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

Executive Council Meeting

AGENDA

Portofino Bay Hotel
Orlando, Florida

Saturday, June 4, 2016
10:00 a.m.

BRING THIS AGENDA TO THE MEETING

Real Property, Probate and Trust Law Section
Executive Council Meeting

Portofino Bay Hotel
Orlando, Florida
June 4, 2016

AGENDA

I. **Presiding** — *Michael J. Gelfand, Chair*

II. **Attendance** — *S. Katherine Frazier, Secretary*

III. **Minutes of Previous Meeting** — *S. Katherine Frazier, Secretary*

Motion to approve the minutes of February 27, 2016 meeting of Executive Council held at the Tampa Waterside Marriott, Florida. **pp. 12 - 41**

IV. **Chair's Report** — *Michael J. Gelfand*

1. Recognition of Guests.

2. Recognition of General Sponsors and Friends of the Section. **pp. 42 - 44**

3. Interim Action by the Executive Committee.

   A. The Florida Bar's proposed Condominium and Planned Development Law Board Certification Committee, recommended nominees proposed to the President-Elect of The Florida Bar. **pp. 45 - 47**

   B. Approved waiver of Executive Council meeting attendance requirements for Martin Awerbach.

V. **Liaison with Board of Governors Report** — *Andrew B. Sasso*

VI. **Chair-Elect's Report** — *Deborah P. Goodall* **p. 48 - 50**

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

1. Statement of Current Financial Conditions. **pp. 51**

VIII. **Director of At-Large Members Report** — *Shane Kelley*

IX. **CLE Seminar Coordination Report** — *Robert Swaine (Real Property)* and *William Hennessey, III (Probate & Trust), Co-Chairs* **p. 53**

XI. **Kids Committee Report** -- *TBA, Chair; Laura Sundberg, Advisor*

XIV. **General Standing Division** — *Deborah P. Goodall, General Standing Division Director and Chair-Elect*

Action Items:

1. **Legislation Committee** --- *Tae Kelley Bronner (Probate & Trust) and Steven Mezer (Real Property), Co-Chairs.*

   Motion to approve the renewal of the RPPTL Section official legislative positions previously adopted except for those marked "Delete" on the attached list. **pp. 54 - 63**

2. **Sponsor Coordination** --- *Wilhelmina F. Kightlinger, Chair*

   Motion to approve, in accordance with past Section practice, the waiver of general sponsorship fees for The Florida Bar Foundation for fiscal year 2016-2017, and allowing The Florida Bar Foundation to have exhibitor space at the 2016 Legislative Update and at the 2017 Convention without paying an exhibitor fee if space is available after registration of paying exhibitors, and to ratify the waiver of the general sponsorship fees for The Florida Bar Foundation for fiscal year 2015-2016.

Information Items:

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

   Report on the *en banc* decision from the Third District Court of Appeal in Deutsche Bank v. Beauvais **pp. 64 - 131**

2. **Fellows –** *E. Ashley McRae, Chair*

   Report on the work of our current classes of Fellows, congratulating our graduating Fellows and welcoming our newest Fellows for 2016 – 2018. **pp.132-133**

3. **Legislation** --- *Tae Kelley Bronner (Probate & Trust) and Steven Mezer (Real Property), Co-Chairs*

   Final Report from 2016 Legislative Session **pp. 134 - 140**

4. **Legislative Update 2016** --- Jim Robbins, Chair

   Update on the Update.

5. **Liaison with Clerks of Circuit Court** – *Laird A. Lile and William Theodore Conner*

Report on current matters involving clerks of court.

6. **Membership and Inclusion** ---- *Lynwood F. Arnold, Jr. and Jason M. Ellison, Co-Chairs*

Report on status of current projects and initiatives including new member handbook.

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

Report on Model and Uniform Acts **pp. 141 - 150**

8. **Professionalism and Ethics** --- *Lawrence J. Miller, Chair*

A. **Introduction of "Safe at Home"**

Report on a project to seek attorney volunteer assistance to clear title to real property for vulnerable low income Florida residents, thereby allowing such residents to receive disaster-related relief, access to community development funds, and available real property tax exemptions. **pp. 151 - 152**

B. **RPPTL Ethics Players**.

9. **Publications:**

A. **ActionLine** --- *Silvia Rojas, Chair*

Update on status of current articles and editorial assignments for 2016-2017.

B. **Florida Bar Journal** --- *Jeffrey Goethe (Probate & Trust) and Douglas Christy (Real Estate) Co-Chairs.*

Update on upcoming deadlines for articles.

10. **Sponsor Coordination** --- *Wilhelmina F. Kightlinger, Chair*

Report on current sponsors and existing opportunities.

XII. Real Property Law Division Report—*Andrew M. O'Malley, Director*

Action Item:

Real Estate Structures and Taxation Committee – *Cristin Keane, Chair*

Motion to (A) adopt as a Section position a total exemption for documentary stamp taxes for transfers of property between spouses including an amendment to FS 201.02 (B) to find that such legislative position is within the purview of the RPPTL Section; and (C) to expend Section funds in support of the proposed

legislative position **pp. 153 - 158**.

Information Item:

Real Estate Structures and Taxation Committee – *Cristin Keane, Chair*

Proposed support of uniform assessment of property held in Florida land trusts, including changes to FS 193.1554(5) and 193.1555(5) **pp. 159 - 166**.

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

Action Items:

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

   Motion to: (A) support a Section position to provide that funeral-related expenses a guardian can expend with court approval is not limited to $6,000.00, including amending F.S. 744.441(16); (B) find that such legislative position is within the purview of the RPPTL Section; and (C) expend Section funds in support of the proposed legislative position **pp. 167 - 170** .

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

   Motion to (A) support a Section position concerning a Chapter 744, examining committee member's report, including an amendment to F.S. 744.331, requiring: the Clerk of Court to timely serve the report; requiring parties to an incapacity proceeding to notice an objection to an examining committee member's report at least 5 days prior to the adjudicatory hearing or have the objection waived; and, address the timing for an adjudicatory hearing, (B) find that such legislative position is within the purview of the RPPTL Section; and (C) expend Section funds in support of the proposed legislative position **pp. 171 -183**.

Informational Items:

1. **Ad Hoc POLST Committee ---** *Jeff Baskies, Chair*

   Proposed support of legislation to recognize Physician Orders for Life Sustaining Treatment under Florida law with appropriate protections to prevent violations of due process for the benefit of the citizens of Florida, including the creation of s. 406.46, Florida Statutes **pp. 184 - 204.**

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

   Proposed support of legislation to amended the Florida Statutes to permit the creation of joint tenancies with rights of survivorship and tenancies by the entireties in certain kinds of personal property without regard to the common law unities of time and title, including the creation of a new s. 689.151, Florida Statutes. The effect of the statute will be to permit a married owner of personal

property to establish a tenancy by the entireties with his or her spouse without the use of a "straw man." Further, if one spouse adds the name of the other spouse as an owner of personal property, a presumption is created that both spouses own such personal property as tenants by the entireties. The presumption may only be overcome by clear and convincing evidence of a contrary intent. The statute also allows for the creation of joint tenancies with rights of survivorship in certain types of personal property (that fall within the scope of the statute) without regard for the common law unities of time and title, just as it dispenses with those unities in the creation of tenancies by the entireties **pp. 205 – 214.**

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

Proposed support of legislation to permit a court to approve a guardian's request to initiate a petition for dissolution of marriage of a ward without the requirement that the ward's spouse consent to the dissolution, including amendments to s. 744.3725, Florida Statutes **pp. 215 – 220.**

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

Proposed support of legislation to revise Florida law to provide that the Attorney General is the proper party to receive notice for matters concerning charitable trusts and further define the manner in which the Attorney General will receive such notices, including changes to §§736.0110(3), 736.1201, 736.1205, 736.1206(2), 736.1207, 736.1208(4)(b), and 736.1209, Florida Statutes. The change will resolve an inconsistency in the current law that names both the Attorney General and the state attorney to receive notices concerning charitable trusts by designating that only the Attorney General is to receive such notices. It also clarifies how notice is to be given to the Attorney General in charitable trust matters **pp. 221 – 228**.

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

Proposed support of legislation revising F.S. 736.04117: (1) allowing a trustee to distribute principal in further trust pursuant to a power of distribution that is limited by an ascertainable standard (currently such distributions are only permitted pursuant to a trustee's power to distribute principal pursuant to an absolute power to make distributions); (2) adding a provision to allow a trustee to distribute trust principal to a supplemental needs trust when a beneficiary is disabled; and (3) expanding the notice requirements to require the trustee to provide a copy of the proposed distributee trust instrument prior to the distribution (currently, providing a copy of the proposed trust instrument is a safe harbor, but it is not mandatory) **pp. 229 - 245**.

XV. Real Property Law Division Reports — *Andrew M. O'Malley, Director*

1. **Commercial Real Estate** – Adele Stone, Chair; Burt Bruton and Martin Schwartz, Co- Vice Chairs.

2. **Condominium and Planned Development** – Bill Sklar, Chair; Alex Dobrev and Steve Daniels, Co-Vice Chairs.

3. **Construction Law** – Hardy Roberts, Chair; Scott Pence and Reese Henderson, Co-Vice Chairs.

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

5. **Construction Law Institute** – Reese Henderson, Chair; Sanjay Kurian, Diane Perera and Jason Quintero, Co-Vice Chairs.

6. **Development & Land Use Planning** – Vinette Godelia, Chair; Mike Bedke, Co-Vice Chair.

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

8. **Liaisons with FLTA** – Norwood Gay and Alan McCall, Co-Chairs; Alexandra Overhoff and James C. Russick, Co-Vice Chairs.

9. **Real Estate Certification Review Course** – Jennifer Tobin, Chair; Manual Farach and Martin Awerbach, Co-Vice Chairs.

10. **Real Estate Leasing** – Rick Eckhard Chair; Brenda Ezell, Vice Chair.

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

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

13. **Real Property Litigation** – Susan Spurgeon, Chair; Manny Farach and Martin Solomon, Co-Vice Chairs.

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

15. **Residential Real Estate and Industry Liaison** – Salome Zikakas, Chair; Trey Goldman and Nishad Khan, Co-Vice Chairs.

16. **Title Insurance and Title Insurance Liaison** – Raul Ballaga, Chair; Alan Fields and Brian Hoffman, Co-Vice Chairs.

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

XVI. Probate and Trust Law Division Committee Reports — *Debra L. Boje, Director*

1. **Ad Hoc Guardianship Law Revision Committee** – David Brennan, Chair; Sancha Brennan Whynot, Hung Nguyen and Charles F. Robinson, Co-Vice Chairs

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

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

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

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

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

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

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

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

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

11. **Guardianship, Power of Attorney and Advanced Directives** – Hung Nguyen, Chair, Tattiana Brenes-Stahl, David Brennan, Eric Virgil, and Nicklaus Curley, Co-Vice Chairs

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

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

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

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

16. **Principal and Income** – Edward F. Koren, Chair; Pamela Price, Vice Chair

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

18. **Probate Law and Procedure** – John C. Moran, Chair; Sarah S. Butters, Michael Travis Hayes and Matt Triggs, Co-Vice Chairs

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

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

XVII. **General Standing Committee Reports** — *Deborah P. Goodall, Director and Chair-Elect*

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

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

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

4. **Budget** – Robert S. Freedman, Chair; S. Kathrine Price, Pamela O. Price, Co-Vice Chairs

5. **CLE Seminar Coordination** – Robert S. Swaine and William T. Hennessey, Co-Chairs; Laura K. Sundberg (Probate & Trust), Sarah S. Butters (Probate & Trust), Lawrence J. Miller (Ethics), Cary Wright (Real Property) and Hardy L. Roberts, III (General E-CLE), Theo Kypreos, Co-Vice Chairs**.**

6. **Convention Coordination** – Laura K. Sundberg Chair; Alex Hamrick and Alex Dobrev, Co-Vice Chairs

7. **Fellows** – Ashley McRae, Chair; Benjamin Diamond and Joshua Rosenberg, Co-Vice Chairs

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

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

10. **Legislation** – Tae Kelley Bronner (Probate & Trust) and Steven Mezer (Real Property), Co-Chairs; Thomas Karr (Probate & Trust), and Alan B. Fields (Real Property), Co-Vice Chairs

11. **Legislative Update (2015)** – R. James Robbins, Chair; Charles I. Nash, Barry F. Spivey, Stacy O. Kalmanson and Jennifer S. Tobin, Co-Vice Chairs

12. **Legislative Update (2016)** – Barry F. Spivey and Stacy O. Kalmanson, Co-Chairs; Thomas Karr, Joshua Rosenberg, and Kymberlee Curry Smith, Co-Vice Chairs

13. **Liaison with:**

    a. **American Bar Association (ABA)** – Edward F. Koren and Julius J. Zschau
    b. **Clerks of Circuit Court** – Laird A. Lile and William Theodore Conner
    c. **FLEA / FLSSI** – David C. Brennan and Roland "Chip" Waller
    d. **Florida Bankers Association** – Mark T. Middlebrook
    e. **Judiciary** – Judge Linda R. Allan, Judge Herbert J. Baumann, Judge Melvin B. Grossman, Judge Hugh D. Hayes, Judge Maria M. Korvick, Judge Norma S. Lindsey, Judge Celeste H. Muir, Judge Robert Pleus, Jr., Judge Walter L. Schafer, Jr., Judge Morris Silberman, Judge Mark Speiser, Judge Richard J. Suarez,., and Judge Patricia V. Thomas
    f. **Out of State Members** – Michael P. Stafford, John E. Fitzgerald, Jr., and Nicole Kibert
    g. **TFB Board of Governors** – Andrew Sasso
    h. **TFB Business Law Section** – Gwynne A. Young
    i. **TFB CLE Committee** – Robert S. Freedman and Tae Kelley Bronner
    j. **TFB Council of Sections** –Michael J. Gelfand and Deborah P. Goodall
    k. **TFB Pro Bono Committee** – Tasha K. Pepper-Dickinson

14. **Long-Range Planning** – Deborah P. Goodall, Chair

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

16. **Member Communications and Information Technology** – William A. Parady, Chair; S. Dresden Brunner, Michael Travis Hayes, and Neil Shoter, Co-Vice Chairs

17. **Membership and Inclusion** –Lynwood F. Arnold, Jr. and Jason M. Ellison, Co-Chairs, Phillip A. Baumann, Kathrine S. Lupo, Guy S. Emerich, Theodore S. Kypreos, Tara Rao, and Kymberlee Curry Smith, Co-Vice Chairs

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

19. **Professionalism and Ethics--General** – Lawrence J. Miller, Chair; Tasha K. Pepper-Dickinson, Vice Chair

20. **Publications (ActionLine)** – Silvia B. Rojas, Chair (Editor in Chief); Jeffrey Baskies (Vice Chair – Editor Probate & Trust Division), Cary Wright (Vice Chair – Editor Real Property Division), Lawrence J. Miller (Vice Chair – Editor Professionalism & Ethics); George D. Karibjanian (Editor, National Reports), Lee Weintraub (Vice Chair - Reporters Coordinator), Benjamin Diamond (Vice Chair – Features Editor), Kathrine S. Lupo (Vice Chair - Advertising Coordinator),

Navin R. Pasem (Vice Chair – Practice Corner Editor), Sean M. Lebowitz (Vice Chair – Probate & Trust Case Summaries), Shari Ben Moussa (Vice Chair – Real Property Case Summaries)

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

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

23. **Strategic Planning** –Michael J. Gelfand and Deborah P. Goodall, Co-Chairs

24. **Professionalism and Ethics--General** – Lawrence J. Miller, Chair; Tasha K. Pepper-Dickinson, Vice Chair

25. **Publications (ActionLine)** – Silvia B. Rojas, Chair (Editor in Chief); Shari Ben Moussa (Advertising Coordinator), Navin R. Pasem (Real Property Case Review), Jeffrey Baskies (Probate & Trust), Ben Diamond (Probate & Trust), George D. Karibjanian (Editor, National Reports), Lawrence J. Miller (Editor, Professionalism & Ethics), and Lee Weintraub (Real Property), Co-Vice Chairs

26. **Publications (Florida Bar Journal)** – Jeffrey S. Goethe (Probate & Trust), and Douglas G. Christie (Real Property), Co-Chairs; Brian Sparks (Editorial Board – Probate & Trust), Cindy Basham (Editorial Board – Probate & Trust), Michael A. Bedke (Editorial Board – Real Property) and Homer Duvall (Editorial Board – Real Property) and Alison Archbold (Editorial Board), Co-Vice Chairs

27. **Sponsor Coordination** –Wilhelmena F. Kightlinger, Chair; J. Michael Swaine, Deborah L. Russell, W. Cary Wright, Benjamin F. Diamond, John Cole, Co-Vice Chairs

28. **Strategic Planning** –Michael J. Gelfand and Deborah P. Goodall, Co-Chairs

XVIII. Adjourn Motion to Adjourn.

MINUTES
OF THE
REAL PROPERTY, PROBATE & TRUST LAW SECTION
EXECUTIVE COUNCIL MEETING

Saturday, February 27, 2016
Tampa Waterside Marriott, Tampa, Florida

I. Call to Order — Michael J. Gelfand, Chair

The meeting was held at the Tampa Waterside Marriott, Tampa, Florida. Mr. Gelfand called the meeting to order at 9:05 a.m. on Saturday, February 27, 2016. Mr. Gelfand recognized the students leading the Council's school supplies contribution efforts, all from Wharton High School National Honor Society: Luke Boyer, Marlies Bronner, Jimmy Cannon and Gabrielle Gonzalez. He also thanked Tae Kelly Bonner for supervising the collection which she explained were for the Wharton program which provides tutoring for Whittier and Mosi Elementary schools, both Title I schools, and Hunters Green Elementary which is need of supplies for the high population of refugee children.

II. Attendance — S. Katherine Frazier, Secretary

Ms. Frazier reminded members that the attendance roster was circulating to be initialed by Council members in attendance at the meeting. Ms. Frazier reminded Council members of the importance of signing the roster in order to document their attendance at the Council meetings. Ms. Frazier also reminded Council members that the Section's By-laws provide that if any Council member misses three consecutive in-state Council meetings then such Council member shall automatically be deemed to have resigned from the Council.

[*Secretary's Note* - The roster showing members in attendance is attached as Addendum "A".]

III. Minutes of Previous Meeting — S. Katherine Frazier, Secretary

Ms. Frazier moved:

> **To approve the Minutes of the November 14, 2015 meeting of the Executive Council held at The Boca Raton Resort, Boca Raton, Florida.** (See Agenda pages 14-43.)

The Motion was unanimously **approved**.

IV. Chair's Report — Michael J. Gelfand

1. Recognition of Guests. Mr. Gelfand recognized and welcomed the guests in attendance. Mr. Gelfand also welcomed back Council member, Brian Sparks.

2. Recognition of General Sponsors and Friends of the Section. Mr. Gelfand introduced Cary Wright who for the Sponsorship Committee recognized the following General Sponsors and Friends of the Section:

General Sponsors

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

Thursday Lunch
Management Planning, Inc. – Roy Meyers

Thursday Night Reception
JP Morgan – Carlos Batlle/Alyssa Feder
Old Republic National Title Insurance Company – Jim Russick

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

Friday Night Dinner
First American Title Insurance Company – Alan McCall
Regions Private Wealth Management – Margaret Palmer

Probate Roundtable
SRR (Stout Risius Ross Inc.) – Garry Marshall

Real Property Roundtable
Fidelity National "Title Group – Pat Hancock

Saturday Lunch
The Florida Bar Foundation – Bruce Blackwell

Friends of the Section

Business Valuation Analysts, LLC – Tim Bronza
Corporation Services Company – Beth Stryzs
Corporate Valuation Services, Inc. – Tony Garvy
Guardian Trust – Ashley Gonnelli
North American Title Insurance Company – Andres San Jorge
Valuation Services, Inc. – Jeff Bae, JD, CVA
Wilmington Trust – David Fritz

(See Agenda pages 44- 45.)

3. Upcoming Meeting. Mr. Gelfand reminded members of the remaining 2016 Council meeting schedule. Mr. Gelfand announced that the scheduled guest speaker at the Convention luncheon will be Gilbert King, the 2014 Pulitzer Prize winner author of *Devil in the Grove*, which is about justice in Florida. Mr. Gelfand also announced that the Section is now working with an independent contractor for meeting planning. (See Agenda pages 47-48)

4. Interim Action by the Executive Committee. Mr. Gelfand reported on the following:

A. Intra-Bar Matters:

1. Rule 4-4.2. Communication to Governmental Attorney, Proposed Rule Change. Approved following position:

> "It remains the position of the RPPTL Section, as previously approved by the Executive Council, that no change is needed to Rule 4-4.2 or the comment to that Rule. As such, the Section opposes any such change. In the spirit of compromise and Bar unity, however, if the Local Government groups will accept the highlighted additional sentence above as the only change to the Rule and comment, the Executive Committee will recommend to the Executive Council at its next meeting that the Section support the addition of that sentence. If the Local Government groups reject this language, the Section's prior position that no change is needed or appropriate will be presented at the December BOG meeting."

2. Florida Realtor-Attorney Joint Committee Appointments for the term 2015-2017. Mr. Gelfand introduced Jamie Marx as the Chair for the Florida Realtor-Attorney Joint Committee. Approved motions to recommend to appointments:

> First Appellate District, Denise L. Hutson (Gainesville)
> Second Appellate District, Julie A. Horstkamp (Venice)
> Third Appellate District, James A. Marx (Miami)
> Fourth Appellate District, Guy Rabideau (Palm Beach)
> Fifth Appellate District, Frederick W. Jones (Winter Park)
> Member At Large, Jamie B. Moses (Orlando)

(See Agenda pages 49-53.)

3. The Florida Bar Probate Rules Committee. Approved motion to approve proposed nominees for appointment to the Probate Rules Committee. (See Agenda pages 54-55)

4. Section Amended By-Laws Approval.

B. Section Committees

1. Attorney Trust Officer Liaison Conference (ATO). Approved request for ATO sponsors to appear in 30 second videos.

2. Leadership Academy Scholarship. Approved RPPTL Executive Committee award of a scholarship for Erin JoAnne Tifton to The Florida Bar Leadership Academy. Mr. Gelfand thanked Kris Fernandez and Brian Sparks for their Committee's efforts.

3. Legislative Update. Approved payment of Legislative Update lunch, and when in conjunction with Section meetings, PAC meeting refreshments, subject to approval of legality issue.

4. Condominium and Planned Development Law Board Certification Committee in the Real Property Law Division.

C. Council Attendance: Approved waiver of the 2015-16 Executive Council meeting attendance requirements for: the Honorable Melvin B. Grossman; William R. Platt; and, Michael David Simon. Mr. Gelfand noted that the Executive Committee also approved the waiver of Executive Council attendance requirements for Shari Diane Ben Moussa and Kenneth Bradley Bell. Mr. Gelfand once again reminded Council members of the significance of attending the Council meetings and signing the roster to document their attendance in accordance with the Section's By-laws.

D. Legislative Positions

1. Temporary Care of Minor Children by Safe Families Act – Approved the following Legislative Position proposed by the Guardianship, Power of Attorney and Advanced Directives Committee.

To oppose the expansion of chapter 709 to include the authority of a parent to assign the custody and control of a minor child through a power of attorney unless proper procedural safeguards are included to assure the proper care and welfare of the minor children are included, find that this position is within the Section's purview; and, authorize the expenditure of funds in support of the position.

2. Temporary Care of Minor Children by Safe Families Act – Legislative Position Approved the following Legislative Position proposed by the Guardianship, Power of Attorney, and Advanced Directives Committee:

To oppose the expansion of chapter 709 to include the authority of a parent to assign the custody and control of a minor child through a power of attorney unless proper procedural safeguards are included to assure the proper care and welfare of the minor children are included; to find that the position is within the purview of the Section, and to authorize the expenditure of funds in furtherance of the position.

3. Vulnerable Adults Approved motion by Probate Litigation Committee:

To oppose legislation to expand the potential plaintiffs who can file an action on behalf of a vulnerable adult who has been abused, neglected, or exploited as specified in Chapter 415 without the consent of the vulnerable adult and without clear requirements that any recovery from successful litigation be paid to the vulnerable adult or their estate, including but not limited to amendments to §415.1111; find that this position is within the Section's purview; and, authorize the expenditure of funds in support of the position.

E. Joint Committee for Drafting FR/BAR Residential Real Estate Contract Forms. Approved motion to approve Joint Committee for Drafting FR/BAR Residential Real Estate Contract Forms proposed emergency text change to accommodate FIRPTA increase in withholding requirements, and requesting the Committee to consider further text changes to delete text that experience has shown is not necessary, and if reasonably possible, and report proposed changes to the Section at the Convention Council meeting.

5. Interim Action by the Chair:

A. Council of Sections. Proposed: "Motion to request the Bar to retain a marketing expert to study CLE presentations, marketing, pricing, and delivery of programs, reporting to the Board of Governors by September 2016"

B. Landlord/Tenant: Renamed to Real Estate Leasing

C. Florida Electronic Filing & Service: Dissolved.

6. Mr. Gelfand then reminded Council members about the ongoing debates as part of the upcoming election cycle, reminding Council members of their responsibility as civic leaders to engage and lead by positive example, and to the extent

there is dissatisfaction, encouraging Council members to pursue positive policies by run for public office.

7. Mr. Gelfand introduced the President-Elect of The Florida Bar, William "Bill" Schifino. Mr. Schifino commended our Section for all of the work of the Section and for the Council meeting in his hometown of Tampa. Mr. Schifino also commended the work of prior Board of Governor's members, Adele Stone, Gwynne Young and current Florida Bar Board of Governor's members, Laird Lile, Sandy Diamond who is chairing the Constitutional Revision Committee. Mr. Schifino recognized Lanse Scriven who has long time Bar service, including on the Florida Bar Board of Governors, and is exploring candidacy for President-Elect for The Florida Bar. Finally, Mr. Schifino recognized Andy Sasso whom he has selected to serve as Parliamentarian on The Florida Bar Board of Governors.

Mr. Schifino commented on Vision 2016 which focused on law school education, the bar exam and how to better serve the State and membership. Mr. Schifino continued that The Florida Bar is establishing better working relationships and meeting regularly with the Supreme Court Justices, the Deans of all of the law schools, and the Florida Bar Board Examiners and the Legislature. Mr. Schifino indicated that his primary focuses were funding for the judiciary, access to judicial services and member services. He commended the work of our lobbyist, Peter M. Dunbar.

8. Mr. Gelfand congratulated Laird Lile on his new law firm, Lile and Hayes, PLLC., and his new partner, Council member Travis Hayes.

9. Mr. Gelfand announced that two members of the Council are running for The Florida Bar Board of Governors, Melissa VanSickle in the Second Circuit and Immediate Past Chair Michael Dribin in the Eleventh Circuit, Miami-Dade County.

10. Mr. Gelfand recognized Lanse Scriven who is exploring running for The Florida Bar Presidency. Mr. Scriven commented that he seeks to give back and that he asked Council members to seek out people that know him to find out more about who he is and more about his strong character. Mr. Scriven reflected that he has lengthy service with The Florida Bar, and his sole purpose in running is to give back to the legal profession.

V. <u>Liaison with Board of Governors Report</u> — *Andrew B. Sasso*. Mr. Sasso reported on the Ad Hoc Estate Planning Attorney Conflict of Interest Study Committee which, formed in October, 2010, proposed F.S. §732.806 and changes to Rule 4.1.8(c), regarding gifts to lawyers. Mr. Sasso commended Bill Hennessey on all of his hard work on that Committee and its proposed legislation. Mr. Sasso then commended Larry Miller for his work on Rule 4.4.2, regarding contact with governmental officials. Mr. Sasso then updated the Council that The Florida Bar is currently evaluating changes to Rule 4-7.22 regarding prohibitions on referrals if another lawyer is involved. The key challenges are the definition of referral service and the definition of fee-splitting. Mr. Sasso welcomed comments on the issues involved.

VI. Chair-Elect's Report — *Deborah P. Goodall*. Ms. Goodall announced her 2016-2017 Council meeting schedule and encouraged attendance at the out of state meeting in Austin, Texas. The schedule is posted on the RPPTL website. Ms. Goodall thanked George Meyer for his assistance in reviewing all of the Council meeting contracts.

VII. Treasurer's Report — *Robert S. Freedman*. Mr. Freedman reported that, notwithstanding the posting of additional expenses from the Council's last Boca Raton meeting, the Section's financial report continues to show positive trends in operations and reserves. Mr. Freedman indicated that he would continue to keep us posted on the work of the Budget subcommittee in evaluating the budget reserves. (See Agenda page 56)

VIII. Director of At-Large Members Report — *Shane Kelley*. Mr. Kelley reminded Council members that there is an ALMS liaison for each substantive committee and that the ALMS have produced a list of certified mediators.

IX. CLE Seminar Coordination Report — *Robert Swaine (Real Property)* and *William Hennessey, III (Probate & Trust), Co-Chairs*. Mr. Hennessey recognized all of the Council member speakers that have participated in seminars in 2015-16. Mr. Hennessey encouraged attendance by all Council members at seminars. Mr. Hennessey announced multiple seminars in the near future, including the Guardianship Seminar which is a symposium for lawyers and professional guardians. (See Agenda page 57.).

X. Kids Committee Report — *TBA, Chair; Laura Sundberg, Advisor* – No Report.

XI. General Standing Division — *Deborah P. Goodall, General Standing Division Director and Chair-Elect*

Action Item:

Legislation Committee — *Tae Kelley Bronner (Probate & Trust) and Steven Mezer (Real Property), Co-Chairs.* Mr. Mezer reminded Council members of the Council's previous contract approval, increasing the fee paid to the Section's legislative consultants by $20,000; however, the contract form provided by The Florida Bar provided that expenses would be inclusive which was not intended. Accordingly, Mr. Mezer requested approval of an addendum to the Florida Bar's prescribed form to document that costs and expenses are in addition to the fee. Mr. Mezer moved on behalf of the Committee:

To approve the proposed Contract Addendum to the Dean Mead 2015 Agreement for legislative consultant services.

The Motion was unanimously **approved**. (See Agenda pages 58-59.)

Information Items:

1. **Ad Hoc Leadership Academy** — Brian Sparks and Kris Fernandez, Co-Chairs. Mr. Fernandez reported that the Committee is waiting on the approval of Erin Tifton by The Florida Bar. (See Agenda pages 60-61)

2. **Amicus Coordination** — *Robert W. Goldman, John W. Little, III, Kenneth B. Bell and Gerald B. Cope, Jr., Co-Chairs.* Mr. Goldman reminded Council members that the Committee does not appear at the trial level or the District Court of Appeal level unless asked to do so and asked Council members to please remember that the Committee tries not to dilute its message and to consider that goal when requesting the Committee's involvement. (See Agenda page 62)

3. **Convention CLE** – Mr. Freedman reported that at the Section's impetus a new speaker's license agreement has been approved by The Florida Bar which deletes the indemnification provision which was objectionable to many speakers. Mr. Freedman reported that The Florida Bar is evaluating hiring a marketing consultant at the Section's suggestion.

4. **Convention Coordination** — *Laura K. Sundberg, Chair*. Ms. Sundberg reported on the exciting activities planned for the convention including: Friday's dinner at Emeril's Tchoup Chop; and, Thursday night event at the Hard Rock Café.

   Ms. Goodall congratulated Ms. Sundberg on the extraordinary success of the ATO conference that she chaired.

5. **Fellows** — *Ashley McRae, Chair***.** Ms. McRae reported that the Fellows are updating the Legislative Committee webpage. Ms. McRae announced there were over 60 applications for four Fellows positions. One Fellow, Melissa Van Sickle, is running for the Board of Governors.

6. **Legislation** — *Tae Kelley Bronner (Probate & Trust)* and *Steven Mezer (Real Property), Co-Chairs*. Mr. Mezer reported three Section legislative initiatives Section pending action by the Governor: repeal of non-resident cost bonds; digital assets; and, family trust company.

7. **Liaison with Clerks of Circuit Court** — *Laird A. Lile* and *William Theodore Conner* Mr. Lile reported on Clerk funding issues and encouraged us to remember that Clerks want to work with the Section and are elected officials anticipating elections.

8. **Member Communication and Information Technology** — *William A. Parady, Chair***.** Mr. Parady reminded everyone about the RPPTL app, which almost all of the Council members are using and encouraged members to continue to use. Mr. Parady reminded committee chairs that agendas must be posted to the website because the app pulls the

agendas from the website. All of a committee's agenda materials should be posted in one pdf. Mr. Parady thanked the app committee for their hard work.

9. **Membership and Inclusion** — *Lynwood F. Arnold, Jr. and Jason M. Ellison, Co-Chairs***.** Mr. Ellison reported that the Committee works hard to help keep Section membership above 10,000. Mr. Ellison thanked the ALMS who are very supportive of the Committee's efforts. Mr. Ellison reported that events are held at all of the law schools and to let him know if a Council member wants to get involved. Ms. Goodall thanked Jason Ellison and Lynwood Arnold for all of their efforts.

10. **Professionalism and Ethics** — *Lawrence J. Miller, Chair*. Mr. Miller thanked all Committee members as part of his final Committee report, and in particular Laird Lile, Sandy Diamond and the liaisons with the Business Law Section, for their assistance concerning the proposed amendments to Rule 4-4.2.

11. **Publications:**

A. **ActionLine** — *Silvia Rojas, Chair*. Ms. Rojas thanked all of the advertisers and authors and Ms. Rojas asked members to provide photos to her. Ms. Rojas reminded Council members of the upcoming April 30 deadline and that she definitely needs probate and trust submissions.

B. **Florida Bar Journal** — *Jeffrey Goethe (Probate & Trust) and Douglas Christy (Real Estate) Co-Chairs.* Mr. Goethe reported that the Journal alternates probate/trust and real estate articles. Currently the Committee has more real property articles in the pipeline and is in need of more probate/trust articles.

12. **Sponsor Coordination** — *Wilhelmina F. Kightlinger, Chair*. In Ms. Kightlinger's absence, Ms. Goodall thanked all Sponsors and Friends of the Section. She requested Council members remind sponsors know when they utilize their businesses so that the sponsors are aware of the Section's appreciation.

XII. <u>Real Property Law Division Report</u>— *Andrew M. O'Malley, Director*. Mr. O'Malley recognized the following sponsors:

<u>Committee Sponsors</u>

Attorneys' Title Fund Services, LLC – Melissa Murphy
Commercial Real Estate Committee
First American Title Insurance Company - Alan McCall
Condominium & Planned Development Committee
First American Title Insurance Company – Wayne Sobien

Real Estate Structure and Taxation Committee

Action Items:

1. **Real Property Problems Study Committee** — *Arthur Menor, Chair*

Mr. Menor summarized the "Priority Reset Statute", formerly the "Start-Stop Statute", addressing the requirement for the cessation of construction as condition to terminate a Notice of Commencement.

Mr. Menor moved on behalf of the Committee:

To (A) adopt as a Section position to remove the requirement for cessation of construction as a condition to terminating a Notice of Commencement, including an amendment to F.S. 713.132(3); (B) find that such legislative position is within the purview of the RPPTL Section; and, (C) expend Section funds in support of the proposed legislative position.

The Motion was unanimously **approved**. (See Agenda pages 63-79)

2. **Title Issues and Title Standards Committee** — *Christopher Smart, Chair*.

Mr. Smart summarized proposed amendments to the Uniform Title Standards including standards addressing the use of powers of attorney with homestead and non-homestead property, conveyances of real property, witnesses, level of consideration and after-acquired property.

Mr. Smart moved on behalf of the Committee:

To approve Uniform Title Standards Concerning: Agency and Powers of Attorney 1.1 (revised), 1.3 (revised), 1.4, and 1.5; and, Conveyances 3.7, 3.8, and 3.9.

The Motion was unanimously **approved**. (See Agenda pages 80-107.)

Information Items:

1. **Real Estate Structures and Taxation Committee** --- *Cristin Keane, Chair*

Mr. O'Malley recognized Burt Bruton who proposed support of the Tax Law Section's proposed Marriage Documentary Stamp Tax Act, FS 201.02(7), creating a total exemption for documentary stamp taxes for transfers of real property between spouses regardless if there is a divorce or a mortgage

encumbering the property. Mr. Bruton did note that this legislation would have a negative fiscal impact. (See Agenda pages 108-113.)

2. **Real Property Litigation Committee** --- *Susan Spurgeon, Chair*

Ms. Spurgeon reported on the proposed amendments to FS 90.902, "Self-Authentication of Documents", that anticipated financial consequences for the Clerks raised concerns, and that evidence Professor Ehrhardt questioned if a certified copy was required for judicial notice. (See Agenda pages 114-115.)

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

Mr. Menor reported that there was consideration of whether to clarify the minimum duration of a notice of commencement. (See Agenda pages 116-117.)

4. **Residential Real Estate and Industry Liaison Committee** --- *Salome Zikakis, Chair*

Ms. Zikakis thanked Jamie Marx for all of his efforts on the FR/BAR Committee, and reported on the following:

i.) Executive Committee action approving a revision to the FR/BAR Residential Contract for Sale to address revisions to the Foreign Investment in Real Property Tax Act ("FIRPTA"). (See Agenda pages 118-121.)

ii.) U.S. Department of the Treasury "FinCEN" Geographic Targeting Order imposing record keeping and reporting requirements on cash purchases by entities of residential real property located in Miami-Dade County, Florida, in excess of $1,000,000. (See Agenda pages 122-125.)

5. **Open/Expired Permits Task Force** --- *Lee Weintraub and Michael Tobin, Co-Chairs.*

Mr. Weintraub reported on proposed legislation regarding open construction permits creating two options. Mr. Weintraub stated that the Committee is still working closely with building officials who have been very actively involved in the process. Mr. O'Malley thanked the Committee's efforts on this complex issue which involved input from various stakeholders, industry groups and governmental officials, all with differing opinions on a process to close open and expired permits. (See Agenda pages 126-130.)

XIII. **Probate and Trust Law Division Report**— *Debra L. Boje, Director.* Ms. Boje recognized the following sponsors:

Business Valuation Analysts – Tim Bronza

Trust Law Committee
Coral Gables Trust – John Harris
Probate and Trust Litigation Committee
Guardian Trust – Ashley Gonnelli
Guardianship, Power of Attorney & Advance Directives Committee
Kravit Estate Appraisal – Bianca Morabito
Estate and Tax Planning Committee

Life Audit Professionals – Nicole Newman
IRA, Insurance & Employee Benefits Committee
Life Audit Professionals – Joe Gitto
Estate and Tax Planning Committee
Management Planning, Inc. – Roy Meyers
Estate & Trust Tax Planning Committee
Northern Trust – Tami Conetta
Trust Law Committee

Information Items:

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

Mr. Nguyen reported on proposed amendments to F.S. §744.441(16) to remove the $6,000 limit on funeral-related expenses a guardian can expend with court approval. (See Agenda pages 131-134.)

Mr. Nguyen also reported on proposed amendments to F.S. §744.331 to address the decision of *Shen v. Parkes* by providing a notice procedure requiring parties to a Chapter 744 incapacity proceeding to give notice of an objection to all or parts of the examining committee members' report(s) at least 5 days prior to the adjudicatory hearing or have their objections waived. Mr. Nguyen commented that the proposal would provide a good balance, allowing the parties to know the issues in advance. (See Agenda pages 135-147.)

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

Ms. Detzel reported on a Third District Court of Appeal elective share decision holding regardless of a waiver of the elective share will provisions, the elective share caps the amount available to a spouse. Ms. Detzel stated that the Committee was proposing legislation because the elective share should never require a spouse to obtain less than the will provided and the elective share should only be a floor rather than a ceiling.

XIV. <u>Real Property Law Division Reports</u> — *Andrew M. O'Malley, Director*

1. **Commercial Real Estate** – Adele Stone, Chair; Burt Bruton and Martin Schwartz, Co- Vice Chairs.

2. **Condominium and Planned Development** – Bill Sklar, Chair; Alex Dobrev and Steve Daniels, Co-Vice Chairs.

3. **Construction Law** – Hardy Roberts, Chair; Scott Pence and Reese Henderson, Co-Vice Chairs.

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

5. **Construction Law Institute** – Reese Henderson, Chair; Sanjay Kurian, Diane Perera and Jason Quintero, Co-Vice Chairs.

6. **Development & Land Use Planning** – Vinette Godelia, Chair; Mike Bedke, Co-Vice Chair.

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

8. **Liaisons with FLTA** – Norwood Gay and Alan McCall, Co-Chairs; Alexandra Overhoff and James C. Russick, Co-Vice Chairs.

9. **Real Estate Certification Review Course** – Jennifer Tobin, Chair; Manual Farach and Martin Awerbach, Co-Vice Chairs.

10. **Real Estate Leasing** – Rick Eckhard Chair; Brenda Ezell, Vice Chair.

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

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

13. **Real Property Litigation** – Susan Spurgeon, Chair; Manny Farach and Martin Solomon, Co-Vice Chairs.

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

15. **Residential Real Estate and Industry Liaison** – Salome Zikakas, Chair; Trey Goldman and Nishad Khan, Co-Vice Chairs.

16. **Title Insurance and Title Insurance Liaison** – Raul Ballaga, Chair; Alan Fields and Brian Hoffman, Co-Vice Chairs.

