BRING TO MEETING

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

Executive Council Meeting

AGENDA

Sawgrass Marriott
1000 PGA Tour Blvd.
Ponte Vedra Beach, FL 32082
904-285-7777

Saturday, March 3, 2012
8:00 a.m.

BRING THIS AGENDA TO THE MEETING

Real Property, Probate and Trust Law Section
Executive Council Meeting
March 3, 2012
Marriott Sawgrass – Ponte Vedra, FL

AGENDA

I. **Presiding** — *George J. Meyer, Chair*

II. **Attendance** — *Michael J. Gelfand, Secretary*

III. **Minutes of Previous Meeting** — *Michael J. Gelfand, Secretary*
Motion to Approve the December 3, 2012 Executive Council Minutes **pp. 11-57**

IV. **Chair's Report** — *George J. Meyer*
2011 – 2012 RPPTL Executive Council Schedule **pp. 58**

V. **Chair-Elect's Report** — *Wm. Fletcher Belcher*
2012 – 2013 RPPTL Executive Council Schedule **pp. 59**

VI. **Liaison with Board of Governors Report** — *Clay A. Schnitker*

VII. **Treasurer's Report** — *Andrew A. O'Malley*
2011-12 Monthly (January) Report Summary **pp. 60-61**

VIII. **At Large Members Report** — *Debra L. Boje, Director*

IX. **Real Property Division**— *Margaret A. Rolando , Real Property Division Director*

Action Items:

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

Motion to approve a letter to The Florida Bar's Standing Committee on the Unauthorized Practice of Law requesting that the Committee determine whether certain activities constitute the unauthorized practice of law when performed by a non-lawyer as set forth in the proposed request letter, including the following activities: (a) preparing a pre-lien letter to a delinquent community association owner; (b) drafting pre-arbitration demand letters required by Section 718.1255; (c) preparing a certificate of assessments due the association by a delinquent owner at the time the account is turned over to the association's lawyer for collection and thereafter; (d) drafting amendments to declarations of covenants, bylaws and articles of incorporation for the association; (e) determining the vote needed to pass a proposition or amendment to the governing documents; and (f) any activity that requires an analysis of statutory or case law to reach a legal conclusion. See attached letter. **pp. 62-72**

2. Legal Opinions Committee - *David R. Brittain, Chair*

Motion to amend the budget adding an expenditure of $23,200.00, and to authorize an expenditure of that amount to match the funds expended by the Business Law Section, dollar-for-dollar, to print, ship, mail, and pay other expenses incident to distribution of the *Report on Third-Party Legal Opinion Customary Practice in Florida* ("Report") to all RPPTL Section members (except those who elect not to receive a copy after written notice), free of charge as a member service by RPPTL.

Background. The Section approved the Report at its Executive Council on December 3, 2011. The anticipated total costs of printing, shipping, and mailing of 15,000 copies of the Report, in the total amount of $46,400.00, with such cost to be equally divided between RPPTL and the Business Law Section. The Committee recommends that the printed Report be distributed to all members, free of charge, as a Section service. The Report would be mailed to all members, except those who indicate before a set deadline, that they did not wish to receive a printed copy of the Report. Any remaining undistributed copies would be available for sale to the general public through the Florida Bar at a cost of $10.00 per copy until the supply is exhausted. The Executive Council of the Business Law Section has previously approved the expenditure of $20,000 to fund its share of the cost of printing, shipping, and mailing of the Report to its members. BLS's Legal Opinions Standards Committee is prepared to request an additional $3,200 in funding from the BLS to equal the total contribution by RPPTL. See attached narrative summary and budget. **pp. 73-75**

Information Item:

Title Insurance Committee*, Kristopher Fernandez, Chair, and Residential Real Estate and Industry Liaison Committee – Frederick Jones, Chair*

Robert Sorgini, a Section member, has asked the Section to request that the Florida Bar Board of Governors reconsider its approval of a proposed rule that "all trust account checks must be signed by an attorney" and that the Florida Supreme Court reject such a rule. See attached letter. **pp. 76-77**

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

Action Items:

1. Probate Law and Procedure Committee, *Tae Kelley Bronner, Chair*

To adopt as proposed a legislative position supporting amendment to F.S. §732.6005, clarifying that property acquired after the execution of a will that is not specifically devised, demonstratively devised or devised to the residual devisee or devisees passes by intestate succession. **pp. 78-84**

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

To approve comments to be submitted to the Internal Revenue Service on the proposed trust "decanting" regulations, dealing with the transfer of assets from one irrevocable trust to another and to authorize the Executive Committee and Section Chair to submit the comments on behalf of the Section. **pp. 85-100**

Information Items:

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

Report on proposed statute which would make void inter vivos or testamentary transfers by clients to estate planning attorneys or members of their families and providing certain exceptions. **pp. 101-108**

2. Guardianship and Advance Directives Committee, *Sean W. Kelley, Chair*

Report on the status of the petition filed by the Section with the Florida Supreme Court, challenging the Administrative Order of the Chief Judge of the Ninth Judicial Circuit. **pp. 109-133**

XI. General Standing Committees – *Wm. Fletcher Belcher, Chair-Elect*

Action Items:

1. Budget Committee – *Andrew M. O'Malley, Chair*

A. Motion to amend the Section's 2011-2012 Budget by adding an expenditure in the amount of $746.98 to fund the purchase of equipment (printer and scanner) for the use of the Section's Program Administrator, and authorizing the disbursement of those funds to The Florida Bar for that purpose.

B. Motion to amend the Section's 2011-2012 Budget by adding an expenditure in the amount of $3,500.00 to fund the purchase of lapel pins for distribution at the Annual Meeting of The Florida Bar, and authorizing the disbursement of those funds to The Florida Bar or its vendor for that purpose.

2. Pro Bono Committee – *Gwynne A Young and Adele Stone, Co-Chairs, and Tasha K. Pepper-Dickinson, Vice Chair*

A. Motion to waive the Section's sponsorship fees for The Florida Bar Foundation for 2011-2012 and 2012-2013 fiscal years, and to provide The Florida bar Foundation exhibitor space without charge at the Section Annual Conventions and Legislative Update programs for 2012 and 2013 on a space-available basis. **pp. 134-143**

B. Motion to amend the Section's 2011-2012 Budget by adding an expenditure in the amount of $75,000.00 to fund a charitable gift to The Florida Bar Foundation to fund a full-time legal aid attorney to provide legal services to children under the Foundation's Children's Legal Services Grant Program. **pp. 144-147**

XII. General Standing Committee Reports – *Wm. Fletcher Belcher, Director and Chair-Elect*

1. **ActionLine** – J. Richard Caskey, Chair; Scott P. Pence, Vice Chair (Real Property);Shari Ben Moussa, Vice Chair (Probate & Trust)

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

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

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

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

6. **CLE Seminar Coordination** – Deborah P. Goodall, Chair; Sancha B. Whynot, Laura Sundberg and Sylvia B. Rojas, Co-Vice Chairs

7. **Convention Coordination (2012)** – S. Katherine Frazier and Phillip A. Baumann, Co-Chairs

8. **Florida Bar Journal** – Kristen M. Lynch, Co-Chair (Probate & Trust); William P. Sklar, Co-Chair (Real Property)

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

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

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

12. **Legislative Update (2012)** – Robert S. Swaine, Chair; Stuart H. Altman, Charles I. Nash, R. James Robbins, and SharaineSibblies, Co-Vice Chairs

13. **Liaison with:**

    A. **American Bar Association (ABA)** – Edward F. Koren and Julius J. Zschau
    B. **Board of Legal Specialization and Education (BLSE)** – Michael C. Sasso, W. Theodore Conner, David M. Silberstein and Deborah L. Russell
    C. **Clerks of Circuit Court** – Laird A. Lile
    D. **FLEA / FLSSI** – David C. Brennan, John Arthur Jones and Roland Chip Waller
    E. **Florida Bankers Association** – Stewart Andrew Marshall, III, and Mark T. Middlebrook
    F. **Judiciary** – Judge Jack St. Arnold, Judge Melvin B. Grossman, Judge Hugh D. Hayes, Judge Claudia RickertIsom, Judge Maria M. Korvick, Judge Lauren Laughlin, Judge Celeste H. Muir, Judge Robert Pleus,Judge Lawrence Allen Schwartz, Judge Richard Suarez, Judge Morris Silberman, Judge Patricia V. Thomas and Judge Walter L. Schafer, Jr.
    G. **Law Schools** – Frederick R. Dudley and Stacy O. Kalmanson
    H. **Out of State Members** – Michael P. Stafford, John E. Fitzgerald, Jr., and Gerard J. Flood
    I. **TFB Board of Governors** – Clay A. Schnitker
    J. **TFB Business Law Section** – Marsha G. Rydberg

K. **TFB CLE Committee** – Deborah P. Goodall
L. **TFB Council of Sections** – George J. Meyer and Wm. Fletcher Belcher

14. **Long-Range Planning** – Wm. Fletcher Belcher, Chair

15. **Meetings Planning** – John B. Neukamm, Chair

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

17. **Membership and Diversity** – Michael A. Bedke andLynwood T. Arnold, Jr., Co-Chairs; Marsha G. Madorsky, Vice Chair (Fellowship); Phillip A. Baumann, Vice Chair (Member Services); Tasha K. Pepper-Dickinson, Vice Chair (Diversity); and Guy S. Emerich, Vice Chair (Mentoring)

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

19. **Pro Bono** – Gwynne A. Young and Adele I. Stone, Co-Chairs; Tasha K. Pepper-Dickinson, Vice Chair

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

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

22. **Strategic Planning** – Wm. Fletcher Belcher, Chair

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

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

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

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

4. **Asset Preservation** – Brian C. Sparks, Chair; Marsha G. Madorsky, Vice-Chair

5. **Attorney/Trust Officer Liaison Conference** – Robin J. King, Chair; Jack A. Falk, Jr., Vice Chair; Mary Biggs Knauer, Corporate Fiduciary Chair

6. **Estate and Trust Tax Planning** – Elaine M. Bucher, Chair; Harris L. Bonnette, Jr., and David Akins, Co-Vice Chairs

7. **Guardianship and Advance Directives** – Sean W. Kelley, Chair; Seth A. Marmor and Tattiana Brenes-Stahl, Co-Vice Chairs

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

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

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

11. **Power of Attorney** – Tami F. Conetta, Chair; William R. Lane, Jr., Vice Chair

12. **Principal and Income** – Edward F. Koren, Chair

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

14. **Probate Law and Procedure** – Tae Kelley Bronner, Chair; S. Dresden Brunner, Jeffrey S. Goethe and John C. Moran, Co-Vice Chairs

15. **Trust Law** – Shane Kelley, Chair; Angela M. Adams, Laura P. Stephenson and Jerry B. Wells, Co-Vice Chairs

16. **Wills, Trusts and Estates Certification Review Course** – Deborah L. Russell, Chair; Richard R. Gans, Vice Chair

XIV. Real Property Division Committee Reports - *Margaret A. Rolando, Director*

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

2. **Condominium and Planned Development** – Steven H. Mezer, Chair; Jane Cornett and Nicole Kibert, Co-Vice-Chairs

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

4. **Construction Law Certification Review Course** – Kim Ashby, Chair; Bruce Alexander and Melinda Gentile, Co Vice-Chairs

5. **Construction Law Institute** – Wm. Cary Wright, Chair; Michelle Reddin and Reese Henderson, Co-Vice Chairs

6. **Governmental Regulation** – Anne Pollack, Chair; Arlene Udick and Frank L. Hearne, Co-Vice Chairs

7. **Landlord and Tenant** – Neil Shoter, Chair; Scott Frank and Lloyd Granet, Co-Vice Chairs

8. **Legal Opinions** – David R. Brittain, Chair; Roger A. Larson and Kip Thorton, Co-Vice Chairs

9. **Liaisons with FLTA** – Norwood Gay and Alan McCall, Co-Chairs; Barry Scholnik, John S. Elzeer, Joe Reinhardt, James C. Russick and Alan Fields, Co-Vice Chairs

10. **Mortgages and Other Encumbrances** – Salome Zikakis, Chair; Robert Swaine and Robert Stern, Co-Vice Chairs

11. **Property & Liability Insurance/Suretyship** – Wm. Cary Wright and Andrea Northrop, Co-Chairs

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

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

14. **Real Property Forms** – Homer Duval, III, Chair; Jeffrey T. Sauer and Arthur J. Menor, Co-Vice Chairs

15. **Real Property Litigation** – Mark A. Brown, Chair; Susan Spurgeon and Martin Awerbach, Co-Vice Chairs

16. **Real Property Problems Study** – S. Katherine Frazier, Chair; Patricia J. Hancock and Alan Fields, Co-Vice Chairs

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

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

19. **Title Issues and Standards** – Patricia P. Jones, Chair; Robert M. Graham, Karla Gray, Jeanne Mott (also archivist) and Christopher W. Smart, Co-Vice Chairs

XV. Adjourn

The Florida Bar
Real Property, Probate & Trust Law Section

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Trust Law Committee

Coral Gables Trust
Probate and Trust Litigation Committee

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

EXECUTIVE COUNCIL MEETING[1]

Saturday December 3, 2011
Marriott Marco Island Resort & Spa, Marco Island, Florida

I. Call to Order – *George J. Meyer, Chair*

Mr. Meyer called the meeting to order at 8:00 a.m. He welcomed the membership and reviewed the day's activities. Thanks extended to Mike Dribin and Peggy Rolando for planning and presenting Thursday afternoon's very successful Committee Chair's Meeting. It is hoped that this become an annual program. Feedback is encouraged to Mike and Peggy. The schedule providing for Roundtables is new.

Sponsors were thanked. A special thank you is provided to the Section's General Sponsors: Attorney's Title Fund Services, LLC; Fidelity National Title Group; First American Title Insurance Company; Harris Private Bank; HFBE Inc.; JP Morgan / Chase; Management Planning, Inc.; Old Republic National Title Insurance; Regions Private Wealth Management; SunTrust Bank; Wells Fargo Private Bank; and, U.S. Trust. Mention is made to the new category of Friends of the Section: Business Valuation Analysts, LLC; Guardian Trust; PCE; require; Wright Private Asset Management.

The Council Meeting's two sponsors were introduced: Stacy Cole of US Trust; and, Ted Connor on behalf of the Attorney's Title Fund Services.

II. Attendance – *Michael J. Gelfand, Secretary.*

Mr. Gelfand reminded members that the attendance roster was circulating to be initialed by Council members in attendance at the meeting. Initialing the roster is a member's responsibility. [*Secretary's Note*: The roster showing members in attendance is attached as Exhibit A.]

III. Minutes of Previous Meeting – *Michael J. Gelfand, Secretary.*

Mr. Gelfand moved:

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[1] References in these minutes to Agenda pages are to the Executive Council Meeting Agenda, dated November 26, 2011, posted at www.RPPTL.org

to approve the Minutes of the Prague Meeting occurring on September 24, 2011, correcting the Exhibit "A" attendance roster, spelling of the name of Jay D. Mussman in the stead of Craig A Mussman.

The Motion was approved without opposition.

IV. Chair's Report – *George J. Meyer, Chair.*

[*Sec. Note*: See above "Call to Order" for report.]

V. Chair-Elect's Report – *William Fletcher Belcher, Chair-Elect.*

Mr. Belcher reported the Executive Council meetings for the following year are listed in the Agenda, page 30. The Tallahassee meeting dates were changed to February 7-10, 2012, moving back one week, to accommodate a Board of Governors meeting.

VI. Liaison with Board of Governors Report – *Clay A. Schnitker, Bank of Governors Liaison.*

Mr. Laird Lile reported for Mr. Clay Schnitker that the Bar will be providing members a weekly report on legislative matters in a consistent method. On legislative issues, this session is anticipated to again address the Judicial branch budgeting process and removing the Bar from the Judicial Nominating process.

Mr. Lile having the floor continued with his report as the Clerks of Court liaison, noting the Section's support of e-filing.

In addition, Mr. Lile stated that he had copies of a Bar consumer pamphlet on the Power of Attorney law which Tami Conetta worked. The Section is lucky to have Gwen Young to be participating, especially in light of her busy schedule as Bar President-Elect to whom he yielded the floor.

Ms. Young urged Section members to access the Bar website and apply for committee appointments, including rules committees, such as the Probate Rules Committee, and the Rules of Judicial Administration Committee, for which there is an apparent need for Section representation.

Mr. Laird continued, reporting on fund raising for legislative candidates by leaders of the Section to demonstrate the Section's depth of interest in the process, encouraging Section members to participate.

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

Mr. O'Malley noted that the Treasurer's report through October 31, 2011, is set forth in the Agenda, starting at page 31. The current surplus is not projected to remain through the end of the year which will result in a deficient of about $48,000 which was anticipated. He

suggested that each member thank the Section sponsors for their contributions to the Section, and thank Sponsorship Committee chair Kristen Lynch for her efforts.

VIII. <u>At Large Members' Report</u> - *Debra Boje, At Large Members' Director*.

Ms. Boje reported that the At Large Members' are active. The Section website has each Circuit's administrative orders for foreclosures, and is expanding to include probate and guardianship division rules. The ALM's are seeking legislative contacts for the legislative process, are reaching out to participate in pilot projects for e-filing, and will be providing webinares for judges on legislative changes. Section members should be getting e-alerts after each meeting including the minutes of the Roundtables and Council Meetings.

IX. <u>Real Property Law Division</u> – *Margaret "Peggy" Rolando, Real Property Law Division*

Ms. Rolando introduced the following:

<u>Action Items</u>.

1. <u>Foreclosures</u>. Ad Hoc Committee on Foreclosure Reform – Jerry Aron, Chair (Page 33)

   Mr. Aron recounted the process of reviewing last year's foreclosure bill introduced by Rep. Passidomo, resulting in a proposed alternative. Starting with a meeting last year with Rep. Passidomo, Rep. Moriatis, and about twenty-five Section members, there has been a continuous drafting process. The drafts were circulated both within the Section and outside the Section. There were many comments, surprisingly large numbers on the perceived extremes of positions; thus, the committee seeks a middle ground.

   In the interim, because of legislative timing Rep. Passidomo filed her Bill before the Section's product was complete. Her proposal, entitled "Fair Foreclosure Act", prompted more efforts by the Committee. The Committee's proposal does not claim to solve all problems, many of which may be unsolvable, but seeks to address the current issues. Constitutional issues, as always, win. Special attention was provided to protect property rights, seeking also to protect the *bona fide* purchaser for value while protecting the rights of the holder of the mortgage, resulting in the proposed amendment to the proposal which is handed out, based upon the UCC lost note process, and to encourage judicial attention to the current statutory process, that the presiding judge make a specific finding of adequate protection. (*Sec. Note:* Exhibit "B")

   The floor was yielded to Mr. Bruton who noted that just saying "no" does not facilitate the effort to ensure judicial review of foreclosure. Representative Passidomo was very courageous to take the lead, and we need to support her.

Mr. Aron noted that the Real Property Roundtable unanimously supported the Committee proposal. Through Marsha Ryberg's efforts, the Business Law Section's support was obtained. On behalf of the Ad Hoc Committee on Foreclosure Reform, Mr. Aron moved:

to adopt a legislative position supporting HB 213 (Passidomo), as amended, and including the materials distributed at the meeting and correcting typographical errors, and to find that the proposal is within the purview of the Section and that the Section expend funds to support the bill.

The motion was approved unanimously. Ms. Rolando thanked Jerry Aron, Burt Bruton and Mark Brown for their extraordinary efforts.

2. Legal Opinions. Legal Opinions Committee - *David R. Brittain, Chair* (Page 77)

Mr. Brittain introduced the *Report on Third-Party Legal Opinion Customary Practice in Florida* as a refined form for opinions to third parties which occur in the transactional process, created to demystify the process.

The Real Property Roundtable unanimously approved the *Report*. The *Report* includes helpful provisions, assisting business entities. The *Report* should also be of assistance with the probate and trust law lawyers. The *Report* was coordinated with the Business Law Section. The *Report* will be posted on the Section website, together with helpful memoranda from the Committee's reporters addressing major sections. Mr. Brittain moved on behalf of the Legal Opinions Committee:

To approve the joint *Report on Third-Party Legal Opinion Customary Practice in Florida*.

Ms. Rolando noted the extensive work of Dave Britton, Kim Thorton and Roger Larson which has drawn the attention of legal groups nationwide. The motion was approved unanimously.

2. Secured Transactions. Mortgage and Other Encumbrances Committee – *Salome Zikakis, Chair, and James Robbins, Chair of the UCC Article 9 Subcommittee.* (Page 678)

S. Katherine Frazier introduced the proposed UCC Article 9 revisions, the result of working with the Business Law Section which is taking the lead. She reviewed significant concepts, including how debtors are named, especially trusts in financing statements. On behalf of the Mortgage and Other Encumbrances Committee, Ms. Frazier moved:

To support a legislative position which recommends adopting the position of the Business Law Section to support HB 483 (Passidomo) which would

amend Chapter 679, Florida Statutes, to incorporate amendment to Article 9 of the UCC.

Ms. Rolando confirmed with Ms. Frazier that the Business Law Section, not this Section, would be lobbying for the position. The motion was approved unanimously.

Information Items.

1. Mortgages and Other Encumbrances Committee – Salome Zikakis, Chair, and Real Property Litigation – Mark A. Brown, Chair

Municipal Liens and Priority. Mr. Brown reported a request to the Section to file an *amicus* brief in the appeal to the Supreme Court of Florida of the 5th District Court of Appeal's decision in *City of Palm Bay v. Wells Fargo*(page 729), regarding the priority of a first mortgage lien over municipal code enforcement liens recorded after the mortgage. The Executive Committee declined to participate as *amicus*. It was noted that the Florida Land Title Association did file an *amicus* brief.

2. Real Property Problem Study Committee – S. Katherine Frazier, Chair

Hidden Liens. Ms. Rolando noted the Section's legislative position to support legislation requiring all governmental liens to be recorded. A version of the Section's initiative has been filed and there is a companion bill.

3. Residential Real Estate and Industry Liaison Committee – Frederick Jones, Chair

Seller Financing Rider. Mr. Jones reported the revision of Rider C, the Seller Financing Rider addendum. (Page 733).

FR/BAR Contract. Ms. Rolando reported the request by The Florida Bar as co-owner of the copyright of the FR/Bar Contract with the Florida Realtors to make the FR/BAR Contract available to Section members on-line. A number of details must be worked out.

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

Action Items.

Trust Law – *Shane W. Kelley, Chair*

Mr. Dribin noted an Agenda correction, to show that the presenting committee is Trust Law and that the presenter is Mr. Shane Kelley. On behalf of the Trust Law Committee, Mr. Kelly introduced the position and moved:

to adopt a legislative position supporting an amendment to F.S. §736.0813(1)(d) to provide that a trustee may provide trust accountings to

qualified beneficiaries more frequently than annually and satisfy the duty to account and to clarify that the trustee does not need to provide an additional annual accounting covering a period already included a previous trust accounting, and to find that the proposal is within the purview of the Section and to expend funds in support.

There was discussion on the necessity and efficacy of the proposal. The motion was approved.

Guardianship - *Sean Kelley, Chair*

Mr. Kelley reported that a Ninth Circuit Court Administrative Order concerning guardianship proceedings is at issue. The Committee did not have time to prepare materials before the meeting. Mr. Kelley moved:

to suspend the rules and to waive the notice requirements.

The motion was approved unanimously.

Mr. Kelley recounted that at the Breaker's meeting a proposed order was circulated. The Order was entered in October, resulting in a time issue. The Order and bullet point summary of issues were distributed to Section (*See* Exhibit "C" and Exhibit "D".).

Mr. Kelley explained that Administrative Orders are to facilitate orderly disposition, not for new procedural rules or to limit judicial discretion. Mr. Kelley reviewed the issues with the Order, including discriminating against a class of citizens, setting a floor for professional guardian fees, limiting time to be billed prior to issuance of letters which is contrary to case law. He moved on behalf of the Guardianship Committee:

Pursuant to Florida Rule of Judicial Administration 2.215 (e)(2), the appropriate representative of the Real Property, Probate and Trust Law Section file an application with the Supreme Court of Florida or the Supreme Court Local Rules Advisory Committee to review The Order and determine whether it falls under the definition of a court rule or local court rule (as defined in 2.120) and applicable case law; and authorize the Executive Committee of the Real Property, Probate and Trust Law Section to take appropriate action in furtherance thereof.

In response to an inquiry from the floor, Ms. Sancha Whynot-Brennan recounted the efforts to communicate concerns to the Court which had some positive impact, but also created addition issues. The motion was approved unanimously. Mr. Dribin thanked Sean Kelley, Sancha Whynot-Brennan, and those on her sub-committee for addressing a difficult matter.

Information Items.

1. Estate and Gift Tax Planning Committee - *Elaine M. Bucher, Chair*

Portability. David Akins reported for Elaine Bucher the comments of the Real Property, Probate and Trust Law Section and of the Tax Section submitted to the Internal Revenue Service, in response to an IRS Notice. The comments, approved by the Executive Committee to address the procedures associated with the preservation of the unused portion of the estate tax exemption available to the estate of the first spouse to die for use by the estate of the surviving spouse. (See Agenda page 748)

2. Probate and Trust Litigation -- *Tom Karr, Chair*

Tom Karr reported on the fruition of the five year process. *Florida Rules of Appellate Procedure*, Rule 9.170, addresses what is a final appealable order, setting forth the standard with 24 examples of an appealable order. Mr. Dribin noted the long term effort by many committees and their chairs and sub-committee chairs, and the result provides significant certainty.

Mr. Dribin provided a special note of Council Member Laura Stevenson's last meeting. She has served as trust counsel for Northern Trust and now is retiring to Tennessee. She served a long time, not seeking limelight, but always reviewing, providing her knowing comments, and allowing a matter to move on. Our efforts and product have been greatly enhanced by her efforts. A round of applause was provided in recognition of her efforts.

XI. General Standing Committee Items – *William Fletcher Belcher, Director and Chair-Elect.*

Action Item.

1. Approval of 2012-2013 Budget – *Andrew A. O'Malley, Chair Budget Committee*.

Mr. O'Malley announced the committee membership and process. He reviewed materials in the Agenda (Page 769), noting that revenues are about the same as last year, but expenses have increased by about $100,000 which is almost all due to the Bar's required reserve which will likely not be actually recognized by the Section. At Large Members' Programs Line item 8411 is added. He then moved on behalf of the Budget Committee:

> **to approve the proposed 2012-2013 Budget, as amended to include the At Large Members' Line 8411, of $5,500.**

The motion was approved unanimously. Mr. O'Malley then moved on behalf of the Budget Committee:

> **That the Executive Council delegate to the Executive Committee the appropriate authority to determine the most advantageous course categorization, CLE or Section Service, for the Attorney Trust Officer**

Conference and the Construction Law Institute in the event Bar policy changes may impact their successful operations or profits.

The motion was approved unanimously.

XI. <u>General Standing Committee Reports</u> – *William Fletcher Belcher, Director and Chair-Elect.*

1. **Actionline** – J. Richard Caskey, Chair; Scott P. Pence and Rose M. LaFemina, Co-Vice Chairs

Mr. Caskey continues to solicit articles for Actionline.

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

Mr. Bruton noted that it is not too late for comments to be received for the Business Law Section's materials presented at the August meeting.

2. **Alternate Dispute Resolution (ADR) --** Debra Bovarnick Mastin and David R. Carlisle, Co-Chairs.

Ms. Mastin reviewed her Committee's efforts, including CLE and addressing *Fla.R.Civ.P.* Rule 1.720, and the Rule's impact upon mediation procedures which needs to be better circulated.

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

Drafters are to watch for the *Basile* case on missing beneficiary and residual clauses.

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

5. **CLE Seminar Coordination** – Deborah P. Goodall, Chair; Sancha B. Whynot, Laura Sundberg and Sylvia B. Rojas, Co-Vice Chairs.

The Calendar appears on Agenda page 774. Thanks to those who volunteer to provide CLE seminars resulting in a positive financial impact for the Section, and information to the Bar. There are fifteen programs over twenty-five days, a very jammed pack year.

Proposals for the following year should be submitted now. A conflict calendar for CLE's is being created on the website. Email conflict and calendar dates to her.

The Executive Committee reviewed a request for access to older materials and approved the sale of older materials with out of date disclaimers.

6. **2011 Convention Coordinator** – S. Katherine Frazier and Phillip A. Baumann, Co Chairs.

Ms. Frazier reported planning proceeds for the May 31 -- June 3, 2012, convention with a great program at the Don CeSar Hotel, including a free seminar for members with extensive ethics credits.

7. **Florida Bar Journal** – Kristen M. Lynch, Chair Probate Division; William P. Sklar, Chair Real Property Division.

Ms. Lynch noted articles have been obtained for publication through March. Articles are sought. Mr. Dribin volunteered Mr. Karr to provide an article on the new appellate rules

Ms. Lynch also reported for the Sponsors Committee, noting a major loss due to sponsors' revenue loss. There are five new Friends of the Section. There will be the annual sponsorship reception in Ponte Venda. Look out for and welcome sponsors.

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

Mr. Rohan Kelley reported on the e-filing traveling road show. While there are some bumps, it works very well. E-service will occur first, before e-filing, likely mandatory in the spring.

9. **Homestead Issues Study** – Shane Kelley, Co-Chair (Probate & Trust); Wilhelmina F. Kightlinger, Co-Chair (Real Property); Deborah Boyd, Vice Chair.

Mr. Shane Kelley anticipates proposals by next year. All homestead issues should go to this Committee.

10. **Legislation** – Barry F. Spivey, Chair; Robert S. Freedman, Vice Chair (Real Property); William T. Hennessey, III, Vice Chair (Probate & Trust); Susan K. Spurgeon and Michael A. Bedke, Legislative Reporters.

