

**Real Property, Probate and Trust Law Section  
Executive Council Zoom Meeting**

**Saturday, August 22, 2020  
10:00 am**

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**Agenda**

- I. **Presiding** — *William T. Hennessey, III, Chair*
- II. **Attendance** — Jon Scuderi, *Secretary*
  1. Attendance roster for Bar year to date.
- III. **Minutes of Previous Meeting** — *Jon Scuderi, Secretary*
  1. Motion to approve the minutes of the May 29, 2020 meeting of the Executive Council held via Zoom **pp. 11 - 40**
- IV. **Chair's Report** — *William T. Hennessey, III, Chair*
  1. Thank you to our Sponsors! **pp. 41 - 43**
  2. Introduction and comments from Sponsors.
  3. Milestones
  4. Section's response to COVID-19.
  5. RPPTL Bylaws meeting attendance requirements.
  6. Interim Actions Taken by the Executive Committee.
    - a. June 10, 2020. The Executive Committee voted approve the renewal of all legislative positions of the Real Property Probate and Trust Law Section. **pp. 44 - 45**
    - b. June 30, 2020. The Executive Committee voted to approve having the RPPTL PACs handle all "day of" registrations for the Legislative and Case Law Update for in-person and webinar attendance with all costs to be paid by PACs and all registrations fees paid to the PACs. The Legislative and Case Law Update will later be made available on the bar website for aftermarket sales which will be retained by the Florida Bar and the RPPTL Section. **pp. 44 - 45**

- c. July 20, 2020. The Executive Committee voted to conduct our August committee meetings and Executive Council meetings via Zoom and to cancel the in-person meetings at the Breakers. **p. 46**
- 7. 2020-2021 Executive Council meetings. **p. 47**
- 8. Jackson Hole updates
- 9. General Comments of the Chair
- V. [Liaison with Board of Governors Report](#) — *Steven W. Davis*
- VI. [Chair-Elect's Report](#) — *Robert S. Swaine, Chair-Elect*
  - 1. 2021-2022 Executive Council meetings.
- VII. [Treasurer's Report](#) — *Steven H. Mezer, Treasurer*
  - 1. Statement of Current Financial Conditions. **pp. 48 - 49**
- VIII. [Director of At-Large Members Report](#) — *Lawrence Jay Miller, Director*
- IX. [CLE Seminar Coordination Report](#) — *Wilhelmina F. Kightlinger (Real Property) and Sancha Brennan (Probate & Trust), Co-Chairs*
  - 1. Upcoming CLE programs and opportunities. **p. 50**
- X. [Legislation Committee](#) — *Wm. Cary Wright and John C. Moran, Co-Chairs*
- XI. [General Standing Division Report](#) — *Robert S. Swaine, General Standing Division Director and Chair-Elect*

**Action Items:**

- 1. **Professionalism and Ethics** — *Andrew B. Sasso, Chair*

Motion to support Proposed Advisory Opinion dated August 17, 2020 in FAO #2019-4, providing “that it would not be the unlicensed practice of law for Petitioner, a Florida domiciliary employed by a New Jersey law firm (having no place of business or office in Florida), to work remotely from his Florida home solely on matters that concern federal intellectual property rights (and not Florida law) and without having or creating a public presence or profile in Florida as an attorney.” **pp. 51 - 117**

- 2. **Strategic Planning Implementation Committee** — *Michael J. Gelfand, Chair*

Motion to approve change to Section Bylaws to permit attendance by video under certain circumstances. **pp. 118 - 120**

3. **Fellows** — *Christopher A. Sadjera, Chair*

Report from the committee on selection of Fellows for the 2020-2021 Bar Year.

**XII. Real Property Law Division Report** — *S. Katherine Frazier, Division Director*

**Action Items:**

1. **Condominium and Planned Development Committee** — *William P. Sklar and Joseph E. Adams, Co-Chairs*

Motion to: (A) adopt as a Section legislative position support for legislation resolving technical inconsistencies and errors within Chapters 718 and 720, Florida Statutes, that have arisen due to multiple revisions of the Chapters and to provide additional clarification as to how Chapters 718 and 720 are to be applied; (B) find that such legislative position is within the purview of the RPPTL Section; and (C) expend Section funds in support of the proposed legislative position. **pp. 121 - 189**

2. **Condominium and Planned Development Committee** — *William P. Sklar and Joseph E. Adams, Co-Chairs*

Motion to: (A) adopt as a Section legislative position support for legislation clarifying and expanding the emergency powers of community associations during a pandemic event or public health crisis; (B) find that such legislative position is within the purview of the RPPTL Section; and (C) expend Section funds in support of the proposed legislative position. **pp. 190 – 215**

*\*Initiated at the request of members of the Legislature and is still in draft form and being vetted by committees due to the expedited nature of the request. It is anticipated that an updated version will be circulated as a supplement to the agenda prior to the Executive Council meeting.*

**Information Item:**

1. **Condominium and Planned Development Committee** — *William P. Sklar and Joseph E. Adams, Co-Chairs*

Consideration of removal of opposition to legislation requiring any insurance policy issued to an individual condominium unit owner to prohibit the right of subrogation against the condominium association, including a change to Fla. Stat. 627.714(4). **pp. 216 - 221**

**XIII. Probate and Trust Law Division Report** — *Sarah Butters, Division Director*

**Action Items:**

**1. Ad Hoc Committee on E-Wills — Angela Adams, Chair**

Motion to: (A) adopt as a Section legislative position support for legislation, retroactive to January 1, 2020, amending

s. 117.201(9) clarifying that "online notarization" includes the appearance of witnesses by means of audio-video communication technology;

s. 117.285 (introductory paragraph) clarifying that supervising the witnessing of an electronic record is a notarial act and that the procedures for online notarization apply when an online notary public supervises the witnessing of an electronic record;

s. 117.285(2) clarifying that the identity of the principal must be verified when an online notary public supervises the witnessing of an electronic record;

s. 117.285(5) clarifying that this subsection is only applicable to the testamentary aspects of revocable trusts and when fewer than two witnesses are physically present with the principal at the time of execution and revising the description of documents to be consistent with s. 732.701 and s. 732.702;

s. 117.285(6)(b) and s. 732.521(7) correcting erroneous cross-references contained therein;

ss. 709.2119(2)(c), 732.401(2)(e), 732.503(1), 732.703(5)(b)3. and 4., and 747.051(1), revising the forms contained in those statutes so that the jurats or notarial certificates in those statutory forms comply with the new requirements of s. 117.05(4)(c) which became effective January 1, 2020;

(B) find that such legislative position is within the purview of the RPPTL Section; and

(C) expend Section funds in support of the proposed legislative position.  
**pp. 222 - 239**

**2. Ad Hoc Guardianship Law Revision Committee — Nicklaus J. Curley and Sancha Brennan, Co-Chairs**

Motion to (A) adopt as a Section legislative position support for a revision to Florida's Guardianship Law through the proposed Florida Guardianship Code to modernize Florida's current guardianship laws in order to increase the protections for incapacitated individuals in Florida, to reduce the cost and expense associated with guardianship proceedings, to increase review and oversight of private and professional guardians, and

to install procedural components to allow for remote proceedings in light of the recent pandemic; (B) find that such legislative position is within the purview of the RPPTL Section; and (C) expend Section funds in support of the proposed legislative position. **pp. 240 - 506**

**3. Probate Law Committee — *M. Travis Hayes, Chair***

- a. Consideration of proposed changes to the Florida Probate Code and Trust Code to clarify that any testamentary bequest made in favor of a former spouse is void upon divorce from that spouse, regardless of when the bequest was made (the Gordon fix). **pp. 507- 518**

Motion to: (A) adopt as a Section legislative position support for revisions to Sections 732.507 and 736.1105 of the Florida Statutes, to clarify uncertainty contained within the Florida Probate Code and the Florida Trust Code, dealing with devises through wills or trust to the former spouse of a decedent; (B) find that such legislative position is within the purview of the RPPTL Section; and (C) expend Section funds in support of the proposed legislative position.

- b. Consideration of amendments to the Probate Code to permit the posting of a fiduciary bond in lieu of a restricted depository account (the Goodstein fix). **pp. 519 - 526**

Motion to: (A) adopt as a Section legislative position support for revisions to Section 69.031, Fla. Stat., permitting personal representatives to post a fiduciary bond in lieu of the imposition of a restricted depository account; (B) find that such legislative position is within the purview of the RPPTL Section; and (C) expend Section funds in support of the proposed legislative position.

**4. Probate and Trust Litigation Committee — *John Richard Caskey, Chair***

Consideration of proposed changes to Florida Statutes § 736.1008 so that the same statute of limitations for breach of trust against a trustee applies to directors, officers, and employees acting for the trustee. **pp. 527 - 532**

Motion to: (A) adopt as a Section legislative position support for legislation changing Fla. Stat. §736.1008 so that the same statute of limitations for breach of trust against a trustee applies to directors, officers and employees acting as trustee; (B) find that such legislative position is within the purview of the RPPTL Section; and (C) expend Section funds in support of the proposed legislative position.

5. **Estate and Trust Tax Planning Committee** — *Robert L. Lancaster, Chair*

Consideration of adopting a new Part XV of the Florida Trust Code to be titled “Florida Community Property Trust Act of 2021”, to permit married couples to create community property in Florida by transferring assets to a Florida Community Property Trust and take advantage of significant income tax benefits. **pp. 533 - 553**

Motion to (A) adopt as a Section legislative position support for the enactment of a new Part XV of the Florida Trust Code, entitled the “Florida Community Property Trust Act of 2021” to permit married couples to create community property in Florida by transferring assets to a Florida Community Property Trust and take advantage of significant income tax benefits; (B) find that such legislative position is within the purview of the RPPTL Section; and (C) expend Section funds in support of the proposed legislative position.

**Information item:**

1. **Asset Protection Committee** — *Brian Malec, Chair*

Consideration of proposed changed to Chapter 222 to clarify the impact of an assignment or pledge on certain exempt assets. **pp. 554 - 565**

2. **Ad Hoc Study Committee on Professional Fiduciary Licensing** — *Angela Adams, Chair*

Consideration of a new act to be called the “Florida Professional Fiduciaries Licensing Act”.  
**pp. 566 - 573**

**XIV. Probate and Trust Law Division Committee Reports** — *Sarah Butters, Division Director*

1. **Ad Hoc ART Committee** — Alyse Reiser Comiter, Chair; Jack A. Falk and Sean M. Lebowitz, Co- Vice Chairs
2. **Ad Hoc Committee on Electronic Wills** — Angela McClendon Adams, Chair; Frederick “Ricky” Hearn and Jenna G. Rubin, Co-Vice Chairs
3. **Ad Hoc Florida Business Corporation Act Task Force** — Travis Hayes and Brian C. Sparks, Co-Chairs
4. **Ad Hoc Guardianship Law Revision Committee** — Nicklaus J. Curley, Stacey B. Rubel and David C. Brennan, Co-Chairs; Sancha Brennan, Vice Chair
5. **Ad Hoc Study Committee on Estate Planning Conflict of Interest** — William T. Hennessey, III, Chair; Paul Edward Roman, Vice-Chair

6. **Ad Hoc Study Committee on Due Process, Jurisdiction & Service of Process** — Barry F. Spivey, Chair; Sean W. Kelley and Christopher Q. Wintter, Co-Vice Chairs
7. **Ad Hoc Study Committee on Professional Fiduciary Licensing** — Angela McClendon Adams, Chair; Yoshimi Smith, Vice Chair
8. **Asset Protection** — Brian M. Malec, Chair; Richard R. Gans and Michael A. Sneeringer, Co-Vice-Chairs
9. **Attorney/Trust Officer Liaison Conference** — Tattiana Patricia Brenes-Stahl and Cady L. Huss, Co-Chairs; Tae Kelley Bronner, Stacey L. Cole (Corporate Fiduciary), Patrick C. Emans, Gail G. Fagan, Mitchell A. Hipsman and Eammon W. Gunther, Co-Vice Chairs
10. **Charitable Planning and Exempt Organizations Committee** — Seth Kaplan, Chair and Jason E. Havens and Denise S. Cazobon, Co-Vice-Chairs
11. **Elective Share Review Committee** — Lauren Y. Detzel, Chair; Cristina Papanikos and Jenna G. Rubin, Co-Vice-Chairs
12. **Estate and Trust Tax Planning** — Robert L. Lancaster, Chair; Richard N. Sherrill and Yoshimi O. Smith, Co-Vice Chairs
13. **Guardianship, Power of Attorney and Advanced Directives** — Nicklaus Joseph Curley, Chair; Brandon D. Bellew, Elizabeth M. Hughes, and Stacy B. Rubel, Co-Vice Chairs
14. **IRA, Insurance and Employee Benefits** — L. Howard Payne and Alfred J. Stashis, Co-Chairs; Charles W. Callahan, III and Rachel B. Oliver, Co-Vice-Chairs
15. **Liaisons with ACTEC** — Elaine M. Bucher, Tami F. Conetta, Thomas M. Karr, Shane Kelley, Charles I. Nash, Bruce M. Stone, and Diana S.C. Zeydel
16. **Liaisons with Elder Law Section** — Travis Finchum and Marjorie E. Wolasky
17. **Liaisons with Tax Section** — Lauren Y. Detzel, William R. Lane, Jr., and Brian C. Sparks
18. **Principal and Income** — Edward F. Koren and Pamela O. Price, Co-Chairs, Joloyon D. Acosta and Keith B. Braun, Co-Vice Chairs
19. **Probate and Trust Litigation** — J. Richard Caskey, Chair; Angela M. Adams, James R. George and R. Lee McElroy, IV, Co-Vice Chairs
20. **Probate Law and Procedure** — M. Travis Hayes, Chair; Benjamin F. Diamond, Robert Lee McElroy IV, Christina Papanikos and Theodore S. Kypreos, Co-Vice Chairs
21. **Trust Law** — Matthew H. Triggs, Chair; Jennifer J. Robinson, David J. Akins, Jenna G. Rubin, and Mary E. Karr, Co-Vice Chairs
22. **Wills, Trusts and Estates Certification Review Course** — Jeffrey S. Goethe, Chair; J. Allison Archbold, Rachel A. Lunsford, and Jerome L. Wolf, Co-Vice Chairs

**XV. Real Property Law Division Committee Reports** — *S. Katherine Frazier, Division Director*

1. **Attorney Bankers Conference** – E. Ashley McRae, Chair; Kristopher E. Fernandez, Salome J. Zikakis, and R. James Robbins, Jr., Co-Vice Chairs
2. **Commercial Real Estate** – Jennifer J. Bloodworth, Chair; Eleanor W. Taft, E. Ashley McRae, and Martin A. Schwartz, Co-Vice Chairs
3. **Condominium and Planned Development** – William P. Sklar and Joseph E. Adams, Co-Chairs; Shawn G. Brown and Sandra E. Krumbein, Co-Vice Chairs
4. **Condominium and Planned Development Law Certification Review Course** – Jane L. Cornett, Chair; Christene M. Ertl, Vice Chair
5. **Construction Law** – Reese J. Henderson, Jr., Chair; Sanjay Kurian and Bruce B. Partington, Co-Vice Chairs
6. **Construction Law Certification Review Course** – Melinda S. Gentile and Elizabeth B. Ferguson Co-Chairs; Gregg E. Hutt and Scott P. Pence, Co-Vice Chairs
7. **Construction Law Institute** – Jason J. Quintero, Chair; Deborah B. Mastin and Brad R. Weiss, Co-Vice Chairs
8. **Development & Land Use Planning** – Julia L. Jennison and Colleen C. Sachs, Co-Chairs; Jin Liu and Lisa B. Van Dien, Co-Vice Chairs
9. **Insurance & Surety** – Michael G. Meyer, Chair; Katherine L. Heckert and Mariela M. Malfeld, Co-Vice Chairs
10. **Liaisons with FLTA** – Alan K. McCall and Melissa Jay Murphy, Co-Chairs; Alan B. Fields and James C. Russick, Co-Vice Chairs
11. **Real Estate Certification Review Course** – Manuel Farach, Chair; Lynwood F. Arnold, Jr., Martin S. Awerbach, Lloyd Granet, Brian W. Hoffman and Laura M. Licastro, Co-Vice Chairs
12. **Real Estate Leasing** – Brenda B. Ezell, Chair; Kristen K. Jaiven and Christopher A. Sajdera, Co-Vice Chairs
13. **Real Property Finance & Lending** – Richard S. McIver, Chair; Deborah B. Boyd and Jason M. Ellison, Co-Vice Chairs
14. **Real Property Litigation** – Michael V. Hargett, Chair; Amber E. Ashton, Manuel Farach and Christopher W. Smart, Co-Vice Chairs
15. **Real Property Problems Study** – Lee A. Weintraub, Chair; Anne Q. Pollack Susan K. Spurgeon and Adele I. Stone, Co-Vice Chairs
16. **Residential Real Estate and Industry Liaison** – Nicole M. Villarroel, Chair; Louis E. “Trey” Goldman, and James A. Marx, Co-Vice Chairs
17. **Title Insurance and Title Insurance Liaison** – Brian W. Hoffman, Chair; Mark A. Brown, Jeremy T. Cranford, Leonard F. Prescott, IV and Cynthia A. Riddell, Co-Vice Chairs
18. **Title Issues and Standards** – Rebecca L. Wood, Chair; Robert M. Graham, Brian W. Hoffman and Karla J. Staker, Co-Vice Chairs

**XVI. General Standing Division Committee Reports** — *Robert S. Swaine, General Standing Division Director and Chair-Elect*



1. **Ad Hoc Florida Bar Leadership Academy** — Kristopher E. Fernandez and J. Allison Archbold, Co-Chairs; Bridget Friedman, Vice Chair
2. **Ad Hoc Remote Notarization** – E. Burt Bruton, Jr., Chair
3. **Amicus Coordination** — Kenneth B. Bell, Gerald B. Cope, Jr., Robert W. Goldman and John W. Little, III, Co-Chairs
4. **Budget** — Steven H. Mezer, Chair; Tae Kelley Bronner, Linda S. Griffin, and Pamela O. Price, Co-Vice Chairs
5. **CLE Seminar Coordination** — Wilhelmina F. Kightlinger and Sancha Brennan, Co-Chairs; Alexander H. Hamrick, Hardy L. Roberts, III, Paul E. Roman (Ethics), Silvia B. Rojas, and Stacy O. Kalmanson, Co-Vice Chairs
6. **Convention Coordination** — Laura K. Sundberg, Chair; S. Dresden Brunner, Marsha G. Madorsky, and Alexander H. Hamrick, Co-Vice Chairs
7. **Disaster and Emergency Preparedness and Response** – Brian C. Sparks, Chair; Jerry E. Aron, Benjamin Frank Diamond and Colleen Coffield Sachs, Co-Vice Chairs
8. **Fellows** — Christopher A. Sajdera, Chair; J. Christopher Barr, Joshua Rosenberg and Angela K. Santos, Co-Vice Chairs
9. **Florida Electronic Filing & Service** — Rohan Kelley, Chair
10. **Homestead Issues Study** — Jeffrey S. Goethe, Chair; Amy B. Beller, Michael J. Gelfand, Melissa Murphy and Charles Nash, Co-Vice Chairs
11. **Information Technology & Communication** — Neil Barry Shoter, Chair; Erin H. Christy, Alexander B. Dobrev, Jesse B. Friedman, Hardy L. Roberts, III, and Michael A. Sneeringer, Co-Vice Chairs
12. **Law School Mentoring & Programing** — Lynwood F. Arnold, Jr. and Johnathan Butler, Co-Chairs; Phillip A. Baumann, Guy Storms Emerich, Kymberlee Curry Smith and Kristine L. Tucker, Co-Vice Chairs
13. **Legislation** — John C. Moran (Probate & Trust) and Wm. Cary Wright (Real Property), Co-Chairs; Theodore S. Kypreos and Robert Lee McElroy, IV (Probate & Trust), Manuel Farach and Arthur J. Menor (Real Property), Co-Vice Chairs
14. **Legislative Update (2020-2021)** — Brenda Ezell, Chair; Theodore Stanley Kypreos, Gutman Skrande, Jennifer S. Tobin, Kit van Pelt and Salome J. Zikakis, Co-Vice Chairs
15. **Legislative Update (2021-2022)** — Brenda Ezell, Chair; Theodore Stanley Kypreos, Gutman Skrande, Jennifer S. Tobin, Kit van Pelt and Salome J. Zikakis, Co-Vice Chairs
16. **Liaison with:**
  - a. **American Bar Association (ABA)** — Robert S. Freedman, Edward F. Koren, George J. Meyer and Julius J. Zschau
  - b. **Clerks of Circuit Court** — Laird A. Lile
  - c. **FLEA / FLSSI** — David C. Brennan and Roland D. “Chip” Waller
  - d. **Florida Bankers Association** — Mark T. Middlebrook and Robert Stern
  - e. **Judiciary** — Judge Mary Hatcher, Judge Hugh D. Hayes, Judge Margaret Hudson, Judge Celeste Hardee Muir, Judge Bryan Rendzio, Judge Mark A. Speiser, and Judge Jessica Jacqueline Ticktin

- f. **Out of State Members** — Nicole Kibert Basler, John E. Fitzgerald, Jr., and Michael P. Stafford
  - g. **TFB Board of Governors** — Steven W. Davis
  - h. **TFB Business Law Section** — Gwynne A. Young and Manuel Farach
  - i. **TFB CLE Committee** — Wilhelmina F. Kightlinger
  - j. **TFB Council of Sections** — William T. Hennessey, III and Robert S. Swaine
  - k. **TFB Diversity & Inclusion** – Erin H. Christy
  - l. **TFB Pro Bono Legal Services**- Lorna E. Brown-Burton
- 17. **Long-Range Planning** — Robert S. Swaine, Chair
  - 18. **Meetings Planning** — George J. Meyer, Chair
  - 19. **Membership and Inclusion** — Annabella Barboza and S. Dresden Brunner, Co-Chairs; Erin H. Christy, Vinette D. Godelia, Jennifer L. Grosso and Roger A. Larson, Co-Vice Chairs
  - 20. **Model and Uniform Acts** — Patrick J. Duffey and Richard W. Taylor, Co-Chairs; Adele I. Stone and Benjamin Diamond, Co-Vice Chair
  - 21. **Professionalism and Ethics** — Andrew B. Sasso, Chair; Elizabeth A. Bowers, Alexander B. Dobrev, and Laura Sundberg, Co-Vice Chairs
  - 22. **Publications (ActionLine)** — Jeffrey Alan Baskies and Michael A. Bedke, Co-Chairs (Editors in Chief); Richard D. Eckhard, Jason M. Ellison, George D. Karibjanian, Keith S. Kromash, Daniel L. McDermott, Jeanette Moffa, Paul E. Roman, Daniel Siegel, Lee Weintraub, Co-Vice Chairs
  - 23. **Publications (Florida Bar Journal)** — Jeffrey S. Goethe (Probate & Trust) and Douglas G. Christy (Real Property), Co-Chairs; J. Allison Archbold (Editorial Board – Probate & Trust), Homer Duvall, III (Editorial Board — Real Property), Marty J. Solomon (Editorial Board — Real Property), and Brian Sparks (Editorial Board – Probate & Trust),Co-Vice Chairs
  - 24. **Sponsor Coordination** — J. Eric Virgil, Chair; Patrick C. Emans, Marsha G. Madorsky, Jason J. Quintero, J. Michael Swaine, and Arlene C. Udick, Co-Vice Chairs
  - 25. **Strategic Planning** —William T. Hennessey, III and Robert Swaine, Co-Chairs
  - 26. **Strategic Planning Implementation** - Michael J. Gelfand, Chair; Michael A. Dribin, Deborah Packer Goodall, Andrew M. O'Malley and Margaret A. “Peggy” Rolando, Co-Vice Chairs

**XVII. Adjourn:** Motion to Adjourn.

ACTIVE 12312189.4

**Real Property, Probate and Trust Law Section  
Executive Council Zoom Meeting**

**Friday, May 29, 2020  
11:30 am**

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**Minutes**

**I. Presiding** — *Robert S. Freedman, Chair*

Mr. Freedman called the meeting to order at 11:35 A.M. and recognized Steven H. Mezer, Secretary.

**II. Attendance** — *Steven H. Mezer, Secretary*

Mr. Mezer indicated that the Attendance Roster for the Bar year to date is at page 9 of the agenda. Attendance at this meeting will be recognized by registration and visual confirmation.

**II. Minutes of Previous Meeting** — *Steven H. Mezer, Secretary*

Mr. Mezer indicated that the minutes of the February 1, 2020 meeting are at page 24 of the agenda.

Motion was made by Michael Gelfand to approve the minutes of the February 1, 2020, meeting of the Executive Council held at the Grand Hyatt Tampa Bay, Tampa, Florida subject to correction of non-substantive typos and grammar.

Second by numerous persons.

Approved unanimously.

**IV. Chair's Report** — *Robert S. Freedman, Chair*

1. Thank you to our Sponsors! Mr. Freedman indicated that Sponsors are at Page 36 of the agenda.

WFG National Title Insurance Co. – App Sponsor – The app was not used for this meeting. Thank you for understanding. Mr. Freedman asked Mr. Tschida to make a few remarks. Mr. Tschida thanked everyone and indicated that WFG loved being a part of this group and looks forward to The Breakers meeting.

Management Planning, Inc. –

JP Morgan Private Bank  
Old Republic Title  
Wells Fargo Private Bank  
Westcor Land Title Insurance Company  
First American Title Insurance Company  
Attorneys Title Fund Services, LLC  
Fidelity National title Group  
Stout Risius Ross, Inc.  
Guardian Trust  
The Florida Bar Foundation

Stewart Title – Mr. Freedman asked David Shanks to provide comments. Mr. Shanks commented on these unconventional times, that Stewart is proud to be a sponsor and that they are happy to help.

Phillips  
Attorneys Title Fund Services, LLC

John Stewart, President of The Florida Bar, congratulated Mr. Freedman for his leadership this year as Chair of the Section leading with grace and honor and he congratulated the Section and Bill Hennessey as Chair-Elect. Mr. Freedman thanked Mr. Stewart for his help and support.

2. Milestones.

Mr. Freedman announced the following Milestones:

Debra Boje's father passed away April 12, 2020. The family mourns his loss.

Phil Baumann and Nancy Baumann – 5th Grandchild born, Aaron Baumann ("Ari"), to his parents Brian Baumann and Kasia Baumann – their 6<sup>th</sup> Grandchild, Sophia McNally, was born to their son and daughter-in-law, Shreve and Lt. Cmdr. Amanda McNally, in November.

Phil Baumann's wife Nancy Baumann became President of FLTA.

Mike Tanner, the Section's Board of Governors Representative was elected President-Elect of the Florida Bar

Mr. Freedman congratulated Class of 2020 and their parents.

Sebastian Obos graduated from Pre-K to Kindergarten.

Mr. Freedman thanked his wife Sheri for her help getting him through this year. Mr. Hennessey also thanked Sheri Freedman for her help too.

3. Section's response to COVID-19:

Mr. Freedman reported that the COVID-19 information on The Section's Website has been a huge hit. John Moran and Wilhelmina Kightlinger took the lead in getting it set up. Jeff Baskies and Michael Bedke dedicated an entire edition of ActionLine to COVID-19 related issues. Mary Ann Obos assisted with the website and did a tremendous job. Content was submitted by Sarah Butters, Michael Gelfand, Allison Archbold, Brenda Ezell, Nick Curley, Rachel Bouchard, Robert Lancaster, Ralph DeMeo, Richard Sherrill, Amber Ashton, Alex Douglas, Jeff Baskies, Mary Karr, Richard Caskey, Angela Adams, Ricky Hearn, Jenna Rubin, Debra Boje, William Hennessey, Rachel Oliver, Laura Licastro, Keith Durkin and Salome Zikakis.

There were over 3,000 unique hits (clicks) and great feedback.

Mr. Freedman reported that in addition to their work on the COVID-19 project, Jeff Baskies and Michael Bedke published the final ActionLine of this Bar year. Everyone did a great job in a very short time.

4. RPPTL Bylaws meeting attendance requirements.

Mr. Freedman indicated that the Executive Committee will be reviewing the attendance requirement in Article V of the Bylaws to this Bar year as one meeting was cancelled. It will most likely be a waiver of the requirement for that meeting. Decision will be announced at The Breakers meeting. The same may apply next year.

5. Virtual committee meeting schedule.

Mr. Freedman reported that comments were enthusiastically positive as to the virtual meetings. A tremendous number of comments were received, and virtual meetings were loved! People who do not normally attend participated in those meetings, which was an unexpected benefit.

6. Leadership Training Program on June 4<sup>th</sup> for all Committee Chairs and Vice Chairs.

Mr. Freedman recognized Wilhemina Kightlinger and Larry Miller.

Mr. Miller indicated materials and the agenda include a variety of panels, including one on how to handle remote meetings. The time allotted is one and a half hours. Mr. Miller indicated that materials and the agenda for the mandatory RPPTL Section Leadership Orientation Program (on Zoom) are final and will be available and emailed to attendees by next Tuesday, June

2, 2020. The Program itself will start at Noon next Thursday, June 4, 2020 with an allotted time of 1.5 hours. An all-star cast has been assembled and will be presenting. Please log into the Zoom program a bit early to assure the Zoom platform is functioning for all attendees

7. Interim Actions Taken by the Executive Committee.

Mr. Freedman reported on the Interim Actions taken by the Executive Committee since the Tampa meeting which are listed at page 40 of the agenda:

- a. Decision was made by the Executive Committee to cancel the Out-of-State (Amsterdam) Meeting and the Annual Convention, to proceed with a virtual Executive Council meeting, and to postpone the 2020 Legislative & Case Law Update to August 20-22, 2020.

Mr. Freedman reported that all of the out-of-state trip attendees have been refunded some money due from tour company. All deposits from Hotel Okura were refunded. Money was returned for Amsterdam and the Orlando meeting. Sapphire Falls was very accommodating. Mr. Freedman thanked the Convention Committee Bridget Friedman, Sancha Brennan, Committee Chair, Alexander Hamrick and Nishad Kahn for work on the Convention.

The Theme of the Convention was to be – shipwrecked on Gilligan’s Island costume party and Murder Mystery.

Year-end awards for the Section will be given Friday night at The Breakers in person.

- b. April 21<sup>st</sup> approval of letter to Ms. Amy Fariior (Chair, Board of Governors Rules Committee) regarding the Advanced Florida Registered Paralegal Proposal is at page 41 of the agenda.

Mr. Freedman recognized Debra Boje and Mr. Mezer.

Mr. Mezer and Ms. Boje reported on on-going discussions with the Florida Commission on Access to Civil Justice. Those proposed amendments to create the Advanced Florida Registered Paralegal program will be considered by the Board of Governors.

- c. Reply to Bar staff on proposal for providing pro bono legal services involving testamentary documents to pandemic frontline responders is at page 59 of the agenda.

E-mail at page 59: Section is working directly with legal aid societies to find volunteers to assist. The Section makes forms available on its Section page.

8. Update on Proposed Rules Pertaining to Mediation of Elder Law Disputes.

Letter received from Judge Orfinger, Chair of the Florida Supreme Court's Committee on Alternative Dispute Resolution Rules and Policy is at p. 61 regarding proposed changes to Rule 1.720, Florida Rules of Civil Procedure and Rule 12.741, Florida Family Rules of Procedure, as applied to elder issues. The letter advises that the Committee has decided not to pursue the amendments at this time and thanked the Section for its time and input. The letter is at page 61 of the agenda. The Chair commended everyone involved.

9. General Comments of the Chair.

Mr. Freedman reported that the 2020-2021 RPPTL Leadership Chart is at page 66-75. It was a great year despite the way it ended. He thanked everyone for the support, ideas and team effort. Mr. Freedman expressed his hope to see everyone at The Breakers.

Debra Boje commended Mr. Freedman for his great job. She said: "Never before has a Chair been faced with so many challenges to overcome. It is said the true test of leadership is how well you function in a crisis. Rob, you aced the test. You not only have kept the Section functioning, but it is thriving. Cheers my friend and welcome to the back row!"

William Hennessey commented "I have big flip flops to fill. Thank you as a friend and leader." Mr. Freedman will be recognized at The Breakers. Mr. Hennessey commented that this was an incredibly complex year. The job Section Chair takes thousands of hours. Three years ago, Rob and Sheri started planning for Amsterdam. When the time came, it had to be cancelled. He led this year with grace and humor.

Mr. Freedman was presented with a virtual cocktail and relegated to the virtual back row. Mr. Hennessey assumed the position of Chair and restored order.

**V. Liaison with Board of Governors Report — Michael G. Tanner**

Mr. Hennessey recognized Michael G. Tanner.

Mr. Tanner reported that the Chair comments are a hard act to follow and extended his kudos to Mr. Freedman for his leadership. Mr. Tanner continued with his report: The Board of Governors met two weeks ago. Also, it was the first time that the Board of Governors met by Zoom which he found "adequate", not

ideal but got the business of The Bar done. The Board of Governors is working on opening for the business of the Courts. This was his final report as Section liaison, and again thanked Rob Freedman and William Hennessey for Chairing the RPPTL Section, the powerhouse of The Bar. He was blown away by the work and thanked all on the call. Congratulations on a wonderful year with grace and humor. Best wishes to William Hennessey for his year. He looks forward to being with the Section in Jackson Hole.

**VI. Chair-Elect's Report — *William T. Hennessey, III, Chair-Elect***

Mr. Hennessey reported that he has been in consistent contact with the venues. Each hotel assured that a plan and protocol is in place with social distancing. The Breakers site will use all ballrooms for Legislative Update and exhibitors in hallways. Dinners and cocktail parties will happen as planned with social distancing. There will be less tables. He has been asked by Section members "Why The Breakers" - one part of the Section, not wanting to get together, one part wants to accommodate both, those who do not attend would not feel left out. The Section will offer a hybrid virtual meeting with Zoom. Do not feel compelled to attend. We will accommodate both.

Mr. Hennessey commented that the list of the 2020-2021 Executive Council meetings is at page 64 of the agenda.

The Breakers has been moved to August 20-23, 2020. Registration will be out in next couple of weeks. Room Rate (Deluxe room-King) \$239; Premium Room Rate \$290

The Breakers opened before Memorial Day and has graciously agreed to change date. ATO has been cancelled.

Thursday: Reception.

Friday: Spouse event on Worth Avenue, tour and shopping.

Friday Night: We will recognize Rob; Section Member Burt Bruton's band Roadkill will play Friday night.

Saturday Afternoon: Pool time.

Saturday Night: Drive Shack. Family friendly golf range and arcade.

September 30-October 4, 2020 – Out of State Executive Council Meeting. Four Season Resort, Jackson Hole, WY. Standard Guest Room Rate: \$395 (single/double). Jackson Hole registration sold out and hotel block was filled within two weeks.

December 3-December 6, 2020 – Executive Council & Committee Meeting. Disney's Yacht Club, Orland, FL. Standard Guest Room Rate: \$285 (\$25 pp for each person over 18 years old).



February 4 – February 7, 2021 Executive Council & Committee Meeting. Hammock Beach Resort, Palm Coast, FL. Standard Guest Room Rate: \$289 (single/double).

June 3-June 6, 2021 Executive Council Meeting & Convention. JW Marriott, Marco Island, FL. Standard Guest Room Rate \$245 (single/double). We may need to cap attendance.

The RPPTL Committee Leadership Appointments for 2020-2021 is at page 65 of the agenda.

Mr. Hennessey congratulated and thanked new Chairs and Vice Chairs. A final chart will be circulated. Mr. Hennessey thanked outgoing Chairs for their service. Mr. Hennessey commented that they did a fantastic job organizing and conducting meetings. He encouraged assistance in transition for Chair and Vice Chairs. We may need more interim meetings for planning purposes.

**VII. Treasurer's Report — *Wm. Cary Wright, Treasurer***

Mr. Hennessey recognized Cary Wright.

Mr. Wright reported year to date revenues of \$1,229,140.00 and expenses of \$1,231,679.00 for a net loss of \$2,539.00, year to date. However, the cancellation of the Convention will result in a considerable net savings.

The Statement of Current Financial Conditions is at page 76 of the agenda. Net savings year to date is quite positive, doing better than budget. Big events CLG-CLO \$68,000.00 about and CLI were pre COVID-19 and \$138,769.00 (Budget \$107,000.00). Budget for the Convention is a \$119,000.00 loss, now showing \$8,000.00 profit. We had budgeted for \$84,000.00 loss, but showing a \$25,000.00 profit, there are \$207,000.00 expenses for Tampa meeting and \$107,000.00 refund not posted and \$20,000.00 correction. June will have few expenses. Page 76 Investment Allocations should be positive.

**VIII. Director of At-Large Members Report — *Lawrence Jay Miller, Director***

Mr. Hennessey recognized Larry Miller.

Mr. Miller reported that when moratorium lifted next week ALMs are supporting a new eviction defense program.

Mr. Miller congratulated Mr. Freedman on the virtual happy hour for the ALMs. He indicated that ALMs are seeking alternative funding for “No Place Like Home.”

Mr. Miller advised of a new ALM’s program called FACE – Florida Attorneys Consulting on Evictions.

Mr. Miller indicated documentation to assist First Responders needing wills. 6<sup>th</sup> and 13<sup>th</sup> Circuit developing a program.

**IX. CLE Seminar Coordination Report — *Wilhelmina F. Kightlinger (Real Property) and John C. Moran (Probate & Trust), Co-Chairs***

Mr. Hennessey recognized John C. Moran.

Mr. Moran thanked everyone for their contribution to the COVID page. The Section co-sponsored a completely free seminar with the ELUL and CCLG Sections on Virtual Hearings – Statewide Best Practices for Local Government and Land Use Hearings. Over 1,000 attended.

1. The Report on CLE Committee Activity since COVID-19 restrictions is at page 77 of the agenda.

Mr. Moran reported that the Section created a COVID-19 webpage. The Section's COVID-19 webinar CLE on best practices had 1,000 attendees. He reported on the impact of COVID-19 on CLE programs. He indicated that the Section is ready with online presentations – many of which had been recently updated. Board Certification Review Trust and Estate programs changed to September 11 to an on-demand format. The August 3, 2020 test is still on. Schedule is in place may transform to full day virtual. Convention seminar on notarization will go to virtual June 24, 2020.

2. The upcoming CLE programs and opportunities is at page 79 of the agenda.

Mr. Moran reported on charitable symposium. Asked Chairs and speakers to remain flexible. There is no plan to have any in person CLE events through the end of 2020.

**X. Legislation Committee – *S. Katherine Frazier and Jon Scuderi, Co-Chairs***

Mr. Hennessey recognized Jon Scuderi. Mr. Scuderi thanked the Section's lobby team for their hard work in 2020 Session.

Mr. Scuderi deferred to Peter Dunbar, Section Legislative Consultant. Mr. Dunbar reported on the status of Section initiatives and the impact of the coronavirus on the legislative process. Mr. Dunbar echoed Mr. Scuderi's comments and thanked everyone who stepped up. Thirty-three (33) items of interest on advocacy. Three signed so far. Four more to governor this week informal protocol due to pandemic. Only 20% of bills have been delivered to date. No vetoes anticipated. Not likely to see a Special Session but may depend on May revenue as reported

in June. Shout out to Michael Gelfand for keeping us up to date with the Governor's Emergency Orders.

The Section is working with Senator Kathleen Passidomo and a task force on the recording of redacted deeds. French Brown is working with her on our behalf. Mr. Dunbar reported that Martha Edenfield is working with the Probate Division on the new trust laws and remote notary. As to initiatives for 2021, Mr. Dunbar expects to see bills that relate to the pandemic, remote notary will be back, a bill relating to emergency powers for community associations, which the Section is already working on and bills relating to Court operations and procedures resulting from the pandemic.

**XI. General Standing Division Report — William T. Hennessey, III, General Standing Division Director and Chair-Elect**

**Information Items:**

Mr. Hennessey recognized Christopher A. Sajdera.

1. **Fellows** - Benjamin Frank Diamond and Christopher A. Sajdera, Co-Chairs

Mr. Sajdera reported:

a. Report on applications for the Fellows program and an extension of the deadline to June 30<sup>th</sup>. Working on outreach to local Bar and minority Bars. Working on remodeling website. Mr. Hennessey thanked the Fellows for work reaching out to minority Bars and diversity. There is a need for individual outreach. Kymberlee Smith organized a minority bar seminar on "How to Set Up a Successful Estate Planning and Drafting Practice; Introduction to Wills and Trusts Drafting" with Rohan Kelley and Circuit Court Judge Kenneth Gillespie. The seminar was well attended and well done. It was sold out. Mr. Hennessey thanked Ms. Smith for her effort to make that happen and for her support.

1. **Liaison with Clerks of the Court** – Laird A. Lile

a. Update on matters of interest.

Mr. Hennessey recognized Laird A. Lile.

Mr. Lile reported that clerks are working hard to keep people's business working. E-filing system came together well. Judges are signing more orders electronically.

3. **Information and Technology** – *Neil Barry Shoter, Chair*

Mr. Hennessey recognized Neil Shoter.

Mr. Shoter provided an update on committee activities. Committee trying to provide tools to all Committees. This week they created a place for Committees to place videos so Section members could access them. Mr. Shoter thanked Mary Ann for her hard work.

4. **Membership and Inclusion** - *Annabella Barboza and Brenda Ezell, Co-Chairs*

Mr. Hennessey recognized Annabella Barboza and Brenda Ezell.

Created a job opportunities ListServe on members page. Another CLE on cyber security. Quick reminder June 14, 2020 present as to Section technology. Tab on Committee home page. Thank you to Michael Gelfand for Zoom tutorial which is on web page.

Ms. Ezell reported on the committee activities, including creating letters to send the 11,062 members of the Section. They are also discussing a potential code of conduct. Dresden Brunner presented on a proposed Section mentoring program called the “Senior Partner” program.

5. **Professionalism and Ethics** – *Gwynne A. Young, Chair*

Mr. Hennessey recognized Gwynne A. Young.

a. Update on proposed Rule 4-1.14 (Client With Diminished Capacity).

Ms. Young reported that the Rule 4-1.14 will be considered by the Florida Supreme Court in the next legislative cycle.

**XII. Real Property Law Division Report** — *Robert S. Swaine, Division Director*

Mr. Hennessey recognized Robert S. Swaine.

Mr. Swaine recognized the Real Property Division Sponsors.

Sponsors:

Amtrust Financial Services  
Attorneys Title Fund Services, LLC  
Attorneys’ Real Estate Councils of Florida, Inc.  
First American Title

Hopping Greens & Sams

Mr. Hennessey thanked Section Sponsors.

Cumberland Trust  
EasySoft  
Fiduciary Trust International of the South  
First American Title Insurance  
Heritage Investment  
Hopping Greens & Sams  
North American Title Insurance Company  
Practice 42  
Valuation Services, Inc.  
Wilmington Trust

**Information Item:**

1. **Condominium and Planned Development** - *William P. Sklar and Joseph E. Adams, Co-Chairs*

**Information Item:**

- a. Discussion of legislative initiative for amendments to Ch. 617, 718 and 720, Fla. Stat., to provide that quorum requirements in governing documents for a community association control over the requirements of Chapter 617 and to provide internal consistency within Chapters 718 and 720, Fla. Stat. The legislative package is at page 80-149 of the agenda.

Mr. Swaine recognized William P. Sklar. Mr. Sklar congratulated Mr. Freedman and added that “The Section is better off for his leadership.”

Mr. Sklar indicated that the 60-page bill is proposed to correct technical errors and glitches in Chapters 718 and 720. Not substantive changes but there are compelling needs. Committee meeting approved Emergency Powers Task Force regarding emergency powers for community associations not anticipated in statute. Range of changes when mortgagee consent is needed, units on records inspection time and pass through lots, developer use of deposit, homeowners’ association statute to remove Rules as a governing document. Allow HOA to use public records to allow secret ballots and clarify nominations from the floor.

**XIII. Probate and Trust Law Division Report — Sarah Butters, Division Director**

Mr. Hennessey recognized Sarah Butters.

Ms. Butters recognized the Probate and Trust Law Division Sponsors.

Sponsors:

BNY Mellon Wealth Management  
Business Valuation Analysts, LLC  
Coral Gables Trust  
Grove Bank and Trust  
Kravit Estate Appraisal  
Management Planning Inc.  
Northern Trust

Mr. Hennessey thanked the sponsors for their continued support.

**Information Items:**

There is a supplement to the agenda on Thursday.

Ms. Butters recognized Angela M. Adams.

1. **Ad Hoc Committee on E-Wills** - *Angela M. Adams, Chair*

Ms. Adams reported on consideration of amendment to Florida Statutes 117.285, 709.2119, 732.401, 732.503, 732.521, 732.703, and 747.051 relating to electronic notarization of testamentary documents. A copy of the legislative package is at page 157-167 of the agenda and supplemental agenda as an information item.

**Information Item:**

Ms. Adams indicated that the bill corrects glitches in Chapter 2019-71, Laws of Florida and revises forms contained in Florida Statutes to comply with new notarization procedures set forth in said Act.

Ms. Adams noted the following clarifications:

Page 1 - line 20 does this apply to all remote transactions. This section of 117.286 focuses on remote witnesses.

Page 3 – line 67 carve out for revocable aspect of testamentary trust.

Page 3 – line 72. New section K same as page 1, line 20. Repeat and reiterate comment already questing need to duplicate and whether it is.

Effective dater – page 9. These are remedial in the bill will be so effective on becoming law.

2. **Ad Hoc Guardianship Law Revision Committee** - *Nicklaus J. Curley and Sancha Brennan Whynot, Co-Chairs*

Ms. Butters recognized Nicklaus J. Curley and Sancha Brennan Whynot.

Mr. Curley provided an update on current version of potential changes to the Guardianship Code. The proposed text is at page 163 of the agenda as an information item. The White Paper should be ready to go soon. Goals of the legislation: 1. Protect due process; 2. Maintain last resort status of guardianship. 3. Money – guardianship has become expensive. Fifteen pages last done in early 1990's.

3. **Probate Law Committee** – *M. Travis Hayes, Chair*

Ms. Butters recognized Richard Sherrill.

Mr. Sherrill presented the second item information to the Florida Probate Code and Trust Code to clarify that any testamentary bequest made in favor of a former spouse is void upon divorce from that spouse, regardless of when the bequest was made (the *Gordon* fix). It will not apply to (1) bequests made after divorce; (2) where there is some specific intent not to disinherit a former spouse; or (3) where a divorce judgment specifies otherwise.

Patrick Duffey then reported on the Probate Law Committee's second info item relating to amendments to the Probate Code to permit the posting of a fiduciary bond in lieu of a restricted depository account (the *Goodstein* fix). The proposed amendments are at page 216-223 of the agenda. Patrick explained that by offering a bond alternative, it would likely save judicial time as well as lawyer time. .

4. **Estate and Trust Tax Planning Committee** - *Robert L. Lancaster, Chair*

Ms. Butters recognized Robert L. Lancaster.

Mr. Lancaster reported that the proposed bill would create a new Part XV of the Florida Trust Code to be titled "Florida Community Property Trust Act of 2021". Income tax planning would be favorably impacted as a double step up in the basis and would add some certainty as to community property (from other states). There are several other states with similar provisions. The Committee looked at many state models but ultimately used the Tennessee model and improved . The proposed text is at page 224 of the agenda.

**XIV. Adjourn:** Motion to Adjourn at 2:02 P.M.

Respectfully submitted.

By: \_\_\_\_\_  
Steven H. Mezer, Secretary

ACTIVE 12305185.1



**ATTENDANCE ROSTER**  
**REAL PROPERTY PROBATE & TRUST LAW SECTION**  
**EXECUTIVE COUNCIL MEETINGS**  
**2019-2020**

Executive Committee	Division		July 24 Breakers	Nov. 6 Miami	Jan. 29 Tampa	April 1 Amsterdam (Trip Cancelled due to COVID 19)	May 28 Orlando
	RP	P&T					
Boe, Debra Lynn Immediate Past Chair		√	√	√	√		√
Freedman, Robert S. Chair	√		√	√	√		√
Pennessy, William Chair-Elect & General Standing Div. Director		√	√	√	√		√
Richtlinger, Hilhelmina F. Co-Chair Real Property	√		√	√	√		√
Swaine, Robert S. Real Property Law Div. Director	√		√	√	√		√
Butters, Sarah S. Probate & Trust Law Div. Director		√	√	√	√		√
Richt, M. Cary Treasurer	√		√	√			√
Frazier, S. Catherine Legislation Co-Chair Real Property	√		√	√	√		√
Scuderi, Jon Legislation Co-Chair Probate & Trust		√	√	√	√		√
Moran, John C. CLE Co-Chair Probate		√	√	√	√		√
Meier, Steven Secretary	√		√	√	√		√
Miller, Lawrence J. Director, At Large Members		√	√	√	√		√

Executive Council Members	Division		July 24 Breakers	Nov. 6 Miami	Jan. 29 Tampa	April 1 Amsterdam Trip Cancelled due to COVID 19)	May 28 Orlando
	RP	P&T					
Acosta, Jolyon Delphin		√	√	√	√		√
Adams, Angela M.		√	√	√	√		√
Adams, Joseph	√		√		√		

Executive Council Members	Division		July 24 Breakers	Nov. 6 Miami	Jan. 29 Tampa	April 1 Amsterdam Trip Cancelled due to COVID 19)	May 28 Orlando
	RP	P&T					
Akins, David J.		√	√	√	√		√
Altman, Stuart □.		√	√	√	√		√
Archbold, J. Allison		√	√		√		√
Arnold, Jr., Lynwood	√		√		√		√
Aron, Jerry E. <b>Past Chair</b>	√		√	√			
Ashton, Amber E.	√		√	√	√		√
Awerbach, Martin S.	√		√	√	√		√
Bald, □imberly A.		√	√	√	√		√
Ballaga, Raul P.	√						
Barbo□a, Annabella	√		√	√	√		√
Baskies, Jeffrey		√	√	√			√
Battle, Carlos A.		√	√	√	√		√
Baumann, Phillip A.		√	√	√	√		√
Beales, III, □alter R. <b>Past Chair</b>	√						
Bedke, Michael A.	√						
Belcher, □illiam F. <b>Past Chair</b>		√	√	√	√		
Bell, □enneth B.	√						
Bell, Rebecca Coulter		√	√	√	√		√
Beller, Amy		√	√		√		√
Bellew, Brandon D.		√	√	√	√		√
Bloodworth, Jennifer J.	√		√	√	√		√
Bonevac, Judy B.		√	√	√	√		√
Bowers, Eli□abeth A.		√	√	√	√		√

Executive Council Members	Division		July 24 Breakers	Nov. 6 Miami	Jan. 29 Tampa	April 1 Amsterdam Trip Cancelled due to COVID 19)	May 28 Orlando
	RP	P&T					
Boyd, Deborah	√		√	√	√		√
Braun, □eith Brian		√	√	√	√		√
Brenes-Stahl, Tattiana		√	√	√	√		
Brennan, David C. <b>Past Chair</b>		√	√				
Bronner, Tae □.		√	√		√		√
Brown, Mark A.	√		√	√	√		
Brown, Shawn	√		√	√	√		√
Brunner, S. Dresden		√	√	√	√		√
Bruton, Jr., Ed Burt	√		√	√	√		√
Bucher, Elaine M.		√	√		√		√
Butler, Johnathan		√	√		√		√
Catlin, Catherine M.	√						
Callahan, Chad □ . III		√			√		√
Carlisle, David R.		√	√				√
Caskey, John R.		√	√	√	√		√
Christiansen, Patrick <b>Past Chair</b>	√		√		√		
Christy, Douglas G. III	√		√	√	√		√
Christy, Erin □ope	√		√	√	√		
Cohen, □oward Allen	√		√	√	√		√
Cole, Stacey L.		√	√	√	√		√
Conetta, Tami F.		√	√	√	√		√
Cope, Jr., Gerald B.	√		√	√	√		√
Cornett, Jane Louise	√		√	√	√		

Executive Council Members	Division		July 24 Breakers	Nov. 6 Miami	Jan. 29 Tampa	April 1 Amsterdam Trip Cancelled due to COVID 19)	May 28 Orlando
	RP	P&T					
Curley, Nick		√	√	√	√		√
Detel, Lauren Y.		√	√	√	√		√
Diamond, Benjamin F.		√	√		√		√
Diamond, Sandra F. <b>Past Chair</b>		√	√	√	√		√
Dobrev, Alex	√		√		√		√
Dollinger, Jeffrey	√				√		√
Dribin, Michael <b>Past Chair</b>		√	√	√	√		√
Duffey, Patrick J.		√	√	√	√		√
Duvall, III, Homer	√		√	√	√		√
Du, Ashley Nichole		√	√	√	√		
Eckhard, Rick	√				√		
Ellison, Jason M.	√		√	√	√		√
Emans, Patrick C		√	√	√			√
Emerich, Guy S.		√	√		√		√
Ertl, Christene M.	√			√			√
Evert, Jamison C.		√	√	√	√		√
Ell, Brenda B.	√		√	√			√
Fagan, Gail		√	√		√		√
Falk, Jr., Jack A.		√	√	√	√		√
Farach, Manuel	√		√	√			√
Faulkner, Debra Ann		√					
Felcoski, Brian J. <b>Past Chair</b>		√	√	√	√		√
Ferguson, Elizabeth B.	√		√		√		√

Executive Council Members	Division		July 24 Breakers	Nov. 6 Miami	Jan. 29 Tampa	April 1 Amsterdam Trip Cancelled due to COVID 19)	May 28 Orlando
	RP	P&T					
Fernandez, Christopher E.	√		√	√	√		√
Fields, Alan B.	√			√	√		√
Finchum, Travis		√	√	√	√		√
Fitzgerald, Jr., John E.		√	√	√	√		√
Foreman, Michael L.		√	√		√		√
Friedman, Bridget	√		√		√		
Friedman, Jesse B.		√	√		√		
Galler, Jonathan		√	√	√	√		
Gans, Richard R.		√	√	√	√		
Gelfand, Michael J <b>Past Chair</b>	√		√	√	√		√
Gentile, Melinda S.	√		√	√			√
George, James		√	√	√	√		√
George, Joseph P.		√	√	√	√		
Godelia, Vinette D.	√				√		
Goethe, Jeffrey S.		√	√	√	√		√
Goldman, Louis (Trey)	√		√		√		√
Goldman, Robert ( ) <b>Past Chair</b>		√		√			√
Goodall, Deborah P. <b>Past Chair</b>		√	√	√			√
Goodman, ( )on Jaimie							
Graham, Robert M.	√		√		√		√
Granet, Lloyd	√		√		√		√
Griffin, Linda S.		√	√		√		
Grimsley, John G. <b>Past Chair</b>		√					

Executive Council Members	Division		July 24 Breakers	Nov. 6 Miami	Jan. 29 Tampa	April 1 Amsterdam Trip Cancelled due to COVID 19)	May 28 Orlando
	RP	P&T					
Grosso, Jennifer		√			√		√
Gunther, Eamonn □ .		√	√	√	√		√
Gurgold, Eric		√	√		√		√
Guttmann, III, Louis B <b>Past Chair</b>	√				√		√
□amrick, Alexander □		√	√	√	√		
□argett, Michael Van	√		√	√	√		√
□atcher, □on. Mary P.			√		√		√
□avens, Jason		√	√	√			√
□ayes, □on. □ugh D.			√	√			
□ayes, Michael Travis		√	√	√	√		√
□earn, Frederick □Ricky□		√	√		√		√
□earn, Steven L. <b>Past Chair</b>		√	√		√		
□eckert, □atie	√		√	√			√
□enderson, Jr., Reese J.	√		√	√			
□enderson, III, Thomas N.	√			√	√		√
□euston, Stephen P.		√	√	√			
□ipsman, Mitchell Alec		√	√	√	√		√
□offman, Brian □ .	√		√	√	√		√
□udson, □on. Margaret □Midge□		√	√		√		
□ughes, Eli□abeth		√		√			√
□uss, Cady L.		√	√	√			√
□utt, Gregg Evan	√				√		
Ispording, Roger O. <b>Past Chair</b>		√	√				

Executive Council Members	Division		July 24 Breakers	Nov. 6 Miami	Jan. 29 Tampa	April 1 Amsterdam Trip Cancelled due to COVID 19)	May 28 Orlando
	RP	P&T					
Jennison, Julia Lee	√		√	√			√
Johnson, Amber Jade		√	√	√	√		√
Jones, Frederick □.	√		√	√	√		√
Jones, Patricia P.□.	√		√	√			
Judd, Robert B.		√	√	√			
□almanson, Stacy O.	√		√	√	√		√
□aplan, Seth		√	√	√	√		√
□angas, Michael R.		√	√	√			√
□arib□anian, George		√	√				√
□arr, Mary E.		√	√	√	√		
□arr, Thomas M.		√	√	√	√		√
□ayser, Joan B. <b>Past Chair</b>		√		√	√		
□elley, Rohan <b>Past Chair</b>		√	√	√	√		√
□elley, Sean □.		√	√	√	√		√
□elley, Shane		√	√	√	√		
□eyser, □on. Janis Brustares							
□han, Nishad	√		√	√	√		√
□ibert-Basler, Nicole	√		√	√			√
□insolving, Ruth Barnes, <b>Past Chair</b>	√				√		√
□oren, Edward F. <b>Past Chair</b>		√	√	√	√		√
□otler, Alan Stephen		√		√	√		√
□romash, □eith S.		√	√	√	√		√
□rumbein, Sandra Eli□abeth	√		√	√			√

Executive Council Members	Division		July 24 Breakers	Nov. 6 Miami	Jan. 29 Tampa	April 1 Amsterdam Trip Cancelled due to COVID 19)	May 28 Orlando
	RP	P&T					
□urian, Sanāy	√		√	√			√
□ypreos, Theodore S.		√	√	√	√		√
LaFemina, Rose M.		√	√	√	√		
Lancaster, Robert L.		√	√	√	√		√
Lane, Jr., □ illiam R.		√	√		√		√
Larson, Roger A.	√		√				√
Leathe, Jeremy Paul		√	√	√	√		√
Lebowit□ Sean				√	√		√
Lile, Laird A. <b>Past Chair</b>		√	√	√	√		√
Lindsey, □on. Norma							
Little, III, John □ .	√		√				
Liu, Jin	√		√	√	√		√
Lunsford, Rachel Albritton		√	√	√	√		√
Madorsky, Marsha G.		√		√			√
Malec, Brian		√		√	√		
Malfeld, Mariela	√		√	√			
Marger, Bruce <b>Past Chair</b>		√			√		
Marshall, III, Stewart		√	√		√		√
Marx, James A.		√	√	√	√		√
Mastin, Deborah Bovarnick	√		√	√	√		
McCall, Alan □.	√		√		√		√
McDermott, Daniel		√	√	√			√
McElroy, IV, Robert Lee		√	√	√	√		



Executive Council Members	Division		July 24 Breakers	Nov. 6 Miami	Jan. 29 Tampa	April 1 Amsterdam Trip Cancelled due to COVID 19)	May 28 Orlando
	RP	P&T					
McIver, Richard	√		√	√	√		√
McRae, Ashley E.	√		√		√		√
Melanson, Noelle M.		√	√	√	√		√
Menor, Arthur J.	√			√			
Meyer, George F. <b>Past Chair</b>	√		√	√	√		√
Meyer, Michael	√			√			√
Middlebrook, Mark	√		√	√	√		√
Miñe, Patrick		√	√	√	√		√
Moffa, Jeanette	√						
Muir, Mon. Celeste M.		√	√	√	√		√
Murphy, Melissa J. <b>Past Chair</b>	√		√		√		√
Nash, Charles I.		√	√		√		√
Neukamm, John B. <b>Past Chair</b>	√		√	√	√		√
Nguyen, Hung V.		√	√	√	√		√
Oliver, Rachel			√	√	√		√
O'Malley, Andrew M.	√			√	√		√
Papanikos, Cristina		√	√	√	√		√
Payne, L. Howard		√	√	√			
Pence, Scott P.	√		√	√	√		√
Pepper-Dickinson, Tasha M.		√	√	√			
Pilotte, Frank		√	√	√	√		√
Pollack, Anne M.	√		√	√	√		√
Prescott, Leonard	√		√	√			√

Executive Council Members	Division		July 24 Breakers	Nov. 6 Miami	Jan. 29 Tampa	April 1 Amsterdam Trip Cancelled due to COVID 19)	May 28 Orlando
	RP	P&T					
Pressly, Grier James				√	√		√
Price, Pamela O.		√	√	√	√		√
Quintero, Jason	√		√	√	√		√
Redding, John N.	√		√	√	√		√
Riddell, Cynthia	√		√	√	√		
Rieman, Alexandra V.		√	√	√	√		√
Robbins, Jr., R.J.	√		√		√		√
Roberts, III, Hardy L.	√			√	√		√
Roñas, Silvia B.	√		√	√	√		√
Rolando, Margaret A. Past Chair	√		√	√	√		√
Roman, Paul E.		√	√	√	√		√
Rosenberg, Joshua		√	√	√			
Rubel, Stacy		√	√	√	√		√
Rubin, Jenna		√	√	√	√		√
Russick, James C.	√		√	√	√		√
Sachs, Colleen C.	√		√	√	√		√
Sañdera, Christopher	√		√	√	√		√
Santos, Angela		√					√
Sasso, Andrew	√		√	√	√		√
Schwartz, Martin	√			√	√		√
Schwartz, Robert M.	√		√	√	√		√
Schwinghamer, Jamie		√	√	√	√		
Seaford, Susan	√						

Executive Council Members	Division		July 24 Breakers	Nov. 6 Miami	Jan. 29 Tampa	April 1 Amsterdam Trip Cancelled due to COVID 19)	May 28 Orlando
	RP	P&T					
Seigel, Daniel A.	√		√	√	√		√
Sheets, Sandra G.		√	√	√	√		√
Sherrill, Richard		√	√	√			√
Shoter, Neil B.	√		√	√	√		√
Sklar, William P.	√		√	√	√		√
Skrande, Gutman		√		√	√		√
Smart, Christopher .	√			√	√		√
Smith, Lymberlee C.	√		√	√			√
Smith, G. Thomas <b>Past Chair/Honorary Member</b>	√		√				
Smith, Yoshimi O.		√	√	√	√		√
Sneeringer, Michael		√	√	√			√
Solomon, Marty	√		√		√		
Sparks, Brian C.		√	√	√	√		√
Speiser, Ron. Mark A.			√		√		
Spivey, Barry F.		√	√	√	√		
Spurgeon, Susan .	√		√		√		√
Stafford, Michael P.		√	√	√	√		
Staker, Carla J.	√		√	√	√		√
Stashis, Alfred Joseph		√	√	√	√		√
Stern, Robert G.	√				√		√
Stone, Adele I.	√		√	√	√		√
Stone, Bruce M. <b>Past Chair</b>		√					√
Suarez, Ron. Richard							

Executive Council Members	Division		July 24 Breakers	Nov. 6 Miami	Jan. 29 Tampa	April 1 Amsterdam Trip Cancelled due to COVID 19)	May 28 Orlando
	RP	P&T					
Sundberg, Laura □.		√	√		√		√
Swaine, Jack Michael <b>Past Chair</b>	√		√		√		
Taylor, Richard □.	√		√	√	√		√
Thomas, □on. Patricia			√		√		√
Thornton, □enneth E.	√		√	√	√		√
Thorpe, □on Janet C.			√				√
Ticktin, □on. Jessica J.							
Tobin, Jennifer S.	√		√		√		√
Triggs, Matthew □.		√	√	√	√		
Tschida, Joseph John	√		√	√	√		√
Tucker, □ristine L.		√	√	√			√
□dick, Arlene C.	√			√	√		√
Van Dien, Lisa Barnett	√		√	√			√
Van Lenten, Jason Paul		√	√	√			√
Van Pelt, □it E.		√	√		√		√
VanSickle, Melissa	√						√
Villarroel, Nicole Marie	√		√		√		√
Virgil, Eric		√	√	√			
□aller, Roland D. <b>Past Chair</b>	√		√	√	√		√
□arner, Richard	√						
□eintraub, Lee A.	√		√	√	√		√
□eiss, Brad R.	√		√	√	√		√
□ells, Jerry B.		√	√		√		

Executive Council Members	Division		July 24 Breakers	Nov. 6 Miami	Jan. 29 Tampa	April 1 Amsterdam Trip Cancelled due to COVID 19)	May 28 Orlando
	RP	P&T					
<input type="checkbox"/> hite, Jr., Richard M.		√	√		√		√
<input type="checkbox"/> hynot, Sancha B.		√	√	√	√		
<input type="checkbox"/> ilder, Charles		√					
<input type="checkbox"/> illiams, Margaret A.	√		√		√		√
<input type="checkbox"/> illiamson, Julie Ann <b>Past Chair</b>	√			√			
<input type="checkbox"/> inter, Christopher		√	√	√	√		√
<input type="checkbox"/> ohlust, Gary Charles		√	√		√		√
<input type="checkbox"/> olasky, Marōrie E.		√	√	√	√		√
<input type="checkbox"/> olf, Jerome L.		√	√	√			
<input type="checkbox"/> ood, Rebecca	√		√	√	√		√
Young, Gwynne A.		√	√	√	√		√
<input type="checkbox"/> eydel, Diana S.C.		√	√		√		√
<input type="checkbox"/> ikakis, Salome J.		√		√	√		√
<input type="checkbox"/> schau, Julius J. <b>Past Chair</b>	√		√		√		

RPPTL Fellows	Division		July 28 Breakers	Nov. 6 Miami	Jan. 29 Tampa	April 1 Amsterdam (Trip Cancelled due to COVID 19)	May 28 Orlando
	RP	P&T					
Abukodeir, Samah		√					√
Barr, James C.	√		√	√			√
Caōobon, Denise		√	√	√	√		√
Coleman, Jami		√		√	√		
de la Riva, Lian		√	√				√
<input type="checkbox"/> inden, Michelle Gome□	√		√	√	√		√
Jackson, Gabrielle	√		√	√			
Jaiven, □risten □ing	√		√	√	√		

RPPTL Fellows	Division		July 28 Breakers	Nov. 6 Miami	Jan. 29 Tampa	April 1 Amsterdam (Trip Cancelled due to COVID 19)	May 28 Orlando
	RP	P&T					
McDermott, Daniel L.		√	√				
Peregrin, Jacqueline J.	√						
Percopo, Joseph		√		√	√		

Legislative Consultants	Division		July 28 Breakers	Nov. 6 Miami	Jan. 28 Tampa	April 1 Amsterdam (Trip Cancelled due to COVID 19)	May 28 Orlando
	RP	P&T					
Brown, French		√	√	√	√		√
Dobson, Michael	√						
Dunbar, Peter M.	√		√	√	√		√
Edenfield, Martha Jane	√	√	√	√	√		
Finkbeiner, Brittany		√	√				
Roth, Cari L.	√		√				

Guest sign in	Division	
	RP	P&T
Jacobeli J. Behar		√
David Shanks -√	√	
Lea Anne Groover - √		√
Antonio Romano -√		√
Sharifa Jarrett		√
Robert Persante		√
Darren Shotts		√
Jack Kuroweste		√
Julia Korstkamp	√	
Paige Baker	√	
Eric Sulberger		√
Erin Finlen -√		√
Eve A. Bouchard		√
Jeremy T. Cranford - √	√	
Marve Ann Alaimo		√
Bonnie Lee Polk		√
Ciselle Leonardo Nov. 7 <sup>th</sup> & 8 <sup>th</sup>		
Sandy Boisrond		√
Steven Hitchcock	√	
Mike Tanner Nov. 7 <sup>th</sup> 9 <sup>th</sup> - √		
Brandon Masher (Law Student)		
Edwin Edalcken		
Sabine Seidel - √	√	
Sarah Volmy	√	√
Erica Conklin Baines		√
Adam Gaslowitz		√
Michael Faulkner		√
Alexis Robbins		√
Jack Kuroweste		√
Addiannette Williams		

Mia Banks		
Yveline Dalmacy		
Yine □Laura□Ciao		√





## Thank you to Our General Sponsors

<b>Event Name</b>	<b>Sponsor</b>	<b>Contact Name</b>	<b>Email</b>
App Sponsor	<b>WFG National Title Insurance Co.</b>	Joseph J. Tschida	<a href="mailto:jtschida@wfgnationaltitle.com">jtschida@wfgnationaltitle.com</a>
Thursday Grab and Go Lunch	<b>Management Planning, Inc.</b>	Roy Meyers	<a href="mailto:rmeyers@mpival.com">rmeyers@mpival.com</a>
Thursday Night Reception	<b>JP Morgan</b>	Carlos Batlle	<a href="mailto:carlos.a.batlle@jpmorgan.com">carlos.a.batlle@jpmorgan.com</a>
Thursday Night Reception	<b>Old Republic Title</b>	Jim Russick	<a href="mailto:jrussick@oldrepublictitle.com">jrussick@oldrepublictitle.com</a>
Friday Reception	<b>Wells Fargo Private Bank</b>	Johnathan Butler	<a href="mailto:johnathan.l.butler@wellsfargo.com">johnathan.l.butler@wellsfargo.com</a>
Friday Reception	<b>Westcor Land Title Insurance Company</b>	Sabine Seidel	<a href="mailto:sseidel@wltic.com">sseidel@wltic.com</a>
Friday Night Dinner	<b>First American Title Insurance Company</b>	Alan McCall	<a href="mailto:Amccall@firstam.com">Amccall@firstam.com</a>
Spouse Breakfast	<b>Attorneys Title Fund Services, LLC</b>	Melissa Murphy	<a href="mailto:mmurphy@thefund.com">mmurphy@thefund.com</a>
Real Property Roundtable	<b>Fidelity National Title Group</b>	Karla Staker	<a href="mailto:Karla.Staker@fnf.com">Karla.Staker@fnf.com</a>
Probate Roundtable	<b>Stout Risius Ross Inc.</b>	Kym Kerin	<a href="mailto:kkerin@srr.com">kkerin@srr.com</a>
Probate Roundtable	<b>Guardian Trust</b>	Ashley Gonnelli	<a href="mailto:ashley@guardiantrusts.org">ashley@guardiantrusts.org</a>
Executive Council Meeting Sponsor	<b>The Florida Bar Foundation</b>	Michelle Fonseca	<a href="mailto:mfonseca@flabarfdn.org">mfonseca@flabarfdn.org</a>
Executive Council Meeting Sponsor	<b>Stewart Title</b>	David Shanks	<a href="mailto:laura.licastro@stewart.com">laura.licastro@stewart.com</a>
Overall Sponsor/Leg. Update	<b>Attorneys Title Fund Services, LLC</b>	Melissa Murphy	<a href="mailto:mmurphy@thefund.com">mmurphy@thefund.com</a>
Overall Sponsor/Leg. Update	<b>Attorneys Title Fund Services, LLC</b>	Melissa Murphy	<a href="mailto:mmurphy@thefund.com">mmurphy@thefund.com</a>



## Thank you to Our Friends of the Section

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Heritage Investment	Joe Gitto	<a href="mailto:jgitto@heritageinvestment.com">jgitto@heritageinvestment.com</a>
North American Title Insurance Company	Jessica Hew	<a href="mailto:jhew@natic.com">jhew@natic.com</a>
Valuation Services, Inc.	Jeff Bae	<a href="mailto:Jeff@valuationservice.com">Jeff@valuationservice.com</a>
Wilmington Trust	David Fritz	<a href="mailto:dfritz@wilmingtontrust.com">dfritz@wilmingtontrust.com</a>



## Thank you to our Committee Sponsors

Sponsor	Contact	Email	Committee
<b>Real Property Division</b>			
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Attorneys Title Fund Services, LLC	Melissa Murphy	<a href="mailto:mmurphy@thefund.com">mmurphy@thefund.com</a>	Commercial Real Estate
Attorneys' Real Estate Councils of Florida, Inc	Rene Rutan	<a href="mailto:RRutan@thefund.com">RRutan@thefund.com</a>	Residential Real Estate and Industry Liaison
CATIC	Deborah Boyd	<a href="mailto:dboyd@catic.com">dboyd@catic.com</a>	Real Property Finance and Lending
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First American Title	Wayne Sobian	<a href="mailto:wsobien@firstam.com">wsobien@firstam.com</a>	Real Property Problems Study
<b>Probate Law Division</b>			
BNY Mellon Wealth Management	Joan Crain	<a href="mailto:joan.crain@bnymellon.com">joan.crain@bnymellon.com</a>	Estate and Trust Tax Planning
BNY Mellon Wealth Management	Joan Crain	<a href="mailto:joan.crain@bnymellon.com">joan.crain@bnymellon.com</a>	IRA, Insurance and Employee Benefits
Business Valuation Analysts, LLC	Tim Bronza	<a href="mailto:tbronza@bvanalysts.com">tbronza@bvanalysts.com</a>	Trust Law
Coral Gables Trust	John Harris	<a href="mailto:jharris@cgtrust.com">jharris@cgtrust.com</a>	Probate and Trust Litigation
Coral Gables Trust	John Harris	<a href="mailto:jharris@cgtrust.com">jharris@cgtrust.com</a>	Probate Law Committee
Grove Bank and Trust	Marta Goldberg	<a href="mailto:mgoldberg@grovebankandtrust.com">mgoldberg@grovebankandtrust.com</a>	Guardianship and Advanced Directives
Kravit Estate Appraisal	Bianca Morabito	<a href="mailto:bianca@kravitestate.com">bianca@kravitestate.com</a>	Estate and Trust Tax Planning
Management Planning Inc.	Roy Meyers	<a href="mailto:rmeyers@mpival.com">rmeyers@mpival.com</a>	Estate and Trust Tax Planning
Northern Trust	Tami Conetta	<a href="mailto:tfc1@ntrs.com">tfc1@ntrs.com</a>	Trust Law

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## MEMORANDUM

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**TO:** Real Property, Probate and Trust Law Section of The Florida Bar  
**FROM:** Steven M. Meeker, Esq.  
**DATE:** August 3, 2020  
**RE:** Summary of Interim Action by Executive Committee

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### June 10, 2020 Via Zoom

Robert S. Freedman, William Carywright, Jon Scuderi, Debra L. Boone, Steven M. Meeker, S. Catherine Frazier, Robert S. Swaine, William T. Pennessy, John C. Moran, Wilhelmina F. Vitelenger, Lawrence Jay Miller, and Sara S. Butters were all present. Additional attendees Mary Ann Obos, Program Administrator and Hilary Stephens, Program Coordinator. Mr. Swaine made a motion to approve the renewal of all legislative positions of the Real Property Probate and Trust Law Section as reflected in the May 11, 2020 letter from Gypsy Bailey, General Counsel. The motion was seconded by Mr. Miller. After discussion, six (6) votes were cast in favor of the motion, three (3) votes in opposition to the motion and two (2) members of the Executive Committee abstained. The motion carried.

Ms. Boone and Mr. Meeker reported on the Task Force considering the proposed Florida Commission on Access to Civil Justice regarding Advanced Florida Registered Paralegals. Mr. Freedman will be providing a further response to the Florida Bar Board of Governors. Meeting adjourned at 6:05 p.m.

### June 30, 2020 Telephonic Meeting

Present Robert S. Freedman, William T. Pennessy, S. Catherine Frazier, Wilhelmina F. Vitelenger, Sancha Lynot, William Carywright, John C. Moran, Jon Scuderi, Lawrence Jay Miller, and Steven M. Meeker.

Absent Robert S. Swain

Motion was made by Mr. Freedman Eventbrite will be retained to handle all registration for the 2020 Real Property, Probate and Trust Law Section's Legislative Update be held at the Breakers on August 21, 2020, with all registration fees received for the day of the event, including Zoom broadcast to be the property of the Real Property, Probate and Trust Law Section's PAC, Real

Real Property, Bar

August 3, 2020

Page 2

Property, Probate and Trust Law Section paying for the cost of recording and all proceeds from after market sales will be the property of the Real Property, Probate and Trust Law Section and The Florida Bar. Mr. Wright seconded the motion. Mr. Scuderi proposed an amendment to the motion requiring that it be subject to approval by The Florida Bar. Mr. Freedman accepted that amendment to his motion. The motion, as amended, was approved unanimously. The meeting was adjourned at 5:35 p.m.

**MEMORANDUM**

To: Bill Hennessey  
From: Jon Scuderi  
Date: August 4, 2020  
Re: Interim Action by Executive Committee in month of July

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**July 20, 2020 Zoom Meeting**

Discussion was held to discuss whether to have an in-person Breakers meeting. Concerns were raised over increase in Covid cases and uncertainty surrounding that and the risks to our members. The Breakers was willing to be very accommodating whether we wanted to proceed or cancel. Masks/social distancing would be required. Concerns were also expressed over how it would look if we went forward with an in-person meeting. It was mentioned that the other Florida Bar Sections had not held in-person meetings except for one small group criminal law section meeting. While certain members are anxious to resume our meetings, it's not worth the risks. A motion was made and seconded to conduct a virtual Breaker's meeting only. The vote in favor was unanimous.

RPPTL 2020-2021  
Executive Council Meeting Schedule  
Bill Hennessey's Year

Limit 1 reservation per registrant, additional rooms will be approved upon special request.

Date	Location
<del>July 23 – July 26, 2020</del> <b>Now – August 17 – 23, 2020</b>	<b>Executive Council Meeting &amp; Legislative Update – <b>NOW VIRTUAL MEETING</b></b> <del>The Breakers</del> <del>Palm Beach, Florida</del> <del>Room Rate (Deluxe Room – King): \$239</del> <del>Premium Room Rate: \$290</del>
<b>September 30 – October 4, 2020</b>	<b>Out of State Executive Council Meeting</b> Four Seasons Resort Jackson Hole, WY Standard Guest Room Rate: \$395 (single/double)
<b>December 3 – December 6, 2020</b>	<b>Executive Council &amp; Committee Meetings</b> Disney's Yacht Club Orlando, FL Standard Guest Room Rate: \$289 (\$25 pp for each person over 18 years old)
<b>February 4 – February 7, 2021</b>	<b>Executive Council &amp; Committee Meetings</b> Hammock Beach Resort Palm Coast, FL Standard Guest Room Rate: \$289 (single/double)
<b>June 3 – June 6, 2021</b>	<b>Executive Council Meeting &amp; Convention</b> JW Marriott Marco Island, FL Standard Guest Room Rate: \$245 (single/double)

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\*Subject to availability



## RPPTL Financial Summary from Separate Budgets

2019-2020 [July 1 - June 30] YEAR

### TO DATE REPORT

#### General Budget

#### YTD

Revenue	\$ 1,383,802
Expenses	\$ 1,392,540
<b>Net:</b>	<b>\$ (8,738)</b>

#### Attorney Loan Officer

#### YTD

Revenue	\$ 23,562
Expenses	\$ 21,556
<b>Net:</b>	<b>\$ 2,006</b>

#### CLI

#### YTD

Revenue	\$ 357,326
Expenses	\$ 220,788
<b>Net:</b>	<b>\$ 136,538</b>

#### Trust Officer Conference\*

Revenue	\$ 289,590
Expenses	\$ 194,932
<b>Net:</b>	<b>\$ 94,658</b>

#### Legislative Update\*

Revenue	\$ 63,238
Expenses	\$ 87,502
<b>Net:</b>	<b>\$ (24,264)</b>

#### Convention

Revenue	\$ 4,020
Expenses	\$ 1,293
<b>Net:</b>	<b>\$ 2,727</b>

#### Roll-up Summary (Total)

Revenue:	\$ 2,121,538
Expenses	\$ 1,918,611
<b>Net Operations</b>	<b>\$ 202,927</b>

<b>Beginning Fund Balance:</b>	<b>\$ 2,136,908</b>
<b>Current Fund Balance (YTD):</b>	<b>\$ 2,339,835</b>
<b>Projected June 2020 Fund Balance</b>	<b>\$ 2,052,489</b>

*1 This report is based on the tentative unaudited detail statement of operations dated 6/30/20 (prepared 08/04/20)*

*\*expenses and revenue have not been finalized*





**Outstanding Meeting Liabilities - Current Hotel Contracts**

Year	Meeting	Venue	Cost to Section if Event Cancels	Date
2020	RPPTL Legislative Update	The Breakers, Palm Beach	\$ -	July 22-25, 2020
2020	ATO Conference	The Breakers, Palm Beach	\$ -	August 20-22, 2020
2020	RPPTL EC Out of State Meeting	Four Seasons, Jackson Hole	\$ 146,880.00	Sept 30 - Oct 3, 2020
2021	RPPTL Spring Meeting	Hammock Beach Resort	\$ 158,396.00	Feb 3 -7, 2021
2021	CLI Conference	JW Marriott Orlando Grande Lakes	\$ 149,556.00	March 17-20, 2021
2021	RPPTL Annual Convention	JW Marriott Marco Island	\$ 196,175.00	June 2-6, 2021
2021	RPPTL Legislative Update	The Breakers, Palm Beach	\$ 220,941.00	July 21 - 24, 2021
2021	ATO Conference	The Breakers, Palm Beach	\$ 145,835.10	August 18-22, 2021
2022	CLI Conference	JW Marriott Orlando Grande Lakes	\$ 156,796.00	March 09-12, 2022
2022	RPPTL Convention	Hawks Cay Resort, Duck Key	\$ 220,228.20	June 1 - 5, 2022
			<b>\$ 1,394,807.30</b>	

**Deferred Payments - Current Liabilities (pre-paid account)**

Year	Vendor		Cost to Section if Event Cancels	Date
2020	Diamond Cross Ranch, LLC	Jackson Hole Meeting	\$ 3,500.00	October 31, 2020
2020	Jackson Hole Mountain Resort	Jackson Hole Meeting	\$ 14,000.00	October 31, 2020
2020	Four Seasons Resort	Jackson Hole Meeting	\$ 15,000.00	October 31, 2020
2020	Judd Grossman	Jackson Hole Meeting	\$ 1,900.00	October 31, 2020
2020	Rocky Mountain Connections	Jackson Hole Meeting	\$ 23,929.41	October 31, 2020
2020	M. Obos	Jackson Hole Meeting	\$ 533.56	October 31, 2020
2020	Four Seasons Resort	Jackson Hole Meeting	\$ 22,000.00	September 30, 2020
2020	One Ton Pig	Jackson Hole Meeting	\$ 3,500.00	October 31, 2020
			<b>\$ 84,362.97</b>	

**2020 – 2021 CLE Calendar  
(as of 08/06/20)**

Date of Presentation	Crs. #	Title	Location
08/12/2020	3722	<a href="#"><u>RPPTL Audio Webcast: Professionalism &amp; Ethics Series - Ethics Potpourri</u></a>	Audio Webcast
08/21/2020	3641	<a href="#"><u>40<sup>th</sup> Annual Legislative and Case Law Update</u></a>	Video Webcast
09/09/2020	4014	<a href="#"><u>RPPTL Audio Webcast: Fair Housing and the Fake ESA</u></a>	Audio Webcast
09/16/2020	3518	RPPTL Audio Webcast: AP/ETTP Joint CLE	Audio Webcast
09/23/2020	4015	<a href="#"><u>RPPTL Audio Webcast - Florida's Uniform Title Standards: One of the Best Resources for the Real Estate Practitioner</u></a>	Audio Webcast
10/08/2020	4018	RPPTL Audio Webcast: (RREIL Committee, Lafont Case)	Audio Webcast
10/14/2020	4017	RPPTL Audio Webcast: COVID-19 Considerations for Real Property and Construction Litigation	Audio Webcast
10/16/2020	3970	Charitable Law Symposium	Video Webcast
11/12/2020	4020	RPPTL Audio Webcast: Real Estate Transactions Pt. II	Audio Webcast
11/13/2020	4068	Probate Law	Video Webcast
2/5/2021		Trust & Estate Symposium	TBD
2/12/2021		Attorney Bankers Conference	TBD
02/19-20/2021		Condo Law Certification Review	TBD
03/17-20/2021		Construction Law Certification Review	TBD
03/17-20/2021		Construction Law Institute	TBD
4/9-10/2021		Real Property Certification Review	Orlando
4/9-10/2021		Wills Trusts and Estates Certification Review	Orlando
04/23/2021		Guardianship CLE	TBD
06/04/2021		Convention CLE	Marco Island

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THE FLORIDA BAR

UNLICENSED PRACTICE OF LAW  
STANDING COMMITTEE

PUBLIC HEARING

held on

Friday, February 7, 2020

9:13 a.m.

Hyatt Regency Orlando  
Room Bayhill 26  
9801 International Drive  
Orlando, Florida 32819

Reported by:

Rita G. Meyer, RDR, CRR, CRC  
Stenographic Shorthand Reporter and  
Notary Public, State of Florida at Large

1 APPEARANCES:

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10 and

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17 On behalf of the Florida Bar

18 STANDING COMMITTEE MEMBERS:

19 Susanne D. McCabe, Esquire, Chairperson  
20 Paul Pelton\*, Vice Chairperson  
21 Jill Klaskin Press\*  
22 Marcia Green\*  
23 Barbara P. Burke, Esquire  
24 Richard B. Collins, Esquire  
25 Gwendolyn T. Lisker\*  
Gregory S. Redmon, Esquire  
Brian M. Rubright\*  
Steven C. Simon, Esquire  
Manohar Athavale\*  
Gilbert J. Alba, Esquire  
Martin J. Sperry, Esquire  
\* Public Member

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I N D E X

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1 MS. McCABE: All right. Good morning. We're  
2 ready to get underway.

3 Welcome to the Florida Bar Standing Committee  
4 on the Unlicensed Practice Of Law. Before we get  
5 our executive meeting underway, we have a public  
6 hearing. And if you'd bear with me for just a  
7 minute, I'd like to read several statements.

8 We do have a court reporter taking down  
9 everybody's comments, so it's important that you  
10 speak clearly and concisely -- to the best of your  
11 ability anyway -- and I'm sure madame court reporter  
12 will let us know if you need us to give you any  
13 spelling or things of that nature.

14 I'm going to start with an immunity statement.  
15 Just to let everyone know that during the time that  
16 this Committee is considering the question raised in  
17 this request for an advisory opinion, any  
18 information that we learn at the hearing through  
19 your testimony won't be deemed an admission or  
20 evidence of the unlicensed practice of law. We  
21 won't initiate an investigation of the activities of  
22 any individual testifying today based solely on that  
23 testimony. However, if there are any ongoing  
24 investigations, they will continue and if we receive  
25 a new unlicensed practice of law complaint on any

1 person present today, we would open up a file.

2 If you are involved in an ongoing unlicensed  
3 practice of law investigation or we receive an  
4 unlicensed practice of law complaint and open a  
5 file, your testimony will not be held against you.  
6 Your testimony will not be deemed an admission or  
7 evidence of the unlicensed practice of law and will  
8 not be sent to the Circuit Committee.

9 The reason for this ruling by the Chair is to  
10 encourage full and candid testimony so that the  
11 Committee can reach a determination in this area.

12 As a preliminary statement, this hearing is  
13 being held pursuant to Rule 10-9 of the rules  
14 regulating the Florida Bar. Pursuant to that rule,  
15 notice of this hearing was published in the Orlando  
16 Sentinel and the Florida Bar News. And it was also  
17 posted on the Florida Bar's website.

18 The question presented for consideration today  
19 is whether it constitutes the unauthorized practice  
20 of law for a Florida domiciliary employed by a New  
21 Jersey law firm, having no place of business or  
22 office in Florida, to work remotely from his Florida  
23 home, solely on matters that concern federal  
24 intellectual property rights -- not Florida law --  
25 and without having or creating a public presence or

1 profile in Florida as an attorney.

2 This hearing came about as a result of our  
3 receipt of a written request for a formal advisory  
4 opinion from Thomas Restaino. Mr. Restaino, am I  
5 pronouncing your name correctly?

6 MR. RESTAINO: Perfect.

7 MS. McCABE: Thank you. Our Committee reviewed  
8 this request and we voted to hold this hearing. The  
9 hearing is the initial action of the Committee and  
10 does not guarantee even the issuance of an opinion.

11 Now, the procedure for the hearing today is  
12 Mr. Restaino, as Petitioner, will be the first to  
13 testify and we will then take testimony from anyone  
14 here who wishes to be heard.

15 Thereafter, the floor will be open to the  
16 Committee members for questions. I'm going to ask  
17 you please to identify yourself for the court  
18 reporter before you speak. And if you have any  
19 written materials with you, they should be given  
20 over to Bar counsel, Jeffrey Picker, who is seated  
21 to my left.

22 Your testimony, generally speaking, may be  
23 limited to ten minutes or so, but let's see how it  
24 goes. If you need a little more time, we will  
25 certainly accommodate you in that regard.



1 I do want to make a statement about a conflict  
2 of interest as a preliminary matter. I'm asking the  
3 members of the Committee to address the question of  
4 conflict of interest. So Rule 10-9.1(e) of the  
5 rules regulating the Florida Bar states, "Committee  
6 members will not participate in any matter in which  
7 they have either a material pecuniary interest that  
8 would be affected by an advisory opinion or  
9 Committee recommendation or any other conflict of  
10 interest that should prevent them from  
11 participating. However, no action of the Committee  
12 will be invalid where full disclosure has been made  
13 and the Committee has not decided that the member's  
14 participation was improper.

15 At this time, I'm going to ask any member of  
16 the Committee to indicate if they have anything they  
17 want to disclose on the Record or otherwise indicate  
18 if they have a conflict.

19 (No Response)

20 MS. McCABE: Seeing no Committee members coming  
21 forward then, we'd like to proceed with the swearing  
22 in of the witness.

23 Before the first witness testifies, our  
24 procedure is to ask each person to be sworn in.  
25 It's not mandatory that you be sworn in. If you

1 don't want to be sworn in, we will still hear your  
2 testimony.

3 Mr. Restaino then, you are welcome to step up  
4 and begin your testimony. Would you -- do you  
5 object to being sworn in?

6 MR. RESTAINO: No.

7 Madame court reporter, will you swear the  
8 witness in, please.

9 (Witness Sworn by the Court Reporter)

10 MR. RESTAINO: I do.

11 MS. McCABE: Thank you, sir. You may proceed.

12 MR. RESTAINO: Thank you.

13 MS. McCABE: I feel like you ought to use that  
14 microphone. I don't know whether your voice is  
15 going to carry.

16 MR. RESTAINO: I'm sure it will. Probably not,  
17 not critical.

18 First of all, I'd like to thank the Committee  
19 for considering my request and inviting me here  
20 today and holding this proceeding. I didn't know  
21 what the process might be, but I prepared just a few  
22 remarks, which is sort of supplemental to the letter  
23 that I wrote, which was the original request and  
24 just to give you a little bit more background about  
25 me and the nature of why we made the request; that

1 sort of thing.

2 I am a New Jersey attorney. Throughout my  
3 32-year career of practicing law, I've limited my  
4 practice to federal intellectual property rights  
5 generally and my particular expertise is in patent  
6 rights.

7 In 2018, I retired from my position as chief  
8 intellectual property counsel for a major U.S.  
9 company and it was a position I had held for the  
10 previous 15 years. In that role, I was responsible  
11 for all intellectual property related advice of  
12 counsel to the businesses and divisions of the  
13 company. And while I am registered to practice  
14 before the United States Patent and Trademark  
15 Office, that makes only a smaller portion of the  
16 work that I had done historically for my company as  
17 chief IP counsel.

18 I now employed by the law firm of Tong, Rea,  
19 Bentley & Kim, a New Jersey firm, and they  
20 specialize in federal intellectual property  
21 practice. I will like to perform my day-to-day work  
22 for the firm from my home in Florida using  
23 essentially modern communication technology. The  
24 Tong, Rea firm uses a cloud-based network system  
25 that enables me to work, if you will, virtually in

1 New Jersey, although I am physically located in  
2 Florida. My work space at home is a converted  
3 bedroom. It has a desk, a computer, mouse, printer,  
4 the usual kinds of things. I use my cell phone for  
5 voice communication and I use the firm's encrypted  
6 network connection for other kinds of communication.

7 I made the request of the Committee for the  
8 formal advisory opinion because both the firm and I  
9 wanted to make sure that my establishing a remote  
10 work location would not be violative of Florida's  
11 unlicensed practice of law rules. Although we had  
12 some reason to think that the establishment of that  
13 kind of remote office wasn't likely going to present  
14 any jeopardy for Florida citizens or Florida courts,  
15 nevertheless, based on the research, if you call it  
16 that, what we did, we just didn't feel that there  
17 was enough clarity around that to simply proceed and  
18 wanted to seek advice of this Committee for  
19 guidance.

20 I provided that request back in June of 2019  
21 and I'm here today in furtherance of that and to try  
22 to answer any questions that the Committee may have  
23 of me. With that, I'm happy to respond or -- to any  
24 questions.

25 MS. McCABE: Yeah. I think that's fine. So we

1 had originally thought about doing questions after  
2 all testimony, but I think it's a better idea to  
3 invite the Committee to ask questions of the  
4 gentleman contemporaneous with your testimony.

5 MR. RESTAINO: Sure. Please.

6 MS. McCABE: Does anybody have any questions  
7 for the gentleman regarding this matter? Go ahead,  
8 sir.

9 MR. COLLINS: My name is Dick Collins and the  
10 only question I would have primarily is, during the  
11 course of your interaction in this capacity, do you  
12 ever give any advice based on the Florida law?

13 MR. RESTAINO: No. No. Actually, I don't  
14 recall even in the course of my career -- only,  
15 largely because my work is focused on U.S. patent  
16 statutes, Title 35; sometimes the U.S. copyright  
17 statute and things tend to be folded around that  
18 statutory regime. State law, typically, is not  
19 involved in any way.

20 MS. McCABE: Sir, please announce your name on  
21 the Record.

22 MR. REDMON: I'm Gregory Redmon from  
23 Jacksonville; a member of the Committee.

24 Sir, I was wondering, what assurance does this  
25 Committee have that the Florida public cannot access

1           you as a patent attorney and try to contact you in  
2           any way or utilize your expertise in that area if  
3           they had an interest? How can the Florida public be  
4           assured that they're not able to reach you?

5           MR. RESTAINO: And that, I think, is an  
6           important issue. What we had thought was, it would  
7           be best if we made -- I think Ms. McCabe mentioned  
8           earlier in the question presented -- I don't want to  
9           create any precedent or profile in Florida, so I  
10          don't wish to -- I don't wish to advertise. I don't  
11          wish to hang a sign. I don't wish to represent  
12          myself as a Florida attorney. I'm not. It's a lot  
13          of don't dos. You know, don't do various things  
14          that might give anyone the indication that I'm even  
15          there, in effect, because I'm working from a  
16          converted bedroom.

17          So I don't -- I suppose to answer your question  
18          directly, I would want to state for the Record that  
19          we wouldn't do any of those things. If you were to  
20          look at the firm's website, it does show me as  
21          someone who is of counsel at the firm, but it lists  
22          my address as in the firm's New Jersey address. It  
23          says I'm admitted in New York and New Jersey and the  
24          United States Patent and Trademark Office and some  
25          federal courts. But Florida's no where mentioned,

1           for obvious reasons. And that's, you know, the way  
2           we viewed it. We wanted to sort of make it out to  
3           be, my presence only in New Jersey -- appearance of  
4           presence, if you will, only in New Jersey and do  
5           everything we could or probably more correctly,  
6           don't do anything that would lead anyone in Florida  
7           to know that I was present, you know, among other  
8           Florida citizens.

9           So the firm's practice is, you know, serves  
10          other companies, et cetera. I'm not aware of  
11          whether any of those companies are located in  
12          Florida. I don't think so. Most of what the firm  
13          does is work for my former employer. And I would,  
14          as a practical matter, be working for my former  
15          employer as outside counsel. And the firm has no  
16          office here, in any office; has no plans to expand  
17          to Florida. It's a relatively small practice. I  
18          think it's ten lawyers or less, myself included.

19          So that's kind of how we looked at it to try to  
20          make sure that no Florida citizens, no Florida  
21          businesses, certainly not the Florida courts, would  
22          have any exposure to me or, you know, the work I was  
23          doing.

24                 MS. McCABE: Thank you. Sure. Go ahead, Ms.  
25                 Press.

1 MS. PRESS: Jill Press. You mentioned that the  
2 address on the law firm is the New Jersey one. How  
3 about the phone number for you? How do they -- what  
4 do they list as a --

5 MR. RESTAINO: Yeah. What they list is I'm  
6 extension 116 at the New Jersey firm's main phone  
7 number. So you dial that number. If you knew I was  
8 116, you could press that. And what happens is it  
9 gets routed to my cell phone.

10 MS. PRESS: Okay.

11 MR. RESTAINO: So I can answer the phone. I  
12 can get messages, receive messages; that sort of  
13 thing. But no one dials my cell phone number. My  
14 cell phone number is a New Jersey -- it's an area  
15 code 908. That's part of New Jersey. But that  
16 doesn't appear on the website, either. It's just  
17 the firm's phone number and my extension.

18 MS. PRESS: Thank you.

19 MS. McCABE: Sure.

20 MS. LISKER: Gwendolyn Lisker, Fort Lauderdale.  
21 How long have you been working out of your home in  
22 Florida?

23 MR. RESTAINO: Just since this past Summer.

24 MS. LISKER: Okay. And how long have you been  
25 coming to Florida?



1 MR. RESTAINO: Well, good question. My wife  
2 and I just moved to Florida after my retirement. I  
3 retired at the very end of 2018 and we moved to  
4 Florida in January. We owned a home here. We sold  
5 our home in New Jersey shortly after I retired. And  
6 so, Florida became our only home in Naples.

7 MS. LISKER: So there's no plans to practice  
8 Florida law since this is going to be your permanent  
9 home base?

10 MR. RESTAINO: No practice -- no plans to  
11 practice Florida law, no. No, I spent a long  
12 career, you know, developing an expertise in this  
13 one particular area and that's all I wish to, that's  
14 all I wish to practice.

15 MS. McCABE: Thank you. Yes?

16 MR. ALBA: Gilbert Alba. While you're  
17 practicing federal law located in Florida, what  
18 agencies or Bar associations regulate your activity?

19 MR. RESTAINO: Well, I am active at the New  
20 Jersey Bar, so I would be subject to all the rules  
21 and requirements of practice by the New Jersey Bar.  
22 I provide the New Jersey Bar with the address of the  
23 Tong, Rea Law Firm in Eatontown, New Jersey as my  
24 address.

25 MR. ALBA: Do you know if it's their position

1           that you're subject to their regulation while you're  
2           physically practicing federal law in the State of  
3           Florida?

4           MR. RESTAINO: I don't know with certainty. I  
5           believe that they do because they have in various  
6           places in their rules, they ask about in any way  
7           that appears permissive, whether if you're  
8           practicing New Jersey law within New Jersey or  
9           practicing New Jersey law outside of New Jersey.  
10          And then they have different rules for -- for  
11          example, I think if you're practicing law outside of  
12          New Jersey and you do not have a New Jersey office,  
13          you have to register with the Secretary of State for  
14          service of process in matters relating to your  
15          practice.

16          So I -- the implication I think would be that,  
17          yes, you are -- they permit such practice and I  
18          would be subject to their disciplinary rules, their  
19          other rules relating to ethics, et cetera.

20          MR. ALBA: Would that be something you would be  
21          certified, for example, you would be subject to  
22          those ethical rules.

23          MR. RESTAINO: Sure. No problem at all.

24          MS. McCABE: Anyone else have any questions?

25          MR. COLLINS: I've got one follow up.

1 MS. McCABE: Sure. Go ahead.

2 MR. COLLINS: Dick Collins here. What do you  
3 to stay current on your continuing legal education  
4 and how do you achieve that since you're primarily  
5 focused on New Jersey or federal law? How do you do  
6 that?

7 MR. RESTAINO: Right. Well, that's, you know,  
8 as an attorney, when I was employed by my former  
9 employer, it's relatively easy to do, we had annual  
10 meetings every year and a lot of that generated  
11 continuing legal education credits both in  
12 substantive areas, as well as in legal ethics.

13 Now it's on me. I've got to do 24 credits of  
14 continuing legal education to satisfy my New Jersey  
15 requirements every two years. And so, I'm going to  
16 have to now attend to complete my credits before the  
17 end of this calendar year. So I will be  
18 attending -- I have to make arrangements to attend  
19 CLE programs on my own. My firm will likely  
20 reimburse me for that, but I haven't -- we haven't  
21 talked about that just yet. But the answer is, yes,  
22 I have to do that. It's something I've done my  
23 entire career and I'll continue, have to continue do  
24 that.

25 MS. McCABE: Yes, Mr. Redmon?

1 MR. REDMON: Yes. Gregory Redmon, follow-up  
2 question for you.

3 MR. RESTAINO: Sure.

4 MR. REDMON: Is it possible for clients of your  
5 firm that know you are associated with the firm in  
6 New Jersey, to contact you in Florida and for you to  
7 speak to them about their subject matter while  
8 you're in Florida?

9 MR. RESTAINO: Um, well, my former employer  
10 knows where I am. That's just an outgrowth of the  
11 fact that I receive a pension and have health  
12 benefits; that sort of thing. And the person who is  
13 my successor in the chief IP counsel role, knows how  
14 to contact me. I'm sure he has my cell phone. So  
15 that's possible. I don't know that anyone else  
16 would have it. So it's just through the personal  
17 relationships of people I've worked with at my  
18 former employer over the years, who may know that.

19 MR. REDMON: Are you saying not necessary  
20 clients who are clients of the New Jersey firm,  
21 contacting you about their case work.

22 MR. RESTAINO: I don't think so. I can't  
23 imagine, I don't know how they would know that.

24 MR. REDMON: All right. Thank you.

25 MR. RESTAINO: Yeah.

1 MS. McCABE: Any other questions? Follow-up?  
2 I did have one question, sir, if you don't mind.

3 MR. RESTAINO: Yes.

4 MS. McCABE: You talked about practicing in the  
5 State of New Jersey.

6 MR. RESTAINO: Mm-hmm.

7 MS. McCABE: And it was primarily in federal  
8 court?

9 MR. RESTAINO: Um, generally not in court at  
10 all. I was -- my role for the company was,  
11 essentially, advising counsel on matters.  
12 Sometimes -- most matters may mature to litigation.  
13 But generally speaking, they don't. But when they  
14 do, that's handled by, at least in my company, it  
15 was handled by a separate litigation group that  
16 specializes in that practice. Intellectual -- you  
17 may know, for example, patent law, obviously, leads  
18 to plenty of litigation. However, that's all --  
19 that's the exclusive jurisdiction of the federal  
20 courts. And so federal district court is where you  
21 bring those cases, the only place you can bring  
22 those cases. And appeals to the Court of Appeals to  
23 the federal circuit in Washington, D.C. and  
24 sometimes to the Supreme Court.

25 But I, myself, do not practice before any

1 courts and while I've been involved in litigations  
2 as kind of a support person, I was never making an  
3 appearance before a court. I was just part of a  
4 team, if you will.

5 MS. McCABE: Okay. Thank you. Sure.

6 MR. SIMON: Steve Simon. Does New Jersey have  
7 any rules or regulations with regard to their  
8 arrangement? Do they consider you to be practicing  
9 outside their state, or are they considering you to  
10 be practicing within their state?

11 MR. RESTAINO: I've told them that I'm  
12 practicing outside; that I won't be practicing  
13 within the state in the sense of physical presence.  
14 I've told them that I have an office at 12  
15 Christopher Way, Eatontown, New Jersey, which is  
16 where the firm is located, but I've also told them  
17 that I'm not physically there, so they know that.

18 But at this juncture, there hasn't been any  
19 discussion with New Jersey about where I'm located  
20 specifically and they haven't asked about that or  
21 sought any other information. I've just done the  
22 usual registration process, every year registration  
23 process with New Jersey. In fact, I just completed  
24 it and gave them the information that I was an  
25 out-of-state person.

1 MR. ALBA: Just a follow-up of my colleague's  
2 question. You said no Florida clients?

3 MR. RESTAINO: No Florida.

4 MR. ALBA: No interaction with Florida clients?

5 MR. RESTAINO: No.

6 MR. ALBA: So are -- just based on my knowledge  
7 of patent law, there's interactions, you're doing  
8 the patent prosecution process, the claim rejection  
9 process; those kind of things?

10 MR. RESTAINO: That is part of what I can do.  
11 In fact, that's what I've done mostly since this  
12 past summer. I've been working on patent  
13 prosecution matters for the United States Patent and  
14 Trademark Office. And having -- what I've done is  
15 I've told my employer, I've actually told the person  
16 who succeeded me, that I have made a request of this  
17 Committee to provide guidance in my situation so  
18 that I didn't want to handle other kinds of matters.

19 It was my understanding that patent prosecution  
20 work, practice before the United States Patent and  
21 Trademark Office by a registered practitioner is  
22 permitted in Florida. So that's where I've  
23 concentrated at this point.

24 The only other thing I've done is respond to  
25 questions from my former employer about what I did

1 while I was the chief IP counsel in particular  
2 matters because they had similar matters that were  
3 coming up and they wanted to know, how did I analyze  
4 that kind of situation; does this sound like a  
5 similar situation. So they kind of wanted  
6 historical perspective from me and I thought it was  
7 appropriate since I conducted the work and it was  
8 done for my former employer while I was in the  
9 position of chief IP counsel.

10 MR. ALBA: Do you interact with clients during  
11 the patent prosecution process from time to time?

12 MR. RESTAINO: It's possible, but it hasn't  
13 happened yet.

14 MR. ALBA: So are you -- if my client lives in  
15 the State of Florida, you would then be practicing  
16 federal law in the State of Florida communicating  
17 with the Florida client?

18 MR. RESTAINO: Interesting. There haven't been  
19 any. And certainly, if it were an issue, if it made  
20 a difference, I could certainly not take on any work  
21 that involved any of the -- you're referring to who  
22 are the inventors, for example --

23 MR. ALBA: Right.

24 MR. RESTAINO: -- in a particular patent  
25 application. Right.



1           I could certainly handle only patent  
2           application work that didn't involve a Florida  
3           inventor. I confess I'm not sure what the meets and  
4           bounds of the Supreme Court precedent is on that in  
5           terms of whether that's necessary or not, but I'll  
6           tell you as a practical matter, that's probably a  
7           very unlikely event and wouldn't really limit my  
8           ability to do any practice as a real limitation.  
9           There's thousands of patent applications that I can  
10          work on that perhaps don't have any Florida  
11          inventors.

12           MR. ALBA: Those could be people from all  
13          different states.

14           MR. RESTAINO: They could be from New Jersey,  
15          Texas, California, yeah. Because a lot of these  
16          people work together -- no surprise, in 2020, a lot  
17          of these people work together virtually. So you can  
18          have a single team of inventors who are scattered  
19          across the country. That does happen.

20           MR. ALBA: Thank you.

21           MR. RESTAINO: It used to happen around the  
22          lunch table, but now it happens off the virtual  
23          lunch table.

24           MS. McCABE: Any other questions from the  
25          Committee members?

1 MR. COLLINS: One more. Dick Collins here. Do  
2 you ever give advice on Florida law as it may impact  
3 their applications or anything?

4 MR. RESTAINO: That, no. That would -- that --  
5 I've never done that and I'm not aware of a --

6 MR. COLLINS: I don't know if there's any  
7 Florida law that impacts it, does it?

8 MR. RESTAINO: Yeah. It's just a separate --  
9 it's all federal. And so, I'm not aware of a -- of  
10 how that might happen. Florida law or the law of  
11 other states wouldn't really impact the process,  
12 either.

13 MS. McCABE: Mr. Alba, I missed your comment.

14 MR. ALBA: Just a question. You're speaking of  
15 Florida inventors. Regarding your patent  
16 prosecution, even though you're exclusively doing  
17 federal law, that's subject to the Florida  
18 attorney/client privilege law, would you agree with  
19 that?

20 MR. RESTAINO: Yes. Yes.

21 MS. McCABE: Okay.

22 MS. PRESS: Jill Press. You're not dealing  
23 with inventors just from just New Jersey, are you?

24 MR. RESTAINO: No.

25 MS. PRESS: So have you posed this particular

1 situation to any other Bar in any other state?

2 MR. RESTAINO: No. The nature of that practice  
3 before the U.S. Patent Office, is essentially a  
4 national practice. I'm not aware of any patent  
5 attorney that limits the discussion with inventors  
6 from different states. It's not a question that  
7 I've considered, but it's a very common circumstance  
8 to be sure.

9 So your question is factually pertinent because  
10 there are commonly in patent applications, filed  
11 with the U.S. Patent Office all the time, inventors  
12 from various states and, frankly, countries around  
13 the world. But it happens all the time.

14 MS. McCABE: Mr. Redmon?

15 MR. REDMON: Another follow-up question,  
16 Gregory Redmon.

17 If I understand the situation before this  
18 Committee is that you've always been in New Jersey  
19 as a New Jersey lawyer practicing patent law up  
20 until this present time.

21 MR. RESTAINO: Correct.

22 MR. REDMON: Have you lived in other states  
23 where you're a New Jersey lawyer, practicing patent  
24 law in other states before now or is this the first  
25 time you've been outside of New Jersey as a New

1 Jersey lawyer practicing?

2 MR. RESTAINO: Well, I had practiced in the  
3 State of New York early in my career.

4 MR. REDMON: But you're also a member of the  
5 Bar there.

6 MR. RESTAINO: I am a member of the New York  
7 Bar. For the succeeding -- after my practice, after  
8 I moved from private practice to my immediate former  
9 employer, I was there for 27 years, always in New  
10 Jersey. So that practice was always there. And  
11 I've practiced as a licensed New Jersey attorney.  
12 Never in any other state in all that time. This is  
13 the first time that I've been in a state where I did  
14 not hold a state Bar license for practice.

15 MS. McCABE: Thank you.

16 Mr. Rubright?

17 MR. RUBRIGHT: Brian Rubright. So if I  
18 understand correctly, your domiciliary is in  
19 Florida.

20 MR. RESTAINO: Yes.

21 MR. RUBRIGHT: You work out of New Jersey or  
22 your employer is in New Jersey.

23 MR. RESTAINO: Correct.

24 MR. RUBRIGHT: Where do you pay taxes? What's  
25 your tax location? Do you pay New Jersey state tax?

1 Do you not pay, since you live in Florida and work  
2 in New Jersey? How does that work out?

3 MR. RESTAINO: I -- this is the first year, so  
4 I don't know what the answer to that. It's one of  
5 the issues I have to have a discussion with. My  
6 sense is that I would be paying New Jersey state  
7 income tax since the source of my paychecks, if you  
8 will, come from a New Jersey business. That's a  
9 question I have for my tax preparer. It's my  
10 assumption that that would be the case, but I  
11 confess that's something that I haven't -- it's a  
12 bridge I haven't even yet addressed.

13 MS. McCABE: Just as a follow-up, I wanted some  
14 clarification. Is it your testimony, sir, that  
15 technology is really what permits you to be in  
16 Florida and live in Florida, but that what you do  
17 is -- where you are is really irrelevant and that  
18 your presence in one state or the other really is  
19 indistinguishable? That your work is the work that  
20 is provided by your New Jersey employment and that  
21 Florida doesn't weigh in in any way except you  
22 happen to be standing in the state?

23 MR. RESTAINO: Um, if I followed your question,  
24 I think the answer to that is yes. The technology  
25 part of this is, I think, critical, because we've

1           tried to set up and utilize the technology in a  
2           fashion that essentially places me virtually in New  
3           Jersey. But for the fact that I'm physically  
4           sitting in a chair in a bedroom in Florida, every  
5           other aspect of what I do is no different than where  
6           I'm physically sitting in a chair in Eatontown, New  
7           Jersey and that's the way I have tried to and have  
8           structured it so that the public sees a presence in,  
9           in Eatontown, New Jersey and no other presence.

10           So you know, with the internet and cloud-based  
11           systems -- the firm employs a cloud-based system.  
12           All the files are located in New Jersey. It's  
13           actually pretty amazing. I didn't have any  
14           appreciation for this technology before I started  
15           with the firm.

16           But apparently, the way it works is, your  
17           computer -- my computer in Florida is just a  
18           keyboard and a mouse and a screen. But the computer  
19           doesn't actually -- you don't generate documents on  
20           the computer. Everything is actually on a computer  
21           in New Jersey, server in New Jersey. And you are  
22           just simply supplying that computer with mouse  
23           clicks and taps on your keyboard. And the document  
24           you're creating, if you're creating a document --  
25           like if I were writing an amendment to USPTO office

1 action, is actually being created in New Jersey.  
2 It's just the tapping happens in Florida, if you  
3 will.

4 So it's gotten to the point where you can have  
5 a virtual presence. And it's -- there's no need to  
6 appear, to be in Florida, or any other state, for  
7 that matter, in order to accomplish what you need to  
8 accomplish in practicing law.

9 So I hope that's responsive to your question.  
10 I think the answer is yes, if you can do that.

11 I think it is important, though, that as  
12 counsel, if you're operating under -- you need to be  
13 under -- to be operating under a license which is  
14 valid and up to date, et cetera. And you need to be  
15 under -- be, if you will, exposed to the regulatory  
16 regime of that license. The ethic regime of that  
17 license. That, I think, is important. But the  
18 virtual presence is entirely possible created by  
19 2020 technology.

20 MS. McCABE: Very good. Any other questions  
21 from the Committee members?

22 MR. COLLINS: I've got one more.

23 MS. McCABE: Sure. Go ahead.

24 MR. COLLINS: Dick Collins here. Do you have  
25 any legal support staff that is based in Florida

1           that assists you in any way? Paralegal, legal  
2           assistants, whatever? How do you do that?

3           MR. RESTAINO: All in New Jersey. It's only at  
4           the office in New Jersey. There's paralegals and,  
5           and other paraprofessionals who are specialists in  
6           interacting with, for example, the patent office.  
7           Formal filing requirements, document handling, all  
8           that --

9           MR. COLLINS: All your files are maintained up  
10          in that server in New Jersey?

11          MR. RESTAINO: Exactly. Everything is there.  
12          You can literally -- it's amazing. You can  
13          literally open up a page and see all of the files on  
14          a particular matter, you know, in date order,  
15          whenever they were created, and retrieve them or  
16          store them. And all the support staff. There's no  
17          support staff that I have. It's just me. That's  
18          it. No one else in Florida. And everything is  
19          there. And the firm's filing and all that stuff is.

20          MR. COLLINS: How is your compensation handled?  
21          Is it based on a percentage of your actual  
22          production and net earnings or how does that work?

