

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



Executive Council Meeting

AGENDA

THE BREAKERS'
Palm Beach, Florida

Saturday, August 1, 2015
10:00 a.m.

BRING THIS AGENDA TO THE MEETING

Real Property, Probate and Trust Law Section
Executive Council Meeting

THE BREAKERS'
Palm Beach, Florida
August 1, 2015

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 June 6, 2015 meeting of Executive Council held at The Fountainbleu, Miami Beach, Florida. **pp. 11 - 43**

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

1. Recognition of Guests.
2. Recognition of General Sponsors and Friends of the Section. **pp. 44 - 46**
3. Upcoming Meetings.
4. Interim Action by the Chair or the Executive Committee.
 - A. Creation of Estoppel Task Force Ad Hoc Committee.
 - B. Approval of Continuation of Legislative Consultant's Agreement.

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

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

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

Statement of Current Financial Conditions. **p. 47**

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

IX. **CLE Seminar Coordination Report** — *Robert Swaine (Real Property) and William Hennessey (Probate & Trust), Co-Chairs p. 48*

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

XI. [Real Property Law Division Report](#)—*Andrew M. O'Malley, Director*

Action Items:

Real Property Litigation Committee — *Susan K. Spurgeon, Chair*

- A. Motion: to adopt as a Section legislative position to support an amendment to F.S. 90.902 regarding authentication of electronic records; to find that the legislative position is within the purview of the Section; and, to expend Section funds in support of the position. **pp. 49 - 54**
- B. Motion: to adopt as a Section legislative position to support an amendment to F.S. 95.281, clarifying that F.S. 95.281 is a statute of repose, not a statute of limitation, clarifying the formula for determining the repose period for a lien arising from advances by a mortgagee, and to restore to a mortgage holder the common law subrogation right it had for tax advances before enactment of this section; to find that the legislative position is within the purview of the Section; and, to expend Section funds in support of the position. **pp. 55 - 63**
- C. Motion to adopt as a Section legislative position to support amendments to F.S. 57.011, to repeal the non-resident cost bond requirement, and to F.S. 559.715 to amend the assignment of consumer debt notice; to find that the legislative position is within the purview of the Section; and, to expend Section funds in support of the position. **pp. 64 - 69**

XII. [Probate and Trust Law Division Report](#)—*Debra L. Boje, Director*

Action Items:

1. **Estate & Trust Tax Planning Committee** — *David J. Akins, Chair*

Motion: to adopt as a Section legislative position to support the creation of F.S. 689.151 to allow for joint tenancies with rights of survivorship, and tenancies by the entirety, in certain kinds of personal property without regard to the common law unities of time and title; to find that this legislative position is within the purview of the Section; and, to expend Section funds in support of the position. **pp. 70 - 77**

2. **Probate and Trust Litigation Committee** — *Jon Scuderi, Chair*

Motion: to adopt as a Section legislative position to support the amendment of F.S. 736.0802(10), 736.0816(20) and 736.1007(1), to clarify intent and application of 736.0802(10) when a trustee is sued for breach of trust; to find that the legislative position is within the purview of the Section; and, to expend Section funds in support of the position. **pp. 78 - 88**

3. **Probate Law & Procedure Committee** — *John C. Moran, Chair*

Motion: to adopt as a Section legislative position to support the amendment of F.S. 731.106(2), to confirm that Florida law governs the validity and effect of the disposition of Florida real property, whether owned by a resident or a nonresident; to find that such legislative positions is within the purview of the Section; and to expend Section funds in support of the position. **pp. 89 - 93**

Informational Item:

Trust Law — *Angela M. Adams, Chair*

Introduce a proposed Section legislative position to amend F.A. 736.0708(1), to clarify that co-trustees are each entitled to reasonable compensation, and that the aggregate compensation awarded by all co- trustees may be greater than reasonable compensation for a single trustee. **pp. 94- 99**

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

Action Items:

1. **Ad Hoc Homestead Study Committee** — *Shane Kelley (Probate & Trust) and Patricia Jones (Real Property), Co-Chairs*

Motion: to adopt as a Section legislative position amendments to F.S. 736.0103, 736.0201 to clarify the law regarding homestead property held in revocable trusts, to add a definition of homestead heirs, to clarify that the exemption from forced sale under Article X, Section 4 of the Florida Constitution inures to homestead heirs who receive the homestead property either outright or as beneficiaries of ongoing or continuing trusts created under the decedent's revocable trust, and to provide for specific rules regarding the expenses during the initial trust administration and passage of title to homestead property devised by the terms of a revocable trust, to find that the legislative position is within the purview of the Section; and, to expend Section funds in support of the position. **pp.100 - 127**

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

Motion to approve the Dean Mead Agreement for legislative consultant services for a 2 year term relating back to July 1, 2015 and to expend Section funds. **p.128**

Information Items:

1. **Ad Hoc Study Committee on Same Sex Marriage Issues** — *George Karibjanian (Probate & Trust) and Jeffrey Dollinger (Real Property), Co-Chairs*

Report on interim recommendations of committee in light of the Supreme Court of United States' decision of *Obergefell v. Hodges*, Opinion can be found at

http://www.supremecourt.gov/opinions/14pdf/14-556_3204.pdf

2. **Amicus Coordination Committee** — *Robert W. Goldman, John W. Little, III, Kenneth B. Bell and Gerald B. Cope, Jr., Co-Chairs*
Report on the decision of the Fourth District Court of Appeal in *Saadeh v. Connors*. [Saadeh v. Connors decision dated June 24, 2015] and [Amicus Brief filed April 9, 2015] **pp. 129 - 152**
3. **Budget Committee** — *Robert S. Freedman, Chair*

Report on new budget procedures and status of budget for 2016 – 2017 Fiscal Year.
4. **Fellows Committee** — *Ashley McRae, Chair*

Report and introduction of new fellows for 2015 – 2017. **pp. 153 - 154**
5. **Legislation Committee** — *Tae Kelley Bronner (Probate & Trust) and Steven Mezer (Real Property), Co-Chairs*
 - A. Final Report of 2015 Legislative Session - Legislative Positions and Interested Matters. **pp. 155 - 160**
 - B. Legislation Approval and Education Process. **pp. 161 - 162**
 - C. Report on the 2016 Legislative Session Timetable. **p. 163**
6. **Member Communication and Information Technology Committee** — *William A. Parady, Chair*
 - A. Report on status of website.
 - B. Importance of committees updating content on committee webpages.
7. **Professionalism and Ethics Committee** — *Lawrence J. Miller, Chair*

Report on the RPPTL Section's objections to the revised proposed amendment to *Rules Regulating The Florida Bar*, Rule 4-4.2, by the City, County and Local Government Section and the Government Law Section, and Letter from Michael Dribin dated June 29, 2015. **pp. 164 - 175**
8. **Publications:**
 - A. **ActionLine Committee** — *Silvia Rojas, Chair*

Report on writer's guidelines and deadlines. **pp. 176 - 178**

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

Report on writer's guidelines and deadlines. **pp. 179 – 180**

9. **Sponsor Coordination Committee** — *Wilhelmina F. Kightlinger, Chair*

Report on current sponsors and existing opportunities.

XIV. 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. **Landlord and Tenant** –Rick Eckhard Chair; Brenda Ezell, Vice Chair.
9. **Liaisons with FLTA** – Norwood Gay and Alan McCall, Co-Chairs; Alexandra Overhoff and James C. Russick, Co-Vice Chairs.
10. **Real Estate Certification Review Course** – Jennifer Tobin, Chair; Manual Farach and Martin Averbach, Co-Vice Chairs.
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 Brittan, 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. Probate and Trust Law Division Committee Reports — *Debra L. Boje, Director*

1. **Ad Hoc Guardianship Law Revision Committee** – David C. Brennan, Chair; Sancha Brennan Whynot, Hung V. 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 Edward 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 Study Committee on Spendthrift Trust Issues** – Lauren Young Detzel and Jon Scuderi, Co-Chairs
5. **Asset Protection** – George Daniel Karibjanian, Chair; Rick Roy Gans and Brian Michael Malec, Co-Vice-Chair
6. **Attorney/Trust Officer Liaison Conference** – Laura K. Sundberg, Chair; Stacey L. Cole, (Corporate Fiduciary), Tattiana Brenes-Stahl and Patrick C. Emans, Co-Vice Chairs
7. **Digital Assets and Information Study Committee** – J. Eric Virgil, Chair; Michael Travis Hayes and S. Dresden Brunner, Co-Vice Chairs
8. **Elective Share Review Committee** – Lauren Young Detzel and Charles I. Nash, Co-Chairs; Jenna Rubin, Vice-Chair
9. **Estate and Trust Tax Planning** – David James Akins, Chair; Tasha Pepper-Dickinson and Robert Logan Lancaster, Co-Vice Chairs
10. **Guardianship, Power of Attorney and Advanced Directives** – Hung V. Nguyen, Chair, Tattiana Brenes-Stahl, David C. Brennan, J. Eric Virgil, and Nicklaus Joseph Curley, Co-Vice Chairs
11. **IRA, Insurance and Employee Benefits** – L. Howard Payne and Kristen M. Lynch, Co-Chairs; Carlos A. Rodriguez, Vice Chair

12. **Liaisons with ACTEC** – Michael David Simon, Bruce Michael Stone, Elaine M. Bucher, and Diana S.C. Zeydel
13. **Liaisons with Elder Law Section** – Charles F. Robinson and Marjorie Ellen Wolasky
14. **Liaisons with Tax Section** – Lauren Young Detzel, William R. Lane, Jr., Brian C. Sparks and Donald R. Tescher
15. **Principal and Income** – Edward F. Koren, Chair; Pamela O. Price, Vice Chair
16. **Probate and Trust Litigation** – Jon Scuderi, Chair; James Raymond George, John Richard Caskey, and Robert Lee McElroy, IV, Co-Vice Chairs
17. **Probate Law and Procedure** – John C. Moran, Chair; Sarah S. Butters, Michael Travis Hayes and Mathew Henry Triggs, Co-Vice Chairs
18. **Trust Law** – Angela M. Adams, Chair; Tami F. Conetta, Jack A. Falk and Mary E. Karr, Co-Vice Chairs
19. **Wills, Trusts and Estates Certification Review Course** – Jeffrey Goethe, Chair; Linda S. Griffin, Seth Andrew 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.

