BRING TO MEETING

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

Executive Council Meeting

AGENDA

Boca Raton Resort & Club, Boca Raton
501 E. Camino Real, Boca Raton FL 33432

Saturday, November 14, 2015
9:00 a.m. - 1:30 p.m.

BRING THIS AGENDA TO THE MEETING

Note: Copies will NOT be available at the meeting

Real Property, Probate and Trust Law Section
Executive Council Meeting
November 14, 2015
Boca Raton Resort & Club
Boca Raton, FL

AGENDA

I. **Presiding** — *Michael J. Gelfand, Chair*

II. **Attendance** — *S. Katherine Frazier, Secretary*

III. **Minutes of Previous Meeting** — *S. Katherine Frazier, Secretary*

Motion to approve the Minutes of October 2, 2015, Meeting at The Ritz Carlton, Berlin **pp. 11-34**

IV. **Chair's Report** — *Michael J. Gelfand*

1. Recognition of guests

2. Recognition of Sponsors **p. 35**

3. 2015 – 2016 RPPTL Section Executive Council Meeting Schedule **p. 36**

4. Tampa Committee Meeting Schedule **pp. 37-38**

5. Executive Committee decisions between Council meetings:

A. **Multi-Jurisdictional Practice.** Response to request from The Florida Bar to comment on proposal concerning Multi-Jurisdictional Practice (Reciprocity) **pp.39-45**

B. **Beauvais Brief.** Report of Section's amicus brief filed in Florida's Third District Court of Appeal in Deutsche Bank Trust Co. v. Beauvais, Case No. 3D14-0575.
pp.46-83

C. **Physician Orders For Life Sustaining Treatment a/k/a POLST.** To approve the legislative position proposal from the ad hoc POLST committee as drafted, including the creation of a new statute recognizing and regulating POLST orders in Florida, to be provided as technical advice for any POLST bill filed this session. See Agenda Item XII.2

V. **Chair-Elect's Report** — *Deborah P. Goodall*

2016 – 2017 RPPTL Section Executive Council Meeting Schedule **p.84**

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

VII. Treasurer's Report — *Robert S. Freedman*

September Financial Report **p.85**

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

IX. CLE Seminar Coordination Report — *Robert S. Swaine (Real Property) and William T. Hennessey (Probate & Trust), Co-Chairs*

X. General Standing Division — *Deborah P. Goodall, General Standing Division Director and Chair-Elect*

Action Items:

1. **Budget** — Robert S. Freedman, Treasurer and Chair

   Motion to approve the proposed Real Property, Probate and Trust Law Section Budget for fiscal year 2016 – 2017. **pp. 86-95**

2. **Daubert Standard Task Force**

   Motion to recommend Section Position to The Florida Bar's Board of Governors to support [adopt. on of Daubert standard/alternative] relating to admissibility of expert testimony. **p. 214**

Information Items:

1. **Ad Hoc Leadership Academy** — *Brian Sparks and Kris Fernandez, Co-Chairs.*

   Report on the Leadership Academy program and information on applications for next class. http://www.floridabar.org/leadershipacademy

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

   A. Report on the Section's *amicus* brief and decision of the Florida Supreme Court in Jones v. Golden Case No. SC13-2536 published October 1, 2015. **pp. 96-111**

   B. Report of Section's *amicus* brief filed in Florida's Third District Court of Appeal in Deutsche Bank Trust Co. v. Beauvais, Case No. 3D14-0575. **pp. 112-135**

3. **Fellows** — *Ashley McRae, Chair*

   Report regarding ongoing projects.

4. **Legislation** — *Tae Kelley Bronner (Probate & Trust) and Steven Mezer (Real Property), Co-Chairs*

   Update on 2016 Legislative Session – Section Legislative Positions and Interested Matters.

5. **Member Communication and Information Technology** — *William A. Parady, Chair*

   Report on status of www.RPPTL.org website and additional items under consideration to improve member communication.

6. **Membership and Inclusion** — *Lynwood F. Arnold, Jr. and Jason M. Ellison, Co-Chairs*

   Report on status of membership and inclusion efforts.

7. **Professionalism and Ethics** — *Lawrence J. Miller, Chair*

   Report on status of the revised proposed amendment to *Rules Regulating The Florida Bar*, Rule 4-4.2, regarding communications to governmental counsel.

8. **Publications:**

   A. **ActionLine** — *Silvia Rojas, Chair*

      Report on upcoming issues, articles and deadlines.

   B. **Florida Bar Journal** — *Jeffrey Goethe (Probate & Trust) and Douglas Christy (Real Estate) Co-Chairs.*

      Report on upcoming issues, articles and deadlines.

9. **Sponsor coordination** — *Wilhelmina F. Kightlinger, Chair*

   Report on current sponsors and existing opportunities.

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

Committee Sponsors

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

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

First American Title Insurance Company - Wayne Sobien

Real Estate Structure and Taxation Committee

Information Item:

Open/Expired Permits Task Force — *Lee Weintraub and Michael Tobin, Co-Chairs.*

Report on proposed legislation regarding impact of open construction permits and potential remedies. **pp. 136-139**

XII. Probate and Trust Law Division Report — *Debra Boje, Director*

Committee Sponsors

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

Business Valuation Analysts – Tim Bronza
Trust Law Committee

Coral Gables Trust - John Harris
Probate and Trust Litigation Committee

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

Kravit Estate Appraisals - Bianco Morabito
Estate & Trust Tax Planning Committee

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

Management Planning, Inc. - Roy Meyers
Estate & Trust Tax Planning Committee

Northern Trust - Brett Rees
Trust Law Committee

Action Item:

Trust Law Committee - *Angela Adams, Chair*

Motion: to adopt as a Section position to provide that when multiple trustees are serving together as cotrustees, each cotrustee is entitled to reasonable compensation, even though the aggregate compensation for multiple trustees may exceed what would be reasonable compensation for a single trustee, including an amendment to F. S. 736.0708(1); to find that such legislative position is within the purview of the RPPTL Section; and, to expend Section funds in support of the proposed legislative position. **pp. 140-145**

Information Items:

1. **Digital Assets and Information Study Committee** – J. Eric Virgil, Chair

   Report on pending legislation containing the Section's initiative creating the "Florida Fiduciary Access to Digital Assets Act." **pp. 146-184**

2. **Ad Hoc Study Committee on POLST (Physician Orders For Life Sustaining Treatment)** - Jeff Baskies and Thomas Karr, Co-Chairs

   Report on POLST opposition and recommendations approved by the Executive Committee and current proposed draft of POLST Bill and Committee technical advice. **pp. 185-213**

XIII. Probate and Trust Law Division Committee Reports — *Debra L. Boje, Director*

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

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

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

4. **Ad Hoc Committee on Physicians Orders for Life Sustaining Treatment (POLST)** – *Jeffrey Baskies and Thomas Karr, Co- Chairs*

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

6. **Asset Protection** – *George Karibjanian, Chair; Rick Gans and Brian Malec, Co-Vice-Chairs*

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

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

9. **Elective Share Review Committee** – Lauren Detzel and Charles I. Nash, Co-Chairs; Jenna Rubin, Vice-Chair

10. **Estate and Trust Tax Planning** – *David Akins, Chair; Tasha Pepper-Dickinson and Rob Lancaster, Co-Vice Chairs*

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

12. **IRA, Insurance and Employee Benefits** – *L. Howard Payne and Kristen Lynch, Co-Chairs; Carlos Rodriguez, Vice Chair*

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

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

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

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

17. **Probate and Trust Litigation** – *Jon Scuderi, Chair; James George, John Richard Caskey, and Lee McElroy, Co-Vice Chairs*

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

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

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

XIV. Real Property Law Division Committee Reports — *Andrew O'Malley, Director*

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

2. **Condominium and Planned Development** – *Bill Sklar, Chair; Alex Dobrev and Steve Daniels, Co-Vice Chairs*

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

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

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

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

7. **Landlord and Tenant** – *Rick Eckhard Chair; Brenda Ezell, Vice Chair*

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

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

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

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

12. **Real Property Finance & Lending** – *David Brittain, Chair; E. Ashley McRae, Richard S. McIver and Robert Stern, Co-Vice Chairs*

13. **Real Property Litigation** – *Susan Spurgeon, Chair; Manny Farach and Martin Solomon, Co-Vice Chairs*

14. **Real Property Problems Study** – *Art Menor, Chair; Mark A. Brown, Robert Swaine, Stacy Kalmanson, Lee Weintraub and Patricia J. Hancock, Co-Vice Chairs*

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

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

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

XV. General Standing Committee Reports — *Deborah Goodall, Director and Chair-Elect*

1. **Ad Hoc Leadership Academy** – *Brian Sparks and Kris Fernandez, Co-Chairs*

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

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

4. **Budget** – *Robert S. Freedman, Chair; S. Kathrine Price, Pamela O. Price, Co-Vice Chairs*

5. **CLE Seminar Coordination** – *Robert S. Swaine and William T. Hennessey, Co-Chairs; Laura K. Sundberg (Probate & Trust), Sarah S. Butters (Probate & Trust), Lawrence J. Miller (Ethics), Cary Wright (Real Property) and Hardy L. Roberts, III (General E-CLE), Theo Kypreos, Co-Vice Chairs*

6. **Convention Coordination** – *Laura K. Sundberg Chair; Alex Hamrick and Alex Dobrev, Co-Vice Chairs*

7. **Fellows** – *Ashley McRae, Chair; Benjamin Diamond and Joshua Rosenberg, Co-Vice Chairs*

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

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

10. **Legislation** – *Tae Kelley Bronner (Probate & Trust) and Steven Mezer (Real Property), Co-Chairs; Thomas Karr (Probate & Trust), and Alan B. Fields (Real Property), Co-Vice Chairs*

11. **Legislative Update (2016)** – *R. James Robbins, Chair, Barry F. Spivey, Stacy O. Kalmanson, Jennifer Tobin, Thomas Karr, Joshua Rosenberg, and Kymberlee Curry Smith, Co-Vice Chairs*

12. **Liaison with:**

    A. **American Bar Association (ABA)** – *Edward F. Koren and Julius J. Zschau*
    B. **Clerks of Circuit Court** – *Laird A. Lile and William Theodore Conner*
    C. **FLEA / FLSSI** – *David C. Brennan and Roland "Chip" Waller*
    D. **Florida Bankers Association** – *Mark T. Middlebrook*
    E. **Judiciary** – *Judge Linda R. Allan, Judge Herbert J. Baumann, Judge Melvin B. Grossman, Judge Hugh D. Hayes, Judge Maria M. Korvick, Judge Norma S. Lindsey, Judge Celeste H. Muir, Judge Robert Pleus, Jr., Judge Walter L. Schafer, Jr., Judge Morris Silberman, Judge Mark Speiser, Judge Richard J. Suarez,., and Judge Patricia V. Thomas*
    F. **Out of State Members** – *Michael P. Stafford, John E. Fitzgerald, Jr., and Nicole Kibert*
    G. **TFB Board of Governors** – *Andrew Sasso*
    H. **TFB Business Law Section** – *Gwynne A. Young*
    I. **TFB CLE Committee** – *Robert S. Freedman and Tae Kelley Bronner*
    J. **TFB Council of Sections** – *Michael J. Gelfand and Deborah P. Goodall*
    K. **TFB Pro Bono Committee** – *Tasha K. Pepper-Dickinson*

13. **Long-Range Planning** – *Deborah P. Goodall, Chair*

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

15. **Member Communications and Information Technology** – *William A. Parady, Chair; S. Dresden Brunner, Michael Travis Hayes, and Neil Shoter, Co-Vice Chairs*

16. **Membership and Inclusion** – *Lynwood F. Arnold, Jr. and Jason M. Ellison, Co-Chairs, Phillip A. Baumann, Kathrine S. Lupo, Guy S. Emerich, Theodore S. Kypreos, Tara Rao, and Kymberlee Curry Smith, Co-Vice Chairs*

17. **Model and Uniform Acts** – *Bruce M. Stone and Richard W. Taylor, Co-Chairs*

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

19. **Publications (ActionLine)** – *Silvia B. Rojas, Chair (Editor in Chief); Jeffrey Baskies (Vice Chair – Editor Probate & Trust Division), Cary Wright (Vice Chair – Editor Real Property Division), Lawrence J. Miller (Vice Chair – Editor Professionalism & Ethics); George D. Karibjanian (Editor, National Reports), Lee Weintraub (Vice Chair - Reporters Coordinator), Benjamin Diamond (Vice Chair – Features Editor), Kathrine S. Lupo (Vice Chair - Advertising Coordinator), Navin R. Pasem (Vice Chair – Practice Corner Editor), Sean M. Lebowitz (Vice Chair – Probate & Trust Case Summaries), Shari Ben Moussa (Vice Chair – Real Property Case Summaries)*

20. **Publications (Florida Bar Journal)** – *Jeffrey S. Goethe (Probate & Trust) and Douglas G. Christy (Real Property), Co-Chairs; Brian Sparks (Editorial Board – Probate & Trust), Cindy Basham (Editorial Board – Probate & Trust), Michael A. Bedke (Editorial Board – Real Property), Homer Duvall (Editorial Board – Real Property) and Allison Archbold (Editorial Board), Co-Vice Chairs*

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

22. **Strategic Planning** – *Michael J. Gelfand and Deborah P. Goodall, Co-Chairs*

XVI. Adjourn

MINUTES
OF THE
REAL PROPERTY, PROBATE AND TRUST LAWSECTION
EXECUTIVE COUNCIL MEETING[1]
October 2, 2015
The Ritz Carlton – Berlin, Germany

I. **Call to Order** — Michael J. Gelfand, Chair

The meeting was held at The Ritz Carlton-Berlin, Berlin, Germany. Michael J. Gelfand, Chair, called the meeting to order at approximately 8:00 a.m. (Berlin time) on Friday, October 2, 2015.

II. **Attendance** — S. Katherine Frazier, Secretary

In Ms. Frazier's stead, Mr. Gelfand reminded members that the attendance roster was circulating to be initialed by Council members in attendance.**[*Secretary's Note* - The roster showing members in attendance is attached as Addendum "A".]**

III. **Minutes of Previous Meeting**— S. Katherine Frazier, Secretary

In Ms. Frazier's stead, Mr. Gelfand moved:

To approve the Minutes of the August 1, 2015, meeting of the Executive Council held at The Breakers, Palm Beach, Florida.

(See Agenda pages 10-41.) The Motion was unanimously**approved**.

IV. **Chair's Report** — Michael J. Gelfand

1. Welcome. Mr. Gelfand welcomed Council members and Section members in attendance and recognized all guests in attendance, including:

Irene Schmid, LL.M., Continental Law Notary, DLA Piper UK LLP

Judge Rosemary Barkett, Iran – United States Claims Tribunal at The Hague; Former Florida Supreme Court Justice; and, Judge of the U.S. Court of Appeals for the Eleventh Circuit, Retired

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

2. Mr. Gelfand recognized the General Sponsor and Friends of the Section (See Agenda page 42):

General Sponsor

Old Republic National Title Insurance Company – Jim Russick

Friends of the Section

Business Valuation Analysts, LLC – Tim Bronza

Corporation Services Company – Beth Stryzs

Guardian Trust – Ashley Gonnelli

North American Title Insurance Company – Andres SanJorge

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

Wilmington Trust – David Fritz

3. Mr. Gelfand reminded members of the remainder of 2015-2016 Section Executive Council meeting schedule. (See Agenda page 43), including the need to reserve rooms for the Boca Raton Executive Council meeting, and sign up when the registration form is distributed. (See Agenda pages 44-46.)

4. In Mr. Little's stead, Mr. Gelfand reported on the decision of the Third District Court of Appeal in *Deutsche Bank Trust Company Americas v. Beauvais*, Case No. 30-14-575 dated December 17, 2014, and the Court's Order Granting Motion for Rehearing dated August 3, 2015, inviting RPPTL Section and others to file Amicus Briefs by October 1, 2015.

Mr. Gelfand further reported that the Executive Committee reviewed and approved the recommendations set forth in the Report of the Section's *Ad Hoc Beauvais* task force dated August 29, 2015, referring the matter to the Amicus Committee to prepare a brief consistent with the task force recommendations. The brief is expected to be filed by mid-month, and a copy will be provided to all Council members. (See Agenda page 48.)

5. In Mr. Miller's stead, Mr. Gelfand reported that there was a request for comment from the Multi-Jurisdictional Practice State Focus Committee of the Vision 2016 Bar Admissions Subgroup. A request to the Bar to extend the deadline beyond October 1, 2015 was denied. A Section task force was formed to expedite recommendations. The report of the Vision 2016 Bar Admissions Subgroup and additional information concerning Vision 2016 can be found at www.floridabar.org/Vision2016.

Mr. Gelfand commented that The Florida Bar's Vision 2016 effort contains many recommendations including the multi-jurisdictional practice and reciprocity issues. Mr. Gelfand reported that the Executive Committee approved the task force's recommendations which were encapsulated in a letter to The Florida Bar, a copy of which was sent to all Council Section members as an Agenda supplement. Each member was urged to read the letter and consider the issues involved, especially those beyond reciprocity, noting the nuanced approach of the Section, including address the hurricane mobilization situations. (See Agenda page 61, and Supplement)

6. Mr. Gelfand reported on the *Jones v. Golden* opinion issued by the Florida Supreme Court. Jim Moran's summary of the opinion was circulated to all Executive Council members.

V. <u>Chair-Elect's Report</u> — Deborah P. Goodall, Chair-Elect

In Ms. Goodall's stead, Mr. Gelfand reminded everyone of the 2016-2017 Section Executive Council tentative meeting schedule. (See Agenda page 47).

VI. <u>Liaison with the Board of Governors</u> - Andrew B. Sasso

Mr. Sasso was not in attendance and his report was deferred until the next meeting.

VII. <u>Treasurer's Report</u> — Robert S. Freedman

Mr. Freedman was not in attendance and the Treasurer's report was deferred until the next meeting.

VIII. <u>Director of At-Large Members' Report</u> — Shane Kelley

Mr. Kelley was not in attendance and his report was deferred until the next meeting.

IX. <u>CLE Seminar Coordination Report</u> — CLE Seminar Coordination – William Hennessey (Probate & Trust), Robert Swaine (Real Property) Co-Chairs

Mr. Hennessy was not in attendance and the report was deferred until the next meeting.

X. <u>Probate and Trust Law Division</u> — Debra L. Boje, Director

In Ms. Boje's stead, Mr. Gelfand recognized the following Probate and Trust Law Division Committee Sponsors:

Committee Sponsors

BNY Mellon Wealth Management – *Joan Crain*

IRA, Insurance & Employee Benefits Committee
&
Probate Law and Procedure Committee

Business Valuation Analysts – *Tim Bronza*
Trust Law Committee

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

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

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

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

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

Northern Trust – *Brett Rees*
Trust Law Committee

XI. Real Property Law Division Report– Andrew O'Malley, Director

In Mr. O'Malley's stead, Mr. Gelfand recognized the following Real Property Law Division Committee Sponsors:

Committee Sponsors

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

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

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

XII. General Standing Division Report– Deborah Goodall, Director and Chair Elect

In Ms. Goodall's stead, Mr. Gelfand reported on the below information items:

Information Items:

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

In Mr. Cope's stead, Mr. Gelfand, included in his Chair's Report issues involving the decision of the Third District Court of Appeal in Deutsche Bank Trust Company Americas v. Harry Beauvais, Case No. 30-14-575 dated December 17, 2014. (See Agenda page 48.)

2. **Professionalism and Ethics** – Lawrence J. Miller, Chair

In Mr. Miller's stead, Mr. Gelfand included in his Chair's Report the request for from the Multijurisdictional Practice State Focus Committee of the Vision 2016 Bar Admissions Subgroup, the formation of a task force, and comments. (See Agenda page 61.)

XIII. <u>Probate and Trust Law Division Committee Reports</u> — Debra L. Boje, Director

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

2. **Ad Hoc Guardianship Law Revision Committee**– David C. Brennan, Chair; Sancha Brennan Whynot, Sean W. Kelley and Charles F. Robinson, Co-Vice Chairs

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

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

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

6. **Ad Hoc Committee on Treatment of Life Insurance Payable to Revocable Trust** – Richard R. Gans, Chair

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

8. **Attorney/Trust Officer Liaison Conference**– Jack A. Falk, Jr., Chair; Sharon DaBrusco, Corporate Fiduciary Chair; Patrick Lannon, Deborah Russell and Laura Sundberg, Co-Vice Chairs

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

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

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

12. **Guardianship, Power of Attorney and Advanced Directives**– Sean W. Kelley, Chair; Seth A. Marmor, Tattiana Brenes-Stahl, Cynthia Fallon and David C. Brennan, Co-Vice Chairs

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

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

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

16. **Liaisons with Tax Section**– Lauren Young Detzel, William R. Lane, Jr., David Pratt, Brian C. Sparks, Donald R. Tescher and Harris L. Bonnette, Jr.

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

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

19. **Probate Law and Procedure**– Thomas M. Karr, Chair; Jon Scuderi, James George, J. Richard Caskey and Jerry Wells, Co-Vice Chairs

20. **Trust Law** – Shane Kelley, Chair; Angela M. Adams, Deborah L. Russell and Tami F. Conetta, Co-Vice Chairs

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

XIV. Real Property Law Division Committee Reports — Andrew M. O'Malley, Director

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

2. **Condominium and Planned Development**– Bill Sklar, Chair; Alex Dobrev and Steve Daniels, Co-Vice Chairs.

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

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

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

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

7. **Landlord and Tenant** –Rick Eckhard Chair; Brenda Ezell, Vice Chair

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

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

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

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

12. **Real Property Finance & Lending**– David Brittan, Chair; E. Ashley McRae, Richard S. McIver and Robert Stern, Co-Vice Chairs.

13. **Real Property Litigation** – Susan Spurgeon, Chair; Manny Farach and Martin Solomon, Co-Vice Chairs.

14. **Real Property Problems Study**– Art Menor, Chair; Mark A. Brown, Robert Swaine, Stacy Kalmanson, Lee Weintraub and Patricia J. Hancock, Co-Vice Chairs.

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

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

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

XV. General Standing Committee Reports — Deborah P. Goodall, Director and Chair-Elect

1. **Ad Hoc Leadership Academy** – Brian Sparks and Kris Fernandez, Co-Chairs

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

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

4. **Budget** – Robert S. Freedman, Chair; S. Katherine Frazier, Pamela O. Price, Co-Vice Chairs

5. **CLE Seminar Coordination** – Robert S. Swaine and William T. Hennessey, Co-Chairs; Laura K. Sundberg (Probate & Trust), Sarah S. Butters (Probate & Trust), Lawrence J. Miller (Ethics), Cary Wright (Real Property) and Hardy L. Roberts, III (General E-CLE), Theo Kypreos, Co-Vice Chairs.

6. **Convention Coordination** – Laura K. Sundberg Chair; Alex Hamrick and Alex Dobrev, Co-Vice Chairs

7. **Fellows** – Ashley McRae, Chair; Benjamin Diamond and Joshua Rosenberg, Co-Vice Chairs

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

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

10. **Legislation** – Tae Kelley Bronner (Probate & Trust) and Steven Mezer (Real Property), Co-Chairs; Thomas Karr (Probate & Trust), and Alan B. Fields (Real Property), Co-Vice Chairs

11. **Legislative Update (2016)** – R. James Robbins, Chair, Barry F. Spivey, Stacy O. Kalmanson, Jennifer Tobin, Thomas Karr, Joshua Rosenberg, and Kymberlee Curry Smith, Co-Vice Chairs

12. **Liaison with:**

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

    b. **Clerks of Circuit Court** – Laird A. Lile and William Theodore

Conner

c. **FLEA / FLSSI** – David C. Brennan and Roland "Chip" Waller

d. **Florida Bankers Association** – Mark T. Middlebrook

e. **Judiciary** – Judge Linda R. Allan, Judge Herbert J. Baumann, Judge Melvin B. Grossman, Judge Hugh D. Hayes, Judge Maria M. Korvick, Judge Norma S. Lindsey, Judge Celeste H. Muir, Judge Robert Pleus, Jr., Judge Walter L. Schafer, Jr., Judge Morris Silberman, Judge Mark Speiser, Judge Richard J. Suarez,., and Judge Patricia V. Thomas

f. **Out of State Members** – Michael P. Stafford, John E. Fitzgerald, Jr., and Nicole Kibert

g. **TFB Board of Governors** – Andrew Sasso

h. **TFB Business Law Section** – Gwynne A. Young

i. **TFB CLE Committee** – Robert S. Freedman and Tae Kelley Bronner

j. **TFB Council of Sections** –Michael J. Gelfand and Deborah P. Goodall

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

13. **Long-Range Planning** – Deborah P. Goodall, Chair

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

15. **Member Communications and Information Technology** – William A. Parady, Chair; S. Dresden Brunner, Michael Travis Hayes, and Neil Shoter, Co-Vice Chairs

16. **Membership and Inclusion** – Lynwood F. Arnold, Jr. and Jason M. Ellison, Co-Chairs, Phillip A. Baumann, Kathrine S. Lupo, Guy S. Emerich, Theodore S. Kypreos, Tara Rao, and Kymberlee Curry Smith, Co-Vice Chairs

17. **Model and Uniform Acts** – Bruce M. Stone and Richard W. Taylor, Co-Chairs

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

19. **Publications (ActionLine)** – Silvia B. Rojas, Chair (Editor in Chief); Jeffrey Baskies (Vice Chair – Editor Probate & Trust Division), Cary Wright (Vice Chair – Editor Real Property Division), Lawrence J. Miller (Vice Chair – Editor Professionalism & Ethics); George D. Karibjanian (Editor, National Reports), Lee Weintraub (Vice Chair - Reporters Coordinator), Benjamin Diamond (Vice Chair – Features Editor), Kathrine S. Lupo (Vice Chair - Advertising Coordinator), Navin R. Pasem (Vice Chair – Practice Corner Editor), Sean M. Lebowitz (Vice Chair – Probate & Trust Case Summaries), Shari Ben Moussa (Vice Chair – Real Property Case Summaries)

20. **Publications (Florida Bar Journal)**– Jeffrey S. Goethe (Probate & Trust) and Douglas G. Christy (Real Property), Co-Chairs; Brian Sparks (Editorial Board – Probate & Trust), Cindy Basham (Editorial Board – Probate & Trust), Michael A. Bedke (Editorial Board – Real Property), Homer Duvall (Editorial Board – Real Property) and Allison Archbold (Editorial Board), Co-Vice Chairs

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

22. **Strategic Planning** –Michael J. Gelfand and Deborah P. Goodall, Co-Chairs

XVI. <u>CLE Presentation I</u> – Irene Schmid, DLA Piper, Berlin

1. **Title Insurance or Notary and Land Register Fees? – The Role of German Notaries and the German Land Register in Real Estate Transactions.**

   Ms. Schmid presented on the German notarial system, the operation of the German land register with a special focus on real estate transactions in Germany, the qualifications and duties of German notaries as compared to U.S. notaries, and the public faith in the German land register and its role in comparison to U.S. title insurance products.(See Agenda page 62.)

2. **Restitution, Compensation or Total Loss – the Impacts of the German Unification for the German Real Estate Market.**

   Ms. Schmid continued her presentation on the German restitution and procedures after the East and West Germany unification, the challenges and effects connected therewith, and the persistence of restitution issues in current real estate transactions.

XVII. **CLE Presentation II** – Judge Rosemary Barkett, Iran – United States Claims Tribunal at The Hague; Former Florida Supreme Court Justine; and, Judge of the U.S. Court of Appeals for the Eleventh Circuit, Retired.

American Lawyers Abroad: Working on International Tribunals, in International Arbitration, and in Global Efforts to Expand the Rule of Law.

Judge Rosemary Barkett made a presentation on the Role of the Iran-United States Claims Tribunal and Service on the Tribunal in The Hague.

(See Agenda page 102)

XVIII. **Adjourn** Motion to Adjourn

There being no further business to come before the Executive Council, Mr. Gelfand thanked those in attendance and a motion to adjourn was unanimously approved and the meeting concluded at approximately 10:00 a.m.

Respectfully submitted,

S. Katherine Frazier, Secretary

ADDENDUM "A"

ATTENDANCE ROSTER
REAL PROPERTY PROBATE & TRUST LAW SECTION
EXECUTIVE COUNCIL MEETINGS
2015-2016

Executive Committee	**Division**		**Aug. 1 Palm Beach**	**Oct. 3 Berlin, Germany**	**Nov. 14 Boca Raton**	**Feb. 27 Tampa**	**June 4 Orlando**
	RP	**P&T**					
Gelfand, Michael J., Chair	√		√	√			
Goodall, Deborah P. Chair-Elect		√	√				
Boje, Debra L., Probate & Trust Law Div. Director		√	√				
O'Malley, Andrew M., Real Property Law Div. Director	√		√				
Kelley, Shane, Director of At-Large Members		√	√				
Frazier, S. Katherine, Secretary	√		√				
Freedman, Robert S., Treasurer	√		√				
Bronner, Tac K., Legislation Co-Chair (P&T)		√	√				
Mezer, Steven H., Legislation Co-Chair (RP)	√		√				
Hennessey, William M., Legislation CLE Seminar Coordination Co-Chair (P&T)		√	√				
Swaine, Robert S., CLE Seminar Coordination Co-Chair (RP)	√		√				
Dribin, Michael A., **Immediate Past Chair**		√	√				

Executive Council Members	**Division**		**Aug. 1 Palm Beach**	**Oct. 3 Berlin, Germany**	**Nov. 14 Boca Raton**	**Feb. 27 Tampa**	**June 4 Orlando**
	RP	**P&T**					
Adams, Angela M.		√	√				
Adcock, Jr., Louie N., **Past Chair**		√					
Akins, David J.		√	√	√			
Allan, Honorable Linda		√					
Altman, Stuart H.		√	√				
Amari, Richard		√	√				

Executive Council Members	Division		Aug. 1 Palm Beach	Oct. 3 Berlin, Germany	Nov. 14 Boca Raton	Feb. 27 Tampa	June 4 Orlando
	RP	P&T					
Archbold, J. Allison		√	√	√			
Arnold, Jr., Lynwood F.	√	√					
Aron Jerry E. **Past Chair**	√		√				
Awerbach, Martin S.	√						
Bald, Kimberly A.	√	√	√				
Ballaga, Raul P.	√		√				
Basham, Cindy	√						
Baskies, Jeffrey		√	√				
Batlle, Carlos A.		√					
Baumann, Honorable Herbert J.		√					
Baumann, Phillip A.		√	√	√			
Beales, III, Walter R. **Past Chair**	√		√				
Bedke, Michael A.	√						
Belcher, William F. **Past Chair**		√					
Bell, Kenneth B.	√						
Beller, Amy		√	√				
Bellew, Brandon D.		√	√				
Ben Moussa, Shari D.	√						
Bloodworth, Jennifer	√		√				
Bonevac, Judy B.		√	√	√			
Boyd, Deborah	√		√				
Brenes-Stahl, Tattiana P.		√	√				
Brennan, David C. **Past Chair**		√	√				
Brittain, David R.	√		√				

Executive Council Members	Division		Aug. 1 Palm Beach	Oct. 3 Berlin, Germany	Nov. 14 Boca Raton	Feb. 27 Tampa	June 4 Orlando
	RP	P&T					
Brown, Mark A.	√		√	√			
Brown, Shawn	√		√				
Brunner, S. Dresden		√	√				
Bruton, Jr., Ed Burt	√		√				
Bucher, Elaine M.		√	√				
Butters, Sarah S.		√	√				
Callahan, Charles III		√	√				
Carlisle, David R.		√	√				
Caskey, John R.		√	√				
Christiansen, Patrick T. **Past Chair**	√		√	√			
Christy, Douglas G. III	√		√				
Cohen, Howard Allen	√		√				
Cole, John P.		√	√				
Cole, Stacey L.		√	√				
Comiter, Alyse R.		√	√				
Conetta, Tami F.		√	√				
Conner, W. Theodore	√						
Cope, Jr., Gerald B.	√		√	√			
Curley, Nick		√	√				
Daniels, Steve	√						
Detzel, Lauren Y.		√	√				
Diamond, Benjamin F.		√	√				
Diamond, Sandra F. **Past Chair**		√	√				
Dobrev, Alex	√						

Executive Council Members	Division		Aug. 1 Palm Beach	Oct. 3 Berlin, Germany	Nov. 14 Boca Raton	Feb. 27 Tampa	June 4 Orlando
	RP	P&T					
Dollinger, Jeffrey	√		√				
Dudley, Frederick R.	√						
Duvall, III, Homer	√		√				
Eckhard, Rick	√		√				
Ellison, Jason M.	√		√				
Emans, Patrick C		√	√				
Emerich, Guy S.		√	√				
Ertl, Christene M.	√		√				
Ezell, Brenda B.	√		√	√			
Fagan, Gail		√	√	√			
Falk, Jr., Jack A.		√	√				
Farach, Manuel	√		√				
Felcoski, Brian J., **Past Chair**		√	√				
Fernandez, Kristopher E.	√		√				
Fields, Alan B.	√		√				
Fitzgerald, Jr., John E.		√	√				
Flood, Gerard J.		√	√				
Foreman, Michael L.		√	√				
Galler, Jonathan		√	√				
Gans, Richard R.		√	√				
Gay, III, Robert Norwood	√						
Gentile, Melinda S.	√		√				
George, James		√	√				
Godelia, Vinette D.	√		√				

Executive Council Members	Division		Aug. 1 Palm Beach	Oct. 3 Berlin, Germany	Nov. 14 Boca Raton	Feb. 27 Tampa	June 4 Orlando
	RP	P&T					
Goethe, Jeffrey S.		√	√				
Goldman, Louis "Trey"	√		√	√			
Goldman, Robert W. **Past Chair**		√	√				
Graham, Robert M.	√		√				
Granet, Lloyd	√		√				
Griffin, Linda S.		√	√				
Grimsley, John G. **Past Chair**		√					
Grossman, Honorable Melvin B.		√					
Gunther, Eamonn W.		√	√				
Guttmann, III, Louis B. **Past Chair**	√		√	√			
Hamrick, Alexander H.		√	√	√			
Hancock, Patricia J.	√						
Hart, W.C.	√		√				
Hayes, Honorable Hugh D.		√					
Hayes, Michael Travis		√	√				
Hearn, Steven L. **Past Chair**		√	√				
Henderson, Jr., Reese J.	√						
Henderson, III, Thomas N.	√		√				
Heuston, Stephen P.		√	√				
Hoffman, Brian W.	√		√				
Isphording, Roger O. **Past Chair**		√	√	√			
Johnson, Amber Jade F.		√	√				
Jones, Darby		√	√				
Jones, Frederick W.	√		√				

Executive Council Members	Division		Aug. 1 Palm Beach	Oct. 3 Berlin, Germany	Nov. 14 Boca Raton	Feb. 27 Tampa	June 4 Orlando
	RP	P&T					
Jones, Patricia P.H.	√		√				
Judd, Robert B.		√	√				
Kalmanson, Stacy O.	√		√				
Karibjanian, George		√	√				
Karr, Mary		√	√				
Karr, Thomas M.		√	√				
Kayser, Joan B. **Past Chair**		√					
Keane, Cristin C.	√		√				
Kelley, Rohan **Past Chair**		√	√	√			
Kelley, Sean W.		√					
Khan, Nishad	√						
Kibert, Nicole C.	√		√	√			
Kightlinger, Wilhelmina F.	√		√	√			
Kinsolving, Ruth Barnes **Past Chair**	√						
Koren, Edward F. **Past Chair**		√	√				
Korvick, Honorable Maria M.		√	√	√			
Kotler, Alan Stephen		√	√				
Kromash, Keith S.		√	√				
Kurian, Sanjay	√		√				
Kypreos, Theodore S.		√	√				
Lancaster, Robert L.		√	√				
Lane, Jr., William R.		√	√				
Lange, George		√	√	√			
Larson, Roger A.	√		√				

Executive Council Members	Division		Aug. 1 Palm Beach	Oct. 3 Berlin, Germany	Nov. 14 Boca Raton	Feb. 27 Tampa	June 4 Orlando
	RP	P&T					
Lebowitz, Sean M.		√	√				
Leebrick, Brian D.	√		√				
Lile, Laird A. **Past Chair**		√	√	√			
Lindsey, Honorable Norma S.	√						
Little, III, John W.	√		√				
Lopez, Sophia A.		√	√				
Lupo, Kathrine S.	√		√				
Lynch, Kristen M.		√	√				
Madorsky, Marsha G.		√	√				
Malec, Brian		√	√				
Marger, Bruce **Past Chair**		√					
Marmor, Seth A.		√	√				
Marshall, III, Stewart A.		√					
Marx, James A.	√		√				
Mastin, Deborah Bovarnick	√		√				
McCall, Alan K.	√		√				
McElroy, IV, Robert Lee		√	√				
McIver, Richard	√		√	√			
McRae, Ashley E.	√		√				
Melanson, Noelle		√	√				
Menor, Arthur J.	√		√				
Meyer, George F. **Past Chair**	√		√	√			
Meyer, Michael	√		√				
Middlebrook, Mark T.		√	√				

Executive Council Members	Division		Aug. 1 Palm Beach	Oct. 3 Berlin, Germany	Nov. 14 Boca Raton	Feb. 27 Tampa	June 4 Orlando
	RP	P&T					
Miller, Lawrence J.		√	√				
Mize, Patrick		√	√				
Moran, John C.		√	√				
Moule, Jr., Rex E.		√					
Muir, Honorable Celeste H.		√	√				
Murphy, Melissa J. **Past Chair**	√		√				
Nash, Charles I.		√	√				
Neukamm, John B. **Past Chair**	√		√				
Nguyen, Hung V.		√	√				
Nice, Marina		√	√				
Overhoff, Alex	√		√	√			
Palmer, Margaret		√					
Parady, William A.		√	√	√			
Pasem, Navin	√						
Payne, L. Howard		√	√				
Pence, Scott P.	√		√				
Pepper-Dickinson, Tasha K.		√	√				
Perera, Diane	√						
Petrino, Bradford	√		√				
Pilotte, Frank		√	√				
Platt, William R.		√					
Pleus, Jr., Honorable Robert J.							
Pollack, Anne Q.	√		√				
Price, Pamela O.		√	√				

