EXECUTIVE COUNCIL MEETING

AGENDA

Disney BoardWalk Inn
Lake Buena Vista, Florida

Saturday, October 8, 2016
8:30 a.m.

BRING THIS AGENDA TO THE MEETING

Real Property, Probate and Trust Law Section
Executive Council Meeting

Disney's BoardWalk Inn
Lake Buena Vista, Florida
October 8, 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 July 30, 2016 meeting of Executive Council held at The Breakers, Palm Beach, Florida. **pp. 10 - 40**

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

1. Recognition of Guests.

2. Recognition of General Sponsors and Friends of the Section. **pp. 41 - 43**

3. Report of Interim Action of the Executive Committee. **pp. 44 - 70**

4. Upcoming Executive Council Meetings **p. 71**

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

VI. **Chair-Elect's Report** — *Andrew M. O'Malley* ***p. 72***

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

Statement of Current Financial Conditions. **p. 73**

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. 74**

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

Information Items:

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

   Report on William Reese Smith Jr. Leadership Academy application process and qualifications. **pp**.**75 - 76**

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

   Report on pending amicus filings

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

   Report on Clerk's position regarding paper filings

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

   i. Report on approval by Uniform Law Commission of seven new acts. **pp. 77 - 78**
   ii. Update on discussions with the Business Law Section regarding concerns to the Business Law Section's proposed position to adopt legislation enacting into law in Florida the Uniform Voidable Transfers Act. **pp. 79 - 83**

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

   i. Report on commencement of the "No Place Like Home" project.
   ii. Report from FinCen GTO Working Group. **pp**. **84 - 102**

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

Information Item:

1. **Commercial Real Estate Committee** – *Adele I. Stone, Chair*

   Recommencement of proposed legislation for assessment of multiple parcel buildings, as originally approved by Executive Council in 2014. **pp. 103 - 112**

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

Action Items:

1. **Ad Hoc POLST Committee** --- *Jeffrey A. Baskies and Thomas M. Karr, Co-Chairs*

Motion to: (A) adopt as a Section position legislation to recognize Physician Orders for Life Sustaining Treatment (POLST) 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. 401.46, 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. **pp. 113 - 143**

2. **Elective Share Review Committee** --- *Lauren Detzel and Charles Nash, Co-Chairs*

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; 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. **pp. 144 - 194**

3. **Probate Law and Procedure Committee**--- *John Moran, Chair*

Motion to: (A) adopt as a Section position legislation allowing a testator to deposit his or her original will with the clerk's office for safekeeping during his or her lifetime, and for 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. **pp. 195 - 203**

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

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 **pp. 204 - 212**

Informational Items:

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

Proposed support of 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: (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 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. **pp. 213 - 224**

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

Update on the Section's joint efforts 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, 2106. **pp. 225 - 241**

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. Zikakas, 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
EXECUTIVE COUNCIL MEETING[1]

Saturday, July 30, 2016
The Breakers, Palm Beach Florida

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

The meeting was held at The Breakers, Palm Beach, Florida. The New Year began with punctuality as our esteemed Chair, Ms. Deborah P. Goodall, called the meeting to order at precisely 9:45 a.m. on Saturday, July 30, 2016, noting how thrilled she was to lead and serve the Section as its Chair. The Council responded with much and well-deserved applause.

Ms. Goodall reminded all members that the yellow attendance roster was circulating and the importance of signing in due to attendance requirements for our meetings.

Ms. Goodall recognized our colleagues at the Brazilian Court who went through an ordeal the evening before involving a fire which apparently originated in or near a room of one of our longtime members. Ms. Goodall assured our Council that, despite rumors, it had nothing to do with any of our Agenda items. Luckily, everyone was safe. Ms. Goodall indicated that Mary Ann Obos was prepared to assist any Council members who need accommodations for the evening.

Ms. Goodall also recognized the new members of Executive Council who were attending their first meeting. Welcome!

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

Ms. Hennessey reminded all members to sign the attendance roster. The roster showing members in attendance is attached as Addendum "A".

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

Mr. Hennessey moved:

To approve the Minutes of the June 4, 2016 meeting of the Executive Council held at the Portofino Hotel, Orlando, Florida.
(See Agenda pages 11-46.)

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

The Motion was unanimously approved.

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

1. **Recognition of Law Students**. Ms. Goodall asked the law students in attendance to stand and be recognized. They complied as did the Council with applause. Mr. Goldman was chided for standing (note from secretary: At least he's still young at heart...)

2. **Recognition of General Sponsors and Friends of the Section**

Ms. Goodall thanked our General Sponsors and Friends of the Section listed on pages 47-49 of the Agenda:

General Sponsors

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

Ms. Goodall specifically thanked Attorneys' Title Fund Services for sponsoring the Legislative Update Seminar.

She also thanked the Legislative Update Committee, including Jim Robinson, Stacy Kalmanson, Salome Zikakis, and all others, for the 2016 Legislative and Case Law Update Seminar to thunderous applause. The RPPTL Section will be back at the Breakers next year on the same July weekend with Stacy Kalmanson as our chair (same bat time, same bat.... Oh, you get the drift...)

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*

Friends of the Section

Business Valuation Analysts, LLC – Tim Bronza
Corporate Valuation Services, Inc. – Tony Garvy
North American Title Insurance Company – Andres San Jorge
Valley National Bank - Jacquelyn McIntosh
Valuation Services, Inc. – Jeff Bae, JD, CVA
Wilmington Trust – David Fritz

App Sponsor

WFG National Title Insurance Company – *Joseph Tschida*

Ms. Goodall announced that first, second, and third place awards will be presented to winners of our App contest for the most points (cough, cough--- Mr. Neukamm). Ms. Goodall invited members to direct any questions or concerns about the App to Steven Goodall.

3. **General Agenda**. Ms. Goodall thanked everyone for reading the Agenda and reminded folks of the importance of doing so because it spurs important discussion. It was this very discussion which has led to changes to a number of our Agenda items under consideration.

4. **Recognition of Award Recipients from the Convention**.

Ms. Goodall recognized former chair, Mr. Gelfand. Mr. Gelfand presented Section Awards to our winners who were not able to attend the Orlando meeting. John Little was presented with the John Arthur Jones Annual Service Award for his tireless work, on among other things, the Amicus Committee and for epitomizing John Arthur Jones's service to the Section. Burt Bruton was presented with the William Fletcher Belcher Lifetime Service Award. Mr. Gelfand shared that Mr. Bruton has been so prolific in his dedication of time and talent to the Section that he has spawned a noun--- we refer to like-minded up-and-comers as a "Burt". Mr. Gelfand thanked both of these gentlemen as true leaders who epitomize professionalism. Both men were recognized with applause and huzzahs from our Council.

5. **Upcoming Executive Council Meetings**

Our upcoming meeting schedule with room block information is listed at pages 50-55 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. Our next meeting will be held at Ms. Goodall's second home and personal playground, the Boardwalk Resort at Walt Disney World. Our Thursday night event will take place in EPCOT at the American Pavilion followed by fireworks on the waterfront in our own viewing area. The Friday night event will be at the Dance Hall at the Boardwalk which has been reserved exclusively for our group. On Saturday night, we will dine at Disney Springs on the waterfront and then go bowling at Splitsville. Upon the mere mention of bowling, our Probate Division Director, Debbie Boje, clapped and squealed in delight. Please keep your eye out for early sign up sheets for the Orlando events.

Ms. Goodall reported that this evening's event is at Uptown Art in West Palm Beach. She displayed a wonderful masterpiece by our own, Bobby Swaine, in the style of American Gothic. The farmer in the photo bore a striking resemblance to Michael Gelfand.

6. Announcements.

Ms. Goodall extended congratulations to Fellow, Angela Santos, who was in attendance at the meeting, even though she had a baby only a couple of weeks before.

Ms. Goodall awarded Jeff Goethe with a $25 gift card to The Breakers for being the first to register for the weekend's events.

Finally, Ms. Goodall applauded the Section's professionalism and commended everyone for the high level of friendly of discourse even on issues in which we sometimes disagree.

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

Ms. Goodall introduced Mr. Scriven who gave his report as Section liaison to the Board of Governors. Mr. Scriven reported on this week's Board of Governors meeting in Miami Beach. The Board of Governors approved an amendment Rule 5-1.1 which added state and federal credit unions to the list of entities authorized to hold IOTA trust accounts. The Board of Governors also approved amendments the rules which address for-profit companies that link lawyers with consumers needing legal work and are designed to prevent fee splitting between those companies and lawyers and protect the public from deceptive, misleading, or false advertising by those companies. Under the proposed amendments, any private entities that connect consumers looking for legal services with lawyers are called "qualifying providers" regardless of whether they are a "traditional" referral service (ASK-GARY, 411 PAIN) or a technology-based provider (AVVO, LegalZoom). The Board of Governors also considered a proposed rule change which would eliminate the additional 5 days for email service making email service rule a facsimile of the facsimile rule. The Appellate Rules Committee had earlier voted to reject that proposed change. The proposed change will be considered further by the Board of Governors at its next meeting.

VI. Chair-Elect's Report – *Andrew M. O'Malley*

Ms. Goodall ceded the floor to our Real Estate Division Director, Scott Pelley from 60 Minutes... ur... Ernest Hemmingway look-a-like, no... our friend, Drew O'Malley (Drew, there are many, many worse faces you could be compared to... trust me!) Mr. O'Malley discussed his venues for 2017-18 for the meetings listed on page 56 of the Agenda. Our Annual Convention will be held at the TradeWinds Island Resort on St. Pete Beach. It was recently completely renovated and updated and is a kid-friendly venue. Our out-of-state meeting for Mr. O'Malley's year will be in Boston. Mr. O'Malley shared that everyone seems to have an opinion about Boston's best spots but invited folks to keep the thoughts, ideas, and opinions flowing. We will be staying at the Fairmont Copley Plaza and our Saturday night event will be at the John F. Kennedy Presidential Library and Museum.

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

Ms. Bronner reported on the RPPTL Financial Summary set forth on page 57 of the Agenda. Ms. Bronner reported that the Section was in very good financial condition with gains to the reserve over the last year. She thanked everyone "across the board" for their good work.

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

Ms. Frazier reported that 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. The ALMs are pleased and excited to be assisting with the No Place Like Home Project.

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

Mr. Kelley reported that the Legislative and Case Law Update Seminar was extremely successful with over 350 attendees. Thanks were extended to FLEA/FLSSI and the Brennan Family for all of their help, support, and hard work in making the seminar a success.

Mr. Kelley encouraged everyone to mark their calendars for the (widely popular) annual Probate Law Seminar, which will be in Tampa on November 18, 2016, and the Estate and Trust Tax Planning/Asset Protection Seminar, which will be held in Fort Lauderdale on December 1, 2016.

All of our upcoming seminars are listed on Page 58 of the Agenda.

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

Information Items:

1. **Sponsorship Coordination** – *Wilhelmina Kightlinger, Chair*

All of our Sponsors are listed at pages 47-50 of the Agenda. Ms. Kightlinger thanked everyone for extending courtesy and keeping chatter to a minimum while sponsors are speaking at events and meetings. The Section is still looking for another Friday Night Dinner sponsor. This sponsorship opportunity is open for the first time in 10 years. Ms. Kightlinger welcomed Guardian Trust as a General Sponsor of the Probate Roundtable. She also welcomed back Wright Investors' Service as our Saturday night dinner sponsor. Mr. Waller helped to bring Wright Investors' Service back into the fold as one of sponsors. Ms. Kightlinger encouraged all Section members to "Be Like Chip" and champion our sponsorship opportunities. Ms. Kightlinger also thanked Valley National Bank for joining on a Friend of the Section.

The Committee theme for this year is "Making it Rain." Please be sure to let sponsors know when referrals come from Section members so that our sponsors know the fantastic support the Section is giving back.

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

Mr. Goldman reported that, as of 96 hours ago, the Amicus Committee was popping corks over a seemingly quite summer. Now, the Committee has been spurred to action by two recent decisions which are currently under study.

In Smith v. Smith, the Fourth 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 indicated that the amicus committee is following this case as it is appealed to the Florida Supreme Court and indicated that Executive Committee action may be required before the next meeting.

Mr. Goldman assured the Council that, despite his probate bent, he was also "up to the task" of studying the recent 3d DCA 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. Mr. Goldman indicated that Executive Committee action may be required on this case as well before the next meeting.

3. **Fellows** – *Benjamin Diamond, Chair*

Our former chair of the Fellows, Ashley McCrae provided the report (while our good friend and current chair, Ben Diamond, was understandably out canvassing and working hard for his upcoming election). She introduced the new class of Fellows who are listed, with full bios, on Page 59 of the Agenda. Ms. McCrae encouraged Council members to get Fellows involved in committee projects in order to make the program a success.

4. **Liaison with FLEA/FLSSI** – *David Brennan and Roland Waller, Liaisons*

Our former chair, Dave Brennan, welcomed the new Executive Council members and shared that his first meeting was almost exactly 40 years ago (about the time when dinosaurs roamed the Palm Beaches). Mr. Brennan provided us with a history of FLEA/FLSSI.

The Florida Legal Education Association was established in 1979 to assist the Section in presenting seminars to its members. At that time, the Section decided to move outside the traditional Florida Bar CLE box. FLEA is a not-for-profit corporation. It was run by our former chair, Bill Sherman, for many years. The primary purpose of FLEA was to present seminars which might not otherwise available to Section members. Currently, one of their largest seminars every year is the "Probate Team Seminar". FLEA seminars are presented with no profit motive as a service to Section members and the public. FLEA provides discounts to Section members and has healthy relationship with the Section.

Florida Lawyers Support Services Inc (FLSSI) was formed in 1981 as another not-for-profit corporation. It has an all-volunteer board with former Section Chair, Roger Isphording, as its president since it was founded. Mr. Isphording has dedicated 1000s of hours service to the Florida Bar and Section. The FLSSI Probate and Guardianship Forms are the largest project of FLSSI. They are edited annually. Our former Section Chair, John Arthur Jones, was instrumental in creating the forms. The forms are provided complementary to the judiciary and sold annually.

Upon conclusion of his report, Mr. Brennan ceded the floor to Chip Waller. Mr. Waller declined the right to speak to collective gasps on the Council floor, particularly among his friends in the back row, who demanded that these minutes accurately reflect Mr. Waller's silence. His silence was duly noted.

Ms. Goodall as Section Chair thanked each of our former Chairs in the back row and had them stand to be recognized---"God bless each of you for the example you set for each of us as Council members" was the refrain from our Chair to applause from the floor.

5. **Liaison with The Florida Bar CLE** – *Robert Freedman, Liaison*

Mr. Robert Freedman reported that The Florida Bar CLE Committee, due in large part to the efforts and advocacy of Mr. Gelfand at the Council of Sections meetings, has retained a consultant to improve CLE efficiency and marketing. Bar members should be receiving a survey from the Florida Bar which requests comments and suggested improvements on the current CLE structure, venues, delivery, and marketing. It is important for RPPTL members to respond to this survey. Members with questions about the survey can direct them to Rob Freedman. The current plan is for the survey results to be reported at the Board of Governors meeting in September.

Mr. Freedman apparently left his good shoes (i.e., flip flops) under the table when providing this report, which drew criticism from Mr. O'Malley who pointed out that proper etiquette required that he wear his shoes. Your secretary is grateful that he decided to at least wear a shirt.

6. **Publications**

A. **ActionLine** – *Jeff Baskies and Cary Wright, Co-Chairs*

Silvia Rojas was recognized, with heartfelt applause, for her years of service to ActionLine. Mr. Wright indicated that Ms. Rojas has continued to assist with the transition. The ActionLine committee is always looking for content. The next publication deadline will be in October.

B. **Florida Bar Journal** – *Douglas Christy and Jeffrey Goethe, Co-Chairs*

Our co-chairs reported that we have a friendly competition going between the dirt and death sides on article submissions. The Bar Journal has now had back-to-back death articles from Dresden Brunner on digital assets and Hung Nguyen on changes to guardianship. The Bar Journal is published 10 times per year. The Section needs six more articles, three from each division, for this year.

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

Lawrence Miller gave a brief update on status of the "No Place Like Home" project which seeks attorney volunteer assistance to clear title to real property for vulnerable low income Florida residents, thereby allowing such residents to receive disaster-related relief, access to community development funds, and available real property tax exemptions. He noted that this is a wonderful opportunity for involvement for both the Real Property and Probate and Trust Divisions. The ALMs will be reaching out for assistance.

XI. RPPTL Probate and Real Estate Division Reports

Ms. Goodall explained that we would be mixing up our Probate and Real Property Information and Action Items on the Agenda to keep things interesting in a game of **RPPTL Wheel of Fortune.**

1. **Recognition of Probate Committee Sponsors**- Debra Boje, Probate Division Director

First up, 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

B. **Elective Share Review Committee** --- Lauren Detzel and Charles Ian Nash, Co-Chair

Ms. Detzel presented as an **INFORMATION ITEM** the report of the Elective Share Review Committee. Elective Share Review Committee was formed three years ago to review the elective share statutes and determine whether there are any needed tweaks, changes, or new thoughts since the passing of the prior overhaul in 1999. The committee engaged in several years of active study and has proposed a number of significant changes to our current statutes. These changes have been discussed and addressed at prior Probate Roundtables. The committee has proposed a draft bill, which appears in part at pages 159-187 of the Agenda. Ms. Detzel noted that the proposal in the Agenda is not the final product and that a number of changes had been made in the last few days as a result of comments and committee meetings at The

Breakers meetings. The revised draft bill has been posted on the APP and the RPPTL website.

Ms. Detzel focused on the seven key substantive changes which are part of the draft bill (as revised):

(1) Amount of elective share. When our Section originally proposed elective share changes in the 1990s, our Section position included a graduated scale which adjusted the amount of the elective share based up number of years of marriage. As part of the legislative process in the 1990s, the legislature ultimately decided to set the elective share at a fixed 30%. However, the committee continues to believe that 30% can be unfair in many instances. Ms. Detzel provided an example of a very short marriage which provides a windfall versus a long-term marriage wherein a spouse might arguably be due much more. The draft bill proposes the following graduated scale for the amount of the elective share: less than 5 years 10%, 5-15 years 20%, 15-25 years 30%, and more than 25 years 40%. The reason for not setting the elective share at 50% for long term marriages is because non-marital assets are excluded in the divorce context but not necessarily with respect to the computation of the elective share.

(2) Time for Election. The committee has proposed to modify s. 732.2135 to allow a spouse to petition for an extension of time to make the election, at any time, "for good cause shown". This change will prevent a spouse from being prejudiced by, among other things, proceedings which significantly alter the share of the spouse which are filed or resolved after the deadline for the election. The proposal also allows the election to be withdrawn up to 6 months after it is filed in instances where an extension is granted.

(3) Interest. Under current law, a spouse cannot receive interest until an order of contribution is entered. The current proposal provides for statutory interest if elective share not paid within 2 years. The interest will follow the contribution share of the elective share which remains unpaid.

(4) Elective Share Trust. The proposal will provide that a spouse will be deemed to have the right to make trust property productive in an elective share trust if an elective share is filed.

(5) Attorneys' Fees. Significant revisions have been made to the attorneys' fee provisions in recognition of the fact that the current laws can be unfair to a spouse when objections are made to the elective share because the spouse has no right to fees under the current law. The proposed bill would allow any party to seek fees in

proceedings involving the elective share. The fee award will be discretionary with the court and may be awarded from the estate, the elective share, or from a party's assets included in the elective estate.

(6) Effective date. The new changes will apply to estates of decedent's dying on or after July 1, 2017, except for fee provisions which apply to proceedings commenced on or after July 1, 2017.

(7) Homestead. Under current law, the value of homestead property is excluded from the elective share both as it relates to computation of the elective estate and satisfaction of the elective share. This creates a significant discrepancy with property which is held as tenants by the entirety. TBE property is included in the computation and satisfaction of the elective share. This difference is inequitable. Proposed changes to s. 732.2035 provide that homestead property is included in the elective estate unless the spouse receives no interest in the homestead by virtue of a waiver (732.2045). For purposes of valuing homestead, if the spouse receives life estate or tenants-in-common interest, the spouse will be deemed to have received 50% of the value of the property.

Ms. Detzel thanked all of the committee members for their outstanding work on this project, including her Co-Chair Charlie Nash, Jack Falk, Don Tescher, Cristina Papanikos, Rick Gans, Jenna Rubin, and Charlie Robinson.

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

Ms. Adams presented as an **ACTION ITEM** a report from the Trust Law Committee on a proposed Section position which would fix a problem in the Florida Trust Code relating to charitable trusts. In particular, our Trust Code grants the Florida Attorney General standing in charitable trust matters under s. 736.0110. However, the notice provisions in the Trust Code require notice, in certain instances, be provided to the "state attorney." The legislation clarifies that notice needs to be delivered to the Attorney General not the state attorney and specifies the manner for delivering notices. A full report, including a legislative position request, white paper, and proposed bill are included in the agenda at pages 95-102. It was an information item at the last meeting. Ms. Adams also explained that this fiscal impact of the proposal should be positive for the State of Florida because currently the state attorney and Attorney General were both being served in most instances.

Ms. Adams made a motion on behalf of the Trust Law Committee to:

(A) adopt as a Section position legislation to revise Florida law to provide that the Attorney General is the proper party to receive notice for matters concerning charitable trusts and further define the manner in which the Attorney

General will receive such notices, including changes to §§736.0110(3), 736.1201, 736.1205, 736.1206(2), 736.1207, 736.1208(4)(b), and 736.1209, 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 unanimously approved.

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

Ms. Boje presented as an **ACTION ITEM** a report from the Trust Law Committee a proposal to amend s. 736.04117 clarifying Florida's trust decanting laws. The full report is found at pages 103-119 of the Agenda, including a legislative position request, proposed bill, and white paper. This matter was previously an information item.

Ms. Adams made a motion on behalf of the Trust Law Committee to:

(A) adopt as a Section position legislation revising §736.04117, Florida Statutes: (1) allowing a trustee to distribute principal in further trust pursuant to a power of distribution that is limited by an ascertainable standard (currently such distributions are only permitted pursuant to a trustee's power to distribute principal pursuant to an absolute power to make distributions); (2) adding a provision to allow a trustee to distribute trust principal to a supplemental needs trust when a beneficiary is disabled; and (3) expanding the notice requirements to require the trustee to provide a copy of the proposed distributee trust instrument prior to the distribution; (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 unanimously **approved.**

5. **Recognition of Real Property Committee Sponsors** – *Robert Freedman, Real Property Division Director*

Robert Freedman, who was now wearing his shoes after being shamed into doing so, 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 49 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

6. **Real Estate Structures and Taxation Committee** – *Burt Bruton*

Mr. Bruton presented as an **ACTION ITEM** a report from the Real Estate Structures and Taxation Committee concerning a proposed amendment to the Florida Statutes which would make it clear that a transfer to a land trust, which vests both legal and equitable title to real property in the land trust trustee, remains subject to 10% cap on annual increases to the assessments of real property. Mr. Bruton explained that in some Florida counties the property appraiser has seized upon the distinction between land trusts and other trusts and have reassessed properties without regard to the 10% cap. A full report from the committee, including a proposed legislative position request, bill, and white paper are included in the Agenda at pages 60-67.

Mr. Bruton made a motion on behalf of the Committee:

To (A) adopt as a Section position changes to F.S. 193.1554(5) and 193.1555(5) in support of uniform assessment of real property held in Florida land trusts; (B) find that such legislative position is within the purview of the RPPTL Section; and (C) to expend Section funds in support of the proposed legislative position.

The Motion was unanimously approved.

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

Jon Scuderi presented as an **INFORMATION ITEM** a report from the Ad Hoc Committee on Spendthrift Trust Issues. The full report of the committee is found at Pages 120-158 of the Agenda. Mr. Scuderi explained that portions of the committee proposal have been controversial leading to a great deal of discussion over the course of the weekend. The committee decided to pull as an information item for this meeting the more controversial issue of restricting a former spouse's ability to seek to garnish the interest of beneficiary in discretionary trust distributions in order to satisfy to past due alimony. However, the committee has left as an information item subsection (4) of the proposed statutory changes contained on Page 120 of the Agenda. Subsection (4) addresses the concept that a writ of garnishment directed to one beneficiary's interest will not impact the ability of a trustee to make discretionary distributions to other beneficiaries of the trust. The language and maybe even the section itself may ultimately change.

Comments were made from the Council floor in support of restricting the former spouse's ability to garnish discretionary trusts to pay past due alimony. The member

recognized the political difficulties and the controversial nature of the position but suggested that the Council should consider specifically addressing this issue because it has support among many of our Section members.

Ms. Detzel clarified Mr. Scuderi's remarks by indicating that no final decision had been made as to what final position the Ad Hoc Committee on Spendthrift Trust Issues would be taking as to the proposed statute on page 120 on any of the issues and that they would be re-thinking their position with due consideration being given to the comments received at the various committee meetings.

Ms. Goodall explained that the committee was not making a specific proposal for consideration at the Council meeting today.

Additional comments were made from the floor indicating that political expediency of just addressing subsection (4) may not assist in addressing the most significant problems. Mr. Scuderi expressed that he was aware of those concerns and indicated that the committee would be exploring whether they should proceed with the conceptual changes addressed in subsection (4) and that no final decisions had been made.

8. **Guardianship, Power of Attorney and Advanced Directives Committee** --- *Hung V. Nguyen, Chair*

Mr. Nguyen presented as an **ACTION ITEM** a report from the Power of Attorney and Advanced Directives Committee. The full report of the committee, including the position request form, white paper, and bill are at pages 89-94 of the Agenda. The current state of the law is that a petition for dissolution of marriage on behalf of an incapacitated ward is considered an extraordinary procedure, which requires court approval upon a finding that it is the ward's best interest by clear and convincing evidence. In addition, current law requires the spouse of the incapacitated ward to consent to the divorce. The proposal will eliminate the requirement of spouse consent before the court can authorize a petition for dissolution of marriage. This matter was previously an information item.

Mr. Nguyen made a motion on behalf of the Committee:

(A) adopt as a Section position legislation to permit a court to approve a guardian's request to initiate a petition for dissolution of marriage of a ward without the requirement that the ward's spouse consent to the dissolution, including amendments to s. 744.3725, 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 unanimously **approved. See Agenda pages p. 89 – 94.**

9. **Probate Law and Procedure** --- *John Moran, Chair*

Mr. Moran presented as an **INFORMATION ITEM** a report from the Probate Law and Procedure Committee on proposed Section Position which would support 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. The proposed statute specifically addresses the issue of orphan wills where the testator cannot be located.

Mr. Kromash presented a couple of highlights of the proposal. The proposal is designed to address the orphan will problem and to allow a testator to deposit his or her will pre-death, presumably to avoid improprieties. The statute specifically addresses what county the will is to be deposited in, which is usually where the testator resides. If the depositor is someone other than the testator, there are several options such where the testator resided at the time it was deposited or where it was executed. On the issue of orphan wills in instances where the testator cannot be located, in absence of this statute, a lawyer may be obligated to hold the will forever. Paragraph 4 of the proposal addresses the legal and ethical issues by requiring that a lawyer, before deposit of the will, make a good faith effort to locate the testator and that the lawyer must not have had contact with the testator ever or in the last 7 years. The lawyer must also affirm that despite good faith efforts the testator cannot be located. Paragraph 6 requires the clerk to make an electronic copy and retain original will for 20 years. A will that is lost or destroyed by clerk will be deemed an original and will be considered a lost or destroyed will for purposes of presumption. Paragraph 7 contains specific language indicating that a deposited will is confidential. It can only be accessed by a limited class of persons, including the testator and a person authorized to receive the will by order of the court. Paragraph 9 addresses retrieval of the will when the testator dies. A certified copy of the death certificate must be filed to put the clerk on notice of the death. The filing of the death certificate will trigger an additional 20 year holding period for the will or a requirement that the will be transferred to another state or county. The proposal limits the liability of clerk for safekeeping of the will. The full proposal, including a draft legislative position request, bill, and white paper are included at pages 188-196 of the Agenda.

A comment was made from the Council floor suggesting that the statute specifically address how deposited wills should be indexed by the clerk in situations where there are commons names. In particular, how are the clerks going to distinguish among testators with the same name? Further, the speaker suggested that we consider requiring that a statewide searchable database be maintained so that searches can be performed on a statewide level to locate filed wills.

Mr. Moran explained that the committee considered but did not pursue a searchable database because it would require a commitment from the state to create the database. Mr. Moran indicated that the committee is considering addressing that issue as a separate piece of legislation in the future.

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

Ms. Adams presented as an **INFORMATION 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, s. 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. The full report, including a legislative position request form, white paper, and bill are located at pages 197-205.

ANNOUNCEMENT BREAK: Upon conclusion of prior report, Ms. Goodall made an announcement reminding people of the importance of registering for the Executive Council meeting in the future so that we can order the correct number of lunches.

Ms. Goodall also requested that our speakers identify themselves for the benefit of the new Executive Council members before making a presentation or commenting from the floor so that new members can put faces with names.

Finally, Ms. Goodall announced the evening's Uptown Art will not feature a painting of Michael Gelfand's face, which led to a chorus of boos and hisses. She shared that we are *instead* actually painting "something really cool". Transportation will be leaving at 5:30 pm.

11. Estate and Trust Tax Planning Committee – *David Akins, Chair*

Ms. Boje informed the Council that the proposed action item of the Estate and Trust Tax Planning Committee set forth at pages 80-88 of the Agenda, dealing with the joint tenants with right of survivorship and tenancy by the entirety in personal property, would not be an action item at this meeting. The committee is addressing technical comments it received and will be re-considering portions of its proposal.

12. Title Insurance and Title Insurance Liaison Committee – *Raul Perez Ballaga, Chair*

Mr. Freedman reported that the action item listed at pages 68-71 of the Agenda, concerning opposition to a Department of Financial Services rule on unlawful inducement in the title insurance realm, was pulled at the Real Estate Roundtable because there are more comments that need to be dealt with. It will be revisited at the Orlando meeting.

13. **Construction Law Committee** – *Scott Pence, Chair*

Mr. Freedman also reported that the information item on open construction permits contained at pages 72-79 of the Agenda was being pulled from today's meeting because building officials provided a number of substantive comments in the last several days. The committee is going to consider these comments and revisit the proposal before the next meeting.

XII. Adjourn

There being no further business to come before the Executive Council, Ms. Goodall thanked those in attendance and a motion to adjourn was unanimously approved at approximately 11:50 a.m. This brought to close Ms. Goodall's very successful first meeting as Chair.

Respectfully submitted,

William T. Hennessey, Secretary

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.		√	√				
Brennan, David C. **Past Chair**		√	√				
Brittain, David R.	√		√				
Brown, Mark A.	√		√				
Brown, Shawn	√		√				
Brunner, S. Dresden		√					
Bruton, Jr., Ed Burt	√		√				
Bucher, Elaine M.		√	√				
Butler, Jonathan Brennan		√	√				
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.		√	√				
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.		√	√				
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		√	√				
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		√					
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**	√		√				
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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 Benita 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.		√					
Spivey, Barry F.		√	√				
Spurgeon, Susan K.	√		√				
Stafford, Michael P.		√	√				
Staker, Karla J.	√		√				
Stern, Robert G.	√		√				
Stone, Adele I.	√						
Stone, Bruce M. **Past Chair**		√	√				
Suarez, Honorable Richard J.		√					
Sundberg, Laura K.		√					
Swaine, Jack Michael **Past Chair**	√		√				
Taylor, Richard W.	√						
Tescher, Donald R.		√	√				
Thomas, Honorable Patricia V.		√	√				
Tobin, Jennifer S.	√		√				
Triggs, Matthew H.		√					
Udick, Arlene C.	√						
Van Lenten, Jason Paul		√	√				
VanSickle, Melissa	√						
Villarroel, Nicole Marie	√		√				
Virgil, Eric		√	√				
Waller, Roland D. **Past Chair**	√		√				
Wartenberg, Stephanie Harriet		√	√				
Weintraub, Lee A.	√		√				

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					
Wells, Jerry B.		√	√				
White, Jr., Richard M.		√	√				
Whynot, Sancha B.	√		√				
Wilder, Charles D.		√	√				
Williams, Margaret A.	√		√				
Williamson, Julie Ann **Past Chair**	√		√				
Wintter, Christopher Q.		√	√				
Wohlust, Gary Charles		√	√				
Wolasky, Marjorie E.		√	√				
Wolf, Jerome L.		√	√				
Wright, William Cary	√		√				
Young, Gwynne A.	√		√				
Zeydel, Diana S.C.		√					
Zikakis, Salome J.		√	√				
Zschau, Julius J. **Past Chair**	√						

RPPTL Fellows	Division		July 30 Breakers	Oct 8 Disney	Dec 10 Key West	June 3 Bonita Spgs	Feb 25 Austin TX
	RP	P&T					
Ashton, Amber	√		√				
Santos, Angela		√	√				
Villavicencio, Stephanie		√	√				
Work, Scott	√		√				
Sajdera, Christopher	√		√				
Friedman, Briget	√		√				
Rubel, Stacy		√	√				
Grosso, Jennifer		√					

Legislative Consultants	Division		July 30 Breakers	Oct 8 Disney	Dec 10 Key West	June 3 Bonita Spgs	Feb 25 Austin TX
	RP	P&T					
Dunbar, Peter M.	√		√				
Edenfield, Martha Jane	√		√				
Finkbeiner, Brittany	√		√				
Roth, Cari L.	√		√				

Guests	Division		July 30 Breakers	Oct 8 Disney	Dec 10 Key West	June 3 Bonita Spgs	Feb 25 Austin TX
	RP	P&T					

Guests	Division		July 30 Breaker	Oct 8 Disney	Dec 10 Key West	June 3 Bonita Spgs	Feb 25 Austin TX
	RP	P&T					
[illegible]		✓	✓				
[illegible]							
Ashley Diaz		✓					
Sarah Cortwright	✓		SC				
Matt Ahearn		✓					
R Dale Noll							
W. Michael Barnett		✓					

WPB_ACTIVE 7261198.1

Daniel M Bennett ✓

Emma Christman ✓

Bonnie Polk

Bonnie Polk

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IN THE SUPREME COURT OF FLORIDA

CASE NO. SC16-1189
L.T. CASE NOS. 3D14-2682 & 3D14-2690

ST. ANDREWS HOLDINGS, LTD.,
ET AL.,
petitioners,

v.

SAVE CALUSA TRUST, ET AL.,
respondents.

NOTICE OF INTENT TO FILE *AMICUS* BRIEF

NOTICE IS GIVEN that the Real Property Probate & Trust Law Section of The Florida Bar ("Section") intends to seek leave to file an *amicus* brief on the merits should this Court accept jurisdiction. This case involves issues impacting our 10,000+ members and all persons engaged in Florida real estate transactions. The Section regularly educates the public, judges, and lawyers on real estate issues and assists this Court, as an *amicus* in complex real estate cases, and the Legislature in drafting statutes pertaining to real estate, including the real estate title law involved in this case. The Section has no interest in the specific dispute between the litigants, but the Section has a significant interest in the policy issues before the Court and in what appear to be conflicting decisions of this Court and district courts of appeal. The Section believes it can assist the Court in analyzing those policy considerations and clarifying this area of the law.

Respectfully submitted,

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Counsel For the RPPTL Section
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/s/ Robert W. Goldman
Robert W. Goldman, FBN 339180

CERTIFICATE OF SERVICE

I CERTIFY that on this 3rd day of August, 2016, a true copy of this document was served via the Florida E-Portal on Gunster, Kenneth B. Bell, kbell@gunster.com and Shubin & Bass, P.A., Jeffrey S. Bass, jbass@shubinbass.com;kmaxwell@shubinbass.com, *Counsel for the Petitioners*; and Brannock & Humphries, Steven L. Brannock and SarahPellenbarg, sbrannock@bhappeals.com, spellenbarg@bhappeals.com, *Counsel for Individual Respondents*; Miami-Dade County Attorney's Office, Dennis A. Kerbel and Lauren E. Morse, dkerbel@miamidade.gov, laurenm@miamidade.gov, *Counsel for Miami-Dade County*; and Florida Land Title Association as intended *amicus curiae*, Alexandra J. Overhoff, alex@flta.org.

/s/ Robert W. Goldman

2016 WL 145997
District Court of Appeal of Florida,
Third District.

SAVE CALUSA TRUST, et al.,
Appellants,
v.
ST. ANDREWS HOLDINGS, LTD.,
etc., et al., Appellees.

Nos. 3D14–2682, 3D14–2690.
|
Jan. 13, 2016.
|
Rehearing Denied June 6, 2016.

Synopsis

Background: Owner of golf course, who sought to redevelop the property, filed lawsuit, asking the court to declare the restrictive zoning covenant void, having been extinguished by Marketable Record Title Act (MRTA). The Circuit Court, Miami–Dade County, Jennifer D. Bailey, J., granted summary judgment to owner. County and homeowners, whose homes were in ring around golf course, appealed.

[Holding:] The District Court of Appeal, Scales, J. held that the restrictive covenant, recorded in compliance with a government-imposed condition of a land use approval, was not a title interest subject to extinguishment by MRTA.

Reversed and remanded.

West Headnotes (3)

[1] **Covenants**
Release or Discharge from Liability on Real Covenants

The duly imposed restrictive covenant was a governmental regulation, rather than an estate, interest, claim or charge affecting the marketability of the property's title, and thus, the restrictive covenant, recorded in compliance with a government-imposed condition of a land use approval, was not a title interest subject to extinguishment by Marketable Record Title Act (MRTA); county's zoning appeals board adopted a resolution approving developer's "unusual use" application, with a condition that restrictive covenants running with the land in proper covenant form, meeting with approval of the zoning director, be recorded to ensure that the golf course be perpetually maintained as such, board's resolution of approval constituted final administrative agency action regarding developer's "unusual use" application, and no language in MRTA or in MRTA's underlying legislative history, extended the reach of MRTA to a zoning regulation. West's F.S.A. § 712.01.

Cases that cite this headnote

[2] **Covenants**
Release or Discharge from Liability on Real Covenants

Restrictive zoning covenant, approved with notice at a public hearing, is not a hidden interest in property that Marketable Record Title Act (MRTA) seeks to exhume and extinguish. West's F.S.A. § 712.01.

Cases that cite this headnote

[3] **Vendor and Purchaser**
Marketable Title

No language in Marketable Record Title Act (MRTA) or in MRTA's underlying legislative history extends the reach of MRTA to a zoning regulation. West's F.S.A. § 712.01.

Cases that cite this headnote

Appeals from the Circuit Court for Miami–Dade County, Jennifer D. Bailey, Judge.

Attorneys and Law Firms

Brannock & Humphries, and Steven L. Brannock and Sarah C. Pellenbarg, Tampa; Abigail Price–Williams, Miami–Dade County Attorney, and Dennis A. Kerbel and Lauren E. Morse, Assistant County Attorneys, for appellants.

Shubin & Bass, P.A., and Jeffrey S. Bass and Katherine R. Maxwell, for appellees.

