BRING TO MEETING

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

Executive Council Meeting

AGENDA

The Sand Pearl Resort
500 Mandalay Avenue
Clearwater Beach, FL 33767
Phone: (727) 441-2425

Saturday, November 6, 2010
10:00 a.m.

BRING TO THE MEETING

Real Property, Probate and Trust Law Section
Executive Council Meeting
The Ritz Carlton Grande Lakes – Orlando, FL

AGENDA

I. **Presiding** — *Brian J. Felcoski, Chair*

II. **Attendance** — *Debra L. Boje, Secretary*

III. **Minutes of Previous Meeting** — *Debra L. Boje, Secretary*
1. Approval of 9/25/2010 Executive Council Meeting Minutes and Roster **pp. 12-64**

IV. **Chair's Report** — *Brian J. Felcoski*
1. 2010 – 2011 RPPTL Executive Council Schedule **pp. 65**

V. **Chair-Elect's Report** — *George J. Meyer*
1. 2011 – 2012 RPPTL Executive Council Schedule **pp. 66**
2. Addition of the Foreclosure Reform Ad Hoc Committee

VI. **Liaison with Board of Governors Report** — *Daniel L. DeCubellis*

VII. **Treasurer's Report** — *Michael A. Dribin*
1. 2010-11 Monthly Report Summary **pp. 67-77**

VIII. **Circuit Representative's Report** — *Andrew O'Malley, Director*

1. First Circuit – W. Christopher Hart; Colleen Coffield Sachs
2. Second Circuit – J. Breck Brannen; Sarah S. Butters; John T. Lajoie
3. Third Circuit – John J. Kendron; Guy W. Norris; Michael S. Smith; Clay Alan Schnitker
4. Fourth Circuit – Roger W. Cruce; Brenda Ezell
5. Fifth Circuit – Del G. Potter; Arlene C. Udick
6. Sixth Circuit – Robert N. Altman; Gary L. Davis; Joseph W. Fleece, III; George W. Lange, Jr.; Sherri M. Stinson; Kenneth E. Thornton; Hugh C. Umstead; Richard Williams, Jr.
7. Seventh Circuit – Sean W. Kelley; Michael A. Pyle; Richard W. Taylor; Jerry B. Wells
8. Eighth Circuit – John Frederick Roscow, IV; Richard M. White Jr.
9. Ninth Circuit – David J. Akins; Amber J. Johnson; Stacy A. Prince; Joel H. Sharp Jr.; Charles D. Wilder; G. Charles Wohlust
10. Tenth Circuit – Sandra Graham Sheets; Robert S. Swaine; Craig A. Mundy
11. Eleventh Circuit – Carlos A. Batlle; Raul Ballaga; Aniella Gonzalez; Thomas M. Karr; Patrick J. Lannon; Marsha G. Madorsky; William T. Muir; Hung Nguyen; Adrienne Frischberg Promoff; Eric Virgil
12. Twelfth Circuit – Kimberly A. Bald; Michael L. Foreman; P. Allen Schofield
13. Thirteenth Circuit – Lynwood F. Arnold, Jr.; Michael A. Bedke; Thomas N. Henderson; Wilhelmina F. Kightlinger; Christian F. O'Ryan; William R. Platt; R. James Robbins; Stephen H. Reynolds; Susan K. Spurgeon
14. Fourteenth Circuit – Brian Leebrick

15. Fifteenth Circuit – Elaine M. Bucher; Glen M. Mednick; Robert M. Schwartz
16. Sixteenth Circuit – Julie A. Garber
17. Seventeenth Circuit –Robert B. Judd; Shane Kelley; Alexandra V. Rieman
18. Eighteenth Circuit – Jerry W. Allender; Steven C. Allender; Stephen P. Heuston
19. Nineteenth Circuit – Jane L. Cornett
20. Twentieth Circuit – Sam W. Boone; John T. Cardillo; Michael T. Hayes; Alan S. Kotler; Jon Scuderi; D. Keith Wickenden

IX. Probate and Trust Law Division – *Wm. Fletcher Belcher, Probate and Trust Law Division*

Information Items

1. Report concerning duties imposed upon attorneys by new Florida Rule of Judicial Administration 2.420(d) (effective 10-1-10), with respect to any form of confidential information contained in papers filed in a Florida court – Laird A. Lile, Liaison to Clerks of Circuit Court

   Important: This report and new Rule contain essential information for all probate, trust, guardianship, and real estate attorneys who are involved in filing papers in court proceedings in Florida.

2. Proposed Advisory Opinion 10-03 (9-24-10) from the Professional Ethics Committee of The Florida Bar, on the issue of ethical obligations of an attorney when a personal representative, beneficiaries, or heirs-at-law of a decedent, or their attorney, request confidential information. The deadline for commenting on this item to the Board of Governors of The Florida Bar is November 15, 2010 **pp. 78-82**

3. To be determined

Action Items

1. IRA, Insurance & Employee Benefits Committee – *Linda Suzzanne Griffin and L. Howard Payne, Co-Chairs*

   Support a legislative position further clarifying that an inherited IRA account, as defined in s. 408(c)(3) of the Internal Revenue Code, is a fund or account exempt from claims of creditors of the owner, beneficiary, or participant. Statutes affected by proposal: Amend s. 222.21, F.S. (Exemption of pension money and certain tax-exempt funds or accounts from legal processes). **pp. 83-91**

2. Probate & Trust Litigation Committee – *William T. Hennessey III, Chair*

   Support a legislative position that the revocation of a will or trust is subject to challenge on the grounds of fraud, duress, mistake or undue influence after the death of the testator or settlor. Statutes affected by proposal: Amend ss. 732.5165 (Effect of fraud, duress, mistake, and undue influence) and 732.518 (Will contests) of the Florida Probate Code, and ss. 736.0207 (Trust contests) and 736.0406 (Effect of fraud, duress, mistake, or undue influence) of the Florida Trust Code. **pp. 92-102**

3. Probate Law & Procedure Committee – *Tae Kelley Bronner, Chair*

   Support a legislative position to clarify and provide additional guidance with respect to a decedent's right to control the disposition of his or her remains and, absent specific directions from a decedent, determining the person who is legally authorized to make decisions regarding

the place and manner of disposition of a decedent's remains. Statutes affected by proposal: Amend s. 732.804 (Provisions relating to disposition of the body) of the Florida Probate Code, s. 406.50 (Unclaimed dead bodies or human remains; disposition, procedure), F.S., and 497.005(37) (Definition of "Grave space"), F.S., and create new ss. 732.805 (Reliance on written declaration), 732.806 (Provisions relating to final arrangements in absence of written declaration), 732.807 (Legal proceeding regarding final arrangements), and 732.808 (Effect of criminal acts on final arrangements), of the Florida Probate Code. **pp. 103-120**

4. Probate Law & Procedure Committee – *Tae Kelley Bronner, Chair*

Support a legislative position that permits judicial reformation and modification of wills, and provides for an award of taxable fees and costs, including attorneys fees and guardian ad litem fees, in such actions. Statutes affected by proposal: Create new ss. 732.615 (Reformation to correct mistakes), 732.616 (Modification to achieve testator's tax objectives), and 733.1061 (Attorneys' fees and costs; will reformation and modification) , of the Florida Probate Code. **pp. 121-135**

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

Action Item

1. Title Issues and Standards Committee – *Patricia P. Hendricks Jones, Chair*

Requests approval of Chapter 17 of the Uniform Title Standards – Marketable Record Title Act **pp. 136-164**

2. Condominium and Planned Development Committee – *Robert S. Freedman, Chair*

Requests approval of legislation to amend Section 718.117 to accommodate partial terminations of condominiums more effectively and to clarify certain ambiguities in the current statute posed by partial terminations **pp. 165-172**

3. Land Trust Committee – *Susan Katherine Frazier, Chair*

Requests approval of revisions to address the use of the Section 689.071(3) powers in trusts other than intended land trusts.

Information Item

1. **Private Transfer Fee Covenants**. On August 16th, the Federal Housing Finance Agency (FHFA) Issued a proposed "Guidance on Private Transfer Fee Covenants" to the Federal National Mortgage Association (Fannie Mae), the Federal Home Loan Mortgage Corporation (Freddie Mac) and the Federal Home Loan Banks which would effectively prohibit them from dealing with mortgages on properties encumbered by private transfer fee covenants. The proposed Guidelines would prohibit Fannie Mae and Freddie Mac from purchasing or investing in any mortgages on property encumbered by private transfer fee covenants, and would prohibit the Banks from purchasing or investing in any such mortgages or holding such mortgages as collateral.

The Section had drafted and successfully lobbied for the passage of Section 689.28 in 2008, which prohibits private transfer fee covenants, but makes exceptions for transfer fees paid to condominium associations, homeowner's associations, and nonprofit or charitable organizations for the purpose of

supporting cultural, educational, charitable, recreational, environmental, conservation, or other similar activities benefiting the community subject to the covenant. Unlike Section 689.28 which was prospective in application, the FHFA Guidelines would apply to existing transfer fees and likely would have a substantial negative impact on sales of new and existing homes and condominium units subject to "good" transfer fees because lenders will not provide mortgages on property in communities with these covenants when the loans cannot be sold into the secondary market controlled by Fannie Mae and Freddie Mac. **pp. 173-178**

The Condominium and Planned Development Committee and Real Estate Problem Study Committee prepared the attached letter on behalf of the Section which commented on the proposed Guidelines and recommended Section 689.28 as an example of an effective, balanced approach. A copy of the letter submitted to FHFA after approval by the Executive Committee is attached.

2. **Foreclosure Reform Ad Hoc Committee**. The Real Property Division has formed a Foreclosure Reform Ad Hoc Committee to draft legislation to improve foreclosure procedures and to advise the Section and provide a resource to the Legislature (if requested) on issues relating to the foreclosure moratoria announced by many of the residential mortgage lenders and servicers.

3. **Confidential Information Contained in Papers filed in a Florida Court.** Please note that the Probate & Trust Law Division information items in this Agenda include the presentation of a report by Laird A. Lile concerning duties imposed upon attorneys by new Florida Rule of Judicial Administration 2.420(d) (effective 10-1-10), with respect to any form of confidential information contained in papers filed in a Florida court. This new Rule applies to real property actions and is of interest to real property attorneys.

XI. General Standing Committee — *George J. Meyer, Director and Chair-Elect*

1. Budget Committee – *Michael A. Dribin, Chair*

Approval of the 2011-2012 Section

Materials will be the subject of a separate email to the Executive Council

XII. General Standing Committee Reports – *George J. Meyer, Director and Chair-Elect*

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

2. **Amicus Coordination** – Robert W. Goldman, John W. Little, III and Kenneth B. Bell Co-Chairs

3. **Budget** – Michael A. Dribin, Chair; Pamela O. Price, Vice Chair

4. **Bylaws** – W. Fletcher Belcher, Chair

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

A. 2010 – 2011 CLE Schedule **pp. 179**

6. **2011 Convention Coordinator** – S. Katherine Frazier and Jon Scuderi, Co Chairs Michael A. Dribin, Vice Chair

7. **Fellowship** – Michael A. Bedke, Chair; Tae Kelley Bronner and Phillip Baumann, Co-Vice Chairs

   2010 New Fellows: Benjamin Bush, Elisa Lucchi, Theodore Kypreos, Navin R Pasem

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

9. **Legislative Review** – Michael J. Gelfand, Chair; Alan B. Fields and Barry F. Spivey, Co-Vice Chairs

   Legislative Drafting Workshop: CLE Credit Information **pp. 180**

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

11. **Liaison Committees:**
    A. **ABA:** Edward F. Koren; Julius J. Zschau
    B. **BLSE:** Michael C. Sasso, W. Theodore Conner, David M. Silberstein, Anne Buzby–Walt.
    C. **Business Law Section:** Marsha G. Rydberg
    D. **BOG:** Daniel L. DeCubellis
    E. **CLE Committee:** Deborah P. Goodall
    F. **Clerks of the Circuit Court:** Laird A. Lile
    G. **Council of Sections:** Brian J. Felcoski and George J. Meyer
    H. **FLEA / FLSSI:** David C. Brennan; John Arthur Jones; Roland Chip Waller
    I. **Florida Bankers:** Stewart Andrew Marshall, III; Mark T. Middlebrook
    J. **Judiciary:** Judge Jack St. Arnold, Judge Gerald B. Cope, Jr., Judge George W. Greer; Judge Melvin B. Grossman; Judge Hugh D. Hayes; Judge Claudia Rickert Isom, Judge Maria M. Korvick; Judge Beth Krier, Judge Lauren Laughlin; Judge Celeste H. Muir; Judge Robert Pleus; Judge Richard Suarez; Judge Morris Silberman; Judge Patricia V. Thomas; Judge Walter L. Schafer, Jr.
    K. **Law Schools:** Frederick R. Dudley, Stacy O. Kalmanson, and Professor James J. Brown
    L. **Out of State:** Michael P. Stafford; John E. Fitzgerald, Jr., Gerard J. Flood

12. **Long Range Planning Committee** – George J. Meyer, Chair

13. **Member Communications and Information Technology** – Alfred A. Colby, Chair; S. Dresden Brunner and Nicole C. Kibert, Co – Vice Chair

14. **Membership Services** – Phillip A. Baumann, Chair; Mary E. Karr, Vice Chair

15. **Membership Diversity Committee** – Lynwood T. Arnold, Jr., and Fabienne E. Fahnestock, Co-Chairs; Karen Gabbadon, Vice-Chair

16. **Mentoring** – Guy S. Emerich, Chair; Jerry E. Aron and Keith S. Kromash, Co-Vice Chairs

17. **Meeting Planning Committee** – Sandra F. Diamond, Chair

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

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

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

21. **Sponsor Coordinators** – Kristen M. Lynch, Chair; Wilhelmina Kightlinger, Jon Scuderi, J. Michael Swaine, Adele I. Stone, Marilyn M. Polsen, Co-Vice Chairs

22. **Strategic Planning** – George J. Meyer, Chair

XIII. Probate and Trust Law Division Committee Reports - *Wm. Fletcher Belcher - Director*

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

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

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

4. **Asset Preservation** – Jerome L. Wolf and Brian C. Sparks, Co-Chairs

5. **Attorney/Trust Officer Liaison Conference** – Robin J. King, Chair; Jack A. Falk, Jr., Vice Chair; Mark T. Middlebrook, Corporate Fiduciary Chair

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

7. **Florida Electronic Court Filing** – Rohan Kelley, Chair; Laird A. Lile, Vice Chair

8. **Guardianship and Advance Directives** – Sean W. Kelley and Alexandra V. Rieman, Co-Chairs; Seth A. Marmor and Sherri M. Stinson, Co-Vice Chairs

9. **IRA, Insurance and Employee Benefits** – Linda Suzzanne Griffin and L. Howard Payne, Co-Chairs; Rex E. Moule, Jr., Vice Chair

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

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

12. **Power of Attorney** – Tami F. Conetta, Chair; David R. Carlisle, Vice Chair

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

14. **Probate and Trust Litigation** – William T. Hennessey, III, Chair; Thomas M. Karr and Jon Scuderi, Co-Vice Chairs

15. **Probate Law and Procedure** – Tae Kelley Bronner, Chair; S. Dresden Brunner, Anne Buzby-Walt and Jeffrey S. Goethe, Co-Vice Chairs

16. **Trust Law** – Shane Kelley, Chair; Angela M. Adams, John C. Moran and Laura P. Stephenson, Co-Vice Chairs

17. **Wills, Trusts and Estates Certification Review Course** – Anne Buzby-Walt, Chair; Deborah L. Russell, Vice Chair

XIV. Real Property Division Committee Reports

1. **Condominium and Planned Development** – Robert S. Freedman, Co-Chair; Steven Mezer, Co-Chair; Jane Cornett, Vice-Chair

2. **Construction Law** – Brian Wolf, Chair; Hardy Roberts and Arnold Tritt, Co Vice-Chairs

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

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

5. **Governmental Regulation of Real Estate** – Eleanor Taft, Chair; Nicole Kibert, Kristen Brundage and Frank L. Hearne, Co Vice-Chairs

6. **Residential Real Estate Committee and Industry Liaison** – Frederick Jones, Chair; William J. Haley, Vice Chair

7. **Land Trusts** – S. Katherine Frazier, Chair; Wilhelmena Kightlinger, Vice Chair

8. **Landlord and Tenant** – Neil Shoter, Chair; Scott Frank, Vice Chair

9. **Legal Opinions** – David R. Brittain and Roger A. Larson, Co Chairs; Burt Bruton, Vice Chair

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

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

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

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

14. **Real Property Insurance** – Jay D. Mussman, Chair; Andrea Northrop and Wm. Cary Wright, Co-Vice Chairs

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

16. **Real Property Problems Study** – Wayne Sobien, Chair; Jeanne Murphy and Pat J. Hancock, Co-Vice Chair

17. **Title Insurance & Title Insurance Liaison** – Melissa Murphy, Chair; Homer Duvall and Kristopher Fernandez, Co-Vice Chairs

18. **Title Issues and Standards** – Patricia Jones, Chair; Robert Graham, Karla Gray and Christopher Smart, Co-Vice Chairs

XV. Adjourn

The Florida Bar
Real Property, Probate & Trust Law Section

Special Thanks to the

GENERAL SPONSORS

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Real Property, Probate & Trust Law Section

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Probate Law & Procedure Committee

Coral Gables Trust
Guardianship & Advanced Directives Committee

First American Title Insurance Company
Condominium & Planned Development Committee

Management Planning, Inc.
Estate & Trust Tax Planning Committee

Northern Trust, N.A.
Trust Law Committee

Business Valuation Analysts
Probate and Trust Litigation

Minutes, Real Property, Probate and Trust Law Section
Executive Council Meeting

September 25, 2010

Ritz-Carlton Orlando, Grand Lakes

References in these minutes to specified pages of "agenda materials" are to the agenda of the September 25, 2010, meeting of the Executive Council posted at the RPPTL website

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AGENDA

I. **Call to Order** - Brian J. Felcoksi, Chair

Brian called the meeting to order at 10:15 a.m.

II. **Attendance** - Debra L. Boje, Secretary

The attendance roster was circulated to be initialed by Council members in attendance at the meeting. Attendance is shown cumulatively on circulated attendance rosters. Debbie reminded the Council members that it is the responsibility of each member to record his or her own attendance on the roster and to promptly bring any corrections to the attention of the Secretary. The cumulative attendance roster to date for the 2010-2011 Bar year is attached to these Minutes as **Exhibit A**.

III. **Minutes of Previous Meeting** - Debra L. Boje, Secretary

The Minutes of the Executive Council Meeting held in Palm Beach, Florida on August 7, 2010, included at pages 12-54 of the agenda materials were corrected to reflect the attendance of Stewart Marshall. In all other respects, the minutes were approved without change.

IV. **Chair's Report** - Brian J. Felcoksi, Chair

1. Brian welcomed all in attendance. Brian advised members that the new Executive Council Directory has been published and was available at the registration desk. Brian next reviewed the day's activities. Brian reviewed the remaining dates and locations of the Executive Council meetings for 2010-2011, appearing on page 55 of the agenda materials. Brian advised that the room block for the out of state meeting in Santa Barbara was full, but those still wishing to attend could put their name on a wait list.

2. Brian thanked the sponsors for their continued support and sponsorship of the activities associated with the Executive Counsel.

3. Brian recognized law students in attendance from Florida Coastal.

4. Brian announced that a new Ad Hoc Committee was being formed to be known as the Ad Hoc Committee Regarding Estate Planning Attorney Conflicts.

5. Brian thanked the Florida Bar Foundation, US Trust, and Stewart Title for their co-sponsorship of the Executive Council luncheon. Representatives from each company where invited to the podium to provide brief remarks.

6. Brian thanked Require and JP Morgan for their continued sponsorship of the Chair Suite.

V. **Chair-Elect's Report** – George J. Meyer, Chair-Elect

George reviewed the schedule of Executive Council meetings for 2011-2012, appearing on page 56 of the agenda materials. Reservations for the Breaker's meeting are currently being taken. Reservations for the other meetings should be opening soon. Information for next year's out of state trip to Prague will be circulated soon.

VI. **Liaison with Board of Governors Report** - Daniel L. DeCubellis

Dan referred the Council to the summary of the Board of Governors July 23, 2010, meeting in Sarasota, Florida appearing on pages 57-58 of the agenda materials. Dan specifically noted that the Board is revamping the advertising rules for attorneys. He also advised that appointments would be made soon for the Joint Committee with the Association of Realtors and encouraged members to apply. Dan reminded members to call him anytime with any questions they may have.

VII. **Treasurer's Report** – Michael A. Dribin, Treasurer

Mike referred the Council to the updated financial reports that were provided as a supplement to the agenda via e-mail. Hard copies were also made available at the meeting. The supplement is attached to these minutes as **Exhibit B**. Mike reviewed the results for the fiscal year ending June 30, 2010. The net result for the fiscal year was positive $115,341. Mike also reviewed the year to date fiscal report.

VIII. Circuit Representative's Report - Andrew O'Malley, Director

Drew advised that John Neukamn conducted the meeting on September 24, 2010. Present at the meeting were the Council sponsors, each of whom provided a brief introduction/presentation. Drew advised that the problem study committee was preparing a report of the suggested responsibilities for the Members at Large, which it hopes to approve at its next meeting.

1. First Circuit – W. Christopher Hart; Colleen Coffield Sachs
2. Second Circuit – J. Breck Brannen; Sarah S. Butters; John T. Lajoie
3. Third Circuit – John J. Kendron; Guy W. Norris; Michael S. Smith; Clay Alan Schnitker
4. Fourth Circuit – Roger W. Cruce; Brenda Ezell
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20. Twentieth Circuit – Sam W. Boone; John T. Cardillo; Michael T. Hayes; Alan S. Kotler; Jon Scuderi; D. Keith Wickenden

IX. Real Property Division – Margret A. Rolando, Real Property Division Director

Action Item

Peg announced that action item 5B on the agenda was being deferred and thus, removed as an action item for today.

1. **Title Issues and Standards Committee** - *Patricia P. Jones, Chair*

   Pat reported, on behalf of the committee, on the proposed revisions to the standards in Chapter 5 of the Uniform Title Standards – Descedents' Estates, appear at pages 60-120 of the agenda materials.

   The committee's motion to approve the changes to the title standards in Chapter 5, as reflected in the agenda materials at pages 60-120, was unanimously approved.

2. **Title Insurance Committee** - *Melissa J. Murphy, Chair*

   On behalf of the Committee, Melissa, provided a brief background and reviewed the Committee's request, appearing at pages 121-123 of the agenda materials, to amend the Section's legislative position adopted at the May 29, 2010, meeting to depart from the Florida Title Insurance Study Advisory Council (TISAC) Final Report on two of its twenty-two recommendations, so that the Section would (i) support a prohibition on rebating title insurance premiums (consistent with the Section's recommendations adopted on September 26, 2009) and (ii) support a post-funded Guarantee Fund.

   The Committee's motion to amend the proposed legislative position previously adopted was unanimously approved.

3. **Real Property Litigation Committee** - *Mark A. Brown, Chair*

   On behalf of the committee, Mark reviewed proposed legislation to revise Section 45.031(2), 50.011 and 702.035 to permit electronic notice of foreclosure sales through a clerk of the courts' website as an alternative to publication in a newspaper. The statutory wording, a White Paper, and Legislative Request appears at pages 123-129 of the agenda materials. Mark advised that the Committee had made changes to the proposed statutory wording. A copy of the revised statutory wording is attached as **Exhibit C**. Because the changes included substantive changes a motion was made to waive the notice rule. The motion to waive the notice rule was approved. The Committee's motion to approve the proposed legislation, as revised, was unanimously approved. The Committee's motions to find such action to be within the purview of the Section and to

authorize the expenditure of Section funds in support of that position also were unanimously approved.

4. **Landlord Tenant Committee** – *Arthur J. Menor, Chair* and **Construction Law Committee** – *Brian A. Wolf, Chair*

Art Menor and Reece Henderson reviewed proposed legislation prepared jointly by the Landlord Tenant Committee and the Construction Law Committee that modifies section 713.10 and 713.10 in light of the *Everglades Electric Supply, Inc. v Paraiso Granite, LLC* case. The proposed legislation creates greater certainty as to the protections afforded to the interests of landlords against construction liens arising from work performed by tenants. The statutory wording, a White Paper, and Legislative Request appears at pages 130-141 of the agenda materials. The committee announced that changes had been made to the proposed statutory wording. A redline copy showing just the revisions made to the statutory wording found in the agenda materials is attached as **Exhibit D**. A motion was made to waive the notice rule. The motion to waive the notice rule was approved. The Committee's motions to approve the proposed legislation, as revised, were unanimously approved. The Committee's motion to find such action to be within the purview of the Section and to authorize the expenditure of Section funds in support of that position also was unanimously approved.

5. **Condominium and Planned Development Committee** - *Robert S. Freedman, Chair*

A. On behalf of the Committee, Rob, reviewed proposed legislation to amend section 720.309 to allow bulk cable and bulk internet service contracts with Homeowners Associations, if provided for in the Homeowners Association's Declaration or approved by the Homeowner Association's Board. The statutory wording, a White Paper, and Legislative Request appears at pages 142-148 of the agenda materials. Changes were made to the proposed statutory changes. A supplement was circulated prior to the meeting. A copy of the Supplement is attached as **Exhibit E**. Additional changes were made. The final revised proposed statutory wording is attached as Exhibit F. A motion was made to waive the notice rule. The motion to waive the notice rule was approved. The Committee's motion to approve the proposed legislation was approved unanimously. The Committee's motions to find such action to be within the purview of the Section and to authorize the expenditure of Section funds in support of that position also were unanimously approved.

B. Rob advised that the Committee removed item 5B appearing on pages 142-148 of the agenda as an action item today, because additional revisions are necessary.

C. On behalf of the Committee, Rob, presented proposed legislation to correct provisions in the Distressed Condominium Relief Act (Part VII of Chapter 718) that became law on July 1, 2010, to clarify the intent of the statutes and the liabilities of and obligations imposed upon bulk assignees and bulk buyers. The statutory wording, a White Paper, and Legislative Request appears at pages 157-171 of the agenda materials. There were missing strikeouts in the proposed wording. The corrected legislative wording was made available and is attached as **Exhibit G**. A motion was made to waive the notice rule. The motion to waive the notice rule was approved. The Committee's motion to approve the proposed legislative position was unanimously approved. The Committee's motions to find such action to be within the purview of the Section and to authorize the expenditure of Section funds in support of that position also were unanimously approved.

Information Item:

Title Insurance Committee - *Melissa J. Murphy, Chair*

On behalf of the Committee, Melissa advised that the Florida Department of Financial Services, Division of Insurance Agents and Agency Services, had released its latest draft of the unlawful inducement rule. The Committee determined that this rule impacts attorney-agents with corporate agencies and that the attorney exemption in 626.8417(4) applies narrowly only to license and appointment, making this type of rule applicable to attorney-agents in law firms. A copy of the Committee's report is found on pages 172-176 of the agenda material. The Committee on an emergency basis recommended to the Executive Committee that the Section take a position opposing the draft rule and offering technical assistance. The Executive Committee approved the motion to oppose the draft of the rule, to find such action to be within the purview of the Section and to authorize the expenditure of Section funds in support of that position. The Executive Committee also authorized Melissa Murphy, the Committee Chair, to appoint a representative from the Section to testify at a hearing on the draft rule on September 20, 2010. Melissa provided a brief summary of the outcome of the hearing and advised that she will be working with the Division in modifying the rule.

X. **Probate and Trust Law Division** - Wm. Fletcher Belcher, Probate and Trust Law Division Director

Action Item

1. **Estate & Trust Tax Planning Committee** – *Richard R. Gans, Chair*

Rick Gans provided a brief summary of the recent Olmstead case and reviewed proposed legislation that was prepared and approved by the Tax Section and approved by the Estate & Trust Tax Planning Committee. The proposed legislation seeks to amend Section 608.433 (Right of assignee to become member) to clarify that a charging order is the sole and exclusive remedy which a judgment creditor of a member of a multiple member limited liability company may use to satisfy the judgment from that member's interests in the multiple member limited liability company. It does not seek to revise Olmstead, it simply clarifies existing law with respect to a multiple member LLC. Although narrower in scope, as it does not address single member limited liability companies, this proposal is consistent with the Section's existing position which "supports the limitation of creditor remedies against partner interests in general and limited liability partnerships and member interests in limited liability companies to charging liens and to prohibit foreclosure against such interests." The statutory wording, a White Paper, and Legislative Request appear at pages 177-188 of the agenda materials. The Committee's motion to approve the proposed legislation was unanimously approved. The Committee's motions to find such action to be within the purview of the Section and to authorize the expenditure of Section funds in support of that position also were unanimously approved.

2. **Power of Attorney Committee** – *Tami F. Conetta, Chair*

On behalf of the Committee, Tami provided a very brief background of the Committee's extensive undertaking in reviewing the Uniform Power of Attorney Act. Tami advised that the differences with the Elder Law Section have been resolved and that the Banker's Association supports the legislation. The proposed legislation adopts the Uniform Power of Attorney Act, with significant Florida modifications. The proposed legislation seeks to enact a new part I (Powers of Attorney) of F.S. Chapter 709. The statutory wording, a White Paper, and Legislative Request appear at pages 189-239 of the agenda materials. The Committee's motion to approve the proposed legislative position was approved unanimously. The Committee's motions to find such action to be within the purview of the Section and to authorize the expenditure of Section funds in support of that position also were unanimously approved.

3. **Probate & Trust Litigation Committee** – *William T. Hennessey III, Chair*

On behalf of the Committee, Bill provide a background for the Committee's recommendation that Florida Rule of Civil Procedure 1.525 (Motions for Costs and Attorneys' Fees) which provides that "[a]ny party seeking a judgment taxing

costs, attorneys' fees, or both shall serve a motion no later than 30 days after filing of the judgment, including a judgment of dismissal, or the service of a notice of voluntary dismissal" should not apply in probate proceedings, including adversary proceedings. Bill advised that the Committee's recommendation is implemented by proposing an adoption of a new Florida Probate Rule 5.026 (Motions for Costs and Attorneys' Fees) and the amendment of existing Florida Probate Rule 5.025 (Adversary Proceedings). Bill noted that the New Florida Probate Rule found at **pp. 240-245** of **the** agenda was numbered 5.525 however, the Committee agreed to accept an amendment to its proposal to renumber the proposed new rule to be 5.026. This change was made so that it would apply to both probate and guardianship proceedings. A copy of the new proposed Florida Probate Rule 5.026 is attached as **Exhibit H**. The motion to approve the proposal of new Florida Probate Rule 5.026 and the amendment to existing Florida Probate Rule 5.025 was approved unanimously.

Fletch noted that because this position supports a court rule change and not a legislative change, no Legislative Position Request Form was needed; likewise it was not necessary to approve the expenditure of funds. A motion was made, however, to approve that the position was within the purview of the Section. This motion was approved.

4. **Probate & Trust Litigation Committee** – *William T. Hennessey III, Chair*

On behalf of the Committee, Bill next reviewed the Committee's concerns regarding the application of Florida Rule of Civil Procedure 1.525 (Motions for Costs and Attorneys' Fees - which provides "[a]ny party seeking a judgment taxing costs, attorneys' fees, or both shall serve a motion no later than 30 days after filing of the judgment, including a judgment of dismissal, or the service of a notice of voluntary dismissal") to judicial proceedings concerning trusts. The Committee believes clarification is needed that certain specified actions do not constitute taxation of costs or attorneys' fees. Bill advised that this clarification would be implemented by enactment of amendments to s. 736.0201 (Role of court in trust proceedings) of the Florida Trust Code. The statutory wording, a White Paper, and Legislative Request appear at pp 246-254 of the agenda materials. The Committee's motion to approve the proposed legislative position was approved unanimously. The Committee's motions to find such action to be within the purview of the Section and to authorize the expenditure of Section funds in support of that position also were unanimously approved.

5. **Probate & Trust Litigation Committee** – *William T. Hennessey III, Chair*

Bill announced that action item 5 appearing at pages 255-264 of the agenda has been removed as an action item. The Committee is going to work with the Guardianship Law Committee in resolving differences concerning a portion of the proposed legislation.

6. **Probate Law & Procedure Committee** – *Tae Bronner Kelley, Chair*

Tae reported on behalf of the Committee. Tae presented the Committee's proposed legislation that supports a change to the intestate statutes to provide that a decedent's surviving spouse receive 100% of the intestate estate in those cases where all of the decedent's descendants are also descendants of the surviving spouse and the surviving spouse does not have any other descendants. The position would be implemented by amending s. 732.102 (Spouse's share of intestate estate) of the Florida Probate Code. The statutory wording, a White Paper, and Legislative Request appear at pp 246-254 of the agenda materials.

The floor was open for discussion. A motion to table until the May meeting was made by Chip Waller. The motion was seconded. The motion to table failed. The floor was opened back up for discussion. The motion to approve the legislation was approved by the required two-thirds vote. The Committee's motions to find such action to be within the purview of the Section and to authorize the expenditure of Section funds in support of that position were unanimously approved.

Information Items

1. **Trust Law Committee** – *Shane Kelley, Chair; and Robert M. Arlen, liaison to Land Trust Committee*

Fletch advised that the Trust Law Committee and the Land Trust Committee were working together to address issues created by *Brigham v. Brigham*, 11 So.3d 374 (Fla. 3d DCA 2009), concerning land trusts and applicability of the Florida Trust Code.

2. **Probate Law Committee**

On behalf of the Committee, Linda Griffin, made members aware of a new rule of Judicial Rule of Administration which becomes effective October 1, 2010. Linda advised that Tae had appointed a subcommittee to study the rule.

XI. **General Standing Committee Reports** – George J. Meyer, Director and Chair-Elect

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

Rich reported that the Actionline is in need of articles. Please consider writing an article. The deadline for the next edition is next week.

2. **Amicus Coordination** – Robert W. Goldman, John W. Little, III and Kenneth B. Bell Co-Chairs

3. **Budget** - Michael A. Dribin, Chair; Pamela O. Price, Vice Chair

Mike advised that the committee is working on the 2011-2012 budget.

4. **Bylaws** - W. Fletcher Belcher, Chair

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

On behalf of the Committee, Debbie reviewed the 2010-2011 CLE Schedule appearing at page 271 of the agenda materials. Debbie advised that on Wednesday her Committee met with the Florida Bar CLE staff in conjunction with the Florida Bar Meeting being held in Orlando. CLEs will now be able to be downloaded 24 hours a day, 7 days a week.

6. **2011 Convention Coordinator** - S. Katherine Frazier and Jon Scuderi, Co Chairs Michael A. Dribin, Vice Chair

7. **Fellowship** - Michael A. Bedke, Chair; Tae Kelley Bronner and Phillip Baumann, Co-Vice Chairs

On behalf of the Committee, Michael asked this years Fellows to stand and be recognized.

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

9. **Legislative Review** - Michael J. Gelfand, Chair; Alan B. Fields and Barry F. Spivey, Co-Vice Chair

Michael advised that the mandatory legislative refresher course was a success and that he will be requesting CLE credit for those who attended.

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

Stu reported that the next Legislative Update will be held on August 5th, 2011, in conjunction with the Executive Council meeting at the Breakers.

11. **Liaison Committees:**

A. **ABA:** Edward F. Koren; Julius J. Zschau
Ed reported that the next ABA meeting with be in November. Ed congratulated George Meyer on his appointment as chairman of the Construction Law Committeee.

B. **BLSE:** Michael C. Sasso, W. Theodore Conner, David M. Silberstein, Anne K. Buzby
David advised that attorneys can now designate on court pleadings that they are board certified.

C. **Business Law Section:** Marsha G. Rydberg

D. **BOG:** Daniel L. DeCubellis

E. **CLE Committee:** Deborah P. Goodall

F. **Clerks of the Circuit Court:** Laird A. Lile
Laird introduced and welcomed Karen Rushing, who is the legislative chair of the FACC and Clerk of the Sarasota County Court and Dale Bonner, who is General Counsel for Hillsborough County Clerk of the Court to the meeting. Karen advised that she will be working closely with the Section to address budget effects on the services of the clerks. She also advised that the Supreme Court and the Clerks of the Court have agreed to an E-portal and implementation by January 2011.

G. **Council of Sections:** Brian J. Felcoski and George J. Meyer

H. **FLEA / FLSSI:** David C. Brennan; John Arthur Jones; Roland Chip Waller
Dave reported that FLEA/FLSSI will be monitoring e-filing very closely and that the updated guardianship and probate forms will be available January 1st. He also advised that FLEA/FLSSI will be holding a stand-alone homestead seminar.

I. **Florida Bankers:** Stewart Andrew Marshall, III; Mark T. Middlebrook

J. **Judiciary:** Judge Jack St. Arnold, Judge Gerald B. Cope, Jr., Judge George W. Greer; Judge Melvin B. Grossman; Judge Hugh D. Hayes; Judge Claudia Rickert Isom, Judge Maria M. Korvick; Judge Beth Krier, Judge Lauren Laughlin; Judge Celeste H. Muir; Judge Robert Pleus; Judge Richard Suarez; Judge Morris Silberman; Judge Patricia V. Thomas; Judge Walter L. Schafer, Jr.