Executive Council Members	Division		Aug. 1 Palm Beach	Oct. 3 Berlin, Germany	Nov. 14 Boca Raton	Feb. 27 Tampa	June 4 Orlando
	RP	P&T					
Pyle, Michael A.		√	√				
Quintero, Jason	√		√				
Rao, Tara		√	√				
Redding, John N.	√		√	√			
Rendzio, Bryan	√						
Reynolds, Stephen H.	√		√				
Rieman, Alexandra V.		√	√				
Robbins, Jr., R.J.	√		√				
Roberts, III, Hardy L.	√		√				
Robinson, Charles F.		√	√				
Rodriguez, Carlos A.		√	√				
Rojas, Silvia B.	√		√				
Rolando, Margaret A. **Past Chair**	√		√	√			
Roman, Paul E.		√	√	√			
Rosenberg, Joshua		√	√				
Rubin, Jenna		√	√				
Russell, Deborah L.		√	√				
Russick, James C.	√		√	√			
Rydberg, Marsha G.	√		√				
Sachs, Colleen C.	√		√				
Sasso, Andrew		√	√				
Schafer, Jr., Honorable Walter L.		√					
Schofield, Percy A.	√						
Schwartz, Martin	√						

Executive Council Members	Division		Aug. 1 Palm Beach	Oct. 3 Berlin, Germany	Nov. 14 Boca Raton	Feb. 27 Tampa	June 4 Orlando
	RP	P&T					
Schwartz, Robert M.	√		√				
Scuderi, Jon		√	√				
Seaford, Susan	√		√				
Sheets, Sandra G.		√	√				
Shoter, Neil B.	√		√				
Silberman, Honorable Morris							
Silberstein, David M.		√	√				
Simon, Michael		√					
Sklar, William P.	√		√				
Smart, Christopher W.	√		√				
Smith, G. Thomas **Past Chair**	√		√	√			
Smith, Kymberlee	√		√				
Smith, Wilson **Past Chair**		√					
Solomon, Marty James	√		√				
Spalding, Ann		√	√				
Sparks, Brian C.		√	√				
Speiser, Honorable Mark A.							
Spivey, Barry F.		√	√				
Spurgeon, Susan K.	√		√	√			
Stafford, Michael P.		√	√				
Staker, Karla J.	√						
Stern, Robert G.	√						
Stone, Adele I.	√						
Stone, Bruce M. **Past Chair**		√	√				

Executive Council Members	**Division**		**Aug. 1 Palm Beach**	**Oct. 3 Berlin, Germany**	**Nov. 14 Boca Raton**	**Feb. 27 Tampa**	**June 4 Orlando**
	RP	**P&T**					
Suarez, Honorable Richard J.							
Sundberg, Laura K.		√	√				
Swaine, Jack Michael **Past Chair**	√		√				
Taylor, Richard W.	√		√				
Tescher, Donald R.		√					
Thomas, Honorable Patricia V.		√	√	√			
Tobin, Jennifer S.	√		√				
Triggs, Matthew H.		√	√				
Udick, Arlene C.	√		√				
Virgil, Eric		√	√				
Waller, Roland D. **Past Chair**	√		√	√			
Wartenberg, Stephanie Harriet		√	√				
Weintraub, Lee A.	√		√	√			
Wells, Jerry B.		√	√				
White, Jr., Richard M.		√					
Whynot, Sancha B.		√	√				
Wilder, Charles D.		√	√				
Williamson, Julie Ann S. **Past Chair**	√		√				
Wintter, Christopher Q.		√	√	√			
Wohlust, Gary Charles		√	√	√			
Wolasky, Marjorie E.		√	√				
Wolf, Jerome L.		√	√				
Wright, William Cary	√		√	√			
Young, Gwynne A.		√					

Executive Council Members	Division		Aug. 1 Palm Beach	Oct. 3 Berlin, Germany	Nov. 14 Boca Raton	Feb. 27 Tampa	June 4 Orlando
	RP	P&T					
Zeydel, Diana S.C.		√	√				
Zikakis, Salome J.	√		√	√			
Zschau, Julius J. **Past Chair**	√		√	√			

RPPTL Fellows	Division		Aug. 1 Palm Beach	Oct. 3 Berlin, Germany	Nov. 14 Boca Raton	Feb. 27 Tampa	June 4 Orlando
	RP	P&T					
Costello, T. John, Jr.		√	√				
Friedman, Bridget	√		√	√			
Grosso, Jennifer Lodge		√	√				
Jennison, Julia Lee	√		√	√			
Rubel, Stacy Beth		√	√				
Sajdera, Christopher Anthony	√		√				
Sneeringer, Michael Alan		√	√				
VanSickle, Melissa	√		√				

Legislative Consultants	Division		Aug. 1 Palm Beach	Oct. 3 Berlin, Germany	Nov. 14 Boca Raton	Feb. 27 Tampa	June 4 Orlando
	RP	P&T					
Dunbar, Peter M.	√		√	√			
Edenfield, Martha Jane	√		√	√			
Finkbeiner, Brittany	√						
Roth, Cari L.	√						
Guests	**Division**		**Aug. 1 Palm Beach**	**Oct. 3 Berlin, Germany**	**Nov. 14 Boca Raton**	**Feb. 27 Tampa**	**June 4 Orlando**
	RP	**P&T**					
Barboza, Annabella	√		√				
Cortvriend, Sarah	√		√				
Friedman, Jesse		√	√				
Hernandez, Carlos Luis	√		√				
Cribben, Tamara			√				
Christy, Erin	√		√				
Leathe, Jeremy P.		√	√				

Guests	Division		Aug. 1 Palm Beach	Oct. 3 Berlin, Germany	Nov. 14 Boca Raton	Feb. 27 Tampa	June 4 Orlando
	RP	P&T					
Barrow, Clyde B.			√				
Mezer, Amanda			√				
Abreu, Vanessa	√		√				
Duz, Ashley		√	√				
Newton, Clay				√			
Jelincic, Cassandra				√			
Fernandez, Cristina				√			
Calas, Perla				√			
Coroo, Lourdes				√			
Zamora, Enrique				√			
Morris, Ellen				√			
Morris, Stuart				√			
Barnett, Robert				√			
Barnett, Ann				√			
Irene Schmid				√			
Judge Rosemary Barkett				√			

The Florida Bar
Real Property, Probate & Trust Law Section

Special Thanks to the

Friends of the Section

Business Valuation Analysts, LLC – *Tim Bronza*

Corporation Services Company – Beth Stryzs

Guardian Trust – *Ashley Gonnelli*

North American Title Insurance Company – *Andres San Jorge*

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

Wilmington Trust – *David Fritz*

RPPTL 2015 - 2016
Executive Council Meeting Schedule
Michael J. Gelfand's Year

Date	Location
July 30, 2015 - August 1, 2015	**Executive Council Meeting & Legislative Update** The Breakers Palm Beach, Florida Reservation Link: https://resweb.passkey.com/go/FLBAR15 Room Rate: $218 Note: The group rate is no longer available for the nights of 7/30, 7/31 and 8/01. Email meeting.reservations@thebreakers.com to be added to a waitlist for this event.
September 30, 2015 - October 4, 2015	**Executive Council Meeting/Out of State** The Ritz Carlton Berlin, Germany Reservation Phone # +49 (0)30-33 777- 5555 Reservation Link: http://www.ritzcarlton.com/en/Properties/Berlin/Reservations/ Default.htm?nr-1%26ng=1%26gc=tfbtfba Room Rate: €210 Conference Code: tfbtfba Please note: This room block is full. To be added to the waitlist, please email mobos@flabar.org.
November 11 - 15, 2015	**Executive Council Meeting** Boca Raton Resort and Club Boca Raton, FL Room Rates[1]: Cloister Estate Room: $220.00 Cloister Suite:$475.00 Yacht Club Waterway Room: $275.00 Tower Room: $220.00 Tower Junior Suite:$260.00 Cut-off Date: October 21, 2015 Reservation Phone: 1-888-557-6375 Reservation Ref Code: Florida Bar Real Property, Probate & Trust Section
February 25, 2016 - February 28, 2016	**Executive Council Meeting** Marriott Tampa Waterside Tampa, Florida Room Rate: $224 Cut-off Date: January 13, 2016 Reservation Phone: 1-813-221-4900 Reservation Ref. Code: The Florida Bar Real Property Executive Council Meeting
June 1 - 5, 2016	**Executive Council Meeting / RPPTL Convention** Loews Portofino Bay Hotel Orlando, Florida Room Rate $219 Cut-off Date: May 2, 2016 Reservation Phone: Reservation Ref. Code: Reservation Link: http://uo.loewshotels.com/en/Portofino-Bay-Hotel/GroupPages/FLBar2016

Date/Time	Committee / Event:	Set	# at Table	# perimeter chairs	Equipment
Wednesday	**February 24, 2016**				
4:00 pm – 6:00 pm	**Registration Desk Hours**				
7:00 pm – 9:30 pm	**Executive Committee Dinner** (Tentative)**	20	15		
Thursday	**February 25, 2016**				
8:00 am – 5:00 pm	**Registration Desk Hours**				
8:15 am – 11:00 am	**Executive Committee ** **	Conf	12	0	
11:30 am – 1:00 pm	**Attorney Trust Officer**	Conf	14	10	speakerphone
12:00 pm – 1:30 pm	**Digital Assets and Information Study Committee**	H/S	40	10	
12:00 pm – 1:30 pm	**Homestead Issues Study***	H/S	20	10	
1:00 pm – 3:30 pm	**Condominium and Planned Development**	H/S	60	60	microphones, podium
1:00 pm – 2:30 pm	**Title Issues & Standards**	Conf	10		speakerphone
1:30 pm – 3:00 pm	**Real Property Finance & Lending**	H/S	40	20	microphones, podium, speaker phone
1:30 pm – 3:30 pm	**Probate & Trust Litigation**	H/S	80	60	microphones, podium
2:00 pm – 3:00 pm	**Refreshment Break**				
3:30 pm – 5:00 pm	**Construction Law Institute**	Conf	10		speakerphone
3:30 pm – 5:00 pm	**Landlord & Tenant**	Conf	10		speakerphone
3:30 pm – 5:00 pm	**Title Insurance & Title Insurance Liaison**	H/S	45	15	speakerphone microphones podium
3:30 pm – 5:00 pm	**Estate & Trust Tax Planning**	H/S	80	60	microphones, podium
5:00 pm – 6:00 pm	**At Large Members**	rounds	80		microphone, podium/beer & wine
5:00 pm – 6:00 pm	**Elective Share Review Committee ***	conf	15		
~~5:00 pm – 6:00 pm~~	~~**ALTA Best Practices Task Force**~~	~~conf~~	~~15~~		~~cancelled per A. O'Malley~~
6:30 pm – 9:00 pm	**Welcome Reception**	***Hold for Reception (off site)***			
9:30 pm – 11:30 pm	**Hospitality Suite**				
Friday	**February 26, 2016**				
6:30 am	**Reptiles Run**				
7:30 am – 9:00 am	**Continental Breakfast (GRAB AND GO)**	***Pre-Registration and Ticket Required***			
8:00 am – 9:00 am	**Fiduciary Practice Group**	*H/S*	*20*		
8:00 am – 9:30 am	**Guardianship & Advanced Directives**	H/S	40	20	microphone
8:00 am – 9:30 am	**Asset Protection**	H/S	60	40	microphones, podium
8:00 am – 9:00 am	**Insurance & Surety**	H/S	20	10	speakerphone
8:00 am – 10:00 am	**Membership & Inclusion**	H/S	25	5	
9:00 am – 11:00 am	**Real Estate Structures and Taxation**	H/S	30	15	microphones, podium
9:00 am – 11:00 am	**Residential Real Estate & Industry Liaison Committee**	H/S	40	20	microphones, podium, speakerphone
9:30 am – 11:30 am	**Trust Law**	H/S	80	60	microphones, podium

9:30 am – 11:00 am	**Development and Land Use**	Conf	14	none	speakerphone
10:00 am - 11:00 am	**Legislative Update**	Conf	10		
11:00 am – 12:30 pm	**Construction Law**	H/S	20	10	podium
11:00 am – 12:30 pm	**Sponsorship Committee**	Conf	10	none	none
11:00 am – 12:30 pm	**Real Property Litigation**	H/S	30	10	speakerphone, microphones, podium
11:30 am – 1:00 pm	**Member Communication and Information Technology**	Conf	10	5	
11:30 pm – 1:30 pm	**Buffet Lunch (GRAB AND GO)**	***Pre-Registration and Ticket Required***			
11:30 pm – 1:00 pm	**Ad Hoc Decanting***				
11:30 pm – 1:00 pm	**Ad Hoc Study on Spendthrift Trust Issues Committee ***	H/S	20	10	
11:30 pm – 1:00 pm	**Ad Hoc Same Sex Marriage Implication ***	H/S	20	10	
11:30 pm – 1:00 pm	**IRA, Insurance & Employee Benefits**	H/S	30	15	microphones
1:00 pm – 3:00 pm	**Probate Law & Procedure**	H/S	80	60	microphones, podium
1:30 pm – 3:00 pm	**Commercial Real Estate**	H/S	25	15	speakerphone
1:30 pm – 3:00 pm	**Real Property Problem Study**	H/S	20	10	speakerphone
1:30 pm – 3:00 pm	**Fellows and Mentoring**	H/S	20	10	
3:00 pm – 5:00 pm	**Real Property Law Division Roundtable**	rounds	100		microphones, podium
3:00 pm – 5:00 pm	**Probate and Trust Law Division Roundtable**	rounds	140		microphones, podium
5:00 pm – 6:00 pm	**PAC**	Rounds	100		microphones, podium
5:00 pm – 6:00 pm	**Ad Hoc Jurisdiction/Service Process***	conf	10		
6:30 pm – 10:00 pm	**Reception and Dinner**	***Pre-Registration and Ticket Required***			
10:00 pm – 12:00 am	**Hospitality Suite**				
Saturday	**February 27, 2016**				
6:00 am	**Reptiles Run**				
7:30 am - 9:00 am	**Executive Council & Guest Breakfast**	***Pre-Registration and Ticket Required- Breakfast is***			
9:00 am – 12:00 pm	**Executive Council Meeting**	class w/ riser	250	50	two screens,podium, microphones, two standing microphones down each aisle
12:30 pm – 2:30 pm	**Career Coaching Session**	special	10		
7:00 pm – 9:30 pm	**Hold for Dinner**	***Hold for Dinner***			

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

**** Attendance by invitation only**

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REAL PROPERTY, PROBATE & TRUST LAW SECTION

THE FLORIDA BAR

www.RPPTL.org

October 1, 2015

The Board of Governors - The Florida Bar
℅ Ray Abadin, Esq., President
651 East Jefferson Street
Tallahassee, Florida 32399-2300

Re: Multijurisdictional Practice ("Waive-In Provisions"/ Reciprocity)

To the Honorable Members of the Board of Governors:

On behalf of Real Property, Probate and Trust Law Section of the Florida Bar ("RPPTL Section"), this letter responds to the Bar's request for the RPPTL Section's expedited comments to the "Preliminary Report of the Multijurisdictional Practice State Focus Committee of the Bar Admissions Sub-Group of Visions 2016" ("Report"), including the "waive-in provisions" that have been popularly referred to as "reciprocity."

1. The RPPTL Section.

The RPPTL Section historically has been, and continues to be by far the largest substantive law section of The Florida Bar. The RPPTL Section assists, represents, and involves over 10,000 voluntary dues paying members practicing in the areas of real estate, construction, probate, trust and estate law. RPPTL Section members' dedication to serving the public in these fields of practice is reflected in just a few of their continuing efforts, including producing educational materials and seminars for attorneys and the public, assisting the public *pro bono*, drafting proposed legislation, rules of procedure and regulation, and, upon request, providing advice to the judicial, legislative and executive branches on issues related to our fields of practice.

2. The RPPTL Section Comment Process.

The RPPTL Section is mindful of the hard work, depth of study, serious approach and good faith expended in the Report's preparation which was observed as the RPPTL Section's review culminated in these comments. Thus, the RPPTL Section appointed a representative task force to review, evaluate and report on many sources of information, not the least being the RPPTL Section's own members. In addition to the Report, the task force considered the Model Rule on Admission by Motion of the American Bar Association (August 2012), proposed Rule 5.5, the Bar's issue paper "Multidisciplinary Practices, Ancillary Businesses and the Legal Profession"[1], articles on reciprocity, and other comments including those by the Florida Board of Bar Examiners, judges at different court levels, and various local bars, including the Palm Beach County Bar Association, written and anecdotal information from California, New York and Arizona, current newspaper editorial opinions, as well as the materials, opinions and recommendations cited therein.

3. Summary of RPPTL Section Comments.

In this letter, the RPPTL Section addresses the three proposed areas of multi-jurisdictional practice that are set out in the Report, including so-called "reciprocity." For ease of review and consideration, we have set out our observations in the numbered paragraphs which follow a summary. Based on the factors summarized in this letter, the RPPTL Section's positions on the relevant three multijurisdictional practice issues are as follows.

Reciprocity. The RPPTL Section opposes suggested changes to the Rules Regulating the Florida Bar which would permit attorneys admitted to practice in other states but not admitted to The Florida Bar and who have actively practiced law for five of the last seven years to be "permanently" admitted on motion to practice law in Florida without taking and successfully passing the Florida Bar Examination. We have used the term "Waive-In-Provisions" below to describe proposed rule changes which deal with this matter.

Natural Disaster. Subject to significant refinement and consideration of relevant details, the RPPTL Section anticipates supporting in principle proposed Rule changes that would permit an attorney admitted in good standing in another state to practice under:

"Hurricane Katrina" Circumstances. Temporarily provide legal services to assist clients concerning the law of that attorney's state of admission, not Florida, when the attorney, because of a natural catastrophe or disaster, is required to relocate to Florida.

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1 Bearing a revision date of 3/22/2007, and published on the Bar's website at: http://www.floridabar.org/DIVCOM/PI/BIPS2001.nsf/1119bd38ae090a748525676f0053b606/50d5d18d542af3d4852567af00708f2d!OpenDocument

> "Hurricane Andrew" Circumstances. Temporarily provide legal services to a Florida resident in conjunction with a natural disaster or catastrophe in Florida when the attorney renders services through and under the auspices of: an authorized Florida Legal Services Organization; and a member of The Florida Bar in good standing.

Cognizant of issues occurring elsewhere, including aircraft disasters, temporary allowances should not be abused to undermine the trust and, expectations of Florida citizens regarding the competency of their legal counsel.

Military Spouses. Although there may be public policy concerns and benefits relating to military spouses not admitted to The Florida Bar to practice law in Florida, Florida citizens and guests' assumptions and expectations for Florida counsel to be well versed in Florida Law, and related concerns, mandate further study before a position in support or opposition can be submitted.

As to the Natural Disaster and Military issues, this letter does not provide further analysis because additional consideration and study beyond the RPPTL Section are necessary. Thus, the RPPTL Section limits further comments to the Waive-In-Provisions.

4. Opposition to Waive-in-Provisions.

Professionalism and the protection of Florida's citizens and guests are at the core of the opposition to Waive-In-Provisions. It would be disingenuous on our part not to recognize that among Florida's citizens who are impacted by the Report and the recommended Rule changes regarding Waive-In-Provisions, are approximately 101,000[2] members of the Florida Bar (over 10,000 of which are members of the RPPTL Section), 72,000 of whom took and passed the Florida Bar exam and who are currently in good standing and eligible to practice in the State of Florida, plus another 4,000 or so who are in good standing but not currently eligible to practice.

Professionalism and the protection of Florida citizens and guests are the reasons most if not all RPPTL Section members were drawn to the call of the Bar, including the desire to help

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[2] According to the Bar's website, as of September 1, 2015, there are 101,006 members of the Bar. Of those, 13,347 are not eligible to practice for various reasons (primarily inactive status), 4,241 are not eligible to practice but are in good standing (the majority of which are not Florida residents), and 11,649 of which reside outside of Florida. These figures are provided not only to clarify the record as far as the various figures that have appeared in the media, but also to dispute alleged support among members of The Florida Bar for changes to the reciprocity rules.

others and prevent harm, rather than mere protectionism as has been suggested by some. Indeed, respected members of the judiciary, who have no financial stake in the market for legal services, have spoken out vehemently against any relaxation of the existing rules regarding Waive-In-Provisions.

A. Insufficient Standards of Knowledge.

There is no question that, as the Report states, our "profession has been revolutionized through technological advances."[3] However, the mere fact that legal research can be accomplished by computer, a "revolution" that actually began more than forty years ago, there is no established connection between that continuing advance and the conclusion that Waive-In-Provisions must therefore follow. Legal research is routinely outsourced to lawyers and non-lawyers all over the world. Does it follow that each of them should therefore be entitled to practice law in Florida? Or is the argument that since a lawyer admitted in another state can perform in-depth research of Florida law with a couple of key strokes, they should be admitted on motion? If so, then why require anyone take The Florida Bar Exam?

Indeed, the very reason we require lawyers to pass The Florida Bar Exam is to help ensure competence for the protection of Florida's citizens and guests regarding nuanced Florida legal issues. This is of particular concern in each of the RPPTL Section's substantive law divisions' Probate and Trusts, and Real Estate. Florida law has many peculiarities which create significant and recurring litigation for out-of-state practitioners, including homestead, elective share, tax apportionment, *in terrorem* clauses, and foreclosures.

Reliance on so-called "uniform laws" is inapposite. While the Florida Legislature has adopted certain aspects of many "uniform" acts, in recognition of Florida's special circumstances resulting from geography, history, and public policy, the Legislature frequently injects many significant changes to "uniform acts." Legislative changes help ensure that the final bill texts are consistent with the Florida Constitution and long-standing Florida common law and public policy.

The significant influx of retirees and families every year creates a significant risk that the Waive-In Provisions would permit and perhaps encourage lawyers in other states, who have not demonstrated competency in Florida law, to maintain their counseling relationships with relocating clients without the attorney learning, understanding, and truly appreciating the nuances of Florida Law. Given that the purpose of the Florida Bar is to "improve the administration of justice" we find that requiring testing and demonstration of working knowledge of Florida law is a threshold of required protection for Florida's citizens.

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[3] Report at 14.

It is not an understatement to acknowledge the nearly every RPPTL Section member has horror situations created by an out of state attorney. The out of state attorney usually means well. Sometimes the attorney does not believe as a practical matter that she or he can tell the client "no, I cannot opine on Florida law." The result is a client's expectation not being met, and many times resulting in litigation, or a claim against the attorney.

B. Alternatives: *Pro Hac Vice*.

Current *pro hac vice* rules provide appropriate relief. Existing *pro hac vice* rules and standards efficiently provide access for those who seek and require the temporary and timely assistance of out of state counsel who may not be admitted to The Florida Bar.

C. Numeracy.

The number of available Florida attorneys is not an issue in this context. Until the release of the Report there was no public or media outcry that Florida did not have enough attorneys to meet the needs of its citizens. Rather, any coverage or discussion given to the issue of the number of Florida attorneys, mostly in professional journals, warned of an over-supply and cautioned college graduates about considering the law as an employment opportunity.

D. The Public.

Waive-In-Provisions have not garnered grass-roots support either among the general public or the members of the Bar. The issue is of apparent interest to those relatively few members of the Bar who seek the ability to service multi-state clients in other states so their clients do not utilize attorneys practicing in those other states, and perhaps by members of the bars of other states who wish to ply their trade in multiple jurisdictions.

E. Methodology.

The methodology employed by the Report for the conclusion that "a majority of Florida lawyers" share the view that "the time has come for Florida to adopt a rule allowing for Admission by Motion based on reciprocity"[4] appears flawed. The Report cites a survey in which "66% of those responding felt that it was important for Florida to adopt some form of reciprocity with 64% favoring an Admission by Motion rule versus 21% opposed."[5] While the Report does not appear to provide the total number of those polled who answered the reciprocity questions,

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[4] Report at 7.

[5] *Id.*

the Report notes a source which in turn indicates that only 232 provided written comments on the reciprocity issue which represents only about 20% of those who responded to the survey in any manner, which in turn represented only about 1% of the Bar's total membership.[6] Thus, the data on which the Report is based does not appear to be a large enough sample to be reliable.

F. Professionalism.

The Governors, the judiciary and practitioners have been increasingly concerned over the years regarding professionalism. As a result statewide efforts have sought to draw attorneys into the community of professionals, especially through Bar sections, substantive committees, and voluntary bars. Adding out-of-state members is anticipated to undermine community and thus professionalism.

Requiring out of state attorneys to be a member of The Florida Bar and pay dues does not enforce professionalism. Further, recognizing the increasing proportion of the budget expended on professional regulation and enforcement, additional dues would not be anticipated to cover the expenses of regulating out-of-state attorneys.

5. RPPTL Section Conclusion.

The RPPTL Section acknowledges that opposition to the Waive-In-Provisions requires the continuation of the *status quo*, that a five year or more experienced lawyer may have to re-take an the multi-state bar exam and perhaps, a separate Florida component. However, the public policy requiring Bar admission for practice, based upon protecting Florida citizens and guests, and recognizing Florida's unique factual and legal concepts, reinforces the RPPTL Section's well-reasoned approach.

There are enough nuances in our laws that admission to the bar of another state provides no assurance of competence in Florida law. Quite simply, Florida's citizens and guests deserve more.

Please note that that Bar's comment deadline of October 1, 2015, falls before the RPPTL Section's Executive Council's next meeting. As a result of the decision to require compliance with the deadline, and in keeping with our RPPTL Section's By-Laws, the Executive Committee of the RPPTL Section has unanimously approved the comments in this letter.

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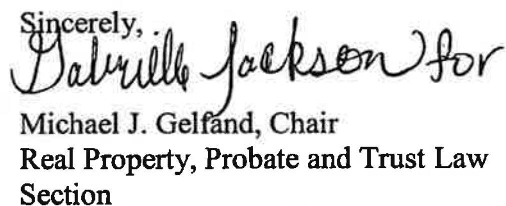
6 *See* "Results of the Vision 2016 Commission Survey on Legal Education and Bar Admissions" cited at Report, *Id.* at 7, fn 11 and 12.

If you have any question or seek additional information regarding these comments, or otherwise, then as always please do not hesitate to contact me.

Sincerely,



Michael J. Gelfand, Chair
Real Property, Probate and Trust Law Section

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IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

THIRD DISTRICT

AUGUST 03, 2015

DEUTSCHE BANK TRUST COMPANY AMERICAS, etc.,
Appellant(s)/Petitioner(s),
vs.
HARRY BEAUVAIS, et al.,
Appellee(s)/Respondent(s),

CASE NO.: 3D14-0575

L.T. NO.: 12-49315

This cause is set for rehearing en banc on Thursday, November 12, 2015 at 10:00 o'clock A.M. Counsel will be allowed twenty (20) minutes a side to present oral argument. Each party may file a supplemental brief within thirty (30) days from the date of this order addressing the following issues:

1. Identify and discuss any parts of the record reflecting the parties' treatment of the December 6, 2010 dismissal as an adjudication denying acceleration and foreclosure which placed the parties back into their respective contractual positions.
2. Identify and discuss any parts of the record evidencing if, how, and when, the Bank notified Beauvais that the December 6, 2010 dismissal constituted an adjudication denying the Bank's January 23, 2007 acceleration.

No reply briefs will be permitted.

Mortgage Bankers Association of South Florida, Business Law Section of The Florida Bar, Real Property Probate & Trust Law Section of The Florida Bar, Florida Alliance for Consumer Protection, Federal National Mortgage Association

and Federal Home Loan Mortgage Corporation are each invited to file an amicus curiae brief within sixty (60) days from the date of this order addressing the following issues:

1. Where a foreclosure action has been dismissed with the note and mortgage still in default:
   a. Does the dismissal of the action, by itself, revoke the acceleration of the debt balance thereby reinstating the installments terms?
   b. Absent additional action by the mortgagee can a subsequent claim of acceleration for a new and different time period be made?
   c. Does it matter if the prior foreclosure action was voluntarily or involuntarily dismissed, or whether the dismissal was with or without prejudice?
   d. What is the customary practice?
2. If an affirmative act is necessary by the mortgagor to accelerate a mortgage, is an affirmative act necessary to decelerate?
3. In light of Singleton v. Greymar Assocs., 882 So. 2d 1004 (Fla. 2004), is deceleration an issue or is deceleration inapplicable if a different and subsequent default is alleged?

cc: Todd L. Wallen
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Business Law Section Of The Florida Bar
William P. McCaughan
Federal Home Loan Mortgage Corporation
Florida Alliance For Consumer Protection
Nicholas D. Siegfried
Federal National Mortgage Association
Mortgage Bankers Association Of South Florida
Real Property Probate & Trust Law Section Of The Florida Bar

Third District Court of Appeal

State of Florida

Opinion filed December 17, 2014.
Not final until disposition of timely filed motion for rehearing.

No. 3D14-575
Lower Tribunal No. 12-49315

Deutsche Bank Trust Company Americas, etc.,
Appellant,

vs.

Harry Beauvais, et al.,
Appellees.

An Appeal from the Circuit Court for Miami-Dade County, Peter R. Lopez, Judge.

K & L Gates LLP, William P. McCaughan, Steven R. Weinstein and Stephanie N. Moot, for appellant.

Sigfried, Rivera, Hyman, De La Torre, Mass & Sobel, Steven M. Siegfried and Nicholas Sigfried; The Wallen Law Firm and Todd L. Wallen, for appellees.

Before SHEPHERD, C.J., and EMAS and SCALES, JJ.

EMAS, J.

I. INTRODUCTION

Deutsche Bank Trust Company Americas, as Indenture Trustee for American Home Mortgage Investment Trust 2006-2 ("Deutsche Bank"), appeals from the trial court's order of final summary judgment in favor of Aqua Master Association, Inc. ("the Association"). Deutsche Bank asserts the trial court erred in concluding that the expiration of the statute of limitations barred the cause of action and rendered the lien of mortgage on the property null and void. The following issue is squarely raised in this case:

> Where a lender files a foreclosure action upon a borrower's default, and expressly exercises its contractual right to accelerate all payments, does an involuntary dismissal of that action without prejudice in and of itself negate, invalidate or otherwise "decelerate" the lender's acceleration of the payments, thereby permitting a new cause of action to be filed based upon a new and subsequent default?

We answer that question in the negative, and hold that the involuntary dismissal without prejudice of the foreclosure action did not by itself negate, invalidate or otherwise decelerate the lender's acceleration of the debt in the initial action. The lender's acceleration of the debt triggered the commencement of the statute of limitations, and because the installment nature of the loan payments was never reinstated following the acceleration, there were no "new" payments due and thus there could be no "new" default following the dismissal without prejudice of the initial action. The filing of the subsequent action, after expiration of the statute

of limitations, was therefore barred. We reverse, however, that portion of the order which canceled the note and mortgage and quieted title in favor of the Association.

II. BACKGROUND AND FACTS

The mortgage at issue ("the Mortgage") encumbered a condominium on Aqua Avenue in Miami Beach ("the Property"), which is currently owned by the Association. Harry Beauvais, the mortgagor and original borrower, lost title to the Property as a result of an unrelated foreclosure proceeding initiated by the Association, as will be described below. The Association has owned the property since February 22, 2011.

The note and mortgage were executed on February 10, 2006 in the principal amount of $1,440,000. Beauvais defaulted on his payments to the original mortgagee in September 2006. There are three actions regarding the Property that provide context for this appeal:

- *American Home Mortgage Servicing, Inc. ("AHMS") v. Beauvais, et al.* ("the Initial Action"): This Initial Action was commenced on January 23, 2007, after Beauvais defaulted on his payments in September 2006. AHMS sought to foreclose on the mortgage on the full amount of the debt. In paragraph four of its complaint, AHMS alleged: "Defendant, Harry Beauvais, failed to pay the payment due on the Note on September 1, 2006, and Plaintiff elected to accelerate payment of the balance." (Emphasis added.) In its complaint, AHMS sought payment of the full, accelerated amount of the remaining principal due-- $1,439,926.80. On December 6,

2010, the trial court dismissed the Initial Action without prejudice because AHMS failed to appear at a case management conference. AHMS did not appeal this dismissal order, and took no further action with regard to its acceleration of the payments.

- *Aqua Master Association, Inc. v. Beauvais, et al* ("the Condominium Action"): In the Condominium Action, Association foreclosed its lien on the Property based on Beauvais' failure to pay condominium assessments. The Association obtained title to the Property in 2011, by issuance of a certificate of title, and obtained title subject to the AHMS mortgage.

- *Deutsche Bank Trust Company Americas v. Beauvais, et al.* ("the Current Action"): The Current Action was filed on December 18, 2012, in which Deutsche Bank[1] sought to foreclosure on the Property due to a default by Beauvais. In its complaint, Deutsche Bank alleges that Beauvais defaulted by failing to make the payment due October 1, 2006[2] as well as all subsequent payments. Similar to the complaint in the Initial Action, Deutsche Bank's complaint in the Current Action declared that it was exercising its contractual right to accelerate all payments, and alleged the full amount of the principal payable under the note and mortgage to be immediately due, in the amount of $1,439,926.80, the same principal amount sought in the complaint filed in the Initial Action. The Association

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[1] Prior to the filing of the Current Action, the mortgage was assigned by AHMS to Deutsche Bank. For ease of reference, all references hereafter will be to Deutsche Bank, including actions and events involving its predecessor in interest, AHMS.

[2] The alleged default date in the Initial Action was September 1, 2006 payment.

answered, raising as an affirmative defense the expiration of the statute of limitations.

The Association moved for summary judgment in the Current Action, arguing that:

- ▶ In the Initial Action, Deutsche Bank exercised its contractual right to accelerate the payments, which triggered the running of the five-year statute of limitations for the entire debt;

- ▶ The trial court's dismissal without prejudice of the Initial Action did not negate or otherwise invalidate the acceleration of the debt or otherwise reinstate the installment nature of the payments due;

- ▶ Deutsche Bank took no action to withdraw its acceleration of the debt or otherwise reinstate the installment nature of the payments due;

- ▶ The Current Action (filed December 18, 2012) was filed more than five years after the statute of limitations commenced with Deutsche Bank's acceleration of the debt in the Initial Action (filed January 23, 2007); and

- ▶ Therefore, Deutsche Bank is barred by the statute of limitations from pursuing the Current Action.

Deutsche Bank responded, contending that:

- ▶ The Initial Action was based on a default date (September 1, 2006) different from the Current Action (October 1, 2006);

► The trial court's dismissal of the Initial Action served to "decelerate" the payments, in effect negating the acceleration exercised by Deutsche Bank in the Initial Action and reinstating the installment nature of the loan repayment; and

► Pursuant to Singleton v. Greymar Assocs., 882 So. 2d 1004 (Fla. 2004), and its progeny, the statute of limitations did not bar the Current Action, because the failure to make a subsequent payment following dismissal of the Initial Action constituted a new default, creating a new and distinct cause of action and the commencement of a new statute of limitations period.

The trial court granted the Association's motion, and entered judgment in its favor, determining that: (i) the Current Action was barred by the statute of limitations because it was filed on December 18, 2012, more than five years after the filing of the complaint in the Initial Action in January 2007; and (ii) the expiration of the statute of limitations rendered the mortgage null and void. In its order, the court quieted title to the Property in favor of the Association against the claims of Deutsche Bank. The trial court denied Deutsche Bank's motion for rehearing, and this appeal followed. We review these issues *de novo*. S. Fla. Coastal Elec., Inc. v. Treasures on Bay II Condo Ass'n, 89 So. 3d 264, 266 (Fla. 2d DCA 2012).

III. ANALYSIS

Deutsche Bank's primary argument in this appeal is that when the Initial Action was involuntarily dismissed without prejudice in December 2010, this dismissal effectively "decelerated" the loan (which had been expressly accelerated by the complaint in the Initial Action), thus returning Deutsche Bank and Beauvais to their original positions before the lawsuit was filed, meaning that the installment nature of the loan repayment was again in effect. Therefore, Deutsche Bank's argument goes, Beauvais' failure to make a payment on October 1, 2006 (one month after the default date in the Initial Action) constituted a "new" default, creating a new and distinct cause of action with a new limitations period, allowing Deutsche Bank to foreclose (and to again exercise its contractual right to accelerate the loan payments), by filing the Current Action in December 2012.

The Association contends that Deutsche Bank's exercise of its contractual right to accelerate the debt in the Initial Action triggered the commencement of the five-year statute of limitations, and neither Deutsche Bank nor Beauvais took any action to reinstate the installment nature of the payments under the mortgage. The Association posits that the trial court's involuntary dismissal without prejudice could not, by operation of law, serve to "decelerate" the loan, to negate the acceleration of the payments, or to otherwise reinstate the installment nature of the payments, because such a conclusion would in effect permit the trial court to rewrite the terms of the contract between the lender and the borrower. Therefore,

the statute of limitations continued to run on the accelerated debt, and expired before Deutsche Bank filed the Current Action in December 2012.

A. The Statute of Limitations and a Contractual Acceleration Clause

Under the relevant statute of limitations, section 95.11(2)(c), Florida Statutes, "[a]n action to foreclose a mortgage" "shall be commenced. . . within five years." The statute of limitations begins to run when a cause of action accrues, and "[a] cause of action accrues when the last element constituting the cause of action occurs." City of Riviera Beach v. Reed, 987 So. 2d 168, 170 (Fla. 4th DCA 2008). An acceleration clause contained in a note which by its terms requires payment in installments "confers a contract right upon the mortgagee which he may elect to enforce, upon a default." Campbell v. Werner, 232 So. 2d 252, 255 (Fla. 3d DCA 1970).

In Campbell, this court further noted that

> a contract for acceleration of a mortgage indebtedness should not be abrogated or impaired, or the remedy applicable thereto denied, except upon defensive pleading and proof of facts or circumstances which are regarded in law as sufficient grounds to prompt or support such action by the court.

Id. at 256.

When a mortgage contains an optional acceleration clause, the statute of limitations commences when the lender exercises this option and invokes the acceleration clause. See Greene v. Bursey, 733 So. 2d 1111, 1115 (Fla. 4th DCA

1999) (noting that in an installment contract with an optional acceleration clause, "the entire debt does not become due on the mere default of payment; rather, it become[s] due when the creditor takes affirmative action to alert the debtor that he has exercised his option to accelerate."); Monte v. Tipton, 612 So. 2d 714 (Fla. 2d DCA 1993); Smith v. F.D.I.C., 61 F.3d 1552, 1561 (11th Cir. 1995)(holding, "when the promissory note secured by a mortgage contains an optional acceleration clause, the foreclosure cause of action accrues, and the statute of limitations begins to run, on the date the acceleration clause is invoked.").

The parties agree that the statute of limitations commenced, at the latest, when the Initial Action was filed on January 23, 2007, in a complaint which by its terms exercised the option to accelerate all payments due under the mortgage, rendering those payments (and the entire principal balance) immediately due and payable.

