EXECUTIVE COUNCIL MEETING

AGENDA

Westin Resort and Marina
Key West, Florida

Saturday, December 10, 2016
9:00 a.m.

BRING THIS AGENDA TO THE MEETING

Real Property, Probate and Trust Law Section
Executive Council Meeting

Westin Resort and Marina
Key West, Florida
December 10, 2016

Agenda

Note: Agenda Items May Be Considered on a Random Basis

I. **Presiding** — *Deborah P. Goodall, Chair*

II. **Attendance** — *William T. Hennessey, Secretary*

III. **Minutes of Previous Meeting** — *William T. Hennessey, Secretary*

Motion to approve the minutes of October 8, 2016 meeting of Executive Council held at The Disney Boardwalk Inn, Lake Buena Vista, Florida. **pp. 10 - 36**

IV. **Chair's Report** — *Deborah P. Goodall*

1. Recognition of Guests.

2. Milestones

3. Recognition of General Sponsors and Friends of the Section. **pp. 37 - 39**

4. Report of Interim Action of the Executive Committee.

   A. Approval of submission of Joint Tax Section and RPPTL comments to the Internal Revenue Service Regarding the Proposed Treasury Regulation under Code Section 2704. **pp. 40 - 53**

   B. Approval of language revising the proposed attorneys' fee provisions of the Elective Share Statute as authorized by the Executive Council at the October 8, 2016 Meeting. **pp**. **54 - 84**

   C. Approval of correspondence to the Department of Elder Affairs requesting a hearing on the proposed rules regarding Professional Guardians. **p**. **85**

   D. Approval of submission of summary letter and comments to the Department of Elder Affairs regarding the proposed rules regarding Professional Guardians. **pp. 86 - 122**

5. Upcoming Executive Council Meetings. **p. 123**

V. **Liaison with Board of Governors Report** — *Lansing C. Scriven*

VI. **Chair-Elect's Report** — *Andrew M. O'Malley* ***p. 124***

VII. **Treasurer's Report** — *Tae Kelley Bronner*

Statement of Current Financial Conditions. **p. 125**

VIII. **Director of At-Large Members Report** — *S. Katherine Frazier*

IX. **CLE Seminar Coordination Report** — *Robert Swaine (Real Property)* and *Shane Kelley (Probate & Trust), Co-Chairs* **p. 126**

X. **General Standing Division** — *Andrew M. O'Malley, General Standing Division Director and Chair-Elect*

Action Item:

1. **Budget Committee -** Tae Kelley Bronner, Chair and Treasurer

   Motion to approve the proposed Real Property, Probate and Trust Law Section Budget for fiscal year 2017 – 2018. **pp**. **127 - 138**

Information Items:

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

   Report on William Reece Smith Jr. Leadership Academy application process and qualifications. Applications available December 1, 2016. **pp**. **139 - 141**

2. **Amicus Coordination –** Kenneth Bell, Gerald Cope, Robert Goldman and John Little, Co-Chairs

   Report on pending amicus filings: Smith v. Smith; Ober v. Town of Lauderdale by the Sea; report on Florida Supreme Court opinion in Bartram v. U.S. Bank. **pp**. **142 - 220**

3. **Liaison with Clerks of Court –** William "Ted" Conner and Laird Lile

   Report from Liaisons.

4. **Membership and Inclusion –** Lynwood Arnold and Jason Ellison, Co-Chairs

   Report on Appointment of Brenda Ezell to the Florida Bar Diversity and Inclusion Committee.

5. **Model and Uniform Acts –** Bruce Stone and Richard Taylor, Co-Chairs

   Update on the Uniform Voidable Transfers Act.

6. **Professionalism and Ethics** – Paul Roman, Chair

Report on volunteers for the "No Place Like Home" project.

XI. Real Property Law Division Report—*Robert S. Freedman, Director*

Action Item:

1. **Residential Real Estate and Industry Liaison Committee –** *Salome Zikakis, Chair*

Committee motion to approve amendments to the Residential Contract For Sale and Purchase (clauses pertaining to force majeure, financing, municipal lien searches, permits disclosure, disclosure as to uncorrected building, environmental or safety code violations, open building permits or improvements not properly permitted, location of closing, FINCen GTO Notice, proration pertaining to real estate taxes, FIRPTA, and various typographical changes) and Section B of the Comprehensive Rider pertaining to homeowners' association and community disclosures. **pp. 221 – 247**

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

Action Item:

1. **Ad Hoc Study Committee on Due Process, Jurisdiction & Service of Process** --- Barry F. Spivey, Chair

Motion to: (A) adopt as a Section position legislation to address the Court's holdings in *Corya v. Sanders*, 155 So. 3d 1279 (Fla. 4th DCA 2015) (limiting a trustee's duty to account to beneficiaries), by amending §736.08135 and §736.1008, Fla. Stat., to clarify that: (1) §736.08135(3) does not limit the beginning period for which a trustee of an irrevocable trust is statutorily required to render a trust accounting to beneficiaries; and (2) a beneficiary's actual knowledge of the existence of an irrevocable trust for which he or she has not received a trust accounting does not commence the running of any limitations or laches period that would bar the beneficiary's assertion of a claim or cause of action against the trustee for breach of trust based upon the trustee's failure to provide a trust accounting as required by law; (B) find that such legislative position is within the purview of the Section; and (C) expend Section funds in support of the proposed legislative position. **pp. 248 - 259**

Information Items:

1. Report on the Florida Supreme Court Judicial Management Council Guardianship Workshop. **pp. 260 - 261**

XIII. Real Property Law Division Reports — *Robert S. Freedman, Director*

1. **Commercial Real Estate** – Adele Ilene Stone, Chair; E. Burt Bruton, R. James Robbins, Jr. and Martin D. Schwartz, Co-Vice Chairs.

2. **Condominium and Planned Development** – William P. Sklar, Chair; Alexander B. Dobrev and Kenneth S. Direktor, Co-Vice Chairs.

3. **Construction Law** – Scott Pence, Chair; Reese J. Henderson, Jr. and Neal A. Sivyer, Co-Vice Chairs.

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

5. **Construction Law Institute** – Sanjay Kurian, Chair; Diane S. Perera, Jason J. Quintero and Brian R. Rendzio, Co-Vice Chairs.

6. **Development & Land Use Planning** – Vinette D. Godelia, Chair; Julia L. Jennison, Co-Vice Chair.

7. **Insurance & Surety** – W. Cary Wright and Scott Pence, Co-Chairs; Frederick R. Dudley and Michael G. Meyer, Co-Vice Chairs.

8. **Liaisons with FLTA** – Alan K. McCall and Melissa Jay Murphy, Co-Chairs; Alexandra J. Overhoff and James C. Russick, Co-Vice Chairs.

9. **Real Estate Certification Review Course** – Jennifer Slone Tobin, Chair; Manuel Farach, Martin S. Awerbach and Brian W. Hoffman, Co-Vice Chairs.

10. **Real Estate Leasing** – Richard D. Eckhard Chair; Brenda B. Ezell, Vice Chair.

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

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

13. **Real Property Litigation** – Susan K. Spurgeon, Chair; Manuel Farach and Marty J. Solomon, Co-Vice Chairs.

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

15. **Residential Real Estate and Industry Liaison** – Salome J. Zikakis, Chair; Louis E. “”Trey” Goldman, Nicole M. Villarroel and James Marx, Co-Vice Chairs.

16. **Title Insurance and Title Insurance Liaison** – Raul P. Ballaga, Chair; Alan B. Fields, Brian J. Hoffman and Melissa N. VanSickle, Co-Vice Chairs.

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

XIV. Probate and Trust Law Division Committee Reports — *Debra Lynn. Boje, Director*

1. **Ad Hoc Guardianship Law Revision Committee** – David Clark Brennan, Chair; Sancha Brennan Whynot, Tattiana Patricia Brenes-Stahl, Nicklaus Joseph Curley, Co-Vice Chairs

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

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

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

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

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

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

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

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

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

11. **Guardianship, Power of Attorney and Advanced Directives** – Hung Viet Nguyen, Chair, Nicklaus Joseph Curley, Lawrence Jay Miller and J. Eric Virgil, Co-Vice Chairs

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

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

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

15. **Liaisons with Tax Section** – Lauren Young Detzel, Cristin Keane, William Roy Lane, Jr., Brian Curtis Sparks and Donald Robert Tescher

16. **Principal and Income** – Edward F. Koren and Pamela O. Price, Co-

Chairs, Keith Braun, Vice Chair

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

18. **Probate Law and Procedure** – John Christopher Moran, Chair; Michael Travis Hayes and Matthew Henry Triggs, Co-Vice Chairs

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

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

XV. General Standing Committee Reports — *Andrew M. O'Malley, Director and Chair-Elect*

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

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

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

4. **Budget** – Tae Kelley Bronner, Chair; Robert S. Freedman and Pamela O. Price, Co-Vice Chairs

5. **CLE Seminar Coordination** – Robert S. Swaine and Shane Kelley, Co-Chairs; Thomas Karr, Silvia Rojas, Alex Hamrick, Theo Kypreos, Hardy L. Roberts, III, (General E-CLE) and Paul Roman (Ethics), Co-Vice Chairs

6. **Convention Coordination** – Dresden Brunner, Chair; Sancha Brennan Whynot and Jon Scuderi, Co-Vice Chairs

7. **Fellows** – Benjamin Diamond, Chair; Joshua Rosenberg, John Costello and Jennifer Bloodworth, Co-Vice Chairs

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

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

10. **Legislation** – Sarah Butters (Probate & Trust) and Steven Mezer (Real Property), Co-Chairs; Travis Hayes and Ben Diamond (Probate & Trust), and Alan B. Fields and Art Menor (Real Property), Co-Vice Chairs

11. **Legislative Update (2016)** – R. James Robbins, Chair; Stacy O. Kalmanson,

Thomas Karr, Kymberlee Smith, Barry F. Spivey, Jennifer S. Tobin, Co-Vice Chairs

12. **Legislative Update (2017)** –Stacy O. Kalmanson, Chair; Brenda Ezell, Travis Hayes, Thomas Karr, Joshua Rosenberg, Kymberlee Curry Smith, Jennifer S. Tobin and Salome Zikakis, Co-Vice Chairs

13. **Liaison with:**

    a. **American Bar Association (ABA)** – Edward F. Koren, Julius J. Zschau, George Meyer and Robert S. Freedman
    b. **Clerks of Circuit Court** – Laird A. Lile and William Theodore Conner
    c. **FLEA / FLSSI** – David C. Brennan and Roland "Chip" Waller
    d. **Florida Bankers Association** – Mark T. Middlebrook
    e. **Judiciary** – Judge Linda R. Allan, Judge Herbert J. Baumann, Judge Melvin B. Grossman, Judge Hugh D. Hayes, Judge Maria M. Korvick, Judge Norma S. Lindsey, Judge Celeste H. Muir, Judge Robert Pleus, Jr., Judge Walter L. Schafer, Jr., Judge Morris Silberman, Judge Mark Speiser, Judge Richard J. Suarez, and Judge Patricia V. Thomas
    f. **Out of State Members** – Michael P. Stafford, John E. Fitzgerald, Jr., and Nicole Kibert
    g. **TFB Board of Governors** – Lansing C. Scriven
    h. **TFB Business Law Section** – Gwynne A. Young and Manuel Farach
    i. **TFB CLE Committee** – Robert S. Freedman and Tae Kelley Bronner
    j. **TFB Council of Sections** –Deborah P. Goodall and Andrew M. O'Malley
    k. **TFB Pro Bono Committee** – Tasha K. Pepper-Dickinson

14. **Long-Range Planning** – Andrew M. O'Malley, Chair

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

16. **Member Communications and Information Technology** – William A. Parady, Chair; Michael Travis Hayes, Neil Shoter, Hardy Roberts, Jesse Friedman, and Erin Christy, Co-Vice Chairs

17. **Membership and Inclusion** –Lynwood F. Arnold, Jr. and Jason M. Ellison, Co-Chairs, Annabella Barboza, Phillip A. Baumann, Guy S. Emerich, Brenda Ezell Theodore S. Kypreos, and Kymberlee Curry Smith, Co-Vice Chairs

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

19. **Professionalism and Ethics--General** – Paul Roman, Chair; Tasha K. Pepper-Dickinson, Alex Dobrev, and Andrew B. Sasso, Vice Chairs

20. **Publications (ActionLine)** – Jeffrey Alan Baskies and W. Cary Wright, Co-Chairs (Editors in Chief); Shari Ben Moussa, George D. Karibjanian, Sean M. Lebowitz, Paul Roman and Lee Weintraub, Co-Vice Chairs.

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

Bedke (Editorial Board – Real Property), Homer Duvall (Editorial Board – Real Property) and Allison Archbold (Editorial Board), Co-Vice Chairs

22. **Sponsor Coordination** – Wilhelmina F. Kightlinger, Chair; J. Michael Swaine, Deborah L. Russell, Benjamin F. Diamond, John Cole, Jason Quintero, Co-Vice Chairs

23. **Strategic Planning** –Deborah P. Goodall and Andrew M. O'Malley, Co-Chairs

XVI. **Adjourn**: Motion to Adjourn.

MINUTES
OF THE
REAL PROPERTY, PROBATE AND TRUST LAW SECTION
Probate Roundtable
Saturday, October 8, 2016
Disney's Boardwalk, Lake Buena Vista, Florida

I. Call to Order – *Deborah P. Goodall, Chair*

The meeting was held in sunny Orlando at Disney's Boardwalk in Lake Buena Vista, Florida after our Executive Council members suffered quite a scare with Hurricane Matthew bearing down on Florida over the prior three days. Most committee meetings scheduled on Thursday and Friday were cancelled due to the storm. Our members in attendance in Orlando spent an enjoyable three days together "in fellowship" at the lovely Boardwalk resort while the city of Orlando remained under a mandatory curfew.

Our Chair, Ms. Deborah P. Goodall, called the meeting to order at 8:30 a.m. on Saturday, October 8, 2016 noting how grateful she was to everyone who rode out the storm. Despite the circumstances, everyone maintained a great attitude. Our Executive Council members had a great bonding experience. Ms. Goodall thanked Mary Ann Obos and our "ride out" crew at the Boardwalk, including of chef and meeting planner, who literally stayed with us straight through the entire weekend. The Council responded with much and well-deserved applause.

Ms. Goodall expressed thoughts and prayers for our friends in Daytona, St. Augustine, and Jacksonville who were significantly impacted by the storm.

II. Attendance – *William T. Hennessey, Secretary*

Mr. Hennessey reminded all members to sign the attendance roster. The roster showing members in attendance is attached as Addendum "A". Attendance will be excused for everyone missing this meeting.

III. Minutes of Previous Meeting – *William T. Hennessey, Secretary*

Mr. Hennessey moved:

> **To approve the Minutes of the July 30, 2016 meeting of the Executive Council held at The Breakers Hotel, Palm Beach, Florida.** (See Agenda pages 10-40.)

The Motion was unanimously approved.

IV. **Chair's Report** – *Deborah P. Goodall*

A. Recognition of General Sponsors and Friends of the Section

Ms. Goodall thanked each of our General Sponsors and Friends of the Section listed on pages 41-43 of the Agenda:

General Sponsors

Overall Sponsors – Legislative Update & Convention & Spouse Breakfast
Attorneys' Title Fund Services, LLC – Melissa Murphy.

Thursday Lunch
Management Planning, Inc. – Roy Meyers

Thursday Night Reception
JP Morgan – Carlos Batlle/Alyssa Feder

Old Republic National Title Insurance Company – Jim Russick

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

Friday Night Dinner
First American Title Insurance Company – Alan McCall

Probate Roundtable
SRR (Stout Risius Ross Inc.) – Garry Marshall
Guardian Trust- Ashley Gonnelli

Real Property Roundtable
Fidelity National Title Group – Pat Hancock

Saturday Lunch
The Florida Bar Foundation – Bruce Blackwell

Saturday Dinner
Wright Investors' Service – Stephen Soper

RPPTL Meeting App

WFG National Title Insurance Company – Joseph Tschida

Friends of the Section

Business Valuation Analysts, LLC – Tim Bronza

Corporate Valuation Services, Inc. – Tony Garvy
Fiduciary Trust International – Claudia Reithauser
North American Title Insurance Company – Andres San Jorge
Valley National Bank - Jacquelyn McIntosh
Valuation Services, Inc. – Jeff Bae, JD, CVA
Wilmington Trust – David Fritz

B. Announcements. Ms. Goodall reported that Saturday evening's dinner at the Boathouse has been cancelled due to Hurricane Matthew but that food and beverages will be available at our bowling excursion at Splitsville in Disney Springs. Debbie Boje was clearly relieved upon hearing the news that bowling was not cancelled.

RPPTL Epcot T-Shirts were made available to the Executive Committee members in attendance.

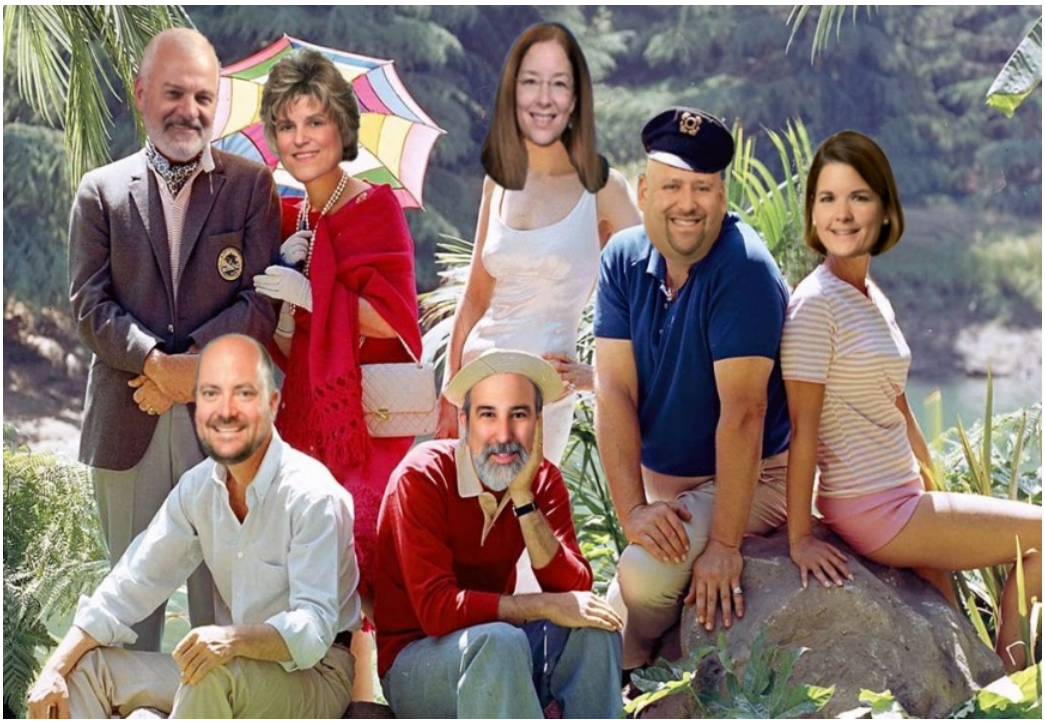
Ms. Goodall reported that John Neukamm had crushed the competition at The Breakers and won the App contest for the most posts. He was presented with an Apple Watch at The Breakers by our App Sponsor WFG National Title Insurance Company. Ms. Goodall then announced that Mr. Neukamm had won the App contest again at this meeting but that he had graciously declined to be named back-to-back champ. Rachel Lunsford was crowned the App Champion of the Disney Meeting.

C. Report of Interim Action of Executive Committee. Ms. Goodall reported that since the last Executive Council meeting there was a flurry of amicus committee activity requiring the Executive Committee to take immediate action. The specific items will be discussed in the formal report of the Amicus Committee.

D. Upcoming Executive Council Meetings. Our upcoming meeting schedule with room block information is listed at page 71 of the Agenda. Ms. Goodall explained that we are trying to open more rooms in the block for each of our meetings. She requested the Council members contact Whitney Kirk (not Mary Ann Obos) to be added to the room waitlists.

Ms. Goodall announced that (God willing) our next meeting will be in December in Key West. At which point, the entire Council in unison "knocked on wood", threw salt over their shoulders, and rubbed their lucky rabbits' feet so as not to tempt fate given the unexpected turn of events this weekend. We are planning to have a fishing tournament on Sunday after the meetings. Any Council members who are interested should let Mary Ann know so that we can get a head count to reserve enough charter boats. We are also taking a Saturday night dinner cruise to watch the boat parade. It's expected to last about three hours.

Note from your secretary: With all due respect to our Chair and my good friend, Ms. Goodall, I would plan for a long boat trip given the weather situation at this meeting…think Gilligan's Island:



V. <u>Liaison with Board of Governors Report</u> – *Lansing C. Scriven*.

Ms. Goodall introduced Mr. Scriven who gave his report as Section liaison to the Board of Governors. Mr. Scriven reported that the Florida Supreme Court adopted a rule change that will require all Florida lawyers to take three hours of technology-related courses during a three year cycle, increasing the total required hours from 30 to 33. The rule change is effective January 1, 2017. Mr. Scriven also reported that the Board of Governors is planning for how to best seek representation on the Constitutional Revision Commission. The Constitutional Revision Commission meets every 20 years to discuss and propose changes to the Florida Constitution. It consists of 15 members appointed by the Governor, 9 members appointed by the Speaker of the House, 9 members appointed by the President of the Senate, 3 members appointed by the Chief Justice of the Florida Supreme Court, and 1 member appointed by the Attorney General. It begins in 2017. The Florida Bar is underrepresented on the Commission. Some of the topics which may be part of the discussions include whether rule-making authority should be removed from the Florida Supreme Court to legislature, whether the regulation of lawyers should be removed to the executive branch, whether the judicial nominating process should be altered with diminished lawyer input, and whether the JQC function should be moved to the legislature. The proposals will ultimately go directly to the ballot. Chief Justice Labarga, Governor Scott, and Senate President Gardiner are all accepting applications for the Commission. It will be one of the biggest issues facing the Bar because of what's at stake.

VI. <u>Chair-Elect's Report</u> – *Andrew M. O'Malley*

Mr. O'Malley reported that the links for The Breakers and Boston hotels are now open. He already has contingency plans in place in Boston in the event of a nor'easter.

The Fairmont Copley Place in Boston is absolutely gorgeous. He promised that we would not be assigned Salons IV-VI (inside joke for those of us at The Boardwalk) which will now take on the unlucky 13th floor status among us Reptiles. Mr. O'Malley has an event planned at the Kennedy Center but is otherwise soliciting suggestions for the meeting.

VII. Treasurer's Report – *Tae Kelley Bronner*.

Ms. Bronner reported on the RPPTL Financial Summary set forth on page 73 of the Agenda. The Section is in excellent financial shape with more than $1.4 million in reserves. Our seminars have been very profitable thanks to the great work of all of Section members. We are planning programs to give back to the Section membership.

VIII. Director of At-Large Members Report – *S. Katherine Frazier*.

Ms. Frazier reported that the No Place Like Home project is up and running in Hillsborough, Miami-Dade, and North Florida with plans to expand statewide. An ALMs liaison has been appointed for each substantive committee to provide ALMs support and updates as needed. The liaisons should be reaching out to the committee chairs before the next meeting.

IX. CLE Seminar Coordination Report – *Robert Swaine (Real Property) and Shane Kelley (Probate & Trust), Co-Chairs*.

Bob Swain congratulated and thanked all of our speakers for a fantastic and profitable CLE year. The Section is working on a best practices guide to provide a uniform manual for materials and presentations. All of our upcoming seminars are listed on Page 74 of the Agenda.

X. Probate and Trust Law Division Report (Part I)—*Debra L. Boje, Director*

Debra Boje, as Probate Division Director, recognized and thanked each of our committee sponsors in the Probate Division, which are listed on page 49 of the Agenda:

BNY Mellon Wealth Management – Joan Crain
Estate and Tax Planning Committee &
IRA, Insurance and Employee Benefits Committee

Business Valuation Analysts – Tim Bronza
Trust Law Committee

Coral Gables Trust – John Harris
Probate and Trust Litigation Committee

Kravit Estate Appraisal – Bianca Morabito
Estate and Tax Planning Committee

Life Audit Professionals – Joe Gitto and Andrea Obey
IRA, Insurance & Employee Benefits Committee &
Estate and Tax Planning Committee

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

Northern Trust – Tami Conetta
Trust Law Committee

A. Action Items:

1. Ad Hoc POLST Committee - *Tae Bronner, Most Knowledgeable*

Tae Bronner presented as an ACTION ITEM the report of the Ad Hoc POLST Committee. The particular committee was formed over a year ago when the Florida legislature began considering a proposed statute which would have allowed POLST forms to be signed by physicians without constitutional safeguards in place for patients. POLST stands for Physician Orders for Life Sustaining Treatment. POLST are similar to a living will in that they provide instructions for life sustaining treatment. The difference is that, unlike a living will, they are effective immediately. The prior proposed statute purported to allow the physician to enter such orders in the file without requiring client consent. The Ad Hoc POLST Committee has proposed a statute which will require physicians to explain the consequence of a POLST and obtain client consent. It will be a statutory regulated form. Physicians will need to sign an affidavit certifying that they explained the consequences and its impact on treatment. Our statute is intended to protect the rights of the elderly and incapacitated to have a say their treatment. Health care surrogates and proxies will be able to provide the necessary consent for a POLST. The Section has a current position opposing POLST legislation unless proper safeguards are put in place. This new position will allow our legislative consultants to advocate for our version of the POLST legislation. The Legislative Position Request, Proposed Bill, and White Paper are located in the Agenda at pages 113-143.

Upon conclusion of the report, the committee made a motion to: (A) adopt as a Section position legislation to recognize Physician Orders for Life Sustaining Treatment under Florida law with appropriate protections to prevent violations of due process for the benefit of the citizens of Florida, including the creation of s. 406.46, Florida Statutes; (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.

The motion passed unanimously.

2. Elective Share Review Committee --- *Lauren Detzel, Chair*

Bill Hennessey and Lauren Detzel presented the report of the Elective Share Review Committee. At last Executive Committee meeting, Lauren Detzel and Shane Kelley explained in detail a number of proposed changes to our elective share statutes. The most important statutory changes will result in a sliding scale for the percentages of

the elective share based upon the length of the marriage. The Family Law Section has reviewed our proposal and will not be taking a position on the legislation. This is good news as it will allow us to proceed without opposition.

The primary changes to the proposal since The Breakers Executive Council meeting relate to extensions of time. The proposal was revised to make it clear that a spouse will be able to seek an election within 40 days after the conclusion of a proceeding, like a will contest, which impacts the amount the surviving spouse receives. The language is similar to that already in the Probate Code as it relates to exempt property. The language prevents a spouse from being barred from making the election by an unanticipated will contest. The outside timeframe for making the election will be two years. These changes were discussed in concept at The Breakers meeting.

The Executive Council engaged in a healthy debate concerning the attorneys' fee provisions contained at lines 402-418 of the proposed legislation. Some concern was expressed about ambiguity in the proposal about what triggers a potential award of fees in connection with elective share proceedings. The general intent is that the Court should have discretion to award fees in disputed or contested proceedings. Concern was raised that the proposal does not accomplish that intent. A number of specific changes to the language were requested. Ms. Boje appointed a working group to discuss proposed changes to address the concerns raised and report back to the Executive Council.

Action was deferred until later in the meeting.

3. Probate Law and Procedure --- Travis Hayes (Admirable "Fill-In" for John Moran, Chair)

Mr. Hayes presented as an ACTION ITEM a report from the Probate Law and Procedure Committee on a proposed Section Position which would support legislation (§ 732.902) allowing a testator to deposit their original will with the clerk's office for safekeeping during their lifetime, and for the other custodians to deposit original wills with the clerk for safekeeping when the testator cannot be located. The proposed statute specifically addresses the issue of orphan wills where the testator cannot be located. The deposited will remains confidential in the Court file. The clerk must make an electronic copy and retain the original will for 20 years. We do not expect opposition from the court clerks but we do expect a fee to be charged for depositing a will. The full legislation position request form, white paper, and proposed bill were included in the Agenda at pages 195-203.

Upon conclusion of the report, the committee made a motion to: (A) adopt as a Section position legislation allowing a testator to deposit their original will with the clerk's office for safekeeping during their lifetime, and for the other custodians to deposit original wills with the clerk for safekeeping when the testator cannot be located; (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.

The motion passed unanimously.

4. Trust Law Committee --- *Angela Adams, Chair*

Ms. Boje welcomed Ms. Adams to the podium noting how glad we all are that she made it here safely… given that she was riding with Fletch Belcher. Ms. Adams looked no worse for the wear and was ready to get down to business. Ms. Adams presented as an **ACTION ITEM** a report from the Trust Law Committee on a proposed Section Position which would support legislation to reaffirm Florida's well established jurisprudence in favor of donative freedom so that the settlor's intent is paramount when applying and interpreting both Florida trust law and the terms of a trust. When Florida enacted the Trust Code, §§ 736.0105 and 736.0404 provided that the terms of the trust must be for the "benefit of the beneficiary." When enacted, the Section felt that these statutes where innocuous because trustees always must enact in the best interest of the beneficiaries. Some legal scholars are now claiming that the "benefit of the beneficiary" language trumps settlor intent such that the focus is now on what's best for the beneficiary even if it is inconsistent with the settlor's wishes. The proposal will make it clear that settlor intent is paramount and includes changes to §§736.0103(11), 736.0105(2)(c), and 736.0404, Florida Statutes. The proposal is intended to be clarifying in nature and will apply retroactively. Several other states have already made similar clarifying revisions. The full report, including a legislative position request form, white paper, and bill are located at pages 204-212.

Upon conclusion of the report, the committee made a motion to: (A) adopt as a Section position legislation to reaffirm Florida's well established jurisprudence in favor of donative freedom so that the settlor's intent is paramount when applying and interpreting both Florida trust law and the terms of a trust, including changes to §§736.0103(11), 736.0105(2)(c), and 736.0404, Florida Statutes; (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.

The motion was approved unanimously.

XI. <u>General Standing Division</u> – *Andrew M. O'Malley, General Standing Division Director and Chair-Elect.*

A. Information Items:

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

Mr. Fernandez reported that the William Reese Smith Jr. Leadership Academy is taking applications again. The applications will be available December 1, 2016 on the Florida Bar website. The Ad Hoc Leadership Academy committee will start taking applications for RPPTL members by December 15, 2016. The applications will be due back to the Florida Bar (independent of submissions to the committee) by January 13,

2017. The RPPTL Section will select 2 applicants who will receive a $3,500 scholarship to attend Leadership Academy sessions.

2. Amicus Coordination – Kenneth Bell, Gerald Cope, Robert Goldman and John Little, Co-Chairs

Mr. Goldman reported that the amicus committee has three matters currently pending.

In Smith v. Smith, the 4th DCA certified as a matter of great public importance the following question: "Where the fundamental right to marry has not been removed from a ward under section 744.3215(2)(a), Florida Statutes, does the statute require the ward to obtain approval from the court prior to exercising the right to marry, without which approval the marriage is absolutely void, or does such failure render the marriage voidable, as court approval could be conferred after the marriage?" In the underlying opinion, the court found that a marriage of an incapacitated ward, who had the right to marry removed, could not be ratified after the marriage because the marriage was void. Mr. Goldman reported that amicus committee has filed a brief on behalf of the Section taking the position that the ward can seek later court approval of the marriage. The Elder Law Section has taken a completely different view.

Mr. Goldman reported that the RPPTL Section has made the very, very rare move of wading into a DCA decision. The decision at issue is Ober v. Town of Lauderdale-By-The Sea (Agenda pages 54-62). It is currently on rehearing at the 4th DCA. The 4th DCA held that the lis pendens statute discharges liens that exist or arise prior to final judgement of foreclosure unless the appropriate steps are taken to protect those interests but that it does not affect liens that accrue after the final judgment but before the sale. The Section believes that the statutory scheme reflects that the certificate of title, not the final judgment, ends the case and that liens filed after final judgment but before certificate of title is issued are subject to discharge under the lis pendens statute. The 4th DCA granted our motion to appear as an amicus. The amicus committee is finalizing its brief.

The amicus committee is also addressing the 3d DCA's decision of Save Calusa Trust v. Andrews Holdings, LTD, wherein the court held that a restriction in a covenant that is required as part of a zoning approval is exempt from extinguishment by Florida's Marketable Record Title Act. The Florida Supreme Court has not yet ruled on whether it will accept jurisdiction. It is before the Court on conflict jurisdiction. The amicus committee has filed a notice of intent letting the court know that the RPPTL Section would like to take a position if it accepts jurisdiction.

Public Service Announcement: Mr. Goldman encouraged everyone to attend our meetings in December in Key West. He assured the Council that there will be no excuses--- wind, rain, hurricanes, or floods--- which can prevent Thursday night's entertainment, the greatest musical *ever* presented, the Doyle and Debbie Show. It's an amazing show, which is pee your pants funny. All adults should plan to attend.

Mr. O'Malley commended the amicus committee for the tremendous amount of time and spectacular job representing the Section. The Council responded with well-deserved gratitude.

3. Liaison with Clerks of Court – Laird Lile and William "Ted" Conner

Mr. O'Malley noted that clerks are generally following 4th DCA's in United Bank v. Estate of Frazee. In Frazee, the 4th DCA affirmed a trial court's decision which found that a creditor claim was untimely because it was filed in paper form with the clerk rather than electronically. The Frazee court noted that the Rules of Judicial Administration require Florida lawyers to file all pleadings electronically. Clerks are generally now refusing to accept paper filings in accordance with the **Frazee** decision.

4. Model and Uniform Acts – Bruce Stone and Richard Taylor, Co-Chairs

Mr. O'Malley encouraged the Council members to review pages 77-78 of the Agenda which lists seven new acts being promulgated by the Uniform Law Commission.

Mr. Hennessey reported that the Section is continuing to work with the Business Law Section to address concerns with the Uniform Voidable Transactions Act. The Tax Law Section has already voted to oppose the Act. The Business Law Section has passed its version of the Uniform Voidable Transactions Act without our comments. We expect the Business Law Section to move forward with their proposal this legislative session. Our primary objections to the Act relate to the comments which are part of the Act rather than the text of the Act itself. The comments jeopardize a number of estate planning techniques which are regularly used as part of tax planning. The RPPTL Section is trying to come up with a solution which will address our concerns without having to oppose the Act.

5. Professionalism and Ethics – Paul Roman, Chair

Mr. O'Malley thanked the ALMs for their good work on the "No Place Like Home" project.

Katherine Frazier presented a report from FinCen Geographic Targeting Order (GTO) Working Group. The materials are in the agenda at pages 84-102. Ms. Frazier thanked the committee members who have worked hard on assessing the impact of FinCen's GTO. The GTO requires certain financial disclosures involving cash transactions for residential real estate sales of $1 million or more in Broward, Miami-Dade, and Palm Beach Counties. From any ethics perspective, the disclosures will

require that confidential information be provided on the necessary forms. Client consent will be necessary to make the required disclosures. There are also US Code provisions which create liability when lawyers give advice in structuring transactions. Florida Ethics opinion 92-5, dealing with similar issues, provides that client consent is required before disclosure can be made. The Committee will likely be seeking an additional updated ethics opinion on the duties of lawyers in complying with the GTO. The Committee will also work to educate the membership on the ethics issues and will be preparing proposed form language to include in engagement letters to obtain necessary consent.

XII. Real Property Division Report—Andrew O'Malley (filling in for Robert Freedman, Real Property Division Director)

A. Recognition of Real Property Committee Sponsors

Mr. O'Malley presented the report of the Real Property Division noting that Mr. Freedman had a blowout on the way to the meeting. Yes, sad but true. Unfortunately, Mr. Freedman's right flip flop blew a strap sidelining him for the day's meeting. (Actually, our good friend caught a bug and was under the weather… feel better Rob!) Mr. O'Malley began the Real Property Division reports by recognizing and thanking each of our committee sponsors in the Real Property Division, which are listed on Page 43 of the Agenda.

Committee Sponsors

Attorneys' Title Fund Services, LLC – Melissa Murphy
Commercial Real Estate Committee

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

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

Hopping Green & Sams – Vinette Godelia
Development and Land Use

B. Information Items

1. Commercial Real Estate Committee – Adele Stone

Mr. O'Malley noted that the RPPTL Section has an active position concerning proposed legislation for assessment of multiple parcel buildings. The Executive Council approved the position in 2014. Materials are included at pages 103-112 of the Agenda. The legislation will likely move forward during the next session.

2. Real Estate Litigation Committee- Marty Schwartz

Mr. Schwartz reported that the committee is working on a proposed statutory fix for the Ober v. Town of Lauderdale-By-The Sea decision. The Ober decision creates two problems. The first problem relates to the potential attachment of a lien between final judgment and the issuance of certificate of title as explained above in the report from the amicus committee. The second problem relates to existing titles wherein liens may not have been foreclosed as originally thought. There are many titles out there where liens were recorded after the final judgment but before the certificate of title. The problems will likely be discovered when people attempt to sell property. There may be a need to quiet title. The committee is working on a proposal which in concept would provide:

"Unless it expires, is withdrawn, or is otherwise discharged, a recorded lis pendens giving notice of pendency of a proceeding shall remain in effect on the property described in the notice through the date of issuance of any instrument transferring title pursuant to a judicial sale in the original action. The preceding sentence will clarify existing law."

This clarification to existing law may be necessary even if the Ober decision is changed on rehearing so that we do not have a problem in another DCA. Mr. Schwartz thanked the subcommittee for its hard work on the proposal.

Mr. Schwartz reported that the committee also heard a report on electronic notarization of documents which are now being permitted in states like Virginia. The concept is that the notary does not actually have to be present to notarize a document. Virginia is already executing documents in this manner. Florida may consider similar legislation in the future.

XIII. Probate and Trust Law Division Report (Part 2)— *Debra L. Boje, Director*

Debra Boje, as Probate Division Director, presented Part 2 of the Probate and Trust Law Division.

A. Informational Items:

1. **Ad Hoc Study Committee on Due Process, Jurisdiction & Service of Process** --- Fletch Belcher

Fletch Belcher reported on an **Information Item** from the Ad Hoc Study Committee on Due Process, Jurisdiction & Service of Process. The proposed legislation would address and legislatively overrule the Court's holdings in *Corya v. Sanders*, 155 So. 3d 1279 (Fla. 4th DCA 2015). The proposed legislation would §736.08135 and §736.1008, Fla. Stat., to clarify that: (A) §736.08135(3) does not limit the beginning period for which a trustee of an irrevocable trust is statutorily required

to render a trust accounting to beneficiaries; and (B) a beneficiary's actual knowledge of the existence of an irrevocable trust and that he or she has not received a trust accounting does not commence the running of any limitations or laches period that would bar the beneficiary's assertion of a claim or cause of action against the trustee for breach of trust based upon the trustee's failure to provide a trust accounting as required by law. The legislation is intended to clarify existing law. The proposed legislative position request form, white paper, and proposed bill are included in the Agenda at pages 213-224.

2. Estate & Trust Tax Planning --- David J. Akins, Chair

Mr. Akins reported that Section has worked jointly with the Tax Law Section in preparing comments to the Internal Revenue Service's proposed regulations under section 2704 of the Internal Revenue Code, that were released to the public on August 2, 2016. The comments are in draft form and will be timely submitted. A report is included in the Agenda at pages 225-241. The Executive Committee will be approving the final version of the comments before they are submitted.

B. Action Item

1. Elective Share Review Committee --- Lauren Detzel, Chair

Lauren Detzel reported that the working group has agreed in concept on revised language concerning the attorneys' fee provisions found at lines 402-418 of the proposed legislation. The new proposal will be removing lines 414-416 (subsection (3)) of the proposed legislation which provides that "nothing in this section shall be construed to create or impose personal liability…" It was decided that this language should be removed because someone with very little at stake could create extensive and costly litigation. The working group also suggested that the fee provisions in subsection (1) which is contained at lines 403-408 be limited to circumstances in which an objection is made to any part of the elective share proceedings. Uncontested matters will generally not permit an award of attorneys' fees. "In its discretion" was removed from line 404 because it is duplicative of the remainder of the paragraph. Line 409-412 will be modified to make it clear that the court can award a money judgment against a party's personal assets such that it is not just limited to a party's interest in the estate.

The Elective Share Review Committee agreed to accept the recommendations of the working group. With those changes, the committee made a motion to: (A) adopt as a Section position legislation to amended the Florida's Elective Share Statute, Sections 732.201-732.2155, including changes to the manner in which protected homestead is included in the elective estate and how it is valued for purposes of satisfying the elective share; quantify the amount of the elective share which the surviving spouse is entitled with reference to the length of the marriage; add a provision to assess interest on persons who are very delinquent in fulfilling their statutory obligations to pay or contribute towards satisfaction of the elective share; add a new section that specifically addresses awards of attorney's fees and costs from elective

share proceedings (subject to the Executive Committee revising the proposed attorneys' fee provisions to provide in all proceedings concerning the elective share in which an objection is filed that the court will have the ability to award taxable costs, including fees, as in chancery actions as discussed above in these minutes); and make changes to Chapter 738 to assure qualification for certain elective share trusts that contain so called unproductive property; (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.

The motion passed unanimously.

XIV. Adjourn

Ms. Goodall once again thanked the Boardwalk staff for all of their assistance this weekend under the most difficult of circumstances. Mr. O'Malley thanked Debbie Goodall again for being the epitome of absolute grace under pressure. The Council responded with thunderous applause and a well-deserved standing ovation. There being no further business to come before the Executive Council, a motion to adjourn was unanimously approved at approximately 10:10 a.m. This brought to close a Ms. Goodall's not-soon-to-be-forgotten "hurricane meeting" as Chair.

Respectfully submitted,

William T. Hennessey, Secretary

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ATTENDANCE ROSTER
REAL PROPERTY PROBATE & TRUST LAW SECTION
EXECUTIVE COUNCIL MEETINGS
2016-2017

Executive Committee	Division		July 30 Breakers	Oct 8 Disney	Dec 10 Key West	June 3 Bonita Spgs	Feb 25 Austin TX
	RP	P&T					
Goodall, Deborah P.. Chair		√	√				
O'Malley, Andrew M., Chair-Elect	√		√				
Boje, Debra L., Probate & Trust Law Div. Director		√	√				
Freedman, Robert S., Real Property Law Div. Director	√		√				
Frazier, S. Katherine, Director of At-Large Members	√		√				
Hennessey, William T., Secretary		√	√				
Bronner, Tae K., Treasurer		√	√				
Butters, Sarah S., Legislation Co-Chair (P&T)		√	√				
Mezer, Steven H., Legislation Co-Chair (RP)	√		√				
Kelley, Shane, Legislation CLE Seminar Coordination Co-Chair (P&T)		√	√				
Swaine, Robert S., CLE Seminar Coordination Co-Chair (RP)	√		√				
Gelfand, Michael J., **Immediate Past Chair**	√		√				

Executive Council Members	Division		July 30 Breakers	Oct 8 Disney	Dec 10 Key West	June 3 Bonita Spgs	Feb 25 Austin TX
	RP	P&T					
Adams, Angela M.		√	√				
Adcock, Jr., Louie N., **Past Chair**		√					
Akins, David J.		√	√				
Allan, Honorable Linda		√					
Altman, Stuart H.		√	√				
Amari, Richard		√	√				

Executive Council Members	Division		July 30 Breakers	Oct 8 Disney	Dec 10 Key West	June 3 Bonita Spgs	Feb 25 Austin TX
	RP	P&T					
Archbold, J. Allison		√	√				
Arnold, Jr., Lynwood F.		√					
Aron Jerry E. **Past Chair**	√		√				
Awerbach, Martin S.	√		√				
Bald, Kimberly A.		√	√				
Ballaga, Raul P.	√		√				
Barboza, Annabella	√		√				
Basham, Cindy		√					
Baskies, Jeffrey		√	√				
Batlle, Carlos A.		√	√				
Baumann, Honorable Herbert J.		√					
Baumann, Phillip A.		√					
Beales, III, Walter R. **Past Chair**	√		√				
Bedke, Michael A.	√		√				
Belcher, William F. **Past Chair**		√	√				
Bell, Kenneth B.	√						
Bell, Rebecca Coulter		√	√				
Beller, Amy		√	√				
Bellew, Brandon D.		√	√				
Ben Moussa, Shari D.	√		√				
Bloodworth, Jennifer J.	√						
Bonevac, Judy B.		√					
Bowers, Elizabeth Anne		√	√				
Boyd, Deborah	√						

Executive Council Members	Division		July 30 Breakers	Oct 8 Disney	Dec 10 Key West	June 3 Bonita Spgs	Feb 25 Austin TX
	RP	P&T					
Braun, Keith Brian		√	√				
Brenes-Stahl, Tattiana P.		√	√	√TBS			
Brennan, David C. **Past Chair**		√	√				
Brittain, David R.	√		√				
Brown, Mark A.	√		√				
Brown, Shawn	√		√	SLB			
Brunner, S. Dresden		√					
Bruton, Jr., Ed Burt	√		√				
Bucher, Elaine M.		√	√				
Butler, Jonathan ~~Brennan~~		√	√	JB			
Callahan, Charles III		√	√				
Carlisle, David R.		√					
Caskey, John R.		√	√				
Christiansen, Patrick T. **Past Chair**	√		√				
Christy, Douglas G. III	√		√				
Christy, Erin Hope	√		√				
Cohen, Howard Allen	√		√				
Cole, John P.		√					
Cole, Stacey L.		√	√	SC			
Conetta, Tami F.		√	√				
Conner, W. Theodore	√						
Cope, Jr., Gerald B.	√		√				
Costello, T. John, Jr.		√	√				
Curley, Nick		√	√				

Executive Council Members	Division		July 30 Breakers	Oct 8 Disney	Dec 10 Key West	June 3 Bonita Spgs	Feb 25 Austin TX
	RP	P&T					
Detzel, Lauren Y.		√	√				
Diamond, Benjamin F.		√					
Diamond, Sandra F. **Past Chair**		√	√				
Direktor, Kenneth Steven	√		√				
Dobrev, Alex	√						
Dollinger, Jeffrey	√						
Dribin, Michael **Past Chair**		√	√				
Dudley, Frederick R.	√						
Duvall, III, Homer	√		√				
Eckhard, Rick	√		√				
Ellison, Jason M.	√		√				
Emans, Patrick C		√	√				
Emerich, Guy S.		√					
Ertl, Christene M.	√		√				
Ezell, Brenda B.	√		√				
Fagan, Gail		√	√				
Falk, Jr., Jack A.		√	√				
Farach, Manuel	√		√				
Faulkner, Debra Ann		√					
Felcoski, Brian J. **Past Chair**		√	√				
Fernandez, Kristopher E.	√		√				
Fields, Alan B.	√		√				
Fitzgerald, Jr., John E.		√	√				
Flood, Gerard J.		√					

Executive Council Members	Division		July 30 Breakers	Oct 8 Disney	Dec 10 Key West	June 3 Bonita Spgs	Feb 25 Austin TX
	RP	P&T					
Foreman, Michael L.		√	√				
Frazier, Nathan	√		√				
Friedman, Jesse B.	√		√				
Galler, Jonathan		√	√				
Gans, Richard R.		√	√				
Gentile, Melinda S.	√		√				
George, James		√	√				
Godelia, Vinette D.	√		√				
Goethe, Jeffrey S.		√	√				
Goldman, Louis "Trey"	√		√				
Goldman, Robert W. **Past Chair**		√	√				
Graham, Robert M.	√		√				
Granet, Lloyd	√		√				
Griffin, Linda S.		√	√				
Grimsley, John G. **Past Chair**		√					
Grossman, Honorable Melvin B.		√					
Gunther, Eamonn W.		√	√				
Gurgold, Eric		√	√				
Guttmann, III, Louis B **Past Chair**	√		√				
Hamrick, Alexander H		√					
Hancock, Patricia J.	√		√				
Hayes, Honorable Hugh D.		√					
Hayes, Michael Travis		√	√				
Hearn, Steven L. **Past Chair**		√	√				

Executive Council Members	Division		July 30 Breakers	Oct 8 Disney	Dec 10 Key West	June 3 Bonita Spgs	Feb 25 Austin TX
	RP	P&T					
Henderson, Jr., Reese J.	√						
Henderson, III, Thomas N.	√		√				
Heuston, Stephen P.		√					
Hipsman, Mitchell Alec		√					
Hoffman, Brian W.	√		√				
Isphording, Roger O. **Past Chair**		√	√				
Jennison, Julia Lee	√		√				
Johnson, Amber Jade F.		√	√				
Jones, Darby		√	√				
Jones, Frederick W.	√		√				
Jones, Patricia P.H.	√		√				
Judd, Robert B.		√	√				
Kalmanson, Stacy O.	√		√				
Karibjanian, George		√	√				
Karr, Mary		√	√				
Karr, Thomas M.		√	√				
Kayser, Joan B. **Past Chair**		√					
Keane, Cristin C.	√						
Kelley, Rohan **Past Chair**		√	√				
Kelley, Sean W.		√	√				
Khan, Nishad	√		√				
Kibert, Nicole C.	√		√				
Kightlinger, Wilhelmina F.	√		√				
Kinsolving, Ruth Barnes, **Past Chair**	√						

Executive Council Members	Division		July 30 Breakers	Oct 8 Disney	Dec 10 Key West	June 3 Bonita Spgs	Feb 25 Austin TX
	RP	P&T					
Koren, Edward F. **Past Chair**		√					
Korvick, Honorable Maria M.		√					
Kotler, Alan Stephen		√	√				
Kromash, Keith S.		√	√				
Kurian, Sanjay	√						
Kypreos, Theodore S.		√	√	TSK			
Lancaster, Robert L.		√	√				
Lane, Jr., William R.		√					
Larson, Roger A.	√		√				
Leathe, Jeremy Paul		√	√				
Lebowitz, Sean M.		√	√				
Leebrick, Brian D.	√		√				
Lile, Laird A. **Past Chair**		√	√				
Lindsey, Honorable Norma S.	√						
Little, III, John W.	√		√				
Lopez, Sophia A.		√	√				
Lynch, Kristen M.		√					
Madorsky, Marsha G.		√	√				
Malec, Brian		√	√	BM			
Marger, Bruce **Past Chair**		√					
Marmor, Seth A.		√	√				
Marshall, III, Stewart A.		√	√				
Marx, James A.		√	√				
Mastin, Deborah Bovarnick	√		√				

Executive Council Members	Division		July 30 Breakers	Oct 8 Disney	Dec 10 Key West	June 3 Bonita Spgs	Feb 25 Austin TX
	RP	P&T					
McCall, Alan K.	√		√				
McElroy, IV, Robert Lee		√	√				
McIver, Richard		√		RSM			
McRae, Ashley E.	√		√				
Melanson, Noelle	√		√				
Menor, Arthur J.		√	√				
Meyer, George F. **Past Chair**	√		√				
Meyer, Michael	√		√				
Middlebrook, Mark T.		√	√				
Miller, Lawrence J.		√	√				
Mize, Patrick		√	√				
Moran, John C.		√	√				
Moule, Rex E.		√					
Muir, Honorable Celeste H.		√	√				
Murphy, Melissa J. **Past Chair**	√						
Nash, Charles I.		√	√				
Neukamm, John B. **Past Chair**	√		√				
Nguyen, Hung V.		√	√				
Overhoff, Alex	√		√				
Parady, William A.	√		√				
Payne, L. Howard		√	√				
Pence, Scott P.	√		√				
Pepper-Dickinson, Tasha K.		√	√				
Perera, Diane	√						

Executive Council Members	Division		July 30 Breakers	Oct 8 Disney	Dec 10 Key West	June 3 Bonita Spgs	Feb 25 Austin TX
	RP	P&T					
Pilotte, Frank		√	√				
Platt, William R.		√					
Pleus, Jr., Honorable Robert J.		√					
Pollack, Anne Q.	√		√				
Price, Pamela O.		√					
Pyle, Michael A.		√	√				
Quintero, Jason	√						
Redding, John N.	√		√				
Rendzio, Bryan	√						
Reynolds, Stephen H.		√	√				
Rieman, Alexandra V.		√	√				
Robbins, Jr., R.J.	√		√				
Roberts, III, Hardy L.	√		√				
Robinson, Charles F.		√	√				
Rodriguez, Carlos A.		√					
Rojas, Silvia B.	√		√				
Rolando, Margaret A. **Past Chair**	√		√				
Roman, Paul E.		√	√				
Rosenberg, Joshua		√	√				
Rubin, Jenna		√					
Russell, Deborah L.		√	√				
Russick, James C.	√		√				
Rydberg, Marsha G.	√						
Sachs, Colleen C.	√		√				

Executive Council Members	Division		July 30 Breakers	Oct 8 Disney	Dec 10 Key West	June 3 Bonita Spgs	Feb 25 Austin TX
	RP	P&T					
Sasso, Andrew	√		√				
Schafer, Jr., Honorable Walter L.		√					
Schwartz, Martin	√		√				
Schwartz, Robert M.	√		√				
Schwinghamer, Jamie Beth		√	√				
Scriven, Lansing Charles	√		√	√			
Scuderi, Jon		√	√				
Seaford, Susan	√		√				
Sheets, Sandra G.		√	√				
Sherrill, Richard Norton		√	√				
Shoter, Neil B.	√		√				
Silberman, Honorable Morris	√						
Silberstein, David M.		√	√				
Simon, Michael		√					
Sivyer, Neal Allen	√		√				
Sklar, William P.	√		√				
Smart, Christopher W.	√		√				
Smith, G. Thomas **Past Chair**	√		√				
Smith, Kymberlee	√		√				
Smith, Wilson **Past Chair**		√					
Sneeringer, Michael Alan		√	√				
Solomon, Marty James	√		√				
Spalding, Ann		√					
Sparks, Brian C.		√	√				

Executive Council Members	Division		July 30 Breakers	Oct 8 Disney	Dec 10 Key West	June 3 Bonita Spgs	Feb 25 Austin TX
	RP	P&T					
Speiser, Honorable Mark A.		√					
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October 31, 2016

Mr. John D. MacEachen
CC:PA:LLPDD:PR (REG-163113-02), Room 5203
Internal Revenue Service
P.O. Box 7604, Ben Franklin Station
Washington, DC 20044

Submitted Electronically to Federal eRulemaking portal at:
http://www.regulations.gov (IRS Reg163113-02)

RE: Proposed Rules on Estate, Gift and Generation-Skipping Transfer Taxes; Restrictions on Liquidation of Interest ("Proposed Section 2704 Regulations") /Comments by The Florida Bar Tax Section and The Florida Bar Real Property, Probate and Trust Law Section

Dear Mr. MacEachen:

Enclosed herewith are comments with respect to the Proposed Section 2704 Regulations submitted jointly by The Florida Bar Tax Section (the "Tax Section") and The Florida Bar Real Property, Probate and Trust Law Section (the "RPPTL Section"). These comments represent the efforts of a number of members of both referenced Florida Bar sections under the auspices of the Estate and Trust Tax Planning Committee of RPPTL, and the Federal Tax Division and the Legislation and Regulations Committee of the Tax Section. These comments have been reviewed by David Akins and Diana Zeydel on behalf of RPPTL, by Joseph B. Schimmel, Brian M. Malec, James H. Barrett, Patrick J. Duffey and the undersigned on behalf of the Tax Section, and by Edward F. Koren on behalf of both Sections. Mr. Koren is a past Chair of both Sections.

Although members of the Tax Section and RPPTL Section who participated in preparing these comments may have clients who would be affected by these regulations as ultimately adopted, no member so involved has been engaged by a client to make a submission with respect to, or to influence the development or outcome of, the subject matter of these comments. We request that questions regarding the comments be delivered to:

Contact Person:

Edward F. Koren
Holland & Knight LLP
100 North Tampa Street, Suite 4100
Tampa, Florida 33602
Telephone: (813) 227-6655
Facsimile: (813) 229-0134
Email: ed.koren@hklaw.com

The Florida Bar Real Property, Probate and Trust Law Section is comprised of over 10,000 members of The Florida Bar, a significant cadre of which practices estate planning. The Florida Bar Tax Section is comprised of approximately 2,000 members of The Florida Bar who practice in all areas of tax law, including Federal individual, corporate and partnership income taxation, federal estate, gift and generation-skipping transfer taxation; international, state and local taxation; employee benefits tax law; and state and federal tax controversies.

The views expressed herein represent only those of the Tax and RPPTL Sections of The Florida Bar, and are not to be ascribed to The Florida Bar or its Board of Governors.

We will be pleased to provide additional commentary as requested. Please do not hesitate to contact us.

Respectfully yours,

William R. Lane, Jr.
Chair, Tax Section
Holland & Knight LLP
100 North Tampa Street, Suite 4100
Tampa, Florida 33602
Telephone: (813) 227-6470
Facsimile: (813) 229-0134
Email: william.lane@hklaw.com

Deborah Packer Goodall
Chair, Real Property, Probate and Trust Law Section
Goldman Felcoski & Stone P.A.
327 Plaza Real, Suite 230
Boca Raton, Florida 33432
Telephone: (561) 395-0400
Email: dgoodall@gfsestatelaw.com

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TAX SECTION

AND

REAL PROPERTY, PROBATE AND TRUST LAW SECTION

COMMENTS TO PROPOSED REGULATIONS UNDER SECTION 2704

Introduction.

Proposed Regulations to section 2704[1] (the "Proposed Regulations") were released on August 2, 2016. Section 2704, like the rest of Chapter 14, provides a special rule for the valuation of certain interests for estate, gift, and generation-skipping transfer tax purposes; specifically, it addresses interests in entities that have "lapsing" rights or restrictions as well as interests in entities that are subject to "applicable restrictions." The Proposed Regulations seek to clarify the application of those existing rules and expand the scope of Section 2704 to address an entirely new class of limitations, termed "disregarded restrictions."

The comments address six areas of concern: **(1)** disregarding the interests of nonfamily members, as set forth in Proposed Regulations section 25.2704-3(b)(4); **(2)** the effect on valuation of the "minimum value" element of disregarded restrictions, as set forth in Proposed Regulations section 25.2704-3(b)(1)(ii); **(3)** failing to distinguish between investment entities and active businesses; **(4)** applying the effective date provisions, as set forth in Proposed Regulations section 25.2704-4(b)(1), to the three-year rule under Proposed Regulations section 25.2704-1(c)(1); **(5)** clarifying the application or non-application of rules in the Proposed Regulations to the value of entity interests determined pursuant to options or agreements that satisfy section 2703, and **(6)** removing the addition of cross references in the Proposed Regulations under section 2704 to the term "controlled entity" as used in section 2701.

Disregarding Interests of Nonfamily Members.

The Proposed Regulations would disregard certain interests held by certain nonfamily members for purposes of determining whether the transferor (or the transferor's estate) and members of the transferor's family are able to unilaterally remove a restriction on the ability to redeem or liquidate an interest in an entity.[2] Specifically, the Proposed Regulations would disregard any interest in an entity held by a person who is not a member of the transferor's family if, at the time of the transfer: (1) the

[1] Estate, Gift, and Generation-Skipping Transfer Taxes; Restrictions on Liquidation of an Interest, REG-163113-02, 81 Fed. Reg. 51,413 (August 4, 2016). A correction to the Proposed Regulations was published October 4, 2016. 81 Fed. Reg. 68,378 (October 4, 2016). References to a "section" are to a section of the Internal Revenue Code of 1986, as amended (the "Code").

[2] Prop. Regs. § 25.2704-3(b)(4).

interest has been held by such person for less than three years (the "Nonfamily Member Lookback Rule"); (2) the interest constituted less than 10% of the value of all of the equity interests in a corporation, or constituted less than 10% of the capital and profits interests in a business entity described in Regulations section 301.7701-2(a) other than a corporation (the "10% Rule"); (3) the interest, when combined with the interests of all other persons who are not members of the transferor's family, constituted less than 20% of the value of all of the equity interests in a corporation, or constituted less than 20% of the capital and profits interests in a business entity described in Regulations section 301.7701-2(a) other than a corporation (the "20% Rule"); or (4) that person did not have an enforceable right to receive in exchange for such interest, on no more than six months' prior notice, the "minimum value" of the interest (the "Put Right Rule").

The Preamble justifies Proposed Regulations section 25.2704-3(b)(4) primarily through explanations that "the grant of an insubstantial interest in the entity to a nonfamily member should not preclude the application of section 2704(b)"[3] and that "the presence of a nonfamily-member interest should be recognized only where the interest is an economically substantial and longstanding one that is likely to have a more substantive effect." The Preamble further states that "a bright line test will avoid the fact-intensive inquiry underlying a determination of whether the interest of the nonfamily member effectively constrains the family's ability to liquidate the entity." While we support the objective of providing a reasonable bright line test, we believe that improvements should be made to all of these rules, and that two of them—the 10% Rule and the Put Right Rule– are based on flawed reasoning and should be substantially modified.

Nonfamily Member Lookback Rule.

The Preamble states that an interest held by a nonfamily member "should be recognized only where the interest is an economically substantial and longstanding one that is likely to have a more substantive effect."[4] Proposed Regulations section 25.2704-3(b)(4)(i)(A) would disregard interests that have not been held by a nonfamily member for at least three years.

The Nonfamily Member Lookback Rule should be revised to allow tacking of holding periods if a nonfamily member has received the interest from another nonfamily member. The Rule should be further revised to account for newly created entities that are less than three years old.

Valuing Interests Under the 10% Rule and 20% Rule.

Implicit in the 10% Rule and the 20% Rule is the need to value a member's interest in "the capital and profits" of a business entity other than a corporation. The Preamble suggests that the 10% Rule and 20% Rule are bright line rules.[5] Nonetheless, measuring the "capital" or "profits" is not as straightforward as the regulations suggest.

[3] Note 1, *supra*, at 51,415.
[4] *Id*.
[5] Note 1, *supra*, at 51,415 ("A bright-line test will avoid [a] fact-intensive inquiry . . . .").

Neither the current Regulations nor the Proposed Regulations provide a method for measuring "capital" or "profits." Partnership agreements that provide for liquidation in accordance with positive capital accounts have become rarer, but we may see their resurgence, as the ability to measure "capital" or "profits" under the section 704(b) regulations is difficult, and their reporting is subject to varying interpretation. Calculations to determine whether such liquidation rights fall within the scope of the Proposed Regulations would be difficult and made more so by the lack of guidance.

If measuring capital is difficult, it would be even more difficult in a capital-intensive partnership with a waterfall allocation of profits and preferred returns on unreturned capital—almost to the point that, without further clarification, certain taxpayers may be unable to apply the 10% Rule and 20% Rule to their specific circumstances.

10% Rule.

The 10% Rule and the 20% Rule each appear to be supported by the justification that an interest must be economically substantial. We recognize that the 20% Rule can be supported by many other examples in the Internal Revenue Code, such as those described below:

- Section 332(a) provides that no gain or loss shall be recognized on the receipt by a corporation of property distributed in complete liquidation of another corporation, provided that the receiving corporation owns at least 80% of the liquidating corporation (*i.e.*, no more than 20% is owned by other shareholders).
- Section 337(a) provides that in a complete liquidation to which section 332 applies, no gain or loss shall be recognized by the liquidating corporation on the distribution to the 80% distributee.
- Section 355(g)(2)(B)(iv) provides for a look-through rule for 20% controlled entities.
- Section 1504(a) provides that a corporation may be included in an affiliated group, provided that no more than 20% of the corporation's voting power and total value is owned outside of the group.

However, the 10% Rule appears to be an arbitrary and unnecessary requirement. Generally, Subtitle B of the Code imposes very few rules that are tied to percentage ownership of an entity. Notable (and perhaps the only) exceptions are section 2036(b)(2) (retained right to vote shares of a 20%-controlled corporation), sections 2107 and 2501(a)(5) (applying the expatriation rules to certain 10%-controlled corporations for pre-2008 expatriations), and of course Chapter 14 of the Code. Section 6166, which provides an extension of time for the payment of estate tax, disregards an interest in a closely held business only if (1) less than 20% of the total capital interest or voting stock is includible in a decedent's gross estate, and (2) the entity has 45 or fewer owners.

If the purpose of the 10% Rule is to disregard minority owners with interests so insubstantial that the owners are indifferent to the operation of the entity, then perhaps a reference to a pecuniary minimum value (similar to the structure of the so-called "5 and 5" rule of section 2041) may be appropriate. Otherwise, the 10% Rule might produce absurd results; by way of example, the owner of a 9% interest in a billion dollar company would own an interest worth (before discounts) $90,000,000 and

would nevertheless be ignored under the 10% rule because his interest in the company is deemed too "insubstantial" to warrant his attention.

Further, the stated purpose for imposing requirements on the interests of non-family members (*i.e.*, that interests of nonfamily members be economically substantial) is satisfied merely by the existence of the 20% Rule; therefore, the 10% Rule is unnecessary. It should not matter whether each of two nonfamily members owns 10% or each of twenty nonfamily members owns 1%. Both situations lead to the same result - that nonfamily members own 20% of the value of the entity which, in the aggregate, constrain the ability of a family to remove a restriction on the liquidation of an individual interest.