K. **Law Schools:** Frederick R. Dudley, Stacy O. Kalmanson, and Professor James J. Brown

L. **Out of State:** Michael P. Stafford; John E. Fitzgerald, Jr., Gerard J. Flood

M. **Young Lawyers Division**: TBD.

12. **Long Range Planning Committee** – George J. Meyer, Chair.

13. **Member Communications and Information Technology** - Alfred A. Colby, Chair; S. Dresden Brunner and Nicole C. Kibert, Co – Vice Chair

Al reminded Committee chairs to update their Committee's website page.

14. **Membership Services** - Phillip A. Baumann, Chair; Mary E. Karr, Vice Chair

15. **Membership Diversity Committee** - Lynwood T. Arnold, Jr., and Fabienne E. Fahnestock, Co-Chairs; Karen Gabbadon, Vice-Chair

Lynwood reviewed the upcoming events, including a seminar being held on October 28 - 29 and the upcoming picnic. Lynwood asked that anyone wishing to become a member of the Committee to contact him.

16. **Mentoring** - Guy Emerich, Chair; Jerry Aron and Keith Kromash, Co-Vice Chairs

Guy thanked those who volunteered to be mentors. He asked that those serving as a mentor send an e-mail to Jerry with any updates. Guy advised that his Committee was reaching out to the Young Lawyers Division to make them aware of our program.

17. **Meeting Planning Committee** – Sandra F. Diamond, Chair

John advised that the Committee meet yesterday and provided a brief report on future meeting planning.

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

Bruce advised that the Uniform Probate Code Committee was going to be meeting in November to review comments to the 2008 amendments to the Uniform Probate Code.

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

Lee advised that the Bar was going to be issuing an advisory ethical opinion on the ability of an estate planning attorney to disclose confidential information after a decedent's death. Lee asked Barry Spivey if he would provide a brief summary of the issues.

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

Gwynne reported that the Committee was in the process of creating a pro-bono project for the "death" side of the Section that would assist low income individuals with estate planning.

21. **Sponsor Coordinators** - Kristen M. Lynch, Chair; Wilhelmina Kightlinger, Jon Scuderi, J. Michael Swaine, Adele I. Stone, Marilyn M. Polsen, Co-Vice Chairs

22. **Strategic Planning** – George J. Meyer, Chair

XII. **Probate and Trust Law Division Committee Reports**- W. Fletcher Belcher, Director

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

2. **Asset Preservation** - Jerome L. Wolf and Brian C. Sparks, Co-Chairs

3. **Attorney/Trust Officer Liaison Conference** – Robin J. King, Chair; Jack A. Falk, Jr., Vice Chair; Mark T. Middlebrook, Corporate Fiduciary Chair

4. **Estate and Trust Tax Planning** - Richard Gans, Chair; Harris L. Bonette Jr. and Elaine
M. Bucher, Co-Vice Chairs

5. **Florida Electronic Court Filing** - Rohan Kelley, Chair; Laird A. Lile, Vice Chair

6. **Guardianship and Advance Directives** – Sean W. Kelley and Alexandra V. Rieman, Co-Chairs; Seth A. Marmor and Sherri M. Stinson, Co-Vice Chairs

7. **IRA's and Employee Benefits** - Linda Suzanne Griffin and L. Howard Payne, Co-Chairs; Rex E. Moule, Jr., Vice Chair

8. **Liaisons with Elder Law Section** - Charles F. Robinson and Marjorie Wolasky

9. **Liaisons with Tax Section** - Lauren Y. Detzel, William R. Loane, Jr., David Pratt; Brian C. Sparks and Donald R. Tescher

10. **Power of Attorney** - Tami F. Conetta, Chair; David R. Carlisle, Vice Chair

11. **Principal and Income** - Edward F. Koren, Chair

12. **Probate and Trust Litigation** - William T. Hennessey, III, Chair; Thomas M. Karr and Jon Scuderi, Co-Vice Chairs

13. **Probate Law and Procedure** - Tae Kelley Bronner, Chair, S. Dresden Brunner, Anne K. Buzby and Jeffrey S. Goethe, Co-Vice Chairs

14. **Trust Law** - Shane Kelley, Chair; Angela M. Adams, John C. Moran and Laura P. Stephenson, Co-Vice Chairs

15. **Wills, Trusts and Estates Certification Review Course** - Anne K. Buzby, Chair; Deborah Russell, Vice Chair

XIII. Real Property Division Committee Reports

1. **Condominium and Planned Development** - Robert S. Freedman, Co-Chair; Steven Mezer, Vice-Chair; Jane Cornett, Vice Chair

2. **Construction Law** - Brian Wolf, Chair; April Atkins and Arnold Tritt, Co Vice-Chairs

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

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

5. **Governmental Regulation of Real Estate** - Eleanor Taft, Chair Nicole Kibert, Kristen Brundage and Frank L. Hearne, Co Vice-Chairs

6. **Residential Real Estate Committee and Industry Liaison** – Frederick Jones, Chair; William J. Haley, Vice Chair

7. **Land Trusts** - S. Katherine Frazier, Chair; Wilhelmena Kightlinger, Vice Chair

8. **Landlord and Tenant** – Neil Shter, Chair; Scott Frank, Vice Chair

9. **Legal Opinions** - David R. Brittain and Roger A. Larson, Co-Chairs; Burt Bruton, Vice Chair

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

11. **Mortgages and Other Encumbrances** - Salome Zikakis, Chair; Robert Stern, Co-Vice Chair

12. **Real Estate Certification Review Course** - Ted Conner, Chair; Guy W. Norris and Raul Ballaga, Co-Vice Chairs

13. **Real Property Forms** – Homer Duval, III, Chair; Jeffrey T. Sauer and Arthur Menor, Vice Chair

14. **Real Property Insurance** - Jay D. Mussman, Chair; Andrea Northrop and Wm. Cary Wright, Co-Vice Chair

15. **Real Property Litigation** - Mark A. Brown, Chair; Eugene E. Shuey and Martin Awerbach, Co-Vice Chairs

16. **Real Property Problems Study** - Wayne Sobien, Chair; Jeanne Murphy and Pat J. Hancock, Co-Vice Chair

17. **Title Insurance & Title Insurance Liaison** - Melissa Murphy, Chair; Homer Duvall and Kristopher Fernandez, Co-Vice Chairs

18. **Title Issues and Standards** - Patricia Jones, Chair; Robert Graham, Karla Gray and Christopher Smart, Co-Vice Chairs

XIV. Adjourn—There being no further business to come before the Executive Council, the meeting was adjourned at approximately 12:15 p.m.

Respectfully submitted,

Debra L. Boje, Secretary

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ATTENDANCE ROSTER

REAL PROPERTY PROBATE & TRUST LAW SECTION
EXECUTIVE COUNCIL MEETINGS
2010 – 2011

Executive Committee	Aug. 7 Palm Beach	Sept. 25 Orlando	Nov. 6 Clearwater	Feb. 26 Santa Barbara	May 28 Miami Beach
Felcoski, Brian J,, Chair	X	X			
Meyer, George J., Chair-Elect	X	X			
Belcher, Wm. Fletcher, Probate & Trust Law Div. Director	X	X			
Rolando, Margaret A., Real Property Law Div. Director	X	X			
Boje, Debra L., Secretary	X	X			
Dribin, Michael A., Treasurer	X	X			
Gelfand, Michael J., Legislation Chair	X	X			
Goodall, Deborah, Seminar Coordinator	X	X			
O'Malley, Andrew M., Director of Circuit Representatives	X	X			
Neukamm, John B., Immediate Past Chair	X	X			

Executive Council Members	Aug. 7 Palm Beach	Sept. 25 Orlando	Nov. 6 Clearwater	Feb. 26 Santa Barbara	May 28 Miami Beach
Adams, Angela M.	X	X			
Adcock, Jr., Louie N., **Past Chair**					
Akins, David James	X	X			
Alexander, Bruce					
Allender, Jerry W.	X				
Allender, Steven C.	X				
Altman, Robert N.	X				
Altman, Stuart H.	X	X			

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EXHIBIT
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A

Executive Council Members	Aug. 7 Palm Beach	Sept. 25 Orlando	Nov. 6 Clearwater	Feb. 26 Santa Barbara	May 28 Miami Beach
Arnold, Jr. , Lynwood F.	X	X			
Aron, Jerry E., **Past Chair**	X	X			
Ashby, Kimberly		X			
Atkins, April					
Awerbach, Martin	X	X			
Bald, Kimberly	X	X			
Ballaga, Raul P.	X	X			
Banister, John R.	X	X			
Batlle, Carlos Alberto	X	X			
Baumann, Phillip A.	X	X			
Beales III, Walter Randolph, **Past Chair**	X				
Bedke, Michael	X	X			
Bell, Honorable Kenneth					
Bonnette, Jr., Harris L.	X	X			
Boone, Jr., Sam Wood	X	X			
Brannen, J. Brecken					
Brennan, David Clark, **Past Chair**	X	X			
Brittain, David Ross	X	X			
Bronner, Tae Kelley	X	X			
Brown, J.J.					
Brown, Mark A.	X	X			
Brundage, Kristen Blaine Parker					
Brunner, S. Dresden	X	X			
Bruton, Jr., Burt	X	X			
Bucher, Elaine M.	X	X			
Butters, Sarah		X			
Buzby, Anne K.		X			
Cardillo, John T.		X			
Carlisle, David Russell	X	X			

Executive Council Members	Aug. 7 Palm Beach	Sept. 25 Orlando	Nov. 6 Clearwater	Feb. 26 Santa Barbara	May 28 Miami Beach
Caskey, J. Richard	X	X			
Christiansen, Pat, **Past Chair**	X	X			
Colby, Alfred		X			
Conetta, Tami Foley	X	X			
Conner, William Theodore					
Cope, Honorable Gerald B., Jr.	X				
Cornett, Jane L.		X			
Cruce, Roger W.	X				
Davis, Gary	X				
DeCubellis, Dan L.	X	X			
Detzel, Lauren Y.	X	X			
Diamond, Sandra F., **Past Chair**	X	X			
Dickinson, Tasha	X	X			
Dudley, Frederick Raymond	X	X			
Duvall III, Homer		X			
Elzeer, John S.	X	X			
Emerich, Guy Storms	X	X			
Ezell, Brenda B.	X	X			
Falk, Jack A.	X	X			
Fahnestock, Fabienne E.	X				
Fernandez, Kristopher	X	X			
Fields, Alan Beaumont	X	X			
Fitzgerald, Jr., John Edward	X				
Fleece III, Joseph W.	X	X			
Flood, Gerard J.	X	X			
Foreman, Michael Loren	X	X			
Frazier, Susan Katherine	X	X			
Freedman, Robert Scott	X	X			
Gabbadon, Karen					
Gans, Richard Roy	X	X			

Executive Council Members	Aug. 7 Palm Beach	Sept. 25 Orlando	Nov. 6 Clearwater	Feb. 26 Santa Barbara	May 28 Miami Beach
Garber, Julie Ann					
Gay III, Robert Norwood	X				
Gentile, Melinda					
Goethe, Jeffrey	X	X			
Goldman, Robert W., **Past Chair**	X				
Gonzalez, Aniella	X	X			
Graham, Robert Manuel	X	X			
Gray, Karla S.	X				
Greer, Honorable George W.					
Griffin, Linda S.	X	X			
Grimsley, John Gall, **Past Chair**					
Grossman, Honorable Melvin B.	X	X			
Guttmann III, Louis B., **Past Chair**		X			
Haley, William James					
Hancock, Patricia J.	X	X			
Hart, W. Christopher	X	X			
Hayes, Honorable Hugh D.	X				
Hayes, M. Travis	X	X			
Hearn, Steven Lee, **Past Chair**		X			
Hearne, Frank L.	X	X			
Henderson, Reese		X			
Henderson, Thomas	X	X			
Hennessey III, William Thomas	X	X			
Heuston, Stephen Paul	X	X			
Huszagh, Victor Lee					
Isom, Honorable Claudia Rickert					
Isphording, Roger O., **Past Chair**	X	X			
Johnson, Amber Jade F.	X	X			
Jones, Frederick Wayne	X				

Executive Council Members	Aug. 7 Palm Beach	Sept. 25 Orlando	Nov. 6 Clearwater	Feb. 26 Santa Barbara	May 28 Miami Beach
Jones, John Arthur, **Past Chair**		X			
Jones, Patricia P. Hendricks	X				
Judd, Robert Brian	X	X			
Kalmanson, Stacy O.	X	X			
Karr, Mary		X			
Karr, Thomas M.		X			
Kayser, Joan Bradbury, **Past Chair**		X			
Kelley, Rohan, **Past Chair**	X	X			
Kelley, Sean	X	X			
Kelley, Shane	X	X			
Kendon, John		X			
Kibert, Nicole C.	X	X			
Kightlinger, Wilhelmina F.	X	X			
King, Robin	X	X			
Kinsolving, Ruth Barnes, **Past Chair**					
Koren, Edward F., **Past Chair**					
Korvick, Honorable Maria Marinello	X	X			
Kotler, A. Stephen	X	X			
Krier, Honorable Beth					
Kromash, Keith Stuart	X	X			
LaFemina, Rose	X				
Lajoie, John Thomas					
Lane, William	X	X			
Lange, Jr., George W.	X	X			
Lannon, Patrick	X	X			
Larson, Roger Allen	X	X			
Laughlin, Honorable Lauren					
Leebrick, Brian	X	X			
Lile, Laird, **Past Chair**					
Little III, John Wesley	X				

Executive Council Members	Aug. 7 Palm Beach	Sept. 25 Orlando	Nov. 6 Clearwater	Feb. 26 Santa Barbara	May 28 Miami Beach
Lynch, Kristen M.	X	X			
Madorsky, Marsha G.	X	X			
Marger, Bruce, **Past Chair**	X				
Marmor, Seth		X			
Marshall III, Stewart Andrew		X			
McCall, Alan K.	X	X			
Mednick, Glenn M.	X				
Menor, Arthur James	X	X			
Mezer, Steven H.	X	X			
Middlebrook, Mark Thomas	X	X			
Miller, Lawrence Jay		X			
Moran, John	X	X			
Moule, Rex E.	X				
Muir, Honorable Celeste	X	X			
Muir, William T.	X				
Mundy, Craig A.	X				
Murphy, Melissa, **Past Chair**	X	X			
Murphy, Jeanne					
Mussman, Jay D.	X	X			
Nash, Charles Ian	X	X			
Nguyen, Hung V.		X			
Norris, Guy W.	X	X			
Northrop, Andrea	X				
Norris, John E., **Past Chair**		X			
O'Ryan, Christian Felix	X	X			
Payne, L. Howard		X			
Pence, Scott	X				
Platt, William R.	X				
Pleus, Jr., Honorable Robert James					
Polson, Marilyn Mewha	X	X			

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57458-2

Executive Council Members	Aug. 7 Palm Beach	Sept. 25 Orlando	Nov. 6 Clearwater	Feb. 26 Santa Barbara	May 28 Miami Beach
Potter, Del G.					
Pratt, David		X			
Promoff, Adrienne F.	X				
Price, Pamela O.	X	X			
Prince-Troutman, Stacy A.	X	X			
Pyle, Michael A.	X	X			
Reddin, Michelle A.		X			
Reinhardt, Joe					
Reynolds, Stephen					
Rieman, Alexandra V.	X	X			
Robbins, James, Jr.	X	X			
Roberts, Hardy		X			
Robinson, Charles F.	X	X			
Rojas, Silvia B.	X	X			
Roman, Paul	X	X			
Roscow IV, John Frederick	X				
Russell, Deborah L.	X	X			
Russick, James C.	X	X			
Rydberg, Marsha G.	X	X			
Sachs, Colleen Coffield	X	X			
Sasso, Michael Cornelius		X			
Sauer, Jeffrey Thomas	X	X			
Schaefer, Jr. , Honorable Walter L.					
Schnitker, Clay	X				
Schofield, Percy Allen	X	X			
Scholnik, Barry	X				
Schwartz, Robert M.		X			
Scuderi, Jon	X	X			
Sheets, Sandra Graham	X	X			
Shoter, Neil	X	X			

Executive Council Members	Aug. 7 Palm Beach	Sept. 25 Orlando	Nov. 6 Clearwater	Feb. 26 Santa Barbara	May 28 Miami Beach
Shuey, Eugene Earl	X	X			
Silberman, Honorable Morris					
Silberstein, David Mark	X	X			
Sklar, William Paul	X				
Smart, Christopher	X				
Smith, G. Thomas, **Past Chair**	X	X			
Smith, Michael S.		X			
Smith, Wilson, **Past Chair**					
Sobien, Wayne	X	X			
Sparks, Brian Curtis	X	X			
Spivey, Barry F.	X	X			
Spurgeon, Susan K.	X				
St. Arnold, Honorable Jack					
Stafford, Michael P.	X	X			
Stephenson, Laura P.	X	X			
Stern, Robert Gary	X	X			
Stinson, Sherri M.	X				
Stone, Adele Ilene	X	X			
Stone, Bruce M., **Past Chair**		X			
Suarez, Honorable Richard					
Sundberg, Laura K.	X	X			
Swaine, Jack Michael, **Past Chair**	X				
Swaine, Robert S.	X				
Taft, Eleanor W.		X			
Taylor, Richard W.	X	X			
Tescher, Donald Robert		X			
Thomas, Honorable Patricia Vitter	X				
Thornton, Kenneth E.	X	X			
Tritt, Arnold	X	X			
Udick, Arlene	X	X			

Executive Council Members	Aug. 7 Palm Beach	Sept. 25 Orlando	Nov. 6 Clearwater	Feb. 26 Santa Barbara	May 28 Miami Beach
Umsted, Hugh Charles	X				
Virgil, Eric	X				
Waller, Roland D., **Past Chair**	X	X			
Weintraub, Lee A.	X	X			
Wells, Jerry	X	X			
White, Jr.; Richard M.	X	X			
Whynot, Sancha Brennan	X	X			
Wickenden, D. Keith	X				
Wilder, Charles D.	X	X			
Williams, Jr., Richard	X	X			
Williamson, Julie Ann Stuice, **Past Chair**	X				
Wohlust, G. Charles	X	X			
Wolasky, Marjorie Ellen	X	X			
Wolf, Brian	X				
Wolf, Jerome Lee	X				
Wright, Wm. Cary	X	X			
Young, Gwynne Alice	X	X			
Zikakis, Salome	X	X			
Zschau, Julius Jay, **Past Chair**		X			
Legislative Consultants					
Adams, Gene	X	X			
Aubuchon, Joshua D.	X	X			
Dunbar, Peter M.	X	X			
Edenfield, Martha		X			

Executive Committee	Aug. 7 Palm Beach	Sept. 25 Orlando	Nov. 6 Clearwater	Feb. 26 Santa Barbara	May 28 Miami Beach
Guests and Fellows					
Armstrong, David G.	X				
Boyd, Deborah	X				
Brenes-Stahl, Tattiana		X			
Bush, Ben	X	X			
Byrnes, Gentry		X			
Callahan, Chad	X				
Cole, Stacey		X			
Dollinger, Jeffrey		X			
Fallon, Cynthia	X				
George, Joseph P.	X				
Hailey, Phyllis	X				
Hale, Russ	X	X			
Hamrick, Alex		X			
Kypreos, Theo	X	X			
Lucchi, Elisa	X	X			
Marx, James	X				
Pasem, Narvin	X	X			
Stone, Andrea		X			
Stuart, Pam	X	X			
Thurlow, Thomas, III	X				
Topor, Thomas K.	X				

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RPPTL FINANCIAL SUMMARY

2009 – 2010 Year End [*July 1, 2009 – June 30, 2010*[1]]

Revenue:	**$1,056,085*
Expenses:	*$940,744*
Net:	*$115,341*

**$158,595 of this figure represents revenue from corporate sponsors and exhibitors*

Beginning Fund Balance (7-1-09)	***RPPTL CLE***
$ 908,659	*RPPTL Year End Actual CLE Revenue* ***$272,988***
Year End Fund Balance (6-30-10)	*RPPTL Budgeted CLE Revenue* ***$200,000***
$1,024,000	

[1] **This report is based on the tentative unaudited detail statement of operations dated 6/30/2010.**

EXHIBIT

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RPPTL Financial Summary from Separate Budgets

2009 – 2010 [July 1, 2009 – June 30, 2010[1]]

YEAR END REPORT

General Budget

Revenue:	**$ 951,488**
Expenses:	**$ 734,332**
Net:	**$ 217,156**

Legislative Update

Revenue:	**$ 49,635**
Expenses:	**$ 96,209**
Net:	**($46,574)**

Convention

Revenue:	**$ 42,170**
Expenses:	**$ 99,211**
Net:	**($57,041)**

Miscellaneous Section Service Courses

Revenue:	**$ 12,792**
Expenses:	**$ 10,992**
Net:	**$ 1,800**

Roll-up Summary (Total)

Revenue:	**$ 1,056,085**
Expenses:	**$ 940,744**
Net Operations:	**$ 115,341**

Reserve (Fund Balance):	**$ 908,659**
GRAND TOTAL	**$ 1,024,000**

[1] This report is based on the tentative unaudited detail statement of operations dated 6/30/2010

RPPTL FINANCIAL SUMMARY

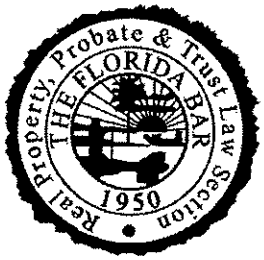
2010 – 2011 [*July 1, 2010 – September 16, 2010*[1]]

Revenue:	**$444,077*
Expenses:	*$285,057*
Net:	*$159,020*

** $51,425 of this figure represents revenue from corporate sponsors and exhibitors*

Beginning Fund Balance (7-1-10)	***RPPTL CLE***
$ 1,024,000	*RPPTL YTD Actual CLE Revenue* ***$33,103***
YTD Fund Balance (9-16-10)	*RPPTL Budgeted CLE Revenue* ***$233,100***
$1,183,020	

[1] **This report is based on the tentative unaudited detail statement of operations dated 9/16/2010.**



RPPTL Financial Summary from Separate Budgets

2010 – 2011 [July 1, 2010 – September 16, 2010[1]]

YEAR TO DATE REPORT

General Budget

Revenue:	$ 409,142
Expenses:	$ 201,395
Net:	$ 207,747

Legislative Update

Revenue:	$ 30,667
Expenses:	$ 81,731
Net:	($51,064)

Convention

Revenue:	$ 93
Expenses:	$125
Net:	($32)

Miscellaneous Section Service Courses

Revenue:	$ 4,175
Expenses:	$ 1,806
Net:	$ 2,369

Roll-up Summary (Total)

Revenue:	$ 444,077
Expenses:	$ 285,057
Net Operations:	$ 159,020

Reserve (Fund Balance):	$ 1,024,000
GRAND TOTAL	**$1,183,020**

[1] This report is based on the tentative unaudited detail statement of operations dated 9/16/2010

A bill to be entitled

An act relating to judicial sale procedures; amending s. 45.031, F.S.; providing for methods and manner of publication including electronic notice; amending s. 50.011 F.S.; providing requirements for electronic publications of sale under s. 45.031 F.S.; amending s. 50.041 F.S.; providing for proof of publication; amending s. 50.051 F.S.; providing for proof of publication; amending s. 702.035 F.S. to be consistent with s. 50.011(2) as amended hereby to provide for internet; providing for an effective date.

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

Section 1. Subsections (3), (4), (5), (6), (7), (8), (9) and (10) of section 45.031 Florida Statutes are renumbered as subsections (4), (5), (6), (7), (8), (9), (10) and (11), respectively, subsection (2) of that section is amended and renumbered as subsections (2) and (3), and subsection (4) of that section, is amended to read:

(2) PUBLICATION OF SALE.— Notice of sale shall be published:

a) ~~once a week for 2 consecutive weeks~~ in a newspaper of general circulation, as defined in chapter 50, published in the county where the sale is to be held once a week for 2 consecutive weeks, ~~. The~~ the second publication shall be at least 5 days before the sale; or,

b) on the clerk of the court's internet website accessible without charge by a clear and conspicuous hyperlink from the website's home page for at least fourteen days before the sale; or,

c) on an internet website accessible without charge by a clear and conspicuous hyperlink from the clerk of court's website's home page for at least fourteen days before the sale.

(3) NOTICE OF SALE. - The ~~notice~~ Notice of Sale shall contain:

(a) A legal description of the property to be sold, and the property's street address, if any, though any failure to include the correct street address shall not cause the Notice of Sale to be ineffectual.

(b) A statement that in the event of any conflict between the legal description of the property to be sold and the street address, the legal description shall control.

(c) The time and place of sale.

EXHIBIT C

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

(d) A statement that the sale will be made pursuant to the order or final judgment.

(e) The caption of the action.

(f) The name of the clerk making the sale.

(g) A statement of the name of the newspaper, or the home page address of the internet website, in or on which the notice is being published.

(h) ~~(f)~~ A statement that any person claiming an interest in the surplus from the sale, if any, other than the property owner as of the date of the lis pendens must file a claim within 60 days after the sale.

The court, in its discretion, may enlarge the time of the sale. Notice of the changed time of sale shall be published as provided herein.

(5) ~~(4)~~ CERTIFICATION OF SALE.--After a sale of the property the clerk shall promptly file a certificate of sale and serve a copy of it on each party in substantially the following form:

(Caption of Action)

CERTIFICATE OF SALE

The Undersigned clerk of the court certifies that notice of public sale of the property described in the order or final judgment was published (a) on the clerk of the court's internet website, (b) on an alternative internet website accessible by hyperlink from the clerk of the court's internet website home page, or (c) in _____, a newspaper circulated in _____ County, Florida, in the manner shown by the proof of publication attached, and on _____, (year), the property was offered for public sale to the highest and best bidder for cash. The highest and best bid received for the property in the amount of $$ _____ was submitted by _____, to whom the property was sold. The proceeds of the sale are retained for distribution in accordance with the order or final judgment or law. WITNESS my hand and the seal of this court on _____, (year).

(Clerk)

By (Deputy Clerk)

Section 2. Section 50.011 Florida Statutes, is amended as follows:

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

50.011 Where and in what language legal notices to be published.—

(1) Whenever by statute an official or legal advertisement or a publication, or notice in a newspaper has been or is directed or permitted in the nature of or in lieu of process, or for constructive service, or in initiating, assuming, reviewing, exercising or enforcing jurisdiction or power, or for any purpose, including all legal notices and advertisements of sheriffs and tax collectors, the contemporaneous and continuous intent and meaning of such legislation all and singular, existing or repealed, is and has been and is hereby declared to be and to have been, and the rule of interpretation is and has been, a publication in a newspaper printed and published periodically once a week or oftener, containing at least 25 percent of its words in the English language, entered or qualified to be admitted and entered as periodicals matter at a post office in the county where published, for sale to the public generally, available to the public generally for the publication of official or other notices and customarily containing information of a public character or of interest or of value to the residents or owners of property in the county where published, or of interest or of value to the general public.

(2) Electronic publication of Notice of Sale.- Subsection 50.011(1) does not apply to any electronic publication of a Notice of Sale authorized by s. 45.031(2), if the electronic publication is on an internet website having at least 25% of its words in the English language, and the website shall be available for viewing by the general public without registration processes of any sort. The Proof of Publication affidavit shall contain in its heading the common name and the Uniform Resource Locator of the internet website where posting occurred; shall contain a copy of the Notice of Sale; and shall include the dates and times on which posting commenced and terminated.

Section 3. Subsection (1) of Section 50.041, Florida Statutes, is amended as follows:

(1) All affidavits of clerks of courts, internet website providers, or publishers of newspapers (or their official representatives) made for the purpose of establishing proof of publication of public notices or legal advertisements shall be uniform throughout the state.

Section 4. Section 50.051, Florida Statutes, is amended to read as follows:

50.051. Proof of publication; form of uniform affidavit

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

____The printed form upon which all such affidavits establishing proof of publication are to be executed shall be substantially as follows:

NAME OF NEWSPAPER OR INTERNET WEBSITE

Published (Weekly or Daily)

(Town or City) (County) FLORIDA

STATE OF FLORIDA

COUNTY OF _____:

Before the undersigned authority personally appeared _____, who on oath says that he or she is (a) _____ of the clerk of court for _____ County, (b) _____ of the _____, an internet website accessible by hyperlink from the clerk of the court's internet website home page, or (c) _____ of the _____, a _____ newspaper published at _____ in _____ County, Florida; that the attached copy of advertisement, being a _____ in the matter of _____ in the _____ Court, was published on the clerk of the court's internet website, or on an internet website accessible by hyperlink from the clerk of the court's internet website home page from _____ through _____, or in said newspaper in the issues of _____.

(If by newspaper):

Affiant further says that the said _____ is a newspaper published at _____, in said _____ County, Florida, and that the said newspaper has heretofore been continuously published in said _____ County, Florida, each _____ and has been entered as periodicals matter at the post office in _____, in said _____ County, Florida, for a period of 1 year next preceding the first publication of the attached copy of advertisement; and affiant further says that he or she has neither paid nor promised any person, firm or corporation any discount, rebate, commission or refund for the purpose of securing this advertisement for publication in the said newspaper.

Sworn to and subscribed before me this _____ day of ____, (year), by _____, who is personally known to me or who has produced (type of identification) as identification.

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

Section 5. Section 702.035, Florida Statutes, is amended to read as follows:

702.035 Legal notice concerning foreclosure proceedings. -

(1) Whenever a legal advertisement, publication, or notice relating to a foreclosure proceeding is required to be placed in a newspaper or posted on an internet website, it is the responsibility of the petitioner or petitioner's attorney to place such advertisement, publication, or notice. For counties with more than 1 million total population as reflected in the 2000 Official Decennial Census of the United States Census Bureau as shown on the official website of the United States Census Bureau, any notice of publication required by this section shall be deemed to have been published in accordance with the law if the notice is published in a newspaper that has been entered as a periodical matter at a post office in the county in which the newspaper is published, is published a minimum of 5 days a week, exclusive of legal holidays, and has been in existence and published a minimum of 5 days a week, exclusive of legal holidays, for 1 year or is a direct successor to a newspaper that has been in existence for 1 year that has been published a minimum of 5 days a week, exclusive of legal holidays.

(2) If the advertisement, publication or notice is electronically published, it shall be deemed to have been published in accordance with the law if the requirements of s. 50.011(2) have been met. The advertisement, publication, or notice shall be placed directly by the attorney for the petitioner, by the petitioner if acting pro se, or by the clerk of the court.

(3) Only the actual costs charged by the newspaper or by the host of the internet website for the advertisement, publication or notice may be charged as costs in the action.

Section 6. This act shall take effect July 1, 2011.

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

713.10 Extent of liens.—

(1) Except as provided in s. 713.12, a lien under this part shall extend to, and only to, the right, title, and interest of the person who contracts for the improvement as such right, title, and interest exists at the commencement of the improvement or is thereafter acquired in the real property.

(2) When an improvement is made by a lessee in accordance with an agreement between such lessee and her or his lessor, the lien shall extend also to the interest of such lessor. When the lease expressly provides that the interest of the lessor shall not be subject to liens for improvements made by the lessee, the lessee shall notify the contractor making any such improvements of such provision or provisions in the lease, and the knowing or willful failure of the lessee to provide such notice to the contractor shall render the contract between the lessee and the contractor voidable at the option of the contractor. The interest of the lessor shall not be subject to liens for improvements made by the lessee when:

(a) The lease, a short form or a memorandum of the lease that contains the specific language set forth in the lease prohibiting such liability is recorded in the official records of the county in which the premises are located prior to the recording of a notice of commencement for improvements to the premises that are the subject of the lease and the terms of the lease expressly prohibit such liability; or

(b) The terms of the lease expressly prohibit such liability and a notice advising that leases for the rental of premises on a parcel of land prohibit such liability has been recorded in the official records of the county in which the parcel of land is located prior to the recording of a notice of commencement for improvements to the premises that are the subject of the lease and the notice sets forth the following:

~~(1)~~1. The name of the lessor.

~~(2)~~2. The legal description of the parcel of land to which the notice applies.

~~(3)~~3. A statement that all leases for premises on the parcel of land expressly prohibit such liability or, if some leases do not prohibit such liability, an identification of the specific leases that do not prohibit such liability and the premises to which those leases apply. The notice shall still be effective and the lessor's interest in a premises on the parcel of land shall not be subject to liens for improvements made by the lessee of such premises even if all of the leases for all of the premises on the parcel of land do not contain language prohibiting such liability or the language prohibiting such liability varies in the various leases so long as:

(i) the lease for the specific premises as to which a lien could otherwise be claimed against the lessor's interest expresses ~~the intention~~ that the interest of the lessor shall not be subject to liens for improvements made by the lessee; and

(ii) the leases that do not prohibit such liability are identified in the notice.

The lessor may amend the notice from time to time to revise the list of leases that do not prohibit such liability. Any such amendment will be effective as of the date it is recorded and shall not be

effective as to any improvements performed under a notice of commencement that is recorded before the amendment.

Creditors secured by or subsequent purchasers of an interest in the affected parcel, for a valuable consideration and without notice, may rely on the accuracy and correctness of the recorded notice as of the time they acquired the affected interest. No person shall have a duty to inquire into the terms of any lease affecting the parcel as a condition to relying on the recorded notice. If a lessor willfully misstates the facts in any notice, any lienor who is materially prejudiced by the misstatement in perfecting lien rights against the lessor has a cause of action against the lessor for his or her damages sustained thereby in the amount that the lienor would have been otherwise able to establish as a construction lien against the lessor's interest provided such lienor is otherwise entitled to a lien under this Part I.

A reference in the recorded notice to specific leases which do not prohibit such liability, shall not be construed to constitute actual or constructive notice of such leases or the interests of the named lessees in the parcel, nor place any party on a duty of further inquiry as to the status of such leases or the interests of such lessees. This paragraph shall not be construed to affect the rights of lienors against the interests of the lessors or lessees referred to in the recorded notice.

(c) The lessee is a mobile home owner who is leasing a mobile home lot in a mobile home park from the lessor.

(3) Any contractor or lienor under contract to furnish improvements being made by a lessee may serve written demand on the lessor for a verified copy of the provision in the lease between such lessee and the lessor prohibiting liability for improvements made by the lessee. The demand must identify the lessee and the premises being improved and must be in a document that is separate from the notice to the owner as provided in Section 713.06(2). The interest of any lessor who does not serve a verified copy of the lease provision within 30 days after demand, or who serves a false or fraudulent copy, shall be subject to a lien under this Part I by the party demanding the verified copy provided such party is (i) otherwise entitled to a lien under this Part I; and (ii) did not otherwise have actual notice that the interest of the lessor is not subject to liens for improvements made by the lessee. The written demand must include the following warning in conspicuous type in substantially the following form:

WARNING: YOUR FAILURE TO SERVE THE REQUESTED VERIFIED COPY WITHIN 30 DAYS OR THE SERVICE OF A FALSE COPY MAY RESULT IN YOUR PROPERTY BEING SUBJECT TO THE CLAIM OF LIEN OF THE PERSON REQUESTING THE VERIFIED COPY.

History.--s. 1, ch. 63-135; s. 35, ch. 67-254; s. 1, ch. 85-103; s. 1, ch. 92-148; s. 806, ch. 97-102.

Note.--Former s. 84.101.

A bill to be entitled

An act relating to homeowners associations; amending s. 720.309, F.S., to authorize homeowners associations to enter into bulk rate communications and internet services contracts; providing an effective date.

Section 1. The existing text of section 720.309 is renumbered to be subsection (1) and subsection (2) of section 720.309 is created to read as follows:

(1) Any grant or reservation made by any document, and any contract with a term in excess of 10 years made by an association before control of the association is turned over to the members other than the developer, which provide for operation, maintenance, or management of the association or common areas must be fair and reasonable.

(2) (a) If so provided in the governing documents, the cost communication services as defined under ch. 202, information services or Internet services obtained pursuant to a bulk contract shall be deemed an operating expense of the association. If the governing documents do not provide for the cost of communication services as defined under ch. 202, information services or Internet services obtained under a bulk contract as an operating expense of the association, the board may enter into such a contract, and the cost of the service will be an operating expense of the association but allocated on a per-parcel basis rather than a percentage basis if the governing documents provide for other than an equal sharing of operating expenses. Any contract entered into before July 1, 2011, in which the cost of the service is not equally divided

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among all parcel owners may be changed by vote of a majority of the voting interests present at a regular or special meeting of the association, to allocate the cost equally among all parcels.

(b) Any contract entered into pursuant to this subsection (2) may be canceled by a majority of the voting interests present at the next regular or special meeting of the association membership. Any member may make a motion to cancel such contract, but if no motion is made or if such motion fails to obtain the required vote at the next regular or special meeting of the association membership, whichever is sooner, following the making of the contract, then such contract shall be deemed ratified for the term therein expressed.

(c) Any contract entered into pursuant to this subsection (2) shall provide, and shall be deemed to provide if not expressly set forth, that any hearing-impaired or legally blind parcel owner who does not occupy the parcel with a non-hearing-impaired or sighted person, or any parcel owner receiving supplemental security income under Title XVI of the Social Security Act or food stamps as administered by the Department of Children and Family Services pursuant to s. 414.31, may discontinue the service without incurring disconnect fees, penalties, or subsequent service charges, and, as to such parcels, the parcel owners shall not be required to pay any operating expenses charge related to such service. If less than all parcel owners share the expenses of communication services as defined under ch. 202, information services or Internet services, the expense shall be shared by all participating parcel owners. The association may use the provisions of s. 720.3085 to enforce payment of the shares of

such costs by the parcel owners receiving communication services, information services or Internet services.

