband Forfeiture Act:

303 (a) "Contraband article" means:

304 1. Any controlled substance as defined in chapter 893 or
 305 any substance, device, paraphernalia, or currency or other means
 306 of exchange that was used, was attempted to be used, or was
 307 intended to be used in violation of ~~any provision of~~ chapter
 308 893, if the totality of the facts presented by the state is
 309 clearly sufficient to meet the state's burden of establishing
 310 probable cause to believe that a nexus exists between the
 311 article seized and the narcotics activity, regardless of whether
 312 ~~or not~~ the use of the contraband article can be traced to a
 313 specific narcotics transaction.

314 2. Any gambling paraphernalia, lottery tickets, money,
 315 currency, or other means of exchange that ~~which~~ was used or,
 316 attempted, or intended to be used in violation of the gambling
 317 laws of the state.

318 3. Any ~~equipment,~~ liquid or solid equipment that, ~~which~~ was
 319 or is being used or, ~~is being used,~~ was attempted ~~to be used,~~ or

40-00147-14

2014412__

320 intended to be used in violation of the beverage or tobacco laws
 321 of the state.

322 4. Any motor fuel upon which the motor fuel tax has not
 323 been paid as required by law.

324 5. Any personal property, including, but not limited to,
 325 any vessel, aircraft, item, object, tool, substance, device,
 326 weapon, machine, vehicle of any kind, money, securities, books,
 327 records, research, negotiable instruments, or currency, which
 328 was used or was attempted to be used as an instrumentality in
 329 the commission of, or in aiding or abetting in the commission
 330 of, any felony, regardless of whether ~~or not~~ comprising an
 331 element of the felony, or which is acquired by proceeds obtained
 332 as a result of a violation of the Florida Contraband Forfeiture
 333 Act.

334 6. Any real property, including any right, title,
 335 leasehold, or other interest in the whole of any lot or tract of
 336 land, which was or is being used, ~~is being used~~, or was
 337 attempted to be used as an instrumentality in the commission of,
 338 or in aiding or abetting in the commission of, any felony, or
 339 which is acquired by proceeds obtained as a result of a
 340 violation of the Florida Contraband Forfeiture Act.

341 7. Any personal property, including, but not limited to,
 342 equipment, money, securities, books, records, research,
 343 negotiable instruments, currency, or any vessel, aircraft, item,
 344 object, tool, substance, device, weapon, machine, or vehicle of
 345 any kind in the possession of or belonging to any person who
 346 takes aquaculture products in violation of s. 812.014(2)(c).

347 8. Any motor vehicle offered for sale in violation of s.
 348 320.28.

40-00147-14

2014412__

349 9. Any motor vehicle used during the course of committing
350 an offense in violation of s. 322.34(9)(a).

351 10. Any photograph, film, or other recorded image,
352 including an image recorded on videotape, a compact disc,
353 digital tape, or fixed disk, which ~~that~~ is recorded in violation
354 of s. 810.145 and ~~is~~ possessed for the purpose of amusement,
355 entertainment, sexual arousal, gratification, or profit, or for
356 the purpose of degrading or abusing another person.

357 11. Any real property, including any right, title,
358 leasehold, or other interest in the whole of any lot or tract of
359 land, which is acquired by proceeds obtained as a result of
360 Medicaid fraud under s. 409.920 or s. 409.9201; any personal
361 property, including, but not limited to, equipment, money,
362 securities, books, records, research, negotiable instruments, or
363 currency; or any vessel, aircraft, item, object, tool,
364 substance, device, weapon, machine, or vehicle of any kind in
365 the possession of or belonging to any person which is acquired
366 by proceeds obtained as a result of Medicaid fraud under s.
367 409.920 or s. 409.9201.

368 12. Any personal property, including, but not limited to,
369 any vehicle, item, object, tool, device, weapon, machine, money,
370 security, book, or record, which ~~that~~ is used or attempted to be
371 used as an instrumentality in the commission of, or in aiding
372 and abetting in the commission of, a person's third or
373 subsequent violation of s. 509.144, whether or not comprising an
374 element of the offense.

375 13. Any vehicle, machinery, equipment, or other item of
376 personal property used in connection with the financial
377 exploitation of a ward in violation of s. 744.4461.

40-00147-14

2014412__

378

Section 5. This act shall take effect October 1, 2014.