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

XV. <u>Probate and Trust Law Division Committee Reports</u> — *Debra L. Boje, Director*

1. **Ad Hoc Guardianship Law Revision Committee** – David Brennan, Chair; Sancha Brennan Whynot, Hung Nguyen and Charles F. Robinson, Co-Vice Chairs

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

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

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

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

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

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

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

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

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

11. **Guardianship, Power of Attorney and Advanced Directives** – Hung Nguyen, Chair, Tattiana Brenes-Stahl, David Brennan, Eric Virgil, and Nicklaus Curley, Co-Vice Chairs

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

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

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

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

16. **Principal and Income** – Edward F. Koren, Chair; Pamela Price, Vice Chair

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

18. **Probate Law and Procedure** – John C. Moran, Chair; Sarah S. Butters, Michael Travis Hayes and Matt Triggs, Co-Vice Chairs

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

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

XVI. **General Standing Committee Reports** — *Deborah P. Goodall, Director and Chair-Elect*

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

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

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

4. **Budget** – Robert S. Freedman, Chair; S. Kathrine Price, Pamela O. Price, Co-Vice Chairs

5. **CLE Seminar Coordination** – Robert S. Swaine and William T. Hennessey, Co-Chairs; Laura K. Sundberg (Probate & Trust), Sarah S. Butters (Probate & Trust), Lawrence J. Miller (Ethics), Cary Wright (Real Property) and Hardy L. Roberts, III (General E-CLE), Theo Kypreos, Co-Vice Chairs**.**

6. **Convention Coordination** – Laura K. Sundberg Chair; Alex Hamrick and Alex Dobrev, Co-Vice Chairs

7. **Fellows** – Ashley McRae, Chair; Benjamin Diamond and Joshua Rosenberg, Co-Vice Chairs

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

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

10. **Legislation** – Tae Kelley Bronner (Probate & Trust) and Steven Mezer (Real Property), Co-Chairs; Thomas Karr (Probate & Trust), and Alan B. Fields (Real Property), Co-Vice Chairs

11. **Legislative Update (2015)** – R. James Robbins, Chair; Charles I. Nash, Barry F. Spivey, Stacy O. Kalmanson and Jennifer S. Tobin, Co-Vice Chairs

12. **Legislative Update (2016)** – Barry F. Spivey and Stacy O. Kalmanson, Co-Chairs; Thomas Karr, Joshua Rosenberg, and Kymberlee Curry Smith, Co-Vice Chairs

13. **Liaison with:**

    a. **American Bar Association (ABA)** – Edward F. Koren and Julius J. Zschau
    b. **Clerks of Circuit Court** – Laird A. Lile and William Theodore Conner
    c. **FLEA / FLSSI** – David C. Brennan and Roland "Chip" Waller
    d. **Florida Bankers Association** – Mark T. Middlebrook
    e. **Judiciary** – Judge Linda R. Allan, Judge Herbert J. Baumann, Judge Melvin B. Grossman, Judge Hugh D. Hayes, Judge Maria M. Korvick, Judge Norma S. Lindsey, Judge Celeste H. Muir, Judge Robert Pleus, Jr., Judge Walter L. Schafer, Jr., Judge Morris Silberman, Judge Mark Speiser, Judge Richard J. Suarez,., and Judge Patricia V. Thomas
    f. **Out of State Members** – Michael P. Stafford, John E. Fitzgerald, Jr., and Nicole Kibert
    g. **TFB Board of Governors** – Andrew Sasso
    h. **TFB Business Law Section** – Gwynne A. Young
    i. **TFB CLE Committee** – Robert S. Freedman and Tae Kelley Bronner
    j. **TFB Council of Sections** –Michael J. Gelfand and Deborah P. Goodall
    k. **TFB Pro Bono Committee** – Tasha K. Pepper-Dickinson

14. **Long-Range Planning** – Deborah P. Goodall, Chair

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

16. **Member Communications and Information Technology** – William A. Parady, Chair; S. Dresden Brunner, Michael Travis Hayes, and Neil Shoter, Co-Vice Chairs

17. **Membership and Inclusion** –Lynwood F. Arnold, Jr. and Jason M. Ellison, Co-Chairs, Phillip A. Baumann, Kathrine S. Lupo, Guy S. Emerich, Theodore S. Kypreos, Tara Rao, and Kymberlee Curry Smith, Co-Vice Chairs

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

19. **Professionalism and Ethics--General** – Lawrence J. Miller, Chair; Tasha K. Pepper-Dickinson, Vice Chair

20. **Publications (ActionLine)** – Silvia B. Rojas, Chair (Editor in Chief); Jeffrey Baskies (Vice Chair – Editor Probate & Trust Division), Cary Wright (Vice Chair – Editor Real Property Division), Lawrence J. Miller (Vice Chair – Editor Professionalism & Ethics); George D. Karibjanian (Editor, National Reports), Lee Weintraub (Vice Chair - Reporters Coordinator), Benjamin Diamond (Vice Chair – Features Editor), Kathrine S. Lupo (Vice Chair - Advertising Coordinator), Navin R. Pasem (Vice Chair – Practice Corner Editor), Sean M. Lebowitz (Vice Chair – Probate & Trust Case Summaries), Shari Ben Moussa (Vice Chair – Real Property Case Summaries)

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

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

23. **Strategic Planning** –Michael J. Gelfand and Deborah P. Goodall, Co-Chairs

24. **Professionalism and Ethics--General** – Lawrence J. Miller, Chair; Tasha K. Pepper-Dickinson, Vice Chair

25. **Publications (ActionLine)** – Silvia B. Rojas, Chair (Editor in Chief); Shari Ben Moussa (Advertising Coordinator), Navin R. Pasem (Real Property Case Review), Jeffrey Baskies (Probate & Trust), Ben Diamond (Probate

& Trust), George D. Karibjanian (Editor, National Reports), Lawrence J. Miller (Editor, Professionalism & Ethics), and Lee Weintraub (Real Property), Co-Vice Chairs

26. **Publications (Florida Bar Journal)** – Jeffrey S. Goethe (Probate & Trust), and Douglas G. Christie (Real Property), Co-Chairs; Brian Sparks (Editorial Board – Probate & Trust), Cindy Basham (Editorial Board – Probate & Trust), Michael A. Bedke (Editorial Board – Real Property) and Homer Duvall (Editorial Board – Real Property) and Alison Archbold (Editorial Board), Co-Vice Chairs

27. **Sponsor Coordination** –Wilhelmena F. Kightlinger, Chair; J. Michael Swaine, Deborah L. Russell, W. Cary Wright, Benjamin F. Diamond, John Cole, Co-Vice Chairs

28. **Strategic Planning** –Michael J. Gelfand and Deborah P. Goodall, Co-Chairs

XVII. **Adjourn** Motion to Adjourn.

There being no further business to come before the Executive Council, Mr. Gelfand thanked those in attendance and a motion to adjourn was unanimously approved and the meeting concluded at approximately 11:05 a.m.

Respectfully submitted,

S. Katherine Frazier, Secretary

ADDENDUM "A"

ATTENDANCE ROSTER
REAL PROPERTY PROBATE & TRUST LAW SECTION
EXECUTIVE COUNCIL MEETINGS
2015-2016

Executive Committee	Division		Aug. 1 Palm Beach	Oct. 3 Berlin, Germany	Nov. 14 Boca Raton	Feb. 27 Tampa	June 4 Orlando
	RP	P&T					
Gelfand, Michael J., Chair	√		√	√	√	√	
Goodall, Deborah P. Chair-Elect		√	√		√	√	
Boje, Debra L., Probate & Trust Law Div. Director		√	√		√	√	
O'Malley, Andrew M., Real Property Law Div. Director	√		√		√	√	
Kelley, Shane, Director of At-Large Members		√	√		√	√	
Frazier, S. Katherine, Secretary	√		√		√	√	
Freedman, Robert S., Treasurer	√		√		√	√	
Bronner, Tae K., Legislation Co-Chair (P&T)		√	√		√	√	
Mezer, Steven H., Legislation Co-Chair (RP)	√		√		√	√	
Hennessey, William M., Legislation CLE Seminar Coordination Co-Chair (P&T)		√	√		√	√	
Swaine, Robert S., CLE Seminar Coordination Co-Chair (RP)	√		√		√		
Dribin, Michael A., **Immediate Past Chair**		√	√		√	√	

Executive Council Members	Division		Aug. 1 Palm Beach	Oct. 3 Berlin, Germany	Nov. 14 Boca Raton	Feb. 27 Tampa	June 4 Orlando
	RP	P&T					
Adams, Angela M.		√	√		√	√	
Adcock, Jr., Louie N., **Past Chair**		√					
Akins, David J.		√	√	√	√	√	
Allan, Honorable Linda		√					
Altman, Stuart H.		√	√		√	√	
Amari, Richard		√	√		√	√	

Executive Council Members	Division		Aug. 1 Palm Beach	Oct. 3 Berlin, Germany	Nov. 14 Boca Raton	Feb. 27 Tampa	June 4 Orlando
	RP	P&T					
Archbold, J. Allison		√	√	√	√	√	
Arnold, Jr., Lynwood F.	√	√			√	√	
Aron Jerry E. **Past Chair**	√		√			√	
Awerbach, Martin S.	√						
Bald, Kimberly A.	√	√	√		√	√	
Ballaga, Raul P.	√		√			√	
Basham, Cindy		√			√	√	
Baskies, Jeffrey		√	√		√	√	
Batlle, Carlos A.		√			√	√	
Baumann, Honorable Herbert J.		√				√	
Baumann, Phillip A.		√	√	√	√		
Beales, III, Walter R. **Past Chair**	√		√				
Bedke, Michael A.	√					√	
Belcher, William F. **Past Chair**		√					
Bell, Kenneth B.	√						
Beller, Amy		√	√		√	√	
Bellew, Brandon D.		√	√		√	√	
Ben Moussa, Shari D.	√						
Bloodworth, Jennifer	√		√		√	√	
Bonevac, Judy B.		√	√	√	√	√	
Boyd, Deborah	√		√			√	
Brenes-Stahl, Tattiana P.		√	√		√		
Brennan, David C. **Past Chair**		√	√			√	
Brittain, David R.	√		√		√	√	

Executive Council Members	Division		Aug. 1 Palm Beach	Oct. 3 Berlin, Germany	Nov. 14 Boca Raton	Feb. 27 Tampa	June 4 Orlando
	RP	P&T					
Brown, Mark A.	√		√	√	√		
Brown, Shawn	√		√			√	
Brunner, S. Dresden		√	√		√	√	
Bruton, Jr., Ed Burt	√		√		√	√	
Bucher, Elaine M.		√	√				
Butters, Sarah S.		√	√		√	√	
Callahan, Charles III		√	√		√	√	
Carlisle, David R.		√	√		√		
Caskey, John R.		√	√		√		
Christiansen, Patrick T. **Past Chair**	√		√	√			
Christy, Douglas G. III	√		√		√	√	
Cohen, Howard Allen	√		√		√	√	
Cole, John P.		√	√		√		
Cole, Stacey L.		√	√			√	
Comiter, Alyse R.		√	√		√	√	
Conetta, Tami F.		√	√		√	√	
Conner, W. Theodore	√				√	√	
Cope, Jr., Gerald B.	√		√	√	√		
Curley, Nick		√	√		√	√	
Daniels, Steve	√						
Detzel, Lauren Y.		√	√		√	√	
Diamond, Benjamin F.		√	√		√		
Diamond, Sandra F. **Past Chair**		√	√			√	
Dobrev, Alex	√		√			√	

Executive Council Members	Division		Aug. 1 Palm Beach	Oct. 3 Berlin, Germany	Nov. 14 Boca Raton	Feb. 27 Tampa	June 4 Orlando
	RP	P&T					
Dollinger, Jeffrey	√		√			√	
Dudley, Frederick R.	√		√				
Duvall, III, Homer	√		√		√	√	
Eckhard, Rick	√		√			√	
Ellison, Jason M.	√		√		√	√	
Emans, Patrick C		√	√		√	√	
Emerich, Guy S.		√	√			√	
Ertl, Christene M.	√		√			√	
Ezell, Brenda B.	√		√	√	√	√	
Fagan, Gail		√	√	√	√	√	
Falk, Jr., Jack A.		√	√		√	√	
Farach, Manuel	√		√		√	√	
Felcoski, Brian J., **Past Chair**		√	√		√		
Fernandez, Kristopher E.	√		√		√	√	
Fields, Alan B.	√		√		√		
Fitzgerald, Jr., John E.		√	√		√	√	
Flood, Gerard J.		√	√		√	√	
Foreman, Michael L.		√	√		√	√	
Galler, Jonathan		√	√		√	√	
Gans, Richard R.		√	√			√	
Gay, III, Robert Norwood	√						
Gentile, Melinda S.	√		√		√	√	
George, James		√	√		√	√	
Godelia, Vinette D.	√		√		√	√	

Executive Council Members	Division		Aug. 1 Palm Beach	Oct. 3 Berlin, Germany	Nov. 14 Boca Raton	Feb. 27 Tampa	June 4 Orlando
	RP	P&T					
Goethe, Jeffrey S.		√	√		√	√	
Goldman, Louis "Trey"	√		√	√		√	
Goldman, Robert W. **Past Chair**		√	√		√	√	
Graham, Robert M.	√		√		√	√	
Granet, Lloyd	√		√		√	√	
Griffin, Linda S.		√	√		√	√	
Grimsley, John G. **Past Chair**		√					
Grossman, Honorable Melvin B.		√					
Gunther, Eamonn W.		√	√		√		
Guttmann, III, Louis B. **Past Chair**	√		√	√			
Hamrick, Alexander H.		√	√	√	√	√	
Hancock, Patricia J.	√		√		√	√	
Hart, W.C.	√		√				
Hayes, Honorable Hugh D.		√					
Hayes, Michael Travis		√	√		√	√	
Hearn, Steven L. **Past Chair**		√	√		√	√	
Henderson, Jr., Reese J.	√						
Henderson, III, Thomas N.	√		√		√	√	
Heuston, Stephen P.		√	√		√	√	
Hoffman, Brian W.	√		√		√	√	
Isphording, Roger O. **Past Chair**		√	√	√	√	√	
Johnson, Amber Jade F.		√	√		√	√	
Jones, Darby		√	√		√	√	
Jones, Frederick W.	√		√		√	√	

Executive Council Members	Division		Aug. 1 Palm Beach	Oct. 3 Berlin, Germany	Nov. 14 Boca Raton	Feb. 27 Tampa	June 4 Orlando
	RP	P&T					
Jones, Patricia P.H.	√		√		√	√	
Judd, Robert B.		√	√		√		
Kalmanson, Stacy O.	√		√			√	
Karibjanian, George		√	√		√		
Karr, Mary		√	√		√		
Karr, Thomas M.		√	√		√	√	
Kayser, Joan B. **Past Chair**		√					
Keane, Cristin C.	√		√			√	
Kelley, Rohan **Past Chair**		√	√	√	√	√	
Kelley, Sean W.		√			√	√	
Khan, Nishad	√					√	
Kibert, Nicole C.	√		√	√		√	
Kightlinger, Wilhelmina F.	√		√	√			
Kinsolving, Ruth Barnes **Past Chair**	√					√	
Koren, Edward F. **Past Chair**		√	√		√	√	
Korvick, Honorable Maria M.		√	√	√	√		
Kotler, Alan Stephen		√	√		√		
Kromash, Keith S.		√	√		√		
Kurian, Sanjay	√		√			√	
Kypreos, Theodore S.		√	√		√	√	
Lancaster, Robert L.		√	√			√	
Lane, Jr., William R.		√	√			√	
Lange, George		√	√	√	√	√	
Larson, Roger A.	√		√		√	√	

Executive Council Members	Division		Aug. 1 Palm Beach	Oct. 3 Berlin, Germany	Nov. 14 Boca Raton	Feb. 27 Tampa	June 4 Orlando
	RP	P&T					
Lebowitz, Sean M.		√	√		√		
Leebrick, Brian D.	√		√			√	
Lile, Laird A. **Past Chair**		√	√	√		√	
Lindsey, Honorable Norma S.	√					√	
Little, III, John W.	√		√		√		
Lopez, Sophia A.		√	√		√	√	
Lupo, Kathrine S.	√		√		√	√	
Lynch, Kristen M.		√	√				
Madorsky, Marsha G.		√	√		√	√	
Malec, Brian		√	√		√	√	
Marger, Bruce **Past Chair**		√			√	√	
Marmor, Seth A.		√	√		√		
Marshall, III, Stewart A.		√			√	√	
Marx, James A.	√		√		√	√	
Mastin, Deborah Bovarnick	√		√		√		
McCall, Alan K.	√		√			√	
McElroy, IV, Robert Lee		√	√		√	√	
McIver, Richard	√		√	√		√	
McRae, Ashley E.	√		√			√	
Melanson, Noelle		√	√		√	√	
Menor, Arthur J.	√		√		√	√	
Meyer, George F. **Past Chair**	√		√	√		√	
Meyer, Michael	√		√			√	
Middlebrook, Mark T.		√	√			√	

Executive Council Members	Division		Aug. 1 Palm Beach	Oct. 3 Berlin, Germany	Nov. 14 Boca Raton	Feb. 27 Tampa	June 4 Orlando
	RP	P&T					
Miller, Lawrence J.		√	√		√	√	
Mize, Patrick		√	√		√	√	
Moran, John C.		√	√		√	√	
Moule, Rex E.		√			√	√	
Muir, Honorable Celeste H.		√	√		√	√	
Murphy, Melissa J. **Past Chair**	√		√	√	√	√	
Nash, Charles I.		√	√				
Neukamm, John B. **Past Chair**	√		√		√	√	
Nguyen, Hung V.		√	√	√	√	√	
Nice, Marina		√	√				
Overhoff, Alex	√		√	√	√	√	
Palmer, Margaret		√				√	
Parady, William A.		√	√	√	√	√	
Pasem, Navin	√						
Payne, L. Howard		√	√		√	√	
Pence, Scott P.	√		√		√	√	
Pepper-Dickinson, Tasha K.		√	√		√	√	
Perera, Diane	√		√				
Petrino, Bradford	√		√			√	
Pilotte, Frank		√	√		√	√	
Platt, William R.		√					
Pleus, Jr., Honorable Robert J.							
Pollack, Anne Q.	√		√		√		
Price, Pamela O.		√	√				

Executive Council Members	Division		Aug. 1 Palm Beach	Oct. 3 Berlin, Germany	Nov. 14 Boca Raton	Feb. 27 Tampa	June 4 Orlando
	RP	P&T					
Pyle, Michael A.		√	√		√	√	
Quintero, Jason	√		√			√	
Rao, Tara		√	√			√	
Redding, John N.	√		√	√	√	√	
Rendzio, Bryan	√				√		
Reynolds, Stephen H.	√		√		√	√	
Rieman, Alexandra V.		√	√		√		
Robbins, Jr., R.J.	√		√		√	√	
Roberts, III, Hardy L.	√		√		√	√	
Robinson, Charles F.		√	√			√	
Rodriguez, Carlos A.		√	√		√		
Rojas, Silvia B.	√		√		√	√	
Rolando, Margaret A. **Past Chair**	√		√	√	√	√	
Roman, Paul E.		√	√	√	√	√	
Rosenberg, Joshua		√	√		√	√	
Rubin, Jenna		√	√		√		
Russell, Deborah L.		√	√				
Russick, James C.	√		√	√	√	√	
Rydberg, Marsha G.	√		√		√		
Sachs, Colleen C.	√		√		√		
Sasso, Andrew		√	√			√	
Schafer, Jr., Honorable Walter L.		√					
Schofield, Percy A.	√						
Schwartz, Martin	√					√	

Executive Council Members	Division		Aug. 1 Palm Beach	Oct. 3 Berlin, Germany	Nov. 14 Boca Raton	Feb. 27 Tampa	June 4 Orlando
	RP	P&T					
Schwartz, Robert M.	√		√		√	√	
Scuderi, Jon		√	√		√	√	
Seaford, Susan	√		√			√	
Sheets, Sandra G.		√	√			√	
Shoter, Neil B.	√		√		√	√	
Silberman, Honorable Morris						√	
Silberstein, David M.		√	√		√	√	
Simon, Michael		√					
Sklar, William P.	√		√		√	√	
Smart, Christopher W.	√		√		√	√	
Smith, G. Thomas **Past Chair**	√		√	√			
Smith, Kymberlee	√		√				
Smith, Wilson **Past Chair**		√					
Solomon, Marty James	√		√		√	√	
Spalding, Ann		√	√		√		
Sparks, Brian C.		√	√			√	
Speiser, Honorable Mark A.							
Spivey, Barry F.		√	√		√	√	
Spurgeon, Susan K.	√		√	√		√	
Stafford, Michael P.		√	√		√		
Staker, Karla J.	√				√	√	
Stern, Robert G.	√				√	√	
Stone, Adele I.	√				√	√	
Stone, Bruce M. **Past Chair**		√	√				

Executive Council Members	Division		Aug. 1 Palm Beach	Oct. 3 Berlin, Germany	Nov. 14 Boca Raton	Feb. 27 Tampa	June 4 Orlando
	RP	P&T					
Suarez, Honorable Richard J.							
Sundberg, Laura K.		√	√		√	√	
Swaine, Jack Michael **Past Chair**	√		√			√	
Taylor, Richard W.	√		√	√		√	
Tescher, Donald R.		√			√	√	
Thomas, Honorable Patricia V.		√	√	√		√	
Tobin, Jennifer S.	√		√			√	
Triggs, Matthew H.		√	√		√	√	
Udick, Arlene C.	√		√	√	√	√	
Virgil, Eric		√	√			√	
Waller, Roland D. **Past Chair**	√		√	√	√	√	
Wartenberg, Stephanie Harriet		√	√			√	
Weintraub, Lee A.	√		√	√	√	√	
Wells, Jerry B.		√	√		√	√	
White, Jr., Richard M.		√			√	√	
Whynot, Sancha B.		√	√		√		
Wilder, Charles D.		√	√		√	√	
Williamson, Julie Ann S. **Past Chair**	√		√				
Wintter, Christopher Q.		√	√	√	√	√	
Wohlust, Gary Charles		√	√	√	√	√	
Wolasky, Marjorie E.		√	√			√	
Wolf, Jerome L.		√	√		√	√	
Wright, William Cary	√		√	√	√	√	
Young, Gwynne A.		√				√	

Executive Council Members	Division		Aug. 1 Palm Beach	Oct. 3 Berlin, Germany	Nov. 14 Boca Raton	Feb. 27 Tampa	June 4 Orlando
	RP	P&T					
Zeydel, Diana S.C.		√	√			√	
Zikakis, Salome J.	√		√	√	√	√	
Zschau, Julius J. **Past Chair**	√		√	√			

RPPTL Fellows	Division		Aug. 1 Palm Beach	Oct. 3 Berlin, Germany	Nov. 14 Boca Raton	Feb. 27 Tampa	June 4 Orlando
	RP	P&T					
Costello, T. John, Jr.		√	√			√	
Friedman, Bridget	√		√	√		√	
Grosso, Jennifer Lodge		√	√		√		
Jennison, Julia Lee	√		√	√	√	√	
Rubel, Stacy Beth		√	√		√	√	
Sajdera, Christopher Anthony	√		√		√	√	
Sneeringer, Michael Alan		√	√		√	√	
VanSickle, Melissa	√		√				

Legislative Consultants	Division		Aug. 1 Palm Beach	Oct. 3 Berlin, Germany	Nov. 14 Boca Raton	Feb. 27 Tampa	June 4 Orlando
	RP	P&T					
Dunbar, Peter M.	√		√	√	√	√	
Edenfield, Martha Jane	√		√	√	√	√	
Finkbeiner, Brittany	√				√		
Roth, Cari L.	√				√		

Guests	Division		Aug. 1 Palm Beach	Oct. 3 Berlin, Germany	Nov. 14 Boca Raton	Feb. 27 Tampa	June 4 Orlando
	RP	P&T					
Skranke, Gutman		√				√	
McDermott, Daniel		√				√	
Fincher, Philip		√				√	
Christman, Emma		√				√	
Powell, Caitlin		√				√	
Butler, Johnathan		√				√	
Barboza, Annabella	√					√	
Duz, Ashley		√				√	

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Real Property, Probate & Trust Law Section

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

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

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

PROBATE DIRECTOR
Debra L. Boje
Gunster
401 E. Jackson St., Ste. 2500
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(813) 222-6614
dboje@gunster.com

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

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

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

Steven H. Mezer
Becker & Poliakoff
1511 N. Westshore Blvd., Suite 1000
Tampa, FL 33607
(813) 527-3900
smezer@bplegal.com

DIRECTOR, AT-LARGE MEMBERS
Shane Kelley
The Kelley Law Firm, PL
3365 Galt Ocean Drive
Fort Lauderdale, FL 33308-7002
(954) 563-1400
shane@estatelaw.com

IMMEDIATE PAST CHAIR
Michael A. Dribin
Harper Meyer, et al.
201 S. Biscayne Blvd., Ste. 800
Miami, Florida 33131-4329
(305) 577-5415
mdribin@harpermeyer.com

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

REAL PROPERTY, PROBATE & TRUST LAW SECTION
THE FLORIDA BAR
www.RPPTL.org

March 18, 2016

VIA E-MAIL ONLY: wschifino@burr.com
William J. Schifino, Esq.
President, The Florida Bar

Dear Mr. Schifino:

Thank you for soliciting nominations to the inaugural Condominium and Planned Development Law Certification Committee. The Real Property Probate and Trust Law Section of The Florida Bar appreciates the Bar's continuing tradition of relying on the RPPTL Section's recommendations for appointments for committees involving the Section's practice areas. Your efforts are especially gratifying in light of the Section's role at the forefront to ensure the creation of the new certification area, dedicated to raise substantive knowledge and professional practices.

Pursuant to your request, the Section proposes nine nominees, each recognized leaders in the area of condominium and planned development law. Each brings to the Bar at least 20 years of extensive practice in the field, diverse in many ways, and each involved to help ensure that the certification area was approved. The nominees are:

- **Joseph Adams** of Fort Myers whose practice emphasizes representation of community associations, including serving on the Florida Advisory Council on Condominiums, and has been on the forefront of many legislative initiatives. He authored "Association Organizational Documents" in the Bar's CLE publication *Florida Condominium and Community Association Law.* (3d Ed.)

- **Chris Davies** of Naples is a past vice-chair of the Section's Condominium and Plan Development Committee and was a member of the Florida Condominium Study Commission. He primarily represents community associations, and co-authored "The Division of Florida Land Sales, Condominiums and Mobile Homes" in the Bar's CLE publication *Florida Condominium Law and Practice.*

- **Peter Dunbar** of Tallahassee is a Board Certified Real Estate Lawyer, a fellow of the American College of Real Estate Lawyers, serving on its Common Interest Ownership Committee, and is a long-standing member of the Section's Condominium and Plan Development Committee, as well as serving as the Section's Legislative Consultants. Mr. Dunbar is an adjunct Professor at the Florida State University College of Law and with Mr. Sklar brings a knowledge and drafting of examinations.

- **Mark Grant** of Fort Lauderdale is a Board Certified Real Estate Lawyer, a Fellow of the American College of Real Estate Lawyers and chairs ACREL's Common Interest Ownership Committee, and is a past-chair of the Section's Condominium and Planned Development Committee. His practice emphasizes representation of developers, and he has written and lectured extensively in this area of the law.

- **Lisa Lerner** of Coral Gables is a Board Certified Real Estate Lawyer, representing associations and owners. She co-authored "The Role of the Association in Condominium Operations" in the Bar's CLE publication *Florida Condominium and Community Association Law.* (3d Ed.)

- **Chad McClenathan** of Sarasota is a Board Certified Real Estate Lawyer, a sole practitioner who primarily represents associations and owners. He authored "Document Amendments and Mergers" in the Bar's CLE publication *Florida Condominium and Community Association Law.* He has been a long-standing and active member of the Condominium and Plan Development Committee.

- **Margaret "Peggy" Rolando** of Miami is a Board Certified Real Estate Lawyer, a Governor of the American College of Real Estate Lawyers, and Past Chair of the RPPTL Section with extensive speaking and writing credits. She serves on the Board of Trustees of Spring Hill College, and was a member of the Board of Trustees of Florida State University and has been a member of the Board of Visitors of Florida State University College of Law.

- **Karl Scheuerman** of Tallahassee served twenty-four years as Chief Arbitrator and Deputy General Counsel for the Division of Florida Condominiums, Timeshares and Mobile Homes, Department of Business and Professional Regulation. He also is a contributing author and editor of the Bar's CLE publication, *Florida Condominium and Homeowners' Association Law and Practice* (2nd and 3d Ed.), as well as a long-standing and active member of the Condominium and Plan Development Committee.

- **Professor William Sklar** of West Palm Beach is a Board Certified Real Estate Lawyer, a Fellow of the American College of Real Estate Lawyers, and is Chair of the Section's Condominium and Planned Development Committee. He is a Professor at the University of Miami School of Law and directors the University's acclaimed Institute on Cluster Housing. His practice runs the gamut of the field.

Reviewing the nominees' credentials you can be assured that each brings to the table significant expertise, a commitment to professionalism, and will to complete the process for the good of the Bar.

Thank you in advance for your continuing support of the RPPTL Section. We look forward to working with you as this year swiftly closes and next year and to serve as the President of the Florida Bar. If there are any questions regarding the nominees, or otherwise, then please do not hesitate to contact me.

Very truly yours,

Michael J. Gelfand, Chair

cc: Michael Higer, Esq., via e-mail
Sandra Diamond, Esq., via e-mail
Laird Lile, Esq., via e-mail
Andrew Sasso, Esq. via e-mail
Michelle Suskauer, Esq. via e-mail
RPPTL Executive Committee
Nominees
Ms. Mary Ann Obos
Ms. Diane Kellogg

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RPPTL 2016 - 2017
Executive Council Meeting Schedule
Deborah P Goodall's Year

Date	Location
July 28 – 31, 2016	**Executive Council Meeting & Legislative Update** The Breakers Palm Beach, Florida Room Rate: $218 – SOLD OUT – email Ria Eck at the Breakers to be added to the waitlist for this event @ Ria.Eck@thebreakers.com.
October 5 – 9, 2016	**Executive Council Meeting** The Walt Disney World BoardWalk Inn Lake Buena Vista, FL Room Rate: $249 (single/double occupancy) – SOLD OUT* (Alternate hotels within an easy walk/boat ride from the BoardWalk: Disney Swan, Disney Dolphin, Disney Yacht Club, Disney Beach Club)
December 7 – 11, 2016	**Executive Council Meeting** The Westin Resort and Marina Key West, FL Reservation Link: https://www.starwoodmeeting.com/events/start.action?id=1510057567&key=1AFAC12C Room Rate: $279 (single/double occupancy) – SOLD OUT*
February 22 – 25, 2017	**Out of State Executive Council Meeting** Four Seasons Hotel Austin, TX Reservation Link: http://www.fourseasons.com/austin/ Room Code:FLOR0222 Room Rate: $299 (single/double occupancy)
May 31 – June 4 , 2017	**Executive Council Meeting & Convention** Hyatt Regency Coconut Point Resort & Spa Bonita Springs, FL Reservation Link: https://resweb.passkey.com/go/flbar2017 Room Rate: $209 (single/double occupancy)

* To be added to the waitlist for this event, please email Whitney Kirk @ wkirk@floridabar.org to be added to the waitlist. Be sure to include the nights needing a reservation and your full contact information in the email.

Date/Time	Committee / Event:	Set	# at Table	# perimeter chairs	Equipment
Wednesday	**July 27, 2016**				
6:30 pm – 8:00 pm	**Executive Committee Dinner****				TBD
Thursday	**July 28, 2016**				
6:30 AM	**Reptile Run/Walk Club**	N/A	N/A	N/A	N/A
7:30 am - 9:00 am	**Ad Hoc Decanting**	Conf	15	10	N/A
8:00 am - 10:00 am	**Continental Breakfast (Grab and go to meeting room)**	*Pre-Registration and Ticket Required*			
8:00 am – 5:00 pm	**Registration Desk Hours**				N/A
8:15 am - 10:00 am	**Executive Committee Planning Meeting ****	Conf	12	N/A	N/A
8:00 am - 9:00 am	**Sponsor Coordination Committee**	Conf	15	10	N/A
8:00 am – 9:00 am	**Insurance & Surety**	Conf	20	10	SPEAKERPHONE
8:00 am – 9:00 am	**Ad Hoc Study on Spendthrift Trust Issues Committee ***	Conf	20	10	N/A
9:00 am – 10:00 am	**Real Estate Structures and Taxation**	H/S	30	15	MICROPHONES
9:00 am - 10:30 am	**Estate and Trust Tax Planning**	H/S	80	60	MICROPHONES
9:00 am - 10:30 pm	**Real Property Financing & Lending**	H/S	40	20	MICROPHONES &
9:00 am - 10:30 pm	**Construction Law Institute**	Conf	10		SPEAKERPHONE
10:00 am - 11:30 am	**Membership Communication & Information Technology**	Conf	10	10	N/A
10:30 am - 12:00 pm	**Construction Law**	H/S	20	10	N/A
10:30 am - 12:00 pm	**Probate Law & Procedure**	H/S	80	40	MICROPHONE
10:30 am - 12:00 pm	**Estoppel Task Force Ad Hoc Committee**	Conf	10	5	SPEAKERPHONE
10:30 am - 12:00 pm	**Commercial Real Estate**	H/S	20	10	SPEAKERPHONE
10:30 am - 12:00 pm	**Title Issues & Standards**	Conf	15	10	MICROPHONE & SPEAKERPHONE
11:00 am – 12:30 am	**Ad Hoc Same Sex Marriage Implication ***	Conf	20	10	N/A
11:30 am - 1:30 pm	**Buffet Lunch (GRAB AND GO)**	*Pre-Registration and Ticket Required*			
12:00 pm - 1:30 pm	**Residential Real Estate & Industry Liaison**	H/S	40	20	MICRPHONE & SPEAKERPHONE
12:00 pm - 1:30 pm	**Development and Land Use**	Conf	15	10	SPEAKERPHONE
12:00 pm - 1:30 pm	**Real Property Litigation**	H/S	40	20	MICROPHONE & SPEAKERPHONE
12:00 pm - 2:00 pm	**Probate & Trust Litigation**	H/S	80	60	MICRPHONE
12:30 pm - 2:00 pm	**IRA, Insurance & Employee Benefits**	H/S	40	20	MICROPHONE
1:30 pm - 3:00 pm	**Title Insurance & Title Insurance Liaison**	H/S	40	20	MICROPHONE & SPEAKERPHONE
2:00 pm - 3:00 pm	**Landlord & Tenant**	Conf	15	10	SPEAKERPHONE
2:00 pm - 3:30 pm	**Membership & Inclusion**	Conf	20	10	SPEAKERPHONE
2:00 pm - 3:30 pm	**Digital Assets**	Conf	20	10	SPEAKERPHONE
2:00 pm - 3:30 pm	**Guardianship & Advanced Directives**	H/S	40	20	MICROPHONE
2:00 pm - 3:30 pm	**Elective Share Review***	Conf	15	10	SPEAKERPHONE
2:00 pm - 3:30 pm	**Asset Protection**	H/S	60	20	MICROPHONE
3:00 pm - 6:00 pm	**Exhibit Booth Setup**	Special			N/A
3:00 pm - 4:30 pm	**Real Property Problems Study**	H/S	20	10	MICROPHONE & SPEAKERPHONE

3:30 pm - 5:00 pm	**Condo & Planned Development**	H/S	60	60	MICROPHONE
3:30 pm - 5:00 pm	**Trust Law**	H/S	80	60	MICRPHONE
4:00 pm - 5:00 pm	**Fellows and Mentoring**	Conf	15	10	SPEAKERSPHONE
5:00 pm - 6:00 pm	**Attorney Trust Officer**	Conf	15	10	SPEAKERSPHONE
5:00 pm - 6:00 pm	**Legislative Update Rehearsal****	Special	15		PROJECTOR PACKAGE
5:00 pm - 6:00 pm	**At Large Members Meeting**	Rounds	80		MICROPHONE
7:00 pm - 8:30 pm	**Reception**	*Pre-Registration and Ticket Required*			
8:30 pm - 10:30 pm	**Hospitality Suite**	Cocktail Rounds	75	on flow	N/A
Friday	**July 29, 2016**				
6:30 AM	**Reptiles Run**				N/A
7:30 am - 4:30 pm	**Registration and Exhibitor Booths/ Continental Breakfast**	Table top	14		Each Exhibitor to order own AV
7:30 am - 4:30 pm	**Legislative Update Seminar**	*Pre-Registration and Ticket Required*			
12:00 pm - 1:15 pm	**Lunch**	Rounds	400		N/A
12:00 pm - 1:30 pm	**Homestead Issues Study**	H/S	20	10	N/A
4:30 pm - 5:30 pm	**PAC**	Rounds	80		MICROPHONE
7:00 pm - 9:30 pm	**Reception and Dinner**	*Pre-Registration and Ticket Required*			
9:30 pm - 11:30 pm	**Hospitality Suite**	Cocktail Rounds	75	on flow	N/A
Saturday	**July 30, 2016**				
6:30 AM	**Reptiles Run**				N/A
8:00 am - 9:45 am	**Probate Roundtable**	Rounds	160		MICROPHONE
8:00 am - 9:45 am	**Real Estate Roundtable**	Rounds	120		MICROPHONE
8:00 am - 10:30 am	**Spouse/Guest Breakfast**	Rounds	40		N/A
10:00 am - 2:00 pm	**Executive Council Meeting**	class w/ riser	250	50	SPECIAL - MICROPHONE & AND AV PACKAGE
Following EC	**Budget Committee Meeting****	15	0		SPEAKERPHONE
6:30 pm – 9:00 pm	**Reception @ Uptown Art**	*Pre-Registration and Ticket Required*			
9:00 pm - 11:00 pm	**Hospitality Suite**	Cocktail Rounds	75	on flow	N/A

***Participation in deliberations and voting is limited to committee members only**

**** Attendance by invitation only**

NOTE: NOT ALL COMMITTEES WILL BE MEETING IN PERSON AT THE LEGISLATIVE UPDATE

RPPTL Financial Summary from Separate Budgets

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

General Budget	YTD
Revenue:	$1,202,039
Expenses:	$1,065,160
Net:	$ 136,879

CLI	YTD
Revenue:	$ 241, 191
Expenses:	$ 164,120
Net:	$ 77,071

Trust Officer Conference	
Revenue:	$ 333,121
Expenses:	$ 200,365
Net:	$ 132,756

Legislative Update	
Revenue:	$ 78,420
Expenses:	$ 56,803
Net:	$ 21,617

Convention	
Revenue:	$ 0
Expenses:	$ (1,027)
Net:	$ (1,027)

Roll-up Summary (Total)

Revenue:	$ 1,854,771
Expenses:	$ 1,487,475
Net Operations:	$ 367,296

Beginning Fund Balance:	$ 1,066,946
Current Fund Balance (YTD):	$ 1,434,242
Projected June 2016 Fund Balance	$ 961,141

[1] This report is based on the tentative unaudited detail statement of operations dated 4/30/16 (prepared on 5/11/16).

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Date	Course Title	Course No.	Location
May 25,2016	Audio Webcast: Law for a Lawyer's Own Business: Prelease Issues (Part 1 of 4)	2343	Audio Webcast
June 4, 2016	Convention CLE: The RPPTL's Guide to the International Investor Client: Scaling "The Wall" of Cross Border Legal Issues	2057	Loews Portofino Bay Hotel
June 15, 2016	Audio Webcast: Law for a Lawyer's Own Business: Key Lease Issues Part 1(Part 2 of 4)	2344	Audio Webcast
June 23-25, 2016	ATO	2114	Laura Sundberg
July 13, 2016	Audio Webcast: Law for a Lawyer's Own Business: Key Lease Issues Part 2 (Part 3 of 4)	2345	Audio Webcast
July 29, 2016	**Legislative Update**	2218	The Breakers
August 10, 2016	**Audio Webcast: Law for a Lawyer's Own Business: Key Lease Issues Part 3 (Part 4 of 4)**		Audio Webcast
August 31, 2016	Audio Webcast: As the World Turns: Everyone Has An Opinion, But Which One is Right?	2223	Audio Webcast
September 21, 2016	**Representing a Buyer of a Parcel or Unit in a Mixed Used Project: Is Your Client Buying Air? Or, Oh My, What did I buy? (Part 1 of 2)**	2233	Audio Webcast
September 28, 2016	**Representing a Buyer of a Parcel or Unit in a Mixed Used Project: Is Your Client Buying Air? Or, Oh My, What did I buy? (Part 2 of 2)**	2217	Audio Webcast
October 21, 2016	**Estate & Trust Planning/Asset Protection**	2247	Fort Lauderdale
November 18, 2016	**RPPTL Probate Law 2016**	2263	Fort Lauderdale
February 17-18, 2017	**Advanced Real Property Certification Review Course 2017**	2284	Orlando
March 3, 2017	**Trust and Estate Symposium**	2288	Fort Lauderdale
March 9-11, 2017	**Construction Law Institute**	2290	JW Orlando, Grand Lakes
March 9-11, 2017	**Construction Law Certification Review**	2291	JW Orlando, Grand Lakes
March 31-April 1, 2017	**Wills, Trusts and Estates Certification Review Course**	2299	Orlando – TBD
April 7, 2017	**Guardianship Law**	2300	Orlando – TBD
May 12, 2017	**Condo & Planned Development Law & Certification Review Course**	2312	Tampa- TBD
June 2, 2017	**RPPTL Convention Seminar**	2317	Hyatt Coconut Point
June 23 -25, 2017	**ATO 2017**	2322	The Breakers

Real Property, Probate and Trust Law Section
Probate, Trust & Guardianship / Estate Planning
July 25, 2014

1. Supports limitation of creditor remedies against partner interest in general and limited liability partnerships and member interests in limited liability companies to charging liens and to prohibit foreclosure against such interests.

2. Opposes the expansion of classes that are to serve as agents under a power of attorney beyond the current class of individuals and financial institutions with trust powers.

3. Supports legislation to provide for alienation of plan benefits under the Florida Retirement System (§121.131 and §121.091 Florida Statutes) Municipal Police Pensions (§185.25 Florida Statutes) and Firefighter Pensions (§175.241 Florida Statutes) in a dissolution proceeding and authorizing such alienation of benefits in a dissolution of marriage under §61.076 Florida Statutes.

4. Supports legislation to (1) change the titles of §222.11 Florida Statutes to clearly reflect that this statute applies to earnings and is not limited to "wages" (2) provide an expanded definition of "earnings" because the term "wages" is not the exclusive method of compensation and (3) add deferred compensation to the exemption statute.

5. Supports legislation which provides that a waiver of the statutory exemption from creditors' claims afforded to certain death benefits payable to trusts must be clear and specific, including amendments to F.S. §§733.808(4) and F.S. 736.05053(1) Delete

December 12, 2014

6. Supports legislation which provides that a lawyer, or certain people related to, or affiliated with, the lawyer will not be entitled to receive compensation for serving as a fiduciary if the lawyer prepared the instrument making the appointment unless: (a) the lawyer or person appointed is related to the client; or (b) certain disclosures are made to the client before the instrument is signed and confirmed in a writing signed by the client.

7. Supports amending the Florida Uniform Transfer to Minors Act, F.S. Ch. 710, to allow for certain custodianships to terminate when the minor attains age 25, and to provide for a procedure to qualify transfers to certain custodianships that terminate when the minor attains age 25 for the federal gift tax annual exclusion. Delete

Probate, Trust & Guardianship / Guardianship & Advance Directives
July 25, 2014

1. Supports legislation to amend the Baker Act to include a provision under which a guardian may request that the court grant the guardian the authority to involuntarily hospitalize a ward pursuant to the Baker Act.

2. Supports legislation to amend F.S. §394.467 to add as criteria for involuntary placement the substantial and imminent likelihood of inflicting serious emotional or psychological harm on another person, and the causation of significant damage to property in the recent past with substantial and imminent likelihood of doing so again.

3. Supports amending 29.007 F. S. to provide authority to appoint and compensate attorneys and professional guardians to serve as guardian advocates and guardian ad litem for indigents in civil commitment and treatment proceedings in proceedings under the mental retardation statutes (ch. 393), Baker Act (ch. 394) and Marchman Act (ch. 397).

4. Supports legislation to amend Chapter 765, Florida Statutes, to improve the law concerning advance directives and to integrate federal HIPPA privacy laws with Florida law.

5. Opposes the adoption of summary guardianship proceedings outside the protections of Chapter 744, Florida Statutes.

6. Opposes amendments to F.S. §393.12 that would (i) remove the existing requirement that a guardian advocate for a developmentally disabled adult must be represented by an attorney if the guardian advocate is delegated authority to manage property, (ii) remove the existing requirement that the petition to appoint a guardian advocate must disclose the identity of the proposed guardian advocate, and (iii) expand the list of individuals entitled to receive notice of the guardian advocate proceedings.

7. Supports clarification of the definition of "income" for calculating Veterans guardianship fees, including an amendment to §744.604, Fla. Stat.

8. Opposes the adoption of the Uniform Adult Guardianship and Protective Proceedings Act.

9. Supports legislation to allow a parent, legal guardian or legal custodian of a minor child to designate a health care surrogate to make health care decisions for the minor if the parent, legal guardian or legal custodian is not reasonably available. Delete!

10. Supports proposed amendment to Florida Guardianship Law to clarify payment of attorney's fees from the ward's assets and to provide that the court may determine the reasonableness of compensation to the guardian, the guardian's attorney, any person employed by the guardian, any attorney rendering services to the ward and any court appointed attorney without the necessity of receiving expert testimony. Delete

11. Supports proposed amendment to the Florida Guardianship Law to allow members of the guardianship examining committee to be paid by the state as court appointed experts pursuant to F.S. §29.004(5) in those circumstances in which the petition for incapacity is dismissed by the court and no guardian is appointed. Delete

12. Supports amendments to the Florida Guardianship Law to protect the interest of incapacitated persons, especially minor wards, by making settlements on their behalf confidential.

13. Supports adoption of clarifications to F.S. Ch. 709, the Florida Power of Attorney Act.

14. Opposes amendments to guardianship statutes that (a) would change the criteria and limit the discretion of the court in awarding fees in guardianship proceedings for services that benefit the ward, (b) seek to significantly change established guardianship laws and procedures concerning the qualification of examining committee members and the content and requirements of their reports, and (c) would criminalize certain conduct in guardianship proceedings, including proposed amendments to F.S. §§744.108, 744.331, and 744.4461.

April 6, 2015

15. Opposes efforts to adopt POLST (Physician Ordered Life Sustaining Treatment) in Florida without appropriate procedural safeguards to protect the wishes of patients and prior advance directives made by the patient, including current Senate Bill 1052.

January 29, 2016

16. Opposes the expansion of chapter 709 to include the authority of a parent to assign the custody and control of a minor child through a power of attorney unless proper procedural safeguards are included to assure the proper care and welfare of the minor children.

Probate, Trust & Guardianship / Probate
July 25, 2014

1. Opposes any efforts to enact a statutory will.

2. Supports legislation to repeal §734.1025, Florida Statutes, because the dollar amount for summary administrations found in § 735.201-2063, Florida Statutes, has been increased thus, making §734.102, Florida Statutes, duplicative.