(3) No resident of any parcel, whether tenant or parcel owner, shall be denied access to any available franchised or licensed cable television service, nor shall such resident or cable television service be required to pay anything of value in order to obtain or provide such service except those charges normally paid for like services by other residents of single-family homes not located in the community but which are within the same franchised or licensed area and except for installation charges as such charges may be agreed to between such resident and the provider of such services.

Section 2. This Act shall take effect July 1, 2011.

A bill to be entitled

An act relating to homeowners associations; amending s. 720.309, F.S., to authorize homeowners associations to enter into bulk rate communications and internet services contracts; providing an effective date.

Section 1. The existing text of section 720.309 is renumbered to be subsection (1) and subsection (2) of section 720.309 is created to read as follows:

(1) Any grant or reservation made by any document, and any contract with a term in excess of 10 years made by an association before control of the association is turned over to the members other than the developer, which provide for operation, maintenance, or management of the association or common areas must be fair and reasonable.

(2) (a) If so provided in the governing documents, the cost of communication services as defined under ch. 202, information services or Internet services obtained pursuant to a bulk contract shall be deemed an operating expense of the association. If the governing documents do not provide for the cost of communication services as defined under ch. 202, information services or Internet services obtained under a bulk contract as an operating expense of the association, the board may enter into such a contract, and the cost of the service will be an operating expense of the association but allocated on a per-parcel basis rather than a percentage basis if the governing documents provide for other than an equal sharing of operating expenses. Any contract entered into before July 1, 2011, in which the cost of the service is not equally divided among all parcel owners may be changed by vote of a majority of the voting interests

present at a regular or special meeting of the association, to allocate the cost equally among all parcels.

(b) Any contract entered into pursuant to this subsection (2) may be canceled by a majority of the voting interests present at the next regular or special meeting of the association membership following the execution of the contract. Any member may make a motion to cancel such contract, but if no motion is made or if such motion fails to obtain the required vote at the next regular or special meeting of the association membership, whichever is sooner, following the execution of the contract, then such contract shall be deemed ratified for the term therein expressed.

(c) Any contract entered into pursuant to this subsection (2) shall provide, and shall be deemed to provide if not expressly set forth, that any hearing-impaired or legally blind parcel owner who does not occupy the parcel with a non-hearing-impaired or sighted person, or any parcel owner receiving supplemental security income under Title XVI of the Social Security Act or food stamps as administered by the Department of Children and Family Services pursuant to s. 414.31, may discontinue the service without incurring disconnect fees, penalties, or subsequent service charges, and, as to such parcels, the parcel owners shall not be required to pay any operating expenses charge related to such service. If less than all parcel owners share the expenses of communication services as defined under ch. 202, information services or Internet services, the expense shall be shared by all participating parcel owners. The association may use the provisions of s. 720.3085 to enforce payment of the shares of

such costs by the parcel owners receiving communication services, information services or Internet services.

(3) No resident of any parcel, whether tenant or parcel owner, shall be denied access to any available franchised or licensed cable television service paid directly to the service provider by the resident, nor shall such resident or cable television service be required to pay anything of value in order to obtain or provide such service except those charges normally paid for like services by other residents of single-family homes not located in the community but which are within the same franchised or licensed area and except for installation charges as such charges may be agreed to between such resident and the provider of such services.

Section 2. This Act shall take effect July 1, 2011.

A bill to be entitled

An act related to condominiums; amending s. 718.703 to clarify the definitions of bulk assignee and bulk buyer; amending s. 718.704 to clarify the liabilities of a bulk assignee and bulk buyer; amending s. 718.705 to clarify provisions pertaining to appointment of directors and transition of control; amending s. 718.706 to clarify bulk assignee responsibilities for financial information and disclosures to be provided to purchasers and to create an exemption from disclosures if all units are being conveyed in bulk to a single purchaser; amending s. 718.707 to clarify the application of the part to acquisitions occurring on or after July 1, 2010; providing an effective date.

Section 1. Subsections (1) and (2) of section 718.703, F.S., are amended to read as follows:

(1) "Bulk assignee" means a person who is not a bulk buyer and who:

(a) Acquires more than seven condominium parcels in any one condominium as set forth in s.718.707; and

(b) Receives an assignment of ~~some or all of the~~ any rights of the developer as set forth in the declaration of condominium or this chapter, other than, or in addition to, those rights of a developer described in subsection (2) below, by:

1. a written instrument recorded as part of or as an exhibit to the deed ~~or as~~,

2. a separate instrument in the public records of the county in which the condominium is located; or

3. pursuant to the final judgment or certificate of title issued in favor of any purchaser at a foreclosure sale.

EXHIBIT

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A mortgagee or its assignee shall not be deemed a bulk assignee or a developer by reason of its acquisition of condominium units and receipt of an assignment of some or all of a developer's rights unless such mortgagee or its assignee exercises any rights of a developer other than those described in s. 718.703(2).

(2) "Bulk buyer" means a person who acquires more than seven condominium parcels in any one condominium as set forth in s. 718.707, but who does not receive an assignment of any developer rights ~~other than~~ or receives only some or all of the following rights:

(a) the right to conduct sales, leasing, and marketing activities within the condominium;

(b) the right to be exempt from the payment of working capital contributions to the condominium association arising out of, or in connection with, the bulk buyer's acquisition of ~~a bulk number of~~ the units; and

(c) the right to be exempt from any rights of first refusal which may be held by the condominium association and would otherwise be applicable to subsequent transfers of title from the bulk buyer to a third party purchaser concerning one or more units.

Section 2. Section 718.704, F.S., are amended to read as follows:

(1) A bulk assignee ~~assumes~~ is deemed to have assumed and is liable for all duties and responsibilities of the developer under the declaration and this chapter for the period following its acquisition of title to its units, except:

(a) Warranties of the developer under s. 718.203(1) or s. 718.618, except:

1. as expressly provided by the bulk assignee in any prospectus or offering circular, or the contract for purchase and sale executed with a purchaser; or

2. for any design, construction, development, or repair work performed by or on behalf of such bulk assignee;

(b) The obligation to:

1. Fund converter reserves under s. 718.618 for a unit that was not acquired by the bulk assignee; or

2. Provide ~~converter~~ implied warranties on any portion of the condominium property except:

a. as expressly provided by the bulk assignee in any prospectus or offering circular, or the contract for purchase and sale executed with a purchaser ~~and pertaining to~~, or

b. for any design, construction, development, or repair work performed by or on behalf of the bulk assignee;

(c) The requirement to provide the association with a cumulative audit of the association's finances from the date of formation of the condominium association as required by s. 718.301(4)(c). However, the bulk assignee must provide an audit for the period during which the bulk assignee elects or appoints a majority of the members of the board of administration;

(d) Any liability arising out of or in connection with actions taken by the board of administration or the developer-appointed directors before the bulk assignee elects or appoints a majority of the members of the board of administration; and

(e) Any liability for or arising out of the developer's failure to fund previous assessments or to resolve budgetary deficits in relation to a developer's right to guarantee assessments, except as otherwise provided in subsection (2).

The bulk assignee is ~~also~~ only responsible for delivering documents and materials in accordance with s. 718.705(3). A bulk assignee may, at its option, expressly assume some or all of the obligations of the developer described in paragraphs (a)-(e).

(2) A bulk assignee receiving the assignment of the ~~rights~~ right of the developer to guarantee the level of assessments and fund budgetary deficits pursuant to s. 718.116 assumes and is liable for all obligations of the developer with respect to such guarantee, applicable to the period following its acquisition of title to its units, including any applicable funding of reserves to the extent required by law, for as long as the guarantee remains in effect. A bulk assignee not receiving such assignment, or a bulk buyer, does not assume and is not liable for the obligations of the developer with respect to such guarantee, but is responsible for payment of assessments following its acquisition of its units in the same manner as all other owners of condominium parcels.

(3) A bulk buyer is liable for the duties and responsibilities of ~~the~~ a developer under the declaration and this chapter only to the extent ~~provided in this part, together with~~ if any, ~~other~~ that such duties or responsibilities of ~~the~~ a developer are expressly assumed in writing by the bulk buyer.

(4) An acquirer of condominium parcels is not a bulk assignee or a bulk buyer if the transfer to such acquirer was made:

(a) before the effective date of this part;

(b) ~~was made~~ with the intent to hinder, delay, or defraud any purchaser, unit owner, or the association~~;~~, or

(c) ~~if the acquirer is~~ by a person who would be considered an insider under s. 726.102(7).

(5) An assignment of developer rights to a bulk assignee may be made by ~~the~~ a developer, a previous bulk assignee, a ~~first~~ mortgagee or its assignee having acquired title to the units, or a court acting on behalf of the developer or the previous bulk assignee, provided that such developer rights are held by the predecessor in title to such bulk assignee. At any particular time, there may be no more than one bulk assignee within a condominium~~;~~ ~~but~~ however, there may be more than one bulk buyer. If more than one acquirer of condominium parcels in the same condominium receives an assignment of developer rights ~~from the same person,~~ in addition to those rights described in s. 718.703(2), then the bulk assignee is the acquirer whose instrument of assignment is recorded first in the public records of the county in which the condominium is located, and any subsequent purported bulk assignee may still qualify as a bulk buyer.

Section 3. Subsections (1) and (3) of section 718.705, F.S., are amended to read as follows:

(1) ~~For~~ If, at the time the bulk assignee acquires title to its units and receives an assignment of developer's rights, the association has not yet been transitioned to unit owners other than the developer pursuant to s. 718.301(1), then for purposes of determining the timing for transfer of control of the board of administration of the

association ~~to unit owners other than the developer under s. 718.301(1)(a) and (b), if a bulk assignee is entitled to elect a majority of the members of the board~~, a condominium parcel acquired by the bulk assignee ~~is~~ shall not be deemed to be conveyed to a purchaser, or owned by an owner other than the developer, until the condominium parcel is conveyed to an owner who is not a bulk assignee.

(3) ~~If~~ When a bulk assignee relinquishes control of the board of administration as set forth in s. 718.301, the bulk assignee must deliver all of those items required by s. 718.301(4). However, the bulk assignee is not required to deliver items and documents not in the possession of the bulk assignee ~~during the period during which the bulk assignee was entitled to elect a majority of the members of the board of administration~~ if some were or should have been in existence or created with respect to the time period before the bulk assignee's acquisition of the units. In conjunction with its acquisition of ~~condominium parcels~~ units, a bulk assignee shall undertake a good faith effort to obtain the documents and materials that must be provided to the association pursuant to s. 718.301(4). ~~If~~ To the extent the bulk assignee is not able to obtain any or all of such documents and materials, the bulk assignee must certify in writing to the association the names or descriptions of the documents and materials that were not obtainable by the bulk assignee. Delivery of the certificate relieves the bulk assignee of responsibility for delivering the documents and materials referenced in the certificate as otherwise required under ss. 718.112 and 718.301 and this part. The responsibility of the bulk assignee for the audit required by s. 718.301(4) commences as of the date on which the bulk assignee elected or appointed a majority of the members of the board of administration.

Section 3. Subsections (1), (2) and (4) of section 718.706, F.S., are amended, and subsection (5) of section 718.706, F.S., is created to read as follows:

(1) Before offering ~~any~~ more than 7 units in any one condominium for sale or for lease for a term exceeding 5 years, a bulk assignee or a bulk buyer must file the following documents with the division and provide such documents to a prospective purchaser or tenant:

(a) An updated prospectus or offering circular, or a supplement to the prospectus or offering circular, filed by the original developer prepared in accordance with s. 718.504, which must include the form of contract for sale and for lease in compliance with s. 718.503(2);

(b) ~~The~~ An updated Frequently Asked Questions and Answers sheet;

(c) An executed escrow agreement if required under s. 718.202; and

(d) The financial information required by s. 718.111(13). However, if a financial information report does not exist for the ~~fiscal year~~ time period before acquisition of title by the bulk assignee or bulk buyer, ~~or~~ and accounting records ~~cannot be obtained in good faith by the bulk assignee or the bulk buyer~~, which would permit preparation of the required financial information report for such period, cannot be obtained despite good faith efforts by the bulk assignee or the bulk buyer, the bulk assignee or bulk buyer is excused from the requirement of this paragraph. However, the bulk assignee or bulk buyer must include in the purchase contract the following statement in conspicuous type:

ALL OR A PORTION OF THE FINANCIAL INFORMATION REPORT REQUIRED UNDER S. 718.111(13) FOR THE ~~IMMEDIATELY PRECEDING FISCAL YEAR OF~~

~~THE~~ ASSOCIATION FOR THE TIME PERIOD PRIOR TO THE SELLER'S ACQUISITION OF THE UNIT IS NOT AVAILABLE OR CANNOT BE ~~CREATED~~ OBTAINED DESPITE GOOD FAITH EFFORTS BY THE SELLER ~~DUE TO THE INSUFFICIENT ACCOUNTING RECORDS OF THE ASSOCIATION~~.

(2) Before offering ~~any~~ more than 7 units in any one condominium for sale or for lease for a term exceeding 5 years, a bulk assignee or bulk buyer must file with the division and provide to ~~a~~ any prospective purchaser, or tenant under a lease for a term exceeding 5 years, a disclosure statement that includes, but is not limited to:

(a) A description of any rights of the developer which have been assigned to the bulk assignee or bulk buyer;

(b) The following statement in conspicuous type:

THE SELLER IS NOT OBLIGATED FOR ANY WARRANTIES OF THE DEVELOPER UNDER S. 718.203(1) OR S. 718.618, AS APPLICABLE, EXCEPT FOR ANY DESIGN, CONSTRUCTION, DEVELOPMENT, OR REPAIR WORK PERFORMED BY OR ON BEHALF OF SELLER; and

(c) If the condominium is a conversion subject to part VI, the following statement in conspicuous type:

THE SELLER HAS NO OBLIGATION TO FUND CONVERTER RESERVES OR TO PROVIDE CONVERTER WARRANTIES UNDER S. 718.618 ON ANY PORTION OF THE CONDOMINIUM PROPERTY EXCEPT AS MAY BE EXPRESSLY REQUIRED OF THE SELLER IN THE CONTRACT FOR PURCHASE AND SALE EXECUTED BY THE SELLER AND THE PREVIOUS DEVELOPER AND PERTAINING TO ANY DESIGN,

CONSTRUCTION, DEVELOPMENT, OR REPAIR WORK PERFORMED BY OR ON BEHALF OF THE SELLER.

(4) A bulk assignee or a bulk buyer must comply with all the requirements of s. 718.302 regarding any contracts entered into by the association during the period the bulk assignee or bulk buyer maintains control of the board of administration. Unit owners shall be afforded all of the rights and protections contained in s. 718.302 regarding agreements entered into by the association ~~before unit owners other than~~ under control of the developer, bulk assignee, or bulk buyer ~~elected a majority of the board of administration~~.

(5) Notwithstanding anything to the contrary in this part, neither a bulk buyer nor a bulk assignee need comply with the filing or disclosure obligations of subsections (1) or (2) of this section, to the extent otherwise applicable, where all of the units owned by the bulk assignee or bulk buyer are offered and conveyed to a single purchaser in a single transaction. ~~A bulk buyer must comply with the requirements contained in the declaration regarding any transfer of a unit, including sales, leases, and subleases. A bulk buyer is not entitled to any exemptions afforded a developer or successor developer under this chapter regarding the transfer of a unit, including sales, leases, or subleases.~~

Section 4. Section 718.707, F.S., is amended to read as follows:

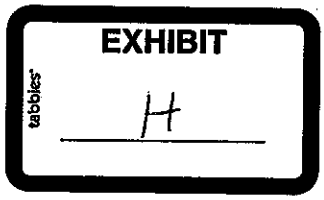
718.707 Time limitation for classification as bulk assignee or bulk buyer. A person acquiring condominium parcels may not be classified as a bulk assignee or bulk buyer under this part unless the condominium parcels were acquired on or after July 1, 2010 and before July 1, 2012. The date of such acquisition shall be determined by the

date of recording of a deed or other instrument of conveyance for such parcels in the public records of the county in which the condominium is located, or by the date of issuance of a certificate of title in a foreclosure proceeding with respect to such condominium parcels.

Section 5. This Act shall take effect upon becoming a law.

Rule ~~5.525~~ 5.026 Motions for Costs and Attorneys' Fees

Florida Rule of Civil Procedure 1.525 shall not apply in proceedings governed by these rules.



RPPTL 2010 - 2011
Executive Council Meeting Schedule
BRIAN FELCOSKI'S YEAR

Date	Location
August 5 – August 8, 2010	**Executive Council Meeting & Legislative Update** The Breakers Palm Beach, Florida Reservation Phone # 561-655-6611 www.thebreakers.com Room Rate: $185.00 Cut-off Date: July 4, 2010
September 23 – September 26, 2010	**Executive Council Meeting** Ritz-Carlton Orlando, Grand Lakes Orlando, Florida Reservation Phone # 1-800-576-5760 http://www.grandelakes.com Room Rate: $219.00 Cut-off Date: August 25, 2010
November 4 – November 7, 2010	**Executive Council Meeting** Sandpearl Resort Clearwater, Florida Reservation Phone #1-877-726-3111 http://www.sandpearl.com Room Rate: $199.00 Cut-off Date: October 1, 2010
February 24 – February 27, 2011	**Executive Council Meeting / Out-of-State Meeting** Four Season Resort Santa Barbara, CA Reservation Phone #805-565-8299 www.fourseasons.com/santabarbara Room Rate: $350.00 Cut-off Date: January 25, 2011
May 26 – May 29, 2011	**Executive Council Meeting / RPPTL Convention** Eden Roc Hotel Miami Beach, Florida Reservation Phone # 1-800-319-5354 http://boldnewedenroc.com/ Room Rate $199.00 Cut-off Date: May 3, 2011

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

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

RPPTL FINANCIAL SUMMARY

2010 – 2011 [*July 1, 2010 – September 30, 2010*[1]]

Revenue:	**$529,167*
Expenses:	*$286,212*
Net:	*$242,955*

** $51,425 of this figure represents revenue from corporate sponsors and exhibitors*

Beginning Fund Balance (7-1-10)	***RPPTL CLE***
$ 1,024,000	*RPPTL YTD Actual CLE Revenue* ***$45,111***
YTD Fund Balance (9-30-10)	*RPPTL Budgeted CLE Revenue* ***$198,100***
$1,266,955	

[1] **This report is based on the tentative unaudited detail statement of operations dated 9/30/2010.**

RPPTL Financial Summary from Separate Budgets

2010 – 2011 [July 1, 2010 – September 30, 2010[1]]
YEAR TO DATE REPORT

General Budget

Revenue:	**$ 486,612**
Expenses:	**$ 207,752**
Net:	**$ 278,860**

Legislative Update

Revenue:	**$ 38,287**
Expenses:	**$ 81,822**
Net:	**($43,535)**

Convention

Revenue:	**$ 93**
Expenses:	**($5,183)**
Net:	**$5,276**

Miscellaneous Section Service Courses

Revenue:	**$ 4,175**
Expenses:	**$ 1,821**
Net:	**$ 2,354**

Roll-up Summary (Total)

Revenue:	**$ 529,167**
Expenses:	**$ 286,212**
Net Operations:	**$ 242,955**

Reserve (Fund Balance):	**$ 1,024,000**
GRAND TOTAL	**$ 1,266,955**

[1] **This report is based on the tentative unaudited detail statement of operations dated 9/30/2010**

	September 2010 Actuals	YTD 10-11 Actuals	Budget	Percent Budget
Total Real Prop Probate &				
31431 Section Dues	10,050	450,150	465,000	96.81
31432 Affiliate Dues	0	1,500	1,750	85.71
31433 Admin Fee to TFB	-3,448	-158,008	-163,450	96.67
Total Dues Income-Net	6,602	293,642	303,300	96.82
32001 Registrations	0	3,888	157,250	2.47
32006 Live Web Cast	250	11,500	8,750	131.43
32010 Legal Span On-line	0	167	750	22.27
32191 CLE Courses	14,499	45,111	198,100	22.77
32205 Compact Disc	7,850	8,840	28,800	30.69
32207 DVD	3,525	3,760	10,000	37.60
32293 Section Differential	1,463	3,388	35,000	9.68
32301 Course Materials	400	1,900	3,500	54.29
34704 Actionline Advertise	1,425	7,275	15,000	48.50
35003 Ticket Events	23	41,287	0	*
35101 Exhibit Fees	0	12,500	37,600	33.24
35201 Sponsorships	0	38,925	277,750	14.01
35603 Bd/Council Mtg Regis	0	-150	120,000	-0.13
38499 Investment Allocatio	57,134	57,134	44,785	127.57
Other Income	86,569	235,525	937,285	25.13
Total Revenues	93,171	529,167	1,240,585	42.65
36998 Credit Card Fees	97	1,695	5,924	28.61
51101 Employee Travel	752	2,130	10,241	20.80
61201 Equipment Rental	125	9,325	20,000	46.63
71001 Telephone/Direct	0	100	1,200	8.33
71005 Internet Charges	0	69	1,100	6.27
75102 1st Class & Misc Mai	3	14	300	4.67
75401 Express Mail	410	629	1,500	41.93
81411 Promotional Printing	0	0	2,000	0.00
81412 Promotional Mailing	0	620	14,000	4.43
84001 Postage	1,198	1,259	5,700	22.09
84002 Printing	186	328	3,950	8.30
84006 Newsletter	0	0	40,000	0.00
84009 Supplies	0	14	500	2.80
84010 Photocopying	90	147	500	29.40
84012 Registration Support	5,079	5,079	3,000	169.30
84015 Officers Conference	0	175	1,200	14.58
84016 Scrivener	0	0	5,000	0.00
84051 Officers Travel Expe	0	0	3,000	0.00
84054 CLE Speaker Expense	30	30	4,500	0.67
84061 Reception	0	494	67,500	0.73
84062 Luncheons	0	23,333	60,000	38.89
84064 Golf Tourn Expenses	0	0	11,000	0.00
84101 Committee Expenses	1,339	22,659	65,000	34.86

	September 2010 Actuals	YTD 10-11 Actuals	Budget	Percent Budget
Total Real Prop Probate &				
84106 Realtor Relations	3,000	3,000	5,000	60.00
84107 Diversity Initiative	475	475	15,000	3.17
84110 Exhibitor Fees	0	0	250	0.00
84115 Entertainment	0	0	20,000	0.00
84201 Board Or Council Mee	23,805	143,260	400,000	35.82
84216 Strategic Planning M	0	0	10,000	0.00
84238 Council Mtg Recreati	1,583	7,754	35,000	22.15
84239 Hospitality Suite	0	1,531	15,000	10.21
84253 Sleeping Rooms	0	0	2,500	0.00
84254 Speaker Gifts	1,591	1,591	2,000	79.55
84258 Web Services	5,025	5,025	6,000	83.75
84279 Council Members Hand	0	0	3,500	0.00
84310 Law School Liaison	0	0	7,500	0.00
84322 Fellowships-Exc Cou	1,967	2,727	10,000	27.27
84422 Website	16	16,135	75,000	21.51
84501 Legislative Consulta	0	0	100,000	0.00
84503 Legislative Travel	0	0	20,000	0.00
84524 Memorial Tributes	0	0	500	0.00
84701 Council Of Sections	0	0	300	0.00
84998 Operating Reserve	0	0	85,092	0.00
84999 Miscellaneous	0	0	500	0.00
85064 Service Recognition	0	760	5,000	15.20
86432 Time Taping Editing	0	5,995	4,500	133.22
88211 Steering Committee	0	0	1,500	0.00
88230 Speakers Expense	993	1,319	7,000	18.84
88233 Speakers Hotel	218	4,062	3,700	109.78
88239 Speakers Other Exp	0	24	0	*
88241 Outline Prt-Inhouse	0	0	7,000	0.00
88242 Outline Prt-Contract	2,095	11,403	13,000	87.72
88252 Course Credit Fee	0	0	150	0.00
88262 Meeting Meals	-5,308	-5,308	84,000	-6.32
88265 Refreshment Breaks	0	4,309	13,000	33.15
88269 Breakfast	0	7,328	38,000	19.28
88281 A/V Ctr Dup/Prod	0	0	1,600	0.00
Total Operating Expenses	44,769	279,490	1,318,707	21.19
86431 Meetings Administrat	240	620	4,500	13.78
86532 Advertising News	0	1,614	2,958	54.56
86543 Graphics & Art	499	4,477	12,698	35.26
86623 Registrars	0	11	2,500	0.44
Total TFB Support Services	739	6,722	22,656	29.67
Total Expenses	45,508	286,212	1,341,363	21.34

Preliminary Unaudited Stmt of Operations

Total Real Prop Probate &	September 2010 Actuals	YTD 10-11 Actuals	Budget	Percent Budget
Net Operations	47,663	242,955	-100,778	-241.08
21001 Fund Balance	0	1,024,000	895,690	114.33
Total Current Fund Balance	47,663	1,266,955	794,912	159.38

Preliminary Unaudited Stmt of Operations

	September 2010 Actuals	YTD 10-11 Actuals	Budget	Percent Budget
Real Prop Probate & Trust				
31431 Section Dues	10,050	450,150	465,000	96.81
31432 Affiliate Dues	0	1,500	1,750	85.71
31433 Admin Fee to TFB	-3,448	-158,008	-163,450	96.67
Total Dues Income-Net	6,602	293,642	303,300	96.82
32191 CLE Courses	14,499	45,111	198,100	22.77
32293 Section Differential	1,463	3,388	35,000	9.68
34704 Actionline Advertise	1,425	7,275	15,000	48.50
35003 Ticket Events	23	41,287	0	*
35201 Sponsorships	0	38,925	187,000	20.82
35603 Bd/Council Mtg Regis	0	-150	120,000	-0.13
38499 Investment Allocatio	57,134	57,134	44,785	127.57
Other Income	74,544	192,970	599,885	32.17
Total Revenues	81,146	486,612	903,185	53.88
36998 Credit Card Fees	143	1,302	3,700	35.19
51101 Employee Travel	752	1,137	4,724	24.07
71001 Telephone/Direct	0	100	1,200	8.33
71005 Internet Charges	0	69	1,100	6.27
84001 Postage	1,149	1,210	3,000	40.33
84002 Printing	186	328	1,500	21.87
84006 Newsletter	0	0	40,000	0.00
84009 Supplies	0	14	300	4.67
84010 Photocopying	90	147	500	29.40
84015 Officers Conference	0	175	1,200	14.58
84016 Scrivener	0	0	5,000	0.00
84051 Officers Travel Expe	0	0	3,000	0.00
84054 CLE Speaker Expense	30	30	4,500	0.67
84101 Committee Expenses	1,339	22,659	65,000	34.86
84106 Realtor Relations	3,000	3,000	5,000	60.00
84107 Diversity Initiative	475	475	15,000	3.17
84201 Board Or Council Mee	23,805	143,260	400,000	35.82
84216 Strategic Planning M	0	0	10,000	0.00
84238 Council Mtg Recreati	1,583	7,754	35,000	22.15
84239 Hospitality Suite	0	1,531	15,000	10.21
84279 Council Members Hand	0	0	3,500	0.00
84310 Law School Liaison	0	0	7,500	0.00
84322 Fellowships-Exc Cou	1,967	2,727	10,000	27.27
84422 Website	16	16,135	75,000	21.51
84501 Legislative Consulta	0	0	100,000	0.00
84503 Legislative Travel	0	0	20,000	0.00
84524 Memorial Tributes	0	0	500	0.00
84701 Council Of Sections	0	0	300	0.00
84998 Operating Reserve	0	0	85,092	0.00
84999 Miscellaneous	0	0	500	0.00

	September 2010 Actuals	YTD 10-11 Actuals	Budget	Percent Budget
Real Prop Probate & Trust				
85064 Service Recognition	0	760	5,000	15.20
Total Operating Expenses	34,535	202,813	922,116	21.99
86431 Meetings Administrat	240	620	4,500	13.78
86543 Graphics & Art	487	4,319	9,400	45.95
Total TFB Support Services	727	4,939	13,900	35.53
Total Expenses	35,262	207,752	936,016	22.20
Net Operations	45,884	278,860	-32,831	-849.38
21001 Fund Balance	0	1,024,000	895,690	114.33
Total Current Fund Balance	45,884	1,302,860	862,859	150.99

Preliminary Unaudited Stmt of Operations

	September 2010 Actuals	YTD 10-11 Actuals	Budget	Percent Budget
Total Legislative Update				
Total Dues Income-Net	0	0	0	*
32006 Live Web Cast	250	11,500	8,750	131.43
32010 Legal Span On-line	0	167	750	22.27
32205 Compact Disc	7,755	8,460	28,800	29.38
32207 DVD	3,525	3,760	10,000	37.60
32301 Course Materials	400	1,900	3,000	63.33
35101 Exhibit Fees	0	12,500	15,000	83.33
Other Income	11,930	38,287	66,300	57.75
Total Revenues	11,930	38,287	66,300	57.75
36998 Credit Card Fees	-45	391	184	212.50
51101 Employee Travel	0	993	1,467	67.69
61201 Equipment Rental	0	9,200	10,000	92.00
75102 1st Class & Misc Mai	3	14	300	4.67
75401 Express Mail	406	598	1,500	39.87
81411 Promotional Printing	0	0	1,000	0.00
81412 Promotional Mailing	0	620	3,500	17.71
84001 Postage	49	49	1,500	3.27
84002 Printing	0	0	700	0.00
84012 Registration Support	5,079	5,079	3,000	169.30
84061 Reception	0	494	2,500	19.76
84062 Luncheons	0	23,333	30,000	77.78
84254 Speaker Gifts	1,591	1,591	2,000	79.55
84258 Web Services	5,025	5,025	6,000	83.75
86432 Time Taping Editing	0	4,230	4,500	94.00
88230 Speakers Expense	993	1,319	4,000	32.98
88233 Speakers Hotel	218	4,062	3,700	109.78
88239 Speakers Other Exp	0	24	0	*
88241 Outline Prt-Inhouse	0	0	3,000	0.00
88242 Outline Prt-Contract	2,095	11,403	13,000	87.72
88265 Refreshment Breaks	0	4,309	5,500	78.35
88269 Breakfast	0	7,328	10,000	73.28
88281 A/V Ctr Dup/Prod	0	0	1,600	0.00
Total Operating Expenses	15,414	80,062	108,951	73.48
86532 Advertising News	0	1,614	800	201.75
86543 Graphics & Art	0	146	1,285	11.36
86623 Registrars	0	0	2,500	0.00
Total TFB Support Services	0	1,760	4,585	38.39

Preliminary Unaudited Stmt of Operations

	September 2010 Actuals	YTD 10-11 Actuals	Budget	Percent Budget
Total Legislative Update				
Total Expenses	15,414	81,822	113,536	72.07
Net Operations	-3,484	-43,535	-47,236	92.16
Total Current Fund Balance	-3,484	-43,535	-47,236	92.16

Preliminary Unaudited Stmt of Operations

RPPTL Convention	September 2010 Actuals	YTD 10-11 Actuals	Budget	Percent Budget
Total Dues Income-Net	0	0	0	*
32001 Registrations	0	93	50,000	0.19
35101 Exhibit Fees	0	0	13,000	0.00
35201 Sponsorships	0	0	25,000	0.00
Other Income	0	93	88,000	0.11
Total Revenues	0	93	88,000	0.11
36998 Credit Card Fees	0	0	1,020	0.00
51101 Employee Travel	0	0	1,352	0.00
61201 Equipment Rental	125	125	0	*
81411 Promotional Printing	0	0	500	0.00
81412 Promotional Mailing	0	0	5,000	0.00
84001 Postage	0	0	1,000	0.00
84002 Printing	0	0	250	0.00
84110 Exhibitor Fees	0	0	250	0.00
84115 Entertainment	0	0	20,000	0.00
84253 Sleeping Rooms	0	0	2,500	0.00
88262 Meeting Meals	-5,308	-5,308	84,000	-6.32
Total Operating Expenses	-5,183	-5,183	115,872	-4.47
86543 Graphics & Art	0	0	898	0.00
Total TFB Support Services	0	0	898	0.00
Total Expenses	-5,183	-5,183	116,770	-4.44
Net Operations	5,183	5,276	-28,770	-18.34
Total Current Fund Balance	5,183	5,276	-28,770	-18.34

Preliminary Unaudited Stmt of Operations

Total RP Miscellaneous Cou	September 2010 Actuals	YTD 10-11 Actuals	Budget	Percent Budget
Total Dues Income-Net	0	0	0	*
32001 Registrations	0	3,795	0	*
32205 Compact Disc	95	380	0	*
Other Income	95	4,175	0	*
Total Revenues	95	4,175	0	*
36998 Credit Card Fees	-1	2	0	*
75401 Express Mail	4	31	0	*
86432 Time Taping Editing	0	1,765	0	*
Total Operating Expenses	3	1,798	0	*
86543 Graphics & Art	12	12	0	*
86623 Registrars	0	11	0	*
Total TFB Support Services	12	23	0	*
Total Expenses	15	1,821	0	*
Net Operations	80	2,354	0	*
Total Current Fund Balance	80	2,354	0	*

PROFESSIONAL ETHICS OF THE FLORIDA BAR

PROPOSED ADVISORY OPINION 10-3
September 24, 2010

The Professional Ethics Committee has been requested by the Florida Bar Board of Governors to render an advisory opinion on the issue of the ethical obligations of a lawyer when the personal representative, beneficiaries or heirs-at-law of a decedent's estate, or their counsel request confidential information regarding a decedent. The analysis of the issue is the same for each person who may request such information, although the answer for each will depend on the individual facts and circumstances of the particular situation and may differ, depending on who is requesting the information and why.

Although a lawyer's ethical obligation of confidentiality and the evidentiary matter of attorney-client privilege are related, the two issues are distinct. Confidentiality is much broader than privilege. According to Rule 4-1.6, Rules of Professional Conduct, all information relating to a client's representation is confidential and may not be voluntarily disclosed by the lawyer without either the client's consent or the application of a relevant exception to the confidentiality rule. The comment to Rule 4-1.6 provides further guidance, in stating: "[t]he confidentiality rule applies not merely to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source." On the other hand, privilege is much narrower as an evidentiary matter set forth in Florida Statutes § 90.502, which provides generally that a lawyer cannot be compelled to disclose communications between a lawyer and client that were made for the purpose of seeking and/or receiving legal advice over the client's objection. Questions of confidentiality arise any time a lawyer is asked to disclose information relating to a client's representation. The question of privilege only arises when a lawyer is compelled by a court, i.e. via subpoena, to disclose confidential communications made for the purpose of obtaining legal advice. Regarding privilege, the comment to Rule 4-1.6 provides as follows:

> If a lawyer is called as a witness to give testimony concerning a client, absent waiver by the client, rule 4-1.6(a) requires the lawyer to invoke the privilege when it is applicable. The lawyer must comply with the final orders of a court or other tribunal of competent jurisdiction requiring the lawyer to give information about the client.

Rule 4-1.6 provides as follows:

> **(a) Consent Required to Reveal Information.** A lawyer shall not reveal information relating to representation of a client except as stated in subdivisions (b), (c), and (d), unless the client gives informed consent.
>
> **(b) When Lawyer Must Reveal Information.** A lawyer shall reveal such information to the extent the lawyer reasonably believes necessary:
>
> (1) to prevent a client from committing a crime; or
>
> (2) to prevent a death or substantial bodily harm to another.

(c) When Lawyer May Reveal Information. A lawyer may reveal such information to the extent the lawyer reasonably believes necessary:

(1) to serve the client's interest unless it is information the client specifically requires not to be disclosed;

(2) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and client;

(3) to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved;

(4) to respond to allegations in any proceeding concerning the lawyer's representation of the client; or

(5) to comply with the Rules of Professional Conduct.

(d) Exhaustion of Appellate Remedies. When required by a tribunal to reveal such information, a lawyer may first exhaust all appellate remedies.

(e) Limitation on Amount of Disclosure. When disclosure is mandated or permitted, the lawyer shall disclose no more information than is required to meet the requirements or accomplish the purposes of this rule.

The comment to the rule states that "[t]he duty of confidentiality continues after the client-lawyer relationship has terminated."

A request for information from a personal representative, beneficiaries or heirs-at-law of a decedent's estate, or their counsel will generally involve information "relating to the representation of a client," and a lawyer ordinarily should not voluntarily disclose such information without the client's informed consent. *See* Florida Ethics Opinion 92-5. There are exceptions to the confidentiality rule that either require or permit a lawyer to disclose confidential information. The Committee cannot envision every instance in which a personal representative, beneficiaries or heirs-at-law of a decedent's estate, or their counsel may request information from a decedent's lawyer, but will provide several examples in an effort to illustrate the appropriate analysis.