If, however, the 10% Rule is to be retained, it can be improved in several respects, while maintaining its "bright line" aspect:

(1) Attribution should be applied among members of the family of non-controlling owners. For example, assume that A owns 76% of a corporation's stock, B owns 24% of the corporation's stock, and that A and B are unrelated. Further assume that B dies, leaving B's stock in equal shares to B's children. The number of B's children should be irrelevant to the application of section 2704. Whether B has two children (each receiving 12% of the corporation's stock) or three (each receiving 8%) is unlikely to have any effect on A's ability to remove restrictions.

(2) Interests received in arms'-length transactions should be exempt from the 10% Rule. The Proposed Regulations instead treat the gift of an interest to a nonfamily member no differently than the common situations when a nonfamily member invests in the venture. The latter owner is far more likely to be actively involved in the venture in order to protect his or her investment.

The Put Right Rule.

The Put Right Rule requires that, in order to be considered for purposes of determining whether the transferor and his family are able to unilaterally remove a limitation on liquidation or redemption, a non-family member must possess the ability to liquidate his or her interest, for cash or "other property" equal to the minimum value of the interest, within six months of providing notice to the entity of his or her intent to withdraw.[6] To say that a right of this nature is unusual radically understates the scarcity of such a right. Indeed, no member of the committee charged with the final review of these comments could recall a single instance in which an owner of a business—family member or not, operating or otherwise—possessed such a significant liquidation right.

In the context of entities operating active trades or businesses, such a put right is simply untenable as a practical reality. Thus, to require such a right before considering the ability of non-family members to affect governance of the entity would result in essentially *all* non-family members being disregarded for purposes of this aspect of section 2704. If this is the desired result, a far simpler section

[6] Prop. Regs. § 25.2704-3(b)(4)(i)(D) referencing Prop. Regs. § 25.2704-3(b)(6).

25.2704-3(b)(4) could have been crafted. Alternatively, if the purpose of the disregarded non-family member analysis is indeed to ignore outside interests that are "economically insubstantial," the Put Right Rule is grossly overbroad and adds nothing meaningful to the 20% rule.

The Effect of "Minimum Value" on the Valuation of Entities that are Subject to Section 2704.

The Proposed Regulations use the term "minimum value" for purposes of determining when a restriction on the ability to redeem or liquidate an interest in an entity should be disregarded.[7] The "minimum value" of an interest in an entity means "the interest's share of the net value of the entity determined on the date of liquidation or redemption.[8] The "net value of the entity" is defined as "the fair market value . . . of *the property held by the entity*, reduced by the outstanding obligations of the entity." [Emphasis added]. In other words, the "net value of the entity" refers to an entity's "net asset value."

Revenue Ruling 59-60[9] recognized that "net asset value" is especially relevant to the value of the stock of a closely held investment company and real estate holding company, but that earnings are of primary consideration when valuing stocks of companies that sell products or services to the public. When determining the fair market values of the assets of a company, the costs of liquidation "merit consideration."[10] Generally speaking, valuations of interests in closely held entities under Revenue Ruling 59-60 consider prior sales of interests (the "sales method"), as well as earnings (the "income method") and liquidation value (the "asset method"). By placing undue emphasis on "net asset value," the Proposed Regulations gut Revenue Ruling 59-60, and replace it with the adoption of a "liquidation value only" method. To the extent that the Internal Revenue Service intends by the Proposed Regulations to overrule any portion of Revenue Ruling 59-60, the intent should have been stated explicitly.

Overall, the effect of the minimum value rule is to move away from long-standing reference to fair market value, which is the polestar of the federal transfer tax regime, as provided in Treasury Regulations §§ 20.2031-1(b) and 25.2512-1. If the regulatory goal is to clarify valuation rules so that certain restrictions applicable to an interest are to be disregarded within the determination of the interest's fair market value, then we suggest that revised proposed regulations so provide, by listing those restrictions which business valuation professionals must ignore in providing opinions of fair market value, by scrapping that the convoluted "minimum value rule".

Furthermore, the notion of an imputed "put right" or the lack of an actual put right, in connection with the minimum value rule, is at odds with normal business practices that rarely result in either the use of or the granting of, put rights in common business ownership arrangements.

Nevertheless, if the Internal Revenue Service continues to utilize the notion of "minimum value," then in the case of operating businesses the definition of "minimum value" may substantially

[7] Prop. Regs. § 25.2704-3(b)(1)(ii). See also § 25.2704-3(b)(6) (using the concept in the definition of "put right").
[8] Prop. Regs. § 25.2704-3(b)(1)(ii).
[9] Rev. Rul. 59-60, 1959-1 CB 237
[10] *Id*. at Sec. 5(b).

undervalue an interest in an entity and, consequently, the concept may not provide a deterrent to the use of restrictions in many instances.

Finally, if adopted, the term "minimum value" should take into account adjustments for income taxes attributable to built-in gains. Although the development of the practice of making the adjustment for built-in gains has been rocky, it previously has been accepted by most courts, as well as the Internal Revenue Service.[11]

Exceptions for Operating Entities.

The Proposed Regulations make only minor concessions for the significant differences between entities primarily holding passive investment assets ("Investment Entities") and entities engaged in an active trade or business ("Operating Entities"). This treatment contrasts with the purported purpose of the Proposed Regulations (as set out in the Preamble) insofar as the structure of Operating Entities is generally a creature of business necessity. Restrictions imposed on owners of Operating Entities generally are not imposed for the purpose of avoiding the application of section 2704.

The Proposed Regulations provide that a commercially reasonable restriction on liquidation will not be disregarded if such restriction is imposed by an unrelated person providing capital to an Operating Entity for the entity's trade or business operations, whether in the form of debt or equity.[12] An unrelated person is defined as "any person whose relationship to the transferor, the transferee, or any member of the family of either is not described in section 267(b) . . . ." (with an exception for publicly held banks defined in section 581).[13] In addition, the "put" exception to the definition of "disregarded restriction" provides that a "restriction" on liquidation or redemption will not be disregarded if, *inter alia*, the consideration payable to the holder consists of cash or property other than a note or other obligation issued by the entity, another holder of interests in the entity, or a person related to the entity or another interest holder.[14] If, however, the entity is an Operating Entity and at least 60% of the entity's value consists of non-passive assets, then the consideration may include a note that is adequately secured, requires periodic payments, is subject to interest at market rates, and has a fair market value on the date of liquidation equal to the liquidation proceeds.[15]

These exceptions for Operating Entities are extremely narrow in scope and have limited application, but demonstrate at least a concession that Operating Entities are fundamentally different from Investment Entities. The Final Regulations should provide a broader exception for Operating Entities, as the Proposed Regulations would cause significant hardships for Operating Entities when the death of an owner of the business results in the imposition of a large estate tax. We suggest that the final Regulations include an exception for Operating Entities under Proposed Regulations section

[11] *E.g.*, *Davis v. Commissioner*, 110 T.C. 530 (1998); *Eisenberg v. Commissioner*, 155 F.3d 50 (2nd Cir. 1998), AOD 1999-001 (1/29/1999).
[12] Prop. Regs. § 25.2704-3(b)(5)(ii).
[13] *Id*.
[14] Prop. Regs. §§ 25.2704-3(b)(5)(v), -3(b)(6).
[15] *Id*.

25.2704-3(b)(5), and make a corresponding revision to Proposed Regulations section 25.2704-3(b)(1)(iv), as set forth below.

The primary change would be the addition of a new section 25.2704-3(b)(1)(vi) to clarify that the Proposed Regulations are inapplicable to Operating Entities by reference to the same standard currently used by the Proposed Regulations in permitting such entities to make payment of a redemption or liquidation right via a promissory notes.[16] We recommend the following addition to section 25.2704-3(b)(1):

> § 25.2704-3(b)(5)(vi) *Entities engaged in active trades or businesses*. A disregarded restriction does not include a restriction imposed on the holder of an interest in an entity that is engaged in an active trade or business, as that phrase is used in section 6166(b)(1), provided that at least 60 percent of the value of such entity consists of non-passive assets of that trade or business.

If the above addition to section 25.2704-3(b)(1) is made, it would negate the need for an exception to the payment rule under sections 25.2704-3(b)(1)(iv) and 25.2704-3(b)(6) that permits satisfaction of a liquidation or redemption right by way of a promissory note. Accordingly, we recommend the following ~~revisions~~:

> § 25.2704-3(b)(1)(iv). The provision authorizes or permits the payment of any portion of the full amount of the liquidation or redemption proceeds in any manner other than in cash or property. Solely for this purpose, ~~except as provided in the following sentence,~~ a note or other obligation issued directly or indirectly by the entity, by one or more holders of interests in the entity, or by a person related to either the entity or any holder of an interest in the entity, is deemed not to be property. ~~In the case of an entity engaged in an active trade or business, at least 60 percent of whose value consists of the non-passive assets of that trade or business, and to the extent that the liquidation proceeds are not attributable to passive assets within the meaning of section 6166(b)(9)(B), such proceeds may include such a note or other obligation if such note or other obligation is adequately secured, requires periodic payments on a non-deferred basis, is issued at market interest rates, and has a fair market value on the date of liquidation or redemption equal to the liquidation proceeds. See § 25.2512-8.~~ For purposes of this paragraph (b)(1)(iv), a related person is any person whose relationship to the entity or to any holder of an interest in the entity is described in section 267(b), provided that for this purpose the term *fiduciary of a trust* as used in section 267(b) does not include a bank as defined in section 581 that is publicly held.
>
> § 25.2704-3(b)(6) Put right. The term put right means a right, enforceable under applicable local law, to receive from the entity or from one or more other holders, on liquidation or redemption of the holder's interest, within six months after the date the holder gives notice of the holder's intent to withdraw, cash and/or other property with a value that is at least equal to the minimum value of the interest determined as of the date of the liquidation or redemption. For this purpose, local law is the law of the jurisdiction, whether domestic or foreign, that governs

[16] Prop. Regs. §§ 25.2704-3(b)(5)(1)(iv).

liquidation or redemption rights with regard to interests in the entity. For purposes of this paragraph (b)(6), the term other property does not include a note or other obligation issued directly or indirectly by the entity, by one or more holders of interests in the entity, or by one or more persons related either to the entity or to any holder of an interest in the entity. ~~However, in the case of an entity engaged in an active trade or business, at least 60 percent of whose value consists of the non-passive assets of that trade or business, and to the extent that the liquidation proceeds are not attributable to passive assets within the meaning of section 6166(b)(9)(B), the term other property does include a note or other obligation if such note or other obligation is adequately secured, requires periodic payments on a non-deferred basis, is issued at market interest rates, and has a fair market value on the date of liquidation or redemption equal to the liquidation proceeds. See §25.2512-8.~~ The minimum value of the interest is the interest's share of the net value of the entity, as defined in paragraph (b)(1)(ii) of this section.

If the above changes are not adopted, we believe that the Proposed Regulations should, at a minimum, broaden the Commercially Reasonable Restriction exception to include limitations on liquidation or redemption rights that are imposed on Operating Entities by a third party business entity as a result of the underlying trade or business. We therefore recommend the following additions to section 25.2704-3(b)(5)(ii):

§ 25.2704-3(b)(5)(ii) Commercially reasonable restriction. A disregarded restriction does not include a commercially reasonable restriction on liquidation or redemption that is imposed by an unrelated person or entity as part of a bona fide business arrangement. A commercially reasonable restriction includes a limitation that is imposed by a lender or investor providing capital to the entity for the entity's trade or business operations (whether in the form of debt or equity); a licensor (including a franchisor) providing a license or other authorization to use property (whether tangible or intangible) that is related to the entity's trade or business operations; or a governing body that sanctions or otherwise authorizes one or more aspects of the entity's trade or business operations. An unrelated person is any person whose relationship to the transferor, the transferee, or any member of the family of either is not described in section 267(b), provided that for purposes of this section the term fiduciary of a trust as used in section 267(b) does not include a bank as defined in section 581 that is publicly held.

Application of the Effective Date Provisions to the Three-Year Rule.

The Proposed Regulations would apply on and after the date the regulations are published as final regulations in the Federal Register, except that Proposed Regulations section 25.2704-3 (transfers subject to disregarded restrictions) would apply to transfers occurring thirty or more days after the date the regulations are published as final regulations.[17] Nevertheless, Proposed Regulations section 25.2704-1(c)(1), relating to transfers made within three years of death (the "Three-Year Rule"), could be interpreted as applying retroactively in some cases. We believe that retroactive application is unreasonable and would create inequities among taxpayers. Therefore, we recommend that the Proposed Regulations be clarified to provide that the Three-Year Rule only applies to transfers made after the date the Proposed Regulations are published as final regulations.

Specifically, Proposed Regulations section 25.2704-1(c)(1) states, in pertinent part, that "[t]he lapse of a voting or liquidation right as a result of the transfer of an interest within three years of the transferor's death is treated as a lapse occurring on the transferor's date of death, includible in the gross estate pursuant to section 2704(a)."[18] The Proposed Regulations would "apply to transfers of property subject to restrictions created after October 8, 1990, occurring on or after the date these regulations are published as final regulations in the Federal Register."[19] It is unclear whether this effective date language applies to the actual lapse that occurs at the time of the transfer or to the deemed lapse occurring at death pursuant to Proposed Regulations section 25.2704-1(c)(1). If the effective date language applies to the deemed lapse occurring at death, then the Three-Year Rule could apply to transfers made before the date that the regulations are published as final regulations (and perhaps before the date that the Proposed Regulations were issued) if the transferor died after the regulations were published as final but within three years of the date of transfer.

Pursuant to section 7805(a), the Secretary of the Treasury may prescribe necessary rules and regulations. Section 7805(b) expands that authority to include the retroactive effect of such rules and regulations, however, such regulations must fall within one of the several specified categories, and generally only may be applied to taxable years that did not expire before the notice of proposed regulations was published in the Federal Register or the date “on which any notice substantially describing the expected contents of any temporary, proposed, or final regulation is issued to the public.”[20]

The Commissioner of the Internal Revenue Service has stated unofficially that regulations are to be applied retroactively only when it would benefit taxpayers.[21] Through litigation, limitations on Treasury's discretionary authority to apply regulations retroactively have emerged, which generally seek to protect the taxpayer against unfair and inequitable effects of the retroactive application of

[17] Prop. Regs. § 25.2704-4(b).
[18] Prop. Regs. § 25.2704-1(c)(1).
[19] Prop. Regs. § 25.2704-4(b)(1).
[20] Code § 7805(b)(1).
[21] David W. Ball, "*Retroactive Application of Treasury Rules and Regulations*," 17 N.M. L. Rev. 139, 152 (Winter 1987).

regulations. [22] Therefore, generally speaking, regulations have historically only been applied retroactively when the fair and reasonable treatment of taxpayers is not jeopardized in so doing.[23]

We believe it would be unfair and unreasonable if the Three-Year Rule applied to transactions that occurred prior to the publication of the final regulations. Specifically, if a taxpayer today transferred property by gift the fair market value of which is determined under current law, and if the taxpayer died within three years of the transfer, at which time the Proposed Regulations had been published as final regulations, the effect of the Three-Year Rule contained in Proposed Regulations section 25.2704-1(c)(1) could result in significant amounts being included improperly in that taxpayer's estate. At the time of the transaction, however, the taxpayer reasonably relied on an interpretation of section 2704 under current law in which such amounts would not be includible in his or her estate. To require the taxpayer to evaluate his or her decision to move forward with the transaction not based on current law, but instead, based on proposed regulations that were not final and subject to change, is unreasonable.

Moreover, it also would be inequitable in certain circumstances for the Three-Year Rule to apply retroactively. For example, if the transaction involved the transfer of an interest subject to section 2704 to a trust for the taxpayer's family, the taxpayer very well may have weighed the estate tax savings of transferring the interest to the trust versus the income tax benefit of receiving a step up in basis if such interest were to be included in the taxpayer's estate upon his or her death. If the taxpayer decided to move forward with the transaction given the estate tax savings under current law, he or she would be consciously foregoing the income tax benefit to the taxpayer's heirs of the step up in basis. If, however, the taxpayer died within three years of that transfer and the Three-Year Rule under Proposed Regulations section 25.2704-1(c)(1) applied retroactively to the transaction, the Internal Revenue Service would be imputing a result that the taxpayer did not intend and which could not have been foreseen under the law applicable at the time of the transaction. This would be fundamentally inequitable to the taxpayer, as it would not allow the taxpayer to modify his or her behavior to select the most tax efficient course of action given the taxpayer's personal objectives within the confines of the current tax law.

We therefore recommend that Proposed Regulations section 27.2704-4(b) be modified to clarify that the Three-Year Rule contained in Proposed Regulations section 25.2704-1(c)(1) only applies prospectively with respect to transfers occurring after the Proposed Regulations are published as final regulations. As such, the Proposed Regulations would not have a retroactive effect with respect to the transfer of interests made before the Proposed Regulations are published as final regulations.

We also suggest that as a matter of sound tax policy, if the intent of the Three-Year Rule is to capture and discourage "deathbed" lapsing of restrictions, a three year time frame is overbroad. Reference instead to the "terminal illness rule" expressed in Treas. Reg. § 1.7520-3(b)(3)(i) should be considered, which provides an effective framework that is acceptable to the Service and already familiar to tax practitioners.

[22] *E.g., LeSavoy Foundation v. Commissioner*, 238 F.2d 589 (3rd Cir. 1956); *International Business Machines Corp. v. United States*, 343 F.2d 914 (Ct. Cl. 1965), *cert. denied*, 382 U.S. 1028 (1966); *Helvering v. R.J. Reynolds Tobacco Co.*, 206 U.S. 110 (1939).
[23] Ball, *supra* Note 19 at 152.

Clarifying the Application or Non-application of Section 2704 to Section 2703 Options and Agreements.

Buy-sell agreements are commonly used among business owners (whether related or unrelated) to establish a clear procedure for the purchase of an owner's interest upon a transfer during life or at death. These agreements set forth the manner for calculating the purchase price of the departing owner's interest as well as the terms for payment of that amount. Section 2703 generally states that the value of any property (which includes an interest in a family-owned business) may not be determined for transfer tax purposes pursuant to the terms of an option or agreement unless such option or agreement, among other things, is a bona fide business arrangement with terms that are comparable to similar arrangements entered into by persons in an arms' length transaction and the option or agreement is not a device to transfer property to members of the owner's family for less than full and adequate consideration. As developed in case law[24] section 2703 also requires a showing that the method for determining the purchase price bears a reasonable relationship to the fair market value of the interest. Thus, it is common for owners to have an independent appraisal prepared for purposes of establishing a purchase price under the terms of an option or agreement that is intended to satisfy the requirements of section 2703. Such an appraisal often will account for the presence of limitations or restrictions on the ability of the interest holder to liquidate the interest that is governed by the section 2703 option or agreement.

The Preamble to the Proposed Regulations states that "although it may appear that sections 2703 and 2704(b) overlap, they do not. While section 2703 and the corresponding regulations currently address restrictions on the sale or use of individual interests in family-controlled entities, the Proposed Regulations would address restrictions on the liquidation or redemption of such interests."[25] Further, Proposed Regulations section 25.2704-2(b)(4)(iii) states that "an option, right to use property, or agreement that is subject to section 2703 is not an applicable restriction." Similarly, Proposed Regulations section 25.2704-3(b)(5)(iv) states that "an option, right to use property, or agreement that is subject to section 2703" is not a disregarded restriction.

The reference in the Proposed Regulations to an agreement that is "subject to section 2703" is confusing because all buy-sell agreements are "subject to" section 2703[26] even though not all buy-sell agreements meet the requirements of section 2703(b). Therefore, we believe it is important to clarify whether only options or agreements that satisfy section 2703 (as opposed to being "subject to" section 2703) are intended to fall within the exceptions of Proposed Regulations sections 25.2704-2(b)(4)(iii) and 25.2704-3(b)(5)(iv).

Further, it is unclear whether and how the Proposed Regulations are intended to affect the value of an interest that is established for federal transfer tax purposes by an option or agreement that satisfies the requirements of section 2703. In other words, if an option or agreement satisfying the requirements of section 2703 provides for the value of an interest to be determined pursuant to an

[24] *E.g.*, *Estate of Lauder v. Commissioner*, T.C. Memo 1992-736; *Estate of True v. Commissioner,* 390 F. 3d 1210 (10th Cir. 2004).
[25] Note 1, *supra*, at 51,417.
[26] Other than certain grandfathered buy-sell agreements. See, *e.g.*, P.L. 101-508, § 11602(e)(1).

independent appraisal that accounts for all characteristics of the interest, including restrictions on the ability of the interest holder to redeem or liquidate his or her interest, would the appraiser be required to disregard the liquidation restriction due to the Proposed Regulations when valuing the interest for purposes of the option or agreement, or does the fact that the buy-sell agreement satisfied section 2703, by itself, eliminate the need to apply the Proposed Regulations under section 2704? It would be helpful if the final regulations clarified the interplay of sections 2703 and 2704.

Section 2704 References to "Controlled Entity."

The Proposed Regulations use the term "control" but define it by reference to the term "controlled entity" from the section 2701 regulations.[27] In contrast, section 2701 provides a definition for the term "control." The cross-reference to the section 2701 regulations, rather than the statute itself, is likely an effort to include the "patch" added by the Proposed Regulations to section 25.2701-2(b)(5), which clarifies that business entities other than corporations and partnerships are to be considered in the analysis. Unfortunately, this cross-reference also causes confusion because "controlled entities" is defined by reference to a very specific family group that differs from the group used elsewhere in the Proposed Regulations.

The term "controlled entity" is defined for purposes of the section 2701 regulations as a corporation or partnership that is controlled, immediately before a transfer, by the transferor, *applicable family members, and any lineal descendants of the parents of the transferor or the transferor's spouse*.[28] In contrast, the Proposed Regulations use the phrase "the transferor and/or *members of the transferor's family* control the entity immediately before the transfer,"[29] but give no indication of the extent to which the definition of "controlled entity" applies. Put another way, the question is which family group is relevant for the control analysis under the Proposed Regulations: the family group from Section 2702 (because the phrase is "*members of the transferor's family* control") or from section 2701 (because "control" is defined by reference to "controlled entity")?

The answer to this question is important because the class of family members considered for purposes of determining a "controlled entity" under section 2701 includes the transferor's nieces, nephews, and more remote lineal descendants of the parents of the transferor and the transferor's spouse, while the "members of the [transferor's] family" considered for purposes of section 2702 does not.[30] Thus, the control tests under the Proposed Regulations may be substantially different from the controlled entity test from section 2701, despite the explicit cross-reference. We recommend that the cross-references to "controlled entity" in the Proposed Regulations under section 2704 be clarified, due to the potential for taxpayer confusion.

[27] Prop. Regs. § 25.2704-2(c), -3(c).
[28] Treas. Regs. § 25.2701-2(b)(5)(i).
[29] Prop. Regs. § 25.2704-3(b)(5)(iii) (emphasis added).
[30] The Proposed Regulations adopt the definition of "member of the family" from 25.2702-2(a)(1). *See* Prop. Regs. §§25.2704-1(a)(2)(ii) and 25.2704-3(c).

LEGISLATIVE POSITION REQUEST FORM

GOVERNMENTAL AFFAIRS OFFICE

Date Form Received _____

GENERAL INFORMATION

Submitted By Lauren Detzel and Charles Nash, Co-Chairs, Ad Hoc Study Committee on Elective Share Revision Real Property Probate & Trust Law Section

Address Lauren Detzel, Dean Mead, P.O. Box 2346, Orlando, Florida 32802-2346
Telephone: (407) 428-5114

Charles Nash, Nash & Kromash, LLP, 440 South Babcock Street, Melbourne, Florida 32901-1276
Telephone: (321) 984-2440

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

CONTACTS

Board & Legislation Committee Appearance

Lauren Detzel, Dean Mead, P.O. Box 2346, Orlando, Florida 328032-2346, Telephone: (407) 428-5114
Charles Nash, Nash & Kromash, LLP, 440 S. Babcock Street, Melbourne, Florida 32901-1276, Telephone: (321) 984-2440
Sarah Butters, Holland & Knight LLP, 315 South Calhoun Street, Suite 600, Tallahassee, Florida 32301, Telephone: (850) 425-5648
Peter M. Dunbar, Dean Mead, 215 South Monroe Street, Suite 815, Tallahassee, Florida 32301, Telephone: (850) 270-5112
Martha J. Edenfield, Dean Mead, 215 South Monroe Street, Suite 815, Tallahassee, Florida 32301, Telephone: (850) 270-5113
(List name, address and phone number)

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

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

PROPOSED ADVOCACY

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

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

Indicate Position Support _X___ Oppose _____ Tech Asst. ____ Other _____

Proposed Wording of Position for Official Publication:

Supports revisions to Florida Elective Share Statute, Sections 732.201-732.2155, that after careful review are believed to be warranted, including changes to the manner in which protected homestead is included in the elective estate and how it is valued for purposes of satisfying the elective share; quantify the amount of the elective share which the surviving spouse is entitled with reference to the length of the marriage; enlarge the time for filing the election; add a provision to assess interest on persons who are very delinquent in fulfilling their statutory obligations to pay or contribute towards satisfaction of the elective share; add a new section that specifically addresses awards of attorney's fees and costs from elective share proceedings; and make changes to Chapter 738 to assure qualification for certain elective share trusts that contain so called unproductive property.

Reasons For Proposed Advocacy:

With respect to the changes relating to protected homestead, those changes are necessary because there is a serious anomaly that results with respect to the amount of the elective share that a surviving spouse receives based upon whether a marital residence was owned as tenants by the entireties by both spouses or if it was owned solely by the deceased spouse. The statutory changes are designed to ameliorate those discrepancies. With respect to the change in the amount of the elective share, the current statute provides for an elective share equal to 30% of the elective estate, no matter how short or long the decedent and spouse were married. Under current law, the elective share amount is the same whether a decedent was married to his/her spouse for 40 minutes or 40 years. It is believed a sliding percentage based upon the number of years of marriage would be more equitable. The provision allowing an extension of time to file the election for good cause shown has been expanded to potentially enlarge the time period for filing. With respect to the new provisions dealing with attorney's fees, it was determined that there should be an award of attorney's fees and costs applicable to all parties who litigate in an elective share proceeding and adopts the standard used in other sections of the Florida Probate Code and the Florida Trust Code, thus making it applicable to all parties involved in an elective share litigation, whereas currently attorney's fees are only allowed to the personal representative. An additional interest provision was added to incentivize personal representatives and other persons to make payment of the elective share amount in a timely basis and therefore, if as to any amount of the elective share unpaid after two years, interest will be assessed at the regular Florida statutory rate. Finally, an additional provision was added to Florida Statute 738.606 to assure that elective share trust qualification is not inadvertently lost due to improper drafting.

PRIOR POSITIONS TAKEN ON THIS ISSUE

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

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

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

REFERRALS TO OTHER SECTIONS, COMMITTEES OR LEGAL ORGANIZATIONS

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

Referrals

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

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

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

Proposed Amendments to
Part II of Ch. 732, Florida Statutes,
Sections 732.201 – 732.2155, F.S.

I. SUMMARY

The proposed legislation would amend certain provisions of Part II of the Chapter 732, Florida Statutes, pertaining to the right of a surviving spouse to take an elective share of the decedent's assets after death. With one exception, a wholesale revision to the text or conceptual framework of the Florida's elective share statutes is not intended.

II. CURRENT SITUATION

Florida's elective share laws are codified in Part II of Chapter 732 of the Florida Statutes. Sections 732.201 - 732.2155, Fla. Stat., in the aggregate give the surviving spouse of a decedent who was domiciled in the State of Florida on his or her death the right to a forced share of the decedent's estate known as the "elective share." Very broadly (and misleadingly simply) stated, the elective share is 30% of the aggregate value of the all of the decedent's assets at death. There are technical rules that govern what is included in the asset base against which the elective share can be taken, and the valuation of those assets for elective share purposes

The surviving spouse must make a timely election to take the elective share, otherwise the right to the elective share is forfeited. The elective share is paid outright to the surviving spouse and is awarded only to the extent that the value of other assets that pass from the decedent to the surviving spouse as a part of the decedent's overall testamentary plan do not rise to the requisite 30% level. An award of elective share to the surviving spouse is in addition to whatever else the decedent may have provided for the surviving spouse. If the surviving spouse takes an elective share, he or she is *not* treated as having predeceased the decedent.

The Real Property, Probate and Trust Law ("RPPTL") Section of The Florida Bar convened an ad hoc committee (the "Committee") to study Florida's elective share laws. The goal in doing so was not to undertake a significant revision of those laws; rather, the objective was to focus on certain narrow and specific provisions of the elective share statutes that, over the years, practical experience and application revealed to be worth study or a fresh look. The legislative proposal is the product of the Committee's many months of close study and in-depth discussion.

III. EFFECT OF PROPOSED CHANGES GENERALLY

The proposed legislation would:

- Make changes to the manner in which so-called "protected homestead" is included in the elective estate and how it is valued for purposes of satisfying the elective share;

- Quantify the amount of the elective share to which the surviving spouse is entitled with reference to the length of the marriage;

- Extends the time during which the surviving spouse can petition to court for an extension of time to file for the elective share;

- Add a provision assessing interest against persons who are very delinquent in fulfilling their statutory obligations to pay or contribute towards satisfaction of the elective share;

- Add a new section that specifically addresses awards of attorney fees and costs in certain elective share proceedings; and

- Make changes to Chapter 738, Florida Statutes, to assure qualification for certain elective share purposes of trusts that contain so-called unproductive property.

IV. SECTION-BY-SECTION ANALYSIS

Section 1, Section 2, Section 3 and Section 6 of the proposed legislation all deal with so-called "protected homestead."

When a spouse dies, the manner in which the marital residence was titled at the time of death can have a dramatic impact on the amount of the elective share to which the surviving spouse is entitled. Specifically, the elective share calculation can be dramatically different depending on whether the marital residence was owned as tenants by the entirety by both spouses (in which case the marital residence by statute *is not* protected homestead) or was owned solely by the deceased spouse (in which case the marital residence *is* protected homestead), even though in both cases the surviving spouse will end up with the same ownership interest in the marital residence.

This anomaly results from the interaction between the Florida homestead statutes and the elective share statutes. Property that is the protected homestead of the decedent is presently *excluded* from the calculation of the elective estate under Section 732.2045, Fla. Stat., and is not an asset to be considered for purposes of satisfaction of the elective share under Section 732.2075, Fla. Stat. Conversely, property owned by the decedent and the surviving spouse as tenants by the entireties is *included* in the calculation of the elective estate at one-half of the fair market value of the property as of the decedent's date of death under Section 732.2035(3), Fla. Stat., and at the same value for purposes of satisfaction of the elective share under Section

732.2075, Fla. Stat. Accordingly, the surviving spouse of a decedent with protected homestead would receive more upon the decedent's death (the homestead plus the elective share) than a surviving spouse that owned property with the decedent as tenants by the entireties (only the elective share), based on an asset titling decision.

Section 1 of the proposed legislation includes protected homestead in the value of the elective estate. This results in a more consistent elective share amount for surviving spouses. This result is more equitable for both surviving spouses and the families of the deceased spouses, because it ensures that the elective share calculation takes into account all that the surviving spouse has received from the decedent and is not altered by an asset titling decision usually made without regard to elective share concerns.

Section 2 of the proposed legislation excludes the protected homestead from the elective estate if the surviving spouse waives his or her homestead rights in a marital agreement under Section 732.702, Fla. Stat., or otherwise, and receives no interest in it. This prevents a spouse who has waived his or her right to the homestead in a premarital or postmarital agreement during the decedent's lifetime from circumventing the marital agreement by claiming a portion of the homestead's value indirectly by taking the elective share after the decedent's death.

Section 3 of the proposed legislation sets forth rules governing the valuation of the interest in the protected homestead that the surviving spouse receives. These rules apply for purposes of valuing the elective estate. The Committee believes that valuing the life estate that the surviving spouse may receive in the protected homestead by operation of Section 732.401(1), Fla. Stat., will avoid likely disputes about the value of the life estate. The Committee believes that the 50% valuation convention for the spouse's life estate is fair to the surviving spouse and to the remainder beneficiaries because the surviving spouse has the unilateral right under Section 732.401(2), Fla. Stat., to elect to take a 50%, one-half, interest in the property.

Section 6 of the proposed legislation provides valuation conventions for protected homestead for purposes of using the property to satisfy the elective share. These rules parallel those set forth in Section 3 of the proposal.

Section 4 of the proposed legislation changes the amount of the elective share, which is currently 30% of the elective estate no matter how short or long the decedent and his or her spouse were married. Under current law, if the decedent was married to his or her spouse for 40 minutes or 40 years, the amount of the elective share is the same.

In 1999, the RPPTL Section proposed a sliding percentage identical to the current proposal, discussed below. Through the legislative process the final statutory version fixed the elective share percentage at 30% of the elective estate. There have been attempts in other areas of the law (divorce, for example) to tie the spousal entitlements to the duration of the marriage. This is in keeping with the contemporary view of marriage as an economic partnership in which there is a presumed unspoken agreement between the spouses that each is to enjoy a one-half interest in the property acquired during the marriage. A decedent who disinherits his or her surviving

spouse, or does not leave his or her surviving spouse a sufficient percentage of his or her estate, is seen as having reneged on that agreement. The general effect of applying the partnership theory to the elective share is to increase the entitlement of a surviving spouse in a long-term marriage and decrease the entitlement of a surviving spouse in a short-term marriage (for example, a marriage later in life in which neither spouse contributed much, if anything, to the acquisition of the other's wealth).

The Committee believes that a surviving spouse's elective share rights in the assets of the deceased spouse should, in the absence of a binding marital agreement to the contrary, be tied to the length of the marriage.

As proposed, the percentage of the elective estate to be awarded as an elective share would be based upon the length of the decedent's most recent marriage to the surviving spouse, as follows: (a) less than 5 years: 10% of the elective estate; (b) at least 5 years but less than 15 years: 20% of the elective estate; (c) at least 15 years but less than 25 years: 30% of the elective estate; and (d) 25 years or more: 40% of the elective estate.

Section 5 of the proposed legislation provides that direct recipients and beneficiaries who are required to make a payment to the surviving spouse of some portion of the elective share are responsible for the interest on any unsatisfied amount after two years. The legislative proposal is intended to encourage settlement and prompt resolution of elective share disputes.

Section 6 of the legislative proposal is discussed above.

Section 7 of the proposed legislation amends Section 732.2135, Fla. Stat., in two particulars.

First, subsection (2) is proposed to be amended to give the surviving spouse a longer period of time during which to file for the elective share. Under the current provision, the surviving spouse must make an election within six months after service of the notice of administration (or within two years of the decedent's death if no notice of administration was served). Suppose Wife's will disinherits Son and leaves all of her estate to Husband. Suppose, further, that Son does not receive Notice of Administration but Husband does. Husband does not file for the elective share, assuming the will to be valid and assuming that he will receive all of Wife's estate. Suppose, finally, that on the day that is six months plus one day after Husband was served with Notice of Administration, Son files a will contest. Son's will contest is timely because he never received Notice of Administration, but under current law it would then be too late for Husband to make the election to take the elective share. The proposed amendments would, in these circumstances, allow Husband to petition the court for an extension of time to file for elective share.

Second, the proposal strikes the provision in Section 732.2135(5), Fla. Stat., that presently permits an award of attorney fees and costs against a surviving spouse if an election is made or pursued in bad faith to avoid possible conflict with the proposed statute. The changes in Section 9 of the proposed legislation, discussed in greater detail below, would permit the trial court to

award attorney fees and costs against the elective share if the surviving spouse is the non-prevailing party, even if the surviving spouse does not act in bad faith. The new provision clearly empowers the court to award attorney fees and costs against a surviving spouse or other person who is found to have acted in bad faith or committed wrongdoing, although such a finding is not required.

Section 8 of the proposed legislation provides for the payment of interest at the statutory rate allowed by Florida law for any amount of the elective share that remains unsatisfied two years after the decedent's date of death. It complements Section 5 of the proposed bill and is designed with the same objectives in mind.

Section 9 of the proposed legislation enacts new Section 732.2151, Fla. Stat., to address the award of attorney fees and costs in certain elective share proceedings.

In subsection (1), the court may award attorney fees and costs as in chancery actions only when there is an objection or dispute over entitlement to or the amount of the elective share, the property interests included in the elective share or its value, or the satisfaction of the elective share. It adopts the same standard for granting an award of costs and attorney fees that is used in sections 733.609, 732.615, 732.616 and 736.1004, that is, "as in chancery actions" applicable to surcharge actions and proceedings to modify a will or trust. The use of the word "may" rather than "shall" in the proposed statute was done purposefully, to emphasize the discretionary nature of the determination. This is also consistent with the "as in chancery" standard that provides wide discretion to the trial court in determining whether attorney fees and costs will be awarded and the proportions in which they may be awarded.

Case law provides further detail on the standard explaining that the well-settled rule in chancery actions is that "costs follow the judgment unless there are circumstances that render application of this rule unjust." *In re Estate of Simon*, 549 So. 2d 210, 212 (Fla. 3rd DCA 1989); *Wilhelm v. Adams*, 136 So. 397 (Fla. 1931); *Schwartz v. Zaconick*, 74 So. 2d 108 (Fla. 1954). This is a "prevailing party rule" subject to the court's discretion, as justice requires, to order that "costs follow the result of the suit, apportion the costs between the parties, or require all costs be paid by the prevailing party." *Nalls v. Millender*, 721 So. 2d 426, 427 (Fla. 4th DCA 1998). When multiples issues are litigated, the courts have determined that a party can prevail or lose on one or more issues and attorney fees and costs may be apportioned based on the result on each issue.

Subsection (2) provides that a court may direct payment from the estate or from a party's interest in the elective share or the elective estate, or may enter a judgment that can be satisfied from other property of the party. As a result, each party involved in an elective share dispute may be held personally liable for attorney fees and costs of the opposing party. The language is intended to clarify that the court can enter a money judgment against a party for fees and costs and such judgment will not be limited solely to property included in the probate or elective share estate. It is not intended to create any specific lien right or remedy beyond the current law as it applies to collection of judgments.

Subsection (3) provides that in addition to the fees and costs awardable under Subsections (1) and (2), if a personal representative does not file a petition to determine the amount of the elective share, the electing spouse or his or her representative may be awarded attorney fees and costs from the estate in connection with the preparation and filing of the petition.

Subsection (4) provides that the statute is prospective and thus applies to all proceedings filed after the effective date of the statute, without regard to the date of the decedent's death.

The provisions of new Section 732.2151 apply to all proceedings commenced after July 1, 2017, regardless of the date of the decedent's death.

The provision in section 732.2135(5) that permits an award of attorney fees and costs against a surviving spouse if an election is made or pursued in bad faith is repealed to avoid possible conflict with the proposed statute. The proposed statute permits the trial court to award attorney fees and costs against the elective share if the surviving spouse is the non-prevailing party, even if the surviving spouse does not act in bad faith. It obviously empowers the court to award attorney fees and costs against a surviving spouse or other person who is found to have acted in bad faith or committed wrongdoing, although such a finding is not required.

The proposed statute does not change the provision in section 732.2145 regarding attorney fees and costs for bringing a claim to enforce a contribution for the elective share.

Section 10 of the proposed legislation expands the scope of the savings clause in Section 738.606, Fla. Stat., a part of the Florida Uniform Principal and Income Act, Chapter 738, Fla. Stat., to include an "elective share trust," as that term is defined in Section 732.2025(2), Fla. Stat. As with marital trusts intended to qualify for the estate tax marital deduction (which trusts are presently protected by the savings provisions of Section 738.606, Fla. Stat.), to qualify as an elective share trust, the governing instrument that creates the trust must give the surviving spouse the power to compel the trustee to convert property that is not productive of income into property that is so productive. Because not all elective share trusts will also be made subject to a marital deduction election, it is necessary to specifically extend the savings provision of this statute to those elective share trusts for which a marital deduction is not elected in order to satisfy the requirements for an elective share trust.

IV. FISCAL IMPACT ON STATE AND LOCAL GOVERNMENTS

The proposal is not expected to have a fiscal impact on state or local governments.

V. DIRECT IMPACT ON PRIVATE SECTOR

The proposal is not expected to have a direct, measurable economic impact on the private sector.

VI. CONSTITUTIONAL ISSUES

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

VII. OTHER INTERESTED PARTIES

The Florida Bankers Association and the Marital and Family Law Section of The Florida Bar.

3380167.00012-FL BAR COMM AD

A bill to be entitled

An act relating to the elective share; amending s. 732.2035, F.S., to include protected homestead in the elective estate, and renumbering subsections thereunder; amending 732.2045, F.S., to modify the circumstances under which property which constitutes the decedent's protected homestead is excluded from the elective estate; amending 732.2055, F.S., to add provisions to quantify the value in the elective estate of an interest in the decedent's protected homestead property received by the surviving spouse, and renumbering subsections thereunder; amending s. 732.2065, F.S., to quantify the amount of the elective share based upon the length of the decedent's marriage to the surviving spouse; amending s. 732.2085, F.S., to impose statutory interest on any portion of a contribution required to satisfy the elective share that remains unpaid two years after the decedent's death; amending s. 732.2095, F.S., to add provisions regarding the satisfaction of the elective share with protected homestead, and renumbering subsections thereunder; amending s. 732.2135, F.S., to strike the provision allowing assessment of attorney's fees and costs as being unnecessary with the enactment of new section 732.2151, F.S., pursuant to this act; amending s. 732.2145, F.S., to harmonize the payment of interest required on contributions to the elective share with the changes made by this act to s. 732.2085, F.S.,; creating new section 732.2151, F.S., pertaining to the award of attorney fees and costs in elective share proceedings; and amending s. 738.606, F.S., to ensure that the surviving spouse can require the trustee of an elective share trust to make the trust property productive of income.

Section 1. Section 732.2035, Florida Statutes, is amended to add a new subsection (2), to amend existing subsections (3), (4) and 5(a), and to redesignate existing subsections (2) through (9) as subsections (3) through (10), respectively, to read:

732.2035 Property entering into elective estate.

Except as provided in s. 732.2045, the elective estate consists of the sum of the values as determined under s. 732.2055 of the following property interests:

(1) The decedent's probate estate.

(2) The decedent's interest in property which constitutes the protected homestead of the decedent.

~~(2)~~(3) The decedent's ownership interest in accounts or securities registered in "Pay On Death," "Transfer On Death," "In Trust For," or coownership with right of survivorship form. For this purpose, "decedent's ownership interest" means, in the case of accounts or securities held in tenancy by the entirety, one-half of the value of the account or security, and in all other cases, that portion of the accounts or securities which the decedent had, immediately before death, the right to withdraw or use without the duty to account to any person.

~~(3)~~(4) The decedent's fractional interest in property, other than property described in subsection ~~(2)~~(3) or subsection(8), held by the decedent in joint tenancy with right of survivorship or in tenancy by the entirety. For this purpose, "decedent's fractional interest in property" means the value of the property divided by the number of tenants.

~~(4)~~(5) That portion of property, other than property described in subsection (2) and subsection (3), transferred by the decedent to the extent that at the time of the decedent's death the transfer was revocable by the decedent alone or in conjunction with any other person. This subsection does not apply to a transfer that is revocable by the decedent only with the consent of all persons having a beneficial interest in the property.

~~(5)~~(6)(a) That portion of property, other than property described in subsection (2), subsection ~~(3)~~(4), subsection ~~(4)~~(5), or subsection ~~(7)~~(8), transferred by the decedent to the extent that at the time of the decedent's death:

1. The decedent possessed the right to, or in fact enjoyed the possession or use of, the income or principal of the property; or

2. The principal of the property could, in the discretion of any person other than the spouse of the decedent, be distributed or appointed to or for the benefit of the decedent.

In the application of this subsection, a right to payments under a commercial or private annuity, an annuity trust, a unitrust, or a similar arrangement shall be treated as a right to that portion of the income of the property necessary to equal the annuity, unitrust, or other payment.

(b) The amount included under this subsection is:

1. With respect to subparagraph (a)1., the value of the portion of the property to which the decedent's right or enjoyment related, to the extent the portion passed to or for the benefit of any person other than the decedent's probate estate; and

2. With respect to subparagraph (a)2., the value of the portion subject to the discretion, to the extent the portion passed to or for the benefit of any person other than the decedent's probate estate.

(c) This subsection does not apply to any property if the decedent's only interests in the property are that:

1. The property could be distributed to or for the benefit of the decedent only with the consent of all persons having a beneficial interest in the property; or

2. The income or principal of the property could be distributed to or for the benefit of the decedent only through the exercise or in default of an exercise of a general power of appointment held by any person other than the decedent; or

3. The income or principal of the property is or could be distributed in satisfaction of the decedent's obligation of support; or

4. The decedent had a contingent right to receive principal, other than at the discretion of any person, which contingency was beyond the control of the decedent and which had not in fact occurred at the decedent's death.

~~(6)~~(7) The decedent's beneficial interest in the net cash surrender value immediately before death of any policy of insurance on the decedent's life.

~~(7)~~(8) The value of amounts payable to or for the benefit of any person by reason of surviving the decedent under any public or private pension, retirement, or deferred compensation plan, or any similar arrangement, other than benefits payable under the federal Railroad Retirement Act or the federal Social Security System. In the case of a defined contribution plan as defined in s. 414(i) of the Internal Revenue Code of 1986, as amended, this subsection shall not apply to the excess of the

proceeds of any insurance policy on the decedent's life over the net cash surrender value of the policy immediately before the decedent's death.

~~(8)~~(9) Property that was transferred during the 1-year period preceding the decedent's death as a result of a transfer by the decedent if the transfer was either of the following types:

(a) Any property transferred as a result of the termination of a right or interest in, or power over, property that would have been included in the elective estate under subsection (5) or subsection (6) if the right, interest, or power had not terminated until the decedent's death.

(b) Any transfer of property to the extent not otherwise included in the elective estate, made to or for the benefit of any person, except:

1. Any transfer of property for medical or educational expenses to the extent it qualifies for exclusion from the United States gift tax under s. 2503(e) of the Internal Revenue Code, as amended; and

2. After the application of subparagraph 1., the first annual exclusion amount of property transferred to or for the benefit of each donee during the 1-year period, but only to the extent the transfer qualifies for exclusion from the United States gift tax under s. 2503(b) or (c) of the Internal Revenue Code, as amended. For purposes of this subparagraph, the term "annual exclusion amount" means the amount of one annual exclusion under s. 2503(b) or (c) of the Internal Revenue Code, as amended.

(c) Except as provided in paragraph (d), for purposes of this subsection:

1. A "termination" with respect to a right or interest in property occurs when the decedent transfers or relinquishes the right or interest, and, with respect to a

power over property, a termination occurs when the power terminates by exercise, release, lapse, default, or otherwise.

2. A distribution from a trust the income or principal of which is subject to subsection (4), subsection (5), or subsection (9) shall be treated as a transfer of property by the decedent and not as a termination of a right or interest in, or a power over, property.

(d) Notwithstanding anything in paragraph (c) to the contrary:

1. A "termination" with respect to a right or interest in property does not occur when the right or interest terminates by the terms of the governing instrument unless the termination is determined by reference to the death of the decedent and the court finds that a principal purpose for the terms of the instrument relating to the termination was avoidance of the elective share.

2. A distribution from a trust is not subject to this subsection if the distribution is required by the terms of the governing instrument unless the event triggering the distribution is determined by reference to the death of the decedent and the court finds that a principal purpose of the terms of the governing instrument relating to the distribution is avoidance of the elective share.

~~(9)~~(10) Property transferred in satisfaction of the elective share.

Section 2. Section 732.2045, Florida Statutes, is amended at subsection (1)(i) to read:

732.2045 Exclusions and overlapping application.—

(1) Exclusions — Section 732.2035 does not apply to:

(a) Except as provided in s. 732.2155(4), any transfer of property by the decedent to the extent the transfer is irrevocable before the effective date of this subsection or after that date but before the date of the decedent's marriage to the surviving spouse.

(b) Any transfer of property by the decedent to the extent the decedent received adequate consideration in money or money's worth for the transfer.

(c) Any transfer of property by the decedent made with the written consent of the decedent's spouse. For this purpose, spousal consent to split-gift treatment under the United States gift tax laws does not constitute written consent to the transfer by the decedent.

(d) The proceeds of any policy of insurance on the decedent's life in excess of the net cash surrender value of the policy whether payable to the decedent's estate, a trust, or in any other manner.

(e) Any policy of insurance on the decedent's life maintained pursuant to a court order.

(f) The decedent's one-half of the property to which ss. 732.216-732.228, or any similar provisions of law of another state, apply and real property that is community property under the laws of the jurisdiction where it is located.

(g) Property held in a qualifying special needs trust on the date of the decedent's death.

(h) Property included in the gross estate of the decedent for federal estate tax purposes solely because the decedent possessed a general power of appointment.

(i) Property which constitutes the protected homestead of the decedent ~~whether held by the decedent or by a trust at the decedent's death~~ but only if the surviving spouse validly waived his or her homestead rights as provided under s. 732.702 or otherwise under applicable law and did not receive any interest in the protected homestead upon the decedent's death.

Section 3. Section 732.2055 is amended to add new subsection (1); amend existing subsection (1); amend existing subsection (2); amend existing subsection (3); amend existing subsection (4); redesignate existing subsections (1) through (5) as subsections (2) through (6) respectively, to read:

732.2055 Valuation of the elective estate

For purposes of s. 732.2035, "value" means:

(1) In the case of protected homestead:

(a) If the surviving spouse receives a fee simple interest, the fair market value of the protected homestead on the date of the decedent's death;

(b) If the spouse takes a life estate as provided in s. 732.401(1), or validly elects to take an undivided one-half interest as a tenant in common as provided in s. 732.401(2), one-half of the fair market value of the protected homestead on the date of the decedent's death;

(c) If the surviving spouse validly waived his or her homestead rights as provided under s. 732.702 but nevertheless receives an interest in the protected homestead, other than an interest described in s. 732.401, including an interest in trust, the value of the spouse's interest is determined as property interests that are not protected homestead.

(d) For purposes of subsections (a) through (c) above, fair market values shall be net of the aggregate amount, as of the date of the decedent's death, of all mortgages, liens, or security interests to which the protected homestead is subject and for which the decedent is liable, but only to the extent that such amount is not otherwise deducted as a claim paid or payable from the elective estate.

~~(1)~~(2) In the case of any policy of insurance on the decedent's life includable under s. 732.2035~~(4)~~(5), ~~(5)~~(6), or ~~(6)~~(7), the net cash surrender value of the policy immediately before the decedent's death.

~~(2)~~(3) In the case of any policy of insurance on the decedent's life includable under s. 732.2035~~(8)~~(9), the net cash surrender value of the policy on the date of the termination or transfer.

~~(3)~~(4) In the case of amounts includable under s. 732.2035~~(7)~~(8), the transfer tax value of the amounts on the date of the decedent's death.

~~(4)~~(5) In the case of other property included under s. 732.2035~~(8)~~(9), the fair market value of the property on the date of the termination or transfer, computed after deducting any mortgages, liens, or security interests on the property as of that date.

~~(5)~~(6) In the case of all other property, the fair market value of the property on the date of the decedent's death, computed after deducting from the total value of the property:

(a) All claims paid or payable from the elective estate; and

(b) To the extent they are not deducted under paragraph (a), all mortgages, liens, or security interests on the property.

Section 4. Section 732.2065, Florida Statutes, is amended to read:

732.2065 Amount of the elective share.—

~~The elective share is an amount equal to 30 percent of the elective estate.~~

The elective share to which the surviving spouse is entitled is determined based upon the number of years of the surviving spouse's marriage to the decedent, determined as of the date of the decedent's death, as follows:

(a) If the decedent and the surviving spouse were last married to each other for less than 5 full years, the elective share is an amount equal to 10 percent of the elective estate.

(b) If the decedent and the surviving spouse were last married to each other for at least 5 full years but less than 15 full years, the elective share is an amount equal to 20 percent of the elective estate.

(c) If the decedent and the surviving spouse were last married to each other for at least 15 full years but less than 25 full years, the elective share is an amount equal to 30 percent of the elective estate.

(d) If the decedent and the surviving spouse were last married to each other for 25 full years or more, the elective share is an amount equal to 40 percent of the elective estate.

Section 5. Section 732.2085, Florida Statutes, is amended at subsection (3)(a) to read:

732.2085 Liability of direct recipients and beneficiaries.—

(1) Only direct recipients of property included in the elective estate and the beneficiaries of the decedent's probate estate or of any trust that is a direct recipient, are liable to contribute toward satisfaction of the elective share.

(a) Within each of the classes described in s. 732.2075(2)(b) and (c), each direct recipient is liable in an amount equal to the value, as determined under s. 732.2055, of the proportional part of the liability for all members of the class.

(b) Trust and probate estate beneficiaries who receive a distribution of principal after the decedent's death are liable in an amount equal to the value of the principal distributed to them multiplied by the contribution percentage of the distributing trust or estate. For this purpose, "contribution percentage" means the remaining unsatisfied balance of the trust or estate at the time of the distribution divided by the value of the trust or estate as determined under s. 732.2055. "Remaining unsatisfied balance" means the amount of liability initially apportioned to the trust or estate reduced by amounts or property previously contributed by any person in satisfaction of that liability.

(2) In lieu of paying the amount for which they are liable, beneficiaries who have received a distribution of property included in the elective estate and direct recipients other than the decedent's probate estate or revocable trusts, may:

(a) Contribute a proportional part of all property received; or

(b) With respect to any property interest received before the date of the court's order of contribution:

1. Contribute all of the property; or

2. If the property has been sold or exchanged prior to the date on which the spouse's election is filed, pay an amount equal to the value of the property, less reasonable costs of sale, on the date it was sold or exchanged.

In the application of paragraph (a), the "proportional part of all property received" is determined separately for each class of priority under s. 732.2075(2).

(3) If a person pays the value of the property on the date of a sale or exchange or contributes all of the property received, as provided in paragraph (2)(b):

(a) No further contribution toward satisfaction of the elective share shall be required with respect to that property; except if a person's required contribution is not fully paid by the date that is two years after the date of death of the decedent, such person must also pay interest at the statutory rate on any portion of the required contribution that remains unpaid.

(b) Any unsatisfied contribution is treated as additional unsatisfied balance and reapportioned to other recipients as provided in s. 732.2075 and this section.

(4) If any part of s. 732.2035 or s. 732.2075 is preempted by federal law with respect to a payment, an item of property, or any other benefit included in the elective estate, a person who, not for value, receives the payment, item of property, or any other benefit is obligated to return the payment, item of property, or benefit, or is personally liable for the amount of the payment or the value of that item of property or benefit, as provided in ss. 732.2035 and 732.2075, to the person who would have been entitled to it were that section or part of that section not preempted.

Section 6. Section 732.2095 is amended to amend existing subparagraph (1)(a)6; amend existing subparagraph (1)(a)8; amend existing paragraph (2)(a); add new paragraphs (2)(b) and (c); renumber the existing paragraphs under section (2), to read:

732.2095 Valuation of property used to satisfy elective share.—

(1) DEFINITIONS.—As used in this section, the term:

(a) "Applicable valuation date" means:

1. In the case of transfers in satisfaction of the elective share, the date of the decedent's death.

2. In the case of property held in a qualifying special needs trust on the date of the decedent's death, the date of the decedent's death.

3. In the case of other property irrevocably transferred to or for the benefit of the surviving spouse during the decedent's life, the date of the transfer.

4. In the case of property distributed to the surviving spouse by the personal representative, the date of distribution.

5. Except as provided in subparagraphs 1., 2., and 3., in the case of property passing in trust for the surviving spouse, the date or dates the trust is funded in satisfaction of the elective share.

6. In the case of property described in s. 732.2035(2), (3) or ~~(3)~~(4), the date of the decedent's death.

7. In the case of proceeds of any policy of insurance payable to the surviving spouse, the date of the decedent's death.

8. In the case of amounts payable to the surviving spouse under any plan or arrangement described in s. 732.2035~~(7)~~(8), the date of the decedent's death.

9. In all other cases, the date of the decedent's death or the date the surviving spouse first comes into possession of the property, whichever occurs later.

(b) "Qualifying power of appointment" means a general power of appointment that is exercisable alone and in all events by the decedent's spouse in favor of the spouse or the spouse's estate. For this purpose, a general power to appoint by will is a qualifying power of appointment if the power may be exercised by the spouse in favor of the spouse's estate without the consent of any other person.

(c) "Qualifying invasion power" means a power held by the surviving spouse or the trustee of an elective share trust to invade trust principal for the health, support, and maintenance of the spouse. The power may, but need not, provide that the other resources of the spouse are to be taken into account in any exercise of the power.

(2) Except as provided in this subsection, the value of property for purposes of s. 732.2075 is the fair market value of the property on the applicable valuation date.

(a) If the surviving spouse has a life interest in property not in trust that entitles the spouse to the use of the property for life, including, without limitation, a life estate in protected homestead as provided in s. 732.401(1), the value of the spouse's interest is one-half of the value of the property on the applicable valuation date.

(b) If the surviving spouse elects to take an undivided one-half interest in protected homestead as a tenant in common as provided in s. 732.401(2), the value of

the spouse's interest is one-half of the value of the property on the applicable valuation date.

(c) If the surviving spouse validly waived his or homestead rights as provided in s. 732.702 or otherwise under applicable law but nevertheless receives an interest in protected homestead, other than an interest described in 732.401, including, without limitation, an interest in trust, the value of the spouse's interest is determined as property interests that are not protected homestead.

~~(b)~~(d) If the surviving spouse has an interest in a trust, or portion of a trust, which meets the requirements of an elective share trust, the value of the spouse's interest is a percentage of the value of the principal of the trust, or trust portion, on the applicable valuation date as follows:

1. One hundred percent if the trust instrument includes both a qualifying invasion power and a qualifying power of appointment.

2. Eighty percent if the trust instrument includes a qualifying invasion power but no qualifying power of appointment.

3. Fifty percent in all other cases.

~~(c)~~(e) If the surviving spouse is a beneficiary of a trust, or portion of a trust, which meets the requirements of a qualifying special needs trust, the value of the principal of the trust, or trust portion, on the applicable valuation date.

~~(d)~~(f) If the surviving spouse has an interest in a trust that does not meet the requirements of either an elective share trust or a qualifying special needs trust, the value of the spouse's interest is the transfer tax value of the interest on the applicable valuation date; however, the aggregate value of all of the spouse's

interests in the trust shall not exceed one-half of the value of the trust principal on the applicable valuation date.

~~(e)~~(g) In the case of any policy of insurance on the decedent's life the proceeds of which are payable outright or to a trust described in paragraph ~~(b)~~(d), paragraph ~~(c)~~(e), or paragraph ~~(d)~~(f), the value of the policy for purposes of s. 732.2075 and paragraphs ~~(b)~~(d), ~~(c)~~(e), and ~~(d)~~(f) is the net proceeds.

~~(f)~~(h) In the case of a right to one or more payments from an annuity or under a similar contractual arrangement or under any plan or arrangement described in s. 732.2035~~(7)~~(8), the value of the right to payments for purposes of s. 732.2075 and paragraphs ~~(b)~~(d), ~~(c)~~(e), and ~~(d)~~(f) is the transfer tax value of the right on the applicable valuation date.

Section 7. Section 732.2135, Florida Statutes, is amended at subsection (5) to read:

732.2135 Time of election; extensions; withdrawal.—

(1) Except as provided in subsection (2), the election must be filed on or before the earlier of the date that is 6 months after the date of service of a copy of the notice of administration on the surviving spouse, or an attorney in fact or guardian of the property of the surviving spouse, or the date that is 2 years after the date of the decedent's death.

(2) Within later of the period provided in subsection (1) or the date that is 40 days after the date of termination of any proceeding which affects the amount the spouse is entitled to receive under s. 732.2075(1), but in no event more than 2 years after the decedent's death, the surviving spouse or an attorney in fact or guardian of

the property of the surviving spouse may petition the court for an extension of time for making an election. For good cause shown, the court may extend the time for election. If the court grants the petition for an extension, the election must be filed within the time allowed by the extension.

(3) The surviving spouse or an attorney in fact, guardian of the property, or personal representative of the surviving spouse may withdraw an election at any time within 8 months after the decedent's death and before the court's order of contribution.

(4) A petition for an extension of the time for making the election or for approval to make the election shall toll the time for making the election.

~~(5) If the court determines that an election is made or pursued in bad faith, the court may assess attorney's fees and costs against the surviving spouse or the surviving spouse's estate.~~

Section 8. Section 732.2145, Florida Statutes, is amended at subsection (1) to read:

732.2145 Order of contribution; personal representative's duty to collect contribution.—

(1) The court shall determine the elective share and contribution. Contributions shall bear interest at the statutory rate beginning 90 days after the order of contribution. In addition, any amount of the elective share not satisfied within two years of the date of death of the decedent shall bear interest at the statutory rate until fully satisfied, even if an order of contribution has not yet been entered. The order is prima facie correct in proceedings in any court or jurisdiction.

(2) Except as provided in subsection (3), the personal representative shall collect contribution from the recipients of the elective estate as provided in the court's order of contribution.

(a) If property within the possession or control of the personal representative is distributable to a beneficiary or trustee who is required to contribute in satisfaction of the elective share, the personal representative shall withhold from the distribution the contribution required of the beneficiary or trustee.

(b) If, after the order of contribution, the personal representative brings an action to collect contribution from property not within the personal representative's control, the judgment shall include the personal representative's costs and reasonable attorney's fees. The personal representative is not required to seek collection of any portion of the elective share from property not within the personal representative's control until after the entry of the order of contribution.

(3) A personal representative who has the duty under this section of enforcing contribution may be relieved of that duty by an order of the court finding that it is impracticable to enforce contribution in view of the improbability of obtaining a judgment or the improbability of collection under any judgment that might be obtained, or otherwise. The personal representative shall not be liable for failure to attempt collection if the attempt would have been economically impracticable.

(4) Nothing in this section limits the independent right of the surviving spouse to collect the elective share as provided in the order of contribution, and that right is hereby conferred. If the surviving spouse brings an action to enforce the order, the judgment shall include the surviving spouse's costs and reasonable attorney's fees.

Section 9. Section 732.2151, Florida Statutes, is created to read:

732.2151 Award of Fees and Costs in Elective Share Proceedings.

(1) In any proceeding under this part in which there is an objection to or dispute over:

(a) the entitlement to or the amount of the elective share;

(b) the property interests included in the elective estate, or its value; or

(c) the satisfaction of the elective share;

the court may award taxable costs as in chancery actions, including attorney's fees.

(2) When awarding taxable costs or attorney's fees, the court may do one or more of the following:

(a) direct payment from the estate;

(b) direct payment from a party's interest in the elective share or the elective estate; or

(c) enter a judgment that can be satisfied from other property of the party.

(3) In addition to any of the fees that may be awarded under subsections (1) and (2), if the personal representative does not file a petition to determine the amount of the elective share as required by the Florida Probate Rules, the electing spouse or the attorney-in-fact, guardian of the property or personal representative of the electing spouse may be awarded from the estate reasonable costs, including attorney's fees, incurred in connection with the preparation and filing of the petition.

(4) This section shall apply to all proceedings commenced after its effective date, without regard to the date of the decedent's death.

Section 10. Subsection (1) of Section 738.606, Florida Statutes, is amended to read:

738.606 Property not productive of income.—

(1) If a marital deduction under the Internal Revenue Code or comparable law of any state is allowed for all or any part of a trust, or if assets are transferred to a trust that satisfies the requirements of ss. 732.2025(2)(a) and (c), whose assets have been used in whole or in part, to satisfy an election by a surviving spouse under s. 732.2125, ~~the income of which must be distributed to the grantor's spouse and,~~ but the trust assets ~~of which~~ consist ~~substantially~~ of property that, in the aggregate, does not provide the spouse with sufficient income from or use of the trust assets, and if ~~the~~ amounts the trustee transfers from principal to income under s. 738.104 and distributes to the spouse from principal pursuant to the terms of the trust are insufficient to provide the spouse with the beneficial enjoyment required to obtain the marital deduction (even though, in the case of an elective share trust, a marital deduction election is not made or is only partially made), the spouse may require the trustee of such marital trust or elective share trust to make property productive of income, convert property within a reasonable time, or exercise the power conferred by ss. 738.104 and 738.1041. The trustee may decide which action or combination of actions to take.

(2) In cases not governed by subsection (1), proceeds from the sale or other disposition of an asset are principal without regard to the amount of income the asset produces during any accounting period.

Section 11. The provisions of this act to create s. 732.2151, Florida Statutes, apply to proceedings commenced on or after July 1, 2017. This remaining provisions of this act take effect for decedents dying on or after July 1, 2017.