3. Opposes amendment to §733.302, F. S., to expand the class of non-residents which may serve as personal representative because of a concern that any addition to the class may subject the entire statute to a renewed constitutional challenge.

4. Opposes changes to Florida Statute 732.103 that would extend the intestate distribution scheme to the level of the decedent's great-grandparents.

5. Supports clarification of a person's rights to direct disposition of his or her remains, providing guidance to courts and family members, especially when disputes arise, and absent specific directions, clarifying who is authorized to decide the place and manner of the disposition of a decedent's remains, including an amendment replacing F.S. § 732.804.

December 12, 2014

6. Supports legislation to provide a non-exclusive list of factors for trial courts to use when exercising their discretion whether and to what extent attorneys' fees and costs should be assessed against a part of an estate or trust, including amendments to F.S. §§ 733.106, 736.1005, 736.1006. Delete!

7. Supports amendments to the estate tax apportionment statutes, including F.S. § 733.817, to update and clarify existing law. Delete!

8. Supports proposed legislation to remove barriers to a fiduciary's access to electronic records, including the Florida Fiduciary Access to Digital Assets Act, F.S. Ch. 740.

9. Supports legislation to ensure prompt objections to various aspects of probate administration and to clarify the rights and duties of parties when a personal representative of an estate is unqualified to act or is no longer qualified to act in that capacity. Delete!

October 16, 2015

10. Supports proposed legislation confirming that Florida law governs the validity and effect of the disposition of Florida real property, whether owned by a resident or a nonresident, including a change to F.S. §731.106(2).

January 29, 2016

11. Opposes legislation to expand the potential plaintiffs who can file an action on behalf of a vulnerable adult who has been abused, neglected, or exploited as specified in Chapter 415 without the consent of the vulnerable adult and without clear requirements that any recovery from successful litigation be paid to the vulnerable adult or their estate.

Probate, Trust & Guardianship / Trust
July 25, 2014

1. Opposes legislation abrogating a trustee's duties of loyalty and duties of full and fair disclosure in connection with affiliated investments by a corporate trustee.

2. Supports amendment of F.S. §736.0813 to clarify the meaning of the requirement that a trustee furnish qualified beneficiaries with a "complete copy" of a trust document.

3. Supports legislation that would (i) amend F.S. §736.0207 to clarify that in an action to contest the validity or revocation of all or part of a trust, the contestant has the burden of proof to establish grounds for invalidity, and (ii) amend F.S. §733.107(2) to clarify and confirm its applicability in all circumstances in which the presumption of undue influence is established, including trust contests as well as challenges to inter vivos gifts. Delete!

4. Supports legislation that would create legislation that authorizes families to form and operate licensed and unlicensed family trust companies and to authorize out of state licensed family trust companies to operate in Florida, including the creation of proposed F.S. Ch. 659, Family Trust Companies.

October 16, 2015

5. Supports proposed legislation that would amend F.S. §§736.0412(4) and 736.0105(2)(k), so that all irrevocable trusts are treated the same with regard to whether non-judicial modification is available during the first 90 years after the trust is created – more specifically, all irrevocable trusts will be restricted to judicial modification during the first 90 years after creation, unless the trust expressly permits non-judicial modification within the first 90 years.

6. Supports legislation to (i) clarify when trust assets may be used to pay a trustee's legal fees and (ii) provide further guidance to practitioners and courts as to the procedure to be employed when a trustee seeks to use trust assets to pay the trustee's legal fees when defending a breach of trust claim, including amendments to F.S. §§ 736.0802(10), 736.0816(20) and 736.1007(1). Delete!

7. Supports proposed amendments to F.S. Chapter 736, which provide much needed clarification and guidance regarding the applicability of constitutional devise restrictions and exemption from creditors' claims provisions, as well as the timing and method of passage of title to homestead real property, when that homestead real property is devised through a

revocable trust at the time of a settlor's death, including amendment to F.S. §736.0103, amendment to F.S. §736.0201, the creation of F.S. §736.0508, and the creation of F.S. §736.08115.

Real Property / Condominiums and Planned Developments
July 25, 2014

1. Supports amendments to Chapter 718, Florida Statutes, Condominiums, and Chapter 719 Florida Statutes, Cooperatives, to require that engineers, architects and other design professionals and manufacturers warrant the fitness of the work they perform on condominiums or cooperatives.

2. Opposes amendments to §718.1255, Florida Statutes, or targeted budget reductions or other governmental action having the purpose or effect or diminishing or eliminating the jurisdiction of the Arbitration Division of the Department of Business and Professional Regulation's Division of Land Sales.

3. Supports condominium unit owner's ability to exercise self-government and undertake fair and efficient community administration, including the exercise of basic contract and investment decisions.

4. Supports legislation to permit condominium unit owners to further subdivide or partition their interest in the condominium and common elements appurtenant thereto pursuant to a sub-declaration of condominium, which subdivided units shall remain subject and subordinate to the existing declaration of condominium, provided such existing declaration of condominium allows for the subdivision.

5. Opposes amendments to Chapter 720, F.S., that would require both pre-suit mediation and pre-suit arbitration before filing a civil action over homeowners' association disputes.

6. Supports legislation providing for electrical elements to three-year warranty, extend subcontractor and supplier warranties to the contractor and to clarify start date for five-year warranty deadline set forth in F.S. §718.203(1)(e).

7. Supports amendment of F.S. §718.403 to permit the addition of proposed phases to a condominium beyond 7 years from the recording of the declaration of condominium upon association membership approval and recorded amendment to the declaration of condominium.

8. Supports additional guidance and regulation respecting the creation of a condominium within a condominium unit, through creation of Section 718.406, F.S.; to provide an effective date.

9. Supports clarification of Ch 718, F.S.: to confirm that certain operational provisions do not apply to nonresidential condominium associations; to define "nonresidential condominiums;" to clarify that the Division's arbitration program only pertains to residential condominiums; to provide an effective date.

10. Supports amendments to F.S. Chapter 718: to replace the date triggering certain obligations; to clarify when a condominium unit is created; to permit extending the period for adding phases to a condominium; and, to provide an effective date.

11. Supports legislation to standardize procedures and to clarify the timing, content and preparation fees relating to estoppel letters issued by condominium and homeowners' associations, including amendments to F.S. §§718.116 & 720.30851.

12. Supports legislation to remove the requirement that statutory late fees must be set forth in a condominium or homeowners' association declaration or bylaws in order for those charges to be imposed, to allow for the collection of such fees by all condominium and homeowner associations, including amendments to F.S. §§718.116 & 718.3085.

13. Supports legislation to differentiate the administration of nonresidential condominiums from residential condominiums and to eliminate for nonresidential condominium associations certain provisions not appropriate in a commercial setting, including amendments to F.S. Ch. 718.

14. Supports an amendment to F.S. §712.05 of the Marketable Record Title Action to correct an error created by an inadvertent requirement imposed by the 2010 amendment to F.S. §712.06, clarifying existing law, removing the costly, time consuming, and unnecessary requirement to mail a copy of the notice of preservation to each owner in a homeowners' association, who would have already been notified of the preservation.

15. Supports an amendment to the Florida Condominium Act for a one-year extension of the expiration date to July 1, 2016, for Part VII of the Act and F.S. §718.707, dealing with distressed condominiums.

16. Supports amendments to the Florida Condominium Act which set forth the rights and obligations of purchasers and lenders that acquire multiple units, but who are not creating developers of the condominium, including creating a Part VIII, and eliminating application of Part VII, of the Condominium Act to transactions recorded after the effective date July 1, 2016.

17. Opposes legislation that changes the definition of the practice of law to exclude from the definition a community association manager's interpretation of documents or statutes that govern a community association, determination of title to real property, or completion of documents that require interpretation of statutes or the documents that govern a community association, including opposition to SB1466, SB1496, HB7037 and CS/HB7039 (2014).

December 12, 2014

18. Supports amending Florida Condominium law pertaining to the termination of condominiums to protect unit owners and provide certainty and predictability to the process.

Real Property / Contracts and Disclosures
July 25, 2014

1. Opposes legislation requiring multiple disclosures by sellers of real property, creating contract rescission rights for buyers and seller liability for damages.

2. Opposes legislation requiring parties to record notices, warnings or reports regarding the physical condition of land or improvements in the public records regarding the title to real property.

Real Property / Corporations and LLCs
July 25, 2014

1. Opposes legislation requiring a Florida corporation or limited liability company to publish notice of its proposed sale of assets other than in regular course of business, or to publish notice of dissolution, including changes to F.S. §607.1202 and §608.4262.

Real Property / Courts
July 25, 2014

1. Oppose the creation of "pilot" court divisions without funding, evaluation criteria, rules of procedure, and competency criteria for magistrates without consideration for current alternate dispute resolution processes.

2. Supports procedures to preserve due process by providing courts with authority to appoint attorney, administrator and guardian ad litems to serve on behalf of known persons, or unknown persons, having claims by, though, under or against a person who is deceased or whose status is unknown, and confirming the sufficiency of prior proceedings in which ad litems have been appointed, including amendment of F.S. §49.021.

Real Property / Environmental
July 25, 2014

1. Supports continuation and improvement of the Florida brownfield redevelopment program, including the voluntary cleanup tax credit (VCTC) program pursuant to F.S. §376.30781.

Real Property / Foreclosures and Judicial Sales
July 25, 2014

1. Oppose legislation which would require a foreclosing creditor to notify the debtor that filing a bankruptcy petition before the foreclosure sale may permit the debtor to retain the property and reorganize the indebtedness.

2. Opposes any amendment to existing Florida law governing real property foreclosures unless those amendments carefully preserve and protect the property rights and due process rights of the holders of interests in or affecting Florida real property.

3. Supports expanded publication of notices of judicial sales, permitting notices to be posted on the Internet, including amendments to F .S. Chapters 45, 50 and 702.
4. Supports foreclosure reform which expedites and streamlines the judicial foreclosure process while preserving and protecting fundamental fairness and the property rights and due process rights of the holders of interests in or affecting Florida real property. [Revised 4/18/13]

5. Supports requirements for electronic publication of legal notices that address due process concerns, including amendments to F.S. §50.0211, 50.041, and 50.061.

6. Supports correction of procedural issues relating to trustee foreclosures of timeshares, including amendments to sections 721.82, 721.855, and 721.856 of the Florida Statutes.

7. Supports legislation to permit the electronic filing of certified copies of documents and permit the self-authentication of documents other than by obtaining a certified copy, including an amendment of F.S. §90.902.

8. Supports a clarification and simplification of the statute of repose applicable to mortgage liens and restoration of subrogation rights for property tax advances through changes to F.S. §95.281.

9. Supports legislation to delete the requirement that out-of-state plaintiffs file a $100 cost bond as set out in F.S. §57.011, and which would clarify and codify existing law by providing that a condition precedent to filing a petition or complaint to collect a debt is not created by F.S. §559.715. Delete!

Real Property / Liens and Encumbrances
July 25, 2014

1. Supports amendment to §162.09(3), Florida Statutes, to clarify the relative priority of recorded municipal code enforcement liens created pursuant to the Local Government Code Enforcement Boards Act.

2. Opposes efforts to create a lien on real property for work that does not add value to the property, and would permit liens against the property of a person other than the party owing a debt.

3. Supports amendment to F.S. §695.01 and ch 162 to reduce problems regarding hidden liens by: (i) requiring all governmental liens (other than taxes, special assessments and those for utility services) to be recorded in the official records and to state their priority; (ii) clarifying the priority of liens asserted by local governments; and (iii) expanding the homestead determination mechanisms of F.S. §222.01 to apply to other types of lien.

4. Supports amendments: to s. 95.11(2) and (5), F.S., as to the statute of limitations for actions on payment bonds; to s. 713.08(3) (the statutory form for a claim of lien) to include the separate statement required by F.S. 713.08(1)(c); to s. s. 713.13, F.S. to delete the requirement that the notice of commencement be verified and to clarify the timing of the expiration date of the notice of commencement; to s. 713.18, F.S. as to electronic confirmation of delivery through the U.S. Postal Service.

5. Supports amendment of: F.S. §713.10(2)(b) to provide that a blanket notice recorded by a landlord remains valid and the landlord's property interest will not be liable for liens arising from tenant improvements even if the leases contain different versions of the lien prohibition language or no lien prohibition language at all, under certain circumstances; and F.S. §713.10(3) to require inclusion of specific language in any claim of lien premised on a landlord's failure to comply so as to provide record notice of the basis of such a claim by a lienor, and to provide that any lien will not take effect as to third parties without notice until 30 days after the recording of the claim of lien.

6. Opposes selective increase of recording expense to only construction claims of lien, adding additional filing requirements, and concluding that filing a lien beyond the statutory 90-day period is an act of fraud, including opposing amendments to F.S. §§28.24 & 713.08.

Real Property / Mobile Homes
July 25, 2014

1. Supports amendment to Chapter 723, Florida Statutes, specifying that each mobile home owner/owners shall have only one vote at elections or meetings, and to allow association bylaws to specify less than a majority for a quorum.

Real Property / Miscellaneous
July 25, 2014

1. Supports amendment to §673.3121, Florida Statutes, to provide a cross reference in it to §673.4111, Florida Statutes, stating that if an official check is not paid, then the person entitled to enforce the official check is entitled to compensation from the obligated bank for refusing to pay.

2. Opposes abolishment of causes of action for architect, engineer, surveyor and mapper professional negligence and other professional breaches of duty.
3. Supports execution curative provisions to cover instruments, other than deeds or wills that convey a fee simple interest in real estate, including an amendment to F.S. §95.231.

4. Supports clarification that an otherwise valid power of attorney executed in compliance with the laws of the state of execution to convey or encumber Florida real property, applies to all Florida real property including homestead property, including amended F.S. §709.2106. Delete!

5. Supports issuance of separate property tax folio numbers for separately described portions of a multiple parcel building and providing for allocation of underlying land value among the separate building parcels, including amendment of F.S. Chapter 193.

Real Property / Notary
July 25, 2014

1. Opposes Section 2 of Senate Bill 298 creating §117.055, which requires that notaries keep a detailed journal of all notarial acts including: the date, time and type of notarial act; the date, type and description of each document; the name of the signer; and description of the evidence of identity.

Real Property / Property Rights
July 25, 2014

1. Opposes any legislation limiting property owners' rights or limiting attorneys' fees in condemnation proceedings.

2. Opposes legislation expanding the definition of sovereign beaches, public beaches or beach access rights over privately owned property without due process of law or compensation for taking of private property rights.

December 12, 2014

3. Supports amendment to F.S.§ 48.23(1) re lis pendens to include those receiving a mortgage or other lien on property in the protections provided by this statute.

Real Property / Recording
July 25, 2014

1. Supports legislation to maintain the integrity of the recording system in the State of Florida.

Real Property / Title Insurance
July 25, 2014

1. Opposes any portion of the National Association of Insurance Commissioners Title Insurers Model Act and Title Insurance Agent Model Act that may adversely affect Florida attorneys' ability to participate in real estate closing and the issuance of title insurance.

2. Supports the regulatory approval of a proposed ALTA Junior Loan Policy Form, but opposes legislation that would exclude from the statutory definition of title insurance the insuring of mortgage liens covering second mortgages and home equity line mortgages.

3. Opposes adoption of a "file and use" system for the determination of title insurance rates in the State of Florida, supplanting a promulgated rate system in which the state regulatory agency determines rates based on actuarial analysis of statutorily determined criteria.

4. Supports recommendations to the Title Insurance Study Advisory Council concerning the providing and regulation of title insurance.

5. Opposes elimination of the requirement that title insurance agencies deposit securities having a value of $35,000 or a bond in that amount for the benefit of any title insurer damaged by an agency's violation of its contract with the insurer.

Third District Court of Appeal

State of Florida

Opinion filed April 13, 2016.

No. 3D14-575
Lower Tribunal No. 12-49315

Deutsche Bank Trust Company Americas, as Indenture Trustee for American Home Mortgage Investment Trust 2006-2,
Appellant,

vs.

Harry Beauvais, and Aqua Master Association, Inc., a non-profit Florida corporation,
Appellees.

An Appeal from the Circuit Court for Miami-Dade County, Peter R. Lopez, Judge.

K&L Gates, and David R. Fine (Harrisburg, PA) and William P. McCaughan, Steven R. Weinstein and Stephanie N. Moot, for appellant.

Siegfried, Rivera, Hyman, Lerner, De La Torre, Mars & Sobel and Steven M. Siegfried and Nicholas D. Siegfried; Wallen Hernandez Lee Martinez, and Todd L. Wallen, for appellee, Aqua Master Association, Inc.

Ausley McMullen and Major B. Harding; Hargrove Law Group and John R. Hargrove, for Baywinds Community Association, Inc., as amicus curiae.

Levine Kellogg Lehman Schneider + Grossman, and Stephanie Reed Traband and Victor Petrescu, for the Federal National Mortgage Association and the Federal Home Loan Mortgage Corporation, as amici curiae.

Morgan, Lewis & Bockius, and Robert M. Brochin, Joshua C. Prever and Christopher K. Smith, for Mortgage Bankers Association of South Florida, as amicus curiae.

Matthew Estevez, for Community Associations Institute, as amicus curiae.

Jacksonville Area Legal Aid and Lynn Drysdale, for the National Association of Consumer Advocates, the National Consumer Law Center and the Jerome N. Frank Legal Services Organization at the Yale Law School, as amici curiae.

Gilbert Garcia Group, Michelle G. Gilbert, Jennifer Lima-Smith and Nicholas R. Cavallaro; Gladstone Law Group, Andrea R. Tromberg and Jason F. Joseph; Robertson, Anschutz & Schneid, Robert R. Edwards and Jessica P. Quiggle; Kass Shuler, Melissa A. Giasi and Richard S. McIver; Elizabeth R. Wellborn; Brock and Scott, Shaib Y. Rios and Curtis J. Herbert, for the American Legal and Financial Network, as amicus curiae.

McGlinchey Stafford, and Manuel Farach, for the Business Law Section of the Florida Bar, as amicus curiae.

Goldman Felcoski & Stone, and Robert W. Goldman; Gunster, and Kenneth B. Bell and John W. Little, III, for the Real Property Probate & Trust Law Section of The Florida Bar, as amicus curiae.

Crabtree & Auslander, and John G. Crabtree, Charles Auslander, George R. Baise, Jr., and Brian C. Tackenberg; Alice Vickers and Bryant H. Dunivan, Jr., for Florida Alliance for Consumer Protection, as amicus curiae.

Before SUAREZ, C.J., and WELLS, SHEPHERD, ROTHENBERG, LAGOA, SALTER, EMAS, FERNANDEZ, LOGUE and SCALES, JJ.

ON MOTION FOR REHEARING EN BANC OR, IN THE ALTERNATIVE, MOTION FOR CERTIFICATION

WELLS, Judge.

We grant rehearing en banc, withdraw our prior opinion in Deutsche Bank Trust Co. America v. Beauvais, 40 Fla. L. Weekly D1 (Fla. 3d DCA Dec. 17, 2014), and substitute this opinion in its stead.

Deutsche Bank appeals from a final summary judgment denying foreclosure of a mortgage securing a $1,440,000 promissory note executed in the bank's favor by borrower Harry Beauvais. The complaint filed by the bank on December 18, 2012, alleged entitlement to relief by virtue of Beauvais' failure to pay an installment payment due on October 1, 2006, "and all subsequent payments." The complaint, in addition to naming Beauvais, joined a number of entities with potential interests in the property securing the bank's loan including the Aqua Master Association, Inc., the condominium association for the premises at issue.

By the time this action was commenced, Beauvais no longer held title to the condominium securing payment of this loan, his interest having been foreclosed and title transferred in 2011 to Aqua to satisfy outstanding condominium assessments. Beauvais, with no interest in the property, filed no answer to the bank's complaint and asserted no defenses to foreclosure of the bank's loan. The bank moved for a default; however, none appears to have been entered. Aqua, on the other hand, now title holder of the property securing the bank's loan, filed an answer and affirmative defenses in which it alleged that the instant action was barred by the five year statute

of limitations governing mortgage foreclosures. See § 95.11(2)(c), Fla. Stat. (2013). According to Aqua, the bank's cause of action for foreclosure accrued in 2007 when the bank's predecessor in interest accelerated the balance due on the loan by filing a prior suit to collect on a September 1, 2006 default,[1] and because the bank failed to pursue foreclosure within five years of that acceleration/accrual after the first suit was dismissed, the instant action was time barred.

The trial court agreed and granted judgment in Aqua's favor:

> The previous mortgage holder filed suit against borrower [Beauvais] and the Association on January 23, 2007, alleg[ing] that the borrower defaulted on the mortgage and elected to accelerate payment of the balance due on the note and mortgage. The prior complaint specifically declared the full amount payable under the note and mortgage, $1,439,976.80, to be due. However, the action was dismissed without prejudice on plaintiff's non-appearance at initial case management conference on December 6, 2010. On December 12, 2012, Plaintiff filed the instant suit to foreclose the mortgage. The complaint called for the entire balance of $1,439,976.80, to be due.
>
> Association is correct that the filing of the prior lawsuit in 2007 triggered the running of the statute of limitations with respect to the entire balance of the mortgage and note. The case to which the Plaintiff cites, Singleton v. Greymar Assoc., 882 So. 2d 1004 (Fla. 2004), is inapposite and concerns only the application of res judicata in an action to collect discrete payments under an installment contract. Singleton is not only distinguishable from the facts of the instant case, it is wholly irrelevant to the issue of the statute of limitations raised by the Association.
>
> It is the determination of this Court that the right to accelerate was exercised by the filing of the prior lawsuit on January 23, 2007.

[1] American Home Mortgage Servicing, Inc. v. Harry Beauvais et. al., Case No 07-02054 CA 10.

> Since more than five years elapsed between the acceleration and the filing of the underlying suit, the action is barred by the statute of limitations. See § 95.11(2)(c), Fla. Stat. . . .

The bank appeals. We reverse because we, like our sister courts, find the Florida Supreme Court's decision in Singleton v. Greymar Associates, 882 So. 2d 1004 (Fla. 2004), applicable to the instant action, and that it mandates reversal. See Evergrene Partners, Inc. v. Citibank, N.A., 143 So. 3d 954, 956 (Fla. 4th DCA 2014) (applying Singleton and concluding that the statute of limitations would not bar foreclosure of an accelerated loan where an earlier, voluntarily dismissed, foreclosure had been brought to enforce the same loan accelerated for a separate default); see also Nationstar Mortg., LLC v. Brown, 175 So. 3d 833, 834-35 (Fla. 1st DCA 2015) (applying Singleton to hold that the statute of limitations did not bar an action to foreclose an accelerated loan brought more than five years after a prior action to foreclose on the same accelerated loan had been brought but then voluntarily dismissed without prejudice); accord Hicks v. Wells Fargo Bank, N.A., 178 So. 3d 957, 959 (Fla. 5th DCA 2015) (citing Singleton and concluding "we reject Homeowners' implication in their brief that Bank is now forever barred from bringing an action to foreclose. Despite the previous acceleration of the balance owed in both the instant suit and prior suit, Bank is not precluded from filing a new foreclosure action based on different acts or dates of default not previously alleged, provided that the subsequent foreclosure action on the subsequent defaults is brought

within the statute of limitations period found in section 95.11(2)(c), Florida Statutes").

1. Application of Singleton to the instant case.

a. Singleton allows for multiple actions for individual defaults with accompanying accelerations.

In Singleton, the Florida Supreme Court held that "successive foreclosure suits, regardless of whether or not the mortgagee sought to accelerate payments on the note in the first suit," were not barred if, as here, the second suit was predicated on a new default because a "subsequent and separate alleged default create[s] a *new* default and *independent right* in the mortgagee *to accelerate payment on the note in a subsequent foreclosure action.*" Singleton, 882 So. 2d at 1008 (emphasis added); see, e.g., PNC Bank, NA v. Neal, 147 So. 3d 32, 32 (Fla. 1st DCA 2013) (stating that "the dismissal with prejudice of PNC Bank's foreclosure action . . . does not preclude PNC Bank from instituting a new foreclosure action based on a different act or a new date of default not alleged in the dismissed action"); Star Funding Solutions, LLC v. Krondes, 101 So. 3d 403, 403 (Fla. 4th DCA 2012) (citing Singleton as support for the conclusion that dismissal with prejudice of the instant action would have no impact on a subsequent foreclosure action because "[a] new default, based on a different act or date of default not alleged in the dismissed action, creates a new cause of action"); Olympia Mortg. Corp. v. Pugh, 774 So. 2d 863, 867 (Fla. 4th DCA 2000) (confirming that voluntary dismissal of a foreclosure action on

an accelerated mortgage and note did not bar a subsequent action on a later default); accord St. Louis Condo. Ass'n, Inc. v. Nationstar Mortg. LLC, No. 14-21827-CIV, 2014 WL 6694780, at *2 (S.D. Fla. Nov. 26, 2014) ("When a 'mortgagee initiates a foreclosure action and invokes its right of acceleration, if the mortgagee's foreclosure action is unsuccessful for whatever reason, the mortgagee still has the right to file later foreclosure actions-and to seek acceleration of the entire debt-so long as they are based on separate defaults.' Dorta v. Wilmington Trust Nat'l Assoc., 13–cv–185–Oc–10PRL, 2014 WL 1152917, at *2–4 (M.D. Fla. Mar. 24, 2014) (relying on Singleton v. Greymar Assoc., 882 So. 2d 1004 (Fla. 2004) (per curium [sic])). Contrary to Plaintiff's assertions, 'an unsuccessful foreclosure action does not subsequently render a mortgage forever invalid and unenforceable.' Id. Rather, the Note and Mortgage remain enforceable and Defendant still has the right to file

foreclosure actions based on separate defaults."); Diaz v. Deutsche Bank Nat'l Trust

Co., No. 14-22583-CIV, 2014 WL 4351411, at *3 (S.D. Fla. Sept. 2, 2014).[2, 3]

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[2] See generally In re Rogers Townsend & Thomas, PC, 773 S.E. 2d 101, 106 (N.C. Ct. App. 2015), referring to Singleton's conclusion that a subsequent and separate alleged default created a new and independent right in the lender to accelerate payment on a note in a subsequent foreclosure action, and concluding:

> We recognize that this view of foreclosure actions involving acceleration on a note is not universal. See U.S. Bank Natl. Assn. v. Gullotta, 120 Ohio St. 3d 399, 405, 899 N.E. 2d 987, 992 (2008) (holding that each missed payment under a promissory note and mortgage did not give rise to a new claim because "[o]nce [the borrower] defaulted and [the lender] invoked the acceleration clause of the note, the . . . obligations to pay each installment merged into one obligation to pay the entire balance on the note"). Even so, Singleton's pronouncement that an "acceleration and foreclosure [action] predicated upon subsequent and different defaults present[s] a separate and distinct" claim expresses the better reasoned view. 882 So. 2d at 1007.

[3] This analysis of Singleton neither undermines nor contradicts prior Florida Supreme Court or other Florida precedent, including the Supreme Court's decision in Travis Co. v. Mayes, 36 So. 2d 264, 265-66 (Fla. 1948). Travis does no more than stand for the unremarkable proposition that when considering a mortgage that contains an automatic acceleration clause "[t]he law is well settled that the Statute of Limitations begins to run against a mortgage at the time the right to foreclose accrues. The rule is also settled that when a mortgage in terms declares the entire indebtedness due upon default of certain of its provisions or within a reasonable time thereafter, the Statute of Limitations begins to run immediately [when] the default takes place or the time intervenes." Travis, 36 So. 2d at 376-77 (citations omitted); see also Spencer v. EMC Mortg. Corp., 97 So. 3d 257, 260 (Fla. 3d DCA 2012) (holding that a foreclosure action filed more than five years after acceleration of the entire debt upon default was barred by the statute of limitations); Greene v. Bursey, 733 So. 2d 1111, 1115 (Fla. 4th DCA 1999) (holding that the statute of limitations began to run in that case from the date of maturity because the lender had not sought to accelerate and foreclose following an earlier default); Monte v. Tipton, 612 So. 2d 714, 716 (Fla. 2d DCA 1993) (stating the general principle that the statute of limitations on a mortgage foreclosure action does not begin to run until the last payment is due unless the mortgage contains an acceleration clause which the mortgagee has chosen to exercise); accord Locke v. State Farm Fire & Cas. Co., 509

b. Singleton considered the view that an acceleration of payments once put at issue is determinative, and rejected that proposition.

In coming to this conclusion, the Florida Supreme Court considered, and expressly rejected the view espoused in Stadler v. Cherry Hill Developers, Inc., 150 So. 2d 468 (Fla. 2d DCA 1963), that an acceleration of payments once put at issue is determinative. In Stadler, the Second District held that acceleration of payments in a foreclosure action on one defaulted installment payment put the entire loan balance at issue, thereby precluding a second foreclosure action on a subsequent default. Faced with a conflict between this determination in Stadler and the Fourth District's opinion in Singleton v. Greymar Associates, 840 So. 2d 356 (Fla. 4th DCA 2003), finding that a second foreclosure on a "new and different breach" would not be precluded, the Supreme Court chose to adopt the view employed by the Fourth District to find that a lender could maintain a separate action for foreclosure for a default which occurred after acceleration on an earlier default:

> [W]e can envision many instances in which the application of the Stadler decision would result in unjust enrichment or other inequitable

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So. 2d 1375, 1377 (Fla. 1st DCA 1987); see also Smith v. F.D.I.C., 61 F.3d 1552, 1561-62 (11th Cir. 1995), and Harmony Homes, Inc. v. U.S. on behalf of Small Bus. Admin., 936 F. Supp. 907, 911 (M.D. Fla. 1996) (similarly relying on Tipton, Locke, and Conner v. Coggins, 349 So. 2d 780 (Fla. 1st DCA 1997), for the general proposition that the statute of limitations begins to run on a mortgage foreclosure action when the last payment is due except when the mortgage includes an acceleration clause). The decision in Singleton gives rise to no inconsistency in the law, and does nothing to change when the clock starts ticking for statute of limitations purposes. Rather, Singleton provides for new accelerations based on subsequent defaults—to which, of course, statutory limitations periods apply.

> results. If res judicata prevented a mortgagee from acting on a subsequent default even after an earlier claimed default could not be established, the mortgagor would have no incentive to make future timely payments on the note. The adjudication of the earlier default would essentially insulate her from future foreclosure action on the note—merely because she prevailed in the first action. Clearly, justice would not be served if the mortgagee was barred from challenging the subsequent default payment solely because he failed to prove the earlier alleged default.
>
> We must also remember that foreclosure is an equitable remedy and there may be some tension between a court's authority to adjudicate the equities and the legal doctrine of res judicata. The ends of justice require that the doctrine of res judicata not be applied so strictly so as to prevent mortgagees from being able to challenge multiple defaults on a mortgage. We can find no valid basis for barring mortgagees from challenging subsequent defaults on a mortgage and note solely because they did not prevail in a previous attempted foreclosure based upon a separate alleged default.

Singleton, 882 So. 2d at 1007-08 (citation omitted).

Here we follow that choice. And, as have numerous post-Singleton courts before us, we apply this determination, while made in the context of a res judicata defense, to a statute of limitations defense. See, e.g., Brown, 175 So. 3d at 834 (applying Singleton to a statute of limitations defense); Evergrene Partners, Inc., 143 So. 3d at 955, 956 (same); U.S. Bank Nat'l Ass'n v. Bartram, 140 So. 3d 1007, 1014 (Fla. 5th DCA 2014), review granted, 160 So. 3d 892 (Fla. Sept. 11, 2014) ("Based on Singleton, a default occurring after a failed foreclosure attempt creates a new cause of action for statute of limitations purposes, even where acceleration had been triggered and the first case was dismissed on its merits. Therefore, we conclude

that a foreclosure action for default in payments occurring after the order of dismissal in the first foreclosure action is not barred by the statute of limitations found in section 95.11(2)(c), Florida Statutes, provided the subsequent foreclosure action on the subsequent defaults is brought within the limitations period."); Dorta, 2014 WL 1152917, at *6 (rejecting a claim that the statute of limitations barred any further actions to foreclose after a previous action for foreclosure on an accelerated loan had been involuntarily dismissed, finding that Singleton "directly refutes this argument, holding that even where a mortgagee initiates a foreclosure action and invokes its right of acceleration, if the mortgagee's foreclosure action is unsuccessful for whatever reason, the mortgagee still has the right to file later foreclosure actions—and to seek acceleration of the entire debt—so long as they are based on separate defaults"); see also Smathers v. Nationstar Mortg., LLC, No.5:15-cv-415-Oc-30 PRL, 2014 WL 4639136, at *2 (M.D. Fla. Sept. 16, 2014) (applying Singleton in a statute of limitations case and confirming that an acceleration and foreclosure predicated upon a subsequent and different default would not be barred by the dismissal of an earlier action predicated on a separate and distinct default); accord LNB-017-13, LLC v. HSBC Bank USA, 96 F. Supp. 3d 1358, 1363-64 (S.D. Fla. 2015) (citing a litany of cases relying upon Singleton to conclude that "the current state of the law does not support [a claim that] . . . prior acceleration and expiration

of the 5-year statute of limitations for foreclosure actions bars all other foreclosure actions based on non-payment").

We therefore conclude that dismissal of a foreclosure action accelerating payment on one default does not bar a subsequent foreclosure action on a later default if the subsequent default occurred within five years of the subsequent action. See Solenenko v. Georgia Notes 18, LLC, 182 So. 3d 876, 877 (Fla. 4th DCA 2016) ("[T]he present action, which was brought in February 2014, was based upon a different event of default [than the 2008 foreclosure action]—namely the borrowers' failure to make the payment due on March 1, 2009. . . . Therefore, under this court's precedent, the action was timely brought within the five-year statute of limitations."); Hicks, 178 So. 3d at 959 (finding that "Bank is not precluded from filing a new foreclosure action based on different acts or dates of default not previously alleged, provided that the subsequent foreclosure action on the subsequent defaults is brought within the statute of limitations period found in section 95.11(2)(c), Florida Statutes"); Evergrene Partners, Inc., 143 So. 3d at 956 ("While any claims relating to individual payment defaults that are now more than five years old may be subject to the statute of limitations, each payment default that is less than five years old . . . created a basis for a subsequent foreclosure and/or acceleration action." (quoting Kaan v. Wells Fargo Bank, N.A., 981 F. Supp. 2d 1271, 1274 (S.D. Fla. 2013))); Bartram, 140 So. 3d at 1014 (concluding that "a

foreclosure action for default in payments occurring after the order of dismissal in the first foreclosure action is not barred by the statute of limitations found in section 95.11(2)(c), Florida Statutes, provided the subsequent foreclosure action on the subsequent defaults is brought within the limitations period"); see also Kaan, 981 F. Supp. 2d at 1274 (finding that, under Singleton and section 95.11(2)(c), Wells Fargo was allowed to bring a subsequent foreclosure action relating to subsequent payment defaults on the note and mortgage that were less than five years old). It is the fact that the bank alleged the failure to pay the October 1, 2006 installment payment "*and all subsequent payments*" that makes the instant case fall within the rule as set out herein. (Emphasis added).

c. Whether a dismissal is with or without prejudice is irrelevant to a lender's right to file subsequent foreclosure actions on subsequent defaults.

Under Singleton, subsequent defaults allow for subsequent accelerations regardless of the nature of a prior dismissal. A lender's right to file a subsequent action to foreclose on an accelerated note following a subsequent default does not turn on whether the first action to foreclose on an earlier default and acceleration was dismissed with or without prejudice. As Singleton teaches, even a dismissal with prejudice which adjudicates the merits of a first filed foreclosure action only precludes the lender from recovering on the underlying defaulted installment and returns the lender and the borrower to the status quo which permits the lender to file subsequent foreclosure actions based on subsequent defaults. See Singleton, 882

So. 2d at 1007 ("[I]f the plaintiff in a foreclosure action goes to trial and loses on the merits, we do not believe such plaintiff would be barred from filing a subsequent foreclosure action based upon a subsequent default. The adjudication merely bars a second action relitigating the same alleged default. A dismissal with prejudice of the foreclosure action is tantamount to a judgment against the mortgagee. That judgment means that the mortgagee is not entitled to foreclose the mortgage. . . . Accordingly, we do not believe the dismissal of the foreclosure action in this case barred the subsequent action on the balance of the note." (quoting Capital Bank v. Needle, 596 So. 2d 1134, 1138 (Fla. 4th DCA 1992))).

A dismissal without prejudice which does not adjudicate the merits of a first filed foreclosure action, similarly can do no more than terminate a lender's ability to collect on the underlying defaulted installment, again leaving the lender free to accelerate and file a subsequent foreclosure action for subsequent defaults. See Brown, 175 So. 3d 834-35 (citations omitted) ("We find that appellant's assertion of the right to accelerate was not irrevocably 'exercised' within the meaning of cases defining accrual for foreclosure actions, when the right was merely asserted and then dismissed without prejudice. After the dismissal without prejudice, the parties returned to the status quo that existed prior to the filing of the dismissed complaint. As a matter of law, appellant's 2012 foreclosure action, based on breaches that

occurred after the breach that triggered the first complaint, was not barred by the statute of limitations.").

Thus, as concluded in Bartram, and alluded to in Dorta, the "with" or "without prejudice" dismissal is a distinction without a difference. Bartram, 140 So. 3d at 1013 n.1 ("We acknowledge that the Bank suffered a dismissal with prejudice of its earlier foreclosure action, unlike the dismissal in Dorta, but conclude that the distinction is not material for purposes of the issue at hand."); Dorta, 2014 WL 1152917 at *6 n.3 ("Singleton involved a dismissal with prejudice; whereas Citibank's foreclosure action was merely dismissed without prejudice. Dismissals without prejudice are not considered adjudications of the merits, and therefore there was no effective acceleration of the Note and the Mortgage."); see also Espinoza v. Countrywide Home Loans Servicing, L.P., 2014 WL 3845795 at *4 (S.D. Fla. Aug. 5, 2014) ("Pursuant to Singleton, when 'a mortgagee initiates a foreclosure action and invokes its right of acceleration, if the mortgagee's foreclosure action is unsuccessful for whatever reason, the mortgagee still has the right to file later foreclosure actions . . . so long as they are based on separate defaults.'" (Emphasis added) (quoting Dorta, 2014 WL 1152917 at *6)). As observed in In re Anthony, 534 B.R. 834, 838-39 (Bkrtcy. M.D. Fla. 2015), "[t]he better view is that dismissals with and without prejudice operate in the same manner with respect to the statute of limitations in mortgage foreclosures."

Simply stated, the holding in Singleton cannot be distinguished away on a *with prejudice/without prejudice* distinction. Whether voluntarily dismissed or dismissed with or without prejudice the result is the same: upon dismissal, acceleration of a note and mortgage is abandoned with the parties returned to the status quo that existed prior to the filing of the dismissed action, leaving the lender free to accelerate and foreclose on subsequent defaults.

Finally, separate and apart from the analysis established by Singleton, case law confirms "[w]hen an action is dismissed without a final adjudication on the merits, the parties are left as if the suit had never been filed. Epstein v. Ferst, 35 Fla. 498, 509, 17 So. 414, 415 (1895); 1 Fla. Jur. 2d Actions § 220 (2003)." JB Int'l, Inc. v. Mega Flight, Inc., 840 So. 2d 1147, 1150 (Fla. 5th DCA 2003). Thus, when the first foreclosure in this case was dismissed without prejudice, under established Florida case law, the parties were returned to their prior positions and nothing barred a new and timely action for acceleration and foreclosure. Epstein, 17 So. at 415 ("A dismissal 'without prejudice' leaves the parties as if no action had been instituted.").

2. The lender in this case was under no obligation, contractually or legally, to "decelerate" this loan following dismissal.

a. The mortgage itself confirms that the installment nature of the loan continues even after acceleration.

There was no obligation on the bank to take any action to "decelerate" this loan following dismissal of the first foreclosure action because the mortgage itself

confirms that the installment nature of the loan continues even after acceleration and the filing of a foreclosure action:

> **19. Borrower's Right to Reinstate After Acceleration.** If Borrower meets certain conditions, *Borrower shall have the right to have enforcement of this Security Instrument discontinued at any time prior to* the earliest of . . . (c) *entry of a judgment enforcing this Security Instrument.* Those conditions are that Borrower . . . (a) *pays Lender all sums which then would be due* under this Security Instrument and the Note *as if no acceleration had occurred . . . . Upon reinstatement by Borrower, this Security Instrument and obligations secured hereby shall remain fully effective as if no acceleration had occurred.*

(Emphasis added).

This provision, while addressing only a borrower's right to cure, confirms that after acceleration, the borrower is not obligated to pay the entire accelerated balance due to cure but, until a final judgment is entered, need only bring the loan current to avoid foreclosure. Stated another way, despite acceleration of the balance due and the filing of an action to foreclose, the installment nature of a loan secured by such a mortgage continues until a final judgment of foreclosure is entered and no action is necessary to reinstate it via a notice of "deceleration" or otherwise. As our sister court has confirmed, "[a]fter the dismissal . . . the parties returned to the status quo that existed prior to the filing of the dismissed complaint." Brown, 175 So. 3d at 835. No further acts were necessary on the bank's part to "decelerate" this loan. See Matos v. Bank of New York, 2014 WL 3734578 at *1 (S.D. Fla. July 28, 2014) ("The statute of

limitations has not run on this foreclosure action due to the dismissal of the prior foreclosure action, which decelerated the notice of acceleration.").

Even if such an affirmative act were required to decelerate this loan and to reinstate its installment nature, the failure to do so following dismissal of the first action would not preclude the instant action. This is because the mortgage at issue here clearly states that the bank's failure to act will not work as a waiver of its rights under the note and mortgage:

> UNIFORM COVENANTS. Borrower and Lender covenant and agree as follows:
>
> . . .
>
> **12. Borrower Not Released; Forbearance By Lender Not a Waiver.** Extension of the time for payment or modification of amortization of the sums secured by the Security Instrument granted by Lender to Borrower or any Successor in Interest of Borrower shall not operate to release the liability of Borrower or any Successors in Interest of Borrower. Lender shall not be required to commence proceedings against any Successor in Interest of Borrower or to refuse to extend time for payment or otherwise modify amortization or the sums secured by this Security Instrument by reason of any demand made by the original Borrower or any Successors in Interest of Borrower. *Any forbearance by Lender in exercising any right or remedy* including, without limitation, Lender's acceptance of payments from third persons, entities or Successors in Interest of Borrower or in amounts less than the amount then due, *shall not be a waiver of or preclude the exercise of any right or remedy*.

(Emphasis added).

Likewise the note provides for no waiver of the noteholder's right to payment:

> **6. BORROWER'S FAILURE TO PAY AS REQUIRED**

. . . .

(D) No Waiver By Note Holder

Even, if, at a time when I am in default, the Note Holder does not require me to pay immediately in full as described above, the Note Holder will still have the right to do so if I am in default at a later time.

Because the installment nature of the loan at issue did not terminate following acceleration and foreclosure, and because dismissal of the foreclosure action returned the parties to the status quo existing before acceleration, the bank was under no obligation to take any affirmative action to reinstate the installment nature of the loan or to "decelerate."

b. This reading of the mortgage contract is in accord with Florida and national mortgage industry practices and best serves the interests of both mortgagees and mortgagors.

This conclusion is wholly consistent with both national and local industry custom and practice. As amici Fannie Mae and Freddie Mac[4] advise in an amicus brief provided on request, the mortgage at issue here is one of their "uniform mortgage instrument[s]" drafted "to ensure uniformity in the residential housing finance market" nationwide. According to them, paragraph 19, the reinstatement provision, was inserted into their standard mortgage forms to benefit defaulting borrowers by allowing them to avoid foreclosure by catching up on missed installment payments rather than having to pay

[4] The purpose of these entities, we are advised, is to assure greater access to mortgage credit while promoting liquidity, stability and affordability in the residential real estate market.

the entire balance of a loan following acceleration. This, according to Fannie Mae and Freddie Mac, effectively preserves the installment nature of a loan even after acceleration making "deceleration" unnecessary following dismissal of a foreclosure action:

> Because a borrower defaulting on his or her installment obligations has a continuing right to reinstate the Mortgage until entry of judgment (at which time the Mortgage ceases to exist), the installment nature of the contract exists for as long as the Mortgage does. Therefore, no affirmative act is necessary to reinstate the Mortgage's installment obligations after dismissal. . . .[5]

Adding support to our conclusion, both The Business Law Section[6] of The Florida Bar and The Real Property Probate & Trust Law Section[7] of The Florida Bar confirm that the custom and practice in Florida is to treat a dismissal of a foreclosure action as "decelerating" an acceleration made in a foreclosure action. See Cooke v.