The exception to the confidentiality rule that is most likely to apply in such requests is set forth in subdivision (c)(1): "to serve the client's interest unless it is information the client specifically requires not to be disclosed." Thus, if a personal representative asks for confidential information relating to a decedent's estate plan and the decedent's lawyer determines that disclosure of the information would aid in the proper distribution of the decedent's estate according to the decedent's wishes, the lawyer may properly disclose the information to the personal representative, unless the decedent specifically required that the information be kept confidential. For example, in Florida Ethics Opinion 72-40, a client instructed the inquiring lawyer who was hired to assist the client with estate planning to "forget" that the client had a "large amount of bearer bonds, registered jointly with his wife." The opinion concludes that the lawyer may not disclose the existence of these assets to the bank which was to be the sole

executor of the client's estate unless the client gave consent to the disclosure or unless ordered to do so by a court, whether the inquiry was made before or after the client's death. The opinion states that "the duty to preserve a client's confidences survives his death. . . ." Thus, a lawyer must undertake the appropriate analysis under the confidentiality rule, even if it is the personal representative who requests information of the decedent from a lawyer who assisted in the decedent's estate planning and the information sought relates specifically to that estate plan.

Similarly, if a beneficiary or heir-at-law asks for specific information and the decedent's lawyer determines that voluntary disclosure of the information would serve the decedent's interests, the lawyer may disclose that specific information. For example, a lawyer might provide a copy of the decedent's will or disclose information relating to the execution of a will to a beneficiary or heir-at-law if the lawyer reasonably believes that disclosure of the information would forestall litigation by the beneficiary or heir-at-law, thereby conserving assets of the estate in the exercise of the lawyer's professional discretion. However, information that the decedent specifically required the lawyer not to disclose to others may not be disclosed by the lawyer to the beneficiary or heir-at-law, regardless of whether the information is privileged. For example, a deceased client may have specifically instructed the lawyer not to disclose information to anyone about an illegitimate child or an extra-marital relationship.

Under Florida Statutes §90.502(3)(c), the *personal representative* may claim the privilege on behalf of the decedent. It would be difficult for the personal representative to claim or waive privilege on behalf of the decedent without knowing the content of the information which is subject to the privilege. Therefore, a lawyer who represented the decedent in estate planning matters may disclose information from the file to the personal representative, unless the decedent specifically required that the information not be disclosed. Disclosure of such information is impliedly authorized, to the extent the decedent did not specifically require that its confidentiality be maintained, to carry out the decedent's wishes involving the estate.

On the other hand, a lawyer who represented the decedent on matters other than estate planning would have no such implied authorization to disclose information to the personal representative. For example, a lawyer who represented a client in a criminal defense matter would not have implied authorization to disclose information to the personal representative, but instead should decline to voluntarily provide information to the personal representative or other third parties unless a different exception to the confidentiality rule clearly applies.

Similarly, beneficiaries or heirs-at-law may attempt to compel the decedent's lawyer to provide information that the lawyer has determined within the lawyer's professional discretion not to provide voluntarily, because it either would not serve the decedent's interests or the decedent previously indicated must not be disclosed. When under compulsion of a subpoena, the lawyer acts ethically by complying with the subpoena as to any information sought that is not privileged. However, the lawyer should raise the appropriate privilege on behalf of the decedent regarding any information for which there is a good faith basis to raise privilege and request that the court make a determination as to disclosure of the information. This may be particularly true of privileged information that may be embarrassing to the decedent. As above, the lawyer should not make any disclosure of information for which the lawyer has raised privilege in good faith until the court orders disclosure of the information. If the court finds that the information is not privileged or that an exception to privilege applies, the lawyer may either comply with the order by disclosing the information or "first exhaust all appellate remedies." See Rule 4-1.6(d) and Florida Ethics Opinions 65-7, 70-40, and 71-29.

Doubts about whether information should be voluntarily disclosed should be resolved in favor of nondisclosure.

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REAL PROPERTY, PROBATE & TRUST LAW SECTION

THE FLORIDA BAR

www.RPPTL.org

October 19, 2010

Stephen W. Teppler, Esq.
5715 Firestone Court
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Re: Proposed Advisory Opinion 10-3

The Real Property, Probate & Trust Law Section would like to express our sincere appreciation to the Professional Ethics Committee and The Florida Bar staff on their hard work in connection with proposed advisory opinion 10-3. The Section appreciates the Committee's openness to the Section's participation in the discussions, as well as the Committee's and Elizabeth's efforts to "get it right."

We believe the opinion is a good one, and it has the Section's full support.

Very truly yours,

Brian J. Felcoski

cc: Mayanne Downs, Esq.
Scott Hawkins, Esq.
Daniel L. DeCubellis, Esq.
Elizabeth Clark Tarbert, Esq.

A bill to be entitled

An act relating to the exemption of inherited individual retirement accounts from legal processes and amending s. 222.21(2)(c), F.S. , to provide that an inherited individual retirement account is exempt from legal processes under Section 222.21 of the Florida Statues and providing an effective date.

WHEREAS, in *Robertson v. Deeb*, 16 So. 3d 936(2009) both the trial court and the second DCA, contrary to the intent of the statute, held that an inherited individual retirement account was not exempt from the beneficiaries' creditors because such an account was not included in property described in Section 222.21 of the Florida Statutes.

WHEREAS, in *In re Ann S. Ard*, 2010 WL 3400368 the Bankruptcy Court of the Middle District followed Robertson and determined that an inherited individual retirement account was not exempt under the Section 222.21 of the Florida Statutes.

WHEREAS, it is clear from the reading of Section 222.21(c) that inherited individual retirement accounts are included in Section 402(c) of the Internal Revenue Code of 1986, as amended, and thus are already included in the statute as exempt from claims of creditors of the owner, beneficiary, or participant of the inherited individual retirement account.

WHEREAS, many citizens of Florida have individual retirement accounts and many may inherit individual retirement accounts and it is imperative that the citizens of Florida know that these accounts were always intended to be exempt under the Florida Statutes.

WHEREAS, this legislation is to clarify that inherited individual retirement accounts, as defined in Section 408(c)(3) of the Internal Revenue Code was always intended to be included as a fund or account exempt from claims of creditors of the owner, beneficiary, or participant as provided in Section 222. 21 of the Florida Statutes.

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

Section 1. Subsection (2)(c) of section 222.21, Florida Statutes, is amended to read:

222.21. Exemption of pension money and certain tax-exempt funds or accounts from legal processes

(c) Any money or other assets and any interest in any fund of account that is or are exempt from claims of creditors of the owner, beneficiary, or participant~~claims of the owner's, participant's or beneficiary's creditors~~ under paragraph (a) do not cease to be exempt~~qualify for exemption~~ after the owner's death by reason of a direct transfer or eligible rollover that is excluded from gross income under s. 402(c) of the Internal Revenue Code of 1986, as amended. This section~~, which~~ specifically includes~~or by reason of~~ a direct transfer or eligible rollover to an inherited individual retirement account as defined in Section 408(d)(3) of the Internal Revenue Code of 1986, as amended.~~.~~

Section 2. This act shall take effect upon enactment.

LEGISLATIVE POSITION REQUEST FORM

GOVERNMENTAL AFFAIRS OFFICE

Date Form Received _____

GENERAL INFORMATION

Submitted By Linda S. Griffin and L. Howard Payne, Co-Chairs, IRA, Employee Benefits and Insurance Committee of the Real Property Probate & Trust Law Section (RPPTL Approval Date_____, 2010)

Address 1455 Court Street, Clearwater, Florida 33756 and 240 South Pineapple Avenue, Suite 401, Sarasota, Florida 34236

Telephone: (727)449.9800 or (941)487.2800

Position Type IRA, Employee Benefits and Insurance Committee, RPPTL Section, The Florida Bar
(Florida Bar, section, division, committee or both)

CONTACTS

Board & Legislation Committee Appearance

[Main Contact Person], Linda S. Griffin, Linda Suzzanne Griffin, P.A. 1455 Court Street, Clearwater, Fl. 33756 or L. Howard Payne, Payne Law Group, 240 South Pineapple Avenue, Suite 401, Sarasota, Florida 34236 Telephone (727) 449.9800 or (941)487.2800.
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(List name, address and phone number)

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

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

PROPOSED ADVOCACY

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

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

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

Proposed Wording of Position for Official Publication:
Support amendment of Section 222.21 of the Florida Statutes to clearly specify the original intent of the statute that an inherited individual retirement account as defined in Section 408(c)(3) of the Internal Revenue Code is a fund or account exempt from claims of creditors of the owner, beneficiary, or participant.

Reasons For Proposed Advocacy:
In Robertson v. Deeb", 16 So. 3d 936 (2009) both the trial court and the second DCA misread the

statute and held that an inherited individual retirement account was not exempt from beneficiaries' creditors because such an account is not included in property described in Florida Statute 222.21 which addresses the exemption of pension money and certain tax-exempt funds or accounts from legal process. This legislation is to clarify that the inherited individual retirement account, as defined in Section 408(c)(3) of the Internal Revenue Code, was always intended to be included as a fund or account exempt from claims of creditors of the owner, beneficiary, or participant as provided in Florida Statute Section 222.21.

PRIOR POSITIONS TAKEN ON THIS ISSUE

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

Most Recent Position NONE

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

Others
(May attach list if more than one) NONE

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

REFERRALS TO OTHER SECTIONS, COMMITTEES OR LEGAL ORGANIZATIONS

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

Referrals

(Name of Group or Organization)	(Support, Oppose or No Position)
TAX SECTION	SUPPORT
FLORIDA BANKERS	
BUSINESS LAW	

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

WHITE PAPER

PROPOSED REVISIONS TO §222.21(2)(c), FLA. STAT.

I. SUMMARY

The proposed amendment to Section 222.21(2)(c) of the Florida Statutes is to clarify that the interest of a beneficiary in an inherited individual retirement account (IRA) is exempt from the claims of the beneficiary's creditors. Although the existing statutory provisions and purpose are clear, at least two Florida courts have misconstrued the statute and ignored the intent of the Florida legislature when it originally enacted the statute in 1987.

II. CURRENT SITUATION

A. The Statute Was Intended to Make Exempt the Interest of a Beneficiary of an Inherited IRA

Section 222.21 of the Florida Statutes was enacted in 1987[1], with subsequent amendments that do not affect the legislative proposal. The applicable portions of the statute currently provide as follows:

> "(2)(a) Except as provided in paragraph (d), any money or other assets payable to an owner, a participant, or a beneficiary from, or any interest of any owner, participant, or beneficiary in, a fund or account is exempt from all claims of creditors of the owner, beneficiary, or participant if the fund or account is:" (emphasis added) . . . [Provisions in the statute, providing that the creditor protection inures to the benefit of the persons described above as long as the fund or account is tax-qualified, are omitted .]
>
> (c) Any money or other assets that are exempt from claims of creditors under paragraph (a) do not cease to qualify for exemption by reason of a direct transfer or eligible rollover that is excluded from gross income under s. 402(c) of the Internal Revenue Code of 1986.

The statute was intended to ensure that the creditor protection features of a qualified plan created under the Internal Revenue Code (hereafter the "Code") which includes a spendthrift clause to implement the anti-alienation rules of Section 401(a)(13) of the Code also applied to single owner/participant plans.[2] There was a concern that Bankruptcy Courts were permitting creditors to attach single owner/participant plans on the theory that the plan which was required to

have a spendthrift provision was a self-settled trust which, then and now, does not defeat claims of the settlor's creditors. The statute was enacted to make clear that *all* plans would be exempt, even if there were a single owner/participant.

One of the original drafters, who testified before the Florida House and Senate, stated that the intent of the word "beneficiary" under the statute was to mean *any* beneficiary, including not only the person who, as the owner of the IRA, could be thought (albeit incorrectly) to be its beneficiary, but also a beneficiary of an inherited IRA after the owner's death. A *Florida Bar Journal* article co-authored by the same drafter soon after the statute was enacted notes that the legislation was intended to "protect from creditors interests in *all* types of tax qualified retirement plans (including… individual retirement accounts)"[3] emphasis added. The legislation used the word "beneficiary" with no qualifiers. The drafters and the legislature could certainly have denied or limited protection afforded to beneficiaries. Neither did so.

In 2005, Florida Statutes §222.21 was amended to respond to certain changes in the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA"). One of the consistent themes of change was from the term "ERISA qualified" to "tax qualified". BAPCPA made it clear that the intent, from the standpoint of the federal government, was to exempt these types of accounts and assets so long as they maintain "tax qualified" status. An inherited IRA that is administered properly by a qualified custodian would meet the requirement of "tax qualified". Subparagraph (c) was added to the statute, stating in part that "[a]ny money or other assets that are exempt from claims of creditors under paragraph (a) do not cease to qualify for exemption by reason of a direct transfer or eligible rollover that is excluded from gross income …." This language was added to clarify those tax-qualified funds could be rolled over or transferred between accounts without losing the protection intended to be afforded by the statute. No change was made to the language regarding beneficiaries, owners or participants. In fact, the Florida Session Law analysis states that the change "is made because technically the owner of an IRA is neither a beneficiary nor a participant in the account."[4] It is clear that the term "beneficiary" as used in the statute means something different from the terms "owner" and "participant."

B. Courts Have Misapplied the Statue

(1) *Robertson v. Deeb*

In *Robertson v. Deeb,* 16 So. 2d 936 (Fla. 2d D.C.A. 2009), the Second District Court of Appeals concluded that the interest of a beneficiary or owner of an inherited IRA was not an exempt asset protected from creditors under the terms of Florida Statues Section 222.21.

In *Robertson*, the custodian of an IRA whose owner was deceased informed the owner's son, as the named beneficiary, that there were two options with respect to the distribution of his father's IRA. The first option would be to transfer his father's IRA into an "inherited IRA", which would require that he take required minimum distributions[5] based on his remaining life expectancy, with the ability to withdraw more than the minimum distributions without a penalty. The second option would be to keep the IRA in his father's titled account and take distributions over 5 years without penalty.[6] The beneficiary chose the first option. The funds were properly transferred from his father's IRA into an inherited IRA by way of an account to account transfer, and properly titled "Richard Robertson, Beneficiary, Harold Robertson, Decedent RBC Capital Markets, Custodial IRA".

The issue before the court was whether Richard Robertson's interest in the inherited IRA, was exempt from garnishment by his creditors. The lower court held that it was not exempt because the "account became Robertson's property and no longer qualified for the same exemptions from taxation."[7] Further, the lower court determined that Robertson's inherited IRA was "not like an IRA in terms of taxing and penalty tax for early withdrawal and things of that nature.

On appeal, Richard argued that under Florida Statutes Section 222.21(2)(a) he was a "beneficiary" of a "fund or account" and, therefore, that his beneficial interest in the inherited IRA was exempt from creditors claims. The appellate court disagreed, concluding that because the IRA was an inherited IRA it was not exempt.

The appellate court determined that the statute did not "exempt the money or assets at issue"[8] unless such amounts were maintained in the *original* "fund or account". The court determined that the inherited IRA was a *different* fund or account which was "created when the original fund or account passes to a beneficiary upon the death of the participant."[9] The court also reasoned that the availability of the creditor exemption for the IRA was a function of the fund's tax-exempt status[10] Once the IRA was transferred to an inherited IRA upon the death of the original owner, the tax-exempt status of the original account changed and the exemption vanished.

The strand of the court's analysis that draws a distinction between the original and subsequent funds or accounts is not a correct interpretation of the statute. Section 222.21(2)(a) of the Florida Statute by its terms makes the interest of *any* beneficiary – without qualification – exempt. If, as the *Robertson* court reasoned, an IRA is not exempt because it "passes to a beneficiary upon the death of the participant," the word "beneficiary" in Section 222.21(2)(a) of the Florida Statutes becomes all but superfluous. The legislature meant to protect the interests of *all* beneficiaries in inherited IRAs; courts in this state do not have the power to arbitrarily ignore or conceptually delete statutory provisions.

The court's distinction between the tax status of the original and the inherited IRA is similarly misguided (and largely incorrect). The court noted that while inherited IRAs are exempt from taxes until distributions are made to the beneficiary, beneficiaries of inherited IRAs are required to take distributions. What the court did *not* note is that, generally, the original owner is also required to take minimum annual distributions upon reaching age 70 ½, that beneficiaries of inherited IRAs are also required to take minimum annual withdrawals from an inherited IRA, and that both "owner IRAs" and inherited, beneficiary-type IRAs are exempt from federal income taxes under the same federal statutory provisions. If the *Robertson* court's "tax classification" analysis is correct, then no beneficiary can ever have a protected interest in an inherited IRA, making the use of the term "beneficiary" in Florida Statutes Section 222.21(2)(a) a nullity.

(2) *In Re Ard*

In *In re Ard*, __B.R. __, 2010 WL3400368 (Brkrtcy. M.D.Fla) (August 18, 2010), the Bankruptcy Court for the Middle District of Florida concluded that the Chapter 7 debtor's interest in her father's inherited IRA was not exempt from creditors claims. The Bankruptcy Court noted a handful of decisions in courts applying the laws of other states, and conceded that "the outcome of each of these cases turned on the particular language of each states laws applicable to the exemption of IRAs." *Id.* Nevertheless, the *Ard* court ignored the language in the Florida statute before it and followed the reasoning of *Robertson,* concluding that the funds in the original IRA did not retain the same tax-exempt status after being transferred to the debtor's inherited IRA.

III. ANALYSIS

The legislative proposal would modify Florida Statutes Section 222.21(2)(c) by adding a provision stating an IRA that is exempt in the hands of the owner under Section 222.21(2)(a) continues to be exempt if the original IRA is transferred to an inherited IRA. Because the term "inherited IRA" is sometimes used imprecisely, the statutory provision defines the term with reference to the definition of "inherited IRA" in the Internal Revenue Code.

The legislative proposal is intended to override the incorrect results reached by the courts in *Robertson* and *Ard,* and to ensure that the intent of the legislature to exempt the interests of a beneficiary in an inherited IRA from the beneficiary's creditors is given effect.

IV. FISCAL IMPACT ON STATE AND LOCAL GOVERNMENTS

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

V. DIRECT IMPACT ON PRIVATE SECTOR

The proposal will not have a direct economic impact on the private sector.

VI. CONSTITUTIONAL ISSUES

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

VII. OTHER INTERESTED PARTIES

Other interested parties include The Florida Bankers Association, and the Tax and Business Law Sections of The Florida Bar.

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[1] Fla. Laws Ch. 87-375, § 1
[2] *See* E. Jackson Boggs and Steven K Barber, *New Florida Statute Protects Retirement Plan Assets for Claims of Creditors*, 61 FLA. B.J. 51 (Nov.1987).
[3] *Id*. at 52
[4] Fla. Staff Analysis S.B. 660 (3/22/05)
[5] *Id.*
[6] *Robertson*, 16 So. 3d at 937
[7] *Id*. at 938
[8] *Id.*
[9] *Id.*
[10] *Id*. at 939

A bill to be entitled

An act relating to trust and probate proceedings; amending s. 732.5165 to clarify that a revocation of a will is subject to challenge on the grounds of fraud, duress, mistake or undue influence; amending s. 732.518 to specify that a challenge to the revocation of a will may not be commenced before the testator's death; amending s. 736.0207 to specify when a challenge to the revocation of a revocable trust may be brought; amending s. 736.0406 to clarify that the creation of a trust amendment or trust restatement is subject to challenge and to clarify that the revocation of a trust is subject to challenge on the grounds of fraud, duress, mistake or undue influence; and providing for an effective date.

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

Section 1. To amend Section 732.5165 to read as follows:

732.5165 A will is void if the execution is procured by fraud, duress, mistake, or undue influence. Any part of the will is void if so procured, but the remainder of the will not so procured shall be valid if it is not invalid for other reasons. If the revocation of a will, or any part thereof, is procured by fraud, duress, mistake, or undue influence, such revocation is void.

Section 2. To amend Section 732.518 to read as follows:

732.518 An action to contest the validity of all or part of a will or the revocation of all or part of a will may not be commenced before the death of the testator.

Section 3. To amend Section 736.0207 to read as follows:

736.0207 An action to contest the validity of all or part of a revocable trust, or the revocation of part of a revocable trust, may not be commenced until the trust becomes irrevocable by its terms or by the settlor's death. If all of a revocable trust has been revoked, an action to contest the revocation may not be commenced until after the settlor's death. ~~, except t~~This section does not prohibit such actions by the guardian of the property of an incapacitated settlor.

Section 4. To amend Section 736.0406 to read as follows:

736.0406 ~~A trust is void i~~If the creation, amendment, or restatement ~~of the~~ of a ~~trust~~, or any part thereof, is procured by fraud, duress, mistake, or undue influence~~.~~ the trust, or ~~A~~any part so procured ~~of the trust~~ is void. ~~if procured by such means, but t~~The remainder of the trust not procured by such means is valid if the remainder is not invalid for other reasons. If the revocation of a trust, or any part thereof, is procured by fraud, duress, mistake, or undue influence, such revocation is void.

Section 5. This act shall take effect upon becoming law and shall apply to all proceedings pending before such date and all cases commenced on or after the effective date.

LEGISLATIVE POSITION REQUEST FORM

GOVERNMENTAL AFFAIRS OFFICE

Date Form Received _____

GENERAL INFORMATION

Submitted By William T. Hennessey, Chair, Probate & Trust Litigation Committee of the Real Property Probate & Trust Law Section

Address Gunster, Yoakley & Stewart, P.A., 777 South Flagler Drive, Suite 500 East, West Palm Beach, FL 33401-6194
Telephone: (561) 650-0663

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

CONTACTS

Board & Legislation Committee Appearance

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Peter M. Dunbar, Pennington, Moore, Wilkinson, Bell & Dunbar, P.O. Box 10095, Tallahassee, Florida 32302-2095, Telephone (850) 222-3533
Martha J. Edenfield, Pennington, Moore, Wilkinson, Bell & Dunbar, P.O. Box 10095, Tallahassee FL 32302-2095, Telephone (850) 222-3533
(List name, address and phone number)

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

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

PROPOSED ADVOCACY

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

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

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

Proposed Wording of Position for Official Publication:

Support proposed amendments to F.S. 732.5165, 732.518, 736.0207 and 736.0406 to clarify that the revocation of a will or a revocable trust can be challenged on the grounds of fraud, duress, mistake or undue influence after the death of the testator or settlor.

Reasons For Proposed Advocacy:

The Florida Trust Code and the Florida Probate Code permit the execution of a will and the creation of a trust to be challenged on the grounds of fraud, duress, mistake and undue influence. However, the Florida Statutes are silent on whether the revocation of a will by physical act or the revocation of a trust may be challenged on those same grounds. The absence of statutory language regarding revocation has led courts to conclude that the revocation of a trust may not be challenged on the grounds of undue influence. It is inconsistent to allow challenges to the creation of a trust on the grounds of undue influence but to not allow a challenge to the revocation of a trust on those same grounds. This result leaves a settlor's intended

beneficiaries with no remedy to correct the wrongdoing on an undue influencer when a trust is improperly revoked. The proposed amendments make clear that challenges to the revocation of a revocable trust or a will on the grounds of fraud, duress, mistake or undue influence are permitted upon the death of the testator/settlor.

PRIOR POSITIONS TAKEN ON THIS ISSUE

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

Most Recent Position [NONE]

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

Others
(May attach list if more than one)

[NONE]

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

REFERRALS TO OTHER SECTIONS, COMMITTEES OR LEGAL ORGANIZATIONS

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

Referrals

Florida Bankers Association — unknown at this time, expect support

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

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

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

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

RPPTL WHITE PAPER

PROPOSED AMENDMENTS OF F.S. SECTIONS 732.5165, 732.518, 736.0207 AND 736.0406 TO CLARIFY THAT REVOCATION OF A WILL OR REVOCABLE TRUST IS SUBJECT TO CHALLENGE ON THE GROUNDS OF FRAUD, DURESS, MISTAKE OR UNDUE INFLUENCE AFTER THE TESTATOR'S OR SETTLOR'S DEATH

I. SUMMARY

This legislation seeks to clarify that a revocation of a will or revocable trust procured by fraud, duress, mistake or undue influence is subject to challenge upon the testator or settlor's death. The amendment clarifies the law as a result of the decision in MacIntyre v. Wedell, 12 So. 3d 273 (Fla. 4th DCA 2009). The amendments also specify when the challenge to the will or revocable trust revocation may be brought. Further, the amendment clarifies that the creation of a trust amendment or restatement is also subject to challenge on the grounds of fraud, duress, mistake or undue influence.

This bill does not have a fiscal impact on state funds.

II. CURRENT SITUATION

A. Post-Death Challenges to the Revocation of a Revocable Trust

Currently, it appears that Florida law does not permit an undue influence challenge to a settlor's revocation of a revocable trust even if that action is brought after the settlor's death.

F.S. Section 736.0406 discusses the effect of fraud, duress, mistake, and undue influence on the creation of a revocable trust. It provides:

> A trust is void if the creation of the trust is procured by fraud, duress, mistake, or undue influence. Any part of the trust is void if procured by such means, but the remainder of the trust not procured by such means is valid if the remainder is not invalid for other reasons.

Thus, under F.S. Section 736.0406, the creation of a trust can clearly be challenged on the grounds of fraud, duress, mistake, or undue influence in post-death proceedings. However. nothing in that statute, or anywhere else in the Florida Trust Code, addresses whether a *revocation or amendment* of a revocable trust may be challenged on those same grounds. This has led courts to conclude that a revocation of a revocable trust cannot be challenged on the grounds of undue influence.

The District Court of Appeal, Second District first addressed this issue in *Hoffman v. Kohns*, 385 So. 2d 1064 (Fla. 2d DCA 1980). In *Hoffman*, the Court allowed a challenged to a revocation of a revocable trust in post-death proceedings. The settlor in *Hoffman* executed a one-paragraph revocation of his revocable trust. After the settlor's death, a trust beneficiary sued claiming the revocation of the trust was procured by undue influence. The court, while finding no case in Florida directly permitting a challenge to the revocation of a trust, set aside the revocation. The court relied on the Supreme Court of Florida's decision in *Rich v. Hallman*, 143 So. 292 (1932), which recognized that a lifetime transfer in the nature of a gift could be set aside on the grounds of undue influence.

Almost three years later, the District Court of Appeal, Fourth District decided *Genova v. Florida National Bank of Palm Beach County*, 433 So. 2d 1211 (Fla. 4th DCA 1983). In *Genova*, the settlor attempted to revoke her revocable trust. The trustee challenged the attempted revocation on the grounds of undue influence during the settlor's lifetime. The trial court found that the attempted revocation of the trust was the product of undue influence and invalidated the attempted revocation. On appeal, the 4th DCA reversed and held that the settler could not be deprived of her right to revoke the trust in the absence of a judicial or medical determination that she was incapacitated. The court determined that since the settlor was not incapacitated, she was free to revoke her trust during her lifetime, regardless of whether or not the settlor had been unduly influenced.

The Supreme Court of Florida accepted jurisdiction of the *Genova* decision by certifying conflict with the *Hoffman* decision. *Florida National Bank of Palm Beach County v. Genova*, 460 So. 2d 895 (Fla. 1984). The Supreme Court of Florida approved the *Genova* decision and found that undue influence cannot be asserted as a basis for preventing a competent settlor from revoking a revocable trust. The Court noted that the settlor's retention of control over the property differentiates a revocable trust from the other types of transfers where undue influence can apply, including gifts, deeds, wills, contracts, etc. The Court disapproved the *Hoffman* decision (action brought after settlor's death).

Recently, in *MacIntyre v. Wedell*, 12 So. 3d 273 (Fla. 4th DCA 2009), the 4th DCA considered whether *Genova*'s apparent pre-death prohibition on proceedings to challenge a revocation of a revocable trust on the grounds of undue influence applied in proceedings after the settlor's death. In *MacIntyre*, the alleged undue influencer caused the settlor to withdraw funds from her revocable trust and place them in joint name with the alleged undue influencer. The trustee filed suit alleging the transfers were procured by undue influence. The 4th DCA, relying on the Supreme Court of Florida's decision in *Genova*, affirmed the lower court's dismissal with prejudice. The court stated the *Genova* decision plainly suggests that the availability of an undue influence challenge to a settlor's revocation of a revocable trust should not turn upon whether the action is brought when the settlor is alive or dead. The court noted that the

Supreme Court accepted jurisdiction of *Genova* based on the conflict with the *Hoffman* decision. *Hoffman* involved a challenge after the settlor's death. Since the Supreme Court of Florida had expressly disapproved the result in *Hoffman*, the court affirmed the dismissal with prejudice.

Thus, under current law, although the creation or amendment of a trust may be challenged on the grounds of undue influence post-death, a revocation of that same document is not subject to challenge on those same grounds.

B. **Post-Death Challenges to the Revocation of a Will or Codicil**

Although there are no cases directly on point, it appears that, under current law, the revocation of a will by written instrument may be challenged on grounds of fraud, duress or undue influence. Restatement (Third) of Property (Wills & Don. Trans.) § 4.1 (1999). This Restatement provision is consistent with our current Florida Probate Code. Section 731.201(40), Florida Statutes, defines a "will" as follows:

> "Will" means an instrument, including a codicil, executed by a person in the manner prescribed by this code, which disposes of the person's property on or after his or her death and includes an instrument which merely appoints a personal representative or revokes or revises another will.

Under that definition, an instrument revoking a will is a "will".

Section 732.5165 discusses the effect of fraud, duress and undue influence on the creation of a will. It provides:

> A will is void if the execution is procured by fraud, duress, mistake, or undue influence. Any part of the will is void if so procured, but the remainder of the will not so procured shall be valid if it is not invalid for other reasons.

Section 732.5165 coupled with the definition of a "will" in F.S. 731.201(40) would seem to permit a challenge to a written instrument revoking a will on the grounds of fraud, duress, mistake or undue influence. However, there are no current Florida Statutes addressing whether an interested person could challenge the revocation of a will by act (e.g. destroying a will through undue influence) on those same grounds. Further, there are no Florida cases addressing a challenge to the revocation of a will on the grounds of fraud, duress, or undue influence.

Under a prior version of the probate code, section 731.09, Florida Statutes (repealed), stated:

> If the revocation of a will, or any part thereof, is procured by fraud, duress, menace or undue influence, such revocation shall be void.

That statute was repealed in 1974.

III. ANALYSIS

Due to *MacIntyre,* it appears that an interested person cannot successfully bring a post-death proceeding contesting revocation of a revocable trust on undue influence grounds where the trust revocation was executed by a competent settlor. Presumably, *MacIntyre* may be extended to bar a post-death challenge to the revocation of revocable trust based on fraud, duress, or mistake, leaving lack of testamentary capacity as the sole grounds for such a challenge.

If Florida courts do not permit a post death challenge to a settlor's revocation of her revocable trust, the problems appear evident. First, intended trust beneficiaries can be deprived of their inheritance, but yet have no remedy to correct the wrongdoing. If a sole intestate heir unduly influences the settlor to revoke her revocable trust, which left everything to her favorite charity, thereby causing the will pour over clause to fail, then the property would pass by intestacy. See § 732.513(4), Fla. Stat. The favorite charity would be denied a remedy.

Additionally, revocations of a trust or a part of a trust are challenged all the time. Any time a party brings a trust contest challenging an amendment or a restatement of trust, the contest challenges not only the validity of the challenged part, but also the revocation of the prior part. It would seem inconsistent to be able to challenge the revocation of a prior amendment by challenging the subsequent amendment but be unable to solely challenge a revocation of the trust or a part of the trust. It also seems inconsistent to allow a post death challenge to an amendment to a revocable trust, but not permit a challenge to the revocation of the trust itself.

Further, it also seems that once the settlor has died, the ability to challenge a trust revocation ought to be consistent with the ability to challenge a revocation of a will, especially since revocable trusts serve as will substitutes. A revocation of a will is subject to a post death challenge on the grounds that the revocation was procured by fraud, duress or undue influence. Restatement (Third) of Property (Wills & Don. Trans.) § 4.1 (1999).

Finally, the dissents' reasoning in both *Genova* opinions is persuasive. If a settlor is unduly influenced to revoke her revocable trust, then the revocation is not a free act of the settlor, but the will of another.

IV. EFFECT OF PROPOSED CHANGES

The proposed change would amend F.S. Sections 732.5165, 732.518, 736.0207 and 736.0406 to make clear that revocation of a will or revocable trust on the grounds of fraud, duress, mistake or undue influence is subject to challenge on the death of the testator/settlor. The amendment to F.S. Section 736.0406 clarifies that the creation of a trust amendment or a restatement of the trust is subject to challenge.

Current Statute:

732.5165. Effect of fraud, duress, mistake, and undue influence

A will is void if the execution is procured by fraud, duress, mistake, or undue influence. Any part of the will is void if so procured, but the remainder of the will not so procured shall be valid if it is not invalid for other reasons.

Proposed Statute:

732.5165. Effect of fraud, duress, mistake, and undue influence

A will is void if the execution is procured by fraud, duress, mistake, or undue influence. Any part of the will is void if so procured, but the remainder of the will not so procured shall be valid if it is not invalid for other reasons. If the revocation of a will, or any part thereof, is procured by fraud, duress, mistake or undue influence, such revocation is void.

Current Statute:

732.518. Will contests

An action to contest the validity of a will may not be commenced before the death of the testator.

Proposed Statute:

732.518. Will contests

An action to contest the validity of all or part of a will or the revocation of all or part of a will may not be commenced before the death of the testator.

Current Statute:

736.0207. Trust contests

An action to contest the validity of all or part of a trust may not be commenced until the trust becomes irrevocable, except this section does not prohibit such action by the guardian of the property of an incapacitated settlor.

Proposed Statute:

736.0207. Trust contests

An action to contest the validity of all or part of a revocable trust, or the revocation of part of a revocable trust, may not be commenced until the trust becomes irrevocable by its terms or by the settlor's death. If all of a revocable trust has been revoked, an action to contest the revocation may not be commenced until after the settlor's death. This section does not prohibit such actions by the guardian of the property of an incapacitated settlor.

Current Statute:

736.0406. Effect of fraud, duress, mistake, or undue influence

A trust is void if the creation of the trust is procured by fraud, duress, mistake, or undue influence. Any part of the trust is void if procured by such means, but the remainder of the trust not procured by such means is valid if the remainder is not invalid for other reasons.

Proposed Statute:

736.0406. Effect of fraud, duress, mistake, or undue influence

If the creation, amendment, or restatement of a trust, or any part thereof, is procured by fraud, duress, mistake, or undue influence, the trust, or any part so procured, is void. The remainder of the trust not procured by such means is valid if the remainder is not invalid for other reasons. If the revocation of a trust, or any part thereof, is procured by fraud, duress, mistake or undue influence, such revocation is void.

V. FISCAL IMPACT ON STATE AND LOCAL GOVERNMENTS

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

VI. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR

The proposal will not have a direct economic impact on the private sector.

VII. CONSTITUTIONAL ISSUES

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

VIII. OTHER INTERESTED PARTIES

None are known at this time.

A bill to be entitled

An act relating to probate, amending s. 732.804, F.S., and adding s. 732.805 through s. 732.808, relating to the disposition of decedent's remains, amending s. 497.005(37), relating to definition of a legally authorized person, amending s. 496.50, relating to disposition of human remains, providing an effective date.

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

Section 1. Section 732.804, Florida Statutes is amended, to read:

732.804. Provisions relating to disposition of decedent's remains, written declaration ~~the body~~.—

(1) Legislative Findings - Subject to certain interests of society, the Legislature finds that every competent adult has the right to control the decisions relating to her or his own funeral, ceremonial, interment and disposition arrangements.

(2) Written declaration. –

(a) For purposes of ss. 732.804 through 732.808, Florida Statutes, the term "written declaration" means a document expressing a person's intent regarding one or more of the matters described in subsection (b).

(b) Any person who is of sound mind, who is 18 or more years of age, or an emancipated minor , may specify in a written declaration any one or more of the following which are referred to in ss. 732.804 through 732.808 as final arrangements:

1. The final disposition to be made of the declarant's remains, as defined in s. 497.005(32) and the disposition of cremated remains;

2. The funeral or ceremonial arrangements, or absence thereof, to be performed after death;

3. The person designated to make arrangements for the final disposition of the declarant's remains, the disposition of cremated remains and funeral or ceremonial arrangements, if any, to be performed after death.

(c) A written declaration must be dated and signed by the declarant, or, if the declarant cannot sign, the written declaration may be signed for the declarant by some other person in the declarant's presence and at the declarant's direction. If the written declaration is signed by another person on the declarant's behalf, it must be signed in the presence of two subscribing witnesses who must sign the written declaration in the presence of the declarant and the person signing on the declarant's behalf and in the presence of each other.

(d) A will executed as provided in s. 732.502 shall be deemed to be a written declaration if the will includes an expression of the decedent's final arrangements or refers to this section.

(e) A preneed contract as defined in s. 497.005 shall not be a written declaration regardless of whether it includes an expression of the decedent's intent regarding one or more of the matters described in subsection (b) above, but a preneed contract may be admitted in an appropriate legal proceeding as evidence of the decedent's intent regarding final arrangements.

(f) If more than one otherwise effective written declarations exist, including an earlier dated will that is deemed to be a written declaration, then to the extent of any conflict among the declarations, the provisions of the most recent written declaration controls.

(g) Notwithstanding the foregoing, to the extent that a written declaration is in conflict with an anatomical gift made pursuant to s. 765.514(1), the anatomical gift shall control over inconsistent directions or instructions in a written declaration.