4427976.00012

CHAIR
Deborah Packer Goodall
Goldman Felcoski & Stone P.A.
327 Plaza Real, Suite 230
Boca Raton, FL 33432-3944
(561) 395-0400
dgoodall@gfsestatelaw.com

CHAIR-ELECT
Andrew M. O'Malley
Carey, O'Malley, Whitaker, et al.
712 S. Oregon Avenue
Tampa, FL 33606-2543
(813) 250-0577
aomalley@cowmpa.com

REAL PROPERTY DIRECTOR
Robert S. Freedman
Carlton Fields Jorden Burt, P.A.
4221 W. Boy Scout Blvd., Ste. 1000
Tampa, FL 33607
(813) 229-4149

PROBATE DIRECTOR
Debra L. Boje
Gunster Yoakley & Stewart, P.A.
401 E. Jackson St., Ste. 2500
Tampa, FL 33602-5226
(813) 222-6614
dboje@gunster.com

SECRETARY
William Thomas Hennessey, III
Gunster Yoakley & Stewart, P.A.
777 S. Flagler Dr., Ste. 500E
West Palm Beach, FL 33401-6121
(561) 650-0663
whennessey@gunster.com

TREASURER
Tae Kelley Bronner
Tae Kelley Bronner, PL
10006 Cross Creek Blvd., PMB 428
Tampa, FL 33647-2595
(813) 907-6643
tae@estatelaw.com

LEGISLATION CO-CHAIRS
Steven H. Mezer
Becker & Poliakoff
1511 N. Westshore Blvd., Suite 1000
Tampa, FL 33607
(813) 527-3906
smezer@bplegal.com

Sarah Swaim Butters
Holland & Knight LLP
315 S Calhoun St Ste 600
Tallahassee, FL 32301-1872
(850) 425-5648
sarah.butters@hklaw.com

DIRECTOR, AT-LARGE MEMBERS
S. Katherine Frazier
Hill Ward Henderson
101 E. Kennedy Blvd., Ste. 3700
Tampa, FL 33602-5195
(813) 221-3900
skfrazier@hwhlaw.com

IMMEDIATE PAST CHAIR
Michael J. Gelfand
Gelfand & Arpe, P.A.
1555 Palm Beach Lakes Blvd., Ste. 1220
West Palm Beach, FL 33401-2329
(561) 655-6224
MJGelfand@gelfandarpe.com

PROGRAM ADMINISTRATOR
Mary Ann Obos
The Florida Bar
651 E. Jefferson Street
Tallahassee, FL 32399-2300
(850) 561-5626
mobos@flabar.org

REAL PROPERTY, PROBATE & TRUST LAW SECTION

THE FLORIDA BAR

www.RPPTL.org

November 1, 2016

VIA E-Mail and U.S. Mail
nelsonj@elderaffairs.org
Jason Nelson
Executive Director
Office of Public and Professional Guardians
4040 Esplanade Way
Tallahassee, Florida 32399

Re: Proposed Rules:
58M-2.001 Professional Guardian Registration and Credit Investigation
58M-2.009 Standards of Practice
58M-2.011 Disciplinary Action and Guidelines

Dear Mr. Nelson:

On behalf of The Real Property, Probate & Trust Law Section of the Florida Bar (the "Section"), pursuant to the Notice of Proposed Rules 58M-2.001, 58M-2.009 and 58M-2.011 published on October 18, 2016 in the Florida Administrative Register, Volume 42, Number 203, request is hereby made for a hearing. The Proposed Rules seek to implement statutory changes to Parts I and II of Ch. 744, F.S. and to the Department's oversight of the public and professional guardians.

Sincerely,

Deborah Packer Goodall

Deborah Packer Goodall
Chair

CHAIR
Deborah Packer Goodall
Goldman Felcoski & Stone P.A.
327 Plaza Real, Suite 230
Boca Raton, FL 33432-3944
(561) 395-0400
dgoodall@gfsestatelaw.com

CHAIR-ELECT
Andrew M. O'Malley
Carey, O'Malley, Whitaker, et al.
712 S. Oregon Avenue
Tampa, FL 33606-2543
(813) 250-0577
aomalley@cowmpa.com

REAL PROPERTY DIRECTOR
Robert S. Freedman
Carlton Fields Jorden Burt, P.A.
4221 W. Boy Scout Blvd., Ste. 1000
Tampa, FL 33607
(813) 229-4149
rfreedman@carltonfields.com

PROBATE DIRECTOR
Debra L. Boje
Gunster Yoakley & Stewart, P.A.
401 E. Jackson St., Ste. 2500
Tampa, FL 33602-5226
(813) 222-6614
dboje@gunster.com

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William Thomas Hennessey, III
Gunster Yoakley & Stewart, P.A.
777 S. Flagler Dr., Ste. 500E
West Palm Beach, FL 33401-6121
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Tae Kelley Bronner
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10006 Cross Creek Blvd., PMB 428
Tampa, FL 33647-2595
(813) 907-6643
tae@estatelaw.com

LEGISLATION CO-CHAIRS
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Becker & Poliakoff
1511 N. Westshore Blvd., Suite 1000
Tampa, FL 33607
(813) 527-3906
smezer@bplegal.com

Sarah Swaim Butters
Holland & Knight LLP
315 S Calhoun St Ste 600
Tallahassee, FL 32301-1872
(850) 425-5648
sarah.butters@hklaw.com

DIRECTOR, AT-LARGE MEMBERS
S. Katherine Frazier
Hill Ward Henderson
101 E. Kennedy Blvd., Ste. 3700
Tampa, FL 33602-5195
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skfrazier@hwhlaw.com

IMMEDIATE PAST CHAIR
Michael J. Gelfand
Gelfand & Arpe, P.A.
1555 Palm Beach Lakes Blvd., Ste. 1220
West Palm Beach, FL 33401-2329
(561) 655-6224
MJGelfand@gelfandarpe.com

PROGRAM ADMINISTRATOR
Mary Ann Obos
The Florida Bar
651 E. Jefferson Street
Tallahassee, FL 32399-2300
(850) 561-5626
mobos@flabar.org

REAL PROPERTY, PROBATE & TRUST LAW SECTION

THE FLORIDA BAR

www.RPPTL.org

November 16, 2016

VIA E-MAIL ONLY (nelsonj@elderaffairs.org)
nelsonj@elderaffairs.org

Jason Nelson, Executive Director
Office of Public and Professional Guardians
4040 Esplanade Way
Tallahassee, Florida 32399

Re: Comments to Proposed Rules:
58M-2.001 Professional Guardian Registration and Credit Investigation;
58M-2.009 Standards of Practice;
58M-2.011 Disciplinary Action and Guidelines

Dear Mr. Nelson:

Introduction

This letter is being submitted on behalf of the Real Property Probate & Trust Law Section of The Florida Bar ("RPPTL Section"). The RPPTL Section is a group of Florida lawyers who practice in the areas of real estate, guardianship, trust and estate law. The RPPTL Section is dedicated to serving all Florida lawyers and the public in these fields of practice. We produce educational materials and seminars, assist the public *pro bono*, draft legislation, draft rules of procedure, and occasionally serve as a friend of the court to assist on issues related to our fields of practice. Our Section has over 10,000 members. The comments that follow are substantially like, although not identical to, those that were submitted on November 8, 2016 by several individual attorneys who are members of the RPPTL Section. At the time that the previous comments were submitted, the RPPTL Section had not had the opportunity to review the proposed rules; however, given the additional time for comment afforded at the November 9th hearing and in accordance with the RPPTL by-laws, the Executive Committee deliberated and formally approved the submission of these revised comments on behalf of the RPPTL Section

First and foremost, we commend the Department of Elder Affairs (the Department) for the extraordinary efforts in assembling

such a comprehensive set of proposed rules. Guardianships by their very nature come in many different varieties: those for minors who will reach majority at a defined time; those for adults who have suffered sudden and unexpected injuries but whose life expectancy may be decades; and those for elderly adults who may be very near the end of their natural lives. Every ward is unique and every ward has different circumstances, different abilities, different financial resources and different needs. In some instances, a ward may only need a Guardian of the Property or a Guardian of the Person but not both or may only need a limited guardianship. In some instances, the ward may have all rights removed and therefore require a plenary Guardian of both Person and Property. A Professional Guardian may only be serving in one of those roles or may be serving in both. To attempt to draft rules that are appropriate for each of these various and very diverse scenarios is certainly a monumental task.

Protecting the citizens of our state who are subjected to the Guardianship process, including through the incapacity determination proceeding, is certainly of the utmost importance. Ensuring that there are qualified Professional Guardians who are ready, willing and able to act to protect the ward when the need arises is also crucial for the system to function. Creating a mechanism to achieve these goals is without a doubt challenging but certainly vital. We appreciate the opportunity to participate in the process.

While the first attachment includes comments providing the reason for the proposed changes, this Summary was prepared to highlight some of the more important proposed changes.

Proposed Changes Through Out the Rules

1. Use of the term "applicant"

The terms "registrant," "applicant," and "relevant person" to describe the person applying for registration as a guardian is confusing since different sections use different terms to mean the same person. For consistency, please consider changing all terms referring to the person applying for registration as guardian to the term "applicant." The proposed change to "applicant" denotes that it is more of an application process and should be denoted as such to more accurately convey what is required, even though sec. 744.2002(1) uses the term registration.

2. Delineating Between a Guardian of the Person and a Guardian of the Property

In many sections, the term "guardian" does not delineate between guardian of the person versus guardian of the property. Differentiating between which rules applies to which type of guardian will properly communicate the requirements for each type of guardianship. These changes are being proposed to the specific rules where the term "guardian" is used in addition to the headings since the rules of construction generally do not apply to headings.

3. "Under their guardianship"

The term describing professional guardians with wards "under their guardianship" is redundant and thus deleted. Wards, by definition, are under guardianships.

58M-2.001 Professional Guardian Registration and Credit Investigation

4. Registration for employees of professional guardians

Subsections (2), (5)(b), and (7) are modified to reflect that only employees with fiduciary responsibility to the ward are required to register to be consistent with sec. 744.3135.

5. Review of application

In order to allow applicants to fully explain and supplement why information may be missing from what is required by the OPPG, subsection (8)(b) is modified from "shall" to "may." This change also makes this subsection more consistent with subsection (8)(a).

6. Subsection 12 is duplicative

Subsection (12) is duplicative of subsection (2) and thus deleted. Subsection (2) requires registration by employees of professional guardians with fiduciary responsibilities (form 002) and that should trigger notice of that employee's existence to the OPPG. Requiring an amended form 001 by the guardian would needless increase labor and costs without adding any benefit.

58M-2.009 Standards of Practice

7. Definition of "abuse"

The definition of "abuse" in subsection (1)(a)(4) is expanded for several reasons. First, there is no reason to limit abuse to just caregivers and family members. This definition should be broader to include anyone guilty of abuse to more accurately reflect the real world. Accordingly, reference is also made to the criminal statute, sec. 825.102. Second, "neglect" in subsection (1)(a)(5) references "abuse". Accordingly, abuse should not be limited to just caregivers, or family members since a guardian can be guilty of neglect if he/she allows anyone to abuse the ward.

8. Guardian fees

While it is the practice of many guardians to obtain approval for their fees prior to taking those fees, the law does not explicitly require pre-approval. Accordingly, it is not appropriate for these rules to place a higher burden on guardians than does the statute and case law. As such,

changes are made to subsection (2)(e) and (21) to ensure they comply with current Florida law, including sec. 744.108.

9. Duty to Notify Court if Ward Regains Capacity

The rules a require guardians to notify the court of any change in the capacity of the ward that warrants a restriction on the guardian's authority (subsection (2)(g) and (20)(b)(1)). However, this is inconsistent with sec. 744.361(13)(e), which only requires the guardian to notify the court if he/she "believes" the ward has regained capacity. The rules should be consistent with the statute and this rule as currently drafted could confuse the standards which govern guardians. In addition, the use of the standard in the statute may be more appropriate because it is based on the guardian's belief rather than requiring a guardian to absolutely know the ward's medical status that even medical doctors may not agree upon. Accordingly, edits were made to subsections (2)(g) and (20)(b)(1).

10. Relationship Between Ward and Guardian

Subsection (3)(a) prohibits "personal relationships" between guardians and their wards and the ward's family unless the ward and guardian are family members or they had a relationship prior to appointment of the guardian. This prohibition, while well meaning, is problematic in that it is vague. What types of personal relationships are prohibited? Is having dinner prohibited? In addition, it is not narrowly tailored to protect the ward and in fact could hurt a ward. Friendly relationships should not be prohibited – it is the exploitation of those relationships for personal gain that should is the problem. Accordingly, subsection (3)(a) is deleted.

The blanket prohibition on sexual relationship between a ward and guardian unless they are married or there was a sexual relationship prior to appointment may not be in the ward's best interest. Section 744.20041(1)(n) recognizes potential problems with a sexual relationship but narrowly tailors the prohibition to instances where the guardian uses his/her position to engage in sexual activity. There are many instances where wards' incapacity is very limited and he/she can exercise most of their rights. To have a blanket prohibition – one that goes beyond that statute – may not be in a ward's best interest and may thwart's a ward's preference where he/she is able to express one. Accordingly, subsection (3)(b) is deleted. Instead, sec. 744.20041(1)(n) is referenced. In addition, subsection (10)(b) is deleted because this standard is extremely difficult if not impossible for a guardian to meet. We believe that questions of sexual conduct and activity should be controlled by the statute and the rules should not intrude on this most sensitive of areas. In addition, as guardians have a general duty to protect wards, that duty still applies to sexual contact and expression.

Subsection (4) and (4)(a) requires guardians to promote social interactions and meaningful relationships for a ward. First, the words "promote" and "meaningful" are vague and would be very difficult for a guardian to abide by (and thus unfair to enforce). Second, this is

not a statutory requirement and sec. 744.361(13)(b) only requires that guardians allow wards to maintain contact with family and friends unless such contact may cause harm to the ward. The language in the preamble adds burdens not required by law which are vague and should be deleted. The same reasoning justifies deleting subsection (4)(a). In addition, subsection (4)(b) should be deleted because it only allows interference to prevent abuse. Guardians must generally protect wards and thus this subsection is too constrictive. This subsection is replaced with a reference to sec. 744.361(13)(b), which is a more reasonable standard.

Subsection (4)(c) is deleted because it infringes on a ward's privacy rights and applies a vague standard. This language in the rule would require a legislative change as it creates a substantive new duty for the guardian to keep certain family members and "friends" informed.

Subsection (4)(d) is duplicative of sec. 744.441 and is contrary to sec. 744.447(2) (sale without notice of perishable items). Further, the use of "interested persons" for purposes of sale of items is problematic as the determination of who is interested in any given personal property would be difficult and not cost effective since it may necessitate an additional hearing to determine who is interested for purposes of any particular sale.

Subsection (4)(e) is unnecessary as court orders must be followed. This rule can also be interpreted to imply that court orders allowing non-interested persons to be kept informed do not have to be followed.

11. Informed Consent

The heading for section (6) regarding "informed consent" is edited to reflect that informed consent should be used in the health care decision making process to be consistent with Florida law, including *In re Guardianship of Browning*, 568 So.2d 4 (Fla. 1990).

12. Decision Making

Subsection (7)(c) is deleted because it requires informed consent for "each decision" made by a professional guardian. This is not required by Florida law and most decisions, including administrative decisions, do not require informed consent and is impractical.

In addition, subsections (14)(d) and (e) seek to impose additional substantive duties and are inconsistent with a guardian's duties under Chapter 744, including sec. 744.361 and should be deleted.

13. Substituted Judgment and Best Interest

Subsections (7)(e) on substituted judgment and (7)(f) on best interest are deleted because they are not needed in these rules. Those terms have been defined and used in Florida statutes and case law and there is still a tension between the two competing standards. As such, these

rules should not seek to impose the standards on guardians and prevailing Florida law should apply.

14. Self-reliance of a Ward

Subsection (9)(b)'s requiring the guardian to maximize self-reliance and independence is an almost impossible standard to fulfill and unrealistic to impose on a guardian. Accordingly, this language is modified to encourage participation which is a more ascertainable standard.

We recognize the importance of including the ward in the making decisions process; however, there are occasions when doing so is neither feasible nor appropriate. For example, on occasion a hospital will petition to have a guardian appointed for a patient who is non-responsive or in a coma and has no family or friends to make decisions for them. A professional guardian is usually appointed. In these cases, it is not possible to discuss the ward's care with the ward or ask the ward what he or she would want. Thus, any rule that imposes a "shall" requirement on the professional guardian would be unworkable. Likewise, there are times when it may be counter-productive to discuss matters with the ward due to the ward's diagnosis (i.e. paranoia or schizophrenia). Thus, we have recommended in several places that the words "when appropriate" be included to address these situations.

Although a professional guardian should strive to make available all medical care and treatment the ward needs and to have the ward reside in only the best of facilities, this is not always economically feasible. For example, the ward may benefit from physical therapy, but if the ward is on Medicare and does not have a private resources to pay for physical therapy, the guardian will not be able to ensure the services are provided once the ward reaches the Medicare cap. Similarly, a ward that is on Medicaid may not like the facility where he or she resides. However, if the ward does not have sufficient funds to permit the guardian to place the ward in a private pay facility, there may be no other choice of residence available to the ward. Medicaid beds are increasingly difficult to secure and often times a ward may have been removed from a care facility before the guardianship was established and other facilities may refuse to admit the ward.

15. Confidentiality

Subsection (11)(e) is deleted because it is superfluous based on subsections (11)(a)-(d).

In addition subsection (14)(e) infringes on a ward's privacy rights.

16. Involuntary placement

Involuntary placement is considered an extraordinary measure under sec. 744.3215 and 744.3725 which require a higher burden and thus added procedures in these statutes to protect a ward. Accordingly, any reference to the rules regarding involuntary placement must comply

with the standards and procedures in the statutes, and thus changes were made to subsection (12)(a)(d).

17. Guardianship Plans

Subsection (13)(b) addressing guardianship plans is inconsistent with the statutory requirements so that section has been edited to refer to the two statutes concerning guardianship of the person plans, sec. 744.363 and 744.3675. For instance, the statutes do not require a budget. To the extent the rules seek to impose additional duties on guardians, this is beyond the rule making authority of the OPPG.

In addition, subsection (17)(a)(3) is modified to reflect that no budget is required by a guardian under Florida law.

18. Documentation

Subsection (13)(b)(13) is overly burdensome and the utility of it is not clear. To the extent the guardian is utilizing the ward's funds based on the goals/desires of the ward, the guardian is accountable for these expenses at the time of the guardian's annual accounting.

19. Assets Outside of Guardianship

Subsection (16)(d) is edited because guardians have no control and thus should have no liability for assets outside of their control.

20. Lawsuits

Subsection (16)(h) is modified to reflect that court approval is required for guardians to institute lawsuits; *see* sec. 744.441(11).

21. Wills

Subsection (16)(o) imposes a duty that is outside of a guardian's purview. Wills deal with post-death disposition of property and should not be included. It is arguable that a will is irrelevant to a guardian's administration of the guardianship during the ward's life time.

22. Accountings

Subsection (17)(a)(7) is modified to reference the new guardianship accounting rule 5.696.

23. Conflicts of Interest

In order to reconcile this rule with sec. 744.446, a reference is provided at the outset of this section prior to laying out more specific requirements of the statute in order to avoid interpretations in the rule that could conflict with the statute.

In addition, subsection (19)(d)(5) is deleted to reflect that in certain situations, including payment of rent, others who are close to the ward may benefit indirectly from the ward's assets. This should not be prohibited where appropriate.

If the RPPTL Section can be of any further assistance to you or to the Office of Public and Professional Guardians with regard to the proposed rules, please do not hesitate to contact either of us.

Respectfully Submitted,

Deborah Packer Goodall
Section Chair

Debra L. Boje
Debra Lynn Boje
Director, Probate and Trust Division

cc: Andrew M. O'Malley, Esq. (aomalley@cowmpa.com)
Sarah Butters, Esq. (sarah.butters@hklaw.com)
Hung V. Nguyen, Esq. (hung@nguyenlawfirm.net)
Nicklaus Curley, Esq. (ncurley@gunster.com)
Mary Ann Obos (mobos@flabar.org)

Notice of Proposed Rule

DEPARTMENT OF ELDER AFFAIRS
Statewide Public Guardianship Office

RULE NOS.:	RULE TITLES:
58M-2.001	Professional Guardian Registration
58M-2.009	Standards of Practice
58M-2.011	Disciplinary Action and Guidelines

PURPOSE AND EFFECT: The purpose of the proposed rulemaking is to implement statutory changes to Parts I and II of Ch. 744, F.S., and to the Department's oversight of public and professional guardians.

SUMMARY: The rulemaking establishes standards of practice, disciplinary guidelines, and credit investigation procedures for public and professional guardians as well as implements revisions of rules as needed based on legislative changes.

SUMMARY OF STATEMENT OF ESTIMATED REGULATORY COSTS AND LEGISLATIVE RATIFICATION: The Agency has determined that this will have an adverse impact on small business or likely increase directly or indirectly regulatory costs in excess of $200,000 in the aggregate within one year after the implementation of the rule. A SERC has been prepared by the Agency.

The main economic impact of the proposed rule is likely generated through the rule's requirement that professional guardians receive court approval of their guardianship fees and through the rule's record keeping requirements. A full copy of the Statement of Estimated Regulatory Costs can be obtained online at http://elderaffairs.state.fl.us/doea/oppg_rulemaking.php

The Agency has determined that the proposed rule is expected to require legislative ratification based on the statement of estimated regulatory costs or if no SERC is required, the information expressly relied upon and described herein: Through the preparation of a SERC, the Department has determined that proposed rule 58M-2.009, Florida Administrative Code, concerning standards of practice for professional guardians, will have a significant regulatory impact on small businesses and is likely to increase regulatory costs in excess of $1,000,000 within the first five years of implementation.

Any person who wishes to provide information regarding a statement of estimated regulatory costs, or provide a proposal for a lower cost regulatory alternative must do so in writing within 21 days of this notice.

RULEMAKING AUTHORITY: 744.2001(2)(b), 744.2002(6), 744.3135(5)(b), 744.20041 FS.

LAW IMPLEMENTED: 744.102(17), 744.2001(2)(b), 744.2002, 744.2003, 744.20041 FS.

IF REQUESTED WITHIN 21 DAYS OF THE DATE OF THIS NOTICE, A HEARING WILL BE HELD AT THE DATE, TIME AND PLACE SHOWN BELOW:

DATE AND TIME: November 9, 2016, 9:30 a.m. – 12:30 p.m.

PLACE: Florida Department of Elder Affairs, 4040 Esplanade Way, Room 301, Tallahassee, Florida 32399

To participate in the rule workshop by telephone please call: 1(888)670-3525 participation code: 5964230985

Pursuant to the provisions of the Americans with Disabilities Act, any person requiring special accommodations to participate in this workshop/meeting is asked to advise the agency at least 5 days before the workshop/meeting by contacting: Jason Nelson at Department of Elder Affairs, Office of Public and Professional Guardians, 4040 Esplanade Way, Tallahassee, FL 32399; email: nelsonj@elderaffairs.org; telephone: (850)414-2113. If you are hearing or speech impaired, please contact the agency using the Florida Relay Service, 1(800)955-8771 (TDD) or 1(800)955-8770 (Voice).

THE PERSON TO BE CONTACTED REGARDING THE PROPOSED RULE IS: Jason Nelson at Department of Elder Affairs, Office of Public and Professional Guardians, 4040 Esplanade Way, Tallahassee, FL 32399; email: nelsonj@elderaffairs.org; telephone: (850)414-2113

THE FULL TEXT OF THE PROPOSED RULE IS:

58M-2.001 Professional Guardian Registration and Credit Investigation.

Applicants must score a minimum of 75% on the Professional Guardian Competency Examination or must receive a waiver from the Department of Elder Affairs' Office of Public and Professional Guardians (OPPG)~~)Statewide Public~~

Comment [CURNIC1]: The committee should reflect on whether 75% is a high enough bar.

~~Guardianship Office (SPGO)~~ before the application for registration will be considered.

(1) Definitions. As used in this rule, the term:

(a) "Adverse credit history information" means the following:

1. Personal bankruptcy within the previous year.

2. Bankruptcy within the previous year of any organization based on events that occurred while the ~~relevant person~~applicant was in a position of control ~~person~~of the organization.

3. Outstanding tax lien or other governmental lien.

4. ~~Outstanding~~ Judgment based upon grounds of fraud, embezzlement, misrepresentation, or deceit.

5. Open collection account or charged-off account that remains unpaid, except accounts related solely to unpaid medical expenses.

6. Foreclosure on ~~personally owned~~any property owned by the applicant within the last 5 years.

(b) "Charged-off" means an account that has been identified by ~~the~~a creditor as an uncollectable debt.

(2)~~(1)~~ Persons who are required to register with the OPPG ~~Department of Elder Affairs' Statewide Public Guardianship Office (SPGO)~~ as a professional guardian must complete the Professional Guardian Registration Form, DOEA/OPPG ~~SPGO~~ Form 001, XXXX 2016 ~~March 2008~~, which is incorporated herein by reference and may be obtained from the Office of Public and Professional Guardians ~~Statewide Public Guardianship Office~~, Department of Elder Affairs, 4040 Esplanade Way, Tallahassee, Florida 32399-7000, or at http://elderaffairs.state.fl.us/english/public.html. The Professional Guardian Employee Registration Form, DOEA/OPPG ~~SPGO~~ Form 002, XXX 2016 ~~March 2008~~ which is incorporated herein by reference and may be obtained from the OPPG ~~SPGO~~ or at http://elderaffairs.state.fl.us/english/public.html must also be completed and submitted for all ~~Professional Guardian Employees~~employees of professional guardians who have a fiduciary responsibility to a ward.

(3)~~(2)~~ The registration form for both a guardian and employee shall be signed by the ~~registrant~~person required to register or a corporate officer if the ~~registrant~~applicant is a corporation.

(4)~~(3)~~ The completed registration form shall be filed with the OPPG ~~Statewide Public Guardianship Office~~, by hand-delivery or mail. Facsimile submissions will not be accepted.

(5)~~(4)~~ The following items must either accompany the registration form or must be on file with the OPPG ~~SPGO~~, for the registration to be deemed complete:

(a) A complete credit report, including all pages, from a nationally recognized credit agency. A nationally recognized credit agency shall mean a credit agency that obtains credit information both within and outside the State of Florida; and validates, updates, and maintains the accuracy of credit information obtained. The report must reflect the financial responsibility of the ~~registrant~~applicant and provide full, accurate, current, and complete information regarding payment history and credit rating.

(b) Criminal history record for guardians and employees as specified in Section 744.3135, F.S.;

(c) Documentation of bonding as required under Section 744.1085, F.S.;

(6)~~(5)~~ For the initial guardian registration, the applicant must submit proof of completion of the required training, as well as~~,~~ proof of competency by evidence of satisfactory completion of the Department of Elder Affairs approved examination unless waived in accordance with Section 744.1085(8), F.S. For annual renewals, proof of receipt of the minimum continuing education requirements must be submitted, if not on file.

(7)~~(6)~~ A registration fee of thirty-five dollars ($35) for each professional guardian or employee with fiduciary responsibility to a ward in the form of a personal check, money order, or cashier's check made payable to the ~~Statewide Public Guardianship Office~~OPPG must be submitted with the registration form.

(8) Adverse Credit History Information. If an applicant's credit report or responses to the registration application contains adverse credit history information, the OPPG will notify the applicant in writing of the specific items constituting adverse credit history information. The notification will also inform the applicant of the following:

(a) Opportunity to explain the circumstances surrounding the specific ~~items~~item(s) and provide any other relevant information that the applicant wishes the OPPG to consider surrounding the specific ~~items~~item(s);

(b) Documents that the OPPG requires in order to complete its review of the specific item(s). The requested documents provided by the applicant must be legible.

If the documents requested above cannot be obtained, the applicant shall submit evidence of that fact in order for the registration application to be deemed complete. Evidence that documents cannot be obtained ~~shall~~may consist

Comment [CURNIC2]: Credit history should go back further than a year if necessary for full review (i.e. 3 years, 5 years)

Comment [HN3]: Throughout the document the terms "applicant", "registrant", and "relevant person" are used interchangeably. We have uniformly changed these terms to "applicant" so that there it is consistent. The term applicant was chosen over the other two terms to connote that this is an application process.

Comment [HN4]: "Control person" is a vague term that could be misinterpreted and is undefined.

Comment [USER5]: All judgmenets for fraud, embezzlement, etc. should be considered

Comment [HN6]: The property in question should not be limited to "personally owned property" but instead should include any property, whether owned personally, through an entity, or otherwise, as any foreclosure should be reviewed as part of the credit history information and show the applicant's fitness to be a fiduciary.

Comment [HN7]: This provision is inconsistent with § 744.3135 regarding credit and criminal history check which only applies to employees who have a fiduciary responsibility to a ward

Comment [CURNIC8]: This is a standard that may not be sufficiently broad. Should this include all people with access to financial information? With access to confidential information?

Comment [HN9]: The form is intended, pursuant to subsection (2) of this rule, to apply to both a guardian and employee. This change is made to avoid confusion on this point.

Comment [HN10]: The word "guardian" was inserted as this provision should only apply to the guardian's initial registration and is not intended to apply to subsequent employee registrations.

Comment [CURNIC11]: Is this a sufficient fee for the ongoing review required? Alternatively, should the initial guardian registration fee be different than the amount for an employee registration fee.

Comment [HN12]: Clarification that the $35 fee applies to all registrations, including registration by the guardian and registration by an employee of the guardian as required in subsection (2) of this rule.

Comment [HN13]: Altered "shall" to "may" to avoid preventing an applicant from providing other information where this specific information cannot be supplied (i.e. an uncooperative credit agency). "May" also works better with the overall scheme of this section which is designed to allow for an explanation by the applicant.

of a written statement from the agency's or creditor's records custodian that is written on the agency's or creditor's letterhead; indicates that the agency or the creditor does not have any record of such matter or that the record was lost, damaged, or destroyed, or cannot otherwise be produced and provide a statement as to why the record cannot be produced; and is signed by the agency's or creditor's records custodian.

(9) Procedure for Reviewing Adverse Credit History Information.

(a) When deciding whether to approve an application for registration as a ~~professoinal~~professional guardian, the OPPG must make a determination regarding whether the applicant has demonstrated that he or she possesses the character, general fitness, and financial responsibility to warrant the OPPG's determination that the applicant will not violate any of the provisions of Chapter 744, Florida Statutes. In making this determination, the OPPG will consider the following information:

1. The ~~Applicant~~applicant's entire credit history as reflected in the credit report.

2. The information provided by the applicant under subsection (8).

3. The responses contained in the registration application.

4. The previous ~~licensing~~registration history with the OPPG and Statewide Public Guardianship Office including whether the ~~relevant person~~applicant was named in any regulatory action by ~~the OPPG~~those agencies.

5. Other information that reflects upon an applicant's character, general fitness, or financial responsibility.

~~6. The time and context of the information available and any pattern of behavior the information may demonstrate.~~

(b) Based on the totality of the circumstances as developed under paragraph (a), the OPPG will make a determination as to whether the applicant has demonstrated that he or she possesses the character, general fitness, and financial responsibility to warrant the OPPG's determination that the applicant will not violate any of the provisions of Chapter 744, F.S.

(10)~~(7)~~(a) The registration period begins the day the registration is approved by the OPPG ~~SPGO~~ and ends on the ~~registrant~~applicant's bond anniversary date. For multi year bonds, the annual registration expiration date will be determined by the day and month that the bond expires.

(b) The OPPG ~~SPGO~~ will prorate the registration fee up to 50% for initial ~~registrants~~applicants whose bond will expire in less than 6 months.

(11)~~(8)~~ Annual Renewals: A completed DOEA/OPPG S~~PGO~~ Form 001 for annual renewal of a registration shall be submitted to OPPG ~~SPGO~~ at least 30 days prior to the expiration date of the current registration to ensure that a lapse in registration does not occur. ~~Registrants may request expedited processing for an additional fee. A schedule of those expedited fees is provided on DOEA/SPGO Form 001.~~ All fees must be received with the completed registration form prior to the registration being processed by the OPPG ~~SPGO~~.

~~(12)(9) If a professional guardian hires an employee with assigned fiduciary responsibilities during the registration period, the professional guardian shall submit an amended DOEA/OPPG SPGO Form 001 that includes the new employee information to the OPPG SPGO for approval prior to the employee assuming any fiduciary responsibilities.~~

Rulemaking Authority 744.2002(6) ~~744.1083(6)~~, 744.3135(5)(b) FS. Law Implemented 744.102(17), 744.2002 ~~744.1083~~, 744.2003 ~~744.1085~~, 744.3135 FS. History–New 5-4-03, Amended 12-12-05, 3-17-08,_____.

58M-2.009 Standards of Practice.

(1) DEFINITIONS

(a) In addition to the terms defined in Chapter 744, F.S., the following definitions are applicable ~~in~~to this rule:

1. "Interested Person" means a person identified as an interested person in a guardianship proceeding. The meaning as it relates to ~~particlular~~particular wards, may vary from time to time and must be determined by the c~~C~~ourt according to the particular matter ~~inolved~~involved.

2. "Family" or "Family Member" means a person or persons who are:

a. A relative of an individual within the third degree by blood or marriage, or

b. The stepparent of a minor if the stepparent is currently married to the parent of the minor and is not a party in a pending dissolution, separate maintenance, domestic violence, or other civil or criminal proceeding in any court of competent jurisdiction involving one or both of the minor's parents as an adverse party.

3. "Friend" means a person ~~whom~~who an individual knows and with whom the individual has a bond of mutual

Comment [HN14]: Chapter 744, including sec. 744.2002, discusses "registration" not licensing, and thus this terminology is changed for consistency.

Comment [HN15]: Added the prior title of the agency in order to avoid argument that this is not intended to be included. This will insure that any prior history with the SPGO is included.

Comment [HN16]: This provision is vague, particularly the phrase "any pattern of behavior the information may demonstrate.". It appears that the OPPG, in obtaining the required information, already has discretion to use its judgment on this topic.

Comment [HN17]: The submission of this form on a repeat basis is unnecessary and redundant. The registration form required for the employee (form 002) should apprise the OPPG of a new employee with assigned fiduciary duties.

affection.

4. "Abuse" means any willful act or threatened act by ~~a relative, caregiver, or household member~~anyone which causes or is likely to cause significant impairment to a ~~Ward~~ward's physical, mental, or emotional health. ~~Abuse includes acts and omissions.~~ This shall specifically include any act of abuse or neglect as defined under Florida Statutes § 825.102.

5. "Neglect" means the failure or omission on the part of a caregiver or guardian to provide the care, supervision, and services necessary to maintain the physical and mental health of a ~~Ward~~ward, including, but not limited to, food, clothing, medicine, shelter, supervision, and medical services, which a prudent person would consider essential for the well-being of the ~~Ward~~ward. The term "neglect" also means the failure of a caregiver or guardian to make a reasonable effort to protect a ~~Ward~~ward from abuse, neglect, or exploitation by others.

6. "Exploitation" means:

a. Knowingly obtaining or using, or endeavoring to obtain or use, a ~~Ward~~ward's funds, assets, or property with the intent to temporarily or permanently deprive the ~~Ward~~ward of the use, benefit, or possession of the funds, assets, or property, or to benefit someone other than the ~~Ward~~ward, or

b. Breach of a fiduciary duty to a ~~Ward~~ward by the ~~Ward~~ward's guardian which results in an unauthorized appropriation, sale, or transfer of property, or

c. Intentionally or negligently failing to effectively use a ~~Ward~~ward's income and assets for the necessities required for that ~~Ward~~ward's support and maintenance~~.~~ by the ~~Ward~~ward's guardian.

7. "Significant Occurrence" means an eventuality, event, incident, affair, episode, milestone, transaction, proceeding, business, concern, circumstance, particular; fact, matter of fact, phenomenon; happenstance, goings-on; adventure, happening; accident, or, casualty that affects a ~~Ward~~ward.

(2) THE PROFESSIONAL GUARDIAN'S RELATIONSHIP TO THE COURT.

(a) Professional ~~Guardians~~guardians shall know the extent of the powers and the limitations of authority granted to them by the court and all their decisions and actions shall be consistent with court orders and Florida law. Any action taken by a ~~Professional Guardian pursant~~professional guardian pursuant to a court order shall not be deemed to be violation of this rule.

(b) Professional ~~Guardians~~guardians shall obtain court authorization for actions that are subject to court approval.

(c) Professional ~~Guardians~~guardians shall clarify with the court any questions that the professional guardian has about the meaning of orders or directions from the court before taking action based on the orders or directions.

(d) Professional ~~Guardians shall~~guardians may seek assistance as ~~needed~~ reasonably necessary to fulfill responsibilities to the ~~Wards~~wards ~~under their guardianship~~.

(e) All payments to ~~Professional Guardians from the assets of a Ward shall be submitted to the court for prior approval and~~professional guardians shall follow the requirements of Section 744.108, F.S.

(f) Professional ~~Guardians~~guardians shall submit reports regarding the status of their ~~Wards~~wards to the court as ordered by the court and as required by Chapter 744, F.S.

~~(g) Professional Guardians shall notify the court of any change in the capacity of a Ward that warrants a restriction of the Professional Guardian's authority within a reasonable period of time under the circumstances.~~

(3) THE PROFESSIONAL GUARDIAN'S ~~PROFESSIONAL~~PERSONAL RELATIONSHIP WITH THE WARD.

~~(a) Professional Guardians shall avoid personal relationships with Wards under their guardianship, their Ward's family, or their Ward's friends, unless the Professional Guardian is a family member, or unless such a relationship existed before the appointment of the Professional Guardian.~~

~~(b) Professional Guardians may not engage in sexual relations with a Ward under their guardianship, unless the Professional Guardian is the Ward's spouse or the sexual relationship existed before the appointment of the Professional Guardian.~~

Professional guardians may not engage in sexual relations with a ward that violate the provisions of Section 744.20041(1)(n), F.S.

(4) THE PROFESSIONAL GUARDIAN'S RELATIONSHIP WITH FAMILY MEMBERS AND FRIENDS OF THE WARD. ~~Professional Guardians shall promote social interactions and meaningful relationships consistent with the preferences of the Wards under their guardianship.~~

Comment [HN18]: Changed for consistency with § 825.102 and to expand the class of people who can commit abuse to reflect real life situations. Abuse should not be limited to specific individuals because someone commits "neglect" under these rules if they allow abuse, and thus limiting the definition of abuse therefore limits the definition of neglect.

Comment [HN19]: Section 825.102's definition of abuse is more expansive and thus should cast a wider net, which for this subject should be the intent. The rule should also track the criminal statute to give it more teeth.

Comment [CURNIC20]: This should only apply to question the guardian may have. Any questions raised by other individuals can be raised by that individual.

Comment [HN21]: Replaced "shall" with "may" as it should be left to the discretion of the guardian, whether assistance is required. Failure to seek assistance at a necessary time would still constitute a violation of this provision.

Comment [HN22]: "Under their guardianship" is redundant and included in the term "ward".

Comment [HN23]: This provision is inconsistent with § 744.108 and Florida law which does not require a guardian to submit fees for "prior" approval.

Comment [HN24]: This is duplicative of § 744.361(13)(d) and (e). This rule is consistent but is being removed to avoid this duplication and the duplication with below sections regarding the duties of the guardian of the person and the duties of the guardian of the property, both of which require notice to the court of any change in capacity warranting a change to the guardianship.

Comment [HN25]: This language is already in sec. 744.361(13)(e), and the statute contains better language. The statute states the guardian shall notify the court if he/she "believes" the ward has regained capacity. The "any change" language here is not ideal.

Comment [N26]: The guardian should be encouraged to have a personal relationship with the ward and the ward's family, in particular a friendly relationship encourages a strong working relationship. Further, the term "personal relationship" is vague.

Comment [HN27]: The rules should not limit a guardian from being friendly with a ward or his/her family. If they decide to go to dinner, which many guardians do with their wards, is that prohibited? In addition, "personal relatoionship" is too vague and will be difficult to enforce, making it unworkable.

Comment [N28]: Proposed subsection (b) is inconsistent with, and likely includes scenarios not included in, § 744.20041(1)(n). A citation to § 744.20041(1)(n) is preferred, or alternatively the statutory language should be duplicated in the rule. The statute specifically prohibits guardians from ...

Comment [N29]: This is inconsistent with Chapter 744. The term "promoting" is vague and lends itself to an interpretation that the guardian must encourage social interaction and meaningful relationships even when not in the best interests of ...

~~(a) Professional Guardians shall make reasonable efforts to encourage and support their Wards maintaining contact with family and friends, as defined by those Wards, unless such contact will subject the Wards to abuse as defined in Section 415.102, F.S.~~

~~(b) Professional Guardians may not interfere with their Ward's established relationships, unless necessary to protect them from abuse as defined in Section 415.102, F.S.~~

(a) Professional guardians of the person shall allow social interaction in accordance with §~~Section~~ 744.361(13)(b), F.S. when appropriate.

~~(c) Professional Guardians must maintain communication with their Wards' families and friends regarding significant occurrences that affect the Wards when that communication would benefit Wards.~~

~~(d) When disposing of a Ward's assets, a Professional Guardian must notify interested persons and give them the opportunity, with court approval, to obtain the Ward's assets (particularly those with sentimental value).~~

~~(e) Professional Guardians shall keep interested persons advised of any pertinent medical issues or decisions when ordred to do so by the Court.~~

(5) THE PROFESSIONAL GUARDIAN'S RELATIONSHIP WITH OTHER PROFESSIONALS AND PROVIDERS OF SERVICES TO THE WARD. Professional ~~Guardians~~guardians shall make a good faith effort to treat all professionals and service providers with courtesy and respect and shall strive to enhance cooperation between all parties on behalf of their ~~Wards~~wards.

(a) Professional ~~Guardians~~guardians who are not family members of their ~~Wards~~wards may not provide any services other than guardianship services to those ~~Wards~~wards except in an emergency. Professional ~~Guardians~~guardians shall coordinate and monitor services needed by ~~Wards~~wards to ensure that ~~Wards~~wards are receiving the appropriate care and treatment.

(b) Professional ~~Guardians~~guardians shall make a good faith effort to cooperate with other surrogate decision-makers for ~~Wards~~wards. These include, where applicable, any other guardians, agents under a power of attorney, health care proxies and surrogates, trustees, U.S. Department of Veterans' Affairs fiduciaries, and representative payees.

(6) INFORMED CONSENT FOR HEALTH CARE DECISIONS.

(a) Decisions that ~~Professional Guardians~~professional guardians of the person make on behalf of their ~~Wards under guardianship shall~~wards regarding health care decisions shall be based on the principle of Informed Consent when possible.

(b) Informed Consent is a decision maker's agreement to a particular course of action based on ~~a full~~ sufficient explanation and disclosure of the facts needed to make the decision intelligently.

(c) To have Informed Consent, a decision maker ~~must have adequate information on the issue,~~ must be able to take voluntary action~~.~~ and must not be coerced.

~~(d) Professional Guardians~~guardians ~~stand in the place of Wards~~wards ~~and are entitled to the same information and freedom of choice as a Ward~~ward ~~would have received if the Ward~~ward ~~were not under guardianship.~~

(~~e~~d) In evaluating each requested decision, taking into consideration any time constraints involved, ~~Professional Guardians~~professional guardians of the person shall do the following:

1. Have a clear understanding of the issue for which informed consent is being sought,
2. Have a clear understanding of the options, expected outcomes, risks and benefits of each alternative,
3. Determine the conditions that necessitate treatment or action,
4. Maximize the participation of ~~Wards~~wards in understanding the facts and directing a decision, to the extent possible,
5. Determine whether a ~~Ward~~ward has previously stated preferences in regard to a decision of this nature,
6. Determine why this decision needs to be made now rather than later,
7. Determine what will happen if a decision is made to take no action,
8. Determine what the least restrictive alternative is for the situation,
9. Obtain a second medical or professional opinion, if necessary,
10. When appropriate, ~~O~~obtain information or input from ~~a Ward's family and from~~ other professionals and the ward's family, unless the guardian believes that such input from the family may cause harm to the ward or be contrary to the ward's best interest; and,

Comment [N30]: Subsections (a) & (b) are inconsistent with sec. 744.361.13(b) because it applies a standard different from the "may cause harm to the ward" statutory standard. As to (b), the ability to "interfere" with the ward's relationships is important as in many instances this is a reason for the guardianship and is being done in instances that may not arise to "abuse" (i.e. undue influence, manipulation, financial reasons, etc.).

Comment [N31]: This language should be removed because it infringes on a ward's privacy rights and applies a vague standard. This would require a legislative change as it creates a substantive new duty for the guardian to keep certain family members and "friends" informed.

Comment [N32]: This subsection is duplicative of sec. 744.441 and is contrary to sec. 744.447(2) (sale without notice of perishable items). Further, the use of "interested persons" for purposes of sale of items is problematic as the determination of who is interested in any given personal property would be difficult and not cost effective since it may necessitate an additional hearing to determine who is interested for purposes of any particular sale.

Comment [N33]: Under court order, the guardian shall keep any person specifically designated by the court informed. This is an unnecessary provision and also unnecessarily limits who the guardian is to keep informed when acting under court order.

Comment [HN34]: This has been clarified to limit the scope of Section 6 to health care decision making which is consistent with Chapters 744 & 765 as well as applicable case law; see *In re Guardianship of Browning*, 568 So.2d 4, 13 (Fla. 1990).

Comment [HN35]: "Adequate information" is a vague standard and is not useful especially when dealing with people who lack capacity. Sec. 744.361(13)(g) requires a guardian to have a clear understanding of the risks and benefits of a course of treatment. Removal of this provision should not impact a guardian's duty to be informed prior to making a decision.

Comment [HN36]: This is a recitation of law rather than a rule or regulation of the guardian.

Comment [CURNIC37]: Many guardianship decision will be made under time constraints of differing degree and thus not all of the considerations may be appropriate in all circumstances.

Comment [N38]: Inserted conditional language for consistency with § 744.361(13)(b) and to ensure that the guardian is not required to seek input from family members when time is of the essence or other factors dictate the guardian's decision.

11. Obtain written documentation of all reports relevant to each decision if possible.

(7) STANDARDS FOR DECISION-MAKING.

(a) Professional ~~Guardians~~guardians shall assist and encourage ~~Wards~~wards ~~to act on their own behalf and~~ to participate in decisions when appropriate.

(b) Professional ~~Guardians~~guardians shall, consistent with court orders and state statutes, exercise authority only as necessitated by the limitations of the ~~Ward~~ward.

(c) ~~Each decision made by a Professional Guardian shall be an informed decision based on the principle of Informed Consent as set forth in subsection (6).(d) Professional Guardians~~Professional guardians shall identify; ~~and~~ advocate for the goals, needs, and preferences of their ~~Wards~~wards; and honor those goals and preferences when appropriate.

1. Professional Guardians shall ask their ~~Wards~~wards what they want.

2. If a ~~Ward~~ward has difficulty expressing what he or she wants, his or her ~~Professional Guardian~~professional guardian shall, to the extent possible, help the ~~Ward~~ward express his or her goals, needs, and preferences.

3. When a ~~Ward~~ward, even with assistance, cannot express his or her goals and preferences, ~~Professional Guardians shall~~professional guardians may seek input from others familiar with the ~~Ward~~ward to determine what the ~~Ward~~ward may have wanted.

4. To the extent that a ~~Ward~~ward's goals and preferences have been made known to a ~~Professional Guardian, the Professional Guardian~~professional guardian, the professional guardian shall honor those goals or preferences, except when the professional guardian has a reasonable belief that following the ~~Ward~~ward's goals and preferences would cause ~~significant~~ impairment to a ~~Ward~~ward's physical, mental, or emotional health.

~~(e) Substituted Judgment.~~

~~1. Substituted Judgment is a principle of decision-making which requires the guardian to consider the decision their Ward would have made when the Ward had capacity and use that as the guiding force in any surrogate decision a guardian makes.~~

~~2. Substituted Judgment shall be used when making decisions on behalf of a ward except when following the Ward's wishes would cause significant impairment to a Ward's physical, mental, or emotional health , or when a Professional Guardian cannot establish a Ward's goals and preferences even with support.~~

~~(f) Best Interest.~~

~~1. Best Interest is the principle of decision-making that should be used only when a Ward has never had capacity, when a Ward's goals and preferences cannot be ascertained even with support, or when following a Ward's wishes would cause significant impairment to a Ward's physical, mental, or emotional health or his or her property.~~

~~2. The Best Interest principle requires a guardian to consider the least restrictive course of action to provide for the needs of a Ward.~~

~~3. The Best Interest principle requires guardians to consider a Ward's past practice and evaluate evidence of his or her choices.~~

~~4. The Best Interest principle requires the course of action that maximizes what is best for a Ward and that includes consideration of the least intrusive, most normalizing, and least restrictive course of action possible given the needs of the Ward.~~

(8) LEAST RESTRICTIVE ALTERNATIVE.

(a) When making a decision, ~~Professional Guardians~~professional guardians shall carefully evaluate the alternatives that are available to the ward and choose the one that best meets the personal and financial goals, needs, and preferences of ~~Wards under their guardianship~~wards~~p~~, while placing the least restrictions on their ~~Wards~~wards' freedoms, rights, and ability to control their environments.

(b) Professional ~~Guardians~~guardians shall weigh the risks and benefits of each decision and develop a balance between maximizing the independence and self-determination of ~~Wards~~wards and maintaining ~~Wards~~wards' dignity, protection, and safety.

(c) Professional ~~Guardians~~guardians shall make individualized decisions. The least restrictive alternative for one ~~Ward~~ward might not be the least restrictive alternative for another ~~Ward~~ward.

(d) The following guidelines apply in the determination of the least restrictive alternative:

Comment [CURNIC39]: A ward who has rights removed cannot "act on their own behalf" although they may be able to participate.

Comment [HN40]: Not every decision of the guardian is dictated by informed consent or substituted judgment. Many/most decisions of the guardian are administrative, particularly those of a guardian of the property. Furthermore, many of a guardian's decisions are dictated by other standards, such as best interests, which are not consistent with informed consent or substituted judgment.

Comment [HN41]: Substituted judgment and informed consent are recognized Florida standards that have been defined through statute and case law and should not be further limited/expanded within the rules. See, § 765.101(10); *Greenberg v. Miami Children's Hospital Research Inst., Inc.*, 264 F.Supp.2d 1064 (S.D. Fla. 2003); *In re Guardianship of Browning*, 568 So.2d 4 (Fla. 1990). Furthermore, there is no need for these provisions in the rules.

1. Professional ~~Guardians~~guardians shall become familiar with the available options for residence, care, medical treatment, vocational training, and education for their wards.

2. Professional ~~Guardians~~guardians shall strive to know their ~~Wards~~wards' goals and preferences.

3. Professional ~~Guardians shall~~guardians may consider assessments of their ~~Wards~~wards' needs as determined by specialists. This may include an independent assessment of a ~~Ward~~ward's functional ability, health status, and care needs.

(9) SELF-DETERMINATION OF THE WARD.

(a) Professional ~~Guardians~~guardians shall provide ~~Wards~~wards ~~under their guardianship~~ with every opportunity to exercise those individual rights that the ~~Ward~~ward ~~might be capable of exercising~~ has retained as they relate to the personal and financial needs of the ~~Ward~~ward, as long as that exercise is consistent with court orders regarding the ward's capacity.

(b) When appropriate, p~~P~~rofessional ~~Guardians shall maximize the self-reliance and independence of their Wards.(c) Professional Guardians~~guardians shall encourage their ~~Wards~~wards to participate, to the maximum extent of their ~~Wards~~wards' abilities, in all decisions that affect him or her~~, to act on his or her own behalf in all matters in which the Ward is able to do so, and to develop or regain his or her own capacity to the maximum extent possible~~.

(~~d~~c) The ~~Professional Guardian~~professional guardian shall, ~~whenever possible~~when appropriate, seek to ensure that the ~~Ward~~ward leads the planning process. If the ~~Ward~~ward is unable to lead the process, the ~~Professional Guardian~~professional guardian shall, whenever possible, seek their participation.

(10) THE PROFESSIONAL GUARDIAN'S DUTIES REGARDING DIVERSITY AND PERSONAL PREFERENCES OF THE WARD.

(a) Professional ~~Guardians~~guardians shall determine the extent to which ~~Wards~~wards ~~under guardianship~~ identify with particular ethnic, religious, and cultural values. To determine these values, ~~Professional Guardians~~professional guardians shall consider the following:

1. The ~~Ward~~ward's attitudes regarding illness, pain, and suffering.
2. The ~~Ward~~ward's attitudes regarding death and dying.
3. The ~~Ward~~ward's views regarding quality of life issues.
4. The ~~Ward~~ward's views regarding societal roles and relationships, and.
5. The ~~Ward~~ward's attitudes regarding funeral and burial customs.

~~(b) Professional Guardians shall respect Wards' right to interpersonal relationships and sexual expression. Professional Guardians shall take steps to ensure that a Ward's sexual expression is consensual, that Wards are not victimized, and that an environment conducive to this expression in privacy is provided.~~

~~1. Professional Guardians shall ensure that Wards have information necessary to permit sexual expression to the extent a Ward desires and to the extent a Ward possesses the capacity to consent to the specific activity.~~

~~2. Professional Guardians shall take reasonable measures to protect the health and well-being of Wards.~~

(11) CONFIDENTIALITY.

(a) Professional ~~Guardians~~guardians shall keep the affairs of ~~Wards under guardianship~~ wards confidential, unless otherwise provided by law or ordered by the Court.

(b) Professional ~~Guardians~~guardians shall respect ~~Wards~~wards' privacy ~~and~~, dignity, and welfare, especially when the disclosure of information is necessary.

(c) Disclosure of information shall be limited to what is necessary and relevant to the issue being addressed.

(d) Professional ~~Guardians~~guardians shall assist ~~Wards~~wards in communicating with third parties ~~unless the disclosure will substantially harm the Ward~~where appropriate.

~~(e) Professional Guardians shall refuse to disclose information about a Ward where disclosure would be detrimental to the well-being of the Ward or would subject the Ward's estate to undue risk.~~

(12) DUTIES OF THE PROFESSIONAL GUARDIAN OF THE PERSON.

(a) Professional ~~Guardians~~guardians who are appointed to be guardians of the person shall have the following duties and obligations to ~~Wards under guardianship:~~wards, unless decision making authority has not been delegated to the ~~Professional Guardian~~professional guardian or the letters of guardianship provides otherwise:

Comment [HN42]: "Under their guardianship" is redundant and included in the term "ward".

Comment [HN43]: Maximixing self-reliance and independence is an extremely vague requirement and may be impossible for guardians to comply with. The language regarding encouraging participation more reasonable and attainable.

Comment [HN44]: This language is superfluous and may be inconsistent with court orders determing a ward's incapacity.

Comment [HN45]: "Under their guardianship" is redundant and included in the term "ward".

Comment [HN46]: The ability for an incapacitated ward to have a consensual sexual relationship is not explicitly clear in the law at this stage. An incapacitated individual cannot give consent to sex. Whether a guardian can ever give that consent, particularly without court order, is something that should be addressed by the courts or legislature prior to inclusion within the rules.

Comment [HN47]: This is duplicative of subsections (a) and (c) and is adequately addressed without subsection (e). To the extent this subsection is included, it should make exception for a guardian compelled to disclose by appropriate authorities (i.e. court order).

1. To ~~see~~ assess that ~~Wards~~wards are living in the most appropriate environment that addresses each ~~Ward~~ward's goals, needs, and preferences subject to limitations of his or her financial resources and availability of government benefits.

a. Professional ~~Guardians~~guardians of the person must prioritize home or other community-based settings, when not inconsistent with a ~~Ward~~ward's goals, needs, and preferences.

b. Professional ~~Guardians~~guardians of the person shall authorize moving ~~Wards~~wards to a more restrictive environment only after evaluating other medical and health care options and making an independent determination that the move is the least restrictive alternative at the time, and fulfills the current needs of a ~~Ward, and serves the overall best interest of a Ward~~ward.

c. Professional ~~Guardians shall~~guardians of the person may consider the proximity of the setting to those people and activities that are important to ~~Wards~~wards when choosing a residential setting.

d. When ~~Professional Guardians~~professional guardians of the person consider involuntary or long-term placement of a ~~Ward~~ward in an institutional setting, ~~the bases of the decision shall be to minimize the risk of significant impairment to a Ward's physical, mental, or emotional health , to obtain the most appropriate placement possible, and to secure the best treatment for the Ward~~he or she must comply with §§~~Sections~~ 744.3725 and 744.3215, F.S.

2. To ensure that provision is made for the support, care, comfort, health, and maintenance of ~~Wards~~wards.

3. To make reasonable efforts to secure for ~~Wards~~wards medical, psychological, therapeutic, and social services, training, education, and social and vocational opportunities that are appropriate and that will maximize ~~Wards~~wards' potential for self-reliance and independence.

~~4. To keep the personal information of Wards confidential, except when it is necessary to disclose such personal information for the best interests of a Ward.~~

~~5. To adhere to the requirements of subsection (17) Duties of the Professional Guardian of the Property and subsection (18) Professional Guardian of the Property: Initial and Ongoing Responsibilities, to the extent that the Professional Guardianprofessional guardian of a Wardward has been authorized by the court to manage a Wardward's property.~~

~~6~~4. To petition the court for limitation or termination of the guardianship when ~~a Ward~~the professional guardian believes the ward no longer meets the ~~standard~~criteria pursuant to which the guardianship was imposed, or when there is an effective alternative available, and

~~7~~5. To report to the Office of Public and Professional Guardians, the Department of Children and Families' Adult Protective Services Unit and local law enforcement incidents of abuse, neglect and/or exploitation as defined by state statutes within a reasonable period of time under the circumstances.

(13) INITIAL AND ONGOING RESPONSIBILITIES OF THE GUARDIAN OF THE PERSON

(a) With the proper authority, ~~Professional Guardians~~professional guardians of the person shall take the following initial steps after appointment as a guardian:

1. Professional ~~Guardians~~guardians of the person shall address all issues of ~~Wards~~wards ~~under guardianship~~ that require immediate action.

2. Whenever possible, p~~P~~rofessional ~~Guardians~~guardians of the person shall meet with ~~Wards~~wards as soon after the appointment as is feasible. At the first meeting~~, Professional Guardians~~ or as soon as reasonable, a professional guardian of the person shall:

a. Communicate to the ~~Ward~~ward the role of the ~~Professional Guardian~~professional guardian,

b. Explain the rights retained by the ~~Ward~~ward,

c. Assess the ~~Ward~~ward's physical and social situation,

d. Assess the ~~Ward~~ward's educational, vocational, and recreational needs,

e. Obtain the ~~Ward~~ward's preferences,

f. Assess the support systems available to the ~~Ward~~ward; and,

g. Attempt to gather any missing necessary information regarding the ~~Ward~~ward.

3. After the first meeting with the ~~Ward~~ward, the ~~Professional Guardian~~professional guardian of the person shall notify all relevant ~~agencies and~~ individuals, agencies, and institutions of the appointment of ~~a Professional Guardian.~~

Comment [HN48]: Changed "see" to "assess" for consistency with sec. 744.361(14).

Comment [HN49]: In cases of this extraordinary nature, citation to the statute is more appropriate to ensure consistency between the rules and the statute. In addition, the statutes cited provide a procedure for involuntary placement that must be followed by a guardian.

Comment [N50]: Duplicative of section 11.

Comment [CURNIC51]: This section is duplicative as a guardian of the property is already required to comply with these other subsections

Comment [N52]: Specifically noted that section 13 is meant to apply to guardians of the person. Section 17 below, dealing with guardians of the property, has a similar change.

Comment [CURNIC53]: This provision needs to be caveated because there are times (i.e. Ward in an unresponsive state) when a guardian may not be able to comply with the "shall" requirement of this section.

and shall complete the intake process by gathering information and ensuring that certain evaluations are completed, if appropriate. The Professional Guardianthe professional guardian.

4. The professional guardian of the person shall:

a. Obtain an evaluation of the Wardward's condition, treatment, and functional status from the Wardward's treating physician or appropriate specialist, if a comprehensive medical evaluation was not completed as part of the petitioning process, or has not been done within the past year.

b. Obtain a psychological evaluation, if appropriate.

c. Obtain an inventory of advance directives. Such statements of intent would include, but are not limited to, powers of attorney, living wills, organ donation statements, and statements by the person recorded in medical charts.

d. Establish contact with and develop a regular pattern of communication with the Professional Guardian the professional guardian of the property or any other relevant fiduciary for the Wardward.

(b) Professional Guardiansguardians of the person shall develop and implement a written guardianship plan setting forth short-term and long-term objectives for meeting the goals, needs, and preferences of the Wardin compliance with §§Florida Statutes 744.363, F.S. and 744.3675, F.S.:

1. The plan must address medical, psychiatric, social, vocational, educational, training, residential, and recreational goals, needs, and preferences of the Ward.

2. If the Professional Guardian is appointed as guardian of the property, the plan must also address whether the Ward's finances and budget are in line with the services the Ward needs, and are flexible enough to deal with the changing status of the Ward.

3. Short-term goals must reflect the first year of guardianship, and long-term goals must reflect the time after the first year.

4. The plan must be updated no less often than annually.

(c) The Professional Guardianprofessional guardian of the person shall maintain a separate file for each Wardward. The file must include, at a minimum, the following information and documents:

1. The Wardward's name, date of birth, address, telephone number, Social Security number, medical coverage, physician, diagnoses, medications, the purpose of each medication, and allergies to medications.

2. All legal documents, including among others the order appointing guardian and the letters of guardianship, involving the Wardward.

3. Advance directives.

4. A list of key contacts and the contact information for next of kin.

5. A list of service providers, contact information, a description of services provided to the person, and progress/status reports.

6. A list of all over-the-counter and prescribed medications the Wardward is taking, the dosage, the reason why it is taken, and the name of the doctor prescribing the medication.

7. Documentation of all client and collateral contacts, including the date, time, and activity. 8. Progress notes and any documentation that reflect contacts made and work done regarding the Wardward,including the date, time and activity.

98. The initial guardianship plan and annual plans.

910. The initial inventory and annual accountings, if required.

110. Assessments regarding the Wardward's past and present medical, psychological, and social functioning.

112. Documentation of the Wardward's known values, lifestyle preferences, and known wishes regarding medical and other care and service.

13. Documentation of any goals or preferences expressed by the Ward that have been made known to the Professional Guardian and would required the expenditure of the Ward's assets in excess of $1,000, and the date, time, location and individuals present when the goal or preference was expressed by the Ward;, and

(d) Professional Guardiansguardians, or one of the guardian's professional staff, shall visit Wardswards at least quarterly each year.

1. Professional Guardiansguardians of the person shall assess the Wardward's physical appearance and condition, the appropriateness of the Wardward's current living situation, and the continuation of existing services while taking

Comment [N54]: "Intake process" is vague. Furthermore, the rule does not provide guidance on what "certain evaluations" may be required. To the extent these are the same evaluations called for in new subsection 4 below, this is duplicative and should be deleted.

Comment [HN55]: "Regular pattern" is vague and unnecessary.

Comment [N56]: Subsection (b) is inconsistent with sec 744.363 and 744.3675. The content of the guardianship plan required by sec. 744.363 and 744.3675 is significantly different from the guardianship plan described herein. To the extent the rule is seeking to impose an additional duty on the professional guardian to make another, separate plan, it is inappropriate.

Comment [USER57]: Next of kin are interested parties in guardianship and should have their information on file

Comment [N58]: This is a burdensome requirement, particularly with the inclusion of "collateral contacts" which is a vague concept. To the extent the rule is seeking to have the guardian document all interactions with the ward, it is sufficiently encapsulated in the subsequent subsection relating to progress notes.

Comment [HN59]: This is overly burdensome and the utility of it is not clear. To the extent the guardian is utilizing the ward's funds based on the goals/desires of the ward, the guardian is accountable for these expenses at the time of the guardian's annual accounting.

Comment [HN60]: Change made for consistency with sec. 744.361(14) which allows for professional staff to perform quarterly visits.

into consideration all aspects of social, psychological, educational, direct services, and health and personal needs as well as the need for any additional services.

2. Professional ~~Guardians~~guardians of the person shall maintain substantive communication with service providers, caregivers, and others attending to ~~Wards~~wards.

3. Professional ~~Guardians~~ of the person ~~guardian~~s shall participate in all care or planning conferences concerning the residential, educational, vocational, or rehabilitation program of ~~Wards~~wards within the rights delegated to the professional guardian of the person by the ~~Court~~court.

4. Professional ~~Guardians~~guardians of the person shall regularly examine all services and all charts, notes, logs, evaluations, and other documents regarding ~~Wards~~wards at the place of residence and at any program site to ascertain that the care plan is being properly followed.

5. Professional ~~Guardians~~guardians of the person shall advocate on behalf of the ~~Ward~~ward. Professional ~~Guardians~~guardians shall assess the overall quality of services provided to ~~Wards~~wards, using accepted regulations and care standards as guidelines, and seeking remedies when care is found to be deficient.

6. Professional ~~Guardians~~guardians of the person shall monitor the residential setting on an ongoing basis and take any necessary action when the setting does not meet the ~~Ward~~ward's current goals, needs, and preferences, including but not limited to:

a. Evaluating the plan,

b. Enforcing residents' rights, legal, and civil rights, and,

c. Ensuring quality of care and appropriateness of the setting in light of the feelings and attitudes of the ~~Ward~~ward.

(e) Professional ~~Guardians~~guardians of the person shall fully identify, examine, and continue to seek information regarding options available to the ward that will fulfill the ~~Ward~~ward's goals, needs, and preferences.