Mr. Belcher noted that page 5 of the Agenda contains Executive Committee actions taken on behalf of the Section since the last Executive Council meeting. Mr. Spivey briefly summarized the Executive Committee actions, approving various Section positions as follows:

Substitute text containing improvements and clarifications to the Uniform Principal and Income Act legislative proposal (p. 780). Mr. Spivey noted that the Principal and Income Act Bill has been filed in the House and the Senate. No drastic changes are included.

A comment on behalf of the Section endorsing the concept of mandatory e-filing for all Florida attorneys and all Florida Courts (p. 843), as explained by Mr. Lile.

Amending F.S. 732.102 to clarify that the recent changes in the intestate share of a surviving spouse applies only to estates of decedents dying prior to October 1, 2011, even if probate proceedings were commenced after that date. pp. 845.

Clarifying the application of the intestate share application effective date, it is to apply for decedents dying on or after, not prior to, October 1. (p. 845)

Please consider whether current proposals can wait and be considered for next year. Do not wait to submit proposals, have then ready for the May meeting, and do not feel that as a chair you have to propose legislation.

Finally, he noted that consideration of this year's proposals is complicated by the apportionment process.

11. **Legislative Update 2011** – Robert S. Swaine, Chair; Stuart H. Altman, Charles I. Nash, James Robbins, and Sharaine Sibblies, Co-Vice Chairs.

The 2012 Update is scheduled for Friday, July 27, at the Breakers.

12. **Liaison with:**

A. **American Bar Association (ABA)** – Edward F. Koren and Julius J. Zschau.
B. **Board of Legal Specialization and Education (BLSE)** – Michael C. Sasso, W. Theodore Conner, David M. Silberstein and Deborah L. Russell.

Mr. Silberstein reported on a leadership conference and a new examination consultant to provide consistency across practice areas.

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

[*Sec. Note*: See above "Liaison with Board of Governors" for report.]

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

Mr. Waller reported that the Real Property Forms Committee is sending forms to the substantive committees for review.

E. **Florida Bankers Association** – Stewart Andrew Marshall, III, and Mark T. Middlebrook.
F. **Judiciary** – Judge Jack St. Arnold, Judge Melvin B. Grossman, Judge Hugh D. Hayes, Judge Claudia Rickert Isom, Judge Maria M. Korvick, Judge Lauren Laughlin, Judge Celeste H. Muir, Judge Robert Pleus, Judge Lawrence Allen Schwartz, Judge Richard Suarez, Judge Morris Silberman, Judge Patricia V., Thomas and Judge Walter L. Schafer, Jr.
G. **Law Schools -** Frederick R. Dudley and Stacy O. Kalmanson.

H. **Out of State Members** – Michael P. Stafford, John E. Fitzgerald, Jr., and Gerard J. Flood.

I. **TFB Board of Governors** – Clay A. Schnitker.

[*Sec.* Note: See above "Liaison with Board of Governors" for report.]

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

Ms. Rydberg followed up upon Mr. Bruton's comments, noting that the Bill submission date has been moved to 2013. There is under consideration a review of receiverships, including a potential form orders.

J. **TFB CLE Committee** – Deborah P. Goodall.

[*Sec. Note*: See above "CLE Seminar Coordination" for report.]

K. **TFB Council of Sections** – George J. Meyer and Wm. Fletcher Belcher.

Mr. Belcher reported that the Council of Sections considered a proposal to add a designated governmental attorney Governor which the Council voted overwhelming against, included the Section's representatives, Mr. Meyer and himself.

13. **Long-Range Planning** – Wm. Fletcher Belcher, Chair.

Mr. Belcher noted that the Section's past chairs will be scheduling meeting to consider nominations for Section officers and for At Large Members. If members have knowledge of Section members who would have an interest in serving as an ALM, then this is the time to submit their names to Ms. Boje.

14. **Meetings Planning** – John B. Neukamm, Chair.

Mr. Dribin reported that there is a meeting in January

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

Ms. Kibert reminded that with January approaching it is time to revise your webpages. An I-Pad app for the agenda is being created, along with a Facebook page. Council meeting photos are up on the website.

16. **Membership and Diversity** – Michael A. Bedke and Lynwood T. Arnold, Jr., Co-Chairs; Marsha G. Madorsky, Vice Chair (Fellowship); Phillip A. Baumann, Vice Chair (Member Services); Tasha K. Pepper-Dickinson, Vice Chair (Diversity); and Guy S. Emerich, Vice Chair (Mentoring).

Mr. Bedke introduced the Committee's members and the new class of Fellows. Projects include the development of a Section informercial. Lunch and learn projects are in progress at the law schools. The Committee is diversifying and this is recognized by the next Bar President-elect and the Section is a potential foot soldier on this important issue. Concerning members in general, to reach 10,000 members we need to provide substantive value for which thanks to the members is provided.

Ms. Madorsky reported on the process to select new Fellows. Applications will close after the Ponte Vedra meeting.

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

Ms. Frazier reported on the monitoring other Uniform Laws.

18. **Pro Bono** – Gwynne A. Young and Adele I. Stone, Co-Chairs; Tasha K. Pepper-Dickinson, Vice Chair.

Ms. Stone reported on the Wills on Wheels project effort, anticipating that it will be presented at the next meeting. Mr. Belcher thanked Ms. Pepper-Dickenson for her efforts on the initial program, providing services to needy in the Palm Beach area.

19. **Professionalism and Ethics** – Lee A. Weintraub, Chair; Paul E. Roman, Vice Chair and Lawrence J. Miller, Vice Chair.

Mr. Miller reported on the effort to create an annotation of ethics opinions and case law with the assistance of law students. The Committee presented a skit bringing current ethics themes to light.

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

[*Sec.* Note: See above "Florida Bar Journal" for report.]

21. **Strategic Planning** – Wm. Fletcher Belcher, Chair

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

Mr. Dribin noted that the Ad Hoc Study Committee on Estate Planning Conflict of Interest" anticipates presenting proposed legislation by the St. Petersburg meeting.

1. **Ad Hoc Committee on Jurisdiction and Service of Process** – Barry F. Spivey, Chair; Sean W. Kelley, Vice Chair.
2. **Ad Hoc Study Committee on Creditors' Rights to Non-Exempt, Non-Probate Assets** – Angela M. Adams, Chair.
3. **Ad Hoc Study Committee on Estate Planning Conflict of Interest** - William T. Hennessey III, Chair.

4. **Asset Preservation** – Brian C. Sparks, Chair; Marsha G. Madorsky, Vice-Chair.
5. **Attorney/Trust Officer Liaison Conference** – Robin J. King, Chair; Jack A. Falk, Jr., Vice Chair; Mary Biggs Knauer, Corporate Fiduciary Chair.
6. **Estate and Trust Tax Planning** – Elaine M. Bucher, Chair; Harris L. Bonnette, Jr., and David Akins, Co-Vice Chairs.
7. **Florida Electronic Court Filing** – Rohan Kelley, Chair; Laird A. Lile, Vice Chair.
8. **Guardianship and Advance Directives** – Sean W. Kelley, Chair; Seth A. Marmor and Tattiana Brenes-Stahl, Co-Vice Chairs.
9. **IRA, Insurance and Employee Benefits** – Linda Suzzanne Griffin and L. Howard Payne, Co-Chairs; Anne Buzby-Walt, Vice Chair.
10. **Liaisons with Elder Law Section** – Charles F. Robinson and Marjorie Wolasky.
11. **Liaisons with Tax Section** – Lauren Y. Detzel, William R. Lane, Jr., David Pratt, Brian C. Sparks and Donald R. Tescher.
12. **Power of Attorney** – Tami F. Conetta, Chair; William R. Lane, Jr., Vice Chair.
13. **Principal and Income** – Edward F. Koren, Chair.
14. **Probate and Trust Litigation** – Thomas M. Karr, Chair; Jon Scuderi and J. Richard Caskey, Co-Vice Chairs.
15. **Probate Law and Procedure** – Tae Kelley Bronner, Chair; S. Dresden Brunner, Jeffrey S. Goethe and John C. Moran, Co-Vice Chairs.
16. **Trust Law** – Shane Kelley, Chair; Angela M. Adams, Laura P. Stephenson and Jerry B. Wells, Co-Vice Chairs.
17. **Wills, Trusts and Estates Certification Review Course** – Deborah L. Russell, Chair; Richard R. Gans, Vice Chair.

XIV. Real Property Division Committee Reports - *Margaret A. Rolando, Director*

1. **Condominium and Planned Development** – Steven H. Mezer, Chair; Jane Cornett and Nicole Kibert, Co-Vice-Chairs.
2. **Construction Law** – Arnold D. Tritt, Chair; Hardy Roberts and Lisa Colon Heron, Co-Vice-Chairs.
3. **Construction Law Certification Review Course** – Kim Ashby, Chair; Bruce Alexander and Melinda Gentile, Co Vice-Chairs.
4. **Construction Law Institute** – Wm. Cary Wright, Chair; Michelle Reddin and Reese Henderson, Co-Vice Chairs.
5. **Governmental Regulation** –Anne Pollack, Chair; Arlene Udick and Frank L. Hearne, Co-Vice Chairs.
6. **Landlord and Tenant** – Neil Shoter, Chair; Scott Frank and Lloyd Granet, Co-Vice Chairs.
7. **Legal Opinions** – David R. Brittain, Chair; Roger A. Larson and Kip Thorton, Co-Vice Chairs.
8. **Liaisons with FLTA** – Norwood Gay and Alan McCall, Co-Chairs; Barry Scholnik, John S. Elzeer, Joe Reinhardt, James C. Russick and Alan Fields, Co-Vice Chairs.
9. **Mortgages and Other Encumbrances** – Salome Zikakis, Chair; Robert Swaine and Robert Stern, Co-Vice Chairs.
10. **Property & Liability Insurance/Suretyship** – Wm. Cary Wright and Andrea Northrop, Co-Chairs.

11. **Real Estate Certification Review Course** – Ted Conner, Chair; Jennifer Tobin and Raul Ballaga, Co-Vice Chairs.
12. **Real Estate Entities and Land Trusts** – Wilhelmina Kightlinger, Chair; Burt Bruton and Dan DeCubellis, Co-Vice Chairs.
13. **Real Property Forms** – Homer Duval, III, Chair; Jeffrey T. Sauer and Arthur J. Menor, Co-Vice Chairs.
14. **Real Property Litigation** – Mark A. Brown, Chair; Susan Spurgeon and Martin Awerbach, Co-Vice Chairs.
15. **Real Property Problems Study** – S. Katherine Frazier, Chair; Patricia J. Hancock and Alan Fields, Co-Vice Chairs.
16. **Residential Real Estate and Industry Liaison** – Frederick Jones, Chair; William J. Haley and Denise Hutson, Co-Vice Chairs.
17. **Title Insurance and Title Insurance Liaison** – Kristopher Fernandez, Chair; Homer Duvall and Raul Ballaga, Co-Vice Chairs.

XV. Announcements

Mr. Meyer reported that: Yvonne Sharron is the new Section Administrator; and, Alan McCall was called away from the Section's meetings because his mother passed away yesterday.

XV. Adjournment -- There being no further business to come before the Executive Council, the meeting was unanimously adjourned at 10:35 a.m.

Respectfully submitted,

Michael J. Gelfand, Secretary

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EXHIBIT A
ATTENDANCE ROSTER
December 3, 2011

ATTENDANCE ROSTER

REAL PROPERTY PROBATE & TRUST LAW SECTION
EXECUTIVE COUNCIL MEETINGS
2011-2012

Executive Committee	**Aug. 6 Palm Beach**	**Sept. 24 Prague**	**Dec. 3 Marco Island**	**March 3 Ponte Vedra**	**June 2 St. Petersburg**
Meyer, George F., Chair	**X**	**X**	**X**		
Belcher, William F., Chair-Elect	**X**		**X**		
Rolando, Margaret A., Real Property Law Div. Director	**X**	**X**	**X**		
Dribin, Michael A., Probate and Trust Law Div. Director	**X**		**X**		
Gelfand, Michael J., Secretary	**X**	**X**	**X**		
O'Malley, Andrew M., Treasurer	**X**		**X**		
Spivey, Barry F., Legislation Chair	**X**		**X**		
Goodall, Deborah P., Seminar Coordinator	**X**		**X**		
Boje, Deborah L., Director of At-Large Members	**X**		**X**		
Felcoski, Brian J., Immediate Past Chair	**X**		**X**		

Executive Council Members	**Aug. 6 Palm Beach**	**Sept. 24 Prague**	**Dec. 3 Marco Island**	**March 3 Ponte Vedra**	**June 2 St. Petersburg**
Adams, Angela M.	**X**		**X**		
Adcock, Jr., Louie N.,**Past Chair**					
Akins, David J.	**X**	**X**	**X**		
Alexander, Bruce G.					
Altman, Robert N.	**X**				
Altman, Stuart H.	**X**		**X**		
Arnold, Jr., Lynwood F.	**X**				
Aron Jerry E. **Past Chair**	**X**		**X**		

Executive Council Members	Aug. 6 Palm Beach	Sept. 24 Prague	Dec. 3 Marco Island	March 3 Ponte Vedra	June 2 St. Petersburg
Ashby, Kimberly A.					
Awerbach, Martin S.	X		X		
Bald, Kimberly A.		X	X		
Ballaga, Raul P.	X				
Banister, John R.	X		X		
Batlle, Carlos A.	X		X		
Baumann, Phillip A.	X	X	X		
Beales, III, Walter R. **Past Chair**					
Bedke, Michael A.	X		X		
Bell, Honorable Kenneth B.					
Ben Moussa, Shari D.	X		X		
Bonnette, Jr., Harris L.	X				
Boone, Jr., Sam W.	X				
Boyd, Deborah	X		X		
Brenes-Stahl, Tattiana P.	X		X		
Brennan, David C. **Past Chair**	X				
Brittain, David R.			X		
Bronner, Tae K.	X				
Brown, Mark A.	X		X		
Brunner, S.D.	X		X		
Bruton, Jr., Ed B.			X		
Bucher, Elaine M.	X		X		
Butters, Sarah S.	X		X		
Buzby-Walt, Anne	X				

Executive Council Members	Aug. 6 Palm Beach	Sept. 24 Prague	Dec. 3 Marco Island	March 3 Ponte Vedra	June 2 St. Petersburg
Cardillo, John T.			X		
Carlisle, David R.	X				
Caskey, John R.	X		X		
Christiansen, Patrick T. **Past Chair**	X	X			
Cole, Stacey L.			X		
Colon Heron, Lisa	X		X		
Conetta, Tami F.	X		X		
Conner, William T.	X		X		
Cope, Jr., Gerald B.	X	X	X		
Cornett, Jane L.	X		X		
DeCubellis, Daniel L.	X				
Detzel, Lauren Y.	X	X			
Diamond, Sandra F. **Past Chair**	X	X	X		
Dollinger, Jeffrey	X				
Dudley, Frederick R.	X				
Duval, III, Homer		X	X		
Elzeer, John S.					
Emerich, Guy S.	X		X		
Ezell, Brenda B.	X				
Falk, Jr., Jack A.	X		X		
Fernandez, Kristopher E.	X		X		
Fields, Alan B.	X				
Fitzgerald, Jr., John E.	X				
Fleece, III, Joseph W.	X	X	X		

Executive Council Members	Aug. 6 Palm Beach	Sept. 24 Prague	Dec. 3 Marco Island	March 3 Ponte Vedra	June 2 St. Petersburg
Fleece, Jr., Joseph W. **Past Chair**					
Flood, Gerard J.	X		X		
Foreman, Michael L.	X		X		
Frazier, S.K.	X		X		
Freedman, Robert S.	X	X	X		
Gans, Richard R.	X		X		
Garber, Julie A.	X		X		
Gay, III, Robert N.	X		X		
Gentile, Melinda S.					
Godelia, Vinette D.	X				
Goethe, Jeffrey S.	X		X		
Goldman, Robert W. **Past Chair**	X		X		
Gonzalez, Aniella	X				
Graham, Robert M.	X		X		
Granet, Lloyd	X		X		
Greer, Honorable George W.					
Griffin, Linda S.	X		X		
Grimsley, John G. **Past Chair**		X			
Grossman, Honorable Melvin B.		X	X		
Guttmann, III, Louis B. **Past Chair**	X	X	X		
Haley, William J.			X		
Hamrick, Alexander H.	X		X		
Hancock, Patricia J.	X		X		
Hart, W.C.			X		

Executive Council Members	Aug. 6 Palm Beach	Sept. 24 Prague	Dec. 3 Marco Island	March 3 Ponte Vedra	June 2 St. Petersburg
Hayes, Honorable Hugh D.					
Hayes, Michael T.	X				
Hearn, Steven L. **Past Chair**	X	X			
Hearne, Frank L.	X				
Henderson, Jr., Reese J.					
Henderson, III, Thomas N.	X		X		
Hennessey, III, William T.	X		X		
Heuston, Stephen P.	X				
Huszagh, Victor L.					
Hutson, Denise L.	X				
Isom, Honorable Claudia R.					
Isphording, Roger O. **Past Chair**	X	X	X		
Johnson, Amber Jade F.	X				
Jones, Frederick W.	X		X		
Jones, Jennifer W.			X		
Jones, John Arthur **Past Chair**					
Jones, Patricia P.H.	X		X		
Judd, Robert B.					
Kalmanson, Stacy O.	X				
Karr, Mary	X				
Karr, Thomas M.	X		X		
Kayser, Joan B. **Past Chair**			X		
Kelley, Rohan **Past Chair**	X	X	X		
Kelley, Sean W.	X		X		

Executive Council Members	Aug. 6 Palm Beach	Sept. 24 Prague	Dec. 3 Marco Island	March 3 Ponte Vedra	June 2 St. Petersburg
Kelley, Shane	X		X		
Kendron, John J.					
Kibert, Nicole C.	X	X	X		
Kightlinger, Wilhelmina F.	X				
King, Robin J.	X		X		
Kinsolving, Ruth Barnes **Past Chair**					
Koren, Edward F. **Past Chair**	X				
Korvick, Honorable Maria M.	X	X	X		
Kotler, Alan S.	X		X		
Krier, Honorable Elizabeth V.					
Kromash, Keith S.	X		X		
LaFemina, Rose	X				
Lane, Jr., William R.					
Lange, George	X	X	X		
Lannon, Patrick J.					
Larson, Roger A.		X	X		
Laughlin, Honorable Lauren C.					
Leebrick, Brian D.	X				
Lile, Laird A. **Past Chair**	X	X	X		
Little, III, John W.	X				
Lyn, Denise A.D.					
Lynch, Kristen M.	X		X		
Madorsky, Marsha G.	X	X	X		
Marger, Bruce **Past Chair**	X		X		

Executive Council Members	Aug. 6 Palm Beach	Sept. 24 Prague	Dec. 3 Marco Island	March 3 Ponte Vedra	June 2 St. Petersburg
Marmor, Seth A.	X		X		
Marshall, III, Stewart A.			X		
Mastin, Deborah Bovarnick	X		X		
McCall, Alan K.	X				
McElroy, IV, Robert L.	X		X		
Mednick, Glenn M.	X				
Menor, Arthur J.	X		X		
Mezer, Steven H.	X		X		
Middlebrook, Mark T.	X		X		
Miller, Lawrence J.	X		X		
Moran, John C.	X		X		
Mott, Jeanne A.					
Moule, Jr., Rex E.			X		
Muir, Honorable Celeste H.	X	X	X		
Mundy, Craig A.					
Murphy, Melissa J. **Past Chair**	X				
Mussman, Jay D.			X		
Nash, Charles I.	X	X	X		
Neukamm, John B. **Past Chair**	X	X			
Nguyen, Hung V.	X				
Norris, John E.	X				
Northrup, Andrea J.C.	X				
O'Ryan, Christian F.	X				
Parady, William A.	X	X	X		

Executive Council Members	Aug. 6 Palm Beach	Sept. 24 Prague	Dec. 3 Marco Island	March 3 Ponte Vedra	June 2 St. Petersburg
Payne, L.H.	X		X		
Pence, Scott P.	X		X		
Pepper-Dickinson, Tasha K.	X		X		
Platt, William R.	X				
Pleus, Jr., Honorable Robert J.					
Pollack, Anne Q.			X		
Polson, Marilyn M.	X		X		
Pratt, David					
Price, Pamela O.	X		X		
Prince-Troutman, Stacey A.					
Pyle, Michael A.	X	X	X		
Raines, Alan L.					
Randolph, Jr., John W.					
Reddin, Michelle A.			X		
Reinhardt, III, Joe A.					
Reynolds, Stephen H.		X	X		
Rieman, Alexandra V.			X		
Robbins, Jr., R.J.	X				
Roberts, III, Hardy L.	X	X	X		
Robinson, Charles F.	X				
Rojas, Silvia B.	X	X	X		
Roman, Paul E.	X	X	X		
Roscow, IV, John F.					
Russell, Deborah L.	X		X		

Executive Council Members	Aug. 6 Palm Beach	Sept. 24 Prague	Dec. 3 Marco Island	March 3 Ponte Vedra	June 2 St. Petersburg
Russick, James C.	X	X	X		
Rydberg, Marsha G.	X	X	X		
Sachs, Colleen C.	X				
Sasso, Michael C.					
Sauer, Jeffrey T.	X				
Schafer, Jr., Honorable Walter L.					
Schnitker, Clay A.	X	X			
Schofield, Percy A.			X		
Scholnik, Barry A.	X				
Schwartz, Lawrence A.					
Schwartz, Robert M.	X		X		
Scuderi, Jon	X		X		
Sheets, Sandra G.	X				
Shoter, Neil B.	X		X		
Shuey, Eugene E.					
Sibblies, Sharaine A.	X		X		
Silberman, Honorable Morris					
Silberstein, David M.	X		X		
Sklar, William P.					
Smart, Christopher W.	X				
Smith, G. Thomas **Past Chair**	X	X	X		
Smith, Wilson **Past Chair**					
Sobien, Wayne J.		X			
Sparks, Brian C.	X		X		

Executive Council Members	Aug. 6 Palm Beach	Sept. 24 Prague	Dec. 3 Marco Island	March 3 Ponte Vedra	June 2 St. Petersburg
Spurgeon, Susan K.	X	X	X		
St. Arnold, Honorable Jack R.					
Stafford, Michael P.		X	X		
Staker, Karla J.	X		X		
Stephenson, Laura P.			X		
Stern, Robert G.	X		X		
Stone, Adele I.	X	X	X		
Stone, Bruce M. **Past Chair**					
Suarez, Honorable Richard J.					
Sundberg, Laura K.	X		X		
Swaine, Jack Michael **Past Chair**	X				
Swaine, Robert S.	X				
Taft, Eleanor W.	X	X	X		
Taylor, Jr., Richard W.	X				
Tescher, Donald R.	X	X			
Thomas, Honorable Patricia V.	X		X		
Thornton, Kenneth E.	X		X		
Tobin, Jennifer S.	X				
Tritt, Jr., Arnold D.	X		X		
Udick, Arlene C.	X				
Umsted, Hugh C.					
Waller, Roland D. **Past Chair**	X		X		
Weintraub, Lee A.	X				
Wells, Jerry B.	X		X		

Executive Council Members	Aug. 6 Palm Beach	Sept. 24 Prague	Dec. 3 Marco Island	March 3 Ponte Vedra	June 2 St. Petersburg
White, Jr., Richard M.	X		X		
Whynot, Sancha B.	X		X		
Wilder, Charles D.	X	X			
Williams, Jr., Richard C.	X		X		
Williamson, Julie Ann S. **Past Chair**	X				
Wohlust, Gary C.	X		X		
Wolasky, Marjorie E.	X		X		
Wolf, Brian A.			X		
Wolf, Jerome L.	X		X		
Wright, William C.	X	X	X		
Young, Gwynne A.					
Zikakis, Salome J.	X	X	X		
Zschau, Julius J. **Past Chair**			X		

RPPTL Fellows	Aug. 6 Palm Beach	Sept. 24 Prague	Dec. 3 Marco Island	March 3 Ponte Vedra	June 2 St. Petersburg
Bush, Benjamin	X				
Kypreos, Theo	X		X		
Lucchi, Elisa F.	X		X		
Pasem, Navin	X		X		

Legislative Consultants	Aug. 6 Palm Beach	Sept. 24 Prague	Dec. 3 Marco Island	March 3 Ponte Vedra	June 2 St. Petersburg
Adams, Howard Eugene	X		X		
Aubuchon, Joshua D.	X		X		
Dunbar, Peter M.	X	X	X		
Edenfield, Martha	X	X	X		

Guests	Aug. 6 Palm Beach	Sept. 24 Prague	Dec. 3 Marco Island	March 3 Ponte Vedra	June 2 St. Petersburg

EXHIBIT B

AD HOC COMMITTEE ON

FORECLOSURE REFORM

FLOOR AMENDMENTS

WHITE PAPER

SUPPORT OF
HB 213, AS AMENDED

SUMMARY

The public interest is served by maintaining the strong tradition of judicial due process in mortgage foreclosure cases while moving mortgage foreclosure cases to final resolution expeditiously in order to get real property back into the stream of commerce, but to do so consistent with due process and fundamental fairness and without impairing the ability of the courts to manage their dockets and schedules. This act is an effort to provide additional tools to the courts to assist in achieving such a balance and to establish new and modified procedures to solve problems which have arisen in light of current foreclosure procedures.

CURRENT SITUATION

The proposed legislation attempts to resolve various issues relating to the current foreclosure process and satisfaction documentation. The bill requires verification of ownership of the note when the action is brought, defines adequate protection for lost notes in foreclosure cases, stabilizes title after a foreclosure case is finalized, lessens the time to seek a deficiency, clarifies the mechanism to expedite a foreclosure, and revises the order to show case statute.

SECTION-BY-SECTION ANALYSIS

A. Section 95.11 (5)(h) is created as a new section relating to the time to pursue deficiencies. Under current law, a deficiency decree can be pursued up to 5 years after default or notice of default on the underlying note, and well after the completion of the underlying foreclosure. §95.11 Florida Statutes. This creates the potential that the current surge of foreclosures will be followed by another surge of lawsuits seeking to establish deficiency decrees, thus prolonging the economic malaise. Proposed 95.11(5)(h) limits the time for pursuing a deficiency with respect to an owner-occupied one- to four-family dwelling to one year after the completion of foreclosure. In order to protect lenders whose foreclosures may have already been completed, the earliest limiting date is one year after the effective date or October 1, 2013.

B. Current §701.04 requires a lender to provide the mortgagor with an estoppel statement setting forth the unpaid balance of a mortgage in order to facilitate sales and refinancings. The bill modifies and updates this requirement in several key respects:

1. It expands the parties who can request the estoppel statement to include others with an interest in the property (such as the purchaser upon foreclosure of a subordinate lien). Some lenders have refused to provide this information to third parties on privacy grounds. Where a party other than the original mortgagor (or their designee) is making the request, there is no duty to provide an itemization of the unpaid loan balance. Proposed §701.04(5)

2. In order to facilitate uniformity and assure acceptability by closing agents and title insurers, proposed §701.04(1) sets forth the required content of the estoppel statement in detail to include:

(a) Unpaid amounts due as of the requested date certain
(b) At least 20 days of per diem interest after that date
(c) Certification that the party providing the estoppel is either the holder of the original promissory note or entitled to enforce the note under §673.3011, as the case may be.
(d) A commitment that upon receipt of funds, they will return a recorded mortgage satisfaction and the original promissory note marked "paid in full" or a lost note affidavit and adequate protections as required by proposed §702.11.

3. Subsection (2) provides that a lender may not charge a fee for the preparation or delivery of the first two estoppel statements in any calendar month. The lender has a separate obligation to provide certain information free of charge to the borrower (without restriction as to the number of requests) under the Real Estate Settlement Procedures Act, 12 U.S.C. §2605 and the Federal Truth in Lending Act, 15 U.S.C. §1641. However those acts do not require provision of the information to third parties (such as a title agent) or set time frames for providing the information.

As the proposed Florida law was an expansion of the obligations under the Federal Act, and subject to enforcement provisions, there was some concern that parties could make an abusive number of requests, which led to the inclusion of the limitation on the number of free requests. Obviously, the Florida statute would not limit a borrower's rights to information under the Federal Acts. §701.04(2)

4. Subsection (3) reiterates the basic concept of an estoppel statement, that third parties relying on it (by purchasing or lending against the property) may rely on and enforce the estoppel statement. The borrower is not a party entitled to rely on the estoppel statement, as it was felt that the borrower should not benefit from an inadvertent error or misstatement by the lender – as there is no detrimental change in position.

5. Current §701.04 requires the holder of a mortgage to execute and record a satisfaction of mortgage. Mortgage holders do not routinely record a continuous chain of assignments in the official records. As a result a satisfaction is rarely given by the owner of record, which creates a title problem affecting the marketability of the property. Subsection (4) adds an additional requirement that if the party giving the satisfaction is not the owner of record, the satisfaction will be supplemented by a sworn certification that the person executing the

satisfaction was then in physical possession of the original promissory note or was then a person entitled to enforce the note pursuant to §673.3011, as the case may be.

In drafting, we considered requiring the mortgage holder to record a continuous chain of assignments, but realized that such would be impractical, if not impossible, (absent fraudulent robo-signing) if the assignments of mortgage had not been created at the time of the original transfer. Instead, we are requiring proof of possession of the note which the mortgage follows whether or not assigned, at each stage of the process.

6. Subsection (6) requires the party receiving payment to return the original promissory note within 60 days of receipt of payment. In lieu of returning the original note, the lender can complete a lost, destroyed or stolen note affidavit and provide adequate protections in accord with current law. Subsection (6) allows the request to designate where the original note should be returned. It is anticipated that after a sale or refinancing, the paid note will be returned to the closing agent, who can then record an affidavit of return of the paid note to supplement the satisfaction from a party who is not the record assignee of the mortgage. While the bill does not require the filing of complete chains of mortgage assignments, such is still the preferred practice and provides the mortgage owner with important protections and the benefit of the limited liability for Condominium and HOA assessments under §718.116 and §720.3085.

