



***EXECUTIVE COUNCIL MEETING***  
**AGENDA**

**The Fairmont Copley Plaza  
Boston, MA**

**Saturday, October 14, 2017  
8:00 a.m.**

**BRING THIS AGENDA TO THE MEETING**

Real Property, Probate and Trust Law Section  
Executive Council Meeting  
The Fairmont Copley Plaza  
Boston, MA  
October 14, 2017

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**Agenda**

**Note: Agenda Items May Be Considered on a Random Basis**

I. **Presiding** — *Andrew M. O'Malley, Chair*

II. **Attendance** — *Lawrence J. Miller, Secretary*

III. **Minutes of Previous Meeting** — *Lawrence J. Miller, Secretary*

Motion to approve the minutes of July meeting of Executive Council held at The Breakers, Palm Beach **pp. 9-38**

IV. **Chair's Report** — *Andrew M. O'Malley, Chair p. 39*

1. Recognition of Guests

2. Milestones

3. Constitution Revision Commission – Michael Gelfand, Liaison

4. Report of Interim Action of the Executive Committee.

A. Approval of request by Florida Supreme Court Guardianship Task Force to reimburse up to \$7500 in travel expenses incurred by task force members attending public hearing.

V. **Liaison with Board of Governors Report** — *John Stewart*

VI. **Chair-Elect's Report** — *Debra L. Boje, Chair-Elect p. 40*

VII. **Treasurer's Report** — *Robert S. Swaine*

Statement of Current Financial Conditions. **p. 41**

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

IX. **CLE Seminar Coordination Report** — *Steven H. Mezer (Real Property) and Shane Kelley (Probate & Trust), Co-Chairs p.42*

X. **General Standing Division** — *Debra L. Boje, General Standing Division Director and Chair-Elect*

## Information Items:

1. **Amicus Coordination** – Kenneth Bell, Gerald Cope, Robert Goldman and John Little, Co-Chairs
  - A. Report on *Rigby v. Bank of New York Mellon* amicus filing. [GS1], **pp.43-54**
  - B. Report on *Smith v. Smith* amicus filing [GS2], **pp. 55 - 85**
2. **Legislation** – Cary Wright and Sarah Butters, Co-Chairs.  
Report on upcoming 2018 Legislative Session.
3. **Liaison with Clerks of Court** – Laird Lile, Liaison  
Update on Clerks' activities.

**XI. [Real Property Law Division Report](#)** — *Robert S. Freedman, Division Director*

**XI. [Probate and Trust Law Division Report](#)** – *William T. Hennessey, Director*

**XIII. [Real Property Law Division Reports](#)** — *Robert S. Freedman, Director*

1. **Attorney-Loan Officer Conference** – Robert G. Stern, Chair; Kristopher E. Fernandez and Wilhelmina F. Kightlinger, Co-Vice Chairs
2. **Commercial Real Estate** – Adele Ilene Stone, Chair; E. Burt Bruton, R. James Robbins, Jr. and Martin D. Schwartz, Co-Vice Chairs
3. **Community Association Law Certification Review Course** – Richard D. DeBoest, II and Sandra Krumbein, Co-Chairs
4. **Condominium and Planned Development** – William P. Sklar, Chair; Kenneth S. Direktor and Alexander B. Dobrev, Co-Vice Chairs
5. **Construction Law** – Scott P. Pence, Chair; Reese J. Henderson, Jr. and Neal A. Sivyer, Co-Vice Chairs
6. **Construction Law Certification Review Course** – Melinda S. Gentile and Deborah B. Mastin, Co-Chairs; Elizabeth B. Ferguson and Gregg E. Hutt, Co-Vice Chairs

7. **Construction Law Institute** – Sanjay Kurian, Chair; Diane S. Perera, Jason J. Quintero and Brian R. Rendzio, Co-Vice Chairs.
8. **Development & Land Use Planning** – Vinette D. Godelia and Julia L. Jennison, Co-Chairs; Colleen C. Sachs, Vice Chair
9. **Insurance & Surety** – Scott P. Pence and W. Cary Wright, Co-Chairs; Frederick R. Dudley and Michael G. Meyer, Co-Vice Chairs
10. **Liaisons with FLTA** – Alan K. McCall and Melissa Jay Murphy, Co-Chairs; James C. Russick, Vice Chair
11. **Real Estate Certification Review Course** – Manuel Farach, Chair; Lynwood F. Arnold, Jr., Martin S. Awerbach and Brian W. Hoffman, Co-Vice Chairs
12. **Real Estate Leasing** – Richard D. Eckhard, Chair; Brenda B. Ezell and Christopher A. Sadjera, Co-Vice Chairs
13. **Real Estate Structures and Taxation** – Michael A. Bedke, Chair; Deborah Boyd, Lloyd Granet and Cristin C. Keane, Co-Vice Chairs
14. **Real Property Finance & Lending** – David R. Brittain, Chair; Bridget Friedman, Richard S. McIver and Robert G. Stern, Co-Vice Chairs
15. **Real Property Litigation** – Marty J. Solomon and Susan K. Spurgeon, Co-Chairs; Manuel Farach, Michael V. Hargett and Brian D. Leebrick, Co-Vice Chairs
16. **Real Property Problems Study** – Arthur J. Menor, Chair; Mark A. Brown, Stacy O. Kalmanson, Patricia J. Hancock, Robert S. Swaine and Lee A. Weintraub, Co-Vice Chairs
17. **Residential Real Estate and Industry Liaison** – Salome J. Zikakas, Chair; Louis E. “Trey” Goldman, James Marx and Nicole M. Villarroel, Co-Vice Chairs
18. **Title Insurance and Title Insurance Liaison** – Raul P. Ballaga and Brian W. Hoffman, Co-Chairs; Alan B. Fields, Cynthia A. Riddell and Melissa N. VanSickle, Co-Vice Chairs
19. **Title Issues and Standards** – Christopher W. Smart, Chair; Robert M. Graham, Brian W. Hoffman, Melissa Sloan Scaletta and Karla J. Staker, Co-Vice Chairs

**XIV. Probate and Trust Law Division Committee Reports** — *William T. Hennessey, III*  
*Director*

1. **Ad Hoc Guardianship Law Revision Committee** – David Clark Brennan, Chair; Sancha Brennan Whynot, Tattiana Patricia Brenes-Stahl, Nicklaus Joseph Curley and Stacey Beth Rubel, Co-Vice Chairs
2. **Ad Hoc Study Committee on Estate Planning Conflict of Interest** – William Thomas Hennessey III, Chair; Paul Edward Roman, Vice Chair
3. **Ad Hoc Study Committee on Due Process, Jurisdiction & Service of Process** – Barry F. Spivey, Chair; Sean William Kelley and Christopher Quinn Wintter, Co-Vice Chairs
4. **Asset Protection** – George Daniel Karibjanian, Chair; Rick Roy Gans and Brian Michael Malec, Co-Vice-Chairs
5. **Attorney/Trust Officer Liaison Conference** – Laura Kristin Sundberg, Chair; Stacey L. Cole, Co-Vice Chair (Corporate Fiduciary), Tattiana Patricia Brenes-Stahl, Patrick Christopher Emans, Tae K. Bronner, and Gail G. Fagan, Co-Vice Chair
6. **Elective Share Review Committee** – Lauren Young Detzel and Charles Ian Nash, Co-Chairs; Jenna Rubin, Vice-Chair
7. **Estate and Trust Tax Planning** – David James Akins, Chair; Tasha K. Pepper-Dickinson and Robert Logan Lancaster, Co-Vice Chairs
8. **Guardianship, Power of Attorney and Advanced Directives** – Nicklaus Joseph Curley, Chair; Brandon D. Bellew and Darby Jones, Co-Vice Chairs
9. **IRA, Insurance and Employee Benefits** – L. Howard Payne and Richard Amari, Co-Chairs; Charles W. Callahan, III and Alfred J. Stashis, Co-Vice Chairs
10. **Liaisons with ACTEC** – Elaine M. Bucher, Michael David Simon, Bruce Michael Stone, and Diana S.C. Zeydel
11. **Liaisons with Elder Law Section** – Charles F. Robinson and Marjorie Ellen Wolasky
12. **Liaisons with Tax Section** – Lauren Young Detzel, Cristin Keane, William Roy Lane, Jr., Brian Curtis Sparks and Donald Robert Tescher
13. **Principal and Income** – Edward F. Koren and Pamela O. Price, Co-Chairs, Joloyon D. Acosta and Keith Braun, Vice Chair

14. **Probate and Trust Litigation** – Jon Scuderi, Chair; John Richard Caskey, Robert Lee McElroy, IV and James Raymond George Co-Vice Chairs
15. **Probate Law and Procedure** – John Christopher Moran, Chair; Amy Beller, Michael Travis Hayes and Matthew Henry Triggs, Co-Vice Chairs
16. **Trust Law** – Angela McClendon Adams, Chair; Tami Foley Conetta, Jack A. Falk and Mary E. Karr, Co-Vice Chairs
17. **Wills, Trusts and Estates Certification Review Course** – Linda S. Griffin, Chair; Jeffrey Goethe, Rachel Lunsford, and Jerome L. Wolf, Co-Vice Chairs

**XV. General Standing Committee Reports** — *Debra L. Boje, General Standing Division Director and Chair-Elect*

1. **Florida Bar Leadership Academy** – Brian Sparks and Kris Fernandez, Co-Chairs
2. **Amicus Coordination** – Robert W. Goldman, John W. Little, III, Kenneth B. Bell and Gerald B. Cope, Jr., Co-Chairs
3. **Budget** – Tae Kelley Bronner, Chair; Linda Griffin, Robert Swaine, Robert S. Freedman and Pamela O. Price, Co-Vice Chairs
4. **CLE Seminar Coordination** – Steven Mezer and Shane Kelley, Co-Chairs; Thomas Karr, Silvia Rojas, Alex Hamrick, Theo Kypreos, Hardy L. Roberts, III, (General E-CLE) and Paul Roman (Ethics), Yoshimi O. Smith, Co-Vice Chairs
5. **Convention Coordination** – Dresden Brunner, Chair; Sancha Brennan Whynot and Jon Scuderi, Co-Vice Chairs
6. **Fellows** – Benjamin Diamond, Chair; Joshua Rosenberg, John Costello and Jennifer Bloodworth, Co-Vice Chairs
7. **Florida Electronic Filing & Service** – Rohan Kelley, Chair
8. **Homestead Issues Study** – Jeffrey S. Goethe (Probate & Trust) and J. Michael Swaine (Real Property), Co-Chairs; Melissa Murphy and Charles Nash, Co-Vice Chairs
9. **Legislation** – Sarah Butters (Probate & Trust) and Wm. Cary Wright (Real Property), Co-Chairs; Travis Hayes and Robert Lancaster (Probate & Trust), and Alan B. Fields and Art Menor (Real Property), Co-Vice Chairs
10. **Legislative Update (2017)** – Stacy O. Kalmanson, Chair; Brenda Ezell, Travis Hayes, Thomas Karr, Joshua Rosenberg, Kymberlee Curry Smith, Jennifer S. Tobin and Salome Zikakis, Co-Vice Chairs

11. **Legislative Update (2018)** – Stacy O. Kalmanson, Chair; Brenda Ezell, Travis Hayes, Thomas Karr, Joshua Rosenberg, Kymberlee Curry Smith, Jennifer S. Tobin and Salome Zikakis, Co-Vice Chairs
12. **Liaison with:**
  - a. **American Bar Association (ABA)** – Edward F. Koren, Julius J. Zschau, George Meyer and Robert S. Freedman
  - b. **Clerks of Circuit Court** – Laird A. Lile
  - c. **FLEA / FLSSI** – David C. Brennan and Roland “Chip” Waller
  - d. **Florida Bankers Association** – Mark T. Middlebrook
  - e. **Judiciary** – Judge Linda R. Allan, Judge Jaimie R. Goodman, Judge Hugh D. Hayes, Judge Janis B. Keyser, Judge Maria M. Korvick, Judge Norma S. Lindsey, Judge Celeste H. Muir, Judge Robert Pleus, Jr., Judge Morris Silberman, Judge Mark Speiser, Judge Richard J. Suarez, Judge Patricia V. Thomas, and Judge Jessica J. Ticktin
  - f. **Out of State Members** – Michael P. Stafford, John E. Fitzgerald, Jr., and Nicole Kibert Basler
  - g. **TFB Board of Governors** – John Stewart
  - h. **TFB Business Law Section** – Gwynne A. Young and Manuel Farach
  - i. **TFB CLE Committee** – Robert Swaine
  - j. **TFB Council of Sections** – Debra L. Boje and Andrew M. O’Malley
  - k. **TFB Pro Bono Committee** – Tasha K. Pepper-Dickinson
  - l. **TFB Tax Law Section** – Cristen Keane and Brian Malec
13. **Long-Range Planning** – Debra L. Boje, Chair
14. **Meetings Planning** – George J. Meyer, Chair
15. **Information Technology** – Neil Barry Shoter, Chair; William A. Parady, Alexander B. Dobrev, Michael Travis Hayes, Hardy Roberts, Jesse Friedman, Keith S. Kromash, Michael Sneeringer, and Erin Christy, Co-Vice Chairs
16. **Membership and Inclusion** – Brenda Ezell and Jason M. Ellison, Co-Chairs, Annabella Barboza, Phillip A. Baumann, Guy S. Emerich, and Kymberlee Curry Smith, Co-Vice Chairs
17. **Model and Uniform Acts** – Bruce M. Stone and Richard W. Taylor, Co-Chairs
18. **Professionalism and Ethics** – Gwynne A. Young, Chair; Tasha K. Pepper-Dickinson, Alexander B. Dobrev, and Andrew B. Sasso, Vice Chairs
19. **Publications (ActionLine)** – Jeffrey Alan Baskies and Michael A. Bedke, Co-Chairs (Editors in Chief); W. Cary Wright, Shari Ben Moussa, George D. Karibjanian, Sean M. Lebowitz, Paul Roman and Lee Weintraub, Co-Vice Chairs.
20. **Publications (Florida Bar Journal)** – Jeffrey S. Goethe (Probate & Trust) and Douglas G. Christy (Real Property), Co-Chairs; Brian Sparks (Editorial Board – Probate & Trust), Cindy Basham (Editorial Board – Probate & Trust), Michael A. Bedke (Editorial Board – Real Property), Homer Duvall (Editorial Board – Real

Property) and Allison Archbold (Editorial Board), Co-Vice Chairs

21. **Sponsor Coordination** – Wilhelmina F. Kightlinger, Chair; Marsha G. Madorsky, Arlene C. Udick, J. Eric Virgil, J. Michael Swaine, Deborah L. Russell, John Cole, and Jason Quintero, Co-Vice Chairs

22. **Strategic Planning** – Debra L. Boje and Andrew M. O'Malley, Co-Chairs

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



**MINUTES  
OF THE  
REAL PROPERTY, PROBATE AND TRUST LAW SECTION  
Executive Council  
Saturday, July 29, 2017  
Palm Beach, Florida**

**I. Call to Order – Andrew M. O’Malley, Chair**

Mr. O’Malley called his first meeting as Chair to order at 10:00 a.m. on Saturday, July 29, 2017 following several days of productive Committee meetings, a wonderful legislative and case law update seminar and serious time spent at poolside, tableside and family side at The Breakers. Friday evening’s Executive Council dinner was joyous and sponsors were highlighted and greatly appreciated.

