BRING TO MEETING

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

Executive Council Meeting

AGENDA

The Breakers
One South County Road
Palm Beach, FL 33480

Saturday, July 27, 2013
10:00 a.m.

BRING THIS AGENDA TO THE MEETING

Real Property, Probate and Trust Law Section
Executive Council Meeting
July 27, 2013
The Breakers – Palm Beach, FL

AGENDA

I. **Presiding** — *Margaret Ann Rolando, Chair*

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

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

Motion to Approve Minutes of May 25, 2013, Meeting in St. Pete **pp. 1 - 33**

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

1. Recognition of guests
2. Introduction and comments from sponsors of Executive Council lunch (The Florida Bar Foundation and U.S. Trust)
3. Acknowledgement of Section sponsors **pp. 34 - 36**
4. Recognition of Legislative Update Committee and Legislative Committee
5. 2013 – 2014 RPPTL Section Executive Council Meeting Schedule **pp. 37**
6. Schedule of events for Executive Council Meeting in Lisbon, Portugal, September 18-22, 2013 **pp. 38 - 40**
7. Hotel reservations and charges for events
8. Notice of RPPTL Section's Intent to File Brief in Supreme Court in Response to Proposed Advisory Opinion Filed with Court by TFB Standing Committee on the Unlicensed Practice of Law
9. Executive Committee's approval of RPPTL Section's position in Fourth District Court of Appeals case of *Ross G. Stone, Appellant v. Nancy Stone and Alma Stone, Appellees,* Case No. 4D11-4541

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

2014 – 2015 RPPTL Section Executive Council Meeting Schedule.**pp. 41**

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

VII. **President of The Florida Bar's Report** — *Eugene Pettis [invited]*

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

2012-13 Monthly June Report Summary. **pp. 42 - 43**

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

X. **CLE Seminar Coordination Report** — CLE Seminar Coordination – Robert Freedman (Real Property) and Tae K. Bronner (Probate & Trust), Co-Chairs **pp. 44 - 45.**

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

Action Items

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

Motions to adopt as legislative positions of the Section the amendment of F.S. 733.808(4) (death benefits; disposition of proceeds) and F.S. 736.05053(1) (Trustee's duty to pay expenses and obligations of settlor's estate) to clarify that a waiver of the protection from creditors' claims afforded to certain death benefits payable to trusts must be clear and specific, and that a general "pay all claims from the assets of my revocable trust" type waiver is insufficient to waive the statutory protections; to find that such legislative positions are within the purview of the Section; and to expend funds in support of the positions. **pp. 46 - 55**

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

Motion to adopt as a legislative position of the Section to allow families to form and operate licensed and unlicensed family trust companies and to authorize out of state licensed family trust companies to operate in Florida, including the creation of new Chapter 659, Family Trust Companies; to find that such legislative position is within the purview of the Section; and to expend funds in support of the position. **pp. 56 - 156**

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

Motion to adopt as a legislative position of the Section the amendment of F.S. 710.123 (Termination of custodianship) to permit a donor, a holder of a power of appointment or a fiduciary acting pursuant to an authorizing provision in a will or a trust to provide in the instrument creating the custodianship that the custodianship not terminate until the minor attains the age of 25; to find that such legislative position is within the purview of the Section; and to expend funds in support of the position. **pp. 157 - 162**

4. **Guardianship, Durable Power of Attorney and Advance Directives** – Sean W. Kelley, Chair.

To adopt as legislative positions of the Section the amendment of F.S. 709.2201 (Authority of agent), 743.0645 (Other persons who may consent to medical care or treatment of a minor), and F.S. Chapter 765 (Health Care Advance Directives) to provide a competent adult with greater protection in designating individuals to make medical decisions and to allow a parent, legal custodian or legal guardian of a minor the ability to designate a competent adult to serve as the minor's health care surrogate when the parents, legal custodian or legal guardian of the minor cannot be timely contacted by the health care provider; to find that such legislative positions are within the purview of the Section; and to expend funds in support of the positions. **pp. 163 - 228**

5. **Trust Law Committee** – Shane Kelley, Chair

To adopt as a legislative position of the Section an amendment to F.S. 736.1106 (Antilapse; survivorship with respect to future interests under terms of intervivos and testamentary trusts; substitute takers) to make the Trust Code's antilapse provisions consistent with the Probate Code's antilapse provisions regarding the treatment of specific devises to certain persons who do not survive the settlor of a revocable trust or the testator of a testamentary trust; to find that such legislative position is within the purview of the Section; and to expend funds in support of the position. **pp. 229 - 238**

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

Action Items:

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

Motion to adopt as a legislative position of the Section the correction of inadvertent impact of the 2010 amendment to s. 712.06, F.S. requiring the clerk of the court to mail a copy of notice of preservation pursuant to Marketable Record Title Act or requiring publishing of a copy of the notice of preservation when preserving a covenant or restriction; to find that such legislative position is within the purview of the Section; and to expend funds in support of the position. **pp. 239 - 244**

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

Motion to adopt as a legislative position of the Section a modification of the definition of bulk buyer, and removal of the "sunset" termination date, in Part VII of Chapter 718; to find that such legislative position is within the purview of the Section; and to expend funds in support of the position. **pp. 245 - 249**

Information Item:

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

In re: Activities of Community Association Managers, Supreme Court of Florida Case No. SC13-889. Submission of Brief Regarding Proposed Advisory Opinion, FAO #2012-2, Activities of Community Association Managers.

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

Action Item:

1. **Legislation Committee** – Robert Swaine and William T. Hennessey, III (Probate and Trust), Co-Chairs

Motion to approve a proposed contract and addendum to contract between the Section and Peter M. Dunbar of the law firm of Pennington, P.A. for the rendering of legislative consulting services to the Section from September 1, 2013 to August 31, 2015, as set forth in the materials attached. **pp. 250 - 259**

Information Items:

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

Report on the status of the Section's efforts to secure the issuance of an ethics opinion from The Florida Bar's Professional Ethics Committee which would confirm the Section's existing position (as enunciated in the Professional Ethics Committee's Advisory Opinion 93-5 and mandated in F.S. §626.8473(8)) that an attorney may continue to permit a title underwriter to audit a special trust account used exclusively for transactions in which the attorney acts as a title or real estate settlement agent without obtaining informed client consent pursuant to Exception (c)(1) to Rule 4-1.6 (which permits an attorney to reveal information to the extent reasonably necessary to serve the client's interests). **pp. 260 - 334**

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

Report on actions of the Executive Committee in connection with the Fourth District Court of Appeals case of *Ross G. Stone, Appellant v. Nancy Stone and Alma Stone, Appellees*, Case No. 4D11-4541:

A. By order of the Fourth District Court of Appeals dated June 14, 2013, the Section was requested to file an *amicus* brief on the following question of first impression:

> "Whether residential property owned by an irrevocable Qualified Personal Residence Trust Agreement (QPRT) at the time of death of the Grantor is subject to Florida Constitutional and statutory homestead devise restrictions where the QPRT provisions provide that the assets of the QPRT will revert back to the Grantor's estate to pass by devise under the Grantor's will if the Grantor dies before the expiration of the QPRT term."

On June 24, 2013, the Executive Committee met telephonically and took the following

actions:

(1) Approved the filing of an *amicus* brief in response to the Court's request.

(2) Authorized Wm. Fletcher Belcher, as Section Chair, to appoint an advisory committee to advise the Executive Committee as to the appropriate content of the *amicus* brief to be filed. The members of the advisory committee appointed were Charles Nash, Patricia Jones, Silvia Rojas, Jeffrey Goethe and Richard Gans. Tae Kelley Bronner was also appointed, but declined to participate due to a potential conflict of interest.

B. After receiving the recommendations of the advisory committee, the Executive Committee met telephonically on July 9, 2013 and unanimously approved the following motion:

To approve, as the positions of the Section with respect to the content of the Section's amicus brief to be filed in the 4th DCA *Stone* case, the following:

(1) In response to the question asked of the Section by the Fourth District Court of Appeal in its June 14, 2013 order:

If a Grantor and his or her spouse convey homestead property to a Qualified Personal Residence Trust ("QPRT"), and the QPRT provisions provide that the assets of the QPRT will revert back to the Grantor's estate, to pass by devise under the Grantor's will if the Grantor dies before the expiration of the QPRT term, and, if, as was the case in the Stone case, the Grantor dies before expiration of the QPRT term, then the disposition of the residence through the Grantor's estate is subject to the constitutional restrictions on devise of homestead. The rationale for this position is that the Grantor retained full control over the disposition of the QPRT assets until his death during the QPRT term.

(2) In response to the second issue raised by Fletch Belcher in his charge to the advisory committee as to whether a spouse's joinder in the deed to the QPRT waives homestead rights when the deed contains no language expressly acknowledging the waiver of homestead rights:

The mere joinder by a spouse in an instrument wherein his or her spouse ("Grantor") conveys homestead property to a Qualified Personal Residence Trust ("QPRT") or similar arrangement, where the terms of the QPRT or similar arrangement provide that the homestead property which is the subject of the conveyance is to be distributed to the Grantor's estate upon the death of the Grantor, and, where the property is, in fact, distributed to the Grantor's estate upon the Grantor's death, does not in and of itself constitute a waiver of the spouse's homestead rights in that property under the Florida Constitution unless the instrument contains express language waiving those rights.

(3) The Amicus Committee of the Section is requested to prepare an

amicus brief in the *Stone* case consistent with these positions. **pp. 335 - 355**

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

Report on the recent Florida Supreme Court's approval of a Code for Resolving Professionalism Complaints based on a recommendation from its Commission on Professionalism. **pp. 356 - 360**

XIV. Probate and Trust Law Division Committee Reports — *Deborah P. Goodall, 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 Brennan, Chair; Sancha Brennan Whynot, Sean W. Kelley and Charles F. Robinson, Co-Vice Chairs

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

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

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

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

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

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

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

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

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

12. **Guardianship, Power of Attorney and Advanced Directives** – Sean W.

Kelley, Chair; Seth A. Marmor, Tattiana Brenes-Stahl, Cynthia Fallon and David Brennan, Co-Vice Chairs

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

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

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

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

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

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

19. **Probate Law and Procedure** – John C. Moran, Chair; Sarah S. Butters, Michael Travis Hayes and Marsha G. Madorsky, Co-Vice Chairs

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

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

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

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

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

3. **Condominium and Planned Development** – Steven H. Mezer, Chair; Jane Cornett, Christopher Davies and Lisa Van Dien, Co-Vice Chairs.

4. **Construction Law** – Hardy Roberts, Chair; Lisa Colon Heron, Scott Pence and Lee Weintraub, Co-Vice Chairs.

5. **Construction Law Certification Review Course** – Lee Weintraub, Chair; Bruce Alexander, Deborah Mastin and Bryan Rendzio, Co-Vice Chairs.

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

7. **Development & Green Building** – Anne Pollack, Chair; Mike Bedke, Vinette Godelia, and Neil Shoter, Co-Vice Chairs.

8. **Landlord and Tenant** – Lloyd Granet, Chair; Rick Eckhard, Vice Chair.

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

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

11. **Property & Liability Insurance/Suretyship** – W. Cary Wright, Chair; Fred Dudley and Michael Meyer, Co-Vice Chairs.

12. **Real Estate Certification Review Course** – Raul Ballaga, Chair; Kip Thornton and Jennifer Tobin, Co-Vice Chairs.

13. **Real Estate Structures and Taxation** – Wilhelmina Kightlinger, Chair; Cristin C. Keane and Salome Zikakis, Co-Vice Chairs.

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

15. **Real Property Litigation** – Marty Awerbach, Chair; Manny Farach and Susan Spurgeon, Co-Vice Chairs.

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

17. **Residential Real Estate and Industry Liaison** – Frederick W. Jones, Chair; Deborah Boyd and E. Ralph Tirabassi, Co-Vice Chairs.

18. **Title Insurance and Title Insurance Liaison** – Kristopher Fernandez, Chair; Raul Ballaga and Julie Horstkamp, Co-Vice Chairs.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

13. **Legislative Update (2013)** – Stuart H. Altman, Chair; Charles I. Nash, R. James Robbins and Stacy Kalmanson, Co-Vice Chairs

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

15. **Liaison with:**

    a. **American Bar Association (ABA)** – Edward F. Koren and Julius J. Zschau
    b. **Board of Legal Specialization and Education (BLSE)** – Raul P. Ballaga, David M. Silberstein and Deborah L. Russell
    c. **Clerks of Circuit Court** – Laird A. Lile and William Theodore (Ted) Conner
    d. **FLEA / FLSSI** – David C. Brennan, John Arthur Jones and Roland "Chip" Waller
    e. **Florida Bankers Association** – Mark T. Middlebrook

f. **Judiciary** – Judge Linda R. Allan, Judge Melvin B. Grossman, Judge Hugh D. Hayes, Judge Claudia Rickert Isom, Judge Maria M. Korvick, Judge Lauren Laughlin, Judge Celeste H. Muir, Judge Robert Pleus, Jr., Judge Richard J. Suarez, Judge Morris Silberman, Judge Patricia V. Thomas and Judge Walter L. Schafer, Jr.
g. **Out of State Members** – Michael P. Stafford and John E. Fitzgerald, Jr.
h. **TFB Board of Governors** – Andrew Sasso
i. **TFB Business Law Section** – Gwynne A. Young
j. **TFB CLE Committee** – Robert S. Freedman
k. **TFB Council of Sections** – Margaret A. Rolando and Michael Dribin
l. **TFB Pro Bono Committee** – Tasha K. Pepper-Dickinson

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

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

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

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

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

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

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

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

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

25. **Sponsor Coordination** – Kristen M. Lynch and Wilhelmina F. Kightlinger, Co-

Chairs; J. Michael Swaine, Adele I. Stone, Deborah L. Russell, W. Cary Wright and Benjamin F. Diamond, Co-Vice Chairs

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

XVII. Adjourn

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

EXECUTIVE COUNCIL MEETING

Saturday, May 25, 2013
Vinoy Hotel, St. Petersburg, Florida

I. **Call to Order** – *William Fletcher Belcher, Chair.*

The meeting was held in the Majestic Ballrooms 1-2-3 at the Renaissance Vinoy Hotel in St. Petersburg, Florida. Mr. William Fletcher Belcher called the Executive Council meeting to order at 10:19am.

II. **Attendance** – *Deborah Packer Goodall, Secretary.*

Deborah Goodall reminded members that the attendance roster was circulating to be initialed by Council members in attendance at the meeting.

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

III. **Minutes of Previous Meeting** – *Deborah Packer Goodall, Secretary.*

Ms. Goodall moved:

To approve the Minutes of the Executive Council Meeting occurring on Saturday February 9, 2013 at the First District Court of Appeal in Tallahassee appearing at page 1 of the Agenda Materials [1].

The Motion was approved unanimously.

IV. **Chair's Report** – *William Fletcher Belcher, Chair*

Mr. Belcher introduced some special guests present at our meeting: Karen Rushing, Clerk of Court for Sarasota County, Second DCA Judge Morris Silberman, and Board of Governors member from Palm Beach County, David Prather. Ms. Rushing spoke briefly and expressed appreciation for the help from members of the Bar working on the e-portal authority and she invited anyone with concerns about clerks to speak with her. Mr. Belcher also introduced our own distinguished guests – Gwynne Young, President of the Florida Bar, and our Board of Governors members: Laird Lile, Sandy Diamond and Andy Sasso. Mr. Belcher also recognized and thanked the Judges who attend our meetings and recognized those present today: Judge

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

Thomas, Judge Grossman, Judge Muir, Judge Korvick, and Judge Hayes. Mr. Belcher expressed appreciation for the sacrifices that the Judges make to join us and encouraged their continued participation.

Mr. Belcher introduced the two sponsors of the Executive Council lunch – The Florida Bar Foundation and U.S. Trust. First, Mr. Belcher introduced Drew O'Malley, former president of the Florida Bar Foundation, to speak on behalf of the Foundation. Mr. O'Malley recognized Jane Curran, the Executive Director of the Foundation for her assistance in preparing comments to share with the Section. Ms. Curran had been present at the Foundation's booth at the Convention. Mr. O'Malley expressed sincere gratitude to the Section for the financial assistance given to the Foundation during this difficult financial time. Mr. O'Malley explained that the decline in IOLTA revenue from $42M approximately 5-7 years ago to $5M currently because of the low interest rates had been very challenging for the Foundation. Mr. O'Malley reported that the Section made contributions to the Foundation by in the form of waivers of exhibitor fees at two of our meetings each year, refunds of past sponsorship fees and approximately $20,000 of personal contributions of our Section members. Mr. O'Malley estimated that the total benefit to the Foundation from the Section was nearly $70,000 that was used as a grant to Children's Legal Services. Mr. O'Malley reminded everyone to keep a watch out for the Annual Bar Fee Statement scheduled to arrive next week. Members can make a contribution to the Foundation for Children's Legal Services. Mr. O'Malley advised us that 100% of the contribution goes to fund grants for local legal services organizations to fund children's legal services.

Mr. Belcher introduced Stacey Cole from U.S. Trust and she thanked the Section for allowing U.S. Trust the privilege of sponsoring. Ms. Cole stated that she was proud of U.S. Trust for its continued support of our Section and that she appreciated the opportunity to attend the committee meetings and witness the good work done by Section members.

Mr. Belcher also recognized and thanked our Sections General Sponsors:

The following sponsors were recognized and thanked for their support:

Attorneys' Title Fund Services, LLC – Ted Conner
BMO Private Bank – Joan Kayser
Fidelity National Title Group – Pat Hancock
First American Title Insurance Company - Alan McCall/Deborah Boyd
JP Morgan – Carlos Batlle and Alyssa Feder
Management Planning, Inc. – Roy Meyers and Joe Gitto
Old Republic National Title Insurance Company – Jim Russick
Regions Private Wealth Management – Margaret Palmer
SRR – Garry Marshall
The Florida Bar Foundation – Jane Curran
U.S. Trust – Stacey Cole
Wells Fargo Private Bank – Mark Middlebrook/George Lange/Alex Hamrick
Wright Private Asset Management, LLC – Diane Timpany

The following Friends of the Section were recognized and thanked for their support:

Business Valuation Analysts, LLC – Tim Bronza
Guardian Trust – Ashley Gonnelli
iBeria Wealth Advisors – Hector Sikes)
Simplifile – Pat Sponem

Mr. Belcher also recognized and thanked Guardian Trust for stepping up to the plate and sponsoring the Yankees/Rays game this afternoon.

Mr. Belcher introduced the initial debut of the RPPTL Section video. The membership committee was responsible for the production of the video. Mr. Belcher recognized that there were many people who contributed to the project and although he especially thanked Mike Bedke, Phil Bauman and Navin Pasem. The first section of the video was played for the audience.

Mr. Belcher re-announced and congratulated the award recipients from last night's dinner.

Alex Hamrick - outstanding ALM of the Year.

Elaine Bucher - Rising Star – Probate

Steve Mezer - Rising Star – Real Estate

Silvia Rojas - John Arthur Jones Award

Rohan Kelley - Bill Belcher Award or this year, the long overdue award

Mr. Belcher stated that two other awards will be announced at the Breakers Meeting. Mr. Belcher took a moment to express thanks to Ms. Rojas for her exemplary work on ActionLine.

Mr. Goldman thanked Mr. Belcher and welcomed him to the back row upon the conclusion of his last meeting.

Mr. Belcher thanked Shane Kelly and Pat Jones, the co-chairs of the seminar that was held at the Convention for the extremely successful program. Mr. Belcher reported that there were over 200 paid attendees at the seminar which is a great accomplishment especially in these challenging CLE times. Mr. Belcher announced that we would be hearing more from Mr. Freedman about CLE.

Mr. Belcher expressed his appreciation to Pete Dunbar for his excellent presentation on his father's book and he thanked Yvonne Sherron for the idea.

Mr. Belcher noted a letter of thanks from Bill Haley's family which is included in the Agenda at page 45.

Mr. Belcher expressed his gratitude to the Convention Coordination Committee chaired by Katherine Frazier – and thanked Katherine as well as Tae Bronner, Debra Boje and Angela Adams. Mr. Belcher especially recognized Angela Adams for her hard work for the Section and for her help with the Convention.

Mr. Belcher discussed the creation of a new General Standing Committee titled the Integrity Awareness and Coordination Committee. The mission of the Committee will be to preserve the Section's reputation for integrity by promoting awareness and understanding of applicable conflict of interest principles and bylaw provisions among components of the Section, coordinating the uniform and consistent application of these principles and provisions within components of the Section, and by other appropriate means. The members will be announced shortly but Mr. Belcher is hoping that Jerry Aron and Sandy Diamond will be involved.

Mr. Belcher announced that the bus for the baseball game will depart from the front of the hotel at 3:00 pm, and to be on the field by 3:30 in time for the warm ups.

V. **Chair-Elect's Report** – *Margaret Rolando, Chair-Elect.*

Ms. Rolando reviewed the meeting schedule. She reported that there will be many activities planned for Lisbon and that the details will be circulated later this month. The Lisbon room block at the Four Seasons is sold out and Yvonne is maintaining a wait list or there is an overflow hotel nearby the Four Seasons. The schedule of future meetings is listed in the Agenda Materials beginning at page 46. Ms. Rolando noted that our hotel contracts provide that our group rates should be available 3 days before the event and 3 days after the event if rooms are available. Ms. Rolando asked that if anyone is having issues with the hotels, to please let Yvonne know.

VI. **Liaison with Board of Governors Report** – *Andy Sasso, Board of Governors Liaison.*

Mr. Sasso reported that he has been following the issue of the trust accounting audit and that he has had conferences with Elizabeth Tarbert of the Florida Bar Professional Ethics Committee. The PEC will be meeting in conjunction with the Florida Bar Convention in June and he will continue to monitor this issue.

Mr. Sasso reported that Mr. Belcher made a presentation to the Board of Governors and he noted that both President Young and President Elect Bettis stood to thank Mr. Belcher and the Section for the work that the Section did this year working with the Board of Governors and the Florida Bar.

Mr. Belcher announced that Mr. Sasso will be our Liaison with the Board of Governors next year as well.

VII. President's Report – *Gwynne Young, President of the Florida Bar*

Gwynne Young was present and again thanked the Section for the help and support on her journey which has been one of the most rewarding experiences of her lifetime. Ms. Young recognized that the relationship between our Section and the Florida Bar has never been better. Ms. Young noted that our Section is extremely well represented on the Board of Governors. As she prepares to conclude her year as President of the Florida Bar, Ms. Young noted the importance of continuing to have Section representatives on the Board of Governors and that together our Section and the Florida Bar can do great things. Ms. Young again expressed her sincere gratitude and noted that she is looking forward to returning to being a regular Section member attending our meetings. Ms. Rolando congratulated and thanked Ms. Young for an extraordinary year.

VIII. Treasurer's Report – *Andrew O'Malley, Treasurer.*

Mr. Andrew O'Malley reported that the financial summary through May 31, 2013 is located in the Agenda beginning at page 47. Mr. O'Malley commented that although we are showing a slight surplus currently, it is expected that the surplus will be absorbed once the final expenses through year end are reported at the end of the fiscal year in June. Once that occurs, we will likely break even or have a small deficit.

IX. At Large Members' Report - *Debra Boje, At Large Members' Director.*

Ms. Debra Boje reported on the work of the At Large Members and congratulated Alex Hamrick for the award that he received from Mr. Belcher last night. Ms. Boje thanked the ALMs for their hard work in communicating to the members in their areas. It has been suggested that the ALMs work with FLEA and FLSSI to attract legal assistant members. Ms. Boje offered the assistance of the ALMs to any committee that needs help and encouraged anyone with ideas to contact her.

X. Probate and Trust Law Division – *Michael A. Dribin, Probate and Trust Law Division Director.*

Ms. Rolando introduced Michael Dribin. Ms. Rolando explained that we will be changing slightly the order in which items are presented today. Ms. Rolando explained that we would first be considering the Action Items from the Probate and Trust Law Division, Real Property Division, General Standing Committees, and then there will be a presentation from the RPPTL Ethics Theater followed by Information Items and Committee Reports. *Secretary's Note: although the order of the presentations was changed, the minutes reflect the order as reported in the Agenda.*

Action Item.

Mr. Dribin began by explaining that the first two action items in the Agenda are being deferred at this time. Mr. Dribin explained that these action items from the Ad Hoc Committee on Creditors' Rights to Non-Exempt, Non-Probate Assets have been in the works for several

years but based upon communications and thoughts and input from members on the Real Property side, Angela Adams, the chair of the committee, has decided that she would like her committee to consider the points raised before these items are considered by the Executive Council. It is expected that they will be presented as an Action Item at the Breakers meeting in July.

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

Mr. Dribin introduced the one remaining Action Item coming from the Probate and Trust Litigation Committee. Mr. Dribin briefly summarized the proposed legislation relating to the subject of burden of proof in trust contests and advised that the materials for this proposal begin on page 85 of the Agenda. Mr. Dribin introduced the Committee chair, Thomas M. Karr. Mr. Karr further explained the proposal that contain two amendments. The first is to clarify that the burden of proof in a trust contest is on the contestant without imposing a burden on the proponent of the trust to prove due execution. The second amendment deals with clarifying that F.S.§733.107, a provision located in the Probate Code, is also applicable to any action where the presumption of undue influence arises including a trust contest notwithstanding the placement of the provision in the Probate Code.

Mr. Karr moved:

To adopt as proposed legislative positions the following: (a) the amendment of F.S. §736.0207 by the addition of a new subsection (1) to clarify that in an action to contest the validity or revocation of all or part of a trust, the contestant has the burden of proof to establish grounds for invalidity, and (b) the amendment of F.S.§733.107(2) to clarify and confirm its applicability in all circumstances in which the presumption of undue influence is established, including trust contests as well as challenges to inter vivos gifts; and finding that such legislative positions are within the purview of the RPPTL Section.

The motion passed unanimously.

Mr. Karr moved:

To expend Section funds in support of the proposal.

The motion passed unanimously.

Information Items.

1. Mr. Dribin reported on the creation of a new Elective Share Review committee that will be co-chaired by Lauren Detzel and Charlie Nash.

2. Mr. Dribin reported that in connection with a panel presentation at the upcoming Attorney Trust Officer Liaison conference, a survey on fees is being circulated by Sandy Diamond, Don Tescher and Lester Law. On behalf of the presenters, Mr. Dribin asked if anyone has received the survey, to please complete it and return it to

the panel. Mr. Dribin encouraged anyone interested in attending the ATO to complete the registration form.

XI. Real Property Law Division – *Michael J. Gelfand, Real Property Law Division Director*

Michael Gelfand thanked Fidelity National Title Group and its representative, Pat Hancock, for sponsoring the Real Property Roundtable Breakfast. Mr. Gelfand announced that there will be two Action Items including one Action Item that is amended.

Action Items.

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

Mr. Steven Mezer discussed the need to amend the Section position regarding certification in Condominium and Planned Development Law that were approved on September 15, 2012. Originally, this certification had been designated as a Sub Specialty of the Real Estate Law Certification. After meeting with the Florida Bar Board of Legal Specialization and Education (BLSE), there are 3 changes that are being requested. The first is that it would no longer be a sub-speciality of Real Estate Law but rather it would be a free standing board certification in Condominium and Planned Development Law. Next, the minimum threshold from practice would be reduced from ten years to five years. Last, the percentage of practice would be reduced from 50% to 40%.

Mr. Mezer moved:

To amend the Section position approved September 15, 2012, to support the Proposed Standards as they appear in the Agenda beginning at page 92 indicating that the Condominium and Planned Development Law Board Certification would be free standing; and that the minimum thresholds for practice would be reduced to five years and forty percent and to find that the position is in the Section's purview. See the materials in the Agenda beginning at page 92.

The motion passed unanimously.

Mr. Gelfand noted that there is no need to spend funds on this matter as it is an internal bar matter. Mr. Gelfand also recognized and thanked Joe Adams for recognizing back when he was a new attorney that the certification designation would be valuable and Jane Cornett for help in preparing a manual to be used for other areas when a new area for certification will be presented to the Florida Bar.

2. **Residential Real Estate and Industry Liaison** — *Frederick W. Jones, Chair*

Mr. Gelfand introduced Frederick Jones and Gary Nagle to report on the 2013 revised FAR/BAR contract, the FAR/BAR As Is Residential Contract and the FAR/BAR CR Forms. It

was noted that there were five housekeeping and clean up amendments that were approved at the Real Property Roundtable and Mr. Jones and Mr. Nagle reviewed the changes in detail.

Mr. Jones moved:

To approve the revised proposed FARBAR Residential Contract Forms: FARBAR K Rev Sum; FARBAR as is Resid Cont.; FARBAR CR Forms , as amended.

The motion passed unanimously.

Mr. Gelfand expressed deep appreciation to all of the volunteers who have spent countless hours on this project.

Information Items:

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

Steven Mezer reported on the issue of the Unauthorized Practice of Law (UPL). Our section had requested clarification from the Florida Bar Standing Committee on UPL regarding activities of Community Association Managers (CAMs). A Proposed Advisory Opinion has been issued by the UPL Committee on May 15, 2013 and is included in the Agenda beginning at page 164. The Section has until June 15, 2013 to file a memo or brief supporting the position of the Section and it is anticipated that will be done.

2. **Ad Hoc Foreclosure Reform Committee** — *Jerry Aron, Chair*

Jerry Aron reported on the Foreclosure Reform Bill that has passed the Legislature after years of hard work and fine-tuning and effort by many people. He reported that the bill is in substantially the same form as was approved by the Executive Council. Mr. Aron reported that the committee sought and received input from the Section and from other groups and had received 100s of comments and that there were changes made in response to the comments. Mr. Aron reported that there has been strong opposition for certain groups including foreclosure defense attorneys and certain consumer groups.

Mr. Aron recognized and thanked the committee including Burt Bruton, Mark Brown, Alan Fields and Jeff Sauer. Mr. Aron also complemented the work of the Legislative Team and the Executive Committee, and especially Mr. Belcher who wrote many letters and spoke to many people regarding the legislation. Mr. Aron noted that Mr. Belcher could be designated an up and coming Real Estate attorney.

Mr. Gelfand expressed that our Section owes a debt of gratitude to Jerry Aron and the entire committee for their work and he noted that it is a testament to our Section that our past Chairs remain so active.

The Committee's Report, the foreclosure defense attorney's letter to The Florida Bar News, and the RPPTL Section's response are attached to the Agenda beginning at page 192.

XII. **General Standing Division** – *Margaret "Peggy" Rolando, Director and Chair-Elect.*

Action Item:

1. **Fellows and Mentoring Committee** *Marsha G. Madorsky, Co-Chair (Fellowship)*

Ms. Rolando introduced Marsha Madorsky, the Co-Chair of the Fellows and Mentoring Committee. Ms. Madorsky advised that the Committee was proposing a change to the Fellowship program so that applications for new fellows would be received annually instead of every two years. The Fellowship program would still be a 2 year program. The Fellowship portion of the video was shown.

Ms. Madorsky moved:

To approve a change in the Fellowship program to (1) seek applications from the Section membership for the Fellowship Program annually instead of every other year; (2) appoint a new class of up to four (4) Fellows each year to serve for up to a two year period with the renewal of the appointment for the second year based on satisfactory performance during the first year; and (3) amend the budget for the Fellowship Program for 2013-2014 to increase the amount allocated to Fellows from $10,000 to $20,000 per year to accommodate the increased number of Fellows.

The motion passed unanimously.

Information Items:

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

Tae Kelley Bronner reported on the work of the Committee. Ms. Bronner reported that following the Section's approval of two scholarships for RPPTL nominees to the Florida Bar Leadership Academy, the Committee asked potential applicants to submit a copy of their Florida Bar Leadership Academy application to the RPPTL Committee by March 15, 2013. The Committee received 12 excellent applications for consideration. After a thorough review of all applications, the Committee selected Brenda Ezell and Tatiana Brenes-Stahl as the nominees to receive a potential scholarship if they were chosen as fellows for the Florida Bar Leadership Academy. Both have been selected as fellows for the Leadership Academy by the Florida Bar Leadership Academy Selection Committee and will be receiving the RPPTL Section scholarships. Ms. Kelley

reported that the committee would be monitoring See the attached full report from the Committee on page 201 of the Agenda.

2. **Ad Hoc Trust Account Committee** — *Roland "Chip" Waller, Chair*

Jerry Aron reported on the status of the audit of trust accounting issue that is currently pending before the Professional Ethics Committee (PEC) of The Florida Bar. The PEC had been asked for an advisory ethics opinion concerning audits by title insurers of a trust account maintained for real property transactions which routinely contain funds for the multiple participants in a real estate closing beyond the buyer and seller, including title insurers, following enactment of Section 626.8473(8), Florida Statutes, which became effective July 1, 2012. The PEC and its Subcommittee on this issue are experiencing significant difficulty in making a determination. The next meeting of the PEC is scheduled for Friday, June 28, 2013. In an effort to provide advice and practical insights from practitioners in the field, the Section's Ad Hoc Trust Account Committee and the leadership of the Real Property Law Division have provided the Professional Ethics Committee with an additional letter containing substantial technical information in support of our position. p. 202 In addition, the Section has provided the Committee with a draft of a proposed ethical opinion that is consistent with our position. p. 216

3. **Legislation Committee** - *Barry F. Spivey, Co-Chair (Probate & Trust), Robert Swaine, Co-Chair (Real Property); William T. Hennessey, III, Co-Vice Chair (Probate & Trust), Alan Fields, Co-Vice Chair (Real Property)*

Secretary's note: This item was heard as the final General Standing Information item but is reported in alphabetical order by committee name.

Barry Spivey gave his final report as Co-Chair of the Legislation Committee. He thanked Bob Swaine for his assistance this past year and Rob Freedman for the prior year. Mr. Spivey reported that next year the Probate and Trust Division would be handled by Bill Hennessey next year. Mr. Swaine asked Mr. Spivey to report that new legislation for the 2014 year must be finalized at the Breakers because the Sarasota meeting in November of 2013 will be too late to find sponsors.

Peter Dunbar was asked to give the remainder of the Legislation Committee report. Before Mr. Dunbar began, he, on behalf of the entire Legislative Team, thanked Mr. Spivey for all of his hard work. Mr. Dunbar gave a report on the timing of the bills being delivered to the Governor for review. The Florida Constitution provides that once the Legislature adjourns, the Governor has 15 days from the day he receives the bill to act. The Governor can sign it, veto it or if the Governor does nothing, it will become law. There is a general protocol for the timing of bills being delivered to the Governor. Mr. Dunbar reported that generally bills with an effective date of July 1st or "upon becoming law" typically are delivered earlier in the process. Bills with an effective date of October 1st or

January 1st or later generally are delivered later. While the Governor is reviewing the budget, typically no other legislation is presented. Mr. Dunbar reported that the budget was approved a week ago and bills will begin to flow again. Once the bills go to the Governor, the 15 day timeline is triggered.

4. **Membership, Diversity and Law School Liaison Committee** — *Michael A. Bedke, Chair*

Phillip A. Baumann reported on the work of the Committee. The third part of the video was shown. Mr. Baumann thanked Yvonne Sherron for originally thinking of the concept of the video and expressed gratitude to Nicole Kibert and Navin Pasem for their assistance with the project. Mr. Baumann also recognized Mike Bedke for his dedicated work and he referred to the written report in the Agenda and noted the privilege of working in the "Belcher Administration." Mr. Baumann commented that the dedication and diligence of Mr. Belcher in assisting with the production of the video resulted in the final product being as fine as it is. Mr. Baumann referred to the detailed reports from Michael A. Bedke, Chair; Lynwood T. Arnold, Jr., Co-Vice Chair (Diversity); and Stacy Kalmanson, Co-Vice Chair (Law Schools) regarding the Committee's extensive initiatives, including the infomercial, diversity programs, successful recruitment law student affiliate members, law school liaison programs, new mentoring initiative, continuation of communication and retention projects and outreach programs. Mr. Bauman recognized and thanked Stacy Kalmanson for her work in promoting the law school outreach program. The report of Mr. Bedke and Mr. Arnold is included at page 221 of the Agenda and the report of Stacy Kalmanson is in the Agenda at page 223

5. **Member Communications and Information Technology Committee** — *Nicole Kibert, Chair*

Nicole Kibert provided an update on the new website that she expects will be previewed at the Breakers meeting. Ms. Kibert reminded the Executive Council that the website will only be as useful as the material that is included and encouraged content to be posted for the benefit of all of our Section members. Ms. Kibert reported that the updated guidelines for maintaining committee website pages and listserves are now posted on the Member Communications and Information Technology Committee page.

6. **Pro Bono Committee** — *Adele Stone and Tasha K. Pepper-Dickinson, Co-Chairs*

Secretary's note: No oral report was given however there is a written report in the Agenda beginning at page 231.

XIV. General Standing Committee Reports – *Margaret "Peggy" Rolando, Director and Chair-Elect*

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

   It was reported that the Legislation has passed.

2. **Ad Hoc Trust Account** – Roland "Chip" Waller, Chair

   No further report.

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

   David Carlisle reported on the committee's first year in existence. The committee hosted a CLE that received favorable reviews although not great attendance. There will be a presentation by Mr. Carlisle at the ATO on this topic.

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

   Robert Goldman reported that we are still awaiting two Supreme Court cases (North Carillon and Basile) that can be reported on any given Thursday. Mr. Goldman expressed gratitude for Paul Hill from the Florida Bar for his hard work in quickly assisting the Committee as time deadlines are frequently very short.

5. **Budget** – Andrew M. O'Malley, Chair; Pamela O. Price and Daniel L. DeCubellis, Co-Vice Chairs

   No further report.

6. **CLE Seminar Coordination** – Robert Freedman, Chair; Laura Sundberg and Sarah Butters, Co-Vice Chairs (Probate & Trust); Brian Leebrick and Jennifer Tobin, Co-Vice Chairs (Real Property). *Secretary's note – this item was heard immediately after the Director of At Large Member's Report.*

   Mr. Freedman thanked everyone that has been a program chair or a speaker at a CLE event this year. He also thanked his vice-chairs from this year: Jennifer Tobin, Brian Leebrick, Laura Sundberg and Sarah Butters. Mr. Freedman reported that our Section ran 14 day long programs and 9 e-CLE programs. He noted that e-CLE is the term that will be used to describe the 1 hour lunch time programs viewed on computer or held on the phone. He noted that for this type of programming, our Section has lower pricing than our competitors.

   Mr. Freedman noted that attendance has dropped and that the Section is struggling to attract people to our programs. The CLE Committee will be working to try to find answers. Mr. Freedman reported that although CLE is not all about revenue, the Section is not in a position to run programs with large deficits. Mr. Freedman

asked the Section members to assist with marketing for the upcoming CLE programs and he recognized the work of the ALMs in promoting programs. Mr. Freedman encouraged everyone to spread the word about Section CLE programs to other members of our firms who are not Section members. Mr. Freedman reported at some upcoming CLE program. A complete report can be found in the Agenda beginning at page 239.

Mr. Freedman announced and congratulated Laura Sundberg as the incoming chair of the Florida Bar CLE Committee. Mr. Freedman introduced and welcomed Tae Kelley Bronner as his co-Chair on the Probate & Trust side for the 2013-2014 year.

Mr. Belcher briefly followed up Mr. Freedman's report with an update on the efforts to formalize our request to exclude the Legislative Fees and CLE Sponsor Revenue from the imposition of overhead and that he had made a presentation to the Board of Governors about this issue.

7. **Convention Coordination (2013)** – S. Katherine Frazier, Chair; Angela Adams, Tae Bronner and Debra Boje, Co-Vice Chairs

No report.

8. **Fellows and Mentoring** – Marsha G. Madorsky, Co-Chair (Fellowship), Guy Emerich, Co-Chair (Mentoring); Brenda Ezell and Sharaine Sibblies, Co-Vice Chairs.

No further report.

9. **Florida Electronic Filing & Service** – Patricia P. Jones, Rohan Kelley and Laird A. Lile, Co-Chairs

Laird Lile reported that all attorneys other than criminal attorneys need to be e-filing and that there are attorneys that are still attempting to file paper pleadings. Mr. Lile asked that everyone spread the word.

10. **Homestead Issues Study** – Shane Kelley, Co-Chair (Probate & Trust); Deborah Boyd, Co-Chair (Real Property)

Shane Kelly reported finally that there is agreement among his committee and that they will be moving forward with some proposed language. Mr. Kelly welcomed Pat Jones as his co Chair.

11. **Legislation** – Barry F. Spivey, Co-Chair (Probate & Trust), Robert Swaine, Co-Chair (Real Property); William T. Hennessey, III, Co-Vice Chair (Probate & Trust), Alan Fields, Co-Vice Chair (Real Property); Susan K. Spurgeon and Michael A. Bedke, Legislative Reporters

No further report.

12. **Legislative Update (2013)** –Stuart H. Altman, Chair; Charles I. Nash, R. James Robbins, Sharaine Sibblies and Stacy Kalmanson, Co-Vice Chairs

Stuart Altman reported that the seminar is two months away but we still need the Governor to sign the bills before we can set the program. There will be some of the favorite speakers including David Brennan, Michael Gelfand as well as some new speakers.

13. **Liaison with:**

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

Mr. Koren reported that the ABA RPTE Committee had a spring meeting and he reported that some of the government lawyers suggested that we might not be as comfortable that we have permanency with estate tax as there may be new tax legislation in the fall. There are new Liaisons with NCCUSL for four new projects: trust decanting, trust protectors, digital media and powers of attorney.

B. **Board of Legal Specialization and Education (BLSE)** – Michael C. Sasso, W. Theodore Conner, David M. Silberstein and Deborah L. Russell

Mr. Silberstein reported that this is the 30th year of Board Certification. This past spring there were 27 people tested for Real Estate, 37 for Construction Law and 9 for Wills, Trusts and Estates. Mr. Silberstein thanked Mr. Mezer for his work on the new category of certification for Condominium and Planned Development Law. Mr. Silberstein reported that there may possibly be new rules for Emeritus certifications and that the Peer Review forms will hopefully be available to be completed online in the near future.

C. **Clerks of Circuit Court** – Laird A. Lile

No further report.

D. **FLEA / FLSSI** – David C. Brennan, John Arthur Jones and Roland Chip Waller

Mr. Brennan reported on the FLSSI forms and requested feedback from anyone that sees the need for updating or changing any forms, to please advise him (i.e. for change of law, rules, new cases, etc). Roger Isphording has been the president for 35 years and the members are

volunteers and past chairs of the Section. Mr. Brennan offered to play our Section Video at the FLEA seminar October 4-5, 2013.

E. **Florida Bankers Association** – Stewart Andrew Marshall, III, and Mark Thomas Middlebrook

No report.

F. **Judiciary** – Judge Jack St. Arnold, Judge Melvin B. Grossman, Judge Hugh D. Hayes, Judge Claudia Rickert Isom, Judge Maria M. Korvick, Judge Lauren Laughlin, Judge Celeste H. Muir, Judge Robert Pleus, Judge Lawrence A. Schwartz, Judge Richard Suarez, Judge Morris Silberman, Judge Patricia V. Thomas and Judge Walter L. Schafer, Jr.

No report.

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

No report.

H. **The Florida Bar** – Gwynne A. Young

No report.

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

No further report.

J. **TFB Business Law Section** – Marsha G. Rydberg

Ms. Rydberg reported that Mr. Bruton had covered her report.

K. **TFB CLE Committee** – Robert Freedman

No further report.

L. **TFB Council of Sections** –Wm. Fletcher Belcher and Margaret A. Rolando

No report.

14. **Long-Range Planning** – Margaret A. Rolando, Chair

No report.

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

No report.

16. **Member Communications and Information Technology** – Nicole C. Kibert, Chair; S. Dresden Brunner and William Parady, Co-Vice Chairs

No further report.

17. **Membership, Diversity and Law School Liaison** – Michael A. Bedke, Chair; Lynwood T. Arnold, Jr., Co-Vice Chair (Diversity); Stacy Kalmanson, Co-Vice Chair (Law Schools), Phillip A. Baumann, Co-Vice Chair (Special Projects), Navin Pasem, Co-Vice Chair (Diversity); Benjamin B. Bush, Frederick R. Dudley, Jason M. Ellison, Brenda B. Ezell, Jennifer Jones and Mary Karr, Law School Liaisons.

No further report.

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

No report.

19. **Pro Bono** – Adele Stone and Tasha K. Pepper-Dickinson, Co-Chairs.

No report.

20. **Professionalism and Ethics** – Lee A. Weintraub, Chair; Paul E. Roman and Lawrence J. Miller, Co-Vice Chairs.

Earlier in the program, there was a presentation by the RPPTL Ethics Players starring Bill Hennessey and Larry Miller. Mr. Miller and Mr. Hennessey acted out a skit involving a deposition of an estate planning attorney who named himself as a fiduciary in documents prepared for a client that he had just met. The skit was based on the facts in the case of Rand v. Giller. At the conclusion of the skit, Mr. Miller and Mr. Hennessey reviewed the applicable ethical rules and the commentary regarding conflict of interest and discussed best practices for disclosure if an attorney is asked to serve as a fiduciary in estate planning documents.

There was no further report.

21. **Publications:**

A. **ActionLine** – Silvia Rojas, Chair; Scott P. Pence, Shari Ben Moussa and Navin Pasem, Co-Vice Chairs (Real Property); Amber Jade Johnson, George Karibjanian and Hung V. Nguyen, Co-Vice Chairs (Probate & Trust)

Silvia Rojas reported that there is much information on the Committee webpage to help authors.

B. **Florida Bar Journal** - Kristen M. Lynch, Co-Chair (Probate & Trust); David Brittain, Co-Chair (Real Property)

Kristen Lynch reported that they have high quality articles through the June/July issue and she thanked the authors. Ms. Lynch asked that articles for real property be sent to David Brittan and articles on the Probate & Trust be sent to her attention.

22. **Sponsor Coordination** – Kristen M. Lynch, Chair; Wilhelmina Kightlinger, Aniella Gonzalez, J. Michael Swaine, Adele I. Stone, Marilyn M. Polson, and W. Cary Wright, Co-Vice Chairs

Kristen Lynch thanked the Section members for the sponsor appreciation. Almost all of the sponsor slots are full except for the box lunch. Ms. Lynch thanked Debra Boje for allowing the sponsors to speak at the ALMS meeting. Ms. Lynch thanked Marilyn Polson for the help on the new tri fold flyers. They are available in hard copy and also as PDFs. Ms. Lynch thanked Willie Kightlinger for her work on the sponsorship appreciation events this weekend.

Ms. Rolando gave a special thanks to the committee sponsors and acknowledged each of them.

23. **Strategic Planning** – Margaret A. Rolando, Chair

Ms. Rolando reported that there will be a strategic planning meeting expected to occur in April, 2014 and approximately 30-40 people will be invited to attend.

XV. Probate and Trust Law Division Committee Reports– *Michael A. Dribin – Director*

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

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

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

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

5. **Ad Hoc Study Committee on Jurisdiction and Service of Process** – Barry F. Spivey, Chair; Sean W. Kelley, Vice Chair

6. **Asset Protection** – Brian C. Sparks, Chair; Marsha G. Madorsky, Vice-Chair

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

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

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

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

11. **IRA, Insurance and Employee Benefits** – Linda Suzzanne Griffin and L. Howard Payne, Co-Chairs; Anne Buzby-Walt and Lester Law, Co-Vice Chairs

12. **Liaisons with Elder Law Section** – Charles F. Robinson, Marjorie Wolasky and Sam W. Boone, Jr.

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

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

15. **Probate and Trust Litigation** – Thomas M. Karr, Chair; Jon Scuderi , J. Richard Caskey and Jerry Wells, Co-Vice Chairs

16. **Probate Law and Procedure** – Tae Kelley Bronner, Chair; John C. Moran, Paul Roman and James George, Co-Vice Chairs

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

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

XVI. Real Property Division Committee Reports - *Michael J. Gelfand, Director.*

1. **Ad Hoc Foreclosure Reform** – Jerry Aron, Chair; Mark Brown, Burt Bruton, Alan Fields, and Jeffrey Sauer, Co-Vice Chairs.

2. **Commercial Real Estate** – Art Menor, Chair; Burt Bruton and Jim Robbins, Co-Vice Chairs.

3. **Condominium and Planned Development** – Steven H. Mezer, Chair; Jane Cornett and Christopher Davies, Co-Vice-Chairs.

4. **Construction Law** – Arnold D. Tritt, Chair; Lisa Colon Heron, Scott Pence and Hardy Roberts, Co-Vice Chairs.

5. **Construction Law Certification Review Course** – Lee Weintraub, Chair; Bruce Alexander, Deborah Mastin and Bryan Rendzio, and Co-Vice Chairs.

6. **Construction Law Institute** – W. Cary Wright, Chair; Reese Henderson, Sanjay Kurian and Rachel Peterkin, Co-Vice Chairs.

7. **Governmental Regulation** – Anne Pollack, Chair; Arlene Udick and Vinette Godelia, Co-Vice Chairs.

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

9. **Legal Opinions** – Kip Thornton, Chair; Dan DeCubellis, Vice-Chair.

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

11. **Property & Liability Insurance/Suretyship** – W. Cary Wright and Fred Dudley, Co-Chairs.

12. **Real Estate Certification Review Course** – Ted Conner, Chair; Raul Ballaga and Jennifer Tobin, Co-Vice Chairs.

13. **Real Estate Entities and Land Trusts** – Wilhelmina Kightlinger, Chair; Burt Bruton, Vice-Chair.

14. **Real Property Finance & Lending** – Dave R. Brittain, Chair; Deborah Boyd, Brenda Ezell and Bill Sklar, Co-Vice Chairs.

15. **Real Property Forms** – Homer Duval, III, Chair; Arthur J. Menor and Silvia Rojas, Co-Vice Chairs.

16. **Real Property Litigation** – Marty Awerbach, Chair; Manny Farach and Susan Spurgeon, Co-Vice Chairs.

17. **Real Property Problems Study** – S. Katherine Frazier, Chair; Mark A. Brown, Patricia J. Hancock and Salome Zikakis, Co-Vice Chairs.

18. **Residential Real Estate and Industry Liaison** – Frederick W. Jones, Chair; William J. Haley and Denise Hutson, Co-Vice Chairs.

19. **Title Insurance and Title Insurance Liaison** – Kristopher Fernandez, Chair; Raul Ballaga and Dan DeCubellis, Co-Vice Chairs.

20. **Title Issues and Standards** – Christopher W. Smart, Chair; Robert M. Graham, Patricia P. Jones and Karla J. Staker, Co-Vice Chairs.

XVI. Adjournment -- Mr. Belcher thanked those in attendance.

There being no further business to come before the Executive Council, the meeting was unanimously adjourned at 12:45.

Respectfully submitted,

Deborah P. Goodall, Secretary

ADDENDUM A

ATTENDANCE ROSTER
MAY 25, 2013

ATTENDANCE ROSTER

REAL PROPERTY PROBATE & TRUST LAW SECTION

EXECUTIVE COUNCIL MEETINGS

2012-2013

Executive Committee	Division		Jul. 28 Palm Beach	Sept. 15 Key Biscayne	Nov. 17 Ashville, NC	Feb. 9 Tallahassee	May 25 St. Petersburg
	RP	P&T					
Belcher, William F., Chair		√	X	X	X	X	X
Rolando, Margaret A., Chair-Elect	√		X	X	X	X	X
Gelfand, Michael J., Real Property Law Div. Director	√		X	X	X	X	X
Dribin, Michael A., Probate and Trust Law Div. Director		√	X	X	X	X	X
Goodall, Deborah P., Secretary		√	X	X	X	X	X
O'Malley, Andrew M., Treasurer	√		X	X	X	X	X
Spivey, Barry F., Legislation Co-Chair		√	X	X	X	X	X
Swaine, Robert S., Legislation Co-Chair	√		X	X		X	X
Freedman, Robert S., Seminar Coordinator	√		X	X	X	X	X
Boje, Debra L., Director of At-Large Members		√	X	X	X	X	X
Meyer, George F., Immediate Past Chair	√		X	X			X

Executive Council Members	Division		Jul. 28 Palm Beach	Sept. 15 Key Biscayne	Nov. 17 Ashville, NC	Feb. 9 Tallahassee	May 25 St. Petersburg
	RP	P&T					
Adams, Angela M.		√	X	X	X		X
Adcock, Jr., Louie N., **Past Chair**		√					
Akins, David J.		√	X	X		X	
Alexander, Bruce G.	√						

Executive Council Members	Division		Jul. 28 Palm Beach	Sept. 15 Key Biscayne	Nov. 17 Ashville, NC	Feb. 9 Tallahassee	May 25 St. Petersburg
	RP	P&T					
Altman, Robert N.		√				X	
Altman, Stuart H.		√	X	X	X		X
Arnold, Jr., Lynwood F.	√			X		X	
Aron Jerry E. **Past Chair**	√		X	X	X	X	X
Awerbach, Martin S.	√		X	X		X	X
Bald, Kimberly A.	√		X			X	X
Ballaga, Raul P.	√		X			X	X
Banister, John R.	√						
Batlle, Carlos A.		√	X	X		X	X
Baumann, Phillip A.		√		X	X		X
Beales, III, Walter R. **Past Chair**	√						
Bedke, Michael A.	√		X				
Bell, Kenneth B.	√						
Ben Moussa, Shari D.	√		X	X			
Bonnette, Jr., Harris L.		√	X		X	X	X
Boone, Jr., Sam W.		√					
Boyd, Deborah	√		X			X	
Brenes-Stahl, Tattiana P.		√	X	X		X	X
Brennan, David C. **Past Chair**		√	X			X	X
Brittain, David R.	√		X	X		X	
Bronner, Tae K.		√	X	X		X	X
Brown, Mark A.	√		X	X	X		X

Executive Council Members	Division		Jul. 28 Palm Beach	Sept. 15 Key Biscayne	Nov. 17 Ashville, NC	Feb. 9 Tallahassee	May 25 St. Petersburg
	RP	P&T					
Brunner, S. Dresden		√	X	X	X		X
Bruton, Jr., Ed Burt	√		X	X	X	X	X
Bucher, Elaine M.		√	X			X	X
Bush, Benjamin B.	√						
Butters, Sarah S.		√	X	X		X	X
Buzby-Walt, Anne		√	X			X	X
Carlisle, David R.		√	X	X			X
Caskey, John R.		√	X	X			X
Christiansen, Patrick T. **Past Chair**	√		X				
Conetta, Tami F.		√		X	X	X	X
Conner, W. Theodore	√		X	X		X	X
Cope, Jr., Gerald B.	√		X	X			
Cornett, Jane L.	√		X	X		X	X
Davies, Christopher	√		X	X		X	X
DeCubellis, Daniel L.	√		X	X	X		X
Detzel, Lauren Y.		√	X	X	X	X	X
Diamond, Benjamin F.		√	X		X		X
Diamond, Sandra F. **Past Chair**		√	X	X	X		X
Dollinger, Jeffrey	√		X			X	X
Dudley, Frederick R.	√		X			X	X
Duvall, III, Homer	√		X	X		X	X
Eckhard, Rick	√		X				X

Executive Council Members	Division		Jul. 28 Palm Beach	Sept. 15 Key Biscayne	Nov. 17 Ashville, NC	Feb. 9 Tallahassee	May 25 St. Petersburg
	RP	P&T					
Ellison, Jason M.	√		X	X	X	X	X
Emerich, Guy S.		√	X	X		X	X
Ezell, Brenda B.	√		X	X		X	X
Falk, Jr., Jack A.		√	X	X		X	X
Fallon, Cynthia		√	X	X	X	X	X
Farach, Manuel	√					X	X
Felcoski, Brian J., **Past Chair**		√	X	X		X	X
Fernandez, Kristopher E.	√		X	X		X	X
Fields, Alan B.	√		X			X	X
Fitzgerald, Jr., John E.		√		X		X	X
Fleece, III, Joseph W.		√	X	X			X
Flood, Gerard J.		√	X	X	X		
Foreman, Michael L.		√	X	X	X	X	X
Frazier, S. Katherine	√		X	X	X	X	X
Gans, Richard R.		√	X	X		X	
Gay, III, Robert Norwood	√		X	X		X	X
George, James		√	X	X		X	
Godelia, Vinette D.	√		X			X	
Goethe, Jeffrey S.		√	X	X	X	X	X
Goldman, Robert W. **Past Chair**		√	X			X	X
Gonzalez, Aniella	√		X	X			
Graham, Robert M.	√		X	X	X	X	X

Executive Council Members	Division		jul. 28 Palm Beach	Sept. 15 Key Biscayne	Nov. 17 Ashville, NC	Feb. 9 Tallahassee	May 25 St. Petersburg
	RP	P&T					
Granet, Lloyd	√		X	X			X
Griffin, Linda S.		√	X	X		X	X
Grimsley, John G. **Past Chair**		√			X	X	
Grossman, Honorable Melvin B.		√	X				X
Guttmann, III, Louis B. **Past Chair**	√		X		X		
Hamrick, Alexander H.		√	X	X	X	X	X
Hancock, Patricia J.	√			X			X
Hart, W.C.	√		X			X	X
Hayes, Honorable Hugh D.		√	X	X			X
Hayes, Michael Travis		√	X	X		X	X
Hearn, Steven L. **Past Chair**		√	X			X	X
Hearne, Frank L.	√						
Henderson, Jr., Reese J.	√			X			
Henderson, III, Thomas N.	√		X	X	X		X
Hennessey, III, William T.		√	X	X		X	X
Heron, Lisa Colon	√		X	X			
Heuston, Stephen P.		√	X	X			X
Hutson, Denise L.	√		X	X		X	X
Isom, Honorable Claudia R.		√					
Isphording, Roger O. **Past Chair**		√	X	X	X		X
Johnson, Amber Jade F.		√	X	X	X	X	X
Jones, Darby		√	X				

Executive Council Members	Division		Jul. 28 Palm Beach	Sept. 15 Key Biscayne	Nov. 17 Ashville, NC	Feb. 9 Tallahassee	May 25 St. Petersburg
	RP	P&T					
Jones, Frederick W.	√		X	X		X	X
Jones, Jennifer W.		√	X	X			
Jones, John Arthur **Past Chair**		√	X				
Jones, Patricia P.H.	√		X	X		X	X
Judd, Robert B.		√	X	X			
Kalmanson, Stacy O.	√		X	X		X	X
Karibjanian, George		√	X			X	X
Karr, Mary		√	X	X			
Karr, Thomas M.		√	X	X		X	X
Kayser, Joan B. **Past Chair**		√		X	X	X	X
Kelley, Rohan **Past Chair**		√	X	X	X	X	X
Kelley, Sean W.		√	X	X	X	X	X
Kelley, Shane		√	X	X	X	X	X
Kibert, Nicole C.	√		X			X	X
Kightlinger, Wilhelmina F.	√		X	X			
King, Robin J.		√	X	X	X	X	
Kinsolving, Ruth Barnes **Past Chair**	√					X	X
Koren, Edward F. **Past Chair**		√	X			X	X
Korvick, Honorable Maria M.		√	X	X	X		X
Kotler, Alan Stephen		√	X	X			X
Kromash, Keith S.		√	X	X		X	X
Kurian, Sanjay	√			X		X	X

Executive Council Members	Division		jul. 28 Palm Beach	Sept. 15 Key Biscayne	Nov. 17 Ashville, NC	Feb. 9 Tallahassee	May 25 St. Petersburg
	RP	P&T					
Kypreos, Theodore S.		√	X	X		X	X
LaFemina, Rose		√					
Lane, Jr., William R.		√	X	X			X
Lange, George		√	X	X	X	X	X
Lannon, Patrick J.		√	X	X			X
Larson, Roger A.	√		X	X	X		X
Laughlin, Honorable Lauren C.		√					
Law, Lester		√	X			X	X
Leebrick, Brian D.	√		X		X		X
Lile, Laird A. **Past Chair**		√		X	X		X
Little, III, John W.	√		X				
Lucchi, Elisa F.		√					
Lynch, Kristen M.		√	X	X			X
Madorsky, Marsha G.		√	X	X	X		X
Marger, Bruce **Past Chair**		√		X			X
Marmor, Seth A.		√		X		X	X
Marshall, III, Stewart A.		√		X		X	X
Mastin, Deborah Bovarnick	√		X	X			
McCall, Alan K.	√			X	X		X
McElroy, IV, Robert Lee		√	X	X		X	X
Menor, Arthur J.	√		X	X			X
Mezer, Steven H.	√		X	X	X	X	X

Executive Council Members	Division		Jul. 28 Palm Beach	Sept. 15 Key Biscayne	Nov. 17 Ashville, NC	Feb. 9 Tallahassee	May 25 St. Petersburg
	RP	P&T					
Middlebrook, Mark T.		√	X	X	X	X	X
Miller, Lawrence J.		√	X	X		X	X
Moran, John C.		√	X	X	X	X	X
Moule, Jr., Rex E.		√	X	X			X
Muir, Honorable Celeste H.		√	X	X		X	X
Murphy, Melissa J. **Past Chair**	√		X	X		X	
Nash, Charles I.		√	X	X		X	X
Neukamm, John B. **Past Chair**	√		X	X		X	X
Nguyen, Hung V.		√	X	X			X
Norris, John E.	√						
Parady, William A.		√	X	X			X
Pasem, Navin	√						
Payne, L. Howard		√	X		X	X	X
Pence, Scott P.	√		X	X			X
Pepper-Dickinson, Tasha K.		√	X			X	X
Peterkin, Rachel	√						
Platt, William R.		√	X	X			X
Pleus, Jr., Honorable Robert J.							
Pollack, Anne Q.	√		X	X	X		X
Polson, Marilyn M.		√	X			X	X
Pratt, David		√					
Price, Pamela O.		√	X	X			

Executive Council Members	Division		Jul. 28 Palm Beach	Sept. 15 Key Biscayne	Nov. 17 Ashville, NC	Feb. 9 Tallahassee	May 25 St. Petersburg
	RP	P&T					
Prince-Troutman, Stacey A.		√		X			X
Pyle, Michael A.		√	X	X		X	X
Reddin, Michelle A.	√						
Rendzio, Bryan	√			X		X	
Reynolds, Stephen H.	√		X			X	X
Rieman, Alexandra V.		√	X	X			X
Robbins, Jr., R.J.	√		X	X	X	X	X
Roberts, III, Hardy L.	√		X		X		X
Robinson, Charles F.		√	X	X	X	X	X
Rojas, Silvia B.	√		X	X		X	X
Roman, Paul E.		√		X		X	X
Russell, Deborah L.		√	X	X	X		X
Russick, James C.	√		X	X	X	X	X
Rydberg, Marsha G.	√		X	X		X	X
Sachs, Colleen C.	√					X	
Sasso, Andrew		√	X	X	X	X	X
Sasso, Michael C.	√						
Sauer, Jeffrey T.	√		X			X	X
Schafer, Jr., Honorable Walter L.		√					
Schnitker, Clay A.	√		X		X		
Schofield, Percy A.	√		X			X	X
Scholnik, Barry A.	√						X

Executive Council Members	Division		Jul. 28 Palm Beach	Sept. 15 Key Biscayne	Nov. 17 Ashville, NC	Feb. 9 Tallahassee	May 25 St. Petersburg
	RP	P&T					
Schwartz, Honorable Lawrence A.		√					
Schwartz, Robert M.	√		X	X			X
Scuderi, Jon		√	X	X		X	X
Sheets, Sandra G.		√	X				X
Shoter, Neil B.	√		X	X			X
Sibblies, Sharaine A.		√		X	X		
Silberman, Honorable Morris							X
Silberstein, David M.		√	X	X			X
Sklar, William P.	√					X	
Smart, Christopher W.	√		X	X			X
Smith, G. Thomas **Past Chair**	√		X		X	X	
Smith, Wilson **Past Chair**		√					
Sobien, Wayne J.	√		X	X			X
Sparks, Brian C.		√	X	X		X	X
Spurgeon, Susan K.	√		X	X		X	X
St. Arnold, Honorable Jack R.		√					
Stafford, Michael P.		√	X	X	X	X	
Staker, Karla J.	√		X			X	X
Stern, Robert G.	√		X	X			X
Stone, Adele I.	√		X	X		X	
Stone, Bruce M. **Past Chair**		√					
Suarez, Honorable Richard J.							

