BRING TO MEETING

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

Executive Council Meeting

AGENDA

Ritz Carlton Key Biscayne
455 Grand Bay Drive
Key Biscayne, FL 33149
(305) 365-4500

Saturday, September 20, 2008
10:30 a.m.

BRING TO THE MEETING

Real Property, Probate and Trust Law Section
Executive Council Meeting
The Ritz Carlton – Key Biscayne, Florida

AGENDA

I. **Presiding** — Sandra Diamond, Chair

II. **Attendance** — Michael A. Dribin, Secretary

III. **Minutes of Previous Meeting** — Michael A. Dribin, Secretary
1. Approval of July 26, 2008 Breakers Executive Council Meeting Minutes **pp. 1 - 27**

IV. **Chair's Report** — Sandra Diamond
1. 2008 – 2009 RPPTL Executive Council Schedule **pp. 28**

V. **Chair-Elect's Report** — John Neukamm
1. 2009 – 2010 RPPTL Executive Council Schedule **pp. 29**

VI. **Liaison with Board of Governors Report** — Daniel DeCubellis
1. BOG Summary – July 2008 **pp. 30**

VII. **Treasurer's Report** — Fletcher Belcher
1. Final 2007 – 2008 Summary **pp. 32 - 36**

VIII. **Circuit Representative's Report** — Margaret Rolando, Director
1. First Circuit – W. Christopher Hart; Colleen Coffield Sachs
2. Second Circuit – J. Breck Brannen; Sarah S. Butters; Victor L. Huszagh; John T. Lajoie
3. Third Circuit – John J. Kendron; Guy W. Norris
4. Fourth Circuit – William R. Blackard, Jr.; Harris LaRue Bonnette, Jr., Roger W. Cruce
5. Fifth Circuit – Del G. Potter; Arlene C. Udick
6. Sixth Circuit – Robert N. Altman; David R. Carter; Gary L. Davis; Robert C. Dickinson, III; Luanne E. Ferguson; Joseph W. Fleece, III; George W. Lange, Jr.; Sherri M. Stinson; Kenneth E. Thornton; Hugh C. Umstead
7. Seventh Circuit – Sean W. Kelley; Michael A. Pyle; Richard W. Taylor; Jerry B. Wells
8. Eighth Circuit – John Frederick Roscow, IV; Richard M. White Jr.
9. Ninth Circuit – David J. Akins; Russell W. Divine; Amber J. F. Johnson; Thomas Michael Katheder; Stacy A. Prince; Randy J. Schwartz; Joel H. Sharp Jr.; Charles D. Wilder; G. Charles Wohlust
10. Tenth Circuit – Gregory R. Deal; Sandra Graham Sheets; Robert S. Swaine
11. Eleventh Circuit – Carlos A. Batlle; Mary E. Clarke; Thomas M. Karr; Nelson C. Keshen; Marsha G. Madorsky; William T. Muir; Adrienne Frischberg Promoff; J. Eric Virgil; Diana S. C. Zeydel
12. Twelfth Circuit – Kimberly A. Bald; Michael L. Foreman; L. Howard Payne; P. Allen Schofield
13. Thirteenth Circuit – Lynwood F. Arnold, Jr.; Thomas N. Henderson; Wilhelmina F. Kightlinger; Christian F. O'Ryan; William R. Platt; R. James Robbins
14. Fourteenth Circuit – Brian Leebrick
15. Fifteenth Circuit – Elaine M. Bucher; Glen M. Mednick; Lawrence Jay Miller; Robert M. Schwartz
16. Sixteenth Circuit – Julie A. Garber

17. Seventeenth Circuit – James R. George; Robert B. Judd; Shane Kelley; Alexandra V. Rieman
18. Eighteenth Circuit – Jerry W. Allender; Steven C. Allender; Stephen P. Heuston
19. Nineteenth Circuit – Jane L. Cornett; Richard J. Dungey
20. Twentieth Circuit – Michael T. Hayes; Alan S. Kotler; Jon Scuderi; Dennis R. White; D. Keith Wickenden

IX. Real Property Division — *George J. Meyer, Real Property Division Director*

Action Items

1. Title Insurance Committee – *Homer Duvall, III, Chair*

   A. Comment Letter to OMB on Proposed RESPA Revisions. OMB is requesting comments on their proposed revisions to RESPA. Because of the adverse impact some of those revisions will have upon settlement services providers (which term includes many Section members); the Title Insurance Committee believes it is both appropriate and prudent for the Section to send to OMB a letter commenting on some of those proposed revisions. A draft of the proposed comment letter is attached at **pp. 37 - 38**

   B. Amendment to Section 201.02 to address Documentary Stamp Tax on Short Sales Issue. A concern within the real estate industry has arisen that, with respect to short sales (i.e., the lender accepts less than the full loan amount owed on a negotiated sale of the property), DOR will take the position that documentary stamp taxes will have to be paid based upon the combined value of both the negotiated sales price and the amount of the forgiven indebtedness. The Title Insurance Committee believes such a position will be detrimental to short sales and therefore detrimental to the overall recovery of the real estate market in Florida. Accordingly, the Committee is proposing to amend Section 201.02 to exclude the amount of the forgiven indebtedness from the documentary stamp tax calculation. Attached are the proposed legislative changes, supporting White Paper and legislative position form. **pp. 39 - 46**

   C. Amendment to Section 501.1377 to Exclude Attorneys from the term "Foreclosure-Rescue Consultant." Section 501.1377 was enacted by the legislature in 2007 to address certain Unfair and Deceptive Trade Practices with respect to foreclosure consultants. A broad definition for "foreclosure-rescue consultant" was adopted which did not expressly exclude attorneys providing legal services to their clients. The Florida Attorney General issued a letter ruling which holds that the term "foreclosure-rescue consultant" does not include attorneys. The amendment being proposed by the Title Insurance Committee seeks to codify that ruling in the statute. Attached are the proposed legislative changes and supporting White Paper. **pp. 47 - 52**

2. Real Property Litigation – *Mark Brown, Chair*

   A. Glitch Edits to Section 48.23 Amendment - Lis Pendens Statute The Real Property Litigation Committee proposed certain edits and changes to Section 48.23 at the last Executive Council Meeting that were approved by the Executive Council at that meeting. Subsequent to the Executive Council Meeting a certain glitch was discovered in the approved changes that potentially could have unintentionally and adversely impacted certain priority rights. Accordingly, the Real Property Litigation

Committee is proposing certain edits to the approved changes to address that glitch. Attached are: (1) a copy of the proposed change to section 48.23 that were approved in West Palm, with the edits to address the glitch highlighted in **bold**; (2) a copy of the revised White Paper; and (3) a copy of the revised Legislative Position Request Form. **pp. 53 - 59**

3. Title Issues and Standards – *Patricia Jones, Chair*

   A. Revised Uniform Title Standards Chapter 11 (Plats). The Title Issues and Standards Committee is proposing revising Chapter 11 of the Uniform Title Standards as reflected in the materials attached at **pp. 60 - 79**

X. Probate and Trust Division Action Item — *Brian Felcoski, Probate Division Director*

Action Items

1. Probate Law and Procedure Committee – *Charlie Nash*

   A. Amendment to Section 732.108 - Paternity **pp. 80 - 84**

   B. Amendment to Section 731.201 to Add Definition of "Minor" **pp. 85-89**

   C. Amendments to Sections 731.201(21), 733.201(3) and 733.504(1) Regarding Change of Reference From "Incompetent" to "Incapacitated". **pp. 90-94**

2. Estate and Trust Tax Planning Committee – *Richard Gans*

   A. Amendments to Sections 193.155(3) – Homestead Assessments **pp. 95-112**

   B. Revisions to Section 739.201(4) and related conforming changes and revisions to Section 739.501 - Uniform Disclaimer of Property **pp. 113-119**

3. IRA and Employee Benefits Committee – *Kristen Lynch*

   A. Proposed Bill - Section 732.xxx – Effect of Dissolution or Invalidity of Marriage on Disposition of Certain Assets at Death **pp. 120-132**

XI. General Standing Committee and Division Reports

General Standing Committees – *John Neukamm, Director and Chair-Elect*

1. **Actionline** – Rich Caskey, Chair; Scott Pence and Rose LaFemina, Co-Vice Chairs

2. **Amicus Coordination** – Bob Goldman and John W. Little, Co-Chairs

   A. In re Estate of Edith Alice Cutler, Third District Court of Appeal **pp. 133-140**

3. **Budget** – Fletch Belcher, Chair; Pamela O. Price, Vice Chair

4. **Bylaws** – Fletch Belcher, Chair

5. **CLE Seminar Coordination** – Jack Falk, Chair; Laura Sundberg and Sylvia Rojas, Co-Vice Chairs
   A. RPPTL Section CLE Calendar 2008 – 2009 **pp. 141-143**

6. **2008 Convention Coordinator** – Marilyn Polson, Chair; Dresden Brunner, Vice Chair

7. **Fellowship** – Tae Bronner and Phil Baumann, Co-Chairs

8. **Florida Bar Journal** – Richard R. Gans, Chair Probate Division; Bill Sklar, Chair Real Property Division

9. **Legislative Review** – Burt Bruton, Chair; Michael Gelfand and Debra Boje, Co-Vice Chairs
   A. Approved RPPTL Section Legislative Positions **pp. 144-149**

10. **Legislative Update Coordinators** – Sancha Brennan Whynot, Chair; Stuart Altman and Bob Swaine, Co-Vice Chairs

11. **Liaison Committees:**
   A. **ABA:** Ed Koren; Julius J. Zschau
   B. **American Resort Development Assoc. (ARDA):** Larry Kinsolving; Jerry Aron; Wayne Sobien
   C. **BLSE:** Howard Payne; Robert Stern; Michael Sasso
   D. **Business Law Section:** Marsha Rydberg
   E. **BOG:** Dan DeCubellis, Board Liaison
   F. **CLE Committee:** Jack Falk
   G. **Clerks of the Circuit Court:** Thomas K. Topor
   H. **Council of Sections:** Sandra Diamond; John Neukamm
   I. **E-filing Agencies:** Judge Mel Grossman; Pat Jones
   J. **FLEA / FLSSI:** David Brennan; John Arthur Jones; Roland Chip Waller
   K. **Florida Bankers:** Stewart Andrew Marshall; Mark T. Middlebrook
   L. **Judiciary:** Judge Jack St. Arnold; Justice Kenneth Bell; Judge Gerald B. Cope Judge George W. Greer; Judge Melvin B. Grossman; Judge Hugh D. Hayes; Judge Maria M. Korvick; Judge Lauren Laughlin; Judge Celeste H. Muir; Judge Larry Martin; Judge Robert Pleus; Judge Susan G. Sexton; Judge Richard Suarez; Judge Winifred J. Sharp; Judge Morris Silberman; Judge Patricia V. Thomas; Judge Walter L. Schafer, Jr.
   M. **Law Schools and Student RPPTL Committee:** Alan Fields; Stacy Kalmanson
   N. **Liaison to the OCCCRC:** Joe George
   O. **Out of State:** Mike Stafford; John E. Fitzgerald, Pam Stuart
   P. **Young Lawyers Division**: Rhonda Chung DeCambre Stroman

12. **Long Range Planning Committee** – John Neukamm, Chair

13. **Member Communications and Information Technology** – Keith S. Kromash, Chair; Alfred Colby, Co-Chair

14. **Membership Development & Communication** – Phil Baumann, Chair; Mary Clarke, Vice Chair

15. **<u>Membership Diversity Committee</u>** – Tae Kelley Bronner and Fabienne Fahnestock Co-Chairs

16. **<u>Mentoring Program</u>** – Steven Hearn, Chair; Jerry Aron and Guy Emerich, Co-Vice Chairs

17. **<u>Model and Uniform Acts</u>** – Bruce Stone and Katherine Frazier, Co-Chairs

18. **<u>Professionalism & Ethics</u>** – Adele Stone and Deborah Goodall, Co-Chairs
    A. Revised Proposal Related to the Attorney-Client Privilege / Work Product Protections in the Public Sector **pp. 150-176**

19. **<u>Pro Bono</u>** – Andrew O'Malley, Chair; Adele I. Stone and David Garten, Co-Vice Chair
    A. FLASH Program Volunteers **pp. 177-222**

20. **<u>Sponsor Coordinators</u>** – Kristen Lynch, Chair; Debbie Goodall and Wilhelmina Kightlinger, Co-Vice Chairs

21. **<u>Strategic Planning</u>** – John Neukamm, Chair; Sandra Diamond, Melissa J. Murphy, and Laird Lyle, Co-Vice Chairs

<u>Real Property Division</u> — *George Meyer, Real Property Division Director*

1. **Affordable Housing** – Jaimie Ross, Chair; Chuck Elsesser, Vice-Chair

2. **Condominium and Planned Development** – Robert S. Freedman, Chair; Steven Mezer, Vice-Chair

3. **Construction Law** – Wm. Cary Wright, Chair; Brian Wolf and April Atkins, Co-Vice-Chairs

4. **Construction Law Institute** – Lee Weintraub, Chair; Wm. Cary Wright and Michelle Reddin, Co-Vice Chairs

5. **Construction Law Certification Review Course** – Fred Dudley, Chair; Kim Ashby, Vice Chair

6. **Development and Governmental Regulation of Real Estate** – Eleanor Taft, Chair; Nicole Kibert, Vice Chair

7. **FAR/BAR Committee and Liaison to FAR** – William J. Haley, Chair; Frederick Jones, Vice Chair

8. **Land Trusts and REITS** – S. Katherine Frazier, Chair; Wilhelmena Kightlinger, Vice Chair

9. **Landlord and Tenant** – Arthur J. Menor, Chair; Neil Shoter, Vice Chair

10. **Legal Opinions** – David R. Brittain and Roger A. Larson, Co-Chairs

11. **Liaison with Eminent Domain Committee** – Susan K. Spurgeon

12. **Liaison with Florida Brownfields Association** – Frank L. Hearne

13. **Liaisons with FLTA** – Norwood Gay and Alan McCall Co-Chairs; Barry Scholnik, John S. Elzeer, Joe Reinhardt, James C. Russick, Lee Huzagh, Co-Vice Chairs

14. **Mobiles Home and RV Parks** – Jonathan J. Damonte, Chair; David Eastman, Vice-Chair

15. **Mortgages and Other Encumbrances** – Jeffrey T. Sauer, Chair; Salome Zikakis and Jo Spear, Co-Vice Chairs

16. **Real Estate Certification Review Course** – Robert Stern, Chair; Ted Conner and Guy Norris, Co-Vice Chairs

17. **Real Property Forms** – Barry B. Ansbacher, Chair; Kristy Parker Brundage, Vice Chair

18. **Real Property Insurance** – Jay D. Mussman, Chair; Andrea Northrop, Vice Chair

19. **Real Property Litigation** – Mark A. Brown, Chair; Eugene E. Shuey and Marty Auerbach, Co-Vice Chairs

20. **Real Property Problems Study** – Wayne Sobien, Chair; Jeanne Murphy and Pat J. Hancock, Co-Vice Chair

21. **Title Insurance & Title Insurance Liaison** – Homer Duvall, Chair; Kristopher Fernandez, Vice Chair

22. **Title Issues and Standards** – Patricia Jones, Chair; Robert Graham, Stephen Reynolds, and Karla Gray, Co-Vice Chairs

Probate Roundtable — *Brian Felcoski, Probate Division Director*

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

2. **Ad Hoc Committee on Homestead Life Estates** – Shane Kelley, Chair

3. **Advance Directives** – Rex E. Moule, Chair; Marjorie Wolasky, Vice Chair

4. **Asset Preservation** – Jerome Wolf, Chair; Brian Sparks, Vice Chair

5. **Charitable Organizations and Planning** – Michael W. Fisher, Co- Chair; Thomas C. Lee, Jr., Michael Stafford and Jeff Baskies, Co-Vice Chairs

6. **Estate and Trust Tax Planning** – Richard Gans, Chair; Craig Mundy, Vice-Chair

7. **Guardianship Law and Procedure** – Debra Boje and Alexandra Rieman, Co-Chairs, Andrea L. Kessler, Vice Chair

8. **Insurance** – L. Howard Payne, Chair; David Silberstein, Vice Chair

9. **IRA's and Employee Benefits** – Kristen Lynch, Chair; Linda Griffin, Vice-Chair

10. **Liaison with Corporate Fiduciaries** – Seth Marmor, Chair; Robin King, Co-Vice Chair; Gwynne Young, Co-Vice Chair; Joan Crain, Corporate Fiduciary Chair

11. **Liaisons with Elder Law Section** – Charles F. Robinson, Chair; Marjorie Wolasky, Vice-Chair

12. **Liaison with Statewide Public Guardianship Office** - Michelle Hollister, Chair

13. **Liaisons with Tax Section** – David Pratt; Brian C. Sparks; Donald R. Tescher

14. **Power of Attorney** – Tami Conetta, Chair; David Carlisle, Vice-Chair

15. **Principal and Income Committee** – Ed F. Koren, Chair

16. **Probate and Trust Litigation** – William Hennessey, Chair; Tom Karr and Jon Scuderi, Co-Vice Chairs

17. **Probate Law and Procedure** – Charles Ian Nash, Chair, Sam Boone, Anne Buzby and Shane Kelley, Co-Vice Chairs

18. **Trust Law** – Barry Spivey, Chair; Christopher Boyett and Laura Stephenson, Co-Vice Chairs

19. **Wills, Trusts and Estates Certification Review Course** – Anne Buzby, Chair; Deborah Russell, Vice Chair

XII. Adjourn

The Florida Bar
Real Property, Probate & Trust Law Section

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Estate & Trust Tax Planning Committee

Northern Trust Bank of Florida
Trust Law Committee

DRAFT

Real Property, Probate and Trust Law Section
Minutes of Executive Council Meeting
The Breakers - Palm Beach, Florida
Saturday, July 26, 2008

I. Presiding —*Sandra Diamond, Chair*

Stewart Title and Florida Bar Foundation were welcomed and thanked by Sandy for their sponsorship of the Executive Council lunch.

II. Attendance — *Michael A. Dribin, Secretary*

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

III. Minutes of Previous Meeting — *Michael A. Dribin, Secretary*

Upon motion duly made, seconded and unanimously carried, the Minutes of the Executive Council meeting held at Bonita Springs, Florida on May 24, 2008, included in the Agenda materials at pp. 1-20, were approved.

IV. Chair's Report — *Sandra Diamond*

1. 2008 – 2009 RPPTL Executive Council schedule is to be found at page 21 of the Agenda materials.
2. Sandy welcomed the new members of the Executive Council.
3. Sandy congratulated Rohan Kelley on his having been awarded a most prestigious award by The Florida Bar for his efforts in promoting diversity issues within the Section.
4. Sandy reported that she and George Meyer had attended and actively participated in the Florida Bar Leadership Conference.

V. Chair-Elect's Report — *John Neukamm*

John reviewed the 2009 – 2010 RPPTL Executive Council Schedule, appearing on page 22 of the Agenda materials.

VI. Liaison with Board of Governors Report — *Daniel DeCubellis*

Dan reported on the May Board of Governors meeting. A summary appears on page 23 of the Agenda materials.

VII. Treasurer's Report — *W. Fletcher Belcher*

Fletch reported on the final 2007- 2008 Section Budget, a summary of which appears on pages 24-28 of the Agenda materials. Fletch emphasized the importance of sponsorships and CLE revenue to the Section's finances.

VIII. Circuit Representative's Report — *Margaret Rolando, Director*

Peggy reported on the FLASH pro bono project, which is being run under the auspices of the Circuit Representatives and the Pro Bono Services committee. Adele Stone, on behalf of the Pro Bono Services committee, then reported that over 300 clients have registered, with over 400 volunteers. She emphasized that meeting the increasing requests for assistance was going to require a great deal of participation by members of the Bar. Peggy emphasized to the Executive Council the importance of widespread participation. Peggy informed the Council that information about the FLASH program and related forms could be found at www.floridaprobono.org. She then entertained questions from the floor.

Peggy welcomed sixteen new circuit representatives to the Executive Council.

IX. Real Property Division

George J. Meyer, Real Property Division Director

A. Action Items

1. Approval of Modifications to Section 48.23 — Edits and Changes to the Lis Pendens Statute. [Real Property Litigation Committee, Mark Brown] –The proposed legislation is reflected in the redlined draft of the statute in the Agenda materials at pages 29-30. The rationale for these edits and changes are set forth in the White Paper attached at pages 31-33 of the Agenda materials.

On behalf of the Real Property Litigation Committee, Mark Brown summarized the proposed revisions. Mark then indicated that there were a number of editorial changes which the Committee was recommending as Committee amendments to the version of the legislation reflected in the Agenda materials. The amended legislation is reflected at pages 22-23 of these minutes.

The Committee's motion to approve the proposed legislative initiative, as amended by the Committee, was approved by in excess of a two-thirds majority. The Committee's motions to find such action to be within the purview of the Section and to authorize the expenditure of Section's funds in support of that initiative were unanimously approved.

2. Guidelines for Real Property, Probate and Trust Law Section Appointed Members of the 2008 Florida Title Insurance Study Council. Appointees. -- [Title Insurance Committee — Homer Duvall]. The Section is to propose two persons to be appointed to the 2008 Title Insurance Study Council. The Title Insurance Committee recommends that the Section adopt certain guidelines to be provided to those two appointees, so as to provide them with the Section's position with regard to some of the title insurance issues the Study Council will be reviewing and reporting on. The proposed guidelines are not mandatory, but rather informational, to be considered by the appointees in their sole discretion. The proposed guidelines are set forth in the Agenda materials at pages 34-36 of the Agenda materials.

On behalf of the Title Insurance Committee, Homer Duvall summarized the proposed guidelines. He advised the Council that two changes were being recommended as Committee amendments. The motion of the Committee, as amended, is reflected on pages 24-26 of these minutes. The Committee's motion to approve the proposed guidelines, as amended, was unanimously approved.

B. Information Items

1. Burt Bruton reported on concerns that language in the new foreclosure fraud law to be codified at Section 501.1377 might apply to lawyers. A letter from Attorney General, Bill McCollum on the subject is reflected at p. 37 of the Agenda materials.

2. George Meyer reported on Section sponsorship of local realtor-attorney seminars and programs.

3. Jerry Aron reported that he and Elaine Bucher had been appointed as liaisons on behalf of the Section with the Business Law Section on proposed changes to the LLC Act.

X. Probate and Trust Division Action Item

Brian Felcoski, Probate Division Director

A. Action Items

1. Revisions to Section 735.203 Petition for Summary Administration. [Probate Law and Procedure Committee — Charlie Nash] Materials and the proposed legislation are reflected on pages 38-40 of the Agenda materials.

On behalf of the Probate and Procedure Committee, Charlie presented a proposal for legislative changes to Section 735.203, as reflected in the attached agenda materials. Charlie indicated that the Committee was recommending certain amendments. The amended Committee motion is reflected on page 27 of these minutes. The Committee's motion to approve the proposed legislative initiative, as amended by the Committee, was unanimously approved. The

Committee's motions to find such action to be within the purview of the Section and to authorize the expenditure of Section's funds in support of that initiative also were unanimously approved.

2. Revisions to Section 736.0813 Regarding Trustee's Duty to Furnish Complete Copy of Trust Instrument. [Trust Law Committee — Barry Spivey] Materials appear at pages 41-45 of the Agenda materials.

On behalf of the Trust Law Committee, Barry presented a proposal for legislative changes to Section 736.0813, as reflected in the attached agenda materials.

The Committee's motion to approve the proposed legislative initiative was unanimously approved. The Committee's motions to find such action to be within the purview of the Section and to authorize the expenditure of Section's funds in support of that initiative also were unanimously approved.

3. Revisions to Section 736.0306 Regarding Designated Representatives for Trust Beneficiaries. [Trust Law Committee — Barry Spivey] Materials appear at pages 46-49 of the Agenda materials.

On behalf of the Trust Law Committee, Barry presented a proposal for legislative changes to Section 736.0306, as reflected in the attached agenda materials. The Committee's motion to approve the proposed legislative initiative was unanimously approved. The Committee's motions to find such action to be within the purview of the Section and to authorize the expenditure of Section's funds in support of that initiative also were unanimously approved.

4. **[THIS MATTER WAS WITHDRAWN FROM CONSIDERATION AT THE COUNCIL MEETING]**. Amendments to Section 736.0505 to clarify existing exemption for the claims of creditors of a trust beneficiary with respect to the lapse or release of a power of withdrawal. [Trust Law Committee — Barry Spivey] pages 50-53 of the Agenda materials.

5. Amendments to Sections 736.0302 and 736.0103(4) regarding permissible appointees under a power of appointment and the representation of the interests of permissible appointees by takers in default of the exercise of the power of appointment.[Trust Law Committee — Barry Spivey] Materials appear at pages 54-58 of the Agenda materials.

On behalf of the Trust Law Committee, Barry presented a proposal for legislative changes to Section 736.0302 and Section 736.0103(4), as reflected in the attached agenda materials. The Committee's motion to approve the proposed legislative initiative was unanimously approved. The Committee's motions to find such action to be within the purview of the Section and to authorize the expenditure of Section's funds in support of that initiative also were unanimously approved.

6. Amendments to Section 738.602 to provide a method for trustees to characterize payments from deferred compensation plans, annuities, retirement plans, IRAs or other similar arrangements as principal or income when payable to a trust named

as the beneficiary. [IRA and Employee Benefits Committee — Kristen Lynch] Materials appear at pages 59-72 of the Agenda materials.

On behalf of the IRA and Employee Benefits Committee, Kristen presented a proposal for legislative changes to Section 738.602, as reflected in the attached agenda materials. The Committee's motion to approve the proposed legislative initiative was unanimously approved. The Committee's motions to find such action to be within the purview of the Section and to authorize the expenditure of Section's funds in support of that initiative also were unanimously approved.

B. Information Items - None

XI. General Standing Committee Action Items

John Neukamm, Director and Chair-Elect

1. **Action Items** — None

2. **Information Items** — None

XII. Report of General Standing Committees

John Neukamm, Director and Chair-Elect

John recognized new members of the General Standing Committees

1. **Actionline** — Rich Caskey, Chair; Scott Pence, Vice Chair; Rose LaFemina, Vice Chair. Rich reported on behalf of the Committee.

2. **Amicus Coordination** — Bob Goldman, Co-Chair; John W. Little, Co-Chair—No report

3. **Budget** — W. Fletcher Belcher, Chair; Pamela 0. Price, Vice-Chair—Fletch reported the Committee would be meeting in Key Biscayne.

4. **Bylaws** — W. Fletcher Belcher, Chair—Fletch reported the Committee would be meeting in Key Biscayne.

5. **CLE Seminar Coordination** — Jack Falk, Chair; Laura Sundberg, Co-Vice-Chair; Sylvia Rojas, Co-Vice Chair. Jack reported on behalf of the Committee. The Florida Bar Master CLE Calendar is reflected on pages 73-87 of the Agenda materials and the Section calendar is reflected at page 88 of the Agenda materials.

6. **2008 Convention Coordinator** — Marilyn Poison, Chair; Dresden Brunner, Vice Chair—No report

7. **Fellowships** — Tae Bronner, Co-Chair; Phil Baumann, Co-Chair—Tae reported on behalf of the Committee.

8. **Florida Bar Journal** — Richard R. Gans, Co-Chair, Probate Division; Bill Sklar, Co-Chair, Real Property Division—Rick reported on behalf of the Committee.

9. **Legislative Review** — Burt Bruton, Chair; Michael Gelfand, Co-Vice-Chair; Debra Boje, Co-Vice¬Chair—Burt reported on behalf of the Committee and indicated that it was necessary that any proposed legislation for the 2009 legislative session be submitted in time to make the Council agenda for the September, 2008 meeting at Key Biscayne.

10. **Legislative Update Coordinators** — Sancha Brennan Whynot, Chair; Stuart Altman, Co-Vice¬Chair; Bob Swaine, Co-Vice-Chair—John Neukamm thanked the Chair and Co-Chairs of the 2008 Legislative and Case Law Update. Sancha reported on behalf of the Committee as to the success of this year's conference and the date of the 2009 conference, July 31, 2009.

11. **Liaison Committees**:

A. ABA: Ed Koren; Julius J. Zschau-No report

B. American Resort Development Assoc. (ARDA): Larry Kinsolving; Jerry A. Aron; Wayne Sobien - No report

C. **BLSE**: David Silberstein, Howard Payne; Robert Stern; Michael Sasso—David reported on behalf of the Committee.

D. **Business Law Section**: Marsha Rydberg—Marsha reported on behalf of the Committee.

E. **BOG**: Dan DeCubellis, Board Liaison (no report beyond his report earlier in the meeting).

F. **CLE Committee**: Jack Falk (no report beyond his report earlier in the meeting).

G. **Clerks of the Circuit Court**: Thomas K. Topor - No report

H. **Council of Sections**: Sandra Diamond; John Neukamm - No report

I. **E-filing Agencies**: Judge Mel Grossman; Judge Patricia Jones—Judge Grossman reported on behalf of the Committee

J. **FLEA / FLSSI:** David Brennan; John Arthur Jones; Roland Chip Waller—David and Chip reported on behalf of the Committee

K. **Florida Bankers**: Stewart Andrew Marshall; Mark T. Middlebrook - No report

L. **Judiciary**: Judge Jack St. Arnold; Justice Kenneth Bell; Judge Gerald Cope; Judge George W. Greer; Judge Melvin B. Grossman; Judge Hugh D. Hayes; Judge Maria M. Korvick; Judge Lauren Laughlin; Judge Larry Martin; Judge Celeste H. Muir; Judge Robert Pleus; Judge Walter L. Schafer, Jr.; Judge Winifred J. Sharp; Judge Morris Silberman; Judge Richard Suarez; Judge Patricia V. Thomas. - No report

M. **Law Schools and Student RPPTL Committee**: Alan Fields; Stacy Kalmanson—Alan reported on behalf of the Committee.

N. **Liaison to the OCCCRC**: Joe George—Joe reported on behalf of the Committee.

O. **Out of State**: Mike Stafford; John E. Fitzgerald, Pam Stuart - No report

P. **Young Lawyers Division**: Rhonda Chung DeCambre Stroman - No report

12. **Long Range Planning Committee** – *John Neukamm, Chair*

13. **Member Communications and Information Technology** – *Keith S. Kromash, Chair; Alfred Colby, Co-Chair*

Keith reported on behalf of the Committee. He described the new website and he introduced Bill Crawford, the new Section Webmaster. Keith emphasized the importance of the committee chairs submitting the email addresses of their members, as well as committee materials.

Bill then addressed the Council. He urged the members to visit the new website.

14. **Membership Development & Communication** – *Phil Baumann, Chair; Mary Clarke, Vice Chair*

Phil reported on behalf of the Committee.

15. **Membership Diversity Committee** - *Tae Kelley Bronner, Co-Chair; Fabienne Fahnestock Co-Chair*

Tae reported on behalf of the Committee and indicated that several seminars are scheduled in September.

16. **Mentoring Program** – *Steven Hearn, Chair; Jerry Aron, Co-Vice-Chair; Guy Emerich, Co-Vice¬Chair*

Steve reported on behalf of the Committee. Steve urged the members of the Executive Council to volunteer as mentors.

17. **Model and Uniform Acts** – *Bruce Stone, Co-Chair; Katherine Frazier, Co-Chair*

Katherine reported on behalf of the Committee.

18. **Professionalism & Ethics** – *Adele Stone, Co-Chair; Deborah Goodall, Co-Chair*

    Adele reported on behalf of the Committee.

19. **Pro Bono** – *Andrew M. O'Malley, Chair; Adele I. Stone, Co-Vice Chair; David Garten, Co-Vice Chair*

    Nothing further to report beyond the earlier report.

20. **Sponsor Coordinators** — *Kristen Lynch, Chair; Debbie Goodall, Co-Vice Chair; Co-Vice-Chair; Wilhelmina Kightlinger, Co-Vice-Chair*

    Kristen reported on behalf of the Committee.

21. **Strategic Planning** — *John Neukamm, Chair; Sandra Diamond Co-Vice Chair; Melissa J. Murphy, Co-Vice Chair; Laird Lyle, Co-Vice Chair* - No report

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SUPPLEMENT TO AGENDA

Real Property Roundtable
George Meyer, Real Property Division Director

1. **Affordable Housing** — Jaimie Ross, Chair; Chuck Elsesser, Vice-Chair - No report

2. **Condominium and Planned Development** —Robert S. Freedman, Chair, Steven Mezer, Vice- Chair - No report

3. **Construction Law** — Wm. Cary Wright, Chair; Brian Wolf, Co-Vice-Chair; April Atkins, Co-Vice¬Chair - No report

4. **Construction Law Institute** — Lee Weintraub, Chair; Wm. Cary Wright, Co-Vice Chair; Michelle Reddin, Co-Vice Chair - No report

5. **Construction Law Certification Review Course** – Fred Dudley, Chair; Kim Ashby, Vice Chair- No report

6. **Development and Governmental Regulation of Real Estate** — Eleanor Taft, Chair; Nicole Kibert, Vice-Chair - No report

7. **FAR/BAR Committee and Liaison to FAR** — William J. Haley, Chair; Frederick Jones, Vice-Chair - No report

8. **Land Trusts and REITS** — S. Katherine Frazier, Chair; Wilhelmena Kightlinger, Vice-Chair - No report

9. **Landlord and Tenant** — Arthur J. Menor, Chair; Neil Shoter, Vice-Chair - No report

10. **Legal Opinions** — David R. Brittain, Co-Chair; Roger A. Larson, Co-Chair - No report

11. **Liaison with Eminent Domain Committee** — Susan K. Spurgeon - No report

12. **Liaison with Florida Brownfields Association** — Frank L. Hearne □ Liaison Report attached at pp. 89 – 93 of Agenda materials

13. **Liaisons with FLTA** — Norwood Gay, Co-Chair; Alan McCall, Co-Chair; Barry Scholnik, Co-Vice Chair; John S. Elzeer, Co-Vice Chair; Joe Reinhardt, Co-Vice Chair; James C. Russick, Co-Vice Chair; Lee Huzagh, Co-Vice Chair - No report

14. **Mobiles Home and RV Parks** — Jonathan J. Damonte, Chair; David Eastman, Vice-Chair - No report

15. **Mortgages and Other Encumbrances** — Jeffrey T. Sauer, Chair; Salome Zikakis, Co-Vice Chair; Jo Spear, Co-Vice Chair - No report

16. **Real Estate Certification Review Course** — Robert Stern, Chair; Ted Conner, Co-Vice-Chair; Guy Norris, Co-Vice-Chair - No report

17. **Real Property Forms** — Barry B. Ansbacher, Chair; Kristy Parker Brundage, Vice Chair - No report

18. **Real Property Insurance** – Jay D. Mussman, Chair; Andrea Northrop, Vice Chair - No report

19. **Real Property Litigation** — Mark A. Brown, Chair; Eugene E. Shuey, Co-Vice-Chair, Marty Auerbach, Co-Vice Chair - No report

20. **Real Property Problems Study** — Wayne Sobien, Chair; Jeanne Murphy, Co-Vice Chair; Pat J. Hancock, Co-Vice Chair - No report

21. **Title Insurance & Title Insurance Liaison** — Homer Duvall, Chair; Kristopher Fernandez, Vice- Chair - No report

22. **Title Issues and Standards** — Patricia Jones, Chair; Robert Graham, Co-Vice-Chair; Stephen Reynolds, Co-Vice Chair; Karla Gray, Co-Vice Chair--Committee Report is attached to Agenda materials at pages 94-99 of Agenda materials.