Minutes of the
Real Property, Probate and Trust Law Section
Executive Council Meeting¹
June 6, 2015
Fontainebleau, Miami Beach, Florida

I. Call to Order — Michael A. Dribin, Chair

The meeting was held at the Fontainebleau, Miami Beach, Florida. Michael A. Dribin, Chair, called the meeting to order at 10:00 am.

II. Attendance — Debra L. Boje, Secretary

Debra L. Boje reminded members that the attendance roster was circulating to be initialed by council members in attendance at the meeting.

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

III. Minutes of Previous Meeting — Debra L. Boje, Secretary

Debra L. Boje moved to approve the Minutes of the March 21, 2015 meeting of the Executive Council held at the Orlando Grande Lakes Resort, Orlando, Florida on pages 11-44 of the Agenda.

The Motion was approved without opposition.

IV. Chair's Report — Michael A. Dribin

1. Welcome

Mr. Dribin welcomed Council members and Section members in attendance.

2. Thank you to Sixtieth Anniversary Committee

Mr. Dribin advised Council members that in honor of the Section's 60th

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

Anniversary, at each seat, is a flash drive which contains photos compiled from past chair's photo albums. Mr. Dribin thanked Bob and Mike Swaine for their hard work putting the presentation together.

3. Convention Gift and Thank you to Convention Coordination Committee

Mr. Dribin announced that at the lunch break each Council member would be given a gift. The gift is a small tile that helps find missing items. Mr. Dribin thanked Laura Sundberg and Stuart Altman co-chairs of the Convention and the members of their committee, Raul Ballaga, Jennifer Jones, Tae Kelley Bronner, and Marsha Madorsky for all their hard work to ensure a successful Convention.

Mr. Dribin asked that members of the Council keep Laura Sundberg in their thoughts. This past week she had to undergo surgery for breast cancer. The procedure went well. Laura regrets not being able to be here. We are sending a card to Laura. Anyone wanting to send a note please see Deborah Goodall.

Mr. Dribin also thanked Chase Early from The Florida Bar who has been assisting MaryAnn Obos in Orlando and this week and will be stepping in to help out while MaryAnn is on maternity leave.

4. Recognition of those elected at the Section's 2015 Annual Meeting

Mr. Dribin congratulated all of those elected as officers and at large members at the annual Section meeting yesterday.

5. Recognition of Recipients of Section Annual Awards

Mr. Dribin recognized the following recipients of the Section annual awards:

Rising Star Award: Brian Hoffman (Real Estate) and Hung Nguyen (Probate)

At-Large Member of the Year: Alexander Hamrick

William S. Belcher Lifetime Professionalism: Lawrence Miller

Robert C. Scott Memorial Award: Elaine Bucher

John Arthur Jones Annual Service Award: Steven Mezer, Robert Goldman and William Hennessey.

6. Introduction of speaker on behalf of The Florida Bar Foundation

Mr. Dribin thanked the Florida Bar Foundation for its continued participation with the Section and introduced David Rothman who is the Second Vice-President of the Florida Bar Foundation to say a few words.

Mr. Rothman thanked Council members, Gail Fagan, Amy Beller and Angela Adams who became Fellows of the Foundation this past week. Mr. Rothman advised that the Foundation has been responsible for helping 14 men who were in prison and found innocent. He proceeded to tell the story of "James" who in 1974 had just graduated from high school. A nine year old boy in the neighborhood was kidnapped and raped. The young boy provided a

description of the man and said he had sideburns and thought the man's name was Jimmy. The assistant principal of the high school who happened to be the boy's uncle, advised the police that there was a kid in his school that could fit that description. James was subsequently arrested. The only person in the line-up with sideburns was James and thus, the young boy identified James as the person who kidnapped and raped him. The FBI said semen evidence could not exclude James. The defense expert testified it could not have been James. James' sister testified that he was with her at the time of the crime. James was convicted and sentenced to life. Thirty-five years later the Foundation became involved in the case and funded over half of James' defense and through DNA testing proved James was innocent. Mr. Rothman concluded by asking members of the Council to consider the potential impact a contribution to the Foundation can do for the lives of others. Materials for making donations are available from MaryAnn.

7. Acknowledgment of General Sponsors and Friends of the Section

Mr. Dribin recognized and thanked the following General Sponsors and Friends of the Section for their continued support to 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*
My Life Audit – *Joe Gitto*

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*

Hospitality Suite
Professional Lien Search, LLC – *Jesse Biter*

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*

Guardian Trust – *Ashley Gonnelli*

Kravit, The Estate Department – *Van Stillman*

North American Title Insurance Company – *Geoffrey B. Ginn, Geoff Harris*

Valuation Services, Inc. – *Jeff Bae, JD, CVA*

Wilmington Trust – *David Fritz*

Mr. Dribin reminded the Council how important the support of our Sponsors is to the Section. Mr. Dribin advised that Mr. Andrew O'Malley and Ms. Deborah Goodall would each introduce the Committee Sponsors from their respective Divisions as part of their reports.

V. Liaison with the Board of Governors - Andrew B. Sasso

Mr. Dribin advised that Mr. Sasso was not able to be with us today. Mr. Dribin introduced Michael Higer who would be presenting the Board of Governors report on behalf of Mr. Sasso. Mr. Higer advised at the last Board of Governor's meeting the JNC nominations were approved and were being sent to the Governor. The budget for the following year was approved. As part of the budget, the proposed change for the allocation of expenses for overhead to the various sections was approved. Two new committees were created: a standing committee and board committee on technology. A proposed rule change to 6-10.3 passed its first reading. This rule change would require 6 hours of CLE on technology. It has not been decided whether this 6 hours would be in addition to the existing 30 hours or incorporated into the 30 hours. This will be decided at the next board meeting.

VI. Address by President of the Florida Bar, Gregory W. Coleman

Mr. Dribin advised that he was pleased to announce that Gregory Coleman, the current President of The Florida Bar was here to speak to us today. Mr. Dribin expressed to the Council how vital Mr. Coleman has been in helping the Section with its issues it has had with The Florida Bar particularly the method in which expenses were being allocated to the Section. Mr. Dribin explained that Michael Gelfand and he had lunch with Mr. Coleman at the immediate start of his term of office. Mr. Coleman listened, took notes and then took action to resolve our issues. Mr. Dribin thanked Mr. Coleman for his help. Mr. Dribin proceeded to introduce Mr. Coleman and invite him to begin his presentation on the threats and encroachments to the future practice of law.

Mr. Coleman thanked Mr. Dribin for allowing him to speak. Mr. Coleman recognized that the Real Property, Probate and Trust Law Section is the largest section of The Florida Bar and arguably the best run Section. Mr. Coleman explained that when Gwynne Young was President she recognized that there were issues that needed to be addressed in our profession. She formed a three year committee called Vision 2016. That committee began to realize that there were drastic changes that needed to be addressed and tackled. The committee realized that the people that were ultimately going to decide the issues were the Florida Supreme Court. The committee invited the Supreme Court justices to attend their subcommittee meeting. This meeting started an open dialogue of the issues. Mr. Coleman proceeded to present his power-point presentation. Mr. Coleman explained that the middle class demand for legal services is not being met. The middle class is in essence priced out of the market. They have too much money for pro-bono services and not enough money to be able to afford a lawyer. Outside businesses are finding ways to meet their needs. There is a gap in access to justice.

Several controversial programs are starting up around the country. The Supreme Court of Washington state has now allowed Limited License Legal Technicians to provide legal services. They are non-lawyers who can practice without the supervision of a lawyer. New York now has a pilot program and California is considering adopting a program as well. D.C. created a limited exception that allows non-lawyers to create, own or manage a law firm. Common law countries like the UK, Australia and Canada are considering the establishment of a regulatory system to permit alternative business structures that would allow non-lawyer and/or external ownership and management. It is only a matter of time before the issue will have to be addressed as to whether the ethics rules blocking non-lawyer ownership of law firms should be reconsidered.

The legal profession is beginning to experience “disruptors” in the delivery of legal services. Other industries have already experienced these disruptors. The best example is “Uber.” The taxi cab industry and regulators fought to prevent Uber from entering the market, but consumer demand ultimately won. Our profession is seeing the same thing with on-line forms. LegalZoom has served over 2 million customers. RocketLawyer refers 1.5 million legal matters per month. Avvo rating service has over 70 million visits per year and generates over 8.5 billion in legal business nationwide. Many question whether Avvo is a lawyer referral service? Some say yes others say no.

Vision 2016 is addressing access to legal service. It will recommend rule changes to allow expansion of unbundled legal services and limited scope representation. Vision 2016 will also define competencies that new lawyers should have. It will address Bar admissions and whether reciprocity should be expanded. Fifteen states now allow uniform bar examinations and New York will begin using the program in the summer of 2016. The final area of focus for Vision 2016 is technology. Technology is changing and we need to integrate these changes into our practice.

Mr. Coleman concluded by encouraging Council members to get engaged. The floor was then open for questions.

VII. Chair-Elect's Report — Michael J. Gelfand, Chair-Elect

1. Mr. Gelfand advised that the Bylaw amendments approved at our last meeting in Orlando are working their way through The Florida Bar process. The Florida Bar staff may have some additional technical changes.

2. Mr. Gelfand reminded all Council members that it was imperative that they submit a current updated photo for the Section directory.

3. Mr. Gelfand reminded members that MaryAnn Obos will be going on maternity leave in a few months. Chase Early will be on-site administrator for Berlin and the Breakers. CLE will be handled by Willie Mae Shepherd. The administrator for all other matters will be Dixey Teel.

4. Mr. Gelfand advised that in the materials there is a year round committee schedule for the Executive Council Meetings. **pp. 48-59**. He encouraged everyone to review it.

5. Mr. Gelfand advised that the Breakers and Berlin room blocks are sold out. Contact MaryAnn if you want to be put on the list. The main events for Berlin will begin on October 1, 2015. There will some optional tours available on September 30, 2015. Mr. Gelfand reviewed the many wonderful tours and events that are planned for Berlin. For future out of state meetings we may be looking at requiring those who attend to sign up for the various events in order to be eligible for rooms in the room block.