Executive Council Members	Division		Jul. 28 Palm Beach	Sept. 15 Key Biscayne	Nov. 17 Ashville, NC	Feb. 9 Tallahassee	May 25 St. Petersburg
	RP	P&T					
Sundberg, Laura K.		√	X		X	X	X
Swaine, Jack Michael **Past Chair**	√		X		X		X
Taft, Eleanor W.	√		X	X			X
Taylor, Richard W.	√		X	X		X	X
Tescher, Donald R.		√	X	X			X
Thomas, Honorable Patricia V.		√	X		X	X	X
Thornton, Kenneth E.	√		X	X	X		
Tobin, Jennifer S.	√		X	X	X		
Tritt, Jr., Arnold D.	√		X				
Udick, Arlene C.	√		X	X			X
Virgil, Eric		√				X	X
Waller, Roland D. **Past Chair**	√		X	X	X	X	X
Weintraub, Lee A.	√		X	X	X	X	X
Wells, Jerry B.		√	X	X	X	X	X
White, Jr., Richard M.		√	X	X		X	X
Whynot, Sancha B.		√	X	X			X
Wilder, Charles D.		√	X	X	X		
Williamson, Julie Ann S. **Past Chair**	√			X			
Wohlust, Gary Charles		√	X		X	X	X
Wolasky, Marjorie E.		√	X	X			X
Wolf, Jerome L.		√	X			X	X
Wright, William Cary	√		X		X	X	X

Executive Council Members	Division		Jul. 28 Palm Beach	Sept. 15 Key Biscayne	Nov. 17 Ashville, NC	Feb. 9 Tallahassee	May 25 St. Petersburg
	RP	P&T					
Wright, Thomas D.	√			X			
Young, Gwynne A.			X		X		X
Zikakis, Salome J.	√		X	X		X	X
Zschau, Julius J. **Past Chair**	√				X	X	

RPPTL Fellows	Division		Jul. 28 Palm Beach	Sept. 15 Key Biscayne	Nov. 17 Ashville, NC	Feb. 9 Tallahassee	May 25 St. Petersburg
	RP	P&T					
Hoffman, Brian W.	√		X	X	X	X	X
Khan, Nishad	√		X	X			X
Melanson, Noelle M.		√	X	X		X	X
Rao, Tara		√	X	X		X	X

Legislative Consultants	Division		Jul. 28 Palm Beach	Sept. 15 Key Biscayne	Nov. 17 Ashville, NC	Feb. 9 Tallahassee	May 25 St. Petersburg
	RP	P&T					
Adams, Howard Eugene			X				X
Aubuchon, Josh	√		X	X			
Dunbar, Peter M.			X	X	X	X	X
Edenfield, Martha			X		X	X	X

The Florida Bar
Real Property, Probate & Trust Law Section

Special Thanks to the

GENERAL SPONSORS

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

BMO Private Bank - *Joan Kayser*
Probate Roundtable

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

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

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

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

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

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

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

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

The Florida Bar Foundation - *Jane Curran*
Saturday Lunch

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

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

The Florida Bar
Real Property, Probate & Trust Law Section

Special Thanks to the

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BB&T Bank - *Rob Frye*

Business Valuation Analysts, LLC - *Tim Bronza*

Guardian Trust - *Ashley Gonnelli*

Iberia Wealth Advisors

Wright Private Asset Management, LLC - *Diane Timpany*

The Florida Bar
Real Property, Probate & Trust Law Section

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

Business Valuation Analysts – *Tim Bronza*
Trust Law Committee

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

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

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

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

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

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

Northern Trust – *Brett Rees*
Trust Law Committee

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

RPPTL 2013 - 2014
Executive Council Meeting Schedule

Peggy Rolando's YEAR

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

FLORIDA BAR - REAL PROPERTY, PROBATE AND TRUST LAW SECTION
EXECUTIVE COUNCIL MEETING IN LISBON, SEPTEMBER 18-22, 2013

DATE	MORNING	LUNCH	AFTERNOON	EVENING
Day 1 Wednesday, Sept 18th	Transportation to Ritz Four Seasons Hotel on your own	Lunch on your own	**Guided tram rides for orientation to Lisbon with overview of Lisbon's districts, city plan and history of tram** [2-3 runs]	**Welcome reception and buffet dinner at Ritz Four Seasons Hotel**
Day 2 Thursday, Sept 19th	Breakfast (optional); 9:00am - 12:30pm **Portugal's history of exploration and discovery**: Bus tour with guides of Jeronimos Monastery, Maritime Museum, Belem Tower, Discoveries Monument; Stop for pasteis de Belem and coffee in private room.	1:00 – 2:30pm Lunch at Olivier Restaurant	3:00pm – 6:00pm: Selection of guided tours (15-20 persons per tour): • Gulbenkian Museum • Tile Museum • Queluz Palace • Architecture Tour • Sidecar caravan • Wine and port tasting • History of Jews in Portugal OR Afternoon off for relaxation, shopping, additional sightseeing on your own	Dinner on your own; may organize dine arounds if there's sufficient interest
Day 3 Friday, Sept 20th	8:00am -10:00pm: Breakfast at Ritz Four Seasons Hotel and moderated panel discussion with Lisbon attorneys and business professionals. CLE Credit applied for. **Lisbon: Real Law, Real Life** **Exploring the Effects of the Economy on our Practice and our "Corporate Responsibility"** Panel:	Lunch on your own	2:00 – 5:00pm: Repeat selection of guided tours (15-20 persons per tour): • Gulbenkian Museum • Tile Museum • Queluz Palace • Architecture Tour • Sidecar caravan • Wine and port tasting • Shopping OR	7:00 – 10:00pm: **Reception, fado concert and dinner at Palace do Rocha Condes do Obidos overlooking the Tagus River**

DATE	MORNING	LUNCH	AFTERNOON	EVENING
	• Mr. Manuel Álvares de Calvão of Inmoseguros • Filipa Arantes Pedroso, Esq. of Morais Leitão, Galvão Teles, Soares da Silva • Miguel Braga da Costa,Esq. of AMBA – Braga da Costa, Sousa de Macedo, Ascensão, Almeida Garrett & Associates • Mr.Francisco Horta e Costa of CBRE • Mr. Eric Van Leuven of Cushman & Wakefield • Julie A.S. Williamson, Esq. of Akerman Senterfitt (moderator) 10:30am-12:30pm: Guided walking tours of small groups through Chicado, Baixa and Rossio with break midway OR 10:30am-1:30pm: Repeat selection of guided tours (15-20 persons per tour): • Gulbenkian Museum • Tile Museum • Queluz Palace • Architecture Tour • Sidecar caravan • Wine and port tasting • History of Jews in Portugal • Shopping		Afternoon off for relaxation, shopping, additional sightseeing on your own	
Day 4 Saturday, Sept 21st	Breakfast (optional) 8:30am – 1:00pm: **Trip to Sintra – Bus tour with guides of Monserrat National Palace and National**	1:30 – 3:00pm: **Lunch at a restaurant in**	3:00 – 4:30pm: **Continue trip through Capa do Roca and Cascais; Return to hotel by Estoril coast**	7:30 – 10:00pm: **Dinner at Via Garca (classic Portuguese cuisine with variety of Portuguese wines**

DATE	MORNING	LUNCH	AFTERNOON	EVENING
	Palace of Sintra (palace in the historic city center)	**Sintra**		**at dinner and port with dessert)**
Day 5 Sunday, Sept 22nd	Breakfast (optional) and check-out			

RPPTL 2014 - 2015
Executive Council Meeting Schedule

Mike Dribin's YEAR

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

RPPTL FINANCIAL SUMMARY

2012 – 2013 (*July 1 - June 30*[1])

Revenue:	*$ 816,421*
Expenses:	*$ 794,084*
Net:	*$ 22,337*

Beginning Fund Balance (7-1-12)	***RPPTL CLE***
$ 843,909	*RPPTL YTD Actual CLE Revenue* ***$141,983***
YTD Fund Balance (6-30-13)	*RPPTL Budgeted CLE Revenue* ***$244,500***
$ 816,505	

[1] **This report is based on the tentative unaudited detail statement of operations dated 7/1/2013.**

RPPTL Financial Summary from Separate Budgets

2012 – 2013 [July 1 - June 30[1]]
YEAR TO DATE REPORT

General Budget

Revenue:	**$ 816,421**
Expenses:	**$ 768,790**
Net:	**$ 22,337**

Legislative Update

Revenue:	**$ 53,764**
Expenses:	**$ 95,127**
Net:	**($41,363)**

Convention

Revenue:	**$ 37,501**
Expenses:	**$140,330**
Net:	**($102,823)**

Miscellaneous Section Service Courses

Revenue:	**$ 345**
Expenses:	**$ 4**
Net:	**$ 341**

Roll-up Summary (Total)

Revenue:	**$ 940,761**
Expenses:	**$ 1,050,227**
Net Operations:	**($ 109,466)**

Reserve (Fund Balance):	**$ 843,909**
GRAND TOTAL	**$ 734,443**

[1] **This report is based on the tentative unaudited detail statement of operations dated 7/1/2013.**

Date	Title of Seminar/Committee	Committee	#	Location	Program Chair
July 24-28, 2013	Executive Council Meeting and Legislative Update			Palm Beach	
August 21, 2013	TRIM Those Taxes			e-CLE	
September 11, 2013	The Perils of "Boilerplate" and Other Common Contract Provisions	Commercial Real Estate		e-CLE	
September 18-22, 2013	Executive Council Meeting			Lisbon	
October 2, 2013	Gifts to Attorneys in Wills			e-CLE	
October 4, 2013		Real Property Litigation		Tampa	
October 18, 2013		Estate Tax/IRA/Gifts		Tampa	
October 30, 2013		Land Trust		Tampa	
November 6, 2013		Title Standards		e-CLE	
November 21-24, 2013	Executive Council Meeting			Sarasota	
December 4, 2013	Year-End Tax Planning			e-CLE	
January 31, 2013		ELULS/Government		Tampa	
February 5, 2014		Landlord - Tenant		e-CLE	
February 6-9, 2014	Executive Council Meeting			Amelia Island	
February 19, 2013	Practical Pointers on Sale of Homestead			e-CLE	
February 21 - 22, 2014		Real Property Certification Review		Orlando	
February 28, 2014		Probate Law		Tampa	
March 5, 2014		Real Estate Finance		e-CLE	

March 20 - 22, 2014		Construction Law Institute		Orlando	
March 20 - 22, 2014		Construction Law Certification Review		Orlando	
April 2, 2014	Digital Estate Planning			e-CLE	
April 4 - 5, 2014		Wills and Trust Certification Review		Orlando	
April 11, 2014		Commercial Real Estate		South Florida	
April 25, 2014		Condominium and Planned Development		Tampa	
May 14, 2014		Insurance		e-CLE	
May 16, 2014	Trust and Estate Litigation Symposium			South Florida	
May 29-June 1, 2014	Executive Council Meeting			Captiva	
May 30, 2014		Convention seminar		Captiva	
June 13, 2014		Attorney-Trust Officer Conference		Naples	

→ in-person (full day or conference) programs
→ e-CLE (PowerPoint on computer and telephone) programs

LEGISLATIVE POSITION REQUEST FORM

GOVERNMENTAL AFFAIRS OFFICE

Date Form Received _____

GENERAL INFORMATION

Submitted By Richard R. Gans, Chair, Ad Hoc Committee on Treatment of Life Insurance Payable to Revocable Trust

Address 1515 Ringling Blvd., Tenth Floor, Sarasota, FL 34236
Telephone: (941) 957-1900

Position Type Ad Hoc Committee on Treatment of Life Insurance Payable to Revocable Trust of the Real Property Probate and Trust Law Section of the Florida Bar

CONTACTS

Board & Legislation Committee Appearance

Richard R. Gans, Ad Hoc Committee on Treatment of Life Insurance Payable to Revocable Trust, Chair, Fergeson Skipper Shaw Keyser Baron & Tirabassi, 1515 Ringling Blvd., Tenth Floor, Sarasota, FL 34236 Telephone: (941) 957-1900

William T. Hennessey, Gunster, Yoakley & Stewart P.A., 777 South Flagler Drive, Suite 500 East, West Palm Beach, FL, Telephone: (561) 650-0663

Peter M. Dunbar, Pennington, Moore, Wilkinson, Bell & Dunbar, P.O. Box 10095, Tallahassee, FL 32302-2095 (850) 222-3533

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

Appearances before Legislators _____

Meetings with Legislators/staff _____

PROPOSED ADVOCACY

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

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

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

Proposed Wording of Position for Official Publication:

Support amendments to F.S. 733.808(4) and F.S. 736.05053(1) to provide that a waiver of the protection from creditors' claims afforded to certain death benefits payable to trusts must be clear and specific, and that a general "pay all claims from the assets of my revocable trust"-type waiver is insufficient to waive the statutory protections.

Reasons For Proposed Advocacy:

The proposed legislation is in response to the decision of the First District Court of Appeals in *Morey v. Everbank and Air Craun, Inc.* 93 So. 2d 482 (Fla. 1 Dist. Ct. App 2012). The *Morey* decision stands for the proposition that if the insured/settlor's revocable trust contains a general provision directing the trustee to fulfill its statutory responsibility under F.S. 736.05053(1) to pay claims of the decedent's creditors properly filed in the decedent's estate, it will be treated as if the insured/settlor named his personal representative a beneficiary of any life insurance proceeds or other death benefits payable to such trustee. Proceeds of insurance on a decedent's life are (unless paid to the decedent's probate estate) exempt from the claims of the insured's creditors. See F S. 222.13(1). Waivers of statutory exemptions should be clear, and should not be inferred from general language. The proposed amendments are to clarify that the exemption from creditors' claims on life insurance proceeds or other death benefits payable to a trustee of the insured/settlor's revocable trust will be maintained under F.S. 733.808(4) unless the insured/settlor clearly and specifically waives the exemption by beneficiary designation or an express provision waiving such exemption in the trust instrument or will pursuant to which any such trust is created.

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

Others
(May attach list if more than one)

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

REFERRALS TO OTHER SECTIONS, COMMITTEES OR LEGAL ORGANIZATIONS

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

Referrals

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

The Business Law Section of The Florida Bar
(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.

465670900012-FL BAR COMM AD.

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

White Paper on

Proposed Revisions to Section 733.808(4) and Section 736.05053(1), Florida Statutes

I. SUMMARY

The proposed legislation is in response to the court opinion in *Morey v. Everbank*, 93 So. 3d 482 (Fla. 1st DCA 2012) ("*Morey*"). The proposed revisions to Sections 733.808(4) and 736.05053(1), Florida Statutes, are intended to be clarifying in nature and should apply retroactively. Life insurance proceeds are generally exempt from administration expenses and creditor claims under Sections 222.13 and 733.808, Florida Statutes. The proposed revisions clarify the circumstances under which this exemption is waived by the insured: In the case of insurance proceeds paid to a trustee of a revocable trust, the exemption is waived only if the trust instrument expressly provides that Section 733.808(4), Florida Statutes, does not apply.

II. CURRENT SITUATION

A. Statutory Background

Life insurance proceeds are generally exempt from administration expenses and the claims of creditors pursuant to Section 222.13(1), Florida Statutes. However, the exemption is lost if the insurance proceeds are paid to the insured or the insured's estate. Section 222.13(1), Florida Statutes, provides, in relevant part:

> . . . whenever the insurance, by designation or otherwise, is payable to the insured *or to the insured's estate or to his or her executors, administrators, or assigns, the insurance proceeds shall become a part of the insured's estate for all purposes* and shall be administered by the personal representative of the estate of the insured in accordance with the probate laws of the state in like manner as other assets of the insured's estate. (*emphasis added*)

Section 733.808(1), Florida Statutes (titled "Death benefits; disposition of proceeds") provides that death benefits of any kind, including life insurance proceeds, may be made payable to the trustee of an inter vivos trust. (While Section 733.808 applies to many types of death benefits, this discussion and the terminology used in this discussion are focused only on life insurance proceeds.) If the insurance proceeds are paid to a trustee of a trust, the statute provides that the insurance proceeds "shall be held and disposed of in accordance with the terms of the trust . . ." Section 733.808(2) provides for similar rules for insurance proceeds made payable to the trustee named in a last will that is admitted to probate.

Section 733.808(3), Florida Statutes, provides that if no trustee makes a valid claim for the insurance proceeds within 6 months, or if satisfactory evidence is furnished that there is no trustee to receive the proceeds, the insurance company shall pay the insurance proceeds to the "personal representative of the person making the designation, unless otherwise provided by an

agreement" between the insurance company and the insured (i.e., the alternative beneficiary on the designation form or a default beneficiary set forth in the insurance contract).

Section 733.808(4), Florida Statutes, provides that insurance proceeds paid to the trustee or to a default or alternate designee, other than the insured's estate, are not subject to the claims of creditors or other expenses. Section 733.808(4) provides:

> *Death benefits payable as provided in subsection (1), subsection (2), or subsection (3), unless paid to a personal representative under the provisions of subsection (3), shall not be deemed to be part of the decedent's estate, and shall not be subject to any obligation to pay the expenses of the administration and obligations of the decedent's estate* or for contribution required from a trust under s. 733.607(2) to any greater extent than if the proceeds were payable directly to the beneficiaries named in the trust. (*emphasis added*)

B. *Morey*

In *Morey*, the insured designated his revocable trust as the beneficiary of a life insurance policy. After the insured's death, the trustee filed a petition requesting a court determination that life insurance proceeds payable to the trust were exempt from all "death obligations" and, therefore, unavailable to the estate or the estate's creditors.

The trust instrument in *Morey* directed the trustee to pay to the personal representative such amounts certified by the personal representative to be required to pay the settlor's "death obligations," including estate administration expenses, all the settlor's enforceable debts, and all estate taxes. *Id.* at 484-85 (quoting Article V of the trust instrument).

The court focused on the language in Section 733.808(1), Florida Statutes, which provides that life insurance proceeds paid to a trustee "shall be *held and disposed of by the trustee in accordance with the terms of the trust* ..." The court concluded that the language of the trust together with the entire structure of the trust evidenced an "apparent intent and practical result" that would be the same if the life insurance proceeds were paid directly to the estate. *Id.* at 487. The court ruled that the settlor waived the statutory exemption in Section 222.13, Florida Statutes. *Id.* at 487.

The holding in *Morey* is contrary to the generally accepted interpretations of Sections 222.13(1) and 733.808(4). The generally accepted interpretations of these sections is that insurance proceeds payable to a trustee of a revocable trust are entitled to the statutory exemption from the claims of the creditors of the insured's estate, notwithstanding any provision in the trust instrument directing the trustee to use trust assets to pay estate administration expenses or satisfy the claims of the creditors.

There is particular concern that the holding in *Morey* will be interpreted too broadly, and that the case will be construed to erode the long-standing (and until this case unchallenged)

understanding that Section 733.808(4) meant what it said, and that proceeds of insurance payable to a trust established by the insured are exempt from creditors claims.

III. EFFECT OF PROPOSED CHANGES GENERALLY

The effect of the legislative proposal is to clarify that a waiver of the statutory exemption from creditor's claims applicable to insurance proceeds paid to a trust established by the insured must be explicit. The waiver of the exemption cannot be inferred from general "pay all my debts"-type language in a trust instrument.

IV. ANALYSIS OF PROPOSED REVISIONS

The subcommittee suggests that the underlined language be added to Section 733.808(4), Florida Statutes, as follows:

> Unless the trust agreement, declaration of trust or will expressly provides that this subsection does not apply, death benefits payable as provided in subsection (1), subsection (2), or subsection (3), unless paid to a personal representative under the provisions of subsection (3), shall not be deemed to be part of the decedent's estate, and shall not be subject to any obligation to pay the expenses of the administration and obligations of the decedent's estate or for contribution required from a trust under s. 733.607(2) to any greater extent than if the proceeds were payable directly to the beneficiaries named in the trust.

The proposed language clarifies that a general "pay all my debts"-type provision in a trust instrument does not waive the statutory exemption from creditor claims for insurance proceeds paid to a trustee. The proposed language prevents an unintentional waiver by providing that the statutory exemption may only be waived with trust language that specifically refers to Section 733.808(4), Florida Statutes.

Further, here are the subcommittee's proposed revisions to Section 736.05053(1):

> . . . The interests of all beneficiaries of such a trust are subject to the provisions of this subsection; however, the payments must be made from assets, property, or the proceeds of assets or property that are included in the settlor's gross estate for federal estate tax purposes, and may not be made from, ~~other than~~ (a) assets proscribed in s. 733.707(3), and (b) death benefits payable as provided in subsection (1), subsection (2) or subsection (3) of s. 733.808, unless the trust instrument expressly directs that s. 733.808(4) does not apply ~~that are included in the settlor's gross estate for federal estate tax purposes~~.

The proposed revisions insure that a trustee, in fulfilling its fiduciary responsibility to pay to the personal representative expenses of administration and obligations of the settlor's estate as provided in Section 736.05053, Florida Statutes, cannot use death benefits described in 733.808(1), (2), or (3), unless the settlor specifically waived the prohibition of the use of such benefits in accordance with 733.808(4). Here again, if the settlor wishes to waive the exemption, the waiver must be specific. A general "pay all my debts"-type waiver is not sufficient.

The legislative proposal is clarifying in nature and should apply retroactively. Before *Morey*, few thought that insurance proceeds to the insured's revocable trust would expose the proceeds of insurance to creditor claims. Practitioners thought that Section 733.808(4), Florida Statutes, meant what it plainly said. Because the proposal is remedial, and clarifies and amplifies existing law, it has a retroactive effect, and will apply to all situations regardless of the date of the decedent's death.

V. IMPACT ON STATE AND LOCAL GOVERNMENTS

None apparent.

VI. DIRECT IMPACT ON PRIVATE SECTOR

The enactment of the legislative proposal will benefit the private sector by making certain litigation unnecessary in the wake of clarification of the issues addressed by the proposal.

VII. CONSTITUTIONAL ISSUES

None apparent.

VIII. OTHER INTERESTED PARTIES

The Florida Bankers Association

The Business Law Section of The Florida Bar

5617999.00012-FL BAR COMM AD

A bill to be entitled "Waiver of Exemption Applicable to Death Benefits".

An act modifying s. 733.808 and 736.05053 relating to the waiver of the exemption of creditors' claims to certain death benefits.

Section 1. Section 733.808 (4) is amended to read:

733.808 Death benefits; disposition of proceeds.-

(1) Death benefits of any kind, including, but not limited to, proceeds of:

(a) An individual life insurance policy;

(b) A group life insurance policy;

(c) A benefit plan as defined by s. 710.102;

(d) An annuity or endowment contract; and

(e) A health or accident policy,

may be made payable to the trustee under a trust agreement or declaration of trust in existence at the time of the death of the insured, employee, or annuitant or the owner of or participant in the benefit plan. The death benefits shall be held and disposed of by the trustee in accordance with the terms of the trust as they appear in writing on the date of the death of the insured, employee, annuitant, owner, or participant. It shall not be necessary to the validity of the trust agreement or declaration of trust, whether revocable or irrevocable, that it have a trust corpus other than the right of the trustee to receive death benefits.

(2) Death benefits of any kind, including, but not limited to, proceeds of:

(a) An individual life insurance policy;

(b) A group life insurance policy;

(c) A benefit plan as defined in s. 710.102;

(d) an annuity or endowment contract; and

(e) A health or accident policy,

may be made payable to the trustee named, or to be named, in a written instrument that is admitted to probate as the last will of the insured, the owner of the policy, the employee, owner, or participant covered by the plan or contract, or any other person, whether or not the will is in existence at the time of designation. Upon the admission of the will to probate, the death benefits shall be paid to the trustee, to

be held, administered, and disposed of in accordance with the terms of the trust or trusts created by the will.

(3) In the event no trustee makes proper claim to the proceeds from the insurance company or other obligor within a period of 6 months after the date of the death of the insured, employee, annuitant, owner, or participant, or if satisfactory evidence is furnished to the insurance company or obligor within that period that there is, or will be, no trustee to receive the proceeds, payment shall be made by the insurance company or obligor to the personal representative of the person making the designation, unless otherwise provided by agreement with the insurer or obligor during the lifetime of the insured, employee, annuitant, owner, or participant.

(4) Unless the trust agreement, declaration of trust or will expressly provides that this subsection does not apply, death benefits payable as provided in subsection (1), subsection (2), or subsection (3), unless paid to a personal representative under the provisions of subsection (3), shall not be deemed to be part of the decedent's estate, and shall not be subject to any obligation to pay the expenses of the administration and obligations of the decedent's estate or for contribution required from a trust under s. 733.607(2) to any greater extent than if the proceeds were payable directly to the beneficiaries named in the trust.

(5) The death benefits held in trust may be commingled with any other assets that may properly come into the trust.

(6) This section does not affect the validity of any designation of a beneficiary of proceeds previously made that designates as beneficiary the trustee of any trust established under a trust agreement or declaration of trust or by will.

Section 2. Section 736.05053(1) is amended to read:

736.05053 Trustee's duty to pay expenses and obligations of settlor's estate.-

(1) A trustee of a trust described in s. 733.707(3) shall pay to the personal representative of a settlor's estate any amounts that the personal representative certifies in writing to the trustee are required to pay the expenses of the administration and obligations of the settlor's estate. Payments made by a trustee, unless otherwise provided in the trust instrument, must be charged as expenses of the trust without a contribution from anyone. The interests of all beneficiaries of such a trust are subject to the

provisions of this subsection; however the payments must be made from assets, property, or the proceeds of the assets or property that are included in the settlor's gross estate for federal estate tax purposes, and may not be made from, ~~other than~~ (a) assets proscribed in s. 733.707(3), and (b) death benefits payable as provided in subsection (1), subsection (2) or subsection (3) of s. 733.808, unless the trust instrument expressly directs that s. 733.808(4) does not apply ~~that are included in the settlor's gross estate for federal estate tax purposes~~.

(2) Unless a settlor provides by will, or designates in a trust described in s. 733.707(3) funds or property passing under the trust to be used as designated, the expenses of the administration and obligations or the settlor's estate must be paid from the trust in the following order:

(a) Property of the residue of the trust remaining after all distributions that are to be satisfied by reference to a specific property or type of property, fund, or sum.

(b) Property that is not to be distributed from specified or identified property or a specified or identified item of property.

(c) Property that is to be distributed from specified or identified property or a specified or identified item of property.

(3) Trust distributions that are to be satisfied from specified or identified property must be classed as distributions to be satisfied from the general assets of the trust and not otherwise disposed of in the trust instrument on the failure or insufficiency of funds or property from which payment should be made, to the extent of the insufficiency. Trust distributions given for valuable consideration abate with other distributions of the same class only to the extent of the excess over the value of the consideration until all others of the same class are exhausted. Except as provided in this section, trust distributions abate equally and ratably and without preference or priority between real and personal property. When a specified or identified item of property that has been designated for distribution in the trust instrument or that is charged with a distribution is sold or taken by the trustee, other beneficiaries shall contribute according to their respective interests to the beneficiary whose property has been sold or take. Before distribution, the trustee shall determine the amounts of the respective contributions and such amounts must be paid or withheld before distribution is made.

(4) The trustee shall pay the expenses of trust administration, including compensation of trustees and attorneys of the trustees, before and in preference to the expenses of the administration and obligations of the settlor's estate.

(5) Nonresiduary trust dispositions shall abate pro rata with nonresiduary devises pursuant to the priorities specified in this section and s. 733.805, determined as if the beneficiaries of the will and trust, other than the estate or trust itself, were taking under a common instrument.

Section 3. This act is intended to clarify existing law, is remedial in nature, and has retroactive application without regard to the date of the settlor's or decedent's death.

4679645.00012-FL BAR COMM AD

LEGISLATIVE POSITION REQUEST FORM

GOVERNMENTAL AFFAIRS OFFICE

Date Form Received _____

GENERAL INFORMATION

Submitted By	Elaine M. Bucher, Chair, Estate and Trust Tax Planning Committee of the Real Property Probate & Trust Law Section
Address	Gunster, Yoakley & Stewart P.A., 777 S. Flagler Drive, Suite 500E, West Palm Beach, FL 33401, Telephone: (561) 655-1980, Email: ebucher@gunster.com
Position Type	Estate and Trust Tax Planning Committee, RPPTL Section, The Florida Bar

CONTACTS

Board & Legislation Committee Appearance

Elaine M. Bucher, Gunster, Yoakley & Stewart P.A., 777 S. Flagler Drive, Suite 500E,West Palm Beach, FL 33401, Telephone: (561) 655-1980, Email: ebucher@gunster.com
William T. Hennessey, Gunster, Yoakley & Stewart P.A., 777 South Flagler Drive, Suite 500 East, West Palm Beach, FL, Telephone: (561) 650-0663, Email: whennessey@gunster.com
Peter M. Dunbar, Pennington, Moore, Wilkinson, Bell & Dunbar, P.O. Box 10095, Tallahassee, Florida 32302-2095, Telephone: (850) 222-3533
Martha J. Edenfield, Pennington, Moore, Wilkinson, Bell & Dunbar, P.O. Box 10095, Tallahassee, FL 32302-2095, Telephone: (850) 222-3533

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

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 **XSupport** Oppose Technical Assistance Other _____

Proposed Wording of Position for Official Publication:

Support legislation that would add Chapter 659, Family Trust Companies, to the Florida Statutes to create legislation that authorizes families to form and operate licensed and unlicensed family trust companies and to authorize out of state licensed family trust companies to operate in Florida.

Reasons For Proposed Advocacy:

Currently, there is no statutory authority in Florida for a family to form and operate a "family trust company." Family trust companies provide fiduciary, investment advisory, wealth management, and administrative services to the family. At least 14 other states currently have statutes governing the organization and operation of family trust companies. Floridia families and families residing outside of Florida desire to establish and operate Florida family trust companies. The proposed legislation would allow certain trust companies, which are limited to providing trust services to one or two families, to operate without having to comply with the statutory and regulatory framework in place for operating a public trust company in Florida. A family may wish to form a family trust company because: (1) the family needs an independent trustee and the traditional trustee options (e.g., a trust company which serves the public or an individual trustee) do not suit the family's circumstances; (2) a family trust company focused on the family's circumstances may be better suited to handle specialized assets, such as agricultural properties, family-owned businesses, or alternative investments, including, but not limited to, private equity or venture capital investments; (3) family trust companies can provide heightened responsiveness and flexibility for a family, including allowing the family to select separate investment managers for specific asset classes; (4) family trust companies foster consolidation of investments and family office matters; (5) family trust companies can promote non-family financial objectives, including family succession planning and wealth education for younger generations; (6) family trust companies can provide an entrepreneurial mindset to the management of the family's investments; and (7) the family may desire to avoid being subjected to supervision by the Federal Securities and Exchange Commission ("SEC"), by instead subjecting its trust company to supervision by the Florida Office of Financial Regulation ("OFR"). The ability to operate family trust companies in Florida will: (1) encourage high net worth families to remain in or move to Florida; (2) increase the likelihood that Florida based family businesses will remain successful over the course of several generations; (3) create employment opportunities within Florida and a need for investment, accounting, legal and advisory support services for these trust companies and family businesses; (4) increase local philanthropy; and (5) bring trust business back to Florida.

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)

*has been consulted in the development of this proposed legislation.

Florida Office of Financial Regulation**

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

**State of Florida regulatory department which supervises Florida trust companies that provide services to the public at large.

Florida Family Office Forum***	SUPPORT
(Name of Group or Organization)	(Support, Oppose or No Position)

***is an organization whose membership is comprised of family offices for ultra-high net worth families.

Business Law Section of The Florida Bar****	UNKNOWN, EXPECT SUPPORT
(Name of Group or Organization)	(Support, Oppose or No Position)

**** The Legislative Committee of the Business Law Section was consulted with respect to the proposed legislation and the requested position. The Executive Council of the Business Law Section will be considering this position at its next meeting in September, 2013.

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

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

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

White Paper on Proposed Family Trust Companies Act

New Florida Statutes Chapter 659

I. SUMMARY

This legislation authorizes families to form and operate licensed family trust companies ("Licensed FTCs"), unlicensed family trust companies ("unlicensed FTCs"), and foreign licensed family trust companies ("Foreign Licensed FTCs"). At least 14 other states currently have statutes governing the organization and operation of family trust companies ("FTCs"). The Florida Statutes currently do not expressly authorize families to establish their own FTCs.

In general, a FTC is an entity which provides trust services similar to those that can be provided by an individual or financial institution (i.e., a bank or a public trust company). This includes serving as a trustee of trusts held for the benefit of the family members, as well as providing other fiduciary, investment advisory, wealth management, and administrative services to the family. A Florida FTC **must be owned exclusively by family members and may not provide fiduciary services to the public.**

II. PURPOSE BEHIND LEGISLATION

Reasons for a Family to Form a FTC

A Family may wish to form a FTC because:

1. The family needs an independent trustee and the traditional trustee options (e.g., a trust company which serves the public or an individual trustee) do not suit the family's circumstances.
2. A FTC focused on the family's circumstances may be better suited to handle specialized assets, such as agricultural properties, family-owned businesses, or alternative investments, including, but not limited to, private equity or venture capital investments.
3. FTCs can provide heightened responsiveness and flexibility for a family, including allowing the family to select separate investment managers for specific asset classes.
4. FTCs foster consolidation of investments and family office matters.
5. FTCs can promote non-family financial objectives, including family succession planning and wealth education for younger generations.
6. FTCs can provide an entrepreneurial mindset to the management of the family's investments.

7. The family may desire to avoid being subjected to supervision by the Federal Securities and Exchange Commission ("SEC"), by instead subjecting its trust company to supervision by the Florida Office of Financial Regulation ("OFR").

Choosing between a Licensed FTC and an unlicensed FTC

A family would likely choose to form a Licensed FTC in the event they plan to provide trust or fiduciary services to a large family or two families, desired to avoid SEC regulation or are of the opinion that a Licensed FTC provides greater transfer tax "protection" to the patriarch or matriarch. Also, as the scope of its operations expands, a family with an unlicensed FTC may choose to convert it to a Licensed FTC. Currently, families who reside in states which subject trusts to state income tax are forming and operating regulated FTCs in tax friendly jurisdictions in order to avoid state income taxation. Using a Licensed FTC provides a strong nexus to the state which regulates the FTC and should strengthen the case that the trust (and perpetuity) law of that state governs trust administration.

A family interested in forming an unlicensed FTC might be one who perhaps recently experienced an increase in liquidity (due to the sale of a family business or an IPO) and would like to establish a more formal framework for managing family wealth for current and succeeding generations. Traditional trustee options do not suit the family's circumstances. These families may consider it unnecessary to have their family trust affairs supervised by a state regulator. This may be more likely for a close knit family, serving a limited number of family members. In addition, an unlicensed FTC can delegate its investment functions to an investment agent, thereby avoiding having to register with the SEC as an investment adviser.

Benefits of Multiple Family FTCs

This legislation authorizes up to two families to together form one Licensed FTC. The purposes for allowing two families to form one Licensed FTC include:

- Many families own interests in closely-held businesses with other families. For instance, a Florida developer, agriculture business or biotech company may be privately owned by two families, with perhaps this ownership structure being in place for many decades. For the reasons identified above, these families may desire to extend their business arrangement into a Licensed FTC.
- It likely is more cost effective for two families to combine their resources to form and operate one Licensed FTC.

No more than one family may form an unlicensed FTC.

Direct Economic Impact on Private Sector

Absent this legislation, Florida families are likely to establish trust companies in one of the other states which has legislation authorizing families to establish their own trust company. This legislation will allow such families to establish their Licensed FTC or unlicensed FTC in Florida or operate a FTC, which is organized in another state, in Florida. In addition, it is expected that as a result of this legislation, families who are not located in Florida may select Florida as the jurisdiction to establish their Licensed FTC or unlicensed FTCs. This legislation will help to improve the State's status as one of the most desired jurisdictions for establishing and administering trusts.

This legislation should therefore be beneficial to the State's economy. Other states have enacted or updated their FTC statutes in an effort to attract and retain good, high-paying jobs in the financial services and legal industries and to encourage family-run businesses to locate in their states. Additional states are considering such legislation.

Fiscal Impact on State and Local Governments

Adoption of this legislative proposal by the Florida Legislature should not have a fiscal impact on state and local governments; rather, it should be revenue neutral. The OFR would regulate the FTCs established and operated under this legislation. The application fees for establishing FTCs and the annual certification and other fees are anticipated to offset OFR's costs in regulating FTCs.

Constitutional Issues

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

Other Interested Parties

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

IRS Notice 2008-63

Over the years the IRS has issued several private letter rulings to taxpayers on the federal tax consequences of using a FTC to administer family trusts. In 2008, the IRS issued Notice 2008-63, which sets forth the contents of a proposed revenue ruling describing the tax ramifications of using an FTC to administer a family's irrevocable trusts. The Notice contains suggested discretionary distribution committee provisions and other restrictions the use of which

are designed to avoid adverse federal tax consequences. To date the Notice has not been converted into a proposed revenue ruling.

The proposed FTC legislation does not contain the discretionary distribution committee provisions and other restrictions which are set forth in IRS Notice 2008-63. Such provisions are not inserted because the Notice has not been issued as a final IRS revenue ruling. Currently, the authors are unaware of any states with FTC legislation which have inserted the IRS Notice 2008-63 discretionary distribution committee provisions and its other restrictions into their statutes. It may be best if such restrictions are not in the legislation, but instead inserted in the individual FTC's governing documents. If enacted, it is important to note that the families forming FTCs should seek counsel from tax professionals in determining the tax ramifications with establishing FTCs.

III. EXAMPLE

Maria Montanez is a successful businesswoman who owns and operates multiple successful family run businesses located in the northeastern United States. Her family office has 50 employees, including certified public accountants and in-house attorneys. Maria is interested in relocating her family office to Florida. She is currently in the process of transferring ownership, operation and control of her family businesses to her children, grandchildren, and other key (non-family) employees. Many of her children and grandchildren reside in Florida and over the last several years Maria has spent her winter months in Florida. Interests in her family businesses are owned by trusts which Maria established for her children and grandchildren. Maria is interested in forming a Florida family trust company for the following reasons:

1. She would like to change the situs of her trusts to Florida, since Florida does not subject trusts to income tax.
2. For personal liability reasons, the key employees serving as trustees of her various family trusts would prefer to serve as officers and directors of the family trust company, which would in turn serve as trustee of the various family trusts.
3. Most, and in some instances all, of the assets of the family trusts are comprised of ownership interests in the family businesses and Maria believes that a family trust company has more flexibility to retain and manage these family business interests (as compared to a public trust company).
4. She would like her children to become more involved in administering the trusts and believes the family trust company format provides a greater opportunity to train and involve her children and grandchildren in administering the family assets.
5. She is hoping that implementing a licensed Florida family trust company will exempt her family office from having to register as an "investment advisor" with the SEC.

IV. SECTION-BY-SECTION ANALYSIS OF CHAPTER 659

Section 659.020

Section 659.020 contains definitions for words and terms used throughout chapter 659.

Section 659.020(1) defines "**Applicant**." An Applicant is the corporation or limited liability company on behalf of which the authorization to operate as a FTC is submitted.

Section 659.020(2) defines "**Authorized Representative**." An Authorized Representative is an officer or director of the FTC if the FTC is a corporation or is a manager or member of the FTC if the FTC is a limited liability company.

Section 659.020(3) defines "**Certificate of Authority**." A Certificate of Authority is the document issued by OFR evidencing the authority to operate as a licensed FTC.

Section 659.020(4) defines "**Collateral Kinship**." Collateral Kinship is a non-lineal relationship that stems from a common ancestor.

Section 659.020(5) defines "**Designated Relative**." A Designated Relative is the person designated in the Certificate of Authority or in the annual certification. The Designated Relative can be living or deceased. It is the person against whom degrees of kinship are measured for purposes of section 659.020(7).

Section 659.020(6) defines "**Family Affiliate**." A Family Affiliate is a company or other entity controlled (more than 50 percent) by a Family Member.

Section 659.020(7) defines "**Family Member**." The definition of Family Member is intended to include certain lineal and collateral relatives of the Designated Relative, certain spouses and former spouses of a Family Member and certain of their lineal relatives, Family Affiliates, certain trusts if all of the qualified beneficiaries are themselves family members or charities, probate estates of Family Members and certain non-Family Members, and certain charitable organizations. The definition is intended to include a reasonable number of persons and entities that are related to the Designated Relative. It is not so broad as to permit abuse of the FTC provisions. Licensed FTCs include a larger number of persons in the definition of Family Member than unlicensed FTCs. For example, a Family Member is any person within the sixth degree of lineal kinship (or ninth degree of collateral kinship) to the Designated Relative of a Licensed FTC, while an unlicensed FTC includes only persons within the fourth degree of lineal kinship (or seventh degree of collateral kinship). For further clarification, see the attached Degrees of Kinship chart.

Section 659.020(8) defines "**Family Trust Company**." A FTC is a corporation or limited liability company exclusively owned by one or more Family Members, organized or qualified to

do business in Florida, and acts as a fiduciary for one or more Family Members. A FTC may not serve as a fiduciary for a non-Family Member, except that it may provide such fiduciary services for up to 35 individuals who are not Family Members, but who are current or former employees of the FTC or of trusts, companies, or other entities that are Family Members.

Section 659.020(9) defines "**Financial Institutions Codes**." The Financial Institutions Codes include Chapter 655, relating to financial institutions generally; Chapter 657, relating to credit unions; Chapter 658, relating to banks and trust companies; Chapter 660, relating to trust business; Chapter 663, relating to international banking corporations; Chapter 665, relating to associations; and Chapter 667, relating to savings banks.

Section 659.020(10) defines "**Foreign Licensed Family Trust Company**." A Foreign Licensed Family Trust Company ("Foreign Licensed FTC") is a FTC that has its principal place of business outside of Florida and is licensed, operating, and supervised by a State other than Florida.

Section 659.020(11) defines "**Lineal Kinship**." Lineal Kinship is a Family Member in a Designated Relative's direct line of ancestry.

Section 659.020(12) defines "**Licensed Family Trust Company**." A Licensed Family Trust Company ("Licensed FTC") is an FTC operating under a current (not revoked or suspended) Certificate of Authority.

Section 659.020(13) defines "**OFR**." OFR is the Florida Office of Financial Regulation.

Section 659.020(14) provides that "**Qualified Beneficiary**" has the same meaning as defined in Florida Statutes section 736.0103.

Section 659.030

Section 659.030 describes the calculation for determining degrees of kinship. The degrees are counted by adding the number of steps from a Designated Relative to the Family Member. For example, if the Designated Relative is a grandparent and the Family member is a grandchild, the degree of kinship between the individuals is two. This is lineal kinship. However, if the Designated Relative is an uncle and the Family member is a nephew, the degree of kinship between the individuals is three. This is collateral Kinship. For further clarification, see the attached Degrees of Kinship chart.

Section 659.031

Section 659.031 provides that except as otherwise provided in chapter 659, the provisions of other chapters of the Financial Institutions Codes do not apply to FTCs.

Section 659.032

Section 659.032 provides that a FTC or a Foreign FTC does not have to be licensed in Florida.

Section 659.033

Section 659.033 describes the different applications of chapter 659 to a Licensed FTC, an unlicensed FTC, and a Foreign Licensed FTC. All sections of the chapter apply to Licensed FTCs and unlicensed FTCs unless otherwise stated in the sections. Only sections that expressly state that they apply to Foreign Licensed FTCs shall apply to such Foreign Licensed FTCs.

Section 659.100

Section 659.100 specifies the maximum number of Designated Relatives. The maximum number for Licensed FTCs is two, while the maximum number for unlicensed FTCs is one. If a Licensed FTC chooses to have two Designated Relatives, such Designated Relatives may not have a common ancestor within five generations. Permitting two Designated Relatives would permit two families to join together to form a single FTC. This would be useful, for example, where two families have historically been engaged in business together and wish to maintain continuity of business dealings through the provision of a collective fiduciary. However, the section strictly limits the number of Designated Relatives to guard against any risk of a FTC being used to provide trust company services to the general public.

Section 659.110

Section 659.110 describes the application of a Licensed FTC for a Certificate of Authority. A Licensed FTC must file an application and a $10,000 application fee with OFR. The application includes the proposed name, Florida address, Articles of Incorporation or Articles of Organization, bylaws or operating agreement, a detailed statement describing the proposed FTC's services, detailed information on each individual initially serving in a managerial capacity, detailed information on each individual who owns or may vote at least 10% of the proposed FTC, the name(s) of the Designated Relative(s), the amount and form of the proposed FTC's equity, the type and amount of bonds or insurance procured on the managers, and a statement with several sworn facts regarding activities of the proposed FTC and the character and background of its managers.

Section 659.120

Section 659.120 describes the investigation process OFR must commence within 60 days of an application for a Certificate of Authority. The application must have included all the information required and any additional information requested by OFR during the investigation. The purpose of the investigation is to determine the character and good standing of the FTC's managers as they attested in their application. If the investigation is satisfactory, OFR will issue a Certificate

of Authority. If OFR denies the Certificate of Authority, it must do so in writing. The applicant may then demand a hearing before an OFR hearing officer within 30 days. If the denial is affirmed, the Applicant may file a petition for judicial review.

Section 659.125

Section 659.125 provides that even if a FTC does not wish to be licensed, it must register with OFR before it begins its operations. The registration includes the name of the Designated Relative, a statement that the FTC and its operations comply with chapter 659, and a current street address and telephone number for both its physical office and its registered agent.

A Foreign Licensed FTC must also register with OFR and state that its operations are in compliance with specific sections of chapter 659 and that it is currently in compliance in its home jurisdiction. The Foreign Licensed FTC must also provide a current street address and telephone number of its registered agent, its physical office in its principal jurisdiction, its principal place of operations in Florida, and any other offices located in Florida. The Foreign Licensed FTC must also submit a certificate of good standing, a copy of its most recent review or certification letter, and a copy of the most recent annual certification, if any.

Both an unlicensed FTC and Foreign Licensed FTC must include a $5,000 registration fee pursuant to this section with their applications. The fees received by OFR will be placed in the Financial Institutions' Regulatory Trust Fund.

Section 659.130

Section 659.130(1) lists the requirements for Licensed and unlicensed FTCs. Licensed and unlicensed FTCs must maintain a principal office in Florida which maintains accessible original material business records and accounts of the Licensed FTC or unlicensed FTC for examination by OFR. The Licensed FTC or unlicensed FTC may maintain additional branches within and outside of Florida. A Licensed FTC or unlicensed FTC must also maintain (i) a registered agent with an office at a street address in Florida, (ii) a deposit account with a Florida branch or principal office of a state chartered or national financial institution, and (iii) all applicable state and local business licenses, charters and permits.

Section 659.130(2) lists the requirements for a Foreign Licensed FTC. A Foreign Licensed FTC must maintain an office in Florida which maintains accessible original material business records and accounts of the Foreign Licensed FTC which pertain to its Florida operations for examination by OFR. A Foreign Licensed FTC must maintain (i) a registered agent with an office at a street address in Florida, (ii) deposit account with a Florida branch or principal office of a state chartered or national financial institution, and (iii) all applicable state and local business licenses, charters and permits. Permitting Foreign Licensed FTCs will allow FTCs already established in other states to relocate part of their operations to Florida.

Section 659.140

Section 659.140(1) provides the information which must be contained within the organizational documents of a Florida Licensed FTC. Subsections 1(a) and 1(b) include requirements as to the name adopted by the FTC as well as the purpose for which it was formed. The name requirements do not apply to a Foreign Licensed FTC using a registered fictitious name. Subsection 1(c) and 1(d) require statements that the Licensed FTC will not offer services to the general public and will not amend the organizational documents (to allow the company to offer its services to a non Family Member) without prior written consent from OFR.

Section 659.140(2) provides that using the word "trust" in a Licensed FTC's name will not disqualify the name as a permissible corporate or limited liability company name.

Section 659.170

Section 659.170(1) provides that the minimum owners' equity of a Licensed FTC with one Designated Relative is $250,000. The minimum owners' equity of a Licensed FTC with two Designated Relatives in the application for a Certificate of Authority or in the annual certification is $350,000. Unlicensed FTCs cannot be organized or operated with an owners' equity of less than $250,000. This section is designed to limit the overall number of FTCs, which should limit the regulatory burden on OFR. In addition, requiring substantial capitalization will encourage professional and orderly establishment and maintenance of FTCs.

Section 659.170(2) cross references section 659.310(1)(a) and requires that the full amount of the initial minimum owners' equity be paid in any combination of cash, specific government obligations or insured deposits, or readily marketable securities.

Section 659.180

Section 659.180 provides that the management of the FTC resides exclusively with the board of directors or managers. This Section additionally provides that there shall not be less than three such directors or managers, and that at least one of the directors or managers must be a resident of the State of Florida. This residency requirement is intended to ensure the FTC has an actual nexus to Florida.

Section 659.190

Sections 659.190(1) and (2) generally require a Licensed FTC to obtain fidelity bonds totaling not less than $1,000,000, in connection with the business of the FTC to indemnify against loss. Section 659.190(6) permits an unlicensed FTC to maintain fidelity bonds.

Section 659.190(3) allows a Licensed FTC to increase its minimum equity (described in section 659.170) by $1,000,000 instead of obtaining the required fidelity bonds (for instance, a Licensed

FTC with one Designated Relative would need equity of $1,250,000 and a Licensed FTC with two Designated Relatives would need equity of $1,350,000).

Section 659.190(4) requires a Licensed FTC to obtain errors and omissions insurance policies of not less than $1,000,000. Section 659.190(7) permits an unlicensed FTC to maintain errors and omissions insurance policies. Section 659.190(5) authorizes Licensed FTCs and unlicensed FTCs to obtain other insurance policies necessary or desirable in connection with the business of the FTC.

These bond and coverage requirements are substantial. In addition, it is important to note that the cost of any loss, error, or omission not covered by a fidelity bond or errors and omissions insurance coverage will be borne solely by the family that owns and is served by the FTC.

Section 659.230

Section 659.230(1) requires FTCs and Licensed FTCs to maintain their fiduciary books and records separate from other records and to segregate all assets held in any fiduciary capacity from any other assets.

Section 659.230(2) provides that the assets received or held by the FTC in a fiduciary capacity are not liable for the debts or obligations of the FTC.

Section 659.240

This Section requires a Licensed FTC, an unlicensed FTC, or a Foreign Licensed FTC to file, within 60 days following the last day of the calendar year, an annual certification with OFR, together with an annual certification fee of $1,500 for a Licensed FTC, $750 for an unlicensed FTC, and $1,000 for a Foreign Licensed FTC.

The annual certification for Licensed FTCs shall set forth that the operations for the calendar year have been in compliance with Chapter 659 and shall describe any changes in operations, management, Designated Relatives or principal place of business since the end of the preceding calendar year. The annual certification for unlicensed FTCs shall set forth the name of its Designated Relative, its current address, and that its operations meet the requirements of certain sections of Chapter 659.

The annual certification for Foreign Licensed FTCs shall set forth that its operations were in compliance with certain sections of Chapter 659 and provide the current street address and telephone number of its registered agent, its physical office in its principal jurisdiction, its principal place of operations in Florida, and any other offices located in Florida. The Foreign Licensed FTC must also submit a certificate of good standing and a copy of its most recent review or certification letter. If OFR determines additional information is necessary, the Foreign

Licensed FTC must send OFR a copy of the most recent annual certification submitted to the foreign jurisdiction, within thirty days of OFR's written request.

The annual certification shall be on a form to be proscribed by OFR and signed under penalties of perjury by an Authorized Representative.

Section 659.250

If Licensed FTC desires to discontinue business, Section 659.250 requires it to furnish to OFR satisfactory evidence of its release and discharge from all of the obligations and trusts which it has assumed or which have been imposed by law and, thereafter, Section 659.240 directs OFR to enter an order revoking the Licensed Certificate of Authority of the Licensed FTC and at such time, the Licensed FTC is released from its fidelity bonds.

Section 659.300

Section 659.300(1) lists the powers of a Licensed FTC and an unlicensed FTC. Subsections 1(a) and (b) include authorizing a Licensed FTC or an unlicensed FTC to act as a trustee of a trust, personal representative of an estate, agent, guardian of the property in a guardianship proceeding, attorney-in-fact, escrow agent and financial advisor. Subsection 1(c) of 659.300 provides the Licensed FTC or the unlicensed FTC with the authority to exercise the powers of a corporation or limited liability company, as the case may be.

Subsection 1(d) of 659.300 provides the Licensed FTC or the unlicensed FTC with the ability to retain agents and to delegate duties and powers, specifically including the ability to retain a public trust company or bank trust department to assist the FTC in carrying out investment and administrative functions.

Subsection 1(e) of 659.300 provides the Licensed FTC or the unlicensed FTC with the power to perform any acts necessary or incidental to effectuate the provisions of chapter 659 and any other Florida laws applicable to the operation of a Licensed FTC or an unlicensed FTC.

Section 659.300(2) allows a Foreign Licensed FTC to exercise the powers and authorities granted to it under its principal jurisdiction, as well as remaining subject to any duties, restrictions, or limitations under its principal jurisdiction. A Foreign Licensed FTC may also act as an agent under Chapter 709 pursuant to a power of attorney.

Section 659.300(3) prohibits a Licensed FTC, an unlicensed FTC, or a Foreign Licensed FTC from engaging in "Banking" or fiduciary with the public, unless licensed under chapter 658 to do so.

Section 659.310

Subsection 1(a) of 659.310 describes the type of assets which may be held to form the minimum capital of the Licensed FTC or unlicensed FTC for all periods subsequent to its initial owners' equity contribution. Generally, the minimum capital must be retained in liquid investments. Subsection 1(b) states that the aggregate market value of these assets must be at least 100% of the company's required owners' equity. There is a five day 5 day curing period, in the event that the owners` equity falls below the required minimum. Note: the required minimum owners` equity is set forth in Section 659.170.

Section 659.310(2) authorizes a Licensed FTC or an unlicensed FTC to purchase or rent real or personal property for use in the conduct of the business or other activities of the company.

Section 659.310(3) authorizes a Licensed FTC or an unlicensed FTC to invest its funds for its own account, other than the minimum owners` equity, in any type or character of equity securities, debt securities, or other asset provided the investment complies with the prudent investor rule under Section 518.11, unless such compliance is otherwise waived in accordance with Section 518.11.

Subsections 4 through 7 of Section 659.310 set forth certain restrictions and requirements on a Licensed FTC or an unlicensed FTC, to the extent it desires to purchase or invest as a fiduciary for a fiduciary estate in securities of which the Licensed FTC or unlicensed FTC or a "Family Affiliate" has an interest. (Family Affiliate is defined in Section 659.020(6).) The Licensed FTC's or unlicensed FTC's interest in these securities includes: (i) their being issued by the Licensed FTC or unlicensed FTC; (ii) the underwriting or distribution of these securities by the Licensed FTC or unlicensed FTC; and (iii) the Licensed FTC or unlicensed FTC providing services to the investment company or investment trust which issued the securities and receiving compensation for these services.

Section 659.310(8) lists certain actions a Licensed FTC or an unlicensed FTC may perform which are not presumed to be affected by a conflict between the personal and fiduciary interests of the fiduciary. This subsection permits the FTC to interact with and invest in the family business without conflict of interest restrictions.

Section 659.310(9) provides that the duty of loyalty provisions in section 736.0802 will apply to Licensed FTCs, unlicensed FTCs, and Foreign Licensed FTCs that are serving as a trustee of a trust administered under chapter 736, only to the extent that such provisions are not inconsistent with Subsections 4 through 8 of section 659.310.

Section 659.320

To the extent a Licensed FTC or an unlicensed FTC is required to make an oath, affirmation, affidavit or acknowledgment, section 659.320 identifies the representatives to perform such acts on behalf of the Licensed FTC or unlicensed FTC.

Section 659.330

Section 659.330 provides that a Licensed FTC, an unlicensed FTC, and a Foreign Licensed FTC may not advertise its services to the public.

Section 659.340

Section 659.340 expressly provides that neither a Licensed FTC nor a Foreign Licensed FTC is required to provide or post bond or other surety to serve as a court appointed fiduciary in any Florida court proceeding, including with respect to it acting as a personal representative of an estate. This section is silent as to unlicensed FTCs, and therefore allows a court discretion to require that an unlicensed FTC post bond.

Section 659.400

Section 659.400 allows OFR to adopt the necessary rules and regulations to carry out the purposes and provisions of Chapter 659.

Section 659.410

Section 659.410(1) allows OFR to examine the books and records of a Licensed FTC at any time to the extent necessary to determine compliance with Chapter 659. Unlike the provisions of Chapter 655, applicable to public trust companies, section 659.410 does not require examinations at any particular interval (i.e., section 655.045 requires public trust companies to be examined at least once every eighteen months). By reference to Chapter 658, this Section allows OFR to take enforcement action if it deems appropriate.

Section 659.410(2) allows OFR to examine the books and records of an unlicensed FTC at any time, to the extent necessary to determine compliance with specific applicable sections of Chapter 659. However, OFR's scope of examination is limited to the information necessary to determine compliance. OFR is permitted to rely on any certificate of trust, trust summary, or written statement from the unlicensed FTC regarding the identity and qualifications of Qualified Beneficiaries of a trust or estate. OFR is not permitted to examine the financial books or records of the unlicensed FTC or anyone that the unlicensed FTC is acting for as a fiduciary.

Section 659.410 (3) allows OFR to examine the books and records of a Foreign Licensed FTC's Florida operations, at any time, to the extent necessary to determine compliance with specific applicable sections of Chapter 659. OFR is permitted to rely on any recent review or certification

letters issued by the regulatory agency to a Foreign Licensed FTC, if the Foreign Licensed FTC can show that the foreign jurisdiction's legislation contains is substantially similar to Chapter 659.

The fee for examination under this Section is limited to the costs incurred by OFR, including the salary directly attributable to any staff conducting the examination, in accordance with Section 655.045(1)(c). Consequently, there is no minimum fee for any examination OFR deems appropriate.

Subsection (5) provides that the fee for any examination under Section 659.410 shall be deposited into the Financial Institutions Regulatory Trust Fund.

Section 659.460

Subsection (1) provides that if the officers or directors (in the case of a corporation) or the managers or members acting in a managerial capacity (of a limited liability company) of a Licensed FTC violate any of the provisions of Chapter 659, such violation is sufficient cause for OFR to revoke the Certificate of Authority of the Licensed FTC.

In order to allow OFR to enforce its authority to conduct examinations of a Licensed FTC, Subsection (2) provides that if a Licensed FTC (or any person authorized to act on its behalf) refuses to allow OFR to inspect all books, records, papers and effects of the business of the Licensed FTC, OFR may provide the Licensed FTC with written notice of OFR's intent to revoke its Certificate of Authority and consequently be required to cease operations. OFR shall provide written notice of its intent to revoke the Certificate of Authority by delivering the same to the principal office or registered agent of the Licensed FTC. If the Licensed FTC fails to allow OFR to inspect the requested information within 30 days of the receipt of the notice, OFR may revoke the Certificate of Authority.

Subsection (3) authorizes OFR to have immediate access to the books, records, papers and effects of the business of the Licensed FTC if such access is necessary to prevent serious harm, financial or otherwise, to any person.

Section 659.465

Section 659.465 permits OFR to issue a cease and desist order to any unlicensed FTC or Foreign Licensed FTC found to be in violation of any applicable sections of Chapter 659.

Section 659.470

This Section allows OFR to impose a fee of $100 per day for each day a Licensed FTC, an unlicensed FTC or a Foreign Licensed FTC fails to submit, within the prescribed period, its annual certification or any report required by Chapter 659 or any regulation.

Section 659.490

Section 659.490 allows OFR to remove from his or her position any officer, director, manager, member, employee or agent of a FTC who knowingly or willfully neglects to perform any duty required by Chapter 659 or other applicable law, or fails to conform to any material requirement made by OFR.

Section 659.500

Section 659.500(1) provides that the books and records of a Licensed FTC, an unlicensed FTC, and a Foreign Licensed FTC are confidential and may only be examined (1) by OFR or its duly authorized representative; (2) by any authorized person of the FTC; (3) if compelled by a court or in accordance with state or federal laws, by the party seeking the examination; (4) if compelled by legislative subpoena as provided by law; (5) pursuant to a subpoena, to any law enforcement or prosecutorial instrumentality; (6) as authorized by the board of directors or the managers; (7) or as provided in subsection (2) discussed below.

Section 659.500(2) provides that each customer, stockholder, or member has the right to inspect books and records that pertain to the person's accounts or determination of the person's voting rights. These records will be kept confidential and will only be released with the express authorization of the involved person. However, information may be released without authorization in a manner prescribed by the board of directors or managers to verify the existence or amount of a customer's account when such information is reasonably provided to meet the needs of commerce and to ensure accurate credit information. The FTC may still disclose financial information as permitted by Pub. L. No. 106-102 (1999). Any person who willfully violates this section is guilty of a third degree felony. Subsection (2) does not apply to Foreign Licensed FTCs as the subsection provides that the law of the Foreign Licensed FTCs principal jurisdiction will apply to rights to inspection.

Section 659.500(3) states that "books and records" includes, but is not limited to, the application and investigation of a Certificate of Authority and related documents, the initial registration documents of an unlicensed FTC or a Foreign Licensed FTC, the annual certification, and any documentation submitted to OFR related to a Licensed FTC discontinuing its business.

Section 659.510

Section 659.510(1) provides that all records and information relating to an examination by OFR of a Licensed FTC, an unlicensed FTC, or a Foreign Licensed FTC are confidential and exempt from Florida Statute section 119.07(1), relating to inspection and copying of records, until such examination is completed. After an examination is complete, portions of the records relating to the examination will remain confidential if the disclosure would be harmful as enumerated in the statute.