1. Professional ~~Guardians~~guardians of the person shall take ~~full~~ advantage of professional assistance in identifying all available options for long term services and support.

2. Sources of professional assistance include, but are not limited to Area Agencies on Aging, Centers for Independent Living, protection and advocacy agencies, Long Term Care Ombudsmen, Developmental Disabilities Councils, Aging and Disability Resource Centers, and community mental health agencies.

(14) DECISION-MAKING CONCERNING MEDICAL TREATMENT ~~by~~ BY GUARDIAN OF THE PERSON.

(a) Professional ~~Guardians~~guardians of the person shall promote, monitor, and maintain the health and well-being of ~~Wards~~wards under guardianship~~.~~ pursuant to their powers and duties as guardian under Florida Statutes § 744.361. ~~and 765.401.~~

(b) Professional ~~Guardians~~guardians of the person shall ensure that all medical care ~~for Wards~~wards available to the ward is appropriately provided ~~and that Wards are treated with dignity~~.

(c) Professional ~~Guardians shall ensure that Wards receive appropriate health care.~~

~~(d) Professional Guardians, in making health care decisions or seeking court approval for such decisions, shall:~~

~~1. Maximize the participation of Wards.~~

~~2. Acquire a clear understanding of the medical facts.~~

~~3. Acquire a clear understanding of the health care options and the risks and benefits of each option; and.~~

~~4. Encourage and support Wards in understanding the facts and directing a decision.~~

~~(e) Professional Guardians shall use the substituted judgment standard with respect to a health care decision, unless a Professional Guardian cannot determine a Ward's prior wishes.~~(f) Professional Guardians guardians of the person shall determine whether a ward~~, before the appointment of a Professional Guardian, executed~~ created any advance directives, such as powers of attorney, living wills, organ donation statements and statements by a ~~Ward~~ward recorded in medical charts. On finding such documents, ~~Professional Guardians~~a professional guardian~~s~~ shall inform the court ~~and other interested parties~~ of the existing health care documents.

(~~e~~d) To the extent a ~~Ward~~ward cannot participate in the decision making process, a ~~Professional Guardian~~professional guardian of the person shall act in accordance with the ~~Ward~~ward's prior ~~general~~ statements,

Comment [CURNIC61]: Language added to ensure guardian not required to consider options which are outside the resources of the ward.

Comment [N62]: This language was inserted to ensure professional guardian's reference to the pertinent statutes as well as to ensure consistency between the rule and these controlling statutes.

Comment [N63]: This is duplicative of the ward's right provided in § 744.3215(1)(d). Inclusion of this term within this subsection addressing appropriate medical care may lend itself to a misinterpretation that certain appropriate medical care should not be provided if it offends the "dignity" of the ward.

Comment [N64]: Subsections (d) & (e) are inconsistent with a guardian's duties under Chapter 744, including sec. 744.361. These rules seek to impose additional substantive duties on the guardian which is not appropriate.

Comment [N65]: This language should be removed because it infringes on a ward's privacy rights. The inclusion of this requirement is more appropriate for the Florida Probate Rules.

actions, values, and preferences to the extent the ~~Professional Guardian~~professional guardian actually knows ~~or should know of them~~.

(~~h~~e) If a ~~Ward~~ward's preferences are unknown and unascertainable, a ~~Professional Guardian~~professional guardian of the person shall act after taking into consideration ~~in accordance with reasonable~~ information received from professionals and persons who demonstrate sufficient interest in the ~~Ward~~ward's welfare to determine the ~~W~~ward's best interests ~~, which determination shall include consideration of consequences for others that an individual in the Ward's circumstances would consider~~.

(~~i~~f) Absent an emergency or a ~~Ward~~ward's execution of a living will, durable power of attorney for health care, or other advance directive declaration of intent that clearly indicates a ~~Ward~~ward's wishes with respect to a medical intervention, a ~~Professional Guardian~~professional guardian of the person who has authority may not grant or deny authorization for a medical intervention until he or she has given careful consideration to the criteria contained in subsections (6) and (7).

(~~j~~g) In the event of an emergency, a ~~Professional Guardian~~professional guardian of the person who has authority to make health care decisions shall grant or deny authorization of emergency medical treatment based on a reasonable assessment of the criteria contained in subsections (6) and (7), within the time allotted by the emergency.

(~~k~~h) Professional ~~Guardians shall seek~~guardians of the person may seek a second medical opinion for any medical treatment or intervention that would cause a reasonable person to do so or in circumstances where any medical intervention poses a significant risk to a ~~Ward~~ward. Professional ~~Guardians~~guardians of the person shall obtain a second opinion from a ~~licensed~~ physician.

(~~l~~i) Professional ~~Guardians shall communicate~~guardians of the person may communicate with the treating medical provider before authorizing or denying any treatment or procedure that has been previously approved.

(~~m~~j) Professional ~~Guardians shall~~guardians of the person may, in accordance with Florida Statutes 765.1103(1),F.S. seek to ensure that appropriate palliative care is incorporated into all health care, unless not in accordance with a ~~Ward~~ward's preferences and values.

(15) DECISION-MAKING CONCERNING ~~WITHOLDING~~WITHHOLDING AND WITHDRAWAL OF MEDICAL TREATMENT BY GUARDIAN OF THE PERSON

(a) ~~There are circumstances in which, with the approval of the court, it is legally and ethically justifiable to consent to the withholding or withdrawal of medical treatment, including artificially provided nutrition and hydration, on behalf of a Ward under guardianship.~~

~~(b) If a Ward expressed or currently expresses a preference regarding the withholding or withdrawal of medical treatment, a Professional Guardian shall follow the wishes of the Ward. If the Ward's current wishes are in conflict with wishes previously expressed when the Ward had capacity, Professional Guardians shall have this ethical dilemma submitted to the court for direction.~~

~~(c) When making this decision on behalf of a Ward, Professional Guardians shall gather and document information as outlined in subsection (6) and shall follow subsection (7).~~

~~(16) CONFLICT OF INTEREST; ANCILLARY AND SUPPORT SERVICES.~~

~~(a) Professional Guardians shall avoid all conflicts of interest and self dealing, when addressing the needs of Wards under guardianship. A conflict of interest arises where a Professional Guardian has some personal or agency interest that can be perceived as self serving or adverse to the position or best interest of a Ward. Self dealing arises when a Professional Guardian seeks to take advantage of his or her position as a Professional Guardian and acts for his or her own interests rather than for the interests of the Ward.~~

~~(b) Guidelines relating to specific ancillary and support service situations include the following:~~

~~1. Professional Guardians may not directly provide housing, medical, legal, or other direct services to a Ward. Some direct services may be approved by the court.~~

~~a. Professional Guardians shall coordinate and assure the provision of all necessary services to Wards, other than guardianship services, rather than providing those services directly.~~

~~b. Professional Guardians shall be independent from all service providers and must challenge inappropriate or poorly delivered services and advocate on behalf of their Wards.~~

Comment [N66]: This is inconsistent with the guardian's duties to act in the best interests of the ward. The guardian does not have a duty to the friends/family of the ward. To the extent this is an appropriate consideration under substituted judgment standards, it should be considered by the guardian under existing law.

Comment [CURNIC67]: All physicians are licensed, the inclusion of the term "licensed" creates ambiguity when not used throughout.

Comment [N68]: Section 16 was combined with Section 19 (Conflict of Interest) rather than having 2 separate conflict of interest sections.

c. An exception to subsection (16) shall apply when a Professional Guardian can demonstrate unique circumstances indicating that no other entity is available to act as guardian, or to provide needed direct services provided that the exception is in the best interest of the Ward. Reasons for the exception must be documented and the court must be notified.

2. When a guardianship program operated by a Professional Guardian is a part of an organization or governmental entity, it shall have independent decision-making authority.

3. A Professional Guardian who is not a family member of the Alleged Incapacitate Person may act as a petitioner for the initial appointment of a guardian only when no other entity is available to act, provided all alternatives have been exhausted.

4. Professional Guardians may not employ their friends or family to provide services for a profit or fee unless no alternative is available and the Professional Guardian discloses this arrangement to the court and the services are provided at the going market rate.

5. Professional Guardians shall neither solicit nor accept incentives from service providers.

6. Professional Guardians shall consider various ancillaries or support service providers and select the providers that best meet the needs of the Ward.

7. Professional Guardians who are attorneys, or employ attorneys, may provide legal services to Wards only when doing so best meets the needs of the Wards and is approved by the court following full disclosure of the conflict of interest. Professional Guardians who are attorneys shall ensure that the services and fees are differentiated and are reasonable. The services and fees are subject to court approval.

8. Professional Guardians may enter into a transaction that may be a conflict of interest only when necessary, or when there is a significant benefit to a Ward under the guardianship, and shall disclose such transactions to the Court and obtain prior court approval.Professional guardians shall comply with Florida Statutes §§ 744.361, F.S. and 765.401, F.S. and Florida Statutes §§ 765.401(3) .404applicable Florida law when making decisions to withhold or withdraw medical treatment.— A professional guardian may seek instructions from the court prior to making a medical decision to withhold or withdraw medical treatment to a ward.

(1716) DUTIES OF THE PROFESSIONAL GUARDIAN OF THE PROPERTY

(a) Professional Guardians who are appointed to be guardians of the propery shall have the following duties and obligations to Wardswards under guardianship; unless decision making authority has not been delegated to the Professional Guardianprofessional guardian or the letters of guardianship provides otherwise.

(b) Professional Guardians, as a fiduciary, shall manage the financial affairs of Wards under guardianship in a way that maximizes the dignity, autonomy, and self-determination of the Ward.(c) When making decisions Professional Guardiansprofessional guardians of the property shall:

1. Give priority to the goals, needs, and preferences of the Wardswards; and,

2. Weigh the costs and benefits to the estate.

(dc) Professional Guardiansguardians of the property shall consider the current wishes, past practices, and evidence of likely choices of their wards. If significant impairment to a Wardward's physical, mental, or emotional health would result or there is no evidence of likely choices, pProfessional Guardiansguardians of the property shall consider the best interests of the wWard.

(ed) Professional Guardians of the property shall assist and encourage wWards to act on their own behalf and to participate in decisions.(f) The Professional Guardians shall use reasonable efforts to provide oversight to any income and assets under the control of Wards.(g) Professional Guardians shall, to the extent they are capable and consistent with court orders and state statutes, exercise authority only as necessitated by the limitations of the Wardorder.

(h) Professional Guardians shall provide competent management of Wards' property and shall supervise all income and disbursements of the estate.

(ie) Professional Guardiansguardians of the property shall manage the estate only for the benefit of the Wardward or as directed by the Courtcourt.

(jf) Professional Guardiansguardians of the property shall keep estate assets safe by keeping accurate records of all transactions and be able to fully account for all the assets in the estate atduring the time of the Professional

Comment [N69]: Inconsistent with sec. 744.361(4) & (11)

Comment [N70]: Guardian should not have liability for assets outside their control ("assets under the control of the ward")

Guardianprofessional guardian's appointment by the Courtcourt.

(kg) Professional Guardiansguardians of the property shall keep estate money separate from their personal money.

(l) Professional Guardians shall make claims against others on behalf of the estate when deemed in the best interest of the Ward and shall defend against actions that would result in a loss of estate assets.(m) Professional Guardianshh) Professional guardians of the property shall apply state law regarding prudent investment practices, including seeking responsible consultation with and delegation to people with appropriate expertise is necessary to manage the estate where appropriate.

(n) Professional Guardians shall employ Generally Accepted Accounting Principles when managing an estate.

(o) Professional Guardians shall determine if a will exists and obtain a copy to determine how to manage estate assets and property.(p) Professional Guardians(i) Professional guardians of the property shall report to the Office of Public and Professional Guardians, the Department of Children and Families' Adult Protective Services and local law enforcement incidents of abuse, neglect, and/or exploitation within a reasonable period of time under the circumstances.

(1817) PROFESSIONAL GUARDIAN OF THE PROPERTY: INITIAL AND ONGOING RESPONSIBILITESRESPONSIBILITIES.

(a) With the proper authority, the initial steps after appointment as Professional Guardianprofessional guardian of the property are as follows:

1. Professional Guardiansguardians of the property shall address all issues of the estate that require immediate action, which include, but are not limited to, securing all real and personal property, insuring it at current market value, and taking the steps necessary to protect it from damage, destruction, or loss.

a. Professional Guardiansguardians of the property shall ascertain the income, assets, and liabilities of the Wardward.

b. Professional Guardiansguardians of the property shall ascertain the goals, needs, and preferences of the Wardward.

c. Professional Guardians shall coordinate and consult with others close to the Ward.2. Professional Guardiansguardians of the property shall meet with Wardswards under guardianship as soon after the appointment as feasible. At the first meeting, Professional GuardiansTo the extent possible based upon the ward's ability, professional guardians of the property shall:

a. Communicate to the Wardward the role of the Professional Guardianprofessional guardian,

b. Outline the rights retained by the Wardward and the grievance procedures available,

c. Assess the previously and currently expressed wishes of the Wardward and evaluate them based on current acuity, and

d. Attempt to gather from the Wardward any necessary information regarding the estate.

3. Professional Guardians shall become educated about the nature of any incapacity, condition, and functional capabilities of the Ward.

2

43. Professional Guardians shall develop and implement a budget for the management of incomeguardians of the property shall manage the income and assets that corresponds incoordination with the care plan for the Wardward, if any, and aim to address the goals, needs, and preferences of the Wardward. Professional Guardiansguardians of the property and the Professional Guardianguardian of the Personperson (if one exists), or other health care decision-maker, shall communicate regularly and coordinate efforts with regard to the care and budget, as well as other events that might affect the Wardward.

a. The budget shall include a listing of all of the Ward's known monthly income and assets. The budget shall also include a listing of all of the Ward's recurring monthly expenses, including but not limited to housing, clothing, medical, health insurance, entertainment, and transportation costs.

b. Professional Guardians shall prioritize the well-being of Wards over the preservation of the estate.

c. Professional Guardians shall maintain the goal of managing, but not necessarily eliminating, risks.

Comment [N71]: Contrary to sec. 744.441(11) which requires court approval prior to prosecuting or defending claims.

Comment [N72]: Duplicative of 744.361(11) and arguably inconsistent.

Comment [N73]: Under current Florida law, a guardian is not required to obtain nor follow a ward's last will and testament as it is an ineffective document until death. The requirement of utilizing a will to determine management of the estate is inconsistent with § 744.361 and Florida law.

Comment [N74]: This is inconsistent with sec. 744.361(13) which requires a guardian OF THE PERSON to be educated about the incapacities of the ward. Such education is not required under the statute for guardians of the property.

Comment [N75]: Rewritten for consistency with Chapter 744 which does not require that a budget be submitted by the guardian. The inclusion of a budget is inconsistent with statute and would constitute a new substantive duty.

54. Professional Guardiansguardians of the property shall assess the feasibility of pursuing all public and insurance benefits for which Wardswards may be eligible.

65. Professional Guardiansguardians of the property shall thoroughly document the management of the estate and the carrying out of any and all duties required by statute or regulation.

76. Professional Guardiansguardians of the property shall prepare an inventory of all property for which he or she is responsible. The inventory must list all the assets owned by Wardsthe ward that are known to the guardianin accordance with § 744.365, F.S. and Florida Probate Rule 5.620.

87. All accountings must contain sufficient information to clearly describe all significant transactions affecting administration during the accounting period. All accountings must be complete, accurate, and understandable. pursuant to Fla. Prob. R. 5.696.

98. Professional Guardiansguardians of the property shall oversee the disposition of Wards' a wards'assets subject to the guardian's control to when seeking to qualify Wardswards for any public benefits program after obtaining court approval.

109. On the termination of the guardianship or the death of a Ward, Professional Guardiansward, a professional guardians of the property shall facilitate the appropriate closing of the estate and submit a final accounting to the court., unless waived by the cCourt

1110. Professional Guardians may monitor, provide oversight, or manage the personal allowance of Wards.12. Professional Guardiansguardians of the property shall, when appropriate, open a burial trust account and/or make funeral arrangements for Wardswards.

(1918) PROPERTY MANAGEMENT.

(a) Professional Guardians may not dispose of a Ward's real or personal property without giving notice to interested parties and getting Court approval.When disposing of a ward's assets, pursuant to Section 744.441, F.S., a professional guardian of the property must seek court approval and notify interested persons as required by Chapter 744, F.S.

(b) In the absence of evidence of a Ward's views before the appointment of a Professional Guardian, Professional Guardians, having the proper authority, may not sell, encumber, convey, or otherwise transfer property of a ward, or an interest in that property, unless doing so is in the best interest of the Ward. In considering whether to dispose of a Wardward's property, Professional Guardiansprofessional guardians of the property shall consider the following:

1. WhetherThe desires of the ward to the extent that it is known to the professional guardian,

2. \If the desires of the ward is unknown to the professional guardian of the property,the professional guardian shall consider Wwhether disposing of the property will benefit or improve the life of the Ward.ward,

2.3. The likelihood that the Wardward will need or benefit from the property in the future.3. The previously expressed or current desires of the Ward with regard to the property.,

4. The provisions of the Wardward's estate plan as it relates to the property, if any,

5. The tax consequences of the transaction,

6. The impact of the transaction on the Wardward's entitlement to public benefits,

7. The condition of the entire estate,

8. The ability of the Wardward to maintain the property,

9. The availability and appropriateness of alternatives to the disposition ofdispositionof the property,

10. The likelihood that property may deteriorate or be subject to waste. and.,

11. The benefits versus the liability and costs of maintaining the property; and.

12. Any other factor that may be relevant to the disposition of the ward's property.

(d) Professional Guardians shall consider the necessity forguardians of the property may obtain an independent appraisal of real and personal property.

(e) Professional Guardiansguardians of the property shall provide forobtain insurance coverage, as appropriate, for property in the estate.

Comment [HN76]: Included citation to new guardianship accounting rule (Fla. Prob. R. 5.696) which lays out the requirements of an annual accounting.

Comment [N77]: As noted previously, a guardian does not have a duty to monitor funds which are not under the control of the guardian.

Comment [N78]: Rewritten to provide consistency with notice requirements of Chapter 744.

Comment [N79]: This language is inconsistent with §§ 744.441(7) & (11) which addresses the sale or abandonment of property only upon court approval. § 744.441 does not include the restrictions which the rule is proposing.

Comment [N80]: The appropriate considerations of the guardian should not be limited by the rule, thus a catchall was inserted.

Comment [HN81]: "Shall" was replaced with "may" because there may be reasons, such as costs, which would make an appraisal inappropriate.

Comment [USER82]: This change is made to clarify that the guardian is not the one providing the coverage but rather the one obtaining the coverage from an insurance provider.

(~~20~~19) CONFLICT OF INTEREST; ESTATE, FINANCIAL, AND BUSINESS SERVICES

(a) Professional ~~Guardians shall~~guardians should avoid ~~all~~ conflicts of interest and self-dealing ~~when addressing the needs of Wards under guardianship. Impropriety or conflict of interest arises where a Professional Guardian has some personal or agency interest that can be perceived as self-serving or adverse to the position or best interest of a Ward. Self-dealing arises when the Professional Guardian seeks to take advantage of his or her position as a Professional Guardian and acts for his or her own interests rather than for the interests of a Ward.~~pursuant to Section 744.446, F.S..

(b) ~~Standards relating to specific situations that might create an impropriety or conflict of interest include the following:1.~~ Professional ~~Guardians~~guardians shall not commingle personal or program funds with the funds of ~~Wards~~wards, except as follows:

~~a.~~1. This standard does not prohibit ~~Professional Guardians~~professional guardians of the property from consolidating and maintaining ~~Wards~~wards' funds in joint accounts with the funds of other ~~Wards~~wards with prior court approval.

~~b. If Professional Guardians~~2. If professional guardians of the property maintain joint accounts, separate and complete accounting of each ~~Ward~~ward's funds shall also be maintained by the ~~Professional Guardian~~professional guardian.

~~c.~~3. If the court allows the use of ~~comingled~~commingled accounts, they should be permitted only where ~~Professional Guardians have available resources~~professional guardians can and are required to keep accurate records of the exact amount of funds in the account, including allocation of interest and charges attributable to each estate based on the asset level of the ~~Ward~~ward.

~~2.~~ (c.) Professional ~~Guardians~~guardians of the property may not sell, encumber, convey, or otherwise transfer a ~~Ward~~ward's real or personal property or any interest in that property to himself or herself, a spouse, a ~~coworker~~co-worker, an employee, a member of the board of the agency or corporate ~~Professional Guardian~~professional guardian, an agent, or an attorney, or any corporation or trust in which the ~~Professional Guardian~~professional guardian has a substantial beneficial interest, except as allowed by law.

~~3. Professional Guardians may not sell or otherwise convey a Ward's property from any of the parties noted in subparagraph (20)(b)2.~~ ~~4.~~(d). Professional ~~Guardians~~guardians may not loan ~~or give~~ money or objects of worth from a ~~Ward~~ward's estate unless specific prior approval is obtained from the court.

~~5. Professional Guardians may not use a Ward's income and assets to support or benefit other individuals directly or indirectly unless specific prior approval is obtained from the court.~~

~~6.~~(e).. Professional ~~Guardians~~guardians may not borrow funds from a ~~Ward~~ward.

~~7.~~(f). Professional ~~Guardians~~guardians may not lend funds to a Ward, except for advancements for minor administrative expenses. ~~unless there is prior notice of the proposed transaction to interested persons and others as directed by the court or agency administering the Ward's benefits, and the transaction is approved by the court.~~

~~8. Professional Guardians may not profit from any transactions made on behalf of a Ward's estate at the expense of the estate, nor may the Professional Guardian compete with the estate, unless prior approval is obtained from the court.~~

~~9.~~(g). Professional ~~Guardians~~guardians shall not give anything of significant value associated with a guardianship referral.

(~~21) TERMINATION AND LIMITATION OF PROFESSIONAL GUARDIANSHIP~~h) Unless prior approval is obtained by court order, or unless such relationship existed prior to appointment of the professional guardian and is disclosed to the court in the petition for appointment of guardian, the following guidelines relating to specific situations should be observed:

1. Professional Guardians may not directly provide housing, medical, or legal services to a ward.

2. Professional guardians may not employ their family to provide services for a profit or fee.

3. Professional guardians shall neither solicit nor accept incentives from service providers.

4. Professional guardians who are attorneys, or employ by attorneys, may provide legal services to wards only when doing so best meets the needs of the ward.

Comment [HN83]: This language is difficult to reconcile with § 744.446 and is inconsistent. It is more appropriate to provide a citation to § 744.446 at the outset of this section prior to laying out more specific requirements.

Comment [HN84]: This is inconsistent with § 744.441(7) & (11). This issue is adequately addressed in Section 18(b) above.

Comment [HN85]: The inclusion of "indirectly" is extremely vague and would encompass a number of transactions which would benefit the ward & someone else (i.e. paying rent for the ward and spouse or grocery bills). Section 744.421 addresses this issue sufficiently.

Comment [HN86]: A professional guardian has a right to a reasonable fee which constitutes a profit. To the extent this provision is meant to avoid self-dealing transactions, it is adequately addressed in § 744.446.

Comment [N87]: The term "significant" was inserted to avoid violation through routine pleasantries, such as holiday gifts.

Comment [N88]: Subsection (h) constitutes provisions relocated from former section 16.

(20) TERMINATION AND LIMITATION OF PROFESSIONAL GUARDIANSHIP

(a) Professional ~~Guardians~~guardians shall assist ~~Wards under guardianship~~wards to develop or regain the capacity to manage their personal and financial affairs~~.~~, if medically possible.

(b) Professional ~~Guardians~~guardians shall seek termination or limitation of the guardianship in the following circumstances:

1. When ~~a Ward~~the guardian believes a ward has developed or regained capacity in areas in which he or she was found incapacitated by the court,

2. When potentially less restrictive alternatives that have not been previously addressed by the court exist,

3. When a ~~Ward~~ward expresses the desire to challenge the necessity of all or part of the guardianship, and such expression by the ward is reasonable under the circumstances

4. When a ~~Ward~~ward has died, or

5. When a guardianship no longer benefits the ~~Ward~~ward,

6. When the ward cannot be located after a diligent search.

~~(22~~(21) PROFESSIONAL GUARDIANSHIP SERVICE FEES.

(a) Professional ~~Guardians~~guardians are entitled to reasonable compensation for their services in accordance with Florida Statutes § 744.108.

(b) All fees related to the duties of the guardianship must be ~~reviewed and approved by the court. Fees must be~~ reasonable and be related only to guardianship duties.

(c) ~~A Professional Guardian may not abandon a Ward when estate funds are exhausted.(d)~~ Fees or expenses charged by a Professional Guardian shall be documented through billings maintained by the ~~Professional Guardian~~professional guardian as required by Florida Statutes § 744.108 and they shall clearly and accurately state among other things:

1. The date and time spent on a task,

2. The duty performed,

3. The expenses incurred,

~~4. The collateral contacts involved; and,~~

~~5~~4. The identification of the individual who performed the duty (e.g., guardian, staff, volunteer)~~.~~, and

~~6~~5. All parties should respect the privacy and dignity of the person when disclosing information regarding fees.

(~~23~~22) MANAGEMENT OF MULTIPLE PROFESSIONAL GUARDIANSHIP CASES.

Professional ~~Guardians~~guardians shall limit his or her caseload to allow the ~~Professional Guardian~~professional guardian to properly carry out his or her duties for each ~~Ward~~ward within statutory guidelines.

Rulemaking Authority 744.2001(2)(b) FS. Law Implemented 744.2001(2)(b) FS. History–New _____.

58M-2.011 Disciplinary Action and Guidelines.

(1) Purpose. Pursuant to section 744.20041, F.S., the Office of Public and Professional Guardians provides disciplinary guidelines in this rule for applicants or guardians over whom it has oversight. The purpose of this rule is to notify applicants and guardians of the range of penalties which will routinely be imposed, unless the Office of Public and Professional Guardians finds it necessary to deviate from the guidelines for the stated reasons given in this rule. The range of penalties are based upon a single count violation of each provision listed. Multiple counts of the violated provisions or a combination of the violations may result in a higher penalty. Each range includes the lowest and highest penalties that may be imposed for that violation. For applicants, all offenses listed in the Disciplinary Guidelines are sufficient for refusal to certify an application for registration. The Office of Public and Professional Guardians may find it necessary to deviate from the guidelines for the reasons stated in subsection (3) of this rule.

(2) Violations and Range of Penalties. In imposing discipline upon applicants and guardians, the Office of Public and Professional Guardians shall act in accordance with guidelines and shall impose a penalty within a range corresponding to the violations set forth in form DOEA/OPPG Form 003, Office of Public and Professional Guardians Disciplinary Guidelines (XXX 2016), incorporated herein by reference and available at https://www.flrules.org/XXXXXXX, unless the Office of Public and Professional Guardians finds it necessary to deviate from the guidelines for the stated reasons given in subsection (3) of this rule.

(3) The Office of Public and Professional Guardians shall take into consideration the danger to the public; the

Comment [HN89]: This language is consistent with sec. 744.361(13)(e).

Comment [HN90]: This is inserted for consistency with § 744.521.

Comment [HN91]: Change to be consistent with sec. 744.108, F.S. which does not require court approval.

Comment [HN92]: This is a duty not imposed by statute or case law and this rule's language may not be constitutional or fair. Guardians should not be indentured servants and there are other mechanisms to address this problem.

Comment [CURNIC93]: In order to avoid any conflict with § 744.108, language was added to require strict compliance with statute.

Comment [N94]: "Collateral contacts" is a vague term.

number of repetitions of offenses; the length of time since date of violation; the number of disciplinary actions taken against the guardian; the length of time the guardian has practiced; the actual damage, physical or otherwise, to the ward; the deterrent effect of the penalty imposed; any efforts for rehabilitation; and any other mitigating or aggravating circumstances in determining the appropriate disciplinary action to be imposed.
Rulemaking Authority 744.20041 F.S. Law Implemented 744.20041 F.S. History–New .

NAME OF PERSON ORIGINATING PROPOSED RULE: Jason Nelson
NAME OF AGENCY HEAD WHO APPROVED THE PROPOSED RULE: Jeffrey Bragg
DATE PROPOSED RULE APPROVED BY AGENCY HEAD: October 12, 2016
DATE NOTICE OF PROPOSED RULE DEVELOPMENT PUBLISHED IN FAR: August 1, 2016

Notice of Proposed Rule

DEPARTMENT OF ELDER AFFAIRS
Statewide Public Guardianship Office

RULE NOS.: RULE TITLES:
58M-2.001 Professional Guardian Registration
58M-2.009 Standards of Practice
58M-2.011 Disciplinary Action and Guidelines

PURPOSE AND EFFECT: The purpose of the proposed rulemaking is to implement statutory changes to Parts I and II of Ch. 744, F.S., and to the Department's oversight of public and professional guardians.

SUMMARY: The rulemaking establishes standards of practice, disciplinary guidelines, and credit investigation procedures for public and professional guardians as well as implements revisions of rules as needed based on legislative changes.

SUMMARY OF STATEMENT OF ESTIMATED REGULATORY COSTS AND LEGISLATIVE RATIFICATION: The Agency has determined that this will have an adverse impact on small business or likely increase directly or indirectly regulatory costs in excess of $200,000 in the aggregate within one year after the implementation of the rule. A SERC has been prepared by the Agency.

The main economic impact of the proposed rule is likely generated through the rule's requirement that professional guardians receive court approval of their guardianship fees and through the rule's record keeping requirements. A full copy of the Statement of Estimated Regulatory Costs can be obtained online at http://elderaffairs.state.fl.us/doea/oppg_rulemaking.php

The Agency has determined that the proposed rule is expected to require legislative ratification based on the statement of estimated regulatory costs or if no SERC is required, the information expressly relied upon and described herein: Through the preparation of a SERC, the Department has determined that proposed rule 58M-2.009, Florida Administrative Code, concerning standards of practice for professional guardians, will have a significant regulatory impact on small businesses and is likely to increase regulatory costs in excess of $1,000,000 within the first five years of implementation.

Any person who wishes to provide information regarding a statement of estimated regulatory costs, or provide a proposal for a lower cost regulatory alternative must do so in writing within 21 days of this notice.

RULEMAKING AUTHORITY: 744.2001(2)(b), 744.2002(6), 744.3135(5)(b), 744.20041 FS.

LAW IMPLEMENTED: 744.102(17), 744.2001(2)(b), 744.2002, 744.2003, 744.20041 FS.

IF REQUESTED WITHIN 21 DAYS OF THE DATE OF THIS NOTICE, A HEARING WILL BE HELD AT THE DATE, TIME AND PLACE SHOWN BELOW:

DATE AND TIME: November 9, 2016, 9:30 a.m. – 12:30 p.m.

PLACE: Florida Department of Elder Affairs, 4040 Esplanade Way, Room 301, Tallahassee, Florida 32399

To participate in the rule workshop by telephone please call: 1(888)670-3525 participation code: 5964230985

Pursuant to the provisions of the Americans with Disabilities Act, any person requiring special accommodations to participate in this workshop/meeting is asked to advise the agency at least 5 days before the workshop/meeting by contacting: Jason Nelson at Department of Elder Affairs, Office of Public and Professional Guardians, 4040 Esplanade Way, Tallahassee, FL 32399; email: nelsonj@elderaffairs.org; telephone: (850)414-2113. If you are hearing or speech impaired, please contact the agency using the Florida Relay Service, 1(800)955-8771 (TDD) or 1(800)955-8770 (Voice).

THE PERSON TO BE CONTACTED REGARDING THE PROPOSED RULE IS: Jason Nelson at Department of Elder Affairs, Office of Public and Professional Guardians, 4040 Esplanade Way, Tallahassee, FL 32399; email: nelsonj@elderaffairs.org; telephone: (850)414-2113

THE FULL TEXT OF THE PROPOSED RULE IS:

58M-2.001 Professional Guardian Registration and Credit Investigation.

Applicants must score a minimum of 75% on the Professional Guardian Competency Examination or must receive a waiver from the Department of Elder Affairs' Office of Public and Professional Guardians (OPPG) before the

application for registration will be considered.

(1) Definitions. As used in this rule, the term:

(a) "Adverse credit history information" means the following:

1. Personal bankruptcy within the previous year.

2. Bankruptcy within the previous year of any organization based on events that occurred while the applicant was in a position of control of the organization.

3. Outstanding tax lien or other governmental lien.

4. Judgment based upon grounds of fraud, embezzlement, misrepresentation, or deceit.

5. Open collection account or charged-off account that remains unpaid, except accounts related solely to unpaid medical expenses.

6. Foreclosure on any property owned by the applicant within the last 5 years.

(b) "Charged-off" means an account that has been identified by a creditor as an uncollectable debt.

(2)~~(1)~~ Persons who are required to register with the OPPG ~~Department of Elder Affairs' Statewide Public Guardianship Office (SPGO)~~ as a professional guardian must complete the Professional Guardian Registration Form, DOEA/OPPG ~~SPGO~~ Form 001, XXXX 2016 ~~March 2008~~, which is incorporated herein by reference and may be obtained from the Office of Public and Professional Guardians ~~Statewide Public Guardianship Office~~, Department of Elder Affairs, 4040 Esplanade Way, Tallahassee, Florida 32399-7000, or at http://elderaffairs.state.fl.us/english/public.html. The Professional Guardian Employee Registration Form, DOEA/OPPG S~~PGO~~ Form 002, XXX 2016 ~~March 2008~~ which is incorporated herein by reference and may be obtained from the OPPG ~~SPGO~~ or at http://elderaffairs.state.fl.us/english/public.html must also be completed and submitted for all employees of professional guardians who have a fiduciary responsibility to a ward.

(3)~~(2)~~ The registration form for both a guardian and employee shall be signed by the person required to register or a corporate officer if the applicant is a corporation.

(4)~~(3)~~ The completed registration form shall be filed with the OPPG~~Statewide Public Guardianship Office~~, by hand-delivery or mail. Facsimile submissions will not be accepted.

(5)~~(4)~~ The following items must either accompany the registration form or must be on file with the OPPG~~SPGO~~, for the registration to be deemed complete:

(a) A complete credit report, including all pages, from a nationally recognized credit agency. A nationally recognized credit agency shall mean a credit agency that obtains credit information both within and outside the State of Florida; and validates, updates, and maintains the accuracy of credit information obtained. The report must reflect the financial responsibility of the applicant and provide full, accurate, current, and complete information regarding payment history and credit rating.

(b) Criminal history record for guardians and employees as specified in Section 744.3135, F.S.;

(c) Documentation of bonding as required under Section 744.1085, F.S.;

(6)~~(5)~~ For the initial guardian registration, the applicant must submit proof of completion of the required training, as well as proof of competency by evidence of satisfactory completion of the Department of Elder Affairs approved examination unless waived in accordance with Section 744.1085(8), F.S. For annual renewals, proof of receipt of the minimum continuing education requirements must be submitted, if not on file.

(7)~~(6)~~ A registration fee of thirty-five dollars ($35) for each professional guardian or employee with fiduciary responsibility to a ward in the form of a personal check, money order, or cashier's check made payable to the OPPG must be submitted with the registration form.

(8) Adverse Credit History Information. If an applicant's credit report or responses to the registration application contains adverse credit history information, the OPPG will notify the applicant in writing of the specific items constituting adverse credit history information. The notification will also inform the applicant of the following:

(a) Opportunity to explain the circumstances surrounding the specific item(s) and provide any other relevant information that the applicant wishes the OPPG to consider surrounding the specific item(s);

(b) Documents that the OPPG requires in order to complete its review of the specific item(s). The requested documents provided by the applicant must be legible.

If the documents requested above cannot be obtained, the applicant shall submit evidence of that fact in order for the registration application to be deemed complete. Evidence that documents cannot be obtained may consist of a written statement from the agency's or creditor's records custodian that is written on the agency's or creditor's

letterhead; indicates that the agency or the creditor does not have any record of such matter or that the record was lost, damaged, or destroyed, or cannot otherwise be produced and provide a statement as to why the record cannot be produced; and is signed by the agency's or creditor's records custodian.

(9) Procedure for Reviewing Adverse Credit History Information.

(a) When deciding whether to approve an application for registration as a professional guardian, the OPPG must make a determination regarding whether the applicant has demonstrated that he or she possesses the character, general fitness, and financial responsibility to warrant the OPPG's determination that the applicant will not violate any of the provisions of Chapter 744, Florida Statutes. In making this determination, the OPPG will consider the following information:

1. The applicant's entire credit history as reflected in the credit report.

2. The information provided by the applicant under subsection (8).

3. The responses contained in the registration application.

4. The previous registration history with the OPPG and Statewide Public Guardianship Office including whether the applicant was named in any regulatory action by those agencies.

5. Other information that reflects upon an applicant's character, general fitness, or financial responsibility.

(b) Based on the totality of the circumstances as developed under paragraph (a), the OPPG will make a determination as to whether the applicant has demonstrated that he or she possesses the character, general fitness, and financial responsibility to warrant the OPPG's determination that the applicant will not violate any of the provisions of Chapter 744, F.S.

(10)~~(7)~~(a) The registration period begins the day the registration is approved by the OPPG and ends on the applicant's bond anniversary date. For multi year bonds, the annual registration expiration date will be determined by the day and month that the bond expires.

(b) The OPPG will prorate the registration fee up to 50% for initial applicants whose bond will expire in less than 6 months.

(11)~~(8)~~ Annual Renewals: A completed DOEA/OPPG Form 001 for annual renewal of a registration shall be submitted to OPPG at least 30 days prior to the expiration date of the current registration to ensure that a lapse in registration does not occur. All fees must be received with the completed registration form prior to the registration being processed by the OPPG.

~~(9) If a professional guardian hires an employee with assigned fiduciary responsibilities during the registration period, the professional guardian shall submit an amended DOEA/ SPGO Form 001 that includes the new employee information to SPGO for approval prior to the employee assuming any fiduciary responsibilities.~~

Rulemaking Authority 744.2002(6) ~~744.1083(6)~~, 744.3135(5)(b) FS. Law Implemented 744.102(17), 744.2002 ~~744.1083~~, 744.2003 ~~744.1085~~, 744.3135 FS. History–New 5-4-03, Amended 12-12-05, 3-17-08,_____.

58M-2.009 Standards of Practice.

(1) DEFINITIONS

(a) In addition to the terms defined in Chapter 744, F.S., the following definitions are applicable to this rule:

1. "Interested Person" means a person identified as an interested person in a guardianship proceeding. The meaning as it relates to particular wards, may vary from time to time and must be determined by the court according to the particular matter involved.

2. "Family" or "Family Member" means a person or persons who are:

a. A relative of an individual within the third degree by blood or marriage, or

b. The stepparent of a minor if the stepparent is currently married to the parent of the minor and is not a party in a pending dissolution, separate maintenance, domestic violence, or other civil or criminal proceeding in any court of competent jurisdiction involving one or both of the minor's parents as an adverse party.

3. "Friend" means a person who an individual knows and with whom the individual has a bond of mutual affection.

4. "Abuse" means any willful act or threatened act by anyone which causes or is likely to cause significant impairment to a ward's physical, mental, or emotional health. This shall specifically include any act of abuse or neglect as defined under Florida Statutes § 825.102.

5. “Neglect” means the failure or omission on the part of a caregiver or guardian to provide the care, supervision, and services necessary to maintain the physical and mental health of a ward, including, but not limited to, food, clothing, medicine, shelter, supervision, and medical services, which a prudent person would consider essential for the well-being of the ward. The term “neglect” also means the failure of a caregiver or guardian to make a reasonable effort to protect a ward from abuse, neglect, or exploitation by others.

6. “Exploitation” means:

a. Knowingly obtaining or using, or endeavoring to obtain or use, a ward’s funds, assets, or property with the intent to temporarily or permanently deprive the ward of the use, benefit, or possession of the funds, assets, or property, or to benefit someone other than the ward, or

b. Breach of a fiduciary duty to a ward by the ward’s guardian which results in an unauthorized appropriation, sale, or transfer of property, or

c. Intentionally or negligently failing to effectively use a ward’s income and assets for the necessities required for that ward’s support and maintenance by the ward’s guardian.

7. “Significant Occurrence” means an eventuality, event, incident, affair, episode, milestone, transaction, proceeding, business, concern, circumstance, particular; fact, matter of fact, phenomenon; happenstance, goings-on; adventure, happening; accident, or, casualty that affects a ward.

(2) THE PROFESSIONAL GUARDIAN’S RELATIONSHIP TO THE COURT.

(a) Professional guardians shall know the extent of the powers and the limitations of authority granted to them by the court and all their decisions and actions shall be consistent with court orders and Florida law. Any action taken by a professional guardian pursuant to a court order shall not be deemed to be violation of this rule.

(b) Professional guardians shall obtain court authorization for actions that are subject to court approval.

(c) Professional guardians shall clarify with the court any questions that the professional guardian has about the meaning of orders or directions from the court before taking action based on the orders or directions.

(d) Professional guardians may seek assistance as reasonably necessary to fulfill responsibilities to the wards.

(e) All payments to professional guardians shall follow the requirements of Section 744.108, F.S.

(f) Professional guardians shall submit reports regarding the status of their wards to the court as ordered by the court and as required by Chapter 744, F.S.

(3) THE PROFESSIONAL GUARDIAN’S PERSONAL RELATIONSHIP WITH THE WARD.

Professional guardians may not engage in sexual relations with a ward that violate the provisions of Section 744.20041(1)(n), F.S.

(4) THE PROFESSIONAL GUARDIAN’S RELATIONSHIP WITH FAMILY MEMBERS AND FRIENDS OF THE WARD.

(a) Professional guardians of the person shall allow social interaction in accordance with §744.361(13)(b), F.S. when appropriate.

(5) THE PROFESSIONAL GUARDIAN’S RELATIONSHIP WITH OTHER PROFESSIONALS AND PROVIDERS OF SERVICES TO THE WARD. Professional guardians shall make a good faith effort to treat all professionals and service providers with courtesy and respect and shall strive to enhance cooperation between all parties on behalf of their wards.

(a) Professional guardians who are not family members of their wards may not provide any services other than guardianship services to those wards except in an emergency. Professional guardians shall coordinate and monitor services needed by wards to ensure that wards are receiving the appropriate care and treatment.

(b) Professional guardians shall make a good faith effort to cooperate with other surrogate decision-makers for wards. These include, where applicable, any other guardians, agents under a power of attorney, health care proxies and surrogates, trustees, U.S. Department of Veterans’ Affairs fiduciaries, and representative payees.

(6) INFORMED CONSENT FOR HEALTH CARE DECISIONS.

(a) Decisions that professional guardians of the person make on behalf of their wards regarding health care decisions shall be based on the principle of Informed Consent when possible.

(b) Informed Consent is a decision maker’s agreement to a particular course of action based on sufficient explanation and disclosure of the facts needed to make the decision intelligently.

(c) To have Informed Consent, a decision maker must be able to take voluntary action and must not be coerced.

(d) In evaluating each requested decision, taking into consideration any time constraints involved, professional

guardians of the person shall do the following:

1. Have a clear understanding of the issue for which informed consent is being sought,

2. Have a clear understanding of the options, expected outcomes, risks and benefits of each alternative,

3. Determine the conditions that necessitate treatment or action,

4. Maximize the participation of wards in understanding the facts and directing a decision, to the extent possible,

5. Determine whether a ward has previously stated preferences in regard to a decision of this nature,

6. Determine why this decision needs to be made now rather than later,

7. Determine what will happen if a decision is made to take no action,

8. Determine what the least restrictive alternative is for the situation,

9. Obtain a second medical or professional opinion, if necessary,

10. When appropriate, obtain information or input from other professionals and the ward's family, unless the guardian believes that such input from the family may cause harm to the ward or be contrary to the ward's best interest; and,

11. Obtain written documentation of all reports relevant to each decision if possible.

(7) STANDARDS FOR DECISION-MAKING.

(a) Professional guardians shall assist and encourage wards to participate in decisions when appropriate.

(b) Professional guardians shall, consistent with court orders and state statutes, exercise authority only as necessitated by the limitations of the ward.

(c) Professional guardians shall identify; advocate for the goals, needs, and preferences of their wards; and honor those goals and preferences when appropriate.

1. Professional Guardians shall ask their wards what they want.

2. If a ward has difficulty expressing what he or she wants, his or her professional guardian shall, to the extent possible, help the ward express his or her goals, needs, and preferences.

3. When a ward, even with assistance, cannot express his or her goals and preferences, professional guardians may seek input from others familiar with the ward to determine what the ward may have wanted.

4. To the extent that a ward's goals and preferences have been made known to a professional guardian, the professional guardian shall honor those goals or preferences, except when the professional guardian has a reasonable belief that following the ward's goals and preferences would cause impairment to a ward's physical, mental, or emotional health.

(8) LEAST RESTRICTIVE ALTERNATIVE.

(a) When making a decision, professional guardians shall carefully evaluate the alternatives that are available to the ward and choose the one that best meets the personal and financial goals, needs, and preferences of wards, while placing the least restrictions on their wards' freedoms, rights, and ability to control their environments.

(b) Professional guardians shall weigh the risks and benefits of each decision and develop a balance between maximizing the independence and self-determination of wards and maintaining wards' dignity, protection, and safety.

(c) Professional guardians shall make individualized decisions. The least restrictive alternative for one ward might not be the least restrictive alternative for another ward.

(d) The following guidelines apply in the determination of the least restrictive alternative:

1. Professional guardians shall become familiar with the available options for residence, care, medical treatment, vocational training, and education for their wards.

2. Professional guardians shall strive to know their wards' goals and preferences.

3. Professional guardians may consider assessments of their wards' needs as determined by specialists. This may include an independent assessment of a ward's functional ability, health status, and care needs.

(9) SELF-DETERMINATION OF THE WARD.

(a) Professional guardians shall provide wards with every opportunity to exercise those individual rights that the ward has retained as they relate to the personal and financial needs of the ward, as long as that exercise is consistent with court orders regarding the ward's capacity.

(b) When appropriate, professional guardians shall encourage their wards to participate, to the maximum extent of their wards' abilities, in all decisions that affect him or her.

(c) The professional guardian shall, when appropriate, seek to ensure that the ward leads the planning process. If

the ward is unable to lead the process, the professional guardian shall, whenever possible, seek their participation.

(10) THE PROFESSIONAL GUARDIAN'S DUTIES REGARDING DIVERSITY AND PERSONAL PREFERENCES OF THE WARD.

(a) Professional guardians shall determine the extent to which wards identify with particular ethnic, religious, and cultural values. To determine these values, professional guardians shall consider the following:

1. The ward's attitudes regarding illness, pain, and suffering,

2. The ward's attitudes regarding death and dying,

3. The ward's views regarding quality of life issues,

4. The ward's views regarding societal roles and relationships, and,

5. The ward's attitudes regarding funeral and burial customs.

(11) CONFIDENTIALITY.

(a) Professional guardians shall keep the affairs of wards confidential, unless otherwise provided by law or ordered by the Court.

(b) Professional guardians shall respect wards' privacy, dignity, and welfare, especially when the disclosure of information is necessary.

(c) Disclosure of information shall be limited to what is necessary and relevant to the issue being addressed.

(d) Professional guardians shall assist wards in communicating with third parties where appropriate.

(12) DUTIES OF THE PROFESSIONAL GUARDIAN OF THE PERSON.

(a) Professional guardians who are appointed to be guardians of the person shall have the following duties and obligations to wards, unless decision making authority has not been delegated to the professional guardian or the letters of guardianship provides otherwise:

1. To assess that wards are living in the most appropriate environment that addresses each ward's goals, needs, and preferences subject to limitations of his or her financial resources and availability of government benefits.

a. Professional guardians of the person must prioritize home or other community-based settings, when not inconsistent with a ward's goals, needs, and preferences.

b. Professional guardians of the person shall authorize moving wards to a more restrictive environment only after evaluating other medical and health care options and making an independent determination that the move is the least restrictive alternative at the time, and fulfills the current needs of a ward.

c. Professional guardians of the person may consider the proximity of the setting to those people and activities that are important to wards when choosing a residential setting.

d. When professional guardians of the person consider involuntary or long-term placement of a ward in an institutional setting, he or she must comply with §§744.3725 and 744.3215, F.S.

2. To ensure that provision is made for the support, care, comfort, health, and maintenance of wards,

3. To make reasonable efforts to secure for wards medical, psychological, therapeutic, and social services, training, education, and social and vocational opportunities that are appropriate and that will maximize wards' potential for self-reliance and independence,

4. To petition the court for limitation or termination of the guardianship when the professional guardian believes the ward no longer meets the criteria pursuant to which the guardianship was imposed, or when there is an effective alternative available, and

5. To report to the Office of Public and Professional Guardians, the Department of Children and Families' Adult Protective Services Unit and local law enforcement incidents of abuse, neglect and/or exploitation as defined by state statutes within a reasonable period of time under the circumstances.

(13) INITIAL AND ONGOING RESPONSIBILITIES OF THE GUARDIAN OF THE PERSON

(a) With the proper authority, professional guardians of the person shall take the following initial steps after appointment as a guardian:

1. Professional guardians of the person shall address all issues of wards that require immediate action.

2. Whenever possible, professional guardians of the person shall meet with wards as soon after the appointment as is feasible. At the first meeting or as soon as reasonable, a professional guardian of the person shall:

a. Communicate to the ward the role of the professional guardian,

b. Explain the rights retained by the ward,

c. Assess the ward's physical and social situation,

d. Assess the ward's educational, vocational, and recreational needs,

e. Obtain the ward's preferences,

f. Assess the support systems available to the ward; and,

g. Attempt to gather any missing necessary information regarding the ward.

3. After the first meeting with the ward, the professional guardian of the person shall notify all relevant individuals, agencies, and institutions of the appointment of the professional guardian.

4. The professional guardian of the person shall:

a. Obtain an evaluation of the ward's condition, treatment, and functional status from the ward's treating physician or appropriate specialist, if a comprehensive medical evaluation was not completed as part of the petitioning process, or has not been done within the past year.

b. Obtain a psychological evaluation, if appropriate.

c. Obtain an inventory of advance directives. Such statements of intent would include, but are not limited to, powers of attorney, living wills, organ donation statements, and statements by the person recorded in medical charts.

d. Establish contact with the guardian of the property or any other relevant fiduciary for the ward.

(b) Professional guardians of the person shall develop and implement a written guardianship plan in compliance with §§744.363, F.S. and 744.3675, F.S.

(c) The professional guardian of the person shall maintain a separate file for each ward. The file must include, at a minimum, the following information and documents:

1. The ward's name, date of birth, address, telephone number, Social Security number, medical coverage, physician, diagnoses, medications, the purpose of each medication, and allergies to medications,

2. All legal documents, including among others the order appointing guardian and the letters of guardianship, involving the ward,

3. Advance directives,

4. A list of key contacts and the contact information for next of kin,

5. A list of service providers, contact information, a description of services provided to the person, and progress/status reports,

6. A list of all over-the-counter and prescribed medications the ward is taking, the dosage, the reason why it is taken, and the name of the doctor prescribing the medication,

7. Progress notes and any documentation that reflect contacts made and work done regarding the ward, including the date, time and activity,

8. The initial guardianship plan and annual plans,

9. The initial inventory and annual accountings, if required,

10. Assessments regarding the ward's past and present medical, psychological, and social functioning,

11. Documentation of the ward's known values, lifestyle preferences, and known wishes regarding medical and other care and service, and,

(d) Professional guardians, or one of the guardian's professional staff, shall visit wards at least quarterly each year.

1. Professional guardians of the person shall assess the ward's physical appearance and condition, the appropriateness of the ward's current living situation, and the continuation of existing services while taking into consideration all aspects of social, psychological, educational, direct services, and health and personal needs as well as the need for any additional services.

2. Professional guardians of the person shall maintain substantive communication with service providers, caregivers, and others attending to wards.

3. Professional of the person s shall participate in all care or planning conferences concerning the residential, educational, vocational, or rehabilitation program of wards within the rights delegated to the professional guardian of the person by the court.

4. Professional guardians of the person shall regularly examine all services and all charts, notes, logs, evaluations,

and other documents regarding wards at the place of residence and at any program site to ascertain that the care plan is being properly followed.

5. Professional guardians of the person shall advocate on behalf of the ward. Professional guardians shall assess the overall quality of services provided to wards, using accepted regulations and care standards as guidelines, and seeking remedies when care is found to be deficient.

6. Professional guardians of the person shall monitor the residential setting on an ongoing basis and take any necessary action when the setting does not meet the ward's current goals, needs, and preferences, including but not limited to:

a. Evaluating the plan,

b. Enforcing residents' rights, legal, and civil rights, and,

c. Ensuring quality of care and appropriateness of the setting in light of the feelings and attitudes of the ward.

(e) Professional guardians of the person shall fully identify, examine, and continue to seek information regarding options available to the ward that will fulfill the ward's goals, needs, and preferences.

1. Professional guardians of the person shall take advantage of professional assistance in identifying all available options for long term services and support.

2. Sources of professional assistance include, but are not limited to Area Agencies on Aging, Centers for Independent Living, protection and advocacy agencies, Long Term Care Ombudsmen, Developmental Disabilities Councils, Aging and Disability Resource Centers, and community mental health agencies.

(14) DECISION-MAKING CONCERNING MEDICAL TREATMENT BY GUARDIAN OF THE PERSON.

(a) Professional guardians of the person shall promote, monitor, and maintain the health and well-being of wards under guardianship pursuant to their powers and duties as guardian under Florida Statutes § 744.361.

(b) Professional guardians of the person shall ensure that all medical care available to the ward is appropriately provided.

(c) Professional guardians of the person shall determine whether a ward created any advance directives, such as powers of attorney, living wills, organ donation statements and statements by a ward recorded in medical charts. On finding such documents, a professional guardian shall inform the court of the existing health care documents.

(d) To the extent a ward cannot participate in the decision making process, a professional guardian of the person shall act in accordance with the ward's prior statements, actions, values, and preferences to the extent the professional guardian actually knows.

(e) If a ward's preferences are unknown and unascertainable, a professional guardian of the person shall act after taking into consideration information received from professionals and persons who demonstrate sufficient interest in the ward's welfare to determine the ward's best interests.

(f) Absent an emergency or a ward's execution of a living will, durable power of attorney for health care, or other advance directive declaration of intent that clearly indicates a ward's wishes with respect to a medical intervention, a professional guardian of the person who has authority may not grant or deny authorization for a medical intervention until he or she has given careful consideration to the criteria contained in subsections (6) and (7).

(g) In the event of an emergency, a professional guardian of the person who has authority to make health care decisions shall grant or deny authorization of emergency medical treatment based on a reasonable assessment of the criteria contained in subsections (6) and (7), within the time allotted by the emergency.

(h) Professional guardians of the person may seek a second medical opinion for any medical treatment or intervention that would cause a reasonable person to do so or in circumstances where any medical intervention poses a significant risk to a ward. Professional guardians of the person shall obtain a second opinion from a physician.

(i) Professional guardians of the person may communicate with the treating medical provider before authorizing or denying any treatment or procedure that has been previously approved.

(j) Professional guardians of the person may, in accordance with Florida Statutes 765.1103(1),F.S. seek to ensure that appropriate palliative care is incorporated into all health care, unless not in accordance with a ward's preferences and values.

(15) DECISION-MAKING CONCERNING WITHHOLDING AND WITHDRAWAL OF MEDICAL TREATMENT BY GUARDIAN OF THE PERSON

(a) Professional guardians shall comply with Florida Statutes §§ 744.361, F.S. and 765.401, F.S. and applicable Florida law when making decisions to withhold or withdraw medical treatment. A professional guardian may seek instructions from the court prior to making a medical decision to withhold or withdraw medical treatment to a ward.

(16) DUTIES OF THE PROFESSIONAL GUARDIAN OF THE PROPERTY

(a) Professional guardians of the property shall have the following duties and obligations to wards under guardianship; unless decision making authority has not been delegated to the professional guardian or the letters of guardianship provides otherwise.

(b) When making decisions professional guardians of the property shall:

1. Give priority to the goals, needs, and preferences of the wards; and,

2. Weigh the costs and benefits to the estate.

(c) Professional guardians of the property shall consider the current wishes, past practices, and evidence of likely choices of their wards. If significant impairment to a ward's physical, mental, or emotional health would result or there is no evidence of likely choices, professional guardians of the property shall consider the best interests of the ward.

(d) Professional Guardians of the property shall assist and encourage wards to participate in decisions to the extent they are capable and consistent with court order.

(e) Professional guardians of the property shall manage the estate only for the benefit of the ward or as directed by the court.

(f) Professional guardians of the property shall keep estate assets safe by keeping accurate records of all transactions and be able to fully account for all the assets in the estate during the time of the professional guardian's appointment by the court.

(g) Professional guardians of the property shall keep estate money separate from their personal money.

(h) Professional guardians of the property shall apply state law regarding prudent investment practices, including seeking responsible consultation with and delegation to people with appropriate expertise is necessary to manage the estate where appropriate.

(i) Professional guardians of the property shall report to the Office of Public and Professional Guardians, the Department of Children and Families' Adult Protective Services and local law enforcement incidents of abuse, neglect, and/or exploitation within a reasonable period of time under the circumstances.

(17) PROFESSIONAL GUARDIAN OF THE PROPERTY: INITIAL AND ONGOING RESPONSIBILITIES.

(a) With the proper authority, the initial steps after appointment as professional guardian of the property are as follows:

1. Professional guardians of the property shall address all issues of the estate that require immediate action, which include, but are not limited to, securing all real and personal property, and taking the steps necessary to protect it from damage, destruction, or loss.

a. Professional guardians of the property shall ascertain the income, assets, and liabilities of the ward.

b. Professional guardians of the property shall ascertain the goals, needs, and preferences of the ward.

2. Professional guardians of the property shall meet with wards as soon after the appointment as feasible. To the extent possible based upon the ward's ability, professional guardians of the property shall:

a. Communicate to the ward the role of the professional guardian,

b. Outline the rights retained by the ward and the grievance procedures available,

c. Assess the previously and currently expressed wishes of the ward and evaluate them based on current acuity, and

d. Attempt to gather from the ward any necessary information regarding the estate.

3. Professional guardians of the property shall manage the income and assets in coordination with the care plan for the ward, if any, and aim to address the goals, needs, and preferences of the ward. Professional guardians of the property and the guardian of the person (if one exists), or other health care decision-maker, shall communicate regularly and coordinate efforts with regard to the care as well as other events that might affect the ward.

4. Professional guardians of the property shall assess the feasibility of pursuing all public and insurance benefits for which wards may be eligible.

5. Professional guardians of the property shall document the management of the estate and the carrying out of any

and all duties required by statute or regulation.

6. Professional guardians of the property shall prepare an inventory in accordance with § 744.365, F.S. and Florida Probate Rule 5.620.

7. All accountings must contain sufficient information to clearly describe all significant transactions affecting administration during the accounting period pursuant to Fla. Prob. R. 5.696.

8. Professional guardians of the property shall oversee the disposition of a ward's assets subject to the guardian's control when seeking to qualify wards for any public benefits program after obtaining court approval.

9. On the termination of the guardianship or the death of a ward, a professional guardian of the property shall facilitate the appropriate closing of the estate and submit a final accounting to the court, unless waived by the court

10. Professional guardians of the property shall, when appropriate, open a burial trust account and/or make funeral arrangements for wards.

(18) PROPERTY MANAGEMENT.

(a) When disposing of a ward's assets, pursuant to Section 744.441, F.S., a professional guardian of the property must seek court approval and notify interested persons as required by Chapter 744, F.S.

(b) In considering whether to dispose of a ward's property, professional guardians of the property shall consider the following:

1. The desires of the ward to the extent that it is known to the professional guardian,

2. Whether disposing of the property will benefit or improve the life of the ward,

3. The likelihood that the ward will need or benefit from the property in the future,

4. The provisions of the ward's estate plan as it relates to the property, if any,

5. The tax consequences of the transaction,

6. The impact of the transaction on the ward's entitlement to public benefits,

7. The condition of the entire estate,

8. The ability of the ward to maintain the property,

9. The availability and appropriateness of alternatives to the disposition of the property,

10. The likelihood that property may deteriorate or be subject to waste,

11. The benefits versus the liability and costs of maintaining the property; and.

12. Any other factor that may be relevant to the disposition of the ward's property.

(d) Professional guardians of the property may obtain an independent appraisal of real and personal property.

(e) Professional guardians of the property shall obtain insurance coverage, as appropriate, for property in the estate.

(19) CONFLICT OF INTEREST: ESTATE, FINANCIAL, AND BUSINESS SERVICES

(a) Professional guardians should avoid conflicts of interest and self-dealing pursuant to Section 744.446, F.S.

(b). Professional guardians shall not commingle personal or program funds with the funds of wards, except as follows:

1. This standard does not prohibit professional guardians of the property from consolidating and maintaining wards' funds in joint accounts with the funds of other wards with prior court approval.

2. If professional guardians of the property maintain joint accounts, separate and complete accounting of each ward's funds shall also be maintained by the professional guardian.

3. If the court allows the use of commingled accounts, they should be permitted only where professional guardians can and are required to keep accurate records of the exact amount of funds in the account, including allocation of interest and charges attributable to each estate based on the asset level of the ward.

(c.) Professional guardians of the property may not sell, encumber, convey, or otherwise transfer a ward's real or personal property or any interest in that property to himself or herself, a spouse, a co-worker, an employee, a member of the board of the agency or corporate professional guardian, an agent, or an attorney, or any corporation or trust in which the professional guardian has a substantial beneficial interest, except as allowed by law.

(d). Professional guardians may not loan money or objects of worth from a ward's estate unless specific prior approval is obtained from the court.

(e) Professional guardians may not borrow funds from a ward.

(f). Professional guardians may not lend funds to a Ward, except for advancements for minor administrative expenses.

(g). Professional guardians shall not give anything of significant value associated with a guardianship referral.

(h) Unless prior approval is obtained by court order, or unless such relationship existed prior to appointment of the professional guardian and is disclosed to the court in the petition for appointment of guardian, the following guidelines relating to specific situations should be observed:

1. Professional Guardians may not directly provide housing, medical, or legal services to a ward.

2. Professional guardians may not employ their family to provide services for a profit or fee.

3. Professional guardians shall neither solicit nor accept incentives from service providers.

4. Professional guardians who are attorneys, or employ by attorneys, may provide legal services to wards only when doing so best meets the needs of the ward.

(20) TERMINATION AND LIMITATION OF PROFESSIONAL GUARDIANSHIP

(a) Professional guardians shall assist wards to develop or regain the capacity to manage their personal and financial affairs, if medically possible.

(b) Professional guardians shall seek termination or limitation of the guardianship in the following circumstances:

1. When the guardian believes a ward has developed or regained capacity in areas in which he or she was found incapacitated by the court,

2. When potentially less restrictive alternatives that have not been previously addressed by the court exist,

3. When a ward expresses the desire to challenge the necessity of all or part of the guardianship, and such expression by the ward is reasonable under the circumstances

4. When a ward has died, or

5. When a guardianship no longer benefits the ward.

6. When the ward cannot be located after a diligent search.

(21) PROFESSIONAL GUARDIANSHIP SERVICE FEES.

(a) Professional guardians are entitled to reasonable compensation for their services in accordance with Florida Statutes § 744.108.

(b) All fees related to the duties of the guardianship must be reasonable and be related only to guardianship duties.

(c) Fees or expenses charged by a Professional Guardian shall be documented through billings maintained by the professional guardian as required by Florida Statutes § 744.108 and they shall clearly and accurately state among other things:

1. The date and time spent on a task,

2. The duty performed,

3. The expenses incurred,

4. The identification of the individual who performed the duty (e.g., guardian, staff, volunteer), and

5. All parties should respect the privacy and dignity of the person when disclosing information regarding fees.

(22) MANAGEMENT OF MULTIPLE PROFESSIONAL GUARDIANSHIP CASES.

Professional guardians shall limit his or her caseload to allow the professional guardian to properly carry out his or her duties for each ward within statutory guidelines.

Rulemaking Authority 744.2001(2)(b) FS. Law Implemented 744.2001(2)(b) FS. History–New .

58M-2.011 Disciplinary Action and Guidelines.

(1) Purpose. Pursuant to section 744.20041, F.S., the Office of Public and Professional Guardians provides disciplinary guidelines in this rule for applicants or guardians over whom it has oversight. The purpose of this rule is to notify applicants and guardians of the range of penalties which will routinely be imposed, unless the Office of Public and Professional Guardians finds it necessary to deviate from the guidelines for the stated reasons given in this rule. The range of penalties are based upon a single count violation of each provision listed. Multiple counts of the violated provisions or a combination of the violations may result in a higher penalty. Each range includes the lowest and highest penalties that may be imposed for that violation. For applicants, all offenses listed in the Disciplinary Guidelines are sufficient for refusal to certify an application for registration. The Office of Public and Professional Guardians may find it necessary to deviate from the guidelines for the reasons stated in subsection (3) of this rule.