6. Mr. Gelfand congratulated Council member Wilhelmina Kightlinger who was recently inducted as a fellow to the American College of Real Estate Lawyers.

7. Mr. Gelfand announced that immediately after the meeting a photo would be taken of all Board Certified Council members.

VIII. Treasurer's Report — S. Katherine Frazier

Katherine Frazier's treasurer report included highlighting the key changes to The Florida Bar's new budget protocol system. Katherine explained that the Bar's overhead will now be allocated to all programs, including section management and CLE courses, based on time and costs.

This change is an effort to create a more stable allocation of overhead for the program areas which will in turn allow the Bar's CFO to create a more stable management fee. Basically using the concept of a fee for services, Section and CLE programs will be charged an all inclusive management fee that will cover the various departments' time and office expenses.

The Bar will no longer bill separately the Section for registrar services, graphic design services or meetings department services.

The Bar will continue to bill for direct expenses, such as printing, copying, postage fees, advertising, audio visual services, etc. Katherine then explained in more detail the different fees that would be charged by the Bar for the additional separate programs as follows:

- CLE – jointly sponsored between Section and with the Bar CLE Committee (regular CLE)
- Section Service Programs (Bar Defined)
- Section sponsored CLE (Section hybrid service program) – not joint with Bar CLE Committee
- Section special projects (might not be CLE related at all)

Katherine indicated that generally we do think that these changes will benefit our Section, not necessarily in any dramatic expense change, but primarily in budgeting and planning. Our Section will continue to work closely with the Bar in the process. Katherine thanked the Bar because we do believe a lot of these changes were due in response to our Section's concerns.

Ms. Frazier advised that the financial summary could be found on page 60 of the Agenda and noted that we are ahead of budget. Ms. Frazier thanked Section sponsors for their continued financial contributions to the Section as a result of positive CLE numbers and good expense control.

IX. Director of At-Large Members' Report — Shane Kelley

Mr. Shane Kelley reported that there were multiple ALMS that were cycling off of ALMS and taking leadership positions as chairs and vice chairs of committees. Mr. Kelley thanked those ALMS for their service and congratulated them on their appointments. Mr. Kelley also reported that the work on the directory of Section members who are also certified mediators is almost complete and hopefully will be up and running by The Breakers meeting.

X. CLE Seminar Coordination Report — CLE Seminar Coordination – Tae Kelley Bronner (Probate & Trust), Robert Swaine (Real Property) Co-Chairs

Ms. Bronner thanked everyone who has spoken at a seminar this year. Ms. Bronner called everyone's attention to the list of future programs in the Agenda. Ms. Bronner reminded committee chairs that each committee is now required to put on a CLE each fiscal year. Each committee has a choice of putting on (i) three 1 hour lunch time CLEs; (ii) a half-day webinar; or (iii) a full scale CLE. Ms. Bronner advised that if you are a committee chair and do not see your committee listed you need to get with Bill Hennessey or Bob Swaine.

Ms. Bronner noted that the Cyber Breach CLE listed for July has been moved to September and in July a FR/BAR contract webinar will be put on by the Residential Real Estate Committee to review the changes made to the contract.

Finally, Ms. Bronner announced that the Attorney's Trust Officer's seminar has been moved to August and the registration forms will be going out next week

XI. Kids Committee Report – Steven Goodall, Chair; Laura Sundberg, Advisor

No report.

XII. Real Property Law Division — Andrew M. O’Malley, Real Property Law Division Director

Recognition of Committee Sponsors:

Mr. Andrew O’Malley recognized the following Real Property Division Committee Sponsors:

Attorneys’ Title Fund Services, LLC – Ted Conner
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

Formation of New Taskforce:

Mr. O’Malley announced that a taskforce has been formed to consider the association estoppel issue. There will be a report at the Breakers. Anyone interested in having input on the taskforce should see Robert Freedman or Steve Mezer.

Action Item:

1. **Residential Real Estate & Industry Liaison Committee** --- Salome J. Zikakis, Chair

Mr. O’Malley called upon Thomas Ball to present the committee report. Mr. Ball provided a brief overview of the changes.

Mr. Ball moved on behalf of the Committee:

To approve the 2015 edits to the FR/BAR Residential Contract for Sale and “Homeowner’s/Flood Insurance”, proposed by the Florida Realtor-Attorney Joint Committee, primarily to address requirements of the Consumer Financial Protection Bureau (“CFPB Requirements”) and changes being implemented by mortgage lenders as of 8/1/2015 for residential real estate closings.

The Motion was approved by the required two-thirds vote.

Information Items:

1. Real Property Litigation Committee --- Susan K. Spurgeon, Chair

Mr. O'Malley called upon Susan Spurgeon who presented the following proposed legislation from her committee that will be voted upon at the meeting at the Breakers:

A. Report on possible revisions to F.S. §90.902 concerning authentication of electronic records.

Ms. Spurgeon advised that the proposed changes are the result of unintended consequences of e-filing. In certain situations the rules or statutes require that certified copies must be filed in the court file. There, however, are no longer court files. Thus, the proposed revisions would allow you to scan and e-file a certified copy of a document. With the advent of technology often times the Judge is able to verify certain facts through the internet. For example, the Kelly Blue Book value of a car. Rather than getting a certified copy of something that can otherwise be authenticated by looking on the internet the proposed legislation would allow the Judge to take judicial notice.

B. Report on possible revisions to F.S. §95.281 to: (i) clarify F.S. §95.281 as a statute of repose, as opposed to a statute of limitation; (ii) make the repose period for a lien arising from advances by mortgagee simpler to calculate; and, (iii) to restore to mortgage holders the common law subrogation rights they had for tax advances prior to enactment of this section.

C. Report on possible revisions to F.S. §57.011 and to F.S. §559.715 to delete non-resident cost bond and to amend assignment of consumer debt notice.

2. Real Property Problems Study Committee --- William Theodore Conner, Chair

Mr. O'Malley next called upon William Theodore Conner to present the following informational reports from his committee that will be voted upon at our next meeting.

A. Report on possible revisions to F.S. §713.07 regarding construction lien stop/start procedures to provide a way of safely resetting priority, in part, between lienors and a mortgage or deed that is given by the owner during the construction of improvements after the recording of a Notice of Commencement.

B. Report on possible revisions to portions of Chapter 82, Florida Statutes,

dealing generally with unlawful detainer, in order to address the problem of squatters on vacant property.

XIII. Probate and Trust Law Division — Deborah P. Goodall, Director

Ms. Deborah Goodall recognized the following Probate and Trust Law Division Committee Sponsors:

Committee Sponsors

BNY Mellon Wealth Management – *Joan Crain*
IRA, Insurance & Employee Benefits Committee
&
Probate Law and Procedure Committee

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 Appraisals – *Bianco Morabito*
Estate & Trust Tax Planning Committee

Life Audit Professionals – *Stacy Tacher*
IRA, Insurance & Employee Benefits Committee

Management Planning, Inc. – *Roy Meyers*
Estate & Trust Tax Planning Committee

Northern Trust – *Brett Rees*
Trust Law Committee

Information Items:

1. Estate and Trust Tax Planning Committee – Elaine M. Bucher, Chair

Ms. Goodall called upon David Akins to present the report of the committee on the status of proposed legislation regarding joint tenancies with rights of survivorship and tenancies by the entireties.

Mr. Akins advised that the committee is recommending the creation of a new statute which would provide that joint tenancies with rights of survivorship and tenancies by the entireties may be created in personal property without regard to the unities of time and title required under common law. The proposed statute would also provide that any personal property held in the name of Husband and Wife is presumed to be tenants by the entireties property unless there is a writing to the contrary. 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 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.

Mr. Akins advised that it may be necessary to tweak the wording of the statute prior to being voted upon at the Breakers depending on the United States Supreme Court's decision regarding same-sex marriages.

2. Probate and Trust Litigation - Thomas M. Karr, Chair

Ms. Goodall next called upon Thomas Karr to present his committee's informational report on the status of proposed legislation regarding a trustee's payment of attorney's fees and costs from assets of the trust in connection with a claim or defense of breach of trust.

Mr. Karr provided an overview of the purpose of the legislative change and reviewed the proposed language.

3. Probate Law and Procedure - John C. Moran, Chair

A. Mr. Goodall called upon John Moran to provide his committee's informational report on the status of proposed legislation amending F.S. §731.106, reaffirming the legal principle that Florida law governs the testamentary disposition of real property located in Florida even when the real property is owned by a nonresident of Florida.

Mr. Moran presented his committee report. Mr. Moran advised that the Real Property Problem Study Committee has reviewed the proposed changes and their comments have been incorporated into the proposed legislation.

B. Ms. Goodall concluded her report by recognizing Matthew Triggs as newly-appointed Chair, Florida Bar Probate Rules Committee.

XIII. General Standing Committees — Michael J. Gelfand, General Standing Division Chair and Chair-Elect

Information Items:

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

Mr. Gelfand called upon Robert Goldman, the newest recipient of the John Arthur Jones Service Award, to present the report of the Amicus Coordination Committee.

Mr. Goldman provided reports on the following:

A. Report on the status of the Section's *amicus* position in the Supreme Court of Florida, reviewing *Golden v. Jones*, 126 So. 3d 390 (Fla. 4th DCA, 2013).

Mr. Goldman reminded the Council that this case pertained to the limitation period for claims of reasonably ascertainable creditors in a probate. The Section supported the position of the Fourth DCA in *Golden* and argued the decisions of the First, Second and Fifth DCA's were wrong. Oral arguments were heard on May 6, 2015.

B. Report on the status of the Section's *amicus* position in the Supreme Court of Florida, answering certified questions in *Rogers v. U.S.*

Mr. Goldman explained that this case involved a question certified by the Court of Claims to the Supreme Court of Florida. The question related to whether a deed means what it says such that parol evidence should not be allowed to be introduced to interpret a deed that is unambiguous on its face. Oral argument was on June 2, 2015. Mr. Goldman believed the Court would come down on the side of the Section.