7. Subsections (7) and (8) are the enforcement mechanisms for this section. If the party who receives payment does not return the note or comply with the lost note mechanism within 60 days, they are subject to a penalty of $100 per day until delivered up to a total of $5,000. A summary proceeding under §51.011 may be brought to compel compliance and the prevailing party is entitled to recover attorneys' fees and costs.

Current §701.04 imposes duties on the holders of mortgages, other liens and judgments to satisfy them of record upon payment in full. Because the modifications of proposed §701.04 were so specific to mortgages and notes, the provisions dealing with other liens and judgments were segregated and moved to new §701.045. The new provision also added a cross reference to §55.206 which addresses the termination of liens in the judgment liens on the personal property database.

C. Proposed §702.015 is an attempt to reschedule the timing of certain aspects of the foreclosure process. The customary practice had been to plead in the alternative – both that the plaintiff was the owner and holder of the note, and that the note had been lost and seeking to re-establish the note. At some point later in the process, the plaintiff would locate and file the original note, or proceed to show its entitlement to enforce a lost note. In the meantime, the defendants were devoting resources to defending unnecessary issues and conducting discovery as to potentially irrelevant issues.

This section mandates that the foreclosing lender gather information within its control and elect procedures at the time of initially filing the foreclosure action. It also requires the foreclosing lender to allege with specificity some of the "routine" discovery requests – such as the authority by which an agent has authority to act on behalf of the note holder.

Section 702.015 also requires any complaint which does not include a lost note count to either (a) file the original note or (b) file certification that the plaintiff is in physical possession of the original promissory note, its location, the date and person who verified possession and attach copies of the note and any allonges thereto.

Any complaint which includes a count to enforce a lost, destroyed or stolen promissory note, must be accompanied by a lost note affidavit which details all assignments of the note, set forth facts showing entitlement to enforce the lost note under §673.3091, and exhibits showing entitlement to enforce.

Since §702.015 will require the earlier filing of original promissory notes, the clerk is delegated authority to return the original note where the mortgage is restructured, the case settles or is voluntarily dismissed without completion of the foreclosure.

D. Proposed §702.035 provides enhanced notice to the mortgagor and property owners, and tenants of their rights in the foreclosure process. Only one notice needs to be given to any party defendant in a single case, even if multiple mortgage holders are seeking to foreclose. A substantial amount of time and many comments were received on every aspect of the proposed notice. It is very difficult to provide meaningful and fulsome notice to the lay person. The language has been amended many times to provide the proper notice.

E. Longstanding common law grants a degree of certainty of title to a bona fide purchaser following the foreclosure sale. It is critical to Florida's real estate economy that foreclosed properties be freely marketable and its title insurable after a foreclosure. Yet the nature of certain allegations made regarding "robo-signing," fabrication of assignments of notes and mortgages, and photo-shopped "original" notes create a significant risk that foreclosures tainted by such alleged practices might be set aside even after the property has been conveyed to an arms' length purchaser. The mere prospect of this has created some hesitation to insure properties coming out of a foreclosure. A case or two expressly reaching the conclusion that a sale could be set aside would freeze up the market in previously foreclosed properties because of the unknowability of which properties might have been tainted by bad practices.

Proposed Section 702.036 recognizes that the real estate economy does require some finality in the foreclosure process. It thus backstops the common law with an express statutory limited scope marketable record title act, which legislatively converts any attempt to "unwind" a completed foreclosure (other than based on the failure of service – as such would be a constitutional defect) into a claim for money damages, and prohibits granting relief which adversely impacts the ownership or title to the property.

In the interest of fairness, this protection of the title only becomes effective after:

1. A final judgment of foreclosure has been entered,
2. Any appeals periods have run without an appeal, or the appeal has been finally resolved;
3. No lis pendens was filed providing notice of the subsequent challenge and the property was acquired, for value, by a person not affiliated with the foreclosing lender; and

4. The party seeking relief from the judgment was properly served.

Proposed §702.036(3) attempts to provide similar finality where the foreclosure was based on a lost, destroyed or stolen note in those rare circumstances in which the "real" note holder attempts to enforce the note. Under that fact pattern, the "real" note holder must pursue the adequate protections given under §673.3091 (which requires the court to provide adequate protection), new Section 702.11, or the party who wrongly claimed to be the owner of the note, rather than the property in the hands of the unaffiliated bona fide purchaser for value.

F. The changes to §702.04 are technical in nature to eliminate an obsolete reference to the no longer required "decree of confirmation of sale" and the no longer used "foreign judgment book."

G. Current §702.06 included language which could only be understood by looking back to technical distinctions before Florida consolidated legal and equitable jurisdiction. Proposed §702.06(1) is intended to have the same meaning as existing §702.06.

Under current law, a deficiency decree can be pursued up to 5 years after default or notice of default on the underlying note, and well after the completion of the underlying foreclosure. §95.11 Florida Statutes. This creates the potential that the current surge of foreclosures will be followed by another surge of lawsuits seeking to establish deficiency decrees, thus prolonging the economic malaise. Proposed subsections (2) and (3) of §702.06 limit the time for pursuing a deficiency with respect to an owner-occupied one- to four-family dwelling to one year after the completion of foreclosure. In order to protect lender's whose foreclosures may have already been completed, the earliest limiting date is one year after the effective date or October 1, 2013.

H. Proposed Section 702.062 gives the court more tools to keep the foreclosure process moving forward, notwithstanding the cross-incentives of both the homeowner and sometimes the lender to move more slowly. Subsection (1) requires any party giving an extension of the time to file a response to a complaint to provide the clerk with notice (usually by a copy of the extension letter). In that manner, the court and other parties are aware of the applicable default deadlines.

Subsections (2) and (3) allows any party to notify the court when defaults are appropriate and to move for entry of defaults. Subsection (3) allows the court to specifically direct the plaintiff to file all affidavits, certifications and proofs necessary for the entry of summary judgment or to show cause why such a filing should not be made, and provides that the filing of these materials shall be construed as a motion for summary judgment. The court may then enter final summary judgment or set the case for trial in accord with its sound judicial discretion. The bill drafters felt that the court had the inherent authority to take these steps, but were advised that certain courts would take comfort in an express statutory provision.

If all parties have been served, forty-eight days after filing, any party may request a case management conference at which the court will set definite timetables for moving the case forward. The bill expressly recognizes that the court may grant extensions and stays when the

parties are engaged in good faith negotiations or otherwise as justice may require, but does provide express authority for the court to condition an extension on the borrower or the lender if it so chooses paying condo & HOA assessments going forward.

I. Current §702.065 is amended to lower the amount of permissible attorneys fees before an evidentiary hearing as to reasonableness is required to the greater of 1.5% or $1500, from the current 3% (without limit).

J. Section 702.10 of the current statutes is the "order to show cause" procedure. Practitioners have complained that the statutory procedure does not achieve its goal of expediting foreclosure actions in foreclosures under certain circumstances. In 2010 the Section appointed a special committee chaired by Peggy Rolando and comprised of Dan DeCubellis, Jeff Sauer, Willie Kightlinger, Kris Fernandez, Michael Gelfand, George Meyer, Mark Brown, Burt Bruton and Jerry Aron. That committee spent a few months analyzing the order to show cause statute and drafted a proposed amendment. That work product was the basis of the language in HB213. Only minor changes have been made to the special committees proposal.

The revised procedure calls for a verified complaint, provides for a specific timetable for a hearing, clarifies various terminology, revises the attorneys fees provision, expands the parties to be served to any defendant, not just the mortgage; and allows for the entry of a final judgment if various events occur. The only substantive change to the prior committee's proposal is that the current statute applies to nonresidential real estate. The prior committee did not propose to change the scope of the statute. HB 213 expands the scope of that portion of the bill requiring payments during pendency of the case to residential property except homestead property. The drafters of HB 213 concluded that an overwhelming percentage of residential property that is not homestead is investment property and investment property which is residential should be subject to the expedited order to show case procedure.

K. New section 702.11 creats a definition as to "adequate protections" for lost notes. Although the drafters recognized that §673.3091 included a provision that the judge provide adequate protection, may judges were not providing any adequate protection. Therefore, it was thought the need for more specific requirements should be sought for mortgage foreclosures. Although the proposed list of adequate protections can be debated, it is intended to be a reasonable approach to solve a difficult problem and requires consideration by the judge.

FISCAL IMPACT ON STATE AND LOCAL GOVERNMENTS

The fiscal impact on state and local governments is unknown.

DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR

There are economic benefits to lenders, borrowers, homeowners and condominium associations in the proposed bill. Lenders have more certainty as to the foreclosure process avoiding lengthy additional litigation and providing a workable process to expedite certain foreclosures. Borrowers have the benefit of knowing the lender foreclosing is the correct party,

if a note is lost adequate security, is provided, satisfactions are expedited and the time to seek a deficiency is reduced. Associations are expressly provided an opportunity to be benefitted.

CONSTITUTIONAL ISSUES

The special committee analyzed various constitutional issues and the final bill addresses all known constitutional concerns. The section which brings finality to the foreclosure process has been evaluated closely to assure that it withstands constitutional attack. The committee reviewed cases upholding other statutes, such as the marketable record title act, where property interests are eliminated, but where strong public policy dictated the need for certainty in title transactions. The proposed statute also provides an alternative adequate remedy as addressed in the case law.

OTHER INTERESTED PARTIES

On two occasions the special committee sought input from a variety of section committees and reviewed each comment and suggested appropriate revisions to Representative Passidomo. She also received comments from the Consumer Protection Law Committee of the Florida Bar and incorporated certain of their requested changes. The Public Interest Law Section has provided comments to the Section. In addition the sections proposal and initial white paper have been provided to a special committee of the Business Law Section.

EXHIBIT C

GUARDIANSHIP COMMITTEE

ADMINISTRATIVE ORDER

ADMINISTRATIVE ORDER
NO. 2011-02

IN THE CIRCUIT COURT OF THE
NINTH JUDICIAL CIRCUIT, IN AND
FOR ORANGE COUNTY, FLORIDA

ADMINISTRATIVE ORDER GOVERNING COURT APPOINTED PROFESSIONAL GUARDIAN FEES AND GUARDIANS' ATTORNEYS' FEES FOR INVOLUNTARY GUARDIANSHIPS IN THE ORANGE COUNTY DIVISION OF THE NINTH JUDICIAL CIRCUIT WITH DIRECTIONS TO THE CLERK

WHEREAS, pursuant to Article V, section 2(d) of the Florida Constitution and section 43.26, Florida Statutes, the chief judge of each judicial circuit is charged with the authority and the power to do everything necessary to promote the prompt and efficient administration of justice; and

WHEREAS, pursuant to the chief judge's constitutional and statutory responsibility for administrative supervision of the courts within the circuit and to create and maintain an organization capable of effecting the efficient, prompt, and proper administration of justice for the citizens of this State, the chief judge is required to exercise direction, *see* Fla. R. Jud. Admin. 2.215(b)(2), (b)(3); and

WHEREAS, as Chief Judge of the Ninth Judicial Circuit, the undersigned is vested with direct authority over the payment of fees for court-appointed guardians; and

WHEREAS, there is a need to establish uniform fees and procedures for professional guardians appointed to protect the person and property of persons deemed incompetent;

NOW THEREFORE, I, Belvin Perry, Jr., in order to facilitate the efficient administration of justice, and pursuant to the authority vested in me as Chief Judge of the Ninth Judicial Circuit of Florida under Florida Rule of Judicial Administration 2.215, hereby order the following, effective **November 1, 2011,** and to continue until further order:

1. Guardians who meet the qualifications defined in section 744.102(17), Florida Statutes, must currently be in compliance with the requirements of section(s) 744.1083, 744.1085 and 744.3135, Florida Statutes, and thereby will be classified, for purposes of this Order, as professional guardians.

2. All services completed from the effective date of this Order forward must comply with the billing and accounting requirements set forth herein. Services completed prior to November 1, 2011, but not yet billed may be compensated at the previous rate.

3. Professional guardians shall be compensated at a rate of $64.00 per hour, pro rata, for all reasonable and necessary work performed for all guardianships which qualify them pursuant to section 744.102(17), Florida Statutes, as professional guardians.

   Should a guardian request to exceed this hourly rate, the guardian must set this request for hearing and submit to the Court a detailed outline in writing stating the reasons for the need to exceed this hourly rate pursuant to section 744.108(2), Florida Statutes. Such requests will be evaluated on a case-by-case basis. The Court retains the discretion to adjust hourly rates higher or lower for each professional guardian (individually), as deemed appropriate by the Court.

4. Professional guardians are not permitted to bill for more than three hours of services, including signing the application and attending the hearing, before receiving Letters of Guardianship unless proof is presented to the Court of extraordinary circumstances.

5. Prior to payment, all guardians are required to apply for and obtain Court approval by petition which shall include a detailed description of the work performed and the time expended in the performance of the services. A Petition for Fees shall include the period covered and the total amount of all prior fees paid or costs awarded to the guardian in the guardianship proceeding currently before the Court. Petitions shall be reviewed without the necessity of hearing provided that there has been compliance with all current Administrative Orders. However, the guardian may request a hearing if there are any adjustments or objections to fees or costs for which approval has been requested.

6. Petitions will be reviewed by the Court in order to determine the reasonableness of the time spent to perform the work.

7. Guardians of the property will not be compensated for performing duties properly performed by the guardian of the person, and vice versa.

8. No funds shall be removed from the ward's account(s) for payment of guardian fees or attorney fees absent a court order. Only after a fee petition has been approved by the Court, may the guardian or attorney be compensated from the ward's funds. The fee petition must outline the specific services performed by the guardian or attorney, the time spent performing each service, and the total fee for the services provided. Time shall be billed in increments of 1/10th of an hour (.1 = 1-6 mins.; .2 = 7-12 mins.; .3 = 13-18

mins.; .4 = 19-24 mins.; .5 = 25-30 mins.; .6 = 31-36 mins.; .7 = 37-42 mins.; .8 = 43-48 mins.; .9 = 49-54mins.; 1.0 = 55-60 mins.)

9. When a guardian conducts one billable activity that is for the benefit of more than one ward, the guardian shall divide the billing equally between all the wards. For example, when a guardian performs shopping duties for three hours for six different wards, the billings shall reflect an accurate accounting of time spent per each ward, rather than three hours per each of the six wards. In the alternative, the guardian may split those three hours equally among the six wards, but the total billing should be for three hours.

   The guardian shall not co-mingle the assets or billing of services of the ward(s). For example, a guardian shall not submit one billing for two people, such as a husband and wife.

10. Tasks performed by employees of professional guardians on behalf of a ward must be billed at a lesser hourly rate than that of the professional guardian. Under no circumstances shall an employee or independent contractor be paid at a rate higher than $20.00 per hour for the following tasks:

    Shopping, picking up prescriptions, driving the ward(s) to an outing or activities, making deposits, bill paying (writing checks, electronic bill paying, balancing the checkbook), attending basic dental, eye and well-care appointments.

11. Guardians may submit one fee petition per ward every other month at a maximum, or one fee petition per ward every six months at a minimum.

    The first petition must be filed within six months after the Inventory has been filed. Fees will not be approved unless the Inventory has been submitted and approved.

    Guardians shall abide by the following schedule regardless of the frequency of submission. The schedule for fee petitions shall be as follows:

Guardian Last Name Beginning With	Group	Fee Petition Submission Months
A-M	1	January, March, May, July, September and November
N-Z	2	February, April, June, August, October and December

A proposed order shall be submitted with the fee petition. Only after the fee petition is reviewed and approved by the Court and an order is issued, may the guardian remove the approved funds from the ward's account.

The Court may offer proposed changes to a fee petition. If the guardian agrees with the changes, he/she shall sign the proposed fee petition and an order for the adjusted amount will issue. If the guardian does not agree with the proposed change, he/she shall schedule a hearing on the fee petition.

In no event may fee petitions be filed less than once a year.

12. The following limits shall apply, absent a showing of extraordinary circumstances:

- Bill Paying for Bills of the Ward: No more than 1 hour per month.

- Shopping: No more than 2.5 hours per month when the ward resides at home and no more than 1 hour per month when the ward resides in a facility.

- Clerical (filing/copying/faxing/reviewing or responding to mail/email, listening to or receiving voicemail, making bank deposits, etc.): No more than 1 hour per month.

- Attendance at Appointments: When it is necessary for a guardian to meet with a service provider or otherwise exercise some fiduciary duty, billing guardian time is appropriate. However, in an effort to reduce costs to the ward, the guardian should engage assistance whenever possible.

  For this reason, guardians will not be paid for attending medical appointments, funerals, family functions, etc., with the ward absent a satisfactory explanation as to why a family member, friend or paid provider was not available to perform this task. Guardian should not attend functions unless his/her attempts to enlist aid have been unsuccessful.

  Guardians, whenever possible, should attempt to enlist assistance from clerical staff, paid providers, family, friends, caretakers or companions to perform routine services that do not require the fiduciary expertise of a professional guardian. It is not in the best interest of the ward to have a guardian charge their standard fee to run to the store for basic necessities.

  Guardians should utilize companions for routine visits, such as dental cleanings and eye exams. Whenever a guardian must be present to meet with a provider or exercise some fiduciary duty, billing guardian time is appropriate.

  If a guardian can avoid lengthy periods of time where they are simply waiting in a doctor's office with the ward or attending a funeral or family function with a ward, efforts must be made to do so. Guardians are strongly encouraged to enlist help in this regard whenever possible. Recognizing that some hired companions charge a minimum amount of hours, if it would cost less to have the guardian attend such a function with the ward than it would to hire the companion for that minimum period that actually exceeds the time needed, then, in that event, the guardian should provide

a brief statement explaining that in the fee statement.

- Travel: Guardians are entitled to travel time and mileage. Mileage shall be compensated at the rate as set by section 112.061(7)(d), Florida Statutes. However, guardians must list their actual mileage per trip with each line-item entry for travel time in order for their travel time to be approved by the Court.

Time spent on each of the aforementioned activities must be broken out separately. For example, if the guardian reviewed, responded to, copied and filed a bank statement, the time must be broken into separate line items: one for reviewing and responding, another for copying and filing.

13. Time spent preparing the fee petition and/or attending hearings on same shall not be billed. Time spent reviewing and/or responding to requests/orders/instructions from the Court due to the guardian's failure to satisfactorily file documents in a timely manner or otherwise meet court-ordered or statutory obligations, and work to produce amended documents as a result of such non-compliance shall not be billed.

14. No "administrative fees" shall be billed.

15. Guardians seeking reimbursement for expenditures made on behalf of the ward must submit valid receipts along with the guardian billing.

16. Guardians billing for time spent paying caregivers must attach a valid 1099 to the guardian billing for each caregiver paid by the guardian.

17. At the Court's discretion, and after the guardian has been given an opportunity to be heard, the Court may reduce the amount of time billed (and thus the total fees due) if the Court deems the amount of time billed to be excessive.

18. At the Court's discretion and after the guardian has been given an opportunity to be heard, the Court may reduce the guardian's hourly rate for failure to meet his/her statutory or court-ordered responsibilities. Such reduction in the guardian's hourly rate may be a one-time sanction on a particular fee petition, or may be a permanent reduction in the guardian's hourly rate.

19. Pursuant to sections 43.26 and 744.368, Florida Statutes, the Clerk of Court is required to review and provide reports to the Court as to the inventory and accountings from professional guardians. Accordingly, the Clerk of Court shall maintain a report, in spreadsheet format containing the billing amounts from the fee petitions submitted by professional guardians. This report shall be generated in accordance with the schedule stated in paragraph 11 of this Order and a copy of each report shall be provided to the Court Monitor by the 15th day of each month following the month when fee petitions are submitted.

20. A copy of the spreadsheet professional guardians are to use when completing and submitting guardian billings as contemplated by this Order is attached hereto as "Exhibit A." This form shall be emailed to each professional guardian in Excel format and is always available upon request from the Guardianship Court Monitor.

    Each professional guardian shall submit a hard copy of each guardian billing spreadsheet and shall also email the spreadsheet to the Office of the Clerk of Court at the email address as provided by the Clerk.

21. In all fiduciary relationships the professional guardian shall not oppose or interfere with efforts to terminate the professional guardians fiduciary relationship with a ward for any reason other than as necessary or appropriate to protect or promote the best interest of the ward as may be determined by the Court.

22. This Order does not apply to veterans' guardianships pursuant to sections 744.602 through 744.653, Florida Statutes, or voluntary guardianships pursuant to section 744.341, Florida Statutes.

Administrative Order No. 07-92-15 is vacated and set aside and has been incorporated and/or amended herein.

DONE AND ORDERED at Orlando, Florida, this 13th day of October, 2011.

_____/s/_____
Belvin Perry, Jr.
Chief Judge

Copies provided to:

Clerk of Court, Orange County
Clerk of Court, Osceola County
General E-Mail Distribution List
http://www.ninthcircuit.org

EXHIBIT A

Guardian:

_____

_____

_____

Invoice Date: _____

Hourly Rate: _____

Invoice Total: _____

Activity Date	Activity Code	Brief Description of Activity	On behalf of	Hours

Activity Codes:

ANNACCT	Preparing annual accounting or amendments
ANNPLAN	Preparing annual plan or amendments
ATNDDEPO	Attending deposition
ATNDHEAR	Attend hearing other than hearing for guardian's fee - please be specific
ATTENDCL	Attending closing for sale of real estate
ATTYCON	Consulting with attorney (guardian's attorney)
BANKING	Visiting banks, credit union
BILLPAY	Bill paying, including reviewing bill and writing checks
BOOKKEEP	Balancing checkbook or other account, review bank statement
CALLLAWENF	Calls to law enforcement
CALLNURS	Calls to or from nursing home
CAREPLAN	Care plan meeting
CHANGAD	File ward's change of address with USPS
CLERICAL	Filing, copying, faxing, scanning, checking mail, etc.
COURTDOC	Review court documents
CPA	Meeting with CPA for guardianship taxes, 1099 preparation
CTMONITOR	Speaking with court monitor
EMAILATTY	Emailing attorney (guardian's)
EMAILFAMILY	Emailing family
EMAILPHY	Emailing physician, psychiatrist other medical personnel, facilities
FIBENEFIT	Filing for benefits other than Medicaid, Social Security and VA
FIBENEFITSVA	Filing for Veterans Administration Benefits
FILINCTAX	Preparing ward's income tax including assembling information
HIREATTY	Hiring attorney to litigate on ward's behalf
HIRECONT	Hiring contractors for property improvement, maintenance
INITPLAN	Preparing initial plan or amendments
LETTERFAMILY	Letters to family members

MCAREGIVER	Meeting with or hiring caregiver
MEDAPPT	Medical appointments
MEDICAID	Medicaid planning and filing
MEETREALTOR	Meeting with real estate agents
MOVEBEL	Moving the ward's belongings
MOVEWRD	Moving the ward
OBTAPPR	Obtaining appraisal of real or personal property
OBTPERMI	Obtaining permit for property improvement
OTHRERACTIVITY	PLEASE GIVE SPECIFIC DETAILED INFORMATION
PHARMACY	Picking up prescription
PHONEATTY	Telephone call to attorney
PHONEFAM	Telephone call to family
PHYCON	Consulting physician, dentist, psychiatrist or other doctor
PRE1099	Preparing 1099 for caregivers
PURCHINS	Purchase of insurance--renters insurance, homeowners, etc
PURFUNER	Purchasing funeral plans
REPPAYEE	Preparation of rep-payee form for the Social Security Administration
REQDCFOM	Requesting DCF or Ombudsman records
REQFINAN	Requesting financial records
REQRECO	Requesting medical records
SAFEDEPOSIT	Inventory of safe deposit box
SELLPROPERTY	Sale of property including real estate, car or other personal property--not to include closing
SHOPPING	Shopping
SOCIALAPPT	Social appointments
SSABENEFITS	Filing for Social Security Benefits or rep-payee; please give office address
TELCALL	Telephone calls to/from DCF, Ombudsman
TRANSAP	Transporting ward for haircuts, hairdresser, shopping
TRANSWA	Transporting ward to physician or psychiatrist or other doctor
TRAVEL	Travel time
VERINVEN	Preparing inventory or amendments including compiling list of household goods, furnishings
VISITSSA	Visiting the Social Security Administration Office, please include the address
VISITWARD	Visits with ward

EXHIBIT D

GUARDIANSHIP COMMITTEE

SUMMARY BULLET POINTS

RE: ADMINISTRATIVE ORDER

Real Property, Probate and Trust Law Section
Guardianship Law Committee

REPORT AND MOTION OF THE GUARDIANSHIP LAW COMMITTEE

Review of Administrative Order No.2011-02
Ninth Judicial Circuit
Orange County, Florida

ISSUE: Administrative Order No. 2011-02, Ninth Judicial Circuit, Orange County, ("The Order") exceeds the scope of an administrative order pursuant to Florida Rule of Judicial Administration 2.120, and violates specific statutory provisions of the Guardianship Code. Furthermore, it appears to violate due process and may negatively impact guardianship administration and quality of care to wards and to the citizens of central Florida.

FINDINGS: The Guardianship Committee finds that Administrative Order No. 2011-02 contains specific provisions which either attempt to modify existing law, or are directly contrary to Florida law, and believes the administrative order to be a local rule (as defined in 2.120) rather than an administrative order and ripe for application to the Supreme Court Local Rules Advisory Committee for a decision on the question.

DISCUSSION:
Administrative orders are meant to coordinate administrative matters within the affected jurisdiction and anything more than that is improper. *In re Report of Com'n on Family Court*, 646 So.2d 178, 181 (Fla. 1994). The order does not "administer properly the court's affairs," but is a minutely detailed rule of procedure that countermands the Florida Guardianship Code in several significant respects and discriminatorily affects a small class of citizens who appear before the court.

An administrative order cannot amend a statute by adding terms and conditions that were not part of the original legislation. *State v. Leukel*, 979 So. 2d 292 (2008)

Any limit placed on the trial judge's discretionary authority through an administrative order renders the administrative order void. *Valdez v. Chief Judge of the 11th Circuit*, 640 So. 2d 1164 (Fla. 3d DCA 1994)

Due process – singles out professional guardians and regulates that class of citizens without imposing those regulations on others similarly situated in that class. There is no compelling governmental interest in singling out this small class, and would require legislative action even if it was permissible.

A Sampling of Statutory Violations:

1. Paragraph 3: Sets a minimum fee for professional guardians and also seems to abrogate the Court's requirement to consider the factors enumerated in 744.108(2)(a)-(i) when making a determination of a reasonable fee.

2. Paragraphs 4 and 7: Violates 744.108(1), which provides that a guardian is entitled to reasonable compensation for services rendered to a ward.

3. Paragraph 8: Directly violates 744.444(16) which allows payment of attorneys fees, subject to approval by the annual accounting.

4. Paragraph 13: Directly contradicts 744.108(8), which provides that fees and costs incurred in determining reasonable compensation are part of the guardianship administration process and "shall be determined by the court and paid from the assets of the guardianship estate unless the court finds the requested compensation under subsection (2) to be substantially unreasonable."

5. Paragraph 19: Violates 744.107, which governs the appointment of court monitors. Court monitors can only be appointed in a specific proceeding and an order needs to be entered by the Judge and served on the guardian, ward and other interested persons. This provision requires information to be given to the "Court Monitor" on a regular basis.

Some other issues with the Order:

- Sets a uniform fee for all guardians (p. 3)
- Arbitrary time limits (p. 4)
- Performing duties of guardian of the person/property (p. 7)
- Sets a uniform fee for employees of professional guardians without reserving the discretion of the judge (p.10)
- Sets arbitrary time limits on tasks (12)
- Administrative fees (14)
- Must attach a valid 1099 (16)

MOTION: That, pursuant to Florida Rule of Judicial Administration 2.215 (e)(2), the appropriate representative of the Real Property, Probate and Trust Law Section file an application with the Supreme Court of Florida or the Supreme Court Local Rules Advisory Committee to review The Order and determine whether it falls under the definition of a court rule or local court rule (as defined in 2.120) and applicable case law; and authorize the Executive Committee of the Real Property, Probate and Trust Law Section to take appropriate action in furtherance thereof.