~~Before issuance of letters, any person may carry out written instructions of the decedent relating to the decedent's body and funeral and burial arrangements. The fact that cremation occurred pursuant to a written direction signed by the decedent that the body be cremated is a complete defense to a cause of action against any person acting or relying on that direction.~~

Section 2. Section 732.805, Florida Statutes, is added to read:

732.805 Reliance on written declaration. --

(1) A written declaration shall be binding on all interested persons if:

(a) The decedent made financial arrangements necessary to carry out the instructions contained in the written declaration; or

(b) The cost of carrying out the instructions contained in the written declaration are advanced by the person designated to direct final arrangement or by the personal representative of the decedent's estate or some other person within 5 days after receiving notice of the decedent's death or 10 days after the decedent's death, whichever is earlier.

(2) A person designated in a written declaration may direct final arrangements in accordance with the written declaration, but if that person fails to direct the specified final arrangements within 5 days after receiving notice of the decedent's death or 10 days after the decedent's death, whichever is earlier, any person who advances the necessary funds may make final arrangements to carry out the decedent's instructions in accordance with a written declaration.

(3) No person shall direct final arrangements pursuant to a written declaration if that person has actual knowledge that:

1. A proceeding is pending to challenge the written declaration; or

2. A later written declaration was executed by the decedent, to the extent of any conflict with an earlier written declaration.

(4) Except as otherwise provided, any person who in good faith directs or carries out final arrangements in reliance on a written declaration that appears to have been created in accordance with s. 732.804 shall have no liability for that act.

(5) Except as otherwise provided herein, any establishment or individual licensed under chapter 497 who, acting in good faith, relies on directions for final arrangements in a written declaration that appears to have been created in accordance with s. 732.804 or on the authorization conferred by a person who claims to have the right to direct final arrangements shall not be subject to liability or administrative discipline.

(6) No person designated in a written declaration to carry out final arrangements shall be liable for failing or refusing to do so.

(7) An establishment or individual licensed under chapter 497 that has actual knowledge that a legal proceeding has been brought to challenge a written declaration may not rely on the directions for the final arrangements in a written declaration that appears to have been created in accordance with s. 732.804 or on the authorization conferred by a person who claims to have the

right to direct final arrangements until the licensee has actual notice that the legal proceeding has been resolved or dismissed.

Section 3. Section 732.806, Florida Statutes, is added to read:

Section 732.806. Provisions relating to final arrangements in absence of written declaration.

(1) In the absence of a written declaration the right to direct final arrangements vests in the following order of preference:

(a) The decedent, if the decedent's intent can be established by a preponderance of the evidence in an appropriate legal proceeding

(b) The person designated by the decedent as authorized to direct disposition pursuant to Pub. L. No. 109-163, s. 564, as listed on the decedent's United States Department of Defense Record of Emergency Data, DD Form 93, or its successor form, if the decedent died while serving military service as described in 10 U.S.C. s. 1481(a)(1)-(8) in any branch of the United States Armed Forces, United States Reserve Forces, or National Guard;

(c) The surviving spouse, unless the spouse has been arrested for committing against the deceased an act of domestic violence as defined in s. 741.28 that resulted in or contributed to the death of the deceased;

(d) A son or daughter of the decedent who is 18 years of age or older;

(e) A parent of the decedent, but both divorced parents of a minor child who have shared parental responsibility in accordance with s. 61.13 must agree on the final arrangements; provided, however, in the case of divorced parents of a minor child, where a court has awarded one parent sole parental responsibility in accordance with s. 61.13, the parent who has been awarded sole parental responsibility shall have preference over the parent who has not been awarded sole parental responsibility.

(f) A sibling of the decedent who is 18 years of age or older;

(g) A grandchild of the decedent who is 18 years of age or older;

(h) A grandparent of the decedent;

(i) A guardian of the person of the decedent at the time of death, and if there is none, then a guardian of the property of the decedent at the time of death;

(j) A personal representative of the decedent;

(k) A health care surrogate of the decedent at the time of death designated pursuant to chapter 765 of the Florida Statutes;

(l) Any person who was an attorney in fact of the decedent at the time of death designated pursuant to chapter 709 of the Florida Statutes, and if there was more than one, a majority of them;

(m) A public health officer;

(n) The medical examiner, county commission, or administrator acting under part II of chapter 406 of the Florida Statutes or other public administrator;

(o) A representative of a nursing home in which the decedent resided at the time of death; or

(p) Any person 18 years of age or older not listed in this subsection who is willing to assume the legal and financial responsibility for the final arrangements.

(2) The right to direct final arrangements shall be exercised by a verified affidavit signed by the person who has priority under subsection (1) stating the basis for that authority, that he or she has complied with subsection (5), and that he or she is not aware of any written declaration, any written objection by a person with equal or greater priority that has not abandoned these rights as provided herein, or of any pending legal proceeding to determine the decedent's intent.

(3) If the person with the right to direct final arrangements pursuant to subsection (1) is unable or unwilling to do so, or if the person's whereabouts cannot be reasonably and promptly determined as set forth in subsection (4), that person's rights shall terminate and the right to direct final arrangements shall be directed as if the person whose rights have terminated did not exist.

(4) The person with the right to direct final arrangements is presumed to be unable or unwilling to direct such arrangements, or the person's whereabouts shall be presumed unknown, if the person has failed to direct final arrangements within 5 days after receiving notice of the decedent's death or 10 days after the decedent's death, whichever occurs first.

(5) If there is more than one person with equal priority to direct final arrangements any person exercising those rights must make a reasonable effort to give prior actual notice to all persons with the same priority of that person's intent to exercise their rights and shall make a reasonable effort to obtain a consensus of the majority of those persons.

(6) No person shall exercise the right to direct final arrangements if that person has actual knowledge that:

(a) A proceeding is pending to determine the decedent's intent under subsection (1)(a); or

(b) A person with equal or greater priority to direct final arrangements serves a written objection to the proposed final arrangements.

(7) A written objection to the directions for final arrangements is deemed abandoned if an appropriate legal proceeding is not filed within 3 days of the date of service of the objection.

(8) A funeral home, cremation facility, cinerator or other licensee under chapter 497 that has received a written objection by a person who claims to have the right to, or equal priority to, direct final arrangements or that has actual knowledge of a legal proceeding which has been brought to challenge the final arrangements shall not proceed with any directions for final arrangements until the licensee has actual notice that the legal proceeding or objection has been resolved or dismissed or the objection has been abandoned.

Section 4. Section 732.807, Florida Statutes, is added to read:

Section 732. 807. Legal proceeding regarding final arrangements –

(1) The individual designated in a written declaration of the decedent, the decedent's spouse, adult child, or any other interested person may seek expedited judicial intervention if that person reasonably believes:

(a) The written declaration is invalid or a later declaration was executed by the decedent that conflicts with the earlier written declaration;

(b) The written declaration is contrary to the intent of the decedent;

(c) The decedent's intent, in the absence of a written declaration, can be proven by a preponderance of the evidence; or

(d) There is more than one person with equal priority to direct final arrangements and a person has directed final arrangements inconsistent with the wishes of the majority of the individuals having equal priority.

(2) In any proceeding brought pursuant to this section, a written declaration creates a rebuttable presumption that it represents the decedent's intent with respect to the final arrangements, and the person designated to direct the final arrangements.

(3) A preliminary hearing must be held within 5 days of the filing of an appropriate legal proceeding under this section.

(4) Venue for a proceeding pursuant to this section shall be in any county in this state:

(a) Where the venue is proper under chapter 47; or

(b) In which the decedent was physically present at the time of his or her death, or

(c) In which the remains of the decedent are located; or

(d) Where the decedent was domiciled; or

(e) In which a probate proceeding for the decedent is pending.

Section 5. Section 732. 808, Florida Statutes, is added to read:

732. 808. Effect of criminal acts on final arrangements.

If any person unlawfully and intentionally kills or participates in procuring the death of the decedent, that person shall not be entitled to direct final arrangements. The court may determine by the greater weight of the evidence whether the person unlawfully and intentionally killed or participated in procuring the death of the decedent for purposes of this Section.

Section 6. Subsection (37) of Section 497.005, Florida Statutes, is amended to read;

497.005 Definitions.— As used in this chapter

(37) "Legally authorized person" means, in the priority listed, the person or persons designated in a written declaration as defined in s. 732.804(2), the person or persons with authority to carry out the written declaration of the decedent as defined in s. 732.805, or the person or persons in whom the right to direct the decedent's final arrangements vests as provided in s. 732.806.

~~(a) The decedent, when written inter vivos authorizations and directions are provided by the decedent;~~

~~(b) The person designated by the decedent as authorized to direct disposition pursuant to Pub. L. No. 109-163, s. 564, as listed on the decedent's United States Department of Defense Record of Emergency Data, DD Form 93, or its successor form, if the decedent died while serving military service as described in 10 U.S.C. s. 1481(a)(1)-(8) in any branch of the United States Armed Forces, United States Reserve Forces, or National Guard;~~

~~(c) The surviving spouse, unless the spouse has been arrested for committing against the deceased an act of domestic violence as defined in s. 741.28 that resulted in or contributed to the death of the deceased;~~

~~(d) A son or daughter who is 18 years of age or older;~~

~~(e) A parent;~~

~~(f) A brother or sister who is 18 years of age or older;~~

~~(g) A grandchild who is 18 years of age or older;~~

~~(h) A grandparent; or~~

~~(i) Any person in the next degree of kinship.~~

~~In addition, the term may include, if no family member exists or is available, the guardian of the dead person at the time of death; the personal representative of the deceased; the attorney in fact of the dead person at the time of death; the health surrogate of the dead person at the time of death; a public health officer; the medical examiner, county commission, or administrator acting under part II of chapter 406 or other public administrator; a representative of a nursing home or other health care institution in charge of final disposition; or a friend or other person not listed in this subsection who is willing to assume the responsibility as the legally authorized person. Where there is a person in any priority class listed in this subsection, the funeral establishment shall rely upon the authorization of any one legally authorized person of that class if that person represents that she or he is not aware of any objection to the cremation of the deceased's human remains by others in the same class of the person making the representation or of any person in a higher priority class.~~

Section 7. Subsection (4) of Section 406.50, Florida Statutes, is amended to read;

406.50 Unclaimed dead bodies or human remains; disposition, procedure.

(4) In the event more than one legally authorized person claims a body for interment, priority shall be given the individual listed in a written declaration. In the absence of a binding written declaration, the requests shall be prioritized in accordance with s. 732.806~~732.103~~.

Section 8. This act shall take effect on July 1, 2010.

LEGISLATIVE POSITION REQUEST FORM

GOVERNMENTAL AFFAIRS OFFICE

Date Form Received _____

GENERAL INFORMATION

Submitted By Tae Kelley Bronner, Chair, Probate Law and Procedure Committee of the Real Property Probate & Trust Law Section of the Florida Bar (August 2, 2009)

Address 10006 Cross Creek Blvd., PMB #428, Tampa, FL 33647
Telephone: (813) 907-6643

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

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(List name, address and phone number)

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

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

PROPOSED ADVOCACY

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

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

Indicate Position **X** **Support** Oppose Technical Assistance Other _____

Proposed Wording of Position for Official Publication:

"Support proposed amendment of F.S. § 732.804, the creation of §732.805 through §732.808,and related amendments to §§406.50 and 497.005(37), to clarify Florida law as it relates to issues involving the disposition of a decedent's remains by providing necessary guidance to courts and family members, especially where disputes arise, as to a decedent's right to control the disposition of his or her remains and, absent specific direction from the decedent, who is legally authorized person to make decisions regarding the place and manner of the disposition of a decedent's remains.

Reasons For Proposed Advocacy:

The current law as to who is legally authorized to make decisions regarding the place and manner of the disposition of a decedent's remains is inconsistent, incomplete, and at times, conflicting. Moreover, when disputes arise, there is no clear direction for courts or parties as to how such disputes should be resolved. Courts around the State of Florida have reached inconsistent positions regarding the applicable law and standards to apply when there is a dispute between surviving individuals over the disposition of a loved one. The most recent example of this uncertainty in Florida law was the death of Anna Nicole Smith and the court proceedings which were necessary in order to determine how her remains should be disposed of and who had the authority to make that decision. See *Arthur v. Milstein, et al*, 949 So.2d 763 (Fla. 4th DCA 2007). The proposed statues will clarify and eliminate conflicting law to aid both courts and family members in dealing with the disposition of a loved one's remains, especially where disputes have arisen.

PRIOR POSITIONS TAKEN ON THIS ISSUE

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

Most Recent Position NONE

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

Others
(May attach list if more than one)

NONE

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

REFERRALS TO OTHER SECTIONS, COMMITTEES OR LEGAL ORGANIZATIONS

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

Referrals

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

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

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

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

WHITE PAPER

PROPOSED REVISIONS TO § 732.804 - 732.808, FLA. STAT.

I. SUMMARY

The purpose of the proposed change is to clarify Florida law as it relates to issues involving the disposition a decedent's remains. The proposed changes would replace existing F.S. § 732.804, in its entirety, create §732.805, §732,806, §732.807 and §732.808, and amend §497.005(37) and §496.50. The proposed statutes would provide guidance to courts and family members, especially where disputes arise, as to who is legally authorized to make decisions regarding the place and manner of the disposition of a decedent's remains.

II. CURRENT SITUATION

There is currently very little legal guidance (both statutory and otherwise) as to the rights of a decedent to control the disposition of his or her remains. There is even further confusion as to who is legally authorized to make decisions regarding the place and manner of the disposition of a decedent's remains if the decedent has not provided specific instructions in that regard. As a result, the courts around the State of Florida have been inconsistent in what law is applicable and what standards should be applied when a dispute arises concerning the disposition of the remains of a decedent.

As detailed in the discussion of the relevant Florida Statutes and case law below, Florida law is unclear with respect to the following issues:

- Should a decedent's intent regarding the place and manner of the disposition of his or her remains control or should the decedent's survivors have a preference in this regard?

- Must the decedent's intent regarding the place and manner of the disposition of his or her remains be in writing or may oral expressions of that intent be given preference?

- Can non-testamentary written instructions be considered?

- Can written instructions (whether testamentary or non-testamentary) of the decedent regarding the place and manner of the disposition of his or her remains be overridden? If so, what is the evidentiary standard for overriding a decedent's written instructions?

- If the decedent has not expressed his or her intent regarding the place and manner of the disposition of his or her remains, who has priority to make such decisions?

- Who has the right to control the place and manner of the disposition of a decedent's remains if the matter is subject to a dispute?

A. Florida Statutes

F.S. § 732.804 currently provides that "[b]efore issuance of letters [of administration], any person may carry out written instructions of the decedent relating to the decedent's body and funeral and burial arrangements." This statute, however, does not explicitly state that a person must follow the instructions of the decedent, and it does not provide whether those instructions are controlling if the matter of the disposition of a decedent is brought before a court for resolution.

Chapter 497 of the Florida Statutes addresses funeral homes, cemeteries and the regulation of those entities. F.S. § 497.002(2) contains a declaration of legislative intent and provides, "Subject to certain interests of society, the Legislature finds that every competent adult has the right to control the decisions relating to her or his own funeral arrangements." F.S. 497.005(37) currently provides as follows:

> "Legally authorized person" means, in the priority listed:
> (a) The decedent, when written inter vivos authorizations and directions are provided by the decedent;
> (b) The person designated by the decedent as authorized to direct disposition pursuant to Pub. L. No. 109-163, s. 564, as listed on the decedent's United States Department of Defense Record of Emergency Data, DD Form 93, or its successor form, if the decedent died while serving military service as described in 10 U.S.C. s. 1481(a)(1)-(8) in any branch of the United States Armed Forces, United States Reserve Forces, or National Guard;
> (c) The surviving spouse, unless the spouse has been arrested for committing against the deceased an act of domestic violence as defined in s. 741.28 that resulted in or contributed to the death of the deceased;
> (d) A son or daughter who is 18 years of age or older;
> (e) A parent;
> (f) A brother or sister who is 18 years of age or older;
> (g) A grandchild who is 18 years of age or older;
> (h) A grandparent; or
> (i) Any person in the next degree of kinship.
>
> In addition, the term may include, if no family member exists or is available, the guardian of the dead person at the time of death; the personal representative of the deceased; the attorney in fact of the dead person at the time of death; the health surrogate of the dead person at the time of death; a public health officer; the medical examiner, county commission, or administrator acting under part II of chapter 406 or other public administrator; a representative of a nursing home or other health care institution in charge of final disposition; or a friend or other person not listed in this subsection who is willing to assume the responsibility as the legally

> authorized person. Where there is a person in any priority class listed in this subsection, the funeral establishment shall rely upon the authorization of any one legally authorized person of that class if that person represents that she or he is not aware of any objection to the cremation of the deceased's human remains by others in the same class of the person making the representation or of any person in a higher priority class.

Although F.S. § 497.005(37) provides a definition of "Legally Authorized Person", the statute is only a definitional section and does not provide what acts "Legally Authorized Persons" can perform or what rights they have under Chapter 497 of the Florida Statutes. More significantly, none of the other provisions in Chapter 497, Florida Statutes address the issue of who has the right to control the place and manner of the disposition of a dead body if the matter is subject to a dispute.

The only statutes in Chapter 497, Florida Statutes, which use the term "Legally Authorized Persons" are F.S. §§ 497.152 (dealing with disciplinary grounds for mishandling human remains), 497.171 (dealing with identification of human remains), 497.383 (dealing with the disposition of fetal remains), 497.384 (dealing with disinterment and re-interment of human remains), 497.606 (dealing with cremation and the regulation of cinterator facilities) and 497.607 (dealing with the procedure for cremation).[1] None of those provisions address the right of a decedent to control the disposition of his or her remains or the right of survivors of the decedent to control the disposition of the decedent's remains if a dispute arises. As explained below, the courts in Florida have been inconsistent as to whether Chapter 479, Florida Statutes, controls these issues.

Finally, F.S. § 406.50(4), found in Chapter 406 of the Florida Statutes (the "Medical Examiner Act") provides, "In the event more than one legally authorized person claims a body for interment, the requests shall be prioritized in accordance with 732.103."[2] The flush language in F.S. § 406.50 further provides, "For purposes of this chapter, the term 'unclaimed' means a dead body or human remains that is not claimed by a legally authorized person, as defined in s. 497.005, for interment at that person's expense." This statute has the same deficiency as Chapter 497 in that it never explicitly states who has the right to control the place and manner of the disposition of a dead body if the matter is subject to a dispute. Also, there is no provision regarding consideration of the intent of a decedent in this regard.

B. Florida Case Law

It is undisputed that Florida law does not view a deceased body as property. In *Crocker v. Pleasant*, 778 So. 2d 978 (Fla. 2001), the Florida Supreme Court held that a body is not property and is not subject to being devised. However, the Court also held that at law, a body is quasi-

[1] F.S. § 497.607 actually uses the term "legally authorized person" rather than "legally authorized persons"

[2] F.S. § 732.103 is an intestacy statute that provides for the order of the disposition of a decedent's property in the event that a decedent dies intestate and without a surviving spouse.

property, "[W]e conclude in Florida there is a legitimate claim of entitlement by the next of kin to possession of the remains of a decedent for burial or other lawful disposition. We also find that referring to the interest as a 'legitimate claim of entitlement' most accurately describes the nature of the interest." The question of who has the right to exert this legitimate claim of entitlement is less clear. In Florida, it has long been held that "in the absence of testamentary disposition to the contrary, a surviving spouse or next of kin has the right to the possession of the body of a deceased person for the purpose of burial, sepulture or other lawful disposition which they may see fit." *Kirksey v. Jernigan*, 45 So. 2d 188 (Fla. 1950). One of the problems with this statement of law is that it appears to be in conflict with F.S. § 732.804 which indicates that *any person* may carry out written instructions of the decedent relating to the decedent's body and funeral and burial arrangements. Moreover, appellate courts have continued to quote the *Kirksey* rule even after enactment of F.S. § 732.804. See *Cohen v. Guardianship of Cohen*, 896 So. 2d 950 (Fla. 4th DCA 2005) and *Arthur v. Milstein, et al*, 949 So. 2d 1163 (Fla. 4th DCA 2007).

In *Leadingham v. Wallace*, 691 So. 2d 1162 (Fla 5th DCA 1997), the Decedent left a suicide note directing that he be buried in Florida. The Fifth District Court of Appeal appeared to honor that intent. The court stated in a footnote after citing to *Kirksey*, "We know of no requirement that a deceased's undisputed wishes concerning the method of his disposal or the place of his burial must be in writing and formally witnessed in order to be honored." This statement seems to contradict the rule as stated by the Florida Supreme Court in *Kirksey* and *Crocker*. However, the result in *Leadingham* is consistent with F.S. § 732.804 which provides that any person may carry out written instructions of the decedent. Moreover, the *Leadingham* court indicated that the next of kin who would have priority to determine where to bury the body of the decedent would be the minor children of the decedent.

In *Andrews v. McGowan*, 739 So. 2d 132 (5th DCA 1999), the Fifth District Court of Appeal addressed a dispute between a separated/estranged spouse and the decedent's adult lineal descendants as to whom would control the disposition of the ashes of the decedent. The lineal descendants sued a funeral home for releasing the remains to the decedent's estranged spouse without the consent of the lineal descendants. The lineal descendants also brought an action against the funeral home which ultimately received possession of the remains for return of those remains. The court entered summary judgment in favor of the funeral home finding that pursuant to F.S. § 470.002(18) (which is the predecessor to F.S. § 497.005(37)), the estranged spouse had to the right to make the determination regarding burial of the decedent. The decedent's intent regarding burial was never interjected into the proceedings.

In this regard, the *McGowan* court found that F.S. § 470.002(18) (the predecessor to F.S. § 497.005(37)), is not simply a regulatory statute for the protection of funeral home directors but actually creates a "priority of rights" regarding who has the legal authority to control the burial of a decedent. If F.S. § 497.005(37) in fact creates a "priority of rights" regarding the disposition of the remains of a decedent, then the *Leadingham* decision is in conflict with *McGowan*. F.S. § 497.005(37) clearly provides that only a child who is 18 years of age or older is a legally authorized person. If F.S. § 497.005(37) was applied to the *Leadingham* facts, the father would have been considered the next of kin rather than the minor children. While the intent of the decedent was not an issue in the case, if the *McGowan* court is correct, the result is that the intent

of the Decedent may only be considered when, "[w]ritten inter vivos authorizations and directions are provided by the decedent." Oral declarations of the decedent would not be relevant. The *McGowan* case stretches the application of F.S. § 497.005(37) beyond its plain language. It also appears to be in conflict with *Arthur v. Milstein, et al*, 949 So. 2d 1163 (Fla. 4th DCA 2007) which is discussed below.

Cohen v. Guardianship of Cohen, 896 So. 2d 950 (Fla. 4th DCA 2005) involved an oral expression by a decedent as to burial which contradicted the instructions contained in the decedent's will. Specifically, there was a direction in the will that the decedent's body was to be buried in New York, the state in which he was residing at the time he executed the will. Subsequent to executing the will, the decedent moved to Florida where he resided for an extended period of time prior to his death. During his residency in Florida, he orally expressed on numerous occasions that it was his desire to be buried in Florida. C*ohen* clearly states that when the testator has expressed his intention in a will, it should be honored. But the case also holds that a testamentary provision need not be honored if it can be shown by clear and convincing evidence that the decedent intended another disposition of his or her body and that such evidence can be through oral communications,

> We instead affirm the trial court's ruling, adopting the majority view that provisions in a will regarding burial instructions are not conclusive of a testator's intent, and the trial court may take evidence that the testator changed his or her mind regarding disposition of his body . . . . to hold otherwise could cause untoward results.

Cohen does not address the issue of whether in the absence of any testamentary declaration the oral expressions of the decedent with regard to disposition of his or her body will be honored.

The most recent case involving a dispute regarding the disposition of a decedent's remains is *Arthur v. Milstein, et al*, 949 So.2d 1163 (Fla. 4th DCA 2007). *Arthur* involved a dispute regarding where to bury Anna Nicole's remains. The dispute was between Vergie Arthur, the decedent's mother, Howard K. Stern, the decedent's "companion"[3] and the person designated as the personal representative under the decedent's will, and the minor child of the decedent, Dannielynn Hope Marshall Stern, through her Guardian Ad Litem, Richard Milstein, Esq. Vergie Arthur wanted the decedent buried in Texas where the decedent was raised as a child. Howard K. Stern wanted the decedent buried in the Bahamas where she was residing at the time of her death. The Guardian Ad Litem also reached the conclusion that the decedent should be buried in the Bahamas next to the grave of her predeceased son.

Vergie Arthur relied on F.S. § 497.005(37) alleging that she was the "legally authorized person" as defined under that statute, and therefore, she had the sole right to determine the place of burial. She relied on the *McGowan* case for the proposition that that statute was not simply designed to regulate funeral homes but rather created a "priority of rights" in her as the legally authorized person to determine where the remains of her daughter should be buried. Mrs. Arthur

[3] The word "companion" is used as there was conflicting testimony in the trial regarding the exact nature of the relationship between Anna Nicole Smith and Howard K. Stern.

indicated that the minor child of Anna Nicole Smith had no right to participate in the decision as only "a son or daughter who is 18 years of age or older" qualifies as a "legally authorized person" under the statute.

Richard Milstein, the Guardian Ad Litem, relied on F.S. § 406.50 as the remains of the decedent were not located in a funeral home but rather at the medical examiner's office. Accordingly, he reasoned that because Chapter 497, Florida Statutes, only applied to funeral homes, it could not be used by Vergie Arthur as authority to control the disposition of her daughter's remains. He argued that both he, as the guardian ad litem, and Vergie Arthur qualified as legally authorized persons pursuant to F.S. § 497.005(37). F.S. § 406.50(4) provides that if there is more than one legally authorized person claiming the body, the requests shall be prioritized pursuant to F.S. § 732.103. Under the provisions of that statute, the minor child is given priority over a parent as the next of kin.

Howard K. Stern relied on the expressed intent of the Decedent that she wanted to be buried in the Bahamas next to her predeceased son, Daniel. The evidence presented at trial was a combination of oral declarations of the decedent regarding her desires and two documents which when read together could arguably form a written expression of intent.

The trial court, citing to both common law and F.S. § 406.50, awarded custody and control of the remains of Anna Nicole Smith to the Guardian Ad Litem of Danneilynn Hope Marshall Stern with the direction that he act in the best interests of the minor child. Specifically, the trial court found that Dannielynn Hope Marshall Stern was the next of kin entitled to possession of the remains.

The Fourth District Court of Appeal invoked the "tipsy coachman doctrine" in affirming the trial court's order finding that the trial court reached the right result but for the wrong reason. Specifically, the court held that neither F.S. § 497.005(37) nor F.S. § 406.50 controlled the outcome of the case and that common law was dispositive,

> We find that neither section 497.005(37), nor section 406.50, control the outcome of this case, which in essence involves private parties engaged in a pre-burial dispute as to the decedent's remains. Otherwise stated, the trial court was not being asked to consider whether a funeral home or medical examiner was liable for its decision with respect to the disposition of a decedent's remains . . . In this case, common law is dispositive.[4]

[4] This result is supported by language in *Matsumoto v. American Burial and Cremation Services*, 949 So. 2d 1054 (Fla. 2d DCA 2006), in which the court held that F.S. § 497.005 does not impose a duty on the funeral homes to investigate whether they are releasing the body to the person with the highest priority under the statute, "The statute does not impose a due diligence requirement on funeral homes. Nor does it require funeral homes to provide others with higher priority notice of a family member's death. We decline to impose such obligations on the funeral home."

The court factually distinguished the *McGowan* case and concluded it was not applicable under the facts presented. However, it appears that the cases are in conflict. As the Fourth District Court of Appeal did not certify a conflict and the *Arthur* decision was not appealed to the Florida Supreme Court, we are left with the apparent conflict. Moreover, the Fourth District Court of Appeal never specifically addressed the issue of whether oral expressions by the decedent as to the disposition of his or her remains without any accompanying writing controls over the contrary wishes of the next of kin. But the court did find that the decedent's wishes were dispositive in this case,

> To the extent that sections 497.005(37) and 406.05(4) provide guidance, the priorities therein could set forth a presumption, rebuttable by clear and convincing evidence of the decedent's intent, as was the will in *Cohen*, and as found here . . . . Herein, the trial court found that 'Anna Nicole Smith's last ascertainable wish with respect to the disposition of her remains was that she be buried in the Bahamas next to her son Daniel Wayne Smith.' This finding is not essentially disputed. In light of the trial court's extensive findings and comments associated with Smith's intent, coupled with the Guardian Ad Litem's representation and commitment to a burial in the Bahamas, we conclude that there is no need to remand the case for further proceedings.

III. EFFECT OF PROPOSED CHANGE

The proposed amendment to F.S. § 732.804 and the creation of statutes § 732.805 through §732.808 would clarify (and in some instances, change) the law relating to the disposition of a decedent's remains in a number of ways. Specifically, the proposed statutes would provide the following:

1. Clarify that all adult individuals and minors whose disability of non-age have been removed have the preference and the right to make their own funeral arrangements by way of a "written declaration." Such arrangements, referred to as final arrangements, include the disposition of one's remains (including cremation) and the disposition of one's cremated remains, the ceremonial arrangements and the person (or persons) designated to carry out the arrangements after death. §732.804.

2. Clearly define the term "written declaration" and set forth the formalities required (i.e., it must be signed and dated by the decedent). §732.804(2)(c). The statute would also clarify that a decedent's will executed in accordance with Florida law will be deemed to be a "written declaration" so long as it includes the expression of the decedent's intent regarding the disposition of his or her remains, the ceremonial arrangements, or the person (or persons) designated to carry out the arrangements after death. §732.804(d). The statute would clarify that the most recent dated written declaration controls over all other documents to the contrary and to the extent that any anatomical gift is inconsistent with a written declaration, the anatomical gift would control. §732.804(f) and (g). Finally, a preneed contract as defined in §497.005, F.S. will not be considered a written declaration but may be used as evidence of the decedent's intent. §732.804(e).

3. Clarify the written declaration is only binding if financial arrangements necessary to carry out the instructions contained in the written declaration are made by the decedent. If no arrangements are made, the declaration will serve as evidence of the decedent's intent but will not be binding on interested persons. §732.805(1)(a).

4. Clarify who is authorized to carry out the decedent's intent as expressed in his or her written declaration, whether an individual is specified or not. §732.805, §732.806. If an individual is not designated in a written declaration, any individual who advances the necessary funds may carry out the decedent's written declaration. §732.805(1)(a). The statute would prohibit a person from carrying out a decedent's written declaration if that person has actual knowledge that a proceeding is pending that challenges the validity of a decedent's written declaration or a later written declaration exists and is in conflict with the earlier written declaration.

5. In the absence of a binding written declaration, a clear statement of priority would be established as to the person or persons who will have the right to control the disposition of a decedent's remains and to make ceremonial arrangements, if any. There would also be a clear statement as to how the right to inter a decedent's remains and to make ceremonial arrangements devolves if a person with priority is unable or unwilling to act. §732.806.

6. Absolve a person or entity from liability for refusing to accept, inter, cremate or otherwise dispose of a decedent's body where that person or entity has actual knowledge that legal action has been brought to challenge a decedent's written declaration. The statue would also absolve a person or entity from liability (both civil and administrative discipline) where that person or entity provides for the lawful disposition of a decedent's body in reasonable reliance on the written declaration (absent bad faith) or on reliance of directions from an individual who purports to have the right to direct such disposition provided the person or entity obtains an affidavit from an individual evidencing the basis for that right. §732.805(5). Finally, the statute would absolve a person named to carry out the terms of the written declaration from liability if that person refuses to carry out the terms of the written declaration. §732.805(4).

7. Provide that in any legal proceeding regarding a decedent's written declaration, a written declaration creates a rebuttable presumption of the decedent's intent regarding the disposition of the decedent's remains (including cremation), the ceremonial arrangements and the person (or persons) designated to carry out the arrangements after death.

8. Provide for proper venues if legal proceedings were initiated regarding the disposition of a decedent's remains. §732.807(4).

9. Provide that any person who unlawfully and intentionally kills or participates in procuring the death of the decedent shall not be entitled to control the disposition of the remains or the ceremonial arrangements of a decedent. §732.808.

The changes to §497.005(37) would amend the definition of legally authorized person under chapter 497 to refer to be the person or persons referred to a written declaration or the person or persons in whom the right to control the disposition of the decedent's remains vests under §732.806. Finally, the changes to §496.50 would amend the individual with the right to

claim a body under Chapter 496 to be the individual designated in a written declaration or in the absence of such declaration, the individual(s) in whom the right to control the disposition of the decedent's remains vests under §732.806. This would result in a consistent application of the law regarding the disposition of remains and prevent conflicts among family members.

IV. ANALYSIS

The proposed statute is designed to clarify the conflicts in the law and to give guidance to families and courts, especially where there is a dispute as to the disposition of a loved one's remains. Additionally, the proposed statute is designed to establish a clear priority of rights among the survivors of a decedent to make arrangements for the disposition of decedents' remains. The proposed statute would be the relevant authority for all questions regarding private citizens' rights to make funeral arrangements for a decedent, especially where disputes arise. Therefore, the question as to whether either F.S. §497.005(37) or F.S. § 406.50 is applicable (as raised in *McGowan* and *Arthur*) in such disputes would be resolved and it would be clear that such statutes are not applicable in resolving such disputes.

The proposed statute also confirms existing law to the extent that all competent adult individuals have the right to make their own funeral arrangements. In this regard, the proposed statute clearly states that an adult or a minor whose disability of non-age has been removed has the priority and right, over all other individuals, to make such arrangements. This is consistent with existing Florida law.

The proposed statute is designed so that individuals are encouraged to make arrangements regarding the disposition of their remains in writing by way of a "written declaration". The proposed statute also clearly defines the term "written declaration" and provides standards for the execution of such a document. To the extent that "formalities" of execution of a written declaration are required, the proposed statute departs from some of the existing case law. The proposed statute also permits a decedent to name a person (or persons) to carry out his or her wishes in this regard. The proposed statute clarifies a last will and testament can constitute a written declaration if the required provisions are included in the will. Because a clear standard would be established for the requirements of a written declaration, less litigation will be necessary and the citizens of the State of Florida will be able to provide for the disposition of their remains with more certainty and confidence.

Perhaps the most significant aspect of the proposed statutes is the statement as to the priority of rights among individuals to make decisions regarding the disposition of a decedent's remains when there is no written declaration (or when a person is not designated to carry out a written declaration). The statutes borrow heavily from the current version of F.S. § 497.005(37) in terms of the priority of the persons who are entitled to control the disposition of the remains of a decedent but clarify exactly what rights those persons have with regard to those issues. The proposed statutes also clarify that if there is no written declaration and there is a subsequent dispute among the survivors, that the courts can consider other expressions of a decedent's intent including oral expressions. The proposed statutes also provides guidance when there are disputes among classes of persons who have authority to act or where a person named does not act for any reason. Finally, the proposed statutes bring consistency among all chapters in the Florida Statutes to provide a unified definition of legally authorized person and a clear priority as

to the individual who has the right to control the disposition of a decedent's remains. This aspect of the proposed statutes will aid courts and families when disputes arise in cases such as *Cohen, Leadingham, McGowan* and *Arthur*.

V. FISCAL IMPACT ON STATE AND LOCAL GOVERNMENTS

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

VI. DIRECT IMPACT ON PRIVATE SECTOR

The proposal will not have a direct economic impact on the private sector.

VII. CONSTITUTIONAL ISSUES

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

VIII. OTHER INTERESTED PARTIES

None are known at this time.

A bill to be entitled

An act relating to probate, creating s. 732.615, creating a statutory right to reform the terms of a will to correct mistakes, creating 732.616, creating a statutory right to modify the terms of will to achieve tax objectives, creating 733.1061, creating a fee shifting statutory right which allows the court to award fees and costs in reformation and modification proceedings either against a party's share in the estate or in the form of a personal judgment against a party individually, and providing an effective date.

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

Section 1. Section 732.615, Florida Statutes, is created to read:

732.615 Reformation to Correct Mistakes.--

Upon application of any interested person, the court may reform the terms of a will, even if unambiguous, to conform the terms to the testator's intent if it is proved by clear and convincing evidence that both the accomplishment of the testator's intent and the terms of the will were affected by a mistake of fact or law, whether in expression or inducement. In determining the testator's original intent, the court may consider evidence relevant to the testator's intent even though the evidence contradicts an apparent plan meaning of the will.

Section 2. Section 732.616, Florida Statutes, is created to read:

732.616 Modification to Achieve Testator's Tax Objectives.--

Upon application of any interested person, to achieve the testator's tax objectives the court may modify the terms of a will in a manner that is not contrary to the testator's probable intent. The court may provide that the modification has retroactive effect.

Section 3. Section 733.1061, Florida Statutes, is created to read:

733.1061 Attorneys' fees and costs; will reformation and modification.

(1) In proceedings arising under ss. 732.615 and 732.616,the court shall award taxable costs as in chancery actions, including attorney's fees and guardian ad litem fees.

(2) When awarding taxable costs, including attorney's fees and guardian ad litem fees, under this section, the court in its discretion may direct payment from a party's interest, if any, in the estate or enter a judgment which may be satisfied from other property of the party, or both.

Section 4. This act shall take effect on July 1, 2010.

LEGISLATIVE POSITION REQUEST FORM

GOVERNMENTAL AFFAIRS OFFICE

Date Form Received _____

GENERAL INFORMATION

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

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

Position Type Real Property Probate & Trust Law Section and its Probate Law Committee

CONTACTS

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Appearances before Legislators Same

Meetings with Legislators/staff Same

PROPOSED ADVOCACY

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

If Applicable, List The Following

(Bill or PCB #) (Bill or PCB Sponsor)

Indicate Position **XX** Support Oppose Technical Assistance Other

Proposed Wording of Position for Official Publication Creates Sections 732.615, 732.616, and 733.1061 to permit the reform and modification of wills in Florida and to provide for an award of taxable fees and costs, including attorneys fees and guardian ad litem fees in such actions.