**II. Attendance – Lawrence J. Miller, Secretary**

Mr. Miller pointed out that severe penalties would be visited upon anyone losing the attendance roster. The roster showing members in attendance is attached as Addendum “A”.

**III. Minutes of Previous Meeting – Lawrence J. Miller, Secretary**

Mr. Miller moved:

**To approve the Minutes of the June 3, 2017 meeting of the Executive Council held at The Hyatt, Coconut Point, Estero, Florida. (See Agenda pages 11-42)**

**The Motion was unanimously approved.**

**IV. Chair’s Report – Andrew M. O’Malley, Chair**

**1. Recognition of Guests:**

**Michael J. Higer, President of the Florida Bar.** Mr. O’Malley introduced Florida Bar President Michael J. Higer, who addressed the Council and introduced and explained his Powerpoint and video presentation “Pursuit of Justice.” The presentation underscored Mr. Higer’s vision and pathway for his term as President of the Florida Bar and for the betterment of Florida’s lawyers and the public we serve. The pillars of Florida’s legal profession included services provided by the Florida Bar, technology and the streamlining and efficient delivery of legal services, the expansion of inclusiveness, the health and wellness of Florida’s Bar the Constitutional Revision Commission and methods to be pursued in bettering Florida’s “governing” document. Mr. Higer’s presentation impressively explained statistical data and connected that data to issues confronting the Florida Bar and the public and the need to enhance and strengthen the five supporting pillars which seek to provide maximum benefit to Florida’s citizens.

Included in his presentation was the role of the RPPTL section and how the Section can assist in providing input, comment, and delivery of services in line with the Florida Bar's vision and past. Mr. Higer introduced the Florida Bar's new Executive Director and recognized members of the Executive Council who also sit on the Board of Governors. During his presentation, Mr. Higer emphasized that health definitely matters in the ability to deliver proper and efficient legal services to Florida's citizens and circled back to the video presentation on how health and wellness programs can and do work.

Mr. O'Malley thanked Mr. Higer for his presentation and his vision.

## **2. Recognition of New Executive Council Members.**

Mr. O'Malley introduced and asked each of the following new members of the Executive Council to stand, starting first with new members of the Real Estate Division and moving next to new members of the Probate Division and then to members of the judiciary including Judge Hugh Haines, Judge Janice Keyser from West Palm Beach and Judge Jessica Tickin from Delray Beach as well as new at large members (see attached list).

Mr. O'Malley also felt it appropriate to add an additional recognition item for those who had spoken at the Section's first Attorney Loan Officer Conference which was a large success and which was held on July 26, 2017 and then recognized and asked to stand all speakers who had participated at the Legislative and Case Law Update Seminar held on July 28, 2017 at the Breakers. Mr. O'Malley asked that each of the members of the ALO and Legislative Update Seminar Committees stand and be recognized as well as the speakers for each of those seminars.

## **3. Milestones and Special Thanks.**

Mr. O'Malley stated that it was with sadness that the Executive Council and the Section remembered Dennis White, a member of the Probate Division of the Executive Council. Mr. White had been instrumental in effectuating Florida's Probate Code and had been an active member of the section, its committees and the Probate Division. He will be sorely missed.

**4. Wilson Smith Resolution.** The Chair then recognized Mr. Miller, who presented an RPPTL Section Resolution mourning the loss of Past Chair, friend, probate litigation pioneer, leader and confidant, Wilson Smith. A copy of the full resolution is included in the Agenda at page 43. The Resolution memorializing Wilson Smith, a beloved past chair of the Section, who passed away on August 7, 2016, was unanimously approved.

## **5. Recognition of General Sponsors and Friends of the Section**

Mr. O'Malley thanked each of our General Sponsors and Friends of the Section listed on pages 44-45 of the Agenda:

**General Sponsors**

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

**Thursday Lunch**

**Management Planning, Inc. – Roy Meyers**

**Thursday Night Reception**

**JP Morgan – Carlos Battle/Alyssa Feder/Phil Reagan**

**Old Republic National Title Insurance Company – Jim Russick**

**Friday Night Reception**

**Wells Fargo Private Bank – Mark Middlebrook/George Lange/Alex Hamrick**

**Friday Night Dinner**

**First American Title Insurance Company – Alan McCall**

**Probate Roundtable**

**SRR (Stout Risius Ross Inc.) – Garry Marshall**

**Real Property Roundtable**

**Fidelity National Title Group – Pat Hancock**

**Saturday Lunch**

**The Florida Bar Foundation – Bruce Blackwell  
Stewart Title- Laura Licastro**

**Hospitality Room**

**Wright Investors’ Service – Stephen Soper**

**RPPTL Meeting App**

**WFG National Title Insurance Company – Joseph Tschida**

**Friends of the Section**

**Business Valuation Analysts, LLC – Tim Bronza  
Corporate Valuation Services, Inc. – Tony Garvy  
Fiduciary Trust International – Claudia Reithauser  
Jones Lowry – Marshall Jones  
North American Title Insurance Company –Valerie Grandin  
Valley National Bank - Jacquelyn McIntosh  
Valuation Services, Inc. – Jeff Bae, JD, CVA  
Wilmington Trust – David Fritz**

The Chair called the Executive Council's attention to the fact that Stewart Title had returned as a general sponsor and most specifically for the Saturday lunch and recognized Laura Licastro from Stewart Title who thanked the Council and "looked forward to continuing the relationship." The Chair also mentioned that WFG National Title Insurance Company had, during each recent Executive Council meeting, through the efforts of Joe Tschida, on behalf of WFG, presented an Apple watch to the Council member with the most posts on the meeting app. The winner for the Breakers meeting Apple watch was Ashton McCrae.

## **6. Report of Interim Action of the Executive Committee.**

### **A. Amicus filing in Rigby v. Bank of New York/Mellon**

Mr. O'Malley thanked all who had helped on this difficult and time consuming project. The Chair indicated that the matter would be more fully reported in the Amicus Coordination Committee report of Robert Goldman, but that a special shout out was appropriate for Real Property Litigation Committee Chair Susan Spurgeon, Michael Hargett and Martin Solomon.

## **V. Liaison with Board of Governor's Report – John Stewart**

The Chair recognized John Stewart, new liaison with the Board of Governors who introduced himself and alluded to and complimented the prior report given by President Higer, indicated his excitement with serving the Section on the Board of Governors, recognized prior work of the Section, and hoped that he can live up to the comments and kudos of Board of Governors members, Sandy Diamond and Laird Lile who recommended and complimented John on his being the choice for this liaison position.

## **VI. Chair-Elect's Report, Debra L. Boje, *Chair-Elect*.**

In reviewing her Executive Council Meeting Schedule for 2018, Ms. Boje explained to the Council that she was drawn to changing the July meeting to the much "warmer" site at the Brazilian Court. She had seriously considered the matter based on the experience of Council member Jerome Wolf and others at last year's "Brazilian Court barbeque experience." However, she thought tradition should prevail and relented in continuing the meeting for The Breakers next July. She also indicated that she felt some pull toward returning to Disney for a meeting during her tenure as Chair but that her thoughts were interrupted by "stormy" distractions experienced during Deb Goodall's meeting there last year. Ms. Boje then reviewed her schedule for meetings including her out of state meeting to be held in Italy. She asked that Council members respond to the Italy idea by taking the survey on traveling to Italy on the meeting app. Ms. Boje recognized Chairman O'Malley who indicated that although Ms. Boje's out of state trip was to be to Italy including Mount Vesuvius, Pompeii, Florence and Rome, it should not be forgotten that his out of state meeting was to Boston during October, 2017.

## **VII. Treasurer's Report, Robert S. Swaine**

Mr. Swaine reported that the Budget Committee is working on the budget for 2018 and that Budget will be presented at the Executive Council meeting in Naples in December, 2017. He indicated that there was substantial thinking and a movement to have the Budget Committee meeting held in Paris, France.

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

At Large Member Director Frazier updated the Council on the No Place Like Home project and announced the pilot Circuit Court jurisdictions which were participating through their respective legal aid programs. These included the First, Second, Twelfth, Thirteenth, Fourteenth, Fifteenth and Seventeenth judicial circuits. She again briefly explained the project, confirmed that support was growing and that the Legal Services Corporation had provided some funding for the program but that additional funds were necessary. She referred the members to the ALMS website and is looking for support for the program from each committee and its members.

## **IX. CLE Seminar Coordination Report — Steven H. Mezer (*Real Property*) and Shane Kelley (*Probate & Trust*), Co-Chairs**

Co-Chairman, Shane Kelley reported that the first ever Attorney Loan Officer Conference ("ALO") was attended by 100 attendees, thanked all involved and asked those members of the Executive Council who had participated either in organizing or speaking at the ALO seminar to stand and be recognized. On the Probate and Trust side, he announced the upcoming Attorney Trust Officer Liaison Conference ("ATO") at The Breakers during August, indicated additional rooms were available and information was available on the Section website for that seminar. The ATO seminar provides an opportunity for more CLE credits, if credits are needed by any section member.

## **X. General Standing Division — Debra L. Boje, *General Standing Division Director and Chair-Elect***

### **Action Item:**

Legislation Committee – Sarah Butters and Cary Wright, Co-Chairs.

1. Ms. Bjoie thanked Pete Dunbar and Martha Edenfield as well as the Dean Mead law firm for their work as Legislative Counsel and advisor. She then recognized Legislation Committee Co-Chair, Sarah Butters, who presented for Executive Council vote and approval the proposed two year and two month contract between the Section and the Dean Mead firm, with that firm through Pete and Martha continuing to act as Legislative Advisor to the Section and the Executive Council and to expend Section funds in furtherance of such contractual arrangement. After questions raised as to whether or not Pete Dunbar would be retiring on an imminent basis, and an indication that that matter would be reviewed with Pete, a motion to approve the contract and expend funds pursuant thereto was made and seconded and a vote taken with the motion passing without objection. In light of the Legislation Committee's already being

at the microphone, Chair Elect Boje recognized and requested that Sarah Butters provide the Legislation Committee report, though out of order. Ms. Butters reported that the Electronic Will Statute which had been opposed by the Section and against which considerable efforts had been made, had been vetoed by the Governor after prior passage by the Legislature. Other provisions of the vetoed bill were not opposed by the Section and will be coming back, perhaps with some changes. These included provisions regarding remote notarization and witnessing and related matters. Ms. Boje requested that any additional information which would be helpful to the Legislation Committee regarding upcoming statutory efforts to reintroduce the Electronic Wills legislation be submitted to the Legislation Committee for follow-up and discussion.

### **Information Items:**

#### **1. Ad Hoc Remote Notary Task Force— E. Burt Bruton, Chair**

The Chair Elect recognized Burt Bruton, Rob Freedman, Melissa Murphy, Alan Fields, Raul Ballaga, Bill Hennessey and Travis Hayes for their continued work on this Task Force. The amount of time taken by members of the Task Force has been truly amazing and compliments are well deserved. This information item is intended for and is a solicitation for input and information regarding the issue under consideration. The packet and summary regarding the observations and suggestions of the Task Force are included at pages 56 through 103 of the Agenda. Mr. Bruton and Mr. Fields delivered the report of the Task Force. Remote notarization has been on the drawing board in Virginia and other states and the Task Force has been able to study the comments and observations in Virginia and compared those to possible impacts of notary statutory changes in Florida. Mr. Fields delved into a bit more detail as to the statutory issues presented by the proposed changes to the law, including a review of how identification is reviewed and confirmed if done remotely, how video recording is and should be a part of the process and pointed out that though there are safeguards for remote notarization, none of those safeguards can actually replace having a live person sign in front of the notary. The proposed statutory provisions for remote notaries is not going to include coverage of or use in the Will and Trust settings. Several additional hypothetical fact scenarios were presented to Messrs. Bruton and Fields by questioning Council members including notarization of a Florida document by a foreign state notary in that foreign state and how same would be dealt with. Mr. Fields pointed out that generally Florida would probably adopt a broad approach indicating that if notarization was valid in the State where it took place, it would be recognized in Florida. He indicated that remote witnesses, as well as remote notarization, is included in the proposal. It was also pointed out that increased educational requirements would probably be imposed for notaries as would increased bonding coverage and possible cyber insurance protection. The Chair Elect thanked Mr. Bruton and Mr. Fields.

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

The Chair Elect, Ms. Boje, recognized the preeminent standing and status of our Amicus Coordination Committee and recognized their continual hard work, especially

during the past year. Thereafter, Mr. Goldman delivered the report of the Committee on three pending matters. Mr. Goldman first reported that the Smith v. Smith case remains under consideration and aims at whether or not to approve the efficacy of a ward's marriage in the guardianship context. As to the Ober case, this case is in the Supreme Court pursuant to both conflict and great public importance grounds. The parties have finished the jurisdictional briefing with no briefing schedule as yet established for the main portion of the case.

Finally, and with the actual brief appearing at page 104 of the Agenda materials, Mr. Goldman reported on what he deems the "Eleanor Rigby" case, using that famous Beatles song as a mnemonic device to assist him in immediate recall of all issues in the Rigby case. He pointed out that the First DCA requested that our section appear and assist them in whether or not they should recede from the "standing at inception rule." Various cases had been cited by the First DCA in their en banc opinion in Rigby. Mr. Goldman pointed out that while some Courts have equated standing with subject matter jurisdiction, they are distinct in important ways. He further stated that standing is required at the beginning, middle and end of a given case and that the Amicus Coordination Committee sees no reason for the Court to recede from that bedrock concept (stating that receding from the concept is not the answer to the problems presented in Rigby).

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

Mr. Diamond thanked all members for supporting the Fellows program as well as the Fellows Committee for their role in the selection process. Mr. Diamond then stated that there are eight fellows, four of whom are returning for their second year and include Amber Ashton, Scott Work, Stephanie Villavicencio and Angela Santos. The four new Fellows, whose biographies appear in our materials at page 122 are Daniel McDermott (P & T), Jamie Coleman (P & T), Liane de la Riva (P & T), and Jacqueline Peregrin (RP). Mr. Diamond indicated that our Fellows are ready, willing and able to assist with Section committee work and asked that Section committee chairs and others seek out their assistance.