23          MR. RESTAINO: It's a salary plus a bonus  
24          structure.

25          MS. McCABE: Anyone else?



1 MR. RESTAINO: Volume of work, that sort of  
2 thing.

3 MR. PELTON: I have a question. Paul Pelton.

4 MR. RESTAINO: Sure.

5 MR. PELTON: Do you see anybody in your house  
6 in Naples that might come down here that needs to  
7 meet with you, concerning anything involved with  
8 your law practice at all?

9 MR. RESTAINO: No. It hasn't happened and I  
10 wouldn't think it would. If there were client  
11 meetings, I would go to the client in Atlanta or  
12 Dallas or New Jersey or whoever the client happened  
13 to be, for whatever the practice issue was.

14 MR. PELTON: Thank you.

15 MS. McCABE: All right. Any other follow-up  
16 questions from the committee members, anything else,  
17 any comments? Thank you so much, Mr. Restaino. We  
18 appreciate your testimony.

19 We're going to next ask if there are any other  
20 individuals who would like to give testimony.

21 MR. RIGBY: I would like to raise something  
22 with the committee.

23 MS. McCABE: Seeing a gentleman in the back,  
24 sir. Did you sign in?

25 MR. RIGBY: I just signed on that sheet back

1           there. I added it in here.

2           MS. McCABE: That works. No worries at all,  
3           sir.

4           MR. RIGBY: You've got my name.

5           MS. McCABE: Yeah. If you would approach the  
6           microphone, please. And if you would, sir, state  
7           your name for the Record.

8           MR. RIGBY: My name is Barry Rigby. I  
9           apologize. I'm a little slow because I'm from  
10          Missouri, but I'm real happy about the Super Bowl  
11          right now, I've just got to say.

12          I don't practice any type of intellectual  
13          property, but in hearing the comments today, what  
14          occurred to me is those of us who are not such  
15          practitioners, kind of put things under the  
16          intellectual property umbrella, that include  
17          copyright trademark and I do know enough to know  
18          that some of the trademarking gets done at the state  
19          level through the Florida Department of State. They  
20          have online information, online forms.

21          It just occurred to me that anybody who read an  
22          opinion from this Committee, who did not have the  
23          benefit of hearing what was described today in  
24          detail, might wonder how this might apply in the  
25          trademark context, which is not as cleanly federal

1 as the patent aspect is.

2 So I just point that out. There may be several  
3 people who have already thought of that, but that  
4 certainly occurred to me because I looked into doing  
5 a little bit of trademark for myself and used a  
6 little bit more than I wanted chew on at the time,  
7 so I know there is a state court aspect of it worthy  
8 of thinking about.

9 MS. McCABE: Thank you.

10 MR. RESTAINO: I can provide some information.  
11 He's quite correct.

12 MS. McCABE: Sure.

13 MR. RESTAINO: And when I was chief IP counsel,  
14 I had a couple of trademark attorneys who were  
15 specialists in this and think handled that work for  
16 my former employer. But it's quite correct.

17 Trademark rights are established at common law.  
18 So state use of trademarks is material.  
19 Registration happens at the federal level and there  
20 are certain overarching federal aspects to  
21 registration, et cetera. But first and foremost, it  
22 happens through use and that's what happens at the  
23 state level.

24 I don't practice trademark law in any way.  
25 It's its own specialty. It's not a specialty that

1 I've developed. And if you know anything about it,  
2 it's a little bit -- it's a lot of alchemy and you  
3 have to be -- you have to know how to weigh, in a  
4 qualitative way, a whole bunch of factors that never  
5 made sense to me. So bottom line is, that's not my  
6 practice and that's why my expertise is in patent  
7 work.

8 And I probably should add it goes beyond just  
9 you know, patent prosecution work for the USPTO. It  
10 involves things like providing advice when my former  
11 employer is accused of patent infringement, for  
12 example, which isn't much to do with the USPTO. It  
13 has to do with analyzing the allegation, figuring  
14 out whether or not the allegation is correct, and  
15 then providing advice and counsel about what to do  
16 with it. And so that's not a USPTO matter, but it  
17 is a very much a patent centric matter, because  
18 you're dealing with patent rights.

19 MS. McCABE: And just as a point of clarity,  
20 your application for an opinion is limited solely on  
21 matters that concern federal intellectual property  
22 rights.

23 MR. RESTAINO: Correct.

24 MS. McCABE: So if you were to start doing  
25 trademark work, first of all, that work would not be

1 work that would, you know, depending on the outcome  
2 of the Committee's weighing this matter --

3 MR. RESTAINO: Right.

4 MS. McCABE: -- that's not federal -- that's  
5 not solely federal intellectual property rights.

6 MR. RESTAINO: That's correct. It's not solely  
7 federal intellectual property rights.

8 MS. McCABE: And it's your testimony that what  
9 you intend to do or what your practice will consist  
10 of is solely federal intellectual property rights.

11 MR. RESTAINO: Correct.

12 MS. McCABE: Yes, sir?

13 MR. ALBA: Just a follow-up on that and one  
14 other question. The federal trademark, there is a  
15 component of federal practice with regard to  
16 trademarks, correct?

17 MR. RESTAINO: Oh, yes. That's the T in USPTO.

18 MR. ALBA: Okay. So by using the term federal  
19 intellectual property, that would, by definition,  
20 include that, both the federal component of the  
21 trademark side but not the state law component?

22 MR. RESTAINO: It could. I'm, frankly, going  
23 to avoid trademarks entirely, I'll tell you that.  
24 It's not something that I've developed any  
25 expertise. I think one time early in my career, a

1 long time ago, I filed one trademark application at  
2 the USPTO, but that's been it.

3 MR. ALBA: Is copyright also federal and state  
4 law, sort of mix?

5 MR. RESTAINO: Not to my knowledge. Copyright  
6 is a federal law matter.

7 MR. ALBA: Okay. Then the other question I had  
8 is, from your understanding, would there be any  
9 distinction between you and a patent agent who is  
10 similarly only providing patent advice under federal  
11 law, but who comes from New Jersey and sets up an  
12 extension office here?

13 MR. RESTAINO: There would be.

14 MR. ALBA: What is that?

15 MR. RESTAINO: Excellent question. So patent  
16 attorneys and patent agents are both admitted to  
17 practice before the United States Patent and  
18 Trademark Office. They have to have certain  
19 qualifications; they sit for the exam; pass the  
20 exam.

21 If you are an attorney, you are termed a patent  
22 attorney. If you are not an attorney, if you're not  
23 admitted to practice before a state Bar, you are  
24 referred to as a patent agent. Both have the same  
25 practice before the United States Patent and

1 Trademark Office. They are both qualified for the  
2 very same things.

3 However, take, for example, the matter I've  
4 mentioned a moment ago. Doing an opinion on whether  
5 a particular -- let's say my former employer gets  
6 accused of patent infringement and wants to know is  
7 this a good accusation, a bad accusation, what do I  
8 do about this? A patent agent is not, by law, able  
9 to offer a view on that because that is a matter of  
10 legal opinion and it's outside the scope of practice  
11 before the United States Patent and Trademark  
12 Office.

13 It's possible that one of the courses of action  
14 that might arise when an opinion such as this is  
15 done by an attorney, it is to recommend going back  
16 to the United States Patent and Trademark Office and  
17 challenging the issuance of that patent or vehicles  
18 for doing that. However, short of that, it's an  
19 opinion matter that would only be handled by a  
20 licensed attorney.

21 MR. ALBA: Thank you.

22 MS. McCABE: Very good. Thank you. Anybody  
23 else?

24 Thank you, Mr. Rigby. Appreciate your  
25 contribution.

1 MR. RIGBY: Thanks for letting me speak.

2 MS. McCABE: Any other questions, comments from  
3 the Committee members or from anybody else who like  
4 to give testimony today?

5 (No Response)

6 MS. McCABE: Seeing as we don't have anybody  
7 wishing to come forward, I think what we'll do is  
8 keep the public hearing open until 10:30 in case we  
9 have anybody that wants to come forward. And then  
10 what I'd like to do is maybe take a five-minute  
11 break before we start our executive session, is that  
12 -- all right.

13 My mistake then. It's almost 10 o'clock. I  
14 think what we're going to do, we're going to keep  
15 the public hearing open until 10:30. We'll take a  
16 half-hour break and if you Committee members would  
17 not get too far away so we can get started promptly  
18 at 10:30 on our regular executive --

19 I'm going to revise my statement again. I  
20 promise it will be the last revision. So take a  
21 ten-minute break? All right.

22 We're going to take a ten-minute break and you  
23 all can come back and we'll still have some time for  
24 public testimony if anybody's interested. All  
25 right? Thank you.



1 (Proceedings recessed at 10:01 a.m.)

2 (Proceedings resumed at 10:30 a.m.)

3 MS. McCABE: All right. It's 10:30. So we  
4 wanted to make an inquiry. Is there anybody else  
5 who wishes to make a public statement this morning?  
6 You're welcome to come forward and let me know.

7 Thank you, Mr. Restaino. Did you have any  
8 follow-up comments to make?

9 MR. RESTAINO: No. I'm good. Thank you.

10 MS. McCABE: Okay. Well, seeing that there's  
11 no further individuals coming forward to make  
12 comments then, our public hearing session is  
13 concluded at this time.

14 Thank you so much, Mr. Restaino --

15 MR. RESTAINO: Thank you very much.

16 MS. McCABE: -- we appreciate you appearing and  
17 thank you again.

18 MR. RESTAINO: Sure. Happy to. If there's  
19 anybody, anybody needs any -- I don't know how the  
20 process works, but if you have any need for any  
21 other information, please let me know.

22 MS. McCABE: All right. All right. Thank you  
23 so much.

24 Now, that is going to conclude our public  
25 hearing, so we are asking anybody who is not on the

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Committee for the unlicensed practice of law,  
respectfully to leave the room because we're going  
to go into executive session, which is, obviously,  
closed to the public.

(Public Proceedings Concluded at 10:35 a.m.)

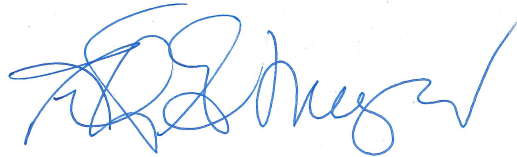
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CERTIFICATE OF OATH

STATE OF FLORIDA  
COUNTY OF ORANGE:

I, RITA G. MEYER, RDR, CRR, CRC, the undersigned  
authority, certify that the witnesses personally appeared  
before me and were duly sworn.

WITNESS my hand and official seal this 17th day of  
February, 2020.



\_\_\_\_\_  
RITA G. MEYER, RDR, CRR, CRC

My Commission #: GG293751  
Expires May 12, 2023



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CERTIFICATE OF REPORTER

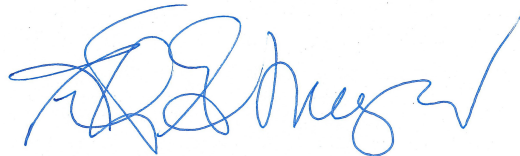
STATE OF FLORIDA:

COUNTY OF ORANGE:

I, RITA G. MEYER, RDR, CRR, CRC, do hereby certify that I was authorized to and did stenographically report the foregoing proceedings and that the foregoing transcript is a true and correct record of my stenographic notes.

I FURTHER CERTIFY that I am not a relative, employee, attorney or counsel of any of the parties, nor am I a relative or employee of any of the parties, attorneys or counsel connected with the action, nor am I financially interested in the outcome of the action.

DATED this 17th day of February, 2020.



---

RITA G. MEYER, RDR, CRR, CRC

## **Picker, Jeffrey T**

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**From:** Michael O'Neill <moneill@mainstream-engr.com>  
**Sent:** Thursday, January 09, 2020 8:22 AM  
**To:** Picker, Jeffrey T  
**Cc:** Vickaryous, James G  
**Subject:** Written testimony for UPL Standing Committee to consider re non-FL lawyer and practice IP law

I submit my written testimony for the Committee's consideration during the hearing on Feb. 7, 2020 concerning the practice of federal IP law by a non-FL lawyer in the state of Florida. This testimony is my personal opinion and is not the opinion of my company Mainstream Engineering Corporation. I am using my corporate email address because that is my official email address for the Florida State Bar to contact me. I am copying my Board of Governors representative to inform him that I have made my opinion known. Thank you.

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**Michael W. O'Neill, Esq.**

**General Counsel**

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## **Picker, Jeffrey T**

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**From:** Jim Vickaryous <jim@vickaryous.com>  
**Sent:** Thursday, January 09, 2020 8:39 AM  
**To:** Michael O'Neill; Picker, Jeffrey T  
**Cc:** Stewart, John M; Doyle, Joshua  
**Subject:** Re: Written testimony for UPL Standing Committee to consider re non-FL lawyer and practice IP law

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## Picker, Jeffrey T

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**Sent:** Thursday, January 09, 2020 8:44 AM  
**To:** Vickaryous, James G; Picker, Jeffrey T  
**Cc:** Stewart, John M; Doyle, Joshua  
**Subject:** RE: Written testimony for UPL Standing Committee to consider re non-FL lawyer and practice IP law

I am also a patent attorney just like the gentleman seeking an exception to the rule. I did some digging on this gentleman and the NJ law firm. I see that this NJ law firm basically handles patent work from AT&T in NJ and hires retiring AT&T patent attorneys as "Of-counsel" to keep that work coming into the firm. This is a typical "double-dipping" that goes on in my patent industry.

### Michael W. O'Neill, Esq.

#### General Counsel

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## Picker, Jeffrey T

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**From:** John Stewart <Jstewart@rosswayswan.com>  
**Sent:** Tuesday, January 14, 2020 8:00 AM  
**To:** Vickaryous, James G; Michael O'Neill; Picker, Jeffrey T  
**Cc:** Doyle, Joshua  
**Subject:** RE: Written testimony for UPL Standing Committee to consider re non-FL lawyer and practice IP law

Mr. O'Neill:

As President of The Florida Bar I just want to thank you for taking the time to participate in the process. No matter the ultimate outcome it is Florida lawyers like you who take the time to offer valuable insight that make The Florida Bar the gold standard in the country. You have a great Board of Governors representative in Jim Vickaryous. I have an office in Melbourne. Maybe we will have a chance to cross paths one day. Thanks again.

JMS

John M. Stewart, Esq.



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**Sent:** Thursday, January 9, 2020 8:22:16 AM

**To:** [jpicker@floridabar.org](mailto:jpicker@floridabar.org) <[jpicker@floridabar.org](mailto:jpicker@floridabar.org)>

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## Picker, Jeffrey T

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**From:** Salome Zikakis <szikakis@parziklaw.com>  
**Sent:** Monday, January 20, 2020 5:18 PM  
**To:** Picker, Jeffrey T  
**Subject:** Written testimony for 2/7/2020 UPL hearing

I wish to submit written testimony in connection with the public hearing by the UPL Standing Committee. I believe the future, if not the present, will involve more and more attorneys and other professionals working remotely, whether from second homes or a primary residence. Technology has enabled this to occur, and this flexibility can contribute to an improved work/life balance. It is not a practice to discourage.

There are areas of the law that do not require being physically present, whether in a courtroom or a law office. Using the attorney's physical presence in Florida as the definitive criteria is inappropriate. So long as the attorney is not practicing Florida law, is not advertising that he practices Florida law, and creates no public presence or profile as a Florida attorney, then there is no UPL simply because the attorney is physically located in Florida. There is no harm to the public. These facts do not and should not constitute UPL in Florida.

Regards,

Salomé J. Zikakis, Esq.

Florida Bar Board Certified Real Estate Attorney

Parady & Zikakis, P.A.

307 SE 14th Street

Fort Lauderdale, FL 33316

954-728-9799 / Fax 954-728-9722

[szikakis@parziklaw.com](mailto:szikakis@parziklaw.com)

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BARRY DAVIDSON  
DIRECT DIAL: (305) 810-2539  
EMAIL: [bdavidson@huntonak.com](mailto:bdavidson@huntonak.com)

FILE NO:

## Via Email

February 4, 2020

Susanne D. McCabe, P.A.  
Chair, Unlicensed Practice of Law Committee  
900 N. Swallow Tail Dr., Suite 101  
Port Orange, FL 32129-6103  
[sdm@mccabelawyers.com](mailto:sdm@mccabelawyers.com)

Dear Ms. McCabe:

This letter is submitted for consideration by your Committee at the public hearing this Friday at which you will consider issues related to an out-of-state licensed lawyer who wishes to live in Florida and continue to serve his out-of-state clients.

I currently represent a multi-state law firm in an UPL matter before the 17<sup>th</sup> Circuit UPL committee. The issues in that matter bear some relationship to the subject matter of the upcoming hearing. I would like to insure that the committee is aware of two decisions which relate to the continued constitutionality of Florida Bar rule 4-5.5. (and ABA Model Rule 5.5) First and most importantly, is the Ohio Supreme Court decision, *In re Application of Jones* on October 17, 2018, 123 N.E.3d 877 (Ohio 2018). There a lawyer admitted in Kentucky moved to a Cincinnati law firm and continued to practice Kentucky law exclusively. Her application to join the Ohio Bar was denied by the appropriate Ohio Board because it found that she had violated the Ohio version of 5.5 by living in Ohio and practicing in Kentucky. The Court reversed the Board on a finding that her practice was temporary in nature relying on 5.5 (c) (2). The important portion of the decision are the observations of the concurring Justices. Of course, this is dicta but I suggest it is quite compelling. Justice DeWine, writing for the concurrence, first noted that the Board properly read the rule but that “.... as applied here, the rule is irrational and arbitrary and cannot be constitutionally enforced.” 123 N.E.3d 877, 882. Thereafter he found that the application of the rule to lawyers not practicing in Ohio does not serve the state’s interest in protecting the Ohio public. Then after referencing the internet and electronic communication, he summarizes the concurrence as follows:

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ANDREWS KURTH

Susanne D. McCabe, P.A.  
Chair, Unlicensed Practice of Law Committee  
February 4, 2020  
Page 2

“I would conclude that as applied to an out-of-state attorney who is not practicing in Ohio courts or providing Ohio legal services, Prof.Cond.R. 5-5(b)(1) violates Article I, Section I of the Ohio Constitution [essentially identical to the same provision of the Florida Constitution] and the Due Process clause of the Fourteenth Amendment to the United States Constitution (footnote omitted). As applied to such an attorney, the rule violates Article I, Section I both because it does not “bear a real and substantial relation to the public health, safety, morals or general welfare and because it is “arbitrary” and “unreasonable.” (citation omitted). Similarly, applying the rule to such an attorney violates the Fourteenth Amendment because it does not bear a rational relationship to any discernable state interest. (citations omitted)

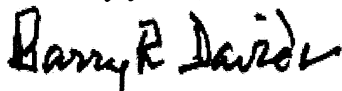
I contend that this well-reasoned concurrence by a respected sister court could strongly influence the outcome of an attack on 4-5.5 (b)(1) in our Supreme Court.

In Massachusetts, a District Judge found that the certain Massachusetts UPL laws and regulations ran afoul of the so called dormant Commerce Clause, U.S. Const. art. I §8, cl. 3. *Real Estate Bar Ass’n for Mass., Inc. v. National Real Estate Information Services*, 609 F.Supp 135 (D. Mass. 2009). Since this holding was reversed by the First Circuit, 608 F.3d 110 (2010), I do not discuss it in detail but it does reflect that UPL laws are vulnerable to Commerce Clause challenges.

Finally, for a valuable and scholarly discussion of the ongoing debate about 5.5 *see Reforming Lawyer Mobility-Protecting Turf or Serving Clients?*, 30 Geo. J. Legal Ethics 125 (2017).

In conclusion, it is time for a significant review and revision of Florida Bar Rule 4-5.5 and 4-5.5 (b)(1) in particular as it has no rational relationship to protection of Florida citizens and residents.

Cordially yours,



Barry R. Davidson

# RULES OF PROFESSIONAL CONDUCT

(Includes all amendments through those effective September 10, 2019)

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**NOTE:** These rules shall be referred to as the Rules of Professional Conduct and shall be abbreviated as "RPC."

harm such as inflicting emotional distress or obtaining a tactical advantage and not to cover instances when no harm is intended unless its occurrence is likely regardless of intent, e.g., where discriminatory comments or behavior is repetitive. While obviously the language of the rule cannot explicitly cover every instance of possible discriminatory conduct, the Court believes that, along with existing case law, it sufficiently narrows the breadth of the rule to avoid any suggestion that it is overly broad. See, e.g., *In re Vincenti*, 114 N.J. 275 (554 A.2d 470) (1989).

**Note:** Adopted July 12, 1984, to be effective September 10, 1984; paragraph (g) adopted July 18, 1990, to be effective September 4, 1990; paragraph (g) amended May 3, 1994, to be effective September 1, 1994; paragraph (e) amended November 17, 2003 to be effective January 1, 2004.

### **RPC 8.5      Disciplinary Authority; Choice of Law**

**(a)**      Disciplinary Authority. A lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction regardless of where the lawyer's conduct occurs. A lawyer not admitted in this jurisdiction is subject also to the disciplinary authority of this jurisdiction if the lawyer provides or offers to provide any legal services in this jurisdiction. A lawyer may be subject to the disciplinary authority of both this jurisdiction and another jurisdiction for the same conduct.

**(b)**      Choice of Law. In the exercise of the disciplinary authority of this jurisdiction, the rules of professional conduct to be applied shall be:

- (1)** for conduct in connection with a matter pending before a tribunal, the rules of the jurisdiction in which the tribunal sits, unless the rules of the tribunal provide otherwise; and
- (2)** for any other conduct, the rules of the jurisdiction in which the lawyer's conduct occurred, or, if the predominant effect of the conduct is in a different jurisdiction, the rules of that jurisdiction shall be applied to the conduct. A lawyer shall not be subject to discipline if the lawyer's conduct conforms to the rules of a jurisdiction in which the lawyer reasonably believes the predominant effect of the lawyer's conduct will occur.

Note: Adopted July 12, 1984 to be effective September 10, 1984; caption amended, text amended and redesignated as paragraph (a) with caption added, new paragraph (b) with caption adopted November 17, 2003 to be effective January 1, 2004; subparagraph (b)(2) amended August 1, 2016 to be effective September 1, 2016.

Ethics Advisory Opinion Committee  
Opinion No. 19-03  
Issued: May 14, 2019

**ISSUE**

1. If an individual licensed as an active attorney in another state and in good standing in that state establishes a home in Utah and practices law for clients from the state where the attorney is licensed, neither soliciting Utah clients nor establishing a public office in Utah, does the attorney violate the ethical prohibition against the unauthorized practice of law?

**OPINION**

2. The Utah Rules of Professional Conduct do not prohibit an out-of-state attorney from representing clients from the state where the attorney is licensed even if the out-of-state attorney does so from his private location in Utah. However, in order to avoid engaging in the unauthorized practice of law, the out-of-state attorney who lives in Utah must not establish a public office in Utah or solicit Utah business.

**BACKGROUND**

3. Today, given electronic means of communication and legal research, attorneys can practice law “virtually” from any location. This can make it possible for attorneys licensed in other states to reside in Utah, but maintain a practice for clients from the states where they are licensed. For example:

- An attorney from New York may decide to semi-retire in St. George, Utah, but wish to continue providing some legal services for his established New York clients.

- An attorney from California may relocate to Utah for family reasons (*e.g.*, a spouse has a job in Utah, a parent is ill and needs care) and wish to continue to handle matters for her California clients.

### ANALYSIS

4. Rule 5.5 of the Utah Rules of Professional Conduct (the “URPC”), which is based upon the Model Rules of Professional Conduct, defines the “unauthorized practice of law,” and Rule 14-802 of the Utah Supreme Court Rules of Professional Practice defines the “practice of law.” In the question posed, the Ethics Advisory Opinion Committee (the “EAO”) takes it as given that the out-of-state lawyer’s activities consist of the “practice of law.”

5. Rule 5.5(a) of the Utah Rules of Professional Conduct provides that a “lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction.” Rule 5.5(b) provides:

A lawyer who is not admitted to practice in this jurisdiction shall not:

(b)(1) except as authorized by these Rules or other law, establish an office or other systematic and continuous presence in this jurisdiction for the practice of law; or

(b)(2) hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction.

URPC 5.5(b).

6. THE LAW OF LAWYERING explains the meaning and relationship of these two sections:

Rule 5.5(b) . . . elaborates on the prohibition against unauthorized practice of law contained in Rule 5.5(a) as it concerns out-of-state lawyers. Rule 5.5(b)(1) broadly prohibits a lawyer from establishing an office or other ‘systemic and continuous presence’ for practicing law in a jurisdiction in which the lawyer is not licensed.

Geoffrey C. Hazard, Jr., W. William Hodes, Peter R. Jarvis, THE LAW OF LAWYERING § 49.02, at 49-7 (4th ed. 2018).

7. With that as our touchstone, it seems clear that the out-of-state attorney who lives in Utah but continues to handle cases for clients from the state where the attorney is licensed has not established an office or “‘other systemic and continuous presence’ for practicing law in [Utah] a jurisdiction in which the lawyer is not licensed” and is not in violation of Rule 5.5 of the Utah Rules of Professional Conduct.

8. While one could argue that living in Utah while practicing law for out-of-state clients does literally “establish a systematic and continuous presence in this jurisdiction for the practice of law,” and that it does not have to be “for the practice of law IN UTAH,” that reading finds no support in case law or commentary.

9. In *In re: Discipline of Jardine*, Utah attorney Nathan Jardine had been suspended from the practice of law in Utah for eighteen months. 2015 UT 51, ¶ 1, 353 P.3d 154. He sought reinstatement, but the Office of Professional Conduct argued against reinstatement because he had violated Rule 14-525(e)(1) of the Supreme Court Rules of Professional Practice by engaging in the unauthorized practice of law while he was suspended. 2015 UT 51, ¶¶ 6, 20. The disciplinary order allowed Mr. Jardine “with the consent of the client after full disclosure, [to] wind up or complete any matters pending on the date of entry of the order,” but “Mr. Jardine never informed [the client] that he was suspended, nor did he wind up his participation in the matter.” *Id.* ¶¶ 8-9 (quotation omitted). Instead, he continued to advise the client and sent a demand letter on the client’s behalf, giving his Utah address but indicating California licensure. *Id.* ¶ 9. Mr. Jardine argued that he did not engage in the unauthorized practice of law because this matter was for an Alaska resident and the resulting case was filed in an Idaho court. *Id.* ¶ 22.



Nevertheless, the Utah Supreme Court found that Mr. Jardine engaged in the unauthorized practice of law in Utah, in violation of his disciplinary order, reasoning: “The disciplinary order expressly prohibited Mr. Jardine from ‘performing *any* legal services for others’ or ‘giving legal advice to others’ within the State of Utah.” *Id.* (emphasis added). All of the work Mr. Jardine performed for the Alaska client was performed in Mr. Jardine’s Utah office, Mr. Jardine’s text messages were made from Utah, and Mr. Jardine’s demand letter listed his Utah address. *Id.*

10. *In re Jardine* does not control the question posed. Not only did the Utah Supreme Court analyze the “unauthorized practice of law” in the context of a suspended Utah attorney violating a disciplinary order that forbid him from performing *any* legal services whatsoever for others, but Mr. Jardine was continuing his legal work out of a Utah office and using a Utah business address. The question posed here to the EAOC deals with attorneys in good standing in other states who simply establish a residence in Utah and continue to provide legal work to out-of-state clients from their private Utah residence.

11. We can find no case where an attorney has been disciplined for practicing law out of a private residence for out-of-state clients located in the state where the attorney is licensed. Indeed, the United States Supreme Court held in *New Hampshire v. Piper*, 470 U.S. 274 (1985), that a New Hampshire Supreme Court rule limiting bar admission to New Hampshire residents violated the rights of a Vermont resident seeking admission under the Privileges and Immunities Clause of the U.S. Constitution. *Id.* at 275-76, 288. Thus, there can be no prohibition on an attorney living in one state and being a member of the bar of the another state and practicing law in that other state.

12. Rather, the concern is that an attorney not establish an office or public presence in a jurisdiction where the attorney is not admitted, and that concern is based upon the need to

protect the interests of potential clients in that jurisdiction. In *Gould v. Harkness*, 470 F. Supp. 2d 1357 (S.D. Fla. 2006), a New York attorney sought to establish an office and advertise his presence in Florida, but advertise “New York Legal Matters Only” or “Federal Administrative Practice.” *Id.* at 1358. The case concerned whether his First Amendment right to freedom of commercial speech under the United States Constitution was violated by the Florida Bar’s prohibition on such advertisements. *Id.* at 1358-59. The *Gould* court held that the Florida Bar was entitled to prohibit such advertisements in order to protect the interests of the public—the residents of Florida. *Id.* at 1364.

13. Similarly, in *In re Estate of Condon*, 76 Cal. Rptr. 2d 933 (Cal. Ct. App. 1998), the court approved payment of attorney fees to a Colorado attorney who handled a California probate matter for a co-executor who lived in Colorado. *Id.* at 924. The *Condon* court held that the unauthorized practice of law statute “does not proscribe an award of attorney fees to an out-of-state attorney for services rendered on behalf of an out-of-state client regardless of whether the attorney is either physically or virtually present within the state of California.” *Id.* at 926.

Here, too, the *Condon* court highlighted concern for in-state California clients:

In the real world of 1998 we do not live or do business in isolation within strict geopolitical boundaries. Social interaction and the conduct of business transcends state and national boundaries; it is truly global. A tension is thus created between the right of a party to have counsel of his or her choice and the right of each geopolitical entity to control the activities of those who practice law within its borders. In resolving the issue ... it is useful to look to the reason underlying the proscription [of the unauthorized practice of law....] [T]he rational is to protect California citizens from incompetent attorneys....

*Id.* at 927.

14. An interesting Ohio Supreme Court case further supports this Opinion that an out-of-state attorney practicing law for clients from the state where he is licensed should not be seen to violate Rule 5.5 of the Utah Rules of Professional Conduct’s prohibition on the *unauthorized*

practice of law. In *In re Application of Jones*, 2018 WL 5076017 (Ohio Oct. 17, 2018), Alice Jones was admitted to the Kentucky bar and practiced law in Kentucky for six years. *Id.* at \*1-2. Her Kentucky firm merged with a firm having an office in Cincinnati, Ohio. *Id.* at \*1. For personal reasons, Ms. Jones moved to Cincinnati and transferred to her firm's Cincinnati office. *Id.* at \*2. She applied for admission to the Ohio bar the month before she moved. *Id.* While awaiting the Ohio Bar's decision, she practiced law exclusively on matters related to pending or potential proceedings in Kentucky. *Id.* Nevertheless, the Board of Commissioners on Character and Fitness chose to investigate Ms. Jones for the unauthorized practice of law and voted to deny her admission to the Ohio Bar. *Id.*

15. The Ohio Supreme Court unanimously reversed this decision. *Id.* at \*4. A majority of the *Jones* court held that Ms. Jones' activities did not run afoul of the unauthorized practice of law provision because Rule 5.5(c)(2) of the Ohio Rules of Professional Conduct permitted her to provide legal services on a "temporary basis" while she awaited admission to the Ohio bar. *Id.* at \*3. However, three of the seven Ohio Supreme Court justices concurred on a different basis. *Id.* at \*5 (DeWine, J., concurring). They found that denial of Jones' application on these facts would violate the Due Process Clause of the Fourteenth Amendment to the United States Constitution as well as the Ohio Constitution's related provisions. *Id.* at \*9 (DeWine, J., concurring). Both constitutions protected one's right to pursue her profession, subject to governmental regulation only to the extent necessary to promote the health, safety, morals, or general welfare of society, provided the legislation is not arbitrary or unreasonable. *Id.* at \*7-8 (DeWine, J., concurring). The concurring opinion noted that "the constitutional question here turns on identifying Ohio's interest in prohibiting Jones from representing her Kentucky clients while working in a Cincinnati office. The short answer is that there is none." *Id.* at \*8 (DeWine,

J., concurring). Two state interests supported attorney regulation—attorneys’ roles in administering justice through the state’s court system and “the protection of the public.” *Id.* (DeWine, J., concurring).

But when applied to a lawyer who is not practicing Ohio law or appearing in Ohio courts, Prof.Cond.R. 5.5(b) serves no state interest. Plainly, as applied to such a lawyer, the rule does not further the state’s interest in protecting the integrity of our court system. Jones, and others like her, are not practicing in Ohio courts. Nor does application of the rule to such lawyer serve the state’s interest in protecting the Ohio public. Jones and others in her situation are not providing services to or holding themselves out as lawyers to the Ohio public. Jones’s conduct as a lawyer is regulated by the state of Kentucky—the state in whose forums she appears.

*Id.* at \*9 (DeWine, J., concurring). The three concurring Ohio Supreme Court justices concluded that Rule 5.5(b) of the Ohio Rules of Professional Conduct, as interpreted by the Ohio Board of Commissioners, would be unconstitutional when applied to Jones and others similarly situated.

*Id.* (DeWine, J., concurring).

16. The question posed here is just as clear as the question before the Ohio Supreme Court: what interest does the Utah State Bar have in regulating an out-of-state lawyer’s practice for out-of-state clients simply because he has a private home in Utah? And the answer is the same—none.

17. Finally, a perusal of various other authorities uncovers no case in which an attorney was disciplined for living in a state where he was not licensed while continuing to practice law for clients from the state where he was licensed. *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 3 *Jurisdictional Scope of the Practice of Law by a Lawyer* (2000); ROY D. SIMON, SIMON’S NY RULES OF PROF. COND. § 5.5:6 (Dec. 2018); and *What Constitutes “Unauthorized Practice of Law” by Out-of-State Counsel*, 83 A.L.R. 5<sup>th</sup> 497 (2000).

## CONCLUSION

18. Accordingly, the EAOC interprets Rule 5.5(b) of the Utah Rules of Professional Conduct in a way consistent with the Due Process and Privileges and Immunities Clauses of the Fourteenth Amendment to the United States Constitution; the Privileges and Immunities Clause of Article IV, Section 2 of the United States Constitution; Article 1, Section 7 of the Due Process Clause and Article 1, Section 24 of the Uniform Operation of the Laws Clause of the Utah Constitution; and all commentators and all persuasive authority in support of permitting an out-of-state attorney to establish a private residence in Utah and to practice law from that residence for clients from the state where the attorney is licensed.

## MEMORANDUM

TO □ William Pennessy and Robert Freedman  
FROM □ Michael J. Gelfand, RPPTL Strategic Planning Implementation Committee, Chair  
RE □ RPPTL By-Laws □ Proposed Amendments for Disruptions  
DATE □ August 11, 2020

---

The Strategic Planning Implementation Committee met on July 2, 2020, and engaged in further deliberation thereafter, in response to your supplemental request to consider whether the Section 3 By-Laws should be amended to address quorum and in person voting requirements when an event disrupts participants from attending a Section or Executive Council meeting; and if so, then to recommend amendment text. Recommended text is attached.

The current COVID-19 pandemic illuminates the limitations of in person Section and Executive Council meetings electronically.

The questions for electronic participation are when and how. The process must strive to protect the critical element, deliberation, from being subordinated to mere formalistic voting. Electronic participation platforms do not replicate the multi-faceted nature of deliberative body decision making.

Technology allows, when working perfectly and participants know how to work the technology, the ability to see two dimensions of a speaker's head, and hear the speaker's words; however, working perfectly is far from standard. Thus, we have each participated in many electronic meetings, telephone and video, that are frustrating.

A greater concern of electronic meetings is losing the components necessary for a continuing long-term deliberative process. These are the informal educational and persuasive discussions that frequently occur off the microphone, a quiet discussion with the member sitting next to you at a committee meeting or being buttonholed in a foyer or in a meeting's social event. These opportunistic encounters spawn great discussions and reinforce the collegial decision-making process, especially with those who disagree. For example, members who vigorously disagree on one proposal, or who approach issues with a completely different perspective, still work together on the next proposal or project with full trust in each other.

Two collateral issues deserve attention. Concerning attendance requirements, By-Law Article V, Section 4 provides a waiver process. Concerning electronic voting for the Executive Council, Bylaw Article VII, Section 2, proposed to be renumbered as Section 4(a), allows electronic voting outside of a meeting, not at a meeting. The limited allowance for electronic voting is retained anticipating that it is utilized sparingly when calling a meeting is not feasible, yet a vote on the record is still sought.

The committee considered a short-term experiment to test the new process. Upon the recommendation of Bar staff, sunset language was deleted.

**PROPOSED AMENDMENTS  
TO THE  
BYLAWS  
OF THE  
REAL PROPERTY, PROBATE AND TRUST LAW SECTION  
OF  
THE FLORIDA BAR**

**It is resolved that the By-Laws of the Real Property, Probate and Trust Law Section of The Florida Bar, Article IV and Article VII, be amended as follows (additions are underlined; deletions are ~~struck-out~~):**

**1) Article IV, entitled “Officers, Elected Positions, And Executive Committee”  
Section 5. entitled “Election and Term of Offices and Positions”:**

(a) The section officers, the representatives for out-of-state members, and the at-large members, are elected by majority vote of the active section members in ~~physical~~ attendance and voting at the election meeting held prior to July 1 of each year. Voting by proxy is not permitted. At the election meeting the section chair, chair-elect, and secretary determine the number of active section members in ~~physical~~ attendance and voting. Voting is by written, secret ballot prepared in advance, except when a governmental state of emergency has been declared for that meeting’s location or declared for any location that significantly impacts a substantial number of section members’s ability to attend the meeting in person, or if the meeting’s venue is no longer reasonably available. If no nominee receives a majority vote for an office or position, additional balloting will take place between the 2 nominees receiving the greatest number of votes until the required majority is obtained. Results of the election will be immediately announced by the section chair.

(b) The nominees elected serve for a period of 1 year, beginning on July 1. The chair-elect automatically becomes section chair on expiration of the term as chair-elect or on the death, resignation, or removal of the section chair.

□□□

**2) Article VII, entitled “Meetings”:**

Section 1. Annual/Election Meeting of the Section. The section chair designates the time, date and location in Florida of the annual meeting of the section at which the elections provided by Article IV will occur before July 1 of each year each year, which is the election meeting and will be held prior to July 1.

Section 2. Special Meeting of the Section. The executive council may call special meetings of the section only after 30 days notice is given to all section members which must include the meeting's purpose.

Section 3. Quorum and Voting by the Section. The active section members in physical attendance at any meeting of the section constitutes a quorum for the transaction of business and a majority vote of those in physical attendance and voting is binding. Voting by proxy is not permitted. However, if a governmental state of emergency has been declared for the section meeting's location or declared for any location that significantly impacts a substantial number of section members' ability to attend the meeting in person, or if the meeting's venue is no longer reasonably available, then the chair in the chair's full and complete discretion may issue protocols permitting section members to be present and vote electronically.

Section 4 2. Executive Council Meetings. There are no fewer than 3 in-state meetings of the executive council each year.

(a) The executive council may act or transact business authorized by these bylaws, without meeting, by written or electronic approval of the majority of its members.

(b) The section chair must give at least ~~may call meetings of the executive council by giving no less than~~ 15 days notice to all executive council ~~its~~ members to call executive council meetings.

(c) Those present at a meeting of the executive council duly called will constitute a quorum and a majority vote of those present and voting is binding, unless a greater majority is required by these bylaws for a particular matter. Voting by proxy is not permitted.

(d) However, if a governmental state of emergency has been declared for an executive council meeting location or declared for any location that significantly impacts a substantial number of executive council members' ability to attend the meeting in person, or if the meeting's venue is no longer reasonably available, then the chair in the chair's full and complete discretion may issue protocols permitting executive council members to be present and vote electronically.

Existing Sections 3 and 4 are renumbered as 5 and 6, respectively.





# The Florida Bar

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Joshua E. Doyle  
Executive Director

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## LEGISLATIVE OR POLITICAL POSITION REQUEST FORM

### GENERAL INFORMATION

**Submitted by:** *(list name of section, division, committee, TFB group, or individual name)*

(RPPTL Approval Date  
8/\_\_\_/2020)

Joe Adams, Co-Chair/Bill Sklar, Co-Chair, Condo and Planned Development Committee, RPPTL

**Address:** *(address and phone #)*  
239-433-7707

12140 Carissa Commerce Ct, Suite 200, Ft. Myers FL 33966

**Position Level:** *(TFB section/division/committee)*

TFB RPPTL/Real Property/Condo and Planned Development

### PROPOSED ADVOCACY

- All requests for legislative and political positions must be presented to the Board of Governors by completing this form and attaching a copy of any existing or proposed legislation or a detailed presentation of the issue.
- Select Section I below if the issue is legislative, II if the issue is political. Regardless, Section III must be completed.

#### If Applicable, List the Following:

(Bill or PCB )

(Sponsor)

\_\_\_\_\_  
\_\_\_\_\_

\_\_\_\_\_  
\_\_\_\_\_

**Indicate Position:**  Support  Oppose  Technical or Other Non-Partisan Assistance

#### I. Proposed Wording of Legislative Position for Official Publication

Support legislation resolving technical inconsistencies and errors within Chapters 718 and 720, Florida Statutes, that have arisen due to multiple revisions of the Chapters and to provide additional clarification as to how Chapters 718 and 720 are to be applied.

**II. Political Proposals:**

N/A

**III. Reasons For Proposed Advocacy:**

A. Is the proposal consistent with *Keller vs. State Bar of California*, 110 S. Ct. 2228 (1990), and *The Florida Bar v. Schwarz*, 552 So. 2d 1094 (Fla. 1981)

Yes

B. Which goal or objective of the Bar's strategic plan is advanced by the proposal

N/A

C. Does the proposal relate to  (check all that apply)

- Regulating the profession
- Improving the quality of legal services
- Improving the functioning of the system of justice
- Increasing the availability of legal services to the public
- Regulation of trust accounts
- Education, ethics, competency, and integrity of the legal profession

D. Additional Information

**PRIOR POSITIONS TAKEN ON THIS ISSUE**

Please indicate any prior Bar or section/divisions/committee 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**

N/A		
TFB Section/Division/Committee	Support/Oppose	Date

**Others (attach list if more than one)**

TFB Section/Division/Committee	Support/Oppose	Date

**REFERRALS TO OTHER SECTIONS, COMMITTEES OR LEGAL ORGANIZATIONS**

A request for action on a position must be circulated to sections and committees that might be interested in the issue. The Legislation Committee and Board of Governors may delay final action on a request if the below section is not completed. Please attach referrals and responses to this form. If you do not believe other sections and committees are affected and you did not circulate this form to them, please provide details below.

**Referrals**

Name of Group or Organization	Support, Oppose or No-Position
Business Law Section of the Florida Bar	Discussions Pending
Public Interest Law Section of the Florida Bar	Discussions Pending
Community Associations Institute	Discussions Pending

**Reasons for Non-Referrals:**

**CONTACTS**

**Board & Legislation Committee Appearance** *(list name, address and phone #)*

Cary Wright, Legislative Co-Chair of the RPPTL Section, 4221 West Boy Scout Boulevard, Suite 1000, Tampa, FL 33607, 813-229-4135

**Appearances before Legislators** *(list name and phone # of those having direct contact before House/Senate committees)*

Peter M. Dunbar and Martha Edenfield, Dean, Mead & Dunbar, P.A., 215 South Monroe Street, Suite 815, Tallahassee, Florida 32301, Telephone: (850) 999-4100

**Meetings with Legislators/staff** *(list name and phone # of those having direct contact with legislators)*

Same

Submit this form and attachments to the Office of General Counsel of The Florida Bar <mailto:hooks@floridabar.org>, (850) 561-5662. Upon receipt, staff will schedule your request for final Bar action; this may involve a separate appearance before the Legislation Committee unless otherwise advised.

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

**PROPOSAL TO CORRECT TECHNICAL ERRORS AND  
GLITCHES – REVISING CHAPTERS 718 AND 720**

**I. SUMMARY**

The proposal seeks to fix technical glitches in Chapters Section 718 and Section 720 (“Chapters”) that have arisen due to multiple prior revisions of the Chapters. It also removes provisions of both Chapters that are superfluous. The changes are necessary to resolve internal inconsistencies in Chapters Section 718 and Section 720 and to provide additional clarification so that multiple conflicting interpretations can be avoided. Additional changes are adopted to clarify that community associations can undertake certain actions. The proposed legislation does not make substantive law or policy changes to Chapters 718 and 720. The legislation does not have a fiscal impact on state funds.

**II. CURRENT SITUATION**

Since their adoption, Chapters Section 718 and Section 720 have been continually amended in virtually every session of the Legislature. These amendments have varied from being comprehensive in nature to amendments that are solely to address specific issues. The result of numerous amendments of Chapters Section 718 and Section 720 is that some provisions in the Chapters that are no longer good law, directly conflict with other provisions of the Chapter or current law, or have ultimately created additional burdens on community associations due to the inconsistent wording within the statutes.

**III. EFFECT OF PROPOSED CHANGE**

No major substantive policy changes are sought; the goal of the proposal is clarification and consistency. The proposed changes seek to resolve many of the technical inconsistencies and errors within Chapters Section 718 and Section 720. The changes also provide additional clarification to certain statutes where the current situation has created an ambiguity as to how the respective law is to be applied. Many of the proposed changes simply involve changing words within the statute to provide better guidance and clarification to community associations, community association managers and community association attorneys on how particular provisions in each respective Chapter are to be implemented and utilized.

In Chapter Section 718, the draft proposal clarifies various definitions in Section 718.103, further clarifies when mortgagee consent is required to amend a declaration of condominium in Section 718.110, clarifies the monetary value of food and services a director or manager may accept and allows associations to vacate easements in Section 718.111, provides further clarification on the items an association is required to insure in Section 718.111(11), specifies the amount of time a member can inspect the official records and allows the association to pass on copying and personnel costs associations incur during a records inspection to the owner.

Section 718.111(12) is amended to specify the threshold of when discussion of a management company employee is an exempt personnel record and addresses the long-standing issue of when emails on board member computers are official records of the association. Section 718.111(13) is amended to remove the penalty on an association timely providing financial records to an owner. Section 718.112(2)(a)2 removes the requirement of the Division of Condominiums to provide opinions to associations and Section 718.112(2)(b)4 is amended to delete the ability of directors to submit written objections to action taken at a meeting the director did not attend. Section 718.112(2)(p) is amended to delete the express conflict with Section 718.3027(7).

Section 718.202(1) and (3) are amended to allow for developers to use alternative assurances, such as an irrevocable letter of credit, for deposits in non-residential condominiums and further to allow developers to use deposits in residential condominiums for hard costs such as permit, impact and utility fees and specifically restricts deposits from being used for attorneys' fees, sales commissions and loan fees.

Section 718.303(3) is amended to provide additional clarification as to how a fining hearing is held and what type of notice must be provided. Section 718.405(5) allows for a multicondominium to adopt a consolidated declaration and that adopting a consolidated declaration does not merge the condominiums.

Section 720.301(8) is amended to remove the rules and regulations of an association as a governing document. Section 720.303(2)(b) is amended to clarify the rights of owners to speak on items on which the board will vote upon and Section 720.303(2)(c)1 provides for posting of meeting notices on association websites. Section 720.303(5)(c) is amended to clarify the threshold a management company employee must spend with the association to qualify as a personal whose personnel records are exempt from being official records. Section 720.305(2) is amended to specify how a fine imposed by an association can become a lien against a parcel and how notice of a fining hearing is to be provided.

The draft proposal also retreats from a prior legislative position of the Section that opposed legislation that allowed fines against a lot in a homeowner's association under Section 720.305 to become a lien against the parcel. This legislation position is retreated from by the draft proposal in that it provides technical edits to Chapter 720.305, but allows the existing language to remain in place that allows for fines to become a lien against a lot

Section 720.306(1)(d) is amended to allow associations to utilize the public records when notifying mortgagees of certain proposed amendments and Section 720.306(1)(g) is amended to allow the association to rely on the addresses provided by owners for notification of meetings.

Finally, the draft proposal amends Section 720.306(7) to clarify how notice of an adjourned meeting is provided to owners acquiring title to a parcel following adjournment of the prior meeting and Section 720.306(9) provides the secret ballots shall be used in elections unless prohibited by the governing documents of an association and resolves the conflict of how nominations from the floor at the annual meeting are to be handled when advance notice of the election is provided to the members.

#### **IV. ANALYSIS**

The following describes the changes being proposed:

- A. Section 617.0725 is amended to provide the quorum requirements in the governing documents for a community association control over the requirements in Chapter 617.
- B. Section 718.103(7) is amended to clarify who may comprise a committee.
- C. Section 718.103(20) is amended to clarify that a multicondominium operates real property.
- D. Section 718.103(21) clarifies that operation includes operating the association.
- E. Section 718.110(11) is amended to clarify that mortgagee consent is only required for amendments that are lawful and that the mortgagee consent is only required when the provision requiring consent existed on the date of the recording of the mortgage. The amendment also removes the requirement of associations to obtain information from the unit owners regarding the mortgagee regarding different address for notice of the proposed amendment and allows associations to rely on the public records.
- F. Section 718.110(12)(b) is amended to provide that amendments in a multicondominium may be approved by a different percentage of the voting interests than a majority when addressing amendments dealing with the share of common expenses.
- G. Section 718.111(1)(a) is amended to clarify that board members and managers can accept food at a business meeting provided the value is \$25 or less. The amendment also removes the duplication with 718.405 that an association may operate more than one condominium.
- H. Section 718.111(10) is amended to provide associations with the authority to vacate easements.
- I. Section 718.111(11) is amended in (c)3 to remove the specific requirement of how insurance deductibles are determined and allow associations freedom to set insurance deductibles; (f)2 is amended to clarify the association only insures alterations and improvements made by the association; (g)2 is amended to clarify owners are responsible for the cost of reconstruction of property for which there is an exclusion under the master insurance policy and that owners are responsible for repair and reconstruction of property they are required to insure; (j)4 is amended to delete the superfluous term “with finality”; (n) is amended to clarify associations are not obligated to repair, replace or reconstruct improvements made by an owner solely for the benefit of that unit.
- J. Section 718.111(12) is amended in (c)1 to limit the ability of an association to adopt rules that limit the ability of an owner or their representative to inspect records to less than one 8 hour day per month; amends (c)3 to allow an association to impose fees to cover the costs of copying official records for owners and fees for personnel costs for records inspections and copying exceeding 30 minutes; (c)3a is amended to provide the attorney-client privilege for official records to extend beyond the end of the litigation; (c)3c is amended to clarify when a management company employee’s personnel records are exempt official records; (c)h is amended to resolve the conflict over when emails on individual board member’s computers are official records of the association; (g)4 is amended to fix a scrivener’s error.

K. Section 718.111(13) is amended to delete the prohibition on association's waiving financial reporting requirements when failing to timely respond to a notice of a failure to provide financial reports from the Division of Condominiums.

L. Section 718.112(2)(a)2 is amended to delete the ability of associations to seek written legal advice from the Division of Condominiums when responding to an owner's written inquiry.

M. Section 718.112(2)(b)2 is amended in (b)2 to clarify how general proxies are used; (b)4 is amended to remove the ability of a board or committee member to file a written objection to action taken at a meeting the member did not attend.

N. Section 718.112(2)(c) is amended in (c)1 to clarify to whom notice of a special assessment meeting is given in a multicondominium association; (c)2 is amended to clarify that all committee meetings except those of committees taking action on behalf of the board of making recommendations on the budget are exempt from the requirements of notice; (c)3 is amended to allow for meetings discussing management company employees from being open to members.

O. Section 718.112(2)(d)3 is amended to clarify where notices of meetings are to be posted by associations.

P. Section 718.112(2)(p) deletes the express conflict with Section 718.3027 regarding conflicts of interest for directors of an association.

Q. Section 718.112(3) is amended to clarify optional provisions in bylaws such as notice for meetings on adopting rules, restrictions on transfer of units and use of condominium property and allows for provisions that are not inconsistent with the articles of incorporation.

R. Section 718.202 is amended in (1) to clarify the Division of Condominiums can only except alternative assurances on residential condominiums. (1) is also amended to allow for developers in nonresidential condominiums to provide a surety bond or irrevocable letter of credit in an amount equal to the aggregate of all payments up to 10% of the sale price; (3) is amended to allow for deposits to be used by the developer for actual costs, which include permit fees, impact fees, costs for architects, engineers and surveyors but does not include attorneys' fees, marketing fees, loan fees, costs or interest.

S. Section 718.303(3) is amended to clarify fines may be imposed for each continuous violation, that an association may suspend the rights of occupants and guests and provides that a fine imposition hearing must be held regardless of whether the person to be fined attends the hearing, that notice of the hearing must be given 14 days in advance and posted 48 hours in advance. The amendment further provides the person fined must be given at least 10 days to pay the fine and that the association may recover its attorneys' fees and costs in an action to collect the fine.

T. Section 718.405(5) is amended to clarify that a multi-condominium may adopt a consolidated or combined declaration and that such an act does not merge the condominiums.

- U. Section 718.503(2) is amended to clarify the financial information contained in the disclosure summary.
- V. Section 720.301(8) is amended to remove the rules and regulations as a governing document of the association.
- W. Section 720.303(1) is amended to delete the 15 lot exception for enforcement of deed restrictions established prior to the purchase of the parcel.
- X. Section 720.303(2) is amended in (b) to clarify members may only speak on board meeting agenda items on which the board will vote upon; (c)1 is amended to clarify the posting of board meetings applies to open meetings and that an association may adopt rules for posting meeting notices on an association website.
- Y. Section 720.303(4)(a) is amended to clarify the association only has to produce records for inspection that it has in its possession.
- Z. Section 720.303(5)(c) is amended to clarify when a management company employee's personnel records are exempt official records.
- AA. Section 720.305(2) is amended to clarify whom an association may fine, that a fine may be levied for each continuous violation, that fines may only become liens if provided by the declaration, that an association may suspect the rights of occupants and guests and provides that a fine imposition hearing must be held regardless of whether the person to be fined attends the hearing, that notice of the hearing must be given 14 days in advance and posted 48 hours in advance. The amendment further provides that the person fined must be given at least 10 days to pay the fine and that the association may recover its attorneys' fees and costs in an action to collect the fine.
- BB. Section 720.306(1) is amended in (1)(d) to remove the requirement of associations to obtain information from the parcel owners regarding the mortgagee regarding different addresses for notice of the proposed amendment and allows associations to rely on the public records; (1)(e) is amended to clarify that amendments to the articles of incorporation must also be filed with the Division of Corporations; (1)(g) is amended to delete the glitch that associations use addresses on the property appraiser's website for notice rather than the addresses contained in the association's official records.
- CC. Section 720.306(5) is amended to clarify how notice of all member's meetings shall be given by an association.
- DD. Section 720.306(7) is amended to provide for how notice is given of an adjourned meeting to owners who acquire title after notice was provided for the meeting that was previously adjourned.
- EE. Section 720.306(8) is amended to provide that secret ballots are used in all elections unless prohibited by the governing documents of the association.
- FF. Section 720.306(9) to clarify that if the election process allows candidates to receive notice of the election in advance and nominate themselves in advance of the annual meeting, then the association is not required to allow nominations from the floor at the meeting.



GG. Section 720.306(10) clarifies that members can record a meeting by audio or video means.

**V. FISCAL IMPACT ON STATE AND LOCAL GOVERNMENTS**

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

**VI. DIRECT IMPACT ON PRIVATE SECTOR**

This proposal will likely reduce the costs of compliance for community associations due to the clarifications provided to Chapters Section 718 and Section 720 and the removal of superfluous provisions of those respective chapters. There are no other fiscal impacts on the private sector.

**VII. CONSTITUTIONAL ISSUES**

There are no constitutional issues.

**VIII. OTHER INTERESTED PARTIES**

The Business Law Section of the Florida Bar, the Public Interest Law Section of the Florida Bar, Cyber Citizens for Justice, and the Community Associations Institute.

1 A bill to be entitled

2 An act relating to \_\_\_\_\_; providing an effective date.

3  
4 Be It Enacted by the Legislature of the State of Florida:

5  
6 **Section 1.** Section 617.0725 is amended to read as follows:

7 **617.0725 Quorum.**—An amendment to the articles of incorporation or  
8 the bylaws which adds, changes, or deletes a greater or lesser  
9 quorum or voting requirement must meet the same quorum or voting  
10 requirement and be adopted by the same vote and voting groups  
11 required to take action under the quorum and voting requirements  
12 then in effect or proposed to be adopted, whichever is greater.

13 This section does not apply to any corporation that is an  
14 association, as defined in s. 720.301, or a corporation regulated  
15 under chapter 718 or chapter 719.

16 **Section 2.** Sections (7), (20) and (21) of Section 718.103 are  
17 amended to read as follows:

18 **718.103 Definitions.**—As used in this chapter, the term:

19 (7) "Committee" means a group of board members, unit owners, or  
20 board members and or unit owners and/or other persons appointed by  
21 the board or a member of the board to make reports or  
22 recommendations to the board regarding the proposed annual budget

23 or, to take action on behalf of the board, or to take such actions  
24 as the resolution creating the committee, or the directors of the  
25 board, may dictate.

26 (20) "Multicondominium" means ~~a real estate development~~ real  
27 property containing two or more condominiums, all of which are  
28 operated by the same association.

29 (21) "Operation" or "operation of the condominium" includes the  
30 administration and management of the condominium property and the  
31 association.

32 **Section 3.** Subsections (11) and (12) of Section 718.110 are  
33 amended to read as follows:

34 **718.110 Amendment of declaration; correction of error or omission**  
35 **in declaration by circuit court.-**

36 (11) The Legislature finds that the procurement of mortgagee  
37 consent to amendments that do not affect the rights or interests of  
38 mortgagees is an unreasonable and substantial logistical and  
39 financial burden on the unit owners and that there is a compelling  
40 state interest in enabling the members of a condominium association  
41 to approve amendments to the condominium documents through legal  
42 means. Accordingly, and notwithstanding any provision to the  
43 contrary contained in this section:

44 (a) As to any mortgage recorded on or after October 1, 2007, any  
45 provision in the declaration, articles of incorporation, or bylaws  
46 that requires the consent or joinder of some or all mortgagees of  
47 units or any other portion of the condominium property to or in  
48 amendments to the declaration, articles of incorporation, or bylaws  
49 or for any other matter shall be enforceable only as to the  
50 following matters:

- 51 1. Those matters described in subsections (4) and (8).
- 52 2. Amendments to the declaration, articles of incorporation, or  
53 bylaws that adversely affect the priority of the mortgagee's lien  
54 or the mortgagee's rights to foreclose its lien or that otherwise  
55 materially affect the rights and interests of the mortgagees.

56 (b) As to mortgages recorded before October 1, 2007, any lawful  
57 existing provisions in the declaration, articles of incorporation,  
58 or bylaws requiring mortgagee consent on the date of recording such  
59 mortgage shall be enforceable.

60 (c) In securing consent or joinder, the association shall be  
61 entitled to rely upon the public records to identify the holders of  
62 outstanding mortgages. The association may use the address provided  
63 in the original recorded mortgage document, unless there is a  
64 different address for the holder of the mortgage in a recorded

65 assignment or modification of the mortgage, which recorded  
66 assignment or modification must reference the official records book  
67 and page on which the original mortgage was recorded. ~~Once the~~  
68 ~~association has identified the recorded mortgages of record, the~~  
69 ~~association shall, in writing, request of each unit owner whose~~  
70 ~~unit is encumbered by a mortgage of record any information the~~  
71 ~~owner has in his or her possession regarding the name and address~~  
72 ~~of the person to whom mortgage payments are currently being made.~~  
73 ~~Notice shall be sent to such person if the address provided in the~~  
74 ~~original recorded mortgage document is different from the name and~~  
75 ~~address of the mortgagee or assignee of the mortgage as shown by~~  
76 ~~the public record. The association shall be deemed to have complied~~  
77 ~~with this requirement by making the written request of the unit~~  
78 ~~owners required under this paragraph. Any notices required to be~~  
79 ~~sent to the mortgagees under this paragraph shall be sent to all~~  
80 ~~available addresses provided to the association.~~

81 (d) Any notice to the mortgagees required under paragraph (c) may  
82 be sent by a method that establishes proof of delivery, and any  
83 mortgagee who fails to respond within 60 days after the date of  
84 mailing shall be deemed to have consented to the amendment.

85 (e) For those amendments requiring mortgagee consent on or after

86 October 1, 2007, in the event mortgagee consent is provided other  
87 than by properly recorded joinder, such consent shall be evidenced  
88 by affidavit of the association recorded in the public records of  
89 the county where the declaration is recorded. Any amendment adopted  
90 without the required consent of a mortgagee shall be voidable only  
91 by a mortgagee who was entitled to notice and an opportunity to  
92 consent. An action to void an amendment shall be subject to the  
93 statute of limitations beginning 5 years after the date of  
94 discovery as to the amendments described in subparagraphs (a)1. and  
95 2. and 5 years after the date of recordation of the certificate of  
96 amendment for all other amendments. This provision shall apply to  
97 all mortgages, regardless of the date of recordation of the  
98 mortgage.

99 (f) Notwithstanding the provisions of this section, any amendment  
100 or amendments to conform a declaration of condominium to the  
101 insurance coverage provisions in s. 718.111(11) may be made as  
102 provided in that section.

103 (12) (a) With respect to an existing multicondominium association,  
104 any amendment to change the fractional or percentage share of  
105 liability for the common expenses of the association and ownership  
106 of the common surplus of the association must be approved by at

107 | least a majority of the total voting interests of each condominium  
108 | operated by the association unless the declarations of all  
109 | condominiums operated by the association uniformly require approval  
110 | by a greater percentage of the voting interests of each  
111 | condominium.

112 | (b) Unless approval by a ~~greater~~ different percentage of the  
113 | voting interests of an existing multicondominium association is  
114 | expressly required in the declaration of an existing condominium,  
115 | the declaration may be amended upon approval of at least a majority  
116 | of the total voting interests of each condominium operated by the  
117 | multicondominium association for the purpose of:

118 | 1. Setting forth in the declaration the formula currently  
119 | utilized, but not previously stated in the declaration, for  
120 | determining the percentage or fractional shares of liability for  
121 | the common expenses of the multicondominium association and  
122 | ownership of the common surplus of the multicondominium  
123 | association.

124 | 2. Providing for the creation or enlargement of a multicondominium  
125 | association by the merger or consolidation of two or more  
126 | associations and changing the name of the association, as  
127 | appropriate.

128 **Section 4.** Paragraph (a) of subsection (1), subsection (10),  
129 paragraphs (c), (f), (g), (j) and (n) of subsection (11) of Section  
130 718.111 are amended to read as follows:

131 **718.111 The association.—**

132 (1) CORPORATE ENTITY.—

133 (a) The operation of the condominium shall be by the association,  
134 which must be a Florida corporation for profit or a Florida  
135 corporation not for profit. However, any association which was in  
136 existence on January 1, 1977, need not be incorporated. The owners  
137 of units shall be ~~shareholders or~~ members of the association. The  
138 officers and directors of the association have a fiduciary  
139 relationship to the unit owners. It is the intent of the  
140 Legislature that nothing in this paragraph shall be construed as  
141 providing for or removing a requirement of a fiduciary relationship  
142 between any manager employed by the association and the unit  
143 owners. An officer, director, or manager may not solicit, offer to  
144 accept, or accept any thing or service of value or kickback for  
145 which consideration has not been provided for his or her own  
146 benefit or that of his or her immediate family, from any person  
147 providing or proposing to provide goods or services to the  
148 association. Any such officer, director, or manager who knowingly



149 | so solicits, offers to accept, or accepts any thing or service of  
150 | value or kickback is subject to a civil penalty pursuant to s.  
151 | 718.501(1) (d) and, if applicable, a criminal penalty as provided in  
152 | paragraph (d). However, ~~this paragraph does not prohibit~~ an  
153 | officer, director, or manager from accepting may accept food to be  
154 | consumed at a business meeting with a value of less than \$25 per  
155 | individual or a services or items good received in connection with  
156 | trade fairs or education programs. ~~An association may operate more~~  
157 | ~~than one condominium.~~

158 | (10) EASEMENTS.—Unless prohibited by the declaration, the board of  
159 | administration has the authority, without the joinder of any unit  
160 | owner, to grant, modify, vacate, or move any easement if the  
161 | easement constitutes part of or crosses the common elements or  
162 | association property. This subsection does not authorize the board  
163 | of administration to modify, move, or vacate any easement created  
164 | in whole or in part for the use or benefit of anyone other than the  
165 | unit owners, or crossing the property of anyone other than the unit  
166 | owners, without the consent or approval of those other persons  
167 | having the use or benefit of the easement, as required by law or by  
168 | the instrument creating the easement. Nothing in this subsection  
169 | affects the minimum requirements of s. 718.104(4) (n) or the powers

170 enumerated in subsection (3).

171 (11) INSURANCE.—In order to protect the safety, health, and  
172 welfare of the people of the State of Florida and to ensure  
173 consistency in the provision of insurance coverage to condominiums  
174 and their unit owners, this subsection applies to every residential  
175 condominium in the state, regardless of the date of its declaration  
176 of condominium. It is the intent of the Legislature to encourage  
177 lower or stable insurance premiums for associations described in  
178 this subsection.

179 (c) Policies may include deductibles as determined by the board.

180 1. The deductibles must be consistent with industry standards and  
181 prevailing practice for communities of similar size and age, and  
182 having similar construction and facilities in the locale where the  
183 condominium property is situated.

184 2. The deductibles may be based upon available funds, including  
185 reserve accounts, or predetermined assessment authority at the time  
186 the insurance is obtained.

187 ~~3. The board shall establish the amount of deductibles based upon~~  
188 ~~the level of available funds and predetermined assessment authority~~  
189 ~~at a meeting of the board in the manner set forth in~~  
190 ~~s. 718.112(2)(c).~~

191 (f) Every property insurance policy issued or renewed on or after  
192 January 1, 2009, for the purpose of protecting the condominium must  
193 provide primary coverage for:

194 1. All portions of the condominium property as originally  
195 installed or replacement of like kind and quality, in accordance  
196 with the original plans and specifications.

197 2. All alterations or additions made by the association to the  
198 condominium property or association property ~~pursuant to~~  
199 ~~s. 718.113(2)~~.

200 3. The coverage must exclude all personal property within the unit  
201 or limited common elements, and floor, wall, and ceiling coverings,  
202 electrical fixtures, appliances, water heaters, water filters,  
203 built-in cabinets and countertops, and window treatments, including  
204 curtains, drapes, blinds, hardware, and similar window treatment  
205 components, or replacements of any of the foregoing which are  
206 located within the boundaries of the unit and serve only such unit.  
207 Such property and any insurance thereupon is the responsibility of  
208 the unit owner.

209 (g) A condominium unit owner policy must conform to the  
210 requirements of s. 627.714.

211 1. All reconstruction work after a property loss must be

212 undertaken by the association except as otherwise authorized in  
213 this section. A unit owner may undertake reconstruction work on  
214 portions of the unit with the prior written consent of the board of  
215 administration. However, such work may be conditioned upon the  
216 approval of the repair methods, the qualifications of the proposed  
217 contractor, or the contract that is used for that purpose. A unit  
218 owner must obtain all required governmental permits and approvals  
219 before commencing reconstruction.

220 2. Unit owners are responsible for the cost of reconstruction of  
221 any portions of the condominium property for which an exclusion  
222 under the association's master policy coverage exists pursuant to  
223 subsection (f)3 hereof ~~the unit owner is required to carry property~~  
224 ~~insurance~~, or for which the unit owner is responsible under  
225 paragraph (j), and the cost of any such reconstruction work  
226 undertaken by the association is chargeable to the unit owner and  
227 enforceable as an assessment and may be collected in the manner  
228 provided for the collection of assessments pursuant to s. 718.116.  
229 Unit owners are responsible for reconstruction of any portions of  
230 the condominium property for which the unit owner is required to  
231 carry property insurance. The preceding sentence is intended to  
232 clarify existing law and applies to associations existing on or

233 after July 1, 2021.

234 3. A multicondominium association may elect, by a majority vote of  
235 the collective members of the condominiums operated by the  
236 association, to operate the condominiums as a single condominium  
237 for purposes of insurance matters, including, but not limited to,  
238 the purchase of the property insurance required by this section and  
239 the apportionment of deductibles and damages in excess of coverage.  
240 The election to aggregate the treatment of insurance premiums,  
241 deductibles, and excess damages constitutes an amendment to the  
242 declaration of all condominiums operated by the association, and  
243 the costs of insurance must be stated in the association budget.  
244 The amendments must be recorded as required by s. 718.110.

245 (j) Any portion of the condominium property that must be insured  
246 by the association against property loss pursuant to paragraph (f)  
247 which is damaged by an insurable event shall be reconstructed,  
248 repaired, or replaced as necessary by the association as a common  
249 expense. In the absence of an insurable event, the association or  
250 the unit owners shall be responsible for the reconstruction,  
251 repair, or replacement as determined by the maintenance provisions  
252 of the declaration or bylaws. All property insurance deductibles  
253 and other damages in excess of property insurance coverage under

254 the property insurance policies maintained by the association are a  
255 common expense of the condominium, except that:

256 1. A unit owner is responsible for the costs of repair or  
257 replacement of any portion of the condominium property not paid by  
258 insurance proceeds if such damage is caused by intentional conduct,  
259 negligence, or failure to comply with the terms of the declaration  
260 or the rules of the association by a unit owner, the members of his  
261 or her family, unit occupants, tenants, guests, or invitees,  
262 without compromise of the subrogation rights of the insurer.

263 2. The provisions of subparagraph 1. regarding the financial  
264 responsibility of a unit owner for the costs of repairing or  
265 replacing other portions of the condominium property also apply to  
266 the costs of repair or replacement of personal property of other  
267 unit owners or the association, as well as other property, whether  
268 real or personal, which the unit owners are required to insure.

269 3. To the extent the cost of repair or reconstruction for which  
270 the unit owner is responsible under this paragraph is reimbursed to  
271 the association by insurance proceeds, and the association has  
272 collected the cost of such repair or reconstruction from the unit  
273 owner, the association shall reimburse the unit owner without the  
274 waiver of any rights of subrogation.

275 4. The association is not obligated to pay for reconstruction or  
276 repairs of property losses as a common expense if the property  
277 losses were known or should have been known to a unit owner and  
278 were not reported to the association until after the insurance  
279 claim of the association for that property was settled or resolved  
280 ~~with finality~~, or denied because it was untimely filed.

281 (n) The association is not obligated to reconstruct, repair or pay  
282 for any reconstruction or repair expenses due to property loss to  
283 any improvements installed by a current or former owner of the unit  
284 or by the developer if the improvement benefits only the unit for  
285 which it was installed and is not part of the standard improvements  
286 installed by the developer on all units as part of original  
287 construction, whether or not such improvement is located within the  
288 unit. The preceding sentence is intended to clarify existing law  
289 and applies to associations existing on or after July 1, 2021.

290 This paragraph does not relieve any party of its obligations  
291 regarding recovery due under any insurance implemented specifically  
292 for such improvements.

293 (o) The provisions of this subsection shall not apply to timeshare  
294 condominium associations. Insurance for timeshare condominium  
295 associations shall be maintained pursuant to s. 721.165.

296 **Section 5.** Paragraphs (b), (c), (g) of subsection (12) of Section  
297 718.111 are amended to read as follows:

298 **718.111 The association.—**

299 (12) OFFICIAL RECORDS.—

300 (b) The official records specified in subparagraphs (a)1.-~~6~~5. must  
301 be permanently maintained from the inception of the association.  
302 All other official records must be maintained within the state for  
303 at least 7 years, unless otherwise provided by general law. The  
304 records of the association shall be made available to a unit owner  
305 within 45 miles of the condominium property or within the county in  
306 which the condominium property is located within 10 working days  
307 after receipt of a written request by the board or its designee.  
308 However, such distance requirement does not apply to an association  
309 governing a timeshare condominium. This paragraph may be complied  
310 with by having a copy of the official records of the association  
311 available for inspection or copying on the condominium property or  
312 association property, or the association may offer the option of  
313 making the records available to a unit owner electronically via the  
314 Internet or by allowing the records to be viewed in electronic  
315 format on a computer screen and printed upon request. The  
316 association is not responsible for the use or misuse of the



317 information provided to an association member or his or her  
318 authorized representative pursuant to the compliance requirements  
319 of this chapter unless the association has an affirmative duty not  
320 to disclose such information pursuant to this chapter.

321 (c)1. The official records of the association are open to  
322 inspection by any association member or the authorized  
323 representative of such member at all reasonable times. The right to  
324 inspect the records includes the right to make or obtain copies, at  
325 the reasonable expense, if any, of the member or authorized  
326 representative of such member, or renter of a unit, as set forth in  
327 subparagraph (c) (3). A renter of a unit has a right to inspect and  
328 copy the association's bylaws and rules. The association may adopt  
329 reasonable rules regarding the frequency, time, location, notice,  
330 and manner of record inspections and copying, but may not limit the  
331 right of any association member or his or her authorized  
332 representative, or renter of a unit, to inspect records to less  
333 than one 8-hour business day per month. The failure of an  
334 association to provide the records within 10 working days after  
335 receipt of a written request creates a rebuttable presumption that  
336 the association willfully failed to comply with this paragraph. A  
337 unit owner who is denied access to official records is entitled to

338 the actual damages or minimum damages for the association's willful  
339 failure to comply. Minimum damages are \$50 per calendar day for up  
340 to 10 days, beginning on the 11th working day after receipt of the  
341 written request. The failure to permit inspection entitles any  
342 person prevailing in an enforcement action to recover reasonable  
343 attorney fees from the person in control of the records who,  
344 directly or indirectly, knowingly denied access to the records.

345 2. Any person who knowingly or intentionally defaces or destroys  
346 accounting records that are required by this chapter to be  
347 maintained during the period for which such records are required to  
348 be maintained, or who knowingly or intentionally fails to create or  
349 maintain accounting records that are required to be created or  
350 maintained, with the intent of causing harm to the association or  
351 one or more of its members, is personally subject to a civil  
352 penalty pursuant to s. 718.501(1)(d).

353 3. The association shall maintain an adequate number of copies of  
354 the declaration, articles of incorporation, bylaws, and rules, and  
355 all amendments to each of the foregoing, as well as the question  
356 and answer sheet as described in s. 718.504 and year-end financial  
357 information required under this section, on the condominium  
358 property to ensure their availability to unit owners and

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359 prospective purchasers, ~~and may charge its actual costs for~~  
360 ~~preparing and furnishing these documents to those requesting the~~  
361 ~~documents.~~ The association may impose fees to cover the costs of  
362 providing copies of official records, including the costs of  
363 copying and the costs required for personnel to copy the records if  
364 the time spent copying the records exceeds one-half hour and if the  
365 personnel costs do not exceed \$20 per hour. Personnel costs may not  
366 be charged for records requests that result in the copying by  
367 personnel of 25 or fewer pages. The association may charge up to 25  
368 cents per page for copies made on the association's photocopier. If  
369 the association does not have a photocopy machine available where  
370 the records are kept, or if the records requested to be copied  
371 exceed 25 pages in length, the association may have copies made by  
372 an outside duplicating service and may charge the actual cost of  
373 copying, as supported by the vendor invoice. An association shall  
374 allow a member or his or her authorized representative to use a  
375 portable device, including a smartphone, tablet, portable scanner,  
376 or any other technology capable of scanning or taking photographs,  
377 to make an electronic copy of the official records in lieu of the  
378 association's providing the member or his or her authorized  
379 representative with a copy of such records. The association may not

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380 charge a member or his or her authorized representative for the use  
381 of a portable device. Notwithstanding this paragraph, the following  
382 records are not accessible to unit owners:

383 a. Any record protected by the lawyer-client privilege as  
384 described in s. 90.502 and any record protected by the work-product  
385 privilege, including a record prepared by an association attorney  
386 or prepared at the attorney's express direction, which reflects a  
387 mental impression, conclusion, litigation strategy, or legal theory  
388 of the attorney or the association, and which was prepared  
389 exclusively for civil or criminal litigation or for adversarial  
390 administrative proceedings, or which was prepared in anticipation  
391 of such litigation or proceedings ~~until the conclusion of the~~  
392 ~~litigation or proceedings.~~

393 c. Personnel records of association or management company  
394 employees, including, but not limited to, disciplinary, payroll,  
395 health, and insurance records. For purposes of this sub-  
396 subparagraph, the term "personnel records" does not include written  
397 employment agreements with an association employee or management  
398 company, or management company employee who spends at least twenty  
399 (20) hours per week of his or her paid time on the condominium  
400 property or association property, or budgetary or financial records

401 that indicate the compensation paid to an association employee or  
402 management company employee who spends at least twenty (20) hours  
403 per week of his or her paid time on the condominium property or  
404 association property.

405 (h) Emails contained on the private email servers of association  
406 board members, committee members or officers, unless the board  
407 member's, committee member's or officer's email account was  
408 established for or is used for the primary purpose of conducting  
409 association business.

410 4. The failure of the association to post information required  
411 under subparagraph 2. is not in and of itself sufficient to  
412 invalidate any action or decision of the ~~association's~~ board or its  
413 committees.

414 **Section 6.** Paragraph (e) of subsection (13) of Section 718.111 are  
415 amended to read as follows:

416 **718.111 The association.—**

417 (13) FINANCIAL REPORTING.—

418 (e) A unit owner may provide written notice to the division of the  
419 association's failure to mail or hand deliver him or her a copy of  
420 the most recent financial report within 5 business days after he or  
421 she submitted a written request to the association for a copy of

422 such report. If the division determines that the association failed  
423 to mail or hand deliver a copy of the most recent financial report  
424 to the unit owner, the division shall provide written notice to the  
425 association that the association must mail or hand deliver a copy  
426 of the most recent financial report to the unit owner and the  
427 division within 5 business days after it receives such notice from  
428 the division. ~~An association that fails to comply with the~~  
429 ~~division's request may not waive the financial reporting~~  
430 ~~requirement provided in paragraph (d) for the fiscal year in which~~  
431 ~~the unit owner's request was made and the following fiscal year.~~ A  
432 financial report received by the division pursuant to this  
433 paragraph shall be maintained, and the division shall provide a  
434 copy of such report to an association member upon his or her  
435 request.

436 **Section 7.** Paragraphs (a), (b), (c) and (p) of subsection (2) of  
437 Section 718.112 are amended to read as follows:

438 **718.112 Bylaws.—**

439 (2) REQUIRED PROVISIONS.—The bylaws shall provide for the  
440 following and, if they do not do so, shall be deemed to include the  
441 following:

442 (a) *Administration.—*

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443 2. When a unit owner of a residential condominium files a written  
444 inquiry by certified mail with the board of administration, the  
445 board shall respond in writing to the unit owner within 30 days  
446 after receipt of the inquiry. The board's response shall either  
447 give a substantive response to the inquirer, notify the inquirer  
448 that a legal opinion has been requested, ~~or notify the inquirer~~  
449 ~~that advice has been requested from the division. If the board~~  
450 ~~requests advice from the division, the board shall, within 10 days~~  
451 ~~after its receipt of the advice, provide in writing a substantive~~  
452 ~~response to the inquirer.~~ If a legal opinion is requested, the  
453 board shall, within 60 days after the receipt of the inquiry,  
454 provide in writing a substantive response to the inquiry. The  
455 failure to provide a substantive response to the inquiry as  
456 provided herein precludes the board from recovering attorney fees  
457 and costs in any subsequent litigation, administrative proceeding,  
458 or arbitration arising out of the inquiry. The association may  
459 through its board of administration adopt reasonable rules and  
460 regulations regarding the frequency and manner of responding to  
461 unit owner inquiries, one of which may be that the association is  
462 only obligated to respond to one written inquiry per unit in any  
463 given 30-day period. In such a case, any additional inquiry or

464 inquiries must be responded to in the subsequent 30-day period, or  
465 periods, as applicable.

466 (b) *Quorum; voting requirements; proxies.*—

467 2. Except as specifically otherwise provided herein, unit owners  
468 in a residential condominium may not vote by general proxy, but may  
469 vote by limited proxies substantially conforming to a limited proxy  
470 form adopted by the division. A voting interest or consent right  
471 allocated to a unit owned by the association may not be exercised  
472 or considered for any purpose, whether for a quorum, an election,  
473 or otherwise. Limited proxies and general proxies may be used to  
474 establish a quorum. Limited proxies shall be used for votes taken  
475 to waive or reduce reserves in accordance with subparagraph (f)2.;  
476 for votes taken to waive the financial reporting requirements of  
477 s. 718.111(13); for votes taken to amend the declaration pursuant  
478 to s. 718.110; for votes taken to amend the articles of  
479 incorporation or bylaws pursuant to this section; and for any other  
480 matter for which this chapter requires or permits a vote of the  
481 unit owners. Except as provided in paragraph (d), a proxy, limited  
482 or general, may not be used in the election of board members in a  
483 residential condominium. General proxies may be used for ~~other~~  
484 parliamentary or procedural matters ~~for which limited proxies are~~



485 ~~not required~~, and may be used in voting for nonsubstantive changes  
486 to items for which a limited proxy is required and given.  
487 Notwithstanding this subparagraph, unit owners may vote in person  
488 at unit owner meetings. This subparagraph does not limit the use of  
489 general proxies or require the use of limited proxies for any  
490 agenda item or election at any meeting of a timeshare condominium  
491 association or a nonresidential condominium association.

492 ~~4. A member of the board of administration or a committee may~~  
493 ~~submit in writing his or her agreement or disagreement with any~~  
494 ~~action taken at a meeting that the member did not attend. This~~  
495 ~~agreement or disagreement may not be used as a vote for or against~~  
496 ~~the action taken or to create a quorum.~~

497 45. A board or committee member's participation in a meeting via  
498 telephone, real-time videoconferencing, or similar real-time  
499 electronic or video communication counts toward a quorum, and such  
500 member may vote as if physically present. A speaker must be used so  
501 that the conversation of such members may be heard by the board or  
502 committee members attending in person as well as by any unit owners  
503 present at a meeting.

504 (c) *Board of administration meetings.*—Meetings of the board of  
505 administration at which a quorum of the members is present are open

506 to all unit owners. Members of the board of administration may use  
507 e-mail as a means of communication but may not cast a vote on an  
508 association matter via e-mail. A unit owner may tape record or  
509 videotape the meetings. The right to attend such meetings includes  
510 the right to speak at such meetings with reference to all  
511 designated agenda items. The division shall adopt reasonable rules  
512 governing the tape recording and videotaping of the meeting. The  
513 association may adopt written reasonable rules governing the  
514 frequency, duration, and manner of unit owner statements.

515 1. ~~Adequate~~ Except as provided in s. 718.112(2)(c)3.a. and b.,  
516 notice of the date, time and place of all board meetings, which  
517 must specifically identify all agenda items, must be posted  
518 conspicuously on the condominium property at least 48 continuous  
519 hours before the meeting except in an emergency. If 20 percent of  
520 the voting interests petition the board to address an item of  
521 business, the board, within 60 days after receipt of the petition,  
522 shall place the item on the agenda at its next regular board  
523 meeting or at a special meeting called for that purpose. An item  
524 not included on the notice may be taken up on an emergency basis by  
525 a vote of at least a majority plus one of the board members. Such  
526 emergency action must be noticed and ratified at the next regular

527 board meeting. Written notice of a meeting at which a nonemergency  
528 special assessment or an amendment to rules regarding unit use will  
529 be considered must be mailed, delivered, or electronically  
530 transmitted to the unit owners and posted conspicuously on the  
531 condominium property at least 14 days before the meeting. In a  
532 multicondominium association, or where assessments are being levied  
533 pursuant to s. 718.113(1), notice of special assessments need only  
534 be given to unit owners who will be subject to the special  
535 assessment. Evidence of compliance with this 14-day notice  
536 requirement must be made by an affidavit executed by the person  
537 providing the notice and filed with the official records of the  
538 association. Notice of any meeting in which regular or special  
539 assessments against unit owners are to be considered must  
540 specifically state that assessments will be considered and provide  
541 the estimated cost and description of the purposes for such  
542 assessments. ~~Upon notice to the unit owners, the board shall, by~~  
543 ~~duly adopted rule, designate a specific location on the condominium~~  
544 ~~property where all notices of board meetings must be posted.~~ If  
545 there is no condominium property or association property where  
546 notices can be posted, notices shall be mailed, delivered, or  
547 electronically transmitted to each unit owner at least 14 days

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548 before the meeting. In lieu of or in addition to the physical  
549 posting of the notice on the condominium property, the association  
550 may, by reasonable rule, adopt a procedure for conspicuously  
551 posting and repeatedly broadcasting the notice and the agenda on a  
552 closed-circuit cable television system serving the condominium  
553 association. However, if broadcast notice is used in lieu of a  
554 notice physically posted on condominium property, the notice and  
555 agenda must be broadcast at least four times every broadcast hour  
556 of each day that a posted notice is otherwise required under this  
557 section. If broadcast notice is provided, the notice and agenda  
558 must be broadcast in a manner and for a sufficient continuous  
559 length of time so as to allow an average reader to observe the  
560 notice and read and comprehend the entire content of the notice and  
561 the agenda. In addition to or in lieu of any of the authorized  
562 means of providing notice of a meeting of the board, the  
563 association may, by rule, adopt a procedure for conspicuously  
564 posting the meeting notice and the agenda on a website serving the  
565 condominium association for at least the minimum period of time for  
566 which a notice of a meeting is also required to be physically  
567 posted on the condominium property or association property. Any  
568 rule adopted shall, in addition to other matters, include a

569 requirement that the association send an ~~electronic~~ notice in the  
570 same manner as a notice for a meeting of the members, which must  
571 include a ~~hyperlink to~~ recitation of the address of the website  
572 where the notice is posted, ~~to unit owners whose e-mail addresses~~  
573 ~~are included in the association's official records.~~

574 2. ~~Meetings of a committee to take final action on behalf of the~~  
575 ~~board or make recommendations to the board regarding the~~  
576 ~~association budget are subject to this paragraph. Meetings of a~~  
577 ~~committee that does not take final action on behalf of the board or~~  
578 ~~make recommendations to the board regarding the association budget~~  
579 ~~are subject to this section, unless those meetings are exempted~~  
580 ~~from this section by the bylaws of the association.~~ Meetings of a  
581 committee are not subject to this paragraph, except a committee  
582 which takes final action on behalf of the board or which makes  
583 recommendations to the board regarding the association budget.

584 3. Notwithstanding any other law, the requirement that board  
585 meetings and committee meetings be open to the unit owners does not  
586 apply to:

587 a. Meetings between the board or a committee and the association's  
588 attorney, with respect to proposed or pending litigation, if the  
589 meeting is held for the purpose of seeking or rendering legal

590 advice; or

591 b. Board meetings held for the purpose of discussing personnel  
592 matters, including matters relating to any management company  
593 employees.

594 (d) *Unit owner meetings.*—

595 3. The bylaws must provide the method of calling meetings of unit  
596 owners, including annual meetings. Written notice must include an  
597 agenda, must be mailed, hand delivered, or electronically  
598 transmitted to each unit owner at least 14 days before the annual  
599 meeting, and must be posted in a conspicuous place on the  
600 condominium property or association property at least 14 continuous  
601 days before the annual meeting. Upon notice to the unit owners, the  
602 board shall, by duly adopted rule, designate a specific location on  
603 the condominium property where all notices of unit owner meetings  
604 must be posted. This requirement does not apply if there is no  
605 condominium property or association property for posting notices.  
606 In lieu of, or in addition to, the physical posting of meeting  
607 notices, the association may, by reasonable rule, adopt a procedure  
608 for conspicuously posting and repeatedly broadcasting the notice  
609 and the agenda on a closed-circuit cable television system serving  
610 the condominium association. However, if broadcast notice is used

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611 in lieu of a notice posted physically on the condominium property,  
612 the notice and agenda must be broadcast at least four times every  
613 broadcast hour of each day that a posted notice is otherwise  
614 required under this section. If broadcast notice is provided, the  
615 notice and agenda must be broadcast in a manner and for a  
616 sufficient continuous length of time so as to allow an average  
617 reader to observe the notice and read and comprehend the entire  
618 content of the notice and the agenda. In addition to or in lieu of  
619 any of the authorized means of providing notice of a meeting of the  
620 board, the association may, by rule, adopt a procedure for  
621 conspicuously posting the meeting notice and the agenda on a  
622 website serving the condominium association for at least the  
623 minimum period of time for which a notice of a meeting is also  
624 required to be physically posted on the condominium property or  
625 association property. Any rule adopted shall, in addition to other  
626 matters, include a requirement that the association send an  
627 ~~electronic~~ notice in the same manner as a notice for a meeting of  
628 the members, which must include a ~~hyperlink to~~ recitation of the  
629 address of the website where the notice is posted, ~~to unit owners~~  
630 ~~whose e-mail addresses are included in the association's official~~  
631 ~~records~~. Unless a unit owner waives in writing the right to receive

632 notice of the ~~annual~~ unit owner meetings, such notice must be hand  
633 delivered to a person in the unit or the unit owner, mailed, or  
634 electronically transmitted to each unit owner. ~~Notice for meetings~~  
635 ~~and notice for all other purposes must be mailed to each unit owner~~  
636 ~~at the address last furnished to the association by the unit owner,~~  
637 ~~or hand delivered to each unit owner. However, iIf a unit is owned~~  
638 by more than one person, the association must provide notice to the  
639 address that ~~the developer identifies for that purpose and~~  
640 ~~thereafter as one or more of~~ the owners of the unit advise the  
641 association in writing, or if no address is given or the owners of  
642 the unit do not agree, to the address ~~provided on the deed of~~  
643 ~~record~~ of the unit. An officer of the association, or the manager  
644 or other person providing notice of the association meeting, must  
645 provide an affidavit or United States Postal Service certificate of  
646 mailing, to be included in the official records of the association  
647 affirming that the notice was mailed or hand delivered in  
648 accordance with this provision.

649 ~~(p) Service providers; conflicts of interest. An association,~~  
650 ~~which is not a timeshare condominium association, may not employ or~~  
651 ~~contract with any service provider that is owned or operated by a~~  
652 ~~board member or with any person who has a financial relationship~~



653 ~~with a board member or officer, or a relative within the third~~  
654 ~~degree of consanguinity by blood or marriage of a board member or~~  
655 ~~officer. This paragraph does not apply to a service provider in~~  
656 ~~which a board member or officer, or a relative within the third~~  
657 ~~degree of consanguinity by blood or marriage of a board member or~~  
658 ~~officer, owns less than 1 percent of the equity shares.~~

659 **Section 7.** Subsection (3) of Section 718.112 is amended to read as  
660 follows:

661 **718.112 Bylaws.—**

662 (3) OPTIONAL PROVISIONS.—The bylaws as originally recorded or as  
663 amended under the procedures provided therein may provide for the  
664 following:

665 (a) A method of adopting and amending administrative rules and  
666 regulations governing the details of the operation and use of the  
667 ~~common elements~~ condominium property.

668 (b) Restrictions on and requirements for the use, transfer,  
669 maintenance, and appearance of the units and the use of the common  
670 elements condominium property.

671 (c) Provisions for giving notice by electronic transmission in a  
672 manner authorized by law of meetings of the board of directors and  
673 committees and of annual and special meetings of the members.

674 (d) Other provisions which are not inconsistent with this chapter  
675 or with the declaration or the articles of incorporation, as may be  
676 desired.

677 **Section 8.** Subsections (1) and (3) of Section 718.202 are amended  
678 to read as follows:

679 **718.202 Sales or reservation deposits prior to closing.—**

680 (1) If a developer contracts to sell a condominium parcel and the  
681 construction, furnishing, and landscaping of the property submitted  
682 or proposed to be submitted to condominium ownership has not been  
683 substantially completed in accordance with the plans and  
684 specifications and representations made by the developer in the  
685 disclosures required by this chapter, the developer shall pay into  
686 an escrow account all payments up to 10 percent of the sale price  
687 received by the developer from the buyer towards the sale price.  
688 The escrow agent shall give to the purchaser a receipt for the  
689 deposit, upon request. In lieu of the foregoing concerning  
690 residential condominiums, the division director has the discretion  
691 to accept other assurances, including, but not limited to, a surety  
692 bond or an irrevocable letter of credit in an amount equal to the  
693 escrow requirements of this section. With respect to nonresidential  
694 condominiums, the developer shall have the option of delivering to

695 escrow agent a surety bond or irrevocable letter of credit in an  
696 amount equivalent to the aggregate of all payments up to 10 percent  
697 of the sale price received by the developer from all buyers towards  
698 the sale price, in all cases the aggregate of initial 10 percent  
699 deposits monies being released secured by a surety bond or  
700 irrevocable letter of credit in an equivalent amount. Default  
701 determinations and refund of deposits shall be governed by the  
702 escrow release provision of this subsection. Funds shall be  
703 released from escrow as follows:

704 (3) If the contract for sale of the condominium unit so provides,  
705 the developer may withdraw escrow funds in excess of 10 percent of  
706 the purchase price from the special account required by subsection  
707 (2) when the construction of improvements has begun. He or she may  
708 use the funds for the actual costs incurred by the developer in the  
709 actual construction and development of the condominium property in  
710 which the unit to be sold is located. Actual costs shall also  
711 include expenditures for demolition, site clearing, permit fees,  
712 impact fees, utility reservation fees, as well as architectural,  
713 engineering, and surveying fees which directly relate to  
714 construction and development. However, no part of these funds may  
715 be used for salaries, commissions, or expenses of salespersons or

716 for advertising, marketing or promotional purposes, loan fees,  
717 costs or interest, attorneys' fees, accounting fees or insurance. A  
718 contract which permits use of the advance payments for these  
719 purposes shall include the following legend conspicuously printed  
720 or stamped in boldfaced type on the first page of the contract and  
721 immediately above the place for the signature of the buyer: ANY  
722 PAYMENT IN EXCESS OF 10 PERCENT OF THE PURCHASE PRICE MADE TO  
723 DEVELOPER PRIOR TO CLOSING PURSUANT TO THIS CONTRACT MAY BE USED  
724 FOR CONSTRUCTION PURPOSES BY THE DEVELOPER.

725 **Section 9.** Subsection (3) of Section 718.303 is amended to read as  
726 follows:

727 **718.303 Obligations of owners and occupants, remedies.—**

728 (3) The association may levy reasonable fines for the failure of  
729 the owner of the a unit or its tenant, guest, occupant, licensee,  
730 or invitee to comply with any provision of the declaration, the  
731 association bylaws, or reasonable rules of the association. A fine  
732 may not become a lien against a unit. A fine may be levied by the  
733 board on the basis of each day of a continuing violation, with a  
734 single notice and opportunity for hearing before a committee as  
735 provided in paragraph (b). However, the a fine may not exceed \$100  
736 per violation, or \$1,000 in the aggregate for each continuous

737 violation.

738 (a) An association may suspend, for a reasonable period of time,  
739 the right of a unit owner, or a ~~unit owner's~~ unit's tenant, guest,  
740 occupant, licensee, or invitee, to use the common elements, common  
741 facilities, or any other association property for failure to comply  
742 with any provision of the declaration, the association bylaws, or  
743 reasonable rules of the association. This paragraph does not apply  
744 to limited common elements intended to be used only by that unit,  
745 common elements needed to access the unit, utility services  
746 provided to the unit, parking spaces, or elevators.

747 (b) A fine or suspension levied by the board of administration may  
748 not be imposed unless the board first provides ~~at least 14 days'~~  
749 written notice to the unit owner and, if applicable, any tenant,  
750 guest, occupant, licensee, or invitee of the unit owner sought to  
751 be fined or suspended, and an opportunity ~~for~~ to attend a hearing  
752 before a committee of at least three members appointed by the ~~board~~  
753 association who are not officers, directors, or employees of the  
754 association, or the spouse, parent, child, brother, or sister of an  
755 officer, director, or employee. The hearing must be held regardless  
756 of whether the person or persons sought to be fined and/or  
757 suspended appear at the scheduled hearing. Notice of the hearing

758 shall be effective when deposited in the U.S. mail ~~and correctly~~  
759 ~~addressed~~ 14 days in advance of the hearing date, or may be given  
760 by electronic transmission to unit owners who have given written  
761 consent to receive notice of association meetings electronically.  
762 Notice of the hearing shall also be posted 48 hours in advance in  
763 the location where notices of board meetings are posted, or in such  
764 other manner that notice of board meetings is given, and shall be  
765 open to attendance by unit owners. The role of the committee is  
766 limited to determining whether to confirm or reject the fine or  
767 suspension levied by the board. If the committee does not approve  
768 the proposed fine or suspension by majority vote, the fine or  
769 suspension may not be imposed. ~~If the proposed fine or suspension~~  
770 ~~is approved by the committee, the fine payment is due 5 days after~~  
771 ~~the date of the committee meeting at which the fine is approved.~~  
772 The association must provide written notice of such fine or  
773 suspension by mail or hand delivery to the unit owner and, if  
774 applicable, to any tenant, guest, occupant, licensee, or invitee of  
775 the unit owner. No fine shall be due and payable less than 10 days  
776 after the notice has been sent by the association. When a fine is  
777 levied against a tenant, guest, occupant, licensee, or invitee, the  
778 unit owner shall be jointly and severally liable for the payment of

779 the fine. Any action to collect a fine or enforce a suspension  
780 shall entitle the prevailing party to recover reasonable attorneys'  
781 fees and costs.

782 **Section 10.** Subsection (5) of Section 718.405 is amended to read  
783 as follows:

784 **718.405 Multicondominiums; muticondominium associations.—**

785 (5) This section does not prevent or restrict a multicondominium  
786 association from adopting a consolidated or combined declaration of  
787 condominium, which shall comply with s. 718.104, provided that such  
788 consolidated or combination shall not serve to merge the  
789 condominiums or change the legal descriptions of the condominium  
790 parcels as set forth in s. 718.109, unless accomplished according  
791 to law. This section is intended to clarify existing law and  
792 applies to associations existing on the effective date of this act.

793 **Section 11.** Subsection (2) of Section 718.503 is amended to read  
794 as follows:

795 **718.503 Developer disclosure prior to sale; nondeveloper unit**  
796 **owner disclosure prior to sale; voidability.—**

797 (2) NONDEVELOPER DISCLOSURE.—

798 (a) Each unit owner who is not a developer as defined by this  
799 chapter shall comply with the provisions of this subsection prior

800 to the sale of his or her unit. Each prospective purchaser who has  
801 entered into a contract for the purchase of a condominium unit is  
802 entitled, at the seller's expense, to a current copy of the  
803 declaration of condominium, articles of incorporation of the  
804 association, bylaws and rules of the association, the most recent  
805 year-end financial information ~~required by s. 718.111~~, and the  
806 document entitled "Frequently Asked Questions and Answers" required  
807 by s. 718.504. On and after January 1, 2009, the prospective  
808 purchaser shall also be entitled to receive from the seller a copy  
809 of a governance form. Such form shall be provided by the division  
810 summarizing governance of condominium associations. In addition to  
811 such other information as the division considers helpful to a  
812 prospective purchaser in understanding association governance, the  
813 governance form shall address the following subjects:

814 (c) Each contract entered into after July 1, 1992, for the resale  
815 of a residential unit shall contain in conspicuous type either:

816 1. A clause which states: THE BUYER HEREBY ACKNOWLEDGES THAT BUYER  
817 HAS BEEN PROVIDED A CURRENT COPY OF THE DECLARATION OF CONDOMINIUM,  
818 ARTICLES OF INCORPORATION OF THE ASSOCIATION, BYLAWS AND RULES OF  
819 THE ASSOCIATION, AND A COPY OF THE CURRENT ANNUAL BUDGET OF THE  
820 ASSOCIATION AND THE MOST RECENT YEAR-END FINANCIAL INFORMATION AND



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821 FREQUENTLY ASKED QUESTIONS AND ANSWERS DOCUMENT MORE THAN 3 DAYS,  
822 EXCLUDING SATURDAYS, SUNDAYS, AND LEGAL HOLIDAYS, PRIOR TO  
823 EXECUTION OF THIS CONTRACT; or  
824 2. A clause which states: THIS AGREEMENT IS VOIDABLE BY BUYER BY  
825 DELIVERING WRITTEN NOTICE OF THE BUYER'S INTENTION TO CANCEL WITHIN  
826 3 DAYS, EXCLUDING SATURDAYS, SUNDAYS, AND LEGAL HOLIDAYS, AFTER THE  
827 DATE OF EXECUTION OF THIS AGREEMENT BY THE BUYER AND RECEIPT BY  
828 BUYER OF A CURRENT COPY OF THE DECLARATION OF CONDOMINIUM, ARTICLES  
829 OF INCORPORATION, BYLAWS AND RULES OF THE ASSOCIATION, AND A COPY  
830 OF THE CURRENT ANNUAL BUDGET OF THE ASSOCIATION AND THE MOST RECENT  
831 ~~YEAR-END~~ FINANCIAL STATEMENT ~~INFORMATION~~ AND FREQUENTLY ASKED  
832 QUESTIONS AND ANSWERS DOCUMENT IF SO REQUESTED IN WRITING. ANY  
833 PURPORTED WAIVER OF THESE VOIDABILITY RIGHTS SHALL BE OF NO EFFECT.  
834 BUYER MAY EXTEND THE TIME FOR CLOSING FOR A PERIOD OF NOT MORE THAN  
835 3 DAYS, EXCLUDING SATURDAYS, SUNDAYS, AND LEGAL HOLIDAYS, AFTER THE  
836 BUYER RECEIVES THE DECLARATION, ARTICLES OF INCORPORATION, BYLAWS  
837 AND RULES OF THE ASSOCIATION, AND A COPY OF THE MOST RECENT YEAR-  
838 END FINANCIAL INFORMATION AND FREQUENTLY ASKED QUESTIONS AND  
839 ANSWERS DOCUMENT IF REQUESTED IN WRITING. BUYER'S RIGHT TO VOID  
840 THIS AGREEMENT SHALL TERMINATE AT CLOSING.  
841 A contract that does not conform to the requirements of this

842 paragraph is voidable at the option of the purchaser prior to  
843 closing.

844 **Section 13.** Subsection (8) of Section 720.301 is amended to read  
845 as follows:

846 **720.301 Definitions.**—AS used in this chapter, the term:

847 (8) “Governing documents” means:

848 (a) The recorded declaration of covenants for a community and all  
849 duly adopted and recorded amendments, supplements, and recorded  
850 exhibits thereto;

851 (b) The articles of incorporation and bylaws of the homeowners’  
852 association and any duly adopted amendments thereto; and

853 ~~(c) Rules and regulations adopted under the authority of the~~  
854 ~~recorded declaration, articles of incorporation, or bylaws and duly~~  
855 ~~adopted amendments thereto.~~

856 **Section 14.** Subsections (1), (2), (4) and (5) of Section 720.303  
857 are amended to read as follows:

858 **720.303 Association powers and duties, meetings of board; official**  
859 **records; budgets; financial reporting; association funds; recalls.**—

860 (1) **POWERS AND DUTIES.**—An association which operates a community  
861 as defined in s. 720.301, must be operated by an association that  
862 is a Florida corporation. After October 1, 1995, the association

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863 must be incorporated and the initial governing documents must be  
864 recorded in the official records of the county in which the  
865 community is located. An association may operate more than one  
866 community. The officers and directors of an association have a  
867 fiduciary relationship to the members who are served by the  
868 association. The powers and duties of an association include those  
869 set forth in this chapter and, except as expressly limited or  
870 restricted in this chapter, those set forth in the governing  
871 documents. After control of the association is obtained by members  
872 other than the developer, the association may institute, maintain,  
873 settle, or appeal actions or hearings in its name on behalf of all  
874 members concerning matters of common interest to the members,  
875 including, but not limited to, the common areas; roof or structural  
876 components of a building, or other improvements for which the  
877 association is responsible; mechanical, electrical, or plumbing  
878 elements serving an improvement or building for which the  
879 association is responsible; representations of the developer  
880 pertaining to any existing or proposed commonly used facility; and  
881 protesting ad valorem taxes on commonly used facilities. The  
882 association may defend actions in eminent domain or bring inverse  
883 condemnation actions. Before commencing litigation against any

884 party in the name of the association involving amounts in  
885 controversy in excess of \$100,000, the association must obtain the  
886 affirmative approval of a majority of the voting interests at a  
887 meeting of the membership at which a quorum has been attained. This  
888 subsection does not limit any statutory or common-law right of any  
889 individual member or class of members to bring any action without  
890 participation by the association. A member does not have authority  
891 to act for the association by virtue of being a member. An  
892 association may have more than one class of members and may issue  
893 membership certificates. ~~An association of 15 or fewer parcel~~  
894 ~~owners may enforce only the requirements of those deed restrictions~~  
895 ~~established prior to the purchase of each parcel upon an affected~~  
896 ~~parcel owner or owners.~~

897 (2) BOARD MEETINGS.—

898 (b) Members have the right to attend all meetings of the board.  
899 The right to attend such meetings includes the right to speak at  
900 such meetings with reference to all ~~designated~~ items on which the  
901 board will vote. The association may adopt written reasonable rules  
902 expanding the right of members to speak and governing the  
903 frequency, duration, and other manner of member statements, which  
904 rules must be consistent with this paragraph and may include a

905 sign-up sheet for members wishing to speak. Notwithstanding any  
906 other law, meetings between the board or a committee and the  
907 association's attorney to discuss proposed or pending litigation or  
908 meetings of the board held for the purpose of discussing personnel  
909 matters are not required to be open to the members other than  
910 directors.

911 (c) The bylaws shall provide the following for giving notice to  
912 parcel owners and members of all board meetings and, if they do not  
913 do so, shall be deemed to include the following:

914 1. Notices of all open board meetings must be posted in a  
915 conspicuous place in the community at least 48 hours in advance of  
916 a meeting, except in an emergency. In the alternative, if notice is  
917 not posted in a conspicuous place in the community, notice of each  
918 open board meeting must be mailed or delivered to each member at  
919 least 7 days before the meeting, except in an emergency.

920 Notwithstanding this general notice requirement, ~~for communities~~  
921 ~~with more than 100 members,~~ the association bylaws may provide for  
922 a reasonable alternative to posting or mailing of notice for each  
923 board meeting, including publication of notice, provision of a  
924 schedule of board meetings, or the conspicuous posting and repeated  
925 broadcasting of the notice on a closed-circuit cable television

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926 system serving the homeowners' association. ~~However,~~ if broadcast  
927 notice is used in lieu of a notice posted physically in the  
928 community, the notice must be broadcast at least four times every  
929 broadcast hour of each day that a posted notice is otherwise  
930 required. When broadcast notice is provided, the notice and agenda  
931 must be broadcast in a manner and for a sufficient continuous  
932 length of time so as to allow an average reader to observe the  
933 notice and read and comprehend the entire content of the notice and  
934 the agenda. In addition to or in lieu of any of the authorized  
935 means of providing notice of a meeting of the board, the  
936 association may, by rule, adopt a procedure for conspicuously  
937 posting the meeting notice and the agenda on a website serving the  
938 association for at least the minimum period of time for which a  
939 notice of a meeting is also required to be physically posted on the  
940 property. The association may provide notice by electronic  
941 transmission in a manner authorized by law for meetings of the  
942 board of directors, committee meetings requiring notice under this  
943 section, and annual and special meetings of the members to any  
944 member who has provided a facsimile number or e-mail address to the  
945 association to be used for such purposes; however, a member must  
946 consent in writing to receiving notice by electronic transmission.

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947 (4) OFFICIAL RECORDS.—The association shall maintain each of the  
948 following items, when applicable, which constitute the official  
949 records of the association:

950 (a) Copies of any plans, specifications, permits, and warranties  
951 related to improvements constructed on the common areas or other  
952 property that the association is obligated to maintain, repair, or  
953 replace, which are in the association's possession.

954 (5) INSPECTION AND COPYING OF RECORDS.—The official records shall  
955 be maintained within the state for at least 7 years and shall be  
956 made available to a parcel owner for inspection or photocopying  
957 within 45 miles of the community or within the county in which the  
958 association is located within 10 business days after receipt by the  
959 board or its designee of a written request. This subsection may be  
960 complied with by having a copy of the official records available  
961 for inspection or copying in the community or, at the option of the  
962 association, by making the records available to a parcel owner  
963 electronically via the Internet or by allowing the records to be  
964 viewed in electronic format on a computer screen and printed upon  
965 request. If the association has a photocopy machine available where  
966 the records are maintained, it must provide parcel owners with  
967 copies on request during the inspection if the entire request is

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968 limited to no more than 25 pages. An association shall allow a  
969 member or his or her authorized representative to use a portable  
970 device, including a smartphone, tablet, portable scanner, or any  
971 other technology capable of scanning or taking photographs, to make  
972 an electronic copy of the official records in lieu of the  
973 association's providing the member or his or her authorized  
974 representative with a copy of such records. The association may not  
975 charge a fee to a member or his or her authorized representative  
976 for the use of a portable device.

977 (c) The association may adopt reasonable written rules governing  
978 the frequency, time, location, notice, records to be inspected, and  
979 manner of inspections, but may not require a parcel owner to  
980 demonstrate any proper purpose for the inspection, state any reason  
981 for the inspection, or limit a parcel owner's right to inspect  
982 records to less than one 8-hour business day per month. The  
983 association may impose fees to cover the costs of providing copies  
984 of the official records, including the costs of copying and the  
985 costs required for personnel to retrieve and copy the records if  
986 the time spent retrieving and copying the records exceeds one-half  
987 hour and if the personnel costs do not exceed \$20 per hour.  
988 Personnel costs may not be charged for records requests that result



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989 in the copying of 25 or fewer pages. The association may charge up  
990 to 25 cents per page for copies made on the association's  
991 photocopier. If the association does not have a photocopy machine  
992 available where the records are kept, or if the records requested  
993 to be copied exceed 25 pages in length, the association may have  
994 copies made by an outside duplicating service and may charge the  
995 actual cost of copying, as supported by the vendor invoice. The  
996 association shall maintain an adequate number of copies of the  
997 recorded governing documents, to ensure their availability to  
998 members and prospective members. Notwithstanding this paragraph,  
999 the following records are not accessible to members or parcel  
1000 owners:

1001 3. Personnel records of association or management company  
1002 employees, including, but not limited to, disciplinary, payroll,  
1003 health, and insurance records. For purposes of this subparagraph,  
1004 the term "personnel records" does not include written employment  
1005 agreements with an association employee, ~~or~~ management company, or  
1006 management company employee who spends at least twenty (20) hours  
1007 per week of his or her paid time on the property operated by the  
1008 association, or budgetary or financial records that indicate the  
1009 compensation paid to an association or management company employee

1010 who spends at least twenty (20) hours per week of his or her paid  
1011 time on the property operated by the association.

1012 **Section 15.** Subsection (2) of Section 720.305 is amended to read  
1013 as follows:

1014 **720.305 Obligations of members; remedies at law or in equity; levy**  
1015 **of fines and suspension of use rights.-**

1016 (2) The association may levy reasonable fines for the failure of  
1017 the owner of a parcel or its tenant, guest, occupant, licensee, or  
1018 invitee to comply with any provision of the declaration, the  
1019 association bylaws, or reasonable rules of the association. A fine

1020 may not exceed \$100 per violation ~~against any member or any~~  
1021 ~~member's tenant, guest, or invitee for the failure of the owner of~~  
1022 ~~the parcel or its occupant, licensee, or invitee to comply with any~~  
1023 ~~provision of the declaration, the association bylaws, or reasonable~~  
1024 ~~rules of the association~~ unless otherwise provided in the governing

1025 documents. A fine may be levied by the board for each day of a  
1026 continuing violation, with a single notice and opportunity for  
1027 hearing, except that the fine may not exceed \$1,000 in the  
1028 aggregate for each continuous violation unless otherwise provided

1029 in the governing documents. A fine of ~~less than~~ \$1,000 or more may  
1030 ~~not~~ become a lien against a parcel if authorized by the

1031 declaration. ~~In any action to recover a fine, the prevailing party~~  
1032 ~~is entitled to reasonable attorney fees and costs from the~~  
1033 ~~nonprevailing party as determined by the court.~~

1034 (a) An association may suspend, for a reasonable period of time,  
1035 the right of a ~~member~~ parcel owner, or a member's parcel's tenant,  
1036 guest, occupant, licensee, or invitee, to use common areas and  
1037 facilities for the failure of ~~the owner of~~ the parcel owner or its  
1038 tenant, guest, occupant, licensee, or invitee to comply with any  
1039 provision of the declaration, the association bylaws, or reasonable  
1040 rules of the association. ~~This paragraph does not apply to that~~  
1041 ~~portion of common areas used to provide access or utility services~~  
1042 ~~to the parcel.~~ A suspension shall not apply to utility services  
1043 provided to the parcel and may not prohibit an owner or a tenant,  
1044 guest, occupant, licensee, or invitee of a parcel from having  
1045 vehicular and pedestrian ingress to and egress from the parcel,  
1046 including, but not limited to, the right to park.

1047 (b) A fine or suspension levied by the board of administration may  
1048 not be imposed unless the board first provides ~~at least 14 days'~~  
1049 written notice to the parcel owner and, if applicable, any tenant,  
1050 guest, occupant, licensee, or invitee of the parcel owner, sought  
1051 to be fined or suspended, and an opportunity ~~for~~ to attend a

1052 hearing before a committee of at least three members appointed by  
1053 the board who are not officers, directors, or employees of the  
1054 association, or the spouse, parent, child, brother, or sister of an  
1055 officer, director, or employee. The hearing must be held regardless  
1056 of whether the person or persons sought to be fined and/or  
1057 suspended appear at the scheduled hearing. Notice of the hearing  
1058 shall be effective when deposited in the U.S. mail and correctly  
1059 addressed 14 days in advance of the hearing date, or may be given  
1060 by electronic transmission to parcel owners who have given written  
1061 consent to receive notice of association meetings electronically.  
1062 Notice of the hearing shall also be posted 48 hours in advance in  
1063 the location where notices of board meetings are posted, or in such  
1064 other manner that notice of board meetings is given, and shall be  
1065 open to attendance by owners. If the committee, ~~by majority vote,~~  
1066 does not approve a proposed fine or suspension by majority vote,  
1067 the ~~proposed~~ fine or suspension may not be imposed. The role of the  
1068 committee is limited to determining whether to confirm or reject  
1069 the fine or suspension levied by the board. ~~If the proposed fine or~~  
1070 ~~suspension levied by the board is approved by the committee, the~~  
1071 ~~fine payment is due 5 days after the date of the committee meeting~~  
1072 ~~at which the fine is approved.~~ The association must provide written

1073 notice of such fine or suspension by mail or hand delivery to the  
1074 parcel owner and, if applicable, to any tenant, guest, occupant,  
1075 licensee, or invitee of the parcel owner. No fine shall be due and  
1076 payable less than 10 days after the notice has been sent by the  
1077 association. When a fine is levied against a tenant, guest,  
1078 occupant, licensee, or invitee, the parcel owner shall be jointly  
1079 and severally liable for the payment of the fine. Any action to  
1080 collect a fine or enforce a suspension shall entitle the prevailing  
1081 party to recover attorneys' fees and costs.