Reasons For Proposed Advocacy The current law permits the modification and reformation of trusts and other will substitutes but prohibits the modification and reformation of wills. The proposed changes will unify the law as applied to all testamentary documents and bring Florida in line with the modern approach adopted by the Restatement Third and the Uniform Probate Code. The proposed

changes to §733.1061 will provide courts with the ability to award costs, including attorneys fees and guardian ad litem fees in such actions.

PRIOR POSITIONS TAKEN ON THIS ISSUE

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

Most Recent Position None
(Indicate Bar or Name Section) (Support or Oppose) (Date)

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

REFERRALS TO OTHER SECTIONS, COMMITTEES OR LEGAL ORGANIZATIONS

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

Referrals

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

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

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

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

WHITE PAPER

PROPOSED CREATION OF §§ 732.615, 732.616 AND 733.1061, FLA. STAT.

I. SUMMARY

The purpose of the proposed changes is to permit the reformation and modification of wills and to unify the law of wills and will substitutes by applying the same standard to all such instruments. This proposed legislation would create new statutory rights and will permit a court to better determine and carry out the true testamentary intent of a testator. The proposed statutes are also designed to bring Florida in line with the growing trend across the country of permitting consideration of the extrinsic evidence of the testator's intent with safeguards to guard against giving effect to mistaken evidence. Finally, the proposed legislative will allow courts to render rulings more consistent with the actual intent of the testator and prevent the unjust enrichment of unintended beneficiaries in light of unilateral mistakes in fact or law.

II. CURRENT SITUATION

A. Introduction: Presently, under Florida law, we are permitted to reform and modify various donative documents containing testamentary provisions including testamentary and irrevocable trusts. However, we are not permitted to "reform" or modify the non-trust provisions of a will. While many courts will fashion relief under the guise of construction of the will, the need for a valid reformation and modification of wills still persists. The inability to reform an unambiguous will which contains a glaring scrivener's error fails to give effect to the testator's intention and may result in unjust enrichment of an unintended beneficiary. *Restatement Third, Property (Wills and Other Donative Transfers)* (cited below as "Restatement Third" or "Restatement") §12.1. Further, if one is lucky enough to convince a court to "reform" or modify a will under the guise of construction, such construction will not be binding on the IRS for tax purposes. A statute permitting reformation or reformation of wills would unify the law of wills and will substitutes by applying the same standard to all such instruments.

B. Classical Reformation: The judicial reformation of written instruments is one of the oldest of equitable remedies. Traditionally, it was used to rewrite the terms of a contract, deed, or other written instrument that did not reflect the actual intent or agreement of the parties due to their mutual mistake. In theory, the court merely conforms the contract to say what the parties intended, provided there is clear and convincing evidence of the mistake and the intention. *Vanater v. Allstate Ins. Co.*, 279 So. 2d 40 (Fla. 4th DCA 1973); *Providence Square Assn., Inc. v. Biancardi*, 507 So. 2d 1366 (Fla. 1987). It is probably more accurate to say that reformation is available when the mutual intent of the parties is not carried out in the instrument due to mistake, because frequently the mistake itself is a unilateral error by the document scrivener. e.g., *Jacobs v. Parodi*, 39 So. 833 (Fla. 1905); Genaro v. Leeper, 313 So. 2d 70 (Fla. 2d DCA 1975).

Reformation, however, is not traditionally at common law available to correct a unilateral mistake of one party unless the other party had engaged in fraud or inequitable conduct in obtaining the contract. *Ayers v. Thompson*, 536 So. 2d 1151(1st DCA 1988); *Mutual of Omaha Ins. Co. v. Russell*, 402 F.2d 339 (10th Cir. 1968). In the absence of fraud or inequitable

conduct, the remedy for a unilateral mistake, if any, was rescission or cancellation of the written instrument. This is because the element of mutuality has long been a fundamental prerequisite to the availability of the reformation remedy. The Supreme Court of Florida discussed the requirement of mutuality in *Providence Square Assn., Inc. v. Biancardi*, 507 So.2d 1366 (Fla. 1987), a case in which the question was whether a declaration of condominium is subject to reformation. The court began its analysis by stating:

> *Clearly, reformation principles cannot be applied to certain kinds of unilaterally generated legal documents which are noncontractual in nature (emphasis supplied). Id. at 1370.*

A decedent's will is a unilaterally generated legal document which is noncontractual in nature and therefore under the quoted language, traditional common law reformation principals could not be applied to it. In addition, any mistake in the will could only be made by the testator, or the scrivener acting as the testator's agent, without a second party to engage in fraud or inequitable conduct. See also *Owen v. Estate of Davis ex rel. Holzauser*, 930 So.2d 873 (Fla. 2d DCA 2000). Therefore, under common law principles, reformation is available to correct even an admitted scrivener's error in a will.

The courts have consistently held that a court may not reform or rewrite a will. *Owen v. Estate of Davis ex rel. Holzauser*, 930 So. 2d 873 (Fla. 2d DCA 2000); *In re Estate of Guess*, 213 So. 2d 638 (Fla.3d DCA 1968); *In Re Estate of Reese*, 622 So. 2d 157 (Fla. 4th DCA 1993). Further, Florida currently follows the plain meaning rule in that if the will is clear and unambiguous on its face, extrinsic evidence may not be admitted and judicial construction is prohibited. *Id*., *In Re Rice's Estate*, 406 So. 2d 469 (Fla. 3rd DCA 1981). If, however, the terms of the will are ambiguous, extrinsic evidence may be admitted to explain the terms of the will or to "construe" the will, depending on whether the ambiguity is a latent or patent ambiguity.

"A latent ambiguity is one that arises when applying the words of a will to the subject matter or object of a devise or a devise." *In Re Rice's Estate*, 406 So. 2d 469 at 476 (Fla. 3rd DCA 1981). An example of a latent ambiguity would be a devise of the decedent's diamond ring to A, when it was found the decedent owned two diamond rings or a devise of a brokerage account when the brokerage account also listed money funds, stocks and bonds (*Kernkamp v. Bolthouse*, 714 So. 2d 655 (Fla. 5th DCA 1998)) or a devise for the benefit of testator's grandchildren when in fact the testator had no grandchildren (*Scheurer v. Tomberlin*, 240 So. 2d 172 (Fla. 1st DCA 1970)). However, a devise of lot 1 block 2 of Blackacre, when the decedent actually owned lot 2 block 1 of Blackacre, does not constitute a latent ambiguity and admission of extrinsic evidence would be prohibited. In such a case, any "construction" of the unambiguous language would amount to a reformation under the guise of a construction. *Perkins v. O'Donald*, 77 Fla. 710 727, 82 So. 401 (1919); see also *Estate of Budny*, 815 So. 2d 781 (Fla. 2nd DCA 2002).

In contrast to latent ambiguities, a patent ambiguity is an ambiguity that is obvious from the face of the will. An example of a patent ambiguity is a devise of "one third of my partnership interest to A and B". It is unclear on the face of the document whether A and B are

each to receive a one-third interest or are to share a one-third interest. *Campbell v. Campbell*. 489 So. 2d 774 (Fla. 3d DCA 1986).

Historically, extrinsic evidence was only admitted to construe a latent ambiguity and not a patent ambiguity. *Perkins v. O'Donald,* 82 So. 401 (Fla. 1919). The basis for this distinction is that the intention of the testator must be gathered from the four corners of the will itself. In the case of a latent ambiguity, the ambiguity is disclosed by reference to facts that do not appear on the face of the will and extrinsic evidence is necessary to resolve the ambiguity outside the will. Simon, Hennessey, and Moran, "Will Construction," *Litigation Under Florida Probate Code*, Seventh Edition 2009, §7.41 at p. 731. With a latent ambiguity, extrinsic evidence "enables the court to place itself as best it can in the testator's shoes, in order to understand and apply the language of the will to give effect to the intention of the testator." *Kernkamp v. Bolthouse*, 714 So. 2d 665 at 657 (Fla. 5th DCA 1998). In contrast, a patent ambiguity is obvious on the face of the will and, therefore, under the plain meaning rule, any such ambiguity should be resolved by examining the will as a whole, rather than resorting to extrinsic testimony. *Estate of Lenahan v. Lenahan*, 511 So. 2d 365 (Fla. 1st DCA 1987). Regardless of whether the ambiguity is a latent or patent ambiguity, if extrinsic evidence is admissible, it is admissible only to demonstrate or establish the circumstances surrounding the testator at the time of execution of the will and to explain the ambiguity. Id. Because it is the intention of the testator that is the polestar of will construction, extrinsic evidence is not appropriate to demonstrate what the draftsman himself intended. Id. The focus must be on the circumstances under which the decedent used the particular term.

The more recent trend in Florida law is to disregard the historical distinctions between latent and patent ambiguities in will construction cases and to receive extrinsic evidence whenever offered, with the trial judge affording it such weight as the circumstances would indicate. *Campbell v. Campbell*, 489 So. 2d 774 (Fla. 3d DCA 1986). This trend is most apparent in the Third District Court of Appeal of Florida, where the court has consistently upheld the admission of extrinsic evidence in the case of a latent or patent ambiguity. See *First Union Nat'l Bank of Fla. v. Frumkin,* 659 So. 2d 463 (Fla. 3rd DCA 1995); *Harbie v. Falk*, 907 So. 2d 566 (Fla. 3rd DCA 2005); *Garcia v. Celestron*, 2 So.3d 1061 (Fla. 3rd DCA 2009). The Second District Court of Appeal has also admitted extrinsic evidence in the case of patent ambiguities without categorizing the ambiguity as latent or patent. See *Dutcher v. Estate of Dutcher*, 437 So. 2d 788 (Fla. 2d DCA 1983). The reason for the changing trend in the law is to make it technically easier for the court to hear and consider all available evidence, because these matters are decided by a judge, not a jury. Parole evidence, if it is determined to be unreliable, can be given whatever weight the court finds to be appropriate to reach the ultimate goal of determining the intent of the testator. The law remains unclear, however, as to admission of patent ambiguities outside the Third and perhaps the Second District. In addition, a construction remedy is limited in its scope because even in light of overwhelming evidence of a unilateral error resulting in distributions contrary to the testator's intent, the court cannot rewrite the will or add language to bring the document in line with the actual intent of the testator as it could if reformation was available.

C. Restatement Third and Uniform Probate Code Approach: In contrast to the law in Florida, many states have adopted a more modern approach set forth in Restatement Third which

permits not only construction of wills where appropriate but also allows reformation of wills for unilateral mistake by the testator (or the scrivener as the testator's agent) where there is clear and convincing evidence of the mistake. This approach has also recently been adopted into the Uniform Probate Code and is consistent with the provisions in the Uniform Trust Code and the Florida Trust Code. Section 12.1 of *Restatement Third Property (Wills and Other Donative Transfers)* provides:

> *A donative document, through unambiguous, may be reformed to conform the text to the donor's intention if it is established by clear and convincing evidence (1) that a mistake of fact or law, whether in expression or inducement, affected specific terms of the document; and (2) what the donor's intention was. In determining whether these elements have been established by clear and convincing evidence, direct evidence of intention contradicting the plain meaning of the text as well as other evidence of intention may be considered.*

The comments to §12.1 explain that reformation has long been permitted for deeds, "inter vivos trusts, life-insurance contacts, and other donative documents" if there is "clear and convincing evidence" of the mistake. *Id*., comment c, p. 354. §12.1 was enacted to unify "the law of wills and will substitutes by applying to wills the standards that govern other donative documents." *Id.* The comments further explain that the historical denial by courts to permit reformation of a will is based upon the Statute of Wills, which imposes restrictions on the execution of testamentary documents with "certain formalities." *Id*. Because reformation inserts language into a will after the death of the testator, the inserted language is not executed with the statutory requirements for testamentary documents. However, there are many will substitutes, including revocable trusts, which contain testamentary language that may be reformed under present law. Testamentary trusts may also be reformed under the Uniform Trust Code and the probably under the Florida Trust Code.

In drafting §12.1, the authors of Restatement Third recognized that the law considers evidence outside the four corners of a testamentary document as inherently suspicious. That suspicion is dealt with in one of two ways: (1) through exclusion of the evidence (which is the approach presently required under Florida law) or (2) consideration of the extrinsic evidence with safeguards to "guard against giving effect to mistaken evidence" through the imposition of a strict burden of proof. The authors of Restatement Third express a belief that only the latter option of allowing the consideration of extrinsic evidence can give effect to the testator's intent, which is the polestar of the interpretation of wills, and prevent unjust enrichment of an unintended beneficiary at the expense of an intended beneficiary. Comment b, §12.1 *Restatement Third*, p. 354.

Current Florida law provides for the consideration of extrinsic evidence only when there is an ambiguity in the will (and in some Districts, only when that ambiguity is latent).[1] In such

[1] Note there is currently a limited exception to the bar on extrinsic evidence in §733.1051,Fla. Stat. Under §733.1051, Fla. Stat., (commonly referred to as the "EstateTax Patch") the court is permitted ot consider extrinsic evidence to determine the intent of the testator, even if such evidence contradicts the plain meaning of the will, in the limited circumstance where a disposition occurs in during the applicable period and the will contains a provision that makes a disposition based upon reference to certain provisions of the federal estate tax that do not presently

cases, the proponent must establish by a preponderance of the evidence that the extrinsic evidence demonstrates the true circumstances surrounding the testator at the time of execution of the will and clarifies the true intent of the testator. In the case of a reformation, however, there is no ambiguity in the will. In fact many times the extrinsic evidence may be admitted to contradict or add a provision to an otherwise unambiguous will. Therefore, Restatement Third imposes a requirement that the donor's true intention must be proved by clear and convincing evidence. Under the clear and convincing standard, the authors of the Restatement reason that this "higher standard of proof under this section imposes a heightened sense of responsibility upon the trier of fact" and will allow appellate courts to "feel free to scrutinize the trial court's work more closely than in preponderance of the evidence review." *Id.* at p. 356. The clear and convincing standard imposes a "tilt" in the risk against the party seeking reformation and "deters a potential plaintiff from bringing a reformation suit on the basis of insubstantial evidence." *Id.* at p. 357.

Clear and convincing evidence is an intermediate standard between preponderance of the evidence used in the typical civil case and the highest standard, beyond a reasonable doubt, required in a criminal case. "Clear and convincing evidence standard requires that the evidence must be found to be credible; the facts to which the witnesses testify must be distinctly remembered; the testimony must be precise and explicit and the witnesses must be lacking in confusion as to the facts in issue." *Slomowitz v. Walker,* 429 So. 2d 797 (Fla. 2d DCA 1983).

Under §12.1, reformation is permitted when there is a mistake of law or fact, in expression or inducement, which affects the specific terms of the donative document. The reformation is not intended to change the donative document; rather it is intended to enforce its true intent. "It orders a change in the drafted instrument so that it will correctly express what has been the real [intent] from its inception." Reporter's Note to Comment f, *Restatement Third* §12.1, p. 374. Reformation may not be used to correct a failure to prepare a document, to give effect to post-execution change of mind, or to compensate for other changes in circumstances. Comment h, *Restatement Third* §12.1, p. 374.

A mistake in expression is one in which the will includes a provision that misstates the testator's intent, includes a provision that was not intended to included or fails to include a provision that was intended to be included. This would encompass most scriveners' errors. By example, in *In Re Estate of Barker,* 448 So. 2d 28 (Fla. 1st DCA 1984), the drafting attorney's secretary failed to include a residual clause in the decedent's will and the attorney did not see the will before it was executed. The evidence clearly demonstrated that the testatrix intended the residual clause to be included in the will and in fact did not want her intestate heirs, who were devised a $1 in the will, to receive her estate. However, under the current Florida law, the court found the will was unambiguous on its face and therefore it was not permitted to consider extrinsic evidence. The provisions of §12.1 would allow the omitted residual clause to be included to reflect the decedent's intent at the time the will was drafted, if the error was proved by clear and convincing evidence. This would prevent the intestate heirs, who would otherwise be unjustly enriched by the scrivener's error, from receiving an unintended benefit. illustration 4 of Restatement Third gives a further example. In Illustration 4, G's will devised "$1,000 to A." Extrinsic evidence, including the testimony and files of the drafting attorney, shows that there

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exist. Note with the anticipated retrun of the estate tax as of January 1, 2011, it is likely this statute will be essentially ineffective as of the date of the proposed changes contained in this white paper.

was a mistake in transcription and that G's intention was to devise $10,000 to A. If this evidence satisfies the clear and convincing evidence standard of proof, the will is reformed to substitute "$10,000" for $1,000." *Restatement Third* §12.1 at p. 359.

Restatement Third indicates "a mistake in the inducement arises when a donative document includes a term that was intended to be included or fails to include a term that was not intended to be included, but the intention to include or not to include the term was the product of a mistake of fact or law." *Id*. at p. 358. The illustrations of the mistake in the inducement involve a grantor who executes a trust without a reservation of a power to revoke on the mistaken belief that the trust is revocable. The Reporter's Notes indicate a mistake in the inducement for a will might be if the testator omitted a child he mistakenly believed to be deceased at the time the will was executed. *Id*. at p. 376.

As stated above, reformation cannot be used to correct a failure to modify a document or to give effect to the donor's post-execution change of mind. For example, reformation would not be available in a situation where a testator signs a will but at the time of the execution expresses an intent to execute a later document changing the terms off the will. At the time of execution, the testator was aware of the terms of the will as drafted and intended the will to be effective until such time as a later will was executed. The testator's untimely or unexpectedly sudden death before a later will could be drafted does not constitute a mistake in the expression or inducement. See *Geiser v. Geiser*, 693 So. 2d 59, in which decedent executed a beneficiary designation for an insurance policy designating his mother as his beneficiary after being told the insurance company would not allow him to designate his minor children. At the time of the execution, he expressed an intent to create a trust for the benefit of his minor children and then change the beneficiary to the trust. However, he was tragically killed in an automobile accident on the very night he executed the original beneficiary designation. The court found there was no evidence of mistake at the time the beneficiary designation was executed.

The authors of Restatement Third clarify that by reading and signing a will, the testator is not deemed under §12.1 to have ratified the mistakes contained in the document. *Restatement Third*, §12.1, p. 376. Therefore, the fact that the testator read the will before signing it will not necessarily in and of itself be a bar to a later reformation of the will if there is clear and convincing evidence of a mistake in expression or inducement on the part of the testator.

Reformation of a will relates back and alters the document nunc pro tunc, not as of the day the reformation order was entered. *Id.* at 374. This is in contrast to a modification of a will, which takes effect as of the date of the order of modification.

In 2008, the Uniform Probate Code added a provision for reformation of wills based upon a similar provision for reformation of trusts contained in the Uniform Trust Code, which was in turn, based upon §12.1 of Restatement Third. UPC §2-805 provides:

> *SECTION 2-805. REFORMATION TO CORRECT MISTAKES. The court may reform the terms of a governing instrument, even if unambiguous, to conform the terms to the transferor's intention if it is proved by clear and convincing*

evidence that the transferor's intent and the terms of the governing instrument were affected by a mistake of fact or law, whether in expression or inducement.

This provision has been adopted in more than 19 states.

D. Reformation and Modification of Testamentary Documents Currently Allowed Under Florida Law: Florida law currently permits the reformation and modification of inter vivos and testamentary trusts. Therefore, under the current law, the terms of a trust within a will can be reformed but the other terms of the will cannot. On July 1, 2007, the effective date of the Florida Trust Code, the provisions of the Uniform Trust Code permitting reformation of trusts, which were based upon §12.1 of Restatement Third, were codified with the addition of a provision clarifying the ability of a court to consider extrinsic evidence even in contradiction of the plain meaning of the trust instrument. §736.0415, Fla. Stat. provides:

Upon application of a settlor or any interested person, the court may reform the terms of a trust, even if unambiguous, to conform the terms to the settlor's intent if it is proved by clear and convincing evidence that both the accomplishment of the settlor's intent and the terms of the trust were affected by a mistake of fact or law, whether in expression or inducement. In determining the settlor's original intent, the court may consider evidence relevant to the settlor's intent even though the evidence contradicts an apparent plain meaning of the trust instrument

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Reformation of Trusts is not a new concept in Florida. Even prior to the effective date of §736.0415, Fla.Stat. Florida courts applied the equitable principals of reformation to reform a trust to correct a unilateral drafting error in an inter vivos trust with testamentary aspects. *Robinson v. Robinson,* 720 So. 2d 23 (Fla. 4th DCA 1998). In *Robinson,* however, the court took great care to distinguish an inter vivos trust from a testamentary trust and held that the inter vivos trust was not a testamentary devise. The court also held that the reformation must not be contrary to the interest of the settlor and limited its holding to situations in which the dispute is between competing beneficiaries of the trust. Following its holding in *Robinson*, the Fourth District Court of Appeal again upheld reformation of a trust with testamentary aspects in *Popp v. Rex,* 916 So. 2d 954 (Fla. 4th DCA 2005).

Although the case law clearly prohibits reformation of wills, some Florida courts have "reformed" wills under the guise of construction. In *In re Estate of Reese,* 622 So.2d 157 (Fla. 4th DCA 1993), petitioner ask the court to reform a testamentary trust into generation skipping exempt and non-exempt trusts, with no other change in the provisions of the trust.[2] All interested persons consented. Judge Rudnick in Palm Beach County denied the relief by his Order Denying the Petition for Authorization to Divide Trust "A" Into Generation Skipping Transfer Exempt and Non Exempt Trusts finding:

Reduced to its most simple terms, the issue presented to the court is whether a circuit court in the State of Florida, in the exercise of its equitable jurisdiction, can and will rewrite the decedent's last will and testament so as to afford to the

[2] This case arose prior to the amendment to F.S. §737.403 to permit severance for tax purposes and the later broader provisions of the Florida Trust Code.

> *estate the greatest tax advantages allowable pursuant to the Tax Reform Act of 1986 where the testator, for reasons best known to himself, who had ample opportunity, failed to do so? For the reasons set forth below, the court answers the question presented in the negative. Id. at 158.*

The parties sought relief from the Fourth District arguing that they had simply asked construction and not reformation. The District Court agreed and found

> *We agree with appellants' argument that the lower court misconstrued their petition to divide the trusts as a request for reformation of the decedent's will, as opposed to a request for construction of the will. . . . Therefore, we hold that under the facts of this case, the trial court erred when it failed to construe the decedent's will consistent with his intent to minimize the federal estate tax liability under Trust A with specific reference to the ramifications of the generation skipping transfer tax. Id. at 158-159.*

See also *Wilson v. First Florida Bank,* 498 So. 2d 1289 (Fla. 2nd DCA 1986), where the court "construed" a will to add words of conveyance to a residuary clause that mistakenly omitted such direction.

E. Current Alternative Available in Case of a Will. If an intended beneficiary is, however, lucky enough to convince a court to reform a will under the guise of a construction, care must be taken if that reformation involves tax issues. Under the U.S. Supreme Court's decision in *Commissioner v. Estate of Bosch,* 387 U.S. 456 (1967), federal courts and the Internal Revenue Service are not bound by decisions of state courts other than the state's highest court on an underlying issue of state law that affects application of a federal tax statute when the United States is not a party to the proceeding. Federal courts and the Service are to apply what they find to be the correct rule or interpretation of state law after giving "proper regard" to relevant rulings of other courts of the state. In other words, the federal courts are free to ignore the decisions of state trial and intermediate appellate courts affecting federal tax revenue if those federal courts believe that state law was not properly applied. Therefore, under the current law, reformation of a will is not afforded the same dignity as a reformation of a will substitute by the federal courts if the reformation involves tax implications because the state law cannot currently be properly applied to reform a will. See Barry Spivey, *Reformation of Trusts in Florida,* Florida Fellows ACTEC Annual Meeting, October 2000.

To remedy the injustice that occurs as a result of the inability of a court to reform a will, many attorneys will seek the imposition of a constructive trust as an alternative remedy. A constructive trust is "constructed to prevent the unjust enrichment of one person at the expense of the other due to 'fraud, undue influence, abuse of confidence or mistake in the transaction that originates the problem.'" Geiser v. Geiser, 693 So2d 59 (Fla. 5th DCA 1997), quoting Wadlington v. Edwards, 92 So. 2d 629, 632 (Fla. 1957). The Florida Supreme Court in In Re: Estate of Tolin 622 So. 2d 988 (Fla. 1993) imposed a constructive trust where the decedent had attempted to revoke a codicil by destroying what he thought was an original but was in fact a photocopy of the document. The court based its holding on the fact that "it was clear from the evidence that the decedent's intent to revoke his codicil was frustrated by his mistake in

destroying the copy of the codicil rather than original" and the beneficiary under the codicil was unjustly enriched by the testator's mistake at the expense of the intended beneficiary. Id. at 991. But see Allen v. Dalk, 826 So. 2d 245 (Fla. 2002) in which the Florida Supreme Court subsequently refused to impose a constructive trust over assets of an estate in favor of a beneficiary named in an invalidly executed will. In Allen, the court held that there was no evidence offered that the improper execution was a mistake when the testatrix failed to sign the will (although it was signed by the witnesses and solemnized by the notary public and the testatrix had signed the other related documents that were being passed around the table) and declined to impose a constructive trust over the assets. Id. at 248.

F. Modification of Wills: Restatement Third also provides for modification of donative documents, including wills to achieve the donor's tax objections. §12.2. provides:

> *A donative document may be modified in a manner that does not violate the donor's probable intention, to achieve the donor's tax objectives.*

This section is based on the probable intent that the testator would have wanted the modification if he or she realized that his or her desired tax objectives would not be realized under the plain meaning of the will. Again, the testator's objectives are established through the admission of extrinsic evidence. However, one important distinction is the clear and convincing standard is not required for this modification.

As with §12.1 Restatement Third, this section was adopted in the Uniform Trust Code §416 and more recently in the Uniform Probate Code §2-806. The Uniform Trust Code §416 has been codified in Florida law in F.S. §736.0416. F.S. §736.0416 is identical to §12.2 of Restatement Third with the addition of a directive that the court may provide that the modification shall have retroactive effect and provides as follows:

> *Upon application of any interested person, to achieve the settlor's tax objectives the court may modify the terms of a trust in a manner that is not contrary to the settlor's probable intent. The court may provide that the modification has retroactive effect.*

The Florida Trust Code (which are beyond the scope of this white paper) also permits many other types of judicial and non-judicial modifications of trusts that have been sanctioned by the legislature. Again, without a statute permitting modification, any modification permitted by the court under the guise of construction of a will most likely will not be recognized by the IRS for tax purposes.

G. Attorneys Fees: Currently, the Florida Probate Code permits a court to award attorneys' fees to an attorney who has rendered services which have resulted in a benefit to the estate under §733.106(3), Fla. Stat. The services rendered by an attorney in a successful reformation or modification action would most likely be deemed to benefit an estate and therefore the attorneys fees could be awarded by the court. In addition, §733.106(4) permits the court to direct from what part of the estate the attorneys fees and costs may be paid, permitting the court to allocate the costs of defending an unsuccessful action against the petitioner if he or

she has an interest in the estate. However, if the petitioner does not have an interest in the estate but for the reformation or modification, the estate would be forced to bear the cost of the defense of the unsuccessful modification or reformation action. In addition, a non-beneficiary (or immaterial beneficiary) has little or no exposure for assessment of fees in an unsuccessful action and the true beneficiaries have little or no recourse in dealing with nuisance claims.

Under the Florida Trust Code, which, as stated above, currently contains statutory authority permitting modification and reformation of trusts, there is a also a corresponding fee shifting provision, which permits a court to award fees and costs in such actions against a party's share in the trust or in the form of a personal judgment against the party individually. §736.1004 provides as follows:

> *736.1004 Attorney's fees and costs.—*
> *(1)(a) In all actions for breach of fiduciary duty or challenging the exercise of, or failure to exercise, a trustee's power; and*
> *(b) In proceedings arising under ss. 736.0410 – 736.0417,*
> *the court shall awared taxable costs as in chancery actions, including attorney fees and guardian ad litem fees.*
> *(2) When awarding taxable costs under this section, including attorney fees and guardian ad litem fees, the court, in its discretion, may direct payment for a party's interest, if any in the trust or enter a judgment that may be satisfied from other property of the party, or both.*

This fee shifting statute further protects the assets of the settlor's trust against nuisance claims for modification and reformation of trusts.

III. EFFECT OF PROPOSED CHANGE

Under § 732.615, Fla. Stat., courts will be permitted to consider extrinsic evidence without regard to whether the will contains an ambiguity to determine the true intent of the testator in the terms of the will. Further, the court will be permitted to reform the terms of a will, even if unambiguous on its face, to conform to the true intent of the testator if it is proved by clear and convincing evidence that both the accomplishment of the testator's intent and the terms of the will were affected by a mistake of fact or law, whether in the expression or inducement. This will prevent the injustice created by a scrivener's error which results in a benefit to an unintended beneficiary to the determinant of the testator's true intended beneficiary. It will also assure the intent of the testator, not the words of the scrivener, is the true polestar of will construction.

Under §732.616, Fla. Stat., courts will be permitted to modify the terms of the will to achieve the testator's tax objectives provided the resulting terms are not inconsistent with the probable intent of the testator. Here the document is modified rather than reformed and the modification is limited to tax objectives. Therefore, the strict burden of proof is not required as it is presumed that all decedents intend to maximize their tax savings. Note again, no determination of an ambiguity is required for the consideration of extrinsic evidence. The court may provide that the modification has retroactive effect.

The implementation of both §§732.615 and 732.616, Fla. Stat., will also provide a stronger argument for reformations and modifications to be recognized for federal tax purposes. While federal tax law determines whether or not a reformation or modification of a testamentary document will be recognized by the Internal Revenue Service for tax purposes, the existence of statutory authority permitting such reformation or modification provides a much stronger case for the recognition of such reformation or modifications and provides reformation and modification of wills the same tax treatment already afforded reformation and modification of trusts and other will substitutes. A reformation or modification will not be recognized under federal law if there is no state authority for the modification.

Under §733.1061, Fla. Stat., the court will be permitted to award taxable costs as in chancery actions, including attorneys' fees and guardian ad litem fees. The court is given the discretion to direct payment of the taxable costs, including attorneys' fees and guardian ad litem fees, from a party's share in the estate or to enter a judgment which may be satisfied from other property, or to do both. This new statute mirrors the current provisions of the Florida Trust Code applicable to reformation and modification of trusts under §736.1004, Fla. Stat. This statute provides an additional safe guard against unsubstantiated reformation or modification actions by imposing a risk of assessment of a personal judgment of attorneys' fees.

IV. ANALYSIS

The proposed statutes are designed to bring the law of modification and reformation of wills in line with the modification of trusts and other will substitutes. With the extensive use of revocable trusts as will substitutes, and the requirement that the testamentary aspects of revocable trusts be executed with the formality of a will, there is no reason to permit a revocable trust to be reformed to reflect the intent of the settlor or to be modified to achieve a settlor's tax objectives but not a will. It will also bring Florida in line with the modern trend across the country permitting consideration of the extrinsic evidence while putting in place safeguards to guard against giving effect to mistaken evidence through the imposition of a strict burden of proof in reformation cases and the addition of a new attorneys' fees statute permitting a personal judgment against an unsuccessful litigant.

The proposed statutes will mirror the statutes already in place in the Florida Trust Code.

V. FISCAL IMPACT ON STATE AND LOCAL GOVERNMENTS

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

VI. DIRECT IMPACT ON PRIVATE SECTOR

The proposal will not have a direct economic impact on the private sector.

VII. CONSTITUTIONAL ISSUES

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

VIII. OTHER INTERESTED PARTIES

None are known at this time.

~~CHAPTER 17~~

Chapter 17

MARKETABLE RECORD TITLE ACT

~~STANDARD~~
Standard 17.1

~~EFFECT~~PURPOSE OF THE MARKETABLE RECORD TITLE ACT

STANDARD: THE ACT SHOULD BE RELIED UPON TO ELIMINATE ~~THOSE~~ IMPERFECTIONS OF TITLE ~~WHICH~~THAT FALL WITHIN ITS SCOPE.

Authorities & References: *F.S.* 712.01~~.10 (1979~~, et seq. (2009); *City of Miami v. St. Joe Paper Co.*, 364 So. 2d 43~~9, 449~~ (Fla. 1978) (holding that the Act is constitutional); *ITT Rayonier, Inc. v. Wadsworth*, 346 So. 2d 1004, 1010 (Fla. 1977) (mother's life estate holder's deed served as root of title to eliminate the remainder interests of her children); *Marshall v. Hollywood, Inc.*, 236 So. 2d 114, 120 (Fla. 1970), *cert. denied*, 400 U.S. 964 (1970) (the Act operates to make title based on wild deed marketable); *Sawyer v. Modrall*, 286 So. 2d 610 ~~(~~, 613 (Fla. 4th D.~~C.A. Fla.~~CA 1973); *cert. denied*, 297 So. 2d 562 (Fla. 1974) (the Act operates to eliminate interest created by deed from the Trustees of the Internal Improvement Trust Fund); *Wilson v. Kelley*, 226 So. 2d 123 ~~(~~, 128 (Fla. 2d D.~~C.A. Fla.~~CA 1969) (quit claim deed may serve as root of title only if it evidences an intent to convey an identifiable interest); *Whaley v. Wotring*, 225 So. 2d 177 (Fla. 1st D.~~C.A. Fla.~~CA 1969); I BOYER, FLORIDA REAL ESTATE TRANSACTIONS §§14.20 to 14 ~~to .14-11 (1980~~.22 (2007).

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Comment: For a discussion of the ~~constitutional question involved~~constitutionality of the Act~~; see I~~ FLORIDA REAL PROPERTY ~~PRACTICE §6.6~~TITLE EXAMINATION AND INSURANCE §2.5 (CLE ~~2d~~5th ed. ~~1971~~2006). ~~*See also, Wichelman v. Messner*, 250 Minn. 88, 83 N.W. 2d 800 (1957); *Annot.*, 71 A.L.R.2d 816 (1960); Boyer & Shapo, *Florida's Marketable Title Act: Prospects and Problems*, 18 MIAMI L. REV. 103 (1963). In~~ *City of Miami v. St. Joe Paper Co.*, 364 So. 2d 439, 449 (Fla. 1978~~), the Florida Supreme Court held~~) (holding that the ~~Marketable Record Title~~ Act is constitutional); *Wichelman v. Messner*, 250 Minn. 88, 83 N.W. 2d 800 (1957); *Annot.*, 71 A.L.R.2d 816 (1960); Boyer & Shapo, *Florida's Marketable Title Act: Prospects and Problems*, 18 MIAMI L. REV. 103 (1963).

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STANDARD 17.2

MARKETABLE RECORD TITLE

STANDARD: ~~A~~ MARKETABLE RECORD TITLE ~~TO AN ESTATE IN LAND~~ EXISTS, SUBJECT TO THE ~~SPECIFIC~~ EXCEPTIONS OF THE ACT, WHEN RECORD TITLE HAS BEEN VESTED IN A PERSON, ALONE, OR TOGETHER WITH PREDECESSORS IN ~~TITLE, HAS BEEN VESTED WITH SUCH ESTATE OF RECORD~~ INTEREST FOR THIRTY YEARS OR MORE AND NOTHING OF RECORD PURPORTS TO DIVEST THE PERSON OF THE ESTATE.

Problem 1: The following chain of title appears of record. In ~~19~~20~~3~~1955 John Doe conveyed Blackacre to "Richard Roe and his heirs for so long as the premises are used for residential purposes." In ~~19~~30~~3~~1965 Richard Roe conveyed Blackacre to "Simon Grant and his heirs." In ~~19~~50~~3~~1985 Simon Grant conveyed Blackacre to "Thomas Frank and his heirs." In ~~19~~70~~3~~2005 did Thomas Frank have marketable record title to Blackacre in fee simple absolute?

Answer: Yes. The ~~19~~30~~3~~1965 conveyance to Simon Grant purports to transfer the fee simple absolute interest which Thomas Frank claims and was recorded at least thirty years prior to the time marketability is being determined in ~~1970.~~2005. Hence the ~~19~~30~~3~~1965 conveyance is the root of title and all interests not evidenced by it or subsequently created or transferred and not excepted under the Act are extinguished.

Problem 2: Same facts as Problem 1 except that in ~~19~~30~~3~~1965 Richard Roe delivered the deed of Blackacre to Simon Grant, but the deed was not recorded until ~~1945.~~1980. In ~~19~~70~~3~~2005 did Thomas Frank have marketable record title to Blackacre in fee~~s~~ simple absolute?

Answer: No. The root of title is the last title transaction to have been recorded at least thirty years prior to the time marketability is being determined. The ~~19~~20~~3~~1955 conveyance is the root of title and it ~~creates~~contains the restriction with the possibility of reverter, hence that interest is not extinguished.

Problem 3: John Doe is the grantee in a deed to Blackacre in fee simple absolute recorded in ~~1930.~~1975. Nothing affecting Blackacre has been recorded since then. In ~~19~~68~~3~~2006 did John Doe have marketable record title to Blackacre?