### 4. **Homestead Issues Committee** – Jeff Goethe and Michael Swaine, Co-Chairs

Mr. Goethe delivered the Committee's report with materials at page 123 of the Council's agenda. The Committee is looking to revise Chapter 732 of Florida Statutes to provide clarification and guidance regarding the Waiver of Constitutional Homestead Protection for surviving spouses. Cases cited in the materials spawned an approach to protecting against an unwitting waiver of homestead and essentially made it more difficult. In essence, the Committee looks to simplify the matter and clarify any possible issues that might arise so as to address the meaning of waiver language when used in various documents. Restrictions are limited to devise at death and would not impact creditor protection or other matters in the homestead context. Revisions would also clarify when a spouse has actually waived his/her rights. Mr. Goethe asks that we take

a look at the Committee's website and would like our comments and input on the proposed revisions by December 1, 2017.

5. **Legislation Committee** – Sarah Butters and Cary Wright, Co-Chairs (see Action Item 1, above)

6. **Liaison with Clerks of Court**, *Laird A. Lile, Liaison*

Former Section Chair, Laird Lile reported that Florida's Clerks of Court, some of whom include members of the Florida Bar, have reached out to the Section for assistance in matters about which Hillsborough County Clerk's general counsel, Dale Bohner, will be speaking during this meeting. Specifically, Mr. Bohner will be speaking in conjunction with Sue Spurgeon's Real Property Litigation Committee and their present discussions with the Clerk's association.

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

Before the Division's Action Items were presented, Mr. Freedman recognized and thanked each of the Division's committee sponsors in the Real Property Division, which are listed on Page 46 of the Agenda and include:

**Committee Sponsors**

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

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

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

**Hopping Green & Sams** – Vinette Godelia  
Development and Land Use

**Seaside National Bank and Trust-** H. Wayne Geist  
Commercial Real Estate



## **Action Items:**

### **1. Open/Expired Permits Task Force - Lee Weintraub, Chair**

Motion to (A) adopt as a Section position legislation to establish a procedure by which property owners may close open or expired permits, to protect from liability bona fide purchasers of property with open or expired permits, and to establish procedures to reduce the number of future open or expired permits; (B) find that such legislative position is within the purview of the RPPTL Section; and (C) expend Section funds in support of the proposed legislative position. **Agenda pp. 137-151**

Lee Weintraub provided background for the above motion. He stated that after a year of working on this project it has become clear that those trying to close on the sale of property are confronted with a sizable issue based upon literally hundreds of thousands of unexpired permits for building and the like which have not been closed and which pose an impediment to finalizing and closing on the sale of real property in Florida. In essence, these permits are outstanding, have not been closed out and the contractor who has pulled such permits is "gone". The motion regarding the above proposed change in statute looks to create a procedure to allow the seller to close out a permit in several ways. A motion to approve the requested statutory change was unanimously passed, was found to be within the purview of the Section and authorization given to spend money to effectuate the statutory change as requested.

### **2. Real Property Problems Study Committee - Art Menor, Chair**

Motion to (A) adopt as a Section position legislation to provide a cause of action for unlawful detainer, clarify the applicability of actions for forcible entry and unlawful detainer, clarify that no pre-suit notice is required in such actions, remove procedural jury verdict forms, and modernize archaic language; (B) find that such legislative position is within the purview of the RPPTL Section; and (C) expend Section funds in support of the proposed legislative position. **Agenda pp. 152-164**

Committee Chair, Art Menor, recognized Mark Brown to update the Council on the proposed changes to the Unlawful Detainer statutes. F.S. 82.01, et. seq.. Mr. Brown pointed out that the statute is approximately 100 years old and contains archaic and unclear language which needs to be addressed and revised. The proposed statutory changes seek to clarify and update the language. The motion to approve the proposed statutory changes was approved, and found to be within the purview of the Section and the expenditure of monies to facilitate and effectuate the statutory changes was authorized.

### **3. Real Property Problems Study Committee - Art Menor, Chair**

Mark Brown gave the report on this matter, as well. The specific statutory changes are aimed at revising the ejectment provisions of Florida law.

Motion to (A) adopt as a Section position legislation to provide a statutory definition for ejectment actions, provide for jurisdiction in the circuit courts for such actions, eliminate any ambiguity over whether pre-suit notice is required in such actions, and update the language in the existing ejectment statute; (B) find that such legislative position is within the purview of the RPPTL Section; and (C) expend Section funds in support of the proposed legislative position. **Agenda pp. 165-172**

The motion was made and unanimously passed, was found to be within the purview of the Section and funds authorized to be expended to effectuate and facilitate the statutory changes.

**4. Real Property Problems Study Committee - Art Menor, Chair**

Motion to (A) adopt as a Section position legislation to provide a statutory definition for ejectment actions, provide for jurisdiction in the circuit courts for such actions, eliminate any ambiguity over whether pre-suit notice is required in such actions, and update the language in the existing ejectment statute; (B) find that such legislative position is within the purview of the RPPTL Section; and (C) expend Section funds in support of the proposed legislative position. **Agenda pp. 165-172**

The Motion to change Florida Statute 713.10 was reviewed by Mr. Menor and upon vote, was unanimously approved, found to be within the purview of the Section and Section funds authorized to be expended in support of the proposed legislation.

**5. Real Property Litigation Committee – Susan Spurgeon and Marty Solomon, Co-Chairs**

Division Director Freedman recognized Susan Spurgeon to deliver the report of the Committee. Mr. Freedman indicated that rules would have to be waived in order to permit Ms. Spurgeon to propose a change in the statutory language to be made from the floor. Upon motion duly made, the Executive Council approved the waiver of the rules to permit discussion of language changes to the proposed statute as follows.

Motion to (A) adopt as a Section position proposed legislation which will clarify s. 48.23(1)(d), F.S. to provide that, in proceedings involving a judicial sale, a valid recorded notice of lis pendens remains in effect through the recording of an instrument transferring title pursuant to the judicial sale, in order to eliminate intervening subordinate interests or liens; (B) find that such legislative position is within the purview of the RPPTL Section; and (C) expend Section funds in support of the proposed legislative position. **Agenda pp. 183-194**

In essence, the proposed statutory changes were intended to clarify and codify the issues raised in the Ober decision. Ms. Spurgeon thanked past chair of the Section, Michael Gelfand for his changes which are the ones which spawned the need to change the statutory language and to waive the rules to accommodate same. The Motion passed including finding the statutory change within the purview of the Section and an authorization to expend funds to support same.

**Information Item:**

1. **Real Property Litigation Committee – Susan Spurgeon and Marty Solomon, Co-Chairs**

Ms. Spurgeon was recognized by Division Director Freedman and introduced General Counsel to the Clerk of Courts of Hillsborough County, Dale Bohner. This had previously been mentioned by Mr. Lile in his Liaison with Clerk's report. Specifically, Florida's Circuit Court Clerks have asked for assistance in proposed legislation governing the disposition of tax certificate sale proceeds. There is a bit of confusion regarding the process and where these funds are to be placed. The first proposed change by the Clerks is to have the tax collector use locator services to prepare property information reports. In essence, and to prepare the proper information for public dissemination, the Clerks need more information as to location of property and parties which would help the Clerks actually identify the properties for purposes of title and necessary follow-up. After hearing Mr. Bohner's report, Mr. Freedman asked the Executive Council if the Clerks' and Mr. Bohner's concerns were something that the Section should follow-up on and assist with. A straw ballot was taken to confirm that the Clerks were on the right path and that the Section would assist in looking at the matter and working with Mr. Bohner and the Clerks on an initiative.

**XII. Probate and Trust Law Division Report— William T. Hennessey, Director**

Before turning to the Division's Informational Items, Division Director Hennessey thanked all of the sponsors listed in the program who are and were as follows:

**Committee Sponsors**

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

**Business Valuation Analysts – Tim Bronze**  
Trust Law Committee

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

**Kravit Estate Appraisal – Bianca Morabito**  
Estate and Trust Law Tax Planning Committee

**Life Audit Professionals – Joe Gitto and Andrea Obey**

IRA, Insurance & Employee Benefits Committee

&

Estate and Trust Tax Planning Committee

**Management Planning, Inc. – Roy Meyers**

Estate & Trust Tax Planning Committee

**Northern Trust – Tami Conetta**

Trust Law Committee

**Pluris Valuation Advisors – Miranda McCray**

Asset Protection Committee

**Next Mr. Hennessey moved to the Division’s Information Items.**

**Information Items:**

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

This matter is covered starting at page 208 of the meeting Agenda and looks for a proposed statutory change to Formal Notice in probate proceedings under F.S. Chapter 731. Specifically, a number of courts have looked at the language of the applicable Statute and have seemingly created a dispute as to whether formal notice is sufficient to obtain personal jurisdiction as opposed to in rem jurisdiction over a party. The proposed motion, to be considered at our December meeting, is to (A) adopt as a Section legislative position support for a proposed amendment to F.S. Chapter 731 to provide that formal notice as provided in the Florida Probate Rules does not confer in personam jurisdiction over persons receiving formal notice; (B) find that such legislative position is within the purview of the RPPTL Section; and (c) expend Section funds in support of the proposed legislative position. **Agenda pp. 208-213**

Mr. Spivey solicited comments as to the proposed statutory changes and would be considering questions as to effective date of the proposed statutory change, as well. In that the matter was an informational item, it was not voted upon.

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

Mr. Moran framed the Motion under consideration as one which considers whether coins, bullion and other precious metals in tangible form, are to be considered tangible personal property for testamentary and intestate purposes. Specifically, the Motion is as follows:

Motion to (A) adopt as a Section legislative position support for proposed legislation defining “tangible personal property” in the Florida Probate Code to make it

clear that tangible personal property, includes, but is not limited to, precious metals in any tangible form, such as bullion and coins; (B) find that such legislative position is within the purview of the RPPTL Section; and (c) expend Section funds in support of the proposed legislative position. **Agenda pp. 214-218**

Mr. Moran solicited input, questions and comments regarding the proposed approach and the statutory changes suggested at pages 214-218. It is expected that a vote on the proposed statutory changes will be taken at the December, 2017 Council meeting in Naples.

### **XIII. Adjourn.**

Before asking for a Motion to adjourn the Executive Council meeting, Chairman O'Malley asked that all Executive Council members visit the meeting app and take the Italy survey regarding Chair Elect Boje's out of state meeting in Italy. The Chair then also thanked Steven Goodall, Whitney Kirk and Mary Ann Obos for having to deal with the meeting registration snafu. He announced that buses will be leaving for the Palm Beach Zoo at the appropriate time but failed to mention which members of the Executive Council were considered appropriate for residence at the zoo. Upon Motion duly made, the Chair adjourned the meeting at 12:30 p.m.

Lawrence J. Miller, Secretary

**ATTENDANCE ROSTER**  
**REAL PROPERTY PROBATE & TRUST LAW SECTION**  
**EXECUTIVE COUNCIL MEETINGS**  
**2017-2018**

Executive Committee	Division		July 29 Breakers	Oct 14 Boston	Dec 9 Naples	Feb 24 St. Augustine	June 2 St. Pete Beach
	RP	P&T					
O'Malley, Andrew Marvel Chair	√		√				
Boje, Debra Lynn Chair-Elect		√	√				
Hennessey, William Thomas III Probate & Trust Law Div. Director		√	√				
Freedman, Robert S., Real Property Law Div. Director	√		√				
Frazier, S. Katherine, Director of At-Large Members	√		√				
Miller, Lawrence J. Secretary		√	√				
Swaine, Robert S. Treasurer	√		√				
Butters, Sarah S., Legislation Co-Chair (P&T)		√	√				
Cary Wright, Wm. Legislation Co-Chair (RP)	√		√				
Kelley, Shane, Legislation CLE Seminar Coordination Co-Chair (P&T)		√	√				
Mezer, Steven H., CLE Seminar Coordination Co-Chair (RP)	√		√				
Goodall, Deborah Packer <b>Immediate Past Chair</b>		√	√				

Executive Council Members	Division		July 29 Breakers	Oct 14 Boston	Dec 9 Naples	Feb 24 St. Augustine	June 2 St. Pete Beach
	RP	P&T					
Acosta, Jolyon Delphin		√	√				
Adams, Angela M.		√	√				
Adcock, Jr., Louie N., <b>Past Chair</b>		√					
Akins, David J.		√	√				
Allan, Honorable Linda Ruth		√					

Executive Council Members	Division		July 29 Breakers	Oct 14 Boston	Dec 9 Naples	Feb 24 St. Augustine	June 2 St. Pete Beach
	RP	P&T					
Altman, Stuart H.		√	√				
Amari, Richard		√	√				
Archbold, J. Allison		√	√				
Arnold, Jr., Lynwood F.		√					
Aron Jerry E. <b>Past Chair</b>	√		√				
Awerbach, Martin S.	√		√				
Bald, Kimberly A.		√	√				
Ballaga, Raul P.	√		√				
Barboza, Annabella	√		√				
Basham, Cindy		√					
Baskies, Jeffrey		√	√				
Battle, Carlos A.		√	√				
Baumann, Phillip A.		√	√				
Beales, III, Walter R. <b>Past Chair</b>	√		√				
Bedke, Michael A.	√						
Behar, Jacobeli J.		√	√				
Belcher, William F. <b>Past Chair</b>		√	√				
Bell, Kenneth B.	√		√				
Bell, Rebecca Coulter		√	√				
Beller, Amy		√	√				
Bellew, Brandon D.		√	√				
Ben Moussa, Shari D.	√						
Bloodworth, Jennifer J.	√		√				
Bonevac, Judy B.		√	√				

Executive Council Members	Division		July 29 Breakers	Oct 14 Boston	Dec 9 Naples	Feb 24 St. Augustine	June 2 St. Pete Beach
	RP	P&T					
Bowers, Elizabeth Anne		√	√				
Boyd, Deborah	√						
Braun, Keith Brian		√	√				
Brenes-Stahl, Tattiana P.		√	√				
Brennan, David C. <b>Past Chair</b>		√	√				
Brittain, David R.	√		√				
Bronner, Tae K.,		√					
Brown, Mark A.	√		√				
Brown, Shawn	√		√				
Brunner, S. Dresden		√	√				
Bruton, Jr., Ed Burt	√		√				
Bucher, Elaine M.		√	√				
Butler, Jonathan		√	√				
Callahan, Charles III		√	√				
Carlisle, David R.		√					
Caskey, John R.		√					
Christiansen, Patrick T. <b>Past Chair</b>	√		√				
Christy, Douglas G. III	√		√				
Christy, Erin Hope	√		√				
Cohen, Howard Allen	√		√				
Cole, John P.		√					
Cole, Stacey L.		√					
Conetta, Tami F.		√	√				
Cope, Jr., Gerald B.	√		√				