1082 **Section 16.** Paragraphs (d), (e) and (g) of subsection (1),  
1083 subsections (5), (7) and (8), paragraph (a) of subsection (9) and  
1084 subsection (10) of Section 720.306 is amended to read as follows:

1085 **720.306 Meetings of members; voting and election procedures;**  
1086 **amendments.—**

1087 (1) QUORUM; AMENDMENTS.—

1088 (d) The Legislature finds that the procurement of mortgagee  
1089 consent to amendments that do not affect the rights or interests of  
1090 mortgagees is an unreasonable and substantial logistical and  
1091 financial burden on the parcel owners and that there is a  
1092 compelling state interest in enabling the members of an association  
1093 to approve amendments to the association's governing documents

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1094 through legal means. Accordingly, and notwithstanding any provision  
1095 of this paragraph to the contrary:

1096 1. As to any mortgage recorded on or after July 1, 2013, any  
1097 provision in the association's governing documents that requires  
1098 the consent or joinder of some or all mortgagees of parcels or any  
1099 other portion of the association's common areas to amend the  
1100 association's governing documents or for any other matter is  
1101 enforceable only as to amendments to the association's governing  
1102 documents that adversely affect the priority of the mortgagee's  
1103 lien or the mortgagee's rights to foreclose its lien or that  
1104 otherwise materially affect the rights and interests of the  
1105 mortgagees.

1106 2. As to mortgages recorded before July 1, 2013, any existing  
1107 provisions in the association's governing documents requiring  
1108 mortgagee consent are enforceable.

1109 3. In securing consent or joinder, the association is entitled to  
1110 rely upon the public records to identify the holders of outstanding  
1111 mortgages. The association may use the address provided in the  
1112 original recorded mortgage document, unless there is a different  
1113 address for the holder of the mortgage in a recorded assignment or  
1114 modification of the mortgage, which recorded assignment or

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1115 modification must reference the official records book and page on  
1116 which the original mortgage was recorded. ~~Once the association has~~  
1117 ~~identified the recorded mortgages of record, the association shall,~~  
1118 ~~in writing, request of each parcel owner whose parcel is encumbered~~  
1119 ~~by a mortgage of record any information that the owner has in his~~  
1120 ~~or her possession regarding the name and address of the person to~~  
1121 ~~whom mortgage payments are currently being made. Notice shall be~~  
1122 ~~sent to such person if the address provided in the original~~  
1123 ~~recorded mortgage document is different from the name and address~~  
1124 ~~of the mortgagee or assignee of the mortgage as shown by the public~~  
1125 ~~record. The association is deemed to have complied with this~~  
1126 ~~requirement by making the written request of the parcel owners~~  
1127 ~~required under this subparagraph. Any notices required to be sent~~  
1128 ~~to the mortgagees under this subparagraph shall be sent to all~~  
1129 ~~available addresses provided to the association.~~

1130 4. Any notice to the mortgagees required under subparagraph 3. may  
1131 be sent by a method that establishes proof of delivery, and any  
1132 mortgagee who fails to respond within 60 days after the date of  
1133 mailing is deemed to have consented to the amendment.

1134 5. For those amendments requiring mortgagee consent on or after  
1135 July 1, 2013, in the event mortgagee consent is provided other than

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1136 by properly recorded joinder, such consent shall be evidenced by  
1137 affidavit of the association recorded in the public records of the  
1138 county in which the declaration is recorded.

1139 6. Any amendment adopted without the required consent of a  
1140 mortgagee is voidable only by a mortgagee who was entitled to  
1141 notice and an opportunity to consent. An action to void an  
1142 amendment is subject to the statute of limitations beginning 5  
1143 years after the date of discovery as to the amendments described in  
1144 subparagraph 1. and 5 years after the date of recordation of the  
1145 certificate of amendment for all other amendments. This  
1146 subparagraph applies to all mortgages, regardless of the date of  
1147 recordation of the mortgage.

1148 (e) A proposal to amend the governing documents must contain the  
1149 full text of the provision to be amended and may not be revised or  
1150 amended by reference solely to the title or number. Proposed new  
1151 language must be underlined, and proposed deleted language must be  
1152 stricken. If the proposed change is so extensive that underlining  
1153 and striking through language would hinder, rather than assist, the  
1154 understanding of the proposed amendment, a notation must be  
1155 inserted immediately preceding the proposed amendment in  
1156 substantially the following form: "Substantial rewording. See



1157 governing documents for current text." An amendment to a governing  
1158 document is effective when recorded in the public records of the  
1159 county in which the community is located, and as to the articles of  
1160 incorporation, when also filed with the Florida Division of  
1161 Corporations.

1162 (f) An immaterial error or omission in the amendment process does  
1163 not invalidate an otherwise properly adopted amendment.

1164 ~~(g) A notice required under this section must be mailed or~~  
1165 ~~delivered to the address identified as the parcel owner's mailing~~  
1166 ~~address on the property appraiser's website for the county in which~~  
1167 ~~the parcel is located, or electronically transmitted in a manner~~  
1168 ~~authorized by the association if the parcel owner has consented, in~~  
1169 ~~writing, to receive notice by electronic transmission.~~

1170 (5) NOTICE OF MEETINGS.— ~~The bylaws shall provide for giving~~  
1171 ~~notice to members of all member meetings, and if they do not do so~~  
1172 ~~shall be deemed to provide the following:~~ The association shall  
1173 give all parcel owners and members actual notice of all membership  
1174 meetings, which shall be mailed, delivered, or electronically  
1175 transmitted to the members not less than 14 days prior to the  
1176 meeting. Evidence of compliance with this 14-day notice shall be  
1177 made by an affidavit executed by the person providing the notice

1178 and filed upon execution among the official records of the  
1179 association. In addition to mailing, delivering, or electronically  
1180 transmitting the notice of any meeting, the association may, by  
1181 reasonable rule, adopt a procedure for conspicuously posting and  
1182 repeatedly broadcasting the notice and the agenda on a closed-  
1183 circuit cable television system serving the association. When  
1184 broadcast notice is provided, the notice and agenda must be  
1185 broadcast in a manner and for a sufficient continuous length of  
1186 time so as to allow an average reader to observe the notice and  
1187 read and comprehend the entire content of the notice and the  
1188 agenda.

1189 (7) ADJOURNMENT.—Unless the bylaws require otherwise, adjournment  
1190 of an annual or special meeting to a different date, time, or place  
1191 must be announced at that meeting before an adjournment is taken,  
1192 or notice must be given of the new date, time, or place pursuant to  
1193 s. 720.303(2). Any business that might have been transacted on the  
1194 original date of the meeting may be transacted at the adjourned  
1195 meeting. ~~If a new record date for the adjourned meeting is or must~~  
1196 ~~be fixed under s. 607.0707, notice~~ Notice of the adjourned meeting  
1197 must be given to ~~persons~~ members who are entitled to vote and are  
1198 members as of the ~~new record~~ date of the adjournment but were not

1199 members as of the ~~previous record~~ date of the original meeting or a  
1200 previous adjournment.

1201 (8) PROXY VOTING.—The members have the right, unless otherwise  
1202 provided in this subsection or in the ~~governing documents~~  
1203 declaration, articles of incorporation or bylaws, to vote in person  
1204 or by proxy.

1205 (a) To be valid, a proxy must be dated, must state the date, time,  
1206 and place of the meeting for which it was given, and must be signed  
1207 by the authorized person who executed the proxy. A proxy is  
1208 effective only for the specific meeting for which it was originally  
1209 given, as the meeting may lawfully be adjourned and reconvened from  
1210 time to time, and automatically expires 90 days after the date of  
1211 the meeting for which it was originally given. A proxy is revocable  
1212 at any time at the pleasure of the person who executes it. If the  
1213 proxy form expressly so provides, any proxy holder may appoint, in  
1214 writing, a substitute to act in his or her place.

1215 (b) ~~If the governing documents permit voting by~~ Unless prohibited  
1216 by the governing documents, secret ballot ~~by members who are not in~~  
1217 ~~attendance at a meeting of the members~~ shall be used for the  
1218 election of directors<sup>7</sup>. ~~such~~ Such ballots must be placed in an  
1219 inner envelope with no identifying markings and mailed or delivered

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1220 to the association in an outer envelope bearing identifying  
1221 information reflecting the name of the member, the lot or parcel  
1222 for which the vote is being cast, and the signature of the lot or  
1223 parcel owner casting that ballot. If the eligibility of the member  
1224 to vote is confirmed and no other ballot has been submitted for  
1225 that lot or parcel, the inner envelope shall be removed from the  
1226 outer envelope bearing the identification information, placed with  
1227 the ballots which were personally cast, and opened when the ballots  
1228 are counted. If more than one ballot is submitted for a lot or  
1229 parcel, the ballots for that lot or parcel shall be disqualified.  
1230 Any vote by ballot received after the closing of the balloting may  
1231 not be considered.

1232 (9) ELECTIONS AND BOARD VACANCIES.—

1233 (a) Elections of directors must be conducted in accordance with  
1234 the procedures set forth in the governing documents of the  
1235 association. Except as provided in paragraph (b), all members of  
1236 the association are eligible to serve on the board of directors,  
1237 and a member may nominate himself or herself as a candidate for the  
1238 board at a meeting where the election is to be held; provided,  
1239 however, that if the election process allows candidates to ~~be~~  
1240 ~~nominated~~ receive a notice of the election in advance of the annual

1241 meeting notice and nominate themselves in advance of the meeting,  
1242 the association is not required to allow nominations at the  
1243 meeting. An election is not required unless more candidates are  
1244 nominated than vacancies exist. If an election is not required  
1245 because there are either an equal number or fewer qualified  
1246 candidates than vacancies exist, and if nominations from the floor  
1247 are not required pursuant to this section or the bylaws, write-in  
1248 nominations are not permitted and such qualified candidates shall  
1249 commence service on the board of directors, regardless of whether a  
1250 quorum is attained at the annual meeting. Except as otherwise  
1251 provided in the governing documents, boards of directors ~~must~~ shall  
1252 be elected by a plurality of the votes cast by eligible voters. Any  
1253 challenge to the election process must be commenced within 60 days  
1254 after the election ~~results are announced~~.

1255 (10) RECORDING.—Any parcel owner may ~~tape~~ record ~~or videotape~~ by  
1256 audio or video means meetings of the board of directors and  
1257 meetings of the members. The board of directors of the association  
1258 may adopt reasonable rules governing the ~~taping~~ recording of  
1259 meetings of the board and the membership.

1260 **Section 17.** This act shall take effect July 1, 2021



# The Florida Bar

651 East Jefferson Street  
Tallahassee, FL 32399-2300

Joshua E. Doyle  
Executive Director

850/561-5600  
www.FLORIDABAR.org

## LEGISLATIVE OR POLITICAL POSITION REQUEST FORM

### GENERAL INFORMATION

**Submitted by:** *(list name of section, division, committee, TFB group, or individual name)*

(RPPTL Approval  
Date 8/\_\_\_ 2020)

Joe Adams, Co-Chair/Bill Sklar, Co-Chair, Condo and Planned Development Committee, RPPTL

**Address:** *(address and phone #)*

12140 Carissa Commerce Ct, Suite 200, Ft. Myers FL 33966

239-433-7707

**Position Level:** *(TFB section/division/committee)*

TFB RPPTL/Real Property/Condo and Planned Development

### PROPOSED ADVOCACY

- All requests for legislative and political positions must be presented to the Board of Governors by completing this form and attaching a copy of any existing or proposed legislation or a detailed presentation of the issue.
- Select Section I below if the issue is legislative, II if the issue is political. Regardless, Section III must be completed.

#### If Applicable, List the Following:

(Bill or PCB )

(Sponsor)

\_\_\_\_\_  
\_\_\_\_\_

\_\_\_\_\_  
\_\_\_\_\_

**Indicate Position:**  Support  Oppose  Technical or Other Non-Partisan Assistance

#### I. Proposed Wording of Legislative Position for Official Publication

“Support legislation clarifying and expanding the emergency powers of community associations during a pandemic event or public health crisis.”

**II. Political Proposals:**

N/A

**III. Reasons For Proposed Advocacy:**

A. Is the proposal consistent with *Keller vs. State Bar of California*, 110 S. Ct. 2228 (1990), and *The Florida Bar v. Schwarz*, 552 So. 2d 1094 (Fla. 1981)

Yes

B. Which goal or objective of the Bar's strategic plan is advanced by the proposal

N/A

C. Does the proposal relate to  (check all that apply)

- Regulating the profession
- Improving the quality of legal services
- Improving the functioning of the system of justice
- Increasing the availability of legal services to the public
- Regulation of trust accounts
- Education, ethics, competency, and integrity of the legal profession

D. Additional Information

**PRIOR POSITIONS TAKEN ON THIS ISSUE**

Please indicate any prior Bar or section/divisions/committee 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**

N/A		
TFB Section/Division/Committee	Support/Oppose	Date

**Others** (attach list if more than one)

TFB Section/Division/Committee	Support/Oppose	Date

**REFERRALS TO OTHER SECTIONS, COMMITTEES OR LEGAL ORGANIZATIONS**

A request for action on a position must be circulated to sections and committees that might be interested in the issue. The Legislation Committee and Board of Governors may delay final action on a request if the below section is not completed. Please attach referrals and responses to this form. If you do not believe other sections and committees are affected and you did not circulate this form to them, please provide details below.

**Referrals**

Name of Group or Organization	Support, Oppose or No-Position
Trial Lawyers Section	Discussions Pending
Business Law Section	Discussions Pending
Public Interest Law Section	Discussions Pending

**Reasons for Non-Referrals:**

**CONTACTS**

**Board & Legislation Committee Appearance** *(list name, address and phone #)*

Cary Wright, Legislative Co-Chair of the RPPTL Section, 4221 West Boy Scout Boulevard, Suite 100, Tampa FL 33607, 813-229-4133

**Appearances before Legislators** *(list name and phone # of those having direct contact before House/Senate committees)*

Peter M. Dunbar and Martha Edenfield, Dean, Mead & Dunbar, P.A., 215 South Monroe Street, Suite 815, Tallahassee, Florida 32301, Telephone: (850) 999-4100

**Meetings with Legislators/staff** *(list name and phone # of those having direct contact with legislators)*

Same

Submit this form and attachments to the Office of General Counsel of The Florida Bar <mailto:hooks@floridabar.org>, (850) 561-5662. Upon receipt, staff will schedule your request for final Bar action; this may involve a separate appearance before the Legislation Committee unless otherwise advised.



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

**WHITE PAPER**

**PROPOSAL TO CLARIFY AVAILABILITY OF AND EXPAND  
EMERGENCY POWERS OF COMMUNITY ASSOCIATIONS  
DURING A PANDEMIC EVENT – REVISING § 718.1265, §  
719.128 AND § 720.316**

**I. SUMMARY**

The proposal would clarify that the emergency powers in Chapters 718, 719 and 720 for community associations are available to be used during a pandemic or public health emergency. It would also allow for emergency powers to be utilized by community associations only upon the declaration of a state of emergency by the Governor of Florida. The proposal allows for meetings to be held by telephonic, video and other means so as to restrict physical access of members to appearing at meetings in person. The proposal also provides absolute immunity for associations, including board members, officers and committee members, based upon limiting triggering events from the claims of parties who do not adhere to closure orders issued by a community association and allows associations to charge owners for sanitization costs incurred by the association due to an owner or occupant accessing facilities closed to address a public health threat. These changes are necessary to ensure that community associations are able to use the emergency powers provided by Florida law to protect the health, safety and welfare of residents in community associations when a state of emergency is declared due to a pandemic or public health event and to ensure community associations are shielded from claims for personal injury from people who fail to comply with closure orders. The legislation does not have a fiscal impact on state funds.

**II. CURRENT SITUATION**

In response to the numerous hurricanes that had impacted Florida in the years prior to 2008, the Florida Legislature amended the Florida Condominium Act in 2008 to provide condominium associations with certain limited, emergency powers to address the operational and life safety issues caused by natural disasters. These emergency powers included the ability to cancel and reschedule meetings; close and evacuate portions of the condominium property; declare portions of the condominium property or units uninhabitable; contract on behalf of unit owners for services to portions of the unit the owner was responsible to maintain to prevent further damage and bill the owner for those costs; levy special assessments regardless of any owner vote required in the governing documents; and borrow money or pledge association assets regardless of any limiting language in the governing documents. The Florida Legislature expanded the emergency powers to cooperative and homeowner associations in 2014.

These emergency powers were limited to responding to damage, usually from natural disasters, and no consideration was given to having these powers available for community

associations to utilize during a pandemic event since the last pandemic event to impact Florida was the Spanish Influenza in 1918-19, over 40 years before the concept of community associations and this unique form of property ownership came to Florida. However, during the onset of the COVID-19 pandemic in March, 2020, community associations were faced with numerous emergency orders from both State and local governments mandating the closure of facilities and limiting the size of gatherings of people. Without the emergency powers statutes clearly providing community associations could use them during a pandemic or public health event, tens of thousands of community associations, comprising millions of Florida residents and property owners, were left without clear guidance as to how they were to operate and govern during the unprecedented public health crisis caused by the novel COVID-19 virus.

In response to the unprecedented COVID-19 pandemic, the Florida Department of Business and Professional Regulation issued an emergency order on March 27, 2020 that suspended the portions of the emergency powers statutes in Chapters 718, 719 and 720 that could be interpreted as limiting the ability of community associations to use the emergency powers only to respond to damage caused by an event where a state of emergency is declared. The Division's Order provided guidance that community associations could use some of the emergency powers provided in Chapter 718, 719 and 720 to deal with the issued caused by the COVID-19 pandemic. The issuance of the emergency order by the Division did initially cause confusion among some practitioners since the emergency order suspended a portion of Section 720.306 and some practitioners felt the Division did not have jurisdiction over community associations governed by Chapter 720.

The confusion of whether the emergency powers statutes applied to community associations as a result of the pandemic caused by the novel COVID-19 virus was only amplified when the Division announced on May 20, 2020 in a subsequent emergency order that its prior emergency order would cease to be effective on June 1, 2020. This left community associations, attorneys, management companies and millions of Florida residents and property owners wondering whether community associations could still exercise the emergency powers provided by Chapters 718, 719 and 720 given the wording of those statutes, the rescission of the emergency order by the Division and the fact that both the State and many local governments had both existing states of emergency and emergency orders in effect.

### **III. EFFECT OF PROPOSED CHANGE**

The proposed changes serve to address the shortfalls in Sections 718.1265, 719.128 and 720.316 to provide that these statutes clearly apply during a pandemic or public health crisis. They also better provide for community associations to utilize technology to limit physical interaction and attendance, such as holding meetings by Zoom and other virtual platforms to carry out the business of the association, to carry out their regular and routine operations during a public health crisis and meet social distancing requirements. The draft proposal provides absolute immunity based upon a limited triggering event from claims against community associations by persons who ignore evacuation orders to all situations involving facility closure orders issued by a community association and allows condominium and cooperative associations to charge owners for

sanitization costs incurred when owners utilize facilities closed to address a public health threat, such as when moving into or out of a building. This will allow community associations to utilize their emergency powers in the interest of the health, safety and welfare of their residents and the community without being involved in litigation over the exercise and discharge of these emergency powers.

The proposed legislation amends the term “declaration” used in Section 719.128 to “cooperative documents” since declaration is not a defined term in the Florida Cooperative Act while cooperative documents is a defined term in Section 719.103(13). The proposed legislation also amended the term “association property” used in Section 720.316 to “common area” since association property is not a defined term in the Florida Homeowner’ Association Act while common area is a defined term in Section 720.301(3).

Sections 718.1265(1), 719.128(1) and 720.316(1) are amended to provide the emergency powers can be used in response to injury, and not just property damage, that is not just existing, but an anticipated public health threat. Sections 718.1265(1)(a), 719.128(1)(a) and 720.316(1)(a) are amended to allow board, committee and membership meetings to be held, in whole or in part, by telephone, real-time video conferencing or other similar measures and the board or membership may conduct and carry out all business on the agenda for the meetings, including elections. Notices of these meetings may, in addition to the already permitted means of notice, be made by electronic transmission such as email or posting on association property.

Sections 718.1265(1)(f), 719.128(1)(f) and 720.316(1)(f) allows associations to adopt an emergency plan in addition to a disaster plan before, during or following the declaration of the state of emergency, with the plan allowing associations to restrict access to the condominium or cooperative property, association property or common areas and facilities by owners, guests, tenants and invitees to protect the health, safety and welfare. Sections 718.1265(1)(g), 719.128(1)(g) and 720.316(1)(g) are amended to allow associations to rely on advice from both emergency management officials and public health officials available to associations when determining if condominium, cooperative or association property or common areas and facilities are to be unavailable for entry and occupancy. The same change to add public health officials is made to Sections 718.1265(1)(i), 719.128(1)(h) and 720.316(1)(h).

Sections 718.1265(1)(h) and 719.128(1)(i) provide absolute immunity based upon a limited triggering event to an association from a claim for injury from a person refusing to evacuate the property when the board has required evacuation to apply to where the board has denied access to portions of the condominium or cooperative party property due to a public health threat and an owner or other occupant accesses or permits access to that portion of the condominium or cooperative property. If an owner or occupant is injured, either suffering a personal injury or property injury, then the association is immune from all liability. This immunity applies to all board members, offices and committee members. Section 720.316(1)(l) is created to provide the same absolute immunity based upon limited triggering events condominium and cooperatives have when the homeowner association denies access to portions of the common areas or facilities.

Sections 718.1265(1)(j), 719.128(1)(j) and 720.316(1)(i) are amended to provide the association with the authority to mitigate further injury or contagion during a public health crisis.

Amendments to Sections 718.1265(1)(j) and 719.128(1)(j) would allow associations to sanitize condominium or cooperative property or association property, even if the owner is obligated to maintain that portion of the condominium property to carry out the sanitization. Section 720.316(1)(i) is amended to allow for a homeowner's association to sanitize the common areas and facilities.

The draft amends Sections 718.1265(1)(k) and 719.128(1)(k) to allow the association to contract for services on behalf of the owner to prevent further injury and contagion even if the owner is the party legally responsible for maintaining the item or area where the work will be performed. This includes the sanitization of the condominium or cooperative property. Charges incurred by the association in contracting for these services are recoverable from the owner and the association may record a claim of lien against the owner and foreclose the claim of lien to recover these charges.

Section 720.316(1)(m) is added to clarify that nothing contained in Section 720.316 shall be authorized to allow a homeowners association to prohibit pedestrian and vehicular ingress and egress to and from a parcel by the owner or occupant of the parcel. This prohibition on associations also applies to the family members, tenants, guests, agents. The prohibition does not apply to licensees.<sup>1</sup>

Finally, Sections 718.1265(2), 719.128(2) and 720.316(2) are amended to add language that harmonizes the addition of the emergency powers to apply to address injury or contagion in Sections 718.1265(1), 719.128(1) and 720.316(1) and provide that injury and contagion are events allowing the association to mitigate damage and make emergency repairs.

#### **IV. ANALYSIS**

The following describes the changes being proposed:

1. Section 718.1265(1) is amended to provide the emergency powers of a condominium are also triggered upon the declaration of a local state of emergency under Section 252.38 and the emergency powers now apply to injury, which can be an anticipated injury, including a public health threat.

2. Section 718.1265(1)(a) is amended to allow directors' meetings, committees meetings and membership meetings to be held, in whole or in part, by telephone, real-time video

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<sup>1</sup> See Wood v. Camp, 284 So.2d 691 (Fla. 1973); The Supreme Court divided plaintiffs in cases where a person enters private property of another into three categories: invitees, uninvited licensees and trespassers; Smith v. Montgomery Ward & Co., 232 So.2d 195 (Fla. 4th DCA 1970); The invitation test bases "invitation" on the fact that the occupier by his arrangement of the premises or other conduct has led the entrant to believe that the premises were intended to be used by visitors for the purpose which this entrant was pursuing, and that such use was not only acquiesced in by the owner or possessor, but that it was in accordance with the intention and design with which the way or place was adopted or prepared.; Bishop v. First Nat'l Bank of Fla., 609 So.2d 722 (Fla. 5th DCA 1992); An uninvited licensee is neither an invitee nor a trespasser, but rather, a legal status in between whose presence is neither sought nor forbidden, but merely permitted or tolerated by the landowner.

conferencing or other similar means and conduct business at the meetings. The statute is further amended to allow for giving notice of the meetings by electronic transmission (email) or posting of notice on association property.

3. Section 718.1265(1)(f) is amended to allow associations to implement an emergency plan, in addition to the disaster plan already permitted, and that the emergency plan can include restricting access to the condominium and association property to protect the health, safety and welfare of people.

4. Section 718.1265(1)(g) and 718.1265(1)(i) are amended to allow associations to rely on the advice of public health officials when restricting access to portions of the condominium property or association property.

5. Section 718.1265(1)(h) is amended to provide an association may prohibit or restrict access to portions of the condominium property in response to a public health threat. The amendment further provides that if an association has prohibited or restricted access to portions of the condominium property and an owner or occupant either access the property or permit access, then the association is immune from liability to property or persons as a result of the accessing of the condominium property the association has denied access to in order to address the public health threat.

6. Section 718.1265(1)(j) is amended to allow associations to contract to prevent the spread of a contagion and to sanitize the condominium and association property to prevent or mitigate further injury or contagion, even if the unit owner is obligated by the declaration of condominium or law to insure or replace those portions of the condominium property.

7. Section 718.1265(1)(k) is amended to allow associations to contract on behalf of owners for services to prevent further injury or contagion, even if the owners are individually responsible. This includes the sanitization of condominium property. The actual costs of these costs must be reimbursed by the owner to the association and failure to reimburse the association allows the association to collect the actual costs pursuant to the association's lien authority.

8. Section 718.1265(2) is amended to add injury and contagion as events allowing the association to mitigate damage and make emergency repairs.

9. Section 719.128(1) is amended to provide the emergency powers of a condominium are also triggered upon the declaration of a local state of emergency under Section 252.38 and the emergency powers not apply to injury, which can be an anticipated injury, including a public health threat.

10. Section 719.128(1)(a) is amended to allow board of director, committees meetings and membership meetings to be held, in whole or in part, by telephone, real-time video conferencing or other similar means. The statute is further amended to allow for giving notice of the meetings by electronic transmission (email) or posting of notice on association property.

11. Section 719.128(1)(f) is amended to allow associations to implement an emergency plan, in addition to the disaster plan already permitted, and that the emergency plan can include

restricting access to the cooperative and association property to protect the health, safety and welfare of people.

12. Section 719.128(1)(g) and 719.128(1)(h) are amended to allow associations to rely on the advice of public health officials when restricting access to portions of the cooperative property or association property.

13. Section 719.128(1)(i) is amended to provide an association may prohibit or restrict access to portions of the cooperative property in response to a public health threat. The amended further provides that if an association has denied access for damage to portions of the cooperative property and an owner or occupant either access the property or permit access, then the association is immune from liability to property or injury to persons as a result of the accessing of the cooperative property the association has denied access to in order to address the public health threat.

14. Section 719.128(1)(j) is amended to allow associations to contract to remove debris to prevent the spread of a contagion and to sanitize the cooperative property to prevent or mitigate further injury or contagion, even if the unit owner is obligated by the declaration insure or replace those portions of the cooperative property.

15. Section 719.128(1)(k) is amended to permit associations to contract on behalf of owners for services to prevent further injury or contagion, even if the owners are individually responsible for the property. This includes the sanitization of cooperative property. The actual costs of these costs must be reimbursed by the owner to the association and failure to reimburse the association allows it to collect the actual costs pursuant to the association's lien authority.

16. Section 719.128(2) is amended to add injury and contagion as events allowing the association to mitigate damage and make emergency repairs.

17. Section 720.316(1) is amended to provide the emergency powers of a condominium are also triggered upon the declaration of a local state of emergency under Section 252.38 and the emergency powers not apply to injury, which can be an anticipated injury, including a public health threat.

18. Section 720.316(1)(a) is amended to allow board of director, committees meetings and membership meetings to be held, in whole or in part, by telephone, real-time video conferencing or other similar means. The statute is further amended to allow for giving notice of the meetings by electronic transmission (email) or posting of notice on common area.

19. Section 720.316(1)(f) is amended to allow associations to implement an emergency plan, in addition to the disaster plan already permitted, and that the emergency plan can include restricting access to the common areas and facilities to protect the health, safety and welfare of people.

20. Section 720.316(1)(g) and 720.316(1)(h) are amended to allow associations to rely on the advice of public health officials when restricting access to portions of the common areas or facilities.

21. Section 720.316(1)(i) is amended to allow associations to contract to prevent the spread of a contagion and to sanitize the common areas or facilities to prevent or mitigate further injury or contagion.

22. Section 720.316(1)(l) is added to provide an association may prohibit or restrict access to portions of the common areas or facilities in response to a public health threat. The amendment further provides that if an association has denied access to portions of the common areas or facilities and an owner or occupant either access the property or permit access, then the association is immune from liability for damage to property or injury to persons as a result of the accessing of the common areas or facilities the association has denied access to in order to address the public health threat

23. Section 720.316(1)(m) is added to clarify that nothing contained in Section 720.316 shall be authorized to allow a homeowners association to prohibit pedestrian and vehicular ingress and egress to and from a parcel by the owner or occupant of the parcel. This prohibition on associations also applies to the family members, tenants, guests, agents.

24. Section 720.316(2) is amended to add injury and contagion as events allowing the association to mitigate damage and make emergency repairs

## **V. FISCAL IMPACT ON STATE AND LOCAL GOVERNMENTS**

The proposal does not have a direct fiscal impact on local governments. The immunity provided to community associations may require an amendment to the Florida Rules of Appellate Procedure to address the appealability of an order determining an association is immune from a suit for personal or property damage as no such rule currently exists.<sup>2</sup> Therefore, any appeal from a determination of immunity that does not dispose of the case completely would have to be done as a petition for a writ of certiorari unless the Florida Rules of Appellate Procedure are amended..

## **VI. DIRECT IMPACT ON PRIVATE SECTOR**

It is unknown if the proposal may reduce the costs of insurance for community associations due to the immunity offered from claims related to injury as a result of a pandemic or public health crisis or will increase the costs of coverage due to a potential increase in claims brought against associations due to the exercise of emergency powers. The proposal limits the ability of the public to bring claims against community associations for torts and injuries in certain limited circumstances due to the expansion of the immunity offered from claims and may curtail certain existing and vested rights. There are no other fiscal impacts on the private sector.

## **VII. CONSTITUTIONAL ISSUES**

**Impairment of contract-** To the extent that a court may find that a covenant or restriction may be considered a contract between the parties, the changes made by this bill may affect such

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<sup>2</sup> Fla. R. App. P. 9.130(a)(3)(C)(v), (vii), (x) & (xi)

current contract rights and obligations. Article I, s. 10 of the United States Constitution, and art. I, s. 10 of the Florida Constitution both prohibit the Legislature from enacting any law impairing the obligation of contracts. Although written in terms of an absolute prohibition, the courts have long interpreted the constitutional provisions to prohibit enactment of any unreasonable impairment of contractual rights existing at the time that the law is enacted. The Florida Supreme Court in *Pomponio v. Claridge of Pompano Condominium, Inc.* set forth the following test:

- Was the law enacted to deal with a broad, generalized economic or social problem?
- Does the law operate in an area which was already subject to state regulation at the time the parties' contractual obligations were originally undertaken, or does it invade an area never before subject to regulation by the state?
- Does the law effect a temporary alteration of the contractual relationships of those within its coverage, or does it work a severe, permanent, and immediate change in those relationships irrevocably and retroactively?

**Access to courts-** To the extent that owners have a cause of action against community associations for personal and property injury claims, the changes made by this bill may affect the right of access to the courts. Article I, s.21 of the Florida Constitution provides that the courts of Florida shall be open to every person for redress of any injury and justice shall be administered without sale, denial or delay. Although written in terms of a right, the courts have long interpreted the constitutional provisions to allow for the enactment of alternative remedies for the access to courts for redress of injury. The Florida Supreme Court in *Kluger v. White* set forth the following exceptions for a statute restricting access to courts:

- The law must provide a reasonable alternative remedy or commensurate benefit; or
- There must be a legislative showing of overpowering public necessity for the abolishment of the right of access to the courts and no alternative method of meeting such public necessity.

**Due process-** To the extent that owners are entitled to notice and an opportunity to respond prior to the association repairing or sanitizing the condominium property at the expense of the owner. Article I, s.9 of the Florida Constitution provides that no person shall be deprived of property without due process of law. Although it is unclear if the law applies to community associations prior to the institution of litigation against an owner, the courts have long allowed for a flexible standard of due process. Florida courts have provided the following general rules when considering whether a statute impairs due process:

- In order to determine whether a statute violates substantive due process, a determination must be made as to whether it bears a reasonable relationship to a legitimate legislative objective and is not discriminatory, arbitrary or oppressive; *Ilkanic v. City of Ft. Lauderdale*



□ When no fundamental right is at stake, the standard for evaluating a substantive due process challenge is the same as the rational basis test used for evaluating equal protection challenges. *United Yacht Brokers, Inc. v. Gillespie*

. □ See *Chicago Title Ins. Co. v. Butler*: Historically, the Florida Supreme Court has carefully reviewed laws that curtail the economic bargaining power of the public. The Florida Supreme Court has found that such legislation is not within the scope of the state's police power noting that constitutional law never sanctions the granting of sovereign power to one group of citizens to be exercised against another unless the *general welfare* is served.

□ See *Alliance of Auto. Mfrs., Inc. v. Jones*. The state has the police power to enact laws reasonably construed as expedient for protections of the public health, safety, welfare, or morals,” which power “embraces regulations designed to promote the public convenience or the general prosperity or the public welfare as well as those designed to promote the public safety or public health. The due process clause does not override the power of the state or its political subdivisions to establish laws that are reasonably necessary to secure the health, safety, good order, comfort, or general welfare of the community. A statute will be upheld under Florida's substantive Due Process Clause if it “bears a rational relation to a legitimate legislative purpose in safeguarding the public health, safety, or general welfare and is not discriminatory, arbitrary, or oppressive.” The narrow question before the court is simply whether the Act is rationally or reasonably related to furthering a legitimate State objective.

## **VIII. OTHER INTERESTED PARTIES**

The Florida Justice Association, Florida Department of Business and Professional Regulation, The Trial Lawyers Section of The Florida Bar, the Business Law Section of The Florida Bar, the Public Interest Law Section of The Florida Bar, Cyber Citizens for Justice, the Community Associations Institute, Florida Land Title Association and Florida Association of Realtors.<sup>3</sup>

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<sup>3</sup> The interested parties do not include other committees of the Real Property Division of the Real Property, Probate and Trust Law Section of the Bar. Committees of the Real Property Division that may have an interest in this proposed legislation include 1) Real Property Litigation, 2) Real Property Problem Studies, 3) Residential Real Estate, 4) Insurance and Surety, 5) Commercial Real Estate, 6) Real Estate Leasing, 7) Real Property Financing & Lending, 8) Title Insurance & Title Insurance Liaison and 9) Construction Law

1 A bill to be entitled

2 An act relating to \_\_\_\_; providing an effective date.

3  
4 Be It Enacted by the Legislature of the State of Florida:

5 **Section 1.** Section 718.1265 is amended to read as follows:

6 718.1265 Association emergency powers.—

7 (1) To the extent allowed by law and unless specifically  
8 prohibited by the declaration of condominium, the articles, or the  
9 bylaws of an association, and consistent with the provisions of s.  
10 617.0830, the board of administration, in response to damage or  
11 injury caused or anticipated by an event, including a public health  
12 threat, for which a state of emergency is declared pursuant to s.  
13 252.36 in the locale in which the condominium is located, may, but  
14 is not required to, exercise the following powers:

15 (a) Conduct board meetings, committee meetings and membership  
16 meetings in whole or in part by telephone, real-time  
17 videoconferencing, or similar real-time electronic or video  
18 communication, with notice given as is practicable. Such notice may  
19 be given in any practicable manner, including publication, radio,  
20 United States mail, the Internet, electronic transmission, public  
21 service announcements, ~~and~~ conspicuous posting on the condominium  
22 property or association property or any other means the board deems

23 reasonable under the circumstances. All meetings shall be open to  
24 unit owners unless otherwise provided by law. Notice of ~~board~~  
25 decisions may be communicated as provided in this paragraph.

26 (b) Cancel and reschedule any association meeting.

27 (c) Name as assistant officers persons who are not directors,  
28 which assistant officers shall have the same authority as the  
29 executive officers to whom they are assistants during the state of  
30 emergency to accommodate the incapacity or unavailability of any  
31 officer of the association.

32 (d) Relocate the association's principal office or designate  
33 alternative principal offices.

34 (e) Enter into agreements with local counties and municipalities  
35 to assist counties and municipalities with debris removal.

36 (f) Implement a disaster or emergency plan before, during, or  
37 ~~immediately~~ following the event for which a state of emergency is  
38 declared which may include, but is not limited to, shutting down or  
39 off elevators; electricity; water, sewer, or security systems; or  
40 air conditioners, or limiting or restricting access to the  
41 condominium property or association property by unit owners, family  
42 members, tenants, guests, agents, or invitees to protect the  
43 health, safety, or welfare of such persons.

44 (g) Based upon advice of emergency management officials, public

45 health officials, or upon the advice of licensed professionals  
46 retained by or otherwise available to the board, determine any  
47 portion of the condominium property or association property  
48 unavailable for entry or occupancy by unit owners, family members,  
49 tenants, guests, agents, or invitees to protect the health, safety,  
50 or welfare of such persons.

51 (h) Require the evacuation of the condominium property in the  
52 event of a mandatory evacuation order in the locale in which the  
53 condominium is located or prohibit or restrict access to the  
54 condominium property or association property in the event of a  
55 public health threat. Should any unit owner or other occupant of a  
56 condominium fail or refuse to evacuate the condominium property or  
57 association property where the board has required evacuation, the  
58 association shall be immune from liability or injury to persons or  
59 property arising from such failure or refusal. Should any unit  
60 owner or other occupant of a condominium unit access or permit  
61 access to the condominium property or association property or any  
62 portion thereof when such access has been prohibited or restricted  
63 by the board pursuant to this section, the association and its  
64 board members, officers, and committee members shall be immune from  
65 liability or injury to persons or property arising from such  
66 access.

67 (i) Based upon advice of emergency management officials, public  
68 health officials, or upon the advice of licensed professionals  
69 retained by or otherwise available to the board, determine whether  
70 the condominium property or association property or any portion  
71 thereof can be safely inhabited, ~~or~~ occupied, or accessed. However,  
72 such determination is not conclusive as to any determination of  
73 habitability pursuant to the declaration.

74 (j) Mitigate ~~further~~ damage, injury or contagion, including taking  
75 action to contract for the removal of debris and to prevent or  
76 mitigate the spread of fungus or contagion, including, but not  
77 limited to, mold or mildew, by removing and disposing of wet  
78 drywall, insulation, carpet, cabinetry, or other fixtures on or  
79 within the condominium property, even if the unit owner is  
80 obligated by the declaration or law to insure or replace those  
81 fixtures and to remove personal property from a unit or to sanitize  
82 the condominium property and association property.

83 (k) Contract, on behalf of any unit owner or owners, for items or  
84 services for which the owners are otherwise individually  
85 responsible, but which are necessary to prevent further damage to  
86 the condominium property, injury, or contagion. In such event, the  
87 unit owner or owners on whose behalf the board has contracted are  
88 responsible for reimbursing the association for the actual costs of

89 the items or services, and the association may use its lien  
90 authority provided by s. 718.116 to enforce collection of the  
91 charges. Without limitation, such items or services may include the  
92 drying of units, the boarding of broken windows or doors, and the  
93 replacement of damaged air conditioners or air handlers to provide  
94 climate control in the units or other portions of the property and  
95 the sanitizing of the condominium property and association  
96 property.

97 (1) Regardless of any provision to the contrary and even if such  
98 authority does not specifically appear in the declaration of  
99 condominium, articles, or bylaws of the association, levy special  
100 assessments without a vote of the owners.

101 (m) Without unit owners' approval, borrow money and pledge  
102 association assets as collateral to fund emergency repairs and  
103 carry out the duties of the association when operating funds are  
104 insufficient. This paragraph does not limit the general authority  
105 of the association to borrow money, subject to such restrictions as  
106 are contained in the declaration of condominium, articles, or  
107 bylaws of the association.

108 (2) The special powers authorized under subsection (1) shall be  
109 limited to that time reasonably necessary to protect the health,  
110 safety, and welfare of the association and the unit owners and the

111 unit owners' family members, tenants, guests, agents, or invitees  
112 and shall be reasonably necessary to mitigate further damage,  
113 injury, or contagion and make emergency repairs.

114 **Section 2.** Section 719.128 is amended to read as follows:

115 719.128 Association emergency powers.—

116 (1) To the extent allowed by law, unless specifically prohibited  
117 by the cooperative documents, and consistent with s. 617.0830, the  
118 board of administration, in response to damage or injury caused or  
119 anticipated by an event, including a public health threat, for  
120 which a state of emergency is declared pursuant to s. 252.36 in the  
121 area encompassed by the cooperative, may exercise the following  
122 powers:

123 (a) Conduct board, committee or membership meetings in whole or in  
124 part by telephone, real-time videoconferencing, or similar real-  
125 time electronic or video communication, with ~~after~~ notice ~~of the~~  
126 ~~meetings and board decisions is provided in~~ given as is  
127 practicable. Such notice may be given in any practicable ~~a~~ manner  
128 ~~as possible~~, including via publication, radio, United States mail,  
129 the Internet, electronic transmission, public service  
130 announcements, conspicuous posting on the cooperative property, or  
131 any other means the board deems appropriate under the  
132 circumstances. All meetings shall be open to unit owners unless

133 otherwise provided by law. Notice of decisions may be communicated  
134 as provided in this paragraph.

135 (b) Cancel and reschedule an association meeting.

136 (c) Designate assistant officers who are not directors. If the  
137 executive officer is incapacitated or unavailable, the assistant  
138 officer has the same authority during the state of emergency as the  
139 executive officer he or she assists.

140 (d) Relocate the association's principal office or designate an  
141 alternative principal office.

142 (e) Enter into agreements with counties and municipalities to  
143 assist counties and municipalities with debris removal.

144 (f) Implement a disaster or emergency plan before, during, or  
145 ~~immediately~~ following the event for which a state of emergency is  
146 declared, which may include turning on or shutting off elevators;  
147 electricity; water, sewer, or security systems; or air conditioners  
148 for association buildings, or limiting or restricting access to the  
149 cooperative property by unit owners, family members, tenants,  
150 guests, agents, or invitees to protect the health, safety, or  
151 welfare of such persons.

152 (g) Based upon the advice of emergency management officials,  
153 public health officials, or upon the advice of licensed  
154 professionals retained by or otherwise available to the board of



155 administration, determine any portion of the cooperative property  
156 unavailable for entry or occupancy by unit owners or their family  
157 members, tenants, guests, agents, or invitees to protect their  
158 health, safety, or welfare.

159 (h) Based upon the advice of emergency management officials,  
160 public health officials, or upon the advice of licensed  
161 professionals retained by or otherwise available to the board of  
162 administration, determine whether the cooperative property or any  
163 portion thereof can be safely inhabited, ~~or~~ occupied, or accessed.  
164 However, such determination is not conclusive as to any  
165 determination of habitability pursuant to the cooperative documents  
166 ~~declaration~~.

167 (i) Require the evacuation of the cooperative property in the  
168 event of a mandatory evacuation order in the area where the  
169 cooperative is located or prohibit or restrict access to the  
170 cooperative property in the event of a public health threat. If a  
171 unit owner or other occupant of a cooperative fails to evacuate the  
172 cooperative property for which the board has required evacuation,  
173 the association is immune from liability for injury to persons or  
174 property arising from such failure. Should any unit owner or other  
175 occupant of a cooperative unit access or permit access to the  
176 cooperative property or any portion thereof when such access has

177 been prohibited or restricted by the board pursuant to this  
178 section, the association and its board members, officers, and  
179 committee members shall be immune from liability or injury to  
180 persons or property arising from such access.

181 (j) Mitigate ~~further~~ damage, injury or contagion, including taking  
182 action to contract for the removal of debris and to prevent or  
183 mitigate the spread of fungus, including mold or mildew, by  
184 removing and disposing of wet drywall, insulation, carpet,  
185 cabinetry, or other fixtures on or within the cooperative property,  
186 regardless of whether the unit owner is obligated by the  
187 cooperative documents ~~declaration~~ or law to insure or replace those  
188 fixtures and to remove personal property from a unit or to sanitize  
189 the cooperative property.

190 (k) Contract, on behalf of a unit owner, for items or services for  
191 which the owner is otherwise individually responsible, but which  
192 are necessary to prevent further damage, injury, or contagion to  
193 the cooperative property. In such event, the unit owner on whose  
194 behalf the board has contracted is responsible for reimbursing the  
195 association for the actual costs of the items or services, and the  
196 association may use its lien authority provided by s. 719.108 to  
197 enforce collection of the charges. Such items or services may  
198 include the drying of the unit, the boarding of broken windows or

199 doors, and the replacement of a damaged air conditioner or air  
200 handler to provide climate control in the unit or other portions of  
201 the property and the sanitizing of the cooperative property.

202 (1) Notwithstanding a provision to the contrary, and regardless of  
203 whether such authority does not specifically appear in the  
204 cooperative documents, levy special assessments without a vote of  
205 the owners.

206 (m) Without unit owners' approval, borrow money and pledge  
207 association assets as collateral to fund emergency repairs and  
208 carry out the duties of the association if operating funds are  
209 insufficient. This paragraph does not limit the general authority  
210 of the association to borrow money, subject to such restrictions  
211 contained in the cooperative documents.

212 (2) The authority granted under subsection (1) is limited to that  
213 time reasonably necessary to protect the health, safety, and  
214 welfare of the association and the unit owners and their family  
215 members, tenants, guests, agents, or invitees, and to mitigate  
216 further damage, injury, or contagion and make emergency repairs.

217 **Section 3.** Section 720.316 is amended to read as follows:

218 720.316 Association emergency powers.—

219 (1) To the extent allowed by law, unless specifically prohibited  
220 by the declaration or other recorded governing documents, and

221 consistent with s. 617.0830, the board of directors, in response to  
222 damage or injury caused or anticipated by an event, including a  
223 public health threat, for which a state of emergency is declared  
224 pursuant to s. 252.36 in the area encompassed by the association,  
225 may exercise the following powers:

226 (a) Conduct board, committee or membership meetings in whole or in  
227 part by telephone, real-time videoconferencing, or similar real-  
228 time electronic or video communication with ~~after~~ notice ~~of the~~  
229 ~~meetings and board decisions is provided in~~ given as is  
230 practicable. Such notice may be given in any practicable ~~a~~ manner  
231 ~~as possible~~, including via publication, radio, United States mail,  
232 the Internet, electronic transmission, public service  
233 announcements, conspicuous posting on the common area ~~association~~  
234 ~~property~~, or any other means the board deems appropriate under the  
235 circumstances. All meetings shall be open to members unless  
236 otherwise provided by law. Notice of decisions may be communicated  
237 as provided in this paragraph.

238 (b) Cancel and reschedule an association meeting.

239 (c) Designate assistant officers who are not directors. If the  
240 executive officer is incapacitated or unavailable, the assistant  
241 officer has the same authority during the state of emergency as the  
242 executive officer he or she assists.

243 (d) Relocate the association's principal office or designate an  
244 alternative principal office.

245 (e) Enter into agreements with counties and municipalities to  
246 assist counties and municipalities with debris removal.

247 (f) Implement a disaster or emergency plan before, during, or  
248 ~~immediately~~ following the event for which a state of emergency is  
249 declared, which may include, but is not limited to, turning on or  
250 shutting off elevators; electricity; water, sewer, or security  
251 systems; or air conditioners for association buildings and common  
252 areas and facilities, or limiting or restricting access to the  
253 common areas and facilities by owners, family members, tenants,  
254 guests, agents, or invitees to protect the health, safety, or  
255 welfare of such persons.

256 (g) Based upon the advice of emergency management officials,  
257 public health officials, or upon the advice of licensed  
258 professionals retained by or otherwise available to the board,  
259 determine any portion of the common areas or facilities ~~association~~  
260 ~~property~~ unavailable for entry or occupancy by owners or their  
261 family members, tenants, guests, agents, or invitees to protect  
262 their health, safety, or welfare.

263 (h) Based upon the advice of emergency management officials,  
264 public health officials, or upon the advice of licensed

265 professionals retained by or otherwise available to the board,  
266 determine whether the common areas or facilities or any portion  
267 thereof ~~association property~~ can be safely inhabited, ~~or~~ occupied  
268 or accessed. However, such determination is not conclusive as to  
269 any determination of habitability pursuant to the declaration.

270 (i) Mitigate ~~further~~ damage, injury, or contagion, including  
271 taking action to contract for the removal of debris and to prevent  
272 or mitigate the spread of fungus, including mold or mildew, by  
273 removing and disposing of wet drywall, insulation, carpet,  
274 cabinetry, or other fixtures on or within the common areas and  
275 facilities ~~association property,~~ or sanitizing the common areas and  
276 facilities.

277 (j) Notwithstanding a provision to the contrary, and regardless of  
278 whether such authority does not specifically appear in the  
279 declaration or other recorded governing documents, levy special  
280 assessments without a vote of the owners.

281 (k) Without owners' approval, borrow money and pledge association  
282 assets as collateral to fund emergency repairs and carry out the  
283 duties of the association if operating funds are insufficient. This  
284 paragraph does not limit the general authority of the association  
285 to borrow money, subject to such restrictions contained in the  
286 declaration or other recorded governing documents.

287 (1) Should any owner or other occupant of a parcel access or permit  
288 access to the common areas or facilities or any portion thereof  
289 when such access has been prohibited or restricted by the board  
290 pursuant to this subsection, the association and its board members,  
291 officers, and committee members shall be immune from liability or  
292 injury to persons or property arising from such access.

293 (m) Nothing in this subsection shall be authorized to prohibit an  
294 owner or other occupant of a parcel or their family members,  
295 tenants, guests, agents, or invitees, from having vehicular or  
296 pedestrian ingress to and egress from the parcel.

297 (2) The authority granted under subsection (1) is limited to that  
298 time reasonably necessary to protect the health, safety, and  
299 welfare of the association and the parcel owners and their family  
300 members, tenants, guests, agents, or invitees, and to mitigate  
301 further damage, injury, or contagion and make emergency repairs.

302 **Section 4.** This act shall take effect upon becoming law.



# The Florida Bar

651 East Jefferson Street  
Tallahassee, FL 32399-2300

Joshua E. Doyle  
Executive Director

850/561-5600  
www.FLORIDABAR.org

## LEGISLATIVE OR POLITICAL POSITION REQUEST FORM

### GENERAL INFORMATION

**Submitted by:** *(list name of section, division, committee, TFB group, or individual name)* (RPPTL Approval Date 8/\_\_\_/2020)

Joe Adams, Co-Chair/Bill Sklar, Co-Chair, Condo and Planned Development Committee, RPPTL

**Address:** *(address and phone #)* 12140 Carissa Commerce Ct, Suite 200, Ft. Myers FL 33966  
239-433-7707

**Position Level:** *(TFB section/division/committee)* TFB RPPTL/Real Property/Condo and Planned Development

### PROPOSED ADVOCACY

- All requests for legislative and political positions must be presented to the Board of Governors by completing this form and attaching a copy of any existing or proposed legislation or a detailed presentation of the issue.
- Select Section I below if the issue is legislative, II if the issue is political. Regardless, Section III must be completed.

#### If Applicable, List the Following:

(Bill or PCB )

(Sponsor)

\_\_\_\_\_  
\_\_\_\_\_

\_\_\_\_\_  
\_\_\_\_\_

**Indicate Position:**  Support  Oppose  Technical or Other Non-Partisan Assistance

#### I. Proposed Wording of Legislative Position for Official Publication

“Remove opposition to legislation requiring any insurance policy issued to an individual condominium unit owner to prohibit the right of subrogation against the condominium association, including a change to Fla. Stat. 627.714(4).”



**II. Political Proposals:**

N/A

**III. Reasons For Proposed Advocacy:**

A. Is the proposal consistent with *Keller vs. State Bar of California*, 110 S. Ct. 2228 (1990), and *The Florida Bar v. Schwarz*, 552 So. 2d 1094 (Fla. 1981)

Yes

B. Which goal or objective of the Bar's strategic plan is advanced by the proposal

N/A

C. Does the proposal relate to  (check all that apply)

- Regulating the profession
- Improving the quality of legal services
- Improving the functioning of the system of justice
- Increasing the availability of legal services to the public
- Regulation of trust accounts
- Education, ethics, competency, and integrity of the legal profession

D. Additional Information

**PRIOR POSITIONS TAKEN ON THIS ISSUE**

Please indicate any prior Bar or section/divisions/committee 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**

RPPTL	Oppose	April, 2019
TFB Section/Division/Committee	Support/Oppose	Date

**Others** (attach list if more than one)

TFB Section/Division/Committee	Support/Oppose	Date

**REFERRALS TO OTHER SECTIONS, COMMITTEES OR LEGAL ORGANIZATIONS**

A request for action on a position must be circulated to sections and committees that might be interested in the issue. The Legislation Committee and Board of Governors may delay final action on a request if the below section is not completed. Please attach referrals and responses to this form. If you do not believe other sections and committees are affected and you did not circulate this form to them, please provide details below.

**Referrals**

Name of Group or Organization	Support, Oppose or No-Position
Business Law Section of the Florida Bar	Discussions Pending
Public Interest Law Section of the Florida Bar	Discussions Pending
Community Associations Institute	Support

**Reasons for Non-Referrals:**

**CONTACTS**

**Board & Legislation Committee Appearance** *(list name, address and phone #)*

Cary Wright, Legislative Co-Chair of the RPPTL Section, 4221 West Boy Scout Boulevard, Suite 1000, Tampa, FL 33607, 813-229-4135

**Appearances before Legislators** *(list name and phone # of those having direct contact before House/Senate committees)*

Peter M. Dunbar and Martha Edenfield, Dean, Mead & Dunbar, P.A., 215 South Monroe Street, Suite 815, Tallahassee, Florida 32301, Telephone: (850) 999-4100

**Meetings with Legislators/staff** *(list name and phone # of those having direct contact with legislators)*

Same

Submit this form and attachments to the Office of General Counsel of The Florida Bar <mailto:hooks@floridabar.org>, (850) 561-5662. Upon receipt, staff will schedule your request for final Bar action; this may involve a separate appearance before the Legislation Committee unless otherwise advised.

## WHITE PAPER

### BILL TO AMEND TO ELIMINATE THE RIGHT OF SUBROGATION IN INDIVIDUAL CONDOMINIUM UNIT OWNER INSURANCE POLICIES - PROPOSED REVISION TO SECTION 627.714(4)

#### 1. SUMMARY

In 2019, the Florida Legislature considered a proposal that would have served to eliminate the right of subrogation from individual insurance policies issued to condominium unit owners against the condominium association. "Subrogation is the substitution of one person in the place of another with reference to a lawful claim or right." *West Am. Ins. Co. v. Yellow Cab Co. of Orlando, Inc.*, 495 So.2d 204, 206 (Fla. 5th DCA 1986). Florida recognizes two types of subrogation: conventional or contractual subrogation and equitable or legal subrogation. *Dade County Sch. Bd. v. Radio Station WQBA*, 731 So.2d 638 (Fla.1999). Conventional or contractual subrogation arises from a contract between the parties establishing an agreement that the party paying the debt will have the rights and remedies of the original creditor. Equitable or legal subrogation is not created by a contract but by the legal consequences of the acts and relationships of the parties. *Id.* at 646. The doctrine is based on the policy that no person should benefit by another's loss, and it "may be invoked wherever justice demands its application, irrespective of technical legal rules." *West Am. Ins. Co.*, 495 So.2d at 207." *State Farm Mut. Auto Ins. Co. v. Johnson*, 18 So.3d 1099, 1100 (Fla. 2d DCA 2009). The proposed legislation addressed the contractual right of subrogation.

#### 2. CURRENT SITUATION

Prior to 2010, individual insurance policies issued to unit owners did not allow for the right of subrogation against the condominium association. This changed in 2010 when the prohibition against contractual subrogation was eliminated. The right of subrogation allowed individual unit owner insurance policies to seek to recoup losses incurred due to the negligent maintenance of components maintained by the association. There has been no appreciable reduction in the costs of insurance since the right of subrogation was added in 2010. Upon further review and analysis since 2019, it appears the right of subrogation has increased the overall costs of insurance and has increased the costs to insurers due to the number of claims paid out due to the right of subrogation existing in individual unit owner and condominium association insurance policies. In an effort to resolve the conflict between the parties who opposed removing the right of subrogation believing that it would increase the costs on unit owners and those who felt that allowing subrogation increased the overall costs of insurance, a compromise was

reached where the prohibition on subrogation in an unit owner insurance policy must also exist in the condominium association's master insurance policy.

### 3. EFFECT OF PROPOSED CHANGE

The proposed change restores the prohibition against the contractual right of subrogation from individual unit owner insurance policies provided the condominium association's insurance policy does not provide for subrogation rights against the unit. The draft will likely decrease the costs of insurance to individual unit owners and association as insurance carriers are able to rely on the stability of a certain insurance market where there is no concern of the unknown costs of subrogation claims. The elimination of the right of subrogation from individual unit owner insurance policies and condominium association insurance policies will likely decrease the costs of housing due to insurance carriers having certainty in the costs of insurance.

### 4. ANALYSIS

The following describes the changes being proposed:

a. Section 627.714(4) is amended to provide that any insurance policy issued to an individual unit owner may not provide for the right of subrogation against the condominium association provided that the condominium association's insurance policy does not provide for the right of subrogation against the unit owner.

### 5. FISCAL IMPACT ON STATE AND LOCAL GOVERNMENTS

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

### 6. DIRECT IMPACT ON PRIVATE SECTOR

This proposal will lower the costs of insurance due to the increased certainty and stability in the insurance market as insurance carriers see a reduction in the costs associated with the payout of claims.

### 7. CONSTITUTIONAL ISSUES

**Impairment of contract-** To the extent that a court may find that a covenant or restriction may be considered a contract between the parties, the changes made by this bill may affect such current contract rights and obligations where subrogation is provided in the covenant or restriction. Article I, s. 10 of the United States Constitution, and art. I, s. 10 of the Florida Constitution both prohibit the Legislature from enacting any law impairing the obligation of contracts. Although written in terms of an absolute prohibition, the courts have long interpreted the constitutional provisions to prohibit enactment of any unreasonable impairment of contractual rights existing at the time that the law is enacted.

The Florida Supreme Court in *Pomponio v. Claridge of Pompano Condominium, Inc.* set forth the following test:

Was the law enacted to deal with a broad, generalized economic or social problem?

Does the law operate in an area which was already subject to state regulation at the time the parties' contractual obligations were originally undertaken, or does it invade an area never before subject to regulation by the state?

Does the law effect a temporary alteration of the contractual relationships of those within its coverage, or does it work a severe, permanent, and immediate change in those relationships irrevocably and retroactively?

#### 8. OTHER INTERESTED PARTIES

The Florida Association of Realtors, Business Law Section, Florida Banker's Association, Public Interest Law Section, Fannie Mae, Institutional Lenders, Insurance Carriers and Agents.



# The Florida Bar

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Tallahassee, FL 32399-2300

Joshua E. Doyle  
Executive Director

850/561-5600  
www.FLORIDABAR.org

## LEGISLATIVE OR POLITICAL POSITION REQUEST FORM

### GENERAL INFORMATION

**Submitted by:** *(list name of section, division, committee, TFB group, or individual name)*

Angela M. Adams, Chair, Ad Hoc Committee on Electronic Wills, RPPTL Section of The Florida Bar

**Address:** *(address and phone #)* 540 Fourth Street N, St. Petersburg, FL 33701; (727) 821-1249

**Position Level:** *(TFB section/division/committee)* TFB RPPTL Section/Probate & Trust/Ad Hoc Committee on Electronic Wills

### PROPOSED ADVOCACY

- All requests for legislative and political positions must be presented to the Board of Governors by completing this form and attaching a copy of any existing or proposed legislation or a detailed presentation of the issue.
- Select Section I below if the issue is legislative, II if the issue is political. Regardless, Section III must be completed.

#### If Applicable, List the Following:

(Bill or PCB #)

(Sponsor)

\_\_\_\_\_  
\_\_\_\_\_

\_\_\_\_\_  
\_\_\_\_\_

**Indicate Position:**  Support  Oppose  Technical or Other Non-Partisan Assistance

#### I. Proposed Wording of Legislative Position for Official Publication

Support amendments to:

s. 117.201(9) clarifying that "online notarization" includes the appearance of witnesses by means of audio-video communication technology;

s. 117.285 (introductory paragraph) clarifying that supervising the witnessing of an electronic record is a notarial act and that the procedures for online notarization apply when an online notary public supervises the witnessing of an electronic record;

s. 117.285(2) clarifying that the identity of the principal must be verified when an online notary public supervises the witnessing of an electronic record;

**II. Political Proposals:**

N/A

**III. Reasons For Proposed Advocacy:**

A. Is the proposal consistent with *Keller vs. State Bar of California*, 110 S. Ct. 2228 (1990), and *The Florida Bar v. Schwarz*, 552 So. 2d 1094 (Fla. 1981)?

Yes

B. Which goal or objective of the Bar’s strategic plan is advanced by the proposal?

N/A

C. Does the proposal relate to: *(check all that apply)*

- Regulating the profession
- Improving the quality of legal services
- Improving the functioning of the system of justice
- Increasing the availability of legal services to the public
- Regulation of trust accounts
- Education, ethics, competency, and integrity of the legal profession

D. Additional Information:

**PRIOR POSITIONS TAKEN ON THIS ISSUE**

Please indicate any prior Bar or section/divisions/committee 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**

TFB Section/Division/Committee	Support/Oppose	Date
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**Others** *(attach list if more than one)*

TFB Section/Division/Committee	Support/Oppose	Date
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**REFERRALS TO OTHER SECTIONS, COMMITTEES OR LEGAL ORGANIZATIONS**

A request for action on a position must be circulated to sections and committees that might be interested in the issue. The Legislation Committee and Board of Governors may delay final action on a request if the below section is not completed. Please attach referrals and responses to this form. If you do not believe other sections and committees are affected and you did not circulate this form to them, please provide details below.

**Referrals**

Name of Group or Organization	Support, Oppose or No-Position
The Elder Law Section of The Florida Bar	Supported initial draft; final draft under review
Notarize.com	

**Reasons for Non-Referrals:**

N/A

**CONTACTS**

**Board & Legislation Committee Appearance** *(list name, address and phone #)*

John C. Moran, Gunster, 777 South Flagler Drive, Suite 500 East, West Palm Beach, Florida 33401-6194; Telephone: (561) 655-1980; e-mail: [jmoran@gunster.com](mailto:jmoran@gunster.com)

**Appearances before Legislators** *(list name and phone # of those having direct contact before House/Senate committees)*

Peter M. Dunbar and/or Martha Edenfield, Dean, Mead & Dunbar, P.A., 215 South Monroe Street, Suite 815, Tallahassee, Florida 32301; Telephone: (850) 999-4100

**Meetings with Legislators/staff** *(list name and phone # of those having direct contact with legislators)*

Peter M. Dunbar and/or Martha Edenfield, Dean, Mead & Dunbar, P.A., 215 South Monroe Street, Suite 815, Tallahassee, Florida 32301; Telephone: (850) 999-4100

Submit this form and attachments to the Office of General Counsel of The Florida Bar – <mailto:jhooks@floridabar.org>, (850) 561-5662. Upon receipt, staff will schedule your request for final Bar action; this may involve a separate appearance before the Legislation Committee unless otherwise advised.



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

## WHITE PAPER

### **AMENDMENTS TO SECTIONS 117.201(9), 117.285 (introductory paragraph), 117.285(2), (5), and (6)(b), 709.2119(2)(c), 732.401(2)(e), 732.503(1), 732.521(7), 732.703(5)(b)3. and 4., 747.051(1), FLORIDA STATUTES, CORRECTING GLITCHES IN CHAPTER 2019-71, LAWS OF FLORIDA, AND REVISING FORMS CONTAINED IN FLORIDA STATUTES SO THAT THE STATUTORY FORMS COMPLY WITH AMENDMENTS TO NOTARIZATION PROCEDURES SET FORTH IN SAID ACT.**

#### **I. SUMMARY**

Chapter 2019-1, Laws of Florida (hereinafter "Chap. 2019-1"), includes provisions authorizing the remote, online notarization and witnessing of electronic documents through the use of specified audio-video communication technology. Chap. 2019-1 also includes provisions authorizing and/or regulating remote, online notarization and witnessing for electronic wills and other estate planning documents such as trusts, living wills, healthcare surrogate designations, and powers of attorney. As explained below, there are some glitches in Chap. 2019-1 and other glitches caused by that new legislation that need to be addressed. The glitches fall into three categories: (i) lack of clarity in the procedures to be followed by an online notary public when supervising the witnessing of an electronic record; (ii) erroneous cross-references contained in Chap. 2019-1; and (iii) forms contained in the current statutes that, as a result of amendments in Chap. 2019-1, no longer comply with the new notarization requirements now in effect. The Real Property, Probate, and Trust Law Section's proposed legislation addresses and fixes these glitches.

#### **II. CURRENT SITUATION**

##### **A. Lack of clarity in procedures for supervising the witnessing of electronic records**

1. Section 117.285 authorizes an online notary public to supervise the witnessing of electronic documents and sets forth the procedures and requirements the online notary public is to follow when doing so. Subsection (5) of 117.285 enumerates several types of electronic estate planning documents for which an online notary public may supervise the witnessing (i.e., wills; trusts with testamentary aspects; healthcare advance directives, which includes living wills and designations of healthcare surrogate; waivers of spousal rights under s. 32.01 or s. 32.02; and powers of attorney authorizing banking or investment transactions described in s. 09.2208). That subsection also sets additional procedures and requirements applicable to the execution and witnessing of those enumerated estate planning documents

Most of the enumerated estate planning documents are not required to be notarized, but all of them are required to be witnessed. At this point in time, it is unknown how the various remote online notarization service providers' systems will operate, but conceivably, an electronic document requiring witnesses but not notarization could result in some of the online notarization procedures, such as verifying the identity of the principal, being inapplicable. It is doubtful that was the intended result, and s. 117.285 should be amended to incorporate the online notarization procedures such as verifying the identity of the principal, requiring the notary to maintain a record of the witnessing in the notary's electronic journal, and requiring the notary to maintain the audio-video recording of the execution and witnessing.

2. In addition, there are several references in Chapter 11 to “notarial acts.” For example, s. 11□021(□) requires the adoption of rules establishing standards for tamper-evident technologies that will indicate any alteration to an electronic record after completion of the notarial act; s. 11□201(5) requires errors and omissions insurance coverage for notarial acts; s. 11□245 requires a description of the notarial act and requiring the electronic journal and audio-video recording to be maintained for ten years after the notarial act; and s. 11□265(3) requires the online notary public to confirm that the principal desires for the notarial act to be performed under the laws of Florida. Arguably, an online notary public supervising the witnessing of an electronic record is a “notarial act,” but there is nothing in Chapter 11 expressly stating that.

3. Section 11□285(2) requires that if a witness is remote from the principal and communicating with the principal by the means of audio-video communication technology, the witness’s identity must be verified in accordance with the procedures for identifying a principal set forth in s. 11□265(4). While a principal’s identity is required to be verified in the online notarization process, s. 11□285 does not require the online notary public to verify the identity of the principal in those circumstances where a principal may be executing a document in the presence of witnesses, but the document is not being notarized. Clearly, the identity of the principal should be verified by the online notary public in all circumstances.

4. In its current form, s. 11□285(5) appears to apply to any electronic will; trust with testamentary aspects; healthcare advance directive (including living will and designation of healthcare surrogate); waiver of spousal rights under s. □32.□01 or s. □32.□02; and power of attorney authorizing banking or investment transactions described in s. □09.2208, to be signed and witnessed, even in those instances where the witnesses are physically present with the principal. It is unlikely that was the intended result and the RPPTL Section believes that the procedures and protections set forth in s. 11□285(5) were intended to be applicable only when fewer than two witnesses are in the physical presence of the principal who is executing one of the enumerated electronic estate planning documents. Accordingly, this subsection should be clarified to limit its applicability to those circumstances.

5. Section □36.0403(2)(b) requires the testamentary aspects contained in a *revocable* trust created by a Florida resident to be executed with the same formalities required for the execution of a will. Section 11□285(5) is applicable to a “trust with testamentary aspects,” which is much more broad than the execution requirements set forth in Chapter □36 (Florida Trust Code) because it includes irrevocable trusts with testamentary aspects. Again, this was not the intended result and s. 11□285(5) should be amended to align with the requirements of s. □36.0403(2)(b).

6. Section 11□285(5) is applicable to a “waiver of spousal rights under s. □32.□01 or s. □32.□02.” While s. □32.□02 does address spousal waivers, s. □32.□01 is not limited to spousal waivers and, in fact, addresses agreements to make a will, give a devise, not revoke a will, not revoke a devise, not to make a will, and not to make a devise. Therefore, the description of “a waiver of spousal rights under s. □32.□01” contained in s. 11□285(5) is inaccurate and could result in the erroneous conclusion by practitioners and/or courts that s. 11□285(5) is not applicable to an “agreement” under s. □32.□01 or is not applicable to agreements between non-spouses. This erroneous description of s. □32.□01 should be corrected to avoid any such erroneous conclusions.

## **B. Erroneous cross-references**

1. Section 11□285(6)(b) refers to a “principal’s responses to the questions in paragraphs (5)(a) or (b)” of s. 11□285. However, as finally enacted, there are no questions in paragraph (5)(b)

of s. 11□285; rather the questions are in paragraphs (5)(a) and (5)(d). Therefore, the reference to subparagraph (5)(b) in s. 11□285(6)(b) should be deleted and replaced with a reference to (5)(d).

2. Under Chap. 2019-□, for an electronic will that is executed in the presence of remote online witnesses to be self-proving, the testator must appoint a qualified custodian who meets the requirements set forth in s. □32.524(1), Florida Statutes. Section □32.521(□), which defines qualified custodians, contains an erroneous cross-reference to s. □32.525(1), rather than to □32.524(1).

Section □32.521(□) contains the following definition□

(□) qualified custodian means a person who meets the requirements of s. □32.525(1).

The requirements of a qualified custodian are actually set forth in s. □32.524(1) (not in s. □25.525(1)). Accordingly, the erroneous cross-reference in s. □32.521(□) should be corrected so that it refers to the section which contains the requirements of a qualified custodian.

### C. Statutory Forms That No Longer Comply With Notarization Requirements

Chap. 2019-□ contains amendments to s. 11□05(4)(c) requiring Florida notary publics to include a statement in the jurat or notarial certificate indicating whether the signer appeared before the notary public by means of physical presence or by means of audio-video communication technology. As a result of these amendments (effective January 1, 2020), the following Florida Statutes which contain forms that include jurats or notarial certificates no longer comply with the requirements of current law□ss. □09.2119(2)(c), □32.401(2)(e), □32.503(1), □32.□03(5)(b)3. and 4., and □4□051(1).

As amended effective January 1, 2020, s. 11□05(4)(c), now states□

(4) When notari□ing a signature, a notary public shall complete a jurat or notarial certificate in substantially the same form as those found in subsection (13). The jurat or certificate of acknowledgment shall contain the following elements□

□□□□

(c) Whether the signer personally appeared before the notary public at the time of the notari□ation by physical presence or by means of audio-video communication technology as authorized under part II of this chapter.

The forms found in subsection (13) of s. 11□05 satisfy this requirement by adding the following to the jurat or notarial certificate□by means of □ physical presence or □ online notari□ation.□

The above-mentioned Florida Statutes should be revised so that the forms contained therein comply with the new requirements of s. 11□05(4)(c).

## III. EFFECT OF PROPOSED CHANGES

A. To address the glitches and/or lack of clarity described in paragraph II.A., above, the proposed amendments include the following changes□

1. To clarify that the online notari<sup>o</sup>ation procedures (such as verifying the identity of the principal, re<sup>u</sup>iring the notary to maintain a record of the witnessing in the notary<sup>s</sup> electronic <sup>o</sup>urnal, and re<sup>u</sup>iring the notary to maintain the audio-video recording of the execution and witnessing) will apply in circumstances where an electronic document re<sup>u</sup>ires witnesses but not notari<sup>o</sup>ation, the introductory paragraph of s. 11<sup>o</sup>285 is amended to re<sup>u</sup>ire compliance with online notari<sup>o</sup>ation procedures.

2. To clarify that an online notary public<sup>s</sup> supervision of the witnessing of an electronic record is a notarial act, the definition of <sup>o</sup>online notari<sup>o</sup>ation<sup>o</sup> in s. 11<sup>o</sup>201(9) is amended to add the appearance of witnesses by means of audio-video communication technology. In addition, the introductory paragraph of s. 11<sup>o</sup>285, which is the section pertaining to an online notary public supervising the witnessing of electronic records, is amended to add a statement confirming that supervising the witnessing of an electronic record under this section is a notarial act.

3. Section 11<sup>o</sup>285(2) is amended to specifically re<sup>u</sup>ire that the principal<sup>s</sup> identity must be verified in accordance with the procedures set forth in s. 11<sup>o</sup>265(4) when an online notary public is supervising the execution and witnessing of an electronic record.

4. Section 11<sup>o</sup>285(5) is amended to clarify that it is applicable only when fewer than two witnesses are in the physical presence of the principal who is executing one of the enumerated electronic estate planning documents. In addition, because subsection (5) of s. 11<sup>o</sup>285 is so long and this concept is important, a new subsection, 11<sup>o</sup>285(5)(k), is added to reiterate that the re<sup>u</sup>irements of s. 11<sup>o</sup>285(5) do not apply if at least two witnesses are in the physical presence of the principal when an enumerated electronic estate planning document is executed.

5. Section 11<sup>o</sup>285(5) is amended to be applicable only to revocable trusts with testamentary aspects described in s. <sup>o</sup>36.0403(2)(b), making it consistent with the re<sup>u</sup>irements of Chapter <sup>o</sup>36. In addition, s. 11<sup>o</sup>285(5)(h) is amended to clearly state that the re<sup>u</sup>irements of s. 11<sup>o</sup>285(5) are not applicable to the non-testamentary aspects of a revocable trust. In other words, failure to comply with the applicable re<sup>u</sup>irements of s. 11<sup>o</sup>285(5) will likely invalidate the testamentary aspects of a Florida resident<sup>s</sup> revocable trust, but will not invalidate the non-testamentary aspects of that revocable trust.

6. Section 11<sup>o</sup>285(5) is amended to apply to agreements for waivers of rights under s. <sup>o</sup>32.<sup>o</sup>01 or s. <sup>o</sup>32.<sup>o</sup>02, making it consistent with the provisions set forth in s. <sup>o</sup>32.<sup>o</sup>01 and s. <sup>o</sup>32.<sup>o</sup>02, and clarifying that it is not limited to <sup>o</sup>a waiver of spousal rights.<sup>o</sup>

B. The proposed amendments to ss. 11<sup>o</sup>285(6)(b) and <sup>o</sup>32.521(<sup>o</sup>) simply correct erroneous cross-references contained in those statutes.

C. The proposed amendments to ss. <sup>o</sup>09.2119(2)(c), <sup>o</sup>32.401(2)(e), <sup>o</sup>32.503(1), <sup>o</sup>32.<sup>o</sup>03(5)(b)3. and 4., and <sup>o</sup>4<sup>o</sup>051(1) revise the forms contained in those statutes so that the <sup>u</sup>rats or notarial certificates in those statutory forms comply with the new re<sup>u</sup>irements of s. 11<sup>o</sup>05(4)(c) which became effective January 1, 2020.

The proposed amendments to <sup>o</sup>32.503(1) may appear unnecessarily repetitive; however, that repetition is necessary. Section <sup>o</sup>32.503(1) permits a will or codicil to be made self-proving upon the acknowledgment of the testator and affidavit of the witnesses made before an officer authori<sup>z</sup>ed to administer oaths and evidenced by a certificate in substantially the form set forth in the statute. <sup>o</sup>ith the advent of electronic wills and remote witnesses, it is possible that the testator and witnesses will

all be remote from the notary, that the testator and one witness will be physically present before the notary and the second witness is remote, or that the testator is physically present with the notary while both witnesses are remote. In order for the statutory form to adequately address all possible execution scenarios, the notary will need to state the means by which each signer appeared before him/her.

There is an additional amendment to s. 32.503(1) adding boxes for the notary public to check in order to satisfy the requirement that the notary public state whether the signer is personally known or produced identification. Although language to this effect is currently in the statutory form, it is too often overlooked by the notary public. It is hoped that the inclusion of boxes will call this requirement to the notary's attention.

These glitch fixes should be retroactive to the date upon which most of Chap. 2019-10 became effective, i.e., January 1, 2020. The proposed amendments also include a provision making them effective upon becoming law.

**IV. FISCAL IMPACT ON STATE AND LOCAL GOVERNMENTS**

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

**V. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR**

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

**VI. CONSTITUTIONAL ISSUES**

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

**VII. OTHER INTERESTED PARTIES**

Elder Law Section of The Florida Bar

Notari@e.com

## 1 A bill to be entitled

2 An act relating to electronic legal documents; amending s. 11□201(9); clarifying that  
3 online notari□ation includes the appearance of witnesses by means of audio-video  
4 communication technology; amending s. 11□285; clarifying that supervising the witnessing of  
5 an electronic record is a notarial act and that the procedures for online notari□ation apply;  
6 amending s. 11□285(2); clarifying that the identity of the principal must be verified; amending s.  
7 11□285(5); clarifying that this subsection is only applicable to the testamentary aspects of  
8 revocable trusts and when fewer than two witnesses are physically present with the principal at  
9 the time of execution; amending s. 11□285(6)(b); deleting erroneous cross-reference; amending  
10 s. □09.2119(2)(c); revising statutory affidavit form to comply with new notari□ation  
11 re□uirements; amending s. □32.401(2)(e); revising statutory affidavit form to comply with new  
12 notari□ation re□uirements; amending s. □32.503(1); revising statutory self-proof form to comply  
13 with new notari□ation re□uirements; amending s. □32.521(□); correcting erroneous cross-  
14 reference; amending s. □32.□03(5)(b)3. and 4.; revising statutory affidavit form to comply with  
15 new notari□ation re□uirements; amending s. □4□051(1); revising statutory affidavit form to  
16 comply with new notari□ation re□uirements; providing that the amendments are remedial and  
17 retroactive; and providing an effective date.

18 Be it Enacted by the Legislature of the State of Florida□

19 Section 1. Subsection (9) of section 11□201 Florida Statutes, is amended to read□  
20 (9) □Online notari□ation□means the performance of a notarial act using electronic means  
21 in which the principal or any witness appears before the notary public by means of audio-video  
22 communication technology.

23 Section 2. The introductory paragraph of section 11□285, Florida Statutes, is amended  
24 to read□

25 Supervising the witnessing of an electronic record under this section is a notarial act. An  
26 online notary public may supervise the witnessing of electronic records by complying with the  
27 online notari□ation procedures of this chapter and using the same audio-video communication  
28 technology used for online notari□ation by a principal, as follows□

29 Section 3. Subsection (2) of section 11□285, Florida Statutes, is amended to read□

30 (2) If the witness is remote from the principal and viewing and communicating with the  
 31 principal by means of audio-video communication technology, the principal's and witness's  
 32 identity must be verified in accordance with the procedures for identifying a principal as set forth  
 33 in s. 11-265(4). If the witness is in the physical presence of the principal, the witness must  
 34 confirm his or her identity by stating his or her name and current address on the audio-video  
 35 recording as part of the act of witnessing.

36 Section 4. Subsection (5) of section 11-285, Florida Statutes, is amended to read:

37 (5) Notwithstanding subsections (2) and (3), if an electronic record to be signed is a  
 38 will under chapter 32, a revocable trust with testamentary aspects described in s. 36.0403(2)(b)  
 39 ~~under chapter 36~~, a health care advance directive, an agreement or a waiver of ~~spousal~~ rights  
 40 under s. 32.01 or s. 32.02, or a power of attorney authorizing any of the transactions  
 41 enumerated in s. 09.2208, the following shall apply when fewer than two witnesses are in the  
 42 physical presence of the principal:

43 (a) Prior to facilitating witnessing of an instrument by means of audio-video  
 44 communication technology, a RON service provider shall require the principal to answer the  
 45 following questions in substantially the following form:

- 46 1. Are you under the influence of any drug or alcohol today that impairs your  
 47 ability to make decisions?
- 48 2. Do you have any physical or mental condition or long-term disability that  
 49 impairs your ability to perform the normal activities of daily living?
- 50 3. Do you require assistance with daily care?

51 (b) If any question required under paragraph (a) is answered in the affirmative, the  
 52 principal's signature on the instrument may only be validly witnessed by witnesses in the  
 53 physical presence of the principal at the time of signing.

54 (c) Subsequent to submission of the answers required under paragraph (a), the RON  
 55 service provider shall give the principal written notice in substantially the following form:

56 NOTICE: If you are a vulnerable adult as defined in s. 415.102, Florida Statutes, the  
 57 documents you are about to sign are not valid if witnessed by means of audio-video

58 communication technology. If you suspect you may be a vulnerable adult, you should  
59 have witnesses physically present with you before signing.

60 (d) The act of witnessing an electronic signature through the witness's presence by  
61 audio-video communication technology is valid only if, during the audio-video communication,  
62 the principal provides verbal answers to all of the following questions, each of which must be  
63 asked by the online notary public in substantially the following form:

64 1. Are you currently married? If so, name your spouse.

65 2. Please state the names of anyone who assisted you in accessing this video  
66 conference today.

67 3. Please state the names of anyone who assisted you in preparing the  
68 documents you are signing today.

69 4. Where are you currently located?

70 5. Who is in the room with you?

71 (e) An online notary public shall consider the responses to the questions specified in  
72 paragraph (d) in carrying out of the duties of a notary public as set forth in s. 11-10(5).

73 (f) A principal's responses to the questions in paragraphs (a) and (d) may be offered as  
74 evidence regarding the validity of the instrument, but an incorrect answer may not serve as the  
75 sole basis to invalidate an instrument.

76 (g) The presence of a witness with the principal at the time of signing by means of  
77 audio-video communication technology is not effective for witnessing the signature of a  
78 principal who is a vulnerable adult as defined in s. 415.102. The contestant of an electronic  
79 record has the burden of proving that the principal was a vulnerable adult at the time of  
80 executing the electronic record.

81 (h) Nothing in this subsection shall:

82 1. ~~Preclude~~ a power of attorney, which includes banking or investment powers  
83 enumerated in s. 09.2208, from being effective with respect to any other authority  
84 granted therein or with respect to the agent's authority in connection with a real property,  
85 commercial, or consumer transaction or loan, to exercise any power specified therein or



to execute and deliver instruments obligating the principal or to draw upon the proceeds of such transaction or loan; or

2. Affect the non-testamentary aspects of a revocable trust under chapter 36.

(i) The electronic record containing an instrument signed by witnesses who were present with the principal by means of audio-video communication technology shall contain a perceptible indication of their presence by such means.

(j) Nothing in this subsection shall affect the application of s. 09.2119.

(k) The requirements of this subsection do not apply if at least two witnesses are in the physical presence of the principal.

Section 5. Subsection (6) of section 11285, Florida Statutes, is amended to read

(6) Pursuant to subpoena, court order, an authorized law enforcement inquiry, or other lawful request, a RON service provider or online notary public shall provide

(a) The last known address of each witness who witnessed the signing of an electronic record using audio-video communication technology under this section.

(b) A principal's responses to the questions in paragraphs (5)(a) or ~~(5)(d)(b)~~, as applicable.

(c) An uninterrupted and unedited copy of the recording of the audio-video communication in which an online notarization is performed.

Section 6. Subsection (2)(c) of section 09.2119, Florida Statutes, is amended to read

(c) 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 (agent) (Affiant) by the means stated below, who swore or affirmed that

1. Affiant is the agent named in the 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

- 116 a. The Principal is not deceased;
- 117 b. Affiant's authority has not been suspended by initiation of proceedings to determine
- 118 incapacity or to appoint a guardian or a guardian advocate;
- 119 c. Affiant's authority has not been terminated by the filing of an action for dissolution or
- 120 annulment of Affiant's marriage to the principal, or their legal separation; and
- 121 d. There has been no revocation, or partial or complete termination, of the power of
- 122 attorney or of Affiant's authority.
- 123 4. Affiant is acting within the scope of authority granted in the power of attorney.
- 124 5. Affiant is the successor to (insert name of predecessor agent), who has resigned, died,
- 125 become incapacitated, is no longer qualified to serve, has declined to serve as agent, or is
- 126 otherwise unable to act, if applicable.
- 127 6. Affiant agrees not to exercise any powers granted by the Power of Attorney if Affiant
- 128 attains knowledge that the power of attorney has been revoked, has been partially or completely
- 129 terminated or suspended, or is no longer valid because of the death or adjudication of incapacity
- 130 of the Principal.

□□□□□□□□□□□□□□□□

(Affiant)

133 Sworn to (or affirmed) and subscribed before me by means of  physical presence or   
134 online notarization, this □□□ day of (month) , (year) , by (name of person making  
135 statement) .

136 (Signature of Notary Public ~~State of Florida~~)  
137 (Print, Type, or Stamp Commissioned Name of Notary Public)

138 Personally known OR Produced Identification  
139 (Type of Identification Produced)

140 Section  Subsection (2)(e) of section 32.401, Florida Statutes, is amended to read   
141 (e) The election shall be made by filing a notice of election containing the legal  
142 description of the homestead property for recording in the official record books of the county or  
143 counties where the homestead property is located. The notice must be in substantially the  
144 following form

ELECTION OF SURVIVING SPOUSE TO TAKE A

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

ONE-HALF INTEREST OF DECEDENT'S INTEREST  
IN HOMESTEAD PROPERTY

STATE OF [REDACTED]

COUNTY OF [REDACTED]

1. The decedent, [REDACTED], died on [REDACTED]. On the date of the decedent's death, ~~the~~ the decedent was married to [REDACTED], who survived the decedent.

2. At the time of the decedent's death, the decedent owned an interest in real property that the affiant believes to be homestead property described in s. 4, Article X of the State Constitution, which real property being in [REDACTED] County, Florida, and described as [REDACTED] (description of homestead property) .

3. Affiant elects to take one-half of decedent's interest in the homestead as a tenant in common in lieu of a life estate.

4. If affiant is not the surviving spouse, affiant is the surviving spouse's attorney in fact or guardian of the property, and an order has been rendered by a court having jurisdiction of the real property authorizing the undersigned to make this election.

[REDACTED]

(Affiant)

Sworn to (or affirmed) and subscribed before me by means of [ ] physical presence or [ ] online notariation, this day of (month), (year), by (affiant) .

(Signature of Notary Public-~~State of Florida~~)

(Print, Type, or Stamp Commissioned Name of Notary Public)

Personally nown OR Produced Identification

(Type of Identification Produced)

Section 8. Subsection (1) of section 32.503, Florida Statutes, is amended to read

(1) A will or codicil executed in conformity with s. 32.520 may be made self-proved at the time of its execution or at any subsequent date by the acknowledgement of it by the testator and the affidavits of the witnesses, made before an officer authorized to administer oaths and evidenced by the officer's certificate attached to or following the will, in substantially the following form

STATE OF ~~FLORIDA~~-[REDACTED]

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CONTY OF

I, , declare to the officer taking my acknowledgment of this instrument, and to the subscribing witnesses, that I signed this instrument as my will.

Testator

e,  and ,

have been sworn by the officer signing below, and declare to that officer on our oaths that the testator declared the instrument to be the testator's will and signed it in our presence and that we each signed the instrument as a witness in the presence of the testator and of each other.

itness

itness

Acknowledged and subscribed before me by means of  physical presence or  online notariation, by the testator, (type or print testator's name), who  is personally known to me or ~~who~~  has produced (state type of identification  see s. 1105(5)(b)2.) as identification, and sworn to and subscribed before me by means of  physical presence or  online notariation, by the witness~~es~~, (type or print name of first witness) who  is personally known to me or ~~who~~  has produced (state type of identification  see s. 1105(5)(b)2.) as identification, and sworn to and subscribed before me by means of  physical presence or  online notariation, by the witness (type or print name of second witness) who  is personally known to me or ~~who~~  has produced (state type of identification  see s. 1105(5)(b)2.) as identification, and subscribed by me in the presence of the testator and the subscribing witnesses, by the means stated above, all on (date).

(Signature of Officer)

(Print, type, or stamp commissioned name and affix official seal)

Section 9. Subsection () of section 32.521, Florida Statutes, is amended to read

204 ( ) "qualified custodian" means a person who meets the requirements of s. ~~32.525(1)~~  
205 32.524(1).

206 Section 10. Subsection (5)(b)3. of section 32.03., Florida Statutes, is amended to read

207 3. If the death certificate is silent as to the decedent's marital status at the time of his  
208 or her death, the payor is not liable for making a payment on account of, or for  
209 transferring an interest in, that portion of the asset to the primary beneficiary upon  
210 delivery to the payor of an affidavit validly executed by the primary beneficiary in  
211 substantially the following form

212 STATE OF [ ]

213 COUNTY OF [ ]

214 Before me, the undersigned authority, personally appeared by the means stated  
215 below, (type or print Affiant's name) (Affiant), who swore or affirmed that

216 1. (Type or print name of Decedent) (Decedent) died on (type or print the date of  
217 the Decedent's death).

218 2. Affiant is a "primary beneficiary" as that term is defined in Section 32.03, Florida  
219 Statutes. Affiant and Decedent were married on (type or print the date of marriage), and were  
220 legally married to one another on the date of the Decedent's death.

221 (Affiant)

222 Sworn to or affirmed before me by means of [ ] physical presence or [ ] online  
223 notarization, by the affiant, who is personally known to me or who has produced (state type of  
224 identification) as identification, this [ ] day of (month), (year).

225 (Signature of Officer)

226 (Print, Type, or Stamp Commissioned name of Notary Public)

227 Section 11. Subsection (5)(b)4. of section 32.03., Florida Statutes, is amended to read

228 4. If the death certificate is silent as to the decedent's marital status at the time of his  
229 or her death, the payor is not liable for making a payment on account of, or for  
230 transferring an interest in, that portion of the asset to the secondary beneficiary upon  
231 delivery to the payor of an affidavit validly executed by the secondary beneficiary  
232 affidavit in substantially the following form

233 STATE OF [ ]

234 CO~~U~~NTY OF

235 Before me, the undersigned authority, personally appeared by the means stated  
236 below, (type or print Affiant's name) (Affiant) , who swore or affirmed that

237 1. (Type or print name of Decedent) (Decedent) died on (type or print the date of  
238 the Decedent's death) .

239 2. Affiant is a secondary beneficiary as that term is defined in Section 32.03,  
240 Florida Statutes. On the date of the Decedent's death, the Decedent was not legally married to  
241 the spouse designated as the primary beneficiaryas that term is defined in Section 32.03,  
242 Florida Statutes.

243 (Affiant)

244 Sworn to or affirmed before me by means of  physical presence or  online  
245 notari~~a~~tion, by the affiant, who is personally known to me or who has produced (state type of  
246 identification) as identification, this  day of (month) , (year) .

247 (Signature of Officer)

248 (Print, Type, or Stamp Commissioned name of Notary Public)

249 Section 12. Subsection (1) of section 4051, Florida Statutes, is amended to read

250 (1) If the wife of any person defined as an absentee in s. 401(1), or his next of kin if  
251 said absentee has no wife, shall wish to sell or transfer any property of the absentee which has a  
252 gross value of less than 5,000, or shall require the consent of the absentee in any matter  
253 regarding the absentee's children or in any other matter in which the gross value of the sub~~je~~ct  
254 matter is less than 5,000, she may apply to the circuit court for an order authori~~z~~ing said sale,  
255 transfer, or consent without opening a full conservatorship proceeding as provided by this  
256 chapter. She may make the application without the assistance of an attorney. Said application  
257 shall be made by petition on the following form, which form shall be made readily available to  
258 the applicant by the clerk of the circuit court

259 **In the Circuit Court**

260 In re (Absentee) , case number

261 **PETITION FOR SUMMARY RELIEF**

262 Petitioner, (Name) , whose residence is (Street & number) , (City or town) , and  
263 (County) , Florida, and who is the (Describe relationship to absentee) of the absentee,

264 (Name) , states that the absentee has been (Imprisoned or missing in action) since (Date)  
265 when (Describe details) . Petitioner desires to sell/transfer (Describe property) of the value  
266 of (Value) because (Give reasons) . The terms of sale/transfer are (Give reasons) .

267 Petitioner requires the consent of the absentee for the purpose of

268 (Petitioner)

269 State of ~~Florida~~

270 County of

271 Sworn to (or affirmed) and subscribed before me by means of  physical presence or

272 online notari~~ation~~, this  day of , (year) , by (name of person making statement) .

273 (Signature of Notary Public—~~State of Florida~~)

274 (Print, Type, or Stamp Commissioned Name of Notary Public)

275 Personally nown OR Produced Identification

276 Type of Identification Produced

277 Section 13. The changes made by this act are remedial in nature, and apply retroactively  
278 as of January 1, 2020.

279 Section 14. This act shall take effect upon becoming law.

# LEGISLATIVE POSITION REQUEST FORM

GOVERNMENTAL AFFAIRS OFFICE

Date Form Received \_\_\_\_\_

## GENERAL INFORMATION

**Submitted By** David Brennan, Nicklaus Curley, Stacy Rubel, Sancha Brennan Whynot, Co-Chairs, Ad Hoc Guardianship Law Revision Committee Committee of the Real Property Probate & Trust Law Section (RPPTL Approval Date July 24, 2020)

**Address** c/o Nicklaus Curley, 777 South Flagler Drive, Suite 500 East, West Palm Beach, FL 33401 – Ncurley@gunster.com  
Telephone: (561) 650-0609

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

## CONTACTS

### Board & Legislation Committee Appearance

**John Moran**, Gunster, 777 South Flagler Drive, Suite 500 East, West Palm Beach, Florida 33401, Telephone (561) 655-1980, Email: jmoran@gunster.com  
**Peter M. Dunbar**, Dean, Mead & Dunbar, P.A., 215 South Monroe Street, Suite 815, Tallahassee, Florida 32301, Telephone: (850) 999-4100, Email: pdunbar@deanmead.com  
**Martha J. Edenfield**, Dean, Mead & Dunbar, P.A., 215 South Monroe Street, Suite 815, Tallahassee, Florida 32301, Telephone: (850) 999-4100, Email: medenfield@deanmead.com

### 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 a revision to Florida's Guardianship Law through the proposed Florida Guardianship Code to modernize Florida's current guardianship laws in order to increase the protections for incapacitated individuals in Florida, to reduce the cost and expense associated with guardianship proceedings, to increase review and oversight of private and professional guardians, and to install procedural components to allow for remote proceedings in light of the recent pandemic.

### Reasons For Proposed Advocacy:

The proposed Florida Guardianship Code is intended to replace Florida Statutes chapter 744 which is rapidly





The Florida Bar Real Property, Probate and Trust Law Section



Florida Guardianship Code  
Scrivener's Summary  
07/20/2020

## **Introduction**

In 1990, the Florida Legislature enacted the last comprehensive revision of the Florida Guardianship Law. In the 30 intervening years, case law and piecemeal statutory changes have resulted in confusion and the inconsistent application of the law throughout the state. In recognition of the growing inconsistencies in the law, the Real Property, Probate and Trust Law Section of The Florida Bar, under the guidance of Chair, W. Fletcher Belcher, established the Ad Hoc Guardianship Law Task Force in 2012. Although the initial charge of the Task Force was to systematically review and recommend changes to chapter 744, it quickly became apparent that the entire body of law required a thorough modernization. The Task Force, chaired by David C. Brennan, Nick Curley, Stacy Rubel, and Sancha Brennan, has seen a number of different members during its eight-year undertaking.<sup>1</sup> The group has consisted of experienced guardianship practitioners from across the state, members of the Real Property, Probate and Trust Law section and the Elder Law sections of The Florida Bar, the Probate Law Committee, a professional guardian and members of the judiciary experienced in handling incapacity and guardianship matters.

In February 2019, the Task Force circulated a draft of its product, proposed as The Florida Guardianship Code, Chapter 745 (the “Code”), and solicited comments and suggestions that were compiled for review by the Task Force. Comments and suggestions were received from a variety of organizations such as the Florida State Guardianship Association, the Elder Law Section of the Florida Bar, a Clerk of Court, the office of Criminal Conflict and Civil Regional Counsel, individual members of these organizations, and members of the public. Every comment received was considered by the Task Force and a number of those suggestions were adopted.

Additionally, the Task Force included some, but not all of the many legislative changes that passed during its seven year project, including recent clarification of the law requiring guardians to obtain court orders to establish Do Not Resuscitate Orders for wards in their care. The final proposed draft of The Guardianship Code, c. 745, which is the first comprehensive modernization of the law in thirty-one years, was produced on November 26, 2019.

This Scrivener’s Summary highlights certain provisions of the Guardianship Code, emphasizing provisions that modify existing law and includes the rationale relied upon by the Task Force to support those changes, where appropriate.

### **Why a Guardianship “Code”?**

Following the trend in Florida to codify cohesive bodies of law similar to the Probate and Trust Codes, the Task Force determined that a Guardianship “Code” would signal the comprehensive changes and reorganization of the Florida Guardianship Law.

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<sup>1</sup> The current Task Force also consists of long-time contributing members: Debra Boje, Michael Foreman, Darby Jones, the Honorable Mark Speiser, and representative from the Elder Law Section, Collette Small. Additional members have also included: Tatiana Brenes-Stahl, David Carlisle, Cynthia Fallon, Honorable Melvin Grossman, Sean Kelley, Seth Marmor, Hung Nguyen, Charlie Robinson, Debbie Slater and Enrique Zamora. Furthermore, this scrivener’s summary was substantially drafted by Elizabeth Hughes, Brandon Bellew, and Caitlin Powell in addition to members of the Task Force.

## Relationship to a Uniform Code

There are two uniform guardianship codes adopted by the Uniform Law Commission. In 1969, the Uniform Guardianship and Protective Proceedings Act, (the UGPPA) was enacted as one section of the Uniform Probate Code. That code was updated in 1982 and 1997, but has remained less comprehensive than the current Florida Guardianship Law. The UGPPA was adopted in 5 states, the District of Columbia and the US Virgin Islands.<sup>2</sup> While the Task Force considered the uniform code initially, it was determined that the existing Florida Guardianship Law was significantly more thorough than the uniform code. The uniform code was most recently revised in 2017, as a more comprehensive act, introducing provisions such as the “less restrictive alternative” to guardianship, which has been a guiding principle and determination preliminary to the establishment of a guardianship in Florida law for many years. This newest version of the uniform act has been renamed the Uniform Guardianship, Conservatorship, and Other Protective Arrangements Act (UGCOPAA).

Although the UGCOPAA is more comprehensive than its prior versions, there remain areas of the law which are not covered as thoroughly as existing Florida law. Due to differences in terminology alone, any consideration of the UGCOPAA in Florida would have a wide-reaching effect across many chapters of the Florida Statutes and would likely require numerous simultaneous amendments. Currently, some version of the UGCOPAA has been introduced in a total of four states and only been adopted by two, Maine and Washington.<sup>3</sup>

A separate uniform act, the Adult Guardianship and Protective Proceedings Jurisdiction Act (the AGPPJA) designed to address specific interjurisdictional issues, was adopted by the Uniform Law Commission in 2007, and has been enacted by 46 states, the US Virgin Islands, the District of Columbia and Puerto Rico. The AGPPJA has been previously considered by RPPTL guardianship law committee and the Executive Council and has been rejected for due process concerns and because it was not considered to be an improvement over existing Florida law.

## What is Different?

In addition to important substantive changes, there are technical fixes throughout the new Code that are too numerous to include here. These fixes range from replacing archaic statutory terminology and outdated references to combining repetitive provisions and reorganizing the order of the statutes to more align with the functional process of incapacity and guardianship proceedings. In addition to the reorganization of the statutes, there have also been a number of commonly used terms added to the definitions section and other terms that have refined definitions. For example, see “audit” and “interested person”. The following is presented to highlight the more important changes to existing Florida Guardianship Law. Each of the enumerated items is more specifically examined in later sections.

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<sup>2</sup> Uniform Law Commission, Guardianship and Protective Proceedings Act (May 12, 2020, 4:33pm), [<https://uniformlaws.org>] [<https://www.uniformlaws.org/committees/community-home?CommunityKey=d716e47d-f50b-4b68-9e25-dd0af47a13b7>].

<sup>3</sup> Uniform Law Commission, 2018/2019 ULC Annual Report (May 12, 2020, 3:50pm) [<https://www.uniformlaws.org>][[www.uniformlaws.org/viewdocument/2018-annual-report](https://www.uniformlaws.org/viewdocument/2018-annual-report)].

- **Preserving the Ward's Right to Privacy.** While existing Florida Guardianship Law<sup>4</sup> and the Florida Rules of Judicial Administration<sup>5</sup> identify and provide procedures for determining certain guardianship filings confidential, the proposed Code expands these protections to all of the ward's private information.<sup>6</sup>
- **Determination of Incapacity.** This process is now compiled in a separate section of the Guardianship Code.
- **Protecting the Alleged Incapacitated Person ("AIP").**
  - The Code creates a clear process for appointment of private attorneys for a ward or AIP.
  - Provisions relating to the examinations of an AIP have been expanded and better defined.
  - Emergency Temporary Guardians ("ETGs") continue to maintain authority until Letters are issued to another guardian, the death of the ward, or there is an order entered otherwise.<sup>7</sup> Time limits for the service of an ETG have been removed.
  - The Code requires an examination of the alternatives to guardianship, requiring disclosure of known alternatives in the initial petition and providing a procedure for the consideration of alternatives to guardianship after a guardian has already been appointed.<sup>8</sup>
  - The Code expands on the Court's authority to determine the viability as an alternative to guardianship of a ward's power of attorney, health care surrogate or trust document within the guardianship proceeding.<sup>9</sup> In addition, the Code grants the Court the ability to authorize a guardian to file an action to definitively determine the validity of these documents.
- **Natural Guardians.** The authority of a natural guardian over the assets of their minor child is **increased** from \$15,000 to \$25,000.<sup>10</sup> Additional protections for a minor child are also created.
- **Resignation and Discharge of Guardians.** The proposed provisions and procedures for resignation and discharge have been **revised** to make the **statutes** workable.<sup>11</sup>
- **Powers of Guardians.** Guardians' duties and powers have been more specifically defined in the Code, both as to powers requiring **court authority** and those that do not.<sup>12</sup>
  - A guardian is required to obtain court authority prior to seeking a Do Not Resuscitate

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<sup>4</sup> Fla. Stat. §§ 744.1076 and 744.3701.

<sup>5</sup> Fla. R. Jud. Admin. 2.420(d)(1)(B)(xv), Fla. R. Jud. Admin. 2.420(d)(2).

<sup>6</sup> See § 745.112.

<sup>7</sup> See § 745.701(5).

<sup>8</sup> § 745.1303.

<sup>9</sup> §§ 745.1313 and 745.1314.

<sup>10</sup> § 745.714, modifying § 744.301.

<sup>11</sup> Part XI, c. 745.

<sup>12</sup> §§ 745.802, .809, and 745.901-.903.

Order (“DNR”) on behalf of a ward<sup>13</sup>. Exceptions are provided for circumstances when the ward’s preferences are known.<sup>14</sup>

- **Protecting the Ward.** The Code provides additional reasons for the removal of guardians and eliminates the rebuttable presumption that guardians related by blood or marriage are acting in the best interest of the ward.<sup>15</sup>
  - Provisions have also been added to allow for the re-appointment of counsel for the ward at the time of a guardian’s discharge.<sup>16</sup>
  - Stronger provisions relating to Guardianship Monitors<sup>17</sup> (no longer “court monitors”) have been added. These include procedures designed to ensure due process is provided to all parties, provisions authorizing the payment of reasonable fees for monitors, and provisions eliminating internal investigations conducted by court employees. These are all new protections not previously provided by c. 744.

### **The Code in Depth**

#### **Part I: General Provisions**

With the goal of familiarity and uniformity, the Florida Guardianship Code borrows its structure from Florida Statutes Chapter 744, the Florida Guardianship Law. It is anticipated the Code will be enacted as a separate chapter and that Chapter 745 will be used for this purpose. This Code consists of thirteen parts, separated into sections by subject matter in an effort to make one consistent, cohesive statutory structure. In addition, the Code contains two additional parts relating to Florida’s Office of Public and Professional Guardians (Part XIV) and to Veterans’ Guardianship (Part XV). Parts XIV and XV remain largely unchanged from the Florida Guardianship Law as these sections were originally promulgated by and are enforced by other agencies and ultimately were outside the scope of the Task Force’s directive.

#### **A. General Provisions and Definitions**

Among the more important things, the several sections of Part I of the Code address the legislative intent underlying its enactment<sup>18</sup>, the scope and applicability of the Code<sup>19</sup>, the meaning of terms utilized in the Code<sup>20</sup>, procedural protections required in incapacity and guardianship proceedings<sup>21</sup>, and the jurisdiction of the Florida courts.<sup>22</sup> In addition, Part I of the Code contains provisions relating to the determination and payment of certain fees and expenses

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<sup>13</sup> See § 745.909(1).

<sup>14</sup> See § 745.909(3).

<sup>15</sup> See § 745.1201.

<sup>16</sup> See § 745.1102(9) and 745.1107(3).

<sup>17</sup> See §§ 745.1008 and 745.1009.

<sup>18</sup> See § 745.102.

<sup>19</sup> See §§ 745.103 and .105.

<sup>20</sup> See §§ 745.106 and .107.

<sup>21</sup> See §§ 745.104, .108, and .110 through .112.

<sup>22</sup> See § 745.114.

of the guardianship.<sup>23</sup> Perhaps most importantly, the Code is given its Short Title as the “Florida Guardianship Code”.<sup>24</sup>

## **B. Legislative Intent**

The Code’s legislative intent maintains Florida’s longstanding policy of ensuring procedural due process and the ultimate goal of utilizing lesser restrictive means of assistance whenever appropriate.<sup>25</sup> The Code slightly alters prior legislative intent by stating that even a *partial* adjudication of incapacity deprives a person of rights, recognizing that any restrictions placed on a person should be avoided when possible.<sup>26</sup> Further, it now explicitly states that it is the legislature’s intention that a person deemed incapacitated should still participate in the decision making process when reasonable and that their dignity should be maintained above all.<sup>27</sup>

## **C. Scope and Applicability**

The Code will be applicable to all pending and ongoing guardianship matters upon its effective date.<sup>28</sup> The Code is intended to replace and repeal the former Florida Guardianship Law, Chapter 744.<sup>29</sup>

## **D. Procedural Provisions of the Code**

### **1. Rules of Evidence**

It is the current law of Florida that the rules of evidence apply to guardianship and incapacity proceedings brought in the court.<sup>30</sup> Because guardianship matters are often uncontested, it is important to confirm the application of the evidence code unless otherwise provided. The Code recognizes this and explicitly states the applicability of the Florida Evidence Code, Florida Statutes Chapter 90, as a confirmation of current law.<sup>31</sup>

### **2. Construction Against Implied Repeal**

Because the Code provides a unified statutory scheme for the facilitation of guardianship and incapacity matters, it is important that aspects of the Code not be deemed repealed unless specifically intended by the legislature. The Code reflects this intent in § 745.105.

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<sup>23</sup> See § 745.113.

<sup>24</sup> See § 745.101.

<sup>25</sup> See § 745.102.

<sup>26</sup> Compare § 744.1012(1) (“Adjudicating a person totally incapacitated and in need of a guardian deprives such person...”) to § 745.102(1) (“Adjudicating an adult partially or totally incapacitated...”). This specifically recognizes that any determination of incapacity has a substantial impact, regardless of the extent or whether a guardian is ultimately appointed.

<sup>27</sup> See § 745.102(2).

<sup>28</sup> § 745.103.

<sup>29</sup> *Id.*, and c. 745, Sections 16 and 17.

<sup>30</sup> *Shen v. Parkes*, 100 So. 3d 1189, 1191 (Fla. 4th DCA 2012).

<sup>31</sup> § 745.104.

### **3. Confidentiality of All Guardianship Records**

Guardianship, incapacity proceedings, and the settlement of minor's claims involve extremely private information which should not be made easily available for public viewing. These matters routinely include confidential physical health, mental health, and financial records being filed with the Court for multiple, relevant reasons. Furthermore, the reports filed by fiduciaries of the incapacitated person or minor, such as annual and initial guardianship reports, contain sensitive information on the historical and future actions to be taken on behalf of the ward.<sup>32</sup>

Historically, the Florida Guardianship Law has limited confidentiality protections to only certain filings<sup>33</sup>, leaving available for discovery large amounts of a ward's private information. The Code expands this protection and provides that all records relating to incapacity, guardianship, or the settlement of a minor's claim are to be maintained as confidential and exempt from the provisions of Fla. Stat. § 119.07(1) and § 24(a), Art. I of the Florida Constitution. In order to ensure all appropriate parties have access, the Code lists eight classes of individuals and organizations afforded access<sup>34</sup> and then grants the Court discretion to release records to anyone upon a showing of good cause.<sup>35</sup>

### **4. Jurisdiction of the Court**

The Florida circuit court has jurisdiction to adjudicate matters in incapacity and guardianship.<sup>36</sup>

### **5. Recording of Hearings**

Consistent with the Florida Guardianship Law, the Code requires hearings on the determination of incapacity, appointment of a guardian, or restoration of capacity to be recorded either electronically or stenographically.<sup>37</sup>

### **6. Notice and Service**

As with prior law, the Code provides for service under the Florida Probate Rules except with regard to notice of the petition to determine incapacity and for appointment of

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<sup>32</sup> See §§ 745.805 and 745.810 through .813 laying out the requirements for initial and annual reports of the guardian which include, among other things, a list of all doctors seen and to be seen by the ward, a list of all assets held by the guardian, the attachment of a physician's report describing the mental capacity of the ward, a log of all transactions of the guardian, and the attachment of banking or other financial statements of the Ward.

<sup>33</sup> See § 744.3701(1) which makes confidential the initial, annual, and final guardianship reports and a court record relating to the settlement of a claim. See also, § 744.1076 which makes confidential the reports of a court monitor relating to the health or finances of the ward. This confidentiality is also reflected in the Florida Rule of Judicial Administration 2.420(d)(xv).

<sup>34</sup> § 745.112(1) provides the following persons with access: (a) the court, (b) the clerk, (c) the guardian, (d) the guardian's attorney, (e) the ward's attorney, (f) a guardian ad litem appointed on behalf of the ward, (g) the Office of Public and Professional Guardians or its designee, and (h) an adult ward who has not been adjudicated totally incapacitated.

<sup>35</sup> § 745.112(2).

<sup>36</sup> § 745.114.

<sup>37</sup> § 745.111 maintains the language of Fla. Stat. § 744.109.



guardian which is controlled by a separate section.<sup>38</sup> The Code also clarifies that service on an alleged incapacitated person is accomplished by service on the attorney of record for the alleged incapacitated person, consistent with the Florida Rules of Judicial Administration.<sup>39</sup> In cases of a totally incapacitated ward, service must go to the ward's attorney or in the absence of an attorney, to the guardian.<sup>40</sup>

## E. Defined Terms

Part I includes the main definitional section setting forth the terminology applicable to all other sections of the Code.<sup>41</sup> In addition, the definitions provided in the Florida Probate Code and the Florida Probate Rules are applicable to the Code unless otherwise defined in the Code or as may be required by context.<sup>42</sup> The Code also includes a number of terms in § 745.106 which are defined in other sections of the Code, intended for use as a reference point for practitioners to ensure awareness of definitions provided elsewhere in the Code.<sup>43</sup> The following lay out the differences between terms defined under the Code and those that were not explicitly defined or were defined differently under Florida Guardianship Law.

**1. “Attorney for the alleged incapacitated person”** is defined to only include an attorney *authorized by court order* to represent an alleged incapacitated person. The Code requires that the attorney, consistent with the rules regulating the Florida Bar, advocate the “preferences” expressed by the alleged incapacitated person.<sup>44</sup>

**2. “Audit”** is more narrowly defined to include a review of specific documents within the guardianship proceeding, including inventories, accountings, plans, guardianship reports, and the materials substantiating those documents.<sup>45</sup> This is intended to limit reviews under audit procedures to be narrowly focused on the guardianship matters and not to allow more broad review of non-guardianship activities beyond the scope of the audit, such as actions taken by a guardian in their personal financial matters or as to non-guardianship assets in their non-guardian capacities. This definition is not intended to limit the ability of auditors to review any materials which are used to substantiate the listed guardianship documents.

**3. “Court”** is defined more specifically as the “circuit court division in which the incapacity or guardianship proceeding is pending”.<sup>46</sup> This is an alteration in the law in order to ensure that only the guardianship court overseeing the case is making rulings on the matters encapsulated in the Code.

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<sup>38</sup> § 745.110. See also, § 745.302 and § 744.106.

<sup>39</sup> See, Fla. R. Jud. Admin 2.516.

<sup>40</sup> § 745.110.

<sup>41</sup> See § 745.106.

<sup>42</sup> § 745.107.

<sup>43</sup> See, for example, § 745.106(9) pointing the reader to § 745.306.

<sup>44</sup> § 745.106(2). Under § 744.102(1), the attorney was required to advocate the “wishes” of the alleged incapacitated person. This alteration is intended to be a clarification that the attorney is bound to act for his client consistent with Florida Bar R. 4-1.14 (Client under a disability).

<sup>45</sup> § 745.106(3).

<sup>46</sup> § 745.106(6).