RPPTL 2011 - 2012
Executive Council Meeting Schedule
George Meyer's YEAR

Date	Location
August 4 – August 7, 2011	**Executive Council Meeting & Legislative Update** The Breakers Palm Beach, Florida Reservation Phone # 561-655-6611 www.thebreakers.com Room Rate: $190.00 Cut-off Date: July 3, 2011
September 21 – September 25, 2011	**Executive Council Meeting / Out-of-State Meeting** Four Seasons – Prague Prague, Czech Republic Reservation Phone # 420-221-427-000 http://www.fourseasons.com/prague/ Room Rate: $362.00 Cut-off Date: August 31, 2011
December 1 – December 4, 2011	**Executive Council Meeting** Marco Island Marriott Marco Island, Florida Reservation Phone #1-800-438-4373 http://www.marcoislandmarriott.com/ Room Rate: $189.00 Cut-off Date: November 9, 2011
March 1 – March 4, 2012	**Executive Council Meeting** Sawgrass Marriott Ponte Vedra Ponte Vedra, Florida Reservation Phone #1-800-457-4653 http://www.sawgrassmarriott.com/ Room Rate: $149.00 Cut-off Date: February 8, 2012
May 31 – June 3, 2012	**Executive Council Meeting / RPPTL Convention** Don CeSar Beach Resort St. Petersburg, Florida Reservation Phone # 1-800-282-1116 http://www.loewshotels.com/en/Hotels/St-Pete-Beach-Resort/Overview.aspx Room Rate $160.00 Cut-off Date: May 9, 2012

RPPTL 2012 - 2013
Executive Council Meeting Schedule
W. Fletcher Belcher's YEAR

Date	Location
July 25 – July 28, 2012	**Executive Council Meeting & Legislative Update** The Breakers Palm Beach, Florida Reservation Phone # 561-655-6611 www.thebreakers.com Room Rate: $199.00 Cut-off Date: June 25, 2012
September 13 – September 15, 2012	**Executive Council Meeting** Ritz Carlton Key Biscayne Key Biscayne, Florida Reservation Phone # 1-800-241-3333 http://www.ritzcarlton.com/keybiscayne Room Rate: $169.00 Cut-off Date: August 22, 2012
November 15 – November 18, 2012	**Executive Council Meeting/Out of State** The Inn on Biltmore Estates Ashville, North Carolina Reservation Phone #1-866-779-6277 www.biltmore.com/stay/rates Room Rate: $219.00 Cut-off Date: October 15, 2012
February 7 – February 10, 2013	**Executive Council Meeting** Hotel Duval Tallahassee, Florida Reservation Phone #1-888-236-2427 http://www.hotelduvall.comn Room Rate: $149.00 Cut-off Date: January 16, 2013
May 23 – May 26, 2013	**Executive Council Meeting / RPPTL Convention** The Vinoy St. Petersburg, Florida http://www.marriott.com/hotels/travel/tpasr-renaissance-vinoy-resort-and-golf-club Reservation Phone # 1-888-303-4430 Room Rate $149.00 Cut-off Date: May 5, 2013

RPPTL FINANCIAL SUMMARY

2011 – 2012 (*July 1 - June 30*[1])

Revenue:	**$702,950*
Expenses:	*$687,591*
Net:	*$15,359*

**$ 123,856 of this figure represents revenue from sponsors and exhibitors*

Beginning Fund Balance (7-1-11)	***RPPTL CLE***
$ 1,070,640	*RPPTL YTD Actual CLE Revenue* ***$119,395***
YTD Fund Balance (10-31-11) **$1,085,999**	*RPPTL Budgeted CLE Revenue* ***$233,500***

[1] **This report is based on the tentative unaudited detail statement of operations dated 1/31/2012.**

RPPTL Financial Summary from Separate Budgets

2011 – 2012 [July 1 - June 30[1]]
YEAR TO DATE REPORT

General Budget

Revenue:	**$ 634,780**
Expenses:	**$ 609,410**
Net:	**$ 25,370**

Legislative Update

Revenue:	**$ 55,995**
Expenses:	**$ 72,453**
Net:	**($16,458)**

Convention

Revenue:	**$ 5,995**
Expenses:	**$ 0**
Net:	**($5,995)**

Attorney Trust Officer Conference

Revenue:	**$ 5,835**
Expenses:	**$ 5,724**
Net:	**$ 111**

Miscellaneous Section Service Courses

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

Roll-up Summary (Total)

Revenue:	**$**	**702,950**
Expenses:	**$**	**687,591**
Net Operations:	**$**	**15,359**

Reserve (Fund Balance):	**$**	**1,070,640**
GRAND TOTAL	**$**	**1,085,999**

[1] **This report is based on the tentative unaudited detail statement of operations dated 1/31/2012.**

DRAFT

[LETTERHEAD]

Standing Committee on the Unauthorized Practice of Law
c/o The Florida Bar
651 E. Jefferson Street
Tallahassee, Florida 32399-2300

Re: Unauthorized Practice of Law Concerns for the Benefit of Florida's Citizenry & Activities that Should Constitute the Practice of Law Submitted Pursuant to Rule 10-9.1 of the Rules Regulating The Florida Bar

Dear Members of the Standing Committee on the Unauthorized Practice of Law,

We, the Florida Bar's Real Property, Probate and Trust Section, along with the support of the Condominium And Planned Unit Development Sub-Committee request an advisory opinion from the Florida Bar's Standing Committee on the Unauthorized Practice of Law (the "UPL Standing Committee") to determine whether certain activities constitute the unauthorized practice of law when performed by non-lawyers. The primary concern in addressing these issues is the protection of the public.

We identify certain activities herein occasioned by changes to Florida law that this Committee has not previously considered and ask for your guidance on those activities. In addition, some of the activities discussed are activities that the UPL Standing Committee and the Florida Supreme Court have previously considered, and we ask for confirmation that these actions continue to constitute the unlicensed practice of law.

We believe that clarification of these issues will serve to protect the public interest, will reduce harm to the public, and will supply needed clarification to board members, managers and attorneys involved in the area of community association law.

The last time some of these issues were fully reviewed by this Committee or by the Florida Supreme Court was in 1996 when the Court affirmed the proposed opinion of the Committee in The Florida Bar re: Advisory Opinion-Activities of Community Association Managers, 681 So.2d 1189 (Fla. 1996). Since that time there have been numerous revisions, year after year, to the chapters of Florida Statutes relevant to the operation of community associations and the licensing and conduct of community association management including, but not limited to, Chapters 718, 719, 720, 723, 617, and 468, Florida Statutes.

The Court's 1996 opinion determined that the following constituted the practice of law: i) drafting a claim lien; drafting a satisfaction of lien; ii) preparing a notice of commencement; iii) determining the timing, method and form of giving notices of

meetings; iv) determining the votes necessary for certain actions by community associations; v) addressing questions asking for the application of a statute or rule; and vi) advising community associations whether a course of action is authorized by statute or rule. The Court further identified a "grey area" which involved activities that may or may not constitute the practice of law depending upon the relevant facts.

I. EXISTING ACTIVITY THAT CONSTITUTES THE UNLICENSED PRACTICE OF LAW INCLUDES OF PREPARATION OF CLAIM OF LIEN (AS SHOULD ALL SIMILAR ACTIVITY).

The Supreme Court has already determined that the preparation of a claim of lien for unpaid assessments is the practice of law. *The Florida Bar Re: Advisory Opinion-Activities of Community Association Managers,* 681 So.2d 1119 (Fla. 1996). Preparation of a claim of lien for unpaid association assessments is not merely a ministerial or secretarial act. If a non-lawyer prepares an association assessment lien, then the non-lawyer is engaged in the practice of law.

Yet, most collection activities are resolved long prior to the lien stage and no one is ensuring such charges are being tabulated in accordance with Florida law. Although there is no comprehensive definition of what constitutes the unlicensed practice of law, the courts consistently cite State ex rel. Florida Bar v. Sperry, 140 So.2d 587 (Fla. 1962) for guidance. See also The Florida Bar v. Neiman, 816 So.2d 587, 596 (Fla. 2002); The Florida Bar Re: Advisory Opinion Activities of Community Association Managers, 681 So.2d 1119 (Fla. 1996); The Florida Bar RE: Advisory Opinion-Non lawyer Preparation of Notice to Owner and Notice to Contractor, 544 So.2d 1013, 1016 (Fla. 1989); The Florida Bar v. Moses, 380 So.2d 412, 414 (Fla. 1980); The Florida Bar v. Brumbaugh, 355 So.2d 1186, 1191 (Fla. 1978).

> "It is generally understood that the performance of services in representing another before the courts is the practice of law. But the practice of law also ***includes the giving of legal advice and counsel to others as to their rights and obligations under the law and the preparation of legal instruments,*** including contracts, ***by which legal rights are*** either obtained, secured or ***given away,*** although such matters may not then or ever be the subject of proceedings in a court." *Sperry,* 140 So.2d at 591 (emphasis added).

The reason for prohibiting the practice of law by those who have not been examined and found qualified is "to protect the public from being advised and represented in legal matters by unqualified persons over whom the judicial department can exercise little, if any, control in the matter of infractions of the code of conduct which, in the public interest, lawyers are bound to observe." Brumbaugh at 1189 (citing Sperry at 595).

The Supreme Court held that community association managers ("CAMs") who

draft documents requiring the legal description of property or establishing rights of community associations, draft documents requiring interpretations of statutes and various rules, or give advice as to legal consequences of taking certain courses of action engage in the unlicensed practice of law. See Advisory Opinion-Activities of Community Association Managers.

As the Court noted, CAMs are licensed through the Department of Business and Professional Regulation's Bureau of Condominiums and require substantial specialized knowledge of condominium law and fulfill continuing education requirements. *Id.* at 1122. Additionally, the Court recognized that "CAM's are specially trained in the field of community association management." *Id.* at 1124. Notwithstanding CAMs' licensure and specialized training, the Court held that drafting a claim of lien must be completed with the assistance of a licensed attorney. *Id.* at 1123.

> "Drafting both a claim of lien and satisfaction of claim of lien requires a legal description of the property; it establishes rights of the community association with respect to the lien, its duration, renewal information, and action to be taken on it. The claim of lien acts as an encumbrance on the property until it is satisfied. ***Because of the substantial rights which are determined by these documents, the drafting of them must be completed with the assistance of a licensed attorney." Id.*** at 1123 (Emphasis added).

Similarly, applying the Court's logic to other community association activities, requires that only lawyers perform certain tasks.

II. PREPARATION OF LETTERS TO OWNERS RELATED TO DELINQUENT ACCOUNTS ("pre-lien letters").

A statutorily required pre-lien letter is a necessary first step in any association collection action. In 2007, The Homeowners' Association Act, Chapter 720, Florida Statutes, was amended to add subsection 720.3085, Florida Statutes. It requires a letter to be sent by both certified and regular mail to both the property address and the mailing address of the delinquent homeowner before a lien can be recorded and a foreclosure complaint filed ("HOA Pre-lien Letter"). This statute requires the pre-lien letter be sent 45 days in advance of the recording of a lien and a second latter 45 days in advance of the filing of a foreclosure complaint. Both the Condominium Act, Chapter 718, Florida Statutes, and the Cooperative Act, Chapter 719, Florida Statutes, contain similar provisions but require only 30 days notice, rather than the 45 days provided to homeowner association members.

Determination of an association member's charges due to their association is, in far too many instances, anything but clear and requires the drafter of such letters to reach a legal conclusion. For example, to name only a few instances that can occur:

1) The charges due as a result of a bankruptcy which can get extremely complicated even for members of the Florida Bar due to myriad of bankruptcy activities that can occur and various types of bankruptcy;

2) The charges due after an association acquires title to a unit where a legal determination must be made to determine if the prior debt merges into the deed, if at all;

3) The charges associated with unit repair and determination of whether such charges are recoverable from a subsequent purchaser;

4) The charges due a subsequent purchaser at a foreclosure sale who acquired title to a unit by result of a first mortgagee foreclosure where such plaintiff lender failed to initially serve the association.

Each and every time a non-lawyer makes such determination as a necessary first step in an association collection action legal conclusions are often being made by non-lawyers who are charging for the preparation and sending of such letters. Not only is this activity the unauthorized practice of law, but it often leads to increased association and debtor expenses because the association's lawyer must very carefully review such letters to ensure consistency with Florida law prior to taking any further collection activity. Thus, the debtor ends paying an added expense.

Permitting non-lawyers to prepare the "pre-lien letter" permits non-lawyers to go well beyond "secretarial" activity. In Brumbaugh, a non-attorney offered services for "Do It Yourself" divorces, wills, and bankruptcies. *Id.* at 1189. The Court held that while Respondent may "engage in secretarial services, typing such forms for her clients, provided that she only copy the information given to her in writing by her clients... she MUST NOT in conjunction with her business, engage in advising clients as to the various remedies available to them, or otherwise assist them in preparing those forms necessary for a dissolution proceeding." *Id.* at 1194.

The Respondent in Brumbaugh claimed to offer secretarial and typing services but the facts showed she chose which forms to file and instructed her clients as to how to file suit. *Id. at* 1190. The Court determined that the Legislature simplified the procedures creating no fault divorce and statutory provided forms for uncontested divorces. *Id.* at 1193. Accordingly, the Court found that Respondent could fill out the forms but not give advice or make any corrections -- a purely secretarial task. The Court stated its holding "with regard to the dissolution of marriage also applies to other unauthorized legal assistance such as the preparation of wills or real estate transaction documents." *Id.* at 1194.

Unlike Brumbaugh, recent statutory changes have complicated, rather than simplified, the process of preparing community association pre-lien letters, claims of lien and the myriad of other association related activities that are discussed below.

By way of example, and often overlooked, to properly prepare a claim of lien, one must perform the following activity:

1) Interpret Section 718.116, Florida Stats. (or Section 720.3085, as appropriate);

2) Review the Declaration of Condominium (or Declaration of Restrictions, as appropriate);

3) Determine the relative rights of the association and owners regarding interest rates;

4) Determine if the association has the authority to charge late fees;

5) Determine the application of payments received per 718.116 or 720.3085, as applicable;

6) Determine any obligation to take payments;

7) Identify the record title holders;

8) Consider the application of Bankruptcy law and Fair Debt Collections Practices Act;

9) Interpret the delivery requirements and notice requirements for pre-lien letters;

10) Determine if fines, estoppel charges and other charges are both collectable and lienable;

11) Analyze the legal sufficiency of legal defenses and counterclaims of owners; and

12) Additionally, if one is collecting from a bank that is taking title, one must review the Declaration for Kaufman language (see Kaufman v. Shere, 347 So. 2d 627 (Fla. 3d DCA 1977), analyze lien priority issues, interpret Florida case law regarding joint and several liability issues, analyze unconstitutional impairment of contract rights issues under the recently-decided cases Coral Lakes v. Busey Bank, N.A., 30 So. 2d 579 (Fla. 2d DCA 2010) and Cohn v. The Grand Condominium Association, Inc., -- *So. 3d* (No. SCIO-430, March 31, 2011), as well as conduct a third party taking title analysis under Bay Holdings, Inc. v. 2000 Island Boulevard Condo. Ass'n, 895 *So. 2d 1197 (Fla. 4'h DCA 2005).*

Many similar activities are required to respond to request for pay-off letters and to properly and lawfully prepare the pre-lien lien letters, too. Yet, there is no guidance as to

who is qualified to draft and issue such letters. In many instances, unit owners, who are already facing financial distress, are paying more than they are legally obligated to pay under threat of recording a lien or foreclosing against their homes for challenging improper charges. Because associations and their managers are not considered "debt collectors" as such terms is defined in Federal Fair Debt Collection Practices Act, they have little to no risk in asserting assessments debts due that do not have a proper basis under in the law or the association's governing documents. This has led to situations where there are no consequences for an association or its manager who assert improperly formulated debts. On the other hand, at every stage of the assessment collection process, lawyers are considered "debt collectors" and are therefore subjected to the significant fines and penalties set forth Federal Fair Debt Collection Practices Act. Association members are entitled to better protection from potential abuse. Only those who are subjected to the Federal Fair Debt Collection Practices Act should be entitled to assist an association in the collection of its delinquent assessments.

Managers routinely send out initial delinquency notices to owners who have not paid their assessments. If the notices are ignored, the matter is usually forwarded to the association's attorney who will, in turn, take the next step in the collection process. This will ultimately result in the attorney recording a claim of lien against the subject property if the delinquent account is not brought current via payment. After the law changed in 2007 and 2008, a question has arisen as to whether the preparation of these pre-lien letters constitutes the unlicensed practice of law. Further complicating matters, many managers charge a fee for the preparation and processing of the initial collection notices and/or the pre-lien letters, or both. Clarification is needed to determine whether non-lawyers are legally permitted to send statutorily required and statutorily formulated pre-lien letters.

Unlike a traditional "late notice" which is typically not required by the community's governing documents, many attorneys are of the opinion that preparation of statutory pre-lien letters does constitute the practice of law. Additional factors that tip the scales toward this conclusion include:

1) The 30 day and 45 day pre-lien letters are a statutorily-mandated pre-requisite to filing a lien. If an association were to file a claim of lien without properly complying with the pre-lien notice law, a slander of title claim could be asserted or the lien could be voided.

2) The Brumbaugh opinion specifically ruled that that determining the "timing, method, and form of giving notices" constitutes the practice of law. Although this statement in the UPL Opinion relates to meeting notices, it can be convincingly asserted that pre-lien letters also involve interpretation as to "timing, method, and form."

3) An interpretation of the governing documents is often required, before a pre-lien letter can be sent. Specifically, the delinquency provisions need to be

reviewed (and it needs to be verified that the account is in fact legally delinquent, not just "late"), title must be examined to determine the identity of the owners who must be sent the pre-lien letter and the remedies set forth in the governing documents must be applied in the letter (for example late fees, if permitted by the governing documents).

Within the realm of the vast body community association law, a non-lawyer engages in the unauthorized practice of law each time the non-lawyer explains to an association board his or her belief as to the meaning of the law. For example, in the issuance of a pay-off or an estoppel requested by a lender who successfully foreclosed and as result owns the unit where a sub-association previously took title prior to the completion of the lender's foreclosure or where a receiver is appointed and asserts monies due that exceed the grant of authority provided by prevailing law and the relevant declaration of covenants. An association lawyer understands the complexity of these issues.

III. The Drafting Of The Pre-Arbitration Demand Letter Required By s. 718.1255.

The drafting of pre-arbitration letters should be considered the practice of law as it involves the interpretation of various statutes, and the application of those statutes to specific facts. The drafting of statutorily required pre-arbitration letters is complicated, even for lawyers. Section 718.1255, Florida Statutes, describes the "Mandatory Non-binding Arbitration Program" administered by the Division of Florida Condominiums, Time Shares and Mobile Homes (the "Division"). Under section 718.1255(4)(b), Florida Statutes, prior to filing a petition for arbitration with the Division, the petitioner is required to serve a pre-arbitration demand letter on the respondent, providing advance written notice of the nature of the dispute, making a demand for specific relief, allowing the respondent a reasonable opportunity to comply, and stating an intent to file a petition for arbitration or other legal action if the demand is not met with compliance.

This particular issue is quite germane to the instant matter. By way of background, and not too long ago, a Division arbitrator held that because the law did not specifically provide an activity was the practice of law, such activity was not required to be performed by a lawyer. In Dania Chateau De Ville Condo Association v. Zalcberg, Arb. Case No. 2009-04-0877 (Whitsitt/Final Order of Dismissal/August 17, 2009), the Division arbitrator held, in relevant part, that

> "a pre-arbitration demand notice which demanded attorney's fees for the act of writing the demand letter was ineffective under the statute. There is no requirement that an attorney prepare the letter and the statute does not authorize its inclusion into the demand letter."

A summary of the Division's arbitration decisions that evidence the legal complications surrounding all aspects of the statutorily required pre-arbitration letters all but demand such activities must be carried out by lawyers. A brief summary of several

such cases follows:

1) Pre-arbitration demand letter which demands immediate removal of dog did not provide the unit owner with a reasonable opportunity to comply with the demand, and was insufficient statutory notice. Petition dismissed. Brickell Place Condominium Association v. Sanz, Arb. Case No. 2010-06-1240 (Campbell/ Final Order of Dismissal/ December 15, 2010).

2) Pre-arbitration demand requiring removal of trash on the outside patio within 7 days provides a reasonable opportunity for compliance. However, where letter simply provided that the failure to remove the trash would result in maintenance personnel moving it, letter did not put the owner on notice of impending legal action. Belmont at Park Central Condominium Association v. Levy, Arb. Case No. 2011-00-6468 (Lang/ Order Requiring Proof of Pre-Arbitration Notice/ February 11, 2011).

3) Where pre-arbitration demand letter in case where a tenant kept a prohibited dog provided that the failure to correct the problem would result in eviction along with all legal fees, or other legal action, since eviction is not available in arbitration, the letter failed to advise that arbitration would be pursued and the notice was inadequate under the statute. It was unclear in the letter whether the tenant or the dog would be evicted. Case dismissed. Biscayne Lake Gardens v. Enituxia Group, Arb. Case No. 2010-02-8314 (Lang/ Final Order of Dismissal/ July 1, 2010).

4) It is improper and contrary to the statute for the pre-arbitration demand notice to incorporate a demand for the payment of attorney's fees. Bixler v. Gardens of Sabel Palm Condo, Arb. Case No. 2010-03-1915 (Chavis/ Order to Amend Petition/ July 1, 2010).

5) Where the governing documents prohibited any dogs, pre-arbitration demand letter which offered to permit the owner to keep one illegal dog while removing other dog claimed to be a service animal and requiring a payment of $9,812 in attorney's fees to the association does not provide the unit owner with a reasonable opportunity to comply with the documents and was not a valid pre-arbitration demand letter. Boca View Condo Association v. Kowaleski, Arb. Case No. 2010-02-2907 (Chavis/ Order to Show Cause/ May 7, 2010).

6) Pre-arbitration demand notice which demanded $300 did not comply with the statute. Coach Houses of Town Place Condominium Association v. Koll, Arb. Case No. 2011-01-0234 (Lang/ Order to Show Cause/ March 9, 2011).

7) Pre-arbitration demand letter requirement is not a mere perfunctory step taken before a petition for arbitration is filed. Demand letter sent the same day as the mailing of the petition for arbitration did not afford respondents a

reasonable opportunity to comply by providing the relief requested. Collonade Condominium Association v. Shore, Arb. Case No. 2010-01-1460 (Slaton/ Order to Show Cause/ October 15, 2010).

8) Posting a demand notice by attaching a copy of it to an unspecified place on the condominium property will not be considered adequate delivery of the notice. Decoplage Condo Association v. Abraham, Arb. Case No. 2009-04-1016.

9) Pre-arbitration demand notice that contained fair debt disclosure gives the impression that the letter was a debt collection effort instead of an enforcement effort. Case dismissed for lack of pre-arbitration notice. Eagles Point Condominium Association, Inc. v. Debelle, Arb. Case No. 2011-02-8477 (Jones/ Order to Show Cause/ June 16, 2011).

10) Where association did not name a co-owner of the unit as a respondent and did not evidently serve pre-arbitration notice on the co-owner, association ordered to show cause why the petition should not be dismissed. Fiore at the Gardens Condo Association v. Anderson, Arb. Case No. 2010-00-6650 (Slaton/ Order to Show Cause/ February 16, 2010).

11) Petition dismissed for failure to join co-owner notwithstanding argument that the co-owner had failed to notify the association upon his acquisition of an interest in the unit in violation of the documents. Fiore at the Gardens Condo Association v. Anderson, Arb. Case No. 2010-00-6650 (Slaton/ Final Order Dismissing Petition/ March 5, 2010).

12) Where association had knowledge that Jake the golden retriever had been "conveyed" to two individuals, "as joint owners, with right of survivorship," the failure to join both individuals and to provide pre-arbitration notice to each putative owner rendered the petition for arbitration, defective. Grove Island Association, Inc. v. Frumkes, Arb. Case No. 2011-01-1343 (Jones/ Final Order of Dismissal/ May 4, 2011).

13) Where pre-arbitration notice was addressed to "Terraind Gulf Drive" instead of the correct address Terrain de Golf Drive and where there was no proof that the pre-arbitration notice was actually received, the case was dismissed. Heatherwood Condominium Association of East Lake, Inc. v. Carollo, Arb. Case No. 2011-01-1495 (Lang/ Final Order of Dismissal/ June 20, 2011).

While this list of relevant decisions clearly evidences the need to ensure the pre-arbitration letters are drafted by lawyers, there are at least twenty more cases decided in the past two years that can be cited to illustrate this point. The need for clarification is *particularly important* because, as previously explained, the Division has specifically held in a final order that the statute does not require an attorney to draft this very important letter. As a result, non-lawyers have accepted the Division's invitation and

have begun producing these letters. It is very likely the public will be harmed because the letters will be rejected, and the petition for arbitration will be dismissed, resulting in a delay in the enforcement of the community documents and ultimately leads to increased legal expense by those who can afford it the least.

V. Other Activity That Should Constitute The Practice of Law.

There are other activities that go far beyond mere ministerial acts and are illustrative as the performance of services that can only be described as the practice of law. Determining "rights" under Florida statutes is most definitely the practice of law. Further, many of these activities generate fees, presumably, collected from unit owners or the association. Under what legal authority is the non-lawyer charging and collecting from condominium unit owners or homeowners' association parcel owners more than assessments, interest, late charges, costs and attorneys fees?

The following activities should be clarified as an activity to be performed only by attorneys:

1) Preparation of a Certificate of assessments due once the delinquent account is turned over to the association's lawyer.

2) Preparation of a Certificate of assessments due once a foreclosure against the unit has commenced.

3) Preparation of Certificate of assessments due once a member disputes in writing to the association the amount alleged as owed.

4) Drafting of amendments (and certificates of amendment that are recorded in the official records) to declaration of covenants, bylaws, and articles of incorporation when such documents are to be voted upon by the members.

5) Determination of number of days to be provided for statutory notice.

6) Modification of limited proxy formspromulgated by the State.

7) Preparation of documents concerning the right of the association to approve new prospective owners.

8) Determination of affirmative votes needed to pass a proposition or amendment to recorded documents.

9) Determination of owners' votes needed to establish quorum.

10) Drafting of pre-arbitration demands (seeabove).

11) Preparation of construction lien documents (e.g. notice of commencement,

notice to owner, lien waivers, etc.)

12) Preparation, review, drafting and/or substantial involvement in the preparation/execution of contracts, including construction contracts, management contracts, cable television contracts, etc.

13) Identifying, through review of title instruments, the owners to receive pre-lien letters.

14) Any activity that requires statutory or case law analysis to reach a legal conclusion.

With the aforementioned in mind and pursuant to Rule 10-9.1 of the Rules Regulating The Florida Bar, the Standing Committee on Unlicensed Practice of Law may issue proposed formal advisory opinions concerning activities which may constitute the unlicensed practice of law. We kindly request that the UPL Standing Committee do so in accordance herewith.

VI. Final Considerations.

Simply put, many attorneys find that they are devoting more and more resources to such issues that would not have occurred, but for the rendering of what appears as the continued rendering of legal advice by non-lawyers.

With few exceptions, there remains great uncertainly as to which specific activities, when performed by non-lawyers, constitute the unlicensed practice of law. To provide greater clarity and protection of the public, we believe it is incumbent upon the UPL Committee of the Florida Bar to bring these issues to the Florida Supreme Court for their consideration.

Very Truly Yours,

_____

George J. Meyer, Chair
The Florida Bar Real Property, Probate and Trust Section

Trenam Kemker
ATTORNEYS

MEMORANDUM

TO: Margaret A. Rolando *(via electronic mail)*
Real Property Division Director of RPPTL

FROM: David R. Brittain, for the Legal Opinions Committee of RPPTL

DATE: February 17, 2012

SUBJECT: Proposed request for expenditure of RPPTL Section funds in connection with printing and distribution of the Florida Opinions Report

Please let us summarize the request of your Legal Opinions Committee in the following memorandum for an expenditure of RPPTL Section funds in the amount of $23,200, which is being submitted to you with the approval of the Committee.

Phil Schwartz, the Chair of the Business Law Section's Legal Opinion Standards Committee, has negotiated what he believes is the best price available for printing, shipping, and mailing the Florida Opinions Report to the members of the Business Law Section and the members of the RPPTL Section. The quote was obtained from the RR Donnelly financial printing company. These costs are as follows:

Printing the Report. RR Donnelley has agreed to print and bind 15,000 copies of the Report for $25,000, plus tax ($26,500 in the aggregate). That amounts to $1.77 per copy of the Report, or approximately $0.006 per page.

Shipping. RR Donnelley reports that shipping of the approximately 340 boxes containing the 15,000 copies of the Report from New Jersey (where it will be printed) to the Florida Bar's office in Tallahassee, Florida will cost approximately $2,500.

Distribution. Phil has spoken with personnel of the Florida Bar's Tallahassee office concerning distribution of 10,000 of these copies to the approximately 5,000 members of the Business Law Section and to the approximately 5,000 members of the Real Property Division of the RPPTL Section. Fulfillment costs include envelopes, postage, labor and the costs of a cover note to accompany the Report from each of the Sections, advising recipients that the hard copy version of the Report is being sent to them as a benefit of their membership in the Section. Fulfillment will likely cost approximately $17,400 for the 10,000 copies to be

101 E. Kennedy Blvd., Suite 2700
Tampa, FL 33602
Tel: (813) 223-7474
Fax: (813) 229-6553
www.trenam.com
200 Central Avenue, Suite 1600
St. Petersburg, FL 33701
Tel: (727) 896-7171
Fax: (727) 820-0835

mailed (approximately $1.74 per copy). Please note that the biggest single item in fulfillment is the $1.50 bulk postage charge per copy (even bulk mailing being very expensive these days).

As such, the total costs of the entire printing and mailing process will be approximately $46,400. Of course, we will still have approximately 5,000 copies to sell in the future (at $10.00 per copy, if we sell all remaining copies we more than make up all of our costs and realize a small profit).

At the moment, Phil Schwartz has received approval from the Business Law Section of a budget of $20,000 towards its one-half share of these costs. Phil is prepared to ask his Section to cover the additional $3,200 that will equalize its contribution to the total with that of RPPTL. If that appropriation is not obtained, RPPTL need only contribute funds from its share to match those actually authorized by the Business Law Section. In that event, we will likely raise the additional funds to close the gap by soliciting donations from law firms whose members were involved in drafting the Report, in exchange for mention in the transmittal letter to members of the two sections.

Our distribution plan for RPPTL is to use an email blast to all section members, as well as an announcement in *ActionLine*, announcing that section members are entitled to receive a printed copy of the Report, free of charge, upon written request received by the Section on or before a stated deadline date. Members would then reply to a designated link on the internet (or could reply by U.S. mail to a designated address stated in *Actionline*), requesting a copy, confirming that they are a member of RPPTL, and stating the appropriate mailing address to which a copy should be mailed.

This "opt-in" system for distribution by section members is necessary because RPPTL currently does not maintain a database differentiating its members according to their participation in the Real Estate Division or the Probate Division of the Section. We should point out that if it is the Section's pleasure instead to distribute copies of the Report to all of its approximately 9,500 members, excepting only those who "opt-out" in response to the email blast, this would certainly be possible. In that event, however, we estimate that it will increase the mailing costs to RPPTL by approximately $6800.00 (we can document this figure and the higher total needed upon request). We will look for the Executive Council of RPPTL to inform us if the higher distribution expenditure is the Council's desire.

The requested budgetary expenditure of $23,200.00 is further summarized in the attached spreadsheet and we have also attached a proposed form of Executive Council Resolution for your consideration. Please feel free to contact the undersigned if you have any questions or comments.