The relevant portion of the note provides:

> **6. BORROWER'S FAILURE TO PAY AS REQUIRED**
>
> . . .
>
> **(B) Default**
> If I do not pay the full amount of each monthly payment on the date it is due, I will be in default.
>
> **(C) Notice of Default**
> If I am in default, the Note Holder may send me a written notice telling me that if I do not pay the overdue amount by a certain date, the Note Holder may require me to pay immediately the full amount of Principal which has not been paid and all the interest that I owe on

> that amount. That date must be at least 30 days after the date on which the notice is mailed to me or delivered by other means.

The relevant portion of the mortgage provides:

> **22. Acceleration; Remedies.** Lender shall give notice[3] to Borrower prior to acceleration following Borrower's breach of any covenant or agreement in this Security Instrument. . . . The notice shall specify: (a) the default; (b) the action required to cure the default; (c) a date, not less than 30 days from the date the notice is given to Borrower, but which the default must be cured; and (d) that failure to cure the default on or before the date specified in the notice may result in acceleration of the sums secured by the Security Instrument, foreclosure by judicial proceeding and sale of the Property. The notice shall further inform Borrower of the right to reinstate after acceleration and the right to assert in the foreclosure proceeding the non-existence of a default or any other defense of Borrower to acceleration and foreclosure. If the default is not cured on or before the date specified in the notice, Lender at its option may require immediate payment in full of all sums secured by this Security Instrument without further demand and may foreclose this Security Instrument by judicial proceeding.

(Emphasis added.)

In this case, Deutsche Bank exercised its right of acceleration, and did "require immediate payment in full of all sums secured by this Security Instrument without further demand" and did seek to "foreclose this Security Instrument by judicial proceeding." Neither the note nor the mortgage provides that dismissal ~~without prejudice of the~~ foreclosure action would negate the acceleration of the

[3] Although the record does not include the notice of default sent to Beauvais before institution of the Initial Action in January 2007, no issue has been raised on appeal regarding the timing, adequacy or propriety of the notice of default prior to acceleration.

debt or otherwise reinstate the installment nature of the loan. Indeed, the mortgage provides only that the notice of default shall "inform Borrower of the right to reinstate after acceleration. . . ." The only other provision regarding reinstatement after acceleration is also framed in terms of the rights of the Borrower:

> **18. Borrower's Right to Reinstate After Acceleration.** If Borrower meets certain conditions, Borrower shall have the right to have enforcement of this Security Instrument discontinued at any time prior to the earliest of: (a) five days before the sale of the Property pursuant to any power of sale contained in this Security Instrument; (b) such other period as Applicable Law might specify for the termination of Borrower's right to reinstate; or (c) entry of a judgment enforcing this Security Instrument. These conditions are that Borrower: (a) pays Lender all sums which then would be due under this Security Instrument and the Note as if no acceleration had occurred; (b) cures any default of any other covenants or agreements; (c) pays all expenses incurred in enforcing this Security Instrument, including, but not limited to, reasonable attorneys' fees, property inspection and valuation fees, and other fees incurred for the purpose of protecting Lender's interest in the Property and rights under this Security Instrument; and (d) takes such action as Lender may reasonably require to assure that Lender's interest in the Property and rights under this Security Instrument, and Borrower's obligation to pay the sums secured by this Security Instrument, shall continue unchanged. . . . Upon reinstatement by Borrower, this Security Instrument and obligations secured hereby shall remain fully effective as if no acceleration had occurred.

(Emphasis added.)

There is no evidence that Beauvais sought to have the acceleration of the debt (or other enforcement of the mortgage) discontinued or modified, nor is there

any evidence that he sought reinstatement of the installment nature of the payments or met any of the conditions necessary for reinstatement.

And so what remains in dispute is whether the involuntary dismissal without prejudice of the Initial Action had any legal effect on the acceleration of the debt: in other words, did the involuntary dismissal without prejudice of the Initial Action reinstate the installment terms of the mortgage and note (i.e., effectuate a "deceleration" of the acceleration option exercised by Deutsche Bank in its complaint) such that a failure to make a subsequent payment could be considered a "new" default, causing the accrual of a new cause of action and commencing the running of a new statute of limitations period?

B. *Singleton* and its Progeny

In support of its position Deutsche Bank relies heavily on Singleton v. Greymar Associates, 882 So. 2d 1004 (Fla. 2004), and several cases applying Singleton. In Singleton, the lender brought a foreclosure action based on borrowers' failure to make payments from September 1, 1999 to February 1, 2000. Id. at 1005. This first action was dismissed *with prejudice* when the lender failed to appear at a case management conference. Id. Thereafter, a second foreclosure action was filed, alleging borrowers failed to make payments from April 1, 2000 onward. Id. The trial court eventually entered final judgment for the lender, against borrowers' contention that res judicata barred relief in the second action,

which borrowers contended was identical to the first action. Id. On appeal, the Fourth District affirmed the trial court, finding that "[e]ven though an earlier foreclosure action filed by [lender] was dismissed with prejudice, the application of res judicata does not bar this lawsuit. . . . The second action involved a new and different breach." Id.

The Florida Supreme Court accepted jurisdiction upon express and direct conflict with the Second District's decision in Stadler v. Cherry Hill Developers, Inc., 150 So. 2d 468 (Fla. 2d DCA 1963). In Stadler, an initial foreclosure action was filed, alleging a default date of May 1960. Id. at 469. That action was later dismissed by the trial court *with prejudice* for failure to comply with a rule of court. Id. A second foreclosure action was thereafter filed, alleging a subsequent default date of August 1960. Id. The trial court entered a final judgment of foreclosure, and the Second District reversed, holding that res judicata barred the second action. Id.

The supreme court disapproved of the holding in Stadler and approved the Fourth District's holding in Singleton:

> We agree with the reasoning of the Fourth District that when a second and separate action for foreclosure is sought for a default that involves a separate period of default from the one alleged in the first action, the case is not necessarily barred by res judicata.

Singleton, 882 So. 2d at 1006-07.

> We conclude that the doctrine of res judicata does not necessarily bar successive foreclosure suits, regardless of whether or not the mortgagee sought to accelerate payments on the note in the first suit. In this case the subsequent and separate alleged default created a new and independent right in the mortgagee to accelerate payment on the note in a subsequent foreclosure action.

Id. at 1008.

Deutsche Bank argues that the Singleton analysis is equally applicable to a claim of a statute of limitations bar, as opposed to a claim of res judicata. The Association argues that Singleton was decided strictly on res judicata principles and its rationale does not extend to a case involving application of the statute of limitations. We conclude that both arguments miss the dispositive distinction between Singleton and the instant case: Singleton involved an involuntary dismissal *with prejudice* of the initial action, whereas the instant case involved an involuntary dismissal *without prejudice*. The dismissal with prejudice in Singleton operated as an adjudication on the merits. By contrast, the trial court's dismissal in the instant case was expressly entered without prejudice, which did not operate as an adjudication on the merits. See Fla. R. Civ. P. 1.420(b) ('[u]nless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision. . . operates as an adjudication on the merits")(emphasis added); CPI Mfg. Co. v. Industrias St. Jack's, S.A. De C.V., 870 So. 2d 89 (Fla. 3d DCA 2003); National

Carloading Corp. v. Gemini Transp., Inc., 364 So. 2d 504 (Fla. 3d DCA 1978); Milsaps v. Orlando Wrecker, Inc., 634 So. 2d 680 (Fla. 5th DCA 1994).

In Singleton, the dismissal with prejudice disposed not only of every issue actually adjudicated, but every justiciable issue as well. Hinchee v. Fisher, 93 So. 2d 351, 353 (Fla. 1957), overruled in part on other grounds, May v. State ex rel. Ervin, 96 So. 2d 126 (Fla. 1957). In Hinchee, as in Singleton and Stadler, the trial court dismissed an initial action with prejudice. Hinchee, 93 So. 2d at 353. This operated as an adjudication on the merits and, as a general proposition for purposes of res judicata, "puts at rest and entombs in eternal quiescence every justiciable, as well as every actually adjudicated, issue." Id. (quoting Gordon v. Gordon, 59 So. 2d 40, 43 (Fla. 1952)). As the Court observed in Hinchee:

> A judgment on the merits does not require a determination of the controversy after a trial or hearing on controverted facts. It is sufficient if the record shows that the parties might have had their controversies determined according to their respective rights if they had presented all their evidence and the court applied the law.

Id. (quoting Olsen v. Muskegon Piston Ring Co., 117 F.2d 163, 165 (6th Cir. 1941)).

Thus, in Singleton (and Stadler), the order of dismissal with prejudice served to adjudicate, in favor of the borrower, the merits of the lender's claim and the borrower's defenses, thus determining there was no valid default (and, by extension, no valid or effective acceleration of the debt). It is this merits

determination that the Supreme Court addressed in Singleton, and is the issue which renders the Singleton analysis inapplicable to the instant case:

> While it is true that a foreclosure action and an acceleration of the balance due based upon the same default may bar a subsequent action on that default, an acceleration and foreclosure predicated upon subsequent and different defaults present a separate and distinct issue. See Olympia Mortgage Corp. [v. Pugh], 774 So.2d [863] at 866 (Fla. 4th DCA 2000) ("We disagree that the election to accelerate placed future installments at issue."); see also Greene v. Boyette, 587 So.2d 629, 630 (Fla. 1st DCA 1991) (holding that a mortgagee can successfully recover twice on one mortgage for multiple periods of default because the payments were different "installments"). For example, a mortgagor may prevail in a foreclosure action by demonstrating that she was not in default on the payments alleged to be in default, or that the mortgagee had waived reliance on the defaults. In those instances, the mortgagor and mortgagee are simply placed back in the same contractual relationship with the same continuing obligations. Hence, an *adjudication* denying acceleration and foreclosure under those circumstances should not bar a subsequent action a year later if the mortgagor ignores her obligations on the mortgage and a valid default can be proven.

Singleton, 882 So. 2d at 1007 (emphasis added.)

Res judicata is not the issue in the instant case because the dismissal of the Initial Action was without prejudice, and therefore the borrower here (unlike the borrower in Singleton) did not "prevail in the foreclosure action by demonstrating that she was not in default" nor was there "an adjudication denying acceleration and foreclosure" such that the parties "are simply placed back in the same contractual relationship with the same continuing obligations." Id. This is significant because, where, as here, there has been no adjudication on the merits,

nor a determination that the acceleration was invalid or ineffectual, the lender's exercise of its option to accelerate the debt survives a dismissal without prejudice.[4] And because the accelerated nature of the debt was unaffected by the order of dismissal without prejudice, and the parties never reinstated the installment terms of the repayment of the debt, it necessarily follows that the statute of limitations on the accelerated debt continued to run. Therefore, the only subsequent cause of action which Deutsche Bank could file under the circumstances was an action on the accelerated debt— it could not thereafter sue upon an alleged "new" default because, without reinstating the installment terms of the repayment of the debt, there were no "new" payments due, only the single accelerated payment that was

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[4] Deutsche Bank's act of acceleration was set forth in the body of the complaint filed in the Initial Action:

> Defendant, Harry Beauvais, failed to pay the payment due on the Note on September 1, 2006, and Plaintiff elected to accelerate payment of the balance.

The inclusion of this language in the complaint carried independent legal significance beyond that of a mere factual allegation. It constituted the exercise of the optional acceleration clause, and served under the facts of this case as the last act necessary to the accrual of a cause of action (and the commencement of the statute of limitations), converting what was an installment loan into a single payment of all principal due and owing immediately. See Campbell, 232 So. 2d at 256 n.1 and cases cited therein (noting "the filing of suit for foreclosure amounts to exercise of the option of the mortgagee to declare the whole of the principal sum and interest secured by the mortgage due and payable"). See also Liles v. Savage, 163 So. 399 (Fla. 1935); Locke v. State Farm Fire and Cas. Co., 509 So. 2d 1375 (Fla. 1st DCA 1987).

due at the time of the Initial Action, which continued to remain due after the dismissal without prejudice. Without a new payment due, there could be no new default, and therefore no new cause of action. Because the Current Action was based upon the very same accelerated debt as the Initial Action, and because that Current Action was filed after the expiration of the five-year statute of limitations, it was barred.[5]

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[5] The Singleton Court cited to Olympia Mortg. Corp. v. Pugh, 774 So. 2d 863 (Fla. 4th DCA 2000), in which the Fourth District held that "[b]y voluntarily dismissing the suit, Olympia in effect decided not to accelerate payment on the note and mortgage at that time." Id. at 866. In so holding, however, the Fourth District equated this voluntary dismissal with an adjudication on the merits:

> [I]f we treat Olympia's voluntary dismissal of the first foreclosure action as an adjudication on the merits against Olympia, then the payment on the note and mortgage could not have been accelerated. Although Olympia sought to accelerate, had Olympia gone through with the suit and lost on the merits, then the court would have necessarily found that the Pughs had not defaulted on the payments due to date. If the Pughs had not defaulted, then Olympia would not be entitled to accelerate payment on the note and mortgage. Id. (emphasis added).

The Fourth District did not offer a rationale for its conclusion that a plaintiff's first voluntary dismissal should be treated as an adjudication on the merits, since such a voluntary dismissal is ordinarily without prejudice and does not constitute an adjudication on the merits, absent a prior dismissal of the same claim by plaintiff. See Fla. R. Civ. P. 1.420(a)(1) (providing that "[u]nless otherwise stated in the notice. . . a [notice of voluntary] dismissal is without prejudice, except that a notice of dismissal operates as an adjudication on the merits when served by a plaintiff who has once dismissed in any court an action based on or including the same claim."). To the extent that Olympia holds that a voluntary dismissal without prejudice of a foreclosure action on an accelerated debt is to be treated as an adjudication on the merits and an adjudication that the debt could not be

We acknowledge that Singleton has been applied to permit, as against an asserted statute of limitations bar, the filing of a subsequent action following dismissal *with prejudice* (i.e., an adjudication on the merits) of an earlier action. See 2010-3 SFR Venture, LLC. v. Garcia, 149 So. 3d 123 (Fla. 4th DCA 2014); Star Funding Solutions, LLC. V. Krondes, 101 So. 3d 403 (Fla. 4th DCA 2012);); U.S. Bank Nat. Ass'n. v. Bartram, 140 So. 3d 1007 (Fla. 5th DCA 2014) review granted, Bartram v. U.S. Bank Nat. Ass'n, Nos. SC14-1265, SC14-1266, SC14-1305 (Fla. Sept. 11, 2014); PNC Bank, N.A., v. Neal, 147 So. 3d 32 (Fla. 1st DCA 2013). We believe our holding is not necessarily inconsistent with the strict holdings of these cited cases, as each of them involved a dismissal of the earlier action with prejudice, representing an adjudication on the merits and, at least implicitly, a determination that there was no default and therefore no valid or effectual acceleration. For example, in Bartram, 140 So. 3d at 1014, the Fifth District held that the bank's acceleration of a note in its initial lawsuit (which was subsequently dismissed with prejudice pursuant to rule 1.420(b)) did not prevent a subsequent foreclosure action by the mortgagee (filed more than five years after the acceleration) based on payment defaults occurring subsequent to dismissal with prejudice of the first action. The Bartram court concluded that the res judicata ~~analysis of Singleton applies with equal force to a statute of limitations analysis~~ accelerated, we must respectfully disagree.

because, given the Supreme Court's "conclusion that each new default creates a new cause of action, the statute of limitations would only begin to run when the new cause of action accrued." Id. at 1012. The Bartram court further held:

> Based on Singleton, a default occurring after a failed foreclosure attempt creates a new cause of action for statute of limitations purposes, even where acceleration had been triggered and the first case was dismissed on its merits. Therefore, we conclude that a foreclosure action for default in payments occurring after the order of dismissal in the first foreclosure action is not barred by the statute of limitations found in section 95.11(2)(c), Florida Statutes, provided the subsequent foreclosure action on the subsequent defaults is brought within the limitations period [of the new default]. We therefore reverse the judgment under review and remand this case to the trial court for further proceedings consistent with this opinion.

Id. at 1014. The Fifth District certified the following question to the Florida Supreme Court:

> Does acceleration of payments due under a note and mortgage in a foreclosure action that was dismissed pursuant to rule 1.420(b), Florida Rules of Civil Procedure, trigger application of the statute of limitations to prevent a subsequent foreclosure action by the mortgagee based on all payment defaults occurring subsequent to dismissal of the first foreclosure suit?

Id.

A foundational element for the decision in Bartram was Singleton's observation "that each new default creates a new cause of action" and the accrual of a new cause of action commences a new statute of limitations period. Id. at 1012. In Bartram (as in Singleton), a new default (and therefore a new cause of

action) existed only because the dismissal of the first action was with prejudice, constituting an adjudication on the merits and a determination that there was no valid acceleration. Here, by contrast, because the dismissal was without prejudice, there was no adjudication on the merits, and thus no determination regarding Deutsche Bank's acceleration of the debt in the Initial Action. Without an adjudication on the merits, the acceleration of the debt remained in place, meaning that the entire balance of the debt was and remained immediately due. Under those circumstances, there are no new payments due. Without any new payment due there could be no new default, and without a new default there could be no new cause of action.

Although the dismissal without prejudice distinguishes the instant case from Singleton and Bartram (and other cases applying Singleton to dismissals with prejudice), we recognize that several courts have applied Singleton to hold that a subsequent foreclosure action was not barred by the statute of limitations following a dismissal *without prejudice* of the first foreclosure action. See Evergrene Partners, Inc. v. Citibank, N.A., 143 So. 3d 954, 956 (Fla. 4th DCA 2014) (applying Singleton and Bartram and holding statute of limitations did not bar a subsequent foreclosure action following a voluntary dismissal without prejudice of prior foreclosure action); Dorta v. Wilmington Trust Nat. Ass'n, No. 5:13-cv-185-Oc-10PRL, 2014 WL 1152917 (M.D. Fla. March 24, 2014); Kaan v. Wells Fargo

Bank, N.A., 981 F. Supp. 2d 1271 (S.D. Fla. 2013); Ros v. Lasalle Bank Nat. Ass'n, No. 14-22112-CIV-Bloom, 2014 WL 3974558 (S.D. Fla. July 18, 2014); Matos v. Bank of New York, No. 14-21954-CIV-Moreno, 2014 WL 3734578 (S.D. Fla. July 28, 2014).

None of these cases, however, appears to address the distinction between dismissals with and without prejudice, the resulting res judicata effect (or absence thereof), and our conclusion that, in the absence of an adjudication on the merits, the lender's prior acceleration of the debt remains in effect. There is a dearth of decisions from other jurisdictions on the precise issue before us. However, at least one reported decision has held, as we do, that a voluntary dismissal without prejudice of an action on an accelerated debt does not, by itself, constitute a deceleration:

> Because an affirmative act is necessary to accelerate a mortgage, the same is needed to decelerate. Accordingly, a deceleration, when appropriate, must be clearly communicated by the lender/holder of the note to the obligor. Here, if [lender] intended to revoke the acceleration of the debt due under the note, it should have done so in a writing documenting the changed status. The voluntary dismissal [without prejudice] did not decelerate the mortgage because it was not accompanied by a clear and unequivocal act memorializing that deceleration.

Cadle Co. II, Inc. v. Fountain, 281 P. 3d 1158 (Nev. 2009).

We hold that, under the facts of this case, once Deutsche Bank accelerated the debt under the terms of the mortgage and note, and in the absence of a

contractual reinstatement, modification by the parties, or an adjudication on the merits, the accelerated debt was not "decelerated" by an involuntary dismissal without prejudice. The accelerated payment of the debt continued to be due and the statute of limitations on the action on the accelerated debt continued to run. Because there were no "new" payments due, there could be no "new" default upon which a "new" cause of action (and newly-commenced statute of limitations) could be based. The statute of limitations expired before the filing of the subsequent action and was thus barred. We certify conflict with Evergrene Partners, Inc. v. Citibank, N.A., 143 So. 3d 954, 956 (Fla. 4th DCA 2014).

B. The Duration of the Mortgage Lien

The remaining question is whether, given our holding on the statute of limitations, the lien of mortgage is null and void and must be canceled. We conclude that the trial court erred in determining that the mortgage was null and void. The trial court's determination on the first issue (and our affirmance of same) does not compel a conclusion that the mortgage itself is null and void. The issues are subject to separate statutory consideration and analysis. "[A] 'statute of limitations' is a shield that may be used as an affirmative defense; a 'statute of repose' is a sword that may terminate a lien." Matos, 2014 WL 3734578, at *3. Section 95.11(2)(c) is a statute of limitations; section 95.281 is a statute of repose,

and determines the duration of a mortgage lien. That statute provides in relevant part:

> (1) The lien of a mortgage … shall terminate after the expiration of the following periods of time:
>
> (a) If the final maturity of an obligation secured by a mortgage is ascertainable from the record of it, 5 years after the date of maturity.
>
> (b) If the final maturity of an obligation secured by a mortgage is not ascertainable from the record of it, 20 years after the date of the mortgage, unless prior to such time the holder of the mortgage:
>
> 1. Rerecords the mortgage and includes a copy of the obligation secured by the mortgage so that the final maturity is ascertainable; or
>
> 2. Records a copy of the obligation secured by the mortgage from which copy the final maturity is ascertainable and by affidavit identifies the mortgage by its official recording data and certifies that the obligation is the obligation described in the mortgage;
>
> in which case the lien shall terminate 5 years after the date of maturity.
>
> (Emphasis added.)

The foregoing section "establishes an ultimate date when the lien of the mortgage terminates and is no longer enforceable." Houck Corp. v. New River, Ltd., 900 So. 2d 601, 603 (Fla. 2d DCA 2005). See also, Am. Bankers Life Assur. Co. of Florida v. 2275 West Corp., 905 So. 2d 189 (Fla. 3d DCA 2005). A statute of repose serves to establish a "definitive time limitation on a valid cause of

action", Houck, 900 So. 2d at 603, which "not only bars enforcement of an accrued cause of action but may also prevent the accrual of a cause of action where the final element necessary for its creation occurs beyond the time period established by the statute." American Bankers, 905 So. 2d at 191 (quoting WRH Mortgage, Inc. v. Butler, 684 So. 2d 325, 327 (Fla. 5th DCA 1996)).

Both parties agree that the applicable subsection is 95.281(1)(a). However, the parties disagree on the construction of that provision and its application to the instant case. The Association contends that Deutsche Bank's acceleration of the note accomplishes an acceleration of the maturity date of the note itself. The language of section 95.281(1)(a) provides that the duration of the lien is "5 years after the date of maturity." Under the facts of this case, the Association argues, the date of maturity became the date of acceleration when the Initial Action was filed on January 23, 2007, and therefore the mortgage lien terminated January 23, 2012, five years after that date of acceleration, and is extinguished.[6]

Deutsche Bank contends, and we agree, that the definitive time limitation established by section 95.281(1)(a) is based upon the fact that the final maturity "is ascertainable from the record" of an obligation secured by a mortgage. The

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[6] For this proposition, the Association cites to Casino Espano de Habana, Inc. v. Bussel, 566 So. 2d 1313 (Fla. 3d DCA 1990). However, we find Casino inapposite, as it did not involve the construction or application of section 95.281 or a determination of the duration of a mortgage lien.

Legislature, by its express language, provided that the mortgage lien under section 95.281(1)(a) would terminate five years after a maturity date that can be determined from the face of a recorded document.[7] The Association's proposed date of maturity (i.e., January 23, 2007, the date of acceleration) cannot be determined from the face of the recorded mortgage. Rather, the face of the recorded mortgage in the instant case reveals a maturity date of March 1, 2036. Therefore, and pursuant to section 95.281(1)(a), the mortgage lien remains valid until March 1, 2041, five years from the date of maturity as reflected in the recorded mortgage securing the obligation. A statute of limitations and a statute of repose serve two distinct purposes and the "limitations period provided in section 95.11(2)(c) does not affect the life of the lien or extinguish the debt; it merely precludes an action to collect the debt after five years." Am. Bankers, 905 So. 2d at 192.

IV. CONCLUSION

We affirm that portion of the trial court's order which determined that the Current Action was barred by the statute of limitations. We reverse that portion of the trial court's order which declared that the mortgage was null and void, canceled

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[7] The determination of final maturity based upon a fixed date contained within a recorded instrument, rather than a date that is neither recorded in the public records nor easily ascertainable, certainly enhances reliability and avoids the uncertainty and other difficulties inherent in the Association's proposed construction of the statute.

same, and quieted title to the Property in favor of the Association. We remand this cause to the trial court for further proceedings consistent with this opinion.

Report of the Ad Hoc *Beauvais* Task Force to the Executive Committee of the Real Property, Probate and Trust Law Section of the Florida Bar
Revised on August 29, 2015

Invitation by the Third District Court of Appeal

On August 3, 2015, the 3rd DCA issued an order granting a Motion for Rehearing *En Banc*, in the case of *Deutsche Bank Trust Company Americas, etc. v. Harry Beauvais, et al.*, Case Number 3D-14-575. The Court also invited various parties, including the RPPTL Section, to file Amicus Curiae briefs within 60 days to answer some specific questions related to the law on acceleration and deceleration of mortgage loans.

Members of the Ad Hoc Task Force

The following Section members were included on the Task Force:

Steve Mezer, Legislation Committee, Chair of the Task Force
Richard McIver, Real Property Finance and Lending Committee
Mark Brown, Real Property Litigation Committee
Mike Tobin, Residential Real Estate & Industry Liaison Committee
Steve Daniels, Condominium and Planned Development Committee
Andrew O'Malley, Director, Real Property Division

Summary of the Facts of *Beauvais*

Beauvais involves successive foreclosures on a high-end condominium unit in Miami-Dade County. The note and mortgage in question are typical forms used in the vast majority of residential mortgage loans, promulgated by Fannie Mae and Freddie Mac. The Task Force felt it significant, as explained more fully below, that the mortgage contract between the parties has several consumer oriented terms that are not typical in non-residential mortgage contracts:

- Paragraph 22 of the mortgage requires that the lender must first give a notice of intent to accelerate, and an opportunity to cure, before it may accelerate the loan. The language is set forth as follows, which is highlighted in bold print in the mortgage:

  22. **Acceleration; Remedies**. Lender shall give notice to Borrower prior to acceleration following Borrower's breach of any covenant or agreement in this Security Instrument (but not prior to acceleration under Section 18 unless Applicable Law provides otherwise). The notice shall specify: (a) the default; (b) the action required to cure the default; c) a date, not less than 30 days from

> the date the notice is given to Borrower, by which the default must be cured; and (d) that failure to cure the default on or before the date specified in the notice may result in acceleration of the sums secured by this Security Instrument, foreclosure by judicial proceeding and sale of the Property. The notice shall further inform Borrower of the right to reinstate after acceleration and the right to assert in the foreclosure proceeding the non-existence of a default or any other defense of Borrower to acceleration and foreclosure. If the default is not cured on or before the date specified in the notice, Lender at its option may require immediate payment in full of all sums secured by this Security Instrument without further demand and may foreclose this Security Instrument by judicial proceeding. Lender shall be entitled to collect all expenses incurred in pursuing the remedies provided in this Section 22, including, but not limited to, reasonable attorneys' fees and costs of title evidence.

- The borrower's right to reinstate the loan at any time before the entry of a final judgment of foreclosure is set forth in Paragraph 19 of the mortgage:

> 19. **Borrower's Right to Reinstate After Acceleration.** If Borrower meets certain conditions, Borrower shall have the right to have enforcement of this Security Instrument discontinued at any time prior to the earliest of: (a) five days before sale of the Property pursuant to any power of sale contained in this Security Instrument; (b) such other period as Applicable Law might specify for the termination of Borrower's right to reinstate; or c) entry of a judgment enforcing this Security Instrument. Those conditions are that Borrower: (a) pays Lender all sums which then would be due under this Security Instrument and the Note as if no acceleration had occurred; (b) cures any default of any other covenants or agreements; c) pays all expenses incurred in enforcing this Security Instrument, including, but not limited to, reasonable attorneys' fees, property inspection and valuation fees, and other fees incurred for the purpose of protecting Lender's interest in the Property and rights under this Security Instrument; and (d) takes such action as Lender may reasonably require to assure that Lender's interest in the Property and rights under this Security Instrument, and Borrower's obligation to pay the sums secured by this Security Instrument, shall continue unchanged.

The procedural history of the litigation against the property is as follows:

- On February 10, 2006, Harry Beauvais borrowed $1,440,000, which was secured by a mortgage on a condominium in Miami-Dade County. The first foreclosure case was filed by American Home Mortgage Servicing on 1/23/07, alleging a default by Mr. Beauvais on his installment payment due on 9/1/06. The principal balance due was alleged to be $1,439,926.80, and American Home's foreclosure complaint further alleged that the lender had elected to accelerate payment of the balance as a result of the default. On 12/6/10, the case was involuntarily dismissed without prejudice as a result of the plaintiff's failure to appear at a case management conference. The dismissal was not appealed.

- A second foreclosure action was filed by the condominium association in 2009 for failure to pay assessments, resulting in a certificate of title being issued in 2011 to the association as the only bidder at the foreclosure sale, subject to the outstanding mortgage.

- A third foreclosure action was filed by Deutsche Bank on 12/18/12, alleging a default in payment on 10/1/06 (a different date of default from the first foreclosure action). The principal balance due alleged in the third foreclosure action was the same as the first: $1,439,926.80. The Association moved for summary judgment in that case, alleging that the action was barred by the statute of limitations, as it was filed more than five years after the acceleration of the debt in the first case. The trial court agreed, finding that the five year statute of limitations expired prior to the filing of the 12/18/12 complaint, as a result of the acceleration allegation in the 1/23/07 complaint. The trial court went further and found that the lien of the mortgage was null and void, quieting title in favor of the association, also as a result of the statute of limitations.

- On December 17, 2014, the 3rd DCA issued an opinion affirming the trial court on the issue of the third foreclosure action being barred by the statute of limitations, but reversed on the issue on the mortgage lien being null and void. The Court found that because the first foreclosure action had been dismissed without prejudice, there had been no adjudication by the trial court that the acceleration was ineffective. Further, there was no evidence in the record that the borrower had taken any action to discontinue or modify the acceleration or attempt to reinstate the installment nature of the obligation. The appellate court found that the debt was never "decelerated", and that there were no new defaults upon which to bring a new cause of action. The court certified conflict with *Evergrene Partners, Inc. v. Citibank*, a case out of the 4th DCA. The court further found that the lien of the mortgage, although unenforceable, remains on the property until March 1, 2041 (5 years after the stated maturity date on the mortgage) under *Florida Statute* §95.281.

- Both Deutsche Bank and the association timely filed motions for rehearing, and the court took no action until August 3, 2015, granting the motions for rehearing *en banc*

and setting oral argument for November 12, 2015. The Order sets forth six questions requests the Section to answer.

- The Task Force has met on multiple occasions to analyze the questions, has done some independent research, and debated the pros and cons of various positions. Its findings are below.

Task Force's Report:

The statute of limitations issue raised in the *Beauvais* case is a topic that has generated a great deal of litigation and interest from various interest groups in the state. Recent cases include the following from other District Courts of Appeal:

- *U.S. Bank National Association v. Bartram*, 140 So.3d 1007 (Fla. 5th DCA 2014), *Review Granted,* 160 So.3d 892 (Fla. 2014). The Fifth DCA held that a second mortgage foreclosure action is not barred by the statute of limitations, even if the mortgage was accelerated in the prior cause of action. The court stated:

  > "Based on *Singleton*, a default occurring after a failed foreclosure attempt creates a new cause of action for statute of limitations purposes, even where acceleration had been triggered and the first case was dismissed on its merits. Therefore, we conclude that a foreclosure action for default in payments occurring after the order of dismissal in the first foreclosure action is not barred by the statute of limitations found in section 95.11(2)(c), Florida Statutes, provided the subsequent foreclosure action on the subsequent defaults is brought within the limitations period."

  The *Bartram* court certified the following question to the Florida Supreme Court, as a matter of great public importance:

  > "Does acceleration of payments due under a note and mortgage in a foreclosure action that was dismissed pursuant to rule 1.420(b), Florida Rules of Civil Procedure, trigger application of the statute of limitations to prevent a subsequent foreclosure action by the mortgagee based on all payment defaults occurring subsequent to dismissal of the first foreclosure suit?"

  The parties to *Bartram* have appealed the decision to the Supreme Court, and oral argument is scheduled for November 4, 2015.

- *Evergrene Partners, Inc. v. Citibank, N.A.*, 143 So.3d 954 (Fla. 4th DCA 2014). An owner of property sought to cancel two mortgages on the property as a result of the voluntary dismissal of a prior foreclosure filed in 2007, more than five years prior to the filing of the suit by the owner. The Fourth DCA held:

  "While a foreclosure action with an acceleration of the debt may bar a subsequent foreclosure action based on the same event of default, it does not bar subsequent actions and acceleration based upon different events of default."

- After the Task Force issued its first Report on August 21, 2015, the 1st District Court of Appeal weighed in on this issue by rendering the following opinion on August 24, 2015 in *Nationstar Mortgage, LLC v. Brown*, 2015 WL 4999017 (1st DCA 2015). The 1st DCA followed *Bartram* and *Evergrene Partners*, holding:

  "The dismissal in this case was *without* prejudice, so much the more preserving appellant's right to file a new foreclosure action based on appellees' breaches subsequent to the February 2007 breach asserted as the procedural trigger of the earlier foreclosure action. We find that appellant's assertion of the right to accelerate was not irrevocably "exercised" within the meaning of cases defining accrual for foreclosure actions, when the right was merely asserted and then dismissed without prejudice. *See Olympia Mortg. Corp. v. Pugh*, 774 So.2d 863, 866-67 (Fla. 4th DCA 2000) ("By voluntarily dismissing the suit, [the mortgagee] in effect decided not to accelerate payment on the note and mortgage at that time."); *see also Slottow v. Hull Inv. Co.*, 129 So. 577, 582 (Fla.1930) (a mortgagee could waive an acceleration election in certain circumstances)."

The 1st DCA went further, and criticized the 3rd DCA in *Beauvais*, pointing out that a recent federal court decision in *Stern v. Bank of America Corp.*, 2015 WL 3991058 (M.D. Fla. June 30, 2015) held that *Beauvais* was "contrary to the overwhelming weight of authority." In addition, the court in *Brown* observed that "both the note and the mortgage at issue here contain typical provisions reflecting the parties' agreement that the mortgagee's forbearance or inaction do not constitute waivers or release appellees from their obligation to pay the note in full. These binding contractual terms refute appellees' arguments and are inconsistent with the judgment under review."

Preface to the Task Force's Conclusions:

Acceleration is a matter of contract. In this case, there is a question whether either party to the contract had any bargaining power over the terms of the mortgage, given that the form of the mortgage is dictated by Fannie Mae, Freddie Mac and the secondary market. The mortgage contract in question places specific duties upon the lender to give notice prior to acceleration, and the borrower has an absolute right to cure the delinquent payments after acceleration, but any time prior to entry of a final judgment. In other words, the lender's right to accelerate is conditioned upon the borrower's right to cure.

This conditional right of acceleration does not require payment of the loan in full until judgment is entered. Future payments are not at issue and do not have to be paid in order to cure the default. The installment nature of the loan remains until the right to reinstate terminates upon entry of a final judgment. If the case does not end in judgment, for whatever reason, the borrower still has the right to cure the default and reinstate the loan.

This is different from an acceleration clause in a commercial mortgage, which may not allow any cure except payment of the entire loan balance after acceleration is exercised. It is also different from acceleration for breach of the due on sale clause in the Beauvais mortgage, which does not provide any contractual right to cure.

In addition, the Task Force felt it was important to distinguish the acceleration that occurred upon the filing of the first foreclosure complaint in this case, as opposed to an acceleration that may be given by other action or notice by the lender, such as by giving written notice by mail.

Finally, it should be noted that acceleration is a remedy that may be waived by conduct of the parties, as discussed below and as mentioned in *Brown* above. Further, the mortgagee's inaction does not constitute a waiver of the remaining obligations of the borrower to pay the note in full.

As to each question asked by the Court (in italics below), the members of the Task Force comment as follows:

> *1. Where a foreclosure action has been dismissed with the note and mortgage still in default:*
> *a. Does the dismissal of the action, by itself, revoke the acceleration of the debt balance thereby reinstating the installments terms?*

The members of the Task Force initially had differences of opinion on this question. Some felt the answer should be "no", as it was argued that the lender must take an affirmative act to communicate to the borrower that the acceleration has been revoked. Others felt that the answer should be "yes", because the notice of acceleration contained solely in the complaint was

merely an allegation to invoke a remedy, which is not effective until the absolute right of the borrower to reinstate the loan is terminated upon entry of the final judgment. Thus, it was argued by some that the installment nature of the loan continues until the judgment is entered. After a great deal of discussion, the members reached a consensus that the answer to this question depends upon how the notice of acceleration was effectuated. In other words, if the notice of acceleration is by a letter sent to the borrower as might provided by the loan documents, it is incumbent upon the lender to send a notice revoking the acceleration or "decelerating" the payments. However, if the option to accelerate is exercised by the filing of a foreclosure complaint (which is typical in residential cases and which occurred in *Beauvais*), then the dismissal of the case operates to revoke the acceleration. The loan remains an installment loan throughout the foreclosure process, as the borrower may cure the default by paying the delinquent payments at any time up to the entry of a judgment. A judgment was never entered in favor of the lender, so the acceleration was never effective.

The members of the Task Force concluded that the issue must be resolved on a case by case basis, as the 3rd DCA has previously held that acceleration may be waived in a variety of ways in *Amerifirst Federal Savings and Loan Association of Miami v. Century 21 Commodore Plaza, Inc.*, 416 So.2d 45 (Fla. 3d DCA 1982). The court stated:

> While neither mere delay on the part of the mortgagee in exercising its right to accelerate, *see Kreiss Potassium Phosphate Company v. Knight*, 98 Fla. 1004, 124 So. 751 (1929), nor the mortgagor's willingness to cure a default after an election to accelerate has been made, *Campbell v. Werner*, 232 So.2d 252 (Fla. 3d DCA 1970), nor tender of amounts due after such an election, *see Kreiss Potassium Phosphate Company v. Knight, supra; New England Mutual Life Insurance Company v. Luxury Homebuilders, Inc.*, 311 So.2d 160 (Fla. 3d DCA 1975) is a ground for depriving a mortgagee of its contractual right of acceleration and foreclosure, the request to and acceptance from the mortgagor of substantially all amounts due under the mortgage, as here, is such conduct on the part of the mortgagee which will justify a court of equity in refusing to foreclose a mortgage, notwithstanding that the conduct comes after an election to accelerate has been made and despite the conceded but immaterial fact that the mortgagee never explicitly waived its election to accelerate. The evidence before the trial court indisputably supported Century 21's affirmative defense of unconscionability, making summary judgment proper. (Emphasis added).