**4. “Emergency temporary guardian”** is added as a defined term in order to avoid confusion on intentional differences between the position of emergency temporary guardian appointed pursuant to § 745.605.<sup>47</sup> The definition also includes that, once appointed, the emergency temporary guardian continues to serve until the ward dies, letters of guardianship are issued, or until otherwise ordered by the court.<sup>48</sup>

**5. “Financial institution”** is defined consistently with current Fla. Stat. § 744.309(4) but is explicitly defined herein to avoid potentially inconsistent terminology utilized under Chapter 744.<sup>49</sup>

**6. “Guardian” is defined to include “emergency temporary guardian”** consistent with case law holding that the term “guardian” includes an emergency temporary guardian.<sup>50</sup> The definition then goes on to further define “limited guardian” which has its definition altered to focus on the powers delegated to the guardian rather than those rights removed from the ward. In particular, limited guardian is now defined as any guardian of person or property which exercises *some, but not all*, of the delegable rights and powers of a ward.<sup>51</sup> This is consistent with the subsequent definition of “plenary guardian” which is a guardian of person or property exercising *all* delegable rights and powers of a ward.<sup>52</sup>

**7. “Plan”, “report”, “accounting” and “inventory”**, were each created and defined to avoid the ambiguity in current practice when referring to the initial and annual filings made by guardians, including the common practice of using the terms “plan”, “report”, and “accounting” interchangeably. To that end, “guardianship plan” is defined to refer only to that initial plan filed by a guardian of the person providing for the initial plan of care and findings relating to the ward.<sup>53</sup> “Guardianship report” is now the annual filing made by the guardian of the person under §§ 745.811-813.<sup>54</sup> “Inventory” means the initial asset report filed by the guardian of property under § 745.803. “Accounting” is defined to include only the verified document filed by a guardian of the property under §§ 745.805 and 745.806.<sup>55</sup>

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<sup>47</sup> § 745.106(8).

<sup>48</sup> Id. This is a change from current law which limits the tenure of an emergency temporary guardian to 90 days. Often guardianship proceedings were ongoing and it was necessary for an emergency temporary guardian to serve past the 90 day period, to that end this change is intended to set more workable termination periods, either upon a subsequent order of the Court (i.e. if no guardian is appointed an order terminating the emergency guardianship) or the issuance of letters to a guardian appointed under § 745.605.

<sup>49</sup> See, § 745.106(10). The term financial institution was previously utilized throughout Chapter 744 as a reference to those institutions listed in § 744.309(4), however it was not an explicitly defined term. See for instance § 744.2003(2) and 744.351(4). However, this same term is used in other parts of Chapter 744 to refer to financial institutions listed in § 655.005(1) which could have created unnecessary ambiguity.

<sup>50</sup> § 745.106(12); *In re Guardianship of Beck*, 204 So. 3d 143 (Fla. 2d DCA 2016).

<sup>51</sup> § 745.106(12)(a). Compare § 744.102(9)(a) which defines a limited guardian as someone acting as guardian for a ward determined to be incapacitated as to some but not all rights and powers. This former definition leaves open those situations in which an alternative is available as to some rights and powers removed, thus in which a guardian serves for a totally incapacitated individual but is only delegated less than plenary authority.

<sup>52</sup> § 745.106(12)(b).

<sup>53</sup> § 745.106(16).

<sup>54</sup> § 745.106(17).

<sup>55</sup> § 745.106(1).

**8. “Incapacitated person”** has a slightly altered definition in the Code. Under Fla. Stat. § 744.102(12), the definition includes a person unable to meet some of the “essential” health and safety requirements of their person. The Code’s definition no longer includes the term “essential” as it was perceived as unintentionally narrowing. Anyone judicially determined to be lacking the mental capacity to provide for the health and safety requirements of their person is incapacitated. It does not matter if the requirements are not essential.

**9. “Interested person”** is specifically defined in the Code<sup>56</sup> for purposes of distinguishing it from the more general definition contained in the Probate Code.<sup>57</sup> Although the definition’s main terms remain intact: “any person who may reasonably be expected to be affected by the outcome...” the Code now goes on to narrow this general structure by providing that a person is not interested solely based on an anticipated expectancy from the ward or because the person has filed a request for copies in the proceedings. These are two points of law often misunderstood but the definition is consistent with current law.<sup>58</sup> The definition also states that a guardian is always an interested person in proceedings affecting the ward, similar to treatment of a personal representative in relation to an estate.<sup>59</sup>

**10. “Manage property”** is an important definition under current law and in the Code as it is utilized as one of the criteria in the determination of a person’s capacity.<sup>60</sup> The definition has been altered to better define the level of decision making expected for an individual with mental capacity. The definition now requires that “lucid decisions” are needed to protect and dispose of property.<sup>61</sup> Current law defines this same term as the ability to take “*action* necessary to obtain, administer, and dispose of” property.<sup>62</sup> The alteration in the definition is intended to focus more on the mental requirement as well as to include a requirement that the person not only be able to obtain or dispose of property, but also make lucid decisions on how to *protect* the property the person currently has.

**11. “Meet requirements for health or safety”** is another definition utilized in the determination of capacity. Like the definition for “manage property” this definition was altered from current law to require “lucid decisions” instead of “action” in order to better focus on the mental requirement.

**12. “Next of Kin”** has its definition clarified slightly to avoid confusion that next of kin includes (i) heirs at law and (ii) lineal descendants.<sup>63</sup> This is not a change from current law.

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<sup>56</sup> § 745.106(20).

<sup>57</sup> § 731.201(23).

<sup>58</sup> See, *Hayes v. Guardianship of Thompson*, 952 So. 2d 498 (Fla. 2006); *Bachinger v. Sunbank/South Florida, N.A.*, 675 So. 2d 185 (Fla. 4th DCA 1996).

<sup>59</sup> § 731.201(23).

<sup>60</sup> See § 745.106(18) definition of incapacitated person.

<sup>61</sup> § 745.106(23).

<sup>62</sup> § 744.102(12)(a).

<sup>63</sup> § 745.106(27).

**13. “Professional guardian”** is defined as a person meeting the requirements of the Office of Public and Professional Guardians (“OPPG”) to serve as a guardian for an unrelated ward.<sup>64</sup> This would include guardians serving for a single ward. The goal is to require additional education and oversight of any non-family guardians in order to further protect the incapacitated individuals. This is a change from the Florida Guardianship Law’s requirement of multiple wards in order to qualify as a professional guardian which was perceived as arbitrary and ambiguous as it was unclear if the three ward requirement applied over the life of the guardian or only if serving simultaneously.<sup>65</sup> A non-professional or family guardian may only serve as guardian for one non-relative ward at any time.<sup>66</sup> The term “relative” is defined as a spouse, adopted child, anyone related by lineal or collateral consanguinity, or a spouse of a relative by lineal or collateral consanguinity.<sup>67</sup>

**14. “Standby guardian”** is clarified to mean a guardian designated by a currently acting guardian and who has been appointed by the court to assume the duties of guardian if the current guardian ceases to serve consistent with requirements in §§ 745.702 and 745.703.<sup>68</sup>

**15. “Totally incapacitated”** is a term often used in guardianship proceedings to colloquially mean an incapacitated individual who had removed all of those rights removable under § 744.331(2)-(3). The lack of clear definition has caused confusion and the Code now includes a specific definition for this term consistent with perceived meaning, which is also utilized in the Code.<sup>69</sup>

## F. Fees and Costs

The Code makes minimal changes to the provisions of the Florida Guardianship Law regarding payment of attorneys’ fees and costs. Like Chapter 744, the Code provides that costs may be awarded in all guardianship proceedings and gives the court discretion to designate specific guardianship property from which costs should be paid.<sup>70</sup>

As to payment of fees, § 745.113 addresses the procedure for payment of the guardian or any professional fees from the assets of the guardianship. The Code explicitly acknowledges the entitlement to a reasonable fee for any professional rendering services to the ward or to the guardian in providing service to the ward.<sup>71</sup> The Code expands the information requirement of any fees paid from guardianship assets, requiring all such fees to be specifically itemized on the guardian’s annual accounting, attaching itemized statements provided by the professional paid.<sup>72</sup> The Code also explicitly grants the court authority to require prior court approval for any

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<sup>64</sup> § 745.106(30).

<sup>65</sup> § 744.102(17).

<sup>66</sup> § 745.503(7).

<sup>67</sup> § 745.106(33).

<sup>68</sup> § 745.106(34).

<sup>69</sup> § 745.106(36).

<sup>70</sup> § 745.109. See also, § 744.105.

<sup>71</sup> § 745.113(1). The section specifically cites guardians, attorneys, accountants, appraisers, and financial advisors as entitled to a reasonable fee in addition to providing a catch-all for other professionals.

<sup>72</sup> § 745.113(2).

payment of fees, although it limits the Court's ability to unnecessarily limit the frequency of fee petition payments.<sup>73</sup>

The Code maintains the factors to be considered by the Court in determining the reasonableness of any fees charged by a guardian or an attorney.<sup>74</sup> Like Chapter 744, the Code also allows for the inclusion of customary and reasonable charges of work performed by employees of the professional, such fees carrying the same requirement of itemization.<sup>75</sup> However employee's fees unrelated to the guardianship may not be charged, such as general clerical and office administrative activities. The same is true for employees of the guardian assisting in the guardian's services.<sup>76</sup>

The Code also maintains Chapter 744's procedures for review of a guardian or attorneys' fees.<sup>77</sup> This allows for approval of the fees without the need for expert testimony. In addition, the Code maintains provision that the fees incurred in defending the professional fees are chargeable as part of the administration of the guardianship unless the original amounts are determined to be "substantially unreasonable."

## **Part II: Venue**

Part II of the Code addresses venue for proceedings for determination of incapacity<sup>78</sup> and for appointment of a guardian<sup>79</sup>, as well as the procedure to change venue for a guardianship proceeding<sup>80</sup>. It also addresses changing a ward's residence.<sup>81</sup>

### **A. Venue**

Venue in proceedings for determination of incapacity shall be the county where the alleged incapacitated person resides or is located.<sup>82</sup> Venue for the appointment of a guardian for an incapacitated person or minor is as follows: For a Florida resident, the county in which the incapacitated person or minor resides, but if the adjudication of incapacity occurs in a county other than the county of residence, venue for the appointment of a guardian and determination of incapacity must be in the same county<sup>83</sup>; for a non-Florida resident, any Florida county where the person's property is located<sup>84</sup>; and venue may also be in the county having jurisdiction over a dependency case for the person<sup>85</sup>.

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<sup>73</sup> § 745.113(4).

<sup>74</sup> § 745.113(5). See also, § 744.108(2).

<sup>75</sup> § 745.113(7).

<sup>76</sup> § 745.113(8). Such fees would be considered part of the guardian's overall fee when considering the reasonableness of the guardian's fee.

<sup>77</sup> § 745.113(10)-(11). See also, § 744.108(8)-(9)

<sup>78</sup> § 745.201(1).

<sup>79</sup> § 745.201(2) The Code now includes venue for the appointment for the guardian of a minor in addition to an incapacitated adult.

<sup>80</sup> § 745.203.

<sup>81</sup> § 745.204.

<sup>82</sup> § 745.201(1).

<sup>83</sup> § 745.201(2)(a).

<sup>84</sup> § 745.201(2)(b).

<sup>85</sup> § 745.201(2)(c). This is an addition to current law on venue for the appointment of a guardian.

## **B. Residence of Ward**

The residence of a ward in a Florida guardianship is the county in which the ward resides.<sup>86</sup> However, the residence or domicile of a ward is not changed when a ward is moved to another county for medical care or rehabilitation.<sup>87</sup>

## **C. Change of Venue**

The guardian is required to petition the court to have the venue of the guardianship changed when the residence of a ward is changed to another county that is not adjacent to the current county of residence.<sup>88</sup>

## **D. Change of Ward's Residence**

A guardian who has been delegated the power to determine the ward's residence may not change the ward's residence from Florida to another state or from one county in Florida to another non-adjacent county without court approval.<sup>89</sup> The guardian must obtain court approval before changing a ward's residence from one county to a non-adjacent county.<sup>90</sup> The court shall determine whether such relocation serves the best interest of the ward.<sup>91</sup>

A guardian who changes the ward's residence to an adjacent county shall notify the court having jurisdiction over the guardianship and the ward's next of kin (whose addresses are known to the guardian) within 15 days after the relocation.<sup>92</sup> The notice shall state the reasons for the change of the ward's residence.<sup>93</sup> Venue need not be changed unless otherwise ordered by the court.<sup>94</sup>

A guardian who, with court approval, has changed the ward's residence to another state, may file the final report and close the guardianship, in accordance with § 745.1105, once the foreign court having jurisdiction over the ward at the ward's new residence has appointed a guardian and that guardian has qualified and posted the required bond.<sup>95</sup>

## **Part III: Incapacity**

Determining that an individual is incapacitated is the first major step in establishing a guardianship. A determination of incapacity results in the deprivation of an individual's civil and legal rights. The Code recognizes that every individual's needs and abilities are different and takes that into consideration during the process to determine incapacity. The Code strives to

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<sup>86</sup> § 745.202. The Code now uses the term residence instead of domicile.

<sup>87</sup> *Id.*

<sup>88</sup> § 745.203.

<sup>89</sup> § 745.204(1).

<sup>90</sup> *Id.*

<sup>91</sup> *Id.* This is a change from current law that only requires the court to consider the reason for the relocation and the longevity of the relocation.

<sup>92</sup> § 745.204(2). This is a change from current law that requires notice of changing the ward's location, which could be temporary. Here, notice is only required on a change of residence and §745.202 states that a ward's residence is not changed when a ward is moved to another county for medical treatment or rehabilitation.

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

<sup>95</sup> § 745.204(3).

allow incapacitated persons the ability to participate as much as possible in the process and its primary goal is to protect and preserve the individual's exercisable rights. Part III of the Code deals with the overall process to determine an individual to be incapacitated. Specifically, it addresses the petition to determine incapacity<sup>96</sup>, notice of both the petition to determine incapacity and to appoint a guardian<sup>97</sup>, rights of an incapacitated person<sup>98</sup>, conduct of a hearing under this Code<sup>99</sup>, the attorney for an alleged incapacitated person<sup>100</sup>, appointment and qualification of the examiners<sup>101</sup>, the examination of the alleged incapacitated person<sup>102</sup>, the examination reports<sup>103</sup>, consideration of the examination reports<sup>104</sup>, the adjudicatory hearing<sup>105</sup>, the order determining incapacity<sup>106</sup>, and fees in incapacity proceedings<sup>107</sup>. The Code addresses these topics in separate statutes that are more concise whereas under current law several of these topics are addressed in the same statute. It is important to note that even an adjudication of total incapacity does not remove all rights from an individual. Certain rights are always retained by the ward<sup>108</sup>.

#### **A. Petition to Determine Incapacity**

The petition to determine incapacity is the initial pleading in the guardianship process for an alleged incapacitated adult. The petition must be executed by any adult with personal knowledge of the information specified in the petition.<sup>109</sup> The petition must be verified and must include basic identifying information about the petitioner, the alleged incapacitated person, the incapacitated person's attending or primary care physician, if known, the rights enumerated in §745.303 the person is incapable of exercising, the names and addresses for the person's next of kin, and a factual basis for incapacity and names and addresses of all persons with knowledge through personal observations to support that basis.<sup>110</sup>

#### **B. Notice of Petition to Determine Incapacity and for Appointment of Guardian**

The notice of filing a petition to determine incapacity and a petition for appointment of a guardian, if any, and copies of the petitions must be personally served on the alleged

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<sup>96</sup> § 745.301.

<sup>97</sup> § 745.302.

<sup>98</sup> § 745.303.

<sup>99</sup> § 745.304.

<sup>100</sup> § 745.305.

<sup>101</sup> § 745.306.

<sup>102</sup> § 745.307.

<sup>103</sup> § 745.308.

<sup>104</sup> § 745.309.

<sup>105</sup> § 745.310.

<sup>106</sup> § 745.311.

<sup>107</sup> § 745.312.

<sup>108</sup> *See*, § 745.303(1).

<sup>109</sup> § 745.301(1), *see L.Y v. Department of Health and Rehabilitative Services*, 696 So. 2d 430 (Fla. 4th DCA 1997) and "A lawyer may seek the appointment of a guardian or take other protective action with respect to a client only when the lawyer reasonably believes that the client cannot adequately act in the client's own interest." *Rule 4-1.14(b), Rules Regulating the Florida Bar*.

<sup>110</sup> § 745.301(2)

incapacitated person.<sup>111</sup> The clerk must serve the notice and copies of the petitions on the attorney for the alleged incapacitated person within 5 days of filing the petitions and the petitioner must serve all next of kin identified in the petition.<sup>112</sup> The notice must state the time and place of the hearing on the petitions, that an attorney has been appointed to represent the alleged incapacitated person, and that if the court determines that the person is incapable of exercising certain rights, a guardian may be appointed to exercise those rights on the person's behalf.<sup>113</sup>

The court appointed attorney for the alleged incapacitated person is responsible for serving the notice and petition on the alleged incapacitated person within 5 days of the attorney's appointment.<sup>114</sup>

### **C. Rights of Persons Determined Incapacitated**

There are certain rights that an incapacitated person retains regardless of an incapacity determination. Those rights are as follows<sup>115</sup>:

1. To have an annual review of the guardianship report and plan;
2. To have continuing review of the need for restriction of his or her rights;
3. To be restored to capacity at the earliest possible time;
4. To be treated humanely, with dignity and respect, and to be protected against abuse, neglect, and exploitation;
5. To have a qualified guardian;
6. To remain as independent as possible, including having his or her preference as to place and standard of living honored, either as expressed or demonstrated prior to the determination of incapacity or as he or she currently expresses such preference, insofar as such request is reasonable and financially feasible;
7. To be properly educated;
8. To receive prudent financial management for his or her property and to be informed how his or her property is being managed to the extent feasible, if he or she has lost the right to manage property;

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<sup>111</sup> § 745.302(1). This alters current law by removing the requirement that the notice and petitions be read to the alleged incapacitated person.

<sup>112</sup> *Id.* This alters current law by specifying that the clerk must serve the notice and petitions on the attorney for the alleged incapacitated person and by providing a time period for service to occur, and specifies that the petitioner must serve the next of kin identified in the petition.

<sup>113</sup> *Id.*

<sup>114</sup> § 745.302(2). This alters current law by specifying that the court appointed attorney is required to effectuate service of the notice and petitions on the alleged incapacitated person and provides a time period in which service is to occur, where current law just says the notice and petitions are to be served but does not specify by whom or when.

<sup>115</sup> § 745.303(1). This does not alter current law, but provides clarification on certain rights.



9. To receive services and rehabilitation necessary to maximize his or her quality of life;
10. To be free from discrimination because of his or her incapacity;
11. To have access to the courts;
12. To counsel;
13. To receive visitors and communicate with others;
14. To notice of all proceedings related to determination of capacity and appointment of guardian; and
15. To privacy, including privacy of incapacity and guardianship proceedings.

Rights that may be removed from a person through an incapacity determination but not delegated to a guardian include the following<sup>116</sup>:

1. To marry. If the right to enter into a contract has been removed, the right to marry is subject to court approval;
2. To vote;
3. To have a driver's license and operate motor vehicles;
4. To travel; and
5. To seek or retain employment.

Rights that may be removed from a person by an order determining incapacity and which may be delegated to a guardian include the following<sup>117</sup>:

1. To contract;
2. To sue and defend lawsuits;
3. To apply for government benefits and deal with all government entities, including taxing authorities<sup>118</sup>;
4. To exercise all rights with regard to ownership and management of property, including among others, firearm rights under chapter 790<sup>119</sup>;

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<sup>116</sup> § 745.303(2). This alters current law by removing the right to personally apply for government benefits as a right that can be removed and not delegated because that is a right that may be removed and delegated to a guardian. The only other alteration to current law is to include "and operate motor vehicles" to the removal of the right to have a driver's license.

<sup>117</sup> § 745.303(3).

<sup>118</sup> This alters current law by specifically adding the right to deal with all government entities, including taxing authorities.

5. To make any gift or disposition of property;
6. To determine his or her residence;
7. To consent to medical and mental health treatment and rehabilitation services<sup>120</sup>;
8. To make decisions about his or her social environment or other social aspects of his or her life; and
9. To make decisions about travel and visitation<sup>121</sup>.

The Code clarifies current law that when a person is found “totally incapacitated” the person is deemed to have lost all rights other than those specified as a right that are always retained and further that the guardian shall be deemed to have been delegated all delegable rights, unless otherwise limited by the Code or determined by the court<sup>122</sup>.

#### **D. Conduct of Hearing**

At any hearing under this Code, the alleged incapacitated person or the adjudicated ward has the right to testify, or to not testify, present evidence, call witnesses, confront and cross-examine witnesses, and have the hearing, open or closed.<sup>123</sup> The person has the right to remain silent and refuse to testify, may not be held in contempt of court or otherwise penalized for refusing to testify.<sup>124</sup> Refusal to testify may not be used as evidence of incapacity.<sup>125</sup>

#### **E. Attorney for the Alleged Incapacitated Person**

The court must appoint a qualified attorney to represent each alleged incapacitated person in all proceedings on petitions for determination of incapacity and appointment of guardian within 5 days of filing the petitions.<sup>126</sup> The alleged incapacitated person may substitute an attorney of his or her choice for the court appointed counsel with court approval.<sup>127</sup> At any time prior to entry of

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<sup>119</sup> This alters current law by clarifying that this includes all rights with regard to ownership and management of property and specifically includes firearm rights under chapter 790, whereas current law only states “to manage property”.

<sup>120</sup> This delegated right now specifically includes “rehabilitation services”.

<sup>121</sup> This has been added to the Code as a delegable right and is not specifically included in current law.

<sup>122</sup> § 745.303(4). This does not alter current law, but specifically states it in the Code.

<sup>123</sup> § 745.304. This slightly alters current law by specifying that after a person has been determined to be incapacitated, the decision to have a hearing open or close to the public shall be made by the guardian, unless otherwise determined by the court, otherwise, this does not change current law.

<sup>124</sup> § 745.304(2).

<sup>125</sup> *Id.*

<sup>126</sup> § 745.305(1). This alters current law under § 744.331(2)(b) as it specifies a “qualified” attorney must be appointed, requires counsel to be appointed for the alleged incapacitated person in proceedings for the appointment of a guardian in addition to the determination of incapacity, and specifically requires that the appointment occur within 5 days of filing the petitions.

<sup>127</sup> *Id.* This alters current law under § 744.331(2)(b) to require court approval of a substitution of the alleged incapacitated person’s own attorney for the court appointed attorney. *Campbell v. Campbell*, 219 So.3d 938 (Fla. 5th DCA 2017) (alleged incapacitated person has clear legal right to have counsel of own choosing and the right to have motion for substitution of counsel heard as soon as possible.); *Holmes v. Burchett*, 766 So. 2d 387 (Fla. 2d DCA

an order allowing substitution, the court, in its discretion and on its own motion, may hold a hearing to determine if the proposed attorney is qualified under this code and if such attorney is the choice of the alleged incapacitated person.<sup>128</sup> The court may allow the court appointed counsel and private counsel chosen by the alleged incapacitated person to serve as co-counsel.<sup>129</sup>

When a court appoints an attorney for an alleged incapacitated person, the court must appoint the office of criminal conflict and civil regional counsel or a private attorney as prescribed in § 27.511(6).<sup>130</sup> A private attorney must be one who is included in the attorney registry compiled pursuant to § 27.40.<sup>131</sup> Appointments of private attorneys must be made on a rotating basis, taking into consideration conflicts arising under this code.<sup>132</sup>

An attorney representing an alleged incapacitated person may not serve as guardian of the alleged incapacitated person or as counsel for the guardian of the alleged incapacitated person or the petitioner.<sup>133</sup>

An attorney representing an alleged incapacitated person under this section must have completed a minimum of 8 hours of education in guardianship.<sup>134</sup> A court may waive the initial training requirement.<sup>135</sup>

An attorney for the alleged incapacitated person must be entitled to examine all medical and mental health records of the alleged incapacitated person and consult with the alleged incapacitated person's physicians.<sup>136</sup>

Unless extended by the court, the attorney for the alleged incapacitated person's duties end upon (a) the court's determination that there is no need for appointment of a guardian or (b) issuance of letters of guardianship, other than letters of emergency temporary guardianship.<sup>137</sup> The attorney shall be deemed discharged without further proceedings.<sup>138</sup>

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2000) (person is presumed to have capacity prior to adjudication and retains the right to employ counsel of his or her choice).

<sup>128</sup> Id. This alters current law by specifically allowing the court to hold such a hearing as this situation created confusion as to whether the proposed attorney was actually hired by the alleged incapacitated person and whether the proposed attorney was qualified for such a representation.

<sup>129</sup> Id. This clarifies existing law and specifically allows a court to do what is often already done.

<sup>130</sup> § 745.305(2). This section is consistent with current law.

<sup>131</sup> Id.

<sup>132</sup> Id.

<sup>133</sup> § 745.305(3). This is consistent with current law.

<sup>134</sup> § 745.305(4). This is consistent with current law.

<sup>135</sup> § 745.305(4). This alters § 744.331(2)(b) slightly by removing the criteria that would allow a court to waive the training requirement and leaves it within the court's discretion.

<sup>136</sup> § 745.305(5). This is an addition to current law.

<sup>137</sup> § 745.305(6). This alters current law under § 744.363(2), which states the appointed attorney's final official action on behalf of the ward shall be review of the initial guardianship report and representation of the ward during any objection thereto.

<sup>138</sup> Id.

## **F. Appointment and Qualification of Examiners**

Within 5 days after a petition for determination of incapacity has been filed, the court shall appoint three (3) qualified persons to examine the alleged incapacitated person.<sup>139</sup> One examiner must be a psychiatrist or other physician and the other examiners must be a psychologist, another psychiatrist, or other physician, a registered nurse, nurse practitioner, licensed social worker, attorney, a person with an advanced degree in gerontology from an accredited institution of higher education, or other person in the court's discretion.<sup>140</sup> Unless good cause is shown, the alleged incapacitated person's attending or primary care physician may not be appointed as an examiner.<sup>141</sup> Any physician for the alleged incapacitated person shall provide records and information, verbal and written, to an examiner upon the examiner's written request.<sup>142</sup>

Examiners may not be related to or associated with one another, with the petitioner, with counsel for the petitioner or the proposed guardian, or with the person alleged to be totally or partially incapacitated.<sup>143</sup> A petitioner may not serve as an examiner.<sup>144</sup>

Examiners must be able to communicate, either directly or through an independent interpreter, in the language that the alleged incapacitated person speaks or in a medium understandable to the alleged incapacitated person if the alleged incapacitated person is able to communicate.<sup>145</sup>

The examiners shall be appointed from a roster of qualified persons maintained by the clerk of court and may not be chosen or recommended by the petitioner, attorney for the alleged incapacitated person, or any interested person.<sup>146</sup>

A person who has been appointed to serve as an examiner may not thereafter be appointed as a guardian for the person who was the subject of the examination.<sup>147</sup>

The training requirements to serve as an examiner are specified in the Code and require 4 hours of initial training and 2 hours of continuing education during each 2-year period after the initial education.<sup>148</sup> Continuing education may be done by internet or video court if first approved by the chief judge in the county of the examiner's residence.<sup>149</sup> The court may waive the initial education requirement for a person who has served as an examiner not less than 5 years.<sup>150</sup> The Code specifies how the education programs are developed and what entities are involved in that

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<sup>139</sup> § 745.306(1). This is consistent with current law in § 744.331(3)(a) but specifies that the members must be "qualified" and states the purpose of the appointment is to examine the alleged incapacitated person. However, the Code refers to persons appointed as an "examiner" and not as a "member" of an examining committee as current law does.

<sup>140</sup> Id. An attorney is added as a person who may serve as an examiner.

<sup>141</sup> Id.

<sup>142</sup> This is an addition to current law.

<sup>143</sup> § 745.306(2).

<sup>144</sup> Id. This is an addition to current law.

<sup>145</sup> § 745.306(3). This is consistent with current law with the modification that an interpreter must be "independent".

<sup>146</sup> § 745.306(4). This is an addition to current law as there are currently no specifications on how examiners are chosen and no prohibition against certain persons choosing or recommending the examiners.

<sup>147</sup> § 745.306(5).

<sup>148</sup> § 745.306(6).

<sup>149</sup> Id.

<sup>150</sup> Id.

process.<sup>151</sup> Each person appointed as an examiner for the first time must file an affidavit with the court stating that the examiner has completed the education requirements or will do so within 4 months of the initial appointment, unless waived by the court.<sup>152</sup> The chief judge of the circuit must prepare a list of qualified examiners each year.<sup>153</sup> The clerk shall serve notice of the appointment to each examiner no later than 3 days after appointment.<sup>154</sup>

### **G. Examination of Alleged Incapacitated Person**

Each examiner, independent from the other examiners, must interview the alleged incapacitated person and must determine the alleged incapacitated person's ability to exercise those rights specified in § 745.303.<sup>155</sup> In addition to the examination, each examiner must have access to, and may consider, previous medical and mental health examinations of the person, including, but not limited to, habilitation plans, school records, psychological and psychosocial reports and other related information voluntarily offered for use by the alleged incapacitated person or the petitioner.<sup>156</sup> The examiners may communicate among themselves as well as with the attorney for the alleged incapacitated person and the petitioner's counsel.<sup>157</sup> In addition, the examiners shall be provided a copy of the petition to determine incapacity.<sup>158</sup>

The examiner may exclude all persons, other than the alleged incapacitated person and the alleged incapacitated person's attorney, from being present at the time of the examination, unless otherwise ordered by the court.<sup>159</sup> This is an important alteration to ensure that the petition, or a third-party, is not able to improperly influence the examination interview.

Each examiner must, within 15 days after appointment, prepare and file with the clerk a report which describes the manner of conducting the examination and the methodology employed by the examiner.<sup>160</sup>

The examination must include:

1. A physical examination, if it deemed relevant to the examination and allowed by the alleged incapacitated person, which shall only be conducted by an examiner who is a

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<sup>151</sup> Id.

<sup>152</sup> § 745.306(7). This is consistent with current law, but slightly modified so that it is specified that an affidavit is only required for the first appointment as an examiner and that the court may waive this requirement.

<sup>153</sup> Id.

<sup>154</sup> § 745.306(8).

<sup>155</sup> § 745.307(1). This does not substantially change current law, but the new Code requires that the examiners conduct the interviews independent from the other examiners.

<sup>156</sup> Id. This amends current law to allow examiners to now consider information voluntarily provided by the petitioner.

<sup>157</sup> Id. This alters current law to explicitly authorize examiners to communicate with the attorneys for both the alleged incapacitated person and for the petitioner.

<sup>158</sup> Id. This requirement is an addition to current law.

<sup>159</sup> § 745.307(2). This is an addition to current law to prevent interference with the interviews of alleged incapacitated persons.

<sup>160</sup> § 745.307(3). The requirement for the examiner to describe the manner of conducting the examination and methodology used by the examiner is an addition to current law.

registered nurse, nurse practitioner, or physician.<sup>161</sup> Other professionals serving as examiners may conduct a visual examination of the alleged incapacitated person's physical appearance to determine if there are any visible signs of abuse, injury, or illness.<sup>162</sup>

2. A mental health examination, which may consist of, but not be limited to, questions related to orientation, current events, and personal identification;<sup>163</sup> and

3. A functional assessment to evaluate the alleged incapacitated person's ability to perform activities of daily living which include preparing food, eating, bathing, dressing, ambulation, toileting, and mobility.<sup>164</sup>

If any of these aspects of the examination is not reported or cannot be accomplished for any reason, the written report must explain the reasons for its omission.<sup>165</sup>

## **H. Examination Reports**

Each examiner's written report must be verified and include, to the extent of the examiner's skill and experience:<sup>166</sup>

1. A diagnosis, prognosis, and recommended level of care.<sup>167</sup>

2. An evaluation of the ward or alleged incapacitated person's ability to retain certain rights.<sup>168</sup>

3. The results of the examination and the examiner's assessment of information provided by the attending or primary care physician, if any, and of any other reports or written material provided to the examiner.<sup>169</sup> The examiner must consult the alleged incapacitated person's primary care physician or explain the reason why such consultation was not held.<sup>170</sup>

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<sup>161</sup> § 745.307(3)(a). This alters current law by specifying that the physical examination may only be done by certain professionals serving as examiners and only if the alleged incapacitated person allows it.

<sup>162</sup> Id.

<sup>163</sup> § 745.307(3)(b). The description of the examination clarifies current law.

<sup>164</sup> § 745.307(3)(c). The stated purpose of the assessment clarifies current law.

<sup>165</sup> Id.

<sup>166</sup> § 745.308(1). This alters current law by requiring verification of the reports and limits the content to "the extent of the examiner's skill and experience".

<sup>167</sup> § 745.308(1)(a).

<sup>168</sup> § 745.308(1)(b).

<sup>169</sup> § 745.308(1)(c). This alters current law to require the examiner to provide an assessment any other reports or written material provided to the examiner in the course of the examination.

<sup>170</sup> Id. This alters current law to require the examiner to explain why no consultation occurred with the primary care physician, the consultation was not held.

4. A description of any functional areas in which the person lacks the capacity to exercise rights, the extent of that incapacity, and the factual basis for the determination that the person lacks that capacity.<sup>171</sup>
5. The names of all persons present during the time the examiner conducted his or her examination.<sup>172</sup> If a person other than the person who is the subject of the examination supplies answers posed to the alleged incapacitated person, the report must include the response and the name of the person supplying the answer.<sup>173</sup>
6. The date, place, and time the examiner conducted his or her examination.<sup>174</sup>

The clerk must serve each examiner's report on the petitioner and on the attorney for the alleged incapacitated person within 3 days after the report is filed and at least 10 days before the hearing on the petition, and shall file a certificate of service in the incapacity proceeding.<sup>175</sup> If any examiners' reports are not completed and served timely, the petitioner and attorney for the alleged incapacitated person may waive the 10 day service requirement and consent to the consideration of the report by the court at the adjudicatory hearing or may seek a continuance of the hearing.<sup>176</sup>

## **I. Consideration of Examination Reports**

The court shall consider the written examination reports without requiring testimony of the examiners, unless there is an objection by the alleged incapacitated person or the petitioner to all or any portion of the reports being admitted into evidence.<sup>177</sup> The objection must be in writing, served on the other party no later than 5 days before the adjudicatory hearing, and state the basis upon which the challenge to the admissibility is made.<sup>178</sup> The court shall apply the rules of evidence to any objection that is timely filed and served and for good cause, the court may extend the time to file and serve the written objection.<sup>179</sup>

If all examiners conclude that the alleged incapacitated person is not incapacitated in any respect, the court shall dismiss the petition unless a verified motion challenging the examiners' conclusions is filed by petitioner within 10 days after the last examination report is filed and served.<sup>180</sup> The verified motion must make a reasonable showing by evidence in the record or

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<sup>171</sup> § 745.308(1)(d). This clarifies current law by requiring a description of "any functional areas" instead of "any matters".

<sup>172</sup> § 745.308(1)(e).

<sup>173</sup> *Id.*

<sup>174</sup> § 745.308(1)(f). This adds "place" to the requirements under current law.

<sup>175</sup> § 745.308(2). This is consistent with current law but removes a required method of service.

<sup>176</sup> § 745.308(3).

<sup>177</sup> § 745.309(1).

<sup>178</sup> § 745.309(2). This is consistent with current law.

<sup>179</sup> *Id.*

<sup>180</sup> § 745.309(3). This is a substantial change to current law in response to *Rothman v. Rothman*, 93 So.3d 1052 (Fla. 4th DCA 2012). Currently, under § 744.331(4), if a majority of the examining committee members conclude that the alleged incapacitated person is not incapacitated in any respect, the court shall dismiss the petition. The court has no discretion and the petitioner has no recourse. This change will provide the court with discretion to make more accurate determinations of an alleged incapacitated person's condition and will allow additional evidence to be

proffered, that a hearing on the petition to determine incapacity is necessary.<sup>181</sup> The court shall rule on the verified motion as soon as practicable.<sup>182</sup> The court shall hold a hearing to consider evidence concerning the propriety of dismissal or the need for further examination of the alleged incapacitated person.<sup>183</sup> If the court finds that the verified motion is filed in bad faith, the court may impose sanctions under § 745.312(3).<sup>184</sup>

## **J. Adjudicatory Hearing**

Upon appointment of the examiners, the court shall set the date for hearing of the petition and the clerk shall serve notice of hearing on the petitioner, the alleged incapacitated person, and next of kin identified in the petition for determination of incapacity.<sup>185</sup> The date of the hearing must be set no more than 20 days after the required date for filing the reports of the examiners, unless good cause is shown.<sup>186</sup> The adjudicatory hearing must be conducted in a manner consistent with due process and the requirements of part III of this code.<sup>187</sup>

The alleged incapacitated person has the right to be present at the adjudicatory hearing and may waive that right.<sup>188</sup> A finding of limited or total incapacity of the person must be established by clear and convincing evidence.<sup>189</sup>

## **K. Order Determining Incapacity**

If the Court finds that a person is incapacitated, the court must enter an order specifying the extent of incapacity that specifies the rights that a person is incapable of exercising.<sup>190</sup> An order determining total incapacity must contain factual findings demonstrating that the individual is totally without capacity to meet essential requirements for the person's health and safety and to manage property.<sup>191</sup> The Order is proof of the person's incapacity until further order of the

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presented to the court to assist with that decision, but still provides quick access to a dismissal in the event a person who is the subject of a guardianship proceeding is not incapacitated.

<sup>181</sup> Id. This allows the court discretion to determine whether evidence may exist to justify further proceedings or the case should be dismissed.

<sup>182</sup> Id.

<sup>183</sup> Id.

<sup>184</sup> Id. This is proposed to prevent bad faith filings when incapacity proceedings should be dismissed.

<sup>185</sup> § 745.310(1). This alters current law by adding the requirement that the clerk serve notice of the hearing on the petitioner, the alleged incapacitated person, and next of kin identified in the petition for determination of incapacity.

<sup>186</sup> Id. This slightly alters current law by adjusting the date by which the hearing must be set to 20 days after the required due date for filing the examiner's reports rather than 10 days, but no later than 30 days after the last report is actually filed.

<sup>187</sup> Id. This is consistent with current law.

<sup>188</sup> § 745.310(2). This slightly alters current law that requires the alleged incapacitated person to be present unless waived by the person or the person's attorney or unless good cause is shown for the absence.

<sup>189</sup> § 745.310(3).

<sup>190</sup> § 745.311(1).

<sup>191</sup> § 745.311(2).



court.<sup>192</sup> An order finding that a person is incapacitated to make any gift or disposition of property creates a rebuttable presumption that the person lacks testamentary capacity.<sup>193</sup>

The clerk must serve the order on the incapacitated person after it has been filed.<sup>194</sup> The clerk must also serve any order that removes the right to have a driver's license and operate motor vehicles on the Florida Department of Highway Safety and Motor Vehicles.<sup>195</sup> Finally, the clerk shall record orders determining incapacity in the public records in the county in which the order was entered, which serves as notice of the incapacity.<sup>196</sup>

## L. Fees in Incapacity Proceedings

The examiners and attorney appointed under this part are entitled to reasonable fees to be determined by the court.<sup>197</sup> If a guardian is appointed, fees for the examiners and attorney for the ward shall be paid from the property of the ward, or by the state, if the ward is indigent.<sup>198</sup> The state shall have a creditor's claim against the ward's property for any amounts paid under this section.<sup>199</sup> The state must file its claim within 90 days after the entry of an order awarding attorney and examiner fees or it is barred.<sup>200</sup> Upon petition by the state for payment of the claim, the court shall enter an order authorizing payment by the guardian from the property of the ward in the amount determined by the court, if any.<sup>201</sup> The state shall keep a record of the payments.<sup>202</sup>

The court may assess costs and attorney's fees against the petitioner if the petition to determine incapacity is dismissed and the court finds that the petition was filed in bad faith.<sup>203</sup> If the petition to determine incapacity is dismissed without a finding of bad faith on the part of the petitioner, the court appointed attorney shall be paid a reasonable fee in the same manner as the payment made to private court-appointed counsel set forth in § 27.5304.<sup>204</sup> The Code also allows payment out of the incapacitated persons funds when there is a finding of incapacity but the Court determines alternatives to guardianship are present and sufficiently address the needs of the incapacitated person, making a guardianship unnecessary.<sup>205</sup> The fees of the examiners shall

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<sup>192</sup> § 745.311(3).

<sup>193</sup> *Id.* This is consistent with current caselaw in Florida. *See, American Red Cross v. Estate of Haynsworth*, 708 So.2d 602 (Fla. 3d DCA 1989) (will executed after testator has been declared legally incompetent shifts burden of going forward with evidence of testamentary capacity to will proponent.)

<sup>194</sup> § 745.311(4). This alters current law by specifying that the clerk must serve the order after it is filed.

<sup>195</sup> § 745.311(5). This is an addition to current law.

<sup>196</sup> § 745.311(6). This is addition to current law, which currently only requires filing the order and the filing serves as notice of incapacity.

<sup>197</sup> § 745.312(1). This is consistent with current law.

<sup>198</sup> § 745.312(2). This is consistent with current law.

<sup>199</sup> *Id.*

<sup>200</sup> *Id.*

<sup>201</sup> *Id.*

<sup>202</sup> *Id.*

<sup>203</sup> § 745.312(3).

<sup>204</sup> § 745.312(4)(a). This clarifies current law by awarding reasonable fees to court-appointed counsel even when the petition to determine incapacity is dismissed. The statute does not reference fees to the emergency temporary guardian and the attorney for the emergency temporary guardian if there is no determination of incapacity because the Committee does not intend to alter current law, which allows these fees to be awarded from the assets of the alleged incapacitated person. (*see In re Guardianship of Beck*, 204 So.3d 143 (Fla. 2d DCA 2016)).

<sup>205</sup> § 745.312(4)(b). This is a change from current law which created a difficult situation in which court appointed counsel could not seek payment from the incapacitated person's assets where there is a finding of incapacity but for

be paid upon court order as expert witness fees under § 29.004(6).<sup>206</sup> The petitioner shall also reimburse the state courts system for any amounts paid above upon a finding of bad faith.<sup>207</sup>

#### **Part IV: Restoration to Capacity**

When a person previously determined to be incapacitated has recovered or improved, the court must consider whether some or all of the rights that were removed should be restored to the person. Part IV of the Code deals with restoration to capacity and specifically, suggestions of capacity<sup>208</sup>, examinations of the ward<sup>209</sup>, objections and hearings<sup>210</sup>, consideration of examination reports<sup>211</sup>, and orders restoring capacity<sup>212</sup>.

##### **A. Suggestion of Capacity**

A suggestion of capacity must be filed in the court in which the guardianship is pending.<sup>213</sup> A guardian, the ward, or any other interested person, may file a suggestion of capacity.<sup>214</sup> It must be verified if it is filed by someone other than the ward.<sup>215</sup> The suggestion of capacity must describe the changed circumstances which would indicate that the ward is currently capable of exercising some or all of the rights which were removed.<sup>216</sup>

Within 5 days after a suggestion of capacity is filed, the clerk shall serve notice of the filing of the suggestion of capacity and a copy of the suggestion of capacity on the ward, the guardian, the attorney for the ward, if any, the ward's known next of kin, and any other interested persons designated by the court.<sup>217</sup> Notice of the suggestion of capacity need not be served on the person who filed the suggestion of capacity.<sup>218</sup> The notice must specify that any objections to the suggestion of capacity or to restoration of the ward's rights must be filed within 10 days after service of the examination report is served.<sup>219</sup>

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various reasons a guardian may not be appointed. The payment to court-appointed counsel is pursuant to a reasonableness determination under § 745.113.

<sup>206</sup> Id. This is consistent with current law.

<sup>207</sup> § 745.312(3). This alters current law.

<sup>208</sup> § 745.401.

<sup>209</sup> § 745.402.

<sup>210</sup> § 745.403.

<sup>211</sup> § 745.404.

<sup>212</sup> § 745.405.

<sup>213</sup> § 745.401(1).

<sup>214</sup> § 745.401(2)(a). This alters clarifies current law to specify that a guardian may file a suggestion of capacity, although a guardian would be included as such a person under current law as an interested person.

<sup>215</sup> Id.

<sup>216</sup> Id. This alters current law under § 744.464(2)(a) that only requires a suggestion of capacity to state that the ward is currently capable of exercising some or all of the right which were removed but does not require a description of the changed circumstances to indicate that the ward's condition has improved.

<sup>217</sup> § 745.401(2)(b). This alters current law to now include a time by which the clerk shall serve notice of filing of the suggestion of capacity and a copy of the suggestion of capacity, that a copy of the suggestion shall be included, and adds the ward's known next of as parties who receive the notice and copy. This removes the requirement under § 744.464(2)(c) that formal notice must be served on the guardian.

<sup>218</sup> Id.

<sup>219</sup> § 745.401(2)(c). This is an addition to current law, which does not specify the contents of the notice.

## **B. Examination of Ward**

The court must appoint a physician who is qualified to be an examiner under the Code to be an examiner within 5 days after a suggestion of capacity is filed to examine the ward.<sup>220</sup> The physician is not excluded if he previously served as an examiner in the ward's incapacity proceeding.<sup>221</sup> The physician must examine the ward and file a verified report with the court within 15 days after appointment.<sup>222</sup> The examination must be conducted and the report prepared in the same manner as reports of examiners.<sup>223</sup> The clerk must serve the report on the same individuals who received the notice of the suggestion of capacity within 5 days after filing the report.<sup>224</sup>

## **C. Objection and Hearing**

Objection to the examination report or to restoration of the ward must be filed within 10 days after service of the report.<sup>225</sup> In the case of either a timely objection or a report which suggests that full restoration is not appropriate, the court shall set the matter to be heard within 30 days after the examination report is filed, unless good cause is shown.<sup>226</sup> If the ward does not have an attorney, the court shall appoint one to represent the ward.<sup>227</sup> Notice of the hearing and copies of the objections and medical examination report shall be served on the ward, the guardian, the ward's next of kin, and any other interested persons as directed by the court.<sup>228</sup> The court shall give priority to a hearing on suggestion of capacity and shall advance the cause on the calendar.<sup>229</sup>

## **D. Consideration of Examination Report**

The court may consider the examination report without requiring testimony of the examiner, unless an objection is filed.<sup>230</sup> Any objection must be filed and served on all other interested persons at least 5 days prior to any hearing at which the report is to be considered.<sup>231</sup>

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<sup>220</sup> § 745.402(1). This alters current law by requiring that the physician be appointed within 5 days after the notice is filed rather than immediately and requires that the physician be qualified to serve as an examiner under the Code.

<sup>221</sup> *Id.*

<sup>222</sup> *Id.* This alters current law by requiring that the report be verified and shortens the timeframe for filing from 20 days after the appointment to 15 days after the appointment.

<sup>223</sup> *Id.* Current law does not specify how the examination must be conducted and the report prepared.

<sup>224</sup> § 745.402(2). Current law does not prescribe a time for serving the medical examination report or who shall make such service.

<sup>225</sup> § 745.403(1). This alters current law under § 744.464(2)(d) which requires objection to be filed within 20 days after service of the notice of the suggestion of capacity.

<sup>226</sup> § 745.403(2). This adds to current law a time period in which the hearing must occur.

<sup>227</sup> § 745.403(3). This is consistent with current law.

<sup>228</sup> § 745.403(4). This is consistent with current law.

<sup>229</sup> § 745.403(5). This is consistent with current law.

<sup>230</sup> § 745.404(1). The person who filed the suggestion of capacity, the guardian, any person who has filed an objection to the suggestion of capacity, or the incapacitated person may file an objection to the examination report being considered by the court. Current law does not specify the method of the court's consideration of the examination report or how to handle objections to the report.

<sup>231</sup> *Id.* This is consistent with the timing requirement for objections to reports of examiners in incapacity proceedings under the Code.

The objection may be to all or any portion of the examination report being introduced into evidence and must be in writing, state the basis upon which the challenge to admissibility is made, and filed and served on the other party no later than 5 days before the hearing where the report will be considered.<sup>232</sup> If an objection is timely filed and served, the court shall apply the rules of evidence in determining the report's admissibility.<sup>233</sup> For good cause shown, the court may extend the time to file and serve the written objection.<sup>234</sup>

### **E. Order Restoring Capacity**

If the examination report concludes that the ward should be restored to full capacity, there are no objections timely filed, and the court is satisfied that the examination report establishes by a preponderance of the evidence that restoration of all of the ward's rights is appropriate, the court must enter an order restoring all of the rights which were removed from the ward without hearing.<sup>235</sup> The order must be entered within 10 days after expiration of the time for objection.<sup>236</sup>

At the conclusion of any hearing to consider restoration of capacity, the court shall make specific findings of fact, and based on a preponderance of the evidence enter an order denying the suggestion of capacity or restoring all or some of the rights of the ward.<sup>237</sup>

If only some rights are restored to the ward, the order must state which rights are restored and amended letters shall be issued to reflect the changed authority of the guardian.<sup>238</sup> A guardian of person shall prepare a new guardianship plan which addresses only the remaining rights retained by the guardian.<sup>239</sup> The guardian must file a copy of the new plan with the court within 60 days after issuance of amended letters.<sup>240</sup>

Additional rights may not be removed from a ward in a proceeding to consider a suggestion of capacity.<sup>241</sup>

## **Part V: Qualifications of Guardians**

It is important to have qualified guardians handling the affairs of incapacitated wards. Part V lays out the requirements and qualifications for an individual to be eligible to serve. This includes who may be appointed guardian of a resident ward<sup>242</sup>, nonprofit corporate guardians<sup>243</sup>,

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<sup>232</sup> § 745.404(2).

<sup>233</sup> Id. This is consistent with the consideration of examination reports in incapacity proceedings under the Code.

<sup>234</sup> Id. This is consistent with the consideration of examination reports in incapacity proceedings under the Code.

<sup>235</sup> § 745.405(1). This alters current law to require that an order of restoration can only be entered without a hearing if the examination report recommends a restoration to full capacity.

<sup>236</sup> Id. Current law does not include a time within which the order must be entered.

<sup>237</sup> § 745.405(2). This is consistent with current law.

<sup>238</sup> § 745.405(3). This alters current law to require the issuance of amended letters if rights are restored.

<sup>239</sup> Id. This is consistent with current law.

<sup>240</sup> Id. The timing is consistent with current law, but the period begins to run from the issuance of amended letters rather than the entry of the order.

<sup>241</sup> § 745.405(4). This clarifies current law.

<sup>242</sup> § 745.501.

<sup>243</sup> § 745.502.

disqualified persons<sup>244</sup>, the credit and criminal investigation<sup>245</sup>, and education requirements for nonprofessional guardians.<sup>246</sup>

### **A. Who May Be Appointed Guardian of a Resident Ward**

Any resident of this state, not disqualified by this Part, who has full legal rights and is 18 years of age or older is qualified to act as a guardian of a ward.<sup>247</sup> A nonresident of the state may serve as guardian of a resident ward if the nonresident is: (i) related by lineal consanguinity to the ward; (ii) a legally adopted child or adoptive parent of the ward; (iii) a spouse, brother, sister, uncle, aunt, niece, or nephew of the ward, or someone related by lineal consanguinity to any such person; or (iv) the spouse of a person otherwise qualified under this section.<sup>248</sup>

A judge may not act as guardian, except when he or she is related to the ward by blood, marriage, or adoption, or has maintained a close relationship with the ward or the ward's family and serves without compensation.<sup>249</sup>

### **B. Nonprofit Corporate Guardians**

A nonprofit corporation organized for religious or charitable purposes and existing under the laws of this state may be appointed guardian for a ward.<sup>250</sup> The corporation must employ at least one professional guardian.<sup>251</sup>

### **C. Disqualified Persons**

The Court is required to inquire into and consider potential disqualifications prior to appointment of a guardian.<sup>252</sup> No person who has been convicted of a felony or who, due to incapacity or illness, is incapable of discharging guardianship duties shall be appointed to act as guardian.<sup>253</sup> Further, no person who has been judicially determined to have committed abuse, abandonment, or neglect against a child as defined in § 39.01 or § 984.03(1), (2), and (37), or who has been found guilty of, or entered a plea of nolo contendere or guilty to, any offense prohibited under § 435.03, Chapter 825 or under any similar statutes of another jurisdiction, shall be appointed to act as a guardian.<sup>254</sup> Further, a non-professional guardian may only serve as guardian for a single non-related ward at any time.<sup>255</sup>

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<sup>244</sup> § 745.503.

<sup>245</sup> § 745.504.

<sup>246</sup> § 745.505.

<sup>247</sup> § 745.501(1)(a). This is consistent with current law.

<sup>248</sup> § 745.501(1)(b). This is consistent with current law.

<sup>249</sup> § 745.501(2). This is consistent with current law.

<sup>250</sup> § 745.502. This is consistent with current law.

<sup>251</sup> Id. This alters current law to require the nonprofit corporation to employ at least one professional guardian regardless of whether the nonprofit corporate guardian charges fees against the assets or property of the ward for its services.

<sup>252</sup> § 745.602(3)(e).

<sup>253</sup> § 745.503(1). This is consistent with current law.

<sup>254</sup> Id. This is consistent with current law.

<sup>255</sup> § 745.503(7).

A person providing substantial services or products to the proposed ward in a professional or business capacity may not be appointed guardian and retain that previous professional or business relationship, unless otherwise provided in this section.<sup>256</sup> A creditor or provider of health care services to the ward, whether direct or indirect, may not be appointed the guardian of the ward, unless the court explicitly finds that there is no conflict of interest with the ward.<sup>257</sup> A person may not be appointed a guardian if he or she is in the employ of any person, agency, government, or corporation that provides services to the proposed ward in a professional or business capacity, except that a person so employed may be appointed if he or she is the spouse, adult child, parent, or sibling of the proposed ward or the court determines that any potential conflict of interest is insubstantial and that the appointment would be in the proposed ward's best interest.<sup>258</sup> The court may not appoint a guardian in any other circumstance in which the proposed guardian has a conflict of interest with the ward.<sup>259</sup>

If a guardian becomes unqualified to serve after appointment, the guardian shall file a resignation and notice of disqualification within 20 days of learning that the guardian is unqualified.<sup>260</sup> A guardian who fails to comply with this section may be personally liable for costs, including attorney fees, incurred in any removal proceeding if the guardian is removed. This liability extends to a guardian who does not know, but should have known, of the facts that would have required the guardian to resign or to file and serve notice as required herein.<sup>261</sup> This liability shall be cumulative to any other provided by law.<sup>262</sup>

#### **D. Credit and Criminal Investigation**

A non-professional who is seeking to be appointed as guardian shall submit to a credit history investigation and a level 2 background screening within 3 days of filing a petition for appointment of guardian.<sup>263</sup> The court must consider the reports before appointing a guardian.<sup>264</sup>

The court may require the satisfactory completion of a criminal history record check for nonprofessional guardians, which is satisfied by undergoing a state and national criminal history record check using fingerprints.<sup>265</sup> The results are transmitted to the clerk, who shall maintain the results in the court file of the nonprofessional guardian.<sup>266</sup>

Professional and public guardians must satisfactorily complete a criminal history record check by undergoing an electronic fingerprint criminal history record check using any electronic fingerprinting equipment used for criminal history record checks.<sup>267</sup> The law enforcement entity completing the record check must transmit the results to the clerk and the Office of Public and

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<sup>256</sup> § 745.503(2). This is consistent with current law.

<sup>257</sup> § 745.503(3). This is consistent with current law.

<sup>258</sup> § 745.503(4). This is consistent with current law.

<sup>259</sup> § 745.503(5). This is consistent with current law.

<sup>260</sup> § 745.503(6). This is an addition to current. law.

<sup>261</sup> Id.

<sup>262</sup> Id.

<sup>263</sup> § 745.504(1). This is consistent with current law.

<sup>264</sup> Id.

<sup>265</sup> § 745.504(2).

<sup>266</sup> Id.

<sup>267</sup> § 745.504(3). Public guardians are now specifically included.

Professional Guardians and the clerk shall maintain the results in the court file of the professional guardian's case.

A professional guardian and each of their employees must complete a level 2 background screening before and at least once every 5 years after the date the guardian is registered with the Office of Public and Professional Guardians and the professional guardian and each employee who has direct contact with the ward or access to the ward's assets must complete a level 1 background screening at least once every 2 years after the date the guardian is registered.<sup>268</sup> Each employee required to submit to a background check must do so within 30 days of employment or meeting the requirement for the background check.<sup>269</sup>

The Department of Law Enforcement shall search all arrest fingerprints against the fingerprints retained in the statewide system and any arrest record identified must be reported to the clerk.<sup>270</sup> The clerk must forward any arrest record received for a professional guardian to the Office of Public and Professional Guardians within 5 days of receipt.<sup>271</sup> At least once every 5 years, the Office of Public and Professional Guardians must request that the Department of Law Enforcement forward the fingerprints maintained under this section to the Federal Bureau of Investigation.<sup>272</sup>

A professional guardian, and each employee of a professional guardian who has direct contact with the ward or access to the ward's assets, must allow, at his or her own expense, an investigation of his or her credit history before and at least once every 2 years after the date of the guardian's registration with the Office of Public and Professional Guardians.<sup>273</sup>

Office of Public and Professional Guardians may inspect, at any time, the results of any credit or criminal history record check of a public or professional guardian conducted under this section.<sup>274</sup> The office shall maintain copies of the credit or criminal history record check results in the guardian's registration file.<sup>275</sup> If the results of a credit or criminal investigation of a public or professional guardian have not been forwarded to the Office of Public and Professional Guardians by the investigating agency, the clerk of the court shall forward copies of the results of the investigations to the office upon receiving them.<sup>276</sup>

A trust company, a state banking corporation or state savings association authorized and qualified to exercise fiduciary powers in this state, or a national banking association or federal

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<sup>268</sup> § 745.504(4)(a). This alters current law for requiring a level 1 background check from employees of professional guardians who have a fiduciary responsibility to a ward to employees who have direct contact with the ward or access to the ward's assets.

<sup>269</sup> Id. This is an addition to current law.

<sup>270</sup> § 745.504(4)(c).

<sup>271</sup> Id.

<sup>272</sup> Id.

<sup>273</sup> § 745.504(5)(a).

<sup>274</sup> § 745.504(6).

<sup>275</sup> Id.

<sup>276</sup> Id.

savings and loan association authorized and qualified to exercise fiduciary powers in this state are not required to submit to credit and criminal investigations.<sup>277</sup>

The court may require a guardian or the guardian's employees to submit to a credit investigation and level 1 background check at any time and the results may be considered during a removal proceeding.<sup>278</sup> The clerk shall maintain a file on each professional guardian appointed by the court and retain documentation of the result of any credit or criminal investigation.<sup>279</sup> The documentation of the result of any credit or criminal investigation for a nonprofessional guardian shall be maintained as a confidential record in the case file for the guardianship.<sup>280</sup>

## **E. Education Requirements for Nonprofessional Guardians**

Each ward is entitled to a guardian competent to perform the duties of a guardian necessary to protect the interests of the ward.<sup>281</sup>

Each person appointed by the court to be a guardian, other than a parent who is the guardian of the property of a minor child, must receive a minimum of 8 hours of instruction and training which covers: (a) legal duties and responsibilities of the guardian; (b) rights of the ward; (c) use of guardianship assets; (d) availability of local resources to aid the ward; and (e) the preparation of guardianship plans, reports, inventories, and accountings.<sup>282</sup>

Each person appointed by the court to be the guardian of the property of his or her minor child must receive a minimum of 4 hours of instruction and training that covers: (a) legal duties and responsibilities of a guardian of property; (b) preparation of an initial inventory and guardianship accountings; and (c) use of guardianship assets.<sup>283</sup>

Each person appointed to be a guardian must complete these requirements within 4 months after appointment.<sup>284</sup> The requirements must be completed through a course approved by the chief judge of the circuit court and taught by a court-approved person or organization, such as community or junior colleges, guardianship organizations, and local bar associations or The Florida Bar.<sup>285</sup> The expenses incurred to satisfy the requirements may be paid from the ward's estate, unless the court directs that the guardian individually pay the expenses.<sup>286</sup>

The court may waive some or all the requirements or impose additional requirements.<sup>287</sup> This decision is made on a case-by-case basis and, in making its decision, shall consider the

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<sup>277</sup> § 745.504(7).

<sup>278</sup> § 745.504(8).

<sup>279</sup> § 745.504(9).

<sup>280</sup> *Id.*

<sup>281</sup> § 745.505(1). This is consistent with current law.

<sup>282</sup> § 745.505(2). The topic of use of guardianship assets is now included.

<sup>283</sup> § 745.505(3). This is consistent with current law.

<sup>284</sup> § 745.505(4). This is consistent with current law.

<sup>285</sup> *Id.*

<sup>286</sup> § 745.505(5). This is consistent with current law.

<sup>287</sup> § 745.505(6). This is consistent with current law.



experience and education of the guardian, the duties assigned to the guardian, and the needs of the ward.<sup>288</sup>

This section does not apply to professional guardians.<sup>289</sup>

## **Part VI: Appointment of Guardians**

One of the most important aspects of Florida's guardianship system is, when necessary, the appointment of a qualified and situationally appropriate guardian to act for an incapacitated individual. Part VI of the Code addresses the required information to be submitted by a nominated guardian<sup>290</sup>, the considerations to be weighed by the Court in selecting a guardian<sup>291</sup>, the procedural requirements of a Petition for Appointment of a Guardian<sup>292</sup>, bonding requirements<sup>293</sup>, and, most importantly, the potential alternatives to guardianship which must be considered prior to any appointment.<sup>294</sup> Part VI is intended to be the primary Code Part in relation to the appointment portion of a guardianship proceeding, to be utilized only after a determination of incapacity has been made.

### **A. Alternatives to Guardianship – Powers of Attorney and Advance Directives**

Florida has a longstanding policy that guardianship is intended to act as a last resort for the incapacitated.<sup>295</sup> The Code builds on this policy by expanding the explicitly stated alternatives to guardianship which must be considered by the Court prior to the appointment of a guardian.<sup>296</sup> The Code requires that the court make an explicit finding whether the incapacitated person, prior to adjudication of incapacity, execute an advance directive under Florida Statutes Chapter 765 or a durable power of attorney under Florida Statutes Chapter 709, and if those documents sufficiently address the needs of the incapacitated person.<sup>297</sup> To the extent such documents are present but do not sufficiently address the person's needs, the Court must specify in its order appointing guardian and the letters of guardianship exactly what authority the guardian exercises and what authority these surrogate or agent is to exercise.<sup>298</sup> In addition, if a potential alternative to guardianship is discovered after issuance of letters of guardianship, the Court may consider the effect on the powers of the guardian upon petition by any interested person.<sup>299</sup>

In addition, § 745.610(2) expands the current authority of the court to suspend, modify, or revoke the authority of a surrogate by granting similar authority over a power of attorney. The court may only exercise such authority upon the filing of a verified petition by an interested

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<sup>288</sup> Id.

<sup>289</sup> § 745.505(7). This is consistent with current law.

<sup>290</sup> § 745.601.

<sup>291</sup> § 745.602.

<sup>292</sup> §§ 745.603-.605.

<sup>293</sup> §§ 745.606.

<sup>294</sup> § 745.610.

<sup>295</sup> See, § 745.102(1); *Smith v. Lynch*, 821 So.2d 1197, 1199 (Fla. 4th DCA 2002); *In re: Guardianship of Fuqua*, 646 So.2d 795, 796 (Fla. 1st DCA 1994).

<sup>296</sup> § 745.610(1).

<sup>297</sup> § 745.610(1) expands the § 744.3115 requirement that the court make a finding as to whether an advance directive under chapter 765 was present. § 744.3115 had no similar requirement for durable powers of attorney.

<sup>298</sup> This is intended to avoid potential overlapping authority by a guardian and an agent/surrogate.

<sup>299</sup> § 745.610(3).

person and any suspension, modification, or revocation must be supported by a written finding of facts.<sup>300</sup>

## **B. Procedures for Appointment of a Guardian**

When there are not alternatives which sufficiently address the needs of the incapacitated person, a guardian will need to be appointed. The main document facilitating this appointment is a verified Petition for Appointment of Guardian filed pursuant to § 745.603.<sup>301</sup> The petition lays out the required statements of the petitioner based on the petitioner's personal knowledge<sup>302</sup> meant to apprise the Court of the nominee's background, association with the ward, the anticipated scope of the guardianship, and the identity of any previous fiduciary designations made by the ward.<sup>303</sup> The petition is also required to state whether the nominee is a professional guardian and whether the incapacitated person is or was previously under guardianship.<sup>304</sup> The petitioner is also required to lay out the reasons guardian advocate or other alternative to guardianship is insufficient to meet the incapacitated person's needs.<sup>305</sup> In the event that a suitable guardian cannot be located by the petitioner (who does not need to be the nominee), the petitioner can state this in the petition in order to request that the court appoint someone of its own determination.<sup>306</sup> In conjunction with the petition, any proposed guardian is required to file a verified information statement which details the guardian's qualifications, guardianship history, beneficial skills, and relation to the ward.<sup>307</sup>

If the petitioner is a professional guardian, the petitioner may not petition for their own appointment unless they are related to the alleged incapacitated person or minor.<sup>308</sup> The public guardian is excepted from this when seeking appointment for a person of limited financial means and all compensation of the public guardian would be paid from the OPPG or local government.

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<sup>300</sup> § 745.610(2). This alters current law which (a) grants the court this authority only over advance directives for healthcare under chapter 765 and (b) requiring a verified petition. § 744.3115 allows the court to exercise this authority on its own motion.

<sup>301</sup> See, § 744.334.

<sup>302</sup> § 745.603(1) alters the current standard which requires the information be to the best of the petitioner's knowledge and belief. This was done to curtail filings based on less than adequate information.

<sup>303</sup> § 745.603(1). § 745.603(1)(h) requires the petitioner to identify any executed pre-need guardian designation, healthcare surrogate designation, and power of attorney purportedly executed by the ward; to identify the appointee under those documents; and to list what efforts the petitioner took to locate such documents. The intention of this provision is to apprise the court of any potential alternatives and/or any indication of the ward's intention for who the ward may have desired to act. Further, the provision is meant to put the burden on petitioner to search for these documents by requiring a description of what efforts the petitioner made to locate the materials.

<sup>304</sup> § 745.603(3).

<sup>305</sup> Id.

<sup>306</sup> § 745.603(2).

<sup>307</sup> § 745.601(1). This expands current law to require nominees to give information on all wards that the nominee has served in the previous five years in order to apprise the court of the guardian's capacity to serve the ward as well as to apprise the court of the guardian's experience. § 744.3125. Additionally, the information statement requires the nominee to disclose financial dealings with the ward (i.e. services rendered to the ward, joint accounts, or known after-death beneficiary interests) intended to flush out any potential conflicts of interest. Nonprofit corporate guardians and public guardians are excused from filing an information statement in each case in lieu of their filing quarterly information statements with the clerk. § 745.601(2)-(3).

<sup>308</sup> § 745.603(4).

Prior to any hearing on the petition for appointment of guardian, petitioner is required to give reasonable notice of the petition and hearing to the incapacitated person, any current guardian, the incapacitated person's next of kin, and any interested persons as the court may direct.<sup>309</sup> The petition for appointment of guardian should be ruled on contemporaneously with the petition for determination of incapacity unless there is good cause for deferring ruling.<sup>310</sup> The petitioner is not required to serve additional notice of the hearing if the petition for appointment of guardian is heard at the conclusion of the incapacity hearing.<sup>311</sup> With regard to minors, formal notice is required to be served on each of the minor's parents.<sup>312</sup> If a parent is the petitioner, notice is not required if the other parent has consented to the appointment.<sup>313</sup>

In order to provide additional protections to the ward, the Code requires several explicit findings by the court when ruling on a petition for appointment of guardian.<sup>314</sup> First, in ruling on the petition for guardian the Court must consider whether there are alternatives to guardianship that will sufficiently address the needs of the incapacitated person.<sup>315</sup> The court is then required to find that guardianship constitutes the least restrictive alternative appropriate for the ward, reserving to the incapacitated person the right to make any decision commensurate with the person's ability to do so.<sup>316</sup>

After determination that a guardian is needed, the order must state the nature of the guardianship as either plenary or limited. If plenary, the order grants the guardian of person the right to exercise all delegable rights of the ward as to the ward's person and the guardian of property the right to exercise all delegable rights of the ward as to the ward's property.<sup>317</sup> If limited, the order must state that the guardian may only exercise those rights removed from the ward and specifically delegated to the guardian.<sup>318</sup> In support of the selected individual to serve, the order must make findings of fact to support why the person was selected.<sup>319</sup> The ward retains all rights which are not specifically delegated to the guardian in the court's order.<sup>320</sup> The order must also

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<sup>309</sup> § 745.604.

<sup>310</sup> § 745.605(6). To the extent the court does not rule contemporaneously, the court has the authority to appoint an emergency temporary guardian to exercise the incapacitated person's rights until the order on petition for appointment of guardian is entered. *See, L.Y. v. Dep't of Health*, 696 So.2d 430, 432 (Fla. 4th DCA 1997).

<sup>311</sup> § 745.604(1). Additional notice is required however if the petition is heard on a later date or if notice of the hearing was not timely served originally.

<sup>312</sup> § 745.604(2). To the extent a parent cannot be found, alternative informal notice may be sent to the parent's last known address.

<sup>313</sup> *Id.*

<sup>314</sup> § 745.605.

<sup>315</sup> § 745.605(1). This is a slight change from the Florida Guardianship Law which required this finding to be done in conjunction with the incapacity determination. This finding is more logically linked to the petition for appointment of guardian as it dictates the need for a guardian and the extent of the needed guardianship.

<sup>316</sup> § 745.605(5). The "appropriateness" of the alternative is an important insertion as it flags to the court the need to not only determine the presence of potential alternatives but whether they make sense for this incapacitated person.

<sup>317</sup> § 745.605(3).

<sup>318</sup> § 745.605(2).

<sup>319</sup> § 745.602(4).

<sup>320</sup> § 745.605(4).

specify the amount of any bond required of the guardian and whether a restricted depository account will be utilized.<sup>321</sup>

### C. Considerations in Choosing a Guardian

The court is required to appoint a person who is fit and proper and qualified to act as guardian.<sup>322</sup> The court is required to appoint a preneed guardian appointed by the ward unless the court determines that such appointment is contrary to the best interests of the ward.<sup>323</sup> If a preneed guardian is not appointed, the Code then instructs the court to give preference to the appointment of a guardian who is (a) related by blood, (b) has relevant educational or professional experiences, (c) has capacity to manage the assets involved, or (d) has the ability to meet the ward's needs.<sup>324</sup> The court is also required to consider the wishes expressed by the incapacitated person or minor over age 14.<sup>325</sup> The court may not give preference to someone based solely on the fact that such person previously acted as an emergency temporary guardian.<sup>326</sup> The court may hear testimony on these issues and in most cases will.

### D. Oath and Bond

Any guardian appointed under the Code is required to file an oath that the guardian “will faithfully perform the duties as guardian.”<sup>327</sup> This may be incorporated into the petition for appointment of guardian if the petitioner is also the nominated guardian.

Upon the appointment of a guardian, the court is required to determine whether a bond should be provided and/or whether a restricted depository account should be utilized.<sup>328</sup> The court has the discretion to determine whether a bond is needed at all and the amount of the bond that should be required.<sup>329</sup> The court also has discretion, for good cause, to increase or reduce the bond throughout the guardianship, this includes the ability to require additional bond from a professional guardian above the professional's blanket bond.<sup>330</sup> The Code makes clear that the premium of the guardian's bond is to be paid as an expense of the guardianship.<sup>331</sup>

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<sup>321</sup> § 745.605(7). The explicit requirement of court direction in the order as to bond and restricted depository is intended to clear up confusion for the guardian as to when such things are required. It has become common place for courts across the state to too often not consider these issues at all or to fall into routine requirements.

<sup>322</sup> § 745.602(2).

<sup>323</sup> § 745.602(1). This is consistent with § 744.312(1) which courts have held requires a factual determination of the court that a preneed guardian's appointment would be *contrary* to the ward's best interests in order to avoid appointment. *Koshenina v. Buvens*, 130 So.3d 276 (Fla. 1st DCA 2014) (deference should be given to the ward's selection and it is insufficient just to find that someone else would be better suited).

<sup>324</sup> § 745.602(2). This is consistent with the preferences laid out by § 744.312(2)(a)-(d).

<sup>325</sup> To the extent the alleged incapacitated person cannot express a preference, the wishes of the ward's next of kind should be considered. § 745.602(3)(d).

<sup>326</sup> § 745.602(6). This was place into the current law after a pattern emerged across the state in which courts were prone to “keeping the status quo” when an emergency temporary guardian was appointed, preferring to keep the current guardian in place over the appointment of someone else who may be better qualified under the statute.

<sup>327</sup> § 745.606; Fla. Prob. R. 5.600.

<sup>328</sup> § 745.605(7).

<sup>329</sup> § 745.607(1); § 745.607(5).

<sup>330</sup> § 745.607(4).

<sup>331</sup> § 745.607(7). This is consistent with and clarifies current Florida law.

## **E. Letters of Guardianship**

The document conveying the guardian's authority is the letters of guardianship.<sup>332</sup> The Code adds additional requirements to the letters of guardianship in order to better inform recipients of the letters what powers are held, and not held, by the guardian. While largely consistent with current Florida Statutes § 744.345, the Code now requires that the letters of guardianship explicitly state the authority held by the guardian versus any holder of a power of attorney (Chapter 709) or advance directive (Chapter 765).<sup>333</sup> In addition, the letters must specify whether the guardian is as to the person or property; limited or plenary; and what powers are held by a limited guardian.<sup>334</sup>

## **Part VII: Types of Guardianship**

Part VII of the Code addresses the types of guardianships, other than the traditional guardian appointed for an incapacitated individual after a determination of incapacity. These include guardians for minors, guardians for non-Florida residents, preneed guardians, and standby guardians. Because each of these types require specific statutory mechanics, they are addressed in separate sections of the Code narrowed to just the individual type. However, if appointed as guardian under any of these sections, the guardian is still bound by the remainder of the Code, including among other things the duties<sup>335</sup> and powers of guardians<sup>336</sup>, unless otherwise noted.

### **A. Emergency Temporary Guardians**

The position of emergency temporary guardian ("ETG") is utilized when a guardian is needed for an incapacitated person, or someone alleged to be incapacitated, and there is a circumstance which requires appointment faster than the process would ordinarily allow.<sup>337</sup> In addition, an emergency temporary guardianship is often utilized when a ward has been determined incapacitated but, because of a dispute as to who should act as guardian, the appointment of a permanent guardian is delayed.<sup>338</sup> The Code maintains these dynamics thorough § 745.701 and seeks to improve the procedural protections associated with the ETG position.

§ 745.701 maintains the recognized standard that an emergency temporary guardian is appropriate only when the court finds "there appears to be imminent danger that the physical or mental health or safety of the person will be seriously impaired or that the person's property is in danger of being wasted, misappropriated, or lost unless immediate action is taken."<sup>339</sup> While the

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<sup>332</sup> § 745.611(4) was included to clarify that the guardian's powers and duties accrue when the letters are issued, not upon the court's entry of an order appointing guardian. This was a commonly misunderstood point of law.

<sup>333</sup> § 745.611(4).

<sup>334</sup> § 745.611(1)-(2); § 745.106(12). The inclusion of specific listing of the powers held by the guardian is intended to avoid confusion.

<sup>335</sup> See, Code Part VIII – Duties of Guardians.

<sup>336</sup> See, Code Part IX – Guardians Powers.

<sup>337</sup> § 744.3031(1) requires a specific finding by the court that "there appears to be imminent danger that the physical or mental health or safety of the person will be seriously impaired or that the person's property is in danger of being wasted, misappropriated, or lost unless immediate action is taken."

<sup>338</sup> § 744.3031. This is an important dynamic to ensure on the one hand that an incapacitated individual is appropriately protected and, on the other, that the selection of an appropriate guardian is not rushed inappropriately.

<sup>339</sup> § 745.701(1).

Florida Guardianship Laws were not explicit as to the content of an order appointing an ETG, the Code improves upon this requiring that the court lay out the powers and duties of the ETG in compliance with Section 745.605(2).<sup>340</sup> The Code clarifies that the court may appoint an ETG when a permanent guardian's appointment is delayed, consistent with common practice, and clarifies that an ETG may be appointed upon resignation of a guardian when a successor's appointment is delayed.<sup>341</sup>

The Code increases the notice requirements for a petition for appointment of an ETG. Current law requires 24 hour notice of a petition prior to a hearing on the petition.<sup>342</sup> This may create a near-impossible situation for respondents who often are served with this document simultaneous with the initial petitions for determination of incapacity and petition for appointment of guardian. Respondents will then need to find representation, brief the attorney on the case, and have the attorney appear in what could be in less than a day. In order to balance (a) the need for expedited proceedings in emergency situations and (b) the need to allow parties to appropriately prepare; the Code expands the notice period from 24 hours to 3 days.<sup>343</sup> The Code, however, does allow for less notice upon a showing by the petition that substantial harm to the alleged incapacitated person would occur if the three days' notice period is observed.<sup>344</sup>

The Code also seeks to improve on ETG proceedings through changes to the duties and procedures for termination of the ETG. The Florida Guardianship Law requires that any ETG automatically terminate 90 days after issuance of letters or upon appointment of a guardian.<sup>345</sup> The Code institutes removal of the arbitrary day-limit, instead terminating upon the first to occur of (1) issuance of letters to the ETG's successor<sup>346</sup>, (2) a finding that the ward has capacity, or (3) the death of the ward.<sup>347</sup> The Code also requires that an ETG follow the discharge and accounting requirements laid out in Part XI of the Code upon termination.<sup>348</sup> Finally, the Code removes the prohibition on payment of the ETG and the ETG's counsel until after filing the ETG's final report.<sup>349</sup>

## **B. Standby Guardians<sup>350</sup>**

A standby guardian is an individual that can be selected by a currently serving guardian to step-in for the guardian upon the death, removal, or resignation of the guardian.<sup>351</sup> The standby

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<sup>340</sup> Id. Reference to § 745.605(2) requires that the order designate whether the ETG is limited or plenary and specify the powers and duties of the ETG.

<sup>341</sup> § 745.701(3)-(4).

<sup>342</sup> § 744.3031(2).

<sup>343</sup> § 745.701(2).

<sup>344</sup> Id.

<sup>345</sup> § 744.3031(4). This section also allows for an extension of an additional 90 days.

<sup>346</sup> The Code ties termination to issuance of letters to the successor which is the instance that the successor's authority begins. § 744.3031(4) ties termination to the appointment of a guardian which can allow for a gap when there is an order appointing the guardian but a delay in the issuance of letters to the guardian.

<sup>347</sup> § 745.701(5). This recognizes the practical reality that an ETG is normally in place until a permanent guardian is appointed or the incapacity proceedings are concluded. In addition, the Court can revoke letters of ETG at any time.

<sup>348</sup> § 744.3031(9) lays out procedures for discharge specific to the ETG which the drafters of the Code found unnecessary in the presence of already existent discharge and accounting procedures which are more fully laid out in Part XI of the Code and, formerly, Part VII of the Florida Guardianship Laws.

<sup>349</sup> *See*, § 744.3031(9)(b).

<sup>350</sup> §§ 745.702-745.704.

guardianship statutes were largely maintained from Chapter 744 to the Code. The Code alters the required notice for a petition for standby guardian for a minor, now requiring notice to the natural guardians and any currently serving guardian.<sup>352</sup> The Code also clarifies that an alternate standby guardian may also be appointed upon petition, something that was inferred from language in § 744.304.<sup>353</sup>

The standby guardian is able to take certain immediate actions upon the removal, death, or resignation of the current guardian.<sup>354</sup> However, upon such triggering, the standby guardian is required to file for confirmation of appointment, to file an oath and to submit to background checks required prior to issuance of letters to any guardian.<sup>355</sup>

### C. Preneed Guardians<sup>356</sup>

A preneed guardian is someone designated by a ward, or the natural guardians of a minor, to serve as guardian should a guardian ever be required.

The Code alters execution and filing requirements in relation to preneed guardians. The execution requirements for preneed guardians now mirror the more modern requirements for the execution of a healthcare surrogate designation.<sup>357</sup> The Code requires two subscribing witnesses, one of whom is not related by blood and neither of which are the designated preneed guardian.<sup>358</sup> The Code also allows the filing of a preneed guardian designation at any time in the declarant's county of residence to be produced by the clerk should a petition for appointment of guardian be filed in relation to the declarant.<sup>359</sup> The filing is no longer required for minor designations and is now optional for adult designations.<sup>360</sup>

As to appointment of a preneed guardian, the Code confirms that a preneed guardian may not act without appointment by the court.<sup>361</sup> The Code also confirms current law that the declaration of preneed guardian creates a presumption that the designated nominee is entitled to serve absent disqualification or a finding that appointment is contrary to the best interests of the ward.<sup>362</sup>

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<sup>351</sup> See, § 744.704(1).

<sup>352</sup> § 745.702. Former § 744.304(1) required notice on the parents and any currently serving guardian.

<sup>353</sup> § 745.703.

<sup>354</sup> § 745.704(1).

<sup>355</sup> § 745.704(2).

<sup>356</sup> §§ 745.705-745.706.

<sup>357</sup> § 745.705(2) and § 745.706(3). Preneed guardian designations are often created in conjunction with the appointment of a healthcare surrogate under chapter 765 Part II. In order to unify the execution procedures, the Code adopts the execution requirements of § 765.202.

<sup>358</sup> *Id.*

<sup>359</sup> § 745.705(3) and § 745.705(4).

<sup>360</sup> *Id.* See, § 744.3046(3) which required the filing of a minor designation of preneed guardian.

<sup>361</sup> § 744.3045(7) included a procedure for "confirmation of appointment" which was inconsistent with the procedures for appointment of a guardian. This has been removed in the Code.

<sup>362</sup> § 745.602(1); § 745.705(4); § 745.706(5); *Koshenina v. Buvens*, 130 So.3d 276 (Fla. 1<sup>st</sup> DCA 2014).

Finally, the Code expands the application of a preneed guardian designation for a minor, allowing appointment should the natural guardian be disqualified from acting.<sup>363</sup>

#### **D. Voluntary Guardians<sup>364</sup>**

A voluntary guardianship is a procedure which allows a competent adult to seek the appointment of a guardian of the property over some or all the adult's assets. The Code will largely maintain the current processes, seeking only to improve rather than substantially modify. First, the Code clarifies that voluntary guardianships may only be as to an adult's property.<sup>365</sup> Second, § 745.707(1) now requires that the physician's report required to be submitted with any petition for appointment of voluntary guardian be based on an examination performed within sixty days of filing.<sup>366</sup>

The Code maintains the current requirement of an annual filing of a physician's report determining the ward understands the nature of the guardianship and the delegation of authority to the voluntary guardian. However, the Code installs a duty on the voluntary guardian to petition for a determination of incapacity if a physician's statement finds that the ward does not have the capacity to understand these items.<sup>367</sup> The Code also now requires a similar physician's statement of capacity in order to terminate the voluntary guardianship.<sup>368</sup> The voluntary guardian's requirement to account upon termination is also confirmed.<sup>369</sup>

#### **E. Foreign Guardians<sup>370</sup>**

The foreign guardianship sections of the Code address the relocation of a ward to Florida and the authority of guardians in relation to non-Florida resident wards.

The Code requires that a foreign guardian relocating a ward's residence to Florida file a petition for determination of incapacity and the appointment of a guardian in Florida within sixty days of the change of residence.<sup>371</sup> The concern being addressed is confirmation of incapacity under Florida's standards once a ward is becoming a Florida resident and thus submitting to Florida's guardianship laws. Because state laws through the country are not uniform, and Florida's due process standards are intentionally high for the protection of the ward, this statute is intended to ensure that any ward under Florida's laws receive the protection of those due process procedures. The foreign guardian may continue to act until a guardian is appointed in Florida or the ward is determined to not require a guardian.<sup>372</sup>

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<sup>363</sup> § 745.706(1) adds disqualification as a circumstance in which a preneed guardian designation may be considered, a change from § 744.3046. This is intended to allow a parent to designate a preneed guardian to act in cases of conflict of interest by the natural guardian, among other circumstances.

<sup>364</sup> § 745.707.

<sup>365</sup> § 745.707.

<sup>366</sup> Compare, § 745.707(1) to § 744.341(1) which does not contain any proximity in time requirements.

<sup>367</sup> § 745.707(6). The voluntary guardian must continue to serve as guardian pending further order of the court.

<sup>368</sup> § 745.707(7).

<sup>369</sup> § 745.707(8).

<sup>370</sup> §§ 745.708-745.710.

<sup>371</sup> § 745.708(1)-(2). This does not prohibit the filing of these petitions by someone other than the guardian, rather it is intended to place an affirmative duty on the guardian to ensure someone files these petitions. § 745.708(4).

<sup>372</sup> § 745.708(3).



As to non-Florida resident wards, the Code makes only minimal changes to current law. The provisions in relation to foreign guardians of nonresident wards is unaltered from what is currently found in § 744.307.<sup>373</sup> In relation to resident guardians of the property of a nonresident ward, the Code maintains the requirement that any petition for appointment of a guardian for a nonresident ward's Florida property be accompanied by a certified copy of the adjudication of incapacity by the foreign state, should on exist.<sup>374</sup> The Code however has eliminated the provision that deems this prima facie evidence of incapacity of the ward.<sup>375</sup> This allows the Court to make a case-by-case determination of the sufficiency of the evidence of incapacity and whether to require further evidence, such as additional medical evidence or an examining committee's report. When a foreign adjudication of incapacity is alleged, the Code mandates formal notice upon the foreign guardian and on the ward, altering the Florida Guardianship Law's requirement of personal service or service by mail upon the ward, the ward's next-of-kin, and legal custodian.<sup>376</sup> When there is no foreign adjudication of incapacity, the procedures for determination of incapacity and the appointment of a guardian under the Code are required to be followed.<sup>377</sup>

#### **F. Guardian Advocates**<sup>378</sup>

The Code does not make any changes to the guardian advocate statutes found in Chapter 744. A guardian advocate continues to be an alternative form of guardianship available to a person with a developmental disability if the person is only partially incapacitated.<sup>379</sup> It is also important to maintain a section in the Code which explicitly cites to the guardian advocate procedures and confirms that "courts are encouraged to consider appointing a guardian advocate, when appropriate, as a less restrictive alternative to guardianship."<sup>380</sup>

#### **G. Minor Guardianships and Natural Guardians**<sup>381</sup>

A "minor" is a person under eighteen years old who has not had the disabilities of nonage removed.<sup>382</sup> Who constitutes the natural guardian for a minor is defined by § 745.712(1).<sup>383</sup> The Code does not make any changes to the definition of natural guardian from current law.

The primary change to minor guardianships and natural guardian authority is in relation to the amount of assets that may be managed by a natural guardian and when a guardian is required to be appointed for a minor. Under current law, a natural guardian may settle any claim of a minor

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<sup>373</sup> § 745.709 (Foreign guardian of nonresident ward).

<sup>374</sup> § 745.710(3).

<sup>375</sup> § 744.308(3).

<sup>376</sup> Compare § 745.710(5) to § 744.308(5).

<sup>377</sup> § 745.710(4).

<sup>378</sup> § 745.711

<sup>379</sup> *Id.* See also, § 393.12 (Capacity; appointment of guardian advocate).

<sup>380</sup> § 745.711.

<sup>381</sup> §§ 745.712-745.714.

<sup>382</sup> § 1.01(13); § 745.106(25).

<sup>383</sup> § 745.712(1) states, summarily, that a minor's parents are the natural guardians unless their parental rights have been altered by death, dissolution, or otherwise. Additionally, the mother of a child born out of wedlock unless there is a subsequent marriage to the father or an order determining paternity is entered.

that does not exceed \$15,000.<sup>384</sup> A guardianship must be established for the minor whenever a minor may settle claims or receive amounts that exceed \$15,000.00.<sup>385</sup> This amount was last increased from \$5,000.00 to \$15,000.00 in 2002. The Code, recognizing the natural inflationary increase in these types of claims as well as the expenses incumbent in the appointment of a guardian, institutes a sliding scale as to when guardianship is required.

The effect of the proposed changes is to lessen the number of guardianship cases that need to be established for a minor, reducing the expense associated with these claims and maximizing the benefits passing to the minor. Under the proposed changes, the minimum threshold for the establishment of a guardianship for a minor will be raised to \$25,000.00, thereby eliminating the need for a guardianship where the settlement or claim exceeds \$15,000.00 but not \$25,000.00.<sup>386</sup> Additionally, the proposed changes will give the court discretion to not require a guardianship be established for a minor who is receiving assets that do not exceed \$50,000.00.<sup>387</sup> Claims of \$50,001.00 and more will still require the appointment of a guardian.<sup>388</sup> The Code also clarifies that when a guardian ad litem is required to be appointed for the minor, the court with jurisdiction over the claim is responsible for appointing the guardian ad litem.<sup>389</sup>

The Code maintains the other authorities granted to the natural guardian without the need for appointment of a guardian, including the ability to settle claims, receive assets, address real property, and make elections for benefits.<sup>390</sup> It also maintains the ability of a natural guardian to execute an inherent risk waiver on behalf of the child, which was added to § 744.301(3) in 2010.<sup>391</sup> The code institutes a requirement that any natural guardian taking possession of funds or other property file with the clerk a verified statement identifying the minor, the nature and value of the property, and the relationship of the natural guardian to the minor.<sup>392</sup>

## **Part VIII: Duties of Guardian**

This part addresses the duties of guardians for both minor and adult wards and is divided between duties of guardians of property and guardians of person. Part IX begins with a declaration of the liability of guardians, applicable to all types of guardians; proceeds to define the duties of guardians of the property, including requirements for inventories and accountings; proceeds next to define the duties of guardians of the person, including requirements for plans and reports; and concludes with the record retention policy applicable to all types of guardians.

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<sup>384</sup> § 744.301(2).

<sup>385</sup> § 744.301(2) and § 744.387(2).

<sup>386</sup> § 745.712(3).

<sup>387</sup> § 745.713(2).

<sup>388</sup> § 745.714.

<sup>389</sup> § 745.714(1)(a). No bond is required for the guardian ad litem, although the court may use a bond. § 745.714(2).

<sup>390</sup> Compare § 745.712(2) to § 744.301(2)

<sup>391</sup> § 745.712(7). See Senate Bill Analysis to CS/SB 2440 (2010) which indicates that this provision was added to ensure the ability of parents to sign pre-injury releases in response to the case of *Kirton v. Fields*, 997 So.2d 349 (Fla. 2008). See also, *Claire's Boutiques v. Locastro*, 85 So.3d 1192, 1199-1200 (Fla. 4<sup>th</sup> DCA 2012) (noting the legislative change as well as the reasoning, and limitations associated with that change).

<sup>392</sup> § 745.712(5). This is intended to mandate a record of funds in order to provide a record to the minor to consult at a later time.

## A. Liability of Guardian

The guardian is not personally liable for the debts, contracts, or torts of the ward. However, a guardian may be personally liable to the ward for the guardian's failure to protect the ward within the scope of the guardian's authority.<sup>393</sup>

## B. Duties of Guardian of the Property

The guardian is a fiduciary and may only exercise the rights that have been removed from the Ward and delegated to the guardian.<sup>394</sup> However, a guardian of a minor's property must always exercise the powers of a plenary guardian of the property.<sup>395</sup>

**1. Compendium of Duties.** The specific duties of a guardian of the property are set forth in § 745.802. They are as follows:

a. **Protect and preserve property.** The guardian must protect and preserve the ward's property and invest it prudently as provided in Chapter 518.<sup>396</sup>

b. **Apply property as provided in § 745.1304.** The guardian must apply property as provided in section 745.1304,<sup>397</sup> which provides in part that the income from the ward's property is applied first and to the ward's care, support, education, maintenance and health care, and provides specific provisions regarding application of principal for the ward's expenses and for support of the dependents of the ward.<sup>398</sup>

c. **Record-keeping.** The guardian must keep clear, distinct, and accurate records of the administration of the ward's property.<sup>399</sup>

d. **Perform all duties.** The guardian must perform all duties required of the guardian by law.<sup>400</sup>

e. **Deliver property upon termination.** Upon termination of the guardianship, the guardian must deliver the property of the ward to the person lawfully entitled to it.<sup>401</sup>

f. **Prudent person.** In dealing with the guardianship property, a guardian must observe the standards that would be observed by a prudent person dealing with the property of another.<sup>402</sup> If the guardian has special skills or is appointed because of the

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<sup>393</sup> § 745.801. Personal liability of the guardian includes if the guardian fails to protect the ward as required under this Code, such as if the guardian is negligent in performing their duties. The Code now provides explicitly that a guardian may be personally liable to the ward.

<sup>394</sup> § 745.802(1). The duties of a guardian of the property have not been substantially changed in the new Code, except for the provision regarding substituted judgment, discussed further below.

<sup>395</sup> *Id.*

<sup>396</sup> § 745.802(2)(a).

<sup>397</sup> § 745.802(2)(b).

<sup>398</sup> § 745.1304.

<sup>399</sup> § 745.802(2)(c).

<sup>400</sup> § 745.802(2)(d).

<sup>401</sup> § 745.802(2)(e).

<sup>402</sup> § 745.802(3).

guardian's representation of special skills or expertise, the guardian has a duty to use those skills.<sup>403</sup>

g. **Secure property.** If authorized by the court, a guardian must secure the ward's property, including the income from such property, whether accruing before or after the guardian's appointment, and the proceeds arising from the sale, lease, or mortgage, of the property. All property is assets in the hands of the guardian for the payment of debts, expenses, taxes, claims, charges and for the care, support, maintenance, and education of the ward or others, as provided by law.<sup>404</sup>

h. **File inventory and accountings.** A guardian must file a verified inventory pursuant to § 745.803 and accountings as provided by § 745.805.<sup>405</sup>

i. **Act within scope of authority & law.** A guardian must act within the scope of the authority granted by the court and as provided by law.<sup>406</sup>

j. **Good faith.** A guardian must act in good faith.<sup>407</sup>

k. **Substituted judgment.** When deciding on behalf of the ward, a guardian must exercise reasonable care, diligence, and prudence.<sup>408</sup> In making the decision:

- i. If there is competent, substantial evidence of what the ward would have wanted and the decision promotes the ward's best interest, then the guardian must use substituted judgment to make the decision; or
- ii. If there is not competent, substantial evidence to support substituted judgment or, if there is but the decision does not promote the ward's best interest, then the decision shall be made based on the ward's best interest.<sup>409</sup>

The use of substituted judgment by the guardian to make decisions on behalf of the ward is a substantial change to existing law. The substituted judgment standard has been included in the new Code in order to clarify the standard that guardians should apply in all situations regarding making decisions on the ward's behalf, instead of having multiple different standards apply to different situations. The substituted judgment standard is different in cases of guardians of the property and guardians of the person. In the case of guardians of the property, the standard requires both that there be competent, substantial evidence to support substituted judgment and that the decision is in the best interest of the ward. If both requirements are not met, the standard is the ward's best interest.

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<sup>403</sup> *Id.*

<sup>404</sup> § 745.802(4).

<sup>405</sup> § 745.802(5).

<sup>406</sup> § 745.802(6).

<sup>407</sup> § 745.802(7).

<sup>408</sup> § 745.802(8).

<sup>409</sup> *Id.*

1. **Multiple guardians.** When two or more guardians are appointed, the guardians must consult with each other on matters of mutual responsibility.<sup>410</sup>

## 2. Inventory

An inventory must be verified by the guardian and filed within 60 days of the issuance of letters of guardianship.<sup>411</sup> This provision applies to the initial inventory filed by a guardian.

a. **Inventory requirements.** The inventory must describe and include:

- i. All property of the ward, both real and personal that has come into the guardian's control or knowledge.<sup>412</sup> This includes property the guardian controls and also property the guardian knows of but does not control;
- ii. A statement of all encumbrances, liens, and claims on each item included in the inventory, including any causes of action accruing to the ward.<sup>413</sup>
- iii. Any trusts of which the ward is a beneficiary.<sup>414</sup> The guardian must identify the name of the trust and the trustee;<sup>415</sup>
- iv. The location of the property sufficient that the property can be identified and located;<sup>416</sup>
- v. All sources of income for the ward, including social security and pensions;<sup>417</sup>
- vi. The location of any safe-deposit boxes, whether individual or joint with any other person.<sup>418</sup> Safe-deposit boxes are further addressed in § 745.808;
- vii. Identification by name, address and occupation of all witnesses present during the initial examination of the ward's tangible personal property;<sup>419</sup>
- viii. The guardian must file with the inventory a copy of statements of all of the ward's cash assets. Statements must be for the period ending closest in time to the date of the letters.<sup>420</sup>

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<sup>410</sup> § 745.802(9).

<sup>411</sup> § 745.803(1). The provisions for inventories have not been substantially changed in the new Code. The new Code explicitly provides that the inventory be filed within 60 days.

<sup>412</sup> § 745.803(2)(a).

<sup>413</sup> *Id.*

<sup>414</sup> *Id.*

<sup>415</sup> § 745.803(4).

<sup>416</sup> § 745.803(2)(b).

<sup>417</sup> § 745.803(2)(c).

<sup>418</sup> § 745.803(2)(d).

<sup>419</sup> § 745.803(2)(e). The Code now requires the identification of anyone present when the ward's tangible personal property is examined and inventoried.

<sup>420</sup> § 745.803(3).

- ix. The inventory must indicate whether the guardian will file the annual accounting on a calendar year or fiscal year and designate the fiscal year.<sup>421</sup>

Should the guardian later discover property of the ward that was not included in the initial inventory, then, within 60 days of learning of the property, the guardian must file an amended or supplementary inventory.<sup>422</sup>

- b. **Audit fee.** The audit fee must be paid at the time the inventory is filed.<sup>423</sup> The calculation of the fee excludes the value of real property.<sup>424</sup> If the value of the ward's property is less than \$25,000.00, no fee can be charged.<sup>425</sup> If the value is equal to or more than \$25,000.00, a fee of up to \$75.00 can be charged.<sup>426</sup> However, if the value is equal to or more than \$25,000.00, and there are insufficient cash assets to pay the audit fee, or for other good cause, the guardian can petition the court to waive the fee.<sup>427</sup>

### 3. Accounting

According to the schedule the guardian sets forth in the inventory (either calendar or fiscal) the guardian must file an annual accounting.<sup>428</sup> The guardian may file a simplified accounting when the only assets are held in restricted depository accounts and other requirements are met.<sup>429</sup>

#### c. Standard annual accounting

- i. **Accounting requirements.** The requirements for annual accountings have been increased in the new Code to require more substantial reporting. The accounting must describe and include:
  - a. All receipts;<sup>430</sup>
  - b. All disbursements;<sup>431</sup>
  - c. A statement of all property in the guardian's control or knowledge at the end of the accounting period. If an item is not within the guardian's control, the guardian must state why;<sup>432</sup>

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<sup>421</sup> § 745.803(5). The guardian must now specify whether the accounting will be filed on a calendar or fiscal year and designate the fiscal year period.

<sup>422</sup> § 745.803(6). The new Code makes mandatory the amendment of the inventory if the guardian later discovers property not included in the prior inventory.

<sup>423</sup> § 745.804(1).

<sup>424</sup> § 745.804(1) and (2). This is a significant change from existing law.

<sup>425</sup> § 745.804(2).

<sup>426</sup> § 745.804(1).

<sup>427</sup> *Id.*

<sup>428</sup> § 745.805(1).

<sup>429</sup> *See* § 745.806.

<sup>430</sup> § 745.805(2)(a).

<sup>431</sup> *Id.*

- d. A copy of all statements demonstrating all receipts and disbursements for each cash account of the ward,<sup>433</sup> and
  - e. If the ward is a beneficiary of a trust, the name of the trust and the trustee. The accounting does not include the receipts and disbursements of the trust.<sup>434</sup>
  - f. A declaration of all remuneration received by the guardian from any source for services rendered to or on behalf of the ward.<sup>435</sup>
- ii. Supporting documentation.** The guardian must obtain (and retain for 7 years) **documentation** to support the accuracy of the accounting.<sup>436</sup> The documents must include receipts, cancelled checks, or other proofs of payment for all expenditures and disbursements made on behalf of the ward.<sup>437</sup> These documents are not filed with the court.<sup>438</sup> For cause, the court may order that the documents be made available for inspection.<sup>439</sup> In order to do so, the court must hold a hearing, giving notice to the guardian, and order the time and place of the inspection and who will be present for the inspection.<sup>440</sup>
- iii. Time period -** Unless the court mandates the accounting period, the accounting may be made on a calendar or fiscal year.<sup>441</sup> As stated above, the guardian must state in the inventory the time period that will be used for accounting. Every accounting after the first must be for the same time period as the first accounting.<sup>442</sup> The first accounting period must end no later than 1 year after the end of the month in which letters are issued.<sup>443</sup> The accounting must be filed on or before the first day of the fourth month after the end of the accounting year.<sup>444</sup>
- iv. Filing and service.** The court may waive the filing of an accounting if the ward receives only social security benefits and the guardian is the ward's

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<sup>432</sup> *Id.* This provision now includes that the guardian must include in the inventory property of which the guardian has knowledge, not just control, and also state why the guardian does not have control of the property.

<sup>433</sup> § 745.805(2)(b).

<sup>434</sup> § 745.805(2)(a). This provision clarifies what information about a trust must be included on the inventory.

<sup>435</sup> § 745.805(2)(c). This includes fees to the guardian paid by a trust held for the benefit of the ward, among other things. This provision is intended to provide information to the Court in determining reasonable compensation to the guardian from the guardianship assets, it does not provide the Court with jurisdiction to review compensation paid from outside of guardianship assets.

<sup>436</sup> § 745.805(3). The retention period for the records has been increased from 3 years to 7 years in the new code.

<sup>437</sup> *Id.*

<sup>438</sup> *Id.*

<sup>439</sup> *Id.*

<sup>440</sup> *Id.*

<sup>441</sup> § 745.805(4).

<sup>442</sup> *Id.*

<sup>443</sup> *Id.*

<sup>444</sup> § 745.805(5).

representative payee for those benefits.<sup>445</sup> The accounting must be served on the ward unless the guardianship of the property is plenary.<sup>446</sup> The court may authorize or require that the guardian also serve the accounting on interested persons.<sup>447</sup>

**d. Simplified accounting**

In lieu of the accounting procedure described above, the guardian may elect to file a simplified annual accounting under § 745.806. Any interested person may seek judicial review of the simplified accounting under § 745.1002.<sup>448</sup> A simplified accounting may only be used when:

- i. All assets of the guardianship estate are in designated depositories under § 69.031; and
- ii. The only transactions that occur are interest accrual, deposits from a settlement, financial institution service charges, and court authorized expenditures.<sup>449</sup>

The simplified accounting must consist of:

- i. Statements from the financial institution showing all receipts and disbursements in the ward's accounts; and
- ii. A statement by the guardian, under penalty of perjury, that the guardian has custody and control of the ward's property as shown in the financial statements.<sup>450</sup>

**e. Audit Fees**

At the time of filing the accounting, whether regular or simplified, the guardian must pay an audit fee from the ward's assets.<sup>451</sup> As with the inventory, discussed above, the court may waive the audit fee upon a showing of insufficient cash assets in the ward's estate (but not for other cause, as with the audit fee for the inventory) upon a petition by the guardian.<sup>452</sup> Unlike the inventory audit fee, the calculation of the fee includes the real property of the ward. The fee schedule is:

- i. For property less than or equal to \$25,000.00, no fee;<sup>453</sup>

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<sup>445</sup> § 745.805(7).

<sup>446</sup> § 745.805(6).

<sup>447</sup> *Id.*

<sup>448</sup> § 745.806(2).

<sup>449</sup> § 745.806(1).

<sup>450</sup> § 745.806(1)(a) and (b).

<sup>451</sup> § 745.807(1).

<sup>452</sup> § 745.807(2).

<sup>453</sup> § 745.807(1)(a).



- ii. For property more than \$25,000.00 but less than or equal to \$100,000.00, up to \$100 fee;<sup>454</sup>
- iii. For property more than \$100,000.00 but less than or equal to \$500,000.00, up to \$200 fee;<sup>455</sup> and
- iv. For property more than \$500,000.00, up to \$400 fee.<sup>456</sup>

#### 4. Safe Deposit Boxes

A guardian may not remove any property from the ward's safe-deposit box without court order.<sup>457</sup> When making the initial entry into the box, whether owned by the ward individually or with a co-lessee(s): (i) An employee of the institution where the box is located must attend the initial entry<sup>458</sup>; (ii) in the presence of the employee, the guardian must compile the inventory of the contents of the box<sup>459</sup>; (iii) both the employee and the guardian must verify the accuracy of the inventory and then execute the inventory pursuant to Florida Probate Rule 5.020, meaning they must sign under penalty of perjury<sup>460</sup>; (iv) the guardian must file the inventory within 10 days<sup>461</sup>; and (v) if there is a co-lessee of the box, the guardian must serve the co-lessee with a copy of the inventory.

The guardian must also serve the inventory to the ward, unless the guardianship is plenary, or the court otherwise requires.<sup>462</sup>

#### C. Duties of Guardian of Person.

A guardian of the person is a fiduciary and may only exercise the rights that have been removed from the ward and delegated to the guardian. However, a guardian of a minor shall exercise the powers of a plenary guardian.

##### 1. Compendium of Duties.

The duties of a guardian of the person are set forth in 745.809. They are as follows:

- a. **Decision-making.** A guardian shall make the decisions necessary to provide medical, mental health, personal and residential care for the ward to the extent of the guardian's authority.
- b. **Personal visits.** At least once each quarter, a guardian must personally visit the ward or, if the guardian is a professional guardian, then a member of the guardian's

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<sup>454</sup> § 745.807(1)(b).

<sup>455</sup> § 745.807(1)(c).

<sup>456</sup> § 745.807(1)(d).

<sup>457</sup> § 745.808(3).

<sup>458</sup> § 745.808(1).

<sup>459</sup> *Id.*

<sup>460</sup> *Id.*

<sup>461</sup> *Id.*

<sup>462</sup> § 745.808(2).

professional staff must personally visit the ward. During the visit, the guardian or staff person must assess:

- i. The ward's physical appearance and condition;
  - ii. The appropriateness of the ward's current residence;
  - iii. The need for any additional services and for continuation of existing services, taking into consideration all aspects of the ward's social, psychological, educational, direct service, health, and personal care needs; and
  - iv. The nature and extent of visitation and communication with the ward's family and others.
- c. **File guardianship plan.** A guardian must file the initial guardianship plan pursuant to 745.810, and the annual guardianship plan pursuant to 745.813.
- d. **Act within scope of authority.** A guardian shall act only within the scope of the authority granted by the court and provided by law.
- e. **Good faith.** A guardian shall act in good faith.
- f. **Substituted judgment.** When making decisions on behalf of the ward, a guardian shall act in a manner consistent with the ward's rights of privacy and self-determination. In making the decision:
- i. If there is competent, substantial evidence of what the ward would have wanted, then the guardian shall use substituted judgment.
  - ii. If there is not competent substantial evidence of what the ward would have wanted, decisions shall be based on the ward's best interest.

The use of substituted judgment by the guardian to make decisions on behalf of the ward is a substantial change to existing law. The substituted judgment standard has been included in the new Code in order to clarify the standard that guardians should apply in all situations regarding making decisions on the ward's behalf, instead of having multiple different standards apply to different situations. The substituted judgment standard is different in cases of guardians of the property and guardians of the person. In the case of guardians of the person, the standard requires only that there be competent, substantial evidence to support substituted judgment, but does not also require that the decision is in the best interest of the ward, as with guardians of the property.<sup>463</sup>

- g. **Prudent person.** A guardian is a fiduciary who must observe the standards that would be observed by a prudent person making decisions on behalf of another. If the

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<sup>463</sup> In the case of guardians of the property, even when there is evidence to support substituted judgment, the decision must also promote the best interests of the ward. § 745.802(8).

guardian has special skills or expertise, or if the guardian was appointed because of the guardian's representation of special skills or expertise, the guardian must use those special skills or expertise when acting on behalf of the ward.

**h. Implement the guardianship plan.** A guardian shall implement the guardianship plan.

**i. Multiple guardians.** When two or more guardians are appointed, the guardians shall consult with each other on matters of mutual responsibility.

**j. Respect the ward's unique needs.** In recognition of the fact that every individual has unique needs and abilities, a guardian shall, as appropriate under the circumstances:

- i. Consider the expressed desires of the ward as known by the guardian when making decisions that affect the ward;
- ii. Allow the ward to maintain contact with family and friends unless the guardian believes such contact may cause harm to the ward;
- iii. Not restrict the physical liberty of the ward more than reasonably necessary to protect the ward or others from serious physical injury, illness, or disease;
- iv. Assist the ward in developing or regaining capacity;
- v. Notify the court if the guardian believes that the ward has regained capacity and if one or more of the rights that have been removed should be restored to the ward;
- vi. Make provision for the medical, mental health, rehabilitative, or personal care services for the welfare of the ward;
- vii. To the extent applicable, acquire a clear understanding of the risks and benefits of a recommended course of health care treatment before making a health care decision;
- viii. Evaluate the ward's medical and health care options, financial resources, and desires when making the residential decisions that are best suited for the current needs of the ward;
- ix. Advocate on behalf of the ward in institutional and other residential settings and regarding access to home and community-based services; and
- x. When not inconsistent with the person's goals, needs, and preferences, acquire an understanding of the available residential options and give priority to home and other community-based services and settings.

## 2. Guardianship Plan.

Every guardian of the person, except for emergency temporary guardians, must file a guardianship plan.

### a. Plan Requirements.<sup>464</sup>

The guardianship plan shall include:

- i. The needed medical, mental health, rehabilitative and personal care services for the ward;
- ii. The social and personal services to be provided for the ward;
- iii. The kind of residential setting best suited for the needs of the ward;
- iv. The ward's residence at the time of issuance of the letters of guardianship, and any anticipated change of residence and the reason therefore;
- v. The health and accident insurance and any other private or governmental benefits to which the ward may be entitled to meet any part of the costs of medical, mental health, or other services provided to the ward;
- vi. Any physical and mental examinations necessary to determine the ward's medical and mental health treatments; and
- vii. A list of any preexisting orders not to resuscitate or preexisting advance directives, the steps taken by the guardian to locate such preexisting items, and whether such items are suspended by the court

In creating the plan, the guardian must consider any recommendations specified in the court appointed examiners' written reports or testimony.

Unless the ward is totally incapacitated or a minor, the guardianship plan must contain an attestation that the guardian has consulted with the ward and, to the extent reasonable, has honored the ward's wishes consistent with the rights retained by the ward.

Nothing in the plan may restrict the physical liberty of the ward more than reasonably necessary to protect the ward from decline in medical and mental health, physical injury, illness, or disease and to protect others from injury, illness, or disease.

### b. Time period.

The plan must be filed within 60 days after letters of guardianship are issued. The plan continues in effect until the first to occur: its amendment or replacement by an

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<sup>464</sup> § 745.810(2).

annual guardianship report; the restoration of capacity or death of the ward; or, if the ward is a minor, upon the ward reaching the age of 18 years.

**c. Amendment.**

If there are significant changes in the capacity of the ward to meet the essential requirements for the ward's health or safety, the guardian may modify the guardianship plan and shall serve the amended plan on all persons who were served with the prior plan.

**3. Reports**

Every guardian must file an annual report. The report requirements for minor wards and adult wards are minimally different. The goal of the report is both to provide information regarding the ward's progress over the past year and also to look forward and consider ways in which the ward's development, health care or other aspects of the ward's life could be improved.

**a. For minors.<sup>465</sup>**

The annual report shall provide current information about the ward and specify the current needs of the ward and how those needs are proposed to be met in the coming year.

The report must include:

- i. Information regarding the residence of the ward, including the ward's address at the time of filing, the name and address of each location where the ward resided during the preceding year and the length of stay of the ward at each location;
- ii. A statement whether the present residential setting is best suited for the current needs of the ward;
- iii. Plans for ensuring that the ward is in the best residential setting to meet the ward's needs;
- iv. Information concerning the medical and mental health condition, and treatment and rehabilitation needs of the minor, including:
  - a. A description of any professional medical treatment given to the minor during the preceding year, including names of health care providers, types of care and dates of service.

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<sup>465</sup> § 745.811.

- b. A report from the physician who examined the minor no more than 180 days before the beginning of the applicable reporting period that contains an evaluation of the minor's physical and medical conditions.
  - v. Anticipated medical care needs and the plan for providing medical services in the coming year;
  - vi. Information concerning the education of the minor, including:
    - a. A summary of the minor's educational progress report.
    - b. The social development of the minor, including a statement of how well the minor communicates and maintains interpersonal relationships.
  - vii. A declaration of all remuneration received by the guardian from any source for services rendered to or on behalf of the ward.<sup>466</sup>
- b. **For adults.**<sup>467</sup>

As with reports for minors, reports for adult wards shall provide current information about the condition of the ward, the current needs of the ward and how those needs are proposed to be met in the coming year.

The report must include the following information, if applicable:

- i. Information regarding the residence of the ward, including the ward's address at the time of filing, the name and address of each location where the ward resided during the preceding year and the length of stay of the ward at each location;
- ii. A statement whether the present residential setting is best suited for the current needs of the ward;
- iii. Plans for ensuring that the ward is in the best residential setting to meet the ward's needs;
- iv. Information concerning the medical and mental health condition, and treatment and rehabilitation needs of the ward, including:
  - a. A description of any professional medical treatment given to the ward during the preceding year, including names of health care providers, types of care and dates of service.

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<sup>466</sup> § 745.811(2)(g). This includes fees to the guardian paid by a trust held for the benefit of the ward, among other things. This provision is intended to provide information to the Court in determining reasonable compensation to the guardian from the guardianship assets, it does not provide the Court with jurisdiction to review compensation paid from outside of guardianship assets.