Probate Roundtable
Brian Felcoski, Probate Division Director

1. **Ad Hoc Committee on Creditors' Rights to Non-Probate Assets** — Angela Adams, Chair - No report

2. **Advance Directives** — Rex E. Moule, Chair; Marjorie Wolasky, Vice Chair - No report

3. **Asset Preservation** — Jerome Wolf, Chair; Brian Sparks, Vice Chair - No report

4. **Charitable Organizations and Planning** — Michael W. Fisher, Co- Chair; Thomas C. Lee, Jr., Co- Chair; Michael Stafford, Co-Vice Chair; Jeff Baskies, Co-Vice Chair - No report

5. **Estate and Trust Tax Planning** — Richard Gans, Chair; Craig Mundy, Vice-Chair - No report

6. **Guardianship Law and Procedure** — Debra Boje, Co-Chair; Alexandra Rieman, Co-Chair, Andrea L. Kessler, Vice Chair - No report

7. **Insurance**— L. Howard Payne, Chair; David Silberstein, Vice Chair - No report

8. **IRA's and Employee Benefits** — Kristen Lynch, Chair; Linda Griffin, Vice-Chair - No report

9. **Liaison with Corporate Fiduciaries** — Seth Marmor, Chair; Robin King, Co-Vice Chair; Gwynne Young, Co-Vice-Chair; Joan Crain, Corporate Fiduciary Chair - No report

10. **Liaisons with Elder Law Section** — Charles F. Robinson, Chair; Marjorie Wolasky, Vice-Chair - No report

11. **Liaison with Statewide Public Guardianship Office** — Michelle Hollister, Chair - No report

12. **Liaisons with Tax Section** — David Pratt; Brian C. Sparks; Donald R. Tescher - No report

13. **Power of Attorney** — Tami Conetta, Chair; David Carlisle, Vice-Chair - No report

14. **Principal and Income Committee** — Edward F. Koren, Chair - No report

15. **Probate and Trust Litigation** — William Hennessey, Chair; Tom Karr, Co-Vice Chair; Jon Scuderi, Co-Vice Chair - No report

16. **Probate Law and Procedure** — Charles lan Nash, Chair, Sam Boone, Co-Vice-Chair; Anne Buzby, Co-Vice Chair, Shane Kelley, Co-Vice Chair - No report

17. **Trust Law** — Barry Spivey, Chair; Christopher Boyett, Co-Vice Chair; Laura Stephenson, Co-Vice Chair - No report

18. **Wills, Trusts and Estates Certification Review Course** — Anne Buzby, Chair; Deborah Russell, Vice Chair - No report

ATTENDANCE ROSTER

REAL PROPERTY PROBATE & TRUST LAW SECTION
EXECUTIVE COUNCIL MEETINGS
2008 - 2009

Executive Committee	July 26 Palm Beach	Sept. 20 Key Biscayne	Dec 6 Tallahassee	Jan. 31 Ecuador	May 22 St. Petersburg
Belcher, Wm. Fletcher; Treasurer	XX				
Bruton, Jr., Ed Burt; Legislation Chair	XX				
Diamond, Sandra; Chair	XX				
Dribin, Michael A.; Secretary	XX				
Falk, Jr., Jack Arnold; Seminar Coordinator	XX				
Felcoski, Brian; Probate & Trust Law Div. Director	XX				
Meyer, George J.; Real Property Law Div. Director	XX				
Murphy, Melissa Jay; Immediate **Past Chair**	XX				
Neukamm, John; Chair-Elect	XX				
Rolando, Margaret; Director of Circuit Rep.	XX				

Executive Council Members	July 26 Palm Beach	Sept. 20 Key Biscayne	Dec 6 Tallahassee	Jan. 31 Ecuador	May 22 St. Petersburg
Adams, Angela M.	XX				
Adcock, Jr., Louie N., **Past Chair**					
Akins, David James	XX				
Allender, Jerry W.	XX				
Allender, Steven C.	XX				
Altman, Robert N.	XX				
Altman, Stuart H.					
Ansbacher, Barry Barnett	XX				
Armstrong, David G.	XX				
Arnold, Jr. , Lynwood F.	XX				

Executive Council Members	July 26 Palm Beach	Sept. 20 Key Biscayne	Dec 6 Tallahassee	Jan. 31 Ecuador	May 22 St. Petersburg
Aron, Jerry E., **Past Chair**	XX				
Ashby, Kimberly					
Atkins, April					
Awerbach, Martin	XX				
Baskies, Jeffrey	XX				
Batlle, Carlos Alberto	XX				
Baumann, Phillip A.	XX				
Beales III, Walter Randolph, **Past Chair**					
Bell, Honorable Kenneth					
Blackard, Jr., William Raymond	XX				
Boje, Debra Lynn	XX				
Bonnette, Jr., Harris L.	XX				
Bookman, Alan Bart					
Boone, Jr., Sam Wood					
Boyett, Christopher William	XX				
Brennan, David Clark, **Past Chair**	XX				
Brittain, David Ross					
Bronner, Tae Kelley	XX				
Brown, Mark A.					
Brundage, Kristy Parker					
Brunner, S. Dresden					
Bucher, Elaine M.	XX				
Buzby, Anne K.					
Carlisle, David Russell					
Carter, David					
Caskey, J. Richard	XX				
Christiansen, Pat, **Past Chair**	XX				
Clarke, Mary					
Colby, Alfred	XX				
Conetta, Tami Foley	XX				

Executive Council Members	July 26 Palm Beach	Sept. 20 Key Biscayne	Dec 6 Tallahassee	Jan. 31 Ecuador	May 22 St. Petersburg
Conner, William Theodore	XX				
Cope, Honorable Gerald B., Jr.	XX				
Cornett, Jane L.	XX				
Crain, Joan					
Damonte, Jonathan James	XX				
Davis, Gary	XX				
Deal, Gregory R.	XX				
DeCubellis, Dan B.	XX				
DeNapoli, Richard	XX				
Dickinson III, Robert C.					
Divine, Russell W.					
Dudley, Frederick Raymond	XX				
Dungey, Richard					
Duvall III, Homer	XX				
Eastman, David Deane	XX				
Elsesser, Jr., Charles F.	XX				
Elzeer, John S.	XX				
Emerich, Guy Storms	XX				
Fahnestock, Fabienne E.	XX				
Fernandez, Kristopher	XX				
Fields, Alan Beaumont	XX				
Fisher, Michael W.					
Fitzgerald, Jr., John Edward	XX				
Fleece III, Joseph W.	XX				
Foreman, Michael Loren	XX				
Frazier, Susan Katherine	XX				
Freedman, Robert Scott	XX				
Gans, Richard Roy	XX				
Garber, Julie Ann	XX				
Garten, David Michael	XX				

Executive Council Members	July 26 Palm Beach	Sept. 20 Key Biscayne	Dec 6 Tallahassee	Jan. 31 Ecuador	May 22 St. Petersburg
Gay III, Robert Norwood	XX				
Gelfand, Michael J.	XX				
George, James R.	XX				
George, Joseph P.	XX				
Goldman, Robert W., **Past Chair**					
Goodall, Deborah					
Graham, Robert Manuel	XX				
Gray, Karla S.	XX				
Greer, Honorable George W.					
Griffin, Linda S.	XX				
Grimsley, John Gall, **Past Chair**					
Grossman, Honorable Melvin B.	XX				
Guttmann III, Louis B., **Past Chair**					
Haley, William James					
Hancock, Patricia J.	XX				
Hart, W. Christopher	XX				
Hayes, Honorable Hugh D.	XX				
Hayes, M. Travis	XX				
Hearn, Steven Lee, **Past Chair**	XX				
Hearne, Frank L.	XX				
Henderson, Thomas	XX				
Hennessey III, William Thomas	XX				
Heuston, Stephen Paul					
Hollister, Michelle Rachel	XX				
Huszagh, Victor Lee					
Isphording, Roger O., **Past Chair**	XX				
Jones, Frederick Wayne	XX				
Jones, John Arthur, **Past Chair**					
Jones, Patricia P. Hendricks	XX				
Judd, Robert Brian	XX				

Executive Council Members	July 26 Palm Beach	Sept. 20 Key Biscayne	Dec 6 Tallahassee	Jan. 31 Ecuador	May 22 St. Petersburg
Kalmanson, Stacy O.					
Karr, Thomas M.					
Kayser, Joan Bradbury, **Past Chair**					
Kelley, Rohan, **Past Chair**	XX				
Kelley, Sean					
Kelley, Shane	XX				
Keshen, Nelson Clive	XX				
Kibert, Nicole C.	XX				
Kightlinger, Wilhelmina F.	XX				
King, Robin	XX				
Kinsolving, Laurence E.					
Kinsolving, Ruth Barnes					
Koren, Edward F., **Past Chair**	XX				
Korvick, Honorable Maria Marinello					
Kromash, Keith Stuart	XX				
LaFemina, Rose	XX				
Lajoie, John Thomas					
Lange, Jr., George W.	XX				
Larson, Roger Allen	XX				
Laughlin, Honorable Lauren					
Lee, Thomas C.	XX				
Leebrick, Brian	XX				
Lile, Laird, **Past Chair**	XX				
Little III, John Wesley					
Lynch, Kristen M.	XX				
Madorsky, Marsha G.	XX				
Marger, Bruce	XX				
Marmor, Seth	XX				
Marshall III, Stewart Andrew	XX				
McCall, Alan K.	XX				

Executive Council Members	July 26 Palm Beach	Sept. 20 Key Biscayne	Dec 6 Tallahassee	Jan. 31 Ecuador	May 22 St. Petersburg
Mednick, Glenn M.					
Menor, Arthur James	XX				
Mezer, Steven H.					
Middlebrook, Mark Thomas	XX				
Miller, Lawrence Jay					
Moule, Rex E.	XX				
Muir, Honorable Celeste	XX				
Muir, William T.	XX				
Mundy, Craig A.	XX				
Murphy, Jeanne	XX				
Mussman, Jay D.	XX				
Nash, Charles Ian	XX				
Nelson, Barry A.					
Norris, Guy W.	XX				
Norris, John E., **Past Chair**	XX				
O'Malley, Andrew Marvel					
O'Ryan, Christian Felix	XX				
Payne, L. Howard	XX				
Pence, Scott	XX				
Platt, William R.	XX				
Pleus, Jr., Honorable Robert James					
Polson, Marilyn Mewha	XX				
Potter, Del G.	XX				
Pratt, David	XX				
Promoff, Adrienne F.	XX				
Price, Pamela O.	XX				
Pyle, Michael A.	XX				
Reddin, Michelle A.					
Reinhardt, Joe	XX				
Reynolds, Stephen H.	XX				

Executive Council Members	July 26 Palm Beach	Sept. 20 Key Biscayne	Dec 6 Tallahassee	Jan. 31 Ecuador	May 22 St. Petersburg
Rieman, Alexandra V.	XX				
Robbins, James, Jr.	XX				
Robinson, Charles F.	XX				
Rojas, Silvia B.	XX				
Roscow IV, John Frederick	XX				
Ross, Jaimie A.					
Russell, Deborah L.	XX				
Russick, James C.	XX				
Rydberg, Marsha G.	XX				
Sachs, Colleen Coffield	XX				
Sasso, Michael Cornelius	XX				
Sauer, Jeffrey Thomas	XX				
Schofield, Percy Allen	XX				
Scholnik, Barry	XX				
Schwartz, Randy James	XX				
Schwartz, Robert M.	XX				
Scuderi, Jon	XX				
Sexton, Honorable Susan G.					
Sharp, Honorable Winifred J.	XX				
Sharp, Jr., Joel Herbert	XX				
Sheets, Sandra Graham	XX				
Sherman, William E., **Past Chair**	XX				
Shoter, Neil	XX				
Shuey, Eugene Earl	XX				
Silberman, Honorable Morris					
Silberstein, David Mark	XX				
Sklar, William Paul					
Smith, G. Thomas, **Past Chair**	XX				
Smith, Michael S.	XX				
Smith, Wilson, **Past Chair**	XX				

Executive Council Members	July 26 Palm Beach	Sept. 20 Key Biscayne	Dec 6 Tallahassee	Jan. 31 Ecuador	May 22 St. Petersburg
Sobien, Wayne	XX				
Sparks, Brian Curtis					
Spivey, Barry F.	XX				
Spurgeon, Susan K.					
Stafford, Michael P.	XX				
Stephenson, Laura P.	XX				
Stern, Robert Gary	XX				
Stinson, Sherri M.	XX				
Stone, Adele Ilene	XX				
Stone, Bruce M., **Past Chair**	XX				
Stroman, Rhonda C. Decambre					
Stuart, Pamela B.					
Sundberg, Laura K.	XX				
Sutherland, John Holt					
Swaine, Jack Michael, **Past Chair**	XX				
Swaine, Robert S.	XX				
Taft, Eleanor W.	XX				
Taylor, Richard W.	XX				
Tescher, Donald Robert	XX				
Thomas, Honorable Patricia Vitter	XX				
Thornton, Kenneth E.	XX				
Thurlow, III; Thomas	XX				
Topor, Thomas Karl					
Umsted, Hugh Charles	XX				
Virgil, J. Eric	XX				
Waller, Roland D., **Past Chair**	XX				
Weintraub, Lee A.					
Wells, Jerry	XX				
White, Dennis R.	XX				
White, Jr.; Richard M.	XX				

Executive Council Members	July 26 Palm Beach	Sept. 20 Key Biscayne	Dec 6 Tallahassee	Jan. 31 Ecuador	May 22 St. Petersburg
Whynot, Sancha Brennan	XX				
Wickenden, D. Keith	XX				
Wilder, Charles D.					
Williamson, Julie Ann Stulce, **Past Chair**	XX				
Wohlust, G. Charles	XX				
Wolasky, Marjorie Ellen	XX				
Wolf, Brian	XX				
Wolf, Jerome Lee	XX				
Wright, Wm. Cary	XX				
Young, Gwynne Alice	XX				
Zeydel, Diana S.C.	XX				
Zikakis, Salome	XX				
Zschau, Julius Jay	XX				
Legislative Consultants					
Adams, Gene	XX				
Dunbar, Peter M.	XX				
Edenfield, Martha	XX				
Guests					
Beriro, Gaël	XX				
Flood, Gerard J.	XX				
Harley, Phyllis	XX				
Northrop, Andrea C.	XX				
Sterling, David F.	XX				
Udick, Arlene C.	XX				

Executive Council Members	July 26 Palm Beach	Sept. 20 Key Biscayne	Dec 6 Tallahassee	Jan. 31 Ecuador	May 22 St. Petersburg

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1 A bill to be entitled

2 An act relating to lis pendens; amending s. 48.23, F.S.; permitting property to be
3 sold exempt from claims asserted in an action when the lis pendens is discharged
4 or expires; permitting the lis pendens to include the date of the action or the case
5 number of the action; clarifying that unrecorded interests are only discharged if
6 there is a judicial sale; providing for the control of a lis pendens that no longer
7 affects the property; and providing for an effective date.

8

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

10

11 Section 1. Subsection (1) of Section 48.23 has been renumbered into two subsections and
12 is modified to read as follows:
13 48.23 (1)(a) ~~No~~An action in any of the state or federal courts in this state operates as a lis
14 pendens on any real or personal property involved therein or to be affected thereby ~~until~~only if a
15 notice of ~~the commencement of the action~~lis pendens is recorded in the office of the clerk of the
16 circuit court of the county where the property is~~, which notice contains~~ located, and such notice
17 has not expired pursuant to subsection (2), been withdrawn, or been discharged. If an action is
18 filed and no lis pendens is recorded, or if an action is filed and a lis pendens is recorded but the
19 lis pendens has expired, is withdrawn or is discharged, the action shall have no effect, except as
20 between the parties to the proceeding, on the title to, or on any lien upon, the real or personal
21 property, and any person acquiring for value an interest in the real or personal property during the
22 pendency of such action, other than a party to the proceeding or the legal successor by operation
23 of law, or personal representative, heir or devisee of a deceased party to the proceeding, shall
24 take such interest exempt from all claims asserted against the title raised in the action and from
25 any judgment entered in the proceeding, notwithstanding the provisions of sec. 695.01 F.S., as if
26 such person has no actual or constructive notice of the proceeding or of the claims made therein
27 or the documents forming the causes of action against the property in the proceedings.
28 (b) A notice of lis pendens shall contain (i) the names of the parties, (ii) the ~~time~~date of
29 the institution of the action~~,~~ or the case number of the action, (iii) the name of the court in which
30 it is pending, (iv) a description of the property involved or to be affected, and (v) a statement of
31 the relief sought as to the property. In the case of any notice of lis pendens filed on the same

7.26.08

date as the pleading upon which the notice of lis pendens is based, the clerk's stamp date of receipt on the notice of lis pendens shall satisfy the requirement that the notice of lis pendens contain the date of the institution of the action.

(~~b~~c) Except for the interest of persons in possession or easements of use, the ~~filing for record~~recording of such notice of lis pendens, which during the pendency of the proceeding has not expired pursuant to subsection (2), been withdrawn, or been discharged, shall constitute a bar to the enforcement against the property described in said notice of lis pendens of all interests and liens including but not limited to federal tax liens and levies, unrecorded at the time of ~~filing for record such~~recording such [notice of lis pendens if such proceedings are prosecuted to a judicial sale of the property described in the said] notice of lis pendens unless the holder of any such unrecorded interest or lien shall intervene in such proceedings within ~~20~~30 days after the ~~filing and~~ recording of said notice of lis pendens. If the holder of any such unrecorded interest or lien does not intervene in the proceedings and if such proceedings are prosecuted to a judicial sale of the property described in said notice of lis pendens, the property shall be forever discharged from all such unrecorded interests and liens. In the event said notice of lis pendens ~~is discharged~~ceases to be effectual due to expiration, withdrawal or discharge by order of the court, the same shall not in any way affect the validity of any unrecorded interest or lien.

[deleted 7.26.08]

(2) No notice of lis pendens is effectual for any purpose beyond 1 year from the commencement of the action, and will expire at that time, unless the relief sought is disclosed by the ~~initial~~pending pleading to be founded on a duly recorded instrument or on a lien claimed under part I of chapter 713 against the property involved, except when the court extends the time of expiration on reasonable notice and for good cause. The court may impose such terms for the extension of time as justice requires.

Section 2. Subsection (2) of Section 48.23 has been renumbered and is modified to read as follows:

(3) When the ~~initial~~pending pleading (a) does not show that the action is founded on a duly recorded instrument or on a lien claimed under part I of chapter 713, or (b) no longer affects the subject property, the court ~~may~~shall control and discharge the recorded notice of lis pendens as the court ~~may~~would grant and dissolve injunctions.

Section 3. This act shall take effect on July 1, 2009.

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DRAFT

PROPOSED GUIDELINES FOR REAL PROPERTY, PROBATE & TRUST LAW SECTION APPOINTED MEMBERS OF THE 2008 FLORIDA TITLE INSURANCE STUDY COUNCIL

The Florida Legislature enacted House Bill 937 which creates the 2008 Florida Title Insurance Study Council ("Study Council"). The Study Council is charged with making a comprehensive examination of the title insurance delivery system in the State of Florida and to make recommendations to the Florida Legislature to promote a sound and stable system for the safety of real property transfers in Florida. The comprehensive examination is to include:

a) The historical development of the title insurance industry in Florida and its uniqueness among other lines of insurance.

b) The current regulatory structure under which state agencies share oversight of the title insurance industry.

c) The adequacy of funds and agency personnel to exercise regulatory oversight.

d) The adequacy of current mechanisms and expertise to gather meaningful data to properly evaluate and adopt title insurance rates.

e) Such other topics as the chair and the Study Council deem appropriate.

House Bill 937, in pertinent part, provides that two (2) of the members of the Study Council shall be appointed by the Real Property, Probate and Trust Law Section of The Florida Bar (the "RPPTL Section"). These members will not be serving in a *per se* representative capacity, and cannot be expected to seek or obtain either guidance or approval of the RPPTL Section for each issue or vote they may be involved in during the course of the Study Council's proceedings.

The Title Insurance Committee of the RPPTL Section proposes that the Study Council members appointed by the RPPTL Section, be provided with guidelines, approved by the Section, which guidelines set forth basic positions of the Section with regard to the matters of examination with which the Study Council is charged.

Proposed Guidelines:

1. The regulatory framework for title insurance should provide for adequate means by which title insurers may obtain approval of new forms. There should be a definite timeframe for the responsible regulatory authority to approve or reject form submissions, so that the failure of the responsible regulatory authority to act has definite consequences, which may be appealed by the title insurer. The regulatory framework should include adequate provisions for timely promulgation of a rate for

any insuring form that is approved by the responsible regulatory authority or which is subsequently approved on appeal, and which by its nature requires that a rate be charged. All title insurers should be treated equally with regard to the approval of forms; and, without limiting the ability of any insurer to seek a rate deviation, all title insurers should also be treated equally with regard to any rates promulgated with regard to insuring forms.

2. The responsible regulatory authority should have regular data calls to title insurers and licensed title agents. The responsible regulatory authority should establish information formats for such data calls sufficiently in advance of the data call so that the parties participating in the data call know what information they are supposed to be collecting. Based on experiences from previous data calls, participation in these data calls by attorney title agents practicing in law firms, rather than through licensed title agencies adjunct to their law firm, is discouraged due to the inability or difficulty in breaking out fees and costs related solely to title insurance. However, a review and examination of how other states collect data from attorney title agents practicing in law firms is encouraged.

3. The responsible regulatory authority should continue to promulgate title insurance rates. The regulation of title insurance rates in Florida creates a level playing field for title insurers and title agents. The establishing of rates by the responsible regulatory authority protects consumers by adding stability to the title insurance industry. Moreover, promulgated rates make it ~~easier for the consumer to shop~~ for title insurance, where the services provided by the title insurer or the title agent and the costs of those services become the consumer's focal point for comparison shopping, rather than the applicable title insurance rate.

other

not included in the promulgated rate

4. Regulation of the title insurance industry should be consolidated in a single agency that will regulate both title insurers and title agents. Because title insurance differs in many regards from other types of insurance, the laws relating to title insurance should be consolidated in a single chapter of Florida Statutes. The laws should be clearly drafted and should adequately empower the title insurance delivery system envisioned by the Study Council and the responsible regulatory authority.

5. Provision should be made for effective enforcement of the title insurance laws and regulations. Enforcement officers shall ~~should~~ be educated in title insurance as well as in the laws and regulations they are enforcing. The enforcement should be uniformly applied. In part, enforcement should be accomplished by creating an effective means of communication between the responsible regulatory authority and title insurers and title agents. Title insurers and title agents should be able to seek and obtain guidance from the responsible regulatory authority with regard to enforcement issues and interpretation of title insurance regulations enacted by the responsible regulatory authority. However, these channels of communication should also include the ability of the title insurers and title agents to participate in the enforcement effort, so that when a title insurer or title agent sees a clear violation by another, that violation can be reported to the appropriate authority, and the reported violation will receive an

investigation and a response or resolution. Additionally, the responsible regulatory authority should adequately police the encroachment of specialty insurance lines or other insurance lines into title insurance, and should actively seek to eliminate insurance lines that are effectively issuing title insurance under some other guise.

6. Finally, any revisions to the existing title insurance laws and regulations, or any new enactments should "do no harm" to those attorneys whose practice includes acting as a title insurance agent and the issuance of title insurance commitments, policies and other insuring forms for the benefit of their clients.

Legislative Proposal:

735.203. Petition for summary administration

(1) A petition for summary administration may be filed by any beneficiary or person nominated as personal representative in the decedent's will offered for probate. The petition must be signed and verified by the surviving spouse, if any, and ~~any~~ all beneficiaries except that the joinder in a petition for summary administration is not required of a beneficiary who will receive full distributive share under the proposed distribution. Any beneficiary not joining shall be served by formal notice with the petition.

(2) If a person named in subsection (1) has died, is incapacitated, or is a minor, or has conveyed or transferred all interest in the property of the estate, then, as to that person, the petition must be signed and ~~certified~~ verified by:

(a) The personal representative, if any, of a deceased person or, if none, the surviving spouse, if any, and the beneficiaries;

(b) The guardian of an incapacitated person or a minor; or

(c) The grantee or transferee of any of them shall be authorized to sign and verify the petition instead of the beneficiary or surviving spouse.

(3) If each trustee of a trust that is a beneficiary of the estate of the deceased person is also a petitioner, ~~notice of the filing of the petition for summary administration must be given to~~ each qualified beneficiary of the trust as that term is defined in Chapter 736 shall be served by formal notice with the petition for summary administration unless joinder in, or consent to, the petition ~~for summary administration~~ is obtained from each qualified beneficiary of the trust.

~~(4) Except to the extent required pursuant to the provisions of subsection (3), the The joinder in, or consent to, a petition for summary administration is not required of a beneficiary who will receive full distributive share under the proposed distribution. Any beneficiary not joining or consenting shall receive formal notice of the petition.~~

RPPTL 2008 – 2009
Executive Council Meeting Schedule
(Sandra Diamond's Year)

Date	Location
July 24 – July 27, 2008	**Executive Council Meeting & Legislative Update** The Breakers Palm Beach, Florida Reservation Phone # 561-655-6611 Room Rate $168.00 (Superior King) $178.00 (Deluxe Double) Cut-off Date July 2, 2008
September 18 – September 21, 2008	**Executive Council Meeting** Ritz-Carlton Key Biscayne, Florida Reservation Phone # 305-365-4500 Room Rate $180.00 Cut-off Date August 18, 2008
December 4 – December 7, 2008	**Executive Council Meeting** DoubleTree Hotel Tallahassee, Florida Reservation Phone # 850-224-5000 Room Rate $129.00 Cut-off Date November 3, 2008
*January 29 – February 2, 2009 & February 2 – February 6, 2009	**Executive Council Meeting / Out-of-State Meeting** Swissotel Quito Quito Ecuador & Galapagos Islands Cruise Hotel Phone # 593 2 2567 600 ext. 6722 Hotel Fax # 593 2 2568 080 Hotel E-Mail lramirez@swissuio.com Group Reservation Coordinator: Lorena Ramirez Room Rate $110.00 USD (Luxury Single) $130.00 USD (Junior Suite) $200.00 USD (Business Suite)
May 21 – May 24, 2009	**Executive Council Meeting / RPPTL Convention** Renaissance Vinoy Resort St. Petersburg, Florida Reservation Phone # 727-894-1000 Room Rate $180.00 Cut-off Date April 23, 2009

RPPTL 2009 - 2010
Executive Council Meeting Schedule
JOHN NEUKAMM'S YEAR

Date	Location
July 30 – August 2, 2009	**Executive Council Meeting & Legislative Update** The Breakers Palm Beach, Florida Reservation Phone # 561-655-6611 www.thebreakers.com Room Rate $176.00 (Superior King) $189.00 (Deluxe Double) Cut-off Date: June 29, 2009
September 24 – September 27, 2009	**Executive Council Meeting** Ritz-Carlton, Naples Naples, Florida Reservation Phone # 800-241-3333 www.ritzcarlton.com/naples Room Rate $199.00 Cut-off Date: August 10, 2009
January 14 – January 17, 2010	**Executive Council Meeting** The Casa Monica Hotel St. Augustine, Florida Reservation Phone # 904-827-1888 www.casamonica.com Room Rate $199.00 Cut-off Date: December 14, 2009
March 16 – March 21, 2010	**Executive Council Meeting / Out-of-State Meeting** The Ritz-Carlton, Kapalua Lahaina, Maui Hawaii Hotel Phone # 800-241-3333 Room Rate $370.00 (Deluxe Room) $370.00 (Garden View Suite) $450.00 (Deluxe Ocean View) $450.00 (Ocean View Suite) Cut-off Date: January 30, 2010
May 27 – May 30, 2010	**Executive Council Meeting / RPPTL Convention** Tampa Marriott – Waterside Hotel & Marina Tampa, Florida Reservation Phone # 800-228-9290 Room Rate $159.00 (Single/Double) $179.00 (Triple) $199.00 (Quad) Cut-off Date: April 27, 2010

The Florida Bar
Board of Governors
July 25, 2008

At its July 25 meeting in Clearwater, The Florida Bar Board of Governors:

• Approved Proposed Advisory Opinion 07-02 on outsourcing of paralegal work to a foreign country. The opinion holds that such work can be sent overseas, although the attorney may need to take extra precautions to protect sensitive information and may need to inform the client. The board approved adding language suggested by the Board Review Committee on Professional Ethics which says the lawyer must also be sensitive to the possible disclosure of confidential information obtained from others, including an opposing party, and whether such disclosure may be regulated by applicable law, when outsourcing. Also, BRCPE Chair Steve Chaykin said the issue will be referred to another committee to comprehensively review use of third parties outside of a law firm to assist in the provision of legal services, whether inside or outside the U.S.

• Approved a motion directing the Bar's representatives to the ABA's House of Delegates to support a resolution to amend ABA Model Rule 1.10 (Imputation of Conflicts) to allow screening to handle conflicts when a lawyer from one firm is hired by another.

• Heard a report from Legislation Committee Chair Greg Coleman that Chief Justice Peggy Quince is setting up a special task force in cooperation with the Governors' office to work on funding for the court system, and that Bar President Jay White will be a member. He encouraged board members to think about ways to get more money for funding of the courts and related agencies, and warned the courts, public defenders, and state attorneys may soon not have enough money to handle all criminal cases.

• Approved two rule changes on providing legal services following a disaster. One would allow out-of-state attorneys to provide pro bono services through a legal aid agency to Florida residents after a disaster and allow out-of-state attorneys to set up a temporary office in Florida to serve their clients when a Katrina-type disaster has hit their home state. The other amends the MJP rule to allow the activity.

• Approved amendments to Florida Supreme Court approved residential lease forms as simplified forms for use by nonlawyers. The amendments included reducing the number of forms from four to two.

• Endorsed the three-year cycle amendments for the Juvenile Procedure Rules, including a change that provides that children in delinquency proceedings will not be shackled unless there is a reason.

• Endorsed two out-of-cycle amendments for the Rules of Criminal Procedure, including one that requires that a defendant be represented and that a prosecutor attend all

first appearance hearings. The second allows a successor judge to do the sentencing in a criminal case.

• Approved a motion to waive the Standing Board Policy that requires that all public reprimands be delivered by the Bar president before the Board of Governors. The Disciplinary Procedure Committee will revisit the issue, and committee Chair Murray Silverstein said the board could have as many as 14 to 18 reprimands at most meetings. The motion applies only to future court orders, not those already approved by the Supreme Court.

• Approved several new Members Benefits products, including ADP payroll services, Staples office supplies, BPC Financial for workers' compensation and pet insurance, and TheBillableHouse.com for law-related books, games, and gifts.

• Discussed, pursuant to inquiries from Bar members, lawyers' liability for clients' funds held in trust accounts if the bank holding the account collapses. Board members heard that the FDIC will guarantee each client's deposit in a trust account up to the $100,000 maximum, reduced, however, by the amount of any other account a client has independently at that bank. Also, case law indicates lawyers are not liable for losses over the $100,000 maximum. Board members and Bar staff are continuing to discuss the issue.

RPPTL FINANCIAL SUMMARY

2007 – 2008 [*July 1, 2007 – June 31, 2008*[1]]

FINAL YEAR END REPORT

Revenue: *$1,263,141*[*]

Expenses: *$1,211,692*

Net:	*$51,449*

** $273,000 of this figure represents revenue from corporate sponsors.*

RPPTL Fund Balance (6-31-08)	***RPPTL CLE***
$917,093	*RPPTL Actual CLE Revenue* ***$222,438*** *RPPTL Budgeted CLE Revenue* ***$100,000***

[1] **This report is based on the tentative unaudited detail statement of operations dated 7/03/08.**

RPPTL Financial Summary from Separate Budgets

2007 – 2008 [July 1, 2007 – June 31, 2008[1]]

FINAL YEAR END REPORT

General Budget

Revenue:	$ 968,985
Expenses:	$ 774,119
Net:	$ 194,866

Attorney / Trust Officer Liaison Conference

Revenue:	$ 208,072
Expenses:	$ 179,938
Net:	$ 28,134

Legislative Update

Revenue:	$ 30,584
Expenses:	$ 81,697
Net:	($51,113)

Convention

Revenue:	$ 175,865
Expenses:	$ 174,307
Net:	($120,365)

Roll-up Summary (Total)

Revenue:	$ 1,263,141
Expenses:	$ 1,211,692
Net Operations:	$ 51,449

Reserve (Fund Balance):	$ 917,093
GRAND TOTAL	**$ 968,542**

[1] This report is based on the tentative unaudited detail statement of operations dated 6/31/2008

	June 2008 Actuals	YTD 07-08 Actuals	Budget	Percent Budget
Total Real Prop Probate & Trust				
31435 Admin Fee Adj	450	4,963	0	*
31431 Section Dues	750	469,368	450,000	104.30
31432 Affilliate Dues	350	1,800	0	*
31433 Admin Fee to TFB	(403)	(165,082)	(157,500)	104.81
Total Dues Income-Net	1,147	311,049	292,500	106.34
32001 Registrations	126,625	127,447	90,000	141.61
32010 Legal Span On-line	152	1,979	0	*
32191 CLE Courses	(1,759)	222,438	100,000	222.44
32201 Audio Tapes	240	4,800	0	*
32204 Audio Tape-Section S	0	0	8,550	0.00
32205 Compact Disc	240	20,805	28,800	72.24
32293 Section Differential	1,325	28,078	0	*
32301 Course Materials	450	3,650	0	*
34001 Book Sales	0	0	3,700	0.00
34702 Actionline Subscript	0	0	300	0.00
34704 Actionline Advertise	1,440	17,929	0	*
35003 Ticket Events	4,245	4,245	0	*
35008 Spouse Program	0	1,860	10,000	18.60
35101 Exhibit Fees	4,250	23,000	30,000	76.67
[illegible]201 Sponsorships	11,250	275,000	195,000	141.03
[illegible]722 Meals	0	(20)	50,000	(0.04)
35901 Misc Seminars	0	0	10,000	0.00
36991 Allowances	(12)	(28)	0	*
38499 Investment Allocatio	(2,639)	28,214	33,095	85.25
39202 Reimb Council Recrea	0	0	4,500	0.00
39998 Meeting Deposits	1,646	192,695	90,000	214.11
Other Income	147,453	952,092	653,945	145.59
Total Revenues	148,600	1,263,141	946,445	133.46
36998 Credit Card Fees	37	6,868	5,550	123.75
51101 Employee Travel	2,733	16,873	14,361	117.49
61201 Equipment Rental	6,222	12,067	13,300	90.73
62202 Meeting Room Rental	0	0	5,000	0.00
71002 Telephone Distributi	315	1,099	0	*
75102 1st Class & Misc Mai	0	22	300	7.33
75401 Express Mail	3	682	0	*
81411 Promotional Printing	0	2,295	2,000	114.75
81412 Promotional Mailing	0	5,783	14,000	41.31
84001 Postage	664	3,328	14,000	23.77
84002 Printing	9,021	10,609	7,400	143.36
84006 Newsletter	0	26,518	28,000	94.71
84009 Supplies	158	574	500	114.80
[illegible]010 Photocopying	33	448	500	89.60
[illegible]015 Officers Conference	0	1,375	1,200	114.58
84052 Meeting Travel Expen	0	1,620	5,000	32.40

Unaudited Detail Statement of Operations

	June 2008 Actuals	YTD 07-08 Actuals	Budget	Percent Budget
Total Real Prop Probate & Trust				
84054 CLE Speaker Expense	0	1,007	3,000	33.57
84061 Reception	76,893	77,893	50,000	155.79
84062 Luncheons	39,115	65,504	56,500	115.94
84064 Golf Tourn Expenses	11,089	11,089	6,500	170.60
84101 Committee Expenses	5,883	49,857	31,000	160.83
84106 Realtor Relations	0	2,150	4,000	53.75
84107 Diversity Initiative	0	1,974	15,000	13.16
84109 Spouse Program	325	325	4,000	8.13
84110 Exhibitor Fees	0	0	250	0.00
84115 Entertainment	7,726	9,526	10,000	95.26
84201 Board Or Council Mee	0	393,656	200,000	196.83
84216 Strategic Planning M	0	1,027	10,000	10.27
84238 Council Mtg Recreati	2,501	25,138	20,000	125.69
84239 Hospitality Suite	0	7,086	20,000	35.43
84241 Spouse Functions	0	8,830	10,000	88.30
84253 Sleeping Rooms	866	866	5,000	17.32
84254 Speaker Gifts	0	1,500	1,500	100.00
84270 Misc Seminars	24,980	24,980	8,000	312.25
84279 Council Members Hand	0	2,270	3,500	64.86
84301 Awards	1,502	3,488	5,000	69.76
84310 Law School Liaison	0	0	5,000	0.00
[illegible]419 Binders	0	0	1,000	0.00
[illegible]422 Website	5,100	53,802	50,000	107.60
84501 Legislative Consulta	25,000	100,000	100,000	100.00
84503 Legislative Travel	3,675	11,519	9,000	127.99
84524 Memorial Tributes	0	268	500	53.60
84701 Council Of Sections	0	300	0	*
84998 Operating Reserve	0	0	51,849	0.00
84999 Miscellaneous	(36)	2,522	500	504.40
86432 Time Taping Editing	0	3,743	0	*
88211 Steering Committee	0	0	1,200	0.00
88230 Speakers Expense	4,260	9,778	6,000	162.97
88231 Speakers Travel	494	494	0	*
88232 Speakers Meals	6	6	0	*
88233 Speakers Hotel	193	193	3,500	5.51
88239 Speakers Other Exp	9	9	0	*
88241 Outline Prt-Inhouse	0	1,857	13,000	14.28
88242 Outline Prt-Contract	0	12,957	6,000	215.95
88252 Course Credit Fee	0	300	450	66.67
88262 Meeting Meals	153,994	161,411	70,000	230.59
88265 Refreshment Breaks	0	4,886	13,000	37.58
88269 Breakfast	36,733	46,233	38,000	121.67
88281 A/V Ctr Dup/Prod	0	836	0	*
Total Operating Expenses	419,494	1,189,441	943,360	126.09
86431 Meetings Administrat	331	4,637	9,117	50.86
[illegible]532 Advertising News	0	671	5,158	13.01
[illegible]543 Graphics & Art	1,996	11,076	16,036	69.07
86623 Registrars	1,562	5,867	0	*

Unaudited Detail Statement of Operations

	June 2008 Actuals	YTD 07-08 Actuals	Budget	Percent Budget
Total Real Prop Probate & Trust				
Total TFB Support Services	3,889	22,251	30,311	73.41
Total Expenses	423,383	1,211,692	973,671	124.45
Net Operations	(274,783)	51,449	(27,226)	(188.97)
21001 Fund Balance	0	917,093	512,791	178.84
Total Current Fund Balance	(274,783)	968,542	485,565	199.47

September 20, 2008

The Honorable Jim Nussle
Director
Office of Management and Budget
725 17th Street, NW Washington, DC 20503

Dear Director Nussle:

The Real Property, Probate and Trust Law Section of the Florida Bar and its approximately 10,000 Florida lawyers, many of whom in their daily practices provide legal counsel, settlement services and title insurance to their clients, support HUD's efforts to simplify and improve disclosure requirements for mortgage settlement charges to enhance shopping among providers and to protect consumers from unnecessarily high settlement costs. As do the ten industry organizations who wrote to you in a joint letter dated July 31, 2008, we too have serious concerns about whether HUD's current Real Estate Settlement Procedures Act (RESPA) proposal will attain those laudable ends and we endorse those concerns expressed in their joint letter.