C. Report on request from Fourth District Court of Appeal to brief the following issue in *Saadeh v. Connors*:

In light of Florida Statute Section 744.331(2)(b) and 744.3031(1), which requires the court to appoint an attorney to represent an alleged incapacitated person, does the attorney for the guardian owe a duty of care to the alleged incapacitated person?

and the Executive Committee's decision to accept the request and brief the issue to support that the lawyer for the emergency temporary guardian owes a duty of

care to the temporary ward (and alleged incapacitated person), even when the temporary ward has counsel.

Mr. Goldman advised that there would not be oral argument in this case. [Secretary Note: The committee report corrected a misperception created by the agenda that that the Section was taking a position that there was not a duty of care].

Mr. Goldman concluded by thanking the Co-Chairs of his Committee for their hard work. He also recognized Paul Hill at The Florida Bar for his quick response in getting the briefs approved.

2. **Fellows** --- Brenda B. Ezell and Hung V. Nguyen, Co-Chairs

Mr. Gelfand called upon Brenda Ezell to present the report of the Fellow Committee. Ms. Ezell announced that the new Fellows being added for the 2015-2016 fiscal year are as follows:

Real Estate:

Christopher A. Sajdera
Bridget M. Friedman

Probate/Trust:

Jennifer Grosso
Stacy B. Rubel

3. **Homestead Study Committee** --- Shane Kelley, Chair

Mr. Gelfand called upon Shane Kelley to report on the status of the Homestead Study Committee's proposed legislation. Mr. Kelley explained that the primary issues that are addressed by the proposed legislation pertain to the treatment of homestead property held in a revocable trust upon the death of the grantor. The proposed legislation addresses when the exemption from creditor claims is preserved. The proposed legislation also addresses the passage of title when homestead property is held in trust. Mr. Kelley explained that the law currently is clear that if property is not properly devised it passes at the moment of death to the rightful takers. The Trustee cannot sell the property. The proposed legislation continues existing law on this issue. There is no guidance as to what happens if the property is lawfully devised. Logic would suggest the result should be the same. The committee's proposed legislation seeks to resolve this issue and create a parallel result whether homestead property passes through a will or trust in as much as the property cannot be sold by the trustee or used to pay administrative expenses. The proposed legislation further seeks to create a lien statute similar to that provided under the Probate Code that allows the Trustee to take possession of

the homestead property. Unlike the Probate Code there are multiple judicial and non-judicial remedies for the sale of the property pending final determination of the lien amount. The final issue addressed in the proposed legislation seeks to afford the probate court jurisdiction to determine homestead status of real property held in a trust in a pending probate proceeding.

Mr. Gelfand opened the floor for discussion. Mr. Waller requested the committee reconsider its proposal and allow a Trustee who has a general power of sale to have authority to sell homestead property that is properly devised and not subject to a specific bequest. Mr. Waller asserted that requiring beneficiaries to sign off on deeds will create title problems. Mr. Homer Duvall expressed concern as well as to the proposed legislation. Melissa Murphy expressed her support for the proposed legislation recognizing that it may not be perfect but it does provide clarity and provides a much needed resolution. Ms. Murphy urged that the proposed legislation proceed as written. Tae Bronner reiterated that it is the only logical conclusion that if the Trustee has authority to sell the property that the beneficiaries are not entitled to creditor protection. Mr. Rohan Kelley pointed out that the grantor could provide in the document that the Trustee has the power to sell the homestead property. If such a provision were added, however, the property would lose its protection from creditors. Mr. Kelley concluded by expressing that the results should be the same regardless of whether property is devised by will or trust.

Mr. Gelfand thanked Mr. Kelley for presenting his report and the committee for their efforts.

3. Legislation --- William T. Hennessey, III (Probate & Trust) and Robert S. Freedman (Real Property), Co-Chairs

A. Legislation Committee Website. Robert Freedman advised that the Committee was in the process of working on the legislative archive in conjunction with the Fellows. When the project is complete you will be able to look at the Section's prior positions, the proposal, the legislative white paper and position form and the result.

B. Status of Section 2015 Legislative Positions and Interested Matters. Bill Hennessey thanked the legislative team for all of its hard work. There were many difficult hurdles that had to be jumped in dealing with the various guardianship legislation that was proposed throughout the session. Mr. Hennessey called upon Peter Dunbar to present the 2015 legislative summary. Mr. Dunbar advised that the Legislature will have a special session this year. In 2016 the session begins in January instead of March. It is anticipated committees will begin in August. Mr.

Dunbar advised they were in the process of securing sponsors for the Section legislation.

C. 2016 Legislative Session Timetable. Mr. Freedman referred the Council to page 179 of the Agenda that has the listing of dates for 2016 legislation. The Breakers is the last time to have legislation approved in the normal course of operation.

4. Professionalism and Ethics Committee --- Lawrence J. Miller, Chair

Michael Gelfand called upon Lawrence Miller to present his committee's report. Before turning the podium over to Mr. Miller, Mr. Gelfand congratulated him on being the latest recipient of the William S. Belcher Lifetime Professionalism Award.

Mr. Miller proceeded to provide his report on the RPPTL Section's objections to the first revised proposed amendment to *Rules Regulating The Florida Bar*, Rule 4-4.2, by the City, County and Local Government Section and the Government Law Section, and second revised proposed amendment draft date April 16, 2015.

Mr. Miller advised that on July 1, 2015 a second response is due. The Board of Governors will be meeting late in July. A joint group of sections will also be meeting to discuss this issue.

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

1. **Commercial Real Estate** – Art Menor, Chair; Burt Bruton and Adele Stone, Co-Vice Chairs.
2. **Condominium and Planned Development** – Steven H. Mezer, Chair; Christopher Davies and Alex Dobrev, Co-Vice Chairs.
3. **Construction Law** – Hardy Roberts, Chair; Scott Pence and Lee Weintraub, 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 and Neil Shoter, Co-Vice Chairs.

7. **Foreclosure Reform (Ad Hoc)** - Jeffrey Sauer, Chair; Mark Brown, Burt Bruton and Alan Fields, Co-Vice Chairs.
8. **Landlord and Tenant** – Lloyd Granet, Chair; Rick Eckhard and Brenda Ezell, Co-Vice Chairs.
9. **Legal Opinions** – Kip Thornton, Chair; Robert Stern, Vice-Chair.
10. **Liaisons with FLTA** – Norwood Gay and Alan McCall, Co-Chairs; Alexandra Overhoff and James C. Russick, Co-Vice Chairs.
11. **Insurance & Surety** – W. Cary Wright and Fred Dudley, Co-Chairs; Scott Pence and Michael Meyer, Co-Vice Chairs.
12. **Real Estate Certification Review Course** – Jennifer Tobin, Chair; Manual Farach and Martin Awerbach, Co-Vice Chairs.
13. **Real Estate Structures and Taxation** – Cristin C. Keane, Chair; Michael Bedke and Deborah Boyd, Co-Vice Chairs.
14. **Real Property Finance & Lending** – Jim Robbins, Chair; Homer Duval, III, Richard S. McIver and Bill Sklar, Co-Vice Chairs.
15. **Real Property Litigation** – Susan Spurgeon, Chair; Manny Farach, Vice Chair.
16. **Real Property Problems Study** – W. Theodore “Ted” Conner, Chair; Mark A. Brown, Jeff Dollinger, Stacy Kalmanson and Patricia J. Hancock, Co-Vice Chairs.
17. **Residential Real Estate and Industry Liaison** – Salome Zikakas, Chair; Trey Goldman and Nishad Khan, Co-Vice Chairs.
18. **Title Insurance and Title Insurance Liaison** – Raul Ballaga, Chair; Alan Fields and Brian Hoffman, Co-Vice Chairs.
19. **Title Issues and Standards** – Christopher W. Smart, Chair; Robert M. Graham, Brian Hoffman and Karla J. Staker, Co-Vice Chairs.

XV. Probate and Trust Law Division Committee Reports — Deborah P. Goodall, 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 Study Committee on Personal Representative Issues** – Jack A. Falk, Jr., Chair
5. **Ad Hoc Study Committee on Spendthrift Trust Issues** – Lauren Detzel and Jon Scuderi, Co-Chairs
6. **Asset Protection** – Brian C. Sparks, Chair; George Karibjanian, Vice-Chair
7. **Attorney/Trust Officer Liaison Conference** – Laura K. Sundberg, Chair; Stacey Cole, Co-Vice Chair (Corporate Fiduciary) and Deborah Russell 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; Robert Lee McElroy IV, Vice-Chair
10. **Estate and Trust Tax Planning** – Elaine M. Bucher, Chair; David Akins, Tasha Pepper-Dickinson and William Lane, Co-Vice Chairs
11. **Guardianship, Power of Attorney and Advanced Directives** – Hung Nguyen, Chair, Tattiana Brenes-Stahl, David Brennan and Eric Virgil, Co-Vice Chairs
12. **IRA, Insurance and Employee Benefits** – L. Howard Payne and Lester Law, Co-Chairs
13. **Liaisons with ACTEC** – Michael Simon, Bruce Stone, and Diana S.C. Zeydel
14. **Liaisons with Elder Law Section** – Charles F. Robinson and Marjorie Wolasky
15. **Liaisons with Tax Section** – Harris L. Bonnette, Jr., 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** – Thomas M. Karr, Chair; John Richard Caskey, James George, Jon Scuderi and Jerry Wells, Co-Vice Chairs
18. **Probate Law and Procedure** – John C. Moran, Chair; Sarah S. Butters, Michael Travis Hayes and Sean Kelley, Co-Vice Chairs
19. **Trust Law** – Angela M. Adams, Chair; Tami F. Conetta, Jack A. Falk and Deborah Russell, Co-Vice Chairs