<sup>467</sup> § 748.812

- b. A report from the physician who examined the ward no more than 120 days before the beginning of the applicable reporting period. The report must contain an evaluation of the ward's condition and a statement of the current level of capacity of the ward. If the guardian makes a statement in the report that a physician was not reasonably available to examine the ward, the examination may be performed by and the report may be prepared and signed by a physician's assistant acting pursuant to section 458.347(4) or 459.022(4), or an advanced practice registered nurse acting pursuant to section 464.012(3).
- v. A list of any preexisting orders not to resuscitate or preexisting advance directives, the steps taken by the guardian to locate such preexisting items, and whether such items are suspended by the court
- vi. A declaration of all remuneration received by the guardian from any source for services rendered to or on behalf of the ward.<sup>468</sup>
- c.
- c. **Filing requirements for all plans.**

If the court requires filing of the report on a calendar year basis, then the report must be filed on or before April 1 of each year.

If calendar-year filing is not required, then the guardian shall file the report on or before the first day of the fourth month after the last day of the anniversary month in which the letters of guardianship were issued.

The report must cover the coming plan year and end on the last day of the anniversary month.

## **D. Record Retention.**

Section 745.814 sets forth specific requirements for the retention of records by the guardian for reports, accountings, and inventories. The time for retention is now tied to the time of filing of the report, not the discharge of the guardian.

### **1. Guardian of the Property.**

The guardian of the property must retain documents sufficient to demonstrate the accuracy of inventory and accountings for at least seven years after the filing of the inventory or accounting.<sup>469</sup>

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<sup>468</sup> § 745.812(2)(h). Like the other provisions on reporting outside remuneration, this provision is intended to provide information to the Court in determining reasonable compensation to the guardian from the guardianship assets, it does not provide the Court with jurisdiction to review compensation paid from outside of guardianship assets.

<sup>469</sup> 745.814(1)

## 2. Guardian of the Person.

The guardian of the person must retain documents sufficient to demonstrate the accuracy of an annual report for at least four years after the filing of the report.<sup>470</sup>

### Part IX: Powers of Guardian.

This part addresses the powers of guardians of both minor and adult wards. This part begins with a statement of the powers a guardian of the property may exercise without court approval and the powers that a guardian of the property may exercise only with court approval; sets forth the requirements for petitions and orders authorizing acts requiring court approval; and then concludes with the requirements for specific situations of conveying property interests, settling claims, acts requiring extraordinary authority, and Do Not Resuscitate Orders.

#### A. Statement of Powers of Guardian.

The guardian of an incapacitated person may only exercise the rights that have been removed from the ward and delegated to the guardian.<sup>471</sup> The guardian of a minor exercises the powers of a plenary guardian, meaning the guardian exercises all rights that are delegable.<sup>472</sup>

#### B. Compendium of Powers of Guardian of Property.

The powers that a guardian of the property may exercise are set forth in sections 745.902 and 745.903. They are divided between powers the guardian can exercise without court approval and those that the guardian can exercise only with court approval, either by requesting authority to act or requesting ratification of the guardian's action. In every instance, the guardian may only exercise the powers that have been removed from the ward and delegated to the guardian, as set forth in § 745.901.

**1. Powers Exercisable Without Court Approval.** The guardian may exercise certain powers without first seeking court approval. This section applies to plenary guardians of the property and also limited guardians of the property, so long as the power to be exercised falls within the scope of those granted to the guardian in the Letters of Guardianship. Without court authority, a guardian may:

- a. Take possession or control of property owned by the ward;<sup>473</sup>
- b. Obtain the ward's legal and financial documents and tax records from persons, financial institutions, and other entities;<sup>474</sup>
- c. Obtain a copy of any trust or any other instrument in which the ward has a beneficial interest, obtain benefits due the ward as a beneficiary of any trust or other

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<sup>470</sup> 745.814(2).

<sup>471</sup> § 745.901. This provision is the same as the current Code.

<sup>472</sup> *Id.*

<sup>473</sup> § 745.902(1).

<sup>474</sup> § 745.902(2). This is a clarification of existing law.



instruments, and bind the ward with regard to any trust consistent with Florida Statutes chapter 736.0303;<sup>475</sup>

d. Vote stocks or other securities in person or by general or limited proxy or not vote stocks or other securities;<sup>476</sup>

e. Insure the assets of the estate against damage, loss, and liability and insure himself or herself against liability as to third persons;<sup>477</sup>

f. Execute and deliver in the guardian's name, as guardian, any instrument necessary or proper to carry out and give effect to this section;<sup>478</sup>

g. Pay taxes and assessments on the ward's property;<sup>479</sup>

h. Pay valid encumbrances against the ward's property in accordance with their terms, but no prepayment may be made without prior court approval;<sup>480</sup>

i. Pay reasonable living expenses for the ward, taking into consideration the accustomed standard of living, age, health, and financial resources of the ward. This subsection does not authorize the guardian of a minor to expend funds for the ward's living expenses if one or both of the ward's parents are alive;<sup>481</sup>

j. Exercise the ward's right to an elective share. The guardian must comply with the requirements of § 732.2125(2). The guardian may assert any other right or choice available to a surviving spouse in the administration of a decedent's estate;<sup>482</sup>

k. Deposit or invest liquid assets of the estate, including money received from the sale of other assets, in federally insured interest-bearing accounts, readily marketable secured loan arrangements, money market mutual funds, or other prudent investments. The guardian may redeem or sell such deposits or investments to pay the reasonable living expenses of the ward as provided herein;<sup>483</sup>

l. When reasonably necessary, employ attorneys, accountants, property managers, auditors, investment advisers, care managers, agents, and other persons and entities to advise or assist the guardian in the performance of guardianship duties;<sup>484</sup>

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<sup>475</sup> § 745.902(3). This is a clarification of existing law.

<sup>476</sup> § 745.902(4).

<sup>477</sup> § 745.902(5).

<sup>478</sup> § 745.902(6).

<sup>479</sup> § 745.902(7).

<sup>480</sup> § 745.902(8).

<sup>481</sup> § 745.902(9).

<sup>482</sup> § 745.902(10). This is a clarification of existing law to make clear the guardian's power to exercise the ward's right to elect an elective share. *Cf.* Florida Statutes § 744.444(9) (2019).

<sup>483</sup> § 745.902(11).

<sup>484</sup> § 745.902(12).

- m. Sell or exercise stock subscription or conversion rights and consent, directly or through a committee or other agent, to the reorganization, consolidation, merger, dissolution, or liquidation of a corporation or other business enterprise;<sup>485</sup>
- n. Execute and deliver any instrument that is necessary or proper to carry out the orders of the court;<sup>486</sup>
- o. Hold a security in the name of a nominee or in other form without disclosure of the interest of the ward, but the guardian is liable for any act of the nominee in connection with the security so held;<sup>487</sup>
- p. Pay and reimburse incidental expenses in the administration of the guardianship and for provision of services to the ward including reasonable compensation to persons employed by the guardian pursuant to subsection (12) from the assets of the ward. These payments shall be reported on the guardian's annual accounting, accompanied by itemized statements describing services rendered and the method of charging for such services;<sup>488</sup>
- q. Provide confidential information about a ward that is related to an investigation arising under § 745.1001 to the clerk, part XIV of this chapter to an Office of Public and Professional Guardians investigator, or part I of chapter 400 to a local or state ombudsman council member conducting that investigation. Any such clerk, Office of Public and Professional Guardians investigator, or ombudsman shall have a duty to maintain the confidentiality of the information provided;<sup>489</sup>
- r. Fulfill financial obligations under the ward's contracts that predate the guardianship;<sup>490</sup>
- s. Maintain and repair the ward's property and purchase furnishings, clothing, appliances, and furniture for the ward;<sup>491</sup>
- t. Pay calls, assessments, and other sums chargeable against securities owned by the ward that are obligations predating the guardianship;<sup>492</sup>
- u. Contract for residential care and placement for the ward and for services pursuant to subsection (12);<sup>493</sup> and

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<sup>485</sup> § 745.902(13).

<sup>486</sup> § 745.902(14).

<sup>487</sup> § 745.902(15).

<sup>488</sup> § 745.902(16). The new Code now requires that payments to employees of the guardian be reported on the guardian's annual accounting and that itemized statements of the services rendered be included.

<sup>489</sup> § 745.902(17).

<sup>490</sup> § 745.902(18). This is a change to existing law. Fulfillment of the ward's contracts would not require court approval under the new Code in contrast to Florida Statutes § 744.441(1).

<sup>491</sup> § 745.902(19). This is a change to existing law. The new Code allows a guardian to make repairs and purchases for the ward without court authority. Florida Statutes § 744.441(3) requires the guardian to seek approval to make repairs. However, the new Code still requires court approval for extraordinary repairs in § 745.903(3).

<sup>492</sup> § 745.902(20). This is a change to existing law. The new Code does not require court approval prior to payment of calls and assessments. Under Florida Statutes § 744.441(8) (2019), the guardian must seek authority to do so.

v. Receive payment and satisfy judgments in favor of the ward.<sup>494</sup>

## 2. Guardian of Property Powers Exercisable Only With Court Approval.

A guardian of property may only exercise the following powers after obtaining court approval. Even when petitioning for court approval, the power the guardian proposes to exercise must still be within the scope of those powers granted to the guardian, the guardian may not petition for court approval to exercise authority beyond the scope of those granted to the guardian.

a. Compromise, or refuse performance of a ward's contracts that predate the guardianship, as the guardian may determine under the circumstances;<sup>495</sup>

b. Execute, exercise, or release any non-fiduciary powers that the ward might have lawfully exercised, consummated, or executed if not incapacitated, if the best interest of the ward requires such execution, exercise, or release;<sup>496</sup>

c. Make extraordinary repairs or alterations in buildings or other structures; demolish any improvements; raze existing walls or erect new, party walls or buildings;<sup>497</sup>

d. Subdivide, develop, or dedicate land to public use; make or obtain the vacation of plats and adjust boundaries; adjust differences in valuation on exchange or partition by giving or receiving consideration; or dedicate easements to public use without consideration;<sup>498</sup>

e. Enter into a lease as lessor of the ward's property for any purpose, with or without option to purchase or renew, for a term within, or extending beyond, the period of guardianship;<sup>499</sup>

f. Enter into a lease or arrangement for exploration and removal of minerals or other natural resources or enter into a pooling or unitization agreement;<sup>500</sup>

g. Abandon property when it is valueless or is so encumbered or in such condition that it is of no benefit to the ward;<sup>501</sup>

h. Borrow money, with or without security, and advance money for the protection of the ward;<sup>502</sup>

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<sup>493</sup> § 745.902(21).

<sup>494</sup> § 745.902(22).

<sup>495</sup> § 745.903(1)(a).

<sup>496</sup> § 745.903(1)(b). This is a change to existing law to remove the ability of a guardian to exercise powers the ward held as a fiduciary. Cf Florida Statutes § 744.441(2) (2019).

<sup>497</sup> § 745.903(1)(c).

<sup>498</sup> § 745.903(1)(d).

<sup>499</sup> § 745.903(1)(e).

<sup>500</sup> § 745.903(1)(f).

<sup>501</sup> § 745.903(1)(g). This is a change to existing law to require that the property be valueless and not that it be valueless "in the opinion of the guardian." Florida Statutes § 744.441(2) (2019).

- i. Effect a fair and reasonable compromise or settlement with any debtor or obligor or extend, renew, or in any manner modify the terms of any obligation owing to the ward;<sup>503</sup>
- j. Prosecute or defend claims or proceedings in any jurisdiction for the protection of the ward and of a guardian in the performance of guardianship duties, including the filing of a petition for dissolution of marriage. Before authorizing a guardian to bring an action described in § 736.0207, the court shall first find that the action appears to be in the ward's best interest during the ward's probable lifetime. There shall be a rebuttable presumption that an action challenging the ward's revocation of all or part of a trust is not in the ward's best interests if the revocation relates solely to a post-death distribution. This subsection does not preclude a challenge after the ward's death. Any judicial proceeding specified in § 736.0201 must be brought as an independent proceeding and is not a part of the guardianship action;<sup>504</sup>
- k. Sell, mortgage, or lease any real or personal property of the ward, including homestead property, or any interest therein for cash or credit, or for part cash and part credit, and with or without security for unpaid balances;<sup>505</sup>
- l. Continue any unincorporated business or venture in which the ward was engaged;<sup>506</sup>
- m. Purchase, in the name of the ward, real property in this state in which the guardian has no interest;<sup>507</sup>
- n. If the ward is married with property owned by the ward and spouse as an estate by the entirety and the property is sold, the proceeds shall retain the same entirety character as the original asset, unless otherwise determined by the court;<sup>508</sup>
- o. Exercise any option contained in any policy of insurance payable to, or inuring to the benefit of, the ward;<sup>509</sup>
- p. Prepay reasonable funeral, interment, and grave marker expenses for the ward from the ward's property;<sup>510</sup>

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<sup>502</sup> § 745.903(1)(h).

<sup>503</sup> § 745.903(1)(i).

<sup>504</sup> § 745.903(1)(j). This is a change to existing law to include petitioning for dissolution of marriage as an act requiring court authority instead of an extraordinary act. *See* Florida Statutes § 744.3215(4)(c) (2019). This new provision also clarifies that a proceeding under the Trust Code be filed as an action independent of the guardianship proceeding.

<sup>505</sup> § 745.903(1)(k).

<sup>506</sup> § 745.903(1)(l).

<sup>507</sup> § 745.903(1)(m). This is a change to existing law to broaden the guardian's authority to purchase real property for the ward and removes the requirement that the property be used as the home of the ward and ward's family under Florida Statutes § 744.441(14) (2019).

<sup>508</sup> § 745.903(1)(n). This provision clarifies existing law to make the default provision that the sale proceeds retain their entirety character. *Cf* Florida Statutes § 744.441(14) (2019).

<sup>509</sup> § 745.903(1)(o).

- q. Make gifts of the ward's property to members of the ward's family for estate and income tax planning purposes or to continue the ward's prior pattern of gifting;<sup>511</sup>
- r. When the ward's will evinces an objective to obtain a United States estate tax charitable deduction by use of a split interest trust (as that term is defined in s. 736.1201), but the maximum charitable deduction otherwise allowable will not be achieved in whole or in part, execute a codicil on the ward's behalf amending the will to obtain the maximum charitable deduction allowable without diminishing the aggregate value of the benefits of any beneficiary under the will;<sup>512</sup>
- s. Create or amend revocable trusts or create irrevocable trusts of property of the ward that may extend beyond the disability or life of the ward in connection with estate, gift, income, or other tax planning or to carry out other estate planning purposes. The court shall retain oversight of the assets transferred to a trust, unless otherwise ordered by the court. Before entering an order authorizing creation or amendment of a trust, the court shall appoint counsel to represent the ward in that proceeding. To the extent this provision conflicts with provisions of Chapter 736, Chapter 736 shall prevail;<sup>513</sup>
- t. Renounce or disclaim any interest of the ward received by testate or intestate succession, insurance benefit, annuity, survivorship, or inter vivos transfer;<sup>514</sup>
- u. Enter into contracts that are appropriate for, and in the best interest of, the ward,<sup>515</sup> and
- v. Pay for a minor ward's support, health, maintenance, and education, if the ward's parents, or either of them, are alive.<sup>516</sup>

### **3. Do Not Resuscitate Orders Require Prior Court Approval.<sup>517</sup>**

A guardian of person may only execute a do not resuscitate order after receiving court approval. The Code adopts the same expedited procedures present in Florida Statutes § 744.441(2) requiring the Court to hold a preliminary hearing on any petition for a DNR within 72 hours of filing. To the extent the Court does not rule at that preliminary hearing, the Court is required to hold an evidentiary hearing within 72 hours of filing. The petition is required to follow the content requirements of the Florida Probate Rules.

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<sup>510</sup> § 745.903(1)(p).

<sup>511</sup> § 745.903(1)(q). This is a change to existing law to broaden the guardian's authority to make gifts by continuing "the ward's prior pattern of gifting." *Cf* Florida Statutes § 744.441(17) (2019).

<sup>512</sup> § 745.903(1)(r).

<sup>513</sup> § 745.903(1)(s).

<sup>514</sup> § 745.903(1)(t). This is a clarification of existing law to fully set forth all of the interests which a guardian may disclaim. *Cf* Florida Statutes § 744.441(20) (2019).

<sup>515</sup> § 745.903(1)(u).

<sup>516</sup> § 745.903(1)(v).

<sup>517</sup> § 745.903(2). This provision became law in July 2020.

## C. Petition & Order Authorizing Acts.

Sections 745.904 and 745.905 set forth the requirements for petitions for authority to act and orders authorizing acts, respectively. These companion sections clarify existing law, and apply to both guardians of the property and guardians of the person and to acts under § 745.903 (rights exercisable by guardian of property only with court authority) and § 745.1309 (acts involving a conflict of interest).

### 1. Petition for Authority to Act.

The petition for authority to act must:<sup>518</sup> (i) state the facts showing the expediency or necessity for the action; (ii) describe the property involved; (iii) state the price and terms of the sale, mortgage or other contract; and (iv) state whether the ward has been adjudicated incapacitated to act with respect to the rights to be exercised. Notice of a petition to authorize sale or repair of a perishable or deteriorating property is not required.<sup>519</sup>

Notice must be given in accordance with the Florida Probate Rules, unless waived for good cause. Otherwise, notice of a petition must be given to the ward (unless the ward is a minor or has been determined to be totally incapacitated, the next of kin, and any other interested person whom the court determines entitled).

**2. Order Authorizing Action.** If a sale or mortgage is authorized, the order shall describe the property and if the sale is private, describe the price and terms of the sale; or if the sale is by public auction, state that the sale shall be made to the highest bidder but that the guardian reserves the right to reject all bids.<sup>520</sup> Any other orders permitting an act under § 745.903 or § 745.1309 shall describe the permitted act and authorize the guardian to perform it.<sup>521</sup>

## D. Conveyance of Property Rights.

The section applies to guardians of the property and, as the title suggests, sets forth the requirements for the guardian to convey the ward's property interests, and also sets forth the requirements for collection of monies owed to the ward. Nothing in this section prohibits the court from appointing a sole guardian to serve as guardian for both spouses.<sup>522</sup> In determining the value of a life estate or remainder interest, the American Experience Mortality Tables may be used.<sup>523</sup>

### 1. Generally.

When an incapacitated person for whom a guardian of property has been appointed owns specific property interest types, then, in accordance with § 745.903 (acts by guardians requiring court approval, discussed above), a guardian may: (a) convey or release any contingent or expectant interest in property, including marital property rights and any right of

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<sup>518</sup> § 745.904(1).

<sup>519</sup> § 745.904(2).

<sup>520</sup> § 745.905(1).

<sup>521</sup> § 745.905(2).

<sup>522</sup> § 745.906(3).

<sup>523</sup> § 745.906(2).

survivorship incident to joint tenancy or tenancy by the entireties;<sup>524</sup> and (b) sell, transfer, convey or mortgage all legal or equitable interests in property owned as an estate by the entireties, if the spouse who is not incapacitated joins in the sale or conveyance. When both spouses are incapacitated, the sale, transfer, conveyance, or mortgage shall be made by the guardian(s) only. The sale, transfer, conveyance, or mortgage may be accomplished by one instrument or by separate instruments.<sup>525</sup>

## 2. Ownership by Ward with Spouse.

When authorizing or confirming the sale or conveyance of real or personal property owned by the ward and the ward's spouse as an estate by the entireties or as joint tenants with right of survivorship, the court may provide that: (a) one-half of the net proceeds of the sale shall go to the guardian of the ward and the other one-half shall go to the ward's spouse; or (b) the proceeds of the sale retain the same character of survivorship as the original asset.<sup>526</sup>

## 3. Collecting Payments.

**a. Intangibles.**<sup>527</sup> A guardian of the property shall collect all payments coming due on intangible property, including notes, mortgages, and other securities, owned by the ward and the ward's spouse as an estate by the entireties or as joint tenants with rights of survivorship. The default provision is that the guardian shall retain one-half of all principal and interest payments collected and shall pay the other one-half to the spouse who is not incapacitated. However, the court may direct that the payments retain their status as to survivorship or specify the allocation of the payments in a manner other than equal division. If both spouses are incapacitated, either guardian (or if there is only one guardian, the guardian acting on behalf of either) may collect the payments and make the applicable payment to the other guardian.

**b. Real Property.**<sup>528</sup> A guardian of the property shall collect all payments of rent coming due on real estate owned by the ward as an estate by the entireties and pay all charges against the property, such as taxes, insurance, maintenance and repairs. The default provision is that the guardian shall retain one-half of the net rents and shall pay the other one-half to the spouse who is not incapacitated. However, the court may direct that the payments retain their status as to survivorship or specify the allocation of the payments in a manner other than equal division. If both spouses are incapacitated, either guardian (or if there is only one guardian, then the guardian acting on behalf of either) may collect the rents, pay the charges, and make the applicable payment to the other guardian.

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<sup>524</sup> § 745.906(4).

<sup>525</sup> § 745.906(1)(a).

<sup>526</sup> § 745.906(1)(b).

<sup>527</sup> § 745.906(1)(c).

<sup>528</sup> § 745.906(1)(d). This is a change to existing law. The guardian is required under the new Code to collect rents, whereas Florida Statutes § 744.457(1)(d) (2019) requires the spouse to collect the rents. *See also* Florida Statutes § 744.361(12) (2019) requiring court approval for the guardian to collect rents.

## **E. Settlement of Claims.**

This section describes the process for settlement of claims by or against both adult and minor wards. These provisions apply whether the claim arose before or after the appointment of the guardian and whether from personal injury or otherwise.<sup>529</sup> The procedure for adult wards is applicable to minor wards.<sup>530</sup>

**1. Adult Wards.** When a settlement of a claim is proposed, but before an action to enforce settlement has begun, a court may enter an order authorizing a settlement if the court is satisfied that the settlement is in the best interest of the ward and the guardian of property files a petition stating the facts of the claim or dispute and the proposed settlement.<sup>531</sup> The order shall relieve the guardian from any further responsibility in connection with the claim or dispute when settlement has been made in accordance with the order. The order may also determine whether additional bond is required and if so, shall fix the amount.<sup>532</sup>

**2. Minor Wards.** A guardian for a minor may settle a claim of a minor in the same manner as for adults or as authorized by § 745.713. The natural guardian or guardian of a minor may settle any claim that does not exceed \$25,000.00 without bond, which constitutes an increase from the current \$15,000.00 limitation. If the net amount of a settlement is less than \$25,000.00, then a guardianship for the minor is not required. If the amount is above \$25,000.00, but not more than \$50,000.00, the Court has discretion to determine whether the natural guardians may settle the claim or whether a guardian should be appointed. If the net amount of the settlement is more than \$50,000.00, a guardianship is required.<sup>533</sup>

**3. Provisions Applicable to all settlements.** A settlement is not effective unless the court having jurisdiction of the guardianship has approved the settlement.<sup>534</sup> Once approved, the guardian is authorized to execute any instrument necessary to effect the settlement. Once executed, the instrument shall be a complete release of the guardian.<sup>535</sup>

## **F. Authority for Extraordinary Actions.**

This section addresses the extraordinary actions a guardian may need to take and what is required for a guardian to do so. The actions described in this section require additional procedural safeguards to protect the ward. This section applies to both guardians of the property and of the person.

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<sup>529</sup> § 745.907(1).

<sup>530</sup> § 745.907(2).

<sup>531</sup> § 745.907(1).

<sup>532</sup> *Id.*

<sup>533</sup> § 745.907(2). This is a change to existing law to increase the amount for which a guardianship of a minor is not required from under \$15,000 to under \$25,000 and to make a guardianship optional in the court's discretion when the net amount of the settlement is between \$25,000 and \$50,000. *Cf* Florida Statutes § 744.387 (2019).

<sup>534</sup> § 745.907(3). This is a change to existing law. Florida Statutes § 744.387(3)(a) (2019) requires the court having jurisdiction of the *action* to approve the settlement.

<sup>535</sup> § 745.907(4).



## 1. Extraordinary Actions.<sup>536</sup>

A guardian shall not take the following actions without first obtaining court authority:

- a. Committing a ward with developmental disabilities to a facility, institution or licensed service provider without a formal placement proceeding pursuant to Florida Statutes Chapter 393.<sup>537</sup>
- b. Consenting to the performance of any experimental biomedical or behavioral procedure on the ward or to the ward's participation in any biomedical or behavioral procedure. The court may permit the performance or participation if it is of direct benefit to the ward and is intended to preserve the ward's life or prevent serious impairment to the mental or physical health of the ward; OR it is intended to assist the ward to develop or regain the ward's abilities.<sup>538</sup>
- c. Consenting to the termination of the ward's parental rights,<sup>539</sup> and
- d. Consenting to a sterilization procedure or abortion procedure on the ward.<sup>540</sup>

## 2. Granting Authority - Before the court can grant authority to exercise these extraordinary powers, the court must:

- a. Appoint an attorney to represent the ward. The attorney must have an opportunity to meet with the ward and to present evidence and cross-examine witnesses at any hearing on the petition for authority to act.<sup>541</sup>
- b. Consider independent medical, psychological, and social evaluations of the ward presented by competent professionals.

The court may appoint experts to assist in the evaluations. The court may consider the written evaluation reports without requiring testimony at the hearing. However, the ward or petitioner may object to the court considering these reports. The objection must be filed and served on interested persons at least 3 days prior to the hearing.<sup>542</sup> The court must find by clear and convincing evidence that the ward lacks the capacity to make a decision about the issues before the court and that the ward's capacity is unlikely to change in the foreseeable future.<sup>543</sup> Finally, the court must find by clear and convincing evidence that the authority being requested is consistent with the ward's intentions

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<sup>536</sup> The new Code does not include petitioning for dissolution of the ward's marriage in extraordinary acts, as does current law under Florida Statutes § 744.3215(4)(c) (2019).

<sup>537</sup> § 745.908(1)(a).

<sup>538</sup> § 745.908(1)(b).

<sup>539</sup> § 745.908(1)(c).

<sup>540</sup> § 745.908(1)(d).

<sup>541</sup> § 745.908(2)(a).

<sup>542</sup> § 745.908(2)(b). This is a change to existing law to allow the court to consider written reports instead of requiring in person testimony by experts. *Cf* Florida Statutes § 744.3725.

<sup>543</sup> § 745.908(2)(c).

expressed prior to incapacity, or if there is no evidence of the ward's intentions, that the authority is in the best interests of the ward.<sup>544</sup>

## **Part X: Oversight and Monitoring**

Part X of the Code sets forth the duties of the Clerk of the Court and for judicial review and oversight of guardianship matters. Among these provisions are the procedures for judicial review of inventories and accountings,<sup>545</sup> plans and reports,<sup>546</sup> and procedures for the Clerk to obtain additional documents.<sup>547</sup> The Clerk's office has the initial duty to review inventories, accountings, plans and reports and then the Court must review and ultimately approve or disapprove of same.<sup>548</sup> Part X also addresses interested persons' rights to seek judicial review of guardianship actions<sup>549</sup> and the procedure for appointing guardianship monitors.<sup>550</sup>

### **A. Duties of Clerk of the Court**

The Clerk of the Court has the vital task of serving as the custodian of guardianship files.<sup>551</sup> Under the Code, the Clerk has the duty to review initial plans and reports for compliance with Florida Statutes and Florida Probate Rules.<sup>552</sup> The Code adds a requirement for the Clerk to provide the Court and the guardian the Clerk's written findings on whether a plan or report provides the information required of the guardian, which must be done within 30 days of the filing.<sup>553</sup> The Clerk has 60 days to audit inventories and accountings<sup>554</sup> and a written audit report of the Clerk's findings is required following review.<sup>555</sup> The Clerk must now advise both the Court and the guardian of results from an audit, which is a departure from Chapter 744 which only required the Clerk to advise the Court.<sup>556</sup> The Code also creates a new duty for the Clerk to provide written notice to the Court and guardian when an inventory, accounting, plan or report is not timely filed.<sup>557</sup>

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<sup>544</sup> § 745.908(2)(d). This is a change to existing law to require that substituted judgment is the standard used, consistent with § 745.809.

<sup>545</sup> § 745.1002.

<sup>546</sup> § 745.1003.

<sup>547</sup> § 745.1001.

<sup>548</sup> *Id.*

<sup>549</sup> § 745.1006.

<sup>550</sup> § 745.1008; § 745.1009.

<sup>551</sup> § 745.1001.

<sup>552</sup> § 745.1001(1). The Code simplifies the requirements for the Clerk's review by removing a laundry list of items and instead citing to Florida Statutes and Florida Probate Rules.

<sup>553</sup> *Id.*

<sup>554</sup> § 745.1001(2). The Code shortens the time period from 90 to 60 days to ensure any financial issues are caught and addressed in a timely fashion.

<sup>555</sup> *Id.*

<sup>556</sup> § 745.1001(4) The Clerk providing its findings to only the Court under Chapter 744 was in essence an *ex parte* communication between the Clerk and the Court with no notice or opportunity to participate given to the guardian. Chapter 745 addresses this problem by (1) obligating the Clerk to produce written reports, and (2) requiring the reports be provided to the guardian.

<sup>557</sup> § 745.1001(3).

The Clerk may request and review additional records when appropriate, and even has subpoena power, which can be exercised upon appropriate notice and a hearing on any objections.<sup>558</sup> The Clerk may request and review records that reasonably impact guardianship assets, and if there is a finding of wrongdoing by the guardian, any fee or cost incurred by the guardian in responding may not be paid from guardianship assets.<sup>559</sup>

## **B. Judicial Review**

The Code creates two statutes on the Court's authority and duty for judicial review of (1) accountings and inventories, and (2) plans and reports.<sup>560</sup> The Code also outlines contempt proceedings for failure to file the required annual documents.<sup>561</sup>

**1. Accountings and Inventories** - After the Clerk issues its written report relating to accountings and inventories, the Court has 45 days to review inventories and accountings and ensure they comply with the law.<sup>562</sup> The Court may appoint a magistrate to assist in review.<sup>563</sup> The Code specifies that if the Court finds that the document complies with the requirements of law, it must approve the inventory or accounting.<sup>564</sup> Whereas the Florida Guardianship Law required the Court to disapprove of the inventory or accounting if there were deficiencies found, the Code requires the Court to notify the guardian in writing of deficiencies and provide a reasonable time to correct same or respond to the Court.<sup>565</sup> The Court may conduct a hearing if the guardian does not respond or further action is needed.<sup>566</sup> Similarly, the Court may conduct a hearing on any objections, which may only be filed by interested persons.<sup>567</sup> The Code allows any objections to be abandoned if a notice of hearing is not served within 30 days of filing of the objection.<sup>568</sup> Last, if an objection is found to have been filed in bad faith, the Court may award taxable costs, including attorney's fees.<sup>569</sup>

**2. Plans and Reports** - After the Clerk issues its audit relating to guardianship plans and reports, the Court has 45 days to review the plans and reports and ensure they comply

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<sup>558</sup> § 745.1001(4)-(6).

<sup>559</sup> § 745.1001(4).

<sup>560</sup> § 745.1002; § 745.1003.

<sup>561</sup> § 745.1004.

<sup>562</sup> § 745.1002(1). Fla. Stat. § 744.369(1) required the Court to review the initial guardianship report within 60 days and annual guardianship reports within 30 days after the Clerk's report. Under Ch. 744 the initial guardianship report includes the initial plan and inventory and the annual guardianship report includes the annual plan and annual accounting. As referenced in Part VIII, these terms were revised to make it easier to understand the requirements.

<sup>563</sup> However, the Code removes the provision from Chapter 744 permitting the Court to require a magistrate to conduct random field audits. § 745.1002(1); § 744.369(2).

<sup>564</sup> § 745.1002(2).

<sup>565</sup> § 744.369(5); § 745.1002(2). Once the deficiencies are corrected to the Court's satisfaction, the inventory or accounting must be approved. § 745.1002(3).

<sup>566</sup> § 745.1002(2).

<sup>567</sup> The Code specifically clarifies that objections may only be filed by interested persons. Interested person is now a specifically defined term in the Code. § 745.106(20); § 745.1002(4).

<sup>568</sup> Chapter 744 required the Court to set any objections for hearing and the Code shifts this responsibility to interested persons who file objections. § 745.1002(4); § 744.369(7).

<sup>569</sup> Chapter 744 allowed the Court to assess costs when objects were found to be without merit, but the Code changes the standard to bad faith. § 745.1002(4); § 744.369(7).

with the law.<sup>570</sup> Like accountings and inventories, the Court may appoint a general or special magistrate to assist.<sup>571</sup> If the plan or report complies with the requirements of law, the Court may approve the plan or report.<sup>572</sup> Plans and reports are treated differently than accountings and inventories because even if they comply with the requirements of law, the judge still has the discretion to disagree with something in the plan or report and can choose not to approve of a proposed action.<sup>573</sup> If the Clerk's written statement shows deficiencies, the Court must notify the guardian, in writing, of deficiencies and provide a reasonable time to correct same or respond to the Court.<sup>574</sup> The Court may conduct a hearing if the guardian does not respond or further action is needed.<sup>575</sup> After any deficiencies are corrected to the satisfaction of the Court, the plan or report must be approved.<sup>576</sup> Similarly, the Court may conduct a hearing on any objections, which may only be filed by interested persons.<sup>577</sup> The Court may abandon the objections if a notice of hearing is not served within 30 days of filing of the objection.<sup>578</sup> Last, if an objection is found to have been filed in bad faith, the Court may award taxable costs, including attorney's fees.<sup>579</sup>

**3. Failure to File** - If a guardian fails to file an accounting, inventory, plan or report, the Court shall order a guardian to file within 15 days from an order to show cause which shall be served on the guardian.<sup>580</sup> If good cause is not shown, the Court may sanction the guardian, such sanction not being payable from guardianship assets.<sup>581</sup>

**4. Interim Judicial Review** - The authority of interested persons to petition for judicial review is an important tool for third parties interested in the guardianship. This section allows any interested person to, at any time, petition the Court for review alleging that the guardian is not complying with a plan or report, is exceeding their authority under a plan or report, or is acting contrary to the guardian's duties as set forth in § 745.802 and § 745.809.<sup>582</sup> The petition must include the petitioner's interest, the nature of the objection and

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<sup>570</sup> § 745.1003(1).

<sup>571</sup> *Id.*

<sup>572</sup> § 745.1003(2).

<sup>573</sup> § 745.1005 remains the same as Chapter 744 and authorizes the Court to enter orders as it deems appropriate for the protection of the ward following review of the annual report.

<sup>574</sup> § 745.1003(2).

<sup>575</sup> *Id.*

<sup>576</sup> § 745.1003(3).

<sup>577</sup> The Code specifically clarifies that objections may only be filed by interested persons. Interested person is now a specifically defined term in the Code. § 745.106(20); § 745.1003(4).

<sup>578</sup> Chapter 744 required the Court to set any objections for hearing and the Code shifts this responsibility to interested persons who file objections. § 745.1003(4); § 744.369(7).

<sup>579</sup> Chapter 744 allowed the Court to assess costs when objects were found to be without merit, but the Code changes the standard to bad faith. § 745.1003(4); § 744.369(7).

<sup>580</sup> The Code mandates that the Court's order be in writing. § 745.1004.

<sup>581</sup> § 745.1004.

<sup>582</sup> § 745.1006(1). The Code eliminates the ability under Chapter 744 for judicial review when the guardian is not acting in the best interest of the ward because the Code shifts focus to the use of substituted judgment as a decision-making standard which means decisions will not always be in the best interest of the ward.

the facts supporting the petition.<sup>583</sup> The Court may award taxable costs, including fees, if it finds a petition is filed in bad faith.<sup>584</sup>

**5. Production of Property-** On the petition of an interested person, the Court can require the guardian to provide satisfactory evidence that the ward's property is in the guardian's possession or control.<sup>585</sup> The Court may order the guardian to produce the property for inspection by the Court or under the Court's direction.<sup>586</sup>

## C. Monitors

### 1. Guardianship Monitor<sup>587</sup>

Protection of the ward is paramount under the Code. One method available to the Court to ensure the proper protection of the ward is to appoint a monitor to investigate one or more aspects of the guardianship administration.<sup>588</sup> The Code strengthens the provisions relating to monitors to ensure due process for all involved.<sup>589</sup> A monitor can be sought by an interested person or the Court's own motion, and the Code requires a hearing and proper notice.<sup>590</sup> One significant change is the prohibition against a clerk or employee of the Court acting as a monitor.<sup>591</sup> Further, the Code establishes requirements for what must be contained in the order appointing a monitor, including the facts supporting the order, the scope of the investigation, the powers and duties of the monitor, and the timeframe in which the investigation must be concluded.<sup>592</sup>

The Code specifies that a monitor is an interested person until discharged and cannot have ex parte communications with the Court.<sup>593</sup> The monitor must file a verified, written report of the monitor's findings and recommendations which must be served on the guardian, the ward (unless a minor or totally incapacitated) and other interested persons determined by the

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<sup>583</sup> The language used in § 745.1006 incorporates the basis for filing as outlined in § 744.3715 by referencing § 745.809. Specifically, under § 745.809(11)(b) the guardian must allow the ward to maintain contact with family and friends unless the guardian believes that such contact may cause harm to the ward. An interested person can still bring a petition for interim review if they believe the guardian is not complying with this duty or any other duty set forth in § 745.809.

<sup>584</sup> § 745.1006(2).

<sup>585</sup> The Code deletes specific reference to a creditor as someone who can petition, though a creditor may be an interested person depending on the circumstances. § 745.1007.

<sup>586</sup> The Code gives the Court more discretion regarding who the guardian must produce property to for inspection. § 745.1007.

<sup>587</sup> The Code refers to monitors as guardianship monitors and not court monitors since the Code specifically prohibits court employees from serving as monitors.

<sup>588</sup> § 745.1008.

<sup>589</sup> Id.

<sup>590</sup> § 745.1008(1).

<sup>591</sup> Under Chapter 744 there is no such prohibition which has led to internal investigations by court employees or clerks with no notice to guardians and ex parte communications between the Court and the monitor in various parts of the state. This change is specifically designed to eliminate same. § 745.1008; § 744.107.

<sup>592</sup> These requirements were added to ensure that the role of the monitor is clear to all involved and to specify what authority the monitor has to act. The monitor will also have an order to show to the guardian and third parties during its investigation to support its authority. § 745.1008(3).

<sup>593</sup> § 745.1008(4).

Court.<sup>594</sup> To ensure the rights of the guardian and the ward, the Code authorizes the guardian and the ward to seek information from the monitor using discovery methods authorized in the Florida Probate Rules.<sup>595</sup>

If the Court believes further action is necessary, after a hearing with proper notice, it can enter an order to protect the ward or the ward's property.<sup>596</sup> Unless otherwise prohibited by law, the monitor can be paid from the ward's property, unless the monitor is a state, county or municipal employee or officer.<sup>597</sup> After proper notice and hearing, costs can be assessed against a person who acts in bad faith when filing a petition for appointment of a monitor, or submitting a written communication that results in the appointment of a monitor.<sup>598</sup>

## 2. Emergency Guardianship Monitor

Upon the petition of an interested person, or on its own motion, if the Court finds imminent danger to the ward or the ward's property, the Court may appoint an emergency monitor without notice.<sup>599</sup> The order of appointment must contain the same information as required for guardianship monitors.<sup>600</sup> Service requirements of the monitor's report are the same as guardianship monitors.<sup>601</sup> Upon review of the report, the Court shall determine whether further action is necessary, and if so, after a hearing with proper notice, enter orders to protect the ward or the ward's property.<sup>602</sup> However, prior to a hearing, the Court can enter a temporary injunction or take other protective measures, such as suspending a guardian or appointing an *ad litem*.<sup>603</sup> Emergency guardianship monitors are allowed reasonable fees from the ward's property and, like § 745.1008, fees and costs can be assessed against petitioners and third parties after proper notice and hearing.<sup>604</sup>

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<sup>594</sup> § 745.1008(5).

<sup>595</sup> *Id.*

<sup>596</sup> § 745.1008(6).

<sup>597</sup> § 745.1008(7). The Code removes the language from § 744.107 that indicates the Court may appoint the office of criminal conflict and civil regional counsel as monitor of the ward is indigent at the request of the office of criminal conflict and civil regional counsel.

<sup>598</sup> *Id.* The Code includes the ability to sanction third parties if their bad faith actions result in the appointment of a monitor because it is common in guardianship matters for unrepresented third parties to file correspondence and other documents accusing the guardian of actions or inactions without specifically seeking a monitor. However, if the third-party communications cause the Court alarm and are later determined to have been filed in bad faith, the Court still has the authority to assess fees against the third party.

<sup>599</sup> Emergency monitors are limited to those qualified to be monitors under § 745.1008. § 745.1009(1).

<sup>600</sup> The order on emergency monitors must specify the time frame for completing the investigation which replaces the 15-day requirement found in § 744.1075(2). This allows the Court discretion to determine how quickly an investigation must be completed and a report filed based on the circumstances of each guardianship. § 745.1009(2).

<sup>601</sup> § 745.1009(3).

<sup>602</sup> The Code deletes reference to "probable cause" as the standard for determining whether further action is necessary and instead focuses on protection of the ward. § 745.1009(5); § 744.1075(4)(a).

<sup>603</sup> § 745.1009(5)(b).

<sup>604</sup> The monitor's right to payment and the ability to assess fees and costs are the same as set forth in § 745.1008(7). § 745.1009(6).

## **Part XI: Resignation and Discharge**

Part XI of the Code sets forth the procedures for a guardian's resignation and the various reasons for termination of a guardianship. The Code separates the resignation and termination of guardian of person and property into separate statutes for easy comprehension.

### **A. Resignation of Guardian**

A guardian may resign at any time.<sup>605</sup> However, a resigning guardian retains their duties and responsibilities until letters of guardianship are issued to a successor.<sup>606</sup> Unless waived, the guardian must give notice of their resignation to (1) the next of kin of the ward, (2) the ward, unless a minor or totally incapacitated, and (3) a successor or proposed successor guardian, if any.<sup>607</sup> Under the Code, guardians are entitled to be discharged regardless of whether a successor has been appointed.<sup>608</sup> If no successor has been appointed, the Court may appoint an emergency temporary guardian.<sup>609</sup>

#### **1. Resignation of Guardian of Person**

The Code creates a new statute that specifically focuses on how and when a guardian of person resigns and is discharged.<sup>610</sup> The guardian must file a resignation and petition for discharge and serve any successor guardian and such interested persons as directed by the Court.<sup>611</sup> The guardian is entitled to discharge upon proof of fully discharging the guardian's duties and proof of delivery of copies of all medical, personal and residential care records for the ward to the successor or emergency temporary guardian.<sup>612</sup> A successor guardian may be appointed and have letters issued after a guardian has resigned and before the former guardian is discharged.<sup>613</sup> The successor guardian has the authority set forth in the guardian's letters.<sup>614</sup>

#### **2. Resignation of Guardian of Property**

The Code creates a new statute that specifically focuses on the how and when a guardian of property resigns and is discharged.<sup>615</sup> The guardian must file a petition for distribution and discharge, a final accounting and notice of filing the documents, which the guardian must

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<sup>605</sup> The committee feels this is a clarification of the current law which indicates that a guardian may resign after notice to the court. § 744.467; § 745.1101(1).

<sup>606</sup> The Court is no longer limited to accepting a resignation only if it will not place the interest of the ward in jeopardy. § 744.467; § 745.1101(2).

<sup>607</sup> The Code eliminates the requirement of notice to the surety. § 744.467; § 745.1101(3).

<sup>608</sup> Chapter 744 requires the appointment of a successor guardian before the Court can discharge a guardian. § 745.1102(6); § 745.1107(5).

<sup>609</sup> § 745.1102(7); § 745.1107(5).

<sup>610</sup> § 745.1107.

<sup>611</sup> These are new requirements. § 745.1107(2).

<sup>612</sup> Id.

<sup>613</sup> § 745.1107(4).

<sup>614</sup> Id.

<sup>615</sup> § 745.1102.

serve on any successor guardian and interested persons as directed by the Court.<sup>616</sup> The petition for distribution must include unpaid expenses of administration and unpaid expenses of the ward.<sup>617</sup> The final accounting is subject to audit by the Clerk which can be waived by the successor guardian.<sup>618</sup>

The notice must specify that interested persons have 30 days from receipt of the notice to file objections.<sup>619</sup> If no objections are filed, the Court may authorize distribution without a hearing.<sup>620</sup> However, if objections are filed, they must be resolved as provided in the Florida Probate Rules.<sup>621</sup> A successor guardian may be appointed and have letters issued after a guardian has resigned and before the former guardian is discharged.<sup>622</sup> The successor guardian has the authority set forth in the guardian's letters.<sup>623</sup>

### **3. Counsel for the Ward**

Upon petition by an interested person or on the Court's own motion, an attorney may be appointed to represent the ward in discharge proceedings.<sup>624</sup> When appointed by the Court, the court must appoint a private attorney who is included in the attorney registry compiled pursuant to § 27.40 or the office of criminal conflict and civil regional counsel.<sup>625</sup> The Code makes clear that counsel's role is to represent the preferences expressed by the ward.<sup>626</sup> The Code also permits the attorney for the ward to assist in locating a successor guardian.<sup>627</sup>

## **B. Termination of Guardianship**

### **1. Termination of Guardianship of Person**

The Code creates a new statute that addresses the termination of guardianships of person.<sup>628</sup> A guardian must file a petition for discharge specifying the grounds for termination when: (i) a ward becomes sui juris, (ii) the ward has been restored to capacity as to all rights relating to

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<sup>616</sup> Chapter 744 did not include requirements for a final accounting and petition for distribution and discharge in resignation proceedings. The committee feels a procedure and proper documentation to the Court is necessary when a guardian resigns. The committee reviewed the Probate Code which requires a final accounting upon resignation when establishing requirements for a guardian's resignation and the Florida Probate Rules which requires a notice of petition for discharge and accounting in probate matters.. *See* § 733.5036; § 745.1102(2); Fla. Prob. R. 5.430.

<sup>617</sup> § 745.1102(4).

<sup>618</sup> § 745.1102(3).

<sup>619</sup> This procedure is new. § 745.1102(5).

<sup>620</sup> *Id.*

<sup>621</sup> *Id.*

<sup>622</sup> § 745.1102(10).

<sup>623</sup> *Id.*

<sup>624</sup> The Code clarifies that counsel can be appointed for the ward and counsel's role if appointed. § 745.1102(9); § 745.1007(3).

<sup>625</sup> *Id.*

<sup>626</sup> Counsel's role in discharge proceedings is the same as counsel for the ward's role in other parts of the Code, which is to represent the preferences expressed by the ward. *Id.*

<sup>627</sup> *Id.*

<sup>628</sup> § 745.1108.



the ward's person, (iii) the guardianship terminates due to relocation of the ward out of state, or (iv) the guardianship is otherwise terminated, except upon the death of the ward.<sup>629</sup>

The petition must be served on the ward.<sup>630</sup> When a ward becomes sui juris or has been restored, the petition and notice of hearing shall be served on the ward unless waived.<sup>631</sup> When a guardian cannot locate the ward, the guardian may file a petition for discharge specifying the attempts to locate the ward.<sup>632</sup> When the ward cannot be located, the guardian shall serve the petition and notice of hearing on the ward's next of kin or other persons as the court may direct.<sup>633</sup>

When a ward dies, the guardian of person is discharged upon the filing of a certified death certificate with a notice of discharge.<sup>634</sup>

## 2. Termination of Guardianship of Property

When a guardianship of property is terminating because: (i) a ward becomes sui juris, (ii) the ward has been restored to capacity as to all rights relating to the ward's property, (iii) the guardianship terminates due to relocation of the ward out of state, or (iv) the guardianship is otherwise terminated, the guardian must file a final accounting, petition for discharge and notice, which must be served on the ward, and if the guardianship is being terminated due to relocation, the successor guardian, next of kin, and any creditors of the ward.<sup>635</sup> The ward can waive audit of the final accounting.<sup>636</sup>

When the ward's property has been exhausted except for minimal personal effects and clothing, and the guardian receives no income on behalf of the ward, the guardian may petition for discharge and file a final accounting, which must be served on the ward and such interested persons as the court may direct.<sup>637</sup> This addition to the Code allows a guardian to terminate a guardianship of property when there are not assets to warrant a continuation of same, but provides the guardian the discretion to continue to maintain the guardianship of property if the guardian deems appropriate or necessary.<sup>638</sup>

When a ward dies, the guardian must file a final accounting and petition for distribution and discharge within 45 days after being served with letters issued in the ward's estate.<sup>639</sup> The guardian must serve the personal representative or curator, but the personal representative or curator can waive the preparation of the accounting or the final audit of the accounting.<sup>640</sup>

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<sup>629</sup> § 745.1108(1).

<sup>630</sup> Id.

<sup>631</sup> § 745.1108(3).

<sup>632</sup> The Code clarifies that a guardian may, but not is not required to, terminate the guardianship of person when the ward cannot be located. § 745.1108(2).

<sup>633</sup> § 745.1108(4).

<sup>634</sup> § 745.1108(5).

<sup>635</sup> § 745.1103(1).

<sup>636</sup> This is a new addition in the Code. Id.

<sup>637</sup> § 745.1103(2).

<sup>638</sup> An example may be for a ward who has an expected inheritance or potential future chose in action.

<sup>639</sup> § 745.1103(3).

<sup>640</sup> Id.

If there are no timely objections, once the Court authorizes distribution and the guardian files proof, the guardian is entitled to discharge.<sup>641</sup> However, if objections are filed, they must be resolved as provided in the Florida Probate Rules.<sup>642</sup> The guardian may retain a sufficient amount to pay the final costs of administration, including fees.<sup>643</sup>

### **3. Termination Upon Change of Residence to Foreign Jurisdiction**

If a ward's residence<sup>644</sup> is changed to another state or country and letters or the equivalent are issued in the new jurisdiction, the Florida guardian may file a petition for discharge in Florida.<sup>645</sup> A guardian of property must also file a final accounting.<sup>646</sup> The petition for discharge, and final accounting if there is a guardian of property, must be served on the new foreign guardian and the ward's next of kin with a notice that objections must be filed within 30 days.<sup>647</sup> A guardian of property must also serve the petition for discharge and final accounting on all known creditors of the ward.<sup>648</sup> If an objection is timely filed, any interested person may set it for hearing, but if no notice of hearing is served within 60 days after the filing of the objection, it is deemed abandoned.<sup>649</sup> After disposition of all objections, the guardian of person shall be discharged and guardian of property shall distribute the guardianship assets.<sup>650</sup> On proof that the guardianship property has been received by the foreign guardian, the guardian of property shall be discharged.<sup>651</sup> The Florida guardian's final accounting shall not be subject to audit.<sup>652</sup>

## **C. Discharge**

### **1. Discharge of Guardian of Property Named as Personal Representative**

If a guardian of property is appointed as the sole personal representative of the ward's estate upon the ward's death, the guardian must serve the final accounting, petition for distribution and discharge and notice on the estate beneficiaries.<sup>653</sup> If a trust is the beneficiary of the estate and the guardian is sole trustee, the final accounting must be served on the qualified

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<sup>641</sup> § 745.1103(4).

<sup>642</sup> § 745.1103(5).

<sup>643</sup> § 745.1103(6). This is consistent with current law. *See Lovest v. Mangiero*, 279 So. 3d 205 (Fla. 3d DCA 2019), *Bivins v. Guardianship of Bivins*, 223 So. 3d 1006, 1007 (Fla. 4th DCA 2017); *Midland Nat'l Bank and Trust v. Comerica Trust Co. of Fla., N.A.*, 616 So. 2d 1081, 1084 (Fla. 4th DCA 1993).

<sup>644</sup> The Code uses the term residence in lieu of domicile.

<sup>645</sup> The Code streamlines the process of termination upon change of residence and creates two different statutes for termination of guardian of person and guardian of property. § 745.1105(1); § 745.1109(1).

<sup>646</sup> § 745.1105(1).

<sup>647</sup> § 745.1105(2); § 745.1109(1).

<sup>648</sup> The Code eliminates the requirement in § 744.524 for publication in a local newspaper. Instead, the Code specifies who is entitled to notice and includes all known creditors, so creditors have an opportunity to take a position regarding the termination of the guardianship in Florida. § 745.1105(2).

<sup>649</sup> The Code sets forth specific timelines for objections and hearing as an improvement over § 744.524 which only indicates that objections can be filed, heard, and sustained or overruled. § 745.1105(2); § 745.1109(2).

<sup>650</sup> § 745.1105(3); § 745.1109(3).

<sup>651</sup> § 745.1105(3).

<sup>652</sup> This is a new addition to guardianship statutes. § 745.1105(4).

<sup>653</sup> § 745.1104(1).

beneficiaries of the trust.<sup>654</sup> The beneficiaries of the estate or qualified beneficiaries of the trust may waive the preparation of the accounting or the final audit of the accounting.<sup>655</sup>

The Code clarifies that those entitled to the accounting have 30 days from receipt of the accounting and petition to file objections.<sup>656</sup> If objections are filed, they must be resolved as provided in the Florida Probate Rules.<sup>657</sup>

The guardian may only be discharged when (1) any objections have been resolved, (2) the final accounting is approved by the Court or waived, and (3) all property has been distributed to those entitled to it.<sup>658</sup>

## 2. Order of Discharge

If the Court is satisfied that (1) the guardian has faithfully discharged the guardian's duties, (2) delivered the property of the ward to the person entitled, if applicable, and (3) the interests of the ward are protected, the Court must enter an order discharging the guardian from any further duties and liabilities as guardian.<sup>659</sup> The discharge shall act as a bar to any action against the guardian, as guardian or individually, or the guardian's surety, as to matters adequately disclosed to interested persons.<sup>660</sup> For matters not adequately disclosed to interested persons, any action is barred unless commenced within 2 years of entry of the order of discharge.<sup>661</sup>

### D. Unclaimed Funds

When a ward dies and, after a reasonable amount of time, no estate proceeding has been instituted, a guardian of property may petition for appointment of a personal representative or curator.<sup>662</sup> Alternatively, the Court may order the guardian to sell the ward's property and deposit the proceeds with the Clerk.<sup>663</sup> The Code sets forth the procedure for the Clerk upon receipt of funds, including notice requirements.<sup>664</sup> After 6 months from providing the appropriate notice, the Clerk shall deposit the funds with the Chief Financial Officer, who shall deposit the funds in a separate fund devoted to the provision of guardianship services to indigent

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<sup>654</sup> This is a new requirement in the Code and is in line with the Probate Code which requires a notice of administration be served on qualified beneficiaries of a trust when each trustee is also a personal representative. § 733.212(1)(c); Id.

<sup>655</sup> § 745.1104(1).

<sup>656</sup> Chapter 744 only indicated that beneficiaries have 30 days to file objections, so the Code clarifies that the time period starts running from receipt of the accounting. § 744.528; § 745.1104(2).

<sup>657</sup> § 745.1104(2).

<sup>658</sup> § 745.1104(3).

<sup>659</sup> Under the Code, the Court does not have to find that the guardian has rendered a complete and accurate final report. § 745.1110(1).

<sup>660</sup> This is a major change in Florida guardianship law. Under Chapter 744, actions can be commenced against a guardian within 3 years after the date of the order of discharge. § 744.531; § 745.1110.

<sup>661</sup> Id.

<sup>662</sup> § 745.1106(1).

<sup>663</sup> The Code makes the sale of assets discretionary. § 745.1106(3).

<sup>664</sup> Id.

wards.<sup>665</sup> The Code does not change the ability of an interested person to petition the Court claiming entitlement to the funds within 5 years.<sup>666</sup>

When the guardian cannot locate the ward after diligent search, the guardian may file a petition under § 731.103(3) and, upon determination of death, proceed either to institute an estate proceeding or sell and deposit assets as set forth above.<sup>667</sup>

## **Part XII: Removal of Guardians**

### **A. Removal Court Process**

#### **1. Reasons for removal of guardian.**

All guardians of the property occupy a fiduciary relationship with their wards, and as a result are subject to certain liabilities that apply to any fiduciary. This section outlines the reasons for removal of a guardian and the penalties prescribed by law. Removal is a penalty imposed by the court on a guardian in addition to any other penalties prescribed by law. The Code maintains many of former Chapter 744's bases for removal of guardian and the additional penalties prescribed by law but removes four reasons for removal and adds two new reasons for removal.<sup>668</sup>

The Code now adds two additional reasons a guardian may be removed: (1) the willful failure to comply with a court order, and (2) being found guilty or nolo contender or a guilty plea to a domestic violence charge.

A material failure of the guardian to comply with the annual guardianship report, the failure of a guardian to comply with the rules for timely filing of initial and annual reports, and the improper management of the ward's assets were all removed and no longer available as a basis for the removal of a guardian. A bad faith failure to submit guardianship records during audit is also no longer a basis for removal.

The Code also removes language from this Section that there be a rebuttable presumption that a guardian related by blood or marriage is acting in the best interests of the ward.

#### **2. Proceedings for removal of guardian.**

If grounds for removal exist, the removal proceedings will be governed by F.S. 745.1202 and Fla. Prob. R. 5.660. The Section outlines the proceedings for the removal of a guardian and who can seek removal.<sup>669</sup>

Florida Statute Section 744.477 required only reasonable notice to the guardian; however, Rule 5.660(a) requires that formal notice of the petition for removal be served on the

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<sup>665</sup> This is a change from Chapter 744 where the funds were to be used solely for the benefit of public guardianships. § 745.1106(4).

<sup>666</sup> § 745.1106(4)(b).

<sup>667</sup> Chapter 744 did not have a provision for unclaimed funds when a guardian cannot locate a ward. § 745.1106(2).

<sup>668</sup> § 744.474, which specified that a guardian may be removed for any of the enumerated reasons.

<sup>669</sup> § 744.477.

guardian and other interested persons. The Code now aligns the rules and applicable statutory sections to now mandate that formal notice will be required for the petition for removal of guardian. The Code also removes language which previously allowed the court to institute removal proceedings.<sup>670</sup> The court may enter its order pursuant to the pleadings and the evidence after a hearing.

**3. Contempt Proceedings<sup>671</sup>** - The Section details how and when the court can hold a removed guardian in contempt and the procedural requirements for doing so. The requirement of showing “cause” for a guardian’s default is amended by the Code to require a showing of “reasonable cause” for the default of the guardian in relation to the contempt proceedings.<sup>672</sup> Now, if reasonable cause is shown for the default, the court will set a reasonable time for compliance. Failure to comply with that order or any subsequent order is cause for contempt proceedings. The proceedings may be instituted by the court or by any interested person, including the ward, or by the successor or, now, the Code adds by an emergency temporary guardian.

## **B. Accounting Upon Removal<sup>673</sup>**

The Code increases the length of time the removed guardian has to file the final accounting after removal from 20 days to 30 days after removal.<sup>674</sup> The Code added the requirement that the final report be served on the attorney for the ward and on the ward, unless the ward is a minor or has been determined to be incapacitated with respect to managing or disposing of their property. Previously the final report was required to be served on the ward unless the ward was a minor or had been determined to be totally incapacitated.

## **C. Successor Guardian**

**1. Appointment of Successor** – § 745.1204 addresses how a successor guardian is appointed, if needed, and provides the court with discretion to appoint an emergency temporary guardian pending the letters appointing a successor guardian. The Code adds language that the court must appoint a successor, as permitted under 745.501, if there is a continued need for a guardian. The Code adds an additional requirement that where no successor guardian has been appointed after the removal of guardian, the court must appoint an attorney for the ward. The section allows a ward to propose a successor guardian and the court may appoint an emergency temporary guardian until the letters of successor guardian are issued. The section removes language that a successor guardian must be appointed and duly qualified before a guardian shall be relieved of their duties and obligations.<sup>675</sup>

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<sup>670</sup> § 744.477 which allowed the removal proceedings to be instituted by the court, by any other guardian, any surety, or any other interested person, or by the ward.

<sup>671</sup> § 745.1206.

<sup>672</sup> §744.517.

<sup>673</sup> § 745.1203.

<sup>674</sup> § 744.511 previously required that a removed guardian of the property file an accounting of the guardianship within 20 days of removal; Fla. Prob. R. 5.660(b).

<sup>675</sup> §744.471 previously required a successor guardian to be appointed before the resigning or removed guardian is relieved of his or her duties.

**2. Surrender of Property Upon Removal** – The Code lays out the requirement and process of the removed guardian turning over assets and records of the ward.<sup>676</sup> The language in the Code removes language requiring the successor guardian to demand assets and records of the ward. Instead, the removed guardian of the ward's property is provided with 30 days after letters are issued appointing the successor guardian to deliver the property and copies of records, unless otherwise ordered by the court.<sup>677</sup> The changes put the obligation on the removed guardian to deliver the records instead of the responsibility on the successor guardian to demand the records of the ward.

### **Part XIII: Miscellaneous**

A number of required provisions of the Code do not appropriately fit within the substantive “parts” and instead are included in Part XIII. The majority of these sections address specific topics that need some authorization under the Code, but do not require multiple sections or are more fully addressed outside of the Code in other statutes.

#### **A. Civil Actions of the Ward**

**1. Suspension of Statute of Limitations**<sup>678</sup> - An action in favor of a ward may be prosecuted in the same manner and in the same courts available to persons not under a disability. Florida Rule of Civil Procedure 1.210(b) provides that, when a guardian of the property has been appointed for an infant or incapacitated person, that guardian may sue or defend on behalf of the ward. This section allows the guardian to bring an action on behalf of the ward after the statute of limitations period has expired if the ward was adjudicated incapacitated before expiration of the period of limitation, and the action is commenced “within 1 year” from the date of the letters of guardianship. The only change to this Section from the prior §744.394 is that the one-year runs begins to run from the date of the letters of guardianship instead of the order appointing guardian.<sup>679</sup>

**2. Actions By and Against Guardian or Ward.**<sup>680</sup> - This provision outlines that a guardian ad litem must be appointed to represent the ward if: (1) the guardian of the property sues the ward or the ward sues the guardian of the property, or (2) when the interest of the guardian of the property is or may be adverse in any way to the ward. This Section now permits the guardian ad litem to seek removal of the guardian if litigation is between the guardian and the ward.<sup>681</sup> The Code removes language as unnecessary from this section which addressed judgments in favor of the ward and the requirement that they become property of the ward without the necessity of any assignment by the guardian; this is not a substantive change in current law.<sup>682</sup>

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<sup>676</sup> § 745.1205

<sup>677</sup> §744.514.

<sup>678</sup> § 745.1301

<sup>679</sup> See §744.394.

<sup>680</sup> § 745.1307.

<sup>681</sup> §744.391 previously mandated that the guardian ad litem seek removal of the guardian by using the language “shall” versus “may” in a scenario under this Section.

<sup>682</sup> See, §744.391.

## **B. Alternatives to Guardianship**

1. **Determination Regarding Alternatives to Guardianship**<sup>683</sup> - The fact that a person has been determined to be incapacitated in some way, or even totally incapacitated, does not necessarily result in the appointment of a guardian. The court must examine alternatives to guardianship. This Section of the Code outlines when a guardian must disclose alternatives to guardianship and when the court can consider alternatives to guardianship after the appointment of a guardian. The Code makes changes to former §744.462 by clarifying that a guardian of the property must report to the court any judicial determination concerning the validity of a power of attorney, durable power of attorney, trust or trust amendment relating to the ward. The Code also adds the requirement that any judicial determination concerning the validity or effect of a health care surrogate designation be reported by the guardian of the person.<sup>684</sup> The Code also explains that an interested person may file a petition alleging that due to (1) a change in circumstances or (2) the discovery of an alternative not previously considered by the court, there is now a sufficient alternative to guardianship for the ward.

2. **Effect of Power of Attorney and Trust**<sup>685</sup> - The appointment of a guardian does not limit the court's power to determine that certain authority granted by a durable power of attorney is to remain exercisable by the agent. If the instrument has been judicially determined to be valid, or if, after the appointment of a guardian, a petition is filed alleging there is an alternative to guardianship that will sufficiently address the problems of a ward, the court is required to review the continued need for a guardian and the extent of the need for delegation of the ward's rights. The Code alters currently law to clarify the procedure for court determination in a guardianship proceeding that a ward's trust, a trust amendment, or a power of attorney is valid.<sup>686</sup> The Code changes former §744.331(6)(f) to explain that the suspension therein is no longer automatic. Now, an interested person may file a verified petition seeking authority to file an action to have a ward's trust, trust amendment or power of attorney determined invalid. The Petitioner must serve the petition on all interested persons. The Code then provides that the court shall consider the petition at a hearing, with notice, and may find that such trust, amendment, or DPOA is not an appropriate alternative to guardianship of property. Under the Code, the Court can also appoint a guardian and still find certain authority under the ward's DPOA to remain exercisable.

3. **Suspension of Power of Attorney Before Incapacity Determination**<sup>687</sup> - This statute sets forth the procedures for the temporary suspension of authority of an agent under a power of attorney and further provides for fees for bad faith filings related to the motion for suspension of powers. The Code now provides that an "interested person" must file a verified petition to suspend an agent's powers under a power of attorney.<sup>688</sup> The Code adds language that the court shall schedule the petition for an expedited hearing upon the earlier of (a) the filing of a response to the petition by the agent under the power of attorney, or (b) 10 days after the service of the petition on the agent under the power of attorney.

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<sup>683</sup> § 745.1303.

<sup>684</sup> See former §744.462.

<sup>685</sup> § 745.1313.

<sup>686</sup> See former §744.331(6)(f).

<sup>687</sup> § 745.1314.

<sup>688</sup> §744.3203 allowed a "petitioner" to file a motion stating the basis for the power of attorney being suspended.

## C. Support of the Ward's Family

1. **Support of Ward's Dependents** – Often others depend on the ward for support and guardianship assets may need to be made available to continue that support. Accordingly, the Code details when a ward's assets can be used for the financial support of third persons.<sup>689</sup> The Code makes changes to former §744.397 by adding a list of what the ward's<sup>690</sup> - income should first be applied towards, i.e. the ward's care, support, education, maintenance, health care and cost of funeral and burial or cremation. This Section of the Code now makes clear that a guardian of the property shall not use the ward's property for the support of a ward's dependents unless approval of the court is obtained. This Section also clarifies the definitions of the ward's dependents to be limited to legal dependents, the ward's parents, and persons whom the ward was providing support to prior to their determination of incapacity. This Section removes superfluous language from former §744.397 referencing the guardian's prohibition of using a minor ward's property for his or her own care if the ward's parents are able to provide for the ward.

2. **Petition for Support of Ward's Dependents**<sup>691</sup> - The Code outlines who, how, and when a guardian, upon court approval, may contribute from the ward's assets to the support of any person dependent on the ward. This Section clarifies as from former §744.421, that only those individuals authorized to receive support pursuant to §745.1304 can petition for support from the ward's income or property. The Code also removes gratuitous language from former §744.421 that an order for support, hereunder, shall be valid for payments made pursuant to it, but not valid payments after termination. This section also provides now that the delivery of the assets to the recipient shall be considered a release of the guardian hereunder instead of requiring a release from the recipient from the petitioner.<sup>692</sup>

## D. Interaction between Co-guardians

1. **Payment to Guardian of Person**<sup>693</sup> - The guardian of person of the ward may be someone other than the guardian of property. This section explains that, in that case, either guardian may petition the court for an order directing the guardian of the property to pay to the guardian of the person periodic amounts for the support of the ward. The Code includes additional language, as from the prior §744.374, explaining that proof of delivery to the guardian of person for payments made pursuant to a court order, in this scenario, shall be a sufficient release of the guardian who makes the payments.<sup>694</sup> The Code further clarifies this Section to make it clear that the guardian of the person is not required to file an accounting for funds unless otherwise ordered to do so by the court.<sup>695</sup>

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<sup>689</sup> See former §744.397.

<sup>690</sup> § 745.1304.

<sup>691</sup> § 745.1305.

<sup>692</sup> See former §744.421.

<sup>693</sup> § 745.1306.

<sup>694</sup> §744.374 provided that a 'receipt of the guardian' for payments made was sufficient discharge of the guardian making the payments.

<sup>695</sup> §744.374 simply stated that the guardian shall not be bound to see the application of the payments.



2. **Temporary Delegation of Authority to Surrogate**<sup>696</sup> - If unavailable to act, a guardian may designate a surrogate guardian, to exercise the guardian's powers. This Section sets forth the requirements for the appointment of a temporary surrogate guardian. The Code now also allows a member of the Florida Bar to act as a surrogate guardian.<sup>697</sup>

3. **Multiple Guardians**<sup>698</sup> - The Code creates this new statutory section to outline decision making in the scenario of multiple guardians being appointed for a ward.<sup>699</sup> The Code provides that when there is a different guardian of property and of the person of a ward, they must consult with each other when a decision of one may affect the duties and responsibilities of the other. If there is disagreement between the multiple guardians, the guardian with authority over the particular decision area shall prevail and the other guardian may petition the court for judicial review of the issue. The Code also provides that if there are two guardians of person or two guardians of property and there are disagreements between the co-guardians as to a proposed action, neither may act as to such proposed action without court order. The Code adds language to explain that if there are three or more guardians of person or property, a majority of them may act and that a guardian who serves on all other guardians a written objection to a proposed action shall not be liable for the action taken.

## E. Conflict of Interest Transactions

Guardians must be independent and impartial to effectively manage a ward's estate. Accordingly, certain activities are prohibited or allowed only with proper court approval and in certain circumstances.

1. **Guardian Forbidden to Borrow or Purchase; Exceptions**<sup>700</sup> - This Section outlines when a guardian can purchase or borrow money from a ward. The Code allows a non-professional guardian to purchase property from the ward, at fair market value, only with prior court authorization.<sup>701</sup> The Code further allows a non-professional guardian to borrow money from the ward if loan is made at prevailing interest rate with adequate security and, again, only with prior court approval of the loan. The Code removes the language in former §744.454 providing the option for a spouse, parent, child, sibling, or cotenant to buy property of the ward at a public sale.

2. **Conflicts of Interest; Prohibited Activities; Court Approval; Breach of Fiduciary Duty**<sup>702</sup> - The fiduciary relationship between the guardian and the ward is delineated in this section.<sup>703</sup> Generally, the guardian may not incur any obligation on behalf of the guardianship which conflicts with the proper discharge of the guardian's duties. In addition to other prohibited activities, the Code makes clear that a Guardian cannot be a co-owner or

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<sup>696</sup> § 745.1311.

<sup>697</sup> Former §744.442 allowed only a professional guardian to serve as a surrogate guardian.

<sup>698</sup> § 745.1312.

<sup>699</sup> See former §744.361(9).

<sup>700</sup> § 745.1308.

<sup>701</sup> See former §744.454, which did not require the purchase to be for fair market value.

<sup>702</sup> § 745.1309.

<sup>703</sup> See former §744.446.

recipient of any property or benefit of the ward unless made by the ward prior to the ward's incapacity. The Code also adds language that, upon petition by an interested person, in the event of a breach of fiduciary duty, the court shall take action to protect the ward and the ward's assets.<sup>704</sup> The Code also adopts language added to the Florida Guardianship Law in 2020 to prohibit "kickback" or commission arrangements for referrals from the guardian.<sup>705</sup>

**3. Abuse, Neglect, or Exploitation by a Guardian<sup>706</sup>** - This section sets forth that a guardian may not abuse, neglect, or exploit a ward. Consistent with Florida Statutes chapters 415 and 825, the section outlines what exploitation means and that a person who believes that a guardian is abusing, neglecting, or exploiting a ward shall report the incident to the central abuse hotline of the Department of Children and Families. The Code makes no changes from the Florida Guardianship Law.<sup>707</sup>

#### **F. Appraisals.<sup>708</sup>**

This section establishes that on the petition of an interested person, the court may appoint appraisers to appraise the property of the ward that is subject to the guardianship. Previously, §744.381 limited the appointment of appraisers to "when the court" deemed it necessary.<sup>709</sup> Now, the Code provides that an interested person can petition for an appraiser to be appointed. The Code also adds language to make it clear that this section is not intended to limit the power of the guardian to employ an appraiser without court order as permitted in §745.902(12). The goal of this expansion is to avoid unused valuations by allowing an interested person to petition the Court for an appraisal so that the guardian has the benefit of this information throughout the guardianship and for inclusion on accountings and/or inventories.

#### **G. Purchaser and Lender Protection<sup>710</sup>**

Like the Florida Guardianship Law, Code § 745.1310 explains that no person or entity purchasing, leasing, or taking a mortgage, pledge, or other lien from a guardian shall be bound to see that the money or other things of value paid to the guardian are actually needed or properly applied. The Code adds language to protect both purchasers and lenders under this Section.<sup>711</sup>

### **Part XIV: Public and Professional Guardians**

Part XIV of the Code is a full-sail adoption of the Florida Guardianship Law's statutory sections addressing the oversight of public and professional guardians operating in Florida.<sup>712</sup> Because these sections were substantially amended in 2016 and because they are focused on the organization and operation of the OPPG, the committee felt it most appropriate to avoid amendment to these sections. To that end, the Code has renumbered these sections to Part XIV

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<sup>704</sup> See former §744.446.

<sup>705</sup> See, § 745.1309 which adopts language added to § 744.446(2) which became effective in July 2020.

<sup>706</sup> § 745.1315.

<sup>707</sup> See § 744.359.

<sup>708</sup> § 745.1302.

<sup>709</sup> See §744.381.

<sup>710</sup> § 745.1310.

<sup>711</sup> See former §744.461.

<sup>712</sup> See, Chapter 744 Part II (Public and Professional Guardians)

and has made appropriate language changes to maintain consistency in light of the Code definitional changes and cross-referencing.<sup>713</sup> The few changes made, are not intended to be substantive changes in comparison to Chapter 744, Part II. The following table lists the renumbered sections found in the Code in comparison to current Chapter 744.

Chapter 745	Chapter 744	Section Title
1401	2001	Office of Public and Professional Guardians
1402	2002	Professional guardian registration
1403	2003	Regulation of professional guardians; application; bond required; educational requirements
1404	2004	Complaints; disciplinary proceedings; penalties; enforcement
1405	20041	Grounds for discipline; penalties; enforcement
1406	2006	Office of Public and Professional Guardians; appointment, notification
1407	2007	Powers and duties
1408	2008	Costs of public guardian
1409	2009	Preparation of budget
1410	2101	Procedures and rules
1411	2102	Surety bond
1412	2103	Reports and standards
1413	21031	Public records exemption
1414	2104	Access to records by the Office of Public and Professional Guardians; confidentiality
1415	2105	Direct-support organization; definition; use of property; board of directors; audit; dissolution
1416	2106	Joining Forces for Public Guardianship grant program; purpose
1417	2107	Program administration; duties of the Office of Public and Professional Guardians
1418	2108	Eligibility
1419	2109	Grant application requirements; review criteria; awards process

### Part XV: Veteran Guardianships

Like Part XIV previously, Part XV of the Code adopts in full the current statutory structure for veteran guardianships and only renumbers these sections for inclusion in the Code.<sup>714</sup> Because the Veteran Guardianship part of the Florida Guardianship Law is intended to be run in conjunction with federal veteran guardianship benefits and procedures, the Code does not make substantive change to these sections of the law. The following table lists the renumbered sections found in the Code in comparison to current Chapter 744.

Chapter 745	Chapter 744	Section Title
1501	602	Short title; scope of part

<sup>713</sup> § 745.106.

<sup>714</sup> See, Chapter 744 Part VIII Be

<b>Chapter 745</b>	<b>Chapter 744</b>	<b>Section Title</b>
1502	604	Definitions
1503	607	Secretary of Veterans Affairs as party in interest
1504	609	Procedure for commitment of veteran to United States Department of Veterans Affairs hospital
1505	613	Appointment of guardian for ward authorized
1506	616	Petition for appointment of guardian
1507	617	Notice by court of petition filed by appointment of guardian
1508	618	Persons who may be appointed guardian
1509	619	Bond of guardian
1510	621	Inventory of ward's property; guardian's failure to file inventory; discharge; forfeiture of commissions
1511	622	Guardian empowered to receive moneys due ward from the United States Government
1512	624	Guardian's application of estate funds for support and maintenance of person other than ward
1513	625	Petition for support, or support and education, of ward's dependents; payments of apportioned benefits prohibit contempt action against veteran
1514	626	Exemption of benefits from claims of creditors
1515	627	Investment of funds of estate by guardian
1516	631	Guardian's petition for authority to sell ward's real estate; notice by publication; penalties
1517	634	Guardian's accounts, filing with court and certification to United States Department of Veterans Affairs; notice and hearing on accounts; failure to account
1518	637	Certified copies of public records made available
1519	638	Clerk of the circuit court; fees; duties
1520	639	Attorney's fee
1521	641	Guardian's compensation; bond premiums
1522	643	Discharge of guardian of minor or incompetent ward
1523	646	Final settlement of guardianship; notice required; guardian ad litem fee; papers required by United States Department of Veterans Affairs
1524	649	Notice of appointment of general guardian; closing veteran's guardianship; transfer of responsibilities and penalties to general guardian
1525	652	Construction of application of part
1526	653	Annual guardianship report

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A bill to be entitled  
An act relating to the Florida Guardianship Code;  
creating parts I, II, III, IV, V, VI, VII, VIII, IX,  
X, XI, XII, XIII, XIV, and XV of chapter 745, F.S.;  
providing a short title; providing general provisions  
and definitions; providing for venue; providing for  
proceedings to determine incapacity; providing for  
proceeding to restore the rights of an individual no  
longer incapacitated; providing for the  
qualifications of a guardian; providing for the  
appointment of a guardian; providing provisions  
relating to different types of guardians; providing  
provisions relating to the duties of guardians;  
providing provisions relating to the powers of  
guardians; providing oversight and monitoring of  
wards and guardians; providing provisions relating to  
the resignation and discharge of guardians; providing  
for the removal of guardians; providing for  
miscellaneous provisions relating to a guardian's  
authorities, the authority of multiple guardians; the  
effect of a guardianship proceeding on a power of  
attorney or trust, and prohibitions on abuse by a  
guardian; provisions relating to the Office of Public  
and Professional Guardians; provisions relating to  
Veteran Guardianships; repealing ch 744; providing an  
effective date.

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



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59 | alternatives to guardianship and to utilize the least restrictive  
60 | means of assistance.

61 | (4) This code shall be liberally construed to accomplish these  
62 | purposes.

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65 | 745.103 Applicability.

66 | This code shall take effect on \_\_\_\_\_. The procedures  
67 | for enforcement of substantive rights and the administration of  
68 | this Code shall be as provided in the Florida Probate Rules.

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70 | 745.104 Rules of evidence.

71 | The Florida Evidence Code is applicable in incapacity and  
72 | guardianship proceedings unless otherwise provided by this code.

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74 | 745.105 Construction against implied repeal.

75 | This code is intended as unified coverage of its subject matter. No  
76 | part of it shall be impliedly repealed by subsequent legislation if  
77 | that construction can reasonably be avoided.

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79 | 745.106 Definitions.

80 | As used in this code, the term:

81 | (1) "Accounting" means that verified document filed by a guardian  
82 | of property pursuant to s. 745.805 or 745.806.

83 | (2) "Attorney for the alleged incapacitated person" means an  
84 | attorney authorized by court order to represent a person in  
85 | proceedings for determination of the person's incapacity, the  
86 | existence of less restrictive alternatives, the appointment of a  
87 | guardian, and as otherwise authorized in this code . The attorney

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88 advocates the preferences expressed by the alleged incapacitated  
89 person, to the extent consistent with the rules regulating The  
90 Florida Bar.

91 (3) "Audit" means a systematic review of inventories, accountings,  
92 plans, guardianship reports, and substantiating documents to ensure  
93 compliance with this code and the Florida Probate Rules.

94 (4) "Clerk" means the clerk or deputy clerk of the court.

95 (5) "Corporate guardian" means a corporation authorized to exercise  
96 fiduciary or guardianship powers in this state and includes a  
97 nonprofit corporate guardian.

98 (6) "Court" means the circuit court division in which the  
99 incapacity or guardianship proceeding is pending.

100 (7) "Developmental disability" shall have the meaning specified in  
101 s. 393.063.

102 (8) "Emergency temporary guardian" means a guardian appointed in  
103 accordance with s. 745.701, to serve until letters of guardianship  
104 are issued or until otherwise ordered by the court.

105 (9) "Examiner" means a person qualified in accordance with s.  
106 745.306 and authorized and directed by the court to assess  
107 available information and to conduct an evaluation of a ward or  
108 alleged incapacitated person, and render a written opinion in an  
109 incapacity or restoration proceeding as provided in this code.

110 (10) "Financial institution" means a trust company, a state banking  
111 corporation or state savings association authorized and qualified  
112 to exercise fiduciary powers in this state, or a national banking  
113 association or federal savings and loan association authorized and  
114 qualified to exercise fiduciary powers in this state may act as  
115 guardian of property of the ward.



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- 116 (11) "Foreign guardian" means a guardian appointed by a court of  
117 another state, territory or country.
- 118 (12) "Guardian" means an individual or entity appointed by the  
119 court to act on behalf of a ward's person, property, or both, and  
120 includes an emergency temporary guardian.
- 121 (a) "Limited guardian" means a guardian of person, property, or  
122 both who has been appointed by the court to exercise some, but not  
123 all, delegable rights and powers of a ward.
- 124 (b) "Plenary guardian" means a guardian of person, property, or  
125 both who has been appointed by the court to exercise all delegable  
126 legal rights and powers of a ward.
- 127 (13) "Guardian ad litem" means a person who is appointed by the  
128 court having jurisdiction of the guardianship, or a court in which  
129 a particular legal matter is pending, to represent a ward in a  
130 particular proceeding.
- 131 (14) "Guardian advocate" means a person appointed by the court to  
132 represent a person with developmental disabilities under s. 393.12.  
133 As used in this chapter, the term does not apply to a guardian  
134 advocate appointed for a person determined incompetent to consent  
135 to treatment under s. 394.4598.
- 136 (15) "Guardianship monitor" means a person appointed by the court  
137 under s. 745.1008 or 745.1009 to provide the court with information  
138 concerning a ward.
- 139 (16) "Guardianship Plan" means the document filed by a guardian of  
140 person within 60 days after letters of guardianship are issued that  
141 provides for the initial plan of care to meet the medical, mental  
142 health, social, residential, personal care and other needs of the  
143 ward, in accordance with s. 745.810.

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144 (17) "Guardianship Report" means the document filed annually by a  
145 guardian of person that provides information regarding the  
146 treatment, services and care provided to the ward during the  
147 reporting period and the plan for addressing the ongoing or  
148 anticipated needs of the ward, in accordance with s. 745.811,  
149 745.812, and 745.813.

150 (18) "Incapacitated person" means a person who has been judicially  
151 determined to lack the capacity to manage at least some of the  
152 person's property as defined in subsection (23) or to meet at least  
153 some of the requirements for the person's health or safety as  
154 defined in subsection (24).

155 (19) "Information Statement" means the verified document filed by a  
156 proposed guardian pursuant to s. 745.601.

157 (20) "Interested person" means any person who may reasonably be  
158 expected to be affected by the outcome of a guardianship or  
159 incapacity proceeding. A guardian is always deemed an interested  
160 person in proceedings that affect the ward. A person is not deemed  
161 interested solely because of an anticipated expectancy of personal  
162 benefit. A person is not deemed interested solely because of  
163 having filed a request for copies and notices of proceedings. The  
164 meaning may vary from time to time and must be determined according  
165 to the particular purpose of, and matter involved in, any  
166 proceedings.

167 (21) "Inventory" means the verified document filed by a guardian of  
168 property pursuant to s. 745.803.

169 (22) "Letters" means authority granted by the court to a guardian  
170 to act on behalf of the ward.

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171 (23) "Manage property" means to make lucid decisions necessary to  
172 secure, safeguard, administer, and dispose of real and personal  
173 property, contractual rights, benefits, and income of a ward.

174 (24) "Meet requirements for health or safety" means to make lucid  
175 decisions necessary to provide for a person's health care, food,  
176 shelter, clothing, personal hygiene, or other care needs of a ward.

177 (25) "Minor" means a person under 18 years of age whose disability  
178 due to age has not been removed by marriage or otherwise.

179 (26) "Natural guardians." The persons designated under §  
180 745.712(1) are the natural guardians of a minor.

181 (27) "Next of kin" means those persons who would be heirs at law of  
182 the ward or alleged incapacitated person if that person was  
183 deceased, and the lineal descendants, per stirpes, of the ward or  
184 alleged incapacitated person.

185 (28) "Nonprofit corporate guardian" means a not for profit  
186 corporation organized under the laws of this state for religious or  
187 charitable purposes and authorized to exercise the powers of a  
188 professional guardian.

189 (29) "Preneed guardian" means a guardian designated by a competent  
190 adult or by the natural guardian of a minor, to serve as guardian  
191 in the event of the adult's incapacity or the need for a court  
192 appointed guardian of a minor. The designation and appointment of  
193 a preneed guardian shall be as specified in s. 745.705 and s.  
194 745.706.

195 (30) "Professional guardian" means a person who has met the  
196 requirements of the Office of Public and Professional Guardians to  
197 qualify to serve as a guardian for unrelated wards, as specified in  
198 this code.

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199 (31) "Property" means both real and personal property or any  
200 interest in it, and anything that may be the subject of ownership.  
201 It includes rights of use under contractual arrangements and  
202 digital assets as defined in Chapter 740.

203 (32) "Public guardian" means a guardian who has been appointed by,  
204 or has a contract with, the Office of the Public and Professional  
205 Guardians to provide guardianship services.

206 (33) "Relative" of a ward means, for purposes related to  
207 professional guardians, a spouse, adopted child, anyone related by  
208 lineal or collateral consanguinity or a spouse of any such  
209 relative.

210 (34) "Standby guardian" means a guardian designated by a currently  
211 serving guardian and appointed by the court to assume the position  
212 of guardian if the current guardian ceases to act. The appointment  
213 of a standby guardian shall be as specified in s. 745.702 and  
214 745.703.

215 (35) "Surrogate guardian" means a guardian appointed for temporary  
216 service in accordance with s. 745.1311.

217 (36) "Totally incapacitated" means judicially determined to be  
218 incapable of exercising any of the rights enumerated in s.  
219 745.303(2) and 745.303(3).

220 (37) "Voluntary guardian" is a guardian of property appointed by  
221 the court pursuant to s. 745.707.

222 (38) "Ward" means a person for whom a guardian has been appointed.  
223  
224 745.107 Additional definitions.

225 The definitions contained in the Florida Probate Code and the  
226 Florida Probate Rules shall be applicable to actions under this  
227 code, unless the context requires otherwise, insofar as such

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228 definitions do not conflict with definitions contained in this  
229 code.

230

231 745.108 Verification of documents.

232 When verification of a document is required in this code or by  
233 rule, the document filed shall include an oath or affirmation or  
234 the following statement: "Under penalties of perjury, I declare  
235 that I have read the foregoing and the facts alleged are true to  
236 the best of my knowledge and belief." Any person who shall  
237 willfully include a false statement in the document shall be guilty  
238 of perjury and upon conviction shall be punished as provided by  
239 law.

240

241 745.109 Costs.

242 In all guardianship proceedings, costs may be awarded. When the  
243 costs are to be paid out of the property of the ward, the court may  
244 direct from what part of the property the costs shall be paid.

245

246 745.110 Notice and service.

247 The methods of providing notice of proceedings under this code are  
248 those specified in the Florida Probate Rules except as provided in  
249 s. 745.302. When the ward or alleged incapacitated person has an  
250 attorney of record in the guardianship or incapacity proceeding,  
251 service on the ward or alleged incapacitated person shall be  
252 completed by service on the attorney in compliance with the Rules  
253 of Judicial Administration. When a totally incapacitated ward has  
254 no attorney of record in the guardianship proceeding, service on  
255 the guardian shall be deemed service on the ward.

256

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257 745.111 Recording of hearings.

258 (1) All hearings related to appointment or removal of a guardian,  
259 adjudication of incapacity, or restoration of capacity must be  
260 electronically or stenographically recorded by the court.

261 (2) If an appeal is taken from any of these proceedings, a  
262 transcript must be furnished to an indigent ward at public expense.

263

264 745.112 Confidentiality of guardianship records.

265 (1) Unless otherwise ordered by the court, all records relating to  
266 incapacity, guardianship, or the settlement of a minor's claim if a  
267 guardianship has not yet been established, are confidential and  
268 exempt from the provisions of s.119.07(1) and s. 24(a), Art. I of  
269 the State Constitution. The following persons shall have access to  
270 the records without court order:

271 (a) The court;

272 (b) The clerk;

273 (c) The guardian;

274 (d) The guardian's attorney;

275 (e) The ward's attorney;

276 (f) A guardian ad litem appointed on behalf of a ward;

277 (g) The Office of Public and Professional Guardians or its designee  
278 pursuant to s 745.1414; and

279 (h) A ward who is an adult and has not been adjudicated totally  
280 incapacitated.

281 (2) The court may order release of all or part of the record for  
282 good cause shown. Unless waived by court order, the confidential  
283 status of the court record shall not be lost by either authorized  
284 or unauthorized disclosure to any person, organization, or agency.

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285 (3) Notwithstanding the provision of subsection (1), letters of  
286 guardianship shall be recorded by the clerk.

287

288 745.113 Guardian and professional's fees and expenses.

289 (1) A guardian, attorney, accountant, appraiser, financial advisor  
290 or other professional who has rendered services to the ward or to  
291 the guardian to assist the guardian in providing services to the  
292 ward and complying with this code, is entitled to a reasonable fee  
293 for services rendered and to reimbursement for costs incurred on  
294 behalf of the ward.

295 (2) Fees, costs and administration expenses may be paid as incurred  
296 and must be itemized on the guardian's annual accounting. Itemized  
297 statements of guardian and attorney fees must provide the detail  
298 specified in subsection (9). For other professional services, the  
299 accounting must include statements demonstrating the fee  
300 arrangement and method of charging for the services rendered.

301 (3) On audit of the guardian's accounting pursuant to s. 745.1001,  
302 the court may require the guardian to justify the fees paid.

303 (4) The court may, on a case by case basis, require a petition for  
304 approval of guardian's and professional's fees in advance of  
305 payment. The court may not unreasonably limit the frequency of such  
306 petitions and must hear such petitions on an expedited basis.

307 (5) When fees for a guardian or attorney are submitted to the court  
308 for determination, the court may consider the following criteria:

309 (a) The time and labor required;

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

312 (c) The likelihood that the acceptance of the particular employment  
313 will preclude other employment of the person;

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- 314 (d) The fee customarily charged in the locality for similar  
315 services;
- 316 (e) The nature and value of the incapacitated person's property,  
317 the amount of income earned by the estate, and the responsibilities  
318 and potential liabilities assumed by the person;
- 319 (f) The results obtained;
- 320 (g) The time limits imposed by the circumstances;
- 321 (h) The nature and length of the relationship with the  
322 incapacitated person; and
- 323 (i) The experience, reputation, diligence, and ability of the  
324 person performing the service.
- 325 (6) In awarding fees to attorney guardians, the court must clearly  
326 distinguish between fees, costs, and expenses for legal services  
327 and fees, costs, and expenses for guardian services and must  
328 determine that no conflict of interest exists.
- 329 (7) Fees for legal services may include customary and reasonable  
330 charges for work performed by paralegals and legal assistants  
331 employed by and working under the direction of the attorney. Fees  
332 may not include general clerical and office administrative services  
333 and services that are unrelated to the guardianship. A petition for  
334 fees may not be approved without prior notice to the guardian and  
335 to the ward, unless the ward is a minor or is totally  
336 incapacitated.
- 337 (8) Fees for a professional guardian's services may include  
338 customary and reasonable charges for work performed by employees of  
339 a guardian for the benefit of the ward. A petition for fees may not  
340 be approved without prior notice to the ward, unless the ward is a  
341 minor or is totally incapacitated.



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342 (9) Unless otherwise ordered by the court, all petitions for  
343 guardian's and attorney's fees must be accompanied by an itemized  
344 statement of the services performed for the fees sought to be  
345 recovered. The itemized statement must specify the name and title  
346 of the person providing the service, the nature of services, date  
347 of performance, time spent on each task and the fees for each  
348 entry.

349 (10) When court proceedings are instituted to review or determine a  
350 guardian's or an attorney's fees, such proceedings are part of the  
351 guardianship administration process and the costs, including fees  
352 and costs for the guardian and guardian's attorney, an attorney  
353 appointed under s. 745.305, or an attorney who has rendered  
354 services to the ward, must be determined by the court and paid from  
355 the assets of the guardianship unless the court finds the requested  
356 compensation to be substantially unreasonable.

357 (11) The court may determine that a request for compensation by the  
358 guardian, the guardian's attorney, an attorney appointed under s.  
359 745.305, an attorney who has rendered services to the ward or other  
360 professional employed by the guardian is reasonable without  
361 receiving expert testimony. An interested person or party may offer  
362 expert testimony for or against a request for compensation after  
363 giving notice to interested persons. Reasonable expert witness fees  
364 must be awarded by the court and paid from the assets of the  
365 guardianship estate using the standards established in subsection  
366 (5).

367  
368 745.114 Jurisdiction of the court.

369 The circuit court has jurisdiction to adjudicate all matters in  
370 incapacity and guardianship proceedings.

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Section 2. Part II of chapter 745, Florida Statutes, consisting of sections 745.201, 745.202, 745.203, and 745.204, is created to read:

PART II  
VENUE

745.201 Venue.

(1) Venue in proceedings for determination of incapacity must be the county in which the alleged incapacitated person resides or is located.

(2) Venue in proceedings for appointment of a guardian must be:

(a) If the incapacitated person or minor is a resident of this state, the county in which the incapacitated person or minor resides provided, however, that if the adjudication of incapacity occurs in a county other than the county of residence pursuant to subsection (1), venue for appointment of guardian must be the county in which the adjudication occurred.

(b) If the incapacitated person or minor is not a resident of this state, any county in this state in which property of the person is located.

(c) If the incapacitated person or minor is under the jurisdiction of a dependency court, venue may also be in the county having jurisdiction of the dependency case.

745.202 Residence of ward.

The residence of a Florida resident ward is the county in which the ward resides. Residence or domicile shall not be deemed to be changed when a ward is moved to another county for medical care or rehabilitation.

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745.203 Change of venue.  
When the residence of a ward is changed to another county, the guardian shall petition to have venue of the guardianship changed to the county of the acquired residence, except as provided in s. 745.204.

745.204 Change of ward's residence.  
(1) A guardian who has power pursuant to this code to determine the residence of a ward may not, without court approval, change the residence of the ward from this state to another, or from one county of this state to another, unless such county is adjacent to the county of the ward's current residence. A guardian who seeks to change the residence of a ward from the ward's current county of residence to another county which is not adjacent to the ward's current county of residence must obtain court approval prior to such change. In considering the petition, the court shall determine that such relocation serves the best interest of the ward.

(2) A guardian who changes the residence of a ward from the ward's current county of residence to another county adjacent to the ward's county of residence shall notify the court having jurisdiction of the guardianship and next of kin whose addresses are known to the guardian within 15 days after relocation of the ward. Such notice shall state the reasons for the change of the ward's residence. Venue need not be changed unless otherwise ordered by the court.

(3) When the residence of a resident ward has changed to another state, in accordance with this section, and the foreign court having jurisdiction over the ward at the ward's new residence has

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429 appointed a guardian and that guardian has qualified and posted a  
430 bond in an amount required by the foreign court, the guardian in  
431 this state may file the final report and close the guardianship in  
432 this state, pursuant to s.745.1105.

433  
434 Section 3. Part III of chapter 745, Florida Statutes,  
435 consisting of sections 745.301, 745.302, 745.303, 745.304, 745.305,  
436 745.306, 745.307, 745.308, 745.309, 745.310, 745.311, and 745.312,  
437 is created to read:

438 PART III

439 INCAPACITY

440 745.301 Petition to determine incapacity.

441 (1) A petition to determine incapacity of a person may be executed  
442 by an adult with personal knowledge of the information specified in  
443 the petition.

444 (2) The petition must be verified and must, to the best of  
445 petitioner's knowledge and belief, :

446 (a) State the name, residence address of the petitioner, and  
447 petitioner's relationship to the alleged incapacitated person;

448 (b) State the name, age, county of residence, residence address and  
449 current location of the alleged incapacitated person;

450 (c) Specify the primary language spoken by the alleged  
451 incapacitated person, and if the person speaks English;

452 (d) Allege that the petitioner believes the alleged incapacitated  
453 person to be incapacitated and specify the factual information on  
454 which such belief is based;

455 (e) State the name and address of the alleged incapacitated  
456 person's attending or primary care physician and other medical and

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457 mental health professionals regularly treating the alleged  
458 incapacitated person, if known;  
459 (f) State which rights enumerated in s. 745.303 the alleged  
460 incapacitated person is incapable of exercising, to the best of  
461 petitioner's knowledge. If the petitioner has insufficient  
462 experience to make such judgment, the petition must so state; and  
463 (g) State the names, relationships, and addresses of the next of  
464 kin of the alleged incapacitated person, specifying the ages of any  
465 who are minors.

466

467 745.302 Notice of petition to determine incapacity and for  
468 appointment of guardian.

469 (1) Notice of filing a petition to determine incapacity and a  
470 petition for the appointment of a guardian, if any, and copies of  
471 the petitions must be personally served on the alleged  
472 incapacitated person. The notice and copies of the petitions must  
473 be served by the clerk on the attorney for the alleged  
474 incapacitated person within 5 days of filing the petitions, and by  
475 the petitioner on all next of kin identified in the petition. The  
476 notice must state the time and place of the hearing on the  
477 petitions; that an attorney has been appointed to represent the  
478 alleged incapacitated person; and that, if the person is determined  
479 to be incapable of exercising certain rights, a guardian may be  
480 appointed to exercise those rights on the person's behalf.

481 (2) The attorney for the alleged incapacitated person shall serve  
482 the notice and petition on the alleged incapacitated person within  
483 5 days of the attorney's appointment.

484

485 745.303 Rights of persons determined incapacitated.

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486 (1) A person who has been determined to be incapacitated retains  
487 the right:  
488 (a) To have an annual review of guardianship accountings and plans;  
489 (b) To have continuing review of the need for restriction of his or  
490 her rights;  
491 (c) To be restored to capacity at the earliest possible time;  
492 (d) To be treated humanely, with dignity and respect, and to be  
493 protected against abuse, neglect, and exploitation;  
494 (e) To have a qualified guardian;  
495 (f) To remain as independent as possible, including having his or  
496 her preference as to place and standard of living honored, either  
497 as expressed or demonstrated prior to the determination of  
498 incapacity or as he or she currently expresses such preference,  
499 insofar as such request is reasonable and financially feasible;  
500 (g) To be properly educated;  
501 (h) To receive prudent financial management for his or her property  
502 and to be informed how his or her property is being managed to the  
503 extent feasible, if he or she has lost the right to manage  
504 property;  
505 (i) To receive services and rehabilitation necessary to maximize  
506 his or her quality of life;  
507 (j) To be free from discrimination because of his or her  
508 incapacity;  
509 (k) To have access to the courts;  
510 (l) To counsel;  
511 (m) To receive visitors and communicate with others;  
512 (n) To notice of all proceedings related to determination of  
513 capacity and appointment of a guardian; and

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- 514 (o) To privacy, including privacy of incapacity and guardianship  
515 proceedings.
- 516 (2) Rights that may be removed from a person by an order  
517 determining incapacity but not delegated to a guardian include the  
518 right:
- 519 (a) To marry. If the right to enter into a contract has been  
520 removed, the right to marry is subject to court approval;
- 521 (b) To vote;
- 522 (c) To have a driver's license and operate motor vehicles;
- 523 (d) To travel; and
- 524 (e) To seek or retain employment.
- 525 (3) Rights that may be removed from a person by an order  
526 determining incapacity and which may be delegated to a guardian  
527 include the right:
- 528 (a) To contract;
- 529 (b) To sue and defend lawsuits;
- 530 (c) To apply for government benefits and deal with all government  
531 entities, including taxing authorities;
- 532 (d) To exercise all rights with regard to ownership and management  
533 of property, including among others, firearm rights under chapter  
534 790;
- 535 (e) To make any gift or disposition of property;
- 536 (f) To determine his or her residence;
- 537 (g) To consent to medical and mental health treatment and  
538 rehabilitation services;
- 539 (h) To make decisions about his or her social environment or other  
540 social aspects of his or her life; and
- 541 (i) To make decisions about travel and visitation.

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542 (4) A person who has been found to be totally incapacitated shall  
543 be deemed to have lost all rights other than those specified in  
544 subsection (1) and the guardian shall be deemed to have succeeded  
545 to all delegable rights, unless otherwise limited by this code or  
546 determined by the court.

547

548 745.304 Conduct of Hearing.

549 At any hearing under this code, the alleged incapacitated person or  
550 the ward has the right to:

551 (1) Testify;

552 (2) Remain silent and refuse to testify. The person may not be held  
553 in contempt of court or otherwise penalized for refusing to  
554 testify. Refusal to testify may not be used as evidence of  
555 incapacity;

556 (3) Present evidence;

557 (4) Call witnesses;

558 (5) Confront and cross-examine all witnesses; and

559 (6) Have the hearing open to the public or closed to the public as  
560 the alleged incapacitated person or ward may choose. After a person  
561 has been determined to be incapacitated, this decision shall be  
562 made by the person's guardian, unless otherwise determined by the  
563 court.

564

565 745.305 Attorney for the alleged incapacitated person.

566 (1) The court must appoint a qualified attorney to represent each  
567 alleged incapacitated person in all proceedings on petitions for  
568 determination of incapacity and appointment of guardian within 5  
569 days of filing the petitions. The alleged incapacitated person may  
570 substitute an attorney of his or her choice for the court appointed



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571 counsel with court approval. At any time prior to entry of an order  
572 allowing substitution, the court may hold a hearing to determine if  
573 the proposed attorney is qualified under this code and if such  
574 attorney is the choice of the alleged incapacitated person. The  
575 court may allow the court appointed counsel and private counsel  
576 chosen by the alleged incapacitated person to serve as co-counsel.  
577 (2) When a court appoints an attorney for an alleged incapacitated  
578 person, the court must appoint the office of criminal conflict and  
579 civil regional counsel or a private attorney as prescribed in s.  
580 27.511(6). A private attorney must be one who is included in the  
581 attorney registry compiled pursuant to s. 27.40. Appointments of  
582 private attorneys must be made on a rotating basis, taking into  
583 consideration conflicts arising under this code.  
584 (3) An attorney representing an alleged incapacitated person may  
585 not serve as guardian of the alleged incapacitated person or as  
586 counsel for the guardian of the alleged incapacitated person or the  
587 petitioner.  
588 (4) An attorney representing an alleged incapacitated person under  
589 this section must have completed a minimum of 8 hours of education  
590 in guardianship. A court may waive the initial training  
591 requirement.  
592 (5) An attorney for the alleged incapacitated person must be  
593 entitled to examine all medical and mental health records of the  
594 alleged incapacitated person and consult with the alleged  
595 incapacitated person's physicians.  
596 (6) Unless extended by the court, the attorney for the alleged  
597 incapacitated person's duties end upon (a) the court's  
598 determination that there is no need for appointment of a guardian  
599 or (b) issuance of letters of guardianship, other than letters of

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600 emergency temporary guardianship. The attorney shall be deemed  
601 discharged without further proceedings.

602  
603 745.306 Appointment and qualification of examiners.

604 (1) Within 5 days after a petition for determination of incapacity  
605 has been filed, the court must appoint three (3) qualified persons  
606 to examine the alleged incapacitated person. One must be a  
607 psychiatrist or other physician. The remaining examiners must be  
608 either a psychologist, another psychiatrist or other physician, a  
609 registered nurse, nurse practitioner, licensed social worker,  
610 attorney, a person with an advanced degree in gerontology from an  
611 accredited institution of higher education, or other person in the  
612 court's discretion. Examiners must have knowledge, skill,  
613 experience, training, or education which, in the court's  
614 discretion, qualifies them to render an opinion in an incapacity  
615 proceeding. Unless good cause is shown, the alleged incapacitated  
616 person's attending or primary care physician may not be appointed  
617 as an examiner. Any physician for the alleged incapacitated person  
618 must provide records and information, verbal and written, to an  
619 examiner upon the examiner's written request.

620 (2) Examiners may not be related to or associated with one another,  
621 with the petitioner, with counsel for the petitioner or the  
622 proposed guardian, or with the person alleged to be totally or  
623 partially incapacitated. A petitioner may not serve as an examiner.

624 (3) Examiners must be able to communicate, either directly or  
625 through an independent interpreter, in the language that the  
626 alleged incapacitated person speaks or in a medium understandable  
627 to the alleged incapacitated person if the alleged incapacitated  
628 person is able to communicate.

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629 (4) The examiners shall be appointed from a roster of qualified  
630 persons maintained by the clerk of court and may not be chosen or  
631 recommended by the petitioner, attorney for the alleged  
632 incapacitated person, or any interested person.

633 (5) A person who has been appointed to serve as an examiner may not  
634 thereafter be appointed as a guardian for the person who was the  
635 subject of the examination.

636 (6) An examiner must complete a minimum of 4 hours of initial  
637 training. The examiner must complete 2 hours of continuing  
638 education during each 2-year period after the initial education.  
639 The initial and continuing education programs must be approved by  
640 or developed under the supervision of the Office of Public and  
641 Professional Guardians in consultation with the Florida Conference  
642 of Circuit Court Judges, the Elder Law and the Real Property,  
643 Probate and Trust Law sections of The Florida Bar and the Florida  
644 State Guardianship Association. The court may waive the initial  
645 education requirement for a person who has served for not less than  
646 5 years as an examiner. An examiner who wishes to obtain continuing  
647 education on the Internet or by video course, must first obtain the  
648 approval of the chief judge in the county of the examiner's  
649 residence.

650 (7) Each person appointed for the first time as an examiner must  
651 file an affidavit with the court stating that the examiner has  
652 completed the required courses or will do so no later than 4 months  
653 after his or her initial appointment unless waived by the court.  
654 Each year, the chief judge of the circuit must prepare a list of  
655 persons qualified to be examiners.

656 (8) The clerk shall serve notice of the appointment to each  
657 examiner no later than 3 days after appointment.

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745.307 Examination of alleged incapacitated person.

(1) Each examiner, independent from the other examiners, must interview the alleged incapacitated person and must determine the alleged incapacitated person's ability to exercise those rights specified in s. 745.303. In addition to the examination, each examiner must have access to, and may consider, previous medical and mental health examinations of the person, including, but not limited to, habilitation plans, school records, psychological and psychosocial reports and other related information voluntarily offered for use by the alleged incapacitated person or the petitioner. The examiners may communicate among themselves as well as with the attorney for the alleged incapacitated person and the petitioner's counsel. In addition, the examiners shall be provided a copy of the petition to determine incapacity.

(2) The examiner may exclude all persons, other than the alleged incapacitated person and the alleged incapacitated person's attorney, from being present at the time of the examination, unless otherwise ordered by the court.

(3) Each examiner must, within 15 days after appointment, prepare and file with the clerk a report which describes the manner of conducting the examination and the methodology employed by the examiner. The examination must include:

(a) If deemed relevant to the examinations and allowed by the alleged incapacitated person, a physical examination which shall only be conducted by an examiner who is a registered nurse, nurse practitioner, or physician. An examiner who is not a physician, registered nurse, or nurse practitioner may conduct a visual examination of the alleged incapacitated person's physical

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687 appearance to determine if there are any visible signs of abuse,  
688 injury or illness;

689 (b) A mental health examination, which may consist of, but not be  
690 limited to, questions related to orientation, current events and  
691 personal identification; and

692 (c) A functional assessment to evaluate the alleged incapacitated  
693 person's ability to perform activities of daily living which  
694 include: preparing food, eating, bathing, dressing, ambulation,  
695 toileting and mobility.

696 If any of these aspects of the examination is not reported or  
697 cannot be accomplished for any reason, the written report must  
698 explain the reasons for its omission.

699

700 745.308 Examination reports.

701 (1) Each examiner's written report must be verified and include, to  
702 the extent of the examiner's skill and experience:

703 (a) A diagnosis, prognosis, and recommended level of care.

704 (b) An evaluation of the ward or alleged incapacitated person's  
705 ability to retain her or his rights, including, without limitation,  
706 the rights to marry; vote; contract; manage or dispose of property;  
707 have a driver's license; determine her or his residence; consent to  
708 medical treatment; and make decisions affecting her or his social  
709 environment.

710 (c) The results of the examination and the examiner's assessment of  
711 information provided by the attending or primary care physician, if  
712 any, and of any other reports or written material provided to the  
713 examiner. The examiner must consult the alleged incapacitated  
714 person's primary care physician or explain the reason why such  
715 consultation was not held.

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716 (d) A description of any functional areas in which the person lacks  
717 the capacity to exercise rights, the extent of that incapacity, and  
718 the factual basis for the determination that the person lacks that  
719 capacity.

720 (e) The names of all persons present during the time the examiner  
721 conducted his or her examination. If a person other than the person  
722 who is the subject of the examination supplies answers posed to the  
723 alleged incapacitated person, the report must include the response  
724 and the name of the person supplying the answer.

725 (f) The date, place and time the examiner conducted his or her  
726 examination.

727 (2) The clerk must serve each examiner's report on the petitioner  
728 and on the attorney for the alleged incapacitated person within 3  
729 days after the report is filed and at least 10 days before the  
730 hearing on the petition, and shall file a certificate of service in  
731 the incapacity proceeding.

732 (3) If any examiners' reports are not completed and served timely,  
733 the petitioner and attorney for the alleged incapacitated person  
734 may waive the 10 day service requirement and consent to the  
735 consideration of the report by the court at the adjudicatory  
736 hearing or may seek a continuance of the hearing.

737

738 745.309 Consideration of examination reports.

739 (1) Unless there is objection by the alleged incapacitated person  
740 or petitioner, the court must consider the written examination  
741 reports without requiring testimony of the examiners.

742 (2) The petitioner and the alleged incapacitated person may object  
743 to the introduction into evidence of all or any portion of the  
744 examination reports by filing and serving a written objection on

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745 | the other party no later than 5 days before the adjudicatory  
746 | hearing. The objection must state the basis upon which the  
747 | challenge to admissibility is made. If an objection is timely filed  
748 | and served, the court must apply the rules of evidence in  
749 | determining the reports' admissibility. For good cause shown, the  
750 | court may extend the time to file and serve the written objection.  
751 | (3) If all examiners conclude that the alleged incapacitated person  
752 | is not incapacitated in any respect, the court must dismiss the  
753 | petition unless a verified motion challenging the examiners'  
754 | conclusions is filed by petitioner within 10 days after the last  
755 | examination report is served. The verified motion must make a  
756 | reasonable showing by evidence in the record or proffered, that a  
757 | hearing on the petition to determine incapacity is necessary. The  
758 | court must rule on the verified motion as soon as practicable. The  
759 | court may hold a hearing to consider evidence concerning the  
760 | propriety of dismissal or the need for further examination of the  
761 | alleged incapacitated person. If the court finds that the verified  
762 | motion is filed in bad faith, the court may impose sanctions under  
763 | s. 745.312(3).

764 |  
765 | 745.310 Adjudicatory hearing.

766 | (1) Upon appointment of the examiners, the court must set the date  
767 | for hearing of the petition and the clerk must serve notice of  
768 | hearing on the petitioner, the alleged incapacitated person, and  
769 | next of kin identified in the petition for determination of  
770 | incapacity. The date for the adjudicatory hearing must be set no  
771 | more than 20 days after the required date for filing the reports of  
772 | the examiners, unless good cause is shown. The adjudicatory hearing

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773 must be conducted in a manner consistent with due process and the  
774 requirements of part III of this code.

775 (2) The alleged incapacitated person has the right to be present at  
776 the adjudicatory hearing and may waive that right.

777 (3) In the adjudicatory hearing on a petition to determine  
778 incapacity, a finding of limited or total incapacity of the person  
779 must be established by clear and convincing evidence.

780

781 745.311 Order determining incapacity.

782 (1) If the court finds that a person is incapacitated, the court  
783 must enter an order specifying the extent of incapacity. The order  
784 must specify the rights described in s. 745.303 (2) and (3) that  
785 the person is incapable of exercising.

786 (2) In determining that a person is totally incapacitated, the  
787 order must contain findings of fact demonstrating that the  
788 individual is totally without capacity to meet essential  
789 requirements for the person's health and safety and manage  
790 property.

791 (3) An order adjudicating a person to be incapacitated constitutes  
792 proof of such incapacity until further order of the court. To the  
793 extent the order finds that a person is incapacitated to make any  
794 gift or disposition of property, it shall constitute a rebuttable  
795 presumption that the person is incapacitated to execute documents  
796 having testamentary aspects. For purposes of this subsection, the  
797 term "testamentary aspects" means those provisions of a document  
798 that dispose of property on or after the death of the incapacitated  
799 person other than to the incapacitated person's estate.

800 (4) After the order determining incapacity has been filed, the  
801 clerk must serve the order on the incapacitated person.



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802 (5) If the order determining incapacity removes the right to have a  
803 driver's license and operate motor vehicles, the clerk must serve  
804 the order on the Florida Department of Highway Safety and Motor  
805 Vehicles.

806 (6) Orders determining incapacity shall be recorded by the clerk in  
807 the public records in the county in which the order was entered.  
808 The recording of the order is notice of the incapacity.

809  
810 745.312 Fees in incapacity proceedings.

811 (1) The examiners and attorney appointed under this part are  
812 entitled to reasonable fees to be determined by the court.

813 (2) If a guardian is appointed, the fees awarded under paragraph  
814 (1) shall be paid by the guardian from the property of the ward or,  
815 if the ward is indigent, by the state. The state shall have a  
816 creditor's claim against the ward's property for any amounts paid  
817 under this section. The state may file its claim within 90 days  
818 after the entry of an order awarding attorney and examiner fees. If  
819 the state does not file its claim within the 90-day period, the  
820 state is thereafter barred from asserting the claim. Upon petition  
821 by the state for payment of the claim, the court shall enter an  
822 order authorizing payment by the guardian from the property of the  
823 ward in the amount determined by the court, if any. The state shall  
824 keep a record of the payments.

825 (3) If the petition to determine incapacity is dismissed, costs and  
826 attorney's fees of the proceeding may be assessed against the  
827 petitioner if the court finds the petition to have been filed in  
828 bad faith. The petitioner shall also reimburse the state courts  
829 system for any amounts paid under subparagraph 4 (b) upon a finding  
830 of bad faith.