Elder Law Section



January 8, 2014

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The Honorable Eleanor Sobel
410 Senate Office Building
404 South Monroe Street
Tallahassee, FL 32399-1100

Re: SB 412

Dear Senator Sobel,

On behalf of the Florida Bar Elder Law Section, I would like to make you aware of the concerns we have with Senate Bill 412, amending Chapter 744, Florida Statutes.

The Elder Law Section opposes the changes this bill makes to Chapter 744 for numerous reasons. Some of the more glaring problems are as follows:

1. Lines 43-45, amending 744.108(1). This change would only award fees to a guardian or attorney if the services rendered accrued a monetary benefit to the ward. Currently there are guardians of the property of the ward as well as guardians of the person. Whenever a guardian is acting as guardian of the person, what is the monetary benefit to the ward? It is our opinion this provision will prevent the awarding of fees for guardians acting as guardians of the person.

2. Lines 79-81, amending 744.108(5). This change would require all guardian and attorney fee petitions to provide an accounting of the monetary benefit accrued to the ward by the petitioner. In addition to ignoring the non-monetary benefit that a guardian or attorney may provide to a ward, providing a detailed accounting each time an award of fees is to be made will only add to the cost of guardianships and increase the fees charged by guardians and attorneys.

3. Lines 43-45 and 79-81 amending 744.108. These changes taken as a whole would only create more litigation and prevent any attorney or guardian from being paid unless the ward is making more money than he or she is spending. In most guardianships, the guardian cannot create a "monetary" value for a ward. In most guardianships, the ward needs more costly care and supervision and that depletes the ward's assets. The changes proposed by this legislation would, contrary to nearly a century of settled law, define the only benefit to a ward under guardianship as a monetary value, as opposed to protection against predators, ensuring proper health care and supervision, etc. This is against the public policy and legislative intent that requires the existence of guardianships for vulnerable individuals.

This narrow definition of the benefit to a ward under a guardianship will lead to the loss of professional guardians leaving vulnerable Floridians with no protections other than Adult Protective Services and the Offices of Public Guardian. The loss of professional guardians will create a significant fiscal impact on the Department of Children & Families' budget as well as the Department of Elder Affairs' budget just to accommodate the necessary protection for Florida's vulnerable adults.

4. Lines 82-91, amending 744.108(6). This change requires all family members who request it to be noticed on fee petitions, whether they are interested parties or not. Many guardianships are filed because of family dysfunction, and there are valid reasons why some family members should not be included in the proceeding. This provision would only increase the amount of litigation in guardianship overburdening courts with often irrelevant issues from individuals claiming a tenuous family relationship with a vulnerable individual. This increase in litigation will have a significant fiscal impact on the state court budget.

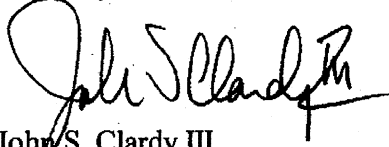
5. Lines 123-138, amending 744.331(3)(a). This change seeks to remove certain individuals who can act as examining committee members and increase the qualifications of the members. In small rural counties around the state, there is already a lack of medical professionals willing to serve on examining committees. This change will further reduce options in small counties and drive up the costs associated with guardianship proceedings. This will have a significant fiscal impact on the courts and the state budget.

6. Lines 250-251, amending 744.331(4). This change requires unanimous consent among all examining committee members that the alleged incapacitated person is incapacitated, otherwise the court shall dismiss the petition. Under current law, if a majority of examining committee members conclude that the alleged incapacitated person is not incapacitated, the petition is dismissed. The examining committee's purpose is to provide expert opinion so the court can determine whether a person is incapacitated. This change goes too far in removing discretion from the court in determining the issue of capacity.

7. The additional amendments to 744.331(4). This change allowing the presence of family members and caregivers at examining committee evaluations and allowing everyone to record them without limitation, directly violates the Constitutional privacy protections for the alleged incapacitated person. Many of these evaluations include discussions of mental health issues, substance abuse histories, intimate personal care issues, and even sexually transmitted diseases. Allowing these evaluations to be attended by a broad range of individuals and those evaluations to be recorded will lead to the public broadcast of an alleged incapacitated person's most private information simply because they are alleged to be incapacitated.

While these are the major points of concern, there are others that we can identify if needed. I hope this information is helpful. Should you or your staff have any other questions or need further clarification on the above points, I would be happy to do so.

Sincerely,

A handwritten signature in black ink, appearing to read "John S. Clardy III". The signature is written in a cursive style with a large initial "J" and a stylized "C".