Based upon this authority, the members concluded that because the acceleration occurred as a result of the filing of the first foreclosure complaint, the dismissal of that complaint acted to revoke the attempted acceleration.

> *b. Absent additional action by the mortgagee can a subsequent claim of acceleration for a new and different time period be made?*

The members of the Task Force unanimously concluded that the answer to this question should be "yes", given its conclusion to the first question.

c. Does it matter if the prior foreclosure action was voluntarily or involuntarily dismissed, or whether the dismissal was with or without prejudice?

The members of the Task Force unanimously concluded that the answer to this question should be "no", given its conclusion to the first question. This conclusion is supported by the recent decision in *Brown*, which held that a dismissal without prejudice does not bar a subsequent foreclosure action based upon a new default. The 1st DCA mentions in *Brown* that it previously held in *PNC Bank, N.A. v. Neal*, 147 So.3d 32 (Fla. 1st DCA 2013) that even a dismissal with prejudice of a foreclosure action does not preclude a mortgagee from instituting a new foreclosure action based upon a different act or a new date of default not alleged in the dismissed action. The courts in *Bartram, Evergrene Partners* and *Brown* all concluded that the Supreme Court's decision in *Singleton* permit the filing of successive foreclosure suits, regardless of whether the prior foreclosure cases were dismissed with or without prejudice. The Task Force did not find that there should be any distinction between a dismissal with or without prejudice as it pertains to the statute of limitations issue.

d. What is the customary practice?

Prior to the *Beauvais* decision, there was no customary practice, probably because no one had thought that this was an issue. Since the *Beauvais* and *Bartram* appeals were filed and the issue became a topic of debate, lenders have begun sending notices of deceleration prior to or contemporaneous with giving a new notice of intent to accelerate and opportunity to cure as required by the mortgage. In addition, many lenders are waiving or paying installments that are in excess of 5 years delinquent, and only suing on defaults that are due less than 5 years from the date of the new suit.

2. If an affirmative act is necessary by the mortgagor to accelerate a mortgage, is an affirmative act necessary to decelerate?

See the answer to 1 (a) above. The members of the Task Force concluded that the answer to this question is dependent upon the method in which the acceleration was exercised. If the acceleration occurred as a result of the filing of the complaint as in *Beavais*, no further affirmative act is necessary to decelerate.

3. In light of Singleton v. Greymar Assocs., 882 So. 2d 1004 (Fla. 2004), is deceleration an issue or is deceleration inapplicable if a different and subsequent default is alleged?

See the answer to 1 (a) above. While *Singleton* is a case about *res judicata*, it was felt that its holding equally applied to the statute of limitations issue. The members of the Task

Force concluded that the answer to this question is dependent upon the method in which the acceleration was exercised. The Supreme Court in *Singleton* was clear that the acceleration did not place the future installments at issue, following *Olympia Mortgage Corp. v. Pugh,* 774 So.2d 863 (Fla. 4th DCA 2000). The monthly installments still accrue, and can be brought current at any time until the judgment is entered under the mortgage contract. The Supreme Court held that if the borrower prevails in the first action, the parties are "simply placed back in the same contractual relationship with the same continuing obligations. Hence an adjudication denying acceleration and foreclosure under those circumstances should not bar a subsequent action a year later if the mortgagor ignores her obligations on the mortgage and a valid default can be proven." *Singleton* stressed the "unique nature of the mortgage obligation" and the continuing obligations of the parties in that relationship. That court concluded that the "ends of justice require that the doctrine of *res judicata* not be applied so strictly so as to prevent mortgagees from being able to challenge multiple defaults on a mortgage." The Task Force concluded that deceleration is inapplicable if a different and subsequent default is alleged.

RPPTL 2016 - 2017
Executive Council Meeting Schedule
Deborah P Goodall's Year

Date	Location
July 28, 2016 – July 31, 2016	**Executive Council Meeting & Legislative Update** The Breakers Palm Beach, Florida Reservation Link: https://resweb.passkey.com/go/FLABR16 Room Rate: **$218**
October 5 – October 9, 2016	**Executive Council Meeting** The Walt Disney World BoardWalk Inn Lake Buena Vista, FL Reservation Link: http://disneyurl.com/TheFloridaBarRealPropertyProbateTrustLaw Room Rate: $249 (single/double occupancy)
December 7 – December 11, 2016	**Executive Council Meeting** The Westin Resort and Marina Key West, FL Reservation Link: https://www.starwoodmeeting.com/events/start.action?id=1510057567&key=1AFAC12C Room Rate: $279 (single/double occupancy) $319 Partial Ocean View
May 31 – June 4 , 2017	**Executive Council Meeting & Convention** Hyatt Regency Coconut Point Resort & Spa Bonita Springs, FL Reservation Link: https://resweb.passkey.com/go/flbar2017 Room Rate: $209 (single/double occupancy)

WATCH THIS SPACE:

Hope to have news soon regarding out of state meeting (likely February 2017)

RPPTL Financial Summary from Separate Budgets

2015 – 2016 [July 1 – September 30[1]]
YEAR TO DATE REPORT

General Budget

	YTD
Revenue:	$ 745,472
Expenses:	$ 532,410
Net:	$ 213,062

Trust Officer Conference

Revenue:	$ 327,810	
Expenses:	$ 160,701	(not final)
Net:	$ 167,109	

Legislative Update

Revenue:	$ 60,339
Expenses:	$ 44,953
Net:	$ 15,386

Convention

Revenue:	$ 0
Expenses:	$ 39
Net:	$ (39)

Roll-up Summary (Total)

Revenue:	$ 1,133,621
Expenses:	$ 738,103
Net Operations:	$ 395,518

Beginning Fund Balance:	**$ 1,066,946**
Current Fund Balance (YTD):	**$ 1,462,464**
Projected June 2016 Fund Balance	**$ 1,153,198**

[1] *This report is based on the tentative unaudited detail statement of operations dated 9/30/15 (prepared on 10/15 /15).*

Proposed Budget 16-17
Real Property Probat Trust Law Section

Account	13-14 Actual	14-15 Actual	15-16 Budget	15-16 Projected Actual	16-17 Proposed Budget
RPPTL GENERAL SECTION BUDGET					
REVENUE					
31431 Dues	583,890	596,160	585,000	594,480	597,000
31432 Affiliate Dues	4,920	4,400	4,000	4,260	4,400
31433 Mgmt Fee-Retained TFB	(172,483)	(175,472)	(198,815)	(204,950)	(205,943)
31435 Admin Fee Adj	0	0			0
32191 CLE Courses	285,778	372,413	188,760	323,668	119,800
32293 Section Differential	29,963	25,945	30,000	23,500	30,000
34704 Actionline Advertisi	17,445	20,154	20,000	19,580	20,000
35003 Ticket Events	0	0	0	0	0
35201 Sponsorships	174,626	162,064	180,000	180,000	180,000
35603 Bd/Council Mtg Regis	190,036	183,184	180,000	187,085	190,000
38499 Investment Allocatio	80,661	(3,295)	25,292	20,730	25,172
39998 Meeting Deposits	0	0	0	0	0
Total Revenue	1,194,836	1,185,553	1,014,237	1,148,353	960,430
EXPENSES					
36998 Credit Card Fees	3,916	3,893	3,700	4,224	3,900
41201 Contract Salaries	0	0	0	0	0
51101 Employee Travel	11,164	7,841	6,500	3,149	8,000
71001 Telephone/Direct	1,103	1,101	1,320	1,196	1,200
71005 Internet Charges	174	58	0	0	150
81411 Promotional Printing	842	2	0	0	0
84001 Postage	278	874	1,500	2,146	1,500
84002 Printing	737	632	500	335	700
84006 Newsletter	59,914	58,557	47,500	61,097	64,000
84009 Supplies	603	683	500	770	700
84010 Photocopying	64	265	200	288	300
84015 Officers Conference	2,473	1,395	2,500	1,373	2,500
84016 Scrivener	0	5,000	5,000	5,000	5,000
84051 Officers Travel Expe	2,674	6,031	3,000	5,140	6,000
84054 CLE Speaker Expense	87	0	1,000	0	1,000
84061 Reception	3,444	0	0	0	0
84075 Sponsorship Exp.	0	400	0	0	0
84101 Committee Expenses	50,332	90,223	60,000	101,414	100,000
84102 Public Info & Websit	4,389	0	15,000	15,000	0
84106 Realtor Relations	2,150	4,150	3,500	3,150	4,000
84107 Diversity Initiative	3,273	2,991	12,000	5,122	12,000
84110 Exhibitor Fees	0	0	0	0	0
84111 At Large Member Event	2,171	6,188	5,000	8,000	3,000

Proposed Budget 16-17
Real Property Probat Trust Law Section

Account	13-14 Actual	14-15 Actual	15-16 Budget	15-16 Projected Actual	16-17 Proposed Budget
84XXX At Large Member Meetings					5,000
84115 Entertainment	816	0	0	0	0
84201 Board Or Council Mee	499,470	462,896	500,000	478,227	505,000
84216 Strategic Planning	11,272	0	0	0	0
84239 Hospitality Suite	9,607	24,245	20,000	27,335	30,000
84279 Council Members Hand	1,820	2,124	3,500	3,500	3,500
84310 Law School Liaison	1,695	3,821	5,500	4,050	5,500
84322 Fellowships-Exc Cou	16,480	16,083	20,000	19,000	20,000
84330 Leadrshp Acad	3,359	2,970	7,000	5,500	7,000
84422 Website	51,551	31,734	30,000	43,000	50,000
84501 Legislative Consulta	110,000	110,000	110,000	120,000	120,000
84503 Legislative Travel	13,776	12,679	15,000	13,500	15,000
84524 Memorial Tributes	0	33	500	500	500
84701 Council Of Sections	300	300	300	300	300
84998 Operating Reserve	0	0	100,000	0	0
84999 Miscellaneous	15	15	10,000	5,000	0
85064 Service Recognition	5,075	5,727	5,000	5,600	5,700
86327 IT Sys Support	989	0	0	0	0
86431 Meetings Administrat	4,862	6,585	0	0	0
86543 Graphics & Art	16,610	19,298	0	0	0
88221 Speaker Workshops	0	0	0	0	0
88230 Speakers Expense	0	0	0	0	0
88239 Speakers Other Exp	1,552	0	0	0	0
88241 Outline Prt-Inhouse	14	12	0	0	0
88252 Course Credit Fee	75	0	0	0	0
Total Expenses	899,126	888,806	995,520	942,916	981,450

** 3% estimate provided by TFB Investment Advisor*

Proposed Budget 16-17
Real Property Probate Trust Law Section

Account	13-14 Actual	14-15 Actual	15-16 Budget	15-16 Projected Actual	16-17 Proposed Budget
RPPTL - CONVENTION					
REVENUE					
32001 Registrations	58,304	45,773	55,000	55,000	55,000
35101 Exhibit Fees	5,000	7,875	7,000	7,000	10,000
35201 Sponsorships	900	0	0	0	10,000
36991 Allowances	0	0		0	
Total Revenue	64,204	53,648	62,000	62,000	75,000
EXPENSES					
36998 Credit Card Fees	111	898	800	900	900
51101 Employee Travel	1,437	1,100	2,000	2,000	2,000
61201 Equipment Rental	20,108	33,480	10,000	20,000	21,000
84001 Postage	9	46	0	50	50
84002 Printing	193	403	250	400	400
84010 Photocopying	1	0	0	0	0
84061 Reception	26,824	0	0	0	0
84062 Luncheons	25,976	0	0	0	0
84069 Dinners	38,907	0	0	0	0
84075 Sponsorship Exp.	483	0	0	0	0
84115 Entertainment	6,090	5,557	8,000	6,000	8,000
84253 Sleeping Rooms	517	0	0	0	0
86543 Graphics & Art	0	2,125	0	0	0
88262 Meeting Meals	0	110,574	120,000	120,000	123,000
88263 Meeting Hospitality	2,975	0	0	0	0
88265 Refreshment Breaks	2,401	0	0	0	0
88269 Breakfast	13,364	0	0	0	0
Total Expenses	139,396	154,183	141,050	149,350	155,350

Assumes Convention is a Section Service Program - no after market sales

Proposed Budget 16-17
Real Property Probate Trust Law Section

Account	13-14 Actual	14-15 Actual	15-16 Budget	15-16 Projected Actual	16-17 Proposed Budget
RPPTL - LEGISLATIVE UPDATE					
REVENUE					
32001 Registrations	0	0	0	0	0
32006 Live Web Cast	11,055	0	12,000	0	0
32010 Legal Span On-line	12,219	23,377	4,500	22,840	20,000
32205 Compact Disc	22,365	23,745	16,000	27,500	16,500
32207 DVD	2,000	3,875	7,000	9,125	4,000
32301 Course Materials	2,000	1,800	3,000	1,100	2,000
35101 Exhibit Fees	13,500	12,750	12,500	16,800	12,500
Total Revenue	63,139	65,547	55,000	77,365	55,000
EXPENSES					
36998 Credit Card Fees	614	477	700	638	700
51101 Employee Travel	2,012	954	2,000	2,365	2,000
61201 Equipment Rental	11,923	12,123	15,000	13,597	13,500
75102 1st Class & Misc Mai	36	8	50	4	50
75401 Express Mail	375	420	500	296	500
81411 Promotional Printing	0	0	50	0	50
81412 Promotional Mailing	0	0		0	0
84001 Postage	0	0		885	0
84002 Printing	33	0		4	0
84009 Supplies	0	0	150	0	150
84010 Photocopying	0	0	50	29	50
84012 Registration Support	0	5,112	5,200	5,200	5,200
84061 Reception	0	0	1,500	659	1,500
84062 Luncheons	25,698	31,622	31,622	31,622	31,500
84253 Sleeping Rooms	(2,058)	0			0
84254 Speaker Gifts	3,346	1,320	2,500	1,514	2,500
84258 Web Services	3,095	0		1,495	0
84999 Miscellaneous	250	474		0	0
86001 Gen. Admin. Overhead	0	0	500	500	1,000
86432 Time Taping Editing	2,621	3,120	4,000	4,000	4,000
86532 Advertising News	0	1,249	1,500	824	1,500
86543 Graphics & Art	766	1,079			0
86623 Registrars	5,258	1,188			0
88230 Speakers Expense	0	0			0
88231 Speakers Travel	229	326			0
88233 Speakers Hotel	2,299	1,853	3,000	1,107	2,000
88239 Speakers Other Exp	125	265	200	200	250
88241 Outline Prt-Inhouse	0	0	300	300	300

Proposed Budget 16-17
Real Property Probate Trust Law Section

88242 Outline Prt-Contract	9,400	9,546	10,000	10,000	10,000
88252 Course Credit Fee	150	0	150	150	150
88265 Refreshment Breaks	9,867	11,577	12,000	10,528	13,000
88269 Breakfast	6,766	9,059	10,500	6,698	10,500
88281 A/V Ctr Dup/Prod	679	630		650	0
Total Expense	83,484	92,402	101,472	93,265	100,400

This is a Special Project

Proposed Budget 16-17
Real Property Probate Trust Law Section

Account	13-14 Actual	14-15 Actual	15-16 Budget	15-16 Projected Actual	16-17 Proposed Budget
RPPTL ATTORNEY TRUST OFFICER LIASON CONFERENCE					
REVENUE					
32001 Registrations	134,928	0	260,000	309,328	160,700
32010 Legal Span On-line	0	2,399	0		0
32205 Compact Disc	3,465	2,605	6,000	10,040	3,000
32207 DVD	985	1,010	0	0	0
32301 Course Materials	1,260	120	2,000	1,840	1,000
35003 Ticket Events	10,359	94	20,000	27,155	10,000
35101 Exhibit Fees	29,850	0	60,000	89,000	30,000
35201 Sponsorships	52,250	0	100,000	105,750	50,000
39342 Sec Over Cap-Serv Pr	0	0	0	0	0
Total Revenue	233,097	6,228	448,000	543,113	254,700
EXPENSES					
36998 Credit Card Fees	2,599	93	5,200	8,296	2,750
41201 Contract Salaries	162	0	0	0	0
51101 Employee Travel	2,271	339	3,000	2,523	2,000
61201 Equipment Rental	17,457	0	30,000	22,939	15,000
75102 1st Class & Misc Mai	0	3	0	0	0
75401 Express Mail	206	34	300	233	150
81412 Promotional Mailing	14		2,000	2,000	1,000
84001 Postage	0	0	0	0	0
84002 Printing	0	0	0	0	0
84009 Supplies	0	0	0	0	0
84061 Reception	0	0	0	0	0
84062 Luncheons	0	0	0	0	0
84064 Golf Tourn Expenses	0	0	16,000	14,822	8,000
84999 Miscellaneous	0	0	1,000	1,000	0
86432 Time Taping Editing	8,401	0	20,000	20,000	10,000
86532 Advertising News	1,249	0	3,200	3,298	1,600
86543 Graphics & Art	906	0	0	0	0
86623 Registrars	4,059	132	0	0	0
88230 Speakers Expense	0	0	0	0	0
88231 Speakers Travel	4,099	0	8,000	4,197	4,000
88232 Speakers Meals	42	0	4,000	4,000	1,100
88233 Speakers Hotel	5,560	0	8,000	6,000	3,000
88234 Speaker Honorarium	5,000	0	0	0	0
88239 Speakers Other Exp	216	0	0	0	0
88241 Outline Prt-Inhouse	1,910	0	4,000	4,675	2,000
88242 Outline Prt - Contract	2,270	0	5,000	5,000	2,500

Proposed Budget 16-17

Real Property Probate Trust Law Section

Account	13-14 Actual	14-15 Actual	15-16 Budget	15-16 Projected Actual	16-17 Proposed Budget
88252 Course Credit Fee	425	325	1,500	1,500	750
88260 Meeting Parking	0	0	0	15	0
88262 Meeting Meals	79,909	0	60,000	65,032	32,000
88263 Meeting Hospitality	109,619	0	170,000	164,561	85,000
88265 Refreshment Breaks	0	0	40,000	36,158	21,000
88269 Breakfast	0	0	50,000	43,331	27,000
88281 A/V Ctr Dup/Prod	210	0	400	400	200
86001 Admin. Expenses (All Inclusive)		0	15,400	15,400	7,700
Total Expense	246,583	926	447,000	425,380	226,750

Note: ATO was service program in 13-14, did not take place in 14-15
ATO will be a Section Sponsored CLE in 15-16 & 16-17.
There will be two ATO conferences held in year 15-16.

Proposed Budget 16-17

Real Property Probate Trust Law Section

Account	16-17 Proposed Budget
RPPTL - CONSTRUCTION LAW INSTITUTE	
REVENUE	
32001 Registrations	94,300
32205 Compact Disc	9,850
32301 Course Materials	950
35003 Ticket Events	1,300
35201 Sponsorships	150,000
39999 Miscellaneous	800
Total Revenue	257,200
EXPENSES	
36998 Credit Card Fees	2,500
41201 Contract Salaries	-
51101 Employee Travel	1,350
61201 Equipment Rental	7,500
75102 1st Class & Misc Mai	25
75401 Express Mail	45
84064 Golf Tourn Expenses	12,400
84252 A/V Equipment & Tech.	16,200
86001 Administrative Exp	18,500
86432 Time Taping Editing	2,350
86532 Advertising News	1,650
88231 Speakers Travel	4,000
88232 Speakers Meals	900
88233 Speakers Hotel	6,000
88234 Speaker Honorarium	1,500
88239 Speakers Other Exp	1,000
88241 Outline Prt-Inhouse	850
88252 Course Credit Fee	150
88262 Meeting Meals	35,000
88263 Meeting Hospitality	25,000
88265 Refreshment Breaks	11,200
88281 A/V Ctr Dup/Prod	250
8999 Other Operating Exp.	2,600
Total Expense	150,970

In 2016 - 2017, this Joint Sponsored CLE program will be held as a Section Sponsored Program

Prepared on 9/24/2015

Proposed Budget 16-17
Real Property Probate Trust Law Section

Account	13-14 Actual	14-15 Actual	15-16 Budget	15-16 Projected Actual	16-17 Proposed Budget
RPPTL SPECIAL PROJECTS					
EXPENSES					
84102 Public Info & Website	4,389	0	15,000	15,000	24,000
84XXX IP Issues - Consultants					5,000
84XXX Marketing Consulting Svcs					10,000
84999 Miscellaneous					11,500
Total Expense	4,389	0	15,000	15,000	50,500
Net Operations	(4,389)		(15,000)	(15,000)	(50,500)

The 84102 Public Info & Website was previously in the General Unit, historical information presented here has been deleted from calculations.

Proposed Budget 16-17
Real Property Probate Trust Law Section

Account	13-14 Actual	14-15 Actual	15-16 Budget	15-16 Projected Actual	16-17 Proposed Budget
SUMMARY					
Beginning Fund Balance	$ 705,581	$ 892,279	$ 1,066,946	$ 1,066,946	$ 1,286,866
Net Operations *	295,710	296,747	18,717	205,437	(71,521)
Net Operations Other **	(109,023)	(122,088)	(124,522)	14,483	8,430
Ending Fund Balance	$ 892,279	$1,066,946	961,141	$ 1,286,866	1,223,775
Add back charge for reserve			100,000		0
Projected Ending Balance			$ 1,061,141		$ 1,223,775

* Net Operations other than Legis. Update, Convention, Attorney Trust Officer Conf. and CLI beginning in 16-17
** Net Operations from Legis. Update, Convention, Attorney Trust Officer Conf. and CLI beginning 16-17.

Supreme Court of Florida

No. SC13-2536

CAROL ANN JONES, etc.,
Petitioner,

vs.

EDWARD I. GOLDEN, etc.,
Respondent.

[October 1, 2015]

CANADY, J.

In this case we consider the timeliness of a creditor's claim against an estate under Chapter 733, Florida Statutes. In particular, we address whether the claim of a creditor who is not served with a copy of the notice to creditors but whose claim is known or reasonably ascertainable is barred under section 733.702(1), Florida Statutes (2006), if not filed within three months after the first publication of the notice to creditors absent an extension, or whether the claim is timely if filed within two years of the decedent's death under section 733.710, Florida Statutes (2006). We have for review Golden v. Jones, 126 So. 3d 390, 390 (Fla. 4th DCA 2013), in which the Fourth District Court of Appeal held "that if a known or

reasonably ascertainable creditor is never served with a copy of the notice to creditors, the statute of limitations set forth in section 733.702(1), Florida Statutes, never begins to run and the creditor's claim is timely if it is filed within two years of the decedent's death." The Fourth District certified that its decision is in direct conflict with the decisions of the First and Second District Courts of Appeal in Morgenthau v. Andzel, 26 So. 3d 628 (Fla. 1st DCA 2009), and Lubee v. Adams, 77 So. 3d 882 (Fla. 2d DCA 2012), which held that even a reasonably ascertainable creditor who was not served with a copy of the notice to creditors is required to file a claim within three months after the first publication of the notice, unless the creditor files a motion for an extension of time under section 733.702(3) within the two-year period of repose set forth in section 733.710. We have jurisdiction. See art. V, § 3(b)(4), Fla. Const.

Because we conclude that the limitations periods prescribed in section 733.702(1) are not applicable to known or reasonably ascertainable creditors who are never served with a copy of the notice to creditors and that the claims of such creditors are timely if filed within two years of the decedent's death under section 733.710, we approve the decision of the Fourth District in Golden and disapprove the decisions of the First and Second Districts in Morgenthau and Lubee.

I. BACKGROUND

Harry Jones died in February 2007 and his estate was opened in April 2007. In June 2007, a notice to creditors was published as required by section 733.2121, Florida Statutes (2006), but neither Harry's ex-wife, Katherine Jones, nor her guardian[1] were ever served with a copy of the notice. In January 2009, however, less than two years after Harry's death, the guardian of Katherine Jones filed a statement of claim in the probate court. The statement of claim asserted that Harry's estate owed Katherine money based on a marital settlement agreement executed in 2002. After Katherine died in 2010, Edward Golden was appointed as the curator of her estate.

In 2012, Golden filed in the probate court a "Petition for Order Declaring Statement of Claim Timely Filed and/or For Enlargement of Time to File Statement of Claim, Nunc Pro Tunc." Essentially, Golden claimed that Katherine's guardianship was a known or reasonably ascertainable creditor of Harry's estate. Carol Jones, the personal representative of Harry's estate and the Petitioner before this Court, filed a response to Golden's petition asserting that Katherine was not a reasonably ascertainable creditor of Harry's estate and that her guardian's claim was time-barred under sections 733.702 and 733.710. After a hearing on the petition, the probate court entered an order striking the guardian's

1. In 2008, a guardian was court appointed for Katherine Jones because she was adjudicated to lack capacity.

2009 claim as untimely under sections 733.702, 733.710, on the authority of the decisions of the First and Second District Courts in Morgenthau and Lubee.

On appeal, Golden argued that because the notice to creditors was not properly served on Katherine, a known or reasonably ascertainable creditor, the three-month limitations period set forth in section 733.702(1) never began to run, and the claims of Katherine's guardianship could only be barred by the two-year statute of repose in section 733.710. The Fourth District agreed with Golden, concluding that the probate court erred "in determining that the claim was untimely without first determining whether Katherine was a known or reasonably ascertainable creditor." Golden, 126 So. 3d at 391, 393-94. The district court reversed and remanded the case to the probate court to determine whether Katherine or her guardianship was a known or reasonably ascertainable creditor. Id. at 394. The district court further instructed that if the probate court determined that Katherine or her guardianship was indeed a known or reasonably ascertainable creditor, then the "claim was timely, as it was filed prior to the earlier of 30 days after service of notice to creditors (which never occurred) or two years after the decedent's death." Id. at 393-94. The Fourth District recognized that the decisions of the First District in Lubee and the Second District in Morgenthau both reached contrary conclusions and certified conflict with those cases. Id.

II. ANALYSIS

The question before the Court is one of statutory interpretation, which is subject to de novo review. BellSouth Telecommunications, Inc. v. Meeks, 863 So. 2d 287, 289 (Fla. 2003). In the analysis that follows, we examine the relevant statutes and discuss the conflicting district court decisions. We then resolve the conflict by approving the reasoning of the Fourth District in Golden and concluding that claims of known or reasonably ascertainable creditors of an estate who were not served with a copy of the notice to creditors are timely if filed within two years of the decedent's death.

A. Relevant Statutes

Three sections of the Florida Probate Code are relevant to our resolution of the conflict presented. Section 733.2121 outlines the duty of a personal representative to publish a notice to creditors of the pending administration of an estate and to serve a copy of the notice to creditors on known or reasonably ascertainable creditors. It provides, in relevant part:

> (1) Unless creditors' claims are otherwise barred by s. 733.710, the personal representative shall promptly publish a notice to creditors. The notice shall contain the name of the decedent, the file number of the estate, the designation and address of the court in which the proceedings are pending, the name and address of the personal representative, the name and address of the personal representative's attorney, and the date of first publication. The notice shall state that creditors must file claims against the estate with the court during the time periods set forth in s. 733.702, or be forever barred.
>
> (2) Publication shall be once a week for 2 consecutive weeks, in a newspaper published in the county where the estate is

administered or, if there is no newspaper published in the county, in a newspaper of general circulation in that county.

(3)(a) The personal representative shall promptly make a diligent search to determine the names and addresses of creditors of the decedent who are reasonably ascertainable, even if the claims are unmatured, contingent, or unliquidated, and shall promptly serve a copy of the notice on those creditors. Impracticable and extended searches are not required. Service is not required on any creditor who has filed a claim as provided in this part, whose claim has been paid in full, or whose claim is listed in a personal representative's timely filed proof of claim.

. . . .

(4) Claims are barred as provided in ss. 733.702 and 733.710.

§ 733.2121, Fla. Stat. (2006); see also Fla. Prob. R. 5.241(a) ("[T]he personal representative shall promptly publish a notice to creditors and serve a copy of the notice on all creditors of the decedent who are reasonably ascertainable.").

Section 773.702 provides, in relevant part:

(1) [N]o claim or demand against the decedent's estate . . . is binding on the estate . . . unless filed in the probate proceeding on or before the later of the date that is 3 months after the time of the first publication of the notice to creditors or, as to any creditor required to be served with a copy of the notice to creditors, 30 days after the date of service on the creditor . . . .

. . . .

(3) Any claim not timely filed as provided in this section is barred even though no objection to the claim is filed unless the court extends the time in which the claim may be filed. An extension may be granted only upon grounds of fraud, estoppel, or insufficient notice of the claims period.

. . . .

> (6) Nothing in this section shall extend the limitations period set forth in s. 733.710.

§ 733.702, Fla. Stat. (2006) (emphasis added).

Section 733.710 provides, in relevant part:

> (1) Notwithstanding any other provision of the code, 2 years after the death of a person, neither the decedent's estate, the personal representative, if any, nor the beneficiaries shall be liable for any claim or cause of action against the decedent, whether or not letters of administration have been issued, except as provided in this section.
>
> (2) This section shall not apply to a creditor who has filed a claim pursuant to s. 733.702 within 2 years after the person's death, and whose claim has not been paid or otherwise disposed of pursuant to s. 733.705.

§ 733.710, Fla. Stat. (2006).

We have held that section 733.702 is a statute of limitations and that section 733.710 is a jurisdictional statute of nonclaim, which cannot be waived or extended. May v. Illinois Nat. Ins. Co., 771 So. 2d 1143, 1150 (Fla. 2000).

B. Morgenthau and Lubee

In Morgenthau, the personal representative of the decedent's estate published a notice to creditors in a newspaper in March 2008, informing possible creditors of the estate that they had three months from the date of the first publication in which to file any claims outstanding against the estate. 26 So. 3d at 629. In April 2009, Morgenthau filed a statement of claim alleging that he was the holder of an outstanding note executed by the decedent and that the personal representative was aware of the amount due to Morgenthau. Id. The probate court

struck the claim as untimely because it was not filed within three months of the first publication of the notice to creditors. Id. at 629-30.

On appeal, the First District found that even if Morgenthau was a known or reasonably ascertainable creditor of the estate who was therefore entitled to receive actual notice by service, because he was not served with a copy of the notice, he was required to file his claim within the three-month window following the first publication of the notice. Id. at 632 ("[T]he claim was untimely as appellant did not receive actual notice of the claim and was, thus, a creditor who fell in the three month filing window following publication."). The district court stated that once Morgenthau's claim fell outside the three-month window, it could only be considered if Morgenthau had requested and been granted an extension of time by the probate court. Id. Because Morgenthau filed only a statement of claim and did not seek an extension of time in which to file that claim, the district court concluded that "the probate court was bound by the relevant statutes to deny the claim." Id.

In Lubee, the decedent died in December 2006, and the notice to creditors was first published in November 2007. 77 So. 3d at 883. More than one year after the first publication, Lubee filed a statement of claim in the probate court. Id. Lubee asserted that because he was a readily ascertainable creditor entitled to be served with a copy of the notice to creditors, he was only required to file his claim

within thirty days after service of the notice under section 733.702(1) or within two years of the decedent's death under section 733.10. According to Lubee, because he was never served with a copy of the notice to creditors, his claim was timely filed within two years of the decedent's death. Id.

The Second District disagreed and concluded that Lubee's claim was untimely because it was filed outside of the three-month window. The Second District concluded that whether Lubee was a reasonably ascertainable creditor or not was immaterial. The court explained:

> Because a notice to creditors was published on November 16, 2007, creditors not entitled to actual notice were required to file their claims on or before February 16, 2008. See § 733.702(1). Creditors who were served with the notice to creditors were required to file their claims within thirty days following service. See id. Because he was not served with a copy of the notice to creditors, Mr. Lubee was required to file his claim in the probate proceeding within the three-month window following publication. Alternatively, Mr. Lubee could seek an extension from the probate court pursuant to section 733.702(3) within the two-year window of section 733.710. See Morgenthau v. Estate of Andzel, 26 So. 3d 628, 632 (Fla. 1st DCA 2009); cf. Miller v. Estate of Baer, 837 So. 2d 448, 449 (Fla. 4th DCA 2002) (affirming order enforcing claim against estate where creditor failed to file claim within three-month window of section 733.702(1) but did file motion for extension of time within two-year window of section 733.710). It is undisputed that he did neither. Mr. Lubee's filing of his claim in the probate proceeding within two years of the decedent's death did not amount to a request for an extension of time and did not otherwise comply with the requirements of section 733.702. Mr. Lubee's claim in the probate proceeding was untimely and therefore barred. As a result, the issue of whether or not Mr. Lubee was a readily ascertainable creditor was immaterial[.]

Id. at 883-84 (emphasis added).

In Golden, the Fourth District rejected the analyses in Morgenthau and Lubee, finding the decisions inconsistent with the plain language of section 733.702(1), which allows a known or reasonably ascertainable creditor to file a claim against an estate "on or before the later of the date that is 3 months after the time of the first publication of the notice to creditors or . . . 30 days after the date of service on the creditor." The court instead followed Fourth District precedent established in In re Estate of Puzzo, 637 So. 2d 26 (Fla. 4th DCA 1994), in which the court stated:

> Due process considerations require that Appellants be furnished notice so that they can determine that the time for filing claims has commenced. However, regardless of whether or not the claimants had actual notice, section 733.702(1), Florida Statutes, does not bar the claim of a creditor required to be served with a copy of the notice of administration, unless barred by section 733.710, until the later of the 3-month period following publication or 30 days after service of notice on the creditor. The latter period had not begun to run at the time Appellants' claims were filed.
>
> We remand for the trial court to determine as to which of Appellant[s'] claims they were known or ascertainable creditors. Any such claims, though filed after the 3-month period, should not have been stricken as untimely if filed prior to the earlier of 30 days after service of notice of administration or 2 years after the decedent's death.

Golden, 126 So. 3d at 392 (alteration in original) (quoting Puzzo, 637 So. 2d at 27).

The Fourth District concluded that the probate court should have determined whether Katherine or her guardianship was a known or reasonably ascertainable

creditor prior to determining the timeliness of her guardian's claim, and if she or the guardianship was a known or reasonably ascertainable creditor, then the claim "though filed after the 3-month period, should not have been stricken as untimely if filed prior to the earlier of 30 days after service of notice of administration or 2 years after the decedent's death." Id. (quoting Puzzo, 637 So. 2d at 27).

C. Resolving the Conflict

Section 733.702(1), Florida Statutes, provides two distinct and different limitations periods for the filing of claims against an estate: one for creditors "required to be served with a copy of the notice to creditors," i.e., known or reasonably ascertainable creditors, and a second for unknown and not reasonably ascertainable creditors (hereinafter "unknown creditors"). The limitations period applicable to unknown creditors, set forth in section 733.702(1), begins to run upon publication of the notice to creditors and ends three months after the date of the first publication.

Creditors who are known or reasonably ascertainable need not rely on publication for notice of the pending administration of an estate. Section 733.2121(3)(a) requires a personal representative to "promptly serve a copy of the notice" on those creditors who are known or reasonably ascertainable after a diligent search. The limitations period applicable to known or reasonably ascertainable creditors does not begin to run until service is perfected. Once

served with a copy of the notice, a known or reasonably ascertainable creditor must file any claim within the later of "3 months after the time of the first publication of the notice to creditors or . . . 30 days after the date of service on the creditor . . . ." § 733.702(1), Fla. Stat.

Under the plain language of section 733.702(1), where a known or reasonably ascertainable creditor is never served with a copy of the notice to creditors, the applicable limitations period never begins to run and cannot bar that creditor's claim. "[A]s to any creditor required to be served with a copy of the notice to creditors," the limitations period can only be triggered by "service on the creditor" of the required notice. § 733.702(1), Fla. Stat. A known or reasonably ascertainable creditor is absolved from the limitations of section 733.702(1) by virtue of the fact that the personal representative failed to serve the creditor with the required notice. The only instance in which a known or reasonably ascertainable creditor is required to file any claims before the expiration of the three-month window after publication of the notice is where the last day of the three-month window occurs more than thirty days after service of the required notice.

Accordingly, if a known or reasonably ascertainable creditor is not served with a copy of the notice, section 733.702(1) does not govern the timeliness of that creditor's claims. Instead, the claims of such a creditor are only barred if not filed

within the two-year period of repose set forth in section 733.710. Thus, the claim of a known or reasonably ascertainable creditor who was never served with a copy of the notice to creditors is timely if filed within two years of the decedent's death. Further, because the limitations periods in section 733.702 are inapplicable under such circumstances, it is not necessary for the creditor to seek an extension of time under section 733.702(3) since that section applies only to claims that are untimely under section 733.702.

The decision of the First District in Morgenthau—on which the Second District relied in Lubee—is based on a misinterpretation of the limitations provisions in section 773.702(1).[2] The First District interpreted that section in the following manner:

> Section 773.702(1) mandates a claim is untimely if it is filed either (1) outside the three month window following publication to creditors or (2) filed outside the 30 day window for responding to a notice of claim if the creditor is a readily ascertainable creditor of the estate entitled to actual notice of the claim.

Morgenthau, 26 So. 3d at 630 (emphasis added). Stated differently, Morgenthau requires that to be timely, a claim must be filed both within the three-month window after publication and within the thirty-day window after service of a copy

2. The Morgenthau court's analysis may also have been hampered by the fact that Morgenthau conceded that his claim was "untimely." Morgenthau, 26 So. 3d at 630.

of the notice. But that's not what the statute says. As explained above, the plain language of section 733.702 specifies that as to a known or reasonably ascertainable creditor, a claim is timely if "filed in the probate proceeding on or before the later of the date that is 3 months after the time of the first publication of the notice to creditors or, as to any creditor required to be served with a copy of the notice to creditors, 30 days after the date of service on the creditor." § 733.702(1), Fla. Stat. (emphasis added).

The interpretation adopted in Golden is in accord with the plain terms of the statute. And it is also in accord with the requirements of due process. In Tulsa Professional Collection Services, Inc. v. Pope, 485 U.S. 478, 489-91 (1988), the United States Supreme Court held that where a creditor is known or reasonably ascertainable, that creditor's claim may not be barred merely by publication of the notice to creditors. Noting that a claim against an estate is property subject to protection by the Fourteenth Amendment, the Supreme Court weighed the important state interests in regulating the timeliness of creditors' claims against the rights of those creditors to have their intangible interests in property protected by the Fourteenth Amendment. Id. at 485. The Supreme Court determined that where a time bar is self-executing—such as the two-year statute of repose in section 733.710—there is insufficient state action to implicate the Due Process Clause of the Fourteenth Amendment. Id. at 485-87. However, where a time bar is triggered

by legal proceedings—such as the limitations periods in section 733.702—there is sufficient state action to implicate the Due Process Clause. Id. at 487-88. The Court thus concluded that where there is sufficient state action and a creditor is "known or 'reasonably ascertainable,' then the Due Process Clause requires that [the creditor] be given '[n]otice by mail or other means as certain to ensure actual notice.' " Id. at 491 (quoting Mennonite Bd. of Missions v. Adams, 462 U.S. 791, 800 (1983)).