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831 (4) (a) If the petition to determine incapacity is dismissed without  
832 a finding of bad faith on the part of the petitioner, the court  
833 appointed attorney shall be paid a reasonable fee in the same  
834 manner as the payment made to private court-appointed counsel set  
835 forth in s. 27.5304. The fees of the examiners shall be paid upon  
836 court order as expert witness fees under s. 29.004(6).

837 (b) When there is a finding of incapacity but no guardian is  
838 appointed, the court appointed attorney shall be paid a reasonable  
839 fee under s. 745.113 or, if the incapacitated person is indigent,  
840 may be paid in the same manner as the payment made to private  
841 court-appointed counsel set forth in s. 27.5304. The fees of the  
842 examiners shall be paid upon court order as expert witness fees  
843 under s. 29.004(6).

844  
845 Section 4. Part IV of chapter 745, Florida Statutes,  
846 consisting of sections 745.401, 745.402, 745.403, 745.404, and  
847 745.405, is created to read:

848 PART IV

849 RESTORATION TO CAPACITY

850 745.401 Suggestion of capacity.

851 (1) Venue.--A suggestion of capacity must be filed in the court in  
852 which the guardianship is pending.

853 (2) Suggestion of Capacity.--

854 (a) A guardian, the ward, or any other interested person, may file  
855 a suggestion of capacity. The suggestion of capacity must describe  
856 the changed circumstances which would indicate that the ward is  
857 currently capable of exercising some or all of the rights which  
858 were removed. If filed by a person other than the ward, the  
859 suggestion of capacity must be verified.

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860 (b) Within 5 days after a suggestion of capacity is filed, the  
861 clerk shall serve notice of the filing of the suggestion of  
862 capacity and a copy of the suggestion of capacity on the ward, the  
863 guardian, the attorney for the ward, if any, the ward's known next  
864 of kin, and any other interested persons designated by the court.  
865 Notice of the suggestion of capacity need not be served on the  
866 person who filed the suggestion of capacity.

867 (c) The notice must specify that any objections to the suggestion  
868 of capacity or to restoration of the ward's rights must be filed  
869 within 10 days after service of the examination report required in  
870 s. 745.402 is served.

871  
872 745.402 Examination of ward.

873 (1) Within 5 days after a suggestion of capacity is filed, the  
874 court must appoint a physician who is qualified to be an examiner  
875 under 745.306 to examine the ward. The physician may have  
876 previously served as an examiner in the ward's incapacity  
877 proceeding. The physician must examine the ward and file a verified  
878 report with the court within 15 days after appointment. The  
879 examination must be conducted and the report prepared in the manner  
880 specified under s. 745.307.

881 (2) Within 5 days after filing the report, the clerk must serve the  
882 report on the guardian, the ward and on the ward's known next of  
883 kin and interested persons who were served notice of the suggestion  
884 of capacity.

885  
886 745.403 Objection and hearing.

887 (1) Objection to the examination report or to restoration of the  
888 ward must be filed within 10 days after service of the report.

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889 (2) If an objection is timely filed, or if the examination report  
890 suggests that full restoration is not appropriate, the court shall  
891 set the matter to be heard within 30 days after the examination  
892 report is filed, unless good cause is shown.

893 (3) If the ward does not have an attorney, the court shall appoint  
894 one to represent the ward.

895 (4) Notice of the hearing and copies of the objections and medical  
896 examination report shall be served on the ward, the guardian, the  
897 ward's next of kin, and any other interested persons as directed by  
898 the court.

899 (5) The court shall give priority to a hearing on suggestion of  
900 capacity and shall advance the cause on the calendar.

901

902 745.404 Consideration of examination report.

903 (1) Unless an objection is timely filed by the person who filed the  
904 suggestion of capacity, the guardian, any person who has filed an  
905 objection to the suggestion of capacity, or the incapacitated  
906 person, the court may consider the examination report without  
907 requiring testimony of the examiner. Any objection must be filed  
908 and served on all other interested persons at least 5 days prior to  
909 any hearing at which the report is to be considered.

910 (2) The person who filed the suggestion of capacity, the guardian,  
911 any person who has filed an objection to the suggestion of  
912 capacity, and the incapacitated person may object to the  
913 introduction into evidence of all or any portion of the examination  
914 report by filing and serving a written objection on the other party  
915 no later than 5 days before the adjudicatory hearing. The objection  
916 must state the basis upon which the challenge to admissibility is  
917 made. If an objection is timely filed and served, the court shall

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918 apply the rules of evidence in determining the report's  
919 admissibility. For good cause shown, the court may extend the time  
920 to file and serve the written objection.

921

922 745.405 Order restoring capacity.

923 (1) If the examination report concludes that the ward should be  
924 restored to full capacity, there are no objections timely filed,  
925 and the court is satisfied that the examination report establishes  
926 by a preponderance of the evidence that restoration of all of the  
927 ward's rights is appropriate, the court must enter an order  
928 restoring all of the rights which were removed from the ward  
929 without hearing. The order must be entered within 10 days after  
930 expiration of the time for objection.

931 (2) At the conclusion of any hearing to consider restoration of  
932 capacity, the court shall make specific findings of fact, and based  
933 on a preponderance of the evidence enter an order denying the  
934 suggestion of capacity or restoring all or some of the rights of  
935 the ward.

936 (3) If only some rights are restored to the ward, the order must  
937 state which rights are restored and amended letters shall be issued  
938 to reflect the changed authority of the guardian. A guardian of  
939 person shall prepare a new guardianship plan which addresses only  
940 the remaining rights retained by the guardian. The guardian must  
941 file a copy of the new plan with the court within 60 days after  
942 issuance of amended letters.

943 (4) Additional rights may not be removed from a ward in a  
944 proceeding to consider a suggestion of capacity.

945

946 Section 5. Part V of chapter 745, Florida Statutes, consisting

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947 of sections 745.501, 745.502, 745.503, 745.504, and 745.504, is  
948 created to read:

949 PART V

950 QUALIFICATIONS OF GUARDIANS

951 745.501 Who may be appointed guardian of a resident ward.

952 (1) Unless disqualified as provided in s. 745.503:

953 (a) Any resident of this state who is sui juris and is 18 years of  
954 age or older is qualified to act as guardian of a ward.

955 (b) A nonresident of the state may serve as guardian of a resident  
956 ward if the non-resident is:

957 1. Related by lineal consanguinity to the ward;

958 2. A legally adopted child or adoptive parent of the ward;

959 3. A spouse, brother, sister, uncle, aunt, niece, or nephew of the  
960 ward, or someone related by lineal consanguinity to any such  
961 person; or

962 4. The spouse of a person otherwise qualified under this section.

963 (2) No judge shall act as guardian, except when he or she is  
964 related to the ward by blood, marriage, or adoption, or has  
965 maintained a close relationship with the ward or the ward's family,  
966 and serves without compensation.

967

968 745.502 Nonprofit corporate guardian.

969 A nonprofit corporation organized for religious or charitable  
970 purposes and existing under the laws of this state may be appointed  
971 guardian for a ward. The corporation must employ at least one  
972 professional guardian.

973

974 745.503 Disqualified persons.

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975 (1) No person who has been convicted of a felony or who, due to  
976 incapacity or illness, is incapable of discharging guardianship  
977 duties shall be appointed to act as guardian. Further, no person  
978 who has been judicially determined to have committed abuse,  
979 abandonment, or neglect against a child as defined in s. 39.01 or  
980 s. 984.03(1), (2), and (37), or who has been found guilty of, or  
981 entered a plea of nolo contendere or guilty to, any offense  
982 prohibited under s. 435.03, chapter 825 or under any similar  
983 statutes of another jurisdiction, shall be appointed to act as a  
984 guardian.

985 (2) Except as provided in subsection (3) or subsection (4), a  
986 person providing substantial services or products to the proposed  
987 ward in a professional or business capacity may not be appointed  
988 guardian and retain that previous professional or business  
989 relationship.

990 (3) A creditor or provider of health care services to the ward,  
991 whether direct or indirect, may not be appointed the guardian of  
992 the ward, unless the court finds that there is no conflict of  
993 interest with the ward.

994 (4) A person may not be appointed a guardian if he or she is in the  
995 employ of any person, agency, government, or corporation that  
996 provides services to the proposed ward in a professional or  
997 business capacity, except that a person so employed may be  
998 appointed if he or she is the spouse, adult child, parent, or  
999 sibling of the proposed ward or the court determines that any  
1000 potential conflict of interest is insubstantial and that the  
1001 appointment would be in the proposed ward's best interest.

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1002 (5) The court may not appoint a guardian in any other circumstance  
1003 in which the proposed guardian has a conflict of interest with the  
1004 ward.

1005 (6) If a guardian is at any time unqualified to serve under  
1006 subsections (1)-(5), the guardian shall file a resignation and  
1007 notice of disqualification within 20 days of learning that the  
1008 guardian is unqualified.. A guardian who fails to comply with this  
1009 section may be personally liable for costs, including attorney  
1010 fees, incurred in any removal proceeding if the guardian is  
1011 removed. This liability extends to a guardian who does not know,  
1012 but should have known, of the facts that would have required the  
1013 guardian to resign or to file and serve notice as required herein.  
1014 This liability shall be cumulative to any other provided by law.

1015 (7) Unless a person is a professional guardian, a person may not be  
1016 appointed as guardian if they, at the time of appointment, serve as  
1017 guardian of another ward who is not a relative of the guardian.

1018

1019 745.504 Credit and criminal investigation.

1020 (1) Within 3 days of filing a petition for appointment of a  
1021 nonprofessional guardian, the proposed guardian shall submit to an  
1022 investigation of the guardian's credit history and a level 2  
1023 background screening as required under s. 435.04. The court must  
1024 consider the credit and background screening reports before  
1025 appointing a guardian.

1026 (2) For nonprofessional guardians, the court may require the  
1027 satisfactory completion of a criminal history record check as  
1028 described in this subsection. A nonprofessional guardian satisfies  
1029 the requirements of this section by undergoing a state and national  
1030 criminal history record check using fingerprints. A nonprofessional



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1031 guardian required to submit fingerprints shall have fingerprints  
1032 taken and forwarded, along with the necessary fee, to the  
1033 Department of Law Enforcement for processing. The results of the  
1034 fingerprint criminal history record check shall be transmitted to  
1035 the clerk, who shall maintain the results in the court file of the  
1036 nonprofessional guardian's case.

1037 (3) For professional and public guardians, the court and Office of  
1038 Public and Professional Guardians shall accept the satisfactory  
1039 completion of a criminal history record check by any method  
1040 described in this subsection. A professional guardian satisfies the  
1041 requirements of this section by undergoing an electronic  
1042 fingerprint criminal history record check. A professional guardian  
1043 may use any electronic fingerprinting equipment used for criminal  
1044 history record checks. The Office of Public and Professional  
1045 Guardians shall adopt a rule detailing the acceptable methods for  
1046 completing an electronic fingerprint criminal history record check  
1047 under this section. The professional guardian shall pay the actual  
1048 costs incurred by the Federal Bureau of Investigation and the  
1049 Department of Law Enforcement for the criminal history record  
1050 check. The entity completing the record check must immediately  
1051 transmit the results of the criminal history record check to the  
1052 clerk and the Office of Public and Professional Guardians. The  
1053 clerk shall maintain the results in the court file of the  
1054 professional guardian's case.

1055 (4) (a) A professional guardian, and each employee of a professional  
1056 guardian, must complete, at the professional guardian's expense, a  
1057 level 2 background screening as set forth in s. 435.04 before and  
1058 at least once every 5 years after the date the guardian is  
1059 registered with the Office of Public and Professional Guardians. A

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1060 professional guardian, and each employee of a professional guardian  
1061 who has direct contact with the ward, or access to the ward's  
1062 assets, must complete, at his or her own expense, a level 1  
1063 background screening as set forth in s. 435.03 at least once every  
1064 2 years after the date the guardian is registered. However, a  
1065 professional guardian is not required to resubmit fingerprints for  
1066 a criminal history record check if the professional guardian has  
1067 been screened using electronic fingerprinting equipment and the  
1068 fingerprints are retained by the Department of Law Enforcement in  
1069 order to notify the clerk of any crime charged against the person  
1070 in this state or elsewhere. Each employee required to submit to a  
1071 level 2 background check must submit to the background check within  
1072 30 days of initial employment. Each employee required to submit to  
1073 a level 1 background check must submit to the background check  
1074 within 30 days of meeting the requirement for a level 1 background  
1075 check.

1076 (b) All fingerprints electronically submitted to the Department of  
1077 Law Enforcement under this section shall be retained by the  
1078 Department in a manner provided by rule and entered in the  
1079 statewide automated biometric identification system authorized by  
1080 s. 943.05(2)(b). The fingerprints shall thereafter be available for  
1081 all purposes and uses authorized for arrest fingerprints entered in  
1082 the Criminal Justice Information Program under s. 943.051.

1083 (c) The Department of Law Enforcement shall search all arrest  
1084 fingerprints received under s. 943.051 against the fingerprints  
1085 retained in the statewide automated biometric identification system  
1086 under paragraph (b). Any arrest record that is identified with the  
1087 fingerprints of a person described in this paragraph must be  
1088 reported to the clerk. The clerk must forward any arrest record

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1089 received for a professional guardian to the Office of Public and  
1090 Professional Guardians within 5 days of receipt. Each professional  
1091 guardian who elects to submit fingerprint information  
1092 electronically shall participate in this search process by paying  
1093 an annual fee to the Office of the Public and Professional  
1094 Guardians. The amount of the annual fee to be imposed for  
1095 performing these searches and the procedures for the retention of  
1096 professional guardian fingerprints and the dissemination of search  
1097 results shall be established by rule of the Department of Law  
1098 Enforcement. At least once every 5 years, the Office of Public and  
1099 Professional Guardians must request that the Department of Law  
1100 Enforcement forward the fingerprints maintained under this section  
1101 to the Federal Bureau of Investigation.

1102 (5) (a) A professional guardian, and each employee of a professional  
1103 guardian who has direct contact with the ward or access to the  
1104 ward's assets, must allow, at his or her own expense, an  
1105 investigation of his or her credit history before and at least once  
1106 every 2 years after the date of the guardian's registration with  
1107 the Office of Public and Professional Guardians.

1108 (b) Office of Public and Professional Guardians shall adopt a rule  
1109 detailing the acceptable methods for completing a credit  
1110 investigation under this section. If appropriate, the office may  
1111 administer credit investigations. If the office chooses to  
1112 administer the credit investigation, it may adopt a rule setting a  
1113 fee, not to exceed \$25, to reimburse the costs associated with the  
1114 administration of a credit investigation.

1115 (6) Office of Public and Professional Guardians may inspect, at any  
1116 time, the results of any credit or criminal history record check of  
1117 a public or professional guardian conducted under this section. The

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1118 office shall maintain copies of the credit or criminal history  
1119 record check results in the guardian's registration file. If the  
1120 results of a credit or criminal investigation of a public or  
1121 professional guardian have not been forwarded to the Office of  
1122 Public and Professional Guardians by the investigating agency, the  
1123 clerk of the court shall forward copies of the results of the  
1124 investigations to the office upon receiving them.

1125 (7) The requirements of this section do not apply to a trust  
1126 company, a state banking corporation or state savings association  
1127 authorized and qualified to exercise fiduciary powers in this  
1128 state, or a national banking association or federal savings and  
1129 loan association authorized and qualified to exercise fiduciary  
1130 powers in this state.

1131 (8) At any time, the court may require a guardian or the guardian's  
1132 employees to submit to an investigation of the person's credit  
1133 history and complete a level 1 background screening as set forth in  
1134 s. 435.03. The court may consider the results of any such  
1135 investigation when considering removal of a guardian.

1136 (9) The clerk shall maintain a file on each professional guardian  
1137 appointed by the court and retain in the file documentation of the  
1138 result of any investigation conducted under this section. A  
1139 professional guardian must pay the clerk of the court a fee of up  
1140 to \$7.50 for handling and processing professional guardian files.  
1141 Such documentation for a nonprofessional guardian shall be  
1142 maintained as a confidential record in the case file for such  
1143 guardianship.

1144  
1145 745.505 Education requirements for nonprofessional guardians.

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1146 (1) Each ward is entitled to a guardian competent to perform the  
1147 duties of a guardian necessary to protect the interests of the  
1148 ward.

1149 (2) Each person appointed by the court to be a guardian, other than  
1150 a parent who is the guardian of the property of a minor child, must  
1151 receive a minimum of 8 hours of instruction and training which  
1152 covers:

1153 (a) The legal duties and responsibilities of the guardian;  
1154 (b) The rights of the ward;  
1155 (c) The use of guardianship assets;  
1156 (d) The availability of local resources to aid the ward; and  
1157 (e) The preparation of guardianship plans, reports, inventories,  
1158 and accountings.

1159 (3) Each person appointed by the court to be the guardian of the  
1160 property of his or her minor child must receive a minimum of 4  
1161 hours of instruction and training that covers:

1162 (a) The legal duties and responsibilities of a guardian of  
1163 property;  
1164 (b) The preparation of an initial inventory and guardianship  
1165 accountings; and  
1166 (c) Use of guardianship assets.

1167 (4) Each person appointed by the court to be a guardian must  
1168 complete the required number of hours of instruction and education  
1169 within 4 months after appointment. The instruction and education  
1170 must be completed through a course approved by the chief judge of  
1171 the circuit court and taught by a court-approved person or  
1172 organization. Court-approved organizations may include, but are not  
1173 limited to, community or junior colleges, guardianship  
1174 organizations, and local bar associations or The Florida Bar.

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1175 (5) Expenses incurred by the guardian to satisfy the education  
1176 requirement may be paid from the ward's estate, unless the court  
1177 directs that such expenses be paid by the guardian individually.

1178 (6) The court may waive some or all of the requirements of this  
1179 section or impose additional requirements. The court shall make its  
1180 decision on a case-by-case basis and, in making its decision, shall  
1181 consider the experience and education of the guardian, the duties  
1182 assigned to the guardian, and the needs of the ward.

1183 (7) The provisions of this section do not apply to professional  
1184 guardians.

1185  
1186 Section 6. Part VI of chapter 745, Florida Statutes,  
1187 consisting of sections 745.601, 745.602, 745.603, 745.604, 745.605,  
1188 745.606, 745.607, 745.608, 745.609, 745.610, and 745.611, is  
1189 created to read:

1190 PART VI

1191 APPOINTMENT OF GUARDIANS

1192 745.601 Proposed guardian's information statement.

1193 (1) At the time of filing a petition for appointment of guardian,  
1194 every proposed guardian must file a verified information statement  
1195 which provides the following:

1196 (a) details sufficient to demonstrate that the person is qualified  
1197 to be guardian pursuant to s. 745.501;

1198 (b) the names of all wards for whom the person is currently acting  
1199 as guardian or has acted as guardian in the previous five years,  
1200 identifying each ward by court file number and circuit court in  
1201 which the case is or was pending, and stating whether the person is  
1202 or was acting as limited or plenary guardian of person or property  
1203 or both;

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1204 (c) any special experience, education or other skills that would be  
1205 of benefit in serving as guardian;

1206 (d) the proposed guardian's relation to the ward, including whether  
1207 the person is providing any services to the ward, holds any joint  
1208 assets with the ward, or, if known, is beneficiary of any part of  
1209 the ward's estate.

1210 (2) Subsection (1) does not apply to nonprofit corporate guardians  
1211 and public guardians.

1212 (3) Nonprofit corporate guardians and public guardians must file  
1213 quarterly with the clerk statements that contain the information  
1214 required under subsection (1), rather than filing an information  
1215 statement with each petition to be appointed guardian.

1216  
1217 745.602 Considerations in appointment of guardian.

1218 (1) If the person designated is qualified to serve pursuant to  
1219 s.745.501, the court shall appoint any standby guardian or preneed  
1220 guardian, unless the court determines that appointing such person  
1221 is contrary to the best interest of the ward.

1222 (2) If a guardian cannot be appointed under subsection (1), the  
1223 court may appoint any person who is fit and proper and qualified to  
1224 act as guardian, whether related to the ward or not. The court  
1225 shall give preference to the appointment of a person who:

1226 (a) is related by blood or marriage to the ward;

1227 (b) has educational, professional, or business experience relevant  
1228 to the nature of the services sought to be provided;

1229 (c) has the capacity to manage the assets involved; or

1230 (d) has the ability to meet the requirements of the law and the  
1231 unique needs of the ward.

1232 (3) The court shall also:

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1233 (a) consider the wishes expressed by an incapacitated person as to  
1234 who shall be appointed guardian.  
1235 (b) consider the preference of a minor who is age 14 or over as to  
1236 who should be appointed guardian.  
1237 (c) consider any person designated as guardian in any will in which  
1238 the ward is a beneficiary.  
1239 (d) consider the wishes of the ward's next of kin, when the ward  
1240 cannot express a preference.  
1241 (e) inquire into and consider potential disqualifications under s.  
1242 745.503 and potential conflicts of interest under s. 745.1309.  
1243 (4) When a guardian is appointed, the court must make findings of  
1244 fact to support why the person was selected as guardian. Except  
1245 when a guardian is appointed under subsection (1), the court must  
1246 consider the factors specified in subsections (2) and (3).  
1247 (5) The court may hear testimony on the question of who is  
1248 qualified and entitled to preference in the appointment of a  
1249 guardian.  
1250 (6) The court may not give preference to the appointment of a  
1251 person under subsection (2) based solely on the fact that such  
1252 person was appointed to serve as an emergency temporary guardian.  
1253  
1254 745.603 Petition for appointment of guardian; contents.  
1255 (1) A petition to appoint a guardian must be verified by an adult  
1256 with personal knowledge of the information in the petition  
1257 alleging:  
1258 (a) the name, age, residence address, and mailing address of the  
1259 alleged incapacitated person or minor and the nature of the  
1260 incapacity, if any;  
1261 (b) the extent of guardianship proposed, either plenary or limited;



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1262 (c) the residence address and mailing address of the petitioner;  
1263 (d) the names and mailing addresses of the next of kin of the  
1264 alleged incapacitated person or minor, if known to the petitioner;  
1265 (e) the name of the proposed guardian and relationship of the  
1266 proposed guardian to the alleged incapacitated person or minor;  
1267 (f) the reasons why the proposed guardian should be appointed;  
1268 (g) whether the proposed guardian is a professional guardian;  
1269 (h) any other guardianship under part VII of this chapter that the  
1270 alleged incapacitated person or minor is in currently or has been  
1271 in previously;  
1272 (i) the nature and value of property subject to the guardianship,  
1273 if any;  
1274 (j) the identity of any pre-need guardian designation, healthcare  
1275 surrogate designation, and power of attorney, purportedly executed  
1276 by the alleged incapacitated person, the identity and county of  
1277 residence of any person designated to act under such documents, and  
1278 the efforts to locate such documents or persons designated to act;  
1279 and  
1280 (k) the reasons why a guardian advocate under s. 745.711 or other  
1281 alternatives to guardianship are insufficient to meet the needs of  
1282 the alleged incapacitated person.  
1283 (2) The petition must state whether a willing and qualified  
1284 guardian cannot be located.  
1285 (3) The petition for appointment of a professional guardian must  
1286 comply with the provisions of subsection (1), and must state that  
1287 the nominated guardian is a professional guardian.  
1288 (4) If the petitioner is a professional guardian, the petitioner  
1289 may not petition for their own appointment unless they are a  
1290 relative of the alleged incapacitated person or minor. For

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1291 purposes of this subsection, the term "relative" means an  
1292 individual who would qualify to serve as a nonresident guardian  
1293 under s. 745.501. This subsection does not apply to a public  
1294 guardian appointed under 745.1406 who seeks appointment as a  
1295 guardian of person of limited financial means and whose  
1296 compensation as guardian for such person would be paid from the  
1297 Office of Public and Professional Guardians or any local  
1298 government.  
1299  
1300 745.604 Notice of petition for appointment of guardian and hearing.  
1301 (1) When a petition for appointment of guardian for an  
1302 incapacitated person is heard at the conclusion of the hearing in  
1303 which the person is determined to be incapacitated, the court shall  
1304 hear the petition without further notice provided that notice of  
1305 hearing of the petition to appoint guardian was timely served. If  
1306 the petition is heard on a later date, reasonable notice of the  
1307 hearing must be served on the incapacitated person, any guardian  
1308 then serving, the person's next of kin, and such other interested  
1309 persons as the court may direct.  
1310 (2) When a petition for appointment of guardian of a minor is  
1311 filed, formal notice must be served on the minor's parents. When a  
1312 parent petitions for appointment as guardian for the parent's minor  
1313 child, formal notice shall be served on the other parent, unless  
1314 the other parent consents to the appointment. If the proposed  
1315 guardian has custody of the minor and the petition alleges that,  
1316 after diligent search, a parent cannot be found, the parent may be  
1317 served by informal notice, delivered to the parent's last known  
1318 address.  
1319

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1320 745.605 Order on petition for appointment of guardian.  
1321 (1) At the hearing on a petition for appointment of guardian, the  
1322 court must consider and find whether there is an alternative to  
1323 guardianship that will sufficiently address the needs of the  
1324 incapacitated person.  
1325 (2) The order appointing a guardian must state the nature of the  
1326 guardianship as either plenary or limited. If limited, the order  
1327 must state that the guardian may exercise only those delegable  
1328 rights which have been removed from the incapacitated person and  
1329 delegated to the guardian. The order shall specify the powers and  
1330 duties of the guardian.  
1331 (3) A plenary guardian of person shall exercise all delegable  
1332 rights and powers of the incapacitated person as it relates to  
1333 person and a plenary guardian of property shall exercise all  
1334 delegable rights and powers of the incapacitated person as it  
1335 relates to property.  
1336 (4) A ward for whom a limited guardian has been appointed retains  
1337 all legal rights except those that have been specifically delegated  
1338 to the guardian in the court's written order.  
1339 (5) The order appointing a guardian must contain a finding that  
1340 guardianship is the least restrictive alternative that is  
1341 appropriate for the ward, and must reserve to the incapacitated  
1342 person the right to make decisions in all matters commensurate with  
1343 the person's ability to do so.  
1344 (6) If a petition for appointment of guardian has been filed, the  
1345 court shall rule on the petition contemporaneously with the order  
1346 adjudicating a person to be incapacitated unless good cause is  
1347 shown to defer ruling. If a guardian is not appointed  
1348 contemporaneously with the order adjudicating the person to be

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1349 incapacitated, the court may appoint an emergency temporary  
1350 guardian in the manner and for the purposes specified in s.  
1351 745.701.

1352 (7) The order appointing a guardian must specify the amount of bond  
1353 to be given by the guardian and must state whether the guardian  
1354 must place all, or part, of the property of the ward in a  
1355 restricted account in a financial institution designated pursuant  
1356 to s. 69.031.

1357

1358 745.606 Oath of guardian.  
1359 Before exercising authority as guardian, every guardian shall take  
1360 an oath that he or she will faithfully perform the duties as  
1361 guardian. This oath is not jurisdictional.

1362

1363 745.607 Bond of guardian.  
1364 (1) Before exercising authority as guardian, a guardian of property  
1365 of a ward shall file a bond with surety as prescribed in s. 45.011  
1366 to be approved by the clerk or by the court. The bond shall be  
1367 payable to the Governor of the state and the Governor's successors  
1368 in office, conditioned on the faithful performance of all duties by  
1369 the guardian. In form the bond shall be joint and several. For good  
1370 cause, the court may waive bond.

1371 (2) When the sureties on a bond are natural persons, the guardian  
1372 shall be required to file, with the annual guardianship report,  
1373 proof satisfactory to the court that the sureties are alive and  
1374 solvent.

1375 (3) All bonds required by this part shall be in the sum that the  
1376 court deems sufficient after considering the value and nature of  
1377 the assets subject to guardianship.

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1378 (4) For good cause, the court may require, or increase or reduce,  
1379 the amount of bond or change or release the surety.

1380 (5) When considering bond of professional guardians, the court may  
1381 take into account the blanket bond provided by such guardian,  
1382 provided that proof of insurance and effectiveness of the bond is  
1383 on file with the clerk. Additional bond may be required.

1384 (6) Financial institutions and public guardians authorized by law  
1385 to be guardians shall not be required to file bonds.

1386 (7) The premium of a guardian's required bond shall be paid as an  
1387 expense of the guardianship.

1388 (8) When it is expedient in the judgment of the court having  
1389 jurisdiction of any guardianship property, because the size of the  
1390 bond required of the guardian is burdensome, or for other cause,  
1391 the court may order, in lieu of a bond or in addition to a lesser  
1392 bond, that the guardian place all or part of the property of the  
1393 ward in a designated financial institution under the same  
1394 conditions and limitations as are contained in s. 69.031. A  
1395 designated financial institution shall also include a dealer, as  
1396 defined in s. 517.021(6), if the dealer is a member of the Security  
1397 Investment Protection Corporation and is doing business in the  
1398 state.

1399

1400 745.608 Validity of bond.

1401 No bond executed by any guardian shall be invalid because of an  
1402 informality in it or because of an informality or illegality in the  
1403 appointment of the guardian. The bond shall have the same force and  
1404 effect as if the bond had been executed in proper form and the  
1405 appointment had been legally made.

1406

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1407 745.609 Liability of surety.  
1408 No surety for a guardian shall be charged beyond the property of  
1409 the ward.  
1410  
1411 745.610 Alternatives to guardianship.  
1412 (1) In each proceeding in which a guardian is appointed under this  
1413 chapter, the court shall make a finding whether the ward, prior to  
1414 adjudication of incapacity, has executed an advance directive under  
1415 chapter 765 or durable power of attorney under chapter 709. If any  
1416 advance directive or durable power of attorney is identified, the  
1417 court must consider and find whether there is an alternative to  
1418 guardianship that will sufficiently address the needs of the  
1419 incapacitated person and specify in the order appointing guardian  
1420 and letters what authority, if any, the guardian shall exercise  
1421 over the ward or the ward's assets and what authority, if any, the  
1422 surrogate or agent shall continue to exercise over the ward or the  
1423 ward's assets.  
1424 (2) Upon verified petition by an interested person or if requested  
1425 in a petition for appointment of guardian with notice to the  
1426 surrogate, agent, and interested persons, the court may suspend,  
1427 modify, or revoke the authority of the surrogate or agent to make  
1428 health care or financial decisions for the ward. Any order  
1429 suspending, modifying, or revoking the authority of an agent or  
1430 surrogate must be supported by written findings of fact.  
1431 (3) If a durable power of attorney, health care surrogate  
1432 designation, trust or other relevant financial or personal care  
1433 document is discovered after issuance of letters of guardianship,  
1434 any interested person may file a petition seeking a determination

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1435 of the effect of any such document and what, if any, changes should  
1436 be made to the powers of the guardian.

1437

1438 745.611 Letters of guardianship.

1439 (1) Letters of guardianship must be issued to the guardian and must  
1440 specify whether the guardianship pertains to the ward's person,  
1441 property, or both.

1442 (2) The letters must state whether the guardianship is plenary or  
1443 limited. If limited, the letters must specify the powers and duties  
1444 of the guardian.

1445 (3) The letters must state whether or not, and to what extent, the  
1446 guardian is authorized to act on behalf of the ward with regard to  
1447 any advance directive under chapter 765 or durable power of  
1448 attorney under chapter 709 previously executed by the ward.

1449 (4) The duties and powers of the guardian accrue on the date  
1450 letters are issued and not the date the order appointing guardian  
1451 is entered.

1452

1453 Section 7. Part VII of chapter 745, Florida Statutes,  
1454 consisting of sections 745.701, 745.702, 745.703, 745.704, 745.705,  
1455 745.706, 745.707, 745.708, 745.709, 745.710, 745.711, 745.712,  
1456 745.713, and 745.714, is created to read:

1457

PART VII

1458

TYPES OF GUARDIANSHIP

1459 745.701 Emergency temporary guardianship.

1460 (1) A court, prior to appointment of a guardian but after a  
1461 petition for determination of incapacity has been filed or as  
1462 otherwise provided in this code, may appoint an emergency temporary  
1463 guardian for the person, property, or both, of an alleged

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1464 incapacitated person. The court must find that there appears to be  
1465 imminent danger that the physical or mental health or safety of the  
1466 person will be seriously impaired or that the person's property is  
1467 in danger of being wasted, misappropriated, or lost unless  
1468 immediate action is taken. The alleged incapacitated person or an  
1469 interested person may apply to the court in which the proceeding is  
1470 pending for appointment of an emergency temporary guardian. The  
1471 powers and duties granted must be described in the order appointing  
1472 the emergency temporary guardian consistent with s. 745.605(2).

1473 (2) The court shall appoint counsel to represent the alleged  
1474 incapacitated person during any such proceedings. An emergency  
1475 temporary guardian may be appointed only after hearing with at  
1476 least 3 days' notice to the alleged incapacitated person, unless  
1477 the petitioner demonstrates that substantial harm to the alleged  
1478 incapacitated person would occur if the 3 days' notice is given and  
1479 that reasonable notice, if any, has been provided.

1480 (3) If no guardian is appointed at the time an order determining  
1481 incapacity is entered, the court may appoint an emergency temporary  
1482 guardian on its own motion after hearing with notice to the  
1483 incapacitated person, and the person's next of kin, and such  
1484 interested persons as the court may direct.

1485 (4) Upon a filing of notice of resignation by a guardian or upon  
1486 the guardian's suspension or removal, if no petition to appoint a  
1487 successor has been filed by the time of the resignation, suspension  
1488 or removal, the court may appoint an emergency temporary guardian  
1489 on its own motion or motion of any interested person, after hearing  
1490 with notice to the ward, the resigning or suspended guardian, and  
1491 such other interested persons as the court may direct.



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1492 (5) The authority of an emergency temporary guardian expires upon  
1493 the issuance of letters to a succeeding guardian, upon a  
1494 determination that the ward is not incapacitated as to the rights  
1495 and abilities specified in the order appointing emergency temporary  
1496 guardian, or upon the death of the ward, whichever occurs first.

1497 (6) An emergency temporary guardian of property whose authority has  
1498 expired shall distribute assets only with prior court order  
1499 approving distribution.

1500 (7) The emergency temporary guardian shall be discharged and  
1501 relieved of further responsibility upon approval of the final  
1502 accounting or report as specified in subsection (12) and  
1503 distribution of assets, if any, as directed by the court.

1504 (8) The court may issue an injunction, restraining order, or other  
1505 appropriate writ to protect the physical or mental health or safety  
1506 or property of the person who is the ward of an emergency temporary  
1507 guardianship.

1508 (9) The emergency temporary guardian shall take an oath to  
1509 faithfully perform the duties of a guardian before letters of  
1510 emergency temporary guardianship are issued.

1511 (10) Before exercising authority as guardian, the emergency  
1512 temporary guardian of property may be required to file a bond in  
1513 accordance with s. 745.607.

1514 (11) An emergency temporary guardian's authority and responsibility  
1515 begins upon issuance of letters of emergency temporary guardianship  
1516 in accordance with s. 745.611.

1517 (12) (a) An emergency temporary guardian of property shall file a  
1518 petition for distribution and discharge and final accounting no  
1519 later than 45 days after the issuance of letters to the succeeding  
1520 guardian, death of the ward, or entry of an order denying the

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1521 petition to appoint guardian. The provisions of s. 745.1102 shall  
1522 apply. The final accounting must consist of a verified inventory of  
1523 the property, as provided in s. 745.803, as of the date letters of  
1524 emergency temporary guardianship were issued and an accounting that  
1525 complies with the requirements of the Florida Probate Rules.

1526 (b) An emergency temporary guardian of person shall file a petition  
1527 for discharge and a final report no later than 45 days after the  
1528 issuance of letters to the succeeding guardian, death of the ward,  
1529 or entry of an order denying the petition to appoint guardian. The  
1530 provisions of s. 745.1106 shall apply. The final report shall  
1531 summarize the activities of the temporary guardian with regard to  
1532 residential placement, medical care, mental health and  
1533 rehabilitative services, and the social condition of the ward to  
1534 the extent of the authority granted to the temporary guardian in  
1535 the letters of emergency temporary guardianship. Upon the death of  
1536 the ward, s. 745.1107(5) shall apply.

1537 (c) A copy of the final accounting or report of the emergency  
1538 temporary guardian shall be served on the succeeding guardian, the  
1539 ward if no guardian is appointed, or the personal representative of  
1540 the ward's estate.

1541

1542 745.702 Standby guardian of minor.

1543 Upon petition by the natural guardians or a guardian appointed  
1544 under s. 745.713, the court may appoint a standby guardian of  
1545 person or property of a minor. The court may also appoint an  
1546 alternate to the guardian to act if the standby guardian does not  
1547 serve or ceases to serve after appointment. Notice of hearing on  
1548 the petition must be served on the natural guardians and on any

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1549 guardian currently serving unless the notice is waived in writing  
1550 by them or waived by the court for good cause shown.

1551

1552 745.703 Standby guardian of adult.

1553 Upon petition by a currently serving guardian, a standby guardian  
1554 of person or property of an incapacitated person may be appointed  
1555 by the court. The court may also appoint an alternate to act if the  
1556 standby guardian does not serve or ceases to serve after  
1557 appointment. Notice of hearing must be served on the ward's next of  
1558 kin.

1559

1560 745.704 Appointment and powers of standby guardian.

1561 (1) Upon filing a guardian's oath and designation of resident agent  
1562 and acceptance, a standby guardian or alternate may assume the  
1563 duties of guardianship immediately on the death, removal, or  
1564 resignation of an appointed guardian of a minor, or on the death or  
1565 adjudication of incapacity of the last surviving natural guardian  
1566 of a minor, or upon the death, removal, or resignation of the  
1567 guardian for an adult. A standby guardian of property may only  
1568 safeguard the ward's property before issuance of letters.

1569 (2) A standby guardian shall petition for confirmation of  
1570 appointment and shall file an oath, designation of resident agent  
1571 and acceptance. Each proposed guardian shall post bond as set forth  
1572 in 745.607 and shall submit to a credit and a criminal history  
1573 record check as set forth in s. 745.504. If the court finds the  
1574 standby guardian to be qualified to serve as guardian under s.  
1575 745.501, the standby guardian shall be entitled to confirmation of  
1576 appointment as guardian. Letters must then be issued in the manner  
1577 provided in s. 745.611.

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1578 (3) After the assumption of duties by a standby guardian, the court  
1579 shall have jurisdiction over the guardian and the ward.

1580

1581 745.705 Preneed guardian for adult.

1582 (1) A competent adult may name a preneed guardian by executing a  
1583 written declaration that names a guardian to serve in the event of  
1584 the declarant's incapacity.

1585 (2) The declaration must be signed by the declarant in the presence  
1586 of two subscribing witnesses as defined in s. 732.504. A declarant  
1587 unable to sign the instrument may, in the presence of witnesses,  
1588 direct that another person sign the declarant's name as required  
1589 herein. The person designated as preneed guardian shall not act as  
1590 witness to the execution of the declaration. At least one person  
1591 who acts as a witness shall be neither the declarant's spouse nor  
1592 blood relative.

1593 (3) The declarant may file the declaration with the clerk in  
1594 declarant's county of residence at any time. When a petition for  
1595 appointment of guardian is filed, the clerk shall produce the  
1596 declaration and serve a copy on the proposed ward and the  
1597 petitioner.

1598 (4) Production of the declaration in a proceeding for appointment  
1599 of guardian shall constitute a rebuttable presumption that the  
1600 preneed guardian is entitled to serve as guardian. The court shall  
1601 not be bound to appoint the preneed guardian if the person is found  
1602 to be disqualified to serve as guardian.

1603 (5) If the preneed guardian is unwilling or unable to serve, a  
1604 written declaration appointing an alternate preneed guardian  
1605 constitutes a rebuttable presumption that the alternate is entitled  
1606 to serve as guardian. The court is not bound to appoint the

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1607 alternate preneed guardian if the person is found to be  
1608 disqualified to serve as guardian.

1609  
1610 745.706 Preneed guardian for minor.

1611 (1) Natural guardians may nominate a preneed guardian of person or  
1612 property or both of their minor child by executing a written  
1613 declaration that names such guardian to serve if the minor's last  
1614 surviving natural guardian becomes incapacitated or dies or if the  
1615 natural guardian is disqualified. The declarant may also name an  
1616 alternate to the guardian to act if the designated preneed guardian  
1617 is unwilling or unable to serve.

1618 (2) The declaration must specify the child's full legal name and  
1619 date of birth, the relationship of the declarant to the child, and  
1620 the proposed preneed guardian.

1621 (3) The declaration must be signed at the end by all of the natural  
1622 guardians or the name of the natural guardians must be subscribed  
1623 at the end by another person in the natural guardians' presence and  
1624 at the natural guardians' direction. The natural guardians'  
1625 signing, or acknowledgement that another person has subscribed his  
1626 or her name to the declaration, must be in the presence of all  
1627 natural guardians and in the presence of two subscribing witnesses  
1628 as defined in s. 732.504. The person designated as preneed guardian  
1629 shall not act as witness to the execution of the declaration. At  
1630 least one person who acts as a witness shall be neither of the  
1631 natural guardians' spouse nor blood relative.

1632 (4) The declarant may file the declaration with the clerk in the  
1633 county of the child's residence, at any time. When a petition for  
1634 appointment of guardian for the minor is filed, the clerk shall

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1635 produce the declaration and serve a copy on the minor and  
1636 petitioner.

1637 (5) The declaration constitutes a rebuttable presumption that the  
1638 designated preneed guardian is entitled to serve as guardian. The  
1639 court is not bound to appoint the designated preneed guardian if  
1640 the person is found to be disqualified to serve as guardian.

1641 (6) If the preneed guardian is unwilling or unable to serve, a  
1642 written declaration appointing an alternate preneed guardian  
1643 constitutes a rebuttable presumption that the alternate is entitled  
1644 to serve as guardian. The court is not bound to appoint the person  
1645 if the alternate is found to be disqualified to serve as guardian.

1646 (7) The clerk shall maintain all declarations filed pursuant to  
1647 this section until the minor child named in the declaration has  
1648 reached the age of majority. The clerk may dispose of such written  
1649 declarations in accordance with law.

1650  
1651 745.707 Voluntary guardianship of property.

1652 (1) Upon petition by the proposed ward, the court must appoint a  
1653 guardian of property of a resident or nonresident person who,  
1654 though of sufficient mental capacity, chooses to have a guardian  
1655 manage all or part of his or her property. The petition must be  
1656 accompanied by a written statement from a licensed physician  
1657 specifying that the physician has examined the petitioner and that  
1658 the petitioner has capacity to understand the nature of the  
1659 guardianship and the delegation of authority. The examination must  
1660 have been conducted within 60 days prior to filing the petition.  
1661 Notice of hearing on any petition for appointment must be served on  
1662 the petitioner and on any person to whom the petitioner requests  
1663 that notice be given. Such request may be made in the petition for

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1664 appointment of guardian or in a subsequent written request for  
1665 notice signed by the petitioner.

1666 (2) If requested in the petition for appointment of a guardian  
1667 brought under this section, the court may direct the guardian to  
1668 take possession of less than all of the ward's property and of the  
1669 rents, income, issues, and profits from it. In such case, the court  
1670 shall specify in its order the property to be included in the  
1671 guardianship. The duties and responsibilities of the guardian  
1672 appointed under this section will extend only to such property.

1673 (3) Unless the voluntary guardianship is limited pursuant to  
1674 subsection (2), any guardian appointed under this section has the  
1675 same duties and responsibilities as are provided by law for plenary  
1676 guardians of the property.

1677 (4) The guardian's accounting, any petition for authority to act  
1678 and notice of hearing must be served on the ward and on any person  
1679 to whom the ward has requested that notice be given, in a notice  
1680 filed with the court.

1681 (5) A guardian must include in the annual accounting filed with the  
1682 court a written statement from a licensed physician who examined  
1683 the ward not more than 60 days before the accounting is filed with  
1684 the court. The written statement must specify whether the ward has  
1685 capacity to understand the nature of the guardianship and the  
1686 delegation of authority.

1687 (6) If the physician's written statement specifies that the ward no  
1688 longer has the capacity to understand the nature of the  
1689 guardianship or the ward's delegation of authority, the guardian  
1690 must file a petition to determine incapacity and must continue to  
1691 serve as guardian pending further order of the court.

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1692 (7) A ward with capacity may terminate a voluntary guardianship by  
1693 filing a notice with the court that the voluntary guardianship is  
1694 terminated. The notice must be accompanied by a written statement  
1695 from a licensed physician specifying that the ward has the capacity  
1696 to understand the nature of the guardianship and the ward's  
1697 delegation of authority. A copy of the notice must be served on the  
1698 guardian and such other persons as the ward may specify.

1699 (8) Upon a filing of notice of termination by the ward, the  
1700 guardian must account, unless waived by the ward, and petition for  
1701 discharge as specified in s. 745.1102.

1702  
1703 745.708 Relocation of ward to Florida.

1704 (1) Within 60 days of the residence of an adult ward of a foreign  
1705 guardian being moved to this state, the foreign guardian shall file  
1706 a petition for determination of incapacity of the ward, a petition  
1707 for appointment of guardian, and a certified copy of the guardian's  
1708 letters of guardianship or equivalent with the clerk in the county  
1709 in which the ward resides.

1710 (2) Within 60 days of the residence of a minor ward of a foreign  
1711 guardian being relocated to this state, the foreign guardian shall  
1712 file a petition for appointment of guardian and a certified copy of  
1713 the guardian's letters of guardianship, or equivalent, with the  
1714 clerk in the county in which the ward resides.

1715 (3) Until a guardian is appointed in this state for the ward or the  
1716 ward is determined to not require a guardian, the foreign  
1717 guardian's authority shall be recognized and given full faith and  
1718 credit in the courts of this state, provided the guardian is  
1719 qualified to serve as guardian of a resident ward. A foreign



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1720 guardian who fails to comply with the requirements of this section  
1721 shall have no authority to act on behalf of the ward in this state.

1722 (4) This section does not foreclose the filing of a petition for  
1723 determination of incapacity or petition for appointment of guardian  
1724 by persons other than a foreign guardian.

1725

1726 745.709 Foreign guardian of nonresident ward.

1727 (1) A guardian of property of a nonresident ward, is not required  
1728 to file a petition under this section in order to manage or secure  
1729 intangible personal property.

1730 (2) A guardian of property of a nonresident ward, duly appointed by  
1731 a court of another state, territory, or country, who desires to  
1732 manage or serve any part or all of the real or tangible personal  
1733 property of the ward located in this state, may file a petition  
1734 showing his or her appointment, describing the property, stating  
1735 its estimated value, and showing the indebtedness, if any, existing  
1736 against the ward in this state, to the best of the guardian's  
1737 knowledge and belief.

1738 (3) A guardian required to petition under subsection (2) shall  
1739 designate a resident agent, as required by the Florida Probate  
1740 Rules, file certified copies of letters of guardianship or other  
1741 authority and the guardian's bond or other security, if any. The  
1742 court shall determine if the foreign bond or other security is  
1743 sufficient to guarantee the faithful management of the ward's  
1744 property in this state. The court may require a guardian's bond in  
1745 this state in the amount it deems necessary and conditioned on the  
1746 proper management of the property of the ward coming into the  
1747 custody of the guardian in this state.

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1748 (4) The authority of the guardian of a nonresident ward shall be  
1749 recognized and given full faith and credit in the courts of this  
1750 state. A guardian appointed in another state, territory, or country  
1751 may maintain or defend any action in this state as a representative  
1752 of the ward unless a guardian has been appointed in this state.

1753 (5) Thereafter, the guardianship shall be governed by this code.  
1754

1755 745.710 Resident guardian of property of nonresident ward.

1756 (1) The court may appoint a person qualified under s. 745.501 as  
1757 guardian of a nonresident ward's Florida property upon the petition  
1758 of a foreign guardian, next of kin, or creditor of the ward,  
1759 regardless of whether the ward has a foreign guardian.

1760 (2) The petition for appointment of a guardian of property of a  
1761 nonresident ward shall comply with requirements of s. 745.603.

1762 (3) If it is alleged that the person has been adjudicated to be  
1763 incapacitated, the petition shall be accompanied by a certified  
1764 copy of the adjudication of incapacity from the court having  
1765 jurisdiction in the state, territory, or country in which the  
1766 incapacitated person resides and shall state the incapacitated  
1767 person's residence and the name and residence of any guardian,  
1768 conservator or other fiduciary appointed for the ward.

1769 (4) If a nonresident is temporarily residing in this state and is  
1770 not under an adjudication of incapacity made in some other state,  
1771 territory, or country, the procedure for determination of  
1772 incapacity and appointment of a guardian of the nonresident's  
1773 property shall be the same as for a resident of this state.

1774 (5) When the ground for the appointment of a guardian is incapacity  
1775 for which the person has been adjudicated in another state,  
1776 territory, or country, formal notice of the petition and notice of

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1777 hearing on the petition shall be served on the foreign guardian or  
1778 other fiduciary appointed for the ward, if any, and on the ward.

1779 (6) In the appointment of the guardian, the court shall be governed  
1780 by s. 745.602.

1781 (7) The duties, powers, and liabilities of the guardian shall be  
1782 governed by this code.

1783

1784 745.711 Guardian advocates.

1785 The court may appoint a guardian advocate, without adjudication of  
1786 incapacity, for a person with developmental disabilities if the  
1787 person is only partially incapacitated. Unless otherwise specified,  
1788 the proceeding shall be governed by the Florida Probate Rules. In  
1789 accordance with the legislative intent of this code, courts are  
1790 encouraged to consider appointing a guardian advocate, when  
1791 appropriate, as a less restrictive alternative to guardianship.

1792

1793 745.712 Natural guardians.

1794 (1) Parents jointly are natural guardians of their minor children  
1795 including their adopted children, unless the parents' parental  
1796 rights have been terminated pursuant to chapter 39. If a child is  
1797 the subject of any proceeding under chapter 39, the parents may act  
1798 as natural guardians under this section unless the court division  
1799 with jurisdiction over guardianship proceedings or the court  
1800 division with jurisdiction over the chapter 39 proceeding finds  
1801 that it is not in the child's best interest. If one parent dies,  
1802 the surviving parent remains the sole natural guardian even if the  
1803 parent remarries. If the marriage between the parents is dissolved,  
1804 both parents remain natural guardians with shared parental  
1805 responsibility unless the court awards sole parental responsibility

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1806 to one parent, in which case the parent awarded parental  
1807 responsibility shall be the sole natural guardian. If the marriage  
1808 is dissolved and neither parent is awarded parental responsibility  
1809 of the child, neither shall act as natural guardian of the child.  
1810 The mother of a child born out of wedlock is the natural guardian  
1811 of the child and is entitled to primary residential care and  
1812 parental responsibility of the child unless the parents marry or  
1813 until an order determining paternity is entered by a court of  
1814 competent jurisdiction. In such event, the father shall also be  
1815 deemed a natural guardian.

1816 (2) Natural guardians are authorized, on behalf of their minor  
1817 child if the total net amounts received do not exceed \$25,000.00,  
1818 to:

1819 (a) Settle and consummate a settlement of any claim or cause of  
1820 action accruing to the minor child for damages to the person or  
1821 property of the minor child;

1822 (b) Collect, receive, manage, and dispose of the proceeds of any  
1823 such settlement;

1824 (c) Collect, receive, manage, and dispose of any real or personal  
1825 property distributed from an estate or trust;

1826 (d) Collect, receive, manage, dispose of and make elections  
1827 regarding the proceeds from a life insurance policy or annuity  
1828 contract payable to, or otherwise accruing to the benefit of, the  
1829 child; and

1830 (e) Collect, receive, manage, dispose of and make elections  
1831 regarding the proceeds of any benefit plan as defined by s.  
1832 710.102, of which the minor is a beneficiary, participant, or  
1833 owner, without appointment, authority, or bond.

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1834 (3) A guardianship shall be required when the total net amounts  
1835 received by, or on behalf of, the minor exceed \$50,000.00. When the  
1836 total net amounts received by, or on behalf of, the minor exceed  
1837 \$25,000.00 but does not exceed \$50,000.00, the court has the  
1838 discretion to determine whether the natural guardians are  
1839 authorized to take any actions enumerated in subsection (2) of this  
1840 statute or whether a guardianship is required.

1841 (4) All instruments executed by a natural guardian for the benefit  
1842 of the ward under the powers specified in subsection (2) shall be  
1843 binding on the ward. The natural guardian may not, without court  
1844 order, use the property of the ward for the guardian's benefit or  
1845 to satisfy the guardian's support obligation to the ward.

1846 (5) Prior to taking possession of any funds or other property as  
1847 authorized by subsection (2), a natural guardian must file with the  
1848 clerk in the county of the ward's residence a verified statement  
1849 identifying the child, nature and value of the property, and the  
1850 name, relationship, and current residence address of the natural  
1851 guardian.

1852 (6) Any funds or other property collected by or put into the  
1853 possession of a natural guardian on behalf of a minor, remain the  
1854 property of the minor and, unless otherwise authorized by the  
1855 court, are not to be used by a natural guardian to fulfill the  
1856 natural guardian's parental obligations.

1857 (7) In addition to the authority granted in subsection (2), natural  
1858 guardians are authorized, on behalf of any of their minor children,  
1859 to waive and release, in advance, any claim or cause of action  
1860 against a commercial activity provider, or its owners, affiliates,  
1861 employees, or agents, which would accrue to a minor child for

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1862 personal injury, including death, and property damage resulting  
1863 from an inherent risk in the activity.  
1864 (a) As used in this subsection, the term "inherent risk" means  
1865 those dangers or conditions, known or unknown, which are  
1866 characteristic of, intrinsic to, or an integral part of the  
1867 activity and which are not eliminated even if the activity provider  
1868 acts with due care in a reasonably prudent manner. The term  
1869 includes, but is not limited to:  
1870 1. The failure by the activity provider to warn the natural  
1871 guardian or minor child of an inherent risk; and  
1872 2. The risk that the minor child or another participant in the  
1873 activity may act in a negligent or intentional manner and  
1874 contribute to the injury or death of the minor child. A participant  
1875 does not include the activity provider or its owners, affiliates,  
1876 employees, or agents.  
1877 (b) To be enforceable, a waiver or release executed under this  
1878 subsection must, at a minimum, include the following statement in  
1879 uppercase type that is at least 5 points larger than, and clearly  
1880 distinguishable from, the rest of the text of the waiver or  
1881 release:

1882 NOTICE TO THE MINOR CHILD'S

1883 NATURAL GUARDIAN

1884 READ THIS FORM COMPLETELY AND CAREFULLY. YOU ARE AGREEING TO LET  
1885 YOUR MINOR CHILD ENGAGE IN A POTENTIALLY DANGEROUS ACTIVITY. YOU  
1886 ARE AGREEING THAT, EVEN IF (name of released party or  
1887 parties) USES REASONABLE CARE IN PROVIDING THIS ACTIVITY, THERE  
1888 IS A CHANCE YOUR CHILD MAY BE SERIOUSLY INJURED OR KILLED BY  
1889 PARTICIPATING IN THIS ACTIVITY BECAUSE THERE ARE CERTAIN DANGERS  
1890 INHERENT IN THE ACTIVITY WHICH CANNOT BE AVOIDED OR ELIMINATED. BY

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1891 SIGNING THIS FORM YOU ARE GIVING UP YOUR CHILD'S RIGHT AND YOUR  
1892 RIGHT TO RECOVER FROM (name of released party or parties) IN A  
1893 LAWSUIT FOR ANY PERSONAL INJURY, INCLUDING DEATH, TO YOUR CHILD OR  
1894 ANY PROPERTY DAMAGE THAT RESULTS FROM THE RISKS THAT ARE A NATURAL  
1895 PART OF THE ACTIVITY. YOU HAVE THE RIGHT TO REFUSE TO SIGN THIS  
1896 FORM, AND (name of released party or parties) HAS THE RIGHT TO  
1897 REFUSE TO LET YOUR CHILD PARTICIPATE IF YOU DO NOT SIGN THIS FORM.

1898 (c) If a waiver or release complies with paragraph (b) and waives  
1899 no more than allowed under this subsection, there is a rebuttable  
1900 presumption that the waiver or release is valid and that any injury  
1901 or damage to the minor child arose from the inherent risk involved  
1902 in the activity.

1903 1. To rebut the presumption that the waiver or release is valid, a  
1904 claimant must demonstrate by a preponderance of the evidence that  
1905 the waiver or release does not comply with this subsection.

1906 2. To rebut the presumption that the injury or damage to the minor  
1907 child arose from an inherent risk involved in the activity, a  
1908 claimant must demonstrate by clear and convincing evidence that the  
1909 conduct, condition, or other cause resulting in the injury or  
1910 damage was not an inherent risk of the activity.

1911 3. If a presumption under this paragraph is rebutted, liability and  
1912 compensatory damages must be established by a preponderance of the  
1913 evidence.

1914 (d) Nothing in this subsection limits the ability of natural  
1915 guardians, on behalf of any of their minor children, to waive and  
1916 release, in advance, any claim or cause of action against a  
1917 noncommercial activity provider, or its owners, affiliates,  
1918 employees, or agents, to the extent authorized by common law.

1919

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1920 745.713 Guardians of minors.

1921 (1) Upon petition of a parent, brother, sister, next of kin, or

1922 other person interested in the welfare of a minor, a guardian for a

1923 minor may be appointed by the court without the necessity of

1924 adjudication of incapacity pursuant to chapter 745 Part III.

1925 (2) Upon petition, the court may determine if the appointment of a

1926 guardian of property of a minor is necessary as provided in s.

1927 745.712(3).

1928 (3) A minor is not required to attend the hearing on the petition

1929 for appointment of a guardian, unless otherwise directed by the

1930 court.

1931 (4) In its discretion, the court may appoint an attorney qualified

1932 under s. 745.305(4) to represent the interests of a minor at the

1933 hearing on the petition for appointment of a guardian.

1934 (5) A petition to appoint guardian may be filed and a proceeding to

1935 determine incapacity under chapter 745 Part III may be commenced

1936 for a minor who is at least 17 years and 6 months of age at the

1937 time of filing. The alleged incapacitated minor under this

1938 subsection shall be provided all the due process rights conferred

1939 upon an alleged incapacitated adult pursuant to this chapter and

1940 applicable court rules. The order determining incapacity, order

1941 appointing guardian, and the letters of guardianship may take

1942 effect on or after the minor's 18th birthday.

1943

1944 745.714 Claims of minors.

1945 (1) (a) If no guardian has been appointed pursuant to this code, the

1946 court having jurisdiction over a claim may appoint a guardian ad

1947 litem to represent the minor's interest before approving a

1948 settlement of the minor's portion of the claim in any case in which



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1949 a minor has a claim for personal injury, property damage, wrongful  
1950 death, or other cause of action in which the proposed gross  
1951 settlement of the claim for all claimants, including immediate and  
1952 deferred benefits, exceeds \$25,000.

1953 (b) The court shall appoint a guardian ad litem to represent the  
1954 minor's interest before approving a settlement of the minor's claim  
1955 in any case in which the proposed gross settlement of the claim,  
1956 for all claimants, including immediate and deferred benefits,  
1957 exceeds \$50,000.

1958 (2) No bond shall be required of the guardian ad litem.

1959 (3) The duty of a guardian ad litem is to protect the minor's  
1960 interests as described in this code.

1961 (4) A court shall not appoint a guardian ad litem for the minor if  
1962 a guardian of the minor has previously been appointed and the  
1963 guardian has no potential adverse interest to the minor.

1964 (5) The court shall award reasonable fees and costs to the guardian  
1965 ad litem to be paid out of the gross proceeds of the settlement.

1966 (6) All records relating to settlement of a claim pursuant to this  
1967 section is subject to the confidentiality provisions of s. 745.112.

1968  
1969 Section 8. Part VIII of chapter 745, Florida Statutes,  
1970 consisting of sections 745.801, 745.802, 745.803, 745.804, 745.805,  
1971 745.806, 745.807, 745.808, 745.809, 745.810, 745.811, 745.812,  
1972 745.813, and 745.814, is created to read:

1973 PART VIII

1974 DUTIES OF GUARDIAN

1975 745.801 Liability of guardian.

1976 A guardian is not personally liable for the debts, contracts or  
1977 torts of the ward. A guardian may be personally liable to the ward

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1978 for failure to protect the ward within the scope of the guardian's  
1979 authority.  
1980  
1981 745.802 Duties of guardian of property.  
1982 (1) A guardian of property is a fiduciary and may exercise only  
1983 those rights that have been removed from the ward and delegated to  
1984 the guardian. The guardian of a minor's property must exercise the  
1985 powers of a plenary guardian of property.  
1986 (2) A guardian of property of the ward must:  
1987 (a) Protect and preserve the property and invest it prudently as  
1988 provided in chapter 518.  
1989 (b) Apply the property as provided in s. 745.1304.  
1990 (c) Keep clear, distinct, and accurate records of the  
1991 administration of the ward's property.  
1992 (d) Perform all other duties required of a guardian of property by  
1993 law.  
1994 (e) At the termination of the guardianship, deliver the property of  
1995 the ward to the person lawfully entitled to it.  
1996 (3) A guardian is a fiduciary who must observe the standards in  
1997 dealing with guardianship property that would be observed by a  
1998 prudent person dealing with the property of another, and, if the  
1999 guardian has special skills or is appointed guardian on the basis  
2000 of representations of special skills or expertise, the guardian is  
2001 under a duty to use those skills.  
2002 (4) A guardian of property, if authorized by the court, must secure  
2003 the ward's property and of the income from it, whether accruing  
2004 before or after the guardian's appointment, and of the proceeds  
2005 arising from the sale, lease, or mortgage of the property. All of  
2006 the property and the income from it are assets in the hands of the

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2007 guardian for the payment of debts, taxes, claims, charges, and  
2008 expenses of the guardianship and for the care, support,  
2009 maintenance, and education of the ward or the ward's dependents, as  
2010 provided by law.

2011 (5) A guardian of property must file a verified inventory of the  
2012 ward's property as required by s. 745.803 and annual accountings in  
2013 accordance with s. 745.805. This requirement also applies to a  
2014 guardian who previously served as emergency temporary guardian for  
2015 the ward.

2016 (6) A guardian must act within the scope of the authority granted  
2017 by the court and as provided by law.

2018 (7) A guardian must act in good faith.

2019 (8) When making decisions on behalf of a ward, a guardian of  
2020 property shall exercise reasonable care, diligence, and prudence.  
2021 The guardian of property shall base all decisions on substituted  
2022 judgment if there is competent, substantial evidence of what the  
2023 ward would have wanted and the decision promotes the ward's best  
2024 interest. If there is no competent, substantial evidence to support  
2025 substituted judgment or the decision does not promote the ward's  
2026 best interest, then the decision shall be made based on the ward's  
2027 best interest.

2028 (9) When two or more guardians have been appointed, the guardians  
2029 shall consult with each other on matters of mutual responsibility.

2030  
2031 745.803 Verified inventory.

2032 (1) A guardian of property shall file a verified inventory of the  
2033 ward's property within 60 days of issuance of letters.

2034 (2) The verified inventory must specify and describe the following:

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2035 (a) All property of the ward, real and personal, that has come into  
2036 the guardian's control or knowledge, including a statement of all  
2037 encumbrances, liens, and other claims on any item, including any  
2038 cause of action accruing to the ward, and any trusts of which the  
2039 ward is a beneficiary.

2040 (b) The location of the real and personal property in sufficient  
2041 detail so that it may be identified and located.

2042 (c) A description of all sources of income, including, without  
2043 limitation, social security benefits and pensions.

2044 (d) The location of any safe-deposit boxes held by the ward  
2045 individually or jointly with any other person.

2046 (e) identification by name, address, and occupation, of witnesses  
2047 present, if any, during the initial examination of the ward's  
2048 tangible personal property.

2049 (3) Along with the verified inventory, the guardian must file a  
2050 copy of statements of all of the ward's cash assets from all  
2051 institutions in which funds are deposited. Statements must be for  
2052 the period ending closest in time to the issuance of letters.

2053 (4) If the ward is a beneficiary of a trust, the inventory must  
2054 identify the trust and the trustee.

2055 (5) The inventory shall specify whether the guardian of property  
2056 will file the annual accounting on a designated fiscal year or  
2057 calendar year basis.

2058 (6) If a guardian of property learns of any property that is not  
2059 included in the inventory, the guardian shall file an amended or  
2060 supplemental inventory to report such property within 60 days after  
2061 the discovery.

2062

2063 745.804 Audit fee for inventory.

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2064 (1) When the value of the ward's property, excluding real property,  
2065 equals or exceeds \$25,000, a guardian shall pay from the ward's  
2066 property to the clerk an audit fee of up to \$75, at the time of  
2067 filing the verified inventory. Upon petition by the guardian, the  
2068 court may waive the audit fee upon a showing of insufficient cash  
2069 assets in the ward's estate or other good cause.

2070 (2) An audit fee may not be charged to any ward whose property,  
2071 excluding real property, has a value of less than \$25,000.

2072

2073 745.805 Annual accounting.

2074 (1) A guardian of property must file an annual accounting with the  
2075 court.

2076 (2) An annual accounting must include:

2077 (a) A full and correct itemization of the receipts and  
2078 disbursements of all of the ward's property in the guardian's  
2079 control or knowledge at the end of the accounting period and a  
2080 statement of the ward's property in the guardian's control or  
2081 knowledge at the end of the accounting period. If the guardian does  
2082 not have control of an asset, the accounting must describe the  
2083 asset and the reason it is not in the guardian's control. If the  
2084 ward is a beneficiary of a trust, the accounting must identify the  
2085 trust and the trustee, but they need not list the receipts and  
2086 disbursements of the trust.

2087 (b) A copy of statements demonstrating all receipts and  
2088 disbursements for each of the ward's cash accounts from each of the  
2089 institutions in which cash is deposited.

2090 (c) A declaration of all remuneration received by the guardian from  
2091 any source for services rendered to or on behalf of the ward. As  
2092 used in this paragraph, the term "remuneration" means any payment

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2093 | or other benefit made directly or indirectly, overtly or covertly,  
2094 | or in cash or in kind to the guardian.  
2095 | (3) A guardian must obtain a receipt, canceled check, or other  
2096 | proof of payment for all expenditures and disbursements made on  
2097 | behalf of the ward. A guardian must preserve all evidence of  
2098 | payment, along with other substantiating papers, for a period of 7  
2099 | years after the end of the accounting year. The receipts, proofs of  
2100 | payment, and substantiating papers need not be filed with the court  
2101 | but shall be made available for inspection at such time and place  
2102 | and before such persons as the court may order for cause, after  
2103 | hearing with notice to the guardian.  
2104 | (4) Unless otherwise directed by the court, a guardian of property  
2105 | may file the first annual accounting on either a fiscal year or  
2106 | calendar year basis. The guardian must notify the court as to the  
2107 | guardian's filing intention on the guardian's inventory. All  
2108 | subsequent annual accountings must be filed for the same accounting  
2109 | period as the first annual accounting. The first accounting period  
2110 | must end within 1 year after the end of the month in which the  
2111 | letters were issued to the guardian of property.  
2112 | (5) The annual accounting must be filed on or before the first day  
2113 | of the fourth month after the end of the accounting year.  
2114 | (6) Unless the guardian is a plenary guardian of property or the  
2115 | requirement is otherwise waived by the court, the annual accounting  
2116 | must be served on the ward. The guardian shall serve a copy of the  
2117 | annual accounting on interested persons as the court may authorize  
2118 | or require.  
2119 | (7) The court may waive the filing of an accounting if it  
2120 | determines the ward receives income only from social security

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2121 | benefits and the guardian is the ward's representative payee for  
2122 | the benefits.

2123 |

2124 | 745.806 Simplified accounting.

2125 | (1) In a guardianship of property, when all assets of the ward are  
2126 | in designated depositories under s. 69.031 and the only  
2127 | transactions that occur in that account are interest accrual,  
2128 | deposits from a settlement, financial institution service charges  
2129 | and court authorized expenditures, the guardian may elect to file  
2130 | an accounting consisting of:

2131 | (a) Statements demonstrating all receipts and disbursements of the  
2132 | ward's accounts from the financial institution; and

2133 | (b) A statement made by the guardian under penalty of perjury that  
2134 | the guardian has custody and control of the ward's property as  
2135 | shown in the attached statements.

2136 | (2) The accounting allowed by subsection (1) is in lieu of the  
2137 | accounting and auditing procedures under s. 745.805. However, any  
2138 | interested party may seek judicial review as provided in s.  
2139 | 745.1002.

2140 |

2141 | 745.807 Audit fee for accounting.

2142 | (1) A guardian shall pay, from the ward's property, to the clerk an  
2143 | audit fee based upon the following graduated fee schedule at the  
2144 | time of filing the annual accounting:

2145 | (a) For property having a value of \$25,000 or less, there shall be  
2146 | no audit fee.

2147 | (b) For property with total value of more than \$25,000 up to and  
2148 | including \$100,000 the clerk may charge a fee of up to \$100.

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2149 (c) For property with total value of more than \$100,000 up to and  
2150 including \$500,000 the clerk may charge a fee of up to \$200.

2151 (d) For property with a value in excess of \$500,000 the clerk may  
2152 charge a fee of up to \$400.

2153 (2) Upon petition by the guardian, the court may waive the auditing  
2154 fee upon a showing of insufficient cash assets in the ward's  
2155 estate.

2156

2157 745.808 Safe-deposit box.

2158 (1) A guardian's initial access to any safe-deposit box leased or  
2159 co-leased by the ward must be conducted in the presence of an  
2160 employee of the institution where the box is located. A written  
2161 inventory of the contents of the safe-deposit box also must be  
2162 compiled in the presence of the employee. The employee and guardian  
2163 must then confirm the contents of the safe-deposit box by executing  
2164 the safe-deposit box inventory in accordance with Florida Probate  
2165 Rule 5.020. The contents must then be replaced in the safe-deposit  
2166 box and the guardian must file the verified safe-deposit box  
2167 inventory within 10 days after the box is opened.

2168 (2) A guardian of property must provide any co-lessee a copy of  
2169 each signed safe-deposit box inventory. A copy of each verified  
2170 safe deposit box inventory must also be provided to the ward unless  
2171 the guardian is a plenary guardian of property or unless otherwise  
2172 directed by the court.

2173 (3) Nothing may be removed from the ward's safe-deposit box by the  
2174 guardian of property without court order.

2175

2176 745.809 Duties of guardian of person.



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2177 (1) A guardian of person is a fiduciary and may exercise only those  
2178 rights that have been removed from the ward and delegated to the  
2179 guardian. A guardian of a minor shall exercise the powers of a  
2180 plenary guardian.

2181 (2) A guardian of person shall make decisions necessary to provide  
2182 medical, mental health, personal and residential care for the ward,  
2183 to the extent of the guardian's authority.

2184 (3) A guardian of person must ensure that each of the guardian's  
2185 wards is personally visited by the guardian or, in the case of a  
2186 professional guardian, by one of the guardian's professional staff  
2187 at least once each calendar quarter. During the personal visit, the  
2188 guardian or the guardian's professional staff person shall assess:

2189 (a) The ward's physical appearance and condition.

2190 (b) The appropriateness of the ward's current residence.

2191 (c) The need for any additional services and for continuation of  
2192 existing services, taking into consideration all aspects of the  
2193 ward's social, psychological, educational, direct service, health,  
2194 and personal care needs.

2195 (d) The nature and extent of visitation and communication with the  
2196 ward's family and others.

2197 (4) A guardian of person shall file an initial guardianship plan as  
2198 required by s. 745.810 and annual plans as required by s. 745.813.

2199 (5) A guardian shall act within the scope of the authority granted  
2200 by the court and as provided by law.

2201 (6) A guardian shall act in good faith.

2202 (7) When making decisions on behalf of a ward, a guardian of person  
2203 shall act in a manner consistent with the ward's constitutional  
2204 rights of privacy and self-determination, making decisions based on  
2205 substituted judgment if there is competent, substantial evidence of

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2206 | what the ward would have wanted. If there is no competent,  
2207 | substantial evidence of what the ward would have wanted, decisions  
2208 | shall be based on the ward's best interest.

2209 | (8) A guardian of person is a fiduciary who must observe the  
2210 | standards that would be observed by a prudent person making  
2211 | decisions on behalf of another, and, if the guardian has special  
2212 | skills or expertise, or is appointed in reliance upon the  
2213 | guardian's representation that the guardian has special skills or  
2214 | expertise, the guardian is under a duty to use those special skills  
2215 | or expertise when acting on behalf of the ward.

2216 | (9) A guardian of person shall implement the guardianship plan.

2217 | (10) When two or more guardians have been appointed, the guardians  
2218 | shall consult with each other on matters of mutual responsibility.

2219 | (11) Recognizing that every individual has unique needs and  
2220 | abilities, a guardian who is given authority over a ward's person  
2221 | shall, as appropriate under the circumstances:

2222 | (a) Consider the expressed desires of the ward as known by the  
2223 | guardian when making decisions that affect the ward.

2224 | (b) Allow the ward to maintain contact with family and friends  
2225 | unless the guardian believes that such contact may cause harm to  
2226 | the ward.

2227 | (c) Not restrict the physical liberty of the ward more than  
2228 | reasonably necessary to protect the ward or another person from  
2229 | serious physical injury, illness, or disease.

2230 | (d) Assist the ward in developing or regaining capacity.

2231 | (e) Notify the court if the guardian believes that the ward has  
2232 | regained capacity and that one or more of the rights that have been  
2233 | removed should be restored to the ward.

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2234 (f) To the extent applicable, make provision for the medical,  
2235 mental, rehabilitative, or personal care services for the welfare  
2236 of the ward.

2237 (g) To the extent applicable, acquire a clear understanding of the  
2238 risks and benefits of a recommended course of health care treatment  
2239 before making a health care decision.

2240 (h) Evaluate the ward's medical and health care options, financial  
2241 resources, and desires when making residential decisions that are  
2242 best suited for the current needs of the ward.

2243 (i) Advocate on behalf of the ward in institutional and other  
2244 residential settings and regarding access to home and community-  
2245 based services.

2246 (j) When not inconsistent with the person's goals, needs, and  
2247 preferences, acquire an understanding of the available residential  
2248 options and give priority to home and other community-based  
2249 services and settings.

2250

2251 745.810 Guardianship plan.

2252 (1) Each guardian of person, other than an emergency temporary  
2253 guardian, shall file a guardianship plan within 60 days after  
2254 letters of guardianship are issued.

2255 (2) The guardianship plan shall include all of the following:

2256 (a) The needed medical, mental health, rehabilitative and personal  
2257 care services for the ward.

2258 (b) The social and personal services to be provided for the ward.

2259 (c) The kind of residential setting best suited for the needs of  
2260 the ward.

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2261 (d) The ward's residence at the time of issuance of the letters of  
2262 guardianship, any anticipated change of residence and the reason  
2263 therefor.

2264 (e) The health and accident insurance and any other private or  
2265 governmental benefits to which the ward may be entitled to meet any  
2266 part of the costs of medical, mental health, or other services  
2267 provided to the ward.

2268 (f) Any physical and mental examinations necessary to determine the  
2269 ward's medical and mental health treatment needs.

2270 (g) A list of any preexisting orders not to resuscitate executed  
2271 under s. 401.45(3) or preexisting advance directives, as defined in  
2272 s. 765.101, the date an order or directive was signed, whether such  
2273 order or directive has been suspended by the court, and a  
2274 description of the steps taken to identify and locate the  
2275 preexisting order not to resuscitate or advance directive.

2276 (h) A declaration of all remuneration received by the guardian from  
2277 any source for services rendered to or on behalf of the minor. As  
2278 used in this paragraph, the term "remuneration" means any payment  
2279 or other benefit made directly or indirectly, overtly or covertly,  
2280 or in cash or in kind to the guardian.

2281 (3) The guardianship plan for an incapacitated person must consider  
2282 any recommendations specified in the court appointed examiners'  
2283 written reports or testimony.

2284 (4) Unless the ward has been found to be totally incapacitated or  
2285 is a minor, the guardianship plan must contain an attestation that  
2286 the guardian has consulted with the ward and, to the extent  
2287 reasonable, has honored the ward's wishes consistent with the  
2288 rights retained by the ward.

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2289 (5) The guardianship plan may not contain requirements which  
2290 restrict the physical liberty of the ward more than reasonably  
2291 necessary to protect the ward from decline in medical and mental  
2292 health, physical injury, illness, or disease and to protect others  
2293 from injury, illness or disease.

2294 (6) A guardianship plan continues in effect until it is amended or  
2295 replaced by an annual guardianship report, until the restoration of  
2296 capacity or death of the ward, or until the ward, if a minor,  
2297 reaches the age of 18 years whichever first occurs. If there are  
2298 significant changes in the capacity of the ward to meet the  
2299 essential requirements for the ward's health or safety, the  
2300 guardian may modify the guardianship plan and shall serve the  
2301 amended plan on all persons who served with the plan.

2302

2303 745.811 Annual guardianship report for minor.

2304 (1) An annual guardianship report for a minor ward shall provide  
2305 current information about ward. The report must specify the current  
2306 needs of the ward and how those needs are proposed to be met in the  
2307 coming year.

2308 (2) Each report filed by the guardian of person of a minor must  
2309 include:

2310 (a) Information concerning the residence of the ward, including the  
2311 ward's address at the time of filing the plan, name and address of  
2312 each location where the ward resided during the preceding year and  
2313 the length of stay of the ward at each location.

2314 (b) A statement of whether the present residential setting is best  
2315 suited for the current needs of the ward.

2316 (c) Plans for ensuring that the ward is in the best residential  
2317 setting to meet the ward's needs.

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2318 (d) Information concerning the medical and mental health condition  
2319 and treatment and rehabilitation needs of the minor, including:  
2320 1. A description of any professional medical treatment given to the  
2321 minor during the preceding year, including names of health care  
2322 providers, types of care and dates of service.  
2323 2. A report from the physician who examined the minor no more than  
2324 180 days before the beginning of the applicable reporting period  
2325 that contains an evaluation of the minor's physical and medical  
2326 conditions.

2327 (e) Anticipated medical care needs and the plan for providing  
2328 medical services in the coming year.

2329 (f) Information concerning education of the minor, including:  
2330 1. A summary of the minor's educational progress report.  
2331 2. The social development of the minor, including a statement of  
2332 how well the minor communicates and maintains interpersonal  
2333 relationships.

2334 (g) A declaration of all remuneration received by the guardian from  
2335 any source for services rendered to or on behalf of the minor. As  
2336 used in this paragraph, the term "remuneration" means any payment  
2337 or other benefit made directly or indirectly, overtly or covertly,  
2338 or in cash or in kind to the guardian.  
2339

2340 745.812 Annual guardianship report for adults.

2341 (1) An annual guardianship report for an adult ward shall provide  
2342 current information about the condition of the ward. The report  
2343 must specify the current needs of the ward and how those needs are  
2344 proposed to be met in the coming year.

2345 (2) Each report for an adult ward must, if applicable, include:

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2346 (a) Information concerning the residence of the ward, including the  
2347 ward's address at the time of filing the plan, name and address of  
2348 each location where the ward resided during the preceding year, and  
2349 the length of stay of the ward at each location.

2350 (b) A statement of whether the present residential setting is best  
2351 suited for the current needs of the ward.

2352 (c) Plans for ensuring that the ward is in the best residential  
2353 setting to meet the ward's needs.

2354 (d) Information concerning the medical and mental health condition  
2355 and treatment and rehabilitation needs of the ward, including:

2356 1. A description of any professional medical and mental health  
2357 treatment given to the ward during the preceding year, including  
2358 names of health care providers, types of care, and dates of  
2359 service.

2360 2. The report of a physician who examined the ward no more than 120  
2361 days before the beginning of the applicable reporting period. The  
2362 report must contain an evaluation of the ward's condition and a  
2363 statement of the current level of capacity of the ward. If the  
2364 guardian makes a statement in the report that a physician was not  
2365 reasonably available to examine the ward, the examination may be  
2366 performed by and the report may be prepared and signed by a  
2367 physician's assistant acting pursuant to s. 458.347(4) or s.  
2368 459.022(4) or an advanced practice registered nurse acting pursuant  
2369 to s. 464.012(3).

2370 (e) The plan for providing medical, mental health, and  
2371 rehabilitative services for the ward in the coming year.

2372 (f) Information concerning the social activities of the ward,  
2373 including:

2374 1. The social and personal services currently used by the ward.

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2375 2. The social skills of the ward, including a statement of the  
2376 ward's ability to communicate and maintain interpersonal  
2377 relationships.

2378 (g) A list of any preexisting orders not to resuscitate executed  
2379 under s. 401.45(3) or preexisting advance directives, as defined in  
2380 s. 765.101, the date an order or directive was signed, whether such  
2381 order or directive has been suspended by the court, and a  
2382 description of the steps taken to identify and locate the  
2383 preexisting order not to resuscitate or advance directive.

2384 (h) A declaration of all remuneration received by the guardian from  
2385 any source for services rendered to or on behalf of the ward. As  
2386 used in this paragraph, the term "remuneration" means any payment  
2387 or other benefit made directly or indirectly, overtly or covertly,  
2388 or in cash or in kind to the guardian.

2389 (i) Each report for an adult ward must address the issue of  
2390 restoration of rights to the ward and include:

2391 1. A summary of activities during the preceding year that were  
2392 designed to improve the abilities of the ward.

2393 2. A statement of whether the ward can have any rights restored.

2394 3. A statement of whether restoration of any rights will be sought.

2395 (j) The court, in its discretion, may require reexamination of the  
2396 ward by an appointed examiner at any time.

2397

2398 745.813 Annual guardianship report - filing.

2399 Unless the court requires filing on a calendar-year basis, each  
2400 guardian of person shall file an annual guardianship report on or  
2401 before the first day of the fourth month after the last day of the  
2402 anniversary month the letters of guardianship were issued, and the  
2403 report must cover the coming plan year, ending on the last day in



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2404 such anniversary month. If the court requires calendar-year filing,  
2405 the guardianship report must be filed on or before April 1 of each  
2406 year.

2407

2408 745.814 Records retention.

2409 (1) A guardian of property shall maintain documents and records  
2410 sufficient to demonstrate the accuracy of the initial inventory for  
2411 a period of 7 years after filing the inventory. The documents need  
2412 not be filed but must be available for inspection at such time and  
2413 place and before such persons as the court may order for cause,  
2414 after hearing with notice to the guardian. The guardian of property  
2415 shall also maintain documents and records sufficient to demonstrate  
2416 the accuracy of the annual accounting for a period of 7 years after  
2417 filing the accounting.

2418 (2) A guardian of person shall maintain documents and records  
2419 sufficient to demonstrate the accuracy of the annual report for a  
2420 period of 4 years after the filing of the respective annual report.

2421

2422 Section 9. Part IX of chapter 745, Florida Statutes,  
2423 consisting of sections 745.901, 745.902, 745.903, 745.904, 745.905,  
2424 745.906, 745.907, and 745.908, is created to read:

2425

PART IX

2426

GUARDIAN POWERS

2427 745.901 Powers and duties of guardian.

2428 The guardian of an incapacitated person may exercise only those  
2429 rights that have been removed from the ward and delegated to the  
2430 guardian. A guardian of a minor shall exercise the powers of a  
2431 plenary guardian.

2432

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2433 745.902 Power of guardian of property without court approval.  
2434 Without obtaining court approval, a plenary guardian of property,  
2435 or a limited guardian of property within the powers granted by the  
2436 letters of guardianship, may:  
2437 (1) Take possession or control of property owned by the ward;  
2438 (2) Obtain the ward's legal and financial documents and tax records  
2439 from persons, financial institutions and other entities;  
2440 (3) Obtain a copy of any trust or any other instrument in which the  
2441 ward has a beneficial interest, obtain benefits due the ward as a  
2442 beneficiary of any trust or other instruments, and bind the ward  
2443 with regard to any trust consistent with Florida Statutes chapter  
2444 736.0303;  
2445 (4) Vote stocks or other securities in person or by general or  
2446 limited proxy or not vote stocks or other securities;  
2447 (5) Insure the assets of the estate against damage, loss, and  
2448 liability and insure himself or herself against liability as to  
2449 third persons;  
2450 (6) Execute and deliver in the guardian's name, as guardian, any  
2451 instrument necessary or proper to carry out and give effect to this  
2452 section;  
2453 (7) Pay taxes and assessments on the ward's property;  
2454 (8) Pay valid encumbrances against the ward's property in  
2455 accordance with their terms, but no prepayment may be made without  
2456 prior court approval;  
2457 (9) Pay reasonable living expenses for the ward, taking into  
2458 consideration the accustomed standard of living, age, health, and  
2459 financial resources of the ward. This subsection does not authorize  
2460 the guardian of a minor to expend funds for the ward's living  
2461 expenses if one or both of the ward's parents are alive;

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2462 (10) Exercise the ward's right to an elective share. The guardian  
2463 must comply with the requirements of s. 732.2125(2). The guardian  
2464 may assert any other right or choice available to a surviving  
2465 spouse in the administration of a decedent's estate;  
2466 (11) Deposit or invest liquid assets of the estate, including money  
2467 received from the sale of other assets, in federally insured  
2468 interest-bearing accounts, readily marketable secured loan  
2469 arrangements, money market mutual funds, or other prudent  
2470 investments. The guardian may redeem or sell such deposits or  
2471 investments to pay the reasonable living expenses of the ward as  
2472 provided herein;  
2473 (12) When reasonably necessary, employ attorneys, accountants,  
2474 property managers, auditors, investment advisers, care managers,  
2475 agents, and other persons and entities to advise or assist the  
2476 guardian in the performance of guardianship duties;  
2477 (13) Sell or exercise stock subscription or conversion rights and  
2478 consent, directly or through a committee or other agent, to the  
2479 reorganization, consolidation, merger, dissolution, or liquidation  
2480 of a corporation or other business enterprise;  
2481 (14) Execute and deliver any instrument that is necessary or proper  
2482 to carry out the orders of the court;  
2483 (15) Hold a security in the name of a nominee or in other form  
2484 without disclosure of the interest of the ward, but the guardian is  
2485 liable for any act of the nominee in connection with the security  
2486 so held;  
2487 (16) Pay and reimburse incidental expenses in the administration of  
2488 the guardianship and for provision of services to the ward  
2489 including reasonable compensation to persons employed by the  
2490 guardian pursuant to subsection (12) from the assets of the ward.

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2491 These payments shall be reported on the guardian's annual  
2492 accounting, accompanied by itemized statements describing services  
2493 rendered and the method of charging for such services;  
2494 (17) Provide confidential information about a ward that is related  
2495 to an investigation arising under s. 745.1001 to the clerk, part  
2496 XIV of this chapter to an Office of Public and Professional  
2497 Guardians investigator, or part I of chapter 400 to a local or  
2498 state ombudsman council member conducting that investigation. Any  
2499 such clerk, Office of Public and Professional Guardians  
2500 investigator, or ombudsman shall have a duty to maintain the  
2501 confidentiality of the information provided;  
2502 (18) Fulfill financial obligations under the ward's contracts that  
2503 predate the guardianship;  
2504 (19) Maintain and repair the ward's property and purchase  
2505 furnishings, clothing, appliances and furniture for the ward;  
2506 (20) Pay calls, assessments and other sums chargeable against  
2507 securities owned by the ward that are obligations predating the  
2508 guardianship;  
2509 (21) Contract for residential care and placement for the ward and  
2510 for services pursuant to subsection (12); and  
2511 (22) Receive payment and satisfy judgments in favor of the ward.  
2512  
2513 745.903 Powers of guardian requiring court approval.  
2514 After obtaining approval of the court pursuant to a petition for  
2515 authorization to act:  
2516 (1) A plenary guardian of property, or a limited guardian of  
2517 property within the powers granted by the letters of guardianship,  
2518 may:

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- 2519 (a) Compromise, or refuse performance of a ward's contracts that  
2520 predate the guardianship, as the guardian may determine under the  
2521 circumstances;
- 2522 (b) Execute, exercise, or release any non-fiduciary powers that the  
2523 ward might have lawfully exercised, consummated, or executed if not  
2524 incapacitated, if the best interest of the ward requires such  
2525 execution, exercise, or release;
- 2526 (c) Make extraordinary repairs or alterations in buildings or other  
2527 structures; demolish any improvements; raze existing walls or erect  
2528 new, party walls or buildings;
- 2529 (d) Subdivide, develop, or dedicate land to public use; make or  
2530 obtain the vacation of plats and adjust boundaries; adjust  
2531 differences in valuation on exchange or partition by giving or  
2532 receiving consideration; or dedicate easements to public use  
2533 without consideration;
- 2534 (e) Enter into a lease as lessor of the ward's property for any  
2535 purpose, with or without option to purchase or renew, for a term  
2536 within, or extending beyond, the period of guardianship;
- 2537 (f) Enter into a lease or arrangement for exploration and removal  
2538 of minerals or other natural resources or enter into a pooling or  
2539 unitization agreement;
- 2540 (g) Abandon property when it is valueless or is so encumbered or in  
2541 such condition that it is of no benefit to the ward;
- 2542 (h) Borrow money, with or without security, and advance money for  
2543 the protection of the ward;
- 2544 (i) Effect a fair and reasonable compromise or settlement with any  
2545 debtor or obligor or extend, renew, or in any manner modify the  
2546 terms of any obligation owing to the ward;

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2547 (j) Prosecute or defend claims or proceedings in any jurisdiction  
2548 for the protection of the ward and of a guardian in the performance  
2549 of guardianship duties, including the filing of a petition for  
2550 dissolution of marriage. Before authorizing a guardian to bring an  
2551 action described in s. 736.0207, the court shall first find that  
2552 the action appears to be in the ward's best interest during the  
2553 ward's probable lifetime. There shall be a rebuttable presumption  
2554 that an action challenging the ward's revocation of all or part of  
2555 a trust is not in the ward's best interests if the revocation  
2556 relates solely to a post-death distribution. This paragraph does  
2557 not preclude a challenge after the ward's death. Any judicial  
2558 proceeding specified in 736.0201 must be brought as an independent  
2559 proceeding and is not a part of the guardianship action;

2560 (k) Sell, mortgage, or lease any real or personal property of the  
2561 ward, including homestead property, or any interest therein for  
2562 cash or credit, or for part cash and part credit, and with or  
2563 without security for unpaid balances;

2564 (l) Continue any unincorporated business or venture in which the  
2565 ward was engaged;

2566 (m) Purchase, in the name of the ward, real property in this state  
2567 in which the guardian has no interest;

2568 (n) If the ward is married with property owned by the ward and  
2569 spouse as an estate by the entirety and the property is sold, the  
2570 proceeds shall retain the same entirety character as the original  
2571 asset, unless otherwise determined by the court;

2572 (o) Exercise any option contained in any policy of insurance  
2573 payable to, or inuring to the benefit of, the ward;

2574 (p) Prepay reasonable funeral, interment, and grave marker expenses  
2575 for the ward from the ward's property;

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2576 (q) Make gifts of the ward's property to members of the ward's  
2577 family for estate and income tax planning purposes or to continue  
2578 the ward's prior pattern of gifting;

2579 (r) When the ward's will evinces an objective to obtain a United  
2580 States estate tax charitable deduction by use of a split interest  
2581 trust (as that term is defined in s. 736.1201), but the maximum  
2582 charitable deduction otherwise allowable will not be achieved in  
2583 whole or in part, execute a codicil on the ward's behalf amending  
2584 the will to obtain the maximum charitable deduction allowable  
2585 without diminishing the aggregate value of the benefits of any  
2586 beneficiary under the will;

2587 (s) Create or amend revocable trusts or create irrevocable trusts  
2588 of property of the ward that may extend beyond the disability or  
2589 life of the ward in connection with estate, gift, income, or other  
2590 tax planning or to carry out other estate planning purposes. The  
2591 court shall retain oversight of the assets transferred to a trust,  
2592 unless otherwise ordered by the court. Before entering an order  
2593 authorizing creation or amendment of a trust, the court shall  
2594 appoint counsel to represent the ward in that proceeding. To the  
2595 extent this provision conflicts with provisions of Chapter 736,  
2596 Chapter 736 shall prevail;

2597 (t) Renounce or disclaim any interest of the ward received by  
2598 testate or intestate succession, insurance benefit, annuity,  
2599 survivorship, or inter vivos transfer;

2600 (u) Enter into contracts that are appropriate for, and in the best  
2601 interest of, the ward; and

2602 (v) Pay for a minor ward's support, health, maintenance, and  
2603 education, if the ward's parents, or either of them, are alive.

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2604 (2) A guardian of person may sign a Do Not Resuscitate Order as  
2605 provided in s. 401.45(3) only with prior court approval. When a  
2606 guardian of person seeks to obtain approval of the court to sign a  
2607 Do Not Resuscitate Order the court must hold a preliminary hearing  
2608 within 72 hours after the petition is filed, and:  
2609 (a) Rule on the relief requested immediately after the preliminary  
2610 hearing; or  
2611 (b) Conduct an evidentiary hearing not later than 4 days after the  
2612 preliminary hearing and rule on the relief requested immediately  
2613 after the evidentiary hearing.  
2614  
2615 745.904 Petition for authority to act.  
2616 (1) Requests by a guardian for authority to perform, or  
2617 confirmation of, any acts under s. 745.903 or s. 745.1309 shall be  
2618 by petition stating facts showing the expediency or necessity for  
2619 the action; a description of any property involved; and the price  
2620 and terms of a sale, mortgage, or other contract. The petition must  
2621 state whether or not the ward has been adjudicated incapacitated to  
2622 act with respect to the rights to be exercised.  
2623 (2) No notice of a petition to authorize sale or repair of  
2624 perishable or deteriorating property shall be required. Notice of a  
2625 petition to perform any other acts under s. 745.903 or s. 745.1309  
2626 must be given to the ward, to the next of kin, if any, and to those  
2627 interested persons whom the court has found to be entitled to  
2628 notice, as provided in the Florida Probate Rules, unless waived by  
2629 the court for good cause. Notice need not be given to a ward who is  
2630 a minor or who has been determined to be totally incapacitated.  
2631  
2632 745.905 Order authorizing action.



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2633 (1) If a sale or mortgage is authorized, the order shall:  
2634 (a) Describe the property;  
2635 (b) If the property is authorized for sale at private sale, the  
2636 price and the terms of sale; and  
2637 (c) If the sale is to be by public auction, the order shall state  
2638 that the sale shall be made to the highest bidder but that the  
2639 guardian reserves the right to reject all bids.  
2640 (2) An order for any other act permitted under s. 745.903 or s.  
2641 745.1309 shall describe the permitted act and authorize the  
2642 guardian to perform it.  
2643  
2644 745.906 Conveyance of various property rights by guardians of  
2645 property.  
2646 (1) (a) All legal or equitable interests in property owned as an  
2647 estate by the entirety by an incapacitated person for whom a  
2648 guardian of the property has been appointed may be sold,  
2649 transferred, conveyed, or mortgaged in accordance with s. 745.903,  
2650 if the spouse who is not incapacitated joins in the sale, transfer,  
2651 conveyance, or mortgage. When both spouses are incapacitated, the  
2652 sale, transfer, conveyance, or mortgage shall be by the guardians  
2653 only. The sale, transfer, conveyance, or mortgage may be  
2654 accomplished by one instrument or by separate instruments.  
2655 (b) In authorizing or confirming the sale and conveyance of real or  
2656 personal property owned by the ward and the ward's spouse as an  
2657 estate by the entirety or as joint tenants with right of  
2658 survivorship, the court may provide that one-half of the net  
2659 proceeds of the sale shall go to the guardian of the ward and the  
2660 other one-half to the ward's spouse, or the court may provide for

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2661 the proceeds of the sale to retain the same character as to  
2662 survivorship as the original asset.

2663 (c) A guardian of property shall collect all payments coming due on  
2664 intangible property, such as notes and mortgages and other  
2665 securities owned by the ward and the ward's spouse as an estate by  
2666 the entirety or as joint tenants with right of survivorship, and  
2667 shall retain one-half of all principal and interest payments so  
2668 collected and shall pay the other one-half of the collections to  
2669 the spouse who is not incapacitated. If both spouses are  
2670 incapacitated, the guardian of either shall collect the payments,  
2671 retain one-half of the principal and interest payments, and pay the  
2672 other one-half to the guardian of the other spouse. The court may  
2673 direct that such payments retain their status as to survivorship or  
2674 specify that such receipts be allocated in a manner other than  
2675 equal division.

2676 (d) The guardian of an incapacitated person shall collect all  
2677 payments of rents on real estate held as an estate by the  
2678 entirety and, after paying all charges against the property, such  
2679 as taxes, insurance, maintenance, and repairs, shall retain one-  
2680 half of the net rents so collected and pay the other one-half to  
2681 the spouse who is not incapacitated. If both spouses are  
2682 incapacitated, the guardian of property of either may collect the  
2683 rent, pay the charges, retain one-half of the net rent, and pay the  
2684 other one-half to the guardian of the other spouse. The court may  
2685 direct that such payments retain their status as to survivorship or  
2686 specify that such receipts be allocated in a manner other than  
2687 equal division.

2688 (2) In determining the value of life estates or remainder  
2689 interests, the American Experience Mortality Tables may be used.

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2690 (3) Nothing in this section shall prohibit the court in its  
2691 discretion from appointing a sole guardian to serve as guardian for  
2692 both spouses.

2693 (4) Any contingent or expectant interest in property, including  
2694 marital property rights and any right of survivorship incident to  
2695 joint tenancy or tenancy by the entireties, may be conveyed or  
2696 released in accordance with s. 745.903.

2697

2698 745.907 Settlement of claims

2699 (1) When a settlement of any claim by or against an adult ward,  
2700 whether arising as a result of personal injury or otherwise, and  
2701 whether arising before or after appointment of a guardian, is  
2702 proposed, but before an action to enforce it is begun, on petition  
2703 by the guardian of property stating the facts of the claim or  
2704 dispute and the proposed settlement, and on evidence that is  
2705 introduced, the court may enter an order authorizing the settlement  
2706 if satisfied that the settlement will be in the best interest of  
2707 the ward. The order shall relieve the guardian from any further  
2708 responsibility in connection with the claim or dispute when  
2709 settlement has been made in accordance with the order. The order  
2710 authorizing the settlement may also determine whether an additional  
2711 bond is required and, if so, shall fix the amount of it.

2712 (2) In the same manner as provided in subsection (1) or as  
2713 authorized by s. 745.713, the natural guardians or guardian of a  
2714 minor may settle any claim by or on behalf of a minor that does not  
2715 exceed \$25,000.00 without bond. A guardianship shall be required  
2716 when the amount of the net settlement to the ward exceeds  
2717 \$50,000.00. When the amount of the net settlement to the ward  
2718 exceeds \$25,000.00 but does not exceed \$50,000.00, the court has

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2719 | the discretion to determine whether the natural guardians may  
2720 | settle the claim or whether a guardianship shall be required. No  
2721 | guardianship of the minor is required when the amount of the net  
2722 | settlement is less than \$25,000.00.

2723 | (3) No settlement after an action has been commenced by or on  
2724 | behalf of a ward shall be effective unless approved by the court  
2725 | having jurisdiction of the guardianship.

2726 | (4) In making a settlement under court order as provided in this  
2727 | section, the guardian is authorized to execute any instrument that  
2728 | may be necessary to effect the settlement. When executed, the  
2729 | instrument shall be a complete release of the guardian.

2730 |

2731 | 745.908 Authority for extraordinary actions.

2732 | (1) Without first obtaining authority from the court, as described  
2733 | in this section, a guardian shall not:

2734 | (a) Commit a ward with developmental disabilities to a facility,  
2735 | institution, or licensed service provider without formal placement  
2736 | proceeding, pursuant to chapters 393.

2737 | (b) Consent on behalf of the ward to the performance on the ward of  
2738 | any experimental biomedical or behavioral procedure or to the  
2739 | participation by the ward in any biomedical or behavioral  
2740 | experiment. The court may permit such performance or participation  
2741 | only if:

2742 | 1. It is of direct benefit to, and is intended to preserve the life  
2743 | of or prevent serious impairment to the mental or physical health,  
2744 | of the ward; or

2745 | 2. It is intended to assist the ward to develop or regain the  
2746 | ward's abilities.

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2747 (c) Consent on behalf of the ward to termination of the ward's  
2748 parental rights.  
2749 (d) Consent on behalf of the ward to the performance of a  
2750 sterilization or abortion procedure on the ward.  
2751 (2) Before the court may grant authority to a guardian to exercise  
2752 any of the powers specified in this section, the court must:  
2753 (a) Appoint an attorney to represent the ward. The attorney must  
2754 have the opportunity to meet with the ward and present evidence and  
2755 cross-examine witnesses at any hearing on the petition for  
2756 authority to act;  
2757 (b) Consider independent medical, psychological, and social  
2758 evaluations with respect to the ward presented by competent  
2759 professionals. The court may appoint experts to assist in the  
2760 evaluations. Unless an objection is filed by the ward or  
2761 petitioner, the court may consider at the hearing written  
2762 evaluation reports without requiring testimony. Any objection to  
2763 such consideration must be filed and served on interested persons  
2764 at least 3 days prior to the hearing;  
2765 (c) Find by clear and convincing evidence that the ward lacks the  
2766 capacity to make a decision about the issues before the court and  
2767 that the ward's capacity is not likely to change in the foreseeable  
2768 future; and  
2769 (d) Find by clear and convincing evidence that the authority being  
2770 requested is consistent with the ward's intentions expressed prior  
2771 to incapacity or, in the absence of evidence of the ward's  
2772 intentions, is in the best interests of the ward.

2773  
2774 Section 10. Part X of chapter 745, Florida Statutes,  
2775 consisting of sections 745.1001, 745.1002, 745.1003, 745.1004,

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2776 745.1005, 745.1006, 745.1007, 745.1008, and 745.1009, is created to  
2777 read:

2778 PART X

2779 OVERSIGHT AND MONITORING

2780 745.1001 Duties of the clerk - General.

2781 In addition to the duty to serve as custodian of guardianship  
2782 files, the clerk shall have the duties specified below:

2783 (1) Within 30 days after the date of filing an initial guardianship  
2784 plan or annual report of a guardian of person, the clerk shall  
2785 examine the initial guardianship plan or annual report to assess  
2786 whether it provides information required by this code and the  
2787 Florida Probate Rules. Within such time, the clerk shall provide  
2788 the court and the guardian a written statement of the clerk's  
2789 findings.

2790 (2) Within 60 days after the filing of an inventory or annual  
2791 accounting by a guardian of property, the clerk shall audit the  
2792 inventory or accounting to assess whether it provides information  
2793 required by this code and the Florida Probate Rules. Within such  
2794 time, the clerk shall provide the court and the guardian a written  
2795 audit report of the clerk's findings.

2796 (3) The clerk shall provide written notice to the court and  
2797 guardian when an inventory, accounting, plan or report is not  
2798 timely filed.

2799 (4) If the clerk has reason to believe further review is  
2800 appropriate, the clerk may request and review records and documents  
2801 that reasonably impact guardianship assets, including, but not  
2802 limited to, the beginning inventory balance and any fees charged to  
2803 the guardianship. As a part of this review, the clerk may conduct  
2804 audits and may cause the plan and annual guardianship report and

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2805 accounting to be audited. The clerk shall notify in writing the  
2806 court and the guardian of the results of any such audit. Any fee or  
2807 cost incurred by the guardian in responding to the review or audit  
2808 may not be paid or reimbursed by the ward's assets if there is a  
2809 finding of wrongdoing by the guardian.

2810 (5) If a guardian fails to produce records and documents to the  
2811 clerk upon request, the clerk may request that the court enter an  
2812 order pursuant to s. 745.1004 by filing an affidavit that  
2813 identifies the records and documents requested and shows good cause  
2814 as to why the documents and records requested are needed to  
2815 complete the audit.

2816 (6) Upon application to the court pursuant to subsection (5), the  
2817 clerk may issue subpoenas to nonparties to compel production of  
2818 books, papers, and other documentary evidence. Before issuance of a  
2819 subpoena, the clerk must serve notice on the guardian and the ward,  
2820 unless the ward is a minor or totally incapacitated, of the intent  
2821 to serve subpoenas to nonparties.

2822 (a) The clerk must attach the affidavit and the proposed subpoena  
2823 to the notice, and the subpoena must:

- 2824 1. State the time, place, and method for production of the  
2825 documents or items, and the name and address of the person who is  
2826 to produce the documents or items, if known, or, if not known, a  
2827 general description sufficient to identify the person or the  
2828 particular class or group to which the person belongs;
- 2829 2. Include a description of the items to be produced;
- 2830 3. State that the person who will be asked to produce the documents  
2831 or items has the right to object to the production under this  
2832 section and that if an objection is filed the person is not  
2833 required to surrender the documents or items.

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2834 (b) A copy of the notice and proposed subpoena may not be furnished  
2835 to the person upon whom the subpoena is to be served.

2836 (c) If the guardian or ward serves an objection to production under  
2837 this subsection within 10 days after service of the notice, the  
2838 subpoena may not be served on the nonparty until resolution of the  
2839 objection. If an objection is not made within 10 days after service  
2840 of the notice, the clerk may issue the subpoena to the nonparty.  
2841 The court may shorten the period within which a guardian or ward is  
2842 required to file an objection upon a showing by the clerk by  
2843 affidavit that the ward's property is in imminent danger of being  
2844 wasted, misappropriated, or lost unless immediate action is taken.

2845

2846 745.1002 Judicial review of guardianship inventories and  
2847 accountings.

2848 (1) Within 45 days after the filing of the clerk's audit report,  
2849 the court shall review guardianship inventories and accountings to  
2850 ensure that they comply with the requirements of law. The court may  
2851 appoint a general or special magistrate to assist the court in its  
2852 review function. Upon examining a guardianship inventory or  
2853 accounting, the court shall enter an order approving or  
2854 disapproving such document or requiring the guardian to provide  
2855 more information or cure deficiencies found in the inventory or  
2856 accounting.

2857 (2) If the court finds, upon review of the inventory or accounting  
2858 and the clerk's audit report, that the document complies with the  
2859 requirements of law, the court must approve the inventory or  
2860 accounting. If the audit report indicates that there are  
2861 deficiencies in the inventory or accounting, the court shall notify  
2862 the guardian, in writing, of the deficiencies determined by the



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2863 clerk and provide a reasonable time within which the guardian must  
2864 correct such deficiencies or otherwise respond by written response  
2865 to the court. If the guardian does not respond within the time  
2866 specified by the court, or if the guardian's response indicates a  
2867 need for further action, the court may conduct a hearing, with  
2868 notice to the guardian, to determine if a revised inventory or  
2869 accounting must be filed or if the guardian should provide proof of  
2870 any matter specified therein.

2871 (3) After a guardian has cured any deficiencies in the inventory or  
2872 accounting to the satisfaction of the court, the guardian's  
2873 inventory or accounting must be approved.

2874 (4) If an objection to an inventory or accounting is filed by an  
2875 interested person, the objection may be set for hearing with  
2876 reasonable notice. If a notice of hearing on the objection is not  
2877 served within 30 days of filing of the objection, the objection is  
2878 deemed abandoned. At the conclusion of the hearing, the court shall  
2879 enter an order either approving the inventory or accounting or  
2880 ordering modifications to it. If an objection is found to have been  
2881 filed in bad faith, the court may award taxable costs, including  
2882 reasonable attorney's fees.

2883

2884 745.1003 Judicial review of guardianship plans and reports.

2885 (1) Within 45 days after the filing of the clerk's audit, the court  
2886 must review guardianship plans and reports to ensure that they  
2887 comply with the requirements of law. The court may appoint a  
2888 general or special magistrate to assist the court in its review  
2889 function. Upon examining a guardianship plan or report, the court  
2890 must enter an order approving or disapproving such document or

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2891 requiring the guardian to provide more information or cure  
2892 deficiencies found in the plan or report.  
2893 (2) If the court finds, upon review of the plan or report and the  
2894 clerk's audit, that the document complies with the requirements of  
2895 law, the court may approve the plan or report. If the clerk's audit  
2896 indicates that there are deficiencies in the plan or report, the  
2897 court shall notify the guardian, in writing, of the deficiencies  
2898 determined by the clerk and provide a reasonable time within which  
2899 the guardian must correct such deficiencies or otherwise respond by  
2900 written response to the court. If the guardian does not respond  
2901 within the time specified by the court, or if the guardian's  
2902 response indicates a need for further action, the court may conduct  
2903 a hearing, with notice to the guardian, to determine if a revised  
2904 plan or report must be filed or if the guardian should provide  
2905 proof of any matter specified therein.  
2906 (3) After a guardian has cured any deficiencies in the plan or  
2907 report to the satisfaction of the court, the guardian's plan or  
2908 report must be approved.  
2909 (4) If an objection to a plan or report is filed by an interested  
2910 person, the objection may be set for hearing with reasonable notice.  
2911 If a notice of hearing on the objection is not served within 30  
2912 days of filing of the objection, the objection is deemed abandoned.  
2913 At the conclusion of the hearing, the court shall enter an order  
2914 either approving the plan or report or ordering modifications to  
2915 it. If an objection is found to have been filed in bad faith, the  
2916 court may award taxable costs including reasonable attorney's fees.  
2917  
2918 745.1004 Order requiring guardianship documents; contempt.

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2919 When a guardian fails to file a plan, report, inventory or  
2920 accounting, the court shall order the guardian to file such  
2921 document within 15 days after the service of the order on the  
2922 guardian or show cause, in writing, why the guardian should not be  
2923 compelled to do so. A copy of the order shall be served on the  
2924 guardian. If the guardian fails to file the document within the  
2925 time specified by the order without good cause, the court shall  
2926 order the guardian to show cause why the guardian should not be  
2927 held in contempt of court. At the conclusion of the hearing, the  
2928 court may sanction the guardian, if good cause is not demonstrated.  
2929 No fine may be paid from property of the ward.

2930  
2931 745.1005 Action on review of guardianship report.  
2932 If it appears from the annual guardianship report that:  
2933 (1) The condition of the ward requires further examination;  
2934 (2) Any change in the proposed care, maintenance, or treatment of  
2935 the ward is needed;  
2936 (3) The ward is qualified for restoration of some or all rights;  
2937 (4) The condition or maintenance of the ward requires the  
2938 performance or doing of any other thing for the best interest of  
2939 the ward which is not indicated in the plan; or  
2940 (5) There is any other action necessary to protect the interests of  
2941 the ward,  
2942 the court may direct the guardian to appear at a hearing with  
2943 appropriate notice to the guardian, to address such issues. The  
2944 court may enter such order as it finds appropriate to protect the  
2945 ward.

2946  
2947 745.1006 Petition for interim judicial review

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2948 (1) At any time, any interested person may petition the court for  
2949 review alleging that the guardian is not complying with a  
2950 guardianship plan or report, is exceeding the guardian's authority  
2951 under such document, or is acting in a manner contrary to s. 745.802  
2952 or s. 745.809. The petition for review must state the interest of  
2953 the petitioner, nature of the objection to the guardian's action or  
2954 proposed action, and facts in support of the petition. Upon  
2955 hearing, the court may prohibit or enjoin any action that is  
2956 contrary to the guardian's obligations under s. 745.809.

2957 (2) The court may award taxable costs and attorney's fees if the  
2958 petition is found to have been filed in bad faith.

2959

2960 745.1007 Production of property.

2961 On the petition of an interested person, the court may require a  
2962 guardian of property to produce satisfactory evidence that the  
2963 property of the ward for which the guardian is responsible is in  
2964 the guardian's possession or under the guardian's control. The  
2965 court may order the guardian to produce the property for inspection  
2966 by the court or under the court's direction.

2967

2968 745.1008 Guardianship monitors.

2969 (1) The court may, upon petition by an interested person or upon  
2970 its own motion, appoint a monitor after hearing with notice to the  
2971 petitioner, guardian, and the ward. The court must not appoint as a  
2972 monitor an employee of the court, the clerk, a family member of the  
2973 ward, or any person with a personal interest in the proceedings.

2974 (2) The order of appointment must be served on the guardian, the  
2975 ward, and such interested persons as the court may direct.

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2976 (3) The order of appointment must specify the facts supporting the  
2977 order, scope of the investigation, powers and duties of the monitor  
2978 and time frame within which the investigation must be completed.  
2979 (4) The monitor is deemed an interested person until discharged and  
2980 may not have ex parte communications with the court.  
2981 (5) The monitor may investigate, seek information, examine  
2982 documents, and interview the ward and guardian and shall file a  
2983 written report of the monitor's findings and recommendations. The  
2984 report shall be verified and may be supported by documents or other  
2985 evidence. Copies of the report and all documents shall be served on  
2986 the guardian, the ward, unless the ward is a minor or is totally  
2987 incapacitated, and such other interested persons as the court may  
2988 determine. The guardian and the ward may seek information from the  
2989 monitor using discovery methods authorized in the Florida Probate  
2990 Rules.  
2991 (6) If it appears from the monitor's report that further action to  
2992 protect the interests of the ward is necessary, the court shall,  
2993 after a hearing with notice, enter any order necessary to protect  
2994 the ward or the ward's property, including requiring the guardian  
2995 to amend a plan or report, requiring an accounting or amended  
2996 accounting, ordering production of assets, freezing assets,  
2997 suspending a guardian, or initiating proceedings to remove a  
2998 guardian.  
2999 (7) Unless otherwise prohibited by law, a monitor may be allowed a  
3000 reasonable fee as determined by the court and paid from the  
3001 property of the ward. No full-time state, county, or municipal  
3002 employee or officer shall be paid a fee for such investigation and  
3003 report. If the court finds a petition to appoint a monitor or a  
3004 written communication by a third party which results in appointment

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3005 of a monitor to have been filed in bad faith, the costs of the  
3006 proceeding and attorney's fees shall be awarded after hearing with  
3007 notice to the petitioner or third party.

3008

3009 745.1009 Emergency guardianship monitor.

3010 (1) The court may, upon petition by an interested person or upon  
3011 its own motion, appoint a guardianship monitor qualified under s.  
3012 745.1008(1) on an emergency basis without notice. The court must  
3013 find that there appears to be imminent danger that the physical or  
3014 mental health or safety of the ward will be seriously impaired or  
3015 that the ward's property is in danger of being wasted,  
3016 misappropriated, or lost unless immediate action is taken.

3017 (2) The order appointing an emergency guardianship monitor shall  
3018 specify the facts supporting the order, scope of the investigation,  
3019 powers and duties of the monitor and the time frame within which  
3020 the investigation must be completed. The order appointing an  
3021 emergency guardianship monitor shall be served on the guardian, the  
3022 ward, and such interested persons as the court may direct.