David R. Brittain, Chair, RPPTL Legal Opinions Committee

Cost of Florida Opinions Report to 5,000 members of Business Law Section and 5,000 members of RPPTL Section

Printing Costs plus tax			**$**	**26,500**
Approximate Number of copies		15,000		
Cost per copy	$	1.77		
Shipping Costs to Tallahassee		15000.00	**$**	**2,500.00**
	$	0.17		
Estimated Shipping Cost to mail 10,000 members			**$**	**17,400.00**
Number of copies to be shipped		10000		
Cost per copy	$	1.74		
Total Costs			**$**	**46,400.00**
Number of copies		15000		
Cost per copy	$	3.09		
Projected Future Sales				
Number of extra copies for sale		5000		
Expected Sale Price per copy		$10.00		
Maximum Total Projected Sales				**$50,000.00**
Net Profit / (Expense) After Sales			**$**	**3,600.00**
Cost per Section Before Sales			**$**	**23,200.00**
Net Cost/ (Profit) After Sales			**$**	**1,800.00**

SORGINI & SORGINI, P.A.
ATTORNEYS AT LAW
300 NORTH FEDERAL HIGHWAY
LAKE WORTH, FLORIDA 33460-3497

RICHARD C. SORGINI
ROBERT C. SORGINI
MATTHEW L. FERGUSON

(561) 585-5000
(FAX) 533-9455

February 7, 2012

The Florida Bar
Attn: Rules
651 East Jefferson Street
Tallahassee, FL 32399

Re: Proposed new trust account rules

Ladies and Gentlemen:

I ask that the Board of Governors revisit and reconsider its approval and that the Florida Supreme Court reject the proposed rule that reads:

"All trust account checks must be signed by a lawyer."

For the reasons stated below, I believe that this new rule will harm the public and create an undue burden on solo and small firms that conduct real estate closings.

You can never schedule an exact date and time for a real estate closing and disbursement. It happens when appraisals, loan approvals, signed documents and wire transfers arrive. Upon closing, it is imperative that immediate disbursement occur.

The public is harmed in the following ways:

1. Mortgages accrue interest daily until paid. The per diem on a large loan can be several hundred dollars. Most banks require payment by 2 p.m., or else the next day's interest is charged. If you miss a Friday payoff deadline, interest will accrue over the weekend.

If the attorney is in court, at a deposition, on vacation, or otherwise physically not in his or her office at the moment a transaction is ready to disburse, then the client can be damaged by several hundred dollars of additional interest on the loan payoff. It is common for a morning closing to fund around the noon hour, which leaves one hour or less to pay off the loan without accruing additional interest.

2. Most residential Sellers need their sale proceeds that same day to close on their new house. It is common for a Seller to have all of their possessions in a moving van when they attend the sale of their old home. They then drive directly to the purchase of their new home. An immediate disbursement is required for that subsequent purchase, or else they are homeless for the night. Real estate closings are very stressful, and we

do not need to add to the stress by telling a client that they have to wait one or two days for the lawyer to return to his office and sign the check before the client can close on their new home.

This rule is devastating to solo or small law firms. Lawyers are in court, take depositions, meet with clients out of the office, and are entitled to take a vacation. Lawyers are responsible for their trust accounts and should be allowed to continue to delegate the ministerial act of signing checks and wiring funds to their trusted bookkeeper or paralegal. The practice of real estate law is preparing contracts, reviewing title, preparing documents and advising clients. The practice of law is not signing checks.

Our goal is the protect the client. I constantly read in The Florida Bar News of attorney discipline for trust account violations. This new rule of requiring the lawyer to personally sign the check will not prevent attorney theft. It has the potential to harm the real estate transactional client more than the additional protection intended.

I would never ask an outside attorney to sign a trust account check from my office. I would never accept that responsibility over another lawyers trust account. The idea of another lawyer covering for you and signing your trust account checks when you are unavailable will not work. This rule will chain a solo or small firm lawyer to his or her office; prevent vacations; or force him or her to decline business with the fear he or she will not be in the office at the exact moment of disbursement.

A compromise solution may be to exempt real estate transactions from this rule. That could be done with a separately designated real estate trust account. Our title insurance underwriter requires legal malpractice insurance and routinely issues Closing Protection Letters to Lenders. There is plenty of insurance covering real estate transaction funds. In addition, as I wrote earlier, the lawyer is ultimately responsible for all trust account disbursements.

Thank you for your consideration and please call or write me with any questions.

Sincerely,

SORGINI & SORGINI, P.A.

By: _____
ROBERT C. SORGINI

RCS/seh

pc: Scott Hawkins, President
Gregory Coleman, 15th Circuit Board of Governor
Gary Lesser, 15th Circuit Board of Governor
David Prather, 15th Circuit Board of Governor
Michelle Suskauer, 15th Circuit Board of Governor

LEGISLATIVE POSITION REQUEST FORM

GOVERNMENTAL AFFAIRS OFFICE

Date Form Received _____

GENERAL INFORMATION

Submitted By Probate Law and Procedure Committee of the Real Property Probate & Trust Law Section

Address Tae Kelley Bronner, Chair, Tae Kelley Bronner, PL, 10006 Cross Creek Blvd., PMB #428 Tampa, FL 33647;
Telephone: (813) 907-6643

Position Type Probate Law and Procedure Committee, RPPTL Section, The Florida Bar

CONTACTS

Board & Legislation Committee Appearance Tae Kelley Bronner, Tae Kelley Bronner, PL, 10006 Cross Creek Blvd., PMB #428 Tampa, FL 33647
Telephone: (813) 907-6643
Barry F. Spivey, Spivey and Fallon, 1515 Ringling Blvd., Suite 885, Sarasota, FL 34236 (941) 840-1991
William T. Hennessey, 777 South Flagler Drive, Suite 500 East, West Palm Beach, FL33401, (561) 650-0663
Peter M. Dunbar, Pennington, Moore, Wilkinson, Bell & Dunbar, P.O. Box 10095, Tallahassee, FL 32302-2095, (850) 222-3533
Martha J. Edenfield, Pennington, Moore, Wilkinson, Bell & Dunbar, P.O. Box 10095, Tallahassee, FL 32302-2095, (850) 222-3533

Appearances before Legislators Same

Meetings with Legislators/staff Same

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 **XX** Support Oppose Technical Assistance Other

Proposed Wording of Position for Official Publication Support amendment to F.S. § 732.6005 clarifying that property acquired after the execution of a will that is not specifically devised, demonstratively devised or devised to residual devisee or devisees passes by intestate succession.

Reasons For Proposed Advocacy Courts have expressed concern and confusion regarding the application of s. 732.6005 to property acquired after the execution of a will but not otherwise devised through the will. The proposed change clarifies that property not otherwise devised passes by intestate succession.

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)

None

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

REFERRALS TO OTHER SECTIONS, COMMITTEES OR LEGAL ORGANIZATIONS

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

Referrals

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

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

A bill to be entitled

An act relating to probate; amending s. 732.6005, F.S.; clarifying distribution of property of a decedent that is not otherwise devised by a will, and providing effective date.

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

Section 1. Subsection (2) of Section 732.6005, Florida Statutes, is amended, and subsection (2)(a) and (2)(b) are added to that section, to read:

732.6005 Rules of construction and intention.—

(2) Subject to the foregoing~~, a will is construed to pass all property which the testator owns at death, including property acquired after the execution of the will.~~:

(a) A will is construed to pass all property which the testator owns at death, including property acquired after the execution of the will.

(b) Property not specifically devised, demonstratively devised, or devised to the residuary devisee or devisees shall pass by intestacy.

Section 2. This act shall take effect on July 1, 2012 and shall apply only to estates of decedents dying on or after the effective date.

RM:6724080:1

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

WHITE PAPER

PROPOSED AMENDMENT TO § 732.6005, FLA. STAT.

I. SUMMARY

The proposed changes to section 732.6005 of the Florida Statutes are intended to clarify that property that is not specifically devised, demonstrative devised or devised to the residual devisee or devisees shall pass by intestate succession. The after acquired property statute is not intended to add provisions to a will.

II. Current Situation:

In *Basile v. Aldrich*, 70 So.3d 362 (Fla. 1st DCA 2011), questions were raised as to whether a will passes after acquired property where the will does not contain a residuary clause and does not contain a specific devise or demonstrative devise of the property, or whether the after acquired property passes by intestacy. In *Basile*, the decedent's will listed in detailed manner specific property that she devised to her sister, or if her sister predeceased, to her brother. The will had no residuary clause. After the will was executed, the decedent inherited land and money from her sister that the decedent placed in a new account. The will did not contain any provision that would convey the property inherited from her sister, even if the decedent had owned it when the will was executed.

F.S. 732.6005 provides:

732.6005 Rules of construction and intention.—

(1) The intention of the testator as expressed in the will controls the legal effect of the testator's dispositions. The rules of construction expressed in this part shall apply unless a contrary intention is indicated by the will.

(2) Subject to the foregoing, a will is construed to pass all property which the testator owns at death, including property acquired after the execution of the will.

In its preliminary opinion (April 2011), the First DCA held that the after acquired property passed to the decedent's brother under F.S. 732.6005(2) since the will is to be construed to pass all property that a testator owns at death, including property acquired after the execution of the will, and the will did not evidence an intent that anyone other than the decedent's brother was to receive anything.

In its revised opinion, the First DCA held that F.S. 732.6005(2) didn't apply, and that the decedent died intestate as to the after acquired property because there was no provision in the will that described the property.

The Court applied F.S. 732.6005(1) which provides that the intention of the testator as expressed in the will controls the legal effect of the testator's dispositions. The Court stated that:

"In order for property, after-acquired or not, to pass under a will, the will must dispose of it in some manner. Whether acquired before, after, or at the time a will is executed, assets covered by no provision of the will—specific, general, or residuary—are not disposed of under the will."

The property passed by intestacy, not because it was acquired after the execution of the will, but because there was no provision in the will disposing of it. The Court pointed out that property added to the specifically devised accounts after the execution of the will passed under the will.

Prior to 1892, a will could not devise after acquired real estate. That was changed in 1892, when the statute was amended to provide that a will that contained a residuary clause was to be construed to pass after acquired property unless the will contained a provision restricting its application to that owned as of the time of execution.

When the probate code was overhauled in 1974, the statute was restated as follows:

" A will is construed to pass all property that the testator owns at his death, including property acquired after the execution of the will."

It was renumbered and revised in 1975 to be substantially the current form. (It was amended after that date to make it gender neutral).

The Court struggled with the removal of the provision in the early statute that a will that contained a residuary clause would be construed to pass after acquired property. In its preliminary opinion, it recited the rule of statutory construction that when an amendment to a statute omits words, the courts must presume that the legislature intended the statute to have a different meaning than before the amendment. This was reiterated in the dissent to the revised opinion. It was the opinion of the dissenting judge that the will had to be construed to pass all property including after acquired property.

After holding that the will did not dispose of after acquired property because there was no provision in the will disposing of it, the First DCA certified the following question to the Florida Supreme Court:

WHETHER SECTION 732.6005, FLORIDA STATUTES (2004), REQUIRES CONSTRUING A WILL AS DISPOSING OF PROPERTY NOT NAMED OR IN ANY WAY DESCRIBED IN THE WILL, DESPITE THE ABSENCE OF ANY RESIDUARY CLAUSE, OR ANY OTHER CLAUSE DISPOSING OF THE PROPERTY, WHERE THE DECEDENT ACQUIRED THE PROPERTY IN QUESTION AFTER THE WILL WAS EXECUTED?

Rehearing on the matter was denied and the Florida Supreme Court has not as of this date accepted review of the case. Regardless of the decision of the Florida Supreme Court regarding review of this case, the RPPTL Section felt it was necessary to amend Section 732. 6005 to clarify that property not specifically devise, demonstratively devised or devised to the residuary devisee or devisees shall pass by intestate succession. This amendment will avoid future confusion and prevent an question regarding the application of Section 732. 6005 to add provisions to a will which do not exist or to devise property not otherwise devised by the will in some manner.

III. EFFECT OF PROPOSED CHANGES:

The proposed changes will amend section 732.6005(2) as follows:

732.6005 Rules of construction and intention.—

(1) The intention of the testator as expressed in the will controls the legal effect of the testator's dispositions. The rules of construction expressed in this part shall apply unless a contrary intention is indicated by the will.
(2) Subject to the foregoing:
(a) A will is construed to pass all property which the testator owns at death, including property acquired after the execution of the will.
(b) Property not specifically devised, demonstratively devised, or devised to the residuary devisee or devisees shall pass by intestacy.

The amendment will clarify that property must be devised in some manner to apply Section 732. 6005. While a residuary clause will serve to devise property acquired after the execution of a will, the property will pass by intestate succession if the will does not contain a residual clause and the property is not otherwise specifically or demonstratively devised.

IV. FISCAL IMPACT ON STATE AND LOCAL GOVERNMENTS

There will be no impact on state and local governments.

V. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR

There will be no direct economic impact on the private sector.

VI. CONSTITUTIONAL ISSUES

The proposed change will be applied only to estates of decedents dying on or after the effective date and therefore will have no constitutional issues.

VII. OTHER INTERESTED PARTIES

None are known at this time.

RPPTL Section
Chair
George J. Meyer

The Florida Bar
651 E. Jefferson Street
Tallahassee, FL 32399-2300

Tax Section
Chair
Domenick R. Lioce

February 20, 2012

Via E-Mail: notice.comments@irscounsel.treas.gov

CC:PA:LPD:PR (Notice 2011-101)
Room 5203
Internal Revenue Service
P.O. Box 7604
Ben Franklin Station
Washington, DC 20044

Re: IRS Notice 2011-101
Guidance on Decanting to Another Irrevocable Trust

To Whom It May Concern:

The Treasury Department recently issued IRS Notice 2011-101, requesting comments on various tax issues and consequences arising from transfers by a trustee of all or part of the principal of a "distributing" irrevocable trust to "receiving" irrevocable trust that change beneficial interests (i.e., "decanting"). We are pleased to submit these comments on behalf of the Tax Section and the Real Property Probate and Trust Law Section of The Florida Bar.

Although the members of The Florida Bar Tax Section and Real Property Probate and Trust Law Section who participated in preparing these comments may have clients who would be affected by the guidance ultimately issued by the Treasury Department and/or Internal Revenue Service (the "Service"), no such member has been engaged by a client to make a government submission with respect to, or otherwise to influence the development or outcome of the specific subject matter of these comments.

Principal responsibility for these comments was exercised by George D. Karibjanian, Esq. and David M. Silberstein, Esq. These comments were reviewed by David Pratt, Esq., Elaine M. Bucher, Esq., Charles Ian Nash, Esq., and _____. Contact information is as follows:

George D. Karibjanian, Esq.
Proskauer Rose LLP
2255 Glades Road, Suite 421 Atrium
Boca Raton, Florida 33431
Telephone: (561) 995-4780
Fax: (561) 241-7145
E-mail: gkaribjanian@proskauer.com

David M. Silberstein, Esq.
Silberstein Law Firm, PLLC
1515 Ringling Boulevard, Suite 860
Sarasota, Florida 34236
Telephone: (941) 953-4400
Fax: (941) 953-4450
E-Mail: david@silbersteinlawfirm.com

If you have questions regarding these comments, please contact either Mr. Karibjanian or Mr. Silberstein.

The Florida Bar is the third largest organized state bar association in the United States. The Tax Section is comprised of more than 2,000 members and the Real Property Probate and Trust Law Section is comprised of more than 9,300 members. These materials were prepared by the Comment Projects Subcommittees of the Tax Section and the Real Property, Probate and Trust Law Section.

As always, we will be pleased to provide additional commentary as requested. If you have any questions, please do not hesitate to contact us.

THE TAX SECTION OF
THE FLORIDA BAR

By: _____
Dominick R. Lioce

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

By: _____
George J. Meyer

Enclosure

THE FLORIDA BAR

TAX SECTION
AND
REAL PROPERTY, PROBATE, AND TRUST LAW SECTION

COMMENTS TO IRS NOTICE 2011-101,

GUIDANCE ON DECANTING TO ANOTHER IRREVOCABLE TRUST

To Whom It May Concern:

These comments are written on behalf of the Tax Section and the Real Property Probate and Trust Law Section of The Florida Bar, and are being submitted in response to the request of the Internal Revenue Service and Treasury Department (collectively referred to herein as "Treasury") in IRS Notice 2011-101 (the "Notice") for comments on various tax issues and consequences arising from transfers by a trustee of all or part of principal of a distributing irrevocable trust ("Distributing Trust") to a receiving irrevocable trust ("Receiving Trust") that change beneficial interests (i.e., "decanting").

We would like to acknowledge and thank the American College of Trusts and Estates Counsel ("ACTEC") for its generosity in sharing a draft of its comments with us. We do not intend to repeat ACTEC's positions and comments, but would like to acknowledge its thoroughness and request that the Treasury give thoughtful consideration to its positions and comments.

The Notice requested comments on the following facts and circumstances listed below and the identification of other factors that may affect the tax consequences:

1. A beneficiary's right to or interest in trust principal or income is changed (including the right or interest of a charitable beneficiary);

2. Trust principal and/or income may be used to benefit new (additional) beneficiaries;

3. A beneficial interest (including any power to appoint income or corpus, whether general or limited, or other power) is added, deleted, or changed;

4. The transfer takes place from a trust treated as partially or wholly owned by a person under §§ 671 through 678 of the Internal Revenue Code of 1986, as amended (a "grantor trust") to one which is not a grantor trust, or vice versa;

5. The situs or governing law of the Receiving Trust differs from that of the Distributing Trust, resulting in a termination date of the Receiving Trust that is subsequent to the termination date of the Distributing Trust;

6. A court order and/or approval of the state Attorney General is required for the transfer by the terms of the Distributing Trust and/or applicable law;

7. The beneficiaries are required to consent to the transfer by the terms of the Distributing Trust and/or applicable local law;

8. The beneficiaries are not required to consent to the transfer by the terms of the Distributing Trust and/or applicable local law;

9. Consent of the beneficiaries and/or a court order (or approval of the state Attorney General) is not required but is obtained;

10. The effect of state law or the silence of state law on any of the above scenarios;

11. A change in the identity of a donor or transferor for gift and/or GST tax purposes;

12. The Distributing Trust is exempt from GST tax under § 26.2601-1, has an inclusion ratio of zero under § 2632, or is exempt from GST under § 2663; and

13. None of the changes described above are made, but a future power to make any such changes is created.

The Treasury also encouraged the public to suggest a definition for the type of transfer ("decanting") that the guidance is intended to address, as well as the tax consequences of such transfers in the context of domestic trusts, the domestication of foreign trusts, transfers to foreign trusts, and on any other relevant facts or combination of facts not included in the above list.

We do not intend to address each of the foregoing issues, which we believe that ACTEC and other organizations have addressed or will address thoroughly and at length in their respective comments. The Florida Supreme Court issued the first opinion from a state's highest court on the issue of decanting; therefore, given Florida's unique position as a state of origin for modern decanting, we will accordingly address issues from a state and common law perspective as to the origins of decanting and the concepts involved in decanting as they pertain to some, but not all, of the enumerated issues.

* * * * *

1. Discussion of the Phipps Opinion.

While the first state statute authorizing decanting was enacted in New York in 1992,[1] decanting has been part of Florida case law since 1940 with the landmark decision *Phipps v. Palm Beach Trust Co.*[2] It should be noted that the decision reached by the Florida Supreme Court was not specific as to a particular Florida law. It has been argued that the Florida Supreme Court simply acknowledged the presence of a common law power of trustees with broad discretionary powers of distribution that is applicable regardless of whether a state has enacted decanting laws.[3] Moreover, practitioners continue to rely on *Phipps* when state law has not statutorily authorized decanting.

a. Introduction and Facts.

The *Phipps* case involved an action in equity by the corporate co-trustee of an irrevocable inter vivos trust seeking clarifications of the actions of the individual co-trustee. In *Phipps,* Mrs.

[1] NEW YORK EST. POWERS & TRUSTS § 10-6.6(a).
[2] 142 Fla. 782, 196 So. 299 (1940).
[3] *See generally,* Halpern and Wandler, Decanting Discretionary Trusts: State Law and Tax Considerations, 29 Tax Mgmt. Est. Gifts & Tr. J. 219 at Footnote 42, *citing* Restatement (Second) of Property, Donative Transfers § 19.3 (2003) and In re Hart's Will, 262 A.D. 190 (N.Y. Sup. Ct. 1941).

Margarita C. Phipps created a trust for the benefit of her four children, naming her husband, John S. Phipps ("JSP"), and Palm Beach Trust Company ("PBTC") as the trustees. Section Six of the trust provided, in part, that

> At any time within the duration of this trust, as hereinafter provided, upon the written direction of the then Individual Trustee, the Trustees shall pay over and transfer all or any part of the rest, residue, and remainder of the trust estate, both principal and income, which may at such time remain and be in the hands of the Trustees to the said John H. Phipps, Hubert B. Phipps, Margaret Douglas and Michael G. Phipps and to the descendents of any of them, in such shares and proportions as the said Individual Trustee, in his or her sole and absolute discretion, shall determine and fix even to the extent of directing the payment of the entire trust estate to one of said parties. The written direction of the said John S. Phipps may be contained in his last will and testament, anything herein to the contrary notwithstanding.[4]

On July 25, 1939, JSP, pursuant to Section Six of the trust, executed and delivered to the corporate co-trustee written directions to transfer the trust estate (referred to as the "Existing Trust") to JSP and PBTC in trust for the benefit of Mrs. Phipps's descendents (the "New Trust"). The provisions of the New Trust were nearly identical to those of the Existing Trust with one exception – the New Trust provided John H. Phipps ("JHP," who was a son of JSP and Mrs. Phipps) with a testamentary power of appointment to provide that income from the New Trust could be paid to his wife. JHP's wife was not a beneficiary of the Existing Trust.

b. Court Holds that Trustee's Absolute Power Includes Power to Create "Less Than Fee" Interests.

In allowing the distribution of property from the Existing Trust to the New Trust, the Florida Supreme Court held that, "[t]he general rule gleaned from … cases of similar import is that the power vested in a trustee to create an estate in fee includes the power to create or appoint any estate less than a fee unless the donor clearly indicates a contrary intent (emphasis added)."[5] The Court rejected the argument of PBTC that the reverse was true, i.e., that the power to create a second trust estate is present under a special power of appointment only where such authority is specifically granted.[6] The Court concluded that, so long as the beneficiaries of the second trust are limited to the class of beneficiaries under the first trust, the power in the trustees to appoint in further trust, much like a power of appointment, is absolute, and to hold otherwise would limit the power of the individual trustee to administer the trust estate in a way not contemplated by the donor of the original trust.[7]

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[4] *Id.* at 784, 300.
[5] *Id.* at 786, 301.
[6] *Id.*; *see also* Bogert's Trusts and Trustees (through 2011 Update), Chapter 39, § 812, under the discussion of the express (and unlimited by an ascertainable standard) power in the Trustees to distribute principal.
[7] *Id.* at 787, 301. Note that the opinion did not discuss the inclusion of JHP's wife as a permissible recipient under a power of appointment; presumably, this is because she was not a current beneficiary of the New Trust and could only receive an interest upon JHP's death. The granting of a testamentary power of appointment naming persons who were not beneficiaries under the original trust would appear to be viewed as if the Trustee appointed the property outright to the beneficiary who could then devise the property to whomever he or she desired.

c. Treatises Acknowledge That Decanting Authority Exists within the Common Law.

A conclusion from *Phipps* is that an absolute power in the trustee to distribute property to a beneficiary may be exercised in any manner at least equal to the interest that the beneficiary would receive had the property been distributed outright to the beneficiary. So long as the trust does not prohibit the granting of a lesser interest, this power could include the power to distribute in trust for the benefit of the beneficiary. Further, if the trustee has the absolute power to distribute trust property to any one or more of a class of beneficiaries, absent a restriction in the trust agreement, there is no prohibition against distributing property to a trust for some, but not all, of the beneficiaries. Both the Restatement (Third) of Property (Wills & Donative Transfers) (the "Third Restatement") in § 19.14 and the Restatement (Second) of Trusts in §17 support this conclusion.

d. Common Law Theory on Decanting.

The common law decision of *Phipps* supports the conclusion that the power of trustees with broad discretionary powers of distribution may distribute property in further trust for the benefit of a beneficiary or beneficiaries regardless of whether a state has enacted decanting laws.[8]

The argument is based on two principles: first, a trustee with absolute power to invade principal, as a matter of property law, is the equivalent of a donee of a special power of appointment, and second, absent a contrary provision in the governing document, a donee of a power of appointment may exercise such power in a manner which is less extensive than authorized by the instrument creating the power. Under this latter principle, if there is authority to distribute outright, there is authority to distribute in further trust.[9] The argument could be made that even if distribution authority is subject to an ascertainable standard, so long as there is authority to distribute property outright, there is authority to distribute in further trust.

e. New York Expands Statutory Decanting Authority.

Relying on this principle, the State of New York recently amended EPTL § 10-6.6 to allow decanting of a trust where the trustee's distribution authority is limited to an ascertainable standard.[10] Accordingly, based on these changes, in New York, it is not necessary for a trustee to have absolute discretion with respect to distributions in order to effect a decant. In the Memorandum to Assembly Bill A08297 (2011), the New York State Assembly stated as follows:

> "To enhance flexibility, the ability to invade principal for any purpose, rather than the ability to invade principal only if the trustee has absolute discretion, should trigger the ability of the trustee to pay from one trust to another. So long as the trustee has the ability to distribute principal for some purpose, for example, if

[8] *See generally,* Halpern and Wandler, Decanting Discretionary Trusts: State Law and Tax Considerations, 29 Tax Mgmt. Est. Gifts & Tr. J. 219 at Footnote 42, *citing* Restatement (Second) of Property, Donative Transfers § 19.3 (2003) and In re Hart's Will, 262 A.D. 190 (N.Y. Sup. Ct. 1941).

[9] *Id.*

[10] Other states also have enacted statues authorizing decanting under an ascertainable standard. *See* DEL. CODE ANN. tit. 12, § 3528; ALASKA STAT. § 13.36.157, TENN. CODE ANN. § 35-15-816(b)(27), S.D. CODIFIED LAWS § 55-2-15, N.H. REV. STAT. ANN. § 564-B:4-418 (note that the New Hampshire statute actually uses the term "decant" in its statutes), ARIZ. REV. STAT. § 14-10819 and N.C. GEN. STAT. § 36C-8-816.1,

> the trustee may make principal distributions for a beneficiary's health, education, maintenance, and support, but may not otherwise invade principal, the trustee should have the ability to pay the trust funds to a new trust for the same purpose. This opportunity should exist regardless of whether a beneficiary has the current need for funds."[11]

2. Applying Phipps, Common Law and Statutory Law to Decanting.

a. A Valid State Law Decanting Should Not Result in the Imposition of Income, Estate or Gift Taxes.

(1) Conclusion.

The trustee's decanting authority is analogous to a special power of appointment; while the trustee also has a fiduciary duty with respect to such authority, there is no distinction under federal tax law as to the exercise of powers and a fiduciary duty, so a fiduciary's distribution power should be treated similarly to a beneficiary's special power of appointment for federal income, estate and gift tax purposes.[12]

Further, so long as the beneficiary's interest in the trust is contingent and nonvested, the beneficiary is not effecting the transfer as all of the elements for a taxable transfer of a property interest are not present; therefore, the decant should have no gift or estate tax consequences.

(2) The Federal Tax Treatment of a Decant by a Trustee Should Be Viewed as Similar to a Special Power of Appointment.

The *Phipps* decision is interpreted to state that a trustee's unlimited authority to distribute property to a beneficiary can be interpreted as the power to distribute the entire trust principal to such beneficiary. The power is similar to that of a special power of appointment, except that the trustee has a fiduciary duty to exercise such power in good faith.[13] For federal transfer tax purposes, however, the separate fiduciary duty is not relevant as there does not appear to be any distinction between a power held in a fiduciary capacity and one held in a nonfiduciary capacity (i.e., a power of appointment). For this reason, the transfer tax analysis of the trustee's power to distribute principal (i.e., "decanting authority") is analogous to that of the exercise of a special power of appointment. These are state law powers.

It is the "good faith" argument that restricts the ability of a trustee with respect to decanting authority over current rights. Because the trustee must act considering the interests of the beneficiaries, the trustee cannot act in a manner that would restrict or remove a current or mandatory right in a beneficiary. A beneficiary's rights in a trust can be broken down into either, (a) current or mandatory rights, and (b) contingent or future rights. It is logical to conclude that any current, vested rights in the beneficiary must be maintained; otherwise, the

[11] Memorandum to Assembly Bill A08297 (2011), *available at* http://assembly.state.ny.us/leg/?default_fld=&bn=A08297&term=&Memo=Y.

[12] Note that this is an analysis from the fiduciary perspective; for an analysis of the effects of a beneficiary's consent to a decant or failure to object to a notice of decanting, see Section 2(b) of this letter, beginning on page 8.

[13] *See* § 105 of the Uniform Trust Code, adopted in 2003 by the National Conference of Commissioners on Uniform State Laws (the "UTC"), which prohibits a trust instrument from exonerating a trustee's duty to act in good faith and in accordance with the terms and purposes of the trust and the interests of the beneficiaries.

trustee would be circumventing such beneficiary's rights and arguably would be acting in bad faith as to such beneficiary. As to decanting, this would require that the Trustee preserve a beneficiary's mandatory current income and principal rights.