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

XVI. General Standing Committee Reports — Michael J. Gelfand, Director and Chair-Elect

1. **Ad Hoc Leadership Academy** – Tae Kelley Bronner 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. **Ad Hoc Trust Account** – John B. Neukamm and Jerry E. Aron, Co-Chairs
4. **Amicus Coordination** – Robert W. Goldman, John W. Little, III, Kenneth B. Bell and Gerald B. Cope, Jr., Co-Chairs
5. **Budget** – S. Katherine Frazier, Chair; Andrew M. O’Malley, Pamela O. Price, Daniel L. DeCubellis, Lee Weintraub and W. Cary Wright, Co-Vice Chairs
6. **CLE Seminar Coordination** – Robert S. Swaine and Tae Kelley Bronner, Co-Chairs; Laura K. Sundberg (Probate & Trust), Sarah S. Butters (Probate & Trust), Lawrence J. Miller (Ethics), Jennifer S. Tobin (Real Property) and Hardy L. Roberts, III (General E-CLE), Co-Vice Chairs
7. **Convention Coordination** – Laura K. Sundberg and Stuart Altman, Co-Chairs; Marsha G. Madorsky, Raul Ballaga and Jennifer Jones, Co-Vice Chairs
8. **Fellows** – Brenda B. Ezell and Hung V. Nguyen, Co-Chairs; Benjamin Diamond and Ashley McCrae, Co-Vice Chairs
9. **Florida Electronic Filing & Service** – Rohan Kelley, Chair
10. **Homestead Issues Study** – Shane Kelley (Probate & Trust) and Patricia P. Jones (Real Property), Co-Chairs; J. Michael Swaine and Charles Nash, Co-Vice Chairs
11. **Legislation** – William T. Hennessey, III (Probate & Trust) and Robert S. Freedman (Real Property), Co-Chairs; Sarah S. Butters (Probate & Trust), and Alan B. Fields and Steven Mezer (Real Property), Co-Vice Chairs
12. **Legislative Update (2014)** – Stuart H. Altman, Chair; Charles I. Nash, R. James Robbins, Barry F. Spivey, Stacy O. Kalmanson, and Jennifer S. Tobin, Co-Vice Chairs

13. **Legislative Update (2015)** – R. James Robbins, Chair; Charles I. Nash, Barry F. Spivey, Stacy O. Kalmanson and Jennifer S. Tobin, Co-Vice Chairs
14. **Liaison with:**
 - a. **American Bar Association (ABA)** – Edward F. Koren and Julius J. Zschau
 - b. **Board of Legal Specialization and Education (BLSE)** – Raul P. Ballaga, Jennifer S. Tobin, William Cary Wright, and Richard Gans
 - c. **Clerks of Circuit Court** – Laird A. Lile and William Theodore (Ted) Conner
 - d. **FLEA / FLSSI** – David C. Brennan, John Arthur Jones and Roland “Chip” Waller Co-Vice Chairs
 - e. **Florida Bankers Association** – Mark T. Middlebrook
 - f. **Judiciary** – Judge Linda R. Allan, Judge Jack St. Arnold, Judge Herbert J. Baumann, Judge Melvin B. Grossman, Judge Hugh D. Hayes, Judge Claudia Rickert Isom, Judge Maria M. Korvick, Judge Lauren Laughlin, Judge Norma S. Lindsey, Judge Celeste H. Muir, Judge Robert Pleus, Jr., Judge Walter L. Schafer, Jr., Judge Morris Silberman, Judge Richard J. Suarez, and Judge Patricia V. Thomas
 - g. **Out of State Members** – Michael P. Stafford, John E. Fitzgerald, Jr., and Nicole Kibert
 - h. **TFB Board of Governors** – Andrew Sasso
 - i. **TFB Business Law Section** – Gwynne A. Young
 - j. **TFB CLE Committee** – Robert S. Freedman and Tae Kelley Bronner
 - k. **TFB Council of Sections** – Michael A. Dribin and Michael J. Gelfand
 - l. **TFB Pro Bono Committee** – Tasha K. Pepper-Dickinson
15. **Long-Range Planning** – Michael J. Gelfand, Chair
16. **Meetings Planning** – George J. Meyer, Chair
17. **Member Communications and Information Technology** – William A. Parady, Chair; S. Dresden Brunner, Michael Travis Hayes, and Tattiana Brenes-Stahl, Co-Vice Chairs
18. **Membership and Inclusion** – Lynwood F. Arnold, Jr. and Jason M. Ellison, Co-Chairs, Phillip A. Baumann - (Career Coaching), Navin R. Pasem (Diversity), and Guy S. Emerich (Career Coaching an Liaison to TFB’s Scope Program), Co-Vice Chairs
19. **Model and Uniform Acts** – Bruce M. Stone and S. Katherine Frazier, Co-Chairs
20. **Professionalism and Ethics--General** – Lawrence J. Miller, Chair; Tasha K. Pepper-Dickinson, Vice Chair

21. **Professionalism and Ethics—Special Subcommittee on Integrity Awareness and Coordination** – Jerry Aron and Sandra Diamond, Co-Chairs
22. **Publications (ActionLine)** – Silvia B. Rojas, Chair (Editor in Chief); Shari Ben Moussa (Advertising Coordinator), Navin R. Pasem (Real Property Case Review), Jane L. Cornett, (Features Editor), Brian M. Malec (Probate & Trust), George D. Karibjanian (Editor, National Reports), Lawrence J. Miller (Editor, Professionalism & Ethics), Arlene Udick and Lee Weintraub, Co-Vice Chairs
23. **Publications (Florida Bar Journal)** – Kristen M. Lynch (Probate & Trust), and David R. Brittain (Real Property), Co-Chairs; Jeffrey S. Goethe (Editorial Board – Probate & Trust), Linda Griffin (Editorial Board – Probate & Trust), Michael A. Bedke (Editorial Board – Real Property) and William T. Conner (Editorial Board – Real Property), Co-Vice Chairs
24. **Sponsor Coordination** –Wilhelmena F. Kightlinger, Chair; J. Michael Swaine, Deborah L. Russell, W. Cary Wright, Benjamin F. Diamond, John Cole, Co-Vice Chairs
25. **Strategic Planning** –Michael A. Dribin and Michael J. Gelfand, Co-Chairs

XVII. 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 1:10 p.m.

Respectfully submitted,

Debra L. Boje, Secretary

ATTENDANCE ROSTER
REAL PROPERTY PROBATE & TRUST LAW SECTION
EXECUTIVE COUNCIL MEETINGS
2014-2015

Executive Committee	Division		Aug. 2 Palm Beach	Sept. 20 Chicago, Illinois	Nov. 15 Naples	Mar. 20 Orlando	Jun. 6 Miami Beach
	RP	P&T					
Dribin, Michael A., Chair	√		√	√	√	√	√
Gelfand, Michael J., Chair-Elect		√	√	√	√	√	√
O'Malley, Andrew M., Real Property Law Div. Director	√		√	√	√	√	√
Goodall, Deborah P., Probate and Trust Law Div. Director		√	√	√	√	√	√
Boje, Debra L., Secretary		√	√		√	√	√
Frazier, S. Katherine, Treasurer	√		√	√	√	√	√
Hennessey, William M., Legislation Co- Chair (P&T)		√	√	√	√	√	√
Freedman, Robert S., Legislation Co-Chair (RP)	√		√	√	√	√	√
Bronner, Tae K. Seminar Coordinator (P&T)		√	√		√	√	√
Swaine, Robert S Seminar Coordinator (RP)	√		√	√	√		√
Kelley, Shane, Director of At-Large Members		√	√	√	√	√	√
Rolando, Margaret A., Immediate Past Chair	√		√	√	√	√	√

Executive Council Members	Division		Aug. 2 Palm Beach	Sept. 20 Chicago, Illinois	Nov. 15 Naples	Mar. 20 Orlando	Jun. 6 Miami Beach
	RP	P&T					
Adams, Angela M.		√	√	√	√	√	√
Adcock, Jr., Louie N., Past Chair		√					
Akins, David J.		√	√		√	√	√
Allan, Honorable Linda		√			√		
Altman, Stuart H.		√	√	√	√		√
Archbold, J. Allison		√	√		√	√	√

Executive Council Members	Division		Aug. 2 Palm Beach	Sept. 20 Chicago, Illinois	Nov. 15 Naples	Mar. 20 Orlando	Jun. 6 Miami Beach
	RP	P&T					
Arnold, Jr., Lynwood F.	√	√	√		√	√	
Aron Jerry E. Past Chair	√		√		√	√	
Awerbach, Martin S.	√		√				√
Bald, Kimberly A.	√	√			√	√	
Ballaga, Raul P.	√		√		√	√	
Battle, 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.	√						
Bonevac, Judy B.		√	√	√	√	√	√
Bonnette, Jr., Harris L.		√	√				
Boyd, Deborah	√				√		
Bowser, Robert Wade	√						
Brenes-Stahl, Tattiana P.		√	√		√		
Brennan, David C. Past Chair		√	√			√	
Brittain, David R.	√				√	√	√
Brown, Mark A.	√		√	√		√	√
Brunner, S. Dresden		√	√		√		

Executive Council Members	Division		Aug. 2 Palm Beach	Sept. 20 Chicago, Illinois	Nov. 15 Naples	Mar. 20 Orlando	Jun. 6 Miami Beach
	RP	P&T					
Bruton, Jr., Ed Burt	√		√		√	√	√
Bucher, Elaine M.		√	√		√		
Butters, Sarah S.		√			√	√	√
Callahan, Charles III		√	√			√	√
Carlisle, David R.		√			√	√	√
Caskey, John R.		√	√		√	√	
Christiansen, Patrick T. Past Chair	√		√			√	
Cole, John P.		√	√	√			√
Cole, Stacey L.		√	√	√		√	√
Conetta, Tami F.		√	√	√	√		√
Conner, W. Theodore	√		√			√	√
Cope, Jr., Gerald B.	√		√				√
Cornett, Jane L.	√					√	
Davies, Christopher	√		√		√		
DeCubellis, Daniel L.	√						
Detzel, Lauren Y.		√	√				√
Diamond, Benjamin F.		√	√	√	√	√	
Diamond, Sandra F. Past Chair		√	√		√	√	√
Dobrev, Alex	√		√		√		√
Dollinger, Jeffrey	√		√		√	√	√
Dudley, Frederick R.	√					√	
Duvall, III, Homer	√				√	√	√
Eckhard, Rick	√		√			√	
Ellison, Jason M.	√		√	√		√	√