(2) Violations and Range of Penalties. In imposing discipline upon applicants and guardians, the Office of Public and Professional Guardians shall act in accordance with guidelines and shall impose a penalty within a range corresponding to the violations set forth in form DOEA/OPPG Form 003, Office of Public and Professional Guardians Disciplinary Guidelines (XXX 2016), incorporated herein by reference and available at https://www.flrules.org/XXXXXXX, unless the Office of Public and Professional Guardians finds it necessary to deviate from the guidelines for the stated reasons given in subsection (3) of this rule.

(3) The Office of Public and Professional Guardians shall take into consideration the danger to the public; the number of repetitions of offenses; the length of time since date of violation; the number of disciplinary actions taken against the guardian; the length of time the guardian has practiced; the actual damage, physical or otherwise, to the ward; the deterrent effect of the penalty imposed; any efforts for rehabilitation; and any other mitigating or aggravating circumstances in determining the appropriate disciplinary action to be imposed.

Rulemaking Authority 744.20041 F.S. Law Implemented 744.20041 F.S. History–New .

NAME OF PERSON ORIGINATING PROPOSED RULE: Jason Nelson
NAME OF AGENCY HEAD WHO APPROVED THE PROPOSED RULE: Jeffrey Bragg
DATE PROPOSED RULE APPROVED BY AGENCY HEAD: October 12, 2016
DATE NOTICE OF PROPOSED RULE DEVELOPMENT PUBLISHED IN FAR: August 1, 2016

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

Date	Location
July 28 – 31, 2016	~~**Executive Council Meeting & Legislative Update**~~ ~~The Breakers~~ ~~Palm Beach, Florida~~ ~~Room Rate: $218 – SOLD OUT – email Ria Eck at the Breakers to be added to the waitlist for this event @ Ria.Eck@thebreakers.com.~~
October 5 – 9, 2016	~~**Executive Council Meeting**~~ ~~The Walt Disney World BoardWalk Inn~~ ~~Lake Buena Vista, FL~~ ~~Room Rate: $249 (single/double occupancy) – SOLD OUT*~~ ~~(Alternate hotels within an easy walk/boat ride from the BoardWalk: Disney Swan, Disney Dolphin, Disney Yacht Club, Disney Beach Club)~~
December 7 – 11, 2016	~~**Executive Council Meeting**~~ ~~The Westin Resort and Marina~~ ~~Key West, FL~~ ~~Reservation~~ ~~Link: https://www.starwoodmeeting.com/events/start.action?id=1510057567&key=1AFAC12C~~ ~~Room Rate: $279 (single/double occupancy) – SOLD OUT*~~
February 22 – 25, 2017	**Out of State Executive Council Meeting** Four Seasons Hotel Austin, TX Reservation Link: http://www.fourseasons.com/austin/ Room Rate: $299 (single/double occupancy)
May 31 – June 4 , 2017	**Executive Council Meeting & Convention** Hyatt Regency Coconut Point Resort & Spa Bonita Springs, FL Reservation Link: https://resweb.passkey.com/go/flbar2017 Room Rate: $209 (single/double occupancy)

* To be added to the waitlist for this event, please email Whitney Kirk @ wkirk@floridabar.org to be added to the waitlist. Be sure to include the nights needing a reservation and your full contact information in the email.

RPPTL 2017 - 2018
Executive Council Meeting Schedule
Andrew O'Malley's Year

Limit 1 reservation per registrant, additional rooms will be approved upon special request. Each hotel has a 30 day cancellation policy on all individual room reservations.

Date	Location
July 27 – July 30, 2017	**Executive Council Meeting & Legislative Update** The Breakers Palm Beach, Florida Room Rate: $225 Room Block Link: https://resweb.passkey.com/go/FLABR17
October 11 – 15, 2017	**Out of State Meeting/ Executive Council/ Boston, MA** Fairmont Copley Plaza Boston, MA Guest Room Rate: $375 Signature Room Rate: $455* Fairmont Gold Rooms: $500* Fairmont Gold Signature Rooms & Junior Suites: $525* Fairmont Gold One Bedroom Suite: $775* Room Block Link: https://resweb.passkey.com/go/floridabarrrptl
December 7 – 10, 2017	**Executive Council & Committee Meetings** The Ritz-Carlton Naples, FL Room Rate: $285 Room Block Link: Not yet available
February 22 – 25, 2018	**Executive Council & Committee Meetings** Casa Monica Hotel St. Augustine, FL Room Rate: $269 Reservation Link: Not yet available
May 31 – June 3 , 2018	**Executive Council Meeting & Convention** Tradewinds Island Resort on St. Pete Beach St. Pete Beach, FL Room Rate: $249 Tropical View Hotel Room Rate: $269* Tropical View One Bedroom Suite: $319* Reservation Link: TBA

*Subject to availability

RPPTL Financial Summary from Separate Budgets

2016-2017 [July 1 - October 31] YEAR
TO DATE REPORT

General Budget		YTD
Revenue	$	863,433
Expenses	$	618,127
Net:	$	245,305

CLI		YTD
Revenue	$	6,900
Expenses	$	5,958
Net:	$	942

Trust Officer Conference

Revenue	$	5,205
Expenses	$	9,796
Net:	$	(4,591)

Legislative Update

Revenue	$	47,277
Expenses	$	89,340
Net:	$	(42,063)

Convention

Revenue	$	17
Expenses	$	13
Net:	$	4

Roll-up Summary (Total)

Revenue:	$	922,831
Expenses	$	723,234
Net Operations	$	199,597

Beginning Fund Balance:	$	1,477,974
Current Fund Balance (YTD):	$	1,677,570
Projected June 2017 Fund Balance	$	1,414,883

1 This report is based on the tentative unaudited detail statement of operations dated 10/31/16 (prepared on 11/22/16)

Date	Course Title	Course No.	Location
January 17, 2017	**Water Intrusion CLE – Video Webcast**	2274	Video Webcast
January 18, 2017	**FAR/BAR Part I**	TBA	Audio Webcast
January 26, 2017	**Representing a Buyer of a Parcel or Unit in a Mixed Used Project: Is Your Client Buying Air? Or, Oh My, What did I buy? (Part 1 of 2)**	2233	Audio Webcast
January 27-28, 2016	**Advanced Real Property Certification Review Course 2017**	2284	Rosen Shingle Creek
February 2, 2017	**Representing a Buyer of a Parcel or Unit in a Mixed Used Project: Is Your Client Buying Air? Or, Oh My, What did I buy? (Part 2 of 2)**	2217	Audio Webcast
February 15, 2017	**FAR BAR Part II**	TBA	Audio Webcast
March 3, 2017	**Trust and Estate Symposium**	2288	Fort Lauderdale
March 16-18, 2017	**Construction Law Institute**	2290	JW Orlando, Grand Lakes
March 16-18, 2017	**Construction Law Certification Review**	2291	JW Orlando, Grand Lakes
April 7, 2017	**Wills, Trusts and Estates Certification Review Course**	2300	Hyatt Airport Orlando
April 28, 2017	**Condo & Planned Development Law**	2312	Tampa- TBD
April 28, 2017	**Guardianship Seminar**	2300	St. Thomas University
June 2, 2017	**RPPTL Convention Seminar**	2317	Hyatt Coconut Point
August 24 -27, 2017	**ATO 2017**	2322	The Breakers

Proposed Budget 17-18
Real Property Probate Trust Law Section

Account	13-14 Actual	14-15 Actual	15-16 Actual	16-17 Budget	17-18 Proposed Budget
SUMMARY					
Beginning Fund Balance	$ 705,581	$ 892,279	$ 1,066,946	$ 1,477,972	$ 1,414,881
Net Operations *	295,710	296,747	141,554	(21,021)	5,285
Legislative Update	(20,345)	(26,855)	28,094	(45,400)	(50,045)
Convention	(75,192)	(100,535)	(70,543)	(80,350)	(97,850)
Attorney Trust Officer	(13,486)	5,302	249,512	27,950	76,650
CLI**			62,409	106,230	69,830
Attorney Loan Officer					(10,575)
Special Projects***		0	0	(50,500)	(112,500)
Ending Fund Balance #	$ 892,279	$ 1,066,946	$ 1,477,972	$ 1,414,881	$ 1,295,676

** Net Operations other than Legis. Update, Convention, Attorney Trust Officer Conf. and CLI beginning in*
*** CLI was previously incuded in CLE roll up reflected in Net Operations from the General Tab until 2015-*
**** Special projects was previously in Net Operations from the General Tab until 2016-2017*
 # Includes small adjustments for rounding differences
@ The original budget adopted by the section was revised to accommodate the new process developed for charging administrative fees and TFB overhead.

Proposed Budget 17-18
Real Property Probate Trust Law Section

Account	13-14 Actual	14-15 Actual	15-16 Actual	16-17 Budget	17-18 Proposed Budget
RPPTL GENERAL SECTION BUDGET					
REVENUE					
31431 Dues	583,890	596,160	600,600	597,000	597,000
31432 Affiliate Dues	4,920	4,400	6,020	4,400	4,400
31433 Mgmt Fee-Retained TFB	(172,483)	(175,472)	(205,751)	(205,943)	(203,715)
31435 Admin Fee Adj	0	0	0	0	0
32191 CLE Courses	285,778	372,413	352,654	119,800	210,000
32293 Section Differential	29,963	25,945	25,100	30,000	25,000
34704 Actionline Advertisi	17,445	20,154	10,404	20,000	20,000
35003 Ticket Events	0	0	(165)	0	0
35201 Sponsorships	174,626	162,064	144,189	180,000	180,000
35603 Bd/Council Mtg Regis	190,036	183,184	172,434	190,000	170,000
38499 Investment Allocatio	80,661	(3,295)	(39,741)	25,172	22,000
Total Revenue	1,194,836	1,185,553	1,065,744	960,429	1,024,685
EXPENSES					
36998 Credit Card Fees	3,916	3,893	3,543	3,900	3,500
41201 Contract Salaries	0	0	0	0	0
51101 Employee Travel	11,164	7,841	11,246	8,000	12,000
71001 Telephone/Direct	1,103	1,101	1,367	1,200	1,400
71005 Internet Charges	174	58	0	150	0
81411 Promotional Printing	842	2	21	0	0
84001 Postage	278	874	2,061	1,500	2,000
84002 Printing	737	632	563	700	1,000
84006 Newsletter	59,914	58,557	70,432	64,000	70,000
84009 Supplies	603	683	118	700	700
84010 Photocopying	64	265	163	300	300
84015 Officers Conference	2,473	1,395	1,671	2,500	4,000
84016 Scrivener	0	5,000	0	5,000	5,000
84051 Officers Travel Expe	2,674	6,031	4,320	6,000	10,000
84054 CLE Speaker Expense	87	0	74	1,000	1,000
84061 Reception	3,444	0	0	0	0
84075 Sponsorship Exp.	0	400	0	0	0
84101 Committee Expenses	50,332	90,223	66,260	100,000	100,000
84102 Public Info & Websit	4,389	0	0	0	0
84106 Realtor Relations	2,150	4,150	1,650	4,000	4,000
84107 Diversity Initiative	3,273	2,991	3,265	12,000	12,000
84110 Exhibitor Fees	0	0	0	0	0
84111 At Large Member Event	2,171	6,188	8,094	3,000	5,000

FY 2015-16 is based on UNAUDITED information
General

Prepared on 11/15/2016

Proposed Budget 17-18
Real Property Probate Trust Law Section

Account	13-14 Actual	14-15 Actual	15-16 Actual	16-17 Budget	17-18 Proposed Budget
84112 At Large Member Meetings	0	0	0	5,000	5,000
84115 Entertainment	816	0	0	0	0
84201 Board Or Council Mee	499,470	462,896	517,631	505,000	510,000
84216 Strategic Planning	11,272	0	0	0	15,000
84239 Hospitality Suite	9,607	24,245	19,187	30,000	30,000
84279 Council Members Hand	1,820	2,124	1,772	3,500	3,500
84310 Law School Liaison	1,695	3,821	1,800	5,500	5,500
84322 Fellowships-Exc Cou	16,480	16,083	16,460	20,000	20,000
84330 Leadrshp Acad	3,359	2,970	4,743	7,000	7,000
84422 Website	51,551	31,734	49,344	50,000	50,000
84501 Legislative Consulta	110,000	110000	120,000	120,000	120,000
84503 Legislative Travel	13,776	12,679	10,983	15,000	15,000
84524 Memorial Tributes	0	33	0	500	500
84701 Council Of Sections	300	300	300	300	300
84991 Special Projects	0	0	3,000	0	0
84998 Operating Reserve	0	0	0	0	0
84999 Miscellaneous	15	15	1,145	0	0
85064 Service Recognition	5,075	5,727	2,974	5,700	5,700
86327 IT Sys Support	989	0	0	0	0
86431 Meetings Administrat	4,862	6,585	0	0	0
86543 Graphics & Art	16,610	19,298	0	0	0
88221 Speaker Workshops	0	0	0	0	0
88230 Speakers Expense	0	0	0	0	0
88239 Speakers Other Exp	1,552	0	0	0	0
88241 Outline Prt-Inhouse	14	12	0	0	0
88252 Course Credit Fee	75	0	0	0	0
Total Expenses	899,126	888,806	924,187	981,450	1,019,400
Net Total	295,710	296,747	141,557	(21,021)	5,285

FY 2015-16 is based on UNAUDITED information
General

Prepared on 11/15/2016

Proposed Budget 17-18
Real Property Probate Trust Law Section

Account	13-14 Actual	14-15 Actual	15-16 Actual	16-17 Budget	17-18 Proposed Budget
RPPTL - CONVENTION					
REVENUE					
32001 Registrations	58,304	45,773	33,617	55,000	40,000
35101 Exhibit Fees	5,000	7,875	5,850	10,000	10,000
35201 Sponsorships	900	0	0	10,000	10,000
36991 Allowances	0	0	0	0	0
Total Revenue	64,204	53,648	39,467	75,000	60,000
EXPENSES					
36998 Credit Card Fees	111	898	631	900	900
51101 Employee Travel	1,437	1,100	418	2,000	2,500
61201 Equipment Rental	20,108	33,480	10,067	21,000	21,000
84001 Postage	9	46	0	50	50
84002 Printing	193	403	389	400	400
84010 Photocopying	1	0	0	0	0
84061 Reception	26,824	0	0	0	0
84062 Luncheons	25,976	0	0	0	0
84069 Dinners	38,907	0	0	0	0
84075 Sponsorship Exp.	483	0	0	0	0
84115 Entertainment	6,090	5,557	219	8,000	8,000
84253 Sleeping Rooms	517	0	0	0	0
86543 Graphics & Art	0	2,125	0	0	0
88262 Meeting Meals	0	110,574	98,286	123,000	125,000
88263 Meeting Hospitality	2,975	0	0	0	0
88265 Refreshment Breaks	2,401	0	0	0	0
88269 Breakfast	13,364	0	0	0	0
Total Expenses	139,396	154,183	110,010	155,350	157,850
Net Total	(75,192)	(100,535)	(70,543)	(80,350)	(97,850)

FY 2015-16 is based on UNAUDITED information
Convention

Prepared on 11/15/2016

Proposed Budget 17-18
Real Property Probate Trust Law Section

Account	13-14 Actual	14-15 Actual	15-16 Actual	16-17 Budget	17-18 Proposed Budget
RPPTL - LEGISLATIVE UPDATE					
REVENUE					
32001 Registrations	0	0	0	0	0
32006 Live Web Cast	11,055	0	0	0	0
32010 Legal Span On-line	12,219	23,377	30,150	20,000	20,000
32205 Compact Disc	22,365	23,745	26,625	16,500	16,500
32207 DVD	2,000	3,875	11,250	4,000	4,000
32301 Course Materials	2,000	1,800	1,300	2,000	1,000
35101 Exhibit Fees	13,500	12,750	19,400	12,500	12,500
Total Revenue	63,139	65,547	88,725	55,000	54,000
EXPENSES					
36998 Credit Card Fees	614	477	850	700	700
51101 Employee Travel	2,012	954	2,474	2,000	2,200
61201 Equipment Rental	11,923	12,123	13,597	13,500	13,500
75102 1st Class & Misc Mai	36	8	17	50	50
75401 Express Mail	375	420	390	500	500
81411 Promotional Printing	0	0	0	50	50
81412 Promotional Mailing	0	0	0	0	0
84001 Postage	0	0	885	0	0
84002 Printing	33	0	4	0	0
84009 Supplies	0	0	0	150	150
84010 Photocopying	0	0	29	50	50
84012 Registration Support	0	5,112	4,000	5,200	5,200
84061 Reception	0	0	659	1,500	1,500
84062 Luncheons	25,698	31,622	0	31,500	31,500
84253 Sleeping Rooms	(2,058)	0	0	0	0
84254 Speaker Gifts	3,346	1,320	1,514	2,500	2,500
84258 Web Services	3,095	0	1,495	0	1,495
84999 Miscellaneous	250	474	0	0	500
86001 Gen. Admin. Overhead	0	0	0	1,000	1,000
86432 Time Taping Editing	2,621	3,120	3,120	4,000	4,000
86532 Advertising News	0	1,249	824	1,500	1,600
86543 Graphics & Art	766	1,079	0	0	0
86623 Registrars	5,258	1,188	0	0	0
88230 Speakers Expense	0	0	0	0	0
88231 Speakers Travel	229	326	252	0	500
88233 Speakers Hotel	2,299	1,853	1,407	2,000	2,000
88239 Speakers Other Exp	125	265	51	250	100
88241 Outline Prt-Inhouse	0	0	0	300	300

FY 2015-16 is based on UNAUDITED information
Legislative

Prepared on 11/15/2016

88242 Outline Prt-Contract	9,400	9,546	10,774	10,000	11,000
88252 Course Credit Fee	150	0	300	150	150
88265 Refreshment Breaks	9,867	11,577	10,528	13,000	13,000
88269 Breakfast	6,766	9,059	6,698	10,500	10,500
88281 A/V Ctr Dup/Prod	679	630	763	0	0
Total Expense	83,484	92,402	60,631	100,400	104,045
Net Total	(20,345)	(26,855)	28,094	(45,400)	(50,045)

Account	13-14 Actual	14-15 Actual	15-16 Actual	16-17 Budget	17-18 Proposed Budget
RPPTL ATTORNEY TRUST OFFICER LIASON CONFERENCE					
REVENUE					
32001 Registrations	134,928	0	314,985	160,700	160,700
32010 Legal Span On-line	0	2,399	1,186	0	0
32205 Compact Disc	3,465	2,605	7,040	3,000	3,000
32207 DVD	985	1,010	1,485	0	0
32301 Course Materials	1,260	120	840	1,000	1,000
35003 Ticket Events	10,359	94	32,032	10,000	10,000
35101 Exhibit Fees	29,850	0	115,900	30,000	60,000
35201 Sponsorships	52,250	0	138,100	50,000	60,000
39342 Sec Over Cap-Serv Pr	0	0	0	0	0
Total Revenue	233,097	6,228	611,568	254,700	294,700
EXPENSES					
36998 Credit Card Fees	2,599	93	7,955	2,750	2,750
41201 Contract Salaries	162	0	414	0	0
51101 Employee Travel	2,271	339	3,058	2,000	2,000
61201 Equipment Rental	17,457	0	32,798	15,000	17,000
75102 1st Class & Misc Mai	0	3	14	0	0
75401 Express Mail	206	34	290	150	150
81411 Promo Printing	0	0	119	1,000	1,000
81412 Promotional Mailing	14	0	0	0	0
84001 Postage	0	0	0	0	0
84002 Printing	0	0	0	0	0
84009 Supplies	0	0	0	0	0
84061 Reception	0	0	0	0	0
84062 Luncheons	0	0	0	0	0
84064 Golf Tourn Expenses	0	0	16,810	8,000	8,000
84999 Miscellaneous	0	0	75	0	0
86432 Time Taping Editing	8,401	0	3,900	10,000	5,000
86532 Advertising News	1,249	0	1,648	1,600	1,600
86543 Graphics & Art	906	0	0	0	0
86623 Registrars	4,059	132	0	0	0
88230 Speakers Expense	0	0	0	0	0
88231 Speakers Travel	4,099	0	1,100	4,000	4,000
88232 Speakers Meals	42	0	0	1,100	1,100
88233 Speakers Hotel	5,560	0	2,526	3,000	3,000
88234 Speaker Honorarium	5,000	0	0	0	0
88239 Speakers Other Exp	216	0	159	0	0
88241 Outline Prt-Inhouse	1,910	0	7,562	2,000	2,000

Proposed Budget 17-18
Real Property Probate Trust Law Section

Account	13-14 Actual	14-15 Actual	15-16 Actual	16-17 Budget	17-18 Proposed Budget
88242 Outline Prt - Contract	2,270	0	404	2,500	2,500
88252 Course Credit Fee	425	325	795	750	750
88260 Meeting Parking	0	0	15	0	0
88262 Meeting Meals	79,909	0	64,886	32,000	32,000
88263 Meeting Hospitality	109,619	0	127,395	85,000	85,000
88265 Refreshment Breaks	0	0	23,169	21,000	15,000
88269 Breakfast	0	0	13,331	27,000	10,000
88281 A/V Ctr Dup/Prod	210	0	280	200	200
89999 Other Operating Exp	0	0	3,353	0	0
86001 Admin. Expenses (All Inclusive)	0	0	50,000	7,700	25,000
Total Expense	246,583	926	362,056	226,750	218,050
Net Total	(13,486)	5,302	249,512	27,950	76,650

FY 2015-16 is based on UNAUDITED information
Attorney Trust Officer Conference

Prepared on 11/15/2016

Account	15-16 Actual	16-17 Budget	17-18 Proposed Budget
RPPTL - CONSTRUCTION LAW INSTITUTE			
REVENUE			
31436 Course Section Diff	(1,740)	0	0
32001 Registrations	67,746	94,300	70,000
32205 Compact Disc	3,510	9,850	4,000
32301 Course Materials	480	950	500
35003 Ticket Events	2,535	1,300	1,300
35201 Sponsorships	175,110	150,000	170,000
39999 Miscellaneous	0	800	800
Total Revenue	247,641	257,200	246,600
EXPENSES			
36998 Credit Card Fees	2,804	2,500	2,500
41201 Contract Salaries	0	0	0
51101 Employee Travel	1,119	1,350	1,350
61201 Equipment Rental	32,093	7,500	7,500
75102 1st Class & Misc Mai	5	25	25
75401 Express Mail	28	45	45
84064 Golf Tourn Expenses	14,262	12,400	12,400
84252 A/V Equipment & Tech.	0	16,200	16,200
84999 Miscellaneous	169	0	0
86001 Administrative Exp	23,650	18,500	25,000
86432 Time Taping Editing	3,315	2,350	2,350
86532 Advertising News	1,249	1,650	1,650
88231 Speakers Travel	3,792	4,000	4,000
88232 Speakers Meals	797	900	900
88233 Speakers Hotel	7,163	6,000	6,000
88234 Speaker Honorarium	0	1,500	1,500
88239 Speakers Other Exp	384	1,000	1,000
88241 Outline Prt-Inhouse	1,551	850	850
88252 Course Credit Fee	150	150	150
88262 Meeting Meals	34,161	35,000	35,000
88263 Meeting Hospitality	42,797	25,000	43,000
88265 Refreshment Breaks	13,063	11,200	12,500
88281 A/V Ctr Dup/Prod	105	250	250
8999 Other Operating Exp.	2,575	2,600	2,600
Total Expense	185,232	150,970	176,770
Net Totals	62,409	106,230	69,830

Account	17-18 Proposed Budget
RPPTL ATTORNEY LOAN OFFICER LIASON CONFERENCE	
REVENUE	
32001 Registrations	17,500
32010 Legal Span On-line	0
32205 Compact Disc	0
32207 DVD	0
32301 Course Materials	0
35003 Ticket Events	0
35101 Exhibit Fees	4,000
35201 Sponsorships	5,000
39342 Sec Over Cap-Serv Pr	0
Total Revenue	26,500
EXPENSES	
36998 Credit Card Fees	500
41201 Contract Salaries	0
51101 Employee Travel	700
61201 Equipment Rental	2,000
75102 1st Class & Misc Mai	0
75401 Express Mail	0
81411 Promo Printing	0
81412 Promotional Mailing	0
84001 Postage	0
84002 Printing	0
84009 Supplies	0
84061 Reception	0
84062 Luncheons	0
84064 Golf Tourn Expenses	0
84999 Miscellaneous	0
86432 Time Taping Editing	0
86532 Advertising News	0
86543 Graphics & Art	0
86623 Registrars	0
88230 Speakers Expense	2,000
88231 Speakers Travel	0
88232 Speakers Meals	0
88233 Speakers Hotel	0
88234 Speaker Honorarium	0
88239 Speakers Other Exp	0
88241 Outline Prt-Inhouse	0
88242 Outline Prt - Contract	0

Proposed Budget 17-18
Real Property Probate Trust Law Section

Account	17-18 Proposed Budget
88252 Course Credit Fee	150
88260 Meeting Parking	0
88262 Meeting Meals	23,000
88263 Meeting Hospitality	0
88265 Refreshment Breaks	0
88269 Breakfast	0
88281 A/V Ctr Dup/Prod	0
89999 Other Operating Exp	3,725
86001 Admin. Expenses (All Inclusive)	5,000
Total Expense	37,075
Net Total	(10,575)

FY 2015-16 is based on UNAUDITED information
Attorney Loan Officer

Prepared on 11/15/2016

Proposed Budget 17-18
Real Property Probate Trust Law Section

Account	13-14 Actual	14-15 Actual	15-16 Actual	16-17 Budget	17-18 Proposed Budget
RPPTL SPECIAL PROJECTS					
EXPENSES					
84102 Public Info & Website		0	0	24,000	2,500
84259 IP Issues			0	5,000	5,000
84265 Marketing Consulting Svcs			0	10,000	10,000
No Place Like Home Project					10,000
Special Projects (Technical and Operating)					75,000
84999 Miscellaneous			0	11,500	10,000
Total Expense	0	0	0	50,500	112,500

The 84102 Public Info. & Website was previously in the General Section Budget, historical information presented here has been deleted from calculations to avoid duplication.

$3,500.00 IS AVAILABLE TO 2 RPPTL SECTION MEMBERS!

Interested in participating in The Florida Bar Wm. Reece Smith, Jr. Leadership Academy? Two RPPTL Section scholarships cover out of pocket travel and hotel expenses incurred in attending the Leadership Academy up to $3,500.00.

WHAT IS THIS? The Florida Bar is accepting applications for the 2017 Leadership Academy, a one-year multi-session training program designed to assist a diverse and inclusive group of lawyers in becoming better leaders within our profession while enhancing their leadership skills.

HOW DOES IT WORK? In support of the Leadership Academy, the RPPTL Section will select up to 2 active contributing members of a RPPTL Section Committee, to apply to the Leadership Academy as the Section's scholarship nominee. If a RPPTL Section nominee is chosen as an Academy Fellow, the Section will reimburse the participant up to $3,500 for out of pocket travel and hotel expenses incurred in attending the Leadership Academy. To receive the scholarship, the nominee(s) if chosen by The Florida Bar as a Leadership Academy Fellow must agree to remain actively involved in the RPPTL Section after the conclusion of the Leadership Academy.

TIMING? 2017 Leadership Academy applications will be available from The Florida Bar on Thursday, December 1, 2016. **To be eligible for the RPPTL Section scholarship(s), potential applicants must submit a COPY of their Leadership Academy application to rpptlapplications@gmail.com by Thursday, December 15, 2016 (with a copy to** kfernandez@kfernandezlaw.com**).** The RPPTL Section Leadership Academy Committee will review the applications and then inform the nominee(s) of their selection for the potential scholarship. The nominee(s) must still submit the completed application to The Florida Bar by Friday, January 13, 2017, for consideration by The Florida Bar Leadership Academy Committee.

A full explanation of the Florida Bar Wm. Reece Smith, Jr. Leadership Academy, is available on the Florida Bar's website at http://www.floridabar.org/leadershipacademy.

If you have any questions regarding the RPPTL Section scholarships for The Florida Bar Wm. Reece Smith, Jr. Leadership Academy, please contact Kristopher Fernandez, (813) 832-6340, kfernandez@kfernandezlaw.com or Brian Sparks, (813) 222-8515, brian.sparks@hwhlaw.com.

DEBORAH GOODALL
Chair, Real Property, Probate & Trust Law Section

The Wm. Reece Smith, Jr. Leadership Academy is a multi-session training program designed to assist a diverse and inclusive group of lawyers in becoming better leaders within our profession, in their chosen path, while enhancing their leadership skills. Each year a select group of participants are selected from applications submitted to the Bar to become Academy Fellows.

During their one year term, Academy Fellows follow a curriculum tailored to enhance their professional development, knowledge base and experience, including attending Bar events and special educational programs. Academy Fellows are given the opportunity to learn more about the inner workings of the Bar and their role in the legal profession, while enhancing their personal leadership skills. The Academy's Mission is to identify, nurture and inspire effective leadership within the Bar and the legal community.

Apply

2017-2018 Leadership Academy Applications will be available December 1, 2016. Applications must be submitted by January 13, 2017.

Mission and Goals of the Wm. Reece Smith, Jr. Leadership Academy

The mission of the Academy is to enhance the skills of a diverse and inclusive group of lawyers selected from across the state that will enable them to become effective leaders throughout the Bar, our profession and the greater community.

The Goals of the Academy include:

- To enhance leadership skills of a diverse and inclusive group of lawyers;
- To identify, nurture and inspire effective leadership within the Bar and the legal community;
- To enhance the diversity of leaders within the Bar;
- To raise the level of awareness and engagement among lawyers regarding issues facing the legal profession through the study of ethical, professional and public service issues.

Becoming A Fellow:

Who Should Apply?

Applications to become a Fellow of the Academy are open to all bar members who are in good standing. Applicants with some history of leadership or involvement within the Bar, their community, offices, and/or the legal profession are encouraged to apply.

Voluntary and specialty bar associations, Bar sections and divisions, members of the judiciary, law firms, and bar members are also encouraged to nominate Fellows to the Academy.

Why Should I Apply?

As a Fellow you will be part of a select group of leaders who are provided the opportunity to:

1. Develop and enhance leadership skills important to your future in the legal profession.
2. Network , interact, collaborate, and build relationships with state and national bar leaders.
3. Get an insider's look at important role the Bar plays within our legal system, while exploring your role in the legal profession.

What Should I Know Before I Apply?

Attendance and Commitment Policy: Participation in the Academy as a Fellow requires a commitment of time and resources. Meetings typically will be held on Friday afternoon through Saturday afternoon at various locations. Attendance at meetings is mandatory and Fellows may be dropped from the program for non attendance. Fellows who complete the program will graduate and receive CLE for their participation.

The Academy meets approximately every other month for a total of six meetings, plus graduation. These meetings include meeting during the Bar's Annual Convention in June, the September Fall meeting, and the January meeting of the Board of Governors in Tallahassee. The three other meetings are at various locations around the state. At the conclusion of the program, Fellows will participate in graduation at the Bar's Annual Convention. While there is no tuition fee to attend the Academy, Fellows will be responsible for their travel expenses and accommodations while at meetings. Full and partial scholarships are available for those with financial need.

When Should I Apply?

2017-2018 Leadership Academy Applications will be available December 1, 2016. Applications must be submitted by January 13, 2017.

Why Should My Employer Support My Application?

Fellows need to obtain the approval of their employers to participate in the Academy given the commitment required. With the invaluable leadership skills Fellows will learn from state and national bar leaders, employers can be assured that the business development possibilities and state wide networking opportunities are limitless for Fellows.

Scholarship Opportunities

Scholarships for travel and accommodations are offered to Fellows on the basis of financial need. To be considered for scholarship from the Bar, applicants should fill out the Financial Need Statement on the application. Selection of Fellows is determined without consideration of financial need or scholarship interest.

Additionally, some sections and divisions, and other associations will offer scholarship opportunities to their members to participate in the Academy. Inquiry regarding those scholarship opportunities should be directed to those entities.

Smith v. Smith

Amicus

IN THE SUPREME COURT OF FLORIDA

Case No. SC16-1312
L.T. Case No. 4D14-1436

Glenda Martinez Smith,
petitioner,

v.

J. Alan Smith,
respondent.

ON DISCRETIONARY REVIEW FROM THE
DISTRICT COURT OF APPEAL OF FLORIDA, FOURTH DISTRICT

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

GOLDMAN, FELCOSKI & STONE, P.A
Robert W. Goldman
Florida Bar No. 339180
rgoldman@gfsestatelaw.com
The 745 Building
745 12th Avenue South, Suite 101
Naples, FL 34102
239-436-1988

GUNSTER
Kenneth B. Bell
Florida Bar No. 347035
kbell@gunster.com
John W. Little, III
Florida Bar No. 384798
jlittle@gunster.com
777 S. Flagler Drive Suite 500E
West Palm Beach, FL 33401
561-650-0701

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

IDENTITY AND INTEREST

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

Pursuant to RPPTL Section bylaws, the Executive Committee of the RPPTL Section voted unanimously to appear in this case if permitted by the Court. The Florida Bar approved the Section's involvement in this case. [2]

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[1] For example, see *Jones v. Golden*, 176 So. 3d 242 (Fla. 2015); *North Carillon, LLC, v. CRC 603, LLC,* 135 So. 3d 274 (Fla. 2014); *Aldrich v. Basile*, 136 So. 3d 530 (Fla. 2014); *Chames v. DeMayo*, 972 So. 2d 850 (Fla. 2007); *McKean v. Warburton,* 919 So. 2d 341 (Fla. 2005); *May v. Illinois Nat. Ins. Co.*, 771 So. 2d 1143 (Fla. 2000); *Friedberg v. SunBank/Miami*, 648 So. 2d 204 (Fla. 3d DCA 1994).

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

Kenneth B. Bell, Gerald B. Cope, Jr., Robert W. Goldman, and John W. Little III, are the four co-chairs of the amicus committee of the RPPTL Section, which is charged with preparing amicus briefs for the RPPTL Section. We are careful to keep lawyers involved with the litigants or other *amicus curiae* away from our process of analyzing, debating and writing briefs of the RPPTL Section. Mr. Cope and his firm have not participated in this matter due to a conflict.

The RPPTL Section's interest in the issue before the Court stems from the need to have this important fundamental guardianship question properly resolved for the benefit of guardianship practitioners and Florida citizens in general.

SUMMARY OF ARGUMENT

The district court of appeal certified the following question as one of great public importance:

> Where the fundamental right to marry has not been removed from a ward under section 744.3215(2)(a), Florida Statutes, does the statute require the ward to obtain approval from the court prior to exercising the right to marry, without which approval the marriage is absolutely void, or does such failure render the marriage voidable, as court approval could be conferred after the marriage?

Smith v. Smith, ---So. 3d ---, 2016 WL 3540953 (Fla. 4th DCA, June 29, 2016).

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membership dues paid by Florida Bar licensees. The Florida Bar approved our filing of this brief.

The certified question challenges the Court to harmonize, if possible, the state's parenting role (for those incapable of protecting themselves) with an incapacitated citizen's fundamental right to marry. As the Court searches for the correct policy and answer to the certified question, we offer the cautionary words from the same court that certified the question:

> In our present day paternalistic society we must take care that in our zeal for protecting those who cannot protect themselves we do not unnecessarily deprive them of some rather precious individual rights.

In re McDonnell, 266 So. 2d 87, 88 (Fla. 4th DCA 1972); *Adelman v. Elfenbein,* 174 So. 3d 516, 518-19 (Fla. 4th DCA 2015).

The state's *parens patriae* role in this case is limited to protecting a ward whose general right to contract was removed by the circuit court, but whose right to marry was retained by the ward. Under that limited circumstance, the state statute requires (albeit in a poorly drafted sentence) that the ward's marriage be approved by the circuit court. §744.3215(2) (a), Fla. Stat. That statute, however, does not specify when that approval has to occur.

This statutory ambiguity should be interpreted to allow the circuit court to approve the marriage before or after the marriage has occurred. First, such a construction is consistent with legislative intent to make the least restrictive form of guardianship available. *See* Section 744.1012, Florida Statutes. Interpreting section 744.3215(2) (a) to allow circuit court approval of the marriage before ***or***

after the marriage has occurred is most consistent with this intent. Second, this interpretation allows the Court to uphold the statute's constitutionality. *See Miami Dolphins LTD., v. Metropolitan Dade County*, 394 So. 2d 981, 988 (Fla. 1981) ("Given that an interpretation upholding the constitutionality of the act is available to this Court, it must adopt that construction."). Finally, and most determinative, this interpretation of section 744.3215(2)(a) is the least restrictive on a ward's fundamental right to marry. *See Obergefell v. Hodges*, 576 U.S. ---,135 S.Ct. 2584 (2015) (right to marry is fundamental personal right); *Loving v. Virginia,* 388 U.S. 1 (1967) ("Marriage is one of the 'basic civil rights of man,' fundamental to our very existence and survival."); *See City of Mobile v. Bolden*, 446 U.S. 55 (1980) (state's infringement on a fundamental right must be by least restrictive means).

ARGUMENT

I. STANDARD OF REVIEW

The question certified to this Court requires that it construe section 744.3215 (2) (a), Florida Statutes. To our knowledge as an *amicus*, there are no issues of fact presented on discretionary review. Therefore, the Court will apply the *de novo* standard of review to the decision below. *Citizens Property Ins. Corp. v. Perdido Sun Condomininium Ass'n*, 164 So. 3d 663, 666 (Fla. 2015) ("As the issue

presented involves a question of statutory construction, this Court's review is de novo.").

II. THE APPLICABLE GUARDIANSHIP LAW AND CERTIFIED QUESTION

Section 744.3215, Florida Statutes, provides a checklist of rights that courts employ to adjudicate the extent to which a ward is incapacitated. Rights removed can be restored to a ward under certain circumstances. Section 744.3215 (2) (a), Florida Statutes, provides:

> (2) Rights that may be removed from a person by an order determining incapacity but not delegated to a guardian include the right:
> (a) To marry. If the right to enter into a contract has been removed, the right to marry is subject to court approval.

The statute is silent as to whether court approval of the marriage must occur prior to the marriage.

All aspects of the Florida Guardianship Law (§744.101, Fla. Stat.) are to be read and interpreted in accordance with section 744.1012, Florida Statutes. There, the Legislature expressly states the intent underlying the Florida Guardianship Law. Section 744.1012 provides, in pertinent part:

> The Legislature finds that:
>
> (1) Adjudicating a person totally incapacitated and in need of a guardian deprives such person of all her or his civil and legal rights and that such deprivation may be unnecessary.

> (2) *It is desirable to make available the least restrictive form of guardianship to assist persons who are only partially incapable of caring for their needs* and that alternatives to guardianship and less restrictive means of assistance, including, but not limited to, guardian advocates, be explored before a plenary guardian is appointed.
>
> (3) By recognizing that every individual has unique needs and differing abilities, *it is the purpose of this act to promote the public welfare by establishing a system that permits incapacitated persons to participate as fully as possible in all decisions affecting them*; that assists such persons in meeting the essential requirements for their physical health and safety, *in protecting their rights*, in managing their financial resources, and in developing or regaining their abilities to the maximum extent possible; *and that accomplishes these objectives through providing, in each case, the form of assistance that least interferes with the legal capacity of a person to act in her or his own behalf. This act shall be liberally construed to accomplish this purpose.*

(Emphasis supplied).

Faced with a scenario in which a ward did not have the right to contract, but retained the right to marry, and married before asking the court for permission, the district court of appeal certified the following question of great public importance:

> Where the fundamental right to marry has not been removed from a ward under section 744.3215(2)(a), Florida Statutes, does the statute require the ward to obtain approval from the court prior to exercising the right to marry, without which approval the marriage is absolutely void, or does such failure render the marriage voidable, as court approval could be conferred after the marriage?

Smith v. Smith, ---So. 3d ---, 2016 WL 3540953 (Fla. 4th DCA, June 29, 2016).

III. STATUTORY CONSTRUCTION

Section 744.3215(2) (a) does not answer the district court of appeal's question and, in that regard, is ambiguous and mandates statutory construction.

See Greenfield v. Daniels, 51 So. 3d 421, 425 (Fla. 2010) (" 'If, however, the language of the [statute] is ambiguous and capable of different meanings, this Court will apply established principles of statutory construction to resolve the ambiguity.' ").

The expression of legislative intent in section 744.1012 resolves any ambiguity in section 744.3215(2) (a).[3] It emphasizes that the ward's exercise of the ward's individual rights is paramount and should be intruded upon as little as possible; and, it dictates that all provisions of the Florida Guardianship Law should be liberally interpreted to achieve that end. §744.1012, Fla. Stat. (2016).[4] Further, when prior court approval of an action under the Florida Guardianship law is intended, the statutes say so very clearly. See, for example section 744.441, Florida Statutes ("after obtaining approval of the court..."). To be consistent with legislative intent, the circuit court should be able to grant or deny approval of the ward's marriage even after it occurs.

As more fully explained below, this interpretation also has the advantage of being more protective of the ward's fundamental right to marry than an interpretation restricting a ward to obtaining approval of his or her marriage *prior*

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[3] The limited legislative history only begs the question posed by the court---and does not answer it. *See* Appendix to Amicus Brief.

[4] This statement of intent was expressed in the predecessor version of this same statute. *See* §744.1012 (1997); 97-102, §1067, Laws of Fla.

to marrying. *See Miami Dolphins LTD., v. Metropolitan Dade County*, 394 So. 2d 981, 988 (Fla. 1981) ("Given that an interpretation upholding the constitutionality of the act is available to this Court, it must adopt that construction.").

IV. THE FUNDAMENTAL RIGHT TO MARRY

That marriage is a core liberty interest of all U.S. citizens, protected by the United States Constitution, is unassailable. Against state action to regulate interracial marriages, marriage by fathers behind on child support, prisoners who wish to marry, and same sex marriages, the United States Supreme Court has not wavered on the fundamental nature of the right to marry. *Loving v. Virginia,* 388 U.S. 1 (1967); *Zablocki v. Redhail,* 434 U.S. 374 (1978); *Turner v. Safley,* 482 U.S. 78 (1987); and *Obergefell v. Hodges*, 576 U.S. ---,135 S.Ct. 2584 (2015). This fundamental liberty interest is protected by the due process clause of the Fourteenth Amendment oftentimes in concert with equal protection. *See Obergefell*, 135 S.Ct. at 2602-03. Further, the decision or choice to marry has been protected as a privacy right. *See Zablocki,* 434 U.S. at 384; *Carey v. Population Services International*, 431 U.S. 678, 684-85 (1977).[5]

[5] Florida's right to privacy in article I, section 23, Florida Constitution may offer even greater protection of one's privacy interests than the United States Constitution. *City of North Miami v. Kurtz*, 653 So. 2d 1025 (Fla. 1995). Further the right to privacy is a right retained by all wards in Florida. §744.3215(1)(o), Fla. Stat. To be sure, in a plenary guardianship, the expectation of privacy in deciding

V. RESTRICTIONS ON FUNDAMENTAL RIGHTS

State action restricting the exercise of an individual's fundamental right, as we have here, must be based on a compelling state interest that is tailored to be least restrictive on the fundamental right on which the state is intruding. Under this exacting test, the state's intrusion on a fundamental right is presumptively unconstitutional. *See North Florida Women's Health and Counseling Services v. State*, 866 So. 2d 612, 625-26 (Fla. 2003); *City of Mobile v. Bolden*, 446 U.S. 55, 76 (1980).

The RPPTL Section believes that the least restrictive intrusion on the ward's fundamental right to marry mandates an interpretation of section 744.3215, Florida Statutes, that allows a court to approve or disapprove a marriage before *or after* it occurs.[6]

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to marry may not exist, but under the scenario posited by the district court of appeal, that expectation might be legitimately expected by a ward who has retained the right to marry.

[6] The hearing process for determining whether approval of a marriage will be granted or denied is not at issue here but obviously that process must also satisfy the due process standards inherent when a court addresses and perhaps intrudes on the fundamental right to marry. *See Guardianship of O'Brien*, 847 N.W.2d 710 (Ct. App. Minn. 2014).

CONCLUSION

In order to bring clarity to the fundamental issue presented by this case, and to preserve the constitutionality of section 744.3215 (2) (a), Florida Statutes, we respectfully suggest that the holding of this Court be as follows:

> The approval of a ward's marriage required by section 744.3215(2) (a), Florida Statutes, may be granted or denied before or after the ward's marriage.

Respectfully submitted,

/s/ Robert W. Goldman
GOLDMAN, FELCOSKI & STONE, P.A

Robert W. Goldman
Florida Bar No. 339180
rgoldman@gfsestatelaw.com
The 745 Building
745 12th Avenue South, Suite 101
Naples, FL 34102
239-436-1988

and

GUNSTER
Kenneth B. Bell
Florida Bar No. 347035
kbell@gunster.com
John W. Little, III
Florida Bar No. 384798
jlittle@gunster.com
777 S. Flagler Drive, Suite 500E
West Palm Beach, FL 33401
561-650-0701

CERTIFICATE OF SERVICE

I CERTIFY that a copy of this motion was served through the Florida E-Portal this 28th day of September, 2016, on Jennifer S. Carroll, Counsel for Petitioner, jc@lojscarroll.com; Lynne K. Hennessey, lkhpa@bellsouth.net; and Alan Fishman, ASF@afishmanlaw.com; Ellen S. Morris, Chair of Elder Law Section, emorris@elderlawassociates.com; Cary L. Moss, cmoss@sawyerandsawyerpa.com; and Gerald L. Hemness, Gerald@hemnesslaw.com.

/s/ Robert W. Goldman, FBN 39180

CERTIFICATE OF FONT COMPLIANCE

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

/s/ Robert W. Goldman, FBN339180

IN THE SUPREME COURT OF FLORIDA

Case No. SC16-1312
L.T. Case No. 4D14-1436

Glenda Martinez Smith,
petitioner,

v.

J. Alan Smith,
respondent.

ON DISCRETIONARY REVIEW FROM THE
DISTRICT COURT OF APPEAL OF FLORIDA, FOURTH DISTRICT

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

APPENDIX

Index

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 457 Guardianship
SPONSOR(S): Sands
TIED BILLS: HB 459 **IDEN./SIM. BILLS:** CS/SB 472

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1) Future of Florida's Families Committee		Preston	Collins
2) Civil Justice Committee			
3) Judiciary Appropriations Committee			
4) Health & Families Council			
5)			

SUMMARY ANALYSIS

HB 457 incorporates the recommendations of the 2003 Guardianship Task Force, the Florida State Guardianship Association, the Statewide Public Guardianship Office, and the State Long-term Care Ombudsman Program within the Department of Elder Affairs (DOEA). Provisions of the bill address:

- Creating definitions for the terms "audit" and "surrogate guardian," and amending the definition of the term "professional guardian."
- Increasing the dollar threshold required for a court to appoint a guardian ad litem to review a settlement from $15,000 to $50,000 when the settlement involves a minor.
- Creating new reporting requirements related to the appointment of emergency temporary guardians.
- Creating new requirements related to investigations of credit history and background screening for guardians, including background investigations using inkless electronic fingerprints instead of fingerprint cards.
- Decreasing the amount of time during which a guardian must complete the required instruction and education from 1 year to 4 months.
- Emphasizing the importance of an incapacitated person's right to quality of life, clarifying which rights cannot be delegated, reinforcing the significance of the right to marry, and subjecting the right to marry to court approval.
- Creating new restrictions and requirements relating to the appointment of an attorney for an alleged incapacitated person and providing for new requirements for members of examining committees.
- Creating requirements for additional information that must be included in an annual guardianship plan.
- Creating additional requirements relating to proof of payment for expenditures and disbursements made on behalf of a ward.
- Providing clerks of court with the authority to audit simplified and final accountings.
- Creating a new section of law related to the appointment of surrogate guardians.

The bill allows for the imposition of a surcharge on non-criminal traffic infractions and certain criminal violations to fund a county's participation in the public guardianship program. The surcharge must be approved by either a vote of two-thirds of the board of county commissioners or a referendum approved by the county's electors. The bill also provides for an $18 surcharge to be added to the fine for all misdemeanors; $15 of which would be used to fund public guardianship programs, with the remaining $3 to be retained by the clerks of the court as a service fee.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. HOUSE PRINCIPLES ANALYSIS:

Provide limited government – The bill increases requirements and duties for a number of entities, including guardians, the clerks of court, and the Statewide Public Guardianship Office, with the goal of reducing risk to those being served through the guardianship process. The bill also requires the Statewide Public Guardianship Office to adopt a rule related to acceptable methods for completing credit investigations. The Florida Department of Law Enforcement must adopt a rule to establish procedures for the retention of guardian fingerprints and dissemination of search results of all arrest fingerprint cards.

Ensure lower taxes – The bill allows the imposition of a surcharge on non-criminal traffic infractions and some criminal violations to fund a county's public guardianship program. The surcharge must be approved by either a vote of two-thirds of the board of county commissioners or a referendum approved by the county's electors. The bill also provides for an additional surcharge on the fine for all misdemeanors; a portion of which would be used to fund public guardianship programs, with the remaining portion being retained by the clerks of court as a service fee.

Safeguard individual liberty – The bill contains provisions designed to reduce risk to wards and ensure that they are better served by the guardianship process.

Empower families – The bill has the potential to increase the number of individuals able to access the services of a public guardian.

B. EFFECT OF PROPOSED CHANGES:

Guardianship and Public Guardianship

Guardianship is the process designed to protect and exercise the legal rights of individuals with functional limitations that prevent them from being able to make their own decisions when they have not otherwise planned in advance for such a loss of capacity. Those individuals in need of guardianship may have dementia, Alzheimer's disease, a developmental disability, chronic mental illness or other such conditions that may limit function. In such instances, a guardian may be appointed by the court to manage some or all the affairs of another.

Prior to a guardianship being established, it must first be determined that a person lacks the capacity required to make decisions concerning his or her personal and/or financial matters and that no other less restrictive alternatives exist. Upon making such a determination, the court may appoint either a limited guardian[1] or a plenary guardian.[2] In the vast majority of cases that result in guardianship, the court will appoint a family member or close friend of the ward to act as guardian. However, when a family member or close friend is unavailable or unwilling to act as guardian, there are generally two options a court may use to provide assistance to the incapacitated person:

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[1] A limited guardian is defined as a guardian who has been appointed by the court to exercise the legal rights and powers specifically designated by court order entered after the court has found that the ward lacks the capacity to do some, but not all, of the tasks necessary to care for his or her person or property, or after the person has voluntarily petitioned for appointment of limited guardian. See section 744.102(8)(a), Florida Statutes.

[2] A plenary guardian is defined as a person who has been appointed by the court to exercise all delegable legal rights and powers of the ward after the court has found that the ward lacks the capacity to perform all of the tasks necessary to care for his or her person or property. See section 744.102(8)(b), Florida Statutes.

- Appoint a professional guardian to act on the ward's behalf when the ward has assets that may be used to pay for guardianship services provided;[3] or

- Appoint a public guardian in instances where the incapacitated ward does not have enough assets to afford a professional guardian.[4]

Department of Elder Affairs, the Statewide Public Guardianship Office, and the Guardianship Task Force

In order to ensure that Florida's incapacitated residents who are indigent receive appropriate public guardianship services, the 1999 Florida Legislature created the Statewide Public Guardianship Office (SPGO). The SPGO is responsible for establishing local offices of public guardian and ensuring the registration and education of public and professional guardians.[5] Currently, public guardianship services are provided to persons in 22 counties through 15 local offices of public guardian and during 2003, those 15 offices served a total of 1716 wards. In May 2003, the SPGO was transferred under the direct supervision of the Secretary of Elder Affairs.[6]

The 2003 Legislature also created the Guardianship Task Force within DOEA, for the purpose of recommending specific statutory and other changes for achieving best practices in guardianship and for achieving citizen access to quality guardianship services. The final report was submitted to the Secretary of Elder Affairs on January 1, 2005.[7]

Public Guardianship Funding Through Court Filing Fees

Until July 2004, each county was authorized under section 28.241, Florida Statutes, to impose, by ordinance or by special or local law, a fee of up to $15 for each civil action filed, for the establishment, maintenance, or supplementation of a public guardian. However, this authority was rescinded as part of the legislative implementation of Constitutional Revision 7 to Article V of the State Constitution. Revision 7, adopted by the voters in 1998, required the state to shift primary costs and funding for the operation of the state courts system to the state and to reallocate other costs and expenses among the local governments and other users and participants in the state courts system. As part of this implementation, all filing fees for trial and appellate proceedings were regulated by the state, with a portion to revert directly to the Department of Revenue to be used to fund court proceedings. However, the $15 allowable for additional expenses that counties were formerly authorized to implement in order to fund public guardianship programs was also removed.[8]

HB 457

The bill incorporates the recommendations of the Guardianship Task Force, the Florida State Guardianship Association, the Statewide Public Guardianship Office, and the State Long-term Care Ombudsman Program within the Department of Elder Affairs. Specifically, the bill contains provisions related to the following:

Definitions

The bill defines the term "audit" for purposes of Chapter 744 as a systematic review of financial documents in accordance with generally accepted auditing standards. The term "surrogate guardian" is defined as a professional guardian who is designated by a guardian to exercise the powers of the guardian if the guardian is unavailable to act. A change to the definition of professional guardian

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[3] See sections 744.102(16) and 744.334, Florida Statutes.
[4] See section 744.703, Florida Statutes.
[5] See section 744.7021, Florida Statutes and Chapter 99-227, Laws of Florida.
[6] See Chapter 2003-57, Laws of Florida.
[7] See Chapter 2003-57, Laws of Florida.
[8] See Chapter 2003-402, Laws of Florida.

clarifies that professional guardians do not have to receive compensation in order to serve as professional guardians as long as they meet all statutory requirements.

Natural Guardians

The bill clarifies that if a parent of a minor child dies, the surviving parent remains as the sole natural guardian even if he or she remarries. Regarding claims or causes of action on behalf of minor children, the bill clarifies that natural guardians are authorized to make certain financial decisions for minor children when the aggregate amount is not more than $15,000. Natural guardians are precluded from using a ward's property for the guardian's benefit or to satisfy the guardian's support obligation to the ward without court approval.

Guardian ad Litem Appointments for Minors

- The court is authorized to appoint a guardian ad litem to represent the minor's interest, before approving a settlement in which a minor has a damages claim in which the gross settlement is more than $15,000, and the court is required to appoint a guardian ad litem where the gross settlement is $50,000 or more;
- The guardian ad litem appointment is required to be without the necessity of bond or notice;
- The duty of the guardian ad litem is to protect the minor's interests in accordance with Florida Probate Rules;
- A court is not required to appoint a guardian ad litem if a guardian has previously been appointed who does not have an adverse interest to the minor; however, a court may appoint a guardian ad litem if the court believes it necessary to protect the minor's interests; and
- The court is required to award reasonable fees and costs to the guardian ad litem, unless waived, to be paid against the gross proceeds of the settlement.

Emergency Temporary Guardians

- The bill increases the initial length of time of an emergency temporary guardianship from 60 days to 90 days;
- An emergency temporary guardian is a guardian for the property and, as such, must include certain information related to accounting and inventory in the final report;
- In instances where the emergency temporary guardian is a guardian of the person, the final report must include such information as residential placement, medical condition, mental health and rehabilitative services, and the social condition of the ward; and
- An emergency temporary guardian is required to file a final report within 30 days upon expiration of the guardianship and a copy of the final report must be provided to the successor guardian and the ward.

Standby Guardianships

- The court may appoint a standby guardian upon petition by the natural guardians or a legally appointed guardian;
- The court may also appoint an alternate if the standby guardian does not serve or ceases to serve;
- The court must serve a notice of hearing on the parents, next of kin, and any currently serving guardian unless notice is waived in writing or by the court for good cause shown; and
- The standby guardian must submit to a credit and criminal investigation.

Credit and Criminal Background Checks

- If a credit or criminal investigation is required, the court must consider investigation results before the appointment of a guardian;
- The court may require a credit investigation at any time;
- The clerk of the court is required to keep a file on each appointed guardian, retain investigation documents, and is required to collect up to $7.50 from each professional guardian for handling and processing of files;
- The court and the Statewide Public Guardianship Office are required to accept the satisfactory completion of a criminal background investigation by any method stated in these provisions;
- A guardian complies with background requirements by paying for and undergoing an electronic fingerprint criminal history check or a criminal history record check using a fingerprint card. The results of the criminal history check shall be immediately forwarded to the clerk who will maintain the results in the guardian's file, and the Statewide Public Guardianship Office;
- A professional guardian is required to complete and pay for a level 2 background screening every five years, a level 1 background screening every two years, unless screened using inkless electronic fingerprinting equipment, and a credit history investigation at least once every two years after appointment;
- Effective December 15, 2006, all fingerprints electronically submitted to Department of Law Enforcement shall be retained as provided by rule and entered into the statewide automated fingerprint identification system. The Department of Law Enforcement shall search all arrest fingerprint cards against those in the system, reporting any matches to the clerk of the court;
- The clerk of the court is required to forward any arrest records to the Statewide Public Guardianship Office within five days upon receipt;
- Guardians who elect to participate in electronic criminal history checks are required to pay a fee, unless the clerk of the court absorbs the fee;
- The Statewide Public Guardianship Office is required to adopt a rule detailing acceptable methods for completing a credit investigation, and may set a fee of up to $25 to reimburse costs; and
- The Statewide Public Guardianship Office may inspect at any time the results of any credit or criminal history check of a public or professional guardian.

Procedures to Determine Incapacity

- Attorneys representing the ward must be appointed from an attorney registry compiled by the circuit's Article V indigent services committee and must, effective January 1, 2007, have completed a minimum of 8 hours education in guardianship;
- A member appointed is precluded from subsequently being appointed as a guardian of the person;
- Each member must file an affidavit certifying completion of course requirements or that they will be completed within four months upon appointment;
- The initial training and continuing education program must be established by the Statewide Public Guardianship Office, in conjunction with other listed entities; and
- The committee's report must include the names of all persons present during the member's examination, the signature of each member, and the date and time each member examined the alleged incapacitated person.

Voluntary Guardianships

- A guardian must include in the annual report filed with the court a certificate from a licensed physician who examined the ward no more than 90 days before the annual report is filed with the court, which certifies that the ward is competent to understand the nature of the guardianship and is also aware of the ward's authority to delegate powers to the voluntary guardian; and
- Where a ward files a notice of termination of guardianship with the court, the notice must include a certificate from a licensed physician who has examined the ward no more than 30 days before the ward filed the notice, certifying that the ward is competent to understand the significance of the termination.

Surrogate Guardians

- A guardian may designate a surrogate guardian if the guardian is unavailable, but the surrogate must be a professional guardian;
- A guardian must file a petition with the court requesting permission to designate a surrogate;
- Upon approval, the court's order must contain certain information, including the duration of appointment, which is up to 30 days, extendable for good cause; and
- The guardian is liable for the acts of the surrogate guardian and may terminate the surrogate's authority by filing a written notice with the court.

Other Provisions

- An incapacitated person retains the right to receive necessary services and rehabilitation necessary to maximize the quality of life and the right to marry unless the right to enter into a contract has been removed, in which case the court must approve the right to marry;
- Professional and public guardians are required to ensure that each of the guardian's wards is personally visited by the guardian or staff at least once every calendar quarter, unless appointed only as a guardian of the property. During the visit, the guardian or staff person must assess the ward's physical appearance and condition, current living situation, and need for additional services;
- The annual guardianship report is required to be filed by April 1, rather than within 90 days after the end of the calendar year, which is current law;
- Annual guardianship plans for minors must include information about the minor's residence, medical and mental health conditions, and treatment and rehabilitation needs of the minor, and the minor's educational progress;
- Property that is under the guardian's control, including any trust of which the ward is a beneficiary but not under the control or administration of the guardian, is not subject to annual accounting requirements;
- If the ward dies, the guardian must file a final report with the court within 45 days after being served with letters of administration or curatorship, rather than the prompt filing requirement under current law; and
- Regarding the discharge of a guardian named as a personal representative for the ward's estate, any interested person may file a notice of a hearing on any objections filed by the beneficiaries of the ward's estate. If a notice is not served within 90 days after filing, objections are considered abandoned.

C. SECTION DIRECTORY:

Section 1. Amends s. 744.102, F.S., relating to definitions.

Section 2. Amends s. 744.1083, F.S., relating to professional guardian registration.

Section 3. Amends s. 744.301, F.S., relating to natural guardians.

Section 4. Creates s. 744.3025, F.S., relating to claims of minors.

Section 5. Amends s. 744.3031, F.S., relating to emergency temporary guardianship.

Section 6. Amends s. 744.304, F.S., relating to standby guardianship.

Section 7. Amends s. 744.3115, F.S., relating to advance directives for health care.

Section 8. Amends s. 744.3135, F.S., relating to credit and criminal investigation.

Section 9. Amends s. 744.3145, F.S., relating to guardian education requirements.

Section 10. Amends s. 744.3215, F.S., relating to rights of persons determined to be incapacitated.

Section 11. Amends s. 744.331, F.S., relating to procedures to determine incapacity.

Section 12. Amends s. 744.341, F.S., relating to voluntary guardianship.

Section 13. Amends s. 744.361, F.S., relating to powers and duties of a guardian.

Section 14. Amends s. 744.365, F.S., relating to verified inventory.

Section 15. Amends s. 744.367, F.S., relating to the duty to file an annual guardianship report.

Section 16. Amends s. 744.3675, F.S., relating to the annual guardianship plan.

Section 17. Amends s. 744.3678, F.S., relating to annual accounting.

Section 18. Amends s. 744.3679, F.S., relating to simplified accounting procedures in certain cases.

Section 19. Amends s. 744.368, F.S., relating to responsibilities of the clerk of the circuit court.

Section 20. Amends s. 744.441, FS., relating to the powers of a guardian upon court approval.

Section 21. Creates s. 744.442, F.S., relating to the delegation of authority.

Section 22. Amends s. 744.464, F.S., relating to the restoration to capacity.

Section 23. Amends s. 744.474, F.S., relating to reasons for removing a guardian.

Section 24. Amends s. 744.511, F.S., relating to the accounting upon removal of a guardian.

Section 25. Amends s. 744.527, F.S., relating to final reports and application for discharge of guardian.

Section 26. Amends s. 744.528, F.S., relating to the discharge of a guardian named as a personal representative.

Section 27. Amends s. 744.708, F.S., relating to reports and standards.

Section 28. Amends s. 765.101, F.S., relating to definitions.

Section 29. Amends s. 28.345, F.S., relating to the exemption from court-related fees and charges.

Section 30. Amends s. 121.091, F.S., relating to benefits payable.

Section 31. Amends s. 121.4501, F.S., relating to Public Employee Optional Retirement Program.

Section 32. Amends s. 709.08, F.S., relating to durable power of attorney.

Section 33. Amends s. 744.1085, F.S., relating to the regulation of professional guardians.

Section 34. Reenacts s. 117.107, F.S., relating to prohibited acts.

Section 35. Amends s. 318.18, F.S., relating to amount of civil penalties.

Section 36. Creates s. 938.065, F.S., relating to additional costs for public guardianship programs.

Section 37. Provides for an effective date of July 1, 2006.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

   See Fiscal Comments.

2. Expenditures:

   See Fiscal Comments.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

   None.

2. Expenditures:

   None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

Persons involved in guardianship will be required to have additional training. These persons may also have to spend more time drafting reports regarding a person's capacity. The cost of these reports may be borne by the ward. Guardians will have to visit their wards more frequently.

D. FISCAL COMMENTS:

The bill allows for the imposition of a $15 surcharge on non-criminal traffic infractions and criminal violations listed in section 318.17, Florida Statutes, to fund a county's public guardianship program. The surcharge must be approved by either a vote of two-thirds of the board of county commissioners or a referendum approved by the county's electors. The bill also provides for an $18 surcharge on all misdemeanors; $15 of which would be used to fund public guardianship programs, with the remaining $3 going to the clerks of court as a service fee.

According to the Department of Highway Safety and Motor Vehicles in 2004 the traffic statistics for criminal traffic, non-criminal moving, and non-moving infractions were as follows:

Total Violations: 4,418,401
Guilty: 434,691
Pending Disposition: 563,948

Adjudication withheld by Judge: 515,594
Adjudication withheld by Clerk: 541,581

Guilty: $6,520,365
Adjudication withheld by Judge: $7,733,910
Total: $14,254,275

These numbers assume 100% collection, that each county would utilize this mechanism for public guardianship funding, and that fines are imposed for each adjudication withheld.

The department estimates there is a minimum of 5,000 to 10,000 indigent and incapacitated persons per year that require the services of a public guardian. Currently, public guardians serve slightly over 1,700 of those individuals. The majority of the state does not have access to a public guardian, and even those areas that do have a public guardian, services are not readily available because the current office is at capacity. These provisions replace the public guardianship funding that was removed in July 2004 in implementing Article V revisions.

The number of misdemeanors where a fine would be imposed for 2004 was:191,432. Multiplying that figure by $15 (not the full $18) results in a possible $2,871,480 for public guardianship. Again, this assumes 100% collection. The clerks of court would retain $574,296 in service fees.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

   This bill does not require counties or municipalities to take an action requiring the expenditure of funds, does not reduce the authority that counties or municipalities have to raise revenue in the aggregate, and does not reduce the percentage of state tax shared with counties or municipalities.