A personal representative is therefore constitutionally obligated to provide actual notice to known or reasonably ascertainable creditors and if the personal representative fails to provide that notice, the creditors' claims cannot be barred except under section 733.710. The Fourth District's decision in Golden properly recognizes the duty of the personal representative to provide notice to known and reasonably ascertainable creditors and the requirement of actual notice to satisfy due process as to those creditors.

III. CONCLUSION

For the reasons explained above, we conclude that claims of known or reasonably ascertainable creditors of an estate who were not served with a copy of the notice to creditors are timely if filed within two years of the decedent's death. Accordingly, we approve the decision of the Fourth District in Golden and

disapprove the decisions of the First District in Lubee and the Second District in Morgenthau.

It is so ordered.

LABARGA, C.J., and PARIENTE, LEWIS, QUINCE, POLSTON, and PERRY, JJ., concur.

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION, AND IF FILED, DETERMINED.

Application for Review of the Decision of the District Court of Appeal - Certified Direct Conflict of Decisions

Fourth District - Case No. 4D12-2094

(Broward County)

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for Petitioner

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for Amicus Curiae The Real Property, Probate & Trust Law Section of The Florida Bar

RECEIVED, 10/23/2015 4:36 PM, Mary Cay Blanks, Third District Court of Appeal

IN THE DISTRICT COURT OF APPEAL OF FLORIDA,
THIRD DISTRICT

CASE NO. 3D14-0575

L.T. NO. 12-49315

DEUTSCHE BANK TRUST
COMPANY AMERICAS, etc.,
Appellants,

v.

HARRY BEAUVAIS, et al.,
Appellees.

ON APPEAL FROM THE CIRCUIT COURT OF FLORIDA,
ELEVENTH JUDICIAL CIRCUIT

BRIEF OF *AMICUS CURIAE* THE REAL PROPERTY PROBATE & TRUST LAW SECTION OF THE FLORIDA BAR

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IDENTITY AND INTEREST

The Real Property Probate & Trust Law Section of The Florida Bar ("Section") is a group of Florida lawyers who practice in the areas of real estate, guardianship, trust and estate law, and who are dedicated to serving all Florida lawyers and the public in these fields of practice. We produce educational materials and seminars, assist the public *pro bono*, draft legislation, draft rules of procedure, and occasionally serve as a friend of the court to assist on issues related to our fields of practice.[1] Our Section has over 10,000 members.

Our interest in this case stems from our experience and expertise with certain of the real estate, mortgage and foreclosure related issues presented to us by the Court. Further, this Court invited us to participate in this case and we believe it is our professional duty to assist the Court where we are able.[2]

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[1] For example, see *Chames v. DeMayo*, 972 So. 2d 850, 854-55 (Fla. 2007); *McKean v. Warburton,* 919 So. 2d 341 (Fla. 2005); *May v. Illinois Nat. Ins. Co.*, 771 So. 2d 1143 (Fla. 2000); *Friedberg v. SunBank/Miami*, 648 So. 2d 204 (Fla. 3d DCA 1994).

[2] The Executive Committee of the Section approved the filing of this brief. Pursuant to Standing Board Policy 8.10, the Board of Governors of The Florida Bar (typically through its Executive Committee) must review a Section's amicus brief and grant approval before the brief can be filed with the Court. Although reviewed by the Board of Governors, the amicus brief will be submitted solely by the Section and supported by the separate resources of this voluntary organization--not in the name of The Florida Bar, and without implicating the mandatory membership dues paid by Florida Bar licensees. The Florida Bar approved our filing of this brief.

SUMMARY OF ARGUMENT

The Court invited the Section and others to address several questions. Typically, when the Section appears as an amicus, we address the issues without reviewing the facts of the case, the testimony below, the record or prior decisions in the case. In this instance, however, in order to more effectively address the issues presented by the Court, the Section has reviewed the underlying mortgage and has considered certain facts to the extent they are set forth in the Panel's December 17, 2014 opinion, *Deutsche Bank Trust Co. Americas v. Beauvais*, No. 3D14-575, 2014 WL 715691 (Fla. 3d DCA 2014).

Limiting itself to the terms of the form of mortgage in this case, the Section's answers to each of the Court's questions are summarized in italics:

1. Where a foreclosure action has been dismissed with the note and mortgage still in default:
   a. Does the dismissal of the action, by itself, revoke the acceleration of the debt balance thereby reinstating the installment terms?

      The optional acceleration the lender exercised as part of the foreclosure process could not be effectuated until entry of the foreclosure judgment. Until then, that acceleration was subject to the foreclosure proceeding being dismissed for various reasons, including the borrower's contractual right to reinstate and discontinue the foreclosure action by curing the past installment payment default. Absent a contrary provision in the mortgage contract, Florida law and equitable principles generally dictate the conclusion that no further affirmative act of deceleration is necessary. The dismissal itself should serve to revoke the acceleration

made as part of the now dismissed foreclosure process and the parties should be deemed to have returned to their pre-filing status quo.

b. Absent additional action by the mortgagee can a subsequent claim of acceleration for a new and different time period be made?

Yes. The installment nature of the mortgage loan, the terms of this form of mortgage, Florida case law and equitable principles dictate allowing a subsequent acceleration and foreclosure action for any new and different default.

c. Does it matter if the prior foreclosure action was voluntarily or involuntarily dismissed, or whether the dismissal was with or without prejudice?

The nature of the dismissal in a prior foreclosure action should not matter in a subsequent foreclosure based on a default occurring after the default that precipitated the prior foreclosure action. However, the nature of the dismissal may matter if the statute of limitations or doctrine of res judicata is applicable to the default at issue in the prior foreclosure action.

d. What is the customary practice?

The RPPTL Section defers to the response in the Business Law Section of the Florida Bar's amicus brief. That response is consistent with the RPPTL Section's understanding of the customary practice.

2. If an affirmative act is necessary by the mortgagee to accelerate a mortgage, is an affirmative act necessary to decelerate?

Unless the mortgage contract or the mortgagee's acceleration otherwise dictates, the dismissal of the foreclosure action should be deemed a deceleration returning the parties to the status quo.

3. In light of *Singleton v. Greymar Assocs.,* 882 So. 2d 1004 (Fla. 2004), is deceleration an issue or is deceleration inapplicable if a different and subsequent default is alleged?

   Under the terms of the mortgage in this case, Singleton dictates the conclusion that deceleration after the dismissal of a prior foreclosure action is not an issue (or is inapplicable) in a subsequent foreclosure based on a different and subsequent alleged default.

ARGUMENT

I. Provisions of the Standard Form Residential Mortgage

The mortgage in this case is the typical form of mortgage used in the vast majority of residential home loans in Florida, promulgated by Fannie Mae and Freddie Mac. The mortgage is a security instrument used, among other things, to secure the borrower's payment obligations to the Lender under the accompanying promissory note.[3] These payment obligations require the borrower to make a series of separate monthly installment payments over the life of the note and mortgage. *See* paragraph 1.

Paragraph 22 of the mortgage is entitled "Acceleration; Remedies." This paragraph requires the lender to give the borrower notice of any default (including

[3] Under the "Definitions" section of the standard form, the mortgage is also referred to as the "Security Instrument," the mortgagor as the "Borrower" and the mortgagee as the "Lender."

a payment default) and an opportunity to cure before it may proceed against the secured property in a judicial foreclosure proceeding. Paragraph 22 provides the following in bold print:

> **22. Acceleration; Remedies. Lender shall give notice to Borrower prior to acceleration following Borrower's breach of any covenant or agreement in this Security Instrument (but not prior to acceleration under Section 18 unless Applicable Law provides otherwise). The notice shall specify: (a) the default; (b) the action required to cure the default; c) a date, not less than 30 days from the date the notice is given to Borrower, by which the default must be cured; and (d) that failure to cure the default on or before the date specified in the notice may result in acceleration of the sums secured by this Security Instrument, foreclosure by judicial proceeding and sale of the Property. The notice shall further inform Borrower of the right to reinstate after acceleration and the right to assert in the foreclosure proceeding the non-existence of a default or any other defense of Borrower to acceleration and foreclosure. If the default is not cured on or before the date specified in the notice, Lender at its option may require immediate payment in full of all sums secured by this Security Instrument without further demand and may foreclose this Security Instrument by judicial proceeding. Lender shall be entitled to collect all expenses incurred in pursuing the remedies provided in this Section 22, including, but not limited to, reasonable attorneys' fees and costs of title evidence.**

The term "may" is twice used in paragraph 22. First, in relation to the required notice, subpart (d) directs the lender to notify the borrower that, "failure to cure the default on or before the date specified in the notice *may* result in acceleration of the sums secured by this Security Instrument, foreclosure by judicial proceedings and sale of the Property." (Emphasis added). Second, paragraph 22 states, "if the default is not cured on or before the date specified in

the notice, lender at its option *may* require immediate payment in full of all sums secured by this Security Interest without further demand and may foreclose this Security Instrument by judicial proceedings." (Emphasis added).

In turn, paragraph 16 of the mortgage is entitled "Governing Law; Severability; Rules of Construction." One of the "rules of construction" in this paragraph addresses the use of the term "may" in the mortgage and states "the word 'may' gives sole discretion without any obligation to take any action."

When paragraphs 22 and 16 of the mortgage are read together, it becomes clear that the default notice described in paragraph 22 does not act to accelerate the full amount secured by the mortgage. Instead, that notice specifies the default, provides the time to cure and informs the borrower that failure to timely cure gives the lender the option of accelerating and pursuing foreclosure proceedings without further demand. In other words, some additional action is required for the lender to exercise its optional remedy to accelerate the total balance due as part of the judicial foreclosure process. Indeed, this is the conclusion this Court reached in two recent decisions, *Snow v. Wells Fargo Bank, N.A.*, 156 So. 3d 538, 541-542 (Fla. 3d DCA 2015); *Pino v. Deutsche Bank National Trust Co.,* Case No. 3D14-2288, Slip Opinion dated September 30, 2015 (not final until disposition of timely filed motion for rehearing).

Significantly, if the lender elects to accelerate and pursue judicial foreclosure, the borrower still has the right to reinstate after acceleration or, as the mortgage states, "to have enforcement of the [mortgage] discontinued." That right is specified in Paragraph 19 of the mortgage:

> **19. Borrower's Right to Reinstate After Acceleration.** If Borrower meets certain conditions, Borrower shall have the right to have enforcement of this Security Instrument discontinued at any time prior to the earliest of: (a) five days before sale of the Property pursuant to any power of sale contained in this Security Instrument; (b) such other period as Applicable Law might specify for the termination of Borrower's right to reinstate; or c) entry of a judgment enforcing this Security Instrument. Those conditions are that Borrower: (a) pays Lender all sums which then would be due under this Security Instrument and the Note as if no acceleration had occurred; (b) cures any default of any other covenants or agreements; c) pays all expenses incurred in enforcing this Security Instrument, including, but not limited to, reasonable attorneys' fees, property inspection and valuation fees, and other fees incurred for the purpose of protecting Lender's interest in the Property and rights under this Security Instrument; and (d) takes such action as Lender may reasonably require to assure that Lender's interest in the Property and rights under this Security Instrument, and Borrower's obligation to pay the sums secured by this Security Instrument, shall continue unchanged.

Simply stated, the borrower has the post-acceleration right to reinstate and have enforcement of the Security Instrument discontinued at any time prior to entry of final judgment. The borrower also has the right, if certain specified conditions are met, to have the monthly installment payments under the mortgage continue unchanged.

An additional provision of the mortgage relevant to the issues the Court has raised is paragraph 12 entitled **"Borrower Not Released; Forbearance by Lender Not a Waiver."** This paragraph states in part, "any Forbearance by Lender in exercising any rights or remedy… shall not be a waiver of or preclude the exercise of any right or remedy."

In summary, the lender's right upon default to accelerate and pursue foreclosure is a matter of contract. Here, the mortgage contract places specific duties upon the lender to give the borrower notice of default and the opportunity to cure prior to exercising the optional right to accelerate and judicially foreclose. Conversely, the borrower has the right to cure the default after acceleration up until the entry of a final judgment in the foreclosure proceeding. Said a different way, the lender's right to accelerate is subject to the borrower's continuing right to cure. And, as such, the installment nature of the note and mortgage continues unless and until the mortgage ceases to exist by entry of the foreclosure judgment.

The borrower's right to reinstate after acceleration does not require payment of the loan in full until final judgment is entered. No future payments are at issue and, until final judgment is entered, do not have to be paid in order to cure the default. The installment nature of the loan remains until the right to reinstate terminates upon entry of a final judgment. If the case does not end in a final judgment, for whatever reason, the borrower still has the right to cure the default and continue with the monthly installment payments under the loan.

This borrower's right to reinstate after acceleration is different from an absolute acceleration clause (more common in a commercial mortgage), which may be self-executing and not allow any cure except payment of the entire loan balance after acceleration is exercised. *See e.g. Baader v. Walker*, 153 So. 2d 51 (Fla. 2d DCA 1963). It is also different from acceleration for breach of the "due on sale" clause in the standard form mortgage, which does not provide a

contractual right to do anything other than pay the full amount due under the Security Instrument within 30 days of notice, period. *See* paragraph 18.

II. Singleton v. Greymar Associates

Singleton v. Greymar Associates, 882 So. 2d 1004 (Fla. 2004) should have a bearing on this case.[4] In *Singleton*, the Supreme Court of Florida addressed an express and direct conflict between the Fourth District's decision in *Singleton* and the Second District's decision in *Stadler v. Cherry Hill Developers, Inc.*, 150 So. 2d 468 (Fla. 2d DCA 1963). Those decisions analyzed the application of the *res judicata* doctrine in successive mortgage foreclosure actions where acceleration had occurred in the earlier foreclosure. As the Florida Supreme Court noted, "the Fourth District has consistently taken the position that *res judicata* does not prevent mortgagees from foreclosing on a mortgage in successive foreclosure cases where the alleged dates of default are different." 882 So. 2d at 1006. In contrast,

> [t]he Second District's holding in *Stadler* shows that it takes a stricter and more technical view of mortgage acceleration elections. *See* 150 So. 2d at 472 ("while it is axiomatic that a suit for one installment payment does not preclude suit for a later installment on a divisible contract, the scant authority found seems unanimous in the view that an election to accelerate puts all future installment payments in issue and forecloses successive suits.").

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[4] As this Court is aware, *Singleton* will likely be further reviewed and discussed by the Supreme Court of Florida in connection with the pending appeal before that Court, *Bartram v. U.S. Bank Assn.*, Case No.: SC14-1265, presently scheduled for oral argument on November 4, 2015.

Id. In resolving this decisional conflict, the Florida Supreme Court held, "we agree with the position of the Fourth District that when a second and separate action for foreclosure is sought for a default that involves a separate period of default from the one alleged in the first action, the case is not necessarily barred by *res judicata*." *Id.* at 1006-07.

In explaining its reasoning, the Florida Supreme Court stated that while a foreclosure action and acceleration of the balance due based on a particular default may bar subsequent action on that same default, an acceleration and foreclosure predicated "upon subsequent and different defaults present a separate and distinct issue." *Id.* at 1007. Recognizing that this ruling in the context of mortgages and foreclosure actions was seemingly at variance from the traditional application of the doctrine of *res judicata*, the Florida Supreme Court explained that this variance arises from "the unique nature of the mortgage obligation and the continuing obligations of the parties in that relationship." *Id.*

Finally, significant to the questions presented by this Court, the Florida Supreme Court concluded "that the doctrine of *res judicata* does not necessarily bar successive foreclosure suits, *regardless of whether or not the mortgagee sought to accelerate payments on the note in the first suit.* In this case the subsequent and separate alleged default created a new and independent right in the mortgagee to accelerate payment on the note in a subsequent foreclosure action. Thus we approve the Fourth District's decision in *Singleton,* and disapprove the Second District's holding in *Stadler*." *Id.* at 1008 (emphasis added).

III. Application of the Standard Form Mortgage Provisions and the Supreme Court's Decision in *Singleton* to the Court's Questions

1. *Where a foreclosure action has been dismissed with the note and mortgage still in default:*

   a. *Does the dismissal of the action, by itself, revoke the acceleration of the debt balance thereby reinstating the installments terms?*

2. *If an affirmative act is necessary by the mortgagor to accelerate a mortgage, is an affirmative act necessary to decelerate?*

As discussed above, under paragraph 22 of the standard form mortgage, the lender is required to send a letter notifying the borrower of the default at issue. That paragraph further specifies what the lender must state in the default letter. As this Court has recently held, without more, the default letter under paragraph 22 does not constitute an exercise of the lender's right to accelerate. Instead, it places the borrower on notice that the lender has the option to exercise the right to accelerate and seek foreclosure in the future should the borrower fail to cure the specified default. *See Snow v. Wells Fargo Bank, supra,* 156 So. 3d at 539-541; *Pino v. Deutsche Bank*, *supra,* Slip Opinion at 2. In short, neither the default letter itself, nor the borrower's failure to cure within the time period specified in the default letter, operate as an acceleration of all sums due under the mortgage.

Consistent with this fact, the Section understands that during the periods in question, the overwhelming majority of lenders notified a borrower of the lender's exercise of the acceleration remedy arising from a specified default by alleging the acceleration in the foreclosure complaint. That foreclosure complaint would be filed after the expiration of the cure period specified in the default letter. This

approach conforms to almost a century of well-established Florida law. *See Prince v. Mahin* 74 So. 696 (Fla. 1917); *Gus' Baths, Inc. v. Lightbown* 133 So. 85 (Fla. 1931); *Liles v. Savage*, 163 So. 399 (Fla. 1935).

This settled principle of law was more recently recognized in *Campbell v. Werner*, 232 So. 2d 252 (Fla. 3d DCA 1970), wherein this Court reviewed the legal effect of a foreclosure complaint in which the lender announced its election to declare the full amount of the note and mortgage due and payable. *Id.* at 254. As this Court stated, "[t]he filing of suit for foreclosure amounts to exercise of the option of the mortgagee to declare the whole of the principal sum and interest secured by the mortgage due and payable. And the filing of suit to foreclose operates as notice to the mortgagor of the election to accelerate, where the election to do so is declared in the complaint (as was done in this case) or, in the absence of such declaration, where the complaint on its face shows that foreclosure for the entire mortgage indebtedness is sought therein." *Id.* at 254, n1(citations omitted).

If filing a foreclosure complaint with allegations of acceleration provides legal notice in Florida of the lender's exercise of this optional right, it stands to reason that the dismissal of that same action, for whatever reason, should operate to "revoke" the acceleration. In other words, just as the filing of the foreclosure complaint with allegations showing the entire secured indebtedness is sought serves to notify the borrower of the lender's decision to accelerate and foreclose, the dismissal of that foreclosure action, for whatever reason, should be deemed a "deceleration" as the parties are returned to their pre-filing status.

This outcome is likewise supported by the terms of the form mortgage. Paragraph 1 establishes the monthly installment payments required under the mortgage. Paragraph 12 establishes that the lender's forbearance in exercising any rights or remedies shall not be a waiver of or prohibition to the exercise of any other right or remedy. If the exercise of the acceleration remedy is accomplished by filing the foreclosure complaint and that complaint is later dismissed, the lender at that point is forbearing the acceleration right and remedy. Under the plain terms of the mortgage contract, that forbearance is without waiver of or prejudice to the lender's rights and remedies with respect to the borrower's failure to make future installment payments.

This result is consistent with the holding in *Singleton* which found that the parties to a foreclosure action which is dismissed are placed back into the same loan relationship that existed prior to the loan being accelerated through the foreclosure proceeding. *Singleton,* 882 So.2d 1004 at 1006-08.[5] The mortgage remains an installment loan and continues in that manner until entry of a final judgment. In other words, if no judgment in favor of the lender is entered in the foreclosure proceeding because the foreclosure action is dismissed, the optional acceleration was never effectuated and the installment nature of the mortgage continues.

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[5] The First District recently reached the same conclusion in *Nationstar Mortg., LLC v. Brown*, 40 Fla. L. Weekly D1958, 2015 WL 4999017 (Fla. 1st DCA Aug. 24, 2015)

In an effort to assist the Court's understanding, the Section will briefly address two hypothetical scenarios to illustrate these points. In the first scenario, the lender sends a default letter under paragraph 22 and the borrower fails to cure the specified defaults within the time specified. The lender then sends the borrower written notice of its election to exercise its optional right to accelerate and files the foreclosure action, either attaching the letters or including allegations about the same.[6] A subsequent dismissal of that foreclosure lawsuit, for whatever reason, should operate to revoke the acceleration without more.

Under the second scenario, assume that the acceleration was effectuated by written notice sent to the borrower following the default letter, and for whatever reason a foreclosure action was never filed. Under this hypothetical scenario, if this Court were to read *Singleton* differently than as suggested above (i.e. by concluding that the ongoing installment nature of the mortgage ceases during the period of acceleration), further analysis would be needed to determine if the lender should be required to send a notice revoking the acceleration or "decelerating" to avoid the running of the statute of limitations. Under this hypothetical, the determination of whether some notice of "deceleration" was required to stop the running of the statute of limitations would require resolution on a case by case basis. For example, this Court has previously held that acceleration may be waived in a variety of ways. *See*, *Amerifirst Federal Savings and Loan Assn of Miami v.*

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[6] It is likely that both the default letter and the acceleration letter would be attached to the foreclosure complaint as exhibits given the requirement of Rule 1.130 of the Florida Rules of Civil Procedure.

Century 21 Commodore Plaza, Inc., 416 So.2d 45 (Fla. 3d DCA 1982). In that case this Court stated:

> While neither mere delay on the part of the mortgagee in exercising its right to accelerate, *see Kreiss Potassium Phosphate Company v. Knight*, 98 Fla. 1004, 124 So. 751 (1929), nor the mortgagor's willingness to cure a default after an election to accelerate has been made, *Campbell v. Werner*, 232 So.2d 252 (Fla. 3d DCA 1970), nor tender of amounts due after such an election, *see Kreiss Potassium Phosphate Company v. Knight, supra; New England Mutual Life Insurance Company v. Luxury Homebuilders, Inc.*, 311 So.2d 160 (Fla. 3d DCA 1975) is a ground for depriving a mortgagee of its contractual right of acceleration and foreclosure, the request to and acceptance from the mortgagor of substantially all amounts due under the mortgage, as here, is such conduct on the part of the mortgagee which will justify a court of equity in refusing to foreclose a mortgage, notwithstanding that the conduct comes after an election to accelerate has been made and *despite the conceded but immaterial fact that the mortgagee never explicitly waived its election to accelerate*. (Emphasis added).

Accordingly, in certain situations as described in the foregoing hypothetical, a subsequent notice of "deceleration" could become unnecessary based upon the conduct and actions of the lender or borrower.

b. *Absent additional action by the mortgagee can a subsequent claim of acceleration for a new and different time period be made?*

The Section has concluded that the answer to this question should be "yes." Given the nature of the installment loan, the provisions of the standard form of mortgage, the case law the First DCA relies upon in *Nationstar Mortg., LLC v. Brown, supra*, the reasoning in *Singleton*, and general equitable principles, a subsequent acceleration and foreclosure for a new and different time period is

available to the mortgagee without any additional action related to a previously dismissed foreclosure action.

c. *Does it matter if the prior foreclosure action was voluntarily or involuntarily dismissed, or whether the dismissal was with or without prejudice?*

The Section believes the answer to this question should be "no." This conclusion is supported by various Florida appellate court decisions and federal court decisions applying Florida law. *See e.g. Evergrene Partners, Inc. v. Citibank, N.A.,*143 So. 3d 954 (Fla. 4th DCA 2014) (voluntary dismissal without prejudice); *Nationstar Mortgage, LLC v. Brown,* supra (involuntarily dismissal without prejudice); *Matos v. Bank of New York*, 2014 WL 3734578 (S.D. Fla. 2014) ("A voluntary or even involuntary dismissal of a lender's earlier foreclosure action does not invalidate the note and mortgage and does not preclude a subsequent foreclosure action for subsequent defaults of payment."); *Rodriguez v. Bank of America, N.A.,* 2014 WL 4851777 (S.D. Fla. September 30, 2014) (involuntary dismissal with prejudice).

d. *What is the customary practice?*

The Business Law Section of the Florida Bar's *amicus* brief responds to this question. That response is consistent with the RPPTL Section's understanding of the customary practice.

3. *In light of Singleton v. Greymar Assocs., 882 So. 2d 1004 (Fla. 2004), is deceleration an issue or is deceleration inapplicable if a different and subsequent default is alleged?*

While *Singleton* is a case about the doctrine of *res judicata*, its reasoning should equally apply in this context. The Florida Supreme Court in *Singleton* was clear that the acceleration did not place the future installments at issue, following *Olympia Mortgage Corp. v. Pugh,* 774 So.2d 863 (Fla. 4th DCA 2000). The monthly installments still accrue and the borrower has the right to bring the loan current (versus paying the entire loan amount) any time until final judgment is entered under the mortgage contract. *Singleton* held that if the borrower prevails in the first foreclosure proceeding, the parties are "simply placed back in the same contractual relationship with the same continuing obligations. Hence an adjudication denying acceleration and foreclosure under those circumstances should not bar a subsequent action a year later if the mortgagor ignores her obligations on the mortgage and a valid default can be proven." 882 So. 2d at 1007. *Singleton* stressed the "unique nature of the mortgage obligation" and the continuing obligations of the parties in that relationship. That court concluded that the "ends of justice require that the doctrine of *res judicata* not be applied so strictly so as to prevent mortgagees from being able to challenge multiple defaults on a mortgage." *Id.* at 1008.

Reason and equity dictate that the same should be true here where: (1) an optional, acceleration is asserted as part of a foreclosure proceeding; (2) the borrower has the right until entry of the foreclosure final judgment to reinstate by curing the default; and (3) the parties are returned to their pre-suit (pre-acceleration) status by the dismissal of the foreclosure complaint with or without prejudice.

CONCLUSION

The Section has welcomed the Court's invitation to file the *amicus* brief and trusts that its answers will assist the Court's en banc consideration of the Panel's decision on this very significant question of Florida law.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I CERTIFY that a true copy of this brief was served , this 23rd day of October, 2015 via electronic mail to the following: William McCaughan William.mccaughan@klgates.com, Todd Wallen todd@wallenlawfirm.com, David R. Fine, Esq. david.fine@klgates.com, Steven R. Weinstein, Esq. steven.weinstein@klgates.com, Stephanie N. Moot, Esq. Stephanie.moot@klgates.com, Robert. M. Brochin, Esq., rbrochin@morganlewis.com, Joshua C. Prever, Esq. jprever@morganlewis.com, and Christopher K. Smith, cksmith@morganlewis.com, Alice Vickers, Esq., alicevickers@flacp.org, John G. Crabtree, Esq., jcrabtree@crabtreelaw.com, Stephanie Reed Traband, Esq. srt@lklsg.com,Victor Petrescu, Esq., vp@lklsg.com, Major B. Harding, Esq., mharding@ausley.com, John R. Hargrove, Esq., jrh@hargrovelawgroup.com, Robert R. Edwards, Esq., redwards@rasflaw.com, Melissa A. Giasi, Esq., mgiasi@kasslaw.com, Richard S. McIver, Esq., rmciver@kasslaw.com, Melissa G. Gilbert, Esq., emailservice@gilbertgrouplaw.com, Andrea R. Tromberg, Esq., atromberg@gladstonelawgroup.com, Elizabeth Wellborn, Esq., ewellborn@erwlaw.com, Shaib Y. Rios, Esq., sahib.rios@brockandscott.com.

/s/ John W. Little, III
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CERTIFICATE OF FONT COMPLIANCE

I certify that this brief complies with the font requirement of Rule 9.210 (a) (2), Florida Rules of Appellate Procedure.

/s/ John W. Little, III
John W. Little, III
Florida Bar No. 3384798

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OPEN AND EXPIRED PERMITS

(1) Any building permit issued for construction of any commercial or residential project that has not been properly closed by passing all necessary final inspections and complying with other permit requirements within one year from the expiration of the notice of commencement or last amendment thereto, or in the absence of a notice of commencement within one year from the last inspection conducted under the permit or, if no inspections have been performed on a project without a notice of commencement, within two years from the date of issuance of the permit, may be closed by or on behalf of the current property owner, regardless of whether the property owner is the same owner who originally applied for the permit or is a subsequent owner, by complying with the following procedures:

(a) The property owner may hire a licensed engineer or architect, possessing a current and active Florida license in a field similar to the nature of the work covered by the open or expired permit at issue and having at least three years experience in performing structural field inspections, to inspect the construction work subject to the open or expired building permit, direct any repairs necessary to comply with all permit requirements, then confirm compliance therewith by submitting a signed and sealed affidavit to the issuing building department. If any of the permitted work includes construction outside the engineer's area of expertise, the owner or engineer may hire licensed engineers in the scope of the permitted work, who may direct any necessary repairs to comply with all permit requirements, then

36 confirm compliance by submitting to the issuing
37 building department a signed and sealed affidavit
38 attesting to same.

39 (b) The building department issuing the
40 permit shall either accept the signed and sealed
41 affidavit or affidavits referenced in subsection 1(a)
42 above in lieu of conducting their own final
43 inspections, or shall conduct their own final
44 inspections within five business days of receipt of
45 the affidavit or affidavits, as satisfaction of all
46 permit requirements and shall thereafter properly
47 close the building permit.

48 (c) The procedures in subsections 1(a) and
49 (b) above shall apply regardless of whether the
50 building permit is still open or has expired.

51 (d) Notwithstanding any of the provisions
52 above or elsewhere in this law, all building permits
53 are automatically deemed properly closed without the
54 need for any further action five years after
55 expiration of the notice of commencement or last
56 amendment thereto for the permitted project. This
57 section shall apply retroactively to all previously
58 issued building permits as well as all permits issued
59 after the effective date of this statute.

60 (2) When applying for a building permit, the
61 property owner at the time of the application must, in
62 addition to paying all applicable permit application
63 fees, pay a deposit to the issuing building department
64 in the amount of 1% of construction costs, as
65 disclosed in the permit application, but in any event
66 the deposit shall not exceed $100,000. Said deposit
67 shall be refunded to whomever is the property owner
68 when the permit is properly closed, whether by the

69 issuing building department or by the process outlined
70 in subsection (1) above. A deposit given for any
71 permit which ends up being closed due to the passage
72 of five years time from the expiration of the notice
73 of commencement or last amendment thereto in
74 accordance with subsection (1)(d) above shall be
75 forfeited to the issuing building department upon
76 expiration of the five year period. The issuing
77 building department may charge a reasonable fee for
78 their services in managing and administering the
79 deposit required by this subsection. Said deposit
80 shall be maintained in an interest-bearing account
81 with all earned interest thereon going to the issuing
82 building department.

83 (3) When issuing any building permit, the
84 building department shall provide to the property
85 owner a mandatory written notice in the following
86 form:

87 IMPORTANT NOTICE REGARDING PERMIT CLOSE-OUTS

88 "You are receiving with this package a building
89 permit authorizing the construction referenced in the
90 application you submitted to this building department.
91 The permit is issued with conditions, including
92 required building inspections and assurances that the
93 construction complies with the design submitted with
94 the permit application and any other conditions
95 referenced in the permit. It is critical that you
96 ensure that all necessary building inspections are
97 obtained and passed before the expiration of any
98 notice of commencement or amendment thereto, as these
99 inspections are important to ensure construction has
100 been performed in a safe and proper manner. In
101 addition to your permit application fee, you paid a
102 deposit in the amount of 1% of all disclosed

103 construction costs, which can only be refunded to you
104 once all inspections have been passed, permit
105 conditions satisfied, and the permit properly closed
106 upon the completion of construction. If you have any
107 questions regarding these procedures, please call the
108 building department. Your failure to comply may not
109 only lead to the forfeiture of your deposit, but may
110 also result in unsafe conditions arising from your
111 construction."

112 (4) Municipalities, counties and building
113 departments may not charge separate search fees for
114 open or unexpired building permits for any units or
115 subunits assigned by any municipality or county to a
116 particular tax parcel identification number. Only one
117 search fee per tax parcel identification number may be
118 charged, in an amount not to exceed $150.00.

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123 ACTIVE: 7647661_1

LEGISLATIVE POSITION REQUEST FORM

GOVERNMENTAL AFFAIRS OFFICE

Date Form Received ____________

GENERAL INFORMATION

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

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

Meetings with Legislators/staff N/A at this time
(List name and phone # of those having face to face contact with Legislators)

PROPOSED ADVOCACY

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

If Applicable, List The Following N/A at this time

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

Indicate Position Support ☒ Oppose ☐ Technical Assistance ☐ Other ☐

Proposed Wording of Position for Official Publication:

Support proposed legislation which would amend §736.0708(1), Florida Statutes, to provide that when multiple trustees serve together as cotrustees, each cotrustee is entitled to reasonable compensation and that the aggregate compensation charged by all the trustees may be greater than reasonable compensation for a single trustee.

Reasons For Proposed Advocacy:

The proposed amendment will eliminate the confusion that currently exists among some attorneys, trustees, and courts as a result of perceived conflicts between the existing case law and the statutory provisions regarding the amount of compensation which is authorized when multiple trustees are serving together as cotrustees.

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

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

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

Please submit completed Legislative Position Request Form, along with attachments, to the Governmental Affairs Office of The Florida Bar. Upon receipt, staff will further coordinate the scheduling for final Bar action of your request which usually involves separate appearances before the Legislation Committee and the Board of Governors unless otherwise advised. For information or assistance, please telephone (850) 561-5662 or 800-342-8060, extension 5662.

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

WHITE PAPER

REVISION TO SECTION 736.0708(1) REGARDING COMPENSATION FOR MULTIPLE TRUSTEES

I. SUMMARY

The proposed legislation provides that when multiple trustees are serving together as cotrustees, each cotrustee is entitled to reasonable compensation, even though the aggregate compensation for the multiple trustees may exceed what would be reasonable compensation for a single trustee.

II. CURRENT SITUATION

Section 736.0708 sets forth the rule for trustee compensation. It provides that a trustee is entitled to compensation as specified in the trust (subject to adjustment by the court in limited circumstances), or if not specified by the trust, a trustee is entitled to compensation that is reasonable under the circumstances. Section 736.0708 does not clearly state whether multiple trustees serving together as cotrustees are each entitled to reasonable compensation that may, in the aggregate, exceed the amount of reasonable compensation for a single trustee.

Historically, the law, as expressed in the *Restatement (Second) of Trusts* and adopted by the Supreme Court of Florida in 1958 in *West Coast Hospital Association v. Florida National Bank of Jacksonville*, 100 So. 2d 807, 812 (Fla. 1958), required that two or more cotrustees must ordinarily share the amount of compensation which would be reasonable for a single trustee in proportion to the services rendered by each.

The more modern view, which is expressed in the *Restatement (Third) of Trusts* § 38 and which was adopted by the Uniform Trust Code (UTC) in section 708, is that each cotrustee is entitled to reasonable compensation, and the aggregate compensation for all cotrustees may exceed what a single trustee would charge. Comment *i* to *Restatement (Third) of Trusts* § 38 articulated the reasoning for departing from the "single fee" approach by explaining that the duty of each trustee to participate in all aspects of administration may result in some duplication of effort, but also can contribute to the quality of the administration.

The analysis for determining the reasonableness of trustee compensation is to evaluate all the facts and circumstances, taking into account various factors including: community custom; the trustee's skill and experience; the time devoted to trustee duties; amount and character of the trust property; the degree of difficulty and the risk assumed and the type of work done in the administration; the nature and costs of services rendered by others; and the quality of the trustee's performance. See *Restatement (Third) of Trusts* § 38, cmt. *c(1)*.

Florida adopted the trustee compensation provisions of the UTC when it enacted the Florida Trust Code. Section 736.0708(1) and section 708(a) of the UTC both state that: "If the terms of a trust do not specify the trustee's compensation, a trustee is entitled to compensation that is reasonable under the circumstances." The term "trustee" is defined in section 736.0103(23) and

the UTC to include "any cotrustee." Reading section 736.0708(1) together with section 736.0103(23) would appear to support an argument that the statutes currently provide for each cotrustee to receive reasonable compensation (which is a compensation model that is different from the *Restatement (Second) of Trusts* approach adopted in the *West Coast Hospital Association* holding). That argument is also supported by the comment to section 708 of the UTC which states: "Because 'trustee' as defined in Section 103(20) includes not only an individual trustee but also cotrustees, each trustee, including a cotrustee, is entitled to reasonable compensation under the circumstances."

However, the argument that section 736.0708(1) statutorily overruled the "single fee" rule announced in *West Coast Hospital Association* is contradicted by the comments to section 736.0708 in the Florida Trust Code Scrivener's Summary (the "Scrivener's Summary"). The Scrivener's Summary concludes that the Florida Trust Code does not address the issue of compensation when multiple trustees are serving together as cotrustees stating: "There is [no] existing statute covering the compensation of multiple trustees and the Code does not address this issue either. . . ." This note in the Scrivener's Summary appears to be inconsistent with the actual text of sections 736.0103(23) and 736.0708(1) and raises the issue of whether the "single fee" rule expressed in *West Coast Hospital Association* was overruled by the enactment of the Florida Trust Code, resulting in confusion among some attorneys, trustees, and courts about whether each cotrustee is entitled to receive reasonable compensation, even if the aggregate compensation exceeds what would be reasonable compensation for a single trustee.

III. EFFECT OF PROPOSED CHANGES

The proposed amendment to section 736.0708(1) makes it clear that when multiple trustees are serving together as cotrustees, each cotrustee is entitled to reasonable compensation and that the aggregate compensation charged by all cotrustees may be greater than the reasonable compensation for a single trustee and eliminates the confusion caused by the Scrivener's Summary note to section 736.0708.

Under this approach, the total amount of compensation and how it should be divided among cotrustees depends on the totality of the circumstances. See Comments to UTC section 708, citing *Restatement (Third) of Trusts* § 38, cmt. *i*. The factors to be considered include the settlor's reasons for naming cotrustees, each trustee's level of responsibility, and the exact services performed by each trustee. *Id.* The total compensation for cotrustees might, in the aggregate, exceed what a single trustee would be entitled to receive, but cotrustees are not automatically entitled to more total compensation, nor are they necessarily eligible to receive the compensation in equal shares. *Id.*

IV. FISCAL IMPACT ON STATE AND LOCAL GOVERNMENTS

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

V. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR

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

VI. CONSTITUTIONAL ISSUES

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

VII. OTHER INTERESTED PARTIES

Florida Bankers Association.