From our collective experience as practicing real estate attorneys, we are concerned generally about what appears to be a lack of understanding by HUD of the flow and mechanics of a consumer real estate transaction. As settlement services providers we also have specific concerns about certain provisions of the proposed rule, as we discuss below.

The closing script, in addition to imposing increased burdens and liabilities on the closing agent, would likely result in increased costs for both sellers and borrowers. The information in the closing script comes too late in the settlement process and from the wrong party. There is no guidance on what the settlement agent should do if there is conflict with terms or costs earlier given by the lender. Many closings are conducted with the borrower not physically present. There is no guidance in the proposed rule for such events.

Use of the word "optional" on the GFE and HUD-1 to identify owner's title insurance sends a message from government that such insurance is not necessary, thus further enforcing the erroneous assumption held by many that the lender's coverage also fully covers the owner.

Proposing to disclose agent's and insurer's share of premium on the HUD-1 does not serve consumers' understanding of their title insurance fees. If that were so, then such disclosures should be required for all lines of insurance, which will surely not happen.

The members of our Section are small business men and women. Tolerances and volume discounts will encourage an anti-competitive climate and disproportionately harm small businesses. If we are pushed out of the marketplace, competition will be reduced, consumers will have fewer choices of settlement services providers, and costs will rise.

The 10% tolerances proposed for certain settlement services charges, as HUD itself discloses in its Regulatory Impact Analysis (the "RIA"), will have a number of interesting effects on settlement services providers. Originators who recommend third party providers will want business arrangements in place that provide set prices not in excess of the tolerances, and will be highly motivated to find low third party prices among a select few providers. The RIA explains to originators that they could raise their origination fees by the savings in third party fees negotiated by them and earn more profit per loan. It further suggests that the borrower could immediately decide to use the originator's third parties because of the lower, locked-in amounts, in which case the borrower's search for a settlement services provider is over. The RIA, then, describes a scenario in which shopping is reduced or eliminated, many small business persons are forced out, reducing competition, and the consumer has no net reduction in transaction costs. We submit that this scenario is not one which supports HUD's announced goals in proposing the new rule.

Thank you for your consideration of our concerns.

Sincerely,

cc: Florida Legislative delegation (?)

Proposed Amendment to Doc Stamp Statute to Address Short Sales
Draft of August 20, 2008

1 A bill to be entitled

2 An act relating to documentary stamp taxes; amending s. 201.02, F.S.; providing that

3 consideration does not include the amount of any debt forgiven in connection with a sale of the

4 property to a party unrelated to the holder of the debt.; providing an effective date.

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

6 Section 1. Subsection (1) of s. 201.02, Florida Statutes is amended to read:

7 201.02 Tax on deeds and other instruments relating to real property or interests in real property.-

8 -

9 (1) On deeds, instruments, or writings whereby any lands, tenements, or other real property, or

10 any interest therein, shall be granted, assigned, transferred, or otherwise conveyed to, or vested

11 in, the purchaser or any other person by his or her direction, on each $100 of the consideration

12 therefor the tax shall be 70 cents. When the full amount of the consideration for the execution,

13 assignment, transfer, or conveyance is not shown in the face of such deed, instrument, document,

14 or writing, the tax shall be at the rate of 70 cents for each $100 or fractional part thereof of the

15 consideration therefor.

16 (a) For purposes of this section:;

17 (1) consideration includes, but is not limited to, the money paid or agreed to be paid;

18 (2) the discharge of an obligation; and

19 (3) the amount of any mortgage, purchase money mortgage lien, or other encumbrance,

20 whether or not the underlying indebtedness is assumed.

21 (b) Consideration shall not include the amount of any forgiveness of indebtedness or discharge of

22 an obligation by the holder of a mortgage or encumbrance on the property made in connection

23 with a sale of such property to a person not related to or affiliated with the holder of such

24 mortgage. The foregoing exclusion from consideration shall not apply to the extent the

25 forgiveness of indebtedness or discharge of an obligation is on account of other goods or services

26 provided to the holder of the mortgage or other encumbrance on the property or any other factor

27 not directly related to a decline in the value of the property or to the financial condition of the

28 seller.

29 If the consideration paid or given in exchange for real property or any interest therein includes

30 property other than money, it is presumed that the consideration is equal to the fair market value

31 of the real property or interest therein.

32 Section 2. This act shall take effect upon becoming law and as it reflects the understanding of the

33 legislature as to what the law has always been regarding short sales, shall apply retroactive to

34 January 1, 200___.

RPPTL WHITE PAPER
REGARDING DOCUMENTARY STAMP TAXES ON "SHORT SALES"
DRAFT OF 8/28/08

I. SUMMARY ANALYSIS

Following the mortgage crisis nationally and significant declines in the value of homes in parts of Florida, some lenders are finding it preferable to accept less than the full amount owed on their mortgages in a negotiated sale (a "short sale") rather than incurring the costs and uncertainties of foreclosing on the property, maintaining the property pending sale and locating another purchaser. Such sales have become quite common and relieved a significant additional burden on the court system.

Private legal counsel and some within DOR have opined that the amount of forgiven indebtedness on a short sale is part of the consideration subject to documentary stamps. The result of this is a higher documentary stamp tax on a short sale deed, and the public impression (which will be relied on by appraisers who look to documentary stamp amounts) that the property sold for a much higher price.

This process is expected to result in unjustifiably higher ad valorem tax appraisals, the appearance that home values are coming back and a resultant delay in working out the existing mortgage crisis.

This bill will have a fiscal impact on state and local government revenues or expenditures by reducing documentary stamp taxes and by reducing artificially increased assessed property valuations. The bill should reduce the expenditures of tax assessors in defending valuations based on artificially inflated valuations.

II. BACKGROUND AND CURRENT LAW

Following the mortgage crisis nationally and significant declines in the value of homes in parts of Florida, some lenders are finding it preferable to accept less than the full amount owed on their mortgages in a negotiated sale (a "short sale") rather than incurring the costs and uncertainties of foreclosing on the property, maintaining the property pending sale and locating another purchaser. Such sales have become quite common and relieved a significant additional burden on the court system.

In these short sale transactions, property is conveyed to a third party purchaser and the existing first mortgage lender agrees to satisfy the existing mortgage for a sum less than what is owed. As part of such short sale transactions, subordinate mortgage and lien holders agree to satisfy their mortgages and liens for a small payment, well below the amounts owed and secured by the property. Since the costs of the transaction are not fully computed at the time of the agreement, and no funds rightfully accrue to the property owner, many first mortgage lenders require the payment to them of all net proceeds even if that exceeds the agreed minimum.

Sec 201.02(1) imposes a documentary stamp tax on the full amount of the consideration for the execution, assignment, transfer, or conveyance of the property. The statute is vague as to whether it applies to "consideration paid" or "consideration received" but is clear that taxable consideration does include the "discharge of an obligation."

This has led to the interpretation that all amounts released at a discount which were previously secured by a lien against the property, including principal, interest, default interest, late fees, costs and even attorneys fees, are part of the obligation discharged, and therefore subject to tax.

Almost all institutional mortgages also secure default interest, late fees, costs and attorneys fees incurred in connection with efforts to collect or restructure the debt. After a default, these amounts quickly and dramatically increase the total debt secured by the mortgage.

Because the payment to the first mortgage holder is often defined in terms of "net proceeds", normal closing costs of the sale paid to realtors, for title insurance, the recording charges and even the taxes paid to the state reduce the payment to the mortgage holder. Thus, closing costs increase the amount of debt forgiven and the consideration subject to documentary stamp taxes. In a traditional sale, closing costs are not part of the consideration paid, so not subject to documentary stamp taxes.

The taxing of the amount of debt forgiven is comparable to the result where a property is conveyed to the mortgage holder by a deed in lieu of foreclosure. In that instance, tax is due on the unpaid portion of any mortgages or other encumbrances the property is subject to, plus any other consideration as defined in Section 201.02(1), F.S., including accrued interest. 12B-4.013(2) F.A.C.

On the other hand, if the same property subject to short sale were taken through a complete foreclosure, the documentary stamp tax would be computed on the amount of the highest and best bid received for the property at the foreclosure sale. 12B-4.013(3)(a) F.A.C. When viewed in this light, the tax is higher when the debt is voluntarily compromised than when the same obligation is judicially foreclosed.

Documentary Stamp Taxes paid on a deed are the primary source of information relied upon by County Property Appraisers, private appraisers, realtors and reporting companies as to the prices at which properties sold. With the elimination of the requirement for filing Form DR-219 effective June 1, 2008, Ch 2008-24, Law of Fla. there is no other systematic source of such information or place to report a transaction that should not be used as a market comparable. Lawyers, Realtors and title companies are subject to various state and federal privacy obligations that preclude them from sharing that information with appraisers.

With the dramatic increase in the number of short sales, charging documentary stamp taxes on the amount of debt forgiven will often give the erroneous impression that the selling price of properties has increased from its peak a few years. This is expected to result in:

a. Overvaluations of properties for ad valorem tax purposes and increased challenges to property tax appraisals;

b. An overvaluation of the same properties for private purposes, which will make lenders less willing to work with over-extended homeowners and extend the workout of the mortgage crisis;
c. Another opportunity for over-appraisal of properties feeding additional mortgage fraud in Florida.

III. EFFECT OF PROPOSED CHANGES

The bill creates within sec. 201.02, an exclusion from the definition of consideration for the amount of debt forgiveness in a sale to a party unaffiliated with the holder of the secured debt. To prevent abuse, there is a limitation where the debt forgiveness is based on goods or services provided to the holder of the debt or other factors not directly related to a decline in the value of the property or financial condition of the borrower.

IV. FISCAL IMPACT ON STATE AND LOCAL GOVERNMENT.

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

This bill will reduce Documentary Stamp Tax revenues by an indeterminable but sizeable amount. As there is no central registry of short sales, exact numbers will be difficult to identify, as will specific transactions potentially subject to this added tax.

As this is a recent interpretation of the statute, revenue estimates presumably do not factor this into future year estimates.

2. Expenditures:

As there is no central registry for short sale transactions, costs of DOR in identifying and enforcing these taxes will increase.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

Ad valorem property tax revenues will decrease from the artificially inflated levels which would otherwise occur as a result of this bill. Given the recent re-interpretation of the statute by DOR, one can presume that the additional documentary stamp taxes on forgiven debt have not yet worked through the system into appraised values.

2. Expenditures:

There will be a savings to County Property Appraisers resulting from fewer challenges to appraised value.

V. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The impact on the private sector will exactly match the lost revenues to the state and local governments.

VI. RULE-MAKING AUTHORITY:

The Department of Revenue has authority under sec. 201.02(c) to adopt rules relating to Documentary Stamp Taxes. However, such rules must be consistent with the statutory mandates. Given the statutory determination that consideration includes "the discharge of an obligation", there is significant doubt as to whether the Department could resolve this issue by rule.

VII. CONSTITUTIONAL ISSUES.

No Constitutional Issues are presented by this Bill.

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

Address Alan B. Fields, First American Title Insurance Company, 7360 Bryan Dairy Road, Suite 200, Largo, FL 33777, 727-549-3243, abfields@firstam.com

Position Type The Florida Bar, RPPTL Section and Committee

CONTACTS

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Michael J. Gelfand, Michael J. Gelfand, Gelfand & Arpe, P.A, Regions Financial Tower, Suite 1220, 1555 Palm Beach Lakes Blvd., West Palm Beach, FL 33401; (561) 655-6224
Peter Dunbar, Pennington, Moore, et al, P.O. Box 10095 Tallahassee, Florida, 32302-2095 (850) 222-3533
Martha J. Edenfield, Pennington, Moore, et al, P.O. Box 10095 Tallahassee, Florida, 32302-2095 (850) 222-3533

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

Indicate Position ______ Support Oppose Technical Assistance Other ______________

Proposed Wording of Position for Official Publication: Support position that documentary stamp taxes should not be assessed against the value of debt forgiven in a short sale to a party unrelated to the mortgage holder or for the public reporting of tax attributable to forgiven debt.

Reasons For Proposed Advocacy: Some within DOR, and private counsel, believe the amount of forgiven indebtedness on a short sale is part of the consideration subject to documentary stamps. The result of this is a higher documentary stamp tax on a short sale deed, and the public impression (which will be relied on by appraisers who look to documentary stamp amounts) that the property sold for a much higher price – unjustifiably increasing ad valorem taxes, private appraisals, increasing the potential for mortgage fraud and delaying the ultimate resolution of the current mortgage crisis.

PRIOR POSITIONS TAKEN ON THIS ISSUE

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

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

Others
(May attach list if more than one)

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

REFERRALS TO OTHER SECTIONS, COMMITTEES OR LEGAL ORGANIZATIONS

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

Referrals

1. Florida Bankers Association — Unknown at this time, expected support
   (Name of Group or Organization) (Support, Oppose or No Position)

2. Florida Land Title Association — Expect Support
   (Name of Group or Organization) (Support, Oppose or No Position)

3. Florida Association of Realtors — Expect Support
   (Name of Group or Organization) (Support, Oppose or No Position)

4. League of Cities/Fla. Assoc of Counties/FL School Bd Assoc — Expect Opposition
   (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.

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

Section 1. Subsection (2)(b) of section 501.1377, Florida Statutes is amended to read:

(2) DEFINITIONS.--As used in this section, the term:

(b) "Foreclosure-rescue consultant" means a person who directly or indirectly makes a solicitation, representation, or offer to a homeowner to provide or perform, in return for payment of money or other valuable consideration, foreclosure-related rescue services. The term does not apply to:

1. A person excluded under s. 501.212.

2. A person acting under the express authority or written approval of the United States Department of Housing and Urban Development or other department or agency of the United States or this state to provide foreclosure-related rescue services.

3. A charitable, not-for-profit agency or organization, as determined by the United States Internal Revenue Service under s. 501(c)(3) of the Internal Revenue Code, which offers counseling or advice to an owner of residential real property in foreclosure or loan default if the agency or organization does not contract for foreclosure-related rescue services with a for-profit lender or person facilitating or engaging in foreclosure-rescue transactions.

4. A person who holds or is owed an obligation secured by a lien on any residential real property in foreclosure if the person performs foreclosure-related rescue services in connection with this obligation or lien and the obligation or lien was not the result of or part of a proposed foreclosure reconveyance or foreclosure-rescue transaction or a person or entity employed or engaged, directly or indirectly,by the holder of such a mortgage.

5. A financial institution as defined in s. 655.005 and any parent or subsidiary of the financial institution or of the parent or subsidiary.

24 6. A licensed mortgage broker, mortgage lender, or correspondent mortgage lender that provides
25 mortgage counseling or advice regarding residential real property in foreclosure, which
26 counseling or advice is within the scope of services set forth in chapter 494 and is provided
27 without payment of money or other consideration other than a mortgage brokerage fee as defined
28 in s. 494.001.
29 7. An attorney licensed to practice law in this state, either individually or through the attorney's
30 law firm, in the course of the practice of law.
31 8. Legal aid clinics, Sections of the Florida Bar, law schools, bar associations, pro-bono
32 programs and other similar groups providing referrals for or coordinating lawyers, certified legal
33 interns and law students in providing foreclosure related rescue services.
34 9. Title insurers, licensed title agents and agencies, who are duly licensed or admitted under the
35 Florida Insurance Code, to the extent they are providing title searches, title insurance or closing
36 services with regard to a foreclosure-rescue transaction or in furtherance of foreclosure-related
37 rescue services.
38 Section 2. This act shall take effect upon becoming law.

White Paper
Glitch Bill to Exempt Attorneys, Title Agents, Pro Bono Programs,
Legal Aid Clinics and those contracted
by Mortgage Holders from Section 501.1377

Draft of August 20, 2008

Laws of Florida Ch. 2008-79 (the “Act”) recognized that homeowners who are in default on their mortgages, in foreclosure, or at risk of losing their homes due to nonpayment of taxes may be vulnerable to fraud, deception, and unfair dealings. The Act placed significant restrictions on certain actions by foreclosure-rescue consultants and equity purchasers and defined violations of the Act as Deceptive and Unfair Trade Practices, subject to fines and penalties under Part II of Chapter 501, Florida Statutes.

Certain categories of actors were expressly excluded from the operative definitions of the Act.

The exclusions, however, did not run to lawyers, law firms, pro-bono and legal aid programs, title agents and the servicing, restructuring and workout companies employed by the holders of mortgages. These omissions raise significant concern as to whether the Act was intended to limit such activities as:

1. providing legal representation to parties in foreclosure.
2. engaging a lawyer to negotiate with a lender and to restructure a loan;
3. legal aid clinics, Sections of the Florida Bar, law schools, bar associations, pro-bono programs and other similar groups providing referrals for or coordinating lawyers, certified legal interns and law students in providing counsel and assistance to homeowners in need of foreclosure related rescue services.
4. obtaining the title searches, title insurance and other closing services necessary to evaluate or consummate an agreed restructuring, refinancing or sale to assist a homeowner in avoiding foreclosure; or
5. the normal practice of many institutional mortgage holders (often trustees as to pools of mortgages) to engage servicing companies, workout specialists and others to negotiate with defaulting borrowers, restructure loans and deal with properties conveyed by a deed in lieu.

This became such an issue that Attorney General McCollum issued his letter purporting to exempt attorneys from the provisions of the Act.

The proposed bill removes those categories from the definition of "Foreclosure-rescue consultant" in the Act.

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

Address Alan B. Fields, First American Title Insurance Company, 7360 Bryan Dairy Road, Suite 200, Largo, FL 33777, 727-549-3243, abfields@firstam.com

Position Type The Florida Bar, RPPTL Section and Committee

CONTACTS

Ed Burt Bruton, Jr., Greenburg Traurig, 1221 Brickell Ave, Miami, FL 33131-3224 (305) 579-0593
Michael J. Gelfand, Michael J. Gelfand, Gelfand & Arpe, P.A, Regions Financial Tower, Suite 1220, 1555 Palm Beach Lakes Blvd., West Palm Beach, FL 33401; (561) 655-6224
Peter Dunbar, Pennington, Moore, et al, P.O. Box 10095 Tallahassee, Florida, 32302-2095 (850) 222-3533
Martha J. Edenfield, Pennington, Moore, et al, P.O. Box 10095 Tallahassee, Florida, 32302-2095 (850) 222-3533

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

Indicate Position ______ Support Oppose Technical Assistance Other ______________

Proposed Wording of Position for Official Publication: Support glitch amendment to F.S. 501.1377 to exclude lawyers, law firms, pro-bono and legal aid programs, title agents and the servicing, restructuring and workout companies employed by the holders of mortgages from the definition of "foreclosure rescue consultant."

Reasons For Proposed Advocacy: F.S. 501.1377 as adopted in 2007 raised concern as to whether the following had been classified as "Unfair and Deceptive Trade Practices:

1. providing legal representation to parties in foreclosure.
2. engaging a lawyer to negotiate with a lender and to restructure a loan;
3. legal aid clinics, Sections of the Florida Bar, law schools, bar associations, pro-bono programs and other similar groups providing referrals for or coordinating lawyers, certified legal interns and law students in providing counsel and assistance to homeowners in need of foreclosure related rescue services.
4. obtaining the title searches, title insurance and other closing services necessary to evaluate or

consummate an agreed restructuring, refinancing or sale to assist a homeowner in avoiding foreclosure; or

5. the normal practice of many institutional mortgage holders (often trustees as to pools of mortgages) to engage servicing companies, workout specialists and others to negotiate with defaulting borrowers, restructure loans and deal with properties conveyed by a deed in lieu.

PRIOR POSITIONS TAKEN ON THIS ISSUE

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

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

Others
(May attach list if more than one)

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

REFERRALS TO OTHER SECTIONS, COMMITTEES OR LEGAL ORGANIZATIONS

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

Referrals

1. Florida Bankers Association — Unknown at this time, expected support
   (Name of Group or Organization) (Support, Oppose or No Position)

2. Florida Land Title Association — Expect Support
   (Name of Group or Organization) (Support, Oppose or No Position)

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

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

A bill to be entitled

An act relating to lis pendens; amending s. 48.23, F.S.; permitting property to be sold exempt from claims asserted in an action when the lis pendens is discharged or expires; permitting the lis pendens to include the date of the action or the case number of the action; providing for the control of a lis pendens that no longer affects the property; and providing for an effective date.

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

Section 1. Subsection (1) of Section 48.23 has been renumbered into two subsections and is modified to read as follows:

48.23 (1)(a) ~~No~~An action in any of the state or federal courts in this state operates as a lis pendens on any real or personal property involved therein or to be affected thereby ~~until~~only if a notice of ~~the commencement of the action~~lis pendens is recorded in the office of the clerk of the circuit court of the county where the property is~~, which notice contains~~ located, and such notice has not expired pursuant to subsection (2), been withdrawn, or been discharged. If an action is filed **for specific performance or which is not based on a duly recorded instrument** and no lis pendens is recorded, or if **such** action is filed and a lis pendens is recorded but the lis pendens has expired, is withdrawn or is discharged, the action shall have no effect, except as between the parties to the proceeding, on the title to, or on any lien upon, the real or personal property, and any person acquiring for value an interest in the real or personal property during the pendency of such action, other than a party to the proceeding or the legal successor by operation of law, or personal representative, heir or devisee of a deceased party to the proceeding, shall take such interest exempt from all claims asserted against the title raised in the action and from any judgment entered in the proceeding, notwithstanding the provisions of sec. 695.01 F.S., as if such person has no actual or constructive notice of the proceeding or of the claims made therein or the documents forming the causes of action against the property in the proceedings.

(b) A notice of lis pendens shall contain (i) the names of the parties, (ii) the ~~time~~date of the institution of the action~~,~~ or the case number of the action, (iii) the name of the court in which it is pending, (iv) a description of the property involved or to be affected, and (v) a statement of the relief sought as to the property. In the case of any notice of lis pendens filed on the same

date as the pleading upon which the notice of lis pendens is based, the clerk's stamp date of receipt on the notice of lis pendens shall satisfy the requirement that the notice of lis pendens contain the date of the institution of the action.

(~~b~~c) Except for the interest of persons in possession or easements of use, the ~~filing for record~~recording of such notice of lis pendens, which during the pendency of the proceeding has not expired pursuant to subsection (2), been withdrawn, or been discharged, shall constitute a bar to the enforcement against the property described in said notice of lis pendens of all interests and liens including but not limited to federal tax liens and levies, unrecorded at the time of ~~filing for record such~~recording such notice of lis pendens unless the holder of any such unrecorded interest or lien shall intervene in such proceedings within ~~20~~30 days after the ~~filing and~~ recording of said notice of lis pendens. If the holder of any such unrecorded interest or lien does not intervene in the proceedings and if such proceedings are prosecuted to a judicial sale of the property described in said notice of lis pendens, the property shall be forever discharged from all such unrecorded interests and liens. In the event said notice of lis pendens ~~is discharged~~ceases to be effectual due to expiration, withdrawal or discharge by order of the court, the same shall not in any way affect the validity of any unrecorded interest or lien.

(2) No notice of lis pendens is effectual for any purpose beyond 1 year from the commencement of the action, and will expire at that time, unless the relief sought is disclosed by the ~~initial~~pending pleading to be founded on a duly recorded instrument or on a lien claimed under part I of chapter 713 against the property involved, except when the court extends the time of expiration on reasonable notice and for good cause. The court may impose such terms for the extension of time as justice requires.

Section 2. Subsection (2) of Section 48.23 has been renumbered and is modified to read as follows:

(3) When the ~~initial~~pending pleading (a) does not show that the action is founded on a duly recorded instrument or on a lien claimed under part I of chapter 713, or (b) no longer affects the subject property, the court ~~may~~shall control and discharge the recorded notice of lis pendens as the court ~~may~~would grant and dissolve injunctions.

Section 3. This act shall take effect on July 1, 2009.

WHITE PAPER

PROPOSED REVISIONS TO THE LIS PENDENS STATUTE

I. SUMMARY

The purposes of the proposed changes are to: (a) address the longstanding problem that even after a lis pendens is discharged, an owner of property cannot convey the property free of the claim asserted in the action until the action is finally disposed of, (b) avoid invalidation of a lis pendens for a technical failure to provide the time of the institution of the action in the notice and substitute comparable requirements that satisfy the intent of the current statute, (c) extend the time to intervene from 20 to 30 days, and (d) make mandatory the trial court's obligation to determine, under the same standard as an injunction, whether to continue a lis pendens which is not founded on a duly recorded instrument.

II. CURRENT SITUATION AND PROPOSED CHANGES

A. Avoiding a Discharged Lis Pendens From Affecting Property - Under the present law, a party can tie up another party's title to property for years without a lis pendens, simply by filing a lis pendens and then dismissing it, letting it expire, or suffering a discharge of the lis pendens by the court for failure to post a bond. Even though the lis pendens is no longer of record, and therefore no longer serves as constructive notice of the lawsuit to any subsequent buyer or mortgagee, title insurers are forced to make exception for the lawsuit in any policy they issue given their actual notice of the pendency of the action, and sellers and their lawyers may be legally or ethically obligated to disclose the pendency of the lawsuit to any potential buyer or mortgagee. One commentator characterized the unfairness of this situation to current property owners as "legal blackmail." See Real Property, Probate and Trust Law: Specific Performance of Real Estate Contracts: Legal Blackmail, Gerald F. Richman and Mark A. Romance, 72 Fla. Bar J. 54 (Nov. 1998).

A recent decision of the Fourth District Court of Appeal indicated it was "not unsympathetic to the predicament" and, citing to the above article, noted that legislation was suggested as a possible solution. Shields v Schuman, 964 So. 2d 813, n.1 (Fla. 4th DCA 2007).

The proposed change to subsection (1)(a) of the statute fixes this problem by making it clear that once a lis pendens is dissolved, expires or is withdrawn, the owner of the property can sell it or mortgage it to a third party, and such third party will take it free of any interest claimed in the action.

Under both the present statute and the proposed change, a plaintiff whose action is founded on a recorded instrument does not suffer any risk of expiration or discharge of its lis pendens. Only a plaintiff whose action is founded on an unrecorded interest runs a risk of having its lis pendens expire or be discharged.

Moreover, under both the present statute and the proposed change, a plaintiff whose action is founded on an unrecorded interest is only at risk of having its lis pendens discharged

after a hearing at which the court considers the requirement for a bond or the discharge of the lis pendens as it would an injunction. This procedure protects both parties by assuring judicial review of the individual circumstances of each case and permits the judge to evaluate and balance the likelihood of success of the plaintiff's claim against the potential harm to the owner through the continuation of the lis pendens.

B. Avoiding the Technical Requirement of Including the "Time of the Institution of the Action" in a Notice of Lis Pendens - In the recent case of Oz v Countrywide Home Loans, Inc., 953 So. 2d 619 (Fla. 3d DCA 2007), the court upheld the discharge of two lis pendens because the lis pendens failed to, inter alia, contain "the time of institution of the action," which is currently required under the statute.

Oftentimes a lis pendens is filed contemporaneously with the institution of a lawsuit. Thus, frequently the precise "time of institution of the action" is not known when the original complaint and lis pendens are sent for filing and recordation. Most court clerks stamp a receipt date on a lis pendens before recording it, which is the same date as the clerk accepts the complaint for filing. Most court clerks also add the case number of the contemporaneously filed complaint onto the lis pendens when the lis pendens is received for filing.

The purpose of the lis pendens statute is to give third parties constructive notice of the pendency of an action. This can be satisfied by identifying in the lis pendens either the date the action is filed or the case number. To avoid the practical problems of requiring that the time of the institution of the action be included in the lis pendens when that time is not always known as of the date the lis pendens is prepared and sent for filing, the proposed change to the statute permits a notice of lis pendens to be effective when it either references the date the action was filed or the case number. Either will permit a party searching title to locate the action. Moreover, given that clerks often stamp this information on the face of a lis pendens when it is filed, the proposed change makes the process of filing a complaint and lis pendens contemporaneously easier.

C. Extending the Time for Holders of Unrecorded Interests to Intervene to 30 Days –

Given that holders of unrecorded interests may not be checking the property records so frequently that they would see a lis pendens in time to intervene within the currently required 20 days, the proposed change extends from 20 to 30 days the time within which such party has to intervene to protect its interest in the action.

D. Requiring That a Trial Court Control a Lis Pendens Based on an Unrecorded Instrument As It Would an Injunction - Currently the statute provides that a court "may" control a notice of lis pendens as it would grant and dissolve injunctions. Because: (a) anyone filing a lawsuit can file a lis pendens without prior court approval, and (b) a lis pendens has the immediate effect of clouding a party's title to property, the party against whose property the lis pendens is filed should have an absolute right, whenever the action is not founded on a recorded instrument, to have a court review the claim and control the lis pendens as it would an injunction.

The court can then hear evidence from both sides and evaluate and balance the strength of the plaintiff's claim against the damages the property owner will suffer if it turns out that the lis pendens was wrongfully placed against the property in determining whether to permit the lis pendens to stand and, if so, the amount of bond to be posted to protect the property owner against loss for a wrongful lis pendens.

III. FISCAL IMPACT ON STATE AND LOCAL GOVERNMENTS

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

IV. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR

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

V. CONSTITUTIONAL ISSUES

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

VI. OTHER INTERESTED PARTIES

None are known at this time.

LEGISLATIVE POSITION REQUEST FORM

GOVERNMENTAL AFFAIRS OFFICE

Date Form Received ____________

GENERAL INFORMATION

Submitted By Mark A. Brown, Chair, Real Property Litigation Committee of the Real Property Probate & Trust Law Section

Address 4221 W. Boy Scout Blvd., Suite 1000, Tampa, Florida 33607
Telephone: (813-223-7000)

Position Type Real Property Litigation Committee, RPPTL Section, The Florida Bar
(Florida Bar, section, division, committee or both)

CONTACTS

Board & Legislation Committee Appearance

Mark A. Brown, Carlton Fields. P.A., 4221 W. Boy Scout Blvd., Suite 1000, Tampa, Florida 33607, Telephone (813) 223-7000
Burt Bruton, Greenberg Traurig, P.A., 1221 Brickell Avenue, Miami, FL 33131, Telephone (305) 579-0593
Peter M. Dunbar, Pennington, Moore, Wilkinson, Bell & Dunbar, P.O. Box 10095, Tallahassee, Florida 32302-2095, Telephone (850) 222-3533
Martha J. Edenfield, Pennington, Moore, Wilkinson, Bell & Dunbar, P.O. Box 10095, Tallahassee FL 32302-2095, Telephone (850) 222-3533
(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 N/A
(Bill or PCB #) (Bill or PCB Sponsor)

Indicate Position X **Support** Oppose Technical Assistance Other ___________

Proposed Wording of Position for Official Publication:

Support amendment of the lis pendens statute, F.S. §48.23, to (i) permit transfer of property where the lis pendens has been discharged, (ii) permit a notice of lis pendens to include the date of the

action or the case number, (iii) extend the time for holders of unrecorded interests to intervene, and (iv) require that a court control a lis pendens based on an unrecorded instrument as it would an injunction.

Reasons For Proposed Advocacy:

The purposes of the proposed changes are to: (a) address the longstanding problem that even after a lis pendens is discharged, an owner of property cannot convey the property free of the claim asserted in the action until the action is finally disposed of, (b) avoid the invalidation of a lis pendens for a technical failure to provide the time of the institution of the action in the notice and substitute comparable requirements that satisfy the intent of the current statute, (c) extend the time to intervene from 20 to 30 days, and (d) make mandatory the trial court's obligation to determine, under the same standard as an injunction, whether to continue a lis pendens which is not founded on a duly recorded instrument.

PRIOR POSITIONS TAKEN ON THIS ISSUE

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

Most Recent Position None

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

(Date)

Others
(May attach list if more than one) None

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

(Date)

REFERRALS TO OTHER SECTIONS, COMMITTEES OR LEGAL ORGANIZATIONS

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

Referrals

None

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.

CHAPTER 11

PLATS

STANDARD 11.1

CORRECTING ERROR IN NAME OR DESIGNATION OF PLAT

STANDARD: AN ERROR IN A CONVEYANCE AS TO THE NAME OF A PLAT MAY BE DISREGARDED IF THE PLAT BOOK AND PAGE REFERENCE ARE CORRECT AND, AT THE TIME OF THE CONVEYANCE, THERE WAS NO RECORDED PLAT WITH THE ERRONEOUS NAME, OR PHASES THEREOF, CONTAINING THE LOT DESIGNATED IN THE CONVEYANCE. AN ERROR IN THE PLAT BOOK OR PAGE REFERENCE IN A CONVEYANCE MAY BE DISREGARDED IF THE NAME OF THE PLAT IS CORRECT AND THE NAME OF THE PLAT RECORDED AT THE ERRONEOUS PLAT BOOK AND PAGE IS SUBSTANTIALLY DIFFERENT FROM THE NAME OF THE PLAT ON THE CONVEYANCE OR THE PLAT AT THE ERRONEOUS PLAT BOOK DOES NOT CONTAIN THE LOT DESIGNATED IN THE CONVEYANCE.

Problem 1: John Doe conveyed land describing it as Lot 1, Block A, of Greenacre, Plat Book 4, Page 3, of the Public Records of Orange County, Florida, instead of the correct plat name of Blueacre. There is no plat named Greenacre recorded in Orange County. Is a corrective deed necessary?

Answer: No.

Problem 2: Same facts as Problem 1, except there is a plat named Greenacre recorded in Orange County, which does not contain a lot with the designation “Lot 1, Block A.” Is a corrective deed necessary?

Answer: No.

Problem 3: Same facts as Problem 2, except there is a plat named Greenacre, *Phase I* recorded in Orange County which does contain a lot with the designation “Lot 1, Block A.” Is a corrective deed necessary?

Answer: Yes, a corrective deed should be obtained where the erroneous plat name refers to a recorded plat, or phase thereof, which contains a lot with the same lot and block designation referenced on the conveyance.

Problem 4: John Doe conveyed land describing it as Lot 1, Block A of Blackacre, Plat Book 5, Page 3, of the Public Records of Miami-Dade County, Florida, instead of the correct description of Plat Book 5, Page 31. The name of the plat actually recorded at Plat Book 5, Page 3 is Whiteacre and the only plat of record in Miami-Dade County named Blackacre is the one recorded at Plat Book 5, Page 31. Is a corrective deed necessary?

Answer: No.

Problem 5: Same facts as Problem 4, except the plat recorded at Plat Book 5, Page 3 is named Blackacre *Phase II*?

Answer: Yes, a corrective deed should be obtained where the name of the plat recorded at the erroneous page is similar to the name of the plat on the conveyance, unless the plat recorded at the erroneous page does not contain the lot and block designated in the conveyance.

Authorities & References: ATIF TN 13.02.02.

Comment: This Standard should be relied upon only when the facts and circumstances, such as the location of the land, references in other recorded documents, etc., make it reasonably clear what plat reference was intended. If an index containing the names of all recorded plats for the county is available, the attorney or title examiner may be able to make the necessary determinations without assistance from the official custodian of the public records. While recordation of an affidavit from an attorney, a title examiner, or the official custodian of records is the best practice where there has been an error in the name or designation of the plat, such an affidavit is not required for marketable title.

STANDARD 11.2

PRIVATE DEDICATONS

STANDARD: ABSENT EXPRESS WORDS OF CONVEYANCE, A DEDICATION OF PROPERTY IN A PLAT TO A PRIVATE ENTITY DOES NOT CONVEY THE FEE SIMPLE TITLE TO THE PROPERTY.

Problem 1: A recorded plat shows a dedication that states as follows: "The Maintenance Tract, as shown hereon, is hereby dedicated and conveyed in fee simple to the Egret Landing Property Owners Association, Inc., its successors and/or assigns, for maintenance, utilities, and vehicle storage purposes and shall be the perpetual maintenance obligation of said Association." Is this a good conveyance of the Maintenance Tract to the Association?

Answer: Yes. The language clearly states that it is a conveyance in fee simple of the property.