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[5] As these amici note, "after dismissal, the lender no longer has any claim to the fully-accelerated amount, only the past-due payments." Were this not true, "a lender that receive[d] a payment from a reinstating borrower for less than the fully-accelerated amount after accelerating the loan could simply return that payment and proceed with its foreclosure. But the Reinstatement Provision [paragraph 19] prohibits that." Moreover, we are advised, if lenders were obligated to take some affirmative act to "decelerate" following dismissal, a lender could unilaterally nullify the reinstatement provision, refuse to decelerate, and obligate the borrower to pay the entire accelerated amount.

[6] The Business Law Section of The Florida Bar is comprised of almost 6,000 Bar members who routinely represent both lenders and borrowers.

[7] The Real Property Probate & Trust Law Section of The Florida Bar is comprised of over 10,000 Bar members who practice in the areas of real estate, guardianship, trust and estate law, and who are dedicated to serving all Florida lawyers and the public in these fields of practice. The Section produces educational materials and seminars, assists the public *pro bono*, drafts legislation, drafts rules of procedure, and occasionally serves as a friend of the court to assist on issues related to their fields of practice.

Commercial Bank of Miami, 119 So. 2d 732, 735 (Fla. 3d DCA 1960) (concluding "customs and usages of the banking business may have a binding force as between banks, and between a bank and the person with whom it deals in the absence of an express agreement to the contrary"); see also Sabatino v. Curtiss Nat'l Bank of Miami Springs, 446 F.2d 1046, 1053 (5th Cir. 1971) ("Absent instructions or an express agreement to the contrary, general customs and usage of the banking business may have a binding effect between banks, and between a bank and the person with whom it deals.").

In response to a number of inquiries posed by this court, The Real Property Probate & Trust Law Section reviewed the underlying mortgage and facts herein and relying on Florida statutes and case law provided the following responses which confirm our conclusion that the installment nature of the a loan continues following acceleration and that the practice in this State is that no more than dismissal of a foreclosure action is necessary to "decelerate" an accelerated loan:

> 1. Where a foreclosure action has been dismissed with the note and mortgage still in default:
>
> *a.* Does the dismissal of the action, by itself, revoke the acceleration of the debt balance thereby reinstating the installment terms?
>
> *The Section responds:*
>
> *The optional acceleration the lender exercised as part of the foreclosure process could not be effectuated until entry of the foreclosure judgment. Until then, that acceleration was subject to the foreclosure proceeding being dismissed for various reasons, including*

the borrower's contractual right to reinstate and discontinue the foreclosure action by curing the past installment payment default. Absent a contrary provision in the mortgage contract, Florida law and equitable principles generally dictate the conclusion that no further affirmative act of deceleration is necessary. The dismissal itself should serve to revoke the acceleration made as part of the now dismissed foreclosure process and the parties should be deemed to have returned to their pre-filing status quo.

b. Absent additional action by the mortgagee can a subsequent claim of acceleration for a new and different time period be made?

The Section responds:

Yes. The installment nature of the mortgage loan, the terms of this form of mortgage, Florida case law and equitable principles dictate allowing a subsequent acceleration and foreclosure action for any new and different default.

c. Does it matter if the prior foreclosure action was voluntarily or involuntarily dismissed, or whether the dismissal was with our without prejudice?

The Section responds:

The nature of the dismissal in a prior foreclosure action should not matter in a subsequent foreclosure based on a default occurring after the default that precipitated the prior foreclosure action. However, the nature of the dismissal may matter if the statute of limitations or doctrine of res judicata is applicable to the default at issue in the prior foreclosure action.

d. What is the customary practice?

e. The Section responds:

The RPPTL Section defers to the response in the Business Law Section of the Florida Bar's amicus brief. That response is consistent with the RPPTL Section's understanding of the customary practice. [The BLS responded: the customary practice appears to be acceleration of

> *"optional acceleration" loans through the filing of suit and not through acceleration notices. Accordingly, the customary practice amongst the BLS's members appears to be based on Singleton and that filing of a new suit is permitted on a mortgage that contains an optional acceleration clause, whether the prior suit was terminated by voluntary dismissal or otherwise.]*
>
> *2.* If an affirmative act is necessary by the mortgagee to accelerate a mortgage, is an affirmative act necessary to decelerate?
>
> *The Section responds:*
>
> *Unless the mortgage contract or the mortgagee's acceleration otherwise dictates, the dismissal of the foreclosure action should be deemed a deceleration returning the parties to the status quo.*
>
> *3.* In light of Singleton v. Greymar Assocs., 882 So. 2d 1004 (Fla. 2004), is deceleration an issue or is deceleration inapplicable if a different and subsequent default is alleged?
>
> *The Section responds:*
>
> *Under the terms of the mortgage in this case, Singleton dictates the conclusion that deceleration after the dismissal of a prior foreclosure action is not an issue (or is inapplicable) in a subsequent foreclosure based on a different and subsequent alleged default.*

The sum of these responses is that the custom and practice nationwide and in Florida is consistent with Singleton and that a loan accelerated for one default is "decelerated" upon dismissal (whether with or without prejudice).

In fact, after the dismissal in this case, the bank treated the loan as decelerated. After the dismissal, the bank sent Beauvais a letter demanding—not the full amount of the accelerated loan—but only the amount due from the date of default to the date of the letter. In the letter, the bank also noted that the next installment payment was

still due on the next payment date, which it provided. The bank's demand for less than the full amount of the accelerated loan, and the bank's notice that the next individual installment payment remained due, is consistent only with the bank's treatment of the loan as decelerated. Thus, the Florida Supreme Court's ruling in Singleton and our decision here, track the actual and best practices of the industry regarding deceleration in these circumstances. There is no reason for courts to structure artificial rules regarding acceleration and deceleration at odds with how these matters are actually treated by borrowers and lenders in the marketplace.

3. The decisions of other states in no way militate against our analysis herein.

There is nothing new or novel in this mode of proceeding. And the view taken in Singleton does not make Florida an outlier in the law. Amici, National Association of Consumer Advocates, The National Consumer Law Center, and the Jerome N. Frank Legal Services Organization at the Yale Law School submitted a joint brief on rehearing en banc, which set forth and examined the relatively few opinions from states that have considered the import of a dismissal of a foreclosure action on an accelerated note and/or the circumstances whereby the lender may reinstate a mortgage after acceleration. Of the jurisdictions that have considered the issue, few appear to have addressed whether some affirmative act is necessary to "decelerate" an accelerated loan following dismissal of a foreclosure action.

As for the approximately fifteen states[8] where, like Florida, home loans are secured by mortgages which require judicial intervention to foreclose, the cases cited to us by these amici confirm that only one appears to have actually determined that some affirmative act following dismissal must be taken to "decelerate" an accelerated loan. See, e.g., Fed. Nat'l Mortg. Ass'n v. Mebane, 618 N.Y.S.2d 88, 89 (N.Y. App. Div. 1994) (confirming that the intermediate appellate courts of New York have taken the position that dismissal of a foreclosure action does not work a "deceleration" and a lender must take an affirmative step to revoke an election to accelerate). By contrast, at least one Indiana court in a "nearly identical situation" to Singleton, has cited with approval and relied upon Singleton. See Afolabi v. Atlantic Mort. & Inv. Corp., 849 N.E. 2d 1170, 1174-75 (Ind. Ct. App. 2006).

As for the remainder of the cases cited to us by amici, the issue remains largely undecided. See Johnson v. Samson Constr. Corp, 704 A. 2d 866, 869 (Me. 1997) (mentioning the issue in dicta in a case that determined, contrary to the position taken in Singleton, that a dismissal with prejudice of a foreclosure action for failure to file

[8] Connecticut: Conn. Gen. Stat. §§ 49-1 to 49-31v; Delaware: Del. Code Ann. tit. 10 §§ 5061 through 5067; Illinois: 735 Ill. Comp. Stat §§ 5/15-1501 to 5/15-1605; Indiana: Ind. Code §§ 32-30-10-1 to 32-30-10-14; Kansas: Kan. Stat. Ann. § 60-2410; Kentucky: Ky. Rev. Stat. Ann. § 426.005; Louisiana: La. Code Civ. Proc. Ann. arts. 3721 to 3723; Maine: Me. Rev. Stat. Ann. tit. 14, §§ 6321 to 6326; New Jersey: N.J. Stat. Ann. §§ 2A:50-1 to 2A:50-73; New York: N.Y. Real Prop. Acts. Law §§ 1301 to 1391; North Dakota: N.D. Cent. Code §§ 32-19-01 to 32-19-41; Ohio: Ohio Rev. Code Ann. § 2323.07; Pennsylvania: 35 Pa. Stat. Ann. §§ 1680.402c to 1680.409c; South Carolina: S.C. Code Ann. §§ 29-3-610 to 29-3-790.

a report by counsel constituted an adjudication on the merits which precluded a subsequent foreclosure action); U.S. Bank Nat'l Ass'n v. Gullotta, 899 N.E. 2d 987, 992-93 (Ohio 2008) (similarly where the Supreme Court of Ohio mentioned the issue in dicta in a decision apparently limited to its facts and which, again contrary to Singleton, confirmed that there each missed installment payment does not yield a new claim); Hamlin v. Peckler, NO. 2005-SC-000166-MR, 2005 WL 3500784, at *2 (Ky. Dec. 22, 2005) (addressing the issue once, in an unpublished, never-again cited opinion that ultimately did not reach the merits of the issue for procedural reasons); Harrison v. Smith, 814 So. 2d 42, 45-46 (La. Ct. App. 2002) (addressing the issue in the context of a note with no reinstatement provision and later cited only twice for a different proposition); Fid. Bank v. Krenisky, 807 A.2d 968, 975 (Conn. App. Ct. 2002) (addressing the issue in the context of an acceleration via a pre-suit letter and finding that "[b]ecause the mortgage documents required no additional notice of default prior to the plaintiff's commencement of its second foreclosure action, that component of the defendants' first special defense is legally insufficient").

The remaining five cases cited to us by amici come from deed-of-trust states[9] which, unlike Florida, generally require no judicial intervention to foreclose. See 55 Am.Jur.2d Mortgages §553 (2015) ("The power of sale in a deed of trust is a

[9] We note that there are a handful of states which allow both judicial and non-judicial foreclosure.

contractual arrangement in a mortgage or a deed of trust which confers upon the trustee or mortgagee the 'power' to sell the real property mortgaged without any order of court in the event of a default.") (Citation omitted). For the most part, these decisions do not demonstrate that Florida is an outlier on this issue because they: (1) address the issue in unpublished opinions with no precedential value, see Kirsch v. Cranberry Fin., LLC, 178 Wash. App. 1031 (Wash Ct. App. 2013), Wood v. Fitz-Simmons, No. 2 CA-VC 2008-0041, 2009 WL 580784 (Ariz. Ct. App., Mar. 6, 2009), and Cadle Co. II, Inc. v. Fountain, 281 P. 3d 1158 (Nev. 2009); (2) are rarely if ever cited as authority, see Kirsch, 178 Wash. App. 1031 (cited once); Wood, 2009 WL 580784 (no citations), Cadle Co. II, Inc., 281 P. 3d 1158 (cited twice, including by the panel in this case); (3) are governed by a statute which expressly provides, unlike in Florida, that the statute of limitations runs from the accelerated due date of the loan, see Kirsch, 178 Wash. App. 1031, at *4-5; or (4) do not even address the issue. See Murphy v. HSBC Bank USA, 95 F. Supp. 3d 1025 (S.D. Tex. 2015) (involving an independent action challenging the mortgagee's standing to foreclose a deed-of-trust in a non-judicial proceeding); Khan v. GBAK Props., Inc., 371 S.W. 3d 347, 352 (Tex. Civ. App. 2012) (addressing whether the note holder had abandoned its prior acceleration—which had been accomplished through an acceleration letter—by continuing to accept payments on the note at a later date); Bankers Trust Co. of California, N.S. v. Baca, 151 P. 3d 88, 90-91 (N.M. Ct. App.

2006) (which stands for the rather unremarkable proposition that while res judicata did not prevent the filing of the second foreclosure action, the second action was nevertheless subject to the applicable statute of limitations that ran from the due date of the installment payment the mortgagor failed to make, as is the case with any installment contract).[10]

In short, by our estimation there is hardly a consensus in this area of the law outside of Florida and by no stretch of the imagination can Florida be labeled as an "outlier" on this point. Thus, while we do not question that several courts across the country have adopted reasoning different from that accepted in Florida, the point is *our* Supreme Court has rejected that different analysis. See Singleton, 882 So. 2d 1006 (disapproving Stadler's conclusion at 150 So. 2d at 472, "that an election to accelerate puts all future installment payments in issue and forecloses successive suits"). Instead, citing both legal and equitable reasons, Singleton chose to conclude

[10] Because this case did not involve an acceleration by letter, this opinion in no way addresses what, if any, notice of deceleration would be required in such an instance. In that same vein, that non-involvement of judicial process may explain why deed-of-trust states may reach a different conclusion as to the requirement of notice of deceleration, as without court participation, the mortgagor may rightly need some notice that acceleration is no longer at issue.

a subsequent default created a new right to accelerate,[11] making the dismissal of the prior action for acceleration—with or without prejudice—non-determinative of a different and subsequent claim.

4. Concerns raised in the dissent.

In summary, as set out above, we reject the dissent's concerns in the following manner:

1) Our analysis in no way perpetuates an upheaval to the contract at issue. As the dissent admits, the instant contract does not address the result of a dismissal or the rights or obligations of the parties thereafter. In fact, the dissent's conclusion that the lender waived its right to accelerate when it failed to decelerate the loan following dismissal is in express contradiction to paragraph 12 of the mortgage and paragraph 6 of the note, both of which specifically provide that any forbearance by the lender in exercising any right or remedy shall not be a waiver or preclude the exercise of that right or remedy.

2) Our analysis in no way perpetuates an upheaval to the statute of limitations. We do not suggest that the statute of limitations becomes a nullity. Rather, under Singleton, dismissal of a foreclosure action accelerating payment on one default does not bar a subsequent foreclosure action accelerating payment on a later default if the subsequent default occurred within five years of the subsequent action and acceleration.

3) Our analysis in no way perpetuates an upheaval to long-standing law on the effect of a dismissal. Rather, as previously stated, the law has been and continues to be that an action dismissed without a final adjudication on the merits leaves the parties as though the suit had never been filed, which is no more than exactly the conclusion we reach herein.

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[11] The Court having spoken, it is our obligation to follow that instruction. See Hoffman v. Jones, 280 So. 2d 431, 434 (Fla. 1973) ("To allow a District Court of Appeal to overrule controlling precedent of this Court would be to create chaos and uncertainty in the judicial forum, particularly at the trial level.").

4) Our conclusion in no way results in a cataclysmic change in Florida law or the way in which lenders proceed against defaulting borrowers. Rather, as Fannie Mae, Freddie Mac, and the Florida Bar confirm, our analysis is in keeping with the understanding of members of the mortgage industry and those who represent both borrowers and lenders.

5) Our conclusion is not the result of any perceived "moral imperative" or quest for equity run amuck. Rather, it is the result of what the Supreme Court has said, what the contract provides, and what a dismissal does.

5. Conclusion.

In sum, after the 2010 dismissal without prejudice of the predecessor mortgagee's foreclosure action, the parties returned to the status quo that existed prior to the filing of the dismissed complaint. As a matter of law, the bank's 2012 foreclosure action, based on breaches that occurred after the breach that triggered the first complaint, was not barred by the statute of limitations. So says Singleton, as well as the terms of the parties' mortgage and note. This resolution is in keeping with the long held practices of the Florida mortgage industry and moreover, best protects the interests of both mortgagees, who are not left with nullified mortgages, but also mortgagors, who by the terms of their mortgages, are permitted any time before judgment, to become current on their mortgage obligation.

Additionally, as should be apparent from the analysis outlined above, we likewise reverse that portion of the trial court's order which declared that the mortgage was null and void, canceled same, and quieted title to the property in favor of the Association. The Legislature, by its express language, provided that the

mortgage lien under section 95.281(1)(a) would terminate five years after a maturity date that can be determined from the face of a recorded document. The face of the recorded mortgage in the instant case reveals a maturity date of March 1, 2036. Therefore, and pursuant to section 95.281(1)(a), the mortgage lien remains valid until March 1, 2041, five years from the date of maturity as reflected in the recorded mortgage securing the obligation.

Accordingly, we reverse the order under review and remand this cause to the trial court for further proceedings consistent with this opinion.

SUAREZ, C.J., and ROTHENBERG, LAGOA, FERNANDEZ and LOGUE, JJ., concur.

SCALES, J. (dissenting)

I respectfully dissent. In my view, contrary to the majority's conclusion, Singleton v. Greymar Associates[12] does not fundamentally alter, *sub silentio*, decades of Florida statute of limitations jurisprudence.

I. Overview

The statute of limitations for a foreclosure action is five years from when the last element constituting the cause of action occurs. § 95.11(2)(c), Fla. Stat. (2013).

When, as here, a mortgage secures a promissory note containing an optional acceleration clause, the statute of limitations begins to run from the date the lender exercises its acceleration right. Greene v. Bursey, 733 So. 2d 1111, 1114-15 (Fla. 4th DCA 1999); Monte v. Tipton, 612 So. 2d 714, 716 (Fla. 2d DCA 1993); see also Smith v. Fed. Deposit Ins. Corp., 61 F. 3d 1552, 1561 (11th Cir. 1995); Erwin v. Crandall, 175 So. 862, 863 (Fla. 1937); Spencer v. EMC Mortg., 97 So. 3d 257, 260 (Fla. 3d DCA 2012).

In this case, after the borrower Harry Beauvais defaulted by failing to make the installment payment due on September 1, 2006, the lender (plaintiff Deutsche Bank's predecessor-in-interest) exercised its option to accelerate all amounts due on

[12] 882 So. 2d 1004 (Fla. 2004)

January 22, 2007. Deutsche Bank's instant foreclosure lawsuit was filed on December 18, 2012, well beyond the five-year statute of limitations.

Relying on almost eighty years of well-established Florida jurisprudence, the trial court granted the defendant's motion for summary judgment on this issue, and a panel of this Court unanimously affirmed the trial court's determination in that regard. Deutsche Bank Trust Co. Americas v. Beauvais, No. 3D14-575 (Fla. 3d DCA Dec. 17, 2014).

Relying on a sweepingly broad interpretation of Singleton v. Greymar Associates – a Florida Supreme Court case in which the term "statute of limitations" is not even mentioned – the *en banc* majority opinion reverses the summary judgment and, in the process: (i) creates the legal fiction that a lender's acceleration does not affect the installment nature of the note; (ii) rewrites the acceleration and reinstatement provisions of the parties' note and mortgage; and (iii) effectively rewrites the statute of limitations for mortgage foreclosure actions in Florida.

Specifically, the majority opinion holds **both** (a) that a borrower's obligation to make, and a lender's obligation to accept, monthly installment payments on an installment note continue after the lender's acceleration; **and** (b) that irrespective of the nature of the dismissal, as a matter of law, **any** dismissal of a foreclosure lawsuit nullifies the lender's prior acceleration and reinstates the installment nature of the previously accelerated note, as if the lender had never exercised acceleration.

In my view, not only are these two holdings inconsistent with each other, but, when taken together, these holdings effectively rewrite Florida statute of limitations jurisprudence in foreclosure cases. Singleton can, and should, be read in harmony with – rather than to upend – significant Florida precedent regarding installment note acceleration, mortgage foreclosure, and limitations of actions.

II. Facts

A. The Promissory Note

On February 10, 2006, Beauvais borrowed $1,440,000 from plaintiff's predecessor-in-interest, American Broker's Conduit. Beauvais's loan was memorialized with a promissory note, requiring Beauvais to repay the loan by making monthly installment payments over thirty years.

The installment nature of the note (which obligates the borrower to repay the loan in prescribed monthly installments, and which obligates the lender to accept such payments) is plainly, precisely, and expressly defined in paragraphs 3(A) and (B) of the note:

> I will make a payment every month . . . . I will make my monthly payment on the 1st day of each month beginning on April 1, 2006. I will make these payments every month until I have paid all of the Principal and interest and any other charges described below that I may owe under this Note. Each monthly payment will be applied as of its scheduled due date, and if the payment includes both principal and interest it will be applied to interest before Principal . . . . I will make my monthly payments at [address of lender] . . . . My monthly payment will be in the amount of U.S. $10,050.00 for the first 120 months of this

> Note, and thereafter will be in the amount of U.S. $12,382.96. The Note Holder will notify me prior to the date of change in monthly payment.

The note's maturity date is expressly defined as March 1, 2036. Specifically, the note reads as follows: "If, on March 1, 2036, I still owe amounts under this Note, I will pay those amounts in full on that date, which is called the 'Maturity Date.'"

In its paragraph 6(C), the note contains the following default/acceleration provision that, upon the borrower's default, gives the lender an option to accelerate all amounts due under the note, thereby advancing the note's maturity date:

> If I am in default, the Note Holder may send me a written notice telling me that if I do not pay the overdue amount by a certain date, the Note Holder may require me to pay immediately the full amount of Principal which has not been paid and all the interest that I owe on that amount. That date must be at least 30 days after the date on which the notice is mailed to me or delivered by other means.

Recognizing that the note is secured by a uniform mortgage (that is, a security instrument), paragraph 10 of the note contains the following language related to the default/acceleration provisions in the accompanying mortgage:

> That Security Instrument describes how and under what conditions I may be required to make immediate payment in full of all amounts I owe under this Note. Some of those conditions are described as follows:
> . . . .
> If Lender exercises this option, Lender shall give Borrower notice of acceleration. The notice shall provide a period of not less than 30 days from the date the notice is given . . . within which Borrower must pay all sums secured by this Security Instrument. If Borrower fails to pay these sums prior to the expiration of this period, Lender may invoke

> any remedies permitted by this Security Instrument without further notice or demand on Borrower.

B. <u>The Mortgage</u>

Beauvais's note was secured by a mortgage, encumbering a unit in the Chatham at Aqua condominiums in Miami Beach.

Consistent with the above-cited default language in the note, paragraph 22 of Beauvais's mortgage contains the following acceleration/remedy provision:

> **Acceleration; Remedies.** Lender shall give notice to Borrower prior to acceleration following Borrower's breach of any covenant or agreement in this Security Instrument . . . . The notice shall specify: (a) the default; (b) the action required to cure the default; (c) a date, not less than 30 days from the date the notice is given to Borrower, by which the default must be cured; and (d) that failure to cure the default on or before the date specified in the notice may result in acceleration of the sums secured by this Security Instrument, foreclosure by judicial proceeding and sale of the Property. The notice shall further inform Borrower of the right to reinstate after acceleration and the right to assert in the foreclosure proceeding the non-existence of a default or any other defense of Borrower to acceleration and foreclosure. If the default is not cured on or before the date specified in the notice, Lender at its option may require immediate payment in full of all sums secured by this Security Instrument without further demand and may foreclose this Security Instrument by judicial proceeding.

In paragraph 19 of the Beauvais mortgage, the parties painstakingly and precisely detail the conditions precedent in order for the installment nature of the note to be reinstated after the lender has exercised its option to accelerate. Paragraph 19 reads as follows:

> **Borrower's Right to Reinstate After Acceleration.** If Borrower meets certain conditions, Borrower shall have the right to have enforcement of this Security Instrument discontinued at any time prior to the earliest of: (a) five days before sale of the Property pursuant to any power of sale contained in this Security Instrument; (b) such other period as Applicable Law might specify for the termination of Borrower's right to reinstate; or (c) entry of judgment enforcing this Security Instrument. Those conditions are that Borrower: (a) pays Lender all sums which then would be due under this Security Instrument and the Note as if no acceleration had occurred; (b) cures any default of any other covenants or agreements; (c) pays all expenses incurred in enforcing this Security Instrument, including, but not limited to, reasonable attorneys' fees, property inspection and valuation fees, and other fees incurred for the purpose of protecting Lender's interest in the Property and rights under this Security Instrument; and (d) takes such action as Lender may reasonably require to assure that Lender's interest in the Property and rights under this Security Instrument, and Borrower's obligation to pay the sums secured by this Security Instrument, shall continue unchanged. Lender may require that Borrower pay such reinstatement sums and expenses in one or more of the following forms, as selected by Lender: (a) cash; (b) money order; (c) certified check, bank check, treasurer's check or cashier's check, provided any such check is drawn upon an institution whose deposits are insured by a federal agency, instrumentality or entity; or (d) Electronic Funds Transfer. Upon reinstatement by Borrower, this Security Instrument and obligations secured thereby shall remain fully effective as if no acceleration had occurred. However, this right to reinstate shall not apply in the case of acceleration under Section 18.

In sum, the parties' note and mortgage provide a contractual mechanism both: (i) for Beauvais to prevent the lender from exercising its right to acceleration after a default and the lender's notice thereof; and (ii) for Beauvais to reinstate the installment nature of the note after the lender has exercised its right to acceleration.

Neither the note nor the mortgage contain any provision reinstating the installment nature of the note if, after acceleration, a lender foreclosure action is dismissed.

C. The First Lawsuit and its Disposition

After Beauvais failed to make the September 2006 installment payment due on his promissory note, American Home Mortgage, Inc. ("AHMS"), the successor to Beauvais's initial lender, exercised its contractual right to accelerate the total amount due on the note.[13]

In its January 22, 2007 complaint, AHMS alleged that Beauvais then owed AHMS the sum of $1,439,976.80 in principal, plus interest accrued from August 1,

[13] The lender's acceleration is memorialized in its January 22, 2007 foreclosure lawsuit. Paragraph 4 of AHMS's complaint reads as follows: "Defendant, HARRY BEAUVAIS, failed to pay the payment due on the Note on September 1, 2006, and Plaintiff elected to accelerate payment of the balance." Similarly, paragraph 14 of the complaint reads as follows: "Plaintiff declares the full amount payable under the Note and Mortgage to be due."

The record is unclear as to whether AHMS exercised its right to accelerate prior to the filing of its complaint. Even if AHMS had accelerated Beauvais's note earlier, such a fact would have no relevance as to whether the statute of limitations had run by the time Deutsche Bank filed the instant action, more than five years after the first action was filed.

2006. The complaint identifies the default date as September 1, 2006, and names as defendants both Beauvais and the Chatham at Aqua Condominium Association.[14]

Almost four years after AHMS's foreclosure lawsuit was filed, the trial court set the matter for a December 6, 2010 case management conference. The trial court's order setting the case management conference required the attendance of all parties at the conference. AHMS failed to appear at the conference. As a result, the trial court dismissed the case without prejudice. The adjudicative portion of the trial court's form order, dated December 6, 2010, reads, in its entirety, as follows: "The Plaintiff failed to appear without explanation. Therefore, this case is dismissed without prejudice."

Nothing in the trial court's order reinstates the installment nature of the loan or adjudicates AHMS's acceleration as ineffective in any regard.

Nothing in the record indicates that, upon entry of the trial court's December 6, 2010 dismissal order, either AHMS or Beauvais treated this order as: (i) reinstating the installment nature of the loan, (ii) nullifying AHMS's prior acceleration, or (iii) readjusting the note's maturity date from January 22, 2007 (the advanced maturity date after acceleration), to March 1, 2036 (the pre-acceleration

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[14] Subsequent to the recordation of the mortgage, Beauvais's master condominium association placed an inferior lien on Beauvais's condominium unit for unpaid condominium assessments. AHMS sought to foreclose this inferior lien.

maturity date expressed in the note). Moreover, it is undisputed that Beauvais never exercised, nor sought to exercise, the "reinstatement after acceleration" provision of paragraph 19 of the mortgage.

D. The Instant Lawsuit and its Disposition

On November 2, 2012, Homeward Residential, Inc., a loan servicer working on behalf of AHMS's successor, Deutsche Bank, sent Beauvais a pre-acceleration default notice.

This notice stated that Beauvais defaulted on the note by failing to make the installment payment due on October 1, 2006 (as opposed to the September 1, 2006 default date alleged in AHMS's acceleration), and that Beauvais owed Deutsche Bank the sum of $796,161.19, which the letter describes as "the sum of payments that have come due on or after the date of default 10/01/2006, any late charges, periodic adjustments to the payment amount (if applicable) and expenses of collection."

This notice also purports to give Beauvais through December 7, 2012 (thirty-five days from the date of the notice), to make the $796,161.19 payment in order to avoid a **second** acceleration and foreclosure lawsuit.

Nothing in this November 2, 2012 letter references AHMS's January 22, 2007 acceleration, any nullification of that acceleration, any reinstatement of the installment nature of the loan, or why Homeward Residential waited more than six years after the alleged October 1, 2006 default to send this notice.

On December 18, 2012, Deutsche Bank filed the instant verified complaint for foreclosure. In its complaint, Deutsche Bank purports to exercise its option to accelerate **a second time**, alleging an October 1, 2006 default date (as opposed to the September 1, 2006 default date identified in the first complaint). The verified complaint alleges an accelerated amount then owed to plaintiff of $1,439,976.80 (the exact same accelerated amount alleged in AHMS's initial foreclosure complaint, filed almost six years earlier).

Deutsche Bank's complaint contains no allegations suggesting that AHMS's initial acceleration was, in any way, ineffective. In fact, Deutsche Bank's complaint contains no allegations whatsoever regarding the January 2007 acceleration, any reinstatement of the installment nature of note occurring after that January 2007 acceleration, or why the complaint is being filed more than six years beyond the date of the alleged October 1, 2006 default.

By the time Deutsche Bank filed its December 18, 2012 complaint, Beauvais's master condominium association, Aqua Master Association, Inc. ("Aqua"), had already foreclosed its previously recorded assessment lien, and had become the title owner of the condominium unit. Aqua filed an answer to Deutsche Bank's complaint, asserting, as its sole affirmative defense, that the five-year statute of limitations, prescribed in section 95.11(2)(c) of the Florida Statutes, barred Deutsche Bank's cause of action.

Specifically, Aqua asserted that more than five years had elapsed between AHMS's 2007 acceleration of the amounts due under Beauvais's note and the filing of Deutsche Bank's December 2012 purported re-acceleration and foreclosure lawsuit.

In December of 2013, Aqua filed a motion for summary judgment, seeking a declaration that the note and mortgage were unenforceable due to the expiration of the statute of limitations. The trial court granted Aqua's summary judgment motion and entered final summary judgment for Aqua. This appeal followed.

This Court's panel opinion affirmed that portion of the trial court's summary judgment declaring that the expiration of the statute of limitations barred the plaintiff's foreclosure action, but reversed the trial court's declaration cancelling the mortgage. Deutsche Bank Trust Co. Americas v. Beauvais, No. 3D14-575 (Fla. 3d DCA Dec. 17, 2014). This Court granted *en banc* review, and the *en banc* majority opinion reverses the trial court's summary judgment. My dissent is explained below.

III. Analysis

A. Synopsis of Majority Opinion's Holding and My Dissent

The majority opinion concludes that the five-year statute of limitations for foreclosure actions does not bar Deutsche Bank's December 20, 2012 lawsuit, "[b]ecause the installment nature of the loan at issue did not terminate following acceleration and foreclosure and because dismissal of the foreclosure action returned

the parties to the status quo existing before acceleration . . . ." See majority opinion at 19.

The majority opines that Singleton – which is a *res judicata* case and not a statute of limitations case – stands for the proposition that a lender's exercising its option to accelerate does not affect the installment nature of a loan. In other words, in the majority's view, Singleton necessarily holds that, subsequent to a lender's acceleration, a borrower's monthly installment payments continue to become due monthly, and a borrower's failure to make those post-acceleration monthly payments constitute subsequent defaults. See majority opinion at 6, 12.

In a separate part of its opinion, the majority also (and, in my view, inconsistently) holds that, under Singleton, **any** dismissal of a prior foreclosure action automatically, and as a matter of law, places the parties into their pre-acceleration positions (i.e., the status quo) and allows the lender to treat the note as if the lender had never accelerated the note. See majority opinion at 13, 19, 30.[15]

In my view, despite the majority's abundant number of citations to Singleton v. Greymar Associates, the majority's conclusions simply are not supported, much less required, by Singleton. The majority's conclusions are contrary to the express

[15] The majority's two principal conclusions are not only erroneous, they are also irreconcilable with each other. If acceleration does not terminate the installment nature of the loan, then dismissal is irrelevant because acceleration has not altered the parties' status quo in the first place.

terms of the parties' note and mortgage, as well as the considerable body of Florida law that has governed this State's mortgage transactions for decades.

Specifically, the majority's principal conclusions are untenable because they: (i) contradict the express language of Singleton that only an adjudication that denies acceleration and foreclosure reinstates the loan (Singleton, 882 So. 2d at 1007); (ii) effectively rewrite the parties' contract documents, both by adding a new reinstatement provision and by redefining acceleration; (iii) rewrite Florida dismissal law, visiting upon a form dismissal order unprecedented adjudicatory effect; (iv) effectively rewrite the statute of limitations defense in foreclosure cases; and (v) conflate Florida's statute of limitations with Florida's statute of repose in foreclosure cases.

B. Singleton v. Greymar Associates

(i) Summary of Singleton

In Singleton, the lender brought its first foreclosure action against the borrower based on a September 1, 1999 default. Singleton, 882 So. 2d at 1005. The trial court dismissed that first foreclosure action, with prejudice, as a sanction for the failure of the lender to appear at a case management conference. Id.

The lender brought its second foreclosure action based on an April 1, 2000 default. The trial court rejected the borrower's *res judicata* defense (that the

adjudication of the first foreclosure lawsuit forever barred the lender from suing on the note and mortgage), and entered summary judgment for the lender. Id.

The borrower appealed, arguing that the trial court's dismissal, with prejudice, of the lender's first case constituted *res judicata* of any subsequent foreclosure case, and forever precluded the lender from suing the borrower on the note and mortgage.

On appeal, the Fourth District Court of Appeal affirmed the trial court's summary judgment, Singleton v. Greymar Assocs., 840 So. 2d 356 (Fla. 4th DCA 2003), and the Florida Supreme Court upheld the district court's affirmance.[16] [17] The Supreme Court determined that *res judicata* does not necessarily bar a subsequent action based on a subsequent default. Singleton, 882 So. 2d at 1005.

The Supreme Court in Singleton held that the trial court's adjudication of the first action "merely bars a second action relitigating the same alleged default." Id. at 1007. The Court held: "While it is true that a foreclosure action and an acceleration of the balance due based upon the same default may bar a subsequent action on that

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[16] The statute of limitations defense was not discussed in either the district court's or the Supreme Court's Singleton opinion. In fact, based on the dates of the opinions, it is apparent that, in Singleton, both the first and the second lawsuits were brought well within five years of the September 1, 1999 default.

[17] The Florida Supreme Court's jurisdiction arose from a conflict between the Fourth District Court of Appeal's decision in Singleton and a Second District Court of Appeal decision, Stadler v. Cherry Hill Developers, 150 So. 2d 468 (Fla. 2d DCA 1963). Stadler is also not a statute of limitations case. In fact, in Stadler the court concluded that *res judicata* barred the mortgagee's second lawsuit, filed a mere thirteen months after the filing of the first lawsuit which was dismissed with prejudice by the trial court.

default, an acceleration and foreclosure predicated upon subsequent and different defaults present a separate and distinct issue." Id.

Critical to understanding Singleton's precedential value to the instant case – and how the majority opinion misinterprets same – is the following language from Singleton whereby the Court provides an illustration of when *res judicata* would not bar a second foreclosure case based on a subsequent default:

> For example, a mortgagor may prevail in a foreclosure action by demonstrating that she was not in default on the payments alleged to be in default, or that the mortgagee had waived reliance on the defaults. In those instances, the mortgagor and mortgagee are simply placed back in the same contractual relationship with the same continuing obligations. Hence, **an adjudication denying acceleration and foreclosure** under those circumstances should not bar a subsequent action a year later if the mortgagor ignores her obligations on the mortgage and a valid default can be proven.

Id. (emphasis added)[18]

In other words, if the lender is unsuccessful in its foreclosure action – **resulting in an adjudication denying acceleration and foreclosure –** the parties are placed back into their same contractual relationship (that is, the installment

[18] In the Court's illustration, the lender's subsequent lawsuit is filed "a year later." Surely, had the Singleton Court intended to upend statute of limitations foreclosure law – as does the majority's interpretation of Singleton – the Court could have employed a hypothetical implicating the five-year statute of limitations.

nature of the loan is reinstated) and the doctrine of *res judicata* will not preclude a lender lawsuit based on a **subsequent borrower non-payment default**.[19]

(ii) The majority's construction of Singleton impermissibly rewrites the parties' contracts

The majority reads Singleton for the proposition that, despite a lender's acceleration, a borrower's obligation to pay – and a lender's obligation to accept – monthly post-acceleration installment payments continues; that is, there can be multiple, post-acceleration non-payment defaults, and multiple, post-acceleration accelerations, on the same note.

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[19] This holding makes perfect sense in the context of *res judicata* law. If, for example, a lender sues a borrower, accelerates, and alleges that a particular payment was not paid, and the borrower is able to establish that the payment was made, the *res judicata* effect of that adjudication for the borrower would bar the lender from again suing on **that** alleged missed payment. Because that adjudication denied the lender's acceleration and foreclosure (and placed the parties back into their contractual relationship), the *res judicata* doctrine would not preclude the lender from suing the borrower for a later missed payment (a subsequent and separate default).

Alternately, if, for example, the borrower successfully defends a foreclosure action asserting he never signed the note or mortgage, or never received the loan proceeds (that is, the parties never had a contractual relationship), the *res judicata* effect of **that** adjudication – which obviously would not place the parties back into any contractual relationship – would likely forever preclude the lender from again suing that borrower on that note.

While, in both of these examples, the mortgagor prevailed in the litigation, the resulting adjudications' effect on the parties' relationship is vastly different. By simply concluding that **all** dismissals reinstate the installment nature of the loan, the majority significantly distorts Singleton and discounts the dramatic variances that can result from different dismissal orders.

Consequently, under the majority's holding, when a borrower fails to make one of these post-acceleration monthly installment payments, a subsequent default has occurred, entitling the lender to accelerate **again** based on this subsequent default.

Yet, nowhere does Singleton say this; and, most certainly, nowhere do the parties' contract documents say this.

(a) Installment nature of loan terminates upon lender acceleration

The plain language of the Beauvais promissory note and mortgage establishes that, once the borrower defaults on a monthly payment and the lender accelerates, the borrower is obligated to pay immediately **all** sums due under the note.

The loan's installment nature is clearly and unequivocally spelled out in paragraph 3 of Beauvais's note (captioned "PAYMENTS"), requiring Beauvais to make monthly payments to retire his $1,440,000 indebtedness.

Paragraph 6 of the note (captioned, "BORROWER'S FAILURE TO PAY AS REQUIRED") expressly provides that if Beauvais defaults by failing to pay a monthly installment payment, and does not pay the "overdue amount by a certain date," then "the Note Holder may **require me to pay immediately the full amount of Principal** which has not been paid and all the interest that I owe on that amount." (emphasis added)

Paragraph 22 of the mortgage securing the note (captioned, "**Acceleration; Remedies**.") contains virtually identical acceleration language: "If the default is not cured on or before the date specified in the notice, Lender at its option may **require immediate payment in full of all sums secured by this Security Instrument** without further demand and may foreclose this Security Instrument by judicial proceeding." (emphasis added)

Similarly, Paragraph 10 of the note (captioned "UNIFORM SECURED NOTE"), describing the acceleration provisions of the mortgage securing the note (the Security Instrument) reads, in relevant part, as follows: "That Security Instrument describes how and under what conditions **I may be required to make immediate payment in full of all amounts I owe under this Note**." (emphasis added)

As these documents clearly and unequivocally provide, once the lender exercises its option to require the borrower to pay immediately **all** amounts due under the note, the installment nature of the note terminates.

This construction of the parties' contract documents is expressly reinforced in the mortgage's reinstatement provision (paragraph 19 of the mortgage captioned, "**Borrower's Right to Reinstate After Acceleration.**"). This post-acceleration provision requires the lender to reinstate the installment nature of the note – "as if no acceleration had occurred" – upon the defaulting borrower paying to the lender

specifically defined "reinstatement sums and expenses," so long as such payment occurs prior to the entry of any foreclosure judgment.[20]

Obviously, this reinstatement provision would be unnecessary and meaningless if, as the majority concludes, Singleton requires the installment nature of the note to continue after a lender accelerates. If, under Singleton, monthly installment payments continue to become due after acceleration, what is being "reinstated?"

Singleton should not be read in such a way as to render this reinstatement provision meaningless. See Bethany Trace Owners' Ass'n, Inc. v. Whispering Lakes I, LLC, 155 So. 3d 1188, 1191 (Fla. 2d DCA 2014) ("When interpreting contractual provisions, courts 'will not interpret a contract in such a way as to render provisions meaningless when there is a reasonable interpretation that does not do so.'") (citation omitted).

Plainly, per the parties' contract documents, after acceleration the borrower no longer enjoys the contractual right to repay the loan in monthly installments

[20] The mortgage's reinstatement provision requires a borrower to exercise his post-acceleration reinstatement right **prior to** the entry of a foreclosure judgment. To the extent that the majority opinion somehow views acceleration as occurring only upon entry of a foreclosure judgment for the lender, such an interpretation would render this paragraph's timing provisions meaningless. Indeed, if acceleration occurs only upon judgment, and the borrower must exercise his reinstatement right after acceleration, but before entry of the judgment, the borrower's reinstatement right would be illusory.

because the lender has exercised its contractual right to require the borrower **immediately** to repay the entire loan.

(b) Majority creates post-acceleration fiction and "new" reinstatement provision

The majority's court-imposed fiction that, after acceleration, subsequent monthly installment payments somehow continue to become due is not only contrary to the parties' contract documents, it is simply fanciful.[21] A borrower's monthly

[21] The majority's conclusion is also irreconcilable with decades of case law holding that a loan acceleration – whether automatic or exercised at the option of the lender – causes the entire indebtedness immediately to become due. Baader v. Walker, 153 So. 2d 51, 54 (Fla. 2d DCA 1963) (holding that lender's agent authorized to collect full amount of indebtedness after borrower's default on installment payment because note contained automatic acceleration provision); Cook v. Merrifield, 335 So. 2d 297 (Fla. 1st DCA 1976) (holding that in the absence of acceleration option, entire indebtedness became due upon borrower default as a product of automatic acceleration provision); cf. Home Credit Co. v. E.B. Brown, 148 So. 2d 257, 260 (Fla. 1962) (finding note to be usurious because lender had option to accelerate full amount of note plus interest; computation under usury law based on lender's contractual right to accelerate even if lender chooses not to exercise full acceleration right). Nothing in this line of cases remotely suggests that, after acceleration, monthly installment payments continue to become due giving rise to successive accelerations. To tell a borrower that he owes everything immediately, and also owes next month's installment payment, makes little sense.

installment payment obligations and a lender's acceleration after default do not, and cannot, coexist.[22]

The majority opinion rewrites the parties' note and mortgage to create a reinstatement provision – i.e., reinstating the installment nature of the note, as if acceleration never occurred, upon any dismissal of any lawsuit – that the parties did not include when drafting their documents. Singleton does not say this; the parties' contract documents certainly do not say this; and Florida law is repugnant to the majority's insertion of a provision into the parties' private contract that the parties themselves most assuredly omitted.[23]

(iii) The majority's construction of Singleton jettisons Singleton's express presupposition that an adjudication denying acceleration is required for any "subsequent and separate alleged default" to exist

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[22] Oddly, the majority opinion cites to the non-waiver provisions of the note (paragraph 6) and mortgage (paragraph 12) as somehow supporting the notion that the installment nature of the note survives acceleration. See majority opinion at 15-17. These provisions say just the opposite: if the mortgagee accepts payments after acceleration, such acceptance shall not constitute a waiver of the mortgagee's rights.

The typical lender's practice is to refuse to accept a borrower's monthly installment payments after the lender has exercised acceleration. If, as the majority concludes, acceleration does not transform the installment nature of the note and advance the note's maturity date to the date of acceleration, not only would this non-waiver provision be entirely unnecessary, but a lender's refusal to accept post-acceleration installment payments could constitute a lender breach.