Holland & Knight, LLP, and Frances G. De La Guardia; Craig E. Leen, City Attorney; Robert L. Krawcheck, for City of Coral Gables as amicus curiae.

Before SHEPHERD, ROTHENBERG and SCALES, JJ.

Opinion

SCALES, J.

*1 In these consolidated appeals, Appellants Save Calusa Trust ("Homeowners") and Miami–Dade County (the "County"), appeal a final summary judgment, entered in favor of St. Andrews Holding, Ltd. and Northeastern Golf LLC (together, "Owner"), declaring void a restrictive covenant under Florida's Marketable Record Title Act ("MRTA").[1] Because the County imposed the subject restrictive covenant as part of its development approval of Owner's property, the covenant is not an estate or interest in, or a claim or charge to, title to real property subject to MRTA. We reverse.

I. Facts

A. Preliminary Stages of Golf Course Development

In 1967, Owner's predecessor-in-interest, North Kendall Investments, Ltd. ("Developer"), sought to create a new golf course development in the Kendall area of unincorporated Miami–Dade County.

The property at the time was zoned General Use or "GU." Developer sought two zoning changes for the property. In order to build a ring of single family homes around the proposed golf course, Developer needed to change the zoning for the "ring" area[2] from GU to EU–M (Estate Use Modified). As to the golf course portion of the property, Developer needed an "unusual use" approval to establish the open space for a golf course, a club house and a driving range.

In April 1967, Developer filed zoning applications with the County to accomplish these changes. The purpose of these applications was to create an integrated development where residential property would surround a golf course.

B. ZAB and County Commission Approvals

On August 16, 1967, the County's Zoning Appeals Board ("ZAB") adopted a resolution approving Developer's "unusual use" application, with a condition "[t]hat restrictive covenants running with the land in proper covenant form, meeting with the approval of the Zoning Director, be recorded to ensure that the golf course be perpetually maintained as such...."[3] ZAB's resolution of approval constituted final administrative agency action regarding Developer's "unusual use" application.

In its resolution of approval, ZAB also recommended to the County Commission that the County Commission, which had authority over zoning district changes, approve the proposed zoning change from GU to EU–M. The County Commission authorized this zoning change for the "ring" lots on September 7, 1967.

C. Recordation of the Restrictive Covenant

Shortly after the County Commission vote, Developer sold the property to a successor developer, Most Available, Inc. Then, consistent with ZAB's resolution approving the "unusual use," Most Available, Inc. recorded the restrictive covenant in the official records of Miami–Dade County on or about March 28, 1968. The relevant provisions of the restrictive zoning covenant are reproduced as follows:

> The aforedescribed property may only be used for the following purposes:
>
> A golf course and for the operation of a country club which may include a clubhouse, pro shop, locker rooms, swimming pools, cabanas, liquor, beer and wine facilities, dining room facilities, parking, tennis courts, putting greens, golf driving ranges and all other uses incidental thereto.
>
> ***2** These restrictions shall continue for a period of ninety-nine years unless released or revised by the Board of

> County Commissioners of the County of Dade, State of Florida, or its successors with the consent of 75% of the members of the corporation owning the aforedescribed property and those owners within 150 feet of the exterior boundaries of the aforedescribed property.

D. Development of Residences in the "Ring"

After the recordation of the covenant, more than 140 single-family homes were developed within the "ring." No reference to the golf course property's restrictive zoning covenant appears in the deeds to any of the homes in the "ring" property. Homeowners have played no role in developing or maintaining, nor have they had any reciprocal responsibilities toward, the golf course property; they have had only the open, green view and errant golf balls associated with the golf course property. Under this arrangement, the golf course and Homeowners co-existed for years;[4] however, the horizon began to change when the golf course property stopped functioning as an active golf course in March of 2011.

E. Owner's Desire to Redevelop the Golf Course

In 2003, St. Andrews Holdings acquired the golf course property and then, in 2006, conveyed a majority interest in the golf course property to Northeastern Golf LLC. Unable to make a financial success of the golf course, Owner sought to redevelop the property and approached the County with a re-zoning application.

The County rebuffed Owner and refused to process Owner's application. Perhaps predictably, Owner's application did not include confirmation of a seventy-five percent consent by Homeowners, per the terms of the restrictive covenant that had been recorded in 1968, pursuant to ZAB's approval of Developer's "unusual use" application.

F. The Instant Lawsuit and its Adjudication

Owner did not file an administrative challenge to the County's decision not to process Owner's application. Rather, Owner, in 2012, filed the instant lawsuit asking the circuit court to declare the restrictive zoning covenant void, having been extinguished by MRTA.[5] The Owner named each of the Homeowners as defendants in the action,[6] and named the County as a defendant as well.

On March 17, 2014, the trial court held a hearing on the parties' cross-motions for summary judgment on Counts I and II only. Owner argued that the restrictive zoning covenant was extinguished by MRTA. The County and Homeowners argued that MRTA was inapplicable to a government-imposed restrictive covenant, and that Owner failed to exhaust administrative remedies by not seeking quasi-judicial review of the County's refusal to process Owner's re-zoning application.

The trial court issued a detailed order granting summary judgment to the Owner and denying Homeowners' and County's cross-motions for summary judgment. On September 6, 2014, the trial court entered

the "Final Judgment Invalidating the 1968 Restriction and Quieting Title," determining that (i) the applicable provisions of MRTA extinguish the restrictive zoning covenant and its Homeowners' consent provision; and (ii) title is quieted as to Owner's golf course property. Homeowners and County each filed separate appeals of the trial court's grant of summary judgment, which we have consolidated.

II. Standard of Review

***3** We review de novo a trial court's grant of summary judgment. *Belanger v. R.J. Reynolds Tobacco Co.,* 140 So.3d 598, 599 (Fla. 3d DCA 2014). We also review de novo a question of statutory interpretation. *Fla. Dep't of Transp. v. Clipper Bay Invs. LLC,* 160 So.3d 858, 862 (Fla.2015).

III. Analysis

A. MRTA and the Restrictive Covenant

The Florida Legislature enacted MRTA in 1963, "to simplify conveyances of real property, stabilize titles, and give certainty to land ownership." *H & F Land, Inc. v. Panama City–Bay Cty. Airport & Indus. Dist.,* 736 So.2d 1167, 1171 (Fla.1999). MRTA seeks to clear defects from titles, limit the period of record searches, and extinguish old interests of record that have not been preserved by a claimant. *Id.*

Pursuant to MRTA, any interest in, or claim or charge to, title to real property is extinguished if such estate, interest, claim or charge is more than thirty years old (based on the date of the root of title), and has not been preserved by the statutory procedure set forth in MRTA. §§ 712.01–05, Fla. Stat. (2012).[7]

[1] The central question in this case is whether a restrictive covenant, recorded in compliance with a government-imposed condition of a land use approval, is a title interest subject to extinguishment by MRTA.

B. Owner's Arguments

Owner acknowledges that MRTA does not apply to zoning and other land development regulations that restrict a property's use. Rather, Owner argues that, while the restrictive zoning covenant might have been contemplated by the zoning process, the subject covenant is neither a zoning regulation nor a development order.

Owner argues that the covenant, irrespective of its genesis, is a use restriction that plainly falls within MRTA's embrace. Chapter 712 mentions "use restrictions" only in section 712.03(1), which provides an exception to extinguishment if a use restriction is in the muniments of title beginning with the root of title. Because the subject use restriction was recorded in 1968, prior to the root of title, Owner asserts that the covenant must be extinguished, for it was not identified in a post-root muniment of title and it was not preserved. § 712.03(1), Fla. Stat. (2012).

Owner also argues that, because the restrictive covenant gives Homeowners an "interest" in how Owner uses its property and a "claim" against the property if Owner

were to violate the covenant, then the covenant is subject to MRTA's extinguishment provision of section 712.04.

Because the covenant authorizes Homeowners—private parties, as opposed to the County—to determine through a consent mechanism whether to vacate the use restriction, Owner asserts that the covenant is private in nature and, therefore, subject to MRTA.

For these reasons, Owner asserts that the plain language of section 712.04 renders the restrictive zoning covenant null and void.

C. The Covenant Operates as a Zoning Regulation

While we are not unsympathetic to Owner's arguments, we cannot so readily divorce the covenant from the governmental approval process that spawned it. The record reflects that ZAB's approval of Developer's unusual use application for the golf course acreage was final administrative agency action.[8] ZAB's unusual use approval was not a recommendation to the County Commission, but rather, a final approval conditioned on the recordation of the restrictive covenant.[9] The record clearly reflects that the ZAB Resolution imposed a condition that a restrictive covenant be generated and recorded. As the unusual use approval was final as of August 16, 1967, the date of the ZAB Resolution, so was the prescribed restrictive covenant. That the Developer's successor took seven months to record the restrictive covenant is of no significance.[10]

**4 The restrictive zoning covenant sealed the intent and objectives of the County's regulation of the golf course property. This Court has determined that a ZAB resolution, containing a restrictive covenant, constitutes a governmental regulation with the force of law. *Metro. Dade Cty. v. Fontainebleau Gas & Wash, Inc.*, 570 So.2d 1006 (Fla. 3d DCA 1990).

In *Fontainebleau Gas,* a restrictive covenant limiting the use of a property to a bank or savings and loan institution, was approved as a part of a County zoning resolution. The covenant was not recorded. Fifteen years later, a successor owner constructed a gas station on the property. This Court characterized this gas station use as "illegal." *Id.* at 1007. In other words, the use was not authorized by the law embodied by the restrictive covenant. This Court went on to observe: "Such a restriction on the property's use which was made in the public interest became binding on the property." *Id.*

[2] Our holding that MRTA does not extinguish the subject restrictive covenant—a product of a governmental approval process—is consistent with established Florida law recognizing that government-imposed restrictions on property do not affect marketability of title. *See Wheeler v. Sullivan,* 90 Fla. 711, 106 So. 876, 878 (1925) ("Reasonable restrictions ... when imposed by public authority through a valid exercise of the powers of government, are not usually regarded as an incumbrance...."). "[Z]oning restrictions are not considered to constitute an encumbrance on or a defect in title to real property." 77 Am.Jur.2d *Vendor and Purchaser* § 170 (2015). A restrictive zoning covenant, approved with notice at a

public hearing, is not a hidden interest in property that MRTA seeks to exhume and extinguish. *Blanton v. City of Pinellas Park,* 887 So.2d 1224, 1232 (Fla.2004).

[3] Furthermore, no language in MRTA or in MRTA's underlying legislative history, extends the reach of MRTA to a zoning regulation; no statutory language forges a change of this magnitude. *See, e.g., Coastal Petroleum Co. v. Am. Cyanamid Co.,* 492 So.2d 339, 344 (Fla.1986) (explaining that if the Legislature had intended to apply MRTA to divest the State of title to certain sovereignty lands, thereby changing "well-established law," the Legislature would have "by special reference to sovereignty lands" given some indication in the act or the legislative history of its intention).

IV. Conclusion

Therefore, we conclude that the duly imposed restrictive covenant in this case is a governmental regulation, rather than an estate, interest, claim or charge affecting the marketability of the property's title so as to be subject to extinguishment under MRTA.[11] We reverse the trial court's summary judgment for Owner and remand for proceedings consistent herewith.[12]

Reversed and remanded.

All Citations

--- So.3d ----, 2016 WL 145997, 41 Fla. L. Weekly D171

Footnotes

1 Chapter 712 of the Florida Statutes.

2 The "ring" is the land area located within 150 feet of the golf course property.

3 This condition reflected ZAB's concurrence with the County Zoning Director who wrote in his recommendation (which was included in staff's analysis of the issue): "The approval should be subject to the usual conditions applicable to golf course development, including plot plan approval and subject to the usual restrictions to assure that the golf course will be maintained as such."

4 In 1977, another predecessor of the Owner, seeking to develop a small, unused portion of the golf course, sought an interpretation of the seventy-five percent consent provision of the restrictive zoning covenant. This Court upheld the covenant in *Calusa Golf, Inc. v. Dade Cty.,* 426 So.2d 1165 (Fla. 3d DCA 1983).

5 Owner's amended complaint actually contains five counts: Counts I and II seek, respectively, to declare the restrictive zoning covenant void and to quiet title under MRTA. Count III seeks a rescission of the restrictive covenant because the restrictive zoning covenant allegedly was a product of mistake. Count IV seeks a declaration that the covenant is an unlawful restraint on alienation of the golf course property. Count V seeks a declaration that the restrictive zoning covenant is no longer enforceable due to materially changed circumstances.

6 We understand "Save Calusa Trust" to be a descriptive name adopted by the Homeowners. The individual Homeowners are the parties to this action.

7 The provisions of MRTA particularly relevant to this appeal are: (i) section 712.01, which provides definitions; (ii) section 712.03, which delineates nine sets of rights that are exempt from extinguishment by MRTA; and (iii) section 712.04, which supplies the operative language nullifying certain stale interests and claims in property. In relevant part, section 712.04 provides that, subject to certain exceptions, a property owner owns such property "free and clear of all estates, interests, claims, or charges, the existence of which depends upon any act, title transaction, event, or omission that occurred ..." prior to the owner's root of title, and all such "estates, interests, claims, or charges, however denominated," ... are declared to be null and void.

8 The record particularly reflects that (i) there was no appeal of ZAB's decision to the County Commission; and (ii) in its separate approval of the proposed re-zoning of the property from GU to EU–M, the County Commission took no action to alter ZAB's unusual use approval. Code of Metropolitan Dade County, Fla., §§ 33–311(d), 33–312 (1959).

9 ZAB's Resolution approving the unusual use did contain a recommendation that the County Commission, under the County Commission's own separate and final authority, approve the related re-zoning of the proposed golf course property; however, nothing in the ZAB Resolution, or in the County Code contemplated any County Commission approval of that portion of the ZAB Resolution that approved Developer's unusual use application for the golf course property.

10 The record is devoid of evidence indicating any reason for Most Available, Inc.'s recording of the restrictive covenant other than to comply with the conditions of the ZAB Resolution that approved Developer's unusual use application.

11 We need not, and do not, reach the questions of whether a non-governmental restrictive covenant constitutes a "claim" under section 712.02, or whether the restrictive zoning covenant in this case is delineated as an exception to MRTA under section 712.03.

12 We do not quarrel with the trial court's implicit determination that, given the County's unbending construction of the subject restrictive covenant, it would have been futile to require Owner to exhaust administrative remedies before filing the instant lawsuit. While we express no opinion on the issues remaining in this case, we are puzzled that the County did not process Owner's re-zoning application and conduct a quasi-judicial hearing, considering sections 33–304, 33–309, 33–310, 33–311 and 33–316 of the Miami–Dade County Code of Ordinances. *See Bd. of Cty. Comm'rs of Brevard Cty. v. Snyder,* 627 So.2d 469, 474 (Fla.1993). Issues still pending before the circuit court might have been addressed as matters preliminary to a proposed re-zoning (for example, whether changed circumstances exist to warrant cancellation of the covenant and whether the covenant constitutes an unlawful restraint on alienation). After all, the provision in the County-imposed covenant that granted Homeowners a right to consent to a re-zoning of the golf course property did not grant Homeowners a right to consent to a quasi-judicial hearing that, in part, would determine whether the County's interest in maintaining the covenant should continue.

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.

THE REAL PROPERTY, PROBATE AND TRUST LAW SECTION OF THE FLORIDA BAR'S MOTION FOR LEAVE TO APPEAR AS AMICUS CURIAE

Pursuant to Rule 9.370, Florida Rules of Appellate Procedure, the Real Property, Probate and Trust Law Section of The Florida Bar ("RPPTL Section" or "Section") moves for leave to appear in this case as an amicus. In support of this motion, the Section states:

1. The RPPTL Section is a group of over 10,000 Florida lawyers who practice in the areas of real estate, trust and estate law and who are dedicated to serving all Florida lawyers and the public in these fields of practice.

2. In addition to producing educational materials and seminars for its members and the public, the Section has long provided its neutral, legal expertise to each branch of Florida's government. The Section has drafted and advised on

legislative enactments. It has drafted and proposed rules of administrative and judicial procedure. And, it has routinely befriended federal and state courts confronted with interpreting the meaning and purpose of both substantive law and procedural rules in these areas of law.[1]

3. The specialized areas of law in which the RPPTL Section's members practice, including title and real estate related litigation issues, are infrequently addressed at the appellate level. Therefore, this Court's interpretation of the lis pendens statute in the context of a foreclosure proceeding is very important to the Section's members and their efforts to serve the citizens of Florida.

4. Further, it is respectfully submitted that an amicus brief from the RPPTL Section will assist the Court in the disposition of the pending Motion for Rehearing, Motion for Rehearing En Banc and Motion to Certify Question of Great Public Importance. The Section has substantial, institutional perspective and history involving these laws and how they are used in practice, which may benefit the Court in deciding the post-decision motions.

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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. 2015); *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)

5. Under Rule 9.370(c), if permitted, the Section would be required to serve its response within ten (10) days after the post decision motions were filed.

6. The Section's Executive Committee voted unanimously, subject to approval by The Florida Bar Board of Governors, to appear as amicus in this case if the Court permits.

7. 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 papers and grant approval before it can be filed with Court.[2] Accordingly, the Section respectfully requests that if the Court grants this motion, the Section be permitted to serve its amicus response within fifteen (15) days after the Court rules on the Section's motion. This requested enlargement of time is fairly needed in order to complete the preparation of the amicus papers and to allow for the Board of Governors' review of the response prior to filing the brief with the Court.

8. As required by Rule 9.370(a) of the Florida Rules of Appellate Procedure, the Section's counsel has contacted counsel for Appellant and for Appellee. The Appellant consents to the Section appearing as an amicus. The

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[2] Although reviewed by the Board of Governors, the amicus brief will be tendered 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 fees paid by any Florida Bar licensee.

Appellee does not consent and advised that it will be filing a response to this motion.

WHEREFORE, the Real Property, Probate and Trust Law Section of The Florida Bar respectfully requests this Court grant the Section leave to appear as amicus and to file a response to the post decision motions within fifteen (15) days of the Court's ruling on this motion.

Respectfully submitted this 16th day of September, 2016.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 16th day of September, 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 Manuel Farach, Esq., mfarach@mcglinchey.com and on Counsel for Appellee, Susan L. Trevarthen, Esq., strevarthen@wsh-law.com; Secondary: nsalgado@wsh-law.com; Laura K. Wendell lwendell@wsh-law.com; Secondary: lmartinez@wsh-law.com; Eric P. Hockman ehockman@wsh-law.com; Secondary isevilla@wsh-law.com.

/s/ John W. Little, III
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John W. Little, III
Florida Bar No. 384798

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DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT

JAMES OBER,
Appellant,

v.

TOWN OF LAUDERDALE-BY-THE-SEA, a Florida Municipality,
Appellee.

No. 4D14-4597

[August 24, 2016]

Appeal from the Circuit Court for the Seventeenth Judicial Circuit, Broward County; Thomas M. Lynch, IV, Judge; L.T. Case No. 14-006782 (05).

Manuel Farach of McGlinchey Stafford, Fort Lauderdale, for appellant.

Susan L. Trevarthen, Laura K. Wendell, and Eric P. Hockman of Weiss Serota Helfman Cole & Bierman, P.L., Coral Gables, for appellee.

Heather K. Judd and Jordan R. Wolfgram, St. Petersburg, for Amicus Curiae City of St. Petersburg.

Alexander L. Palenzuela of Law Offices of Alexander L. Palenzuela, P.A., Miami, for Amicus Curiae City of Coral Gables.

FORST, J.

This case involves the application of Florida's lis pendens statute, section 48.23, Florida Statutes, to liens placed on property between a final judgment of foreclosure and the judicial sale. We agree with the Appellee, Town of Lauderdale-by-the-Sea ("the Town"), and hold that liens placed on property during this time window are not discharged by section 48.23. We affirm without discussion with respect to any other challenges to the trial court's entry of summary judgment.

Background

On November 26, 2007, a non-party bank recorded a lis pendens on the subject property as part of a foreclosure proceeding against a non-

party homeowner. On September 22, 2008, the bank obtained a final judgment of foreclosure. Beginning on July 13, 2009, and continuing through October 27, 2011, the Town recorded a total of seven liens on the property related to various code violations.[1] These liens all stemmed from violations occurring after the final judgment was entered.

On September 27, 2012, the property was sold at a foreclosure sale to the Appellant, James Ober ("the Property Owner"). Shortly thereafter, the clerk issued the certificate of title. Beginning on February 26, 2013, the Town imposed three more liens on the property.

The Property Owner filed suit to quiet title, attempting to strike the liens against his property. The Town counterclaimed to foreclose the liens. Both parties moved for summary judgment. The trial court granted the Town's motion (and denied the Property Owner's motion) and entered a final judgment of foreclosure on the ten liens. This appeal followed.

Analysis

The issue in this case is the interpretation of a statute, which we review de novo. *Brown v. City of Vero Beach*, 64 So. 3d 172, 174 (Fla. 2011). The statute at issue here states, in relevant part:

> [T]he recording of . . . lis pendens . . . constitutes a bar to the enforcement against the property described in the notice of all interests and liens . . . unrecorded at the time of recording the notice unless the holder of any such unrecorded interest or lien intervenes in such proceedings within 30 days after the recording of the notice. If the holder of any such unrecorded interest or lien does not intervene in the proceedings and if such proceedings are prosecuted to a judicial sale of the property described in the notice, the property shall be forever discharged from all such unrecorded interests and liens. . . .

§ 48.23(1)(d), Fla. Stat. This statute "not only bars enforcement of an accrued cause of action, but may also 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." *Adhin v. First Horizon Home Loans*, 44 So. 3d 1245, 1253 (Fla. 5th DCA 2010).

By its terms, section 48.23(1)(d) does not provide an end date for the lis

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[1] The Town also recorded one lien before the final judgment was issued, but concedes that this lien was discharged.

pendens. In order to avoid the absurd result of a lis pendens precluding any lien from ever being placed on the property into perpetuity, *see Maddox v. State*, 923 So. 2d 442, 448 (Fla. 2006) (avoiding absurd results), the parties both urge this Court to apply an implied end date to the lis pendens. The Town argues that the lis pendens applies only to liens existing or accruing prior to the date of final judgment, whereas the Property Owner argues that the lis pendens continues to the date of the judicial sale, which in this case was over four years later.

In attempting to discern which of these dates was intended by the legislature to be the operative "shut off" date, we read the statute "in the context in which it is found and in conjunction with related statutory provisions." *Maddox*, 923 So. 2d at 448. One of the related provisions is section 48.23(1)(a), which states that "[a]n action in any of the state or federal courts in this state operates as a lis pendens . . . only if a notice of lis pendens is recorded." The plain meaning of this provision indicates that the action itself is the actual lis pendens, which takes effect if and when a notice is filed. The lis pendens therefore logically must terminate along with the action. The "action" in this case was the foreclosure action initiated by the non-party bank, which terminated thirty days after the court's issuance of a final judgment.[2]

Although it does not appear to have been a litigated issue, this conclusion has been reached by this Court and other District Courts of Appeal in the past. *See U.S. Bank Nat'l Ass'n v. Quadomain Condo. Ass'n*, 103 So. 3d 977, 979-80 (Fla. 4th DCA 2012) ("[T]he court presiding over the action which created the *lis pendens* has exclusive jurisdiction to adjudicate any encumbrance or interest in the subject property from the date the *lis pendens* is recorded *to the date it enters final judgment*" (emphasis added)); *Seligman v. N. Am. Mortg. Co.*, 781 So. 2d 1159, 1196 (Fla. 4th DCA 2001) ("[T]he court in the dissolution proceeding had jurisdiction over the property *until final judgment* . . . ." (emphasis added)); *Hotel Eur., Inc. v. Aouate*, 766 So. 2d 1149, 1151 (Fla. 3d DCA 2000) ("Because a Final Judgment has been entered, the instant case is no longer pending and thus the Notice of Lis Pendens is no longer valid"); *Marchand v. De Soto Morg. Co.*, 149 So. 2d 357, 359 (Fla. 2d DCA 1963) ("[T]he

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[2] When no appeal is taken, an action terminates when the time for appeal expires. *S. Title Research Co. v. King*, 186 So. 2d 539, 544-45 (Fla. 4th DCA 1966). That time is 30 days after rendition of the order. Fla. R. App. P. 9.110(b). Here, no appeal from the final judgment in the original action was taken. There is also no question in this case that the liens at issue accrued after this 30-day period, making the precise distinction between the date of the final judgment and the date of the termination of the action irrelevant under the facts before us.

doctrine of lis pendens is the jurisdiction, power or control which courts acquire of property involved in a suit pending the continuance of the action *and until final judgment therein*" (emphasis added)). The Florida Supreme Court has also used the "until final judgment" phrase when describing the scope of a lis pendens. *De Pass v. Chitty*, 105 So. 148, 149 (Fla. 1925). We find these authorities both controlling and persuasive, and hold that a lis pendens bars liens only through final judgment, and does not affect the validity of liens after that date, even if they are before the actual sale of the property.

We do note, however, that this case appears to reveal a misstatement of the law in Form 1.996(a) of the Florida Rules of Civil Procedure. That rule provides an example foreclosure judgment, and includes a provision stating: "On filing the certificate of sale, defendant(s) and all persons claiming under or against defendant(s) since the filing of the notice of lis pendens shall be foreclosed." Fla. R. Civ. P. Form 1.996(a). This language suggests that all liens from the filing of the lis pendens until the certificate of sale is filed are discharged. Although we recognize the conflict between the form and our holding in this case, to hold otherwise would be to create conflict between this decision and both the legislative intent and prior case law. But the form has been, and could again, be modified "to bring it into conformity with current statutory provisions and requirements . . . and better conform to prevailing practices in the courts." *In re Amendments to the Florida Rules of Civil Procedure-Form 1.996 (Final Judgment of Foreclosure)*, 51 So. 3d 1140, 1140 (Fla. 2010). Such an amendment may be appropriate here.

Conclusion

The lis pendens statute serves to discharge liens that exist or arise prior to the final judgment of foreclosure unless the appropriate steps are taken to protect those interests. However, it does not affect liens that accrue after that date. The ten liens that were involved in the case before us were all recorded and based on conduct which occurred after the date of the first final judgment. The trial court therefore did not err in entering summary judgment in favor of the Town foreclosing those liens.

Affirmed.

GROSS and KLINGENSMITH, JJ., concur.

* * *

Not final until disposition of timely filed motion for rehearing.

Filing # 46749758 E-Filed 09/21/2016 03:45:53 PM

Supreme Court of Florida

WEDNESDAY, SEPTEMBER 21, 2016

CASE NO.: SC16-1312
Lower Tribunal No(s).:
4D14-1436;
502013DR002143XXXXSB

GLENDA MARTINEZ SMITH vs. J. ALAN SMITH

Petitioner(s) Respondent(s)

The motion for leave to file brief as amicus curiae filed by Real Property, Probate and Trust Law Section of The Florida Bar is hereby granted and they are allowed to file brief only. The brief by the above referenced amicus curiae shall be served within fifteen days after the initial brief is filed.

A True Copy
Test:

John A. Tomasino
Clerk, Supreme Court

ca
Served:

ROBERT W. GOLDMAN
ELLEN SUE MORRIS
GERALD L. HEMNESS
LYNNE K. HENNESSEY
JENNIFER SUZANNE CARROLL
ALAN SIDNEY FISHMAN
ENRIQUE ZAMORA
CARY LEIGH MOSS

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.

MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE*

Pursuant to Rule 9.370, Florida Rules of Appellate Procedure, the Real Property, Probate and Trust Law Section of The Florida Bar ("RPPTL Section" or "Section") moves for leave to file an *amicus* brief in this case that does not intentionally support either party. In support of this motion, the Section states:

1. The RPPTL Section is a group of over 10,000 Florida lawyers who practice in the areas of guardianship, real estate, trust and estate law and who are dedicated to serving all Florida lawyers and the public in these fields of practice.

2. In addition to producing educational materials and seminars for its members and the public, the Section has long provided its neutral, legal expertise to each branch of Florida's government. The Section has drafted and advised on legislative enactments. It has drafted and proposed rules of administrative and judicial procedure. And, it has routinely befriended federal and state courts

confronted with interpreting the meaning and purpose of both substantive law and procedural rules in these areas of law.[1]

3. The specialized areas of law in which the RPPTL Section's members practice are infrequently litigated at the appellate level. Therefore, this Court's interpretation of guardianship law and its interplay with the United States Constitution is very important to the Section's members and their efforts to serve the citizens of Florida.

4. Further, it is respectfully submitted that an *amicus* brief from the RPPTL Section will assist the Court in the disposition of this case by addressing this area of jurisprudence and the tension that can arise between the state's protection of incapacitated persons and the fundamental rights of incapacitated persons.

5. The RPPTL Section is neutral as to the parties and the Court's ultimate decision in this case. Accordingly under Rule 9.370(c), if permitted, the Section's brief is required to be served within ten (10) days after the initial brief is filed.

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[1] For example, see *Jones v. Golden*, 176 So. 3d 242 (Fla. 2015); *McKean v. Warburton,* 919 So.2d 341 (Fla. 2005); *May v. Illinois Nat. Ins. Co.*, 771 So.2d 1143 (Fla. 2000); *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)

6. The Section's Executive Committee voted unanimously, subject to approval by The Florida Bar Board of Governors, to appear as amicus in this case if the Court permits.

7. 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 it can be filed with Court.[2] Accordingly, the Section respectfully requests that if the Court grants this motion, the Section be permitted to serve its amicus brief within fifteen (15) days after the initial brief is filed. This requested enlargement of time is fairly needed in order to complete the preparation of the *amicus* brief and to allow for the Board of Governors' review of the brief prior to filing the brief with the Court.

8. The Section's counsel has contacted counsel for Petitioner and Respondent. The Respondent has not advised if he objects to the Court granting this motion. The Petitioner has indicated her consent to the Court granting this motion.

WHEREFORE, the Real Property, Probate and Trust Law Section of The Florida Bar respectfully requests this Court grant leave to file an *amicus* brief in

[2] Although reviewed by the Board of Governors, the *amicus* brief will be tendered 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 fees paid by any Florida Bar licensee.

this matter and that the Section be permitted to serve its brief within fifteen (15) days of the filing of the initial brief.

Respectfully submitted this ___ day of September, 2016.

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CERTIFICATE OF SERVICE

I CERTIFY that a copy of this motion was served through the Florida E-Portal this 30th 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.

/s/ Robert W. Goldman, FBN 39180

41 Fla. L. Weekly D1514a

Marriage -- Annulment -- Guardianship -- Incapacitated persons -- Question certified: 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?

GLENDA MARTINEZ SMITH, Appellant, v. J. ALAN SMITH, Appellee. 4th District. Case No. 4D14-1436. June 29, 2016. Appeal from the Circuit Court for the Fifteenth Judicial Circuit, Palm Beach County; David E. French, Judge; L.T. Case No. 502013DR002143. Counsel: Jennifer S. Carroll of Law Offices of Jennifer S. Carroll, P.A., Palm Beach Gardens, for appellant. No brief filed for appellee.

ON MOTION TO CERTIFY A QUESTION

OF GREAT PUBLIC IMPORTANCE

[Original Opinion at 41 Fla. L. Weekly D542b]

(PER CURIAM.) We deny the motion for rehearing and rehearing en banc. We grant the motion to certify a question of great public importance.

The majority and dissent disagree on the effect of a statute which restricts the fundamental right to marry. "Marriage is one of the 'basic civil rights of man,' fundamental to our very existence and survival." *Loving v. Virginia*, 388 U.S. 1, 12 (1967). Where a fundamental right is involved, the statute must be "strictly tailored to remedy the problem in the most effective way and must not restrict a person's rights any more than absolutely necessary." *Mitchell v. Moore*, 786 So. 2d 521, 527 (Fla. 2001). Section 744.3215(2), Florida Statutes (2013), which requires court approval of a marriage of a ward, whose right to contract has been removed but whose right to marry has not, affects the rights of wards of all types, although it particularly affects the elderly. Because of its implications on that fundamental right to marry and its potential impact on wards, the interpretation of that statute is a question of great public importance, and we certify 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?

(WARNER and MAY, JJ., concur. DAMOORGIAN, J., dissents with opinion.)

(DAMOORGIAN, J., dissenting.) I dissent because the ward did not lose his right to marry. Rather, his right to marry was made subject to court approval for his own protection. Strikingly absent from the majority's attempt to explain why this case is a matter of great public importance justifying the certified question, is any attempt to argue that the state does not have a compelling state interest in protecting those who are declared incompetent from becoming victims of nefarious conduct. Perhaps

this is because the condition precedent imposed on the ward's right to marry is not unduly burdensome. The implication of the majority's certified question is to allow a ward to be victimized and then have the court system unravel the mess. I do not join in such an undertaking.

* * *

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*~~
December 7 – 11, 2016	**Executive Council Meeting** The Westin Resort and Marina Key West, FL Room Rate: $279 (single/double occupancy) $319 Partial Ocean View Email Shannon Lutz at the Westin Resort for reservation options and to be added to a waitlist @ Shannon.Lutz@WestinKeyWestResort.com
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) – SOLD OUT*
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 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

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

General Budget	YTD
Revenue:	$1,271,495
Expenses:	$1,129,941
Net:	$ 141,554

CLI	YTD
Revenue:	$ 247,641
Expenses:	$ 185,232
Net:	$ 62,409

Trust Officer Conference

Revenue:	$ 611,568
Expenses:	$ 362,056
Net:	$ 249,512

Legislative Update

Revenue:	$ 88,725
Expenses:	$ 60,631
Net:	$ 28,094

Convention

Revenue:	$ 39,467
Expenses:	$ (110,010)
Net:	$ (70,543)

Roll-up Summary (Total)

Revenue:	$ 2,258,896
Expenses:	$ 1,847,870
Net Operations:	$ 411,026

Beginning Fund Balance:	$ 1,066,946
Current Fund Balance (YTD):	$ 1,477,972
Projected June 2016 Fund Balance	$ 961,141

[1] This report is based on the tentative unaudited detail statement of operations dated 6/30/16 (prepared on 8/8/16).

Date	Course Title	Course No.	Location
October 26, 2016	**Court Appointed Receivers Over Real Property: Planning for and Navigating the Worst Case Scenario**	TBA	Audio Webcast
November 2, 2016	**Professionalism in Real Estate Litigation**	TBA	Audio Webcast
November 9, 2016	**Community Development Districts**	TBA	Audio Webcast
November 18, 2016	**RPPTL Probate Law 2016**	2263	Tampa Airport Marriott
December 1, 2016	**Estate & Trust Planning/Asset Protection**	2247	Westin Cypress Creek
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
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 & Certification Review Course**	2312	Tampa- TBD
June 2, 2017	**RPPTL Convention Seminar**	2317	Hyatt Coconut Point
August 24 -27, 2017	**ATO 2017**	2322	The Breakers

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

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.

Report of the Model and Uniform Acts General Standing Committee-
Bruce M. Stone and Richard W. Taylor, Co-Chairs

Prepared for the Executive Council Meeting, October 6-8, 2016

At its recently concluded 125th Annual Meeting in Stowe, Vermont, the Uniform Law Commission (ULC) approved seven new acts, including a new act governing access to students' and employees' online accounts.

1. The Uniform Employee and Student Online Privacy Protection Act addresses both employers' access to employees or prospective employees' social media and other online accounts accessed via username and password or other credentials of authentication as well as educational institutions' access to students' or prospective students' similar online accounts.

2. The Uniform Family Law Arbitration Act standardizes the arbitration of family law. It is based in part on the Revised Uniform Arbitration Act, though it departs from the RUAA in areas in which family law arbitration differs from commercial arbitration, such as: standards for arbitration of child custody and child support; arbitrator qualifications and powers; protections for victims of domestic violence.

3. The Revised Uniform Unclaimed Property Act updates provisions on numerous issues, including escheat of gift cards and other stored-value cards, life insurance benefits, securities, dormancy periods, and use of contract auditors.

4. The Uniform Unsworn Domestic Declarations Act builds upon the Uniform Unsworn Foreign Declarations Act, which covers unsworn declarations made outside the United States. This new Uniform Act permits the use of unsworn declarations made under penalty of perjury in state courts when the declaration was made inside the U.S. States that have already enacted the Uniform Unsworn Foreign Declarations Act (UUFDA) should enact this act. For those states that have not yet enacted the UUFDA, a new act - the Uniform Unsworn Declarations Act - will be available that will essentially combine both the UUFDA and the Uniform Unsworn Domestic Declarations Act into one comprehensive act.

6. The Uniform Wage Garnishment Act seeks to simplify and clarify wage garnishments for employers, creditors, and consumers by standardizing how the wage garnishment process works and offering plain-language notice and garnishment calculation forms.

7. The Amendment to the Revised Uniform Law on Notarial Acts authorizes notaries public to perform notarial acts in the state in which they are commissioned for individuals who are

located outside the United States. The amendment is optional for the states. The amendment requires the use of audio- and video-technologies for real-time communication, and requires the notary to record the interaction. It authorizes the commissioning agency to regulate the technologies used. The act of the individual in making the statement or signing the record must not be prohibited in the foreign country in which the individual is physically located. The certificate affixed by the notary to the record must indicate that the notarial act took place while the individual was located in a foreign country.

Other drafts which were debated at the ULC annual meeting, but which were not scheduled for final approval, include the Limited Liability Company Protected Series Act, the Non-Parental Rights to Child Custody and Visitation Act, the Divided Trusteeship Act, the Amendments to the Uniform Parentage Act, the Revised Uniform Guardianship and Protective Proceedings Act, the Regulation of Virtual Currency Businesses Act, and the Criminal Records Accuracy Act.

The current drafts of all of these acts can be found at the ULC's website at www.uniformlaws.org.

White Paper

Analysis of Uniform Voidable Transactions Act
Florida Bar Tax Section
September 12, 2016

I. Introduction - July 2014 – The Uniform Law Commission revises the Uniform Fraudulent Transfer Act ("UFTA") and renames it Uniform Voidable Transactions Act ("UVTA"). Changes to the UFTA were accompanied by extensive new and revised official Comments. In addition, the UVTA adds a new Section 10 that provides that the law of an individual's residence is to be the governing law concerning whether such individual has made a voidable transfer. The impetus for these changes seems to be the disapproval of "forum shopping" by individuals, their families and businesses to seek and obtain the legal and tax benefits of utilizing another state's trust, estate and business entity laws.

The new Comments have a major, and adverse, impact on many "mainstream" estate planning and business entity structure planning transactions in Florida. Within this paper we have identified several areas where the UVTA negatively affects commonly-used estate, tax, and business planning techniques. Comments to Uniform Acts have a significant impact on the judicial interpretation of uniform laws, and the potential impact of the UVTA Comments is no exception. Therefore, for the reasons expressed below, the Florida Bar Tax Section opposes the adoption of the UVTA in Florida.

II. Importance of the Comments - With little legislative history, many courts – including state Supreme Courts – give significant weight to Uniform Law Commission Official Comments in formulating decisions interpreting state statutes based on uniform acts.