1 A bill to be entitled

2 An act relating to the administration of trusts; amending s. 736.0807(1).

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

4

5 Section 1. Subsection (1) of section 736.0708, Florida Statutes, is amended to read:

6 736.0807. Compensation of trustee.

7 (1) If the terms of a trust do not specify the trustee's compensation, a trustee, including
8 each cotrustee, is entitled to compensation that is reasonable under the circumstances. In the
9 aggregate, the reasonable compensation for multiple trustees may be greater than for a single
10 trustee.

11 Section 2. This act shall take effect July 1, 2017.

WHITE PAPER

PROPOSED ENACTMENT OF CHAPTER 740, FLORIDA STATUTES

I. SUMMARY

The proposed legislation is a result of a study by the Digital Assets Committee of The Real Property, Probate and Trust Law Section of The Florida Bar of the Revised Uniform Fiduciary Access to Digital Assets Act. The proposal would add a new Chapter to the Florida Statutes that follows the proposed uniform act.

Under present Florida law, there is no legislation on fiduciary access to digital assets, only criminal laws regarding access to stored communications. The purpose of this act is to vest fiduciaries with certain authority to access, control, or copy digital assets and accounts. The Florida Fiduciary Access to Digital Assets Act ("FFADAA") addresses four different types of fiduciaries: personal representatives of decedents' estates, guardians of the property of minors or incapacitated persons, agents acting pursuant to a power of attorney, and trustees.

II. CURRENT SITUATION

As the number of digital assets held by the average person increases, questions surrounding the disposition of these assets upon the individual's death or incapacity are becoming more common. These assets range from online gaming items to photos, to digital music, to client lists. And these assets have real value: according to a 2011 survey from McAfee, Intel's security-technology unit, American consumers valued their digital assets, on average, at almost $55,000.[1] Few holders of digital assets and accounts consider the fate of their online presences once they are no longer able to manage their assets. There are millions of Internet accounts that belong to decedents. Some Internet service providers have explicit policies on what will happen when an individual dies, others do not; even where these policies are included in the terms of service, most consumers click through these agreements. Few laws exist on the rights of fiduciaries over digital assets.

The **current federal legislation** that dictates access to digital assets is buried in the Stored Communications Act ("SCA") and the Computer Fraud and Abuse Act ("CFAA"), both passed in 1986, with only minor revisions since. The CFAA and similar state laws impose criminal penalties and perhaps civil liability too for the unauthorized access of computer hardware, devices, and stored data. These laws are explained in more detail below.

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[1] Kelly Greene, *Passing Down Digital Assets*, WALL STREET JOURNAL (Aug. 31, 2012), http://goo.gl/7KAaOm.

Under **current Florida law**, Florida has enacted statutory counterparts to the provisions of the SCA and located them in Chapter 934, entitled "Security of Communications"[2] and in Chapter 815, entitled "Florida Computer Crimes Act". There is no legislation on fiduciary access to digital assets.

A minority of **other states** has enacted legislation on fiduciary access to digital assets, including Delaware, Connecticut, Idaho, Indiana, Oklahoma, Rhode Island, Nevada, and Virginia, and the existing statutes grant varying degrees of access to different types of digital assets. In addition, numerous other states have considered, or are considering, legislation. Existing legislation differs with respect to the types of digital assets covered, the rights of the fiduciary, the category of fiduciary included, and whether the principal's death or incapacity is covered.

The **National Conference of Commissioners on Uniform State Laws** at its annual conference July 2015 passed the **Revised Uniform Fiduciary Access to Digital Assets Act (2015)** (the "Revised UFADAA"). The Act specifically addresses how a fiduciary addresses digital assets. The commissioners on the drafting committee received input from estate attorneys, educators, and lawyers with expertise in various areas of the law affected by digital assets, advisors from the American Bar Association, representatives from service providers, such as Facebook and Yahoo, policy counsel from NetChoice (a trade association of eCommerce businesses and on-line consumers), and General Counsel from the State Privacy and Security Coalition, Inc. (which is comprised of 20 communications, technology, and media companies).[3]

The Revised UFADAA took into account the **Supremacy Clause of the U.S. Constitution**. According to the Supremacy Clause, "This Constitution, and the laws of the United States which shall be made in pursuance thereof.... *shall be the supreme law of the land,* and the judges in every state shall be bound thereby, anything in the Constitution or laws of any State to the contrary, notwithstanding."[4] The Supreme Court has ruled that a federal law that conflicts with a state law "preempts" the state law and that state laws that conflict with federal law are "without effect."[5] Due to the Supremacy Clause and the Supreme Court's interpretation, one major challenge in drafting the uniform act was that it does not directly conflict with existing federal law and could survive a constitutional challenge.[6]

It is what the **SCA** *does not specifically address* that gave rise to the Revised UFADAA proposed state law that the Uniform State Laws Commissioners believed can be legally interpreted as filling in the gaps of the SCA, as opposed to conflicting with it. The SCA was originally written to provide Fourth Amendment-like[7] privacy protection

[2] *Tracey v. State, 69 So.3d 992* (Fla. 4th DCA 2011).
[3] "Surf the Evolving Web of Laws Affecting Digital Assets" Bissett, W. and Kauffman, D. 41 Estate Planning No. 4 April 2014.
[4] U.S. Const. Art. VI (Emphasis added.)
[5] Maryland v. Louisiana, 451 U.S, 725 (1981).
[6] "Surf the Evolving Web" at 34.
[7] The Fourth Amendment to the U.S. Constitution protects the "people's rights to be secure in their houses, *papers, and effects,* against unreasonable searches and seizures." (Emphasis added.)

for certain types of email communications, social networking accounts, and other digital assets stored on a remote server. "The SCA attempts to modernize the reasonable expectation of privacy provided by the Fourth Amendment and later the Supreme Court to include two types of online services, "electronic communication services" and "remote computing services". To provide this privacy protection, the SCA limits the ability of the government to *compel disclosure* of both "non-content" information (i.e., logs of email communications including addresses of recipient/senders (analogous to the envelope of a letter)) as well as the "content" (what is inside the letter). The SCA also limits the ability of those internet service providers ("ISPs") that are "subject to" the SCA to reveal "content" information to non-government entities."[8] In general, the SCA states that certain service providers are permitted to disclose "non-content" information of electronic communications and files to anyone except the government without the consent of the user. However, a service provider *may* divulge the "content" of an electronic communication to a non-government entity *only* when the user lawfully consents.[9]

Like the SCA, the **CFAA** similarly protects against anyone who "intentionally accesses a computer without authorization or exceeds authorized access." Neither the SCA nor the CFAA specifically provides for or denies a fiduciary access to electronic and stored communications. In essence, even if consent was granted to a fiduciary, current federal law does not acknowledge the potential for such a vested right.[10]

The Revised UFADAA uses well-established, existing law for non-digital probate assets in order to provide **a fiduciary the right to "step into the shoes"** of a decedent to manage digital assets. However, the Revised UFADAA draws a sharp distinction between disclosing a catalogue of "non-content" communications (the outside of the envelope information described earlier) as opposed to the underlying content (what is inside the letter). If certain conditions are met, a catalogue may be provided to a decedent's fiduciary without express prior consent, whereas the actual content may only be provided with express prior consent (and subject to numerous conditions). Because the fiduciary has the same authority as the deceased user (no more and no less), the fiduciary is "authorized" by the deceased user as required under the two federal statutes (the SCA and CFAA) that prohibit unauthorized access.

The Revised UFADAA was also drafted in light of the fact that deceased users likely registered with on-line services for email, on-line purchases, photo sharing, on-line banking, and a long list of other items now done on-line by first consenting to a terms-of service agreement ("TOSA"). The Revised UFADAA recognized that in most situations the user likely consented to the TOSA by clicking "I agree" without ever reading it. These TOSAs generally describe the user's rights in using the service, how personal information will be protected, the conditions on information sharing, and user's rights (if any) upon death. The Revised UFADAA introduces the concept of an "online tool" for directing fiduciary access. An online tool is defined as an electronic service provided by a

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[8] "Surf the Evolving Web" at 34 (citations omitted).
[9] 18 U.S.C. section 2702(b)(3).
[10] "Surf the Evolving Web" at 34 (citations omitted).

custodian that is distinct and separate from the TOSA.[11] The Revised UFADAA expressly permits a custodian to offer an online tool and provides that a direction regarding disclosure using an online tool supersedes a contrary direction in a will, trust, or power of attorney and over the TOSA (provided the online tool is available at all times). In the absence of an online tool directive, the deceased user's direction in a will, trust, power of attorney, or other record prevails over the blanket TOSA, or if no written direction, the TOSA will control.

Because of issues like the federal Supremacy Clause, the interest of ISPs in differing jurisdictions, privacy concerns, and overriding TOSA, the Florida drafting committee closely adhered to the careful analysis and drafting set forth within the Revised UFADAA, deviating from the proposed uniform law minimally, only where necessary to comport with Florida law.

III. EFFECT OF PROPOSED CHANGES

A. **Effect of the Proposed Changes.** It is important to understand that the goal of the FFADAA is to remove barriers to a fiduciary's access to electronic records and that the federal and state substantive rules of fiduciary, probate, trust, banking, security, and agency law remain unaffected by FFADAA. The act applies only to fiduciaries that act in compliance with their fiduciary powers. It distinguishes the authority of fiduciaries—which exercise authority subject to this act only on behalf of the user—from any other efforts to access the digital assets. Family members or friends may seek such access, but, unless they are fiduciaries, their efforts are subject to other laws and are not covered by this act.

This Act follows mirrors the Revised UFADAA because a uniform approach among states will provide certainty and predictability for courts, users, fiduciaries, and ISPs. The uniform act gives states precise, comprehensive, and easily accessible guidance on questions concerning fiduciaries' ability to access the electronic records of a decedent, protected person, principal, or a trust. Additionally, ISPs have participated in the redrafting of the Revised UFADAA and, presumably, find the proposed act to be acceptable.

The general goal of the FFADAA is to facilitate fiduciary access while respecting the privacy and intent of the user and concerns of the ISPs over federal privacy laws. It adheres to the traditional approach of trusts and estates law, which respects the intent of the user and promotes the fiduciary's ability to administer the user's property. With regard to the general scope of the act, the act's coverage is inherently limited by the definition of "digital assets." The act applies only to electronic records. The term does not include the underlying asset or liability unless it is itself an electronic record.

[11] For example, Facebook's Legacy Contact and Google's Inactive Account Manager.

B. The act is divided into **twenty sections.**

1. **Section 1** creates Chapter 740, Florida Statutes.

2. **Section 2** creates **740.001** which contains the short title of the Act.

3. **Section 3** creates **740.101** which contains general provisions and definitions, including those relating to the scope of the fiduciary's authority.

The definitions of "agent", "guardian", "court", "electronic", "fiduciary", "person", "personal representative", "power of attorney", "principal", "record", "trustee", "ward", and "will" are based on those found in applicable Florida law, such as the Florida Probate Code and Florida Powers of Attorney Act.

FloridaFADAAct	Florida Statutes
Section .101 Definitions	
(2) Agent	709.2102(1)
(6) Court	731.201(7)
(10) Electronic	709.2102(5)
(13) Fiduciary	739.102(6), 738.102 (4), 733.817, 518.10
(14) Guardian	744.604(6)
(17) Person	1.01(3)
(18) Personal Representative	731.201(28)
(19) Power of Attorney	709.2102(7)
(20) Principal	709.2102(9)
(21) Record	709.2102(13)
(24) Trustee	731.201(39)
(26) Ward	744.102(22)
(27) Will	731.201(40)

The other definitions are new for this Act, although the definition of digital service comes from the White House Digital Government Strategy: http://www.whitehouse.gov/sites/default/files/omb/egov/digital-government/digital-government-strategy.pdf. The definition of "electronic communication" is from 18 U.S.C. §§ 2510(12); the definition of "electronic communication service" is drawn from 18 U.S.C. 2510(15); and the definition of "remote computing service" is adapted from 18 U.S.C. § 2711(2), to help ensure the Act's compliance with federal law.

A user includes any person who entered into a TOSA with a custodian, including a deceased individual who entered into the agreement during the individual's lifetime. A fiduciary is defined as a person, and a fiduciary can be a user when the fiduciary opens the account.

The Act includes a definition for "catalogue of electronic communications." This is designed to cover log-type information about an electronic communication such as the

email addresses of the sender and the recipient, and the date and time the communication was sent.

The term "content of an electronic communication" is adapted from 18 U.S.C. § 2510(8), but it refers only to information that is not readily accessible to the public because, if the information were readily accessible to the public, it would not be subject to the privacy protections of federal law under the Electronic Communications Privacy Act ("ECPA"), 18 U.S.C. §§ 2510 et seq. See S. Rep. No. 99-541, at 36 (1986). When the privacy protections of federal law under ECPA apply to the content of an electronic communication, the ECPA's legislative history notes the requirements for disclosure: "Either the sender or the receiver can directly or through authorized agents authorize further disclosures of the contents of their electronic communication."[12]

Example: X uses a Twitter account to send a message. If the tweet is sent only to other people who have been granted access to X's tweets, then it meets the Act's definition of "content of an electronic communication." But, if the tweet is completely public with no access restrictions, then it does not meet the Act's definition of "content of an electronic communication."

ECPA does not apply to private e-mail service providers, such as employers and educational institutions.[13]

A "custodian" includes any internet service provider as well as any other entity that provides or stores electronic data of a user. The term "carries" means engaging in the transmission or switching of electronic communications. See 47 U.S.C. § 1001(8). A custodian does not include most employers because an employer typically does not have a terms-of-service agreement with an employee. Any digital assets created through employment generally belong to the employer.

Example 1—Fiduciary access to an employee email account. D dies, employed by Company Y. Company Y has an internal email communication system, available only to Y's employees. D's personal representative, R, believes that D used Company Y's email system for some financial transactions that R cannot find through other means. R requests access from Company Y to the emails.

Company Y is not a custodian subject to the act. Under Section .101(7), a custodian must carry, maintain or store a user's digital assets. A user, in turn, is defined under Section .101(25) as someone who has entered into a terms-of-service agreement. Company Y, like most employers, did not enter into a terms-of-service agreement with D, so D was not a user.

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[12] S. Rep. No. 99-541, at 37 (1986)).

[13] See 18 U.S.C. §2702(a)(2); James D. Lamm, Christina L. Kunz, Damien A. Riehl, & Peter John Rademacher, *The Digital Death Conundrum: How Federal and State Laws Prevent Fiduciaries from Managing Digital Property*, 68 U. Miami L. Rev. 385, 404 (2014) (available at: http://goo.gl/T9jX1d).

Example 2—Employee of electronic-communication service provider. D dies, employed by Company Y. Company Y is an electronic-communication service provider. Company Y has an internal e-mail communication system, available only to Y's employees and used by them in the ordinary course of Y's business. D used the internal Company Y system. When not at work, D also used an electronic-communication service system that Company Y provides to the public. D's personal representative, R, believes that D used Company Y's internal e-mail system as well as Company Y's electronic-communication system available to the public to effectuate some financial transactions. R seeks access to both communication systems.

As is true in Example 1, Company Y is not a custodian subject to the act for purposes of the internal email system. The situation is different with respect to R's access to Company Y's system that is available to the public. Assuming that Company Y can disclose the communications under federal law, then Company Y must disclose the catalogue of electronic communications to R (unless the decedent opted out of disclosure) and will disclose the content of electronic communications if D consented to disclosure.

"Digital asset" includes products currently in existence and yet to be invented that are available only electronically. Digital assets include electronically-stored information, such as: 1) any information stored on a computer and other digital devices; 2) content uploaded onto websites, ranging from photos to documents; and 3) rights in digital property, such as domain names or digital entitlements associated with online games.[14] Both the catalogue and content of an electronic communication are covered by the term "digital assets."

The fiduciary's access to a record defined as a "digital asset" does not mean that the fiduciary is entitled to "own" the asset or otherwise engage in transactions with the asset. Consider, for example, funds in a bank account or securities held with a broker or other custodian, regardless of whether the bank, broker, or custodian has a brick-and-mortar presence. This Act affects records concerning the bank account or securities, but does not affect the authority to engage in transfers of title or other commercial transactions in the funds or securities, even though such transfers or other transactions might occur electronically. The Act reinforces the right of the fiduciary to access relevant electronic communications (subject to conditions) and the online account that provides evidence of ownership. Thus, an entity may not refuse to provide access to online records any more than the entity can refuse to provide the fiduciary with access to hard copy records.

The definition of "electronic communication" is that set out in 18 U.S.C. Section 2510(12):
"electronic communication" means any transfer of signs, signals, writing, images, sounds, data, or intelligence of any nature transmitted in whole or in part by a wire, radio, electromagnetic, photoelectronic or photooptical system that affects interstate or foreign commerce, but does not include—

(A) any wire or oral communication;

(B) any communication made through a tone-only paging device;

[14] See Lamm, et al, supra, at 388.

(C) any communication from a tracking device (as defined in section 3117 of this title); or

(D) electronic funds transfer information stored by a financial institution in a communications system used for the electronic storage and transfer of funds.

The definition of "electronic-communication service" is drawn from 18 U.S.C. § 2510(15): "any service which provides to users thereof the ability to send or receive wire or electronic communications."

The definition of "remote computing service" is adapted from 18 U.S.C. § 2711(2): "the provision to the public of computer storage or processing services by means of an electronic communications system" and refers to 18 U.S.C. Section 2510(14), which defines an electronic communications system as: "any wire, radio, electromagnetic, photooptical or photoelectronic facilities for the transmission of wire or electronic communications, and any computer facilities or related electronic equipment for the electronic storage of such communications." The adaptation is to help ensure the Act's compliance with federal law. Electronic communication is a subset of digital assets and covers only the category of digital assets subject to the privacy protections of the ECPA. For example, material stored on a computer's hard drive is a digital asset but not an electronic communication.

A "fiduciary" under this chapter occupies a status recognized by Florida law, and fiduciaries' powers under the chapter are subject to the relevant limits established by other state laws.

An "online tool" means an electronic service that the custodian establishes and provides to a user, separate and apart from the TOSA, by which the user may direct disclosure or non-disclosure of digital assets to other persons.

The "terms-of-service agreement" ("TOSA") definition relies on the definition of "agreement" found in UCC § 1-201(3) and that found in UCC § 1-201(b) (3) ("the bargain of the parties in fact, as found in their language or inferred from other circumstances, including course of performance, course of dealing, or usage of trade"). It refers to any agreement that controls the relationship between a user and a custodian, even though it might be called a terms-of-use agreement, a click-wrap agreement, a click-through license, or a similar term. State and federal law determine capacity to enter into a binding terms-of-service agreement.

4. **Section 4** creates **740.201** which establishes the applicability of this Act. This Act applies in situations in which a decedent dies testate or intestate, as well as a guardianship, a power of attorney, and a trust, and to a custodian if the user resides in Florida. This Section clarifies that the Act does not apply to a fiduciary's access to an employer's internal email system. The treatment of digital assets of an employer used by an employee in the ordinary course of the employer's business is discussed in Section 3 establishing 740.101.

This Act does not change the substantive rules of other law, such as agency, banking, guardianship, contract, copyright, criminal, fiduciary, privacy, probate, property, security, trust, or other applicable law except to vest fiduciaries with authority, according to the provisions of this Act, to access, control, or copy digital assets of a decedent, ward, principal, settlor, or trustee.

5. **Section 5** creates **740.301** which establishes the user's ability to direct disclosure of digital assets and the order of preference for the user's direction. A user's direction using an online tool prevails over an offline direction (such as a will, power of attorney, or trust) and over the TOSA so long as the online tool allows the user to modify or delete a direction at all times. Secondly, a user's direction in a will, trust, power of attorney or other record prevails over the TOSA regarding disclosure to a fiduciary. Thirdly, if a user provides no direction, the TOSA controls or other law controls if the TOSA are silent on fiduciary access.

6. **Section 6** creates **740.401** which establishes the effect on the terms of service agreement. This section clarifies that, unless it conflicts with a user's direction, TOSA are preserved and the fiduciary has no greater rights than the user. The fiduciary has the same authority as the user if the user were the one exercising the authority (note that, where the user has died, this means that the fiduciary has access as of the hour before the user's death).

7. **Section 7** creates **740.501** which establishes the procedure for disclosing digital assets. The custodian has three options for disclosing digital assets. First, the custodian may allow the fiduciary to access the user's account. Secondly, the custodian may allow the fiduciary to partially access the user's account if such limited access is sufficient to perform the necessary tasks. Thirdly, the custodian may provide the fiduciary with a "data dump" of all digital assets held in the account.

A custodian may assess a reasonable administrative charge for the cost of disclosing a user's digital assets. Deleted assets need not be disclosed. A request for some, but not all, of a user's digital assets need not be fulfilled if segregation is unduly burdensome. Instead, either party may petition the court for further instructions.

8. **Section 8** creates **740.601** which establishes the rights of personal representatives to the contents of electronic communications of a deceased user. A personal representative is not permitted to access the contents of a decedent's electronic communications absent consent by the user or direction by a court. The custodian may request a court order specifically identifying the account and finding consent. The subsection clarifies the difference between fiduciary authority over digital assets other than electronic communications protected by ECPA and authority over ECPA-covered electronic communications.

9. **Section 9** creates **740.701** which establishes the rights of personal representatives to other digital assets of a deceased user. A personal representative is permitted, however, to have access to all of the decedent's other digital assets (except the contents of electronic communications) unless the user prohibited disclosure or a

court directs otherwise. The custodian may request a court order specifically identifying the account and finding that access is reasonably necessary for estate administration. This section establishes the default rule that the personal representative is authorized to access all of the decedent's digital assets other than material covered by the ECPA. The subsection clarifies the difference between fiduciary authority over digital assets other than electronic communications protected by ECPA and authority over ECPA-covered electronic communications.

10. **Section 10** creates **740.801** which establishes the rights of agents acting pursuant to a power of attorney to the contents of electronic communications of the principal. An agent acting pursuant to a power of attorney is permitted access to the contents of a principal's electronic communications if authority is expressly granted by the principal and not otherwise restricted by the principal or a court. The custodian may require specific identification of the account and evidence linking the account to the principal.

With respect to the contents of electronic communications, the agent must be specifically authorized by the principal to access the contents of the principal's electronic communications. Because a power of attorney contains the consent of the user, ECPA should not prevent the agent from exercising authority over the content of electronic communications. There should be no question that an explicit delegation of authority in a power of attorney constitutes authorization from the user to access digital assets, and provides "lawful consent" to allow disclosure of electronic communications from an electronic communication service or a remote computing service pursuant to applicable law. Both authorization and lawful consent are important because 18 U.S.C. § 2701 deals with intentional access without authorization and 18 U.S.C. § 2702 allows a provider to disclose with lawful consent.

The uniform law commissioners considered whether the authority over digital assets and electronic communications should be a default power. They decided that the power to access the contents of electronic communications must be expressly granted, because when expressed and not default, it satisfies the lawful consent requirement of ECPA. The agent has default authority over other digital assets under the Act.

Federal law distinguishes between the permissible disclosure of the "contents" of a communication, covered in 18 U.S.C. § 2702(b), and of "a record or other information pertaining to a" subscriber or customer, covered in 18 U.S.C. § 2702(c).[15] Content-based material can, in turn, be divided into two types of communications: those received by the user and those sent. Material when the user is the "addressee or intended recipient" can be disclosed either to that individual or to an agent for that person, 18 U.S.C. § 2702(b)(1), and it can also be disclosed to third parties with the "lawful consent" of the addressee or intended recipient. 18 U.S.C. § 2702(b)(3). Material for which the user is the "originator" can only be disclosed to third parties with the user's "lawful consent." 18 U.S.C. § 2702(b)(3). (Note that, when the user is the addressee or intended recipient,

[15] See Matthew J. Tokson, *The Content/Envelope Distinction in Internet Law,* 50 Wm. & Mary L. Rev. 2105 (2009).

material can be disclosed under either § 2702(b)(1) or (b)(3), but that when the user is the originator, lawful consent is required.)

By contrast to content-based material, non-content material can be disclosed not only with the lawful consent of the user but also to any person other than a governmental entity (which would presumably include fiduciaries). This information includes material about any communication sent, such as the addressee, sender, date/time, and other subscriber data, what this Act defines as the "catalogue of electronic communication". (Further discussion of this issue and examples are set out in the comments to Section .1401, *infra.*)

11. **Section 11** creates **740.901** which establishes the rights of agents acting pursuant to a power of attorney to other digital assets of the principal. An agent acting pursuant to a power of attorney granting specific authority over digital assets or general authority to act on behalf of a principal is permitted access to the catalogue of a principal's electronic communications and any other digital assets (except the contents of electronic communications), unless otherwise directed by the principal, a court, or the power of attorney. The custodian may require specific identification of the account and evidence linking the account to the principal. This section establishes that the agent has default authority over the principal's digital assets and the records, other than the contents, of the principal's electronic communications. When the principal does not want the agent to exercise this authority, then the power of attorney must explicitly prevent an agent from doing so.

12. **Section 12** creates **740.1001** which establishes the rights of trustees when the trustee is the original user. A trustee that is an original user may access any digital asset—including catalogue and content of electronic communications—held by the trust unless that is contrary to the terms of the trust or otherwise directed by a court. Access to digital assets, including the contents of the electronic communications, is presumed with respect to assets for which the trustee is the initial user. A trustee may have title to digital assets and electronic communications when the trust itself becomes the user of a digital asset held by the trust, and when the trustee becomes a user for trustee business. The underlying trust documents and the Florida Trust Code will supply the allocation of responsibilities between and among trustees.

13. **Section 13** creates **740.1101** which establishes the rights of trustees to contents of electronic communications held in trust when the trustee is not the original user. A trustee that is not an original user may access the content of an electronic communication in an account of the trust if the trust includes consent to such disclosure, unless prohibited by the user, the trust instrument, or a court. The custodian may require specific identification of the account and evidence linking the account to the trust.

Sections .1101 and .1201 address situations involving either an inter vivos transfer of a digital asset into a trust or transfer via a pour-over will of a digital asset into a trust. In those situations, a trustee becomes a successor user when the settlor transfers a digital asset into the trust. Nonetheless, sections .1101 and .1201 distinguish between the

catalogue and contents of electronic communications in case there are any questions about whether the form in which property – transferred into a trust - is held constitutes lawful consent. Both authorization and lawful consent are important because 18 U.S.C. § 2701 deals with intentional access without authorization, and 18 U.S.C. § 2702 allows a provider to disclose with lawful consent.

The underlying trust documents and the Florida Trust Code will supply the allocation of responsibilities between and among trustees.

14. **Section 14** creates **740.1201** which establishes the rights of trustees to other digital assets held in trust when the trustee is not the original user. A trustee that is not an original user may access the catalogue of electronic communications and any digital assets (excluding the content of electronic communication) in an account of the trust, unless prohibited by the user, the trust instrument, or a court. The custodian may require specific identification of the account and evidence linking the account to the trust. The underlying trust documents and the Florida Trust Code will supply the allocation of responsibilities between and among trustees.

15. **Section 15** creates **740.1301** which establishes the rights of guardians.

A guardian is not permitted to access the contents of a ward's electronic communications absent consent by the ward. A guardian is permitted, however, to access all of the ward's other digital assets (except the contents of electronic communications) pursuant to letters of guardianship or a court order, unless directed otherwise by a court or by the user. The custodian may request specific identification of the account and evidence linking the account to the ward. The custodian may suspend or terminate an account for good cause if requested by the guardian of the property.

This section establishes that the guardian must be specifically authorized (not implicitly authorized) to access the ward's digital assets and electronic communications. The requirement for express authority over digital assets does not limit the fiduciary's authority over the underlying "bricks and mortar" assets, such as a bank account. As a legislative enacting matter, the meaning of the term "hearing" will vary, depending on a state's procedures.

Section .1301 is comparable to Sections .601 and .701. It responds to the concerns of ISPs who believe that the Act should be structured to clarify the difference between fiduciary authority over digital assets other than electronic communications protected by federal law (the ECPA) and fiduciary authority over ECPA-protected electronic communications. Consequently, this Act sets out procedures that cover all digital assets as well as the catalogue of electronic communications (logs and records) that providers may release without consent under ECPA and addresses ECPA-covered communications.

The guardian must exercise authority in the best interests of the ward pursuant to Chapter 744.

16. **Section 16** creates **740.1401** which contains provisions relating to the rights and duties of the fiduciary to access digital assets. In exercising its responsibilities, the fiduciary is subject to the duties and obligations established pursuant to Florida law and is liable for breach of those duties.

This issue concerning the parameters of the fiduciary's authority potentially arises in two situations: 1) the fiduciary obtains access to a password directly from the user, as would be true in various circumstances such as for the trustee of an inter vivos trust or someone who has stored passwords with a digital locker and those passwords are then transmitted to the fiduciary; and 2) the fiduciary has obtained access pursuant to this Act.

The fiduciary does not, however, obtain power over any digital assets if that property was illegally obtained by the user. Note that even if the digital asset were illegally obtained by the user, the fiduciary would still need access in order to handle that asset appropriately. There may, for example, be tax consequences that the fiduciary would be obligated to report.

Finally, the fiduciary has the same responsibilities as the user more generally. For example, a fiduciary cannot delete an account if this would be fraudulent. Similarly, if the user could challenge provisions in a terms-of-service agreement, then the fiduciary is similarly able to do so.[16]

Subsection (2) is designed to establish that the fiduciary is authorized to exercise control over digital assets in accordance with other applicable laws. A fiduciary's control over a digital asset is not equivalent to a transfer of ownership or a laundering of illegally obtained material. For example, where the user has an online securities account or has a game character and in-game property associated with an online game, then the fiduciary's ability to sell the securities, the game character, or the in-game property is controlled by traditional probate law. The act is only granting access in the sense of enabling the fiduciary to do electronically what the user could have done electronically. Thus, if a TOSA precludes online transfers, then the fiduciary is unable to make those transfers electronically as well.

Example – Fiduciary control over a digital asset. D dies with a will disposing of all D's assets to D's spouse, S. E is the personal representative for D's estate. D left a bank account, for which D only received online statements, and a blog.

E as personal representative of D's estate has access to both of D's accounts and can request the passwords from the custodians of both accounts. If D's agreement with the bank requires that transferring the underlying title to the account be done in person, through a hard copy signed by the user and the bank manager, then E must comply with those procedures (signing as the user) and cannot transfer the funds in the account electronically. If the TOSA for the blog permitted D to transfer the blog electronically,

[16] See *Ajemian v. Yahoo!, Inc.*, 987 N.E.2d 604 (Mass. 2013).

then E can make the transfer electronically as well.

The subsection clarifies that the fiduciary is "authorized" under the two federal statutes that prohibit unauthorized access to computers and computer data, the SCA and the CFAA,[17] as well as pursuant to any comparable state laws criminalizing unauthorized access.[18] The language mirrors that used in Title II of the ECPA, known as the Stored Communications Act (SCA), 18 U.S.C. § 2701 *et seq.*

The Stored Communications Act contains two potentially relevant prohibitions.

(a) 18 U.S.C. § 2701(a), which concerns access to the digital assets, makes it a crime for anyone to "intentionally access without authorization a facility through which an electronic communication service is provided" as well as to "intentionally exceed an authorization to access that facility." Thus, someone who has authorization to access the facility is not engaging in criminal behavior. Moreover, this section does not apply to "conduct authorized . . . by a user of that service with respect to a communication of or intended for that user."[19]

(b) 18 U.S.C. § 2702, "Voluntary disclosure of customer communications or records," concerns actions by the service provider. It prohibits an electronic communication service or a remote computing service from knowingly divulging the contents of a communication that is stored by or carried or maintained on that service unless disclosure is made (among other exceptions) "to an addressee or intended recipient of such communication or an agent of such addressee or intended recipient" or "with the *lawful consent* of the originator or an addressee or intended recipient of such communication, or the subscriber in the case of remote computing service."[20] The statute permits disclosure of "customer records" that do not include content, either with lawful consent from the customer or "to any person other than a governmental entity."[21] Thus, unlike the contents, the provider is permitted to disclose the non-content "records" of the electronic communications to anyone except the government, and may disclose to the government with the customer's lawful consent or in certain emergencies.

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[17] Stored Communications Act, 18 U.S.C. § 2701 *et seq.* (2006); Computer Fraud and Abuse Act, 18 U.S.C. § 1030 *et seq.* (2006); *see, e.g.,* Orin S. Kerr, *A User's Guide to the Stored Communications Act, and a Legislator's Guide to Amending It*, 72 GEO. WASH. L. REV. 1208 (2004); Allan D. Hankins, Note, *Compelling Disclosure of Facebook Content Under the Stored Communications Act*, 17 SUFFOLK J. TRIAL & APP. ADVOC. 295 (2012).

[18] *See Computerized Hacking and Unauthorized Access States Laws*, NATIONAL CONFERENCE OF STATE LEGISLATURES (May 21, 2009), http://www.ncsl.org/issues-research/telecom/computer-hacking-and-unauthorized-access-laws.aspx; Christina Kunz, Peter Rademacher & Lucie O'Neill, 50 State Survey of Unauthorized Access (2012) (on file with the Committee and available on the Google Drive); James D. Lamm, et al., *The Digital Death Conundrum: How Federal and State Laws Prevent Fiduciaries from Managing Digital Property*, 68 U. Miami L. Rev. __ (2013), http://lawreview.law.miami.edu/wp-content/uploads/2011/12/The-Digital-Death-Conundrum-How-Federal-and-State-Laws-Prevent-Fiduciaries-from-Managing-Digital-Property.pdf.

[19] 18 U.S.C. §§ 2701(a), (c)(2).

[20] 18 U.S.C. § 2702(b)(1), (3) (emphasis added).

[21] 18 U.S.C. § 2702(c)(2) and (6).

The Computer Fraud and Abuse Act prohibits unauthorized access to computers. 18 U.S.C. § 1030. Like the SCA, the CFAA similarly protects against anyone who "intentionally accesses a computer without authorization or exceeds authorized access." 18 U.S.C. § 1030(a).

Florida laws prohibit unauthorized access. See Chapters 815 and 934, Florida Statutes.

By defining the fiduciary as an authorized user, the fiduciary has authorization to access the files under the *first* section of the SCA, 18 U.S.C. § 2701, as well as under the CFAA. Moreover, this language should be adequate to avoid liability under the Florida unauthorized access laws. The "lawful consent" of the originator/subscriber must be specifically granted by the user so that the provider can voluntarily disclose the files pursuant to the *second* relevant provision of the SCA, 18 U.S.C. § 2702.

However, an online tool by which a user has made an affirmative choice, separate from the user's assent to other provisions of the terms-of-service agreement, to grant or to limit a fiduciary's access to the user's digital assets is not voided by this Act and will supersede any contrary provision in a will or trust. (*See* Example 5).

Subsections (2) and (3) reinforce the concept that the fiduciary "steps into the shoes" of the user, with no more – and no fewer – rights. For example, the TOSA controls the rights of the user (settlor, principal, incapacitated person, decedent). The Act does not permit the user's fiduciary to override the TOSA in order to make a digital asset or collection of digital assets "descendible," although it does preserve the rights of the fiduciary to make the same claims as the user.[22]

Subsections (4) and (5) are designed to clarify that the fiduciary is authorized to access digital assets stored on equipment of the decedent, ward, principal, or settlor, thereby superseding Florida laws on unauthorized access to the equipment. For criminal law purposes, this clarifies that the fiduciary is authorized to access all of the user's digital assets, whether held locally or remotely.

Example 1 – Access to digital assets by personal representative. D dies with a will that is silent with respect to digital assets. D has a bank account for which D received only electronic statements, D has stored photos in a cloud-based Internet account, and D has an e-mail account with a company that provides electronic-communication services to the public. The personal representative of D's estate needs access to the electronic bank account statements, the photo account, and e-mails.

The personal representative of D's estate has the authority to access D's electronic

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[22] See *Ajemian v. Yahoo!, Inc.*, 987 N.E.2d 604 (Mass. 2013); David Horton, *Indescendibility*, 102 Calif. L. Rev. __ (forthcoming 2014), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2311506.

banking statements and D's photo account, which both fall under the Act's definition of a "digital asset," unless D opted out or a court directs otherwise. This means that, if these accounts are password-protected or otherwise unavailable to the personal representative, then the bank and the photo account service must give access to the personal representative when the request is made in accordance with Section .701. The custodian may request a court order specifically identifying the account and finding that access is reasonably necessary for estate administration. If the TOSA permits D to transfer the accounts electronically, then the personal representative of D's estate can use that procedure for transfer as well.

The personal representative of D's estate is also able to request that the e-mail account service provider grant access to e-mails sent or received by D; the Act and ECPA permit the service provider to release the catalogue to the personal representative. The service provider will not provide the personal representative access to the content of an electronic communication sent or received by D if D did not consent to disclose the content. The service provider may request a court order specifically identifying the account and finding consent. The bank may release the catalogue of electronic communications or content of an electronic communication for which it is the originator or the addressee because the bank is not a custodian providing electronic communication services to the public or providing a remote-computing service to the public.

Example 2 – Access to digital assets by guardian. C is seeking appointment as the guardian of the property for P. P has a bank account for which P received only electronic statements, P has stored photos in a cloud-based Internet account, and P has an e-mail account with a company that provides electronic communication services to the public. C needs access to the electronic bank account statements, the photo account, and e-mails.

Without a court order that explicitly grants access to P's digital assets, including the catalogue of electronic communications, C has no authority pursuant to this Act to access the electronic bank account statements, the photo account, or the e-mails. The contents of the e-mail account may not be disclosed without the express consent of the Ward (granted prior to incapacity). The service provider may suspend or terminate an account for good cause if requested by the guardian. The bank may release the catalogue of electronic communications or content of an electronic communication for which it is the originator or the addressee because the bank is not a custodian providing electronic communication services to the public or providing a remote-computing service to the public.

Example 3 – Access to digital assets by agent. X creates a power of attorney designating A as X's agent. The power of attorney expressly grants A authority over X's digital assets, including the content of an electronic communication. X has a bank account for which X receives only electronic statements, X has stored photos in a cloud-based Internet account, and X has a game character and in-game property associated with an online game. X also has an e-mail account with a company that provides electronic-communication services to the public.

A has the authority to access X's electronic bank statements, the photo account, the game character and in-game property associated with the online game, all of which fall under the act's definition of a "digital asset." This means that, if these accounts are password-protected or otherwise unavailable to A as X's agent, then the bank, the photo account service provider, and the online game service provider must give access to A when the request is made in accordance with Section .901. The custodian may require specific identification of the account and evidence linking the account to the principal. If the TOSA permits X to transfer the accounts electronically, then A as X's agent can use that procedure for transfer as well.