Answer: Yes. The deed qualifies as a root of title and all interests~~, unless specifically exempted, arising~~ prior to the recording of the deed in ~~1930,~~1975 are extinguished, unless specifically excepted under the Act.

~~Problem 4: John Doe is the last grantee in the regular chain of title to Blackacre by a deed recorded in 1930. John Doe died in 1939. Court proceedings recorded in 1940 involving his estate establish that his sole heir, Ralph Doe, acquired ownership of Blackacre. In 1972 did Ralph Doe have marketable record title to Blackacre?~~

Problem 4: In 1970, John Doe conveyed Blackacre to Richard Roe. In 1975, Simon Grant, although he never owned Blackacre, purports to convey a portion of Blackacre to Thomas Frank. Does Richard Roe have marketable title?

Answer: No. Although the 1970 deed is the root of title and the 1975 deed was a wild deed, the latter nevertheless created an estate, interest, claim or charge arising out of a title transaction which has been recorded subsequent to the effective date of the root of title, so is an exception to

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marketability under *F.S.* 712.03(4).

Problem 5: John Doe is the last grantee in the regular chain of title to Blackacre by a deed recorded in 1960. John Doe died in 1969. Court proceedings recorded in 1970 involving his estate establish that his sole heir, Ralph Doe, acquired ownership of Blackacre. In 2001 did Ralph Doe have marketable record title to Blackacre?

Answer: Yes. The court proceedings affect title to land and were recorded thirty years prior to the time marketability is being determined, hence they qualify as the root of title.

Authorities & References: *F.S.* 712.01~~–.04 (1979); 1~~, et seq. (2009); FLORIDA REAL PROPERTY ~~PRACTICE §§6.1–~~ TITLE EXAMINATION AND INSURANCE §§ 2.5~~–~~.12 (CLE ~~2d~~5th ed. ~~1971~~2006); 1 BOYER, FLORIDA REAL ESTATE TRANSACTIONS §§ 14.~~14-1–.14-7 (1980); ATIF TN 28.03~~22 (2007); Fund Title Note 10.01.02.

Comment: A wild or interloping deed may constitute a root of title. *City of Miami v. St. Joe Paper Co.*, 364 So. 2d 439~~,~~ 446 (Fla. 1978). Exceptions to the operation of the Act are contained in F.S. 712.03–.04 (~~1979~~2009) and are dealt with specifically in other ~~Title~~ Standards in this Chapter.

The Act does not eliminate an interest or claim arising out of a title transaction recorded after the root of title, even if the subsequent interest or claim is outside the chain of title, such as a wild deed. *See, Holland v. Hattaway*, 438 So. 2d 456, 468-470 (Fla. 5th DCA 1983) (the Act did not extinguish an easement purportedly created by a wild deed recorded several years after the root of title, although the court held that the easement was extinguished on other grounds).

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STANDARD 17.3

EXTINGUISHMENT OF INTERESTS

STANDARD: SUBJECT TO THE EXCEPTIONS IN MRTA, ALL ESTATES, INTERESTS, CLAIMS OR CHARGES ~~WHATSOEVER, THE EXISTENCE~~THAT EXIST BY VIRTUE OF ~~WHICH DEPENDS UPON~~ ANY ACT, TITLE TRANSACTION, EVENT OR OMISSION THAT OCCURRED PRIOR TO THE EFFECTIVE DATE OF THE ROOT OF TITLE~~,~~ ARE EXTINGUISHED BY THE ACT ~~UNLESS THEY ARE DISCLOSED BY OR ARE DEFECTS INHERENT IN THE MUNIMENTS OF TITLE BEGINNING WITH THE ROOT OF TITLE, PROVIDED NO OTHER EXCEPTION TO THE ACT IS APPLICABLE~~.

Problem 1: A deed to Blackacre executed by John Doe and recorded in ~~1930~~1965 contained ~~(1)~~ a condition subsequent that the grantor or his heirs could re-enter in the event of a breach of certain specified conditions and (2) a special limitation that the land was conveyed "so long as" it was used for a specified purpose. A deed to Blackacre recorded in ~~1940~~1975 does not mention any conditions or limitations. No notice of a claim based on them has been filed. Marketability of title to Blackacre was sought to be determined in ~~1972.~~2007. Were the right of entry for condition broken and the possibility of reverter barred as clouds upon title?

Answer: Yes. The claims would be based on a title transaction occurring prior to ~~1940~~1975, the effective date of the root of title and no exception is applicable.

Problem 2: Same facts as Problem 1 except that the ~~1940~~1975 deed, or a subsequent deed, contained a provision that the conveyance was "subject to conditions and limitations of record." Were the rights thereby preserved?

Answer: No. Interests disclosed by the muniments of title, beginning with the root of title, are preserved but *F.S.* 712.03(1) requires that a general reference to such interests include specific identification by reference to book and page of record or by name of recorded plat.

~~Problem 3: A deed to Blackacre executed by John Doe and recorded in 1930 reserved an easement. A deed to Blackacre in 1940 does not mention the easement. John Doe and his successors in interest have used the easement, or a part thereof, since 1930. No notice of a claim based on the easement has been filed. Marketability of title to Blackacre was sought to be determined in 1972. Did the easement constitute a cloud upon the title?~~

Problem 3: The plat for Blackacre Subdivision, filed in 1925, contained a setback restriction. A deed to Lot 1 in Blackacre Subdivision recorded in 1953 contained a reference to the name of the recorded plat, as did subsequent deeds, but none specifically referenced the setback restriction. Is the setback restriction still valid as to Lot 1?

Answer: Yes. A restriction is preserved if the root or subsequent muniment of title by name refers to the recorded plat that imposed the restriction. *F.S.* 712.03(1).

Problem 4: A deed to Blackacre executed by John Doe and recorded in 1965 reserved an easement. A deed to Blackacre in 1975 does not mention the easement. John Doe and his successors in interest have used the easement, or a part thereof, since 1965. No notice of a claim based on the easement has been filed. Marketability of title to Blackacre was sought to be determined in 2007. Did the easement constitute a cloud upon the title?

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Answer: Yes. Easements or rights, interests, or servitudes in the nature of easements, rights of way and terminal facilities and encumbrances thereon are preserved by *F.S.* 712.03(5) so long as they, or any part thereof, are used.

~~Authorities & References:~~ ~~*F.S.* 712.03-.04(1979); 1 BOYER, FLORIDA REAL ESTATE TRANSACTIONS §§14.14-4[1]-[2] (1980).~~

Problem 5: In 1975, ABC Corp. purports to convey Blackacre to John Doe. The deed is signed by "Richard Roe as Secretary of ABC Corp." No corporate resolution was recorded authorizing Richard Roe to execute deeds on behalf of ABC Corp. Nothing affecting Blackacre has been recorded since then. Does John Doe have marketable title?

Answer: No. Although the deed is the root of title, it contains an inherent defect. Hence, the potential ownership claim of ABC Corp. is not extinguished.

Problem 6: A deed to Blackacre executed by John Doe and recorded in 1965 reserved the right of entry to explore and extract mineral rights. A deed to Blackacre in 1975 does not mention the mineral rights reservation. No notice of a claim based on the reservation has been filed. Marketability of title to Blackacre was sought to be determined in 2007. Did the right of entry to explore and extract mineral rights constitute a cloud upon the title?

Answer: No. *See* Comment, below.

Authorities & References: *F.S.* 712.03-.04 (2009); 1 BOYER, FLORIDA REAL ESTATE TRANSACTIONS §14.22 (2007).

Comment: The "root of title" is any title transaction that describes the land sufficiently, and has been of record for more than 30 years. *F.S.* 712.01; *Marshall v. Hollywood, Inc.*, 224 So. 2d 743, 750 (Fla. 4th DCA 1969), aff'd 236 So. 2d 114 (Fla. 1970) (a void deed may be a root of title); *Miami V. St. Joe Paper Co.*, 364 So. 2d 439, 446 (Fla. 1978) (wild deed); *Kittrell v. Clark*, 363 So. 2d 373, 374 (Fla. 1st DCA 1978) (probate); *Mayo v. Owens*, 367 So. 2d 1054, 1057 (Fla. 1st DCA 1979) (judgment determining heirs).

The title examiner should be vigilant for inherent defects in the root of title. *See, e.g., Marshall v. Hollywood, Inc., supra*, at 751 ("'defects in the muniments of title' do not refer to defects or failures in the transmission of title . . . but refer to defects in the make up or constitution of the deed or other muniments of title on which such transmission depends").

A restriction older than 30 years is preserved if the root of title or a subsequent muniment of title contains a reference to the name of the recorded plat that imposed the restriction. *Sunshine Vistas Homeowners Association v. Caruana*, 623 So. 2d 490, 492 (Fla. 1993).

The Act may operate to extinguish a county's claim of ownership. *Florida DOT v. Dardashti Properties*, 605 So. 2d 120, 122 (Fla. 4th DCA 1992) (County's interest in a strip of land held for right of way was extinguished by MRTA).

The Act operates to extinguish an otherwise valid claim of common law way of necessity when such claim was not asserted within 30 years. *H & F Land , Inc. v. Panama City-Bay County Airport and Development District*, 736 So. 2d 1167 (Fla. 1999). The Act does not, however, operate to extinguish statutory ways of necessity. *Blanton v. City of Pinellas Park*, 887 So. 2d 1224, 1233 (Fla. 2004) (receding from *H & F Land , Inc.* to the extent its dicta indicated that the Act applies to statutory ways of necessity).

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Whether the Act extinguishes mineral rights is undecided and questionable since the courts have held that mineral rights constitute a separate estate from the surface rights. *See*, *e.g.*, *P & N Investment Corp. v. Florida Ranchettes, Inc.*, 220 So. 2d 451, 453 (Fla. 1st DCA 1969). However, the Act, subject to its exceptions, does serve to eliminate rights of entry to explore and extract mineral rights, whether expressly reserved or implied. *Noblin v. Harbor Hills Development, L.P.*, 896 So. 2d 781, 785 (Fla. 5th DCA 1981) (the Act serves to extinguish rights of entry for exploring or mining oil, gas, minerals, or fissionable materials, unless those rights of entry or easements are excepted); *but see*, *F.S.* 704.05 (excluding the rights of entry held by the state or any of its agencies, boards or departments from operation of the Act).

See, *F.S.* 712.03 for a list of exceptions for rights not extinguished by the Act. *F.S.* 712.03(9), effective July 1, 2010 added another exception for any right, title or interest held by the Trustees of the Internal Improvement Trust Fund, any water management district created under chapter 373, or the United States.

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STANDARD 17.4

~~FILING OF~~RECORDING A NOTICE TO PROTECT INTERESTS

STANDARD: RECORDING A PROPER NOTICE PROTECTS ESTATES, INTERESTS, CLAIMS, OR CHARGES ~~MAY BE PROTECTED~~ FROM THE OPERATION OF THE ACT ~~BY THE FILING OF PROPER NOTICE~~.

Problem 1: John Doe, the record owner of Blackacre, gave a mortgage to Richard Roe encumbering Blackacre, which was recorded in January, ~~1942.~~1975. The last payment was not due until ~~1982.~~2010. On June 15, ~~1942~~1975 a deed to Blackacre, which qualified as a root of title, was recorded but it contained no mention of the mortgage. Must Richard Roe file proper notice to preserve the lien of his mortgage by June 15, ~~1972?~~2005?

Answer: Yes.

Problem 2: John Doe gave a 99-year lease to Richard Roe on July 1, ~~1940~~1975, at which time the lease was recorded and Roe went into possession of the land. Did John Doe need to file proper notice of his ownership prior to July 1, ~~1970~~2005 to preserve his interest?

Answer: No. The ~~1940~~1975 transaction created a leasehold interest only. John Doe's fee simple interest would not be extinguished. Filing of notice is necessary only when there is a subsequent title transaction that purports to divest the interest claimed.

~~Authorities & References:~~ ~~*F.S.* 712.03(2), 712.05-.06 (1979), 1 BOYER, FLORIDA REAL ESTATE TRANSACTIONS §14.14-4[3] (1980).~~

Problem 3: Blackacre Homeowners' Association filed a Declaration of Covenants and Restrictions for Blackacre Subdivision in 1975. John Doe conveyed Lot 1 in Blackacre Subdivision to Richard Roe in 1978. That deed did not mention the covenants or restrictions, and there is no subsequent specific reference to the recording information of the covenants or restrictions in the public record. In 2009, marketability was sought to be determined as to Lot 1. Are the covenants and restrictions still valid as to Lot 1?

Answer: No, unless the Blackacre Homeowners' Association timely complied with the notice requirements under *F.S.* 712.06 or used the procedures in *F.S.* 720.403 – 720.407 to revive the expired covenants.

Authorities & References: *F.S.* 712.03(2), 712.05-.06 (2009), 1 BOYER, FLORIDA REAL ESTATE TRANSACTIONS §14.23[3] (2007).

Comment: The requirements of the notice filed pursuant to the Act are set forth at *F.S.* 712.06 (~~1979).~~2009).

The notice merely protects claims as they otherwise exist and does not validate a claim or create a new claim.

F.S. Chapter 712 was amended effective October 1, 1997, to allow homeowner associations to file a notice under MRTA to preserve covenants and restrictions. *F.S.* 712.05 (1) (2009).

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If a false or fictitious claim is asserted by the filing of notice pursuant to the A~~ct, the~~ prevailing party may be entitled to costs and ~~attorney~~attorneys' fees arising out of any action related thereto and damages sustained as a result of the filing of such notice. *F.S.* 712.08 (~~1979~~2009).

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STANDARD 17.5

RIGHTS OF PERSONS IN POSSESSION

STANDARD: THE ACT DOES NOT ~~AFFECT OR EXTINGUISH~~ELIMINATE THE RIGHTS OF ~~ANY PERSON~~PERSONS IN POSSESSION OF LAND.

Problem: John Doe was grantee in a deed to Blackacre recorded in ~~1940~~1970, which constitutes ~~the root~~ of title. Nothing further appears of record, but investigation in ~~1972~~2002 disclosed that Richard Roe was in actual open possession of Blackacre. In ~~1972~~2002 did John Doe have a marketable record title to Blackacre free of the claims of Roe?

Answer: No. The possession of Roe was inconsistent with the record title in John Doe and was therefore prima facie hostile. Upon satisfactory proof that ~~Roe's~~Roe's possession was in fact held in subordination to the title of John Doe (as, for example, that he was a tenant, licensee, or an employee of Doe), Doe would have had marketable record title under the Act.

Authorities & References: *F.S.* 712.03(03) (~~1979~~2009); 1 BOYER, FLORIDA REAL ESTATE TRANSACTIONS §14.~~14~~ 23[4[~~4] (1980~~] (2007).

Comment: No person can have a marketable record title within the meaning of the Act if the land is in the hostile possession of another person. However, the exception to the Act prevents destruction of existing rights and does not create any new rights.

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~~STANDARD 17.6~~

SUBSEQUENT RECORDED INSTRUMENTS

STANDARD: THE ACT DOES NOT ~~AFFECT OR EXTINGUISH~~ELIMINATE ESTATES, INTERESTS, CLAIMS, OR CHARGES ARISING OUT OF A TITLE TRANSACTION RECORDED SUBSEQUENT TO THE RECORDING OF THE ROOT OF TITLE.

Problem 1: John Doe is the last grantee of record in a regular chain of title to Blackacre by ~~a~~ deed recorded in ~~1940.~~1970. A deed to Blackacre recorded in ~~1950~~1980 recites that John Doe died intestate and the grantor therein named, Richard Roe, was the sole heir at law. In ~~1970~~2007, was the ~~1950~~1980 deed a title transaction not affected or extinguished by the Act?

Answer: Yes. Even if the facts recited are not correct ~~it~~, the 1980 deed is a recorded instrument that affects title to an estate or interest in land, and, hence, a title transaction. Any recorded instrument or court proceeding ~~which~~that affects any estate or interest in land qualifies as a title transaction.

Problem 2: John Doe is the last grantee of record in a regular chain of title to Blackacre by a deed recorded in ~~1940.~~1970. In ~~1950~~1980 a stranger to the title executed a deed to Blackacre, at which time the deed was recorded. In ~~1970 was~~determining marketability in 2001, did the ~~1950~~1980 deed constitute a title transaction subsequent to the root of title and therefore not ~~affected or extinguished~~eliminated by the Act?

Answer: Yes. With respect to wild deeds, see Title Standard 16.5 (Wild Instruments — Stranger to Stranger).

Authorities & References: *F.S.* 712.01, 712.03(4) (~~1979~~2009); 1 BOYER, FLORIDA REAL ~~ES~~TATE TRANSACTIONS §14.~~14~~ 423[5] (~~1980~~2007).

Comment: The fact that the Act does not ~~affect or extinguish~~eliminate an estate, interest, claim, or charge arising out of a title transaction does not bear, either favorably or unfavorably, on the validity of such estate, interest, claim, or charge. That is, the Act protects existing rights but does not create new rights.

A wild deed may constitute a root of title. *City of Miami v. St. Joe Paper Co.*, 364 So.2d 439~~,~~ 446 (Fla. 1978).

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STANDARD 17.7

RIGHTS OF PERSONS TO WHOM
TAXES ARE ASSESSED

STANDARD: THE ACT DOES NOT ~~AFFECT OR EXTINGUISH~~ELIMINATE THE RIGHTS OF A~~NY~~ PERSON IN WHOSE NAME THE LAND IS ASSESSED FOR THE PERIOD OF TIME THE LAND IS SO ASSESSED AND THREE YEARS THEREAFTER.

Problem 1: John Doe was grantee in a deed to Blackacre in ~~1940~~1970 which constitutes the root ~~of title.~~ Nothing further appears of record, but investigation in ~~1972~~2002 disclosed that Blackacre had been assessed on the county tax rolls in the name of Richard Roe since ~~1970.~~2000. In ~~1972~~2002, did John Doe have a marketable record title to Blackacre free of the claims of Roe?

Answer: No. The rights of Roe would need to be ascertained. However, this exception to the Act only prevents destruction of existing rights and does not create any new rights so Roe would have to prove up his purported interest based on something more than the mere payment of property taxes.

Problem 2: Same facts as Problem 1 except that ~~1972~~2002 is the last year that Blackacre is assessed in the name of Richard Roe. In ~~1973~~2003 through ~~1975~~2005 Blackacre was assessed in the name of John Doe. In ~~1976~~2006 did John Doe have a marketable record title to Blackacre free of the claims of Roe?

Answer: Yes. Any rights of Roe would be preserved for only three years after Blackacre was last assessed in his name. This assumes that no other exception is applicable to preserve any rights of Roe.

Authorities & References: *F.S.* 712.03(6) (~~1979~~2009); 1 BOYER, FLORIDA REAL ESTATE TRANSACTIONS §14.~~14-4~~23[6] (~~1980~~2007).

Comment: This exception necessitates examination of the county tax rolls for the three years prior to the year in which marketability is being determined. ~~See Title Standard 17.11 (Scope Of Title Examination).~~

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STANDARD 17.8

RIGHTS OF THE UNITED STATES AND FLORIDA

STANDARD: THE ACT DOES NOT ~~AFFECT~~ELIMINATE ANY RIGHT, TITLE, OR INTEREST OF THE UNITED STATES OR FLORIDA RESERVED IN THE PATENT OR DEED BY WHICH THE UNITED STATES OR FLORIDA PARTED WITH TITLE.

Problem: John Doe executed a deed to Blackacre and it was recorded in ~~1930.~~1960. No mention ~~of any~~ other interest was contained in the deed. Nothing affecting Blackacre has been recorded since. The title to Blackacre was being examined in ~~1975.~~2005. The seller agreed to furnish an abstract of title. The buyer demanded that the seller provide an abstract which included the conveyance by which the United States or Florida parted with title. Was the demand justified?

Answer: Yes. The statutory exception includes the interests of any officers, boards, commissions or other agencies of the United States or Florida.

Authorities & References: *F.S.* 712.04 (~~1979); 1 BOYER, FLORIDA REAL ESTATE TRANSACTIONS §14.14-5 (1980); I FLORIDA REAL PROPERTY PRACTICE §§6.4, 9.5 (CLE 2d ed. 1971).~~2009).

Comment: With respect to submerged sovereignty land, see *F.S.* 712.03(7) (~~1979~~2009) (effective June 15, 1978); ~~*Starnes*~~*Coastal Petroleum Co. v. ~~Marcon Inv. Group~~*, ~~571 F.2d 1369 (5th Cir. 1978); *Odom v. Deltona Corp.*, 341 So. 2d 977~~*American Cyanamid Co.*, 492 So. 2d 167 (Fla. ~~1977); *Sawyer v. Modrall*, 286 So. 2d 610 (4th D.C.A. Fla. 1973~~1986), cert. den~~ied, 297 So. 2d 562 (Fla. 1974).~~. 479 U.S. 1065 (1987) (holding that the Marketable Record Title Act as originally enacted and as subsequently amended did not operate to divest the state of title to sovereignty lands, even though conveyances of state lands to private interests encompassed sovereignty lands within the lands being conveyed); 1 BOYER, FLORIDA REAL ESTATE TRANSACTIONS §14.23[7] (2007); FLORIDA REAL PROPERTY TITLE EXAMINATION AND INSURANCE §2.7 (CLE 5th ed. 2006).

Effective July 1, 2010, *F.S.* 712.03(9), created another exception for any right, title or interest held by the Trustees of the Internal Improvement Trust Fund, any water management district created under chapter 373, or the United States.

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STANDARD 17.9

~~ELIMINATION OF DOWER~~

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~~**STANDARD: THE ACT CAN BE RELIED UPON TO ELIMINATE OUTSTANDING INCHOATE DOWER IN REAL PROPERTY ARISING OUT OF TITLE TRANSACTIONS PRIOR TO THE ROOT OF TITLE, UNLESS NOTICE IS FILED DURING THE 30 YEAR PERIOD IMMEDIATELY FOLLOWING THE EFFECTIVE DATE OF THE ROOT OF TITLE.**~~

~~Problem 1:~~ ~~John Doe, a married man and sole owner of Blackacre, conveyed it to Richard Roe in 1935 and the deed was recorded. Mary Doe, John's wife, did not join in the conveyance or otherwise release her dower rights. By a deed recorded in 1940, Richard Roe, a single man, conveyed Blackacre to Simon Grant. Nothing else affecting the title to Blackacre appears of record. Simon Grant sought to determine marketability of his title to Blackacre in 1972. Is his title marketable?~~

~~Answer:~~ ~~Yes. This result follows whether or not Mary Doe could otherwise assert a valid claim of dower. Marketable record title is free of claims, the existence of which depend upon any event that occurred prior to the effective date of the root of title. The event, within the meaning of *F.S.* 712.04, giving rise to a dower right, is either a woman's marriage to a landowner, or the purchase of land by the husband during the existence of the marriage.~~

~~Problem 2:~~ ~~John Doe, a married man and sole owner of Blackacre, conveyed it to Richard Roe in 1935 and the deed was recorded. Mary Doe, John's wife, did not join in the conveyance or otherwise release her dower rights. Nothing else affecting the title to Blackacre appears of record. Richard Roe sought to determine marketability of his title to Blackacre in 1972. Is his title marketable?~~

~~Answer:~~ ~~No. Interests disclosed by and defects inherent in the muniments of title beginning with the root of title are not extinguished.~~

~~Authorities & References:~~ ~~*F.S.* 712.02-.04 (1979); BASYE, CLEARING LAND TITLES §59 (2d ed 1970).~~

~~Comment:~~ ~~With respect to the issue of the existence of outstanding dower, see Title Standards 20.5 (Elimination Of Inchoate Dower In Real Property Conveyed Before Death), 20.6 (Release Of Dower — Prior To October 1, 1973), and 20.7 (Release Of Dower — On Or After October 1, 1973).~~

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STANDARD 17.10

ELIMINATION OF HOMESTEAD

STANDARD: THE ACT CAN BE RELIED UPON TO DEFEAT A CLAIM OF HOMESTEAD AGAINST A CONVEYANCE RECORDED PRIOR TO THE ROOT OF TITLE, UNLESS CLAIMANT FILES A NOTICE WITHIN THE 30 YEAR PERIOD AFTER THE EFFECTIVE DATE OF THE ROOT OF TITLE.

Problem 1: John Doe~~, a married man with two children,~~ owned and resided ~~at~~on Blackacre ~~as~~ his homestead, ~~Blackacre,~~with his wife and two children. In ~~1923~~1960 John Doe conveyed Blackacre to Richard Roe for valuable consideration, but without the joinder of his wife. John Doe died in ~~1930~~1967, survived by his wife and children. Blackacre was conveyed by Roe in ~~1935.~~1972. In ~~1970~~2005, Buyer's attorney examined the abstract and objected to the title. No notice of the homestead claim had ever been filed. Was the ~~attorney's~~attorney's objection valid?

Answer: No. The ~~1935~~1972 deed was the root of title, and all claims prior to it are extinguished unless specifically exempted by the Act.

Problem 2: Same facts as Problem 1 except that there were no conveyances of Blackacre after the ~~1923~~1960 conveyance by John Doe. Was the ~~attorney's~~attorney's objection valid?

Answer: Yes. The homestead claim renders the ~~1923~~1960 deed void and this is a defect inherent in the root of title.

Authorities & References: *F.S.* 712.01-.04 (~~1979~~2009); *ITT Rayonier, Inc. v. Wadsworth*, 386 F.Supp. 940, 942-43 (M.D. Fla. 1975), *accord*, *ITT Rayonier, Inc. v. Wadsworth*, 346 So. 2d 1004, 1009 (Fla. 1977); *see also, Reid v. Bradshaw*, 302 So. 2d 180~~,~~ (, 181 (Fla. 1st D.~~C.A. Fla.~~CA 1974) (homestead rights are not eliminated by the mere passage of time).

Comment: The answer to Problem 1 would probably be the same without regard to whether the homestead owner died before or after the effective date of the root of title. *See, F.S.* 712.04. However, the *Reid v. Bradshaw* opinion casts some doubt in the latter instance, and caution should be exercised in such a situation. *See, also, Conservatory-City of Refuge, Inc. v. Kinney*, 514 So. 2d 377, 378 (Fla. 2d DCA 1987) (holding that the Act did not apply to eliminate homestead claims where the children's remainder interests did not vest until the homestead owner died, which was after the asserted root of title).

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~~STANDARD 17.11~~

~~SCOPE OF TITLE EXAMINATION~~

~~STANDARD: THE CHAIN OF TITLE SHOULD BE EXAMINED AS BEFORE THE ACT AND ANY IMPERFECTION OF TITLE CONSIDERED TO DETERMINE WHETHER IT IS ELIMINATED BY THE ACT.~~

~~Problem:~~ ~~John Doe agreed to sell Blackacre to Richard Roe in 1974. The contract called for John Doe to furnish an abstract of title showing marketable title. John Doe provided an abstract that went back to his root of title, a title transaction recorded in 1940. The abstract showed no title transactions prior to 1940. Richard Roe objected and requested an abstract going back to the title transaction by which the sovereign originally parted with title. Was the objection valid?~~

~~Answer:~~ ~~Yes. The Act does not limit the period of title examination but rather eliminates the necessity of curing imperfections of title that fall within its scope. The chain of title must be examined prior to the root of title and imperfections located to determine whether each imperfection is eliminated or whether it is the subject of an exception to the Act.~~

~~Authorities & References:~~ ~~*F.S.* 712.01-.05 (1979); I FLORIDA REAL PROPERTY PRACTICE §§6.3-.4, 9.5 (CLE 2d ed. 1971); 1 BOYER, FLORIDA REAL ESTATE TRANSACTIONS §14.14-11 (1980). See Barnett, *Marketable Title Acts — Panacea Or Pandemonium?*, 53 CORNELL L. REV. 45 (1967).~~

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Chapter 17

MARKETABLE RECORD TITLE ACT

Standard 17.1

PURPOSE OF THE MARKETABLE RECORD TITLE ACT

STANDARD: THE ACT SHOULD BE RELIED UPON TO ELIMINATE IMPERFECTIONS OF TITLE THAT FALL WITHIN ITS SCOPE.

Authorities & References: *F.S.* 712.01, et seq. (2009); *City of Miami v. St. Joe Paper Co.*, 364 So. 2d 439, 449 (Fla. 1978) (holding that the Act is constitutional); *ITT Rayonier, Inc. v. Wadsworth*, 346 So. 2d 1004, 1010 (Fla. 1977) (mother's life estate holder's deed served as root of title to eliminate the remainder interests of her children); *Marshall v. Hollywood, Inc.*, 236 So. 2d 114, 120 (Fla. 1970), *cert. denied*, 400 U.S. 964 (1970) (the Act operates to make title based on wild deed marketable); *Sawyer v. Modrall*, 286 So. 2d 610, 613 (Fla. 4th DCA 1973); *cert. denied*, 297 So. 2d 562 (Fla. 1974) (the Act operates to eliminate interest created by deed from the Trustees of the Internal Improvement Trust Fund); *Wilson v. Kelley*, 226 So. 2d 123, 128 (Fla. 2d DCA 1969) (quit claim deed may serve as root of title only if it evidences an intent to convey an identifiable interest); *Whaley v. Wotring*, 225 So. 2d 177 (Fla. 1st DCA 1969); I BOYER, FLORIDA REAL ESTATE TRANSACTIONS §§14.20 to 14.22 (2007).

Comment: For a discussion of the constitutionality of the Act, see FLORIDA REAL PROPERTY TITLE EXAMINATION AND INSURANCE §2.5 (CLE 5th ed. 2006). *See also*, *City of Miami v. St. Joe Paper Co.*, 364 So. 2d 439, 449 (Fla. 1978) (holding that the Act is constitutional); *Wichelman v. Messner*, 250 Minn. 88, 83 N.W. 2d 800 (1957); *Annot.*, 71 A.L.R.2d 816 (1960); Boyer & Shapo, *Florida's Marketable Title Act: Prospects and Problems*, 18 MIAMI L. REV. 103 (1963).

STANDARD 17.2

MARKETABLE RECORD TITLE

STANDARD: MARKETABLE RECORD TITLE EXISTS, SUBJECT TO THE EXCEPTIONS OF THE ACT, WHEN RECORD TITLE HAS BEEN VESTED IN A PERSON, ALONE, OR TOGETHER WITH PREDECESSORS IN INTEREST FOR THIRTY YEARS OR MORE AND NOTHING OF RECORD PURPORTS TO DIVEST THE PERSON OF THE ESTATE.

Problem 1: The following chain of title appears of record. In 1955 John Doe conveyed Blackacre to "Richard Roe and his heirs for so long as the premises are used for residential purposes." In 1965 Richard Roe conveyed Blackacre to "Simon Grant and his heirs." In 1985 Simon Grant conveyed Blackacre to "Thomas Frank and his heirs." In 2005 did Thomas Frank have marketable record title to Blackacre in fee simple absolute?

Answer: Yes. The 1965 conveyance to Simon Grant purports to transfer the fee simple absolute interest which Thomas Frank claims and was recorded at least thirty years prior to the time marketability is being determined in 2005. Hence the 1965 conveyance is the root of title and all interests not evidenced by it or subsequently created or transferred and not excepted under the Act are extinguished.

Problem 2: Same facts as Problem 1 except that in 1965 Richard Roe delivered the deed of Blackacre to Simon Grant, but the deed was not recorded until 1980. In 2005 did Thomas Frank have marketable record title to Blackacre in fee simple absolute?

Answer: No. The root of title is the last title transaction to have been recorded at least thirty years prior to the time marketability is being determined. The 1955 conveyance is the root of title and it contains the restriction with the possibility of reverter, hence that interest is not extinguished.

Problem 3: John Doe is the grantee in a deed to Blackacre in fee simple absolute recorded in 1975. Nothing affecting Blackacre has been recorded since then. In 2006 did John Doe have marketable record title to Blackacre?

Answer: Yes. The deed qualifies as a root of title and all interests arising prior to the recording of the deed in 1975 are extinguished, unless specifically excepted under the Act.

Problem 4: In 1970, John Doe conveyed Blackacre to Richard Roe. In 1975, Simon Grant, although he never owned Blackacre, purports to convey a portion of Blackacre to Thomas Frank. Does Richard Roe have marketable title?

Answer: No. Although the 1970 deed is the root of title and the 1975 deed was a wild deed, the latter nevertheless created an estate, interest, claim or charge arising out of a title transaction which has been recorded subsequent to the effective date of the root of title, so is an exception to marketability under *F.S.* 712.03(4).

Problem 5: John Doe is the last grantee in the regular chain of title to Blackacre by a deed recorded in 1960. John Doe died in 1969. Court proceedings recorded in 1970 involving his estate establish that his sole heir, Ralph Doe, acquired ownership of Blackacre. In 2001 did Ralph Doe have marketable record title to Blackacre?

Answer: Yes. The court proceedings affect title to land and were recorded thirty years prior to the time marketability is being determined, hence they qualify as the root of title.

Authorities & References: *F.S.* 712.01, et seq. (2009); FLORIDA REAL PROPERTY TITLE EXAMINATION AND INSURANCE §§ 2.5-.12 (CLE 5th ed. 2006); 1 BOYER, FLORIDA REAL ESTATE TRANSACTIONS §§ 14.22 (2007); Fund Title Note 10.01.02.

Comment: A wild or interloping deed may constitute a root of title. *City of Miami v. St. Joe Paper Co.*, 364 So. 2d 439, 446 (Fla. 1978). Exceptions to the operation of the Act are contained in F.S. 712.03–.04 (2009) and are dealt with specifically in other Standards in this Chapter.

The Act does not eliminate an interest or claim arising out of a title transaction recorded after the root of title, even if the subsequent interest or claim is outside the chain of title, such as a wild deed. *See, Holland v. Hattaway*, 438 So. 2d 456, 468-470 (Fla. 5th DCA 1983) (the Act did not extinguish an easement purportedly created by a wild deed recorded several years after the root of title, although the court held that the easement was extinguished on other grounds).

STANDARD 17.3

EXTINGUISHMENT OF INTERESTS

STANDARD: SUBJECT TO THE EXCEPTIONS IN MRTA, ALL ESTATES, INTERESTS, CLAIMS OR CHARGES THAT EXIST BY VIRTUE OF ANY ACT, TITLE TRANSACTION, EVENT OR OMISSION THAT OCCURRED PRIOR TO THE EFFECTIVE DATE OF THE ROOT OF TITLE ARE EXTINGUISHED BY THE ACT.

Problem 1: A deed to Blackacre executed by John Doe and recorded in 1965 contained: (1) a condition subsequent that the grantor or his heirs could re-enter in the event of a breach of certain specified conditions and (2) a special limitation that the land was conveyed "so long as" it was used for a specified purpose. A deed to Blackacre recorded in 1975 does not mention any conditions or limitations. No notice of a claim based on them has been filed. Marketability of title to Blackacre was sought to be determined in 2007. Were the right of entry for condition broken and the possibility of reverter barred as clouds upon title?

Answer: Yes. The claims would be based on a title transaction occurring prior to 1975, the effective date of the root of title and no exception is applicable.

Problem 2: Same facts as Problem 1 except that the 1975 deed, or a subsequent deed, contained a provision that the conveyance was "subject to conditions and limitations of record." Were the rights thereby preserved?

Answer: No. Interests disclosed by the muniments of title, beginning with the root of title, are preserved but *F.S.* 712.03(1) requires that a general reference to such interests include specific identification by reference to book and page of record or by name of recorded plat.

Problem 3: The plat for Blackacre Subdivision, filed in 1925, contained a setback restriction. A deed to Lot 1 in Blackacre Subdivision recorded in 1953 contained a reference to the name of the recorded plat, as did subsequent deeds, but none specifically referenced the setback restriction. Is the setback restriction still valid as to Lot 1?

Answer: Yes. A restriction is preserved if the root or subsequent muniment of title by name refers to the recorded plat that imposed the restriction. *F.S.* 712.03(1).

Problem 4: A deed to Blackacre executed by John Doe and recorded in 1965 reserved an easement. A deed to Blackacre in 1975 does not mention the easement. John Doe and his successors in interest have used the easement, or a part thereof, since 1965. No notice of a claim based on the easement has been filed. Marketability of title to Blackacre was sought to be determined in 2007. Did the easement constitute a cloud upon the title?

Answer: Yes. Easements or rights, interests, or servitudes in the nature of easements, rights of way and terminal facilities and encumbrances thereon are preserved by *F.S.* 712.03(5) so long as they, or any part thereof, are used.

Problem 5: In 1975, ABC Corp. purports to convey Blackacre to John Doe. The deed is signed by "Richard Roe as Secretary of ABC Corp." No corporate resolution was recorded authorizing Richard Roe to execute deeds on behalf of ABC Corp. Nothing affecting Blackacre has been recorded since then. Does John Doe have marketable title?

Answer: No. Although the deed is the root of title, it contains an inherent defect. Hence, the potential ownership claim of ABC Corp. is not extinguished.

Problem 6: A deed to Blackacre executed by John Doe and recorded in 1965 reserved the right of entry to explore and extract mineral rights. A deed to Blackacre in 1975 does not mention the mineral rights reservation. No notice of a claim based on the reservation has been filed. Marketability of title to Blackacre was sought to be determined in 2007. Did the right of entry to explore and extract mineral rights constitute a cloud upon the title?

Answer: No. *See* Comment, below.

Authorities & References: *F.S.* 712.03-.04 (2009); 1 BOYER, FLORIDA REAL ESTATE TRANSACTIONS §14.22 (2007).