[23] Brooks v. Green, 993 So. 2d 58, 61 (Fla. 1st DCA 2008) (holding that a court is without authority to rewrite a clear and unambiguous contract between parties).

In order for an adjudication to place the parties "back in the same contractual relationship with the same continuing obligations," so that subsequent non-payment defaults would exist, Singleton insists upon "an adjudication denying acceleration and foreclosure."[24]

Yet, according to the majority opinion, after **any** dismissal of a foreclosure action, the parties are returned to their pre-acceleration positions. See majority opinion at 16. Then, unburdened by Florida's statute of limitations, the lender is free to: (i) treat its prior acceleration as a nullity, (ii) pick another month as the "new" default date,[25] and (iii) bring a new foreclosure action at any time seeking the identical sums sought in the dismissed lawsuit.

Again though, Singleton does not say this. Explicit in Singleton is that, in order to reinstate the parties' previous contractual relationship so that subsequent defaults may occur, the trial court's adjudication of the first foreclosure action **must deny the lender's acceleration**. Singleton, 882 So. 2d at 1007. Otherwise, without such an adjudication denying acceleration, the lender's affirmative, contractually prescribed acceleration remains unaffected.

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[24] Singleton, 882 So. 2d at 1007.

[25] According to the majority opinion, the "new" default date alleged in the second lawsuit must be within five years of the filing of the second lawsuit.

The majority's overbroad construction of Singleton not only undermines this crucial aspect of Singleton, but also, as more particularly described in section III.C.*(i)*, below, visits unprecedented adjudicatory effect upon a form dismissal order.

C. The Majority Opinion Subverts Dismissal Law and Statute of Limitations Jurisprudence in Foreclosure Cases

As I describe in the three subsections below, the majority's interpretation of Singleton fundamentally alters, in a foreclosure setting, both Florida dismissal law and statute of limitations jurisprudence in profound, and certainly unintended, ways.

(i) The majority opinion visits upon a form dismissal order an array of inferred adjudications

The trial court's December 6, 2010 case management conference dismissal order – a form order – states: "The Plaintiff failed to appear without explanation. Therefore, this case is dismissed without prejudice."

According to the majority, this simple form dismissal order, by operation of law, and without a scintilla of record support evidencing any such intention by the

trial court: (i) nullified the lender's January 22, 2007 acceleration;[26] (ii) reinstated the installment nature of the loan; (iii) placed the parties back into their pre-acceleration positions, allowing Beauvais to make, and requiring Deutsche Bank to accept, monthly installment payments; and (iv) reset the note's maturity date to March 1, 2036.

Yet the trial court's form dismissal order **adjudicated nothing**. It simply dismissed the plaintiff's action, requiring the plaintiff to file a new lawsuit if the plaintiff wished to proceed with the action.

Indeed, the dismissal was without prejudice so it would not have had *res judicata* effect even if Deutsche Bank's second foreclosure lawsuit were to have alleged the exact same breach. Markow v. Am. Bay Colony, Inc., 478 So. 2d 413 (Fla. 3d DCA 1986). It certainly was not an "adjudication denying acceleration and foreclosure" so as to place the parties back into their prior contractual provisions, as expressly contemplated by Singleton.

To illustrate the significant problem with the majority's conclusion in this regard, assume the following scenario: after the trial court announces the dismissal of the lender's foreclosure case for failure to attend the trial, the borrower's counsel

[26] The majority's implicit, entirely court-created conclusion that the trial court's form dismissal order affects – much less nullifies – AHMS's acceleration is nothing short of remarkable. At no time in the case below, or on appeal, has any party challenged the effectiveness of AHMS's January 22, 2007 acceleration of Beauvais's note.

requests the trial court to enter an *ex parte* order nullifying the lender's prior acceleration and reinstating the installment nature of the borrower's loan.

The trial court reviews the mortgage's detailed reinstatement provision (paragraph 19), and asks the borrower's counsel whether the borrower has cured all defaults and paid the lender all expenses, as is expressly required for a borrower to reinstate a loan. The borrower's counsel responds that the borrower has paid nothing to the lender in years and still owes tens, if not hundreds, of thousands of dollars to the lender.

Armed with this information, the trial court then grants the borrower's motion, nullifies acceleration and reinstates the installment nature of the loan. Clearly, no trial judge would ever enter such an order and, in the unlikely event such an order were entered, presumably it would be dead on arrival in any appellate court.

Yet the majority opinion's conclusion that the trial court's form dismissal order nullified the prior acceleration and reinstated Beauvais's loan does precisely what no trial judge would ever do. In my view, this conclusion turns procedural fairness on its head by giving the sanctioned party (the lender) the after-the-fact benefit of reinstatement: a remedy that the prevailing party (the borrower) never would receive.

In my view, the majority traverses a dangerously slippery slope. We should be reluctant to hold that a trial court's form dismissal order visits upon the borrower

and lender a host of critical, yet unarticulated, adjudications that fundamentally change the parties' contractual relationship and are entirely unsupported by the existing law or by the record below.

(ii) The majority opinion effectively rewrites the statute of limitations in foreclosure cases

The majority opinion states: "under Singleton, dismissal of a foreclosure action accelerating payment on one default does not bar a subsequent foreclosure action accelerating payment on a later default if the subsequent default occurred within five years of the subsequent action and acceleration." See majority opinion at 29 (paragraph 2). The majority supports this notion with citation to several, recent cases. See majority opinion at 12-13.

These cases implicitly hold what no Florida court, and certainly not the Singleton court, has ever explicitly held before: that payment default and not acceleration constitute the last element of a foreclosure cause of action. Despite the majority's characterization otherwise, this holding marks an upheaval of well-established Florida law.

In a foreclosure case such as this one, where the lender has exercised its contractual right to accelerate, the last element of the cause of action – triggering the running of the five-year statute of limitations – is the lender's affirmative act of acceleration, **not** the borrower's missed payment. Monte v. Tipton, 612 So. 2d at

716 (declaring that the statute of limitations begins to run upon notice of acceleration, while noting that the initial payment default occurred more than fifteen years prior to the notice of acceleration); see also Penagos v. Capital Bank, 766 So. 2d 1089 (Fla. 3d DCA 2000).[27]

Recognizing that the lender's notice of acceleration, and not the borrower's payment default, triggers the statute of limitations, the note and mortgage in this case expressly reflect that the lender's forbearance in exercising its right to accelerate does not constitute a waiver of its right to accelerate later.[28] Requiring lender

[27] Presumably, if the lender's action sought only recoupment of missed payments, rather than the accelerated amount of the loan, then the borrower's default would constitute the last element of the cause of action. In this case, however, as a practical matter, lenders exercise their right to accelerate immediately prior to, or contemporaneously with, their foreclosure action. In such a case, the date of the borrower's default is irrelevant to the statute of limitations inquiry.

[28] Paragraph 6(D) of the note reads, in its entirety, as follows: "**No Waiver By Note Holde**r . . . Even if, at a time when I am in default, the Note Holder does not require me to pay immediately in full as described above, the Note Holder will still have the right to do so if I am in default at a later time." Similarly, paragraph 12 of the mortgage reads, in relevant part, as follows: "Any forbearance by Lender in exercising any right or remedy . . . shall not be a waiver of or preclude the exercise of any right or remedy."

acceleration and the filing of the lender's foreclosure action to occur within five years of a default eviscerates these express contract provisions.[29]

Finally, the majority states: "We . . . conclude that dismissal of a foreclosure action accelerating payment on one default does not bar a subsequent foreclosure action on a later default **if the subsequent default occurred within five years of the subsequent action**." See majority opinion at 12. Yet the majority fails to explain how its conclusion would require reversal in this case. In this case, the lender's subsequent action was brought on December 18, 2012, which alleged that the subsequent default had occurred on October 1, 2006. Even assuming that both the majority's rewrite of the statute of limitations and the parties' contract correctly express the state of the law (which, in my view, it does not), plainly Deutsche Bank's subsequent action was not brought within five years of the alleged subsequent default.

(iii) The majority opinion conflates the statute of repose with the statute of limitations

[29] It appears that the majority might have confused a lender's forbearance of a contractual right with a lender's exercise of a contractual right. See majority opinion at 29 (paragraph 1). In this case, the lender did not forbear (or waive) the exercise of its contractual right to accelerate; the lender affirmatively exercised its contractual right to accelerate on January 22, 2007.

The practical effect of the majority's opinion is to conflate the statute of repose for foreclosure actions (section 95.281 of the Florida Statutes) with the statute of limitations for foreclosure actions.[30]

Under the majority's opinion, the only time a statute of limitations defense conceivably could be effective is when a lender tries to bring a foreclosure action more than five years after the maturity date expressed on the face of the note and mortgage. Yet, this is precisely what the legislature has already done by enacting section 95.281(1)(a), the statute of repose for foreclosure actions.

This provision reads, in relevant part, as follows: "(1) The lien of a mortgage . . . shall terminate . . . 5 years after the date of maturity." § 95.281(1)(a), Fla. Stat. (2013).

If it had been the intent of the legislature to render acceleration meaningless, so that the statute of limitations and the statute of repose for foreclosure actions were identical, the statute of repose would have been unnecessary. In other words, by

[30] A cause of action accrues, and the statute of limitations begins to run, when the last element of the cause of action occurs. § 95.031(1), Fla. Stat. (2014). A statute of repose operates to set a time limit on a cause of action when the last element of the cause of action occurs beyond the repose statute's outside date. Am. Bankers Life Assurance Co. of Fla. v. 2275 West Corp., 905 So. 2d 189 (Fla. 3d DCA 2005. In a foreclosure action, the statute of limitations precludes an action to collect the debt if the action is brought more than five years from lender acceleration; while the statute of repose "establishes an ultimate date when the lien of the mortgage terminates and is no longer enforceable." Houck Corp. v. New River, Ltd., Pasco, 900 So. 2d 601 (Fla. 2d DCA 2005). In this case, because the maturity date is evident from the face of the mortgage (March 1, 2036), section 95.281(1)(a) sets this "ultimate" date as March 1, 2041.

allowing the lender's acceleration and potential re-accelerations to keep delaying the operation of the statute of limitations, the majority establishes the note's maturity date as the only date that can trigger application of the five-year statute of limitations. The statute of limitations and the statute of repose, absurdly, would shake hands on March 1, 2041.

IV. Singleton Distinguished and Harmonized

A. Singleton's Equitable Considerations Are Irrelevant to this Court's Statute of Limitations Inquiry

Because Singleton is a *res judicata* case and not a statute of limitations case, equitable principles expressly underpin Singleton's holding. Id. at 1007-08.[31] In fact, it was upon this very foundation that the Florida Supreme Court rested its decision in Singleton:

> We must also remember that foreclosure is an equitable remedy and there may be some tension between a court's authority to adjudicate the equities and the legal doctrine of res judicata. The ends of justice require that the doctrine of res judicata not be applied so strictly so as to prevent mortgagees from being able to challenge multiple defaults on a mortgage. See deCancino v. E. Airlines, Inc., 283 So. 2d 97, 98 (Fla. 1973) ("[T]he doctrine [of *res judicata*] will not be invoked where it will work an injustice. . . .").

Singleton, 882 So. 2d at 1008 (alteration in original).

[31] Aeacus Real Estate Ltd. P'ship v. 5th Ave. Real Estate Dev., Inc., 948 So. 2d 834, 836 (Fla. 4th DCA 2007) (observing that *res judicata* is an equitable doctrine). *Res judicata* is a judicially-created principle, rooted in equity, and "will not be invoked where it would defeat the ends of justice." State v. McBride, 848 So. 2d 287, 291 (Fla. 2003).

By contrast, statutes of limitations are "fixed limitations on actions. . . predicated on public policy and are a product of modern legislative, rather than judicial processes." Major League Baseball v. Morsani, 790 So. 2d 1071, 1074 (Fla. 2001).

Equitable considerations, while relevant to the Supreme Court's *res judicata* analysis in Singleton, are entirely irrelevant to cases (such as this) involving the application of a statute of limitations.[32] Proper application of a statute of limitations may by its very nature mean a plaintiff is barred from maintaining a suit that is otherwise meritorious. Nevertheless, the statute of limitations is the province of the legislative branch, and this Court's equitable powers (which may be exercised appropriately in the *res judicata* context) have no place in a statute of limitations analysis. As the Florida Supreme Court held more than eighty years ago:

> Statutes should, when reasonably possible, be so construed as not to conflict with the Constitution or with long and well settled legal principles, but the language of this statute, considering it as a whole, cannot be given its apparent meaning and purpose without upsetting to some extent the principle of res judicata, and thus creating a somewhat

[32] In fact, section 95.051(1)(f) of the Florida Statutes expressly provides that only "[t]he payment of any part of the principal or interest of any obligation or liability founded on a written instrument" tolls the five-year statute of limitations. Section 95.051(2) limits statute of limitations tolling to the reasons specified in section 95.051(1)(a)-(i). HCA Health Servs. of Fla., Inc. v. Hillman, 906 So. 2d 1094, 1100-01 (Fla. 2d DCA 2004) (providing that the legislature's enactment of section 95.051 establishes exclusive list of conditions that can toll a statute of limitations, effectively eliminating the concept of "equitable tolling"). The majority's sweeping interpretation of Singleton – holding that a borrower's installment payments continue after acceleration – disregards section 95.051(1)(f) altogether.

> anomalous situation, which will in some cases require a circuit judge to grant to a party a judgment at law on a cause of action, which, sitting as chancellor in a court of equity, he had already held such party was not, in equity and good conscience, entitled to enforce.

Cragin v. Ocean & Lake Realty Co., 133 So. 569, 573-74 (Fla. 1931); see also Dobbs v. Sea Isle Hotel, 56 So. 2d 341, 342 (Fla. 1952) (holding that courts must presume that the legislature, in establishing a statute of limitations, "thoroughly considered and purposely preempted the field of exceptions to, and possible reasons for tolling, the statute. We cannot write into the law any other exception, nor can we create by judicial fiat a reason or reasons, for tolling the statute since the legislature dealt with such topic and thereby foreclosed judicial enlargement thereof.").

Yet it seems that equitable considerations – rather than any explicit pronouncement in Singleton – fuel the majority opinion's sweeping construction of Singleton to the detriment of well-established precedent.

Regrettably, the lure of equity diverts the majority from a proper distinguishing of Singleton, and causes the majority effectively to overrule cases that Singleton does not mention, much less disrupt. Examples abound.

B. What Singleton Does Not Do

Singleton does not overrule Conner v. Coggins, 349 So. 2d 780 (Fla. 1st DCA 1977), Locke v. State Farm Fire & Casualty Co., 509 So. 2d 1375 (Fla. 1st DCA 1987), or Monte v. Tipton, 612 So. 2d 714 (Fla. 2d DCA 1993). Singleton does not

stand for the proposition that a lender's acceleration is irrelevant to the calculation of the statute of limitations.

Singleton does not overrule Erwin v. Crandall, 175 So. 862 (Fla. 1937), Casino Espanol de la Habana, Inc. v. Bussel, 566 So. 2d 1313, 1314 (Fla. 3d DCA 1990), or Greene v. Bursey, 733 So. 2d 1111, 1114-15 (Fla. 4th DCA 1999) (holding that entire debt becomes due, and loan's maturity date is advanced, when the creditor takes affirmative action to alert the debtor that creditor has exercised option to accelerate). Singleton does not stand for the proposition that a lender's acceleration does not advance the note's maturity date.

Singleton does not overrule Baader v. Walker, 153 So.2d 51 (Fla. 2nd DCA 1963), or Cook v. Merrifield, 335 So. 2d 297 (Fla. 1st DCA 1976). Singleton does not stand for the proposition that, despite a lender's acceleration, a mortgagor's obligation to pay – and a mortgagee's corresponding obligation to accept – monthly installment payments continue.

Yet, relying on Singleton, the majority opinion makes each of these significant, unsupported leaps, as if Singleton, *sub silentio*, overturned decades of jurisprudence.[33]

C. Harmonizing Singleton; Employing an Inquiry Consistent with Precedent

[33] Puryear v. State, 810 So. 2d 901, 905 (Fla. 2002) ("We take this opportunity to expressly state that this Court does not intentionally overrule itself sub silentio.").

In my view, it is incumbent upon the district courts to apply Florida Supreme Court precedent in such a way as not to produce a wholesale upheaval of well-established law. A far more restrained reading of Singleton – in harmony, and not at odds, with Florida case law regarding lender acceleration and the statute of limitations – is more compatible with a district court's place in Florida's court hierarchy.

Thus, consistent with Singleton and decades of Florida statute of limitations case law, I suggest that the following inquiry be employed when, as in the instant case, both the first foreclosure action's dismissal order and the parties' contract documents are silent as to whether the dismissal has effected reinstatement: the court must consider relevant and highly probative, contemporaneous and post-dismissal factors to determine whether the prior case's adjudication **actually** reinstated the installment nature of the loan. Such factors include: (i) whether the lender's internal records treated the loan as being reinstated; (ii) how the lender characterized the loan for reporting purposes to any regulator; (iii) if, when, and how the lender communicated reinstatement to the borrower; (iv) how the lender treated any post-

dismissal installment payments tendered by the borrower; and (v) the nature of any other post-dismissal communications between the lender and borrower.[34]

In the instant case, the record is devoid of any evidence indicating that, at any time contemporaneous with the December 6, 2010 dismissal, either party treated the trial court's form dismissal order as a reinstatement of the installment nature of the loan.[35] In sum, after the dismissal of the first case in 2010, the parties did not reinstate the installment nature of the loan; the contract documents did not reinstate the installment nature of the loan; and the trial court did not reinstate the installment nature of the loan. Why should we?

V. Conclusion

I am not unmindful of the moral imperative driving both the majority's opinion and a host of other State appellate court and federal decisions: borrowers

[34] I recognize that the inquiry I suggest here is more nuanced than the inquiry suggested by the panel opinion with which I concurred. The panel opinion suggested a more formulaic approach to determining whether dismissal of the prior action reinstated the installment nature of the loan, i.e., a dismissal without prejudice does not reinstate the loan, while a dismissal with prejudice does reinstate the loan. Deutsche Bank Trust Co. Americas v. Beauvais, No. 3D14-575 (Fla. 3d DCA Dec. 17, 2014). This reflected a thoughtful attempt to distinguish Singleton's equity-based *res judicata* analysis and to avoid an extension of Singleton to the case at bar; however, I am left with little choice but to expound fully upon the inapplicability of Singleton in this context.

[35] My approach is hardly novel. In order to avoid summary judgment on a statute of limitations defense, New York's appellate courts – certainly not outliers in the mortgage foreclosure arena – require an affirmative revocation of a lender acceleration prior to the expiration of the statute of limitations. See e.g. EMC Mortg. Corp. v. Patella, 720 N.Y.S.2d 161 (N.Y. App. Div. 2001).

should pay their mortgage obligations. The expiration of a statute of limitations, however, generally results in a windfall for the escaping defendant. In my view, neither the moral imperative that borrowers pay their obligations, nor Singleton, has abrogated decades of Florida jurisprudence governing the statute of limitations in foreclosure cases. I would affirm that part of the trial court's final judgment holding that the statute of limitations precludes Deutsche Bank's foreclosure action.

SHEPHERD, SALTER and EMAS, JJ., concur.

2016-2018 Class of Fellows

By: E. Ashley McRae, Ben Diamond and Joshua Rosenburg

We received a large number of overwhelmingly impressive applications for the 2016-2018 Fellows Program. After much deliberation, the Fellows Selection Committee selected the following candidates: **Stephanie Villavicencio** and **Angela Santos** for the Probate and Trust Division and **Amber Ashton** and **Scott Work** for the Real Property Division. When you see our new Fellows, please welcome them, guide them and most importantly, encourage them to become actively involved in our committees.

Stephanie Villavicencio is a partner at the firm of Zamora, Hillman & Villavicencio located in Miami, Florida. She completed her undergraduate studies at the University of Miami in 2007 and earned her law degree with St. Thomas University School of Law in 2010. Upon graduation, she was offered an associate position at Zamora & Hillman and in 2015 they welcomed her as partner. Her practice is dedicated to probate and guardianship administration and related litigation, as well, as, estate planning. She has been a member of RPPTL for five years, is an active member of the Dade County Bar Association, Cuban American Bar Association and served as Editor for the section magazine of the Elder Law Section of The Florida Bar from 2011 through 2015. Ms. Villavicencio co-authored an article titled "Standards and Basic Principles of Examining and Evaluating Capacity in Guardianship Proceedings" published by St. Thomas Law Review in Fall 2013.

Angela Santos is an Associate with Duane Morris LLP located in Boca Raton, Florida. She completed her undergraduate studies at Ohio State University, earned her law degree in 2009 at Syracuse University College of Law and obtained an L.L.M. in taxation in 2010 from Georgetown University Law Center. Ms. Santos is admitted in Florida, New York and Connecticut. Her practice areas include private wealth planning and representing personal representatives/executors and trustees on complex estate and trust administration. Ms. Santos has been a member of RPPTL for four years. She is a Fellow of the 2015-2016 inaugural class of the American College of Trust and Estate Counsel. She has authored and co-authored several articles, including an article titled "Offshore Trusts and Reporting Obligations" published by the Palm Beach Daily News, Estate Planning Supplement in January of 2014 and an article titled "Foreign Reporting for Estate Planners" published by the ABA Section of Taxation and Section of Real Property, Trust and Estate Law, Joint Fall CLE Meeting, October 2011.

Amber Ashton is a Senior Associate at de Beaubien, Knight, Simmons, Mantzaris & Neal, LLP located in Tampa, Florida. She completed her undergraduate studies at Vanderbilt University and earned her law degree at Stetson University College of Law in 2006. Ms. Ashton is admitted in the Middle and Southern Districts of Florida and is AV rated by Martindale Hubbell. Her practice includes all areas of real estate litigation including eminent domain proceedings, inverse condemnation, code enforcement matters, title claims and HOA and condominium association litigation. She also serves as the Special Magistrate for the City of St. Pete Beach. Ms. Ashton is an active member of RPPTL, currently serving as secretary for the Real Property Litigation Committee. She has also authorized and co-authored several articles

including an article titled “E-Recording: The Next Step in Legal Technology” published by ActionLine, Winter of 2015.

Scott Work is an Associate at Clark, Partington, Hart, Larry, Bond & Stackhouse located in Destin, Florida. He completed his undergraduate studies at University of Florida, earned his law degree in 2004 at the Florida Coastal School of Law and received his L.L.M. in real property development at University of Miami in 2015. His practice includes real estate transactions and development, landlord tenant matters, condominium development law, community association law and real estate litigation. Mr. Work has been very involved in the Okaloosa Bar Association, serving as past secretary, treasurer, vice-president and now president. He also served as a member of the Okaloosa County Value Adjustment Board for 2015.

DEAN MEAD

Dean Mead & Dunbar
215 S. Monroe Street, Suite 815
Tallahassee, Florida 32301

(850) 999-4100
(850) 577-0095 Fax
www.deanmead.com

Attorneys and Counselors at Law
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Tallahassee

PETER M. DUNBAR
MARTHA J. EDENFIELD
CARI L. ROTH
BRITTANY O. FINKBEINER
pdunbar@deanmead.com
medenfield@deanmead.com
croth@deanmead.com
bfinkbeiner@deanmead.com

FINAL 2016 POST SESSION REPORT

NUMERICAL INDEX SUMMARY OF 2016 LEGISLATIVE ISSUES

Steve Mezer and Tae Kelley Bronner, Legislative Co-Committee Chairmen
and
Peter Dunbar, Martha Edenfield, Brittany Finkbeiner and Cari Roth
RPPTL Legislative Counsel

April 18, 2016

The *final* post-Session report follows below. The Section's initiatives and bills where the Section provided technical assistance appear in the first part of the summary. The part of the report following the list of Section initiatives includes other items of interest that passed, as well as the items of interest that did not pass.

The Governor has taken final action on all of the measures, and the appropriate Session Law number follows the summary of the bill in **bold type**. The full text of each enrolled bill, as well as applicable legislative staff reports, are available on the legislative web sites (www.flsenate.gov; www.myfloridahouse.com; and www.leg.state.fl.us.). A summary of each measure that passed appears below by category in numerical bill order.

I. SECTION INITIATIVES AND TECHNICAL ASSISTANCE

Family Trust Companies: SB 80 by Senator Richter and Representative Roberson contains the Section's initiative to complete the authorizing legislation in chapter 662 to permit the creation and regulation of family trust companies and licensed family trust companies in Florida. (**Chapter 2016-35, *Laws of Florida*.**)

Guardianship: CS/CS/CS/SB 232 by Senator Detert and Representative Ahern reorganizes the Statewide Public Guardianship Office; requires the least restrictive means to be used; establishes practice standards, training and regulation for public and professional guardians; and provides for oversight and disciplinary procedures for professional guardians. (**Chapter 2016-40, *Laws of Florida*.**)

Medical Marijuana—Designated Representatives: CS/CS/CS/HB 307 Representative Gaetz provides for patients and legal representatives to purchase and possess marijuana for medical use. CS/CS/CS/HB 307 contained a provision allowing the representative to be designated by a power of attorney, and the Section had technical concerns on this portion of the bill. The legislation was amended to include the Section's recommended revision to provide that the legal representative be a designated health care surrogate. CS/CS/CS/HB 307 has passed the Legislature and is pending action by the Governor. (**Chapter 2016-123, *Laws of Florida*.**)

Civil Action—Non-Resident Bonds: SB 396 by Senator Bradley and Representative Sprowls contains the Section's initiative to repeal the antiquated requirement for posting of a bond by non-resident plaintiffs in a civil action. (**Chapter 2016-43, *Laws of Florida*.**)

Digital Assets: CS/CS/SB 494 by Senator Hukill and Representative Fant contains the Section's initiative relating to digital assets. The legislation creates the "Florida Fiduciary Access to Digital Assets Act;" provides access to digital records by appropriate representatives designated by a principal; and provides the procedures for gaining the access under the Act. (**Chapter 2016-46, *Laws of Florida*.**)

Estates: CS/CS/CS/SB 540 by Senator Hukill and Representative Berman contains the Section's following trust and estate initiatives—(1) disposition of assets of a non-domiciliary, (2) use of trust assets to defend a breach of trust claim, (3) and the Section's technical clarification to the elective share statute. CS/CS/CS/SB 540 has passed the Legislature and is pending action by the Governor. (**Chapter 2016-189, *Laws of Florida*.**)

Service of Process: CS/CS/SB 1432 by Senator Stargel provides for the service of process at a virtual office, executive office or mini-suite in the same manner as service of process can be made at private mailbox. The Section provided technical comments on the bill and portions of the comments were adopted to the bill prior to passage. CS/CS/SB 1432 has passed the Legislature and is pending action by the Governor. (**Chapter 2016-207, *Laws of Florida*.**)

II. INITIATIVES OF INTEREST

Substance Abuse—"Ulysses" Agreements: CS/SB 12 by Senator Garcia is a comprehensive mental health initiative that includes a provision in Section 70 that creates a workgroup to study the feasibility and appropriate uses of "Ulysses" agreements within the Department of Children and Family Services. CS/SB 12 has

passed the Legislature and is pending action by the Governor. (**Chapter 2016-241, Laws of Florida.**)

Residential Property—Discharge of a Firearm: CS/CS/CS/CS/SB 130 by Senator Richter provides for criminal penalties for the discharge of a firearm in a residential area with a density of one unit or more per acre. (**Chapter 2016-12, *Laws of Florida*.**)

Service Personnel—Rental Approvals: CS/SB 184 by Senator Bean provides a series of benefits for military service personnel. Among the provisions in the bill (Section 1) is new s. 83.683 that imposes a 7-day period on a condominium association or mandatory homeowners association to review an application by a member of the military as a prospective tenant. CS/SB 184 has passed the Legislature and is pending action by the Governor. (**Chapter 2016-242, *Laws of Florida*.**)

Conservation Easements: CS/SB 190 by Senator Hutson amends Section 196.26 to provide that a property owner is not required to file a renewal application for a conservation easement until the use of the property no longer complies with the restrictions and requirements of the conservation easement. CS/SB 190 has passed the Legislature and is pending action by the Governor. (**Chapter 2016-110, *Laws of Florida*.**)

Title Insurance—Reinsurance: CS/CS/HB 413 by Representative Hager increases a title insurer's level of risk and provides for reinsurance coverage from recognized companies. CS/CS/HB 413 has passed the Legislature and is pending action by the Governor. (**Chapter 2016-88, *Laws of Florida*.**)

Cohabitation Ban—Repealed: SB 498 by Senator Sobel repeals the ban on an unmarried man and woman cohabiting together that is currently contained in s. 798.02 of the state's criminal code. SB 498 has passed the Legislature and is pending action by the Governor. (**Chapter 2016-188, *Laws of Florida*.**)

Ad Valorem Taxes: CS/CS/HB 499 by Representative Avila makes revisions to the ad valorem tax chapters; among these are provisions requiring that a return be timely filed before a taxpayer may contest an assessment; provisions requiring a 30-day written notice before a tax lien may be filed; and provisions designating authorized representatives of a tax payer before the value adjustment board. The authorized representatives include an attorney, real estate broker, certified public accountant, and a person acting under a power of attorney that conforms to Part II of chapter 709. CS/CS/HB 499 has passed the Legislature and is pending action by the Governor. (**Chapter 2016-128, *Laws of Florida*.**)

Building Codes: CS/CS/CS/HB 535 by Representative Eagle is a comprehensive bill updating the state's building codes. Two of its provisions relate to existing residential structures and may be of interest to practitioners. The first provision is found in Section 5 of the bill and it extends the provisions of the Homeowners' Construction Recovery Fund to individual single-family residences. The second provision requires installation

of minimum radio strength in all high-rise buildings, and those buildings not in current compliance must do so by January 1, 2022. (**Chapter 2016-129, *Laws of Florida*.**)

Water Policy Revision: CS/CS/SB 552 by Senator Dean is the primary initiative dealing with water quality, water supply and water conservation programs. The legislation mandates a new data base of conservation lands and a consolidated annual report on water quality and quantity. The bill contains a 5-year planning process for water resource projects to be funded and creates the Florida Springs and Aquifer Protection Act. The legislation gives preference to projects that (1) have a measurable impact on improving water quality and quantity; (2) have state or regional significance; (3) impact areas of greatest impairment; (4) projects that are recommended by multiple water management districts; (5) projects that are recommended by multiple local governments; (6) projects with a significant local match; and (7) projects with significant private sector contributions. (**Chapter 2016-1, *Laws of Florida*.**)

Title Insurance—Reserves: CS/HB 695 by Representative Boyd revises the reserves to be maintained by title insurance companies; manner in which reserves must be released; and the reserve requirements for a title insurer who transfers domicile to Florida. CS/HB 695 has passed the Legislature and is pending action by the Governor. (**Chapter 2016-57, *Laws of Florida*.**)

Agricultural Lands—Conservation Easements: CS/CS/HB 749 by Representative Rayburn deals with a variety of agricultural initiatives, and Section 4 of the bill provides that permitted uses on agricultural lands with a conservation easement may include forestry and livestock grazing activities. CS/CS/HB 749 has passed the Legislature and is pending action by the Governor. (**Chapter 2016-88, *Laws of Florida*.**)

Mobile Homes: CS/CS/SB 826 by Senator Latvala revises the Florida Mobile Home Act and imposes notice requirements on complaints filed with the Division; directs implementation of a training program for board members; requires a 90-day notice prior to lot rental increases; and clarifies membership and quorum requirements for a mobile homeowners' association. CS/CS/SB 826 has passed the Legislature and is pending action by the Governor. (**Chapter 2016-169, *Laws of Florida*.**)

Cremated Remains: CS/CS/SB 854 by Senator Hukill makes regulatory changes to the funeral and cemetery services, and among its provisions, Section 30 declares that cremated remains are not considered property as a matter of law and are not subject to partition. The legislation provides that a division of cremated remains requires the consent of the legally authorized person who authorized the cremation. CS/CS/SB 854 has passed the Legislature and is pending action by the Governor. (**Chapter 2016-172, *Laws of Florida*.**)

Community Development Districts: CS/HB 971 by Representative Sullivan modifies the regulation of CDDs by increasing the minimum size requirements for the creation of districts at the county level; revising the procedure for changing district boundaries; and providing for procedures to merge existing districts. CS/HB 971 has passed the

Legislature and is pending action by the Governor. (**Chapter 2016-94, *Laws of Florida*.**)

Judgments: CS/SB 1042 by Senator Simmons amends Chapter 56, F.S., relating to judgments. The legislation provides new definitions; provides clarification for procedures governing the execution and collections of judgments; provides criteria for the sale of property; provides procedures for resolving 3rd party claims; and sets out the rights of both judgment debtors and judgment creditors. CS/SB 1042 has passed the Legislature and is pending action by the Governor. (**Chapter 2016-33, *Laws of Florida*.**)

State Lands: CS/CS/HB 1075 by Representative Caldwell is a comprehensive initiative dealing with state lands. Among its provisions are revised procedures for the appraisal and acquisition of state lands; an emphasis on alternatives to fee simple acquisition of lands in cooperation with private owners for preservation, conservation and recreational purposes; and innovation preservation options, including the purchase of development rights; acquisition of conservation and flowage easements; acquisition of timber and mineral rights; and the use of life estates. CS/CS/HB 1025 has passed the Legislature and is pending action by the Governor. (**Chapter 2016-233, *Laws of Florida*.**)

Financial Institutions—Service of Process: CS/CS/SB 1104 by Senator Flores amends sections 48.092 and 655.0201 and designates the manner for making service of process on financial institutions for all matters in Florida. CS/CS/SB 1174 has passed the Legislature and is pending action by the Governor. (Chapter 2016-___, *Laws of Florida*.)

Community Residential Homes—Siting: CS/SB 1174 by Senator Diaz de la Portilla amends Chapter 419 to clarify the distance requirements for siting community residential homes and provides that a residential home may not be cited within 1,200 feet of an existing home. CS/SB 1174 has passed the Legislature and is pending action by the Governor. (**Chapter 2016-74, *Laws of Florida*.**)

Growth Management: CS/CS/HB 1361 by Representative La Rosa provides for the modification of previously approved projects by permitting reductions in density and intensity; it modifies the procedures for challenges to comp plan amendments; it creates a procedure to permit the exchange of designated land uses in an approved project; and it creates a process to permit the addition of acreage to a previously approved project. CS/CS/HB 1361 has passed the Legislature and is pending action by the Governor. (**Chapter 2016-148, Laws of Florida.**)

Land Use—Airport Zoning: CS/SB 1508 by Senator Simpson revises the state's airport zoning code and imposing permitting requirements on structures, building alterations and the construction of landfills adjacent to an airport or in an airport protection area. CS/SB 1508 has passed the Legislature and is pending action by the Governor. (**Chapter 2016-209, *Laws of Florida*.**)

Elevator Retrofits: CS/CS/SB 1602 by Senator Galvano requires all elevators in private residential structures to have a clearance of no more than 3 inches between the hoistway doors and the edge of a hoistway landing. The legislation was amended to provide that the standard is applicable only to new structures and does not require retrofitting of existing structures. CS/CS/SB 1602 has passed the Legislature and is pending action by the Governor. (**Chapter 2016-211, *Laws of Florida*.**)

Ad Valorem Tax Exemption: HB 7023 by the Finance and Tax Committee expands the ad valorem tax exemptions for deployed service personnel to include deployments to operations up to and including 2014. HB 7023 has passed the Legislature and is pending action by the Governor. (**Chapter 2016-26, *Laws of Florida*.**)

Ad Valorem and Sales Tax Incentives: CS/HB 7099 by the House Finance and Tax Committee and Representative Gaetz is the comprehensive tax incentive package. Among its provision in Section 2, there is a new option for counties to defer of ad valorem taxes on data center equipment for up to 20 years; and in Section 11, there is a new sales tax exemption for agricultural-related business equipment used in "postharvest activities." (**Chapter 2016-220, *Laws of Florida*.**)

III. INITIATIVES OF INTEREST THAT FAILED

Power of Attorney: CS/HB 23 by Representative Raburn and SB 362 by Senator Lee is the initiative to allow the Sun City Center Program to use powers of attorney that the Section has consistently opposed. SB 362 has 3 committees of reference and has not been scheduled for a hearing as of this date. The legislation died in committee upon adjournment of the 2016 Session.

Term Limits—Appellate Judges: CS/HJR 197 by Representative Wood and SJR 322 by Senator Hutson would impose term limits on Florida appellate judges. CS/HJR 197 has passed the House and was pending in Messages in the Senate at adjournment. SJR 322 received 3 references, but did not receive a hearing. Under the Rules, this initiative now appears dead for the 2016 Session. The initiative died in committee upon adjournment of the 2016 Session.

Estoppel Letters—Residential Properties: CS/CS/CS/HB 203 by Representative Wood and SB 722 by Senator Stargel are companion bills that revise the process for providing estoppel certificates under Chapters 718 and 720, providing for the response time and duration of the estoppel and designating the amount of the fee that can be charged. The Section is offering technical assistance on the compromise version of the legislation. The legislation died in committee upon adjournment of the 2016 Session.

Evidence Code—Self-Authentication of Documents: CS/CS/HB 225 by Representative Fitzenhagen and CS/SB 352 by Senator Bradley are companion bills that contain the Section's initiative that will allow certified copies of public documents to be filed electronically; it provides the procedures for filing that will allow a court to take judicial

notice of the documents; and it will conform the Evidence Code to current case law. The legislation died in committee upon adjournment of the 2016 Session.

Guardianship—Minor Children: CS/CS/HB 259 by Representative R. Rodrigues and CS/SB 1102 by Senator Brandes are companion bills that would authorize a parent or legal guardian of a minor child to delegate care of the child to an agent by a properly executed power of attorney. The Section has concerns with the legislation and is working with the Family Law Section to resolve the issues. The legislation died in committee upon adjournment of the 2016 Session.

POLST: CS/SB 664 by Senator Brandes and HB 957 by Representative Gonzalez would authorize a doctor to withhold life sustaining treatment to a patient (POLST). The Section has a standing position against POLST legislation without sufficient procedural safeguards. CS/SB 664 received 3 committee references and was amended and approved by the first committee. HB 957 received 4 references. The legislation died in committee upon adjournment of the 2016 Session.

Caregivers to Vulnerable Adults: CS/HB 557 by Representative Harrison and SB 1536 by Senator Richter are companion bills that would authorize a caregiver of a vulnerable adult to recovery amounts for goods and services when another person is engaged in exploitation of the individual. The legislation died in committee upon adjournment of the 2016 Session.

MRTA—Covenant Exemptions: CS/HB 7031 by the House Civil Justice Committee and Representative Passidomo adds covenants of a mandatory property owners association to s. 712.03 as additional exception to the applicability of MRTA. The legislation also extends the right of extension of covenants under 712.05 to all mandatory property owners associations, and it authorizes the revitalization of covenants to all mandatory property owners association. CS/HB 7031 was pending on the House Calendar when the Legislature adjourned.

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

1. The Uniform Law Commission (ULC) is also known as the National Conference of Commissioners on Uniform State Laws. The website is http://www.uniformlaws.org. Information on each of its Model Acts is found on the website and for many of the Acts there is an enactment kit which can be downloaded to provide additional information.

2. An **Uniform Recognition of Substitute Decision Making Documents Act**, was approved by the ULC in 2014, has been enacted in one state to date. Substitute decision-making documents are widely used in every U.S. State and Canadian Province for both financial transactions and health care decisions. These documents are commonly called powers of attorney, proxies, or representation agreements, depending on the jurisdiction, and the law governing their use also varies from place to place. Consequently, a person's authority under a decision-making document may not be recognized if the document is presented in a place outside the state of its origin. The **Uniform Recognition of Substitute Decision-making Documents Act** (URSDDA) is the result of a joint project between the Uniform Law Commission and the Uniform Law Conference of Canada to resolve these problems. The act employs a three-part approach to portability modeled after the Uniform Power of Attorney Act.

3. Amendments to the **Uniform Voidable Transactions Act** were approved by the ULC in 2014, and have been adopted to date in seven states. The Uniform Fraudulent Transfer Act was promulgated in 1984 and has been enacted by 46 jurisdictions. The 2014 amendments are the first made to the act since its original promulgation. The amendments address a small number of narrowly-defined issues, and are not a comprehensive revision. The principal features of the amendments include: name change to the "**Uniform Voidable Transactions Act**"; addition of choice of law rule for claims of the nature governed by the act; addition of new rules allocating the burden of proof and defining the standard of proof with respect to claims and defenses under the act.

4. At its 124th Annual Meeting in Williamsburg, Virginia, on July 15, 2015, the Uniform Law Commission (ULC) approved seven new acts, including a new Revision to the **Uniform Athlete Agents Act** as well as a new **Revised Uniform Fiduciary Access to Digital Assets Act.**

5. The **Revised Uniform Fiduciary Access to Digital Assets Act** was also approved. The revised act clarifies the application of federal privacy laws and gives legal effect to an account holder's instructions for the disposition of digital assets. While the 2014 UFADAA provided fiduciaries with default access to all digital information, the revised act protects the contents of electronic communications from disclosure without the user's consent. Fiduciaries can still access other digital assets unless prohibited by the user.

6. "Decanting" is the term used to describe the distribution of assets from one trust into a second trust, like wine is decanted from the bottle to another vessel. Decanting can be a useful strategy for changing the outdated terms of an otherwise irrevocable trust, but can also be abused to defeat the settlor's intent. The **Uniform Trust Decanting Act** provides a method of reforming an irrevocable trust document. The act also limits decanting when it would defeat a charitable or tax-related purpose of the settlor.

7. The **Revised Uniform Residential Landlord and Tenant Act** is an updated version of the Uniform Residential Landlord and Tenant Act, which was first promulgated in 1972 and last amended in 1974. The act includes new articles covering the disposition of tenant property, lease termination in case of domestic violence or sexual assault, and security deposits. The revised act also includes an appendix for states that only want to enact the updated provisions.

8. The **Uniform Home Foreclosure Procedures Act** is intended to provide a balanced set of rules and procedures to standardize and streamline the foreclosure process. The act protects homeowners by requiring adequate notice and documentation before a foreclosure action can proceed. The act protects lenders by precluding contrary municipal ordinances and expediting foreclosure of abandoned properties. Finally, the act includes rules for pre-foreclosure resolutions and negotiated transfers to encourage non-judicial solutions.

9. Receivership is an equitable remedy allowing a court to oversee the orderly management and disposition of property subject to a lawsuit. Although the remedy is not new, there is no standard set of receivership rules and the courts of different states have applied widely varying standards. This **Uniform Commercial Real Estate Receivership Act** applies to receiverships involving commercial real estate, and provides a standard set of rules for courts to apply. It will result in greater predictability for litigants, lenders, and other parties doing business with a company subject to receivership.

10. Other drafts which were debated at the ULC annual meeting, but which were not scheduled for final approval, include the **Family Law Arbitration Act**, the **Series of Unincorporated Business Entities Act**, the **Wage Garnishment Act**, the **Revised Uniform Unclaimed Property Act**, and the **Social Media Privacy Act**.

11. On December 15, 2015, three uniform acts were recently approved for inclusion in the Council of State Governments' (CSG) "Suggested State Legislation" compilation at the CSG's 2015 National Conference in Nashville, TN. The **Uniform Real Property Transfer on Death Act**, the **Uniform Electronic Recordation of Custodial Interrogations Act**, and the **Uniform Business Organizations Code, Articles 1 through 5** - all included as "suggested state legislation" - were drafted and approved by the Uniform Law Commission (ULC). The Council of State Governments The Council of State Governments is the country's only organization serving all three branches of state government. CSG is a region-based forum that fosters the exchange of insights and ideas to help state officials shape public policy. This offers unparalleled regional, national and international opportunities to network, develop leaders, collaborate and create problem-solving partnerships. Suggested State Legislation (SSL) is a series of compilations of draft legislation about topics of current importance to states. CSG publishes SSL drafts in annual SSL volumes. The program does not seek to influence the enactment of state legislation, but to compile draft legislation so states can learn from the experience of others. Legislation submitted to the SSL program is first evaluated by CSG policy experts against the SSL criteria. This legislation is then split into docket books for consideration by the Committee on Suggested State Legislation. The SSL Committee meets at least twice each year to consider submitted legislation for inclusion in the following year's SSL volume. The SSL Committee typically reviews approximately 80 pieces of legislation per meeting, voting to include an average of 30 to 40 bills per SSL volume. SSL Committee members represent all regions of the country. They are generally legislators, legislative staff and other state governmental officials who contribute their time and efforts to assisting the states in the identification of timely and innovative state legislation.