Problem 2: A recorded plat shows a dedication that states as follows: "The Maintenance Tract, as shown hereon, is hereby dedicated and reserved to the Egret Landing Property Owners Association, Inc., its successors and/or assigns, for maintenance, utilities, and vehicle storage purposes and shall be the perpetual maintenance obligation of said Association." Is this a good conveyance of the Maintenance Tract to the Association?

Answer: No. The language does not clearly state that it is a conveyance in fee simple of the property.

Authorities & References: *City of Miami v. Florida East Coast Railway Company*, 84 So.2d 726 (Fla. 1920); *Reiger v. Anchor Post Products, Inc.*, 210 So.2d 283 (Fla. 3rd DCA, 1968); *Burnham v. Davis Islands, Inc.*, 87 So.2d 97 (Fla. 1956); 4-120 *Florida Real Estate Transactions* §120.03.

Comment: A common law dedication requires four elements, one of which is a public use or public purpose. There can be no dedication for private use or to uses public in their nature but the enjoyment of which is restricted to a limited part of the public.

STANDARD 11.3

TITLE TO STREETS ABUTTING PLATTED LOTS

STANDARD: PRIOR TO ANY CONVEYANCE OF LOTS ON A PLAT, THE OWNER AND DEDICATOR OF A PLATTED SUBDIVISION OWNS THE FEE INTEREST IN ALL THE STREETS DEPICTED ON THE PLAT, SUBJECT TO THE EASEMENT CREATED BY THE DEDICATION. A CONVEYANCE OF A LOT BY REFERENCE TO THE PLAT, CARRIES TITLE TO THE CENTERLINE OF AN INTERIOR STREET ABUTTING THE LOT, SUBJECT TO THE EASEMENT, SUCH THAT TITLE TO THE STREET IS ENCUMBERED BY THE PURCHASER'S MORTGAGE OF THE LOT, UNLESS PROVIDED OTHERWISE IN THE CONVEYANCE OR MORTGAGE.

Problem 1: John Doe conveys his subdivision lot, which abuts an abandoned street, to Richard Roe. Does the conveyance by lot and block number alone carry the interest in the street?

Answer: Yes, subject to any private easement rights in the street.

Problem 2: John Doe mortgages a lot in a platted subdivision by reference to lot and block number alone, without mention of an interest in the street. Subsequently, he executes a quitclaim deed to Richard Roe for the portion of an abandoned street abutting his mortgaged lot. The mortgagee neither joins in the deed nor executes a release of the mortgage with reference to the abandoned street. Is Richard Roe's title marketable?

Answer: No.

Problem 3: John Doe mortgaged a lot in a platted subdivision by reference to lot and block number alone, without mention of an interest in the interior street. Subsequently, the interior street abutting his lot was abandoned by the city. Thereafter, the mortgagee foreclosed and obtained a certificate of title which referenced the lot and block number alone, without mention of the vacated interior street. Would the mortgagee's conveyance of the lot include marketable title to the centerline of the vacated street?

Answer: Yes, subject to any private easement rights in the street.

Authorities & References: *Servando Building Co. v. Zimmerman*, 91 So. 2d 289 (Fla. 1956); *Buckels v. Tomer*, 78 So. 2d 861 (Fla. 1955); *Smith v. Horn*, 70 So. 435 (1915); *Joseph v. Duran*, 436 So. 2d 316 (Fla. 1st DCA 1983); 19 FLA. JUR. 2d, *Deeds* §133 (2008); ATIF TN 13.01.04, 24.01.03.

Comment: As the conveyance of lots by reference to a plat may create private easement rights in adjoining lot owners, these rights should be considered in addition to public easement rights when analyzing abandonment of a street. *See* Comment to Standard 11.4. This standard is applicable to lots abutting interior streets, and the Comment to Standard 11.5 should be referred to when dealing with periphery streets. Standards 11.3, 11.4 and 11.5 treat closely related issues and should be read together for a full understanding of title to streets dedicated by plat.

STANDARD 11.4

RESERVATION OF STREET DEDICATED BY PLAT

STANDARD: A PROVISION IN THE DEDICATORY LANGUAGE OF A PLAT RESERVING THE STREETS OR THE "REVERSIONARY INTEREST" THEREIN TO THE DEDICATOR DOES NOT PREVENT TITLE TO THE CENTERLINE OF AN INTERIOR ABUTTING STREET FROM PASSING WITH TITLE TO THE LOT, SUBJECT TO PUBLIC AND PRIVATE EASEMENTS, UNLESS OTHERWISE CLEARLY PROVIDED IN THE CONVEYANCE. WHEN THE PUBLIC RIGHTS IN THE STREET ARE VACATED, THE LOT OWNER HOLDS TITLE TO THE CENTERLINE OF THE INTERIOR STREET SUBJECT TO ANY PRIVATE EASEMENT RIGHTS.

Problem 1: John Doe recorded a plat dedicating the streets. The dedication contained the following language: "and does hereby dedicate to the perpetual use of the public, as public highways, the streets as shown hereon, reserving unto himself, his heirs, successors, assigns, or legal representatives, the reversion or reversions of the same, whenever abandoned by the public or discontinued by law." John Doe thereafter conveyed lots abutting interior streets in the subdivision. These deeds referred to the plat but were silent with respect to title to the streets. The streets were subsequently abandoned. Do the abutting owners now own the fee to the centerline of the streets?

Answer: Yes, subject to any private easement rights in the street.

Problem 2: Same facts as Problem 1, except the deeds from John Doe expressly reserve title to or the "reversionary interest" in the streets. Do the abutting owners own the fee to the centerline of the vacated street?

Answer: No, fee title to the street remains with John Doe, subject to any private easement rights.

Authorities & References: *F.S.* 177.085 (2008); *U.S. v. 16.33 Acres of Land in Dade County*, 342 So. 2d 476 (Fla. 1977); ATIF TN 24.01.01.

Comment: The above Standard is based on *F.S.* 177.085, which became effective on July 1, 1972. The statute purports to be retroactive, but there is some question with respect to the constitutionality of its retroactive application. Therefore, as to Problem 1, caution should be exercised as to plats filed prior to July 1, 1972 which contain reversionary language. *See Peninsula Point, Inc. v. South Georgia Dairy Co-Op*, 251 So. 2d 690 (Fla. 1st DCA 1971); ATIF TN 24.01.03. Dedication of a street by plat and subsequent conveyance of lots by reference to that plat create two independent sets of rights in the street easement: the one in the public, which may be vacated by act of the appropriate local government, the other in the owners who take by reference to the plat and for whom the use of the street is reasonably and materially beneficial. Private rights should therefore also be considered in addition to public rights when analyzing a reservation or reversion. *See Florida E. Coast Ry. Co. v. Worley*, 38 So. 618 (Fla. 1905); *Powers v. Scobie,* 60 So. 2d 738 (Fla.1952); *Highland Const., Inc. v. Paquette,* 697 So. 2d 235 (Fla. 5th DCA 1997); *Easton v. Appler*, 548 So. 2d 691 (Fla. 3rd DCA 1989); *Reiger v. Anchor Post Products, Inc.*, 210 So. 2d 283 (Fla. 3rd DCA 1968). This standard is applicable to lots abutting interior streets, and the Comment to Standard 11.5 should be referred to when dealing with periphery streets. Standards 11.3, 11.4 and 11.5 treat closely related issues and should be read together for a full understanding of title to streets dedicated by plat.

STANDARD 11.5

ABANDONMENT OF STREET ON PLATTED LAND

STANDARD: WHEN AN INTERIOR STREET DEDICATED BY PLAT IS DISCONTINUED THROUGH LEGAL PROCESS AND TITLE TO, OR THE "REVERSIONARY INTEREST" IN, THE STREET HAS NOT BEEN NOT PROPERLY RESERVED TO THE DEDICATOR, FEE TITLE TO THE CENTERLINE OF THE STREET ABUTTING A LOT IS IN THE LOT OWNER, SUBJECT TO ANY PRIVATE EASEMENT RIGHTS, SUCH THAT TITLE TO THE STREET IS ENCUMBERED BY THE LOT OWNER'S MORTGAGE OF THE LOT, UNLESS PROVIDED OTHERWISE IN THE CONVEYANCE OR MORTGAGE.

Problem: Veronese Street, a dedicated interior street in the Blackacre subdivision, was vacated by the City. John Doe owned a lot in Blackacre which abutted Veronese Street. There was no effective reservation of title to, or the reversionary interest in, Veronese Street. John Doe claimed fee title to the centerline of the street. Was his claim of title valid?

Answer: Yes, subject to any private easement rights.

Authorities & References: *New Fort Pierce Hotel Co. v. Phoenix Title Corp.*, 171 So. 525 (1936); *Smith v. Horn*, 70 So. 435 (1915); *Florida S. Ry. v. Brown*, 1 So. 512 (1887); *Burkart v. City of Ft. Lauderdale*, 168 So. 2d 65 (Fla. 1964); *Dean v. MOD Properties, Ltd.*, 528 So. 2d 432 (Fla. 5th DCA 1988); *Calvert v. Morgan*, 436 So. 2d 314 (Fla 1st DCA 1983); *Hurt v. Lenchuk*, 233 So. 2d 350 (Fla. 4th DCA 1969); ATIF TN 24.01.01.

Comment: As the conveyance of lots by reference to a plat may create private easement rights in adjoining lot owners, these rights should be considered in addition to public easement rights when analyzing the abandonment of a street. *See* Comment to Standard 11.4. When the street is on the periphery of the plat and the dedicator does not, at the time of the plat, own the land on the other side of the street outside of the plat and does not reserve title to, or the "reversionary interest" in, the street, the abutting lot owner will take the entire width of the street upon vacation of the street, subject to any private easement rights. Title to the underlying fee of a street on the periphery of the plat is otherwise subject to the all of standards applicable to title to interior streets, but caution should be observed when analyzing periphery streets as they frequently run along bodies of water and this may raise separate issues of submerged lands and may implicate riparian rights. *See, e.g., Caples v. Taliaferro*, 197 So. 861 (Fla. 1940). Standards 11.3, 11.4 and 11.5 treat closely related issues and should be read together for a full understanding of title to streets dedicated by plat.

STANDARD 11.6

DESCRIPTION MADE BY REFERENCE TO A PLAT

STANDARD: IF A DEED DESCRIBES PROPERTY CONVEYED BY REFERENCE TO A RECORDED PLAT, THE CONVEYANCE IS TAKEN SUBJECT TO EVERY PARTICULAR SHOWN ON THE PLAT.

Problem: John Doe acquired title by a deed which described the property as Lot 1, Block A, of Blackacre, Plat Book 7, Page 12, of the Public Records of Dade County, Florida. The recorded plat shows a 10 ft. wide easement within the northern boundary of Lot 1. Doe was never made aware of the easement. Is John Doe's title to the property subject to the easement shown on the plat?

Answer: Yes.

Authorities & References: *Sunshine Vistas Homeowners Ass'n v. Caruana*, 623 So. 2d 490 (Fla. 1993); *Wahrendorff v. Moore*, 93 So. 2d 720 (Fla. 1957); *Lawyers Title Guaranty Fund v. Milgo Electronics*, 318 So. 2d 416 (Fla. 3d DCA 1975); 19 FLA. JUR. 2d, *Deeds* §135 (2008); ATIF TN 24.03.01.

CHAPTER 11

PLATS

STANDARD 11.1

CORRECTING ERROR IN NAME OR DESIGNATION OF PLAT

STANDARD: AN ERROR IN A CONVEYANCE ~~WITH RESPECT~~AS TO THE NAME ~~OR DESIGNATION~~ OF A ~~RECORDED~~ PLAT MAY BE ~~CORRECTED BY A CERTIFICATE~~DISREGARDED IF THE PLAT BOOK AND PAGE REFERENCE ARE CORRECT AND, AT THE TIME OF THE ~~CLERK~~CONVEYANCE, THERE WAS NO RECORDED PLAT WITH THE ERRONEOUS NAME, OR PHASES THEREOF, CONTAINING THE LOT DESIGNATED IN THE CONVEYANCE. AN ERROR IN THE PLAT BOOK OR PAGE REFERENCE IN A CONVEYANCE MAY BE DISREGARDED IF THE NAME OF THE ~~CIRCUIT COURT WHEN THE NATURE~~PLAT IS CORRECT AND THE NAME OF THE ~~ERROR IS REASONABLY CLEAR.~~PLAT RECORDED AT THE ERRONEOUS PLAT BOOK AND PAGE IS SUBSTANTIALLY DIFFERENT FROM THE NAME OF THE PLAT ON THE CONVEYANCE OR THE PLAT AT THE ERRONEOUS PLAT BOOK DOES NOT CONTAIN THE LOT DESIGNATED IN THE CONVEYANCE.

Problem 1: John Doe conveyed land describing it as Lot 1, Block A, of ~~Blackacres~~Greenacre, Plat Book ~~5~~4, Page 3, of the Public Records of ~~Dade~~Orange County, Florida, instead of the correct ~~description of Plat Book 5, Page 31. The Clerk of the Circuit Court for Dade County gave a certificate stating that the only~~ plat ~~of record in Dade County under the~~ name of ~~Blackacres is the one recorded in Plat Book 5, Page 31.~~Blueacre. There is no plat named Greenacre recorded in Orange County. Is a corrective deed necessary?

Answer: No.

Problem 2: Same facts as Problem 1, except there is a plat named Greenacre recorded in Orange County, which does not contain a lot with the designation "Lot 1, Block A." Is a corrective deed necessary?

Answer: No.

Problem 3: Same facts as Problem 2, except there is a plat named Greenacre, *Phase I* recorded in Orange County which does contain a lot with the designation "Lot 1, Block A."~~?~~ Is a corrective deed necessary?

Answer: Yes, a corrective deed should be obtained where the erroneous plat name refers to a recorded plat, or phase thereof, which contains a lot with the same lot and block designation referenced on the conveyance.

Problem 4: John Doe conveyed land describing it as Lot 1, Block A of Blackacre, Plat Book 5, Page 3, of the Public Records of Miami-Dade County, Florida, instead of the correct description of Plat Book 5, Page 31. The name of the plat actually recorded at Plat Book 5, Page 3 is Whiteacre and the only plat of record in Miami-Dade County named Blackacre is the one recorded at Plat Book

5, Page 31. Is a corrective deed necessary?

Answer: No.

~~Authorities & References:~~ ~~BASYE, CLEARING LAND TITLES §237 (2d ed 1970); ATIF TN 13.02.02.~~

Problem 5: Same facts as Problem 4, except the plat recorded at Plat Book 5, Page 3 is named Blackacre *Phase II*?

Answer: Yes, a corrective deed should be obtained where the name of the plat recorded at the erroneous page is similar to the name of the plat on the conveyance, unless the plat recorded at the erroneous page does not contain the lot and block designated in the conveyance.

Authorities & References: ATIF TN 13.02.02.

Comment: This Standard should be relied upon only when the facts and circumstances, such as the location of the land, references in other recorded documents, etc., make it reasonably clear ~~that the corrected~~what plat reference ~~is the one~~was intended. If an index containing the names of all recorded plats for the county is available, the attorney or title examiner may be able to make the necessary determinations without assistance from the official custodian of the public records. While recordation of an affidavit from an attorney, a title examiner, or the official custodian of records is the best practice where there has been an error in the name or designation of the plat, such an affidavit is not required for marketable title.

STANDARD 11.2

PRORATING ERRORS IN DIMENSIONS

STANDARD: WHERE THE TOTAL DISTANCE IN A BLOCK OF A RECORDED PLAT IS GREATER OR LESS THAN THE ACTUAL DISTANCE SHOWN BY AN ACTUAL SURVEY, THE OVERAGE OR SHORTAGE SHOULD BE PRORATED BETWEEN ALL OF THE LOTS IN THE BLOCK.

STANDARD 11.2

PRIVATE DEDICATONS

STANDARD: ABSENT EXPRESS WORDS OF CONVEYANCE, A DEDICATION OF PROPERTY IN A PLAT TO A PRIVATE ENTITY DOES NOT CONVEY THE FEE SIMPLE TITLE TO THE PROPERTY.

Problem~~:~~ 1 — A recorded plat shows a ~~block comprised of seven lots, each having a width of 100 feet. An actual survey shows~~dedication that ~~the aggregate frontage on the block~~states as follows: "The Maintenance Tract, as shown hereon, is ~~693 feet. What are the actual dimensions of each lot in the block?~~hereby dedicated and conveyed in fee simple to the Egret Landing Property Owners Association, Inc., its successors and/or assigns, for maintenance, utilities, and vehicle storage purposes and shall be the perpetual maintenance obligation of said Association." Is this a good conveyance of the Maintenance Tract to the Association?

Answer: ~~99 feet. The same rule would apply if the actual survey reveals that the distance in the block is more than 700 feet.~~
Yes. The language clearly states that it is a conveyance in fee simple of the property.

~~Authorities & References:~~Problem 2 — ~~*Madison v. Haynes*, 264 So.2d 852 (4th D.C.A. Fla. 1972); 1 BOYER, FLORIDA REAL ESTATE TRANSACTIONS §13.08 (1980); CLARK ON SURVEYING AND BOUNDARIES §222 (3d ed. 1959).~~A recorded plat shows a dedication that states as follows: "The Maintenance Tract, as shown hereon, is hereby dedicated and reserved to the Egret Landing Property Owners Association, Inc., its successors and/or assigns, for maintenance, utilities, and vehicle storage purposes and shall be the perpetual maintenance obligation of said Association." Is this a good conveyance of the Maintenance Tract to the Association?

~~STANDARD 11.3~~

~~RESERVATION OF REVERSIONARY INTEREST~~

~~**STANDARD: A CONVEYANCE BY THE DEDICATOR OF LOTS ABUTTING STREETS DEDICATED IN A PLAT CARRIES THE REVERSIONARY INTEREST IN THE ABUTTING STREETS TO THE CENTER LINE UNLESS THE GRANTOR CLEARLY PROVIDES OTHERWISE IN THE CONVEYANCE, EVEN THOUGH THE DEDICATION CONTAINS A PROVISION RESERVING THE REVERSIONARY INTEREST IN THE STREETS TO THE DEDICATOR, HIS HEIRS, SUCCESSORS, ASSIGNS, OR LEGAL REPRESENTATIVES.**~~

~~Problem:~~Answer: ~~John Doe subdivided a tract of land and recorded the plat, dedicating the streets. The dedication contained the following language: "and does hereby dedicate to the perpetual use of the public, as public highways, the streets as shown hereon, reserving unto himself, his heirs, successors, assigns, or legal representatives, the reversion or reversions of the same, whenever abandoned by the public or discontinued by law." John Doe thereafter conveyed lots abutting streets in the subdivision. These deeds referred to the plat but were still silent with respect to the reversionary interest in the streets. Subsequently a street was discontinued. Do the abutting owners now own the fee to the center line of the vacated street?~~
No. The language does not clearly state that it is a conveyance in fee simple of the property.

Authorities & References: *City of Miami v. Florida East Coast Railway Company*, 84 So.2d 726 (Fla. 1920); *Reiger v. Anchor Post Products, Inc.*, 210 So.2d 283 (Fla. 3rd DCA, 1968); *Burnham v. Davis Islands, Inc.*, 87 So.2d 97 (Fla. 1956); 4-120 *Florida Real Estate Transactions* §120.03.

Comment: A common law dedication requires four elements, one of which is a public use or public purpose. There can be no dedication for private use or to uses public in their nature but the enjoyment of which is restricted to a limited part of the public.

STANDARD 11.3

TITLE TO STREETS ABUTTING PLATTED LOTS

STANDARD: PRIOR TO ANY CONVEYANCE OF LOTS ON A PLAT, THE OWNER AND DEDICATOR OF A PLATTED SUBDIVISION OWNS THE FEE INTEREST IN ALL THE STREETS DEPICTED ON THE PLAT, SUBJECT TO THE EASEMENT CREATED BY THE DEDICATION. A CONVEYANCE OF A LOT BY REFERENCE TO THE PLAT, CARRIES TITLE TO THE CENTERLINE OF AN INTERIOR STREET ABUTTING THE LOT, SUBJECT TO THE EASEMENT, SUCH THAT TITLE TO THE STREET IS ENCUMBERED BY THE PURCHASER'S MORTGAGE OF THE LOT, UNLESS PROVIDED OTHERWISE IN THE CONVEYANCE OR MORTGAGE.

~~Answer:~~Problem 1: ~~Yes.~~John Doe conveys his subdivision lot, which abuts an abandoned street, to Richard Roe. Does the conveyance by lot and block number alone carry the interest in the street?

~~Problem 2:~~Answer: ~~Same facts as Problem 1, except the deeds from John Doe expressly reserve the reversionary interest in the streets. Do the abutting owners own the fee to the center line of the vacated street?~~Yes, subject to any private easement rights in the street.

~~Answer:~~Problem 2: ~~No. The fee reverts to John Doe.~~John Doe mortgages a lot in a platted subdivision by reference to lot and block number alone, without mention of an interest in the street. Subsequently, he executes a quitclaim deed to Richard Roe for the portion of an abandoned street abutting his mortgaged lot. The mortgagee neither joins in the deed nor executes a release of the mortgage with reference to the abandoned street. Is Richard Roe's title marketable?

~~Authorities & References:~~Answer: ~~*F.S.* 177.085 (1979); 5 FUND CONCEPT 45 (Sept. 1973).~~No.

~~Comment:~~Problem 3: ~~The above Standard is based on *F.S.* 177.085, which became effective on July 1, 1972. The statute purports to be retroactive, but there is some question with respect to the constitutionality of its retroactive application. Therefore, as to Problem 1, caution should be exercised as to plats filed prior to July 1, 1972 which contain reversionary language. See *Peninsula Point, Inc. v. South Georgia Dairy Co-Op*, 251 So. 2d 690 (1st D.C.A. Fla. 1971); 5 FUND CONCEPT 45 (Sept. 1973); ATIF TN 24.01.03.~~John Doe mortgaged a lot in a platted subdivision by reference to lot and block number alone, without mention of an interest in the interior street. Subsequently, the interior street abutting his lot was abandoned by the ~~C~~city. Thereafter, the mortgagee foreclosed and obtained a certificate of title which referenced the lot and block number alone, without mention of the vacated interior street. Would the mortgagee's conveyance of the lot include marketable title to the centerline of the vacated street?

Answer: Yes, subject to any private easement rights in the street.

Authorities & References: *Servando Building Co. v. Zimmerman*, 91 So. 2d 289 (Fla. 1956); *Buckels v. Tomer*, 78 So. 2d 861 (Fla. 1955); *Smith v. Horn*, 70 So. 435 (1915); *Joseph v. Duran*, 436 So. 2d 316 (Fla. 1st DCA 1983); 19 FLA. JUR. 2d, *Deeds* §133 (2008); ATIF TN 13.01.04, 24.01.03.

Comment: As the conveyance of lots by reference to a plat may create private easement rights in adjoining lot owners, these rights should be considered in addition to public easement rights when

analyzing abandonment of a street. *See* Comment to Standard 11.4. This standard is applicable to lots abutting interior streets, and the Comment to Standard 11.5 should be referred to when dealing with periphery streets. Standards 11.3, 11.4 and 11.5 treat closely related issues and should be read together for a full understanding of title to streets dedicated by plat.

STANDARD 11.4

RESERVATION OF STREET DEDICATED BY PLAT

STANDARD: A PROVISION IN THE DEDICATORY LANGUAGE OF A PLAT RESERVING THE STREETS OR THE "REVERSIONARY INTEREST" THEREIN TO THE DEDICATOR DOES NOT PREVENT TITLE TO THE CENTERLINE OF AN INTERIOR ABUTTING STREET FROM PASSING WITH TITLE TO THE LOT, SUBJECT TO PUBLIC AND PRIVATE EASEMENTS, UNLESS OTHERWISE CLEARLY PROVIDED IN THE CONVEYANCE. WHEN THE PUBLIC RIGHTS IN THE STREET ARE VACATED, THE LOT OWNER HOLDS TITLE TO THE CENTERLINE OF THE INTERIOR STREET SUBJECT TO ANY PRIVATE EASEMENT RIGHTS.

Problem 1: John Doe recorded a plat dedicating the streets. The dedication contained the following language: "and does hereby dedicate to the perpetual use of the public, as public highways, the streets as shown hereon, reserving unto himself, his heirs, successors, assigns, or legal representatives, the reversion or reversions of the same, whenever abandoned by the public or discontinued by law." John Doe thereafter conveyed lots abutting interior streets in the subdivision. These deeds referred to the plat but were silent with respect to title to the streets. The streets were subsequently abandoned. Do the abutting owners now own the fee to the centerline of the streets?

Answer: Yes, subject to any private easement rights in the street.

Problem 2: Same facts as Problem 1, except the deeds from John Doe expressly reserve title to or the "reversionary interest" in the streets. Do the abutting owners own the fee to the centerline of the vacated street?

Answer: No, fee title to the street remains with John Doe, subject to any private easement rights.

Authorities & References: *F.S.* 177.085 (2008); *U.S. v. 16.33 Acres of Land in Dade County*, 342 So. 2d 476 (Fla. 1977); ATIF TN 24.01.01.

Comment: The above Standard is based on *F.S.* 177.085, which became effective on July 1, 1972. The statute purports to be retroactive, but there is some question with respect to the constitutionality of its retroactive application. Therefore, as to Problem 1, caution should be exercised as to plats filed prior to July 1, 1972 which contain reversionary language. *See Peninsula Point, Inc. v. South Georgia Dairy Co-Op*, 251 So. 2d 690 (Fla. 1st DCA 1971); ATIF TN 24.01.03. Dedication of a street by plat and subsequent conveyance of lots by reference to that plat creates two independent sets of rights in the street easement~~.~~: ~~T~~the one in the public, which may be vacated by act of the appropriate local government, the other in the owners who take by reference to the plat and for whom the use of the street is reasonably and materially beneficial. Private rights should therefore also be considered in addition to public rights when analyzing a reservation or reversion. *See Florida E. Coast Ry. Co. v. Worley*, 38 So. 618 (Fla. 1905); *Powers v. Scobie*, 60 So. 2d 738 (Fla.1952); *Highland Const., Inc. v. Paquette*, 697 So. 2d 235 (Fla. 5th DCA 1997); *Easton v. Appler*, 548 So. 2d 691 (Fla. 3rd DCA 1989); *Reiger v. Anchor Post Products, Inc.*, 210 So. 2d 283 (Fla. 3rd DCA 1968). This standard is applicable to lots abutting interior streets, and the Comment to Standard 11.5 should be referred to when dealing with periphery streets. Standards 11.3, 11.4 and 11.5 treat closely related issues and should be read together for a full understanding of title to streets dedicated by plat.

STANDARD 11.5

ABANDONMENT OF STREET ON PLATTED LAND

STANDARD: WHEN ~~A~~ AN INTERIOR STREET ~~IS~~ DEDICATED BY ~~AN OWNER WHO DOES NOT PROPERLY RESERVE THE REVERSIONARY INTEREST, AND THE STREET~~PLAT IS ~~THEREAFTER~~ DISCONTINUED THROUGH LEGAL PROCESS~~,~~, AND TITLE TO, OR THE "REVERSIONARY INTEREST" IN, THE STREET HAS NOT BEEN NOT PROPERLY RESERVED TO THE ~~ABUTTING OWNERS TAKE THE~~DEDICATOR, FEE TITLE TO THE ~~CENTER~~CENTERLINE OF THE STREET~~.~~ ABUTTING A LOT IS IN THE LOT OWNER, SUBJECT TO ANY PRIVATE EASEMENT RIGHTS, SUCH THAT TITLE TO THE STREET IS ENCUMBERED BY THE LOT OWNER'S MORTGAGE OF THE LOT, UNLESS PROVIDED OTHERWISE IN THE CONVEYANCE OR MORTGAGE.

Problem: Veronese Street, a dedicated interior street in the Blackacre subdivision, was ~~legally closed~~vacated by the ~~city.~~City. John Doe owned a lot in Blackacre which abutted Veronese Street. There was no effective reservation of title to, or the reversionary interest~~.~~ in, Veronese Street. John Doe claimed fee title to the ~~center~~centerline of the street. Was his claim of title valid?

Answer: Yes, subject to any private easement rights.

Authorities & References: *New Fort Pierce Hotel Co. v. Phoenix Title Corp.*, ~~126 Fla. 552,~~ 171 So. 525 (1936); *Smith v. Horn*, 70 ~~Fla. 484, 70~~ So. 435 (1915); *Florida S. Ry. v. Brown*, ~~23 Fla. 104,~~ 1 So. 512 (1887~~).~~); *Burkart v. City of Ft. Lauderdale*, 168 So. 2d 65 (Fla. 1964); *Dean v. MOD Properties, Ltd.*, 528 So. 2d 432 (Fla. 5th DCA 1988); *Calvert v. Morgan*, 436 So. 2d 314 (Fla 1st DCA 1983); *Hurt v. Lenchuk*, 233 So. 2d 350 (Fla. 4th DCA 1969); ATIF TN 24.01.01.

STANDARD 11.5

REVERSIONARY INTERESTS IN ABUTTING STREETS

STANDARD: WHEN THE OWNER OF A PLATTED SUBDIVISION LOT OWNS AN INTEREST IN AN ABUTTING STREET, SUCH OWNERSHIP IS INCIDENTAL TO THE OWNERSHIP OF THE LOT AND PASSES WITH A CONVEYANCE OF THE LOT AND IS ENCUMBERED BY A MORTGAGE OF THE LOT, UNLESS IT IS PROVIDED OTHERWISE IN THE CONVEYANCE OR MORTGAGE.

Problem 1:Comment: John Doe conveys his subdivision lot which abuts an abandoned street to Richard Roe. Does the conveyance by lots and block number only, carry the interest in the street?As the conveyance of lots by reference to a plat may create private easement rights in adjoining lot owners, these rights should be considered in addition to public easement rights when analyzing the abandonment of a street. *See* Comment to Standard 11.4. When the street is on the periphery of the plat and the dedicator does not, at the time of the plat, own the land on the other side of the street outside of the plat and does not reserve title to, or the "reversionary interest" in, the street, the abutting lot owner will take the entire width of the street upon vacation of the street, subject to any private easement rights. Title to the underlying fee of a street on the periphery of the plat is otherwise subject to the all of standards applicable to title to interior streets, but caution should be observed when analyzing periphery streets as they frequently run along bodies of water and this may raise separate issues of submerged lands and may implicate riparian rights. *See, e.g., Caples v. Taliaferro*, 197 So. 861 (Fla. 1940). Standards 11.3, 11.4 and 11.5 treat closely related issues and should be read together for a full understanding of title to streets dedicated by plat.

Answer: Yes.

Problem 2: John Doe executes a quitclaim deed to Richard Roe of an abandoned street abutting his lot, which lot is subject to a mortgage. The mortgagee neither joins in the deed nor executes a release or mortgage with reference to the street. Is Richard Roe's title marketable?

Answer: No.

Authorities & References: *Servando Building Co. v. Zimmerman*, 91 So.2d 289 (Fla. 1965); *Buckhels v. Tomer*, 78 So.2d 861 (Fla. 1955); *Smith v. Horn*, 70 Fla. 484, 70 So. 435 (1915); ATIF TN 13.01.04, 24.01.03.

STANDARD 11.6

DESCRIPTION MADE BY REFERENCE TO A PLAT

STANDARD: IF A DEED DESCRIBES PROPERTY CONVEYED BY REFERENCE TO A RECORDED PLAT, THE CONVEYANCE IS TAKEN SUBJECT TO EVERY PARTICULAR SHOWN ON THE PLAT.

Problem: John Doe acquired title by a deed which described the property as Lot 1, Block A, of Blackacre~~s~~, Plat Book 7, Page 12, of the Public Records of Dade County, Florida. The recorded plat shows a 10 ft. wide easement within the northern boundary of Lot 1. Doe was never made aware of the easement. Is John ~~Doe's~~Doe’s title to the property subject to the easement shown on the plat?

Answer: Yes.

Authorities & References: ~~*Kahn*~~*Sunshine Vistas Homeowners Ass’n v.* ~~*Delaware Securities Corp.*, 114~~ *Caruana*, 623 So. 2d 490 (Fla. ~~32, 153~~1993)*; Wahrendorff v. Moore*, 93 So. ~~308 (1934); *Lawyers'*~~2d 720 (Fla. 1957); *Lawyers Title Guaranty Fund v. Milgo Electronics*, 318 So. 2d 416 (Fla. 3d D~~.C.A. Fla.~~CA 1975); 19 FLA. JUR. 2d, *Deeds* §~~132 (1980~~135 (2008); ATIF TN 24.03.01.

LEGISLATIVE POSITION REQUEST FORM

GOVERNMENTAL AFFAIRS OFFICE

Date Form Received ____________

GENERAL INFORMATION

Submitted By Charles Ian Nash, Chair, Probate Law and Procedure Committee of the Real Property Probate & Trust Law Section

Address 440 South Babcock Street, Melbourne, FL 32901;
Telephone: (321) 984-2440

Position Type Probate Law and Procedure Committee, RPPTL Section, The Florida Bar
(Florida Bar, section, division, committee or both)

CONTACTS

Board & Legislation Committee Appearance

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Martha J. Edenfield, Pennington, Moore, Wilkinson, Bell & Dunbar, P.O. Box 10095, Tallahassee FL 32302-2095, Telephone (850) 222-3533
(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 N/A
(Bill or PCB #) (Bill or PCB Sponsor)

Indicate Position X **Support** Oppose Technical Assistance Other ____________

Proposed Wording of Position for Official Publication:

"Support amendment of F.S. §732.108(2) to provide that the four year statute of limitations under F.S. §95.11(3)(b) does not apply to actions to establish paternity under §732.108(2) after the death of the alleged father."

Reasons For Proposed Advocacy:

Section 732.108(2), Florida Statutes provides a mechanism whereby persons born out of wedlock or their descendants can establish entitlement to a share of a decedent's estate. However, Estate of Smith, 685 So. 2d 1206 (Fla. 1996), held that the 4 year statute of limitations under Section 95.11(3)(b), Florida Statutes applies to determinations of paternity under Section 732.108(2). Because most fathers do not die within 4 years of a child reaching majority, this statute creates an empty right. This proposed legislation would provide that Chapter 95, Florida Statutes does not apply to actions to establish paternity under Section 732.108(2) after the death of the alleged father. See attached white paper.

PRIOR POSITIONS TAKEN ON THIS ISSUE

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

Most Recent Position NONE

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

Others
(May attach list if more than one) NONE

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

REFERRALS TO OTHER SECTIONS, COMMITTEES OR LEGAL ORGANIZATIONS

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

Referrals

(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.

PROPOSED AMENDMENT TO FS §732.108

732.108 Adopted persons and persons born out of wedlock.--

(1) For the purpose of intestate succession by or from an adopted person, the adopted person is a descendant of the adopting parent and is one of the natural kindred of all members of the adopting parent's family, and is not a descendant of his or her natural parents, nor is he or she one of the kindred of any member of the natural parent's family or any prior adoptive parent's family, except that:

(a) Adoption of a child by the spouse of a natural parent has no effect on the relationship between the child and the natural parent or the natural parent's family.

(b) Adoption of a child by a natural parent's spouse who married the natural parent after the death of the other natural parent has no effect on the relationship between the child and the family of the deceased natural parent.

(c) Adoption of a child by a close relative, as defined in s. 63.172(2), has no effect on the relationship between the child and the families of the deceased natural parents.

(2) For the purpose of intestate succession in cases not covered by subsection (1), a person born out of wedlock is a descendant of his or her mother and is one of the natural kindred of all members of the mother's family. The person is also a descendant of his or her father and is one of the natural kindred of all members of the father's family, if:

(a) The natural parents participated in a marriage ceremony before or after the birth of the person born out of wedlock, even though the attempted marriage is void.

(b) The paternity of the father is established by an adjudication before or after the death of the father. In determining heirs in a probate proceeding under this paragraph, Chapter 95 shall not apply.

(c) The paternity of the father is acknowledged in writing by the father.

WHITE PAPER

PROPOSED REVISIONS TO §732.108 FLA.STAT.

I. SUMMARY

The purpose of the proposed change is to provide that the four year statute of limitations under Section 95.11(3)(b) will not apply to actions to determine paternity under Section 732.108(2). Estate of Smith, 885 So.2d 1206 (Fla.1996) held that the four year statute of limitation does apply, which has the effect of foreclosing many determinations of heirship in intestate probate estates.

II. CURRENT SITUATION

Under Section 732.108(2), for the purpose of intestate succession where adoption is not involved under section 732.108(1), a person born out of wedlock is a descendant of his or her father and is one of the natural kindred of all members of the father's family if (a) the natural parents participated in a marriage ceremony before or after the birth of the person, even though the attempted marriage is void, (b) the paternity of the father is established before or after the death of the father, or (c) the paternity of the father is acknowledged in writing by the father. Because most fathers do not die within four years of a child reaching majority, applying Section 95.11(3)(b) to adjudications under Section 732.108(2) creates an empty right because adjudications of paternity can not be brought more than four years from the date a child reaches majority.