The breadth of the Comments will render voidable many commonly-used estate, business, and tax planning transactions:

A. Asset Substitution - The Comments suggest that "asset substitution" involving the swap of a liquid asset for an illiquid asset shows intent to "hinder, delay, or defraud" the creditor, including future creditors. For example, the new third paragraph to Comment 8 of § 4 provides, "[a] transaction that does not place an asset entirely beyond the reach of creditors may nevertheless 'hinder, delay or defraud' creditors if it makes the asset more difficult for creditors to reach. Simple exchange by a debtor of an asset for a less liquid asset, or disposition of liquid assets while retaining illiquid assets, may be voidable for that reason."

"Asset substitution", as described in § 675(4) of the Internal Revenue Code ("IRC"), is one of most commonly used provisions to create "grantor trust" status for federal income tax purposes within an irrevocable inter-vivos trust, a long-recognized income tax and estate planning tool. Similarly, once such a trust is in place, swapping an asset with an income tax basis near to or equal to its value (such as cash) (which is liquid), in exchange for a low income tax basis asset, such as an interest in a family business entity (which may be illiquid), is commonly used to minimize income taxes (in the form of capital gains taxes) after death. Asset substitution also may be used to alter the type of family asset from which a trust beneficiary will benefit. For example, a grantor may substitute income-producing real property into a trust in exchange for the trust's illiquid interest in the family business because the trust beneficiary is not, or does not wish to be, involved in the family business. In either circumstance, both federal tax and Florida fiduciary law would impose a requirement upon the trustee of the trust to assure that the assets exchanged have equivalent value.

Nevertheless, the Comments suggest that asset substitution involving the swap of a liquid asset for an illiquid asset of reasonably equivalent value is a voidable transaction, even as to a future, currently unanticipated creditor. This could have the effect of retroactively reversing (i) technical tax planning, which could create additional and unnecessary federal taxes as well as interest and penalties on such taxes, or (ii) estate planning. This could encourage capital flight from Florida by inducing high net worth families to relocate their domicile from Florida to jurisdictions which have not adopted the UVTA in order to have certainty in the viability of their intra-family tax and business transactions.

B. Entity Formation – With respect to entity formation, the Comments suggest that where a member or partner of an LLC or partnership, respectively, has third party creditors, the entity formation is voidable. Because this comment is under §4, it could also be applied to the member's or partner's future unknown creditors. The Comments appear to add many additional general, subjective criteria which can be broadly interpreted. For example, Comment 8 to §4 states:

> [I]t is voidable for a debtor to intentionally hinder creditors by transferring assets to a wholly-owned corporation or other organization, as may be the case if the equity interest in the organization is more difficult to realize upon than the assets (either because the equity interest is less liquid, or because the applicable procedural rules are more demanding)....Thus, for example, suppose that entrepreneurs organize a business as a limited liability company, contributing assets to capitalize it, in the ordinary situation in which none of the owners has a particular reason to anticipate personal liability or financial distress and no other unusual facts are present. Assume that the LLC statute has the *creditor-thwarting* feature of precluding execution upon equity interests in the LLC and providing only for charging orders against such interests. Notwithstanding that [creditor-thwarting] feature, the owners' transfers of assets to capitalize the LLC is not voidable under § 4(a)(1) as in force in the same state. The legislature in that state having created the LLC vehicle having that feature, must have expected it to be used in such ordinary circumstances. By contrast, if owners of an existing business were to reorganize it as an LLC under such a statute when the *clouds of personal liability* or *financial distress* have gathered over some of them, and with the intention of gaining the benefit of that *creditor-thwarting* feature, the transfer effecting the reorganization should be voidable under § 4(a)(1), at least absent a clear indication that the legislature truly intended the LLC form, with its *creditor-thwarting* feature, to be available even in such circumstances. (emphasis added)

The use of the terms "financial distress", "clouds of personal liability", and "creditor-thwarting", for example, without clear definitions, create ambiguity and are overbroad. Is it really equitable to the non-debtor members or partners to undo an entire business entity formation, as suggested by the Comments?

Comment 8 to § 4 states "§4(a)(1) would render voidable an attempt by the owners of a corporation to convert it to a different legal form (e.g., limited liability company or partnership) with intent to hinder the owners' creditors, as may be the case if an owner's interest in the alternative organization would be subject only to a charging order, and not to execution (which would typically be available against stock in a corporation)." Further, Comment 8 provides "[i]f

such a conversion is done with intent to hinder creditors, it contravenes § 4(a)(1) regardless of whether it is effected by conveyance of the corporation's assets to a new entity or by conversion of the corporation to the alternative form....Either is a 'transfer' under the designedly sweeping language of § 1(16), which encompasses 'every mode...of...parting with an asset or an interest in an asset." Thus, if one member of the entity has an "issue" with a future creditor, the comments suggest that the entire entity structure could be unwound, adversely affecting all of the members as well as the underlying business operation.

Most closely held family businesses organized in Florida as corporations are taxed as S Corporations for federal income tax purposes. It is not unusual for shareholders to be concerned that a shareholder might subject his or her stock to attachment by a creditor who may not be an eligible S Corporation shareholder. This event would terminate the S Corporation status of the entity for all shareholders, with negative tax consequences. Accordingly, owners may wish convert the entity to a Florida limited liability company to take advantage of Florida's Revised Uniform Limited Liability Company Act, which prohibits attachment by a creditor of a member's entire interest in the LLC, thereby protecting the S Corporation status. Instead, the creditor obtains the right to receive distributions from the LLC as the debtor –member would have received.

The Comments disregard and ignore common modern business planning practices such that a business may modify its initial choice of legal entity for valid tax and business planning reasons, including protecting the S Corporation status for federal income tax purposes as described above. Similarly, an entity "conversion" can be initiated to lawfully change form or to keep the same form and change jurisdictions for both tax and practical business considerations. For example, the owner of a single-member LLC in Florida may decide to change jurisdictions to Delaware in connection with the decision to expand operations nationwide. If the conversion could make it more difficult for a creditor or potential creditor of a member to obtain assets of the LLC or attach the member's interest in the LLC, the Comments indicate that the conversion could be voided. Uncertainty as to corporate or company governance may lead businesses and individuals to leave Florida for jurisdictions where the UVTA would not potentially and adversely affect their business and tax planning.

C. **DAPTS** – The impact of Section 10 of the UVTA and Comments suggest an intention to invalidate a "domestic asset projection trust" ("DAPT") established under the laws of another state by a resident of Florida (which has not adopted its own DAPT legislation). The Comments deem as voidable all transfers from a non-DAPT state resident into a DAPT created within a DAPT jurisdiction. This would invalidate common estate planning arrangements.

By adopting §10 and applying the Comments, high net worth residents of Florida who wish to take advantage of another state's DAPT-authorizing legislation will be advised to relocate and change their domicile from Florida prior to such time to avoid the impact of this proposed legislation, resulting in both capital flight and a less accommodating business climate.

It appears that the Comments would call into question all of the aforementioned transactions.

D. **Section 10. Governing Law and Non-Florida Business Entities** – Section 10 of the UVTA creates a governing law provision that states "[a] claim for relief under this [Act] is governed by the local law of the jurisdiction in which the debtor is located when the transfer is made or the obligation is incurred." For purposes of determining the debtor's location, § 10 provides that (i) a debtor who is an individual is located at the individual's principal residence,

(ii) a debtor that is an organization with only one place of business is located at its place of business and (iii) a debtor that is an organization with more than one place of business is located at its chief executive office.

Based on § 10 and the Comments, Section 10 eliminates the ability of a Florida resident to create a business entity or trust under the laws of a state other than Florida to obtain the benefits of the other state's business entity or trust laws. A Florida resident should be able to create a business entity or trust instrument in any state he or she chooses without fear of the business formation or gift transaction being voidable per se.

E. Federal Tax Transferee Liability - The UVTA would make it easier for the IRS to successfully assert "transferee liability" as generally occurs in "*Midco*" cases. IRC Section 6901 permits the IRS to proceed against a transferee of property to recover federal tax, penalties, and interest owed by a transferor. See 26 U.S.C. § 6901. A party who receives a transfer of property may be held liable under § 6901 if (1) the transferor is liable for the unpaid taxes; (2) the party is a transferee within the meaning of §6901; and (3) the party is subject to transferee liability under state law. See *Cullifer v. Comm.* (11th Cir. 2016). The case relied on Texas uniform fraudulent transfer law as part of the third element. The UVTA will make it easier to prove the third element against Florida-based business purchasers and sellers.

III. Tax Purview – Federal and state tax planning, and planning for choice and legal situs of business entities, has long been a basic pillar of the practice of federal tax law. Certainty in business operations and tax results drive choice of entity and choice of governing law decisions. Legal jurisprudence in Florida has long favored use of business entities to limit the owners' liability exposure from a business enterprise. In the case of *Dania Jai-Alai Palace, Inc. v. Sykes,* 450 So. 2d 1114 (1984) the Supreme Court of Florida acknowledges the use of entities to limit liability to the "four corners" of the business. Theories of thin capitalization, inter-locking directorships and similar arguments for piercing the corporate veil were rejected unless coupled with a bad purpose (e.g., a current fraud on creditors). The *Dania Jai-Alai* case and its progeny have long been cited by counsel encouraging clients to take advantage of Florida's long-time pro-business climate.

The Official Comments to the UVTA would call into question every business entity formation and potentially make voidable all transfers based on an intent to avoid *unknown future* creditors. This is in contrast to the long-standing efforts of the Florida Legislature to promote business formations through laws establishing corporations, limited liability companies and other limited liability entities. Adoption of the UVTA in Florida will restrain business and capital formation, and will discourage the migration of capital into the state of Florida. Instead of helping clients change their residency from high-tax states to Florida (as is currently the case), adoption of UVTA by Florida will result in tax professionals advising clients not to change their residence to Florida.

Adopting the UVTA without disavowing the Official Comments and modifying the choice of law provisions to allow Florida residents to take advantage of the laws of other jurisdictions will make Florida an undesirable business home. The adoption of the UVTA as proposed without modification will gut long settled law as interpreted by the Supreme Court in *the Dania Jai-Alai* case; drive successful individuals, businesses and capital to relocate from Florida to jurisdictions where the freedom to use entities for business operations is more certain; and reverse long-standing legislative and constitutional policy to encourage wealth formation and preservation within the state of Florida.

The proposed UVTA affects the practice and proper administration of federal, state and international tax law. Therefore, taking a legislative position with respect to the UVTA is within the purview of the Tax Section.

IV. Conclusion/Recommendation – The Tax Section opposes adoption of the UVTA in Florida.

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Fact Sheet for Financial Crimes Enforcement Network Geographic Targeting Orders for Manhattan, N.Y., and Miami-Dade County, Fla.

AMERICAN LAND TITLE ASSOCIATION

On January 13, 2016, the Financial Crimes Enforcement Network (FinCEN), one of the U.S. Department of Treasury's lead agencies in the fight against money laundering, issued two Geographic Targeting Orders, imposing temporary new data collection and reporting requirements on certain title companies. Pursuant to the Orders, which are effective March 1, 2016 through August 27, 2016, these title companies will be required to identify natural persons with 25% or greater ownership interest in a legal entity making an all cash real estate purchase in excess of $3 million dollars in the Borough of Manhattan in New York, N.Y., and an all cash real estate purchase in excess of $1 million in Miami-Dade County, Fla.

- *Manhattan, N.Y., order*
- *Miami-Dade County, Fla., order*
- *Read FinCEN's press release*
- *Read ALTA's Background article*

I. The Basics

What is FinCEN?

Established in 1990, FinCEN is a bureau of the U.S. Department of the Treasury. Its mission is "to safeguard the financial system from illicit use and combat money laundering and promote national security through the collection, analysis, and dissemination of financial intelligence and strategic use of financial authorities." FinCEN fulfills its mission by receiving and maintaining financial transactions data, analyzing and disseminating that data for law enforcement purposes, and building global cooperation with counterpart organizations in other countries and with international bodies. FinCEN's authority comes from the Currency and Financial Transactions Reporting Act of 1970, as amended by Title III of the USA PATRIOT Act of 2001 and other legislation. This legislative framework is commonly referred to as the Bank Secrecy Act (BSA).

What is the Bank Secrecy Act?

The Bank Secrecy Act (BSA) is the primary U.S. anti-money laundering (AML) law and tool for detecting, deterring and disrupting terrorist financing networks. The BSA authorizes the Secretary of the Treasury to issue regulations requiring banks and other financial institutions to take a number of precautions against financial crime, including the establishment of anti-money laundering programs and the filing of reports that have been determined to have a high degree of usefulness in criminal, tax, and regulatory investigations and proceedings, and certain intelligence and counter-terrorism matters. See *31 U.S.C. 310*.

What is money laundering?

Money laundering is the process of disguising financial assets produced through illegal activity. Through money laundering, the monetary proceeds derived from criminal activity are transformed into funds with an apparently legal source.

II. Geographic Targeting Orders

What is a Geographic Targeting Order (GTO)?

Under the BSA, the director of FinCEN can issue orders imposing additional recordkeeping and reporting requirements on domestic financial institutions or non-financial trades or businesses in a specific geographic area for transactions involving certain amounts of United States currency or monetary instruments. These orders can be in effect for up to 180 days. See 31 U.S.C. § 5326(a); 31 C.F.R. § 1010.370.

How is a GTO different from cash transaction reporting?

Under the internal revenue code, a business does not need to report a cash transaction or multiple related transactions unless more than $10,000 in currency is received. Under a GTO, FinCEN can lower this threshold for certain Covered Business and certain Covered Transactions. Both cash transaction reporting and GTO reporting are made to the government using versions of the *IRS form 8300*.

Can a GTO be renewed after the initial 180 day period?

Yes. GTOs can be renewed by the director of FinCEN following a finding that the circumstances justifying the original GTO continue to exist.

III. Details of the GTOs

What are the effective dates of the GTO?

The GTO goes into effect on March 1, 2016 and ends on August 27, 2016.

Who is subject to the GTOs?

Only the specific title insurance companies that received the Geographic Targeting Order, including any subsidiaries or agents of the title insurance company ("Covered Business"), are subject to the requirements of the GTO.

What types of transactions must the Covered Business report?

A Covered Business must report any transaction that involves each of the following elements:

1. The buyer must be a **Legal Entity**, defined under the GTO as a corporation, limited liability company, partnership or other similar business entity, whether formed under the laws of a state or of the United States or a foreign jurisdiction;
2. **Residential** real property located in the Borough of **Manhattan**, N.Y., or **Miami Dade County**, Fla.;
3. For a **purchase price** of more than $3 million (Manhattan) or $1 million (Miami);
4. **Without a loan** or similar form of external financing from a financial institution; and
5. Any portion of the purchase price is paid using currency, cashier's check, certified check, traveler's check or money order.

How long does a Covered Business have to report a Covered Transaction to FinCEN?

A Covered Business must report a Covered Transaction to FinCEN within thirty (30) days of the closing of the Covered Transaction.

How Long is a Covered Business required to retain Covered Transaction records?

All records related to compliance with the GTO must be retained for a period of five (5) years from the last day the GTO is effective. Under the terms of the existing GTO, a Covered Business would be required to retain such records until August 27, 2021. However, should the GTO be renewed, all records related to compliance with the GTO must retained for five (5) years from the last day the GTO is effective pursuant to all renewals of the GTO.

Will the GTO stop real estate transactions from closing?

The GTO is not intended to prevent real estate closings from taking place. The GTO is meant to allow the Treasury to collect information about these transactions.

VI. Reporting Requirements

What information must a Covered Business report about a Covered Transaction?

A Covered Business must report a Covered Transaction to FinCEN using *Form 8300*, and include the following information:

- *Identity of the individual primarily responsible for representing the Legal Entity;*
- *A description of the identification (driver's license, passport or other similar identifying document) obtained from the individual primarily responsible for representing the Purchaser with a copy retained in the file;*
- *identity of the Purchaser and any Beneficial Owner(s) of the Purchaser's;*
- *A description of the type of identification, driver's license, passport or other similar identifying document, obtained from the Beneficial Owner with a copy retained in the file;*
- *Date of closing of the Covered Transaction;*
- *Total amount transferred in the form of a Monetary Instrument;*
- *Total purchase price of the Covered Transaction; and*
- *Address of the real property involved in the Covered Transaction;*
- *Also include the term "REGTOMIA" or "REGTONYC" as a unique identifier for this GTO in the Comments section.*

Does the GTO define who is a Beneficial Owner?

A Beneficial Owner is an individual who directly or indirectly owns 25% or more of the equity interest in the Legal Entity.

What if the Legal Entity purchasing the real property is owned by another Legal Entity?

If the purchasing Legal Entity is owned by another Legal Entity, the GTO requires the reporting of information about the Beneficial Owners of any and all of the related Legal Entities.

What are the penalties for violating the GTO?

Violation of the GTO may subject a Covered Business to the following criminal and civil penalties:

Criminal Penalties

Type of Violation	Penalty
Willful violation	*Up to $250,000 fine and 5 years in prison*
Willful violation while violating another law of the United States	*Up to $500,000 fine and 10 years in prison*
Structuring or assisting in structuring a transaction to avoid the currency transaction reporting	*Fine and up to five years in prison*

Civil Penalties

Type of Violation	Penalty
Willful violation *(a separate violation occurs for each day the violation continues and each location a violation occurs)*	*Greater of the amount involved (up to $100,000) or $25,000*
Failure to file a report, material misstatement or omission	*Not to exceed the amount involved in the transaction*
Structuring or assisting in structuring a transaction to avoid the currency transaction reporting	*Not to exceed the amount involved in the transaction*
Negligence	*Not to exceed $500 or $50,000 if a pattern of negligence is found*

Can penalties be assessed against a Covered Business' individual employees or agents?

Yes. Both civil and criminal penalties may be levied against a partner, director, officer, agent or employee of the Covered Business.

How long after a violation can the government assess a penalty?

Penalties can be assessed any time within six years from the date of the Covered Transaction. Civil actions may be commenced within two years of the date of the penalty or criminal conviction.

VII. Covered Transactions

Does private or seller financing qualify as "without a bank loan" under the GTO reporting requirements?

Yes, the reporting exclusion is only triggered by loans financed by a financial institution that is required to have an anti-money laundering policy. If financing is provided by a private lender, seller or other business that does not have a federal requirement to maintain an anti-money laundering policy, then the transaction is reportable.

Are the reporting requirements triggered when the purchase price is paid entirely through a wire transfer or personal or business check?

No. If a purchase of real property is made entirely by a wire transfer or personal or business check, this would not fall within the definition of a Covered Transaction and the reporting requirements of the GTO would not apply.

What if only a de minimis amount of currency is used in the purchase payment?

If any amount of the purchase, including a de minimis amount, is funded by using currency or any one of the types of payment listed in the order, then it would be considered a Covered Transaction subject to the reporting requirements of the GTO.

What if the purchase price is paid for using a wire transfer, but a settlement service is paid using currency?

The GTO's reporting requirements are only triggered when the purchase of the real property is funded by one of the forms of payment covered in the GTO, which includes currency but not wire transfers or personal or business checks. The GTO does not cover how the payment of a settlement service is funded.

VIII. Who must file a Form 8300?

Is a title insurance agent, settlement attorney or real estate agent required to report Covered Transactions to FinCEN?

No. The GTO only applies to the title insurance companies, and its subsidiaries and agents that received the order from FinCEN. It does not apply to business involved in the Covered Transactions that are not agents of the Covered Business, such as attorneys or real estate agents. While the definition of a Covered Business includes the insurer's agents, only one report is required for each Covered Transaction. Depending on the policy and procedures of the covered insurer, the report can be filed by either the insurer or their agent.

If the Covered Business just insured the transaction but was not involved in the closing, does it need to report the transaction?

Yes. A Covered Business must report the transaction whenever it, or its subsidiaries or agents, are involved in the Covered Transaction. This includes when they only provide title insurance and not settlement services in the transactions.

IX. Collecting information.

Can a Covered Business rely on information provided by real estate attorneys or agents when reporting?

Yes. For purposes of completing the FinCEN Form 8300, in addition to collecting information directly from the Purchaser or the Beneficial Owner(s), a Covered Business may collect information regarding the Purchaser of Beneficial Owner(s), when made available by from the real estate agent or attorney involved in the Covered Transaction.

Can an attorney withhold client information from the title insurance company under a claim of privilege?

Information necessary for completing a form 8300, Suspicious Activity Report or other Bank Secrecy Act reporting requirement cannot be withheld from the government due to attorney-client privilege. See *United States v. Goldberger & Dublin, P.C.*, 935 F.2d 501 (2nd Cir. 1991), holding that absent special circumstances, attorneys were required to disclose client information on Forms 8300. See also *United States v. Leventhal*, 961 F.2d 936 (11th Cir. 1992), holding that state bar ethical rules do not constitute a "special circumstance" that would protect clients' names and fee arrangements from disclosure.

UNITED STATES DEPARTMENT OF THE TREASURY

FinCEN

FINANCIAL CRIMES ENFORCEMENT NETWORK

GEOGRAPHIC TARGETING ORDER

The Director of the Financial Crimes Enforcement Network ("FinCEN"), U.S. Department of the Treasury, hereby issues a Geographic Targeting Order ("Order") requiring Fidelity National Financial, Inc. to collect and report information about the persons involved in certain residential real estate transactions, as further described in this Order.

I. AUTHORITY

The Director of FinCEN may issue an order that imposes certain additional recordkeeping and reporting requirements on one or more domestic financial institutions or nonfinancial trades or businesses in a geographic area. See 31 U.S.C. § 5326(a); 31 CFR § 1010.370; and Treasury Order 180-01. Pursuant to this authority, the Director of FinCEN hereby finds that reasonable grounds exist for concluding that the additional recordkeeping and reporting requirements described below are necessary to carry out the purposes of the Bank Secrecy Act and prevent evasions thereof.[1]

II. ADDITIONAL RECORDKEEPING AND REPORTING REQUIREMENTS

A. Business and Transactions Covered by this Order

1. For purposes of this Order, the "Covered Business" means Fidelity National Financial, Inc. and any of its subsidiaries and agents.

2. For purposes of this Order, a "Covered Transaction" means a transaction in which:

   i. A Legal Entity (as defined in Section III.A of this Order);

   ii. Purchases residential real property:

      1. For a total purchase price of $500,000 or more in the Texas county of Bexar;

      2. For a total purchase price of $1,000,000 or more in the Florida county of Miami-Dade, Broward, or Palm Beach;

      3. For a total purchase price of $1,500,000 or more in the Borough of Brooklyn, Queens, Bronx, or Staten Island in New York City, New York;

[1] The Bank Secrecy Act is codified at 12 U.S.C. §§ 1829b, 1951-1959 and 31 U.S.C. §§ 5311-5314, 5316-5332. Regulations implementing the Bank Secrecy Act appear at 31 CFR Chapter X.

4. For a total purchase price of $2,000,000 or more in the California county of San Diego, Los Angeles, San Francisco, San Mateo, or Santa Clara; or

5. For a total purchase price of $3,000,000 or more in the Borough of Manhattan in New York City, New York; and

iii. Such purchase is made without a bank loan or other similar form of external financing; and

iv. Such purchase is made, at least in part, using currency or a cashier's check, a certified check, a traveler's check, a personal check, a business check, or a money order in any form.

B. **Reports Required to be Filed by the Covered Business**

1. If the Covered Business is involved in a Covered Transaction, then the Covered Business shall report the Covered Transaction to FinCEN by filing a FinCEN Form 8300 within 30 days of the closing of the Covered Transaction. Each FinCEN Form 8300 filed pursuant to this Order must be: (i) completed in accordance with the terms of this Order and the FinCEN Form 8300 instructions (when such terms conflict, the terms of this Order apply), and (ii) e-filed through the Bank Secrecy Act E-filing system.[2]

2. A Form 8300 filed pursuant to this Order shall contain the following information about the Covered Transaction:

i. Part I shall contain information about the identity of the individual primarily responsible for representing the Purchaser (as defined in Section III.A of this Order). The Covered Business must obtain and record a copy of this individual's driver's license, passport, or other similar identifying documentation. A description of such documentation must be provided in Field 14 of the form.

ii. Part II shall contain information about the identity of the Purchaser. The Covered Business should select Field 15 on the FinCEN Form 8300, which will enable reporting of multiple parties under Part II of the form.

iii. Part II shall also contain information about the identity of the Beneficial Owner(s) (as defined in Section III.A of this Order) of the Purchaser. The Covered Business must obtain and record a copy of the Beneficial Owner's driver's license, passport, or other similar identifying documentation. A description of such documentation must be provided in Field 27 of the form.

iv. Part III shall contain information about the Covered Transaction as follows:

[2] For more information on E-filing, go to this Website: http://bsaefiling.fincen.treas.gov/main.html and do the following: (a) review "Getting Started"; (b) fill out a Supervisory User Application Form; (c) assign the supervisory user to represent your business; (d) obtain a digital certificate; and (e) register on the system.

1. Field 28: Date of closing of the Covered Transaction.
2. Field 29: Total amount transferred in the form of payment specified in Section II.A.2.iv of this Order.
3. Field 31: Total purchase price of the Covered Transaction.
4. Field 34: Address of real property involved in the Covered Transaction.

v. Part IV shall contain information about the Covered Business.

vi. The Comments section to the Form 8300 shall contain the following information:
1. The term "REGTO" as a unique identifier for this Order.
2. If the purchaser involved in the Covered Transaction is a limited liability company, then the Covered Business must provide the name, address, and taxpayer identification number of all its members.
3. If a Form 8300 is being filed by an agent of the Covered Business named in this Order, then the agent shall include the name of such Covered Business.

III. GENERAL PROVISIONS

A. Additional Definitions

1. For purposes of this Order:

i. "Beneficial Owner" means each individual who, directly or indirectly, owns 25% or more of the equity interests of the Purchaser.

ii. "Legal Entity" means a corporation, limited liability company, partnership or other similar business entity, whether formed under the laws of a state or of the United States or a foreign jurisdiction.

iii. "Purchaser" means the Legal Entity that is purchasing residential real property as part of a Covered Transaction.

2. All terms used but not otherwise defined herein have the meaning set forth in Chapter X of Title 31 of the United States Code of Federal Regulations.

B. Order Period

The terms of this Order are effective beginning on August 28, 2016 and ending on February 23, 2017 (except as otherwise provided in Section III.C of this Order).

C. Retention of Records

The Covered Business must: (1) retain all records relating to compliance with this Order for a period of five years from the last day that this Order is effective (including any renewals of this Order); (2) store such records in a manner accessible within a reasonable period of time; and

(3) make such records available to FinCEN or any other appropriate law enforcement or regulatory agency, upon request.

D. No Effect on Other Provisions of the Bank Secrecy Act

Nothing in this Order modifies or otherwise affects any provision of the regulations implementing the Bank Secrecy Act to the extent not expressly stated herein.

E. Compliance

The Covered Business must supervise, and is responsible for, compliance by each of its officers, directors, employees, and agents with the terms of this Order. The Covered Business must transmit this Order to each of its agents. The Covered Business must also transmit this Order to its Chief Executive Officer or other similarly acting manager.

F. Penalties for Noncompliance

The Covered Business and any of its officers, directors, employees, and agents may be liable, without limitation, for civil or criminal penalties for violating any of the terms of this Order.

G. Validity of Order

Any judicial determination that any provision of this Order is invalid does not affect the validity of any other provision of this Order, and each other provision must thereafter remain in full force and effect. A copy of this Order carries the full force and effect of an original signed Order.

H. Paperwork Reduction Act

The collection of information subject to the Paperwork Reduction Act contained in this Order has been approved by the Office of Management and Budget ("OMB") and assigned OMB Control Number 1506-0056.

I. Questions

All questions about the Order must be addressed to the FinCEN Resource Center at (800) 767-2825 (Monday through Friday, 8:00 a.m. - 6:00 p.m. EST).

Dated: July 22, 2016

Jamal El-Hindi
Acting Director
Financial Crimes Enforcement Network
U.S. Department of the Treasury

NEW FinCEN GTO

On July 22, 2016, the Financial Crimes Enforcement Network ("FinCEN") issued Geographic Targeting Orders ("GTO") relating to certain real estate transactions in **Palm Beach, Broward and Miami-Dade** Counties in Florida and several other areas across the nation. **The Orders were served on all title insurance underwriters in Florida,** as well as those in other states. The Orders apply to agents of all underwriters.

The current GTO is in effect from **August 28, 2016 through February 23, 2017**. The first GTO, which affected only Miami-Dade County properties, remained in effect through August 27, 2016.

As to Palm Beach, Broward and Miami-Dade Counties, the GTO applies to real estate purchase transactions which meet all of the following criteria:

1. Residential property;
2. Sales price of $1,000,000.00 or more;
3. Purchaser is an entity (other than a trust);
4. Purchase is made without financing by a financial institution that is required to have an anti-money laundering policy; and
5. Purchase price is at least partially paid by use of:
    - Cash
    - Cashier's check
    - Certified check
    - Traveler's check
    - Money order
    - **Personal or business check**

If the transaction meets all of the above criteria, then the agent/underwriter must collect and report identifying information about the Beneficial Owner(s) (owns 25% or more of the equity interests, directly or indirectly) of the Purchaser. If the Purchaser is a LLC, identifying information must be provided for all members. IRS Form 8300 (Report of Cash Payments over $10,000) is the form used for the required reporting.

For more details, see the attached GTO. Although this GTO was addressed to Fidelity, **please note the same GTO was served on every underwriter in the State of Florida.** Also on this site, we have posted FAQs published by FinCEN regarding the GTO, Form 8300, and a Fact Sheet created by ALTA. The FAQs from both FinCEN and ALTA were created for a GTO that expired on August 27, 2016, but are also relevant to the current GTO which became effective August 28, 2016. **IT IS IMPORTANT TO NOTE THAT THE CURRECT GTO INCLUDES PAYMENT OF ANY PORTION OF THE PURCHASE PRICE BY PERSONAL AND BUSINESS CHECKS IN THE CATEGORY OF REPORTABLE TRANSACTIONS.** The prior GTO excluded transactions where the purchase price was partially or completely paid by personal or business checks.

Deborah Boyd, Vice-Chair, Real Estate Structures and Taxation Committee

Art Menor, Chair, Real Estate Problem Studies Committee

UNITED STATES DEPARTMENT OF THE TREASURY

FinCEN

FINANCIAL CRIMES ENFORCEMENT NETWORK

FREQUENTLY ASKED QUESTIONS

Issued: February 1, 2016

Subject: Geographic Targeting Orders Involving Certain Real Estate Transactions

On January 13, 2016, FinCEN issued Geographic Targeting Orders (GTOs) requiring Covered Businesses to collect and report information about certain residential real estate transactions in the Borough of Manhattan in New York, New York and Miami-Dade County, Florida. As a general matter, FinCEN expects a Covered Business to implement procedures reasonably designed to ensure compliance with the terms of the GTOs, including reasonable due diligence to determine whether it (or its subsidiaries or agents) is involved in a Covered Transaction and to collect and report the required information. In complying with the terms of the GTOs, a Covered Business may reasonably rely on information provided to it by third parties, including other parties involved in Covered Transactions.

To assist Covered Businesses in complying with the GTOs, FinCEN is publishing this list of frequently asked questions (FAQs) in response to inquiries FinCEN has received since issuing the GTOs. These FAQs are applicable only to the GTOs and should not be construed to apply to any other FinCEN regulation or order. Terms used but not otherwise defined herein shall have the meaning set forth in the GTOs. For additional questions, please contact the FinCEN Resource Center at (800) 767-2825.

1) What does the term "residential real property" mean?

For purposes of the GTOs, "residential real property" means real property (including individual units of condominiums and cooperatives) designed principally for the occupancy of from one to four families.

2) To what extent must a Covered Business verify information about the Beneficial Owner of a Purchaser?

The GTOs require a Covered Business to collect and report certain identifying information about the Beneficial Owner(s) of the Purchaser in a Covered Transaction. For purposes of the GTOs, a "Beneficial Owner" means each individual who, directly or indirectly, owns 25% or more of the equity interests of the Purchaser. The GTOs provide that the Covered Business must obtain and record a copy of the Beneficial Owner's driver's license, passport, or other similar identifying documentation. The Covered Business may reasonably rely on the information provided to it by third parties involved in the Covered Transaction, including the Purchaser or its representatives, in determining whether the individual identified as a Beneficial Owner is in fact a Beneficial Owner.

3) **Who is considered a Covered Business's "agents" for purposes of the GTOs?**

A Covered Business's "agents" refers to people or entities that are authorized by the Covered Business, usually through a contractual relationship, to act on its behalf to provide title insurance underwritten by the Covered Business (or its subsidiaries). FinCEN notes that the recordkeeping and reporting requirements under the GTOs are triggered only when a Covered Business (or its subsidiaries or agents) is involved in a Covered Transaction by providing title insurance underwritten by that Covered Business (or its subsidiaries) in connection with the Covered Transaction.

FinCEN also recognizes that a person or entity may be an independent agent of a Covered Business, and thus may act on behalf of multiple title insurance companies. A Covered Business is responsible for the recordkeeping and reporting requirements under the GTOs only when such agents are acting on its behalf in connection with a Covered Transaction.

4) **What methods of payment are covered under Section II.A.2.v. of the GTOs?**

Section II.A.2.v. of the GTOs, which lists one of the five criteria that triggers a Covered Transaction, provides: "Such purchase is made, at least in part, using currency or a cashier's check, a certified check, a traveler's check, or a money order in any form." Accordingly, payment of at least part of the purchase price using one of these methods, such as a cashier's check (sometimes referred to as a "bank check," "official check," or "treasurer's check") or a certified check, triggers a Covered Transaction, assuming the other four criteria listed in Section II.A.2. are met. A method of payment not specifically enumerated in Section II.A.2.v. (e.g., a wire transfer or an uncertified personal check) would not, in and of itself, qualify as a Covered Transaction. With respect to information required to be reported in Field 29 of the Form 8300, the Covered Business should include the total amount of the purchase price that was paid using the methods of payment specified in Section II.A.2.v. of the GTOs.

5) **Is there a *de minimis* exception regarding the methods of payment covered under Section II.A.2.v. of the GTOs?**

No. If any part of the purchase price was made using a method of payment specified in Section II.A.2.v. of the GTOs, then the transaction is considered a Covered Transaction (assuming the other four criteria listed in Section II.A.2. are met). FinCEN expects a Covered Business to take reasonable steps to determine whether any part of the purchase price was made using a method of payment specified in Section II.A.2.v. of the GTOs. FinCEN recognizes that in some instances a small percent of the purchase price of a residential real estate transaction may be held by a third party, such as a real estate agent holding an earnest money deposit. A Covered Business may reasonably rely on information provided to it by such third parties.

6) **Who is the "individual primarily responsible for representing the Purchaser"?**

The "individual primarily responsible for representing the Purchaser" means the individual authorized by the entity to enter legally binding contracts on behalf of the entity.

7) **How long must a Covered Business retain records relating to compliance with the GTOs?**

Consistent with the general recordkeeping provisions of the regulations promulgated under the Bank Secrecy Act, a Covered Business must retain all records relating to compliance with the GTOs for at least five years from the last day that the GTOs are effective (including any renewals thereof).

IRS Form **8300** (Rev. August 2014)

Department of the Treasury
Internal Revenue Service

Report of Cash Payments Over $10,000 Received in a Trade or Business

▶ See instructions for definition of cash.

▶ Use this form for transactions occurring after August 29, 2014. Do not use prior versions after this date.

For Privacy Act and Paperwork Reduction Act Notice, see the last page.

FinCEN Form **8300** (Rev. August 2014)
OMB No. 1506-0018
Department of the Treasury
Financial Crimes
Enforcement Network

1 Check appropriate box(es) if: a ☐ Amends prior report; b ☐ Suspicious transaction.

Part I Identity of Individual From Whom the Cash Was Received

2 If more than one individual is involved, check here and see instructions ▶ ☐

3 Last name	4 First name	5 M.I.	6 Taxpayer identification number

7 Address (number, street, and apt. or suite no.)	8 Date of birth (see instructions) ▶ M M D D Y Y Y Y

9 City	10 State	11 ZIP code	12 Country (if not U.S.)	13 Occupation, profession, or business

14 Identifying document (ID)	a Describe ID ▶	b Issued by ▶
	c Number ▶	

Part II Person on Whose Behalf This Transaction Was Conducted

15 If this transaction was conducted on behalf of more than one person, check here and see instructions ▶ ☐

16 Individual's last name or organization's name	17 First name	18 M.I.	19 Taxpayer identification number

20 Doing business as (DBA) name (see instructions)	Employer identification number

21 Address (number, street, and apt. or suite no.)	22 Occupation, profession, or business

23 City	24 State	25 ZIP code	26 Country (if not U.S.)

27 Alien identification (ID)	a Describe ID ▶	b Issued by ▶
	c Number ▶	

Part III Description of Transaction and Method of Payment

28 Date cash received M M D D Y Y Y Y	29 Total cash received $ .00	30 If cash was received in more than one payment, check here ▶ ☐	31 Total price if different from item 29 $ .00

32 Amount of cash received (in U.S. dollar equivalent) (must equal item 29) (see instructions):

a	U.S. currency	$ .00	(Amount in $100 bills or higher $ .00)
b	Foreign currency	$ .00	(Country ▶)
c	Cashier's check(s)	$ .00	Issuer's name(s) and serial number(s) of the monetary instrument(s) ▶
d	Money order(s)	$ .00	
e	Bank draft(s)	$ .00	
f	Traveler's check(s)	$ .00	

33 Type of transaction

a	☐ Personal property purchased	f	☐ Debt obligations paid
b	☐ Real property purchased	g	☐ Exchange of cash
c	☐ Personal services provided	h	☐ Escrow or trust funds
d	☐ Business services provided	i	☐ Bail received by court clerks
e	☐ Intangible property purchased	j	☐ Other (specify in item 34) ▶

34 Specific description of property or service shown in 33. Give serial or registration number, address, docket number, etc. ▶

Part IV Business That Received Cash

35 Name of business that received cash	36 Employer identification number

37 Address (number, street, and apt. or suite no.)	Social security number

38 City	39 State	40 ZIP code	41 Nature of your business

42 Under penalties of perjury, I declare that to the best of my knowledge the information I have furnished above is true, correct, and complete.

Signature ▶ _____ Authorized official Title ▶ _____

43 Date of signature M M D D Y Y Y Y	44 Type or print name of contact person	45 Contact telephone number

Multiple Parties

(Complete applicable parts below if box 2 or 15 on page 1 is checked.)