12. The **Uniform Real Property Transfer on Death Act** (URPTODA) allows an owner of real property to pass the property simply and directly to a beneficiary on the owner's death without probate. URTODA was approved by the ULC in 2009, and has been enacted in 14 states.

13. The **Uniform Business Organizations Code** harmonizes the numerous uniform business entity acts. The primary purposes of

the new Code are: (1) to harmonize the language of all of the unincorporated entity laws, and (2) to revise the language of each of those acts in a manner that permits their integration into a single Code of entity laws. States that choose to adopt this new Code will also have the option of including all of their corporation and non-profit corporation acts within the Uniform Code. The CSG Committee on Suggested State Legislation included a summary of each article of the code as a legislative note in the SSL compilation. The UBOC was approved by the ULC in 2011, amended in 2013, and has been adopted in two states.

14. The following are ULC Acts which may be of interest to RPPTL committees:

Uniform Probate Code

Uniform Trust Code

Uniform Guardianship and Protective Proceedings Act

Uniform Power of Attorney Act

Adoption Act (1994)

Adult Guardianship and Protective Proceedings Jurisdiction Act

Alcoholism and Intoxication Treatment

Anatomical Gift Act (2006)

Appointment of Commissioners

Arbitration Act (2000)

Article 1 of the Uniform Business Organizations Code (UBOC Hub) (2011) (Last Amended 2013)

Asset-Preservation Orders Act Civil Procedure & Courts; International Laws

Assignment of Rents Act

Attendance of Out of State Witnesses

Audio-Visual Deposition

Business Organizations Code

Certificate of Title Act

Certificate of Title for Vessels Act

Certification Of Questions of Law (1995)

Choice of Court Agreements Convention Implementation Act

Class Actions

Collateral Consequences of Conviction Act

Commercial Real Estate Receivership Act

Common Interest Owners Bill of Rights

Common Interest Ownership Act Business Organizations & Regulations

Common Interest Ownership Act (1982)

Common Interest Ownership Act (1994)

Common Interest Ownership Act (2008)

Computer Information Transactions Act

Condominium Act

Conservation Easement Act

Construction Lien Act, Model

Consumer Credit Code

Consumer Leases Act

Debt-Management Services (2011)

Declaratory Judgments Act

International Laws

Determination of Death Act

Disclaimer of Property Interests Act

Discovery of Electronically Stored Information,

Disposition of Community Property Rights at Death Act (1971)

Division of Income for Tax Purposes

Dormant Mineral Interests Act, Model

Duties to Persons with Medical ID Devices

Electronic Legal Material Act

Electronic Transactions Act

Emergency Volunteer Health Practitioners

Eminent Domain Code

Enforcement of Foreign Judgments Act

Entity Transactions Act, Model (2007) (Last Amended 2013)

Environmental Covenants Act

Estate Tax Apportionment and Probate Code 3-916

Facsimile Signatures of Public Officials

Federal Lien Registration Act

Fiduciary Access to Digital Assets Act, Revised (2015)

Foreign Money Claims Act

Foreign Money Judgments Recognition Act

Foreign-Country Money Judgments Recognition Act B

Fraudulent Transfer Act - now known as Voidable Transactions Act

Guardianship and Protective Proceedings Act (1997)

Health-Care Decisions Act

Home Foreclosure Procedures Act

Information Practices Code

Insurable Interests Amendment to the Uniform Trust Code

Interstate Depositions and Discovery Act

Interstate Family Support Act Amendments (2008)

Land Transactions

Law on Notarial Acts, Revised

Limited Cooperative Association Act (2007) (Last Amended 2013)

Limited Liability Company (2006) (Last Amended 2013)

Limited Partnership Act (2001) (Last Amended 2013)

Management of Public Employee Retirement Systems Act

Manufactured Housing Act

Marital Property Act

Marketable Title Act, Model

Marriage and Divorce Act, Model

Mediation Act

Money Services Act

Multiple-Person Accounts

Real Property, Mortgages, & Liens
Nonjudicial Foreclosure Act

Parentage Act

Partition of Heirs Property Act

Partnership Act (1997) (Last Amended 2013)

Periodic Payment of Judgments Act C

Planned Community Act

Power of Attorney

Powers of Appointment

Premarital and Marital Agreements Act

Principal and Income Act (2000)

Principal and Income Amendments (2008)

Probate Code

Probate Code Amendments (2008)

Protection of Charitable Assets Act, Model

Protection of Genetic Information in Employment Act

Prudent Investor Act

Prudent Management of Institutional Funds Act

Punitive Damages Act, Model

Real Estate Cooperative

Real Estate Time Share

Real Property Electronic Recording Act

Real Property Transfer on Death Act

Recognition of Substitute Decision-Making Documents

Registered Agents Act, Model (2006) (Last Amended 2011)

Residential Landlord and Tenant Act 1972

Residential Landlord and Tenant Act 2015

Residential Mortgage Satisfaction Act

Rules of Evidence C

Securities Act

Simplification of Land Transfers

Simultaneous Death Act

State Administrative Procedure Act, Revised Model

Statute and Rule Construction Act

Statutory Rule Against Perpetuities

Statutory Trust Entity Act

Statutory Trust Entity Act (2009) (Last Amended 2013) B

Surface Use and Mineral Development Accommodation Act

Testamentary Additions to Trusts Act

TOD Security Registration Act

Trade Secrets Act

Transboundary Pollution Reciprocal Access Act

Transfer of Litigation Act

Transfers to Minors Act

Tribal Secured Transactions Act,

Trust Code

Trust Decanting

UCC Article 1, General Provisions (2001)

UCC Article 2,Sales and Article 2A, Leases (2003)

UCC Article 2A, Leases (1987) (1990) C

UCC Article 3, Negotiable Instruments (1990)

UCC Article 3, Negotiable Instruments and Article 4, Bank Deposits (2002)

UCC Article 4A Amendments (2012)

UCC Article 4A, Funds Transfers (1989)

UCC Article 5, Letters of Credit (1995)

UCC Article 6, Bulk Sales (1989)

UCC Article 7, Documents of Title (2003)

UCC Article 8, Investment Securities (1994)

UCC Article 9 Amendments (2010)

UCC Article 9, Secured Transactions (1998)

Unclaimed Property Act

Unincorporated Nonprofit Association Act (2008) (Last Amended 2011)

Unsworn Foreign Declarations Act (2008)

Vendor and Purchaser Risk Act (1935)

Voidable Transactions Act Amendments (2014) - Formerly Fraudulent Transfer Act

Wage Withholding and Unemployment Insurance Procedure Act

Wills Recognition Act

Professionalism and Ethics Committee Summary Report
Review and Implementation of "Safe at Home" Program
RPPTL Executive Council Meeting
Saturday, June 4, 2016
Orlando, Florida

Summary of Issue: Longstanding record title defects (a significant number of which are capable of resolution) preclude many low income Florida residents from accessing relief and community development funds necessary to repair and rebuild their long term residences following times of individual or collective disaster.

Summary of RPPTL Section Objective for Addressing Issue: To make available RPPTL Section member assistance in clearing title to real property for vulnerable low income Florida residents, thereby allowing such residents to not only receive disaster-related relief and access to community development funds, but also assuring them available real property tax exemptions.

General Description of Section Action: Providing RPPTL Section and Executive Council members as title attorneys, teachers, leaders and mentors for clearing title for low-income house and mobile home residents, providing substantive materials as to legal remedies, and directly assisting community and local bar associations in addressing and resolving such title defects.

Summary of Program (Provided by Bay Area Legal Services, Tampa, and edited in part):

THERE'S NO PLACE LIKE HOME – IF YOU CAN PROVE TITLE

In low-income communities throughout the country, generations of families live in houses and mobile homes to which they may be legally entitled, but for which they lack proper record title. Title-challenged residents commonly include heirs who cannot afford to probate the property after the record owner's death, or those whose "do-it-yourself deed" results in an invalid conveyance.

Often, title problems arise in the context of disaster – only those with title are eligible for FEMA and many other forms of disaster-related relief to repair and rebuild. Without assistance to their low-income residents, entire communities can be devastated. One need only look to New Orleans to understand the magnitude of the problem; after Hurricane Katrina, a program called The Pro Bono Project

Greater NOLA tackled more than 6000 title cases in order to facilitate relief for low-income residents. The efforts of legal service and pro bono private attorneys were heroic. Advocates worked to remedy title defects when time was of the essence, but the system was crippled by storm-related conditions. The task took years in some cases, and the greatest impact was on the most vulnerable residents. For more information about the disparate impact on our client populations, see the video "Achieving Equity in Housing Recovery." (https://www.youtube.com/watch?v=ZReQdx8iTTk#action=share)

Policymakers have learned much about disaster response from Katrina, and advocates for the poor will always confront countless issues in the wake of a disaster. However, title issues present an opportunity to be proactive. Title deficiencies are pre-existing; fortunately, so are the remedies. The Section looks to team with Bay Area Legal Services in Tampa, Florida ("Bay Area") in rolling out "Safe at Home." Bay Area recently partnered with the Hillsborough County Bar Association to present training on clearing title for low-income house and mobile home residents. In addition to receiving substantive materials about legal remedies and information about how to obtain indigent waivers of filing fees, attorney participants were given free CLE credits in exchange for committing to take at least one pro bono case within twelve months. They were also promised access to a roster of seasoned mentor attorneys. The materials used by Bay Area will be reviewed and adapted for statewide and, possibly, national use.

The benefits of such a proactive project are clear – providing low-income residents with clear title allows access not only to disaster-related relief, but to community development funds and property tax exemptions designed to benefit vulnerable homeowners at any time. That assistance, in turn, helps maintain the integrity of entire communities. There is no place like home – if you can prove title.

LEGISLATIVE POSITION REQUEST FORM

GOVERNMENTAL AFFAIRS OFFICE

Date Form Received _____

GENERAL INFORMATION

Submitted By Cristin Keane, Chair, Real Estate Structures and Taxation Committee of the Real Property Probate & Trust Law Section (RPPTL Approval Date _____, 2016)

Address Carlton Fields Jorden Burt, P.A., Corporate Center Three at International Plaza, 4221 W. Boy Scout Boulevard, Suite 1000, Tampa, Florida 33607-5780 Telephone: (813) 223-7000 Email:ckeane@cfjblaw.com

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

CONTACTS

Board & Legislation Committee Appearance **Robert S. Freedman**, Carlton Fields Jorden Burt, P.A., Corporate Center Three at International Plaza, 4221 W. Boy Scout Boulevard, Suite 1000, Tampa, Florida 33607-5780 Telephone: (813) 223-7000 Email:rfreedman@cfjblaw.com
Peter M. Dunbar, Dean, Mead, Egerton, Bloodworth, Capouano & Bozarth, P.A., 215 S. Monroe Street, Suite 815, Tallahassee, FL 32301, Telephone: (850) 999-4100 Email: pdunbar@deanmead.com
Martha J. Edenfield, Dean, Mead, Egerton, Bloodworth, Capouano & Bozarth, P.A., 215 S. Monroe Street, Suite 815, Tallahassee, FL 32301, Telephone: (850) 999-4100 Email:medenfield@deanmead.com

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

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

PROPOSED ADVOCACY

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

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

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

Proposed Wording of Position for Official Publication:

"Supports legislation eliminating documentary stamp tax on deeds and mortgage assumptions between persons who are married."

Reasons For Proposed Advocacy:

To eliminate documentary stamp tax on deeds and mortgage assumptions between persons who are married.

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

Tax Section of the Florida Bar	Support
(Name of Group or Organization)	(Support, Oppose or No Position)
Family Law Section of the Florida Bar	Unknown
(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.

A bill to be entitled

An Act relating to assessment of documentary stamp taxes upon the transfer of real property or assumption of a mortgage between spouses; amending s. 201.02(7); creating s. 201.02(12); creating s. 201.08(9); providing an effective date.

Section 1. Subsection 201.02(7), Florida Statutes, is amended to read:

201.02. Tax on deeds and other instruments relating to real property or interests in real property.—

(7) Taxes imposed by this Section do not apply to a deed, transfer, or conveyance:

(a) between spouses, or

(b) between former spouses pursuant to an action for dissolution of their marriage wherein the real property is or was their marital home or an interest therein. ~~Taxes paid pursuant to this section shall be refunded in those cases in which a deed, transfer, or conveyance occurred 1 year before a dissolution of marriage. This subsection applies in spite of any consideration as defined in subsection (1). This subsection does not apply to a deed, transfer, or conveyance executed before July 1, 1997.~~

Section 2. Subsection 201.02(12), Florida Statutes, is created to read:

201.02. Tax on deeds and other instruments relating to real property or interests in real property.—

(12) For purposes of this Section if a person has the right to revoke a trust and vest property owned by that trust in such person, then any property owned by that trust shall be deemed to be owned by the person who has the right to revoke that trust.

Section 3. Subsection 201.08(9), Florida Statutes, is created to read:

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

201.08. Tax on promissory or nonnegotiable notes, written obligations to pay money, or assignments of wages or other compensation; exception.—

(9) Taxes imposed by this Section do not apply to an assumption of indebtedness:

(a) by the spouse of an obligor; or

(b) by the former spouse of an obligor pursuant to an action for dissolution of their marriage.

Section 4. This act shall take effect July 1, 2016.

WHITE PAPER

SUPPORT OF MARRIAGE DOCUMENTARY STAMP TAX ACT

I. SUMMARY

This proposed legislation will modify provisions in Chapter 201 of the Florida Statutes to create a total exemption for documentary stamp taxes for transfers of property between spouses.

II. CURRENT SITUATION

Section 201.02 F.S. imposes documentary stamp tax on deeds and other instruments which transfer an interest in real property. The tax is measured by the consideration given for the deed. The statute provides that consideration includes the amount of any mortgage or other encumbrance on the property.

When unencumbered property is transferred as a gift, the tax is not imposed. However, where there is a mortgage balance, tax is imposed on the deed based upon the mortgage balance. When encumbered property is transferred from one spouse to the other, from one spouse to both, or from both spouses to one, tax is due. Section 201.02(7) F.S. provides an exemption for transfers between spouses incident to a divorce, but there is no exemption for transfers between spouses when there is no divorce.

When encumbered property is transferred to a spouse, often the lender will require the transferee spouse to assume the mortgage on the property. When this occurs, a second documentary stamp tax is imposed pursuant to s. 201.08 F.S. on the assumption of the mortgage.

Example 1: John Doe buys a house as a single man for $350,000.00. He obtains a mortgage in the amount of $280,000.00. He marries Jane Doe and wants to add her on the title, to create a tenancy by the entireties. They will have to pay documentary stamps in the amount of $980.00 (based upon ½ of the underlying balance and the rate of .007).

Example 2: John Doe buys a house as a married man for $350,000.00. He obtains a mortgage in the amount of $280,000.00. He is married to Jane Doe at the time, and she joins in the mortgage, as required under The Florida Constitution, Article X, Section 4. He later wants to add her onto the title, to create a tenancy by the entireties. They will have to pay documentary stamps in the amount of $980.00 (based upon ½ of the underlying balance and the rate of .007).

Example 3: John Doe and Jane Doe own a house worth $350,000.00, encumbered by a mortgage with a balance of $280,000.00. They get divorced, and John conveys the house to Jane. No documentary stamps are due.

The required payment of documentary stamps is an inhibitor to the creation of tenancies by the entireties, because of the large cost. For the couple which chooses divorce, there is no cost factor.

In the first and second examples, the couple would want to put title into husband and wife. The results of not doing so, are often, misunderstood, and unintended. If the married owner dies, the property will have to be administered through probate, which will cost the heirs thousands of dollars. If the decedent was survived by children, even minors, they may inherit the house, and the wife may only receive a life estate

III. EFFECT OF PROPOSED CHANGE

Places spouses who remain married in the same position as those who are getting divorced.

LEGISLATIVE POSITION REQUEST FORM

GOVERNMENTAL AFFAIRS OFFICE

Date Form Received _____

GENERAL INFORMATION

Submitted By Cristin Keane, Chair, Real Estate Structures and Taxation Committee of the Real Property Probate & Trust Law Section (RPPTL Approval Date _____, 2016)

Address Carlton Fields Jorden Burt, P.A., Corporate Center Three at International Plaza, 4221 W. Boy Scout Boulevard, Suite 1000, Tampa, Florida 33607-5780 Telephone: (813) 223-7000 Email:ckeane@cfjblaw.com

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

CONTACTS

Board & Legislation Committee Appearance

Robert S. Freedman, Carlton Fields Jorden Burt, P.A., Corporate Center Three at International Plaza, 4221 W. Boy Scout Boulevard, Suite 1000, Tampa, Florida 33607-5780 Telephone: (813) 223-7000 Email:rfreedman@cfjblaw.com
Peter M. Dunbar, Dean, Mead, Egerton, Bloodworth, Capouano & Bozarth, P.A., 215 S. Monroe Street, Suite 815, Tallahassee, FL 32301, Telephone: (850) 999-4100 Email: pdunbar@deanmead.com
Martha J. Edenfield, Dean, Mead, Egerton, Bloodworth, Capouano & Bozarth, P.A., 215 S. Monroe Street, Suite 815, Tallahassee, FL 32301, Telephone: (850) 999-4100 Email:medenfield@deanmead.com

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

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

PROPOSED ADVOCACY

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 uniform assessment of property held in Florida land trusts, including changes to Fla. Stat. 193.1554(5) and 193.1555(5)."

Reasons For Proposed Advocacy:

Some county property appraisers reassess property conveyed by an owner-beneficiary to a land trustee, without regard to the 10% limitation imposed by Sections 193.1554 and 193.1555, even though the beneficial ownership of the property does not change. These statutes say there is no change in ownership when property is transferred "between legal and equitable title." When property is conveyed to a land trustee, the trustee is vested with legal *and* equitable title, and beneficial title remains vested in the land trust beneficiary. This legislation will treat both kinds of trusts uniformly, by also exempting transfers "between a land trustee under s. 689.071 and the owner of the beneficial interest in the land trust." See attached White Paper.

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

Tax Section of the Florida Bar

(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)

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A bill to be entitled

An Act relating to assessment of real property following a transfer with a land trustee; amending s. 193.1554(5); amending s. 193.1555(5); providing an effective date.

Section 1. Subsection 193.1554(5), Florida Statutes, is amended to read:

193.1554. Assessment of nonhomestead residential property.—

(5) Except as provided in this subsection, property assessed under this section shall be assessed at just value as of January 1 of the year following a change of ownership or control. Thereafter, the annual changes in the assessed value of the property are subject to the limitations in subsections (3) and (4). For purpose of this section, a change of ownership or control means any sale, foreclosure, transfer of legal title or beneficial title in equity to any person, or the cumulative transfer of control or of more than 50 percent of the ownership of the legal entity that owned the property when it was most recently assessed at just value, except as provided in this subsection. There is no change of ownership if:

(a) The transfer of title is to correct an error.

(b) The transfer is between legal and equitable title, or between a land trustee under s. 689.071 and the owner of the beneficial interest in the land trust.

(c) The transfer is between husband and wife, including a transfer to a surviving spouse or a transfer due to a dissolution of marriage.

(d) For a publicly traded company, the cumulative transfer of more than 50 percent of the ownership of the entity that owns the property occurs through the buying and selling of shares of the company on a public exchange. This exception does not apply to a transfer made through a merger with or an acquisition by

another company, including an acquisition by acquiring outstanding shares of the company.

Section 2. Subsection 193.1555(5), Florida Statutes, is amended to read:

193.1555. Assessment of certain residential and nonresidential real property.—

(5) Except as provided in this subsection, property assessed under this section shall be assessed at just value as of January 1 of the year following a qualifying improvement or change of ownership or control. Thereafter, the annual changes in the assessed value of the property are subject to the limitations in subsections (3) and (4). For purpose of this section:

(a) A qualifying improvement means any substantially completed improvement that increases the just value of the property by at least 25 percent.

(b) A change of ownership or control means any sale, foreclosure, transfer of legal title or beneficial title in equity to any person, or the cumulative transfer of control or of more than 50 percent of the ownership of the legal entity that owned the property when it was most recently assessed at just value, except as provided in this subsection. There is no change of ownership if:

1. The transfer of title is to correct an error.

2. The transfer is between legal and equitable title, or between a land trustee under s. 689.071 and the owner of the beneficial interest in the land trust.

3. For a publicly traded company, the cumulative transfer of more than 50 percent of the ownership of the entity that owns the property occurs through the buying and selling of shares of the company on a public exchange. This exception does not apply to a transfer made through a merger with or acquisition by another company, including acquisition by acquiring outstanding shares of the company.

Section 3. This act shall take effect October 1, 2016.

WHITE PAPER

UNIFORM ASSESSMENT OF PROPERTIES HELD IN LAND TRUSTS

I. SUMMARY

This proposed legislation will clarify provisions in Chapter 193 of the Florida Statutes that have been interpreted by some county property appraisers to assess properties conveyed to Florida land trustees differently from properties conveyed to other trustees.

II. CURRENT SITUATION

Sections 193.1554 and 193.1555 of the Florida Statutes limit annual increases in the assessed value of certain non-homestead properties to ten percent of the assessed value of the property for the prior year. Subsection (5) of each statute provides that this 10% limitation does not apply to the assessment of property in a tax year following a "change of ownership or control." A change in ownership or control is defined identically in each section as follows: "any sale, foreclosure, *transfer of legal title or beneficial title in equity to any person*, or the cumulative transfer of control or of more than 50 percent of the ownership of the legal entity that owned the property when it was most recently assessed at just value, except as provided in this subsection." Each of these sections provides that there is no change of ownership if "[t]he transfer is *between legal and equitable title*." (emphasis added)

When the owner of real property conveys it to the trustee of an express trust in which the grantor is also the beneficiary of the trust, there is a change in legal title but no change in beneficial or equitable title. With no change in beneficial ownership of the property, such a conveyance does not remove the property from the 10% assessment cap statute, as it is a transfer between legal title (the title conveyed to the trustee) and equitable title (the ownership interest retained by the owner as trust beneficiary).

Subsection 689.071(3) of the Florida Land Trust Statute provides that a conveyance to a land trustee in compliance with that statute vests in the land trustee *both legal and equitable title* to the real property. The beneficiary(ies) of the land trust own the beneficial interest in the property, which may be an interest in personal property or real property, depending on the provisions of the documents. Accordingly, a deed from an owner-beneficiary to a land trustee is not a transfer between legal and equitable title, as both titles vest in the land trustee. Such a deed is, however, a transfer between legal title (the title conveyed to the land trustee) and beneficial title (the ownership interest retained by the owner as land trust beneficiary).

In certain counties in Florida, county property appraisers have seized upon this distinction between land trusts and other trusts and have re-assessed Florida properties without regard to the 10% limitation, following a conveyance of property to a Florida land trustee, even if the grantor is the beneficiary of the land trust and there is no change in the beneficial title to the property. This practice is unfair to property owners who choose to hold their real property in a Florida land trust rather than other trusts, and it is a misapplication of a statute that was intended to limit assessment increases when the ownership of the property was unchanged.

III. EFFECT OF PROPOSED CHANGES

This proposed legislation will treat transfers into and out of land trusts the same as other trusts that do not vest equitable title in the trustee. In each section, the following phrase will be added to the specific exemption for transfers between legal and equitable title, as follows:

> There is no change of ownership if ... the transfer is between legal and equitable title, or between a land trustee under s. 689.071 and the owner of the beneficial interest in the land trust.

As a result of this additional phrase, a transfer between a land trustee and a beneficiary of the land trust will not be considered a change in ownership that removes the property from the 10% assessment increase cap under either Section 193.1554 or Section 193.1555. This result treats land trusts the same as any other express trust and preserves the 10% assessment limitation in both cases, since there is no change in beneficial ownership in either case. This additional phrase harmonizes the specific list of exempt transfers with the general language preceding that list, which evidences a clear legislative intention to retain the assessment cap when there is no transfer of beneficial ownership.

The proposed additional phrase specifically refers to land trusts under Fla. Stat. §689.071 to discourage an over-broad reading of the exemption. Other conveyances between beneficiaries and trustees are already treated as exempt because they are transfers between legal and equitable title. The additional phrase is intended to exempt both kinds of transfers with land trustees: (1) conveyances to a land trustee by a property owner that is also the beneficiary of the land trust, and (2) conveyances by a land trustee to the beneficiary of the land trust.

IV. FISCAL IMPACT ON STATE AND LOCAL GOVERNMENTS

To the extent that county property appraisers have previously succeeded in re-assessing properties following a conveyance to a land trustee, this legislation will prospectively end that practice and uniformly limit annual assessment increases for all transfers into and out of trusts in which the beneficial owner remains unchanged. The annual 10% limitation temporarily reduces the taxes collectible from such a property until the following years, when the assessment may increase up to 10% annually even if market values do not rise as quickly.

V. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR

Members of the private sector who hold real property in land trusts will receive the same uniform treatment as other trusts, limiting annual increases in assessed property values in a nondiscriminatory manner regardless of the type of trust they choose. Uniformly limiting assessment increases will postpone increases in tax revenues derived from land trust properties to the same extent as other properties held by trustees.

VI. CONSTITUTIONAL ISSUES

This legislation will end a practice by certain county property appraisers that is arguably an unconstitutional denial of equal protection of the laws, by arbitrarily taxing property held in one type of trust differently from another type of trust, even when the beneficial ownership of the property has not changed in either case.

V. OTHER INTERESTED PARTIES

This legislation will be opposed by the county property appraisers who have interpreted Sections 193.1554(5) and 193.1555(5) as described above to re-assess properties conveyed to land trustees.

LEGISLATIVE POSITION REQUEST FORM

GOVERNMENTAL AFFAIRS OFFICE

Date Form Received _____

GENERAL INFORMATION

Submitted By Hung V. Nguyen, Chairman, Guardianship, Power of Attorney, and Advanced Directives Committee of the Real Property Probate & Trust Law Section

Address Hung V. Nguyen, Nguyen Law Firm, 306 Alcazar Avenue, Suite 303-A, Coral Gables, Florida 33134
Telephone: (786) 600-2530

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

CONTACTS

Board & Legislation Committee Appearance

Hung V. Nguyen, Nguyen Law Firm, 306 Alcazar Avenue, Suite 303-A, Coral Gables, Florida 33134, Telephone: (786) 600-2530
Tae Kelley Bronner, Tae Kelley Bronner, PL, 10006 Cross Creek Blvd PMB 428, Tampa, FL 33647, Telephone (813) 907-6643
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 legislation removing the statutory cap on amounts which guardians, with prior court approval, may expend for funeral related expenses, including a change to § 744.441(16), Fla. Stat.

Reasons For Proposed Advocacy:

The proposed change removes the current statutory cap which limits the amount a guardian may expend for funeral expenses of the ward. The proposed change is necessary due to the increase in costs since the prior amendment to the cap in 1997. The present cost of a funeral far exceeds the maximum provided in the statute. Under the proposed change, the court will be permitted to set a reasonable amount based on a cases by case basis for the funeral costs of the ward.

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

N/A

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

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

A bill to be entitled

An act relating to the payment of funeral expenses; amending s. 744.441(16) to delete the cap on the amount a guardian can expend on funeral expenses with prior court approval.

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

Section 1. Subsection (16) of Section 744.441 is amended to read as follows:

744.441. Powers of guardian upon court approval --

After obtaining approval of the court pursuant to a petition for authorization to act, a plenary guardian of the property, or a limited guardian of the property within the powers granted by the order appointing the guardian or an approved annual or amended guardianship report, may:

(16) Pay reasonable funeral, interment, and grave marker expenses for the ward from the ward's estate, ~~up to a maximum of $6,000.00~~.

Section 2. This bill shall be effective upon becoming law.

WHITE PAPER
PROPOSED AMENDMENT TO SECTION 744.441(16), FLORIDA STATUTES
FUNERAL EXPENSES FOR WARD

I. SUMMARY

The proposed amendment revises Fla. Stat. Section 744.441(16) to remove the current statutory cap of $6,000.00 on the amount a guardian may expend for funeral expenses for the ward and permits the court to make an appropriate determination on a case-by-case basis.

II. CURRENT SITUATION

The relevant portion of the existing statute reads as follows:

"744.441 Powers of guardian upon court approval.—After obtaining approval of the court pursuant to a petition for authorization to act, a plenary guardian of the property, or a limited guardian of the property within the powers granted by the order appointing the guardian or an approved annual or amended guardianship report, may: . . .

(16) Pay reasonable funeral, interment, and grave marker expenses for the ward from the ward's estate, up to a maximum of $6,000."

The existing statute permits a guardian with court approval to pre-pay funeral expenses for the ward during the ward's lifetime from the guardianship assets. When the existing law was passed in 1997 under ch. 97-140; s.5, it increased the ceiling on these expenses from $3,000 to $6,000. Most practitioners find that funeral, internment and grave marker expenses well exceed the maximum provided in the statute. Instead of raising the ceiling on these court approved expenses, it is more practical to delete the cap and let the court determine what is reasonable under the circumstances.

III. EFFECT OF PROPOSED CHANGES

The proposed amendment provides the court discretion to determine the reasonable cost of funeral, interment and grave marker expenses of the ward on a case- by- case basis.

IV. FISCAL IMPACT ON STATE AND LOCAL GOVERNMENTS

The proposed change would have no impact on state and local governments.

V. DIRECT ECONOMIC IMPACT ON THE PRIVATE SECTOR

The proposed change may benefit the funeral services industry if additional funeral, interment and grave marker expenses are permitted to be paid.

VI. CONSTITUTIONAL ISSUES

None.

VII. OTHER INTERESTED PARTIES

The Elder Law Section of The Florida Bar

LEGISLATIVE POSITION REQUEST FORM

GOVERNMENTAL AFFAIRS OFFICE

Date Form Received _____

GENERAL INFORMATION

Submitted By Hung V. Nguyen, Chairman, Guardianship, Power of Attorney, and Advanced Directives Committee of the Real Property Probate & Trust Law Section

Address Hung V. Nguyen, Nguyen Law Firm, 306 Alcazar Avenue, Suite 303-A, Coral Gables, Florida 33134
Telephone: (786) 600-2530

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

CONTACTS

Board & Legislation Committee Appearance

Hung V. Nguyen, Nguyen Law Firm, 306 Alcazar Avenue, Suite 303-A, Coral Gables, Florida 33134, Telephone: (786) 600-253**0**
Tae Kelley Bronner, Tae Kelley Bronner, PL, 10006 Cross Creek Blvd PMB 428, Tampa, FL 33647, Telephone (813) 907-6643
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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 creation of new statutory procedures for the service of examining committee reports and deadlines for the service and filing of objections to such reports in incapacity proceedings, including revisions to Section 744.331, Fla. Stat.

Reasons For Proposed Advocacy:

Under current law, as held in *Shen v. Parkes*, 100 So. 3d 1189 (Fla. 4th DCA 2012), the reports of the examining committee members are inadmissible hearsay if an objection is made. Because the guardianship code contains no deadline for an interested party to object to the report, the examining committee members must be prepared to attend all incapacity hearings to testify even though in most guardianship cases, incapacity is clear and uncontested. Requiring committee members to attend, or prepare to attend, all incapacity hearings when incapacity is clear is a waste of resources and time. To eliminate this problem, new statutory deadlines are created to require that objections to the reports of the examining committee must be filed a minimum of 5 days prior to the incapacity hearing or the objection is waived, thereby allowing the examining committee members to prepare and attend the incapacity hearing only if incapacity is contested.

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 Court Clerks & Comptrollers

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

Florida Conference of Circuit Court Judges

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

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

A bill to be entitled

An act relating to the procedures for adjudication of incapacity of adult persons; amending s. 744.331, giving incapacitated persons and minors the same privacy protections available to non-incapacitated adults; and providing for an effective date.

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

Section 1. Subsections (3)(h) and 5(a) of section 744.331, Florida Statutes are amended and a new subsection (3)(i) is added to read:

744.331 Procedures to determine incapacity.--

(1) NOTICE OF PETITION TO DETERMINE INCAPACITY.—Notice of the filing of a petition to determine incapacity and a petition for the appointment of a guardian if any and copies of the petitions must be served on and read to the alleged incapacitated person. The notice and copies of the petitions must also be given to the attorney for the alleged incapacitated person, and served upon all next of kin identified in the petition. The notice must state the time and place of the hearing to inquire into the capacity of the alleged incapacitated person and that an attorney has been appointed to represent the person and that, if she or he is determined to be incapable of exercising certain rights, a guardian will be appointed to exercise those rights on her or his behalf.

(2) ATTORNEY FOR THE ALLEGED INCAPACITATED PERSON.—

(a) When a court appoints an attorney for an alleged incapacitated person, the court must appoint the office of criminal conflict and civil regional counsel or a private attorney as prescribed in s. 27.511(6). A private attorney must be one who is included in the attorney registry compiled pursuant to s. 27.40. Appointments of private attorneys must be made on a rotating basis, taking into consideration conflicts arising under this chapter.

(b) The court shall appoint an attorney for each person alleged to be incapacitated in all cases involving a petition for adjudication of incapacity. The alleged incapacitated person may substitute her or his own attorney for the attorney appointed by the court.

(c) Any attorney representing an alleged incapacitated person may not serve as guardian of the alleged incapacitated person or as counsel for the guardian of the alleged incapacitated person or the petitioner.

(d) Effective January 1, 2007, an attorney seeking to be appointed by a court for incapacity and guardianship proceedings must have completed a minimum of 8 hours of education in guardianship. A court may waive the initial training requirement for an attorney who has served as a court-appointed attorney in incapacity proceedings or as

an attorney of record for guardians for not less than 3 years. The education requirement of this paragraph does not apply to the office of criminal conflict and civil regional counsel until July 1, 2008.

(3) EXAMINING COMMITTEE.—

(a) Within 5 days after a petition for determination of incapacity has been filed, the court shall appoint an examining committee consisting of three members. One member must be a psychiatrist or other physician. The remaining members must be either a psychologist, gerontologist, another psychiatrist, or other physician, a registered nurse, nurse practitioner, licensed social worker, a person with an advanced degree in gerontology from an accredited institution of higher education, or other person who by knowledge, skill, experience, training, or education may, in the court's discretion, advise the court in the form of an expert opinion. One of three members of the committee must have knowledge of the type of incapacity alleged in the petition. Unless good cause is shown, the attending or family physician may not be appointed to the committee. If the attending or family physician is available for consultation, the committee must consult with the physician. Members of the examining committee may not be related to or associated with one another, with the petitioner, with counsel for the petitioner or the proposed guardian, or with the person alleged to be totally or partially incapacitated. A member may not be employed by any private or governmental agency that has custody of, or furnishes, services or subsidies, directly or indirectly, to the person or the family of the person alleged to be incapacitated or for whom a guardianship is sought. A petitioner may not serve as a member of the examining committee. Members of the examining committee must be able to communicate, either directly or through an interpreter, in the language that the alleged incapacitated person speaks or to communicate in a medium understandable to the alleged incapacitated person if she or he is able to communicate. The clerk of the court shall send notice of the appointment to each person appointed no later than 3 days after the court's appointment.

(b) A person who has been appointed to serve as a member of an examining committee to examine an alleged incapacitated person may not thereafter be appointed as a guardian for the person who was the subject of the examination.

(c) Each person appointed to an examining committee must file an affidavit with the court stating that he or she has completed the required courses or will do so no later than 4 months after his or her initial appointment. Each year, the chief judge of the circuit must prepare a list of persons qualified to be members of an examining committee.

(d) A member of an examining committee must complete a minimum of 4 hours of initial training. The person must complete 2 hours of continuing education during each 2-year period after the initial training. The initial training and continuing education

program must be developed under the supervision of the Statewide Public Guardianship Office, in consultation with the Florida Conference of Circuit Court Judges; the Elder Law and the Real Property, Probate and Trust Law sections of The Florida Bar; the Florida State Guardianship Association; and the Florida Guardianship Foundation. The court may waive the initial training requirement for a person who has served for not less than 5 years on examining committees. If a person wishes to obtain his or her continuing education on the Internet or by watching a video course, the person must first obtain the approval of the chief judge before taking an Internet or video course.

(e) Each member of the examining committee shall examine the person. Each examining committee member must determine the alleged incapacitated person's ability to exercise those rights specified in s. 744.3215. In addition to the examination, each examining committee member must have access to, and may consider, previous examinations of the person, including, but not limited to, habilitation plans, school records, and psychological and psychosocial reports voluntarily offered for use by the alleged incapacitated person. Each member of the examining committee must ~~submit a report~~ file their report with the clerk of the court within 15 days after appointment.

(f) The examination of the alleged incapacitated person must include a comprehensive examination, a report of which shall be filed by each examining committee member as part of his or her written report. The comprehensive examination report should be an essential element, but not necessarily the only element, used in making a capacity and guardianship decision. The comprehensive examination must include, if indicated:

1. A physical examination;

2. A mental health examination; and

3. A functional assessment.

If any of these three aspects of the examination is not indicated or cannot be accomplished for any reason, the written report must explain the reasons for its omission.

(g) Each committee member's written report must include:

1. To the extent possible, a diagnosis, prognosis, and recommended course of treatment.

2. An evaluation of the alleged incapacitated person's ability to retain her or his rights, including, without limitation, the rights to marry; vote; contract; manage or dispose of property; have a driver license; determine her or his residence; consent to medical treatment; and make decisions affecting her or his social environment.

3. The results of the comprehensive examination and the committee member's assessment of information provided by the attending or family physician, if any.

4. A description of any matters with respect to which the person lacks the capacity to exercise rights, the extent of that incapacity, and the factual basis for the determination that the person lacks that capacity.

5. The names of all persons present during the time the committee member conducted his or her examination. If a person other than the person who is the subject of the examination supplies answers posed to the alleged incapacitated person, the report must include the response and the name of the person supplying the answer.

6. The signature of the committee member and the date and time the member conducted his or her examination.

(h) ~~A copy of each committee member's report must be served on the petitioner and on the attorney for the alleged incapacitated person within 3 days after the report is filed and at least 5 days before the hearing on the petition.~~ Within 3 days after the clerk's receipt of each of the examining committee member's report, the clerk must serve the report on petitioner's counsel and the attorney for the alleged incapacitated person via electronic mail delivery or U.S. Mail. Upon service of the report, the clerk shall promptly file a certificate of service of the report in the incapacity proceeding. Petitioner's counsel and the attorney for the alleged incapacitated person must be served with each report at least 10 days prior to the hearing on the petition. If service is not timely effectuated in advance of the hearing, the petitioner or the alleged incapacitated person may move for continuance of the hearing.

(i) The petitioner and the alleged incapacitated person may object to the introduction of any of the examining committee member's reports or any part thereof into evidence by filing and serving a written objection on the other party no later than 5 days prior to the adjudicatory hearing. The objection shall state the basis upon which it is made to the admissibility of any report or part thereof into evidence. If an objection is timely filed and served, the admissibility of the report(s) or part thereof in question shall be determined and governed by the rules of evidence for purposes of the incapacity hearing. For good cause, the court may extend the time to file and serve the written objection. The alleged incapacitated person and the petitioner shall be the only individuals entitled to object to the admissibility of the reports, unless otherwise provided by the court.

(4) DISMISSAL OF PETITION.—If a majority of the examining committee members conclude that the alleged incapacitated person is not incapacitated in any respect, the court shall dismiss the petition.

(5) ADJUDICATORY HEARING.—

(a) Upon appointment of the examining committee, the court shall set the date upon which the petition will be heard. The ~~date for the~~ adjudicatory hearing must be ~~set~~ conducted at least 10 days after the filing of the latest report of the examining committee members but must not be conducted ~~no~~ more than ~~14~~30 days after ~~the filing of~~ the latest report~~s~~ of the examining committee members has been filed, unless good cause is shown. The adjudicatory hearing must be conducted at the time and place specified in the notice of hearing and in a manner consistent with due process.

(b) The alleged incapacitated person must be present at the adjudicatory hearing, unless waived by the alleged incapacitated person or the person's attorney or unless good cause can be shown for her or his absence. Determination of good cause rests in the sound discretion of the court.

(c) In the adjudicatory hearing on a petition alleging incapacity, the partial or total incapacity of the person must be established by clear and convincing evidence.

1(6) ORDER DETERMINING INCAPACITY.—If, after making findings of fact on the basis of clear and convincing evidence, the court finds that a person is incapacitated with respect to the exercise of a particular right, or all rights, the court shall enter a written order determining such incapacity. In determining incapacity, the court shall consider the person's unique needs and abilities and may only remove those rights that the court finds the person does not have the capacity to exercise. A person is determined to be incapacitated only with respect to those rights specified in the order.

(a) The court shall make the following findings:

1. The exact nature and scope of the person's incapacities;

2. The exact areas in which the person lacks capacity to make informed decisions about care and treatment services or to meet the essential requirements for her or his physical or mental health or safety;

3. The specific legal disabilities to which the person is subject; and

4. The specific rights that the person is incapable of exercising.

(b) When an order determines that a person is incapable of exercising delegable rights, the court must consider and find whether there is an alternative to guardianship that will sufficiently address the problems of the incapacitated person. A guardian may not be appointed if the court finds there is an alternative to guardianship which will sufficiently address the problems of the incapacitated person. If the court finds there is not an alternative to guardianship that sufficiently addresses the problems of the incapacitated person, a guardian must be appointed to exercise the incapacitated person's delegable rights.

(c) In determining that a person is totally incapacitated, the order must contain findings of fact demonstrating that the individual is totally without capacity to care for herself or himself or her or his property.

(d) An order adjudicating a person to be incapacitated constitutes proof of such incapacity until further order of the court.

(e) After the order determining that the person is incapacitated has been filed with the clerk, it must be served on the incapacitated person. The person is deemed incapacitated only to the extent of the findings of the court. The filing of the order is notice of the incapacity. An incapacitated person retains all rights not specifically removed by the court.

(f) Upon the filing of a verified statement by an interested person stating:

1. That he or she has a good faith belief that the alleged incapacitated person's trust, trust amendment, or durable power of attorney is invalid; and

2. A reasonable factual basis for that belief,

the trust, trust amendment, or durable power of attorney shall not be deemed to be an alternative to the appointment of a guardian. The appointment of a guardian does not limit the court's power to determine that certain authority granted by a durable power of attorney is to remain exercisable by the agent.

(7) FEES.—

(a) The examining committee and any attorney appointed under subsection (2) are entitled to reasonable fees to be determined by the court.

(b) The fees awarded under paragraph (a) shall be paid by the guardian from the property of the ward or, if the ward is indigent, by the state. The state shall have a creditor's claim against the guardianship property for any amounts paid under this section. The state may file its claim within 90 days after the entry of an order awarding attorney ad litem fees. If the state does not file its claim within the 90-day period, the state is thereafter barred from asserting the claim. Upon petition by the state for payment of the claim, the court shall enter an order authorizing immediate payment out of the property of the ward. The state shall keep a record of the payments.

1(c) If the petition is dismissed or denied:

1. The fees of the examining committee shall be paid upon court order as expert witness fees under s. 29.004(6).

2. Costs and attorney fees of the proceeding may be assessed against the petitioner if the court finds the petition to have been filed in bad faith. The petitioner shall also reimburse the state courts system for any amounts paid under subparagraph 1. upon such a finding.

Section 2. This act shall take effect upon becoming law.

WHITE PAPER

PROPOSED AMENDMENT OF F.S. SECTION 744.331 IN LIGHT OF *SHEN v. PARKES*

A. SUMMARY

This proposal seeks the creation of a notice-and-demand procedure for hearsay and other objections to the examining committee reports in guardianship/incapacity proceedings. The guardianship process depends on the examination of the alleged incapacitated person ("AIP") by three court appointed committee members, who each receive a nominal fee and prepare a report to be presented to the court, pursuant to subsection 744.331(3), Florida Statutes. The Fourth District Court of Appeal ("Fourth DCA") in *Shen v. Parkes*, 100 So. 3d 1189 (Fla. 4th DCA 2012) held that reports of the examining committee members are inadmissible hearsay. While examining committee reports are typically received into evidence without testimony, the *Shen* decision creates an undue burden on the court process by potentially forcing the appearance of all committee members at hearings in order to provide testimony on the information contained in their reports.