3023 (3) The monitor shall file a report of the monitor's findings and  
3024 recommendations. The report shall be verified and may be supported  
3025 by documents or other evidence.

3026 Copies of the report and all documents shall be served on:

3027 (a) the guardian,

3028 (b) the ward and

3029 (c) such other interested persons as the court may determine  
3030 appropriate after the court has made a determination under  
3031 subsection (4).

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3032 (4) Upon review of the report, the court shall determine whether  
3033 further action is necessary to protect the person or property of  
3034 the ward.

3035 (5) (a) If it appears from the monitor's report that further action  
3036 to protect the interests of the ward is necessary, the court shall,  
3037 after a hearing with notice, enter any order necessary to protect  
3038 the ward or the ward's property, including requiring the guardian  
3039 to amend a plan or report, requiring an accounting or amended  
3040 accounting, ordering production of assets, freezing assets,  
3041 suspending a guardian, or initiating proceedings to remove a  
3042 guardian.

3043 (b) At any time prior to the hearing, the court may issue a  
3044 temporary injunction, a restraining order, or an order freezing  
3045 assets; may suspend the guardian; may appoint a guardian ad litem;  
3046 or may issue any other appropriate order to protect the health,  
3047 safety, or property of the ward. A copy of all such orders or  
3048 injunctions shall be transmitted by the court or under its  
3049 direction to all parties at the time of entry of the order or  
3050 injunction.

3051 Nothing in subsection (5) shall be construed to preclude the  
3052 mandatory reporting requirements of chapter 39.

3053 (6) Unless otherwise prohibited by law, a monitor may be allowed a  
3054 reasonable fee as determined by the court and paid from the  
3055 property of the ward. No full-time state, county, or municipal  
3056 employee or officer shall be paid a fee for such investigation and  
3057 report. If the court finds the petition to appoint a court monitor  
3058 or a written communication by a third party which results in  
3059 appointment of a monitor to have been filed in bad faith, the costs

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3060 of the proceeding and attorney's fees, shall be awarded after  
3061 hearing with notice to the petitioner or third party.

3062 (7) The monitor shall be deemed an interested person until  
3063 discharged and may not have ex parte communications with the court.

3064

3065 Section 11. Part XI of chapter 745, Florida Statutes,  
3066 consisting of sections 745.1101, 745.1102, 745.1103, 745.1104,  
3067 745.1105, 745.1106, 745.1107, 745.1108, 745.1109, and 745.1110, is  
3068 created to read:

3069

PART XI

3070

RESIGNATION AND DISCHARGE

3071 745.1101 Resignation of guardian.

3072 (1) A guardian may resign at any time.

3073 (2) A resigning guardian shall retain the duties and  
3074 responsibilities of a guardian until discharged by the court as  
3075 specified in this part.

3076 (3) A resigning guardian shall file a resignation with the court  
3077 and, unless waived, serve a notice of resignation on:

3078 (a) next of kin of the ward;

3079 (b) the ward, unless the ward has been found to be totally  
3080 incapacitated or is a minor; and

3081 (c) a successor or proposed successor guardian, if any.

3082

3083 745.1102 Resignation and discharge of guardian of property.

3084 (1) A successor guardian of property must be appointed if a  
3085 guardian dies, becomes incapacitated, resigns or is removed.

3086 (2) A resigning guardian of property must file:

3087 (a) a petition for distribution and discharge,

3088 (b) final accounting, and



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3089 (c) notice of filing petition for distribution and discharge and  
3090 final accounting  
3091 and must serve such documents on any successor guardian and such  
3092 interested persons as the court may direct.  
3093 (3) The guardian's final accounting is subject to audit by the  
3094 clerk in the manner and within the time specified in s. 745.1001,  
3095 unless waived by the successor guardian.  
3096 (4) The petition for distribution and discharge must include a  
3097 schedule of unpaid expenses of the ward and administration expenses  
3098 to be paid prior to discharge.  
3099 (5) The notice of filing petition for distribution and discharge  
3100 and final accounting must specify that interested persons have 30  
3101 days from the date of receipt of the notice to file any objections  
3102 with the court. If no objections are timely filed, the court may  
3103 enter an order authorizing distribution of assets without further  
3104 notice or hearing. If objections are timely filed, the objections  
3105 must be resolved as provided in the Florida Probate Rules.  
3106 (6) Upon approval of a resigned guardian's final accounting and  
3107 petition for distribution and discharge, the guardian is entitled  
3108 to distribute assets and, upon proof of distribution, to be  
3109 discharged regardless of whether a successor guardian has been  
3110 appointed.  
3111 (7) If no successor guardian is appointed at the time the petition  
3112 for distribution and discharge is filed, the court may appoint an  
3113 emergency temporary guardian.  
3114 (8) Prior to discharge, a resigning guardian shall deliver all  
3115 assets of the ward and copies of all asset records to a successor  
3116 guardian, an emergency temporary guardian, or as otherwise directed  
3117 by the court.

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3118 (9) Upon petition by an interested person or on the court's own  
3119 motion, an attorney may be appointed to represent the ward in the  
3120 discharge proceedings. When a court appoints an attorney for the  
3121 ward, the court must appoint the office of criminal conflict and  
3122 civil regional counsel or a private attorney as prescribed in s.  
3123 27.511(6). A private attorney must be one who is included in the  
3124 attorney registry compiled pursuant to s. 27.40. Appointments of  
3125 private attorneys must be made on a rotating basis, taking into  
3126 consideration conflicts arising under this code. The attorney for  
3127 the ward represents the preferences expressed by the ward, to the  
3128 extent consistent with the rules regulating the Florida Bar. The  
3129 attorney for the ward may assist in locating a successor guardian.  
3130 (10) A successor guardian may be appointed and have letters issued  
3131 after a guardian has resigned and before an order of discharge of  
3132 the resigned guardian has been entered. The successor guardian  
3133 succeeds to the powers specified in the letters of guardianship and  
3134 such guardian's authority shall inure as of the date of issuance of  
3135 letters.  
3136  
3137 745.1103 Termination of guardianship of property  
3138 (1) When a ward becomes sui juris, has been restored to capacity as  
3139 to all rights related to the ward's property, the guardianship has  
3140 terminated as a result of the relocation of the ward's residence to  
3141 an out-of-state jurisdiction, or the guardianship is otherwise  
3142 terminated, the guardian must file a final accounting and petition  
3143 for discharge. The accounting and petition, together with a notice  
3144 of filing the final accounting and petition for discharge, must be  
3145 served on the ward. The ward may waive audit of the guardian's  
3146 final accounting.

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3147 (2) When the ward's property has been exhausted except for clothing  
3148 and minimal personal effects and the guardian receives no income on  
3149 behalf of the ward, the guardian may file a final accounting and  
3150 petition for discharge. The final accounting and petition for  
3151 discharge, together with a notice of filing the final accounting  
3152 and petition for discharge, must be served on the ward and such  
3153 interested persons as the court may direct.

3154 (3) When a ward dies, the guardian must file a final accounting and  
3155 petition for distribution and discharge within 45 days after the  
3156 guardian has been served with letters of administration or letters  
3157 of curatorship of the ward's estate. The petition for distribution  
3158 and discharge and final accounting and notice of filing shall be  
3159 served on the personal representative or curator. The personal  
3160 representative or curator may waive preparation or audit of the  
3161 guardian's final accounting subject to the provisions of s.  
3162 745.1104.

3163 (4) If no objections are timely filed by the ward, in the case of a  
3164 ward who has become sui juris or has been restored to capacity, or  
3165 by the personal representative or curator, in the case of a  
3166 deceased ward, the guardian may distribute the ward's assets as  
3167 directed by the court and, upon proof of such distribution, shall  
3168 be entitled to discharge.

3169 (5) If objections to the final accounting or petition for discharge  
3170 are timely filed, the objections shall be resolved as provided in  
3171 the Florida Probate Rules.

3172 (6) The guardian applying for discharge may retain from the funds  
3173 in the guardian's possession a sufficient amount to pay the final  
3174 costs of administration, including guardian and attorney's fees.

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3175 (7) The court retains jurisdiction over the guardian until the  
3176 guardian is discharged.

3177

3178 745.1104 Discharge of guardian of property named as personal  
3179 representative.

3180 (1) A guardian of property who is subsequently appointed sole  
3181 personal representative of a deceased ward's estate must serve a  
3182 copy of the guardian's final accounting and petition for  
3183 distribution and discharge, together with a notice of filing the  
3184 final accounting and petition for distribution and discharge, on  
3185 the beneficiaries of the ward's estate who will be affected by the  
3186 report. If the beneficiary of the estate is a trust of which the  
3187 guardian is sole trustee, the final accounting must be served on  
3188 qualified beneficiaries of the trust as defined in s. 736.0103. The  
3189 beneficiaries of the estate or qualified beneficiaries of the trust  
3190 may waive preparation or audit of the guardian's final accounting.

3191 (2) All such beneficiaries shall have 30 days from receipt of the  
3192 final accounting and petition for distribution and discharge to  
3193 file objections thereto. If objections are timely filed, the  
3194 objections shall be resolved as provided in the Florida Probate  
3195 Rules.

3196 (3) The guardian may not be discharged until:

3197 (a) All objections have been resolved;

3198 (b) The final accounting of the guardian is approved by the court  
3199 or waived by the persons entitled to notice under subsection (1);  
3200 and

3201 (c) All property has been distributed to the ward's estate or the  
3202 persons entitled to it.

3203

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3204 745.1105 Termination of guardianship of property on change of  
3205 residence of ward to foreign jurisdiction.

3206 (1) When the residence of a ward has changed to another state or  
3207 country, and the foreign court having jurisdiction over the ward at  
3208 the ward's new residence has issued letters or the equivalent, the  
3209 guardian of property in this state may file a final accounting and  
3210 petition for discharge.

3211 (2) The guardian shall serve the petition for discharge and final  
3212 accounting on the new guardian, the ward's next of kin and all  
3213 known creditors of the ward with a notice directing that any  
3214 objections must be filed within 30 days. If an objection is timely  
3215 filed, any interested person may set the objection for hearing. If  
3216 no notice of hearing is served within 60 days after filing the  
3217 objection, the objection is deemed abandoned.

3218 (3) Upon disposition of all objections, or if no objection is  
3219 filed, distribution shall be made by the Florida guardian. On proof  
3220 that the remaining property in the guardianship has been received  
3221 by the foreign guardian, the Florida guardian of property shall be  
3222 discharged.

3223 (4) The Florida guardian's final accounting shall not be subject to  
3224 audit.

3225

3226 745.1106 Disposition of unclaimed funds held by guardian.

3227 (1) When a ward dies and the guardian cannot distribute the ward's  
3228 property because no estate proceeding has been instituted, the  
3229 guardian of property shall be considered an interested person  
3230 pursuant to s. 733.202 and may, after a reasonable time, petition  
3231 for appointment of a personal representative or curator. In the

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3232 alternative, the guardian may follow the procedures set forth in  
3233 subsection (3).

3234 (2) When a guardian is unable to locate the ward after diligent  
3235 search, the guardian may file a petition pursuant to s. 731.103(3)  
3236 and, upon a determination of death, may proceed under subsections  
3237 (1) or (3).

3238 (3) The court may order the guardian of property to sell the  
3239 property of the ward and deposit the proceeds and cash on hand  
3240 after retaining the amounts provided for in paragraph (d) with the  
3241 clerk. The clerk shall acknowledge receipt of the funds and deposit  
3242 them in the registry of the court, to be disposed of as follows:

3243 (a) If the value of the funds is \$500 or less, the clerk shall post  
3244 a notice for 30 days at the courthouse specifying the amount, the  
3245 name of the ward, the guardianship court file number, the name and  
3246 mailing address of the guardian, and other pertinent information  
3247 that will put interested persons on notice.

3248 (b) If the value of the funds is over \$500, the clerk shall publish  
3249 the notice once a month for 2 consecutive months in a newspaper of  
3250 general circulation in the county.

3251 (4) Pursuant to subsection (3), after the expiration of 6 months  
3252 from the posting or first publication, the clerk shall deposit the  
3253 funds with the Chief Financial Officer after deducting the clerk's  
3254 fees and the costs of publication.

3255 (a) Upon receipt of the funds, the Chief Financial Officer shall  
3256 deposit them in a separate fund devoted to the provision of  
3257 guardianship services to indigent wards. All interest and all  
3258 income that may accrue from the money while so deposited shall  
3259 belong to the fund. The funds so deposited shall constitute and be  
3260 a permanent appropriation for payments by the Chief Financial

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3261 Officer as required by court orders entered as provided by  
3262 paragraph (b) .  
3263 (b) On petition to the court that directed deposit of the funds and  
3264 informal notice to the Department of Legal Affairs and the ward's  
3265 next of kin, any person claiming entitlement to the funds may  
3266 petition for a court order directing the payment of the funds to the  
3267 petitioner. Such petition must be filed within 5 years after  
3268 deposit of the funds with the Chief Financial Officer. All funds  
3269 deposited with the Chief Financial Officer and not claimed within 5  
3270 years from the date of deposit shall escheat to the state to be  
3271 deposited in the Department of Elderly Affairs Administrative Trust  
3272 Fund to be used solely for the provision of guardianship services  
3273 for indigent wards as determined by the Secretary of the Department  
3274 of Elderly Affairs.  
3275 (c) Upon depositing the funds with the clerk, a guardian of  
3276 property may file a final accounting and petition for discharge  
3277 under s. 745.1103.  
3278 (d) A guardian depositing assets with the clerk is permitted to  
3279 retain from the assets in the guardian's possession a sufficient  
3280 amount to pay the final costs of administration, including guardian  
3281 and attorney's fees accruing prior to the order of discharge. Any  
3282 surplus funds so retained must be deposited with the clerk prior to  
3283 discharge of the guardian of property.  
3284  
3285 745.1107 Resignation and discharge of guardian of person.  
3286 (1) A successor guardian of person must be appointed if a guardian  
3287 dies, becomes incapacitated, resigns or is removed.  
3288 (2) A resigning guardian of person must file a resignation and  
3289 petition for discharge and must serve such documents on any

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3290 successor guardian and such interested persons as the court may  
3291 direct. The guardian is entitled to discharge upon proof that the  
3292 guardian has fully discharged the guardian's duties and proof of  
3293 delivery to a successor guardian or emergency temporary guardian of  
3294 copies of all records of medical, personal and residential care for  
3295 the ward.

3296 (3) Upon petition by an interested person or on the court's own  
3297 motion, an attorney may be appointed to represent the ward in the  
3298 discharge proceedings. When a court appoints an attorney for a  
3299 ward, the court must appoint the office of criminal conflict and  
3300 civil regional counsel or a private attorney as prescribed in s.  
3301 27.511(6). A private attorney must be one who is included in the  
3302 attorney registry compiled pursuant to s. 27.40. Appointments of  
3303 private attorneys must be made on a rotating basis, taking into  
3304 consideration conflicts arising under this code. The attorney for  
3305 the ward represents the preferences expressed by the ward, to the  
3306 extent consistent with the rules regulating the Florida Bar. The  
3307 attorney for the ward may assist in locating a successor guardian.

3308 (4) A successor guardian of person may be appointed and have  
3309 letters issued after a guardian has resigned and before an order of  
3310 discharge of the resigned guardian has been entered. The successor  
3311 guardian shall exercise the powers specified in the letters of  
3312 guardianship and such guardian's authority inures as of the date of  
3313 issuance of letters.

3314 (5) If no successor guardian is appointed at the time the petition  
3315 for discharge is filed, the court may appoint an emergency  
3316 temporary guardian.

3317

3318



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3319 745.1108 Termination of guardianship of person.

3320 (1) When a ward becomes sui juris, has been restored to capacity as  
3321 to all rights related to the ward's person, the guardianship has  
3322 terminated as a result of the relocation of the ward's residence to  
3323 an out-of-state jurisdiction, or the guardianship is otherwise  
3324 terminated, except as provided in subsection (5), a guardian of  
3325 person must file a petition for discharge, specifying the grounds  
3326 therefor. The petition for discharge must be served on the ward.

3327 (2) When the guardian has been unable to locate the ward after  
3328 diligent search, a guardian of person may file a petition for  
3329 discharge, specifying the guardian's attempts to locate the ward.

3330 (3) In the case of a ward who has become sui juris or has been  
3331 restored to capacity, a copy of the petition for discharge and a  
3332 notice of hearing on said petition shall be served on the ward,  
3333 unless waived.

3334 (4) If a guardian has been unable to locate the ward, the guardian  
3335 shall serve the petition for discharge and a notice of hearing on  
3336 the ward's next of kin and such other persons as the court may, in  
3337 its discretion, direct.

3338 (5) A guardian of person is discharged without further proceedings  
3339 upon filing a certified copy of the ward's death certificate,  
3340 together with a notice of discharge.

3341 (6) The court retains jurisdiction over the guardian until the  
3342 guardian is discharged.

3343

3344 745.1109 Termination of guardianship of person on change of  
3345 residence of ward to foreign jurisdiction.

3346 (1) When the residence of a ward has changed to another state or  
3347 country and the foreign court having jurisdiction of the ward at

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3348 the ward's new place of residence has issued letters or the  
3349 equivalent, the guardian of person in this state may file a  
3350 petition for discharge and serve it on the new foreign guardian and  
3351 the ward's next of kin with a notice directing that any objections  
3352 must be filed within 30 days.

3353 (2) If an objection is timely filed, any interested person may set  
3354 the objection for hearing. If no notice of hearing is served within  
3355 60 days after filing the objection, the objection is deemed  
3356 abandoned.

3357 (3) Upon disposition of all objections, or if no objection is  
3358 filed, the guardian of person shall be discharged.

3359  
3360 745.1110 Order of discharge.

3361 (1) If the court is satisfied that the guardian has faithfully  
3362 discharged the guardian's duties and, in the case of a guardian of  
3363 property, has delivered the property of the ward to the person  
3364 entitled, and that the interests of the ward are protected, the  
3365 court must enter an order discharging the guardian from any further  
3366 duties and liabilities as guardian. The discharge shall also act as  
3367 a bar to any action against the guardian, as such and individually,  
3368 or the guardian's surety, as to matters adequately disclosed to  
3369 interested persons.

3370 (2) As to matters not adequately disclosed to interested persons,  
3371 any action against the guardian, as such and individually, shall be  
3372 barred unless commenced within 2 years of entry of the order of  
3373 discharge.

3374  
3375 Section 12. Part XII of chapter 745, Florida Statutes,  
3376 consisting of sections 745.1201, 745.1202, 745.1203, 745.1204,

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3377 745.1205, and 745.1206, is created to read:

3378 PART XII

3379 REMOVAL OF GUARDIANS

3380 745.1201 Reasons for removal of guardian.

3381 A guardian may be removed for any of the following reasons, and the  
3382 removal shall be in addition to any other penalties prescribed by  
3383 law:

3384 (1) Fraud in obtaining appointment.

3385 (2) Failure to discharge guardianship duties.

3386 (3) Abuse of guardianship powers.

3387 (4) An incapacity or illness, including substance abuse, which  
3388 renders the guardian incapable of discharging the guardian's  
3389 duties.

3390 (5) Willful failure to comply with any order of the court.

3391 (6) Failure to account for property sold or to produce the ward's  
3392 property when so required.

3393 (7) Waste, embezzlement, or other mismanagement of the ward's  
3394 property.

3395 (8) Failure to give bond or security when required by the court or  
3396 failure to file with the annual guardianship plan the evidence  
3397 required by s. 745.607 that the sureties on the guardian's bond are  
3398 alive and solvent.

3399 (9) Conviction of a felony.

3400 (10) Appointment of a receiver, trustee in bankruptcy, or  
3401 liquidator for any corporate guardian.

3402 (11) Development of a conflict of interest between the ward and the  
3403 guardian.

3404 (12) Having been found guilty of, regardless of adjudication, or  
3405 entered a plea of nolo contendere or guilty to, any offense

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3406 described in s. 435.04(2), s. 741.28 or under any similar statute  
3407 of another jurisdiction.

3408 (13) A failure to fulfill the guardianship education requirements.

3409 (14) A material change in the ward's financial circumstances so  
3410 that the guardian is no longer qualified to manage the finances of  
3411 the ward, or the previous degree of management is no longer  
3412 required.

3413 (15) After appointment, the guardian becomes a disqualified person  
3414 as specified in s. 745.503.

3415 (16) Upon a showing that removal of the current guardian is in the  
3416 best interest of the ward.

3417

3418 745.1202 Proceedings for removal of a guardian.

3419 A petition to remove a guardian may be filed by any surety,  
3420 interested person, or by the ward. Formal notice shall be served on  
3421 the guardian. After hearing, the court may enter an order that is  
3422 proper considering the pleadings and the evidence.

3423

3424 745.1203 Accounting upon removal.

3425 A removed guardian of property shall file with the court a true,  
3426 complete, and final accounting of the ward's property within 30  
3427 days after removal and shall serve a copy on the successor  
3428 guardian, if any; the attorney for the ward, if any; and the ward,  
3429 unless the ward is a minor or has been determined to be totally  
3430 incapacitated to manage or dispose of property.

3431

3432 745.1204 Appointment of successor guardian upon removal.

3433 (1) If there is still the need for a guardian of the ward, the  
3434 court must appoint a successor guardian as permitted under s.

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3435 745.501.

3436 (2) If no successor guardian has been appointed when a guardian is  
3437 removed, the court shall appoint an attorney to represent the ward  
3438 and the accounting shall be served on the ward. The ward may  
3439 propose a successor guardian and the court may appoint an emergency  
3440 temporary guardian to serve until letters are issued to a successor  
3441 guardian.

3442

3443 745.1205 Surrender of property upon removal.

3444 A removed guardian of property shall deliver to the successor or  
3445 emergency temporary guardian all property of the ward and copies of  
3446 all records under the guardian's control within 30 days after  
3447 notice of issuance of letters to the successor or emergency  
3448 temporary guardian, unless otherwise ordered by the court.

3449

3450 745.1206 Proceedings for contempt.

3451 If a removed guardian of property fails to file a true, complete,  
3452 and final accounting or turn over to the successor or emergency  
3453 temporary guardian the property of the ward and copies of all  
3454 guardianship records that are in the guardian's control, the court  
3455 shall issue an order requiring the guardian to show cause for such  
3456 failure. If reasonable cause is shown by the guardian, the court  
3457 shall set a reasonable time within which to comply, and, on failure  
3458 to comply with this or any subsequent order, the removed guardian  
3459 may be held in contempt. Proceedings for contempt may be instituted  
3460 by the court, by any interested person, including the ward, or by a  
3461 successor or emergency temporary guardian.

3462

3463 Section 13. Part XIII of chapter 745, Florida Statutes,

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3464 consisting of sections 745.1301, 745.1302, 745.1303, 745.1304,  
3465 745.1305, 745.1306, 745.1307, 745.1308, 745.1309, 745.1310,  
3466 745.1311, 745.1312, 745.1313, 745.1314, and 745.1315, is created to  
3467 read:

3468 PART XIII

3469 MISCELLANEOUS

3470 745.1301 Suspension of statutes of limitation in favor of guardian.  
3471 If a person entitled to bring an action is declared incapacitated  
3472 before expiration of the time limited for the commencement of the  
3473 action and the cause of the action survives, the action may be  
3474 commenced by a guardian of property after such expiration and  
3475 within 1 year from the date of the issuance of letters or the time  
3476 otherwise limited by law, whichever is longer.

3477  
3478 745.1302 Appraisals.

3479 On petition by an interested person, the court may appoint  
3480 appraisers to appraise property of the ward that is subject to the  
3481 guardianship. This section does not limit the power of a guardian  
3482 of property to employ appraisers without court order pursuant to s.  
3483 745.902(12).

3484  
3485 745.1303 Determination regarding alternatives to guardianship.

3486 (1) Any judicial determination concerning the validity or effect of  
3487 the ward's power of attorney, durable power of attorney, trust or  
3488 trust amendment shall be promptly reported in the guardianship  
3489 proceeding by the guardian of property.

3490 (2) Any judicial determination concerning the validity or effect of  
3491 the ward's health care surrogate designation shall be promptly  
3492 reported in the guardianship proceeding by the guardian of person.

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3493 (3) During the guardianship, an interested person may file a  
3494 petition alleging that, due to a change in circumstances or the  
3495 discovery of an alternative not previously considered by the court,  
3496 there is an alternative to guardianship which will sufficiently  
3497 address the problems of the ward and the court shall consider the  
3498 continued need for a guardian and the extent of the continued need  
3499 for delegation of the ward's rights, if any.

3500

3501 745.1304 Support of ward's dependents.

3502 (1) A guardian of property shall first apply the ward's income to  
3503 the ward's care, support, education, maintenance, health care and  
3504 cost of funeral and burial or cremation. The guardian shall not use  
3505 the ward's property for support of the ward's dependents unless  
3506 approved by the court. The court may approve the guardian to use  
3507 the ward's income for the care, support, education, maintenance,  
3508 cost of final illness, and cost of funeral and burial or cremation  
3509 of the dependents of the ward, to the extent funds are available  
3510 for such use, without jeopardizing the needs of the ward, taking  
3511 into consideration the resources of the dependents. If the income  
3512 is not sufficient for these purposes, the court may approve the  
3513 expenditure of principal for such purposes.

3514 (2) The word "dependents," as used in subsection (1) means, in  
3515 addition to those persons who are legal dependents of a ward under  
3516 existing law, the ward's spouse, the ward's parents, and persons to  
3517 whom the ward was providing support prior to the ward's incapacity.

3518

3519 745.1305 Petition for support of ward's dependents.

3520 (1) A spouse or dependent of the ward, as defined in s. 745.1304,  
3521 may petition for an order directing the guardian of property to

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3522 contribute to the support of the person from the income or property  
3523 of the ward. The court may enter an order for support of the spouse  
3524 or dependent out of the ward's income and property that is subject  
3525 to the guardianship. The grant or denial of an order for support  
3526 shall not preclude a further petition for support or for increase,  
3527 decrease, modification, or termination of allowance for support by  
3528 either the petitioner or the guardian. Delivery to the recipient  
3529 shall be a release of the guardian for payments made pursuant to  
3530 the order.

3531 (2) If the property of the ward is derived in whole or in part from  
3532 payments of compensation, adjusted compensation, pension,  
3533 insurance, or other benefits made directly to the guardian by the  
3534 United States Department of Veterans Affairs, notice of the  
3535 petition for support shall be given by the petitioner to the office  
3536 of the United States Department of Veterans Affairs having  
3537 jurisdiction over the area in which the court is located and the  
3538 chief attorney for the Department of Veterans' Affairs in this  
3539 state at least 15 days before the hearing on the petition.

3540 (3) The court may not authorize payments from an incapacitated  
3541 ward's income or property unless the ward has been adjudicated  
3542 incapacitated to manage such income or property in accordance with  
3543 s. 745.311.

3544 (4) In a voluntary guardianship, a petition for support may be  
3545 granted only upon the written consent of the ward.

3546  
3547 745.1306 Payments to guardian of person.  
3548 If there is more than one guardian, either guardian may petition  
3549 for an order directing the guardian of property to pay to the  
3550 guardian of person periodic amounts for the support, care,



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3551 maintenance, education, and other needs of the ward. The amount may  
3552 be increased or decreased from time to time. If an order is  
3553 entered, proof of delivery to the guardian of person for payments  
3554 made shall be a sufficient release of the guardian who makes the  
3555 payments pursuant to the order. The guardian of property shall not  
3556 be bound to see to the application of the payments and the guardian  
3557 of person shall not be required to file an accounting for the funds  
3558 received, unless otherwise ordered to do so by the court.

3559

3560 745.1307 Actions by and against guardian or ward.

3561 If an action is brought by a guardian against the ward, by a ward  
3562 against the guardian, or in which the interest of the guardian is  
3563 adverse to that of the ward, a guardian ad litem shall be appointed  
3564 to represent the ward in that proceeding. In any litigation between  
3565 the guardian and the ward, the guardian ad litem may petition the  
3566 court for removal of the guardian.

3567

3568 745.1308 Guardian forbidden to borrow or purchase; exceptions.

3569 (1) A professional guardian may not purchase property or borrow  
3570 money from the ward.

3571 (2) A guardian who is not a professional guardian may purchase  
3572 property from the ward if the property is to be purchased at fair  
3573 market value and the court gives prior authorization for the  
3574 transaction.

3575 (3) A guardian who is not a professional guardian may borrow money  
3576 from the ward if the loan is to be made at the prevailing interest  
3577 rate, with adequate security, and the court gives prior  
3578 authorization for the transaction.

3579

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3580 745.1309 Conflicts of interest; prohibited activities; court  
3581 approval; breach of fiduciary duty.  
3582 (1) The fiduciary relationship which exists between the guardian  
3583 and the ward may not be used for the private gain of the guardian  
3584 other than the remuneration for services rendered for the ward. The  
3585 guardian may not incur any obligation on behalf of the ward which  
3586 conflicts with the proper discharge of the guardian's duties.  
3587 (2) A guardian may not offer, pay, solicit, or receive a commission,  
3588 benefit, bonus, rebate, or kickback, directly or indirectly, overtly  
3589 or covertly, in cash or in kind, or engage in a split-fee  
3590 arrangement in return for referring, soliciting, or engaging in a  
3591 transaction for goods or services on behalf of an alleged  
3592 incapacitated person or minor, or a ward, for past or future goods  
3593 or services.  
3594 (3) Unless prior court approval is obtained, or unless such  
3595 relationship existed before appointment of the guardian, a guardian  
3596 may not:  
3597 (a) Have any interest, financial or otherwise, direct or indirect,  
3598 in any business transaction or activity with the ward, the judge  
3599 presiding over the case, any examiner appointed by the court, any  
3600 court employee involved in the guardianship process, or the attorney  
3601 for the ward;  
3602 (b) Acquire an ownership, possessory, security, or other pecuniary  
3603 interest adverse to the ward;  
3604 (c) Be designated as a beneficiary, co-owner or recipient of any  
3605 property or benefit of the ward unless such designation or transfer  
3606 was made by the ward before the ward's incapacity; or  
3607 (d) Directly or indirectly purchase, rent, lease, or sell any  
3608 property or services from or to any business entity of which the

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3609 guardian or the guardian's spouse or any of the guardian's lineal  
3610 heirs, or collateral kindred, is an officer, partner, director,  
3611 shareholder, or proprietor, or has any financial interest.

3612 (3) Any activity prohibited by this section is voidable during the  
3613 term of the guardianship or by the personal representative of the  
3614 ward's estate, and the guardian is subject to removal and to  
3615 imposition of personal liability through a proceeding for  
3616 surcharge, in addition to any other remedies otherwise available.

3617 (4) In the event of a breach by the guardian of the guardian's  
3618 fiduciary duty, the court shall take action to protect the ward and  
3619 the ward's assets upon petition by an interested person.

3620

3621 745.1310 Purchasers and lenders protected.

3622 No person or entity purchasing, leasing, or taking a mortgage,  
3623 pledge, or other lien from a guardian shall be bound to see that  
3624 the money or other things of value paid to the guardian are  
3625 actually needed or properly applied. The person or entity is not  
3626 otherwise bound as to the proprieties or expediencies of the acts  
3627 of the guardian.

3628

3629 745.1311 Temporary delegation of authority to surrogate.

3630 (1) A guardian may designate a surrogate guardian to exercise the  
3631 powers of the guardian if the guardian is unavailable to act. A  
3632 person designated as a surrogate guardian under this section must  
3633 be a professional guardian or a member of the Florida Bar qualified  
3634 to act under s. 745.501.

3635 (2) (a) A guardian must file a petition with the court requesting  
3636 permission to designate a surrogate guardian.

3637 (b) If the court approves the designation, the order must specify

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3638 the name and business address of the surrogate guardian and the  
3639 duration of appointment, which may not exceed 30 days. The court  
3640 may extend the appointment for good cause shown. The surrogate  
3641 guardian may exercise all powers of the guardian unless limited by  
3642 court order. The surrogate guardian must file with the court an  
3643 oath swearing or affirming that the surrogate guardian will  
3644 faithfully perform the duties delegated. The court may require the  
3645 surrogate guardian to post a bond.

3646 (3) This section does not limit the responsibility of the guardian  
3647 to the ward and to the court. The guardian is liable for the acts  
3648 of the surrogate guardian. The guardian may terminate the authority  
3649 of the surrogate guardian by filing a written notice of termination  
3650 with the court.

3651 (4) The surrogate guardian is subject to the jurisdiction of the  
3652 court as if appointed to serve as guardian.

3653  
3654 745.1312 Multiple guardians.

3655 (1) When separate guardians of person and property have been  
3656 appointed, the guardians must consult with each other when the  
3657 decision of one may affect the duties and responsibilities of the  
3658 other. If there is disagreement as to a proposed action, the  
3659 decision of the guardian within whose authority the decision lies  
3660 shall prevail. The other guardian may petition for judicial review  
3661 pursuant to s. 745.1006.

3662 (2) If there are two guardians of person or two guardians of  
3663 property and there are disagreements between the co-guardians as to  
3664 a proposed action, neither may act as to such proposed action  
3665 without court order.

3666 (3) If there are three or more guardians of person or property, a

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3667 majority of them may act. A guardian who serves on all other  
3668 guardians a written objection to a proposed action shall not be  
3669 liable for the action taken. Any guardian may petition the court  
3670 for direction as to such matter.

3671

3672 745.1313 Effect of power of attorney and trust.

3673 (1) An interested person may file a verified petition in a  
3674 guardianship proceeding seeking authority for the guardian to file  
3675 an action to have a ward's trust, trust amendment or power of  
3676 attorney determined to be invalid pursuant to s. 745.903(10). The  
3677 petition must allege that the petitioner has a good faith belief  
3678 that the ward's trust, trust amendment, or durable power of  
3679 attorney is invalid, and state a reasonable factual basis for that  
3680 belief.

3681 (2) The petition shall be served on all interested persons by the  
3682 petitioner.

3683 (3) The court shall consider such petition at a hearing with notice  
3684 to all interested persons and may, for cause, find that such trust,  
3685 trust amendment or durable power of attorney is not an appropriate  
3686 alternative to guardianship of property.

3687 (4) The appointment of a guardian does not limit the court's power  
3688 to determine that certain authority granted under a durable power  
3689 of attorney is to remain exercisable by the agent.

3690

3691 745.1314 Suspension of power of attorney before incapacity  
3692 determination.

3693 (1) At any time during proceedings to determine incapacity but  
3694 before the entry of an order determining incapacity, the authority  
3695 granted under an alleged incapacitated person's power of attorney

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3696 to a parent, spouse, child, or grandchild is suspended when an  
3697 interested person files a verified petition stating that a specific  
3698 power of attorney should be suspended for any of the following  
3699 grounds:

3700 (a) The agent's decisions are not in accord with the alleged  
3701 incapacitated person's known desires;

3702 (b) The power of attorney is invalid;

3703 (c) The agent has failed to discharge the agent's duties or  
3704 incapacity or illness renders the agent incapable of discharging  
3705 the agent's duties;

3706 (d) The agent has abused the agent's powers; or

3707 (e) There is a danger that the property of the alleged  
3708 incapacitated person may be wasted, misappropriated, or lost unless  
3709 the authority under the power of attorney is suspended.

3710 Grounds for suspending a power of attorney do not include the  
3711 existence of a dispute between the agent and the petitioner which  
3712 is more appropriate for resolution in some other forum or a legal  
3713 proceeding other than a guardianship proceeding.

3714 (2) The verified petition must:

3715 (a) Identify one or more of the grounds in subsection (1);

3716 (b) Include specific statements of fact showing that grounds exist  
3717 to justify the relief sought; and

3718 (3) Upon the earlier of (a) the filing of a response to the  
3719 petition by the agent under the power of attorney, or (b) 10 days  
3720 after the service of the petition on the agent under the power of  
3721 attorney, the court shall schedule the petition for an expedited  
3722 hearing. Unless an emergency arises and the agent's response sets  
3723 forth the nature of the emergency, the property or matter involved,  
3724 and the power to be exercised by the agent, notice must be given to

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3725 all interested persons, the alleged incapacitated person, and the  
3726 alleged incapacitated person's attorney. The court order following  
3727 the hearing must set forth what powers the agent is permitted to  
3728 exercise, if any, pending the outcome of the petition to determine  
3729 incapacity.

3730 (4) In addition to any other remedy authorized by law, a court may  
3731 award reasonable attorney fees and costs to an agent who  
3732 successfully challenges the suspension of the power of attorney if  
3733 the petitioner's petition was made in bad faith.

3734 (5) The suspension of authority granted to persons other than a  
3735 parent, spouse, child, or grandchild shall be as provided in  
3736 s. 709.2109.

3737

3738 745.1315 Abuse, neglect, or exploitation by a guardian.

3739 (1) A guardian may not abuse, neglect, or exploit a ward.

3740 (2) A guardian has committed exploitation when the guardian:

3741 (a) Commits fraud in obtaining appointment as a guardian;

3742 (b) Abuses the guardian's powers; or

3743 (c) Wastes, embezzles, or intentionally mismanages the assets of  
3744 the ward.

3745 (3) A person who believes that a guardian is abusing, neglecting,  
3746 or exploiting a ward shall report the incident to the central abuse  
3747 hotline of the Department of Children and Families.

3748 (4) This section shall be interpreted in conformity with s.  
3749 825.103.

3750

3751 Section 14. Part XIV of chapter 745, Florida Statutes,  
3752 consisting of sections 745.1401, 745.1402, 745.1403, 745.1404,  
3753 745.1405, 745.1406, 745.1407, 745.1408, 745.1409, 745.1410,

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3754 745.1411, 745.1412, 745.1413, 745.1414, 745.1415, 745.1416,  
3755 745.1417, 745.1418, 745.1419, and 745.1420, is created to read:

3756 PART XIV

3757 PUBLIC AND PROFESSIONAL GUARDIANS

3758 745.1401 Office of Public and Professional Guardians.

3759 There is created the Office of Public and Professional Guardians  
3760 within the Department of Elderly Affairs.

3761 (1) The Secretary of Elderly Affairs shall appoint the executive  
3762 director, who shall be the head of the Office of Public and  
3763 Professional Guardians. The executive director must be a member of  
3764 The Florida Bar, knowledgeable of guardianship law and of the  
3765 social services available to meet the needs of incapacitated  
3766 persons, shall serve on a full-time basis, and shall personally, or  
3767 through a representative of the office, carry out the purposes and  
3768 functions of the Office of Public and Professional Guardians in  
3769 accordance with state and federal law. The executive director shall  
3770 serve at the pleasure of and report to the secretary.

3771 (2) The executive director shall, within available resources:

3772 (a) Have oversight responsibilities for all public and professional  
3773 guardians.

3774 (b) Establish standards of practice for public and professional  
3775 guardians by rule, in consultation with professional guardianship  
3776 associations and other interested stakeholders, no later than  
3777 October 1, 2016. The executive director shall provide a draft of  
3778 the standards to the Governor, the Legislature, and the secretary  
3779 for review by August 1, 2016.

3780 (c) Review and approve the standards and criteria for the  
3781 education, registration, and certification of public and  
3782 professional guardians in Florida.



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3783 (3) The executive director's oversight responsibilities of  
3784 professional guardians must be finalized by October 1, 2016, and  
3785 shall include, but are not limited to:  
3786 (a) Developing and implementing a monitoring tool to ensure  
3787 compliance of professional guardians with the standards of practice  
3788 established by the Office of Public and Professional Guardians.  
3789 This monitoring tool may not include a financial audit as required  
3790 by the clerk of the circuit court under s. 745.1001.  
3791 (b) Developing procedures, in consultation with professional  
3792 guardianship associations and other interested stakeholders, for  
3793 the review of an allegation that a professional guardian has  
3794 violated the standards of practice established by the Office of  
3795 Public and Professional Guardians governing the conduct of  
3796 professional guardians.  
3797 (c) Establishing disciplinary proceedings, conducting hearings, and  
3798 taking administrative action pursuant to chapter 120.  
3799 (4) The executive director's oversight responsibilities of public  
3800 guardians shall include, but are not limited to:  
3801 (a) Reviewing the current public guardian programs in Florida and  
3802 other states.  
3803 (b) Developing, in consultation with local guardianship offices and  
3804 other interested stakeholders, statewide performance measures.  
3805 (c) Reviewing various methods of funding public guardianship  
3806 programs, the kinds of services being provided by such programs,  
3807 and the demographics of the wards. In addition, the executive  
3808 director shall review and make recommendations regarding the  
3809 feasibility of recovering a portion or all of the costs of  
3810 providing public guardianship services from the assets or income of  
3811 the wards.

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3812 (d) By January 1 of each year, providing a status report and  
3813 recommendations to the secretary which address the need for public  
3814 guardianship services and related issues.

3815 (e) Developing a guardianship training program curriculum that may  
3816 be offered to all guardians, whether public or private.

3817 (5) The executive director may provide assistance to local  
3818 governments or entities in pursuing grant opportunities. The  
3819 executive director shall review and make recommendations in the  
3820 annual report on the availability and efficacy of seeking Medicaid  
3821 matching funds. The executive director shall diligently seek ways  
3822 to use existing programs and services to meet the needs of public  
3823 wards.

3824 (6) The executive director may conduct or contract for  
3825 demonstration projects authorized by the Department of Elderly  
3826 Affairs, within funds appropriated or through gifts, grants, or  
3827 contributions for such purposes, to determine the feasibility or  
3828 desirability of new concepts of organization, administration,  
3829 financing, or service delivery designed to preserve the civil and  
3830 constitutional rights of persons of marginal or diminished  
3831 capacity. Any gifts, grants, or contributions for such purposes  
3832 shall be deposited in the Department of Elderly Affairs  
3833 Administrative Trust Fund.

3834

3835 745.1402 Professional guardian registration.

3836 (1) A professional guardian must register with the Office of Public  
3837 and Professional Guardians established in part XIV of this chapter.

3838 (2) Annual registration shall be made on forms furnished by the  
3839 Office of Public and Professional Guardians and accompanied by the

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3840 applicable registration fee as determined by rule. The fee may not  
3841 exceed \$100.

3842 (3) Registration must include the following:

3843 (a) Sufficient information to identify the professional guardian,  
3844 as follows:

3845 1. If the professional guardian is a natural person, the name,  
3846 address, date of birth, and employer identification or social  
3847 security number of the person.

3848 2. If the professional guardian is a partnership or association,  
3849 the name, address, and employer identification number of the  
3850 entity.

3851 (b) Documentation that the bonding and educational requirements of  
3852 s. 745.1403 have been met.

3853 (c) Sufficient information to distinguish a guardian providing  
3854 guardianship services as a public guardian, individually, through  
3855 partnership, corporation, or any other business organization.

3856 (4) Prior to registering a professional guardian, the Office of  
3857 Public and Professional Guardians must receive and review copies of  
3858 the credit and criminal investigations conducted under s. 745.504.  
3859 The credit and criminal investigations must have been completed  
3860 within the previous 2 years.

3861 (5) The executive director of the Office of Public and Professional  
3862 Guardians may deny registration to a professional guardian if the  
3863 executive director determines that the guardian's proposed  
3864 registration, including the guardian's credit or criminal  
3865 investigations, indicates that registering the professional  
3866 guardian would violate any provision of this chapter. If a  
3867 guardian's proposed registration is denied, the guardian has

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3868 standing to seek judicial review of the denial pursuant to chapter  
3869 120.

3870 (6) The Department of Elderly Affairs may adopt rules necessary to  
3871 administer this section.

3872 (7) A trust company, a state banking corporation or state savings  
3873 association authorized and qualified to exercise fiduciary powers  
3874 in this state, or a national banking association or federal savings  
3875 and loan association authorized and qualified to exercise fiduciary  
3876 powers in this state, may, but is not required to, register as a  
3877 professional guardian under this section. If a trust company, state  
3878 banking corporation, state savings association, national banking  
3879 association, or federal savings and loan association described in  
3880 this subsection elects to register as a professional guardian under  
3881 this subsection, the requirements of subsections (3) and (4) do not  
3882 apply and the registration must include only the name, address, and  
3883 employer identification number of the registrant, the name and  
3884 address of its registered agent, if any, and the documentation  
3885 described in paragraph (3) (b).

3886 (8) The Department of Elderly Affairs may contract with the Florida  
3887 Guardianship Foundation or other not-for-profit entity to register  
3888 professional guardians.

3889 (9) The department or its contractor shall ensure that the clerks  
3890 of the court and the chief judge of each judicial circuit receive  
3891 information about each registered professional guardian.

3892 (10) A state college or university or an independent college or  
3893 university that is located and chartered in Florida, that is  
3894 accredited by the Commission on Colleges of the Southern  
3895 Association of Colleges and Schools or the Accrediting Council for  
3896 Independent Colleges and Schools, and that confers degrees as

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3897 defined in s. 1005.02(7) may, but is not required to, register as a  
3898 professional guardian under this section. If a state college or  
3899 university or independent college or university elects to register  
3900 as a professional guardian under this subsection, the requirements  
3901 of subsections (3) and (4) do not apply and the registration must  
3902 include only the name, address, and employer identification number  
3903 of the registrant.

3904

3905 745.1403 Regulation of professional guardians; application; bond  
3906 required; educational requirements.

3907 (1) The provisions of this section are in addition to and  
3908 supplemental to any other provision of this code, except s.  
3909 745.505.

3910 (2) Each professional guardian who files a petition for appointment  
3911 after October 1, 1997, shall post a blanket fiduciary bond with the  
3912 clerk of the circuit court in the county in which the guardian's  
3913 primary place of business is located. The guardian shall provide  
3914 proof of the fiduciary bond to the clerks of each additional  
3915 circuit court in which the guardian is serving as a professional  
3916 guardian. The bond shall be maintained by the guardian in an amount  
3917 not less than \$50,000. The bond must cover all wards for whom the  
3918 guardian has been appointed at any given time. The liability of the  
3919 provider of the bond is limited to the face amount of the bond,  
3920 regardless of the number of wards for whom the professional  
3921 guardian has been appointed. The act or omissions of each employee  
3922 of a professional guardian who has direct contact with the ward or  
3923 access to the ward's assets is covered by the terms of such bond.  
3924 The bond must be payable to the Governor of the State of Florida  
3925 and the Governor's successors in office and conditioned on the

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3926 faithful performance of all duties by the guardian. In form the  
3927 bond must be joint and several. The bond is in addition to any  
3928 bonds required under s. 745.607. This subsection does not apply to  
3929 any attorney who is licensed to practice law in this state and who  
3930 is in good standing, to any financial institution as defined in s.  
3931 745.106, or a public guardian. The expenses incurred to satisfy the  
3932 bonding requirements prescribed in this section may not be paid  
3933 with the assets of any ward.

3934 (3) Each professional guardian defined in s. 745.106(30) and public  
3935 guardian must receive a minimum of 40 hours of instruction and  
3936 training. Each professional guardian must receive a minimum of 16  
3937 hours of continuing education every 2 calendar years after the year  
3938 in which the initial 40-hour educational requirement is met. The  
3939 instruction and education must be completed through a course  
3940 approved or offered by the Office of Public and Professional  
3941 Guardians. The expenses incurred to satisfy the educational  
3942 requirements prescribed in this section may not be paid with the  
3943 assets of any ward. This subsection does not apply to any attorney  
3944 who is licensed to practice law in this state or an institution  
3945 acting as guardian under s. 745.1402(7).

3946 (4) Each professional guardian must allow, at the guardian's  
3947 expense, an investigation of the guardian's credit history, and the  
3948 credit history of employees of the guardian, in a manner prescribed  
3949 by the Department of Elderly Affairs.

3950 (5) As required in s. 745.504, each professional guardian shall  
3951 allow a level 2 background screening of the guardian and employees  
3952 of the guardian in accordance with the provisions of s. 435.04.

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3953 (6) Each professional guardian is required to demonstrate  
3954 competency to act as a professional guardian by taking an  
3955 examination approved by the Department of Elderly Affairs.  
3956 (a) The Department of Elderly Affairs shall determine the minimum  
3957 examination score necessary for passage of guardianship  
3958 examinations.  
3959 (b) The Department of Elderly Affairs shall determine the procedure  
3960 for administration of the examination.  
3961 (c) The Department of Elderly Affairs or its contractor shall  
3962 charge an examination fee for the actual costs of the development  
3963 and the administration of the examination. The examination fee for  
3964 a guardian may not exceed \$500.  
3965 (d) The Department of Elderly Affairs may recognize passage of a  
3966 national guardianship examination in lieu of all or part of the  
3967 examination approved by the Department of Elderly Affairs, except  
3968 that all professional guardians must take and pass an approved  
3969 examination section related to Florida law and procedure.  
3970 (7) The Department of Elderly Affairs shall set the minimum score  
3971 necessary to demonstrate professional guardianship competency.  
3972 (8) The Department of Elderly Affairs shall waive the examination  
3973 requirement in subsection (6) if a professional guardian can  
3974 provide:  
3975 (a) Proof that the guardian has actively acted as a professional  
3976 guardian for 5 years or more; and  
3977 (b) A letter from a circuit judge before whom the professional  
3978 guardian practiced at least 1 year which states that the  
3979 professional guardian had demonstrated to the court competency as a  
3980 professional guardian.

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3981 (9) The court may not appoint any professional guardian who is not  
3982 registered by the Office of Public and Professional Guardians.

3983 (10) This section does not apply to a professional guardian or the  
3984 employees of that professional guardian when that guardian is a  
3985 trust company, a state banking corporation, state savings  
3986 association authorized and qualified to exercise fiduciary powers  
3987 in this state, or a national banking association or federal savings  
3988 and loan association authorized and qualified to exercise fiduciary  
3989 powers in this state.

3990

3991 745.1404 Complaints; disciplinary proceedings; penalties;  
3992 enforcement.

3993 (1) By October 1, 2016, the Office of Public and Professional  
3994 Guardians shall establish procedures to:

3995 (a) Review and, if determined legally sufficient, investigate any  
3996 complaint that a professional guardian has violated the standards  
3997 of practice established by the Office of Public and Professional  
3998 Guardians governing the conduct of professional guardians. A  
3999 complaint is legally sufficient if it contains ultimate facts that  
4000 show a violation of a standard of practice by a professional  
4001 guardian has occurred.

4002 (b) Initiate an investigation no later than 10 business days after  
4003 the Office of Public and Professional Guardians receives a  
4004 complaint.

4005 (c) Complete and provide initial investigative findings and  
4006 recommendations, if any, to the professional guardian and the  
4007 person who filed the complaint within 60 days after receipt.

4008 (d) Obtain supporting information or documentation to determine the  
4009 legal sufficiency of a complaint.



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4010 (e) Interview a ward, family member, or interested party to  
4011 determine the legal sufficiency of a complaint.

4012 (f) Dismiss any complaint if, at any time after legal sufficiency  
4013 is determined, it is found there is insufficient evidence to  
4014 support the allegations contained in the complaint.

4015 (g) Coordinate, to the greatest extent possible, with the clerks of  
4016 court to avoid duplication of duties with regard to the financial  
4017 audits prepared by the clerks pursuant to s. 745.1001.

4018 (2) The Office of Public and Professional Guardians shall establish  
4019 disciplinary proceedings, conduct hearings, and take administrative  
4020 action pursuant to chapter 120. Disciplinary actions may include,  
4021 but are not limited to, requiring a professional guardian to  
4022 participate in additional educational courses provided or approved  
4023 by the Office of Public and Professional Guardians, imposing  
4024 additional monitoring by the office of the guardianships to which  
4025 the professional guardian is appointed, and suspension or  
4026 revocation of a professional guardian's registration.

4027 (3) In any disciplinary proceeding that may result in the  
4028 suspension or revocation of a professional guardian's registration,  
4029 the Department of Elderly Affairs shall provide the professional  
4030 guardian and the person who filed the complaint:

4031 (a) A written explanation of how an administrative complaint is  
4032 resolved by the disciplinary process.

4033 (b) A written explanation of how and when the person may  
4034 participate in the disciplinary process.

4035 (c) A written notice of any hearing before the Division of  
4036 Administrative Hearings at which final agency action may be taken.

4037 (4) If the office makes a final determination to suspend or revoke  
4038 the professional guardian's registration, it must provide such

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4039 determination to the court of competent jurisdiction for any  
4040 guardianship case to which the professional guardian is currently  
4041 appointed.

4042 (5) If the office determines or has reasonable cause to suspect  
4043 that a vulnerable adult has been or is being abused, neglected, or  
4044 exploited as a result of a filed complaint or during the course of  
4045 an investigation of a complaint, it shall immediately report such  
4046 determination or suspicion to the central abuse hotline established  
4047 and maintained by the Department of Children and Families pursuant  
4048 to s. 415.103.

4049 (6) By October 1, 2016, the Department of Elderly Affairs shall  
4050 adopt rules to implement the provisions of this section.

4051

4052 745.1405 Grounds for discipline; penalties; enforcement.

4053 (1) The following acts by a professional guardian shall constitute  
4054 grounds for which the disciplinary actions specified in subsection

4055 (2) may be taken:

4056 (a) Making misleading, deceptive, or fraudulent representations in  
4057 or related to the practice of guardianship.

4058 (b) Violating any rule governing guardians or guardianships adopted  
4059 by the Office of Public and Professional Guardians.

4060 (c) Being convicted or found guilty of, or entering a plea of  
4061 guilty or nolo contendere to, regardless of adjudication, a crime  
4062 in any jurisdiction which relates to the practice of or the ability  
4063 to practice as a professional guardian.

4064 (d) Failing to comply with the educational course requirements  
4065 contained in s. 745.1403.

4066 (e) Having a registration, a license, or the authority to practice  
4067 a regulated profession revoked, suspended, or otherwise acted

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4068 against, including the denial of registration or licensure, by the  
4069 registering or licensing authority of any jurisdiction, including  
4070 its agencies or subdivisions, for a violation under Florida law or  
4071 similar law under a foreign jurisdiction. The registering or  
4072 licensing authority's acceptance of a relinquishment of  
4073 registration or licensure, stipulation, consent order, or other  
4074 settlement offered in response to or in anticipation of the filing  
4075 of charges against the registration or license shall be construed  
4076 as an action against the registration or license.

4077 (f) Knowingly filing a false report or complaint with the Office of  
4078 Public and Professional Guardians against another guardian.

4079 (g) Attempting to obtain, obtaining, or renewing a registration or  
4080 license to practice a profession by bribery, by fraudulent  
4081 misrepresentation, or as a result of an error by the Office of  
4082 Public and Professional Guardians which is known by the  
4083 professional guardian and not disclosed to the Office of Public and  
4084 Professional Guardians.

4085 (h) Failing to report to the Office of Public and Professional  
4086 Guardians any person who the professional guardian knows is in  
4087 violation of this chapter or the rules of the Office of Public and  
4088 Professional Guardians.

4089 (i) Failing to perform any statutory or legal obligation placed  
4090 upon a professional guardian.

4091 (j) Making or filing a report or record that the professional  
4092 guardian knows to be false, intentionally or negligently failing to  
4093 file a report or record required by state or federal law, or  
4094 willfully impeding or obstructing another person's attempt to do  
4095 so. Such reports or records shall include only those that are  
4096 signed in the guardian's capacity as a professional guardian.

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4097 (k) Using the position of guardian for the purpose of financial  
4098 gain by a professional guardian or a third party, other than the  
4099 funds awarded to the professional guardian by the court pursuant to  
4100 s. 745.113.

4101 (l) Violating a lawful order of the Office of Public and  
4102 Professional Guardians or failing to comply with a lawfully issued  
4103 subpoena of the Office of Public and Professional Guardians.

4104 (m) Improperly interfering with an investigation or inspection  
4105 authorized by statute or rule or with any disciplinary proceeding.

4106 (n) Using the guardian relationship to engage or attempt to engage  
4107 the ward, or an immediate family member or a representative of the  
4108 ward, in verbal, written, electronic, or physical sexual activity.

4109 (o) Failing to report to the Office of Public and Professional  
4110 Guardians in writing within 30 days after being convicted or found  
4111 guilty of, or entered a plea of nolo contendere to, regardless of  
4112 adjudication, a crime in any jurisdiction.

4113 (p) Being unable to perform the functions of a professional  
4114 guardian with reasonable skill by reason of illness or use of  
4115 alcohol, drugs, narcotics, chemicals, or any other type of  
4116 substance or as a result of any mental or physical condition.

4117 (q) Failing to post and maintain a blanket fiduciary bond pursuant  
4118 to s. 745.1403.

4119 (r) Failing to maintain all records pertaining to a guardianship  
4120 for a reasonable time after the court has closed the guardianship  
4121 matter.

4122 (s) Violating any provision of this chapter or any rule adopted  
4123 pursuant thereto.

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4124 (2) When the Office of Public and Professional Guardians finds a  
4125 professional guardian guilty of violating subsection (1), it may  
4126 enter an order imposing one or more of the following penalties:  
4127 (a) Refusal to register an applicant as a professional guardian.  
4128 (b) Suspension or permanent revocation of a professional guardian's  
4129 registration.  
4130 (c) Issuance of a reprimand or letter of concern.  
4131 (d) Requirement that the professional guardian undergoes treatment,  
4132 attends continuing education courses, submits to reexamination, or  
4133 satisfies any terms that are reasonably tailored to the violations  
4134 found.  
4135 (e) Requirement that the professional guardian pay restitution to a  
4136 ward or the ward's estate, if applicable, of any funds obtained or  
4137 disbursed through a violation of any statute, rule, or other legal  
4138 authority.  
4139 (f) Requirement that the professional guardian undergo remedial  
4140 education.  
4141 (3) In determining what action is appropriate, the Office of Public  
4142 and Professional Guardians must first consider what sanctions are  
4143 necessary to safeguard wards and to protect the public. Only after  
4144 those sanctions have been imposed may the Office of Public and  
4145 Professional Guardians consider and include in the order  
4146 requirements designed to mitigate the circumstances and  
4147 rehabilitate the professional guardian.  
4148 (4) The Office of Public and Professional Guardians shall adopt by  
4149 rule and periodically review the disciplinary guidelines applicable  
4150 to each ground for disciplinary action that may be imposed by the  
4151 Office of Public and Professional Guardians pursuant to this  
4152 chapter.

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4153 (5) It is the intent of the Legislature that the disciplinary  
4154 guidelines specify a meaningful range of designated penalties based  
4155 upon the severity and repetition of specific offenses and that  
4156 minor violations be distinguished from those which endanger the  
4157 health, safety, or welfare of a ward or the public; that such  
4158 guidelines provide reasonable and meaningful notice to the public  
4159 of likely penalties that may be imposed for proscribed conduct; and  
4160 that such penalties be consistently applied by the Office of Public  
4161 and Professional Guardians.

4162 (6) The Office of Public and Professional Guardians shall by rule  
4163 designate possible mitigating and aggravating circumstances and the  
4164 variation and range of penalties permitted for such circumstances.

4165 (a) An administrative law judge, in recommending penalties in any  
4166 recommended order, must follow the disciplinary guidelines  
4167 established by the Office of Public and Professional Guardians and  
4168 must state in writing any mitigating or aggravating circumstance  
4169 upon which a recommended penalty is based if such circumstance  
4170 causes the administrative law judge to recommend a penalty other  
4171 than that provided in the disciplinary guidelines.

4172 (b) The Office of Public and Professional Guardians may impose a  
4173 penalty other than those provided for in the disciplinary  
4174 guidelines upon a specific finding in the final order of mitigating  
4175 or aggravating circumstances.

4176 (7) In addition to, or in lieu of, any other remedy or criminal  
4177 prosecution, the Office of Public and Professional Guardians may  
4178 file a proceeding in the name of the state seeking issuance of an  
4179 injunction or a writ of mandamus against any person who violates  
4180 any provision of this chapter or any provision of law with respect  
4181 to professional guardians or the rules adopted pursuant thereto.

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4182 (8) Notwithstanding chapter 120, if the Office of Public and  
4183 Professional Guardians determines that revocation of a professional  
4184 guardian's registration is the appropriate penalty, the revocation  
4185 is permanent.

4186 (9) If the Office of Public and Professional Guardians makes a  
4187 final determination to suspend or revoke the professional  
4188 guardian's registration, the office must provide the determination  
4189 to the court of competent jurisdiction for any guardianship case to  
4190 which the professional guardian is currently appointed.

4191 (10) The purpose of this section is to facilitate uniform  
4192 discipline for those actions made punishable under this section  
4193 and, to this end, a reference to this section constitutes a general  
4194 reference under the doctrine of incorporation by reference.

4195 (11) The Office of Public and Professional Guardians shall adopt  
4196 rules to administer this section.

4197  
4198 745.1406 Office of Public and Professional Guardians; appointment,  
4199 notification.

4200 (1) The executive director of the Office of Public and Professional  
4201 Guardians, after consultation with the chief judge and other  
4202 circuit judges within the judicial circuit and with appropriate  
4203 advocacy groups and individuals and organizations who are  
4204 knowledgeable about the needs of incapacitated persons, may  
4205 establish, within a county in the judicial circuit or within the  
4206 judicial circuit, one or more offices of public guardian and, if so  
4207 established, shall create a list of persons best qualified to serve  
4208 as the public guardian, who have been investigated pursuant to s.  
4209 745.504. The public guardian must have knowledge of the legal  
4210 process and knowledge of social services available to meet the

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4211 needs of incapacitated persons. The public guardian shall maintain  
4212 a staff or contract with professionally qualified individuals to  
4213 carry out the guardianship functions, including an attorney who has  
4214 experience in probate areas and another person who has a master's  
4215 degree in social work, or a gerontologist, psychologist, registered  
4216 nurse, or nurse practitioner. A public guardian that is a nonprofit  
4217 corporate guardian under s. 745.502 must receive tax-exempt status  
4218 from the United States Internal Revenue Service.

4219 (2) The executive director shall appoint or contract with a public  
4220 guardian from the list of candidates described in subsection (1). A  
4221 public guardian must meet the qualifications for a guardian as  
4222 prescribed in s. 745.501(1)(a). Upon appointment of the public  
4223 guardian, the executive director shall notify the chief judge of  
4224 the judicial circuit and the Chief Justice of the Supreme Court of  
4225 Florida, in writing, of the appointment.

4226 (3) If the needs of the county or circuit do not require a full-  
4227 time public guardian, a part-time public guardian may be appointed  
4228 at reduced compensation.

4229 (4) A public guardian, whether full-time or part-time, may not hold  
4230 any position that would create a conflict of interest.

4231 (5) The public guardian is to be appointed for a term of 4 years,  
4232 after which the public guardian's appointment must be reviewed by  
4233 the executive director, and may be reappointed for a term of up to  
4234 4 years. The executive director may suspend a public guardian with  
4235 or without the request of the chief judge. If a public guardian is  
4236 suspended, the executive director shall appoint an acting public  
4237 guardian as soon as possible to serve until such time as a  
4238 permanent replacement is selected. A public guardian may be removed  
4239 from office during the term of office only by the executive



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4240 director who must consult with the chief judge prior to said  
4241 removal. A recommendation of removal made by the chief judge must  
4242 be considered by the executive director.

4243 (6) Public guardians who have been previously appointed by a chief  
4244 judge prior to the effective date of this act pursuant to this  
4245 section may continue in their positions until the expiration of  
4246 their term pursuant to their agreement. However, oversight of all  
4247 public guardians shall transfer to the Office of Public and  
4248 Professional Guardians upon the effective date of this act. The  
4249 executive director of the Office of Public and Professional  
4250 Guardians shall be responsible for all future appointments of  
4251 public guardians pursuant to this act.

4252  
4253 745.1407 Powers and duties.

4254 (1) A public guardian may serve as a guardian of a person  
4255 adjudicated incapacitated under this chapter if there is no family  
4256 member or friend, other person, bank, or corporation willing and  
4257 qualified to serve as guardian.

4258 (2) The public guardian shall be vested with all the powers and  
4259 duties of a guardian under this chapter, except as otherwise  
4260 provided by law.

4261 (3) The public guardian shall primarily serve incapacitated persons  
4262 who are of limited financial means, as defined by contract or rule  
4263 of the Department of Elderly Affairs. The public guardian may serve  
4264 incapacitated persons of greater financial means to the extent the  
4265 Department of Elderly Affairs determines to be appropriate.

4266 (4) The public guardian shall be authorized to employ sufficient  
4267 staff to carry out the duties of the public guardian's office.

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4268 (5) The public guardian may delegate to assistants and other  
4269 members of the public guardian's staff the powers and duties of the  
4270 office of public guardian, except as otherwise limited by law. The  
4271 public guardian shall retain ultimate responsibility for the  
4272 discharge of the public guardian's duties and responsibilities.

4273 (6) Upon appointment as guardian of an incapacitated person, a  
4274 public guardian shall endeavor to locate a family member or friend,  
4275 other person, bank, or corporation who is qualified and willing to  
4276 serve as guardian. Upon determining that there is someone qualified  
4277 and willing to serve as guardian, either the public guardian or the  
4278 qualified person shall petition the court for appointment of a  
4279 successor guardian.

4280 (7) A public guardian may not commit a ward to a treatment  
4281 facility, as defined in s. 394.455(47), without an involuntary  
4282 placement proceeding as provided by law.

4283 (8) When a person is appointed successor public guardian, the  
4284 successor public guardian immediately succeeds to all rights,  
4285 duties, responsibilities, and powers of the preceding public  
4286 guardian.

4287 (9) When the position of public guardian is vacant, subordinate  
4288 personnel employed under subsection (4) shall continue to act as if  
4289 the position of public guardian were filled.

4290

4291 745.1408 Costs of public guardian.

4292 (1) All costs of administration, including filing fees, shall be  
4293 paid from the budget of the office of public guardian. No costs of  
4294 administration, including filing fees, shall be recovered from the  
4295 assets or the income of the ward.

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4296 (2) In any proceeding for appointment of a public guardian, or in  
4297 any proceeding involving the estate of a ward for whom a public  
4298 guardian has been appointed guardian, the court shall waive any  
4299 court costs or filing fees.  
4300  
4301 745.1409 Preparation of budget.  
4302 Each public guardian, whether funded in whole or in part by money  
4303 raised through local efforts, grants, or any other source or  
4304 whether funded in whole or in part by the state, shall prepare a  
4305 budget for the operation of the office of public guardian to be  
4306 submitted to the Office of Public and Professional Guardians. As  
4307 appropriate, the Office of Public and Professional Guardians will  
4308 include such budgetary information in the Department of Elderly  
4309 Affairs' legislative budget request. The office of public guardian  
4310 shall be operated within the limitations of the General  
4311 Appropriations Act and any other funds appropriated by the  
4312 Legislature to that particular judicial circuit, subject to the  
4313 provisions of chapter 216. The Department of Elderly Affairs shall  
4314 make a separate and distinct request for an appropriation for the  
4315 Office of Public and Professional Guardians. However, this section  
4316 may not be construed to preclude the financing of any operations of  
4317 the office of public guardian by moneys raised through local effort  
4318 or through the efforts of the Office of Public and Professional  
4319 Guardians.  
4320  
4321 745.1410 Procedures and rules.  
4322 The public guardian, subject to the oversight of the Office of  
4323 Public and Professional Guardians, is authorized to:

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4324 (1) Formulate and adopt necessary procedures to assure the  
4325 efficient conduct of the affairs of the ward and general  
4326 administration of the office and staff.

4327 (2) Contract for services necessary to discharge the duties of the  
4328 office.

4329 (3) Accept the services of volunteer persons or organizations and  
4330 provide reimbursement for proper and necessary expenses.

4331

4332 745.1411 Surety bond.

4333 Upon taking office, a public guardian shall file a bond with surety  
4334 as prescribed in s. 45.011 to be approved by the clerk. The bond  
4335 shall be payable to the Governor and the Governor's successors in  
4336 office, in the penal sum of not less than \$5,000 nor more than  
4337 \$25,000, conditioned on the faithful performance of all duties by  
4338 the guardian. The amount of the bond shall be fixed by the majority  
4339 of the judges within the judicial circuit. In form the bond shall  
4340 be joint and several. The bond shall be purchased from the funds of  
4341 the local office of public guardian.

4342

4343 745.1412 Reports and standards.

4344 (1) The public guardian shall keep and maintain proper financial,  
4345 case control, and statistical records on all matters in which the  
4346 public guardian serves as guardian.

4347 (2) No report or disclosure of the ward's personal and medical  
4348 records shall be made, except as authorized by law.

4349 (3) A public guardian shall file an annual report on the operations  
4350 of the office of public guardian, in writing, by September 1 for  
4351 the preceding fiscal year with the Office of Public and

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4352 Professional Guardians, which shall have responsibility for  
4353 supervision of the operations of the office of public guardian.  
4354 (4) Within 6 months of appointment as guardian of a ward, the  
4355 public guardian shall submit to the clerk of the court for  
4356 placement in the ward's guardianship file and to the executive  
4357 director of the Office of Public and Professional Guardians a  
4358 report on the public guardian's efforts to locate a family member or  
4359 friend, other person, bank, or corporation to act as guardian of  
4360 the ward and a report on the ward's potential to be restored to  
4361 capacity.  
4362 (5) (a) Each office of public guardian shall undergo an independent  
4363 audit by a qualified certified public accountant at least once  
4364 every 2 years. A copy of the audit report shall be submitted to the  
4365 Office of Public and Professional Guardians.  
4366 (b) In addition to regular monitoring activities, the Office of  
4367 Public and Professional Guardians shall conduct an investigation  
4368 into the practices of each office of public guardian related to the  
4369 managing of each ward's personal affairs and property. If feasible,  
4370 the investigation shall be conducted in conjunction with the  
4371 financial audit of each office of public guardian under paragraph  
4372 (a).  
4373 (6) A public guardian shall ensure that each of the guardian's  
4374 wards is personally visited by the public guardian or by one of the  
4375 guardian's professional staff at least once each calendar quarter.  
4376 During this personal visit, the public guardian or the professional  
4377 staff person shall assess:  
4378 (a) The ward's physical appearance and condition;  
4379 (b) The appropriateness of the ward's current living situation; and

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4380 (c) The need for any additional services and the necessity for  
4381 continuation of existing services, taking into consideration all  
4382 aspects of social, psychological, educational, direct service,  
4383 health, and personal care needs.

4384 (7) The ratio for professional staff to wards shall be 1  
4385 professional to 40 wards. The Office of Public and Professional  
4386 Guardians may increase or decrease the ratio after consultation  
4387 with the local public guardian and the chief judge of the circuit  
4388 court. The basis for the decision to increase or decrease the  
4389 prescribed ratio must be included in the annual report to the  
4390 secretary.

4391  
4392 745.1413 Public records exemption.  
4393 The home addresses, telephone numbers, dates of birth, places of  
4394 employment, and photographs of current or former public guardians  
4395 and employees with fiduciary responsibility; the names, home  
4396 addresses, telephone numbers, dates of birth, and places of  
4397 employment of the spouses and children of such persons; and the  
4398 names and locations of schools and day care facilities attended by  
4399 the children of such persons are exempt from s. 119.07(1) and s.  
4400 24(a), Art. I of the State Constitution. As used in this section,  
4401 the term "employee with fiduciary responsibility" means an employee  
4402 of a public guardian who has the ability to direct any transactions  
4403 of a ward's funds, assets, or property; who under the supervision  
4404 of the guardian, manages the care of the ward; or who makes any  
4405 health care decision, as defined in s. 765.101, on behalf of the  
4406 ward. This exemption applies to information held by an agency  
4407 before, on, or after July 1, 2018. An agency that is the custodian  
4408 of the information specified in this section shall maintain the

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4409 exempt status of that information only if the current or former  
4410 public guardians and employees with fiduciary responsibility submit  
4411 to the custodial agency a written request for maintenance of the  
4412 exemption. This section is subject to the Open Government Sunset  
4413 Review Act in accordance with s. 119.15 and shall stand repealed on  
4414 October 2, 2023, unless reviewed and saved from repeal through  
4415 reenactment by the Legislature.

4416  
4417 745.1414 Access to records by the Office of Public and Professional  
4418 Guardians; confidentiality.

4419 (1) Notwithstanding any other provision of law to the contrary, any  
4420 medical, financial, or mental health records held by an agency, or  
4421 the court and its agencies, or financial audits prepared by the  
4422 clerk of the court pursuant to s. 745.1001 and held by the court,  
4423 which are necessary as part of an investigation of a guardian as a  
4424 result of a complaint filed with the Office of Public and  
4425 Professional Guardians to evaluate the public guardianship system,  
4426 to assess the need for additional public guardianship, or to  
4427 develop required reports, shall be provided to the Office of Public  
4428 and Professional Guardians or its designee upon that office's  
4429 request. Any confidential or exempt information provided to the  
4430 Office of Public and Professional Guardians shall continue to be  
4431 held confidential or exempt as otherwise provided by law.

4432 (2) All records held by the Office of Public and Professional  
4433 Guardians relating to the medical, financial, or mental health of  
4434 vulnerable adults as defined in chapter 415, persons with a  
4435 developmental disability as defined in chapter 393, or persons with  
4436 a mental illness as defined in chapter 394, shall be confidential

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4437 and exempt from s. 119.07(1) and s. 24(a), Art. I of the State  
4438 Constitution.

4439  
4440 745.1415 Direct-support organization; definition; use of property;  
4441 board of directors; audit; dissolution.

4442 (1) DEFINITION.— As used in this section, the term "direct-support  
4443 organization" means an organization whose sole purpose is to  
4444 support the Office of Public and Professional Guardians and is:

4445 (a) A not-for-profit corporation incorporated under chapter 617 and  
4446 approved by the Department of State;

4447 (b) Organized and operated to conduct programs and activities; to  
4448 raise funds; to request and receive grants, gifts, and bequests of  
4449 moneys; to acquire, receive, hold, invest, and administer, in its  
4450 own name, securities, funds, objects of value, or other property,  
4451 real or personal; and to make expenditures to or for the direct or  
4452 indirect benefit of the Office of Public and Professional  
4453 Guardians; and

4454 (c) Determined by the Office of Public and Professional Guardians  
4455 to be consistent with the goals of the office, in the best  
4456 interests of the state, and in accordance with the adopted goals  
4457 and mission of the Department of Elderly Affairs and the Office of  
4458 Public and Professional Guardians.

4459 (2) CONTRACT.— The direct-support organization shall operate under  
4460 a written contract with the Office of Public and Professional  
4461 Guardians. The written contract must provide for:

4462 (a) Certification by the Office of Public and Professional  
4463 Guardians that the direct-support organization is complying with  
4464 the terms of the contract and is doing so consistent with the goals  
4465 and purposes of the office and in the best interests of the state.



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4466 This certification must be made annually and reported in the  
4467 official minutes of a meeting of the direct-support organization.  
4468 (b) The reversion of monies and property held in trust by the  
4469 direct-support organization:  
4470 1. To the Office of Public and Professional Guardians if the  
4471 direct-support organization is no longer approved to operate for  
4472 the office;  
4473 2. To the Office of Public and Professional Guardians if the  
4474 direct-support organization ceases to exist;  
4475 3. To the Department of Elderly Affairs if the Office of Public and  
4476 Professional Guardians ceases to exist; or  
4477 4. To the state if the Department of Elderly Affairs ceases to  
4478 exist.  
4479 The fiscal year of the direct-support organization shall begin on  
4480 July 1 of each year and end on June 30 of the following year.  
4481 (c) The disclosure of the material provisions of the contract, and  
4482 the distinction between the Office of Public and Professional  
4483 Guardians and the direct-support organization, to donors of gifts,  
4484 contributions, or bequests, including such disclosure on all  
4485 promotional and fundraising publications.  
4486 (3) BOARD OF DIRECTORS.— The Secretary of Elderly Affairs shall  
4487 appoint a board of directors for the direct-support organization  
4488 from a list of nominees submitted by the executive director of the  
4489 Office of Public and Professional Guardians.  
4490 (4) USE OF PROPERTY.—The Department of Elderly Affairs may permit,  
4491 without charge, appropriate use of fixed property and facilities of  
4492 the department or the Office of Public and Professional Guardians  
4493 by the direct-support organization. The department may prescribe  
4494 any condition with which the direct-support organization must

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4495 | comply in order to use fixed property or facilities of the  
4496 | department or the Office of Public and Professional Guardians.  
4497 | (5) MONIES.—Any monies may be held in a separate depository account  
4498 | in the name of the direct-support organization and subject to the  
4499 | provisions of the written contract with the Office of Public and  
4500 | Professional Guardians. Expenditures of the direct-support  
4501 | organization shall be expressly used to support the Office of  
4502 | Public and Professional Guardians. The expenditures of the direct-  
4503 | support organization may not be used for the purpose of lobbying as  
4504 | defined in s. 11.045.  
4505 | (6) PUBLIC RECORDS.—Personal identifying information of a donor or  
4506 | prospective donor to the direct-support organization who desires to  
4507 | remain anonymous is confidential and exempt from s. 119.07(1) and  
4508 | s. 24(a), Art. I of the State Constitution.  
4509 | (7) AUDIT.—The direct-support organization shall provide for an  
4510 | annual financial audit in accordance with s. 215.981.  
4511 | (8) DISSOLUTION.—A not-for-profit corporation incorporated under  
4512 | chapter 617 that is determined by a circuit court to be  
4513 | representing itself as a direct-support organization created under  
4514 | this section, but that does not have a written contract with the  
4515 | Office of Public and Professional Guardians in compliance with this  
4516 | section, is considered to meet the grounds for a judicial  
4517 | dissolution described in s. 617.1430(1)(a). The Office of Public  
4518 | and Professional Guardians shall be the recipient for all assets  
4519 | held by the dissolved corporation which accrued during the period  
4520 | that the dissolved corporation represented itself as a direct-  
4521 | support organization created under this section.  
4522 |

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4523 745.1416 Joining Forces for Public Guardianship grant program;  
4524 purpose.  
4525 The Legislature establishes the Joining Forces for Public  
4526 Guardianship matching grant program for the purpose of assisting  
4527 counties to establish and fund community-supported public  
4528 guardianship programs. The Joining Forces for Public Guardianship  
4529 matching grant program shall be established and administered by the  
4530 Office of Public and Professional Guardians within the Department  
4531 of Elderly Affairs. The purpose of the program is to provide  
4532 startup funding to encourage communities to develop and administer  
4533 locally funded and supported public guardianship programs to  
4534 address the needs of indigent and incapacitated residents.  
4535 (1) The Office of Public and Professional Guardians may distribute  
4536 the grant funds as follows:  
4537 (a) As initial startup funding to encourage counties that have no  
4538 office of public guardian to establish an office, or as initial  
4539 startup funding to open an additional office of public guardian  
4540 within a county whose public guardianship needs require more than  
4541 one office of public guardian.  
4542 (b) As support funding to operational offices of public guardian  
4543 that demonstrate a necessity for funds to meet the public  
4544 guardianship needs of a particular geographic area in the state  
4545 which the office serves.  
4546 (c) To assist counties that have an operating public guardianship  
4547 program but that propose to expand the geographic area or  
4548 population of persons they serve, or to develop and administer  
4549 innovative programs to increase access to public guardianship in  
4550 this state.

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4551 Notwithstanding this subsection, the executive director of the  
4552 office may award emergency grants if the executive director  
4553 determines that the award is in the best interests of public  
4554 guardianship in this state. Before making an emergency grant, the  
4555 executive director must obtain the written approval of the  
4556 Secretary of Elderly Affairs. Subsections (2), (3), and (4) do not  
4557 apply to the distribution of emergency grant funds.

4558 (2) One or more grants may be awarded within a county. However, a  
4559 county may not receive an award that equals, or multiple awards  
4560 that cumulatively equal, more than 20 percent of the total amount  
4561 of grant funds appropriated during any fiscal year.

4562 (3) If an applicant is eligible and meets the requirements to  
4563 receive grant funds more than once, the Office of Public and  
4564 Professional Guardians shall award funds to prior awardees in the  
4565 following manner:

4566 (a) In the second year that grant funds are awarded, the cumulative  
4567 sum of the award provided to one or more applicants within the same  
4568 county may not exceed 75 percent of the total amount of grant funds  
4569 awarded within that county in year one.

4570 (b) In the third year that grant funds are awarded, the cumulative  
4571 sum of the award provided to one or more applicants within the same  
4572 county may not exceed 60 percent of the total amount of grant funds  
4573 awarded within that county in year one.

4574 (c) In the fourth year that grant funds are awarded, the cumulative  
4575 sum of the award provided to one or more applicants within the same  
4576 county may not exceed 45 percent of the total amount of grant funds  
4577 awarded within that county in year one.

4578 (d) In the fifth year that grant funds are awarded, the cumulative  
4579 sum of the award provided to one or more applicants within the same

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4580 county may not exceed 30 percent of the total amount of grant funds  
4581 awarded within that county in year one.

4582 (e) In the sixth year that grant funds are awarded, the cumulative  
4583 sum of the award provided to one or more applicants within the same  
4584 county may not exceed 15 percent of the total amount of grant funds  
4585 awarded within that county in year one.

4586 The Office of Public and Professional Guardians may not award grant  
4587 funds to any applicant within a county that has received grant  
4588 funds for more than 6 years.

4589 (4) Grant funds shall be used only to provide direct services to  
4590 indigent wards, except that up to 10 percent of the grant funds may  
4591 be retained by the awardee for administrative expenses.

4592 (5) Implementation of the program is subject to a specific  
4593 appropriation by the Legislature in the General Appropriations Act.  
4594

4595 745.1417 Program administration; duties of the Office of Public and  
4596 Professional Guardians.

4597 The Office of Public and Professional Guardians shall administer  
4598 the grant program. The office shall:

4599 (1) Publicize the availability of grant funds to entities that may  
4600 be eligible for the funds.

4601 (2) Establish an application process for submitting a grant  
4602 proposal.

4603 (3) Request, receive, and review proposals from applicants seeking  
4604 grant funds.

4605 (4) Determine the amount of grant funds each awardee may receive  
4606 and award grant funds to applicants.

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4607 (5) Develop a monitoring process to evaluate grant awardees, which  
4608 may include an annual monitoring visit to each awardee's local  
4609 office.

4610 (6) Ensure that persons or organizations awarded grant funds meet  
4611 and adhere to the requirements of this act.

4612

4613 745.1418 Eligibility.

4614 (1) Any person or organization that has not been awarded a grant  
4615 must meet all of the following conditions to be eligible to receive  
4616 a grant:

4617 (a) The applicant must meet or directly employ staff that meet the  
4618 minimum qualifications for a public guardian under this chapter.

4619 (b) The applicant must have already been appointed by, or is  
4620 pending appointment by, the Office of Public and Professional  
4621 Guardians to become an office of public guardian in this state.

4622 (2) Any person or organization that has been awarded a grant must  
4623 meet all of the following conditions to be eligible to receive  
4624 another grant:

4625 (a) The applicant must meet or directly employ staff that meet the  
4626 minimum qualifications for a public guardian under this chapter.

4627 (b) The applicant must have been appointed by, or is pending  
4628 reappointment by, the Office of Public and Professional Guardians  
4629 to be an office of public guardian in this state.

4630 (c) The applicant must have achieved a satisfactory monitoring  
4631 score during the applicant's most recent evaluation.

4632

4633 745.1419 Grant application requirements; review criteria; awards  
4634 process.

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4635 Grant applications must be submitted to the Office of Public and  
4636 Professional Guardians for review and approval.  
4637 (1) A grant application must contain:  
4638 (a) The specific amount of funds being requested.  
4639 (b) The proposed annual budget for the office of public guardian  
4640 for which the applicant is applying on behalf of, including all  
4641 sources of funding, and a detailed report of proposed expenditures,  
4642 including administrative costs.  
4643 (c) The total number of wards the applicant intends to serve during  
4644 the grant period.  
4645 (d) Evidence that the applicant has:  
4646 1. Attempted to procure funds and has exhausted all possible other  
4647 sources of funding; or  
4648 2. Procured funds from local sources, but the total amount of the  
4649 funds collected or pledged is not sufficient to meet the need for  
4650 public guardianship in the geographic area that the applicant  
4651 intends to serve.  
4652 (e) An agreement or confirmation from a local funding source, such  
4653 as a county, municipality, or any other public or private  
4654 organization, that the local funding source will contribute  
4655 matching funds to the public guardianship program totaling not less  
4656 than \$1 for every \$1 of grant funds awarded. For purposes of this  
4657 section, an applicant may provide evidence of agreements or  
4658 confirmations from multiple local funding sources showing that the  
4659 local funding sources will pool their contributed matching funds to  
4660 the public guardianship program for a combined total of not less  
4661 than \$1 for every \$1 of grant funds awarded. In-kind contributions,  
4662 such as materials, commodities, office space, or other types of  
4663 facilities, personnel services, or other items as determined by

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4664 rule shall be considered by the office and may be counted as part  
4665 or all of the local matching funds.

4666 (f) A detailed plan describing how the office of public guardian  
4667 for which the applicant is applying on behalf of will be funded in  
4668 future years.

4669 (g) Any other information determined by rule as necessary to assist  
4670 in evaluating grant applicants.

4671 (2) If the Office of Public and Professional Guardians determines  
4672 that an applicant meets the requirements for an award of grant  
4673 funds, the office may award the applicant any amount of grant funds  
4674 the executive director deems appropriate, if the amount awarded  
4675 meets the requirements of this act. The office may adopt a rule  
4676 allocating the maximum allowable amount of grant funds which may be  
4677 expended on any ward.

4678 (3) A grant awardee must submit a new grant application for each  
4679 year of additional funding.

4680 (4) (a) In the first year of the Joining Forces for Public  
4681 Guardianship program's existence, the Office of Public and  
4682 Professional Guardians shall give priority in awarding grant funds  
4683 to those entities that:

4684 1. Are operating as appointed offices of public guardians in this  
4685 state;

4686 2. Meet all of the requirements for being awarded a grant under  
4687 this act; and

4688 3. Demonstrate a need for grant funds during the current fiscal  
4689 year due to a loss of local funding formerly raised through court  
4690 filing fees.



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4691 (b) In each fiscal year after the first year that grant funds are  
4692 distributed, the Office of Public and Professional Guardians may  
4693 give priority to awarding grant funds to those entities that:

4694 1. Meet all of the requirements of this section and ss. 745.1416,  
4695 745.1417, and 745.1418 for being awarded grant funds; and

4696 2. Submit with their application an agreement or confirmation from  
4697 a local funding source, such as a county, municipality, or any  
4698 other public or private organization, that the local funding source  
4699 will contribute matching funds totaling an amount equal to or  
4700 exceeding \$2 for every \$1 of grant funds awarded by the office. An  
4701 entity may submit with its application agreements or confirmations  
4702 from multiple local funding sources showing that the local funding  
4703 sources will pool their contributed matching funds to the public  
4704 guardianship program for a combined total of not less than \$2 for  
4705 every \$1 of grant funds awarded. In-kind contributions allowable  
4706 under this section shall be evaluated by the Office of Public and  
4707 Professional Guardians and may be counted as part or all of the  
4708 local matching funds.

4709  
4710 745.1420 Confidentiality.

4711 (1) The following are confidential and exempt from the provisions  
4712 of s. 119.07(1) and s. 24(a), Art. I of the State Constitution,  
4713 when held by the Department of Elderly Affairs in connection with a  
4714 complaint filed and any subsequent investigation conducted pursuant  
4715 to this part, unless the disclosure is required by court order:

4716 (a) Personal identifying information of a complainant or ward.

4717 (b) All personal health and financial records of a ward.

4718 (c) All photographs and video recordings.

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4719 (2) Except as otherwise provided in this section, information held  
4720 by the department is confidential and exempt from s. 119.07(1) and  
4721 s. 24(a), Art. I of the State Constitution until the investigation  
4722 is completed or ceases to be active, unless the disclosure is  
4723 required by court order.

4724 (3) This section does not prohibit the department from providing  
4725 such information to any law enforcement agency, any other  
4726 regulatory agency in the performance of its official duties and  
4727 responsibilities, or the clerk of the circuit court pursuant to s.  
4728 745.1001.

4729 (4) The exemption under this section applies to all documents  
4730 received by the department in connection with a complaint before,  
4731 on, or after July 1, 2017.

4732 (5) This section is subject to the Open Government Sunset Review  
4733 Act in accordance with s. 119.15 and shall stand repealed on  
4734 October 2, 2022, unless reviewed and saved from repeal through  
4735 reenactment by the Legislature.

4736 Section 15. Part XV of chapter 745, Florida Statutes,  
4737 consisting of sections 745.1501, 745.1502, 745.1503, 745.1504,  
4738 745.1505, 745.1506, 745.1507, 745.1508, 745.1509, 745.1510,  
4739 745.1511, 745.1512, 745.1513, 745.1514, 745.1515, 745.1516,  
4740 745.1517, 745.1518, 745.1519, 745.1520, 745.1521, 745.1522,  
4741 745.1523, 745.1524, 745.1525, and 745.1526, is created to read:

4742 PART XV

4743 VETERANS' GUARDIANSHIP

4744 745.1501 Short title; scope of part.

4745 (1) This part shall be known and may be cited as the "Veterans'  
4746 Guardianship Law."

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4747 (2) The application of this part is limited to veterans and other  
4748 persons who are entitled to receive benefits from the United States  
4749 Department of Veterans Affairs. This part is not intended to  
4750 replace the general law relating to guardianship except insofar as  
4751 this part is inconsistent with the general law relating to  
4752 guardianship; in which event, this part and the general law  
4753 relating to guardianship shall be read together, with any conflict  
4754 between this part and the general law of guardianship to be  
4755 resolved by giving effect to this part.

4756

4757 745.1502 Definitions.

4758 As used in this part, the term:

4759 (1) "Adjudication by a court of competent jurisdiction" means a  
4760 judicial decision or finding that a person is or is not  
4761 incapacitated as provided in chapter 745 Part III.

4762 (2) "Adjudication by the United States Department of Veterans  
4763 Affairs" means a determination or finding that a person is  
4764 competent or incompetent on examination in accordance with the laws  
4765 and regulations governing the United States Department of Veterans  
4766 Affairs.

4767 (3) "Secretary" means the Secretary of Veterans Affairs as head of  
4768 the United States Department of Veterans Affairs or her or his  
4769 successor.

4770 (4) "Benefits" means arrears of pay, bonus, pension, compensation,  
4771 insurance, and all other moneys paid or payable by the United  
4772 States through the United States Department of Veterans Affairs by  
4773 reason of service in the Armed Forces of the United States.

4774 (5) "Estate" means income on hand and assets acquired in whole or  
4775 in part with income.

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4776 (6) "Guardian" means any person acting as a fiduciary for a ward's  
4777 person or the ward's estate, or both.

4778 (7) "Income" means moneys received from the United States  
4779 Department of Veterans Affairs as benefits, and revenue or profit  
4780 from any property acquired in whole or in part with such moneys.

4781 (8) "Person" means an individual, a partnership, a corporation, or  
4782 an association.

4783 (9) "United States Department of Veterans Affairs" means the United  
4784 States Department of Veterans Affairs or its predecessors or  
4785 successors.

4786 (10) "Ward" means a beneficiary of the United States Department of  
4787 Veterans Affairs.

4788  
4789 745.1503 Secretary of Veterans Affairs as party in interest.  
4790 The Secretary of Veterans Affairs shall be a party in interest in  
4791 any proceeding for the appointment or removal of a guardian or for  
4792 the removal of the disability of minority or mental incapacity of a  
4793 ward, and in any suit or other proceeding affecting in any manner  
4794 the administration by the guardian of the estate of any present or  
4795 former ward whose estate includes assets derived in whole or in  
4796 part from benefits heretofore or hereafter paid by the United  
4797 States Department of Veterans Affairs. Not less than 15 days prior  
4798 to hearing in such matter, notice in writing of the time and place  
4799 thereof shall be given by mail (unless waived in writing) to the  
4800 office of the United States Department of Veterans Affairs having  
4801 jurisdiction over the area in which any such suit or any such  
4802 proceeding is pending.

4803

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4804 745.1504 Procedure for commitment of veteran to United States  
4805 Department of Veterans Affairs hospital.  
4806 The procedure for the placement into a United States Department of  
4807 Veterans Affairs hospital of a ward hereunder shall be the  
4808 procedure prescribed in s. 394.4672.  
4809  
4810 745.1505 Appointment of guardian for ward authorized.  
4811 (1) Whenever, pursuant to any law of the United States or  
4812 regulation of the United States Department of Veterans Affairs, the  
4813 secretary requires, prior to the payment of benefits, that a  
4814 guardian be appointed for a ward, the appointment may be made in  
4815 the manner hereinafter provided.  
4816 (2) When a petition is filed for the appointment of a guardian of a  
4817 minor ward, a certificate of the secretary or the secretary's  
4818 authorized representative setting forth the age of such minor, as  
4819 shown by the records of the United States Department of Veterans  
4820 Affairs, and a statement that the appointment of a guardian is a  
4821 condition precedent to the payment of any moneys due to the minor  
4822 by the United States Department of Veterans Affairs are prima facie  
4823 evidence of the necessity for such appointment.  
4824 (3) When a petition is filed for the appointment of a guardian of a  
4825 mentally incompetent ward, a certificate of the secretary or the  
4826 secretary's authorized representative, setting forth the fact that  
4827 the person has been found incompetent and has been rated  
4828 incompetent by the United States Department of Veterans Affairs, on  
4829 examination in accordance with the laws and regulations governing  
4830 the United States Department of Veterans Affairs, and that the  
4831 appointment of a guardian is a condition precedent to the payment  
4832 of any moneys due to such person by the United States Department of

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4833 Veterans Affairs, is prima facie evidence of the necessity for such  
4834 appointment.

4835

4836 745.1506 Petition for appointment of guardian.

4837 (1) A petition for the appointment of a guardian may be filed in  
4838 any court of competent jurisdiction by, or on behalf of, any person  
4839 who under existing law is entitled to priority of appointment. If  
4840 no person is so entitled, or if the person so entitled neglects or  
4841 refuses to file such a petition within 30 days after the mailing of  
4842 notice by the United States Department of Veterans Affairs to the  
4843 last known address of such person, indicating the necessity for  
4844 filing the petition, a petition for such appointment may be filed  
4845 in any court of competent jurisdiction by, or on behalf of, any  
4846 responsible person residing in this state.

4847 (2) (a) The petition for appointment shall set forth:

- 4848 1. The name, age, and place of residence of the ward;  
4849 2. The names and places of residence of the nearest relative, if  
4850 known;  
4851 3. The fact that the ward is entitled to receive moneys payable by  
4852 or through the United States Department of Veterans Affairs;  
4853 4. The amount of moneys then due and the amount of probable future  
4854 payments;  
4855 5. The name and address of the person or institution, if any,  
4856 having actual custody of the ward; and  
4857 6. The name, age, relationship, if any, occupation, and address of  
4858 the proposed guardian.

4859 (b) In the case of a mentally incompetent ward, the petition shall  
4860 show that the ward has been found incompetent and has been rated  
4861 incompetent on examination by the United States Department of

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4862 Veterans Affairs, in accordance with the laws and regulations  
4863 governing the United States Department of Veterans Affairs.

4864  
4865 745.1507 Notice by court of petition filed for appointment of  
4866 guardian.

4867 (1) When a petition for the appointment of a guardian has been  
4868 filed pursuant to s. 745.1506, the court shall cause such notice to  
4869 be given as provided by the general guardianship law. In addition,  
4870 notice of the petition shall be given to the office of the United  
4871 States Department of Veterans Affairs having jurisdiction over the  
4872 area in which the court is located.

4873 (2) A copy of the petition provided for in s. 745.1506 shall be  
4874 mailed by the clerk of the court to the person or persons for whom  
4875 a guardian is to be appointed, the clerk of court mailing the copy  
4876 of the petition to the last known address of such person or persons  
4877 not less than 5 days prior to the date set for the hearing of the  
4878 petition by the court.

4879  
4880 745.1508 Persons who may be appointed guardian.

4881 (1) Notwithstanding any law with respect to priority of persons  
4882 entitled to appointment, or nomination in the petition, the court  
4883 may appoint some other individual or a bank or trust company as  
4884 guardian if the court determines that the appointment of the other  
4885 individual or bank or trust company would be in the best interest  
4886 of the ward.

4887 (2) It is unlawful for a circuit judge to appoint either herself or  
4888 himself, or a member of her or his family, as guardian for any  
4889 person entitled to the benefits provided for in 38 U.S.C., as

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4890 amended, except in a case when the person entitled to such benefits  
4891 is a member of the family of the circuit judge involved.

4892

4893 745.1509 Bond of guardian.

4894 When the appointment of a guardian is made, the guardian shall  
4895 execute and file a bond to be approved by the court in an amount  
4896 not less than the sum of the amount of moneys then due to the ward  
4897 and the amount of moneys estimated to become payable during the  
4898 ensuing year. The bond shall be in the form, and shall be  
4899 conditioned, as required of guardians appointed under the general  
4900 guardianship laws of this state. The court has the power to  
4901 require, from time to time, the guardian to file an additional  
4902 bond.

4903

4904 745.1510 Inventory of ward's property; guardian's failure to file  
4905 inventory; discharge; forfeiture of commissions.

4906 Every guardian shall, within 30 days after his or her qualification  
4907 and whenever subsequently required by the circuit judge, file in  
4908 the circuit court a complete inventory of all the ward's personal  
4909 property in his or her hands and, also, a schedule of all real  
4910 estate in the state belonging to his or her ward, describing it and  
4911 its quality, whether it is improved or not, and, if it is improved,  
4912 in what manner, and the appraised value of same. The failure on the  
4913 part of the guardian to conform to the requirements of this section  
4914 is a ground for the discharge of the guardian, in which case the  
4915 guardian shall forfeit all commissions.

4916

4917 745.1511 Guardian empowered to receive moneys due ward from the  
4918 United States Government.



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4919 A guardian appointed under the provisions of s. 745.1506 may  
4920 receive income and benefits payable by the United States through  
4921 the United States Department of Veterans Affairs and also has the  
4922 right to receive for the account of the ward any moneys due from  
4923 the United States Government in the way of arrears of pay, bonus,  
4924 compensation or insurance, or other sums due by reason of his or  
4925 her service (or the service of the person through whom the ward  
4926 claims) in the Armed Forces of the United States and any other  
4927 moneys due from the United States Government, payable through its  
4928 agencies or entities, together with the income derived from  
4929 investments of these moneys.

4930  
4931 745.1512 Guardian's application of estate funds for support and  
4932 maintenance of person other than ward.  
4933 A guardian shall not apply any portion of the estate of her or his  
4934 ward to the support and maintenance of any person other than her or  
4935 his ward, except upon order of the court after a hearing, notice of  
4936 which has been given to the proper office of the United States  
4937 Department of Veterans Affairs as provided in s. 745.1513.

4938  
4939 745.1513 Petition for support, or support and education, of ward's  
4940 dependents; payments of apportioned benefits prohibit contempt  
4941 action against veteran.

4942 (1) Any person who is dependent on a ward for support may petition  
4943 a court of competent jurisdiction for an order directing the  
4944 guardian of the ward's estate to contribute from the estate of the  
4945 ward to the support, or support and education, of the dependent  
4946 person, when the estate of the ward is derived in whole or in part  
4947 from payments of compensation, adjusted compensation, pension,

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4948 insurance, or other benefits made directly to the guardian of the  
4949 ward by the United States Department of Veterans Affairs. A notice  
4950 of the application for support, or support and education, shall be  
4951 given by the applicant to the office of the United States  
4952 Department of Veterans Affairs having jurisdiction over the area in  
4953 which the court is located at least 15 days before the hearing on  
4954 the application.

4955 (2) The grant or denial of an order for support, or support and  
4956 education, does not preclude a further petition for an increase,  
4957 decrease, modification, or termination of the allowance for such  
4958 support, or support and education, by either the petitioner or the  
4959 guardian.

4960 (3) The order for the support, or support and education, of the  
4961 petitioner is valid for any payment made pursuant to the order, but  
4962 no valid payment can be made after the termination of the  
4963 guardianship. The receipt of the petitioner shall be a sufficient  
4964 release of the guardian for payments made pursuant to the order.

4965 (4) When a claim for apportionment of benefits filed with the  
4966 United States Department of Veterans Affairs on behalf of a  
4967 dependent or dependents of a disabled veteran is approved by the  
4968 United States Department of Veterans Affairs, subsequent payments  
4969 of such apportioned benefits by the United States Department of  
4970 Veterans Affairs prohibit an action for contempt from being  
4971 instituted against the veteran.

4972  
4973 745.1514 Exemption of benefits from claims of creditors.  
4974 Except as provided by federal law, payments of benefits from the  
4975 United States Department of Veterans Affairs or the Social Security  
4976 Administration to or for the benefit of a disabled veteran or the

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4977 | veteran's surviving spouse or dependents are exempt from the claims  
4978 | of creditors and shall not be liable to attachment, levy, or  
4979 | seizure by or under any legal or equitable process whatever, either  
4980 | before or after the receipt of the payments by the guardian or the  
4981 | beneficiary.

4982 |  
4983 | 745.1515 Investment of funds of estate by guardian.

4984 | Every guardian shall invest the funds of the estate in such manner  
4985 | or in such securities, in which the guardian has no interest, as  
4986 | allowed by chapter 518.

4987 |  
4988 | 745.1516 Guardian's petition for authority to sell ward's real  
4989 | estate; notice by publication; penalties.

4990 | (1) When a guardian of the estate of a minor or an incompetent  
4991 | ward, which guardian has the control or management of any real  
4992 | estate that is the property of such minor or incompetent, deems it  
4993 | necessary or expedient to sell all or part of the real estate, the  
4994 | guardian shall apply, either in term time or in vacation by  
4995 | petition to the judge of the circuit court for the county in which  
4996 | the real estate is situated, for authority to sell all or part of  
4997 | the real estate. If the prayer of the petition appears to the judge  
4998 | to be reasonable and just and financially beneficial to the estate  
4999 | of the ward, the judge may authorize the guardian to sell the real  
5000 | estate described in the petition under such conditions as the  
5001 | interest of the minor or incompetent may, in the opinion of the  
5002 | judge, seem to require.

5003 | (2) The authority to sell the real estate described in the petition  
5004 | shall not be granted unless the guardian has given previous notice,  
5005 | published once a week for 4 successive weeks in a newspaper

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5006 published in the county where the application is made, of his or  
5007 her intention to make application to the judge for authority to  
5008 sell such real estate, the guardian setting forth in the notice the  
5009 time and place and to what judge the application will be made. If  
5010 the lands lie in more than one county, the application for such  
5011 authority shall be made in each county in which the lands lie.

5012 (3) The failure on the part of the guardian to comply with the  
5013 provisions of this section makes the guardian and the guardian's  
5014 bond agents individually responsible for any loss that may accrue  
5015 to the estate of the ward involved, and is a ground for the  
5016 immediate removal of such guardian as to his or her functions, but  
5017 does not discharge the guardian as to his or her liability or  
5018 discharge the liabilities of his or her sureties.

5019  
5020 745.1517 Guardian's accounts, filing with court and certification  
5021 to United States Department of Veterans Affairs; notice and hearing  
5022 on accounts; failure to account.

5023 (1) Every guardian who receives on account of his or her ward any  
5024 moneys from the United States Department of Veterans Affairs shall  
5025 annually file with the court on the anniversary date of the  
5026 appointment, in addition to such other accounts as may be required  
5027 by the court, a full, true, and accurate account under oath, which  
5028 account is an account of all moneys so received by him or her and  
5029 of all disbursements from such moneys, and which account shows the  
5030 balance of the moneys in his or her hands at the date of such  
5031 filing and shows how the moneys are invested. A certified copy of  
5032 each of such accounts filed with the court shall be sent by the  
5033 guardian to the office of the United States Department of Veterans  
5034 Affairs having jurisdiction over the area in which such court is

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5035 located. If the requirement of certification is waived in writing  
5036 by the United States Department of Veterans Affairs, an uncertified  
5037 copy of each of such accounts shall be sent.

5038 (2) The court, at its discretion or upon the petition of an  
5039 interested party, shall fix a time and place for the hearing on  
5040 such account; and notice of the hearing shall be given by the court  
5041 to the United States Department of Veterans Affairs not less than  
5042 15 days prior to the date fixed for the hearing.

5043 (3) The court need not appoint a guardian ad litem to represent the  
5044 ward at the hearing provided for in subsection (2). If the  
5045 residence of the next kin of the ward is known, notice by  
5046 registered mail shall be sent to such relative. Notice also shall  
5047 be served on the ward; or, if the ward is mentally incapable of  
5048 understanding the matter at issue, the notice may be served on the  
5049 person in charge of the institution where the ward is detained, or  
5050 on the person having charge or custody of the ward.

5051 (4) When a hearing on an account is required by the court or  
5052 requested in the petition of an interested party as provided in  
5053 subsection (2), the judge of the court on the day of the hearing as  
5054 provided for in subsection (2) shall carefully examine the vouchers  
5055 and audit and state the account between the guardian and ward.  
5056 Proper evidence shall be required in support of any voucher or item  
5057 of the account that may appear to the court not to be just and  
5058 proper, such evidence to be taken by affidavit or by any other  
5059 legal mode. If any voucher is rejected, the item or items covered  
5060 by the disapproval of any voucher or vouchers shall be taxed  
5061 against the guardian personally. After such examination, the court  
5062 shall render a decree upon the account, which shall be entered on  
5063 the record, and the account and vouchers shall be filed. Such

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5064 partial settlement shall be taken and presumed as correct on final  
5065 settlement of the guardianship.

5066 (5) If a guardian fails to file any account of the moneys received  
5067 by him or her from the United States Department of Veterans Affairs  
5068 on account of his or her ward within 30 days after such account is  
5069 required by either the court or the United States Department of  
5070 Veterans Affairs, or fails to furnish the United States Department  
5071 of Veterans Affairs a copy of his or her accounts as required by  
5072 subsection (1), such failure shall be a ground for the removal of  
5073 the guardian.

5074  
5075 745.1518 Certified copies of public records made available.  
5076 When a copy of any public record is required by the United States  
5077 Department of Veterans Affairs to be used in determining the  
5078 eligibility of any person to participate in benefits made available  
5079 by the United States Department of Veterans Affairs, the official  
5080 charged with the custody of such public record shall, without  
5081 charge, provide to the applicant for such benefits or any person  
5082 acting on her or his behalf, or to the authorized representative of  
5083 the United States Department of Veterans Affairs, a certified copy  
5084 of such record. For each and every certified copy so furnished by  
5085 the official, the official shall be paid by the board of county  
5086 commissioners the fee provided by law for copies.

5087  
5088 745.1519 Clerk of the circuit court; fees; duties.  
5089 Upon the filing of the petition for guardianship, granting of same,  
5090 and entering decree thereon, the clerk of the circuit court is  
5091 entitled to the service charge as provided by law, which shall  
5092 include the cost of recording the petition, bond, and decree and

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5093 the issuing of letters of guardianship. The certificate of the  
5094 secretary or the secretary's authorized representative provided for  
5095 in s. 745.1505 need not be recorded but must be kept in the file.  
5096 Upon issuing letters of guardianship or letters appointing a  
5097 guardian for the estate of a minor or incompetent, the clerk of the  
5098 circuit court shall send to the regional office of the United  
5099 States Department of Veterans Affairs having jurisdiction in this  
5100 state two certified copies of the letters and two certified copies  
5101 of the bond approved by the court, without charge or expense to the  
5102 estate involved. The clerk of the circuit court shall also send a  
5103 certified copy of such letters to the property appraiser and to the  
5104 tax collector in each county in which the ward owns real property.

5105  
5106 745.1520 Attorney's fee.  
5107 The fee for the attorney filing the petition and conducting the  
5108 proceedings shall be fixed by the court in an amount as small as  
5109 reasonably possible, not to exceed \$250. However, this section is  
5110 not to be interpreted to exclude a petition for extraordinary  
5111 attorney's fees, properly filed, and if approved by the United  
5112 States Department of Veterans Affairs, does not necessitate a  
5113 hearing before the court for approval, but the court shall enter  
5114 its order for withdrawal of said attorney's fees from the ward's  
5115 guardianship account accordingly.

5116  
5117 745.1521 Guardian's compensation; bond premiums.  
5118 The amount of compensation payable to a guardian shall not exceed 5  
5119 percent of the income of the ward during any year and may be taken,  
5120 by the guardian, on a monthly basis. In the event of extraordinary  
5121 services rendered by such guardian, the court may, upon petition

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5122 and after hearing on the petition, authorize additional  
5123 compensation for the extraordinary services, payable from the  
5124 estate of the ward. Provided that extraordinary services approved  
5125 by the United States Department of Veteran's Affairs do not require  
5126 a court hearing for approval of the fees, but shall require an  
5127 order authorizing the guardian to withdraw the amount from the  
5128 guardianship account. No compensation shall be allowed on the  
5129 corpus of an estate received from a preceding guardian. The  
5130 guardian may be allowed from the estate of her or his ward  
5131 reasonable premiums paid by the guardian to any corporate surety  
5132 upon the guardian's bond.

5133  
5134 745.1522 Discharge of guardian of minor or incompetent ward.  
5135 When a minor ward, for whom a guardian has been appointed under the  
5136 provisions of this part or other laws of this state, attains his or  
5137 her majority and, if such minor ward has been incompetent, is  
5138 declared competent by the United States Department of Veterans  
5139 Affairs and the court, or when an incompetent ward who is not a  
5140 minor is declared competent by the United States Department of  
5141 Veterans Affairs and the court, the guardian shall, upon making a  
5142 satisfactory accounting, be discharged upon a petition filed for  
5143 that purpose.

5144  
5145 745.1523 Final settlement of guardianship; notice required;  
5146 guardian ad litem fee; papers required by United States Department  
5147 of Veterans Affairs.  
5148 On the final settlement of the guardianship, the notice provided  
5149 herein for partial settlement must be given and the other  
5150 proceedings conducted as in the case of partial settlement, except



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5151 that a guardian ad litem may be appointed to represent the ward,  
5152 the fee of which guardian ad litem shall in no case exceed \$150.  
5153 However, if the ward has been pronounced competent, is shown to be  
5154 mentally sound, appears in court, and is 18 years of age, the  
5155 settlement may be had between the guardian and the ward under the  
5156 direction of the court without notice to the next of kin, or the  
5157 appointment of a guardian ad litem. A certified copy of the final  
5158 settlement so made in every case must be filed with the United  
5159 States Department of Veterans Affairs by the clerk of the court.

5160

5161 745.1524 Notice of appointment of general guardian; closing of  
5162 veteran's guardianship; transfer of responsibilities and penalties  
5163 to general guardian.

5164 When the appointment of a general guardian has been made in the  
5165 proper court and such guardian has qualified and taken charge of  
5166 the other property of the ward, the general guardian shall file  
5167 notice of such appointment in the court in which the veteran's  
5168 guardianship is pending and have the veteran's guardianship settled  
5169 up and closed so that the general guardian may take charge of the  
5170 moneys referred to and described in ss. 745.1505(2) and (3) and  
5171 745.1511. When the appointment of a general guardian, whether for  
5172 an incompetent or minor child or another beneficiary entitled to  
5173 the benefits provided in 38 U.S.C., as amended, has been confirmed  
5174 by the court having jurisdiction, such general guardian is  
5175 responsible and is subject to the provisions and penalties  
5176 contained in 38 U.S.C., as amended, as well as the requirements  
5177 pertaining to guardians as set forth in this part.

5178

5179 745.1525 Construction and application of part.

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5180 This part shall be construed liberally to secure the beneficial  
5181 intents and purposes of this part and applies only to beneficiaries  
5182 of the United States Department of Veterans Affairs. It shall be so  
5183 interpreted and construed as to effectuate its general purpose of  
5184 making the welfare of such beneficiaries the primary concern of  
5185 their guardians and of the court.

5186

5187 745.1526 Annual guardianship report.

5188 Guardians appointed under the Veterans' Guardianship Law shall not  
5189 be required to comply with the provisions of s. 745.805 or s.

5190 745.813.

5191

5192 Section 16. Chapter 744 is repealed.

5193

5194 Section 17. This act shall take effect on July 1, 2020 and  
5195 shall apply to all proceedings pending before such date and all  
5196 proceedings commenced on or after the effective date.

5197



# The Florida Bar

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Tallahassee, FL 32399-2300

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## LEGISLATIVE OR POLITICAL POSITION REQUEST FORM

### GENERAL INFORMATION

Submitted by: *(list name of section, division, committee, TFB group, or individual name)*

M. Travis Hayes, Chair, Probate Law and Procedure Committee, RPPTL

Address: *(address and phone #)*

5551 Ridgewood Drive, Suite 501, Naples, FL 34108

239/514-1000 extension 2015

Position Level: *(TFB section/division/committee)*

TFB RPPTL/Probate/Probate Law and Procedure

### PROPOSED ADVOCACY

- All requests for legislative and political positions must be presented to the Board of Governors by completing this form and attaching a copy of any existing or proposed legislation or a detailed presentation of the issue.
- Select Section I below if the issue is legislative, II if the issue is political. Regardless, Section III must be completed.

If Applicable, List the Following:

(Bill or PCB #)

(Sponsor)

\_\_\_\_\_  
\_\_\_\_\_

\_\_\_\_\_  
\_\_\_\_\_

Indicate Position:  Support  Oppose  Technical or Other Non-Partisan Assistance

#### I. Proposed Wording of Legislative Position for Official Publication

To support revisions to Sections 732.507 and 736.1105, Florida Statutes, to clarify uncertainty contained within the Florida Probate Code and the Florida Trust Code, dealing with devises through will or trust to the former spouse of a decedent.

**II. Political Proposals:**

**III. Reasons For Proposed Advocacy:**

A. Is the proposal consistent with *Keller vs. State Bar of California*, 110 S. Ct. 2228 (1990), and *The Florida Bar v. Schwarz*, 552 So. 2d 1094 (Fla. 1981)?

Yes.

B. Which goal or objective of the Bar's strategic plan is advanced by the proposal?

N/A

C. Does the proposal relate to: (check all that apply)

- Regulating the profession.
- Improving the quality of legal services
- Improving the functioning of the system of justice
- Increasing the availability of legal services to the public
- Regulation of trust accounts
- Education, ethics, competency, and integrity of the legal profession

D. Additional information:

The proposed statutory revisions address the anomalous situation illustrated in *Gordon v. Fishman* — where the ex-spouse of a deceased testator or settlor takes under the will or revocable trust simply because the testamentary instrument was executed prior to the marriage. Amending §732.507 and §736.1106 in that manner will harmonize the statutes with §732.703, which makes no reference to marital status of the decedent, and eliminates this unintended consequence.