Executive Council Members	Division		Aug. 2 Palm Beach	Sept. 20 Chicago, Illinois	Nov. 15 Naples	Mar. 20 Orlando	Jun. 6 Miami Beach
	RP	P&T					
Emerich, Guy S.		√	√		√	√	√
Ertl, Christene M.	√		√			√	√
Ezell, Brenda B.	√		√			√	√
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.		√	√		√	√	√
Gault, Doug		√					
Gay, III, Robert Norwood	√		√		√		
George, James		√	√		√	√	
Godelia, Vinette D.	√				√		√
Goethe, Jeffrey S.		√	√		√		√
Goldman, Louis "Trey"	√		√	√	√	√	√
Goldman, Robert W. Past Chair		√	√		√		√
Graham, Robert M.	√		√	√	√	√	√
Granet, Lloyd	√		√		√	√	√
Griffin, Linda S.		√	√		√	√	
Grimsley, John G. Past Chair		√					

Executive Council Members	Division		Aug. 2 Palm Beach	Sept. 20 Chicago, Illinois	Nov. 15 Naples	Mar. 20 Orlando	Jun. 6 Miami Beach
	RP	P&T					
Grossman, Honorable Melvin B.		√					
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.	√		√	√	√		√
Heron, Lisa Colon	√						
Heuston, Stephen P.		√	√		√	√	√
Hoffman, Brian W.	√		√		√	√	
Isom, Honorable Claudia R.		√					
Ispording, Roger O. Past Chair		√	√	√	√	√	√
Johnson, Amber Jade F.		√	√	√	√	√	√
Jones, Darby		√	√		√	√	√
Jones, Frederick W.	√		√	√	√		√
Jones, Jennifer W.		√	√	√			√
Jones, John Arthur Past Chair		√					
Jones, Patricia P.H.	√		√	√	√		√
Judd, Robert B.		√	√		√		√
Khan, Nishad	√		√	√	√	√	√
Kalmanson, Stacy O.	√		√		√	√	√

Executive Council Members	Division		Aug. 2 Palm Beach	Sept. 20 Chicago, Illinois	Nov. 15 Naples	Mar. 20 Orlando	Jun. 6 Miami Beach
	RP	P&T					
Karibjanian, George		√			√	√	√
Karr, Thomas M.		√	√		√	√	√
Kayser, Joan B. Past Chair		√		√	√		
Keane, Cristin C.	√				√	√	√
Kelley, Rohan Past Chair		√	√	√	√	√	√
Kelley, Sean W.		√	√	√	√	√	√
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.	√		√		√	√	√
Laughlin, Honorable Lauren C.		√					√
Law, Lester		√					
Leebrick, Brian D.	√			√	√	√	√
Lile, Laird A. Past Chair		√	√		√	√	
Lindsey, Honorable Norma S.	√		√		√		

Executive Council Members	Division		Aug. 2 Palm Beach	Sept. 20 Chicago, Illinois	Nov. 15 Naples	Mar. 20 Orlando	Jun. 6 Miami Beach
	RP	P&T					
Little, III, John W.	√		√		√		
Lynch, Kristen M.		√			√	√	√
Madorsky, Marsha G.		√	√	√	√	√	√
Malec, Brian		√	√		√		√
Marger, Bruce Past Chair		√	√	√			
Marmor, Seth A.		√	√		√	√	√
Marshall, III, Stewart 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	√		√		√	√	√
Mezer, Steven H.	√		√	√	√	√	
Middlebrook, Mark T.		√	√	√	√		√
Miller, Lawrence J.		√	√	√	√	√	√
Mize, Patrick		√	√		√		√
Moran, John C.		√	√		√	√	√
Moule, Jr., Rex E.		√	√		√		√
Muir, Honorable Celeste H.		√	√	√	√	√	√
Murphy, Melissa J. Past Chair	√		√	√	√	√	√

Executive Council Members	Division		Aug. 2 Palm Beach	Sept. 20 Chicago, Illinois	Nov. 15 Naples	Mar. 20 Orlando	Jun. 6 Miami Beach
	RP	P&T					
Nash, Charles I.		√	√	√	√		√
Neukamm, John B. Past Chair	√		√	√	√	√	√
Nice, Marina		√	√		√	√	
Overhoff, Alex	√		√		√	√	√
Nguyen, Hung V.		√	√		√	√	√
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.	√				√	√	√
Polson, Marilyn M.		√			√	√	√
Price, Pamela O.		√	√			√	√
Prince-Troutman, Stacey A.		√				√	
Pyle, Michael A.		√	√	√		√	√
Quintero, Jason	√		√	√			√
Rao, Tara		√	√		√	√	
Redding, John N.	√		√	√		√	

Executive Council Members	Division		Aug. 2 Palm Beach	Sept. 20 Chicago, Illinois	Nov. 15 Naples	Mar. 20 Orlando	Jun. 6 Miami Beach
	RP	P&T					
Reiser Comiter, Alyse		√	√		√		√
Renzio, Bryan	√		√			√	√
Reynolds, Stephen H.	√		√		√	√	
Rieman, Alexandra V.		√	√		√	√	√
Robbins, Jr., R.J.	√		√			√	√
Roberts, III, Hardy L.	√			√	√	√	√
Robinson, Charles F.		√	√		√	√	
Rojas, Silvia B.	√		√	√	√	√	√
Roman, Paul E.		√	√	√	√		√
Russell, Deborah L.		√	√	√	√		√
Russick, James C.	√		√		√	√	√
Rydberg, Marsha G.	√			√		√	√
Sachs, Colleen C.	√				√		√
Sasso, Andrew		√	√		√	√	
Sauer, Jeffrey T.	√						
Schafer, Jr., Honorable Walter L.		√					
Schnitker, Clay A.	√						
Schofield, Percy A.	√		√		√		
Schwartz, Robert M.	√		√		√	√	√
Scuderi, Jon		√			√	√	√
Seaford, Susan	√		√			√	√
Sheets, Sandra G.		√			√	√	√
Shoter, Neil B.	√		√	√	√	√	
Silberman, Honorable Morris							

Executive Council Members	Division		Aug. 2 Palm Beach	Sept. 20 Chicago, Illinois	Nov. 15 Naples	Mar. 20 Orlando	Jun. 6 Miami Beach
	RP	P&T					
Silberstein, David M.		√	√		√		
Simon, Michael		√	√				
Sklar, William P.	√		√		√		
Smart, Christopher W.	√				√		
Smith, G. Thomas Past Chair	√		√				
Smith, Wilson Past Chair		√					
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		√			√		√
Suarez, Honorable Richard J.							
Sundberg, Laura K.		√	√	√			
Swaine, Jack Michael Past Chair	√		√	√			
Taft, Eleanor W.	√				√		
Taylor, Richard W.	√		√			√	√
Tescher, Donald R.		√	√		√		√
Thomas, Honorable Patricia V.		√	√	√			
Thornton, Kenneth E.	√		√	√		√	√
Tobin, Jennifer S.	√		√				

Executive Council Members	Division		Aug. 2 Palm Beach	Sept. 20 Chicago, Illinois	Nov. 15 Naples	Mar. 20 Orlando	Jun. 6 Miami Beach
	RP	P&T					
Triggs, Matthew H.		√	√		√		√
Udick, Arlene C.	√		√			√	√
Virgil, Eric		√	√			√	√
Waller, Roland D. Past Chair	√		√	√	√	√	√
Walters, Hanton H.	√						
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.		√	√			√	√
Zeydel, Diana S.C.		√	√		√	√	√
Zikakis, Salome J.	√		√	√	√	√	√
Zschau, Julius J. Past Chair	√		√			√	

RPPTL Fellows	Division		Aug. 2 Palm Beach	Sept. 20 Chicago, Illinois	Nov. 15 Naples	Mar. 20 Orlando	Jun. 6 Miami Beach
	RP	P&T					
Christy, Doug	√		√		√	√	√
Costello, T. John, Jr.		√	√		√	√	√
Jennison, Julia Lee	√		√		√		√
Lebowitz, Sean		√	√		√	√	√
Rosenberg, Josh		√	√	√	√	√	√
Smith, Kym	√		√		√	√	√
Sneeringer, Michael Alan		√	√		√	√	√
VanSickle, Melissa	√		√		√	√	√

Legislative Consultants	Division		Aug. 2 Palm Beach	Sept. 20 Chicago, Illinois	Nov. 15 Naples	Mar. 20 Orlando	Jun. 6 Miami Beach
	RP	P&T					
Dunbar, Peter M.			√		√	√	√
Edenfield, Martha			√	√	√	√	√
Finkbeiner, Brittany						√	√

Guests	Division		Aug. 2 Palm Beach	Sept. 20 Chicago, Illinois	Nov. 15 Naples	Mar. 20 Orlando	Jun. 6 Miami Beach
	RP	P&T					
Amari, Richard							√
Barboza, Annabella	√				√	√	√
Braun, Keith			√				
Brown, Shawn			√			√	√
Bryant-Willis, Arnell							√
Butler, Johnathan			√			√	√
Christy, Erin			√		√	√	√
Coleman, Greg				√			
Cortvriend, Sarah					√	√	
Duz, Ashley		√	√			√	√
Evans, Kara				√			
Frazier, Nathan			√				
Gentile, Mindy	√		√			√	

Guests	Division		Aug. 2 Palm Beach	Sept. 20 Chicago, Illinois	Nov. 15 Naples	Mar. 20 Orlando	Jun. 6 Miami Beach
	RP	P&T					
Gunther, Eamonn			√				
Horstkamp, Julie			√				
Leathe, Jeremy P.		√			√		√
Lee, Karline	√					√	√
Marx, James	√						√
Miller, Erin					√		
Rubin, Jenna						√	
Solomon, Marty	√		√		√		
Spalding, Ann					√	√	
White, Dennis R.					√		



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Management Planning, Inc. - Roy Meyers

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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

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The Florida Bar Foundation – Bruce Blackwell



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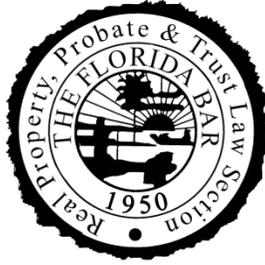
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Estate & Trust Tax Planning Committee

Northern Trust – *Tami Conetta*
Trust Law Committee



RPPTL Financial Summary from Separate Budgets
2014 – 2015 [July 1 – June 30¹]
YEAR TO DATE REPORT

General Budget	YTD
Revenue:	\$ 1,372,831
Expenses:	\$ 1,072,388
Net:	\$ 300,443

Trust Officer Conf	
Revenue:	\$ 15,578
Expenses:	\$ 3,337
Net:	\$ 12,241

Legislative Update	
Revenue:	\$ 67,164
Expenses:	\$ 92,402
Net:	\$ (25,238)

Convention	
Revenue:	\$ 60,648
Expenses:	\$ 141,408
Net:	\$ (80,760)

Roll-up Summary (Total)	
Revenue:	\$ 1,516,221
Expenses:	\$ 1,309,535
Net Operations:	\$ 206,686

Beginning Fund Balance:	\$ 892,279
Current Fund Balance (YTD):	\$ 1,098,965
Projected June 2015 Fund Balance	\$ 811,368

¹ This report is based on the tentative unaudited detail statement of operations dated 6/30/15.