Part I Continued—Complete if box 2 on page 1 is checked

3	Last name	4 First name	5 M.I.	6 Taxpayer identification number	
7	Address (number, street, and apt. or suite no.)		8 Date of birth . . . ▶ (see instructions)	M M D D Y Y Y Y	
9	City	10 State	11 ZIP code	12 Country (if not U.S.)	13 Occupation, profession, or business
14	Identifying document (ID)	a Describe ID ▶ c Number ▶		b Issued by ▶	

3	Last name	4 First name	5 M.I.	6 Taxpayer identification number	
7	Address (number, street, and apt. or suite no.)		8 Date of birth . . . ▶ (see instructions)	M M D D Y Y Y Y	
9	City	10 State	11 ZIP code	12 Country (if not U.S.)	13 Occupation, profession, or business
14	Identifying document (ID)	a Describe ID ▶ c Number ▶		b Issued by ▶	

Part II Continued—Complete if box 15 on page 1 is checked

16	Individual's last name or organization's name	17 First name	18 M.I.	19 Taxpayer identification number	
20	Doing business as (DBA) name (see instructions)			Employer identification number	
21	Address (number, street, and apt. or suite no.)			22 Occupation, profession, or business	
23	City	24 State	25 ZIP code	26 Country (if not U.S.)	
27	Alien identification (ID)	a Describe ID ▶ c Number ▶		b Issued by ▶	

16	Individual's last name or organization's name	17 First name	18 M.I.	19 Taxpayer identification number	
20	Doing business as (DBA) name (see instructions)			Employer identification number	
21	Address (number, street, and apt. or suite no.)			22 Occupation, profession, or business	
23	City	24 State	25 ZIP code	26 Country (if not U.S.)	
27	Alien identification (ID)	a Describe ID ▶ c Number ▶		b Issued by ▶	

Comments – Please use the lines provided below to comment on or clarify any information you entered on any line in Parts I, II, III, and IV

Section references are to the Internal Revenue Code unless otherwise noted.

Future Developments

For the latest information about developments related to Form 8300 and its instructions, such as legislation enacted after they were published, go to *www.irs.gov/form8300*.

Important Reminders

- Section 6050I (26 United States Code (U.S.C.) 6050I) and 31 U.S.C. 5331 require that certain information be reported to the IRS and the Financial Crimes Enforcement Network (FinCEN). This information must be reported on IRS/FinCEN Form 8300.
- Item 33, box i, is to be checked only by clerks of the court; box d is to be checked by bail bondsmen. See *Item 33* under *Part III*, later.
- The meaning of the word "currency" for purposes of 31 U.S.C. 5331 is the same as for the word "cash" (See *Cash* under *Definitions*, later).

General Instructions

Who must file. Each person engaged in a trade or business who, in the course of that trade or business, receives more than $10,000 in cash in one transaction or in two or more related transactions, must file Form 8300. Any transactions conducted between a payer (or its agent) and the recipient in a 24-hour period are related transactions. Transactions are considered related even if they occur over a period of more than 24 hours if the recipient knows, or has reason to know, that each transaction is one of a series of connected transactions.

Keep a copy of each Form 8300 for 5 years from the date you file it.

Clerks of federal or state courts must file Form 8300 if more than $10,000 in cash is received as bail for an individual(s) charged with certain criminal offenses. For these purposes, a clerk includes the clerk's office or any other office, department, division, branch, or unit of the court that is authorized to receive bail. If a person receives bail on behalf of a clerk, the clerk is treated as receiving the bail. See *Item 33* under *Part III*, later.

If multiple payments are made in cash to satisfy bail and the initial payment does not exceed $10,000, the initial payment and subsequent payments must be aggregated and the information return must be filed by the 15th day after receipt of the payment that causes the aggregate amount to exceed $10,000 in cash. In such cases, the reporting requirement can be satisfied by sending a single written statement with the aggregate Form 8300 amounts listed relating to that payer. Payments made to satisfy separate bail requirements are not required to be aggregated. See Treasury Regulations section 1.6050I-2.

Casinos must file Form 8300 for nongaming activities (restaurants, shops, etc.).

Voluntary use of Form 8300. Form 8300 may be filed voluntarily for any suspicious transaction (see *Definitions*, later) for use by FinCEN and the IRS, even if the total amount does not exceed $10,000.

Exceptions. Cash is not required to be reported if it is received:

- By a financial institution required to file FinCEN Report 112, BSA Currency Transaction Report (BCTR);
- By a casino required to file (or exempt from filing) FinCEN Report 112, if the cash is received as part of its gaming business;
- By an agent who receives the cash from a principal, if the agent uses all of the cash within 15 days in a second transaction that is reportable on Form 8300 or on FinCEN Report 112, and discloses all the information necessary to complete Part II of Form 8300 or FinCEN Report 112 to the recipient of the cash in the second transaction;
- In a transaction occurring entirely outside the United States. See Publication 1544, Reporting Cash Payments of Over $10,000 (Received in a Trade or Business), regarding transactions occurring in Puerto Rico and territories and possessions of the United States; or
- In a transaction that is not in the course of a person's trade or business.

When to file. File Form 8300 by the 15th day after the date the cash was received. If that date falls on a Saturday, Sunday, or legal holiday, file the form on the next business day.

Where to file. File the form with the Internal Revenue Service, Detroit Computing Center, P.O. Box 32621, Detroit, MI 48232.

You may be able to electronically file Form 8300 using FinCEN's Bank Secrecy Act (BSA) Electronic Filing (E-Filing) System as an alternative method to filing a paper Form 8300. To get more information, visit the BSA E-Filing System, at http://bsaefiling.fincen.treas.gov/main.html.

Statement to be provided. You must give a written or electronic statement to each person named on a required Form 8300 on or before January 31 of the year following the calendar year in which the cash is received. The statement must show the name, telephone number, and address of the information contact for the business, the aggregate amount of reportable cash received, and that the information was furnished to the IRS. Keep a copy of the statement for your records.

Multiple payments. If you receive more than one cash payment for a single transaction or for related transactions, you must report the multiple payments any time you receive a total amount that exceeds $10,000 within any 12-month period. Submit the report within 15 days of the date you receive the payment that causes the total amount to exceed $10,000. If more than one report is required within 15 days, you may file a combined report. File the combined report no later than the date the earliest report, if filed separately, would have to be filed.

Taxpayer identification number (TIN). You must furnish the correct TIN of the person or persons from whom you receive the cash and, if applicable, the person or persons on whose behalf the transaction is being conducted. You may be subject to penalties for an incorrect or missing TIN.

The TIN for an individual (including a sole proprietorship) is the individual's social security number (SSN). For certain resident aliens who are not eligible to get an SSN and nonresident aliens who are required to file tax returns, it is an IRS Individual Taxpayer Identification Number (ITIN). For other persons, including corporations, partnerships, and estates, it is the employer identification number (EIN).

If you have requested but are not able to get a TIN for one or more of the parties to a transaction within 15 days following the transaction, file the report and use the comments section on page 2 of the form to explain why the TIN is not included.

Exception. *You are not required to provide the TIN of a person who is a nonresident alien individual or a foreign organization if that person or foreign organization:*

- *Does not have income effectively connected with the conduct of a U.S. trade or business;*
- *Does not have an office or place of business, or a fiscal or paying agent in the U.S.;*
- *Does not furnish a withholding certificate described in §1.1441-1(e)(2) or (3) or §1.1441-5(c)(2)(iv) or (3)(iii) to the extent required under §1.1441-1(e)(4)(vii); or*
- *Does not have to furnish a TIN on any return, statement, or other document as required by the income tax regulations under section 897 or 1445.*

Penalties. You may be subject to penalties if you fail to file a correct and complete Form 8300 on time and you cannot show that the failure was due to reasonable cause. You may also be subject to penalties if you fail to furnish timely a correct and complete statement to each person named in a required report. A minimum penalty of $25,000 may be imposed if the failure is due to an intentional or willful disregard of the cash reporting requirements.

Penalties may also be imposed for causing, or attempting to cause, a trade or business to fail to file a required report; for causing, or attempting to cause, a trade or business to file a required report containing a material omission or misstatement of fact; or for structuring, or attempting to structure, transactions to avoid the reporting requirements. These violations may also be subject to criminal prosecution which, upon conviction, may result in imprisonment of up to 5 years or fines of up to $250,000 for individuals and $500,000 for corporations or both.

Definitions

Cash. The term "cash" means the following.

- U.S. and foreign coin and currency received in any transaction; or
- A cashier's check, money order, bank draft, or traveler's check having a face amount of $10,000 or less that is received in a designated reporting transaction (defined below), or that is received in any transaction in which the recipient knows that the instrument is being used in an attempt to avoid the reporting of the transaction under either section 6050I or 31 U.S.C. 5331.

Note. Cash does not include a check drawn on the payer's own account, such as a personal check, regardless of the amount.

Designated reporting transaction. A retail sale (or the receipt of funds by a broker or other intermediary in connection with a retail sale) of a consumer durable, a collectible, or a travel or entertainment activity.

Retail sale. Any sale (whether or not the sale is for resale or for any other purpose) made in the course of a trade or business if that trade or business principally consists of making sales to ultimate consumers.

Consumer durable. An item of tangible personal property of a type that, under ordinary usage, can reasonably be expected to remain useful for at least 1 year, and that has a sales price of more than $10,000.

Collectible. Any work of art, rug, antique, metal, gem, stamp, coin, etc.

Travel or entertainment activity. An item of travel or entertainment that pertains to a single trip or event if the combined sales price of the item and all other items relating to the same trip or event that are sold in the same transaction (or related transactions) exceeds $10,000.

Exceptions. A cashier's check, money order, bank draft, or traveler's check is not considered received in a designated reporting transaction if it constitutes the proceeds of a bank loan or if it is received as a payment on certain promissory notes, installment sales contracts, or down payment plans. See Publication 1544 for more information.

Person. An individual, corporation, partnership, trust, estate, association, or company.

Recipient. The person receiving the cash. Each branch or other unit of a person's trade or business is considered a separate recipient unless the branch receiving the cash (or a central office linking the branches), knows or has reason to know the identity of payers making cash payments to other branches.

Transaction. Includes the purchase of property or services, the payment of debt, the exchange of cash for a negotiable instrument, and the receipt of cash to be held in escrow or trust. A single transaction may not be broken into multiple transactions to avoid reporting.

Suspicious transaction. A suspicious transaction is a transaction in which it appears that a person is attempting to cause Form 8300 not to be filed, or to file a false or incomplete form.

Specific Instructions

You must complete all parts. However, you may skip Part II if the individual named in Part I is conducting the transaction on his or her behalf only. For voluntary reporting of suspicious transactions, see *Item 1*, next.

Item 1. If you are amending a report, check box 1a. Complete the form in its entirety (Parts I-IV) and include the amended information. Do not attach a copy of the original report.

To voluntarily report a suspicious transaction (see *Suspicious transaction* above), check box 1b. You may also telephone your local IRS Criminal Investigation Division or call the FinCEN Financial Institution Hotline at 1-866-556-3974.

Part I

Item 2. If two or more individuals conducted the transaction you are reporting, check the box and complete Part I on page 1 for any one of the individuals. Provide the same information for the other individual(s) by completing Part I on page 2 of the form. If more than three individuals are involved, provide the same information in the comments section on page 2 of the form.

Item 6. Enter the taxpayer identification number (TIN) of the individual named. See *Taxpayer identification number (TIN)*, earlier, for more information.

Item 8. Enter eight numerals for the date of birth of the individual named. For example, if the individual's birth date is July 6, 1960, enter "07" "06" "1960."

Item 13. Fully describe the nature of the occupation, profession, or business (for example, "plumber," "attorney," or "automobile dealer"). Do not use general or nondescriptive terms such as "businessman" or "self-employed."

Item 14. You must verify the name and address of the named individual(s). Verification must be made by examination of a document normally accepted as a means of identification when cashing checks (for example, a driver's license, passport, alien registration card, or other official document). In item 14a, enter the type of document examined. In item 14b, identify the issuer of the document. In item 14c, enter the document's number. For example, if the individual has a Utah driver's license, enter "driver's license" in item 14a, "Utah" in item 14b, and the number appearing on the license in item 14c.

Note. You must complete all three items (a, b, and c) in this line to make sure that Form 8300 will be processed correctly.

Part II

Item 15. If the transaction is being conducted on behalf of more than one person (including husband and wife or parent and child), check the box and complete Part II for any one of the persons. Provide the same information for the other person(s) by completing Part II on page 2. If more than three persons are involved, provide the same information in the comments section on page 2 of the form.

Items 16 through 19. If the person on whose behalf the transaction is being conducted is an individual, complete items 16, 17, and 18. Enter his or her TIN in item 19. If the individual is a sole proprietor and has an employer identification number (EIN), you must enter both the SSN and EIN in item 19. If the person is an organization, put its name as shown on required tax filings in item 16 and its EIN in item 19.

Item 20. If a sole proprietor or organization named in items 16 through 18 is doing business under a name other than that entered in item 16 (for example, a "trade" or "doing business as (DBA)" name), enter it here.

Item 27. If the person is not required to furnish a TIN, complete this item. See *Taxpayer identification number (TIN),* earlier. Enter a description of the type of official document issued to that person in item 27a (for example, a "passport"), the country that issued the document in item 27b, and the document's number in item 27c.

Note. You must complete all three items (a, b, and c) in this line to make sure that Form 8300 will be processed correctly.

Part III

Item 28. Enter the date you received the cash. If you received the cash in more than one payment, enter the date you received the payment that caused the combined amount to exceed $10,000. See *Multiple payments,* earlier, for more information.

Item 30. Check this box if the amount shown in item 29 was received in more than one payment (for example, as installment payments or payments on related transactions).

Item 31. Enter the total price of the property, services, amount of cash exchanged, etc. (for example, the total cost of a vehicle purchased, cost of catering service, exchange of currency) if different from the amount shown in item 29.

Item 32. Enter the dollar amount of each form of cash received. Show foreign currency amounts in U.S. dollar equivalent at a fair market rate of exchange available to the public. The sum of the amounts must equal item 29. For cashier's check, money order, bank draft, or traveler's check, provide the name of the issuer and the serial number of each instrument. Names of all issuers and all serial numbers involved must be provided. If necessary, provide this information in the comments section on page 2 of the form.

Item 33. Check the appropriate box(es) that describe the transaction. If the transaction is not specified in boxes a–i, check box j and briefly describe the transaction (for example, "car lease," "boat lease," "house lease," or "aircraft rental"). If the transaction relates to the receipt of bail by a court clerk, check box i, "Bail received by court clerks." This box is only for use by court clerks. If the transaction relates to cash received by a bail bondsman, check box d, "Business services provided."

Part IV

Item 36. If you are a sole proprietorship, you must enter your SSN. If your business also has an EIN, you must provide the EIN as well. All other business entities must enter an EIN.

Item 41. Fully describe the nature of your business, for example, "attorney" or "jewelry dealer." Do not use general or nondescriptive terms such as "business" or "store."

Item 42. This form must be signed by an individual who has been authorized to do so for the business that received the cash.

Comments

Use this section to comment on or clarify anything you may have entered on any line in Parts I, II, III, and IV. For example, if you checked box b (Suspicious transaction) in line 1 above Part I, you may want to explain why you think that the cash transaction you are reporting on Form 8300 may be suspicious.

Privacy Act and Paperwork Reduction Act Notice. Except as otherwise noted, the information solicited on this form is required by the IRS and FinCEN in order to carry out the laws and regulations of the United States. Trades or businesses and clerks of federal and state criminal courts are required to provide the information to the IRS and FinCEN under section 6050I and 31 U.S.C. 5331, respectively. Section 6109 and 31 U.S.C. 5331 require that you provide your identification number. The principal purpose for collecting the information on this form is to maintain reports or records which have a high degree of usefulness in criminal, tax, or regulatory investigations or proceedings, or in the conduct of intelligence or counter-intelligence activities, by directing the federal government's attention to unusual or questionable transactions.

You are not required to provide information as to whether the reported transaction is deemed suspicious. Failure to provide all other requested information, or providing fraudulent information, may result in criminal prosecution and other penalties under 26 U.S.C. and 31 U.S.C.

Generally, tax returns and return information are confidential, as stated in section 6103. However, section 6103 allows or requires the IRS to disclose or give the information requested on this form to others as described in the Internal Revenue Code. For example, we may disclose your tax information to the Department of Justice, to enforce the tax laws, both civil and criminal, and to cities, states, the District of Columbia, and U.S. commonwealths and possessions, to carry out their tax laws. We may disclose this information to other persons as necessary to obtain information which we cannot get in any other way. We may disclose this information to federal, state, and local child support agencies; and to other federal agencies for the purposes of determining entitlement for benefits or the eligibility for and the repayment of loans. We may also provide the records to appropriate state, local, and foreign criminal law enforcement and regulatory personnel in the performance of their official duties. We may also disclose this information to other countries under a tax treaty, or to federal and state agencies to enforce federal nontax criminal laws and to combat terrorism. In addition, FinCEN may provide the information to those officials if they are conducting intelligence or counter-intelligence activities to protect against international terrorism.

You are not required to provide the information requested on a form that is subject to the Paperwork Reduction Act unless the form displays a valid OMB control number. Books or records relating to a form or its instructions must be retained as long as their contents may become material in the administration of any law under 26 U.S.C. or 31 U.S.C.

The time needed to complete this form will vary depending on individual circumstances. The estimated average time is 21 minutes. If you have comments concerning the accuracy of this time estimate or suggestions for making this form simpler, we would be happy to hear from you. You can send us comments from *www.irs.gov/formspubs.* Click on *More Information* and then click on *Give us feedback.* Or you can send your comments to Internal Revenue Service, Tax Forms and Publications Division, 1111 Constitution Ave. NW, IR-6526, Washington, DC 20224. Do not send Form 8300 to this address. Instead, see *Where to file,* earlier.

LEGISLATIVE POSITION
REQUEST FORM

GOVERNMENTAL AFFAIRS OFFICE

Date Form Received_____

GENERAL INFORMATION

Submitted By Real Property, Probate and Trust Law Section, Commercial Real Estate Committee
Burt Bruton, Vice Chair

Position Level The Florida Bar, RPPTL Section and Committee

CONTACTS

Board & Legislation Committee Appearance
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Tallahassee, FL 32301 (850) 999-4100
Martha J. Edenfield, Dean Mead, 215 S. Monroe Street, Suite 815,
Tallahassee, FL 32301 (850) 999-4100
Contacts Above
(List name, address and phone number)

Appearances Before Legislators
Contacts Above
(List name and phone # of those appearing before House/Senate Committees)

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

PROPOSED ADVOCACY

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

If Applicable, List The Following _____ (Bill or PCB#) (Bill or PCB Sponsor)

Indicate Position X Support Oppose Technical Assistance Other _____

Proposed Wording of Position for Official Publication: Support issuance of separate property tax folio numbers for separately described portions of a multiple parcel building and provide for allocation of underlying land value among the separate building parcels, including an amendment of F.S. Chapter 193.

Reasons for Proposed Advocacy: As buildings with multiple parcels (each parcel designed to have a separate owner) become more common in urban areas in Florida, a recurring problem has been the inability of the separate parcel owners to obtain a separate tax folio number for each separately owned parcel and for the value of the underlying land to be properly allocated among the parcels. The process of separate tax folio numbers and allocation of underlying land value has been successfully implemented for decades in a similar context,

issuance of tax folio numbers for separate condominium units located in one condominium with allocation of underlying land values.

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

Others
(May attach list if
More than one)

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

REFERRALS TO OTHER SECTIONS, COMMITTEES OR LEGAL ORGANIZATIONS

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

Referrals

1. Tax Section, TFB
(Name of Group or Organization) (Support, Oppose or No Position)

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

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

Please submit completed Legislative Position Request Form, along with attachments, to the Governmental Affairs Office of The Florida Bar. Upon receipt, staff will further coordinate the scheduling for final Bar action of your request which usually involves separate appearances before the Legislation Committee and the Board of Governors unless otherwise advised.

BILL YEAR

A bill to be entitled

An act relating to ad valorem taxation of multiple parcel buildings; creating s. 193.0237, F.S.; providing an effective date.

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

Section 1. Section 193.0237, Florida Statutes, is created to read:

193.0237 Assessment of multiple parcel buildings.--

(1) An ad valorem tax or non-ad valorem assessment, including a tax or assessment imposed by a county, municipality, special district, or water management district, may not be assessed separately against the land upon which a multiple parcel building is located. The value of the land containing a multiple parcel building, regardless of ownership, shall not be separately assessed by the property appraiser but shall be allocated among and included in the assessment of all the parcels in the multiple parcel building.

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

(a) "Multiple parcel building" means a building, other than a condominium or timeshare or cooperative, that contains separate parcels that are vertically located, in whole or in part, on or over the same land.

(b) "Parcel" means a portion of a multiple parcel building, which portion is identified in a recorded instrument by a legal description that is sufficient for record ownership and conveyance by deed separately from any other portion of the building.

(c) "Recorded instrument" means a declaration, covenant, easement, deed, plat, agreement or other legal instrument, other

CODING: Words ~~stricken~~ are deletions; words underlined are additions.

than a lease or mortgage or lien, describing one or more parcels in a multiple parcel building and recorded in the public records of the county in which the multiple parcel building is located.

(3) If a recorded instrument for a multiple parcel building provides a method for allocating all of the land value to the assessed values of the parcels in the building, then the property appraiser shall allocate the land value among the parcels for assessment purposes as provided in the recorded instrument. If a land value allocation method is not provided in a recorded instrument, then the property appraiser shall allocate all of the land value among the parcels in a multiple parcel building for assessment purposes in accordance with the relative vertical and horizontal size each parcel bears to the size of the entire multiple parcel building.

(4) A condominium, timeshare or cooperative may be created within a parcel in a multiple parcel building, and any land value allocated to the assessed value of that parcel in accordance with this section shall be further allocated among the condominium units in that parcel in the manner required in s. 193.023(5), or among the cooperative units in the manner required in s. 719.114, or among the timeshare interests in the manner required in s. 192.037.

(5) Each parcel in a multiple parcel building shall be assigned a separate tax folio number, except to the extent that a condominium or cooperative is created within any such parcel, in which case a separate tax folio number shall be assigned to each condominium unit or cooperative unit rather than to the parcel in which they were created.

(6) The separate assessed valuations of each of the parcels in a multiple parcel building shall not, in the aggregate, exceed the just valuation, as required by s.4, Art. VII of the State

Constitution, of the building and the land upon which it is located as if such land and building constituted a single property for purposes of taxation.

(7) This section applies to any land on which a multiple parcel building is substantially completed as of January 1 of the respective assessment year.

(8) This section does not affect or supersede, and shall be applied without regard to, any state or local land use, zoning or subdivision law, ordinance or regulation.

Section 2. This act applies to assessments for the calendar year 2015 and subsequent years.

Section 3. This act shall take effect upon becoming a law.

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

WHITE PAPER

SEPARATE AD VALOREM TAXATION OF A MULTIPLE PARCEL BUILDING

I. SUMMARY

This proposed legislation provides for the separate assessment of separate portions of a multiple parcel building, which portions are vertically located, in whole or in part, on or over the same land. The proposed legislation directs county property appraisers to apportion the value of the underlying land and include the value of the underlying land in the assessed values of the separate parcels in the multiple parcel building.

II. CURRENT SITUATION

When multiple parcel owners share a single tax folio number, each owner's parcel is at risk of being lost as the result of a tax deed sale unless someone pays the entire single tax bill. Even if all of the parcels are vested in one owner, the same issue arises if the parcels have different mortgagees, each mortgage lien on each parcel is at risk of being extinguished by the superior lien of real estate taxes unless the entire tax bill is paid. The primary purpose of this proposed legislation is to enable county property appraisers to assign separate tax folio numbers for each parcel in a multiple parcel building and to eliminate this concern.

Under current law (FS §193.023), the value of common elements or common areas in a condominium or cooperative is not separately assessed for ad valorem taxes or other governmental assessments; rather, the value of such property is included in the assessment of each unit. Similarly, FS §193.0235 provides that common elements in a subdivision are not separately assessed but the value of such property is included in the assessments for the subdivision lots. These provisions are exceptions to the general rule that the property appraiser's assessment roll must include certain land characteristic details, including the land value (FS §193.114(2)(j)).

There is no statute in Florida prohibiting the vertical subdivision of real property, and a number of multiple parcel buildings in Miami-Dade County have been developed or are currently being developed without utilizing a condominium regime. Typically, the separate parcels are described by using vertical elevation information and are based on the dimensions of as-built improvements. Some of the parcels may include a portion of the underlying land, but the common characteristic of these projects is the vertical sharing of the land, in whole or in part, by two or more portions of the improvements located on or above the same land.

The Florida Statutes do not guide the county property appraisers in assigning separate tax folio numbers for the separately owned parcels or (unlike the condominium and subdivision

exceptions noted above) in allocating the value of the underlying land among those parcels located on or above the same land. Because of this statutory silence, Joseph Ruiz, the general counsel for the Miami-Dade Property Appraiser, reached out for RPPTL Section help in addressing the need for separate assessments for such multiple parcel buildings.

Quoting from Mr. Ruiz's email: "[T]he issue of air rights/ vertical subdivisions has become a hot topic, especially in light of the upswing in construction in South Florida. By way of background, where there is a divided-ownership structure, the Miami-Dade County Property Appraiser's Office does not issue separate folio numbers for each ownership interest, absent the use of a condominium structure. As a result, multiple owners and properties within a single structure are issued a single ad valorem tax bill. While I can only speak for MDC, I am almost sure the same goes for all counties throughout the state. This can become burdensome for mixed-use high rise developments who choose not to avail themselves of a condominium structure, which may not provide them the flexibility required for that type of use."

As an example, the existing Four Seasons Hotel project on Brickell Avenue in Miami is encumbered by a recorded document that establishes a separate hotel parcel, office parcel, spa parcel, and two separate condominium parcels (one for the residences and one for condominium hotel units), with each parcel having separate ownership, notwithstanding that they are all contained in a single structure. Although separate tax folios were created for the condominium units, the other separately owned parcels of the structure share a single tax folio. Other existing and proposed projects in Miami-Dade County involve structures combining multiple uses - retail, hotel, office, parking, residential etc., each of which should be capable of separate ownership and entitled to their own tax folio assignment.

III. EFFECT OF PROPOSED CHANGES

A. General Overview

This proposed legislation is intended to help county property appraisers respond to the market demand for separate tax folio numbers for the separate parcels located in a multiple parcel building. It is modeled on the similar existing statutory provisions dealing with the taxation of common elements and common areas in condominium projects and horizontal lot subdivisions (FS §193.023 and §193.0235).

B. Point by Point Analysis

1. Allocation of land value among parcels.

Proposed new subsection 193.0237(1) would provide that the value of the land underlying a mixed parcel building is not separately assessable, but must be apportioned among the various parcels in the building and included in their assessed values. Under subsection (3), the allocation of land value would follow the apportionment scheme in the recorded instrument that describes the separate parcels, by analogy to the existing method of distributing common element value among condominium units in accordance with their respective percentages established in the recorded

declaration of condominium. If no apportionment scheme is provided in a recorded instrument, then this statute directs the property appraiser to allocate the land value among the parcels in proportion to their vertical and horizontal size (i.e., the amount of "airspace") relative to the building as a whole. Either way, this statute directs that ALL of the land value must be allocated among the parcels, so there is no opportunity for lost tax revenue from undervaluing the land in the final aggregate assessed parcel values.

2. Separate tax folio numbers.

Separate taxation is a key concern when different owners own different parcels within a multiple parcel building. Subsection (5) provides that each parcel in a multiple parcel building must be assigned its own tax folio number. If a condominium or cooperative is created within any such parcel, then the respective condominium or cooperative units (rather than the parcel) would receive the separate folio number. Subsection (4) provides that the land value apportioned to a parcel containing a condominium or cooperative is to be further apportioned among the units in accordance with existing law. Subsection (6) provides that the aggregate of the assessed parcel values cannot exceed the land and building value that would be assigned if the building did not comprise multiple parcels.

3. Definitions.

Subsection (2) of the proposed statute defines certain key terms. The term "multiple parcel building" means a building, other than a condominium or a cooperative, that contains separate "parcels" that are vertically located, in whole or in part, over the same land. The term "parcel" means a portion of such a building, which portion is identified in a "recorded instrument" by a legal description that is sufficient for record ownership and conveyance by deed separately from any other portion of the building. The term "recorded instrument" means a declaration, covenant, easement, deed, plat, agreement or other legal instrument, other than a lease or mortgage or lien, describing one or more parcels in a multiple parcel building and recorded in the county where the building is located.

These definitions embody some key concepts. One is that the statute excludes condominiums and cooperatives. Another is that the statute applies only if two or more portions of the building share, at least in part, a vertical location on or over the same land. Townhouse developments, therefore, would not fall under this definition because each unit sits on its own parcel.

The definition of "recorded instrument" encompasses a variety of instruments that are typically recorded in connection with a multiple parcel building, such as a declaration of easements and/or covenants governing the operation of the project. The recorded instrument could be as simple, however, as a deed conveying "air space" with defined elevations. Instruments such as leases, mortgages or liens are excluded from the definition, however, as they typically do not contemplate separate ownership of the parcels and could impose an unnecessary burden on property appraisers. Although this proposed solution for separate tax folios will be favored by mortgage holders, it will take more than a mortgage to produce a separate tax folio number for the lender's benefit (say, a mortgage PLUS a declaration of covenants).

Another key concept is that the recorded instrument need not actually create separate ownership of the separate parcels; rather, it must contain a sufficient legal description for separate ownership of one or more parcels. In this regard, the definition contemplates that the recorded instrument will result in separate tax folio numbers much like a condominium declaration or subdivision plat, even though the developer initially owns all of the units. Unlike a condominium declaration or subdivision plat, however, the recorded instrument will not result in discrete unit or lot identification numbers that are sufficient for a short form of legal description. Someday Florida may adopt three-dimensional subdivision platting, but that will not result from this proposed legislation. If three-dimensional platting is ever adopted in Florida, however, this proposed tax assessment statute will still work because it contemplates that a plat can be a "recorded instrument."

4. Timing.

Under existing law, improvements are not included in the assessed value of real property until they are substantially completed. Similarly, this separate folio statute does not apply in a particular assessment year unless the multiple parcel building is substantially completed on January 1 of the assessment year. As a practical matter, most multiple ownership buildings are completed before any document containing as-built legal descriptions are recorded. As a result, this proposed legislation will not require property appraisers to assign tax folio numbers for pure "air space" parcels containing no completed improvements.

The effective date of the legislation need not be as early as "upon becoming a law" as indicated in this draft, and it would apply to tax years beginning in 2015. If the legislation is not adopted in 2014, then the first applicable tax year would move back accordingly.

IV. FISCAL IMPACT ON STATE AND LOCAL GOVERNMENTS

The proposal does not have a fiscal impact on state or local governments because it does not increase or reduce the assessed values of any property that would otherwise apply if a building is not a multiple parcel building. Implementation costs should not be material, as there are only a limited number of such projects existing now, and most if not all are already known to the county property appraisers because the developers have previously requested separate tax numbers.

V. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR

This legislation benefit the private sector by encouraging and facilitating the development of multiple parcel buildings, making more efficient usage of limited land resources in urbanized areas.

VI. CONSTITUTIONAL ISSUES

It is anticipated that this legislation will not raise constitutional issues.

V. OTHER INTERESTED PARTIES

Property Appraisers
Tax Collectors
Florida Board of Realtors,
Department of Revenue
Florida Land Title Association and its agents,
Florida Bankers Association

LEGISLATIVE POSITION REQUEST FORM

GOVERNMENTAL AFFAIRS OFFICE

Date Form Received _____

GENERAL INFORMATION

Submitted By Jeffrey Alan Baskies, Co-Chair, Ad Hoc POLST Committee of the Real Property Probate & Trust Law Section (RPPTL Approval Date *****)

Address Katz, Baskies and Wolf, PLLC, One Boca Place, 2255 Glades Rd. Suite 240-W Boca Raton, FL 33431-7382; Email: jeff.baskies@katzbaskies.com

Position Type Ad Hoc POLST Committee, RPPTL Section, The Florida Bar
(Florida Bar, section, division, committee or both)

CONTACTS

Board & Legislation Committee Appearance

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Martha J. Edenfield, Dean, Mead, Egerton, Bloodworth, Capouano & Bozarth, P.A., 215 S. Monroe Street, Suite 815, Tallahassee, FL 32301, Telephone: (850) 999-4100, Email: medenfield@deanmead.com

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

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

PROPOSED ADVOCACY

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

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

Proposed Wording of Position for Official Publication:

"Supports proposed legislation to recognize Physician Orders for Life Sustaining Treatment (POLST) under Florida law with appropriate protections to prevent violations of due process for the benefit of the citizens of Florida and the protection of medical professionals and emergency responders who withhold or withdraw treatment based upon a POLST, including the amendment of s. 395.1041, 400.142, 400.487, 400.605, 400.6095, 401.35, 401.45, 429.255, 429.73, 765.205, 456.072, and the creation of s. 401.46, Florida Statutes."

Reasons For Proposed Advocacy:

The proposed statute allows for the recognition of Physicians Orders for Life Sustaining Treatment (POLST) under Florida law while integrating the POLST paradigm with Chapter 765 and s. 401.45 (DNR statute). The proposed statute also provides a framework that ensures the continued protection of a patient's right to self-determination in directing their medical care while addressing due process issues associated with the present use of POLST in Florida and assures the protection of medical professionals and emergency responders the necessary protections to honor a POLST.

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 RPPTL (see below) — Oppose — April 2015
(Indicate Bar or Name Section) (Support or Oppose) (Date)

The RPPTLs previously adopted the following position in opposition of POLST: "Opposes efforts to adopt POLST (Physician Ordered Life Sustaining Treatment) in Florida without appropriate procedural safeguards to protect the wishes of patients and prior advance directives made by the patient, including current Senate Bill 1052." The Section has since prepared the attached legislation to address the Section's concerns. While the Section's proposed legislation satisfies the Section's concerns, the Section would continue to oppose any other legislation on this topic if it did not contain appropriate safeguards.

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

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

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

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

A bill to be entitled

An act relating to Physician Orders for Life Sustaining Treatment (POLST), amending ss. 395.1041, 400.142, and 400.487, F.S.; authorizing specified personnel to withhold or withdraw cardiopulmonary resuscitation if a patient has a POLST form that contains such an order; providing immunity from civil and criminal liability to such personnel for such actions; providing that the absence of a POLST form does not preclude a physician from withholding or withdrawing cardiopulmonary resuscitation; amending s. 400.605, F.S.; requiring the Department of Elder Affairs, in consultation with the ACHA, to adopt by rule procedures for the implementation of POLST forms in hospice care; amending s. 400.6095, F.S.; authorizing a hospice care team to withhold or withdraw cardiopulmonary resuscitation if a patient has a POLST form that contains such an order; providing immunity from civil and criminal liability to a provider for such actions; providing that the absence of a POLST form does not preclude a physician from withholding or withdrawing cardiopulmonary resuscitation; amending s. 401.35, F.S.; requiring the Department of Health to establish circumstances and procedures for honoring a POLST form; amending s. 401.45, authorizing resuscitation to be withheld based upon Physician Orders for Life Sustaining Treatment (POLST), creating s. 401.46, recognizing POLST and establishing requirements for the execution of POLST, establishing requirements for POLST forms, amending s. 429.255, F.S.; authorizing assisted living facility personnel to withhold or withdraw cardiopulmonary resuscitation if a patient has a POLST form that contains such an order;

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providing immunity from civil and criminal liability to facility staff and facilities for such actions; providing that the absence of a POLST form does not preclude a physician from withholding or withdrawing cardiopulmonary resuscitation; amending s. 429.73, F.S.; requiring the Department of Elder Affairs to adopt rules for the implementation of POLST forms in adult family-care homes; authorizing a provider of such home to withhold or withdraw cardiopulmonary resuscitation if a patient has a POLST form that contains such an order; providing immunity from civil and criminal liability to a provider for such actions; amending s. 765.205, F.S.; requiring a health care surrogate to provide written consent for a POLST form under certain circumstances; amending s. 456.072, F.S.; providing that a licensee may withhold or withdraw cardiopulmonary resuscitation or the use of an external defibrillator if presented with an order not to resuscitate or a POLST; requiring the Department of Health to adopt rules providing for the implementation of such orders; providing immunity to licensees for withholding or withholding cardiopulmonary resuscitation or use of an automated defibrillator pursuant to such orders; providing an effective date.

Be it enacted by the Legislature of the State of Florida:

Section 1. Paragraph (l) of subsection (3) of section 395.1041, Florida Statutes, is amended to read:

395.1041 Access to emergency services and care.—

(3) EMERGENCY SERVICES; DISCRIMINATION; LIABILITY OF FACILITY OR HEALTH CARE PERSONNEL.—

(l) Hospital personnel may withhold or withdraw cardiopulmonary resuscitation if presented with an order not to

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resuscitate executed pursuant to s. 401.45 or a physician order for life-sustaining treatment (POLST) form executed pursuant to s. 401.46 which contains an order not to resuscitate. Facility staff and facilities shall not be subject to criminal prosecution or civil liability, nor be considered to have engaged in negligent or unprofessional conduct, for withholding or withdrawing cardiopulmonary resuscitation pursuant to such an order or POLST form. The absence of an order not to resuscitate executed pursuant to s. 401.45 or a POLST form executed pursuant to s. 401.46 does not preclude a physician from withholding or withdrawing cardiopulmonary resuscitation as otherwise allowed ~~permitted~~ by law.

Section 2. Subsection (3) of section 400.142, Florida Statutes, is amended to read:

400.142 Emergency medication kits; orders not to resuscitate.—

(3) Facility staff may withhold or withdraw cardiopulmonary resuscitation if presented with an order not to resuscitate executed pursuant to s. 401.45 or a physician order for life-sustaining treatment (POLST) form executed pursuant to s. 401.46 which contains an order not to resuscitate. Facility staff and facilities are not subject to criminal prosecution or civil liability, or considered to have engaged in negligent or unprofessional conduct, for withholding or withdrawing cardiopulmonary resuscitation pursuant to such an order or POLST form. The absence of an order not to resuscitate executed pursuant to s. 401.45 or a POLST form executed pursuant to s. 401.46 does not preclude a physician from withholding or withdrawing cardiopulmonary resuscitation as otherwise allowed ~~permitted~~ by law.

Section 3. Subsection (7) of Section 400.487, Florida Statutes, is amended to read:

400.487 Home health service agreements; physician's,

physician assistant's, and advanced registered nurse practitioner's treatment orders; patient assessment; establishment and review of plan of care; provision of services; orders not to resuscitate; physician orders for life-sustaining treatment.—

(7) Home health agency personnel may withhold or withdraw cardiopulmonary resuscitation if presented with an order not to resuscitate executed pursuant to s. 401.45 or a physician order for life-sustaining treatment (POLST) form executed pursuant to s. 401.46 which contains an order not to resuscitate. The agency shall adopt rules providing for the implementation of such orders. Home health personnel and agencies shall not be subject to criminal prosecution or civil liability, nor be considered to have engaged in negligent or unprofessional conduct, for withholding or withdrawing cardiopulmonary resuscitation pursuant to such an order or POLST form and rules adopted by the agency.

Section 4. Paragraph (e) of subsection (1) of section 400.605, Florida Statutes, is amended to read:

400.605 Administration; forms; fees; rules; inspections; fines.—

(1) The agency, in consultation with the department, may adopt rules to administer the requirements of part II of chapter 408. The department, in consultation with the agency, shall by rule establish minimum standards and procedures for a hospice pursuant to this part. The rules must include:

(e) Procedures relating to the implementation of advance ~~advanced~~ directives; physician orders for life-sustaining treatment (POLST) forms executed pursuant to s. 401.46; and do-not-resuscitate orders.