Section 659.510(2) provides generally that reports of examinations, operations, or condition prepared or used by OFT are confidential and exempt from Florida Statute section 119.07(1). Such reports may be released to certain persons under the section 659.510(2), however any confidential information obtained from OFR must be maintained as confidential.

Section 659.510(3) provides certain circumstances which are not restricted by this section, including (1) publishing reports required by applicable federal law; (2) furnishing information for the regulation of the FTC; (3) disclosing summaries and general economic data if the identity of the FTC is not disclosed; and (4) reporting suspected criminal activity.

Section 659.510(4) outlines procedure for producing records or information compelled by court orders, administrative law judges, and legislative subpoena.

Section 659.510(5) requires all Licensed FTCs, unlicensed FTCs, and Foreign Licensed FTCs to maintain complete records of all shareholders or members, and the number and percentage ownership of their respective shares or units. These records are subject to inspection during normal business hours by those shareholders or members and by state taxing authorities. A list of shareholders or members must be made available to OFR for inspection. However, this information is confidential and exempt from Florida Statute section 119.07(1).

Section 659.510(6) provides that materials supplied to OFR or employees of the FTC remain the property of the submitting agency. Any confidential information remains confidential.

Section 659.510(7) provides that examination reports, investigatory records, the application and investigation of a Certificate of Authority and related documents, the initial registration documents of an unlicensed FTC or a Foreign Licensed FTC, the annual certification, any documentation submitted to OFR related to a Licensed FTC discontinuing its business, and any related information compiled by OFR must be retained by OFR for at least ten years.

Section 659.510(8) provides that a certified true copy of a document on file with the OFR may be used as evidence as if it were the original. OFR will establish a fee schedule for preparing true copies of documents.

Section 659.510(9) provides that any person who willfully discloses the information made confidential by this section is guilty of a third degree felony.

Section 659.600

Section 659.600 describes "domestication" as a Foreign FTC's application to become a Florida FTC. The Foreign Licensed FTC must be in good standing in its primary jurisdiction and must (1) file with the Department of State a certificate of domestication and articles of incorporation if a corporation or a certificate of conversion and articles or organization if a limited liability company (under the applicable chapter, either 608 or 605 of Florida Statutes); and (2) file an

application for a Certificate of Authority to commence operations as a Licensed FTC or register as an unlicensed FTC. The application or registration may be completed prior to filing with the Department of State; however both requirements must be met before operations are commenced.

Section 659.610

Section 659.610 describes the application for a Foreign Licensed FTC to commence operations in Florida. This Section differs from Section 659.600 in that it pertains only to Foreign FTCs wanting to do business in both Florida and its principal jurisdiction (and perhaps others). Only Foreign Licensed FTCs are granted this privilege. The Foreign Licensed FTC must be in good standing in its primary jurisdiction and must (1) file with the Department of State a certificate of authority under Chapters 607, 608, 605 or 620 or apply for a statement of qualification in accordance with Chapter 620 to conduct business in Florida; and (2) file an initial registration to commence operations as a Foreign Licensed FTC under the requirements of this chapter.

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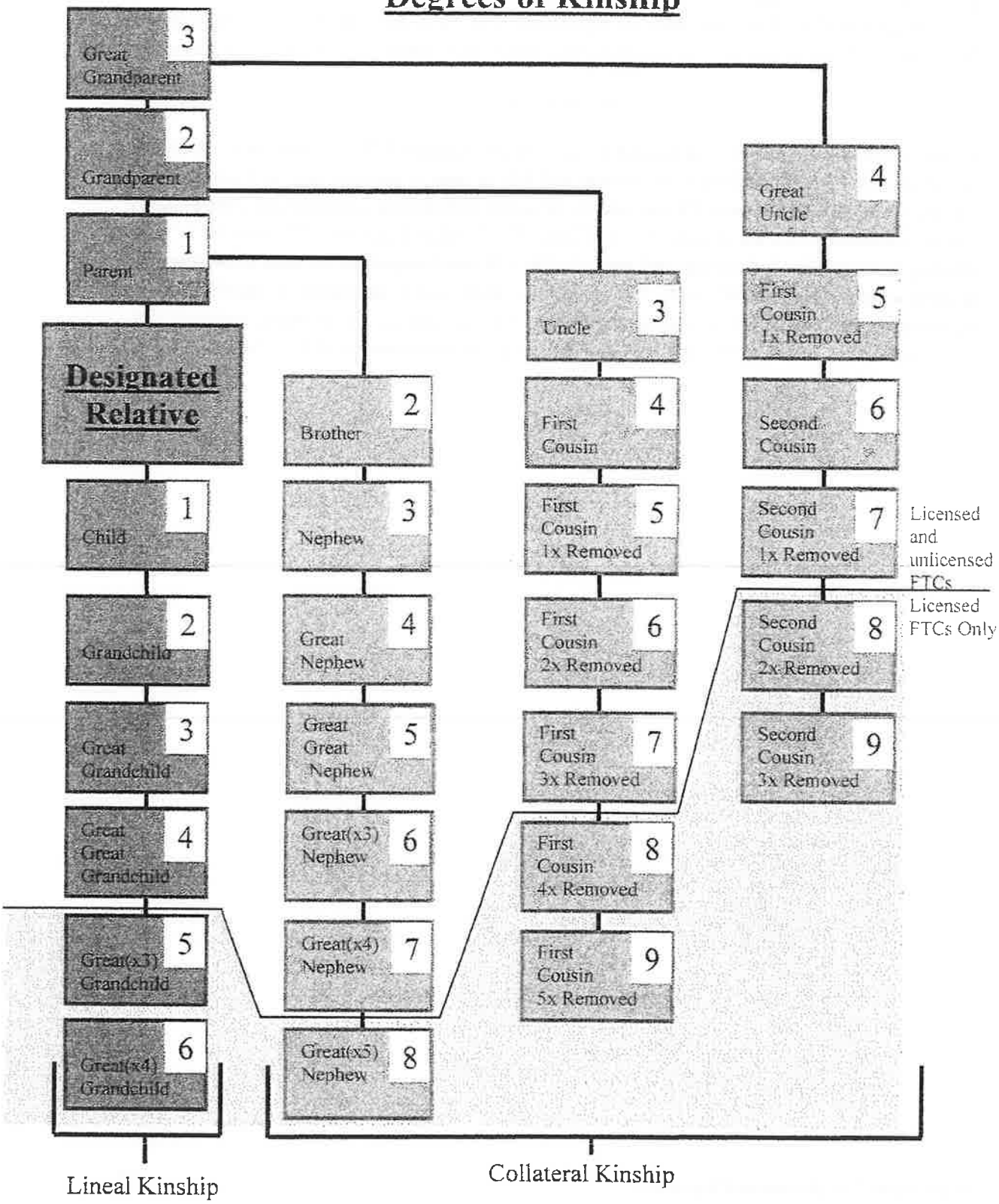
Degrees of Kinship



A bill to be entitled

An act authorizing by statute the establishment of family trust companies by way of establishing new chapter 659, F.S.; creating s. 659.010, F.S.; providing a short title; creating s. 659.020, F.S.; providing definitions; creating s. 659.030, F.S.; providing degrees of kinship; creating s. 659.031, F.S.; pertaining to the applicability of other chapters of the financial institution codes to a family trust company; creating s. 659.032, F.S.; specifying that a family trust company is not be required to be licensed as a trust company; creating s. 659.033, F.S.; describing applicability of chapter 659 to a licensed family trust company, a family trust company which is not a licensed family trust company and a foreign licensed family trust company; creating s. 659.100, F.S.; describing the maximum number of designated relatives for a family trust company and a licensed family trust company; creating s. 659.110, F.S.; describing application for certificate of authority for licensed family trust company, its contents, and the application fee; creating s. 659.120, F.S.; providing the investigation of licensed family trust company applicant; rights of applicant upon denial of certificate of authority; entry of final order; and judicial review; creating s. 659.125, F.S.; providing initial registration with OFR of family trust company

which is not a licensed family trust company and of a foreign licensed family trust company; creating s. 659.130, F.S.; providing requirements for a family trust company and a licensed family trust company: principal office, registered agent, licenses, permits and deposit account; creating s. 659.140, F.S.; providing certain provisions required in articles of incorporation, certificate of incorporation or articles of organization of a family trust company or a licensed family trust company; creating s. 659.170, F.S.; providing minimum owners' equity required for organization and operation a family trust company and a licensed family trust company; creating s. 659.180, F.S.; providing for the exclusive authority of directors and managers to manage a family trust company or licensed family trust company, the minimum number of directors and managers and director and manager residency requirements; creating s. 659.190, F.S.; providing fidelity bonds and insurance; creating s. 659.230, F.S.; requiring the segregation of books, records, and assets held in a fiduciary capacity and that fiduciary assets not liable for debts or obligations of family trust company or licensed family trust company; creating s. 659.240, F.S.; providing annual certification for family trust companies, licensed family trust companies and foreign licensed family trust companies; creating s. 659.250, F.S.;

providing for a licensed family trust company's discontinuing business; creating s. 659.300, F.S.; providing powers of family trust companies, licensed family trust companies and foreign licensed family trust companies and providing that banking business is prohibited; creating s. 659.310, F.S.; providing investment authority of a family trust company and licensed family trust company; creating s. 659.320, F.S.; providing authority to make oaths, affidavits, and acknowledgments on behalf of a family trust company or licensed family trust company; creating s. 659.330, F.S.; providing that a family trust company, licensed family trust company or a foreign licensed family trust company shall not advertise its services to the public; creating s. 659.340, F.S.; providing that service as a court appointed fiduciary by a family trust company, licensed family trust company or a foreign licensed family trust company shall not require a bond; creating s. 659.400, F.S.; providing that OFR may adopt rules and regulations necessary to carry out purposes of ch. 659; creating s. 659.410, F.S.; providing for OFR examinations and fees for examination; creating s. 659.460, F.S.; providing authority of OFR to revoke certificate of authority; creating s. 659.465, F.S.; providing OFR with cease and desist authority with respect to a family trust company or a foreign licensed family trust company;

creating s. 659.470, F.S.; providing for fees for failure to submit required report; creating s. 659.490, F.S.; providing for scope of OFR removal authority of officers, directors, managers, employees or agents of licensed family trust company; creating s. 659.500, F.S.; providing access to books and records, confidentiality and penalty for disclosure with respect to family trust companies, licensed family trust companies and foreign licensed family trust companies; creating s. 659.510, F.S.; providing records relating to an OFR examination of a family trust company, licensed family trust company or a foreign licensed family trust company and limited restrictions upon public access; creating s. 659.600, F.S.; providing domestication of a foreign family trust company; creating s. 659.610, F.S.; providing for qualification of a foreign licensed family trust company to commence operations in this state; amending s. 709.2102, F.S.; adding "family trust company", "foreign licensed family trust company" and "licensed family trust company" definitions; amending s. 709.2105(1), F.S.; authorizing family trust companies, licensed family trust companies and foreign licensed family trust companies to be power of attorney agents; amending s. 709.2112(4); adding to the definition of power of attorney "qualified agent" a family trust company, licensed family trust company and a foreign licensed

family trust company; amending s. 709.2119(1) and(2), F.S.; providing that a third party can rely on the authority and actions of an officer or manager executing for or behalf of a family trust company, foreign licensed family trust company or licensed family trust company acting as a power of attorney agent and that a third party may require an officer or manager of a family trust company, foreign licensed family trust company or licensed family trust company to execute and affidavit evidencing its authority to act under the power of attorney; amending s. 733.305(1), F.S.; providing authority for family trust companies, licensed family trust companies and foreign licensed family trust companies to serve as personal representatives and curators of estates; amending s. 733.402(3), F.S.; providing that family trust companies which are not licensed family trust companies or foreign licensed family trust companies are not exempt from the estate bond requirements of s. 733.402, F.S.; amending s. 736.0802(2) and (3), F.S.; providing an exception to the voidability of a conflict of interest transaction for those entered into by a family trust company, licensed family trust company or a foreign licensed family trust company to the extent the transaction is authorized under one or more of sub-subsections (4) through (8) of s. 659.310, F.S. and excluding from the presumption that a transaction is affected by

a conflict of interest any transaction of a family trust company, licensed family trust company or a foreign licensed family trust company which is authorized under one or more of sub-subsections (4) through (8) of s. 659.310, F.S.; amending s. 736.0802(5), F.S.; providing that such subsection is not applicable to a trust being administered by a family trust company, licensed family trust company or a foreign licensed family trust company, as each is defined in ch. 659, F.S.; amending s. 744.351(5), F.S.; providing that a family trust company which is not a licensed family trust company or a foreign licensed family trust company is not exempt from the guardianship bond requirements of s. 744.351, F.S.; providing an effective date.

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

Section 1. The Division of Statutory Revision is requested to create part I of chapter 659, Florida Statutes, consisting of ss. 659.010-659.033, entitled "GENERAL PROVISIONS."

Section 2. The Division of Statutory Revision is requested to create part II of chapter 659, Florida Statutes, consisting of ss. 659.100-659.250, entitled "FORMATION; OPERATION; TERMINATION."

Section 3. The Division of Statutory Revision is requested to create part III of chapter 659, Florida Statutes, consisting of ss. 659.300-659.340, entitled "AUTHORITY, POWERS & LIMITATIONS."

Section 4. The Division of Statutory Revision is requested to create part IV of chapter 659, Florida Statutes, consisting of ss. 659.400-659.510, entitled "REGULATION; PENALTIES CONFIDENTIALITY."

Section 5. The Division of Statutory Revision is requested to create part V of chapter 659, Florida Statutes, consisting of ss. 659.600-659.610, entitled "FOREIGN FAMILY TRUST COMPANIES."

Section 6. Section 659.010, Florida Statutes, is created to read:

659.010 Short title.-This chapter may be cited as the "Florida Family Trust Company Act."

Section 7. Section 659.020, Florida Statutes, is created to read:

659.020 Definitions.-As used in this chapter, unless the context otherwise requires:

(1) "Applicant" means the corporation or limited liability company on behalf of which the application under s. 659.110 for a Certificate of Authority to operate as a Licensed Family Trust Company is submitted.

(2) "Authorized Representative" means an officer or director of the Licensed Family Trust Company, Family Trust Company, or Foreign Licensed Family Trust Company if organized as a corporation; or a manager or member of the Licensed Family Trust Company, Family Trust Company, or Foreign Licensed Family Trust Company if organized as a limited liability company.

(3) "Certificate of Authority" means the document issued by OFR evidencing the authority to operate as a Licensed Family Trust Company under this chapter.

(4) "Collateral Kinship" means a relationship that is not lineal, but stems from a common ancestor.

(5) "Designated Relative" means a common ancestor of a family, who may be either a living or deceased person, designated in the application for a Certificate of Authority or in the annual certification.

(6) "Family Affiliate" means a company or other entity of which one or more Family Members own, control, or have the power

to vote, directly or indirectly, more than 50 percent of any class of voting securities of that company or other entity.

(7) "Family Member" means:

(a) A Designated Relative;

(b) Any person within the sixth degree of lineal kinship to a Designated Relative of a Licensed Family Trust Company or any person within the fourth degree of lineal kinship to a Designated Relative of a Family Trust Company;

(c) Any person within the ninth degree of collateral kinship to a Designated Relative of a Licensed Family Trust Company or any person within the seventh degree of collateral kinship to a Designated Relative of a Family Trust Company;

(d) The spouse or former spouse of any individual qualifying as a Family Member and any individual who is within the fifth degree of lineal kinship to such spouse or former spouse;

(e) A Family Affiliate;

(f) A trust established by a Family Member if the trust is funded exclusively by one or more Family Members, and for this purpose a trust to which property has been transferred as a result of a Family

Member's exercise of a power of appointment shall be deemed established by such Family Member if all Qualified Beneficiaries of the appointee trust are Family Members;

(g) A trust established by an individual who is not a Family Member if all of the non-charitable Qualified Beneficiaries of the trust are Family Members; except that a trust comprised exclusively of non-individual Qualified Beneficiaries is considered to be a Family Member if all such non-individual Qualified Beneficiaries are charitable foundations or other charitable entities as described in (j) of this subsection;

(h) The probate estate of a Family Member;

(i) The probate estate of an individual who is not a Family Member if all of the non-charitable beneficiaries of the estate are Family Members; except that an estate comprised exclusively of non-individual beneficiaries is considered to be a Family Member if all such non-individual beneficiaries are charitable foundations or other charitable entities as described in (j) of this subsection; and

(j) A charitable foundation or other charitable entity in which a majority of the governing body is comprised of Family Members.

(8) "Family Trust Company" means a corporation or limited liability company that:

(a) Is exclusively owned by one or more Family Members;

(b) Is organized or qualified to do business in this State;

(c) Acts or proposes to act as a fiduciary to serve one or more Family Members; and

(d) Does not serve as a fiduciary for a person, entity, trust, or estate which is not a Family Member, except that it may serve as a fiduciary for up to 35 individuals who are not Family Members provided that such individuals are current or former employees of the Family Trust Company or one or more trusts, companies, or other entities that are Family Members.

(9) "Financial Institutions Codes" means those chapters of the Florida Statutes as are described in s. 655.005(1)(k).

(10) "Foreign Licensed Family Trust Company" means a Family Trust Company which is licensed and has its principal place of

252 business in a jurisdiction other than Florida and is being
253 operated based on family or private trust company statutes of a
254 jurisdiction other than Florida (which statutorily limits its
255 operation to providing services to a defined set of family
256 members and a limited number of current or former employees) and
257 is subject to statutory or regulatory mandated supervision by
258 the jurisdiction in which the principal place of business is
259 located.
260 (11) "Lineal Kinship" means a Family Member who is in the
261 direct line of ascent or descent from a Designated Relative.
262 (12) "Licensed Family Trust Company" means a Family Trust
263 Company that is operating under this chapter which has a
264 Certificate of Authority that has not been revoked or suspended
265 by OFR.
266 (13) "OFR" means the Florida Office of Financial
267 Regulation.
268 (14) "Qualified Beneficiary" has the same meaning as
269 defined in s. 736.0103.
270

Section 8. Section 659.030, Florida Statutes, is created to read:

659.030 Degrees of kinship.-Degrees of kinship shall be calculated by adding the number of steps from a Designated Relative through each person to the Family Member, either directly in the case of Lineal Kinship, or through the common ancestor in the case of Collateral Kinship.

Section 9. Section 659.031, Florida Statutes, is created to read:

659.031 Application of other chapters of the financial institutions codes to a family trust company.-Except as expressly provided in this chapter, the provisions of the other chapters of the Financial Institutions Codes do not apply to a Family Trust Company, Licensed Family Trust Company or to a Foreign Licensed Family Trust Company.

Section 10. Section 659.032, Florida Statutes, is created to read:

659.032 Family trust company not required to be licensed as trust company.-A Family Trust Company or a Foreign Licensed

Family Trust Company is not required to be a Licensed Family Trust Company.

Section 11. Section 659.033, Florida Statutes, is created to read:

659.033 Application of this chapter to a licensed family trust company, a family trust company which is not a licensed family trust company and a foreign licensed family trust company.-

(1) A Family Trust Company which is a Licensed Family Trust Company is subject to all of the sections of this chapter which specifically apply to a Licensed Family Trust Company or which are not expressly limited in their application to a Family Trust Company which is not a Licensed Family Trust Company or to a Foreign Licensed Family Trust Company.

(2) A Family Trust Company which is not a Licensed Family Trust Company or is not a Foreign Licensed Family Trust Company is subject to all of the sections of this chapter unless they are expressly limited in their application to a Licensed Family Trust Company or a Foreign Licensed Family Trust Company.

(3) A Family Trust Company which is a Foreign Licensed Family Trust Company is subject to all of the sections of this chapter which expressly state that they apply to a Foreign Licensed Family Trust Company.

Section 12. Section 659.100, Florida Statutes, is created to read:

659.100 Maximum number of designated relatives.-

(1) A Family Trust Company shall not have more than one Designated Relative.

(2) A Licensed Family Trust Company shall not have more than two Designated Relatives, provided that the Designated Relatives do not have a common ancestor within five generations.

Section 13. Section 659.110, Florida Statutes, is created to read:

659.110 Application for certificate of authority for licensed family trust company: contents; fees.-

An Applicant for a Certificate of Authority to operate as a Licensed Family Trust Company must file an application with OFR on forms prescribed by OFR and accompanied by a $10,000 application fee. The application shall contain or be accompanied by the following information:

(1) The name of the proposed Licensed Family Trust Company;

(2) A copy of the Articles of Incorporation or the Articles of Organization and of the bylaws or operating agreement of the proposed Licensed Family Trust Company;

(3) The physical address and mailing address of the office located in Florida of the proposed Licensed Family Trust Company;

(4) A statement describing in detail the services that will be provided to Family Members by the proposed Licensed Family Trust Company;

(5) Such detailed financial, educational, business and biographical information for each individual who will initially serve as a director, officer, manager or member acting in a managerial capacity of the proposed Licensed Family Trust Company as the OFR may reasonably require, which may include a list of personal references;

(6) Such detailed biographical information for each individual who owns or has the ability or power to vote, either directly or indirectly, at least ten percent (10%) or more of the outstanding shares, membership interest or membership units of the proposed Licensed Family Trust Company, which may include a list of personal references;

(7) The name(s) of the Designated Relative(s);

(8) The amount of the initial owners' equity of the proposed Licensed Family Trust Company and the form in which such capital was paid and will be maintained;

(9) The type and amount of bonds or insurance that will be procured and maintained on directors, officers, managers or members acting in a managerial capacity; and

(10) A statement signed by Applicant under penalties of perjury that:

(a) The proposed Licensed Family Trust Company is not currently transacting business with the general public;

(b) No director, officer, manager or member acting in a managerial capacity has had a license as a trust company or any other financial institution issued in any other state, district or territory of the United States or any foreign country suspended or revoked within the ten (10) years immediately preceding the date of the application;

(c) No director, officer, manager or member acting in a managerial capacity has been found guilty of any violation of any of the provisions of the Financial Institutions Codes or Chapter 896 or any regulation adopted pursuant thereto that in the judgment of the

OFR would render the person unfit for the proposed position;

(d) No director, officer, manager or member acting in a managerial capacity has had a license that was issued pursuant to the provisions of the Financial Institution Codes suspended or revoked within the ten (10) years immediately preceding the date of the application;

(e) No director, officer, manager or member acting in a managerial capacity has been convicted of, or entered a plea of nolo contendere to, a felony or any crime involving fraud, misrepresentation or moral turpitude; and

(f) All information contained in the application is true and correct to the best of the knowledge of the individual(s) signing the application on behalf of the proposed Licensed Family Trust Company.

Section 14. Section 659.120, Florida Statutes, is created to read:

659.120 Investigation of licensed family trust company applicant; rights of applicant upon denial of certificate of authority; entry of final order; judicial review.-

(1) Within sixty (60) days after the application for Certificate of Authority to operate as a Licensed Family Trust Company is filed, OFR shall investigate the application and the other requirements of this chapter to determine:

(a) The character, reputation, financial standing, business experience, and business qualifications of the proposed directors or officers of the corporation, or the managers or members acting in a managerial capacity of the limited-liability company, as applicable.

(b) That the persons who will serve as directors or officers of the corporation, or the managers or members acting in a managerial capacity of the limited-liability company, as applicable:

(1) Have not been convicted of, or entered a plea of nolo contendere to, a felony or any crime

involving fraud, misrepresentation or moral turpitude.

(2) Have not made a false statement of material fact on the application.

(3) Have not had a license that was issued pursuant to the provisions of the Financial Institutions Codes suspended or revoked within the ten (10) years immediately preceding the date of the application.

(4) Have not had a license as a trust company which was issued in any other state, district or territory of the United States or any foreign country suspended or revoked within the ten (10) years immediately preceding the date of the application.

(5) Have not been found guilty of any violation of any of the provisions of the Financial Institutions Codes or chapter 896 or any regulation adopted pursuant thereto that in the judgment of OFR would render the person unfit for the proposed position.

(c) That the name of the proposed company complies with the provisions of s. 659.140.

(d) That the owners' equity is not less than the required minimum and that the required fidelity bonds and errors and omissions insurance coverage is in place.

(2) If the investigation required in (1) confirms that the Applicant has demonstrated satisfaction of all requirements to be a Licensed Family Trust Company then OFR shall issue a Certificate of Authority to permit the Applicant to act as a Licensed Family Trust Company.

(3) For purposes of this section, the application shall not be deemed to be filed until the Applicant has provided OFR with all information required to be included in such application pursuant to s. 659.110 and such additional information as OFR may request during its investigation.

(4) Notice of the entry of an order denying a Certificate of Authority to operate as a Licensed Family Trust Company must be given in writing, served personally, sent by electronic delivery, or sent by certified mail to the Applicant. The Applicant may demand, in a writing delivered to OFR, a hearing before an OFR hearing officer on the entry of the order denying a Certificate of Authority, but if no such demand is made within thirty (30) days after the entry of an order denying a Certificate of Authority to any Applicant, OFR shall enter a

final order. If an Applicant makes demand of a hearing before an OFR hearing officer on the entry of the order denying a Certificate of Authority, then such hearing shall occur within ninety (90) days of the demand.

(5) If the hearing officer affirms the order of OFR denying the Certificate of Authority to operate as a Licensed Family Trust Company, the Applicant may file a petition for judicial review pursuant to chapter 120.

Section 15. Section 659.125, Florida Statutes, is created to read:

659.125 Initial registration with OFR of family trust company which is not a licensed family trust company and of a foreign licensed family trust company.-

(1) A Family Trust Company which is not making application under s. 659.110 to become a Licensed Family Trust Company must register with OFR prior to commencing operations. The registration shall provide the name of the Designated Relative, state that the Family Trust Company meets the requirements of s. 659.020(8), state that its operations will be in compliance with ss. 659.130, 659.300(3) and 659.330, provide the current street address and telephone number of the physical location in Florida

of its principal place of operations (which is where its books and records will be maintained) and list the name and current Florida street address of its registered agent.

(2) A Foreign Licensed Family Trust Company must register with the OFR prior to commencing operations in this state. The registration shall state that its operations will be in compliance with ss. 659.130, 659.300(3) and 659.330 and state that it is currently in compliance with the family trust company laws and regulations of it principal jurisdiction and provide:

(a) the current street address and telephone number of the physical location of their principal place of business in its principal jurisdiction;

(b) the current street address and telephone number of the physical location in Florida of its principal place of Florida operations (which is where its books and records pertaining to its Florida operations will be maintained);

(c) the current address and telephone number of the physical location of any other offices located within this state; and

(d) the name and current Florida street address of its registered agent.

(3) Accompanying the registration of a Foreign Licensed Family Trust Company shall be:

(a) A certified copy of a certificate of good standing, or document of similar import, duly authenticated by the official having custody of records in the jurisdiction under the law of which the Foreign Licensed Family Trust Company is organized;

(b) A copy of the most recent review or certification letter issued to the Foreign Licensed Family Trust Company by the state regulatory agency in the jurisdiction under the law of which it is organized, to the extent such agency is required under its laws or rules to issue such review or certification letter; and

(c) A copy of the most recent certification, or document of similar import, if any, submitted by the Foreign Licensed Family Trust Company to the state regulatory agency under the law of which it is organized.

(4) The registration for a Family Trust Company and a Foreign Licensed Family Trust Company under this section shall be accompanied by a registration fee of $5,000.

(5) Registrations required by this section shall be made on a form prescribed by OFR and shall be signed under penalties of perjury by an officer or director if the Family Trust Company is organized as a corporation, or by a manager or member if the Family Trust Company is organized as a limited liability company.

(6) All money received by OFR pursuant to this section must be placed in the Financial Institutions' Regulatory Trust Fund pursuant to the provisions of s. 655.049.

Section 16. Section 659.130, Florida Statutes, is created to read:

659.130 Requirements for a family trust company, licensed family trust company and a foreign licensed family trust company: principal office; registered agent; licenses and permits; deposit account.-

(1) A Family Trust Company and Licensed Family Trust Company shall maintain:

(a) A principal office physically located in this State where original or true copies of all material business records and accounts of the Family Trust Company or the Licensed Family Trust Company may be

accessed and readily available for examination by OFR, all in accordance with the other provisions of this chapter. A Family Trust Company or a Licensed Family Trust Company may also maintain one or more branch offices within or outside of this State;

(b) A registered agent, with an office at the street address of the registered agent, in this State;

(c) All applicable state and local business licenses, charters and permits; and

(d) A deposit account with a state chartered or national financial institution having a principal or branch office in this State.

(2) In order to operate in this state a Foreign Licensed Family Trust Company must be in good standing in its principal jurisdiction and shall maintain:

(a) An office physically located in this State where original or true copies of all material business records and accounts of the Foreign Licensed Family Trust Company pertaining to its Florida operations may be accessed and readily available for examination by OFR, all in accordance with the other provisions of this chapter;

(b) A registered agent, with an office at the street address of the registered agent, in this State;

(c) All applicable state and local business licenses, charters and permits; and

(d) A deposit account with a state chartered or national financial institution having a principal or branch office in this State.

Section 17. Section 659.140, Florida Statutes, is created to read:

659.140 Certain provisions required in organizational documents; use of word "trust" in name.-

(1) The articles of incorporation, certificate of incorporation or articles of organization of a Family Trust Company or a Licensed Family Trust Company must contain:

(a) The name adopted by the company, which must distinguish it from any other trust company formed in this State or engaged in the business of a trust company, Family Trust Company or Licensed Family Trust Company in this State, provided, however, that this paragraph shall not apply to a Foreign Licensed Family Trust Company using a fictitious name,

registered and maintained pursuant to s. 865.09, that so distinguishes it;

(b) The purpose for which the company is formed;

(c) A statement to the effect that the company shall not offer its services to the general public; and

(d) A statement to the effect that the articles of incorporation, certificate of incorporation or articles of organization may not be amended, without prior written consent from OFR, in a manner purporting to permit the company to offer its services to any individual or entity other than a Family Member.

(2) Inclusion of the word "trust" in the name adopted by a Family Trust Company or Licensed Family Trust Company shall not disqualify such name from being permissible under s. 607.0401 (corporate name) or s. 608.406 or 605.0112 (limited liability company name).

Section 18. Section 659.170, Florida Statutes, is created to read:

659.170 Minimum owners' equity required for organization and operation.-

(1) A Licensed Family Trust Company which has one Designated Relative shall not be organized or operated with an owners' equity of less than $250,000.00. The minimum owners' equity required by this Section shall be increased to $350,000.00 to the extent the Licensed Family Trust Company has two Designated Relatives named in the application for a Certificate of Authority or in the annual certification. A Family Trust Company shall not be organized or operated with an owners' equity of less than $250,000.00.

(2) The full amount of the initial minimum owners' equity of a Family Trust Company or a Licensed Family Trust Company shall be comprised of one or more of the asset groups described in s. 659.310(1)(a), exclusive of all organization expenses.

Section 19. Section 659.180, Florida Statutes, is created to read:

659.180 Directors; managers; number.-

(1) The exclusive authority to manage a Family Trust Company or a Licensed Family Trust Company shall be vested in a board of directors, if a corporation, or a board of directors or managers, if a limited liability company.

(2) A Family Trust Company or a Licensed Family Trust Company shall not have fewer than three (3) directors, if a corporation, or three (3) directors or managers, if a limited liability company. At least one director or manager of the Family Trust Company or a Licensed Family Trust Company must be a resident of the State of Florida.

Section 20. Section 659.190, Florida Statutes, is created to read:

659.190 Fidelity bonds; insurance.-

(1) The directors or managers of a Licensed Family Trust Company shall procure and maintain fidelity bonds on all active officers, directors, managers, members acting in a managerial capacity and employees of the Licensed Family Trust Company,

whether or not such person receives a salary or other compensation from the Licensed Family Trust Company, in order to indemnify the Licensed Family Trust Company against loss because of any dishonest, fraudulent or criminal act or omission by any of the persons bonded, acting alone or in combination with any other persons.

(2) Each fidelity bond shall be in an amount of not less than $1,000,000.00.

(3) In lieu of the fidelity bonds as described in the foregoing provisions of this section a Licensed Family Trust Company may increase its s. 659.170 minimum owners' equity by $1,000,000.00, so that if it has one Designated Relative it shall not be organized or operated with an owners' equity of less than $1,250,000.00 or if it has two Designated Relatives it shall not be organized or operated with an owners' equity of less than $1,350,000.00.

(4) The Licensed Family Trust Company shall also procure and maintain an errors and omissions insurance policy of not less than $1,000,000.00 to cover the acts of any active officers, directors, managers and members acting in a managerial capacity whether or not such person receives a salary or other compensation from the Licensed Family Trust Company.

(5) A Family Trust Company or a Licensed Family Trust Company may also procure and maintain other insurance policies necessary or desirable in connection with the business of the Family Trust Company or Licensed Family Trust Company including, but not limited to, one or more casualty insurance policies.

(6) A Family Trust Company may, but is not required to, procure and maintain fidelity bonds described in this section.

(7) A Family Trust Company may, but is not required to, procure and maintain errors and omissions insurance coverage described in this section.

(8) Bonds or insurance policies procured and maintained pursuant to this section may be in any form and may be paid for by the Family Trust Company or the Licensed Family Trust Company.

Section 21. Section 659.230, Florida Statutes, is created to read:

659.230 Segregation of books, records, and assets; fiduciary assets not liable.-

(1) Each Family Trust Company and Licensed Family Trust Company shall maintain its fiduciary books and records separate and distinct from other records of the Family Trust Company and

Licensed Family Trust Company and shall segregate all assets held in any fiduciary capacity from other assets of the Family Trust Company or Licensed Family Trust Company.

(2) No assets received or held in a fiduciary capacity by any Family Trust Company or Licensed Family Trust Company shall be liable for the debts or obligations of the Family Trust Company or of the Licensed Family Trust Company.

Section 22. Section 659.240, Florida Statutes, is created to read:

659.240 Annual certification.-

(1) Within sixty (60) days of the end of each calendar year a Family Trust Company, Licensed Family Trust Company and Foreign Licensed Family Trust Company shall file its annual certification with OFR.

(2) The annual certification filed by a Licensed Family Trust Company shall include a verified statement that:

(a) The Licensed Family Trust Company operated as a Family Trust Company in full compliance with this chapter during the calendar year; and

(b) Describing any changes during the calendar year to its operations, principal place of business,

directors, officers, managers, members acting in a managerial capacity and Designated Relatives since the end of the preceding calendar year.

(3) The annual certification filed by a Family Trust Company shall include a verified statement that the Family Trust Company meets the requirements of s. 659.020(8), its operations were in compliance with ss. 659.130, 659.300(3) and s. 659.330 and shall also include the name of its Designated Relative and the street address for its principal place of business.

(4) The annual certification filed by a Foreign Licensed Family Trust Company shall include a verified statement that its operations were in compliance with ss. 659.130, 659.300(3) and s. 659.330 and in compliance with the family trust company laws and regulations of its principal jurisdiction and provide:

(a) the current street address and telephone number of the physical location of their principal place of business in its principal jurisdiction;

(b) the current street address and telephone number of the physical location in Florida of its principal place of Florida operations (which is where its books and records pertaining to its Florida operations will be maintained);

(c) the current address and telephone number of the physical location of any other offices located within this state; and

(d) the name and current Florida street address of its registered agent.

(5) Accompanying the annual certification of a Foreign Licensed Family Trust Company shall be:

(a) A certified copy of a certificate of good standing, or a document of similar import, duly authenticated by the official having custody of records in the jurisdiction under the law of which the Foreign Licensed Family Trust Company is organized; and

(b) A copy of the most recent review or certification letter issued to the Foreign Licensed Family Trust Company by the state regulatory agency in the jurisdiction under the law of which it is organized, to the extent such agency is required under its laws or rules to issue such review or certification letter.

(6) If OFR reasonably determines additional information is necessary, the Foreign Licensed Family Trust Company shall, within thirty (30) calendar days of receipt of OFR's written

notice so requesting, submit a copy of the most recent certification or document of similar import submitted by the Foreign Licensed Trust Company to the state regulatory agency of the jurisdiction in which it was organized.

(7) The annual certification shall be made on a form prescribed by OFR and shall be signed under penalties of perjury by an Authorized Representative.

(8) An annual certification fee of $1,500 for a Licensed Family Trust Company, $750 for a Family Trust Company and $1,000 for a Foreign Licensed Family Trust Company shall accompany the annual certification. All money received by OFR pursuant to this section must be placed in the Financial Institutions' Regulatory Trust Fund pursuant to the provisions of s. 655.049.

Section 23. Section 659.250, Florida Statutes, is created to read:

659.250 Discontinuing business.-Whenever a Licensed Family Trust Company desires to discontinue its business as a Licensed Family Trust Company, it shall furnish to OFR satisfactory evidence of its release and discharge from all the obligations and trusts which it has assumed or which have been imposed by law. Thereafter, OFR shall enter an order revoking the Certificate of

Authority of the Licensed Family Trust Company and at such time, the Licensed Family Trust Company shall be released from any fidelity bonds which it has maintained pursuant to s. 659.190(1).

Section 24. Section 659.300, Florida Statutes, is created to read:

659.300 Powers of family trust companies, licensed family trust companies and foreign licensed family trust companies; banking business prohibited.-

(1) A Licensed Family Trust Company and a Family Trust Company may:

(a) Act as a sole fiduciary or co-fiduciary, including trustee, personal representative, agent pursuant to chapter 709 and guardian of the property, within and outside this State;

(b) Act within and outside this State as advisory agent, agent, assignee, assignee for the benefit of creditors, attorney-in-fact, authenticating agent, bailee, bond or indenture trustee, conservator, conversion agent, curator, custodian, escrow agent, exchange agent, fiscal or paying agent, financial

advisor, investment advisor, investment manager, managing agent, purchase agent, receiver, registrar, safekeeping agent, subscription agent, transfer agent except for public companies, warrant agent, or in similar capacities generally performed by corporate trustees, and in so acting possess, purchase, sell, invest, reinvest, safekeeping or otherwise manage or administer real or personal property of others;

(c) Exercise the powers of a corporation or a limited-liability company incorporated or organized under the laws of this state or qualified to transact business as a foreign corporation or a limited-liability company under the laws of this State and any incidental powers that are reasonably necessary to enable it to fully exercise, in accordance with commonly accepted customs and usages, a power conferred in this chapter;

(d) Delegate duties and powers, including investment functions under s. 518.112, in accordance with the powers granted to a trustee in chapter 736 or any other applicable law, and retain agents, attorneys, accountants, investment advisers or other individuals or entities to advise or assist the Family Trust

Company, Licensed Family Trust Company or Foreign Licensed Family Trust Company in the exercise of its of its powers and duties under this chapter and chapter 736, including, but not limited to retaining a public trust company (other than another Family Trust Company, Licensed Family Trust Company or a Foreign Licensed Family Trust Company) or bank trust department for these purposes; and

(e) Do and perform all acts necessary or incidental to exercise the powers enumerated in this section or authorized by this chapter and any other applicable laws of this State.

(2) Subject to the provisions of (3) and ss. 659.130 and 659.330 and provided it is in good standing in its principal jurisdiction a Foreign Licensed Family Trust Company may exercise the powers and authorities granted to it pursuant to the family or private trust company statutes, regulations and rules of its principal jurisdiction and it is also subject to the duties, restrictions and limitations as set forth in the family or private trust company statutes, regulations and rules of its principal jurisdiction. In addition, a Foreign

Licensed Family Trust Company may act as power of attorney agent pursuant to Chapter 709.

(3) A Family Trust Company, Licensed Family Trust Company or a Foreign Licensed Family Trust Company shall not engage in any:

(a) Banking, provided, however, that a Family Trust Company or Licensed Family Trust Company may establish accounts at other financial institutions for its own purposes or on behalf of Family Members to which it provides services pursuant to this chapter; or

(b) Fiduciary services with the public unless licensed pursuant to chapter 658.

Section 25. Section 659.310, Florida Statutes, is created to read:

659.310 Investments.-

(1) For all periods after its initial owners' equity contribution the assets forming the minimum capital of a Licensed Family Trust Company or a Family Trust Company must:

(a) Consist of:

(1) Cash;

(2) Governmental obligations or insured deposits that mature within 3 years after acquisition;

(3) Readily marketable securities or other liquid, secure assets, bonds, sureties or insurance; or

(4) Any combination thereof.

(b) Have an aggregate market value of at least 100 percent of the company's required owners' equity, as specified in s. 659.170. If the aggregate market value of 100 percent of the company's required owners' equity shall at any time be less than the amount required by s. 659.170, the company shall have five (5) business days to restore the owners' equity to comply with s. 659.170.

(2) A Family Trust Company or Licensed Family Trust Company may purchase or rent real or personal property for use in the conduct of the business and other activities of the company.

(3) Notwithstanding the provisions of any other law to the contrary, a Family Trust Company or Licensed Family Trust Company may invest its funds for its own account, other than those required or permitted to be maintained by subsection 1 or 2, in any type or character of equity securities, debt

902 securities or other asset, provided the investment complies with
903 the prudent investor rule in s. 518.11, unless such compliance
904 is otherwise waived in accordance with s. 518.11.
905 (4) Notwithstanding the provisions of any other law to the
906 contrary, a Family Trust Company or Licensed Family Trust
907 Company is authorized while acting as a fiduciary to purchase
908 directly from underwriters or distributors or in the secondary
909 market:
910 (a) Bonds or other securities underwritten or
911 distributed by:
912 (1) the Family Trust Company or Licensed Family
913 Trust Company,
914 (2) a Family Affiliate, or
915 (3) a syndicate including the Family Trust
916 Company or Licensed Family Trust Company or
917 Family Affiliate, and
918 (b) Securities of any investment company (mutual
919 fund, closed-end fund, or unit investment trust), as
920 defined under the Investment Company Act of 1940, for
921 which the Family Trust Company or Licensed Family
922 Trust Company acts as advisor, custodian,
923 distributor, manager, registrar, shareholder
924 servicing agent, sponsor or transfer agent.

(5) The authority granted in subsection 4 may be exercised only if:

(a) The investment is not expressly prohibited by the instrument, judgment, decree or order establishing the fiduciary relationship;

(b) The Family Trust Company or Licensed Family Trust Company procures in writing the consent of its co-fiduciaries with discretionary investment powers, if any, to the investment; and

(c) The Family Trust Company or Licensed Family Trust Company discloses in writing to the person or persons to whom it sends account statements its intent to exercise the authority granted in subsection 4 before the first exercise of that authority, and each such disclosure shall reflect the following;

(1) the nature of any interest the Family Trust Company or Licensed Family Trust Company's interest has (or is reasonably expected to have) in the underwriting or distribution of any bonds or securities purchased;

(2) the nature and amount of any fee or other compensation received (or reasonably expected to

be received) by the Family Trust Company or Licensed Family Trust Company in connection with the transaction;

(3) the nature of the relationship between the Family Trust Company or Licensed Family Trust Company and any investment company described in paragraph (b) of subsection 4, and

(4) the nature and amount of any fee or other compensation received (or reasonably expected to be received) by the Family Trust Company or Licensed Family Trust Company for providing any services to any investment company described in paragraph (b) of subsection 4.

(6) Nothing in subsections 4 or 5 shall affect the degree of prudence which is required of fiduciaries under the laws of this State. However, any purchase of bonds or securities under authority of subsections 4 and 5 of this section are not presumed to be affected by a conflict between the fiduciary's personal and fiduciary interests if such purchase:

(a) Is at a fair price;

(b) Is in accordance with:

(1) The interest of the Qualified Beneficiaries; and

(2) The purposes of the trusts; and

(c) Otherwise complies with:

(1) The prudent investor rule in s. 518.11, or any prudent investor or similar rule under other applicable law, unless such compliance is otherwise waived in accordance with s. 518.11 or such other applicable law; and

(2) The terms of the instrument, judgment, decree or order establishing the fiduciary relationship.

(7) Notwithstanding the foregoing provisions of this section, a Family Trust Company or Licensed Family Trust Company shall not, while acting as a fiduciary, purchase any bond or security issued by the Family Trust Company or Licensed Family Trust Company or an affiliate thereof unless:

(a) The Family Trust Company or Licensed Family Trust Company is expressly authorized to do so by:

(1) The terms of the instrument creating the trust;

(2) A court order;

(3) The written consent of the settlor of the trust for which the Family Trust Company or

Licensed Family Trust Company is serving as trustee; or

(4) The written consent of every adult Qualified Beneficiary of the trust who, at the time of such purchase is entitled to receive income under the trust or who would be entitled to receive a distribution of principal if the trust were terminated; or

(b) The purchase of the security:

(1) Is at a fair price; and

(2) Complies with:

(I) The prudent investor rule in s. 518.11, or any prudent investor or similar rule under other applicable law, unless such compliance is otherwise waived in accordance with s. 518.11 or such other applicable law; and

(II) The terms of the instrument, judgment, decree or order establishing the fiduciary relationship.

(8) Except as otherwise expressly limited by the foregoing provisions of this subsection, a Family Trust Company or Licensed Family Trust Company while acting as a fiduciary is

also authorized, without limiting any powers otherwise conferred on fiduciaries by law, to do any of the following, which are not presumed to be affected by a conflict between the fiduciary's personal and fiduciary interests:

(a) Make an equity investment in a closely held entity that may or may not be marketable and that is owned or controlled, either directly or indirectly, by one or more Family Members;

(b) Place a security transaction using a broker that is a Family Member;

(c) Enter into an agreement with a Family Member who is the settlor or a Qualified Beneficiary of any trust with respect to the appointment of the Family Trust Company or Licensed Family Trust Company as a fiduciary of such trust or with respect to the compensation of the Family Trust Company and Licensed Family Trust Company for service as a fiduciary;

(d) Transact business with a Family Member;

(e) Transact business with or invest in any asset of another trust, estate, guardianship, or conservatorship for which the Family Trust Company or Licensed Family Trust Company is a fiduciary or in which a Family Member has an interest;

(f) Deposit trust assets in a financial institution that is owned, controlled or operated by one or more Family Members;

(g) Purchase, sell, hold, own or invest in any security, bond, real or personal property, stock or other asset of a Family Member; and

(h) With or without adequate security, loan money to or borrow money from any Family Member, or any trust, estate or guardianship for which the Family Trust Company or Licensed Family Trust Company serves as a fiduciary.

(9) To the extent not inconsistent with and subject to the terms of sections (4) through(8) above, the duty of loyalty provisions in 736.0802 shall apply to Family Trust Companies, Licensed Family Trust Companies, and Foreign Licensed Family Trust Companies when serving as trustee of any trust whose administration is subject to chapter 736.

Section 26. Section 659.320, Florida Statutes, is created to read:

659.320 Oaths, affidavits, and acknowledgments.-Whenever a Family Trust Company or a Licensed Family Trust Company is

required to make an oath, affirmation, affidavit, or acknowledgment regarding any fiduciary capacity in which it is acting or is preparing to act, any director or officer or, if the Family Trust Company or Licensed Family Trust Company is a limited liability company, any manager expressly authorized by the Family Trust Company or Licensed Family Trust Company, shall make, and subscribe if required, any such oath, affirmation, affidavit, or acknowledgment on behalf of such Family Trust Company or Licensed Family Trust Company.

Section 27. Section 659.330, Florida Statutes, is created to read:

659.330 Unlawful to advertise services to public.-A Family Trust Company, Licensed Family Trust Company or a Foreign Licensed Family Trust Company shall not advertise its services to the public.

Section 28. Section 659.340, Florida Statutes, is created to read:

659.340 Service as court appointed fiduciary; bond requirement.-No Licensed Family Trust Company or Foreign Licensed Family Trust Company shall be required to provide or otherwise post a

bond or other surety to serve as a court appointed fiduciary in any proceeding brought or conducted in this State, including, but not limited to, serving as a personal representative.

Section 29. Section 659.400, Florida Statutes, is created to read:

659.400 Regulations of OFR.-OFR may adopt such rules and regulations as may be necessary to carry out the purposes and provisions of this chapter.

Section 30. Section 659.410, Florida Statutes, is created to read:

659.410 Examination and fees for examination.-

(1) OFR may examine the books and records of a Licensed Family Trust Company at any time to the extent necessary to determine that it is operating in compliance with this chapter, and take appropriate enforcement actions as if the company were operating under Chapter 658.

(2) OFR may examine the books and records of a Family Trust Company at any time to the extent necessary to determine if the Family Trust Company meets the requirements of s. 659.020(8) and

is in compliance with ss. 659.130, 659.240, 659.300(3) and 659.330. OFR shall limit the scope of any examination of a Family Trust Company to the information necessary to make such determinations. OFR may rely upon any certificate of trust, trust summary or written statement from the Family Trust Company regarding the identity of the Qualified Beneficiaries of any trust or estate for which the Family Trust Company serves as a fiduciary and the qualification of such Qualified Beneficiaries as permissible recipients of Family Trust Company services under ss. 659.020(8). OFR shall not be entitled to examine the financial books or records of a Family Trust Company or the financial books or records of any trust, estate or Family Member for which the Family Trust Company serves as a fiduciary or agent.

(3) OFR may examine the books and records of a Foreign Licensed Family Trust Company at any time to the extent necessary to determine if the Foreign Licensed Family Trust Company and is in compliance with ss. 659.130, 659.240, 659.300(3) and 659.330. In connection with any examination of the books and records of a Foreign Licensed Family Trust Company, OFR may rely upon any recent review or certification letters issued by the applicable regulatory agency of the principal jurisdiction of the Foreign Licensed Family Trust Company to the extent the Foreign Licensed

Family Trust Company is able to demonstrate to the satisfaction of OFR that the applicable restrictions and definitions contained in the family trust company legislation of the principal jurisdiction are substantially similar to the corresponding restrictions in the Chapter 659. Moreover, OFR's examination of the books and records of a Foreign Licensed Family Trust Company shall, to the extent practicable, be limited to the books and records of the Florida operations of the Foreign Family Trust Company.

(4) For each examination of the books and records of a Licensed Family Trust Company, Family Trust Company or Foreign Licensed Family Trust Company as authorized under this chapter, OFR shall charge and collect from the Licensed Family Trust Company, Family Trust Company or Foreign Licensed Family Trust Company a fee for conducting the examination and in preparing and copying the report of the examination at the rate established pursuant to s. 655.045(1)(c).

(5) All money collected under this section must be deposited in the Financial Institutions' Regulatory Trust Fund to be used to pay its costs of administering the Financial Institutions Codes in s. 655.049.

Section 31. Section 659.460, Florida Statutes, is created to read:

659.460 Authority of OFR to revoke certificate of authority.-

(1) The violation of any of the provisions of this chapter by the officers or directors, or the managers or members acting in a managerial capacity, of any Licensed Family Trust Company is sufficient cause for OFR to revoke the Certificate of Authority of the Licensed Family Trust Company.

(2) If a Licensed Family Trust Company or any person authorized to act on behalf of the Licensed Family Trust Company refuses to allow OFR to inspect all books, records, papers and effects of the business of the Licensed Family Trust Company, OFR may provide the Licensed Family Trust Company written notice of its intent to revoke the Certificate of Authority of the Licensed Family Trust Company. Such written notice shall be delivered to the Licensed Family Trust Company at its principal office or its registered agent in this State. If the Licensed Family Trust Company fails to allow OFR to inspect all books, records, papers and effect of the business of the Licensed Family Trust Company on or before the 30th day after the Licensed Family Trust Company receives such notice, OFR may then

revoke the Certificate of Authority of the Licensed Family Trust Company.

(3) Notwithstanding the provisions of subsection (2), OFR shall be permitted immediate access to such books, records, papers and effects of the business of the Licensed Family Trust Company if such access is necessary to prevent serious harm, financial or otherwise, to any person.

Section 32. Section 659.465, Florida Statutes, is created to read:

659.465 OFR cease and desist authority with respect to a family trust company or a foreign licensed family trust company.-OFR may issue and serve a cease and desist order to a Family Trust Company or a Foreign Licensed Family Trust Company found to be in violation of any sections in this title which are applicable to a Family Trust Company or a Foreign Licensed Family Trust Company, as the case may be.

Section 33. Section 659.470, Florida Statutes, is created to read:

659.470 Failure to submit required report; fees.-If a Family Trust Company, Licensed Family Trust Company or a Foreign

Licensed Family Trust Company fails to submit within the prescribed period its annual certification or any other report required by this chapter or any regulation, OFR may impose and collect a fee of not more than one hundred dollars ($100) for each day the annual certification or report is overdue.

Section 34. Section 659.490, Florida Statutes, is created to read:

659.490 Willful neglect to perform duties imposed by law or failure to conform to material lawful requirement made by OFR; removal.-Each officer, director, manager, member, employee or agent of a Licensed Family Trust Company who, following written notice from OFR sent by certified mail, knowingly or willfully neglects to perform any duty required by this chapter or other applicable law, or fails to conform to any material lawful requirement made by OFR, is subject to removal upon order of OFR.

Section 35. Section 659.500, Florida Statutes, is created to read:

659.500 Access to books and records; confidentiality; penalty for disclosure.-

(1) The books and records of a Family Trust Company, Licensed Family Trust Company and Foreign Licensed Family Trust Company are confidential and shall be made available for inspection and examination only:

(a) To OFR or its duly authorized representative;

(b) To any person duly authorized to act for the Family Trust Company, Licensed Family Trust Company or Foreign Licensed Family Trust Company;

(c) As compelled by a court of competent jurisdiction, pursuant to a subpoena issued pursuant to the Florida Rules of Civil Procedure, the Florida Rules of Criminal Procedure, or the Federal Rules of Civil Procedure, or pursuant to a subpoena issued in accordance with state or federal law. Prior to the production of the books and records of a Family Trust Company, Licensed Family Trust Company or Foreign Licensed Family Trust Company, the party seeking production must reimburse the Family Trust Company, Licensed Family Trust Company or Foreign Licensed Family Trust Company for the reasonable costs and fees incurred in compliance with the production. If the parties disagree regarding the amount of reimbursement, the party seeking the records may

request the court having jurisdiction to set the amount of reimbursement;

(d) As compelled by legislative subpoena as provided by law, in which case the provisions of s. 659.510 apply;

(e) Pursuant to a subpoena, to any federal or state law enforcement or prosecutorial instrumentality authorized to investigate suspected criminal activity;

(f) As authorized by the board of directors (if in corporate form) or the managers (if in limited liability company form) of the Family Trust Company, Licensed Family Trust Company or Foreign Licensed Family Trust Company; or

(g) As provided in subsection (2).

(2) Books and records pertaining to customers, stockholders or members.

(a)Each customer, stockholder (if in corporate form) or the member (if in limited liability company form) has the right to inspect such books and records of a Family Trust Company or Licensed Family Trust Company as pertain to her or his accounts or the determination of her or his voting rights.

(b)The books and records pertaining to customers, members, and stockholders of any Family Trust Company or Licensed Family Trust Company shall be kept confidential by the Family Trust Company or Licensed Family Trust Company and its directors, managers, officers, and employees and shall not be released except upon express authorization of the customer as to her or his own accounts or stockholder or members as to her or his voting rights. However, information may be released, without the authorization of a customer, member or shareholder in a manner prescribed by the board of directors (if in corporate form) or managers (if in limited liability company form) to verify or corroborate the existence or amount of a customer's account when such information is reasonably provided to meet the needs of commerce and to ensure accurate credit information. Notwithstanding this paragraph, nothing in this subsection shall prohibit a Family Trust Company or a Licensed Family Trust Company from disclosing financial information as referenced in this subsection as permitted by Pub. L. No. 106-102(1999), as set forth in 15 U.S.C.A. s. 6802, as amended.

(c) A person who willfully violates the provisions of this section that relate to unlawful disclosure of confidential information is guilty of a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

(d) The provisions of this subsection (2) shall not apply to a Foreign Licensed Family Trust Company in that the laws of the jurisdiction of its principal place of business shall govern the rights of customers, members, and stockholders to inspect it books and records.

(3) For purposes of this section the term "books and records" shall include, but is not limited to, the ss. 659.110 and 659.120 application for a Certificate of Authority (and any documents connected with such application and the OFR's corresponding investigation in granting or denying the issuance of such Certificate of Authority), the s. 659.125 initial registration documents of a Family Trust Company or a Foreign Licensed Family Trust Company, the s. 659.240 annual certification made by a Family Trust Company, Licensed Family Trust Company or a Foreign Licensed Family Trust Company and the s. 659.250

documentation submitted to OFR in connection with a Licensed Family Trust Company discontinuing its business.

Section 36. Section 659.510, Florida Statutes, is created to read:

659.510 Records relating to an OFR examination; limited restrictions upon public access.-

(1) Except as otherwise provided in this section and except for such portions thereof which are otherwise public record, all records and information relating to an examination of a Family Trust Company, Licensed Family Trust Company or Foreign Licensed Family Trust Company by OFR are confidential and exempt from the provisions of s. 119.07(1) until such examination is completed or ceases to be active. For purposes of this subsection, an examination is considered "active" while such examination is being conducted by OFR with a reasonable, good faith belief that it may lead to the filing of administrative, civil, or criminal proceedings. An examination does not cease to be active if OFR is proceeding with reasonable dispatch, and there is a good faith belief that action may be initiated by OFR or other administrative or law enforcement agency. After an examination is completed or ceases to be

active, portions of such records relating to the examination shall be confidential and exempt from the provisions of s. 119.07(1) to the extent that disclosure would:

(a) Jeopardize the integrity of another active examination;

(b) Impair the safety and soundness of the Family Trust Company, Licensed Family Trust Company or Foreign Licensed Family Trust Company;

(c) Reveal personal financial information of a customer, Family Member, stockholder (if in corporate form) or member (if in limited liability company form);

(d) Defame or cause unwarranted damage to the good name or reputation of an individual or jeopardize the safety of an individual; or

(e) Reveal investigative techniques or procedures.

(2) Except as otherwise provided in this section and except for such portions thereof which are public record, reports of examinations, operations, or condition, including working papers, or portions thereof, prepared by, or for the use of OFR are confidential and exempt from the provisions of s. 119.07(1). However, such reports or papers or portions thereof may be released to:

(a) The Family Trust Company, Licensed Family Trust Company or Foreign Licensed Family Trust Company under examination;

(b) Any officer, director, committee member, employee, attorney, auditor, or independent auditor officially connected with the Family Trust Company, Licensed Family Trust Company or Foreign Licensed Family Trust Company, upon approval by the board of directors, if organized as a corporation or its managers, if organized as a limited liability company, of such Family Trust Company, Licensed Family Trust Company or Foreign Licensed Family Trust Company; or

(c) A fidelity insurance company, upon approval of the board of directors, if organized as a corporation or its managers, if organized as a limited liability company of the Family Trust Company, Licensed Family Trust Company or Foreign Licensed Family Trust Company. However, a fidelity insurance company may receive only that portion of an examination report relating to a claim or investigation being conducted by such fidelity insurance company.

(d) Examination, operation, or condition reports of a Family Trust Company, Licensed Family Trust Company or Foreign Licensed Family Trust Company shall be released by the OFR within 1 year after the appointment of a liquidator, receiver, or conservator to such Family Trust Company, Licensed Family Trust Company or Foreign Licensed Family Trust Company. However, any portion of such reports which discloses the identities of bondholders, customers, Family Members , members or stockholders shall remain confidential and exempt from the provisions of s. 119.07(1).

Any confidential information or records obtained from OFR pursuant to this subsection shall be maintained as confidential and exempt from the provisions of s. 119.07(1).

(3) The provisions of this section do not prevent or restrict:

(a) Publishing reports required by applicable federal statues or regulations to be published.

(b) Furnishings records or information to any other state, federal, or foreign agency responsible for the regulation or supervision of Family Trust Companies,

Licensed Family Trust Companies or Foreign Licensed Family Trust Companies.

(c) Disclosing or publishing summaries of the condition of Family Trust Company, Licensed Family Trust Company or Foreign Licensed Family Trust Company and general economic and similar statistics and data, provided that the identity of a particular Family Trust Company, Licensed Family Trust Company or Foreign Licensed Family Trust Company is not disclosed.

(d) Reporting any suspected criminal activity, with supporting documents and information, to appropriate law enforcement and prosecutorial agencies.

Any confidential information or records obtained from OFR pursuant to this subsection shall be maintained as confidential and exempt from the provisions of s. 119.07(1).

(4) Compelled production of records.

(a) Orders of courts or of administrative law judges for the production of confidential records or information shall provide for inspection in camera by the court of the administrative law judge and, after the court or administrative law judge has made a determination that the documents requested are

relevant or would likely lead to the discovery of admissible evidence, said documents shall by subject to further orders by the court or the administrative law judge to protect the confidentiality thereof. Any order directing the release of information shall be immediately reviewable, and a petition by OFR for review of such order shall automatically stay further proceedings in the trial court or the administrative hearing until the disposition of such petition by the reviewing court. If any other party files such a petition for review, it will operate as a stay of such proceedings only upon order of the reviewing court.

(b) Confidential records and information furnished pursuant to a legislative subpoena shall be kept confidential by the legislative body or committee which received the records or information, except in a case involving investigation of charges against a public official subject to impeachment or removal, and then disclosure of such information shall be only to the extent determined by the legislative body or committee to be necessary.

(5) Every Family Trust Company, Licensed Family Trust Company and Foreign Licensed Family Trust Company shall maintain at the office they are required to maintain in s. 659.130 full and complete records of the names and residences of all the shareholders or members of the Family Trust Company and the number of shares or membership units held by each, as applicable, as well as the ownership percentage of each shareholder or member, as the case may be. Such records shall be subject to the inspection of all the shareholders or members of the Family Trust Company, and the officers authorized to assess taxes under state authority, during the normal business hours of the Family Trust Company, Licensed Family Trust Company or Foreign Licensed Family Trust Company. A current list of shareholders or members shall be made available to the OFR's examiners for their inspection and, upon the request of the OFR, shall be submitted to OFR. Except as otherwise provided in this subsection, any portion of this list which reveals the identities of the shareholders or members is confidential and exempt from the provision of s. 119.07(1).

(6) Materials supplied to OFR or to employees of any Family Trust Company, Licensed Family Trust Company or Foreign Licensed Family Trust Company by other governmental agencies, federal or state, shall remain the property of the submitting

agency, and any document request must be made to the appropriate agency. Any confidential documents supplied to OFR or to employees of any Family Trust Company, Licensed Family Trust Company or Foreign Licensed Family Trust Company by other governmental agencies, federal or state, shall be confidential and exempt from the provisions of s. 119.07(1). Such information shall be made public only with the consent of such agency or the Family Trust Company, Licensed Family Trust Company or Foreign Licensed Family Trust Company.