As X's agent, A is also able to request that the e-mail account service provider grant access to e-mails sent or received by X. This Act permits the service provider to release the catalogue and, because the power of attorney expressly granted authority over the contents of electronic communications sent or received by X, the service provider also must provide A access to the content of an electronic communication. The custodian may require specific identification of the account and evidence linking the account to the principal. The bank may release the catalogue of electronic communications or content of an electronic communication for which it is the originator or the addressee because the bank is not a custodian providing electronic communication services to the public or providing a remote-computing service to the public.

Example 4 – Access to digital assets by trustee. T is the trustee of a trust established by S. As trustee of the trust, T opens a bank account for which T receives only electronic statements. S transfers into the trust to T as trustee (in compliance with a TOSA) a game character and in-game property associated with an online game and a cloud-based Internet account in which S has stored photos. S also transfers to T as trustee (in compliance with the TOSA) an e-mail account with a company that provides electronic-communication services to the public.

T is an original user with respect to the bank account that T opened, and T has the ability to access the electronic banking statements. T, as successor user to S, may access the game character and in-game property associated with the online game and the photo account, which both fall under the act's definition of a "digital asset." This means that, if these accounts are password-protected or otherwise unavailable to T as trustee, then the bank, the photo account service provider, and the online game service provider must give access to T when the request is made in accordance with Section .1201. If the TOSA permits the user to transfer the accounts electronically, then T as trustee can use that procedure for transfer as well. The custodian may require specific identification of the account and evidence linking the account to the trust.

T as successor user of the e-mail account for which S was previously the user is also able to request that the e-mail account service provider grant access to e-mails sent or received by S. The Act permits the service provider to release the catalogue, unless otherwise directed by the user, the trust, or a court. The service provider also must provide T access to the content of an electronic communication sent or received by S if the trust includes consent to disclosure of the contents of electronic communications to the trustee. The custodian may require specific identification of the account and evidence

linking the account to the trust. The bank may release the catalogue of electronic communications or content of an electronic communication for which it is the originator or the addressee because the bank is not a custodian providing electronic communication services to the public or providing a remote-computing service to the public.

Example 5 – Access notwithstanding terms in a TOSA. D, who is domiciled in Florida, dies. D was a professional photographer who stored valuable digital photos in an online storage account provided by C. P is appointed by a court in Florida to administer D's estate. P needs access to D's online storage account to inventory and appraise D's estate assets and to file D's estate tax return. During D's lifetime, D entered into a TOSA with C for the online storage account. The choice-of-law provision selects the law of state Y to govern the contractual rights and duties under the TOSA. A provision of the TOSA prohibits fiduciary access to the digital assets of a user, but, using the custodian's online tool, separate from D's assent to other provisions of the TOSA, D designated P to have access to his account. FFADAA has been enacted but no similar law has been enacted by state Y. Because of D's direction using an online tool to grant access to P, the custodian must grant P access to D's assets, even though the TOSA selected the law of state Y to govern the contractual rights and duties under the TOSA.

17. **Section 17** creates **740.1501** which addresses compliance and grants immunity to custodians.

Subsection (1) establishes 60 days as the appropriate time for compliance. If the custodian fails to comply, then the fiduciary may apply to the court for an order directing compliance and finding that compliance does not violate 18 U.S.C. § 2702.

Subsection (4) establishes that, in the situation of a joint account, a custodian may deny a fiduciary's request for disclosure or account termination if the custodian is aware of any lawful access to the account following the fiduciary's request for access.

This section establishes that custodians are protected from liability when they act, or fail to act, in accordance with the procedures of this Act and in good faith. The types of actions covered include disclosure as well as transfer of copies.

18. **Section 18** creates **740.1601** which establishes the relation with the Electronic Signatures in Global and National Commerce Act.

19. **Section 19** creates **740.1701** which establishes the severability of the provisions of the act.

20. **Section 20** establishes the effective date.

IV. FISCAL IMPACT ON STATE AND LOCAL GOVERNMENTS

The proposal does not have a fiscal impact on state or local governments. In fact, it should decrease the risk of unauthorized access to digital assets from the fiduciaries appointed by users and would provide certainty and predictability for courts, users, fiduciaries, and Internet service providers.

V. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR

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

VI. CONSTITUTIONAL ISSUES

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

VII. OTHER INTERESTED PARTIES

Criminal Law Section, State law enforcement and state attorney offices who track and enforce privacy and cyber crimes.

Florida Bankers Association
Business Law Section
Trial Lawyers Association

By Senator Hukill

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1 A bill to be entitled
2 An act relating to digital assets; providing a
3 directive to the Division of Law Revision and
4 Information; creating s. 740.001, F.S.; providing a
5 short title; creating s. 740.002, F.S.; defining
6 terms; creating s. 740.003, F.S.; authorizing a user
7 to use an online tool to allow a custodian to disclose
8 or to prohibit a custodian from disclosing digital
9 assets under certain circumstances; providing that
10 specified user's direction overrides a contrary
11 provision in a terms-of-service agreement under
12 certain circumstances; creating s. 740.004, F.S.;
13 providing construction; authorizing the modification
14 of a fiduciary's assets under certain circumstances;
15 creating s. 740.005, F.S.; providing procedures for
16 the disclosure of digital assets; creating s. 740.006,
17 F.S.; requiring a custodian to disclose the content of
18 electronic communications of a deceased user under
19 certain circumstances; creating s. 740.007, F.S.;
20 requiring a custodian to disclose other digital assets
21 of a deceased user under certain circumstances;
22 creating s. 740.008, F.S.; requiring a custodian to
23 disclose the content of electronic communications of a
24 principal under certain circumstances; creating s.
25 740.009, F.S.; requiring a custodian to disclose other
26 digital assets of a principal under certain
27 circumstances; creating s. 740.01, F.S.; requiring a
28 custodian to disclose to a trustee who is the original
29 user the digital assets held in trust under certain

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30 circumstances; creating s. 740.02, F.S.; requiring a
31 custodian to disclose to a trustee who is not the
32 original user the content of electronic communications
33 held in trust under certain circumstances; creating s.
34 740.03, F.S.; requiring a custodian to disclose to a
35 trustee who is not the original user other digital
36 assets under certain circumstances; creating s.
37 740.04, F.S.; authorizing the court to grant a
38 guardian the right to access a ward's digital assets
39 under certain circumstances; requiring a custodian to
40 disclose to a guardian a specified catalog of
41 electronic communications and specified digital assets
42 of a ward under certain circumstances; creating s.
43 740.05, F.S.; imposing fiduciary duties; providing for
44 the rights and responsibilities of certain
45 fiduciaries; creating s. 740.06, F.S.; requiring
46 compliance of a custodian; providing construction;
47 providing for immunity from liability for a custodian
48 and its officers, employees, and agents acting in good
49 faith in complying with their duties; creating s.
50 740.07, F.S.; providing construction; creating s.
51 740.08, F.S.; providing applicability; creating s.
52 740.09, F.S.; providing severability; providing an
53 effective date.
54
55 Be It Enacted by the Legislature of the State of Florida:
56
57 Section 1. The Division of Law Revision and Information is
58 directed to create chapter 740, Florida Statutes, consisting of

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59 ss. 740.001-740.09, Florida Statutes, to be entitled "Fiduciary
60 Access to Digital Assets."
61 Section 2. Section 740.001, Florida Statutes, is created to
62 read:
63 740.001 Short title.—This chapter may be cited as the
64 "Florida Fiduciary Access to Digital Assets Act."
65 Section 3. Section 740.002, Florida Statutes, is created to
66 read:
67 740.002 Definitions.—As used in this chapter, the term:
68 (1) "Account" means an arrangement under a terms-of-service
69 agreement in which the custodian carries, maintains, processes,
70 receives, or stores a digital asset of the user or provides
71 goods or services to the user.
72 (2) "Agent" means a person that is granted authority to act
73 for a principal under a durable or nondurable power of attorney,
74 whether denominated an agent, an attorney in fact, or otherwise.
75 The term includes an original agent, a co-agent, and a successor
76 agent.
77 (3) "Carries" means to engage in the transmission of
78 electronic communications.
79 (4) "Catalog of electronic communications" means
80 information that identifies each person with which a user has
81 had an electronic communication, the time and date of the
82 communication, and the electronic address of the person.
83 (5) "Content of an electronic communication" means
84 information concerning the substance or meaning of the
85 communication which:
86 (a) Has been sent or received by a user;
87 (b) Is in electronic storage by a custodian providing an

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88 electronic communication service to the public or is carried or
89 maintained by a custodian providing a remote computing service
90 to the public; and
91 (c) Is not readily accessible to the public.
92 (6) "Court" means a circuit court of this state.
93 (7) "Custodian" means a person that carries, maintains,
94 processes, receives, or stores a digital asset of a user.
95 (8) "Designated recipient" means a person chosen by a user
96 through an online tool to administer digital assets of the user.
97 (9) "Digital asset" means an electronic record in which an
98 individual has a right or interest. The term does not include an
99 underlying asset or liability unless the asset or liability is
100 itself an electronic record.
101 (10) "Electronic" means relating to technology having
102 electrical, digital, magnetic, wireless, optical,
103 electromagnetic, or similar capabilities.
104 (11) "Electronic communication" has the same meaning as
105 provided in 18 U.S.C. s. 2510(12).
106 (12) "Electronic communication service" means a custodian
107 that provides to a user the ability to send or receive an
108 electronic communication.
109 (13) "Fiduciary" means an original, additional, or
110 successor personal representative, guardian, agent, or trustee.
111 (14) "Guardian" means a person who is appointed by the
112 court as guardian of the property of a minor or an incapacitated
113 individual. The term includes an original guardian, a co-
114 guardian, and a successor guardian, as well as a person
115 appointed by the court as an emergency temporary guardian of the
116 property.

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117 (15) "Information" means data, text, images, videos,
118 sounds, codes, computer programs, software, databases, or the
119 like.
120 (16) "Online tool" means an electronic service provided by
121 a custodian which allows the user, in an agreement distinct from
122 the terms-of-service agreement between the custodian and user,
123 to provide directions for disclosure or nondisclosure of digital
124 assets to a third person.
125 (17) "Person" means an individual, estate, trust, business
126 or nonprofit entity, public corporation, government or
127 governmental subdivision, agency, or instrumentality, or other
128 legal entity.
129 (18) "Personal representative" means the fiduciary
130 appointed by the court to administer the estate of a deceased
131 individual pursuant to letters of administration or an order
132 appointing a curator or administrator ad litem for the estate.
133 The term includes an original personal representative, a
134 copersonal representative, and a successor personal
135 representative, as well as a person who is entitled to receive
136 and collect a deceased individual's property pursuant to an
137 order of summary administration issued pursuant to chapter 735.
138 (19) "Power of attorney" means a record that grants an
139 agent authority to act in the place of a principal pursuant to
140 chapter 709.
141 (20) "Principal" means an individual who grants authority
142 to an agent in a power of attorney.
143 (21) "Record" means information that is inscribed on a
144 tangible medium or that is stored in an electronic or other
145 medium and is retrievable in perceivable form.

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146 (22) "Remote computing service" means a custodian that
147 provides to a user computer processing services or the storage
148 of digital assets by means of an electronic communications
149 system as defined in 18 U.S.C. s. 2510(14).
150 (23) "Terms-of-service agreement" means an agreement that
151 controls the relationship between a user and a custodian.
152 (24) "Trustee" means a fiduciary that holds legal title to
153 property under an agreement, declaration, or trust instrument
154 that creates a beneficial interest in the settlor or other
155 persons. The term includes an original trustee, a cotrustee, and
156 a successor trustee.
157 (25) "User" means a person that has an account with a
158 custodian.
159 (26) "Ward" means an individual for whom a guardian has
160 been appointed. The term includes an individual for whom an
161 application for the appointment of a guardian is pending.
162 (27) "Will" means an instrument admitted to probate,
163 including a codicil, executed by an individual in the manner
164 prescribed by the Florida Probate Code, which disposes of the
165 individual's property on or after his or her death. The term
166 includes an instrument that merely appoints a personal
167 representative or revokes or revises another will.
168 Section 4. Section 740.003, Florida Statutes, is created to
169 read:
170 740.003 User direction for disclosure of digital assets.—
171 (1) A user may use an online tool to direct the custodian
172 to disclose or not to disclose some or all of the user's digital
173 assets, including the content of electronic communications. If
174 the online tool allows the user to modify or delete a direction

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175 at all times, a direction regarding disclosure using an online
176 tool overrides a contrary direction by the user in a will,
177 trust, power of attorney, or other record.
178 (2) If a user has not used an online tool to give direction
179 under subsection (1) or if the custodian has not provided an
180 online tool, the user may allow or prohibit disclosure to a
181 fiduciary of some or all of the user's digital assets, including
182 the content of electronic communications sent or received by the
183 user, in a will, trust, power of attorney, or other record.
184 (3) A user's direction under subsection (1) or subsection
185 (2) overrides a contrary provision in a terms-of-service
186 agreement that does not require the user to act affirmatively
187 and distinctly from the user's assent to the terms of service.
188 Section 5. Section 740.004, Florida Statutes, is created to
189 read:
190 740.004 Terms-of-service agreement preserved.—
191 (1) This chapter does not change or impair a right of a
192 custodian or a user under a terms-of-service agreement to access
193 and use the digital assets of the user.
194 (2) This chapter does not give a fiduciary any new or
195 expanded rights other than those held by the user for whom, or
196 for whose estate or trust, the fiduciary acts or represents.
197 (3) A fiduciary's access to digital assets may be modified
198 or eliminated by a user, by federal law, or by a terms-of-
199 service agreement if the user has not provided direction under
200 s. 740.003.
201 Section 6. Section 740.005, Florida Statutes, is created to
202 read:
203 740.005 Procedure for disclosing digital assets.—

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204 (1) When disclosing the digital assets of a user under this
205 chapter, the custodian may, at its sole discretion:
206 (a) Grant a fiduciary or designated recipient full access
207 to the user's account;
208 (b) Grant a fiduciary or designated recipient partial
209 access to the user's account sufficient to perform the tasks
210 with which the fiduciary or designated recipient is charged; or
211 (c) Provide a fiduciary or designated recipient a copy in a
212 record of any digital asset that, on the date the custodian
213 received the request for disclosure, the user could have
214 accessed if the user were alive and had full capacity and access
215 to the account.
216 (2) A custodian may assess a reasonable administrative
217 charge for the cost of disclosing digital assets under this
218 chapter.
219 (3) A custodian is not required to disclose under this
220 chapter a digital asset deleted by a user.
221 (4) If a user directs or a fiduciary requests a custodian
222 to disclose under this chapter some, but not all, of the user's
223 digital assets to the fiduciary or a designated recipient, the
224 custodian is not required to disclose the assets if segregation
225 of the assets would impose an undue burden on the custodian. If
226 the custodian believes the direction or request imposes an undue
227 burden, the custodian or the fiduciary may seek an order from
228 the court to disclose:
229 (a) A subset limited by date of the user's digital assets;
230 (b) All of the user's digital assets to the fiduciary or
231 designated recipient, or to the court for review in chambers; or
232 (c) None of the user's digital assets.

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233 Section 7. Section 740.006, Florida Statutes, is created to
234 read:
235 740.006 Disclosure of content of electronic communications
236 of deceased user.—If a deceased user consented to or a court
237 directs the disclosure of the content of electronic
238 communications of the user, the custodian shall disclose to the
239 personal representative of the estate of the user the content of
240 an electronic communication sent or received by the user if the
241 personal representative gives to the custodian:
242 (1) A written request for disclosure which is in physical
243 or electronic form;
244 (2) A certified copy of the death certificate of the user;
245 (3) A certified copy of the letters of administration, the
246 order authorizing a curator or administrator ad litem, the order
247 of summary administration issued pursuant to chapter 735, or
248 other court order;
249 (4) Unless the user provided direction using an online
250 tool, a copy of the user's will, trust, power of attorney, or
251 other record evidencing the user's consent to disclosure of the
252 content of electronic communications; and
253 (5) If requested by the custodian:
254 (a) A number, username, address, or other unique subscriber
255 or account identifier assigned by the custodian to identify the
256 user's account;
257 (b) Evidence linking the account to the user; or
258 (c) A finding by the court that:
259 1. The user had a specific account with the custodian,
260 identifiable by information specified in paragraph (a);
261 2. Disclosure of the content of electronic communications

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262 of the user would not violate 18 U.S.C. s. 2701 et seq., 47
263 U.S.C. s. 222, or other applicable law;
264 3. Unless the user provided direction using an online tool,
265 the user consented to disclosure of the content of electronic
266 communications; or
267 4. Disclosure of the content of electronic communications
268 of the user is reasonably necessary for the administration of
269 the estate.
270 Section 8. Section 740.007, Florida Statutes, is created to
271 read:
272 740.007 Disclosure of other digital assets of deceased
273 user.—Unless a user prohibited disclosure of digital assets or
274 the court directs otherwise, a custodian shall disclose to the
275 personal representative of the estate of a deceased user a
276 catalog of electronic communications sent or received by the
277 user and digital assets of the user, except the content of
278 electronic communications, if the personal representative gives
279 to the custodian:
280 (1) A written request for disclosure which is in physical
281 or electronic form;
282 (2) A certified copy of the death certificate of the user;
283 (3) A certified copy of the letters of administration, the
284 order authorizing a curator or administrator ad litem, the order
285 of summary administration issued pursuant to chapter 735, or
286 other court order; and
287 (4) If requested by the custodian:
288 (a) A number, username, address, or other unique subscriber
289 or account identifier assigned by the custodian to identify the
290 user's account;

291 (b) Evidence linking the account to the user;
292 (c) An affidavit stating that disclosure of the user's
293 digital assets is reasonably necessary for the administration of
294 the estate; or
295 (d) An order of the court finding that:
296 1. The user had a specific account with the custodian,
297 identifiable by information specified in paragraph (a); or
298 2. Disclosure of the user's digital assets is reasonably
299 necessary for the administration of the estate.
300 Section 9. Section 740.008, Florida Statutes, is created to
301 read:
302 740.008 Disclosure of content of electronic communications
303 of principal.—To the extent a power of attorney expressly grants
304 an agent authority over the content of electronic communications
305 sent or received by the principal and unless directed otherwise
306 by the principal or the court, a custodian shall disclose to the
307 agent the content if the agent gives to the custodian:
308 (1) A written request for disclosure which is in physical
309 or electronic form;
310 (2) An original or copy of the power of attorney expressly
311 granting the agent authority over the content of electronic
312 communications of the principal;
313 (3) A certification by the agent, under penalty of perjury,
314 that the power of attorney is in effect; and
315 (4) If requested by the custodian:
316 (a) A number, username, address, or other unique subscriber
317 or account identifier assigned by the custodian to identify the
318 principal's account; or
319 (b) Evidence linking the account to the principal.

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320 Section 10. Section 740.009, Florida Statutes, is created
321 to read:
322 740.009 Disclosure of other digital assets of principal.—
323 Unless otherwise ordered by the court, directed by the
324 principal, or provided by a power of attorney, a custodian shall
325 disclose to an agent with specific authority over the digital
326 assets or with general authority to act on behalf of the
327 principal a catalog of electronic communications sent or
328 received by the principal, and digital assets of the principal,
329 except the content of electronic communications, if the agent
330 gives the custodian:
331 (1) A written request for disclosure which is in physical
332 or electronic form;
333 (2) An original or a copy of the power of attorney which
334 gives the agent specific authority over digital assets or
335 general authority to act on behalf of the principal;
336 (3) A certification by the agent, under penalty of perjury,
337 that the power of attorney is in effect; and
338 (4) If requested by the custodian:
339 (a) A number, username, address, or other unique subscriber
340 or account identifier assigned by the custodian to identify the
341 principal's account; or
342 (b) Evidence linking the account to the principal.
343 Section 11. Section 740.01, Florida Statutes, is created to
344 read:
345 740.01 Disclosure of digital assets held in trust when
346 trustee is the original user.—Unless otherwise ordered by the
347 court or provided in a trust, a custodian shall disclose to a
348 trustee that is an original user of an account any digital asset

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349 of the account held in trust, including a catalog of electronic
350 communications of the trustee and the content of electronic
351 communications.
352 Section 12. Section 740.02, Florida Statutes, is created to
353 read:
354 740.02 Disclosure of content of electronic communications
355 held in trust when trustee is not the original user.—Unless
356 otherwise ordered by the court, directed by the user, or
357 provided in a trust, a custodian shall disclose to a trustee
358 that is not an original user of an account the content of an
359 electronic communication sent or received by an original or
360 successor user and carried, maintained, processed, received, or
361 stored by the custodian in the account of the trust if the
362 trustee gives the custodian:
363 (1) A written request for disclosure which is in physical
364 or electronic form;
365 (2) A certified copy of the trust instrument, or a
366 certification of trust under s. 736.1017, which includes consent
367 to disclosure of the content of electronic communications to the
368 trustee;
369 (3) A certification by the trustee, under penalty of
370 perjury, that the trust exists and that the trustee is a
371 currently acting trustee of the trust; and
372 (4) If requested by the custodian:
373 (a) A number, username, address, or other unique subscriber
374 or account identifier assigned by the custodian to identify the
375 trust's account; or
376 (b) Evidence linking the account to the trust.
377 Section 13. Section 740.03, Florida Statutes, is created to

378 read:
379 740.03 Disclosure of other digital assets held in trust
380 when trustee is not the original user.—Unless otherwise ordered
381 by the court, directed by the user, or provided in a trust, a
382 custodian shall disclose to a trustee that is not an original
383 user of an account, a catalog of electronic communications sent
384 or received by an original or successor user and stored,
385 carried, or maintained by the custodian in an account of the
386 trust and any digital assets in which the trust has a right or
387 interest, other than the content of electronic communications,
388 if the trustee gives the custodian:
389 (1) A written request for disclosure which is in physical
390 or electronic form;
391 (2) A certified copy of the trust instrument, or a
392 certification of trust under s. 736.1017;
393 (3) A certification by the trustee, under penalty of
394 perjury, that the trust exists and that the trustee is a
395 currently acting trustee of the trust; and
396 (4) If requested by the custodian:
397 (a) A number, username, address, or other unique subscriber
398 or account identifier assigned by the custodian to identify the
399 trust's account; or
400 (b) Evidence linking the account to the trust.
401 Section 14. Section 740.04, Florida Statutes, is created to
402 read:
403 740.04 Disclosure of digital assets to guardian of ward.—
404 (1) After an opportunity for a hearing under chapter 744,
405 the court may grant a guardian access to the digital assets of a
406 ward.

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407 (2) Unless otherwise ordered by the court or directed by
408 the user, a custodian shall disclose to a guardian the catalog
409 of electronic communications sent or received by the ward and
410 any digital assets in which the ward has a right or interest,
411 other than the content of electronic communications, if the
412 guardian gives the custodian:
413 (a) A written request for disclosure which is in physical
414 or electronic form;
415 (b) A certified copy of letters of plenary guardianship of
416 the property or the court order that gives the guardian
417 authority over the digital assets of the ward; and
418 (c) If requested by the custodian:
419 1. A number, username, address, or other unique subscriber
420 or account identifier assigned by the custodian to identify the
421 ward's account; or
422 2. Evidence linking the account to the ward.
423 (3) A guardian with general authority to manage the
424 property of a ward may request a custodian of the digital assets
425 of the ward to suspend or terminate an account of the ward for
426 good cause. A request made under this section must be
427 accompanied by a certified copy of the court order giving the
428 guardian authority over the ward's property.
429 Section 15. Section 740.05, Florida Statutes, is created to
430 read:
431 740.05 Fiduciary duty and authority.—
432 (1) The legal duties imposed on a fiduciary charged with
433 managing tangible property apply to the management of digital
434 assets, including:
435 (a) The duty of care;

436 (b) The duty of loyalty; and
437 (c) The duty of confidentiality.
438 (2) A fiduciary's authority with respect to a digital asset
439 of a user:
440 (a) Except as otherwise provided in s. 740.003, is subject
441 to the applicable terms-of-service agreement;
442 (b) Is subject to other applicable law, including copyright
443 law;
444 (c) Is limited by the scope of the fiduciary's duties; and
445 (d) May not be used to impersonate the user.
446 (3) A fiduciary with authority over the tangible personal
447 property of a decedent, ward, principal, or settlor has the
448 right to access any digital asset in which the decedent, ward,
449 principal, or settlor had or has a right or interest and that is
450 not held by a custodian or subject to a terms-of-service
451 agreement.
452 (4) A fiduciary acting within the scope of the fiduciary's
453 duties is an authorized user of the property of the decedent,
454 ward, principal, or settlor for the purpose of applicable
455 computer fraud and unauthorized computer access laws, including
456 under chapter 815.
457 (5) A fiduciary with authority over the tangible personal
458 property of a decedent, ward, principal, or settlor:
459 (a) Has the right to access the property and any digital
460 asset stored in it; and
461 (b) Is an authorized user for the purpose of computer fraud
462 and unauthorized computer access laws, including under chapter
463 815.
464 (6) A custodian may disclose information in an account to a

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465 fiduciary of the user when the information is required to
466 terminate an account used to access digital assets licensed to
467 the user.
468 (7) A fiduciary of a user may request a custodian to
469 terminate the user's account. A request for termination must be
470 in writing, in paper or electronic form, and accompanied by:
471 (a) If the user is deceased, a certified copy of the death
472 certificate of the user;
473 (b) A certified copy of the letters of administration; the
474 order authorizing a curator or administrator ad litem; the order
475 of summary administration issued pursuant to chapter 735; or the
476 court order, power of attorney, or trust giving the fiduciary
477 authority over the account; and
478 (c) If requested by the custodian:
479 1. A number, username, address, or other unique subscriber
480 or account identifier assigned by the custodian to identify the
481 user's account;
482 2. Evidence linking the account to the user; or
483 3. A finding by the court that the user had a specific
484 account with the custodian, identifiable by the information
485 specified in subparagraph 1.
486 Section 16. Section 740.06, Florida Statutes, is created to
487 read:
488 740.06 Custodian compliance and immunity.—
489 (1) Not later than 60 days after receipt of the information
490 required under ss. 740.006-740.04, a custodian shall comply with
491 a request under this chapter from a fiduciary or designated
492 recipient to disclose digital assets or terminate an account. If
493 the custodian fails to comply, the fiduciary or designated

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494 representative may apply to the court for an order directing
495 compliance.
496 (2) An order under subsection (1) directing compliance must
497 contain a finding that compliance is not in violation of 18
498 U.S.C. s. 2702.
499 (3) A custodian may notify a user that a request for
500 disclosure or to terminate an account was made under this
501 chapter.
502 (4) A custodian may deny a request under this chapter from
503 a fiduciary or designated representative for disclosure of
504 digital assets or to terminate an account if the custodian is
505 aware of any lawful access to the account following the receipt
506 of the fiduciary's request.
507 (5) This chapter does not limit a custodian's ability to
508 obtain or require a fiduciary or designated recipient requesting
509 disclosure or termination under this chapter to obtain a court
510 order that:
511 (a) Specifies that an account belongs to the ward or
512 principal;
513 (b) Specifies that there is sufficient consent from the
514 ward or principal to support the requested disclosure; and
515 (c) Contains a finding required by a law other than this
516 chapter.
517 (6) A custodian and its officers, employees, and agents are
518 immune from liability for an act or omission done in good faith
519 in compliance with this chapter.
520 Section 17. Section 740.07, Florida Statutes, is created to
521 read:
522 740.07 Relation to Electronic Signatures in Global and

523 National Commerce Act.—This chapter modifies, limits, and
524 supersedes the Electronic Signatures in Global and National
525 Commerce Act, 15 U.S.C. ss. 7001 et seq., but does not modify,
526 limit, or supersede s. 101(c) of that act, 15 U.S.C. s. 7001(c),
527 or authorize electronic delivery of any of the notices described
528 in s. 103(b) of that act, 15 U.S.C. s. 7003(b).
529 Section 18. Section 740.08, Florida Statutes, is created to
530 read:
531 740.08 Applicability.—
532 (1) Subject to subsection (3), this chapter applies to:
533 (a) A fiduciary acting under a will, trust, or power of
534 attorney executed before, on, or after July 1, 2016;
535 (b) A personal representative acting for a decedent who
536 died before, on, or after July 1, 2016;
537 (c) A guardian appointed through a guardianship proceeding,
538 whether pending in a court or commenced before, on, or after
539 July 1, 2016; and
540 (d) A trustee acting under a trust created before, on, or
541 after July 1, 2016.
542 (2) This chapter applies to a custodian if the user resides
543 in this state or resided in this state at the time of the user's
544 death.
545 (3) This chapter does not apply to a digital asset of an
546 employer used by an employee in the ordinary course of the
547 employer's business.
548 Section 19. Section 740.09, Florida Statutes, is created to
549 read:
550 740.09 Severability.—If any provision of this chapter or
551 its application to any person or circumstance is held invalid,

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552 the invalidity does not affect other provisions or applications
553 of this chapter which can be given effect without the invalid
554 provision or application, and to this end the provisions of this
555 chapter are severable.
556 Section 20. This act shall take effect July 1, 2016.

OPPOSITION TO THE PROPOSED POLST BILL RELATING TO PHYSICIAN ORDERS FOR LIFE SUSTAINING TREATMENT, OR IN THE ALTERNATIVE, RECOMMENDATIONS ON PROCEDURAL SAFEGUARDS TO BE ADDED AS TECHNICAL CORRECTIONS TO ANY POLST BILL

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

AD HOC STUDY COMMITTEE ON POLST

I. Summary

The current proposed statutes in the pre-filing draft prepared by Senator Brandes for Physician Orders for Life-Sustaining Treatment ("POLST") do not contain adequate procedural safeguards to protect the public. Accordingly, the POLST Bill should be opposed by the RPPTL section. While the idea of POLST may be beneficial and, indeed have merit, this matter requires numerous procedural safeguards needed to respect the rights of patients regarding the ultimate questions of their mortality. These requisite protections are absent in the present draft of the POLST Bill. If POLST were to be adopted in Florida, it needs to be carefully considered, it should be a stand-alone statute, and it must contain procedural safeguards to protect the patients.[1]

II. Comment and Analysis on the POLST Bill

A. Comments on the POLST Proposals

1. POLST form is not satisfactorily defined

A POLST form is akin to an advanced directive, although it is an immediately effective medical order. It is a form signed by a physician, which follows the patient in her or his medical records, and provides instructions as to life saving/preserving procedures such as CPR, hydration, and the like. In the proposed POLST Bill, some concessions have been made since the bill submitted last year which do improve the form. However, the POLST form is defined in terms that are still confusing and misleading. The language utilized in the POLST Bill to "describe" POLST is better used to describe an advance directive and does not emphasize the fact that a POLST is an immediately effective medical order. In addition, the language is not appropriate to be included in a statute. Rather, a POLST statute needs to provide statutory guidance and regulations, not rhetoric regarding the POLST concept.

The proposed legislation leaves the development and adoption of the POLST form to the Department of Health with minimal statutory direction and combines that very limited direction into a definition of POLST under the newly created statute providing for the creation of an Information Clearinghouse and Establishment of Electronic Database. Standards for the use of

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[1] Three pre-filing copies of the proposed bill, "Draft A," "Draft B," and "Draft C" were provided. The comments herein were originally drafted to correspond to Draft A and have been revised to recognize changes made in Draft B and Draft C. We have also provided a revised copy of Draft C incorporating our suggested changes.

POLST forms should be adopted in a separate statutory scheme and the requirements for the POLST form should be well defined.

2. POLST can be valid under the proposal without consent or even knowledge of patient

According to the proposed POLST Bill, the only requirement for a POLST is that it be on a form approved by the Department of Health and signed by the physician after consultation with the patient or their health care surrogate, proxy, attorney in fact or guardian. The proposal does not clearly require that the physician who signs the form is the individual who conducted the consultation with the patient or is the patient's treating physician. Under the current language, an administrative worker checking the patient into a nursing home could conduct the required consultation and a physician who has never met the patient could sign the form. The purpose of POLST is to encourage conversations between patients and their physicians regarding end of life decisions. While this may work well within a critical care unit in a hospital without further statutory protections, these forms are being promoted at nursing home facilities and ACLFs. There is no limitation that the POLST form be used only in a hospital setting and in most states that use POLST, they are more commonly utilized outside a hospital setting. The bill provides immunities to a multitude of medical professional who might come in contact with a patient with a POLST but provides little safe guards for the patient. This lack of a standard will lead to varying and inconsistent results on literally life and death situations. Therefore, clarification is necessary to clearly require the consultation occur between the patient and his or her treating physician.

Of equal importance is the fact that the POLST Bill does not require the consent or signature of the patient or of the patient's proxy. A glaring concern is what happens when a patient or proxy disagrees with the physician? Under the proposal, the physician can still execute a POLST which may prevent the patient from getting life sustaining medical treatment even if the patient wants medical treatment! Surely such an important document should have stricter standards and safeguards.

3. No restrictions on who can execute a POLST or when one is appropriate

In addition to the failure to require consent (preferably written consent) by the patient or the proxy, the POLST proposals are missing appropriate safeguards regarding when a POLST is appropriate or when a physician should execute one. The proposal contains a vague requirement that the patient have an end stage condition or a patient is expected by the physician to be suffering from at least one life-limiting condition that will likely result in the death of the patient within one year. However, the form does not require that the condition which justifies the POLST be listed on the form. This form is anticipated to be accepted by all physicians across all health care settings but yet the physician at the next facility has no way of knowing what condition necessitated the form. Perhaps the patient's medical condition has changed, perhaps the patient's prognosis has changed. The physician at the successive facility is under the present POLST system expected to blindly follow the POLST form with little or no information.

The POLST Bill also provides no mechanism for revocation of the form once signed. The patient, if competent, or their health care surrogate, proxy, guardian or attorney in fact,

should at any time be permitted to revoke the POSLT. Further, there should be a provision in the law which allows a family member or interested person to challenge a POLST if they believe it is in conflict with the patient's expressed desire regarding end of life care through an expedited procedure. Finally, the POLST Bill should provide for a hierarchy of documents among advance directives and POLSTs. In the current bill, a conflict may exist between a POLST executed unilaterally by the physician and the patient's living will or advance directive. The patient's expressed intent or self-direction of medical care must always prevail under the law to comply with the requirements of due process.

4. Pecuniary motive

Another concern is that POLSTs allow physicians and hospitals to hasten or prolong the demise of patients based upon pecuniary motives. Oftentimes, patients cannot afford their stay but the hospitals or nursing home are required to provide care for them anyhow (often at the hospital's expense) despite wanting to discharge them. The concern is now physicians and treatment facilities have the power over a patient's life and conflicting financial incentives in certain situations. This is of particular concern in Florida due to the large population of elder individuals with diminished capacity who do not have someone to speak for them and would be particularly susceptible to influence by untrained individuals presenting these forms.

5. Privacy concerns

The current draft of the POLST Bill, creates s. § 408.064, Fla. Stat., which creates an electronic database (clearinghouse) to purportedly safely and securely submit directives for compassionate and palliative care. Although the Agency for Health Care Administration is authorized to create a "reliable and secure" database, the proposed statute gives no further direction as to how the Agency must act upon such direction or how such a database can be properly secure and private. While we do not offer technical advice on this provision as it extends beyond our purview, we express concern as to the privacy protections of patients under the limited language included in the statute. We also recommend a January 1, 2017 effective date if the bill proceeds to allow for the proper creation of the database.

6. Problems with statutory scheme or lack thereof

The POLST bill is tied directly to our current statutory scheme for a "do not resuscitate order" (DNRO). The POLST Bill attempts to treat a DNRO and POLST similarly. A review of other states which have statutory concepts similar to the proposed POLST bills, including Wyoming, Oregon, West Virginia and Maryland, reveal that those states have separate POLST statutes. The POLST bills do not create something similar in Florida.

POLSTs should be studied further and set forth in a comprehensive separate, statutory scheme within the Florida statutes. Ideally, a comprehensive group with representatives from Palliative Care Groups, Biomedical Ethics groups, Hospital and Nursing Home Management Departments, the RPPTL Section and Elder Law Section of the Florida Bar, and Physicians should be formed to study this issue and create a comprehensive statutory scheme including all necessary due process concerns.

B. Analysis of POLST Bill

1. § 395.1041, Fla. Stat.

   This section allows hospital personnel to withhold cardiopulmonary resuscitation if there is a POLST for a patient.

2. § 400.142, Fla. Stat.

   This section allows nursing home personnel to withhold cardiopulmonary resuscitation if there is a POLST for a patient.

3. § 400.487, Fla. Stat.

   This section allows home health agency personnel to withhold cardiopulmonary resuscitation if there is a POLST for a patient.

4. § 400.605, Fla. Stat.

   This section requires the Agency for Health Care Administration to establish procedures for the implementation of POLST.

5. § 400.6095, Fla. Stat.

   This section allows hospice personnel to withhold cardiopulmonary resuscitation if there is a POLST for a patient.

6. § 401.35, Fla. Stat.

   This section requires the Department of Health to establish procedures for emergency medical technicians and paramedics to honor POLSTs.

7. § 401.45, Fla. Stat.

   This section allows denial of emergency medical treatment to an individual who has a POLST. The POLST does not have to be signed by the individual – only by his physician after consultation (by someone, not necessarily the physician) with the individual or their proxy.

8. § 429.255, Fla. Stat.

   This section allows staff at an assisted living facility to withhold cardiopulmonary resuscitation or the use of an automated external defibrillator if there is a POLST for a patient.

9. § 429.73, Fla. Stat.

   This section requires the Department of Elderly Affairs to adopt rules to implement POLSTs, and also allows providers at adult family-care homes to withhold cardiopulmonary resuscitation if there is a POLST for a patient.

10. §765.205, Fla. Stat.

    This section requires a health care surrogate to provide the POLST when written consent is required (presumably where appropriate).