III. EFFECT OF PROPOSED CHANGE GENERALLY

The proposed change amends Section 732.108(2) by adding a statement that in determining heirs in a probate proceeding under that paragraph, Chapter 95, shall not apply.

IV. ANALYSIS

The proposed change would allow a determination of paternity to be made in a probate proceeding solely for the purpose of proving heirship even if it is after four years from the date the child attained majority.

Without this change, current case law prohibits a person from proving that someone is his father, even if he has hard scientific data proving it. His brother, born to the same father but a different mother, could prove his heirship, if, for example, his parents participated in a marriage ceremony, even if the "marriage" is void. The comparative result is fundamentally unfair and depends entirely on the type of proof the two siblings have.

The proposed change is limited to intestate succession and makes no changes in any other statutes. The proposed change is not intended to apply to proving paternity in any other context.

V. FISCAL IMPACT ON STATE AND LOCAL GOVERNMENTS

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

VI. DIRECT IMPACT ON PRIVATE SECTIOR

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

VII. CONSTITUTIONAL ISSUES

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

VIII. OTHER INTERESTED PARTIES

None are known at this time.

LEGISLATIVE POSITION REQUEST FORM

GOVERNMENTAL AFFAIRS OFFICE

Date Form Received ____________

GENERAL INFORMATION

Submitted By Charles Ian Nash, Chair, Probate Law and Procedure Committee of the Real Property Probate & Trust Law Section

Address 440 South Babcock Street, Melbourne, FL 32901;
Telephone: (321) 984-2440

Position Type Probate Law and Procedure Committee, RPPTL Section, The Florida Bar
(Florida Bar, section, division, committee or both)

CONTACTS

Board & Legislation Committee Appearance

Charles Ian Nash, Nash Moule & Kromash LLP, 440 South Babcock Street, Melbourne, FL 32901, Telephone (321) 984-2440
Burt Bruton, Greenberg Traurig, P.A., 1221 Brickell Avenue, Miami, FL 33131, Telephone (305) 579-0593
Peter M. Dunbar, Pennington, Moore, Wilkinson, Bell & Dunbar, P.O. Box 10095, Tallahassee, Florida 32302-2095, Telephone (850) 222-3533
Martha J. Edenfield, Pennington, Moore, Wilkinson, Bell & Dunbar, P.O. Box 10095, Tallahassee FL 32302-2095, Telephone (850) 222-3533
(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 N/A
(Bill or PCB #) (Bill or PCB Sponsor)

Indicate Position **X** **Support** Oppose Technical Assistance Other ____________

Proposed Wording of Position for Official Publication:

"Support amendment of F.S. §731.201 to add definition of "minor" to the Florida Probate Code consistent with the definition in the Florida Guardianship Code."

Reasons For Proposed Advocacy:

The existing Florida Probate Code uses the term "minor" but does not define it. This proposed legislation would add a definition of "minor" to §731.201 of the Florida Probate Code that is consistent with the Florida Guardianship Code , F.S. Chapter 744, and would renumber subsequent subsections. See attached text.

PRIOR POSITIONS TAKEN ON THIS ISSUE

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

Most Recent Position NONE

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

Others
(May attach list if more than one) NONE

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

REFERRALS TO OTHER SECTIONS, COMMITTEES OR LEGAL ORGANIZATIONS

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

Referrals

(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.

PROPOSED AMENDMENT TO FS §731.201
TO ADD DEFINITION OF "MINOR"

F.S. §731.201 is amended by adding a new subsection (25) and by renumbering each subsection thereafter correspondingly:

(25) "Minor" means a person under 18 years of age whose disabilities have not been removed by marriage or otherwise.

~~(25)~~ (26) "Other state" means any state of the United States other than Florida and includes the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession subject to the legislative authority of the United States.

~~(26)~~ (27) "Parent" excludes any person who is only a stepparent, foster parent, or grandparent.

~~(27)~~ (28) "Personal representative" means the fiduciary appointed by the court to administer the estate and refers to what has been known as an administrator, administrator cum testamento annexo, administrator de bonis non, ancillary administrator, ancillary executor, or executor.

~~(28)~~ (29) "Petition" means a written request to the court for an order.

~~(29)~~ (30) "Power of appointment" means an authority, other than as an incident of the beneficial ownership of property, to designate recipients of beneficial interests in property.

~~(30)~~ (31) "Probate of will" means all steps necessary to establish the validity of a will and to admit a will to probate.

~~(31)~~ (32) "Property" means both real and personal property or any interest in it and anything that may be the subject of ownership.

~~(32)~~ (33) "Protected homestead" means the property described in s. 4(a)(1), Art. X of the State Constitution on which at the death of the owner the exemption inures to the owner's surviving spouse or heirs under s. 4(b), Art. X of the State Constitution. For purposes of the code, real property owned as tenants by the entirety is not protected homestead.

~~(33)~~ (34) "Residence" means a person's place of dwelling.

~~(34)~~ (35) "Residuary devise" means a devise of the assets of the estate which remain after the provision for any devise which is to be satisfied by reference to a specific property or type of property, fund, sum, or statutory amount. If the will contains no devise which is to be satisfied by reference to a specific property or type of property, fund, sum, or statutory amount, "residuary devise" or "residue" means a devise of all assets remaining after satisfying the obligations of the estate.

~~(35)~~ (36) "Security" means a security as defined in s. 517.021.

~~(36)~~ (37) "Security interest" means a security interest as defined in s. 671.201.

~~(37)~~ (38) "Trust" means an express trust, private or charitable, with additions to it, wherever and however created. It also includes a trust created or determined by a judgment or decree under which the trust is to be administered in the manner of an express trust. "Trust" excludes other constructive trusts, and it excludes resulting trusts; conservatorships; custodial arrangements pursuant to the Florida Uniform Transfers to Minors Act; business trusts providing for certificates to be issued to beneficiaries; common trust funds; land trusts under s. 689.071, except to the extent provided in s. 689.071(7); trusts created by the form of the account or by the deposit agreement at a financial institution; voting trusts; security arrangements; liquidation trusts; trusts for the primary purpose of paying debts, dividends, interest, salaries, wages, profits, pensions or employee benefits of any kind, and any arrangement under which a person is nominee or escrowee for another.

~~(38)~~ (39) "Trustee" includes an original, additional, surviving, or successor trustee, whether or not appointed or confirmed by court.

~~(39)~~ (40) "Will" means an instrument, including a codicil, executed by a person in the manner prescribed by this code, which disposes of the person's property on or after his or her death and includes an instrument which merely appoints a personal representative or revokes or revises another will.

WHITE PAPER

PROPOSED AMENDMENT TO
§ 731.201, *FLA. STAT.*

I. SUMMARY

The purpose of the proposed amendment is to provide a definition of the term "minor" as that word is used in the Florida Probate Code, consistent with the definition of that word in F.S. §744.102(13).

II. CURRENT SITUATION

No such definition of the word "minor" currently exists, in spite of the fact that the word is used in a number of statutory portions of the Florida Probate Code.

III. EFFECT OF PROPOSED CHANGE

Generally, the proposed change is intended to provide certainty under the Florida Probate Code as to the meaning of the word "minor" when used in the statutory context. The proposed wording is identical to the definition appearing in the Florida Guardianship Code, F.S. § 744.102(13).

IV. ANALYSIS

See III. above.

V. FISCAL IMPACT ON STATE AND LOCAL GOVERNMENTS

None.

VI. DIRECT IMPACT ON PRIVATE SECTOR

None.

VII. CONSTITUTIONAL ISSUES

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

VIII. OTHER INTERESTED PARTIES

None are known at this time.

LEGISLATIVE POSITION REQUEST FORM

GOVERNMENTAL AFFAIRS OFFICE

Date Form Received ____________

GENERAL INFORMATION

Submitted By Charles Ian Nash, Chair, Probate Law and Procedure Committee of the Real Property Probate & Trust Law Section

Address 440 South Babcock Street, Melbourne, FL. 32901-1276
Telephone: (321) 984.2440

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

CONTACTS

Board & Legislation Committee Appearance
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Burt Bruton, Greenberg Traurig, P.A., 1221 Brickell Avenue, Miami, FL 33131, Telephone (305) 579-0593
Peter M. Dunbar, Pennington, Moore, Wilkinson, Bell & Dunbar, P.O. Box 10095, Tallahassee, Florida 32302-2095, Telephone (850) 222-3533
Martha J. Edenfield, Pennington, Moore, Wilkinson, Bell & Dunbar, P.O. Box 10095, Tallahassee FL 32302-2095, Telephone (850) 222-3533
(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

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If Applicable, List The Following N/A
(Bill or PCB #) (Bill or PCB Sponsor)

Indicate Position X **Support** Oppose Technical Assistance Other ________

Proposed Wording of Position for Official Publication:

"Support amendment of F.S. §731.201(21) to replace the definition of "incompetent" with a new definition of "incapacitated" or "incapacity", as well as making consistent changes to F.S. §733.201(3) and F.S. §733.504(1)."

Reasons For Proposed Advocacy:

The proposed change would replace the term "incompetent" in F.S. §731.201(21) of the Florida Probate Code with the term "incapacitated" as defined in F.S. §744.102(12) of the Florida Guardianship Code and would make corresponding changes in other sections of the Florida Probate Code which use the words "incompetent". and "incompetency", all for the purpose of reflecting consistency between the Florida Probate Code and the Florida Guardianship Code. See attached text.

PRIOR POSITIONS TAKEN ON THIS ISSUE

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

Most Recent Position NONE

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

Others
(May attach list if more than one) NONE

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

REFERRALS TO OTHER SECTIONS, COMMITTEES OR LEGAL ORGANIZATIONS

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

Referrals

(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.

Proposed Amendment to F.S. § 731.201(21), to change the reference from "incompetent" to "incapacitated" and to utilize the same definition of "incapacitated" in the Florida Probate Code as in F. S. §744.102(12)

A. F.S. §731.201(21) is amended to read as follows:

~~(21) "Incompetent" means a minor or a person adjudicated incompetent.~~

(21) "Incapacitated" or "incapacity" means an incapacitated person, as defined in s 744.102(12).

B. F.S. §733.201(3) is amended to read as follows:

(3) If it appears to the court that the attesting witnesses cannot be found or that they have become ~~incompetent~~, incapacitated after the execution of the will or their testimony cannot be obtained within a reasonable time, a will may be admitted to probate upon the oath of the personal representative nominated by the will as provided in subsection (2), whether or not the nominated personal representative is interested in the estate, or upon the oath of any person having no interest in the estate under the will stating that the person believes the writing exhibited to be the true last will of decedent.

C. F.S. §733.504(1) is amended to read as follows:

F.S. §733.504(1)

A personal representative may be removed and the letters revoked for any of the following causes, and the removal shall be in addition to any penalties prescribed by law:

(1) adjudication of ~~incompetency~~ incapacity.

WHITE PAPER
PROPOSED AMENDMENT TO
§ 731.201(21), FLA. STAT.

I. SUMMARY

The purpose of the proposed amendment is to replace the word "incompetent" as used in the definitional section of the Florida Probate Code and in other statutes within the Florida Probate Code, with the word "incapacitated", which is the word used in the Florida Guardianship Code.

II. CURRENT SITUATION

F.S. § 731.201(21) currently uses the word "incompetent", rather than the word "incapacitated", which is the word used in the Florida Guardianship Code. The word "incapacitated" is defined in F.S.§ 744.102(12). In addition, F.S. §733.201(3) and F.S. §733.504(1) currently utilize the words "incompetent" and "incompetency", respectively, rather than "incapacitated" and "incapacity".

III. EFFECT OF PROPOSED CHANGE

The proposed change would be to replace the definition of "incompetent" with the definition of "incapacitated" as found in F.S.§744.102(12) and to make corresponding changes in those statutes in the Florida Probate Code which use the words "incompetent". and "incompetency".

IV. ANALYSIS

The proposed change would make the definition of "incapacitated" in the Florida Probate Code the same as the definition of "incapacitated person" of the Florida Guardianship Code, as that definition may change from time to time, in F.S.§ 744.102(12), and to make corresponding changes to statutes in the Florida Probate Code.

V. FISCAL IMPACT ON STATE AND LOCAL GOVERNMENTS

None.

VI. DIRECT IMPACT ON PRIVATE SECTOR

None.

VII. CONSTITUTIONAL ISSUES

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

VIII. OTHER INTERESTED PARTIES

None are known at this time

LEGISLATIVE POSITION REQUEST FORM

GOVERNMENTAL AFFAIRS OFFICE

Date Form Received ____________

GENERAL INFORMATION

Submitted By Richard R. Gans, Estate and Trust Tax Planning Committee, RPPTL Section, The Florida Bar
(List name of the section, division, committee, bar group or individual)

Address P. O. Box 3018, Sarasota, FL 34230-3018 (941) 957-1900
(List street address and phone number)

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

CONTACTS

Board & Legislation Committee Appearance
Richard R. Gans, P.O. Box 3018, Sarasota, FL 34230-3018, Telephone (941) 957-1900
Charles Ian Nash, Nash, Moule & Kromash LLP, 440 S. Babcock St., Melbourne, FL 32901-1276, Telephone (321) 984-2440
Burt Bruton, Greenberg Traurig, P.A., 1221 Brickell Avenue, Miami, FL 33131, Telephone (305) 579-0593
Peter M. Dunbar, Pennington, Moore, Wilkinson, Bell & Dunbar, P.O. Box 10095, Tallahassee, Florida 32302-2095, Telephone (850) 222-3533
Martha J. Edenfield, Pennington, Moore, Wilkinson, Bell & Dunbar, P.O. Box 10095, Tallahassee FL 32302-2095, Telephone (850) 222-3533
(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 N/A
(Bill or PCB #) (Bill or PCB Sponsor)

Indicate Position X <u>**Support**</u> Oppose Technical Assistance Other ____________

Proposed Wording of Position for Official Publication:
Amend F.S. section 193.155(3) to clarify that transfers of ownership interests, whether legal or equitable, pursuant to which the same person or that person's spouse continues to hold legal or equitable title of the homestead real property or otherwise qualifies for the homestead exemption under requirements of Section 196.031, Florida Statutes, after the transfer from legal to equitable title, legal to legal title, equitable to legal title or equitable to equitable title will not be treated as a change in ownership for purposes of Section 193.155(3), Florida Statutes.

Reasons For Proposed Advocacy:

The current subsection 193.155(3), Florida Statutes, provides that there is no change in ownership for purposes of determining whether homestead real property is to be reassessed merely because subsequent to a change or transfer of ownership, the same person is entitled to the homestead exemption as was previously entitled and the transfer is between legal and equitable title. This provision has been interpreted by at least one office of the property appraiser that a change or transfer of ownership between equitable title and equitable title will result in the homestead real property being reassessed for purposes of determining ad valorem taxes subsequent to the transfer. Thus, under the reasoning of at least one office of the property appraiser, an individual who creates a new revocable inter vivos trust and transfers ownership of his or her homestead real property from the old trust to the new trust would be subject to having his or her homestead real property reassessed and lose the benefit of the Save Our Homes cap previously enjoyed prior to the transfer. The same reasoning would apply to an individual who transfers his or her homestead from that individual's revocable inter vivos trust to a revocable inter vivos trust established by that individual's spouse or to a person who had established a qualified personal residence trust whose equitable interest changes from the retained interest initially established upon creation of the trust to a leasehold interest if the homestead real property is subsequently leased to the grantor for a period of ninety-eight years or more after the expiration of the retained interest in the homestead real property. Therefore, the provisions of subsection 193.155(3), Florida Statutes, should be clarified to provide that any transfer of ownership which results in the transferor or the transferor's spouse possessing, immediately after the transfer, the legal title, equitable title or other interest which qualifies for the homestead exemption under the provisions of Section 196.031, Florida Statutes, should not be treated as a change in ownership for purposes of determining whether homestead real property is to be reassessed so long as the transferor or the transferor's spouse would, independently of such transfer, meet the requirements of Section 196.031(1)(a), Florida Statutes.

PRIOR POSITIONS TAKEN ON THIS ISSUE

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

Most Recent Position NONE
(Indicate Bar or Name Section) (Support or Oppose) (Date)

Others
(May attach list if more than one) NONE
(Indicate Bar or Name Section) (Support or Oppose) (Date)

REFERRALS TO OTHER SECTIONS, COMMITTEES OR LEGAL ORGANIZATIONS

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

Referrals

(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.

Legislative Proposal:

193.155 Homestead assessments.--Homestead property shall be assessed at just value as of January 1, 1994. Property receiving the homestead exemption after January 1, 1994, shall be assessed at just value as of January 1 of the year in which the property receives the exemption.

(1) Beginning in 1995, or the year following the year the property receives homestead exemption, whichever is later, the property shall be reassessed annually on January 1. Any change resulting from such reassessment shall not exceed the lower of the following:

(a) Three percent of the assessed value of the property for the prior year; or

(b) The percentage change in the Consumer Price Index for All Urban Consumers, U.S. City Average, all items 1967=100, or successor reports for the preceding calendar year as initially reported by the United States Department of Labor, Bureau of Labor Statistics.

(2) If the assessed value of the property as calculated under subsection (1) exceeds the just value, the assessed value of the property shall be lowered to the just value of the property.

(3) Except as provided in this subsection, property assessed under this section shall be assessed at just value as of January 1 of the year following a change of ownership. Thereafter, the annual changes in the assessed value of the property are subject to the limitations in subsections (1) and (2). For the purpose of this section, a change in ownership means any sale, foreclosure, or transfer of legal title or beneficial title in equity to any person, except as provided in this subsection. There is no change of ownership if:

(a) Subsequent to the change or transfer, the ~~same person~~ transferor or the transferor's spouse possess legal title, equitable title or otherwise qualifies for the homestead exemption under s. 196.031, provided the transferor or the transferor's spouse would, when viewed independently of such transfer, meet the requirements of s. 196.031(1)(a). ~~is entitled to the homestead exemption as was previously entitled and:~~

~~1. The transfer of title is to correct an error;~~

~~2. The transfer is between legal and equitable title; or~~

~~3. The change or transfer is by means of an instrument in which the owner is listed as both grantor and grantee of the real property and one or more other individuals are additionally named as grantee. However, if any individual who is additionally named as a grantee applies for a homestead exemption on the property, the application shall be considered a change of ownership;~~

(b) The transfer is between husband and wife, including a transfer to a surviving spouse or a transfer due to a dissolution of marriage;

(c) The transfer occurs by operation of law under s. 732.4015; or

(d) Upon the death of the owner, the transfer is between the owner and another who is a permanent resident and is legally or naturally dependent upon the owner.

(4)(a) Except as provided in paragraph (b), changes, additions, or improvements to homestead property shall be assessed at just value as of the first January 1 after the changes, additions, or improvements are substantially completed.

(b) Changes, additions, or improvements that replace all or a portion of homestead property damaged or destroyed by misfortune or calamity shall not increase the homestead property's assessed value when the square footage of the homestead property as changed or improved does not exceed 110 percent of the square footage of the homestead property before the damage or destruction. Additionally, the homestead property's assessed value shall not increase if the total square footage of the homestead property as changed or improved does not exceed 1,500 square feet. Changes, additions, or improvements that do not cause the total to exceed 110 percent of the total square footage of the homestead property before the damage or destruction or that do not cause the total to exceed 1,500 total square feet shall be reassessed as provided under subsection (1). The homestead property's assessed value shall be increased by the just value of that portion of the changed or improved homestead property which is in excess of 110 percent of the square footage of the homestead property before the damage or destruction or of that portion exceeding 1,500 square feet. Homestead property damaged or destroyed by misfortune or calamity which, after being changed or improved, has a square footage of less than 100 percent of the homestead property's total square footage before the damage or destruction shall be assessed pursuant to subsection (5). This paragraph applies to changes, additions, or improvements commenced within 3 years after the January 1 following the damage or destruction of the homestead.

(c) Changes, additions, or improvements that replace all or a portion of real property that was damaged or destroyed by misfortune or calamity shall be assessed upon substantial completion as if such damage or destruction had not occurred and in accordance with paragraph (b) if the owner of such property:

1. Was permanently residing on such property when the damage or destruction occurred;

2. Was not entitled to receive homestead exemption on such property as of January 1 of that year; and

3. Applies for and receives homestead exemption on such property the following year.

(d) Changes, additions, or improvements include improvements made to common areas or other improvements made to property other than to the homestead property by the owner or by an owner association, which improvements directly benefit the homestead property. Such changes, additions, or improvements shall be assessed at just value, and the just value shall be apportioned among the parcels benefiting from the improvement.

(5) When property is destroyed or removed and not replaced, the assessed value of the parcel shall be reduced by the assessed value attributable to the destroyed or removed property.

(6) Only property that receives a homestead exemption is subject to this section. No portion of property that is assessed solely on the basis of character or use pursuant to s. 193.461 or s. 193.501, or assessed pursuant to s. 193.505, is subject to this section. When property is assessed under s. 193.461, s. 193.501, or s. 193.505 and contains a residence under the same ownership, the portion of the property consisting of the residence and curtilage must be assessed separately, pursuant to s. 193.011, for the assessment to be subject to the limitation in this section.

(7) If a person received a homestead exemption limited to that person's proportionate

interest in real property, the provisions of this section apply only to that interest.

(8) Property assessed under this section shall be assessed at less than just value when the person who establishes a new homestead has received a homestead exemption as of January 1 of either of the 2 immediately preceding years. A person who establishes a new homestead as of January 1, 2008, is entitled to have the new homestead assessed at less than just value only if that person received a homestead exemption on January 1, 2007, and only if this subsection applies retroactive to January 1, 2008. For purposes of this subsection, a husband and wife who owned and both permanently resided on a previous homestead shall each be considered to have received the homestead exemption even though only the husband or the wife applied for the homestead exemption on the previous homestead. The assessed value of the newly established homestead shall be determined as provided in this subsection.

(a) If the just value of the new homestead as of January 1 is greater than or equal to the just value of the immediate prior homestead as of January 1 of the year in which the immediate prior homestead was abandoned, the assessed value of the new homestead shall be the just value of the new homestead minus an amount equal to the lesser of $500,000 or the difference between the just value and the assessed value of the immediate prior homestead as of January 1 of the year in which the prior homestead was abandoned. Thereafter, the homestead shall be assessed as provided in this section.

(b) If the just value of the new homestead as of January 1 is less than the just value of the immediate prior homestead as of January 1 of the year in which the immediate prior homestead was abandoned, the assessed value of the new homestead shall be equal to the just value of the new homestead divided by the just value of the immediate prior homestead and multiplied by the assessed value of the immediate prior homestead. However, if the difference between the just value of the new homestead and the assessed value of the new homestead calculated pursuant to this paragraph is greater than $500,000, the assessed value of the new homestead shall be increased so that the difference between the just value and the assessed value equals $500,000. Thereafter, the homestead shall be assessed as provided in this section.

(c) If two or more persons who have each received a homestead exemption as of January 1 of either of the 2 immediately preceding years and who would otherwise be eligible to have a new homestead property assessed under this subsection establish a single new homestead, the reduction from just value is limited to the higher of the difference between the just value and the assessed value of either of the prior eligible homesteads as of January 1 of the year in which either of the eligible prior homesteads was abandoned, but may not exceed $500,000.

(d) If two or more persons abandon jointly owned and jointly titled property that received a homestead exemption as of January 1 of either of the 2 immediately preceding years, and one or more such persons who were entitled to and received a homestead exemption on the abandoned property establish a new homestead that would otherwise be eligible for assessment under this subsection, each such person establishing a new homestead is entitled to a reduction from just value for the new homestead equal to the just value of the prior homestead minus the assessed value of the prior homestead divided by the number of owners of the prior homestead who received a homestead exemption, unless the title of the property contains specific ownership shares, in which case the share of reduction from just value shall be proportionate to the ownership share. In calculating the assessment reduction to be transferred from a prior homestead that has an assessment reduction for living quarters of parents or grandparents pursuant to s. 193.703, the value calculated pursuant to s. 193.703(6) must first be added back to the assessed value of the prior homestead. The total reduction from just value for all new homesteads established under this paragraph may not exceed $500,000. There

shall be no reduction from just value of any new homestead unless the prior homestead is reassessed at just value or is reassessed under this subsection as of January 1 after the abandonment occurs.

(e) If one or more persons who previously owned a single homestead and each received the homestead exemption qualify for a new homestead where all persons who qualify for homestead exemption in the new homestead also qualified for homestead exemption in the previous homestead without an additional person qualifying for homestead exemption in the new homestead, the reduction in just value shall be calculated pursuant to paragraph (a) or paragraph (b), without application of paragraph (c) or paragraph (d).

(f) For purposes of receiving an assessment reduction pursuant to this subsection, a person entitled to assessment under this section may abandon his or her homestead even though it remains his or her primary residence by notifying the property appraiser of the county where the homestead is located. This notification must be in writing and delivered at the same time as or before timely filing a new application for homestead exemption on the property.

(g) In order to have his or her homestead property assessed under this subsection, a person must file a form provided by the department as an attachment to the application for homestead exemption. The form, which must include a sworn statement attesting to the applicant's entitlement to assessment under this subsection, shall be considered sufficient documentation for applying for assessment under this subsection. The department shall require by rule that the required form be submitted with the application for homestead exemption under the timeframes and processes set forth in chapter 196 to the extent practicable.

(h) 1. If the previous homestead was located in a different county than the new homestead, the property appraiser in the county where the new homestead is located must transmit a copy of the completed form together with a completed application for homestead exemption to the property appraiser in the county where the previous homestead was located. If the previous homesteads of applicants for transfer were in more than one county, each applicant from a different county must submit a separate form.

2. The property appraiser in the county where the previous homestead was located must return information to the property appraiser in the county where the new homestead is located by April 1 or within 2 weeks after receipt of the completed application from that property appraiser, whichever is later. As part of the information returned, the property appraiser in the county where the previous homestead was located must provide sufficient information concerning the previous homestead to allow the property appraiser in the county where the new homestead is located to calculate the amount of the assessment limitation difference which may be transferred and must certify whether the previous homestead was abandoned and has been or will be reassessed at just value or reassessed according to the provisions of this subsection as of the January 1 following its abandonment.

3. Based on the information provided on the form from the property appraiser in the county where the previous homestead was located, the property appraiser in the county where the new homestead is located shall calculate the amount of the assessment limitation difference which may be transferred and apply the difference to the January 1 assessment of the new homestead.

4. All property appraisers having information-sharing agreements with the department are authorized to share confidential tax information with each other pursuant to s. 195.084, including social security numbers and linked information on the forms provided pursuant to this section.

5. The transfer of any limitation is not final until any values on the assessment roll on which the transfer is based are final. If such values are final after tax notice bills have been sent, the property appraiser shall make appropriate corrections and a corrected tax notice bill shall be sent. Any values that are under administrative or judicial review shall be noticed to the tribunal or court for accelerated hearing and resolution so that the intent of this subsection may be carried out.

6. If the property appraiser in the county where the previous homestead was located has not provided information sufficient to identify the previous homestead and the assessment limitation difference is transferable, the taxpayer may file an action in circuit court in that county seeking to establish that the property appraiser must provide such information.

7. If the information from the property appraiser in the county where the previous homestead was located is provided after the procedures in this section are exercised, the property appraiser in the county where the new homestead is located shall make appropriate corrections and a corrected tax notice and tax bill shall be sent.

8. This subsection does not authorize the consideration or adjustment of the just, assessed, or taxable value of the previous homestead property.

9. The property appraiser in the county where the new homestead is located shall promptly notify a taxpayer if the information received, or available, is insufficient to identify the previous homestead and the amount of the assessment limitation difference which is transferable. Such notification shall be sent on or before July 1 as specified in s. 196.151.

10. The taxpayer may correspond with the property appraiser in the county where the previous homestead was located to further seek to identify the homestead and the amount of the assessment limitation difference which is transferable.

11. If the property appraiser in the county where the previous homestead was located supplies sufficient information to the property appraiser in the county where the new homestead is located, such information shall be considered timely if provided in time for inclusion on the notice of proposed property taxes sent pursuant to ss. 194.011 and 200.065(1).

12. If the property appraiser has not received information sufficient to identify the previous homestead and the amount of the assessment limitation difference which is transferable before mailing the notice of proposed property taxes, the taxpayer may file a petition with the value adjustment board in the county where the new homestead is located.

(i) Any person who is qualified to have his or her property assessed under this subsection and who fails to file an application by March 1 may file an application for assessment under this subsection and may, pursuant to s. 194.011(3), file a petition with the value adjustment board requesting that an assessment under this subsection be granted. Such petition may be filed at any time during the taxable year on or before the 25th day following the mailing of the notice by the property appraiser as provided in s. 194.011(1). Notwithstanding s. 194.013, such person must pay a nonrefundable fee of $15 upon filing the petition. Upon reviewing the petition, if the person is qualified to receive the assessment under this subsection and demonstrates particular extenuating circumstances judged by the property appraiser or the value adjustment board to warrant granting the assessment, the property appraiser or the value adjustment board may grant an assessment under this subsection. For the 2008 assessments, all petitioners for assessment under this subsection shall be considered to have demonstrated particular extenuating circumstances.

(j) Any person who is qualified to have his or her property assessed under this subsection and who fails to timely file an application for his or her new homestead in the first year following eligibility may file in a subsequent year. The assessment reduction shall be applied to assessed value in the year the transfer is first approved, and refunds of tax may not be made for previous years.

(k) The property appraisers of the state shall, as soon as practicable after March 1 of each year and on or before July 1 of that year, carefully consider all applications for assessment under this subsection which have been filed in their respective offices on or before March 1 of that year. If, upon investigation, the property appraiser finds that the applicant is entitled to assessment under this subsection, the property appraiser shall make such entries upon the tax rolls of the county as are necessary to allow the assessment. If, after due consideration, the property appraiser finds that the applicant is not entitled under the law to assessment under this subsection, the property appraiser shall immediately make out a notice of such disapproval, giving his or her reasons therefore, and a copy of the notice must be served upon the applicant by the property appraiser either by personal delivery or by registered mail to the post office address given by the applicant. The applicant may appeal the decision of the property appraiser refusing to allow the assessment under this subsection to the value adjustment board, and the board shall review the application and evidence presented to the property appraiser upon which the applicant based the claim and shall hear the applicant in person or by agent on behalf of his or her right to such assessment. Such appeal shall be heard by an attorney special magistrate if the value adjustment board uses special magistrates. The value adjustment board shall reverse the decision of the property appraiser in the cause and grant assessment under this subsection to the applicant if, in its judgment, the applicant is entitled to be granted the assessment or shall affirm the decision of the property appraiser. The action of the board is final in the cause unless the applicant, within 15 days following the date of refusal of the application by the board, files in the circuit court of the county in which the homestead is located a proceeding against the property appraiser for a declaratory judgment as is provided by chapter 86 or other appropriate proceeding. The failure of the taxpayer to appear before the property appraiser or value adjustment board or to file any paper other than the application as provided in this subsection does not constitute any bar to or defense in the proceedings.

(9) Erroneous assessments of homestead property assessed under this section may be corrected in the following manner:

(a) If errors are made in arriving at any assessment under this section due to a material mistake of fact concerning an essential characteristic of the property, the just value and assessed value must be recalculated for every such year, including the year in which the mistake occurred.

(b) If changes, additions, or improvements are not assessed at just value as of the first January 1 after they were substantially completed, the property appraiser shall determine the just value for such changes, additions, or improvements for the year they were substantially completed. Assessments for subsequent years shall be corrected, applying this section if applicable.

(c) If back taxes are due pursuant to s. 193.092, the corrections made pursuant to this subsection shall be used to calculate such back taxes.

(10) If the property appraiser determines that for any year or years within the prior 10 years a person who was not entitled to the homestead property assessment limitation granted under this section was granted the homestead property assessment limitation, the property appraiser making such determination shall

record in the public records of the county a notice of tax lien against any property owned by that person in the county, and such property must be identified in the notice of tax lien. Such property that is situated in this state is subject to the unpaid taxes, plus a penalty of 50 percent of the unpaid taxes for each year and 15 percent interest per annum. However, when a person entitled to exemption pursuant to s. 196.031 inadvertently receives the limitation pursuant to this section following a change of ownership, the assessment of such property must be corrected as provided in paragraph (9)(a), and the person need not pay the unpaid taxes, penalties, or interest.

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WHITE PAPER

PROPOSED REVISIONS TO §193.155, FLA. STAT.

I. SUMMARY

The purpose of the proposed change to this statute is to clarify that a change in the form of an individual's ownership in their homestead real property does not result in the reassessment of the appraised value of their homestead for purposes of the "Save Our Homes" cap.

II. CURRENT SITUATION

The current subsection 193.155(3) provides that there is no change in ownership for purposes of determining whether homestead real property is to be reassessed merely because subsequent to a change or transfer of ownership, the same person is entitled to the homestead exemption as was previously entitled and the transfer is between legal and equitable title. This provision has been interpreted by at least one office of the property appraiser that a change or transfer of ownership between equitable title and equitable title will result in the homestead real property being reassessed for purposes of determining ad valorem taxes subsequent to the transfer. Thus, under the reasoning of at least one office of the property appraiser, an individual who creates a new revocable inter vivos trust and transfers ownership of his or her homestead real property from the old trust to the new trust would be subject to having his or her homestead real property reassessed and lose the benefit of the Save Our Homes cap previously enjoyed prior to the transfer. The same reasoning would apply to an individual who transfers his or her homestead from that individual's revocable inter vivos trust to a revocable inter vivos trust established by that individual's spouse or to a person who had established a qualified personal residence trust whose equitable interest changes from the retained interest initially established upon creation of the trust to a leasehold interest if the homestead real property is subsequently leased to the grantor for a period of ninety-eight years or more after the expiration of the retained interest in the homestead real property. Therefore, the provisions of subsection 193.155(3) should be clarified to provide that any transfer of ownership which results in the transferor or the transferor's spouse possessing, immediately after the transfer, the legal title, equitable title or other interest which qualifies for the homestead exemption under the provisions of Section 196.031, *Fla. Stat.*, should not be treated as a change in ownership for purposes of determining whether homestead real property is to be reassessed so long as the transferor or the transferor's spouse would, independently of such transfer, meet the requirements of Section 196.031(1)(a), *Fla. Stat*.

III. EFFECT OF PROPOSED CHANGE

The proposed amendment would make it clear that transfers pursuant to which the same person or that person's spouse continues to hold legal or equitable title of the homestead real property or otherwise qualifies for the homestead exemption under requirements of Section 196.031, *Fla. Stat.*, after the transfer from legal to equitable title, legal to legal title, equitable to legal title or equitable to equitable title will not be treated as a change in ownership for purposes of Section 193.155(3), *Fla. Stat*.

193.155 Homestead assessments.--Homestead property shall be assessed at just value as of January 1, 1994. Property receiving the homestead exemption after January 1, 1994, shall be assessed at just value as of January 1 of the year in which the property receives the exemption.

(1) Beginning in 1995, or the year following the year the property receives homestead exemption, whichever is later, the property shall be reassessed annually on January 1. Any change resulting from such reassessment shall not exceed the lower of the following:

(a) Three percent of the assessed value of the property for the prior year; or

(b) The percentage change in the Consumer Price Index for All Urban Consumers, U.S.

City Average, all items 1967=100, or successor reports for the preceding calendar year as initially reported by the United States Department of Labor, Bureau of Labor Statistics.

(2) If the assessed value of the property as calculated under subsection (1) exceeds the just value, the assessed value of the property shall be lowered to the just value of the property.

(3) Except as provided in this subsection, property assessed under this section shall be assessed at just value as of January 1 of the year following a change of ownership. Thereafter, the annual changes in the assessed value of the property are subject to the limitations in subsections (1) and (2). For the purpose of this section, a change in ownership means any sale, foreclosure, or transfer of legal title or beneficial title in equity to any person, except as provided in this subsection. There is no change of ownership if:

(a) Subsequent to the change or transfer, the ~~same person~~ transferor or the transferor's spouse possess legal title, equitable title or otherwise qualifies for the homestead exemption under s. 196.031, provided the transferor or the transferor's spouse would, when viewed independently of such transfer, meet the requirements of s. 196.031(1)(a). ~~is entitled to the homestead exemption as was previously entitled and:~~

~~1. The transfer of title is to correct an error;~~

~~2. The transfer is between legal and equitable title; or~~

~~3. The change or transfer is by means of an instrument in which the owner is listed as both grantor and grantee of the real property and one or more other individuals are additionally named as grantee. However, if any individual who is additionally named as a grantee applies for a homestead exemption on the property, the application shall be considered a change of ownership;~~

(b) The transfer is between husband and wife, including a transfer to a surviving spouse or a transfer due to a dissolution of marriage;

(c) The transfer occurs by operation of law under s. 732.4015; or

(d) Upon the death of the owner, the transfer is between the owner and another who is a permanent resident and is legally or naturally dependent upon the owner.