(7) Examination reports, investigatory records, the ss. 659.110 and 659.120 application for a Certificate of Authority (and any documents connected with such application and the OFR's corresponding investigation in granting or denying the issuance of such Certificate of Authority), the s. 659.125 initial registration documents of a Family Trust Company or a Foreign Licensed Family Trust Company, the s. 659.240 annual certification made by a Family Trust Company, Licensed Family Trust Company or a Foreign Licensed Family Trust Company and the s. 659.250 documentation submitted to OFR in connection with a Licensed Family Trust Company discontinuing its business and any related information compiled by OFR, or photographic copies thereof, shall be retained by OFR for a period of at least 10 years.

(8) A copy of any document on file with OFR which is certified by OFR as being a true copy may be introduced in evidence as if it were the original. OFR shall establish a schedule of fees for preparing true copies of documents.

(9) Any person who willfully discloses the information made confidential by this section is guilty of a felony of the third degree, punishable as provided in s.775.082, s.775.083, or s.775.084.

Section 37. Section 659.600, Florida Statutes, is created to read:

659.600 Application for domestication of a foreign family trust company.-

(1) Any Foreign Family Trust Company lawfully organized and currently in good standing with the state regulatory agency in the jurisdiction under the law of which it is organized may become domesticated in this state by:

(a) Filing with the Department of State a certificate of domestication and articles of incorporation in accordance with and subject to all requirements of s. 607.1801, by filing a certificate of conversion and articles of organization in

accordance with the requirements of s. 608.439, or by filing articles of conversion in accordance with the requirements of s. 605.1045, and

(b) Filing an application for a Certificate of Authority to commence operations as a Licensed Family Trust Company in accordance with s. 659.110 which is approved by OFR or by filing the prescribed OFR form to register as a Family Trust Company to commence operations in accordance with s. 659.125.

(2) The Foreign Family Trust Company may make application pursuant to 1(b)of this section prior to satisfying the requirements of 1(a). Upon receipt of a Certificate of Authority, the Foreign Family Trust Company must satisfy the requirements of 1(a) to complete the domestication process before commencing operations.

Section 38. Section 659.610, Florida Statutes, is created to read:

659.610 Application of qualification of a foreign licensed family trust company for multi-state activities.-Any Foreign Licensed Family Trust Company lawfully organized and currently in good standing with the state regulatory agency in the

jurisdiction under the law of which it is organized may qualify to commence operations in this state by:

(1) Filing an application with the Department of State to apply for a certificate of authority in accordance with and subject to all requirements of s. 607.1503, 608.503, 605.0902, or 620.1902 or to apply for a statement of qualification in accordance with and subject to all requirements of s. 620.9102 to transact business in this state, and

(2) Filing an initial registration to commence operations as a Foreign Licensed Family Trust Company in accordance with and subject to all requirements of 659.125 and subject to the sections of this Chapter which specifically state that they apply to a Foreign Licensed Family Trust Company.

Section 39. Subsection (5) of section 709.2102, Florida Statutes, is renumbered as subsection (6)and subsections (6) and (7) of section 709.2102 are renumbered as subsections (8) and (9)and subsections (8) through (15) of section 709.2102 are renumbered as subsections (11) through (18), respectively, and new subsections (5), (7) and (10)are added to that section, to read:

(5) "Family Trust Company" has the same meaning as in s. 659.020(8).

(7) "Foreign Licensed Family Trust Company" has the same meaning as in s. 659.020(10).

(10)"Licensed Family Trust Company" has the same meaning as in s. 659.020(12).

Section 40. Subsection (1) of section 709.2105, Florida Statutes, is deleted and is replaced with the following:

(1) The agent must be:

(a) a natural person who is 18 years of age or older ~~or~~;

(b) a financial institution that has trust powers, has a place of business in this state, and is authorized to conduct trust business in this state; or

(c) a Family Trust Company, Licensed Family Trust Company or a Foreign Licensed Family Trust Company.

Section 41. Subsection (4) of section 709.2112, Florida Statutes, is amended, to read:

(4) For purposes of this section, the term "qualified agent" means an agent who is the spouse of the principal,

an heir of the principal within the meaning of s. 732.103, a financial institution that has trust powers and a place of business in this state, a Family Trust Company, a Licensed Family Trust Company, a Foreign Licensed Family Trust Company, an attorney or certified public accountant who is licensed in this state, or a natural person who is a resident of this state and who has never been an agent for more than three principals at the same time.

Section 42. Subsections (1) and (2) of section 709.2119, Florida Statutes, are amended to read:

(1)(a) A third person who in good faith accepts a power of attorney that appears to be executed in the manner required by law at the time of its execution may rely upon the power of attorney and the actions of the agent which are reasonably within the scope of the agent's authority and may enforce any obligation created by the actions of the agent as if:

1. The power of attorney were genuine, valid, and still in effect;

2. The agent's authority were genuine, valid, and still in effect; and

3. The authority of the officer executing for or on behalf of a financial institution that has trust powers or the officer or manager executing for or on behalf of a Family Trust Company, Licensed Family Trust Company or Foreign Licensed Family Trust Company and acting as agent is genuine, valid, and still in effect.

(b) For purposes of this subsection, and without limiting what constitutes good faith, a third person does not accept a power of attorney in good faith if the third person has notice that:

1. The power of attorney is void, invalid, or terminated; or

2. The purported agent's authority is void, invalid, suspended, or terminated.

(2) A third person may require:

(a) An agent to execute an affidavit stating where the principal is domiciled; that the principal is not deceased; that there has been no revocation, or partial or complete termination by adjudication of incapacity or by the occurrence of an event referenced in the power of attorney; that there has been no suspension by initiation of proceedings to determine incapacity, or to appoint a guardian, of the principal; that the agent's authority has

not been terminated by the filing of an action for dissolution or annulment of marriage or by the legal separation of the agent and the principal; and, if the affiant is a successor agent, the reasons for the unavailability of the predecessor agents, if any, at the time the authority is exercised.

(b) An officer of a financial institution or an officer or manager of a Family Trust Company, Licensed Family Trust Company or a Foreign Licensed Family Trust Company acting as agent to execute a separate affidavit, or include in the form of the affidavit, the officer's or manager's title and a statement that the officer or manager has full authority to perform all acts and enter into all transactions authorized by the power of attorney for and on behalf of the financial institution, Family Trust Company, Licensed Family Trust Company or Foreign Licensed Family Trust Company in its capacity as agent. A written affidavit executed by the agent under this subsection may, but need not, be in the following form:

STATE OF
COUNTY OF

Before me, the undersigned authority, personally appeared (attorney in fact) ("Affiant"), who swore or affirmed that:

1. Affiant is the attorney in fact named in the Durable Power of Attorney executed by (principal) ("Principal") on (date).

2. This Power of Attorney is currently exercisable by Affiant. The principal is domiciled in (insert name of state, territory, or foreign country).

3. To the best of Affiant's knowledge after diligent search and inquiry:

a. The Principal is not deceased;

b. Affiant's authority has not been suspended by initiation of proceedings to determine incapacity or to appoint a guardian or a guardian advocate; and

c. There has been no revocation, or partial or complete termination, of the power of attorney or of Affiant's authority.

4. Affiant is acting within the scope of authority granted in the power of attorney.

5. Affiant is the successor to (insert name of predecessor agent), who has resigned, died, become incapacitated, is no longer qualified to serve, has declined to serve as agent, or is otherwise unable to act, if applicable.

6. Affiant agrees not to exercise any powers granted by the Durable Power of Attorney if Affiant attains knowledge that it has been revoked, has been partially or completely terminated or suspended, or is no longer valid because of the death or adjudication of incapacity of the Principal.

(Affiant)

Sworn to (or affirmed) and subscribed before me this day of (month), (year), by (name of person making statement)

(Signature of Notary Public-State of Florida)

(Print, Type, or Stamp Commissioned Name of Notary Public)

Personally Known OR Produced Identification

(Type of Identification Produced)

Section 43. Subsection (1) of section 733.305, Florida Statutes, is amended, to read:

(1) All trust companies incorporated under the laws of Florida, all state banking corporations and state savings associations authorized and qualified to exercise fiduciary powers in Florida, all family trust companies, licensed family trust companies and foreign licensed family trust companies authorized to serve as personal representative pursuant to s. 659.300(1) or (2), and all national banking associations and federal savings and loan associations authorized and qualified to exercise fiduciary powers in Florida shall be entitled to act as personal representatives and curators of estates.

Section 44. Subsection (3) of section 733.402, Florida Statutes, is amended, to read:

(3) The requirements of this section shall not apply to banks and trust companies authorized by law to act as personal representative. Notwithstanding the foregoing, trust companies operating under ch. 659 which are not Licensed Family Trust Companies or Foreign Licensed Family Trust Companies as such terms are defined in s. 659.020 shall not be exempt from the requirements of this section.

Section 45. Subsections (2) and (3) of section 736.0802, Florida Statutes, are amended, to read:

(2) Subject to the rights of persons dealing with or assisting the trustee as provided in s. 736.1016, a sale, encumbrance, or other transaction involving the investment or management of trust property entered into by the trustee for the trustee's own personal account or which is otherwise affected by a conflict between the trustee's fiduciary and personal interests is voidable by a beneficiary affected by the transaction unless:

(a) The transaction was authorized by the terms of the trust;

(b) The transaction was approved by the court;

(c) The beneficiary did not commence a judicial proceeding within the time allowed by s. 736.1008;

(d) The beneficiary consented to the trustee's conduct, ratified the transaction, or released the trustee in compliance with s. 736.1012;

(e) The transaction involves a contract entered into or claim acquired by the trustee when that person had not become or contemplated becoming trustee;

(f) The transaction was consented to in writing by a settlor of the trust while the trust was revocable; ~~or~~

(g) The transaction is one by a corporate trustee that involves a money market mutual fund, mutual fund, or a common trust fund described in s. 736.0816(3); or

(h) With respect to a trust being administered by a Family Trust Company, Licensed Family Trust Company, or Foreign Licensed Family Trust Company, as each is defined in ch. 659, Florida Statutes, the transaction is authorized by one or more of sub-subsections (4) through (8) of s. 659.310.

(3)(a) A sale, encumbrance, or other transaction involving the investment or management of trust property is presumed to be affected by a conflict between personal and

fiduciary interests if the sale, encumbrance, or other transaction is entered into by the trustee with:

~~(a)~~1. The trustee's spouse;

~~(b)~~2. The trustee's descendants, siblings, parents, or their spouses;

~~(c)~~3. An officer, director, employee, agent, or attorney of the trustee; or

~~(d)~~4. A corporation or other person or enterprise in which the trustee, or a person that owns a significant interest in the trustee, has an interest that might affect the trustee's best judgment.

(b) This subsection shall not apply with respect to a trust being administered by a Family Trust Company, Licensed Family Trust Company, or Foreign Licensed Family Trust Company, as each is defined in ch. 659, Florida Statutes, if the sale, encumbrance, or other transaction is authorized by one or more of sub-subsections (4) through (8) of s. 659.310.

Section 46. Subsection (5) of section 736.0802, Florida Statutes, is amended to add a new paragraph (i) at the end, to read:

(i) This subsection shall not apply with respect to a trust being administered by a Family Trust Company, Licensed Family Trust Company, or Foreign Licensed Family Trust Company, as each is defined in ch. 659, Florida Statutes.

Section 47. Subsection (5) of section 744.351, Florida Statutes, is amended, to read:

(5) Financial Institutions as defined in s. 744.309(4), other than a trust company operating under Ch. 659 which is not a Licensed Family Trust Company or Foreign Licensed Family Trust Company as such terms are defined in s. 659.020, and public guardians authorized by law to be guardians shall not be required to file bonds.

Section 48. This act shall take effect upon becoming a law.

LEGISLATIVE POSITION REQUEST FORM

GOVERNMENTAL AFFAIRS OFFICE

Date Form Received _____

GENERAL INFORMATION

Submitted By Elaine M. Bucher, Chair, Estate and Trust Tax Planning Committee of the Real Property Probate and Trust Section
(List name of the section, division, committee, bar group or individual)

Address 777 S. Flagler Dr., Ste. 500 East, West Palm Beach, FL 33401 –
Telephone: (561) 650-0693

Position Type Estate and Trust Tax Planning Committee of the Real Property Probate and Trust Section of the Florida Bar

CONTACTS

Board & Legislation Committee Appearance

Elaine Bucher, Gunster, Yoakley & Stewart, P.A., 777 S. Flagler Dr., Ste. 500 East, West Palm Beach, FL 33401
Telephone: (561) 650-0693
William T. Hennessey, Gunster, Yoakley & Stewart P.A., 777 South Flagler Drive, Suite 500 East, West Palm Beach, FL, Telephone: (561) 650-0663, Email: whennessey@gunster.com
Peter M. Dunbar, Pennington, Moore, Wilkinson, Bell & Dunbar, P.O. Box 10095, Tallahassee, FL 32302-2095 Telephone 850-222-3533
Martha J. Edenfield, Pennington, Moore, Wilkinson, Bell & Dunbar, P.O. Box 10095, Tallahassee, FL 32302-2095 Telephone 850-222-3533

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

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

PROPOSED ADVOCACY

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

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

Indicate Position Support ☒ Oppose ☐ Technical Assistance ☐ Other ☐

Proposed Wording of Position for Official Publication:

Support amending §710.123 to permit a donor, a holder of a power of appointment or a fiduciary acting pursuant to an authorizing provision in a will or a trust to provide in the instrument creating the custodianship that the custodianship not terminate until the minor's attainment of age 25.

Reasons For Proposed Advocacy:

The proposed amendment of the Florida Uniform Transfers to Minors Act is intended to give Floridians the option in certain circumstances of using custodianships which do not terminate until the minor's attainment of age 25 rather than the current age 21. The result will be to allow Floridians to benefit from the advantages of the statutory protections of UTMA for college-aged beneficiaries without the expense and complexity of a formal trust arrangement.

PRIOR POSITIONS TAKEN ON THIS ISSUE

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

Most Recent Position

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

Others
(May attach list if more than one)

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

REFERRALS TO OTHER SECTIONS, COMMITTEES OR LEGAL ORGANIZATIONS

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

Referrals

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

The Florida Bankers Association
(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.

7-06

Real Property, Probate and Trust Law Section of The Florida Bar
White Paper on Amended Florida Statutes Section 710.123

I. SUMMARY

This legislation modifies Florida's Uniform Transfers to Minors Act to authorize holding assets in custodianship until age 25 in certain circumstances.

II. CURRENT SITUATION

Currently, Florida's Uniform Transfers to Minors Act (Section 710.123) provides that assets transferred:

(1) by gift or exercise of power of appointment or a fiduciary pursuant to an authorizing provision in a will or a trust may be held by the custodian until the minor (i.e., the beneficiary) attains age 21, and

(2) by an obligor (including a pension plan or a person who owes the minor a liquidated debt) or a fiduciary pursuant to a will or a trust without an authorizing provision may be held by the custodian until the minor attains age 18.

III. EFFECT OF PROPOSED CHANGE GENERALLY

The proposed change would amend Section 710.123 to permit a donor, a holder of a power of appointment or a fiduciary acting pursuant to an authorizing provision in a will or a trust to provide in the instrument creating the custodianship that the custodianship not terminate until the minor's attainment of age 25 (assuming that the minor does not die prior to that age). If the instrument creating the custodianship did not so provide, then the custodianship would continue to terminate upon the minor's attainment of age 21.

IV. ANALYSIS

At least seven states – Alaska, California, Nevada, Oregon, Pennsylvania, Tennessee, and Washington – now permit a custodian to hold assets until age 25 under certain circumstances. With the new Section 710.123A, Florida would join these states in providing Floridians the option of creating a custodianship for a minor that lasts until the minor attains age 25 (in certain circumstances). As a result, Floridians would be allowed to continue the advantages of the statutory protections of UTMA for beneficiaries until age 25, rather than being forced to bear the expense and complexity of establishing formal trust arrangements in order to protect such beneficiaries.

Note, however, that this amended Section would not authorize the creation of a custodianship for a person who has attained the age of 21. Under UTMA, a custodianship may only be created for a person who is a minor, which is defined in existing Section 710.102(11) as a person who has not attained age 21.

In addition, to ensure qualification of gifts for the annual exclusion from gift tax under Section 2503(c) of the Internal Revenue Code, if an individual creates a custodianship by a gift that lasts until the minor attains age 25, the minor has a 30 day withdrawal right commencing upon the minor's 21st birthday. No withdrawal right is granted if the custodianship is created by exercise of a power of appointment or a transfer authorized by a will or trust as no tax benefit would be achieved.

No change would be made to the provisions of Florida's Uniform Transfers to Minors Act which apply to custodianships created by an obligor, a conservator or a fiduciary pursuant to a will or trust which lacks an authorizing provision.

The proposed change would be effective for custodianships created on or after July 1, 2014.

V. FISCAL IMPACT ON STATE AND LOCAL GOVERNMENTS - None.

VI. DIRECT IMPACT ON PRIVATE SECTOR - None.

VII. CONSTITUTIONAL ISSUES - None apparent.

VIII. OTHER INTERESTED PARTIES - The Tax Section of the Florida Bar and the Florida Bankers Association.

A bill to be entitled

An act amending s. 710.123 to permit certain custodianships to terminate when the minor attains age 25.

Section 1. Section 710.123, F.S., is amended to read:

710.123 Termination of custodianship.

(1) The custodian shall transfer in an appropriate manner the custodial property to the minor or to the minor's estate upon the earlier of:

(a) Unless subsection (2) applies, ~~T~~the minor's attainment of 21 years of age with respect to custodial property transferred under s. 710.105 or s. 710.106;

(b) The minor's attainment of age 18 with respect to custodial property transferred under s. 710.107 or s. 710.108; or

(c) The minor's death.

(2) An instrument creating a custodianship with respect to custodial property transferred under s. 710.105 or s. 710.106 on or after July 1, 2014 can provide that the custodianship terminates upon the minor's attainment of 25 years of age, but if the transfer creating such a custodianship is an irrevocable gift under s. 710.106, the custodianship will nevertheless terminate upon the date of receipt by the custodian of a written request for the custodial property by the minor during the 30-day period beginning on the minor's 21st birthday.

(3) Notwithstanding s. 710.102(11), if the custodianship is created on or after July 1, 2014 and the instrument creating the custodianship provides that the custodianship continues until the minor's attainment of 25 years of age, then solely

for purposes of the application of the termination provisions of this section, "minor" means an individual who has not attained the age of 25 years.

Section 2. This Act shall become effective on July 1, 2014.

3938104.00012-FL BAR COMM AD

LEGISLATIVE POSITION REQUEST FORM

GOVERNMENTAL AFFAIRS OFFICE

Date Form Received _____

GENERAL INFORMATION

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

Address Sean W. Kelley, Kelley & Kelley, P.L., 904 Anastasia Blvd., St. Augustine, FL 32080
Telephone: (904) 819-9706

Position Type Guardianship, Durable Power of Attorney and Advance Directives Committee of the Real Property, Probate and Trust Law Section, The Florida Bar
(Florida Bar, section, division, committee or both)

CONTACTS

Board & Legislation Committee Appearance

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Martha J. Edenfield, Pennington, Moore, Wilkinson, Bell & Dunbar, P.O. Box 10095, Tallahassee FL 32302-2095, Telephone (850) 222-3533
(List name, address and phone number)

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

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

PROPOSED ADVOCACY

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

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

Indicate Position Support _X_ Oppose _____ Tech Asst. ____ Other _____

Proposed Wording of Position for Official Publication:

Support proposed amendments to F.S. Secs. 709.2201, 743.0645, and F.S. Chapter 765 to provide competent adults greater protection in designating individuals to make medical decisions for them and to allow a parent, legal custodian or legal guardian of a minor the ability to designate a competent adult to serve as the minor's health care surrogate for when the parent, legal custodian or legal guardian of the minor cannot be timely contacted by the health care provider.

Reasons For Proposed Advocacy:

Under current law, a person can designate a health care power of attorney, but must make that designation under Chapter 709 which deals with financial powers of attorney. Additionally, there is no legal authority to name a health care surrogate to make health care decisions for a minor when the parents, legal custodian or legal guardian of the minor cannot be timely contacted by the health care provider. The proposed revisions will move the ability to appoint a health care power of attorney to Chapter 765, where it properly belongs.

They will also codify the ability of the parents, legal custodian or legal guardian of the minor to name a health care surrogate to act for the minor in the situation where that person cannot be timely contacted to make medical decisions for the minor (for instance, when the parents are out of the country).

PRIOR POSITIONS TAKEN ON THIS ISSUE

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

Most Recent Position

Real Property Probate and Trust Law	Support	2011
(Indicate Bar or Name Section)	(Support or Oppose)	(Date)

Others
(May attach list if more than one)

Elder Law Section	Support	2011
(Indicate Bar or Name Section)	(Support or Oppose)	(Date)

REFERRALS TO OTHER SECTIONS, COMMITTEES OR LEGAL ORGANIZATIONS

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

Referrals

Elder Law Section of the Florida Bar	unknown at this time, expect support
(Name of Group or Organization)	(Support, Oppose or No Position)

Health Law Section of the Florida Bar	unknown at this time, expect support
(Name of Group or Organization)	(Support, Oppose or No Position)

Family Law Section of the Florida Bar	unknown at this time, expect support
(Name of Group or Organization)	(Support, Oppose or No Position)

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

PROPOSED LEGISLATIVE REVISIONS FOR 2014
REAL PROPERTY, PROBATE AND TRUST LAW SECTION
OF THE FLORIDA BAR
GUARDIANSHIP AND POWER OF ATTORNEY COMMITTEE

I. SUMMARY

The purpose of this proposal is to afford Floridians with more protection in designating those they want to help them make medical decisions and to have access to health care information so that the proper medical decisions can be made.

In addition, this proposal allows a parent, legal custodian or legal guardian of the person of a minor to designate a competent adult to serve as a surrogate to make health care decisions for the minor when the parents, legal custodian or legal guardian of the minor cannot be timely contacted by the health care provider.

II. CURRENT SITUATION

The current situation as to this proposal is:

Chapter 765, Fla. Stat., "Health Care Advance Directives" is the chapter that governs Florida's law on health care surrogates and living wills which are advance directives. It sets forth the responsibilities and duties of a surrogate who has been designated to make medical decisions for a principal, as well as protection of the principal from those surrogates who are not acting in the principal's best interest by a mechanism of review and removal, if necessary.

Part II of chapter 709, Fla. Stat., "Powers of Attorney" sets forth Florida's law on powers of attorney, which, with one exception, deals exclusively with a principal delegating authority to an agent in matters of finances and the handling of real, tangible and intangible personal property. The one exception is contained in §709.2201(2)(c), Fla. Stat., "Authority of agent" which reads:

> (2) As confirmation of the law in effect in this state when this part became effective, such authorization may include ... authority to: (c) If such authority is specifically granted in a durable power of attorney, make health care decisions on behalf of the principal, including, but limited to, those set forth in chapter 765."

This aspect of Florida's power of attorney law has been in effect since the adoption of the Uniform Durable Power of Attorney Act of 1974. For purposes of this paper, a power of attorney created under §709.2201(2)(c) will be referred to as a "medical power of attorney." All non-medical powers of attorney will be referred to as a "financial power of attorney." All powers of attorney created under part II of chapter 709, Fla. Stat. are immediately effective. Florida attorneys have used

medical powers of attorney for many years as an effective estate planning document.

Under chapter 709, unfortunately the duties of an agent under a financial power of attorney and a medical power of attorney are the same and defined in §709.2114, Fla. Stat., "Agent's duties," which are duties that govern fiduciaries. §709.2114 (1) reads: "(1) An agent is a fiduciary...." Part II of chapter 709 does not define fiduciary. A fiduciary is generally thought of as set forth in Black's Law Dictionary as "one who must exercise a high standard of care in managing another's money or property."

Section (1) of §709.2116, Fla. Stat., "Judicial relief; conflicts of interest" empowers a court to terminate an agent's authority or remove an agent if the agent is in violation of its duties. §709.2117, Fla. Stat., "Agent's liabilities" reads in part "An agent who violates this part is liable to the principal for an amount required to: (1) Restore the value of the principal's property to what it would have been had the violation not occurred;..." These statutes set forth financial standards of conduct and not medical standards of conduct.

Part II of chapter 765, Fla. Stat., "Health Care Surrogate" governs surrogates appointed by a principal to make health care decisions. Contrary to the duties of an agent under part II of chapter 709, Fla. Stat., the responsibilities of a surrogate under §765.205, Fla. Stat., "Responsibility of the surrogate" are all medical in nature. The principal's family, and other interested persons, may seek judicial intervention under §765.105, Fla. Stat., "Review of surrogate or proxy's decision" when, among other reasons, the surrogate's decision is not in accord with the principal's known desires.

The long standing concept of a medical power of attorney should remain in our law, but should be moved from the financial law of part II of chapter 709, Fla. Stat., to the medical decisions law of part II of chapter 765, Fla. Stat.

In addition, under current law, when the parents, legal custodian or legal guardian of a minor cannot be timely contacted to give consent for medical treatment of a minor, §743.0645, Fla. Stat., sets forth a list of persons who have the power to consent on behalf of the minor. The person who has the first priority is a person who possesses a power of attorney to provide medical consent for the minor. However, part II, chapter 709, Fla. Stat., "Powers of Attorney" does not have a provision authorizing a parent, legal custodian or legal guardian to execute such a power of attorney.

The situation where it most commonly occurs is when parents go on vacation and leave their children with a caregiver. Lawyers routinely draft powers of attorney authorizing the caregiver to consent to medical treatment of a minor in reliance upon the words of §743.0645, Fla. Stat. even though it is not technically effective.

Designating a person to make medical decisions for a minor is a type of advance directive and should be addressed in chapter 765 "Health Care Advance Directives" and not part II, chapter 709, Fla. Stat., "Powers of Attorney." Chapter 765, Fla. Stat. has an effective mechanism for designating surrogates as well as review of a surrogate's decisions and removal of a surrogate, if

necessary, whereas part II, chapter 709, Fla. Stat. dealing with financial matters, does not have such protective provisions.

III. EFFECT OF PROPOSED CHANGE

The first effect of these proposals is to transfer the long used concept of a medical power of attorney from part II of chapter 709, Fla. Stat., "Powers of Attorney" to chapter 765, Fla. Stat., "Health Care Advance Directives." A medical power of attorney is an advance directive for medical care, and chapter 765, Fla. Stat. is the chapter that governs such medical directives. This will afford Floridians more protection since chapter 765, Fla. Stat. contains medical standards of care to safeguard a principal from the inappropriate actions of an appointed agent which part II of chapter 709 does not contain.

In addition, the proposed changes integrates the definition of health care information to comply with the Privacy Rule of HIPAA and to allow a designated health care surrogate to have access to all health information of a principal needed to make health care decisions of behalf of the principal and to assess the principal's ability to function in relevant situations.

The second effect of these proposals is to give the authority to parents, legal custodian or legal guardian of the person of a minor to designate a person in their absence to consent to non-emergency and necessary medical treatment of a minor.

IV. FISCAL IMPACT ON STATE AND LOCAL GOVERNMENTS

There should be no fiscal impact on state and local governments.

V. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR

None, other than the possible reduction in medical costs and legal fees.

VI. CONSTITUTIONAL ISSUES

None

VII. OTHER INTERESTED PARTIES

1. Health Law Section of the Florida Bar

2. Elder Law Section of the Florida Bar

3. Family Law Section of the Florida Bar

The chairs of each of the above-referenced committees were provided copies of the proposed

legislation.

VIII. SECTION-BY-SECTION ANALYSIS OF PROPOSED CHANGES

The 2012 Florida Statutes

SECTION 1

Purpose: §709.2201(2)(c) is removed, and the same authority of the agent under this section is moved to Part II, Health Care Surrogate, of Chapter 765, Health Care Advance Directives, for the better protection of the principal.

§ 709.2201. Authority of agent.

(1) Except as provided in this section or other applicable law, an agent may only exercise authority specifically granted to the agent in the power of attorney and any authority reasonably necessary to give effect to that express grant of specific authority. General provisions in a power of attorney which do not identify the specific authority granted, such as provisions purporting to give the agent authority to do all acts that the principal can do, are not express grants of specific authority and do not grant any authority to the agent. Court approval is not required for any action of the agent in furtherance of an express grant of specific authority.

(2) As a confirmation of the law in effect in this state when this part became effective, such authorization may include, without limitation, authority to:

(a) Execute stock powers or similar documents on behalf of the principal and delegate to a transfer agent or similar person the authority to register any stocks, bonds, or other securities into or out of the principal's or nominee's name.

(b) Convey or mortgage homestead property. However, if the principal is married, the agent may not mortgage or convey homestead property without joinder of the principal's spouse or the spouse's guardian. Joinder by a spouse may be accomplished by the exercise of authority in a power of attorney executed by the joining spouse, and either spouse may appoint the other as his or her agent.

(c) If such authority is specifically granted in a durable power of attorney executed prior to October 1, 2014, make all health care decisions on behalf of the principal, including, but not limited to, those set forth in chapter 765.

(3) Notwithstanding the provisions of this section, an agent may not:

(a) Perform duties under a contract that requires the exercise of personal services of the principal;

(b) Make any affidavit as to the personal knowledge of the principal;

(c) Vote in any public election on behalf of the principal;
(d) Execute or revoke any will or codicil for the principal;

(e) Exercise powers and authority granted to the principal as trustee or as court-appointed fiduciary.

(4) Subject to s. 709.2202, if the subjects over which authority is granted in a power of attorney are similar or overlap, the broadest authority controls.

(5) Authority granted in a power of attorney is exercisable with respect to property that the principal has when the power of attorney is executed and to property that the principal acquires later, whether or not the property is located in this state and whether or not the authority is exercised or the power of attorney is executed in this state.

(6) An act performed by an agent pursuant to a power of attorney has the same effect and inures to the benefit of and binds the principal and the principal's successors in interest as if the principal had performed the act.

SECTION 2

Purpose: §743.0645(2)(a) is modified to allow a health care surrogate for a minor to consent to the minor's medical treatment in the absence of the parents, legal custodian or legal guardian of the person.

743.0645 Other persons who may consent to medical care or treatment of a minor.--

(1) As used in this section, the term:

(a) "Blood testing" includes Early Periodic Screening, Diagnosis, and Treatment (EPSDT) testing and other blood testing deemed necessary by documented history or symptomatology but excludes HIV testing and controlled substance testing or any other testing for which separate court order or informed consent as provided by law is required.

(b) "Medical care and treatment" includes ordinary and necessary medical and dental examination and treatment, including blood testing, preventive care including ordinary immunizations, tuberculin testing, and well-child care, but does not include surgery, general anesthesia, provision of psychotropic medications, or other extraordinary procedures for which a separate court order, health care surrogate designation under s. 765.2035 executed after September 30, 2014, power of attorney executed after July 1, 2001, and prior to October 1, 2014, or informed consent as provided by law is required, except as provided in s. 39.407(3).

(c) "Person who has the power to consent as otherwise provided by law" includes a natural or adoptive parent, legal custodian, or legal guardian.

(2) Any of the following persons, in order of priority listed, may consent to the medical care or

treatment of a minor who is not committed to the Department of Children and Family Services or the Department of Juvenile Justice or in their custody under chapter 39, chapter 984, or chapter 985 when, after a reasonable attempt, a person who has the power to consent as otherwise provided by law cannot be contacted by the treatment provider and actual notice to the contrary has not been given to the provider by that person:

(a) A health care surrogate designated under s. 765.2035 after September 30, 2014, or a ~~A~~ person who possesses a power of attorney to provide medical consent for the minor executed prior to October 1, 2014. A health care surrogate designation under s. 765.2035 executed after September 30, 2014, and a power of attorney executed after July 1, 2001, and prior to October 1, 2014, to provide medical consent for a minor includes the power to consent to medically necessary surgical and general anesthesia services for the minor unless such services are excluded by the individual executing the health care surrogate for a minor or power of attorney.

(b) The stepparent.

(c) The grandparent of the minor.

(d) An adult brother or sister of the minor.

(e) An adult aunt or uncle of the minor.

There shall be maintained in the treatment provider's records of the minor documentation that a reasonable attempt was made to contact the person who has the power to consent.

(3) The Department of Children and Family Services or the Department of Juvenile Justice caseworker, juvenile probation officer, or person primarily responsible for the case management of the child, the administrator of any facility licensed by the department under s.393.067, s.394.875, or s.409.175, or the administrator of any state-operated or state-contracted delinquency residential treatment facility may consent to the medical care or treatment of any minor committed to it or in its custody under chapter 39, chapter 984, or chapter 985, when the person who has the power to consent as otherwise provided by law cannot be contacted and such person has not expressly objected to such consent. There shall be maintained in the records of the minor documentation that a reasonable attempt was made to contact the person who has the power to consent as otherwise provided by law.

(4) The medical provider shall notify the parent or other person who has the power to consent as otherwise provided by law as soon as possible after the medical care or treatment is administered pursuant to consent given under this section. The medical records shall reflect the reason consent as otherwise provided by law was not initially obtained and shall be open for inspection by the parent or other person who has the power to consent as otherwise provided by law.

(5) The person who gives consent; a physician, dentist, nurse, or other health care professional licensed to practice in this state; or a hospital or medical facility, including, but not limited to, county health departments, shall not incur civil liability by reason of the giving of consent, examination, or rendering of treatment, provided that such consent, examination, or treatment was given or rendered

as a reasonable prudent person or similar health care professional would give or render it under the same or similar circumstances.

(6) The Department of Children and Family Services and the Department of Juvenile Justice may adopt rules to implement this section.

(7) This section does not affect other statutory provisions of this state that relate to medical consent for minors.

CHAPTER 765

HEALTH CARE ADVANCE DIRECTIVES

PART I

GENERAL PROVISIONS (ss. 765.101 -765.113)

PART II

HEALTH CARE SURROGATE (ss. 765.201- 765.205)

PART III

LIFE-PROLONGING PROCEDURES

PART IV

ABSENCE OF ADVANCE DIRECTIVE

PART V

ANATOMICAL GIFTS

PART I

GENERAL PROVISIONS

765.101 Definitions.

765.102 Legislative findings and intent.

765.103 Existing advance directives.

765.104 Amendment of revocation.

765.105 Review of surrogate or proxy's decision.
765.106 Preservation of existing rights.

765.107 Construction.

765.108 Effect with respect to insurance.

765.109 Immunity from liability; weight of proof; presumption.

765.110 Health care facilities and providers; discipline.

765.1103 Pain management and palliative care.

765.1105 Transfer of a patient.

765.1115 Falsification forgery, or willful concealment, cancellation, or destruction of directive or revocation or amendment; penalties.

765.112 Recognition of advance directive executed in another state.

765.113 Restrictions on providing consent.

SECTION 3

Purpose: The definition section of chapter 765 is modified to add the terms "health care" and "health information" and to integrate those terms where appropriate. The present definition section of chapter 765 does not define medical records even though medical records are an essential aspect of the duties of a health care surrogate and proxy.

The definition of "Attending physician" is changed to "Primary physician" for two reasons. First, the new definition allows the principal to designate a physician he or she wants to determine incapacity. Second, "Primary physician" is the term used under the Uniform Health-Care Decisions Act, some of which formed the proposed changes to chapter 765.

Also added to the definitions is the concept of "reasonably available." Under present chapter 765, a principal can designate a surrogate and an alternate surrogate. The authority of the alternate surrogate commences if the original surrogate is "unwilling or unable to perform his or her duties." The "unwilling or unable" criteria could take time to the detriment of the principal. Under the proposed changes the alternate surrogate would assume his or her duties if the original surrogate is "not willing, able or reasonably available." The meaning of "reasonably available" is defined in the definitional section below.

Lastly, a new definition of "Minor's principal" is added to the definitional section of chapter 765.

765.101 Definitions as used in this chapter:

(1) "Advance directive" means a witnessed written document or oral statement in which instructions are given by a principal or in which the principal's desires are expressed concerning any aspect of the principal's health care or health information, and includes, but is not limited to, the designation of a health care surrogate, a living will or an anatomical gift made pursuant to part V of this chapter.

~~(2) "Attending physician" means the primary physician who has responsibility for the treatment and care of the patient.~~

(2) ~~(3)~~ "Close personal friend" means any person 18 years of age or older who has exhibited special care and concern for the patient, and who presents an affidavit to the health care facility or to the attending or treating physician stating that he or she is a friend of the patient; is willing and able to become involved in the patient's health care; and has maintained such regular contact with the patient so as to be familiar with the patient's activities, health, and religious or moral beliefs.

(3) ~~(4)~~ "End-stage condition" means an irreversible condition that is caused by injury, disease, or illness which has resulted in progressively severe and permanent deterioration, and which, to reasonable degree of medical probability, treatment of the condition would be ineffective.

(4) "Health care" means care, services, or supplies related to the health of an individual and includes, but is not limited to, preventive, diagnostic, therapeutic, rehabilitative, maintenance, or palliative care, and counseling, service, assessment, or procedure with respect to the individual's physical or mental condition or functional status or that affect the structure or function of the individual's body.

(5) "Health care decision" means:

(a) Informed consent, refusal of consent, or withdrawal of consent to any and all health care, including life-prolonging procedures and mental health treatment, unless otherwise stated in the advance directives.

(b) The decision to apply for private, public, government, or veterans' benefits to defray the cost of health care.

(c) The right of access to health information ~~all records~~ of the principal reasonably necessary for a health care surrogate or proxy to make decisions involving health care and to apply for benefits.

(d) The decision to make an anatomical gift pursuant to part V of this chapter.

(6) "Health care facility" means a hospital, nursing home, hospice, home health agency, or health maintenance organization licensed in this state, or any facility subject to part I of chapter 394.

(7) "Health care provider" or "provider" means any person licensed, certified, or otherwise authorized by law to administer health care in the ordinary course of business or practice of a profession.

(8) "Health information" means any information, whether oral or recorded in any form or medium, as defined from time to time in 45 C.F.R. s. 164.502(g) and the Health Insurance Portability and Accountability Act of 1996, Pub. L. No. 104-191, 110 Stat. 1936, that:

(a) Is created or received by a health care provider, health care facility, health plan, public health authority, employer, life insurer, school or university, or health care clearinghouse; and

(b) Relates to the past, present, or future physical or mental health or condition of the principal; the provision of health care to the principal; or the past, present, or future payment for the provision of health care to the principal.

(9) ~~(8)~~ "Incapacity" or "incompetent" means the patient is physically or mentally unable to communicate a willful and knowing health care decision. For the purposes of making an anatomical gift, the term also includes a patient who is deceased.

(10) ~~(9)~~ "Informed consent" means consent voluntarily given by a person after a sufficient explanation and disclosure of the subject matter involved to enable that person to have a general understanding of the treatment or procedure and the medically acceptable alternatives, including the substantial risks and hazards inherent in the proposed treatment or procedures, and to make a knowing health care decision without coercion or undue influence.

(11) ~~(10)~~ "Life-prolonging procedure" means any medical procedure, treatment, or intervention, including artificially provided sustenance and hydration, which sustains, restores or supplants a spontaneous vital function. The term does not include the administration of medication or performance of medical procedure, when such medication or procedure is deemed necessary to provide comfort care or to alleviate pain.

(12) ~~(11)~~ "Living will" or "declaration" means:

(a) A witnessed document in writing, voluntarily executed by the principal in accordance with s. 765.302 or

(b) A witnessed oral statement made by the principal expressing the principal's instructions

concerning life-prolonging procedures.

(13) "Minor's principal" means a principal who is a natural guardian as defined in s. 744.301(1), legal custodian or, subject to the provisions of chapter 744, legal guardian of the person of a minor.

(14) ~~(12)~~ "Persistent vegetative state" means a permanent and irreversible condition of unconsciousness in which there is:

(a) The absence of voluntary action or cognitive behavior of any kind.

(b) An inability to communicate or interact purposefully with the environment.

(15) ~~(13)~~ "Physician" means a person licensed pursuant to chapter 458 or chapter 459.

(16) "Primary physician" means a physician designated by an individual or the individual's surrogate, proxy, or attorney in fact under a durable power of attorney as provided in chapter 709, to have primary responsibility for the individual's health care or, in the absence of a designation or if the designated physician is not reasonably available, a physician who undertakes the responsibility.

(17) ~~(14)~~ "Principal" means a competent adult executing an advance directive and on whose behalf health care decisions are to be made or health care information is to be received, or both.

(18) ~~(15)~~ "Proxy" means a competent adult who has not been expressly designated to make health care decisions for a particular incapacitated individual, but who, nevertheless, is authorized pursuant to s. 765.401 to make health care decisions for such individual.

(19)"Reasonably available" means readily able to be contacted without undue effort and willing and able to act in a timely manner considering the urgency of the principal's health-care needs.

(20) ~~(16)~~ "Surrogate" means any competent adult expressly designated by a principal to make health care decisions and to receive health information. The principal may stipulate whether the authority of the surrogate to receive health information is exercisable immediately without the necessity for a determination of incapacity or only upon the principal's incapacity as set forth in s. 765.204 ~~on behalf of the principal upon the principal's incapacity~~.

(21) ~~(17)~~ "Terminal condition" means a condition caused by injury, disease, or illness from which there is no reasonable medical probability of recovery and which, without treatment, can be expected to cause death.

SECTION 4

Purpose: In light of this proposal that a principal can designate a surrogate to make health care decisions for him or her and to receive health care information without the necessity of a

determination of incapacity, a legislative intent section has been added.

765.102 Legislative findings and intent.--

(1) The Legislature finds that every competent adult has the fundamental right or self-determination regarding decisions pertaining to his or her own health, including the right to choose or refuse medical treatment. This right is subject to certain interests of society, such as the protection of human life and the preservation of ethical standards in the medical profession.

(2) To ensure that such right is not lost or diminished by virtue of later physical or mental incapacity, the Legislature intends that a procedure be established to allow a person to plan for incapacity by executing a document or orally designating another person to direct the course of his or her health care or receive his or her health information, or both, ~~medical treatment~~ upon his or her incapacity. Such procedure should be less expensive and less restrictive than guardianship and permit a previously incapacitated person to exercise his or her full right to make health care decisions as soon as the capacity to make such decisions has been regained.

(3) The Legislature also recognizes that some competent adults may want to have immediate assistance in making health care decisions or accessing health information, or both, without a determination of incapacity. The Legislature intends that a procedure be established to allow a person to designate a surrogate to make health care decisions or receive health information, or both, without the necessity for a determination of incapacity under this chapter.

(4) ~~(3)~~ The Legislature recognizes that for some the administration of life-prolonging medical procedures may result in only a precarious and burdensome existence. In order to ensure that the rights and intentions of a person may be respected even after he or she is no longer able to participate actively in decisions concerning himself or herself, and to encourage communication among such patient, his or her family, and his or her physician, the Legislature declares that the laws of this state recognize the right of a competent adult to make an advance directive instructing his or her physician to provide, withhold, or withdraw life-prolonging procedures, or to designate another to make the health care ~~treatment~~ decision for him or her in the event that such person should become incapacitated and unable to personally direct his or her health ~~medical~~ care.

(5) ~~(4)~~ The Legislature recognizes the need for all health care professionals to rapidly increase their understanding of end-of-life and palliative care. Therefore, the Legislature encourages the professional regulatory boards to adopt appropriate standards and guidelines regarding end-of-life care and pain management and encourages educational institutions established to train health care professionals and allied health professionals to implement curricula to train such professionals to provide end-of-life care, including pain management and palliative care.

(6) ~~(5)~~ For purposes of this chapter:

(a) Palliative care is the comprehensive management of the physical, psychological, social, spiritual,

and existential needs of patients. Palliative care is especially suited to the care of persons, who have incurable, progressive illnesses.

(b) Palliative care must include:

1. An opportunity to discuss and plan for end-of-life care.

2. Assurance that physical and mental suffering will be carefully attended to.

3. Assurance that preferences for withholding and withdrawing life-sustaining interventions will be honored.

4. Assurance that the personal goals of the dying person will be addressed.

5. Assurance that the dignity of the dying person will be a priority.

6. Assurance that health care provider will not abandon the dying person.

7. Assurance that the burden to family and others will be addressed.

8. Assurance that advance directives for care will be respected regardless of the location of care.

9. Assurance that organizational mechanisms are in place to evaluate the availability and quality of end-of-life, palliative, and hospice care services, including the evaluation of administrative and regulatory barriers.

10. Assurance that necessary health care services will be provided and that relevant reimbursement policies are available.

11. Assurance that the goals expressed in subparagraphs 1.10. will be accomplished in a culturally appropriate manner.

(7) ~~(6)~~ The Department of Elderly Affairs, the Agency for Health Care Administration, and the Department of Health shall jointly create a campaign on end-of-life care for purposes of educating the public. This campaign should include culturally sensitive programs to improve understanding of end-of-life care issues in minority communities.

SECTION 5

Purpose: To provide for an effective date prior to which valid advance directives will be recognized.

765.103 Existing advance directives. Any advance directive made prior to ~~October 1, 1999,~~

October 1, 2014, shall be given effect as executed, provided such directive was legally effective when written.

SECTION 6

Purpose: Words not needed are taken out.

765.104 Amendment or revocation.–

(1) An advance directive ~~or designation of surrogate~~ may be amended or revoked at any time by a competent principal:

(a) By means of a signed, dated writing;

(b) By means of the physical cancellation or destruction of the advance directive by the principal or by another in the principal's presence and at the principal's directions;

(c) By means of an oral expression of intent to amend or revoke; or

(d) By means of a subsequently executed advance directive that is materially different from a previously executed advance directive.

(2) Unless otherwise provided in the advance directive or in an order of dissolution or annulment or marriage, the dissolution or annulment of marriage of the principal revokes the designation of the principal's former spouse as a surrogate.

(3) Any such amendment or revocation will be effective when it is communicated to the surrogate, health care provider or health care facility. No civil or criminal liability shall be imposed upon any knowledge of such amendment or revocation.

(4) Any patient for whom a ~~medical~~ proxy has been recognized under s. 765.401 and for whom any previous legal disability that precluded the patient's ability to consent is removed may amend or revoke the recognition of the ~~medical~~ proxy and any uncompleted decision made by that proxy. The amendment or revocation takes effect when it is communicated to the proxy, the health care provider, or the health care facility in writing or, if communicated orally, in the presence of a third person.

SECTION 7

Purpose: Integrates the term "primary physician." The proposal adds subsection (7) because a principal with capacity can review the surrogate's actions and remove a surrogate who is acting not in accordance with the principal's best interest.

765.105 Review of surrogate or proxy's decision. The patient's family, the health care facility, or the primary ~~attending~~ physician, or any other interested person who may reasonably be expected to be directly affected by the surrogate or proxy's decision concerning any health care decision may seek expedited judicial intervention pursuant to rule 5.900 of the Florida Probate Rules, if that person believes:

(1) The surrogate or proxy's decision is not in accord with the patient's known desires or the provisions of this chapter;

(2) The advance directive is ambiguous, or the patient has changed his or her mind after execution of the advance directive;

(3) The surrogate or proxy was improperly designated or appointed, or the designation of the surrogate is no longer effective or has been revoked;

(4) The surrogate or proxy has failed to discharge duties, or incapacity or illness renders the surrogate or proxy incapable of discharging duties;

(5) The surrogate or proxy has abused his or her powers or;

(6) The patient has sufficient capacity to make his or her own health care decisions.

(7) The provisions of this section do not apply to a principal who is not incapacitated and who has designated a surrogate who has immediate authority to make health care decisions or receive health information, or both, on behalf of the principal.

SECTION 8

Purpose: No change to present law.

765.106 Preservation of existing rights. The provisions of this chapter are cumulative to the existing law regarding an individual's right to consent, or refuse to consent, to medical treatment and do not impair any existing rights or responsibilities which a health care provider, a patient, including a minor, competent or incompetent person, or a patient's family may have under the common law, Federal Constitution, State Constitution, or statutes of this state.

765.107 Construction--

(1) This chapter shall not be construed to repeal by implication any provision of s. 766.103, the Florida Medical Consent Law. For all purposes, the Florida Medical Consent Law shall be considered an alternative to provisions of this section.

(2) Procedures provided in this chapter permitting the withholding of withdrawal of life-prolonging

procedures do not apply to a person who never had capacity to designate a health care surrogate or execute a living will.

765.108 Effect with respect to insurance. The making of an advance directive pursuant to the provisions of this chapter shall not affect the sale, procurement, or issuance of any policy of life insurance, nor shall such making of an advance directive be deemed to modify the terms of an existing policy of life insurance. No policy of life insurance will be legally impaired or invalidated by the withholding or withdrawal of life-prolonging procedures from an insured patient in accordance with the provisions of this chapter, nor by any other treatment decision made according to this chapter, notwithstanding any term of the policy to the contrary. A person shall not be required to make an advance directive as a condition for being insured for, or receiving, health care services.

765.109 Immunity from liability; weight of proof; presumption.--

(1) A health care facility, provider, or other person who acts under the direction of a health care facility or provider is not subject to criminal prosecution or civil liability, and will not be deemed to have engaged in unprofessional conduct, as a result of carrying out a health care decision made in accordance with the provisions of this chapter. The surrogate or proxy who makes a health care decision on a patient's behalf, pursuant to this chapter, is not subject to criminal prosecution or civil liability for such action.

(2) The provisions of this section shall apply unless it is shown by a preponderance of the evidence that the person authorizing or effectuating a health care decision did not, in good faith, comply with the provisions of this chapter.

765.110 Health care facilities and providers; discipline.--

(1) A health care facility, pursuant to Pub. L. No. 101-508, ss. 4206 and 4751, shall provide to each patient written information concerning the individual's rights concerning advance directives and the health care facility's policies respecting the implementation of such rights, and shall document in the patient's medical records whether or not the individual has executed an advance directive.

(2) A health care provider or health care facility may not require a patient to execute an advance directive or to execute a new advance directive using the facility's or provider's forms. The patient's advance directives shall travel with the patient as part of the patient's medical record.

(3) A health care provider or health care facility shall be subject to professional discipline and revocation of license or certification, and a fine of not more than $1,000 per incident, or both, if the health care provider or health care facility, as a condition of treatment or admission, requires an individual to execute or waive an advance directive.

(4) The Department of Elderly affairs for hospices and, in consultation with the Department of Elderly Affairs, the Department of Health for health care providers; the Agency for Health Care

Administration for hospitals, nursing homes, home health agencies, and health maintenance organizations; and the Department of Children and Family Services for facilities subject to part I of chapter 394 shall adopt rules to implement the provisions of the section.

SECTION 9

Purpose: Integrates the term "primary physician" and limits the authority of an attorney in fact to powers of attorney signed before the effective date of the proposed changes.

765.1103 Pain management and palliative care.--
(1) A patient shall be given information concerning pain management and palliative care when he or she discusses with the primary ~~attending or treating~~ physician, or such physician's designee, the diagnosis, planned course of treatment, alternatives, risks, or prognosis for his or her illness. If the patient is incapacitated, the information shall be given to the patient's health care surrogate, proxy, court-appointed guardian as provided in chapter 744, or attorney in fact under a durable power of attorney as provided in chapter 709 executed prior to October 1, 2014. The court-appointed guardian or attorney in fact under a durable power of attorney as provided in chapter 709 executed prior to October 1, 2014 must have been delegated authority to make health care decisions on behalf of the patient.

(2) Health care providers and practitioners regulated under chapter 458, chapter 459, or chapter 464 must, as appropriate, comply with a request for pain management or palliative care from a patient under their care or, for an incapacitated patient under their care, from a surrogate, proxy, guardian, or other representative permitted to make health care decisions for the incapacitated patient. Facilities regulated under chapter 395 or chapter 400 must comply with the pain management or palliative care measures ordered by the patient's physician.

SECTION 10

Purpose: No change to present law except it adds the word "proxy" where appropriate.

765.1105 Transfer of a patient.--

(1) A health care provider or facility that refuses to comply with a patient's advance directive, or the treatment decision of his or her surrogate or proxy, shall make reasonable efforts to transfer the patient to another health care provider or facility that will comply with the directive or treatment decision. This chapter does not require a health care provider or facility to commit any act which is contrary to the provider's or facility's moral or ethical beliefs, if the patient:

(a) Is not in an emergency condition; and

(b) Has received written information upon admission informing the patient of the policies of the health care provider or facility regarding such moral or ethical beliefs.

(2) A health care provider or facility that is unwilling to carry out the wishes of the patient or the treatment decision of his or her surrogate or proxy because of moral or ethical beliefs must within 7 days either:

(a) Transfer the patient to another health care provider or facility. The health care provider or facility shall pay the costs for transporting the patient to another health care provider or facility; or

(b) If the patient has not been transferred, carry out the wishes of the patient or the patient's surrogate or proxy, unless the provisions of s. 765.105 apply.

SECTION 11

Purpose: No change to present law.

765.1115 Falsification, forgery, or willful concealment, cancellation, or destruction of directive or revocation or amendment; penalties.--

(1) Any person who willfully conceals, cancels, defaces, obliterates, or damages an advance directive without the principal's consent or who falsifies or forges the revocation or amendment of an advance directive of another, and who thereby causes life-prolonging procedures to be utilized in contravention of the previously expressed intent of the principal, commits a felony of the third degree, punishable as provided in s. 775.082, or s. 775.083, or s. 775.084.

(2) Any person who falsifies or forges the advance directive of another or who willfully conceals or withholds personal knowledge of the revocation of an advance directive, with the intent to cause a withholding or withdrawal of life-prolonging procedures contrary to the wishes of the principal, and who thereby because of such act directly causes life-prolonging procedures to by withheld or withdrawn and death to be hastened, commits a felony of the second degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

765.112 Recognition of advance directive executed in another state. An advance directive executed in another state in compliance with the law of that state or of this state is validly executed for the purposes of this chapter.

765.113 Restrictions on providing consent. Unless the principal expressly delegates such authority to the surrogate in writing, or a surrogate or proxy has sought and received court approval pursuant to rule 5.900 of the Florida Probate Rules, a surrogate or proxy may not provide consent for:

(1) Abortion, sterilization, electroshock therapy, psychosurgery, experimental treatment that have not been approved by a federally approved institutional review board in accordance with 45 C.F.R. part 46 or 21 C.F. R. part 56, or voluntary admission to a mental health facility.

(2) Withholding or withdrawing life-prolonging procedures from a pregnant patient prior to viability as defined in s. 390.0111 (4).

PART II

HEALTH CARE SURROGATE

765.201 Short title.

765.202 Designation of a health care surrogate.

765.203 Suggested form of designation.

765.2035 Designation of health care surrogate for a minor.

765.2038. Suggested form of designation of health care surrogate for a minor.

765.204 Capacity of principal; procedure.

765.205 Responsibility of the surrogate.

SECTION 12

Purpose: No change to present law.

765.201 Short title.B Sections 765.202-765.205 may be cited as the >Florida Health Care Surrogate Act.@

SECTION 13

Purpose: The proposal integrates the term "reasonably available."

765.202 Designation of a health care surrogate.--

(1) A written document designating a surrogate to make health care decisions for a principal or receive health information on behalf of a principal, or both, shall be signed by the principal in the presence of two subscribing adult witnesses. A principal unable to sign the instrument may, in the presence of witnesses, direct that another person sign the principal's name as required herein. An exact copy of the instrument shall be provided to the surrogate.

(2) The person designated as surrogate shall not act as witness to the execution of the document designating the health care surrogate. At least one person who acts as a witness shall be neither the principal's spouse nor blood relative.

(3) A document designation a health care surrogate may also designate an alternate surrogate provided the designation is explicit. The alternate surrogate may assume his or her duties as surrogate for the principal if the original surrogate is not willing, able or reasonably available ~~unwilling or unable~~ to perform his or her duties. The principal's failure to designate an alternate surrogate shall not invalidate the designation of a surrogate.

(4) If neither the designated surrogate nor the designated alternate surrogate is not willing, able or reasonably available ~~able or willing~~ to make health care decisions on behalf of the principal and in accordance with the principal's instructions, the health care facility may seek the appointment of a proxy pursuant to part IV.

(5) A principal may designate a separate surrogate to consent to mental health treatment in the event that the principal is determined by a court to be incompetent to consent to mental health treatment and a guardian advocate is appointed as provided under s. 394.4598. However, unless the document designating the health care surrogate expressly states otherwise, the court shall assume that the health care surrogate authorized to make health care decisions under this chapter is also the principal's choice to make decisions regarding mental health treatment.

(6) Unless the document states a time of termination, the designation shall remain in effect until revoked by the principal.

(7) A written designation of a health care surrogate executed pursuant to this section establishes a rebuttable presumption of clear and convincing evidence of the principal's designation of the surrogate.

SECTION 14

Purpose: The proposal changes the suggested form to comply with the proposed changes. The entire suggested form in essence has been changed.

765.203 Suggested form of designation. -- A written designation of a health care surrogate executed pursuant to this chapter may, but need not be, in the following form:

PART I
DESIGNATION OF HEALTH CARE SURROGATE

I, [(name)_____(Last)_____(First)_____(Middle Initial)], hereby designate as my health care surrogate under s. 765.202, Florida 358 Statutes:

Name:_____

Address:_____

Phone:_____

If my health care surrogate is not willing, able, or reasonably available to perform his or her duties, I wish to designate as my alternate health care surrogate:

Name:_____

Address:_____

Phone:_____

PART 2
INSTRUCTIONS FOR HEALTH CARE

I authorize my health care surrogate to:

[Initials] Receive any of my health information, whether oral or recorded in any form or medium, that:

1. Is created or received by a health care provider, health care facility, health plan, public health authority, employer, life insurer, school or university, or health care clearinghouse; and

2. Relates to my past, present, or future physical or mental health or condition; the provision of health care to me; or the past, present, or future payment for the provision of health care to me.

I further authorize my health care surrogate to:

[Initials] Make all health care decisions for me, which means he or she has the authority to:

1. Provide informed consent, refusal of consent, or withdrawal of consent to any and all of my health care, including life-prolonging procedures.

2. Apply on my behalf for private, public, government, or veteran's benefits to defray the cost of health care.

3. Access my health information reasonably necessary for the health care surrogate to make decisions involving my health care and to apply for benefits.

4. Decide to make an anatomical gift pursuant to part VI of chapter 765, Florida Statutes.

(Initials) Specific instructions and restrictions:

_____

_____

_____

To the extent I am capable of understanding, my health care surrogate shall keep me reasonably informed of all matters that he or she has performed on my behalf.

I further affirm that this designation is not being made as a condition of treatment or admission to a health care facility.

I will notify and send a copy of this document to the following persons other than my health care surrogate, so they may know who my health care surrogate is.

Name:_____

Name:_____

THIS HEALTH CARE SURROGATE DESIGNATION IS NOT AFFECTED BY MY SUBSEQUENT INCAPACITY EXCEPT AS PROVIDED IN CHAPTER 765, FLORIDA STATUTES.

My health care surrogate shall make health-care decisions for me in accordance with this designation, any additional instructions I give in this form, and my other wishes to the extent known to my surrogate and not inconsistent with this designation. To the extent my wishes are unknown, my surrogate shall make health-care decisions for me in accordance with what my surrogate determines to be in my best interest. In determining my best interest, my surrogate shall consider my personal values to the extent known to my surrogate.

(If you do not agree with any of the optional choices above and wish to write your own, or if you wish to add to the instructions you have given above, you may do so here.) I direct that:

_____

_____

_____

_____

(Add additional sheets if needed.)

PART 3
PRIMARY PHYSICIAN

(OPTIONAL)

I designate the following physician as my primary physician:

(Name of physician)

(Address) (City) (State) (Zip Code)

(Phone)

Optional: If the physician I have designated above is not willing, able or reasonably available to act as my primary physician, I designate the following physician as my primary physician:

(Name of physician)

(Address) (City) (State) (Zip Code)

(Phone)

A copy of this form has the same effect as the original.

A designation of a health care surrogate shall contain, directly above the signature line, a statement in all capital letters in at least 14-point boldfaced type in substantially the following form:

MY HEALTH CARE SURROGATE'S AUTHORITY BECOMES EFFECTIVE WHEN MY PRIMARY PHYSICIAN DETERMINES THAT I AM UNABLE TO MAKE MY OWN HEALTH CARE DECISIONS UNLESS I INITIAL EITHER OR BOTH OF THE FOLLOWING BOXES:

IF I INITIAL THIS BOX [ ], MY HEALTH CARE SURROGATE'S AUTHORITY TO RECEIVE MY HEALTH INFORMATION TAKES EFFECT IMMEDIATELY.

IF I INITIAL THIS BOX [ ] MY HEALTH CARE SURROGATE'S AUTHORITY TO MAKE HEALTH CARE DECISIONS FOR ME TAKES EFFECT IMMEDIATELY.

SIGNATURES: Sign and date the form here:

(date) (sign your name)

(address) (print your name)

(city) (state)

SIGNATURES OF WITNESSES:

First witness	Second witness
(print name)	(print name)
(address)	(address)
(city) (state)	(city) (state)
(signature of witness)	(signature of witness)
(date)	(date)

NOTICE TO PHYSICIANS, HEALTH CARE PROVIDERS, AND HEALTH CARE FACILITES

If the principal has designated a health care surrogate or has delegated authority to make health care decisions to an attorney in fact under a durable power of attorney executed prior to October 1, 2014, as provided in chapter 709, and has stipulated that the authority of the surrogate or attorney in fact is to commence immediately, the fundamental right of self determination of every competent adult regarding his or her health care decisions shall be controlling. Before implementing a health care decision made for the principal, the primary physician, another physician, a health care provider, or a health care facility, if possible, must promptly communicate to the principal the decision made and the identity of the person making the decision.

SECTION 15

Purpose: A new section is added to chapter 765 to allow a parent or other legal guardian to designate a surrogate to give medical consent for non-emergency and necessary medical care for a minor in the parent or the legal custodian's absence. For example, a caretaker being designated as a surrogate for medical treatment while the parents are on vacation and cannot be timely contacted.

765.2035. Designation of a health care surrogate for a minor

(1) A natural guardian as defined in s. 744.301 (1), legal custodian or legal guardian of the person of a minor may designate a competent adult to serve as a surrogate to make health care decisions for the minor. Such designation shall be made by a written document which shall be signed by the designator in the presence of two subscribing adult witnesses. If a designator is unable to sign the instrument, such designator may, in the presence of witnesses, direct another person sign the designator's name as required herein. An exact copy of the instrument shall be provided to the surrogate.

(2) The person designated as surrogate shall not act as witness to the execution of the document designating the health care surrogate.

(3) A document designating a health care surrogate may also designate an alternate surrogate provided the designation is explicit. The alternate surrogate may assume his or her duties as surrogate if the original surrogate is not willing, able, or reasonably available to perform his or her duties. The designator's failure to designate an alternate surrogate shall not invalidate the designation.

(4) If neither the designated surrogate nor the designated alternate surrogate is willing, able, or reasonably available to make health care decisions for the minor on behalf of the designator and in accordance with the designator's instructions, the health care facility may seek the appointment of a proxy pursuant to part IV.

(5) A natural guardian as defined in s. 744.301 (1), legal custodian or legal guardian of the person of a minor may designate a separate surrogate consent to mental health treatment for a minor. However, unless the document designating the health care surrogate expressly states otherwise, the court shall assume that the health care surrogate authorized to make health care decisions for a minor under this chapter is also the designator's choice to make decisions regarding mental health treatment for the minor.