Executive Council Members	Division		July 29 Breakers	Oct 14 Boston	Dec 9 Naples	Feb 24 St. Augustine	June 2 St. Pete Beach
	RP	P&T					
Cornett, Jane Louise	√		√				
Costello, T. John, Jr.		√					
Curley, Nick		√	√				
DeBoest II, Richard Dearborn			√				
Detzel, Lauren Y.		√	√				
Diamond, Benjamin F.		√	√				
Diamond, Sandra F. <b>Past Chair</b>		√	√				
Direktor, Kenneth Steven	√						
Dobrev, Alex	√		√				
Dollinger, Jeffrey	√						
Dribin, Michael <b>Past Chair</b>		√	√				
Dudley, Frederick R.	√						
Duvall, III, Homer	√		√				
Duz, Ashley Nichole		√	√				
Eckhard, Rick	√						
Ellison, Jason M.	√		√				
Emans, Patrick C		√	√				
Emerich, Guy S.		√	√				
Ertl, Christene M.	√		√				
Ezell, Brenda B.	√		√				
Fagan, Gail		√	√				
Falk, Jr., Jack A.		√	√				

Executive Council Members	Division		July 29 Breakers	Oct 14 Boston	Dec 9 Naples	Feb 24 St. Augustine	June 2 St. Pete Beach
	RP	P&T					
Farach, Manuel	√		√				
Faulkner, Debra Ann		√					
Felcoski, Brian J. <b>Past Chair</b>		√	√				
Ferguson, Elizabeth B.							
Fernandez, Kristopher E.	√		√				
Fields, Alan B.	√		√				
Fitzgerald, Jr., John E.		√	√				
Flood, Gerard J.		√	√				
Foreman, Michael L.		√	√				
Frazier, Nathan	√		√				
Friedman, Briget	√		√				
Friedman, Jesse B.		√	√				
Galler, Jonathan		√	√				
Gans, Richard R.		√	√				
Gelfand, Michael J <b>Past Chair</b>	√		√				
Gentile, Melinda S.	√		√				
George, James		√	√				
Godelia, Vinette D.	√		√				
Goethe, Jeffrey S.		√	√				
Goldman, Louis "Trey"	√		√				
Goldman, Robert W. <b>Past Chair</b>		√	√				
Goodman, Hon. Jaimie Randall							
Graham, Robert M.	√		√				
Granet, Lloyd	√		√				

Executive Council Members	Division		July 29 Breakers	Oct 14 Boston	Dec 9 Naples	Feb 24 St. Augustine	June 2 St. Pete Beach
	RP	P&T					
Griffin, Linda S.		√	√				
Grimsley, John G. <b>Past Chair</b>		√					
Grosso, Jennifer		√					
Gunther, Eamonn W.		√	√				
Gurgold, Eric		√	√				
Guttmann, III, Louis B <b>Past Chair</b>	√						
Hamrick, Alexander H		√	√				
Hancock, Patricia J.	√		√				
Hargett, Michael Van	√		√				
Hayes, Honorable Hugh D.		√					
Hayes, Michael Travis		√	√				
Hearn, Steven L. <b>Past Chair</b>		√	√				
Henderson, Jr., Reese J.	√		√				
Henderson, III, Thomas N.	√		√				
Heuston, Stephen P.		√	√				
Hipsman, Mitchell Alec		√	√				
Hoffman, Brian W.	√		√				
Hughes, Elizabeth Marie MacDonald		√	√				
Hutt, Gregg Evan	√		√				
Isphording, Roger O. <b>Past Chair</b>		√					
Jennison, Julia Lee	√		√				
Johnson, Amber Jade F.		√	√				
Jones, Darby		√					
Jones, Frederick W.	√		√				

Executive Council Members	Division		July 29 Breakers	Oct 14 Boston	Dec 9 Naples	Feb 24 St. Augustine	June 2 St. Pete Beach
	RP	P&T					
Jones, Patricia P.H.	√		√				
Judd, Robert B.		√	√				
Kalmanson, Stacy O.	√						
Kangas, Michael Ryan		√	√				
Karibjanian, George		√	√				
Karr, Mary		√	√				
Karr, Thomas M.		√	√				
Kayser, Joan B. <b>Past Chair</b>		√					
Keane, Cristin C.	√						
Kelley, Rohan <b>Past Chair</b>		√	√				
Kelley, Sean W.		√					
Keyser, Hon. Janis Brustares							
Khan, Nishad	√		√				
Kibert, Nicole C.	√						
Kightlinger, Wilhelmina F.	√						
Kinsolving, Ruth Barnes, <b>Past Chair</b>	√						
Koren, Edward F. <b>Past Chair</b>		√					
Korvick, Honorable Maria M.		√	√				
Kotler, Alan Stephen		√	√				
Kromash, Keith S.		√	√				
Krumbein, Sandra Elizabeth	√		√				
Kurian, Sanjay	√		√				
Kypreos, Theodore S.		√	√				
Lancaster, Robert L.		√	√				

Executive Council Members	Division		July 29 Breakers	Oct 14 Boston	Dec 9 Naples	Feb 24 St. Augustine	June 2 St. Pete Beach
	RP	P&T					
Lane, Jr., William R.		√					
Larson, Roger A.	√		√				
Leathe, Jeremy Paul		√	√				
Lebowitz, Sean M.		√	√				
Leebrick, Brian D.	√		√				
Lile, Laird A. <b>Past Chair</b>		√	√				
Lindsey, Honorable Norma S.	√						
Little, III, John W.	√						
Lopez, Sophia A.		√	√				
Lunsford, Rachel Albritton			√				
Madorsky, Marsha G.		√	√				
Malec, Brian		√	√				
Marger, Bruce <b>Past Chair</b>		√					
Marmor, Seth A.		√					
Marshall, III, Stewart A.		√	√				
Marx, James A.		√	√				
Mastin, Deborah Bovarnick	√		√				
McCall, Alan K.	√		√				
McElroy, IV, Robert Lee		√					
McIver, Richard		√	√				
McRae, Ashley E.	√		√				
Melanson, Noelle		√	√				
Menor, Arthur J.		√	√				
Meyer, George F. <b>Past Chair</b>	√						

Executive Council Members	Division		July 29 Breakers	Oct 14 Boston	Dec 9 Naples	Feb 24 St. Augustine	June 2 St. Pete Beach
	RP	P&T					
Meyer, Michael	√		√				
Middlebrook, Mark T.		√	√				
Mize, Patrick		√	√				
Moran, John C.		√	√				
Moule, Rex E.		√					
Muir, Honorable Celeste H.		√	√				
Murphy, Melissa J. <b>Past Chair</b>	√		√				
Nash, Charles I.		√	√				
Neukamm, John B. <b>Past Chair</b>	√						
Nguyen, Hung V.		√	√				
Overhoff, Alex	√						
Parady, William A.	√		√				
Payne, L. Howard		√	√				
Pence, Scott P.	√		√				
Pepper-Dickinson, Tasha K.		√	√				
Perera, Diane	√						
Pilotte, Frank		√	√				
Pleus, Jr., Honorable Robert J.		√					
Pollack, Anne Q.	√		√				
Price, Pamela O.		√	√				
Pyle, Michael A.		√					
Quintero, Jason	√		√				
Redding, John N.	√		√				
Rendzio, Bryan	√						

Executive Council Members	Division		July 29 Breakers	Oct 14 Boston	Dec 9 Naples	Feb 24 St. Augustine	June 2 St. Pete Beach
	RP	P&T					
Reynolds, Stephen H.		√					
Riddell, Cynthia	√		√				
Rieman, Alexandra V.		√	√				
Robbins, Jr., R.J.	√		√				
Roberts, III, Hardy L.	√		√				
Robinson, Charles F.		√	√				
Rodstein, David William							
Rojas, Silvia B.	√		√				
Rolando, Margaret A. <b>Past Chair</b>	√		√				
Roman, Paul E.		√	√				
Rosenberg, Joshua		√	√				
Rubel, Stacy		√	√				
Rubin, Jenna		√					
Russell, Deborah L.		√	√				
Russick, James C.	√						
Rydberg, Marsha G.	√						
Sachs, Colleen C.	√		√				
Sajdera, Christopher	√		√				
Sasso, Andrew	√						
Scaletta, Melissa Sloan							
Schafer, Jr., Honorable Walter L.		√					
Schwartz, Martin	√		√				
Schwartz, Robert M.	√		√				
Schwingamer, Jamie Beth		√	√				

Executive Council Members	Division		July 29 Breakers	Oct 14 Boston	Dec 9 Naples	Feb 24 St. Augustine	June 2 St. Pete Beach
	RP	P&T					
Scriven, Lansing Charles	√		√				
Scuderi, Jon		√	√				
Seaford, Susan	√		√				
Sheets, Sandra G.		√	√				
Sherrill, Richard Norton		√	√				
Shoter, Neil B.	√		√				
Silberman, Honorable Morris	√						
Silberstein, David M.		√					
Sivyer, Neal Allen	√		√				
Sklar, William P.	√		√				
Smart, Christopher W.	√		√				
Smith, G. Thomas <b>Past Chair</b>	√						
Smith, Kymberlee	√						
<del>Smith, Wilson</del> <b>Past Chair</b>		√					
Smith, Yoshimi O.		√	√				
Sneeringer, Michael Alan		√					
Solomon, Marty James	√		√				
Sparks, Brian C.		√	√				
Speiser, Honorable Mark A.		√					
Spivey, Barry F.		√	√				
Spurgeon, Susan K.	√		√				
Stafford, Michael P.		√	√				
Staker, Karla J.	√		√				
Stashis, Alfred Joseph			√				



Executive Council Members	Division		July 29 Breakers	Oct 14 Boston	Dec 9 Naples	Feb 24 St. Augustine	June 2 St. Pete Beach
	RP	P&T					
Stern, Robert G.	√		√				
Stewart, John Mitchel			√				
Stone, Adele I.	√		√				
Stone, Bruce M. <b>Past Chair</b>		√					
Suarez, Honorable Richard J.		√					
Sundberg, Laura K.		√	√				
Swaine, Jack Michael <b>Past Chair</b>	√		√				
Taylor, Richard W.	√		√				
Tescher, Donald R.		√	√				
Thomas, Honorable Patricia V.		√	√				
Thornton, Kenneth E.			√				
Ticktin, Hon. Jessica Jacqueline							
Tobin, Jennifer S.	√		√				
Triggs, Matthew H.		√	√				
Tschida, Joseph John			√				
Tucker, Kristine L.			√				
Udick, Arlene C.	√		√				
Van Dien, Lisa Barnett			√				
Van Lenten, Jason Paul		√	√				
Van Pelt, Kit E.							
VanSickle, Melissa	√						
Villarroel, Nicole Marie	√		√				
Virgil, Eric		√					
Waller, Roland D. <b>Past Chair</b>	√		√				

Executive Council Members	Division		July 29 Breakers	Oct 14 Boston	Dec 9 Naples	Feb 24 St. Augustine	June 2 St. Pete Beach
	RP	P&T					
Wartenberg, Stephanie Harriet		√	√				
Weintraub, Lee A.	√		√				
Wells, Jerry B.		√	√				
White, Jr., Richard M.		√	√				
Whynot, Sancha B.	√		√				
Wilder, Charles D.		√	√				
Williams, Margaret A.	√		√				
Williamson, Julie Ann <b>Past Chair</b>	√		√				
Wintter, Christopher Q.		√	√				
Wohlust, Gary Charles		√	√				
Wolasky, Marjorie E.		√	√				
Wolf, Jerome L.		√	√				
Young, Gwynne A.	√		√				
Zeydel, Diana S.C.		√	√				
Zikakis, Salome J.		√	√				
Zschau, Julius J. <b>Past Chair</b>	√		√				

RPPTL Fellows	Division		July 29 Breakers	Oct 14 Boston	Dec 9 Naples	Feb 24 St. Augustine	June 2 St. Pete Beach
	RP	P&T					
Ashton, Amber	√		√				
Coleman, Jami		√	√				
de la Riva, Lian		√	√				
McDermott, Daniel L.		√	√				
Peregrine, Jacqueline J.	√		√				
Santos, Angela		√					
Villavicencio, Stephanie		√					
Work, Scott	√		√				

Legislative Consultants	Division		July 29 Breakers	Oct 14 Boston	Dec 9 Naples	Feb 24 St. Augustine	June 2 St. Pete Beach
	RP	P&T					
Dunbar, Peter M.	√		√				
Edenfield, Martha Jane	√		√				
Finkbeiner, Brittany	√		√				
Roth, Cari L.	√						

Guests	Division		July 29 Breakers	Oct 14 Boston	Dec 9 Naples	Feb 24 St. Augustine	June 2 St. Pete Beach
	RP	P&T					
Laura Licastro	√		√				
Greg Morler		√	√				
Brad Trushsa		√	√				
Matt Ahearn		√	√				
Stacey Price Trontman		√	√				
Krisuer		√	√				
Sanjiv Patel	√		√				
Travis Finchum		√	√				
Rose LaFermina		√	√				
Bonnie Polk		√	√				




# Real Property, Probate & Trust Law Section

## 2017-2018 Executive Council Meetings

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DATES	LOCATIONS
<b>July 27-July 30, 2017</b>	<p><b>Executive Council Meeting &amp; Legislative Update</b>            The Breakers, Palm Beach, Florida            Room Rate: \$225</p>
<b>October 11-15, 2017</b>	<p><b>Out of State Meeting Executive Council/ Boston, MA</b>            Fairmont Copley Plaza, Boston, MA            Guest Room Rate: \$375            Signature Room Rate: \$455*            Fairmont Gold Rooms: \$500*            Fairmont Gold Signature Rooms &amp; Junior Suites: \$525*            Fairmont Gold One Bedroom Suite: \$775*</p>
<b>December 7-10, 2017</b>	<p><b>Executive Council &amp; Committee Meetings</b>            The Ritz-Carlton, Naples, FL            Room Rate: \$285            Room Block Link: Please note at this time the group block is completely full. You may be placed on waitlist by calling the Reservation Office directly at 877-590-8187</p>
<b>February 22-25, 2018</b>	<p><b>Executive Council &amp; Committee Meetings</b>            Casa Monica Hotel, St. Augustine, FL            Room Rate: \$269            Reservation Link: Please note at this time the group block is completely full. You may be placed on waitlist by emailing Whitney Kirk at <a href="mailto:wkirk@floridabar.org">wkirk@floridabar.org</a>.</p> <p><b>Alternative Room Blocks are available at the following hotels:</b></p> <p>Hilton St. Augustine            Room Rate: \$199 for Wednesday, \$259 for Thursday - Sunday            Room Block Link: <a href="http://group.hilton.com/floridabar">http://group.hilton.com/floridabar</a></p> <p>Holiday Inn Historic St. Augustine            Room Rate: \$169 for Wednesday-Thurs, \$199 for Friday -Sunday            Room Block Link: Call (877) 847-3736. Room Block Code TFB</p> <p>The Collector            Room Rate: \$269            Code: FLABAR0218</p>
<b>May 31-June 3, 2018</b>	<p><b>Executive Council Meeting &amp; Convention</b>            Tradewinds Island Resort on St. Pete Beach, St. Pete Beach, FL            Room Rate: \$249            Tropical View Hotel Room Rate: \$269*            Tropical View One Bedroom Suite: \$319*            Reservation Link: TBA</p>