(4)(a) Except as provided in paragraph (b), changes, additions, or improvements to homestead property shall be assessed at just value as of the first January 1 after the changes, additions, or improvements are substantially completed.

(b) Changes, additions, or improvements that replace all or a portion of homestead property damaged or destroyed by misfortune or calamity shall not increase the homestead property's assessed value when the square footage of the homestead property as changed or improved does not exceed 110 percent of the square footage of the homestead property before the damage or destruction. Additionally, the homestead property's assessed value shall not increase if the total square footage of the homestead property as changed or improved does not exceed 1,500 square feet. Changes, additions, or improvements that do not cause the total to exceed 110 percent of the total square footage of the homestead property before the damage or destruction or that do not cause the total to exceed 1,500 total square feet shall be reassessed as provided under subsection (1). The homestead property's assessed value shall be increased by the just value of that portion of the changed or improved homestead property which is in excess of 110 percent of the square footage of the homestead property before the damage or destruction or of that portion exceeding 1,500 square feet. Homestead property damaged or destroyed by misfortune or calamity which, after being changed or improved, has a square footage of less than 100 percent of the homestead property's total square footage before the damage or destruction shall be assessed pursuant to subsection (5). This paragraph applies to changes, additions, or improvements commenced within 3 years after the January 1 following the damage or destruction of the homestead.

(c) Changes, additions, or improvements that replace all or a portion of real property that

was damaged or destroyed by misfortune or calamity shall be assessed upon substantial completion as if such damage or destruction had not occurred and in accordance with paragraph (b) if the owner of such property:
1. Was permanently residing on such property when the damage or destruction occurred;
2. Was not entitled to receive homestead exemption on such property as of January 1 of that year; and
3. Applies for and receives homestead exemption on such property the following year.
(d) Changes, additions, or improvements include improvements made to common areas or other improvements made to property other than to the homestead property by the owner or by an owner association, which improvements directly benefit the homestead property. Such changes, additions, or improvements shall be assessed at just value, and the just value shall be apportioned among the parcels benefiting from the improvement.
(5) When property is destroyed or removed and not replaced, the assessed value of the parcel shall be reduced by the assessed value attributable to the destroyed or removed property.
(6) Only property that receives a homestead exemption is subject to this section. No portion of property that is assessed solely on the basis of character or use pursuant to s. 193.461 or s. 193.501, or assessed pursuant to s. 193.505, is subject to this section. When property is assessed under s. 193.461, s. 193.501, or s. 193.505 and contains a residence under the same ownership, the portion of the property consisting of the residence and curtilage must be assessed separately, pursuant to s. 193.011, for the assessment to be subject to the limitation in this section.
(7) If a person received a homestead exemption limited to that person's proportionate interest in real property, the provisions of this section apply only to that interest.

(8) Property assessed under this section shall be assessed at less than just value when the person who establishes a new homestead has received a homestead exemption as of January 1 of either of the 2 immediately preceding years. A person who establishes a new homestead as of January 1, 2008, is entitled to have the new homestead assessed at less than just value only if that person received a homestead exemption on January 1, 2007, and only if this subsection applies retroactive to January 1, 2008. For purposes of this subsection, a husband and wife who owned and both permanently resided on a previous homestead shall each be considered to have received the homestead exemption even though only the husband or the wife applied for the homestead exemption on the previous homestead. The assessed value of the newly established homestead shall be determined as provided in this subsection.

(a) If the just value of the new homestead as of January 1 is greater than or equal to the just value of the immediate prior homestead as of January 1 of the year in which the immediate prior homestead was abandoned, the assessed value of the new homestead shall be the just value of the new homestead minus an amount equal to the lesser of $500,000 or the difference between the just value and the assessed value of the immediate prior homestead as of January 1 of the year in which the prior homestead was abandoned. Thereafter, the homestead shall be assessed as provided in this section.

(b) If the just value of the new homestead as of January 1 is less than the just value of the immediate prior homestead as of January 1 of the year in which the immediate prior homestead was abandoned, the assessed value of the new homestead shall be equal to the just value of the new homestead divided by the just value of the immediate prior homestead and multiplied by the assessed value of the immediate prior homestead. However, if the difference between the just value of the new homestead and the assessed value of the new homestead calculated pursuant to this paragraph is greater than

$500,000, the assessed value of the new homestead shall be increased so that the difference between the just value and the assessed value equals $500,000. Thereafter, the homestead shall be assessed as provided in this section.

(c) If two or more persons who have each received a homestead exemption as of January 1 of either of the 2 immediately preceding years and who would otherwise be eligible to have a new homestead property assessed under this subsection establish a single new homestead, the reduction from just value is limited to the higher of the difference between the just value and the assessed value of either of the prior eligible homesteads as of January 1 of the year in which either of the eligible prior homesteads was abandoned, but may not exceed $500,000.

(d) If two or more persons abandon jointly owned and jointly titled property that received a homestead exemption as of January 1 of either of the 2 immediately preceding years, and one or more such persons who were entitled to and received a homestead exemption on the abandoned property establish a new homestead that would otherwise be eligible for assessment under this subsection, each such person establishing a new homestead is entitled to a reduction from just value for the new homestead equal to the just value of the prior homestead minus the assessed value of the prior homestead divided by the number of owners of the prior homestead who received a homestead exemption, unless the title of the property contains specific ownership shares, in which case the share of reduction from just value shall be proportionate to the ownership share. In calculating the assessment reduction to be transferred from a prior homestead that has an assessment reduction for living quarters of parents or grandparents pursuant to s. 193.703, the value calculated pursuant to s. 193.703(6) must first be added back to the assessed value of the prior homestead. The total reduction from just value for all new homesteads established under this paragraph may not exceed $500,000. There shall be no reduction from just value of any new homestead unless the prior homestead is reassessed at just value or is reassessed under this subsection as of January 1 after the abandonment occurs.

(e) If one or more persons who previously owned a single homestead and each received the homestead exemption qualify for a new homestead where all persons who qualify for homestead exemption in the new homestead also qualified for homestead exemption in the previous homestead without an additional person qualifying for homestead exemption in the new homestead, the reduction in just value shall be calculated pursuant to paragraph (a) or paragraph (b), without application of paragraph (c) or paragraph (d).

(f) For purposes of receiving an assessment reduction pursuant to this subsection, a person entitled to assessment under this section may abandon his or her homestead even though it remains his or her primary residence by notifying the property appraiser of the county where the homestead is located. This notification must be in writing and delivered at the same time as or before timely filing a new application for homestead exemption on the property.

(g) In order to have his or her homestead property assessed under this subsection, a person must file a form provided by the department as an attachment to the application for homestead exemption. The form, which must include a sworn statement attesting to the applicant's entitlement to assessment under this subsection, shall be considered sufficient documentation for applying for assessment under this subsection. The department shall require by rule that the required form be submitted with the application for homestead exemption under the timeframes and processes set forth in chapter 196 to

the extent practicable.

(h) 1. If the previous homestead was located in a different county than the new homestead, the property appraiser in the county where the new homestead is located must transmit a copy of the completed form together with a completed application for homestead exemption to the property appraiser in the county where the previous homestead was located. If the previous homesteads of applicants for transfer were in more than one county, each applicant from a different county must submit a separate form.

2. The property appraiser in the county where the previous homestead was located must return information to the property appraiser in the county where the new homestead is located by April 1 or within 2 weeks after receipt of the completed application from that property appraiser, whichever is later. As part of the information returned, the property appraiser in the county where the previous homestead was located must provide sufficient information concerning the previous homestead to allow the property appraiser in the county where the new homestead is located to calculate the amount of the assessment limitation difference which may be transferred and must certify whether the previous homestead was abandoned and has been or will be reassessed at just value or reassessed according to the provisions of this subsection as of the January 1 following its abandonment.

3. Based on the information provided on the form from the property appraiser in the county where the previous homestead was located, the property appraiser in the county where the new homestead is located shall calculate the amount of the assessment limitation difference which may be transferred and apply the difference to the January 1 assessment of the new homestead.

4. All property appraisers having information-sharing agreements with the department are authorized to share confidential tax information with each other pursuant to s. 195.084, including social security numbers and linked information on the forms provided pursuant to this section.

5. The transfer of any limitation is not final until any values on the assessment roll on which the transfer is based are final. If such values are final after tax notice bills have been sent, the property appraiser shall make appropriate corrections and a corrected tax notice bill shall be sent. Any values that are under administrative or judicial review shall be noticed to the tribunal or court for accelerated hearing and resolution so that the intent of this subsection may be carried out.

6. If the property appraiser in the county where the previous homestead was located has not provided information sufficient to identify the previous homestead and the assessment limitation difference is transferable, the taxpayer may file an action in circuit court in that county seeking to establish that the property appraiser must provide such information.

7. If the information from the property appraiser in the county where the previous homestead was located is provided after the procedures in this section are exercised, the property appraiser in the county where the new homestead is located shall make appropriate corrections and a corrected tax notice and tax bill shall be sent.

8. This subsection does not authorize the consideration or adjustment of the just,

assessed, or taxable value of the previous homestead property.

9. The property appraiser in the county where the new homestead is located shall promptly notify a taxpayer if the information received, or available, is insufficient to identify the previous homestead and the amount of the assessment limitation difference which is transferable. Such notification shall be sent on or before July 1 as specified in s. 196.151.

10. The taxpayer may correspond with the property appraiser in the county where the previous homestead was located to further seek to identify the homestead and the amount of the assessment limitation difference which is transferable.

11. If the property appraiser in the county where the previous homestead was located supplies sufficient information to the property appraiser in the county where the new homestead is located, such information shall be considered timely if provided in time for inclusion on the notice of proposed property taxes sent pursuant to ss. 194.011 and 200.065(1).

12. If the property appraiser has not received information sufficient to identify the previous homestead and the amount of the assessment limitation difference which is transferable before mailing the notice of proposed property taxes, the taxpayer may file a petition with the value adjustment board in the county where the new homestead is located.

(i) Any person who is qualified to have his or her property assessed under this subsection and who fails to file an application by March 1 may file an application for assessment under this subsection and may, pursuant to s. 194.011(3), file a petition with the value adjustment board requesting that an assessment under this subsection be granted. Such petition may be filed at any time during the taxable year on or before the 25th day following the mailing of the notice by the property appraiser as provided in s. 194.011(1). Notwithstanding s. 194.013, such person must pay a nonrefundable fee of $15 upon filing the petition. Upon reviewing the petition, if the person is qualified to receive the assessment under this subsection and demonstrates particular extenuating circumstances judged by the property appraiser or the value adjustment board to warrant granting the assessment, the property appraiser or the value adjustment board may grant an assessment under this subsection. For the 2008 assessments, all petitioners for assessment under this subsection shall be considered to have demonstrated particular extenuating circumstances.

(j) Any person who is qualified to have his or her property assessed under this subsection and who fails to timely file an application for his or her new homestead in the first year following eligibility may file in a subsequent year. The assessment reduction shall be applied to assessed value in the year the transfer is first approved, and refunds of tax may not be made for previous years.

(k) The property appraisers of the state shall, as soon as practicable after March 1 of each year and on or before July 1 of that year, carefully consider all applications for assessment under this subsection which have been filed in their respective offices on or before March 1 of that year. If, upon investigation, the property appraiser finds that the applicant is entitled to assessment under this subsection, the property appraiser shall make such entries upon the tax rolls of the county as are necessary to allow the assessment. If, after due consideration, the property appraiser finds that the applicant is

not entitled under the law to assessment under this subsection, the property appraiser shall immediately make out a notice of such disapproval, giving his or her reasons therefore, and a copy of the notice must be served upon the applicant by the property appraiser either by personal delivery or by registered mail to the post office address given by the applicant. The applicant may appeal the decision of the property appraiser refusing to allow the assessment under this subsection to the value adjustment board, and the board shall review the application and evidence presented to the property appraiser upon which the applicant based the claim and shall hear the applicant in person or by agent on behalf of his or her right to such assessment. Such appeal shall be heard by an attorney special magistrate if the value adjustment board uses special magistrates. The value adjustment board shall reverse the decision of the property appraiser in the cause and grant assessment under this subsection to the applicant if, in its judgment, the applicant is entitled to be granted the assessment or shall affirm the decision of the property appraiser. The action of the board is final in the cause unless the applicant, within 15 days following the date of refusal of the application by the board, files in the circuit court of the county in which the homestead is located a proceeding against the property appraiser for a declaratory judgment as is provided by chapter 86 or other appropriate proceeding. The failure of the taxpayer to appear before the property appraiser or value adjustment board or to file any paper other than the application as provided in this subsection does not constitute any bar to or defense in the proceedings.

(9) Erroneous assessments of homestead property assessed under this section may be corrected in the following manner:
(a) If errors are made in arriving at any assessment under this section due to a material mistake of fact concerning an essential characteristic of the property, the just value and assessed value must be recalculated for every such year, including the year in which the mistake occurred.
(b) If changes, additions, or improvements are not assessed at just value as of the first January 1 after they were substantially completed, the property appraiser shall determine the just value for such changes, additions, or improvements for the year they were substantially completed. Assessments for subsequent years shall be corrected, applying this section if applicable.
(c) If back taxes are due pursuant to s. 193.092, the corrections made pursuant to this subsection shall be used to calculate such back taxes.
(10) If the property appraiser determines that for any year or years within the prior 10 years a person who was not entitled to the homestead property assessment limitation granted under this section was granted the homestead property assessment limitation, the property appraiser making such determination shall record in the public records of the county a notice of tax lien against any property owned by that person in the county, and such property must be identified in the notice of tax lien. Such property that is situated in this state is subject to the unpaid taxes, plus a penalty of 50 percent of the unpaid taxes for each year and 15 percent interest per annum. However, when a person entitled to exemption pursuant to s. 196.031 inadvertently receives the limitation pursuant to this section following a change of ownership, the assessment of such property must be corrected as provided in paragraph (9)(a), and the person need not pay the unpaid taxes, penalties, or interest.

IV. ANALYSIS

It is not good public policy for transactions to be treated inconsistently by different offices of the property appraisers throughout the state. Residents should be provided with laws that are consistently applied and are logical in their application. The proposed amendment adds clarity to the law and provides guidance to the various offices of the property appraisers throughout the state.

V. FISCAL IMPACT ON STATE AND LOCAL GOVERNMENTS

The proposal does not have a fiscal impact on state or local governments because it is merely clarifying what should be the interpretation of existing law.

VI. DIRECT IMPACT ON PRIVATE SECTOR

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

VII. CONSTITUTIONAL ISSUES

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

VIII. OTHER INTERESTED PARTIES

The various offices of the property appraiser throughout the state.

401840 v1

LEGISLATIVE POSITION REQUEST FORM

GOVERNMENTAL AFFAIRS OFFICE

Date Form Received ____________

GENERAL INFORMATION

Submitted By Richard R. Gans, Estate and Trust Tax Planning Committee, RPPTL Section, The Florida Bar

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

Address P. O. Box 3018, Sarasota, FL 34230-3018 (941) 957-1900
(List street address and phone number)

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

CONTACTS

Board & Legislation Committee Appearance

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Martha J. Edenfield, Pennington, Moore, Wilkinson, Bell & Dunbar, P.O. Box 10095, Tallahassee FL 32302-2095, Telephone: (850) 222-3533

(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 N/A
(Bill or PCB #) (Bill or PCB Sponsor)

Indicate Position X **Support** Oppose Technical Assistance Other ____________

Proposed Wording of Position for Official Publication:

The proposed legislation would: *(1)* amend F.S. §739.201(4) to add a new subsection (4) the effect of which is to treat a disclaimer of an interest in property also as a disclaimer of any fiduciary or non-fiduciary power over the disclaimed property interest, unless the instrument of disclaimer specifically provides otherwise; *(2)* amend two other subsections of the F. S. ch. 739 to assure consistency with the changes to F.S. §739.201(4); *(3)* correct a typographical error in F.S. §739.402(2)(a); and *(4)* clarify issues of interpretation of F.S. §739.501 in the context of Florida's long-standing statutory prohibition on disclaimers by insolvent persons.

Reasons For Proposed Advocacy:

See attached White Paper

PRIOR POSITIONS TAKEN ON THIS ISSUE

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

Most Recent Position NONE

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

Others
(May attach list if more than one) NONE

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

REFERRALS TO OTHER SECTIONS, COMMITTEES OR LEGAL ORGANIZATIONS

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

Referrals

(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.

Legislative Proposal

(1) Savings Provision

ADD NEW SUBSECTION (4) TO F. S. 739.201 AS FOLLOWS:

(4) In the case of a disclaimer of property over which the disclaimant has a power, in a fiduciary or non-fiduciary capacity, to direct the beneficial enjoyment of the disclaimed property then, unless the disclaimer specifically provides to the contrary with reference to this subsection, the disclaimant also shall be deemed to have disclaimed that power unless the power is limited by an "ascertainable standard," as that term is defined in s. 736.0103(3) as in effect when the disclaimer becomes irrevocable.

MODIFY THE FIRST SENTENCE OF F. S. 739.104(2) AS FOLLOWS:

(2) With court approval, a fiduciary may disclaim, in whole or in part, any interest in or power over property, including any power of appointment, except that a disclaimer of a power arising under s. 739.201(4) shall not require court approval.

MODIFY F. S. 739.207(3) AS FOLLOWS:

(3) A disclaimer under this section is effective as to another fiduciary if the disclaimer so provides and the fiduciary disclaiming has the authority to bind the estate, trust, or other person disclaiming, except that a disclaimer of a fiduciary power arising under s. 739.201(4) shall bind only the disclaiming fiduciary.

(2) **Correction of Typographical Error**

MODIFY F. S. 739.402(2) AS FOLLOWS:

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

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

(3) **Revisions to F.S. 739.501**

MODIFY F.S. 739.501 AS FOLLOWS:

Notwithstanding any other provision of this chapter other than s. 739.402, ~~,~~ if, as a result of a disclaimer or transfer, the disclaimed or transferred interest is treated pursuant to the provisions of s. 2518 of the Internal Revenue Code of 1986 as never having been transferred to the disclaimant, the disclaimer or transfer is effective as a disclaimer under this chapter.

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

White Paper on Proposed Revisions to Certain Provisions of Chapter 739, Florida Statutes

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I. SUMMARY

The proposed legislation is the product of study and analysis by The Estate and Trust Tax Planning Committee (the "Committee") of the Real Property, Probate and Trust Section of The Florida Bar.

The legislative proposal would add a savings provision to Florida Statutes Chapter 739, the Florida Uniform Disclaimer of Property Interests Act (the "Act"), intended to protect practitioners from inadvertently disqualifying certain post-mortem disclaimers under Section 2518 of the Internal Revenue Code. The legislative proposal would also modify certain other provisions of the Act to assure consistency in light of the addition of the savings clause, and correct a minor typographical error in the Act. Lastly, the proposed legislation would add a proviso to ensure that the traditional statutory prohibition on disclaimers by insolvent beneficiaries remains unquestionably intact.

II. CURRENT SITUATION

(A) Savings Provision.

Unless a disclaimer of an interest in property qualifies under Section 2518 of the Internal Revenue Code, the disclaimant will be treated for federal gift tax purposes as if he or she had made a transfer subject to federal gift taxes. A disclaimer of an interest in property will *not* qualify under Section 2518 unless the disclaimant has no power to direct the disposition of the disclaimed interest, whether in a fiduciary or non-fiduciary capacity, unless the power of disposition is limited by a so-called ascertainable standard. Code Section 2518; Treas. Regs. §§ 25.2518-2(d)(2), -(2)(e).

A common post-mortem planning technique involves a disclaimer, by a surviving spouse, of interests in property where the disclaimed interests pass to a trust for the lifetime benefit of the surviving spouse. Such a disclaimer often arises from a desire to fully utilize the first deceased spouse's estate tax exemption amount. The trust into which the disclaimed assets pass frequently confers upon the surviving spouse a testamentary power of appointment. Unless this power is also disclaimed, the surviving spouse's disclaimer will fail under Section 2518. Practitioners familiar with the federal tax disclaimer rules will know that the surviving spouse must separately disclaim the testamentary power of appointment to qualify the disclaimer under Section 2518; inexperienced or non-specialized attorneys may not.

(B) Disclaimers by Insolvent Beneficiaries.

Florida's statutory disclaimer law has long barred disclaimers by certain persons. Prior Sections 689.21 (disclaimers of non-testamentary interests) and 733.801 (disclaimers of testamentary interests) contained explicit prohibitions. Current law provides likewise: Sections 739.402(1) and (2) bar disclaimers by persons who have waived the right to disclaim, where the interest sought to be disclaimed has been accepted, where such interest has been sold, assigned or purchased at a judicial sale, or when the disclaimant is insolvent.

However, in the case of the last of the bars to disclaimer under the state statute, the insolvency of the disclaimant is not necessarily a bar to the effectiveness of a disclaimer for federal law. In this regard, federal law defers to state law. If there is a state law provision that bars disclaimers by insolvents, the

disclaimer will not be valid. *See* Treas. Regs. §25.2518-1(c)(2) ("a disclaimer that is wholly void [under state law]...cannot be a qualified disclaimer.") On the other hand, where state law provides that a disclaimer by an insolvent person is void, such a disclaimer is not a qualified disclaimer.

However, F. S. §739.501 states that "Notwithstanding any other provision of this chapter" a disclaimer that qualifies under Code Section 2518 and (implicitly) accompanying Treasury Regulations qualifies as a disclaimer under Florida law. One of the provisions of "this chapter," e.g., the Act, is §739.103, which makes the Act "the exclusive means by which a disclaimer may be made under Florida law." The "notwithstanding" proviso of §739.501 would nullify §739.103 for purposes of determining whether a disclaimer by an insolvent can qualify for federal tax purposes. This means that common law would apply to the question of the qualification of the disclaimer for federal tax purposes and, therefore, for state law purposes.

That was not the intent of the Act. *Kearley v. Crawford,* 112 Fla. 43, 151 So. 2d 293 (Fla. 1933) may be authority for the ability at common law of an insolvent person to make an effective disclaimer under state law. Common law may or may not permit a disclaimer or renunciation in other circumstances intended to be barred by §739.402. To preserve the intent and integrity of the statute, and to clarify that the bars on disclaimers in §739.402 mean what they say, those bars should be carved out of the "notwithstanding" proviso of §739.501.

III. EFFECT OF PROPOSED CHANGES
(DETAILED ANALYSIS OF PROPOSED REVISIONS)

(A) Addition of Savings Clause and Related Revisions.

The legislative proposal would add new subsection (4) to F. S. §739.201. The proposed addition of §739.201(4) will operate, in the circumstance described in Section II(A) above, to treat the surviving spouse's disclaimer of an interest in property that passes to a trust for the surviving spouse's benefit also as a disclaimer of any fiduciary or non-fiduciary power over the disclaimed property interest, unless the instrument of disclaimer specifically provides otherwise.

The savings provision will, of course, operate in other circumstances. For example, where a person disclaims an interest as a trust beneficiary but is designated to serve as a trustee with wholly discretionary powers to distribute trust assets, §739.201(4) would act to treat the disclaimer as one also of the power to act as trustee over all the trust assets, and not merely the part of the trust attributable to the disclaimed property.

The addition of the §739.201(4) savings provision requires certain conforming changes.

Section 739.104(2) permits a fiduciary to disclaim a power with court approval if the instrument governing the fiduciary's power does not explicitly give the fiduciary the ability to disclaim a fiduciary power. Section 739.104(2) requires revision to ensure that a disclaimer of a fiduciary power resulting from the application of the savings provision does not require prior court approval.

Section 739.207(3) permits a fiduciary who disclaims a power under Ch. 739 to bind successor fiduciaries under certain circumstances. That section requires revision so that a disclaimer of a power traveling under the savings provision binds only the disclaimant.

(C) Correction of Typographical Error.

The legislative proposal would change the word "disclaimer" in F.S. §739.402(2)(a) to "disclaimant".

(B) Revisions to F.S. §739.501

The legislative proposal would add the phrase "other than s. 739.402" immediately after the words " Notwithstanding any other provision of this chapter" at the beginning of F.S. §739.501. As so revised, §739.501 would clearly provide that the statutory bars to disclaimer set forth in §739.402 would still apply to disqualify the disclaimer under state law, even though Section 2518 and accompanying Treasury Regulations and §739.501 might otherwise act to salvage the disclaimer. A disclaimer that is void under state law cannot qualify as a disclaimer under the federal tax laws.

IV. FISCAL IMPACT ON STATE AND LOCAL GOVERNMENTS

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

V. DIRECT IMPACT ON PRIVATE SECTOR

The revisions to §739.201 to include the savings provision will protect consumers from mistakes made by inexperienced or non-specialist attorneys. Such revisions will ease the burden on civil courts who might otherwise be called upon to hear cases brought by clients who were harmed by substandard lawyering.

The revisions to §739.501 will solidify Florida's long-standing bar against disclaimers by insolvent beneficiaries, thereby lending predictability to legal outcomes and preserving the intended balance between the rights of creditors and debtors in this important and sometimes controversial area.

VI. CONSTITUTIONAL ISSUES

The Committee believes that the legislative proposal does not violate any of the provisions of the Constitution of the State of Florida or of the United States Constitution.

VII. OTHER INTERESTED PARTIES

Other groups that may have an interest in the legislative proposal include the Tax Section of The Florida Bar, the Business Law Section of The Florida Bar, the Elder Law Section of The Florida Bar, and the Florida Bankers Association.

402384

LEGISLATIVE POSITION REQUEST FORM

GOVERNMENTAL AFFAIRS OFFICE

Date Form Received ____________

GENERAL INFORMATION

Submitted By Kristen M. Lynch, Chair, IRA and Employee Benefits Committee of the Real Property Probate & Trust Law Section

Address 4800 N. Federal Hwy, Ste. 200E, Boca Raton, FL 33431
Telephone: (561) 368-8800

Position Type IRA and Employee Benefits Committee, RPPTL Section, The Florida Bar
(Florida Bar, section, division, committee or both)

CONTACTS

Board & Legislation Committee Appearance

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Linda Griffin-Keliher, 1455 Court Street, Clearwater, FL 33756, Telephone (727) 449-9800 (Office), (727) 804-0994 (Mobile)
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(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 N/A
(Bill or PCB #) (Bill or PCB Sponsor)

Indicate Position **X** **Support** Oppose Technical Other

Assistance ______________

Proposed Wording of Position for Official Publication:

See proposed bill attached.

Reasons for Proposed Advocacy:

The purpose of the proposed bill is to create a presumption and a cause of action in situations where someone divorces, and then dies without changing beneficiary designations to reflect the divorce. There is currently a statutory presumption for wills and trusts that, under circumstances where someone divorces and dies without changing their will or trust, the ex-spouse is treated as having pre-deceased the decedent. This bill proposes a means to create a cause of action for the intended beneficiary for cover life insurance policies, annuities and similar contracts; employee benefit accounts; individual retirement accounts; pay-on-death accounts, and transfer-on-death accounts. The drafters have been careful to exclude any accounts covered by ERISA from this statute.

PRIOR POSITIONS TAKEN ON THIS ISSUE

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

Most Recent Position NONE
(Indicate Bar or Name Section) (Support or Oppose)
(Date)

Others
(May attach list if more than one) NONE
(Indicate Bar or Name Section) (Support or Oppose)
(Date)

REFERRALS TO OTHER SECTIONS, COMMITTEES OR LEGAL ORGANIZATIONS

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

Referrals

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

Family Law Section 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.

Proposed F.S. 732.xxx

Effect of Dissolution or Invalidity of Marriage on Disposition of Certain Assets at Death

(1) As used in this section, unless the context requires to the contrary:

(a) "asset," when not modified by another word or phrase or other words or phrases, means an asset described in subsection (3).

(b) "beneficiary" means any person designated in the governing instrument to receive an interest in an asset after the decedent's death.

(c) "death certificate" means a certified copy of a death certificate issued by an official or agency for the place where the decedent's death occurred.

(d) "governing instrument" means a writing governing the disposition of all or any part of an asset after the decedent's death.

(e) "payor" means any person obligated to make payment of the decedent's interest in an asset after the decedent's death, and any other person who is in control or possession of an asset.

(f) "primary beneficiary" is a beneficiary designated under the governing instrument to receive an interest in an asset after the decedent's death who is not a secondary beneficiary. A person who receives an interest in the asset after the decedent's death because of the death, before the decedent, of another beneficiary is also a "primary beneficiary."

(g) "secondary beneficiary" is a beneficiary designated under the governing instrument to receive an interest in an asset if the interest of the primary beneficiary is revoked as provided in this section.

(2) If the decedent's marriage was dissolved or invalidated prior to the decedent's death, a provision made by or on behalf of the decedent prior to that time relating to the payment or transfer at death of an interest in an asset to or for the benefit of the decedent's former spouse is revoked if the provision was made prior to the date of the dissolution or the date of the determination of the invalidity of the decedent's marriage. The decedent's interest in the asset shall pass as if the former spouse failed to survive the decedent and died at the time of entry of the decree of dissolution or declaration of invalidity. Nothing in this section applies to any asset subject at the decedent's death to the decedent's will or to any trust established by the decedent during his or her lifetime. For purposes of this section, an individual retirement account described in Section 408 or 408A of the Internal Revenue Code of 1986 is not a trust.

(3) The assets to which the revocation of a former spouse's interest under subsection (2) applies are the following assets in which a Florida resident has an interest at the time of the resident's death:

(a) A life insurance policy, annuity or other similar contract;

(b) An employee benefit plan, which, for purposes of this section, is any funded or unfunded plan, program or fund established to provide an employee's beneficiaries with benefits that may be payable on the employee's death;

(c) An individual retirement account described in Section 408 or 408A of the Internal Revenue Code of 1986;

(d) A payable-on-death account; or

(e) A security or other account registered in transfer-on-death form.

(4) Subsection (2) does not apply:

(a) To the extent that controlling federal law so provides;

(b) If the contract or governing instrument expressly provides that benefits will be payable to the decedent's former spouse notwithstanding the dissolution or invalidity of the decedent's marriage;

(c) If the decree of dissolution or declaration of invalidity requires that the decedent maintain the asset for the benefit of a former spouse or children of the marriage, payable on the decedent's death either outright or in trust, and other assets of the decedent fulfilling such a requirement for the benefit of the former spouse or children of the marriage do not exist at the decedent's death;

(d) If, under the terms of the decree of dissolution or declaration of invalidity, the decedent could not have unilaterally terminated or modified the ownership of, or the disposition at the decedent's death under, the asset;

(e) If the instrument directing the disposition of the asset at death is governed by the laws of a state other than Florida;

(f) To an asset held in two or more names as to which the death of one co-owner vests ownership of the asset in the surviving co-owner or co-owners; or

(g) If the decedent remarries the person whose interest would otherwise have been revoked hereunder and the decedent and that person are married to one another at the decedent's death.

(5) In the case of an asset described in subsection (3)(a), (b) or (c), unless payment or transfer would violate a court order directed to, and served as required by law on, the payor:

(a) If the governing instrument does not explicitly specify the relationship of the beneficiary to the decedent, or if the governing instrument explicitly provides that the beneficiary is not the decedent's spouse, the payor is not liable for making any payment on account of, or transferring any interest in, the asset to the beneficiary.

(b) As to any portion of the asset required by the governing instrument to be paid after the decedent's death to a primary beneficiary explicitly designated in the governing instrument as the decedent's spouse:

1. If the death certificate states that the decedent was married at his or her death to that spouse, the payor is not liable for making a payment on account of, or for transferring an interest in, that portion of the asset to such primary beneficiary.

2. If the death certificate states that the decedent was not married at his or her death, or if the death certificate states that the decedent was married to a person other than the spouse designated as the primary beneficiary, the payor is not liable for making a payment on account of, or for transferring an interest in, that portion of the asset to a secondary beneficiary under the governing instrument.

3. If the death certificate is silent as to the decedent's marital status at the time of his or her death, the payor is not liable for making a payment on account of, or for transferring an interest in, that portion of the asset to the primary beneficiary upon delivery to the payor of an affidavit validly executed by the primary beneficiary in substantially the following form:

STATE OF _________

COUNTY OF ____________

Before me, the undersigned authority, personally appeared (name of affiant) ("Affiant"), who swore or affirmed that:

1. (Name of decedent) ("Decedent") died on (date).

2. Affiant is a "primary beneficiary" as that term is defined in Section 732.xxx(1)(f), Florida Statutes. Affiant and Decedent were married on (date of marriage), and were legally married to one another on the date of the Decedent's death.

____

(Affiant)

Sworn to (or affirmed) and subscribed before me this ____ day of (month), (year), by (name of person making statement)

(Signature of Notary Public-State of___________________)

(Print, Type or Stamp Commissioned name of Notary Public)

Personally known OR Produced Identification) (Type of Identification Produced).

4. If the death certificate is silent as to the decedent's marital status at the time of his or her death, the payor is not liable for making a payment on account of, or for transferring an interest in, that portion of the asset to the secondary beneficiary upon delivery to the payor of an affidavit validly

executed by the secondary beneficiary affidavit in substantially the following form:

STATE OF _________

COUNTY OF ____________

Before me, the undersigned authority, personally appeared (name of affiant) ("Affiant"), who swore or affirmed that:

1. (Name of decedent) ("Decedent") died on (date).

2. Affiant is a "secondary beneficiary" as that term is defined in Section 732.xxx(1)(g), Florida Statutes. On the date of the Decedent's death, the Decedent was not legally married to the spouse designated as the "primary beneficiary" as that term is defined in Section 732.xxx(1)(f), Florida Statutes.

____

(Affiant)

Sworn to (or affirmed) and subscribed before me this ____ day of (month), (year), by (name of person making statement)

(Signature of Notary Public-State of________________)

(Print, Type or Stamp Commissioned name of Notary Public)

Personally known OR Produced Identification) (Type of Identification Produced).

(6) In the case of an asset described in subsection (3)(d) or (e), the payor is not liable for making any payment on account of, or transferring any interest in, the asset to any

beneficiary.

(7) Subsections (5) and (6) apply notwithstanding the payor's knowledge that the person to whom the asset is transferred is different from the person who would own the interest pursuant to subsection (2).

(8) This section does not affect the ownership of an interest in an asset as between the former spouse and any other person entitled to such interest by operation of this section, the rights of any purchaser for value of any such interest, the rights of any creditor of the former spouse or any other person entitled to such interest, or the rights and duties of any insurance company, financial institution, trustee, administrator or other third party.

(9) This section shall be effective for deaths occurring after _________________.

330466

REAL PROPERTY, PROBATE & TRUST LAW SECTION OF THE FLORIDA BAR
WHITE PAPER
ON
A PROPOSED BILL TO CREATE FLORIDA STATUTE § 732.xx
(Effect of Dissolution or Invalidity of Marriage on Disposition of Certain Assets at Death)

I. SUMMARY.

This proposal is intended to address a public policy concern and address an inequity within the Florida Statutes as they currently exist. There is currently no statutory presumption in regard to certain non-probate assets in situations where the decedent is divorced prior to date of death, whereas there is a statutory presumption for wills and trusts that when a decedent divorces prior to death but does not amend a will or trust to remove a former spouse, the former spouse is presumed to have predeceased the decedent. This proposed statute creates such a presumption for several types of non-probate assets.

II. CURRENT SITUATION.

It is currently estimated that approximately $14 trillion dollars are currently held in Individual Retirement Accounts and Employee Benefit accounts in this country, and an even larger amount of money is currently invested in life insurance contracts and similar arrangements. These accounts do not normally pass by way of will or trust, but rather by some form of beneficiary designation as provided for in the contract. These types of assets are more prevalent among individuals that do not seek out traditional estate planning. Many times the retirement accounts are funded by employers, as are some of the insurance policies. Pay-on-death and transfer-on-death accounts are a simple and inexpensive substitute for a will or trust. Both wills and trusts are provided protection under a statutory presumption created in F.S. § 737.106 for trusts, and F.S. § 732.507(2) for wills, revoking the rights of a former spouse by treating the former spouse as if he or she had predeceased the grantor or testator.

Many times, individuals holding only IRAs, retirement plan assets, insurance policies and annuities, which all pass by way of beneficiary designation, do not perceive a need for professional advice in regard to these assets, and do not seek out the help of an estate planning attorney or financial planner. A search of Florida case law reveals a prolific number of cases concerning these types of accounts, predominantly regarding disputes over beneficial rights in such accounts in situations where the decedent owned an interest in such accounts, divorced, and then subsequently died without changing the beneficiary designation to remove the former spouse. In some instances, individuals take a "pro se" approach to estate planning insofar as pay-on-death and transfer-on-death accounts are established intentionally to avoid the perceived expense and delay inflicted by the probate process. It could be argued or debated that a failure to change a beneficiary or pay-on-death designation could be attributed to poor planning or no planning on the part of the decedent, misunderstanding of the requirements to effect such a change, an oversight, an error, bad timing or, in the extreme, bad legal advice. Regardless of the cause, the intended beneficiaries of such accounts are the individuals being harmed by a lack of consistent treatment between classes of assets within the Florida statutes, and it could be argued

that the only residents of Florida that are afforded protection are those that seek out the help of an attorney to draft a will or trust.