Section 5. Subsection (8) of section 400.6095, Florida Statutes, is amended to read:

400.6095 Patient admission; assessment; plan of care; discharge; death.—

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(8) The hospice care team may withhold or withdraw cardiopulmonary resuscitation if presented with an order not to resuscitate executed pursuant to s. 401.45 or a physician order for life-sustaining treatment (POLST) form executed pursuant to s. 401.46 which contains an order not to resuscitate. The department shall adopt rules providing for the implementation of such orders. Hospice staff shall not be subject to criminal prosecution or civil liability, nor be considered to have engaged in negligent or unprofessional conduct, for withholding or withdrawing cardiopulmonary resuscitation pursuant to such an order or POLST form and applicable rules. The absence of an order to resuscitate executed pursuant to s. 401.45 or a POLST form executed pursuant to s. 401.46 does not preclude a physician from withholding or withdrawing cardiopulmonary resuscitation as otherwise allowed ~~permitted~~ by law.

Section 6. Subsection (4) of section 401.35, Florida Statutes, is amended to read:

401.35 Rules.—The department shall adopt rules, including definitions of terms, necessary to carry out the purposes of this part.

(4) The rules must establish circumstances and procedures under which emergency medical technicians and paramedics may honor orders by the patient's physician not to resuscitate executed pursuant to 401.45 or under a physician order for life-sustaining treatment (POLST) form executed pursuant to s. 401.46 which contains an order not to resuscitate and the documentation and reporting requirements for handling such requests.

Section 7. Paragraph (a) of Subsection (3) of Section 401.45 is amended to read as follows:

401.45 Denial of emergency treatment; civil liability.—

(3)(a) Resuscitation or other forms of medical intervention may be withheld or withdrawn from a patient by an emergency medical technician, paramedic, or other medical personnel if

evidence of a Physician Order for Life-Sustaining Treatment (POLST), as defined in Section 401.46 or an order not to resuscitate by the patient's physician is presented to that professional. To be valid, an order not to resuscitate, must be on the form adopted by rule of the department. The form must be signed by the patient's physician and by the patient or, if the patient is incapacitated, the patient's health care surrogate or proxy as provided in chapter 765, court-appointed guardian as provided in chapter 744, or attorney in fact under a durable power of attorney as provided in chapter 709. The court-appointed guardian or attorney in fact must have been delegated authority to make health care decisions on behalf of the patient.

Section 8. Section 401.46 is created to read as follows:

401.46 Physician Order for Life Sustaining Treatment.-

(1) POLST form. Physician Order for Life Sustaining Treatment ("POLST") must be on the form adopted by rule of the department which includes the statutory requirements and must be executed as required by this section.

(a) A POLST form may only be utilized by or for a patient determined by the patient's physician to have an end-stage condition as defined in s. 765.101(4) or a patient, who, in the good faith clinical judgment of his or her physician, is suffering from at least one terminal medical condition that will likely result in the death of the patient within one year.

(b) A POLST form must be signed by the patient's physician. The POLST form must contain a certification by the physician signing the POLST that the physician consulted with the patient signing the POLST, or if the patient is incapable of making health care decisions for herself or himself or is incapacitated, with the patient's health care surrogate, proxy, court appointed guardian or attorney-in-fact permitted to execute a POLST form on behalf of the patient as provided in section (c), about the patient's care goals and preferences selected as reflected on the

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POLST, specifically including the use of and the effect of removal or refusal of life sustaining medical treatment. The physician signing the POLST must further indicate the medical circumstance justifying the execution of the POLST.

(c) A POLST form must also be signed by the patient, or if the patient is incapable of making health care decisions for herself or himself or is incapacitated, by the patient's surrogate or proxy, as appointed or provided in Chapter 765, or if none, by the patient's court appointed guardian if the guardian has such authority, as appointed or provided in Chapter 744, or if none, by the patient's attorney-in-fact if the patient has delegated the power to make all health care decisions to the attorney-in-fact, as appointed or provided in Chapter 709. If a POLST form is signed by a health care surrogate, proxy, court appointed guardian or attorney-in-fact, the patient's physician must certify the basis for the authority of the appropriate individual to execute the POLST form on behalf of the patient including compliance with the relevant statutory provisions of Chapter 765, Chapter 744 or Chapter 709.

(d) Any subsequently executed POLST form by the patient shall revoke any prior executed POLST form by the patient.

(e) A patient's health care surrogate, proxy, court appointed guardian or attorney-in-fact permitted to execute a POLST form on behalf of a patient as provided in section (c) may subsequently revoke a POLST form for a patient, unless a valid advance directive or prior POLST form executed by the patient expressly forbids changes by a surrogate, proxy, guardian or attorney-in-fact.

(f) An individual acting in good faith as surrogate, proxy, court appointed guardian, or attorney-in-fact under this act shall not be subject to civil liability or criminal prosecution for executing or acting in compliance with a POLST form as provided in this act on behalf of a patient who lacks capacity.

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(g) The patient's family, the health care facility, or the attending physician, or any other interested person who may reasonably be expected to be directly affected by the decisions as reflected on a POLST form may seek expedited judicial intervention pursuant to Rule 5.900 of the Florida Probate Rules, if that person believes:

(i) The POLST form regarding the patients' wishes regarding life sustaining treatment is ambiguous or the patient has changed his or her mind after execution of the advance directive or POLST form;

(ii) The POLST was executed by a surrogate, proxy, court appointed guardian, or attorney-in-fact permitted to execute a POLST form on behalf of a patient as provided in section (c) and the POLST is not in accord with the patient's known desires or the provisions of chapter 765, chapter 744, or chapter 709;

(ii) The POLST was executed by a surrogate, proxy, or attorney-in-fact on behalf of a patient as provided in section (c) and the surrogate, proxy or attorney-in-fact was improperly designated or appointed, or the designation of the surrogate, proxy or attorney-in-fact is no longer effective or has been removed;

(iv) The surrogate, proxy, court appointed guardian, or attorney-in-fact who executed the POLST form on behalf of the patient as provided in section (c) has failed to discharge her or his duties, or incapacity or illness renders her or him incapable of discharging those duties;

(v) The POLST was executed by surrogate, proxy, court appointed guardian, or attorney-in-fact permitted to execute a POLST form on behalf of a patient as provided in section (c) who has abused her or his powers; or

(vi) The patient has sufficient capacity to make her or his own health care decisions.

(2) Duties of the Department. The department shall

implement the POLST program.

(a) The department shall promulgate rules implementing this section and prescribing a standardized POLST form, subject to the following:

(i) The rules shall contain protocols for the implementation of a standardized POLST form, which shall be available in electronic format on the department website for downloading by patients and health care providers;

(ii) The department in formulating rules and forms shall consult with health care professional licensing groups, provider advocacy groups, patient advocacy groups, medical ethicists and other appropriate stakeholders;

(iii) To the extent possible, the standardized POLST form and protocols shall be consistent with use across all health care settings and shall reflect nationally recognized standards for end-of-life care. The form shall include, in addition to the requirements in subsection (1), the following: (A) The patient's directives concerning (1) the administration of life sustaining treatment, (2) the administration of measures to relieve pain and suffering through the use of medication , wound care and related measures, and (3) the ability to transfer the patient to a setting able to provide comfort care, such as a hospice or palliative care; and (B) a statement in a prominent manner that if the patient has capacity to make decisions, the patient's presently expressed health-care treatment decisions shall guide such patient's treatment, even if in conflict with the written POLST form. The form shall not include a direction regarding hydration, as decisions to supply or withhold hydration may not be made on the POLST form, but may only be made in the context of a patient's actual condition at the time of such a decision.

(b) The department in implementing this article shall:

(i) Recommend a uniform method of identifying persons who have executed a POLST form and providing health care providers

with contact information of the person's primary health care provider;

(ii) Oversee the education of health care providers regarding the POLST program under the department's licensing authority;

(iii) Develop a process for collecting provider feedback to enable periodic redesign of the POLST form in accordance with current health care best practices.

(c) The department shall adopt and enforce all rules necessary to implement this section.

(3) Duty to comply with POLST; duty to comply with out-of-state POLST; and limited immunity.

(a) Emergency medical service personnel, health care providers, physicians and health care facilities, absent actual notice of revocation or termination of a POLST form, may comply with the orders on a person's POLST form, without regard to whether the POLST ordering provider is on the medical staff of the treating health care facility. If the POLST ordering provider is not on the medical staff of the treating health care facility, the POLST form shall be reviewed by the treating health care professional at the receiving facility with the patient (or the patient's health care surrogate, proxy, court appointed guardian, or attorney-in-fact permitted to execute a POLST form on behalf of a patient as provided in section 1(c)) and made into a medical order at the receiving facility unless, the POLST form is replaced or voided as provided in this act.

(b) A POLST form from another state, absent actual notice of revocation or termination, shall be presumed to be valid and shall be effective in this state and shall be complied with to the same extent as a POLST form executed in this state.

(c) Any licensee, physician, medical director, or emergency medical technician or paramedic who acts in good faith on a POLST is not subject to criminal prosecution or civil liability, and

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has not engaged in negligent or unprofessional conduct, as a result of carrying out the directives of the POLST made in accordance with the provisions of this section and rules adopted by the department.

(4) Patient Transfer; POLST transferability. If a patient whose goals and preferences for care have been entered on a valid POLST form is transferred from one health care facility to another, the health care facility initiating the transfer shall communicate the existence of the POLST form to the receiving facility prior to the transfer. The POLST form shall accompany the individual to the receiving facility and shall remain in effect. The POLST form shall be reviewed by the treating health care professional at the receiving facility with the patient (or the patient's health care surrogate, proxy, court appointed guardian or attorney-in-fact permitted to execute a POLST form on behalf of a patient as provided in section 1(c)) and made into a medical order at the receiving facility, unless the POLST form is replaced or voided as provided in this act.

(5) POLST conflicts with other advance directives. To the extent that the orders on a POLST form described in this section conflict with the provisions of an advance directive made under chapter 765, the most recent of those documents (a POLST or an advance directive) signed by the patient takes precedence, unless the patient lacks capacity to make such medical decisions and the patient's health care surrogate, proxy, court appointed guardian or attorney-in-fact permitted to execute a POLST form on behalf of a patient as provided in section 1(c) believes it is consistent with the wishes of the patient to alter the most recent of those documents, in which case the patient's health care surrogate, proxy, court appointed guardian or attorney-in-fact permitted to execute a POLST form on behalf of a patient as provided in section 1(c) may amend or revoke a prior POLST form or execute a new POLST form, unless a valid advance directive or

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prior POLST form executed by the patient expressly forbids changes by a surrogate, proxy, guardian or attorney-in-fact.

(6) POLST for minors. If medical orders on a POLST form relate to a minor and direct that life sustaining treatment be withheld from the minor, the order shall include a certification by two (2) health care providers (in addition to the physician executing the POLST) that, in their clinical judgment, an order to withhold treatment is in the best interests of the minor. Any POLST for a minor must also be signed by the minor's proxy, natural guardian or court appointed guardian, and the patient's physician must certify the basis for the authority of the appropriate individual to execute the POLST form on behalf of the patient including compliance with the relevant statutory provisions of Chapter 765 or Chapter 744.

(7) POLST form may not be a prerequisite for services. Facilities or providers shall not require a person to complete a POLST form as a prerequisite or condition for the provision of services or treatment. The execution of a POLST form must be a voluntary decision.

(8) Presence or absence of POLST form; effect on contract of life or health insurance or annuity. An individual's execution of or refusal or failure to execute a POLST form shall not affect, impair or modify any contract of life or health insurance or annuity to which the individual is a party, shall not be the basis for any delay in issuing or refusing to issue an annuity or policy of life or health insurance and shall not be the basis for any increase or decrease in premium charged to the individual.

(9) Revocation of POLST form.

(a) A POLST form may be revoked at any time by a patient deemed to have capacity:

(i) By means of a signed, dated writing;

(ii) By means of the physical cancellation or destruction of the POLST form by the patient or by another in the patient's

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presence and at the patient's direction;

(iii) By means of an oral expression of intent to revoke; or

(iv) By means of a subsequently executed POLST or advance directive that is materially different from a previously executed POLST or advance directive.

(b) A surrogate, proxy, court appointed guardian or attorney-in-fact permitted to execute a POLST form on behalf of a patient as provided in section 1(c), who created a POLST form for a patient, may revoke a POLST form at any time in a writing signed by such surrogate, proxy, court appointed guardian or attorney-in-fact.

(c) Any revocation of a POLST shall be promptly communicated to the patient's primary health care provider, primary physician and any health care facility at which the patient is receiving care. Further, a health care professional, surrogate, agent, proxy or guardian who is informed of the revocation of a POLST shall promptly communicate the fact of the revocation to the patient's primary care physician, the current supervising health care professional and any health care facility at which the patient is receiving care, to the extent known to the surrogate, proxy, court appointed guardian or attorney-in-fact.

(d) Upon revocation, a POLST form shall be void. A POLST form may only be revoked in its entirety. A partial revocation of a POLST form renders the entirety of the POLST form void.

(10) Effect of act on euthanasia; mercy killing; construction of statute. Nothing is this section shall be construed as condoning, authorizing or approving euthanasia or mercy killing. In addition, the legislature does not intend that this article be construed as permitting any affirmative or deliberate act to end a person's life, except to permit natural death as provided by this section.

Section 9. Subsection (4) of section 429.255, Florida

Statutes, is amended to read:

429.255 Use of personnel; emergency care.—

(4) Facility staff may withhold or withdraw cardiopulmonary resuscitation or the use of an automated external defibrillator if presented with an order not to resuscitate executed pursuant to s. 401.45 or a physician order for life-sustaining treatment (POLST) form executed pursuant to s. 401.46 which contains an order not to resuscitate. The department shall adopt rules providing for the implementation of such orders. Facility staff and facilities shall not be subject to criminal prosecution or civil liability, nor be considered to have engaged in negligent or unprofessional conduct, for withholding or withdrawing cardiopulmonary resuscitation or use of an automated external defibrillator pursuant to such an order or POLST form and rules adopted by the department. The absence of an order to resuscitate executed pursuant to s. 401.45 or a POLST form executed pursuant to s. 401.46 does not preclude a physician from withholding or withdrawing cardiopulmonary resuscitation or use of an automated external defibrillator as otherwise allowed by law

Section 10. Subsection (3) of section 429.73, Florida Statutes, is amended to read:

429.73 Rules and standards relating to adult family-care homes.—

(3) The department shall adopt rules providing for the implementation of orders not to resuscitate and physician orders for life-sustaining treatment (POLST) forms executed pursuant to s. 401.46. The provider may withhold or withdraw cardiopulmonary resuscitation if presented with an order not to resuscitate executed pursuant to s. 401.45 or a POLST form executed pursuant to s. 401.46 which contains an order not to resuscitate. The provider is ~~shall~~ not ~~be~~ subject to criminal prosecution or civil liability, and may not ~~nor~~ be considered to have engaged in negligent or unprofessional conduct, for withholding or

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withdrawing cardiopulmonary resuscitation pursuant to such orders ~~an order~~ and applicable rules.

Section 11. Subsections (7) and (8) of section 456.072, Florida Statutes, are renumbered as subsections (8) and (9), respectively, and subsection (7) is added to that section, to read:

456.072 Grounds for discipline; penalties; enforcement.—

(7) A licensee may withhold or withdraw cardiopulmonary resuscitation or the use of an automated external defibrillator if presented with an order not to resuscitate executed pursuant to s. 401.45 or a physician order for life-sustaining treatment (POLST) form executed pursuant to s. 401.46 which contains an order not to resuscitate. The department shall adopt rules providing for the implementation of such orders. Licensees shall not be subject to criminal prosecution or civil liability, nor be considered to have engaged in negligent or unprofessional conduct, for withholding or withdrawing cardiopulmonary resuscitation or use of an automated external defibrillator or otherwise carrying out the orders in a POLST form pursuant to such an order or POLST form and rules adopted by the department. The absence of an order to resuscitate executed pursuant to s. 401.45 or a POLST form executed pursuant to s. 401.46 does not preclude a licensee from withholding or withdrawing cardiopulmonary resuscitation or use of an automated external defibrillator or otherwise carrying out medical orders as otherwise allowed by law.

Section 12. Paragraph (c) of subsection (1) of section 765.205, Florida Statutes, is amended to read:

765.205 Responsibility of the surrogate.—

(1) The surrogate, in accordance with the principal's instructions, unless such authority has been expressly limited by the principal, shall:

(c) Provide written consent using an appropriate form

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whenever consent is required, including a physician's order not to resuscitate or a physician order for life-sustaining treatment (POLST) form executed pursuant to s. 401.46.

Section 12. This act shall take effect July 1, 2017.

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WHITE PAPER

PROPOSED LEGISLATION REGARDING PHYSICIAN ORDERS FOR LIFE-SUSTAINING TREATMENT

I. SUMMARY ON POLST

Physician orders for life sustaining treatment, or POLST, is a movement that began about a decade ago in Oregon. POLST is intended to be a complement to an advanced directive. A POLST combines a do not resuscitate order, or DNRO, and an advanced directive on an immediately effective physician's order thereby giving patients a tool to document medical preferences. A POLST is distinguishable from what is known as the current living will under Chapter 765, Florida Statutes in that POLST orders are not advanced directives but are rather medical orders and therefore travel with the patient across facilities. Under the parameters of the POLST paradigm, the POLST form (and for POLST to actually be effective) it must be recognized by all physicians at all facilities, regardless of where the form was originally completed. POLST is intended to encourage open conversations between physicians and their patients about end of life care and give patients a method to better express self-determination. The POLST paradigm calls on non-physician healthcare personnel (e.g. nurses, social workers, chaplains, admissions coordinators, nursing home administration) to initiate advance care planning discussions with patients or their surrogates. These "facilitators" act as frontline implementers of the POLST paradigm. The Gunderson Lutheran Medical Center in La Crosse, Wisconsin, runs a nationally recognized training program for POLST facilitators, which program is known as The Respecting Choices program. Gunderson has operated since the early 1990s providing a special training curriculum for non-physicians to become certified POLST facilitators. Completed forms can then be submitted to the clinicians for signature, and many statutes that have implemented a POLST statute, including Florida's proposed statute, require the clinicians to engage in a discussion with the patient, or the patient's health care surrogate or health proxy, to ensure that the patient understands his/her options, that he/she is making informed decisions regarding end of life treatment and that it is the self-determination and decision of the patient, or the surrogate/proxy on his/her behalf, that is being ordered by the clinician.

The incentive behind the POLST movement is the reality that not enough patients have living wills, health care surrogates or advance directives. Also, for those patients that are terminally ill or in an end stage condition, living wills are often either too general or too fact specific and therefore of little use to physicians that are being asked by the surrogate to implement the directives as written. End of life directives involve decisions that affect how medical care is provided or withheld and therefore, in many cases where the patient's medical condition is already volatile and changing by the day, discussions on end of life care should be taking place with the patient's medical team, not a lawyer's office. The proposed Florida POLST statute is drafted to work hand in hand with Chapter 765 and to resolve any potential conflicts between a patient's advance directive and his/her POLST.

II. CURRENT LAW

An individual in Florida has the constitutional right to dictate the terms of his medical care while the individual has the mental capacity required to understand those decisions. In re: Guardianship of Browning, 568 So. 2d 4, 10 (Fla. 1990). Upon the loss of capacity to make medical decisions, Florida law provides for a number of avenues under which a patient's proxy, either designated by the patient or through statute, can act in the patient's stead. These methods

include the use of a Health Care Surrogate (Fla. Stat. §§ 765.201-765.205), the use of a Living Will (Fla. Stat. §§ 765.301-765.309), the use of a Power of Attorney (Fla. Stat. Ch. 709), the designation of a Health Care Proxy (Fla. Stat. §§ 765.401-765.404), and through the appointment of a Guardian of the Person (Fla. Stat. Ch. 744). Each of these methods is detailed further below along with an overview of Florida's current law on do-not-resuscitate orders (Fla. Stat. § 401.45). Florida does not currently have a POLST statute nor does it recognize the validity of these documents from other jurisdictions.

Health Care Surrogate – Florida Statutes Chapter 765 Part II – Florida Statutes § 765.202 allows an individual to designate a person to make medical decisions on behalf of the individual. Prior to 2015, a health care surrogate's authority went into effect only upon the principal's loss of capacity. However, Florida law now allows for a surrogate's power to immediately take effect if so designated in the health care surrogate document, nonetheless the directions of a principal with capacity always overrides the directions of a surrogate. Fla. Stat. § 765.202. In making medical decisions, the health care surrogate is required to follow the instructions of the principal first, and then in the absence of instruction, to make health care decisions for the individual which the surrogate believes the principal would have made under the circumstances if the principal was capable of making the decision. Fla. Stat. § 765.205.

Under 765.101, "Advance directive" means a witnessed written document or oral statement in which instructions are given by a principal or in which the principal's desires are expressed concerning any aspect of the principal's health care or health information, and includes, but is not limited to, the designation of a health care surrogate, a living will, or an anatomical gift made pursuant to part V of this chapter.

Florida statutes § 765.203 provides a suggested form for designation of a health care surrogate. If in writing, the designation of health care surrogate should be signed by the principal in the presence of two subscribing adult witnesses. An exact copy of the instrument is then required to be presented to the surrogate.

Living Will – Florida Statutes Chapter 765 Part III – A "Living Will" is a written or oral declaration directing the providing, withholding, or withdrawal of life-prolonging procedures in the event that the principal has a terminal condition, has an end-stage condition, or is in a persistent vegetative state. Fla. Stat. § 765.302. A Living Will is required to be made by the principal in the presence of two subscribing witnesses, one of whom is neither a spouse nor a blood relative of the principal. Id. A written Living Will must be signed by the principal. A properly executed living will establishes a rebuttable presumption of clear and convincing evidence of the principal's wishes.

Florida Statutes § 765.304 lays out the procedures for the implementation of a principal's living will directions. If a health care surrogate has been designated by the principal under Fla. Stat. Ch. 765 Part II, it is the responsibility of the surrogate to make decisions consistent with the directions laid out in the living will. Fla. Stat. § 765.205. If a surrogate has not been designated, the attending physician may proceed as directed in the living will. Fla. Stat. § 765.304. In the event of a disagreement on the proper course of action between the living will and the attending physician, a dispute procedure is laid out in the statute. Id. The Living Will's directions are not

required to be followed until it has been determined that (a) the principal does not have a reasonable medical probability of recovering capacity to exercise his rights personally, (b) the principal has a terminal condition, has an end-stage condition, or is in a persistent vegetative state, and (c) any limitations expressed orally or in a written declaration have been carefully considered and satisfied. Id. The statute specifically notes that these statutes are not to be interpreted to condone mercy killing or euthanasia. Fla. Stat. § 765.309.

Power of Attorney – Florida Statutes Chapter 709 – While a durable power of attorney is historically thought of in the realm of property rights, Florida Statutes § 709.2201 does allow for the granting of a health care decision making powers to an attorney-in-fact. Under this statute, an attorney-in-fact, if so given the authority under the power of attorney, may "make all health care decisions on behalf of the principal, including, but not limited to, those set forth in chapter 765." Id. The required formalities for execution of a power of attorney are a written document which is signed by the principal and two subscribing witnesses and acknowledged by the principal before a notary public.

Health Care Proxy – Florida Statutes Chapter 765 Part IV – In the absence of an effective advance directive, healthcare surrogate, or power of attorney with health care decision making powers, Florida Statutes § 765.401 provides a hierarchy of decision makers to act on behalf of an incapacitated or developmentally disabled patient. The hierarchy provided under the statute is as follows: (a) a court appointed guardian, (b) the patient's spouse, (c) an adult child of the patient or a majority of the adult children available for consultation, (d) a parent of the patient, (e) the adult sibling of the patient or a majority of the adult siblings available for consultation, (f) an adult relative of the patient who exhibits special care, maintains contact with the patient, and is familiar with the patient's beliefs, (g) a close friend of the patient, or (h) a clinical social worker. Any healthcare decisions made by a proxy are to be under the guise of what the patient would have decided under the circumstances. Fla. Stat. § 765.401(2).

Guardian of the Person – Florida Statutes Chapter 744 – A court appointed guardian may be delegated the authority to make health care decisions on behalf of an incapacitated ward. Fla. Stat. § 744.3215(3). Prior to delegation to a guardian, the Court is required to review whether there is a reasonable alternative to guardianship to exercise any rights which the ward is incapable of exercising; such alternatives may include a power of attorney and healthcare surrogate designation. Fla. Stat. § 744.331(6). If a suitable alternative is available, the Court is not to appoint a guardian to exercise any powers adequately addressed by the alternative. A guardian is required to comply with any advance directives executed by the Ward, including a living will, and is further required to utilize the substituted judgment standard in any healthcare decisions made on behalf of the ward. Fla. Stat. § 765.401(2).

Do-Not-Resuscitate Orders – Florida Statutes § 401.45 – Resuscitation may be withheld or withdrawn from a patient by an emergency medical technician or paramedic upon presentation of an order not to resuscitate by the patient's physician. An order not to resuscitate must be on the form adopted by rule of the Department of Health, must be signed by the patient's physician, and must be signed by either the patient or, if the patient is incapacitated, the patient's surrogate, proxy, guardian, or attorney-in-fact. Any licensee, physician, medical director, emergency

medical technician, or paramedic who in good faith withholds or withdraws treatment in compliance with § 401.45 is not subject to criminal prosecution or civil liability.

III. EXPRESSED CONCERNS WITH THE USE OF POLST

To fully understand the background of POLST, one must begin with an understanding of the current law in Florida as it applies to advance directives and, from there, dive into the different concerns raised by interested groups. Florida law clearly preserves a patient's right to privacy by allowing any competent individual to choose or refuse medical treatment under the theory of self-determination and for those wishes to be carried out by a designated surrogate or statutory proxy if the patient later becomes incompetent. The relevant portions of Chapter 765 can be summarized as follows:

Chapter 765 of the Florida Statutes provides detailed provisions for the creation of advance directives. Advance directives are intended to document a patient's desires as to medical procedures and treatment. The most common advance directive is a living will, which by statute applies to life prolonging procedures in the event that the person has a terminal condition, has an end stage condition or is in a persistent vegetative state. Other advance directives are, however, contemplated and may be created by a competent individual to document a patient's desires of the administration of other medical procedures under common law rights. Advance directives under Florida law can be oral or written. Florida law also provides for do not resuscitate orders directing physicians and emergency personal to withhold CPR under F.S. 401.45. A POLST order could also, in the appropriate circumstances, be utilized under our current existing law, under Section 765.304, Florida Statutes, where there is a living will but no surrogate is appointed. Under such circumstances, the principal's primary physician may proceed as directed by the principal in the living will.

As detailed more fully in the prior section, current Florida law, under Section 765.102, provides for collaboration between the patient, physicians, health care professionals and the patient's family, and the appointed surrogate or health care proxy. The POLST movement, ideally, is the culmination of this effort, already supported by Florida's public policy in this area. By way of example, Chapter 765 already establishes the parameters for such collaboration, and POLST is only an extension of this effort, which is intended to empower patients by having better communication with treating medical professionals and providing the patient and the medical facilities with more access to medical information so that the patient can make informed decisions with regard to his/her medical care. In summary, Florida law already provides as follows:

- Chapter 765 provides for the appointment of a surrogate to carry out the patient's wishes and the appointment of a statutory proxy in the absence of a surrogate designation. Our common law (and our statutes) clearly direct and require the surrogate (and statutory proxy) to follow the instructions of the patient as to medical choices that the patient would have made if competent.

- Chapter 765 requires every health care facility to provide patients with written information about self-determination, advance directive and palliative care.

- Chapter 765 provides a detailed procedure to provide for any interested person or facility to seek expedited judicial intervention to contest the decision of a health care surrogate or statutory proxy who refuses to carry out the wishes of the patient.

- Chapter 765 requires physicians to discuss palliative care and pain management with the patient along with diagnosis and planned course of treatment, the alternatives, risks or prognosis of the illness.

Clearly the public policy in Florida which is codified under Section 765.102, Florida Statutes, contemplates the collaboration among the medical profession, the patient, and those interested on the patient's behalf. This is all in an effort to protect a competent adult's fundamental right to self-determination regarding his/her own healthcare. This right is counterbalanced or subject to certain interests of society, such as the protection of human life and the preservation of ethical standards in the medical profession.

Certainly, a physician order on life sustaining treatment should not be a substitute for the principal's own direction in this regard. The principal/patient must be able to arrive at his/her own decision regarding life sustaining treatment, which decision is unbiased and made with sufficient clinical information to effectuate informed consent. As such, scholars and professionals studying POLST have come up with various questions and ways to improve the POLST paradigm, which improvements are now being implemented into some of the recently drafted POLST legislations throughout the country. Some of these questions or improvements involve whether POLST should be confined to the responsibility of the physician and not the "facilitators," or assisting healthcare professionals. Although the use of facilitators promotes efficiency of the POLST process[1], some parties argue the use of facilitators marginalizes the role of physicians such that those other than physicians are making decisions that have life and death implications. One study found that even in states where POLST statutes require a physician signature, 72 percent of the POLST forms of nursing home residents were completed by facilitators. As such, physician participation, which may include a signing requirement by the physician, may still be less than thorough. New statutory schemes are coming up with ways to ensure a more thorough review by the physician signing the POLST. Many POLST statutes, more recently drafted, require a physician to verify the choices made and the process used to communicate these choices to the patient. Nonetheless, it is evident from the research on POLST that significant efficiencies have been recorded at the end of life stage through the use of POLST facilitator programs.[2]

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[1] *See* FN 51 of Brugger et al., *The POLST paradigm and form: Facts and analysis,* The Linacre Quarterly, 80 (2) 2013, 103-138 at 117: Facilitators increase utilization of advance directives in a given community: This was first demonstrated in 1991 in Wisconsin, where advance directive completion increased from 15 to 85% (Hammes and Rooney 1998); the effect was confirmed in a randomized control trial in Melbourne, Australia in 2010, where 84% of patients who, receiving advance care planning by "trained non-medical facilitators" (based upon the Respecting Patient Choices model, La Crosse, Wisconsin), completed advance directives, compared with 30% in the non-facilitator control group (see Detering et al. 2010).

[2] Brugger et al., *The POLST paradigm and form: Facts and analysis,* The Linacre Quarterly, 80 (2) 2013, 103-138 at 118

Another perceived problem is getting professionals in this arena to agree on a POLST form that is uniform and accessible by all health care professionals. Opponents of POLST argue that the POLST forms, mandated by many POLST statute states, are biased toward non-treatment and seek to create an off-the-shelf clinical care model for addressing potential end of life scenarios. For example, the Wisconsin POLST form requires a patient to choose between "aggressive" "limited" or "comfort" measures, however, there is no option for "full treatment." "Aggressive measures" are defined as "endotracheal intubation, advanced airway, and cardioversion/automatic defibrillation." The Washington state POLST form adds a fourth option, "use antibiotics if life can be prolonged." Does the term "prolonged" have negative implications and should more neutral language be used, like: "use antibiotics if medically available to treat the ailment."[3]

Another concerns is with when POLST is appropriate for a patient. Although many people think of POLST as being intended for those that are in a terminally ill state or end of life state, some state laws around POLST do not indicate such restriction or limitation. In fact POLST model legislation annuls the requirement that a patient must be terminally ill before he or she may direct the withholding or withdrawal of life sustaining treatments. It is worth noting that the history behind the state laws that introduced living wills into common use in the 1980s limited the rightful use and execution of refusal orders to patients who, according to the judgment of two physicians, suffered from a "terminal condition" or were in a state of permanent unconsciousness. Based on that historical backdrop, it is possible that POLST, conceptually, allows a patient, along with the consent or direction of a physician, to refuse life sustaining treatment even when the patient may not be suffering from a terminal or irreversible condition.[4]

In most states the POLST form offers a simple check box list of treatment options. As a result, many opponents of POLST indicate that medical decisions are reduced to over simplified scenarios that do not reflect some of the nuances of actual medical practice. For example, Section A of a POLST form often offers a choice between providing or withholding CPR, applicable specifically when a patient has no pulse and is not breathing. The patient has to choose between rejection or consent of CPR, but what if a patient has no pulse but is breathing or has a pulse but is not breathing, which can occur in a choking victim. In this case, only a simple Heimlich maneuver might be all that is needed, however it is arguable that the healthcare provider is not allowed to use his clinical judgment, but must instead proceed to section B and C of the POLST form. Under B and C, the physician, or healthcare provider, is limited to preselected options that are listed when, in reality, each patient and clinical scenario is unique and personal to the presenting situation at the very moment that action is required by the healthcare provider.

Opponents of POLST argue that medical decisions need to be made in the context of a patient's presenting situation and not reduced to a simple predetermined checklist.[5] Moreover, the POLST design is intended to make POLSTs transferable across care settings. In essence, this

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[3] Brugger et al., *The POLST paradigm and form: Facts and analysis,* The Linacre Quarterly, 80 (2) 2013, 103-138 at 114.
[4] Id. at 113.
[5] Id. at 114.

means that a POLST could be established by one healthcare provider in one setting, then the patient is transferred to a different setting. At that point, is the physician at the new setting required to adhere to the previously determined POLST or is he/she required to reassess the patient under the current setting. Standard procedure would be for the physician at the new setting to write his own orders as to medical treatment after assessing the patient's situation. The notion that POLST is transferrable from one medical facility to another seems to go against this common practice of reassessment by each treating physician confronted with a medical condition he/she needs to act on or a request by the patient that needs to be addressed in view of the patient's current goals and desires.

Finally, if the POLST is transferrable, what if the physician signing the POLST is not on staff at the new facility and therefore has no privileges at the facility such that the POLST is ineffective.[6] The proposed Florida POLST statute addresses this issue by requiring the treating physician at the receiving medical institution to review the POLST form with the patient, or his agent (as defined by the statute and Chapter 765) and turning it into a physician Order at the receiving institution, signed by the treating physician at the receiving institution.

Given the importance of the myriad of issues affecting POLST, it was important that proper study be undertaken and that any proposal address those issues in thoughtful ways to balance the legitimate concerns with the use of POLST as a tool needed by Florida's citizens. To that end, the RPPTL section created an ad hoc committee to conduct a detailed study of Chapter 765 and the benefits and risks of statutory recognition of POLST orders in Florida. In analyzing the problems that exist in end of life planning and what procedural safeguards need to be put in place to assure due process for the citizens of Florida, it has drafted Section 401.46, Florida Statutes, allowing for a Florida POLST paradigm that is intended to work hand in hand with Chapter 765 and 401.45 (DNR statute), and to provide a framework that speaks to resolving many of the concerns associated with POLST to ensure the continued protection of the principal's right to self-determination.

IV. EFFECT OF PROPOSED STATUTORY CHANGE

The proposed statutes provide for the utilization of POLST forms in Florida. The following is a section by section analysis of the effect of the proposed change to Florida Statutes § 401.45 and the proposed new § 401.46, Fla. Stat.:

Section 1. Fla. Stat. § 395.1041. Effect of Proposed Change. The proposed amendment to § 395.1041(3)(l) allows hospital personnel to withhold or withdraw cardiopulmonary resuscitation if presented with a POLST form which contains an order not to resuscitate. This amendment tracks current law regarding orders not to resuscitate executed pursuant to § 401.45.

Section 2. Fla. Stat. § 400.142. Effect of Proposed Change. The proposed amendment to § 400.142(3) allows healthcare facility staff, as defined in § 400.021, to withhold or withdraw cardiopulmonary resuscitation if presented with a POLST form which contains an order not to

[6] Id. at 115.

resuscitate. This amendment tracks current law regarding orders not to resuscitate executed pursuant to § 401.45.

Section 3. Fla. Stat. § 400.487. Effect of Proposed Change. The proposed amendment to § 400.487 allows home health agency personnel, as defined in § 400.462(13), to withhold or withdraw cardiopulmonary resuscitation if presented with a POLST form which contains an order not to resuscitate. This amendment tracks current law regarding orders not to resuscitate executed pursuant to § 401.45.

Section 4. Fla. Stat. § 400.605. Effect of Proposed Change. The proposed amendment to § 400.605(1)(e) requires the Department of Health to establish minimum procedures for a hospice to implement POLST forms. POLST forms are being added to subsection (1)(e) which currently requires the Department of Health to establish minimum procedures for a hospice to implement advance directives and do-not-resuscitate orders.

Section 5. Fla. Stat. § 400.6095. Effect of Proposed Change. The proposed amendment to § 400.6095(8) allows hospice care teams, as defined in § 400.601(4), to withhold or withdraw cardiopulmonary resuscitation if presented with a POLST form which contains an order not to resuscitate. This amendment tracks current law regarding orders not to resuscitate executed pursuant to § 401.45.

Section 6. Fla. Stat. § 401.35. Effect of Proposed Change. The proposed amendment to § 401.35(4) requires the Department of Health to establish circumstances and procedures for an emergency medical technician or paramedic not to resuscitate a patient pursuant to a POLST forms and the reporting requirements required for such handling these instances. POLST forms are being added to subsection (4) which currently requires the Department of Health to establish pertains to orders not to resuscitate executed pursuant to § 401.45.

Section 7. Fla. Stat. § 401.45. Effect of Proposed Change. The proposed amendment to § 401.45(3)(a) allows emergency medical technicians, paramedics, or other health care professionals to withhold or withdraw resuscitation or other form of medical intervention pursuant to a POLST form or order not to resuscitate executed pursuant to this section.

Section 8. Fla. Stat. § 401.46. Effect of Proposed Change. The proposed new § 401.46 is the main POLST statute laying out the effect, procedures, and requirements of a POLST form.

Subsection (1) requires that all POLST forms be on the form adopted by rule of the Department of Health and to be executed in compliance with § 401.46.

Proposed subsection (1)(a) states that POLST forms may only be utilized by or for patients suffering from an end-stage condition, as defined in § 765.101(4), or a terminal medical condition that will likely result in the death of the patient within one year.

Proposed subsection (1)(b) requires all POLST forms to be signed by the patient's physician and to contain a physician's consultation certification. This certification will state that the physician consulted with the patient, or with the patient's surrogate, proxy, guardian, or

attorney-in-fact if the patient is incapable of making health decisions, about the use and removal of life sustaining medical treatment. The physician must also indicate the medical circumstance justifying execution of the POLST (i.e. the patient's terminal medical or end-stage condition).

Proposed subsection (1)(c) states that all POLST forms must be signed by the patient, or if the patient is incapable of making health care decisions, by the individual having the authority to execute a POLST on the patient's behalf. If a POLST is signed by someone other than the patient, the patient's physician must certify the basis for the individual's authority to execute the POLST form and must certify compliance with the relevant statutory provisions of Chapter 765, Chapter 744, or Chapter 709.

Proposed subsections (1)(d) and (1)(e) deal with revocation of POLST forms. Subsection (1)(d) states that any executed POLST form automatically revokes all prior POLST forms. Subsection (1)(e) gives an individual having the authority to execute a POLST on the patient's behalf the ability to revoke a POLST form for a patient unless an advance directive or prior POLST form executed by the patient expressly forbids changes by a surrogate, proxy, guardian, or attorney-in-fact.