(6) Unless the document states a time of termination, the designation shall remain in effect until revoked by the designator. An otherwise valid designation of a surrogate for a minor shall not be invalid solely because it was made before the birth of the minor.

(7) A written designation of a health care surrogate executed pursuant to this section establishes a rebuttable presumption of clear and convincing evidence of the designator's designation of the surrogate and becomes effective pursuant to s. 743.0645(2)(a).

SECTION 16

Purpose: The proposal sets forth a non-mandatory suggested form for designation of a surrogate for a minor.

765.2038. Suggested form of designation of health care surrogate for a minor.

A written designation of a health care surrogate for a minor executed pursuant to this chapter may, but need to be, in the following form:

DESIGNATION OF HEALTH CARE SURROGATE
FOR MINOR

I/We, _____, the ____ natural guardian(s) as defined in s. 744.301 (1); _____ legal custodian(s); _____ legal guardian(s) [check one] of the following minor(s): _____; _____; _____, pursuant to s. 765.2035, designate the following person as my/our surrogate for health care decisions for a minor to act in the event that I/we am/are not able or reasonably available to provide consent for medical treatment and surgical and diagnostic procedures:

Name: _____
Address: _____
Zip Code _____
Phone: _____

If my/our designated health care surrogate for a minor is not willing, able, or reasonably available to perform his or her duties, I/we designate the following person as my/our alternate health care surrogate for a minor:

Name: _____
Address: _____
Zip Code _____
Phone: _____

I/We authorize and request all physicians, hospitals or other providers of medical services to follow the instructions of my/our surrogate or alternate surrogate, as the case may be, at any time and under any circumstances whatsoever, with regard to medical treatment and surgical and diagnostic procedures for a minor, provided the medical care and treatment of any minor is on the advice of a licensed physician.

I/We fully understand that this designation will permit my/our designee to make health care decisions for a minor and to provide, withhold, or withdraw consent on my/our behalf, to apply for public benefits to defray the cost of health care, and to authorize the admission or transfer of a minor to or from a health care facility.

I/We will notify and send a copy of this document to the following person(s) other than my/our surrogate, so that they may know the identity of my/our surrogate.

Name:
Name:

Signed: _____
Date: _____
Witnesses:
1. _____
2. _____

SECTION 17

Purpose: Integrates the term "primary physician" and requires the surrogate of an immediately effective designation to be informed of a determination of incapacity of the principal.

765.204 Capacity of principal: procedure.--

(1) A principal is presumed to be capable to make health care decisions for herself or himself unless she or he is determined to be incapacitated. Incapacity may not be inferred from the person's voluntary or involuntary hospitalization for mental illness or from her or his mental retardation.

(2) If a principal's capacity to make health care decisions for herself or himself or provide informed consent is in question, the primary ~~attending~~ physician shall evaluate the principal's capacity and, if the primary physician concludes that the principal lacks capacity, enter that evaluation in the principal's medical record. If the primary ~~attending~~ physician has a question as to whether the principal lacks capacity, another physician shall also evaluate the principal's capacity, and if the second physician agrees that the principal lacks the capacity to make health care decisions or provide informed consent, the health care facility shall enter both physicians' evaluations in the principal's medical record. If the principal had designated a health care surrogate or has delegated authority to make health care decisions to an attorney in fact under a durable power of attorney, the health care facility shall notify such surrogate or attorney in fact in writing that her or his authority under the instrument has commenced, as provided in chapter 709 or s. 765.203.

(3) The surrogate's authority shall commence upon a determination under subsection (2) that the principal lacks capacity, and such authority shall remain in effect until a determination that the principal has regained such capacity. Upon commencement of the surrogate's authority, a surrogate who is not the principal's spouse shall notify the principal's spouse or adult children of the principal's designation of the surrogate. In the event the primary ~~attending~~ physician determines that the principal has regained capacity, the authority of the surrogate shall cease, but shall recommence if the principal subsequently loses capacity as determined pursuant to this section.

(4) A determination made pursuant to this section that a principal lacks capacity to make health care decisions shall not be construed as a finding that a principal lacks capacity for any other purpose.

(5) In the event the surrogate is required to consent to withholding or withdrawing life-prolonging procedures, the provisions of part III shall apply.

SECTION 18

Purpose: The proposal integrates the term health information.

765.205 Responsibility of the surrogate.--

(1) The surrogate, in accordance with the principal's instructions, unless such authority had been expressly limited by the principal, shall:

(a) Have authority to act for the principal and to make all health care decisions for the principal during the principal's incapacity.

(b) Consult expeditiously with appropriate health care providers to provide informed consent, and make only health care decisions for the principal which he or she believes the principal would have made under the circumstances if the principal were capable of making such decisions. If there is no indication of what the principal would have chosen, the surrogate may consider the patient's best interest in deciding that proposed treatments are to be withheld or that treatments currently in effect are to be withdrawn.

(c) Provide written consent using an appropriate form whenever consent is required, including a physician's order not to resuscitate.

(d) Be provided access to the appropriate health information ~~medical records~~ of the principal.

(e) Apply for public benefits, such as Medicare and Medicaid, for the principal and have access to information regarding the principal's income and assets and banking and financial records to the extent required to make application. A health care provider or facility may not, however, make such application a condition of continued care if the principal, if capable, would have refused to apply.

(2) The surrogate may authorize the release of health information ~~and medical records~~ to appropriate persons to ensure the continuity of the principal's health care and may authorize the admission, discharge, or transfer of the principal to or from a health care facility or other facility or program licensed under chapter 400 or chapter 429.

(3) If, after the appointment of a surrogate, a court appoints a guardian, the surrogate shall continue to make health care decisions for the principal, unless the court has modified or revoked the authority of the surrogate pursuant to s. 744.3115. The surrogate may be directed by the court to report the

principal's health care status to the guardian.

SECTION 19

Purpose: There are no changes to Part III of chapter 765.

PART III

LIFE-PROLONGING PROCEDURES

SECTION 20

Purpose: There are no changes to Part IV of chapter 765.

PART IV

ABSENCE OF ADVANCE DIRECTIVE

SECTION 21

Purpose: There are no changes to Part V of chapter 765.

PART V

ANATOMICAL GIFTS

A bill to be entitled

An act relating to health care representatives; amending s. ~~709.08~~ 709.2201, F.S.; providing continuing validity for powers of attorney with authority to make health care decisions made under prior law; prohibiting powers of attorney executed pursuant to ch. 709, F.S., after a specified date from including authorization for health care decisions; amending s. 743.0645, F.S.; providing continuing validity for powers of attorney with authority to make health care decisions made under prior law; conforming provisions to changes made by the act; amending s. 765.101, F.S.; defining the terms "health care," "health information," "minor's principal," and "reasonably available" for purposes of ch. 765, F.S.; revising definitions to conform to changes made by the act; amending s. 765.102, F.S.; revising legislative intent to include reference to surrogate authority that is not dependent on a determination of incapacity; amending s. 765.104, F.S.; conforming provisions to changes made by the act; amending s. 765.105, F.S.; conforming provisions to changes made by the act; providing an exception for a patient who has designated a surrogate to make health care decisions and receive health information without a determination of incapacity being required; amending ss. 765.1103 and 765.1105, F.S.; conforming provisions to changes made by the act; amending s. 765.202, F.S.; revising provisions relating to the designation of health care surrogates; amending s. 765.203, F.S.; revising the

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suggested form for designation of a health care surrogate; creating s. 765.2035, F.S.; providing for designation of health care surrogates for minors; providing for designation of an alternate surrogate; providing for decisionmaking if neither the designated surrogate nor the designated alternate surrogate is willing, able, or reasonably available to make health care decisions for the minor on behalf of the minor's principal; authorizing designation of a separate surrogate to consent to mental health treatment for a minor; providing that the health care surrogate authorized to make health care decisions for a minor is also the minor's principal's choice to make decisions regarding mental health treatment for the minor unless provided otherwise; providing that a written designation of a health care surrogate establishes a rebuttable presumption of clear and convincing evidence of the minor's principal's designation of the surrogate; creating s. 765.2038, F.S.; providing a suggested form for the designation of a health care surrogate for a minor; amending s. 765.204, F.S.; conforming provisions to changes made by the act; providing for notification of incapacity of a principal; amending s. 765.205, F.S.; conforming provisions to changes made by the act; providing an additional requirement when a patient has designated a surrogate to make health care decisions and receive health information, or both, without a

determination of incapacity being required; providing an effective date.

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

Section 1. Paragraph (c) of Subsections (2) and (7) of section 709.08 709.2201, Florida Statutes, are is amended to read:

(c) If such authority is specifically granted in a durable power of attorney executed prior to October 1, 2014, make all health care decisions on behalf of the principal, including, but not limited to, those set forth in chapter 765.

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~~709.08 Durable power of attorney.~~

~~(2) EFFECT OF OBLIGATION, REVOCATION, OR FILING OF PETITION TO DETERMINE INCAPACITY.~~

~~(a) A durable power of attorney is nondelegable except as permitted in subparagraph (7)(a)1.~~

~~(b) The attorney in fact may exercise the authority granted under a durable power of attorney until the principal dies, revokes the power, or is adjudicated totally or partially incapacitated by a court of competent jurisdiction, unless the court determines that certain authority granted by the durable power of attorney is to remain exercisable by the attorney in fact.~~

~~(c)1. If any person or entity initiates proceedings in any court of competent jurisdiction to determine the principal's~~

~~incapacity, the authority granted under the durable power of attorney is suspended until the petition is dismissed or withdrawn. Notice of the petition must be served upon all attorneys in fact named in any power of attorney which is known to the petitioner.~~

~~2. If an emergency arises after initiation of proceedings to determine incapacity and before adjudication regarding the principal's capacity, the attorney in fact may petition the court in which the proceeding is pending for authorization to exercise a power granted under the durable power of attorney. The petition must set forth the nature of the emergency, the property or matter involved, and the power to be exercised by the attorney in fact.~~

~~3. Notwithstanding the provisions of this section, a proceeding to determine incapacity must not affect any authority of the attorney in fact designated under this chapter before October 1, 2010 2011, to make health care decisions for the principal, including, but not limited to, those defined in chapter 765, unless otherwise ordered by the court. If the principal has executed a health care advance directive designating a health care surrogate pursuant to chapter 765, the terms of the directive will control if the two documents are in conflict unless the durable power of attorney is later executed and expressly states otherwise.~~

~~(7) POWERS OF THE ATTORNEY IN FACT AND LIMITATIONS.~~

~~(a) Except as otherwise limited by this section, by other applicable law, or by the durable power of attorney, the~~

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~~attorney in fact has full authority to perform, without prior court approval, every act authorized and specifically enumerated in the durable power of attorney. Such authorization may include, except as otherwise limited in this section:~~

~~1. The authority to execute proxy powers or similar documents on behalf of the principal and delegate to a transfer agent or similar person the authority to register any stocks, bonds, or other securities either into or out of the principal's or nominee's name.~~

~~2. The authority to convey or mortgage homestead property. If the principal is married, the attorney in fact may not mortgage or convey homestead property without joinder of the spouse of the principal or the spouse's legal guardian. Joinder by a spouse may be accomplished by the exercise of authority in a durable power of attorney executed by the joining spouse, and either spouse may appoint the other as his or her attorney in fact.~~

~~(b) Notwithstanding the provisions of this section, an attorney in fact may not:~~

~~1. Perform duties under a contract that requires the exercise of personal services of the principal.~~

~~2. Make any affidavit as to the personal knowledge of the principal.~~

~~3. Vote in any public election on behalf of the principal.~~

~~4. Execute or revoke any will or codicil for the principal.~~

~~5. Create, amend, modify, or revoke any document or other disposition effective at the principal's death or transfer assets to an existing trust created by the principal unless expressly authorized by the power of attorney; or~~

~~6. Exercise powers and authority granted to the principal as trustee or as court-appointed fiduciary.~~

~~(c) Any durable power of attorney that includes the authority to make health care decisions on behalf of the principal, including, but not limited to, those set forth in chapter 765, executed pursuant to this chapter before October 1, 2010-2011, shall be given effect as executed, provided such durable power of attorney was legally effective when written. Any power of attorney executed pursuant to this chapter on or after October 1, 2010-2011, may not include authorization for health care decisions. If such authority is specifically granted in the durable power of attorney, the attorney in fact may make all health care decisions on behalf of the principal, including, but not limited to, those set forth in chapter 765.~~

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Section 2. Paragraph (b) of subsection (1) and paragraph (a) of subsection (2) of section 743.0645, Florida Statutes, are amended to read:

743.0645 Other persons who may consent to medical care or treatment of a minor.—

(1) As used in this section, the term:

(b) "Medical care and treatment" includes ordinary and necessary medical and dental examination and treatment, including blood testing, preventive care including ordinary

immunizations, tuberculin testing, and well-child care, but does not include surgery, general anesthesia, provision of psychotropic medications, or other extraordinary procedures for which a separate court order, health care surrogate designation under s. 765.2035 executed after September 30, ~~2010 2011~~ 2014, power of attorney executed after July 1, 2001, and before October 1, ~~2010 2011~~ 2014, or informed consent as provided by law is required, except as provided in s. 39.407(3).

(2) Any of the following persons, in order of priority listed, may consent to the medical care or treatment of a minor who is not committed to the Department of Children and Family Services or the Department of Juvenile Justice or in their custody under chapter 39, chapter 984, or chapter 985 when, after a reasonable attempt, a person who has the power to consent as otherwise provided by law cannot be contacted by the treatment provider and actual notice to the contrary has not been given to the provider by that person:

(a) A health care surrogate designated under s. 765.2035 after September 30, ~~2010 2011~~ 2014, or a person who possesses a power of attorney to provide medical consent for the minor executed before October 1, ~~2010 2011~~ 2014. A health care surrogate designation under s. 765.2035 executed after September 30, ~~2010 2011~~ 2014, and a power of attorney executed after July 1, 2001, and before October 1, ~~2010 2011~~ 2014, to provide medical consent for a minor includes the power to consent to medically necessary surgical and general anesthesia services for the minor unless such services are excluded by the individual

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executing the health care surrogate for a minor or power of attorney.

There shall be maintained in the treatment provider's records of the minor documentation that a reasonable attempt was made to contact the person who has the power to consent.

Section 3. Subsections (5) through (7) of section 765.101, Florida Statutes, are renumbered as subsections (6) through (8), respectively, present subsections (8) through (11) are renumbered as subsections (10) through (13), respectively, present subsections (12) through (15) are renumbered as subsections (15) through (18), respectively, present subsections (16) and (17) are renumbered as subsections (20) and (21), respectively, new subsections (5), (9), (14), and (19) are added to that section, and present subsections (1), (2), (5), (14), and (16) of that section are amended, to read:

765.101 Definitions.—As used in this chapter:

(1) "Advance directive" means a witnessed written document or oral statement in which instructions are given by a principal or in which the principal's desires are expressed concerning any aspect of the principal's health care or health information, and includes, but is not limited to, the designation of a health care surrogate, a living will, or an anatomical gift made pursuant to part V of this chapter.

~~(2)~~ (16) "Primary ~~attending physician~~" means a physician designated by an individual or the individual's surrogate, proxy, or attorney in fact under a durable power of attorney

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executed before October 1, ~~2010~~ ~~2011~~ 2014, as provided in chapter 709, to have primary responsibility for the individual's health care or, in the absence of a designation or if the designated physician is not reasonably available, a physician who undertakes the responsibility ~~the primary physician who has responsibility for the treatment and care of the patient~~.

~~(5)~~(4) "Health care" means care, services, or supplies related to the health of an individual and includes, but is not limited to, preventive, diagnostic, therapeutic, rehabilitative, maintenance, or palliative care, and counseling, service, assessment, or procedure with respect to the individual's physical or mental condition or functional status or that affect the structure or function of the individual's body.

~~(6)~~(5) "Health care decision" means:

(a) Informed consent, refusal of consent, or withdrawal of consent to any and all health care, including life-prolonging procedures and mental health treatment, unless otherwise stated in the advance directives.

(b) The decision to apply for private, public, government, or veterans' benefits to defray the cost of health care.

(c) The right of access to health information ~~all records~~ of the principal reasonably necessary for a health care surrogate or proxy to make decisions involving health care and to apply for benefits.

(d) The decision to make an anatomical gift pursuant to part V of this chapter.

~~(9)~~ (8) "Health information" means any information,

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whether oral or recorded in any form or medium, as defined from time to time in 45 C.F.R. s. 164.502(g) and the Health Insurance Portability and Accountability Act of 1996, 42 U.S.C. s. 1320d, Pub. L. No. 104-191, Title II, s. 262(a), 110 Stat. 2021, that:

(a) Is created or received by a health care provider, health care facility, health plan, public health authority, employer, life insurer, school or university, or health care clearinghouse; and

(b) Relates to the past, present, or future physical or mental health or condition of the principal; the provision of health care to the principal; or the past, present, or future payment for the provision of health care to the principal.

~~(14)~~ (13) "Minor's principal" means a principal who is a natural guardian as defined in s. 744.301(1); legal custodian; or, subject to the provisions of chapter 744, legal guardian of the person of a minor.

(17)~~(14)~~ "Principal" means a competent adult executing an advance directive and on whose behalf health care decisions are to be made or health care information is to be received, or both.

(19) "Reasonably available" means readily able to be contacted without undue effort and willing and able to act in a timely manner considering the urgency of the patient's health care needs.

(20)~~(16)~~ "Surrogate" means any competent adult expressly designated by a principal to make health care decisions and to receive health information. The principal may stipulate whether

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the authority of the surrogate is exercisable immediately without the necessity for a determination of incapacity or only upon the principal's incapacity as provided in s. 765.204 ~~on behalf of the principal upon the principal's incapacity~~.

Section 4. Subsections (3) through (6) of section 765.102, Florida Statutes, are renumbered as subsections (4) through (7), respectively, present subsections (2) and (3) of that section are amended, and a new subsection (3) is added to that section, to read:

765.102 Legislative findings and intent.—

(2) To ensure that such right is not lost or diminished by virtue of later physical or mental incapacity, the Legislature intends that a procedure be established to allow a person to plan for incapacity by executing a document or orally designating another person to direct the course of his or her health care or receive his or her health information, or both, ~~medical treatment~~ upon his or her incapacity. Such procedure should be less expensive and less restrictive than guardianship and permit a previously incapacitated person to exercise his or her full right to make health care decisions as soon as the capacity to make such decisions has been regained.

(3) The Legislature also recognizes that some competent adults may want to have immediate assistance in making health care decisions or accessing health information, or both, without a determination of incapacity. The Legislature intends that a procedure be established to allow a person to designate a surrogate to make health care decisions or receive health

information, or both, without the necessity for a determination of incapacity under this chapter.

(4) ~~(3)~~ The Legislature recognizes that for some the administration of life-prolonging medical procedures may result in only a precarious and burdensome existence. In order to ensure that the rights and intentions of a person may be respected even after he or she is no longer able to participate actively in decisions concerning himself or herself, and to encourage communication among such patient, his or her family, and his or her physician, the Legislature declares that the laws of this state recognize the right of a competent adult to make an advance directive instructing his or her physician to provide, withhold, or withdraw life-prolonging procedures~~,~~ or to designate another to make the health care ~~treatment~~ decision for him or her in the event that such person should become incapacitated and unable to personally direct his or her health ~~medical~~ care.

Section 5. Section 765.104, Florida Statutes, is amended to read:

765.104 Amendment or revocation.—

(1) An advance directive ~~or designation of a surrogate~~ may be amended or revoked at any time by a competent principal:

(a) By means of a signed, dated writing;

(b) By means of the physical cancellation or destruction of the advance directive by the principal or by another in the principal's presence and at the principal's direction;

(c) By means of an oral expression of intent to amend or

revoke; or

(d) By means of a subsequently executed advance directive that is materially different from a previously executed advance directive.

(2) Unless otherwise provided in the advance directive or in an order of dissolution or annulment of marriage, the dissolution or annulment of marriage of the principal revokes the designation of the principal's former spouse as a surrogate.

(3) Any such amendment or revocation will be effective when it is communicated to the surrogate, health care provider, or health care facility. No civil or criminal liability shall be imposed upon any person for a failure to act upon an amendment or revocation unless that person has actual knowledge of such amendment or revocation.

(4) Any patient for whom a ~~medical~~ proxy has been recognized under s. 765.401 and for whom any previous legal disability that precluded the patient's ability to consent is removed may amend or revoke the recognition of the ~~medical~~ proxy and any uncompleted decision made by that proxy. The amendment or revocation takes effect when it is communicated to the proxy, the health care provider, or the health care facility in writing or, if communicated orally, in the presence of a third person.

Section 6. Section 765.105, Florida Statutes, is amended to read:

765.105 Review of surrogate or proxy's decision.—

(1) The patient's family, the health care facility, or the primary ~~attending~~ physician, or any other interested person who

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may reasonably be expected to be directly affected by the surrogate or proxy's decision concerning any health care decision may seek expedited judicial intervention pursuant to rule 5.900 of the Florida Probate Rules, if that person believes:

(a) ~~(1)~~ The surrogate or proxy's decision is not in accord with the patient's known desires or the provisions of this chapter;

(b) ~~(2)~~ The advance directive is ambiguous, or the patient has changed his or her mind after execution of the advance directive;

(c) ~~(3)~~ The surrogate or proxy was improperly designated or appointed, or the designation of the surrogate is no longer effective or has been revoked;

(d) ~~(4)~~ The surrogate or proxy has failed to discharge duties, or incapacity or illness renders the surrogate or proxy incapable of discharging duties;

(e) ~~(5)~~ The surrogate or proxy has abused his or her powers; or

(f) ~~(6)~~ The patient has sufficient capacity to make his or her own health care decisions.

(2) This section does not apply to a patient who is not incapacitated and who has designated a surrogate who has immediate authority to make health care decisions and receive health information, or both, on behalf of the patient.

Section 7. Subsection (1) of section 765.1103, Florida Statutes, is amended to read:

765.1103 Pain management and palliative care.—

(1) A patient shall be given information concerning pain management and palliative care when he or she discusses with the primary ~~attending~~ or treating physician, or such physician's designee, the diagnosis, planned course of treatment, alternatives, risks, or prognosis for his or her illness. If the patient is incapacitated, the information shall be given to the patient's health care surrogate or proxy, court-appointed guardian as provided in chapter 744, or attorney in fact under a durable power of attorney executed before October 1, ~~2010~~ ~~2011~~ 2014, as provided in chapter 709. The court-appointed guardian or attorney in fact under a durable power of attorney as provided in chapter 709 executed before October 1, ~~2010~~ ~~2011~~ 2014, must have been delegated authority to make health care decisions on behalf of the patient.

Section 8. Section 765.1105, Florida Statutes, is amended to read:

765.1105 Transfer of a patient.—

(1) A health care provider or facility that refuses to comply with a patient's advance directive, or the treatment decision of his or her surrogate or proxy, shall make reasonable efforts to transfer the patient to another health care provider or facility that will comply with the directive or treatment decision. This chapter does not require a health care provider or facility to commit any act which is contrary to the provider's or facility's moral or ethical beliefs, if the patient:

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(a) Is not in an emergency condition; and

(b) Has received written information upon admission informing the patient of the policies of the health care provider or facility regarding such moral or ethical beliefs.

(2) A health care provider or facility that is unwilling to carry out the wishes of the patient or the treatment decision of his or her surrogate or proxy because of moral or ethical beliefs must within 7 days either:

(a) Transfer the patient to another health care provider or facility. The health care provider or facility shall pay the costs for transporting the patient to another health care provider or facility; or

(b) If the patient has not been transferred, carry out the wishes of the patient or the patient's surrogate or proxy, unless the provisions of s. 765.105 apply.

Section 9. Subsections (1), (3), and (4) of section 765.202, Florida Statutes, are amended to read:

765.202 Designation of a health care surrogate.—

(1) A written document designating a surrogate to make health care decisions for a principal or receive health information on behalf of a principal, or both, shall be signed by the principal in the presence of two subscribing adult witnesses. A principal unable to sign the instrument may, in the presence of witnesses, direct that another person sign the principal's name as required herein. An exact copy of the instrument shall be provided to the surrogate.

(3) A document designating a health care surrogate may also designate an alternate surrogate provided the designation is explicit. The alternate surrogate may assume his or her duties as surrogate for the principal if the original surrogate is not willing, able, or reasonably available ~~unwilling or unable~~ to perform his or her duties. The principal's failure to designate an alternate surrogate shall not invalidate the designation of a surrogate.

(4) If neither the designated surrogate nor the designated alternate surrogate is willing, able, or reasonably available ~~able or willing~~ to make health care decisions on behalf of the principal and in accordance with the principal's instructions, the health care facility may seek the appointment of a proxy pursuant to part IV.

Section 10. Section 765.203, Florida Statutes, is amended to read:

765.203 Suggested form of designation.—A written designation of a health care surrogate executed pursuant to this chapter may, but need not be, in the following form:

PART I

DESIGNATION OF HEALTH CARE SURROGATE

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I, [_____(Last name)_____(First name)_____(Middle initial)], hereby designate as my health care surrogate under s. 765.202, Florida Statutes:

Name: _____

Address: _____

Phone: _____

If my health care surrogate is not willing, able, or reasonably available to perform his or her duties, I ~~[initial here]~~ designate as my alternate health care surrogate:

Name: _____

Address: _____

Phone: _____

PART 2

INSTRUCTIONS FOR HEALTH CARE

I authorize my health care surrogate to:

(Initial here) Receive any of my health information,

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whether oral or recorded in any form or medium, that:

1. Is created or received by a health care provider, health care facility, health plan, public health authority, employer, life insurer, school or university, or health care clearinghouse; and

2. Relates to my past, present, or future physical or mental health or condition; the provision of health care to me; or the past, present, or future payment for the provision of health care to me.

I further authorize my health care surrogate to:

(Initial here) Make all health care decisions for me, which means he or she has the authority to:

1. Provide informed consent, refusal of consent, or withdrawal of consent to any and all of my health care, including life-prolonging procedures.

2. Apply on my behalf for private, public, government, or veterans' benefits to defray the cost of health care.

3. Access my health information reasonably necessary for the health care surrogate to make decisions involving my health care and to apply for benefits for me.

4. Decide to make an anatomical gift pursuant to part VI of chapter 765, Florida Statutes.

(Initial here) Specific instructions and restrictions:

512 _____
513 _____
514
515 To the extent I am capable of understanding, my health care
516 surrogate shall keep me reasonably informed of all decisions
517 that he or she has made on my behalf and matters concerning me.
518
519 I further affirm that this designation is not being made as a
520 condition of treatment or admission to a health care facility.
521
522 I will notify and send a copy of this document to the following
523 persons other than my health care surrogate, so they may know
524 who my health care surrogate is:
525
526 Name:_____
527
528 Name:_____
529
530 THIS HEALTH CARE SURROGATE DESIGNATION IS NOT AFFECTED BY MY
531 SUBSEQUENT INCAPACITY EXCEPT AS PROVIDED IN CHAPTER 765, FLORIDA
532 STATUTES.
533
534 Signed:_____
535
536 Date:_____
537
538 Witnesses:

1. _____

2. _____

My health care surrogate shall make health care decisions for me in accordance with this designation, any additional instructions I give in this form, and my other wishes to the extent known to my surrogate. To the extent my wishes are unknown, my surrogate shall make health care decisions for me in accordance with what my surrogate determines to be in my best interest. In determining my best interest, my surrogate shall consider my personal values to the extent known to my surrogate.

(If you do not agree with any of the optional choices above and wish to write your own, or if you wish to add to the instructions you have given above, you may do so here.) I direct that:

_____

_____

_____

_____

(Add additional sheets if needed.)

PART 3
PRIMARY PHYSICIAN

(OPTIONAL)

I designate the following physician as my primary physician:

(Name of physician)

(Address) (City) (State) (Zip Code)

(Phone)

Optional: If the physician I have designated above is not willing, able or reasonably available to act as my primary physician, I designate the following physician as my primary physician:

(Name of physician)

(Address) (City) (State) (Zip Code)

(Phone)

A copy of this form has the same effect as the original.

A designation of a health care surrogate shall contain, directly above the signature line, a statement in all capital letters in at least 14-point boldfaced type in substantially the following form:

MY HEALTH CARE SURROGATE'S AUTHORITY BECOMES EFFECTIVE WHEN MY PRIMARY PHYSICIAN DETERMINES THAT I AM UNABLE TO MAKE MY OWN HEALTH CARE DECISIONS UNLESS I INITIAL EITHER OR BOTH OF THE FOLLOWING BOXES:

IF I INITIAL THIS BOX [ ], MY HEALTH CARE SURROGATE'S AUTHORITY TO RECEIVE MY HEALTH INFORMATION TAKES EFFECT IMMEDIATELY.

IF I INITIAL THIS BOX [ ] MY HEALTH CARE SURROGATE'S AUTHORITY TO MAKE HEALTH CARE DECISIONS FOR ME TAKES EFFECT IMMEDIATELY.

~~MY HEALTH CARE SURROGATE'S AUTHORITY BECOMES EFFECTIVE WHEN MY PRIMARY ATTENDING PHYSICIAN DETERMINES THAT I AM UNABLE TO MAKE MY OWN HEALTH CARE DECISIONS UNLESS I HAVE THE FOLLOWING BOX INITIAL THIS BOX [ ] MY HEALTH CARE SURROGATE'S AUTHORITY TO MAKE HEALTH CARE DECISIONS FOR ME TAKES EFFECT IMMEDIATELY.~~

SIGNATURES: Sign and date the form here:

_____ _____

(date) (sign your name)

_____ _____

(address) (print your name)

_____

(city) (state)

SIGNATURES OF WITNESSES:

First witness Second witness

_____ _____

(print name) (print name)

_____ _____

(address) (address)

_____ _____

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(city) (state) (city) (state)

(signature of witness) (signature of witness)

(date) (date)

NOTICE TO PHYSICIANS, HEALTH CARE PROVIDERS, AND HEALTH CARE FACILITIES

If the principal has designated a health care surrogate or has delegated authority to make health care decisions to an attorney in fact under a durable power of attorney executed before October 1, ~~2010~~ ~~2011~~ 2014, as provided in chapter 709, Florida Statutes, and has stipulated that the authority of the surrogate or attorney in fact is to commence immediately, the fundamental right of self-determination of every competent adult regarding his or her health care decisions shall be controlling. Before implementing a health care decision made for the principal, an primary ~~attending~~ physician, another physician, a health care provider, or a health care facility, if possible, must promptly communicate to the principal the decision made and the identity of the person making the decision.

~~Name: (Last) (First) (Middle Initial)~~

~~In the event that I have been determined to be incapacitated to provide informed consent for medical treatment and surgical and diagnostic procedures, I wish to designate as my surrogate for health care decisions:~~

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~~Name:~~

~~Address:~~

~~Zip~~

~~Code:~~

~~Phone:~~

~~If my surrogate is unwilling or unable to perform his or her duties, I wish to designate as my alternate surrogate:~~

~~Name:~~

~~Address:~~

~~Zip~~

~~Code:~~

~~Phone:~~

~~I fully understand that this designation will permit my designee to make health care decisions and to provide, withhold, or withdraw consent on my behalf; to apply for public benefits to defray the cost of health care; and to authorize my admission to or transfer from a health care facility.~~

~~Additional instructions (optional):~~

~~I further affirm that this designation is not being made as~~

~~a condition of treatment or admission to a health care facility. I will notify and send a copy of this document to the following persons other than my surrogate, so they may know who my surrogate is.~~

~~Name:~~

~~Name:~~

~~Signed:~~

~~Date:~~

~~Witnesses: 1.~~

~~2.~~

Section 11. Section 765.2035, Florida Statutes, is created to read:

765.2035 Designation of a health care surrogate for a minor.—

(1) A natural guardian as defined in s. 744.301(1), legal custodian, or legal guardian of the person of a minor may designate a competent adult to serve as a surrogate to make health care decisions for a minor. Such designation shall be made by a written document signed by the minor's principal in the presence of two subscribing adult witnesses. If a minor's principal is unable to sign the instrument, the principal may, in the presence of witnesses, direct that another person sign

the minor's principal's name as required by this subsection. An exact copy of the instrument shall be provided to the surrogate.

(2) The person designated as surrogate may not act as witness to the execution of the document designating the health care surrogate.

(3) A document designating a health care surrogate may also designate an alternate surrogate, provided the designation is explicit. The alternate surrogate may assume his or her duties as surrogate if the original surrogate is not willing, able, or reasonably available to perform his or her duties. The minor's principal's failure to designate an alternate surrogate does not invalidate the designation.

(4) If neither the designated surrogate nor the designated alternate surrogate is willing, able, or reasonably available to make health care decisions for the minor on behalf of the minor's principal and in accordance with the minor's principal's instructions, the provisions of s. 743.0645(2) shall apply as if no surrogate had been designated.

(5) A natural guardian as defined in s. 744.301(1), legal custodian, or legal guardian of the person of a minor may designate a separate surrogate to consent to mental health treatment for a minor. However, unless the document designating the health care surrogate expressly states otherwise, the court shall assume that the health care surrogate authorized to make health care decisions for a minor under this chapter is also the minor's principal's choice to make decisions regarding mental health treatment for the minor.

(6) Unless the document states a time of termination, the designation shall remain in effect until revoked by the minor's principal. An otherwise valid designation of a surrogate for a minor shall not be invalid solely because it was made before the birth of the minor.

(7) A written designation of a health care surrogate executed pursuant to this section establishes a rebuttable presumption of clear and convincing evidence of the minor's principal's designation of the surrogate and becomes effective pursuant to s. 743.0645(2)(a).

Section 12. Section 765.2038, Florida Statutes, is created to read:

765.2038 Designation of health care surrogate for a minor; suggested form.—A written designation of a health care surrogate for a minor executed pursuant to this chapter may, but need to be, in the following form:

DESIGNATION OF HEALTH CARE SURROGATE

FOR MINOR

I/We, _____,

the ____ natural guardian(s) as defined in s. 744.301(1), Florida Statutes; _____ legal custodian(s); _____ legal guardian(s) [check one] of the following minor(s):

_____;

_____;

757 _____.

758

759 pursuant to s. 765.2035, Florida Statutes, designate the

760 following person to act as my/our surrogate for health care

761 decisions for such minor(s) in the event that I/we am/are not

762 able or reasonably available to provide consent for medical

763 treatment and surgical and diagnostic procedures:

764

765 Name: _____

766 Address: _____

767 Zip Code: _____

768 Phone: _____

769

770 If my/our designated health care surrogate for a minor is

771 not willing, able, or reasonably available to perform his or her

772 duties, I/we designate the following person as my/our alternate

773 health care surrogate for a minor:

774

775 Name: _____

776 Address: _____

777 Zip Code: _____

778 Phone: _____

779

780 I/We authorize and request all physicians, hospitals, or

781 other providers of medical services to follow the instructions

782 of my/our surrogate or alternate surrogate, as the case may be,

783 at any time and under any circumstances whatsoever, with regard

to medical treatment and surgical and diagnostic procedures for a minor, provided the medical care and treatment of any minor is on the advice of a licensed physician.

I/We fully understand that this designation will permit my/our designee to make health care decisions for a minor and to provide, withhold, or withdraw consent on my/our behalf, to apply for public benefits to defray the cost of health care, and to authorize the admission or transfer of a minor to or from a health care facility.

I/We will notify and send a copy of this document to the following person(s) other than my/our surrogate, so that they may know the identity of my/our surrogate.

Name:

Name:

Signed:_____

Date:_____

Witnesses:

1._____

2._____

Section 13. Section 765.204, Florida Statutes, is amended to read:

765.204 Capacity of principal; procedure.—

(1) A principal is presumed to be capable of making health care decisions for herself or himself unless she or he is

determined to be incapacitated. Incapacity may not be inferred from the person's voluntary or involuntary hospitalization for mental illness or from her or his mental retardation.

(2) If a principal's capacity to make health care decisions for herself or himself or provide informed consent is in question, the primary ~~attending~~ physician shall evaluate the principal's capacity and, if the physician concludes that the principal lacks capacity, enter that evaluation in the principal's medical record. If the primary ~~attending~~ physician has a question as to whether the principal lacks capacity, another physician shall also evaluate the principal's capacity, and if the second physician agrees that the principal lacks the capacity to make health care decisions or provide informed consent, the health care facility shall enter both physicians' ~~physician's~~ evaluations in the principal's medical record. If the principal has designated a health care surrogate or has delegated authority to make health care decisions to an attorney in fact under a durable power of attorney executed before October 1, ~~2010 2011~~ 2014, as provided in chapter 709, the health care facility shall notify such surrogate or attorney in fact in writing that her or his authority under the instrument has commenced, as provided in chapter 709 or s. 765.203.

(3) The surrogate's authority shall commence upon a determination under subsection (2) that the principal lacks capacity, and such authority shall remain in effect until a determination that the principal has regained such capacity. Upon commencement of the surrogate's authority, a surrogate who

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is not the principal's spouse shall notify the principal's spouse or adult children of the principal's designation of the surrogate. In the event the primary ~~attending~~ physician determines that the principal has regained capacity, the authority of the surrogate shall cease, but shall recommence if the principal subsequently loses capacity as determined pursuant to this section.

(4) Notwithstanding subsections (2) and (3), if the principal has designated a health care surrogate or has delegated authority to make health care decisions to an attorney in fact under a durable power of attorney executed before October 1, ~~2010~~ ~~2011~~ 2014, as provided in chapter 709, and has stipulated that the authority of the surrogate or attorney in fact is to take effect immediately, the health care facility shall notify such surrogate or attorney in fact in writing when a determination of incapacity has been entered into the principal's medical record.

(5)~~(4)~~ A determination made pursuant to this section that a principal lacks capacity to make health care decisions shall not be construed as a finding that a principal lacks capacity for any other purpose.

(6)~~(5)~~ In the event the surrogate is required to consent to withholding or withdrawing life-prolonging procedures, the provisions of part III shall apply.

Section 14. Section 765.205, Florida Statutes, is amended to read:

765.205 Responsibility of the surrogate.—

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(1) The surrogate, in accordance with the principal's instructions, unless such authority has been expressly limited by the principal, shall:

(a) Have authority to act for the principal and to make all health care decisions for the principal during the principal's incapacity.

(b) Consult expeditiously with appropriate health care providers to provide informed consent, and make only health care decisions for the principal which he or she believes the principal would have made under the circumstances if the principal were capable of making such decisions. If there is no indication of what the principal would have chosen, the surrogate may consider the patient's best interest in deciding that proposed treatments are to be withheld or that treatments currently in effect are to be withdrawn.

(c) Provide written consent using an appropriate form whenever consent is required, including a physician's order not to resuscitate.

(d) Be provided access to the appropriate health information ~~medical records~~ of the principal.

(e) Apply for public benefits, such as Medicare and Medicaid, for the principal and have access to information regarding the principal's income and assets and banking and financial records to the extent required to make application. A health care provider or facility may not, however, make such application a condition of continued care if the principal, if capable, would have refused to apply.

(2) The surrogate may authorize the release of health information ~~and medical records~~ to appropriate persons to ensure the continuity of the principal's health care and may authorize the admission, discharge, or transfer of the principal to or from a health care facility or other facility or program licensed under chapter 400 or chapter 429.

(3) Notwithstanding subsections (1) and (2), if the principal has designated a health care surrogate or has delegated authority to make health care decisions to an attorney in fact under a durable power of attorney executed before October 1, ~~2010~~ ~~2011~~ 2014, as provided in chapter 709, and has stipulated that the authority of the surrogate or attorney in fact is to take effect immediately, the fundamental right of self-determination of every competent adult regarding his or her health care decisions shall be controlling. Before implementing a health care decision made for a principal who is not incapacitated, an primary ~~attending~~ physician, another physician, a health care provider, or a health care facility, if possible, must promptly communicate to the principal the decision made and the identity of the person making the decision.

(4)~~(3)~~ If, after the appointment of a surrogate, a court appoints a guardian, the surrogate shall continue to make health care decisions for the principal, unless the court has modified or revoked the authority of the surrogate pursuant to s. 744.3115. The surrogate may be directed by the court to report the principal's health care status to the guardian.

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Section 15. This act shall take effect October 1, ~~2010~~ ~~2011~~ 2014.

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LEGISLATIVE POSITION REQUEST FORM

GOVERNMENTAL AFFAIRS OFFICE

Date Form Received _____

GENERAL INFORMATION

Submitted By Shane Kelley, Chair, Trust Law Committee of the Real Property Probate & Trust Law Section (RPPTL Approval Date July 27, 2013)

Address The Kelley Law Firm
3365 Galt Ocean Drive, Ft. Lauderdale, Florida 33308
Telephone: (954) 563-1400

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

CONTACTS

Board & Legislation Committee Appearance

Shane Kelley, The Kelley Law Firm, 3365 Galt Ocean Drive, Ft. Lauderdale, Florida 33308, Telephone: (954) 563-1400
William T. Hennessey, Gunster, Yaokley & Stewart, PA, 777 South Flagler Drive, Suite 500 East, West Palm Beach, FL 33401, Telephone (561) 650-0663
Peter M. Dunbar, Pennington, Moore, Wilkinson, Bell & Dunbar, P.O. Box 10095, Tallahassee, Florida 32302-2095, Telephone (850) 222-3533
Martha J. Edenfield, Pennington, Moore, Wilkinson, Bell & Dunbar, P.O. Box 10095, Tallahassee FL 32302-2095, Telephone (850) 222-3533
(List name, address and phone number)

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

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

PROPOSED ADVOCACY

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

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

Indicate Position Support _____ Oppose _____ Tech Asst. ____ Other _____

Proposed Wording of Position for Official Publication:

"Support revision to make the Trust Code's antilapse statute consistent with the Probate Code's antilapse statute regarding the treatment of specific devises to certain persons who do not survive the settlor of a revocable trust or the testator of a testamentary trust (F.S. § 736.1106)."

Reasons For Proposed Advocacy:

The purpose of the proposed amendment to §736.1106 of the Florida Statutes is to make the Trust Code's antilapse statute consistent with the Probate Code's antilapse statute regarding the treatment of specific

devises to certain persons who do not survive the settlor of a revocable trust or the testator of a testamentary trust. Devises to persons who are not a grandparent or a descendant of a grandparent of the settlor or testator *and* who predecease the settlor or testator will fail (or lapse) unless a contrary intent appears in the trust. This change will make the treatment of outright devises in wills and trusts consistent so there is no disparity in how these devises will be treated when the beneficiary has pre-deceased the testator or settlor.

PRIOR POSITIONS TAKEN ON THIS ISSUE

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

Most Recent Position None

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

Others
(May attach list if more than one) None

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

REFERRALS TO OTHER SECTIONS, COMMITTEES OR LEGAL ORGANIZATIONS

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

Referrals

None

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

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

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

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

WHITE PAPER

Proposed Amendment to §736.1106 Florida Statute

I. SUMMARY

The purpose of the proposed amendment to §736.1106 of the Florida Statutes is to make the Trust Code's antilapse statute consistent with the Probate Code's antilapse statute regarding the treatment of specific devises to certain persons who do not survive the settlor of a revocable trust or the testator of a testamentary trust. Devises to persons who are not a grandparent or a descendant of a grandparent of the settlor or testator *and* who predecease the settlor or testator will fail (or lapse) unless a contrary intent appears in the trust. Currently, there is a different result under the Trust Code and The Probate Code and most citizens of Florida are not aware of the discrepancy. This proposed amendment will make the treatment of outright devises in wills and trusts consistent so there is no disparity in how these devises will be treated when the beneficiary has pre-deceased the testator or settlor.

II. CURRENT SITUATION:

An "antilapse" statute prevents a devise from failing, or lapsing, when the designated beneficiary is not alive to receive the distribution. Currently, the Trust Code's antilapse statue applies to all gifts regardless of familial relationship to the creator of the gift. *See*, Florida Statute §736.1106 (2012). The statute applies to a "future interest," and does not contain any qualification that the beneficiary of that interest be a blood relative of the settlor. The statute defines "future interest" for purposes of determining lapse[1].

---

[1] Florida Statute §736.1106(1)(c) - "Future interest" includes an alternative future interest and a future interest in the form of a class gift.

Florida Statute §736.1106(1)(d) - "Future interest under the terms of a trust" means a future interest created by an inter vivos or testamentary trust to an existing trust or creating a trust or by an exercise of a power of appointment to an existing trust directing the continuance of an existing trust, designating a beneficiary of an existing trust, or creating a trust.

This scheme is inconsistent with the Probate Code and the previous Trust Code's treatment of *outright devises*. The Probate Code, Florida Statute §732.603, provides that a gift to only a "grandparent, or a descendant of a grandparent" is subject to the Probate Code's antilapse statute, thereby saving the devise from lapsing. Florida's previous Trust Code, which was amended in 2007, contained a similar antilapse provision that saved only gifts to grandparents or descendants of grandparents from lapse. *See*, Florida Statute §737.6035 (2007). A new Trust Code was enacted in 2008, but that Code's antilapse statute does not contain a broad savings clause for gifts made to grandparents or descendants of grandparents. Instead, the new (current) Trust Code's antilapse statute applies to a "future interest," and does not contain any qualification that the beneficiary of that interest be a blood relative of the settlor.

Currently, the antilapse provisions of the Trust Code saves all devises, regardless of familial relationship, for administrative convenience. Trusts can exist for multiple generations and it was deemed easier to save all gifts from lapsing then it would be to attempt to deal with the administrative inconvenience of locating beneficiaries of lapsed gifts that might happen generations after a settlor's death. With outright, specific devises that vest at the death of the settlor or testator, however, there is little administrative inconvenience in distributing a lapsed gift to the residuary beneficiaries. Thus, changing the Trust Code's antilapse provision to make it more consistent with the Probate Code allows for outright devises to be treated more consistently with the settlor or testator's presumed intent.

III. EFFECT OF THE PROPOSED CHANGE GENERALLY:

Under these proposed changes to Florida Statute §736.1106, an outright specific devise to a deceased beneficiary in a revocable trust or testamentary trust would fail unless the beneficiary was a grandparent, or a lineal descendant of a grandparent, of the settlor of a revocable trust or the testator of a testamentary trust. This rule would be a default provision, however, so the settlor or testator could provide to the contrary in his or her testamentary documents if desired. This would make the Probate Code and Trust Code's antilapse statutes more consistent, which is important given that many people use revocable trust agreements as substitute for wills. Also, testamentary trusts, which are created under wills, are not covered by the Probate Code's

antilapse statute. Instead, the definition of "future interest" under the Trust Code encompasses those devises which create a testamentary trust.

IV. FISCAL IMPACT ON STATE AND LOCAL GOVERNMENT

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

V. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR

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

VI. CONSTITUTIONAL ISSUES

There are no constitutional issues raised by this proposal. The proposed legislation will not apply to vested interests or trusts that are currently irrevocable. Instead, the new provisions will only apply to trusts that become irrevocable after June 30, 2014.

VII. OTHER INTERESTED PARTIES

Florida Bankers Association

A bill to be entitled

An act relating to the vesting of specific devises in trusts; amending s. 736.1106, F.S.; providing an effective date.

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

Section 1. Subsections (5) and (6) of Section 736.1106, Florida Statutes, shall be amended to read:

736.1106 Antilapse; survivorship with respect to future interests under terms of inter vivos and testamentary trusts; substitute takers.—

(1) As used in this section, the term:

(a) "Beneficiary" means the beneficiary of a future interest and includes a class member if the future interest is in the form of a class gift.

(b) "Distribution date," with respect to a future interest, means the time when the future interest is to take effect. The distribution date need not occur at the beginning or end of a calendar day, but can occur at a time during the course of a day. The distribution date refers to the time that the right to possession or enjoyment arises and is not necessarily the time that any benefit of the right is realized.

(c) "Future interest" includes an alternative future interest and a future interest in the form of a class gift.

(d) "Future interest under the terms of a trust" means a future interest created by an inter vivos or testamentary transfer to an existing trust or creating a trust or by an exercise of a power of appointment to an existing trust directing the continuance of an existing trust, designating a beneficiary of an existing trust, or creating a trust.

(e) "Surviving beneficiary" or "surviving descendant" means a beneficiary or a descendant who did not predecease the distribution date or is not deemed to have predeceased the distribution date by operation of law.

(2) A future interest under the terms of a trust is contingent upon the beneficiary surviving the distribution date. Unless a contrary intent appears in the trust instrument, if a beneficiary of a future interest under the terms of a trust fails to survive the distribution date, and the deceased beneficiary leaves surviving descendants, a substitute gift is created in the beneficiary's surviving descendants. They take per stirpes the property to which the beneficiary would have been entitled if the beneficiary had survived the distribution date.

(3) In the application of this section:

(a) Words of survivorship attached to a future interest are a sufficient indication of an intent contrary to the application of this section.

(b) A residuary clause in a will is not a sufficient indication of an intent contrary to the application of this section, whether or not the will specifically provides that lapsed or failed devises are to pass under the residuary clause.

(4) If, after the application of subsections (2) and (3), there is no surviving taker, the property passes in the following order:

(a) If the future interest was created by the exercise of a power of appointment, the property passes under the donor's gift-in-default clause, if any, which clause is treated as creating a future interest under the terms of a trust.

(b) If no taker is produced by the application of paragraph (a) and the trust was created in a nonresiduary devise or appointment in the transferor's will, the property passes under the residuary clause in the transferor's will. For purposes of this section, the residuary clause is treated as creating a future interest under the terms of a trust.

(c) If no taker is produced by the application of paragraph (a) or paragraph (b), the property passes to those persons, including the state, and in such shares as would succeed to the transferor's intestate estate under the intestate succession law of the transferor's domicile if the transferor died when the disposition is to take effect in possession or enjoyment.

For purposes of paragraphs (b) and (c), the term "transferor" with respect to a future interest created by the exercise of a power of appointment, means the donor if the power was a nongeneral power and the donee if the power was a general power.

~~(5) Subsections (1) (4) apply to all trusts other than trusts that were irrevocable before the effective date of this code. Sections 732.603, 732.604, and 737.6035, as they exist on June 30, 2007, continue to apply to other trusts executed on or after June 12, 2003.~~

(5) Unless a contrary intent appears in the trust instrument, subsections (2) - (4) shall not apply to any outright devise that vests upon the death of the settlor unless the beneficiary is a grandparent, or a lineal descendant of a grandparent, of the settlor or testator, and:

(a) Is dead at the time of the execution of the revocable trust or will;

(b) Fails to survive the settlor or testator; or

(c) Is required by the inter vivos trust or by operation of law to be treated as having predeceased the settlor or testator.

A devise in a revocable trust or a testamentary trust that is to take effect at the death of the settlor or testator does not vest until the death of the settlor or testator.

(6) Subsections (1)-(4) apply to all trusts other than trusts that were irrevocable before the effective date of this code. Sections 732.603, 732.604, and 737.6035, as they exist on June 30, 2007, continue to apply to other trusts executed on or after June 12, 2003. Subsection (5) applies to those trusts that become irrevocable after June 30, 2014.

Section 2. This act shall take effect July 1, 2014.

LEGISLATIVE POSITION
REQUEST FORM

GOVERNMENTAL AFFAIRS OFFICE

Date Form Received_____

GENERAL INFORMATION

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

Position Level The Florida Bar, RPPTL Section and Committee

CONTACTS

Steven H. Mezer, 1801 N. Highland Avenue, Tampa, FL 33602 (813) 204-6492
Peter Dunbar, Pennington, Moore, et al, P. O. Box 10095,
Tallahassee, FL 32302-2095 (850) 222-3533
Martha J. Edenfield, Pennington, Moore, et al., P. O. Box 10095,
Tallahassee, FL 32302-2095 (850) 222-3533

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

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

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

PROPOSED ADVOCACY

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

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

Indicate Position X Support Oppose Technical Assistance Other _____

Proposed Wording of Position for Official Publication: Correction of inadvertent impact of 2010 amendment to s. 712.06, F.S. requiring the clerk to mail a copy of notice of preservation pursuant to Marketable Record Title Act or requiring publishing of a copy of the notice of preservation when preserving a covenant or restriction.

Reasons for Proposed Advocacy:

Before 2010, s. 712.06, F.S. of the Marketable Record Title Act (MRTA) expressly excluded the clerk of the

court from the requirement to mail what would be an unnecessary duplicate copy of the notice of preservation to the purported owners of property when the notice of preservation pertained solely to the preservation of any covenant or restrictions. In 2010, Section 712.06, F.S. of the MRTA was amended to add 712.06(3)(b) to allow a notice by publication alterative when preserving other documents pursuant to the MRTA. However, the location of the amendment in 712.06(3)(b) inadvertently rescinded the notice exception when preserving covenants and restrictions which primarily impact homeowners associations, significantly increasing the expense of the process.

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: 2003, supported amendments to s. 712.05 and s. 712.06 to provide the exception to notice. Enacted as 2003-79.

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

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

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

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

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

A bill to be entitled

An act related to marketable record title and homeowners associations; amending s. 712.06, F.S.; intending to clarifying existing law, providing for mailing and publication requirements when preserving covenants and restrictions.

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

Section 1. Subsections (3), (4) and (5) of 712.06, Florida Statutes, is amended to read:

712.06 Contents of notice; recording and indexing.—

(3) The person providing the notice referred to in s. 712.05 shall:

(a) Cause the clerk of the circuit court to mail by registered or certified mail to the purported owner of said property, as stated in such notice, a copy thereof and shall enter on the original, before recording the same, a certificate showing such mailing. For preparing the certificate, the claimant shall pay to the clerk the service charge as prescribed in s. 28.24(8) and the necessary costs of mailing, in addition to the recording charges as prescribed in s. 28.24(12). If the notice names purported owners having more than one address, the person filing the same shall furnish a true copy for each of the several addresses stated, and the clerk shall send one such copy to the purported owners named at each respective address. Such certificate shall be sufficient if the same reads substantially as follows:

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

I hereby certify that I did on this_____, mail by registered (or certified) mail a copy of the foregoing notice to each of the following at the address stated:

(Clerk of the circuit court)
of _____ County, Florida,
By (Deputy clerk)

~~The clerk of the circuit court is not required to mail to the purported owner of such property any such notice that pertains solely to the preserving of any covenant or restriction or any portion of a covenant or restriction~~; or

(b) Publish once a week, for 2 consecutive weeks, the notice referred to in s. 712.05, with the official record book and page number in which such notice was recorded, in a newspaper as defined in chapter 50 in the county in which the property is located.

(4) Neither the mailing requirements by the clerk of the circuit court in subsection (3)(a) or publishing requirements in (3)(b) are required when the notice referred to in s. 712.05 pertains solely to the preserving of any covenant or restriction or any portion of a covenant or restriction.

(5) Failure of any purported owner to receive ~~the mailed~~ notice shall not affect the validity of the notice or vitiate the effect of the filing of such notice.

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

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

WHITE PAPER

A proposal to amend the Marketable Record Title Act s. 712.06, F.S. to clarify existing law, by providing that homeowner associations and others preserving a covenant or a restriction are not included in publishing or clerk of the court notice requirements.

I. SUMMARY.

An amendment is proposed to Section 712.06, F.S. of the Marketable Record Title Act (MRTA), to rescind a duplicate notice requirement inadvertently created when the statute was amended in 2010.

II. CURRENT SITUATION.

Before 2010, Section 712.06, F.S. of the Marketable Record Title Act (MRTA) expressly excluded the clerk of the court from the requirement to mail a copy of the notice of preservation to the purported owners of property when the notice of preservation pertained solely to the preservation of any covenant or restrictions. This avoided the costly, time consuming and unnecessary requirement to mail a copy of the preservation to each owner in a homeowners' association, who would have been notified of the preservation.

Publishing the notice of preservation of covenants and restrictions was impractical because of the large amount of publication space required to publish the entire notice of preservation. In 2010, Section 712.06, F.S. of the MRTA was amended to add 712.06(3)(b), which allows a publication alterative to the notice by the clerk of the court when preserving document pursuant to the MRTA. However, due to the location of its placement in Section 712.06, F.S., the 2010 addition of 712.06(3)(b) inadvertently now requires clerk notification or publication regarding the former exception for clerk notification requirement for notice of preservations pertaining solely to the preservation of any covenants and restrictions, which primarily impact homeowners associations.

III. EFFECT OF PROPOSED CHANGES.

The proposed change would correct the inadvertent duplicate notification by a clerk's mailing, or by publication requirement, inadvertently imposed by the placement of the 2010 amendment to Section. 712.06(3), F.S. Owners of property will still receive notice of the MRTA preservation of the deed restrictions through the existing notice provisions of 712.06(1), and prospective purchasers will receive notice of the MRTA preservation from the recording of the notice in the public records. Holders of other types of interests will be able utilize the two alternative notice methods by the creation of s. 718.06(4).

Correcting the inadvertent error cause by the 2010 amendment to Section 712.06(3) F.S., will substantially decrease the cost and expense to preserve deed restrictions, which will encourage homeowner association boards and homeowners to timely preserve homeowners' association covenants consistent with the legislative's stated public policy in Section 720.403, F.S. If this mistake is permitted to remain, then the increased cost and expense to both homeowners and the clerk of the court will discourage homeowner association boards and homeowners from preserving deed restrictions.

III. FISCAL IMPACT ON STATE AND LOCAL GOVERNMENTS

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

IV. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR

This proposal will have a positive economic impact on clerk of the court and Florida residents living in homeowner association, by rescinding a duplicate notice requirement. Correcting this inadvertent error will encourage homeowner association boards and homeowners to preserve homeowner association deed restrictions consistent with the legislative's stated public policy in Section 720.403, F.S, as the substantial publication cost to publish such a large document can be avoided. If this mistake is permitted to remain, then the increased cost and expense to both homeowners and the clerk of the court will discourage homeowner association boards and homeowners from preserving deed restrictions.

V. CONSTITUTIONAL ISSUES

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

VI. OTHER INTERESTED PARTIES

Florida Land Title Association

LEGISLATIVE POSITION
REQUEST FORM

GOVERNMENTAL AFFAIRS OFFICE

Date Form Received_____

GENERAL INFORMATION

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

Position Level The Florida Bar, RPPTL Section and Committee

CONTACTS

Board & Legislation Committee Appearance Steven H. Mezer, 1801 N. Highland Avenue, Tampa, FL 33602 (813) 204-6492
Peter Dunbar, Pennington, Moore, et al, P. O. Box 10095, Tallahassee, FL 32302-2095 (850) 222-3533
Martha J. Edenfield, Pennington, Moore, et al., P. O. Box 10095, Tallahassee, FL 32302-2095 (850) 222-3533

(List name, address and phone number)

Appearances Before Legislators Contacts Above

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

Meetings with Legislators/staff Contacts Above

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

PROPOSED ADVOCACY

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

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

Indicate Position ___X___ Support Oppose Technical Assistance Other _____

Proposed Wording of Position for Official Publication: Support modification of the definition of bulk buyer, and removal of the "sunset" termination date, in Part VII of Chapter 718.

Reasons for Proposed Advocacy:

Part VII of the Condominium Act has proven successful, helping to save "distressed condominiums" when a developer fails to continue to sell units, by encouraging buyers to acquire the unsold units, including construction lenders.

13380455.2

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: 2009, Supported creation of the Bulk Buyer exception, 2010-176
2011, Supported extension of sunset provisions to 2017, 2013 - 020

Others
(May attach list if
More than one) _____

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

REFERRALS TO OTHER SECTIONS, COMMITTEES OR LEGAL ORGANIZATIONS

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

Referrals

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

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

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

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

A bill to be entitled

Removing the termination date from Part VII by amending s. 718.707

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

Section 1. Section 718.707, Florida Statutes, is amended to read:

718.707 **Time limitation for classification as bulk assignee or bulk buyer.** A person acquiring condominium parcels may not be classified as a bulk assignee or bulk buyer unless the condominium parcels were acquired on or after July 2, 2010~~, but before July 1, 2015~~. The date of such acquisition shall be determined by the date of recording a deed or other instrument of conveyance for such parcels in the public records of the county in which the condominium is located, or by the date of issuing a certificate of title in a foreclosure proceeding with respect to such condominium parcels.

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

WHITE PAPER

PROPOSAL TO AMEND FLORIDA CONDOMINIUM LAW SECTION 718.707 TO REMOVE THE "SUNSET" PROVISION WHICH WOULD MAKE ALL OF PART VII INAPPLICABLE BEGINNING JULY 1, 2015.

I. SUMMARY

With respect to proposed amendment to Section 718.707:

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

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

Since the adoption of the Part VII of the Condominium Act bulk buyers and bulk assignees have played a major part in revitalizing the residential condominium market. Many of those looking to buy in bulk now are saying that their plan is to hold the units for three (3) to five (5) years and to resell them in bulk to another buyer or resell them one at a time. They are looking at the sunset provision of Part VII and questioning what is going to happen after July, 2015. The major concern is that the next bulk purchaser will not have the protections of Part VII and that this diminishes the value of their units. They are also concerned as to what their status would be if they do not sell their units until after July 1, 2015. If Part VII is allowed to expire, the biggest concern is that the next bulk purchaser will be considered a successor developer. This means that they will not be able to vote their units for control of the Board, may be liable if the association was not properly operated prior to its acquisition of the units, and may be liable for defects in construction they had nothing to with. These are some of the same concerns that prompted the original enactment of Part VII.

Without the repeal of the sunset provision, bulk purchasers will be less likely to enter this market. This will leave more condominiums in a "fractured condominium" status. Less units will be sold and vacant units will remain vacant. This will have a spill-over effect on condominium associations. Maintenance fees will remain unpaid and market values will remain depressed. Lenders, title insurance companies and other participants in the real estate market will feel the effect as will the economy as a whole.

II. ANALYSIS

718.707

Current Situation: Section 718.707 currently provides as follows: "A person acquiring condominium parcels will not be classified as a bulk assignee or bulk buyer unless the condominium parcels were acquired on or after July 1, 2010, but before July 1, 2015."

Effect of Proposed Change: The proposed change would remove "but before July 1, 2015" from the first sentence of 718.707. This proposal would therefore mean that Part VII would remain in existence indefinitely and would not become invalid after July 1, 2015.

III. PHYSICAL IMPACT ON STATE AND LOCAL GOVERNMENTS

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

IV. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR

This proposal does not have an economic impact on the private sector.

V. CONSTITUTIONAL ISSUES

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

VI. OTHER INTERESTED PARTIES

The other group of individuals who may have an interest in this proposal or are believed to be interested in this proposal is the Florida Bar's Condominium and Planned Unit Development Committee which voted in favor of this proposal, real estate agents, the Department of Business Regulation, title underwriters, title insurance agents and lending institution. The only group of individuals that assisted in the development of this proposal and were contacted regarding this proposal is the Florida Bar's Condominium and Planned Unit Development Committee.