# Real Property, Probate & Trust Law Section

## 2018-2019 Executive Council Meetings

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DATES	LOCATIONS
<i>July 25-28, 2018</i>	<b>Executive Council Meeting &amp; Legislative Update</b> The Breakers Palm Beach, Florida Room Rate: \$225/ Deluxe King
<i>September 26-30, 2018</i>	<b>Out of State Executive Council Meeting</b> The Westin Excelsior Rome, Italy (with pre-event in Florence, Italy-TBA) Standard Room: Euro 325.00 Euro (single) Euro 335.00 (double) - includes Breakfast
<i>December 5-9, 2018</i>	<b>Executive Council Meeting</b> Four Seasons Hotel Orlando, Florida Room Rates: Standard Guest Rooms: \$285 (single/double occupancy) Park View Rooms: \$399 (single/double occupancy)
<i>March 13-17, 2019</i>	<b>Executive Council Meeting</b> Omni Resorts Amelia Island Plantation Room Rates: Hotel/Villa Guestrooms \$259 (single/double occupancy) One Bedroom Oceanfront Villa: \$299 (single/double occupancy) Two Bedroom Oceanfront Villa: \$399.00 (single/double occupancy) Three Bedroom Oceanfront Villa: \$459 (single/double occupancy)
<i>May 15-18, 2019</i>	<b>Executive Council Meeting &amp; Convention</b> Opal Sands Resort Clearwater Beach, Florida Room Rate: \$239 Deluxe Gulf Front (single/double occupancy)

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NOTE: All Reservations will have strict cancellation policies that will result in forfeiture of deposits and/or payment in full for rooms cancelled. Please carefully review cancellation policies before booking your room. When the link opens up for booking more details will be provided.





## RPPTL Financial Summary from Separate Budgets

2017-2018 [July 1 - August 31] YEAR

### TO DATE REPORT

#### General Budget

#### YTD

Revenue	\$ 802,918
Expenses	\$ 266,730
<b>Net:</b>	<b>\$ 536,188</b>

#### Attorney Loan Officer

#### YTD

Revenue	\$ 11,875
Expenses	\$ 10,065
<b>Net:</b>	<b>\$ 1,810</b>

#### CLI

#### YTD

Revenue	\$ 5,038
Expenses	\$ 74
<b>Net:</b>	<b>\$ 4,964</b>

#### Trust Officer Conference

Revenue	\$ 273,766
Expenses	\$ 29,790
<b>Net:</b>	<b>\$ 243,976</b>

#### Legislative Update

Revenue	\$ 32,057
Expenses	\$ 10,906
<b>Net:</b>	<b>\$ 21,151</b>

#### Convention

Revenue	\$ -
Expenses	\$ 36
<b>Net:</b>	<b>\$ (36)</b>

#### Roll-up Summary (Total)

Revenue:	\$ 1,125,654
Expenses	\$ 317,601
<b>Net Operations</b>	<b>\$ 808,053</b>

<b>Beginning Fund Balance:</b>	<b>\$ 1,684,323</b>
<b>Current Fund Balance (YTD):</b>	<b>\$ 2,492,376</b>
<b>Projected June 2018 Fund Balance</b>	<b>\$ 1,582,237</b>

RPPTL CALENDAR OF EVENTS

DATE	TITLE	LOCATION	PROGRAM CHAIR
October 17, 2017	AUDIO WEBCAST: Hurricane Irma: Now What Do We Do? (2557)	Audio Webcast	Steve Mezer
November 3, 2017	Probate Law 2017 (Course 2574)	Fort Lauderdale Riverside Hotel	John Moran
November 16, 2017	Navigating a Foreclosure Agreement (Course 2580)	Audio Webcast	Jason Ellison
November 20, 2017	Expert Witnesses in Construction Cases (2549)	Video Webcast	Neal Sivyer
November 30, 2017	Estate and Trust Planning/Asset Protection CLE (2583)	Hyatt Orlando Airport	Jolyon Acosta
January 10, 2018	AUDIO WEBCAST - PENDING (2588)	Audio Webcast	TBA
February 9-10, 2018	Real Property Certification Review Course (2597)	Lowes Portifino Resort, Orlando	Manny Farach
February 9-10, 2018	Condo Law Certification Review Course (2623)	Lowes Portifino Resort, Orlando	Bill Sklar
February 14, 2018	AUDIO WEBCAST - PENDING (2602)	Audio Webcast	TBA
March 2, 2018	2018 Litigation and Trust Law Symposium (2607)	Tampa	Jon Scuderi/Angela Adams/Tami Conetta/Rich Caskeys
March 8-11, 2018	Construction Law Certification Review Course (2608)	JW Marriott, Orlando	Deborah Mastin
March 9-11, 2018	11th Annual Construction Law Institute (2609)	JW Marriott, Orlando	Sanjay Kurian
March 14, 2018	AUDIO WEBCAST - PENDING (2610)	Audio Webcast	TBA
April 6-7, 2018	Wills, Trusts and Estate Certification (2621)	Hyatt Orlando Airport	Linda Griffin
April 11, 2018	AUDIO WEBCAST - PENDING (2622)	Audio Webcast	TBA
May 9, 2018	AUDIO WEBCAST - PENDING (2635)	Audio Webcast	TBA
June 1, 2018	RPPTL Convention Seminar(2638)	Tradewinds Island Resort, St. Pete Beach, FL	
July 27, 2018	RPPTL Legislative and Case Law Update 2018	The Breakers, Palm Beach, FL	Stacy Kalmanson
August 23-26, 2018	RPPTL Attorney/Trust Officer Liaison Conference	The Breakers, Palm Beach, FL	Tattiana Stahl
August 22-25, 2019	RPPTL Attorney/Trust Officer Liaison Conference	The Breakers, Palm Beach, FL	TBA

IN THE DISTRICT COURT OF APPEAL  
FIRST DISTRICT, STATE OF FLORIDA

RICHARD M. RIGBY,

Appellant,

v.

NOT FINAL UNTIL TIME EXPIRES TO  
FILE MOTION FOR REHEARING AND  
DISPOSITION THEREOF IF FILED

CASE NO. 1D16-665

BANK OF NEW YORK  
MELLON, f/k/a The Bank of New  
York, as Trustee for the  
Certificateholders of CWMBS,  
Inc., Alternative Loan Trust 2006-  
8T1, Mortgage Pass-Through  
Certificates, Series 2006-7,

Appellee.

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Opinion filed September 18, 2017.

An appeal from the Circuit Court for Bay County.  
James Fensom, Judge.

Douglas L. Smith of Burke, Blue, Hutchison, Walters & Smith, P.A., Panama City;  
Michael R. Reiter, Lynn Haven, for Appellant.

Mark P. Stopa of Stopa Law Firm, Tampa, for Amicus Curiae Mark P. Stopa, Esq.  
and Stopa Law Firm, in support of Appellant.

Mary J. Walter and Tricia J. Duthiers of Liebler Gonzalez & Portuondo, Miami,  
for Appellee.

Marissa M. Yaker, Robert K. Bowen and Timothy D. Padgett of Padgett Law  
Group, Tallahassee; Robert R. Edwards and Ari Miller of Choice Legal Group,  
P.A., Ft. Lauderdale; David Rosenberg of Robertson, Anschutz & Schneid, PL,  
Boca Raton; Andrea R. Tromberg and Jason Joseph of Gladstone Law Group,  
P.A., Boca Raton; Michelle Garcia Gilbert and Jennifer Lima-Smith of Gilbert

Garcia Group, P.A., Tampa, for Amicus Curiae American Legal and Financial Network, in support of Appellee.

Carrie Ann Wozniak, Joseph E. Foster and Sara A. Brubaker of Akerman LLP, Orlando; Richard H. Martin of Akerman LLP, Tampa, for Amicus Curiae The Florida Bankers Association, in support of Appellee.

Kenneth B. Bell and John W. Little, III of Gunster, West Palm Beach; Robert W. Goldman of Goldman Felcoski & Stone, P.A., Naples, for Amicus Curiae The Real Property Probate and Trust Law Section of The Florida Bar.

PER CURIAM.

AFFIRMED. *Ashby v. Wells Fargo Bank, N.A.*, 221 So. 3d 1217 (Fla. 1st DCA 2017).

B.L. THOMAS, C.J., and OSTERHAUS, J., CONCUR; BILBREY, J., DISSENTS WITH OPINION.

BILBREY, J., Dissenting.

Richard Rigby challenges the final judgment of foreclosure in favor of Bank of New York Mellon, f/k/a the Bank of New York, as Trustee for the Certificate Holders CWMBS, Inc., Alternative Loan Trust 2006-8T1 Mortgage Pass-Through Certificates Series 2006-7 (BONY), on grounds that certain evidence at trial was improperly admitted and that the evidence was insufficient to prove that BONY had standing to enforce the note on the date the original foreclosure complaint was filed. Having reviewed the documents and testimony presented at trial and in the record, I believe that evidence was improperly admitted, and without that improperly admitted evidence, there was insufficient proof of BONY's standing. Therefore, I would reverse the final judgment and remand for a new trial. Since the majority affirms the decision of the trial court, I respectfully dissent.

BONY filed the original complaint for foreclosure on May 14, 2010, alleging that Mr. Rigby's mortgage was in default due to his failure to pay the amount due September 1, 2009, and amounts due thereafter. Paragraph 8 of the complaint alleged that BONY "owns and holds the note and mortgage." Attached to the complaint was a copy of a promissory note obligating Mr. Rigby to repay a loan from lender BankTrust and a copy of the mortgage securing the note. The signature page of the copy of the note included an undated special indorsement from an officer of BankTrust to "the order of Countrywide Bank, N.A." See

§ 673.2051(1), Fla. Stat. (stating that a special indorsement may only be negotiated by the person identified). In his answer and affirmative defenses, Mr. Rigby denied the allegations in paragraph 8 of the complaint pertaining to BONY's ownership and possession of the note and mortgage.

With leave of court, BONY filed an amended complaint with the same allegations in paragraph 8 to assert BONY's standing to enforce the note. However, the note attached to the amended complaint included two indorsements in addition to the special indorsement to Countrywide Bank, N.A., which appeared on the earlier filed copy. The next indorsement on the note attached to the amended complaint was from Countrywide Bank, N.A., to Countrywide Home Loans, Inc. The last of the additional indorsements was a blank indorsement from Countrywide Home Loans, Inc., making the note payable to bearer and negotiable by transfer of possession alone. See § 673.2051(2), Fla. Stat. ("When indorsed in blank, an instrument becomes payable to bearer and may be negotiated by transfer of possession alone until specially indorsed."). No dates appeared on any of the three indorsements.

Consistent with his original answer, in his answer to the amended complaint, Mr. Rigby again denied BONY's allegations that it owned and held the note and mortgage. Accordingly, BONY's status as a holder or other person entitled to enforce the note, pursuant to section 673.3011, Florida Statutes, continued to be a

contested matter which BONY was required to prove. See Lacombe v. Deutsche Bank Nat'l Trust Co., 149 So. 3d 152, 154 (Fla. 1st DCA 2014) (citing Gee v. U.S. Bank Nat'l Ass'n, 72 So. 3d 211, 214 (Fla. 5th DCA 2011)) (“Accordingly, throughout the litigation Appellants disputed the fact of Deutsche Bank's right to enforce the note and attendant standing to maintain an action for foreclosure. Deutsche Bank's ownership of the note was thus an issue it was required to prove.”).

It is well-settled that where “the plaintiff files the original note after filing suit, an undated blank endorsement [sic] on the note is insufficient to prove standing at the time the initial complaint was filed.” Tilus v. AS Michai LLC, 161 So. 3d 1284, 1286 (Fla. 4th DCA 2015); see also Kelly v. Bank of New York Mellon, 170 So. 3d 145, 146 (Fla. 1st DCA 2015) (quoting Tilus, 161 So. 3d at 1286). Because the blank indorsement on the note in this case was undated, and BONY’s status as the holder when the action was filed was a contested issue, BONY offered additional evidence at trial in an attempt to prove standing. See Walton v. Deutsche Bank Nat'l Trust Co., 201 So. 3d 831, 833 (Fla. 1st DCA 2016) (“Where the documentary evidence is insufficient to prove standing at the time of the filing of the complaint, a witness may provide sufficient testimony to prove standing.”).

BONY presented the testimony of Melissa Sequete, Assistant Vice President

of Residential Credit Solutions, Inc. (RCS), the most recent loan servicer connected with the mortgage. Through Ms. Sequete's testimony, BONY presented a series of documents it advanced as proof that the note was indorsed in blank and in the possession of BONY as of the date the original complaint was filed. The trial court allowed the testimony and admitted the documents over Mr. Rigby's attorney's repeated hearsay objections. However, because Ms. Sequete began her employment with RCS in 2011, she had no personal knowledge of the location of the note on May 14, 2010; no explanation for the difference in the indorsements appearing on the copy of the note filed in 2010 and the original filed with the amended complaint in 2011; and no personal knowledge to offer evidence that the blank indorsement on the original note was in place as of May 14, 2010.

BONY attempted to prove standing by admitting certain business records through Ms. Sequete's testimony. A sufficient evidentiary foundation must be provided to admit business records over a hearsay objection. § 90.803(6)(a), Fla. Stat. As the Florida Supreme Court has stated:

To secure admissibility under this exception, the proponent must show that (1) the record was made at or near the time of the event; (2) was made by or from information transmitted by a person with knowledge; (3) was kept in the ordinary course of a regularly conducted business activity; and (4) that it was a regular practice of that business to make such a record.

Yisrael v. State, 993 So. 2d 952, 956 (Fla. 2008).