Proposed subsection (1)(f) releases a surrogate, proxy, guardian, or attorney-in-fact acting in good faith from civil or criminal liability for executing a POLST form in compliance with § 401.46.

A family member of the patient, health care facility, attending physician, or other interested person may seek judicial intervention under proposed subsection (1)(g) with regards to specific subjects relating to the decisions of a surrogate, proxy, guardian, or attorney-in-fact as to a POLST form. Subjects under which a person may seek judicial intervention are listed in subsection (1)(g)(i)-(1)(g)(vi) and include (i) that the POLST form is ambiguous or the patient has changed his mind after execution of the POLST form; (ii) that the decisions of the agent are not in accord with the patient's known desires or the provisions of Florida Statutes Chapters 709, 744, or 765; (iii) the agent permitted to execute a POLST form on the patient's behalf was improperly designated or the designation is no longer effective; (iv) the agent has failed to discharge his duties or is incapable of discharging those duties; (v) the agent has abused his powers; and (vi) the patient has capacity to make his own health care decisions.

Proposed subsection (2) lays out the duties of the Department of Health to implement the POSLT program pursuant to the act. Under proposed subsection (2)(a), the Department of Health is required to create rules for a standardized form subject to the following requirements: (i) the rules must contain protocols for implementation of a standardized POLST form available in electronic format on the Department of Health website; (ii) the Department must consult with the appropriate stakeholders regarding the POLST protocols; (iii) the POLST form shall be consistent across all settings to the extent possible and shall reflect nationally recognized standards for end of life care. Proposed subsection (2)(a)(iii) goes on to require the POLST form to include, in addition to proper execution, (A) the patient's directives concerning life sustaining treatment, measures to relieve pain and suffering, and the ability to transfer the patient to a setting providing comfort care and (B) a prominent statement that if the patient has health care decision-making capacity then the patient's expressions shall guide the patient's treatment even

if in conflict with the POLST. Finally, the POLST form is not permitted to include a direction regarding hydration.

Proposed subsection (2)(b) places additional duties on the Department of Health. The Department of Health is to recommend a uniform method of identifying persons who have executed a POLST form and for providing health care providers with contact information for the person's primary health care provider. The Department of Health is required to oversee the education of health care providers regarding the POLST program. Finally, the Department of Health is required to develop a process for collecting provider feedback on the POLST form.

Proposed subsection (2)(c) states that the Department of Health shall adopt and enforce all rules necessary to implement § 401.46.

Proposed subsection (3) addresses the duty to comply with POLST forms and limited immunity for appropriate compliance. Under this subsection, emergency medical service personnel, health care providers, physicians, and health care facilities may comply with orders on a person's POLST form absent actual notice of revocation or termination of the POLST form. If the POLST ordering provider is not on the medical staff of the treating health care facility, the POLST form is required to be reviewed with the patient, or the patient's appropriate agent, and made into a medical order at the treating facility unless the POLST form is replaced or voided. Proposed subsection (3)(b) presumes valid any POLST forms from another state absent actual notice of revocation or termination and allows compliance with the out-of-state form. Finally, proposed subsection (3)(c) grants immunity from criminal or civil liability to any licensee, physician, medical director, emergency medical technician, or paramedic acting in good faith on a POLST in compliance with this proposed section.

Proposed subsection (4) requires a health care facility initiating a patient transfer to communicate the existence of a POLST form to the receiving facility prior to the transfer. The POLST form is to remain in effect and accompany the patient to the receiving facility where it is to be reviewed at the receiving facility with the patient, or the patient's appropriate agent, and made into a medical order at the receiving facility unless the POLST form is replaced or voided.

Proposed subsection (5) addresses conflicts between a patient's advance directives, giving precedence to the most recently executed document. Pursuant to this subsection a surrogate, proxy, guardian, or attorney-in-fact may still execute a POLST form on behalf of the patient if it is consistent with the patient's wishes to alter the most recently executed document.

Proposed subsection (6) addresses withholding treatment from a minor under a POLST form. In this scenario, the POLST is required to contain a certification by two health care providers that in their clinical judgment the withholding of treatment is in the best interests of the minor. The POLST form must also be executed by the minor's proxy or guardian. The physician must certify the basis for the authority of the individual executing the POLST form on behalf of the minor including compliance with Florida Statutes Chapters 744 or 765.

Proposed subsection (7) clarifies that the execution of a POLST form must be a voluntary decision. Accordingly, the proposed subsection states that a POLST form may not be a prerequisite for services.

Proposed subsection (8) addresses the impact of a POLST form on insurance and annuity contracts. The execution of a POLST form or refusal to execute a POLST form may not affect, impair, or modify any annuity contract, life insurance, or health insurance. Furthermore, the execution or refusal to execute may not be the basis for any delay in issuing or refusing to issue an annuity, life insurance policy, or health insurance policy. Finally, premiums cannot be increased or decreased based on the existence of a POLST form.

Proposed subsection (9) provides guidance on the revocation of a POLST form. Upon revocation, a POLST form is void. A POLST may only be revoked in full, partial revocation is not allowed. A POLST may be revoked by a patient with capacity by (i) signed, dated writing; (ii) physical cancellation or destruction; (iii) oral expression of revocation; or (iv) subsequent execution of another POLST form or advance directive materially different from the POLST form. Subsection (9)(b) specifically notes that a surrogate, proxy, guardian, or attorney-in-fact may revoke all or part of a POLST form created by the agent at any time by signed writing. Finally, proposed subsection (9)(c) requires any revocation to be promptly communicated to the patient's primary health care provider, primary physician, and any health care facility at which the patient is receiving care. Additionally, any health care professional, surrogate, attorney-in-fact, proxy, or guardian informed of an amendment or revocation is required to promptly inform the same entities.

Proposed subsection 10 clarifies that nothing in this section is to be construed as condoning, authorizing, or approving euthanasia or mercy killing. Further this section is not to be construed as permitting any affirmative or deliberate act to end a person's life.

Section 9. Fla. Stat. § 429.255. Effect of Proposed Change. The proposed amendment to § 429.255(4) allows assisted living facility staff, as defined in § 429.02, to withhold or withdraw cardiopulmonary resuscitation or the use of an automated external defibrillator if presented with a POLST form which contains an order not to resuscitate. This amendment tracks current law regarding orders not to resuscitate executed pursuant to § 401.45.

Section 10. Fla. Stat. § 429.73. Effect of Proposed Change. The proposed amendment to § 429.73(3) requires the Department of Elderly Affairs to adopt rules to implement POLST forms. POLST forms are being added to subsection (3) which currently requires the Department of Elderly Affairs to adopt rules for the implementation of orders not to resuscitate executed pursuant to § 401.45.

Section 11. Fla. Stat. § 765.205. Effect of Proposed Change. The proposed amendment to § 765.205(1)(c) includes POLST as a specifically included form which may be executed by a health care surrogate when so required in accordance with the principal's instructions. This amendment tracks current law regarding orders not to resuscitate executed pursuant to § 401.45.

Section 12. Fla. Stat. § 456.072. Effect of Proposed Change. The proposed amendment to § 456.072 inserts a new subsection (7) which provides that a licensee, as defined in § 456.001(6), may withhold or withdraw cardiopulmonary resuscitation or the use of an automated external defibrillator if presented with an order not to resuscitate executed pursuant to § 401.45 or a POLST form which contains an order not to resuscitate.

New subsection (7) also requires the Department of Health to adopt rules providing for the implementation of orders not to resuscitate and POLST forms. It further provides that licensees are not subject to criminal or civil liability for carrying out the orders in a POLST form pursuant to the form and rules adopted by the Department of Health. Finally, new subsection 7 confirms that it does not preclude a licensee from acting as otherwise allowed by law.

The proposed amendment also renumbers current subsection (7) as subsection (8) and current subsection (8) as subsection (9).

Section 13. The Effective date of this act is contemplated to be July 1, 2017.

V. FISCAL IMPACT ON STATE AND LOCAL GOVERNMENTS

The Department of Health is required to oversee the POLST program and to promulgate rules concerning the use of POLST forms throughout the state. Initially, the Department of Health will be required to form a workgroup to promulgate the rules. The Department is further required, after initial drafting of the rules, to continue oversight of the POLST program and to make intermittent improvements to the POLST procedures based on feedback from medical professionals. The cost associated with the actions of the Department of Health will likely be substantial during initial implementation. The costs will likely then decrease after initial implementation but continued costs are expected due to the oversight responsibilities of the Department of Health.

VI. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR

The use of POLST forms will require additional training of medical professionals and their staff on proper execution, revocation, and overall use of POLST forms. Additionally, it is likely that medical professionals will charge an additional fee for the time spent helping to execute a POLST form and/or the costs associated with the execution of a POLST form, such as printing, coordination with other medical providers, and/or coordination with the Department of Health.

VII. CONSTITUTIONAL ISSUES

A POLST form is an additional type of advance directive being utilized for the first time in Florida. Due process concerns are inherent in the delegation of health care decision making authority. In re Guardianship of Browning, 568 So. 2d 4 (Fla. 1990) (an individual has the right to choose or refuse medical treatment and to make other decisions concerning one's health).

VIII. OTHER INTERESTED PARTIES

The Elder Law Section of the Florida Bar, the Health Law Section of the Florida Bar, the Florida Department of Health, Florida Department of Elder Affairs, Florida Agency for Health Care Administration, the Florida Board of Medicine, medical professionals of all types and the corresponding groups representing those professionals.

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

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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 _____

O1499916.v4

Proposed Wording of Position for Official Publication:

Supports revisions to Florida 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; 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)

O1499916.v4

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	
(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.

O1499916.v4

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 732.2165, 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 732.2165, 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 renumber existing subsections (3) through and including (9), 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 (7), 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 (4) or subsection (5) 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 section (1); amend existing section (1); amend existing section (2); amend existing section (3); amend existing section (4); renumber existing paragraph (5), 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 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 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 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 732.2165, Florida Statutes, is created to read:

732.2165 Award of Fees and Costs in Elective Share Proceedings.

(1) In all proceedings concerning the elective share under ss. 732.201-732.2155, the court in its discretion may award taxable costs as in chancery actions, including attorney fees, in such proportions as the court may determine, including an amount against the elective share. No taxable costs, including attorney fees, may be awarded against a person for legal services rendered to prepare or file any document required or permitted by Rule 5.360, Florida Probate Rules.

(2) When awarding taxable costs, including attorney fees, the court in its discretion may direct payment from a person's interest in any asset included in the elective estate, or enter a judgment which may be satisfied from other assets of the person to the extent of that person's interest in assets included in the elective estate.

(3) Nothing in this section shall be construed to create or impose personal liability for costs, including attorney fees, on a person in an amount that exceeds the person's interest in assets included in the elective estate.

(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. Section 738.606, Florida Statutes, is amended at subsection (1) 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 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. This act shall take effect July 1, 2017.

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

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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 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 732.2165, Fla. Stat., to make the award of attorney fees and costs applicable to all parties who litigate in an elective share proceeding. It adopts a standard used in sections 733.609, 732.615, 732.616 and 736.1004, for an award of attorney fees and costs "as in chancery actions" in claims for surcharge and to modify or reform a will or trust.

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 (1) vests discretion in the court to award taxable costs as in chancery actions, including attorney fees, in proportions that the court may determine. It is anticipated that the court will exercise its discretion in most instances to not assess attorney fees or costs against a party for legal services ordinarily required to file commonly filed documents required or permitted under Rule 5.360, Florida Probate Rules, where no dispute is anticipated or ongoing.

Subsection (2) provides that a court may award attorney fees and costs from a person's interest in the probate estate, the elective share or any asset included in the elective estate. In addition or alternatively, the court may enter judgment against a person that may be satisfied from other assets of that person to the extent of the person's interest in assets included in the probate estate, the elective estate or the elective share. This provision accounts for circumstances in which a person involved in an elective share dispute receives non-probate assets and attorney fees and costs are assessed against the person where the non-probate asset has been received.

Subsection (3) provides that the statute does not create or impose personal liability for attorney fees or costs on a person beyond the amount of the person's interest in assets included in the elective estate. Thus, a personal representative cannot be held personally liable for attorney fees

or costs incurred by a surviving spouse under the statute. Nor can a beneficiary of an estate, or a person having an interest in a non-probate asset of the decedent included in the elective estate, be held personally liable beyond the amount of the person's interest in the estate, or assets comprising the elective estate, as the case may be.

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 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.

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.

ATTACHMENT SHOWS CHANGES

MADE SINCE THE STATUTE WAS AN

INFORMATIONAL ITEM

AT THE EXECUTIVE COUNCIL MEETING

ON JULY 30, 2016

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 732.2165, 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 732.2165, 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 renumber existing subsections (3) through and including (9), 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 (7), 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 ~~surviving~~ 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 (4) or subsection (5) 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 ~~surviving~~ 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 section (1); amend existing section (1); amend existing section (2); amend existing section (3); amend existing section (4); renumber existing paragraph (5), 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 ~~full~~ fee simple interest, the fair market value of the protected homestead on the date of the decedent's death;

(b) If the ~~surviving~~ 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 ~~surviving~~ 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.~~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 surviving 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~~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~~732.2075 and this section.

(4) If any part of s. ~~732.2035~~732.2035 or s. ~~732.2075~~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~~732.2035 and ~~732.2075~~,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 ~~surviving~~ spouse in favor of the ~~surviving~~ spouse or the ~~surviving~~ 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 ~~surviving~~ spouse in favor of the ~~surviving~~ 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 ~~surviving~~ spouse. The power may, but need not, provide that the other resources of the ~~surviving~~ 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 ~~surviving~~ spouse to the use of the property for life, including a life estate in protected homestead as provided in s. 732.401(1), the value of the ~~surviving~~ 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 ~~surviving~~ 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 an interest in trust, the value of the ~~surviving~~ 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 ~~surviving~~ 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 ~~surviving~~ spouse's interest is the transfer tax value of the interest on the applicable valuation date; however, the aggregate value of all of the ~~surviving~~ 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), ~~The~~ 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 732.2165, Florida Statutes, is created to read:

732.2165 Award of Fees and Costs in Elective Share Proceedings.

(1) In all proceedings concerning the elective share under ss. 732.201-732.2155, the court in its discretion may award taxable costs as in chancery actions, including attorney fees, in such proportions as the court may determine, including an amount against the elective share. No taxable costs, including attorney fees, may be awarded against a person for legal services rendered to prepare or file any document required or permitted by Rule 5.360, Florida Probate Rules.

(2) When awarding taxable costs, including attorney fees, the court in its discretion may direct payment ~~from the estate, the elective share or~~ from a person's

interest in any asset included in the elective estate, or enter a judgment which may be satisfied from other assets of the person to the extent of that person's interest in assets included in the elective estate.

(3) Nothing in this section shall be construed to create or impose personal liability for costs, including attorney fees, on a person in an amount that exceeds the person's interest in assets included in the elective estate.

(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. Section 738.606, Florida Statutes, is amended at subsection (1) 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 ~~surviving~~ 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 ~~surviving~~ spouse from principal pursuant to the terms of the trust are insufficient to provide the ~~surviving~~ spouse with the beneficial enjoyment required to obtain the marital deduction ~~or qualify as an elective share~~

~~trust~~ (even though, in the case of an elective share trust, a marital deduction is not made or is only partially made), ~~then~~ the ~~surviving~~ 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. ~~Except as otherwise provided in this act, this~~This act shall ~~apply to estates of decedents dying on or after~~take effect July 1, 2017.

3362512.00012

WPB_ACTIVE 7350105.1

LEGISLATIVE POSITION REQUEST FORM

GOVERNMENTAL AFFAIRS OFFICE

Date Form Received _____

GENERAL INFORMATION

Submitted By John C. Moran, Chair, Probate Law and Procedure Committee of the Real Property Probate & Trust Law Section (RPPTL Approval Date _____, 2016)

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

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

PROPOSED ADVOCACY

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

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

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

Proposed Wording of Position for Official Publication:

"Supports proposed legislation allowing a testator to deposit their original will with the clerk's office for safekeeping during their lifetime, and for other custodians to deposit original wills with the clerk for safekeeping when the testator cannot be located."

Reasons For Proposed Advocacy:

Currently there is no mechanism for a testator to deposit their original will for safekeeping with the clerk of court. Similarly, there is no system for the custodian of an original will to deposit a will for safekeeping when the testator cannot be located. The proposed legislation is aimed at avoiding improprieties such as fraud and undue influence as it relates to wills. The benefits of depositing a will are that it will be kept safe, away from public viewing during the testator's lifetime, and protected from loss and inadvertent destruction.

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

[List here other Bar sections, committees or attorney organizations]

(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.

WPB_ACTIVE 7199335.1

A bill to be entitled

An act relating to the deposit of original wills with the clerk of court for safekeeping.

Be it enacted by the Legislature of the State of Florida:

Section 1. Section 732.902, F.S. is created as follows:

732.902 Deposit of wills.

(1) This Section applies with respect to a testator whose will is to be deposited if:

(a) the testator is alive; or

(b) it is unknown if the testator is alive.

(2) As used in this Section:

(a) the term "depositor" shall mean any person who deposits a will with the clerk under this Section; and

(b) the term "will" includes a separate writing as described in s. 732.515.

(3) A will may be deposited by a testator who is alive with the clerk of the court of the county in which the testator resides at the time of the deposit of the will. A will may be deposited by any other depositor with the clerk of court of the county where the depositor knows, reasonably believes or can reasonably conclude or infer from the face of the will:

(a) the testator resided at the time of the deposit of the will;

(b) the testator resided when the testator executed the will; or

(c) the testator executed the will.

(4) An attorney in possession of a will may not deposit a will pursuant to this Section unless the attorney:

(a) has either never had contact with the testator or has not had contact with the testator for at least seven (7) years prior to depositing the will;

CODING: Words stricken are deletions; words underlined are additions.

(b) has made a good faith attempt to locate the testator; and

(c) has been unable to locate the testator despite a good faith effort to do so.

(5) An attorney in possession of a will shall, at the time of the deposit of the will with the clerk, submit an affidavit, together with the will, in substantially the following form:

STATE OF FLORIDA

COUNTY OF

Before me, the undersigned authority, personally appeared (name of Affiant), who swore or affirmed that:

I am an attorney licensed to practice law in the state of . I am submitting this affidavit in connection with a will that I am depositing in accordance with the provisions of s. 732.902. I have either never had contact with the testator or I have not had contact with the testator for at least seven (7) years. I have made a good faith attempt to locate the testator and have been unable to do so.

(signature of Affiant)

Sworn to (or affirmed) and subscribed before me this day of (month), (year), by (name of Affiant)

(Signature of Notary Public-State of Florida)

(Print, Type, or Stamp Commissioned Name of Notary Public)

Personally Known OR Produced Identification

(Type of Identification Produced)

(6) Upon receipt of a will deposited under this Section, the clerk shall transform and store the will on film, microfilm, magnetic, electronic, optical, or other substitute media or record the will onto an electronic recordkeeping system in accordance with the standards adopted by the Supreme Court of Florida. The clerk shall also retain and preserve the original will in its original form for at least twenty (20) years.

CODING: Words stricken are deletions; words underlined are additions.

Transforming and storing a will on film, microfilm, magnetic, electronic, optical, or other substitute media or recording a will onto an electronic recordkeeping system, whether or not in accordance with the standards adopted by the Supreme Court of Florida, or permanently recording a will does not eliminate the requirement to preserve the original will. If the original will deposited under this Section either cannot be located or is destroyed, an electronic copy of the deposited will that was stored by the clerk shall be deemed to be an original will for purposes of offering the will for probate. Notwithstanding the foregoing, any will deemed to be an original under this paragraph is not a lost or destroyed will under the provisions of s. 733.207.

(7) Except as otherwise provided in paragraph (9) of this Section, a will deposited under this Section shall not be deemed a public record as that term is defined in s. 119.011(12) and is confidential and exempt from s. 119.07(1) and s. 24(a), Art. I of the State Constitution.

(8) While the testator is alive, the only individuals to whom the clerk may deliver the will are:

(a) the testator; or

(b) a person authorized to receive the will by an order of a court.

(9) If the clerk, who is in possession of a will deposited under this Section, receives a certified copy of the death certificate of the testator, then the clerk shall retain and preserve the will in accordance with the provisions of s. 732.901(4). Provided, however, if venue over the probate administration of the testator's estate is in a state or county outside of the clerk's county, then any interested person may seek an order of the circuit court directing the clerk as to where, or as to whom, to deliver the will. For purposes of

CODING: Words stricken are deletions; words underlined are additions.

determining when the 20-year period for retention of the will begins under s. 732.901(4), the will shall be deemed deposited under s. 732.901(4) as of the date of the clerk's receipt of a certified copy of the death certificate of the testator, or the date that the will is deposited with the clerk of court with venue over the probate administration of the testator's estate, whichever is later.

(10) The clerk shall have no liability in connection with any will deposited, retained, destroyed, or delivered in accordance with the provisions of this Section.

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

CODING: Words stricken are deletions; words underlined are additions.

WHITE PAPER

PROPOSED ADDITION TO PART IX OF CHAPTER 732, FLORIDA STATUTES

SECTION 732.902 – DEPOSIT OF WILLS

I. SUMMARY

Currently there is no system for testators or custodians of original wills to deposit wills for safekeeping with the clerk of court. The purpose of proposed Section 732.902 is to provide a statutory framework for testators to deposit their original wills with the clerk for safekeeping during their lifetimes, and for other custodians, such as attorneys, to deposit original wills with the clerk when the testator cannot be located.

The proposed legislation is aimed at avoiding improprieties such as fraud and undue influence as it relates to wills. The benefits of depositing a will are that it will be kept safe, away from public viewing during the testator's lifetime, and protected from loss and inadvertent destruction.

A number of states have already enacted statutes that allow for the deposit of wills. These states include Virginia, Colorado, and Indiana. Proposed Section 732.902 is roughly patterned after Indiana Code Section 29-1-7-3.1. The proposed statute is numbered as Section 732.902, Florida Statutes because it shares many concepts with Section 732.901, Florida Statutes. Section 732.901, Florida Statutes already addresses the deposit of wills following the death of a testator.

II. CURRENT SITUATION

Under current Florida law, there is no mechanism for a testator to deposit their original last will and testament for safekeeping with the clerk of court during his or her life. Similarly, there is no system for the custodian of an original will to deposit a will for safekeeping with the clerk when the testator cannot be located. This is known as the "orphan will" problem. However, pursuant to Section 732.901, Florida Statutes, it is mandatory for a "custodian of a will ... to deposit the will [of a testator] with the clerk of the court having venue of the estate of the decedent within 10 days after receiving information that the testator is dead."

III. EFFECT OF PROPOSED CHANGES

The effect of proposed Section 732.902, Florida Statutes is to provide a statutory framework for testators and other custodians of original wills to deposit those wills with the clerk of court for safekeeping.

Paragraph (1) provides that the Section applies either when the testator is alive or if it is unknown if the testator is alive. Paragraph (1) is intended to clarify that this proposal addresses both the "orphan will" problem and that it permits testators to deposit original wills during their lives.

Paragraph (2) defines the terms "depositor" and "will." The use of the term "person" to describe a "depositor" means that a depositor of a will may be an individual, a bank, a trust company, an attorney, etc. *See* Section 1.01(3), Florida Statutes. Moreover, by stating that a will, which is defined in Section 731.201(40), Florida Statutes, includes a separate writing described in Section 732.515, Florida Statutes, this paragraph mirrors Section 732.901(5), Florida Statutes and makes clear that a separate writing may be deposited under Section 732.902, Florida Statutes.

Paragraph (3) provides that a will may be deposited by a testator who is alive only with the clerk of the county in which the testator resides at the time of the deposit of the will. However, where the depositor is an individual other than the testator, Paragraph (3) provides that the will is to be deposited either with the clerk of the county where the testator resided at the time of the deposit of the will, where the testator resided at the time of the execution of the will, or where the testator executed the will.

Paragraph (4) provides that in order for an attorney to deposit a will with the clerk, the attorney must not have had contact with the testator for at least seven (7) years prior to depositing the will, that the attorney must have made a good faith effort to locate the testator, and that the attorney must have been unable to locate the testator despite a good faith effort to do so. Paragraph (4) is included to address document retention obligations that are unique to attorneys.

Paragraph (5) provides a form affidavit that must be submitted by an attorney who deposits a will with the clerk.

Paragraph (6) directs the clerk to make an electronic copy of the will and to retain the original will for twenty (20) years. This twenty (20) year time period mirrors the time period already provided for in Section 732.901(4), Florida Statutes. Paragraph (6), in large measure, mirrors Section 732.901(4), Florida Statutes. Paragraph (6) also provides that if an original will deposited under this Section cannot be located or is destroyed, the electronic copy is deemed to be an original will for purposes of offering the will for probate. Finally, Paragraph (6) provides that any will deemed to be an original for purposes of offering it for probate is not a "lost or destroyed" will under the provisions of Section 733.207, Florida Statutes.

Paragraph (7) provides that a will deposited under this Section is a private document and is not a public record for as long as the testator is alive.

Paragraph (8) provides that while the testator is alive, the only individual to whom the clerk may deliver a will is the testator or a person authorized to receive the will by an order of the court.

Paragraph (9) addresses what happens when a testator whose will is on deposit dies, and it provides that a certified copy of the death certificate of the testator is necessary in order to establish the death of the testator. If venue over the probate of the testator's will is in the county where the will is already on deposit, the will is deemed deposited under Section 732.901(4), Florida Statutes, and the twenty (20) year holding period under Section 732.901(4), Florida Statutes begins running as of the date that the clerk received the certified

copy of the testator's death certificate. However, if venue is in a state or county outside of the clerk's county, then an order of the circuit court will be needed to direct the clerk as to where, or as to whom, to deliver the will. If the will is then transferred to another county in the State of Florida, the twenty (20) year holding period under Section 732.901(4), Florida Statutes begins running on the date that the will is deposited with the clerk with venue over the probate administration of the testator's estate.

Paragraph (10) provides that the clerk has no liability in connection with any will deposited, retained, destroyed, or delivered in accordance with Section 732.902, Florida Statutes.

IV. FISCAL IMPACT ON STATE AND LOCAL GOVERNMENTS

It is anticipated that this proposal will have a fiscal impact on the clerks of court in the State of Florida. Under the proposal, clerks will need to scan wills, physically store wills, and maintain records of wills that have been both stored and scanned. Although clerks already provide these services and accept wills for deposit upon the death of Florida citizens, the proposal would authorize wills to be deposited while testators are alive or cannot be located. Although not expressly addressed in the proposed statute, it is anticipated that the clerks will charge a reasonable fee for the deposit of any will under this Section.

V. DIRECT FISCAL IMPACT ON PRIVATE SECTOR

None.

VI. CONSTITUTIONAL ISSUES

None.

VII. OTHER INTERESTED PARTIES

Other interested parties include the clerks of court of the State of Florida.

LEGISLATIVE POSITION REQUEST FORM

GOVERNMENTAL AFFAIRS OFFICE

Date Form Received _____

GENERAL INFORMATION

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

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

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

PROPOSED ADVOCACY

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

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

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

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

Proposed Wording of Position for Official Publication:

Support proposed 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.

Reasons For Proposed Advocacy:

The proposed amendment will clarify Florida law to assure that the interests of trust beneficiaries are as defined by the trust settlor within the terms of a trust.

PRIOR POSITIONS TAKEN ON THIS ISSUE

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

Most Recent Position None

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

Others
(May attach list if more than one)

None

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

REFERRALS TO OTHER SECTIONS, COMMITTEES OR LEGAL ORGANIZATIONS

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

Referrals

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

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

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

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

A bill to be entitled

An act relating to settlor intent as provided in the terms of a trust; amending ss. 736.0103(11), 736.0105(2)(c), and 736.04040 F.S.

Be it enacted by the Legislature of the State of Florida:

Section 1. Subsection (11) of Section 736.0103 is amended to read :

736.0103 Definitions.

Unless the context otherwise requires, in this code:

(11) "Interests of the beneficiaries" means the beneficial interests intended by the settlor as provided in the terms of ~~the~~ a trust.

Section 2. Section 736.0105(2)(c) is amended to read :

736.0105 Default and Mandatory Rules.

(2) The terms of a trust prevail over any provision of this code except:

(b) The duty of the trustee to act in good faith and in accordance with the terms and purposes of the trust and the interests of the beneficiaries.

(c) The requirement that a trust ~~and its terms be for the benefit of the trust's beneficiaries, and that the trust~~ have a purpose that is lawful, not contrary to public policy, and possible to achieve.

Section 3. Section 736.0404 is amended to read :

736.0404 Trust Purposes.

A trust may be created only to the extent the purposes of the trust are lawful, not contrary to public policy, and possible to achieve. ~~A trust and its terms must be for the benefit of its beneficiaries.~~

Section 4. This act shall take effect July 1, 2017.

CODING: Words ~~stricken~~ are deletions; words underlined are additions.

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

WHITE PAPER

Proposed Revisions to §§736.0103, 736.0105 and 736.0404, Florida Statutes

I. SUMMARY

The purpose of the proposed amendments to §§736.0103, 736.0105 and 736.0404 of the Florida Statutes is to clarify and illuminate Florida's well-established jurisprudence in favor of donative freedom, so that it is crystal clear that the settlor's intent is paramount when interpreting and applying Florida trust law. Florida has a strong and robust tradition of protecting the settlor's intent, and these proposed amendments reaffirm those protections in order to make certain that effectuating the settlor's intent continues to be a hallmark of Florida trust law.

II. CURRENT SITUATION:

Under American trust law, there always has been tension between the dual goals of effectuating the settlor's intent and protecting the interests of beneficiaries. This tension is a natural byproduct of the essential nature of a trust—where the settlor transfers legal title of the trust's assets to the trustee while simultaneously creating equitable interests for the trust beneficiaries. Historically, trust law has tilted towards the primacy of the settlor's intent, because donative freedom has been the jurisprudential foundation of American trusts and estates law. *See, e.g.*, Lee-ford Tritt, *The History, Impact, and Future of the Benefit of the Beneficiary Rule (Part One)*, Estate and Personal Financial Planning (Thomson-West) (December 2014).

Indeed, the guiding principle of trusts and estates law is that the "donor's intention is given effect to the maximum extent allowed by law." Restatement (Third) of Prop. § 10.1. And, this fundamental principle is reflected in the General Comment to Uniform Trust Code (UTC) Article 8 and UTC § 801 (Duty to Administer Trust), which describes an overarching duty to fulfill donative intent. In Florida, a donor's right to bequeath property is so sacred that it may be a constitutionally protected right. *See, Shriners Hospitals v. Zrillic*, 563 So.2d 64 (Fla. 1990)

("that the right to devise property is a property right protected by the Florida Constitution"). Accordingly, under Florida law, a court should give primary consideration to the preservation of the settlor's intent as expressed in the terms of the trust when applying or interpreting the state's trust laws. Similarly, the settlor's intent, as set forth in the terms of the trust, governs the duties and powers of the trustees and the interests of the beneficiaries.

In general, a fiduciary has a fundamental obligation to follow the terms of the will or trust. *See*, Fla. Stat. §736.0801. Recently, however, there has occurred an erosion or shift from the principle of protecting the settlor's donative intent towards the concept of protecting the beneficiaries' perceived interests despite the donative intent. *See, e.g.*, Thomas P. Gallanis, The New Direction of American Trust Law, 97 Iowa L. Rev. 215 (2011). This shift is reflected in the so-called "Benefit-of-the-Beneficiary" rule, which is based upon some language in the mandatory provisions of the 2000 version of the UTC. When Florida modeled the new Florida Trust Code (the "Trust Code") after the UTC, and adopted Chapter 736 of the Florida Statutes in 2006, this seemingly innocuous language also was adopted and became part of Florida law.

Arguably, the purported Benefit-of-the-Beneficiary rule would be a mandatory, non-waivable requirement under Florida's Trust Code that provides that a "trust and its terms must be for the benefit of its beneficiaries." *See*, Fla. Stat. §§736.0105(2)(c) and 736.0404. Such a mandatory rule would apply not only to the entire trust or its general purpose, but to each of its terms, individually. *See*, Fla. Stat. §736.0105(2)(c). Since the promulgation of the UTC, some academics have written about possible implications of this rule that were neither addressed nor considered by the Uniform Law Commissions, the Florida Bar, or the Florida Legislature. Some of these commentators foresee that these provisions may undermine the strong common law tradition of protecting the settlor's intent. Thus, a Benefit-of-the-Beneficiary rule will have a significant adverse impact on estate planning and trust administration if it is interpreted as some academic commentators have advocated. This was not the aim, purpose, or meaning of the statute when proposed by the Florida Bar and adopted by the Florida Legislature.

By way of example, one such commentator suggests that a settlor's waiver of the Trustee's duty to diversify would be void, even where the settlor specifically set out his rationale for that choice. [1] Thus, the broad view of the Benefit-of-the-Beneficiary rule as espoused by

[1] *See* John H. Langbein, *Burn the Rembrandt? Trust Law's Limits on the Settlor's Power to Direct Investments*, 90 B.U. L. REV. 375, 392 (2010) ("The settlor's well-intentioned but primitive views on investment matters do not

some in academia would have the effect of converting the "Prudent Investor Rule" (*See* Fla. Stat. §518.11), from its present status as a "default rule" under trust law into a "mandatory" rule. *See*, Fla. Stat. §§736.0901 and 736.0105.

A Benefit-of-the-Beneficiary rule's impact likely may be much broader than just investment directives. It also implicates conditional gifts, single-purpose trusts, and "spend thrift" provisions, to name a few. *See, e.g.*, Lee-ford Tritt, *The History, Impact, and Future of the Benefit of the Beneficiary Rule (Part Two)*, Estate and Personal Financial Planning (Thomson-West) (December 2014). That change alone would vitiate many existing estate plans, including those taking advantage of popular estate planning instruments such as "grantor retained annuity trusts" (GRAT) or "irrevocable life insurance trusts" (ILIT), both of which rely on concentrated investments to properly function. More profoundly, this interpretation of a Benefit-of-the-Beneficiary rule would shift the fundamental focus of Florida trust law away from donative intent and donative freedom solely in favor of the beneficiaries' economic interests. Accordingly, these statutes require clarification before they are misapplied in the State of Florida.

The deleterious impact of a Benefit-of-the-Beneficiary rule upon traditional trust law has not gone unnoticed. At least two states that otherwise have adopted some version of the UTC—New Hampshire and Ohio—recently have enacted legislation that deletes any purported mandatory Benefit-of-the-Beneficiary rule and replaces it with a more settlor-friendly default rule to re-establish the primacy of donative intent. *See* N.H. Rev. Stat. §§564-B:1-112, 564-B:1-105, 564-B:4-404 and Ohio Rev. Code § 5804.04. Another state, Georgia, has not adopted the UTC; but nevertheless, its Legislature has seen fit recently to adopt legislation re-affirming the primacy of donative intent in the context of Georgia's version of the Prudent Investor Rule. *See* Ga. Code § 53-12-341. Finally, the notion of the primacy of donative intent was recently re-affirmed in Delaware as well. *See*, *In re Trust Under Will of Flint for the Benefit of Shadek*, 2015 WL 3823900 (Del. Ch. June 17, 2015). This proposal follows this movement.

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justify investment directions that are otherwise objectively foolish by the standards of the field. . . . Sincere belief in folly does not make folly any less foolish."). Note that Langbein's flippant characterization of investment standards is far from a uniform belief among professional investors. *See, e.g.*, Jeffrey A. Cooper, *Empty Promises: Settlor's Intent, the Uniform Trust Code, and the Future of Trust Investment Law*, 88 B.U. L. REV. 1165, 1191 (2008) (discussing legendary investor, Warren Buffet's well-known aversion to diversification).

III. EFFECT OF THE PROPOSED CHANGE:

Under the proposed changes to Sections 736.0103, 736.0105 and 736.0404, Florida Statutes, the current language in those statutes that a trust and its terms be administered for the benefit of the beneficiaries would be eliminated, so as to be consistent with the settlor's intent being the paramount, guiding principle of Florida trust law. These changes would clarify that the suggestions made by some academics post-enactment do not reflect the intended meaning of the relevant statutes, as adopted, and would illuminate and reaffirm the robust concept of the protection of settlor's intent in the State of Florida.

Section 736.0103(11), Florida Statutes, is amended to clarify that the "interests of the beneficiaries" are to be determined solely by the settlor, whether that intent is expressed in the trust instrument or must be established by other evidence that would be admissible in a judicial proceeding. *See also*, Fla. Stat. §736.0103(21). This change, in conjunction with the deletion of the phrase "benefit of the beneficiaries" elsewhere in the Code, has the effect of unifying the terminology used throughout the Code to describe the legal rights possessed by beneficiaries of a trust. *See, e.g.,* Fla. Stat. §736.0105(2)(b). Changing the definite article in the final clause ("as provided in the terms of a trust") clarifies that the phrase used there is the same phrase defined in Section 736.0103(21), Florida Statutes.

Section 736.0105(2)(c), Florida Statutes, is amended to remove the requirement that a trust be for the "benefit" of its beneficiaries, leaving only the mandatory (and traditional common law) conditions that the trust have a purpose that is (i) lawful, (ii) not contrary to public policy, and (iii) possible to achieve.

Section 736.0404, Florida Statutes, is also amended to remove the requirement that a trust be for the "benefit" of its beneficiaries, leaving only the mandatory (and traditional common law) conditions that a trust have a purpose that is (i) lawful, (ii) not contrary to public policy, and (iii) possible to achieve. Grammatically, the statement that a trust must "be for the benefit of its beneficiaries" is little more than a meaningless tautology. To the extent such a phrase might be interpreted by courts as imposing an additional requirement on the creation of a trust that relegates a settlor's intent as a secondary consideration to the economic interests of a beneficiary, it is inconsistent with existing Florida common law.[2] This amendment separates the protection

[2] *See, e.g., Provost v. Justin*, 19 So. 3d 333, 334 (Fla. 2d D.C.A. 2009) ("The polestar of trust interpretation is the settlors' intent.") *quoting L'Argent v. Barnett Bank*, N.A., 730 So.2d 395, 397 (Fla. 2d DCA 1999); *Bryan v. Dethlefs*,

of a beneficiary's legal and equitable rights in a trust (which are already addressed elsewhere in the Trust Code) from the determination of the *validity* of a trust or its provisions.

IV. FISCAL IMPACT ON STATE AND LOCAL GOVERNMENT - None.

V. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR - None.