June 5, 2015	FLORIDA, SAME-SEX MARRIAGE, RPPTL and the U.S. SUPREME COURT: Finality, Futility or Both? (Webcast and Live) Miami Beach
July 15, 2015	CYBER BREACH eCLE
July 31, 2015	THE 35 th ANNUAL RPPTL LEGISLATIVE & CASE LAW UPDATE -(Webcast and Live) Palm Beach
August 27-30, 2015	ATTORNEY TRUST OFFICER- (Live) Palm Beach
October 23, 2015	ESTATE TAX & ASSET PROTECTION—(Webcast and Live) Tampa
November 9, 2015 LITIGATION-eCLE	THE SAGA OF THE FAILED REAL ESTATE PROJECT: TITLE, LIENS AND
December 4, 2015	RPPTL PROBATE LAW—(Live and Webcast) Fort Lauderdale
February 19-20, 2016	REAL PROPERTY CERTIFICATION REVIEW—(Webcast and Live) Orlando
March 4, 2016	TRUST AND ESTATE SYMPOSIUM—(Webcast and Live), Tampa
March 10-12 , 2016 Lakes, Orlando	2016 CONSTRUCTION LAW INSTITUTE—(Live Only), JW Marriott Grande
March 10-12 , 2016	CONSTRUCTION LAW CERTIFICATION REVIEW COURSE—(Live Only), JW Marriott Grande Lakes, Orlando
April 1-2, 2016 Webcast) Orlando	WILLS, TRUSTS & ESTATE CERTIFICATION REVIEW COURSE – (Live and
April 22, 2016	CONDO AND PLANNED DEVELOPMENT LAW—(Live and Webcast), Tampa

LEGISLATIVE POSITION REQUEST FORM

GOVERNMENTAL AFFAIRS OFFICE

Date Form Received _____

GENERAL INFORMATION

Submitted By Susan K. Spurgeon, Chair, Real Property Litigation Committee of the Real Property Probate & Trust Law Section (RPPTL Approval Date _____, 2015)

Address 2701 N. Rocky Point Dr. Suite 900
Tampa, FL 33607
Telephone: (813) 639-9599

Position Type Real Property Litigation Committee, Real Property Division, RPPTL Section, The Florida Bar

CONTACTS

Board & Legislation Committee Appearance

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Robert S. Freedman, Carlton, Fields, Jorden, Burt, P.A., Corporate Center Three at International Plaza, 4221 W. Boy Scout Boulevard, Tampa, Florida 33607-5780 Telephone (813) 229-4149 ; rfreedman@cfjblaw.com

Peter M. Dunbar, Dean Mead, 215 S. Monroe St. Suite 815 Tallahassee, Florida 32301, Telephone (850) 577-0095

Martha J. Edenfield, Dean Mead, 215 S. Monroe St. Suite 815 Tallahassee, Florida 32301, Telephone (850) 577-0095

(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)

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PROPOSED ADVOCACY

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If Applicable,

List The Following Amendment to Fla. Stat. § 90.902

(Bill or PCB #)

(Bill or PCB Sponsor)

Indicate Position

Support

Oppose

Tech Asst.

Other

Proposed Wording of Position for Official Publication:

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 Florida Statutes § 90.902.

Reasons for Proposed Advocacy:

As an unintended consequence of e-filing, Clerks of the Court will not accept paper certified copies of documents, which may result in the inability to authenticate a public record. Further, since many public records are available on the internet, such as court pleadings, orders, property records and official records the legislation provides an alternate method to authenticate such documents without obtaining and filing a paper certified copy.

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

None]
(Name of Group or Organization) (Support, Oppose or No Position)

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

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

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

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Real Property, Probate, and Trust Law Section of the Florida Bar

White Paper

Proposed changes to Fla. Stat. 90.902, concerning authentication of electronic records

I. SUMMARY

The proposed changes to Fla. Stat. § 90.902

- Amends subsection (4) to deem authentic a certified copy of a public record which has been filed electronically pursuant to Section 28.22205, Fla. Stat.
- Creates a new subsection (5) providing a process for authenticating electronic records. Specifically, it will allow a party to file an electronic copy of any pleading, order of any court in the U.S. or U.S. Territory as well as any document or record entry filed with or retained by any state or governmental agency; which records are available to the public from a website operated by or authorized by a governmental agency. The filing party will be required to file a Notice of Reliance on Electronic Records a specified number of days prior to a hearing thereon. The subsection also provides a procedure for the opposing party to challenge the authenticity of the document.
- Renumbers subsections (5)-(11) as subsections (6)-(12).
- These changes do not prohibit a party from authenticating a document using any other method allowed by statute, but rather provides an alternative method of authentication. Please note, this statute concerns authenticity and does not impact hearsay, relevance, or other issues of admissibility.

II. CURRENT SITUATION

All county clerks in Florida require that all documents be filed electronically. Authentication of certain records is available pursuant to 90.902, provided that a party submit a “certified copy” of the record to be admitted. Due to the new requirement that all documents be filed electronically, some county clerks will not accept an original certified copy into the court file. An unintended consequence of the change to e-filing, the clerks’ inability or unwillingness to accept original paper certified copies results in an inability to authenticate a public record. Subsection (4) alleviates the problem and allows a litigant to authenticate a certified copy by e-filing same.

An additional update to the authentication statute may significantly benefit practitioners. Contrary to the time when the authentication statute was passed (1976), many public records are now readily available on the internet (such as court pleadings, orders, property records, official records). Therefore, to economize time and resources, an alternative method of authentication should be made available to utilize the information available over the internet and on governmental or governmental-sponsored websites.

III. EFFECT OF PROPOSED CHANGES

The proposed changes will allow an electronically filed certified copy to be deemed authentic. Furthermore, the proposed change provides an alternative method to authenticate documents that are maintained by a governmental agency on a website available to the public. Such alternative authentication will also provide the opposing party an opportunity to challenge the authenticity of said document.

IV. FISCAL IMPACT ON STATE AND LOCAL GOVERNMENTS

The first proposed change to Fla. Stat. § 90.902 will not likely have any fiscal impact.

The second proposed change to Fla. Stat. § 90.902 may have an impact on governmental agencies who charge for certified copies of documents, to the extent that such entity profits from certification (as opposed to simply covering the cost of providing the certified copy). The amount of impact is unknown, as such depends upon how many litigants decide to use this alternative method of authentication.

V. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR

The proposed changes to Fla. Stat. § 90.902 should have no impact on the private sector, except that if utilized will save litigants costs relating to obtaining certified copies.

VI. CONSTITUTIONAL ISSUES

None

V. OTHER INTERESTED PARTIES

Clerks of the circuit court, any governmental agency that charges for copies and/or certified copies of their records which are available on a website accessible by the public.

The Business Law Section of The Florida Bar may have interest in these changes to the Florida Evidence Code.

1 A bill to be entitled

2 An act relating to self-authentication of documents; amending s. 90.902, F.S. by allowing
3 certified copies to be filed electronically and providing a method for authenticating public
4 documents other than by certified copies and providing for an effective date.

5
6 Be It Enacted by the Legislature of the State of Florida:

7
8 Section 1. Subsections (4) of section 90.902, Florida Statutes, is amended;
9 Subsections (5)-(11) are renumbered as subsections (6) through (12) respectively; and
10 new subsection (5) is created, to read:

11 (4) A copy of an official public record, report, or entry, or of a
12 document authorized by law to be recorded or filed and actually recorded or filed
13 in a public office, including data compilations in any form, certified as correct by
14 the custodian or other person authorized to make the certification by certificate
15 complying with subsection (1), subsection (2), or subsection (3) or complying
16 with any act of the Legislature or rule adopted by the Supreme Court, which
17 certified copy may be filed electronically pursuant to Section 28.22205, Florida
18 Statutes. An electronically filed certified copy is admissible as would be the
19 original, provided it complies with this subpart.

20 (5) A copy of: (i) any pleadings, orders, or other filings in any court
21 sitting in the United States or U.S. Territory; or (ii) any document or record entry
22 filed with or retained by the United States, any State, municipality, district,
23 commonwealth, territory or governmental department or agency of the same
24 which is available to the public from a website on the Internet operated by a
25 governmental agency or authorized by a governmental agency, provided,
26 however:

27 (a) that a party seeking authentication of the document files a
28 Notice of Reliance on Electronic Records which (i) attaches a copy of the
29 document to be admitted, (ii) discloses the website and web address on the
30 Internet where said document can be located, and (iii) serves written notice not
31 less than 20 days before a hearing at which the authenticity of the document or its

32 acceptance by a Court as an authentic document is at issue. The Court may waive
33 or shorten the time period for filing the notice set forth herein in this Section
34 90.902(5)(a);

35 (b) If a party desires to object to the authenticity of a
36 document which is the subject of a Notice of Reliance on Electronic Records,
37 such party shall file and serve on every other party an affidavit within 5 days
38 prior to a hearing (which time period may be waived or shortened by the Court)
39 challenging either: (i) the authenticity of said document by attaching a copy of
40 what the challenging party asserts is the true, correct and authentic document and
41 detailing in writing the portion(s) of said document which is not authentic; or (ii)
42 that said document does not exist on the website or web address as specified in
43 the notice.

44 (c) After review and consideration by the Court, the Court
45 shall deem authentic the document which is the subject of the Notice of Reliance
46 on Electronic Records unless: (i) the document does not satisfy the requirements
47 set forth in Section 5(a); (ii) an objection is filed pursuant to subsection (b) herein
48 and the Court sustains the objection or otherwise determines the document to not
49 be authentic; or (iii) the document does not have the same content or text, in all
50 material respects, as the document that appears on the website identified in said
51 Notice of Reliance on Electronic Records.