The requirement of examining committee member's attendance at every hearing is time consuming, costly, and places an undue burden on the court system, despite the fact that, in most cases, incapacity may not be disputed. In order to address this issue, there should be a mechanism in place requiring advance notice of an objection by those who seek to challenge the reports so that preparation for a contested hearing, including securing witness appearances, is limited to those cases when it is actually necessary. This solution will reduce undue burden on the guardianship process while preserving a party's ability to cross examine the committee members when advance notice of an objection is given.

In order to facilitate this procedure and otherwise improve the current legislation on the delivery of the reports to the court and the parties, the current procedure for transmittal of the reports should also be clarified and improved. Despite the importance of the examining committee reports as part of the guardianship process, there is no specific statutory mechanism to effectuate the timely receipt of these reports from the examining committee members to the parties and the court. Without statutory authority, counties have simply enacted their own procedures, which are sometimes ineffective, inconsistent, or they have no procedure at all, which deprives the court and parties of the opportunity to review and receive these reports in advance of the hearing.

The Guardianship, Power of Attorney and Advance Directives Committee of the Real Property, Probate & Trust Law Section of The Florida Bar has studied this issue, believes *Shen* was correctly decided, and recommends that certain amendments to subsection 744.331 be made to eliminate unnecessary burden on the guardianship court process and to improve the law regarding the delivery of reports. This proposal adopts changes to subsection 744.331 to i) institute a new pre-hearing procedure for notice of objections, including hearsay, to examining committee reports, and ii) clarify and amend the existing legislation for the transmittal of the reports to the court and the parties.

B. CURRENT SITUATION: *SHEN V. PARKES*

Subsection 744.331(3), Florida Statutes (2015), provides that upon the filing of a petition for determination of incapacity, a court shall appoint a three member examining committee to meet with the alleged incapacitated person and make determinations as to the person's mental capacity. Once the examining committee members have performed their evaluation, each member submits a report detailing their findings and conclusions as to the person's capacity. *See* §744.331(3)(f), Fla. Stat. (2015). Subsection 744.331(4) provides that if two of the three examining committee members conclude that the alleged incapacitated person is not incapacitated in any respect, the court must dismiss the petition. If two of the three examining committee members conclude the person is incapacitated in some respect, the court proceeds to a hearing on the petition and makes a final determination based on the evidence presented by the parties. *See* § 744.331(5), Fla. Stat. (2015).

In *Shen*, Mr. Shen's family member filed a petition for incapacity alleging that he was incapacitated, which in turn prompted an examination of his mental capacity by the court appointed committee members in accordance with section 744.331(3). An adjudicatory hearing was held, and Mr. Shen's attorney objected to the admission of the examining committee reports on the ground of inadmissible hearsay. None of the committee members testified nor did other witnesses provide testimony regarding the alleged incapacity of Mr. Shen. The trial court accepted the written reports of the examining committee members over Mr. Shen's objection, and the reports were the only evidence of his incapacity. In reversing the trial court, the Fourth DCA found that the proponent of the reports did not assert the reports were admissible under any hearsay exception and the court otherwise found that no hearsay exception existed. The appellate court relied upon Florida Probate Rule 5.170, which provides that "[i]n proceedings under the Florida Probate Code and the Florida Guardianship Law the rules of evidence in civil actions are applicable unless specifically changed by the Florida Probate Code, the Florida Guardianship Law, or these rules." *Shen,* 100 So. 3d at 1191. The court stated that "[e]ven if it could be said that the guardianship statute permits the court to consider the comprehensive examination portion of the reports in the face of a hearsay objection, the statute does not reference the court's consideration of the remainder of the reports, which includes the diagnosis, prognosis, recommended treatment, evaluation of rights, and finding of incapacity and need for limited or plenary guardianship." *Id*. at 1191-92, citing § 744.331(3)(g), Fla. Stat. (2011).

In light of the *Shen* decision, many practitioners feel compelled to require the attendance of examining committee members at every hearing out of concern over a potential hearsay objection relating to the admission of the examining committee report, even when such an objection may never be asserted. In the face of the potential for an objection and the lack of advance notice as to whether such objection will occur, an unnecessary burden is being placed on examining committee members as well as the court system to prepare for these unknown contested guardianship proceedings (and to pay for same).

C. EFFECT OF PROPOSED CHANGES

Under this proposal, a procedure is created which requires that a party seeking to challenge a report provides advance notice of their objection, or if no written objection is made in a timely manner all objections are waived and the reports are admissible without further proof. This type of procedure is known as a "notice-and-demand" procedure and is a statutorily

recognized mechanism in the context of criminal proceedings where one's liberties are at stake.[1] Although guardianship cases are civil proceedings, the potential restraint on an AIP's liberties is similar to that of a criminal defendant, and thus the AIP's right to confront the examining committee members is a significant consideration in the context of addressing the *Shen* issue. While it is unclear if the right to confrontation would even be recognized in a civil guardianship proceeding, [2] the proposed revisions to subsection 744.331 nonetheless will provide an adequate solution to the *Shen* issue while avoiding any potential infringement on confrontation rights.[3] The AIP maintains his or her right to confront, as the notice-and-demand procedure simply governs the time within which the AIP must assert his or her right to do so. Specifically, the proposal requires that any objection to a report must be raised at least five days before the hearing. This is consistent with the legislative intent in guardianship proceedings to place the burden of proof on the party filing the incapacity petition, not the AIP. Also, it will further Florida's policy of deciding matters on the merits by avoiding delays and dismissals on technical grounds.[4] Finally, in considersation of other alternatives to address the *Shen* decision, a notice-and-demand provision, rather than a creation of a hearsay exception in the Evidence Code, will avoid shifting the burden of proof to the AIP and provide the AIP the opportunity to cross examine his or her examiners through a timely objection.

Additionally, this proposal takes the opportunity to address other issues in the current process in order to improve the procedure in guardianship proceedings. The first such change addresses the arguably ambiguous terminology which required examinining committee members to "submit" a report to the clerk rather than "filing" it with the clerk. The second change places the duty on the clerk to serve the examining committee reports on counsel and sets a clear timetable for that service.

Accordingly, the changes being made to Florida Statute § 744.331 are as follows:

1: § 744.331(3)(e) is revised to require the examining committee members to file their reports with the clerk of the court, clearing up an unclear term in the statute which currently requires the members to "submit a report."

2: § 744.331(3)(h) is revised to require the clerk of court to serve each examining committee report on the petitioner's counsel and the attorney for the alleged incapacitated person upon receiving the report from the examining committee member. This change also sets up a requirement that all reports are to be served at least 10 days prior to the hearing on the petition for determination of incapacity.

[1] *See Melendez v. Massachusetts*, 557 U.S. 305, 326 (2009).
[2] *See Walker v. Hadi*, 611 F. 3d 720 (11th Cir. 2010) (affirming the lower court's decision not to widen the scope of *Crawford v. Washington*, 541 U.S. 36 (2004) to civil proceedings).
[3] *See Melendez v. Massachusetts*, 557 U.S. at 326 (2009); *also see* Crawford v. Washington, 541 U.S.36 (2004).
[4] *See, e.g., Ciffo v. Public Storage Management, Inc.*, 622 So. 2d 1053, 1055 (Fla. 4th DCA 1993); *Tubero v. Chapnich*, 552 So. 2d 932, 935 (Fla. 4th DCA 1989) ("justice prefers decisions based upon the merits over determinations resulting from defaults or dismissals").

3: § 744.331(3)(i) is created to insert the "notice-and-demand" provision which requires objection to the examining committee reports, including hearsay objections, to be made at least 5 days prior to the adjudicatory hearing. The objection is required to be made in writing and served on the other party. This change further confirms that only the alleged incapacitated person and the petitioner shall be entitled to make such an objection, which is consistent with current law.

4: § 744.331(5) is revised to require the adjudicatory hearing to be conducted at least 10 days after, but not more than 30 days after, the last examining committee report has been filed. This extends the current 14 day time frame to allow for the notice-and-demand procedures and was done to allow for the notice and demand mechanism.

D. FISCAL IMPACT ON STATE AND LOCAL GOVERNMENTS

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

E. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR

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

F. CONSTITUTIONAL ISSUES

There appear to be no constitutional issues raised by this proposal per *Melendez v. Massachusetts* which is addressed in Section C above.

G. OTHER INTERESTED PARTIES

None are known at this time.

LEGISLATIVE POSITION REQUEST FORM

GOVERNMENTAL AFFAIRS OFFICE

Date Form Received _____

GENERAL INFORMATION

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

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

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

CONTACTS

Board & Legislation Committee Appearance

Katz, Baskies and Wolf, PLLC, One Boca Place, 2255 Glades Rd. Suite 240-W, Boca Raton, FL 33431-7382; Phone: (561) 910-5700, Email:Jeff.baskies@katzbaskies.com
Tae Kelley Bronner, Tae Kelley Bronner, P.L., 10006 Cross Creek Blvd., PMB #428, Tampa, FL 33467, Telephone: 813-907-6643, Email: taek@estatelaw.com
Peter M. Dunbar, Dean, Mead, Egerton, Bloodworth, Capouano & Bozarth, P.A., 215 S. Monroe Street, Suite 815, Tallahassee, FL 32301, Telephone: (850) 999-4100, Email: pdunbar@deanmead.com
Martha J. Edenfield, Dean, Mead, Egerton, Bloodworth, Capouano & Bozarth, P.A., 215 S. Monroe Street, Suite 815, Tallahassee, FL 32301, Telephone: (850) 999-4100, Email: medenfield@deanmead.com

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

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

PROPOSED ADVOCACY

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

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

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

Proposed Wording of Position for Official Publication:

"Supports proposed legislation to recognize Physician Orders for Life Sustaining Treatment under Florida law with appropriate protections to prevent violations of due process for the benefit of the citizens of Florida, including the creation of s. 406.46, Florida Statutes."

Reasons For Proposed Advocacy:

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

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

Elder Law Section

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

Health Law Section

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

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

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

WPB_ACTIVE 6470876.1

A bill to be entitled

An act relating to Physician Orders for Life Sustaining Treatment, creating s. 401.46, recognizing Physician Orders for Life Sustaining Treatment (POLST) and establishing requirements for the execution of POLST, establishing requirements for POLST forms.

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

Section 1. Section 401.46 is created to read as follows:

401.46 Physician Orders for Life Sustaining Treatment.-

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

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

(b) A POLST form must be signed by the patient's physician. The POLST form must contain a certification by the physician signing the POLST that the physician consulted with the patient signing the POLST, or if the patient is incapable of making health care decisions for herself or himself or is incapacitated, with the patient's health care surrogate, proxy, court appointed guardian or attorney-in-fact permitted to execute a POLST form on behalf of the patient as provided in section (c), about the use of and the effect of removal, refusal, or of life sustaining medical treatment and the physician signing the POLST must indicate the medical circumstance justifying the execution of the POLST.

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

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

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

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

(g) The patient's family, the health care facility, or the attending physician, or any other interested person who may reasonably be expected to be directly affected by the decisions as reflected on a POLST form of a surrogate, proxy, court

appointed guardian or attorney-in-fact permitted to execute a POLST form on behalf of the patient as provided in section (c) may seek expedited judicial intervention pursuant to Rule 5.900 of the Florida Probate Rules, if that person believes:

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

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

(iii) The surrogate, proxy, or attorney-in-fact permitted to execute a POLST form on behalf of a patient as provided in section (c) was improperly designated or appointed, or the designation of the surrogate, proxy or attorney-in-fact is no longer effective or has been removed;

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

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

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

(2) Duties of the Department. The department shall implement the POLST program.

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

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following:

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

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

(iii) To the extent possible, the standardized POLST form and protocols shall be consistent with use across all health care settings and shall reflect nationally recognized standards for end-of-life care. The form shall include: (A) The patient's directives concerning (1) the administration of life sustaining treatment, (2) the administration of measures to relieve pain and suffering through the use of medication by any route, wound care and related measures, and (3) the ability to transfer the patient to a setting able to provide comfort care, such as a hospice or palliative care; (B) The dated signature of the patient or, if applicable, the patient's surrogate, proxy, court appointed guardian, or attorney in fact permitted to execute a POLST form on behalf of a patient as provided in section 1(c); (C) The name, address and telephone number of the patient's primary health care provider; (D) The dated signature of the primary health care provider entering medical orders on the POLST form, a certification by the signing provider that he or she discussed the patient's care goals and preferences as reflected on the POLST form with the patient or the patient's surrogate, proxy, court appointed guardian or attorney-in-fact permitted to execute a POLST form on behalf of a patient as provided in section 1(c); and (E) a statement in a prominent manner that if the patient has health care decision-making capacity, the patient's presently expressed health-care treatment decisions shall guide such

patient's treatment, even if in conflict with the written POLST form. The form shall not include a direction regarding hydration, as decisions to supply or withhold hydration may not be made on the POLST form, but may only be made in the context of a patient's actual condition at the time of such a decision.

(b) The department in implementing this article shall:

(i) Recommend a uniform method of identifying persons who have executed a POLST form and providing health care providers with contact information of the person's primary health care provider;

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

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

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

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

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

is replaced or voided as provided in this act.

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

(c) Any licensee, physician, medical director, or emergency medical technician or paramedic who acts in good faith on a POLST is not subject to criminal prosecution or civil liability, and has not engaged in negligent or unprofessional conduct, as a result of carrying out the directives of the POLST made in accordance with the provisions of this section and rules adopted by the department.

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

(5) POLST conflicts with other advance directives. To the extent that the orders on a POLST form described in this section conflict with the provisions of an advance directive made under chapter 765, the most recent of those documents (a POLST or an advance directive) signed by the patient takes precedence, unless the patient is incapacitated to make such medical decisions and the patient's health care surrogate, proxy, court appointed

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guardian or attorney-in-fact permitted to execute a POLST form on behalf of a patient as provided in section 1(c) believes it is consistent with the wishes of the patient to alter the most recent of those documents, in which case the patient's health care surrogate, proxy, court appointed guardian or attorney-in-fact permitted to execute a POLST form on behalf of a patient as provided in section 1(c) may amend or revoke a prior POLST form or execute a new POLST form, unless a valid advance directive or prior POLST form executed by the patient expressly forbids changes by a surrogate, proxy, guardian or attorney-in-fact.

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

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

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

life or health insurance and shall not be the basis for any increase or decrease in premium charged to the individual.

(9) Revocation of POLST form.

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

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

(ii) By means of the physical cancellation or destruction of the POLST form by the patient or by another in the patient's presence and at the patient's direction;

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

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

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

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

(d) Upon revocation, a POLST form shall be void.

(10) Effect of act on euthanasia; mercy killing; construction of statute. Nothing is this section shall be

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construed as condoning, authorizing or approving euthanasia or mercy killing. In addition, the legislature does not intend that this article be construed as permitting any affirmative or deliberate act to end a person's life, except to permit natural death as provided by this section.

Section 2. This act shall take effect July 1, 2017.

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WHITE PAPER

PROPOSED LEGISLATION REGARDING PHYSICIAN ORDERS FOR LIFE-SUSTAINING TREATMENT

I. SUMMARY ON POLST

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

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

II. <u>BACKGROUND:</u>

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

Chapter 765 of the Florida Statutes provides detailed provisions for the creation of advance directives. Advance directives are intended to document a patient's desires as to medical procedures and treatment. The most common advance directive is a living will, which by statute applies to life prolonging procedures in the event that the person has a terminal condition, has an end stage condition or is in a persistent vegetative state. Other advance directives are, however, contemplated and may be created by a competent individual to document a patient's desires of the administration of other medical procedures under common law rights. Advance directives under Florida law can be oral or written. Florida law also provides for DNROs directing physicians and emergency personal to withhold CPR under F.S. 401.45. A POLST order could also, in the appropriate circumstances, be utilized under our current existing law, under Section 765.304, Florida Statutes, where there is a living will but no surrogate is appointed. Under such circumstances, the principal's primary physician may proceed as directed by the principal in the living will.

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

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

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

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

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

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

Certainly, a physician order on life sustaining treatment should not be a substitute for the principal's own direction in this regard. The principal/patient must be able to arrive at his/her own decision regarding life sustaining treatment, which decision is unbiased and made with sufficient clinical information to effectuate informed consent. As such, scholars and professionals studying POLST have come up with various questions and ways to improve the POLST paradigm, which improvements are now being implemented into some of the recently drafted POLST statutes in the later states that are now adopting some form of a POLST paradigm of their own. Some of these questions or improvements involve the following: whether POLST should be confined to the responsibility of the physician and not the "facilitators," or assisting healthcare professionals. Although the use of facilitators promotes efficiency of the POLST process[1], does the use of facilitators marginalize the role of physicians such that those other than physicians are making decisions that have life and death implications. One study found that even in states where POLST statutes require a physician signature, 72 percent of the POLST forms of nursing home residents were completed by facilitators. As such, physician participation, which may include a signing requirement by the physician, may still be less than thorough[2]. New statutory schemes are coming up with ways to ensure a more thorough review by the physician signing the POLST. Many POLST statutes, more recently drafted, require a physician to verify the choices made and the process used to communicate these choices to the patient. Nonetheless, it is evident from the research on POLST that significant cost savings have been recorded at the end of life stage through the use of POLST facilitator programs, and hence the driving reason for subscription to facilitator programs in connection with the administration of POLST.[3]

Another problem is getting professionals in this arena to agree on a POLST form that is uniform and accessible by all health care professionals. Opponents of POLST, i.e. Catholic Coalition and right to life proponents, argue that the POLST forms, mandated by many states, which have a POLST statute, are biased toward non-treatment and seek to create an off the shelf clinical care model for addressing potential end of life scenarios. For example, the Wisconsin POLST form requires a patient to choose between "aggressive" "limited" or "comfort" measures, however, there is no option for "full treatment." "Aggressive measures" are defined as "endotracheal intubation, advanced airway, and cardioversion/automatic defibrillation." The Washington state POLST form adds a fourth option, "use antibiotics if life can be prolonged." Does the term "prolonged" have negative implications and should more neutral language be used, like: "use antibiotics if medically available to treat the ailment."[4]

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

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

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

Although many people think of POLST as being intended for those that are in a terminally ill state or end of life state, the state laws around POLST do not indicate such restriction or limitation. In fact POLST model legislation annuls the requirement that a patient must be terminally ill before he or she may direct the withholding or withdrawal of life sustaining treatments. It is worth noting that the history behind the state laws that introduced living wills into common use in the 1980s limited the rightful use and execution of refusal orders to patients who, according to the judgment of two physicians, suffered from a "terminal condition" or were in a state of permanent unconsciousness. Based on that historical backdrop, it is possible that POLST, conceptually, allows a patient, along with the consent or direction of a physician, to refuse life sustaining treatment even when the patient may not be suffering from a terminal or irreversible condition.[5]

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

Opponents of POLST argue that medical decisions need to be made in the context of a patient's presenting situation and not reduced to a simple predetermined checklist.[6] Moreover, the POLST design is intended to make POLSTs transferable across care settings. In essence, this means that a POLST could be established by one healthcare provider in one setting, then the patient is transferred to a different setting, and is the physician at the new setting required to adhere to the previously determined POLST or is he/she required to reassess the patient under the current setting. Standard procedure would be for the physician at the new setting to write his own orders as to medical treatment after assessing the patient's situation. The notion that POLST is transferrable from one medical facility to another seems to go against this common practice of reassessment by each treating physician confronted with a medical condition he/she needs to act on or a request by the patient that needs to be addressed in view of the patient's current goals and desires.

If the POLST is transferrable, what if the physician signing the POLST is not on staff at the new facility and therefore has no privileges at the facility such that the POLST is ineffective.[7] The proposed Florida POLST statute addresses this issue by requiring the treating physician at the receiving medical institution to review the POLST form with the patient, or his agent (as defined by the statute and Chapter 765) and turning it into a physician Order at the receiving institution, signed by the treating physician at the receiving institution.

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[5] Id. at 113.
[6] Id. at 114.
[7] Id. at 115.

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

II. CURRENT LAW

An individual in Florida has the constitutional right to dictate the terms of his medical care while the individual has the mental capacity required to understand those decisions. In re: Guardianship of Browning, 568 So. 2d 4, 10 (Fla. 1990). Upon the loss of capacity to make medical decisions, Florida law provides for a number of avenues under which a patient's proxy, either designated by the patient or through statute, can act in the patient's stead. These methods include the use of a Health Care Surrogate (Fla. Stat. §§ 765.201-765.205), the use of a Living Will (Fla. Stat. §§ 765.301-765.309), the use of a Power of Attorney (Fla. Stat. Ch. 709), the designation of a Health Care Proxy (Fla. Stat. §§ 765.401-765.404), and through the appointment of a Guardian of the Person (Fla. Stat. Ch. 744). Each of these methods is detailed further below along with an overview of Florida's current law on do-not-resuscitate orders (Fla. Stat. § 401.45). Florida does not currently have a POLST statute nor does it recognize the validity of these documents from other jurisdictions.

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

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

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

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

Florida Statutes § 765.304 lays out the procedures for the implementation of a principal's living will directions. If a health care surrogate has been designated by the principal under Fla. Stat. Ch. 765 Part II, it is the responsibility of the surrogate to make decisions consistent with the directions laid out in the living will. Fla. Stat. § 765.205. If a surrogate has not been designated, the attending physician may proceed as directed in the living will. Fla. Stat. § 765.304. In the event of a disagreement on the proper course of action between the living will and the attending physician, a dispute procedure is laid out in the statute. Id. The Living Will's directions are not required to be followed until it has been determined that (a) the principal does not have a reasonable medical probability of recovering capacity to exercise his rights personally, (b) the principal has a terminal condition, has an end-stage condition, or is in a persistent vegetative state, and (c) any limitations expressed orally or in a written declaration have been carefully considered and satisfied. Id. The statute specifically notes that these statutes are not to be interpreted to condone mercy killing or euthanasia. Fla. Stat. § 765.309.

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

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

Guardian of the Person – Florida Statutes Chapter 744 – A court appointed guardian may be delegated the authority to make health care decisions on behalf of an incapacitated ward.

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

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

III. EFFECT OF PROPOSED STATUTORY CHANGE

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

Fla. Stat. § 401.45. Effect of Proposed Change. The proposed amendment to § 401.45(3)(a) allows emergency medical technicians, paramedics, or other health care professionals to withhold or withdraw resuscitation or other form of medical intervention pursuant to a POLST form or order not to resuscitate executed pursuant to this section. Further, the proposal expands the professionals affected by the statute by including "other health care professionals" in addition to emergency medical technicians and paramedics.

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

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

Proposed subsection (1)(a) requires all POLST forms to be signed by the patient's physician and to contain a physician's consultation certification. This certification will state that the physician consulted with the patient, or with the patient's surrogate, proxy, guardian, or attorney-in-fact if the patient is incapable of making health decisions, about the use and removal of life sustaining medical treatment. The physician must also indicate the medical circumstance justifying execution of the POLST (i.e. the patient's terminal medical or end-stage condition).

Proposed subsection (1)(b) states that all POLST forms must be signed by the patient, or if the patient is incapable of making health care decisions, by the individual having the authority

to execute a POLST on the patient's behalf. If a POLST is signed by someone other than the patient, the patient's physician must certify the basis for the individual's authority to execute the POLST form and must certify compliance with the relevant statutory provisions of Chapter 765, Chapter 744, or Chapter 709.

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

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

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

Proposed subsection (2) lays out the duties of the Department of Health to implement the POSLT program pursuant to the act. Under proposed subsection (2)(a), the Department of Health is required to create rules for a standardized form subject to the following requirements: (i) the rules must contain protocols for implementation of a standardized POLST form available in electronic format on the Department of Health website; (ii) the Department must consult with the appropriate stakeholders regarding the POLST protocols; (iii) the POLST form shall be consistent across all settings to the extent possible and shall reflect nationally recognized standards for end of life care. Proposed subsection (2)(a)(iii) goes on to require the POLST form to include (A) the patient's directives concerning life sustaining treatment, measures to relieve pain and suffering, and the ability to transfer the patient to a setting providing comfort care; (B) the dated signature of the patient or the patient's appropriate agent; (C) the name, address, and telephone number of the patient's primary health care provider; (D) the dated signature of the primary health care provider entering medical orders on the POLST form along with the required certifications; (E) a prominent statement that if the patient has health care decision-making capacity then the patient's expressions shall guide the patient's treatment even if in conflict with the POLST. Finally, the POLST form is not permitted to include a direction regarding hydration.

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

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

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

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

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

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

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

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

Proposed subsection (9) provides guidance on the revocation of a POLST form. Upon revocation of a POLST form is void. A POLST may be revoked by a patient with capacity by (i) signed, dated writing; (ii) physical cancellation or destruction; (iii) oral expression of revocation; or (iv) subsequent execution of another POLST form or advance directive materially different from the POLST form. Subsection (9)(b) specifically notes that a surrogate, proxy, guardian, or attorney-in-fact may revoke all or part of a POLST form created by the agent at any time by signed writing. Finally, proposed subsection (9)(c) requires any revocation to be promptly communicated to the patient's primary health care provider, primary physician, and any health care facility at which the patient is receiving care. Additionally, any health care professional, surrogate, attorney-in-fact, proxy, or guardian informed of an amendment or revocation is required to promptly inform the same entities.

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

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

IV. FISCAL IMPACT ON STATE AND LOCAL GOVERNMENTS

...

V. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR

...

VI. CONSTITUTIONAL ISSUES

...

VII. OTHER INTERESTED PARTIES

LEGISLATIVE POSITION REQUEST FORM

GOVERNMENTAL AFFAIRS OFFICE

Date Form Received _____

GENERAL INFORMATION

Submitted By David J. Akins, Chair, Estate and Trust Tax Planning Committee of the Real Property Probate and Trust Section
(List name of the section, division, committee, bar group or individual)

Address 800 North Magnolia Avenue, Suite 1500 Orlando, FL 32803
Telephone: (407) 841-1200

Position Type Estate and Trust Tax Planning Committee of the Real Property, Probate and Trust Law Section of The Florida Bar
(Florida Bar, section, division, committee or both)

CONTACTS

Board & Legislation Committee Appearance

David J, Akins, Dean Mead, 800 North Magnolia Avenue, Suite 1500 Orlando, FL 32803 Telephone: (407) 841-1200
Tae Kelley Bronner, Tae Kelly Bronner, P.L., 10006 Cross Creek Blvd., PMB # 428, Tampa, FL 33647
Telephone: (813) 907-6643
Peter M. Dunbar, Dean Mead, 215 S. Monroe Street, Suite 815, Tallahassee, FL 32301 Telephone 850-999-4100
Martha J. Edenfield, Dean Mead, 215 S. Monroe Street, Suite 815, Tallahassee, FL 32301 Telephone 850-999-4100

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

Meetings with Legislators/staff _____
(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 [ ] Technical Assistance [ ] Other [ ]

Proposed Wording of Position for Official Publication:

Support amendment to the Florida Statutes to permit the creation of joint tenancies with rights of survivorship and tenancies by the entireties in certain kinds of personal property without regard to the common law unities of time and title, including the creation of a new s. 689.151, Florida Statutes.

Reasons For Proposed Advocacy:

The proposed addition to the Florida Statutes will bring clarity and certainty to an area of Florida law in which there is now considerable confusion, apprehension and misconception. Under the current law, the creation of a tenancy by the entireties or joint tenancy with rights of survivorship is treated differently for real property and bank accounts than it is for other types of personal property. The proposed statute will eliminate this difference for personal property which falls within the scope of the statute by eliminating the common law requirement of the unities of time and title. Under the proposed s. 689.151, Florida Statutes, a married owner of personal property will be permitted to establish a tenancy by the entireties with his or her spouse without the use of a straw man and a presumption is created that if one spouse adds the name of the other spouse as an owner of personal property both spouses own such personal property as tenants by the entireties. The presumption may only be overcome by clear and convincing evidence of a contrary intent. Similarly, the proposed statute allows the owner of personal property which falls within the scope of the statute to create a joint tenancy with rights of survivorship without the necessity for the transfer to a straw man.

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 _____

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

Others
(May attach list if more than one) _____

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

REFERRALS TO OTHER SECTIONS, COMMITTEES OR LEGAL ORGANIZATIONS

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

Referrals

Family Law Section, TFB _____
(Name of Group or Organization) (Support, Oppose or No Position)

Florida Bankers Association _____
(Name of Group or Organization) (Support, Oppose or No Position)

Business Law Section, TFB _____
(Name of Group or Organization) (Support, Oppose or No Position)

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

information or assistance, please telephone (850) 561-5662 or 800-342-8060, extension 5662.

7-06
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A bill to be entitled

An act relating to conveyance of personal property, creating s. 689.151, Florida Statutes, to permit the creation of tenancies by the entireties and joint tenancies with right of survivorship in personal property without regard to the unities of time and title, and creating a rebuttable presumption that certain personal property is owned by spouses as tenant by the entireties.

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

Section 1. Section 689.151, F.S., is created to read:

689.151. Tenancy by the Entireties and Joint Tenancy with Right of Survivorship in Personal Property.

(1) An owner of personal property may create a joint tenancy with right of survivorship in such property by designating one or more additional persons as joint tenants with right of survivorship in an instrument or record of transfer, or in an instrument or record evidencing ownership of property, without the necessity of a transfer to or through a third person.

(2) A spouse owning personal property may create a tenancy by the entireties in such property by designating his or her spouse as a co-owner of the property in an instrument or record of transfer, or in an instrument or record evidencing ownership of the property, without the necessity of a transfer to or through a third person.

(3) If a spouse owning personal property adds the name of his or her spouse to an instrument or record evidencing ownership of personal property, there exists a presumption that the spouses own the property as tenants by entireties. This presumption may be overcome by clear and convincing evidence of a contrary intent.

(4) This section shall not apply to a motor vehicle or mobile home to which s. 319.22 applies, to a deposit or account to which s. 655.78 or s. 655.79 applies, or to a mortgage and the obligation it secures to which s. 689.115 applies.

(5) As used in this section:

CODING: Words ~~stricken~~ are deletions; words underlined are additions.
O1423644.v1

(a) The term "personal property" means all property other than "real property," as that latter term is defined in s. 192.001, and other than an interest in a trust to which ch. 736 applies.

(b) The term "record" has the meaning given it in s. 605.0102.

(6) The common law of tenancy by the entireties and of joint tenancy with rights of survivorship supplements this section except to the extent modified by it.

(7) This section creates no inferences as to joint tenancies with rights of survivorship or tenancies by the entireties in personal property in existence on its effective date.

Section 2. This Act shall become effective upon becoming law.

CODING: Words ~~stricken~~ are deletions; words underlined are additions.
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Real Property, Probate and Trust Law Section of The Florida Bar

White Paper on Proposed Enactment of Florida Statutes Section 689.151

I. SUMMARY

The proposed legislation originates from The Estate and Trust Tax Planning Committee (the "Committee") of the Real Property, Probate and Trust Section of The Florida Bar (the "RPPTL Section").

The proposed legislation would enact new Florida Statutes Section 689.151 to provide that joint tenancies with rights of survivorship and tenancies by the entireties can be created in personal property without regard to the unities of time and title required under common law. The statute would thus codify common law to the effect that when one spouse transfers solely-owned property to both spouses as tenants by the entirety that the property is, in fact, owned by them as tenants by the entirety.

The proposed statute creates a rebuttable presumption of clear and convincing evidence that a tenancy by the entireties exists where one spouse adds the name of his her spouse to a document of title evidencing ownership of personal property.

Enactment of the proposed legislation would make the requirements for the valid creation of joint tenancies with rights of survivorship and tenancies by the entireties in personal property broadly (but not necessarily entirely) consistent with those applicable to real property, and would bring clarity and certainty to an area of the law in which there is considerable apprehension, confusion and misconception.

II. CURRENT SITUATION

At common law, four unities must be present to create a joint tenancy with right of survivorship: (1) unity of possession (joint ownership and control); (2) unity of interest (the interest in the property must be identical; (3) unity of title (the interests must have originated in the same instrument); and (4) unity of time (the interests must have commenced simultaneously). A fifth unity, unity of person, is also required to establish a tenancy by the entireties.

Florida Statutes 689.11(1) overrides the requirement for the unities of time and title in the case of conveyances of real estate involving married persons, allowing, for example, either spouse to create a tenancy by the entireties by conveying the property to both spouses. Similarly, under Florida Statutes Section 655.79(1) deposits in Florida banks and credit unions held in the name of married persons are considered to be a tenancy by the entirety (unless otherwise specified in writing), without regard to the common law unities.

In *Beal Bank, SSB v. Almand & Associates*, 780 So. 2d 45 (Fla. 2001), the Florida Supreme Court addressed whether certain accounts held in the names of both spouses were held as tenants

by the entireties. The Supreme Court reasoned that there was a rebuttable presumption of an intent to create a tenancy by the entireties in an account held by husband and wife where the account documentation was silent with respect to type of ownership intended.

Beal Bank is a misunderstood case. It does not, as is generally supposed, stand for the proposition that an asset held in the names of husband and wife is presumed to be held as tenants by the entirety. Much to the contrary: in *Beal Bank* the Court *assumed* that the four common law unities of possession, interest, title and time were present. *Beal Bank* is significant chiefly because the Court concluded that the fact that the spouses intended to hold the account as tenants by the entireties – in other words, the fifth unity of person – could be presumed and did not have to be proved by the account owner. Instead, the fact that the account was *not* intended to be held as tenants by the entireties had to be proved by a preponderance of the evidence by the party arguing that the account was not so owned.

Beal Bank does *not* stand for the proposition that the other four common law unities are not necessary for the creation of a tenancy by the entireties. That this is so has been demonstrated by the decision of United States Bankruptcy Court for the Southern District of Florida in *In re Aranda*, 2011 WL 87237 (Bnkrtcy, S.D. Fla. 2011), where the court held that an account was not held as tenants by the entireties because the common law unity of time was not present.

There is no compelling policy reason to make it more difficult for a husband and wife to create a tenancy by the entireties in personal property than it is for real property. Married couples have a legitimate expectation that personal property that they hold jointly should be treated no differently from their jointly-owned home. A statute that does for personal property what Florida Statutes Section 689.11(1) does for real property would provide greater uniformity and predictability, and would reduce confusion and litigation.

The Bankruptcy Court in *In re Shahegh*, 2013 WL 364821 (Bkrtcy, S.D. Fla 2013), after struggling with the existing, muddled state of the law on the creation of tenancies by the entireties, in a sense of exasperation asked "[s]hould the concept of TBE ownership in personal property be changed and modified? Section 689.11, Fla. Stat., suggests that changes may also be warranted when it comes to TBE interests in personalty."

The legislative proposal does not go so far as to import the bright-line clarity to personal property that Section 689.11, Fla. Stat., does for real property. It does abolish the common law unities of time and title. However, where a spouse adds the name of his or her spouse to any documentary evidence of title for personal property – as opposed to a transfer of the property from one spouse to both of them as tenants by the entireties – a presumption is created that both spouses own such property as tenants by the entireties. The presumption may only be overcome by clear and convincing evidence of a contrary intent. The statute does not deem it to be tenants by the entireties property.

III. EFFECT OF PROPOSED LEGISLATION (DETAILED ANALYSIS OF PROPOSED STATUTE)

A. Effect of Proposed Legislation Generally.

The proposed legislation would create Section 689.151 of the Florida Statutes. If enacted, the statute would eliminate the requirement that certain common law unities be present to create a joint tenancy with rights of survivorship or a tenancy by the entireties in certain personal property.

B. Specific Statutory Provisions

1. Subsection (1)

Subsection (1) dispenses with the requirements of the unities of time and title for personal property in the valid creation of a joint tenancy with right of survivorship.

Thus, for example, Owner One, who is the 100% owner of Asset X, can convey Asset X to Owner One and Owner Two as joint tenants with rights of survivorship, and the joint tenancy will exist notwithstanding the lack of unities of time and title. The same result will flow from the addition of a new owner or owners to an asset, whether or not the addition of names is a "transfer" in the traditional sense. Thus, it will no longer be necessary for Owner One first to convey Asset X to a "straw man," who would then convey the Asset to Owner One and Owner Two as joint tenants with right of survivorship.

The conveyance or the addition of new owners to title can also be evidenced by an unwritten (e.g., electronic) record. The statute borrows the definition of "record" from the Florida Revised Uniform Limited Liability Company Act, Ch. 605 Florida Statutes.

2. Subsection (2)

Subsection (2) dispenses with the requirements of the unities of time and title for personal property in the valid creation of a tenancy by the entireties.

Thus, for example, Married Person, who is the 100% owner of Asset X, can convey Asset X to Married Person and his or her spouse as tenants by the entireties, and the tenancy by the entireties will exist notwithstanding the lack of unities of time and title. The same result will flow from the addition of a spouse as another titleholder of an asset, whether or not the addition of names is a "transfer" in the traditional sense. Thus, it will no longer be necessary for Married Person first to convey Asset X to a "straw man," who would then convey the Asset to Married Person and his or her spouse as tenants by the entireties.

Subsection (2) of the proposed statute tracks the substance, if not the language, of Section 689.11(1), Florida Statutes. As in the real estate statute, the proposed legislation would allow one spouse to create a valid tenancy by the entireties in personal property by conveying the property to herself and her spouse.

It should be noted that there is common law that supports the ability of one spouse who owns personal property to create a joint ownership in both spouses that establishes all the unities of an entireties estate in such property without a straw man. *See, e.g., In re Kossow*, 325 B. R. 478 (Bankr. S.D. Fla. 2005); *In re Golub*, 80 B. R. 230 (Bankr. M.D. Fla. 1987).

The conveyance or addition to title to create the tenancy by the entireties can be by an instrument or other record.

3. Subsection (3)

If one spouse adds the name of his or her spouse to a written instrument of title for personal property (as opposed to a transfer of personal property from one spouse to both spouses as tenants by the entireties), there exists a presumption that the spouses own the property as tenants by the entireties, which may be overcome by clear and convincing evidence of a contrary intent.

The subsection imports the reasoning of Section 655.79(1), Florida Statues, which provides that a bank deposit held by married persons "is considered to be" a tenancy by the entireties. Further, Section 655.79(2), Florida Statutes, provides that "[t]he presumption created in this section may be overcome by proof of fraud, undue influence or clear and convincing proof of a contrary intent." The Legislature added this presumption to implement the public policy articulated by the Florida Supreme Court in *Beal Bank*, 780 So. 2d at 62, n. 24. That Section has been construed by Florida courts as establishing a presumption that a deposit subject to the statute is held as tenants by the entireties. *See, e.g., Regions Banks v. Hyman*, 2013 WL 10253581 (M.D. Fla. 2013); *Branch Banking and Trust Co. v. Maxwell*, 2012 WL 4078407 (M.D. Fla. 2012).

4. Subsection (4)

The proposed legislation does not cover assets and financial arrangements already covered elsewhere in the Florida Statutes.

5. Subsection (5)

This subsection defines the terms "personal property" and "record" as used in the proposed statute. An interest in a trust subject to the Florida Trust Code, Chapter 736, Florida Statutes, is excluded by this definition. The legislative proposal is not the proper place to address so-called "tenancy by the entireties trusts."

6. Subsection (6)

The new statute would supersede common law principles of tenancy by the entireties and joint tenancy with rights of survivorship only to the extent it is inconsistent with those principles.

7. Subsection (7)

Application of the statute will be prospective only. Given the current muddled and confused state of the common law on the creation of joint tenancies and tenancy by the entireties, the Committee did not want to create any inference as to whether the unities of time and title were,

or were not, dispositive of the valid creation of these relationships prior to the statute. Such questions will still be answered with regard to applicable pre-enactment law.

IV. FISCAL IMPACT ON STATE AND LOCAL GOVERNMENTS

Adoption of this legislative proposal by the Florida Legislature should not have a fiscal impact on state and local governments. It should instead be revenue neutral.

V. DIRECT IMPACT ON PRIVATE SECTOR

The certainty and predictability that the proposed legislation will lend to rights and liabilities in personal property intended to be owned as joint tenants with right of survivorship or tenants by the entireties will benefit the private sector.

VI. CONSTITUTIONAL ISSUES

The proposed legislation is prospective in application. There are no known Constitutional issues.

VII. OTHER INTERESTED PARTIES

Other groups that may have an interest in the legislative proposal include the Family and Business Law Sections of The Florida Bar and the Florida Bankers Association.

LEGISLATIVE POSITION REQUEST FORM

GOVERNMENTAL AFFAIRS OFFICE

Date Form Received _____

GENERAL INFORMATION

Submitted By Hung V. Nguyen, Chairman, Guardianship, Power of Attorney, and Advance Directives Committee of the Real Property Probate & Trust Law Section

Address Hung V. Nguyen, Nguyen Law Firm, 306 Alcazar Avenue, Suite 303-B, Coral Gables, Florida 33134
Telephone: (786) 600-2530

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

CONTACTS

Board & Legislation Committee Appearance

Hung V. Nguyen, Nguyen Law Firm, 306 Alcazar Avenue, Suite 303-B, Coral Gables, Florida 33134, Telephone: (786) 600-253**0**
Tae Kelley Bronner, Tae Kelley Bronner, PL, 10006 Cross Creek Blvd PMB 428, Tampa, FL 33647, Telephone (813) 907-6643
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 changes to Florida law to permit a court to approve a guardian's request to initiate a petition for dissolution of marriage of a ward without the requirement that the ward's spouse consent to the dissolution, including amendments to s. 744.3725, Florida Statutes.

Reasons For Proposed Advocacy:

Under current law, s. 744.3725(6), Fla. Stat. prohibits a court from granting a guardian the power to initiate divorce proceedings on behalf of a ward if the ward's spouse refuses to consent to the dissolution. This is unfair (and may raise an equal protection problem) to the ward since the spouse is able to initiate divorce proceedings from a ward without the ward or the ward's guardian's consent. Under the current law, the spouse has the right to absolutely bar the ward or the ward's guardian from initiating a divorce proceeding, even if doing so is in the ward's best interest. The proposed change does not change the procedure under sections 744.3215(4) and 744.3725, Fla. Stat., which recognize that initiating a divorce proceeding is an extraordinary remedy requiring that a high burden be met before the relief can be granted, but rather simply removes the spousal consent requirement.

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

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

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

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

A bill to be entitled

An act relating to guardianship, amending s. 744.3725, to remove prohibition that prevents a guardian from initiating a petition for dissolution of marriage for a ward if the ward's spouse refuses to consent to the dissolution; and providing for an effective date.

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

Section 1. Subsection (4) of section 744.3725, Florida Statutes is amended and Subsection (6) is deleted to read:

744.3725. Procedure for extraordinary authority.--Before the court may grant authority to a guardian to exercise any of the rights specified in s. 744.3215(4), the court must:

(1) Appoint an independent attorney to act on the incapacitated person's behalf, and the attorney must have the opportunity to meet with the person and to present evidence and cross-examine witnesses at any hearing on the petition for authority to act;

(2) Receive as evidence independent medical, psychological, and social evaluations with respect to the incapacitated person by competent professionals or appoint its own experts to assist in the evaluations;

(3) Personally meet with the incapacitated person to obtain its own impression of the person's capacity, so as to afford the incapacitated person the full opportunity to express his or her personal views or desires with respect to the judicial proceeding and issue before the court;

(4) Find by clear and convincing evidence that the person lacks the capacity to make a decision about the issue before the court and that the incapacitated person's capacity is not likely to change in the foreseeable future; and

(5) Be persuaded by clear and convincing evidence that the authority being requested is in the best interests of the incapacitated person~~; and~~.

~~(6) In the case of dissolution of marriage, find that the ward's spouse has consented to the dissolution.~~

The provisions of this section and s. 744.3215(4) are procedural and do not establish any new or independent right to or authority over the termination of parental rights, dissolution of marriage, sterilization, abortion, or the termination of life support systems.

Section 2. This act shall take effect upon becoming law.

WHITE PAPER

PROPOSED STATUTE ALLOWING A COURT TO AUTHORIZE A GUARDIAN TO SEEK A DISSOLUTION OF MARRIAGE WITHOUT THE CONSENT OF THE WARD'S SPOUSE

I. SUMMARY:

Florida currently requires a court to find that a ward's spouse has consented to the dissolution of marriage before it can authorize a guardian to seek dissolution of marriage. The ward is denied access to the courts unless the spouse consents. The proposed revision to Section 744.3725 would remove the requirement that the court must find that the ward's spouse consents to the dissolution before authorizing a guardian to seek dissolution of the ward's marriage.