III. Explanation Regarding Why the Language in proposed POLST Bill is insufficient

As stated above, the present version of the POLST Bill creates a new s.§ 408.064, Fla. Stat., to establish an electronic database and pigeonholes POLST into this statute's definitional provisions. Unfortunately, the POLST Bill as drafted does not offer any true protection to the patient. Moreover, the added language creates loop holes that may have dangerous consequences. For a POLST proposal to contain the true protections for patients and comply with the requirements of due process in this state, the proposal must contain the following provisions:

- To be valid, the POLST form must not only be **signed by a physician**, but signed by a physician who **certifies** that he or she **personally has consulted with the patient** who is signing with the POSLT or the patient's health care surrogate, proxy, guardian, or attorney in fact **about the use of and the effect of removal or refusal of life sustaining medical treatment**.
- The POLST must be **signed by the Patient** or the patient's health care surrogate, proxy, guardian or attorney in fact. (There should be no physician unilateral POLSTs!)
- A surrogate should only be permitted to sign the POLST on behalf of the patient after the procedures in Chapter 765 are followed to determine that a patient is incompetent or incapacitated.
- POLST forms **must always be revocable** by a patient with capacity, and also by a Surrogate.
- The POLST form should require that the **physician describe in detail the reasoning/diagnosis** leading to the discussion and execution of the POLST form. We recommend this must be documented on the POLST form (goes with all of the "change of condition" points).
- **A procedure for revocation** of POLST forms must be established by statute.
- Statute must require **confirmation of POLST by patients with capacity** upon being admitted for treatment
- Statute must require **confirmation of POLST by patients upon change in condition.**
- Statute must require **confirmation of POLST by Physician upon initiating or withholding treatment**.

- Statute must create a **hierarchy of decision makers** (i.e. Patient > Living Will > HCPOA > POLST > §765.401/§743.0645). Moreover, the Statute must contemplate if the hierarchy of decision makers should be impacted by which document is more recent (i.e. 2005 Living Will vs. 2009 POLST)
- Statute must specify that completion of a POLST form **may not be a condition of admission** to a facility – see FS 765.110(3)
- Statute must **specify that a facility cannot offer remuneration for patient signing a POLST** or actions leading to the execution of a POLST
- Statute must provide patient, family and physicians the ability to seek an **expedited review** of whether the POLST form complies with or is an accurate reflection of the patient's self-determination similar to the expedited proceedings provided in Fla. Prob. Rule 5.900
- Statute must limit **one effective POLST per patient**. Statute should state that the **execution of a subsequent POLST revokes any prior POLST** (and thus the statute should require the POLSTs be dated in order to be valid)
- Statute must **define what conditions (if any) will automatically terminate the POLST** (i.e. change in diagnosis, difference in opinion between doctors, etc.)
- Statute must address if Florida will recognize Foreign POLSTs, yes or no
- Statute must provide how a physician should interpret the POLST if a section of the POLST is left blank.
- Statute must define if POLST statutes **can be applicable to minors** and if so under what circumstances and who can execute
- **Election options must span the full scope of treatment**, from aggressive treatment to foregoing treatment and should be defined in the statute.
- § **765.204 Capacity determination** procedures are applicable to POLSTs
- The statute must be **coordinated with chapter 765.** Therefore, an examination should be made to determine the application of Chapter 765 immunities (§ 765.109), disciplines (§ 765.110), and restrictions (§ 765.113)
- There must be some consideration to the clearinghouse for compassionate and palliative care (proposed FS 408.064) as to how best to protect patient confidences and the patients' rights to privacy.
- Extend the effective date to provide sufficient time for the Department of Health to develop an appropriate form and for the electronic database to be properly created.

IV. Recommendations if the Bill Proceeds

To create POLST legislation that contains the necessary safeguards and due process considerations to protect the public in the State of Florida, a new stand-alone POLST statute with well-defined rights and protections should be created. If the bill proceeds, the RPPTL section has provided technical advice by drafting a suggested stand- alone statute which contains the necessary due process protections to assure the POLST form is utilized only when requested by a patient or their legal representative, after an open and complete discussion of the issues with the patient's physician.

V. Conclusion

The current proposals in the POLST Bill do not contain adequate procedural safeguards and therefore, should be opposed. If, however, POLST is adopted in Florida, it needs to be carefully considered, it should be a stand-alone statute, and must contain procedural safeguards to protect the wishes of patients and to ensure that their advance directives are properly considered.

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1 A bill to be entitled
2 An act relating to physician orders for life-
3 sustaining treatment; creating s. 408.064, F.S.;
4 defining terms; requiring the Agency for Health Care
5 Administration to act as the state clearinghouse for
6 compassionate and palliative care plans and
7 information on those plans; requiring that such plans
8 and information be electronically accessible to
9 specified health care providers; requiring the agency
10 to develop and maintain a database that allows the
11 electronic submission of a compassionate and
12 palliative care plan by a resident of this state which
13 indicates his or her advance directives for care, the
14 electronic storage and retrieval of such plans, and
15 access to such plans by specified health care
16 providers; requiring the agency to consult with
17 advisers and experts as necessary and appropriate to
18 facilitate the development and implementation of the
19 database; authorizing the agency to subscribe to or
20 participate in a public or private clearinghouse,
21 which may be nationwide, in lieu of establishing and
22 maintaining an independent database; requiring the
23 agency to publish and disseminate certain information
24 and provide certain training relating to the database;
25 amending ss. 395.1041, 400.142, and 400.487, F.S.;
26 authorizing specified personnel to withhold or
27 withdraw cardiopulmonary resuscitation if a patient
28 has a POLST form that contains such an order;
29 providing immunity from civil and criminal liability

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30 to such personnel for such actions; providing that the
31 absence of a POLST form does not preclude a physician
32 from withholding or withdrawing cardiopulmonary
33 resuscitation; amending s. 400.605, F.S.; requiring
34 the Department of Elderly Affairs, in consultation
35 with the agency, to adopt by rule procedures for the
36 implementation of POLST forms in hospice care;
37 amending s. 400.6095, F.S.; authorizing a hospice care
38 team to withhold or withdraw cardiopulmonary
39 resuscitation if a patient has a POLST form that
40 contains such an order; providing immunity from civil
41 and criminal liability to a provider for such actions;
42 providing that the absence of a POLST form does not
43 preclude a physician from withholding or withdrawing
44 cardiopulmonary resuscitation; amending s. 401.35,
45 F.S.; requiring the Department of Health to establish
46 circumstances and procedures for honoring a POLST
47 form; amending s. 401.45, F.S.; authorizing emergency
48 medical transportation providers to withhold or
49 withdraw cardiopulmonary resuscitation or other
50 medical interventions if a patient has a POLST form
51 that contains such an order; creating s. 401.46,
52 recognizing Physician Orders for Life Sustaining
53 Treatment (POLST) and establishing requirements for
54 the execution of POLST, establishing requirements for
55 POLST forms, amending s. 429.255, F.S.; authorizing
56 assisted living facility personnel to withhold or
57 withdraw cardiopulmonary resuscitation if a patient
58 has a POLST form that contains such an order;

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59 providing immunity from civil and criminal liability
60 to facility staff and facilities for such actions;
61 providing that the absence of a POLST form does not
62 preclude a physician from withholding or withdrawing
63 cardiopulmonary resuscitation; amending s. 429.73,
64 F.S.; requiring the Department of Elderly Affairs to
65 adopt rules for the implementation of POLST forms in
66 adult family-care homes; authorizing a provider of
67 such home to withhold or withdraw cardiopulmonary
68 resuscitation if a patient has a POLST form that
69 contains such an order; providing immunity from civil
70 and criminal liability to a provider for such actions;
71 amending s. 765.205, F.S.; requiring a health care
72 surrogate to provide written consent for a POLST form
73 under certain circumstances; amending s. 456.072,
74 F.S.; providing that a licensee may withhold or
75 withdraw cardiopulmonary resuscitation or the use of
76 an external defibrillator if presented with an order
77 not to resuscitate or a POLST; requiring the
78 Department of Health to adopt rules providing for the
79 implementation of such orders; providing immunity to
80 licensees for withholding or withholding
81 cardiopulmonary resuscitation or use of an automated
82 defibrillator pursuant to such orders; providing an
83 effective date.
84
85 Be It Enacted by the Legislature of the State of Florida:
86
87 Section 1. Section 408.064, Florida Statutes, is created to

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88 read:

89 408.064 Clearinghouse for compassionate and palliative care
90 plans; POLST form.—

91 (1) DEFINITIONS.—As used in this section, the term:

92 (a) "Advance directive" has the same meaning as in s.
93 765.101.

94 (b) "Compassionate and palliative care plan" or "plan"
95 means a collectively any end-of-life document or any medical
96 directive document recognized by this state and executed by a
97 resident of this state, including, but not limited to, an
98 advance directive, do-not-resuscitate order, physician order for
99 life-sustaining treatment (POLST), or health care surrogate
100 designation.

101 (c) "Department" means the Department of Health.

102 (d) "Do-not-resuscitate order" means an order issued
103 pursuant to s. 401.45(3).

104 (e) "End-stage condition" has the same meaning as in s.
105 765.101.

106 (f) "Physician order for life-sustaining treatment" means
107 an order issued pursuant to s. 401.46.

108 (3) INFORMATION CLEARINGHOUSE AND ESTABLISHMENT OF
109 ELECTRONIC DATABASE.—The agency shall act as a clearinghouse of
110 information on compassionate and palliative care plans, which
111 must be accessible to health care providers. The agency shall
112 develop and maintain as part of the clearinghouse a reliable and
113 secure database that allows the electronic submission, storage,
114 indexing, and retrieval of plans submitted by residents of this
115 state, which plans may be accessed by a resident's treating
116 health care provider. The agency shall consult with

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117 compassionate and palliative care providers, health care
118 facilities, and residents of this state as necessary and
119 appropriate to facilitate the development and implementation of
120 the database. The agency may subscribe to or otherwise
121 participate in a public or private clearinghouse, which may be
122 nationwide, to meet the requirements of this subsection. The
123 agency shall publish and disseminate to residents of this state
124 information regarding its role as a clearinghouse and the
125 availability of the database. The agency shall also provide
126 training to health care providers and health care facilities in
127 this state as to how to access plans through the database.
128 Section 2. Paragraph (l) of subsection (3) of section
129 395.1041, Florida Statutes, is amended to read:
130 395.1041 Access to emergency services and care.—
131 (3) EMERGENCY SERVICES; DISCRIMINATION; LIABILITY OF
132 FACILITY OR HEALTH CARE PERSONNEL.—
133 (l) Hospital personnel may withhold or withdraw
134 cardiopulmonary resuscitation if presented with an order not to
135 resuscitate executed pursuant to s. 401.45 or a physician order
136 for life-sustaining treatment (POLST) form executed pursuant to
137 s. 401.65 which contains an order not to resuscitate. Facility
138 staff and facilities shall not be subject to criminal
139 prosecution or civil liability, nor be considered to have
140 engaged in negligent or unprofessional conduct, for withholding
141 or withdrawing cardiopulmonary resuscitation pursuant to such an
142 order or POLST form. The absence of an order not to resuscitate
143 executed pursuant to s. 401.45 or a POLST form executed pursuant
144 to s. 401.46 does not preclude a physician from withholding or
145 withdrawing cardiopulmonary resuscitation as otherwise allowed

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146 ~~permitted~~ by law.
147 Section 3. Subsection (3) of section 400.142, Florida
148 Statutes, is amended to read:
149 400.142 Emergency medication kits; orders not to
150 resuscitate.—
151 (3) Facility staff may withhold or withdraw cardiopulmonary
152 resuscitation if presented with an order not to resuscitate
153 executed pursuant to s. 401.45 <u>or a physician order for life-</u>
154 <u>sustaining treatment (POLST) form executed pursuant to s. 401.46</u>
155 <u>which contains an order not to resuscitate</u>. Facility staff and
156 facilities are not subject to criminal prosecution or civil
157 liability, or considered to have engaged in negligent or
158 unprofessional conduct, for withholding or withdrawing
159 cardiopulmonary resuscitation pursuant to such <u>an</u> order <u>or POLST</u>
160 <u>form</u>. The absence of an order not to resuscitate executed
161 pursuant to s. 401.45 <u>or a POLST form executed pursuant to s.</u>
162 <u>401.46</u> does not preclude a physician from withholding or
163 withdrawing cardiopulmonary resuscitation as otherwise <u>allowed</u>
164 ~~permitted~~ by law.
165 Section 4. Section 400.487, Florida Statutes, is amended to
166 read:
167 400.487 Home health service agreements; physician's,
168 physician assistant's, and advanced registered nurse
169 practitioner's treatment orders; patient assessment;
170 establishment and review of plan of care; provision of services;
171 orders not to resuscitate<u>; physician orders for life-sustaining</u>
172 <u>treatment</u>.—
173 (1) Services provided by a home health agency must be
174 covered by an agreement between the home health agency and the

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175 patient or the patient's legal representative specifying the
176 home health services to be provided, the rates or charges for
177 services paid with private funds, and the sources of payment,
178 which may include Medicare, Medicaid, private insurance,
179 personal funds, or a combination thereof. A home health agency
180 providing skilled care must make an assessment of the patient's
181 needs within 48 hours after the start of services.
182 (2) If ~~When~~ required by ~~the provisions of~~ chapter 464; part
183 I, part III, or part V of chapter 468; or chapter 486, the
184 attending physician, physician assistant, or advanced registered
185 nurse practitioner, acting within his or her respective scope of
186 practice, shall establish treatment orders for a patient who is
187 to receive skilled care. The treatment orders must be signed by
188 the physician, physician assistant, or advanced registered nurse
189 practitioner before a claim for payment for the skilled services
190 is submitted by the home health agency. If the claim is
191 submitted to a managed care organization, the treatment orders
192 must be signed within the time allowed under the provider
193 agreement. The treatment orders shall be reviewed, as frequently
194 as the patient's illness requires, by the physician, physician
195 assistant, or advanced registered nurse practitioner in
196 consultation with the home health agency.
197 (3) A home health agency shall arrange for supervisory
198 visits by a registered nurse to the home of a patient receiving
199 home health aide services in accordance with the patient's
200 direction, approval, and agreement to pay the charge for the
201 visits.
202 (4) Each patient has the right to be informed of and to
203 participate in the planning of his or her care. Each patient

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204 must be provided, upon request, a copy of the plan of care
205 established and maintained for that patient by the home health
206 agency.
207 (5) If ~~When~~ nursing services are ordered, the home health
208 agency to which a patient has been admitted for care must
209 provide the initial admission visit, all service evaluation
210 visits, and the discharge visit by a direct employee. Services
211 provided by others under contractual arrangements to a home
212 health agency must be monitored and managed by the admitting
213 home health agency. The admitting home health agency is fully
214 responsible for ensuring that all care provided through its
215 employees or contract staff is delivered in accordance with this
216 part and applicable rules.
217 (6) The skilled care services provided by a home health
218 agency, directly or under contract, must be supervised and
219 coordinated in accordance with the plan of care.
220 (7) Home health agency personnel may withhold or withdraw
221 cardiopulmonary resuscitation if presented with an order not to
222 resuscitate executed pursuant to s. 401.45 or a physician order
223 for life-sustaining treatment (POLST) form executed pursuant to
224 s. 401.46 which contains an order not to resuscitate. The agency
225 shall adopt rules providing for the implementation of such
226 orders. Home health personnel and agencies shall not be subject
227 to criminal prosecution or civil liability, nor be considered to
228 have engaged in negligent or unprofessional conduct, for
229 withholding or withdrawing cardiopulmonary resuscitation
230 pursuant to such an order or POLST form and rules adopted by the
231 agency.
232 Section 5. Paragraph (e) of subsection (1) of section

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233 400.605, Florida Statutes, is amended to read:
234 400.605 Administration; forms; fees; rules; inspections;
235 fines.—
236 (1) The agency, in consultation with the department, may
237 adopt rules to administer the requirements of part II of chapter
238 408. The department, in consultation with the agency, shall by
239 rule establish minimum standards and procedures for a hospice
240 pursuant to this part. The rules must include:
241 (e) Procedures relating to the implementation of advance
242 ~~advanced~~ directives; physician orders for life-sustaining
243 treatment (POLST) forms executed pursuant to s. 401.46; and do-
244 not-resuscitate orders.
245 Section 6. Subsection (8) of section 400.6095, Florida
246 Statutes, is amended to read:
247 400.6095 Patient admission; assessment; plan of care;
248 discharge; death.—
249 (8) The hospice care team may withhold or withdraw
250 cardiopulmonary resuscitation if presented with an order not to
251 resuscitate executed pursuant to s. 401.45 or a physician order
252 for life-sustaining treatment (POLST) form executed pursuant to
253 s. 401.46 which contains an order not to resuscitate. The
254 department shall adopt rules providing for the implementation of
255 such orders. Hospice staff shall not be subject to criminal
256 prosecution or civil liability, nor be considered to have
257 engaged in negligent or unprofessional conduct, for withholding
258 or withdrawing cardiopulmonary resuscitation pursuant to such an
259 order or POLST form and applicable rules. The absence of an
260 order to resuscitate executed pursuant to s. 401.45 or a POLST
261 form executed pursuant to s. 401.46 does not preclude a

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262 physician from withholding or withdrawing cardiopulmonary
263 resuscitation as otherwise allowed ~~permitted~~ by law.
264 Section 7. Subsection (4) of section 401.35, Florida
265 Statutes, is amended to read:
266 401.35 Rules.—The department shall adopt rules, including
267 definitions of terms, necessary to carry out the purposes of
268 this part.
269 (4) The rules must establish circumstances and procedures
270 under which emergency medical technicians and paramedics may
271 honor orders by the patient's physician not to resuscitate
272 executed pursuant to 401.45 or under a physician order for life-
273 sustaining treatment (POLST) form executed pursuant to s. 401.46
274 which contains an order not to resuscitate and the documentation
275 and reporting requirements for handling such requests.
276 Section 8. Paragraph (a) of subsection (3) of section
277 401.45, Florida Statutes, is amended to read:
278 401.45 Denial of emergency treatment; civil liability.—
279 (3)(a) Resuscitation or other forms of medical intervention
280 may be withheld or withdrawn from a patient by an emergency
281 medical technician, ~~or~~ paramedic, or other health care
282 professional if he or she is presented with evidence of a
283 Physician Order for Life-Sustaining Treatment (POLST) as defined
284 in s. 401.46 or an order not to resuscitate by the patient's
285 physician ~~is presented to the emergency medical technician or~~
286 ~~paramedic~~. To be valid, an order not to resuscitate~~, to be~~
287 ~~valid,~~ must be on the form adopted by rule of the department.
288 The form must be signed by the patient's physician and by the
289 patient or, if the patient is incapacitated, the patient's
290 health care surrogate or proxy as provided in chapter 765,

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291 court-appointed guardian as provided in chapter 744, or attorney
292 in fact under a durable power of attorney as provided in chapter
293 709. The court-appointed guardian or attorney in fact must have
294 been delegated authority to make health care decisions on behalf
295 of the patient.
296 Section 9. s. 401.46, Florida Statutes, is created to read:
297 401.46 Physician Orders for Life Sustaining Treatment.-
298 (1) POLST form. Physician Orders for Life Sustaining
299 Treatment ("POLST") must be on the form adopted by rule of the
300 department which includes the statutory requirements and must be
301 executed as required by this section.
302 (a) A POLST form may only be utilized by or for a patient
303 determined by the patient's physician to have an end-stage
304 condition as defined in s. 765.101(4) or a patient, who, in the
305 good faith clinical judgement of his or her physician, is
306 suffering from at least one terminal medical condition that will
307 likely result in the death of the patient within one year.
308 (b) A POLST form must be signed by the patient's
309 physician. The POLST form must contain a certification by the
310 physician signing the POLST that the physician consulted with
311 the patient signing the POLST, or if the patient is incapable of
312 making health care decisions for herself or himself or is
313 incapacitated, with the patient's health care surrogate, proxy,
314 court appointed guardian or attorney-in-fact permitted to
315 execute a POLST form on behalf of the patient as provided in
316 section (c), about the use of and the effect of removal,
317 refusal, or of life sustaining medical treatment and the
318 physician signing the POLST must indicate the medical
319 circumstance justifying the execution of the POLST.

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320 (c) A POLST form must also be signed by the patient, or if
321 the patient is incapable of making health care decisions for
322 herself or himself or is incapacitated, by the patient's
323 surrogate or proxy, as appointed or provided in Chapter 765, or
324 if none, by the patient's court appointed guardian if the
325 guardian has such authority, as appointed or provided in Chapter
326 744, or if none, by the patient's attorney-in-fact if the
327 patient has delegated the power to make all health care
328 decisions to the attorney-in-fact, as appointed or provided in
329 Chapter 709; if a POLST form is signed by a health care
330 surrogate, proxy, court appointed guardian or attorney-in-fact,
331 the patient's physician must certify the basis for the authority
332 of the appropriate individual to execute the POLST form on
333 behalf of the patient including compliance with the relevant
334 statutory provisions of Chapter 765, Chapter 744 or Chapter 709.
335 (d) Any subsequently executed POLST form by the patient
336 shall revoke any prior executed POLST form by the patient.
337 (e) A patient's health care surrogate, proxy, court
338 appointed guardian or attorney-in-fact permitted to execute a
339 POLST form on behalf of a patient as provided in section (b) may
340 subsequently revoke a POLST form for a patient, unless a valid
341 advance directive or prior POLST form executed by the patient
342 expressly forbids changes by a surrogate, proxy, guardian or
343 attorney-in-fact.
344 (f) An individual acting in good faith as surrogate,
345 proxy, court appointed guardian, or attorney-in-fact under this
346 act shall not be subject to civil liability or criminal
347 prosecution for executing a POLST form as provided in this act
348 on behalf of a patient who lacks capacity.

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349 (g) The patient's family, the health care facility, or the
350 attending physician, or any other interested person who may
351 reasonably be expected to be directly affected by the decisions
352 as reflected on a POLST form of a surrogate, proxy, court
353 appointed guardian or attorney-in-fact permitted to execute a
354 POLST form on behalf of the patient as provided in section (b)
355 may seek expedited judicial intervention pursuant to Rule 5.900
356 of the Florida Probate Rules, if that person believes:
357 (i) The decisions of the surrogate, proxy, court appointed
358 guardian, or attorney-in-fact permitted to execute a POLST form
359 on behalf of a patient as provided in section (b) is not in
360 accord with the patient's known desires or the provisions of
361 chapter 765, chapter 744, or chapter 709;
362 (ii) The advance directive or POLST form regarding the
363 patients' wishes regarding life sustaining treatment is
364 ambiguous or the patient has changed his or her mind after
365 execution of the advance directive or POLST form;
366 (iii) The surrogate, proxy, or attorney-in-fact
367 permitted to execute a POLST form on behalf of a patient as
368 provided in section (b) was improperly designated or appointed,
369 or the designation of the surrogate, proxy or attorney-in-fact
370 is no longer effective or has been removed;
371 (iv) The surrogate, proxy, court appointed guardian, or
372 attorney-in-fact permitted to execute a POLST form on behalf of
373 a patient as provided in section (b) has failed to discharge her
374 or his duties, or incapacity or illness renders her or him
375 incapable of discharging those duties;
376 (v) The surrogate, proxy, court appointed guardian, or
377 attorney-in-fact permitted to execute a POLST form on behalf of

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378 a patient as provided in section (b) has abused her or his
379 powers; or
380 (vi) The patient has sufficient capacity to make her or his
381 own health care decisions.
382 (2) Duties of the Department. The department shall
383 implement the POLST program.
384 (a) The department shall promulgate rules implementing
385 this section and prescribing a standardized POLST form, subject
386 to the following:
387 (i) The rules shall contain protocols for the
388 implementation of a standardized POLST form, which shall be
389 available in electronic format on the department website for
390 downloading by patients and health care providers;
391 (ii) The department in formulating rules and forms shall
392 consult with health care professional licensing groups, provider
393 advocacy groups, patient advocacy groups, medical ethicists and
394 other appropriate stakeholders;
395 (iii) To the extent possible, the standardized POLST form
396 and protocols shall be consistent with use across all health
397 care settings and shall reflect nationally recognized standards
398 for end-of-life care. The form shall include: (A) The
399 patient's directives concerning (1) the administration of life
400 sustaining treatment, (2) the administration of measures to
401 relieve pain and suffering through the use of medication by any
402 route, wound care and related measures, and (3) the ability to
403 transfer the patient to a setting able to provide comfort care,
404 such as a hospice or palliative care; (B) The dated signature of
405 the patient or, if applicable, the patient's surrogate, proxy,
406 court appointed guardian, or attorney in fact permitted to

407 execute a POLST form on behalf of a patient as provided in
408 section 1(b); (C) The name, address and telephone number of the
409 patient's primary health care provider; (D) The dated signature
410 of the primary health care provider entering medical orders on
411 the POLST form, a certification by the signing provider that he
412 or she discussed the patient's care goals and preferences as
413 reflected on the POLST form with the patient or the patient's
414 surrogate, proxy, court appointed guardian or attorney-in-fact
415 permitted to execute a POLST form on behalf of a patient as
416 provided in section 1(b); and (E) a statement in a prominent
417 manner that if the patient has health care decision-making
418 capacity, the patient's presently expressed health-care
419 treatment decisions shall guide such patient's treatment, even
420 if in conflict with the written POLST form. The form shall not
421 include a direction regarding hydration, as decisions to supply
422 or withhold hydration may not be made on the POLST form, but may
423 only be made in the context of a patient's actual condition at
424 the time of such a decision.
425 (b) The department in implementing this article shall:
426 (i) Recommend a uniform method of identifying persons who
427 have executed a POLST form and providing health care providers
428 with contact information of the person's primary health care
429 provider;
430 (ii) Oversee the education of health care providers
431 regarding the POLST program under the department's licensing
432 authority;
433 (iii) Develop a process for collecting provider feedback to
434 enable periodic redesign of the POLST form in accordance with
435 current health care best practices.

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436 (c) The department shall adopt and enforce all rules
437 necessary to implement this section.
438 (3) Duty to comply with POLST; duty to comply with out-of-
439 state POLST; and limited immunity.
440 (a) Emergency medical service personnel, health care
441 providers, physicians and health care facilities, absent actual
442 notice of revocation or termination of a POLST form, may comply
443 with the orders on a person's POLST form, without regard to
444 whether the POLST ordering provider is on the medical staff of
445 the treating health care facility. If the POLST ordering
446 provider is not on the medical staff of the treating health care
447 facility, the POLST form shall be reviewed by the treating
448 health care professional at the receiving facility with the
449 patient (or the patient's health care surrogate, proxy, court
450 appointed guardian, or attorney-in-fact permitted to execute a
451 POLST form on behalf of a patient as provided in section 1(b))
452 and made into a medical order at the receiving facility unless
453 the POLST form is replaced or voided as provided in this act.
454 (b) A POLST form from another state, absent actual notice
455 of revocation or termination, shall be presumed to be valid and
456 shall be effective in this state and shall be complied with to
457 the same extent as a POLST form executed in this state.
458 (c) Any licensee, physician, medical director, or emergency
459 medical technician or paramedic who acts in good faith on a
460 POLST is not subject to criminal prosecution or civil liability,
461 and has not engaged in negligent or unprofessional conduct, as a
462 result of carrying out the directives of the POLST made in
463 accordance with the provisions of this section and rules adopted
464 by the department.

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465 (4) Patient Transfer; POLST transferability. If a patient
466 whose goals and preferences for care have been entered on a
467 valid POLST form is transferred from one (1) health care
468 facility to another, the health care facility initiating the
469 transfer shall communicate the existence of the POLST form to
470 the receiving facility prior to the transfer. The POLST form
471 shall accompany the individual to the receiving facility and
472 shall remain in effect. The POLST form shall be reviewed by the
473 treating health care professional at the receiving facility with
474 the patient (or the patient's health care surrogate, proxy,
475 court appointed guardian or attorney-in-fact permitted to
476 execute a POLST form on behalf of a patient as provided in
477 section 1(b)) and made into a medical order at the receiving
478 facility unless the POLST form is replaced or voided as provided
479 in this act.
480 (5) POLST conflicts with other advance directives. To the
481 extent that the orders on a POLST form described in this section
482 conflict with the provisions of an advance directive made under
483 chapter 765, the most recent of those documents (a POLST or an
484 advance directive) signed by the patient takes precedence,
485 unless the patient is incapacitated to make such medical
486 decisions and the patient's health care surrogate, proxy, court
487 appointed guardian or attorney-in-fact permitted to execute a
488 POLST form on behalf of a patient as provided in section 1(b)
489 believes it is consistent with the wishes of the patient to
490 alter the most recent of those documents, in which case the
491 patient's health care surrogate, proxy, court appointed guardian
492 or attorney-in-fact permitted to execute a POLST form on behalf
493 of a patient as provided in section 1(b) may amend or revoke a

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494 prior POLST form or execute a new POLST form, unless a valid
495 advance directive or prior POLST form executed by the patient
496 expressly forbids changes by a surrogate, proxy, guardian or
497 attorney-in-fact.
498 (6) POLST for minors. If medical orders on a POLST form
499 relate to a minor and direct that life sustaining treatment be
500 withheld from the minor, the order shall include a certification
501 by two (2) health care providers (in addition to the physician
502 executing the POLST) that, in their clinical judgment, an order
503 to withhold treatment is in the best interests of the minor.
504 Any POLST for a minor must also be signed by the minor's proxy,
505 natural guardian or court appointed guardian, and the patient's
506 physician must certify the basis for the authority of the
507 appropriate individual to execute the POLST form on behalf of
508 the patient including compliance with the relevant statutory
509 provisions of Chapter 765 or Chapter 744.
510 (7) POLST form may not be a prerequisite for services.
511 Facilities or providers shall not require a person to complete a
512 POLST form as a prerequisite or condition for the provision of
513 services or treatment. The execution of a POLST form must be a
514 voluntary decision.
515 (8) Presence or absence of POLST form; effect on life or
516 health insurance. An individual's execution of or refusal or
517 failure to execute a POLST form shall not affect, impair or
518 modify any contract of life or health insurance or annuity to
519 which the individual is a party, shall not be the basis for any
520 delay in issuing or refusing to issue an annuity or policy of
521 life or health insurance and shall not be the basis for any
522 increase or decrease in premium charged to the individual.

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523 (9) Revocation of POLST form.
524 (a) A POLST form may be revoked at any time by a patient
525 deemed to have capacity:
526 (i) By means of a signed, dated writing;
527 (ii) By means of the physical cancellation or destruction
528 of the POLST form by the patient or by another in the patient's
529 presence and at the patient's direction;
530 (iii) By means of an oral expression of intent to
531 revoke; or
532 (iv) By means of a subsequently executed POLST or advance
533 directive that is materially different from a previously
534 executed POLST or advance directive.
535 (b) A surrogate, proxy, court appointed guardian or
536 attorney-in-fact permitted to execute a POLST form on behalf of
537 a patient as provided in section 1(b) who created a POLST form
538 for a patient may revoke all or part of the POLST form at any
539 time in a writing signed by such surrogate, proxy, court
540 appointed guardian or attorney-in-fact.
541 (c) Any revocation of a POLST shall be promptly
542 communicated to the patient's primary health care provider,
543 primary physician and any health care facility at which the
544 patient is receiving care. Further, a health care professional,
545 surrogate, agent, proxy or guardian who is informed of an
546 amendment or revocation of a POLST shall promptly communicate
547 the fact of the revocation to the patient's primary care
548 physician, the current supervising health care professional and
549 any health care facility at which the patient is receiving care,
550 to the extent known to the surrogate, proxy, court appointed
551 guardian or attorney-in-fact.

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552 (d) Upon revocation, a POLST form shall be void.
553 (10) Effect of act on euthanasia; mercy killing;
554 construction of statute. Nothing is this section shall be
555 construed as condoning, authorizing or approving euthanasia or
556 mercy killing. In addition, the legislature does not intend that
557 this article be construed as permitting any affirmative or
558 deliberate act to end a person's life, except to permit natural
559 death as provided by this section.
560 Section 10.
561 Subsection (4) of section 429.255, Florida Statutes, is
562 amended to read:
563 429.255 Use of personnel; emergency care.—
564 (4) Facility staff may withhold or withdraw cardiopulmonary
565 resuscitation or the use of an automated external defibrillator
566 if presented with an order not to resuscitate executed pursuant
567 to s. 401.45 or a physician order for life-sustaining treatment
568 (POLST) form executed pursuant to s. 401.46 which contains an
569 order not to resuscitate. The department shall adopt rules
570 providing for the implementation of such orders. Facility staff
571 and facilities shall not be subject to criminal prosecution or
572 civil liability, nor be considered to have engaged in negligent
573 or unprofessional conduct, for withholding or withdrawing
574 cardiopulmonary resuscitation or use of an automated external
575 defibrillator pursuant to such an order or POLST form and rules
576 adopted by the department. The absence of an order to
577 resuscitate executed pursuant to s. 401.45 or a POLST form
578 executed pursuant to s. 401.46 does not preclude a physician
579 from withholding or withdrawing cardiopulmonary resuscitation or
580 use of an automated external defibrillator as otherwise allowed

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581 Section 110. Subsection (3) of section 429.73, Florida
582 Statutes, is amended to read:
583 429.73 Rules and standards relating to adult family-care
584 homes.—
585 (3) The department shall adopt rules providing for the
586 implementation of orders not to resuscitate and physician orders
587 for life-sustaining treatment (POLST) forms executed pursuant to
588 s. 401.46. The provider may withhold or withdraw cardiopulmonary
589 resuscitation if presented with an order not to resuscitate
590 executed pursuant to s. 401.45 or a POLST form executed pursuant
591 to s. 401.46 which contains an order not to resuscitate. The
592 provider is ~~shall~~ not ~~be~~ subject to criminal prosecution or
593 civil liability, and may not ~~nor~~ be considered to have engaged
594 in negligent or unprofessional conduct, for withholding or
595 withdrawing cardiopulmonary resuscitation pursuant to such
596 orders ~~an order~~ and applicable rules.
597 ~~-permitted~~ by law.
598 Section 12. Paragraph (c) of subsection (1) of section
599 765.205, Florida Statutes, is amended to read:
600 765.205 Responsibility of the surrogate.—
601 (1) The surrogate, in accordance with the principal's
602 instructions, unless such authority has been expressly limited
603 by the principal, shall:
604 (c) Provide written consent using an appropriate form
605 whenever consent is required, including a physician's order not
606 to resuscitate or a physician order for life-sustaining
607 treatment (POLST) form executed pursuant to s. 401.46.
608 Section 13. Subsections (7) and (8) of section 456.072,
609 Florida Statutes, are renumbered as subsections (8) and (9),

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610 respectively, and subsection (7) is added to that section, to
611 read:
612 456.072 Grounds for discipline; penalties; enforcement.—
613 (7) A licensee may withhold or withdraw cardiopulmonary
614 resuscitation or the use of an automated external defibrillator
615 if presented with an order not to resuscitate executed pursuant
616 to s. 401.45 or a physician order for life-sustaining treatment
617 (POLST) form executed pursuant to s. 401.46 which contains an
618 order not to resuscitate. The department shall adopt rules
619 providing for the implementation of such orders. Licensees shall
620 not be subject to criminal prosecution or civil liability, nor
621 be considered to have engaged in negligent or unprofessional
622 conduct, for withholding or withdrawing cardiopulmonary
623 resuscitation or use of an automated external defibrillator or
624 otherwise carrying out the orders in a POLST form pursuant to
625 such an order or POLST form and rules adopted by the department.
626 The absence of an order to resuscitate executed pursuant to s.
627 401.45 or a POLST form executed pursuant to s. 401.46 does not
628 preclude a licensee from withholding or withdrawing
629 cardiopulmonary resuscitation or use of an automated external
630 defibrillator or otherwise carrying out medical orders as
631 otherwise allowed by law.
632 Section 13. This act shall take effect January 1, 2017.
633

Michael J. Gelfand

From: Francine A Walker <fwalker@flabar.org> on behalf of President <President@flabar.org>
Sent: Monday, October 26, 2015 1:43 PM
To: Florida Bar Section and Committee and Voluntary Bar Association Leaders
Cc: Voluntary Bar Executive Directors
Subject: Important Message from President Ramón Abadin: FL Bar Member Comment Sought on Daubert/Frye; Your Assistance is Requested

Section, Committee and Voluntary Bar Association leaders:

A matter of great importance to you and to the citizens of Florida is currently being considered by the Board of Governors that I want to inform you about and ask for your engagement and assistance in soliciting comments from your members for consideration by the Board before our vote scheduled on December 4, 2015. The Board is required to consider and vote on all procedural rule changes before those changes are submitted to the Florida Supreme Court.

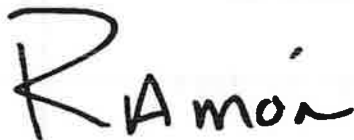
The matter involves Chapter 2013-107, Laws of Florida, which amended two evidentiary statutes regarding expert witness testimony. In 2013, the Florida Legislature enacted amendments to §§ 90.702 and 90.704, *Florida Statutes*, with the intent to adopt the *Daubert* standard. The Florida Supreme Court specifically follows the *Frye* standard. (*See Bundy v. State*, 471 So. 2d 9 (Fla. 1985); *Hadden v. State*, 690 So. 2d 573 (Fla. 1997).)

At the Board's most recent meeting, two Code and Rules of Evidence Committee members -- one in support of Daubert and one in support of Frye -- made presentations regarding the matter. The Committee's recommendation, following a 16-14 vote, was in support of retaining the *Frye* standard and that the Florida Supreme Court not adopt into the evidence rules of procedure the law changing the standards for qualifying expert witnesses from *Frye* to the *Daubert* standard. The Committee presented this recommendation with two others it intends to include within its three-year cycle report due February 1, 2016. The Board is required to consider and vote no later December 15, 2015, on this procedural rule change before those changes are submitted to the Florida Supreme Court.

The Board tabled the matter until its December 4, 2015, meeting in order to have more time to receive members' comments and to review the committee's findings. This webpage has been set up to provide information and receive all member comments via the form linked below. **I encourage you to become fully informed on this matter, submit comments and respond to this question: Should *Florida Statutes* §90.702 and §90.704, as amended by Chapter 2013-107, adopting the *Daubert* standard, be adopted as rules of evidentiary procedure, to the extent they are procedural?**

Please share your views with the Board of Governors using the comment form below by November 15, 2015 at 11:59 p.m. in order for all comments to be compiled and disseminated to the members of the Board before the December 4 meeting.

Thank you in advance for your assistance. We appreciate your engagement in this important issue.



Ramón A. Abadin

NOTE: Your comments are solely for review by The Florida Bar Board of Governors. They are not in response to an official notice and will not be forwarded to the Florida Supreme Court or to The Florida Bar's Code and Rules of Evidence Committee. The Committee published the recommendation to seek comments from July 15 to August 15, 2015; that comment period is now closed and those comments have been reviewed by the Committee. The Supreme Court will publish an invitation to comment subsequent to the filing by the Committee with the Board of Governors' vote. However, your comments received by The Florida Bar Board of Governors will be maintained as public record pursuant to Florida Law and/or Rules of the Supreme Court of Florida.