Comment: The "root of title" is any title transaction that describes the land sufficiently, and has been of record for more than 30 years. *F.S.* 712.01; *Marshall v. Hollywood, Inc*., 224 So. 2d 743, 750 (Fla. 4th DCA 1969), aff'd 236 So. 2d 114 (Fla. 1970) (a void deed may be a root of title); *Miami V. St. Joe Paper Co.*, 364 So. 2d 439, 446 (Fla. 1978) (wild deed); *Kittrell v. Clark*, 363 So. 2d 373, 374 (Fla. 1st DCA 1978) (probate); *Mayo v. Owens*, 367 So. 2d 1054, 1057 (Fla. 1st DCA 1979) (judgment determining heirs).

The title examiner should be vigilant for inherent defects in the root of title. *See, e.g., Marshall v. Hollywood, Inc*., *supra*, at 751 ("'defects in the muniments of title' do not refer to defects or failures in the transmission of title . . . but refer to defects in the make up or constitution of the deed or other muniments of title on which such transmission depends").

A restriction older than 30 years is preserved if the root of title or a subsequent muniment of title contains a reference to the name of the recorded plat that imposed the restriction. *Sunshine Vistas Homeowners Association v. Caruana*, 623 So. 2d 490, 492 (Fla. 1993).

The Act may operate to extinguish a county's claim of ownership. *Florida DOT v. Dardashti Properties*, 605 So. 2d 120, 122 (Fla. 4th DCA 1992) (County's interest in a strip of land held for right of way was extinguished by MRTA).

The Act operates to extinguish an otherwise valid claim of common law way of necessity when such claim was not asserted within 30 years. *H & F Land , Inc. v. Panama City-Bay County Airport and Development District*, 736 So. 2d 1167 (Fla. 1999). The Act does not, however, operate to extinguish statutory ways of necessity. *Blanton v. City of Pinellas Park*, 887 So. 2d 1224, 1233 (Fla. 2004) (receding from *H & F Land , Inc.* to the extent its dicta indicated that the Act applies to statutory ways of necessity).

Whether the Act extinguishes mineral rights is undecided and questionable since the courts have held that mineral rights constitute a separate estate from the surface rights. *See, e.g., P & N Investment Corp. v. Florida Ranchettes, Inc.*, 220 So. 2d 451, 453 (Fla. 1st DCA 1969). However, the Act, subject to its exceptions, does serve to eliminate rights of entry to explore and extract mineral rights, whether expressly reserved or implied. *Noblin v. Harbor Hills Development, L.P.*, 896 So. 2d 781, 785 (Fla. 5th DCA 1981) (the Act serves to extinguish rights of entry for exploring or mining oil, gas, minerals, or fissionable materials, unless those rights of entry or easements are excepted); *but see, F.S.* 704.05 (excluding the rights of entry held by the state or any of its agencies, boards or departments from operation of the Act).

See, *F.S.* 712.03 for a list of exceptions for rights not extinguished by the Act. *F.S.* 712.03(9), effective July 1, 2010 added another exception for any right, title or interest held by the Trustees of the Internal Improvement Trust Fund, any water management district created under chapter 373, or the United States.

STANDARD 17.4

RECORDING A NOTICE TO PROTECT INTERESTS

STANDARD: RECORDING A PROPER NOTICE PROTECTS ESTATES, INTERESTS, CLAIMS, OR CHARGES FROM THE OPERATION OF THE ACT.

Problem 1: John Doe, the record owner of Blackacre, gave a mortgage to Richard Roe encumbering Blackacre, which was recorded in January, 1975. The last payment was not due until 2010. On June 15, 1975 a deed to Blackacre, which qualified as a root of title, was recorded but it contained no mention of the mortgage. Must Richard Roe file proper notice to preserve the lien of his mortgage by June 15, 2005?

Answer: Yes.

Problem 2: John Doe gave a 99-year lease to Richard Roe on July 1, 1975, at which time the lease was recorded and Roe went into possession of the land. Did John Doe need to file proper notice of his ownership prior to July 1, 2005 to preserve his interest?

Answer: No. The 1975 transaction created a leasehold interest only. John Doe's fee simple interest would not be extinguished. Filing of notice is necessary only when there is a subsequent title transaction that purports to divest the interest claimed.

Problem 3: Blackacre Homeowners' Association filed a Declaration of Covenants and Restrictions for Blackacre Subdivision in 1975. John Doe conveyed Lot 1 in Blackacre Subdivision to Richard Roe in 1978. That deed did not mention the covenants or restrictions, and there is no subsequent specific reference to the recording information of the covenants or restrictions in the public record. In 2009, marketability was sought to be determined as to Lot 1. Are the covenants and restrictions still valid as to Lot 1?

Answer: No, unless the Blackacre Homeowners' Association timely complied with the notice requirements under *F.S.* 712.06 or used the procedures in *F.S.* 720.403 – 720.407 to revive the expired covenants.

Authorities & References: *F.S.* 712.03(2), 712.05-.06 (2009), 1 BOYER, FLORIDA REAL ESTATE TRANSACTIONS §14.23[3] (2007).

Comment: The requirements of the notice filed pursuant to the Act are set forth at *F.S.* 712.06 (2009).

The notice merely protects claims as they otherwise exist and does not validate a claim or create a new claim.

F.S. Chapter 712 was amended effective October 1, 1997, to allow homeowner associations to file a notice under MRTA to preserve covenants and restrictions. *F.S.* 712.05 (1) (2009).

If a false or fictitious claim is asserted by the filing of notice pursuant to the Act, the prevailing party may be entitled to costs and attorneys' fees arising out of any action related thereto and damages sustained as a result of the filing of such notice. *F.S.* 712.08 (2009).

STANDARD 17.5

RIGHTS OF PERSONS IN POSSESSION

STANDARD: THE ACT DOES NOT ELIMINATE THE RIGHTS OF PERSONS IN POSSESSION OF LAND.

Problem:	John Doe was grantee in a deed to Blackacre recorded in 1970, which constitutes the root of title. Nothing further appears of record, but investigation in 2002 disclosed that Richard Roe was in actual open possession of Blackacre. In 2002 did John Doe have a marketable record title to Blackacre free of the claims of Roe?
Answer:	No. The possession of Roe was inconsistent with the record title in John Doe and was therefore prima facie hostile. Upon satisfactory proof that Roe's possession was in fact held in subordination to the title of John Doe (as, for example, that he was a tenant, licensee, or an employee of Doe), Doe would have had marketable record title under the Act.
Authorities & References:	*F.S.* 712.03(03) (2009); 1 BOYER, FLORIDA REAL ESTATE TRANSACTIONS §14.23[4] (2007).
Comment:	No person can have a marketable record title within the meaning of the Act if the land is in the hostile possession of another person. However, the exception to the Act prevents destruction of existing rights and does not create any new rights.

STANDARD 17.6

SUBSEQUENT RECORDED INSTRUMENTS

STANDARD: THE ACT DOES NOT ELIMINATE ESTATES, INTERESTS, CLAIMS, OR CHARGES ARISING OUT OF A TITLE TRANSACTION RECORDED SUBSEQUENT TO THE RECORDING OF THE ROOT OF TITLE.

Problem 1: John Doe is the last grantee of record in a regular chain of title to Blackacre by a deed recorded in 1970. A deed to Blackacre recorded in 1980 recites that John Doe died intestate and the grantor therein named, Richard Roe, was the sole heir at law. In 2007, was the 1980 deed a title transaction not affected or extinguished by the Act?

Answer: Yes. Even if the facts recited are not correct, the 1980 deed is a recorded instrument that affects title to an estate or interest in land, and, hence, a title transaction. Any recorded instrument or court proceeding that affects any estate or interest in land qualifies as a title transaction.

Problem 2: John Doe is the last grantee of record in a regular chain of title to Blackacre by a deed recorded in 1970. In 1980 a stranger to the title executed a deed to Blackacre, at which time the deed was recorded. In determining marketability in 2001, did the 1980 deed constitute a title transaction subsequent to the root of title and therefore not eliminated by the Act?

Answer: Yes. With respect to wild deeds, see Title Standard 16.5 (Wild Instruments — Stranger to Stranger).

Authorities & References: *F.S.* 712.01, 712.03(4) (2009); 1 BOYER, FLORIDA REAL ESTATE TRANSACTIONS §14.23[5] (2007).

Comment: The fact that the Act does not eliminate an estate, interest, claim, or charge arising out of a title transaction does not bear, either favorably or unfavorably, on the validity of such estate, interest, claim, or charge. That is, the Act protects existing rights but does not create new rights.

A wild deed may constitute a root of title. *City of Miami v. St. Joe Paper Co.*, 364 So.2d 439, 446 (Fla. 1978).

STANDARD 17.7

RIGHTS OF PERSONS TO WHOM
TAXES ARE ASSESSED

STANDARD: THE ACT DOES NOT ELIMINATE THE RIGHTS OF A PERSON IN WHOSE NAME THE LAND IS ASSESSED FOR THE PERIOD OF TIME THE LAND IS SO ASSESSED AND THREE YEARS THEREAFTER.

Problem 1: John Doe was grantee in a deed to Blackacre in 1970 which constitutes the root of title. Nothing further appears of record, but investigation in 2002 disclosed that Blackacre had been assessed on the county tax rolls in the name of Richard Roe since 2000. In 2002, did John Doe have a marketable record title to Blackacre free of the claims of Roe?

Answer: No. The rights of Roe would need to be ascertained. However, this exception to the Act only prevents destruction of existing rights and does not create any new rights so Roe would have to prove up his purported interest based on something more than the mere payment of property taxes.

Problem 2: Same facts as Problem 1 except that 2002 is the last year that Blackacre is assessed in the name of Richard Roe. In 2003 through 2005 Blackacre was assessed in the name of John Doe. In 2006 did John Doe have a marketable record title to Blackacre free of the claims of Roe?

Answer: Yes. Any rights of Roe would be preserved for only three years after Blackacre was last assessed in his name. This assumes that no other exception is applicable to preserve any rights of Roe.

Authorities & References: *F.S.* 712.03(6) (2009); 1 BOYER, FLORIDA REAL ESTATE TRANSACTIONS §14.23[6] (2007).

Comment: This exception necessitates examination of the county tax rolls for the three years prior to the year in which marketability is being determined.

STANDARD 17.8

RIGHTS OF THE UNITED STATES AND FLORIDA

STANDARD: THE ACT DOES NOT ELIMINATE ANY RIGHT, TITLE, OR INTEREST OF THE UNITED STATES OR FLORIDA RESERVED IN THE PATENT OR DEED BY WHICH THE UNITED STATES OR FLORIDA PARTED WITH TITLE.

Problem: John Doe executed a deed to Blackacre and it was recorded in 1960. No mention of any other interest was contained in the deed. Nothing affecting Blackacre has been recorded since. The title to Blackacre was being examined in 2005. The seller agreed to furnish an abstract of title. The buyer demanded that the seller provide an abstract which included the conveyance by which the United States or Florida parted with title. Was the demand justified?

Answer: Yes. The statutory exception includes the interests of any officers, boards, commissions or other agencies of the United States or Florida.

Authorities & References: *F.S.* 712.04 (2009).

Comment: With respect to submerged sovereignty land, see *F.S.* 712.03(7) (2009) (effective June 15, 1978); *Coastal Petroleum Co. v. American Cyanamid Co.*, 492 So. 2d 167 (Fla. 1986), cert. den. 479 U.S. 1065 (1987) (holding that the Marketable Record Title Act as originally enacted and as subsequently amended did not operate to divest the state of title to sovereignty lands, even though conveyances of state lands to private interests encompassed sovereignty lands within the lands being conveyed); 1 BOYER, FLORIDA REAL ESTATE TRANSACTIONS §14.23[7] (2007); FLORIDA REAL PROPERTY TITLE EXAMINATION AND INSURANCE §2.7 (CLE 5th ed. 2006).

Effective July 1, 2010, *F.S.* 712.03(9), created another exception for any right, title or interest held by the Trustees of the Internal Improvement Trust Fund, any water management district created under chapter 373, or the United States.

STANDARD 17.9

Reserved for future title standard

STANDARD 17.10

ELIMINATION OF HOMESTEAD

STANDARD: THE ACT CAN BE RELIED UPON TO DEFEAT A CLAIM OF HOMESTEAD AGAINST A CONVEYANCE RECORDED PRIOR TO THE ROOT OF TITLE, UNLESS CLAIMANT FILES A NOTICE WITHIN THE 30 YEAR PERIOD AFTER THE EFFECTIVE DATE OF THE ROOT OF TITLE.

Problem 1: John Doe owned and resided on Blackacre as his homestead, with his wife and two children. In 1960 John Doe conveyed Blackacre to Richard Roe for valuable consideration, but without the joinder of his wife. John Doe died in 1967, survived by his wife and children. Blackacre was conveyed by Roe in 1972. In 2005, Buyer's attorney examined the abstract and objected to the title. No notice of the homestead claim had ever been filed. Was the attorney's objection valid?

Answer: No. The 1972 deed was the root of title, and all claims prior to it are extinguished unless specifically exempted by the Act.

Problem 2: Same facts as Problem 1 except that there were no conveyances of Blackacre after the 1960 conveyance by John Doe. Was the attorney's objection valid?

Answer: Yes. The homestead claim renders the 1960 deed void and this is a defect inherent in the root of title.

Authorities & References: *F.S.* 712.01-.04 (2009); *ITT Rayonier, Inc. v. Wadsworth*, 386 F.Supp. 940, 942-43 (M.D. Fla. 1975), *accord, ITT Rayonier, Inc. v. Wadsworth*, 346 So. 2d 1004, 1009 (Fla. 1977); *see also, Reid v. Bradshaw*, 302 So. 2d 180, 181 (Fla. 1st DCA 1974) (homestead rights are not eliminated by the mere passage of time).

Comment: The answer to Problem 1 would probably be the same without regard to whether the homestead owner died before or after the effective date of the root of title. *See, F.S.* 712.04. However, the *Reid v. Bradshaw* opinion casts some doubt in the latter instance, and caution should be exercised in such a situation. *See, also, Conservatory-City of Refuge, Inc. v. Kinney*, 514 So. 2d 377, 378 (Fla. 2d DCA 1987) (holding that the Act did not apply to eliminate homestead claims where the children's remainder interests did not vest until the homestead owner died, which was after the asserted root of title).

Amendments to 718.117

Section 1. Subsections (3), (4), (11), (14), (18) and (19) and paragraph (17) (a) of Section 718.117 are amended to read as follows:

(3) OPTIONAL TERMINATION.—Except as provided in subsection (2) or unless the declaration provides for a lower percentage, the condominium form of ownership ~~of the property~~ may be terminated as to all or a portion of the condominium property pursuant to a plan of termination approved by at least 80 percent of the total voting interests of the condominium if not more than 10 percent of the total voting interests of the condominium have rejected the plan of termination by negative vote or by providing written objections thereto. The subsection does not apply to condominiums in which 75 percent or more of the units are timeshare units.

(4) EXEMPTION.—A plan of termination is not an amendment subject to s. 718.110(4). In the event of a partial termination, a plan of termination is not an amendment subject to s. 718.110(4) when the ownership share of the common elements of a surviving unit in the condominium remains in the same proportion to the surviving units as it was among surviving units prior to the partial termination.

(11) PLAN OF TERMINATION; OPTIONAL PROVISIONS; CONDITIONAL OR PARTIAL TERMINATION.—

(a) The plan of termination may provide that each unit owner retains the exclusive right of possession to the portion of the real estate that formerly constituted the unit, in which case the plan must specify the conditions of possession. In the event of a partial termination, the content of the plan of termination specified in subsection (10) must identify the units that survive the partial termination and provide that such units remain in the condominium form of ownership pursuant to an amendment or amended and restated declaration. In a partial termination, title to the surviving units and common elements that remain as part of the condominium property specified in the plan of termination shall remain vested in the ownership shown in the public records and do not vest in the termination trustee.

(b) In a conditional termination, the plan must specify the conditions of termination. A conditional plan does not vest title in the termination trustee until the plan or a certificate executed by the association with the formalities of a deed, confirming that the conditions in the conditional plan have been satisfied or waived by the requisite percentage of the voting interests, have been recorded. In a partial termination, the plan does not vest title to the surviving units or common elements that remain as a part of the condominium property in the termination trustee.

(12) ALLOCATION OF PROCEEDS OF SALE OF CONDOMINIUM PROPERTY.—

(a) Unless the declaration expressly provides for the allocation of the proceeds of sale of condominium property, the plan of termination must first apportion the proceeds between the aggregate value of all units and the value of the common elements, based on their respective fair market values immediately before the termination, as determined by one or more independent appraisers selected by the association or termination trustee. In the event of a partial termination, the aggregate values of the units and common elements being terminated shall be separately determined and the plan of termination shall specify the allocation of proceeds of sale for said units and common elements.

(d) Liens that encumber a unit shall be transferred to the proceeds of sale of the condominium property and the proceeds of sale or other distribution of association property, common surplus, or other association assets attributable to such unit in the same priority. In the event of a partial termination, liens that encumber a unit being terminated shall be transferred to the proceeds of sale of the portion of the condominium property being terminated attributable to such unit. The proceeds of any sale of condominium property pursuant to a plan of termination may not be deemed common surplus or association property.

(14) TITLE VESTED IN TERMINATION TRUSTEE—If termination is pursuant to a plan of termination under subsection (2) or subsection (3), the unit owners' rights and title as tenants in common in undivided interests in the condominium property being terminated vest in the termination trustee when the plan is recorded or at a later date specified in the plan. The unit owners thereafter become the beneficiaries of the proceeds realized from the plan of termination. The termination trustee may deal with the condominium property being terminated and any interest therein if the plan confers on the trustee the authority to protect, conserve, manage, sell, or dispose of the condominium property. The trustee, on behalf of the unit owners, may contract for the sale of real property being terminated, but the contract is not binding on the unit owners until the plan is approved pursuant to subsection (2) or subsection (3).

(17) DISTRIBUTION.—

(a) Following termination of the condominium, the condominium property, association property, common surplus, and other assets of the association shall be held by the termination trustee pursuant to the plan of termination, as trustee for unit owners and holders of liens on the units, in their order of priority unless otherwise set forth in the plan of termination.

(18) ASSOCIATION STATUS.—The termination of a condominium does not change the corporate status of the association that operated the condominium property. The association continues to exist to conclude its affairs, prosecute and defend actions by or against it, collect and discharge obligations, dispose of and convey its property, and collect and divide its assets, but not to act except as necessary to

conclude its affairs. In the case of a partial termination, the association may continue as the condominium association for the property that remains subject to a declaration of condominium.

(19) CREATION OF ANOTHER CONDOMINIUM.—The termination or partial termination of a condominium does not bar the filing of a declaration of condominium ~~or a restated declaration of condominium~~ by the termination trustee or the trustee's successor in interest affecting any portion of the ~~same~~ property that does not continue under the condominium form of ownership pursuant to the plan of termination. The partial termination of a condominium may provide for the simultaneous filing of an amendment or amended and restated declaration of condominium by the condominium association for any portion of the property remaining in the condominium form of ownership.

LEGISLATIVE POSITION REQUEST FORM

GOVERNMENTAL AFFAIRS OFFICE

Date Form Received _____

GENERAL INFORMATION

Submitted By Robert S. Freedman, Co-Chair, Condominium and Planned Development Committee of the Real Property Probate & Trust Law Section

Address c/o Carlton Fields, P.A., 4221 Boy Scout Blvd., Suite 1000, Tampa, Florida 33607
Telephone: (813) 223-7000

Position Type Condominium and Planned Development Committee, RPPTL Section, The Florida Bar

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(List name, address and phone number)

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

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

PROPOSED ADVOCACY

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

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

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

Proposed Wording of Position for Official Publication:

"Support amendments to the Florida Condominium Act; to accommodate partial terminations of condominiums more effectively and to clarify certain ambiguities in the current statute posed by partial terminations."

Reasons For Proposed Advocacy:

Currently, Chapter 718 does not specifically address the partial termination of condominium projects and the issues created by a partial termination. Due to the economic downturn, there are a number of existing condominium projects that are failing and could become viable if a portion of the condominium property is terminated. The proposed amendments specifically allow for partial termination of condominium property and address the vesting of title, allocation and distribution of proceeds and association status in a partial termination.

PRIOR POSITIONS TAKEN ON THIS ISSUE

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

Most Recent Position NONE

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

Others
(May attach list if more than one)

NONE

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

REFERRALS TO OTHER SECTIONS, COMMITTEES OR LEGAL ORGANIZATIONS

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

Referrals

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

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

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

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

WHITE PAPER

AMENDMENTS TO ALLOW FOR AND CLARIFY PARTIAL TERMINATION - PROPOSED REVISIONS TO SECTIONS 718.117(3), (4), (11), (17)(A), (18) AND (19), FLORIDA STATUTES

1. SUMMARY

The purpose of the proposed changes to Sections 718.117 (3), (4), (11), (17)(a), (18) and (19) is to (i) specifically address partial termination in 718.111, F.S., (ii) clarify how title to the terminated portions of the condominium property vests in a partial termination and (iii) clarify the process for a partial termination under 718.117, Florida Statutes.

2. SITUATION

The current economic climate has caused condominium projects to fail thereby creating problems for the existing unit owners, associations, lenders, municipalities and developers. A once viable condominium project may now be facing one of the following situations which could be addressed by a partial termination: to remove phantom units which were added prior to construction in anticipation of market demand that disappeared or never materialized; to eliminate or restructure amenities that no longer address the present market needs or are in disrepair or are no longer needed or wanted by the Community; or to raise funds for the association by selling unused or surplus common elements. A troubled condominium project may become viable by partially terminating a portion of the condominium property, leaving a surviving condominium project and allowing the terminated portion to be utilized for other purposes. Currently, the 718,117, F.S. does not specifically contemplate a termination of a portion of the condominium property thereby creating ambiguity as to title, allocation of proceeds and association status. The proposed amendments to 718.117(3), (4), (11), (17) (a), (18) and (19) provide the necessary clarifications to allow partial termination of condominium property.

3. EFFECT OF PROPOSED CHANGE

The proposed amendments accommodate partial termination and clarify ambiguities created by a partial termination.

4. ANALYSIS

The proposed amendments would accommodate partial termination thereby allowing failing condominium projects an opportunity to restructure in order to meet the current market conditions in Florida.

Section 718.117(3) would be amended to clarify that all or a portion of the condominium property may be terminated.

Section 718.117(4) would be amended to exempt a partial termination from 718.110(4) when the proportionate interest of each surviving unit in the common elements of the condominium remains in the same proportion to the other surviving units as before the termination.

Section 718.117(11) would be amended to require the plan of termination for a partial termination (i) to identify the surviving units, (ii) provide that the surviving units remain in the condominium form of ownership and (iii) specify that title to the surviving units remain vested in the ownership set forth in the public records and not in the termination trustee.

Section 718.117(12)(a) would be amended to require the aggregate values of the condominium units and common elements being terminated to be separately determined and the plan to specify the allocation of the proceeds.

Section 718.117(12)(b) would be amended to require liens that encumber a terminated condominium unit be transferred to the proceeds of sale attributable to such unit.

Section 718.117(14) would be amended to reflect that title to condominium units and common elements being terminated vest in the termination trustee.

Section 718.117(17)(a) would be amended to clarify that distribution is pursuant to 718.117(17) unless otherwise set forth in the plan of termination.

Section 718.117(18) would be amended to clarify that in the event of partial termination, the association may continue as the condominium association for the condominium property that is not terminated.

Section 718.117(19) would be amended to clarify that there is no bar to filing a declaration of condominium for that portion of the property that does not continue under the condominium form of ownership set forth in the termination plan. Further, this section specifically permits the filing of an amendment to the declaration or amended and restated declaration for the condominium property remaining in the condominium form of ownership.

5. FISCAL IMPACT ON STATE AND LOCAL GOVERNMENTS

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

6. DIRECT IMPACT ON PRIVATE SECTOR

This proposal provides a mechanism for failed or failing condominium projects to restructure the condominium thereby encouraging sale and resale of remaining condominium units, create financing eligibility for FNMA and FHLMC and resolve longstanding issues related to phantom units.

7. CONSTITUTIONAL ISSUES

There are no constitutional issues raised by this proposal.

8. OTHER INTERESTED PARTIES

None are known at this time. [lenders? Division of Condominiums, Timeshares and Mobile Homes?]

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REAL PROPERTY, PROBATE & TRUST LAW SECTION

THE FLORIDA BAR

www.RPPTL.org

VIA E-MAIL: regcomments@fhfa.gov

Alfred M. Pollard, General Counsel
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Fourth Floor, 1700 G Street NW
Washington, DC 20552

Re: Guidance on Private Transfer Fee Covenants (No. 2010-N-11)

Dear Mr. Pollard:

On behalf of the Real Property, Probate and Trust Law Section of The Florida Bar ("Section"), I am submitting comments regarding the Federal Housing Finance Agency's "Guidance on Private Transfer Fee Covenants" (No. 2010-N-11) (the "Guidance") published in the Federal Register on August 16, 2010.

The Section is a group of over 9,500 Florida lawyers who practice in the areas of real estate, probate, trust and estate law, and who are dedicated to serving all Florida lawyers and the public in these fields of practice. We produce educational materials and seminars, assist the public pro bono, draft legislation, draft rules of procedure, and occasionally offer advice to the judicial, legislative and executive branches to assist on issues related to our fields of practice.

The Section is writing to the Federal Housing Finance Agency ("Agency") because the Section has a substantial, institutional history and perspective involving private transfer fee covenants and how they are used in practice, which viewpoint may benefit the Agency. The perspective of the Section is oftentimes broader and more independent than those of individuals or a particular constituency. Indeed, the Section and its executive council are comprised of members who represent virtually every segment of the residential real estate market, including condominium unit owners, residential lenders, consumer purchasers, real estate brokers, contractors, non-developer controlled community associations, construction lenders and developers, to name a few.

The Section wishes to share our experience with private transfer fee covenants because its membership, many of our clients and the public will be adversely impacted by the Guidance in its current form.

In 2008, the Section closely examined private transfer fee covenants and was instrumental in drafting and supporting the passage of Section 689.28, Florida Statutes (2010) (the "Statute") which prohibits most private transfer fee covenants in Florida but permits certain customary, widely accepted ones. A copy of the Statute is attached for your reference. In the course of drafting the Statute, the Section devoted considerable analysis to distinguishing between "detrimental" and "beneficial" transfer fees and to avoiding Constitutional taking claims. The Section believes that the Statute embodies an appropriate public policy balance and commends it to the Agency as a solid framework for revising the Guidance. The impetus for the Florida legislation was serious efforts by promoters to encourage the use of covenants to collect a fee from the seller or buyer at each resale of a home in a community; most or all of the fee are paid to the developer or landowner who records the covenants, a promoter or investors. Such private transfer fees are included in a declaration of covenant recorded in the public records and become a perpetual obligation. The Section concluded that those covenants which generated income for a private third party, but did not enhance the community or support cultural, educational, charitable, recreational, environmental, conservation, or other similar activities benefiting the community subject to the declaration, impeded the marketability of the properties encumbered by them. The Section also discovered that an overly broad prohibition on transfer fees, such as that proposed in the Guidance, would inadvertently restrict many customary business practices in real estate, such as deferred payment of real estate commissions, shared appreciation sales or mortgages or options to purchase.

In drafting the Statute, the Section recognized that that proponents of private transfer fees could readily structure around any narrowly defined prohibition and crafted a statute of very broad scope of application with specific exceptions. The Statute defines "transfer fee" broadly as "a fee or charge required by a transfer fee covenant and payable upon the transfer of an interest in real property, or payable for the right to make or accept such transfer, regardless of whether the fee or charge is a fixed amount or is determined as a percentage of the value of the property, the purchase price, or other consideration given for the transfer."

The Statute carves out certain exceptions from the broad definition in order to permit and preserve many legitimate even desirable payments. The Statute excludes the following fees from the definition of transfer fee:

- Any tax, fee, charge, assessment, fine, or other amount payable to or imposed by a governmental authority.

- Any fee, charge, assessment, fine, or other amount payable to a homeowners', condominium, cooperative, mobile home, or property owners' association pursuant to a declaration or covenant or law applicable to such association, including, but not limited to, fees or charges payable for estoppel letters or certificates issued by the association or its authorized agent.

- Any fee, charge, assessment, dues, contribution, or other amount imposed by a declaration or covenant encumbering four or more parcels in a community with a

homeowners association, and payable to a nonprofit or charitable organization for the purpose of supporting cultural, educational, charitable, recreational, environmental, conservation, or other similar activities benefiting the community subject to the declaration or covenant.

- Any fee, charge, assessment, dues, contribution, or other amount pertaining to the purchase or transfer of a club membership relating to real property owned by the member, including, but not limited to, any amount determined by reference to the value, purchase price, or other consideration given for the transfer of the real property.

- Any payment required pursuant to an environmental covenant or servitude that imposes limitations on the use of real property pursuant to an environmental remediation project pertaining to the property.

- Any consideration payable by the buyer to the seller for the interest in real property being transferred, including any subsequent additional consideration for the property payable by the buyer based upon any subsequent appreciation, development, or sale of the property. An interest in real property may include a separate mineral estate and its appurtenant surface access rights.

- Any commission payable to a licensed real estate broker for the transfer of real property pursuant to an agreement between the broker and the seller or the buyer, including any subsequent additional commission for that transfer payable by the seller or the buyer based upon any subsequent appreciation, development, or sale of the property.

- Any interest, charges, fees, or other amounts payable by a borrower to a lender pursuant to a loan secured by a mortgage against real property, including, but not limited to, any fee payable to the lender for consenting to an assumption of the loan or a transfer of the real property subject to the mortgage, any fees or charges payable to the lender for estoppel letters or certificates, and any shared appreciation interest or profit participation or other consideration measured by the success of the venture and payable to the lender in connection with the loan.

- Any rent, reimbursement, charge, fee, or other amount payable by a tenant to a landlord under a lease, including, but not limited to, any fee payable to the landlord for consenting to an assignment, subletting, encumbrance or transfer of the lease.

- Any consideration payable to the holder of an option to purchase an interest in real property or the holder of a right of first refusal or first offer to purchase an interest in real property for waiving, releasing, or not exercising the option or right upon the transfer of the property to another person.

In adopting the Statute, the Florida legislature sought to strike a balance between prohibiting those which unduly burdened the property and its owners and preserving widely accepted, beneficial fees payable at transfer of the property.

These exceptions to the prohibition fall into several categories. The first type of Florida exceptions deals with deferred or future payments directly agreed to by the impacted parties (as distinguished from those affecting a non-contracting subsequent owner). This category includes deferred purchase prices, commissions payable on resale, profit participations to prior owners or participating mortgagees and "due on sale" clauses in leases, mortgages and other instruments. The distinguishing characteristic of these exemptions is that they are arms-length transactions between consenting parties. These types of restrictions would arguably fall within the Guidelines definition of a transfer fee. They attach to real property as part of a recorded document, are placed by the owner, and require a payment to an identified party upon resale.

A second group of Florida exceptions exempts transfer fees imposed by or payable to a governmental entity and transfer fees imposed pursuant to environmental or conservation covenants (which sometimes require payments on resale or certain other triggering events – e.g. brownfields remediation programs). To the extent documented by a recorded covenant imposed by an owner, these would also be proscribed by the proposed Guidance.

A third group of Florida exceptions are covenants of a type which were not perceived as a significant public policy problem. These include the following covenants: those solely benefitting a community charity, those funding cultural, educational, recreational or other similar activities for a community; those paid to condominium and home owners' associations, and those relating to transfers of club memberships. Several major developers have created transfer fee covenants pursuant to which 100% of the proceeds are paid into a 501(c)(3) charitable organization and applied to community improvements and activities. These have proven popular and generally successful. Many Florida condominium associations and a lesser number of homeowners' associations require association approval of new purchasers in an attempt to maintain the character and harmony of the community. A transfer of property in those communities thus requires an application process and usually some credit and background checks, which are funded by fees that can be characterized as private transfer fees. Some communities also charge fees on a transfer in order to build reserves, fund capital improvements or accomplish other association goals. Almost every Florida condominiums requires a payment of some sort on the transfer of property – whether for estoppel letters, application fees or even the type of percentage of sale price transfer fee which the Guidance seeks to preclude. The same is true of a smaller number of subdivisions with mandatory home owners' associations. These fees are widely accepted and generally popular.

The Guidance will require condominium associations and homeowners' associations to carefully evaluate their covenants and determine how to proceed in light of the adverse consequences for the community. The process will entail significant expenditures for legal advice. Likely, federally insured mortgage lending will slow or cease while this review process occurs. At the end of the evaluation, a significant number of subdivisions and most

condominiums will find themselves excluded from the insured mortgage market, and in the current market all but unmarketable. We anticipate that prices will drop as the pool of potential buyers will be limited to those able to pay cash or to secure financing from the small number of lenders willing to make non-conforming loans.

The Guidance essentially makes any mortgage loan against a property encumbered by a transfer fee covenant "non-conforming" for federal lending purposes. In today's already difficult mortgage market dominated by federally insured mortgages, this will greatly reduce the financing options available and materially diminish the value of those properties – further exacerbating the real estate crisis. The market has demonstrated the consequences of mortgage balances exceeding the value of the collateral: defaults rise, the value and performance of the mortgage decline, and the loan to value ratio increases. We would suggest that one of the unintended consequences of the Guidance is to increase the lender's risks and further destabilize the secondary mortgage market.

The expected reaction by an affected condominium or owners association is to amend its declaration to remove the prohibited transfer fees. Under Florida law, this process typically requires a vote by the board of directors, formal notice to all association members, and approval by the requisite number of owners. Given the requirements in most declarations for super-majority approval, the amendment may not be achievable. Many declarations also require approval of all or a majority of the mortgagees, which is expensive, time consuming and difficult to obtain, assuming the lender responds to the association's request for approval. At a minimum, amending the covenants will necessitate months of effort and attorneys fees. Applying the Guidance to existing communities that cannot readily change their documents unfairly penalizes them for what has been a legal, even desirable, practice.

It is troubling that the Guidance readily admits that it "does not distinguish between private transfer fee covenants which purport to render a benefit to the affected property and those which accrue value only to unrelated third parties." The Agency's position ignores the fact that many transfer fees directly enhance the communities and benefit their residents. Other transfer fees are required by local governments to fund their mandates or preserve environmentally sensitive or historically significant sites. Overly broad language in the Guidance could adversely affect mortgagees or sellers entitled to collect shared appreciation payments or others holding contractual rights to receive deferred payments such as payments under options to purchase or real estate commissions.

Unless the Agency revises the positions taken in the Guidance, the Guidance will impair the value, marketability and financability of thousands of homes in communities throughout Florida, and directly impact multiple participants in the residential real estate market including individual consumer owner/buyers, developers, lenders, community associations, real estate brokers, contractors and others. This result would be contrary to the mission of the Agency and disrupt the market for residential real estate sales and mortgages. Again, we submit Florida Statute Section 689.28 for your consideration as striking the appropriate balance.

Thank you for the opportunity to offer our insights into this process.

Sincerely,

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

Brian J. Felcoski, Chair

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RPPTL 2010-2011 CLE Calendar				
DATE	SEMINAR	COURSE #	CITY	HOTEL
August 6, 2010	* 31st Annual Legislative & Case Law Update	1216	Palm Beach	The Breakers
August 26, 2010	* Oil Spill Impacts in Real Property Practice	1225	Tampa	Marriott
September 14, 2010	* FAR/BAR	1134	Orlando	FAR Office
November 12, 2010	* Mortgage Law & Problem Studies	1159	Tampa	Airport Marriott
November 19, 2010	* Estate Planning & Asset Preservation	1147	Orlando	Hilton
January 2011 TBD	* Real Property Litigation	1155	Tampa	Airport Marriott
Mar. 17 - 18, 2011	* Probate Law	1177	Ft. Lauderdale/Tampa	TBD/ Airport Marriott
Mar. 31 - April 02, 2011	4th Annual Construction Law Institute	1179	Orlando	TBD
Mar. 31 - April 02, 2011	Construction Law Certification Review Course	1180	Orlando	TBD
April 8 - 9, 2011	* Wills, Trusts & Estates Certification Review Course	1186	Orlando	Hyatt Regency Airport
April 8 - 9, 2011	* Real Estate Certification review Course	1185	Orlando	Hyatt Regency Airport
April 15, 2011	* Condominium Law & Condominium Association Law	1191	Tampa	Airport Marriott
May 6, 2011	* Development & Government Regulation	1197	Tampa	Airport Marriott
May 12-13, 2011	* Trust & Estate Symposium	1167	Tampa/Ft. Lauderdale	Airport Marriott/TBD
May 27, 2011	* Real Property, Probate and Trusts Law Convention Seminar	1205	Miami	Eden Roc
June 15 - 19, 2011	30th Annual Attorney Trust Officer Liaison Conference	1210	Palm Beach	The Breakers

* Webcast Program

THE FLORIDA BAR

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CLE COURSE CREDIT INFORMATION

Course Title: Drafting Florida Legislation

Date of Course: 9/24/2010 Course Number: 9824 0

Course Level: INT

CLE Course Credit

General Credits:	1.5	
Including:	0.5	Ethics
	0	Professionalism
	0	Substance Abuse
	0	Mental Illness Awareness

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