VI. CONSTITUTIONAL ISSUES – The amendments to Sections 736.0404 and 736.0105(2)(c) clarify the Trust Code so as to preempt an unconstitutional interpretation of those provisions. A Benefit-of-the-Beneficiary rule, if interpreted as suggested by some academic commentators, would apply not only to the creation of every single trust, but to each provision of every trust. Under a Benefit-of-the-Beneficiary rule, a trust or trust provision that did not advance the purely economic interests of the beneficiaries might be void, ineffective, or at least interpreted in a way that benefits the beneficiary in a manner not contemplated by the settlor. Thus, the effect of such a rule would be to elevate the rights of those receiving an entirely gratuitous disposition of property above the rights of the individual making such a disposition. By limiting an individual's ability to dispose of property *in each and every instance* of disposition by trust, a Benefit-of-the-Beneficiary rule may unconstitutionally infringe upon the right of disposition that is inherent in property ownership. *See, Shriners Hospitals v. Zrillic*, 563 So.2d at 67 ("Thus, the phrase 'acquire, possess and protect property' in article I, section 2 [of the Florida Constitution], includes the incidents of property ownership: the '[c]ollection of rights to use and enjoy property, *including [the] right to transmit it to others.*'" (emphasis in original)) *quoting* Black's Law Dictionary 997 (5th ed. 1979); *see also, Hodel v. Irving*, 481 U.S. 704, 715, 107 S. Ct. 2076, 2082-83 (1987) ("there is no question, however, that the right to pass on valuable property to one's heirs is itself a valuable right."). The proposed revisions would resolve any potential uncertainty in the law.

VII. OTHER INTERESTED PARTIES - None.

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959 So. 2d 314, 317 (Fla. 3d D.C.A. 2007) ("The polestar of trust or will interpretation is the settlor's intent.") *citing Arellano v. Bisson*, 847 So.2d 998 (Fla. 3d D.C.A. 2003) and *Phillips v. Estate of Holzmann*, 740 So.2d 1, 2 (Fla. 3d D.C.A. 1998); and *Minassian v. Rachins*, 152 So. 3d 719, 725 (Fla. 4th D.C.A. 2014) ("[t]he polestar of trust or will interpretation is the settlor's intent") *quoting Bryan v. Dethlefs*, 959 So.2d 314, 317 (Fla. 3d D.C.A. 2007).

VIII. EFFECTIVE DATE – The contemplated amendments to Sections 736.0103, 736.0105 and 736.0404, Florida Statutes, are proposed as a clarification to existing Florida law rather than as a substantive change. The amendments mirror and are similar to those made in other states that are intended to prospectively preclude an entirely novel interpretation of a UTC provision advanced by a minority of academic commentators subsequent to the publication of the UTC. As clarifying changes, the amendments would—once enacted—have retroactive effect and would be applicable immediately to all existing Florida trusts.

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

CONTACTS

Board & Legislation Committee Appearance

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Martha J. Edenfield, Dean Mead, P.O. Box 10095, Tallahassee FL 32302-2095, Telephone (850) 999-4100; Email: medenfield@deanmead.com

(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.

WPB_ACTIVE 7350112.1

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

CODING: Words ~~stricken~~ are deletions; words underlined are additions.

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~~ Subsection (2) governs the form and content of all trust accountings rendered for any accounting periods beginning on or after January 1, 2003, and all trust accountings prepared on or after July 1, 2017. This subsection (3) does not abridge the duty of a trustee to account from the date upon which the trustee became accountable.

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. Subsection (3)(a) does not bar any claim that is based upon a trustee's failure to provide a trust accounting as required by law.

(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.

WPB_ACTIVE 7350111.1

CODING: Words ~~stricken~~ are deletions; words underlined are additions.

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 based on a trustee's failure to provide a trust accounting as required by law. 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.

WPB_ACTIVE 7350110.1

INTERNAL REVENUE BULLETIN

IRS

Bulletin No. 2016–36
September 6, 2016

HIGHLIGHTS OF THIS ISSUE

These synopses are intended only as aids to the reader in identifying the subject matter covered. They may not be relied upon as authoritative interpretations.

INCOME TAX

Rev. Rul. 2016–20 page 279.

Federal rates; adjusted federal rates; adjusted federal long-term rate and the long-term exempt rate. For purposes of sections 382, 642, 1274, 1288, 7872, and other sections of the Code, tables set forth the rates for September 2016.

Rev. Proc. 2016–43 page 316.

This revenue procedure provides the national monthly average premium for a bronze-level qualified health plan (NABP) available through Marketplaces in 2016. The NABP is the maximum monthly individual shared responsibility payment under section 5000A for nonexempt individuals who do not have minimum essential coverage for a month.

Rev. Proc. 2016–44 page 316.

This revenue procedure provides safe harbor conditions under which a management contract does not result in private business use of property financed with governmental tax-exempt bonds under section 141(b) of the Internal Revenue Code or cause the modified private business use test for property financed with qualified 501(c)(3) bonds under section 145(a)(2)(B) to be met.

T.D. 9777 page 282.

Section 148 imposes yield restriction and rebate requirements on issuers of tax-exempt bonds and other tax-advantaged bonds. These final regulations under section 148 consolidate and finalize proposed regulations published in 2007 and 2013. The final regulations include numerous, independent, technical amendments to various topics in the regulations under section 148. Generally, the final regulations simplify certain provisions, make certain provisions more administrable, resolve certain technical issues, and address certain market developments. Specific topics addressed in the final regulations include, among other things, working capital financings, qualified hedges, and valuation of investments.

T.D. 9782 page 301.

Section 301 of James Zadroga 9/11 Health and Compensation Act of 2010, Public Law 111–347 (124 Stat. 3623) added section 5000C to the Internal Revenue Code that imposes a 2 percent tax on payments made by the U.S. government to foreign persons pursuant to certain contracts. These final regulations provide guidance to U.S. government acquiring agencies and foreign persons to determine what goods or services are subject to the section 5000C; and how to remit the 2 percent tax by U.S. government acquiring agencies or foreign persons, if the section 5000C tax is applicable.

ESTATE TAX

REG–163113–02 page 329.

These proposed regulations provide additional guidance under section 2704, which contains special rules for valuing interests in corporations and partnerships transferred within the family, for estate, gift and generation-skipping transfer (GST) tax purposes. The proposed regulations add a new section to address restrictions on the liquidation of an individual interest in a family controlled entity and the effect of small interests held by persons who are not members of the family. The effect of these revisions is to disregard restrictions that reduce the value of the interest for tax purposes, but do not reduce the value of the interest to the family-member recipient.

GIFT TAX

REG–163113–02 page 329.

These proposed regulations provide additional guidance under section 2704, which contains special rules for valuing interests in corporations and partnerships transferred within the family, for estate, gift and generation-skipping transfer (GST) tax purposes. The proposed regulations add a new section to address

Finding Lists begin on page ii.

restrictions on the liquidation of an individual interest in a family controlled entity and the effect of small interests held by persons who are not members of the family. The effect of these revisions is to disregard restrictions that reduce the value of the interest for tax purposes, but do not reduce the value of the interest to the family-member recipient.

EXCISE TAX

T.D. 9782 page 301.

Section 301 of James Zadroga 9/11 Health and Compensation Act of 2010, Public Law 111–347 (124 Stat. 3623) added section 5000C to the Internal Revenue Code that imposes a 2 percent tax on payments made by the U.S. government to foreign persons pursuant to certain contracts. These final regulations provide guidance to U.S. government acquiring agencies and foreign persons to determine what goods or services are subject to the section 5000C; and how to remit the 2 percent tax by U.S. government acquiring agencies or foreign persons, if the section 5000C tax is applicable.

TAX CONVENTIONS

T.D. 9782 page 301.

Section 301 of James Zadroga 9/11 Health and Compensation Act of 2010, Public Law 111–347 (124 Stat. 3623) added section 5000C to the Internal Revenue Code that imposes a 2 percent tax on payments made by the U.S. government to foreign persons pursuant to certain contracts. These final regulations provide guidance to U.S. government acquiring agencies and foreign persons to determine what goods or services are subject to the section 5000C; and how to remit the 2 percent tax by U.S. government acquiring agencies or foreign persons, if the section 5000C tax is applicable.

ADMINISTRATIVE

REG–108792–16 page 320.

This document contains proposed amendments to the regulations that provide user fees for installment agreements. The proposed amendments affect taxpayers who wish to pay their liabilities through installment agreements. This document also provides a notice of public hearing on these proposed amendments to the regulations.

present oral comments at the hearing must submit written comments or electronic comments by October 6, 2016 and submit an outline of the topics to be discussed and the amount of time to be devoted to each topic (a signed original and 8 copies) by October 6, 2016. A period of 10 minutes will be allotted to each person for making comments. An agenda showing the scheduling of the speakers will be prepared after the deadline for receiving outlines has passed. Copies of the agenda will be available free of charge at the hearing.

Drafting Information

The principal author of these regulations is Maria Del Pilar Puerto of the Office of Associate Chief Counsel (Procedure and Administration). Other personnel from the Treasury Department and the IRS participated in their development.

* * * * *

Proposed Amendments to the Regulations

Accordingly, 26 CFR part 300 is proposed to be amended as follows:

PART 300—USER FEES

Paragraph 1. The authority citation for part 300 continues to read as follows:

Authority: 31 U.S.C. 9701.

Par. 2. In § 300.1, paragraphs (b) and (d) are revised to read as follows:

§ 300.1 Installment agreement fee.

* * * * *

(b) *Fee.* The fee for entering into an installment agreement before January 1, 2017, is $120. The fee for entering into an installment agreement on or after January 1, 2017, is $225. A reduced fee applies in the following situations:

(1) For installment agreements entered into before January 1, 2017, the fee is $52 when the taxpayer pays by way of a direct debit from the taxpayer's bank account. The fee is $107 when the taxpayer pays by way of a direct debit from the taxpayer's bank account for installment agreements entered into on or after January 1, 2017;

(2) For online payment agreements entered into before January 1, 2017, the fee is $120, except that the fee is $52 when the taxpayer pays by way of a direct debit from the taxpayer's bank account. The fee is $149 for entering into online payment agreements on or after January 1, 2017, except that the fee is $31 when the taxpayer pays by way of a direct debit from the taxpayer's bank account; and

(3) Notwithstanding the type of installment agreement and method of payment, the fee is $43 if the taxpayer is a low-income taxpayer, that is, an individual who falls at or below 250 percent of the dollar criteria established by the poverty guidelines updated annually in the **Federal Register** by the U.S. Department of Health and Human Services under authority of section 673(2) of the Omnibus Budget Reconciliation Act of 1981 (95 Stat. 357, 511), or such other measure that is adopted by the Secretary, except that the fee is $31 when the taxpayer pays by way of a direct debit from the taxpayer's bank account with respect to online payment agreements entered into on or after January 1, 2017;

* * * * *

(d) *Effective/applicability date.* This section is applicable beginning January 1, 2017.

Par. 3. In § 300.2, paragraphs (b) and (d) are revised to read as follows:

§ 300.2 Restructuring or reinstatement of installment agreement fee.

* * * * *

(b) *Fee.* The fee for restructuring or reinstating an installment agreement before January 1, 2017, is $50. The fee for restructuring or reinstating an installment agreement on or after January 1, 2017, is $89. If the taxpayer is a low-income taxpayer, that is, an individual who falls at or below 250 percent of the dollar criteria established by the poverty guidelines updated annually in the **Federal Register** by the U.S. Department of Health and Human Services under authority of section 673(2) of the Omnibus Budget Reconciliation Act of 1981 (95 Stat. 357, 511), or such other measure that is adopted by the Secretary, then the fee for restructuring or reinstating an installment agreement on or after January 1, 2017 is $43.

* * * * *

(d) *Effective/applicability date.* This section is applicable beginning January 1, 2017.

John Dalrymple,
Deputy Commissioner for Services and Enforcement.

(Filed by the Office of the Federal Register on August 19, 2016, 8:45 a.m., and published in the issue of the Federal Register for August 22, 2016, 81 F.R. 56543)

Estate, Gift, and Generation-Skipping Transfer Taxes; Restrictions on Liquidation of an Interest

REG–163113–02

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice of proposed rulemaking and notice of public hearing.

SUMMARY: This document contains proposed regulations concerning the valuation of interests in corporations and partnerships for estate, gift, and generation-skipping transfer (GST) tax purposes. Specifically, these proposed regulations concern the treatment of certain lapsing rights and restrictions on liquidation in determining the value of the transferred interests. These proposed regulations affect certain transferors of interests in corporations and partnerships and are necessary to prevent the undervaluation of such transferred interests.

DATES: Written and electronic comments must be received by November 2, 2016. Outlines of topics to be discussed at the public hearing scheduled for December 1, 2016, must be received by November 2, 2016.

ADDRESSES: Send submissions to: CC:PA:LPD:PR (REG–163113–02), room 5203, Internal Revenue Service, POB 7604, Ben Franklin Station, Washington, DC 20044. Submissions also may be hand delivered Monday through Friday between the hours of 8 a.m. and 5 p.m. to: CC:PA:LPD:PR (REG–163113–02), Courier's Desk, Internal Revenue Service,

1111 Constitution Avenue, NW, Washington, DC 20224, or sent electronically via the Federal eRulemaking portal at www.regulations.gov (IRS REG–163113–02). The public hearing will be held in the Auditorium, Internal Revenue Service Building, 1111 Constitution Avenue, NW, Washington, DC 20224.

FOR FURTHER INFORMATION CONTACT: Concerning the proposed regulations, John D. MacEachen, (202) 317-6859; concerning submissions of comments, the hearing, and/or to be placed on the building access list to attend the hearing, Regina L. Johnson at (202) 317-6901 (not toll-free numbers).

SUPPLEMENTARY INFORMATION:

Background

Section 2704 of the Internal Revenue Code provides special valuation rules for purposes of subtitle B (relating to estate, gift, and GST taxes) for valuing intra-family transfers of interests in corporations and partnerships subject to lapsing voting or liquidation rights and restrictions on liquidation. Lapses of voting or liquidation rights are treated as a transfer of the excess of the fair market value of all interests held by the transferor, determined as if the voting or liquidation rights were nonlapsing, over the fair market value of such interests after the lapse. Certain restrictions on liquidation are disregarded in determining the fair market value of the transferred interest. The legislative history of section 2704 states that the provision is intended, in part, to prevent results similar to that in *Estate of Harrison v. Commissioner*, T.C. Memo. 1987–8. Informal S. Rep. on S. 3209, 136 Cong. Rec. S15629–4 (October 18, 1990); H.R. Conf. Rep. No. 101–964, 2374, 2842 (October 27, 1990).

In *Harrison*, the decedent and two of his children each held a general partner interest in a partnership immediately before the decedent's death. The decedent also held all of the limited partner interests in the partnership. Because any general partner could liquidate the partnership during life, each general partner could cause all partners to obtain the full value of such partner's partnership interests. A general partner's right to liquidate the partnership lapsed on the death of that partner. In determining the estate tax value of the decedent's limited partner interest, the court concluded that the right of the decedent to liquidate the partnership (and thus readily obtain the full value of the limited partner interest) could not be taken into account because that right lapsed at death. As a result, the Court determined the value for transfer tax purposes of the limited partner interest to be less than its value either in the hands of the decedent immediately before death or in the hands of his family (the other general partners) immediately after death.

Section 2704(a)(1) provides generally that, if there is a lapse of any voting or liquidation right in a corporation or a partnership and the individual holding such right immediately before the lapse and members of such individual's family hold, both before and after the lapse, control of the entity, such lapse shall be treated as a transfer by such individual by gift, or a transfer which is includible in the gross estate, whichever is applicable. The amount of the transfer is the fair market value of all interests held by the individual immediately before the lapse (determined as if the voting and liquidation rights were nonlapsing) over the fair market value of such interests after the lapse.

Section 25.2704–1(a)(2)(v) of the current Gift Tax Regulations defines a liquidation right as the right or ability, including by reason of aggregate voting power, to compel the entity to acquire all or a portion of the holder's equity interest in the entity, whether or not its exercise would result in the complete liquidation of the entity.

Section 25.2704–1(c)(1) provides a rule that a lapse of a liquidation right occurs at the time a presently exercisable liquidation right is restricted or eliminated. However, under § 25.2704–1(c)(1), a transfer of an interest that results in the lapse of a liquidation right generally is not subject to this rule if the rights with respect to the transferred interest are not restricted or eliminated. The effect of this exception is that the inter vivos transfer of a minority interest by the holder of an interest with the aggregate voting power to compel the entity to acquire the holder's interest is not treated as a lapse even though the transfer results in the loss of the transferor's presently exercisable liquidation right.

The Treasury Department and the IRS, however, believe that this exception should not apply when the inter vivos transfer that results in the loss of the power to liquidate occurs on the decedent's deathbed. *Cf. Estate of Murphy v. Commissioner*, T.C. Memo. 1990–472 (rejecting "attempts to avoid taxation of the control value of stock holdings through bifurcation of the blocks"). Such transfers generally have minimal economic effects, but result in a transfer tax value that is less than the value of the interest either in the hands of the decedent prior to death or in the hands of the decedent's family immediately after death. *See Harrison, supra*. The enactment of section 2704 was intended to prevent this result. *See* Informal S. Rep. on S. 3209, *supra*; H.R. Conf. Rep. No. 101–964, *supra*. *See also* section 2704(a)(3) (conferring on the Secretary broad regulatory authority to apply section 2704(a) to the lapse of rights similar to voting and liquidation rights). The Treasury Department and the IRS have concluded that the regulatory exception created in § 25.2704–1(c)(1) should apply only to transfers occurring more than three years before death, where the loss of control over liquidation is likely to have a more substantive effect. A bright-line test will avoid the fact-intensive inquiry underlying a determination of a donor's subjective motive which is administratively burdensome for both taxpayers and the IRS. *Cf.* section 2035(a) (replacing the contemplation of death presumption of prior law with a bright-line, three-year test). Accordingly, the proposed regulations treat transfers occurring within three years of death that result in the lapse of a liquidation right as transfers occurring at death for purposes of section 2704(a).

Section 2704(b)(1) provides generally that, if a transferor transfers an interest in a corporation or partnership to (or for the benefit of) a member of the transferor's family, and the transferor and members of the transferor's family hold, immediately before the transfer, control of the entity, any "applicable restriction" is disregarded in valuing the transferred interest. Under section 2704(b)(2), an applicable restriction is defined as a restriction that effec-

tively limits the ability of the entity to liquidate, but which, after the transfer, either in whole or in part, will lapse or may be removed by the transferor or the transferor's family, either alone or collectively. Section 2704(b)(3)(B) excepts from the definition of an applicable restriction any restriction "imposed, or required to be imposed, by any Federal or State law."

Section 2704(b)(4) provides that the Secretary may by regulations provide that other restrictions shall be disregarded in determining the value of any interest in a corporation or a partnership transferred to a member of the transferor's family if the restriction has the effect of reducing the value of the transferred interest for transfer tax purposes but does not ultimately reduce the value of the interest to the transferee.

Section 25.2704–2(b) provides, in part, that an applicable restriction "is a limitation on the ability to liquidate the entity (in whole or in part) that is more restrictive than the limitations that would apply under the State law generally applicable to the entity in the absence of the restriction."

The Treasury Department and the IRS have determined that the current regulations have been rendered substantially ineffective in implementing the purpose and intent of the statute by changes in state laws and by other subsequent developments. First, courts have concluded that, under the current regulations, section 2704(b) applies only to restrictions on the ability to liquidate an entire entity, and not to restrictions on the ability to liquidate a transferred interest in that entity. *Kerr v. Commissioner*, 113 T.C. 449, 473 (1999), *aff'd*, 292 F.3rd 490 (5th Cir. 2002). Thus, a restriction on the ability to liquidate an individual interest is not an applicable restriction under the current regulations.

Second, as noted above, the current regulations except from the definition of an applicable restriction a restriction on liquidation that is no more restrictive than that of the state law that would apply in the absence of the restriction. The Tax Court viewed this as a regulatory expansion of the statutory exception to the application of section 2704(b) contained in section 2704(b)(3)(B) that excepts "any restriction imposed, or required to be imposed, by any Federal or State law." *Kerr*, 113 T.C. at 472. Since the promulgation of the current regulations, many state statutes governing limited partnerships have been revised to allow liquidation of the entity only on the unanimous vote of all owners (unless provided otherwise in the partnership agreement), and to eliminate the statutory default provision that had allowed a limited partner to liquidate his or her limited partner interest. Instead, statutes in these jurisdictions typically now provide that a limited partner may not withdraw from the partnership unless the partnership agreement provides otherwise. *See, e.g.*, Tex. Bus. Orgs. Ann. § 153.110 (West 2016) (limited partner may withdraw as specified in the partnership agreement); Uniform Limited Partnership Act (2001) § 601(a), 6A U.L.A. 348, 448 (Supp. 2015) (limited partner has no right to withdraw before completion of the winding up of the partnership). Further, other state statutes have been revised to create elective restrictions on liquidation. *See, e.g.*, Nev. Rev. Stat. § 87A.427 (2016) (limited partnership electing to be restricted limited partnership may not make any distributions for a 10-year period). Each of these statutes is designed to be at least as restrictive as the maximum restriction on liquidation that could be imposed in a partnership agreement. The result is that the provisions of a partnership agreement restricting liquidation generally fall within the regulatory exception for restrictions that are no more restrictive than those under state law, and thus do not constitute applicable restrictions under the current regulations.

Third, taxpayers have attempted to avoid the application of section 2704(b) through the transfer of a partnership interest to an assignee rather than to a partner. Again relying on the regulatory exception for restrictions that are no more restrictive than those under state law, and the fact that an assignee is allocated partnership income, gain, loss, etc., but does not have (and thus may not exercise) the rights or powers of a partner, taxpayers argue that an assignee's inability to cause the partnership to liquidate his or her partnership interest is no greater a restriction than that imposed upon assignees under state law. *Kerr*, 113 T.C. at 463–64; *Estate of Jones v. Commissioner*, 116 T.C. 121, 129–30 (2001). Taxpayers thus argue that the assignee status of the transferred interest is not an applicable restriction.

Finally, taxpayers have avoided the application of section 2704(b) through the transfer of a nominal partnership interest to a nonfamily member, such as a charity or an employee, to ensure that the family alone does not have the power to remove a restriction. *Kerr*, 292 F.3rd at 494.

As the Tax Court noted in *Kerr*, Congress granted the Secretary broad discretion in section 2704(b)(4) to promulgate regulations identifying restrictions not covered by section 2704(b) that nevertheless should be disregarded for transfer tax valuation purposes. 113 T.C. at 474. The Treasury Department and the IRS have concluded that, as was recognized by Congress when enacting section 2704(b), there are additional restrictions that may affect adversely the transfer tax value of an interest but that do not reduce the value of the interest to the family-member transferee, and thus should be disregarded for transfer tax valuation purposes. H.R. Conf. Rep. No. 101–964, *supra*, at 1138. The Treasury Department and the IRS have determined that such restrictions include: (a) a restriction on the ability to liquidate the transferred interest; and (b) any restrictions attendant upon the nature or extent of the property to be received in exchange for the liquidated interest, or the timing of the payment of that property.

Further, the Treasury Department and the IRS have concluded that the grant of an insubstantial interest in the entity to a nonfamily member should not preclude the application of section 2704(b) because, in reality, such nonfamily member interest generally does not constrain the family's ability to remove a restriction on the liquidation of an individual interest. *Cf. Kerr*, 292 F.3rd at 494 (noting that a charity receiving a partnership interest would "convert its interests into cash as soon as possible, so long as it believed the transaction to be in its best interest and that it would receive fair market value for its interest"). The interest of such nonfamily members does not affect the family's control of the entity, but rather, when combined with a requirement that all holders approve liquidation, is designed to reduce the transfer tax value of the family-held interests while not ultimately reduc-

ing the value of those interests to the family member transferees. The enactment of section 2704 was intended to prevent this result. See section 2704(b)(4) (conferring on the Secretary broad regulatory authority to apply section 2704(b) to other restrictions if the restriction has the effect of reducing the value of the transferred interest for transfer tax purposes but does not ultimately reduce the value of the interest to the transferee). The Treasury Department and the IRS have concluded 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. 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. Accordingly, the proposed regulations disregard the interest held by a nonfamily member that has been held less than three years before the date of the transfer, that constitutes less than 10 percent of the value of all of the equity interests, that when combined with the interests of other nonfamily members constitutes less than 20 percent of the value of all of the equity interests, or that lacks a right to put the interest to the entity and receive a minimum value.

Finally, since the promulgation of §§ 301.7701–1 through 301.7701–3 of the Procedure and Administration Regulations (the check-the-box regulations), an entity's classification for federal tax purposes may differ substantially from the entity's structure or form under local law. In addition, many taxpayers now utilize a limited liability company (LLC) as the preferred entity to hold family assets or business interests. The Treasury Department and the IRS have concluded that the regulations under section 2704 should be updated to reflect these significant developments.

Explanation of Provisions

The proposed regulations would amend § 25.2701–2 to address what constitutes control of an LLC or other entity or arrangement that is not a corporation, partnership, or limited partnership. The proposed regulations would amend § 25.2704–1 to address deathbed transfers that result in the lapse of a liquidation right and to clarify the treatment of a transfer that results in the creation of an assignee interest. The proposed regulations would amend § 25.2704–2 to refine the definition of the term "applicable restriction" by eliminating the comparison to the liquidation limitations of state law. Further, the proposed regulations would add a new section, § 25.2704–3, to address restrictions on the liquidation of an individual interest in an entity and the effect of insubstantial interests held by persons who are not members of the family.

Covered Entities

The proposed regulations would clarify, in §§ 25.2704–1 through 25.2704–3, that section 2704 applies to corporations, partnerships, LLC's, and other entities and arrangements that are business entities within the meaning of § 301.7701–2(a), regardless of whether the entity or arrangement is domestic or foreign, regardless of how the entity or arrangement is classified for other federal tax purposes, and regardless of whether the entity or arrangement is disregarded as an entity separate from its owner for other federal tax purposes.

Classification of the Entity

Section 2704 speaks in terms of corporations and partnerships. Under the proposed regulations, a corporation is any business entity described in § 301.7701–2(b)(1), (3), (4), (5), (6), (7), or (8), an S corporation within the meaning of section 1361(a)(1), and a qualified subchapter S subsidiary within the meaning of section 1361(b)(3)(B). For this purpose, a qualified subchapter S subsidiary is treated as a corporation that is separate from its parent owner. For most purposes under the proposed regulations, a partnership would be any other business entity within the meaning of § 301.7701–1(a), regardless of how the entity is classified for federal tax purposes.

However, these proposed regulations address two situations in which it is necessary to go beyond this division of entities into only the two categories of corporation and partnership. These situations (specifically, the test to determine control of an entity, and the test to determine whether a restriction is imposed under state law) require consideration of the differences among various types of business entities under the local law under which those entities are created and governed. As a result, for purposes of the test to determine control of an entity and to determine whether a restriction is imposed under state law, the proposed regulations would provide that in the case of any business entity or arrangement that is not a corporation, the form of the entity or arrangement would be determined under local law, regardless of how it is classified for other federal tax purposes, and regardless of whether it is disregarded as an entity separate from its owner for other federal tax purposes. For this purpose, local law is the law of the jurisdiction, whether domestic or foreign, under which the entity or arrangement is created or organized. Thus, in applying these two tests, there would be three types of entities: corporations, partnerships (including limited partnerships), and other business entities (which would include LLCs that are not S corporations) as determined under local law.

Control of the Entity

Section 2704(c)(1) incorporates the definition of control found in section 2701(b)(2). Control of a corporation, partnership, or limited partnership is defined in sections 2701(b)(2)(A) and (B). The proposed regulations would clarify, in § 25.2701–2, that control of an LLC or of any other entity or arrangement that is not a corporation, partnership, or limited partnership would constitute the holding of at least 50 percent of either the capital or profits interests of the entity or arrangement, or the holding of any equity interest with the ability to cause the full or partial liquidation of the entity or arrangement. *Cf.* section 2701(b)(2)(B)(ii) (defining control of a limited partnership as including the holding of any interest as a general partner). Further, for purposes of determining control, under the attribution rules of existing § 25.2701–6, an individual, the individual's estate, and members of the individual's family are treated as hold-

ing interests held indirectly through a corporation, partnership, trust, or other entity.

Lapses under Section 2704(a)

The proposed regulations would amend § 25.2704–1(a) to confirm that a transfer that results in the restriction or elimination of any of the rights or powers associated with the transferred interest (an assignee interest) is treated as a lapse within the meaning of section 2704(a). This is the case regardless of whether the right or power is exercisable by the transferor after the transfer because the statute is concerned with the lapse of rights associated with the transferred interest. Whether the lapse is of a voting or liquidation right is determined under the general rules of section 25.2704–1.

The proposed regulations also would amend § 25.2704–1(c)(1) to narrow the exception in the definition of a lapse of a liquidation right to transfers occurring three years or more before the transferor's death that do not restrict or eliminate the rights associated with the ownership of the transferred interest. In addition, the proposed regulations would amend § 25.2704–1(c)(2)(i)(B) to conform the existing provision for testing the family's ability to liquidate an interest with the proposed elimination of the comparison with local law, to clarify that the manner in which liquidation may be achieved is irrelevant, and to conform with the proposed provision for disregarding certain nonfamily-member interests in testing the family's ability to remove a restriction in proposed § 25.2704–3 regarding disregarded restrictions.

Applicable Restrictions under Section 2704(b)

The proposed regulations would remove the exception in § 25.2704–2(b) that limits the definition of applicable restriction to limitations that are more restrictive than the limitations that would apply in the absence of the restriction under the local law generally applicable to the entity. As noted above, this exception is not consistent with section 2704(b) to the extent that the transferor and family members have the power to avoid any statutory rule. The proposed regulations also would revise § 25.2704–2(b) to provide that an applicable restriction does include a restriction that is imposed under the terms of the governing documents, as well as a restriction that is imposed under a local law regardless of whether that restriction may be superseded by or pursuant to the governing documents or otherwise. In applying this particular exception to the definition of an applicable restriction, this proposed rule is intended to ensure that a restriction that is not imposed or required to be imposed by federal or state law is disregarded without regard to its source.

Further, with regard to the exception for restrictions "imposed, or required to be imposed, by any Federal or State law," in section 2704(b)(3)(B), the proposed regulations would clarify that the terms "federal" and "state" refer only to the United States or any state (including the District of Columbia (*see* section 7701(a)(10)), but do not include any other jurisdiction.

A restriction is imposed or required to be imposed by law if the restriction cannot be removed or overridden and it is mandated by the applicable law, is required to be included in the governing documents, or otherwise is made mandatory. In addition, a restriction imposed by a state law, even if that restriction may not be removed or overridden directly or indirectly, nevertheless would constitute an applicable restriction in two situations. In each situation, although the statute itself is mandatory and cannot be overridden, another statute is available to be used for the entity's governing law that does not require the mandatory restriction, thus in effect making the purportedly mandatory provision elective. The first situation is that in which the state law is limited in its application to certain narrow classes of entities, particularly those types of entities most likely to be subject to transfers described in section 2704, that is, family-controlled entities. The second situation is that in which, although the state law under which the entity was created imposed a mandatory restriction that could not be removed or overridden, either at the time the entity was organized or at some subsequent time, that state's law also provided an optional provision or an alternative statute for the creation and governance of that same type of entity that did not mandate the restriction. Thus, an optional provision is one for the same category of entity that did not include the restriction or that allowed it to be removed or overridden, or that made the restriction optional, or permitted the restriction to be superseded, whether by the entity's governing documents or otherwise. For purposes of determining whether a restriction is imposed on an entity under state law, there would be only three types of entities, specifically, the three categories of entities described in § 25.2701–2(b)(5) of the proposed regulations: corporations; partnerships (including limited partnerships); and other business entities. A similar proposed rule applies to the additional restrictions discussed later in this preamble.

If an applicable restriction is disregarded, the fair market value of the transferred interest is determined under generally applicable valuation principles as if the restriction does not exist (that is, as if the governing documents and the local law are silent on the question), and thus, there is deemed to be no such restriction on liquidation of the entity.

Disregarded Restrictions

A new class of restrictions is described in the proposed regulations that would be disregarded, described as "disregarded restrictions." This class of restrictions is identified pursuant to the authority contained in section 2704(b)(4). Note 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.

Under § 25.2704–3 of the proposed regulations, in the case of a family-controlled entity, any restriction described below on a shareholder's, partner's, member's, or other owner's right to liquidate his or her interest in the entity will be disregarded if the restriction will lapse at any time after the transfer, or if the transferor, or the transferor and family members, without regard to certain interests held by nonfamily members, may remove or override the restriction. Under the pro-

posed regulations, such a disregarded restriction includes one that: (a) limits the ability of the holder of the interest to liquidate the interest; (b) limits the liquidation proceeds to an amount that is less than a minimum value; (c) defers the payment of the liquidation proceeds for more than six months; or (d) permits the payment of the liquidation proceeds in any manner other than in cash or other property, other than certain notes.

"Minimum value" is the interest's share of the net value of the entity on the date of liquidation or redemption. The net value of the entity is the fair market value, as determined under section 2031 or 2512 and the applicable regulations, of the property held by the entity, reduced by the outstanding obligations of the entity. Solely for purposes of determining minimum value, the only outstanding obligations of the entity that may be taken into account are those that would be allowable (if paid) as deductions under section 2053 if those obligations instead were claims against an estate. For example, and subject to the foregoing limitation on outstanding obligations, if the entity holds an operating business, the rules of § 20.2031–2(f)(2) or 20.2031–3 apply in the case of a testamentary transfer and the rules of § 25.2512–2(f)(2) or 25.2512–3 apply in the case of an inter vivos transfer. The minimum value of the interest is the net value of the entity multiplied by the interest's share of the entity. For this purpose, the interest's share is determined by taking into account any capital, profits, and other rights inherent in the interest in the entity.

A disregarded restriction includes limitations on the time and manner of payment of the liquidation proceeds. Such limitations include provisions permitting deferral of full payment beyond six months or permitting payment in any manner other than in cash or property. For this purpose, the term "property" does not include a note or other obligation issued directly or indirectly by the entity, other holders of an interest in the entity, or persons related to either. An exception is made for the note of an entity engaged in an active trade or business to the extent that (a) the liquidation proceeds are not attributable to passive assets within the meaning of section 6166(b)(9)(B), and (b) the note is adequately secured, requires periodic payments on a non-deferred basis, is issued at market interest rates, and has a fair market value (when discounted to present value) equal to the liquidation proceeds. A fair market value determination assumes a cash sale. *See* Section 2 of Rev. Rul. 59–60, 1959–1 C.B. 237 (defining fair market value and stating that "[c]ourt decisions frequently state in addition that the hypothetical buyer and seller are assumed to be able, as well as willing to trade. . ."). Thus, in the absence of immediate payment of the liquidation proceeds, the fair market value of any note falling within this exception must equal the fair market value of the liquidation proceeds on the date of liquidation or redemption.

Exceptions that apply to applicable restrictions under the current and these proposed regulations also apply to this new class of disregarded restrictions. One of the exceptions applicable to the definition of a disregarded restriction applies if (a) each holder of an interest in the entity has an enforceable "put" right to receive, on liquidation or redemption of the holder's interest, cash and/or other property with a value that is at least equal to the minimum value previously described, (b) the full amount of such cash and other property must be paid within six months after the holder gives notice to the entity of the holder's intent to liquidate any part or all of the holder's interest and/or withdraw from the entity, and (c) such 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 a person 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), such proceeds may include a note or other obligation if such note 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 the liquidation or redemption equal to the liquidation proceeds. A similar exception is made to the definition of an applicable restriction in proposed § 25.2704–2(b)(4).

In determining whether the transferor and/or the transferor's family has the ability to remove a restriction included in this new class of disregarded restrictions, any interest in the entity held by a person who is not a member of the transferor's family is disregarded if, at the time of the transfer, the interest: (a) has been held by such person for less than three years; (b) constitutes less than 10 percent of the value of all of the equity interests in a corporation, or constitutes less than 10 percent of the capital and profits interests in a business entity described in § 301.7701–2(a) other than a corporation (for example, less than a 10-percent interest in the capital and profits of a partnership); (c) when combined with the interests of all other persons who are not members of the transferor's family, constitutes less than 20 percent of the value of all of the equity interests in a corporation, or constitutes less than 20 percent of the capital and profits interests in a business entity other than a corporation (for example, less than a 20-percent interest in the capital and profits of a partnership); or (d) any such person, as the owner of an interest, does not have an enforceable right to receive in exchange for such interest, on no more than six months' prior notice, the minimum value referred to in the definition of a disregarded restriction. If an interest is disregarded, the determination of whether the family has the ability to remove the restriction will be made assuming that the remaining interests are the sole interests in the entity.

Finally, if a restriction is disregarded under proposed § 25.2704–3, the fair market value of the interest in the entity is determined assuming that the disregarded restriction did not exist, either in the governing documents or applicable law. Fair market value is determined under generally accepted valuation principles, including any appropriate discounts or premiums, subject to the assumptions described in this paragraph.

Coordination with Marital and Charitable Deductions

Section 2704(b) applies to intra-family transfers for all purposes of subtitle B

relating to estate, gift and GST taxes. Therefore, to the extent that an interest qualifies for the gift or estate tax marital deduction and must be valued by taking into account the special valuation assumptions of section 2704(b), the same value generally will apply in computing the marital deduction attributable to that interest. The value of the estate tax marital deduction may be further affected, however, by other factors justifying a different value, such as the application of a control premium. *See, e.g., Estate of Chenoweth v. Commissioner*, 88 T.C. 1577 (1987).

Section 2704(b) does not apply to transfers to nonfamily members and thus has no application in valuing an interest passing to charity or to a person other than a family member. If part of an entity interest includible in the gross estate passes to family members and part of that interest passes to nonfamily members, and if (taking into account the proposed rules regarding the treatment of certain interests held by nonfamily members) the part passing to the decedent's family members is valued under section 2704(b), then the proposed regulations provide that the part passing to the family members is treated as a property interest separate from the part passing to nonfamily members. The fair market value of the part passing to the family members is determined taking into account the special valuation assumptions of section 2704(b), as well as any other relevant factors, such as those supporting a control premium. The fair market value of the part passing to the nonfamily member(s) is determined in a similar manner, but without the special valuation assumptions of section 2704(b). Thus, if the sole nonfamily member receiving an interest is a charity, the interest generally will have the same value for both estate tax inclusion and deduction purposes. If the interest passing to nonfamily members, however, is divided between charities and other nonfamily members, additional considerations (not prescribed by section 2704) may apply, resulting in a different value for charitable deduction purposes. *See, e.g., Ahmanson Foundation v. United States*, 674 F.2d 761 (9th Cir. 1981).

Effective Dates

The amendments to § 25.2701–2 are proposed to be effective on and after the date of publication of a Treasury decision adopting these rules as final regulations in the **Federal Register.** The amendments to § 25.2704–1 are proposed to apply to lapses of rights created after October 8, 1990, occurring on or after the date these regulations are published as final regulations in the **Federal Register.** The amendments to § 25.2704–2 are proposed to 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.** Section 25.2704–3 is proposed to apply to transfers of property subject to restrictions created after October 8, 1990, occurring 30 or more days after the date these regulations are published as final regulations in the **Federal Register.**

Special Analyses

Certain IRS regulations, including this one, are exempt from the requirements of Executive Order 12866, as supplemented and reaffirmed by Executive Order 13563. Therefore, a regulatory impact assessment is not required. Pursuant to the Regulatory Flexibility Act (5 U.S.C. chapter 6), it is hereby certified that this regulation will not have a significant economic impact on a substantial number of small entities. The proposed regulations affect the transfer tax liability of individuals who transfer an interest in certain closely held entities and not the entities themselves. The proposed regulations do not affect the structure of such entities, but only the assumptions under which they are valued for federal transfer tax purposes. In addition, any economic impact on entities affected by section 2704, large or small, is derived from the operation of the statute, or its intended application, and not from the proposed regulations in this notice of proposed rulemaking. Accordingly, a regulatory flexibility analysis is not required. Pursuant to section 7805(f) of the Internal Revenue Code, this regulation has been submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on its impact on small business.