Discretionary rights, however, are different. A trustee's absolute discretionary power to distribute principal to a beneficiary does not require that such beneficiary receive the principal; on the contrary, the trustee is under no obligation to effect any distributions absent an abuse of discretion. Where the discretion of the trustee is uncontrolled in making distributions, the general rule is that, absent arbitrary acts by the trustee or the exercise of bad faith or abuses in the exercise of such discretion, the settlor's intentions regarding trustee's absolute authority regarding distributions should be upheld and a beneficiary will not be able to compel the trustee to make any payment to him or her or to apply payments for his or her benefit.[14] The presentation of a "bad faith" claim would be based on a perceived abuse of discretion and the alleged "bad faith" would have to appear very obvious and egregious. One example of this is the Florida decision *Mesler v. Holly*,[15] wherein the Florida Second District Court of Appeal found an abuse of discretion where the trustee was the sole lifetime beneficiary, that she had not furnished any accounts or reports of her administration to the remaindermen, and that she was not confining her invasions of principal to herself to reasonable limits.

For this reason, it would appear to be possible and permissible for the trustee, acting in good faith, to change future income and principal rights in a beneficiary if such interests are contingent and non-vested rights.

(3) A Change in a Beneficiary's Contingent, Non-Vested Interest Should Not Be Considered a Gratuitous Transfer of an Interest in Property.

The question then becomes whether the change in a beneficiary's contingent, non-vested interest in the trust is somehow deemed to be a gratuitous transfer of that interest that would cause transfer taxation.

The starting point for any analysis is the requirements for a taxable gift, which are, (a) a donor is competent to make the gift; (b) a clear and unmistakable intention by the donor to make the gift (in the absence of adequate consideration); (c) a conveyance, assignment, or transfer of property (or an interest in property) sufficient to vest legal title in the donee without power of revocation at the donor's will; (d) relinquishment of "dominion and control" over the gift property by delivery; and (e) acceptance by the donee.[16]

The focus for this analysis is on the second and third elements, "a clear and unmistakable intention by the donor to make the gift (in the absence of adequate consideration)" and "a conveyance, assignment, or transfer of property (or an interest in property) sufficient to vest legal title in the donee without power of revocation at the donor's will." The trustee acting as a fiduciary has no capacity to express any donative intent; therefore, from the trustee perspective, there cannot be a taxable gift. From the beneficiary's perspective, since the beneficiary's interest

[14] Grimsley, 18 Fla. Prac., Law of Trusts § 5:1 (2010 ed.), *citing* In re Martin's Trust, 63 Pa. D. & C.2d 340, 1971 WL 13100 (C.P. 1971); Barnett Banks Trust Co., N.A. v. Herr, 546 So. 2d 755 (Fla. 3d DCA 1989); Watkins v. First Nat. Bank in Fort Myers, 204 So. 2d 736 (Fla. 2d DCA 1967); Mesler v. Holly, 318 So. 2d 530 (Fla. 2d DCA 1975); In re Duncan's Will, 80 Misc. 2d 32, 362 N.Y.S.2d 788 (Sur. Ct. 1974); and In re Stone, 500 So. 2d 737 (Fla. 1st DCA 1987).

[15] 318 So.2d 530 (Fla. 2nd Dist. Ct. App. 1975).

[16] *Gift Requirement for Gift Tax Purposes*, RIA Estate Planning, ¶47,152.

is contingent and non-vested, it is debatable whether the beneficiary actually has an interest in property to gift. Regardless of the answer, because the decanting power lies solely with the trustee, the beneficiary is not the originator of the decant nor is the beneficiary the transferor with respect to the transfer of assets to the new trust. Therefore, from the beneficiary's perspective, all of the elements for a taxable gift are also lacking.

(4) Based on ACTEC Analysis, Generally, No Current Income Tax Recognition Should Occur from a Valid Decant.

The income tax analysis under the ACTEC submission may be generally concluded as follows: under a valid decant, the new trust should be viewed as a continuation of the old trust for all elements of income taxation. ACTEC addresses several issues which require additional review and guidance from Treasury, i.e., the income tax consequences of a decanting distribution involving negative basis assets. We do not believe that those issues require further discussion. In addition, with respect to administrative issues, ACTEC advocates that the new trust succeed to the taxpayer identification number of the decanted trust.

(5) When a Trustee Decants Only a Portion of the Trust's Assets, the New Trust Should Obtain a New Taxpayer Identification Number, and a New IRS Form Should be Filed Indicating the Pro-Rata Decant.

One additional comment should be made to the income tax discussion from the ACTEC comments, which concerns the ability of a trustee to decant less than the entire assets of the original trust. Should this occur, Treasury should consider adopting a new income tax form allowing the trustee of the decanting trust to allocate a proportionate amount of the income tax items from the decanted trust to the new trust. Further, the new form would report the taxpayer identification number of the new trust so that from a record keeping perspective, Treasury is on notice as to the tax treatment of decanted assets in case the underlying custodians do not issue accurate year-end tax forms to the respective trusts.

(*6) Suggested Treasury Guidance.*

Based on the foregoing, we request that Treasury issue guidance on the following: (1) either create a definition for transfer tax purposes of a "beneficial interest" in the context of a decant, or issue a statement that, for purposes of decanting, a "beneficial interest" should be defined under applicable state law; (2) a transfer under a valid state law decant is not a gratuitous transfer by either the trustee or any beneficiary who has a contingent or non-vested interest in the trust; (3) as a general rule, decanting does not result in the immediate recognition of income taxes, but Treasury should issue guidance as to issues set forth in the ACTEC submission; and (4) if less than the entire trust is decanted, Treasury should determine that the new trust receives its proportionate share of all income tax items from the decanting trust, and, further, Treasury should release a new form whereby the trustee of the decanted trust can notify both Treasury and the trustee of the new trust as to such transferred income tax items.

b. Neither a Beneficiary's Statutory or Voluntary Consent to a Decant or a Beneficiary's Failure to Timely Object to a Decant Results in a Taxable Gift by the Beneficiary.

(1) State Law Concerns Are Independent of Tax Concerns.

The shift in the approach of modern trust law over the past two decades is perhaps the most pronounced in the area of trust reformation. The concept of correcting mistakes or reforming a trust's provisions to take into account an unanticipated circumstance of events has led to the adoption by many states of various provisions allowing such reformations. The UTC, the purpose of which is to present model statutes embodying the current approach to trust law, has enacted a series of statutes specifically governing the reformation of trusts.[17] Some of the UTC provisions require the consent of all beneficiaries (referred to thereunder as "qualified beneficiaries"), some allow a petition to the court to be filed by a qualified beneficiary, and many require notice be given to all qualified beneficiaries (similar to the requirement found in decanting statutes). In each particular statute, a state law concern[18] allows the court (or, in some instances, non-judicially by consent of the qualified beneficiaries) to modify or terminate a trust. The state law concern may in some instances require the formal consent of the beneficiaries.

What is obvious is that the consent or notification rights are implemented so as to protect the beneficiary's state law rights without any concern as to federal transfer tax law. Such concerns should not be skewed as to impose a gratuitous transfer subject to federal transfer tax liability; to do so would encroach the state's concern for enacting the statute.

(2) Suggested Treasury Guidance.

Based on the foregoing, since the distribution does not originate with the beneficiary, the beneficiary should not be penalized for any actions with respect to acquiescence to the transaction. Thus, we suggest that Treasury issue guidance stating that under a valid state law decant, a statutory requirement for a beneficiary to consent to the decant, the delivery of consent by a beneficiary where no consent is otherwise required (whether by statute or common law), the waiver by a beneficiary of a mandatory waiting period, or a failure by a beneficiary to file an objection to a decant within a prescribed time period, is not a transfer by the beneficiary subject to federal transfer tax law and, further, does not result in any additional income tax recognition to the beneficiary other than any such recognition as may be determined under the decant.

[17] See, for example, UTC § 111, Nonjudicial Settlement Agreements; UTC § 410. Modification or Termination of Trust; Proceedings for Approval or Disapproval; UTC § 411. Modification or Termination of Noncharitable Irrevocable Trust by Consent; UTC § 412. Modification or Termination Because of Unanticipated Circumstances or Inability to Administer Trust Effectively; UTC § 414. Modification or Termination of Uneconomic Trust; UTC § 415. Reformation to Correct Mistakes; UTC § 416. Modification to Achieve Settlor's Tax Objectives; and UTC § 417. Combination and Division of Trusts.

[18] It should be noted that in one specific instance, i.e., UTC § 416, the state law concern is linked to federal taxes, i.e., a reformation based on the settlor's tax objectives.

c. The Determination of "Beneficiaries" of a Recipient Trust for Decanting Purposes Should be Determined by State Law.

(1) Conclusion.

The determination of whether additional beneficiaries may be added to a trust pursuant to a valid decanting should be determined under state law. As a result, if permissible appointees of a special power of appointment are not considered to be "beneficiaries" under applicable state law, a special power of appointment granted under the new trust in a decant may expand the class of permissible appointees beyond those classified as "beneficiaries" under the decanted trust. Such actions are state law concerns and should not result in the imposition of any federal transfer taxes.

(2) Who is a "Beneficiary"?

As stated above, under the *Phipps* rationale, the trustee's authority to appoint in further trust is an extension of the trustee's distribution power to the beneficiaries which must be exercised in good faith. With respect to distributions, a trustee will always be restricted in its actions by two factors: applicable law and the terms of the governing instrument. A trustee can never exceed either of these restrictions.

With decanting, the focus is on the recipients of property in the new, recipient trust. While the trustee's discretionary authority to distribute principal may be absolute as to discretion, under the common law, it is limited as to the class of beneficiaries to whom property may be distributed, namely, the beneficiaries stated in the trust. To add beneficiaries to those initially stated in the trust agreement would appear to be a violation of the terms of the governing instrument, and thus an improper action.

Both the Restatement (Second) of Property: Donative Transfers (the "Second Restatement") and the Third Restatement codify the common law (although the Second Restatement adopts an initial minority provision that has come to be an accepted position through statutory adoption). The Second Restatement, in § 1.2, provides the historical rule that "the rule of this [§ 1.2] does not permit the creation of a non-general power to be executed by objects of the power in favor of non-objects of the original power."[19] The Third Restatement, in § 19.14, provides that "[the recipient of the newly created special power of appointment] can only be authorized to appoint to permissible appointees of the first [special] power, excluding himself or herself."[20]

However, the issue becomes blurred because state decanting statutes rarely describe persons as "permissible appointees"; rather, such statutes often refer to "beneficiaries."[21] Thus, conformity to a state statute requires defining the term "beneficiaries."

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[19] Restatement (Second) of Property, Donative Transfers § 19.4 (1986) at Reporter's Note 3 to Section 19.4, *citing* Horwitz v. Norris, 49 Pa. 213 (1865), Hood v. Haden, 82 Va. 588 (1866) and McLean v. McLean, 174 A.D. 152, 160 N.Y.S. 949 (1916).

[20] Restatement (Third) of Property (Wills and Donative Transfers) § 19.14 (2011) at Comment (g)(3).

[21] For example, see New York EPTL § 10-6.6(b) ("(b) An authorized trustee with unlimited discretion to invade trust principal may appoint part or all of such principal to a trustee of an appointed trust for, and only for the benefit of, one, more than one or all of the current *beneficiaries* of the invaded trust (to the exclusion of any one or more of such current *beneficiaries*…"; *see also* Florida Statutes § 736.04117(1)(a)1. ("…for the current benefit of one or

Section 103 of the UTC defines “beneficiary” as follows:

> “(3) “Beneficiary” means a person that:
>
> (A) has a present or future beneficial interest in a trust, vested or contingent; or
>
> (B) in a capacity other than that of trustee, holds a power of appointment over trust property.”

Under the UTC, it appears to be unclear whether permissible recipients of property under a special power of appointment are considered to be beneficiaries of a trust. Consider a trust created by A which purports to benefit A's child, B, and B's descendants. The trust provides that the trustee has absolute discretion to distribute income and principal to B for B’s life, and, upon B’s death, B has a special power of appointment to appoint the trust property to any one or more of B's descendants; in default of the exercise of B’s power of appointment, the trust property passes in shares, per stirpes, for B's descendants. Under the UTC definition of “beneficiary,” it is clear that the beneficiaries of the trust are B and B's descendants. Suppose that B exercises the power of appointment by appointing the trust property in further trust for each of B's descendants, C and D, and, upon each individual's death, the individual is granted a special power of appointment to appoint among the individual's descendants and the individual's surviving spouse; in default of exercise, the property is paid outright to the individual's descendants (who would be B's remote descendants). The respective surviving spouses of C and D are not members of the class of permissible appointees under the original trust agreement; however, the UTC definition of "beneficiary" does not clarify the status of permissible appointees under a power of appointment. It may be argued in the negative that if such appointees were considered to be beneficiaries, the statute would have stated as such, so therefore, they should not be considered "beneficiaries." If that is true, the permissible appointees would *not* be considered to be beneficiaries, meaning that interpreted literally, the UTC statutory "beneficiaries" under B's exercise of the special power of appointment are still only B's descendants and the decant is permissible.

This result appears a bit clearer under Florida's Trust Code. The Florida definition of “beneficiary” under F.S. §736.0103(4), states:

> “(4) “Beneficiary” means a person who has a present or future beneficial interest in a trust, vested or contingent, or who holds a power of appointment over trust property in a capacity other than that of trustee. *An interest as a permissible appointee of a power of appointment, held by a person in a capacity other than that of trustee, is not a beneficial interest for purposes of this subsection.* Upon an irrevocable exercise of a power of appointment, the interest of a person in whose favor the appointment is made shall be considered a present or future beneficial interest in a trust in the same manner as if the interest had been included in the trust instrument.

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more of such persons under the same trust instrument or under a different trust instrument; provided. 1. The *beneficiaries* of the second trust may include only *beneficiaries* of the first trust…) (emphasis added).

(emphasis added.)

Under the Florida Statutes, a permissible appointee under a power of appointment is specifically not considered to be a beneficiary. Therefore, C and D's respective spouses would clearly not be "beneficiaries" for purposes of F.S. § 736.04117 and, therefore, B's exercise of the special power is statutorily valid.

(3) Suggested Treasury Guidance.

Based on the foregoing, we suggest that Treasury issue guidance acknowledging that the determination of "beneficiaries" for decanting purposes is a matter of state law.

e. The Maximum Perpetuities Period for a Recipient Trust in a Decant Should Not Extend Beyond the Maximum Perpetuities Period In Effect at the Creation of the Decanted Trust.

(1) Conclusion.

A common trust provision allows the trustees to non-judicially move the trust situs and governing law to another trust. While perceivably the governing law could be shifted to allow a decant, the issue of whether such an action is permissible is a matter of state law. If the governing law is moved and if a decant thereafter occurs, the maximum applicable rule against perpetuities of the new trust should be limited to the maximum rule against perpetuities in effect at the creation of the original decanted trust. Further, if the state law governing the decanting trust is modified so that a longer rule against perpetuities is in effect, or if such state abolishes the rule against perpetuities, regardless of the application of such state law, the maximum applicable rule against perpetuities of the new trust should be limited to the maximum rule against perpetuities in effect at the creation of the original decanted trust.

(2) Rule Against Perpetuities – Background.

A general premise is that any trust, upon creation, must terminate within the applicable "rule against perpetuities" ("RAP") under the law governing the trust.

The common law definition of the RAP is set forth in § 1.1 of the Second Restatement, which provides that property interests created by donative transfers must vest within 21 years after lives in being (the measuring lives) at the time the period of the rule begins to run. Pursuant to § 1.3(2) of the Second Restatement, the "measuring lives" are, (1) the transferor if the period of the rule begins to run in the transferor's lifetime; (2) those individuals alive when the period of the rule begins to run, if reasonable in number, who have beneficial interests vested or contingent in the property in which the non-vested interest in question exists and the parents and grandparents alive when the period of the rule begins to run of all beneficiaries of the property in which the non-vested interest exists, and (3) the donee of a nonfiduciary power of appointment alive when the period of the rule begins to run if the exercise of such power could affect the non-vested interest in question. In addition, said section provides that a child in gestation when the period of the rule begins to run who is later born alive is treated as a life in being at the time the period of the rule begins and, hence, may be a measuring life.

The position adopted by the Second Restatement is commonly referred to as the "wait-and-see" approach, which provides that an interest only fails if it does not vest within the period

of the rule, as opposed to the strict interpretation which provides that an interest fails if it "might not vest" within the applicable period.[22]

The Third Restatement removes the "wait-and-see" approach of the Second Restatement and measures the perpetuity period by generations rather than by lives in being at the creation of the interest. In addition, the Third Restatement states that the RAP is not a rule against remoteness of vesting that only applies to a contingent future interest as the distinction between a contingent and a vested future interest is irrelevant.[23] Instead, the Third Restatement focuses more on generational assignment, defining the "measuring lives" as the following individuals: the transferor, the beneficiaries of the disposition who are related to the transferor and no more than two generations younger than the transferor, and the beneficiaries of the disposition who are unrelated to the transferor and no more than the equivalent of two generations younger than the transferor.

Several states have codified the RAP into statutory form. For example, pursuant to F.S. §689.225(2)(a), the Florida RAP adopts a "wait-and-see" approach with the "lives in being plus 21 years" or full vesting within 90 years if the trust is created prior to January 1, 2001, or 360 years of the trust is created after December 31, 2000.

(3) A Change in Governing Law Could Extend the RAP.

If the trust is created under Florida law, the determining factor is set forth in F.S. §689.225(2)(a)1. in that the RAP is established at the moment that the interest is created. Other states, such as Delaware and New Jersey, have abolished the RAP. A concern is whether, through the use of a special power of appointment and a change of governing law, the length of time during which the property is held in trust could extend beyond the original RAP.

Under the common law, the exercise of a special power of appointment granted under a trust appointing property in further trust does not restart the RAP; rather, the RAP relates back to the date of the creation of the original trust. This is the accepted result in both the Second and Third Restatements. Specifically, the Second Restatement provides,

> the period of the rule against perpetuities begins to run with respect to non-vested interests created by the exercise of the trust beneficiary's power of appointment, and as to the non-vested interests under the trust in default of the exercise of the power of appointment, on the date the trust is established, unless the donee of the power of appointment can appoint to himself or herself by a deed at any time.[24]

Similarly, the Third Restatement provides that, "the transferor in the case of a trust or other donative disposition created by the exercise of a power of appointment is the donor of the power, unless the exercised power was a presently exercisable general power."[25]

[22] Restatement (Second) of Property, Donative Transfers § 1.4 (1983), Comment (a).
[23] Restatement (Third), § 27.1, Comment (a).
[24] Restatement (Second) of Property, Donative Transfers § 1.2 (1983), Comment (d).
[25] Restatement (Third) of Property (Wills & Donative Transfers) § 27.1 (2011), Comment (d).

Some states, such as New Jersey and Delaware, have adopted statutory provisions that disregard the common law and provide that a new RAP commences upon the exercise of any power, regardless of whether the power is general or special.[26] Case law supports the statutory deviation from the common law. For example, in *Matter of Wold*,[27] a special power of appointment created before enactment of the N.J. Stat. Ann. § 46:2F-5(a),[28] but not exercised until after the enactment of the RAP, was judged according to the statutory 90-year "wait-and-see approach" and not the common law "lives in being plus 21" since the statute specifically provided that an interest created pursuant to a power of appointment is deemed to be created upon the exercise of the power. Thus, under the then-New Jersey statute, the exercise of the power could create non-vested interests that might vest longer than 21 years after the death of the last life in being upon the creation of the power.

The UTC provides that the trustee may change the principal place of administration without judicial approval.[29] It is also customary for trusts to allow the trustee to also switch the governing law of a trust.[30] Thus, if (a) a trustee is administering a trust in a state without a decanting statute, (b) if the trustee is qualified to act as a trustee in a state with a decanting statute, and (c) assuming that the governing instrument so authorized (and, in the absence of specific authority, as a court may order), the trustee has the ability to switch the governing law and principal place of administration to such favorable state and thereafter effect a decant. This concept of "forum shopping" should not result in any adverse transfer tax consequences because the decant would be a transfer that would have been authorized had the trust originally been governed by the favorable state's law and the provisions of state law would specifically permit the transfer.

(4) Treasury Has Already Opined That No Taxable Transfer Occurs if a Trust's RAP Remains the Same After a Decant.

In one instance, the Service has taken the position that any transfers from a trust into a new trust pursuant to the exercise of a power must retain the original trust's RAP. In Treas. Reg. § 26.2601-1(b)(4)(i)(A), informally known as the "Delaware Tax Trap" provision, with respect to the generation-skipping transfer tax ("GSTT") exempt status of a trust whereby principal from such GSTT exempt trust is distributed to a new trust, the Treasury states that one of the requirements that must be present for the new trust to succeed to the old trust's GSTT exempt status is that the terms of the governing instrument of the new trust will not extend the time for vesting beyond any life in being at the date the *original trust became irrevocable plus a period of 21 years* (emphasis added). In adopting the GSTT regulations, Treasury adopted the position that if the RAP were permitted to begin upon the date of the exercise of the special power of appointment, the power holder, in effect, would become the "transferor" for RAP purposes. Presumably, the transferor should also become the "transferor" for GSTT purposes; thus, Treasury stated that any trust that does not limit the RAP to the original RAP regardless of the

[26] Del. Code. Ann. tit. 25, § 5-501, former N.J. Stat. Ann. § 46:2F-5(a) (1991).
[27] 310 N.J. Super. 382, 708 A.2d 787 (Ch. Div. 1998), *as cited in* Bogerts, § 213 at Footnote 59.
[28] Note that New Jersey has since abolished the RAP; *see* N.J. Stat. Ann. § 46:2F-9, effective for interests created after July 9, 1999.
[29] UTC § 108(c); *see also* F.S. § 736.0108(4).
[30] UTC § 107 pertains to a trust's governing law; pursuant to UTC § 105, the provisions of the UTC may be overridden by the governing instrument, except as set forth in UTC § 105(b). A trustee's ability to change the governing law is not such an exception. *See also* F.S. §§ 736.0107 and 736.0105.

applicable state law would invoke the GSTT upon the exercise of the special power of appointment.

Treasury's position on this issue could, perhaps, have been the result of the fact that the ability to extend the RAP is limited to a small handful of jurisdictions and the predominant view is that the RAP cannot be extended. We believe that since Treasury has already determined this issue in such prior instance, that this position should be extended to decanting as it is consistent with the common law and the majority of state's laws.

(5) Suggested Treasury Guidance.

Based on the foregoing, we suggest that Treasury issue guidance acknowledging that as to the maximum period of time that property may be held in a trust after a decant, (a) the ability to switch the principal place of administration and governing law of a trust in order to take advantage of another state's decanting laws is a matter of state law, and (b) the maximum RAP applicable to property held in trust after a decant should be limited to the RAP in effect at the time of the creation of the trust from which the property was decanted consistent with other Treasury Regulations.

3. Summary Comments.

In summary, we believe that the use of decanting can be beneficial to trustees and beneficiaries, creating flexibility for correction of mistakes and for correction of situations in which the grantor's original intent cannot be achieved due to changes in circumstances. Treasury should provide guidance to trustees and beneficiaries so that there are safe harbors for the implementation of decanting; safe from unforeseen income, estate, gift, and generation skipping transfer tax consequences. In order to structure their lives and implement a grantor's intent, it is important that trustees and beneficiaries be able to rely on state laws pertaining to decanting. Consistency and predictability should be achievable, but will be difficult if each type of decant results in some type of unpredictable or unforeseen tax liability.

732.806. Gifts to Attorneys and Other Disqualified Persons

(1) Any part of a written instrument which makes a gift to a lawyer or a person related to the lawyer is void if the lawyer prepared or supervised the execution of the written instrument, or solicited the gift, unless the lawyer or other recipient of the gift is related to the person making the gift.

(2) This section is not applicable to a provision in a written instrument appointing a lawyer, or a person related to the lawyer, as a fiduciary.

(3) A provision in a written instrument purporting to waive the application of this section is unenforceable.

(4) If property distributed in kind, or a security interest in that property, is acquired by a purchaser or lender for value from a person who has received a gift in violation of this section, the purchaser or lender takes title free of any claims arising under this section and incurs no personal liability by reason of this section, whether or not the gift is void under this section.

(5) In all actions brought under this section, the court shall award taxable costs as in chancery actions, including attorneys' fees. When awarding taxable costs and attorneys' fees under this section, the court, in its discretion, may direct payment from a party's interest, if any, in the estate or trust, or enter a judgment that may be satisfied from other property of the party, or both. Attorneys' fees and costs shall not be awarded against a party who, in good faith, initiates an action under this section to declare a gift void.

(6) If any part of a written instrument is invalid by reason of this section, the invalidity shall not affect any other part of the written instrument that can be given effect, including terms which make an alternate or substitute gift, and to this end the invalid parts are severable. In the case of a power of appointment, this section does not affect the power to appoint in favor of persons other than the lawyer or a person related to the lawyer.

(7) For purposes of this section:

(a) A lawyer shall be deemed to have prepared, or supervised the execution of, a written instrument if the preparation, or supervision of the execution, of the written instrument was performed by an employee or lawyer employed by the same firm as the lawyer.

(b) A person is "related" to an individual if, at the time the lawyer prepared or supervised the execution of the written instrument or solicited the gift, the person is:

1. A spouse of the individual;

2. A lineal ascendant or descendant of the individual;

3. A sibling of the individual;

4. A relative of the individual or of the individual's spouse with whom the lawyer maintains a close, familial relationship;

5. A spouse of a person described in subparagraph (b)2., subparagraph (b)3., or subparagraph (b)4.; or

6. A person who cohabitates with the individual.

(c) The term "written instrument" includes, but is not limited to, a will, a trust, a deed, a document exercising a power of appointment, or a beneficiary designation under a life insurance contract or any other contractual arrangement which creates an ownership interest or permits the naming of a beneficiary.

(d) The term "gift" includes an inter vivos gift as well a testamentary transfer of real or personal property or any interest therein, regardless of whether the gift is outright or in trust, and regardless of when the transfer is to take effect; and the power to make such a transfer, whether the power is held in a fiduciary or non-fiduciary capacity.

(8) The rights and remedies granted in this section are in addition to and not in derogation of any other rights or remedies any person may have at law or equity.

(9) This section shall take effect upon becoming law and shall apply to all written instruments executed after its effective date.

WHITE PAPER

PROPOSED LEGISLATION REGARDING GIFTS TO LAWYERS

I. SUMMARY

The Supreme Court of Florida has adopted rules regulating the The Florida Bar (the "Rules). Chapter 4 of the Rules contains the Rules of Professional Conduct for lawyers. Rule 4-1.8 deals with issues concerning conflict of interest and prohibited transactions. Rule 4-1.8(c) provides in pertinent part as follows:

> A lawyer shall not solicit any substantial gift from a client, including a testamentary gift or prepare on behalf of a client an instrument giving the lawyer or person related to the lawyer any substantial gift unless the lawyer or other recipient of the gift is related to client.

On its face, Rule 4-1.8 appears to prohibit a lawyer from preparing a will, trust, or other written instrument making a testamentary or inter vivos gift to the lawyer or the lawyer's family except in the limited circumstance when the lawyer or recipient of the gift is related to the client. Given the nature of the confidential relationship between a lawyer and a client, Rule 4-1.8(c) serves the important purpose of protecting the client from potential overreaching and impropriety by the lawyer by prohibiting the lawyer from preparing the instrument which makes the gift.

The violation of this Rule, however, does not give rise to a civil cause of action or render the gift to the lawyer void as a matter of law. As a consequence, a lawyer may violate this Rule and, under certain circumstances, still be entitled to retain the gift or bequest from his or her client even though the lawyer is subject to discipline. Further, even if the bequest or gift is set aside, the ultimate beneficiaries of the estate or trust may be forced to deplete the assets of the estate or trust or expend personal funds in attorneys' fees and costs challenging the validity of the gift. To that end, the Rule does not go far enough in protecting the public.

The Real Property Probate and Trust Law Section of the Florida Bar created an ad hoc committee in 2010 to examine the law in the area and determine whether a statute specifically addressing the issue of gifts to lawyers was necessary. The Ad Hoc Estate Planning Conflicts of Interest Committee has proposed a new statute, Florida Statutes § 732.806, to address this issue. The proposed legislation makes a gift to a lawyer, or certain people related to, or affiliated with, the lawyer, void if the lawyer prepares the instrument making the gift, or solicits the gift, unless the lawyer or recipient of the gift is related to the client.

II. CURRENT LAW

The issue of whether an attorney may draft a will in which he or she is named as a beneficiary is not a new or novel question. Indeed, as explained by Honorable Judge Lauren C. Laughlin in the Estate of Virginia Murphy, Case 06-6744ES-4 (Fla. Cir. Ct. August 1, 2008), the prohibition on the scrivener of a will inheriting under it dates back to Roman law. Murphy, at 7 (citing Dig. 48.15 supplement to the *lex cornelia* ordered in edict by Emperor Claudius). Nevertheless, Florida law does not specifically prohibit such a practice.

In fact, in the absence of a specific statutory prohibition, Florida courts have held that a violation of Rule 4-1.8 does not render a gift to the lawyer in violation of the Rule void. In Agee v. Brown, 73 So. 3d 882 (Fla. 4th DCA 2011), the 4th DCA reversed the trial court which had found that a gift to a drafting lawyer under a will was void as a matter of law because it violated Rule 4-1.8 and public policy. The Agee court held that the trial court had improperly "incorporated Rule 4–1.8(c) of the Rules Regulating The Florida Bar into the statutory framework of the probate code." Id. at 886. The court found that this interpretation was erroneous as "[i]t is a well-established tenet of statutory construction that courts are not at liberty to add words to the statute that were not placed there by the Legislature." Id. The court noted that the "best way to protect the public from unethical attorneys in the drafting of wills . . . is entirely within the province of the Florida Legislature." Id. at 887.