“Proper authentication by a witness requires that the witness demonstrate familiarity with the record-keeping system of business that prepared the document and knowledge of how the data was uploaded into the system.” Burdeshaw v. Bank of New York Mellon, 148 So. 3d 819, 823 (Fla. 1st DCA 2014). Although the witness attempting to authenticate the business records of a predecessor business need not be the person who prepared the records or who is the custodian of the records, “since records crafted by a separate business lack the hallmarks of reliability inherent in a business’s self-generated records, proponents must demonstrate not only that ‘the other requirements of [the business records exception rule] are met’ but also that the successor business relies upon those records and ‘the circumstances indicate the records are trustworthy.’” Nationstar Mortgage, LLC, v. Berdecia, 169 So. 3d 209, 215 (Fla. 5th DCA 2015) (quoting Bank of New York v. Calloway, 157 So. 3d 1065, 1071 (Fla. 4th DCA 2015) (citations omitted)).<sup>1</sup>

The pooling and servicing agreement pertaining to BONY’s trust and a document Ms. Sequete described as a “note routing history” were admitted into

<sup>1</sup> Other recent cases from the Fourth District hold a predecessor’s business records are admissible by showing they were “boarded” into the successor’s records with certain indicia of reliability. See Ocwen Loan Servicing, LLC v. Gundersen, 204 So. 3d 530 (Fla. 4th DCA 2016); Wells Fargo Bank, N.A. v. Eisenberg, 220 So. 3d 517 (Fla. 4th DCA 2017). However, I respectfully submit that the “kept in the ordinary course of business” requirement of Yisrael requires proof of familiarity with the predecessor’s record-keeping practices, as Burdeshaw and Berdecia also require. Yisrael, 993 So. 2d at 956.

evidence as business records over hearsay objections. Ms. Sequete testified that the note was indorsed in blank when put into the trust on February 28, 2006. The implication from Ms. Sequete's testimony was that the blank indorsed note remained there and BONY was the holder when suit was filed. Ms. Sequete had knowledge of RCS' records and systems, but not as to the prior servicer, Bank of America. When asked if she had knowledge of whether Bank of America kept the records offered in the regular course of business, all she could testify to was industry standards. When asked about Bank of America's practices in making records, all she could testify to was what she read in the documents. Her association with Bank of America consisted only of training in how to function as a servicer and not as to how Bank of America kept its records. As such Ms. Sequete's testimony was an insufficient basis for admission of the pooling and service agreement and the note routing history. See § 90.803(6)(a); Yisrael; Burdeshaw; Hunter v. Aurora Loan Servs., 137 So. 3d 570 (Fla. 1st DCA 2014). Without these documents there was no evidence as to when the note went into the trust, so there was no evidence that BONY was the holder when the original complaint was filed. See Powers v. HSBC Bank USA, N.A., 202 So. 3d 121 (Fla. 2d DCA 2016) (holding that the attempt to prove standing failed where there was no evidence that a loan was included in a pooling and service agreement).<sup>2</sup>

<sup>2</sup> Had BONY been able lay a proper predicate for admission of the pooling and

As a result of the improperly admitted evidence I would reverse the final judgment of foreclosure and remand for a new trial. See Evans v. HSBC Bank, USA, Nat'l Ass'n, 2017 WL 1829484 (Fla. 2d DCA May 5, 2017); Miller v. Bank of America, N.A., 201 So. 3d 1286 (Fla. 5th DCA 2016); Helton v. Bank of America, N.A., 187 So. 3d 245 (Fla. 5th DCA 2016).

service agreement and the note routing history under the business records exception, then I agree that they could have been used to show that BONY held the note at the time the initial complaint was filed and therefore had standing to sue. See Ashby v. Wells Fargo Bank, N.A., 2017 WL 887103 (Fla. 1st DCA March 6, 2017); Bolous v. U.S. Bank Nat. Ass'n, 210 So. 3d 691 (Fla. 4th DCA 2016); Deutsche Bank Nat. Trust v. Marciano, 190 So. 3d 166 (Fla. 5th DCA 2016).

**IN THE DISTRICT COURT OF APPEAL, FIRST DISTRICT  
FOR THE STATE OF FLORIDA**

RICHARD M. RIGBY,

Appellant,

v.

DCA NO: 1D16-0665  
LOWER TRIBUNAL NO.: 2010-1313CA

BANK OF NEW YORK MELLON,

Appellee.

**APPELLANT’S MOTION FOR CERTIFICATION**

COMES NOW the Appellant Richard M. Rigby [hereinafter “Rigby”], by and through his undersigned counsel, and, pursuant to Rule 9.330, Fla. R. App. P., hereby moves this Court for certification of conflict to the Florida Supreme Court.

As ground for said Motion, Rigby would show as follows:

1. The Court’s majority opinion in the instant appeal is in direct conflict with *Friedle v. Bank of New York Mellon*, — So.3d —, 2017 WL 2264647, 42 Fla. L. Weekly D1163 (Fla. 4<sup>th</sup> DCA 2017).

2. This Court’s ruling in favor of Appellee BANK OF NEW YORK MELLON [hereinafter “BONY”] necessarily includes the conclusion that BONY’s evidence concerning its Pooling and Servicing Agreement [hereinafter the “BONY PSA”] (R. 1073-1232) was sufficient to meet the requirement of proving standing

at the inception of the mortgage foreclosure lawsuit by BONY.

3. Based upon the Fourth District Court of Appeal's holding in *Friedle*, the BONY PSA did not meet the evidentiary standard of proof for Pooling and Servicing Agreements which is required to meet the burden of proof for proving standing at the inception.

4. Therefore, there is a direct conflict between the majority holding of this Court in the instant appeal and the *Friedle* court, such that the conflict should be certified to the Florida Supreme Court for determination of the proof required concerning Pooling and Servicing Agreements when those are used to provide the additional evidence needed to prove a lender plaintiff's standing at the inception of the mortgage foreclosure action.

WHEREFORE, Rigby respectfully requests that this Court certify conflict with the Fourth District Court of Appeal's *Friedle* decision, and grant such other relief as the Court deems just and proper.

Dated this 27<sup>th</sup> day of September, 2017.

**BURKE BLUE**  
**HUTCHISON WALTERS & SMITH, P.A.**  
Attorneys for Appellant Rigby

By: 


DOUGLAS L. SMITH, ESQ.  
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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a copy of the foregoing has been furnished via electronic service to Mary J. Walter, Esq., of Liebler, Gonzalez & Portuondo, Courthouse Tower - 25th Floor, 44 West Flagler Street, Miami, FL 33130, at [service@lgplaw.com](mailto:service@lgplaw.com) and [mjw@lgplaw.com](mailto:mjw@lgplaw.com), Jason F. Joseph, Esq., of Gladstone Law Group, P.A., 1499 W. Palmetto Park Road, Suite 300, Boca Raton, FL 33486, at [eservice@gladstonelawgroup.com](mailto:eservice@gladstonelawgroup.com), , and Jonathan Jacobson, Esq., 1499 W. Palmetto Park Road, Suite 300, Boca Raton, FL 33486, at [eservice@gladstonelawgroup.com](mailto:eservice@gladstonelawgroup.com), on this 27<sup>th</sup> day of September, 2017.

**BURKE BLUE**  
**HUTCHISON WALTERS & SMITH, P.A.**  
Attorneys for Appellant Rigby

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# MANDATE

## SUPREME COURT OF FLORIDA

*To the Honorable, the Judges of the:*

**District Court of Appeal, Fourth District**

*WHEREAS, in that certain cause filed in this Court styled:*

**GLENDIA MARTINEZ SMITH vs. J. ALAN SMITH**

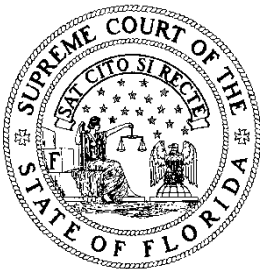
*Case No.:* **SC16-1312**


*Your Case No.:* **4D14-1436**

*The attached opinion was rendered on:* **08/31/2017**

*YOU ARE HEREBY COMMANDED that further proceedings be had in accordance with said opinion, the rule of this Court and the laws of the State of Florida.*

*WITNESS, The Honorable JORGE LABARGA, Chief Justice of the Supreme Court of Florida and the Seal of said Court at Tallahassee, the Capital, on this 25th day of September 2017.*



  
Clerk of the Supreme Court of Florida

# Supreme Court of Florida

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No. SC16-1312

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**GLEND A MARTINEZ SMITH,**  
Petitioner,

vs.

**J. ALAN SMITH,**  
Respondent.

[August 31, 2017]

LABARGA, C.J.

This case is before the Court for review of the decision of the Fourth District Court of Appeal in Smith v. Smith, 199 So. 3d 911 (Fla. 4th DCA 2016). The district court certified the following question to be of great public importance:

WHERE THE FUNDAMENTAL RIGHT TO MARRY HAS NOT BEEN REMOVED FROM A WARD UNDER SECTION 744.3215(2)(a), FLORIDA STATUTES, DOES THE STATUTE REQUIRE THE WARD TO OBTAIN APPROVAL FROM THE COURT PRIOR TO EXERCISING THE RIGHT TO MARRY, WITHOUT WHICH APPROVAL THE MARRIAGE IS ABSOLUTELY VOID, OR DOES SUCH FAILURE RENDER THE MARRIAGE VOIDABLE, AS COURT APPROVAL COULD BE CONFERRED AFTER THE MARRIAGE?



Smith v. Smith, 195 So. 3d 416, 416 (Fla. 4th DCA 2016). We have jurisdiction. See art. V, § 3(b)(4), Fla. Const. For the reasons discussed below, we quash the decision of the Fourth District and hold that where the right to contract has been removed under section 744.3215(2)(a), Florida Statutes (2016), the ward is not required to obtain court approval prior to exercising the right to marry, but court approval is necessary before such a marriage can be given legal effect.

## OVERVIEW

When a person is deemed incapacitated, a guardianship court may remove some of his or her rights. See § 744.331, Fla. Stat. (2016).<sup>1</sup> Section 744.3215, Florida Statutes (2016), titled “Rights of persons determined incapacitated,” separates the rights of an incapacitated person into three distinct categories: rights retained by the incapacitated person (or rights that cannot be removed through incapacity proceedings); rights that can be removed and delegated to a guardian;

---

1. Before a right can be removed from an incapacitated person, section 744.331(3)(a) requires the guardianship court to appoint a three-member examining committee, of which one member must be a psychiatrist or other physician. Each of the remaining members must be a physician, nurse, “or other person who by knowledge, skill, experience, training, or education may, in the court’s discretion, advise the court in the form of an expert opinion.” Id. Each committee member is required to conduct a comprehensive examination of the person to “determine the alleged incapacitated person’s ability to exercise those rights specified in [section] 744.3215,” and each member must submit a written report with his or her findings. § 744.331(3)(e), Fla. Stat. An adjudicatory hearing must then be held, and “the partial or total incapacity of the person must be established by clear and convincing evidence.” § 744.331(5)(c), Fla. Stat.

and rights that can be removed, but not delegated to a guardian. The right to marry falls within the latter category, under section 744.3215(2)(a), which provides:

(2) Rights that may be removed from a person by an order determining incapacity but not delegated to a guardian include the right:

(a) To marry. If the right to enter into a contract has been removed, the right to marry is subject to court approval.

Consequently, a guardianship court may remove an incapacitated person's right to marry if there is clear and convincing evidence that he or she is incapacitated with respect to that right. Id.; § 744.331(6), Fla. Stat. However, even when a guardianship court does not remove the right to marry, an incapacitated person's right to marry becomes "subject to court approval" when his or her right to contract has been removed. § 744.3215(2)(a), Fla. Stat. The question presented in this case is whether court approval must be obtained before the incapacitated person marries.

## **FACTS AND PROCEDURAL HISTORY**

This annulment challenge is an offshoot of a guardianship case initiated by the daughter of Respondent, J. Alan Smith (Alan), in 2010 after Alan was involved in an automobile accident in which he suffered head trauma. Smith, 199 So. 3d at 911; id. at 914 (Warner, J., dissenting); see also Martinez v. Guardianship of Smith, 159 So. 3d 394, 396 (Fla. 4th DCA 2015). According to Alan's daughter, Alan was no longer competent to handle his financial affairs or care for his

property as a result of his diminished mental capacity. In April 2010, Alan was determined to be partially incapacitated. Alan’s right to contract and his right to manage property were removed and delegated to John Cramer, who was appointed to be Alan’s limited guardian of property. However, the court specifically found there was “no incapacity on the part of [Alan] that would warrant a guardian of a person.” The court issued an Order that provided:

The following rights of the Ward are delegated to the Guardian appointed by this Order:

[X] to Contract,

[X] to manage the property of the Ward

Note: If the right of the Ward to Contract has been delegated to the Guardian but the right to marry is retained, then the right to marry is subject to Court approval.<sup>[2]</sup>

(Emphasis added.)

It is undisputed that Petitioner, Glenda Martinez Smith (Glenda), met and became engaged to Alan before he was deemed incapacitated. In 2009, the year prior to his accident, Alan executed a Designation of Health Care Surrogate and Living Will Declaration naming Glenda as his health care surrogate and preneed guardian.<sup>3</sup> Alan also gave Glenda durable power of attorney.

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2. This provision tracks the language in section 744.3215(2)(a).

3. A preneed guardian is someone who has been designated to serve as a person’s guardian in the event that person is declared incapacitated. See § 744.3045(1), Fla. Stat. (2016).

In December 2011, Glenda and Alan were married. Court approval was not obtained prior to the marriage ceremony. However, Glenda asked Cramer to seek court approval on two separate occasions, but Cramer refused.

Alan's court-appointed counsel, Lynne Hennessey, filed a petition for annulment in early 2013 based solely on the assertion that the marriage was void because court approval had not been obtained prior to the act of marriage. Glenda then moved to ratify the marriage, and Hennessey moved for summary judgment. After a hearing, the court denied Glenda's motion and granted Hennessey's motion, concluding section 744.3215(2)(a) requires prior court approval because the "statute does not contemplate the right to ratify or somehow prove an existing marriage." Because neither Alan nor Glenda obtained court approval before marrying, the court concluded their marriage was void and incapable of ratification.

Glenda appealed the final judgment of annulment, arguing that neither the statute nor the order that removed Alan's right to contract explicitly required prior court approval, and as such, the marriage could be ratified by obtaining approval after the marriage was solemnized. Glenda also asserted such approval had been obtained during a December 2012 hearing.<sup>4</sup> The Fourth District Court of Appeal

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4. The hearing was related to a petition to move Alan to another assisted living facility.

rejected Glenda's assertions and affirmed the trial court's decision. Smith, 199 So. 3d at 912. The district court agreed with the trial court's rationale that the plain language of the statute

does not state that "a marriage" is subject to court approval, but rather, it states that "the right to marry" is subject to court approval. Therefore, if a person deemed incapacitated has had his or her right to contract removed, he or she has no right to marry unless the court gives its approval.