II. CURRENT SITUATION:

Section 744.3215(4) provides that certain acts may only be exercised by a guardian if the guardian obtains specific authority from the court. Among those acts is the initiation of a petition for dissolution of marriage. §744.3215(4)(c), Fla. Stat. Section 744.3725 provides the procedure the court must employ before authorizing a guardian to perform the acts enumerated in Section 744.3215(4). The court must:

(1) Appoint an independent attorney to act on the incapacitated person's behalf, and the attorney must have the opportunity to meet with the person and to present evidence and cross-examine witnesses at a full judicial hearing;
(2) Receive as evidence independent medical, psychological, and social evaluations with respect to the incapacitated person by competent professionals or appoint its own experts to assist in the evaluations;
(3) Personally meet with the incapacitated person to obtain its own impression of the person's capacity, so as to afford the incapacitated person the full opportunity to express his personal views or desires with respect to the judicial proceeding and issue before the court;
(4) Find by clear and convincing evidence that the person lacks the capacity to make a decision about the issue before the court and that the incapacitated person's capacity is not likely to change in the foreseeable future;
(5) Be persuaded by clear and convincing proof that the authority being requested is in the best interests of the incapacitated person; and
(6) In the case of dissolution of marriage, find that the ward's spouse has consented to the dissolution.

The court may not authorize a guardian to petition for dissolution of marriage unless the court finds that the spouse has consented to the dissolution. Although Section 744.3215(1)(k) provides that a ward retains the right to have access to the court, a ward is denied access to the court to seek dissolution unless the court first finds that the ward's spouse consents.

As one commentator noted, "[B]ased on this requirement, a guardian's ability to initiate a divorce on behalf of his or her ward is contingent on the approval of the ward's spouse, the very person who may be the ward's abuser. If the ward's spouse has an incentive to remain married, he or she can simply veto the proposed divorce, thereby terminating the divorce proceeding. Given that the purpose of a statute authorizing a guardian to initiate a divorce is to protect the ward, the current legislation contravenes that purpose by leaving the ward's spouse with complete and absolute control over the marriage and the ward without adequate legal recourse against potential abuse." Bella Feinstein, *A New Solution to an Age-Old Problem: Statutory Authorization for Guardian Initiated Divorces*, NAELA JOURNAL 10(2).

III. EFFECT OF PROPOSED CHANGE

The proposed revision to the statute eliminates the requirement that the court must find that the spouse has consented to the dissolution of marriage before it can authorize the guardian to petition for dissolution. The elimination of subsection (6) of Section 744.3725 preserves the ward's right to access to the courts. The other procedural protections set forth in Section 744.3725 will protect the ward from any improvident exercise of the authority.

IV. FISCAL IMPACT ON STATE AND LOCAL GOVERNMENTS

None.

V. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR

None.

VI. CONSTITUTIONAL ISSUES

None.

LEGISLATIVE POSITION REQUEST FORM

GOVERNMENTAL AFFAIRS OFFICE

Date Form Received _____

GENERAL INFORMATION

Submitted By Angela M. Adams, Chair, Trust Law Committee of the Real Property, Probate & Trust Law Section

Address
Angela M. Adams
Law Offices of Wm. Fletcher Belcher
540 Fourth Street North
St. Petersburg, Florida 33701
(727) 821-1249

Position Type Trust Law Committee, Real Property, Probate & Trust Law Section of The Florida Bar

CONTACTS

Board & Legislation Committee Appearance

Angela M. Adams, Law Offices of Wm. Fletcher Belcher, 540 Fourth Street N., St. Petersburg, FL 33701
Telephone: (727) 821-1249, Email: amemadams@gmail.com

Tae Kelley Bronner, 10006 Cross Creek Blvd. PMB 428, Tampa, FL 33647
Telephone: (813) 907-6643, Email: taek@estatelaw.com

Debra Boje, Gunster, 401 E. Jackson St., Suite 2500, Tampa, FL 33602,
Telephone: (813) 222-6614, Email: dboje@gunster.com

Peter M. Dunbar, Dean Mead, P.O. Box 10095, Tallahassee, Florida 32302-2095, Telephone (850) 222-3533

Martha J. Edenfield, Dean Mead, P.O. Box 10095, Tallahassee FL 32302-2095, Telephone (850) 222-3533

Appearances before Legislators N/A at this time
(List name and phone # of those appearing before House/Senate Committees)

Meetings with Legislators/staff N/A at this time
(List name and phone # of those having face to face contact with Legislators)

PROPOSED ADVOCACY

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

If Applicable, List The Following N/A at this time

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

Indicate Position Support [X] Oppose [ ] Technical Assistance [ ] Other [ ]

Proposed Wording of Position for Official Publication:

Support proposed legislation to revise Florida law to provide that the Attorney General is the proper party to receive notice for matters concerning charitable trusts and further define the manner in which the Attorney General will receive such notices, including changes to §§736.0110(3), 736.1201, 736.1205, 736.1206(2), 736.1207, 736.1208(4)(b), and 736.1209, Florida Statutes,.

Reasons For Proposed Advocacy:

The proposed amendment will resolve an inconsistency in the current law that names both the Attorney General and the state attorney to receive notices concerning charitable trusts by designating that only the Attorney General is to receive such notices. It also clarifies how notice is to be given to the Attorney General in charitable trust matters.

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)

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

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

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

Please submit completed Legislative Position Request Form, along with attachments, to the Governmental Affairs Office of The Florida Bar. Upon receipt, staff will further coordinate the scheduling for final Bar action of your request which usually involves separate appearances before the Legislation Committee and the Board of Governors unless otherwise advised. For information or assistance, please telephone (850) 561-5662 or 800-342-8060, extension 5662.

A bill to be entitled

An act relating to notice for charitable trusts; amending ss. 736.0110(3), 736.1201, 736.1205, 736.1206(2), 736.1207, 736.1208(4(b), and 736.1209 F.S.

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

Section 1. Subsection (3) of Section 736.0110, Florid Statutes is amended to read:

736.0110. Others treated as qualified beneficiaries.-

(3) The Attorney General may assert the rights of a qualified beneficiary with respect to a charitable trust having its principal place of administration in this state. The Attorney General has standing to assert such rights in any judicial proceedings.

Section 2. Subsections (2) through (4) of Section 736.1201, Florida Statutes, are renumbered as Subsections (3) through (5), respectively; Subsection (5) is deleted, a new Subsection (2) is added to that Section to read:

736.1201. Definitions.-(1) “Charitable organization” means an organization described in s. 501(c)(3) of the Internal Revenue Code and exempt from tax under s. 501(a) of the Internal Revenue Code.

(2) “Delivery of notice” means delivery of a written notice required under this part by sending a copy by any commercial delivery service requiring a signed receipt or by any form of mail requiring a signed receipt.

~~(2)~~(3) “Internal revenue code” means the Internal Revenue Code of 1986, as amended.

~~(3)~~(4) “Private foundation trust” means a trust, including a trust described in s. 4947(a)(1) of the Internal Revenue Code, as defined in s. 509(a) of the Internal Revenue Code.

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

~~(4)~~(5) “Split interest trust” means a trust for individual and charitable beneficiaries that is subject to the provisions of s. 4947(a)(2) of the Internal Revenue Code.

(~~5)“State attorney” means the state attorney for the judicial circuit of the principal place of administration of the trust pursuant to s. 736.0108.~~

Section 3. Section 736.1205, Florida Statutes is amended to read:

736.1205. Notice that this part does not apply.-

In the case of a power to make distributions, if the trustee determines that the governing instrument contains provisions that are more restrictive than s. 736.1204(2), or if the trust contains other powers, inconsistent with the provisions of s. 736.1204(3) that specifically direct acts by the trustee, the trustee shall notify the ~~state attorney~~ Attorney General by delivery of notice when the trust becomes subject to this part. Section 736.1204 does not apply to any trust for which notice has been given pursuant to this section unless the trust is amended to comply with the terms of this part.

Section 4. Section 736.1206(2), Florida Statutes is amended to read:

736.1206(2). Power to amend trust instrument.-

(2) In the case of a charitable trust that is not subject to the provisions of subsection (1), the trustee may amend the governing instrument to comply with the provisions of s. 736.1204(2) after delivery of notice to, and with the consent of the ~~state attorney~~ Attorney General.

Section 5. Section 736.1207, Florida Statutes is amended to read:

736.1207. Power of court to permit deviation.-

This part does not affect the power of a court to relieve a trustee from any restrictions on the powers and duties that are

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

placed on the trustee by the governing instrument or applicable law for cause shown and on complaint of the trustee, ~~state attorney~~ Attorney General, or an affected beneficiary and notice to the affected parties.

Section 6. Subparagraph (4)(b) of Section 736.1208, Florida Statutes is amended to read:

736.1208. Release; property and persons affected; manner of effecting.-

(4) Delivery of a release shall be accomplished as follows:

* * * *

(b) If the release is accomplished by reducing the class of permissible charitable organizations, by delivery of notice ~~a copy~~ of the release to the ~~state attorney~~ Attorney General including a copy of the release.

Section 7. Section 736.1209, Florida Statutes is amended to read:

736.1209. Election to come under this part.-

With the consent of that organization or organizations, a trustee of a trust for the benefit of a public charitable organization or organizations may come under s. 736.1208(5) by delivery of notice ~~filing with the state attorney~~ to the Attorney General ~~an~~ of the election, accompanied by the proof of required consent. Thereafter the trust shall be subject to s. 736.1208(5).

Section 8. This act shall apply to all actions filed on or after July 1, 2016.

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

WHITE PAPER

PROPOSED AMENDMENTS TO PART XII OF CHAPTER 736, FLORIDA STATUTES

NOTICE FOR CHARITABLE TRUSTS

I. SUMMARY

The purpose of the proposed amendments to Part XII of Chapter 736 of the Florida Statutes is to make consistent and clarify that notice for charitable trusts be sent to only one entity, the Attorney General, rather than to the state attorney in some instances and the Attorney General in others. The proposed amendments also define how the Attorney General is to receive notice under Part XII of Chapter 736 of the Florida Statutes. The proposed legislation is a product of study and analysis by the Trust Law Committee, Real Property, Probate and Trust Law Section of the Florida Bar (the "Committee").

II. CURRENT SITUATION

Section 736.0110(3) of the Florida Statues provides that the Attorney General may assert the rights of a qualified beneficiary with respect to a charitable trust[1] having its principal place of administration in the State of Florida. However, Part XII of Chapter 736 of the Florida Statutes, also governing charitable trusts,[2] requires that notice be given to and action be taken by the state attorney, rather than the Attorney General. Specifically, Part XII of Chapter 736 of the Florida Statutes provides:

- Section 736.1205 requires that the trustee of a charitable trust notify the state attorney if the power to make distributions are more restrictive than Section 736.1204(2) or if the trustee's powers are inconsistent with Section 736.1204(3).

- Section 736.1206(2) provides that the trustee of a charitable trust may amend the governing instrument with consent of the state attorney to comply with Section 736.1204(2).

- Section 736.1207 clarifies that Part XII does not affect the power of a court to relieve a trustee from restrictions on that trustee's powers and duties for cause shown and upon complaint of the state attorney, among others.

[1] "Charitable trust" for purposes of Section 736.0110 of the Florida Statutes means a trust, or portion of a trust, created for a charitable purpose as described in s. 736.0405(1).

[2] The provisions of Part XII of Chapter 736 of the Florida Statutes apply to all private foundation trusts and split interest trusts, whether created or established before or after November 1, 1971, and to all trust assets acquired by the trustee before or after November 1, 1971.

- Section 736.1208(4)(b) requires that a trustee who has released a power to select charitable donees accomplished by reducing the class of permissible charitable organizations must deliver a copy of the release to the state attorney.

- Section 736.1209 permits the trustee to file an election with the state attorney to bring the trust under Section 736.1208(5), relating to public charitable organization(s) as the exclusive beneficiary of a trust.

Together, section 736.0110 and Part XII of Chapter 736 of the Florida Statutes can be read to require that notice be given to the Attorney General for certain charitable trusts and to the state attorney for the same charitable trusts. There is no case law directly addressing this inconsistency. However, in dicta, the First District Court of Appeal in *Delaware ex rel. Gebelein v. Florida First National Bank of Jacksonville*, stated that, as a general rule, only the Attorney General may enforce a charitable trust because the beneficiaries of such a trust are the public at large. 381 So. 2d 1075, 1077 (1st DCA 1979). The court also recognized that an entity other than the Attorney General can be a proper party to enforce a charitable trust, including trustees and persons having a special interest.

Trustees are often confused as to whether the notifications, releases, and elections described in Part XII of Chapter 736 of the Florida Statutes must be provided to the Attorney General, the state attorney, or both when administering a charitable trust or in litigation matters involving charitable trusts. Accordingly, the Committee has proposed amendments to Part XII of Chapter 736 of the Florida Statutes to replace the state attorney with the Attorney General.

In addition, there is uncertainty as to how the Attorney General should be notified and receive releases or elections under Part XII of Chapter 736 of the Florida Statutes. The Committee has proposed amendments to Part XII of Chapter 736 of the Florida Statutes defining how the Attorney General should receive those notifications, releases, and elections.

III. EFFECT OF PROPOSED CHANGES

Under the proposed changes to Part XII of Chapter 736 of the Florida Statutes, the Attorney General, rather than the state attorney, would receive notifications, releases, and elections for charitable trusts under Sections 736.1205 and 736.1207 - 736.1209 of the Florida Statutes. Furthermore, the Attorney General, rather than the state attorney, would consent to a charitable trust amendment effectuated by the trustee under Section 736.1206 of the Florida Statutes. Lastly, the proposed changes define how the Attorney General is to be given the notifications, releases, and elections under Part XII of Chapter 736 of the Florida Statutes.

IV. FISCAL IMPACT ON STATE AND LOCAL GOVERNMENTS

The proposal may have a positive fiscal impact on the state attorney's office in that its employees would no longer be required to handle matters currently falling under Part XII of Chapter 736 of the Florida Statutes. The proposal may have a negative fiscal impact on the Attorney General's office in that its employees would be required to handle notifications related to matters currently falling under Part XII of Chapter 736 of the Florida Statutes, although the Committee has determined that under the current law, it is not uncommon for trustees to notify the Attorney General's office of matters involving Part XII of Chapter 736 of the Florida Statutes because of the inconsistency with Section 736.0110 of the Florida Statutes. As such, the fiscal impact to the Attorney General's office may be minimal. The proposal defining how the Attorney General is to receive notifications, releases, and elections under Part XII of Chapter 736 of the Florida Statues should have no fiscal impact.

V. DIRECT FISCAL IMPACT ON PRIVATE SECTOR

It is anticipated that this proposal will have a direct economic impact on the private sector by resolving various confusing provisions that require additional effort by the trustees of charitable trusts.

VI. CONSTITUTIONAL ISSUES

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

VII. OTHER INTERESTED PARTIES.

None.

LEGISLATIVE POSITION REQUEST FORM

GOVERNMENTAL AFFAIRS OFFICE

Date Form Received _____

GENERAL INFORMATION

Submitted By

Angela Adams, Chair, Trust Law Committee, of the Real Property Probate & Trust Law Section and Donald R. Tescher, Chair, Ad Hoc Committee on Decanting, a subcommittee of the Trust Law Committee
(RPPTL Approval Date_____, 2016)

Address

Angela Adams
540 4th Street N
St. Petersburg, FL 33701
Telephone: (727) 821-1249

Donald R. Tescher
925 S. Federal Highway, Suite 500,
Boca Raton, Florida 33432
Telephone: (561) 997-7008

Position Type

Ad Hoc Committee on Decanting, as subcommittee of the Trust Law Committee, RPPTL Section, The Florida Bar
(Florida Bar, section, division, committee or both)

CONTACTS

Board & Legislation Committee Appearance

Tae Kelley Bronner, 10006 Cross Creed Blvd, PMB 428, Tampa, Florida 33647, Telephone: (813) 907-6643 Email: tae@estatelaw.com
Peter M. Dunbar, Dean, Mead, Egerton, Bloodworth, Capouano & Bozarth, P.A., 215 S. Monroe Street, Suite 815, Tallahassee, FL 32301, Telephone: (850) 999-4100 Email: pdunbar@deanmead.com
Martha J. Edenfield, Dean, Mead, Egerton, Bloodworth, Capouano & Bozarth, P.A., 215 S. Monroe Street, Suite 815, Tallahassee, FL 32301, Telephone: (850) 999-4100 Email:medenfield@deanmead.com

Appearances Before Legislators

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

Meetings with Legislators/staff

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

PROPOSED ADVOCACY

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 legislation to expand and modernize the statutory authority for trustees to "decant" by distributing trust principal from one trust into a second trust and expand the notice requirements for the transaction, including changes to F.S. 736.04117

Reasons For Proposed Advocacy:

The proposed revisions to F.S. 736.04117: (1) allow a trustee to distribute principal in further trust pursuant to a power of distribution that is limited by an ascertainable standard (currently such distributions are only permitted pursuant to a trustee's power to distribute principal pursuant to an absolute power to make distributions); (2) add a provision to allow a trustee to distribute trust principal to a supplemental needs trust when a beneficiary is disabled; and (3) expand the notice requirements to require the trustee to provide a copy of the proposed distributee trust instrument prior to the distribution (currently, providing a copy of the proposed trust instrument is a safe harbor, but it is not mandatory).

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 known

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

Others
(May attach list if more than one)

None known

(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

The Florida Bankers Association

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

Tax Section of the Florida Bar

(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.

AD HOC DECANTING SUBCOMMITTEE
DRAFT STATUTE

An act relating to trusts, amending Section 736.04117, Florida Statutes, expanding the power of a trustee to make discretionary distributions to decant trust assets.

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

Section 1. Section 736.04117, Florida Statutes, is substantially amended to read:

736.04117 Trustee's power to ~~invade principal in trust~~ decant. —

~~(1)(a) Unless the trust instrument expressly provides otherwise, a trustee who has absolute power under the terms of a trust to invade the principal of the trust, referred to in this section as the "first trust," to make distributions to or for the benefit of one or more persons may instead exercise the power by appointing all or part of the principal of the trust subject to the power in favor of a trustee of another trust, referred to in this section as the "second trust," for the current benefit of one or more of such persons under the same trust instrument or under a different trust instrument; provided:~~ DEFINITIONS. – As used in this section, the term:

~~1. The beneficiaries of the second trust may include only beneficiaries of the first trust;~~

~~2. The second trust may not reduce any fixed income, annuity, or unitrust interest in the assets of the first trust; and~~

~~3. If any contribution to the first trust qualified for a marital or charitable deduction for federal income, gift, or estate tax purposes under the Internal Revenue Code of 1986, as amended, the second trust shall not contain any provision which, if included in the first trust, would have prevented the first trust from qualifying for such a deduction or would have reduced the amount of such deduction.~~

~~(b) For purposes of this subsection, an absolute power to invade principal shall include~~

(a) "Absolute power" means a power to invade principal that is not limited to specific or ascertainable purposes, such as health, education, maintenance, and support, whether or not the term "absolute" is used. A power to invade principal for purposes such as best interests, welfare, comfort, or happiness shall constitute an absolute power not limited to specific or ascertainable purposes.

(b) "Appointive property" means the property or property interest subject to a power of appointment.

(c) "Authorized trustee" means a trustee who has the power to invade the principal of a trust other than (i) the settlor or (ii) a beneficiary.

(d) "Internal Revenue Code" means the Internal Revenue Code of 1986, as amended.

(e) "Beneficiary with a disability" means a beneficiary of the first trust who the authorized trustee believes may qualify for governmental benefits based on disability, whether or not the beneficiary currently receives those benefits or is an individual who has been adjudicated incapacitated.

(f) "Current beneficiary" means a beneficiary that on the date the beneficiary's qualification is determined is a distributee or permissible distributee of trust income or principal. The term includes the holder of a presently exercisable general power of appointment but does not include a person that is a beneficiary only because the person holds any other power of appointment.

(g) "Governmental benefits" means financial aid or services from any state, federal or other public agency.

(h) "Power of appointment" means a power of appointment as defined in s.731.201(30).

(i) "Presently exercisable power of appointment" means a power of appointment exercisable by the powerholder at the relevant time. The term:

1. includes a power of appointment exercisable only after the occurrence of a specified event, the satisfaction of an ascertainable standard, or the passage of a specified time only after:

(a) the occurrence of the specified event;

(b) the satisfaction of the ascertainable standard; or

(c) the passage of the specified time; and

2. does not include a power exercisable only at the powerholder's death.

(j) "Substantially similar" means that there is no material change in a beneficiary's beneficial interests or in the power to make distributions. A power to make a distribution under a second trust for the benefit of a beneficiary who is an individual is substantially similar to a power under the first trust to make a distribution directly to the beneficiary. A distribution is for the benefit of a beneficiary if:

1. the distribution is applied for the benefit of a beneficiary;

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2. the beneficiary is under a legal disability or the trustee reasonably believes the beneficiary is incapacitated, and the distribution is made as permitted under this code; or

3. the distribution is made as permitted under the terms of the first trust instrument and the second trust instrument for the benefit of the beneficiary.

(k) "Supplemental needs trust" means a trust the authorized trustee believes would not be considered a resource for purposes of determining whether the beneficiary with a disability is eligible for governmental benefits.

(l) "Vested interest" means:

1. a current unconditional right to receive a mandatory distribution of income, a specified dollar amount or a percentage of value of a trust, or a current unconditional right to withdraw income, a specified dollar amount or a percentage of value of a trust, which is not subject to the occurrence of a specified event, the passage of a specified time, or the exercise of discretion; or

2. a presently exercisable general power of appointment.

A beneficiary's interest in a trust is not a vested interest if the trustee has discretion to make a distribution of trust property to a person other than such beneficiary.

(2) ~~The exercise of a power to invade principal under subsection (1) shall be by an instrument in writing, signed and acknowledged by the trustee, and filed with the records of the first trust.~~ DISTRIBUTION TO SECOND TRUST IF ABSOLUTE POWER.--

(a) Unless the trust instrument expressly provides otherwise, an authorized trustee who has absolute power under the terms of a trust to invade the principal of the trust, referred to in this section as the "first trust," to make current distributions to or for the benefit of one or more beneficiaries, may instead exercise such power by appointing all or part of the principal of the trust subject to such power in favor of a trustee of one or more other trusts, whether created under the same trust instrument as the first trust or a different trust instrument, including a trust instrument created for the purposes of exercising the power granted by this section, each referred to in this section as the "second trust" for the current benefit of one or more of such beneficiaries; provided:

1. The beneficiaries of the second trust may include only beneficiaries of the first trust; and

2. The second trust may not reduce any ~~under~~ vested interest.

(b) In an exercise of absolute power, the second trust may:

1. Retain a power of appointment granted in the first trust;

2. Omit a power of appointment granted in the first trust, other than a presently exercisable general power of appointment;

3. Create or modify a power of appointment if the powerholder is a current beneficiary of the first trust;

4. Create or modify a power of appointment if the powerholder is a beneficiary of the first trust who is not a current beneficiary, but the exercise of the power of appointment may take effect only after the powerholder becomes, or would have become if then living, a current beneficiary; and

5. Extend the term of the second trust beyond the term of the first trust.

(c) The class of permissible appointees in favor of which a created or modified power of appointment may be exercised may be broader than or different from the beneficiaries of the first trust.

(3) DISTRIBUTION TO SECOND TRUST IF NO ABSOLUTE POWER. Unless the trust instrument expressly provides otherwise, an authorized trustee who has a power (that is not an absolute power) under the terms of a first trust to invade principal to make current distributions to or for the benefit of one or more beneficiaries may instead exercise such power by appointing all or part of the principal of the first trust subject to such power in favor of a trustee of one or more second trusts. If the authorized trustee exercises such power:

(a) The second trusts, in the aggregate, shall grant each beneficiary of the first trust beneficial interests in the second trusts which are substantially similar to the beneficial interests of the beneficiary in the first trust.

(b) If the first trust grants a power of appointment to a beneficiary of the first trust, the second trust shall grant such power of appointment in the second trust to such beneficiary and the class of permissible appointees shall be the same as in the first trust.

(c) If the first trust does not grant a power of appointment to a beneficiary of the first trust, then the second trust may not grant a power of appointment in the second trust to such beneficiary.

(d) Notwithstanding paragraphs (a), (b), and (c) of this subsection ~~(1~~, the term of the second trust may extend beyond the term of the first trust, and, for any period after the first trust

would have otherwise terminated, in whole or in part, under the provisions of the first trust, the second trust may with respect to property subject to such extended term also:

1. Include language providing the trustee with the absolute power to invade the principal of the second trust during such extended term; and

2. Create a power of appointment if the powerholder is a current beneficiary of the first trust or expand the class of permissible appointees in favor of which a power of appointment may be exercised.

(4) DISTRIBUTION TO SUPPLEMENTAL NEEDS TRUST.

(a) Notwithstanding the provisions of subsections (2) and (3), unless the trust instrument expressly provides otherwise, an authorized trustee who has the power under the terms of a first trust to invade the principal of the first trust to make current distributions to or for the benefit of a beneficiary with a disability, may instead exercise such power by appointing all or part of the principal of the first trust in favor of a trustee of a second trust which is a supplemental needs trust if:

1. The supplemental needs trust benefits the beneficiary with a disability;

2. The beneficiaries of the second trust include only beneficiaries of the first trust; and

3. The authorized trustee determines the exercise of such power will further the purposes of the first trust.

(b) In exercising the power to invade principal under paragraph (a) of this subsection, the following rules apply:

1. The interest of a beneficiary with a disability in the second trust may, but need not be, a pooled trust as defined at 42 U.S.C. Section 1396p(d)(4)(c), as amended, or may, but need not, contain payback provisions consistent with 42 U.S.C. Section 1396p(d)(4)(a), as amended.

2. Except as affected by any change to the interests of the beneficiary with a disability, the second trusts, in the aggregate, shall grant each other beneficiary of the first trust beneficial interests in the second trusts which are substantially similar to such beneficiary's beneficial interests in the first trust.

(5) TAX RELATED PROVISIONS.

(a) An authorized trustee may not distribute the principal of a trust under this section in a manner that would prevent a contribution to that trust from qualifying for or that would reduce the exclusion, deduction, or other federal tax benefit that was originally claimed or could have been claimed for that contribution, including:

1. the exclusions under s. 2503(b) or 2503(c) of the Internal Revenue Code;

2. a marital deduction under s. 2056, 2056A, or 2523 of the Internal Revenue Code;

3. a charitable deduction under s. 170(a), 642(c), 2055(a), or 2522(a) of the Internal Revenue Code;

4. direct skip treatment under s. 2642(c) of the Internal Revenue Code; or

5. any other tax benefit for income, gift, estate, or generation-skipping transfer tax purposes under the Internal Revenue Code.

(b) If S corporation stock is held in the first trust, an authorized trustee may not distribute all or part of that stock to a second trust that is not a permitted shareholder under s. 1361(c)(2) of the Internal Revenue Code. If the first trust holds stock in an S corporation and the first trust is, or but for provisions of this section other than this subsection, would be a qualified subchapter-S trust within the meaning of s. 1361(d), the second trust instrument may not include or omit a term that prevents the second trust from qualifying as a qualified subchapter-S trust.

(c) Except as provided in paragraphs (a), (b) and (d) of this subsection, an authorized trustee may distribute the principal of a first trust to a second trust regardless of whether the settlor is treated as the owner of either the first or second trust under ss. 671-679 of the Internal Revenue Code; however, if the settlor is not treated as the owner of the first trust, then the settlor may not be treated as the owner of the second trust unless the settlor has the power at all times to cause the second trust to cease being treated as owned by the settlor.

(d) If an interest in property that is subject to the minimum distribution rules of s. 401(a)(9) of the Internal Revenue Code is held in trust, an authorized trustee may not distribute the trust's interest in the property to a second trust under subsection (2), (3) or (4) if the distribution would shorten the maximum distribution period otherwise applicable to such property.

(6) EXERCISED BY A WRITING. – The exercise of a power to invade principal under subsection (2), (3) or (4) shall be by an instrument in writing, signed and acknowledged by the authorized trustee, and filed with the records of the first trust.

~~(3)~~ (7) RESTRICTIONS. – The exercise of a power to invade principal under subsection ~~(1)~~ (2), (3), or (4):

(a) shall be considered the exercise of a power of appointment, other than a power to appoint to the authorized trustee, the authorized trustee's creditors, the authorized trustee's estate, or the creditors of the authorized trustee's estate, ~~and~~

(b) shall be subject to the provisions of s. 689.225 covering the time at which the permissible period of the rule against perpetuities begins and the law that determines the permissible period of the rule against perpetuities of the first trust~~.~~,

(c) may be to a second trust created or administered under the law of any jurisdiction, and

(d) may not (i) increase the authorized trustee's compensation beyond the compensation specified in the first trust instrument or (ii) relieve the authorized trustee from liability for breach of trust or provide for indemnification of the authorized trustee for any liability or claim to a greater extent than the first trust instrument; provided, however, that the exercise of the power may divide and reallocate fiduciary powers among fiduciaries and relieve a fiduciary from liability for an act or failure to act of another fiduciary as permitted by any other section of this code or under another provision of law or under common law.

(8) NOTICE.

~~(4)~~ (a) The authorized trustee shall notify all ~~qualified beneficiaries~~ of the ~~first trust,~~ following in writing, at least 60 days prior to the effective date of the authorized trustee's exercise of the authorized trustee's power to invade principal pursuant to subsection ~~(1)~~ (2), (3) or (4), of the manner in which the authorized trustee intends to exercise the power: ~~A copy of the proposed instrument exercising the power shall~~

1. all qualified beneficiaries of the ~~proposed instrument exercising~~first trust,

2. if paragraph (c) of subsection (5) applies, the settlor of the first trust,

3. all trustees of the first trust, and

4. any person who has the power ~~shall~~to remove or replace the authorized trustee of the first trust.

(b) To satisfy the trustee's notice obligation under this subsection~~.~~, the trustee shall provide copies of the proposed instrument exercising the power, the trust instrument of the first trust and the proposed trust instrument of the second trust.

(c) If all ~~qualified beneficiaries~~ of those required to be notified waive the notice period by signed written instrument delivered to the authorized trustee, the authorized trustee's power to invade principal shall be exercisable immediately.

(d) The authorized trustee's notice under this subsection shall not limit the right of any beneficiary to object to the exercise of the authorized trustee's power to invade principal except as provided in other applicable provisions of this code.

~~(5)~~ (9) SPENDTHRIFT. – The exercise of the power to invade principal under subsection ~~(1)~~ (2), (3) or (4) is not prohibited by a spendthrift clause or by a provision in the trust instrument that prohibits amendment or revocation of the trust.

~~(6)~~ (10) NO DUTY TO EXERCISE. – Nothing in this section is intended to create or imply a duty to exercise a power to invade principal, and no inference of impropriety shall be made as a result of an authorized trustee not exercising the power to invade principal conferred under subsections ~~(1)~~ (2), (3) and (4).

~~(7)~~ (11) NO ABRIDGMENT OF COMMON LAW RIGHTS. – The provisions of this section shall not be construed to abridge the right of any trustee who has a power of invasion to appoint property in further trust that arises under the terms of the first trust or under any other section of this code or under another provision of law or under common law.

Section 2. This act shall take effect upon becoming law. This act applies to all trusts created before, on, or after such date.

REAL PROPERTY, PROBATE AND TRUST LAW SECTION OF THE FLORIDA BAR WHITE PAPER ON PROPOSED CHANGES TO FLORIDA'S DECANTING STATUTE, F.S. SECTION 736.04117

I. SUMMARY

The proposed Section 736.04117 (the "Act") modifies Florida's current decanting laws in a manner that is consistent with Florida's policy of maximizing the usefulness of trusts, while at the same time protecting the settlor's intent and the interests of the trust beneficiaries. Florida's current decanting statute was enacted only 9 years ago, but it has quickly become outdated (in comparison to the decanting statutes of other states and the Uniform Decanting Act). This Act implements a moderate amount of modernization to Florida's decanting statute, but only to the extent such improvements are also consistent with Florida's policy of protecting the integrity of the settlor's intent and the interests of the beneficiaries.

The term "decanting" describes a trustee's distribution of principal from one trust into a second trust (as opposed to distributing principal directly to the beneficiary). Florida law currently allows a trustee to decant principal to a second trust when the trustee has absolute power to make principal distributions. *See Phipps v. Palm Beach Trust Co.*, 196 So. 2999 (Fla. 1940) and Section736.04117 (which was enacted in 2007). The trustee's authority to decant to the second trust is subject to several safeguards to ensure that the distribution is consistent with the settlor's intent.

Decanting is a useful tool for trustees and beneficiaries who wish to cure or avoid issues with the terms of the first trust, while still preserving the settlor's intention of maintaining the assets in trust (as opposed to distributing to a beneficiary outright). Unlike a trust modification, which often times is only available through a court proceeding, a trust decanting is an exercise of the trustee's discretionary authority to make distributions. This exercise avoids having to expend significant trust funds for judicial involvement. Further, the trustee's decision to decant is held to the same fiduciary standards as the decision to make a discretionary principal distribution (i.e., the beneficiary can sue the trustee for a decanting distribution to the same extent the beneficiary could sue the trustee for an outright distribution). This approach is adopted by the Restatement (Third) of Trusts, which states, in §87, that "when a trustee has discretion with respect to the exercise of a power, its exercise is subject to supervision by a court only to prevent abuse of discretion."

However, to avoid misuse and abuse, it is also necessary to impose restrictions and safeguards on the trustee's authority to decant to ensure that the power is exercised only in a manner that is consistent with the settlor's objectives and in the best interests of the beneficiaries. Decanting has been authorized in Florida since 1940 (76 years) and expressly authorized by the Florida Trust Code since 2007 (9 years), and there is no known pervasive abusive of the decanting authority. Therefore, it is believed that while the opportunity for abuse exists with any and all trust distributions, the authority to decant does not appear to be a favored or widely used vehicle for such abuse. Nonetheless, the proposal expands the notice requirements because doing so does not appear to diminish the usefulness of the decanting transaction.

The purpose of the proposed revisions is to improve, update, and modernize the current Florida Statute in three ways:

- Authorize a trustee to decant principal to a second trust pursuant to a power to distribute that is not an absolute power (i.e., pursuant to a power to distribute that is limited by an ascertainable standard);

- Authorize a trustee to decant principal to a supplemental needs trust when the beneficiary is disabled; and

- Expand the notice requirements that apply to a trust decanting done pursuant to Fla. Stat. § 736.04117.

II. CURRENT STATUS OF FLORIDA DECANTING LAW

Currently, a trustee can decant principal to a second trust only if the trustee has absolute power to make principal distributions. A trustee cannot decant pursuant to an authority to make principal distributions that is subject to a specific or ascertainable purpose, such as health, education, maintenance, and support.

If a trust beneficiary is disabled, the trustee cannot decant the assets to a supplemental needs trust (the assets of which are excluded in the determination of entitlements to government benefits) unless the terms of the trust provide that the trustee has absolute power to invade the trust principal for the benefit of the disabled beneficiary.

Currently, under Section 736.04117, a trustee is not required to provide a copy of the second trust (the trust that will receive the decanted assets) prior to the decanting transaction. A trustee is required to give notice of the decanting, but the statute does not mandate that the notice include a copy of the decanting instrument or a copy of the proposed second trust.

III. EFFECT OF PROPOSED CHANGES

The proposed legislation: (i) modifies Florida law to allow a trustee to decant principal to a second trust pursuant to a power to invade principal that is not an absolute power (i.e., a power to distributable principal for the beneficiary's health, education, maintenance and support); (ii) allows the trustee to decant assets to a supplemental needs trust when the beneficiary is suffering from a disability; and (iii) expands the notice requirements that apply to a trust decanting done pursuant to Section 736.04117. The following is a detailed summary of each revised subsection:

1. Section 736.04117(1):

This subsection is new. For statutory organizational purposes, terms used throughout the statute are defined at the outset to allow for ease of understanding and clarity. All of the definitions are new except the definition of "absolute power," which is found in Section 736.04117(1)(b). Among the definitions of particular significance are the definitions of "authorized trustee," "vested interest" and "substantially similar."

Authorized Trustee. Trustees under Section 736.04117 currently have full authority to decant, regardless of whether the trustee is a settlor or a beneficiary. In order to avoid any potential or conceivable transfer tax issues and conflicts of interest, the definition of "authorized trustee" has been added to specifically exclude a trustee who is a settlor or a beneficiary from exercising decanting authority.

Fixed Interests. Under Section 736.04117(1)(a)2., a decant may not reduce certain "fixed" interests, such as income, annuity and unitrust interests. Other non-contingent or discretionary interests of a beneficiary, such as a current unconditional right to withdraw principal or the possession of a general power of appointment, were subject to modification or elimination through a decant. The trend with more modern decanting statutes is to prevent any such modification or elimination, so the encompassing term "vested interests" has been introduced to include such interests.

Substantially Similar. "Substantially similar" generally means that there is no material change in the interest being modified, whether it is a beneficiary's beneficial interest or in the power of a trustee to make distributions. As explained in the official Comment to s. 12 of the Uniform Decanting Act, "a distribution standard that was more restrictive or more expansive would not be substantially similar. Thus if the first trust permitted distributions for support, health care and education, the beneficial interests would not be substantially similar if the second trust permitted distributions only for support and health care. If the first trust, however, permitted distributions for education without elaboration with respect to what was included within the term, the second trust might define education to include college, graduate school and vocational schools if otherwise consistent with applicable law."

2. Section 736.04117(2):

Subsection (2) authorizes decanting where an authorized trustee has an absolute power with respect to discretionary distributions of principal. This subsection is based upon existing Section 736.04117(1).

Subsection (2) expands upon current law by clarifying the permissible or impermissible modification of certain trust provisions. For example, under existing law, the statute is silent as to whether a power of appointment granted under the distributing trust (defined as the "first trust") must be maintained or may be modified in the receiving trust (defined as the "second trust"), or whether the second trust may grant a power of appointment to a beneficiary where none was created in the first trust. The general belief is that omitting, creating or modifying a power of appointment was permitted in a decant pursuant to an absolute power. Subsection (2) clarifies this point by specifically providing that the second trust may omit, create or modify a power of appointment.

In addition, the second trust may not reduce any vested interest which, as noted above, is an expansion on the existing prohibition on reducing certain fixed interests.

3. Section 736.04117(3):

Decanting is only permitted under Section 736.04117 if the trustee's discretionary distribution authority is absolute. Although Florida was one of the first states to enact a decanting statute, since the enactment of Section 736.04117, 22 other states have either enacted or modified decanting statutes and all such statutes – other than Michigan's statute - permit decanting where the trustee's discretionary distribution authority is not an absolute power, i.e., is limited to an ascertainable standard.

Subsection (3) modifies current law by specifically authorizing decanting where an authorized trustee has a power to invade principal which is not an absolute power. When such power is not absolute, the authorized trustee's decanting authority is restricted so that generally, each beneficiary of the first trust must have a substantially similar interest in the second trust. Substantially similar, in this instance, also includes powers of appointment, meaning that if a beneficiary is granted a power of appointment in the first trust, a substantially similar power must be granted to such beneficiary in the second trust.

Furthermore, as explained in the official Comment to s. 12 of the Uniform Decanting Act, "a severance of a trust [is permitted] if the beneficial interests in the second trust[s], in the aggregate, are substantially similar to the beneficial interests in the first trust. For this purpose, an equal vertical division of a trust in which multiple beneficiaries have equal discretionary interests would usually be considered to be substantially similar."

With respect term of the trust in which all interests must vest, subsection (3) specifically authorizes the second trust to extend the term from the first trust. In the event of any such extension (the "extended term"), the interests of beneficiaries during the extended term are not required to be substantially similar to those during the prior term. For example, if, under the first trust, where the trustee's discretionary authority is not absolute, a beneficiary's interest is required to be distributed upon the beneficiary's attaining age thirty-five, and under the second trust the beneficiary's interest continues instead for the beneficiary's lifetime, the trustees may be granted absolute discretionary authority for the term of the beneficiary's trust beginning with the beneficiary's thirty-fifth birthday; during the term prior to the beneficiary's thirty-fifth birthday, the beneficiary's interest in the second trust must be substantially similar to the beneficiary's interest in the first trust.

4. Section 736.04117(4):

Current law is silent as to whether a decant may take into consideration a particular beneficiary's disability and whether the beneficiary would be best served by the second trust contained supplemental needs provisions. If the trustee has absolute power, the trustee has the ability to decant to a supplemental needs trust; however, the trustee cannot eliminate the disabled beneficiary's "fixed interest".

Subsection (4) specifically authorizes a decant for supplemental needs purposes regardless of whether the authorized trustee has an absolute discretionary power or

discretionary power limited to an ascertainable standard. Nonetheless, if the decant to a second trust occurred pursuant to the authority granted in subsection (4), the interests of all beneficiaries, other than the disabled beneficiary, must be substantially similar to the interests of such beneficiaries in the first trust.

5. Section 736.04117(5):

Section 736.04117(1)(a)3. provides that certain tax benefits associated with the first trust, such as qualification for the federal estate tax marital deduction, must be maintained in the second trust. Certain additional tax provisions, such as direct skip treatment for generation-skipping transfer tax purposes or qualification as an eligible shareholder for a subchapter S corporation, are not referenced.

Subsection (5) considers and adopts such additional tax provisions, which also includes the gift tax annual exclusion and any and all other tax benefits for income, gift, estate or generation-skipping transfer tax purposes.

Subsection (5) also incorporates provisions regarding "grantor" trust status under Subchapter J of the Internal Revenue Code. Under subsection (5), grantor trust status is not a decanting consideration, meaning that an authorized trustee may decant from a grantor trust to a non-grantor trust and from a non-grantor trust to a grantor trust; with respect to the a transfer from a non-grantor trust to a grantor trust, the second trust must provide the settlor with the power to relinquish such grantor trust status.

6. Section 736.04117(6):

Subsection (6) incorporates Section 736.04117(2) in full and expands the provisions therein to incorporate the ability to decant pursuant to a non-absolute power (subsection (3)) and the ability to decant to a supplemental needs trust (subsection (4)).

7. Section 736.04117(7):

Subsection (7) is an expanded version of Section 736.04117(3). Subsection (7) explicitly recognizes that the second trust may be created under the laws of any jurisdiction and to institute certain safeguards to prohibit an authorized trustee from decanting to a second trust which provides the authorized trustee with increased compensation or greater protection under an exculpatory or indemnification provision. An authorized trustee is permitted to decant to a second trust that divides trustee responsibilities among various parties, including one or more trustees and others. The language is broad enough to include others to whom fiduciary powers can be given, whether currently authorized or authorized by future law, such as investment advisors and trust protectors.

8. Section 736.04117(8):

Section 736.04117(4) contains various notice provisions with respect to a decant by providing that notice of the exercise of the power to decant be provided to all

qualified beneficiaries of the first trust, in writing, at least 60 days prior to the effective date of the decant Subsection (8) maintains these notice requirements but also provides that notice be provided to, (a) the settlor of the first trust, if the first trust was not a grantor trust and the second trust will be a grantor trust; (b) all trustees of the first trust; and (c) any person with the power to remove the authorized trustee of the first trust.

Consistent with Section 736.04117(4), if all of those entitled to notice waive the notice period by signed written instrument, the authorized trustee may exercise the power to decant immediately.

Subsection (8) also provides that the notice provided by the authorized trustee also include copies of both the first and second trusts. The purpose for this additional requirement is to allow each notice recipient the opportunity to review the differences in the two trust instruments.

9. Section 736.04117(9):

Subsection (9) incorporates Section 736.04117(5), in full, and expands the provisions therein to incorporate the ability to decant pursuant to a non-absolute power (subsection (3)) and the ability to decant to a supplemental needs trust (subsection (4)).

10. Section 736.04117(10):

Subsection (10) incorporates Section 736.04117(5) in full and expands the provisions therein to incorporate the ability to decant pursuant to a non-absolute power (subsection (3)) and the ability to decant to a supplemental needs trust (subsection (4)).

11. Section 736.04117(11):

Subsection (11) incorporates Section 736.04117(7) in full.

IV. FISCAL IMPACT ON STATE AND LOCAL GOVERNMENTS

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

V. DIRECT IMPACT ON PRIVATE SECTOR

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

VI. CONSTITUTIONAL ISSUES

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

VIII. OTHER INTERESTED PARTIES

The Tax Section of the Florida Bar and the Florida Bankers Association may have an interest in this proposal.