In the absence of a specific statute rendering a gift void, beneficiaries are left to challenge the instrument based upon standard allegations of fraud, undue influence, and duress. *See* id. This is precisely what happened in the Estate of Murphy decision. In that case, the decedent's heir-at-law challenged gifts to, among others, the lawyer who drafted the decedent's will, the lawyer's secretary, and the decedent's accountant, who had each entered into an agreement to uphold the validity of the will. Like Agee, the Murphy court refused to find the gift void as a matter of law. Instead, the decedent's heir-at-law was forced to rely upon a claim for undue influence. The court noted the difficulties of proof which a contestant can face in such cases:

> "The nature of the attorney-client relationship in matters testamentary is a particularly circumspect matter for the courts. The decisions that go into the drafting of a testamentary instrument are inherently private. Because the testator will not be available to correct any errors that the attorney may have made when the will is offered for probate, a client is especially dependent upon an attorney's advice and professional skill when they consult an attorney to have a will drawn. A client's dependence upon, and trust in, an attorney's skills, disinterested advice, and ethical conduct exceeds the trust and confidence found in most fiduciary relationships. Seldom is the client's dependence upon, and trust in, his attorney greater than when, contemplating his own mortality, he seeks the attorney's advice, guidance and drafting skill in the preparation of a will to dispose of his estate after death. These consultations are among the most private to take place between an attorney and his client."

Murphy, at 8.

Judge Laughlin discussed the fact that Rule 4-1.8 itself is not enough to prevent or dissuade overreaching by lawyers in the area of testamentary gifts. "The court cannot help but speculate on whether the lawyer made a cost/benefit analysis, weighing the risks of being charged with a disciplinary infraction (having no intention of continuing to practice law) against the economic benefits to be derived from the conduct." Id. at 26.

III. EFFECT OF PROPOSED STATUTORY CHANGE

The proposed legislation adds a new section to the Florida Probate Code that would render any part of a written instrument which makes a gift to a lawyer or a person related to the

lawyer void if the lawyer prepared or supervised the execution of the written instrument, or solicited the gift, unless the lawyer or other recipient of the gift is related to the person making the gift. This new section makes the gift *void* rather than *voidable*. The new statute will prevent unnecessary litigation over whether the client intended to make the gift to the lawyer taking the case out of a contested evidentiary proceeding after the decedent's death. The statute does not prevent a lawyer from inheriting from a client. Indeed, a client is free to draft a will or other instrument making a gift to the lawyer or the lawyer's family. The statute merely prevents the lawyer or persons related to the lawyer from preparing the document making the gift. In such circumstances, the client should be advised to go to an independent lawyer to have the instrument making the gift prepared. The statute makes an exception for the typical situation in which the lawyer prepares a document for a family member or other related person.

A section-by-section analysis of the proposed legislation captioned "Section 732.806. Gifts to Attorneys and Other Disqualified Persons" follows:

A. Effect of Subsection (1) to § 732.806

Subsection (1) provides that any part of a written instrument which makes a gift to a lawyer or a person related to the lawyer is void if the lawyer prepared or supervised the execution of the written instrument, or solicited the gift, unless the lawyer or other recipient of the gift is related to the person making the gift.

Under Subsection (1), the gift is void. As a consequence, the lawyer or other disqualified person will not be permitted to defend the gift by arguing intent or offering other proof of the legitimacy of the gift once it is proven that the lawyer prepared or supervised the execution of the written instrument, or solicited the gift. The client may still make a gift by having independent counsel prepare the written instrument.

Subsection (7) of the statute defines terms used in Subsection (1) including when a person is deemed to have prepared or supervised the execution of an instrument and when a person is deemed to be "related" for purposes of the statute. Those definitions will be discussed below.

B. Effect of Subsection (2) to § 732.806

Under Florida law, a lawyer may prepare a will or trust nominating the lawyer as a fiduciary. The Rules specifically recognize that such a practice is not prohibited. The comment to Rule 4-1.8 provides that the "rule does not prohibit a lawyer from seeking to have the lawyer or a partner or associate of the lawyer named as personal representative of the client's estate or to another potentially lucrative fiduciary position." Subsection (2) makes it clear that the proposed statute does not prevent a lawyer from preparing a document naming the lawyer as fiduciary or otherwise apply to render such an appointment void.

C. Effect of Subsection (3) to § 732.806

Subsection (3) of the proposed statute makes it clear that the application of the statute cannot be waived by the client. The risk of overreaching by the lawyer in obtaining a waiver in

such circumstances is too great. Further, the difficulties involved in proving whether the client gave informed consent for the waiver is not practical given the fact that in many circumstances the client is deceased at the time of the challenge.

D. Effect of Subsection (4) to § 732.806

Subsection (4) provides that purchasers for value and lenders take title free of any claims arising under this section and incur no personal liability by reason of this section, whether or not the gift is void under this section. This Subsection is intended to protect bona fide purchasers and lenders who deal with a recipient of a gift which is otherwise void under this section. In such a circumstance, the beneficiaries would have no claim against the bona fide purchaser or lender, but would have a claim to recover the proceeds of the sale from the recipient of the invalid gift.

E. Effect of Subsection (5) to § 732.806

Subsection (5) provides that the court shall award taxable cost as in chancery actions, including attorney's fees in claims made under this section. When awarding fees and costs in the context of an estate or trust, the court has discretion to direct all or part of the payment from a party's interest in an estate or trust, or to enter a judgment that may be satisfied from other property of the party. The subsection also provides that attorneys' fees and costs shall not be awarded against a party who, in good faith, initiates an action under this section to declare a gift void. This subsection is intended to deter persons from drafting wills in violation of the section by placing them at risk for fees and costs and to encourage beneficiaries and other interested persons to initiate good faith challenges to invalid gifts.

F. Effect of Subsection (6) to § 732.806

Subsection (6) provides that if any part of a written instrument is invalid by reason of this section, the invalidity shall not affect any other part of the written instrument that can be given effect, including terms which make an alternate or substitute gift, and to this end the invalid parts are severable. It also provides that in the case of a power of appointment, this section does not affect the power to appoint in favor of persons other than the lawyer or a person related to the lawyer. Subsection (6) is intended to make it clear that only the gift to the lawyer or other disqualified person is invalid. The remainder of the written instrument is to be given effect unless it is invalid for other reasons.

G. Effect of Subsection (7) to § 732.806

Subsection (7) defines several of the key terms and concepts used in the section.

A lawyer is deemed to have "prepared, or supervised the execution of, a written instrument" if the preparation, or supervision of the execution, of the written instrument was performed by an employee or lawyer employed by the same firm as the lawyer. This definition is intended to prevent a lawyer from avoiding the application of the statute by having another lawyer or employee in their firm prepare the document.

A person is "related" to an individual if, at the time the lawyer prepared or supervised the execution of the written instrument or solicited the gift, the person is: (a) a spouse of the individual; (b) a lineal ascendant or descendant of the individual; (c) a sibling of the individual; (d) a relative of the individual or of the individual's spouse with whom the lawyer maintains a close, familial relationship; (e) a spouse of any such persons; or (f) a person who cohabitates with the individual. This definition recognizes that it is natural for a lawyer to be asked to prepare a written instrument making a gift by a relative or other person with whom the lawyer shares a close, familial relationship. The statute does not render a gift a void in such circumstances.

The term "written instrument" includes, but is not limited to, a will, a trust, a deed, a document exercising a power of appointment, or a beneficiary designation under a life insurance contract or any other contractual arrangement which creates an ownership interest or permits the naming of a beneficiary. The statute is intended to cover all forms of written instruments by which a donor/client may be able to grant property rights.

The term "gift" includes an inter vivos gift as well a testamentary transfer of real or personal property or any interest therein, regardless of whether the gift is outright or in trust, and regardless of when the transfer is to take effect; and the power to make such a transfer, whether the power is held in a fiduciary or non-fiduciary capacity. The time or form in which the lawyer receives the gift should not matter. Accordingly, the statute is intended to cover all manner of gifts.

G. Effect of Subsection (8) to § 732.806

Subsection (8) provides that the proposed statute does not limit the rights that any litigant may have under existing Florida law. There may be other causes of action available when a lawyer prepares an instrument making a gift to the lawyer or solicits a gift from the client. For example, there may be claims for breach of fiduciary duty, tortious interference with an expectancy, fraud, duress, or undue influence. This statute is not intended to limit such claims.

H. Effect of Subsection (9) to § 732.806

Subsection (9) provides that the statute only applies to written instruments executed after the effective date of the statute.

IV. FISCAL IMPACT ON STATE AND LOCAL GOVERNMENTS

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

V. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR

The proposal will prevent financial benefits from passing to a lawyer in favor of the innocent beneficiaries. Therefore, no net impact on the private sector is expected.

VI. CONSTITUTIONAL ISSUES

There do not appear to be any constitutional issues that arise as a result of this proposal.

VII. OTHER INTERESTED PARTIES

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Professional Ethics Committee of the Florida Bar

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REAL PROPERTY, PROBATE & TRUST LAW SECTION

THE FLORIDA BAR

www.RPPTL.org

January 12, 2012

Florida Supreme Court
Attention: Clerk's Office
500 South Duval Street
Tallahassee, Florida 32399-1927

VIA FEDERAL EXPRESS

Re: Administrative Order 2011-02 of the Ninth Judicial Circuit

Dear Clerk:

On behalf of the Real Property, Probate and Trust Law Section of the Florida Bar, enclosed for filing and submittal to the Supreme Court Local Rules Advisory Committee in accordance with Rule 2.215(e)(2) of the Florida Rules of Judicial Administration, please find an Application Regarding Review of Administrative Order 2011-02 of the Ninth Judicial Circuit. One original and nine copies are enclosed per your instruction.

It is my understanding there are no filing fees required with this Application. Please do not hesitate to contact me with any questions, or should require anything further.

Sincerely,

George Joseph Meyer, Chair
Real Property, Probate, and
Trust Law Section of The
Florida Bar

Enclosures (as stated)
cc (via electronic mail only):
RPPTL Executive Committee
Paul Hill, Esq.
Robert Goldman, Esq.
Sean Kelley, Esq.
Sancha Brennan Whynot, Esq.

IN THE SUPREME COURT FOR THE STATE OF FLORIDA

IN RE: ADMINISTRATIVE ORDER NO. 2011-02 OF THE NINTH JUDICIAL CIRCUIT

CASE NO. SC12-_____

_____/

APPLICATION TO THE SUPREME COURT
LOCAL RULES ADVISORY COMMITTEE REGARDING REVIEW OF ADMINISTRATIVE ORDER 2011-02 OF THE NINTH JUDICIAL CIRCUIT

Pursuant to Florida Rule of Judicial Administration 2.215(e)(2), the undersigned Applicant, as a member of The Florida Bar and on behalf of the Real Property, Probate and Trust Law Section of the Florida Bar, seeks review of Administrative Order No. 2011-02, entered by the Ninth Judicial Circuit. The issue is whether that order is appropriately enacted as an administrative order in accordance with existing law or is in fact a court rule or local court rule requiring additional procedural process and prior approval of the Supreme Court in accordance with Fla. R. Jud. Admin. 2.215 (e)(1). Applicant believes the order requires additional procedural process and prior approval of the Supreme Court and states as follows:

1. Administrative Order No. 2011-02, was entered in Orange County on October 13, 2011 and became effective on November 1, 2011. It is entitled:

"Administrative Order Governing Court Appointed Professional Guardian Fees and Guardians' Attorneys' Fees for Involuntary Guardianships in the Orange County Division of the Ninth Judicial Circuit with Directions to the Clerk." A copy of the order is included in the Appendix as Exhibit "1." Hereafter it is referred to as "Order."

2. The Order is not applicable to all probate divisions in the Ninth Judicial Circuit. It does not apply to Osceola County, which continues to be governed by Administrative Order No. 07-92-15, entitled "Administrative Order on Compensation of Guardians and Professionals Providing Services to the Guardian, Circuit Court - - Probate Division. A copy of Administrative Order No. 07-92-15 is included in the Appendix as Exhibit "2".

3. A court rule is "a rule of practice or procedure adopted to facilitate the uniform conduct of litigation applicable to all proceedings, all parties, and all attorneys." *Fla.R.Jud.Admin. 2.120(a)*. A local court rule is a rule of procedure or practice for circuit or county application that, due to local conditions, "supplies an omission in or facilitates application of a rule of statewide application and does not conflict therewith." *Fla.R.Jud.Admin. 2.120(b)(1).*

4. In contrast, an administrative order is a directive necessary to properly administer the court's affairs. *Fla.R.Jud.Admin. 2.120(c)*. An administrative order is meant to merely coordinate administrative matters within an affected

jurisdiction. *Fla.R.Jud.Admin. 2.120(c)*; *also see In re Report of Com'n on Family Court,* 646 So.2d 178, 181 (Fla. 1994). Further, an administrative order cannot amend a statute by adding terms and conditions that are not part of existing legislation. *Valdez v. Chief Judge of the 11th Circuit,* 640 So. 2d 1164 (Fla. 3d DCA 1994); *see State of Florida v. Luekel,* 979 So.2d 292, 295 (Fla. 5th DCA 2008) (an order that alters legislation is an unconstitutional encroachment on the legislature's sole authority to enact legislation).

5. In some instances, the Order is in direct contravention of existing Florida statutes. In others, it attempts to modify or restrict application of existing law. For example:

a. Paragraph 3 of the Order sets a uniform hourly fee for all professional guardians, thereby eliminating the Court's statutory requirement to consider the factors enumerated in Fla. Stat. s. 744.108(2)(a)-(i) when making a determination of a reasonable fee for a guardian. The hourly rate ($64.00) provided in the Order overpays new or inexperienced guardians who did not previously earn that much in this jurisdiction. At the same time, the $64 hourly rate underpays the more skilled and experienced guardians. No mandatory rate is provided for family guardians or other guardians.

After providing that professional guardians "shall be compensated at a rate of $64 per hour," the Order does establish procedural rules and substantive provisions for attempting to obtain a different fee on a case-by-case basis. This, however, does not save the Order from its infirmity as an administrative order. The Order still changes Florida law.

b. Paragraphs 4, 7 and 12 of the Order violate Fla. Stat. s. 744.108(1), which provides that a guardian is entitled to reasonable compensation for services rendered to a ward. Paragraph 4 specifically restricts professional guardians (but not family or corporate guardians) from billing for more than three hours of services prior to receiving Letters of Guardianship. Paragraph 12 limits the ability of a professional guardian to receive reasonable compensation for performing duties that are otherwise specifically delegated to them by the Court and some of which are fiduciary responsibilities. These provisions require the guardian to limit the time spent assisting each of their wards arbitrarily and without consideration of the different needs of each ward, the complexity of the applicable

guardianship estate and in disregard to the ability or inability of each guardianship to afford fees.[1]

Paragraph 7 of the Order denies compensation to guardians of the property for performing the duties customary of a guardian of the person and vice versa. While at first blush, this concept would appear to be reasonable, in practical application it is anything but reasonable. A guardian of the person has numerous duties, including implementing the provision of medical, mental or personal care services of the ward, overseeing social and personal services for the welfare of the ward, determining the best residential setting for the ward, and seeing to the proper application of health insurance and any other private or governmental benefits to which the ward would be entitled. A guardian of the property is required to protect and preserve the property of the ward, and account for all activity involving the ward's assets.

Not infrequently, these duties overlap and require that both guardians consult with each other. *Fla. Stat. s. 744.361(5).* An example where the duties overlap and require consultation occurs when a guardian of the person

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[1] Unlike an estate, in guardianships, the ward is a living human being typically having immediate needs for services. There is no time to wait for the court to assess whether the proposed services are extraordinary and therefore worthy of payment under paragraph 12 of the Order. This explains why the Legislature has not seen fit to be as restrictive as the Order.

is reviewing medical bills that have been submitted to the guardianship for payment. Since the guardian of the property would not have accompanied the ward to the medical appointment, only the guardian of the person would have the requisite knowledge to review the itemized medical billing statement rendered to ensure its accuracy. Further, the guardian of the person is charged with ensuring that the appropriate insurance or governmental benefits are applied and needs to coordinate with the guardian of the property to ensure the proper payment is made. In this situation, despite the guardians' efforts on behalf of the ward and in accordance with the guardians' statutory duties and responsibilities to the ward, paragraph 7 of the Order denies them reasonable compensation. Failure of the guardians to perform these duties would violate section 744.361(5), Florida Statutes, which requires guardians to consult with each other where two or more guardians have been appointed for a ward; It also violates section 744.361(6)(a), Florida Statues, which requires the guardian of the property to protect and preserve the assets of the ward.

Equally important, the legislature does not restrict guardians in this way. *Fla. Stat. s. 744.108.*

c. Paragraph 8 of the Order, which states that, "no funds shall be removed from the ward's account(s) for payment of guardian fees or

attorney fees absent a court order" is also contrary to law. *See Fla. Stat s. 744.444 (16)* (authorizing the payment of attorney's fees without prior court approval, subject to approval of the annual accounting).

d. Paragraph 13 of the Order specifically prohibits the billing of "time spent preparing the fee petition and/or attending hearings on same...". This section contradicts section 744.108(8), Florida Statutes, which provides that fees and costs incurred in determining reasonable compensation are part of the guardianship administration process and "shall be determined by the court and paid from the assets of the guardianship estate unless the court finds the requested compensation under subsection (2) to be substantially unreasonable."

e. Paragraph 19 of the Order, which requires certain information in all guardianships to be provided to the "Court Monitor" on a routine basis is an attempt to amend or supplement the terms of section 744.107, Florida Statutes, which governs the appointment of court monitors. Court monitors may only be appointed in a specific proceeding and an order setting forth the purpose and extent of the court monitor's authority needs to be entered by the Judge and served on the guardian, ward and other interested persons. *Fla.Stat. s. 744.107(1)*. There is no provision in Florida Guardianship Law allowing for a quasi-judicial omnibus court monitor and this provision seeks

to amend or supplement a statute by adding terms and conditions that were not part of the original legislation. *See Valdez, supra*.

f. Paragraph 21 of the Order is another substantive legislative addition to Florida law by a local judge. This provision dictates that professional guardians "shall not oppose or interfere with efforts to terminate the professional guardian's fiduciary relationship with a ward," unless the judge authorizes it. This policy may or may not have merit as a substantive law, which would need to be debated statewide in the legislative forum, but has no place in an administrative order. It also may prove counter-productive. In many guardianships, a professional guardian is appointed to protect the ward from internal family feuding or suspected or known misappropriation of the ward's assets. Should a disgruntled family member be replaced by a professional guardian, the professional guardian will likely be the subject of that family member's discontent, and unjustified petitions for removal are not uncommon. Thus, under the local judge's legislative edict, the very reason for the appointment of the professional guardian may be defeated by the very persons from whom the ward was being protected.

g. Paragraph 10 of the Order limits the amount a guardian may pay an employee or independent contractor to $20.00 per hour for certain

services, including paying the ward's bills and balancing the checkbook and attending "basic" dental, eye and well-care appointments. While some of the other limiting fee provisions retain Court discretion, this provision does not allow the trial court discretionary authority to modify the hourly rate based upon the nature and difficulty of the services provided. However, any limit placed on the trial judge's discretionary authority through an administrative order renders the administrative order void. *Valdez v. Chief Judge of the 11th Circuit*, 640 So.2d 1164 (Fla. 3d DCA 1994); *Hatcher v. Davis*, 798 So.2d 765, 766 (Fla. 3d DCA 2001). Limiting a trial judge's discretion in this way also removes the most important arrow in the judge's quiver, his or her common sense. *See Espinosa v. Sparber, Shevin, Shapo, Rosen & Heilbronner*, 586 So. 2d 1221, 1228 (Fla. 3d DCA 1991) ("Courts must have rules to guide them in the performance of this function, but it has never been considered improper to toss right and common sense in the scales and weigh them with the evidence to reach a just result.") Here again, there might be sound policy reasons for advocating this idea to the legislature which the Applicant has not fully considered; However, it is a legislative matter, not law that should be born from one judge's administrative order.

h. Another example of the overreaching effect of the Order appears in Paragraph 16, which requires that a 1099 must be attached to each

invoice for each caregiver paid by the guardian in order to be compensated for that time. This clearly is not "meant to coordinate administrative matters within an affected jurisdiction" and is not "necessary to properly administer the court's affairs." This is a minutely detailed procedural issue, which is unworkable in application and contradicts the applicable provisions of the Internal Revenue Code. Form 1099's are issued on an annual basis, and are only required if payment to a third party exceeds a certain amount. To require a guardian to issue a 1099 every time a payment is made to a caregiver is unworkable.

6. We have no reason to believe the Order was entered maliciously. We have every reason to believe the judge was trying to improve the law. But, an administrative order is not the appropriate vehicle and eliminates too many thoughtful legislators and rule makers from the process.

WHEREFORE, Applicant requests the Supreme Court Local Rules Advisory Committee issue a recommendation to the Supreme Court that Administrative Order No. 2011-02, entered by the Ninth Judicial Circuit is:

1. Not an administrative order in accordance with Fla. R. Jud. Admin. 2.120(c); and is therefore, void; or, in the alternative, that it is

2. Either a Court Rule or Local Court Rule in accordance with Fla. R. Jud. Admin. 2.120(a) or (b); and as such is required to be properly reviewed prior to enactment pursuant to Fla. R. Jud. Admin. 2.125(e)(1), et. seq.

Certificate of Service

I HEREBY CERTIFY that a true and correct copy of the foregoing Application to the Supreme Court Local Rules Advisory Committee was furnished by U.S. Mail to: The Honorable Belvin Perry, Chief Judge, Orange County Circuit Court, 425 N. Orange Avenue, Orlando, Florida 32801, this 12th day of January 2012.

George Joseph Meyer, Chair
Real Property, Probate, and
Trust Law Section of the
Florida Bar
c/o Carlton Fields, P.A.
P.O. Box 3239
Tampa, Florida 33601
Florida Bar No. 570265

IN THE SUPREME COURT FOR THE STATE OF FLORIDA

IN RE: ADMINISTRATIVE ORDER NO. 2011-02 CASE NO. SC12-_____

OF THE NINTH JUDICIAL CIRCUIT

_____/

INDEX TO APPENDIX EXHIBIT

1. Administrative Order No. 2011-02, of the Ninth Judicial Circuit

2. Administrative Order No. 07-92-15, of the Ninth Judicial Circuit

ADMINISTRATIVE ORDER
NO. 2011-02

IN THE CIRCUIT COURT OF THE
NINTH JUDICIAL CIRCUIT, IN AND
FOR ORANGE COUNTY, FLORIDA

ADMINISTRATIVE ORDER GOVERNING COURT APPOINTED PROFESSIONAL GUARDIAN FEES AND GUARDIANS' ATTORNEYS' FEES FOR INVOLUNTARY GUARDIANSHIPS IN THE ORANGE COUNTY DIVISION OF THE NINTH JUDICIAL CIRCUIT WITH DIRECTIONS TO THE CLERK

WHEREAS, pursuant to Article V, section 2(d) of the Florida Constitution and section 43.26, Florida Statutes, the chief judge of each judicial circuit is charged with the authority and the power to do everything necessary to promote the prompt and efficient administration of justice; and

WHEREAS, pursuant to the chief judge's constitutional and statutory responsibility for administrative supervision of the courts within the circuit and to create and maintain an organization capable of effecting the efficient, prompt, and proper administration of justice for the citizens of this State, the chief judge is required to exercise direction, *see* Fla. R. Jud. Admin. 2.215(b)(2), (b)(3); and

WHEREAS, as Chief Judge of the Ninth Judicial Circuit, the undersigned is vested with direct authority over the payment of fees for court-appointed guardians; and

WHEREAS, there is a need to establish uniform fees and procedures for professional guardians appointed to protect the person and property of persons deemed incompetent;

NOW THEREFORE, I, Belvin Perry, Jr., in order to facilitate the efficient administration of justice, and pursuant to the authority vested in me as Chief Judge of the Ninth Judicial Circuit of Florida under Florida Rule of Judicial Administration 2.215, hereby order the following, effective **November 1, 2011,** and to continue until further order:

EXHIBIT "1"

1. Guardians who meet the qualifications defined in section 744.102(17), Florida Statutes, must currently be in compliance with the requirements of section(s) 744.1083, 744.1085 and 744.3135, Florida Statutes, and thereby will be classified, for purposes of this Order, as professional guardians.

2. All services completed from the effective date of this Order forward must comply with the billing and accounting requirements set forth herein. Services completed prior to November 1, 2011, but not yet billed may be compensated at the previous rate.

3. Professional guardians shall be compensated at a rate of $64.00 per hour, pro rata, for all reasonable and necessary work performed for all guardianships which qualify them pursuant to section 744.102(17), Florida Statutes, as professional guardians.

   Should a guardian request to exceed this hourly rate, the guardian must set this request for hearing and submit to the Court a detailed outline in writing stating the reasons for the need to exceed this hourly rate pursuant to section 744.108(2), Florida Statutes. Such requests will be evaluated on a case-by-case basis. The Court retains the discretion to adjust hourly rates higher or lower for each professional guardian (individually), as deemed appropriate by the Court.

4. Professional guardians are not permitted to bill for more than three hours of services, including signing the application and attending the hearing, before receiving Letters of Guardianship unless proof is presented to the Court of extraordinary circumstances.

5. Prior to payment, all guardians are required to apply for and obtain Court approval by petition which shall include a detailed description of the work performed and the time expended in the performance of the services. A Petition for Fees shall include the period covered and the total amount of all prior fees paid or costs awarded to the guardian in the guardianship proceeding currently before the Court. Petitions shall be reviewed without the necessity of hearing provided that there has been compliance with all current Administrative Orders. However, the guardian may request a hearing if there are any adjustments or objections to fees or costs for which approval has been requested.

6. Petitions will be reviewed by the Court in order to determine the reasonableness of the time spent to perform the work.

7. Guardians of the property will not be compensated for performing duties properly performed by the guardian of the person, and vice versa.

8. No funds shall be removed from the ward's account(s) for payment of guardian fees or attorney fees absent a court order. Only after a fee petition has been approved by the Court, may the guardian or attorney be compensated from the ward's funds. The fee petition must outline the specific services performed by the guardian or attorney, the time spent performing each service, and the total fee for the services provided. Time shall be billed in increments of 1/10th of an hour (.1 = 1-6 mins.; .2 = 7-12 mins.; .3 = 13-18

mins.; .4 = 19-24 mins.; .5 = 25-30 mins.; .6 = 31-36 mins.; .7 = 37-42 mins.; .8 = 43-48 mins.; .9 = 49-54mins.; 1.0 = 55-60 mins.)

9. When a guardian conducts one billable activity that is for the benefit of more than one ward, the guardian shall divide the billing equally between all the wards. For example, when a guardian performs shopping duties for three hours for six different wards, the billings shall reflect an accurate accounting of time spent per each ward, rather than three hours per each of the six wards. In the alternative, the guardian may split those three hours equally among the six wards, but the total billing should be for three hours.

   The guardian shall not co-mingle the assets or billing of services of the ward(s). For example, a guardian shall not submit one billing for two people, such as a husband and wife.

10. Tasks performed by employees of professional guardians on behalf of a ward must be billed at a lesser hourly rate than that of the professional guardian. Under no circumstances shall an employee or independent contractor be paid at a rate higher than $20.00 per hour for the following tasks:

    Shopping, picking up prescriptions, driving the ward(s) to an outing or activities, making deposits, bill paying (writing checks, electronic bill paying, balancing the checkbook), attending basic dental, eye and well-care appointments.

11. Guardians may submit one fee petition per ward every other month at a maximum, or one fee petition per ward every six months at a minimum.

    The first petition must be filed within six months after the Inventory has been filed. Fees will not be approved unless the Inventory has been submitted and approved.

    Guardians shall abide by the following schedule regardless of the frequency of submission. The schedule for fee petitions shall be as follows:

Guardian Last Name Beginning With	Group	Fee Petition Submission Months
A-M	1	January, March, May, July, September and November
N-Z	2	February, April, June, August, October and December

A proposed order shall be submitted with the fee petition. Only after the fee petition is reviewed and approved by the Court and an order is issued, may the guardian remove the approved funds from the ward's account.

The Court may offer proposed changes to a fee petition. If the guardian agrees with the changes, he/she shall sign the proposed fee petition and an order for the adjusted amount will issue. If the guardian does not agree with the proposed change, he/she shall schedule a hearing on the fee petition.

In no event may fee petitions be filed less than once a year.

12. The following limits shall apply, absent a showing of extraordinary circumstances:

- Bill Paying for Bills of the Ward: No more than 1 hour per month.

- Shopping: No more than 2.5 hours per month when the ward resides at home and no more than 1 hour per month when the ward resides in a facility.

- Clerical (filing/copying/faxing/reviewing or responding to mail/email, listening to or receiving voicemail, making bank deposits, etc.): No more than 1 hour per month.

- Attendance at Appointments: When it is necessary for a guardian to meet with a service provider or otherwise exercise some fiduciary duty, billing guardian time is appropriate. However, in an effort to reduce costs to the ward, the guardian should engage assistance whenever possible.

  For this reason, guardians will not be paid for attending medical appointments, funerals, family functions, etc., with the ward absent a satisfactory explanation as to why a family member, friend or paid provider was not available to perform this task. Guardian should not attend functions unless his/her attempts to enlist aid have been unsuccessful.

  Guardians, whenever possible, should attempt to enlist assistance from clerical staff, paid providers, family, friends, caretakers or companions to perform routine services that do not require the fiduciary expertise of a professional guardian. It is not in the best interest of the ward to have a guardian charge their standard fee to run to the store for basic necessities.

  Guardians should utilize companions for routine visits, such as dental cleanings and eye exams. Whenever a guardian must be present to meet with a provider or exercise some fiduciary duty, billing guardian time is appropriate.

  If a guardian can avoid lengthy periods of time where they are simply waiting in a doctor's office with the ward or attending a funeral or family function with a ward, efforts must be made to do so. Guardians are strongly encouraged to enlist help in this regard whenever possible. Recognizing that some hired companions charge a minimum amount of hours, if it would cost less to have the guardian attend such a function with the ward than it would to hire the companion for that minimum period that actually exceeds the time needed, then, in that event, the guardian should provide

a brief statement explaining that in the fee statement.

- Travel: Guardians are entitled to travel time and mileage. Mileage shall be compensated at the rate as set by section 112.061(7)(d), Florida Statutes. However, guardians must list their actual mileage per trip with each line-item entry for travel time in order for their travel time to be approved by the Court.