AGREEMENT

THIS AGREEMENT entered into as of this ___day of _____ 2013, by and between the REAL PROPERTY PROBATE, AND TRUST LAW SECTION OF THE FLORIDA BAR ("Section") and PETER M. DUNBAR of the law firm of Pennington, P.A. ("Legislative Consultant"), in exchange for the consideration expressed, agree that the Legislative Consultant shall serve for two years beginning September 1, 2013, as Legislative Consultant for the Section as described in this instrument. The Legislative Consultant agrees to comply with all policies adopted by The Florida Bar Board of Governors and by the Section and the provisions of this Agreement shall apply to all professional personnel at the Legislative Consultant's law firm. The Legislative Consultant and the Section further agree:

1. That the Legislative Consultant shall serve as consultant regarding legislative, administrative and regulatory matters which affect the Section. Although other professional personnel at his law firm shall assist and support him, the Legislative Consultant shall be the lead contact and shall be personally primarily responsible for performing the services (including coordinating and reporting) to the Section under this Agreement. In that regard, the Legislative Consultant shall make a presentation at the Section's Annual Legislative Update Seminar and shall personally attend each Section Executive Council meeting held within the State of Florida. The Legislative Consultant anticipates that Martha Edenfield, Gene Adams and Ashley DiNunzio shall perform work under his direction. Any other professional personnel from the Legislative Consultant's

law firm may only provide service under this Agreement with the prior approval of the Section.

2. The Legislative Consultant agrees that if the Legislative Consultant individually, or the Legislative Consultants law firm intend or desire to represent any client before the Florida Legislature or any regulatory or administrative body (other than those disclosed on the attachment to this Agreement), the Legislative Consultant shall notify, in writing, the Executive Director of The Florida Bar, the Chair of The Florida Bar's Legislation Committee, the Chair of the Section, and the Chair of the Section's Legislative Committee at least five (5) days prior to commencement of that representation.

3. If an actual conflict, or even the potential for a conflict, arises between a position of the Section and a position of any other client represented by the Legislative Consultant or his law firm, the Legislative Consultant shall immediately notify, in writing, the Chair of the Section and the Chair of the Section's Legislative Committee. The Legislative Consultant and the Section acknowledge that the services to be provided under this Agreement are governed by The Florida Bar's Rules of Professional Conduct, including those provisions relating to conflict of interest between clients. Consequently, the Legislative Consultant shall not represent any other client which would have a position which would conflict with a position of the Section. If a conflict arises between a position of the Section and another existing client of the Legislative Consultant or his law firm, unless such conflict is waived by the affected clients, then the Legislative Consultant agrees that neither he nor his law firm may

represent either the Section or the other party. Under such circumstances, an appropriate reduction in the fee otherwise due under this Agreement shall be made and the Section may engage other representation for the particular matter.

4. The Legislative Consultant agrees to work on Florida Bar legislative matters when directed by the Executive Director of The Florida Bar when the Executive Director believes that such participation is necessary and in the best interest of the membership of The Florida Bar. In this event, the fee for such services performed by the Legislative Consultant shall be assessed against the Section unless this creates a shortage or hardship on the Section. In that event, The Florida Bar may reimburse the Section for the appropriate amount of the legislative expense. This fee, if any, is deemed included within the total fee specified within this Agreement. The Legislative Consultant shall keep the Section advised of all such legislative matter requests from the Executive Director, and shall track and report to the Section the time expended and costs incurred by the Legislative Consultant in responding to such requests.

5. The Legislative Consultant agrees to coordinate all activities regarding the Florida Legislature which might affect the Section. "Coordination" shall include, but is not limited to, the following:

A. The Legislative Consultant shall identify legislative issues likely to come before the Legislature during the term of the Agreement and which shall require services under the Agreement.

B. The Legislative Consultant, in advance of (as well as during) the legislative session, shall notify the Section of any committee hearings of the Legislature dealing with an issue affecting or concerning any area within the purview of the Section.

C. The Legislative Consultant shall work with Section designated contacts to prepare presentations, where appropriate, to be made to legislators and their committee staff.

D. The Legislative Consultant shall provide to the Section summaries of prefiled and filed bills dealing with the areas within the purview of the Section and copies of the actual bills when appropriate. Special procedures approved by the Section shall be used to insure timely distribution during the legislative session.

E. The Legislative Consultant shall, during the legislative session, provide weekly written reports on the status of legislative matters on which the Section has taken a position or has a pending legislative proposal. Additionally, reports shall be given upon any new matters which are filed and which are within the purview of the Section.

F. The Legislative Consultant shall provide all services necessary to promote and support the Section's legislative proposals and other matters affecting the Section's areas of practice. The Legislative Consultant shall coordinate, with Section designated contacts, obtaining legislative sponsors for the Section's proposals. The Legislative Consultant shall use best efforts, working with Section representatives, to ensure that there is a diversity of

legislators who sponsor Section legislation from year to year. The Section's policy is to use as wide a group of sponsors as possible while at the same time recognizing that a sponsor must be an ardent proponent of the proposal.

G. The Legislative Consultant shall alert the Section to the activities of other interested groups relating to legislative proposals promoted by, supported, or opposed by the Section.

6. The Legislative Consultant shall coordinate other matters which might affect, or be of interest to, the Section and its legislative program, including but not limited to regulation, rulemaking, and the provisions of technical assistance to the Executive Branch, executive branch agencies and the Florida Legislature.

7. The Section shall pay the Legislative Consultant for the provision of services, as set forth herein, a fee in the amount of $110,000 a year for the two years beginning September 1, 2013 to August 31, 2015. The fees shall be payable each year in four equal payments (on September 30, December 31, March 31 and June 30), which shall include all out-of-pocket costs and expenses other than for attendance at Executive Council meetings and certain incidental expenses approved by the Section. The Section shall reimburse the Legislative Consultant for transportation (at the minimum rates approved by The Florida Bar for mileage and at the lowest coach class airfare available) and lodging (at the lowest negotiated group rates) when attending Executive Council meetings. With respect to incidental expenses, the Section shall reimburse the fees paid by Legislative Consultant to register as the Section's legislative and executive

lobbyist, an appropriately prorated portion of Legislative Consultant's online research, Lobby Tools and in-session mobile phone charges, and such other incidental expenses that may be approved from time to time by the Section. The Section and Legislative Consultant further agree and consent to the disclosure of any information in this Agreement by either party or by The Florida Bar as required by law, to include disclosure to the Florida Legislature of any amounts paid to the Legislative Consultant pursuant to this agreement.

8. The Legislative Consultant shall identify himself at all times as a representative of the Section and not as a representative of The Florida Bar when working on Section matters.

THIS AGREEMENT is not assignable by either party and may be terminated by (i) either party upon sixty (60) days written notice being given, (ii) the Section immediately upon the Legislative Consultant withdrawing from his current law firm of Pennington, P.A., (iii) the Section, prior to the second year of the contract, if the Section determines that budgetary restrictions would prevent it from meeting its obligation under the contract, or (iv) The Florida Bar if it decides that the Legislative Consultant or any professional personnel of the Legislative Consultant's law firm does not act within the best interest of The Florida Bar. In the event the Agreement is terminated, then the amount payable shall be decreased to an amount reflective of the services provided prior to the termination.

WITNESS our hands and seals as of the date first set forth above.

Witness	THE FLORIDA BAR REAL PROPERTY, PROBATE & TRUST LAW SECTION
Witness	
Witness	THE FLORIDA BAR
Witness	
Witness	PETER M. DUNBAR Legislative Consultant Pennington, P.A.
Witness	

CONTRACT ADDENDUM

By mutual consent of the parties hereto and consistent with the enactment of revisions to Sections 11.045 and 112.3215 and related provisions of the Florida Statutes during the 2005-B Special Session of the Legislature, the contract with Pennington, P.A. (APennington@) is revised to identify the services and the compensation for said services in the following categories:

1. **Lobbying before the Legislature:** The client and Pennington agree that the portion of time and services under the Agreement that is to be devoted to influencing or attempting to influence legislative action or non-action through oral or written communication or attempting to obtain the goodwill of members of the Legislature and employees of the Legislature shall be equal to forty percent (40%) of the total time and services to be provided under this Agreement. The annual compensation to be paid for these services shall be $44,000.00.

2. **Lobbying before the Executive Branch:** The client and Pennington agree that the portion of time and services under the Agreement that is to be devoted to influencing or attempting to influence an agency with respect to a decision of the agency in the area of policy through oral or written communication or attempting to obtain the goodwill of an agency official or employee shall be equal to twenty percent (20%) of the total time and services to be provided under this Agreement. The annual compensation to be paid for these services shall be $22,000.00.

3. **Other Non-Lobbying Services:** The client and Pennington agree that the portion of time and services under the Agreement to be devoted to non-lobbying services for the client, its members and employees, including, but not limited to, preparation of CLE educational written and oral offerings and briefings, legal research, attendance at meetings of the client and related travel, communications with judicial and court administration officials and the preparation of written articles, opinions and reports for the client, shall be equal to forty percent (40%) of the total time and services to be provided under this Agreement. The annual compensation to be paid for these services shall be $44,000.00.

Except as modified hereby, the terms and conditions of the contract with Pennington, P.A., are ratified and confirmed to be effective this ____ day of _____, 2013.

PENNINGTON, P.A.,

By:_____
PETER M. DUNBAR

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

By:_____

THE FLORIDA BAR

By: _____

Names of Clients	Name of Agencies
Affiliated Computer Services, Inc., A Xerox Co. & its Affiliates	Legislative & Executive Branch
American Council of Independent Laboratories	Legislative & Executive Branch
American Safety Institute, Inc	Executive Branch
Albritton Insurance Services, LLC	Executive Branch
American Express Company	Executive Branch
American Express Travel Related Services Company Inc.	Legislative Branch
Auto Club Insurance Company of Florida	Executive Branch
Avis Budget Group	Legislative & Executive Branch
B.J. Alan Companies	Legislative & Executive Branch
Bankers Life Insurance Company	Executive Branch
Behavior Analyst Certification Board	Legislative & Executive Branch
Bernstein Litowitz Berger & Grossmann LLP	Legislative & Executive Branch
Bowling Centers Association of Florida	Legislative & Executive Branch
Central United Life Insurance Company	Executive Branch
Cincinnati Insurance Companies, The	Executive Branch
City of Clearwater	Legislative & Executive Branch
City of Ormond Beach	Legislative & Executive Branch
City of Palm Coast	Legislative & Executive Branch
City of South Daytona	Legislative & Executive Branch
Coca-Cola Refreshments USA, Inc.	Legislative & Executive Branch
Conference of Circuit Judges of Florida	Legislative & Executive Branch
Daiichi Sankyo, Inc.	Legislative & Executive Branch
Dosal Tobacco Corporation	Legislative & Executive Branch
Endurance Reinsurance Corporation of America	Executive Branch
First Floridian Auto & Home Insurance Company	Executive Branch
Florida Chapter of AAP/Florida Pediatric Society	Legislative & Executive Branch
Florida Chapter American College of Cardiology	Legislative & Executive Branch
Florida Children's Council, Inc.	Legislative & Executive Branch
Florida Citrus, Business & Industries Fund	Executive Branch
Florida Feed Association	Legislative & Executive Branch
Florida Governmental Utility Authority	Legislative Branch
Florida Outdoor Advertising Association	Legislative & Executive Branch
Florida Portable Building Manufacturers Association	Legislative & Executive Branch
Florida Sheriff's Auto Risk Program	Legislative & Executive Branch
Florida Sheriffs Risk Management Fund	Legislative & Executive Branch
Florida Voters Coalition	Legislative Branch
Forethought Life Insurance Company	Legislative & Executive Branch
Funeral Directors Life Insurance Company	Legislative Branch
Funeral Services, Inc.	Legislative & Executive Branch
Geographic Solutions	Legislative & Executive Branch
Great Western Insurance Company	Legislative Branch
Habitat for Humanity of Florida, Inc.	Legislative & Executive Branch
Hanover Insurance Company, The	Executive Branch
Haven Recovery Center	Legislative Branch
Hayes	Legislative & Executive Branch
Home State Insurance Group, Inc.	Executive Branch
Homesteaders Life Company	Legislative & Executive Branch
John Alden Life Insurance Company	Executive Branch
Kellogg Brown & Root Services, Inc.	Legislative & Executive Branch

Leukemia & Lymphoma Society	Legislative & Executive Branch
MAG Mutual Insurance Company	Legislative & Executive Branch
McDonald's Corporation	Legislative & Executive Branch
Marriott International, Inc.	Legislative & Executive Branch
Marriott Vacations Worldwide Corporation	Legislative & Executive Branch
Medico Insurance Company	Executive Branch
Mutual of Omaha	Executive Branch
National Association of Industrial & Office Properties	Legislative & Executive Branch
National Center for Sports Safety	Legislative & Executive Branch
National Guardian Life Insurance Company	Legislative & Executive Branch
Northrop Grumman Corporation	Executive Branch
Old Republic National Title Insurance Company	Legislative & Executive Branch
Palm Beach County	Legislative & Executive Branch
Palm Beach County Tax Collector	Legislative & Executive Branch
Patients for Fair Compensation, Inc.	Legislative & Executive Branch
Parkway Maintenance & Management Company	Legislative & Executive Branch
Pinellas County Board of County Commissioners	Legislative & Executive Branch
Preferred Governmental Insurance Trust	Legislative & Executive Branch
Progressive Insurance Company	Legislative & Executive Branch
QBE Insurance Company	Executive Branch
Real Property, Probate & Trust Law Section	Legislative & Executive Branch
State Farm Mutual Automobile Insurance Company	Legislative & Executive Branch
Stewart-Marchman-Act Behavioral Healthcare	Legislative & Executive Branch
Stronach Group, The	Legislative & Executive Branch
Sunovion Pharmaceuticals, Inc.	Legislative & Executive Branch
Tampa Bay Water	Legislative & Executive Branch
Time Insurance Company	Executive Branch
Trane, a division of American Standard, Inc.	Legislative & Executive Branch
Universal Insurance Company of North America	Legislative & Executive Branch
Universal Property and Casualty Insurance Company	Legislative & Executive Branch
Unity Financial Life Insurance Company	Legislative & Executive Branch
Verizon	Legislative & Executive Branch
Volusia County	Legislative & Executive Branch
Westcor Land Title Insurance Company	Legislative & Executive Branch
Xerox Business Services, LLC and its Affiliates	Legislative & Executive Branch

Updated (July 2013)

Michael Dribin

From: John Neukamm [jbn@floridalandlaw.com]
Sent: Monday, July 08, 2013 11:42 AM
To: Michael Dribin; ysherron@flabar. org
Cc: Margaret (Peggy) Rolando; Michael J. Gelfand; Jerry Aron; Ted Conner; jrharris@scott-harris.com; ALAN@flta.mygbiz.com; larnold@arnold-law.com
Subject: RPPTL Palm Beach Meeting Agenda Materials for RPPTL Ad Hoc Committee on Trust Account Issues
Attachments: RPPTL Palm Beach Meeting Agenda Materials (Ad Hoc Committee on Trust Accounts).pdf

Mike and Yvonne, on behalf of the RPPTL Section's Ad Hoc Committee on Trust Account Issues, I'm submitting materials to be included as an information item in the agenda for the upcoming RPPTL Section's Executive Council meeting in Palm Beach. The attached materials include the following items:

(1) Florida Bar Rule 4-1.6 (Addressing Confidentiality of Information);
(2) Section 626.8473 (8), Florida Statutes (Addressing Title Insurers' Audits of Trust Accounts);
(3) Emails re: Florida Bar's Professional Ethics Committee's Proposed Advisory Opinion 12-4 (Including Draft Copies of Proposed Opinions);
(4) List of Members of The Florida Bar's Professional Ethics Committee;
(5) RPPTL Section Correspondence re: Proposed Advisory Opinion (Including the Section's Proposed Advisory Opinion);
(6) Title Insurer's and FLTA's Correspondence re: Proposed Advisory Opinion;
(7) *Florida Bar News* and *ActionLine* Articles re: Trust Account Audits by Title Insurers; and
(8) Professional Ethics Committee's Advisory Opinion 93-5 Issued October 1, 1994.

I hope to discuss the attached materials during the Real Property Roundtable and Executive Council meetings in Palm Beach. Specifically, our Committee intends to continue to advocate the RPPTL Section's existing position (as enunciated in the Professional Ethics Committee's Advisory Opinion 93-5 and mandated in Section 626.8473 (8), Florida Statutes) that an attorney may continue to permit a title insurer to audit a special trust account used exclusively for transactions in which the attorney acts as a title or real estate settlement agent without obtaining client consent pursuant to Exception (c)(1) to Rule 4-1.6 (which permits an attorney to reveal information to the extent reasonably necessary to serve clients' interests).

Please include a copy of this email as the first item in the Committee's agenda submission.

Thanks,

John

John B. Neukamm, Co-Chair
RPPTL Section's Ad Hoc Committee on Trust Accounts

Mechanik Nuccio Hearne & Wester, P.A.
305 S. Boulevard
Tampa, Florida 33606
Telephone No.: (813) 276-1920
Facsimile No.: (813) 276-1560
E-mail: jbn@floridalandlaw.com

RULE 4-1.6 CONFIDENTIALITY OF INFORMATION

4 RULES OF PROFESSIONAL CONDUCT
4-1 CLIENT-LAWYER RELATIONSHIP

RULE 4-1.6 CONFIDENTIALITY OF INFORMATION

(a) Consent Required to Reveal Information. A lawyer shall not reveal information relating to representation of a client except as stated in subdivisions (b), (c), and (d), unless the client gives informed consent.

(b) When Lawyer Must Reveal Information. A lawyer shall reveal such information to the extent the lawyer reasonably believes necessary:

(1) to prevent a client from committing a crime; or

(2) to prevent a death or substantial bodily harm to another.

(c) When Lawyer May Reveal Information. A lawyer may reveal such information to the extent the lawyer reasonably believes necessary:

(1) to serve the client's interest unless it is information the client specifically requires not to be disclosed;

(2) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and client;

(3) to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved;

(4) to respond to allegations in any proceeding concerning the lawyer's representation of the client; or

(5) to comply with the Rules of Professional Conduct.

(d) Exhaustion of Appellate Remedies. When required by a tribunal to reveal such information, a lawyer may first exhaust all appellate remedies.

(e) Limitation on Amount of Disclosure. When disclosure is mandated or permitted, the lawyer shall disclose no more information than is required to meet the requirements or accomplish the purposes of this rule.

Comment

The lawyer is part of a judicial system charged with upholding the law. One of the lawyer's functions is to advise clients so that they avoid any violation of the law in the proper exercise of their rights.

This rule governs the disclosure by a lawyer of information relating to the representation of a client during the lawyer's representation of the client. See rule 4-1.18 for the lawyer's duties with respect to information provided to the lawyer by a prospective client, rule 4-1.9(c) for the lawyer's duty not to reveal information relating to the lawyer's prior representation of a former client, and rules 4-1.8(b) and 4-1.9(b) for the lawyer's duties with respect to the use of such information to the disadvantage of clients and former clients.

A fundamental principle in the client-lawyer relationship is that, in the absence of the client's informed consent, the lawyer must not reveal information relating to the representation. See terminology for the definition of informed consent. This contributes to the trust that is the hallmark of the client-lawyer relationship. The client is thereby encouraged to seek legal assistance and to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter. The lawyer needs this information to represent the client effectively and, if necessary, to advise the client to refrain from wrongful conduct. Almost without exception, clients come to lawyers in order to determine their rights and what is, in the complex of laws and regulations, deemed to be legal and correct. Based upon experience, lawyers know that almost all clients follow the advice given, and the law is upheld.

The principle of confidentiality is given effect in 2 related bodies of law, the attorney-client privilege (which includes the work product doctrine) in the law of evidence and the rule of confidentiality established in professional ethics. The attorney-client privilege applies in judicial and other proceedings in which a lawyer may be called as a witness or otherwise required to produce evidence concerning a client. The rule of client-lawyer confidentiality applies in situations other than those where evidence is sought from the lawyer through compulsion of law. The confidentiality rule applies not merely to matters communicated in confidence by the client but also to all information relating to the

representation, whatever its source. A lawyer may not disclose such information except as authorized or required by the Rules of Professional Conduct or by law. However, none of the foregoing limits the requirement of disclosure in subdivision (b). This disclosure is required to prevent a lawyer from becoming an unwitting accomplice in the fraudulent acts of a client. See also Scope.

The requirement of maintaining confidentiality of information relating to representation applies to government lawyers who may disagree with the policy goals that their representation is designed to advance.

Authorized disclosure

A lawyer is impliedly authorized to make disclosures about a client when appropriate in carrying out the representation, except to the extent that the client's instructions or special circumstances limit that authority. In litigation, for example, a lawyer may disclose information by admitting a fact that cannot properly be disputed or in negotiation by making a disclosure that facilitates a satisfactory conclusion.

Lawyers in a firm may, in the course of the firm's practice, disclose to each other information relating to a client of the firm, unless the client has instructed that particular information be confined to specified lawyers.

Disclosure adverse to client

The confidentiality rule is subject to limited exceptions. In becoming privy to information about a client, a lawyer may foresee that the client intends serious harm to another person. However, to the extent a lawyer is required or permitted to disclose a client's purposes, the client will be inhibited from revealing facts that would enable the lawyer to counsel against a wrongful course of action. While the public may be protected if full and open communication by the client is encouraged, several situations must be distinguished.

First, the lawyer may not counsel or assist a client in conduct that is criminal or fraudulent. See rule 4-1.2(d). Similarly, a lawyer has a duty under rule 4-3.3(a)(4) not to use false evidence. This duty is essentially a special instance of the duty prescribed in rule 4-1.2(d) to avoid assisting a client in criminal or fraudulent conduct.

Second, the lawyer may have been innocently involved in past conduct by the client that was criminal or fraudulent. In such a situation the lawyer has not violated rule 4-1.2(d),

because to "counsel or assist" criminal or fraudulent conduct requires knowing that the conduct is of that character.

Third, the lawyer may learn that a client intends prospective conduct that is criminal. As stated in subdivision (b)(1), the lawyer shall reveal information in order to prevent such consequences. It is admittedly difficult for a lawyer to "know" when the criminal intent will actually be carried out, for the client may have a change of mind.

Subdivision (b)(2) contemplates past acts on the part of a client that may result in present or future consequences that may be avoided by disclosure of otherwise confidential communications. Rule 4-1.6(b)(2) would now require the attorney to disclose information reasonably necessary to prevent the future death or substantial bodily harm to another, even though the act of the client has been completed.

The lawyer's exercise of discretion requires consideration of such factors as the nature of the lawyer's relationship with the client and with those who might be injured by the client, the lawyer's own involvement in the transaction, and factors that may extenuate the conduct in question. Where practical the lawyer should seek to persuade the client to take suitable action. In any case, a disclosure adverse to the client's interest should be no greater than the lawyer reasonably believes necessary to the purpose.

Withdrawal

If the lawyer's services will be used by the client in materially furthering a course of criminal or fraudulent conduct, the lawyer must withdraw, as stated in rule 4-1.16(a)(1).

After withdrawal the lawyer is required to refrain from making disclosure of the client's confidences, except as otherwise provided in rule 4-1.6. Neither this rule nor rule 4-1.8(b) nor rule 4-1.16(d) prevents the lawyer from giving notice of the fact of withdrawal, and the lawyer may also withdraw or disaffirm any opinion, document, affirmation, or the like.

Where the client is an organization, the lawyer may be in doubt whether contemplated conduct will actually be carried out by the organization. Where necessary to guide conduct in connection with the rule, the lawyer may make inquiry within the organization as indicated in rule 4-1.13(b).

Dispute concerning lawyer's conduct

A lawyer's confidentiality obligations do not preclude a lawyer from securing confidential legal advice about the lawyer's personal responsibility to comply with these rules. In most situations, disclosing information to secure such advice will be impliedly authorized for the lawyer to carry out the representation. Even when the disclosure is not impliedly authorized, subdivision (c)(5) permits such disclosure because of the importance of a lawyer's compliance with the Rules of Professional Conduct.

Where a legal claim or disciplinary charge alleges complicity of the lawyer in a client's conduct or other misconduct of the lawyer involving representation of the client, the lawyer may respond to the extent the lawyer reasonably believes necessary to establish a defense. The same is true with respect to a claim involving the conduct or representation of a former client. The lawyer's right to respond arises when an assertion of such complicity has been made. Subdivision (c) does not require the lawyer to await the commencement of an action or proceeding that charges such complicity, so that the defense may be established by responding directly to a third party who has made such an assertion. The right to defend, of course, applies where a proceeding has been commenced. Where practicable and not prejudicial to the lawyer's ability to establish the defense, the lawyer should advise the client of the third party's assertion and request that the client respond appropriately. In any event, disclosure should be no greater than the lawyer reasonably believes is necessary to vindicate innocence, the disclosure should be made in a manner that limits access to the information to the tribunal or other persons having a need to know it, and appropriate protective orders or other arrangements should be sought by the lawyer to the fullest extent practicable.

If the lawyer is charged with wrongdoing in which the client's conduct is implicated, the rule of confidentiality should not prevent the lawyer from defending against the charge. Such a charge can arise in a civil, criminal, or professional disciplinary proceeding and can be based on a wrong allegedly committed by the lawyer against the client or on a wrong alleged by a third person; for example, a person claiming to have been defrauded by the lawyer and client acting together. A lawyer entitled to a fee is permitted by subdivision (c) to prove the services rendered in an action to collect it. This aspect of the rule expresses the principle that the beneficiary of a fiduciary relationship may not exploit it to the detriment of the fiduciary. As stated above, the lawyer must make every effort practicable to avoid unnecessary disclosure of information relating to a representation, to limit disclosure to those having the need to know it, and to obtain protective orders or make other arrangements minimizing the risk of disclosure.

Disclosures otherwise required or authorized

The attorney-client privilege is differently defined in various jurisdictions. If a lawyer is called as a witness to give testimony concerning a client, absent waiver by the client, rule 4-1.6(a) requires the lawyer to invoke the privilege when it is applicable. The lawyer must comply with the final orders of a court or other tribunal of competent jurisdiction requiring the lawyer to give information about the client.

The Rules of Professional Conduct in various circumstances permit or require a lawyer to disclose information relating to the representation. See rules 4-2.3, 4-3.3, and 4-4.1. In addition to these provisions, a lawyer may be obligated or permitted by other provisions of law to give information about a client. Whether another provision of law supersedes rule 4-1.6 is a matter of interpretation beyond the scope of these rules, but a presumption should exist against such a supersession.

Former client

The duty of confidentiality continues after the client-lawyer relationship has terminated. See rule 4-1.9 for the prohibition against using such information to the disadvantage of the former client.

[Revised: 10/01/2011]

626.8473 Escrow; trust fund.—

(1) A title insurance agent may engage in business as an escrow agent as to funds received from others to be subsequently disbursed by the title insurance agent in connection with real estate closing transactions involving the issuance of title insurance binders, commitments, policies of title insurance, or guarantees of title, provided that a licensed and appointed title insurance agent complies with the requirements of s. 626.8417, including such requirements added after the initial licensure of the agent.

(2) All funds received by a title insurance agent as described in subsection (1) shall be trust funds received in a fiduciary capacity by the title insurance agent and shall be the property of the person or persons entitled thereto.

(3) All funds received by a title insurance agent to be held in trust shall be immediately placed in a financial institution that is located within this state and is a member of the Federal Deposit Insurance Corporation or the National Credit Union Share Insurance Fund. These funds shall be invested in an escrow account in accordance with the investment requirements and standards established for deposits and investments of state funds in s. 17.57, where the funds shall be kept until disbursement thereof is properly authorized.

(4) Funds required to be maintained in escrow trust accounts pursuant to this section shall not be subject to any debts of the title insurance agent and shall be used only in accordance with the terms of the individual, escrow, settlement, or closing instructions under which the funds were accepted.

(5) The title insurance agents shall maintain separate records of all receipts and disbursements of escrow, settlement, or closing funds.

(6) In the event that the department promulgates rules necessary to implement the requirements of this section pursuant to s. 624.308, the department shall consider reasonable standards necessary for the protection of funds held in trust, including, but not limited to, standards for accounting of funds, standards for receipt and disbursement of funds, and protection for the person or persons to whom the funds are to be disbursed.

(7) A title insurance agent, or any officer, director, or employee thereof, or any person associated therewith as an independent contractor for bookkeeping or similar purposes, who converts or misappropriates funds received or held in escrow or in trust by such title insurance agent, or any person who knowingly receives or conspires to receive such funds, commits:

(a) If the funds converted or misappropriated are $300 or less, a misdemeanor of the first degree, punishable as provided in s. 775.082 or s. 775.083.

(b) If the funds converted or misappropriated are more than $300, but less than $20,000, a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

(c) If the funds converted or misappropriated are $20,000 or more, but less than $100,000, a felony of the second degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

(d) If the funds converted or misappropriated are $100,000 or more, a felony of the first degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

(8) An attorney shall deposit and maintain all funds received in connection with transactions in which the attorney is serving as a title or real estate settlement agent into a separate trust account that is maintained exclusively for funds received in connection with such transactions and permit the account to be audited by its title insurers, unless maintaining funds in the separate account for a particular client would violate applicable rules of The Florida Bar.

History.—s. 24, ch. 85-185; s. 1, ch. 86-286; s. 1, ch. 89-305; s. 134, ch. 90-363; s. 114, ch. 92-318; s. 3, ch. 98-409; s. 971, ch. 2003-261; s. 3, ch. 2012-206.

From: MAIL [mailto:Ethics_Opinions@flabar.org] **On Behalf Of** Ethics Opinions
Sent: Saturday, June 29, 2013 12:32 PM
To: bruce.goorland@gmlaw.com; wfbelcher@gmail.com; Michael J. Gelfand; tconner@thefund.com; jrussick@oldrepublictitle.com; lisle@lairdalile.com; ysherron@flabar.org; jpatterson@lpspa.com; Jcurran@flabarfndn.org; alan@flta.org; SJones@aronlaw.com
Subject: Professional Ethics Committee - Draft Proposed Advisory Opinion 12-4

At its meeting of June 28, 2013, the Professional Ethics Committee reviewed alternative drafts of Proposed Advisory Opinion 12-4, regarding a lawyer's ethical obligations in light of new section (8) of §626.8473, Florida Statutes, which requires lawyers acting as a real estate settlement agent to hold real estate transaction funds in a separate trust account to allow audit by title insurers, which became effective July 1, 2012. The committee voted 28-6 to direct its subcommittee to redraft the proposed advisory opinion to conclude that the lawyer cannot permit audits without client consent unless an exception to the confidentiality rule applies, delete lines 61-66 and 132, and make other amendments as necessary to make the poroposed advisory opinion consistent, for the full committee's consideration at its next meeting.

The next meeting is yet to be scheduled, but likely will be held in either September or October 2013 at the Tampa Airport Marriott. I will inform you once the meeting is scheduled.

If you have any questions, please contact me. Thank you for your continued interest in this issue.

Sincerely,

_____

Elizabeth Clark Tarbert
Ethics Counsel
The Florida Bar
651 E. Jefferson Street
Tallahassee, Florida 32399-2300

PEC Subcommittee on Subcommittee on Real Estate Trust Accounts & Proposed Advisory Opinion 12-4

Loretta O'Keeffe to: Elizabeth Tarbert (etarbert@flabar.org) 06/24/2013 01:34 PM

Cc: "Carolyn.Bell@usdoj.gov", "Philip N. Kabler, Esq. (pnkabler@bellsouth.net)", "gsquires@kpsos.com", "larnold@arnold-law.com", "Gail Ferguson (gferguso@flabar.org)"

History: This message has been replied to.

Elizabeth: Further meetings of The Professional Ethics Committee's Subcommittee on Real Estate Trust Accounts and proposed advisory opinion 12-4 were held on June 13, 2013 and June 24, 2013.

After extensive discussion and deliberation, the Subcommittee renewed its recommendation regarding the Subcommittee's proposed opinions. The Subcommittee recommends adopting the original proposed opinion that advised that the client's informed consent can be obtained by having the client execute a separate document that explains the possibility of an audit by title insurers. Alternatively, the Subcommittee offers two additional proposed opinions for consideration by the Professional Ethics Committee: (i) the proposed advisory opinion finding that the attorney may permit multiple title insurance companies to audit a single RE trust account without obtaining each client's informed consent if the lawyer reasonably believes it is necessary to serve each client's interest; or (ii) the proposed advisory opinion advising that the attorney may permit multiple title insurance companies to audit a single RE trust account without obtaining each client's informed consent as long as the attorney either maintains separate trust accounts or the lawyer properly redacted all identifying information from a single trust account. These three proposed advisory opinions are referred to as: (1) the original proposed opinion; (2) the necessary in the client's interest proposed opinion; or (3) the separate accounts or redacting information proposed opinion. To facilitate sufficient review of these 3 proposed opinions by the entire PEC, the Subcommittee recommends providing the PEC with the red-lined versions of these 3 proposed opinions. The Subcommittee also carefully reviewed and considered the proposed opinion offered by the RPPTL Section. The Subcommittee renewed its decision not to adopt this opinion as an alternative opinion.

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PROFESSIONAL ETHICS OF THE FLORIDA BAR
DRAFT Proposed Advisory Opinion 12-4 (Revised ~~January 8~~April XX, 2013)
(XXXX, 2013)

A member of The Florida Bar has requested an advisory ethics opinion. The legislature adopted section 626.8473 (8), Florida Statutes, effective July 1, 2012, which states:

> An attorney shall deposit and maintain all funds received in connection with transactions in which the attorney is serving as a title or real estate settlement agent into a separate trust account that is maintained exclusively for funds received in connection with such transactions and permit the account to be audited by its title insurers, unless maintaining funds in the separate account for a particular client would violate applicable rules of The Florida Bar.

The inquirer asks for guidance regarding compliance with both the statute and the applicable Rules Regulating The Florida Bar.[1] The inquirer's firm employs numerous attorneys who handle real estate transactions and work with multiple title insurers. Some real estate transactions involve no title insurance. The inquirer asks two questions which will be addressed in turn:

> **Question 1: Is an attorney permitted to allow a title insurance company to audit the firm's special trust account used exclusively for real estate and title transactions without the informed consent of the clients who have no involvement with that particular title insurance company?**

The answer is no. As explained below, an attorney is not permitted to allow a title insurance company to audit the special trust account used exclusively for real estate and title transactions if the special trust account holds funds for client transactions that are unrelated to the title insurer requesting the audit, unless the affected clients give informed consent.

Rule 4-1.6 (a), Rules Regulating The Florida Bar, prohibits a lawyer from voluntarily disclosing any information regarding a representation without a client's informed consent, unless one of the exceptions to the rule applies, and states:

> ***Rule 4-1.6 Confidentiality of Information***
>
> **(a) Consent Required to Reveal Information.** A lawyer shall not reveal information relating to representation of a client except as stated in subdivisions (b), (c), and (d), unless the client gives *informed consent*.

[1] Trust accounts established pursuant to section 626.8473 (8), Florida Statutes (2012), must comply with the Interest on Trust Accounts (IOTA) Program, Rule 5-1.1 (g), Rules Regulating The Florida Bar. The rule requires that lawyers place short term or nominal funds in an IOTA trust account. Lawyers should place funds that are not short term or nominal in a separate trust account with interest accruing to the benefit of the client or third party who owns the funds.

Emphasis added.

The Preamble of the Rules of Professional Conduct defines *informed consent* as follows:

> "Informed consent" denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.

The comment to Rule 4-1.6 further explains that confidentiality is fundamental to the trust that is the hallmark of the attorney-client relationship and emphasizes the broad scope of the rule:

> The confidentiality rule applies not merely to matters communicated in confidence by the client but also to *all information relating to the representation, whatever its source.*

Emphasis added.

The lawyer's ethical obligations under Rules 4-1.6 (a) and 4-1.4 to obtain informed consent to disclose information and to explain matters dictate the lawyer's affirmative duty to provide the client with information relevant to the client's interests. Failure to comply with a lawyer's obligations to adequately inform and explain prior to obtaining consent may constitute a conflict of interest if it serves the lawyer or a third party more than the client's interest. *See* Rule 4-1.7 (a) (2).

The confidentiality rule is limited by several exceptions that would permit a lawyer to voluntarily disclose a client's information without informed consent. The only exception relevant to the present inquiry is Rule 4-1.6 (c) (1), which permits a lawyer to disclose information without a client's informed consent to serve the client's interest, unless the client has specifically instructed otherwise.

Florida Ethics Opinion 93-5 acknowledges that a lawyer must obtain a client's consent[2] to permit a title insurer to audit the lawyer's general trust account, but advises that if the lawyer uses a special trust account exclusively for transactions in which the lawyer acts as the title or real estate settlement agent on behalf of that insurer, the exception under Rule 4-1.6 (c) (1) may permit the audit without a client's informed consent. The committee recognized that a client's

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[2]Rule 4-1.6 (a), Rules Regulating The Florida Bar (1994), did not require *informed* consent, as is required by the current applicable rule, and states: "A lawyer shall not reveal information relating to a representation of a client except as stated in subdivisions (b), (c), and (d), *unless the client consents after disclosure* to the client." Emphasis added. The term "disclosure" was not defined in the 1994 Preamble.

interest is served if the title insurer's audit ensures the safety of the funds held in the special trust account and facilitates a satisfactory conclusion for clients whose funds are held in the account:

> An attorney who is an agent for a title insurance company may not permit the title insurer to audit the attorney's general trust account without consent of the affected clients. *The attorney, however, need not obtain client consent before permitting the insurer to audit a special trust account used exclusively for transactions in which the attorney acts as the title or real estate settlement agent.*
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> . . . .
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> . . . Subdivision (c)(1) authorizes an attorney to disclose confidential information "to serve the client's interest unless it is information the client specifically requires not to be disclosed." *The committee recognizes that audits by title insurance underwriters are necessary to ensure the safety of the funds deposited in the special trust account and thus facilitate a satisfactory conclusion for those whose funds are placed in the account.* Consequently, if a special trust account is used exclusively for transactions in which the attorney is acting as the title or real estate settlement agent, the attorney ethically may permit the proposed audits unless the attorney has been specifically directed otherwise by the client.

Florida Ethics Opinion 93-5 (emphasis added).

The facts of the present inquiry are distinguishable from those addressed in Florida Ethics Opinion 93-5. The inquiry addressed in Opinion 93-5 was presented by a lawyer from the general counsel of a title insurance company asking on behalf of the company wanting to audit,[3] and therefore the opinion was written under the assumption that only transactions insured by that one title insurer would be included in the special trust account discussed in the opinion.

The inquirer's firm employs many lawyers who serve as title agents for different title insurers and who represent many different clients in unrelated transactions. Some clients' transactions involve no title insurer. The inquiry states that each title insurer wants to audit the trust account used by its own title agents. Even if the firm maintains a separate trust account exclusively for real estate and title transactions, the account will hold funds for different clients who are represented by different lawyers who are title agents for different title insurers, and some client funds will be held for transactions that involve no title insurer.

If the firm permits each title insurer to audit the separate trust account without clients' informed consent, each insurer will obtain information relating to the firm's representation of clients who are not involved in any transaction with that particular title insurer. That would not serve those clients' interests and would be tantamount to permitting the insurer to audit a general trust account in violation of the prohibition expressed in Opinion 93-5. The inquirer's affirmative duties to inform and explain under Rules 4-1.4 and 4-1.6 (a) would be triggered under

[3] Florida Ethics Opinion 93-5 was outside the scope of ethics opinions customarily issued by the Professional Ethics Committee.

such circumstances. Disclosure to title insurers without a client's informed consent would be prohibited by Rule 4-1.6 (a) and the exception under Rule 4-1.6 (c) (1) would be inapplicable.

Based on the foregoing, the answer to the inquirer's first question is no, an attorney is not permitted to allow a title insurance company to audit the special trust account used exclusively for real estate and title transactions if the special trust account holds funds for client transactions unrelated to the title insurer requesting the audit, unless the attorney obtains the affected clients' informed consent.

If, however, consistent with Florida Ethics Opinion 93-5, the special trust account is used exclusively for real estate and title transactions insured by a single title insurer, the inquirer may allow that one title insurer to audit the special trust account without a client's informed consent, unless the client specifically instructed otherwise.

Question 2: If an attorney is not ethically permitted to allow a title insurer to audit the special trust account without the clients' informed consent because the special trust account involves unrelated transactions, but new section 626.8473 (8), Florida Statutes, requires that attorney to allow the audit, does the attorney abide by the ethics rules or the statute?

The inquirer's second question arises from concerns regarding the interpretation of section 626.8473 (8), Florida Statutes, which became effective July 1, 2012, and states:

> (8) An attorney shall deposit and maintain all funds received in connection with transactions in which the attorney is serving as a title or real estate settlement agent into a separate trust account that is maintained exclusively for funds received in connection with such transactions and permit the account to be audited by its title insurers, unless maintaining funds in the separate account for a particular client would violate applicable rules of The Florida Bar.

Although questions of statutory interpretation are beyond the scope of an ethics opinion, pursuant to Procedure 2 (a) (1)(D), Florida Bar Procedures for Ruling on Questions of Ethics (2012), the committee offers the following general discussion to provide guidance to bar members.

The statute appears to mandate that lawyers maintain a separate trust account devoted exclusively to funds held in connection with transactions in which the lawyer serves as a title or real estate settlement agent. The statute appears to further require that the lawyer permit the separate trust account to be audited by multiple title insurers.

As discussed in the answer to the inquirer's first question, Rule 4-1.6 (a), Rules Regulating The Florida Bar would require that a lawyer obtain each client's informed consent before permitting multiple title insurers to audit a single trust account, even if that separate trust

account was devoted exclusively to holding funds for clients' real estate and title transactions. Consistent with Florida Ethics Opinion 93-5, a lawyer would not be required to obtain clients' informed consent to permit one title insurer to audit a separate trust account that is devoted exclusively to funds for clients' transactions that are insured by the one title insurer requesting the audit, because the audit would serve the clients' interests under Rule 4-1.6 (c) (1).

Lawyers thus should consider maintaining: 1) a separate trust account for each different title insurer used by that lawyer or law firm, or 2) one separate trust account and obtain each client's informed consent to disclose information regarding their transactions to multiple title insurers for their audits, or 3) one separate trust account and obtain consent from the various title insurers to audit only the information related to transactions that the title insurer is underwriting. With respect to number 2 in the preceding sentence, the lawyer may obtain the client's informed consent in the sales contract or in a separate document executed by the client prior to or at the closing.

In sum, the answer to the inquirer's first question is no. The inquirer may not permit multiple title insurance companies to audit a single trust account used exclusively for real estate and title transactions, because that would be tantamount to permitting a prohibited audit of a general trust account. The inquirer may permit a title insurer to audit a single trust account used exclusively for client transactions insured by the title insurer requesting the audit. The answer to the inquirer's second question offers three alternatives that may harmonize the inquirer's obligations under the applicable Rules Regulating The Florida Bar and the statute.

PROFESSIONAL ETHICS OF THE FLORIDA BAR

DRAFT Proposed Advisory Opinion 12-4 (Revised ~~January 8~~April XX, 2013)

(XXXX, 2013)

A member of The Florida Bar has requested an advisory ethics opinion. The legislature adopted section 626.8473 (8), Florida Statutes, effective July 1, 2012, which states:

> An attorney shall deposit and maintain all funds received in connection with transactions in which the attorney is serving as a title or real estate settlement agent into a separate trust account that is maintained exclusively for funds received in connection with such transactions and permit the account to be audited by its title insurers, unless maintaining funds in the separate account for a particular client would violate applicable rules of The Florida Bar.

The inquirer asks for guidance regarding compliance with both the statute and the applicable Rules Regulating The Florida Bar.[1] The inquirer's firm employs numerous attorneys who handle real estate transactions and work with multiple title insurers. Some real estate transactions involve no title insurance. The inquirer asks two questions which will be addressed in turn:

> **Question 1: Is an attorney permitted to allow a title insurance company to audit the firm's special trust account used exclusively for real estate and title transactions without the informed consent of the clients who have no involvement with that particular title insurance company?**

The answer is ~~no.~~yes, as long as the lawyer reasonably believes that the audits are necessary to serve the client's interest. If, however, the lawyer believes that audits by insurers who have no involvement with the client are not necessary to serve the client's interest, the answer is no, the audits are impermissible without a client's informed consent. As explained below, an attorney is not permitted to allow a title insurance company to audit the special trust account used exclusively for real estate and title transactions if the special trust account holds funds for client transactions that are unrelated to the title insurer requesting the audit, unless the affected clients give informed consent~~.~~, or unless the lawyer reasonably believes that audits by multiple insurers are necessary to serve the client's interest.

Rule 4-1.6 (a), Rules Regulating The Florida Bar, prohibits a lawyer from voluntarily disclosing any information regarding a representation without a client's informed consent, unless one of the exceptions to the rule applies, and states:

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[1] Trust accounts established pursuant to section 626.8473 (8), Florida Statutes (2012), must comply with the Interest on Trust Accounts (IOTA) Program, Rule 5-1.1 (g), Rules Regulating The Florida Bar. The rule requires that lawyers place short term or nominal funds in an IOTA trust account. Lawyers should place funds that are not short term or nominal in a separate trust account with interest accruing to the benefit of the client or third party who owns the funds.

Rule 4-1.6 Confidentiality of Information

> **(a) Consent Required to Reveal Information.** A lawyer shall not reveal information relating to representation of a client except as stated in subdivisions (b), (c), and (d), unless the client gives *informed consent.*

Emphasis added.

The Preamble of the Rules of Professional Conduct defines *informed consent* as follows:

> "Informed consent" denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.

The comment to Rule 4-1.6 further explains that confidentiality is fundamental to the trust that is the hallmark of the attorney-client relationship and emphasizes the broad scope of the rule:

> The confidentiality rule applies not merely to matters communicated in confidence by the client but also to *all information relating to the representation, whatever its source.*

Emphasis added.

The lawyer's ethical obligations under Rules 4-1.6 (a) and 4-1.4 to obtain informed consent to disclose information and to explain matters dictate the lawyer's affirmative duty to provide the client with information relevant to the client's interests. Failure to comply with a lawyer's obligations to adequately inform and explain prior to obtaining consent may constitute a conflict of interest if it serves the lawyer or a third party more than the client's interest. *See* Rule 4-1.7 (a) (2).

The confidentiality rule is limited by several exceptions that would permit a lawyer to voluntarily disclose a client's information without informed consent. The only exception relevant to the present inquiry is Rule 4-1.6 (c) (1), which permits a lawyer to disclose information without a client's informed consent to serve the client's interest, unless the client has specifically instructed otherwise.

Florida Ethics Opinion 93-5 acknowledges that a lawyer must obtain a client's consent[2] to

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[2]Rule 4-1.6 (a), Rules Regulating The Florida Bar (1994), did not require *informed* consent, as is required by the current applicable rule, and states: "A lawyer shall not reveal information relating to a representation of a client except as stated in subdivisions (b), (c), and (d), *unless the client consents after disclosure* to the client." Emphasis

permit a title insurer to audit the lawyer's general trust account, but advises that if the lawyer uses a special trust account exclusively for transactions in which the lawyer acts as the title or real estate settlement agent on behalf of that insurer, the exception under Rule 4-1.6 (c) (1) may permit the audit without a client's informed consent. The committee recognized that a client's interest is served if the title insurer's audit ensures the safety of the funds held in the special trust account and facilitates a satisfactory conclusion for clients whose funds are held in the account:

> An attorney who is an agent for a title insurance company may not permit the title insurer to audit the attorney's general trust account without consent of the affected clients. *The attorney, however, need not obtain client consent before permitting the insurer to audit a special trust account used exclusively for transactions in which the attorney acts as the title or real estate settlement agent.*
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> . . . .
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> . . . Subdivision (c)(1) authorizes an attorney to disclose confidential information "to serve the client's interest unless it is information the client specifically requires not to be disclosed." *The committee recognizes that audits by title insurance underwriters are necessary to ensure the safety of the funds deposited in the special trust account and thus facilitate a satisfactory conclusion for those whose funds are placed in the account.* Consequently, if a special trust account is used exclusively for transactions in which the attorney is acting as the title or real estate settlement agent, the attorney ethically may permit the proposed audits unless the attorney has been specifically directed otherwise by the client.

Florida Ethics Opinion 93-5 (emphasis added).

The facts of the present inquiry are distinguishable from those addressed in Florida Ethics Opinion 93-5. The inquiry addressed in Opinion 93-5 was presented by a lawyer from the general counsel of a title insurance company asking on behalf of the company wanting to audit,[3] and therefore the opinion was written under the assumption that only transactions insured by that one title insurer would be included in the special trust account discussed in the opinion.

The inquirer's firm employs many lawyers who serve as title agents for different title insurers and who represent many different clients in unrelated transactions. Some clients' transactions involve no title insurer. The inquiry states that each title insurer wants to audit the trust account used by its own title agents. Even if the firm maintains a separate trust account exclusively for real estate and title transactions, the account will hold funds for different clients who are represented by different lawyers who are title agents for different title insurers, and some client funds will be held for transactions that involve no title insurer.

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added. The term "disclosure" was not defined in the 1994 Preamble.

[3] Florida Ethics Opinion 93-5 was outside the scope of ethics opinions customarily issued by the Professional Ethics Committee.

If the firm permits each title insurer to audit theone separate trust account ~~without clients' informed consent~~, each insurer will obtain information relating to the firm's representation of clients who are not involved in any transaction with that particular title insurer. ~~That~~ If the lawyer reasonably believes that multiple audits by different insurers are necessary to serve the interests of clients who have no involvement with a particular auditing insurer, the lawyer may permit audits by multiple insurers without obtaining each client's informed consent. If the lawyer does not reasonably believe audits by multiple insurers are necessary to serve the interests of those clients who are not involved in a transaction with a particular insurer, then it would not serve those clients' interests and would be tantamount to permitting the insurer to audit a general trust account in violation of the prohibition expressed in Opinion 93-5. The inquirer's affirmative duties to inform and explain under Rules 4-1.4 and 4-1.6 (a) would be triggered under such circumstances. Disclosure to title insurers without a client's informed consent would be prohibited by Rule 4-1.6 (a) and the exception under Rule 4-1.6 (c) (1) would be inapplicable.

Based on the foregoing, the answer to the inquirer's first question is yes, as long as the lawyer reasonably believes that multiple audits by multiple insurers are necessary to serve each client's interest, even if it means that the lawyer will disclose client information to insurers who are not involved with their transactions. Conversely, the answer is no, ~~an attorney~~the lawyer is not permitted to allow ~~a title insurance company to audit the special trust account used exclusively for real estate and title transactions if the special trust account holds funds for client transactions~~audits by multiple unrelated ~~to the title insurer requesting the audit, unless the attorney obtains the affected clients'~~insurers without informed consent, if the lawyer does not believe such audits are necessary to serve each client's interest.

If, however, consistent with Florida Ethics Opinion 93-5, the special trust account is used exclusively for real estate and title transactions insured by a single title insurer, the inquirer may allow that one title insurer to audit the special trust account without a client's informed consent, unless the client specifically instructed otherwise.

> **Question 2: If an attorney is not ethically permitted to allow a title insurer to audit the special trust account without the clients' informed consent because the special trust account involves unrelated transactions, but new section 626.8473 (8), Florida Statutes, requires that attorney to allow the audit, does the attorney abide by the ethics rules or the statute?**

The inquirer's second question arises from concerns regarding the interpretation of section 626.8473 (8), Florida Statutes, which became effective July 1, 2012, and states:

> (8) An attorney shall deposit and maintain all funds received in connection with transactions in which the attorney is serving as a title or real estate settlement agent into a separate trust account that is maintained exclusively for funds received in connection with such transactions and permit the account to be audited by its title insurers, unless maintaining funds in the separate account for a particular client

would violate applicable rules of The Florida Bar.

Although questions of statutory interpretation are beyond the scope of an ethics opinion, pursuant to Procedure 2 (a) (1)(D), Florida Bar Procedures for Ruling on Questions of Ethics (2012), the committee offers the following general discussion to provide guidance to bar members.

The statute appears to mandate that lawyers maintain a separate trust account devoted exclusively to funds held in connection with transactions in which the lawyer serves as a title or real estate settlement agent. The statute appears to further require that the lawyer permit the separate trust account to be audited by multiple title insurers.

As discussed in the answer to the inquirer's first question, Rule 4-1.6 (a), Rules Regulating The Florida Bar would require that a lawyer obtain each client's informed consent before permitting multiple title insurers to audit a single trust account, even if that separate trust account was devoted exclusively to holding funds for clients' real estate and title transactions., unless the lawyer reasonably believes that it would serve each client's interest to disclose information to multiple insurers without obtaining the client's informed consent, pursuant to Rule 4-1.6 (c) (1). Consistent with Florida Ethics Opinion 93-5, a lawyer would not be required to obtain clients' informed consent to permit one title insurer to audit a separate trust account that is devoted exclusively to funds for clients' transactions that are insured by the one title insurer requesting the audit, because the audit would serve the clients' interests under Rule 4-1.6 (c) (1).

~~Lawyers thus~~If the lawyer concludes that it is not necessary to serve the clients' interests, the lawyer should consider maintaining: 1) a separate trust account for each different title insurer used by that lawyer or law firm, or 2) one separate trust account and obtain each client's informed consent to disclose information regarding their transactions to multiple title insurers for their audits, or 3) one separate trust account and obtain consent from the various title insurers to audit only the information related to transactions that the title insurer is underwriting. With respect to number 2 in the preceding sentence, the lawyer may obtain the client's informed consent in the sales contract or in a separate document executed by the client prior to or at the closing.

In sum, the answer to the inquirer's first question is ~~no. They~~es, the inquirer may ~~not~~ permit multiple title insurance companies to audit a single trust account used exclusively for real estate and title transactions without obtaining each client's informed consent if the lawyer reasonably believes it is necessary to serve each client's interest. On the other hand, the lawyer may not permit title insurers that are not involved with a client's transaction to audit the special trust account without the affected clients' informed consent if the lawyer believes the audits by unrelated insurers are not necessary to serve the client's interests, because that would be tantamount to permitting a prohibited audit of a general trust account. The inquirer may permit a title insurer to audit a single trust account used exclusively for client transactions insured by the

title insurer requesting the audit. The answer to the inquirer's second question offers three four alternatives that may harmonize the inquirer's obligations under the applicable Rules Regulating The Florida Bar and the statute.

PROFESSIONAL ETHICS OF THE FLORIDA BAR

DRAFT Proposed Advisory Opinion 12-4 (Revised ~~January 8~~April XX, 2013)

(XXXX, 2013)

A member of The Florida Bar has requested an advisory ethics opinion. The legislature adopted section 626.8473 (8), Florida Statutes, effective July 1, 2012, which states:

> An attorney shall deposit and maintain all funds received in connection with transactions in which the attorney is serving as a title or real estate settlement agent into a separate trust account that is maintained exclusively for funds received in connection with such transactions and permit the account to be audited by its title insurers, unless maintaining funds in the separate account for a particular client would violate applicable rules of The Florida Bar.

The inquirer asks for guidance regarding compliance with both the statute and the applicable Rules Regulating The Florida Bar.[1] The inquirer's firm employs numerous attorneys who handle real estate transactions and work with multiple title insurers. Some real estate transactions involve no title insurance. The inquirer asks two questions which will be addressed in turn:

> **Question 1: Is an attorney permitted to allow a title insurance company to audit the firm's special trust account used exclusively for real estate and title transactions without the informed consent of the clients who have no involvement with that particular title insurance company?**

The answer is ~~no~~yes, as long as the lawyer either maintains a separate trust account for each different title insurer, or maintains a single trust account and permits multiple title insurers access only to information related to transactions that the particular insurer is underwriting, or permits access to the entire account to all title insurers but redacts all identifying information of clients whose transactions the insurer is not underwriting. Identifying information includes but is not limited to client names, contact information, social security and tax identification (EIN) numbers, financial and other account information, and property addresses. As explained below, an attorney is not permitted to allow a title insurance company to audit the special trust account used exclusively for real estate and title transactions if the special trust account holds funds for client transactions that are unrelated to the title insurer requesting the audit, unless the affected clients give informed consent.

Rule 4-1.6 (a), Rules Regulating The Florida Bar, prohibits a lawyer from voluntarily disclosing any information regarding a representation without a client's informed consent, unless

[1] Trust accounts established pursuant to section 626.8473 (8), Florida Statutes (2012), must comply with the Interest on Trust Accounts (IOTA) Program, Rule 5-1.1 (g), Rules Regulating The Florida Bar. The rule requires that lawyers place short term or nominal funds in an IOTA trust account. Lawyers should place funds that are not short term or nominal in a separate trust account with interest accruing to the benefit of the client or third party who owns the funds.

one of the exceptions to the rule applies, and states:

> ***Rule 4-1.6 Confidentiality of Information***
>
> **(a) Consent Required to Reveal Information.** A lawyer shall not reveal information relating to representation of a client except as stated in subdivisions (b), (c), and (d), unless the client gives *informed consent*.

Emphasis added.

The Preamble of the Rules of Professional Conduct defines *informed consent* as follows:

> "Informed consent" denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.

The comment to Rule 4-1.6 further explains that confidentiality is fundamental to the trust that is the hallmark of the attorney-client relationship and emphasizes the broad scope of the rule:

> The confidentiality rule applies not merely to matters communicated in confidence by the client but also to *all information relating to the representation, whatever its source*.

Emphasis added.

The lawyer's ethical obligations under Rules 4-1.6 (a) and 4-1.4 to obtain informed consent to disclose information and to explain matters dictate the lawyer's affirmative duty to provide the client with information relevant to the client's interests. Failure to comply with a lawyer's obligations to adequately inform and explain prior to obtaining consent may constitute a conflict of interest if it serves the lawyer or a third party more than the client's interest. *See* Rule 4-1.7 (a) (2).

The confidentiality rule is limited by several exceptions that would permit a lawyer to voluntarily disclose a client's information without informed consent. The only exception relevant to the present inquiry is Rule 4-1.6 (c) (1), which permits a lawyer to disclose information without a client's informed consent to serve the client's interest, unless the client has specifically instructed otherwise.

Florida Ethics Opinion 93-5 acknowledges that a lawyer must obtain a client's consent[2] to

[2]Rule 4-1.6 (a), Rules Regulating The Florida Bar (1994), did not require *informed* consent, as is required by the

permit a title insurer to audit the lawyer's general trust account, but advises that if the lawyer uses a special trust account exclusively for transactions in which the lawyer acts as the title or real estate settlement agent on behalf of that insurer, the exception under Rule 4-1.6 (c) (1) may permit the audit without a client's informed consent. The committee recognized that a client's interest is served if the title insurer's audit ensures the safety of the funds held in the special trust account and facilitates a satisfactory conclusion for clients whose funds are held in the account:

> An attorney who is an agent for a title insurance company may not permit the title insurer to audit the attorney's general trust account without consent of the affected clients. *The attorney, however, need not obtain client consent before permitting the insurer to audit a special trust account used exclusively for transactions in which the attorney acts as the title or real estate settlement agent.*
>
> . . . .
>
> . . . Subdivision (c)(1) authorizes an attorney to disclose confidential information "to serve the client's interest unless it is information the client specifically requires not to be disclosed." *The committee recognizes that audits by title insurance underwriters are necessary to ensure the safety of the funds deposited in the special trust account and thus facilitate a satisfactory conclusion for those whose funds are placed in the account.* Consequently, if a special trust account is used exclusively for transactions in which the attorney is acting as the title or real estate settlement agent, the attorney ethically may permit the proposed audits unless the attorney has been specifically directed otherwise by the client.

Florida Ethics Opinion 93-5 (emphasis added).

The facts of the present inquiry are distinguishable from those addressed in Florida Ethics Opinion 93-5. The inquiry addressed in Opinion 93-5 was presented by a lawyer from the general counsel of a title insurance company asking on behalf of the company wanting to audit,[3] and therefore the opinion was written under the assumption that only transactions insured by that one title insurer would be included in the special trust account discussed in the opinion.

The inquirer's firm employs many lawyers who serve as title agents for different title insurers and who represent many different clients in unrelated transactions. Some clients' transactions involve no title insurer. The inquiry states that each title insurer wants to audit the trust account used by its own title agents. Even if the firm maintains a separate trust account exclusively for real estate and title transactions, the account will hold funds for different clients who are represented by different lawyers who are title agents for different title insurers, and some

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current applicable rule, and states: "A lawyer shall not reveal information relating to a representation of a client except as stated in subdivisions (b), (c), and (d), *unless the client consents after disclosure* to the client." Emphasis added. The term "disclosure" was not defined in the 1994 Preamble.

[3] Florida Ethics Opinion 93-5 was outside the scope of ethics opinions customarily issued by the Professional Ethics Committee.

client funds will be held for transactions that involve no title insurer.

If the firm permits each title insurer to audit ~~the separate trust account without clients' informed consent~~,a separate trust account maintained only for transactions underwritten by that particular insurer, the lawyer is not required to obtain each client's informed consent. Likewise, the firm may permit multiple title insurers to audit a single separate trust account if the lawyer permits each insurer access only to information related to transactions the particular insurer is underwriting or to all clients' information if it is properly redacted. The firm must obtain clients' informed consent, however, to permit multiple title insurers to audit one separate trust account, because each insurer will obtain information relating to the firm's representation of clients who are not involved in any transaction with that particular title insurer. That would not serve those clients' interests and would be tantamount to permitting the insurer to audit a general trust account in violation of the prohibition expressed in Opinion 93-5. The inquirer's affirmative duties to inform and explain under Rules 4-1.4 and 4-1.6 (a) would be triggered under such circumstances. Disclosure to title insurers without a client's informed consent would be prohibited by Rule 4-1.6 (a) and the exception under Rule 4-1.6 (c) (1) would be inapplicable.

Based on the foregoing, the answer to the inquirer's first question is ~~no, ayes~~, as long as the lawyer either maintains a separate trust account for each different auditing insurer, provides the information in a single separate trust account to permit each auditing insurer access only to transactions that are underwritten by that particular insurer, or permits access to all information, but it is properly redacted. An attorney is not permitted to allow a title insurance company to audit the special trust account used exclusively for real estate and title transactions if the special trust account holds funds for client transactions unrelated to the title insurer requesting the audit, unless the attorney obtains the affected clients' informed consent.

If, however, consistent with Florida Ethics Opinion 93-5, the special trust account is used exclusively for real estate and title transactions insured by a single title insurer, the inquirer may allow that one title insurer to audit the special trust account without a client's informed consent, unless the client specifically instructed otherwise.

Question 2: If an attorney is not ethically permitted to allow a title insurer to audit the special trust account without the clients' informed consent because the special trust account involves unrelated transactions, but new section 626.8473 (8), Florida Statutes, requires that attorney to allow the audit, does the attorney abide by the ethics rules or the statute?