John S. Clardy III
Chair, Florida Bar Elder Law Section, 2013-2014

HB 635

2014

1 A bill to be entitled
 2 An act relating to guardianship; amending s. 744.102,
 3 F.S.; redefining the term "audit"; amending s.
 4 744.3135, F.S.; requiring a nonprofessional guardian
 5 to submit to a credit history investigation and
 6 background screening; amending s. 744.3678, F.S.;
 7 authorizing the court to order an accounting of
 8 property or a trust of which the ward is a beneficiary
 9 but which is not under the administration or control
 10 of the guardian; amending s. 744.368, F.S.;
 11 authorizing the clerk to obtain and review records
 12 impacting guardianship assets and to issue subpoenas
 13 upon application to the court; amending s. 744.474,
 14 F.S.; providing for the removal of a guardian for
 15 failure to submit records during an audit; amending s.
 16 943.059, F.S.; providing that a person seeking an
 17 appointment as a guardian may not lawfully deny or
 18 fail to acknowledge the arrests covered by a sealed
 19 record; providing an effective date.

20
 21 Be It Enacted by the Legislature of the State of Florida:

22
 23 Section 1. Subsection (2) of section 744.102, Florida
 24 Statutes, is amended to read:

25 744.102 Definitions.—As used in this chapter, the term:

26 (2) "Audit" means a systematic review of financial and ~~all~~

27 other documents to ensure compliance with s. 744.368, rules of
 28 court, and local procedures using generally accepted accounting
 29 principles. The term includes, but is not limited to, various
 30 practices that meet professional standards such as
 31 verifications, reviews of substantiating papers and accounts,
 32 interviews and hearings, inspections, and investigations.

33 Section 2. Subsection (1) of section 744.3135, Florida
 34 Statutes, is amended to read:

35 744.3135 Credit and criminal investigation.—

36 (1) The court shall ~~may~~ require a nonprofessional
 37 guardian, ~~and shall require~~ a professional guardian, or a public
 38 guardian, and all employees of a professional guardian who have
 39 a fiduciary responsibility to a ward, to submit, at their own
 40 expense, to an investigation of the guardian's credit history
 41 and to undergo level 2 background screening as required under s.
 42 435.04. ~~If a credit or criminal history record check is~~
 43 ~~required,~~ The court must consider the results of any
 44 investigation before appointing a guardian. At any time, the
 45 court may require a guardian or the guardian's employees to
 46 submit to an investigation of the person's credit history and
 47 complete a level 1 background screening pursuant to ~~as set forth~~
 48 ~~in~~ s. 435.03. The court shall consider the results of any
 49 investigation in determining whether to reappoint ~~when~~
 50 ~~reappointing~~ a guardian. The clerk of the court shall maintain a
 51 file on each guardian appointed by the court and retain in the
 52 file documentation of the result of any investigation conducted

53 under this section. A professional guardian shall ~~must~~ pay the
 54 clerk of the court a fee of up to \$7.50 for handling and
 55 processing professional guardian files.

56 Section 3. Paragraph (a) of subsection (2) of section
 57 744.3678, Florida Statutes, is amended to read:

58 744.3678 Annual accounting.—

59 (2) The annual accounting must include:

60 (a) A full and correct account of the receipts and
 61 disbursements of all of the ward's property over which the
 62 guardian has control and a statement of the ward's property on
 63 hand at the end of the accounting period. This paragraph does
 64 not apply to any property or any trust of which the ward is a
 65 beneficiary but which is not under the control or administration
 66 of the guardian unless an accounting is ordered by the court.

67 Section 4. Present subsections (2) through (4) of section
 68 744.368, Florida Statutes, are redesignated as subsections (3)
 69 through (5), respectively, and a new subsection (2) is added to
 70 that section, to read:

71 744.368 Responsibilities of the clerk of the circuit
 72 court.—

73 (2) The clerk may:

74 (a) At the direction of the court, obtain and review
 75 records and documents that reasonably impact guardianship
 76 assets, including, but not limited to, the beginning inventory
 77 balance and any fees charged to the guardianship.

78 (b) Upon application to the court, exercise the power to

HB 635

2014

79 issue and serve subpoenas supported by affidavit to parties and
 80 nonparties and compel the production of books, papers,
 81 documents, and other evidence.

82 Section 5. Subsection (21) is added to section 744.474,
 83 Florida Statutes, to read:

84 744.474 Reasons for removal of guardian.—A guardian may be
 85 removed for any of the following reasons, and the removal shall
 86 be in addition to any other penalties prescribed by law:

87 (21) Failure to submit guardianship records during the
 88 audit pursuant to s. 744.368.