Time spent on each of the aforementioned activities must be broken out separately. For example, if the guardian reviewed, responded to, copied and filed a bank statement, the time must be broken into separate line items: one for reviewing and responding, another for copying and filing.

13. Time spent preparing the fee petition and/or attending hearings on same shall not be billed. Time spent reviewing and/or responding to requests/orders/instructions from the Court due to the guardian's failure to satisfactorily file documents in a timely manner or otherwise meet court-ordered or statutory obligations, and work to produce amended documents as a result of such non-compliance shall not be billed.

14. No "administrative fees" shall be billed.

15. Guardians seeking reimbursement for expenditures made on behalf of the ward must submit valid receipts along with the guardian billing.

16. Guardians billing for time spent paying caregivers must attach a valid 1099 to the guardian billing for each caregiver paid by the guardian.

17. At the Court's discretion, and after the guardian has been given an opportunity to be heard, the Court may reduce the amount of time billed (and thus the total fees due) if the Court deems the amount of time billed to be excessive.

18. At the Court's discretion and after the guardian has been given an opportunity to be heard, the Court may reduce the guardian's hourly rate for failure to meet his/her statutory or court-ordered responsibilities. Such reduction in the guardian's hourly rate may be a one-time sanction on a particular fee petition, or may be a permanent reduction in the guardian's hourly rate.

19. Pursuant to sections 43.26 and 744.368, Florida Statutes, the Clerk of Court is required to review and provide reports to the Court as to the inventory and accountings from professional guardians. Accordingly, the Clerk of Court shall maintain a report, in spreadsheet format containing the billing amounts from the fee petitions submitted by professional guardians. This report shall be generated in accordance with the schedule stated in paragraph 11 of this Order and a copy of each report shall be provided to the Court Monitor by the 15th day of each month following the month when fee petitions are submitted.

20. A copy of the spreadsheet professional guardians are to use when completing and submitting guardian billings as contemplated by this Order is attached hereto as "Exhibit A." This form shall be emailed to each professional guardian in Excel format and is always available upon request from the Guardianship Court Monitor.

    Each professional guardian shall submit a hard copy of each guardian billing spreadsheet and shall also email the spreadsheet to the Office of the Clerk of Court at the email address as provided by the Clerk.

21. In all fiduciary relationships the professional guardian shall not oppose or interfere with efforts to terminate the professional guardians fiduciary relationship with a ward for any reason other than as necessary or appropriate to protect or promote the best interest of the ward as may be determined by the Court.

22. This Order does not apply to veterans' guardianships pursuant to sections 744.602 through 744.653, Florida Statutes, or voluntary guardianships pursuant to section 744.341, Florida Statutes.

Administrative Order No. 07-92-15 is vacated and set aside and has been incorporated and/or amended herein.

DONE AND ORDERED at Orlando, Florida, this 13th day of October, 2011.

/s/
Belvin Perry, Jr.
Chief Judge

Copies provided to:

Clerk of Court, Orange County
Clerk of Court, Osceola County
General E-Mail Distribution List
http://www.ninthcircuit.org

EXHIBIT A

Guardian:

_____

_____

_____

Invoice Date: _____

Hourly Rate: _____

Invoice Total: _____

Activity Date	Activity Code	Brief Description of Activity	On behalf of	Hours

Activity Codes:

ANNACCT	Preparing annual accounting or amendments
ANNPLAN	Preparing annual plan or amendments
ATNDDEPO	Attending deposition
ATNDHEAR	Attend hearing other than hearing for guardian's fee - please be specific
ATTENDCL	Attending closing for sale of real estate
ATTYCON	Consulting with attorney (guardian's attorney)
BANKING	Visiting banks, credit union
BILLPAY	Bill paying, including reviewing bill and writing checks
BOOKKEEP	Balancing checkbook or other account, review bank statement
CALLLAWENF	Calls to law enforcement
CALLNURS	Calls to or from nursing home
CAREPLAN	Care plan meeting
CHANGAD	File ward's change of address with USPS
CLERICAL	Filing, copying, faxing, scanning, checking mail, etc.
COURTDOC	Review court documents
CPA	Meeting with CPA for guardianship taxes, 1099 preparation
CTMONITOR	Speaking with court monitor
EMAILATTY	Emailing attorney (guardian's)
EMAILFAMILY	Emailing family
EMAILPHY	Emailing physician, psychiatrist other medical personnel, facilities
FIBENEFIT	Filing for benefits other than Medicaid, Social Security and VA
FIBENEFITSVA	Filing for Veterans Administration Benefits
FILINCTAX	Preparing ward's income tax including assembling information
HIREATTY	Hiring attorney to litigate on ward's behalf
HIRECONT	Hiring contractors for property improvement, maintenance
INITPLAN	Preparing initial plan or amendments
LETTERFAMILY	Letters to family members

MCAREGIVER	Meeting with or hiring caregiver
MEDAPPT	Medical appointments
MEDICAID	Medicaid planning and filing
MEETREALTOR	Meeting with real estate agents
MOVEBEL	Moving the ward's belongings
MOVEWRD	Moving the ward
OBTAPPR	Obtaining appraisal of real or personal property
OBTPERMI	Obtaining permit for property improvement
OTHRERACTIVITY	PLEASE GIVE SPECIFIC DETAILED INFORMATION
PHARMACY	Picking up prescription
PHONEATTY	Telephone call to attorney
PHONEFAM	Telephone call to family
PHYCON	Consulting physician, dentist, psychiatrist or other doctor
PRE1099	Preparing 1099 for caregivers
PURCHINS	Purchase of insurance--renters insurance, homeowners, etc
PURFUNER	Purchasing funeral plans
REPPAYEE	Preparation of rep-payee form for the Social Security Administration
REQDCFOM	Requesting DCF or Ombudsman records
REQFINAN	Requesting financial records
REQRECO	Requesting medical records
SAFEDEPOSIT	Inventory of safe deposit box
SELLPROPERTY	Sale of property including real estate, car or other personal property--not to include closing
SHOPPING	Shopping
SOCIALAPPT	Social appointments
SSABENEFITS	Filing for Social Security Benefits or rep-payee; please give office address
TELCALL	Telephone calls to/from DCF, Ombudsman
TRANSAP	Transporting ward for haircuts, hairdresser, shopping
TRANSWA	Transporting ward to physician or psychiatrist or other doctor
TRAVEL	Travel time
VERINVEN	Preparing inventory or amendments including compiling list of household goods, furnishings
VISITSSA	Visiting the Social Security Administration Office, please include the address
VISITWARD	Visits with ward

ADMINISTRATIVE ORDER
NO. 07-92-15

IN THE CIRCUIT COURT OF FLORIDA, NINTH JUDICIAL CIRCUIT, ORANGE AND OSCEOLA COUNTIES

ADMINISTRATIVE ORDER ON COMPENSATION OF GUARDIANS AND PROFESSIONALS PROVIDING SERVICES TO THE GUARDIAN, CIRCUIT COURT--PROBATE DIVISION

Whereas, guardians are authorized to employ attorneys and other professionals to assist them in performing their services, and are authorized to pay administration expenses pursuant to Florida Statute §744.444; and

Whereas, the determination of reasonable fees paid to guardians and professionals serving the guardianship is within the sound discretion of this court; and

Whereas, establishment of a procedure for payment and review of payment of the compensation of guardians and others providing services to the guardianship will aid the administration of justice, assist this court and the clerk of court in performing their respective review functions and will provide necessary information to guardians to assist them in carrying out their duties while allowing an equitable manner for them to be paid for their services;

Now, therefore, I, FREDERICK PFEIFFER, pursuant to the authority vested in me as Chief Judge of the Ninth Judicial Circuit, do hereby order the following administrative procedures be implemented to govern the determination and payment of fees for guardians and other professionals providing services in guardianship proceedings in the Ninth Judicial Circuit.

EXHIBIT "2"

1. Guardians and the attorneys, accountants, appraisers, investment advisors, and others providing professional services to the guardian shall be entitled to reasonable fees for such services. In the case of guardians and attorneys, reasonable fees shall be determined by considering the criteria specified in Florida Statute §744.108. Guardians are authorized to pay for such services on behalf of the guardianship as they are performed and billed and may pay guardian's fees on such periodic basis as the guardian shall determine, in keeping with sound business practices and the best interest of the ward; provided, however, that the guardian shall pay no more than reasonable fees for work done by the guardian or other professionals performing services to the guardianship.

2. All fees paid for any of the aforesaid services shall be accounted for in detail on the guardian's annual report with a description of work performed. In addition to identifying the recipient and amount of any such payment, the guardian shall include, as to each item of payment, a statement showing the specific manner of determining the amount of fees paid. For instance, if payment is made for legal services, the guardian shall specify the number of hours of time expended by the attorney and/or legal assistant working for such attorney, the respective hourly rate or rates and the total amount of fees paid. If a fee is determined on the basis of a percentage of receipts or disbursements, the guardian shall specify the manner of such computation.

3. Upon review of an annual accounting, if the court finds it appropriate to obtain further information to substantiate the amount of fees paid, the court may require the guardian and other professionals whose fees are under scrutiny, to provide such additional information as the court may require, including itemized time and work records.

4. If a timely objection to any such fees is filed, or at any time on the court's own motion, the court may require that a hearing, be held to determine the amount of reasonable fees. At such hearing the burden shall be on the guardian and the professional whose fees are under consideration to establish the reasonableness of such compensation. In the event fees have already been paid and the court finds that reasonable compensation is less than the amount paid, the court may require refund by the recipient to the guardianship estate or may require that any excess amount shall be credited toward future services to the guardianship.

5. The court may, on a case by case basis, determine that the amount of compensation to be paid to the guardian, attorney for the guardianship and other professionals providing services to the ward be established by court order, prior to payment therefor.

6. The guardian and the attorney for the guardianship shall maintain all records related to time expended and services rendered to the guardianship for a period of three years after the end of the accounting period during which compensation for such services was paid.

7. This order shall take effect January 1, 1993.

DONE AND ORDERED in Orlando, Florida this 17th day of December, 1992.

Frederick Pfeiffer

FREDERICK PFEIFFER
Chief Judge

Copies to:

All Circuit & County Judges, Ninth Judicial Circuit
State Attorney's Office, Ninth Judicial Circuit
Public Defender's Office, Ninth Judicial Circuit
General Counsel, Orange County Sheriff's Office
Orange County Corrections
Orange County Bar Association
Bar Briefs, Orange County Bar Association
Legal Department, Orange County
Paul C. Perkins Bar Association
Hispanic Bar Association of Orange County
Clerk of Courts, Orange County
Orange County Law Library
Clerk of Courts, Osceola County
The Osceola County Bar Association
The Osceola County Law Library
The Osceola County Sheriff's Office
The Legal Review

Administrative Order 07-92-15

CLERK CIRCUIT COURT

STATE OF FLORIDA, COUNTY OF ORANGE
I HEREBY CERTIFY
That the above and foregoing is a true copy of the original filed in this office.
FRAN CARLTON, Clerk Circuit Court
Dated 12/18/92 By [illegible] D.C.

MEMORANDUM

To: **File**

From: **Fletch Belcher**

Subect: **Types of Children's Legal Services Funded by The Florida Bar Foundation's Children's Legal Services Grant Program**

Date: **February 13, 2012**

Based upon information received from The Florida Bar Foundation and communications with its Executive Director, it is likely that the charitable gift that the RPPTL Section is being requested to make would fund one or more of the following types of legal services for children of financially eligible clients:

1. Services to secure special education and other educational services for children.

2. Services to secure removal of children from foster care or detention for placement in the parental home, an adopted home, or a relative's home.

3. Services to secure improved health care and mental health services for children within and without the foster care system.

4. Services to secure "Road to Independence" benefits (educational and vocational stipends) or other benefits for current or former foster care children up to 21 or 23 years of age.

5. Services to secure disability benefits for children.

6. Services to secure state-held trust funds for children.

7. Services to secure removal of children from immigration detention to family or other placement.

8. Services to secure legal immigration status for children.

9. Services to secure education or other benefits or services for children as a result of change in immigration status.

Although the overwhelming majority of work done with the Foundation's funding involves individual case representation, in some instances the grant recipients engage in policy, administrative and legislative advocacy (lobbying) on specific issues directly affecting children. However, gifts to the Foundation may be restricted to grantees which do not lobby.

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

RPPTL CHILDREN'S LEGAL SERVICES FELLOWSHIP

PROPOSAL FROM
THE FLORIDA BAR FOUNDATION

JANUARY 19, 2012

Proposal Summary

This proposal requests funding of $75,000 to establish The Real Property, Probate and Trust Law Section *Children's Legal Services Fellowship*. The funding would assure continuation of a full-time legal aid attorney dedicated to children's legal services at a legal aid program receiving funding under the Foundation's Children's Legal Services Grant Program. The Fellowship would last for one year and could be extended for additional one-year periods.

If the Real Property, Probate and Trust Law Section approves this funding request by March 5, 2012, the Fellowship would begin with the annual Foundation Children's Legal Services grants to be awarded by the Foundation on March 16, 2012. If after March 5, 2012, the annual Fellowship would begin in March 2013.

This proposal also requests that the Section temporarily waive sponsor fees to enable the Foundation to continue to exhibit at its Annual Convention and Legislative Conference.

Purpose of *Children's Legal Services Fellowships*

The Foundation is requesting a $75,000 charitable contribution to support a *Children's Legal Services Fellowship* to offset a portion of the 47% funding cut the Foundation will make in its Children's Legal Services Grant Program over the next three years. The funding cut results from an 88% drop in IOTA revenue since 2008 caused by the severe decline in bank interest rates since the recession. Once IOTA revenue increases, the Foundation will gradually increase funding for its Children's Legal Services Grant Program and does not expect to request additional contributions.

Section funding of a *Children's Legal Services Fellowship* will assure continuation, for a 12-month period, of a full-time legal aid attorney dedicated to children's legal services at a legal aid program receiving funding under the Foundation's Children's Legal Services Grant Program. The *Fellowship* can be continued for additional 12-month periods with additional $75,000 charitable contributions.

The Florida Bar Foundation's Children's Legal Services Grant Program

The mission of the Foundation's Children's Legal Services Grant Program is to provide legal assistance to needy children in critical areas which affect their safety, well being and future development. This mission is promoted through an annual competitive grant program centering on, but not limited to, legal assistance to foster care children, children seeking and in need of health benefits and children needing special educational assistance. In addition to funds from Florida's Interest on Trust Accounts program, this Grant Program is supported by annual contributions from Florida lawyers and other contributions to the Foundation.

The Children's Legal Services Grant Program supports children's legal services attorneys throughout Florida, both statewide and local. The funding criteria established by the Foundation for Children's Legal Services grants are designed to encourage local matching funds and collaboration with other agencies providing services to children and among Foundation children's legal services grantees.

Selection of the Children's Legal Services Fellow

The recipient of a Real Property, Probate and Trust Law Section *Children's Legal Services Fellowship* would be selected by the Foundation. In selecting the *Children's Legal Services Fellowship* recipient, the Foundation will consider a number of factors, including the ability of legal aid programs to maintain a full-time children's legal services attorney by offsetting Foundation funding cuts with other resources, as well as the number of children's legal services attorneys serving specific geographic areas.

Request for Waiver of Sponsor Fees

The Foundation has sponsored Real Property, Probate and Trust Law Conferences since 2009-10 ($32,345.00). With the reduction in IOTA revenue, however, the Foundation reluctantly suspended its sponsorships in 2011-12. That suspension will necessarily continue until IOTA revenue rises which is not expected until at least mid-2013.

It is important to the long-term fundraising success of the Foundation to maintain a presence within the Section. To further that important goal, the Foundation respectfully requests that the Section waive sponsor fees for its Annual Convention and Legislative Conference.

Conclusion

Funding by the Real Property, Probate and Trust Law Section of a *Children's Legal Services Fellowship* would ensure continuation of a full-time children's legal services attorney that would not otherwise be possible given cuts the Foundation must make in

funding for its Children's Legal Services Grant Program. Through its *Fellowship*, the Section would support legal assistance to needy children in critical areas which affect their safety, well being and future development.

Favorable consideration by the Section to waiving Annual Convention and Legislative Conference sponsor fees will assist the Foundation to maintain a presence within the Section and further its long-term planned giving program goals.

There is a strong link between leadership of the Real Property, Probate and Trust Law Section and the Foundation. Past Section Chair Louie Adcock, Section Treasurer Drew O'Malley and Section Pro Bono Committee Co-Chair Adele Stone all have served as presidents of the Foundation. In addition, Section Executive Council member Mike Stafford has served on the Foundation's board of directors. The Foundation hopes that these strong ties will increase the Section's confidence in the Foundation and its favorable action on this Proposal.

Recognition of RPPTL Section

If the Real Property, Probate and Trust Law Section funds a *Children's Legal Services Attorney Fellowship*, the Foundation, working with the Section, will issue a statewide news release, have an article published in The Florida Bar News, prominently list the *Fellowship* in its annual report and on its website. Additional recognition activities can be undertaken.

THE FLORIDA BAR FOUNDATION
LEGAL ASSISTANCE FOR THE POOR

GRANT PROGRAM DESCRIPTION
Children's Legal Services

I. Children's Legal Services Grants for Legal Assistance for the Poor (LAP)

The mission of the FBF's Children's Legal Services Grant Program is to provide legal assistance to needy children in critical areas which affect their safety, well being and future development. This mission is promoted through an annual competitive grant program centering on, but not limited to, legal assistance to foster care children, children seeking and in need of health benefits and children needing special educational assistance. In addition to funds from Florida's Interest on Trust Accounts program, this grant program is supported by annual contributions from Florida lawyers and other contributions to the FBF. Such contributions add significantly to the IOTA resources committed to this grant program.

The Children's Legal Services grant program provides grants to children's legal services programs throughout Florida, both statewide and local. Through this grant program the FBF also seeks to engage private volunteer attorneys in the provision of legal assistance to needy children by the funding of pro bono programs. The funding criteria established by the FBF for these grants are designed to encourage local matching funds and collaboration with other agencies providing services to children and among children's legal services grantees.

II. Eligible Applicants

A. An applicant must use FBF grant funds for the provision of free legal assistance to financially eligible clients. Financially eligible clients are defined as:

1. A financially eligible client is one whose income is no higher than (a) 125% of the poverty level issued by the U.S. Department of Health and Human Services; or (b) 200% of the poverty level issued by the U.S. Department of Health and Human Services, provided the applicant for legal assistance has other extenuating circumstances (such as significant unreimbursed medical expenses or child care expense in connection with employment) which clearly render such applicant unable to hire private counsel.

2. A client whose available assets do not exceed reasonable asset guidelines as established by the applicant=s governing board,

which asset guidelines shall consider the readily convertibility to cash and current actual availability of assets and the economy of service area to ensure the availability of legal assistance to those in the greatest economic and legal need.

3. A client group, corporation or association (a) which is primarily composed of persons financially eligible under the guidelines above; or (b) who has as a principal activity the delivery of services to those persons in the community who would be financially eligible under the guidelines above and legal assistance sought relates to such activity. Under either (a) or (b) of this paragraph, the applicant for legal assistance must provide information showing that it lacks, and has no practical means of obtaining funds to enable it to obtain private counsel in the matter for which legal assistance is sought.

B. An applicant must be staffed by, at least, one full-time attorney or have access to one attorney on a full-time basis or equivalent, licensed to practice in the State of Florida

C. An applicant must be exempt from tax and qualified to receive charitable donations within the meaning of the U.S. Internal Revenue Code.

III. Specific Funding Criteria

1. The FBF seeks applications proposing children's legal advocacy on statewide and local levels. The FBF encourages the utilization of all legal tools on behalf of children, including litigation (individual and impact), legislative and administrative advocacy, policy advocacy, and community education.

2. The FBF strongly encourages the utilization of multidisciplinary strategies by potential applicants but, due to the limited funds available, will not be providing funds to non-legal assistance providers.

3. While the FBF seeks applications involving a wide variety of children's legal issues, including but not limited to representation of children in foster care, educational issues (particularly special education and disciplinary issues), health access and services issues, protection from abuse and neglect, representation of children in dependency matters, representation of children in juvenile justice matters but not the direct representation of children in delinquency charges and appeals, we strongly encourage each potential applicant to focus their efforts in one or two areas.

4. The FBF strongly encourages potential applicants to incorporate in their applications the development and utilization of pro bono resources to

strategically expand the impact of contemplated staff services in circumstances in which utilization of pro bono resources would be feasible and a useful complement to staff services.

5. The FBF seeks the matching of other funds with its funds to expand the representation of children and strongly encourages potential applicants to seek matching grants from other sources. Further, the FBF encourages any potential applicant which receives an IOTA general support grant to support its proposed children's advocacy project by allocating a part of such grant to such project.

6. The submission of applications from collaborative agencies is encouraged, provided the proposed collaboration is motivated by the desire of the agencies to work together and the collaboration is programmatically desirable.

7. Potential applicants should indicate their ability and willingness to participate actively in a contemplated information-sharing and communication system among programs engaged in children's advocacy in Florida.

IV. General Funding Criteria and Policies

In addition to evaluating all of the information provided by the grant application, the following specific funding criteria and policies will be applied and considered in evaluating applications and making funding decisions:
A. Multiple Funding Sources. Absent special circumstance, priority will be given to requests from applicants having multiple funding sources.

B. Direct Representation of Clients and Client Groups. Priority will be given to applicants which request FBF funds for the direct representation of clients or client groups. Community legal education and community economic development are regarded as direct representation of clients and client groups.

C. Full Range of Legal Strategies. The FBF supports and encourages the utilization by legal assistance providers of a full range of legal strategies, including legislative, administrative and policy advocacy, litigation (including class actions), community economic development and community legal education to meet client needs.

D. Full Case Representation. The FBF seeks to ensure that legal assistance providers recognize the need for aggressive, full representation of clients and that legal assistance providers achieve appropriate balance in the nature of services (i.e., counsel and advice, referral, negotiation, court and administrative agency representation, etc.) they provide clients.

E. Service Techniques and Studies. The FBF encourages and will seek to promote the development of innovative client service techniques and the study and evaluation of the effectiveness and efficiency of client service techniques.

F. Representation of Special Needs Clients. The FBF encourages and supports efforts of current legal assistance providers to address the legal needs of special needs client groups through the provision of a full range of legal services, including systemic strategies, and will seek to address such needs through special grants and projects when such needs cannot be addressed by or would overburden existing providers.

G. Statewide Resource Centers. The FBF recognizes that (1) Florida Legal Services should be utilized as the statewide resource center for legal assistance providers and clients; (2) state support services and activities should be strengthened and supported; and (3) separate resource center capacity should not be established unless specific justification exists.

H. Inter-Program Cooperation and Joint Program Activities. The FBF supports and encourages legal assistance providers to cooperate in the delivery of legal assistance through utilization of services and programs of Florida Legal Services and, in areas with multiple providers, to undertake cooperative efforts, joint venturing and consolidation, when appropriate.

I. Staff Programs, Pro Bono and Existing Providers. The FBF recognizes that: (1) staffed legal assistance providers are the most effective and efficient means by which to deliver high quality legal assistance to the poor and, as such, should be given the highest funding priority; (2) the pro bono legal services programs are an important complement to staffed programs; and (3) expansion of current qualified providers is preferred over the creation and establishment of additional separate programs unless a separate program can address client needs more effectively and efficiently.

J. Staff Attorney Recruitment, Compensation and Development. The FBF encourages and will seek to support efforts by legal assistance providers to institute and maintain competitive public interest staff attorney salaries, the recruitment of highly qualified attorneys, specifically including minority attorneys, and the provision of professional development opportunities for staff.

K. Compensation of Private Counsel. FBF funds will be awarded for the compensation of private counsel only when staff attorney or Pro Bono Public programs are unavailable, and even then, only in extraordinary circumstances.

V. Processing of Grant Applications

The FBF will receive and review all applications. FBF staff will submit funding

recommendations, grant application summaries and other information to the Legal Assistance for the Poor/Law Student Assistance Grant Committee of the FBF for its review. The committee will make funding recommendations for submission to the Board of Directors, which makes final decisions on grant awards. The application review and decision-making process is more fully detailed in the FBF's grant making policy.

VI. Grant Application Package

The Florida Bar Foundation's Legal Assistance for the Poor Children's Legal Services Grant Application consists of:

- Cover Memorandum from the FBF Director of Legal Assistance for the Poor/Law Student Assistance Grant Programs
- Description of Grant Program
- Application Forms

Applicants which are not current grantees of the FBF must contact Andrea Horne at 407-843-0045, 800-541-2195 or via e-mail at ahorne@flabarfndn.org for information on submitting a concept paper prior to submitting an application.

TALKING POINTS ON FLORIDA BAR FOUNDATION FUNDING
November 2011

- **The Florida Bar Foundation has been providing roughly a third of the total funding to legal aid organizations serving all of the state's 67 counties.**

- **The Foundation will have to cut this funding 53% between 2011 and 2014 without additional resources.**

- **The cuts result from an 88% drop in IOTA revenue since 2008 caused by the drop in the interest rates banks pay depositors since the recession.**

- **Through use of its reserve funds, the Foundation was able to maintain stable funding for three years, but reserves, which were not planned for this deep and long a recession, will run out in 2012.**

- **While the legal aid funding gap is expected to be temporary, it will require layoffs of an estimated 27% of Florida's 410 legal aid attorneys at work in 2011. This will severely weaken individual legal aid organizations across Florida and will dismantle the safety net for tens of thousands of low-income families.**

- **At the same time, federal funding for Florida's seven Legal Services Corporation grantees is expected to be cut by just under 15% in 2012 and likely will not rise until the economy recovers.**

- **Florida TaxWatch found that civil legal assistance generated $4.78 of economic impact for ever $1 spent on legal aid by federal, state and local governments, The Florida Bar Foundation, grants from community foundations and charitable donations. It also created more than 2,000 jobs outside of legal aid.**

- **A healthy legal aid infrastructure is therefore not only critical to Florida's low-income populations; it is also a stabilizing force in Florida communities and for the state's economy.**

THE FLORIDA BAR
REAL PROPERTY, PROBATE AND TRUST LAW SECTION

RPPTL CHILDREN'S LEGAL SERVICES FELLOWSHIP

PROPOSAL FROM
THE FLORIDA BAR FOUNDATION

JANUARY 19, 2012

Proposal Summary

This proposal requests funding of $75,000 to establish The Real Property, Probate and Trust Law Section Children's Legal Services Fellowship. The funding would assure continuation of a full-time legal aid attorney dedicated to children's legal services at a legal aid program receiving funding under the Foundation's Children's Legal Services Grant Program. The Fellowship would last for one year and could be extended for additional one-year periods.

If the Real Property, Probate and Trust Law Section approves this funding request by March 5, 2012, the Fellowship would begin with the annual Foundation Children's Legal Services grants to be awarded by the Foundation on March 16, 2012. If after March 5, 2012, the annual Fellowship would begin in March 2013.

This proposal also requests that the Section temporarily waive sponsor fees to enable the Foundation to continue to exhibit at its Annual Convention and Legislative Conference.

Purpose of Children's Legal Services Fellowships

The Foundation is requesting a $75,000 charitable contribution to support a Children's Legal Services Fellowship to offset a portion of the 47% funding cut the Foundation will make in its Children's Legal Services Grant Program over the next three years. The funding cut results from an 88% drop in IOTA revenue since 2008 caused by the severe decline in bank interest rates since the recession. Once IOTA revenue increases, the Foundation will gradually increase funding for its Children's Legal Services Grant Program and does not expect to request additional contributions.

Section funding of a Children's Legal Services Fellowship will assure continuation, for a 12-month period, of a full-time legal aid attorney dedicated to children's legal services at a legal aid program receiving funding under the Foundation's Children's Legal Services Grant Program. The Fellowship can be continued for additional 12-month periods with additional $75,000 charitable contributions.

The Florida Bar Foundation's Children's Legal Services Grant Program

The mission of the Foundation's Children's Legal Services Grant Program is to provide legal assistance to needy children in critical areas which affect their safety, well being and future development. This mission is promoted through an annual competitive grant program centering on, but not limited to, legal assistance to foster care children, children seeking and in need of health benefits and children needing special educational assistance. In addition to funds from Florida's Interest on Trust Accounts program, this Grant Program is supported by annual contributions from Florida lawyers and other contributions to the Foundation.

The Children's Legal Services Grant Program supports children's legal services attorneys throughout Florida, both statewide and local. The funding criteria established by the Foundation for Children's Legal Services grants are designed to encourage local matching funds and collaboration with other agencies providing services to children and among Foundation children's legal services grantees.

Selection of the Children's Legal Services Fellow

The recipient of a Real Property, Probate and Trust Law Section Children's Legal Services Fellowship would be selected by the Foundation. In selecting the Children's Legal Services Fellowship recipient, the Foundation will consider a number of factors, including the ability of legal aid programs to maintain a full-time children's legal services attorney by offsetting Foundation funding cuts with other resources, as well as the number of children's legal services attorneys serving specific geographic areas.

Reguest for Waiver of Sponsor Fees

The Foundation has sponsored Real Property, Probate and Trust Law Conferences since 2009-10 ($32,345.00). With the reduction in IOTA revenue, however, the Foundation reluctantly suspended its sponsorships in 2011-12. That suspension will necessarily continue until IOTA revenue rises which is not expected until at least mid-2013.

It is important to the long-term fundraising success of the Foundation to maintain a presence within the Section. To further that important goal, the Foundation respectfully requests that the Section waive sponsor fees for its Annual Convention and Legislative Conference.

Conclusion

Funding by the Real Property, Probate and Trust Law Section of a Children's Legal Services Fellowship would ensure continuation of a full-time children's legal services

attorney that would not otherwise be possible given cuts the Foundation must make in funding for its Children's Legal Services Grant Program. Through its Fellowship, the Section would support legal assistance to needy children in critical areas which affect their safety, well being and future development.

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