Comments and Public Hearing

Before these proposed regulations are adopted as final regulations, consideration will be given to any written (a signed original and eight (8) copies) or electronic comments that are submitted timely (in the manner described in "ADDRESSES") to the IRS. The Treasury Department and the IRS request comments on all aspects of the proposed regulations. All comments will be available at www.regulations.gov, or upon request.

A public hearing on these proposed regulations has been scheduled for December 1, 2016, beginning at 10 a.m. in the Auditorium, Internal Revenue Building, 1111 Constitution Avenue, NW, Washington, DC 20224. Due to building security procedures, visitors must enter at the Constitution Avenue entrance. In addition, all visitors must present photo identification to enter the building. Because of access restrictions, visitors will not be admitted beyond the immediate entrance area more than 30 minutes before the hearing starts. For information about having your name placed on the building access list to attend the hearing, see the "FOR FURTHER INFORMATION CONTACT" section of this preamble.

The rules of 26 CFR 601.601(a)(3) apply to the hearing. Persons who wish to present oral comments at the hearing must submit comments by November 2, 2016, and submit an outline of the topics to be discussed and the time to be devoted to each topic (signed original and eight (8) copies) by November 2, 2016.

A period of 10 minutes will be allotted to each person for making comments. Copies of the agenda will be available free of charge at the hearing.

Drafting Information

The principal author of these proposed regulations is John D. MacEachen, Office of the Associate Chief Counsel (Passthroughs and Special Industries). Other personnel from the Treasury Department and the IRS participated in their development.

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Proposed Amendments to the Regulations

Accordingly, 26 CFR part 25 is proposed to be amended as follows:

PART 25—GIFT TAX; GIFTS MADE AFTER DECEMBER 31, 1954

Par. 1. The authority citation for part 25 is amended by adding entries in numerical order to read in part as follows:

Authority: 26 U.S.C. 7805. * * *

Section 25.2701–2 also issued under 26 U.S.C. 2701(e).

Section 25.2704–1 also issued under 26 U.S.C. 2704(a).

Sections 25.2704–2 and 25.2704–3 also issued under 26 U.S.C. 2704(b).

* * * * *

Par. 2. Section 25.2701–2 is amended as follows:

1. In paragraph (b)(5)(i), the first sentence is revised and five sentences are added before the last sentence.

2. Paragraph (b)(5)(iv) is added.

The revision and additions read as follows:

§ 25.2701–2 Special valuation rules for applicable retained interests.

* * * * *

(b) * * *

(5) * * *

(i) * * * For purposes of section 2701, a controlled entity is a corporation, partnership, or any other entity or arrangement that is a business entity within the meaning of § 301.7701–2(a) of this chapter controlled, immediately before a transfer, by the transferor, applicable family members, and/or any lineal descendants of the parents of the transferor or the transferor's spouse. The form of the entity determines the applicable test for control. For purposes of determining the form of the entity, any business entity described in § 301.7701–2(b)(1), (3), (4), (5), (6), (7), or (8) of this chapter, an S corporation within the meaning of section 1361(a)(1), and a qualified subchapter S subsidiary within the meaning of section 1361(b)(3)(B) is a corporation. For this purpose, a qualified subchapter S subsidiary is treated as a corporation separate from its parent corporation. In the case of any business entity that is not a corporation under these provisions, the form of the entity is determined under local law, regardless of how the entity is classified for federal tax purposes or whether it is disregarded as an entity separate from its owner for federal tax purposes. For this purpose, local law is the law of the jurisdiction, whether domestic or foreign, under whose laws the entity is created or organized. * * *

* * * * *

(iv) *Other business entities.* In the case of any entity or arrangement that is not a corporation, partnership, or limited partnership, control means the holding of at least 50 percent of either the capital interests or the profits interests in the entity or arrangement. In addition, control means the holding of any equity interest with the ability to cause the liquidation of the entity or arrangement in whole or in part.

* * * * *

Par. 3. Section 25.2701–8 is amended as follows:

1. The existing text is designated as paragraph (a).

2. The first sentence of newly designated paragraph (a) is revised and paragraph (b) is added.

The revision and addition reads as follows:

§ 25.2701–8 Effective dates.

(a) Except as provided in paragraph (b) of this section, §§ 25.2701–1 through 25.2701–4 and §§ 25.2701–6 and 25.2701–7 are effective as of January 28, 1992. * * *

(b) The first six sentences of § 25.2701–2(b)(5)(i) and (iv) are effective on the date these regulations are published as final regulations in the **Federal Register.**

Par. 4. Section 25.2704–1 is amended as follows:

1. In paragraph (a)(1), the first two sentences are revised and four sentences are added before the third sentence.

2. In paragraph (a)(2)(i), a sentence is added at the end.

3. Paragraph (a)(2)(iii) is removed.

4. Paragraphs (a)(2)(iv) through (vi) are redesignated as paragraphs (a)(2)(iii) through (v), respectively.

5. In newly designated paragraph (a)(2)(iii), a sentence is added before the third sentence.

6. Paragraph (a)(4) is revised.

7. Paragraph (a)(5) is added.

8. In paragraph (c)(1), the second sentence is revised and a sentence is added at the end.

9. Paragraph (c)(2)(i)(B) is revised.

10. In paragraph (f) *Example 4*, the third and fourth sentences are revised and a sentence is added at the end.

11. In paragraph (f) *Example 6*, the third sentence is removed.

12. In paragraph (f) *Example 7*, the third and fourth sentences are revised and a sentence is added at the end.

The revisions and additions read as follows:

§ 25.2704–1 Lapse of certain rights.

(a) * * *

(1) * * * For purposes of subtitle B (relating to estate, gift, and generation-skipping transfer taxes), the lapse of a voting or a liquidation right in a corporation or a partnership (an entity), whether domestic or foreign, is a transfer by the individual directly or indirectly holding the right immediately prior to its lapse (the holder) to the extent provided in paragraphs (b) and (c) of this section. This section applies only if the entity is controlled by the holder and/or members of the holder's family immediately before and after the lapse. For purposes of this section, a corporation is any business entity described in § 301.7701–2(b)(1), (3), (4), (5), (6), (7), or (8) of this chapter, an S corporation within the meaning of section 1361(a)(1), and a qualified subchapter S subsidiary within the meaning of section 1361(b)(3)(B). For this purpose, a qualified subchapter S subsidiary is treated as a corporation separate from its parent corporation. A partnership is any other business entity within the meaning of § 301.7701–2(a) of this chapter regardless of how that entity is classified for federal tax purposes. Thus, for example, the term partnership includes a limited liability company that is not an S corporation, whether or not it is disregarded as an entity separate from its owner for federal tax purposes. * * *

(2) * * *

(i) * * * For purposes of determining whether the group consisting of the holder, the holder's estate and members of the holder's family control the entity, a member of the group is also treated as holding any interest held indirectly by such member through a corporation, partnership, trust, or other entity under the rules contained in § 25.2701–6.

* * * * *

(iii) * * * In the case of a limited liability company, the right of a member to participate in company management is a voting right. * * *

* * * * *

(4) *Source of right or lapse.* A voting right or a liquidation right may be conferred by or lapse by reason of local law, the governing documents, an agreement, or otherwise. For this purpose, local law is the law of the jurisdiction, whether domestic or foreign, that governs voting or liquidation rights.

(5) *Assignee interests.* A transfer that results in the restriction or elimination of the transferee's ability to exercise the voting or liquidation rights that were associated with the interest while held by the transferor is a lapse of those rights. For example, the transfer of a partnership interest to an assignee that neither has nor may exercise the voting or liquidation rights of a partner is a lapse of the voting and liquidation rights associated with the transferred interest.

(c) * * *

(1) * * * Except as otherwise provided, a transfer of an interest occurring more than three years before the transferor's death that results in the lapse of a voting or liquidation right is not subject to this section if the rights with respect to the transferred interest are not restricted or eliminated. * * * The 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).

(2) * * * *

(i) * * * *

(B) *Ability to liquidate.* Whether an interest can be liquidated immediately after the lapse is determined under the local law generally applicable to the entity, as modified by the governing documents of the entity, but without regard to any restriction (in the governing documents, applicable local law, or otherwise) described in section 2704(b) and the regulations thereunder. The manner in which the interest may be liquidated is irrelevant for this purpose, whether by voting, taking other action authorized by the governing documents or applicable local law, revising the governing documents, merging the entity with an entity whose governing documents permit liquidation of the interest, terminating the entity, or otherwise. For purposes of making this determination, an interest held by a person other than a member of the holder's family (a nonfamily-member interest) may be disregarded. Whether a nonfamily-member interest is disregarded is determined under § 25.2704–3(b)(4), applying that section as if, by its terms, it also applies to the question of whether the holder (or the holder's estate) and members of the holder's family may liquidate an interest immediately after the lapse.

* * * * *

(f) * * *

Example 4. * * * More than three years before D's death, D transfers one-half of D's stock in equal shares to D's three children (14 percent each). Section 2704(a) does not apply to the loss of D's ability to liquidate Y because the voting rights with respect to the transferred shares are not restricted or eliminated by reason of the transfer, and the transfer occurs more than three years before D's death. However, had the transfers occurred within three years of D's death, the transfers would have been treated as the lapse of D's liquidation right occurring at D's death.

* * * * *

Example 7. * * * More than three years before D's death, D transfers 30 shares of common stock to D's child. The transfer is not a lapse of a liquidation right with respect to the common stock because the voting rights that enabled D to liquidate prior to the transfer are not restricted or eliminated, and the transfer occurs more than three years before D's death. * * * However, had the transfer occurred within three years of D's death, the transfer would have been treated as the lapse of D's liquidation right with respect to the common stock occurring at D's death.

Par. 5. Section 25.2704–2 is amended as follows:

1. Paragraphs (a) and (b) are revised.

2. Paragraphs (c) and (d) are designated as paragraphs (e) and (g), respectively.

3. New paragraphs (c), (d), and (f) are added.

4. The first sentence of newly designated paragraph (e) is revised.

5. The third sentences of newly designated paragraph (g) *Example 1.* and *Example 3.* are removed.

6. The third sentence of newly designated paragraph (g) *Example 5.* is revised.

The revisions and additions read as follows:

§ 25.2704–2 Transfers subject to applicable restrictions.

(a) *In general.* For purposes of subtitle B (relating to estate, gift, and generation-skipping transfer taxes), if an interest in a corporation or a partnership (an entity), whether domestic or foreign, is transferred to or for the benefit of a member of the transferor's family, and the transferor and/or members of the transferor's family control the entity immediately before the transfer, any applicable restriction is disregarded in valuing the transferred interest. For purposes of this section, a corporation is any business entity described in § 301.7701–2(b)(1), (3), (4), (5), (6), (7), or (8) of this chapter, an S corporation within the meaning of section 1361(a)(1), and a qualified subchapter S subsidiary within the meaning of section 1361(b)(3)(B). For this purpose, a qualified subchapter S subsidiary is treated as a corporation separate from its parent corporation. A partnership is any other business entity within the meaning of § 301.7701–2(a) of this chapter, regardless of how that entity is classified for federal tax purposes. Thus, for example, the term partnership includes a limited liability company that is not an S corporation, whether or not it is disregarded as an entity separate from its owner for federal tax purposes.

(b) *Applicable restriction defined*—(1) *In general.* The term *applicable restriction* means a limitation on the ability to liquidate the entity, in whole or in part (as opposed to a particular holder's interest in the entity), if, after the transfer, that limitation either lapses or may be removed by the transferor, the transferor's estate, and/or any member of the transferor's family, either alone or collectively. See § 25.2704–3 for restrictions on the ability to liquidate a particular holder's interest in the entity.

(2) *Source of limitation.* An applicable restriction includes a restriction that is imposed under the terms of the governing documents (for example, the corporation's by-laws, the partnership agreement, or other governing documents), a buy-sell agreement, a redemption agreement, or an assignment or deed of gift, or any other document, agreement, or arrangement; and a restriction imposed under local law regardless of whether that restriction may be superseded by or pursuant to the governing documents or otherwise. For this purpose, local law is the law of the jurisdiction, whether domestic or foreign, that governs the applicability of the restriction. For an exception for restrictions imposed or required to be imposed by federal or state law, see paragraph (b)(4)(ii) of this section.

(3) *Lapse or removal of limitation.* A restriction is an applicable restriction only to the extent that either the restriction by its terms will lapse at any time after the transfer, or the restriction may be removed after the transfer by any one or more members, either alone or collectively, of the group consisting of the transferor, the transferor's estate, and members of the transferor's family. For purposes of determining whether the ability to remove the restriction is held by any member(s) of this group, members are treated as holding the interests attributed to them under the rules contained in § 25.2701–6, in addition to interests held directly. The manner in which the restriction may be removed is irrelevant for this purpose, whether by voting, taking other action authorized by the governing documents or applicable local law, removing the restriction from the governing documents, revising the governing documents to override the restriction prescribed under local law in the absence of a contrary provision in the governing documents, merging the entity with an entity whose governing documents do not contain the restriction, terminating the entity, or otherwise.

(4) *Exceptions.* A restriction described in this paragraph (b)(4) is not an applicable restriction.

(i) *Commercially reasonable restriction.* An applicable restriction does not include a commercially reasonable restriction on liquidation imposed by an unrelated person providing capital to the entity for the entity's trade or business operations, whether in the form of debt or equity. 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.

(ii) *Imposed by federal or state law.* An applicable restriction does not include a restriction imposed or required to be imposed by federal or state law. For this purpose, federal or state law means the laws of the United States, of any state thereof, or of the District of Columbia, but does not include the laws of any other jurisdiction. A provision of law that applies only in the absence of a contrary provision in the governing documents or that may be superseded with regard to a particular entity (whether by the shareholders, partners, members and/or managers of the entity or otherwise) is not a restriction that is imposed or required to be imposed by federal or state law. A law that is limited in its application to certain narrow classes of entities, particularly those types of entities (such as family-controlled entities) most likely to be subject to transfers described in section 2704, is not a restriction that is imposed or required to be imposed by federal or state law. For example, a law requiring a restriction that may not be removed or superseded and that applies only to family-controlled entities that otherwise would be subject to the rules of section 2704 is an applicable restriction. In addition, a restriction is not imposed or required to be imposed by federal or state law if that law also provides (either at the time the entity was organized or at some subsequent time) an optional provision that does not include the restriction or that allows it to be removed or overridden, or that provides a different statute for the creation and governance of that same type of entity that does not mandate the restriction, makes the restriction optional, or permits the restriction to be superseded, whether by the entity's governing documents or otherwise. For purposes of determining the type of entity, there are only three types of entities, specifically, the three categories of entities described in § 25.2701–2(b)(5): corporations; partnerships (including limited partnerships); and other business entities.

(iii) *Certain rights under section 2703.* An option, right to use property, or agreement that is subject to section 2703 is not an applicable restriction.

(iv) *Put right of each holder.* Any restriction that otherwise would constitute an applicable restriction under this section will not be considered an applicable restriction if each holder of an interest in the entity has a put right as described in § 25.2704–3(b)(6).

(c) *Other definitions.* For the definition of the term *controlled entity*, see § 25.2701–2(b)(5). For the definition of the term *member of the family*, see § 25.2702–2(a)(1).

(d) *Attribution.* An individual, the individual's estate, and members of the individual's family are treated as also holding any interest held indirectly by such person through a corporation, partnership, trust, or other entity under the rules contained in § 25.2701–6.

(e) * * * If an applicable restriction is disregarded under this section, the fair market value of the transferred interest is determined under generally applicable valuation principles as if the restriction (whether in the governing documents, applicable law, or both) does not exist. * * *

(f) *Certain transfers at death to multiple persons.* Solely for purposes of section 2704(b), if part of a decedent's interest in an entity includible in the gross estate passes by reason of death to one or more members of the decedent's family and part of that includible interest passes to one or more persons who are not members of the decedent's family, and if the part passing to the members of the decedent's family is to be valued pursuant to paragraph (e) of this section, then that part is treated as a single, separate property interest. In that case, the part passing to one or more persons who are not members of the decedent's family is also treated as a single, separate property interest. See paragraph (g) *Ex. 4* of § 25.2704–3.

(g) * * *

Example 5. * * * The preferred stock carries a right to liquidate X that cannot be exercised until 1999. * * *

* * * * *

§ 25.2704–3 [Redesignated as § 25.2704–4]

Par. 6. Section 25.2704–3 is redesignated as § 25.2704–4.

Par. 7. New § 25.2704–3 is added to read as follows.

§ 25.2704–3 Transfers subject to disregarded restrictions.

(a) *In general.* For purposes of subtitle B (relating to estate, gift and generation-skipping transfer taxes), and notwithstanding any provision of § 25.2704–2, if an interest in a corporation or a partnership (an entity), whether domestic or foreign, is transferred to or for the benefit of a member of the transferor's family, and the transferor and/or members of the transferor's family control the entity immediately before the transfer, any restriction described in paragraph (b) of this section is disregarded, and the transferred interest is valued as provided in paragraph (f) of this section. For purposes of this section, a corporation is any business entity described in § 301.7701–2(b)(1), (3), (4), (5), (6), (7), or (8) of this chapter, an S corporation within the meaning of section 1361(a)(1), and a qualified subchapter S subsidiary within the meaning of section 1361(b)(3)(B). For this purpose, a qualified subchapter S subsidiary is treated as a corporation separate from its parent corporation. A partnership is any other business entity within the meaning of § 301.7701–2(a) of this chapter, regardless of how that entity is classified for federal tax purposes. Thus, for example, the term partnership includes a limited liability company that is not an S corporation, whether or not it is disregarded as an entity separate from its owner for federal tax purposes.

(b) *Disregarded restrictions defined—*(1) *In general.* The term *disregarded restriction* means a restriction that is a limitation on the ability to redeem or liquidate an interest in an entity that is described in any one or more of paragraphs (b)(1)(i) through (iv) of this section, if the restriction, in whole or in part, either lapses after the transfer or can be removed by the transferor or any member of the transferor's family (subject to paragraph (b)(4) of this section), either alone or collectively.

(i) The provision limits or permits the limitation of the ability of the holder of the interest to compel liquidation or redemption of the interest.

(ii) The provision limits or permits the limitation of the amount that may be received by the holder of the interest on liquidation or redemption of the interest to an amount that is less than a minimum value. The term *minimum value* means the interest's share of the net value of the entity determined on the date of liquidation or redemption. The net value of the entity is the fair market value, as determined under section 2031 or 2512 and the applicable regulations, of the property held by the entity, reduced by the outstanding obligations of the entity. Solely for purposes of determining minimum value, the only outstanding obligations of the entity that may be taken into account are those that would be allowable (if paid) as deductions under section 2053 if those obligations instead were claims against an estate. For example, and subject to the foregoing limitation on outstanding obligations, if the entity holds an operating business, the rules of § 20.2031–2(f)(2) or § 20.2031–3 of this chapter apply in the case of a testamentary transfer and the rules of § 25.2512–2(f)(2) or § 25.2512–3 apply in the case of an inter vivos transfer. The minimum value of the interest is the net value of the entity multiplied by the interest's share of the entity. For this purpose, the interest's share is determined by taking into account any capital, profits, and other rights inherent in the interest in the entity. If the property held by the entity directly or indirectly includes an interest in another entity, and if a transfer of an interest in that other entity by the same transferor (had that transferor owned the interest directly) would be subject to section 2704(b), then the entity will be treated as owning a share of the property held by the other entity, determined and valued in accordance with the provisions of section 2704(b) and the regulations thereunder.

(iii) The provision defers or permits the deferral of the payment of the full amount of the liquidation or redemption proceeds for more than six months after the date the holder gives notice to the entity of the holder's intent to have the holder's interest liquidated or redeemed.

(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.

(2) *Source of limitation.* A disregarded restriction includes a restriction that is imposed under the terms of the governing documents (for example, the corporation's by-laws, the partnership agreement, or other governing documents), a buy-sell agreement, a redemption agreement, or an assignment or deed of gift, or any other document, agreement, or arrangement; and a restriction imposed under local law regardless of whether that restriction may be superseded by or pursuant to the governing documents or otherwise. For this purpose, local law is the law of the jurisdiction, whether domestic or foreign, which governs the applicability of the restriction. For an exception for restrictions imposed or required to be imposed by federal or state law, see paragraph (b)(5)(iii) of this section.

(3) *Lapse or removal of limitation.* A restriction is a disregarded restriction only to the extent that the restriction either will lapse by its terms at any time after the transfer or may be removed after the transfer by any one or more members, either alone or collectively, of the group consisting of the transferor, the transferor's estate, and members of the transferor's family. For purposes of determining whether the ability to remove the restriction is held by any one or more members of this group, members are treated as holding interests attributed to them under the rules contained in § 25.2701–6, in addition to interests held directly. See also paragraph (b)(4) of this section. The manner in which the restriction may be removed is irrelevant for this purpose, whether by voting, taking other action authorized by the governing documents or applicable local law, removing the restriction from the governing documents, revising the governing documents to override the restriction prescribed under local law in the absence of a contrary provision in the governing documents, merging the entity with an entity whose governing documents do not contain the restriction, terminating the entity, or otherwise.

(4) *Certain interests held by nonfamily members disregarded*—(i) *In general.* In the case of a transfer to or for the benefit of a member of the transferor's family, for purposes of determining whether the transferor (or the transferor's estate) or any member of the transferor's family, either alone or collectively, may remove a restriction within the meaning of this paragraph (b), an interest held by a person other than a member of the transferor's family (a nonfamily-member interest) is disregarded unless all of the following are satisfied:

(A) The interest has been held by the nonfamily member for at least three years immediately before the transfer;

(B) On the date of the transfer, in the case of a corporation, the interest constitutes at least 10 percent of the value of all of the equity interests in the corporation, and, in the case of a business entity within the meaning of § 301.7701–2(a) of this chapter other than a corporation, the interest constitutes at least a 10-percent interest in the business entity, for example, a 10-percent interest in the capital and profits of a partnership;

(C) On the date of the transfer, in the case of a corporation, the total of the equity interests in the corporation held by shareholders who are not members of the transferor's family constitutes at least 20 percent of the value of all of the equity interests in the corporation, and, in the case of a business entity within the meaning of § 301.7701–2(a) of this chapter other than a corporation, the total interests in the entity held by owners who are not members of the transferor's family is at least 20 percent of all the interests in the entity, for example, a 20-percent interest in the capital and profits of a partnership; and

(D) Each nonfamily member, as owner, has a put right as described in paragraph (b)(6) of this section.

(ii) *Effect of disregarding a nonfamily-member interest.* If a nonfamily-member interest is disregarded under this section, the rules of this section are applied as if all interests other than disregarded nonfamily-member interests constitute all of the interests in the entity.

(iii) *Attribution.* In applying the 10-percent and 20-percent tests when the property held by the corporation or other business entity is, in whole or in part, an interest in another entity, the attribution rules of paragraph (d) of this section apply both in determining the interest held by a nonfamily member, and in measuring the interests owned through other entities.

(5) *Exceptions.* A restriction described in this paragraph (b)(5) is not a disregarded restriction.

(i) *Applicable restriction.* A disregarded restriction does not include an applicable restriction on the liquidation of the entity as defined in and governed by § 25.2704–2.

(ii) *Commercially reasonable restriction.* A disregarded restriction does not include a commercially reasonable restriction on liquidation imposed by an unrelated person providing capital to the entity for the entity's trade or business operations whether in the form of debt or equity. 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.

(iii) *Requirement of federal or state law.* A disregarded restriction does not include a restriction imposed or required to be imposed by federal or state law. For this purpose, federal or state law means the laws of the United States, of any state thereof, or of the District of Columbia, but does not include the laws of any other jurisdiction. A provision of law that applies only in the absence of a contrary provision in the governing documents or that may be superseded with regard to a particular entity (whether by the shareholders, partners, members and/or managers of the entity or otherwise) is not a restriction that is imposed or required to be imposed by federal or state law. A law that is limited in its application to certain narrow classes of entities, particularly those types of entities (such as family-controlled entities) most likely to be subject to transfers described in section 2704, is not a restriction that is imposed or required to be imposed by federal or state law. For example, a law requiring a restriction that may not be removed or superseded and that applies only to family-controlled entities that otherwise would be subject to the rules of section 2704 is a disregarded restriction. In addition, a restriction is not imposed or required to be imposed by federal or state law if that law also provides (either at the time the entity was organized or at some subsequent time) an optional provision that does not include the restriction or that allows it to be removed or overridden, or that provides a different statute for the creation and governance of that same type of entity that does not mandate the restriction, makes the restriction optional, or permits the restriction to be superseded, whether by the entity's governing documents or otherwise. For purposes of determining the type of entity, there are only three types of entities, specifically, the three categories of entities described in § 25.2701–2(b)(5): corporations; partnerships (including limited partnerships); and other business entities.

(iv) *Certain rights described in section 2703.* An option, right to use property, or agreement that is subject to section 2703

is not a restriction for purposes of this paragraph (b).

(v) *Right to put interest to entity.* Any restriction that otherwise would constitute a disregarded restriction under this section will not be considered a disregarded restriction if each holder of an interest in the entity has a put right as described in paragraph (b)(6) of this section.

(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 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.

(c) *Other definitions.* For the definition of the term *controlled entity*, see § 25.2701–2(b)(5). For the definition of the term *member of the family*, see § 25.2702–2(a)(1).

(d) *Attribution.* An individual, the individual's estate, and members of the individual's family, as well as any other person, also are treated as holding any interest held indirectly by such person through a corporation, partnership, trust, or other entity under the rules contained in § 25.2701–6.

(e) *Certain transfers at death to multiple persons.* Solely for purposes of section 2704(b), if part of a decedent's interest in an entity includible in the gross estate passes by reason of death to one or more members of the decedent's family and part of that includible interest passes to one or more persons who are nonfamily members of the decedent, and if the part passing to the members of the decedent's family is to be valued pursuant to paragraph (f) of this section, then that part is treated as a single, separate property interest. In that case, the part passing to one or more persons who are not members of the decedent's family is also treated as a single, separate property interest. See paragraph (g) *Example 4* of this section.

(f) *Effect of disregarding a restriction.* If a restriction is disregarded under this section, the fair market value of the transferred interest is determined under generally applicable valuation principles as if the disregarded restriction does not exist in the governing documents, local law, or otherwise. For this purpose, local law is the law of the jurisdiction, whether domestic or foreign, under which the entity is created or organized.

(g) *Examples.* The following examples illustrate the provisions of this section.

Example 1. (i) D and D's children, A and B, are partners in Limited Partnership X that was created on July 1, 2016. D owns a 98 percent limited partner interest, and A and B each own a 1 percent general partner interest. The partnership agreement provides that the partnership will dissolve and liquidate on June 30, 2066, or by the earlier agreement of all the partners, but otherwise prohibits the withdrawal of a limited partner. Under applicable local law, a limited partner may withdraw from a limited partnership at the time, or on the occurrence of events, specified in the partnership agreement. Under the partnership agreement, the approval of all partners is required to amend the agreement. None of these provisions is mandated by local law. D transfers a 33 percent limited partner interest to A and a 33 percent limited partner interest to B.

(ii) By prohibiting the withdrawal of a limited partner, the partnership agreement imposes a restriction on the ability of a partner to liquidate the partner's interest in the partnership that is not required to be imposed by law and that may be removed by the transferor and members of the transferor's family, acting collectively, by agreeing to amend the partnership agreement. Therefore, under section 2704(b) and paragraph (a) of this section, the restriction on a limited partner's ability to liquidate that partner's interest is disregarded in determining the value of each transferred interest. Accordingly, the amount of each transfer is the fair market value of the 33 percent limited partner interest determined under generally applicable valuation principles taking into account all relevant factors affecting value including the rights determined under the governing documents and local law and assuming that the disregarded restriction does not exist in the governing documents, local law, or otherwise. See paragraphs (b)(1)(i) and (f) of this section.

Example 2. The facts are the same as in *Example 1*, except that, both before and after the transfer, A's partnership interests are held in an irrevocable trust of which A is the sole income beneficiary. The trustee is a publicly-held bank. A is treated as holding the interests held by the trust under the rules contained in § 25.2701–6. The result is the same as in *Example 1*.

Example 3. The facts are the same as in *Example 1*, except that, on D's subsequent death, D's remaining 32 percent limited partner interest passes outright to D's surviving spouse, S, who is a U.S. citizen. In valuing the 32 percent interest for purposes of determining both the amount includible in the gross estate and the amount allowable as a marital deduction, the analysis and result are as described in *Example 1*.

Example 4. (i) The facts are the same as in *Example 1*, except that D made no gifts and, on D's subsequent death pursuant to D's will, a 53 percent limited partner interest passes to D's surviving spouse who is a U.S. citizen, a 25 percent limited partner interest passes to C, an unrelated individual, and a 20 percent limited partner interest passes to E, a charity. The restriction on a limited partner's ability to liquidate that partner's interest is a disregarded restriction. In determining whether D's estate and/or D's family may remove the disregarded restriction after the transfer occurring on D's death, the interests of C and E are disregarded because these interests were not held by C and E for at least three years prior to D's death, nor do C and E have the right to withdraw on six months' notice and receive their respective interest's share of the minimum value of X. Thus, the 53 percent interest passing to D's surviving spouse is subject to section 2704(b). D's gross estate will be deemed to include two separate assets: a 53 percent limited partner interest subject to section 2704(b), and a 45 percent limited partner interest not subject to section 2704.

(ii) The fair market value of the 53 percent interest is determined for both inclusion and deduction purposes under generally applicable valuation principles taking into account all relevant factors affecting value, including the rights determined under the governing documents and local law, and assuming that the disregarded restriction does not exist in the governing documents, local law, or otherwise. The 45 percent interest passing to nonfamily members is not subject to section 2704(b), and will be valued as a single interest for inclusion purposes under generally applicable valuation principles, taking into account all relevant factors affecting value including the rights determined under the governing

documents and local law as well as the restriction on a limited partner's ability to liquidate that partner's interest. The 20 percent passing to charity will be valued in a similar manner for purposes of determining the allowable charitable deduction. Assuming that, under the facts and circumstances, the 45 percent interest and the 20 percent interest are subject to the same discount factor, the charitable deduction will equal four-ninths of the value of the 45 percent interest.

Example 5. (i) D and D's children, A and B, are partners in Limited Partnership Y. D owns a 98 percent limited partner interest, and A and B each own a 1 percent general partner interest. The partnership agreement provides that a limited partner may withdraw from the partnership at any time by giving six months' notice to the general partner. On withdrawal, the partner is entitled to receive the fair market value of his or her partnership interest payable over a five-year period. Under the partnership agreement, the approval of all partners is required to amend the agreement. None of these provisions are mandated by local law. D transfers a 33 percent limited partner interest to A and a 33 percent limited partner interest to B. Under paragraph (b)(1)(iii) of this section, the provision requiring that a withdrawing partner give at least six months' notice before withdrawing provides a reasonable waiting period and does not cause the restriction to be disregarded in valuing the transferred interests. However, the provision limiting the amount the partner may receive on withdrawal to the fair market value of the partnership interest, and permitting that amount to be paid over a five-year period, may limit the amount the partner may receive on withdrawal to less than the minimum value described in paragraph (b)(1)(ii) of this section and allows the delay of payment beyond the period described in paragraph (b)(1)(iii) of this section. The partnership agreement imposes a restriction on the ability of a partner to liquidate the partner's interest in the partnership that is not required to be imposed by law and that may be removed by the transferor and members of the transferor's family, acting collectively, by agreeing to amend the partnership agreement.

(ii) Under section 2704(b) and paragraph (a) of this section, the restriction on a limited partner's ability to liquidate that partner's interest is disregarded in determining the value of the transferred interests. Accordingly, the amount of each transfer is the fair market value of the 33 percent limited partner interest, determined under generally applicable valuation principles taking into account all relevant factors affecting value, including the rights determined under the governing documents and local law, and assuming that the disregarded restriction does not exist in the governing documents, local law, or otherwise. See paragraph (f) of this section.

Example 6. The facts are the same as in *Example 5*, except that D sells a 33 percent limited partner interest to A and a 33 percent limited partner interest to B for fair market value (but without taking into account the special valuation assumptions of section 2704(b)). Because section 2704(b) also is relevant in determining whether a gift has been made, D has made a gift to each child of the excess of the value of the transfer to each child as determined in *Example 5* over the consideration received by D from that child.

Example 7. The facts are the same as in *Example 5*, except, in a transaction unrelated to D's prior transfers to A and B, D withdraws from the partnership and immediately receives the fair market value (but without taking into account the special valuation assumptions of section 2704(b)) of D's remaining 32 percent limited partner interest. Because a gift to a partnership is deemed to be a gift to the other partners, D has made a gift to each child of one-half of the excess of the value of the 32 percent limited partner interest as determined in *Example 5* over the consideration received by D from the partnership.

Example 8. D and D's children, A and B, organize Limited Liability Company X under the laws of State Y. D, A, and B each contribute cash to X. Under the operating agreement, X maintains a capital account for each member. The capital accounts are adjusted to reflect each member's contributions to and distributions from X and each member's share of profits and losses of X. On liquidation, capital account balances control distributions. Profits and losses are allocated on the basis of units issued to each member, which are not in proportion to capital. D holds 98 units, A and B each hold 1 unit. D is designated in the operating agreement as the manager of X with the ability to cause the liquidation of X. X is not a corporation. Under the laws of State Y, X is neither a partnership nor a limited partnership. D and D's family have control of X because they hold at least 50 percent of the profits interests (or capital interests) of X. Further, D and D's family have control of X because D holds an interest with the ability to cause the liquidation of X.

Example 9. The facts are the same as in *Example 8*, except that, under the operating agreement, all distributions are made to members based on the units held, which in turn is based on contributions to capital. Further, X elects to be treated as a corporation for federal tax purposes. Under § 25.2701–2(b)(5), D and D's family have control of X (which is not a corporation and, under local law, is not a partnership or limited partnership) because they hold at least 50 percent of the capital interests in X. Further, D and D's family have control of X because D holds an interest with the ability to cause the liquidation of X.

Example 10. D owns a 1 percent general partner interest and a 74 percent limited partner interest in Limited Partnership X, which in turn holds a 50 percent limited partner interest in Limited Partnership Y and a 50 percent limited partner interest in Limited Partnership Z. D owns the remaining interests in partnerships Y and Z. A, an unrelated individual, has owned a 25 percent limited partner interest in partnership X for more than 3 years. The governing documents of all three partnerships permit liquidation of the entity on the agreement of the owners of 90 percent of the interests but, with the exception of A's interest, prohibit the withdrawal of a limited partner. A may withdraw on 6-months' notice and receive A's interest's share of the minimum value of partnership X as defined in paragraph (b)(1)(ii) of this section, which share includes a share of the minimum value of partnership Y and of partnership Z. Under the governing documents of all three partnerships, the approval of all partners is required to amend the documents. D transfers a 40 percent limited partner interest in partnership Y to D's children. For purposes of determining whether D and/or D's family members have the ability to remove a restriction after the transfer, A is treated as owning a 12.5 percent (.25 x.50) interest in partnership Y, thus more than a 10 percent interest, but less than a 20 percent interest, in partnership Y. Accordingly, under paragraph (b)(4)(i)(C) of this section, A's interest is disregarded for purposes of determining whether D and D's family hold the right to remove a restriction after the transfer (resulting in D and D's children being deemed to own 100 percent of Y for this purpose). However, if D instead had transferred a 40 percent limited partner interest in partnership X to D's children, A's ownership of a 25 percent interest in partnership X would not have been disregarded, with the result that D and D's family would not have had the ability to remove a restriction after the transfer.

Example 11. (i) D owns 85 of the outstanding shares of X, a corporation, and A, an unrelated individual, owns the remaining 15 shares. Under X's governing documents, the approval of the shareholders holding 75 percent of the outstanding stock is required to liquidate X. With the exception of nonfamily members, a shareholder may not withdraw from X. Nonfamily members may withdraw on six months' notice and receive their interest's share of the minimum value of X as defined in paragraph (b)(1)(ii) of this section. D transfers 10 shares to C, a charity. Four years later, D dies. D bequeaths 10 shares to B, an unrelated individual, and the remaining 65 shares to trusts for the benefit of D's family.

(ii) The prohibition on withdrawal is a restriction described in paragraph (b)(1)(i) of this section. In determining whether D's estate and/or D's family may remove the restriction after the transfer occurring on D's death, the interest of B is disregarded because it was not held by B for at least three years prior to D's death. The interests of A and C, however, are not disregarded, because each held an interest of at least 10 percent for at least three years prior to D's death, the total of those interests represents at least 20 percent of X, and each had the right to withdraw on six months' notice and receive their interest's share of the minimum value of X. As a result, D and D's family hold 65 of the deemed total of 90 shares in X, or 72 percent, which is less than the 75 percent needed to liquidate X. Thus, D and D's family do not have the ability to remove the restriction after the transfer, and section 2704(b) does not apply in valuing D's interest in X for federal estate tax purposes.

Par. 8. Newly designated § 25.2704–4 is amended as follows:

1. The undesignated text is designated as paragraph (a).

2. In the first and second sentences of newly designated paragraph (a), the language "Section" is removed and the language "Except as provided in paragraph (b) of this section, § " is added in its place.

3. Paragraph (b) is added.

The addition reads as follows:

§ 25.2704–4 Effective date.

* * * * *

(b)(1) With respect to § 25.2704–1, the first six sentences of paragraph (a)(1), the last sentence of paragraph (a)(2)(i), the third sentence of paragraph (a)(2)(iii), the first and last sentences of paragraph (a)(4), paragraph (a)(5), the second and last sentences of paragraph (c)(1), paragraph (c)(2)(i)(B), and *Examples 4*, *6* and *7* of paragraph (f), apply to lapses of rights created after October 8, 1990, occurring on or after the date these regulations are published as final regulations in the **Federal Register.**

(2) With respect to § 25.2704–2, paragraphs (a), (b), (c), (d), and (f), the first sentence of paragraph (e), and *Examples 1*, *3* and *5* of paragraph (g) apply to transfersof 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.**

(3) Section 25.2704–3 applies to transfers of property subject to restrictions created after October 8, 1990, occurring 30 or more days after the date these regulations are published as final regulations in the **Federal Register.**

John Dalrymple,

Deputy Commissioner for Services and Enforcement.

(Filed by the Office of the Federal Register on August 02, 2016, 11:15 a.m., and published in the issue of the Federal Register for August 04, 2016, 81 F.R. 51413)