89 Section 6. Paragraph (a) of subsection (4) of section
 90 943.059, Florida Statutes, is amended to read:

91 943.059 Court-ordered sealing of criminal history
 92 records.—The courts of this state shall continue to have
 93 jurisdiction over their own procedures, including the
 94 maintenance, sealing, and correction of judicial records
 95 containing criminal history information to the extent such
 96 procedures are not inconsistent with the conditions,
 97 responsibilities, and duties established by this section. Any
 98 court of competent jurisdiction may order a criminal justice
 99 agency to seal the criminal history record of a minor or an
 100 adult who complies with the requirements of this section. The
 101 court shall not order a criminal justice agency to seal a
 102 criminal history record until the person seeking to seal a
 103 criminal history record has applied for and received a
 104 certificate of eligibility for sealing pursuant to subsection

105 (2). A criminal history record that relates to a violation of s.
 106 393.135, s. 394.4593, s. 787.025, chapter 794, s. 796.03, s.
 107 800.04, s. 810.14, s. 817.034, s. 825.1025, s. 827.071, chapter
 108 839, s. 847.0133, s. 847.0135, s. 847.0145, s. 893.135, s.
 109 916.1075, a violation enumerated in s. 907.041, or any violation
 110 specified as a predicate offense for registration as a sexual
 111 predator pursuant to s. 775.21, without regard to whether that
 112 offense alone is sufficient to require such registration, or for
 113 registration as a sexual offender pursuant to s. 943.0435, may
 114 not be sealed, without regard to whether adjudication was
 115 withheld, if the defendant was found guilty of or pled guilty or
 116 nolo contendere to the offense, or if the defendant, as a minor,
 117 was found to have committed or pled guilty or nolo contendere to
 118 committing the offense as a delinquent act. The court may only
 119 order sealing of a criminal history record pertaining to one
 120 arrest or one incident of alleged criminal activity, except as
 121 provided in this section. The court may, at its sole discretion,
 122 order the sealing of a criminal history record pertaining to
 123 more than one arrest if the additional arrests directly relate
 124 to the original arrest. If the court intends to order the
 125 sealing of records pertaining to such additional arrests, such
 126 intent must be specified in the order. A criminal justice agency
 127 may not seal any record pertaining to such additional arrests if
 128 the order to seal does not articulate the intention of the court
 129 to seal records pertaining to more than one arrest. This section
 130 does not prevent the court from ordering the sealing of only a

131 | portion of a criminal history record pertaining to one arrest or
 132 | one incident of alleged criminal activity. Notwithstanding any
 133 | law to the contrary, a criminal justice agency may comply with
 134 | laws, court orders, and official requests of other jurisdictions
 135 | relating to sealing, correction, or confidential handling of
 136 | criminal history records or information derived therefrom. This
 137 | section does not confer any right to the sealing of any criminal
 138 | history record, and any request for sealing a criminal history
 139 | record may be denied at the sole discretion of the court.

140 | (4) EFFECT OF CRIMINAL HISTORY RECORD SEALING.—A criminal
 141 | history record of a minor or an adult which is ordered sealed by
 142 | a court of competent jurisdiction pursuant to this section is
 143 | confidential and exempt from the provisions of s. 119.07(1) and
 144 | s. 24(a), Art. I of the State Constitution and is available only
 145 | to the person who is the subject of the record, to the subject's
 146 | attorney, to criminal justice agencies for their respective
 147 | criminal justice purposes, which include conducting a criminal
 148 | history background check for approval of firearms purchases or
 149 | transfers as authorized by state or federal law, to judges in
 150 | the state courts system for the purpose of assisting them in
 151 | their case-related decisionmaking responsibilities, as set forth
 152 | in s. 943.053(5), or to those entities set forth in
 153 | subparagraphs (a)1., 4., 5., 6., and 8. for their respective
 154 | licensing, access authorization, and employment purposes.