2. Other:

   None.

B. RULE-MAKING AUTHORITY:

The bill requires the Statewide Public Guardianship Office to adopt a rule related to acceptable methods for completing credit investigations. It also requires the Florida Department of Law Enforcement to adopt a rule to establish procedures for the retention of guardian fingerprints and dissemination of search results of all arrest fingerprint cards.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/COMMITTEE SUBSTITUTE & COMBINED BILL CHANGES

Ober v. Town of Lauderdale-by-the-Sea RPPTL Amicus

IN THE DISTRICT COURT OF APPEAL OF FLORIDA
FOURTH DISTRICT

Case No. 4D-14-4597
L.T. Case No. 14-6782 (05)

JAMES OBER,

Appellant,

v.

TOWN OF LAUDERDALE-BY-THE-SEA, a Florida municipality,

Appellee.

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

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

GOLDMAN FELCOSKI & STONE, P.A.
Robert W. Goldman
Florida Bar No. 339180
745 12th Avenue South
Suite 101`
Naples, FL 34102
Tel: 239-436-1988
rgoldman@gfsestatelaw.com

GUNSTER
Kenneth B. Bell
Florida Bar No. 347035
John W. Little III
Florida Bar No. 384798
777 S. Flagler Drive
Suite 500 East
West Palm Beach, FL 33401
Tel: 561-650-0701
kbell@gunster.com
jlittle@gunster.com

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases

Rules

Other Authorities

IDENTITY AND INTEREST

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

Pursuant to RPPTL Section bylaws, the Executive Committee of the RPPTL Section voted unanimously to appear in this case if permitted, which permission was granted by Order of this Court dated September 27, 2016. The Florida Bar approved the RPPTL Section's involvement in this case.[2]

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[1] For example, see *Jones v. Golden*, 176 So. 3d 242 (Fla. 2015); *Aldrich v. Basile,* 136 So. 3d 530 (Fla. 2014); *North Carillon LLC, v. CRC 603, LLC* 135 So. 3d 274 (Fla. 2014); *Chames v. DeMayo*, 972 So. 2d 850 (Fla. 2007); *McKean v. Warburton,* 919 So. 2d 341 (Fla. 2005); *Deuteche Bank Trust Co. Americas v. Beauvais,* 188 So. 3d 938, (Fla. 3d DCA *en banc* 2016); *Sims v. New Falls Corp.,* 37 So. 3d 358 (Fla. 3d DCA 2010); *JPG Enterprises, Inc., v. McLellan* 31 So. 3d 821 (Fla. 4th DCA 2010); *Skylake Insurance, Inc. v. NMB Plaza, LLC,* 23 So. 3d 175 (Fla. 3d DCA 2009).

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

Our interest in this case stems from our experience and expertise with the real estate, mortgage and foreclosure related issues presented by the panel opinion and the pending motions for rehearing, rehearing en banc and for certification. Further, this Court's interpretation of the lis pendens statute in the context of a foreclosure proceeding is very important to the RPPTL Section's members and their efforts to serve the citizens of Florida. Accordingly, the RPPTL Section seeks to assist the Court in its consideration of the pending motions.

SUMMARY OF ARGUMENT

ARGUMENT

The Court's decision interprets Florida's lis pendens statute, section 48.23 Florida Statutes, in the context of a mortgage foreclosure proceeding. Specifically the Court examines whether a duly filed notice of lis pendens in a foreclosure action bars enforcement of liens or interests in the subject property perfected after the final judgment of foreclosure but before the judicial foreclosure sale and issuance of the certificate of title. In other words, as the panel phrased the question, what is the "shut off" date for a duly filed notice of lis pendens in a mortgage foreclosure action?

The *Ober* decision concludes that a notice of lis pendens under section 48.23 ends thirty days after the entry of a final judgment of foreclosure (assuming no appeal). The Court bases this conclusion on its reading of section 48.23 and language in prior judicial decisions addressing the expiration of a lis pendens in what are effectively *non-foreclosure* actions.

For the reasons that follow, the RPPTL Section respectfully submits that in the context of a foreclosure action, both the Florida Legislature and the Florida Supreme Court have concluded that the notice of lis pendens remains in effect and discharges liens or interests that exist or arise prior to the issuance of the certificate of title following the judicial sale.

I. The Circuit Court Has Continuing Jurisdiction and Control Over The Property Which Is Subject To Foreclosure Beyond the Entry of The Final Judgment of Foreclosure

The Court begins its statutory analysis by examining section 48.23(1)(d) and concludes that "section 48.23(1)(d) does not provide an end date for the lis pendens." The Panel next turns to section 48.23(1)(a) for legislative guidance, focuses on the use of the term "action" in that subsection, determines that the action itself is the lis pendens, and therefore the lis pendens must necessarily terminate along with the civil action. From there, the Court holds that a civil action concludes thirty days after the entry of final judgment (absent an appeal) and with it the operation of a notice of lis pendens under section 48.23.

The RPPTL Section respectfully submits that the Court has misconstrued the term "action" in the context of a foreclosure proceeding. A foreclosure action differs from a typical civil action that ends, absent appeal, thirty days after entry of a final judgment. Unlike a normal civil action, a foreclosure action continues through and includes a judicial foreclosure sale and issuance of the certificate of title.

Indeed, the statutory framework of a foreclosure proceeding reveals a legislative intent that a foreclosing court has jurisdiction and continuing control over the property well beyond the entry of the final judgment of foreclosure. The work of the court is not concluded, as assumed by this Court, when the time for

appeal of the final judgment of foreclosure has passed. The lis pendens must remain in effect through the issuance of the certificate of title so that the priorities of ownership, as determined in the final judgment of foreclosure, are given effect.

The legislature unequivocally recognizes in the language of the lis pendens statute that a foreclosure proceeding extends past a final judgment of foreclosure and through judicial sale and issuance of the certificate of title. Section 48.23(1)(d) plainly states that if the specified claimant does not timely intervene in the proceedings, "and if such proceedings *are prosecuted to a judicial sale of the property* described in the notice, the property shall be discharged from all such unrecorded interests and liens." § 48.23(1)(d) Fla. Stat. (2016) (emphasis added).

Further, section 45.031, Florida Statutes, sets forth the various steps for a judicial sale after the entry of the final judgment of foreclosure. Because of the statutory requirements of publication of notice, the judicial sale and transfer of title typically take place more than thirty days after the entry of final judgment. *See* § 45.031(1) Fla. Stat. (2016). The statute also provides that the trial court may entertain objections to the sale ordered in the final judgment of foreclosure under section 45.031(5). Only after any objections are ruled upon by the trial court, or the time for filing objections (10 days) has passed, may the clerk of court issue a certificate of title pursuant to section 45.031(6), thus ending the trial court's labor in the action under the final judgment of foreclosure. (add FN on deficiency and

surplus after certificate). Clearly, the trial court's jurisdiction reaches beyond the entry of final judgment in order to ensure that the mandated judicial sale is properly completed.

Simply put, it is the RPPTL Section's view that when these statutes are read completely and together, the legislative intent is clear – in a foreclosure action the lis pendens remains in effect through the judicial sale process. That process is not complete until a certificate of title is issued. Thus, the "end date" in a foreclosure action should be the issuance of the certificate of title. To end the effectiveness of the lis pendens earlier would leave a "gap" period prior to the issuance of the certificate of title during which liens and interests may attach to the property foreclosed. This would undermine the purpose of the lis pendens and would be an absurd, unintended result. In sum, to "turn off" the operation of the lis pendens in a foreclosure action prior to that time would emasculate the Florida Legislature's statutory framework and intent.

Consistent with this statutory framework and legislative intent, the Florida Supreme Court adopted Fla. R. Civ. P. Form 1.996 (a). *In re Amendments to Florida Rules of Civil Procedure*, 153 So. 3d 258 (Fla. 2014). That form sets forth the additional steps that occur after entry of a final judgment of foreclosure. As it relates to the operation of a lis pendens, the form specifically provides that "on the filing of the certificate of title," (which by necessity occurs more than 30 days after

entry of the final judgment of foreclosure), "all persons claiming under or against the defendant since the filing of the notice of lis pendens shall be foreclosed…." *Ober* characterizes that portion of the form as "a misstatement of the law." To the contrary, the statement of law in the Rule simply codifies the law and is well accepted and reflects long standing practice and procedure based upon the statutory framework of a foreclosure action in Florida.

II. The Legislative History of section 48.23(1)(d) Reveals That From Its Inception, A Lis Pendens Barred the Enforcement of Liens or Interests Which Were Acquired Subsequent To The Recording of Lis Pendens

As noted above, this Court finds that the "end point" of the effectiveness of the lis pendens should be thirty days after the entry of the final judgment of foreclosure, when the time for appeal has expired. In part, the decision notes that pursuant to section 48.23(1)(d), the lis pendens may prevent the accrual of a cause of action when the final element necessary for its creation occurs beyond the time period established by the statute (*citing Adhin v. First Horizon Home Loans*, 44 So.3d 1245, 1253 (Fla. 5th DCA 2010)). This holding misapprehends the legislative history of the statute.

Historically, a lis pendens was intended to provide notice to the world of a pending lawsuit and that any subsequent interest in the property or lien against the property acquired would be subject to the outcome of the pending litigation. Before 1985, a lis pendens was effective only against interests and liens acquired

subsequent to the recording of the lis pendens. An interest or lien acquired prior to the filing of the lis pendens but recorded after the lis pendens and prior to the final judicial sale of the property was therefore not affected by the outcome of the suit.

In addition to having to do a title search from the recording of the mortgage being foreclosed to the recording of the notice of lis pendens, this "gap" required foreclosing lenders to search the property's title from the recording of the lis pendens through the time of judicial sale. This second search was required to see if there were any interests or liens that had arisen prior to the filing, but were not recorded until after the notice of lis pendens was recorded. If such an interest or lien was found, the foreclosing lender either had to amend its complaint to add the newly discovered, interested parties or re-foreclose.

The lis pendens statute was amended in 1985, in part through the efforts of the RPPTL Section's Problems Study Committee. The 1985 amendments included what is today subsection 48.23 (1)(d) to provide that the lis pendens bars the enforcement of any lien or interest in the property which was unrecorded at the time of recording of the notice of lis pendens unless the interested party intervenes in the ongoing litigation within the term specified in the statute. The intervention requirement and short time limit in subsection 48.23(1)(d) (originally 20 days, but increased to 30 days by 2009 amendment) is also consistent with its applicability to prior unrecorded interests and liens, as generally it would not be possible for

holders of interests or liens created after a lis pendens, such as the lien holder in *Ober*, to have intervened within 30 days after the recording of the lis pendens.

Thus, section 48.23(1)(d) was intended to *expand* the effect of the lis pendens to bar the effect of unrecorded interests arising prior to the recording of the notice. It certainly was not intended to *limit* the effectiveness of the lis pendens to thirty days after the entry of the final judgment of foreclosure.

III. Thousands of Transactions Have Been Based On The Accepted Interpretation That All Interests and Liens Arising Subsequent to the Recording of the Notice of Lis Pendens Are Foreclosed When the Foreclosure is Prosecuted to Judicial Sale and Issuance of the Certificate of Title

Prior to the *Ober* decision, it has been well accepted in Florida among lenders, title insurers, property owners and practitioners that the lis pendens remains in effect through the issuance of the certificate of title. Consistent with the terms and the intent of the statute, this assured that all interests or liens recorded subsequent to the recording of the notice of lis pendens and up to the issuance of the certificate of title are barred from enforcement if the foreclosure is prosecuted to judicial sale. As noted above, this understanding is consistent with subsection (1)(d) of the lis pendens statute and Form 1.996(a) of the Florida Rules of Civil Procedure.

Thousands of foreclosures judgments are entered every year with the secured property sold at judicial sale returning that to productive use. Until the

Ober opinion, buyers, lenders and title insurers were secure in the knowledge that any interest or lien placed of record prior to the certificate of title was foreclosed and barred from enforcement against the real property.

If the *Ober* decision stands, the title to thousands of properties across the state will be called into question. Title will have to be re-examined to determine whether it is encumbered by liens or other interests placed of record more than 30 days after the entry of the final judgment of foreclosure and prior to the judicial sale and issuance certificate of title. Litigation will then ensue to determine the validity and priority of those liens or interests. There will be a delay in returning foreclosed properties to the market, creating a greater burden on lenders, as well as counties, municipalities and homeowners' associations.

Moreover, frequent settlement technique requested by borrowers and agreed to by foreclosing lenders is for the lender to waive a deficiency and to agree to extend the judicial sale date, permitting the borrower a longer time to remain in possession. Under *Ober*, this settlement technique could result in enforceable interests or liens being placed of record thirty days after the entry of the final judgment of foreclosure.

There is also a concern within the Section that, if the *Ober* decision stands, it will lead to the filing of interests and/or claims of lien more than thirty days after the entry of the final judgment of foreclosure. Foreclosing lenders will be required

to re-foreclose to eliminate these newly recorded claims. The cycle could, indeed, become endless.

Additionally, uncertainty as to the status of the foreclosed property's title will depress the bidding at the foreclosure sale. Even with on-line searching, the clerk's index may be on or more days behind in posting recorded claims of interest or liens It is impossible to search up to the moment of sale and be assured that the title will be "clean." The uncertainty also may negatively affect the marketability of "REO" (property which has been foreclosed and is now offered for sale by the lender). This harms all Floridians, including the local government who will have a reduced tax base from these properties.

For all of these reasons, the RPPTL Section urges the Court to reconsider its decision in *Ober* and reaffirm the commonly accepted understanding that lis pendens are effective through the issuance of the certificate of title. Alternatively the Section requests that the issue be certified to the Supreme Court of Florida as a question of great public importance.

CONCLUSION

The RPPTL Section appreciates the Court's permission to file as *amicus curiae* and trusts that its response will assist the Court's consideration of the pending motions on this very significant question of Florida law.

Respectfully submitted,

GUNSTER
Kenneth B. Bell
Florida Bar No. 347035
John W. Little III
Florida Bar No. 384798
777 S. Flagler Drive
Suite 500 East
West Palm Beach, FL 33401-0701
561-650-0701
kbell@gunster.com
jlittle@gunster.com
alackey@gunster.com

and

GOLDMAN FELCOSKI & STONE, P.A.
Robert W. Goldman
Florida Bar No. 339180
Goldman Felcoski & Stone, P.A.
745 12th Avenue South
Suite 101
Naples, FL 34102
239-436-1988
rgoldman@gfsestatelaw.com

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the ____day of October, 2016, a true and correct copy of this document was filed with the Clerk of the Court and has been served via electronic mail on:

Counsel for Appellant
McGLINCHEY STAFFORD, PLLC
Manuel Farach, Esq., mfarach@mcglinchey.com

Counsel for Appellee
WEISS SEROTA HELFMAN COLE BIERMAN & POPOK, P.L.
Susan L. Trevarthen, Esq. Primary: strevarthen@wsh-law.com; Secondary: nsalgado@wsh-law.com; Laura K. Wendell Primary: lwendell@wsh-law.com Secondary: lmartinez@wsh-law.com; Eric P. Hockman Primary: ehockman@wsh-law.com Secondary: szavala@wsh-law.com

Attorneys for Proposed Amicus The Florida Land Title Association
CARLTON FIELDS JORDEN BURT, P.A.
Chris W. Altenbernd, Esq.: caltenbernd@carltonfields.com; bsickimich@carltonfields.com; tpaecf@cfdom.net
Marty J. Solomon, Esq.: msolomon@carltonfields.com; bbehan@carltonfields.com
Nicholas A. Brown, Esq. nbrown@carltonfields.com; jgrayson@carltonfields.com

Attorneys for Amicus Curiae Florida Bankers Association
AKERMAN LLP
Joseph E. Foster, Esq.: Ed.foster@akerman.com
Carri Ann Wozniak, Esq.: Carrieann.wozniak@akerman.com
Richard H. Martin, Esq.: Richard.martin@akerman.com

GUNSTER
John W. Little, III
Florida Bar No. 384798

CERTIFICATE OF FONT COMPLIANCE

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

_____

GUNSTER
John W. Little, III
Florida Bar No. 3384798

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Bartram v. U.S. Bank

Opinion

Supreme Court of Florida

No. SC14-1265

LEWIS BROOKE BARTRAM,
Petitioner,

vs.

U.S. BANK NATIONAL ASSOCIATION, etc., et al.,
Respondents.

No. SC14-1266

THE PLANTATION AT PONTE VEDRA,
Petitioner,

vs.

U.S. BANK NATIONAL ASSOCIATION, etc., et al.,
Respondents.

No. SC14-1305

GIDEON M.G. GRATSIANI,
Petitioner,

vs.

U.S. BANK NATIONAL ASSOCIATION, etc., et al.,
Respondents.

[November 3, 2016]

PARIENTE, J.

The issue before the Court involves the application of the five-year statute of limitations to "[a]n action to foreclose a mortgage" pursuant to section 95.11(2)(c), Florida Statutes (2012).[1] The Fifth District Court of Appeal relied on this Court's reasoning in Singleton v. Greymar Associates, 882 So. 2d 1004 (Fla. 2004), rejecting that the statute of limitations had expired. Because of the importance of this issue to both lenders and borrowers, the Fifth District certified to this Court a question of great public importance, which we have rephrased to acknowledge that the note in this case is a standard residential mortgage, which included a contractual right to reinstate:

> DOES ACCELERATION OF PAYMENTS DUE UNDER A RESIDENTIAL NOTE AND MORTGAGE WITH A REINSTATEMENT PROVISION IN A FORECLOSURE ACTION THAT WAS DISMISSED PURSUANT TO RULE 1.420(B), FLORIDA RULES OF CIVIL PROCEDURE, TRIGGER APPLICATION OF THE STATUTE OF LIMITATIONS TO PREVENT A SUBSEQUENT FORECLOSURE ACTION BY THE MORTGAGEE BASED ON PAYMENT DEFAULTS OCCURRING SUBSEQUENT TO DISMISSAL OF THE FIRST FORECLOSURE SUIT?

1. In addition to the briefs of the parties, we have also reviewed briefs submitted on behalf of the parties by the following amici curiae: the U.S. Financial Network, the Mortgage Bankers Association and the American Legal and Financial Network on behalf of Respondent and Bradford and Cheri Langworthy and the Titcktin Law Group, P.A., Baywinds Community Association, Upside Property Investment, LLC, the Florida Alliance for Consumer Protection, the Community Associations Institute, and the National Association of Consumer Advocates on behalf of Bartram.

We have jurisdiction. See art. V, § 3(b)(4), Fla. Const.

In this case, it is uncontroverted that the borrower, Lewis Brooke Bartram, also referred to as the mortgagor, stopped making payments on his $650,000 mortgage and note, both before and after the foreclosure action was brought and subsequently dismissed. For the reasons set forth in this opinion, we answer the rephrased certified question in the negative and hold, consistent with our reasoning in Singleton, that the mortgagee, also referred to as the lender, was not precluded by the statute of limitations from filing a subsequent foreclosure action based on payment defaults occurring subsequent to the dismissal of the first foreclosure action, as long as the alleged subsequent default occurred within five years of the subsequent foreclosure action. When a mortgage foreclosure action is involuntarily dismissed pursuant to Rule 1.420(b), either with or without prejudice, the effect of the involuntary dismissal is revocation of the acceleration, which then reinstates the mortgagor's right to continue to make payments on the note and the right of the mortgagee, to seek acceleration and foreclosure based on the mortgagor's subsequent defaults. Accordingly, the statute of limitations does not continue to run on the amount due under the note and mortgage. [2]

2. Our holding is consistent with the views of the excellent amici briefs submitted by the Real Property Probate & Law Section of The Florida Bar, The Business Law Section of The Florida Bar, and the Federal National Mortgage Association and the Federal Home Loan Mortgage Corporation at the request of the Third District in Deutsche Bank Trust Co. Americas v. Beauvais, 188 So. 3d

Absent a contrary provision in the residential note and mortgage, dismissal of the foreclosure action against the mortgagor has the effect of returning the parties to their pre-foreclosure complaint status, where the mortgage remains an installment loan and the mortgagor has the right to continue to make installment payments without being obligated to pay the entire amount due under the note and mortgage. Accordingly, we approve the Fifth District's opinion in U.S. Bank National Association v. Bartram, 140 So. 3d 1007 (Fla. 5th DCA 2014), and answer the rephrased certified question in the negative.

FACTS AND PROCEDURAL BACKGROUND

On November 14, 2002, Petitioners Lewis Bartram ("Bartram") and his then-wife Patricia Bartram[3] ("Patricia"), purchased real property in St. Johns County, Florida (the "Property"). Less than a year later, Patricia filed for dissolution of the couple's marriage, which was officially dissolved on November 5, 2004. Pursuant to a prenuptial agreement the Bartrams had previously executed, the divorce court ordered Bartram to purchase Patricia's interest in the Property.

938 (Fla. 3d DCA 2016). These amici briefs addressed the same issue presented by the rephrased certified question and limited their discussion to the terms of the standard form mortgage that is the subject of this case.

3. Gideon Gratsiani was substituted as a party by order of this Court after Gratsiani purchased Patricia Bartram's mortgage.

In order to comply with the divorce court's order, on February 16, 2005, Bartram obtained a $650,000 loan through Finance America, LLC, secured by a mortgage on the Property in favor of Mortgage Electronic Registration Systems, Inc., in its capacity as nominee for Finance America (the "Mortgage"). Finance America subsequently assigned the Mortgage to Respondent, U.S. Bank National Association (the "Bank"), as trustee and assignee. A day later, on February 17, 2005, Bartram executed a second mortgage (the "Second Mortgage") to Patricia as security for a second mortgage note of $120,000.

The Mortgage was a standard residential form mortgage and required the lender to give the borrower notice of any default and an opportunity to cure before the mortgagee could proceed against the secured property in a judicial foreclosure action. Specifically, paragraph 22 of the Mortgage was an optional acceleration clause and provided that the lender was required to give the borrower notice that failure to cure the default "may result in acceleration of the sums secured" by the mortgagee and foreclosure of the property:

> Acceleration; Remedies. Lender shall give notice to Borrower prior to acceleration following Borrower's breach of any covenant or agreement in this Security Instrument (but not prior to acceleration under Section 18 unless Applicable Law provides otherwise). The notice shall specify: (a) the default; (b) the action required to cure the default; (c) a date, not less than 30 days from the date the notice is given to Borrower, by which the default must be cured; and <u>(d) that failure to cure the default on or before the date specified in the notice may result in acceleration of the sums secured by this Security Instrument, foreclosure by judicial proceeding and sale of the Property. The notice shall further inform Borrower of the right to</u>

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

(Emphasis added).

In addition to providing optional acceleration and foreclosure as a remedy for default, paragraph 19 of the Mortgage also granted the borrower a right to reinstate the note and Mortgage after acceleration if certain conditions were met, including paying the mortgagee all past defaults and other related expenses that would be due "as if no acceleration had occurred":

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

> sums secured by this Security Instrument, shall continue unchanged. Lender may require that Borrower pay such reinstatement and expenses in one or more of the following forms, as selected by Lender: (a) cash; (b) money order; (c) certified check, bank check, treasurer's check or cashier's check, provided any such check is drawn upon an institution whose deposits are insured by a federal agency, instrumentality or entity; or (d) Electronic Funds Transfer. Upon reinstatement by Borrower, this Security Instrument and obligations secured hereby shall remain fully effective as if no acceleration had occurred. However, this right to reinstate shall not apply in the case of acceleration under Section 18.[4]

(Emphasis added). The designated maturity date of the note was March 1, 2035.

On January 1, 2006, Bartram stopped making payments on the Mortgage, and never made payments on the Second Mortgage. Around the same time, Bartram also stopped paying homeowners' association assessments to the Plantation at Ponte Vedra, Inc. (the "HOA"), the homeowners' association of the development where the Property was located. The HOA subsequently placed a lien on the Property for nonpayment of the HOA assessments.

On May 16, 2006, the Bank filed a complaint to foreclose the Mortgage based on Bartram's failure to make payments due from January of that year to the date of the complaint. The foreclosure complaint stated that all conditions precedent to the acceleration of the Mortgage and to the foreclosure of the Mortgage had been fulfilled or had occurred, and declared the full amount payable

4. Paragraph 18 concerned the transfer of the mortgaged property in a real estate sale without the Lender's "prior written consent," and required "immediate payment in full of of all sums secured by this Security Instrument" if breached.

under the note and Mortgage to be due. Nearly five years later, on May 5, 2011, the foreclosure action was involuntarily dismissed after the Bank failed to appear at a case management conference.[5] The Bank did not appeal the dismissal.

Following the dismissal of the foreclosure action, Bartram filed a motion to cancel the promissory note and release the lien on the mortgage. The trial court denied the motion in an order dated August 29, 2011, citing to its lack of jurisdiction in the matter since the May 5, 2011, involuntary dismissal under Rule 1.420(b) "was an adjudication on the merits and the case has been closed."

Approximately a year later, after the dismissal of the foreclosure action and almost six years after the Bank filed its foreclosure complaint, Bartram filed a crossclaim against the Bank in a separate foreclosure action Patricia had brought against Bartram, the Bank, and the HOA. Bartram's crossclaim sought a declaratory judgment to cancel the Mortgage and to quiet title to the Property, asserting that the statute of limitations barred the Bank from bringing another foreclosure action.[6]

5. The Record does not indicate what action occurred, if any, in the first foreclosure action from the date the complaint was filed in 2006 until it was dismissed in 2011.

6. On May 24, 2012, Bartram filed a motion for default against the Bank for failure to respond to his crossclaim, but the trial court never ruled on this motion.

Bartram then moved for summary judgment on his crossclaim. The trial court found no genuine issue as to any material fact, granted summary judgment, quieted title in Bartram, found the Bank had no further ability to enforce its rights under the note and Mortgage that were the subject matter of the Bank's dismissed foreclosure action, and cancelled the note and Mortgage. In doing so, the trial court released the Bank's lien on the Property. The Bank subsequently filed a motion for rehearing, and after the trial court denied the Bank's motion, appealed to the Fifth District.

Before the Fifth District, the Bank relied on this Court's decision in Singleton for its position that the trial court's dismissal "nullified [the Bank's] acceleration of future payments; accordingly, the cause of action on the accelerated payments did not accrue and the statute of limitations did not begin to run on those payments, at least until default occurred on each installment." Bartram, 140 So. 3d at 1009-10. The Bank acknowledged, however, that it could not seek to foreclose the Mortgage based on Bartram's defaults prior to the first foreclosure action, but could seek foreclosure based on defaults occurring subsequent to the dismissal of the first foreclosure action. Id. at 1009. Bartram contended on appeal, joined by Patricia and the HOA, "that the cause of action for default of future installment payments accrued upon acceleration, thus triggering the statute of limitations clock to run, and because the Bank did not revoke its acceleration at any time after the dismissal, the five-year statute of limitations period eventually expired, barring the

Bank from bringing another suit [to foreclose the Mortgage]." Id. at 1010 (citations omitted).

The Fifth District agreed with the Bank and held that if a "new and independent right to accelerate" exists in a res judicata analysis under Singleton, 882 So. 2d at 1008, then "there is no reason it would not also exist vis-à-vis a statute of limitations issue." Id. at 1013. The Fifth District reasoned that a "new and independent right to accelerate" would mean that each new default would present new causes of action, regardless of whether the payment due dates had been accelerated in the first foreclosure action. Id. at 1013-14. Based on Singleton, the Fifth District explained, "a default occurring after a failed foreclosure attempt creates a new cause of action for statute of limitations purposes, even where acceleration had been triggered and the first case was dismissed on its merits." Id. at 1014. The Fifth District accordingly reversed the trial court's judgment, remanded the case to the trial court, and certified the question of great public importance we now address.

ANALYSIS

The rephrased certified question involves a pure question of law. Therefore, the standard of review is de novo. See Christensen v. Bowen, 140 So. 3d 498, 501 (Fla. 2014). In answering the rephrased certified question, we begin by reviewing this Court's decision in Singleton, which the Fifth District and most courts throughout the state have held to be determinative of the rephrased certified

question. We then discuss the cases, both state and federal, that concern successive mortgage foreclosure actions in a statute of limitations context decided after Singleton. In doing so, we examine whether our analysis in Singleton, which was decided on res judicata grounds, extends to the statute of limitations context present in this case. We then discuss the significance to our analysis, if any, of the involuntary dismissal of the foreclosure action pursuant to Rule 1.420(b) and the effect of the Mortgage's reinstatement provision. Based on this analysis, we conclude by answering the rephrased certified question in the negative and approving the Fifth District's decision in Bartram.

I. Singleton v. Greymar Associates

In Singleton, a mortgagee brought two consecutive foreclosure actions against a mortgagor. 882 So. 2d at 1005. The first foreclosure action was based on the mortgagor's failure to make mortgage payments from September 1999 to February 2000 and "sought to accelerate the entire indebtedness against" the mortgagor. Id. & n.1. The first foreclosure action was dismissed with prejudice by the trial court after the mortgagee failed to appear at a case management conference. Id. After this involuntary dismissal, the mortgagee filed a second foreclosure action based on a separate default that occurred when the mortgagor failed to make mortgage payments starting in April 2000. Id. at 1005. The mortgagor contended that the dismissal of the first foreclosure action barred relief

in the second foreclosure action, but the trial court rejected this argument and entered a summary final judgment of foreclosure for the mortgagee. Id.

The mortgagor appealed, and "the Fourth District affirmed the circuit court's decision, finding that '[e]ven though an earlier foreclosure action filed by appellee was dismissed with prejudice, the application of res judicata does not bar this lawsuit. The second action involved a new and different breach.' " Id. (citing Singleton v. Greymar Assocs., 840 So. 2d 356, 356 (Fla. 4th DCA 2003)). Singleton petitioned this Court for jurisdiction, citing an express and direct conflict with Stadler v. Cherry Hill Developers, Inc., 150 So. 2d 468 (Fla. 2d DCA 1963). Id.

Stadler also involved two successive foreclosure actions where the first foreclosure action had been dismissed with prejudice. 150 So. 2d at 469. The mortgagee brought a second foreclosure action that was identical except for alleging a different period of default. That action was successful, and the mortgagor appealed. The Second District reversed the judgment of foreclosure entered on the basis of res judicata and concluded that the "election to accelerate put the entire balance, including future installments at issue." Id. at 472. Therefore, even though different periods of default were asserted, the "entire amount due" was the same and thus the "actions are identical." Id. Accordingly, the Second District concluded that res judicata barred the second foreclosure action. Id. at 473.

After analyzing the position of the two appellate courts, this Court agreed with the Fourth District that "when a second and separate action for foreclosure is sought for a default that involves a separate period of default from the one alleged in the first action, the case is not necessarily barred by res judicata." Singleton, 882 So. 2d at 1006-07. In support, we cited with approval the Fourth District's reasoning in Capital Bank v. Needle, 596 So. 2d 1134 (Fla. 4th DCA 1992):

> Our reading of the case law set out above leads us to conclude that a final adjudication in a foreclosure action that also prays for a deficiency judgment on the underlying debt may, but does not necessarily, bar a subsequent action on the debt. For instance, if the plaintiff in a foreclosure action goes to trial and loses on the merits, we do not believe such plaintiff would be barred from filing a subsequent foreclosure action based upon a subsequent default. The adjudication merely bars a second action relitigating the same alleged default. A dismissal with prejudice of the foreclosure action is tantamount to a judgment against the mortgagee. That judgment means that the mortgagee is not entitled to foreclose the mortgage. Such a ruling moots any prayer for a deficiency, since a necessary predicate for a deficiency is an adjudication of foreclosure. There was no separate count in the Capital Bank complaint seeking a separate recovery on the promissory note alone.
>
> Accordingly, we do not believe the dismissal of the foreclosure action in this case barred the subsequent action on the balance due on the note.

Singleton, 882 So. 2d at 1007 (quoting Capital Bank, 596 So. 2d at 1138) (emphasis added).

Our holding in Singleton was based on the conclusion that an "acceleration and foreclosure predicated upon subsequent and different defaults present a separate and distinct issue" than a foreclosure action and acceleration based on the

same default at issue in the first foreclosure action. Id. Indeed, we cited with approval another decision of the Fourth District, Olympia Mortgage Corp. v. Pugh, 774 So. 2d 863, 866 (Fla. 4th DCA 2000), which held—contrary to the Second District's conclusion in Stadler—that an acceleration of debt in a mortgage foreclosure action did not place future installments at issue. As we explained, the unique nature of a mortgage compelled this result:

> This seeming variance from the traditional law of res judicata rests upon a recognition of the unique nature of the mortgage obligation and the continuing obligations of the parties in that relationship. For example, we can envision many instances in which the application of the Stadler decision would result in unjust enrichment or other inequitable results. If res judicata prevented a mortgagee from acting on a subsequent default even after an earlier claimed default could not be established, the mortgagor would have no incentive to make future timely payments on the note. The adjudication of the earlier default would essentially insulate her from future foreclosure actions on the note—merely because she prevailed in the first action. Clearly, justice would not be served if the mortgagee was barred from challenging the subsequent default payment solely because he failed to prove the earlier alleged default.

Singleton, 882 So. 2d at 1007-08 (emphasis added).

Our recognition in Singleton that each new default presented a separate cause of action was based upon the acknowledgement that because foreclosure is an equitable remedy, "[t]he ends of justice require that the doctrine of res judicata not be applied so strictly so as to prevent mortgagees from being able to challenge multiple defaults on a mortgage." Id. at 1008. Thus, the failure of a mortgagee to foreclose the mortgage based on an alleged default did not mean the mortgagor had

automatically and successfully defeated his or her obligation to make continuing payments on the note.

II. Mortgage Foreclosure Cases Post-Singleton: Application to Statute of Limitations Context

In cases concerning mortgage foreclosure actions, since our decision in Singleton, both federal and state courts have applied our reasoning in Singleton in the statute of limitations context and have concluded that because of "the unique nature of the mortgage obligation and the continuing obligations of the parties in that relationship," an "adjudication denying acceleration and foreclosure" does not bar subsequent foreclosure actions based on separate and distinct defaults. See id. at 1007. As the Fourth District explained, under Singleton, a "new default, based on a different act or date of default not alleged in the dismissed action, creates a new cause of action." Star Funding Sols., LLC v. Krondes, 101 So. 3d 403 (Fla. 4th DCA 2012). That is because, as the First District has also explained, this Court's "analysis in Singleton recognizes that a note securing a mortgage creates liability for a total amount of principal and interest, and that the lender's acceptance of payments in installments does not eliminate the borrower's ongoing liability for the entire amount of the indebtedness." Nationstar Mortg., LLC v. Brown, 175 So. 3d 833, 834 (Fla. 1st DCA 2015).

Other district courts of appeal have similarly applied our reasoning in Singleton to determine that the five-year statute of limitations did not bar a

subsequent foreclosure action when the mortgagee had brought an initial foreclosure action that accelerated all sums due under the mortgage and note, on that same mortgage outside the statute of limitations window. For instance, in Deutsche Bank Trust Co. Americas v. Beauvais, 188 So. 3d 938, 947 (Fla. 3d DCA 2016), the Third District concluded that because the subject mortgage's reinstatement provision granted the mortgagor the right to avoid foreclosure by paying only the past due defaults, that "despite acceleration of the balance due and the filing of an action to foreclose, the installment nature of a loan secured by such a mortgage continue[d] until a final judgment of foreclosure [was] entered and no action [was] necessary to reinstate it via a notice of 'deceleration' or otherwise."

With reasoning similar to Beauvais, in Evergrene Partners, Inc. v. Citibank, N.A., 143 So. 3d 954, 955 (Fla. 4th DCA 2014), a mortgagor challenged, on statute of limitations grounds, a second foreclosure action brought by the mortgagee when the mortgagee had voluntarily dismissed a prior foreclosure action based on a separate default. The Fourth District held that the mortgage was still enforceable because "the statute of limitations ha[d] not run on all of the payments due pursuant to the note," specifically those payments missed after the initial alleged default. Id. In reaching this conclusion, the Fourth District relied on Singleton, and emphasized that "[w]hile a foreclosure action with an acceleration of the debt may bar a subsequent foreclosure action based on the same event of default, it does not bar subsequent actions and acceleration based upon different events of

default." Id. Similarly, in PNC Bank, N.A. v. Neal, 147 So. 3d 32, 32 (Fla. 1st DCA 2013), the First District held that an initial foreclosure action that sought acceleration and was dismissed with prejudice did not bar the mortgagee from "instituting a new foreclosure action based on a different act or a new date of default not alleged in the dismissed action."

Federal district courts in the state have also applied Singleton to dismiss claims seeking cancellation of a mortgage and note that are premised on the expiration of the statute of limitations after an initial foreclosure action that sought acceleration was dismissed. In Dorta v. Wilmington Trust National Ass'n, No. 5:13-cv-185-Oc-10PRL, 2014 WL 1152917 (M.D. Fla. Mar. 24, 2014), the mortgagor brought an action seeking cancellation of the mortgage based on the expiration of the statute of limitations where the mortgagee previously accelerated payments and brought a foreclosure action that was ultimately dismissed without prejudice more than five years prior. Id. at *1-2. In dismissing the mortgagor's complaint, the federal district court held that even when the initial foreclosure action is dismissed without prejudice, "where a mortgagee initiates a foreclosure action and invokes its right of acceleration, if the mortgagee's foreclosure action is unsuccessful for whatever reason, the mortgagee still has the right to file later foreclosure actions . . . so long as they are based on separate defaults." Id. at *6.

Similarly, in Torres v. Countrywide Home Loans, Inc., No. 14-20759-CIV, 2014 WL 3742141, at *1 (S.D. Fla. July 29, 2014), the federal district court

dismissed a complaint that sought a declaration that the statute of limitations barred foreclosing on a mortgage after a prior foreclosure action where the mortgagee had sought acceleration of the note that had been dismissed. Relying on Singleton, the court noted that "each payment default that is less than five years old creates a basis for a subsequent foreclosure or acceleration action." Id. at *4; see also Romero v. SunTrust Mortg., Inc., 15 F. Supp. 3d 1279 (S.D. Fla. 2014) (holding that the installment nature of the note remained in effect after dismissal of a foreclosure action where the mortgagee had sought acceleration); Kaan v. Wells Fargo Bank, N.A., 981 F. Supp. 2d 1271 (S.D. Fla. 2013) (same).

We agree with the reasoning of both our appellate courts and the federal district courts that our analysis in Singleton equally applies to the statute of limitations context present in this case. As the Fifth District concluded, "[i]f a 'new and independent right to accelerate' exists in a res judicata analysis, there is no reason it would not also exist vis-à-vis a statute of limitations issue." Bartram, 140 So. 3d at 1013. This conclusion follows from our prior reasoning that a "subsequent and separate alleged default created a new and independent right in the mortgagee to accelerate payment on the note in a subsequent foreclosure action." Singleton, 882 So. 2d at 1008. Therefore, with each subsequent default, the statute of limitations runs from the date of each new default providing the mortgagee the right, but not the obligation, to accelerate all sums then due under the note and mortgage.

Consistent with the reasoning of Singleton, the statute of limitations on the balance under the note and mortgage would not continue to run after an involuntary dismissal, and thus the mortgagee would not be barred by the statute of limitations from filing a successive foreclosure action premised on a "separate and distinct" default. Rather, after the dismissal, the parties are simply placed back in the same contractual relationship as before, where the residential mortgage remained an installment loan, and the acceleration of the residential mortgage declared in the unsuccessful foreclosure action is revoked.

III. Significance of an Involuntary Dismissal and Reinstatement Provision

Having reaffirmed our prior holding in Singleton and the application of its reasoning to a statute of limitations context, we finally consider whether the type of dismissal of a foreclosure action has any bearing on our analysis and the effect of the Mortgage's reinstatement provision. In this case, the first foreclosure action was dismissed pursuant to Florida Rule of Civil Procedure 1.420, which provides for involuntary dismissals, and is the rule upon which the rephrased certified question is premised. Involuntary dismissal of a legal action by a court under Rule 1.420(b) terminates a court's jurisdiction over that action and may be with or without prejudice. A dismissal under Rule 1.420(b) operates as an adjudication on the merits as long as the dismissal was not for "lack of jurisdiction or for improper venue or for lack of an indispensable party," neither of which were a basis for the trial court's dismissal of the Bank's foreclosure action in this case.

The Fifth District determined that the involuntary dismissal was with prejudice but concluded that "the distinction is not material for purposes" of the statute of limitations analysis. See Bartram, 140 So. 3d at 1013 n.1. We agree. While a dismissal without prejudice would allow a mortgagee to bring another foreclosure action premised on the same default as long as the action was brought within five years of the default per section 95.11(2)(c), critical to our analysis is whether the foreclosure action was premised on a default occurring subsequent to the dismissal of the first foreclosure action. As the federal district court in Dorta reasoned, "if the mortgagee's foreclosure action is unsuccessful for whatever reason, the mortgagee still has the right to file subsequent foreclosure actions—and to seek acceleration of the entire debt—so long as they are based on separate defaults." 2014 WL 1152917 at *6 (emphasis added). Accord Espinoza v. Countrywide Home Loans Servicing, L.P., No. 14-20756-CIV, 2014 WL 3845795, at *4 (S.D. Fla. Aug. 5, 2014) (finding the issue of whether the initial foreclosure action was dismissed with or without prejudice a distinction that was "irrelevant" to its analysis of whether acceleration of a mortgage note barred a subsequent foreclosure action brought outside the statute of limitations period).

Whether the dismissal of the initial foreclosure action by the court was with or without prejudice may be relevant to the mortgagee's ability to collect on past defaults. However, it is entirely consistent with, and follows from, our reasoning in Singleton that each subsequent default accruing after the dismissal of an earlier

foreclosure action creates a new cause of action, regardless of whether that dismissal was entered with or without prejudice.

Our conclusion is buttressed by the reinstatement provision of the Residential Mortgage that by its express terms granted the mortgagor, even after acceleration, the continuing right to reinstate the Mortgage and note by paying only the amounts past due as if no acceleration had occurred. Specifically, the reinstatement provision in paragraph 19 of Bartram's form residential mortgage gave Bartram "the right to have enforcement of this Security Instrument discontinued at any time prior to the earliest of . . . (c) entry of a judgment enforcing this Security Instrument," as long as Bartram "(a) pa[id] the Lender all sums which then would be due under this Security Instrument and Note as if no acceleration had occurred."

Under the reinstatement provision of paragraph 19, then, even after the optional acceleration provision was exercised through the filing of a foreclosure action—as it was in this case—the mortgagor was not obligated to pay the accelerated sums due under the note until final judgment was entered and needed only to bring the loan current and meet other conditions—such as paying expenses related to the enforcement of the security interest and meeting other requirements established by the mortgagee-lender to ensure the mortgagee-lender's interest in the property would remain unchanged—to avoid foreclosure. "Stated another way, despite acceleration of the balance due and the filing of an action to foreclosure,

the installment nature of a loan secured by such a mortgage continues until a final judgment of foreclosure is entered and no action is necessary to reinstate it via a notice of 'deceleration' or otherwise." Beauvais, 188 So. 3d at 947. Or, as the Real Property Law Section of the Florida Bar has explained, "[t]he lender's right to accelerate is subject to the borrower's continuing right to cure." Brief for The Real Property Probate & Trust Law Section of the Florida Bar at 8, Beauvais, 188 So. 3d 938 (Fla. 3d DCA 2016), 2015 WL 6406768, at *8. In the absence of a final judgment in favor of the mortgagee, the mortgagor still had the right under paragraph 19 of the Mortgage, the reinstatement provision, to cure the default and to continue making monthly installment payments.

Accepting Bartram's argument that the installment nature of his contract terminated once the mortgagee attempted to exercise the mortgage contract's optional acceleration clause—ignoring the existence of the mortgage's reinstatement provision—would permit the mortgagee only one opportunity to enforce the mortgage despite the occurrence of any future defaults. As we cautioned in Singleton, "justice would not be served if the mortgagee was barred from challenging the subsequent default payment solely because he failed to prove the earlier alleged default." 882 So. 2d at 1008. Following to its logical conclusion Bartram's argument that acceleration of the loan was effective before final judgment in favor of the mortgagee-lender in a foreclosure action would mean that the mortgagor-borrower would owe the accelerated amount after the

dismissal, effectively rendering the reinstatement provision a nullity, and—in most cases—leading to an unavoidable default.

IV. This Case

Here, the Bank's first foreclosure action was involuntarily dismissed, and therefore there was no judicial determination that a default actually occurred. Thus, even if the note had been accelerated through the Bank's foreclosure complaint, the dismissal of the foreclosure action had the effect of revoking the acceleration. By the express terms of the reinstatement provision, if, in the month after the dismissal of the foreclosure action, Bartram began to make monthly payments on the note, the Bank could not have subsequently accelerated the entire note until there were future defaults. Once there were future defaults, however, the Bank had the right to file a subsequent foreclosure action—and to seek acceleration of all sums due under the note—so long as the foreclosure action was based on a subsequent default, and the statute of limitations had not run on that particular default.

There have been many claims of unfair and predatory practices by banks and mortgage holders in the aftermath of the financial crisis that shook the country, and in particular, Florida. See, e.g., Pino v. Bank of N.Y., 121 So. 3d 23, 27 (Fla. 2013) (discussing allegations of fraudulent backdating of mortgage assignments); see also In re Amends. to Fla. Rules of Civ. Pro.—Form 1.996, 51 So. 3d 1140 (Fla. 2010) (noting the necessity for verification of ownership of the note or right

to enforce the note in a foreclosure action because of "recent reports of alleged document fraud and forgery in mortgage foreclosure cases"). Some of these claims have included allegations that mortgage holders have precipitously sought foreclosure even though the mortgagor missed only one or two payments and attempted to cure their defaults. In this case, quite the opposite is true. Bartram raised no defense as to the terms of the Mortgage and note itself. His sole claim is that the Bank lost the right to seek foreclosure of the Mortgage based on distinct defaults that occurred subsequent to the dismissal of the initial foreclosure complaint.

After Bartram defaulted on the Mortgage, the Bank, in accordance with the terms of the mortgage contract, notified Bartram that failure to cure his past defaults would result in acceleration of the sums due under the mortgage and judicial foreclosure. When Bartram failed to cure the past defaults, the Bank filed its foreclosure complaint and exercised the optional acceleration clause. Yet, the reinstatement provision of the Mortgage afforded Bartram the opportunity to continue the installment nature of the loan by curing the past defaults. Until final judgment was entered in favor of the Bank, Bartram was not obligated to pay the accelerated loan amount. Dismissal of the foreclosure action therefore returned the parties to their pre-foreclosure complaint status. In considering the law, the facts, and equity, Bartram's position simply has no validity.

CONCLUSION

The Fifth District properly extended our reasoning in Singleton to the statute of limitations context in a mortgage foreclosure action. Here, the Bank's initial foreclosure action was involuntarily dismissed. Therefore, as we previously explained in Singleton, the dismissal returned the parties back to "the same contractual relationship with the same continuing obligations." 882 So. 2d at 1007. Bartram and the Bank's prior contractual relationship gave Bartram the opportunity to continue making his mortgage payments, and gave the Bank the right to exercise its remedy of acceleration through a foreclosure action if Bartram subsequently defaulted on a payment separate from the default upon which the Bank predicated its first foreclosure action. Therefore, the Bank's attempted prior acceleration in a foreclosure action that was involuntarily dismissed did not trigger the statute of limitations to bar future foreclosure actions based on separate defaults.

Accordingly, we approve the Fifth District's decision in Bartram and answer the rephrased certified question in the negative.

It is so ordered.

LABARGA, C.J., and QUINCE, CANADY, and PERRY, JJ., concur.
POLSTON, J., concurs in result.
LEWIS, J., concurs in result only with an opinion.

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

LEWIS, J., concurring in result only.

I am troubled by the expansion of Singleton v. Greymar Associates, 882 So. 2d 1004 (Fla. 2004), to potentially any case involving successive foreclosure actions. Other courts in this State have already broadly applied Singleton—a decision involving res judicata and dismissal with prejudice—to cases that were either dismissed for lack of prosecution or voluntarily dismissed by the note-holder, as well as to cases that concern the statute of limitations, without careful consideration of the procedural distinctions of each case. E.g., In re Anthony, 550 B.R. 577 (M.D. Fla. 2016); Dorta v. Wilmington Tr. Nat'l Ass'n, 2014 WL 1152917 (M.D. Fla. 2014); Romero v. Suntrust Mortg., Inc., 15 F. Supp. 3d 1279 (S.D. Fla. 2014); Kaan v. Wells Fargo Bank, N.A., 981 F. Supp. 2d 1271 (S.D. Fla. 2013); Evergrene Partners, Inc. v. Citibank, N.A., 143 So. 3d 954 (Fla. 4th DCA 2014); see also In re Rogers Townsend & Thomas, PC, 773 S.E.2d 101, 105-06 (N.C. Ct. App. 2015) (relying on Singleton in a case involving previous voluntary dismissals and the statute of limitations). Today's decision will only continue that expansion, which I fear will come at the cost of established Florida law and Floridians who may struggle with both the costs of owning a home and uncertain behavior by lenders. I therefore respectfully concur in result only.

At its narrowest, Singleton simply held that "when a second and separate action for foreclosure is sought for a default that involves a separate period of default from the one alleged in the first action, the case is not necessarily barred by

res judicata." 882 So. 2d at 1006-07 (emphasis supplied). However, as has been noted elsewhere, Singleton left several matters unanswered:

> [T]he Supreme Court omitted explanation of 1) what constitutes a valid new default after the initial round of default, acceleration, foreclosure filing, and dismissal; 2) how the fact-finder below determines that a valid new default has occurred; and 3) what conditions constitute valid new default, including whether the lender must reinstate the original note and mortgage terms in the interim or serve a second notice of intent to accelerate. Moreover, the court in no way addressed the effect of the involuntary dismissal on the statute of limitations.

Andrew J. Bernhard, Deceleration: Restarting the Expired Statute of Limitations in Mortgage Foreclosures, Fla. B.J., Sept.-Oct. 2014, at 30, 32. Given the procedural posture of this matter and the relatively sparse record before this Court, the decision today fails to address evidentiary concerns regarding how to determine the manner in which a mortgage may be reinstated following the dismissal of a foreclosure action, as well as whether a valid "subsequent and separate" default occurred to give rise to a new cause of action. See Singleton, 882 So. 2d at 1008. Instead of addressing these concerns, the Court flatly holds that the dismissal itself—for any reason—"decelerates" the mortgage and restores the parties to their positions prior to the acceleration without authority for support. Majority op. at 3.

In this case, there is no evidence contained in the record before this Court to show whether the parties tacitly agreed to a "de facto reinstatement" following the

dismissal of the previous foreclosure action.[7] Further, despite the assumption of the majority of the Court to the contrary, the mortgage itself did not create a right to reinstatement following acceleration and the dismissal of a foreclosure action. The contractual right to reinstatement under the terms of this mortgage existed only under specific conditions,[8] which do not appear to have been satisfied in the

7. Moreover, the precise nature of the dismissal in this case is even more uncertain than the mortgage in Beauvais, which was dismissed without prejudice. See Deutsche Bank Tr. Co. Americas v. Beauvais, 188 So. 3d 938, 964 (Fla. 3d DCA 2016) (Scales, J., dissenting). The trial court below dismissed the first foreclosure action after indicating that it had informed the parties that "[f]ailure of the parties . . . to appear in person [at the case management conference] may result in the case being dismissed without prejudice." Order of Dismissal, U.S. Bank Nat'l Ass'n v. Bartram, No. CA06-428 (Fla. 7th Cir. Ct. May 5, 2011) (emphasis added). However, the trial court's order did not explicitly state whether this dismissal was with or without prejudice. Id. ("The Complaint to Foreclose Mortgage . . . is hereby dismissed."). Further complicating the matter, the Fifth District below stated that this dismissal was with prejudice, but summarily determined "that the distinction is not material for purposes of the issue at hand." U.S. Bank Nat'l Ass'n v. Bartram, 140 So. 3d 1007, 1013 n.1 (Fla. 5th DCA 2014).

8. The mortgage note provides the following right to reinstatement:

> Borrower's Right to Reinstate After Acceleration. If Borrower meets certain conditions, Borrower shall have the right to have enforcement of this Security Instrument discontinued at any time prior to the earliest of: (a) five days before sale of the Property pursuant to any power of sale contained in this Security Instrument; (b) such other period as Applicable Law might specify for the termination of Borrower's right to reinstate; or (c) entry of a judgment enforcing this Security Instrument. Those conditions are that Borrower: (a) pays Lender all sums which then would be due under this Security Instrument and the Note as if no acceleration had occurred; (b) cures any default of any other covenants or agreements; (c) pays all expenses incurred in enforcing this Security Instrument, including, but

record before this Court. Parties, particularly those as sophisticated as the banks and other lenders that routinely engage in such litigation, should be required to present evidence that the mortgage was actually decelerated and reinstated, rather than require our courts to fill in the blank and assume that deceleration automatically occurred upon dismissal of a previous foreclosure action.

Instead, I find myself more closely aligned with the dissenting opinion of Judge Scales in Beauvais, 188 So. 3d at 954 (Scales, J., dissenting). A majority of the en banc Third District Court of Appeal reached the same conclusion as the majority of this Court does today regarding very similar facts. By contrast, Judge Scales, joined by three of his colleagues, raised several concerns that arise from the

> not limited to, reasonable attorneys' fees, property inspection and valuation fees, and other fees incurred for the purpose of protecting Lender's interest in the Property and rights under this Security Instrument; and (d) takes such action as Lender may reasonably require to assure that Lender's interest in the Property and rights under this Security Instrument, and Borrower's obligation to pay the sums secured by this Security Instrument, shall continue unchanged. Lender may require that Borrower pay such reinstatement and expenses in one or more of the following forms, as selected by Lender: (a) cash; (b) money order; (c) certified check, bank check, treasurer's check or cashier's check, provided any such check is drawn upon an institution whose deposits are insured by a federal agency, instrumentality or entity; or (d) Electronic Funds Transfer. Upon reinstatement by Borrower, this Security Instrument and obligations secured hereby shall remain fully effective as if no acceleration had occurred. However, this right to reinstate shall not apply in the case of acceleration under Section 18.

See majority op. at 6-7.

conclusion that a mortgage is automatically decelerated and reinstated following the dismissal of a foreclosure action for any reason.

First, Judge Scales pointed out that the mortgage in Beauvais, like the mortgage in this case, created the borrower's right to reinstatement only under specific conditions, which did not include dismissal of a prior foreclosure action. Id. at 956-57 ("Neither the note nor the mortgage contain any provision reinstating the installment nature of the note if, after acceleration, a lender foreclosure action is dismissed."). Further reviewing the clear terms of the mortgage, Judge Scales explained that the mortgage ceased to be an installment contract upon the exercise of the lender's right to acceleration. Id. at 961-62. Thus, the conclusion that a court's dismissal of a foreclosure action itself can end acceleration and reinstate the mortgage ignores basic principles of Florida contract law:

> The majority opinion rewrites the parties' note and mortgage to create a reinstatement provision—i.e., reinstating the installment nature of the note, as if acceleration never occurred, upon any dismissal of any lawsuit—that the parties did not include when drafting their documents. Singleton does not say this; the parties' contract documents certainly do not say this; and Florida law is repugnant to the majority's insertion of a provision into the parties' private contract that the parties themselves most assuredly omitted. [FN. 23]
>
> > [FN. 23]: Brooks v. Green, 993 So. 2d 58, 61 (Fla. 1st DCA 2008) (holding that a court is without authority to rewrite a clear and unambiguous contract between parties).

Id. at 963.

Moreover, Judge Scales cogently explained that the overbroad construction of Singleton will undermine its limited holding. Singleton indicated that "an adjudication denying acceleration and foreclosure" should not bar a successive foreclosure predicated upon a "subsequent and separate alleged default." 882 So. 2d at 1007, 1008. Yet, under the majority decisions of the Third District and this Court, any dismissal of a foreclosure action can support a successive foreclosure action. See Beauvais, 188 So. 3d at 963-64 (Scales, J., dissenting). The form dismissal in Beauvais should not constitute an "adjudication denying acceleration and foreclosure," which could, at least according to Singleton, restore the parties to their respective pre-acceleration positions. Id. at 964 (quoting Singleton, 882 So. 2d at 1007). In light of the even more vague dismissal at issue in this case, I agree with Judge Scales' warning that "[w]e should be reluctant to hold that a trial court's form dismissal order visits upon the borrower and lender a host of critical, yet unarticulated, adjudications that fundamentally change the parties' contractual relationship and are entirely unsupported by the existing law or by the record below." Id. at 965.

Finally, the expansion of Singleton's holding that res judicata "does not necessarily" bar the filing of successive foreclosure actions to the statute of limitations ignores critical distinctions between these two doctrines, at a serious cost to the statute of limitations and the separation of powers. As long recognized in this State, res judicata is a doctrine of equity not to "be invoked where it would

defeat the ends of justice." Id. at 967 n.31 (citing State v. McBride, 848 So. 2d 287, 291 (Fla. 2003); Aeacus Real Estate Ltd. P'ship. v. 5th Ave. Real Estate Dev., Inc., 948 So. 2d 834 (Fla. 4th DCA 2007)); see also Singleton, 882 So. 2d at 1008 (citing deCancino v. E. Airlines, Inc., 283 So. 2d 97, 98 (Fla. 1973)). However, "equity follows the law"; therefore, equitable principles are subordinate to statutes enacted by the Legislature, including the statute of limitations. May v. Holley, 59 So. 2d 636 (Fla. 1952); Beauvais, 188 So. 3d at 967-68 (Scales, J., dissenting) (citing Dobbs v. Sea Isle Hotel, 56 So. 2d 341, 342 (Fla. 1952); Cragin v. Ocean & Lake Realty Co., 133 So. 569, 573-74 (Fla. 1931)). This untenable extension of an equitable, judicial doctrine into an area of law expressly governed by legislative action veers perilously close to violating the separation of powers. Nonetheless, the majority opinion of this Court fails to recognize these concerns and justifies the imposition of Singleton's equitable focus onto the statute of limitations by simply reviewing the decisions of federal and Florida courts that have reached this same conclusion without acknowledging the critical distinctions between res judicata and the statute of limitations.

I recognize the concern raised by this Court and others regarding the need to avoid encouraging delinquent borrowers from abusing the lending process by remaining in default after an initial foreclosure action is dismissed. See Singleton, 882 So. 2d at 1008; see also Fairbank's Capital Corp. v. Milligan, 234 Fed. Appx. 21, 24 (3d Cir. 2007) (relying on Singleton and seeking to avoid "encourag[ing] a

delinquent mortgagor to come to a settlement with a mortgagee on a default in order to later insulate the mortgagor from the consequences of a subsequent default"). Nonetheless, these legitimate policy concerns should not outweigh the established law of this State. In light of the narrow holding of Singleton, I fear that its expansion today to a case involving a previous dismissal (presumably) without prejudice and no clear reinstatement of the mortgage terms in either the note or the facts of this limited record will lead to inequitable results. Just as the courts should not encourage mortgage delinquency, so too should they avoid encouraging lenders from abusing Florida law and Floridians by "retroactively reinstating" mortgages after many of those lenders initially slept on their own rights to seek foreclosures. See Bernhard, supra, at 27. Therefore, I concur in result only.

Application for Review of the Decision of the District Court of Appeal – Certified Great Public Importance

Fifth District - Case No. 5D12-3823

(St. Johns County)

Kendall B. Coffey, Jeffrey B. Crockett, and Daniel Frederick Blonsky of Coffey Burlington, P.L., Miami, Florida; Dineen Pashoukos Wasylik of Dineen Pashoukos Wasylik, P.A., Tampa, Florida; Thomas R. Pycraft, Jr. of Pycraft Legal Services, LLC, Saint Augustine, Florida; and Michael Alex Wasylik of Ricardo & Wasylik, PL, Dade City, Florida,

for Petitioner Lewis Brooke Bartram

Paul Alexander Bravo of P.A. Bravo, Coral Gables, Florida,

for Petitioner Gideon M.G. Gratsiani

Joel Stephen Perwin of Joel S. Perwin, P.A., Miami, Florida,

for Petitioner The Plantation at Ponte Vedra, Inc.

Michael Darren Starks and Kelly Overstreet Johnson of Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Orlando, Florida; William Power McCaughan, Stephanie N. Moot and Karen Poy Finesilver of K&L Gates LLP, Miami, Florida; and David R. Fine of K&L Gates LLP, Harrisburg, Pennsylvania,

for Respondent U.S. Bank National Association

Lynn Drysdale of Jacksonville Area Legal Aid, Inc., Jacksonville, Florida; Thomas A. Cox of The National Consumer Law Center, Portland, Maine; J.L. Pottenger, Jr. of Jerome N. Frank Legal Services Organization, New Haven, Connecticut; and James C. Sturdevant of The Sturdevant Law Firm, San Francisco, California,

for Amici Curiae National Association of Consumer Advocates, The National Consumer Law Center, and The Jerome N. Frank Legal Services Organization

Steven Michael Siegfried, Nicholas David Siegfried, and Nicole Reid Kurtz of Siegfried, Rivera, Hyman, Lerner, De La Torre, Mars & Sobel, P.A., Coral Gables, Florida; and Todd L. Wallen of The Wallen Law Firm, P.A., Coral Gables, Florida,

for Amicus Curiae Community Associations Institute

John Granville Crabtree, George Richard Baise, Jr., and Brian Carson Tackenberg of Crabtree & Associates, P.A., Key Biscayne, Florida; Alice Maria Vickers of Florida Alliance for Consumer Protection, Tallahassee, Florida; Kimberly Laura Sanchez of Community Legal Services of Mid-Florida, Orlando, Florida; Sarah Elizabeth Mattern of Brevard County Legal Aid, Inc, Rockledge, Florida; and Peter P. Sleasman of Florida Legal Services Inc., Newberry, Florida,

for Amici Curiae Florida Alliance for Consumer Protection, Brevard County Legal Aid, and Consumer Umbrella Group of Florida Legal Services

Andrew David Manko and John Stewart Mills of The Mills Firm, P.A., Tallahassee, Florida,

for Amici Curiae Upside Property Investment, LLC, Signature Land, Inc., Upside Property Enterprises, Inc., and The Lynne B. Preminger Living Trust

Major Best Harding and John R. Beranek of Ausley McMullen, Tallahassee, Florida; and John Russell Hargrove of Hargrove Pierson & Brown P.A., Boca Raton, Florida,

for Amicus Curiae Baywinds Community Association, Inc.

Peter David Ticktin, Timothy Richard Quinones, and Kendrick Almaguer of The Ticktin Law Group, P.A., Deerfield Beach, Florida,

for Amici Curiae Bradford and Cheri Langworthy, and The Ticktin Law Group, P.A.

Robert Rex Edwards and Jessica Pierce Quiggle of Robertson, Anschutz & Schneid, PL, Boca Raton, Florida; Melissa A. Giasi and Richard Slaughter McIver of Kass Shuler, P.A., Tampa, Florida; Shaib Yariel Rios and Curtis James Herbert of Brock and Scott PLLC, Fort Lauderdale, Florida; Andrea Rachael Tromberg of Gladstone Law Group, P.A., Boca Raton, Florida; Elizabeth Redchuk Wellborn of Elizabeth R. Wellborn, P.A., Deerfield Beach, Florida; Michelle Garcia Gilbert and Jennifer Lima-Smith of Gilbert Garcia Group, P.A., Tampa, Florida,

for Amicus Curiae American Legal and Financial Network

Robert Mark Brochin, Joshua Charles Prever, and Brian Michael Ercole of Morgan, Lewis & Bockius LLP, Miami, Florida,

for Amicus Curiae Mortgage Bankers Association

David William Rodstein of Padula Hodkin, PLLC, Boca Raton, Florida,

for Amicus Curiae US Financial Network

REALTOR® / ATTORNEY JOINT COMMITTEE
ABSTRACT OF 2016PROPOSED REVISIONS TO
FR-BAR RESIDENTIAL CONTRACT FOR SALE AND PURCHASE
as of November 7, 2016

EXPLANATIONS AND RATIONALES FOR PROPOSED REVISIONS

1. PARAGRAPH 5.(b) "EXTENSION OF CLOSING DATE" and **STANDARD 18 "G. "FORCE MAJEURE"** to be amended to eliminate confusing and duplicative language; to clarify the definition of "*force majeure*"; and to standardize the period of delay granted in event of "*force majeure*".

RATIONALE: Both Paragraph 5(b) and Standard G. of existing form contained conflicting calculations for extensions of time periods necessitated by acts of "*force majeure*". These proposed revisions provide a single method to apply to possible extensions for all Contract time periods and extend the outside date for termination due to a continuing force majeure from 14 days to 30 days.

2. PARAGRAPH 8.(b) "FINANCING" to be amended by eliminating requirement for "written loan commitment" and substituting requirement of approval of a loan meeting "Financing" terms ("Loan Approval"); specifying loan term requiring sale of other property does not constitute "Loan Approval"; shortening the default time period for Buyer to obtain Loan Approval from 45 to 30 days; defining "diligent effort" and providing failure to use such effort as a default; providing Buyer's authorization for release of closing disclosures and settlements statements to Seller; providing that Buyer's failure to promptly deliver notice during "Loan Approval Period" either waiving Loan Approval or terminating Contract will result in Buyer's Deposit being subject to forfeiture if Closing does not occur; eliminating Buyer's right to cancel after expiration of Loan Approval Period, but providing Seller three day window to terminate.