Florida Case Law

The leading case in Florida in this regard is *Cooper v. Muccitelli,* 682 So. 2d 77, 78 (Fla. 1996). This case involved life insurance proceeds. The spouses had divorced, and then the husband changed one of the policies to reflect his sister as the beneficiary, but died without changing the beneficiary designation on the second policy to someone other than his former spouse. The Appellate Court certified a question to the Florida Supreme Court regarding the Court's holding that, without specific reference in a property settlement to life insurance proceeds, the beneficiary of the proceeds is determined by looking only to the insurance contract. The Florida Supreme Court examined the dissolution terms as well as the insurance documentation. It determined that the husband was free to name anyone he liked as beneficiary of the insurance policy and that the instructions were clear as to how to accomplish a change. He did not take any steps to effectuate a change on the second policy prior to his death and, therefore, the former spouse remained as the beneficiary. The Court said:

> "The analysis that the general language in the separation agreement trumps the specific language in the policy would place the insurance carrier in an impossible position – the carrier could never be certain whom to pay in such a situation without going to court, in spite of what the policy said or how clearly it was worded." Id. at 79.

It is clear that this situation may be avoided with specific language in the settlement agreement, although there are various cases that address what language is sufficient. Recent Florida cases include:

Vaughan v. Vaughan (741 So.2d 1221) Fla. App. 2 Dist., 1999 – Decedent's daughter sought declaratory relief to determine distribution of proceeds of decedent's life insurance policy and his individual retirement account. Decedent's former wife filed a counterclaim contending she was entitled to the entire proceeds of the insurance policy and to the IRA funds free of any claims of the daughter. The former spouse was named as the beneficiary on the life insurance policy and the IRA. The Court ruled that the wife was not entitled to the IRA, because the settlement agreement specifically referred to her forfeiture of rights in the IRA, but the Court ruled that the former spouse was entitled to the life insurance proceeds because the life insurance was not specifically mentioned.

In Re Estate of Dellinger (760 So.,2d 1016) Fla.App. 4 Dist., 2000 – In an action between the former wife, who was named as beneficiary of the decedent's IRA, and the personal representative of the decedent's estate, the lower court entered an order in favor of the estate. The former wife appealed. 4th DCA found in favor of the former spouse because the settlement agreement executed by the decedent and the former wife did not reference the IRA.

Luszcz v. Lavoie (787 So.2d 245) Fla.App. 2 Dist., 2001 – The personal representative of the decedent's estate brought an action against the former husband, seeking repayment to the estate

of funds the husband received as beneficiary of the wife's IRA. The 2nd DCA held that, because the settlement agreement did not call for a change of beneficiary on the IRA, and there was no specific release of claims, the husband was entitled to the IRA proceeds. The dissenting judge in this case made the following observation:

> "The Florida Legislature has thus expressed the public policy of this state with regard to inheritance and trust rights of former spouses. I would have concluded that the courts had fashioned a similar rule, so that when assets are distributed by a final judgment of dissolution, the final judgment controls over the beneficiary designation unless expressly provided otherwise. In today's opinion, however, this court reaches a contrary conclusion. Thus, the legislature may wish to consider enacting a law similar to sections 732.507 and 737.106 to cover assets passing outside an estate or trust." Id. at 250.

The only other Florida case more recent than Luszcz is the case of *Smith v. Smith*, (919 So.2d 525), Fla.App. 5 Dist., 2005. In the Smith case, the fact pattern is very familiar. The spouses divorce, and sign a marital settlement agreement, in which the wife waives all rights and responsibilities regarding certain assets, including life insurance policies, an IRA and an interest in a retirement plan. Not only did this court not follow the Luszcz case, but this court also receded from the Vaughan case. The Court determined that the insurance proceeds should go to the former wife, because she had not waived her right to the *proceeds* in the policies. The Court further determined that the waiver of rights in the retirement plan fell short of an effective ERISA waiver, therefore making it payable to the former spouse. Finally, the Court determined that the IRA should also go to the former spouse because an IRA is a contract with a third party. The Court goes on to say that IRAs should be payable to the beneficiary named unless changing the beneficiary designation is a condition of the dissolution agreement.

It is apparent from this sampling of holdings that the prospects of a decedent's assets ending up in the hands of the intended beneficiary is dependent not only upon the type of assets involved (probate versus non-probate) but also depends in large part upon which DCA the case will be filed in.

Other States

Other states have the same type of case law history. A listing of some recent cases in this regard would include:

Pardee v. Pardee, (112 P,3d 308), Okla.Civ.App. Div. 2, 2004;
In re Estate of Sbarra, (17 A.D.3d 975), N.Y.S.2d 479, N.Y. 2005;
Foster v. Hurley, (444 Mass. 157), Mass., 2005;
Stephenson v. Stephenson, (163 Ohio App.3d 109), Ohio App.9 Dist., 2005;
In re Estate of Freeberg, (130 Wash.App., 202, 122 P.3d 741), 2005;
In re Estate of Wellshear, (142 P.3d 994), Okla.Civ. App.Div. 4, 2006.

The one thing all of the above cases have in common is a dispute between the estate or

beneficiaries of the decedent, and a former spouse, over insurance proceeds, retirement accounts or IRAs. The holdings in all of the above cases vary, much as they do here within the state of Florida. In some cases, more weight is given to the contractual agreement, in other cases the intent of the decedent is taken into account. UPC section 2-804 provides a model divorce revocation statute, which has been followed so far by Colorado, Utah, Wisconsin, Arizona, Washington, Michigan, Minnesota, Montana, New Mexico, South Dakota and North Dakota. States that have enacted statutes that do not completely follow the UPC include Ohio, Pennsylvania, and Texas. Our proposed statute is loosely modeled after the UPC, but specifically identifies the types of interests that the statute is intended to cover.

Potential problems

There are two potential problems with regard to a statute of this nature. The first potential problem involves the pre-emption clause contained within the Employee Retirement Income Security Act of 1974 (ERISA). The pre-emption clause operates in such a way that state law cannot override or dictate the administration of a plan that is covered by ERISA. In regard to the proposed statute at hand, the only type of account that this would effect is a retirement plan that would fall within the scope of ERISA. The proposed statute provides an exception in regard to revocation "to the extent that controlling federal law provides", and therefore should not be perceived to attempt to have the dreaded "impermissible connection with ERISA plans" alluded to in the Egelhoff case. **Egelhoff v. Egelhoff** (121 S. Ct. 1322), U.S. Wash., 2001.

The other potential problem has to do with constitutional protection of contractual rights. Although there does not appear to be a clear consensus among other states of the correct approach, the biggest potential problem appears to occur when states have attempted to retroactively apply a statute, such as the one proposed here. So long as the beneficiary or pay-on-death designation is in place prior to the enactment of the statute, the party to the contract has not had any right impaired. The current draft of this statute does not contemplate retroactive application. The majority of states also seem to indicate that a beneficiary is not a party to a contract and has merely expectancy in an inheritance. Additionally, there has always been an exception available in regard to the contract clause when the contemplated action is in furtherance of public policy. In furtherance of public policy, the proposed revocation statute would actually complement and support the augmented elective share statute insofar as the new augmented estate includes the assets contemplated by this proposed statute. In a situation where a former spouse is still named as a beneficiary and there is a current spouse of the decedent who subsequently files for an elective share, the proposed statute would support the public policy argument underlying the need for an elective share to protect spousal rights.

III. EFFECT OF PROPOSED CHANGES.

The proposed legislation is designed to provide a means for determining the rightful beneficiary or, in the alternative, provides a basis for a cause of action for the rightful beneficiary in the following manner:

A. Purpose – The purpose of this proposed statute is to create a presumption, in Section 2, that the former spouse predeceased the decedent, subject to certain exceptions.

B. Scope – The intended scope of this statute is to cover life insurance policies, annuities and similar contracts; employee benefit accounts; individual retirement accounts; pay-on-death accounts, and transfer-on-death accounts. Section 3 specifies the type of assets, held by a Florida resident at the time of their death, subject to this statute. Section 4 addresses the exceptions. Mindful of the pre-emption clause of the constitution, this statute is not intended to supersede any governing federal law that would otherwise control, nor does it apply if the governing document expressly provides that the interest will be payable to the designated former spouse regardless of dissolution or invalidity of the decedent's marriage. This statute will not apply if a court order or decree required the decedent to maintain the asset for benefit of the former spouse of children of the marriage, nor will this apply if the decedent did not have the ability to unilaterally change the beneficiary or pay-on-death designation. This statute is not intended to cover any agreements that are otherwise governed by state law other than Florida, and this statute will also not apply to jointly owned accounts. This statute will not preclude a former spouse that has remarried the decedent and is married to the decedent at time of death from receiving benefits, nor does this statute apply to any asset that would otherwise be conveyed through the decedent's will or trust.

C. Procedures for determining beneficiary – In section 5, the statute sets forth procedures for determining who the proper payee of the account should be. If the governing document does not specify the relationship between the designated beneficiary and the decedent, the payor may pay the account to the named beneficiary without further inquiry. If the governing document specifies the beneficiary to be the spouse of the decedent, the payor must first look to the death certificate. If the death certificate states that the decedent was married to the named beneficiary at the time of death, the payor may pay out the benefits to the named beneficiary. If the death certificate states that the decedent was not married, or was married to another individual other than the person specified on the account as the spouse, the payor may pay the interest out to the secondary beneficiary under the governing document. If the death certificate is silent as to marital status of the decedent, then there are two form affidavits provided in the statute. One affidavit is for execution by someone alleging to be the surviving spouse of the decedent. If the alleged surviving spouse executes the affidavit, stating that they are the surviving spouse of the decedent and that the decedent was married to them at the time of the decedent's death, the payor may pay the account to such individual without further inquiry. Similarly, the other affidavit is for execution by a secondary beneficiary, stating that the primary beneficiary was not married to the decedent at the time of the decedent's death. The payor may also pay out the interest to the secondary beneficiary upon receipt of a properly

executed affidavit. In regard to pay-on-death and transfer-on-death accounts, the payor may pay out those interests without further inquiry.

D. No liability for Payor - This statute is not intended to create any additional liability for any payor. In regard to why affidavits are required for certain accounts and not others, it was determined in the drafting of this statute that certain due diligence would already be required on the part of the payor with regard to life insurance, annuities and similar arrangements, employee benefit accounts, and individual retirement accounts. Such due diligence was not already required for pay-on-death or transfer-on-death accounts.

E. Creation of the basis for a cause of action – The primary purpose of this statute is to create the basis for a cause of action for accounts that are paid out to former spouses as opposed to intended beneficiaries. A general cause of action is intended to be created by the presumption that the former spouse was not the intended beneficiary, with the exception of the situations listed in Section 4. A specific cause of action may be created if an affiant makes a false statement with regard to the marital status of the decedent.

IV. FISCAL IMPACT ON STATE OR LOCAL GOVERNMENTS.

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

V. CONSTITUTIONAL ISSUES.

No constitutional issues are expected to arise under the proposal.

State of Florida, July Term, A.D. 2008

Opinion filed September 3, 2008.

Not final until disposition of timely filed motion for rehearing.

No. 3D04-3070

Lower Tribunal No. 04-2930

Edward T. Cutler

Appellant,

vs.

Cynthia Cutler

In Re: The Estate of Edith Alice Cutler,

Appellee.

An Appeal from the Circuit Court for Miami-Dade County, D. Bruce Levy, Judge.

Billbrough & Marks, and G. Bart Billbrough and Geoffrey B. Marks, for appellant.

Brian R. Hersh and Andrew Teschner; Shutts & Bowen and William Jay Palmer, for appellee.

Goldman Felcoski & Stone and Robert W. Goldman (Naples); Brigham and Moore and John W. Little, III (West Palm Beach), as Amicus Curiae.

ON MOTION FOR REHEARING, REHEARING *EN BANC*, CLARIFICATION, AND CERTIFICATION

Before GERSTEN, C.J., and COPE, GREEN, RAMIREZ, WELLS, SHEPHERD, SUAREZ, CORTIÑAS, ROTHENBERG, LAGOA and SALTER, JJ.

WELLS, Judge.

Appellants seek rehearing, rehearing *en banc,* clarification, and certification of this Court's opinion filed February 28, 2007. We grant the motion for rehearing *en banc,* withdraw our prior opinion, and substitute the following modified opinion in its stead.

I. PROCEDURAL BACKGROUND

Edward T. Cutler appeals from an order declaring a devise of property to Cynthia Cutler, his sister, to be homestead property and exempt from the decedent's debts. While we affirm that portion of the order confirming that the devised property retained its homestead character even though titled in a trust at the time of the decedent's death, we reverse that portion of the order finding it exempt from the decedent's debts.

II. FACTS

In October 2003, approximately eight months before her death, Edith Cutler created a land trust for estate planning purposes. Edith, a widow with two adult children, named herself and her two children, Edward and Cynthia, co-trustees of the trust and conveyed her residence and an adjacent vacant lot to the trust subject to a life estate in herself. Edith was the sole beneficiary of this trust and retained the right to withdraw and appoint the principal of the trust to or for her benefit at any time. The trust also provided that the remainder interests in these properties, which were titled to the trust, would be distributed to Edith's estate upon her death:

[T]he entire remaining Trust Estate, including without limitation any accumulated income, shall be distributed to the Estate of the Settlor to be administered and distributed as any other part of the Estate of the Settlor.

On the same day on which this trust was created, Edith deeded her residence and the adjacent vacant lot to it. She also executed a will, in which she specifically devised the residence titled to the trust to her daughter, Cynthia; she specifically devised the adjacent vacant lot titled

to the trust to her son, Edward. She also directed that her debts be satisfied equally from both properties should the funds in her estate be insufficient to satisfy those debts:

[Article VI: I leave] all of my right, title and interest in the home in which I now live . . . to my daughter, CYNTHIA . . . .

[Article VII: I leave] all of my right, title and interest in the .. . . the vacant real property located next to my home in which I now live . .. .. to my son, EDWARD . . . .

[Article XII: I direct that] ***[a]ll claims, charges and allowances*** against, and costs of administration of [] my Estate . . . shall be paid out of the residuary portion of my Estate to the extent that gift suffices. The balance of such items ***shall be paid out of and shall reduce equally the gifts under Article VI (the gift of my home to Cynthia . . .) and Article VII (the gift of the vacant real property next to my home to Edward .. . .) herein***. *(*Emphasis added).

On June 6, 2004, Edith died. Because estate funds were insufficient to satisfy all of Edith's creditors, Edward sought to have the two parcels devised to Edith's estate abate "equally" in accordance with his mother's express wishes. Cynthia objected. The trial court concluded that the residence retained its homestead status while titled in the trust and passed to Cynthia where it remained exempt from Edith's creditors after her death. Edward appealed. While we agree that the residence retained its homestead status even though titled in the trust, we do not agree that it passed to Cynthia free of the obligations Edith validly impressed upon it.

III. DISCUSSION

A. The property titled in the trust retained its homestead status.

To qualify for protection under Article X, section 4 of the Florida Constitution, a parcel of property must meet constitutionally defined size limitations and must be owned by a natural person who is a Florida resident who either makes or intends to make the property that person's residence. Art. X, § 4(a), 4(a)(1) Fla. Const. (1985); Estate of Van Meter, 214 So. 2d 639 (Fla. 2d DCA 1968), approved 231 So. 2d 524 (Fla. 1970) (permanent "residence"); Raulerson v. Peeples, 81 So. 271 (Fla. 1919) ("owner"). See generally John F. Cooper and Professor

Thomas C. Marks, Jr., Florida Constitutional Law: Cases and Materials, 618-619 (4th ed. 2006).

Edward claims that the residence devised to Cynthia does not qualify as homestead property because it was not owned by a "natural person" at the time of Edith's death. We disagree.

This court, and other district courts of appeal as well, have confirmed that property held in trust may be impressed, legally speaking, with the character of homestead. Callava v. Feinberg, 864 So. 2d 429, 431 (Fla. 3d DCA 2003) (stating "[t]he constitutional provision does not designate how title to the property is to be held") (internal citations omitted), rev. denied, 879 So. 2d 621 (Fla. 2004); HCA Gulf Coast Hosp. v. Estate of Downing, 594 So. 2d 774, 776 (Fla. 1st DCA 1991) (devise of house to spendthrift trust found to be irrelevant for purposes of homestead under Article X, section 4 of the Florida Constitution (2003)).

This court has also confirmed that the Florida Constitution does not limit the types of interests that may qualify for homestead protection. See Callava, 864 So. 2d at 431 (confirming that the Florida Constitution does not limit the estate that must be owned to qualify for homestead protection). As our sister court in Southern Walls, Inc. v. Stilwell Corp., 810 So. 2d 566 (Fla. 5th DCA 2002), has stated:

The Constitution limits the homestead land area that may be exempted, but it does not define or limit the estates in land to which homestead exemption may apply; therefore, in the absence of controlling provisions or principles of law to the contrary, the exemptions allowed by section 1, article 10 [now Article X, section 4], may attach to any estate in land owned by the head of a family [now natural person] residing in this state, whether it is a freehold or less estate, if the land does not exceed the designated area and it is in fact the [natural person's] home place.

S. Walls, Inc., 810 So. 2d at 570 (quoting Menendez v. Rodriguez, 106 Fla. 214, 221, 143 So. 223, 226 (1932) (Whitfield, J., concurring)).

Based on the terms of the trust involved in this case, the remainder estate in Edith's residence titled in Edith's trust was correctly determined by the lower court to qualify for homestead protection.

B. The constitutional exemption from creditors' claims did not inure to Cynthia's benefit following Edith's death.

While we agree with the trial court's conclusion that the property devised to Cynthia was Edith's homestead, we cannot agree that the constitutional exemption from creditors' claims inured to Cynthia's benefit.

It is a cardinal rule of testamentary construction that "the primary objective in construing a will is the intent of the testator." McKean v. Warburton, 919 So. 2d 341, 344 (Fla. 2005) ("a person can dispose of his or her property by will as he or she pleases so long as that person's intent is not contrary to any principle of law or public policy" (citing Mosgrove v. Mach, 182 So. 786, 791 (1938))); Marshall v. Hewett, 24 So. 2d 1, 2 (Fla. 1945) ("In will construction the primary objective of the courts is to ascertain and give effect to the intentions of the testator. In the ascertainment of such intention the will in its entirety will be considered, and when once the intention has been discovered the wording of the will will be given such liberal construction and interpretation as will effectuate the intention of the testator so far as may be consistent with established rules of law.") (citation omitted); Phillips v. Estate of Holzmann, 740 So. 2d 1, 2 (Fla. 3d DCA 1998) ("The polestar in construing any will is to ascertain the intent of the testator.").

In this case, the trust agreement expressly stated that the corpus of the trust, that is, the interests in Edith's residence and the adjacent vacant lot, were to pass to, and be administered as part of, her estate upon her death. Edith's will provides that the interest in her residence held by the trust should be passed to her daughter and that the interest in the adjacent vacant lot should pass to her son. She also directed that her debts be satisfied equally from both properties should the funds in her estate be insufficient to satisfy those debts.

In City National Bank of Florida v. Tescher, 578 So. 2d 701, 703 (Fla. 1991), the Florida Supreme Court held that property protected under article X, section 4(c) may be devised in a will to anyone if the owner is survived by neither spouse nor minor child. Warburton takes Tescher one step further and holds that homestead property not devised to a specific beneficiary passes to the residuary and retains article X, section 4 protection if the residuary beneficiaries are also qualified for protection. Warburton, 919 So. 2d at 341; see also Snyder v. Davis, 919

So. 2d at 347. 699 So. 2d 999, 1003-04, 1005 (Fla. 1997) (confirming that homestead property not devised specifically becomes part of the residuary and will continue to be protected under article X, section 4 if the residuary beneficiary is also entitled to protection). Warburton also confirms that a testator may direct that homestead property be used after death in the same manner the testator could have used such property while alive. Warburton

This is not a recent development. It has long been recognized that the owner of homestead property may devise that property in a manner that terminates the protections accorded by article X, section 4. In Estate of Price v. West Florida Hospital., Inc., 513 So. 2d 767, 767 (Fla. 1st DCA 1987), the court confirmed that where a testator directs the sale of homestead property and distribution of the proceeds, the proceeds lose their homestead character and become part of the estate subject to administrative costs and creditors' claims. As the court explained, this is because the same result would have obtained had the testator sold the property and either gifted or used the proceeds while alive. Id. ("[I]f Mrs. Price had sold her house during her lifetime and distributed the proceeds to her two children, those proceeds would unquestionably lose their homestead character and would be subject to the claims of her creditors."); see Knadle v. Estate of Knadle, 686 So. 2d 631, 632 (Fla. 1st DCA 1997) (holding that because a will specifically directed that homestead property be sold and the proceeds placed in the residue for distribution, 766 So. 2d 1087, 1088 (Fla. 3d DCA 2000) (confirming that where a will directs that homestead property be sold and the proceeds distributed, the proceeds lose their homestead protection). along with other assets, it lost its homestead character); see also Thompson v. Laney

Although Edith did not direct that her home be sold, she did direct, in a specific manner, that it be used to satisfy her debts. This was the equivalent of ordering it sold and the proceeds distributed to pay debts, actions which Price and its progeny confirm results in loss of homestead protections.[1] While the benefits of homestead protections vest in a qualified beneficiary at the moment of a testator's death,[2] the property in this case passed into the beneficiary's hands impressed with the obligation to pay the testatrix's debts, an obligation that deprived the property of homestead protection under article X, section 4. to pay the

claims and expenses of the grantor's estate, does not subject protected homestead property to creditors claims).

This is, of course, wholly consistent with article X, section 4 which expressly confers the power on the owner of homestead property to sell, mortgage, or give it away. See Art. X, § 4(a)(2)(c), Fla. Const. ("The owner of homestead real estate, joined by the spouse if married, may alienate the homestead by mortgage, sale or gift and, if married, may by deed transfer title to an estate by the entirety with the spouse."). If a homestead owner (with no spouse and children) can sell, mortgage or give homestead property away while alive and use the proceeds from any such transaction as he or she sees fit, that same owner may give the property away upon death and order it to be used to satisfy debts even if such a devise means the property will no longer enjoy homestead protection.

In this case, rather than selling or mortgaging her homestead interests while alive and using the funds recognized to pay debts, Edith devised her homestead property to her daughter and expressly directed that this devise be used to satisfy a portion of her debts. This devise is wholly consistent with Tescher, Snyder, and Warburton and with article X, section 4 of the Florida Constitution and should be given effect.

IV. CONCLUSION

In sum, if it was legally permissible for Edith to have left her properties to someone outside of her family not qualified for homestead protection, which would make this property subject to payment of debts, we see no reason why she could not lawfully leave it to her heirs with the provision that the properties be available to satisfy her debts. While we are hard put to imagine a situation where the desire to satisfy one’s debts is deemed anything but laudable, we reach our conclusion today not out of concern for Edith’s creditors, but out of consideration for Edith’s legal right to have her wishes followed in the absence of any constitutional impediment.[3] See Tescher, 578 So. 2d at 703. We therefore grant rehearing *en banc* and reverse that part of the decision below concluding that the constitutional exemption from the claims of decedent’s creditors inured to the property Edith Alice Cutler devised to Cynthia Cutler.

COPE, GREEN, RAMIREZ, SUAREZ, CORTIÑAS, ROTHENBERG and SALTER, JJ., concur.

1 See generally Direction in will for payment of debts and expenses as subjecting exempt homestead to their payment, 103 A.L.R. 257 (1936) ("Express directions in a will for the payment of the testator's debts before devises shall take effect generally result in the subjection of a devised homestead, which would otherwise be exempt, to the payment of such debts.").

2 See In re Estate of Hamel, 821 So. 2d 1276, 1279-80 (Fla. 2d DCA 2002) (confirming that the proceeds from the sale of homestead property completed after a testator's death remained protected in the hands of adult children to whom the property was devised in the residuary estate and observing that "[g]enerally, property rights passing by virtue of the death of a person vest at the time of death. The same has been held true for homestead. If the property is homestead on the date of death, the homestead protection is impressed upon the land and the protection from creditors' claims inures to the benefit of the heirs to whom the property is devised.") (citations omitted); Thompson, 766 So. 2d at 1088 (confirming that the recipient of a specific devise of homestead property "was entitled to sell the homestead property and its contents and keep the proceeds of the sale [secure from creditors]," because the will had not "specifically require[d] that the property be sold"); see also Engelke v. Estate of Engelke, 921 So. 2d 693, 696-97 (Fla. 4th DCA 2006) (holding that "a general direction" in a trust document

3 We find this analysis consistent with the Supreme Court's recent decision in Chames v. DeMayo, 32 Fla. L. Weekly S820 (Fla. Dec. 20, 2007). In DeMayo, the Court decided that a client's waiver of the constitutional homestead exemption in a retainer agreement with a law firm, which allowed the law firm to enforce a charging lien against all of the client's property, including his homestead, was unenforceable. The Court came to this conclusion in good measure based on the reasonable fear that such a waiver could unwittingly become an everyday occurrence, in effect eviscerating this important right. Thus, the Court observed in part that "[w]hile the exemption can be waived in a mortgage, for over a hundred years we have held that it cannot be waived in an unsecured agreement." DeMayo, 2007 WL 4440212 at *1. DeMayo relied in part on Carter's Administrators v. Carter, 20 Fla. 558, 570 (1884), wherein the Court many years ago observed that "the very nature of the transaction [a mortgage or bill of sale] implies the exercise of discretion and the contemplation of inevitable consequences." It is clear to us that the execution of a will, with its statutorily imposed safeguards, demonstrates that same "contemplation of inevitable consequences." Thus, when a waiver of homestead exemption is expressed in a will, and the rights of neither a spouse nor a minor child are at issue, that intentional waiver should be given effect.

RPPTL 2008-2009 CLE Seminar Schedule

DATE	EVENT	LOCATION
October 16-17, 2008	Real Property Seminar # 1 [Real Estate Ethical Fraud & Other Fairy Tales - Silvia Rojas]	Miami/Tampa
October 24, 2008	Probate Seminar # 1 [What Every Estate Planner…Generation Skipping Tax -- Craig Mundy]	Orlando
November 6-7, 2008	Probate Seminar # 2 [Guardianship Law & Procedure Seminar -- David Carlisle, Debra Boje]	Ft. Laud/Tampa
November 12 - 13, 2008	Probate Seminar # 3 [Asset Protection in Florida -- Jerry Wolf]	
December 5, 2008	Probate Seminar # 4 [Trust Law Seminar / Tallahassee webcast -- Tae Bronner]	
January 23, 2009	Real Property Seminar # 2 [RPPTL Foreclosure & Creditor's Rights -- Program Chair ?]	Tampa
February 12-13, 2009	Probate Seminar #5 [Annual Trust & Estate Symposium - Program Chair ?]	Ft. Laud/Tampa
March 5-7, 2009	Real Property Seminar # 3 [2nd Annual Construction Law Institute - Lee Weintraub]	Orlando
March 5-7, 2009	Real Property Seminar # 4 [Construction Law Cert Review - Fred Dudley]	Orlando
March 19-20, 2009	Probate Seminar # 6 [Probate Law & Procedure Seminar -- Program Chair ?]	Ft. Laud/Tampa
April 3-4, 2009	Real Property Seminar # 5 [Real Estate Cert Review -- Rob Stern]	Orlando
April 3-4, 2009	Probate Seminar # 5 [Wills, Trusts & Estates Cert Review -- Marilyn Polson]	Orlando
April 23, 2009	Real Property Seminar # 6 [The Ins & Outs of Florida Condominium Law -- Rob Freedman, S. Mezer]	Tampa
April 24, 2009	Real Property Seminar # 7 [Condominium Developer's Attorney Seminar - R Freedman, S Mezer]	Tampa
June 18-21, 2009	RPPTL Attorney/Trust Officer Liaison Conference	Palm Beach

RPPTL 2008-2009 CLE Seminar Schedule

DATE	EVENT	LOCATION
July 4, 2008	Independence Day Holiday	
July 24-27, 2008	RPPTL Executive Council Meeting & Legislative Update	Palm Beach
September 1, 2008	Labor Day Holiday	
September 10-13, 2008	The Florida Bar General Meetings	Tampa
September 18-21, 2008	RPPTL Executive Council Meeting	Key Biscayne
September 30, 2008	Rosh Hashanah Holiday	
October 9, 2008	Yom Kippur Holiday	
October 16-17, 2008	Real Property Seminar # 1 [Real Estate Ethical Fraud & Other Fairy Tales - Silvia Rojas]	Miami/Tampa
October 23-26, 2008	ACREL Meeting	California
October 23-27, 2008	ACTEC Fall Meeting	Georgia
October 24, 2008	Probate Seminar # 1 [What Every Estate Planner…Generation Skipping Tax -- Craig Mundy]	Orlando
November 11, 2008	Veterans Day Holiday	
November 6-7, 2008	Probate Seminar # 2 [Guardianship Law & Procedure Seminar -- David Carlisle, Debra Boje]	Ft. Laud/Tampa
November 12 - 13, 2008	Probate Seminar # 3 [Asset Protection in Florida -- Jerry Wolf]	
November 27-28, 2008	Thanksgiving Holidays	
December 4-7, 2008	RPPTL Executive Council Meeting	Tallahassee
December 5, 2008	Probate Seminar # 4 [Trust Law Seminar / Tallahassee webcast -- Tae Bronner]	
December 25-26, 2008	Christmas Holidays	
January 1, 2009	New Year's Day Holiday	
January 14-17, 2009	The Florida Bar Mid-Year Meeting	Miami
January 19, 2009	Martin Luther King Jr. Holiday	
January 23, 2009	Real Property Seminar # 2 [RPPTL Foreclosure & Creditor's Rights -- Program Chair ?]	Tampa
January 24-27, 2009	The Florida Bar Annual Meeting	Orlando
Jan 29 - Feb 6, 2009	RPPTL Annual Out-of-State Executive Council Meeting	Quito/Galapagos
February 12-13, 2009	Probate Seminar #5 [Annual Trust & Estate Symposium - Program Chair ?]	Ft. Laud/Tampa
February 16, 2009	President's Day Holiday	
March 4-9, 2009	ACTEC Annual Meeting	California
March 5-7, 2009	Real Property Seminar # 3 [2nd Annual Construction Law Institute - Lee Weintraub]	Orlando
March 5-7, 2009	Real Property Seminar # 4 [Construction Law Cert Review - Fred Dudley]	Orlando
March 19-20, 2009	Probate Seminar # 6 [Probate Law & Procedure Seminar -- Program Chair ?]	Ft. Laud/Tampa
March 26-29, 2009	ACREL Meeting	Puerto Rico
April 3-4, 2009	Real Property Seminar # 5 [Real Estate Cert Review -- Rob Stern]	Orlando
April 3-4, 2009	Probate Seminar # 5 [Wills, Trusts & Estates Cert Review -- Marilyn Polson]	Orlando
April 23, 2009	Real Property Seminar # 6 [The Ins & Outs of Florida Condominium Law -- Rob Freedman, S. Mezer]	Tampa

April 24, 2009	Real Property Seminar # 7 [Condominium Developer's Attorney Seminar - R Freedman, S Mezer]	Tampa
May 7-9, 2009	The Fund Assembly	Orlando
May 21 - 24, 2009	RPPTL Executive Council Meeting & Convention	St. Petersburg
May 22, 2009	Real Property Seminar # 8 [RP Convention CLE Seminar]	St. Petersburg
May 22, 2009	Probate Seminar # 7 [Probate Convention CLE Seminar]	St. Petersburg
May 25, 2009	Memorial Day Holiday	
June 18-21, 2009	RPPTL Attorney/Trust Officer Liaison Conference	Palm Beach
June 24-27, 2009	ACTEC Summer Meeting	California

The Florida Bar

John G. White, III
President

John F. Harkness, Jr.
Executive Director

Jesse H. Diner
President-elect

July 28, 2008

John B. Neukamm, Chair
Real Property, Probate & Trust Law Section of The Florida Bar
Mechanik Nuccio Hearne & Wester P.A.
305 South Boulevard
Tampa, Florida 33606-2150

Re: Reactivation of 2006-08 Legislative Positions for 2008-2010 Biennium

Dear John:

On July 25, 2008 the Board of Governors of The Florida Bar considered your section's request for reactivation of various recognized legislative positions from the 2006-08 legislative biennium following their formal sunset pursuant to Standing Board Policy 9.20(d). The Board also acted on one entirely new position request as well.

Upon review of those requests, the BoG determined that they were consistent with Standing Board Policy 9.50 concerning section legislative activity and opted to not prohibit the RPPTL Section's advocacy of these matters for the 2008-2010 biennium. Per your request, this new and other newly reactivated positions will be officially published within the 2008-2010 Master List of Legislative Positions on The Florida Bar's website as reflected on the attached document.

As you may otherwise know, Bylaw 2-7.5 of the Rules Regulating The Florida Bar specifies that legislative action taken by a section shall be clearly identified as that of the section rather than The Florida Bar.

And, for the benefit of all involved in Bar legislative activities, the Office of Governmental Affairs maintains a listing of individuals who might be directly lobbying legislators on any section position. Our listing includes the names of all "contacts" listed on your original Legislative Position Request Form as well as the section chair and legislative chair. However, if you anticipate legislative visits or appearances by persons other than those cited above regarding any particular matter, please advise us as soon as possible.

If you have any questions or need further assistance, please do not hesitate to contact me.

Sincerely,

Paul F. Hill
General Counsel

Attachment

cc: Ed Burt Bruton, Jr., Section Legislation Committee Chair
Carmalita Hawkins, Staff Administrator

2006-08 SECTION LEGISLATIVE POSITIONS REQUESTED FOR REACTIVATION OR "ROLLOVER" IN 2008-10 + NEW POSITION 71

Real Property, Probate and Trust Law Section

1. Opposes any legislation limiting property owners' rights or limiting attorneys' fees in condemnation proceedings.

2. Opposes any efforts to enact a statutory will.

3. Supports a constitutional amendment removing the restriction on devise of homestead property; also to provide that homestead rights are limited to the head of a family with a surviving spouse or dependent heir.

4. Supports amendments to Chapter 718, *Florida Statutes*, Condominiums, and Chapter 719 *Florida Statutes*, Cooperatives, to require that engineers, architects and other design professionals and manufacturers warrant the fitness of the work they perform on condominiums or cooperatives.

5. Supports amendment to §695.26(3)(a), *Florida Statutes*, to provide that its requirements do not apply to instruments executed before July 1, 1995.

6. Opposes any portion of the National Association of Insurance Commissioners Title Insurers Model Act and Title Insurance Agent Model Act that may adversely affect Florida attorneys' ability to participate in real estate closing and the issuance of title insurance.

7. Supports amendment to Chapter 723, *Florida Statutes*, specifying that each mobile home owner/owners shall have only one vote at elections or meetings, and to allow association bylaws to specify less than a majority for a quorum.

8. Supports amendment to §162.09(3), *Florida Statutes*, to clarify the relative priority of recorded municipal code enforcement liens created pursuant to the Local Government Code Enforcement Boards Act.

9. Supports amendment to §673.3121, *Florida Statutes*, to provide a cross reference in it to §673.4111, *Florida Statutes*, stating that if an official check is not paid, then the person entitled to enforce the official check is entitled to compensation from the obligated bank for refusing to pay.

10. Supports legislation to amend the Baker Act to include a provision under which a guardian may request that the court grant the guardian the authority to involuntarily hospitalize a ward pursuant to the Baker Act.

11. Opposes efforts to create a lien on real property for work that does not add value to the property, and would permit liens against the property of a person other than the party owing a debt.

12. Opposes §718.1255, *Florida Statutes,* or targeted budget reductions or other governmental action having the purpose or effect or diminishing or eliminating the jurisdiction of the Arbitration Division of the Department of Business and Professional Regulation's Division of Land Sales.

13. Supports legislation to amend F.S. §733.2121(1) to delete the requirement that any notice to creditors state that claims must be filed against the estate within the two-year time period set forth in F.S. §733.710.

14. Supports legislation to amend F.S. §744.444(16) to allow a guardian, without court approval, to pay from the assets of the guardianship estate the costs and fees of persons -- including attorneys, auditors,

investment advisers or agents -- employed by the guardian to advise or assist the guardian in the performance of his or her duties.

15. Supports legislation to amend F.S. §394.467 to add as criteria for involuntary placement the substantial and imminent likelihood of inflicting serious emotional or psychological harm on another person, and the causation of significant damage to property in the recent past with substantial and imminent likelihood of doing so again.

16. Supports legislation to amend F.S. §725.06 to make contracts for indemnity for acts of omissions of an indemnitee unenforceable except in certain limited situations and/or to the extent of insurance coverage.

17. Supports the regulatory approval of a proposed ALTA Junior Loan Policy Form, but opposes legislation that would exclude from the statutory definition of title insurance the insuring of mortgage liens covering second mortgages and home equity line mortgages.

18. Opposes SB 2300 (condominium association pre-litigation disclosures) which imposes burdensome pre-suit disclosures for condominium homeowners associations members, but supports changes to mitigate some of these requirements.