Id. The district court explained that, because a "marriage entered into by a person with no right to marry is void . . . it follows that in order to enter into a valid marriage, an incapacitated person who has had his or her right to contract removed must first ask the court to approve his or her right to marry." Id. Accordingly, the district court held "the trial court correctly determined that the marriage was void."

Id.

The district court also concluded that because

the marriage was void from the inception, [Glenda's] argument that the court "ratified" the marriage by acknowledging it at the December 18, 2012 hearing is without merit. A void marriage, in legal contemplation, has never existed and, therefore, cannot be ratified. At any rate, this Court reversed the court's order stemming from the December 18, 2012 hearing and remanded for a new hearing. By virtue of our mandate, nothing the court did on December 18, 2012 has any binding legal effect.

Id. at 912 n.1 (citations omitted).

Judge Warner disagreed with the majority's interpretation of section 744.3215(2)(a). Id. at 913 (Warner, J., dissenting). She found it significant both

that the statute “does not state that marriage is prohibited unless approval is given prior to the marriage” and that “the right to marry was not removed from [Alan] at the time of the marriage ceremony.” Id. at 916-17 (Warner, J., dissenting). Judge Warner stated she “would hold that the failure to obtain court approval prior to the marriage at most rendered the marriage voidable, not void, so that the court could approve the union post-marriage.” Id. at 913 (Warner, J., dissenting).

After the district court issued its decision, Glenda filed a motion to certify a question of great public importance, which the district court granted. Smith, 195 So. 3d at 416. This review follows.

### **ANALYSIS**

The certified question presents a pure question of law subject to a de novo review. See W. Fla. Reg'l Med. Ctr. v. See, 79 So. 3d 1, 8 (Fla. 2012) (“Statutory and constitutional construction are questions of law subject to a de novo review.”). A court’s purpose in construing a statute is to give effect to the legislative intent underlying that statute. Davila v. State, 75 So. 3d 192, 195 (Fla. 2011).

Discerning legislative intent requires a court to look first to the plain language of the statute. Id. When the language is unambiguous and conveys a clear meaning, “the statute must be given its plain and obvious meaning.” Id. at 195-96 (quoting Velez v. Miami–Dade Cty. Police Dep’t, 934 So. 2d 1162, 1164 (Fla. 2006)).

“When necessary, the plain and ordinary meaning can be ascertained by reference

to a dictionary.” Bennett v. St. Vincent’s Med. Ctr., Inc., 71 So. 3d 828, 839 (Fla. 2011). An unambiguous statute cannot be construed “in a way which would extend, modify, or limit, its express terms or its reasonable and obvious implications.” McLaughlin v. State, 721 So. 2d 1170, 1172 (Fla. 1998) (quoting Holly v. Auld, 450 So. 2d 217, 219 (Fla. 1984)). However, when a statute is subject to more than one interpretation, the rules of statutory construction should be applied to resolve the ambiguity. Greenfield v. Daniels, 51 So. 3d 421, 425 (Fla. 2010). This may include an examination of the statute’s legislative history and the purpose behind its enactment. W. Fla. Reg’l Med. Ctr., 79 So. 3d at 9.

The certified question asks whether the failure to obtain court approval pursuant to section 744.3215(2)(a) renders the ward’s marriage “void” or “voidable.” To resolve the matter, we will first discuss the meaning of these terms as traditionally defined by Florida precedent in the marital context. Then, we will look to the plain language of section 744.3215(2)(a) and the legislative history of the Florida Guardianship Laws to ascertain whether the Legislature intended either of these terms to apply to the disputed provision.

### **“Void” and “Voidable” Marriages**

Although the right to marry is considered a fundamental right, it is not unconditional. A marriage may be rendered invalid either by statute or circumstance. As this Court has explained,

[t]o constitute a valid marriage, the marital contract must be voluntarily entered into in good faith for the purposes actuating such contracts, the parties must be legally eligible to make the contract, and their status must be such that the union will not be contrary to public policy or obnoxious to the prevailing social mores.

Goldman v. Dithrich, 179 So. 715, 717 (Fla. 1938).

An invalid marriage has traditionally been considered either void or voidable. “A marriage is considered voidable . . . when it is possible for the parties to subsequently ratify it when there has been removed a disabling or voiding impediment which was unknown to both parties at the time the invalid marriage was originally contracted.” Jones v. Jones, 161 So. 836, 838 (Fla. 1935). In other words, it is possible for a voidable marriage to ripen into a valid marriage if it is ratified by the parties. For example, minors who get married without parental consent may later ratify the marriage once they reach the age of majority. See, e.g., Needam v. Needam, 33 S.E.2d 288 (Va. 1945). Likewise, a marriage entered into where a party lacks mental capacity (due to intoxication, for example) may later be ratified upon regaining capacity. See, e.g., Mahan v. Mahan, 88 So. 2d 545, 548 (Fla. 1956) (holding marriage entered into while intoxicated is invalid unless later ratified by the parties); see also Prine v. Prine, 18 So. 781, 785 (Fla. 1895) (recognizing it is “well established that a marriage, invalid at the time for want of mental capacity, may be ratified and made valid afterwards by any acts or conduct which amount to a recognition of its validity.”). Importantly, a “voidable



marriage is good for every purpose until avoided[;] it can be attacked only in a direct proceeding during the life of the parties.” Kuehmsted v. Turnwall, 138 So. 775, 777 (Fla. 1932) (emphasis added) (citing 18 R. C. L. 447). Upon the death of either party, “the marriage is good ab initio.” Id.

In contrast, a void marriage is generally one that is incapable of ratification or prohibited by statute. When a marriage is deemed void, “the effect . . . so far as [it] concerns the conferring of legal rights upon the parties, is as though no marriage had ever taken place.” Id. (quoting 18 R. C. L. 446). Due to the harshness of declaring a marriage void, few circumstances have been identified as requiring such a result. See Mahan, 88 So. 2d at 548 (“The marriage contract is one of the most sacred of compacts. It should not be set aside or dissolved in the absence of clear and substantial proof that annulment or dissolution is justified under the law.”). Historically, permanent incapacity and insanity have been among the rare circumstances which render a marriage void. Kuehmsted, 138 So. at 777 (“At the common law, the canonical disabilities of consanguinities, affinity, and impotence rendered the marriage voidable and not void, while insanity rendered it

absolutely void.”).<sup>5</sup> Unlike a voidable marriage, the validity of a void marriage may be challenged at any time, including after the death of the alleged spouses. Id.

### **Plain Language of Section 744.3215(2)(a)**

The plain language of section 744.3215(2)(a) reflects that the Legislature did not intend for the type of invalid marriage at issue in this case to be classified as either void or voidable according to how these terms have been defined under Florida precedent.

The disputed provision does not use the terms “void” or “voidable,” nor does it use language that embodies the traditional definitions of these terms. Other statutes clearly identify circumstances that render a marriage void; however, such language was not used in section 744.3215(2)(a). For example, section 741.211, Florida Statutes (2016), is titled “Common-law marriages void,” and provides “[n]o common-law marriage . . . shall be valid.” (Emphasis added.) Similarly, section 741.21, Florida Statutes (2016), is titled “Incestuous marriages prohibited,” and provides that a man or woman “may not” marry certain relatives. (Emphasis added.) In contrast, section 744.3215(2)(a) does not expressly provide that an incapacitated person whose right to contract has been removed is “prohibited”

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5. Bigamous and incestuous marriages are also considered void. § 741.21, Fla. Stat. (2016); Jones v. Jones, 161 So. 836, 832 (Fla. 1935) (recognizing bigamous marriages as void).

from marrying unless court approval is obtained, or that any marriage entered into would be “void” absent such approval.

Moreover, the term “subject” in the disputed clause of section 744.3215(2)(a)—“the right to marry is subject to court approval”—is not defined as a condition precedent. Merriam-Webster defines the term as “contingent on or under the influence of some later action ([e.g.,] the plan is subject to discussion).” Merriam-Webster’s Collegiate Dictionary 1243 (11th ed. 2014) (emphasis added). According to Webster’s International Dictionary, “subject” is defined as “likely to be conditioned, affected, or modified in some indicated way: having a contingent relation to something and usu[ally] dependent on such relation for final form, validity, or significance.” Webster’s Third New International Dictionary 2275 (1993). In the context of section 744.3215(2)(a), “the right to marry is subject to court approval” means that the ward’s right to marry is contingent on court approval, though that approval may come later in time, such as after the marriage ceremony. Although the validity of the marriage itself depends on court approval, nowhere in the statute does it provide that court approval must be obtained prior to marrying.

Unlike section 744.3215(2)(a), other provisions within the Florida Guardianship Laws expressly require court approval as a condition precedent. See generally BellSouth Telecomm., Inc. v. Meeks, 863 So. 2d 287, 291 (Fla. 2003)

(holding that “when the [L]egislature includes a provision in one section of a statute but excludes it in another, courts will deem the difference intentional and will assign meaning to the omission”). Section 744.3215(4), Florida Statutes (2016), lists actions a guardian may not take “[w]ithout first obtaining specific authority from the court.” (Emphasis added.) Similarly, section 744.446(2), Florida Statutes (2016), requires “prior approval” by court order before a guardian can engage in certain activities, and section 744.441, Florida Statutes (2016), delineates the powers a guardian has “[a]lfter obtaining approval of the court.” (Emphasis added.) See also § 744.1098(1), Fla Stat. (2016) (requiring a guardian to “obtain court approval prior to removal of the ward” to a nonadjacent county (emphasis added)). Although these subsections are distinguishable because each addresses acts of the guardian that require court approval, and not acts by the incapacitated person, they are nonetheless illustrative of language used by the Legislature to explicitly mandate prior court approval. The fact that such language was not used in section 744.3215(2)(a) indicates the Legislature did not intend to require prior court approval.

The plain language of section 744.3215(2)(a) is likewise inconsistent with the traditional meaning of a “voidable” marriage. As previously discussed, the statute makes a ward’s “right to marry” contingent on court approval if the right to contract has been removed. In other words, the ward’s ability to enter into a valid

marriage depends on court approval. Thus, if the right to marry is not approved, any attempt by the ward to marry would result in an invalid marriage. If court approval is never obtained, the invalidity of the marriage cannot be cured, and the marriage can be given no effect. This is inconsistent with the traditional concept of a “voidable” marriage, which is “good for every purpose” until it is challenged, and “good ab initio” if it is not challenged within the parties’ lifetimes.

Kuehmsted, 138 So. at 777.

In sum, the critical language of section 744.3215(2)(a)—“the right to marry is subject to court approval”—should be given its plain meaning: the ward’s right to marry is contingent on court approval when the right to contract is removed. However, the statute does not use the term “void” or expressly require prior court approval. Further, the word “subject” is not defined as a condition precedent. Therefore, to interpret the statute as requiring court approval prior to the marriage ceremony would impermissibly “extend, modify, or limit, its express terms or its reasonable and obvious implications.” McLaughlin, 721 So. 2d at 1172 (quoting Holly, 450 So. 2d at 219). Moreover, the plain language is inconsistent with a “voidable” marriage.

Accordingly, we conclude that the Legislature did not intend for the concept of a “void” or “voidable” marriage to apply to the disputed provision. We hold that section 744.3215(2)(a) does not preclude the possibility of ratification of a

marriage if the court subsequently gives its approval, but an unapproved marriage is invalid and can be given legal effect only if court approval is obtained.

### **Legislative History**

The legislative history of the Florida Guardianship Laws further supports our conclusion. It reflects the Legislature's objective of protecting incapacitated persons from abuse and exploitation on the one hand, and upholding their rights, dignity, and quality of life on the other. Requiring court approval before a ward may enter a valid marriage, while also allowing for subsequent ratification, furthers the Legislature's stated goals.

Prior to 1989, guardianship laws in Florida took an "all-or-nothing" approach that assumed "a person is either competent and capable of exercising all civil rights, or incompetent and thus incapable of making any significant personal decision." Ch. 89-96, Preamble, at 176, Laws of Fla. However, the Legislature found this approach to be "intrusive and demeaning to a person whose loss of capacity is only partial." Id. It recognized that "an untold number of individuals not in full control of their capacities [were] being taken advantage of, both financially and by having their personal rights stripped by the court without adequate supervision." Id. The Legislature even found that incapacitated persons under the then-existing guardianship laws "typically retain[ed] fewer rights than are retained by convicted felons, since most guardianship orders remove from the

individual basic rights such as the rights to vote, own property, marry, consent to medical treatment, and contract.” Id. As a result, the Legislature undertook a “comprehensive set of reforms to adequately protect the rights and property” of incapacitated persons. Id. at 177. Among other changes, the option of limited guardianships was created, which the Legislature stated would “minimize the invasion of a ward’s privacy and fundamental rights and . . . preserve the ward’s dignity and self respect.” Id. at 176. The Legislature also specified that courts “should take a more proactive and affirmative role in guardianship matters, rather than wait . . . until an abuse of the system is brought to its attention.” Id. at 177.

Protecting the rights of incapacitated persons was likewise considered when section 744.3215(2)(a) was amended in 2006 to include the now-disputed provision. The staff analysis to that bill stated that the amendment “reinforc[es] the significance of the right to marry.” HB 457 (2006) Staff Analysis (March 26, 2006). Further, the bill incorporated the recommendations of several groups, including the Guardianship Task Force.<sup>6</sup> Id. In its report, the Task Force stated it “focused on the premise that the court must consider the least restrictive alternatives to ensure each individual’s dignity.” Guardianship Task Force, Final

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6. In 2003, the Guardianship Task Force was created within the Department of Elder Affairs in order “to examine guardianship and incapacity and make recommendations to the Governor and the Legislature for the improvement of guardianship and incapacity practice.” Ch. 2003-262, § 4(1), at 2712, Laws of Fla.

Report at 8 (2004). The Task Force also “spent a significant amount of time debating the concept of the right to marry being a contractual right,” and as such, whether the right to marry should be removed if the right to contract is removed. Id. However, the Task Force ultimately recommended that the right to marry should not be automatically removed when the right to contract is removed, especially considering that the right to marry is a fundamental right. Id. Instead, it recommended that the right to marry be “subject to court approval so that the judge can determine if the ward understands the marriage contract and that the ward is not a likely victim of abuse or financial exploitation.” Id.

The legislative intent, as declared in section 744.1012, Florida Statutes (2016), further illustrates the goal of protecting incapacitated persons from exploitation while upholding their rights. Section 744.1012 provides:

(1) Adjudicating a person totally incapacitated and in need of a guardian deprives such person of all her or his civil and legal rights and that such deprivation may be unnecessary.

(2) It is desirable to make available the least restrictive form of guardianship to assist persons who are only partially incapable of caring for their needs and that alternatives to guardianship and less restrictive means of assistance, including, but not limited to, guardian advocates, be explored before a plenary guardian is appointed.