RATIONALE: The history of the FR-BAR Contract's finance contingency provision evidences a continuing dissatisfaction and frustration among both sellers and buyers. Buyers want to timely receive a loan commitment without unsatisfied lender contingencies, and sellers want to be kept fully informed as to buyers' application progress and promptly notified whether and when a "loan commitment" meeting the terms of the Contract has, in fact, been received.

Measuring a buyer's performance and possible default of the financing contingency has proven challenging and unsatisfactory. For example, the lender practice of not issuing "written loan commitments" until at or just prior to Closing, is inconsistent with the FR-BAR form requirement that Buyer must obtain a "written loan commitment" during a specified period prior to Closing – the "Loan Approval Period". Providing commercially-appropriate remedies for both buyer and seller in situations where a "written loan commitment" is not timely issued by the lender during the "Loan Commitment Period" has presented further challenges and frustrations.

The recommended revisions address these issues by:

(i) replacing the requirement for Buyer to receive "written loan commitment" as the measure of satisfaction of the financing contingency with the requirement for Buyer to receive "Loan Approval";

(ii) providing that "diligent effort" requires Buyer to timely furnish lender-requested documents and information and pay loan application fees and charges;

(iii) requiring Buyer to keep Seller informed by furnishing copies of loan disclosures and statements;

(iv) requiring Buyer to furnish written notice during "Loan Approval Period" either acknowledging receipt of Loan Approval, failure to obtain Loan Approval, and electing to either waive the contingency or terminate the Contract;

(v) providing that Buyer's failure to provide such written notice will result in Loan Approval being "deemed obtained" and placing Buyer's Deposit at risk of possible forfeiture if Closing does not thereafter occur; and

(vi) eliminating the right of either party to terminate the Contract up to 7 days prior to Closing if Buyer does not timely obtain Loan Approval, and substituting therefore a 3 day right of Seller to terminate the Contract if Buyer fails to deliver any of the notices above. (This right recognizes that if Buyer has failed to timely receive "Loan Approval" and has not given a notice of waiver or termination, then seller may desire to extract him/herself from the Contract rather than wait for Closing to see if Buyer will close or the deposit will be forfeited.)

It is recognized that placing the Buyer's Deposit at risk if Buyer fails to timely delivery ANY appropriate notice to Seller during the Loan Approval Period will be a significant departure from past FR-BAR Contract versions. However, existing Contract provisions that do not require Buyer to provide Seller with any timely notices or elections of waiver or termination during the "Loan Commitment Period" were considered, after much deliberation, to be insufficient motivators for buyers to act diligently and timely. Additionally, the existing provision providing Buyers a right of termination even after failing to

provide timely notice during the "Loan Commitment Period" has not been well-received and is considered by some to have given buyers a "second bite of the apple" and rendered the Loan Approval Period meaningless. Finally, allowing either party to cancel at any time after expiration of the Loan Approval Period was considered, but not approved.

3. PARAGRAPH 9(c) "TITLE EVIDENCE AND INSURANCE to be amended by inserting at the end of Paragraph 9.(c) a definition of the term "municipal liens".

RATIONALE: The term "municipal lien search" was introduced into the FR-BAR form several years ago to recognize the predominately south Florida practice of ordering a "municipal lien search" to be performed at the expense of a designated party. The term "municipal lien" is not specifically defined by statute, but is generally recognized by many to include any obligation imposed upon individuals or their property arising under F.S. Chapters 159 or 170 and which may result in unrecorded liens on real property.

Vendors who offer to provide "municipal lien searches" have included in their offerings matters which do not affect marketable title, such as searches for code enforcement violations, permit violations, and other matters. Because of the confusion existing in the marketplace caused by such vendor practices, the term "municipal lien search" has been improperly applied to Contract provisions. Thus, it was determined that a Contract definition of the term "municipal lien search" should be provided to avoid any interpretation that the vendor-accepted definition was intended to be used to identify matters of title and marketability.

The Joint Committee recognizes that there remain continuing issues with respect to the timely acquisition and examination of "municipal lien searches", payment of cost of the search – especially when closing does not occur, and the proper application of the results to issues of marketability, title policy exceptions, and building permit matters. Additional legislation and other solutions are needed to resolve these concerns.

4. **PARAGRAPH 10.(b) "PERMITS DISCLOSURE"** to be amended to conform the Standard form and the "AS IS" Form by requiring Seller to provide documents and information related to certain building permit issues that have been disclosed by Seller.

RATIONALE: This proposed revision is similar to the existing obligation of Seller under Paragraph 12(c) of the "AS IS" form that requires Seller to provide related documents and information if Buyer's permit inspection discovers permit violations. This revision will impose the same obligation on Seller if Seller has identified existing violations. This revision will also be placed in the "AS IS" form.

5. PARAGRAPH 10.(i) "FIRPTA TAX WITHHOLDING" to be amended by striking "Withholding" from title to Sub-paragraph, which subject is addressed in Standard V.

RATIONALE: This proposed revision recognizes that the purpose of Paragraph 10(i) was to disclose FIRPTA generally and that the discussion of "withholding" issues occurs in Standard V.

6. PARAGRAPH 10.(j) "SELLER DISCLOSURE" to be amended to conform the Standard form to the "AS IS" form by requiring Seller to disclose receipt of notice of certain violations.

RATIONALE: This proposed revision currently exists in the "AS IS' form and was determined to be appropriate for the Standard form.

7. PARAGRAPH 12(d) (i) and (ii) "INSPECTION AND CLOSE-OUT OF BUILDING PERMITS " to be amended by requiring Seller to provide documents and information related to certain building permit issues that have been identified by Buyer's Permit Inspection and requiring Seller to not only obtain needed permits, but to also close such permits.

RATIONALE: The proposed revision to Paragraph 12(d)(i) has been a part of Paragraph 12(c) of the "AS IS" form for several years and was determined to also be appropriate under the Standard form. The proposed revision to Paragraph 12(d)(ii) imposes the obligation on Seller not only to acquire needed permits, but to also close such permits.

The Joint Committee is acutely aware of the continuing dilemma faced by sellers, buyers, licensees, and attorneys to timely order permit searches and identify and resolve issues involving open, expired and needed permits, and deal with costs for such searches if closing does not occur. Additional legislation and other solutions are needed to resolve these concerns.

8. STANDARD 18 I (i) "CLOSING LOCATION; DOCUMENTS; AND PROCEDURE to be amended to provide for Closing conducted by overnight courier and to clarify existing language.

RATIONALE: The proposed revision was made to provide clarity to the existing provision as it relates to by whom and where the Closing will be conducted, and to allow delivery of closing documents by overnight courier.

9. (NEW) STANDARD 18 I (ii) "FinCEN GTO NOTICE" to be inserted to require certain Buyers to furnish information required by U.S. Treasury Department's Financial Crimes Enforcement Network ("FinCEN") Geographic Targeting Orders ("GTOs"), and consent to release of such information by Closing Agents.

RATIONALE: The proposed revision was requested by RREIL to specifically obligate buyers, whose funding methods require closing agents to comply with FinCEN, to provide closing agents the information necessary to do so.

10. STANDARD 18. K. "PRORATIONS; CREDITS" to be amended to clarify that maximum allowable discounts and applicable homestead and other exemptions apply to the calculation of all prorations.

RATIONALE: The phrase permitting maximum allowable discounts and exemptions was misplaced and appeared to be limited only to prorations based on current year's taxes, not those based upon prior year's tax or millage.

11. STANDARD 18. T. "LOAN COMMITMENT" to be deleted as a result of other amendments eliminating use of term "loan commitment".

RATIONALE: This proposed revision is dictated by the revisions proposed for Paragraph 8. "FINANCING".

12. STANDARD 18. V. "FOREIGN INVESTMENT IN REAL PROPERTY TAX ACT", to be amended for clarity and to eliminate reference to exemption relating to sale of residential property for less than $300,000 by modifying the title, opening paragraph, and Sub-paragraphs (i) and (ii).

RATIONALE: This proposed revision eliminates discussion and the giving of advice regarding a complex exemption and clarifying how Seller may provide proof of non-foreign status that is not conditioned upon Buyer's discretion.

COMPARISON OF MODIFIED PROVISIONS (red = deleted; blue = new; green = moved)

1. PARAGRAPH 5.(b) "EXTENSION OF CLOSING DATE" and **STANDARD 18 "G. "FORCE MAJEURE"** to be amended to eliminate confusing and duplicative language; to clarify the definition of "*force majeure*"; and to standardize the period of delay granted in event of "*force majeure*".

PARAGRAPH 5(b) "EXTENSION OF CLOSING DATE". - CHANGES MARKED
(b) If an ~~extreme weather or other condition or~~ event constituting ~~"~~Force Majeure~~"~~ ~~(see STANDARD G)~~ causes~~: (i) disruption of utilities or other~~ services essential for Closing ~~or (ii) Hazard, Wind, Flood or Homeowners' insurance,~~ to be~~come~~ unavailable~~ prior to Closing~~, including the unavailability of utilities or issuance of hazard, wind, flood or homeowners' insurance, Closing Date shall be extended ~~a reasonable time up to 3 days after restoration of utilities and other services essential to Closing and availability of applicable Hazard, Wind, Flood or Homeowners' insurance. If restoration of~~ such ~~utilities or services and availability of insurance has not occurred within _____ (if left blank, then 14) days after Closing Date, then either party may terminate this Contract by delivering written notice to the other party, and Buyer shall be refunded the Deposit, thereby releasing Buyer and Seller from all further obligations under this Contract~~ as provided in Standard G.

PARAGRAPH 5(b) "EXTENSION OF CLOSING DATE". SUB-PARAGRAPH (B) – AS REVISED
(b) If an event constituting Force Majeure causes services essential for Closing to be unavailable, including the unavailability of utilities or issuance of hazard, wind, flood or homeowners' insurance, Closing Date shall be extended as provided in Standard G.

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18. STANDARDS: G. FORCE MAJEURE - CHANGES MARKED
G. FORCE MAJEURE: Buyer or Seller shall not be required to perform any obligation under this Contract or be liable to each other for damages so long as performance or non-performance of the obligation, or the availability of services, insurance or required approvals essential for Closing is disrupted, delayed, caused or prevented by Force Majeure. "Force Majeure" means: hurricanes, ~~earthquakes,~~ floods, extreme weather, earthquakes, ~~floods,~~ fire, or other acts of God; unusual transportation delays; or wars, insurrections, or ~~and~~ acts of terrorism, which, by exercise of reasonable diligent effort, the non-performing party is unable in whole or in part to prevent or overcome. All time periods, including Closing Date, will be extended a reasonable time up to seven (7) days after ~~for the period that~~ the Force Majeure no longer prevents performance under this Contract, provided, however, if such Force Majeure continues to prevent performance under this Contract more than thirty (30) ~~14~~ days beyond Closing Date, then either party may terminate this Contract by delivering written notice to the other and the Deposit shall be refunded to Buyer, thereby releasing Buyer and Seller from all further obligations under this Contract.

18. STANDARDS: G. FORCE MAJEURE - AS REVISED
G. FORCE MAJEURE: Buyer or Seller shall not be required to perform any obligation under this Contract or be liable to each other for damages so long as performance or non-performance of the obligation, or the availability of services, insurance or required approvals essential to Closing is disrupted, delayed, caused or prevented by Force Majeure. "Force Majeure" means: hurricanes, floods, extreme weather, earthquakes, fire, or other acts of God; unusual transportation delays; or wars, insurrections, or acts of terrorism, which, by exercise of reasonable diligent effort, the non-performing party is unable in whole or in part to prevent or overcome. All time periods, including Closing Date, will be extended a reasonable time up to seven (7) days after the Force Majeure no longer prevents performance under this Contract, provided, however, if such Force Majeure continues to prevent performance under this Contract more than thirty (30) days beyond Closing Date, then either party may terminate this Contract by delivering written notice to the other and the Deposit shall be refunded to Buyer, thereby releasing Buyer and Seller from all further obligations under this Contract.

2. PARAGRAPH 8.(b) "FINANCING" to be amended by eliminating requirement for "written loan commitment" and substituting requirement of approval of a loan meeting "Financing" terms ("Loan Approval"); specifying loan term requiring sale of other property does not constitute "Loan Approval"; defining "diligent effort", and providing failure to use such effort as a default; providing Buyer's authorization for release of closing disclosures and settlements statements to Seller; providing that Buyer's failure to promptly deliver notice during "Loan Approval Period" either waiving Loan Approval or terminating Contract will result in Buyer's Deposit being subject to forfeiture if Closing does not occur; and eliminating Buyer's right to cancel after expiration of Loan Approval Period, but providing Seller three day window to terminate.

PARAGRAPH 8(b) "FINANCING". - -CHANGES MARKED

☐ (b) This Contract is contingent upon Buyer obtaining approval of ~~a written loan commitment for~~ a ☐ conventional ☐ FHA ☐ VA or ☐ other _____ (describe) loan ~~on the following terms~~ within _____ (if left blank, then 30 ~~45~~) days after Effective Date ("Loan Approval Period ~~Commitment Date~~") for **(CHECK ONE):** ☐ fixed, ☐ adjustable, ☐ fixed or adjustable rate ~~loan~~ in the Loan Amount (See Paragraph 2(c)), at an initial interest rate not to exceed _____ % (if left blank, then prevailing rate based upon Buyer's creditworthiness), and for a term of _____(if left blank, then 30) years ("Financing").

(i) Buyer shall make mortgage loan application for the Financing within _____ (if left blank, then 5) days after Effective Date and use good faith and diligent effort to obtain approval of a ~~written~~ loan ~~commitment for~~ meeting the Financing terms ("Loan Approval ~~Commitment~~") and thereafter to close this Contract. ~~Buyer shall keep Seller and Broker fully informed about the status of mortgage loan application, and Loan Commitment, and authorizes Buyer's mortgage broker and Buyer's lender to disclose such status and progress to Seller and Broker~~. Loan Approval which requires a condition related to the sale by Buyer of other property shall not be deemed Loan Approval for purposes of this subparagraph.

Buyer's failure to use diligent effort to obtain Loan Approval during the Loan Approval Period shall be considered a default under the terms of this Contract. For purposes of this provision, "diligent effort" includes, but is not limited to: timely furnishing all documents and information and paying of all fees and charges requested by Buyer's mortgage broker and lender in connection with Buyer's mortgage loan application.

(ii) Buyer shall keep Seller and Broker fully informed about the status of Buyer's mortgage loan application. Loan Approval, and loan processing and authorizes Buyer's mortgage broker, lender, and Closing Agent to disclose such status and progress and release preliminary and finally-executed closing disclosures and settlement statements to, Seller and Broker.

(iii) Upon Buyer~~'s receipt of~~ obtaining Loan Approval ~~Commitment~~, Buyer shall promptly deliver ~~provide~~ written notice of such approval ~~same~~ to Seller.

(iv) If Buyer ~~does not receive Loan Commitment by Loan Commitment Date~~ is unable to obtain Loan Approval after the exercise of diligent effort, then ~~thereafter either party may cancel this Contract up to the earlier of~~

~~(i.) Buyer's delivery of written notice to Seller that Buyer has either received Loan Commitment or elected to waive the financing contingency of this Contract; or~~

~~(ii.) 7 days prior to the Closing Date specified in Paragraph 4, which date, for purposes of this Paragraph 8(b)(ii), shall not be modified by Paragraph 5(a)~~.

at any time prior to expiration of the Loan Approval Period, Buyer may provide written notice to Seller stating that Buyer has been unable to obtain Loan Approval and has elected to either:

(1) waive Loan Approval, in which event this Contract will continue as if Loan Approval had been obtained; or

(2) terminate this Contract.

(v) If Buyer fails to timely deliver either notice provided for in (iii) or (iv) above to Seller prior to expiration of the Loan Approval Period, then Loan Approval shall be deemed waived, in which event this Contract will continue as if Loan Approval had been obtained; provided, however, Seller may elect to terminate this Contract by delivering written notice to Buyer within three (3) days after expiration of the Loan Approval Period.

(vi) If ~~either party timely cancels~~ this Contract ~~pursuant to this Paragraph 8~~ is timely terminated as provided by (iv)(2) or (v) above, and Buyer is not in default under the terms of this Contract, Buyer shall be refunded the Deposit thereby releasing Buyer and Seller from all further obligations under this Contract. ~~If neither party has timely canceled this Contract pursuant to this Paragraph 8, then this financing contingency shall be deemed waived by Buyer.~~

(vii) If ~~Buyer delivers written notice of receipt of Loan Commitment to Seller and this Contract does not thereafter close,~~ Loan Approval has been obtained, or deemed to have been waived, as provided above, and Buyer fails to close this Contract, then the Deposit shall be paid to Seller unless failure to close is due to: (1) Seller's default or inability to satisfy other contingencies of this Contract; (2) Property related conditions of the Loan Approval have not been met (except when such conditions are waived by other provisions of this Contract); or (3) appraisal of the Property obtained by Buyer's lender is insufficient to meet terms of the Loan Approval~~; or (4) the loan is not funded due to financial failure of Buyer's lender~~, in which event(s) the Buyer shall be refunded the Deposit, thereby releasing Buyer and Seller from all further obligations under this Contract.

PARAGRAPH 8(b) "FINANCING" - AS REVISED

☐ (b) This Contract is contingent upon Buyer obtaining approval of a ☐ conventional ☐ FHA ☐ VA or ☐ other _____ (describe) loan within _____ (if left blank, then 30) days after Effective Date ("Loan Approval Period") for **(CHECK ONE):** ☐ fixed, ☐ adjustable, ☐ fixed or adjustable rate in the Loan Amount (See Paragraph 2(c)), at an initial interest rate not to exceed _____ % (if left blank, then prevailing rate based upon Buyer's creditworthiness), and for a term of _____(if left blank, then 30) years ("Financing").

(i) Buyer shall make mortgage loan application for the Financing within _____ (if left blank, then 5) days after Effective Date and use good faith and diligent effort to obtain approval of a loan meeting the Financing terms ("Loan Approval") and thereafter to close this Contract. Loan Approval which requires a condition related to the sale by Buyer of other property shall not be deemed Loan Approval for purposes of this subparagraph.

Buyer's failure to use diligent effort to obtain Loan Approval during the Loan Approval Period shall be considered a default under the terms of this Contract. For purposes of this provision, "diligent effort" includes but not limited to, the timely furnishing of all documents and information and payment of all fees and charges requested by Buyer's mortgage broker and lender in connection with Buyer's mortgage loan application, Loan Approval, and loan processing.

(ii) Buyer shall keep Seller and Brokers fully informed about the status of Buyer's mortgage loan application, Loan Approval, and loan processing, and authorizes Buyer's mortgage broker, lender, and Closing Agent, to disclose such status and progress, and release preliminary and finally-executed closing disclosures and settlement statements, to Seller and Brokers.

(iii) Upon Buyer obtaining Loan Approval, Buyer shall promptly deliver written notice of such approval to Seller.

(iv) If Buyer is unable to obtain Loan Approval after the exercise of diligent effort, then at any time prior to expiration of the Loan Approval Period Buyer may provide written notice to Seller stating that Buyer has been unable to obtain Loan Approval and has elected to either:

(1) waive Loan Approval, in which event this Contract will continue as if Loan Approval had been obtained; or

(2) terminate this Contract.

(v) If Buyer fails to timely deliver either notice provided or in (iii) or (iv) above to Seller prior to expiration of the Loan Approval Period, then Loan Approval shall be deemed waived, in which event this Contract will continue as if Loan Approval had been obtained; provided, however, within three (3) days after expiration of the Loan Approval Period, Seller may elect to terminate this Contract by delivering written notice to Buyer.

(vi) If this Contract is timely terminated as provided by (iv) (2) or (v) above, and Buyer is not in default under the terms of this Contract, Buyer shall be refunded the Deposit thereby releasing Buyer and Seller from all further obligations under this Contract.

(vii) If Loan Approval has been obtained, or deemed to have been waived, as provided above, and Buyer fails to close this Contract, then the Deposit shall be paid to Seller unless failure to close is due to: (1) Seller's default or inability to satisfy other contingencies of this Contract; (2) Property related conditions of the Loan Approval have not been met (except when such conditions are waived by other provisions of this Contract); or (3) appraisal of the Property obtained by Buyer's lender is insufficient to meet terms of the Loan Approval, in which event(s) the Buyer shall be refunded the Deposit, thereby releasing Buyer and Seller from all further obligations under this Contract.

3. PARAGRAPH 9(c) "TITLE EVIDENCE AND INSURANCE to be amended by inserting at the end of Paragraph 9.(c) a definition of the term "municipal liens".

PARAGRAPH 9(c) "TITLE EVIDENCE AND INSURANCE - CHANGES MARKED

(c) ……. For purposes of this Contract "municipal lien search" means a search of public records necessary for the owner's policy of title insurance to be issued without exception for unrecorded liens imposed pursuant to Chapters 159 or 170, F.S. in favor of any governmental body, authority or agency.

PARAGRAPH 9(c) "TITLE EVIDENCE AND INSURANCE – AS REVISED

(c) …….For purposes of this Contract "municipal lien search" means a search of public records necessary for the owner's policy of title insurance to be issued without exception for unrecorded liens imposed pursuant to Chapters 159 or 170, F.S. in favor of any governmental body, authority or agency.

4. **PARAGRAPH 10.(b) "PERMITS DISCLOSURE"** to be amended to conform the Standard form and the "AS IS" Form by requiring Seller to provide documents and information related to certain building permit issues that have been disclosed by Seller. This provision will also be placed in the "AS IS" form.

PARAGRAPH 10(b) "PERMITS DISCLOSURE" - CHANGES MARKED
(b) **PERMITS DISCLOSURE:** Except as may have been disclosed by Seller to Buyer in a written disclosure, Seller does not know of any improvements made to the Property which were made without required permits or made pursuant to permits which have not been properly closed. If Seller identifies permits which have not been properly closed or improvements which were not permitted, then Seller shall promptly deliver to Buyer all plans, written documentation or other information in Seller's possession, knowledge, or control relating to improvements to the Property which are the subject of such open permits or unpermitted improvements.

PARAGRAPH 10(b) "PERMITS DISCLOSURE" – AS REVISED
(b) **PERMITS DISCLOSURE:** Except as may have been disclosed by Seller to Buyer in a written disclosure, Seller does not know of any improvements made to the Property which were made without required permits or made pursuant to permits which have not been properly closed. If Seller identifies permits which have not been properly closed or improvements which were not permitted, then Seller shall promptly deliver to Buyer all plans, written documentation or other information in Seller's possession, knowledge, or control relating to improvements to the Property which are the subject of such open permits or unpermitted improvements.

5. PARAGRAPH 10.(I) "FIRPTA TAX WITHHOLDING" to be amended by striking "Withholding" from title to Sub-paragraph, which subject is addressed in Standard V.

PARAGRAPH 10(I) "FIRPTA TAX WITHHOLDING" - CHANGES MARKED
(i) FOREIGN INVESTMENT IN REAL PROPERTY TAX ACT ("FIRPTA") ~~**TAX WITHHOLDING**~~**:** Seller shall inform Buyer in writing if Seller is a "foreign person" as defined by the Foreign Investment in Real Property Tax Act ("FIRPTA"). Buyer and Seller shall comply with FIRPTA, which may require Seller to provide additional cash at Closing. If Seller is not a "foreign person", Seller can provide Buyer, at or prior to Closing, a certification of non-foreign status, under penalties of perjury, to inform Buyer and Closing Agent that no withholding is required. See **STANDARD V** for further information pertaining to FIRPTA. Buyer and Seller are advised to seek legal counsel and tax advice regarding their respective rights, obligations, reporting and withholding requirements pursuant to FIRPTA.

6. PARAGRAPH 10.(j) "SELLER DISCLOSURE" to be amended to conform to the Standard form to the "AS IS" form by requiring Seller to disclose receipt of notice of certain violations.

PARAGRAPH 10(j) "SELLER DISCLOSURE" - CHANGES MARKED
(j) SELLER DISCLOSURE: Seller knows of no facts materially affecting the value of the Real Property which are not readily observable and which have not been disclosed to Buyer. Except as otherwise disclosed in writing Seller has received no written or verbal notice from any governmental entity or agency as to a currently uncorrected building, environmental or safety code violation.

PARAGRAPH 10(j) "SELLER DISCLOSURE" – AS REVISED
(j) SELLER DISCLOSURE: Seller knows of no facts materially affecting the value of the Real Property which are not readily observable and which have not been disclosed to Buyer. Except as otherwise disclosed in writing Seller has received no written or verbal notice from any governmental entity or agency as to a currently uncorrected building, environmental or safety code violation.

7. PARAGRAPH 12(d) (i) and (ii) "INSPECTION AND CLOSE-OUT OF BUILDING PERMITS " to be amended by requiring Seller to provide documents and information related to certain building permit issues that have been identified by Buyer's Permit Inspection and requiring Seller to not only obtain needed permits, but to also close such permits.

PARAGRAPH 12(d) (i) and (ii) "INSPECTION AND CLOSE-OUT OF BUILDING PERMITS CHANGES MARKED

(i). **Permit Inspection:** Buyer may have an inspection and examination of records and documents made to determine whether there exist any open or expired building permits or unpermitted improvements to the Property ("Permit Inspection"). Buyer shall, within the Permit Inspection Period, deliver written notice to Seller of the existence of any open or expired building permits or unpermitted improvements to the Property. If Buyer's inspection of the Property identifies permits which have not been properly closed or improvements which were not permitted, then Seller shall promptly deliver to Buyer all plans, written documentation or other information in Seller's possession, knowledge, or control relating to improvements to the Property which are the subject of such open permits or unpermitted improvements.

(ii) **Close-Out of Building Permits:** Seller shall, within 10 days after receipt of Buyer's Permit Inspection notice, have an estimate of costs to remedy Permit Inspection items prepared by an appropriately licensed person and a copy delivered to Buyer. No later than 5 days prior to Closing Date, Seller shall, up to the Permit Limit, have open and expired building permits identified by Buyer or known to Seller closed by the applicable governmental entity, and obtain and close any required building permits for improvements to the Property. Prior to Closing Date, Seller will provide Buyer with any written documentation that all open and expired building permits identified by Buyer or known to Seller have been closed out and that Seller has obtained and closed required building permits for improvements to the Property. If final permit inspections cannot be performed due to delays by the governmental entity, Closing Date shall be extended for up to 10 days to complete such final inspections, failing which, either party may terminate this Contract, and Buyer shall be refunded the Deposit, thereby releasing Buyer and Seller from all further obligations under this Contract.

If cost to close open or expired building permits or to remedy any permit violation of any governmental entity exceeds Permit Limit, then within 5 days after a party's receipt of estimates of cost to remedy: (A) Seller may elect to pay the excess by delivering written notice to Buyer; or (B) Buyer may deliver written notice to Seller accepting the Property in its "as is" condition with regard to building permit status and agreeing to receive credit from Seller at Closing in the amount of Permit Limit. If neither party delivers such written notice to the other, then either party may terminate this Contract and Buyer shall be refunded the Deposit, thereby releasing Buyer and Seller from all further obligations under this Contract.

8. STANDARD 18 I (i) "CLOSING LOCATION; DOCUMENTS; AND PROCEDURE to be amended to clarify existing language and provide for Closing conducted by overnight courier**.**

STANDARD 18 I (i) "CLOSING LOCATION; DOCUMENTS; AND PROCEDURE"- CHANGES MARKED

I. CLOSING LOCATION; DOCUMENTS; AND PROCEDURE:

(i) **LOCATION:** Closing will ~~take place in the county where the Real Property is located at the office of the~~ be conducted by the attorney or other closing agent ("Closing Agent") designated by the party paying for the owner's policy of title insurance~~, or if no title insurance, designated by,~~ and will take place in the county where the Real Property is located at the office of the Closing Agent, or at such other location agreed to by the parties. If there is no title insurance, Seller will designate Closing Agent. Closing may be conducted by mail, overnight courier, or electronic means.

STANDARD 18 I(i) "CLOSING LOCATION; DOCUMENTS; AND PROCEDURE"- AS REVISED

I. CLOSING LOCATION; DOCUMENTS; AND PROCEDURE:

(i) **LOCATION:** Closing will be conducted by the attorney or other closing agent ("Closing Agent") designated by the party paying for the owner's policy of title insurance and will take place in the county where the Real Property is located at the office of the Closing Agent, or at such other location agreed to by the parties. If there is no title insurance, Seller will designate Closing Agent. Closing may be conducted by mail, overnight courier, or electronic means.

9. **(NEW) STANDARD 18 I (ii) "FinCEN GTO NOTICE"** to be inserted to require certain Buyers to furnish information required by U.S. Treasury Department's Financial Crimes Enforcement Network ("FinCEN") Geographic Targeting Orders ("GTOs"), and consent to release of such information by Closing Agents.

STANDARD 18 I "CLOSING LOCATION; DOCUMENTS; AND PROCEDURE"- CHANGES MARKED
I. CLOSING LOCATION; DOCUMENTS; AND PROCEDURE: (iii) **FinCEN GTO NOTICE. If Closing Agent is required to comply with the U.S. Treasury Department's Financial Crimes Enforcement Network ("FinCEN") Geographic Targeting Orders ("GTOs"), then Buyer shall provide Closing Agent with the information related to Buyer and the transaction contemplated by this Contract that is required to complete IRS Form 8300, and Buyer consents to Closing Agent's collection and report of said information to IRS.**

10. **STANDARD 18. K. "PRORATIONS; CREDITS"** to be amended to clarify that maximum allowable discounts and applicable homestead and other exemptions apply to the calculation of all prorations.

STANDARD 18 K. "PRORATIONS; CREDITS" – CHANGES MARKED
K. PRORATIONS; CREDITS: The following recurring items will be made current (if applicable) and prorated as of the day prior to Closing Date, or date of occupancy if occupancy occurs before Closing Date: real estate taxes (including special benefit tax assessments imposed by a CDD), interest, bonds, association fees, insurance, rents and other expenses of Property. Buyer shall have option of taking over existing policies of insurance, if assumable, in which event premiums shall be prorated. Cash at Closing shall be increased or decreased as may be required by prorations to be made through day prior to Closing. Advance rent and security deposits, if any, will be credited to Buyer. Escrow deposits held by Seller's mortgagee will be paid to Seller. Taxes shall be prorated based on current year's tax ~~with due allowance made for maximum allowable discount, homestead and other exemptions~~. If Closing occurs on a date when current year's millage is not fixed but current year's assessment is available, taxes will be prorated based upon such assessment and prior year's millage. If current year's assessment is not available, then taxes will be prorated on prior year's tax. If there are completed improvements on the Real Property by January 1st of year of Closing, which improvements were not in existence on January 1st of prior year, then taxes shall be prorated based upon prior year's millage and at an equitable assessment to be agreed upon between the parties, failing which, request shall be made to the County Property Appraiser for an informal assessment taking into account available exemptions. In all cases, due allowance shall be made for the maximum allowable discounts and applicable homestead and other exemptions. A tax proration based on an estimate shall, at either party's request, be readjusted upon receipt of current year's tax bill. This STANDARD K shall survive Closing.

STANDARD 18 K. "PRORATIONS; CREDITS" - AS REVISED
K. PRORATIONS; CREDITS: The following recurring items will be made current (if applicable) and prorated as of the day prior to Closing Date, or date of occupancy if occupancy occurs before Closing Date: real estate taxes (including special benefit tax assessments imposed by a CDD), interest, bonds, association fees, insurance, rents and other expenses of Property. Buyer shall have option of taking over existing policies of insurance, if assumable, in which event premiums shall be prorated. Cash at Closing shall be increased or decreased as may be required by prorations to be made through day prior to Closing. Advance rent and security deposits, if any, will be credited to Buyer. Escrow deposits held by Seller's mortgagee will be paid to Seller. Taxes shall be prorated based on current year's tax. If Closing occurs on a date when current year's millage is not fixed but current year's assessment is available, taxes will be prorated based upon such assessment and prior year's millage. If current year's assessment is not available, then taxes will be prorated on prior year's tax. If there are completed improvements on the Real Property by January 1st of year of Closing, which improvements were not in existence on January 1st of prior year, then taxes shall be prorated based upon prior year's millage and at an equitable assessment to be agreed upon between the parties, failing which, request shall be made to the County Property Appraiser for an informal assessment taking into account available exemptions. In all cases, due allowance shall be made for the maximum allowable discounts and applicable homestead and other exemptions. A tax proration based on an estimate shall, at either party's request, be readjusted upon receipt of current year's tax bill. This STANDARD K shall survive Closing.

11. STANDARD 18. T. "LOAN COMMITMENT" to be deleted as a result of other amendments eliminating use of term "loan commitment".

STANDARD 18. "T. LOAN COMMITMENT" – - CHANGES MARKED
T. RESERVED ~~LOAN COMMITMENT: "Loan Commitment" means a statement by the lender setting forth the terms and conditions upon which the lender is~~ willing ~~to make a particular mortgage loan to a particular borrower. Neither a pre-approval letter nor a prequalification letter shall be deemed a Loan Commitment for purposes of this Contract.~~

STANDARD 18. "T. LOAN COMMITMENT" – - AS REVISED
T. RESERVED.

12. STANDARD 18. V. "FOREIGN INVESTMENT IN REAL PROPERTY TAX ACT", to be amended for clarity and by eliminating reference to exemption relating sale of residential property for less than $300,000 by modifying the title, opening paragraph, and Sub-paragraphs (i) and (ii).

STANDARD 18. V. "FOREIGN INVESTMENT IN REAL PROPERTY TAX ACT" – - CHANGES MARKED
V. ~~FOREIGN INVESTMENT IN REAL PROPERTY TAX ACT ("~~FIRPTA~~")~~ TAX WITHHOLDING: If a seller of U.S. real property is a "foreign person" as defined by FIRPTA, Section 1445 of the Internal Revenue Code ("Code") requires the buyer of the real property to withhold up to 15% of the amount realized by the seller on the transfer and remit the withheld amount to the Internal Revenue Service (IRS) unless an exemption to the required withholding applies or the seller has obtained a Withholding Certificate from the IRS authorizing a reduced amount of withholding. ~~Due to the complexity and potential risks of FIRPTA, Buyer and Seller should seek legal and tax advice regarding compliance, particularly if an "exemption" is claimed on the sale of residential property for $300,000 or less.~~ (i) No withholding is required under Section 1445 of the Code if the Seller is not a "foreign person."~~, provided Buyer accepts proof of same from Seller which may include Buyer's receipt of certification~~. Seller can provide proof of non-foreign status ~~from Seller~~ to Buyer by delivery of written certification signed under penalties of perjury, stating that Seller is not a foreign person and containing Seller's name, U.S. taxpayer identification number and home address (or office address, in the case of an entity), as provided for in 26 CFR 1.1445-2(b). Otherwise, Buyer shall withhold the applicable percentage of the amount realized by Seller on the transfer and timely remit said funds to the IRS. (ii) If Seller is a foreign person and has received a Withholding Certificate from the IRS which provides for reduced or eliminated withholding in this transaction and provides same to Buyer by Closing, then Buyer shall withhold the reduced sum~~, if any~~ required, if any, and timely remit said funds to the IRS. …….

STANDARD 18. V. "FOREIGN INVESTMENT IN REAL PROPERTY TAX ACT" – AS REVISED
V. FIRPTA TAX WITHHOLDING: If a seller of U.S. real property is a "foreign person" as defined by FIRPTA, Section 1445 of the Internal Revenue Code ("Code") requires the buyer of the real property to withhold up to 15% of the amount realized by the seller on the transfer and remit the withheld amount to the Internal Revenue Service (IRS) unless an exemption to the required withholding applies or the seller has obtained a Withholding Certificate from the IRS authorizing a reduced amount of withholding. (i) No withholding is required under Section 1445 of the Code if the Seller is not a "foreign person", Seller can provide proof of non-foreign status to Buyer by delivery of written certification signed under penalties of perjury, stating that Seller is not a foreign person and containing Seller's name, U.S. taxpayer identification number and home address (or office address, in the case of an entity), as provided for in 26 CFR 1.1445-2(b). Otherwise, Buyer shall withhold the applicable percentage of the amount realized by Seller on the transfer and timely remit said funds

to the IRS.

(ii) If Seller is a foreign person and has received a Withholding Certificate from the IRS which provides for reduced or eliminated withholding in this transaction and provides same to Buyer by Closing, then Buyer shall withhold the reduced sum required, if any, and timely remit said funds to the IRS.

(iii) If prior to Closing Seller has submitted a completed application to the IRS for a Withholding Certificate and has provided to Buyer the notice required by 26 CFR 1.1445-1(c) (2)(i)(B) but no Withholding Certificate has been received as of Closing, Buyer shall, at Closing, withhold the applicable percentage of the amount realized by Seller on the transfer and, at Buyer's option, either (a) timely remit the withheld funds to the IRS or (b) place the funds in escrow, at Seller's expense, with an escrow agent selected by Buyer and pursuant to terms negotiated by the parties, to be subsequently disbursed in accordance with the Withholding Certificate issued by the IRS or remitted directly to the IRS if the Seller's application is rejected or upon terms set forth in the escrow agreement.

(iv) In the event the net proceeds due Seller are not sufficient to meet the withholding requirement(s) in this transaction, Seller shall deliver to Buyer, at Closing, the additional COLLECTED funds necessary to satisfy the applicable requirement and thereafter Buyer shall timely remit said funds to the IRS or escrow the funds for disbursement in accordance with the final determination of the IRS, as applicable.

(v) Upon remitting funds to the IRS pursuant to this STANDARD, Buyer shall provide Seller copies of IRS Forms 8288 and 8288-A, as filed.

Residential Contract For Sale And Purchase PROPOSED

THIS FORM HAS BEEN APPROVED BY THE FLORIDA REALTORS AND THE FLORIDA BAR

FloridaRealtors®

PARTIES: _____ ("Seller"), and _____ ("Buyer"), agree that Seller shall sell and Buyer shall buy the following described Real Property and Personal Property (collectively "Property") pursuant to the terms and conditions of this Residential Contract For Sale And Purchase and any riders and addenda ("Contract"):

1. PROPERTY DESCRIPTION:

(a) Street address, city, zip: _____

(b) Property is located in: _____ County, Florida. Real Property Tax ID No.: _____

(c) Real Property: The legal description is _____

_____

_____

together with all existing improvements and fixtures, including built-in appliances, built-in furnishings and attached wall-to-wall carpeting and flooring ("Real Property") unless specifically excluded in Paragraph 1(e) or by other terms of this Contract.

(d) Personal Property: Unless excluded in Paragraph 1(e) or by other terms of this Contract, the following items which are owned by Seller and existing on the Property as of the date of the initial offer are included in the purchase: range(s)/oven(s), refrigerator(s), dishwasher(s), disposal, ceiling fan(s), intercom, light fixture(s), drapery rods and draperies, blinds, window treatments, smoke detector(s), garage door opener(s), security gate and other access devices, and storm shutters/panels ("Personal Property").

Other Personal Property items included in this purchase are: _____

_____

Personal Property is included in the Purchase Price, has no contributory value, and shall be left for the Buyer.

(e) The following items are excluded from the purchase: _____

_____

PURCHASE PRICE AND CLOSING

2. PURCHASE PRICE (U.S. currency): ..... **$** _____

(a) Initial deposit to be held in escrow in the amount of **(checks subject to COLLECTION)** ..... $ _____

The initial deposit made payable and delivered to "Escrow Agent" named below

(CHECK ONE): (i) ☐ accompanies offer or (ii) ☐ is to be made within _____ (if left blank, then 3) days after Effective Date. IF NEITHER BOX IS CHECKED, THEN OPTION (ii) SHALL BE DEEMED SELECTED.

Escrow Agent Information: Name: _____

Address: _____

Phone: _____ E-mail: _____ Fax: _____

(b) Additional deposit to be delivered to Escrow Agent within _____ (if left blank, then 10) days after Effective Date ..... $ _____

(All deposits paid or agreed to be paid, are collectively referred to as the "Deposit")

(c) Financing: Express as a dollar amount or percentage ("Loan Amount") see Paragraph 8 ..... _____

(d) Other: _____ ..... $ _____

(e) Balance to close (not including Buyer's closing costs, prepaids and prorations) by wire transfer or other **COLLECTED** funds ..... $ _____

NOTE: For the definition of "COLLECTION" or "COLLECTED" see STANDARD S.

3. TIME FOR ACCEPTANCE OF OFFER AND COUNTER-OFFERS; EFFECTIVE DATE:

(a) If not signed by Buyer and Seller, and an executed copy delivered to all parties on or before _____, this offer shall be deemed withdrawn and the Deposit, if any, shall be returned to Buyer. Unless otherwise stated, time for acceptance of any counter-offers shall be within 2 days after the day the counter-offer is delivered.

(b) The effective date of this Contract shall be the date when the last one of the Buyer and Seller has signed or initialed and delivered this offer or final counter-offer ("Effective Date").

4. CLOSING DATE: Unless modified by other provisions of this Contract, the closing of this transaction shall occur and the closing documents required to be furnished by each party pursuant to this Contract shall be delivered ("Closing") on _____ ("Closing Date"), at the time established by the Closing Agent.

5. EXTENSION OF CLOSING DATE:

(a) If Paragraph 8. (b) is checked and Closing funds from Buyer's lender are not available on Closing Date due to Consumer Financial Protection Bureau Closing Disclosure delivery requirements ("CFPB Requirements"), then Closing

Date shall be extended for such period necessary to satisfy CFPB Requirements, provided such period shall not exceed 10 days.

(b) If an ~~extreme weather or other condition or~~ event constituting ~~"~~Force Majeure~~"~~ ~~(see STANDARD G)~~ causes~~: (i) disruption of utilities or other~~ services essential for Closing ~~or (ii) Hazard, Wind, Flood or Homeowners' insurance,~~ to be~~come~~ unavailable~~ prior to Closing~~, including the unavailability of utilities or issuance of hazard, wind, flood or homeowners' insurance, Closing Date shall be extended ~~a reasonable time up to 3 days after restoration of utilities and other services essential to Closing and availability of applicable Hazard, Wind, Flood or Homeowners' insurance. If restoration of such utilities or services and availability of insurance has not occurred within _____ (if left blank, then 14) days after Closing Date, then either party may terminate this Contract by delivering written notice to the other party, and Buyer shall be refunded the Deposit, thereby releasing Buyer and Seller from all further obligations under this Contract~~ as provided in Standard G.

6. OCCUPANCY AND POSSESSION:

(a) Unless the box in Paragraph 6(b) is checked, Seller shall, at Closing, deliver occupancy and possession of the Property to Buyer free of tenants, occupants and future tenancies. Also, at Closing, Seller shall have removed all personal items and trash from the Property and shall deliver all keys, garage door openers, access devices and codes, as applicable, to Buyer. If occupancy is to be delivered before Closing, Buyer assumes all risks of loss to the Property from date of occupancy, shall be responsible and liable for maintenance from that date, and shall be deemed to have accepted the Property in its existing condition as of time of taking occupancy, except with respect to any items identified by Buyer pursuant to Paragraph 12, prior to taking occupancy, which require repair, replacement, treatment or remedy.

(b) ☐ **CHECK IF PROPERTY IS SUBJECT TO LEASE(S) OR OCCUPANCY AFTER CLOSING.** If Property is subject to a lease(s) after Closing or is intended to be rented or occupied by third parties beyond Closing, the facts and terms thereof shall be disclosed in writing by Seller to Buyer and copies of the written lease(s) shall be delivered to Buyer, all within 5 days after Effective Date. If Buyer determines, in Buyer's sole discretion, that the lease(s) or terms of occupancy are not acceptable to Buyer, Buyer may terminate this Contract by delivery of written notice of such election to Seller within 5 days after receipt of the above items from Seller, and Buyer shall be refunded the Deposit thereby releasing Buyer and Seller from all further obligations under this Contract. Estoppel Letter(s) and Seller's affidavit shall be provided pursuant to STANDARD D. If Property is intended to be occupied by Seller after Closing, see Rider U. POST-CLOSING OCCUPANCY BY SELLER.

7. ASSIGNABILITY: (CHECK ONE): Buyer ☐ may assign and thereby be released from any further liability under this Contract; ☐ may assign but not be released from liability under this Contract; or ☐ may not assign this Contract.

FINANCING

8. FINANCING:

☐ (a) Buyer will pay cash for the purchase of the Property at Closing. There is no financing contingency to Buyer's obligation to close. If Buyer obtains a loan for any part of the Purchase Price of the Property, Buyer acknowledges that any terms and conditions imposed by Buyer's lender(s) or by CFPB Requirements shall not affect or extend the Buyer's obligation to close or otherwise affect any terms or conditions of this Contract.

☐ (b) This Contract is contingent upon Buyer obtaining approval of ~~a written loan commitment for~~ a ☐ conventional ☐ FHA ☐ VA or ☐ other _____ (describe) loan ~~on the following terms~~ within _____ (if left blank, then 30 ~~45~~) days after Effective Date ("Loan Approval Period ~~Commitment Date~~") for **(CHECK ONE):** ☐ fixed, ☐ adjustable, ☐ fixed or adjustable rate ~~loan~~ in the Loan Amount (See Paragraph 2(c)), at an initial interest rate not to exceed _____ % (if left blank, then prevailing rate based upon Buyer's creditworthiness), and for a term of _____(if left blank, then 30) years ("Financing").

(i) Buyer shall make mortgage loan application for the Financing within _____ (if left blank, then 5) days after Effective Date and use good faith and diligent effort to obtain approval of a ~~written~~ loan ~~commitment for~~ meeting the Financing terms ("Loan Approval ~~Commitment~~") and thereafter to close this Contract. ~~Buyer shall keep Seller and Broker fully informed about the status of mortgage loan application, and Loan Commitment, and authorizes Buyer's mortgage broker and Buyer's lender to disclose such status and progress to Seller and Broker~~. Loan Approval which requires a condition related to the sale by Buyer of other property shall not be deemed Loan Approval for purposes of this subparagraph.

Buyer's failure to use diligent effort to obtain Loan Approval during the Loan Approval Period shall be considered a default under the terms of this Contract. For purposes of this provision, "diligent effort" includes, but is not limited to: timely furnishing all documents and information and paying of all fees and charges requested by Buyer's mortgage broker and lender in connection with Buyer's mortgage loan application.

(ii) Buyer shall keep Seller and Brokers fully informed about the status of Buyer's mortgage loan application, Loan Approval, and loan processing and authorizes Buyer's mortgage broker, lender, and Closing Agent to disclose such

status and progress, and release preliminary and finally-executed closing disclosures and settlement statements, to Seller and Brokers.

(iii) Upon Buyer~~'s receipt of~~ obtaining Loan Approval ~~Commitment~~, Buyer shall promptly deliver ~~provide~~ written notice of such approval ~~same~~ to Seller.

(iv) If Buyer ~~does not receive Loan Commitment by Loan Commitment Date~~ is unable to obtain Loan Approval after the exercise of diligent effort, then ~~thereafter either party may cancel this Contract up to the earlier of~~

~~(i.) Buyer's delivery of written notice to Seller that Buyer has either received Loan Commitment or elected to waive the financing contingency of this Contract; or~~
~~(ii.) 7 days prior to the Closing Date specified in Paragraph 4, which date, for purposes of this Paragraph 8(b) (ii), shall not be modified by Paragraph 5(a)~~.
at any time prior to expiration of the Loan Approval Period, Buyer may provide written notice to Seller stating that Buyer has been unable to obtain Loan Approval and has elected to either:
(1) waive Loan Approval, in which event this Contract will continue as if Loan Approval had been obtained; or
(2) terminate this Contract.

(v) If Buyer fails to timely deliver either notice provided in (iii) or (iv) above to Seller prior to expiration of the Loan Approval Period, then Loan Approval shall be deemed waived, in which event this Contract will continue as if Loan Approval had been obtained; provided, however, Seller may elect to terminate this Contract by delivering written notice to Buyer within three (3) days after expiration of the Loan Approval Period.

(vi) If ~~either party timely cancels~~ this Contract ~~pursuant to this Paragraph 8~~ is timely terminated as provided by (iv) (2) or (v) above, and Buyer is not in default under the terms of this Contract, Buyer shall be refunded the Deposit thereby releasing Buyer and Seller from all further obligations under this Contract. ~~If neither party has timely canceled this Contract pursuant to this Paragraph 8, then this financing contingency shall be deemed waived by Buyer.~~

(vii) If ~~Buyer delivers written notice of receipt of Loan Commitment to Seller and this Contract does not thereafter close,~~ Loan Approval has been obtained, or deemed to have been waived, as provided above, and Buyer fails to close this Contract, then the Deposit shall be paid to Seller unless failure to close is due to: (1) Seller's default or inability to satisfy other contingencies of this Contract; (2) Property related conditions of the Loan Approval have not been met (except when such conditions are waived by other provisions of this Contract); or (3) appraisal of the Property obtained by Buyer's lender is insufficient to meet terms of the Loan Approval~~; or (4) the loan is not funded due to financial failure of Buyer's lender~~, in which event(s) the Buyer shall be refunded the Deposit, thereby releasing Buyer and Seller from all further obligations under this Contract.
☐ (c) Assumption of existing mortgage (see rider for terms).
☐ (d) Purchase money note and mortgage to Seller (see riders; addenda; or special clauses for terms).

CLOSING COSTS, FEES AND CHARGES

9. CLOSING COSTS; TITLE INSURANCE; SURVEY; HOME WARRANTY; SPECIAL ASSESSMENTS:
(a) **COSTS TO BE PAID BY SELLER:**
- Documentary stamp taxes and surtax on deed, if any
- Owner's Policy and Charges (if Paragraph 9(c)(i) is checked)
- Title search charges (if Paragraph 9(c)(iii) is checked)
- Municipal lien search (if Paragraph 9(c) (i) or (iii) is checked)
- HOA/Condominium Association estoppel fees
- Recording and other fees needed to cure title
- Seller's attorneys' fees
- Other:_____

Seller shall pay the following amounts/percentages of the Purchase Price for the following costs and expenses:
(i) up to $ _____ or _____ % (1.5% if left blank) for General Repair Items ("General Repair Limit"); and
(ii) up to $ _____ or _____ % (1.5% if left blank) for WDO treatment and repairs ("WDO Repair Limit"); and
(iii) up to $ _____ or _____ % (1.5% if left blank) for costs associated with closing out open or expired building permits and obtaining required building permits for any existing improvement for which a permit was not obtained ("Permit Limit").
If, prior to Closing, Seller is unable to meet the Maintenance Requirement as required by Paragraph 11 or the repairs, replacements, treatments or permitting as required by Paragraph 12, then, sums equal to 125% of estimated costs to complete the applicable item(s) (but, not in excess of applicable General Repair, WDO Repair, and Permit Limits set forth above, if any) shall be escrowed at Closing. If actual costs of required repairs, replacements, treatment or permitting exceed applicable escrowed amounts, Seller shall pay such actual costs (but,

not in excess of applicable General Repair, WDO Repair, and Permit Limits set forth above). Any unused portion of escrowed amount(s) shall be returned to Seller.

(b) **COSTS TO BE PAID BY BUYER:**

- Taxes and recording fees on notes and mortgages
- Recording fees for deed and financing statements
- Owner's Policy and Charges (if Paragraph 9(c)(ii) is checked)
- Survey (and elevation certification, if required)
- Lender's title policy and endorsements
- HOA/Condominium Association application/transfer fees
- Municipal lien search (if Paragraph 9(c) (ii) is checked)
- Other:_____
- Loan expenses
- Appraisal fees
- Buyer's Inspections
- Buyer's attorneys' fees
- All property related insurance
- Owner's Policy Premium (if Paragraph 9 (c) (iii) is checked.)

(c) **TITLE EVIDENCE AND INSURANCE:** At least _____ (if left blank, then 15, or if Paragraph 8 (a) is checked, then 5) days prior to Closing Date ("Title Evidence Deadline"), a title insurance commitment issued by a Florida licensed title insurer, with legible copies of instruments listed as exceptions attached thereto ("Title Commitment") and, after Closing, an owner's policy of title insurance (see STANDARD A for terms) shall be obtained and delivered to Buyer. If Seller has an owner's policy of title insurance covering the Real Property, a copy shall be furnished to Buyer and Closing Agent within 5 days after Effective Date. The owner's title policy premium, title search and closing services (collectively, "Owner's Policy and Charges") shall be paid, as set forth below. The title insurance premium charges for the Owner's Policy and any lender's policy will be calculated and allocated in accordance with Florida law, but may be reported differently on certain federally mandated closing disclosures and other closing documents. For purposes of this Contract "municipal lien search" means a search of public records necessary for the owner's policy of title insurance to be issued without exception for unrecorded liens imposed pursuant to Chapters 159 or 170, F.S. in favor of any governmental body, authority or agency.

(**CHECK ONE):**

☐ (i) Seller shall designate Closing Agent and pay for Owner's Policy and Charges and Buyer shall pay the premium for Buyer's lender's policy and charges for closing services related to the lender's policy, endorsements and loan closing, which amounts shall be paid by Buyer to Closing Agent or such other provider(s) as Buyer may select); or

☐ (ii) Buyer shall designate Closing Agent and pay for Owner's Policy and Charges and charges for closing services related to Buyer's lender's policy, endorsements, and loan closing; or

☐ (iii) [**MIAMI-DADE/BROWARD REGIONAL PROVISION]:** Seller shall furnish a copy of a prior owner's policy of title insurance or other evidence of title and pay fees for: (A) a continuation or update of such title evidence, which is acceptable to Buyer's title insurance underwriter for reissue of coverage; (B) tax search; and (C) municipal lien search. Buyer shall obtain and pay for post-Closing continuation and premium for Buyer's owner's policy, and if applicable, Buyer's lender's policy. Seller shall not be obligated to pay more than $ _____ (if left blank, then $200.00) for abstract continuation or title search ordered or performed by Closing Agent.

(d) **SURVEY:** On or before Title Evidence Deadline, Buyer may, at Buyer's expense, have the Real Property surveyed and certified by a registered Florida surveyor ("Survey"). If Seller has a survey covering the Real Property, a copy shall be furnished to Buyer and Closing Agent within 5 days after Effective Date.

(e) **HOME WARRANTY:** At Closing, ☐ Buyer ☐ Seller ☐ N/A shall pay for a home warranty plan issued by _____ at a cost not to exceed $_____. A home warranty plan provides for repair or replacement of many of a home's mechanical systems and major built-in appliances in the event of breakdown due to normal wear and tear during the agreement's warranty period.

(f) **SPECIAL ASSESSMENTS:** At Closing, Seller shall pay: (i) the full amount of liens imposed by a public body ("public body" does not include a Condominium or Homeowner's Association) that are certified, confirmed and ratified before Closing; and (ii) the amount of the public body's most recent estimate or assessment for an improvement which is substantially complete as of Effective Date, but that has not resulted in a lien being imposed on the Property before Closing. Buyer shall pay all other assessments. If special assessments may be paid in installments **(CHECK ONE):**

☐ (a) Seller shall pay installments due prior to Closing and Buyer shall pay installments due after Closing. Installments prepaid or due for the year of Closing shall be prorated.

☐ (b) Seller shall pay the assessment(s) in full prior to or at the time of Closing.

IF NEITHER BOX IS CHECKED, THEN OPTION (a) SHALL BE DEEMED SELECTED.

This Paragraph 9(f) shall not apply to a special benefit tax lien imposed by a community development district (CDD) pursuant to Chapter 190, F.S., which lien shall be prorated pursuant to STANDARD K.

DISCLOSURES

10. DISCLOSURES:

(a) **RADON GAS:** Radon is a naturally occurring radioactive gas that, when it is accumulated in a building in sufficient quantities, may present health risks to persons who are exposed to it over time. Levels of radon that exceed federal

and state guidelines have been found in buildings in Florida. Additional information regarding radon and radon testing may be obtained from your county health department.

(b) **PERMITS DISCLOSURE:** Except as may have been disclosed by Seller to Buyer in a written disclosure, Seller does not know of any improvements made to the Property which were made without required permits or made pursuant to permits which have not been properly closed. If Seller identifies permits which have not been properly closed or improvements which were not permitted, then Seller shall promptly deliver to Buyer all plans, written documentation or other information in Seller's possession, knowledge, or control relating to improvements to the Property which are the subject of such open permits or unpermitted improvements.

(c) **MOLD:** Mold is naturally occurring and may cause health risks or damage to property. If Buyer is concerned or desires additional information regarding mold, Buyer should contact an appropriate professional.

(d) **FLOOD ZONE; ELEVATION CERTIFICATION:** Buyer is advised to verify by elevation certificate which flood zone the Property is in, whether flood insurance is required by Buyer's lender, and what restrictions apply to improving the Property and rebuilding in the event of casualty. If Property is in a "Special Flood Hazard Area" or "Coastal Barrier Resources Act" designated area or otherwise protected area identified by the U.S. Fish and Wildlife Service under the Coastal Barrier Resources Act and the lowest floor elevation for the building(s) and /or flood insurance rating purposes is below minimum flood elevation or is ineligible for flood insurance coverage through the National Flood Insurance Program or private flood insurance as defined in 42 U.S.C. §4012a, Buyer may terminate this Contract by delivering written notice to Seller within _____ (if left blank, then 20) days after Effective Date, and Buyer shall be refunded the Deposit thereby releasing Buyer and Seller from all further obligations under this Contract, failing which Buyer accepts existing elevation of buildings and flood zone designation of Property. The National Flood Insurance Program may assess additional fees or adjust premiums for pre-Flood Insurance Rate Map (pre-FIRM) non-primary structures (residential structures in which the insured or spouse does not reside for at least 50% of the year) and an elevation certificate may be required for actuarial rating.

(e) **ENERGY BROCHURE:** Buyer acknowledges receipt of Florida Energy-Efficiency Rating Information Brochure required by Section 553.996, F.S.

(f) **LEAD-BASED PAINT:** If Property includes pre-1978 residential housing, a lead-based paint disclosure is mandatory.

(g) **HOMEOWNERS' ASSOCIATION/COMMUNITY DISCLOSURE: BUYER SHOULD NOT EXECUTE THIS CONTRACT UNTIL BUYER HAS RECEIVED AND READ THE HOMEOWNERS' ASSOCIATION/COMMUNITY DISCLOSURE, IF APPLICABLE.**

(h) **PROPERTY TAX DISCLOSURE SUMMARY:** BUYER SHOULD NOT RELY ON THE SELLER'S CURRENT PROPERTY TAXES AS THE AMOUNT OF PROPERTY TAXES THAT THE BUYER MAY BE OBLIGATED TO PAY IN THE YEAR SUBSEQUENT TO PURCHASE. A CHANGE OF OWNERSHIP OR PROPERTY IMPROVEMENTS TRIGGERS REASSESSMENTS OF THE PROPERTY THAT COULD RESULT IN HIGHER PROPERTY TAXES. IF YOU HAVE ANY QUESTIONS CONCERNING VALUATION, CONTACT THE COUNTY PROPERTY APPRAISER'S OFFICE FOR INFORMATION.

(i) **FOREIGN INVESTMENT IN REAL PROPERTY TAX ACT ("FIRPTA") ~~TAX WITHHOLDING~~:** Seller shall inform Buyer in writing if Seller is a "foreign person" as defined by the Foreign Investment in Real Property Tax Act ("FIRPTA"). Buyer and Seller shall comply with FIRPTA, which may require Seller to provide additional cash at Closing. If Seller is not a "foreign person", Seller can provide Buyer, at or prior to Closing, a certification of non-foreign status, under penalties of perjury, to inform Buyer and Closing Agent that no withholding is required. See **STANDARD V** for further information pertaining to FIRPTA. Buyer and Seller are advised to seek legal counsel and tax advice regarding their respective rights, obligations, reporting and withholding requirements pursuant to FIRPTA.

(j) **SELLER DISCLOSURE:** Seller knows of no facts materially affecting the value of the Real Property which are not readily observable and which have not been disclosed to Buyer. Except as otherwise disclosed in writing Seller has received no written or verbal notice from any governmental entity or agency as to a currently uncorrected building, environmental or safety code violation.

PROPERTY MAINTENANCE, CONDITION, INSPECTIONS AND EXAMINATIONS

11. PROPERTY MAINTENANCE: Except for ordinary wear and tear and Casualty Loss, and those repairs, replacements or treatments required to be made by this Contract, Seller shall maintain the Property, including, but not limited to, lawn, shrubbery, and pool, in the condition existing as of Effective Date ("Maintenance Requirement").

12. PROPERTY INSPECTION AND REPAIR:

(a) **INSPECTION PERIOD:** Buyer shall have _____ (if left blank 15) days after Effective Date ("Inspection Period"), within which Buyer may, at Buyer's expense, conduct "General", "WDO", and "Permit" Inspections described below. If Buyer fails to timely deliver to Seller a written notice or report required by (b), (c), or (d) below, then, except for Seller's continuing Maintenance Requirement, Buyer shall have waived Seller's obligation(s) to repair, replace, treat or remedy the matters not inspected and timely reported. If this Contract does not close, Buyer

shall repair all damage to Property resulting from Buyer's inspections, return Property to its pre-inspection condition and provide Seller with paid receipts for all work done on Property upon its completion.

(b) **GENERAL PROPERTY INSPECTION AND REPAIR:**

(i) **General Inspection:** Those items specified in Paragraph 12(b) (ii) below, which Seller is obligated to repair or replace ("General Repair Items") may be inspected ("General Inspection") by a person who specializes in and holds an occupational license (if required by law) to conduct home inspections or who holds a Florida license to repair and maintain the items inspected ("Professional Inspector"). Buyer shall, within the Inspection Period, inform Seller of any General Repair Items that are not in the condition required by (b)(ii) below by delivering to Seller a written notice and upon written request by Seller a copy of the portion of Professional Inspector's written report dealing with such items.

(ii) **Property Condition:** The following items shall be free of leaks, water damage or structural damage: ceiling, roof (including fascia and soffits), exterior and interior walls, doors, windows, and foundation. The above items together with pool, pool equipment, non-leased major appliances, heating, cooling, mechanical, electrical, security, sprinkler, septic and plumbing systems and machinery, seawalls, and dockage, are, and shall be maintained until Closing, in "Working Condition" (defined below). Torn screens (including pool and patio screens), fogged windows, and missing roof tiles or shingles shall be repaired or replaced by Seller prior to Closing. Seller is not required to repair or replace "Cosmetic Conditions" (defined below), unless the Cosmetic Conditions resulted from a defect in an item Seller is obligated to repair or replace. "Working Condition" means operating in the manner in which the item was designed to operate. "Cosmetic Conditions" means aesthetic imperfections that do not affect Working Condition of the item, including, but not limited to: pitted marcite; tears, worn spots and discoloration of floor coverings, wallpapers, or window treatments; nail holes, scrapes, scratches, dents, chips or caulking in ceilings, walls, flooring, tile, fixtures, or mirrors; and minor cracks in walls, floor tiles, windows, driveways, sidewalks, pool decks, and garage and patio floors. Cracked roof tiles, curling or worn shingles, or limited roof life shall not be considered defects Seller must repair or replace, so long as there is no evidence of actual leaks, leakage or structural damage.

(iii) **General Property Repairs:** Seller is only obligated to make such general repairs as are necessary to bring items into the condition specified in Paragraph 12(b) (ii) above. Seller shall within 10 days after receipt of Buyer's written notice or General Inspection report, either have the reported repairs to General Repair Items estimated by an appropriately licensed person and a copy delivered to Buyer, or have a second inspection made by a Professional Inspector and provide a copy of such report and estimates of repairs to Buyer. If Buyer's and Seller's inspection reports differ and the parties cannot resolve the differences, Buyer and Seller together shall choose, and equally split the cost of, a third Professional Inspector, whose written report shall be binding on the parties.

If cost to repair General Repair Items equals or is less than the General Repair Limit, Seller shall have repairs made in accordance with Paragraph 12(f). If cost to repair General Repair Items exceeds the General Repair Limit, then within 5 days after a party's receipt of the last estimate: (A) Seller may elect to pay the excess by delivering written notice to Buyer, or (B) Buyer may deliver written notice to Seller designating which repairs of General Repair Items Seller shall make (at a total cost to Seller not exceeding the General Repair Limit) and agreeing to accept the balance of General Repair Items in their "as is" condition, subject to Seller's continuing Maintenance Requirement. If neither party delivers such written notice to the other, then either party may terminate this Contract and Buyer shall be refunded the Deposit, thereby releasing Buyer and Seller from all further obligations under this Contract.

(c) **WOOD DESTROYING ORGANISM ("WDO") INSPECTION AND REPAIR:**

(i) **WDO Inspection:** The Property may be inspected by a Florida-licensed pest control business ("WDO Inspector") to determine the existence of past or present WDO infestation and damage caused by infestation ("WDO Inspection"). Buyer shall, within the Inspection Period, deliver a copy of the WDO Inspector's written report to Seller if any evidence of WDO infestation or damage is found. "Wood Destroying Organism" ("WDO") means arthropod or plant life, including termites, powder-post beetles, oldhouse borers and wood-decaying fungi, that damages or infests seasoned wood in a structure, excluding fences.