19. Supports amendment of §55.141, *Florida Statutes*, to also allow the clerk of court to issue a satisfaction of judgment, rather than only the judgment holder

20. Supports legislation to repeal §734.1025, Florida Statutes, because the dollar amount for summary administrations found in § 735.201-2063, Florida Statutes, has been increased thus, making §734.102, Florida Statutes, duplicative.

21. Support legislation to amend §201.02, Florida Statutes, to clarify and better define the circumstances under which the documentary stamp tax will apply to instruments conveying real property to and from various entities.

22. Supports legislation to amend §558.001, Florida Statutes, relating to construction defects, to make compliance requirements more practical, clarifying vague provisions, and maintaining consistency with similar statutes enacted in other states.

23. Oppose legislative restrictions on condominium associations" rights to govern themselves and their own documents, but do not oppose further disclosure requirements to a purchaser concerning rental provisions.

24. Opposes proposed §518.117, Florida Statutes, and related amendments abrogating a trustee's duties of loyalty and duties of full and fair disclosure in connection with affiliated investments by a corporate trustee.

25. Opposes legislation requiring multiple disclosures by sellers of real property, creating contract rescission rights for buyers and seller liability for damages.

26. Supports legislation to preserve homeowner association governance and/or assessment regimes notwithstanding extinguishment of community covenants and restrictions by the Marketable Record Title Act.

27. Supports an amendment to F. S. 222.01 to provide persons with the same procedure for determination of real property homestead status against foreign judgments as currently is provided against domestic judgments.

28. Supports condominium unit owner's ability to exercise self-government and undertake fair and efficient community administration, including the exercise of basic contract and investment decisions.

29. Supports the revision of 718.117 F. S. process for terminating condominium property.

30. Supports amending 29.007 F. S. to provide authority to appoint and compensate attorneys and professional guardians to serve as guardian advocates and guardian ad litem for indigents in civil commitment and treatment proceedings in proceedings under the mental retardation statutes (ch. 393), Baker Act (ch. 394) and Marchman Act (ch. 397).

31. Supports amending §704.01(2) to provide landlocked landowners with a statutory way of necessity.

32. Opposes Section 2 of Senate Bill 298 creating §117.055, which requires that notaries keep a detailed journal of all notarial acts including: the date, time and type of notarial act; the date, type and description of each document; the name of the signer; and description of the evidence of identity.

33. Supports changes to the Florida Construction Lien Laws governing conditional payment bonds and changing procedures for determining whether a claim will be covered by such bonds.

34. Technical Assistance - The section does not oppose House Bill 113 as originally drafted, but favors additional changes to numerous construction bond and lien statutes.

35. Opposes legislation requiring parties to record notices, warnings or reports regarding the physical condition of land or improvements in the public records regarding the title to real property.

36. Opposes SB 1520's definition of "travel club" which would remove one type of timeshare program from the traditional regulatory supervision of the Department of Business and Professional Regulation.

37. Supports legislation to clarify the law to ensure that communications between a lawyer and client acting as a fiduciary in estate- and trust-related matters are privileged to the same extent as if the client were not acting as a fiduciary.

38. Opposes amendment to §733.302, F. S., to expand the class of non-residents which may serve as personal representative because of a concern that any addition to the class may subject the entire statute to a renewed constitutional challenge.

39. Supports the amendment of Chapter 713 F. S. to change seventeen (17) construction lien law statutes to clarify the statues and to conform to existing case law.

40. Supports the amendment of § 627.404 F. S. to make explicit the requirement of an insurable interest, detail those who may have an insurable interest in the life of another, clearly require the insured's consent to the purchase of a policy of insurance by another, and address the liability of the insurer in the absence of the necessary insurable interest.

41. Opposes proposed omnibus amendments to Florida Statutes Chapter 617, the Florida Not for Profit Corporation Act. The changes intended to facilitate to charitable corporate governance with voluntary membership would impair other non profit corporations' governance with required membership.

42. Supports legislation to maintain the integrity of the recording system in the State of Florida.

43. Supports limitation of creditor remedies against partner interest in general and limited liability partnerships and member interests in limited liability companies to charging liens and to prohibit foreclosure against such interests.

44. Supports legislation to provide that the charge by a condominium association or homeowners' association for an estoppel certificate is an obligation of the owner of the unit for whose benefit the estoppel certificate is requested and not the obligation of the closing agent; and to provide for enforcement of any assessment for the charge made for such an estoppel certificate.

45. Opposes HB 743 containing proposed changes to the Florida Trust Code that would erode Florida Consumer's rights by enlarging a corporate trustee's ability to engage in conflict of interest transactions with its own fiduciary accounts, providing a statute of repose and shortening the statute of limitations in circumstances where the trustee has failed to account and concealed its breach of trust from the beneficiaries, exonerating a co-trustee from liability for a directed co-trustee's breach of trust, and would enlarge the provisions concerning fiduciary exculpatory provisions compromised with the Florida Banker's Association last year.

46. Opposes changes to Florida Stature 732.103 that would extend the intestate distribution scheme to the level of the decedent's great-grandparents.

47. Supports legislation permitting consumers to negotiate rates for title insurance services within statutory parameters and suggests revisions to proposed legislation relating to such legislation.

48. Opposes the passage of Senate Bill 2004 and House Bill 1455.

49. Supports proposed amendments to Florida Statutes Chapter 718, the Condominium Act. The proposed changes are intended to clarify that changes to a developer prospectus' estimated operating budgets prepared in good-faith that are beyond the control of the developer do not trigger rescission rights under Section 718.503(1), Florida Statutes.

50. Supports legislation to permit condominium unit owners to further subdivide or partition their interest in the condominium and common elements appurtenant thereto pursuant to a sub-declaration of condominium, which subdivided units shall remain subject and subordinate to the existing declaration of condominium, provided such existing declaration of condominium allows for the subdivision.

51. Oppose HB 1437/SB1460, which would require a foreclosing creditor to notify the debtor that filing a bankruptcy petition before the foreclosure sale may permit the debtor to retain the property and reorganize the indebtedness.

52. Oppose the creation of "pilot" court divisions without funding, evaluation criteria, rules of procedure, and competency criteria for magistrates without consideration for current alternate dispute resolution processes.

53. Opposes a mandatory 90-day time extension for owners in community associations to pay liens and related attorneys' fees.

54. Opposes HB 1373 (2007) and SB 2816 (2007) because they contain amendments to community association regulations which are unconstitutional, impossible or impractical to implement, contradictory, and undermine the ability of volunteers to administer associations.

55. Supports legislation to amend §736.0802(10) F. S., to permit a trustee to use trust assets to pay attorneys' fees and costs to defend litigation involving an allegation of breach of trust unless a party obtains an order prohibiting the use of trust assets by showing a reasonable basis for the court to conclude that a breach of trust occurred.

56. Supports amendment of §739.102(8) F. S., to include the definition of "insolvent" solely for the purposes of the Florida Uniform Disclaimer of Property Interests Act.

57. Supports the adoption of §689.28 F. S. to provide that transfer fee covenants recorded after effective date do not run with the title to real property and are not binding on successor owners, purchasers or mortgagees.

58. Supports legislation to amend Chapter 765, Florida Statutes, to improve the law concerning advance directives and to integrate federal HIPPA privacy laws with Florida law.

59. Supports legislation to amend §733.604 Florida Statutes, to treat inventories which are filed with the

clerk of court in a probate proceeding in connection with the spousal elective share procedure the same as estate inventories in terms of not being subject to public inspection.

60. Supports legislation to provide for alienation of plan benefits under the Florida Retirement System (§121.131 and §121.091 Florida Statutes) Municipal Police Pensions (§185.25 Florida Statutes) and Firefighter Pensions (§175.241 Florida Statutes) in a dissolution proceeding and authorizing such alienation of benefits in a dissolution of marriage under §61.076 Florida Statutes.

61. Supports legislation to (1) change the titles of §222.11 Florida Statutes to clearly reflect that this statute applies to earnings and is not limited to "wages" (2) provide an expanded definition of "earnings" because the term "wages" is not the exclusive method of compensation and (3) add deferred compensation to the exemption statute.

62. Supports amendment of F.S. §§ 689.01 & 692.01, to permit a corporation to execute certain instruments conveying, mortgaging or affecting interests in real property, whether on the corporation's own behalf or in a representative capacity.

63. Supports amendment of F.S. §732.402 to update limitations on "exempt property" to: (i) increase the dollar limitation on household goods, from $10,000 to $20,000; (ii) change the personal "automobile" limitation to a "motor vehicle" limitation based on gross weight and limit the exemption to two motor vehicles; and (iii) include all qualified tuition plans authorized by IRC § 529.

64. Supports amendment of F.S. §733.602 to remove an unnecessary and incorrect cross-reference to the Florida Trust Code.

65. Supports amendment of F.S. §718.111(11) to clarify what are or are not common expenses when insurance proceeds are insufficient for reconstruction, as well as to restructure the statute to clearly describe and state the adequacy and scope of insurance and responsibilities in the event of reconstruction following a casualty.

66. Supports amendment of F.S. §718.115 to provide that unless the manner of payment or allocation of common expenses is otherwise addressed in the declaration of condominium, the expenses of items or services required by any governmental entity, such as water or sewer meters or fire safety equipment required to be installed by a governmental entity, are common expenses under Chapter 718.

67. Supports amendment of F.S. §718.117(17) to provide that in the event of termination of a condominium, when the proceeds are distributed to purchase-money lienholders on units to the extent necessary to satisfy their liens, such distribution shall not exceed a unit's share of the proceeds.

68. Opposes the adoption of summary guardianship proceedings outside the protections of Chapter 744, Florida Statutes.

69. Opposes amendments to F.S. §393.12 that would (i) remove the existing requirement that a guardian advocate for a developmentally disabled adult must be represented by an attorney if the guardian advocate is delegated authority to manage property, (ii) remove the existing requirement that the petition to appoint a guardian advocate must disclose the identity of the proposed guardian advocate, and (iii) expand the list of individuals entitled to receive notice of the guardian advocate proceedings.

70. Opposes amendments to Chapter 720, F.S., that would require both pre-suit mediation and pre-suit arbitration before filing a civil action over homeowners' association disputes.

71. Supports amendment of F.S. Chapter 558 to clarify ambiguous provisions, to specify when and how the statute applies to the resolution of construction defect disputes, and to permit the parties to opt out of the statute.

□

THE FLORIDA BAR

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ohn F. Harkness, Jr.
Executive Director

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July 22, 2008

To: Chairs of All Florida Bar Sections, Select Committees, and Interested Parties

From: Marcos D. Jimenez, Chair, Task Force on Attorney-Client Privilege

cc: John G. White III; Jesse H. Diner; John F. Harkness, Jr.; Paul Hill; Mary Ellen Bateman; Staff Liaisons

Re: Invitation to Comment on Revised Proposal Related to the Attorney-Client Privilege/Work Product Protections in the Public Sector

Summary

In January, 2008 you received a Request for Comment on a preliminary proposal for revisions to s. 119.071 and s. 286.011 of the Florida Statutes, and for the creation of s.119.0710 of the Florida Statutes, to strengthen the attorney-client privilege and work product protections in the public sector. The proposal was developed by The Florida Bar's Task Force on Attorney-Client Privilege.

The task force received 20 comments from sections and committees, as well as other interested parties not directly affiliated with The Florida Bar. In response to the comments, the task force revised and pared down its original proposal. The revised proposal is being sent to you for any additional review and comment before it is considered by the Board of Governors of The Florida Bar.

Any interested person or entity is invited to provide written comments regarding the revised proposal. Comments are requested by September 15, 2008 and may be e-mailed to mbateman@flabar.org or sent by mail to:

Mr. Marcos D. Jimenez, Chair
Attorney-Client Privilege Task Force
c/o Mary Ellen Bateman
The Florida Bar
651 E. Jefferson St.
Tallahassee, Florida 32301-2399

Background

In October 2006, Florida Bar President Henry M. Coxe, III created a task force in response to the adoption of policies by a number of governmental agencies that weaken the attorney-client privilege and the work product doctrine. The appointment of the task force acknowledged the urging of the National Conference of Chief Justices to create state bar committees devoted to the preservation of the attorney-client privilege and work-product doctrine, as well as the urging of the ABA for state and local bar associations to address erosion of the attorney-client privilege.

The task force was asked to examine the purpose behind the attorney-client privilege and its exceptions, the circumstances under which and the extent to which the privilege is being threatened by government waiver policies, and the competing interests being asserted to override the privilege. The task force was directed to identify issues currently impacting the privilege and to report and to recommend resolutions to those issues, if warranted.

The task force has already submitted recommendations to the Board of Governors, many of which have been approved. A list of the recommendations and their current status is attached for your information. FN1 The task force is considering several additional recommendations for referral to the board. This proposal is one of them.

After becoming aware of the issues related to the erosion of the attorney-client privilege and the work product protections in the public sector in Florida, the task force created a Public Sector Subcommittee to study the issue. The Public Sector Subcommittee, chaired by task force member Marion Radson, met by telephone on several occasions and ultimately submitted a report to the full task force. FN2 The task force reviewed the report on January 17, 2008, approved it, and asked that it be referred to the appropriate sections, committees and divisions of the bar for comment. After receiving and considering the comments on its preliminary proposal, the task force pared down the proposal and is referring it back out to the sections, select committees, and interested parties for comment before submitting the proposals to the Board of Governors.

Analysis

The attached Report of the Attorney-Client Privilege Task Force on the Attorney-Client Privilege in the Public Section provides an analysis of the issue of the erosion of the attorney-client privilege and work product doctrine in the public sector in Florida, as well as an analysis of the proposed recommendations to strengthen the attorney-client

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1 See, Appendix A. The full Interim Report of the Attorney-Client Privilege Task Force is available at http://www.floridabar.org/tfb/TFBComm.nsf/6b07501281c8e567852570000072a0b9/cb3c3b701837f2908525723a006b08e9?OpenDocument.

2 See, Report of the Attorney-Client Privilege Task Force on the Attorney-Client Privilege in the Public Sector, Appendix B.

privilege and work product doctrine. The report also includes the proposed amendments for your review and comment. FN3

Changes Made From The Preliminary Proposal to the Revised Proposal

1. The preliminary proposal expanded the work product exemption to include fact work product. The revised proposal maintains that expansion but, in response to comments, would limit fact work product to information prepared by the attorney for specific civil, criminal or adversarial proceedings.

2. The preliminary proposal eliminated the disclosure of the work product at the conclusion of the litigation. The revised proposal maintains this provision.

3. The preliminary proposal would protect the public attorney's work product from discovery in the same manner that an attorney's work product is privileged in the civil discovery context. In response to comments, the revised proposal eliminates this provision entirely.

4. The preliminary proposal allowed necessary persons to attend an attorney-client session. As there were no real objections to this proposal, the provision remains in the revised recommendations.

5. The preliminary proposal allowed the substantive discussions in the attorney-client session to include any matter raised in a claim or lawsuit or anticipated lawsuit

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3 Id.

against a public agency. The revised provision allows the discussion to include matters regarding anticipated or pending litigation.

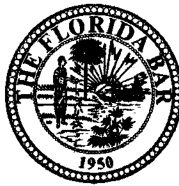
6. The preliminary proposal eliminated the requirement that the session be transcribed and made available at the conclusion of the litigation. In response to comments, the revised proposal maintains the requirement that the session be transcribed, but allows the transcript to be sealed unless opened by a court order.

7. The preliminary proposal required litigants against a public agency to obtain documents through the normal discovery process during pendency of the litigation. In response to comments, the revised proposal eliminates this provision entirely.

8. In response to comments, the revised proposal clarifies that any final agency action, as a result of the attorney-client session, must be made in an open public meeting.

If you have any questions concerning this invitation to comment, please e-mail Mary Ellen Bateman, counsel to the task force, at mbateman@flabar.org or call at (850)561-5777. If you would like a task force member to attend your meeting or telephone conference when this issue is discussed, please let Ms. Bateman know. We may be able to arrange it.

APPENDIX A



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Status of Recommendations of Florida's Task Force on Attorney-Client Privilege to the Board of Governors

1. Adopt the following resolutions:

a. That The Florida Bar supports the preservation of the attorney-client privilege and work product doctrine as essential to maintaining the confidential relationship between client and attorney; opposes policies, practices and procedures of governmental bodies that would erode the privilege; and opposes the routine practice by governmental officials of seeking to obtain waivers of the privilege or work product doctrine by the granting or denial of a benefit. (Resolution 1) APPROVED BY THE BOARD OF GOVERNORS

b. That The Florida Bar opposes government policies or practices that erode the constitutional and other legal rights of employees by requiring, encouraging or permitting prosecutors or other enforcement authorities to consider the following factors in determining whether an organization has been cooperative: (1) that the organization provided counsel or paid the legal fees of the employee; (2) that the organization chose to retain or declined to sanction an employee who refused a government request for an interview, testimony or other information; (3) that the organization entered into a joint defense or common interest

agreement with an employee; (4) that the organization shared its records with an employee. (Resolution 2) APPROVED BY THE BOARD OF GOVERNORS

c. That the attorney-client privilege and work product doctrine should be preserved with respect to audits of company financial statements. (Resolution 3) APPROVED BY THE BOARD OF GOVERNORS

2. Approve the following recommendations:

a. That The Florida Bar take a legislative position in support of the legislation introduced by U.S. Senator Arlen Specter (S.186) or similar comprehensive legislation. APPROVED BY THE BOARD OF GOVERNORS. THE FLORIDA BAR SENT LETTERS TO CONGRESS ON THIS ISSUE AND CONTINUES TO MONITOR THE PROPOSED LEGISLATION. HOUSE BILL 3013 APPROVED NOV. 13, 2007 BY THE HOUSE.

b. That The Florida Bar make no proposal at this time to amend section 90.502 to include a selective waiver provision. ACCEPTED BY THE BOARD OF GOVERNORS

c. That the concepts on inadvertent waiver contained in ABA Recommendation 120D be adopted and referred to the Florida Bar Civil Procedure Rules Committee and the Florida Bar Code and Rules of

Evidence Committee for drafting of appropriate rules consistent with the concepts. ACCEPTED BY THE BOARD OF GOVERNORS AND REFERRED TO THE NAMED COMMITTEES. THE CODE AND RULES OF EVIDENCE COMMITTEE RECOMMENDS THAT A COMMITTEE COMMENT SHOULD BE ADDED TO RULE 90.507 AND THAT ANY RULES AMENDMENTS SHOULD BE ADDRESSED BY THE CIVIL PROCEDURE RULES COMMITTEE. THE CIVIL PROCEDURE RULES COMMITTEE CONSIDERED A SUBCOMMITTEE REPORT IN JUNE, 2008 AND RECOMMENDED A PROPOSED RULE ON INADVERTENT DISCLOSURE OF PRIVILEGED MATERIALS. THE RULE MUST BE REVIEWED BY THE TASK FORCE AND THE BOARD OF GOVERNORS.

d. That The Florida Bar not pursue amendments to Rule 4-3.8(e) of the Rules of Professional Conduct to restrict a prosecutor from subpoenaing a lawyer in a grand jury or other criminal proceeding to present evidence about a past or present client. APPROVED THE BOARD OF GOVERNORS

e. That the Rules of Professional Conduct (including ABA Model Rule 3.4(g) and Florida's rules) not be amended to address the issue of attorney-client privilege. ACCEPTED BY THE BOARD OF GOVERNORS

f. That the issue of whether state rules and statutes governing civil procedure should be amended or adopted to protect from discovery draft expert reports and communications between an attorney and a testifying expert be referred to the Florida Bar Civil Procedure Rules

Committee and the Florida Bar Code and Rules of Evidence Committee for review and consideration. ACCEPTED BY THE BOARD OF GOVERNORS AND REFERRED TO THE NAMED COMMITTEES. THE CODE AND RULES OF EVIDENCE COMMITTEE IS RECOMMENDING THAT NO ACTION BE TAKEN BY THE EVIDENCE COMMITTEE AS THE ISSUE IS MORE PROPERLY ADDRESSED BY THE RULES OF CIVIL PROCEDURE COMMITTEE. THE RULES OF CIVIL PROCEDURE COMMITTEE CONSIDERED A PROPOSED RULE AMENDMENT TO Rule 1.280(B)(4)(e) BUT VOTED NOT TO ADOPT IT.

g. That The Florida Bar take no action at this time on the issue of the proposed "firewall amendment" to S.186 or similar comprehensive legislation. ACCEPTED BY THE BOARD OF GOVERNORS

APPENDIX B

REPORT OF THE
ATTORNEY-CLIENT PRIVILEGE TASK FORCE
ON THE
ATTORNEY-CLIENT PRIVILEGE IN THE PUBLIC SECTIOR

JUNE 2008

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B. The Interplay Between Sunshine Law and Attorney-Client Privilege
C. The Interplay Between the Public Records Law and the Attorney-Client Privilege and Work Product Doctrine

V. SUMMARY OF PROPOSED BILL PROVIDING APPROPRIATE PROTECTION TO ATTORNEY-CLIENT WRITTEN COMMUNICATIONS AND AMENDING THE CONDITIONS OF THE ATTORNEY-CLIENT SESSION

- Summary of the Draft Bill

VI. PROPOSED BILL:
AN ACT PROVIDING APPROPRIATE PROTECTION TO ATTORNEY-CLIENT PRIVILEGED COMMUNICATIONS AND ATTORNEY WORK PRODUCT FOR ALL PUBLIC AGENCIES; AMENDING S. 119.071 F.S., REVISING THE EXEMPTION FOR THE ATTORNEY'S WORK PRODUCT OF A PUBLIC AGENCY; AMENDING S. 286.011 F.S., REVISING THE CRITERIA FOR THE ATTORNEY-CLIENT SESSIONS OF A PUBLIC AGENCY AND PROVIDING THE TRANSCRIPT OF THE PROCEEDINGS SHALL BE SEALED UNLESS OPENED BY COURT ORDER; PROVIDING AN EFFECTIVE DATE.

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II. RECOMMENDATION OF THE ATTORNEY-CLIENT PRIVILEGE TASK FORCE

The Florida Bar take a legislative position in support of a bill to amend § 119.071(1), Florida Statutes, to provide enhanced protection for attorney work product for all governmental entities; and to amend §286.011, Florida Statutes, to revise the criteria for the attorney-client session for governmental entities, and to seal the transcript of the session unless opened by court order.

III. BACKGROUND

After becoming aware of the issues related to the erosion of the attorney-client privilege and the work product protections in the public sector in Florida, the task force created a Public Sector Subcommittee to study the issue. The Public Sector Subcommittee, chaired by Marion Radson, met by telephone on several occasions and ultimately submitted its report to the full task force. In summary, the report called for revisions that would:

(1) expand the work product exemption to include fact work product;
(2) eliminate the disclosure of the work product at the conclusion of the litigation;
(3) protect the public attorney's work product from discovery in the same manner that an attorney's work product is privileged in the civil discovery context;
(4) allow necessary persons to attend an attorney-client session;
(5) allow the substantive discussions to include any matter raised in a claim or lawsuit or anticipated lawsuit against a public agency;
(6) eliminate the requirement that the session be transcribed and made available at the conclusion of the litigation; and
(7) require litigants against a public agency to obtain documents through the normal discovery process during the pendency of the litigation.

The task force reviewed the report on January 17, 2008, approved it, and asked that it be referred to the appropriate sections, committees and divisions of the bar for comment. On January 25, 2008, the preliminary proposal of the task force was sent to all sections, committees and divisions of The Florida Bar with an invitation to comment on the proposals. Comments were received from approximately 20 entities and individuals, including some entities not directly related to The Florida Bar.

On April 15, 2008, the task force met to consider the comments received on its preliminary proposal. After reviewing the comments and after careful consideration, the task force agreed to permit the sub-committee to further study this issue in view of the comments, and recommend any revisions at the next meeting of the task force. The sub-

committee met by conference call on May 2, 2008 and voted to revise and pare down its original proposal. In response to comments, this report limits the proposed changes to:

(1) expanding the work product exemption to include fact work product, but limits fact work product to information prepared by the attorney for specific civil, criminal, or adversarial proceedings;
(2) eliminating the disclosure of the work product at the conclusion of the litigation;
(3) allowing necessary persons to attend an attorney-client session;
(4) allowing the substantive discussions to include anticipated or pending litigation of a public agency while retaining the requirement that the session be transcribed, but allowing the transcript to be sealed unless opened by court order;
(5) clarifying that any action, as a result of the attorney-client session, must be made in an open public meeting.

The task force on June 20, 2008, considered the Final Report of the Public Sector Subcommittee and its recommendation to support the statutory amendments as enumerated above. The task force recognizes the value and benefit of the government-in-the sunshine law and the public records law in Florida. Similarly, the task force recognizes the time-honored value and benefit of the attorney-client privilege and work product doctrine. The attorney-client privilege and the related work product doctrine encourage communications between the attorney and client, and allow the attorney to provide informed legal counsel that actually promotes the administration of justice. Like a majority of states that have considered this issue, the task force believes that the two public interests (sunshine/public records laws and the attorney-client/work product privileges) are capable of concurrent operation as long as the attorney-client privilege and work product doctrine are permitted to occur within the parameters and safeguards as recommended. The task force further believes that these revisions will encourage public officers and employees to seek legal counsel from government attorneys who are charged with the duty of upholding the law and advising their clients to follow the law, thus enhancing the rights of all people.

IV. EROSION OF THE ATTORNEY-CLIENT PRIVILEGE AND WORK PRODUCT DOCTRINE IN THE PUBLIC SECTOR

A. Preface

As a result of the work of the Attorney-Client Privilege Task Force, The Florida Bar has affirmed the preservation of the attorney-client privilege and work product doctrine as essential to maintaining the confidential relationship between client and attorney. The Florida Bar has also opposed policies, practices and procedures of governmental bodies that would erode the privilege.

A little more than twenty years ago government entities in Florida lost the ability to invoke the attorney-client privilege in almost all meetings between the governing body and its government attorney. *Neu v. Miami Herald Publishing Co.*, 462 So.2d 821 (Fla. 1983) Similarly, a little more than twenty-five years ago government entities in Florida and government attorneys lost almost all claims of work product privilege under the public records law. *Wait v. Florida Power and Light Co.*, 372 So. 2d 420 (Fla. 1979) There is also confusion and uncertainty about the very existence of the privilege in the public sector in Florida. This uncertainty hampers full disclosure and discussion between the attorney who represents the government and the government as client. As one United States Supreme Court Justice stated, an uncertain privilege is a little better than no privilege at all. (Justice Rehnquist in Jaffee v. Redmond, 518 U.S. 1, 17-18 (1996), quoting from Justice Stevens in Upjohn Co. v. U.S., 449 U.S. 383, 393 (1981)

B. The Interplay Between Sunshine Law and Attorney-Client Privilege

The attorney-client privilege for governments in Florida is limited by the Government-in-the-Sunshine Law, commonly referred to as the Sunshine Law. §119.01 Fla. Stat. (2007). Although the Sunshine Law does not specifically mention the attorney-

client privilege, the Florida Supreme Court held in *Neu v. Miami Herald Publishing Company*, 462 So. 2d 821 (Fla. 1985) that the privilege was waived by the Florida legislature by implication. The court declared that the attorney-client privilege could not be claimed for communications made at public meetings. An essential element of the privilege, namely confidentiality, was obviously missing. The Supreme Court declined to find any independent basis for the privilege, like the evidence code or the rules of professional conduct, and deferred to the state legislature to create exemptions for the government.

The Florida Supreme Court is in the minority of state high courts to reject an independent basis for the attorney-client privilege for government. Courts in other states have recognized an independent basis for the privilege, often based on the strong policy considerations that apply to private clients. See e.g., *Sacramento Newspaper Guild v. Sacramento County Board of Supervisors,* 69 Cal. Rptr. 480 (Cal. App. 3 Dist. 1968) and *Dunn v. Alabama State Univ. Bd. of Trustees*, 628 So.2d 519 (Ala. 1993); and *Oklahoma Ass'n of Mun. Attorneys v. State*, 577 P.2d 1310 (Okla. 1978); *Cool Homes, Inc. v. Fairbanks North Star Borough, et al.,* 860 P.2d 1248 (Alaska 1993); *Tausz v. Clarion-Goldfield Comm. Sch. Dist.* 569 N.W.2d 125 (Iowa 1997); and *Peters v. County Comm'n of Wood County*, 519 S.E.2d 179 (W.Va. 1999).

Since the Florida Supreme Court decision in *Neu*, the Florida legislature created a unique type of private "attorney-client" session, sometimes referred to as a shade session. §286.011 Fla. Stat. (2007). Under the current statutory law, a government lawyer can meet in a private session with a board or commission to discuss *pending* litigation. The discussion is limited to "settlement negotiations, or strategy sessions related to litigation

expenditures". Only specifically designated persons may attend the session. Finally, and most significantly, these sessions must be transcribed by a certified court reporter, and the record is then made public after the conclusion of the litigation.

These artificial limitations have severely limited the usefulness of these sessions. No matter how significant or imminent the threatened litigation, an attorney-client session cannot be held to discuss the claim or related strategies to avoid a lawsuit. Essential information may not be available during the sessions because necessary individuals, who are not specifically authorized by statute, are prohibited from attending these sessions.

Due to these constraints and restrictions, governments are understandably reluctant to hold these sessions. The result is elected officials do not obtain the type of legal advice that is essential to good government and its citizens. As the court aptly stated in attempting to reconcile the open meetings law and the attorney-client privilege: "Public agencies face the same hard realities as other civil litigants. An attorney who cannot confer with his client outside his opponent's presence may be under insurmountable handicaps." *Sacramento* 69 Cal. Rptr. at 490.

C. The Interplay Between the Public Records Law and the Attorney-Client Privilege and Work Product Doctrine

Early in the history of Florida's Public Records Act, the Florida Supreme Court declined to recognize any exemption for a government attorney's work product or attorney-client privileged documents. In *Wait v. Florida Power and Light Company*, 372 So. 2d 420 (Fla. 1979) the Supreme Court of Florida found that the legislature intended to exempt only those public records that were made confidential by statute. According to the Court, documents that were confidential or privileged as a result of judicial creation –

such as those protected by the attorney-client and work product privileges – were not exempt. Any exemption, the Court noted, must come from the legislature and not from the courts.

In response to the court's holding in *Wait*, the Florida legislature created a limited and temporary exemption for certain documents of a government attorney. §119.071(1)(d)(1) Fla. Stat. (2007). First, the exemption protects only "opinion work product", not the "fact work product" of the government attorney. Second, the litigation or adversarial proceeding must be "imminent" as opposed to "substantially likely". Finally, and most significantly, the exemption terminates at the conclusion of the litigation.

As a result of these limitations, government lawyers are reluctant to offer legal advice in writing to the public client. Some government lawyers do not take notes of meetings. Government lawyers are reluctant to create records and work product that are subject to disclosure under the public records. They are often placed in ethical dilemmas trying to maintain the confidentiality of information while abiding by the public records law. Inefficiency, unfairness, and sharp practices develop when offering legal advice or preparing for trial.

In contrast to Florida, the courts of other states have found that public records laws do not abrogate the attorney-client privilege because the two can co-exist while protecting the fundamental purpose of each. See e.g., *Suffolk Construction Co., Inc. v. Division of Capital Asset Management*, 870 N.E. 2d 33 (Mass 2007).

V. SUMMARY OF PROPOSED BILL PROVIDING PROTECTION TO ATTORNEY-CLIENT WRITTEN COMMUNICATIONS AND AMENDING THE CONDITIONS OF THE ATTORNEY-CLIENT SESSION

Revisions to statutory law are recommended to remove barriers that impede the government attorney's ability to provide effective legal counsel to the government as client. Attorney-client written communications that meet the definition of opinion work product and fact work product should be kept confidential. Additionally, the attorney-client session should be amended to encourage its use and provide the government, as client, with a forum to obtain effective legal counsel.

Summary of the Draft Bill:

Section 1: CURRENT LAW: The current law does not protect from disclosure the work product of a government attorney or a private attorney retained by the government. The current law only permits a temporary limited opinion work product that terminates at the conclusion of the litigation.

PROPOSED BILL: The proposed bill expands the work product exemption to include fact work product. The bill eliminates the termination of the exemption for work product at the conclusion of the litigation. In response to comments, the bill limits fact work product to information prepared by the attorney for specific civil, criminal or adversarial proceedings. Additionally, in response to comments, the bill does not include a confusing reference to discovery in the civil context.

Section 2: CURRENT LAW: The current law does not allow for a confidential attorney-client session between a government lawyer, or a private lawyer retained by the government, and the governing body of a public agency. The current law only permits a

chief executive officer to be present with the governing body and the government attorney, and the transcript of the session is made public at the conclusion of the litigation.

PROPOSED BILL: The proposed bill would allow additional necessary persons to attend attorney-client sessions, and allow the substantive discussions to include any anticipated or pending litigation of a public agency. In response to comments, the proposed bill retains the requirement that the session be transcribed, but then sealed unless opened by court order. Additionally, in response to comments, the bill clarifies that any final agency action, as a result of the attorney-client session, must be made in an open public meeting.

VI. PROPOSED BILL

A bill to be entitled

An act providing appropriate protection to attorney-client privileged communications and attorney work product for all public agencies; amending s. 119.071 F.S., revising the exemption for the attorneys' work product of a public agency; amending s. 286.011 F.S., revising the criteria for the attorney-client sessions of a public agency and providing the transcript of the proceedings shall be sealed unless opened by court order; providing an effective date.

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

Section 1. Section 119.071(1)(d), Florida Statutes, is amended, and Paragraph 3 is created and added to said Section to read:

119.071 General exemptions from inspection or copying of public records.--

(1) AGENCY ADMINISTRATION.--

(d)1. A public record that was prepared by an agency attorney (including an attorney employed or retained by the agency or employed or retained by another public officer or agency to protect or represent the interests of the agency having custody of the record) or prepared at the attorney's express direction, that either (1) reflects a mental impression, conclusion, litigation strategy, or legal theory of the attorney or the agency, or (2) is factual information, and that was prepared ~~exclusively~~ for that specific civil or criminal litigation or for adversarial administrative proceedings, or that was

prepared in anticipation of ~~imminent~~ that specific civil or criminal litigation or ~~imminent~~ adversarial administrative proceedings, is exempt from s. 119.07(1) and s. 24(a), Art. I of the State Constitution ~~until the conclusion of the litigation or adversarial administrative proceedings~~. For purposes of capital collateral litigation as set forth in s. 27.7001, the Attorney General's office is entitled to claim this exemption for those public records prepared for direct appeal as well as for all capital collateral litigation after direct appeal until execution of sentence or imposition of a life sentence.

2. This exemption is not waived by the release of such public record to another public employee or officer of the same agency or any person consulted by the agency attorney. When asserting the right to withhold a public record pursuant to this paragraph, the agency shall identify the potential parties to any such criminal or civil litigation or adversarial administrative proceedings. If a court finds that the document or other record has been improperly withheld under this paragraph, the party seeking access to such document or record shall be awarded reasonable attorney's fees and costs in addition to any other remedy ordered by the court.

Section 2. Section 286.011(8) is amended to read:

286.011 Public meetings and records; public inspection; criminal and civil penalties.--

(8) Notwithstanding the provisions of subsection (1), any board or commission of any state agency or authority or any agency or authority of any county, municipal corporation, or political subdivision, and the chief administrative or executive officer of the

governmental entity, and any public employees or agents who possess relevant information needed by the entity's attorney, may meet in private with the entity's attorney to discuss anticipated or pending litigation to which the entity is presently a party before a court or administrative agency, provided that the following conditions are met:

(a) The entity's attorney shall advise the entity at a public meeting that he or she desires advice concerning the anticipated or pending litigation.

(b) The subject matter of the meeting shall be confined to advice ~~settlement negotiations or strategy sessions~~ related to matters regarding the anticipated or pending litigation ~~expenditures~~.

(c) The entire session shall be recorded by a certified court reporter. The reporter shall record the times of commencement and termination of the session, all discussion and proceedings, the names of all persons present at any time, and the names of all persons speaking. No portion of the session shall be off the record. The court reporter's notes shall be fully transcribed, sealed and filed with the entity's clerk within a reasonable time after the meeting.

(d) The entity shall give reasonable public notice of the time and date of the attorney-client session and the names of persons who will be attending the session. The session shall commence at an open meeting at which the persons chairing the meeting shall announce the commencement and estimated length of the attorney-client session and the names of the persons attending. At the conclusion of the attorney-client session, the meeting shall be reopened, and the person chairing the meeting

shall announce the termination of the session. Any final agency action required, as a result of the attorney-client session, shall be requested at the reopened meeting or at a subsequent public meeting.

(e) The transcript shall ~~be~~ remain sealed. The record may be opened by court order following a finding ~~and~~ after an in-camera proceeding by a petition filed in circuit court that the entity failed to materially comply with the provisions of this subsection. If such a finding is made, the court may order the transcript be made part of the public record upon conclusion of the litigation.

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

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