(3) By recognizing that every individual has unique needs and differing abilities, it is the purpose of this act to promote the public welfare by establishing a system that permits incapacitated persons to participate as fully as possible in all decisions affecting them; that assists such persons in meeting the essential requirements for their physical health and safety, in protecting their rights, in managing their



financial resources, and in developing or regaining their abilities to the maximum extent possible; and that accomplishes these objectives through providing, in each case, the form of assistance that least interferes with the legal capacity of a person to act in her or his own behalf. This act shall be liberally construed to accomplish this purpose.

(Emphasis added.) This expression of legislative intent, combined with the legislative history of the Florida Guardianship Laws, demonstrates the Legislature's consistent efforts to uphold incapacitated persons' rights to the greatest extent possible. Therefore, the Legislature likely did not intend for section 744.3215(2)(a) to render a ward's unapproved marriage absolutely void, particularly in cases such as this, where the ward was not deemed incapacitated with respect to his right to marry, the parties were engaged prior to his incapacitation, the guardian was asked twice to obtain the court's approval, and there is no evidence whatsoever of abuse or financial exploitation.

Similarly, to interpret section 744.3215(2)(a) as rendering a ward's unapproved marriage merely voidable would undermine the Legislature's efforts to safeguard a ward's inalienable right "to be protected against abuse, neglect, and exploitation." § 744.3215(1)(d), Fla. Stat. As previously discussed, if a ward whose right to contract has been removed enters into a marriage without obtaining court approval, and such a union is considered voidable, the effect is that the marriage is essentially valid "for every purpose" unless and until it is challenged in a direct proceeding during the ward's lifetime. This affords the ward and the

ward's estate little, if any, protection from financial exploitation if the ward passes away before the validity of the marriage can be challenged.

The interpretation of section 744.3214(2)(a) the Legislature likely intended—that, absent court approval, a marriage entered into by a ward whose right to contract has been removed is invalid, but ratifiable—advances both objectives of the Florida Guardianship Laws. It protects the ward and the ward's estate by allowing a court to assess the risk of abuse and exploitation before the alleged spouse acquires any rights as a result of the marriage. It also upholds the ward's fundamental right to marry to the greatest extent possible by allowing for the possibility of ratification.

### **Ratification in This Case**

Glenda argues that the guardianship court did, in fact, ratify her marriage to Alan in a December 2012 hearing. When the collateral issue of Alan's marriage to Glenda arose, the couple's marriage certificate was entered into evidence without objection, although Alan's guardian, Cramer, stated that he did not think they were actually married because court approval had not been obtained. The guardianship court stated:

[M]y concern for you, Mr. Cramer, because I'm going to look to you to make proper decisions, is that Mr. Smith is married, apparently to Ms. Martinez, I have a certificate of marriage, that right was not removed, and her testimony I struck, but the essence of her testimony that was important to me had to do with the fact that she is able to provide companionship and companion care, those two things. Now

for someone like Mr. Smith, it's great that he has good doctors, good nurses, and people like that from a medical point of view, but that is not [a] substitute for the type of personal ability that a spouse has to provide companion care to their spouse. Like it or not . . . she is his spouse, she certainly is hands-on and it is often when a spouse is in an impaired condition like that one of the real benefits, even to someone in Mr. Smith's condition, is to still see his spouse, be able to know she's there and benefit from that, so while the ETG [emergency temporary guardianship] will be plenary in nature . . . you must take into consideration what I just said about Ms. Martinez being able to have close and continuing contact . . . with her husband, because I think Mr. Smith still looks out to her. . . .

(Emphasis added.)<sup>7</sup> Glenda argues that these statements by the guardianship court were sufficient to ratify the marriage. We disagree.

Although the invalid marriage between Glenda and Alan is capable of ratification under section 744.3215(2)(a), it is unlikely that the Legislature intended for "court approval" to consist merely of acknowledging the existence of a marriage certificate and commenting on the alleged marriage, without issuing an order ratifying the marriage or conducting a hearing to verify that the ward understands the marriage contract, desires the marriage, and that the relationship is not exploitative. Therefore, we conclude the guardianship court's statements here were not sufficient to approve the marriage. However, the parties are not foreclosed from seeking court approval based on our decision today.

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7. The presiding judge was subsequently disqualified for remarks made during this hearing regarding Glenda. Martinez v. Cramer, 111 So. 3d 206, 207 (Fla. 4th DCA 2013).

## CONCLUSION

Based upon the foregoing, we answer the certified question by holding that a ward's failure to obtain court approval prior to exercising the right to marry does not render the marriage void or voidable. Instead, we conclude that under section 744.3215(2)(a), court approval is required before a ward whose right to contract has been removed may enter a valid marriage. Any marriage entered into without court approval is invalid. However, the statute does not prevent the ward or the intended spouse from seeking court approval after marrying in order to ratify the marriage. Accordingly, we quash the decision of the Fourth District and remand to the district court for proceedings consistent with this opinion.

It is so ordered.

PARIENTE and QUINCE, JJ., concur.

LAWSON, J., concurs specially with an opinion.

POLSTON, J., dissents with an opinion, in which LEWIS and CANADY, JJ., concur.

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION, AND IF FILED, DETERMINED.

LAWSON, J., specially concurring.

I fully agree with the majority opinion and write to address the dissent. Obviously, this is a difficult case. Both the dissent and the majority strive to apply the plain language of this statute, but read the statute differently. I believe the majority's reading to be correct because it gives effect to all words in the statute,

without adding to them. While the dissent’s reading gives effect to the “right to marry” language, it does so at the expense of the “subject to” language. The majority gives effect to both. In other words, the majority more faithfully construes the text “reasonably, to contain all that it fairly means.” Antonin Scalia, A Matter of Interpretation: Federal Courts and the Law, 23 (Amy Gutmann ed., 1997) (emphasis added).

Saying that something “is subject to court approval” suggests authorization for ratification and does not demand prior approval, as the dissent would require. In essence, the dissent infers from the “right to marry” language that the statute really means “subject to” prior “court approval.” Before adding a word to a statute that the Legislature did not, I would resort to the following secondary rule of construction: “Where reasonable differences arise as to the meaning or application of a statute, the legislative intent must be the polestar of judicial construction.” Lowry v. Parole & Prob. Comm’n, 473 So. 2d 1248, 1249 (Fla. 1985) (citing Tampa-Hillsborough Cty. Expressway Auth. v. K.E. Morris Alignment Servs., Inc., 444 So. 2d 926 (Fla. 1983)).

This statute is clearly intended to protect the ward from exploitation while preserving, as best as possible, the ward’s fundamental right to marry. These twin goals cannot be met using our common law construct under which a marriage is classified, if not fully valid, as either voidable or void.

This case illustrates why the Legislature’s intent would be thwarted by reading the statute to mean that a marriage is void if entered without prior approval. Here, the ward’s committed supportive relationship pre-dated his injury by a number of years—and, the couple was engaged to be married at the time of the injury. The guardian, for reasons not clear on this record, refused to petition the court for approval of the marriage. It also appears from this record that both before and after the marriage, Glenda Martinez Smith supported and cared for Alan Smith, enhancing his quality of life consistent with the ideals of marriage. In short, it appears from this limited record that the relationship was in no way exploitative, was in the ward’s best interest, and was the ward’s choice. If these inferences are proven at a hearing, it would be contrary to the purpose of this statute to treat the marriage as void, with no opportunity for ratification.

It is also easy to see why the Legislature’s intent would be thwarted by reading the statute to mean that a marriage entered by a ward without prior court approval is voidable. A “voidable” marriage, at common law, cannot be challenged after the death of a spouse. Kuehmsted v. Turnwall, 138 So. 775, 777 (Fla. 1932) (citing 18 R. C. L. 447). If the Legislature had chosen to make a ward’s marriage voidable, a ward could be coerced or manipulated into an exploitative marriage, potentially leaving the ward’s children or other relatives with no recourse if they do not discover the marriage until after the ward’s death.

Because the Legislature’s intent would have been thwarted by employing either common law category (of void or voidable marriages), I find it unsurprising that the Legislature chose to avoid them. I do find it perplexing, however, that the dissent seems to criticize the majority for “avoid[ing] . . . the categories of void and voidable marriages” when it was the Legislature that chose not to use them. Dissenting op. at 27. I also take issue with the dissent’s critique of the majority opinion as “strictly construing the term ‘subject’ to mean less than it fairly means in this context but leniently construing the term ‘the right to marry’ to gloss over the difference in meaning with the term ‘marriage.’ ” Dissenting op. at 27.

Contrary to this assertion, the majority properly recognizes that by using the phrase “right to marry” the Legislature has foreclosed viewing the marriage as voidable because the marriage itself cannot be validated until the “right to marry” has been approved. Majority op. at 4. Then, the majority reasonably reads “subject to” as allowing for approval before or after the marriage. Majority op. at 14-15. That is not a “strict construction,” as the dissent contends, but is a reasonable reading—and the only reading consistent with the clear intent of the statute. It is the dissent’s construction—with its addition of a prior approval requirement—that is an unreasonable narrowing of the plain language of the statute which would produce a result inconsistent with the Legislature’s intent.

POLSTON, J., dissenting.

Under the plain and reasonable meaning of section 744.3215(2)(a), Florida Statutes, an incapacitated person, who has had the right to contract removed, must obtain court approval prior to exercising the right to marry, without which the marriage is void.

Specifically, section 744.3215(2)(a) provides the following:

(2) Rights that may be removed from a person by an order determining incapacity but not delegated to a guardian include the right:

(a) To marry. If the right to enter into a contract has been removed, the right to marry is subject to court approval.

(Emphasis added.) Consistent with section 744.3215(2)(a), the trial court issued the following order when removing Smith's rights to contract and manage property:

The following rights of the Ward are delegated to the Guardian appointed by this Order:

[X] to contract,

[X] to manage property of the Ward

Note: if the right of the Ward to contract has been delegated to the Guardian but the right to marry is retained, then the right to marry is subject to Court approval.

(Emphasis added.)

Pursuant to the plain meaning of "the right to marry is subject to court approval," the ward's ability to exercise his right to marry and enter into a marriage contract is contingent upon court approval. As the Fourth District noted,



the statute's text subjects "the right to marry" to court approval, not the marriage itself, reasonably meaning that court approval must be obtained before the right to enter into the contract of marriage is exercised. See Smith v. Smith, 199 So. 3d 911, 912 (Fla. 4th DCA 2016) (explaining that the statute "does not state that 'a marriage' is subject to court approval, but rather, it states that 'the right to marry' is subject to court approval. Therefore, if a person deemed incapacitated has had his or her right to contract removed, he or she has no right to marry unless the court gives its approval."). Stated otherwise, although the incapacitated person retains the right to marry under the statute when the right to contract has been removed, the ability to validly and effectively exercise that right is dependent upon court approval. If court approval has not been obtained, the incapacitated person may not validly exercise the right, and any attempt to do so results in a void marriage. Cf. Jasser v. Saadeh, 97 So. 3d 241, 249 (Fla. 4th DCA 2012) ("[A]t the time of the execution of the trust, the right to contract had been removed from Saadeh. . . . Thus, because Saadeh had no legal right to execute the trust, the trust was invalid and void."); In re Guardianship of Bockmuller, 602 So. 2d 608, 609 (Fla. 2d DCA 1992) (denying attorneys' fees and holding that, because the ward's right to contract had been removed, the ward "had no power to contract with [counsel] to represent her" even though section 744.3215, Florida Statutes, gives incapacitated persons the right to counsel).

The majority avoids this plain meaning of the statute (as well as the categories of void and voidable marriages) by strictly construing the term “subject” to mean less than it fairly means in this context but leniently construing the term “the right to marry” to gloss over the difference in meaning with the term “marriage.” See majority op. at 12 (“In the context of section 744.3215(2)(a), ‘the right to marry is subject to court approval’ means that the ward’s right to marry is contingent on court approval, though that approval may come later in time, such as after the marriage ceremony. Although the validity of the marriage itself depends on court approval, nowhere in the statute does it provide that court approval must be obtained prior to marrying.”). The majority recites multiple dictionary definitions of “subject,” but complains that “the word ‘subject’ is not defined as a condition precedent.” Id. at 14. The majority also faults the Legislature for failing to employ the terms “void,” “voidable,” “first,” “prior,” “after,” “prohibited,” or “may not.” Id. at 11-14. Of course, the Legislature also failed to employ the terms “ratification” or “invalid, but ratifiable,” which is what the majority says section 744.3215(2)(a) provides for. Id. at 19.

Importantly, however, construing the plain meaning of a statute is not a magic words test. Instead, “[w]ords of common usage, when used in a statute, should be construed in the plain and ordinary sense, because it must be assumed that the Legislature knows the plain and ordinary meaning of words used in

statutes and that it intended the plain and obvious meaning of the words used.”

Dadeland Depot, Inc. v. St. Paul Fire & Marine Ins. Co., 945 So. 2d 1216, 1225

(Fla. 2006). As Justice Scalia explained, “[a] text should not be construed strictly, and it should not be construed leniently; it should be construed reasonably, to

contain all that it fairly means.” Antonin Scalia, A Matter of Interpretation:

Federal Courts and the Law, 23 (Amy Gutmann ed., 1997).

In this case, the text “the right to marry is subject to court approval” fairly and reasonably means that the ward must obtain court approval before exercising the right to marry. The fact that dictionary definitions of the term “subject” do not include a specification of being a condition precedent does not change the common understanding that the approval must take place beforehand. For example, if I tell a friend that they have “the right to borrow my car subject to my approval,” I am telling that friend that he or she may borrow my car but that he or she must ask for and obtain my permission before doing so. If, instead, my friend simply drives off with my car before obtaining my approval, my friend has committed a crime and stolen my vehicle. It would be commonly understood and plainly obvious that the term “subject to my approval” means that the approval to borrow my car must be obtained beforehand. The same is true with the text at issue in section 744.3215(2)(a). And construing the statute to mean all that it fairly and plainly contains is not “extend[ing], modify[ing], or limit[ing] its express terms or its

reasonable and obvious implications.” Majority op. at 14 (quoting McLaughlin v. State, 721 So. 2d 1170, 1172 (Fla. 1998) (quoting Holly v. Auld, 450 So. 2d 217, 219 (Fla. 1984))).

To summarize, the plain meaning of section 744.3215(2)(a) requires an incapacitated person, who has had the right to contract removed, to obtain court approval before exercising the right to marry. Without such statutorily required court approval beforehand, the marriage is void. Accordingly, I would approve the Fourth District’s decision, and I respectfully dissent.

LEWIS and CANADY, JJ., concur.

Application for Review of the Decision of the District Court of Appeal - Certified Great Public Importance

Fourth District - Case No. 4D14-1436

(Palm Beach County)

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