155 | (a) The subject of a criminal history record sealed under
 156 | this section or under other provisions of law, including former

157 s. 893.14, former s. 901.33, and former s. 943.058, may lawfully
 158 deny or fail to acknowledge the arrests covered by the sealed
 159 record, except when the subject of the record:

160 1. Is a candidate for employment with a criminal justice
 161 agency;

162 2. Is a defendant in a criminal prosecution;

163 3. Concurrently or subsequently petitions for relief under
 164 this section, s. 943.0583, or s. 943.0585;

165 4. Is a candidate for admission to The Florida Bar;

166 5. Is seeking to be employed or licensed by or to contract
 167 with the Department of Children and Families, the Division of
 168 Vocational Rehabilitation within the Department of Education,
 169 the Agency for Health Care Administration, the Agency for
 170 Persons with Disabilities, the Department of Health, the
 171 Department of Elderly Affairs, or the Department of Juvenile
 172 Justice or to be employed or used by such contractor or licensee
 173 in a sensitive position having direct contact with children, the
 174 disabled, or the elderly;

175 6. Is seeking to be employed or licensed by the Department
 176 of Education, any district school board, any university
 177 laboratory school, any charter school, any private or parochial
 178 school, or any local governmental entity that licenses child
 179 care facilities; ~~or~~

180 7. Is attempting to purchase a firearm from a licensed
 181 importer, licensed manufacturer, or licensed dealer and is
 182 subject to a criminal history check under state or federal law;

HB 635

2014

183 or

184 8. Is seeking to be appointed as a guardian pursuant to s.

185 744.3125.

186 Section 7. This act shall take effect July 1, 2014.

Page 8 of 8

CODING: Words ~~stricken~~ are deletions; words underlined are additions.

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Legislation Approval and Education Process

This memorandum sets forth the Legislation Approval and Education Process for the RPPTL Section of the Florida Bar. This process is intended to improve the work product produced and submitted by our subcommittees, reduce the number of corrective “glitch” bills, avoid legislative redrafting that inadvertently changes a proposal’s effect, and to encourage collaboration among the Divisions of the RPPTL Section on legislative initiatives. It is not intended to create a new level of substantive review by the Legislative Committee.

Each RPPTL substantive committee Chair will select one or more of the appointed Vice Chairs of the substantive committee as “Vice Chair(s) of Legislation”. The Vice Chair of Legislation will assist with all bill drafting by their respective committees and will regularly update the Legislation Committee on the status of each committee’s legislative projects.

The Legislation Committee will be tasked with educating the substantive Committee Chairs and Vice Chairs of Legislation for each substantive committee on the: (a) applicable elements of the current House bill drafting guide for the text and format of legislation; (b) time deadlines to have proposed legislation approved by the committee and ultimately the Executive Council; and (c) the necessity for clear and concise white papers and legislation position request forms. Further, the Legislation Committee will educate the Chairs and Vice Chairs on effective approaches for facilitating discussion on legislation and best practices for structuring debate on legislative initiatives.

When a substantive committee has determined that new legislation is needed and has fully vetted the policy rationale underlying the proposed legislation, the Vice Chair of Legislation for the substantive committee shall be responsible for ensuring the proper preparation, including final proofing and editing, of the proposal consisting of a white paper and proposed bill text so that each document is technically sound and internally consistent. Once these documents are prepared, the Chair of the proponent committee shall review, approve and refer the proposal to the Legislation Committee for editorial review before the proposal is approved by final vote of the substantive committee. The proposal must be referred to the Legislation Committee no later than 45 days before the substantive committee is scheduled to vote on the proposal unless the appropriate Division Director determines that circumstances otherwise warrant expedited consideration.

The Chair and Vice Chair of Legislation for the proponent committee will participate in the review by the Legislation Committee to provide context, history and the policy rationale behind the proposed text to the extent not evident in the white paper. The Legislation Committee will work with its Legislative Reporters (currently Susan Spurgeon and Mike Bedke for Real Estate and Sarah Butters and Dresden Brunner for Probate/Trust) to edit the text to assure compliance with the House bill drafting guidelines and provide a “fresh set of eyes”. The Legislation Committee will then forward the text to the Division Directors of the RPPTL Section and, in consultation with the Division Directors, all Section committees whose areas of substantive law

may be impacted by the legislation. The Legislation Committee will work with the applicable Vice Chair of Legislation to integrate the beneficial responses into the proposal documents.

After the proposed bill text and white paper are approved by the Chairs of the Legislation Committee, the proposed bill text and white paper will be referred back to the proponent committee. The proposed bill text and white paper may then be vetted and voted on by the proponent Committee.

If the proponent Committee makes changes to either the bill text or white paper, the proposed documents will be referred back to the Legislative Committee for further action consistent with the goals and objectives described in this memorandum. The Legislative Committee, in consultation with the appropriate Division Director, will notify the chair of the proponent Committee of any additional steps required to be taken as a result of the changes and the timing associated with such steps.

The failure to follow the procedures and timeframes set forth above may cause a delay in Executive Council consideration of the proposal or require that the proposal be referred back to the proponent committee. The Division Director for the substantive Committee may adjust these procedures if exigent circumstances warrant.