**PRIOR POSITIONS TAKEN ON THIS ISSUE**

Please indicate any prior Bar or section/divisions/committee 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**

_____	_____	_____
TFB Section/Division/Committee	Support/Oppose	Date

**Others (attach list if more than one)**

_____	_____	_____
TFB Section/Division/Committee	Support/Oppose	Date

**REFERRALS TO OTHER SECTIONS, COMMITTEES OR LEGAL ORGANIZATIONS**

A request for action on a position must be circulated to sections and committees that might be interested in the issue. The Legislation Committee and Board of Governors may delay final action on a request if the below section is not completed. Please attach referrals and responses to this form. If you do not believe other sections and committees are affected and you did not circulate this form to them, please provide details below.

**Referrals**

Name of Group or Organization	Support, Oppose or No-Position
Florida Bar Family Law Section	No Response
Florida Bar Elder Law Section	No Position

**Reasons for Non-Referrals:**

**CONTACTS**

**Board & Legislation Committee Appearance** *(list name, address and phone #)*

Jon Scuderi, Legislative Co-Chair of the RPPTL Section  
 850 Park Shore Drive, Suite 203, Naples, FL 34102  
 239/436-1988

**Appearances before Legislators** *(list name and phone # of those having direct contact before House/Senate committees)*

Peter M. Dunbar and Martha Edenfield; Dean Mead & Dunbar, P.A.  
 215 South Monroe Street, Suite 815, Tallahassee, FL 32501  
 850/999-4100

**Meetings with Legislators/staff** *(list name and phone # of those having direct contact with legislators)*

Same

Submit this form and attachments to the Office of General Counsel of The Florida Bar -  
<mailto:jhooks@floridabar.org>, (850) 561-5662. Upon receipt, staff will schedule your request for final Bar action; this  
 may involve a separate appearance before the Legislation Committee unless otherwise advised.

**Real Property, Probate and Trust Law Section of The Florida Bar**  
**White Paper**  
**Proposed Revisions to Sections 732.507 and 736.1105, Florida Statutes**

**I. SUMMARY.**

The proposed legislation would revise and restate Sections 732.507 and 736.1105, *Florida Statutes*, to clarify that the provisions of a will or revocable trust that provide for a former spouse shall be disregarded regardless of whether the instrument was executed prior to the marriage or during the marriage, unless otherwise saved by clear intent to the contrary or by court order.

**II. CURRENT SITUATION.**

*The Will statute:* Current 732.507, *Florida Statutes*, dealing with the effect of subsequent dissolution of marriage, provides under subsection (2) in pertinent part

Any provision of a will executed by a married person that affects the spouse of that person shall become void upon divorce. After the divorce the will shall be administered and construed as if the former spouse had died at the time of divorce unless the will or the dissolution or divorce judgment expressly provides otherwise. *[underline emphasis added.]*

*The Trust statute:* Section 736.1105, dealing with the effect of subsequent dissolution of marriage as to a trust provision, provides under subsection (2) in pertinent part

736.1105 Dissolution of marriage; effect on revocable trust. Unless the trust instrument or the judgment for dissolution of marriage or divorce expressly provides otherwise, if a revocable trust is executed by a husband or wife as settlor prior to annulment of the marriage or entry of a judgment for dissolution of marriage or divorce of the settlor from the settlor's spouse, any provision of the trust that affects the settlor's spouse will become void upon annulment of the marriage or entry of the judgment of dissolution of marriage or divorce and any such trust shall be administered and construed as if the settlor's spouse had died on the date of the annulment or on entry of the judgment for dissolution of marriage or divorce. *[underline emphasis added.]*

Section 732.03 deals with the effect of divorce, essentially in beneficiary designations and pay-on-death/transfer-on-death situations. Subsection 2 of that statute provides that

□A designation made by or on behalf of the decedent providing for the payment or transfer at death of an interest in an asset to or for the benefit of the decedent's former spouse is void as of the time the decedent's marriage was □udicially dissolved or declared invalid by court order prior to the decedent's death□ .□

A clear and important distinction between the two will and trust statutes at issue and the pay-on-death/transfer-on-death statute is that pay-on-death/transfer-on-death statute does not require that the disposition at death *be made during the marriage*. Instead, □32.03 simply provides that any such designation to or for the benefit of an ex-spouse, whenever made, is void (unless otherwise saved, ratified or □udicially required, for example).

In 2018 DCA case, *Gordon v. Fishman* (253 So. 3d 1218, 2<sup>d</sup> DCA 2018), an unmarried testator executed a will that included a devise to his fiancē. The testator married his fiancē, then divorced, then died without changing his will. The 2d DCA in the *Gordon* case held that □32.50(2) is not applicable to treat the ex-spouse as predeceasing the testator because the will was not made *while the decedent was married*. The court simply points to the statutory requirement that for □32.50(2) to apply, the will must have been executed *during marriage*. The unintended consequence is that the ex-spouse *does* inherit under the will, simply because the will was executed prior to marriage.

Absent a specific intention expressed in the will, or savings provision such as ratification or □udicial requirement incidental to divorce, an ex-spouse should be treated as predeceasing the testator or trust settlor □regardless of when the will or revocable trust is executed.

### III. EFFECT OF PROPOSED CHANGES GENERALLY.

The proposed revisions to the statutes would clarify that the devise by a decedent to an ex-spouse under will or revocable trust would be rendered void, unless otherwise saved by court order, agreement or specific contrary indication, regardless of whether the testator or trust settlor was married to the ex-spouse at the time of the devise.

IV. ANALYSIS.

Section 32.50(2) will be clarified by eliminating the provision "executed by a married person," with the following

(2) Any provision of a will that affects the testator's spouse is void upon dissolution of marriage of the testator and such spouse, whether the marriage occurred before or after the execution of such will. Upon dissolution of marriage, the will shall be construed as if such spouse died at the time of the dissolution of marriage.

The current statute refers to divorce in an awkward manner. The statute could be clarified by using the definition of divorce under Chapter 61. To do so, the following subparagraph (a) is recommended to be added to 32.50(2)

(a) Dissolution of marriage occurs at the time the decedent's marriage is judicially dissolved or declared invalid by court order.

Lastly, the circumstances where the statutory presumption of predeceasing *do not* apply should be clarified as subparagraph (b) to 32.50(2)

(b) This subsection (2) shall not apply to invalidate a provision of a will

1. Executed by the testator after the dissolution of the marriage;
2. If there is a specific intention to the contrary stated in the will; or
3. If the dissolution of marriage judgment expressly provides otherwise.

Altogether, *the Will statute proposed revision to section 732.507*, is as follows

32.50 Effect of subsequent marriage, birth, adoption, or dissolution of marriage.

(1) Neither subsequent marriage, birth, nor adoption of descendants shall revoke the prior will of any person, but the pretermitted child or spouse shall inherit as set forth in ss. 32.301 and 32.302, regardless of the prior will.

(2) Any provision of a will that affects the testator's spouse is void upon dissolution of marriage of the testator and such spouse, whether the



marriage occurred before or after the execution of such will. Upon dissolution of marriage, the will shall be construed as if such spouse died at the time of the dissolution of marriage.

(a) Dissolution of marriage occurs at the time the decedent's marriage is judicially dissolved or declared invalid by court order.

(b) This subsection (2) shall not apply to invalidate a provision of a will

1. Executed by the testator after the dissolution of the marriage;

2. If there is a specific intention to the contrary stated in the will; or

3. If the dissolution of marriage judgment expressly provides otherwise.

*The Trust Code* section should also be revised in the same manner, and the **proposed revised §736.1105** is as follows

§36.1105. Effect of subsequent marriage, birth, adoption, or dissolution of marriage.

(1) Neither subsequent marriage, birth, nor adoption of descendants shall revoke the revocable trust of any person.

(2) Any provision of a revocable trust that affects the settlor's spouse is void upon dissolution of marriage of the settlor and such spouse, whether the marriage occurred before or after the execution of such revocable trust. Upon dissolution of marriage, the revocable trust shall be construed as if such spouse died at the time of the dissolution of marriage.

(a) Dissolution of marriage occurs at the time the decedent's marriage is judicially dissolved or declared invalid by court order.

(b) This subsection (2) shall not apply to invalidate a provision of a revocable trust

1. Executed by the settlor after the dissolution of the marriage;

2. If there is a specific intention to the contrary stated in the revocable trust; or

3. If the dissolution of marriage judgment expressly provides otherwise.

The recommended statutory revisions do not impact descendants or heirs of the ex-spouse.

Because the modification (and the existing statute) invalidates any provision of a will or revocable trust that affects the ex-spouse, this includes the right to serve as fiduciary.

The present Will and Trust statutes are inadequate and leave a trap for the unwary at the conclusion of what is typically a stressful time of divorce. A divorced party such as the decedent in *Gordon* would need to know that, although the Probate Code solves the problem of having provided for a former spouse, it only applies if the will or revocable trust was executed during the marriage. Once revised the statutes will clarify that a provision under a will or revocable trust that affects an ex-spouse is void regardless of whether the instrument was executed before or during the marriage, unless otherwise saved through specific intent or court order.

The proposed statutory revisions address the anomalous situation illustrated in *Gordon v. Fishman* where the ex-spouse of a deceased testator or settlor takes under the will or revocable trust simply because the testamentary instrument was executed prior to the marriage. Amending §§32.50 and §36.1105 in that manner will harmonize the statutes with §32.03, which makes no reference to marital status of the decedent, and eliminates this unintended consequence.

This legislative action is not regarded as remedial, and if enacted would only apply to decedents dying after the effective date.

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**  Elder Law (no position on this proposed legislation), Family Law (no response).

1 A bill to be entitled

2 An act relating to the effect of dissolution of marriage on  
 3 wills and trusts; modifying ss. 732.507 and 736.1105, Florida  
 4 Statutes, to clarify that the provisions of a will or revocable  
 5 trust providing for a former spouse shall be disregarded  
 6 regardless of whether the instrument was executed prior to or  
 7 during the marriage, unless otherwise saved by clear intent to  
 8 the contrary or by court order; providing an effective date.

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

10 Section 1. Section 732.507, Florida Statutes, is revised to  
 11 read:

12 732.507 - Effect of subsequent marriage, birth, adoption,  
 13 or dissolution of marriage.

14 (1) Neither subsequent marriage, birth, nor adoption of  
 15 descendants shall revoke the prior will of any person, but the  
 16 pretermitted child or spouse shall inherit as set forth in ss.  
 17 732.301 and 732.302, regardless of the prior will.

18 (2) Any provision of a will ~~executed by a married person~~  
 19 that affects the testator's spouse of that person shall become is  
 20 void upon ~~the divorce of that person or upon the dissolution or~~  
 21 ~~annulment of the marriage of the testator and such spouse,~~  
 22 whether the marriage occurred before or after the execution of  
 23 such will. After Upon the dissolution, divorce, or annulment, of  
 24 marriage, the will shall be ~~administered and construed as if the~~  
 25 ~~former~~ such spouse had died at the time of the dissolution,

26 ~~divorce, or annulment of the marriage, unless the will or the~~  
 27 ~~dissolution or divorce judgment expressly provides otherwise.~~

28 (a) Dissolution of marriage occurs at the time the  
 29 decendent's marriage is judicially dissolved or declared invalid  
 30 by court order.

31 (b) This subsection (2) shall not apply to invalidate a  
 32 provision of a will:

33 1. Executed by the testator after the dissolution of  
 34 the marriage;

35 2. If there is a specific intention to the contrary  
 36 stated in the will; or

37 3. If the dissolution of marriage judgment expressly  
 38 provides otherwise.

39 Section 2. Section 736.1105, Florida Statutes, is revised  
 40 to read:

41 736.1105 - ~~Dissolution of marriage; effect on revocable~~  
 42 ~~trust. Unless the trust instrument or the judgment for~~  
 43 ~~dissolution of marriage or divorce expressly provides otherwise,~~  
 44 ~~if a revocable trust is executed by a husband or wife as settlor~~  
 45 ~~prior to annulment of the marriage or entry of a judgment for~~  
 46 ~~dissolution of marriage or divorce of the settlor from the~~  
 47 ~~settlor's spouse, any provision of the trust that affects the~~  
 48 ~~settlor's spouse will become void upon annulment of the marriage~~  
 49 ~~or entry of the judgment of dissolution of marriage or divorce~~  
 50 ~~and any such trust shall be administered and construed as if the~~

51 ~~settlor's spouse had died on the date of the annulment or on~~  
 52 ~~entry of the judgment for dissolution of marriage or divorce.~~  
 53 Effect of subsequent marriage, birth, adoption, or dissolution of  
 54 marriage.

55 (1) Neither subsequent marriage, birth, nor adoption of  
 56 descendants shall revoke the revocable trust of any person.

57 (2) Any provision of a revocable trust that affects the  
 58 settlor's spouse is void upon dissolution of marriage of the  
 59 settlor and such spouse, whether the marriage occurred before or  
 60 after the execution of such revocable trust. Upon dissolution of  
 61 marriage, the revocable trust shall be construed as if such  
 62 spouse died at the time of the dissolution of marriage.

63 (a) Dissolution of marriage occurs at the time the  
 64 decedent's marriage is judicially dissolved or declared invalid  
 65 by court order.

66 (b) This subsection (2) shall not apply to invalidate a  
 67 provision of a revocable trust:

68 1. Executed by the settlor after the dissolution of the  
 69 marriage;

70 2. If there is a specific intention to the contrary  
 71 stated in the revocable trust; or

72 3. If the dissolution of marriage judgment expressly  
 73 provides otherwise.

74 Section 3. This act shall take effect upon becoming law.



# The Florida Bar

651 East Jefferson Street  
Tallahassee, FL 32399-2300

Joshua E. Doyle  
Executive Director

850/561-5600  
www.FLORIDABAR.org

## LEGISLATIVE OR POLITICAL POSITION REQUEST FORM

### GENERAL INFORMATION

**Submitted by:** *(list name of section, division, committee, TFB group, or individual name)*

Travis Hayes, Chair, Probate Law & Procedure Committee, RPPTL

**Address:** *(address and phone #)*  
(239) 514-1000

5551 Ridgewood Drive, Suite 501, Naples, Florida 34108

**Position Level:** *(TFB section/division/committee)*

FB RPPTL/Probate/Probate Law & Procedure Committee

### PROPOSED ADVOCACY

- All requests for legislative and political positions must be presented to the Board of Governors by completing this form and attaching a copy of any existing or proposed legislation or a detailed presentation of the issue.
- Select Section I below if the issue is legislative, II if the issue is political. Regardless, Section III must be completed.

#### If Applicable, List the Following:

(Bill or PCB #)

(Sponsor)

\_\_\_\_\_  
\_\_\_\_\_

\_\_\_\_\_  
\_\_\_\_\_

**Indicate Position:**  Support  Oppose  Technical or Other Non-Partisan Assistance

#### I. Proposed Wording of Legislative Position for Official Publication

Support revisions Section 69.031, Florida Statutes, permitting personal representatives to post a fiduciary bond in lieu of the imposition of a restricted depository account.

**II. Political Proposals:**

**III. Reasons For Proposed Advocacy:**

A. Is the proposal consistent with *Keller vs. State Bar of California*, 110 S. Ct. 2228 (1990), and *The Florida Bar v. Schwarz*, 552 So. 2d 1094 (Fla. 1981)?

Yes.

B. Which goal or objective of the Bar’s strategic plan is advanced by the proposal?

N/A

C. Does the proposal relate to: (*check all that apply*)

- Regulating the profession
- Improving the quality of legal services
- Improving the functioning of the system of justice
- Increasing the availability of legal services to the public
- Regulation of trust accounts
- Education, ethics, competency, and integrity of the legal profession

D. Additional Information:

**PRIOR POSITIONS TAKEN ON THIS ISSUE**

Please indicate any prior Bar or section/divisions/committee 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**

TFB Section/Division/Committee	Support/Oppose	Date
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**Others** (*attach list if more than one*)

TFB Section/Division/Committee	Support/Oppose	Date
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**REFERRALS TO OTHER SECTIONS, COMMITTEES OR LEGAL ORGANIZATIONS**

A request for action on a position must be circulated to sections and committees that might be interested in the issue. The Legislation Committee and Board of Governors may delay final action on a request if the below section is not completed. Please attach referrals and responses to this form. If you do not believe other sections and committees are affected and you did not circulate this form to them, please provide details below.

**Referrals**

Name of Group or Organization	Support, Oppose or No-Position
Elder Law Section of the Florida Bar	No-Position

**Reasons for Non-Referrals:**

**CONTACTS**

**Board & Legislation Committee Appearance** *(list name, address and phone #)*

Jon Scuderi, Legislative Co-Chair of the RPPTL Section, 850 Park Shore Drive, Suite 203, Naples, Florida 34102, 239-436-1988

**Appearances before Legislators** *(list name and phone # of those having direct contact before House/Senate committees)*

Peter M. Dunbar and Martha Edenfield, Dean, Mead & Dunbar, P.A., 215 South Monroe Street, Suite 815, Tallahassee, Florida 32301, Telephone: (850) 999-4100

**Meetings with Legislators/staff** *(list name and phone # of those having direct contact with legislators)*

Peter M. Dunbar and Martha Edenfield, Dean, Mead & Dunbar, P.A., 215 South Monroe Street, Suite 815, Tallahassee, Florida 32301, Telephone: (850) 999-4100

Submit this form and attachments to the Office of General Counsel of The Florida Bar – <mailto:jhooks@floridabar.org>, (850) 561-5662. Upon receipt, staff will schedule your request for final Bar action; this may involve a separate appearance before the Legislation Committee unless otherwise advised.

## WHITE PAPER

### Proposed Revisions to §69.031, Florida Statutes

#### I. SUMMARY

The proposed amendments to §69.031, Florida Statutes permit personal representatives to post a fiduciary bond in lieu of the imposition of a restricted depository account. This legislation promotes Florida's strong public policy of a speedy and efficient resolution of probates, ensures uniformity of estate administration among Florida's various counties, protects the interests of estate beneficiaries and creditors, and effectuates testamentary intent granting broad administrative powers to personal representatives. The bill does not have a fiscal impact on state funds.

#### II. CURRENT SITUATION

Currently, §69.031(1), Florida Statutes provides

When it is expedient in the judgment of any court having jurisdiction of any estate in process of administration by any guardian, curator, executor, administrator, trustee, receiver, or other officer, *because the size of the bond required of the officer is burdensome or for other cause, the court may order part or all of the personal assets of the estate placed with a bank, trust company, or savings and loan association . . . .*

In several circuit courts, §69.031(1) has been used to require restricted depository accounts for all probate estates. This state of affairs was recognized and reflected by the Fourth District Court of Appeal in a recent case. Goodstein v. Goodstein, 263 So. 3d 8, 80 (Fla. 4th DCA 2019) (The emphasized language makes it clear and unambiguous that a blanket policy providing for a depository to be used in all probate cases is improper.). Despite that holding, the practice continues in several judicial circuits, including the Eleventh Judicial Circuit (Miami-Dade County) and the Fifteenth Judicial Circuit (Palm Beach Counties). Those two circuits alone represented nearly sixteen percent (16%) of all new probate actions in the 2017-18 fiscal year, the most recent year for which data was available at the time of this writing.<sup>1</sup>

The practice of imposing mandatory restricted depository accounts is meant as an extraordinary remedy, applicable to only a limited number of estates, and imposed only after a court makes specific factual findings. See Goodstein at 81. Those courts ordering restricted depository accounts on all estates as a *de facto* rule not only disrupt the statutory balance between powers and duties of a personal representative, but also create a parallel probate process for decedents dying in just those counties.

A restricted depository account obliges personal representatives to obtain court approval prior to making even routine expenditures on behalf of the estate, which further clogs already strained court dockets and inevitably results in substantial delays in administration. Moreover, the accounts compel personal representatives to make the otherwise unnecessary expenditure of estate funds to pay their counsel to draft and file a pleading seeking that payment. For estates with

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<sup>1</sup> See Florida Office of the State Courts Administrator, FY 2017-18 Statistical Reference Guide at 6-4, <https://www.flcourts.org/content/download/430407/4673785/Chapter-6-Probate-FY-2017-18.pdf> (retrieved February 23, 2020).

unhappy or apathetic beneficiaries, the practice effectively requires full (and sometimes contested) evidentiary hearings to establish the propriety of the expenditures. The cost of these additional proceedings is significant and is often substantial in relation to the overall size of estates. Residuary beneficiaries bear the burden of the increased costs, though the rights of estate creditors could be impacted as well where an estate is insolvent.

That level of court supervision of the personal representative is not contemplated by the Florida Probate Code, which, by default, grants personal representatives broad power to deal with estate assets. Testators are presumed to understand the law applicable to their last wills and testaments but cannot be presumed to know the peculiar *de facto* policies adopted by their circuit court. Those testators expect that their personal representatives will be empowered to deal with their assets in much the same way that they would during their life and testators often go through great pains to select trusted and qualified persons or institutions to serve in that role. Accordingly, testators dying in those counties have their testamentary intent impaired as a result of the mandatory restricted depository accounts.

### **III. EFFECT OF PROPOSED CHANGES**

The proposed legislation makes two changes to §69.031, Florida Statutes. The first change is substantive and is the principal change in the proposed legislation—in situations where the probate court has properly made a determination under Goodstein that a restricted depository account is appropriate, §69.031, Florida Statutes is amended to add a provision permitting the personal representative to post and maintain a bond (for the value of the estate's personal property or "such other reasonable amount determined by the court") in lieu of the restricted depository account. Thus, personal representatives who are able to obtain a sufficient fiduciary bond may elect into the default statutory regime granting them the ability to freely deal in the assets of the estate. Estate beneficiaries and creditors are protected by the bond in the event of a breach by a personal representative who has insufficient assets to satisfy the judgment against him or her. All parties would benefit from reduced costs and increased efficiency.

The second change, revising "assets" to "property" is stylistic in nature, but brings the statute into conformity with the Florida Statutes, generally. While the term "personal property" appears throughout the Florida Statutes, the term "personal assets" seems only to be used to differentiate between the assets of an individual and that of an entity.

**IV. FISCAL IMPACT ON STATE AND LOCAL GOVERNMENTS – None.**

**V. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR – None.**

**VI. CONSTITUTIONAL ISSUES – None.**

**VII. OTHER INTERESTED PARTIES – Elder Law Section of the Florida Bar; Florida Bankers Association.**



A bill to be entitled

An act permitting personal representatives to post a fiduciary bond in lieu of the imposition of a restricted depository account.

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

Section 1. Section 69.031, Florida Statutes, is revised to read:

**69.031 Designated financial institutions for assets property in hands of guardians, curators, administrators, trustees, receivers, or other officers.—**

(1) When it is expedient in the judgment of any court having jurisdiction of any estate in process of administration by any guardian, curator, executor, administrator, trustee, receiver, or other officer, because the size of the bond required of the officer is burdensome or for other cause, the court may order part or all of the personal assets property of the estate placed with a bank, trust company, or savings and loan association (which savings and loan association is a member of the Federal Savings and Loan Insurance Corporation and doing business in this state) designated by the court, consideration being given to any bank, trust company or savings and loan association proposed by the officer. Notwithstanding the foregoing, in probate proceedings and in accordance with s. 733.402, the court shall allow the officer at any time to elect to post and maintain bond for the value of the personal property (or such other reasonable amount determined by the court) whereupon the court shall vacate or terminate any order establishing the depository. When the assets property are is placed with the designated financial institution, it shall file a receipt therefor in the name of the estate and give the officer a copy. Such receipt shall acknowledge the assets property

received by the financial institution. All interest, dividends, principal and other debts collected by the financial institution on account thereof shall be held by the financial institution in safekeeping, subject to the instructions of the officer authorized by order of the court directed to the financial institution.

(2) Accountings shall be made to the officer at reasonably frequent intervals. After the receipt for the original assets has been filed by the financial institution, the court shall waive the bond given or to be given or reduce it so that it shall apply only to the estate remaining in the hands of the officer, whichever the court deems proper.

(3) When the court has ordered any assets of an estate to be placed with a designated financial institution, any person or corporation having possession or control of any of the assets, or owing interest, dividends, principal or other debts on account thereof, shall pay and deliver such assets, interest, dividends, principal and other debts to the financial institution on its demand whether the officer has duly qualified or not, and the receipt of the financial institution relieves the person or corporation from further responsibility therefor.

(4) Any bank, trust company, or savings and loan association which is designated under this section, may accept or reject the designation in any instance, and shall file its acceptance or rejection with the court making the designation within 15 days after actual knowledge of the designation comes to the attention of the financial institution, and if the financial institution accepts, it shall be allowed a reasonable amount for its services and expenses which the court may allow as a charge against the assets placed with the financial institution.

Section 2. This act shall take effect upon becoming law.



# The Florida Bar

651 East Jefferson Street  
Tallahassee, FL 32399-2300

Joshua E. Doyle  
Executive Director

850/561-5600  
www.FLORIDABAR.org

## LEGISLATIVE OR POLITICAL POSITION REQUEST FORM

### GENERAL INFORMATION

**Submitted by:** *(list name of section, division, committee, TFB group, or individual name)*

Rich Caskey, Chair, Probate and Trust Litigation Committee of the Real Property, Property and Trust Law Section

**Address:** *(address and phone #)*

777 S. Harbour Island Blvd. Ste 940

Tampa, FL 33602 Phone No.: 813-443-5709

**Position Level:** *(TFB section/division/committee)*

Probate and Trust Litigation Committee, RPPTL, Florida Bar

### PROPOSED ADVOCACY

- All requests for legislative and political positions must be presented to the Board of Governors by completing this form and attaching a copy of any existing or proposed legislation or a detailed presentation of the issue.
- Select Section I below if the issue is legislative, II if the issue is political. Regardless, Section III must be completed.

#### If Applicable, List the Following:

(Bill or PCB #)

(Sponsor)

N/A

**Indicate Position:**  Support  Oppose  Technical or Other Non-Partisan Assistance

#### I. Proposed Wording of Legislative Position for Official Publication

Support legislation to change Fla. Stat. § 736.1008 so that the same statute of limitations for breach of trust against a trustee applies to directors, officers, and employees acting for the trustee.

**II. Political Proposals:**

**III. Reasons For Proposed Advocacy:**

A. Is the proposal consistent with *Keller vs. State Bar of California*, 110 S. Ct. 2228 (1990), and *The Florida Bar v. Schwarz*, 552 So. 2d 1094 (Fla. 1981)?

YES.

B. Which goal or objective of the Bar’s strategic plan is advanced by the proposal?

C. Does the proposal relate to: (*check all that apply*)

- Regulating the profession
- Improving the quality of legal services
- Improving the functioning of the system of justice
- Increasing the availability of legal services to the public
- Regulation of trust accounts
- Education, ethics, competency, and integrity of the legal profession

D. Additional Information:

Fla. Stat. 736.1008 allows a trustee to utilize a six-month statute of limitations when a matter is adequately disclosed in a trust disclosure document. Local and national banking associations are authorized to engage in trust business and serve as trustee in Florida. See Fla Stat. §§ 658.12(20) and 660.41. The same statute of limitations for claims of breach of trust against a trustee should apply to the trustee's employees, officers, and directors.

**PRIOR POSITIONS TAKEN ON THIS ISSUE**

Please indicate any prior Bar or section/divisions/committee 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**

N/A		
_____	_____	_____
TFB Section/Division/Committee	Support/Oppose	Date

**Others** (*attach list if more than one*)

_____	_____	_____
TFB Section/Division/Committee	Support/Oppose	Date



**REFERRALS TO OTHER SECTIONS, COMMITTEES OR LEGAL ORGANIZATIONS**

A request for action on a position must be circulated to sections and committees that might be interested in the issue. The Legislation Committee and Board of Governors may delay final action on a request if the below section is not completed. Please attach referrals and responses to this form. If you do not believe other sections and committees are affected and you did not circulate this form to them, please provide details below.

**Referrals**

Name of Group or Organization	Support, Oppose or No-Position
The Florida Bar Elder Law Section	No Position

**Reasons for Non-Referrals:**

**CONTACTS**

**Board & Legislation Committee Appearance** *(list name, address and phone #)*

Jon Scuderi, Goldman Felcoski & Stone, P.A., 850 Park Shore Drive, Suite 203, Naples, FL 34103, Telephone: 239-436-1988, Email: [jscuderi@gfsestatelaw.com](mailto:jscuderi@gfsestatelaw.com)  
Peter M. Dunbar, Dean, Mead & Dunbar, P.A., 215 South Monroe St., Suite 815, Tallahassee, FL, 32301, Telephone: 850-999-4100. Email: [pdunbar@deanmead.com](mailto:pdunbar@deanmead.com)  
Martha J. Edenfield, Dean, Mead & Dunbar, P.A., 215 South Monroe St., Suite 815, Tallahassee, FL, 32301, Telephone: 850-999-4100, Email: [medenfield@deanmead.com](mailto:medenfield@deanmead.com)

**Appearances before Legislators** *(list name and phone # of those having direct contact before House/Senate committees)*

Same as above.

**Meetings with Legislators/staff** *(list name and phone # of those having direct contact with legislators)*

Same as above.

Submit this form and attachments to the Office of General Counsel of The Florida Bar – <mailto:jhooks@floridabar.org>, (850) 561-5662. Upon receipt, staff will schedule your request for final Bar action; this may involve a separate appearance before the Legislation Committee unless otherwise advised.

## WHITE PAPER

### PROPOSED AMENDMENT OF F.S. SECTION 736.1008

#### A. SUMMARY

The proposed amendment adds language to Florida Statutes § 736.1008 so that the same statute of limitations for breach of trust against a trustee applies to directors, officers, and employees acting for the trustee.

#### B. CURRENT SITUATION

Section 736.1008 includes the statute of limitations for a beneficiary's claims against a trustee for a breach of trust. The trustee has the authority to adequately disclose matters in a trust disclosure document and include a limitations notice to utilize a six-month statute of limitations. "Trustee" is defined in the Florida Trust Code as "the original trustee and includes any additional trustee, any successor trustee, and any cotrustee." Fla. Stat. § 736.0103(23) (2018). Local and national banking associations and corporations with trust powers are authorized to engage in trust business and serve as trustees in Florida. Fla. Stat. §§ 658.12(20) and 660.41 (2018). Local and national banking associations employ trust officers, directors, and other personnel that work with and provide information to beneficiaries. Currently, it is unclear whether the statute of limitations periods identified in Section 736.1008 extend to the employees and officers of corporations serving as trustee.

In *Beaubien v. Cambridge Consolidated, LTD*, 652 So. 2d 936 (Fla. 5<sup>th</sup> DCA 1995), trust beneficiaries sued an individual allegedly serving as director and manager of a corporate trustee. The Fifth District noted, "It is well settled that an individual acting for a corporate trustee may be personally liable to third persons injured by his actions even if the individual was acting as agent for the corporation. Such corporate agents owe duties not only to the corporation, but also to the beneficiaries of a trust administered by the corporation." The Court required the individual director to account for the funds held and disposed of while he was in control of the trust account.

Other cases and statutes stand for the same position—that an individual, acting on behalf of a corporate trustee, can be separately liable to the trust beneficiaries. Those cases and statutes include *Raimi v. Furlong*, 102 So. 2d 1213 (Fla. 3d DCA 1991) (bank officers were personally liable for breach of fiduciary duty); *Sun First Nat'l Bank of Melbourne v. Batchelor*, 321 So. 2d 113 (Fla. 19<sup>th</sup> DCA 1975) (release of bank did not operate to discharge former trust officer/employee); and Fla. Stat. § 736.1002(5) ("The beneficiary's recovery of a judgment for breach of trust against one liable person does not of itself discharge other liable persons from liability for the breach of trust unless the judgment is satisfied. The satisfaction of the judgment does not impair any right of contribution.").

The same statute of limitations for claims of breach of trust against a trustee should apply to the trustee's employees, officers, and directors. Accordingly, the proposed changes extend the six-month statute of limitations protections of Section 36.1008 to the employees, officers, and directors of trustees who make adequate disclosures in a trust information document.

**C. EFFECT OF PROPOSED CHANGES**

The proposed amendment adds a new subsection to Section 36.1008 and clarifies that the same statutes of limitations apply to the trustee as to the directors, officers, and employees of that trustee. If claims are barred against the trustee, they are also barred against the trustee's officers, directors, and employees.

**D. FISCAL IMPACT ON STATE AND LOCAL GOVERNMENTS**

None

**E. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR**

None

**F. CONSTITUTIONAL ISSUES**

None

**G. OTHER INTERESTED PARTIES**

Florida Elder Law Section.

Florida Bankers Association.

1 An act relating to trusts; creating a new subsection in section  
2 736.1008, F.S.; clarifying that the same statute of limitations  
3 barring claims against trustees applies to directors, officers,  
4 and employees acting for that trustee.

5 Section 1. Effective July 1, 2021, subsection (7) of  
6 section 736.1008, Florida Statutes, is created to read:

7  736.1008 Limitations on proceedings against trustees.—

8 (7) Any claim barred against a trustee under this  
9 section, is also barred against the directors, officers, and  
10 employees acting for that trustee.

11 ~~(7)~~(8) This section applies to trust accountings for  
12 accounting periods beginning on or after July 1, 2007, and to  
13 written reports, other than trust accountings, received by a  
14 beneficiary on or after July 1, 2007.



# The Florida Bar

651 East Jefferson Street  
Tallahassee, FL 32399-2300

Joshua E. Doyle  
Executive Director

850/561-5600  
www.FLORIDABAR.org

## LEGISLATIVE OR POLITICAL POSITION REQUEST FORM

### GENERAL INFORMATION

**Submitted by:** *(list name of section, division, committee, TFB group, or individual name)*

Robert L. Lancaster, Chair, Estate & Trust Tax Planning Committee, RPPTL Section

**Address:** *(address and phone #)* 3001 Tamiami Trail North, Suite 400, Naples, Florida 34103  
(239) 262-8311

**Position Level:** *(TFB section/division/committee)* TFB / RPPTL / Probate & Trust Law /  
Estate & Trust Tax Planning

### PROPOSED ADVOCACY

- All requests for legislative and political positions must be presented to the Board of Governors by completing this form and attaching a copy of any existing or proposed legislation or a detailed presentation of the issue.
- Select Section I below if the issue is legislative, II if the issue is political. Regardless, Section III must be completed.

#### If Applicable, List the Following:

(Bill or PCB #)

(Sponsor)

\_\_\_\_\_  
\_\_\_\_\_

\_\_\_\_\_  
\_\_\_\_\_

**Indicate Position:**  Support  Oppose  Technical or Other Non-Partisan Assistance

#### I. Proposed Wording of Legislative Position for Official Publication

To support the enactment of a new Part XV of the Florida Trust Code, entitled the “Florida Community Property Trust Act of 2021,” to permit married couples to create community property in Florida by transferring assets to a Florida Community Property Trust and take advantage of significant income tax benefits.

**II. Political Proposals:**

**III. Reasons For Proposed Advocacy:**

A. Is the proposal consistent with *Keller vs. State Bar of California*, 110 S. Ct. 2228 (1990), and *The Florida Bar v. Schwarz*, 552 So. 2d 1094 (Fla. 1981)?

Yes.

B. Which goal or objective of the Bar’s strategic plan is advanced by the proposal?

N/A.

C. Does the proposal relate to: (*check all that apply*)

- Regulating the profession
- Improving the quality of legal services
- Improving the functioning of the system of justice
- Increasing the availability of legal services to the public
- Regulation of trust accounts
- Education, ethics, competency, and integrity of the legal profession

D. Additional Information:

**PRIOR POSITIONS TAKEN ON THIS ISSUE**

Please indicate any prior Bar or section/divisions/committee 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**

TFB Section/Division/Committee	Support/Oppose	Date

**Others** (*attach list if more than one*)

TFB Section/Division/Committee	Support/Oppose	Date

**REFERRALS TO OTHER SECTIONS, COMMITTEES OR LEGAL ORGANIZATIONS**

A request for action on a position must be circulated to sections and committees that might be interested in the issue. The Legislation Committee and Board of Governors may delay final action on a request if the below section is not completed. Please attach referrals and responses to this form. If you do not believe other sections and committees are affected and you did not circulate this form to them, please provide details below.

**Referrals**

Name of Group or Organization	Support, Oppose or No-Position
Florida Bar Family Law Section	No-Position
Florida Bar Tax Section	No-Position

**Reasons for Non-Referrals:**

**CONTACTS**

**Board & Legislation Committee Appearance** *(list name, address and phone #)*

John C. Moran, Legislative Co-Chair of the RPPTL Section  
777 South Flagler Drive, Suite 500 East, West Palm Beach, Florida 33401  
(561) 655-1980

**Appearances before Legislators** *(list name and phone # of those having direct contact before House/Senate committees)*

Peter M. Dunbar and Martha Edenfield; Dean Mead & Dunbar, P.A.  
215 South Monroe Street, Suite 815, Tallahassee, Florida 32501  
(850) 999-4100

**Meetings with Legislators/staff** *(list name and phone # of those having direct contact with legislators)*  
Same.

Submit this form and attachments to the Office of General Counsel of The Florida Bar – <mailto:jhooks@floridabar.org>, (850) 561-5662. Upon receipt, staff will schedule your request for final Bar action; this may involve a separate appearance before the Legislation Committee unless otherwise advised.

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

### White Paper on Proposed Enactment of Sections 736.1501-736.1513 of the Florida Statutes (Florida Community Property Trust Act of 2021)

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#### I. SUMMARY

The proposed legislation originates from The Estate and Trust Tax Planning Committee (the “Committee”) of the Real Property, Probate and Trust Section of The Florida Bar (the “RPPTL Section”).

The focus of clients’ Florida estate planning attorneys and other advisors has shifted from wealth transfer taxes to federal income tax. With today’s all-time-high federal estate tax exemption (currently \$11,580,000 per person) and a relatively low transfer tax rate, coupled with the increased federal income tax top marginal rate, planning that maximizes Florida heirs’ federal income tax basis in appreciated assets often trumps wealth transfer tax concerns. In this new tax planning world, an often overlooked provision — section 1014(b)(6) of the Internal Revenue Code — assumes a more prominent role. Under that section, the surviving spouse of a marriage in a community property state will receive a fair market value basis, determined as of the date of the deceased spouse’s death, in all of the couple’s property (referred to as a “step-up” in basis). In contrast, the surviving spouse of a marriage in a common law state, such as Florida, will receive a step-up in basis only in the property owned by the deceased spouse; the tax basis of property owned by the surviving spouse is unaffected by the death of the other spouse and does not receive a step-up in basis.

The disparate outcomes in common law states and community property states are illustrated in the following fact pattern. A married couple, Michael and Colleen, own appreciated undeveloped real estate, purchased several years ago, with a current tax basis of \$100,000 and a \$1 million fair market value. The title to the property is held in their joint names. Michael dies, and the real estate is sold at year’s end for its \$1 million fair market value. In a common law state, section 1014(a)(1) of the Internal Revenue Code results in a \$550,000 income tax basis to Colleen. Michael’s basis in his half of the property increases from the original \$50,000 to \$500,000 (the date of death value), plus Colleen’s basis in her half of the property remains \$50,000. The subsequent sale of the property produces a \$450,000 gain (\$1 million amount realized less \$550,000 basis) and a tax liability of \$107,100 ( $\$450,000 \times 23.8$  percent (20 percent long-term capital gains tax rate plus 3.8 percent unearned income tax rate)). In contrast, in a community property state, section 1014(b)(6) of the Internal Revenue Code results in a \$1 million income tax basis to Colleen due to the step-up in basis. In light of that adjustment, the subsequent sale of the property produces zero gain (\$1 million amount realized less \$1 million basis) and zero tax liability.

Additionally, many residents of Florida have moved to our state with community property (or the proceeds therefrom), whether acquired in one of the ten community property states or in a foreign jurisdiction with a community property regime. It is anticipated that many new residents will be moving to Florida with community property in the future due to the increasing amount of



people establishing residency in Florida after moving from other states.<sup>1</sup> It is important for all Florida attorneys to be aware of how to plan for this type of property. While there are indications, such as the case of *Quintana v. Ordone*, 195 So.2d 577 (Fla. 3d DCA 1967), and Florida's adoption of a version of the Uniform Disposition of Community Property Rights at Death Act (discussed *infra*), that community property will retain its character when brought to Florida, there remains uncertainty as to whether the Internal Revenue Service will challenge the status of community property for a Florida decedent for purposes of section 1014(b)(6) of the Internal Revenue Code. Florida residents should not be deprived of tax benefits afforded to residents of other states.

For the reasons set forth herein, Florida should consider adopting Florida community property trust legislation, similar to that of Alaska, Tennessee and South Dakota (and Ohio, Michigan, and North Carolina are considering community property legislation), to allow Florida married residents to treat their property, acquired by a married couple as separate property, as community property, and provide Florida married residents who moved to Florida with community property (or the proceeds therefrom) certainty that such property remains community property.

The proposed legislation would create a new Part XV of the Florida Trust Code and enact Sections 736.1501-736.1513 of the Florida Statutes, referred to as the "Florida Community Property Trust Act of 2021." The proposed legislation would allow spouses to transfer property to a trust known as a "Florida community property trust" ("FCPT").

## **II. CURRENT SITUATION**

### **A. Community Property.**

Community property results in a "double step-up in basis" on the death of the first spouse, because of the interplay of sections 1014(a), (b)(1) and (b)(6) of the Internal Revenue Code ("Code").

Section 1014(a)(1) of the Code looks at the recipient of property (i.e. the legatee or devisee) and sets forth what the basis will be in such recipient's hands. It states in part that when a recipient is "acquiring property from a decedent" or if the recipient is that person "to whom property passed from a decedent," and if such property has not been sold, exchanged or otherwise disposed of before the decedent's death, the recipient's basis shall be the fair market value of such property at the decedent's date of death (i.e., the recipient gets a new basis, and, in our lingo, it results in a "step-up" in basis).

Section 1014(b) of the Code has ten subsections, namely sections 1014(b)(1) through (10) inclusive. Those ten subsections attempt to define the two phrases used in section 1014(a) of the Code, namely "acquired property from a decedent" and "property passed from a decedent." Section 1014(b) of the Code is referred to as a "deeming" provision because it provides if "X" happens; then it is "considered to be" "Y." The statute does not provide if "X" happens; then it

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<sup>1</sup> Florida remains the largest recipient of state-to-state migration in the United States (<https://www.census.gov/library/stories/2019/04/moves-from-south-west-dominant-recent-migration-flows.html>), and is the top choice among retirees (<https://smartasset.com/retirement/where-are-retirees-moving-2018-edition>).

“is” “Y.” The words “considered to be” are analogous to “deemed to be” or “shall be treated as if.” Those words (i.e., “considered to be”) create a legal fiction.

The other relevant provisions for determining the basis of community property are: (1) section 1014(b)(1) of the Code that determines the basis of one-half of the community property owned by the decedent spouse; and (2) section 1014(b)(6) which determines the other half of the property owned by the surviving spouse.

Section 1014(b)(1) of the Code provides that the property passing from the decedent by bequest, devise, or inheritance to the surviving spouse gets a basis step-up. With community property, this means that the decedent spouse’s one-half gets a basis step-up.

Section 1014(b)(6) of the Code provides that the surviving spouse’s other half gets a basis adjustment, if (1) the property is community property under the community property laws of any State, or possession of the United States or a foreign country, and (2) at least one-half of the community property was included in the decedent spouse’s gross estate.

Thus, the interrelationship between sections 1014(a), (b)(1) and (b)(6) of the Code allow for the double basis step-up for community property, and the focus would be on section 1014(b)(6) since it allows a surviving spouse to adjust such survivor’s basis.

A significant issue for couples moving to Florida from community property states is whether their real and personal property is community property after they have become residents of Florida. Specifically, whether personal property that was once community property of a couple when they lived in a community property state is still community property at the time of the death of the first spouse to die, if the couple had migrated to Florida to become Florida residents.

## B. What do other States do to address community property?

### 1. Community Property States.

Wisconsin, Washington, Texas, New Mexico, Nevada, Louisiana, Idaho, California and Arizona are known as the traditional community property states. Alaska allows a married couple to establish community property by entering into a community property agreement (it is an “opt-in” community property state). Puerto Rico, which is the largest United States territory by population (and one of every three migrants to the US mainland from Puerto Rico settles in Florida), is also a community property jurisdiction.

### 2. States Allowing Community Property Trusts.

Three states, Alaska, Tennessee and South Dakota, currently provide that property acquired by a married couple is separate property, but allow the couple to elect to treat it as community property. This is in contrast with the general rule in most community property states that all property acquired by a couple is community property unless they have clearly provided to the contrary. Alaska, Tennessee and South Dakota permit the creation of a trust to hold property and community property, and treat the assets held in the trust as community property (even if the couple do not reside within the state). Other states, including Ohio, Michigan and North Carolina, are considering the enactment of similar legislation.

### C. Community Property Trusts and Their Treatment by the IRS.

1. Commissioner v. Harmon. During the 1940s, Hawaii, Michigan, Nebraska, Oklahoma, Oregon, and Pennsylvania enacted laws allowing residents to opt-in to community property treatment of assets. In *Commissioner v. Harmon*, 323 U.S. 44 (1944), the United States Supreme Court ruled that an Oklahoma statute allowing spouses to elect community property treatment under that state's law would not be recognized for federal income tax reporting. Some argue that the IRS will rely on the ruling in *Harmon* to disallow the full step-up in basis for community property acquired through an opt-in community property state, such as Alaska, Tennessee or South Dakota.

However, many practitioners believe that the *Harmon* decision does not affect the community property classification under an opt-in system. In Revenue Ruling 77-359, the IRS concluded that the conversion of separate property to community property by residents of a community property state would be effective for gift tax purposes while ineffective for the transmutation of income from such property. Based on this Revenue Ruling, it appears that the IRS will treat the underlying property as community property and will not distinguish between elective and default community property regimes (unless it is for purposes of income splitting).

2. Due Process. Section 1 of the 14th Amendment of the United States Constitution provides in part “nor shall any State deprive any person of life, liberty, or property, without due process of law.” A move across state lines cannot deprive a spouse of the vested property rights the spouse has under the laws of community property because there would be no due process to cause the change. Similarly, under basic conflict of laws principles, a right belonging to either or both spouses in property is not affected by a change in domicile by the couple to a different state. See Restatement (Second) Conflict of Laws § 259.

3. Application of Basis Rules. IRS Publication 555 (entitled “Community Property”), most recently revised and released in 2016, does not consider “the federal tax treatment of income or property subject to the ‘community property’ election under Alaska state laws.” IRS Publication 555 only speaks to Alaska's opt-in community property regime, and not to the efficacy of Alaska community property trusts. The IRS likely views these type of community property systems as providing too much flexibility to the taxpayers to opt in and out of community property status, and that the Alaska-type system is more akin to a tax avoidance ploy rather than a state property law system. With that being said, no reported cases or IRS rulings have addressed the federal income tax capital gains basis step-up for property held in a community property trust established in Alaska, Tennessee or South Dakota. Also, no known challenges have been made to the community property classifications in these states for income tax purposes.

4. Opt-in v. Opt-Out. Some practitioners have suggested that a state cannot allow an opt-in to community property treatment for purposes of IRC § 1014(b)(6) (based mostly on the ruling in *Harmon*), but in each of the nine states where community property is the default method of ownership, spouses may opt out of the community property regime by agreement. To allow spouses to opt-in, where separate property is the default, should be considered the same.

## E. Florida and Its Treatment of Community Property.

Florida adopted the Florida Uniform Disposition of Community Property Rights at Death Act (“FUDCPRDA”) in 1992 with the adoption of Sections 732.216-732.228 of the Florida Statutes. The purpose of the FUDCPRDA, a Uniform Act, is described, with respect to non-community property states (such as Florida), to preserve “the rights of each spouse in property that was community property before the spouses moved to the non-community property state, unless they have severed or altered their community property rights.” See Uniform Law Commission, Disposition of Community Property Rights at Death Act (1971).<sup>2</sup> The FUDCPRDA preserves the rights in what was community property for the benefit of the surviving spouse when the decedent spouse dies, and does not (a) create community property rights in the property after the spouses have become residents of the new state, and (b) state whether the property is community property. Except for Florida specific concepts such as homestead and tenants by the entirety, Florida’s adoption of the FUDCPRDA mostly resembles the Uniform Act. In drafting its statutes in conformity with the FUDCPRDA, Florida arguably preserves the rights of each spouse in property which was community property prior to a change of domicile from a community property state to Florida, but like the FUDCPRDA, Florida’s application solely covers such dispositive rights at death.

*Quintana v. Ordonez*<sup>3</sup> is one of the few reported Florida cases to address community property. In *Quintana*, plaintiffs, children of the deceased by a prior marriage, sought a declaration determining the rights of the defendant surviving spouse, and the estate of the deceased in certain property. *Id.* at 578. The decedent and his spouse were domiciled in Cuba, a community property jurisdiction, through most of the decedent’s lifetime. *Id.* The decedent purchased shares of a Florida corporation while still domiciled in Cuba. *Id.* Following his death, a promissory note payable to the decedent and a contract for sale of some of the shares was received. *Id.* at 578-79. The court relied on the Restatement Conflict of Laws to determine that the “[i]nterests of one spouse in movables acquired by the other during the marriage are determined by the law of the domicile of the parties when the movables are acquired.” *Id.* at 579. Citing to the Civil Code of Cuba, the court found that under the laws of Cuba, the stock did not vest solely in the decedent; the surviving spouse “had a vested interest in the stock equal to that of her husband”, and this interest “was not affected by the subsequent change of domicile from Cuba to Florida.” *Id.* at 580. As to the promissory note and contract for sale, the court indicated that if a portion of the consideration belonged to the surviving spouse and title was taken in the decedent’s name along, a resulting trust arose in favor of the surviving spouse “by implication of law to the extent that consideration furnished by her is used.” *Id.* As such, the decedent’s estate, holding legal title to the promissory note and contract for sale, held a one-half interest in trust for the surviving spouse.

Together, *Quintana*, as well as Florida’s enactment of the FUDCPRDA, have signaled to some Florida attorneys that Florida recognizes community property. However, taking a look at Florida’s adoption of the FUDCPRDA after *Quintana* and noting that *Quintana* merely created a resulting trust for the surviving spouse, one might more appropriately conclude that while

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<sup>2</sup> <https://www.uniformlaws.org/committees/community-home?CommunityKey=cc060023-d743-4d32-b7e5-35b12cba4fb8>

<sup>3</sup> 195 So.2d 577 (Fla.3d DCA 1967).

Florida does not recognize community property, it must recognize the rights of a Florida domiciliary in community property imported from a community property jurisdiction.

Additionally, a recent Fourth District Court of Appeals case illustrates the uncertainty surrounding the application of the FUDCPRDA and its effect on Florida residents who move to our state with community property. In *Johnson v. Townsend*<sup>4</sup>, a married couple moved to Florida from Texas (a community property state). When the husband died in January 2015, he was survived by his wife and children from a prior marriage. In March 2015, the husband's will was admitted to probate and his wife was appointed personal representative. In September 2017 (over two and a half years after the husband's death), the wife filed a FUDCPRDA claim seeking to receive her one-half interest in the community property acquired while the couple were residents of Texas. The Fourth District Court of Appeals ruled that the wife's FUDCPRDA claim was a creditor claim which was subject to the two-year statute of repose contained in the Florida Probate Code. The wife was therefore barred from receiving her one-half interest in the community property since she did not file a timely creditor claim. Many Florida practitioners disagree with this result. Regardless of whether or not this case was correctly decided, *Johnson v. Townsend* clearly illustrates the ambiguities contained in the FUDCPRDA and that current law regarding the treatment of community property in Florida is a potential trap for the unwary.

### **III. EFFECT OF PROPOSED LEGISLATION** **(DETAILED ANALYSIS OF PROPOSED STATUTE)**

#### A. Effect of Proposed Legislation.

1. In General. The proposed legislation would create Sections 736.1501-736.1513 of the Florida Statutes (the "Florida Community Property Trust Act of 2021"), and allow spouses to transfer property to a FCPT. Adoption of the proposed legislation enables surviving spouses who have property passing through a FCPT to receive a 100% step-up in basis on that property for federal income tax purposes, regardless of the order of the spouses' deaths, thus creating a benefit similar to that of surviving spouses in community property states. Many public policies of Florida and some facets of Florida law already support this type of legislation.

Based on the current uncertainties involved with Florida community property rights and the potential that the IRS may deny the full step-up in basis for community property (or community property proceeds) brought into Florida under current law, married couples moving to Florida from community property jurisdictions would be the most obvious beneficiaries if Florida passed this type of legislation. Community property trusts would also be advantageous for Florida married couples whose assets are not currently deemed to be community property, but have one or more of the following characteristics: (1) a long-term stable marriage (so that the trust will truly get the step-up at death; although the trust may also function as to trust property as a postnuptial agreement on dissolution of the marriage, that is not its primary intent); (2) the couple has highly appreciated property, stocks or real estate (owned by one or both spouse); (3) an over-weighted financial portfolio that the couple has delayed selling because of exposure to capital gains tax; (4) rental real estate or other real property that the surviving spouse would not want to manage and may immediately want to sell; (5) property that could benefit from the 100% step-up in basis, such as those who own self-created intellectual property, negative basis, highly

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<sup>4</sup> 259 So.3d 851 (Fla. 3rd DCA 2018).

depreciated property, gold, artwork, or other collectibles (which may be subject to a minimum 28% long-term capital gain rate); and/or (6) no present or foreseeable creditor concerns. Even if a Florida couple does meet some of the criteria, it is important to keep in mind that not all of the couple's property has to be transferred to the FCPT.

2. More Clarity Regarding Full Step-Up in Basis. The community property trust platform would provide more clarity and certainty than relying on Florida's version of the UDCPRDA and the limited case law available.

3. Evening the Playing Field with Community Property State Residents. With respect to the benefits of the federal income tax laws' step-up in basis, allowing the creation of FCPTs would equalize the benefits of Florida married couples to those in community property states, regardless of the property regimes the states have adopted.

4. Simplicity. Allowing Florida married couples to transfer assets to a FCPT would simplify the estate planning process. For example, there would not be a need to equalize the couple's assets between the spouses. It would give planners a simpler method to divide assets between spouses if necessary to fund a trust for estate planning purposes, such as tax planning and long-term care planning, while also obtaining the tax benefits afforded community property. Income tax basis planning would also be much easier to accomplish (e.g., this would be an alternative to trying to transfer low-basis stock to spouse most likely to be the first to die to get the step-up in basis at death). Additionally, there would not be the temptation to implement other types of untested and more complicated trusts which attempt to achieve the full step-up in basis, including joint exempt step-up trusts (JESTs) and step-up grantor retained interest trusts (SUGRITs).

5. No Need for Tracing. If a Florida married couple utilized a FCPT, there would be a clear bifurcation between community and separate property. Currently, community property rights for Florida residents requires tracing in order to identify community property and to quantify the amount of community property versus separate property. This can be labor intensive and could in essence turn into a forensic accounting project. In making the required community versus separate property determination, the attorney also needs to ascertain how the property is treated under the laws of the couple's prior community property jurisdiction as part of the tracing process. Allowing a Florida couple's community property to be segregated in a Florida community property trust will alleviate (if not eliminate) the need for the time-consuming tracing process.

6. Evidence of Couples' Intent. If a Florida married couple transfer assets to a FCPT, it makes it very evident that they wish for those assets to be treated as the couples' community property and to acquire the rights (and to relinquish others) associated with this type of property classification. This evidence of the couples' intent should diminish post-death litigation regarding whether property is community or separate.

## B. Specific Statutory Provisions.

1. 736.1501. Short title. This section explains that the proposed legislation would add Part XV to the Florida Trust Code and refer to the new chapter as the "Florida Community Property Trust Act of 2021."

2. 736.1502. Definitions. This section defines terms that appear throughout the proposed legislation. Specifically, it defines the terms “community property”, “decree”, “dissolution”, “during marriage”, “Florida community property trust”, “qualified trustee”, and “settlor spouses”.

3. 736.1503. Requirements for community property trust. This section describes the requirements for creating a FCPT. The proposed legislation would mandate that the capitalized language in § 736.1503(4), which is intended to provide clear notice to the couple creating the trust of its effect on the trust property, be contained at the beginning of a FCPT.

4. 736.1504. Agreement establishing Florida community property trust; amendments and revocation. This section describes the terms that may be agreed to by spouses in a FCPT. It describes the procedure for a FCPT amendment. It provides that only the married couple who establish the trust shall be deemed to be qualified beneficiaries of a FCPT until the death of one of the spouses.

5. 736.1505. Classification of property as community property; enforcement; duration; management and control; effect of distributions. This section describes the classification of property transferred to a FCPT. It provides that upon distribution from a FCPT, property no longer constitutes community property within the meaning of the proposed legislation. This makes it clear that assets shall only be community property under Florida if held in a FCPT.

6. 736.1506. Satisfaction of obligations. This section describes creditors’ rights against a married couple who have established a FCPT.

7. 736.1507. Death of a spouse. This section describes the treatment of the surviving spouse’s share of a FCPT. It also describes the treatment of the deceased spouse’s share of a FCPT.

8. 736.1508. Dissolution of marriage. This section provides that upon the dissolution of the settlor spouses’ marriage, the FCPT shall terminate and the trustee of the FCPT shall distribute one-half of the FCPT assets to each spouse.

9. 736.1509. Right of child to support. This section provides that a FCPT shall not affect the right of a child of either settlor who is required to be provided child support.

10. 736.1510. Homestead property. This section provides that Homestead property transferred to a FCPT shall continue to qualify as Homestead.

11. 736.1511. Application of Internal Revenue Code; community property classified by another jurisdiction. This section provides that property transferred to a FCPT is “community property” within the meaning of section 1014(b)(6) of the Code. Community property transferred into a FCPT from another state retains its character as community property while in the FCPT. If a FCPT is revoked, community property transferred out of the FCPT as classified by a jurisdiction other than Florida retains its character as community property unless otherwise provided by the FUDCPRDA.

12. 736.1512. Unenforceable trusts. This section explains that a FCPT executed during a marriage may be unenforceable if one of the spouses proves that the FCPT was unconscionable when made, was not voluntarily created, or that the spouse against whom enforcement is sought was not given a fair and reasonable disclosure of the property and financial obligations of the other spouse, did not voluntarily sign a waiver expressly waiving right to disclosure of the property and financial obligations of the other spouse beyond the disclosure provided, and did not have notice of the property or financial obligations of the other spouse.

13. 736.1513. Applicability. This section provides that following enactment of the proposed legislation, a FCPT could be created beginning on July 1, 2021.

#### **IV. FISCAL IMPACT ON STATE AND LOCAL GOVERNMENTS**

Adoption of this legislative proposal by the Florida Legislature should have a fiscal impact on state and local governments by allowing additional wealth to be managed by Florida corporate trustees, with the result of increased fiduciary commissions becoming subject to the state's corporate income tax. Future Florida residents will also be more comfortable bringing property into the state from community property jurisdictions and purchasing property in Florida with community property proceeds since there will be certainty regarding community property maintaining its character and income tax treatment under Florida law. It should also result in Florida residents not transferring assets out of the State of Florida to jurisdictions that allow for the creation of community property trusts.

#### **V. DIRECT IMPACT ON PRIVATE SECTOR**

Adoption of this legislative proposal by the Florida Legislature would benefit members of the private sector (i.e., Florida attorneys, trustees, persons employed by trustees and trust beneficiaries) by allowing the use of trusts, created by Florida attorneys and administered by Florida corporate trustees, that otherwise could be created in other states to the detriment of Florida attorneys possessing the knowledge to create such trusts and Florida corporate trustees who have the expertise to administer such trusts. Allowing such trusts provides Florida residents with an opportunity to utilize a Federal income tax benefit that could only be allowed to residents in community property states.

#### **VI. CONSTITUTIONAL ISSUES**

There are no known Constitutional issues.

#### **VII. OTHER INTERESTED PARTIES**

Other groups that may have an interest in the legislative proposal include the Family and Tax Sections of The Florida Bar, and the Florida Bankers Association.



1 A bill to be entitled

2 An act creating a new Part XV of the Florida Trust  
3 Code that permits a married couple to create community  
4 property in Florida by transferring property to a Florida  
5 Community Property Trust established pursuant to the act;  
6 providing an effective date.

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

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9  
10 Section 1. Part XV of chapter 736, Florida Statutes, is created  
11 to read as follows:

12 PART XV

13 COMMUNITY PROPERTY TRUSTS

14 736.1501. Short title. - This chapter may be cited as the  
15 "Florida Community Property Trust Act of 2021."

16 736.1502. Definitions. - Unless the context otherwise requires,  
17 as used in this act:

18 (1) "Community property" means the property and the  
19 appreciation of and income from the property owned by a qualified  
20 trustee of a Florida community property trust during the marriage of  
21 the Settlor spouses. The property owned by a Florida community  
22 property trust pursuant to this act and the appreciation of and income  
23 from such property shall be deemed to be community property for  
24 purposes of the laws of this state.

25 (2) "Decree" means a judgment or other order of a court of  
 26 competent jurisdiction.

27 (3) "Dissolution" means either:

28 (a) Termination of a marriage by a decree of dissolution,  
 29 divorce, annulment or declaration of invalidity; or

30 (b) Entry of a decree of legal separation maintenance.

31 (4) "During marriage" means a period that begins at marriage  
 32 and ends upon the dissolution of marriage or upon the death of a  
 33 spouse.

34 (5) "Florida community property trust" means an express trust  
 35 that complies with s. 736.1503.

36 (6) "Qualified trustee" means either:

37 (a) A natural person who is a resident of this state; or

38 (b) A company authorized to act as a fiduciary in this  
 39 state.

40 (7) "Settlor spouses" means a married couple that establishes a  
 41 Florida community property trust pursuant to this act.

42 736.1503. Requirements for community property trust. - An  
 43 arrangement is a Florida community property trust if one or both  
 44 Settlor spouses transfer property to a trust, that:

45 (1) Expressly declares that the trust is a Florida community  
 46 property trust within the meaning of this act.

47 (2) Has at least one trustee who is a qualified trustee whose  
 48 powers include, or are limited to, maintaining records for the trust  
 49 on an exclusive or a nonexclusive basis and preparing or arranging for

50 the preparation of, on an exclusive or a nonexclusive basis, any  
 51 income tax returns that must be filed by the trust. Both spouses or  
 52 either spouse may be a trustee.

53 (3) Is signed by both Settlor spouses.

54 (4) Contains the following language in capital letters at the  
 55 beginning of the Florida community property trust agreement:

56 THE CONSEQUENCES OF THIS FLORIDA COMMUNITY PROPERTY  
 57 TRUST MAY BE VERY EXTENSIVE, INCLUDING, BUT NOT LIMITED TO,  
 58 YOUR RIGHTS WITH RESPECT TO CREDITORS AND OTHER THIRD  
 59 PARTIES, AND YOUR RIGHTS WITH YOUR SPOUSE DURING THE COURSE  
 60 OF YOUR MARRIAGE, AT THE TIME OF A DIVORCE, AND UPON THE  
 61 DEATH OF YOU OR YOUR SPOUSE. ACCORDINGLY, THIS TRUST  
 62 AGREEMENT SHOULD ONLY BE SIGNED AFTER CAREFUL  
 63 CONSIDERATION. IF YOU HAVE ANY QUESTIONS ABOUT THIS TRUST  
 64 AGREEMENT, YOU SHOULD SEEK COMPETENT AND INDEPENDENT LEGAL  
 65 ADVICE.

66 736.1504. Agreement establishing Florida community property  
 67 trust; amendments and revocation.

68 (1) In the agreement establishing a Florida community property  
 69 trust, the Settlor spouses may agree upon:

70 (a) The rights and obligations in the property transferred  
 71 to the trust, notwithstanding when and where the property is acquired  
 72 or located;

73 (b) The management and control of the property transferred  
 74 into the trust;

85 (c) The disposition of the property transferred to the  
86 trust on dissolution, death, or the occurrence or nonoccurrence of  
87 another event, subject to ss. 736.1507 and 736.1508;

88 (d) Whether the trust is revocable or irrevocable; and

89 (e) Any other matter that affects the property transferred  
80 to the trust and does not violate public policy or a statute imposing  
81 a criminal penalty, or result in the property not being treated as  
82 community property under the laws of any jurisdiction.

83 (2) In the event of the death of a Settlor spouse, the  
84 surviving spouse may amend a Florida community property trust  
85 regarding the disposition of that spouse's one-half share of the  
86 community property, regardless of whether the agreement provides that  
87 the Florida community property trust is irrevocable.

88 (3) A Florida community property trust may be amended or  
89 revoked by the Settlor spouses unless the agreement itself  
90 specifically provides that the Florida community property trust is  
91 irrevocable.

92 (4) Notwithstanding any other provision of this code, the  
93 Settlor spouses shall be deemed to be the only qualified beneficiaries  
94 of a Florida community property trust until the death of one of the  
95 Settlor spouses, regardless of whether the trust is revocable or  
96 irrevocable. After the death of one of the Settlor spouses, the  
97 surviving spouse shall be deemed to be the only qualified beneficiary  
98 as to his or her share of the Florida community property trust.

99           736.1505. Classification of property as community property;  
100 enforcement; duration; management and control; effect of  
101 distributions.

102           (1) Whether or not both, one or neither is domiciled in this  
103 state, Settlor spouses may classify any or all of their property as  
104 community property by transferring that property to a Florida  
105 community property trust and providing in the trust that the property  
106 is community property pursuant to the provisions of this act.

107           (2) A Florida community property trust is enforceable without  
108 consideration.

109           (3) All property owned by a Florida community property trust  
110 will be community property under the laws of this jurisdiction during  
111 the marriage of the Settlor spouses.

112           (4) The right to manage and control property that is  
113 transferred to a Florida community property trust is determined by the  
114 terms of the trust agreement.

115           (5) When property is distributed from a Florida community  
116 property trust, it shall no longer constitute community property  
117 within the meaning of this act, provided that community property as  
118 classified by a jurisdiction other than this state retains its  
119 character as community property to the extent otherwise provided by  
120 ss. 732.216-732.228.

121           736.1506. Satisfaction of obligations. - Except as provided in  
122 s. 4, Art. X of the State Constitution:

123 (1) An obligation incurred by only one spouse before or during  
124 the marriage may be satisfied from that spouse's one-half share of a  
125 Florida community property trust.

126 (2) An obligation incurred by both spouses during the marriage  
127 may be satisfied from a Florida community property trust of the  
128 Settlor spouses.

129 736.1507. Death of a spouse. - Upon the death of a spouse, one-  
130 half of the aggregate value of the property held in a Florida  
131 community property trust established by the Settlor spouses reflects  
132 the share of the surviving spouse and is not subject to testamentary  
133 disposition by the decedent spouse or distribution under the laws of  
134 succession of this state. The other one-half of the value of that  
135 property reflects the share of the decedent spouse and is subject to  
136 testamentary disposition or distribution under the laws of succession  
137 of this state. Unless provided otherwise in the Florida community  
138 property trust agreement, the trustee has the power to distribute  
139 assets of the trust in divided or undivided interests and to adjust  
140 resulting differences in valuation. A distribution in kind may be made  
141 on the basis of a non pro rata division of the aggregate value of the  
142 trust assets, on the basis of a pro rata division of each individual  
143 asset, or by using both methods. The decedent's spouse's one-half  
144 share shall not be included in the elective estate.

145 736.1508. Dissolution of marriage. - Upon the dissolution of the  
146 marriage of the Settlor spouses, the Florida community property trust  
147 shall terminate and the trustee shall distribute one-half of the trust

148 assets to each spouse, with each spouse receiving one-half of each  
149 asset, unless otherwise agreed to in writing by both spouses. For  
150 purposes of this act, s. 61.075 shall not apply to the disposition of  
151 the assets and liabilities held in a Florida community property trust.

152 736.1509. Right of child to support. - A Florida community  
153 property trust shall not adversely affect the right of a child of the  
154 Settlor spouses to support which either spouse would be required to  
155 give under the applicable laws of the Settlor spouses' state of  
156 domicile.

157 736.1510. Homestead property. -

158 (1) Property which is transferred to or acquired subject to a  
159 Florida community property trust may continue to qualify or may  
160 initially qualify as the Settlor spouses' homestead within the meaning  
161 of s. 4(a)(1), Art. X of the State Constitution and for all purposes  
162 of the statutory law of this state, provided that the property would  
163 qualify as the Settlor spouses' homestead if title was held in one or  
164 both of the Settlor spouses' individual names.

165 (2) The Settlor spouses shall be deemed to have beneficial  
166 title in equity to the homestead property held subject to a Florida  
167 community property trust for all purposes, including for purposes of  
168 s. 196.031.

169 736.1511. Application of Internal Revenue Code; community  
170 property classified by another jurisdiction. - For purposes of the  
171 application of s. 1014(b)(6) of the Internal Revenue Code of 1986, 26  
172 U.S.C. s. 1014(b)(6), as of January 1, 2021, a Florida community

103 property trust is considered a trust established under the community  
104 property laws of this state. Community property as classified by a  
105 jurisdiction other than this state which is transferred to a Florida  
106 community property trust retains its character as community property  
107 while in the trust. If the trust is revoked and property is  
108 transferred on revocation of the trust, the community property as  
109 classified by a jurisdiction other than this state retains its  
180 character as community property to the extent otherwise provided by  
181 ss. 732.216-732.228.

182 736.1512. Unenforceable trusts. - A Florida community property  
183 trust executed during marriage is not enforceable if the spouse  
184 against whom enforcement is sought proves that:

185 (1) The trust was unconscionable when made;

186 (2) The spouse against whom enforcement is sought did not  
187 execute the Florida community property trust agreement voluntarily; or

188 (3) Before execution of the Florida community property trust  
189 agreement, the spouse against whom enforcement is sought:

190 (a) Was not given a fair and reasonable disclosure of the  
191 property and financial obligations of the other spouse;

192 (b) Did not voluntarily sign a written waiver expressly  
193 waiving right to disclosure of the property and financial obligations  
194 of the other spouse beyond the disclosure provided; and

195 (c) Did not have notice of the property or financial  
196 obligations of the other spouse.



19 (4) Whether a Florida community property trust is  
198 unconscionable shall be determined by a court as a matter of law.

199 (5) The fact that the Settlor spouses did not have separate  
200 legal representation shall not result in a Florida community property  
201 trust being deemed to be unenforceable, subject to the provisions of  
202 paragraphs (1), (2) and (3).

203 736.1513. Applicability. - This act applies to all Florida  
204 community property trusts created on or after July 1, 2021.

205 Section 2. This act shall take effect July 1, 2021.

## WHITE PAPER

PROTECTION OF FLORIDA RESIDENTS FROM UNINTENTIONALLY ASSIGNING, PLEDGING, OR WAIVING RIGHTS TO ASSETS THAT OTHERWISE ARE EXEMPT FROM LEGAL PROCESS UNDER CHAPTER 222 OF THE FLORIDA STATUTES BY IMPLEMENTING CLEARLY DEFINED REQUIREMENTS FOR WAIVING THE PROTECTION OF SPECIFIC EXEMPTIONS

### I. SUMMARY

This legislation protects Florida residents from unintentionally assigning, pledging, or waiving rights to, retirement accounts, annuities, and certain life insurance policies that otherwise are exempt from legal process under Chapter 222 of the Florida Statutes by imposing clearly defined requirements for a written agreement to constitute a valid and intentional assignment, pledge, or waiver of such exemptions. Because of the adverse economic impact of Covid-19, it is imperative to protect citizens from unknowing forfeiture of assets and potentially disastrous tax consequences. The bill does not have a fiscal impact on state funds.

### II. CURRENT SITUATION

#### A. Current Florida Statutes

Chapter 222 of the Florida Statutes contains most of the statutory exemptions that protect certain assets from legal process under Florida law. Florida Statutes Section 222.21(2)(a) allows Florida Consumers to claim an exemption from creditors for funds held in individual retirement accounts (IRAs), 401(k) retirement accounts, and other tax-exempt accounts. Florida Statutes Section 222.14 provides that the cash surrender values of life insurance policies and the proceeds of annuity contracts issued to citizens or residents of the State of Florida are exempt from creditor attachment. Florida Statutes Section 222.22 and Fla. Stat. §222.25 state that funds held in qualified tuition programs and other qualifying accounts and certain individual property are also protected from creditors.

Under Fla. Stat. §222.11, wages are exempt from attachment or garnishment unless the Florida Consumer agrees to waive the protection from wage garnishment in a writing complying with the requirements set forth in Fla. Stat. §222.11(2)(b). Florida Statutes Section 222.11(2)(b) provides that the agreement to waive the protection from wage garnishment must be in writing and be written in the same language as the contract to which the waiver relates, be contained in a separate document attached to the contract, and contain the mandatory waiver language specified in Fla. Stat. §222.11(2)(b) in at least 14-point type. This writing ensures the Consumer understands they are waiving a statutory exemption.

It has been standard result for any asset which is exempt under Chapter 222 of the Florida Statutes to remain exempt from the reach of creditors, if the exempt asset is not specifically pledged. Long standing public policy of the Florida legislature promotes the financial independence of the retired and elderly by protecting their IRAs and pensions plans with an exemption, thus reducing the need for public financial assistance. This consumer protection built

into the framework of the existing law protecting Florida Consumers from overreaching creditors, unfair transactions, and retirement poverty was recently cast aside in the decision of *Kearney Constr. Co., LLC v. Travelers Cas. & Sur. Co. of Am.*, 2019 WL 595361 at 3 (11th Cir. 2019). The *Kearney* result flies in the face of the intent of the Florida legislature and the current statutory framework which requires a Florida Consumer to understand and acknowledge any waiver of a statutory exemption under Florida law.

## **B. Kearney Holding**

On October 2, 2011, the United States District Court Middle District of Florida, Tampa Division granted a motion for entry of final judgment in favor of Travelers Casualty & Surety Company of America and against Bing Charles J. Kearney (**Kearney**) and others in the amount of \$3,50,000. Magistrate Judge's Report and Recommendation, Case 09-cv-01850-JSM-TBM, Docket 11, at 1-2 (March 1, 2016). On March 1, 2012, Kearney executed a Revolving Line of Credit Promissory Note (the **Promissory Note**) in favor of Moose Investments of Tampa, LLC (**Moose Investments**), which was an entity owned by Kearney's son. Magistrate Judge's Report and Recommendation, Case 09-cv-01850-JSM-TBM, Docket 865, at 9 (August 16, 2016). The Promissory Note was collateralized by a security agreement (the **Security Agreement**), in which Kearney pledged a security interest in

**all assets and rights of the Pledgor**, wherever located, whether now owned or hereafter acquired or arising, and all proceeds and products thereof, all good (including inventory, equipment and any accessories thereto), instruments (including promissory notes), documents, accounts, chattel paper, **deposit accounts**, letters of credit, rights, securities and all other **investment property**, supporting obligation, any contract or contract rights or rights to the payment of money, insurance claims, and proceeds, and **general intangibles** (the **Collateral**). *Id.* at 9-10 (emphasis added).

On October 25, 2012, Kearney deposited funds into an IRA at SAmeriBank. *Id.* at 10. On July 23, 2015, the Magistrate Judge granted Travelers' motion for a writ of garnishment directed to SAmeriBank. Magistrate Judge's Report and Recommendation, Docket 11, at 2.

Magistrate Judge McCoun III submitted a Report and Recommendation on March 1, 2016 (Docket 11) and a Report and Recommendation on August 16, 2016 (Docket 865) addressing the numerous summary judgment motions related to the writ of garnishment directed to SAmeriBank. In the Report and Recommendation submitted on August 16, 2016, Magistrate Judge McCoun III issued a recommendation on three summary judgment motions related to determining whether the funds deposited into Kearney's IRA at SAmeriBank lost the exempt status because of Kearney's pledge of collateral in the Security Agreement with Moose Investments. Docket 865, at 8. Kearney argued the funds held in his IRA were exempt from garnishment under Fla. Stat. 221.21(2). *Id.* at 8. Travelers countered that Kearney pledged the IRA as security to Moose Investments pursuant to the Promissory Note and Security Agreement, and such pledge of the IRA as collateral caused the funds in the IRA to both lose its tax-exempt status and its exempt status from garnishment. *Id.* at 8-9. Kearney responded that the Promissory

Note and Security Agreement did not specify the IRA was intended to be pledged as a "deposit account" as part of the collateral under the Security Agreement. *Id.* at 22- 23.

The Magistrate Judge determined that Kearney pledged all of his assets and rights in the Security Agreement securing the Promissory Note. *Id.* at 22. Thus, the funds held in Kearney's IRA lost their tax-exempt status and were not protected by Fla. Stat. § 221.21(2) or any other statutory exemption. *Id.* at 29. In arriving at this conclusion, the Magistrate Judge determined the language of the Security Agreement was "clear, unambiguous, and without exception." *Id.* at 26. Although Kearney's IRA was not specifically identified as part of the collateral, the Magistrate Judge noted that the broad language of the Security Agreement "encompassed potential retirement accounts or funds, such as the IRA at issue here." *Id.* at 28. The Magistrate Judge did not identify the collateral category in the Security Agreement that purportedly covered the IRA. The Magistrate Judge did not explain whether the IRA was a "deposit account," "investment property," a "general intangible," or something else. Furthermore, the Magistrate Judge did not reference Fla. Stat. § 69.1081(3), which provides that a description of collateral as "all the debtor's assets" or "all the debtor's personal property" or using words of similar import does not reasonably identify the collateral for purposes of the security agreement. Such general descriptions are legally inadequate to create a lien. The Magistrate Judge did not cite any Florida case law or the Florida Statutes in support of the Magistrate Judge's position that a pledge of IRA funds causes such funds to lose their creditor exempt status in Florida. In fact, the Magistrate Judge only cited cases from the United States Bankruptcy Court for the Southern District of Ohio and the Eastern District Court of Virginia to support the conclusion. *Id.* at 21-22 (citing *In re Roberts*, 326 B.R. 424, 426 (Bankr. S.D. Ohio 2004), and *XL Specialty Ins. Co. v. Truland*, 2015 WL 2195181, at \*13 (E.D. Va., May 11, 2015)).

The United States District Court Middle District of Florida, Tampa Division adopted, confirmed, and approved in all respects the Reports and Recommendations submitted by Magistrate Judge McCoun III in Docket 11 and Docket 865. *Kearney Construction Company, LLC v. Travelers Casualty & Surety Company of America*, 2016 WL 1394302 at \*1; *Kearney Construction Company, LLC v. Travelers Casualty & Surety Company of America*, 2016 WL 4244390 at \*1. In 2019, the United States Court of Appeals for the Eleventh Circuit reexamined whether Kearney pledged his IRA as collateral under the Security Agreement. *Kearney Constr. Co., LLC v. Travelers Cas. & Sur. Co. of Am.*, 2019 WL 595361 at \*1 (11th Cir. 2019). The Eleventh Circuit agreed with the United States District Court Middle District of Florida, Tampa Division, and determined the language in the Security Agreement "constitutes an unambiguous pledge of "all assets and rights of the Pledgor," including his IRA Account . . . ." *Id.* at \*2. The Eleventh Circuit concluded the District Court properly held the IRA was pledged as security for Kearney's loan with Moose Investments and "therefore was not exempt under § 222.21." *Id.* at \*3. As with the Magistrate Judge, the Eleventh Circuit did not identify the collateral category in the Security Agreement that purportedly covered the IRA and did not reference how Fla. Stat. § 69.1081(3) provides that general descriptions of collateral are legally inadequate to create a valid lien.

As discussed in Footnote 1, the Eleventh Circuit rejected Kearney's argument that the IRA was protected by Fla. Stat. §§ 222.21(2)(a) 1 and 2 even if it was determined that the IRA was pledged under the Security Agreement. *Id.* at \*2, n.1. The Eleventh Circuit asserted Fla. Stat.

§ 222.21(2)(a)(1) can be applied only if the Internal Revenue Service (the "IRS") "pre-approved" the IRA as exempt from taxation. *Id.* The Eleventh Circuit also stated Fla. Stat. § 222.21(2)(a)(2) can be applied only if the IRS has "determined" an IRA is exempt from taxation. *Id.* The Eleventh Circuit concluded "Kearney provided no evidence the IRS "pre-approved" "Kearney's IRA as exempt from taxation, or that the IRS made a "determination" that "Kearney's IRA was exempt from taxation. *Id.* Since "Kearney had the burden of proving such "pre-approval" or "determination," the Eleventh Circuit concluded the funds held in "Kearney's IRA lost their tax-exempt status and were not protected by Fla. Stat. § 221.21(2) or any other statutory exemption. *Id.* Although there is a procedure for obtaining a determination letter from the IRS for a "qualified plan, employers who sponsor retirement plans are generally not required to apply for a determination letter from the IRS. Furthermore, effective January 1, 2016, Revenue Procedure 2016-3 provides the limited circumstances under which plan sponsors may submit determination letter applications to the IRS. In general, a sponsor of an individually designed plan may submit a determination letter application only for initial plan "qualification and for "qualification upon plan termination. Thus, the custodians of IRAs rarely seek determination of tax-exempt status from the IRS. Furthermore, it is both absurd and impossible to require all Florida Consumers owning IRAs to obtain the IRS's approval regarding the status of their IRAs as exempt in order to be protected by Florida's statutory exemption.

### **C. Issues Resulting from Kearney Holding**

Chapter 222 of the Florida Statutes contains most of the statutory exemptions that protect certain assets from legal process under Florida law. The Magistrate Judge, the District Court, and the Eleventh Circuit concluded that "Kearney forfeited the exempt status of the funds held in the IRA by pledging the funds as collateral because the Security Agreement provided "Kearney pledged all of his "assets and rights." In arriving at this conclusion, the three courts ignored Fla. Stat. § 69.1081(3), which provides that a description of collateral as "all the debtor's assets" or words of similar import does not reasonably identify the collateral for purposes of the security agreement. Such general descriptions are legally inadequate to create a lien. "Historically, when an individual signs a general pledge of "all assets" in a security agreement, a creditor can only recover those assets specifically pledged to the creditor in such agreement. The Security Agreement did not specifically identify the IRA as part of the collateral. It has been standard practice for any asset which is exempt under Chapter 222 of the Florida Statutes to remain exempt from the reach of creditors, if the exempt asset is not specifically pledged. The three courts did not identify the collateral category in the Security Agreement that purportedly covered the IRA, and never explained whether the IRA was a "deposit account," "investment property," "a "general intangible," or something else.

The three Florida courts did not cite any Florida case law or relevant statute in the Florida Statutes to support the conclusion that "Kearney waived his exemption from creditors for funds held in the IRA by signing the Security Agreement containing a broadly worded security interest provision. The Magistrate Judge cited cases from the "United States Bankruptcy Court for the Southern District of Ohio and the Eastern District Court of Virginia to support the conclusion that a pledge of IRA funds causes such funds to lose their creditor exempt status. "However, those cases were not decided under Florida law, are not binding on a Florida court, and rest in "jurisdictions that do not necessarily have state law creditor exemptions similar to Florida for

IRAs.

The Eleventh Circuit, in the *Kearney* decision, without citing any Florida case law supporting its conclusion

- blind-sides millions of Florida Consumers by rendering moot numerous statutory exemptions from creditors under Florida law for anyone who has signed a contract containing a blanket security interest provision that includes deposit accounts, general intangibles, and/or investment property;
- causes citizens to unintentionally remove the exempt protection they have from their IRAs and qualified retirement plans which may cause them to become so destitute they must become wards of the state;
- creates a toxic environment for business because all business loans requiring a general pledge of assets would force business owners to give their creditors total access to their retirement savings, children's college funds, life insurance cash surrender values and coin collections as collateral; and
- potentially triggers a ruinous immediate financial result for Florida Consumers by causing the loss of the pledged amount of a Consumer's IRAs and qualified retirement plans, plus up to 40% of the full value to taxes and penalties upon making a general pledge of assets.

**1. Forfeiture of Exempt Status for Pledged Assets:** Chapter 222 of the Florida Statutes contains most of the statutory exemptions that protect certain assets from legal process under Florida law. For example, Fla. Stat. §222.21(2)(a) allows Florida Consumers to claim an exemption from creditors for funds held in IRAs, 401(k) retirement accounts, and other tax-exempt accounts. Florida Consumers have long operated under the belief any asset which is exempt under Chapter 222 of the Florida Statutes is exempt from the reach of creditors unless such exempt asset is specifically pledged in a security agreement. The Magistrate Judge, the District Court, and the Eleventh Circuit cast aside this widely held belief in concluding that *Kearney* forfeited the exempt status of the funds held in the IRA by pledging the funds as collateral because the Security Agreement provided *Kearney* pledged all of his assets and rights. In arriving at this conclusion, the three courts ignored Fla. Stat. §609.1081(3), which provides that a description of collateral as "all the debtor's assets" or words of similar import does not reasonably identify the collateral for purposes of the security agreement. Such general descriptions are legally inadequate to create a lien. Furthermore, the Security Agreement at issue in *Kearney* did not specifically identify *Kearney's* IRA as part of the collateral. The three courts did not identify the collateral category in the Security Agreement that purportedly covered the IRA, and never explained whether the IRA was a "deposit account," "investment property," a "general intangible," or something else. A long standing public policy of the Florida legislature is the promotion of the financial independence of the retired and elderly through the protection of their IRAs and pensions plans with an exemption, thus reducing the need for public financial assistance. However, the *Kearney* decision may result in Florida Consumers unintentionally

removing the exempt protection they have from their IRAs and qualified retirement plans, which could then cause them to become so destitute they must become wards of the state.

**2. Application of *Kearney* Decision Beyond IRAs:** The *Kearney* decision creates a dangerous precedent by permitting funds held in an IRA or other qualified plans to be garnished by creditors without a Consumer making an express and knowing waiver of the Fla. Stat. § 222.21(2)(a) exemption. The holding in *Kearney* appears to be in contravention with the intent of the Florida legislature to protect the assets of IRAs and pension plans from creditors. *See Dunn v. Doskocz*, 590 So. 2d 521, 522, n.2 (Fla. Dist. Ct. App. 1991) (It appears the legislature has made the policy decision that it should protect the assets of IRAs and pension plans, thereby promoting the financial independence of IRA and pension plan beneficiaries in their retirement years in turn reducing the incidence and amount of requests for public financial assistance). The ripple effects of the *Kearney* decision go beyond the loss of the statutory exemption for funds held in IRAs or other qualified retirement plans. In *Kearney*, the Eleventh Circuit only examined whether Kearney waived the statutory exemption for his IRA. However, the *Kearney* holding is not necessarily limited to the waiver of the statutory exemption for IRAs. The *Kearney* decision can be used by creditors to pursue other purportedly exempt assets. *Kearney* potentially renders moot numerous statutory exemptions from creditors under Florida law for anyone who has signed a contract containing a broadly worded security interest provision that includes a general reference to deposit accounts, general intangibles, and/or investment property. For example, funds in other tax-exempt accounts protected under Fla. Stat. § 222.21(2)(a), such as 401(k) retirement accounts, are potentially vulnerable to creditors. Since the Eleventh Circuit did not identify which collateral category in the Security Agreement covered the IRA in *Kearney*, it is not unreasonable to believe that the cash surrender values of life insurance policies and the proceeds of annuity contracts protected under Fla. Stat. § 222.14 could be classified as deposit accounts or investment property in a different security agreement, and thus, potentially accessible to creditors. A similar analysis applies to funds held in qualified tuition programs and other qualifying accounts and certain individual property currently protected by Fla. Stat. § 222.22 and Fla. Stat. § 222.25, respectively.

**3. Creates a toxic environment for new business:** Mortgages, credit card applications, home equity line of credit agreements, security agreements, financing statements, and personal guarantees on business loans are only a few examples of documents that typically include a general pledge of assets as collateral similar to the provision at issue in *Kearney*. Millions of Florida Consumers are parties to at least one (if not more) of these contracts secured by their assets, which may now, unbeknownst to them, include a pledge of their exempt assets. The *Kearney* holding creates a toxic environment for business because almost all business loans require a general pledge of assets, which forces business owners to unknowingly give their creditors total access to their retirement savings, children's college funds, life insurance cash surrender values, and coin collections as collateral.

**4. Triggers early distribution taxes and penalties of up to 40%:** The tax result of the *Kearney* decision makes it even worse. Under federal law, if an IRA owner uses the account or any portion of such account as security for a loan, the portion used as security is deemed distributed to the owner. IRC § 408(e)(4). The IRA owner is required to include any amount paid or distributed out of the IRA in gross income and to pay federal income taxes on such gross

income. IRC §408(d)(1). The same federal income tax results will occur if a Consumer pledges an interest in a qualified employer plan. Pursuant to §2(p)(1)(B) of the Code, if a Consumer pledges (or agrees to pledge) any portion of his interest in a qualified employer plan, such portion shall be treated as having been received by such individual as a loan from such plan. IRC §2(p)(1)(B). A loan from a qualified employer plan is treated as being received as a deemed distribution for purposes of §2. IRC §2(p)(1). Additionally, the Code imposes penalties depending on when the deemed distribution from an IRA or qualified employer plan is made. Like an actual distribution, a deemed distribution is subject to the 10% additional tax on certain early distributions under §2(t). Treas. Reg. 1.2(p)-1, §11(b). For example, if a Consumer is under the age of 59 and not disabled, the deemed distribution under §408(e)(4) is also subject to the 10% penalty tax under §2(t). IRC §2(t).

The *Kearney* holding generates a calamitous financial result for Florida Consumers. If a Consumer signs a document containing a broadly worded security interest provision that includes a general reference to deposit accounts, general intangibles, and/or investment property, that Consumer, under *Kearney*, has arguably pledged the entirety of all such funds owned in an IRA, as well as their other exempt assets, such as cash surrender values of life insurance policies and the proceeds of annuity contracts. If a Consumer pledges an IRA, potentially the entirety of the pledged funds held in the IRA will be treated as a loan to the Consumer and thus taxable as a deemed distribution. If a creditor can garnish the funds held in an IRA, the debtor Consumer would, in addition to losing the pledged funds, be required to pay federal income taxes on all of the funds along with possibly the additional tax penalty for making an early distribution of the IRA.

#### **D. Legislative Fix Needed**

The Eleventh Circuit, without citing any Florida case law supporting its conclusion, potentially rendered moot numerous statutory exemptions from creditors contained in Chapter 222 of the Florida Statutes for any Florida Consumer who has signed any contract containing a blanket security interest provision that includes deposit accounts, general intangibles, and/or investment property. The *Kearney* result flies in the face of the current statutory framework requiring a Consumer is to be made aware of, understand, and acknowledge that such Consumer is waiving a statutory exemption under Florida law. In light of the serious issues resulting from the *Kearney* holding, Chapter 222 requires a legislative fix. In the absence of legislative action, a Consumer, by signing a document containing a broadly worded security interest provision, unknowingly places their IRA, pension plan, annuity, life insurance contract, or personal property at risk of forfeiture and confiscatory taxation.

### **III. EFFECT OF PROPOSED CHANGES**

#### **Florida Statutes Section 222.105**

Current Situation In Fla. Stat. §222.11(2)(b), for a Consumer to waive protection from wage garnishment, the Consumer must consent to garnishment of such Consumer's wages in writing. This written waiver document must be written in the same language as the contract to which the waiver relates, be contained in a separate document attached to the contract, and contain the



mandatory waiver language specified in Fla. Stat. § 222.11(2)(b) in at least 14-point type. Pursuant to Fla. Stat. § 32.02, a surviving spouse can waive his or her homestead rights by a written contract, agreement, or waiver, signed by two subscribing witnesses, that contains a waiver of "all rights," or equivalent language in the homestead property. There is currently no law in the Florida Statutes that discusses when and how a Consumer can waive the statutory exemptions from garnishment set forth in Fla. Stat. § 222.14, Fla. Stat. § 222.21, Fla. Stat. § 222.22, and Fla. Stat. § 222.25.

Effect of Proposed Changes The Committee proposes the insertion of proposed Fla. Stat. § 222.105, which will clarify a Consumer can only waive the exemption from garnishment for funds held in an IRA or other "qualified retirement account (Fla. Stat. § 222.21), funds held in "qualified tuition programs and other "qualified accounts (Fla. Stat. § 222.22), proceeds from an annuity or life insurance contract (Fla. Stat. § 222.14), and individual property exempt from the legal process (Fla. Stat. § 222.25) by making an express and knowing waiver in a writing containing similar terms to those set forth in Fla. Stat. § 222.11(2)(b). The proposed legislation protects Florida residents from unintentionally assigning, pledging, or waiving rights to, assets that otherwise are exempt from legal process under Chapter 222 of the Florida Statutes by imposing clearly defined requirements for a written agreement to constitute a valid and intentional assignment, pledge, or waiver of such exemptions. A general pledge of assets should not allow a creditor to attach to those assets otherwise exempt under Florida law without a waiver in writing specifying the specific exempt asset being pledged. This writing ensures the Consumer understands they are waiving the exemptions from garnishment. The committee is not proposing changes to the waiver process governing the homestead exemption or the wage exemption because they are clear and consistent with proposed Fla. Stat. § 222.105 and contain protections similar to those being proposed herein.

The written waiver in proposed Fla. Stat. § 222.105 must specifically reference the accounts or contracts in which the Consumer is waiving the exemption. In the case of an individual retirement or other "qualified retirement identified in Fla. Stat. § 222.21 or a "qualified tuition program or other "qualified account specified in Fla. Stat. § 222.22, the waiver should identify the custodian of the account as well as the last four digits of the corresponding account number. In the case of an annuity or life insurance contract as identified under Fla. Stat. § 222.14, the waiver should identify the name of the issuer or insurer and the last four digits of the annuity or policy number. In the case of other individual property specified in Fla. Stat. § 222.25, the waiver should make a specific reference to the individual property. The proposed Fla. Stat. § 222.105 includes Fla. Stat. § 222.25 within its purview, because the general pledge language in *Kearney* included "goods" as part of the collateral.

The written waiver must also contain language in at least 14-point type in capital letters notifying the Consumer that pledging an exempt asset causes the Consumer to forfeit their statutory rights and may cause adverse income tax consequences. The Consumer must initial two paragraphs and sign the waiver in order to effectively waive the protection for such exemptions included in the waiver. The proposed Fla. Stat. § 222.105 ensures a Consumer has sufficient notice and understanding regarding the decision to waive their right to the statutory exemptions from garnishment under Florida law.

As it is currently proposed, new Fla. Stat. § 222.105 would be effective prospectively upon becoming law.

#### **IV. FISCAL IMPACT ON STATE AND LOCAL GOVERNMENTS**

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

#### **V. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR**

Millions of Florida Consumers are parties to at least one (if not more) contracts secured by their assets, which may now, unbeknownst to them, include a pledge of their exempt assets. Today, especially given the devastating economic hardships caused by Covid-19, citizens of the state of Florida have but few assets which they can rely upon for a modicum of financial security. The proposed Fla. Stat. § 222.105 protects Florida residents from unintentionally assigning, pledging, or waiving rights to, assets that otherwise are exempt from legal process under Chapter 222 of the Florida Statutes by imposing clearly defined requirements for a written agreement to constitute a valid and intentional assignment, pledge, or waiver of such exemptions. Without having a Consumer sign a written waiver waiving their statutory exemptions, the *Kearney* decision unknowingly places a Consumer's IRA, pension plan, annuity, life insurance contract, or personal property at risk of forfeiture and confiscatory taxation. For example, if a Consumer pledges the funds held in an IRA, the portion used as security is deemed distributed to the Consumer. The Consumer must pay federal income taxes on this deemed distribution. The Consumer may also be required to pay a 10% additional tax for making an early distribution of the IRA. This proposal saves Florida Consumers from unknowingly losing the pledged funds and paying federal income taxes on the total balance of the pledged funds.

#### **VI. CONSTITUTIONAL ISSUES**

There are no constitutional issues that may arise as a result of the proposal.

#### **VII. OTHER INTERESTED PARTIES**

Tax Section of The Florida Bar

Name

Contact Information

Support, Oppose or No Position  Support pending finalization of language

Business Law Section of The Florida Bar

Name

Contact Information

Support, Oppose or No Position  Support pending finalization of language

1 A bill to be entitled

2 An act relating to protection of Florida residents from  
3 unintentionally assigning, pledging, or waiving rights to assets  
4 that are otherwise exempt from legal process; creating s.  
5 222.105, Florida Statutes to provide requirement for specific  
6 waivers of exemptions; providing an effective date.

□

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

9

10 Section 1. Section 222.105, Florida Statutes, is created to  
11 read:

12 222.105 - Requirement for specific waivers of exemptions.

13 (1) The exemptions set forth in Florida Statutes Chapter 222  
14 cannot be waived unless the person who is entitled to such exemption  
15 has specifically agreed otherwise in a writing described in this  
16 section. References in a commercial instrument to all of a person's  
17 "assets and rights, wherever located, whether now owned or after  
18 acquired, and all proceeds thereof", or words of similar import, shall  
19 not include assets which are exempt under Chapter 222.

20 (2) The agreement to waive the protection provided by this  
21 Section must:

22 (a) Be written in the same language as the contract or  
23 agreement to which the waiver relates;

24 (b) Be a separate document from the contract or agreement to  
25 which the waiver relates;

26 (c) In the case of an account described in Sections 222.21 or  
27 222.22, refer to the name of the custodian of the account and the last  
28 four digits of the account number;

29 (d) In the case of an annuity contract or life insurance policy  
 30 described in Section 222.14, refer to the name of the issuer or  
 31 insurer and the last four digits of the annuity or policy number;

32 (e) In the case of other individual property described in  
 33 Section 222.25, refer to the individual property; and

34 (f) Contain the following language in at least 14-point type in  
 35 capital letters stating:

36 **WARNING - PLEDGING YOUR EXEMPT ASSETS WILL CAUSE YOU TO**  
 37 **FORFEIT YOUR STATUTORY RIGHTS AND CAUSE ADVERSE INCOME TAX**  
 38 **CONSEQUENCES - PLEASE CONSULT YOUR TAX ADVISOR BEFORE**  
 39 **SIGNING THIS FORM.**

40  
 41 FLORIDA LAW PROVIDES THAT YOUR RETIREMENT AND OTHER  
 42 ACCOUNTS DESCRIBED IN FLORIDA STATUTES SECTIONS 222.21 AND  
 43 222.22, ANNUITY CONTRACTS AND THE CASH SURRENDER VALUE OF  
 44 LIFE INSURANCE POLICIES DESCRIBED IN FLORIDA STATUTES  
 45 SECTION 222.14, AND CERTAIN PERSONAL PROPERTY DESCRIBED IN  
 46 FLORIDA STATUTES SECTION 222.25 ARE EXEMPT FROM CREDITOR  
 47 ATTACHMENT, GARNISHMENT OR OTHER LEGAL PROCESS IN FAVOR OF  
 48 YOUR CREDITORS. Initial \_\_\_\_\_

49  
 50 ADDITIONALLY, THE PLEDGE OF YOUR RETIREMENT AND OTHER  
 51 ACCOUNTS DESCRIBED IN FLORIDA STATUTES SECTIONS 222.21 AND  
 52 222.22, ANNUITY CONTRACTS AND THE CASH SURRENDER VALUE OF  
 53 LIFE INSURANCE POLICIES DESCRIBED IN FLORIDA STATUTES  
 54 SECTION 222.14 IS LIKELY TO CAUSE IMMEDIATE FEDERAL (AND  
 55 STATE, IF APPLICABLE) INCOME TAX CONSEQUENCES AND PENALTIES  
 56 IN ADDITION TO SURRENDER CHARGES UNDER CERTAIN LIFE  
 57 INSURANCE POLICIES AND ANNUITY CONTRACTS. **YOU ARE ADVISED**

58 TO SEEK THE ADVICE OF YOUR TAX ADVISOR PRIOR TO PLEDGING  
59 SUCH ASSETS AND SIGNING BELOW. Initial \_\_\_\_\_

60  
61 BY INITIALING ABOVE AND SIGNING BELOW, YOU AGREE TO WAIVE  
62 THE PROTECTION FOR SUCH EXEMPTION AS TO THE FOLLOWING  
63 ASSETS (CIRCLE ALL APPLICABLE):

64  
65 RETIREMENT AND OTHER ACCOUNTS DESCRIBED IN SECTION 222.21  
66 OR SECTION 222.22

67  NAME OF CUSTODIAN: \_\_\_\_\_

68 LAST FOUR DIGITS OF ACCOUNT NUMBER(S): \_\_\_\_\_

69 ANNUITY CONTRACT DESCRIBED IN SECTION 222.14

70  NAME OF ISSUER OF ANNUITY CONTRACT: \_\_\_\_\_

71  LAST FOUR DIGITS OF CONTRACT NUMBER(S): \_\_\_\_\_

72  LIFE INSURANCE POLICY DESCRIBED IN SECTION 222.14

73  NAME OF LIFE INSURANCE COMPANY: \_\_\_\_\_

74  LAST FOUR DIGITS OF POLICY NUMBER(S): \_\_\_\_\_

75  PERSONAL PROPERTY DESCRIBED IN SECTION 222.25

76  LIST OF PROPERTY: \_\_\_\_\_

77

78 (Consumer's Signature) (Date Signed)

79

80 I have fully explained this document to the consumer.

81

82 (Creditor's Signature) (Date Signed)

83

84 Section 2. This act shall take effect upon becoming law.

**FLORIDA PROFESSIONAL FIDUCIARIES LICENSING ACT  
(DRAFT FOR DISCUSSION PURPOSES – 7-31-20)**

**XXX Title.** This chapter may be cited as the “Florida Professional Fiduciaries Licensing Act.”<sup>1</sup>

**XXX Legislative Findings; Intent.** The Legislature finds that the act of serving as a fiduciary is a skilled profession. The legislative purpose for enacting this chapter is to ensure that every professional fiduciary practicing in this state meets minimum requirements for competent practice; for the protection of the public interest in the proper conduct of fiduciary functions; and for the protection of the interests of beneficiaries and other members of the public using the services of, doing business with, or otherwise affected by professional fiduciaries in their conduct of business or other exercise of fiduciary functions or powers.

**XXX Definitions.** Unless the context otherwise requires, in this chapter:

- (1) “Client” means an individual who is served, or whose legal or equitable interests are administered by a fiduciary.
- (2) “Department” means the Office of Financial Regulation.<sup>2</sup>
- (3) “Licensed professional fiduciary” or “licensee” means a person who is licensed under this chapter as a professional fiduciary.
- (4) “Person”. As defined in the Florida Statutes, “person” includes individuals and entities. Nothing in this chapter shall be deemed a grant of authority for an entity to serve as a fiduciary.
- (5) “Professional fiduciary”<sup>3</sup> means a person who works in Florida as a professional providing fiduciary services to a Florida resident as guardian of the person or property, trustee, agent under a power of attorney, health care surrogate, conservator, or personal representative and receives compensation for providing fiduciary or other services.

**XXX Licensing Requirements.**

- (1) Every person acting as a professional fiduciary shall be licensed by the Department. For an entity acting as a professional fiduciary, its owner or an officer, shall also be licensed.
- (2) Every person who is required to register as a professional guardian with the Office of Statewide Public Guardian shall obtain a license as a professional fiduciary under this chapter.

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<sup>1</sup> Language tracks 736.0101.

<sup>2</sup> Consideration should be given to the role, if any, of the Department of Business and Professional Regulation.

<sup>3</sup> This definition still needs some work to include “care managers,” “bill payors,” etc.

**XXX Exemptions from Licensing.** The following are exempt from the mandatory licensing requirements of this chapter:<sup>4</sup>

- (1) A bank or trust company, authorized by state or federal law to exercise trust powers in this State.
- (2) Any public agency as defined in Chapter 287, or other agency of the State of Florida or of a county of Florida.
- (3) The fiduciary of a pooled special needs trust.
- (4) The fiduciary of a charitable purpose trust. [???
- (5) Any charity serving as trustee for a trust under which it is a beneficiary.
- (6) A not for profit corporation providing fiduciary services solely to a tax exempt organization.
- (7) A person employed by or acting as an agent on behalf of an exempt person or entity under this chapter.
- (8) A fiduciary who is related to the client as a spouse, parent, lineal descendant, sibling, or spouse of one of the foregoing.

**XXX Regulatory Agency.** The Department shall be responsible for administering and enforcing the licensing of professional fiduciaries, including establishment of licensing fees, maintenance of required licensee applications and filings, issuing licenses, and suspending or revoking licenses. The Department may adopt rules necessary to implement the requirements of this chapter and to set standards and fees as a Department deems necessary.

**XXX Qualifications To Be Licensed.** In order to meet the qualifications for licensure as a licensed professional fiduciary, a person shall meet all of the following requirements:

- (1) Submit an application to the Department on the form provided by the Department, which shall include the applicant's full legal name, date of birth, social security number, complete contact information, including current addresses, telephone numbers for applicant's place of business and place of residence, and e-mail address. The application shall be signed and sworn to by the applicant and include a statement by the applicant agreeing to adhere to all statutes and regulations of this State.
- (2) Submit all of the following to the Department with the application:

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<sup>4</sup> There may be a need to add exemptions for schools, booster clubs, etc.

(a) Fingerprint images in order to obtain a level 2 screening pursuant to s.435.04.

(b) A list of current or prior licenses or certifications from this State or elsewhere which the applicant holds or held within the last 10 years, and for each license identified, the duration of the license and the issuing State or entity.

(c) A list of prior names by which the applicant has been known, including maiden names or, if an entity, fictitious or “doing business as” names.

(d) Proof of completion of the education or experience requirements described in section (6) below.

(e) Proof of completion of the required pre-licensing education courses described in section (7) below.

(f) Proof of the fidelity bond and insurance required in sections (8) and (9) below.

(g) Three letters of reference from professionals, dated within three months of the application, including, but not limited to, attorneys, trust officers, certified public accountants, and members of the judiciary discussing the applicant’s performance of fiduciary services.

(h) A statement containing the number of current fiduciary appointments, length of service for each current appointment, and type of fiduciary service for each fiduciary appointment the applicant is currently providing to a client.

(g) A nonrefundable application fee established by the Department.

(3) Be at least 21 years of age.

(4) Have not committed any acts that are grounds for denial of a license under s.XXX.

(5) Have not filed for bankruptcy or held a controlling financial interest in a business that filed for bankruptcy in the last 10 years.

(6) Have at least one of the following:

(a) A bachelor’s degree from an accredited college or university.

(b) An associate’s degree from an accredited college or university, and at least two years of years of experience working as a professional fiduciary.

(c) Experience of not less than five years, prior to January 1, 2022, working as a professional fiduciary or working with substantive fiduciary responsibilities for a professional fiduciary.

(d) Demonstratable sufficient work and life experience satisfactory to the Department.



(7) Completion of 40 hours of pre-licensing education courses developed by the Department, Office of Public and Professional Guardians, the Real Property, Probate, and Trust Law Section of The Florida Bar, or other appropriate organizations.

(8) Provide evidence satisfactory to the Department that the applicant has obtained a fidelity bond in an amount of at least \$\_\_\_\_\_, payable to the Governor of the State of Florida.<sup>5</sup>

(9) Provide evidence satisfactory to the Department that the applicant has obtained errors and omissions insurance. The amount of the coverage must be at least \$1,000,000.00, with a deductible no greater than \$50,000.<sup>6</sup>

(10) The fidelity bond and errors and omissions insurance must remain in effect and unimpaired as long as the person is licensed as a professional fiduciary.

(11) Pass the licensing examination developed by the Department in conjunction with the Department, Office of Public and Professional Guardians and/or the Real Property and Probate Trust Law Section of The Florida Bar.

(12) Receipt by the Department of a satisfactory criminal background check and three credit reports obtained by the Department directly from the agency or national credit reporting services.

(13) The cost of any educational course required by this chapter shall be borne by the applicant and shall not be borne by any client served by an applicant.

**XXX Annual Report and Renewal Application.** In order to renew or restore an application for licensure as a licensed professional fiduciary, each year, a person shall meet all of the following requirements:

(1) File an annual report, in writing under oath, by \_\_\_\_\_, for the preceding fiscal year with the Department, which shall contain the following:

(a) The current business and residential addresses, telephone numbers and email for the licensed professional fiduciary.

(b) Written proof that the errors and omissions insurance required in s. \_\_\_\_ (8) and (9) [above] are in full force and effect.

(2) Submit an affidavit that the licensed professional fiduciary has not been arrested, indicted, or convicted of a crime; filed for bankruptcy; been removed or the subject of

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<sup>5</sup> The type of bond (fidelity, fiduciary or surety bond) may need further consideration together with the need for further legislation to allow for the bond to be payable to the Governor. If a bond is unavailable generally, the Department must adopt rules for alternative methods to comply with this paragraph.

<sup>6</sup> If errors and omissions insurance is unavailable generally, the Department shall adopt rules for alternative methods that comply with this paragraph.

removal for cause from any fiduciary position; sued for breach of a fiduciary duty; found liable for breach of a fiduciary duty; does not have any ownership, financial or beneficial interest in any businesses or organization that has received payments from a client other than the licensed professional fiduciary's business or organization through the licensee rendering fiduciary services; has not settled any claims against the licensed professional fiduciary for breach of fiduciary duty; any claims filed against licensee's errors and omissions insurance policy; and any other professional licenses have not been revoked or suspended.

- (3) Complete 15 hours of approved education courses.
- (4) Provide a statement under oath that no professional license or certification held by the licensed professional fiduciary has been revoked.
- (5) Provide information regarding any disciplinary proceeding or action against the licensed professional fiduciary.
- (6) A statement containing the number, length of service, and type of fiduciary service for each fiduciary appointment the applicant is currently providing to a client.
- (7) Disclosure of all payments from the client's funds or assets to any individual or entity by whom the fiduciary is employed or to any entity in which the licensed professional fiduciary or relative of the licensed professional fiduciary has an ownership interest of 10% or more, and identify said individual or entity.
- (8) A renewal fee established by the Department.

**XXX Self Reporting.**

(1) A licensed professional fiduciary shall file a written statement under penalty of perjury with the Department within \_\_\_\_\_ days of the occurrence of any of the following events:

(a) The licensed professional fiduciary has been removed as a conservator, guardian, trustee, personal representative, health care surrogate or agent under a power of attorney for cause. The licensee may file an additional statement of the issues and facts pertaining to the case.

(b) The licensed professional fiduciary has been determined by a final court determination to have breached a fiduciary duty.

(c) The licensed professional fiduciary has settled a matter in which a complaint concerning the licensee's acts or omissions as a fiduciary had been filed, along with the case number and a statement of the issues and facts pertaining to the allegations.

(d) The licensed professional fiduciary has had any licenses or professional certificates held by the licensee revoked.

(e) The licensed professional fiduciary has filed for bankruptcy or held a controlling financial interest in a business that filed for bankruptcy.

(f) The licensed professional fiduciary has been charged, indicted or convicted of a felony or a misdemeanor substantially related to the functions and duties of a professional fiduciary.

(g) A claim has been filed against the licensed professional fiduciary's fidelity bond or errors and omissions Insurance policy.

(h) The licensed professional fiduciary's fidelity bond or errors and omissions insurance policy has been revoked or terminated.

(2) The statement by the licensee required by this section may be filed electronically with the Department, or in a form approved by the Department.

**XXX Suspension, Revocation, and Denial of License.**

(1) A license issued under this chapter to a licensed professional fiduciary shall be suspended, revoked, denied, or other disciplinary action imposed for any of the following grounds:<sup>7</sup>

(a) A conviction of any felony.

(b) A conviction of a misdemeanor substantially related to the functions and duties of a licensed professional fiduciary.<sup>8</sup>

(c) A failure to report or disclose to the Department of a conviction under paragraph (a) or (b) of this subsection.

(d) A fraud or willful misrepresentation in obtaining or renewing a license issued under this chapter.

(e) The unprofessional conduct, fraud, dishonesty, corruption, willful violation of duty, gross negligence or incompetence by a licensed professional fiduciary while performing fiduciary functions.

(2) A license issued under this chapter to a licensed professional fiduciary may be suspended, revoked, denied, or other disciplinary action imposed for any of the following grounds:

(a) A charge or indictment of a felony.

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<sup>7</sup> After all appeals have been completed, if any.

<sup>8</sup> Examples include theft, conversion, and defalcation.

(b) A conviction of a misdemeanor that is not substantially related to the functions and duties of a licensed professional fiduciary, including but not limited to, theft, conversion, and defalcation.

(c) A charge or indictment of a misdemeanor that is not substantially related to the functions and duties of a licensed professional fiduciary.<sup>9</sup>

(d) The unprofessional conduct, fraud, dishonesty, corruption, willful violation of duty, gross negligence or incompetence by a licensed professional fiduciary while performing fiduciary functions.<sup>10</sup>

(e) A disciplinary action, suspension or revocation of any other professional license issued by any state of the United States held by the licensed professional fiduciary.

(f) A violation of any section of this chapter.

(g) A violation of any rule or order issued by the Florida Office of Financial Regulations.

(h) The violation of any statute, rule, or regulation pertaining to the duties or functions of a fiduciary.

(i) The filing of a petition in bankruptcy under the provisions of any bankruptcy law or any insolvency act by the licensed professional fiduciary.

**XXX Proceedings Against Licensee.** All proceedings against a licensee for any violation of this chapter or any regulations adopted by Department shall be conducted in accordance with section. 120, Florida Administrative Procedures Act.

**XXX Prohibited Conduct.** On and after January 1, 2022:

(1) No person shall act or hold himself or herself out to the public as a licensed professional fiduciary, as defined in this chapter, unless that person is currently licensed in accordance with the provisions of this chapter. A person required to be licensed as a professional fiduciary shall not operate with an expired, suspended, retired, canceled, or revoked license.

(2) Unless exempt under this chapter, no person other than a licensed professional fiduciary shall act or serve as a professional fiduciary in this State, or hold himself or herself out to the public as qualified to serve as a professional fiduciary in this State, or willfully pretend to be, or willfully take or use any name, title, addition, or description

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<sup>9</sup> Id.

<sup>10</sup> This section is listed under section (1) and (2).

implying that he or she is qualified, or recognized by law as qualified, to serve as a professional fiduciary in this State. A professional fiduciary must present evidence of that professional fiduciary's exempt status, or valid, unexpired, unsuspended license upon request of any person.

(3) Any person who violates the provisions of this section:

(a) Commits the crime of exploitation, a felony punishable as provided in s. 825.103(3)(b).

(b) Must forfeit and disgorge the fees paid by any client for any services rendered by the professional fiduciary to the client, whether or not such fees are identified as fees for fiduciary services or otherwise.