The inquirer's second question arises from concerns regarding the interpretation of section 626.8473 (8), Florida Statutes, which became effective July 1, 2012, and states:

> (8) An attorney shall deposit and maintain all funds received in connection with transactions in which the attorney is serving as a title or real estate settlement agent into a separate trust account that is maintained exclusively for funds received in

connection with such transactions and permit the account to be audited by its title insurers, unless maintaining funds in the separate account for a particular client would violate applicable rules of The Florida Bar.

Although questions of statutory interpretation are beyond the scope of an ethics opinion, pursuant to Procedure 2 (a) (1)(D), Florida Bar Procedures for Ruling on Questions of Ethics (2012), the committee offers the following general discussion to provide guidance to bar members.

The statute appears to mandate that lawyers maintain a separate trust account devoted exclusively to funds held in connection with transactions in which the lawyer serves as a title or real estate settlement agent. The statute appears to further require that the lawyer permit the separate trust account to be audited by multiple title insurers.

As discussed in the answer to the inquirer's first question, Rule 4-1.6 (a), Rules Regulating The Florida Bar would require that a lawyer obtain each client's informed consent before permitting multiple title insurers to audit a single trust account, even if that separate trust account was devoted exclusively to holding funds for clients' real estate and title transactions., unless the account information provided relates only to transactions underwritten by the auditing insurer, or all account information is provided but it is properly redacted. Consistent with Florida Ethics Opinion 93-5, a lawyer would not be required to obtain clients' informed consent to permit one title insurer to audit a separate trust account that is devoted exclusively to funds for clients' transactions that are insured by the one title insurer requesting the audit, because the audit would serve the clients' interests under Rule 4-1.6 (c) (1).

Lawyers thus should consider maintaining: 1) a separate trust account for each different title insurer used by that lawyer or law firm, ~~or 2) one separate trust account and obtain each client's informed consent to disclose information regarding their transactions to multiple title insurers for their audits, or 3~~2) one separate trust account and obtain consent from the various title insurers to audit only the information related to transactions that the title insurer is underwriting. ~~With respect to number 2,~~ or 3) one separate trust account and obtain each client's informed consent to disclose information regarding their transactions to multiple title insurers for their audits. With respect to number 3 in the preceding sentence, the lawyer may obtain the client's informed consent in the sales contract or in a separate document executed by the client prior to or at the closing.

In sum, the answer to the inquirer's first question is ~~no. The inquirer may not permit multiple title insurance companies to audit a single trust account used exclusively for real estate and title transactions~~yes, the inquirer may permit a title insurance company to audit a single trust account used exclusively for real estate and title transactions, as long as the lawyer either maintains a separate trust account for each different auditing insurer, the lawyer maintains a single separate trust account and permits each auditing insurer access only to transactions that are underwritten by that particular insurer, or the lawyer provides all information from a single

separate trust account to each auditing insurer, but the information is properly redacted to exclude all identifying information for clients whose transactions are not underwritten by the auditing insurer. An attorney is not permitted to allow multiple title insurers to audit one special trust account used exclusively for real estate and title transactions if the special trust account holds funds for client transactions unrelated to the title insurer requesting the audit, unless the attorney obtains the affected clients' informed consent, because that would be tantamount to permitting a prohibited audit of a general trust account. ~~The inquirer may permit a title insurer to audit a single trust account used exclusively for client transactions insured by the title insurer requesting the audit.~~ The answer to the inquirer's second question offers three alternatives that may harmonize the inquirer's obligations under the applicable Rules Regulating The Florida Bar and the statute.

The Florida Bar
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Standing Committees

Professional Ethics Committee

This committee is charged with the duty of answering ethics inquiries from members of the Bar concerning the inquirer's own proposed conduct. The committee reviews informal advisory opinions issued by Florida Bar ethics department attorneys. Additionally, the committee publishes formal advisory opinions to guide bar members in interpreting and applying the ethics rules. A formal opinion is published in accordance with Board of Governors approved procedures as a proposed advisory opinion to which Bar members may submit comments. *
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Agenda

[Revised: 06-27-2012]

REAL PROPERTY, PROBATE & TRUST LAW SECTION

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August 23, 2012

VIA ELECTRONIC MAIL

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Re: Request for Ethics Opinion Regarding Requirements of Section 626.8473(8), Florida Statutes, for a Separate Trust Account for Transactions when an Attorney Serves as a Title or Real Estate Settlement Agent

Dear Members of the Professional Ethics Committee:

In response to various inquiries from members of the Real Property, Probate and Trust Law Section of The Florida Bar ("Section"), the Section has considered whether s. 626.8473(8), Florida Statutes, adopted by the 2012 Legislature, requires legislative clarification or guidance from The Florida Bar. The legislation, which was adopted in response to the recommendations of the 2009 Title Insurance Study Advisory Council, added the following provision which became effective July 1, 2012:

> An attorney shall deposit and maintain all funds received in connection with transactions in which the attorney is serving as a title or real estate settlement agent into a separate trust account that is maintained exclusively for funds received in connection with such transactions and permit the account to be audited by its title insurers, unless maintaining funds in the separate account for a particular client would violate applicable rules of The Florida Bar.

Some Section members have inquired as to whether this statutory provision requires a law firm to establish a "separate trust account" for each real estate transaction and are concerned about the practical implications of doing so. Other practitioners read the provision to require one separate trust account for *all* real estate transactions, but see the title insurers' ability to audit the account as an ethical violation. Others construed the language, "unless maintaining funds in the separate account for a particular client would violate applicable rules of The Florida Bar," as acquiescing in whatever position The Florida Bar takes on the ethical issue. Several have suggested that the Section request an Ethics Opinion on this issue from The Florida Bar.

As you know, The Florida Bar's Professional Ethics Committee issued Ethics Opinion 93-5 in 1994, in which it concluded that "[a]n attorney who is an agent for a title insurance company may not permit the title insurer to audit the attorney's general trust account without consent of the affected clients. The attorney, however, need not obtain client consent before permitting the insurer to audit a special trust account used exclusively for transactions in which the attorney acts as the title or real estate settlement agent."

The issue posed is whether an audit of a separate trust account by a title insurer under s. 626.8473(8) violates Rule 4-1.6, Rules Regulating The Florida Bar. Rule 4-1.6, which imposes the duty of confidentiality, ordinarily obligates an attorney to refrain from voluntarily revealing any "information relating to representation of a client" unless: (1) the client has given informed consent; or (2) the disclosure falls into one of the exceptions articulated in Rule 4-1.6. The Professional Ethics Committee has previously determined that trust account records are confidential under Rule 4-1.6 (Florida Ethics Opinion 72-3) and that a client's identity may be confidential (Florida Ethics Opinions 77-25 and 62-24).

Although an audit of an attorney's *general* trust account is permitted only if the affected clients have consented, Ethics Opinion 93-5 allows audit of a *special* trust account pursuant to an exception in Rule 4-1.6(c)(1) that authorizes an attorney to disclose confidential information "to serve the client's interest unless it is information the client specifically requires not to be disclosed." In that Opinion, the Professional Ethics Committee concluded that:

> . . . audits by title insurer insurance underwriters are necessary to ensure the safety of the funds deposited in the special trust account and thus facilitate a satisfactory conclusion for those whose funds are placed in the account. Consequently, if a special trust account is used exclusively for transactions in which the attorney is acting as the title or real estate settlement agent, the attorney ethically may permit the proposed audits unless the attorney has been specifically directed otherwise by the client.

After due consideration, the Section's Executive Council unanimously approved requesting the Professional Ethics Committee to issue an Ethics Opinion reaffirming opinion 93-5 and specifically clarifying the following matters:

1. That s. 626.8473(8), Florida Statutes (2012), which requires attorneys to "deposit and maintain all funds received in connection with transactions in which the attorney is serving as a title or real estate settlement agent into a separate trust account and permit the account to be audited by its title insurers," is consistent with Ethics Opinion 93-5 and the exemption in Rule 4-1.6(c)(1). If a separate or special trust account is used exclusively for transactions in which the attorney is acting as the title or real estate settlement agent for clients, the attorney may ethically permit the proposed audits by the title insurers with whom he or she has a relationship unless the attorney has been specifically directed otherwise by the client; and clarifying that the attorney has no obligation to affirmatively disclose such right to the client.

2. That the attorney's obligation to maintain a separate or special trust account under s. 626.8473(8), Florida Statutes (2012), does not require each individual attorney to maintain his or her own trust account, but that the obligation may be satisfied through the maintenance of one or more law firm trust accounts. While each individual attorney has a statutory duty to assure compliance, compliance may be achieved through maintenance of a firm special trust account that is subject to title insurer audit.

3. That the Committee does not interpret s. 626.8473(8), Florida Statutes (2012), to require the maintenance of a separate or special trust account for each client, for each transaction, or for each title insurer, although there is no prohibition on maintaining such multiple trust accounts should the attorney or law firm choose to do so.

4. That where the attorney is serving as a title or real estate settlement agent, escrow funds from multiple clients may properly be deposited into a single special trust account, if not contrary to other statutory or regulatory requirements, with the account being subject to audit by any or all of title insurers with whom the attorney or law firm maintains a relationship.

5. That to the extent that funds received in connection with a title or real estate transaction are shown on the closing statement for the transaction, such funds must be deposited and maintained in a special trust account in accordance with s. 626.8473(8). In most real estate transactions, all parties, opposing counsel, and real estate brokers are privy to the closing statement and receive a copy of it. As a result, neither the information on a closing statement, nor the receipts and disbursements from a special trust account in accordance with a closing statement, are confidential. In such cases, permitting an audit to confirm that disbursements were made in accordance with the approved closing statement does not violate the duty of confidentiality, and there should be no affirmative duty to advise clients of the option to insist on the use of an

unbilled account. Where other facts or considerations suggest the potential advisability of a different course of action, the attorney should advise his or her client in accordance with the attorney's best professional judgment. Furthermore, the attorney should not be required to disclose the attorney's fees on the closing statement unless expressly required by law.

If you have any questions regarding any of our recommendations, comments or requests, please contact the RPPTL Section's Chair-Elect, Peggy Rolando, at (305) 379-9144. Thank you for your consideration of this matter.

Sincerely yours,

Wm. Fletcher Belcher
RPPTL Section Chair

Cc: Lynwood Arnold, Esq.
Gwynne A. Young, Esq.
Laird A. Lile, Esq.
Sandra F. Diamond, Esq.
Arlene I. Stone, Esq.
Roland "Chip" Waller, Esq.
Margaret A. Rolando, Esq.
Jerry Aron, Esq.
William Sklar, Esq.
Alan Fields, Esq.
Yvonne Sherron
All Via E-Mail

MEMORANDUM

To: Executive Council of Real Property Probate and Trust Law Section

From: Ad Hoc Committee on Trust Account Issues
Chip Waller, chair; Jerry Aron, Alan Fields and Bill Sklar, members

Re: Requirements of Section 626.8473(8), Florida Statutes, on law firm and attorney trust account practices

Date: July 24, 2012

Ad Hoc Committee on Trust Account Issues was asked to analyze whether Section 626.8473(8) adopted by the 2012 Legislature in response to the recommendations of the 2009 Title Insurance Study Advisory Council required legislative clarification or guidance from The Florida Bar. The legislation added the following provision:

> (8) An attorney shall deposit and maintain all funds received in connection with transactions in which the attorney is serving as a title or real estate settlement agent into a separate trust account that is maintained exclusively for funds received in connection with such transactions and permit the account to be audited by its title insurers, unless maintaining funds in the separate account for a particular client would violate applicable rules of The Florida Bar.

This requirement became effective July 1, 2012. The Section received several inquiries about the trust account requirements in the new law. Some real estate practitioners believed that the provision requires a law firm to establish a separate trust account for each real estate transaction. They were concerned about the practical implications of doing so. Others read it to require one separate trust account for all real estate transactions, but saw the title insurers' ability to audit the account as an ethical violation. Others construed the language, "unless maintaining funds in the separate account for a particular client would violate applicable rules of The Florida Bar," as acquiescing to whatever position The Florida Bar takes on the issue. Several have requested that the Section request an Ethics Opinion from the Bar.

The Florida Bar's Professional Ethics Committee has previously issued Ethics Opinion 93-5 in 1994 in which it concluded that "[a]n attorney who is an agent for a title insurance company may not permit the title insurer to audit the attorney's general trust account without consent of the affected clients. The attorney, however, need not obtain client consent before permitting the insurer to audit a special trust account used exclusively for transactions in which the attorney acts as the title or real estate settlement agent."

After due consideration, the Committee recommends that the Section ask the Florida Bar's Professional Ethics Committee to consider amending its Ethics Opinion 93-5 as follows (All additions to the text of the opinion appear as underlined and any deletions to the text appear as strikeout)::

OPINION 93-5
(October 1, 1994)

An attorney who is an agent for a title insurance company ("title insurer") may not permit the title insurer to audit the attorney's general trust account without consent of the affected clients. The attorney, however, need not obtain client consent before permitting the insurer to audit a special trust account used exclusively for transactions in which the attorney acts as the title or real estate settlement agent.

RPC: 4-1.6

Opinions: 62-24, 72-3, 77-25

Statutes: F.S. sec. 627.786, 627.792 and 626.8473(8)

~~The inquiring attorney is counsel for a title insurance company~~. Pursuant to F.S. sec. 627.792, a title insurer is liable if its licensed agent misappropriates trust funds. Title insurers also have liability for defalcations under closing protection letters provided pursuant to F.S. sec. 627.786. Many title insurance agents in Florida are members of The Florida Bar. The title insurer ~~insurance company~~ wants to audit the trust accounts of its licensed attorney/agents. Some of the proposed audits would involve trust accounts devoted exclusively to transactions in which the attorney acts as the title or real estate settlement agent ("special trust accounts"), while others would involve trust accounts used for multiple purposes ("general trust accounts").

The issue presented is whether, or under what circumstances, the proposed audits would be ethically permissible under Rule 4-1.6, Rules Regulating The Florida Bar. This rule spells out an attorney's ethical duty of confidentiality:

> (a) Consent Required to Reveal Information. A lawyer shall not reveal information relating to representation of a client except as stated in subdivisions (b), (c), and (d), unless the client consents after disclosure to the client.
>
> (b) When Lawyer Must Reveal Information. A lawyer shall reveal such information to the extent the lawyer believes necessary:
> (1) to prevent a client from committing a crime; or
> (2) to prevent a death or substantial bodily harm to another.
>
> (c) When Lawyer May Reveal Information. A lawyer may reveal such information to the extent the lawyer believes necessary:
> (1) to serve the client's interest unless it is information the client specifically requires not to be disclosed;
> (2) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and client;
> (3) to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved;
> (4) to respond to allegations in any proceeding concerning the lawyer's representation of the client; or
> (5) to comply with the Rules of Professional Conduct.

(d) Exhaustion of Appellate Remedies. When required by a tribunal to reveal such information, a lawyer may first exhaust all appellate remedies.

Rule 4-1.6, Rules Regulating The Florida Bar, ordinarily obligates an attorney to refrain from voluntarily revealing any "information relating to representation of a client" unless: (1) the attorney has the client's consent; or (2) the attorney fits one of the exceptions articulated in Rule 4-1.6. The ethical duty of confidentiality exists by virtue of Rule 4-1.6. In rendering this advisory opinion the committee is simply explaining and applying Rule 4-1.6 to the facts presented.

This committee previously has recognized that trust account records are confidential under Rule 4-1.6. See Florida Ethics Opinion 72-3. Likewise, the committee has opined that a client's identity may be confidential. See Florida Ethics Opinions 77-25 and 62-24. Thus, the information contained in trust account records falls within the broad ambit of confidentiality established by Rule 4-1.6(a).

Because of the duty of confidentiality, an attorney/agent ethically may permit a title insurer to audit the attorney's general trust account only if the affected clients have consented.

With regard to audits of a special trust account, however, one of the exceptions to the Rule 4-1.6 duty of confidentiality is relevant. Subdivision (c)(1) authorizes an attorney to disclose confidential information "to serve the client's interest unless it is information the client specifically requires not to be disclosed." The committee recognizes that audits by title insurers ~~insurance underwriters~~ are necessary to ensure the safety of the funds deposited in the special trust account and thus facilitate a satisfactory conclusion for those whose funds are placed in the account. Consequently, if a special trust account is used exclusively for transactions in which the attorney is acting as the title or real estate settlement agent, the attorney ethically may permit the proposed audits unless the attorney has been specifically directed otherwise by the client; provided, however, that the attorney has no obligation to affirmatively disclose such right to the client.

F.S. sec. 626.8473(8) (2012) which requires attorneys to "deposit and maintain all funds received in connection with transactions in which the attorney is serving as a title or real estate settlement agent into a separate trust account and permit the account to be audited by its title insurers" is consistent with this opinion.

Just as Rule 5-1.1 properly places the responsibility of maintaining a trust account on each individual lawyer, it has long been recognized, in practice and the comments to the Rule, that the obligation does not require each attorney to maintain his or her own trust account, but that the obligation may be satisfied through the maintenance of one or more law firm trust accounts.

The same interpretation should be applied to F.S. sec. 626.8473(8). Each individual attorney has a statutory duty to assure compliance, but compliance may be achieved through maintenance of a firm special trust account subject to title insurer audit. Likewise, we do not interpret F.S. sec. 626.8473(8) to require

the maintenance of a separate or special trust account for each client, for each transaction, or for each title insurer, although there is no prohibition on maintaining multiple trust accounts should the attorney or law firm so desire. Where the attorney is serving as a title or real estate settlement agent, escrow funds from multiple clients may properly be deposited into a single special trust account, subject to audit by any or all of title insurers with whom the attorney or law firm maintains a relationship.

The Committee is aware that in most real estate transactions, all parties, opposing counsel, and real estate brokers will be privy to the closing statement. In such cases, there are no confidentiality concerns in permitting an audit to confirm disbursements were made in accord with the approved closing statement and there is no affirmative duty to advise clients of the option to insist on the use of an unaudited account. Where other facts or considerations suggest the potential advisability of a different course of action, the attorney should advise his or her client in accord with the attorney's best professional judgment.

To the extent that funds received in connection with a title or real estate transaction are shown on the closing statement for the transaction, such funds must be deposited and maintained in a special trust account in accordance with Section 626.8473(8). The attorney is not required to disclose the attorney fees on the closing statement unless required by law.

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September 19, 2012

VIA E-MAIL ONLY to: Ethics_Opinions@flabar.org
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Professional Ethics Committee
of The Florida Bar
651 E. Jefferson Street
Tallahassee, Florida 32399-2300

Attn: Elizabeth Clark Tarbert
Ethics Counsel

Attn: Loretta C. O'Keeffe, Esquire
Subcommittee Chair

Re: Request for Ethics Opinion Regarding Requirements of Section 626.8473(8), Florida Statutes, for a Separate Trust Account for Transactions when an Attorney Serves as a Title or Real Estate Settlement Agent

Dear Members of the Professional Ethics Committee:

The Real Property, Probate & Trust Law Section ("Section") appreciates the opportunity to comment upon Subcommittee Draft Proposed Advisory Opinion 12-4 (September 13, 2012) ("Draft"). The Section's Real Property Law Division considered the Draft at its meeting on September 15, 2012. There appeared to be a narrow consensus that the following provisions were workable: (1) a separate trust account for each different title insurer used by the lawyer or law firm; or (2) one separate trust account with the consent from the various title insurers to audit only the information related to transaction the title insurer had underwritten. While obtaining the client's informed consent to allow audits by multiple title insurers regarding the clients' transactions is ideal, this alternative is impractical except for those law firms with a small number of clients.

Despite the narrow consensus, many members voiced significant objections to the provision in the Draft which would prohibit multiple title

insurers from auditing a single trust account for real estate and title transactions. The Draft indicates that such an audit would violate an attorney's duty to maintain confidentiality. Some title insurers were concerned about the anti-trust implications of industry representatives agreeing to limit the scope of such audits. In addition, the title insurers and attorneys with audit experience questioned the ability to conduct meaningful audits if the auditor is prohibited from "following the money" when transferred to another trust account or if the auditor is unable to reconcile the transactions with bank statements that included transactions with other title insurers. In those circumstances, without the ability to follow the money through multiple accounts, meaningful audits would be impossible. Auditors need to be given the tools to determine the source and timing of all funds involved in their transactions in real time. Limiting access to only one of multiple escrow accounts will severely impair an auditor's ability to investigate whether an agent is engaging in fraud and greatly enhance an attorney agent's ability to conceal improper activity.

Please note that under F.S. 626.8473, the client has the right to fully preserve client confidentiality by specifically requesting that its funds be maintained in an account that is not subject to audit. The last clause of F.S. 626.8473 ("unless maintaining funds in the separate account for a *particular client* would violate applicable rules of The Florida Bar." [emphasis added]) was designed to preserve this option for a particular client.

I. Factual Background.

A predicate to any discussion concerning trust accounts for real estate transactions is the rationale for the Florida Legislature's creation of F.S. 626.8473.

A. Study Advisory Council.

The genesis for this new law is found in the 2009 Title Insurance Study Advisory Council. Defalcations by attorney agents in the last decade resulted in significant losses to title insurers. The misuse of funds led the Advisory Council to recommend legislation to "require attorneys engaged in title insurance to maintain . . . a separate escrow account for the funds to be held in escrow in which title insurance will be issued." (Final Report and Recommendations, December 31, 2012, page 8)

B. Auditing.

The Florida Legislature accepted this recommendation, granting title insurers a vehicle to audit attorney title agents' title insurance funds. Audits are a routine and customary risk assessment and management tool employed by businesses to verify the accuracy of the statements in an organization's account, to deter and expose fraud and to detect weaknesses in its internal controls. There is also a public policy justification for allowing audits to protect the client, the public and the financial stability of the title

insurance industry. This public policy is reinforced by The Florida Bar's strict enforcement of trust account disbursements, not only to protect the client but also to assure the public that an attorney will properly handle real estate transaction funds.

The Section believes that it is imperative that the Committee's final opinion balance the duty to maintain client confidences with realities of what is practical in real estate transactions. Title insurance is a necessary component of nearly all bona fide arms-length real estate transactions: conveyances, mortgages and long-term commercial leases. Simply stated, title insurance facilitates the real estate market by assuring the efficacy of title.

The Bar has recognized the traditional and significant role of attorneys in real estate transactions, including the examination of title and issuance of title insurance policies as title agents. The real estate attorney's position has eroded over the years with the growth of non-attorney title and closing agents. Consequently, to a large extent, parties to real estate transactions have lost the advice of informed counsel which can mitigate costly disputes and litigation. The attorney has a fiduciary duty to protect the interest of the client, while the non-attorney title agent does not have that obligation.

Significantly, in this market shift, title insurers have the ability to audit their non-attorney agents without confidentiality impediments. Thus, the Draft opinion's confidentiality stance could significantly undermine the role of attorneys in real estate transactions and deprive the parties of valuable counsel. The Florida Bar should not be espousing a position that lessens client protections, diminishes the role of attorneys in real estate transactions and discourages business relationships between title insurers and attorney agents.

In a separate but related area, the Supreme Court of Florida's approach to the issue of trust account checks signatories would favor auditing requirements that take into account practical concerns, not just aspirational concepts. First, the Court has rejected stringent rules prohibiting non-attorneys from signing trust account checks. The Court expressly considered the need "to accommodate the issues raised by solo practitioners and lawyers in small firms." *In re Amendments to the Rules Regulating the Florida Bar (Biannual Report)*, ____ So. 3d ____ (No. SC10-1967, April 13, 2012). Second, the decision leaves in place a broad group able to sign checks, not just regulated attorneys.

C. Circumstances.

We would like to believe that attorneys are not involved in the significant losses to citizens of this State; however, sadly, that belief is not always justified. A review of nearly any edition in last few years of the *The Florida Bar News* quickly reveals that a very small, but still significant, number of "bad apples" cause great harm. These bad attorneys directly injure their clients and the title insurers, both of whom suffer losses

from fraud. Public confidence in the sanctity of attorney trust accounts and the profession generally is significantly undermined by attorney fraud and defalcations.

II. Practical Considerations.

Treating virtually all information that an attorney receives in connection with a transaction as confidential without exception is not only contrary to established practice, but is also impractical and frequently contrary to the client's interest in an expedited closing. The Draft does not give sufficient weight to the exception in Rule 4-1.6(c)(1) that allows a lawyer to reveal information relating to the representation of a client to the extent necessary "to serve the client's interest unless it is information the client specifically requires not to be disclosed . . . ." The commentary to the Rule explicitly recognizes that "[a] lawyer is impliedly authorized to make disclosures about a client when appropriate in carrying out the representation, except to the extent that the client's instructions or special circumstances limit that authority."

The Draft fails to account for the fact that the attorney must frequently disclose information about the client or real estate transaction in order to accomplish the client's objective of closing the transaction. Real estate practitioners have historically exchanged information with many third-party vendors involved in the real estate title transaction. For example, the transactional attorney routinely provides title insurers with the names of the parties, parcel information, purchase price, mortgagee, mortgage amount, and other information. The attorney also has a need to disclose information about the client and the transaction during the course of exercising due diligence, ordering title information or commitment, preparing for closing, investigating zoning and land use, requesting estoppel information from mortgagees, tenants, condominium associations, homeowner associations and real estate brokers, and arranging for surveys, environmental inspections, physical inspections and geotechnical testing.

An ethical threshold that does not serve the client's best interest and is not practical to apply is counterproductive. Impractical ethical mandates create unintended violations on a regular basis. Subjecting otherwise everyday and accepted conduct to sanction on a potentially arbitrary basis generates disregard, if not contempt, for the threshold.

III. Conclusion.

If attorney agents are permitted to hide behind trust account confidentiality while title insurers that bear the losses are not permitted to take reasonable preventive or investigative action, then title insurers will have little incentive to retain and cultivate their strong relations with attorney agents. In Florida, the issuance of title insurance and the legal representation in the transaction are often linked. Both clients and the general

public will suffer if fewer attorneys are involved in real estate transactions and title insurance.

There is an undeniable tension between protecting the public, the marketplace, and the touchstone of confidentiality. However, the Draft's position that an attorney may not permit multiple title insurance companies to audit a single trust account used exclusively for real estate and title transactions materially impairs the ability of title insurers to conduct necessary and appropriate audits and ignores their significant benefit to the client and the public.

If you have any questions regarding any of our recommendations or comments, please contact me at (727) 821-1249 or the RPPTL Section's Chair-Elect, Peggy Rolando, at (305) 379-9144. Thank you for your consideration of the Section's recommendations and supporting comments.

Very truly yours,

William F. Belcher

Wm. Fletcher Belcher, Chair
Real Property, Probate & Trust Law Section
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April 16, 2013

VIA ELECTRONIC MAIL

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Re: Request for Ethics Opinion Regarding Requirements of Section 626.8473(8), Florida Statutes, for a Separate Trust Account for Transactions When an Attorney Serves as a Title or Real Estate Settlement Agent

Dear Members of the Professional Ethics Committee:

As a consequence of confusion within the Bar resulting from the enactment of s. 626.8473(8), Fla. Stat., in 2012, the RPPTL Section has previously requested the Professional Ethics Committee of The Florida Bar to issue a new Ethics Opinion reaffirming Opinion 93-5 and clarifying it to specifically address the related issues raised by the enactment of s. 626.8473(8).

The essence of the Section's position is that disclosure by an attorney incident to an audit pursuant to s. 626.8473(8) of a separate trust account maintained by the attorney exclusively for funds received in connection with transactions in which the attorney is serving as a title or

real estate settlement agent serves the client's interest and is therefore permissible under Rule of Professional Conduct 4-1.6(c).

Realizing the complexity of these issues and their great importance to attorneys practicing real estate law in Florida, through this letter and the attached proposed draft opinion, the Section respectfully seeks to assist the Committee by providing information, technical assistance, and analysis. If the Committee has any questions or if there are any other ways in which the Section can provide support the Committee concerning this matter, please do not hesitate to contact any of the following RPPTL representatives: Margaret Ann Rolando, RPPTL Chair-Elect, MRolando@shutts.com; Michael J. Gelfand, Real Property Law Division Director, MJGelfand@gelfandarpe.com; or Jerry E. Aron, Former RPPTL Chair, JAron@aronlaw.com.

The discussion regarding a proposed ethics opinion addressing s. 626.8473(8) may benefit from the following foundational information describing the unique expectations and requirements present in administering an escrow relating to real estate transactions.

Preserving the Public's Access to Legal Counsel in Real Estate Transactions

The public is best served by access to the knowledge, skill and training of attorneys in conducting real estate transactions. Legislative, regulatory and market pressures demand oversight of the escrow and trust accounts through which billions of dollars flow annually for Florida real estate transactions.

In two years alone (2008 and 2009), one title insurer suffered losses of $65 million when funds held for Florida real estate transactions were stolen from attorney controlled trust accounts by attorneys or their employees. Three Florida domestic title insurers have been required to cease issuing policies in significant part due to theft from attorney trust accounts. While the bulk of trust account theft losses were sustained by title insurers, significant sums were also lost by members of the public. In response to such losses and other issues, the Florida Legislature created the Title Insurance Study Advisory Council, chaired by then Lt. Governor Jeff Kottkamp.

The Advisory Council's Final Report and Findings issued in 2009 noted that questions were raised regarding "who should be allowed to establish escrow accounts and remit funds to preclude the misuse of those funds." After hearing testimony concerning Florida Ethics Opinon 93-5, the Council recommended that attorneys engaging in title insurance transactions be required "to maintain in a separate escrow account for the funds to be held." This recommendation was the impetus for s. 626.8473(8), which includes language drawn from Florida Ethics Opinion 93-5. Without the protections of this statute, title insurers and other parties may no longer permit attorneys to hold funds from real estate transaction and act as title insurance agents. At particular risk would

be attorneys in smaller firms. The negative impact on real estate attorneys and the representation of their clients would be significant.

The financial services market is also moving to require oversight of trust and escrow accounts. The Service Providers Bulletin issued by the Consumer Financial Protection Bureau (created by the federal Dodd-Frank Act) on April 13, 2012, stated that:

> "The Consumer Financial Protection Bureau (CFPB) expects supervised banks and non-banks to oversee their business relationships with service providers in a manner that ensures compliance with Federal consumer protection finance law, which is designed to protect the interests of consumers and avoid consumer harm."

Although the Bulletin approves of the use of third party providers, it hastens to add that doing so "does not absolve the supervised bank or non-bank of responsibility for complying with Federal consumer financial law to avoid consumer harm." The CFPB set forth its expectation that lenders have "an effective process for managing the risks of service provider relationships [and] should take steps to ensure that their business arrangements with service providers do not present unwarranted risks to consumers."

The crux of the CFPB Bulletin delineates the steps expected of lenders when considering or entering into third party provider arrangements. "These steps should include, but are not limited to:

- Conducting thorough due diligence to verify that the service provider understands and is capable of complying with Federal consumer financial law;

- Requesting and reviewing the service provider's policies, procedures, internal controls, and training materials to ensure that the service provider conducts appropriate training and oversight of employees or agents that have consumer contact or compliance responsibilities;

- Including in the contact with the service provider clear expectations about compliance, as well as appropriate and enforceable consequences for violating any compliance-related responsibilities, including engaging in unfair, deceptive, or abusive acts or practices;

- Establishing internal controls and on-going monitoring to determine whether the service provider is complying with Federal consumer financial law; and

- Taking prompt action to address fully any problems identified through the monitoring process, including terminating the relationship where appropriate.

The definition of "Service Providers" contained in the Dodd-Frank Act includes title and settlement agents, including attorney agents. Lenders are demanding a mechanism to meet the CFPB requirements relative to title and settlement agents. Giving title insurers the full ability for "on-going monitoring" of trust accounts may be necessary to meet the requirement of determining whether the provider is complying with Federal consumer financial laws such as RESPA.

Attorneys as Title Insurance Agents

Florida citizens benefit from attorney title insurance agents far more than any other state. Over 4,000 Florida attorneys are available to assist the public as title insurance agents. The percentage of policies issued by independent title insurance agents in the three most active states are:

California – 15%
Texas – 50%
Florida – 85%

Approximately two-thirds of the independent title insurance agents in Florida are attorneys. Agent oversight is an important component of a title insurer's ability to manage risk. Licensed title agents are required by Fla. Admin Code §69O-186.009 to provide the appointing title insurer with a completed escrow account reconciliation monthly. In this time of extraordinary loss by title insurers, attorneys must be permitted to demonstrate their good stewardship of the funds of others to preserve the role of attorney agents for the benefit of the public.

The role of the closing protection letter deserves special comment. Lenders and purchasers routinely send millions of dollars to real property settlement agents to be held in trust or escrow and appropriately disbursed as directed by the lender. With the amount of money at risk, lenders will not send the money to independent settlement agents without certain assurances from title insurers, which are given in the form of closing protection letters. Without such assurances, many lenders and purchasers will not permit attorney agents to hold trust or escrow funds and will only conduct such business directly with title insurers, thus depriving the public of the benefits of an attorney conducting the real estate closing. The provisions of closing protection letters, which protect lenders and purchasers from fraud or dishonesty of the agent in handling the lender's funds, are defined in the Florida Administrative Code.

In order to serve clients by acting as settlement agents, attorneys must request this additional coverage for lenders and purchasers from title insurers, who have a very legitimate interest in protecting the trust and escrow funds held by attorneys and must be able to take reasonable measures to manage the risk associated with this additional protection for the attorneys' clients.

Client's Best Interest and Expectations of Confidentiality

The client's expectation of confidentiality with respect to the source and disbursement of trust or escrow funds in a real estate transaction is fundamentally different than in most other types of legal representation, where it is rarely in the client's interest to disclose information relating to the representation to a third party. In the real estate transaction, the attorney is specifically engaged to collect and disburse funds in accord with the terms of the contract. That process necessarily requires the disclosure of information regarding the receipt and disbursement of those funds – sometimes as expressly required in the contract, other times to further the goal of closing the transaction – to a number of third parties. Disclosing information regarding all receipts and distributions in a real estate transaction is necessary to serve the client's interest.

In addition, Federal law requires the complete and accurate disclosure of all funds received and disbursed by settlement agents in transactions regulated by the Real Estate Settlement Procedures Act (RESPA).

Some of the many examples unique to real estate transactions in which it is necessary to disclose information concerning receipts and disbursements in order to serve the client's interest are as follows:

Residential Transaction with a Purchase Money Mortgage

Florida attorneys close hundreds of thousands of transactions each year. Note that the attorney's client may be the buyer, the seller or the lender. An attorney will owe certain duties to each of the parties irrespective of which party is the attorney's client.

Parties interested in the transaction:

Seller – Will require confirmation from attorney that attorney has received buyer's deposit in cleared funds.

Buyer – Will require confirmation from attorney that estoppel letters have been obtained from lienholders and payments are timely paid.

Holder of existing mortgage – Responds to a payoff request from attorney settlement agent with information on the amount necessary to satisfy an outstanding mortgage.

Purchase money lender - Will require buyer to invest buyer's own funds into the property, often 20% of the purchase price. Lender will require attorney settlement agent to verify that buyer's funds have come from a source acceptable to lender. Past abuses have included buyer's cash to close coming directly or indirectly from the seller, inflating the apparent sales price of the property. Lender will require closing protection letter that

is consistent with Fla. Admin. Code 69O-186.010 from settlement/title agent's insurer as a condition of permitting an independent attorney agent to receive lender's proceeds. Lender will also require attorney to provide the HUD-1 settlement statement disclosing all receipts and disbursements prior to funding the mortgage. The form and disclosures required by the HUD-1 are promulgated pursuant to 12 U.S.C.A. §2603 of the Real Estate Settlement Procedures Act (RESPA).

Title insurer – Attorney agent's title insurer is interested in the trust account in three ways:

1. Upon closing, insurer's portion of the title insurance premium is property of insurer. RESPA requires disclosure of insurer's portion on settlement statement.

2. Pursuant to closing protection letter, title insurer has agreed, subject to certain conditions, to reimburse lender for actual loss sustained by reason of:
    a. Failure of attorney agent to comply with written instructions related to the status of title or obtain any document specifically required by the lender; and
    b. Fraud or dishonesty of the attorney agent in handling lender's funds or documents. Insurer must be able to verify attorney's representations to lender regarding source of funds, often requiring examination of multiple trust accounts.

3. Confirm payments to prior lienholders have cleared in order to discharge contractual obligations to buyer and lender.

Attorney agent – As a settlement agent closing a transaction subject to the federal Real Estate Settlement Procedures Act, attorney is required to complete and distribute a HUD-1 settlement statement and must:

1. Accurately disclose all funds received, together with the recipient and amount of all funds distributed; and

2. Execute the following Settlement Agent Certification on the HUD-1 settlement statement:

> The HUD-1 Settlement Statement which I have prepared is a true and accurate account of this transaction. I have caused the funds to be disbursed in accordance with this statement.

Condominium or Homeowner's Association – Attorney agent advances estoppel letter fee and receives funds designated to pay outstanding association dues and fees.

Real estate brokers and salesmen – Real estate commissions earned by real estate licensees are disclosed on the settlement statement and are to be paid directly from the attorney's real estate related trust account.

Homeowner's insurance company – Property insurance companies frequently issue a binder prior to the closing and buyer and lender require payment of the premium by the settlement agent from the attorney's real estate related trust account.

Surveyors – Surveyors routinely deliver completed surveys to attorney title/settlement agent with instructions for payment from the real estate related trust account.

Child support recipients (via clerk of court) – Recorded certificates of delinquency constitute a cloud on the title to real estate. Title/settlement agents, including attorney agents, disburse millions of dollars a year from trust and escrow accounts to pay delinquent child support obligations.

Construction lien holders (recorded and unrecorded) – Contractors, subcontractors, laborers and parties supplying materials for the improvement of real estate are entitled to liens against the property if they are unpaid. Attorney agent will determine any amount unpaid and satisfy the lien with payment from the real estate related trust account.

County recording offices – Attorney settlement agents are required to communicate the exact consideration paid for real estate and the amount of any mortgage to the county recording office and pay the calculated taxes from the real estate related trust account.

Receipts and Disbursements

A ledger card ("Balance Sheet") and settlement statement (HUD-1 Settlement Statement) for a typical real estate transaction is attached to illustrate the following points:

1. The funds of buyer, seller and lender are held for a very short time. The HUD-1 Settlement Statement disclosing the planned receipt and disbursement of all funds must be approved prior to attorney's receipt of funds.

2. Disbursements are made to a large number of parties. Each party is interested in the escrow funds and is aware funds are being received to be disbursed to them. The the information concerning the existence of the funds in trust is not confidential. These parties may include buyer, seller, prior lender(s), new lender, real estate brokers and salesmen, title insurers, surveyors, home warranty companies, homeowner's associations, condominium associations, home inspectors, judgment holders, child support receipients, construction lien holders (recorded and unrecorded), and county recording offices.

3. The title insurer's check is often prepared and dated the date of closing, but held until the policy is prepared and issued 30 to 60 days later, during which time attorney is holding funds of the title insurer.

Commercial Transaction

Commercial transactions are not subject to the disclosures mandated by RESPA for residential transactions. However, commercial transactions also require the accurate disclosure of the consideration for the transaction when recording documents, the debt secured by mortgages, verification of cash to close, and confirmation of deposits and escrows held for tenant deposits. Purchasers and lenders in commercial transactions routinely require closing protection letters with the attendant title insurer risk and exposure described above.

Proposed Opinion

Upon careful consideration of the unique aspects of representation of a client involved in a real estate transaction and the multiple obligations to parties other than clients, the attached proposed opinion is respectfully submitted in hopes that it will facilitate the work of the Committee and its Subcommittee on Real Estate Trust Accounts on this matter.

Sincerely yours,

William F. Belcher

Wm. Fletcher Belcher, Chair
Real Property, Probate and Trust Law Section
of The Florida Bar

cc: Gwynne A. Young, Esq.
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Lynwood Arnold, Esq.
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William Sklar, Esq.
Yvonne Sherron
ALL VIA E-MAIL

From: Margaret A. Rolando
Sent: Sunday, June 30, 2013 1:04 AM
To: 'Fletch Belcher'
Subject: RE: Ethics Opinion

Fletch, the draft opinion approved by the Committee is disappointing and problematic. It takes the position that a title insurer cannot audit a separate trust account for real estate transactions without the informed consent of the client unless the attorney believes it to be in the best interest of the client. Thus, the decision to allow an audit is determined solely by the lawyer. The opinion allows the dishonest attorney to use lack of informed consent to shield his or her trust account from the scrutiny of an audit. A dishonest lawyer has no incentive to solicit informed consent to an audit from clients.

The opinion also is contrary to the intent of Section 626.8473(8) which reads as follows:

> 8) An attorney shall deposit and maintain all funds received in connection with transactions in which the attorney is serving as a title or real estate settlement agent into a separate trust account that is maintained exclusively for funds received in connection with such transactions and permit the account to be audited by its title insurers, unless maintaining funds in the separate account for a particular client would violate applicable rules of The Florida Bar.

The statute contemplates that the attorney *shall* permit the separate trust account to be audited. The qualifying phrase does not say "unless allowing an audit of the separate account would violate the rules of The Florida Bar." It says "unless ***maintaining funds in the separate account for a particular client would violate applicable rules of The Florida Bar.***" Clearly, maintaining a client's funds is a separate account is not a violation of the Bar rules. This provision was enacted by the Legislature on the recommendation of the Title Insurance Study Commission, chaired by Jeff Kottkamp. I am quite concerned that the PEC's advisory opinion could be construed as an attempt to flaunt the legislative intent of Section 626.8473(8). Also, it has taken several years of effort by TFB to rebuild its relationship with the Legislature after fights over court funding. This opinion is not a positive move.

A couple of months ago the local media was buzzing with stories about a Boca Raton attorney who disappeared and $6,000,000 was missing from his trust and title company escrow accounts. It would be very easy for the Legislature, press and public to interpret this advisory opinion as an attempt by The Bar to shield bad lawyers from legitimate efforts to detect theft from real estate accounts holding client and non-client funds.

Regards. Peggy

From: Fletch Belcher [mailto:wfbelcher@gmail.com]
Sent: Saturday, June 29, 2013 4:42 PM

To: Margaret A. Rolando
Subject: Ethics Opinion

Peggy:

Hope that you survived your busy week.

I read the recent e-mail from Elizabeth Tarbert stating that the next revised draft opinion will not permit audits by title insurers without client consent unless the audit falls within one or more exceptions to the disclosure of confidential information forth in the Rule. What is your read on this? What do you believe is the status of the position that such audits come within the best interest of the client exception? Thanks.

Fletch
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John Neukamm

From: Alan B. Fields <alan@flta.org>
Sent: Tuesday, May 28, 2013 9:40 AM
To: 'Lynwood Arnold'
Subject: Auditing of Attorney Trust Accounts

Lynwood,

As you requested, I have reached out to each of the title insurance companies who are members of the Florida Land Title Association. While I have not received responses from all, everyone responding (representing over 90% of the Florida title insurance business including all the major underwriters) has indicated a willingness to enter into confidentiality agreements with attorney-agents as regards any client information which comes into their possession in the course of an audit or otherwise. I anticipate every title insurer will agree to confidentiality agreements if such will assist their attorney-agents in meeting their ethical obligations.

Each was quick to indicate that as financial institutions, title insurers are already subject to rigorous privacy obligations under an assortment of federal and state laws, including the Gramm, Leach, Bliley Act.

Regards,

Alan

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FLTA

close with confidence

January 22, 2013

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RE: Request for Ethics Opinion Regarding Requirements of Sec. 626.8473, Florida Statutes

Dear Members of the Professional Ethics Committee:

The 2012 Florida Legislature adopted s. 626.8473(8), Florida Statues. The section requires attorneys to maintain funds received in connection with real estate transactions "in which the attorney is serving as a title or real estate settlement agent" in a separate trust account. The section further requires attorneys to permit the separate trust accounts to be audited by their title insurers unless maintaining funds in the separate accounts would violate applicable rules of the Florida Bar.

The Committee considered the application of the section in light of applicable Rules Regulating the Florida Bar at the Committee's September 21, 2012 meeting. During that meeting, a question was raised inquiring as to the safeguards title insurers have in place to protect information gathered during an audit. This letter will address that question. This response does not address the question of whether the records of trust accounts dedicated to real estate transactions constitutes information subject to attorney client privilege.

Title insurers are regulated by both state and federal law. Applicable provisions of both state and federal law require title insurers to protect non-public personal financial information from disclosure.

Financial Services Modernization Act, a/k/a Gramm-Leach-Bliley (GLB)

15 U.S.C. § 6801 provides as follows:

(a) Privacy obligation policy

It is the policy of the Congress that each financial institution has an affirmative and continuing obligation to respect the privacy of its customers and to protect the security and confidentiality of those customers' non-public personal information.

(b) Financial institutions safeguards

In furtherance of the policy in subsection (a) of this section, each agency or authority described in section 6805(a) of this title, other than the Bureau of Consumer Financial Protection, shall establish appropriate standards for the financial institutions subject to their jurisdiction relating to administrative, technical, and physical safeguards -

(1) to insure the security and confidentiality of customer records and information;

(2) to protect against any anticipated threats or hazards to the security or integrity of such records; and

(3) to protect against unauthorized access to or use of such records or information which could result in substantial harm or inconvenience to any customer.

16 CFR § 313.10, promulgated under the authority of GLB, prohibits disclosure of any non-public personal information about a consumer to a non-affiliated third party unless the consumer has elected to opt out of the protection after adequate and defined notice.

Title insurers are "financial institutions" under the definitions of GLB. "Consumer" means an individual who obtains, from a financial institution, financial products or services which are used primarily for personal, family or household purposes, and also means the legal representative of such a person. 15 U.S.C. § 6809.

Fla. Admin. Code Chap. 690-128, Privacy of Consumer Financial and Health Information

Subtitle 690 of the Florida Administrative Code sets forth the regulations of Florida's Office of Insurance Regulation. Fla. Admin. Code r. 690-128.011 is entitled Limits on Disclosure of Nonpublic Personal Financial Information to Nonaffiliated Third Parties. The regulation prohibits the disclosure of nonpublic personal information about a consumer unless the consumer has elected to opt out in a procedure very similar to the federal rules.

Chap. 690-128 regulates all insurers required to be licensed or authorized in Florida. All title insurers appointing agents in Florida must be licensed or authorized by the Office of Insurance Regulation.

Application of the federal and state rules

It should be observed that audits of title insurance agents do not routinely result in capturing or copying trust account information unless a specific risk or irregularity has been identified and further analysis is necessary to protect the title insurer and clients of the title agent.

To comply with both state and federal law, title insurers must have policies and procedures in place to protect the nonpublic personal information about a consumer acquired from any aspect of the insurer's operations.

The federal and state regulations cited above are applicable to an individual that seeks to obtain an insurance product or service for personal, family or household purposes. It is true that attorneys' real estate trust accounts may include information on commercial real estate transactions that are not within the protected class of the state and federal privacy regulations.

As a practical matter the privacy safeguards title insurers must have in place for consumer information also inures to the benefit of non-consumer information. It is difficult to imagine that a title insurer would operate two systems to capture and analyze information to permit one system to avoid the regulatory safeguards.

Any risk of a breach of confidentiality to a third party is very remote and the benefits of an audit to the attorney's clients are immediate.

Attorney Discretion

Rule 4-1.6(c)(1) permits a lawyer to reveal confidential information to the extent the lawyer reasonably believes it will serve the clients interest.

With this standard and the benefits described in my previous letter to the Committee, a lawyer may believe it would be in the client's best interest to permit a title insurer to audit an account that may include transactions insured by another title insurer. As described in my previous letter, there are immediate benefits to clients to have an independent audit conducted. At a minimum, it should be left to each attorney to establish whether to maintain one common real estate transaction account or one for each title insurer's transactions. It cannot be said that the clients are never benefitted by audits by title insurers irrespective of whether a particular transaction was insured by the auditing insurer.

Current Third Party Review of Trust Accounts

I can report that many attorneys engage third party bookkeepers and accountants to reconcile trust accounts. In fact, the Florida Bar's Law Office Management Assistance Service (LOMAS) posts forms contemplating use of nonemployee CPAs to reconcile trust accounts. Certainly it is in the clients' best interest for attorneys to disclose trust account

information to such experts. Such experts assist attorneys in protecting client funds. Audits by title insurers responsibly provide a related service.

Client Directed Confidentiality

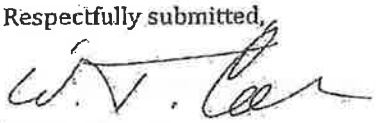
Rule 4-1.6(c)(1) contains one limitation on a lawyer's authority to reveal confidential information to serve the client's interest. The information may not be disclosed if the client specifically requires that the information not be disclosed.

S. 626.8473(8), Florida Statues accommodates this provision. I was privileged to be invited by Rep. George R. Moraitis, Jr. and Sen. Thad Altman to provide technical assistance in drafting HB 643 and SB 1404 creating s. 626.8473(8) Florida Statutes. The section requires funds be maintained in a separate account for audit "... unless maintaining funds in the separate account for a particular client would violate applicable rules of The Florida Bar."

The audit requirement was enacted to protect individuals and businesses depositing funds with attorneys, and to manage losses by title insurers that could lead to increased premium rates. The provision permitting a client to opt out of audit protection was placed in the section to accommodate the relatively rare client who directs complete confidentiality. Such confidentiality direction is more likely to occur in larger commercial transactions where creating a separate account for the transaction, exempt from audit, may be economically feasible.

If you have any questions, please do not hesitate to contact me.

Respectfully submitted,



W. Theodore Conner
Senior Vice President, General Counsel

32249

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January 23, 2013

The Florida Bar
Professional Ethics Committee
c/o Elizabeth Tarbert, Esq.
651 E. Jefferson Street
Tallahassee, FL 32399-2300

Via E-mail to: eto@flabar.org

Re: Draft Proposed Advisory Opinion 12-4 (Revised January 8, 2013)

Ladies & Gentlemen:

As a transactional real estate attorney, and on behalf of the Attorney-Agent members of the Florida Land Title Association I wanted to share some thoughts and concerns about the draft Proposed Advisory Opinion 12-4 (Revised January 8, 2013).

The Role for Which my Client Hired Me is Not One Where Absolute Confidentiality is Expected or Desired.

First, I want to put something into context that may have been missed in the initial drafting. When you hire me, or any attorney, to represent you in a residential closing – as Buyer or Seller – you have a very different set of expectations and goals in mind. You are hiring me specifically to guide you through the closing process, to assist you in meeting your obligations under the contract you signed (usually long before you hired me), and perhaps most of all, to get the deal closed. You are not hiring me to be a zealous advocate, but to protect your rights under the contract you negotiated while carrying out the goals of that contract. When you further ask that I serve as the escrow and settlement agent or title agent, you have immediately introduced me into a situation where I may have conflicting duties.[1]

About the first thing that happens is someone's Realtor® brings me the earnest money deposit check. That may or may not be money "belonging" to my client – depending on whether my client is the buyer or seller -- and the instant I accept that money, I have fiduciary duties to all

[1] Such conflicting duties are recognized in Ethics Opinion 02-6; The Florida Bar v. Golden, 566 So.2d 1286 (Fla. 1990) and The Florida Bar v. Joy, 679 So.2d 1165 (Fla. 1996).

parties in the transaction. In contrast to a traditional lawyer trust account – I can't simply refund your unused funds on request.

To meet my obligations as an escrow agent, I'm going to send out confirmation that I received the deposit[2] – And Oops, I didn't get a separate informed consent before doing so.[3] Confirming receipt of your funds in accord with the contract is one of my obligations as escrow agent, so I will also send out a second confirmation when the second earnest money deposit is received.

As the various information and inspections come in, and conditions of the contract are satisfied, I notify the parties to the transaction. All parties (and their Realtors® and the lenders) will hear from my office when the termite inspection comes in, when the survey has been received and reviewed, when the title has been examined, everyone will get a copy of the title commitment, sometimes with a demand that the seller clear certain defects, the parties will be told when the mortgage payoffs come in, if we learn of any open building permits or liens, and so forth.

In order to obtain title insurance – again as contemplated in the contract -- I must open an order with my insurer and/or with a search/abstract company in order to obtain the title search. That necessarily involves a disclosure of the parties to the transaction, the property being sold/refinanced and the amounts to be insured.

As closing/settlement agent, the lender involved will impose another set of duties – including disclosure duties -- on my office in the form of written closing instructions. At closing, both parties, the lenders[4] and the Realtors® will receive a copy of the completed closing statement.

However, under the standards of the draft opinion, all of that information – even the portions which come directly from the public records – could be construed as confidential information.

Historically an attorney engaged to serve as an escrow-closing agent has not sought informed consent for each specific disclosure – it is all part of the process my client has hired me to facilitate and, once I have undertaken duties as escrow agent or to the lender, the client's decision to withhold certain information would put me into an immediate conflict as to the other

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[2] That notification is, of course, consistent with Rule 5-1.1(e) requiring not only notification, but rendering a full accounting to the client or third parties. This requirement highlights the inherent conflict between the confidentiality obligations of Rule 4-1.6 and the trust account duties of Rule 5-1.1(e).

[3] The FAR/BAR contract does not include a waiver of attorney-client confidentiality to permit this information to be shared, nor do I believe that a client can give "informed consent" at a time they don't have an attorney to advise them.

[4] Providing a copy of the final, signed closing statement showing both sides of the transaction is a requirement of almost all lender closing instructions.

duties I've undertaken on behalf of that client.[5] Moreover, withholding information would not only give an appearance of impropriety, but depending on the information being withheld, could constitute assisting my client in committing a crime by withholding material information from a lender.[6]

The simple fact is that, in a residential real estate transaction, the attorney is engaged specifically to facilitate the transaction in accord with the terms of the contract. That requires distributing information – sometimes as expressly required in the contract, other times to further the goal of closing the transaction -- that in another context might be considered confidential.

As such these disclosures, including the disclosure to facilitate audits by title insurers, further the client's interests[7] and thus fall squarely within the exception at Rule 4-1.6(c)(1). Imposing a requirement of informed consent for each disclosure is not only contrary to the client's expectations, desire to consummate the transaction, and often express contractual duties, it is wholly impractical when (as is the normal case) the earnest money deposit and contract are signed and delivered to your office well before your first meeting with the client and your first meaningful opportunity to discuss informed consent.

As to the Detail of the Draft Ethics Opinion:

1. The draft opinion attempts to distinguish Opinion 93-5 as having been based on "the assumption that only transactions insured by that one title insurer would be included in the special trust account." This is a flawed assumption. While it is true that at the time the opinion was requested, Louis Guttmann was assistant general counsel of Attorney's Title Insurance Fund, Inc., he was also an active member of the Executive Council of the Real Property, Probate and Trust Law Section (RPPTL)[8]. He recently confirmed to me that the request for opinion "was not written under that assumption." In fact, his request for the opinion was first circulated and discussed within the leadership of the RPPTL section and with other title insurers then serving on the RPPTL Title Insurance Committee.

Those submitting the request for an opinion did not believe their request was limited to audits by a single insurer only as to that insurer's transactions. We would be very surprised if the records of the ethics committee suggest that a contrary representation had been made by Mr. Guttmann

[5] Here I'm referring specifically to the duties to all parties under the escrow and to the duties imposed by the lender's closing instructions.

[6] See e.g. §817.545, Fla. Stat. (2012) and 18 U.S.C. §§1012, 1014.

[7] Obviously under the second clause of the exception -- "unless it is information the client specifically requires not to be disclosed" – the client always retains the right to specifically direct otherwise.

[8] Mr. Guttmann also served as the RPPTL Legislative Committee Chair and later as RPPTL Section Chair.

or even that such an assumption was expressly made by the Professional Ethics Committee at the time Opinion 93-5 was drafted.

2. The duty of confidentiality is an absolute. There is no distinction in Rule 4-1.6 and its exceptions between allowing the specific title insurer to audit, and not allowing other insurers, or for that matter for providing any information to others involved in a given transaction. Submission to audits is not a precondition to the issuance of title insurance. As such, the conclusion in the draft opinion that the insuring company is permitted to audit transactions that particular company insured must logically have been predicated on the additional protections to the client provided by a third party audit (just as was concluded in Opinion 93-5). That audit is permitted because it "serves the client's interests."

I would submit that the benefit of a third party audit by any insurer is the same (and definitely is serving the client's interests) whether or not the auditing insurer also insured a given transaction.

The draft opinion's broad confidentiality protection is directly contradicted by Rule 5-1.1(e). In an escrow context, that rule requires prompt notification of third parties upon receipt of funds and the rendering of a full accounting to the client and third parties upon request – without any requirement for informed consent. The conflict between these Rules, like the apparent conflict with the statutory duty of §626.8473 Fla. Stat., is reconciled when the "serving the interest of the client" language of the exception to Rule 4-1.6 is interpreted in the context of the client's reasonable goals and expectations in a real estate transaction.[9]

3. The proposed solutions are impractical and effectively gut the benefits of an audit – and do so in a manner that gives the client the mistaken impression that meaningful audits are being performed to protect their interests.

a. While obtaining written informed consent is obviously the "Gold Standard" under the Rule, the suggestion that consent may be obtained "in the sales contract" or in a document executed "prior to or at the closing" is based on a fundamental misunderstanding of the normal real estate sales process. The sales contract is usually prepared by one of the Realtors® involved and executed without benefit of counsel. Without a lawyer's involvement, there is no one to provide the explanation necessary for the consent to be "informed."

Obtaining the consent at or prior to closing creates a timing problem for the attorney involved. The earnest money deposit often comes into the trust account months before a closing. At the time of any audit, the trust account will contain funds relating to multiple files at all stages in the

[9] "Serving the client's interest" exception is always subject to the right of the client to specifically direct that certain information not be disclosed Rule 4-1.6(c)(1). That qualification was expressly contemplated in the final clause of §626.8473(8) Fla. Stat, which states "unless maintaining funds in the separate account for a particular client would violate applicable rules of The Florida Bar."

process – from initial deposit to completely closed. If informed consent isn't obtained prior to the very first deposit (a practical impossibility when deposits are delivered by third parties and there is a duty to promptly deposit the checks), some portion of the funds being audited will not have the requisite consents.

b. Dollars being fungible, the suggestion that the public is protected by a "partial" audit in which each title insurer would only be permitted to audit the transactions it insured is illusory -- and quite misleading to the public. Absent sloppiness in the conduct of a fraud, or thefts to such an extent that there wasn't enough in the trust account to cover the auditing insurer's transactions, the partial audit proposed would almost never be able to identify trust account shortages. The attorney being audited could always be expected to represent that the bank balance included the "correct" amount for a given insurer.

c. Nor does the suggestion that a separate account be maintained for each account adequately protect the client, although that would at least permit reconciliation to a bank balance. There are legitimate reasons for moving a transaction from one insurer to another and for transferring the related funds between trust accounts, but having only one insurer audit "their" trust account at a given time provides a ready opportunity for "kiting" among trust accounts in order to obfuscate any shortages. It also leaves unaddressed the question of whether Insurer A can permissibly audit Trust Account A when doing so would reveal deposits from a client whose transaction was ultimately closed on Insurer B after being transferred to Trust Account B.

Title Insurers are Also Subject to Privacy Laws

Although arguably not rising to quite the same level as the duty of confidentiality owed in an Attorney-Client relationship, title insurers are subject to the federal privacy obligations of the Gramm- Leach-Bliley Act.[10] To provide further assurance as to the privacy of information which might be obtained in audits of attorney-trust accounts, I inquired of many of Florida's title insurers. They unanimously indicated a willingness to consider entering into separate confidentiality agreements with law firms if such were to be required for an attorney-agent's ethics compliance – subject of course to reasonable exceptions for reporting trust account shortfalls, apparent frauds or other criminal acts.

Meaningful, Regular Audits are Important to Protect Clients

As far as protecting the clients from theft and defalcations out of an attorney trust account, the Florida Bar's audit staff and resources are dwarfed by those deployed by Florida's title insurers and the $250,000 maximum available for any client from the client security fund (and then only when funds are available at the end of a fiscal year) is miniscule by comparison to the unlimited

[10] Public Law 106-102, codified at 15 U.S.C. §6801 *et seq.*; and regulations contained in 16 C.F.R. §313 *et seq.*

liability of title insurers for defalcations by non-attorney agents under Fla. Stat. §627.792.[11] While no audit can provide absolute protection against all frauds and improprieties, regular audits by (multiple) title insurers provide an additional level of protection for clients that the Florida Bar is simply not equipped to provide – and serve the interest of the client.

To further limit the client protections provided by title insurer audits through the imposition of unworkable ethics interpretations is detrimental to clients (while perhaps providing a false sense of security), puts attorney-agents at a further disadvantage in providing real estate closing services, and may ultimately force many mid-size real estate law firms[12] to form corporate title agencies not subject to Bar regulation or IOLTA rules.

In the final analysis, we suggest that the conclusion originally reached in Opinion 93-5 that audits of a separate real estate trust account even by multiple title insurers serves the client's interest and are permitted under the exception to Rule 4-1.6, unless the client has specifically directed otherwise.

Thank you for the opportunity to submit these comments.

Sincerely,

Alan B. Fields

Alan B. Fields
Executive Director
Florida Bar No. 615919

[11] Section 627.792 provides: "Liability of title insurers for defalcation by title insurance agents or agencies.—A title insurer is liable for the defalcation, conversion, or misappropriation by a licensed title insurance agent or agency of funds held in trust by the agent or agency pursuant to s. 626.8473. If the agent or agency is an agent or agency for two or more title insurers, any liability shall be borne by the title insurer upon which a title insurance commitment or policy was issued prior to the illegal act. If no commitment or policy was issued, each title insurer represented by the agent or agency at the time of the illegal act shares in the liability in the same proportion that the premium remitted to it by the agent or agency during the 1-year period before the illegal act bears to the total premium remitted to all title insurers by the agent or agency during the same time period."

[12] Those too small to have a second underwriter will be largely unaffected by this draft opinion. The very large firms are rarely audited by insurers on the knowledge that if funds ever were missing from their trust account, the client would be made whole by the law firm partners immediately. The middle size firms, big enough to benefit from multiple insurer relationships, would find themselves caught between the proposed ethics rule and the perfectly reasonable demand of their insurers for regular audits.

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January 24, 2013

Professional Ethics Committee
The Florida Bar
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Attn: Elizabeth Clark Tarbert
Ethics Counsel
eto@flabar.org

Attn: Loretta C. O'Keeffe
Subcommittee Chair
lokeeffe@gibbblaw.com

Re: Request for Ethics Opinion Regarding Requirements of §626.8473, Florida Statutes

Dear Members of the Professional Ethics Committee:

The proposed ethics opinion regarding the auditing of attorney trust accounts currently contains several matters requiring more background information. There are three assumptions within the current draft opinion that I shall address, after which, I will share some overarching matters that underscore just how imperative it is for title insurance underwriters to audit title insurance related trust accounts.