(ii) **WDO Repairs:** If Seller previously treated the Property for the type of WDO found by Buyer's WDO Inspection, Seller does not have to retreat the Property if there is no visible live infestation, and Seller, at Seller's cost, transfers to Buyer at Closing a current full treatment warranty for the type of WDO found. Seller shall within 10 days after receipt of Buyer's WDO Inspector's report, have reported WDO damage estimated by an appropriately licensed person, necessary corrective treatment, if any, estimated by a WDO Inspector, and a copy delivered to Buyer. Seller shall have treatments and repairs made in accordance with Paragraph 12(f) below up to the WDO Repair Limit. If cost to treat and repair the WDO infestations and damage to Property exceeds the WDO Repair Limit, then within 5 days after receipt of Seller's estimate, Buyer may deliver written notice to Seller agreeing to pay the excess, or designating which WDO repairs Seller shall make (at a total cost to Seller not exceeding the WDO Repair Limit), and accepting the balance of the Property in its "as is" condition with regard to WDO infestation and damage, subject to Seller's continuing Maintenance Requirement. If Buyer does not deliver such written notice to Seller, then either party may terminate this Contract by written notice to the other, and Buyer shall be refunded the Deposit, thereby releasing Buyer and Seller from all further obligations under this Contract.

(d) **INSPECTION AND CLOSE-OUT OF BUILDING PERMITS:**

(i) **Permit Inspection:** Buyer may have an inspection and examination of records and documents made to determine whether there exist any open or expired building permits or unpermitted improvements to the Property ("Permit Inspection"). Buyer shall, within the Permit Inspection Period, deliver written notice to Seller of the existence of any open or expired building permits or unpermitted improvements to the Property. If Buyer's inspection of the Property identifies permits which have not been properly closed or improvements which were not permitted, then Seller shall promptly deliver to Buyer all plans, written documentation or other information in Seller's possession, knowledge, or control relating to improvements to the Property which are the subject of such open permits or unpermitted improvements.

(ii) **Close-Out of Building Permits:** Seller shall, within 10 days after receipt of Buyer's Permit Inspection notice, have an estimate of costs to remedy Permit Inspection items prepared by an appropriately licensed person and a copy delivered to Buyer. No later than 5 days prior to Closing Date, Seller shall, up to the Permit Limit, have open and expired building permits identified by Buyer or known to Seller closed by the applicable governmental entity, and obtain and close any required building permits for improvements to the Property. Prior to Closing Date, Seller will provide Buyer with any written documentation that all open and expired building permits identified by Buyer or known to Seller have been closed out and that Seller has obtained and closed required building permits for improvements to the Property. If final permit inspections cannot be performed due to delays by the governmental entity, Closing Date shall be extended for up to 10 days to complete such final inspections, failing which, either party may terminate this Contract, and Buyer shall be refunded the Deposit, thereby releasing Buyer and Seller from all further obligations under this Contract.

If cost to close open or expired building permits or to remedy any permit violation of any governmental entity exceeds Permit Limit, then within 5 days after a party's receipt of estimates of cost to remedy: (A) Seller may elect to pay the excess by delivering written notice to Buyer; or (B) Buyer may deliver written notice to Seller accepting the Property in its "as is" condition with regard to building permit status and agreeing to receive credit from Seller at Closing in the amount of Permit Limit. If neither party delivers such written notice to the other, then either party may terminate this Contract and Buyer shall be refunded the Deposit, thereby releasing Buyer and Seller from all further obligations under this Contract.

(e) **WALK-THROUGH INSPECTION/RE-INSPECTION:** On the day prior to Closing Date, or on Closing Date prior to time of Closing, as specified by Buyer, Buyer or Buyer's representative may perform a walk-through (and follow-up walk-through, if necessary) inspection of the Property solely to confirm that all items of Personal Property are on the Property and to verify that Seller has maintained the Property as required by the Maintenance Requirement, has made repairs and replacements required by this Contract, and has met all other contractual obligations.

(f) **REPAIR STANDARDS; ASSIGNMENT OF REPAIR AND TREATMENT CONTRACTS AND WARRANTIES:** All repairs and replacements shall be completed in a good and workmanlike manner by an appropriately licensed person, in accordance with all requirements of law, and shall consist of materials or items of quality, value, capacity and performance comparable to, or better than, that existing as of the Effective Date. Except as provided in Paragraph 12(c)(ii), at Buyer's option and cost, Seller will, at Closing, assign all assignable repair, treatment and maintenance contracts and warranties to Buyer.

ESCROW AGENT AND BROKER

13. ESCROW AGENT: Any Closing Agent or Escrow Agent (collectively "Agent") receiving the Deposit, other funds and other items is authorized, and agrees by acceptance of them, to deposit them promptly, hold same in escrow within the State of Florida and, subject to **COLLECTION**, disburse them in accordance with terms and conditions of this Contract. Failure of funds to become **COLLECTED** shall not excuse Buyer's performance. When conflicting demands for the Deposit are received, or Agent has a good faith doubt as to entitlement to the Deposit, Agent may take such actions permitted by this Paragraph 13, as Agent deems advisable. If in doubt as to Agent's duties or liabilities under this Contract, Agent may, at Agent's option, continue to hold the subject matter of the escrow until the parties agree to its disbursement or until a final judgment of a court of competent jurisdiction shall determine the rights of the parties, or Agent may deposit same with the clerk of the circuit court having jurisdiction of the dispute. An attorney who represents a party and also acts as Agent may represent such party in such action. Upon notifying all parties concerned of such action, all liability on the part of Agent shall fully terminate, except to the extent of accounting for any items previously delivered out of escrow. If a licensed real estate broker, Agent will comply with provisions of Chapter 475, F.S., as amended and FREC rules to timely resolve escrow disputes through mediation, arbitration, interpleader or an escrow disbursement order.

Any proceeding between Buyer and Seller wherein Agent is made a party because of acting as Agent hereunder, or in any proceeding where Agent interpleads the subject matter of the escrow, Agent shall recover reasonable attorney's fees and costs incurred, to be paid pursuant to court order out of the escrowed funds or equivalent. Agent shall not be liable to any party or person for mis-delivery of any escrowed items, unless such mis-delivery is due to Agent's willful breach of this Contract or Agent's gross negligence. This Paragraph 13 shall survive Closing or termination of this Contract.

14. PROFESSIONAL ADVICE; BROKER LIABILITY: Broker advises Buyer and Seller to verify Property condition, square footage, and all other facts and representations made pursuant to this Contract and to consult appropriate professionals for legal, tax, environmental, and other specialized advice concerning matters affecting the Property and the transaction contemplated by this Contract. Broker represents to Buyer that Broker does not reside on the Property and that all representations (oral, written or otherwise) by Broker are based on Seller representations or public records. **BUYER AGREES TO RELY SOLELY ON SELLER, PROFESSIONAL INSPECTORS AND GOVERNMENTAL AGENCIES FOR VERIFICATION OF PROPERTY CONDITION, SQUARE FOOTAGE AND FACTS THAT MATERIALLY AFFECT PROPERTY VALUE AND NOT ON THE REPRESENTATIONS (ORAL, WRITTEN OR OTHERWISE) OF BROKER.** Buyer and Seller (individually, the "Indemnifying Party") each individually indemnifies, holds harmless, and releases Broker and Broker's officers, directors, agents and employees from all liability for loss or damage, including all costs and expenses, and reasonable attorney's fees at all levels, suffered or incurred by Broker and Broker's officers, directors, agents and employees in connection with or arising from claims, demands or causes of action instituted by Buyer or Seller based on: (i) inaccuracy of information provided by the Indemnifying Party or from public records; (ii) Indemnifying Party's misstatement(s) or failure to perform contractual obligations; (iii) Broker's performance, at Indemnifying Party's request, of any task beyond the scope of services regulated by Chapter 475, F.S., as amended, including Broker's referral, recommendation or retention of any vendor for, or on behalf of Indemnifying Party; (iv) products or services provided by any such vendor for, or on behalf of, Indemnifying Party; and (v) expenses incurred by any such vendor. Buyer and Seller each assumes full responsibility for selecting and compensating their respective vendors and paying their other costs under this Contract whether or not this transaction closes. This Paragraph 14 will not relieve Broker of statutory obligations under Chapter 475, F.S., as amended. For purposes of this Paragraph 14, Broker will be treated as a party to this Contract. This Paragraph 14 shall survive Closing or termination of this Contract.

DEFAULT AND DISPUTE RESOLUTION

15. DEFAULT:

(a) **BUYER DEFAULT:** If Buyer fails, neglects or refuses to perform Buyer's obligations under this Contract, including payment of the Deposit, within the time(s) specified, Seller may elect to recover and retain the Deposit for the account of Seller as agreed upon liquidated damages, consideration for execution of this Contract, and in full settlement of any claims, whereupon Buyer and Seller shall be relieved from all further obligations under this Contract, or Seller, at Seller's option, may, pursuant to Paragraph 16, proceed in equity to enforce Seller's rights under this Contract. The portion of the Deposit, if any, paid to Listing Broker upon default by Buyer, shall be split equally between Listing Broker and Cooperating Broker; provided however, Cooperating Broker's share shall not be greater than the commission amount Listing Broker had agreed to pay to Cooperating Broker.

(b) **SELLER DEFAULT:** If for any reason other than failure of Seller to make Seller's title marketable after reasonable diligent effort, Seller fails, neglects or refuses to perform Seller's obligations under this Contract, Buyer may elect to receive return of Buyer's Deposit without thereby waiving any action for damages resulting from Seller's breach, and, pursuant to Paragraph 16, may seek to recover such damages or seek specific performance.

This Paragraph 15 shall survive Closing or termination of this Contract.

16. DISPUTE RESOLUTION: Unresolved controversies, claims and other matters in question between Buyer and Seller arising out of, or relating to, this Contract or its breach, enforcement or interpretation ("Dispute") will be settled as follows:

(a) Buyer and Seller will have 10 days after the date conflicting demands for the Deposit are made to attempt to resolve such Dispute, failing which, Buyer and Seller shall submit such Dispute to mediation under Paragraph 16(b).

(b) Buyer and Seller shall attempt to settle Disputes in an amicable manner through mediation pursuant to Florida Rules for Certified and Court-Appointed Mediators and Chapter 44, F.S., as amended (the "Mediation Rules"). The mediator must be certified or must have experience in the real estate industry. Injunctive relief may be sought without first complying with this Paragraph 16(b). Disputes not settled pursuant to this Paragraph 16 may be resolved by instituting action in the appropriate court having jurisdiction of the matter. This Paragraph 16 shall survive Closing or termination of this Contract.

17. ATTORNEY'S FEES; COSTS: The parties will split equally any mediation fee incurred in any mediation permitted by this Contract, and each party will pay their own costs, expenses and fees, including attorney's fees, incurred in conducting the mediation. In any litigation permitted by this Contract, the prevailing party shall be entitled to recover from the non-prevailing party costs and fees, including reasonable attorney's fees, incurred in conducting the litigation. This Paragraph 17 shall survive Closing or termination of this Contract.

STANDARDS FOR REAL ESTATE TRANSACTIONS ("STANDARDS")

18. STANDARDS:

A. TITLE:

(i) **TITLE EVIDENCE; RESTRICTIONS; EASEMENTS; LIMITATIONS:** Within the time period provided in Paragraph 9(c), the Title Commitment, with legible copies of instruments listed as exceptions attached thereto, shall be issued and

delivered to Buyer. The Title Commitment shall set forth those matters to be discharged by Seller at or before Closing and shall provide that, upon recording of the deed to Buyer, an owner's policy of title insurance in the amount of the Purchase Price, shall be issued to Buyer insuring Buyer's marketable title to the Real Property, subject only to the following matters: (a) comprehensive land use plans, zoning, and other land use restrictions, prohibitions and requirements imposed by governmental authority; (b) restrictions and matters appearing on the Plat or otherwise common to the subdivision; (c) outstanding oil, gas and mineral rights of record without right of entry; (d) unplatted public utility easements of record (located contiguous to real property lines and not more than 10 feet in width as to rear or front lines and 7 1/2 feet in width as to side lines); (e) taxes for year of Closing and subsequent years; and (f) assumed mortgages and purchase money mortgages, if any (if additional items, attach addendum); provided, that, unless waived by Paragraph 12 (a), there exists at Closing no violation of the foregoing and none prevent use of the Property for **RESIDENTIAL PURPOSES**. If there exists at Closing any violation of items identified in (b) – (f) above, then the same shall be deemed a title defect. Marketable title shall be determined according to applicable Title Standards adopted by authority of The Florida Bar and in accordance with law.

(ii) **TITLE EXAMINATION:** Buyer shall have 5 days after receipt of Title Commitment to examine it and notify Seller in writing specifying defect(s), if any, that render title unmarketable. If Seller provides Title Commitment and it is delivered to Buyer less than 5 days prior to Closing Date, Buyer may extend Closing for up to 5 days after date of receipt to examine same in accordance with this STANDARD A. Seller shall have 30 days ("Cure Period") after receipt of Buyer's notice to take reasonable diligent efforts to remove defects. If Buyer fails to so notify Seller, Buyer shall be deemed to have accepted title as it then is. If Seller cures defects within Cure Period, Seller will deliver written notice to Buyer (with proof of cure acceptable to Buyer and Buyer's attorney) and the parties will close this Contract on Closing Date (or if Closing Date has passed, within 10 days after Buyer's receipt of Seller's notice). If Seller is unable to cure defects within Cure Period, then Buyer may, within 5 days after expiration of Cure Period, deliver written notice to Seller: (a) extending Cure Period for a specified period not to exceed 120 days within which Seller shall continue to use reasonable diligent effort to remove or cure the defects ("Extended Cure Period"); or (b) electing to accept title with existing defects and close this Contract on Closing Date (or if Closing Date has passed, within the earlier of 10 days after end of Extended Cure Period or Buyer's receipt of Seller's notice), or (c) electing to terminate this Contract and receive a refund of the Deposit, thereby releasing Buyer and Seller from all further obligations under this Contract. If after reasonable diligent effort, Seller is unable to timely cure defects, and Buyer does not waive the defects, this Contract shall terminate, and Buyer shall receive a refund of the Deposit, thereby releasing Buyer and Seller from all further obligations under this Contract.

B. SURVEY: If Survey discloses encroachments on the Real Property or that improvements located thereon encroach on setback lines, easements, or lands of others, or violate any restrictions, covenants, or applicable governmental regulations described in STANDARD A (i)(a), (b) or (d) above, Buyer shall deliver written notice of such matters, together with a copy of Survey, to Seller within 5 days after Buyer's receipt of Survey, but no later than Closing. If Buyer timely delivers such notice and Survey to Seller, such matters identified in the notice and Survey shall constitute a title defect, subject to cure obligations of STANDARD A above. If Seller has delivered a prior survey, Seller shall, at Buyer's request, execute an affidavit of "no change" to the Real Property since the preparation of such prior survey, to the extent the affirmations therein are true and correct.

C. INGRESS AND EGRESS: Seller represents that there is ingress and egress to the Real Property and title to the Real Property is insurable in accordance with STANDARD A without exception for lack of legal right of access.

D. LEASE INFORMATION: Seller shall, at least 10 days prior to Closing, furnish to Buyer estoppel letters from tenant(s)/occupant(s) specifying nature and duration of occupancy, rental rates, advanced rent and security deposits paid by tenant(s) or occupant(s)("Estoppel Letter(s)"). If Seller is unable to obtain such Estoppel Letter(s), the same information shall be furnished by Seller to Buyer within that time period in the form of a Seller's affidavit, and Buyer may thereafter contact tenant(s) or occupant(s) to confirm such information. If Estoppel Letter(s) or Seller's affidavit, if any, differ materially from Seller's representations and lease(s) provided pursuant to Paragraph 6, or if tenant(s)/occupant(s) fail or refuse to confirm Seller's affidavit, Buyer may deliver written notice to Seller within 5 days after receipt of such information, but no later than 5 days prior to Closing Date, terminating this Contract and receive a refund of the Deposit, thereby releasing Buyer and Seller from all further obligations under this Contract. Seller shall, at Closing, deliver and assign all leases to Buyer who shall assume Seller's obligations thereunder.

E. LIENS: Seller shall furnish to Buyer at Closing an affidavit attesting (i) to the absence of any financing statement, claims of lien or potential lienors known to Seller and (ii) that there have been no improvements or repairs to the Real Property for 90 days immediately preceding Closing Date. If the Real Property has been improved or repaired within that time, Seller shall deliver releases or waivers of construction liens executed by all general contractors, subcontractors, suppliers and materialmen in addition to Seller's lien affidavit setting forth names of all such general contractors, subcontractors, suppliers and materialmen, further affirming that all charges for improvements or repairs which could serve as a basis for a construction lien or a claim for damages have been paid or will be paid at Closing.

F. TIME: Calendar days shall be used in computing time periods. **Time is of the essence in this Contract.** Other than time for acceptance and Effective Date as set forth in Paragraph 3, any time periods provided for or dates specified in this Contract, whether preprinted, handwritten, typewritten or inserted herein, which shall end or occur on a

Saturday, Sunday, or a national legal holiday (see 5 U.S.C. 6103) shall extend to 5:00 p.m. (where the Property is located) of the next business day.

G. FORCE MAJEURE: Buyer or Seller shall not be required to perform any obligation under this Contract or be liable to each other for damages so long as performance or non-performance of the obligation, or the availability of services, insurance or required approvals essential to Closing, is disrupted, delayed, caused or prevented by Force Majeure. "Force Majeure" means: hurricanes, ~~earthquakes,~~ floods, extreme weather, earthquakes, ~~floods,~~ fire, or other acts of God, unusual transportation delays, or wars, insurrections, or ~~and~~ acts of terrorism, which, by exercise of reasonable diligent effort, the non-performing party is unable in whole or in part to prevent or overcome. All time periods, including Closing Date, will be extended a reasonable time up to seven (7) days after ~~for the period that~~ the Force Majeure no longer prevents performance under this Contract, provided, however, if such Force Majeure continues to prevent performance under this Contract more than thirty (30) ~~14~~ days beyond Closing Date, then either party may terminate this Contract by delivering written notice to the other and the Deposit shall be refunded to Buyer, thereby releasing Buyer and Seller from all further obligations under this Contract.

H. CONVEYANCE: Seller shall convey marketable title to the Real Property by statutory warranty, trustee's, personal representative's, or guardian's deed, as appropriate to the status of Seller, subject only to matters described in STANDARD A and those accepted by Buyer. Personal Property shall, at request of Buyer, be transferred by absolute bill of sale with warranty of title, subject only to such matters as may be provided for in this Contract.

I. CLOSING LOCATION; DOCUMENTS; AND PROCEDURE:

(i) **LOCATION:** Closing will ~~take place in the county where the Real Property is located at the office of the~~ be conducted by the attorney or other closing agent ("Closing Agent") designated by the party paying for the owner's policy of title insurance~~, or if no title insurance, designated by,~~ and will take place in the county where the Real Property is located at the office of the Closing Agent, or at such other location agreed to by the parties. If there is no title insurance, Seller will designate Closing Agent. Closing may be conducted by mail, overnight courier, or electronic means.

(ii) **CLOSING DOCUMENTS:** Seller shall, at or prior to Closing, execute and deliver, as applicable, deed, bill of sale, certificate(s) of title or other documents necessary to transfer title to the Property, construction lien affidavit(s), owner's possession and no lien affidavit(s), and assignment(s) of leases. Seller shall provide Buyer with paid receipts for all work done on the Property pursuant to this Contract. Buyer shall furnish and pay for, as applicable the survey, flood elevation certification, and documents required by Buyer's lender.

(iii) **FinCEN GTO NOTICE. If Closing Agent is required to comply with the U.S. Treasury Department's Financial Crimes Enforcement Network ("FinCEN") Geographic Targeting Orders ("GTOs"), then Buyer shall provide Closing Agent with the information related to Buyer and the transaction contemplated by this Contract that is required to complete IRS Form 8300, and Buyer consents to Closing Agent's collection and report of said information to IRS.**

(iv) PROCEDURE: The deed shall be recorded upon **COLLECTION** of all closing funds. If the Title Commitment provides insurance against adverse matters pursuant to Section 627.7841, F.S., as amended, the escrow closing procedure required by STANDARD J shall be waived, and Closing Agent shall, **subject to COLLECTION of all closing funds**, disburse at Closing the brokerage fees to Broker and the net sale proceeds to Seller.

J. ESCROW CLOSING PROCEDURE: If Title Commitment issued pursuant to Paragraph 9(c) does not provide for insurance against adverse matters as permitted under Section 627.7841, F.S., as amended, the following escrow and closing procedures shall apply: (1) all Closing proceeds shall be held in escrow by the Closing Agent for a period of not more than 10 days after Closing; (2) if Seller's title is rendered unmarketable, through no fault of Buyer, Buyer shall, within the 10 day period, notify Seller in writing of the defect and Seller shall have 30 days from date of receipt of such notification to cure the defect; (3) if Seller fails to timely cure the defect, the Deposit and all Closing funds paid by Buyer shall, within 5 days after written demand by Buyer, be refunded to Buyer and, simultaneously with such repayment, Buyer shall return the Personal Property, vacate the Real Property and re-convey the Property to Seller by special warranty deed and bill of sale; and (4) if Buyer fails to make timely demand for refund of the Deposit, Buyer shall take title as is, waiving all rights against Seller as to any intervening defect except as may be available to Buyer by virtue of warranties contained in the deed or bill of sale.

K. PRORATIONS; CREDITS: The following recurring items will be made current (if applicable) and prorated as of the day prior to Closing Date, or date of occupancy if occupancy occurs before Closing Date: real estate taxes (including special benefit tax assessments imposed by a CDD), interest, bonds, association fees, insurance, rents and other expenses of Property. Buyer shall have option of taking over existing policies of insurance, if assumable, in which event premiums shall be prorated. Cash at Closing shall be increased or decreased as may be required by prorations to be made through day prior to Closing. Advance rent and security deposits, if any, will be credited to Buyer. Escrow deposits held by Seller's mortgagee will be paid to Seller. Taxes shall be prorated based on current year's tax ~~with due allowance made for maximum allowable discount, homestead and other exemptions~~. If Closing occurs on a date when current year's millage is not fixed but current year's assessment is available, taxes will be prorated based upon such assessment and prior year's millage. If current year's assessment is not available, then taxes will be prorated on prior year's tax. If there are completed improvements on the Real Property by January 1st of year of Closing, which improvements were not in existence on January 1st of prior year, then taxes shall be prorated based upon prior year's

millage and at an equitable assessment to be agreed upon between the parties, failing which, request shall be made to the County Property Appraiser for an informal assessment taking into account available exemptions. In all cases, due allowance shall be made for the maximum allowable discounts and applicable homestead and other exemptions. A tax proration based on an estimate shall, at either party's request, be readjusted upon receipt of current year's tax bill. This STANDARD K shall survive Closing.

L. ACCESS TO PROPERTY TO CONDUCT APPRAISALS, INSPECTIONS, AND WALK-THROUGH: Seller shall, upon reasonable notice, provide utilities service and access to Property for appraisals and inspections, including a walk-through (or follow-up walk-through if necessary) prior to Closing.

M. RISK OF LOSS: If, after Effective Date, but before Closing, Property is damaged by fire or other casualty ("Casualty Loss") and cost of restoration (which shall include cost of pruning or removing damaged trees) does not exceed 1.5% of Purchase Price, cost of restoration shall be an obligation of Seller and Closing shall proceed pursuant to terms of this Contract. If restoration is not completed as of Closing, a sum equal to 125% of estimated cost to complete restoration (not to exceed 1.5% of Purchase Price), will be escrowed at Closing. If actual cost of restoration exceeds escrowed amount, Seller shall pay such actual costs (but, not in excess of 1.5% of Purchase Price). Any unused portion of escrowed amount shall be returned to Seller. If cost of restoration exceeds 1.5% of Purchase Price, Buyer shall elect to either: take Property "as is" together with the 1.5%, or receive a refund of the Deposit, thereby releasing Buyer and Seller from all further obligations under this Contract. Seller's sole obligation with respect to tree damage by casualty or other natural occurrence shall be cost of pruning or removal.

N. 1031 EXCHANGE: If either Seller or Buyer wish to enter into a like-kind exchange (either simultaneously with Closing or deferred) under Section 1031 of the Internal Revenue Code ("Exchange"), the other party shall cooperate in all reasonable respects to effectuate the Exchange, including execution of documents; provided, however, cooperating party shall incur no liability or expense related to the Exchange, and Closing shall not be contingent upon, nor extended or delayed by, such Exchange.

O. CONTRACT NOT RECORDABLE; PERSONS BOUND; NOTICE; DELIVERY; COPIES; CONTRACT EXECUTION: Neither this Contract nor any notice of it shall be recorded in any public records. This Contract shall be binding on, and inure to the benefit of, the parties and their respective heirs or successors in interest. Whenever the context permits, singular shall include plural and one gender shall include all. Notice and delivery given by or to the attorney or broker (including such broker's real estate licensee) representing any party shall be as effective as if given by or to that party. All notices must be in writing and may be made by mail, personal delivery or electronic (including "pdf") media. A facsimile or electronic (including "pdf") copy of this Contract and any signatures hereon shall be considered for all purposes as an original. This Contract may be executed by use of electronic signatures, as determined by Florida's Electronic Signature Act and other applicable laws.

P. INTEGRATION; MODIFICATION: This Contract contains the full and complete understanding and agreement of Buyer and Seller with respect to the transaction contemplated by this Contract and no prior agreements or representations shall be binding upon Buyer or Seller unless included in this Contract. No modification to or change in this Contract shall be valid or binding upon Buyer or Seller unless in writing and executed by the parties intended to be bound by it.

Q. WAIVER: Failure of Buyer or Seller to insist on compliance with, or strict performance of, any provision of this Contract, or to take advantage of any right under this Contract, shall not constitute a waiver of other provisions or rights.

R. RIDERS; ADDENDA; TYPEWRITTEN OR HANDWRITTEN PROVISIONS: Riders, addenda, and typewritten or handwritten provisions shall control all printed provisions of this Contract in conflict with them.

S. COLLECTION or COLLECTED: "COLLECTION" or "COLLECTED" means any checks tendered or received, including Deposits, have become actually and finally collected and deposited in the account of Escrow Agent or Closing Agent. Closing and disbursement of funds and delivery of closing documents may be delayed by Closing Agent until such amounts have been COLLECTED in Closing Agent's accounts.

T. RESERVED ~~LOAN COMMITMENT:~~ ~~"Loan Commitment" means a statement by the lender setting forth the terms and conditions upon which the lender is willing to make a particular mortgage loan to a particular borrower. Neither a pre-approval letter nor a prequalification letter shall be deemed a Loan Commitment for purposes of this Contract.~~

U. APPLICABLE LAW AND VENUE: This Contract shall be construed in accordance with the laws of the State of Florida and venue for resolution of all disputes, whether by mediation, arbitration or litigation, shall lie in the county where the Real Property is located.

V. ~~FOREIGN INVESTMENT IN REAL PROPERTY TAX ACT (")~~FIRPTA~~")~~ TAX WITHHOLDING: If a seller of U.S. real property is a "foreign person" as defined by FIRPTA, Section 1445 of the Internal Revenue Code ("Code") requires the buyer of the real property to withhold up to 15% of the amount realized by the seller on the transfer and remit the withheld amount to the Internal Revenue Service (IRS) unless an exemption to the required withholding applies or the seller has obtained a Withholding Certificate from the IRS authorizing a reduced amount of withholding. ~~Due to the complexity and potential risks of FIRPTA, Buyer and Seller should seek legal and tax advice regarding compliance, particularly if an "exemption" is claimed on the sale of residential property for $300,000 or less.~~

(i) No withholding is required under Section 1445 of the Code if the Seller is not a "foreign person."~~, provided Buyer accepts proof of same from Seller which may include Buyer's receipt of certification~~. Seller can provide proof of non-

foreign status ~~from Seller~~ to Buyer by delivery of written certification signed under penalties of perjury, stating that Seller is not a foreign person and containing Seller's name, U.S. taxpayer identification number and home address (or office address, in the case of an entity), as provided for in 26 CFR 1.1445-2(b). Otherwise, Buyer shall withhold the applicable percentage of the amount realized by Seller on the transfer and timely remit said funds to the IRS.

(ii) If Seller is a foreign person and has received a Withholding Certificate from the IRS which provides for reduced or eliminated withholding in this transaction and provides same to Buyer by Closing, then Buyer shall withhold the reduced sum~~, if any~~ required, if any, and timely remit said funds to the IRS.

(iii) If prior to Closing Seller has submitted a completed application to the IRS for a Withholding Certificate and has provided to Buyer the notice required by 26 CFR 1.1445-1(c) (2)(i)(B) but no Withholding Certificate has been received as of Closing, Buyer shall, at Closing, withhold the applicable percentage of the amount realized by Seller on the transfer and, at Buyer's option, either (a) timely remit the withheld funds to the IRS or (b) place the funds in escrow, at Seller's expense, with an escrow agent selected by Buyer and pursuant to terms negotiated by the parties, to be subsequently disbursed in accordance with the Withholding Certificate issued by the IRS or remitted directly to the IRS if the Seller's application is rejected or upon terms set forth in the escrow agreement.

(iv) In the event the net proceeds due Seller are not sufficient to meet the withholding requirement(s) in this transaction, Seller shall deliver to Buyer, at Closing, the additional COLLECTED funds necessary to satisfy the applicable requirement and thereafter Buyer shall timely remit said funds to the IRS or escrow the funds for disbursement in accordance with the final determination of the IRS, as applicable.

(v) Upon remitting funds to the IRS pursuant to this STANDARD, Buyer shall provide Seller copies of IRS Forms 8288 and 8288-A, as filed.

ADDENDA AND ADDITIONAL TERMS

19. ADDENDA: The following additional terms are included in the attached addenda or riders and incorporated into this Contract (**Check if applicable**):

- ☐ A. Condominium Rider
- ☐ B. Homeowners' Assn.
- ☐ C. Seller Financing
- ☐ D. Mortgage Assumption
- ☐ E. FHA/VA Financing
- ☐ F. Appraisal Contingency
- ☐ G. Short Sale
- ☐ H. Homeowners'/Flood Ins
- ☐ I. RESERVED
- ☐ J. Interest-Bearing Acct.
- ☐ K. "As Is"
- ☐ L. Right to Inspect/ Cancel
- ☐ M. Defective Drywall
- ☐ N. Coastal Construction Control Line
- ☐ O. Insulation Disclosure
- ☐ P. Lead Based Paint Disclosure (Pre-1978 Housing)
- ☐ Q. Housing for Older Persons
- ☐ R. Rezoning
- ☐ S. Lease Purchase/ Lease Option
- ☐ T. Pre-Closing Occupancy by Buyer
- ☐ U. Post-Closing Occupancy by Seller
- ☐ V. Sale of Buyer's Property
- ☐ W. Back-up Contract
- ☐ X. Kick-out Clause
- ☐ Y. Seller's Attorney Approval
- ☐ Z. Buyer's Attorney Approval
- ☐ AA. Licensee-Personal Interest in Property
- ☑ BB. Binding Arbitration
- ☐ Other_____

20. ADDITIONAL TERMS:_____

COUNTER-OFFER/REJECTION

☐ Seller counters Buyer's offer (to accept the counter-offer, Buyer must sign or initial the counter-offered terms and deliver a copy of the acceptance to Seller).

☐ Seller rejects Buyer's offer.

THIS IS INTENDED TO BE A LEGALLY BINDING CONTRACT. IF NOT FULLY UNDERSTOOD, SEEK THE ADVICE OF AN ATTORNEY PRIOR TO SIGNING.

THIS FORM HAS BEEN APPROVED BY THE FLORIDA REALTORS AND THE FLORIDA BAR.

Approval of this form by the Florida Realtors and The Florida Bar does not constitute an opinion that any of the terms and conditions in this Contract should be accepted by the parties in a particular transaction. Terms and conditions should be negotiated based upon the respective interests, objectives and bargaining positions of all interested persons.

AN ASTERISK (*) FOLLOWING A LINE NUMBER IN THE MARGIN INDICATES THE LINE CONTAINS A BLANK TO BE COMPLETED.

* Buyer: _____ Date: _____

* Buyer: _____ Date: _____

* Seller: _____ Date: _____

* Seller: _____ Date: _____

Buyer's address for purposes of notice	Seller's address for purposes of notice
* _____	_____
* _____	_____
* _____	_____

BROKER: Listing and Cooperating Brokers, if any, named below (collectively, "Broker"), are the only Brokers entitled to compensation in connection with this Contract. Instruction to Closing Agent: Seller and Buyer direct Closing Agent to disburse at Closing the full amount of the brokerage fees as specified in separate brokerage agreements with the parties and cooperative agreements between the Brokers, except to the extent Broker has retained such fees from the escrowed funds. This Contract shall not modify any MLS or other offer of compensation made by Seller or Listing Broker to Cooperating Brokers.

* _____	_____
Cooperating Sales Associate, if any	**Listing Sales Associate**
* _____	_____
Cooperating Broker, if any	**Listing Broker**

When initialed by all parties, the parties acknowledge that the disclosure set forth below was provided to Buyer prior to execution of the Florida Realtors/Florida Bar Contract For Sale and Purchase between the parties and the clauses below will be incorporated therein:_____(SELLER)
and _____(BUYER)
concerning the Property described as _____

Buyer's Initials _____ _____ ***Seller's Initials*** _____ _____

B. HOMEOWNERS' ASSOCIATION RIDER WITH ~~/~~COMMUNITY DISCLOSURE

IF THE DISCLOSURE SUMMARY REQUIRED BY SECTION 720.401, FLORIDA STATUTES, HAS NOT BEEN PROVIDED TO THE PROSPECTIVE PURCHASER BEFORE EXECUTING THIS CONTRACT FOR SALE, THIS CONTRACT IS VOIDABLE BY BUYER BY DELIVERING TO SELLER OR SELLER'S AGENT OR REPRESENTATIVE WRITTEN NOTICE OF THE BUYER'S INTENTION TO CANCEL WITHIN 3 DAYS AFTER RECEIPT OF THE DISCLOSURE SUMMARY OR PRIOR TO CLOSING, WHICHEVER OCCURS FIRST. ANY PURPORTED WAIVER OF THIS VOIDABILITY RIGHT HAS NO EFFECT. BUYER'S RIGHT TO VOID THIS CONTRACT SHALL TERMINATE AT CLOSING.

BUYER SHOULD NOT EXECUTE THIS CONTRACT UNTIL BUYER HAS RECEIVED AND READ THIS DISCLOSURE.

DISCLOSURE SUMMARY FOR _____
(Name of Community)

(a) AS A BUYER OF PROPERTY IN THIS COMMUNITY, YOU WILL BE OBLIGATED TO BE A MEMBER OF A HOMEOWNERS' ASSOCIATION ("ASSOCIATION").
(b) THERE HAVE BEEN OR WILL BE RECORDED RESTRICTIVE COVENANTS ("COVENANTS") GOVERNING THE USE AND OCCUPANCY OF PROPERTIES IN THIS COMMUNITY.
(c) YOU WILL BE OBLIGATED TO PAY ASSESSMENTS TO THE ASSOCIATION. ASSESSMENTS MAY BE SUBJECT TO PERIODIC CHANGE. IF APPLICABLE, THE CURRENT AMOUNT(S) IS:
$_____per_____to_____
$_____per_____to_____
(d) YOU WILL ALSO BE OBLIGATED TO PAY ANY SPECIAL ASSESSMENTS IMPOSED BY THE ASSOCIATION. SUCH SPECIAL ASSESSMENTS MAY BE SUBJECT TO CHANGE. IF APPLICABLE, THE CURRENT AMOUNT(S) IS
$_____per_____to_____
$_____per_____to_____
~~(d) YOU MAY BE OBLIGATED TO PAY SPECIAL ASSESSMENTS TO THE RESPECTIVE MUNICIPALITY, COUNTY, OR SPECIAL DISTRICT. ALL ASSESSMENTS ARE SUBJECT TO PERIODIC CHANGE .~~
(e) THERE MAY BE AN OBLIGATION TO PAY RENT OR LAND USE FEES FOR RECREATIONAL OR OTHER COMMONLY USED FACILITIES AS AN OBLIGATION OF MEMBERSHIP IN THE HOMEOWNERS' ASSOCIATION. IF APPLICABLE, THE CURRENT AMOUNT(S) IS:
$_____per_____for_____to_____
$_____per_____for_____to_____
(f) YOU MAY BE OBLIGATED TO PAY SPECIAL ASSESSMENTS TO THE RESPECTIVE MUNICIPALITY, COUNTY, OR SPECIAL DISTRICT. ALL ASSESSMENTS ARE SUBJECT TO PERIODIC CHANGE.
(g) ~~(e)~~ YOUR FAILURE TO PAY SPECIAL ASSESSMENTS OR ASSESSMENTS LEVIED BY A MANDATORY HOMEOWNERS' ASSOCIATION COULD RESULT IN A LIEN ON YOUR PROPERTY.
~~(f) THERE MAY BE AN OBLIGATION TO PAY RENT OR LAND USE FEES FOR RECREATIONAL OR OTHER COMMONLY USED FACILITIES AS AN OBLIGATION OF MEMBERSHIP IN THE HOMEOWNERS' ASSOCIATION. IF APPLICABLE, THE CURRENT AMOUNT IS $ _____ per _____~~
(h) ~~(g)~~ THE DEVELOPER MAY HAVE THE RIGHT TO AMEND THE RESTRICTIVE COVENANTS WITHOUT THE APPROVAL OF THE ASSOCIATION MEMBERSHIP OR THE APPROVAL OF THE PARCEL OWNERS.
(i) ~~(h)~~ THE STATEMENTS CONTAINED IN THIS DISCLOSURE FORM ARE ONLY SUMMARY IN NATURE, AND, AS A PROSPECTIVE PURCHASER, YOU SHOULD REFER TO THE COVENANTS AND THE ASSOCIATION GOVERNING DOCUMENTS BEFORE PURCHASING PROPERTY.
(j) ~~(i)~~ THESE DOCUMENTS ARE EITHER MATTERS OF PUBLIC RECORD AND CAN BE OBTAINED FROM THE RECORD OFFICE IN THE COUNTY WHERE THE PROPERTY IS LOCATED, OR ARE NOT RECORDED AND CAN BE OBTAINED FROM THE DEVELOPER.

DATE _____ BUYER _____ DATE _____ BUYER _____

B. HOMEOWNERS' ASSOCIATION RIDER WITH COMMUNITY DISCLOSURE (CONTINUED)

The Property is located in a community with a (**CHECK ONE**) ☐ voluntary ☐ mandatory homeowners' association ("Association"). If voluntary, Seller (**CHECK ONE**) ☐ has ☐ has not opted into the Association. Seller's warranty and risk of loss, and the rights and obligations of the parties arising under Paragraphs 11 and 12 of this Contract to inspect, maintain, repair, replace or treat, extends only to the Property and do not extend to common areas, Association facilities, or any other part of Association's property

1. **ASSOCIATION APPROVAL:** The Association's approval of Buyer (**CHECK ONE**): ☐ is ☐ is not required. If approval is required, this Contract is contingent upon Buyer being approved by Association no later than _____ (if left blank, the 5) days prior to Closing. Within _____ (if left blank, then 5) days after Effective Date Seller shall initiate the approval process with Association and Buyer shall apply for such Property and approval. Buyer and Seller shall sign and deliver any documents required by Association in order to complete transfer of the Property and each shall use diligent effort to obtain such approval, including making personal appearances if required. If Buyer is not approved within the stated time period, this Contract shall terminate and Buyer shall be refunded the Deposit, thereby releasing Buyer and Seller from all further obligations under this Contract.

2. **RIGHT OF FIRST REFUSAL:**
   (a) The Association (**CHECK ONE**): ☐ has ☐ does not have a right of first refusal ("Right"). If the Association has a Right, this Contract is contingent upon the Association, within the time permitted for the exercise of such Right, either providing written confirmation to Buyer that the Association is not exercising that Right, or failing to timely exercise such Right pursuant to the terms of the Articles of Incorporation, Bylaws, Covenants, and other governing documents of the Association (collectively "Association Governing Documents", which reference includes all amendments thereto).
   (b) The members of the Association (**CHECK ONE**): ☐ have ☐ do not have a Right. If the members do have a Right, this Contract is contingent upon the members, within the time permitted for the exercise of such Right, either providing written confirmation to Buyer that the members are not exercising that Right, or failing to timely exercise such Right pursuant to the terms of the Association Governing Documents.
   (c) Buyer and Seller shall, within _____ (if left blank, then 5) days after Effective Date, sign and deliver any documents required as a condition precedent to the exercise of the Right, and shall use diligent effort to submit and process the matter with the Association and members, including personal appearances, if required.
   (d) If, within the stated time period, the Association, the members of the Association, or both, fail to provide the written confirmation or the Right has not otherwise expired, then this Contract shall terminate and the Deposit shall be refunded to the Buyer, thereby releasing Buyer and Seller from all further obligations under this Contract.
   (e) If the Association or a member timely exercises its or their Right, this Contract shall terminate and the Deposit shall be refunded to Buyer (unless this Contract provides otherwise), thereby releasing Buyer and Seller from all further obligations under this Contract, and Seller shall pay to Broker the full commission at Closing in recognition that Broker procured the sale.

3. **DISCLOSURE OF SPECIAL OR OTHER ASSESSMENTS**: Other than as disclosed in sub-paragraphs (c) and (d) on Page 1, Seller represents that Seller is not aware of any special or other assessment that has been levied or imposed by the Association except as follows: _____:
   _____.

4. **PAYMENT OF FEES, ASSESSMENTS, RENTS, AND OTHER ASSOCIATION CHARGES; PRORATIONS:**
   (a) Buyer shall pay any application, transfer, initial contribution, or membership fees charged by Association. If applicable, the current amount(s) is
   $_____ per_____ for _____to_____
   $_____ per_____ for _____to_____
   (b) All annual assessments levied or imposed by Association and rent on recreational areas, if any, shall be made current by Seller at Closing, and Buyer shall reimburse Seller for prepayments.
   (c) Seller shall, at Closing, pay all fines, if any, levied or imposed against the Property by Association as of Closing Date and any fees, if any, Association charges to provide information about the Property, assessment(s) and fees.
   (d) If levied or imposed special or other assessments exist as of the Effective Date are disclosed above by Seller and may be paid in installments (**CHECK ONE**): ☐ Buyer ☐ Seller (if left blank, then Buyer) shall pay installments due after Closing Date. **If Seller is checked, Seller shall pay the assessment in full prior to or at the time of Closing.**
   (e) If levied or imposed special or other assessments exist as of the Effective Date and are not disclosed above by Seller, then Seller shall pay such assessments in full prior to or at the time of Closing.
   (f) If, after Effective Date, Association levies or imposes special or other assessments for improvements, work or services, then Seller shall pay all amounts due prior to Closing Date and Buyer shall pay all amounts due after Closing Date.
   (g) .An assessment or other charge shall be deemed levied or imposed on the date when the assessment or other charge has been approved as required for enforcement pursuant to Florida law and the Association Governing Documents.
   (h) Association assets and liabilities, including Association reserve accounts, shall not be prorated.

B. HOMEOWNERS' ASSOCIATION RIDER WITH COMMUNITY DISCLOSURE (CONTINUED)

5. LITIGATION DISCLOSURE:

Seller represents that Seller is not aware of pending or anticipated litigation affecting the Property or Association Property, except as follows:_____

_____

6. DAMAGE TO ASSOCIATION PROPERTY: If any portion of Association Property is damaged due to fire, hurricane or other casualty before Closing, either party may cancel this Contract and Buyer's Deposit shall be refunded if (a) as a result of damage to Association Property, the Property appraises below the Purchase Price and either the parties cannot agree on a new purchase price or Buyer elects not to proceed, or (b) Association has not determined the assessment attributable to the Property for such damage at least 5 days prior to Closing Date, or (c) the assessment determined or imposed by Association attributable to the Property for such damage to Association Property is greater than $ _____ or _____% (1.5% if left blank) of the Purchase Price

7. BUYER'S REQUEST FOR, AND REVIEW OF, DOCUMENTS: If the Property is subject to a mandatory Association, then (**CHECK ONE)**

(a)

(b) ☐ Buyer does not request any Homeowner Association documents.

(c) ☐ Buyer requests Seller, at Seller's cost, to provide Buyer with most recent copies of the following documents: Association Bylaws, Covenants, Restrictions, Rules and Regulations, Association's most recent year-end financial statements, and Board meeting agendas and minutes for the last 12 months preceding the Effective Date. Seller shall: : (1) within five (5) days after Effective Date, deliver written request to Association Board, or its designee, to provide copies of any such documents not in Seller's possession; and
(2) within twenty (20) days after Effective Date, deliver all requested documents to Buyer.
If 7.(b) is checked, Buyer may cancel this Contract by delivering written notice to Seller within three (3) days, excluding Saturdays, Sundays, and Legal Holidays, after receipt by Buyer of the above requested documents. If Seller fails to deliver the requested documents to Buyer within twenty days after Effective Date, Buyer may within three (3) days thereafter, excluding Saturdays, Sundays, and Legal Holidays, cancel this Contract by delivering written notice to Seller. Buyer's right to cancel this Contract shall terminate at Closing.

(c) ☐ Buyer acknowledges having received the requested Homeowners' Association documents described in 7(b), above, on or before the execution of this Contract. Buyer may cancel this Contract based on Buyer's review of said documents by delivering written notice to Seller within three (3) days, excluding Saturdays, Sundays, and Legal Holidays, after the Effective Date.

(d) If this Contract does not close, Buyer shall immediately return any Seller provided documents to Seller or reimburse Seller for the cost of the documents.

IF NO BOX ABOVE IS CHECKED, THEN OPTION (a) SHALL BE DEEMED SELECTED:

FOR INFORMATIONAL PURPOSES ONLY: **The Property Management Company is:**

_____

Phone # _____ **Email** _____

LEGISLATIVE POSITION REQUEST FORM

GOVERNMENTAL AFFAIRS OFFICE

Date Form Received _____

GENERAL INFORMATION

Submitted By Barry Spivey, Chair, Ad Hoc Jurisdiction and Due Process Committee of the Real Property, Probate & Trust Law Section

Address
Barry Spivey
Spivey & Fallon, P.A.
1515 Ringling Blvd., Suite 885
Sarasota, FL 34236
(941) 840-1991

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

CONTACTS

Board & Legislation Committee Appearance

Barry Spivey, Spivey & Fallon, P.A., 1515 Ringling Blvd., Suite 885, Sarasota, FL 34236, Telephone: (941) 840-1991

Tae Kelley Bronner, Tae Kelley Bronner, P.L., 10006 Cross Creek Blvd., PMB 428, Tampa, Florida 33647, Telephone: (813) 907-6643

Peter M. Dunbar, Dean Mead, P.O. Box 10095, Tallahassee, Florida 32302-2095, Telephone (850) 222-3533

Martha J. Edenfield, Dean Mead, P.O. Box 10095, Tallahassee FL 32302-2095, Telephone (850) 222-3533

(List name, address and phone number)

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

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

PROPOSED ADVOCACY

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

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

Indicate Position Support _X___ Oppose _____ Tech Asst. ____ Other _____

Proposed Wording of Position for Official Publication:

Support proposed amendments to F.S. Secs. 736.08135(3) and 736.1008(3) to clarify the duty of a Trustee to account to the qualified beneficiaries of a trust and the form and content of a trust accounting prepared on or after July 1, 2017, and to clarify that the period for which qualified beneficiaries can seek trust accountings.

Reasons For Proposed Advocacy:

The recent appellate court decision in *Corya v. Sanders*, 155 So. 3d 1279 (Fla. 4th DCA 2015) construes Florida statutes in a manner that is contrary to the intended operation of those statutes. The Court improperly construed F.S. Sec. 736.08135 to mean that a trustee had no duty to account prior to January 1, 2003, and

also improperly held that a qualified beneficiary's right to seek an accounting for any period that is more than four years prior to filing an action to compel an accounting is barred by the statute of limitations. This holding interprets the existing law in a manner that is inconsistent with its meaning and intent and is contrary to the Section's interpretation of the law. These amendments clarify the intended meaning of the existing law.

PRIOR POSITIONS TAKEN ON THIS ISSUE

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

Most Recent Position [NONE]

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

Others
(May attach list if more than one)

[NONE]

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

REFERRALS TO OTHER SECTIONS, COMMITTEES OR LEGAL ORGANIZATIONS

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

Referrals

Florida Bankers Association — unknown at this time, expect support

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

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

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

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

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

WHITE PAPER

Proposed amendments of §§ 736.08135 and 736.1008 to clarify the period for which beneficiaries can seek trust accountings.

I. SUMMARY

The appellate court decision in *Corya v. Sanders*, 155 So. 3d 1279 (Fla. 4th DCA 2015) construes Florida statutes in a manner that is contrary to the intended operation of those statutes. First, the court construed section 736.08135 to mean that trustees do not have a duty account prior to January 1, 2003. Second, the court construed Florida law as barring a beneficiary's right to seek an accounting for any period that is more than four years prior to the filing of an action to compel an accounting.

II. CURRENT SITUATION

A. Trustee's duty to account

A trustee's duty to account to trust beneficiaries existed at common law. In 1976, Florida codified the common law duty to account with the enactment of section 737.303 (Duty to inform and account to beneficiaries), which provided that the trustee had a duty to keep beneficiaries reasonably informed and to provide the beneficiary with a statement of the trust accounts annually. The Florida Trust Code (enacted in 2007) renumbered this section as 736.0813 (Duty to inform and account).

In 2002, Florida enacted section 737.3035 (Trust accountings) to provide specific standards for the form and content of trust accountings rendered on or after January 1, 2003. The new statute did not abridge the already existing duty to account. *See* §13(3) of Ch. 2002-82 of the Laws of Florida (providing that section 737.303 as it existed continues to apply to accounting periods prior to January 1, 2003). Rather, the statute just created new standards for accountings rendered after January 1, 2003 (i.e. not retroactively). This section was renumbered as 736.08135 when the Florida Trust Code was enacted in 2007.

The *Corya* court held that "trustees of irrevocable trusts could not be statutorily required to render accountings prior to January 1, 2003" and that the "beginning period for the first accounting, in situations where an accounting had never been done or was not prepared annually, [would] be no earlier than January 1, 2003, as stated in section 736.08135." *Corya* at 1287. The court based its conclusion on the effective date language in section 736.08135 (the statute that enacted specific standards for the form and content of trust accountings). The effective date language in that statute was only intended to make it clear that the new standards governing the form and content of trust

accountings did not apply retroactively. The effective date language was not intended to abridge the time period for which a trustee is accountable to beneficiaries.

The effect of the *Corya* holding is to entirely bar the remedy of compelling a trust accounting for all periods prior to January 1, 2003.

B. Limitations on proceedings against trustees

Section 736.1008 (Limitations on proceedings against trustees) specifies the limitations periods for claims by a beneficiary against a trustee for breach of trust. A trustee's failure to provide accountings is a breach of trust. *See* Fla. Stat. § 736.1001(1). Therefore, section 736.1008 applies to a claim for breach of trust for failure to provide an accounting.

Generally, the limitations periods for claims against trustees do not begin to run until the beneficiary receives a trust disclosure document that adequately discloses the matter that is the subject of the claim (i.e., an accounting). Fla. Stat. § 736.1008(1)-(2). But, an exception exists when the beneficiary has actual knowledge, even if no trust disclosure document is provided -- the limitations period will begin to run when the beneficiary has actual knowledge of the facts upon which the claim is based. Fla. Stat. § 736.1008(3)(a). Section 736.1008(3)(a) is the only mechanism to begin the accrual of a limitations period for a beneficiary's claim against the trustee when a trustee has not provided a trust disclosure document.

The *Corya* court found that the beneficiary had actual knowledge that he was a beneficiary of the trusts at issue in that case. The court went on to hold that section 95.11(6) "limits the right to an accounting, where no accounting has been done, to no more than four years before the filing of an action for an accounting against the trustee of an irrevocable trust." In other words, the court held a beneficiary's right to seek an accounting is subject to a four year limitations period that begins to run on the date he learns that he is a beneficiary of a trust.

The effect of the *Corya* holding is to eliminate the trustee's duty to provide an accounting for any period other than the four most recent years. This result is contrary to Florida law, which makes the duty to provide an accounting a mandatory duty that cannot even be eliminated by the settlor. *See* Fla. Stat. § 736.105(2)(s).

III. EFFECT OF PROPOSED CHANGES

A. Trustee's duty to account

The proposal amends section 736.08135 to make it clear that the subsection (3) of that statute does not abridge the duty of a trustee to account from the date upon which the trustee became accountable.

B. Limitations on proceedings against trustees

The proposal also amends section 736.1008 to make it clear that subsection (3)(a) does not apply to claims for breach of trust based on a trustee's failure to provide a trust accounting as required by law and that a beneficiary's actual knowledge that he or she hasn't received a trust accounting does not cause any period of limitations or latches for a claim to run under either section 736.1008(3)(a) or chapter 95. The proposal does not change the fact that section 736.1008 may operate to bar claims related to particular transactions disclosed in the accountings if the beneficiary had actual knowledge of the facts upon which such claim is based prior to the issuance of the accounting.

IV. FISCAL IMPACT ON STATE AND LOCAL GOVERNMENTS

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

V. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR

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

VI. CONSTITUTIONAL ISSUES

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

VII. OTHER INTERESTED PARTIES

Florida Bankers Association.

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A bill to be entitled

An act relating to trusts; amending s. 736.08135(3), F.S.; amending s. 736.1008(3), F.S.; addressing certain holdings in *Corya v. Sanders*, 155 So. 3d 1279 (Fla. 4th DCA 2015); clarifying the purposes and applicability of s. 736.08135(2), F.S.; clarifying the applicability of the limitations provision in s. 736.1008(3)(a), F.S.; providing applicability; providing an effective date.

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

Section 1. Subsection 736.08135(3), Florida Statutes, is amended to read:

736.08135. Trust accountings.

(1) A trust accounting must be a reasonably understandable report from the date of the last accounting or, if none, from the date on which the trustee became accountable, that adequately discloses the information required in subsection (2).

(2) (a) The accounting must begin with a statement identifying the trust, the trustee furnishing the accounting, and the time period covered by the accounting.

(b) The accounting must show all cash and property transactions and all significant transactions affecting administration during the accounting period, including compensation paid to the trustee and the trustee's agents. Gains and losses realized during the accounting period and all receipts and disbursements must be shown.

(c) To the extent feasible, the accounting must identify and value trust assets on hand at the close of the accounting period. For each asset or class of assets reasonably capable of valuation, the accounting shall contain two values, the asset

acquisition value or carrying value and the estimated current value. The accounting must identify each known noncontingent liability with an estimated current amount of the liability if known.

(d) To the extent feasible, the accounting must show significant transactions that do not affect the amount for which the trustee is accountable, including name changes in investment holdings, adjustments to carrying value, a change of custodial institutions, and stock splits.

(e) The accounting must reflect the allocation of receipts, disbursements, accruals, or allowances between income and principal when the allocation affects the interest of any beneficiary of the trust.

(f) The trustee shall include in the final accounting a plan of distribution for any undistributed assets shown on the final accounting.

(3) ~~This section applies to~~ Subsections (1) and (2) govern the form and content of all trust accountings rendered for any accounting periods beginning on or after January 1, 2003, and all trust accountings rendered on or after July 1, 2017. This subsection (3) does not limit the beginning period from which a trustee is required to render a trust accounting.

Section 2. Subsection 736.1008(3), Florida Statutes, is amended to read:

736.1008. Limitations on proceedings against trustees.

(1) Except as provided in subsection (2), all claims by a beneficiary against a trustee for breach of trust are barred as provided in chapter 95 as to:

(a) All matters adequately disclosed in a trust disclosure document issued by the trustee, with the limitations period beginning on the date of receipt of adequate disclosure.

(b) All matters not adequately disclosed in a trust disclosure document if the trustee has issued a final trust accounting and has given written notice to the beneficiary of the availability of the trust records for examination and that any claims with respect to matters not adequately disclosed may be barred unless an action is commenced within the applicable limitations period provided in chapter 95. The limitations period begins on the date of receipt of the final trust accounting and notice.

(2) Unless sooner barred by adjudication, consent, or limitations, a beneficiary is barred from bringing an action against a trustee for breach of trust with respect to a matter that was adequately disclosed in a trust disclosure document unless a proceeding to assert the claim is commenced within 6 months after receipt from the trustee of the trust disclosure document or a limitation notice that applies to that disclosure document, whichever is received later.

(3) When a trustee has not issued a final trust accounting or has not given written notice to the beneficiary of the availability of the trust records for examination and that claims with respect to matters not adequately disclosed may be barred, a claim against the trustee for breach of trust based on a matter not adequately disclosed in a trust disclosure document is barred as provided in chapter 95 and accrues when the beneficiary has actual knowledge of:

(a) The facts upon which the claim is based if such actual knowledge is established by clear and convincing evidence; or

(b) The trustee's repudiation of the trust or adverse possession of trust assets.

Paragraph (a) applies to claims based upon acts or omissions occurring on or after July 1, 2008. A beneficiary's actual knowledge that he or she has not received a trust accounting does not cause a claim to accrue against the trustee for breach of trust based upon the failure to provide a trust accounting required by s. 736.0813 (or former s. 737.303), nor commence the running of any period of limitations or laches for such a claim, and neither paragraph (a) nor chapter 95 bars any such claim.

(4) As used in this section, the term:

(a) "Trust disclosure document" means a trust accounting or any other written report of the trustee. A trust disclosure document adequately discloses a matter if the document provides sufficient information so that a beneficiary knows of a claim or reasonably should have inquired into the existence of a claim with respect to that matter.

(b) "Trust accounting" means an accounting that adequately discloses the information required by and that substantially complies with the standards set forth in s. 736.08135.

(c) "Limitation notice" means a written statement of the trustee that an action by a beneficiary against the trustee for breach of trust based on any matter adequately disclosed in a trust disclosure document may be barred unless the action is commenced within 6 months after receipt of the trust disclosure document or receipt of a limitation notice that applies to that trust disclosure document, whichever is later. A limitation notice may but is not required to be in the following form: "An action for breach of trust

based on matters disclosed in a trust accounting or other written report of the trustee may be subject to a 6-month statute of limitations from the receipt of the trust accounting or other written report. If you have questions, please consult your attorney."

(5) For purposes of this section, a limitation notice applies to a trust disclosure document when the limitation notice is:

(a) Contained as a part of the trust disclosure document or as a part of another trust disclosure document received within 1 year prior to the receipt of the latter trust disclosure document;

(b) Accompanied concurrently by the trust disclosure document or by another trust disclosure document that was received within 1 year prior to the receipt of the latter trust disclosure document;

(c) Delivered separately within 10 days after the delivery of the trust disclosure document or of another trust disclosure document that was received within 1 year prior to the receipt of the latter trust disclosure document. For purposes of this paragraph, a limitation notice is not delivered separately if the notice is accompanied by another written communication, other than a written communication that refers only to the limitation notice; or

(d) Received more than 10 days after the delivery of the trust disclosure document, but only if the limitation notice references that trust disclosure document and:

1. Offers to provide to the beneficiary on request another copy of that trust disclosure document if the document was received by the beneficiary within 1 year prior to receipt of the limitation notice; or

2. Is accompanied by another copy of that trust disclosure document if the trust disclosure document was received by the beneficiary 1 year or more prior to the receipt of the limitation notice.

(6) (a) Notwithstanding subsections (1), (2), and (3), all claims by a beneficiary against a trustee are barred:

1. Upon the later of:

a. Ten years after the date the trust terminates, the trustee resigns, or the fiduciary relationship between the trustee and the beneficiary otherwise ends if the beneficiary had actual knowledge of the existence of the trust and the beneficiary's status as a beneficiary throughout the 10-year period; or

b. Twenty years after the date of the act or omission of the trustee that is complained of if the beneficiary had actual knowledge of the existence of the trust and the beneficiary's status as a beneficiary throughout the 20-year period; or

2. Forty years after the date the trust terminates, the trustee resigns, or the fiduciary relationship between the trustee and the beneficiary otherwise ends.

(b) When a beneficiary shows by clear and convincing evidence that a trustee actively concealed facts supporting a cause of action, any existing applicable statute of repose shall be extended by 30 years.

(c) For purposes of sub-subparagraph (a)1.b., the failure of the trustee to take corrective action is not a separate act or omission and does not extend the period of repose established by this subsection.

(d) This subsection applies to claims based upon acts or omissions occurring on or after July 1, 2008.

(7) This section applies to trust accountings for accounting periods beginning on or after July 1, 2007, and to written reports, other than trust accountings, received by a beneficiary on or after July 1, 2007.

Section 3. The changes made by this act are intended to clarify existing law, are remedial in nature, and apply retroactively to all cases pending or commenced on or after the effective date of this act.

Section 4. This act shall take effect July 1, 2017.

Supreme Court of Florida

FOR IMMEDIATE RELEASE 10/24/2016

Contact: Craig Waters, Director of Public Information
Florida Supreme Court
(850) 414-7641

Workgroup to Focus on Guardianship Issues in Florida's Courts

TALLAHASSEE – Few decisions are more challenging to a judge than removing a person's rights because they are no longer capable of making decisions independently, Florida Chief Justice Jorge Labarga said Monday. Caseloads are increasing in number and complexity and have convinced him to create a workgroup to study guardianships in the court system with a goal of improving accountability to better protect vulnerable people – children, adults with developmental and mental disabilities, and the elderly.

"As Florida grows and ages, we can expect more and more cases dealing with guardianship issues to come into our courts," Labarga said. "As judges, we are committed to protecting the rights of individuals involved in these matters and doing everything in our power to ensure their safety, security, and well-being."

Florida's guardianship system exists to assist and protect an individual who is judged by a court to be unable to make decisions for himself or herself. When appointed by the court, guardians can make decisions about an individual's care, finances, or property on their behalf.

On Friday, Labarga established the Guardianship Workgroup under the Court's Judicial Management Council, the group that advises the chief justice and the Supreme Court on long-range issues confronting Florida's judiciary. Three JMC members will be appointed to serve on the workgroup, including Judge Olin Shinholser who has been a member of the JMC since 2012 and will serve as chair of the workgroup. Shinholser has served the judiciary in the 10th Judicial Circuit for over 26 years. His knowledge and experience will guide the workgroup.

"There is often tension, clash and/or conflict between the needs, interests and desires of the ward and those of the guardian, caregivers and families of the ward," Shinholser said. "The system must be sensitive that it fairly and adequately assists, protects and safeguards the rights and welfare of the ward

while allowing the necessary tools to those providing and supervising the care of the ward. Comments and complaints from various stakeholders are indicative that we need to take a closer look at whether the rules and procedures in place accomplish the balance needed."

The workgroup will examine judicial procedures and best practices pertaining to guardianship to ensure that courts are best protecting the person, property, and rights of individuals who have been judged to be incapacitated and persons who may have diminished capacity to function independently.

In the last two legislative sessions, state lawmakers passed laws addressing guardianship concerns. The state's regulation and oversight of guardians was increased and measures designed to curb abuses enacted.

"This is an appropriate time to re-evaluate our system and determine if the courts are doing everything possible to meet the needs of everyone involved," Labarga said.

The workgroup will focus on the following issues:

- the use of least restrictive alternatives that address specific functional limitations;
- determinations of incapacity;
- restoration of capacity;
- the assessment and assignment of costs associated with guardianship administration;
- post adjudicatory proceedings and responsibilities related to guardianship, including the rights guaranteed by Florida law; and
- training opportunities available to judges and court staff.

The workgroup will provide the Supreme Court with a report evaluating guardianship practices and recommending ways to enhance the guardianship process. An interim report is due to the Court by October 2017 and a final report is due to the Court by September 2018.

Additional workgroup members include:

- Judge Robert Lee, Broward County, Ft. Lauderdale (JMC Member)
- Judge Michelle Morley, 5th Circuit, Bushnell
- Judge Peter Dearing, 4th Circuit, Jacksonville
- Judge Maria Korvick, 11th Circuit, Miami
- Mr. Jason Nelson, Office of Public and Professional Guardians, Florida Department of Elder Affairs, Tallahassee
- Mr. Laird Lile, J.D., Lile & Hayes, PLLC, Naples (JMC Member)
- Mr. Andrew Sasso, J.D., Macfarlane Ferguson & McMullen, Clearwater
- Ms. Karen Campbell, J.D., North Florida Office of Public Guardian, Tallahassee
- Ms. Vicki Alkire, CPHQ, LHCRM, MG, CMC, Viable Alternatives, Inc., Sarasota

"Further evaluating guardianship practices supports the branch's goal of ensuring that court procedures and operations are easily understandable and user friendly and supports our mission to protect rights and liberties of all," Shinholser said. "It's imperative we stay proactive in this area and provide real solutions to emerging issues."

For more information about guardianship in Florida's court system visit the Court Improvement web page at www.flcourts.org or to learn about the Florida Supreme Court, www.floridasupremecourt.org.