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RPPTL SECTION 2013-2014 CLE CALENDAR

Date	Title of Seminar/Committee	Committee	Location	CLE Committee Liaison
July 24-28, 2013	EXECUTIVE COUNCIL MEETING AND LEGISLATIVE UPDATE		PALM BEACH	
<i>August 21, 2013</i>	<i>TRIM Those Taxes: 2013 Update For Challenging Ad Valorem Taxes</i>		<i>e-CLE</i>	
<i>September 11, 2013</i>	<i>The Perils of "Boilerplate" and Other Common Contract Provisions</i>		<i>e-CLE</i>	
September 18-22, 2013	EXECUTIVE COUNCIL MEETING		LISBON	
<i>October 2, 2013</i>	<i>Gifts to Attorneys in Wills</i>		<i>e-CLE</i>	
<i>October 4, 2013</i>	<i>Hot Topics in Real Property Litigation - 2013 Edition</i>		<i>Tampa</i>	<i>Jennifer Tobin</i>
<i>October 18, 2013</i>	<i>Estate Tax/IRA/Gifts-</i>		<i>Tampa</i>	<i>Sarah Butters</i>
<i>October 30, 2013</i>	<i>The Revised Land Trust Act: All Treats, No Tricks</i>	<i>Real Estate Structures and Taxation</i>	<i>Tampa</i>	<i>Larry Miller</i>
<i>November 6, 2013 (POSTPONED UNTIL 2014)</i>	<i>Title Standards</i>		<i>e-CLE</i>	
November 21-24, 2013	EXECUTIVE COUNCIL MEETING		SARASOTA	
<i>December 4, 2013 (POSTPONED UNTIL 2014)</i>	<i>Year-End Tax Planning</i>		<i>e-CLE</i>	
<i>December 6, 2013</i>	<i>Probate Law</i>		<i>Tampa</i>	<i>Sarah Butters</i>
<i>January 31, 2014</i>	<i>ELULS/RPPTL - Emerging Trends on the Development Front for Environmental, Land Use and Real Estate Practitioners</i>		<i>Tampa</i>	<i>Larry Miller</i>
<i>February 5, 2014</i>	<i>Landlord - Tenant</i>		<i>e-CLE</i>	
February 6-9, 2014	EXECUTIVE COUNCIL MEETING		AMELIA ISLAND	
<i>February 19, 2013</i>	<i>Practical Pointers on Sale of Homestead</i>		<i>e-CLE</i>	
<i>February 21 - 22, 2014</i>	<i>Real Property Certification Review</i>		<i>Orlando</i>	<i>Jennifer Tobin</i>
<i>March 5, 2014</i>	<i>Real Estate Finance</i>		<i>e-CLE</i>	
<i>March 20 - 22, 2014</i>	<i>Construction Law Institute</i>		<i>Orlando</i>	<i>Hardy Roberts</i>
<i>March 20 - 22, 2014</i>	<i>Construction Law Certification Review</i>		<i>Orlando</i>	<i>Hardy Roberts</i>
<i>April 2, 2014</i>	<i>Digital Estate Planning</i>		<i>e-CLE</i>	
<i>April 4 - 5, 2014</i>	<i>Wills and Trust Certification Review</i>		<i>Orlando</i>	<i>Laura Sundberg</i>
<i>April 4, 2014</i>	<i>Condominium and Planned Development</i>			
<i>May 15, 2014</i>	<i>Commercial Real Estate</i>		<i>South Florida</i>	<i>Jennifer Tobin</i>
<i>April 25, 2014</i>	<i>Condominium and Planned Development</i>		<i>Tampa</i>	<i>Rob Freedman</i>
<i>April 25, 2014</i>	<i>Trust and Estate Litigation Symposium</i>		<i>South Florida</i>	<i>Sarah Butters</i>
<i>May 14, 2014</i>	<i>Insurance</i>		<i>e-CLE</i>	
<i>May 30, 2014</i>	<i>Convention seminar</i>		<i>Captiva</i>	
May 29-June 1, 2014	EXECUTIVE COUNCIL MEETING		CAPTIVA	
<i>June 12-14, 2014</i>	<i>Attorney-Trust Officer Conference</i>		<i>Naples</i>	<i>Laura Sundberg</i>

Normal Text

Italics

BOLD

→ in-person (full day or conference) programs

→ e-CLE (PowerPoint on computer and telephone) programs

→ Executive Council meetings