REAL ESTATE TRANSACTION FINANCIAL DETAILS ARE NOT CONFIDENTIAL: The first assumption requiring closer scrutiny is the tacit view that the funds flowing through the real estate transaction specific trust account are confidential information. While that is an easy conclusion on its face, it does not stand up well to closer scrutiny. Real estate transactions, by their very nature, require a flow of information about funds between the client and third parties. This fundamental fact is recognized in Rule 5-1.1(e) that authorizes acknowledgement to third parties of the receipt of a deposit and an accounting. Such a disclosure is in the best interests of the client, whether the client is the buyer or the seller. It signifies the meeting of a necessary contingency in any pending sales transaction. So our rules clearly contemplate disclosure with no requirement for informed consent.

The analysis does not stop there. Disclosures are further required under Florida law upon completion of any real estate transaction. Recorded deeds must display documentary stamps that reveal the sales price. Similarly, documentary stamps and intangible taxes must be affixed on the face of any recorded mortgage. They tell the world the amount of the lien. These revelations may

not be legally or ethically manipulated. See Florida AGO 95-80. Again, there is no requirement of informed consent.

What is left of a real estate transaction that is confidential? Assuming that miscellaneous fees and costs associated with any transaction (e.g. the cost for a land survey) have no expectation of confidentiality, there remains the issue of source of funds. Source of funds cannot be confidential to a title insurance underwriter. Every lender on every loan transaction is issued a Closing Protection Letter by the title insurance underwriter as set out in Section 690-186.010, F. A. C. That Closing Protection Letter indemnifies the lender against loss in the event the issuing attorney either steals their loan proceeds or fails to follow their loan closing instructions. Those instructions always require verification of source of funds and are usually accompanied by related instructions such as a prohibition against any secondary financing or a requirement to notify the lender of any other evidence of mortgage fraud. This is fundamental to the process. When a lender underwrites a loan, it approves and prices the risk of that loan on representations by the borrower on the ratio of the loan amount to the value of the real property. This is commonly referred to as the loan to value ratio, or LTV. There is greater risk in a 90% LTV loan transaction than a 70% LTV transaction. It is a question of how much the borrower has personally at risk. So undisclosed secondary financing, or payment of the down payment by a third party (this could be as innocent as undisclosed parental assistance or as nefarious as fraudulent builder bailout schemes), is of paramount interest to the lender. The pending case of The Federal Deposit Insurance Corporation vs. Attorney's Title Insurance Fund (attached) is demonstrative of the exposure. The title insurer is held responsible through the loan closing instructions under the CPL. The title insurer ***must*** audit source of funds, a fact that becomes critical when considering the pragmatic issues confronted when there are multiple trust accounts.

There remains the last consideration driven by the fact that there will be unclosed, pending transactions in a trust account at the time of an audit. We must acknowledge that not every transaction proceeds to closing. However, as recognized by 690-186.003(7) F.A.C., title insurers bear certain liabilities and responsibilities, including exposure for funds advanced by third party lenders, even if a transaction does not close. Protections are currently in place both in state and federal law. Ted Conner has addressed these protections in his materials and comments.

SEPARATE TRUST ACCOUNTS CANNOT BE AUDITED: The call of the Question #1 in the draft opinion presumes that there is some special nexus between the client and the selected title insurer. More specifically, the word "involvement" is utilized as though the client impliedly consents to disclosure of the financial information by selecting the title insurer. Rarely does that occur. Rather, it is typically the attorney, exercising his professional judgment, who selects which title insurer to utilize on a given transaction. So the current draft, by its very implication, acknowledges the applicability of Rule 4-1.6(c)(1). Client information may be revealed by the attorney based on the reasonable belief that it serves the client's interest to do so. That client interest is the protection of client funds from either the attorney or staff.

This analysis is the fundamental pre-requisite to a discussion of the second erroneous assumption of the draft opinion, that separate trust accounts can be audited. They cannot. Granted, on the face, it would appear completely logical that an underwriter's audit can be confined to the account selected for a given insurer's transactions. But in fact, that cannot be accomplished. Agents often switch transactions from one underwriter to another. This can be driven by client direction, by differing underwriting opinions, or by lender requirements. Such a change would require the movement of funds from the trust account for the original underwriter to the trust account of the selected underwriter should the draft ethics opinion stand as currently written. How could that transaction be properly audited? It cannot be given the "source of funds" requirements placed on underwriters. But that is not the only reason. Title insurers must also protect against check kiting between accounts by the agent or their employees given need to protect of client funds. To achieve this purpose, all trust accounts utilized for real estate transactions must be subject to audit by all title insurers of the firm. Separate trust accounts are not a viable solution. The draft opinion would logically encourage firms to form separate corporate agencies to more efficiently service their clients. This point will become more apparent with the upcoming information on the regulatory climate.

Multiple trust accounts present all parties with other practical problems as well. When this issue was presented to an experienced title industry auditor, the following pertinent points were made:

1. It is common to post funds to the wrong account or draw funds on the wrong account where there are multiple accounts. These innocent mistakes must still be verified through the audit by reviewing the other involved account.
2. There is greater protection of client monies when multiple underwriters have the access and ability to audit a single account. This is just a function of focusing more personnel on the account.

THE CURRENT INQUIRY IS NOT DISTINGUISHABLE FROM ETHICS OPINION 93-5: The current draft opinion reads, "The facts of the present inquiry are distinguishable from those addressed in Florida Ethics Opinion 93-5. . . (because) the opinion was written under the assumption that only transactions insured by that one title insurer would be included in the special trust account discussed in the opinion." There is no difference in the function of transactional law firms in Florida today than in 1993. The issue submitted then presumed that firms represented several title insurers in the same fashion that they do today. All the problems presented by multiple accounts were the same in 1993 as they are now. To presume otherwise is an unsupportable fiction.

IMPORTANCE OF THIS ETHICS OPINION: The impact of this opinion is exceptional. While all formal ethics opinions carry with them a special importance, the issues you address here could impact the ability of Florida transactional attorneys to remain relevant in the real estate marketplace. The current federal regulatory environment has brought extraordinary focus on the responsibilities that mortgage lenders have to borrowers for the actions of their third party

providers. This specifically includes attorneys that lenders authorize to close loans on their behalf. I have attached an article from the latest issue of Action Line co-authored by Ted Conner and me that better explains the current regulatory environment. Additionally, I have appended the Best Practices recently published by the American Land Title Association. It appears that these Best Practices will become the requisite standards that all attorneys will have to meet in order to be authorized to transact lender business. Please pay careful attention to the audit requirements contained in these Best Practices and carefully consider their impact. If attorneys cannot meet these prerequisites as law firms, expect that they will establish corporate title agencies to meet the needs of their clients.

ALTERNATIVE APPROACHES: It would appear that the committee has been struggling with the concept of informed consent. Altering the FAR/BAR contract to imbed authorization is a fiction, not a solution. While prevalent, it by no means is the only contract form commonly in use in Florida. Too many transactions would be exempted from such an approach.

Reliance on Rule 4-1.6(c)(1) and the attorney's discretionary authority to reveal client information when such disclosure is in the best interests of the client is the better analysis, particularly given the state and federal privacy protections directing the conduct of the title insurers. Such a disclosure is not inconsistent with the disclosure of identical information to the Florida Bar Foundation, Inc. under the IOTA Program set out in Rule 5.1-1.

Alternatively, inclusion of "any Title Insurer authorized to do business in Florida under Chpt 624, F. S." into Rule 5-1.1(g)(7) would be a very rational and acceptable solution.

When considering these proposed alternative approaches, please understand that my company already binds itself under our agency contract to protect confidential customer information.

Thank you for your consideration of these critical issues.

Respectfully Submitted,

James C. Russick, Esq.
Vice President
Florida State Legislative and Regulatory Counsel
Old Republic National Title Insurance Company

JCR/smb

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April 15, 2013

Professional Ethics Committee
The Florida Bar
651 E Jefferson Street
Tallahassee, FL 32399-2300

Attn: Elizabeth Clark Tarbert
Ethics Counsel

Re: Request for Ethics Opinion Regarding Requirements of Section 626.8473(8), Florida Statutes

Dear Members of the Professional Ethics Committee:

During the last meeting of the Florida Bar Professional Ethics Committee, there was a request to view a typical audit of an attorney's trust account by a title insurer. Audits constitute a review of the account monthly reconciliations coupled with a statistical sampling of representative files. Additionally, practices, policies and procedures utilized by the firm for the protection of client funds are reviewed. All of this is designed to assist the law firm to meet its obligations under Chapter 5 of the Rules Regulating the Florida Bar.

Each insurer has its own unique audit practices and procedures that have developed over time, but the basic format and content of a trust account audit is consistent through the industry. We have attached copies of the basic audit program created by the American Land Title Association (ALTA) as it is a fair representation of title insurer audits. It is designed to acquire the basic information necessary to evaluate the practices of a firm and assess the risk those practices create for a title insurer and the firm's clients.

Note the breadth of the inquiry. It does not merely focus on the attorney's personal integrity. There is a tacit recognition that a lawyer must deal with a host of threats, both external and within the office, to the security of funds entrusted to the firm. So audits are specifically not punitive absent cause. They are designed to assist the attorney by identifying procedural deficiencies and help them improve their practices.

Essential components of an audit include a review of the reconciliations required by Rule 5-1.2 (c) Minimum Trust Accounting Procedures and a selection of files to confirm that disbursements were made in compliance with the settlement statement delivered to the parties.

The nature of the real estate practice requires the review of every account maintained by the firm for real estate transactional purposes because money routinely flows between such accounts for regular business purposes. For instance, it is not unusual to switch title insurers because of differing underwriting opinions or insured's preference. Or wires for deposits get posted to the wrong account. But whatever the reason, the title insurer's auditor must have access to all real estate transactional trust accounts to support the obligations undertaken by the title insurer to protect all parties and funds in a transaction. Unfortunately, as the Florida Bar audit staff will surely attest, check kiting between accounts is a traditional tactic utilized to hide criminal activity involving the theft of trust funds.

The file review also will consider actual title policy risk elimination practices that, given the unique nature of real property, are designed to assist all parties to a given transaction.

The Committee made inquiry about the use and dissemination of information acquired during an audit. This too varies with insurer, but is generally addressed in the agency agreement between the firm and the insurer. By way of example, my company contracts in writing as follows:

> *"CONFIDENTIALITY*
> *The parties agree that neither will, without the prior written consent of the other, use, divulge, disclose or make accessible to any other person, firm, partnership or corporation, any Confidential Information, as hereinafter defined, except when required to do so by law, provided, however, that in the case of any such requirement, such party shall provide written notice to the other at least 10 days prior to producing such Confidential Information. For purposes of this agreement, "Confidential Information" shall mean all non-public information concerning the business of the party which has value to the party and is not generally known to competitors, including, by way of illustration and without limitation, information relating to its financial products, product development, customer lists, business and marketing plans and strategies, and operating policies and manuals, except for items which become publicly available information other than through a breach by either party of its duty hereunder."*

Given the serious nature of this commitment to confidentiality, dissemination of audit results is kept under very strict control. Results go only to immediately responsible management. Files are kept locked and must be signed for if removed.

Any insurer's actions are done against the backdrop of both federal and state privacy obligations previously outlined by Ted Conner in his submission to the Professional Ethics Committee for the previous meeting.

I encourage the Committee to inquire with Florida Bar auditors to validate the importance and value of audits to the clients of attorneys and the necessity of auditing each trust account through which funds have passed.

I sincerely hope that this input is of assistance to the Professional Ethics Committee in fashioning its opinion. I remain available to assist the Committee in any additional way.

Sincerely,

James C. Russick
VP Florida State & Governmental Affairs Counsel
EMAIL: jrussick@oldrepublictitle.com

JCR/sml

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February 15, 2013

News HOME

Debate over who may audit trust accounts continues

By Gary Blankenship
Senior Editor

The question of whether attorneys handling real estate transactions can allow title companies to audit their trust accounts, which have deposits from clients not using that title company, has stymied — for the moment — the Bar's Professional Ethics Committee.

At issue is a state law passed last year that would allow title insurance companies to audit trust accounts, assuming no Bar rules would be violated. The question posed to the committee was whether such an audit might violate Bar rules if the trust fund contained monies from clients who are not using the auditing title company and if the company might be able to learn confidential information about those clients through the audit, unless the affected clients gave their informed consent to the lawyer providing the information to the title insurance company.

At its January 25 meeting, the committee first rejected a proposed advisory opinion, by an 11-13 vote, that said such audits would not be allowed without client consent. A follow-up motion to decline to issue an advisory opinion failed 7-14. Another motion to return the proposed advisory opinion back to its drafting subcommittee failed to get a second, as did a motion to instruct the subcommittee to redraft the opinion to say that audits would be allowed as long as there was a separate trust account for each title insurer used by the law firm.

The committee did vote that it would answer the question from the inquiring attorney but then deferred the matter — after more than two hours of discussion — to address other matters on its agenda. The committee next meets at the Bar's June Annual Convention.

"This is a difficult inquiry, and it's important that the committee gives its full consideration to this," said Loretta O'Keefe, chair of the subcommittee that drafted the proposed advisory opinion. "Continued discussion on this topic is good. It's important for our profession and for people who do real estate transactional work."

She said the proposed advisory opinion was based on strong Bar rules protecting the confidentiality of client information.

"Without discussing it with the client, you're allowing trust account information, which is considered confidential, to be reviewed by a title insurance company that is not a party to the transaction," O'Keefe said. "The Bar rules on confidentiality state that all information relating to the representation is confidential. Therefore, you have to worry about a third-party title insurer seeing information that would normally be considered confidential and whether there could be any dissemination of that information."

She acknowledged that there are laws requiring title companies to protect information, but said those are not as all encompassing as Bar rules.

Committee member Lynwood Arnold served on the drafting subcommittee but opposed the proposed opinion, saying it failed to deal with the complexities of real estate transactions. For example, he said a lawyer may be hired by the seller to handle a closing but the money in his trust account is a payment from the buyer to the seller, pending the closing.

"I know lawyers involved in closing pass closing statements out to people who are not clients. In a closing, you've got a lot of different stakeholders who require information," he said. "For example, you have to give information to the lender; you have to give information to the title insurer; you have to give information to insurance agents, to real estate agents. That's part of the implied or understood part of the scope of your representation."

Also, if attorneys and law firms set up multiple trust accounts for multiple title companies and multiple clients, title companies will have worries that defalcating attorneys will be able to avoid detection by switching money between audited and unaudited funds, he said.

"It's in the best interest of the client to have a viable title insurance system, and the audit can uncover problems," Arnold said.

The issue came to the ethics panel following a legislative change to F.S. §626.8473, effective July 1, 2012. It requires attorneys handling real estate transactions in which they act as a title of settlement agent to deposit all funds relating to those transactions into trust accounts reserved for those real estate dealings. The attorney must "permit the account to be audited by its title insurers, unless maintaining funds in the separate account for a particular client would violate applicable rules of The Florida Bar."

The inquiring attorney noted he works in a firm where several attorneys handle such real estate transactions, working with a number of title insurance companies. He asked if the firm could ethically allow a title insurance company to audit a trust account that included funds from clients who have no dealings with that title company, without consent from those clients.

The proposed opinion from the subcommittee — rejected by the full committee — answered that question with a "no."

"If the firm permits each title insurer to audit the separate trust account without clients' informed consent, each insurer will obtain information relating to the firm's representation of clients who are not involved in any transaction with that particular title insurer," the proposed opinion said. "That would not serve those clients' interests and would be tantamount to permitting the insurer to audit a general trust account in violation of the prohibition expressed in [Ethics] Opinion 93-5. The inquirer's affirmative duties to inform and explain under [Bar] Rules 4-1.4 and 4-1.6 (a) would be triggered under such circumstances. Disclosure to title insurers without a client's informed consent would be prohibited by Rule 4-1.6 (a) and the exception under Rule 4-1.6 (c) (1) [which allows a disclosure if it benefits the client] would be inapplicable."

The attorney could allow the audit of "a single trust account used exclusively for client transactions insured by the title insurer requesting the audit."

The inquiring attorney also asked if the lawyers would be exempt from the law because it

violates Bar ethics rules. The proposed opinion answered by noting that was a question of law, which is beyond the committee's purview.

But it also went on to note, "Lawyers . . . should consider maintaining: 1) a separate trust account for each different title insurer used by that lawyer or law firm, or 2) one separate trust account and obtain each client's informed consent to disclose information regarding their transactions to multiple title insurers for their audits, or 3) one separate trust account and obtain consent from the various title insurers to audit only the information related to transactions that the title insurer is underwriting. With respect to number 2 in the preceding sentence, the lawyer may obtain the client's informed consent in the sales contract or in a separate document executed by the client prior to or at the closing."

O'Keeffe said the committee was discussing that section of the proposed opinion when it ran out of time.

The issue generated considerable debate. The Real Property, Probate and Trust Law Section's Executive Committee submitted a letter advising that it thinks the audits are allowable as they protect clients and that there is no need to maintain a separate trust account for each title insurance company or for each client.

The section, in a letter from Chair Wm. Fletcher Belcher, asserted: "In most real estate transactions, all parties, opposing counsel, and real estate brokers are privy to the closing statement and receive a copy of it. As a result, neither the information on a closing statement, nor the receipts and disbursements from a special trust account in accordance with a closing statement, are confidential. In such cases, permitting an audit to confirm that disbursements were made in accordance with the approved closing statement does not violate the duty of confidentiality. . . ."

Likewise, W. Theodore Conner, senior vice president and general counsel for Attorneys' Title Fund Services, wrote to the committee that several federal laws and state administrative procedures already provide privacy protections, and that consumers would benefit from the audits. He also argued the audit is little different from attorneys engaging third-party bookkeepers and accountants to handle their trust accounts.

"[T]here are immediate benefits to clients to have an independent audit conducted," Conner said. "At a minimum, it should be left to each attorney to establish whether to maintain one common real estate transaction account or one for each title insurer's transactions. It cannot be said that the clients are never benefitted by audits by title insurers irrespective of whether a particular transaction was insured by the auditing insurer."

[Revised: 02-07-2013] News HOME

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Title Insurors' Audits of Trust Accounts

by John Neukamm, Chair
Real Property Professionalism Committee

On October 1, 1994, The Florida Bar issued an Advisory Ethics Opinion concerning the ethical permissibility of a title insurance underwriter's audit of its attorney/agents' trust accounts. The opinion was issued in response to a September 1, 1993 letter from a title insurance underwriter asking whether it is ethical for a member of The Florida Bar who functions as a title insurance agent to permit a title insurance underwriter to audit their trust account. The underwriter requesting the opinion noted that, pursuant to F.S. §627.792, an underwriter is liable for defalcation by its agents. Therefore, escrow or trust accounts maintained by an underwriter's agents are one of the primary focuses of any audit.

At a meeting of The Florida Bar's Professional Ethics Committee on April 22, 1994, the Committee considered two draft advisory opinions on this topic. The first draft concluded that any such audit would be ethically impermissible due to concerns regarding client confidentiality. An alternative draft concluded that trust accounts may only be audited with the consent of all affected parties. The alternative version was adopted as the Committee's proposed advisory opinion, but, prior to the publication of the proposed advisory opinion, a copy was circulated to the Real Property, Probate & Trust Law Section of The Florida Bar for the Section's comments. Ultimately, the proposed advisory opinion was published on June 15, 1994.

Louis Guttmann was appointed to chair an ad hoc committee to draft a response to the proposed advisory opinion on behalf of the Section. The ad hoc committee met by teleconference and prepared a response to the proposed advisory opinion which suggested that The Florida Bar recognize that an attorney who is an agent for a title insurance company may maintain a separate and distinct trust account for those funds entrusted to the attorney in the attorney's capacity as a title insurance agent. The Committee suggested that the title insurance underwriter should be permitted to audit that trust account without the specific consent of the attorney's clients or others.

On July 29, 1994, members of the ad hoc committee and other representatives of the Section met in Palm Beach with The Florida Bar's Ethics Counsel, Timothy Chinaris, and Don Beverly, the Chair of The Florida Bar's Professional Ethics Committee, to discuss the proposed advisory opinion and the Section's response. As a result of that meeting, a compromise was reached which provides that an attorney who is an agent for a title insurance underwriter may not permit the underwriter to audit the attorney's general trust account without the consent of all affected clients but that client consent is not necessary before an underwriter is permitted to audit special trust accounts used exclusively for transactions in which the attorney acts as the title or real estate settlement agent.

In adopting the exception for special trust accounts, the Bar recognized that one of the exceptions to Rule 4-1.6 governing the duty of confidentiality is relevant. Specifically, subsection (c)(1) of that Rule authorizes an attorney to disclose confidential information "to serve the client's interest unless it is information the client specifically requires not to be disclosed." Recognizing that audits by title insurance underwriters are necessary to ensure the safety of deposited funds, the advisory opinion provides that an attorney may ethically permit an underwriter to audit such accounts unless the attorney has been specifically directed otherwise by the client. Thus, many underwriters may begin to insist that attorney/agents maintain a separate trust account to be utilized solely for real estate settlement services.

PROFESSIONAL ETHICS OF THE FLORIDA BAR

OPINION 93-5
October 1, 1994

An attorney who is an agent for a title insurance company may not permit the title insurer to audit the attorney's general trust account without consent of the affected clients. The attorney, however, need not obtain client consent before permitting the insurer to audit a special trust account used exclusively for transactions in which the attorney acts as the title or real estate settlement agent.

RPC: 4-1.6
Opinions: 62-24, 72-3, 77-25
Statutes: F.S. sec. 627.786, 627.792

The inquiring attorney is counsel for a title insurance company. Pursuant to F.S. sec. 627.792, a title insurer is liable if its licensed agent misappropriates trust funds. Title insurers also have liability for defalcations under closing protection letters provided pursuant to F.S. sec. 627.786. Many title insurance agents in Florida are members of The Florida Bar. The title insurance company wants to audit the trust accounts of its licensed attorney/agents. Some of the proposed audits would involve trust accounts devoted exclusively to transactions in which the attorney acts as the title or real estate settlement agent ("special trust accounts"), while others would involve trust accounts used for multiple purposes ("general trust accounts").

The issue presented is whether, or under what circumstances, the proposed audits would be ethically permissible under Rule 4-1.6, Rules Regulating The Florida Bar. This rule spells out an attorney's ethical duty of confidentiality:

> **(a) Consent Required to Reveal Information.** A lawyer shall not reveal information relating to representation of a client except as stated in subdivisions (b), (c), and (d), unless the client consents after disclosure to the client.
> **(b) When Lawyer Must Reveal Information.** A lawyer shall reveal such information to the extent the lawyer believes necessary:
> (1) to prevent a client from committing a crime; or
> (2) to prevent a death or substantial bodily harm to another.
> **(c) When Lawyer May Reveal Information.** A lawyer may reveal such information to the extent the lawyer believes necessary:
> (1) to serve the client's interest unless it is information the client specifically requires not to be disclosed;
> (2) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and client;
> (3) to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved;

(4) to respond to allegations in any proceeding concerning the lawyer's representation of the client; or

(5) to comply with the Rules of Professional Conduct.

(d) Exhaustion of Appellate Remedies. When required by a tribunal to reveal such information, a lawyer may first exhaust all appellate remedies.

Rule 4-1.6 ordinarily obligates an attorney to refrain from voluntarily revealing any "information relating to representation of a client" unless: (1) the attorney has the client's consent; or (2) the attorney fits one of the exceptions articulated in Rule 4-1.6. The ethical duty of confidentiality exists by virtue of Rule 4-1.6. In rendering this advisory opinion the committee is simply explaining and applying Rule 4-1.6 to the facts presented.

This committee previously has recognized that trust account records are confidential under Rule 4-1.6. See Florida Ethics Opinion 72-3. Likewise, the committee has opined that a client's identity may be confidential. See Florida Ethics Opinions 77-25 and 62-24. Thus, the information contained in trust account records falls within the broad ambit of confidentiality established by Rule 4-1.6(a).

Because of the duty of confidentiality, an attorney/agent ethically may permit a title insurer to audit the attorney's general trust account only if the affected clients have consented.

With regard to audits of a special trust account, however, one of the exceptions to the Rule 4-1.6 duty of confidentiality is relevant. Subdivision (c)(1) authorizes an attorney to disclose confidential information "to serve the client's interest unless it is information the client specifically requires not to be disclosed." The committee recognizes that audits by title insurance underwriters are necessary to ensure the safety of the funds deposited in the special trust account and thus facilitate a satisfactory conclusion for those whose funds are placed in the account. Consequently, if a special trust account is used exclusively for transactions in which the attorney is acting as the title or real estate settlement agent, the attorney ethically may permit the proposed audits unless the attorney has been specifically directed otherwise by the client.

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA FOURTH DISTRICT, 1525 PALM BEACH LAKES BLVD., WEST PALM BEACH, FL 33401

June 14, 2013

CASE NO.: 4D11-4541
L.T. No.: 502007CP002812XXXXMB

DR. ROSS G. STONE v. NANCY STONE and ALMA STONE

Appellant / Petitioner(s) Appellee / Respondent(s)

BY ORDER OF THE COURT:

THIS COURT *sua sponte* requests an amicus brief from the Real Property, Probate & Trust Law Section of the Florida Bar on the issue below, which is a matter of first impression:

> Whether residential property owned by an irrevocable Qualified Personal Residence Trust Agreement (QPRT) at the time of death of the Grantor is subject to Florida Constitutional and statutory homestead devise restrictions where the QPRT provisions provide that the assets of the QPRT will revert back to the Grantor's estate to pass by devise under the Grantor's will if the Grantor dies before the expiration of the QPRT term.

Real Property, Probate & Trust Law Section
Mr. William F. Belcher, Chair
540 4th St. N
Saint Petersburg, FL 33701-2302

&/or

Ms. Margaret Ann Rolando, Chair-elect
Shutts & Bowen, LLP
201 S. Biscayne Blvd., Ste. 1500
Miami, FL 33131-4328

We request that the amicus brief be filed within sixty (60) days of the date of this order.

I HEREBY CERTIFY that the foregoing is a true copy of the original court order.

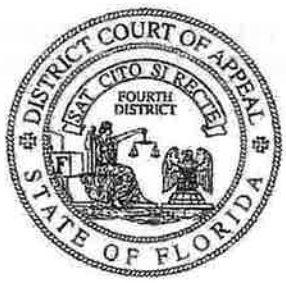
Served:

cc: Edward Downey William T.Viergever Kevan Boyles

kb

Marilyn Beuttenmuller

MARILYN BEUTTENMULLER, Clerk
Fourth District Court of Appeal



IN THE CIRCUIT COURT IN AND
FOR PALM BEACH COUNTY FLORIDA

IN RE: ESTATE OF

PROBATE DIVISION IB

JEROME M. STONE,

CASE NO. 502007CP002812XXXXMB

Deceased.
_____/

NANCY STONE,

Petitioner,
vs.

ROSS G. STONE,

Respondent.
_____/

ORDER GRANTING NANCY STONE'S AMENDED MOTION FOR SUMMARY JUDGMENT AS TO HER PETITION FOR INSTRUCTIONS, DETERMINATION OF STATUS OF ASSETS, AND OTHER RELIEF AND AGAINST ROSS STONE AS TO ROSS STONE'S VERIFIED AMENDED RESPONSE AND COUNTER-PETITION FOR DETERMINATION OF HOMESTEAD STATUS AND ROSS STONE'S MOTION FOR SUMMARY JUDGMENT ON HOMESTEAD STATUS AND ENTERING FINAL SUMMARY JUDGMENT THEREON

NANCY STONE's Motion for Summary Judgment on her Petition for Instructions, Determination of Status of Assets and other Relief and ROSS STONE's Verified Amended Response and Counter-Petition for Determination of Homestead Status and ROSS STONE's Motion for Summary Judgment on Homestead Status have come before the Court for hearing on November 3, 2011. The Court has reviewed and considered the

Motions, the verified pleading, the arguments of counsel and memoranda of law submitted by the parties.

UNDISPUTED MATERIAL FACTS

1. The residence which is the subject of these proceedings is located in Juno Beach, Florida and is legally described as Lot 6, 700 Ocean Drive, according to the Plat thereof as recorded in Plat Book 62, Page 161, Public Records of Palm Beach County, Florida (the "property").

2. The property was initially titled in the name of Jerome Stone ("JEROME") and Alma G. Stone ("ALMA"), his wife, by Warranty Deed dated May 3, 1991.

3. On March 27, 2000 JEROME and ALMA, as husband and wife, executed a Warranty Deed which conveyed the property to themselves as "tenants in common, and not as tenants by the entireties, each as to an undivided one-half (1/2) interest" which Deed explicitly reflects that the grantor "grants, bargains, sells, aliens, remises, releases, conveys, and confirms" the property unto the grantee "together with all the tenements, hereditaments, and appurtenances thereto belonging or in anywise appertaining" which Deed was signed in the presence of 2 subscribing witnesses and a notary.

4. On March 27, 2000, JEROME executed the Jerome M. Stone Qualified Personal Residence Trust Agreement (the "QPRT"), and then, JEROME, joined by ALMA his wife, executed a Warranty Deed which conveyed to "Jerome M. Stone and Alma G. Stone, as Co-Trustees" of the QPRT, JEROME's undivided one-half (1/2) interest as tenant in common in the property, which Deed again explicitly reflects that the grantor "grants, bargains, sells, aliens, remises, releases, conveys, and confirms" the property unto the grantee "together with all the tenements, hereditaments, and appurtenances thereto belonging or in anywise appertaining" which Deed was signed in the presence of 2 subscribing witnesses and a notary. [ALMA similarly executed her own qualified personal residence trust on that same day and transferred her undivided one-half tenancy in common interest in the property into her QPRT. ALMA's qualified personal residence trust and her one-half tenancy in common interest is not at issue in this matter]

5. After the creation of the QPRT, on October 18, 2000 JEROME and ALMA executed a "Certificate of Trust" for the Palm Beach County Property Appraiser's office certifying their entitlement to the use and occupancy of the property held in their respective QPRT's, and their having a sufficient interest in the property to claim the homestead exemption from ad valorem taxation.

6. The property received the ad valorem homestead tax exemption from 1994 through both JEROME'S and ALMA'S dates of death.

7. Pursuant to the QPRT, JEROME and ALMA were the initial Trustees of the QPRT.

8. JEROME's intent in the creation of the QPRT was to insure it qualified under the governing Internal Revenue Code and Regulations which intent is set forth in Article VII (and titled "GRANTOR's INTENT")of the QPRT which includes the following:

> "Grantor intends that the Trust hereby created shall be a 'Qualified Personal Residence Trust' within the meaning of Section 2702(a)(3)(A)(ii) of the Code and Regulations Section 25.2702-5(c)... . The provisions of this Agreement shall be interpreted to carry out that intention. Any questions with respect to the administration of the Trust Estate shall be resolved accordingly, and, the powers and discretion of Trustee shall not be exercised or exercisable except in a manner consistent with such intention... ."

9. Pursuant to Article VIII of the QPRT, JEROME declared that the QPRT was irrevocable.

10. Pursuant to Article I of the QPRT, the term of the QPRT was the earlier of 5 years from its creation and funding or JEROME's death, and during the QPRT term JEROME "shall be entitled to the exclusive use, possession and enjoyment of the personal residence held by the Trustee".

11. Pursuant to the administrative provisions of the QPRT found in Article XI, "and to the extent they are not inconsistent with Grantor's Intent as expressed in the Article herein entitled

'GRANTOR'S INTENT'," JEROME, as the Grantor, retained the following power in Article XI(K):

> K. Grantor's Retained Administrative Power Over the Corpus of the Trust. Subject to the provisions of the Article herein entitled "SPECIAL PROHIBITION AGAINST TRANSFER," the entire principal of the Trust shall be subject to a power exercisable by Grantor (in a non-fiduciary capacity and without the approval or consent of any person in a fiduciary capacity) to reacquire the Trust principal by substituting other property of an equivalent value... .

12. Article XX of the QPRT (titled "SPECIAL PROHIBITION AGAINST TRANSFER") explicitly prohibits the Trustee of the QPRT from selling or transferring the property back to JEROME, as follows:

> Article XX
> Special Prohibition Against Transfer
>
> The Trustee shall not sell or otherwise transfer the residence in a manner that conflicts with the provisions of Treasury Regulation Section 25.2702-5. By way of amplification, under the present application of that Regulation, during the Trust Term (and during anytime after the Trust Term that the Trust is a Grantor Trust for income tax purposes), Trustee may not sell or transfer the personal residence, directly or indirectly, to Grantor (or Grantor's spouse, if any) or an entity controlled by Grantor (or Grantor's spouse, if any). Notwithstanding the foregoing, if Grantor dies during the Trust Term, Trustee may distribute the personal residence (or other Trust property) to the legal representative(s) of Grantor's Estate, as provided in Section B of the Article herein entitled "DISPOSITION OF REMAINDER INTEREST."

13. Pursuant to Treasury Regulation Section 25.2702-5(c)(9), a QPRT must prohibit the Trust from selling or transferring the residence to the Grantor, as follows:

> (9) Sale of residence to Grantor, Grantor's spouse, or entity controlled by Grantor or Grantor's spouse. The governing instrument must prohibit the Trust from selling

or transferring the residence, directly or indirectly, to the Grantor, the Grantor's spouse, or an entity controlled by the Grantor or the Grantor's spouse during the retained term interest of the Trust, or at any time after the retained term interest that the Trust is a Grantor Trust.

14. Pursuant to Article V(B) of the QPRT, if JEROME died before March 27, 2005 (i.e. 5 years after the creation and funding of the QPRT), the remaining balance of the Trust Estate "shall revert and be distributed to the legal representative of Grantor's Estate, to be disposed of as part of Grantor's Estate."

15. JEROME died on February 10, 2005, failing to live the entire five (5) years of the QPRT term.

16. At the time of JEROME's death, he was survived by ALMA and his 2 adult children, ROSS STONE and NANCY STONE.

17. Pursuant to JEROME's Will dated December 22, 2000, his probate assets poured over to his Revocable Trust dated December 22, 2000, to be distributed pursuant to the terms of the Revocable Trust. JEROME'S Will and Revocable Trust explicitly make no provision for ROSS STONE.

18. Pursuant to JEROME's Revocable Trust, upon JEROME's death the Trust became irrevocable and his Trust assets were then held in further Trust for the benefit of ALMA for her life and, upon her death, the Trust was to terminate and be distributed pursuant to ALMA's exercise of a power of appointment, and in default of such exercise then the remaining assets are to be distributed outright to NANCY STONE.

19. ALMA died on June 18, 2009, survived by her 2 adult children, ROSS STONE and NANCY STONE.

LEGAL ISSUE PRESENTED

20. The legal issue presented is whether the property was owned by the QPRT at the time of death of JEROME and thus was not subject to the devise limitations; or even if the property was deemed owned

by JEROME at the time of his death and would otherwise be subject to devise limitations, whether ALMA had waived her homestead rights in the property, thereby causing the property to be properly devised under JEROME's testamentary plan.

RELEVANT CONSTITUTIONAL PROVISIONS AND FLORIDA STATUTES

21. The constitutional protections awarded to homestead property are found in Article VII, Section 6 and Article X, Section 4(a),(b), and (c), respectively, and reflect as follows:

i. Article VII, Section 6 of the Florida Constitution provides the homestead exemption for ad valorem taxes and states, in pertinent part:

> "(a) Every person who has the legal or equitable title to real estate and maintains thereon the permanent residence of the owner, or another legally or naturally dependent upon the owner, shall be exempt from taxation thereon,... . The real estate may be held by legal or equitable title, by the entireties, jointly, in common, as a condominium, or indirectly by stock ownership or membership representing the owner's or member's proprietary interest in a corporation owning a fee or a leasehold initially in excess of ninety-eight years... ."

ii. Article X, Sections 4(a) and (b) of the Florida Constitution concern homestead protection from forced sale, and state:

> "(a) There shall be exempt from forced sale under process of any court, and no judgment, decree or execution shall be a lien thereon, except for the payment of taxes and assessments

> thereon, obligations contracted for the purchase, improvement or repair thereof, or obligations contracted for house, field or other labor performed on the realty, the following property owned by a natural person:
> (1) a homestead,... ."
>
> (b) These exemptions shall inure to the surviving spouse or heirs of the owner."

iii. Article X, Section 4(c) of the Florida Constitution concerns the restriction on devise and states:

> "(c) The homestead shall not be subject to devise if the owner is survived by spouse or minor child, except the homestead may be devised to the owner's spouse if there be no minor child. The owner of homestead real estate, joined by the spouse if married, may alienate the homestead by mortgage, sale or gift... ."

22. The applicable statutory homestead provisions are Florida Statutes §§ 196.031, 732.401, 732.4015, and 732.4017 and reflect as follows:

i. Florida Statute §196.031 is entitled "Exemption of homestead" and concerns the homestead exemption from ad valorem taxation and states, in pertinent part:

> "(1)(a) Every person who, on January 1, has the legal title or beneficial title in equity to real property in this state and who resides thereon and in good faith makes the same his or her permanent residence, or the permanent residence of another or others legally or naturally dependent upon such person, is entitled to an exemption from all taxation, except for assessments for special benefits, up to the assessed valuation of $25,000 on the residence and contiguous real property, as defined in s. 6, Art. VII of the State Constitution."

ii. Florida Statute §732.401 is entitled "Descent of

homestead" and states, in pertinent part:

> "(1) If not devised as authorized by law and the constitution, the homestead shall descend in the same manner as other intestate property; but if the decedent is survived by a spouse and one or more descendants, the surviving spouse shall take a life estate in the homestead, with a vested remainder to the descendants in being at the time of the decedent's death per stirpes."

iii. Florida Statute §732.4015 is entitled "Devise of homestead" and states, in pertinent part:

> "(1) As provided by the Florida Constitution, the homestead shall not be subject to devise if the owner is survived by a spouse or a minor child or minor children, except that the homestead may be devised to the owner's spouse if there is no minor child or minor children.
>
> (2) For the purposes of subsection (1), the term:
>
> (a) "Owner" includes the Grantor of a Trust described in s. 733.707(3) that is evidenced by a written instrument which is in existence at the time of the Grantor's death as if the interest held in Trust was owned by the Grantor.
>
> (b) "Devise" includes a disposition by Trust of that portion of the Trust Estate which, if titled in the name of the Grantor of the Trust, would be the Grantor's homestead."

iv. Florida Statute §732.4017 is entitled "Inter vivos transfer of homestead property" and states in its entirety:

> "(1) If the owner of homestead property transfers an interest in that property, including a transfer in Trust, with or without consideration, to one or more persons during the owner's lifetime, the transfer is not a devise for purposes of s. 731.201(10) or s. 732.4015, and the interest transferred does not descend as provided in s. 732.401 if the transferor fails to retain a power, held in any capacity, acting alone or in conjunction with any other person, to revoke or revest that

interest in the transferor.

(2) As used in this section, the term "transfer in trust" refers to a Trust under which the transferor of the homestead property, alone or in conjunction with another person, does not possess a right of revocation as that term is defined in s. 733.707(3)(e). A power possessed by the transferor which is exercisable during the transferor's lifetime to alter the beneficial use and enjoyment of the interest within a class of beneficiaries identified only in the Trust instrument is not a right of revocation if the power may not be exercised in favor of the transferor, the transferor's creditors, the transferor's estate, or the creditors of the transferor's estate or exercised to discharge the transferor's legal obligations. This subsection does not create an inference that a power not described in this subsection is a power to revoke or revest an interest in the transferor.

(3) The transfer of an interest in homestead property described in subsection (1) may not be treated as a devise of that interest even if:

(a) The transferor retains a separate legal or equitable interest in the homestead property, directly or indirectly through a Trust or other arrangement such as a term of years, life estate, reversion, possibility of reverter, or fractional fee interest;

(b) The interest transferred does not become a possessory interest until a date certain or upon a specified event, the occurrence or nonoccurrence of which does not constitute a power held by the transferor to revoke or revest the interest in the transferor, including, without limitation, the death of the transferor; or

(c) The interest transferred is subject to divestment, expiration, or lapse upon a date certain or upon a specified event, the occurrence or nonoccurrence of which does not constitute a power held by the transferor to revoke or revest the interest in the transferor, including, without limitation, survival of the transferor.

(4) It is the intent of the Legislature that this section clarify

existing law."

FINDINGS OF LAW

23. Florida case law notes that the three separate homestead protections (i.e. ad valorem tax exemption, protection from forced sale, and limitations on devise) are based on separate and distinct provisions of the Florida Constitution. See, Snyder v. Davis, 699 So.2d 999, 1001 (Fla. 1997). Therefore, courts are cautioned against relying upon other homestead exemptions as authority. See, Willens v. Garcia, 53 So.3d 1113, 1119 (Fla. 3rd DCA 2011) (citing to other courts noting "The homestead exemption from forced sale is different from the homestead exemption as defined for tax purposes" and "We begin our analysis by noting that the concept of homestead will be given different meanings depending on the context in which it is used").

24. Thus, Florida case law provides that property which is homestead for purposes of exemption from ad valorem taxation is not necessarily considered homestead for purposes of devise restrictions. See for example Wartels v. Wartels, 357 So.2d 708 (Fla. 1978)(cooperative apartment was not subject to the devise limitations, even though it was eligible for homestead ad valorem tax exemption).

25. Therefore, the October 18, 2000 Certificate of Trust

executed by JEROME and ALMA to obtain the ad valorem homestead tax exemption and the fact that the property received the ad valorem tax exemption is not determinative of the homestead status of the property for purposes of the Article X, Section 4(c) devise restrictions.

26. In fact, the Fourth DCA recognizes that property titled in a QPRT is eligible for the homestead ad valorem tax exemption (even though the QPRT limited the taxpayer's use of the residence to a term of years). See, Nolte v. White, 784 So.2d 493 (Fla. 4th DCA 2001).

27. This matter instead turns on whether the QPRT is a Trust described in Florida Statute §732.4017 and consequently whether the QPRT was the owner of the property at JEROME's date of death.

28. Florida Statute §732.4017 applies to this matter notwithstanding that it became effective on October 1, 2010 - i.e. after the transfers at issue in this case. As noted in paragraph (4) of the statute, F.S. §732.4017 is a clarification of existing law and can be relied upon by the Court in this matter. D & T Properties, Inc. v. Marina Grande Associates, Ltd., 985 So.2d 43 (Fla. 4th DCA 2008) (with a legislative statement in a statutory amendment that the amendment is "to clarify existing law," it is appropriate for the trial Court to consider the amended statute to determine the original legislative intent).

29. Whether the QPRT is a Trust described in Florida Statute §732.4017 appears to turn on whether JEROME had a "right of revocation" over the QPRT or could otherwise revest the property in himself.

30. The Florida Statute §732.4017 reference to the definition of a "right of revocation" over a Trust refers to Florida Statute §733.707(3)(e), which statute provides:

> "For purposes of this Subsection, a "right of revocation" is a power retained by the decedent, held in any capacity, to:
> 1. Amend or revoke the trust and revest the principal of the trust in the decedent; or
> 2. Withdraw or appoint the principal of the trust to or for the decedent's benefit."

31. The QPRT was an irrevocable Trust and JEROME did not have a right of revocation as he did not have the power to amend or revoke the QPRT and revest the property back to himself. See Article VIII of the QPRT.

32. JEROME's power under Article XI(K) to reacquire the Trust principal by substituting other property of equivalent value - was explicitly limited by the express statement of JEROME's intent in the preamble to Article XI and by the express exception in Article XI(K) (i.e. "Subject to the provisions of the Article herein entitled "Special Prohibition Against Transfer..."). Article XX of the QPRT,

entitled "Special Prohibition Against Transfer," expressly prohibits the Trustee from selling or transferring the property back to JEROME.

33. Therefore, JEROME did not have a right of revocation over the QPRT or the power to revest the property in himself and therefore Florida Statute §732.4017 applies.

34. Therefore, the owner of the property at the time of JEROME's death was the QPRT, not JEROME.

35. As reflected in F.S. §732.4017, JEROME's transfer of the property to the QPRT (joined by ALMA's execution of the March 27, 2000 Deed) and the disposition of the property upon JEROME's death was not violative of the devise limitation in the Florida Constitution or Florida Statutes.

36. Pursuant to F.S. §732.4017, JEROME's transfer of the property is not a devise for purposes of §731.201(10) and §732.4015, and the property does not descend as provided in §732.401.

37. Furthermore, regardless of whether Florida Statute §732.4017 applies and/or whether the QPRT or JEROME were deemed the owner of the property at JEROME's date of death, ALMA nevertheless waived her homestead rights by virtue of the March 27, 2000 Warranty Deeds she executed transferring the property to the QPRT. For that reason, the devise of the property in JEROME's Will and Revocable Trust (i.e. life estate to ALMA and remainder to NANCY STONE) is not

an improper homestead devise as ROSS STONE has argued and will not be set aside.

38. A spouse can waive her homestead rights in a written contract or agreement or waiver executed before or after the marriage, signed in the presence of 2 subscribing witnesses pursuant to the dictates of F.S. §732.702.

39. The March 27, 2000 Warranty Deeds signed by ALMA in the presence of 2 subscribing witnesses, constitute a written contract as contemplated under F.S. §732.702, and effectively constitute a waiver by ALMA of any rights she had in the homestead character of the property and the devise limitations/protections that would otherwise inure to her benefit.

40. The Florida Supreme Court in City National Bank of Florida v. Tescher, 578 So.2d 701 (Fla. 1991) held that when a decedent is survived by no minor children and the surviving spouse has waived her homestead rights, there is no constitutional restriction on the devise of the homestead, as noted:

> "Historically, the purpose of the homestead provision was to protect the family. *See generally Barlow v. Barlow*, 156 Fla. 458, 23 So.2d 723 (1945). The constitutional provision prohibiting devise of the homestead property if the owner is survived by a spouse or minor child reflects this same concern for protection of the family. *See In re Estate of Scholtz*, 543 So.2d 219, 222 (Fla. 1989)(Ehrlich, C.J., dissenting). Accordingly, "[a]rticle X, section 4(c) is designed to

> protect two classes of persons only: surviving spouses and minor children. [Petitioners] are neither of these, they are adult children." *Wadsworth v. First Union National Bank,* 564 So.2d 634, 636 (Fla. 5th DCA 1990). Moreover, the restraint on the right of an individual to devise property at death should not be extended beyond that expressly allowed by the constitution. *In re Estate of McGinty*, 258 So.2d 450 (Fla. 1971). Thus, only the decedent's husband falls within the class which the constitution intended to protect, and only the husband was entitled to the protection of article X, section 4(c).
>
> "Although the decedent's husband was physically alive at the time of her death, he has waived all rights to homestead through the antenuptial agreement which he executed. Such a waiver is valid under Florida law. *See* section 732.702(1), Florida Statutes (1975); *Hulsh v. Hulsh*, 431 So.2d 658 (Fla. 3d DCA), *review denied*, 440 So.2d 352 (Fla. 1983). The spouse's antenuptial waiver of rights in the homestead is the legal equivalent of predeceasing the decedent, for purposes of article X, section 4(c). Thus, decedent died with no one entitled to the protection of article X, section 4(c), and the property could pass by devise under the residuary clause of the will."

41. ROSS STONE's argument that the Tescher case is not controlling because the spouse's waiver of homestead rights in that case was by virtue of an antenuptial agreement is not persuasive. The Tescher Court cites to F.S. §732.702(1) - which statute explicitly allows for the waiver of homestead rights "before or after marriage." See also, First National Bank of Clearwater v. Morse, 248 So.2d 658 (Fla. 2d DCA 1971) (Court recognized that waiver of homestead rights in a postnuptial agreement was supported by consideration).

42. ROSS STONE argues that even if ALMA waived her homestead rights in the property, this waiver by ALMA does not prevent JEROME's children from asserting that the devise to ALMA was improper and seeking to set it aside nonetheless.

43. However, ROSS STONE's argument that a spouse's waiver of homestead rights was not binding upon the Decedent's adult child was denied by the Florida Supreme Court in Hartwell v. Blasingame, 584 So.2d 6 (Fla. 1991) (the valid waiver of homestead by a surviving spouse was binding on the adult child of the decedent).

44. More recently, the Fourth DCA described the 3 distinct protections afforded to homestead and analyzed the effect of a spouse's waiver of homestead rights under Article X Section(4)(c) of the constitution (i.e. the limitations on the devise of homestead) on the separate homestead protection of exemption from forced sale found in Article X Section(4)(a) of the constitution. In Engelke v. Estate of Engelke, 921 So.2d 693 (Fla. 4th DCA 2006), Judge Warner, writing for the Court, noted that although the subject residence (which was held in the decedent's Revocable Trust) could be freely devised since the spouse had waived her homestead rights, it nevertheless retained its protected homestead status for purposes of exemption from forced sale. As Judge Warner noted:

"Judy waived her homestead rights in the antenuptial

> agreement, and her waiver is the legal equivalent of predeceasing Paul. *See City National Bank of Fla. V. Tescher,* 578 So.2d 701 (Fla. 1991). Thus, Paul's homestead could be devised or alienated in accordance with the provisions of the constitution. Because Judy waived her homestead rights as a spouse, and Paul had no minor children, he was able to convey his property free of the restrictions of article X, section 4(c) of the constitution. However, the property continued to remain his homestead, and Article I(a) of the Trust Agreement so indicates. Thus, the homestead continued to retain the constitutional protections provided in sections 4(a) and (b). Paul's homestead interest was protected from creditors by section 4(a) while he was alive, and his heirs can claim the exemption for themselves under section 4(b), even though they retain only a reminder interest in the property. *See Hubert v. Hubert,* 622 So.2d 1049 (Fla. 4th DCA 1993)."

45. Thus, the Fourth DCA recognizes that a residence that is eligible for homestead protection from forced sale or for ad valorem taxation (such as a residence held in a QPRT) may simultaneously be unconstrained by the limitations on devise of homestead.

46. Therefore, although the law governing homestead and its protections and limitations is complex, in this case there are no material issues of fact and summary judgment is appropriate and accordingly the Court rules as follows:

a. The property was owned by the QPRT at the time of JEROME's death, and, because JEROME did not retain a right of revocation over the QPRT or the right to revest the property into his name, JEROME was not the

owner of the property at the time of his death and therefore there were no restrictions on its devise, and

b. Even if JEROME was deemed the owner of the property at the time of his death (because of any powers he reserved in the QPRT), ALMA waived her homestead rights in the property by her execution and joinder in the March 27, 2000 Warranty Deeds and, because JEROME was not survived by minor children, there were no restrictions on its devise.

Accordingly, it is hereby

ORDERED AND ADJUDGED that NANCY STONE's Amended Motion for Summary Judgment as to her Petition for Instructions, Determination of Status of Assets and other Relief and as to ROSS STONE's Verified Amended Response and Counter-Petition for Determination of Homestead Status is GRANTED and ROSS STONE's Motion for Summary Judgment on Homestead Status is denied. The property was freely divisible by JEROME at the time of his death, and the devise limitations of Article X, Section 4(c) of the Florida Constitution and Florida Statutes §732.401 and §732.4015 do not apply. Therefore, Final Summary Judgment is hereby entered in favor of NANCY STONE and against ROSS STONE as to NANCY STONE's Petition for Instructions, Determination

of Status of Assets and other Relief and in favor of NANCY STONE and against ROSS G. STONE as to ROSS STONE's Verified Amended Response and Counter-Petition for Determination of Homestead Status.

DONE AND ORDERED in West Palm Beach, Palm Beach County, FL on this 18 day of Nov, 2011.

Diana Lewis

HONORABLE DIANA LEWIS
CIRCUIT COURT JUDGE

Copies furnished to:

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Attorneys -- Discipline – Professionalism -- Code for Resolving Professionalism Complaints, proposed by Supreme Court of Florida Commission on Professionalism, is adopted by the Court -- The Code is not an entirely new code of conduct and integrates already existing standards of behavior, provides that the mechanism for initiating, processing and resolving complaints be the Attorney Consumer Assistance and Intake Program created by the Florida Bar, and adopts a Local Professionalism Panel plan

IN RE: CODE FOR RESOLVING PROFESSIONALISM COMPLAINTS. Supreme Court of Florida. Case No. SC13-688. June 6, 2013. Original Proceedings -- Code for Resolving Professionalism Complaints.

(LEWIS, J.) The Supreme Court of Florida Commission on Professionalism has requested that the Court adopt a Code for Resolving Professionalism Complaints which would include a structure to provide a process to more critically address professionalism issues in Florida. We have jurisdiction, art. V, § 15, Fla. Const. ("The supreme court shall have exclusive jurisdiction to regulate the admission of persons to the practice of law and the discipline of persons admitted"), and grant the request.

The current professionalism movement in Florida traces its formal beginning to a Florida Bar task force created in 1989 which generated a report to this Court in 1996 that reported lawyers' professionalism to be in a state of "steep decline." In July of 1996, The Florida Bar requested that this Court create the Supreme Court of Florida Commission on Professionalism with the overarching objective of increasing the professionalism aspirations of all lawyers in Florida and ensuring that the practice of law remains a high calling with lawyers invested in not only the service of individual clients but also service to the public good as well.

Recognizing that professionalism involves principles, character, critical and reflective judgment, along with an understanding of ourselves and others working in and under stressful circumstances, Florida has traditionally followed a more passive, academic approach to enhance and improve professionalism. Continuing legal education programs, speeches, contests, meetings and other academic methods of addressing professionalism have been implemented on both state and local levels. During the last two years, the Professionalism Commission has studied and reviewed both our status and progress in advancing professionalism. Although it is impossible to determine with scientific certainty the true or exact status of professionalism today, the passive academic approach to such problems has probably had a positive impact toward improving professionalism or at least maintaining the status quo by preventing a further decline as reported in 1996, the Professionalism Commission has concluded that we continue to experience significant problems that are unacceptable, requiring further and more concrete action. Surveys of both lawyers and judges continue to consistently reflect that professionalism is one of the most significant adverse problems that negatively impacts the practice of law in Florida today. While we continue our educational approach, the Professionalism Commission concluded that further integrated, affirmative, practical and active measures are now needed. We agree.

Over the years, we have come to understand that professionalism or acceptable professional behavior is not simply a matter of character or principles nor is it simply an issue of rule-following or rule-violating. To the contrary, unacceptable professional conduct and behavior is often a matter of choice or decision-making. Therefore, we accept the proposal of the Professionalism Commission to create a structure for affirmatively addressing unacceptable professional conduct. This first step admittedly contains small initial measures designed to firmly encourage better behavior. This structure attempts to utilize a wide range of interventions from mere conversations to written communications to more severe sanctions as may be applied under our existing Florida Code of Professional Responsibility, which continues above

and beyond the structure we approve today.

As a first step, the Professionalism Commission has concluded and now proposes that we should *not* attempt to create an entirely new code of "professional" or "unprofessional" conduct nor should we, at this time, attempt to codify an entirely new "Code of Professionalism." We agree with this approach. The Professionalism Commission has proposed, and we adopt, the collection and integration of our current and already existing standards of behavior as already codified in: (1) the Oath of Admission to The Florida Bar; (2) The Florida Bar Creed of Professionalism; (3) The Florida Bar Ideals and Goals of Professionalism; (4) The Rules Regulating The Florida Bar; and (5) the decisions of the Florida Supreme Court into and as part of the Code for Resolving Professionalism Complaints we adopt today. This provides an integrated standard based on the standards previously adopted and already in existence for many years. These standards have been previously approved and are in use, but are not expressed and placed in one location as our standards of expected professional behavior.

The Professionalism Commission has also proposed that the mechanism for initiating, processing, and resolving professionalism complaints be the Attorney Consumer Assistance and Intake Program (ACAP) created by The Florida Bar. We agree and adopt this mechanism. ACAP has been previously created and already accepts, screens, mediates and attempts to resolve any complaints concerning professional behavior. This structure exists to receive and resolve any complaints before and in the place of the initiation of formal grievance proceedings.

The Professionalism Commission also recognized that pursuant to the Administrative Order issued by this Court on June 11, 1998, the Chief Judge of each circuit was directed to create and maintain in continuous operation a Circuit Committee on Professionalism. The Professionalism Commission has proposed that a local committee in each circuit be activated to receive, screen and act upon any and all complaints of unprofessional conduct and to resolve those complaints informally, if possible, or refer to The Florida Bar if necessary. We agree with this proposal and also adopt the Local Professionalism Panel plan. The Chief Judge of every circuit shall create a Local Professionalism Panel to receive and resolve professionalism complaints informally if possible. In the discretion of the Chief Judge, the Circuit Committee on Professionalism may be designated as the Local Professionalism Panel. The Chief Judge of each circuit is responsible for activating the respective committees.

The Code for Resolving Professionalism Complaints, attached as Exhibit A, was published for comments, comments were received and considered by the Professionalism Commission, and a public hearing was conducted. The Conference of County Court Judges and the Conference of Circuit Court Judges have responded in favor of the proposed Code as an initial step toward improving professional conduct in Florida. We hereby adopt the Code for Resolving Professionalism Complaints attached as Exhibit A, effective immediately. The Court extends its gratitude to the members of the Professionalism Commission, the Standing Committee on Professionalism, The Florida Bar Center for Professionalism, and The Florida Bar for the extensive work expended in connection with this major project.

It is so ordered. (POLSTON, C.J., and PARIENTE, QUINCE, CANADY, LABARGA, and PERRY, JJ., concur.)

EXHIBIT A

Code for Resolving Professionalism Complaints

Standards of Professionalism

Members of The Florida Bar shall not engage in unprofessional conduct. "Unprofessional conduct" means substantial or repeated violations of the *Oath of Admission to The Florida Bar, The Florida Bar Creed of Professionalism, The Florida Bar Ideals and Goals of Professionalism, The Rules Regulating The Florida Bar, or the decisions of The Florida Supreme Court.*

Unprofessional conduct, as defined above, in many instances will constitute a violation of one or more of the *Rules of Professional Conduct.* In particular, Rule 4-8.4(d) of *The Rules Regulating The Florida Bar* has been the basis for imposing discipline in such instances. *See generally, The Florida Bar v. Ratiner*, 46 So. 3d 35 (Fla. 2010); *The Florida Bar v. Abramson,* 3 So. 3d 964 (Fla. 2009); and *The Florida Bar v. Martocci*, 791 So. 2d 1074 (Fla. 2001).

Implementation Procedures

1. Terminology

1.1. Standards of Professionalism: The Standards of Professionalism are set forth in the *Oath of Admission to The Florida Bar, The Florida Bar Creed of Professionalism, The Florida Bar Ideals and Goals of Professionalism, The Rules Regulating The Florida Bar* and the decisions of The Florida Supreme Court.

1.2. Complainant: The person who complains that an attorney's conduct has violated the Standards of Professionalism.

1.3. Respondent: The attorney whose behavior is the subject of the complaint.

1.4. Attorney Consumer Assistance and Intake Program (ACAP): The program of The Florida Bar which fields and screens complaints against members of The Florida Bar. Depending upon the nature and severity of the professionalism complaint, ACAP can resolve the complaint informally as provided herein or it can refer the matter to the appropriate branch office of The Florida Bar's Lawyer Regulation Department for further action.

1.5. Local Professionalism Panel: An entity independent of The Florida Bar which is established at the local level for the purpose of resolving complaints of alleged unprofessional conduct by attorneys practicing in that circuit.

1.6. Practice and Professionalism Enhancement Programs: The various programs of The Florida Bar which exist for use in diversion cases or as a condition of discipline. These programs include Ethics School, Professionalism Workshops, Law Office Management Assistance Service (LOMAS), Anger Management Classes, Florida Lawyers Assistance, Inc., and the Trust Accounting Workshop.

2. Initiating Professionalism Complaints

2.1. Commencement of the Process: Any person may initiate a professionalism complaint against a member of The Florida Bar through a Local Professionalism Panel when available and appropriate, or through ACAP. Complaints received by a Local Professionalism Panel may be referred to ACAP at any time depending upon the nature and severity of the complaint.

3. Processing Professionalism Complaints Through ACAP

3.1. Complaints initiated through ACAP can be an informal request for assistance either through a telephone call or by a written request. The complaint can also be a formal complaint either under oath as required by Rule 3-7.3(c) of *The Rules Regulating The Florida Bar* or as an unsworn judicial referral as outlined in Standing Board Policy 15.91 of The Florida Bar. The Bar may also lodge a complaint on its own initiative.

3.2. Initial Screening

3.2.1. Upon receipt of a complaint, ACAP will create a record of the request by obtaining the contact information for both the Complainant and the Respondent. The information will then be forwarded to an ACAP Attorney for Initial Screening.

3.2.2. If the ACAP Attorney determines that the concerns raised in the complaint could be resolved informally, the ACAP Attorney will contact the Respondent to discuss the professionalism issues and provide remedial guidance as necessary, or refer the complaint to a Local Professionalism Panel. If the matter cannot be resolved informally, the ACAP Attorney will contact the Complainant and explain any further available options.

3.2.3. Upon receipt of a complaint that cannot be resolved informally, the ACAP Attorney will determine whether the allegations, if proven, would constitute a violation of *The Rules of Professional Conduct* relating to professionalism. If the ACAP Attorney determines the facts as alleged would constitute a violation, an inquiry will be opened and the ACAP Attorney will investigate the allegations. If the ACAP Attorney determines the facts as alleged would not constitute a violation, the ACAP Attorney will advise the Complainant and the Respondent of the decision not to pursue an inquiry and will provide the reasons for doing so.

3.2.4. If the ACAP Attorney determines after investigation that the facts show the Respondent did not violate *The Rules of Professional Conduct*, the ACAP Attorney may dismiss the case after taking informal action if necessary, such as providing remedial guidance. The Complainant and Respondent will be notified of the dismissal and will be provided the reasons for doing so.

3.2.5. If the ACAP Attorney determines after investigation that a complaint warrants further action for a possible violation of one or more of *The Rules of Professional Conduct*, the ACAP Attorney will forward the matter to the appropriate branch office of The Florida Bar's Lawyer Regulation Department for further consideration.

3.3. Review at the Branch Level: Upon a referral to the branch office, branch Bar counsel may dismiss the case after further review and/or investigation, recommend Diversion to a Practice and Professionalism Enhancement Program in accordance with Rule 3-5.3(d) of *The Rules Regulating The Florida Bar*, or refer to a Grievance Committee for further investigation.

3.4. Review by the Grievance Committee: Upon referral and conclusion of the investigation, the Grievance Committee will make one of the following findings:

A. No probable cause;

B. No probable cause and include a letter of advice to the Respondent;

C. Recommendation of Diversion to one of the Practice and Professionalism Enhancement Programs;

D. Recommendation of Admonishment for Minor Misconduct; or

E. Probable cause. Probable cause under Rule 3-2.1 of *The Rules Regulating The Florida Bar* is a finding of guilt justifying disciplinary action.

3.5. Confidentiality: The confidentiality of disciplinary investigations and proceedings is outlined in Rule 3-7.1 of *The Rules Regulating the Florida Bar*. Any record of informal attempts to resolve a dispute as outlined in paragraph 3.2.2. would also be subject to the provisions of Rule 3-7.1 except that notes of any telephonic communication between the ACAP Attorney and the Complainant, the Respondent, or any third party would be considered the work product of The Florida Bar and would remain confidential and not become part of the public record.

* * *