52 (d) Nothing herein shall prohibit a party from authenticating a
53 document under Section 90.901, Florida Statutes or as otherwise provided in
54 Section 4 or Section 5 hereof, all of which are alternative methods of
55 authentication.

56
57 Section 2. This act shall take effect upon becoming a law.
58
59

LEGISLATIVE POSITION REQUEST FORM

GOVERNMENTAL AFFAIRS OFFICE

Date Form Received _____

GENERAL INFORMATION

Submitted By David W. Rodstein, Chair, Joint Subcommittee on Stale Mortgages,
Subcommittee of the Real Property Probate & Trust Law Section (RPPTL)
Approval Date _____, 20__)

Address 101 Plaza Real South, Suite 207, Boca Raton, FL 33432
Telephone: 954-514-9276

Position Type RPPTL Section

CONTACTS

Board & Legislation Committee Appearance

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Peter M. Dunbar, Dean, Mead, Egerton, Bloodworth, Capouano & Bozarth,
P.A., 215 S. Monroe Street, Suite 815, Tallahassee, FL 32301, Telephone:
(850) 999-4100

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

Appearances

Before Legislators

(SAME)

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

Meetings with

Legislators/staff

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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 _____

Oppose _____

Tech Asst. _____

Other _____

Proposed Wording of Position for Official Publication:

"Support 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 Fla. Stat. § 95.281."

Reasons For Proposed Advocacy:

(1) To clarify that F.S. § 95.281 is a statute of repose and not of limitations; (2) To create uniformity between the repose period applicable to advances made by a mortgagee for the benefit of the property and that applicable to the mortgage debt; and, (3) To restore to mortgagees the common law subrogation rights for the payment of property taxes, which promotes fundamental fairness by giving the mortgagee a superior lien for the tax paid.

**REAL PROPERTY, PROBATE & TRUST LAW SECTION
OF THE FLORIDA BAR (RPPTL)**

White Paper

Proposal To Amend § 95.281, Fla. Stat.

I. SUMMARY

This proposal is intended:

- (1) to clarify the character of § 95.281 as a statute of repose versus a statute of limitation;
- (2) to make the repose period for a lien arising from advances by a mortgagee simpler to calculate; and
- (3) to restore to mortgage holders the common law subrogation rights they had for tax advances prior to enactment of this section.

II. CURRENT SITUATION

Under current § 95.281, the situation is as follows.

- (1) The title reads: “*Limitations*; instruments encumbering real property.” (Emphasis added).
- (2) The lien for advances by a mortgagee appears unclear as to whether such lien rights may expire five years after the date of the advance, no matter when the lien of the mortgage expires.
- (3) A mortgagee that advances property taxes has no right of subrogation to the lien of the taxing authority, unless he or she obtains an assignment of the tax certificate.

III. EFFECT OF PROPOSED CHANGES

1. The title will be amended to change the word “Limitations” to “Repose.”

This change is required to correct a quirk of legislative history. When the statute was originally passed in 1945 (as § 95.28), it was both the statute of limitations for mortgage foreclosures and the statute of repose.¹ At that time, the word “Limitations” in the title was a reasonable description.

¹ The limitations language stated: “no action or proceeding of any kind shall begin to enforce or foreclose the mortgage...” after the specified time periods. The repose language provided that the lien of the mortgage “shall terminate.” This difference recognizes the fundamental difference in Florida between statutes of limitation, which affect only the ability to file an action, and statutes of repose, which terminate the right on which an action would be based.

However, in 1974 the statute was amended by deleting the limitations language, leaving only the repose language and was renumbered to § 95.281. *See* Ch. 74-382, § 18, Laws of Florida; *Houck Corp. v. New River, Ltd., Pasco*, 900 So. 2d 601, 603-04 (Fla. 2d DCA 2005).

2. The lien for advances by a mortgagee is clarified to expire at the same time as the lien for the mortgage debt expires.

The first sentence of current § 95.281(1)(c) makes the lien of a mortgagee that advances payment for items such as taxes and insurance terminate 5 years after the date of the advance. Depending upon when the advance is made, this can result in the lien for the advance terminating earlier than the lien of the mortgage debt or later than the lien for the mortgage debt.

That is an inconsistency that has no justification in the legislative history and creates a lack of uniformity in the termination of the mortgagee's rights. Additionally, since most mortgages have a term that says the mortgage secures repayment of such advances, the statute creates a potential litigation issue over which time limit should apply – the one for advances or the one for the mortgage debt. The amendment deletes this sentence, resulting in greater uniformity of application, reducing legislative complexity, and removing a litigation issue that could affect hundreds of thousands of mortgages.

3. The amendment will restore to a mortgagee that advances property taxes the common law right of subrogation without needing a special assignment.

At common law, a mortgagee that advanced property taxes was always subrogated by to the superior lien position of the governmental taxing authority – both before and after the 1945 passage of § 95.281. *Prudential Ins. Co. of Am. v. Baylarian*, 168 So. 7, 9 (Fla. 1936) (before); *H.K.L. Realty Corp. v. Kirtley*, 74 So. 2d 876, 878-79 (Fla. 1954) (after). However, in 1955, the statute was amended to require the mortgagee obtain an assignment of the tax certificate before that subrogation would attach.

The RPPTL Subcommittee on “Stale” Mortgages has found no legislative history explaining the motivation for this added requirement. Practitioners in the RPPTL Real Property Litigation Committee and the Real Property Finance & Lending Committee with substantial experience in litigation over lien priorities unanimously affirmed that practitioners and courts ignore this section and grant subrogated priority rights to a mortgagee without requiring the assignment.

The requirement, if enforced, would have several drawbacks. First, it discourages mortgagees in junior positions or positions of doubtful priority from paying delinquent taxes because they may be throwing away “good money after bad” should a senior lien foreclose them. Second, it creates an off-record documentation issue affecting lien priority. Title examiners have no way of verifying from the official records whether a junior mortgagee that paid substantial amounts of taxes has as first priority lien securing those taxes or a junior lien securing them. That results in uncertainty for underwriting of new loans and other transactions. Third, it is fundamentally unfair for junior mortgagees who protect the interests of senior lienholders from a tax deed sale not to have a superior lien for the amounts they advanced.

IV. FISCAL IMPACT ON STATE AND LOCAL GOVERNMENTS

- (1) Correcting the name of the statute will have no impact, other than clarifying the law for the benefit of governments and the private sector alike.
- (2) Making the lien for advances terminate at the same time as the lien for the mortgage debt will simplify the law and increase uniformity for the benefit of governments and the private sector alike.
- (3) Restoring the subrogation rights of mortgagees that advance taxes will benefit state and local governments by encouraging the holders of mortgages with junior priority and questionable priority to pay delinquent tax bills. This will result in earlier payment of property tax obligations.

V. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR

- (1) Correcting the name of the statute will have no impact, other than clarifying the law for the benefit of governments and the private sector alike.
- (2) Making the lien for advances terminate at the same time as the lien for the mortgage debt will simplify the law and increase uniformity for the benefit of governments and the private sector alike.
- (3) Restoring the subrogation rights of mortgagees that advance taxes will benefit the private sector. First, the rights of mortgage holders that advance payment for taxes will have greater protection for the monies advanced. Second, title examiners and title underwriters will be better able to assess the priority of liens without reference to off-record assignments of tax certificates.

VI. CONSTITUTIONAL ISSUES

There are no known constitutional issues. Section 3 of the proposed legislation is a savings clause meant to avoid any constitutional issues.

VII. OTHER INTERESTED PARTIES

This proposal has been approved by the RPPTL Real Property Litigation Committee and the RPPTL Real Property Finance & Lending Committee. It is likely of interest to the following additional RPPTL Committees and should be approved by them:

_____.

It is also likely of interest to the mortgage lending industry, the title underwriting industry, the title examination industry, state and local governments, and consumer advocacy groups.

1 A bill to be entitled

2 An act relating to statute of repose for instruments encumbering
3 real property; amending s. 95.281, F.S.

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

5 Section 1. Section 95.281, Florida Statutes, is amended as
6 follows:

7 95.281. ~~Limitations~~ Repose; instruments encumbering real
8 property

9 (1) The lien of a mortgage or other instrument encumbering
10 real property, herein called mortgage, except those specified in
11 subsection (5), shall terminate after the expiration of the
12 following periods of time:

13 (a) If the final maturity of an obligation secured by a
14 mortgage is ascertainable from the record of it, 5 years after
15 the date of maturity.

16 (b) If the final maturity of an obligation secured by a
17 mortgage is not ascertainable from the record of it, 20 years
18 after the date of the mortgage, unless prior to such time the
19 holder of the mortgage:

20 1. Rerecords the mortgage and includes a copy of the
21 obligation secured by the mortgage so that the final maturity is
22 ascertainable; or

23 2. Records a copy of the obligation secured by the mortgage
24 from which copy the final maturity is ascertainable and by

25 affidavit identifies the mortgage by its official recording data
26 and certifies that the obligation is the obligation described in
27 the mortgage;

28 in which case the lien shall terminate 5 years after the
29 date of maturity.

30 ~~(c) For all obligations, including taxes, paid by the~~
31 ~~mortgagee, 5 years from the date of payment. A mortgagee shall~~
32 ~~have no right of subrogation to the lien of the state for taxes~~
33 ~~paid by the mortgagee to protect the security of his or her~~
34 ~~mortgage unless he or she obtains an assignment from the state~~
35 ~~of the tax certificate. Redemption of the tax certificate shall~~
36 ~~be insufficient for subrogation.~~

37 Section 2. Section 95.051(1), Florida Statutes, is amended
38 as follows:

39 (1) The running of the time under any statute of
40 limitations except ss. ~~95.281~~, 95.35, and 95.36 is tolled by:

41 Section 3. The effective date of this act shall be July 1,
42 2016.

43 Section 4. The amendments made by this act apply to
44 advances made prior to the effective date, except to the extent
45 that such application would result in an unconstitutional
46 infringement of contractual rights.

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GOVERNMENTAL AFFAIRS OFFICE

Date Form Received _____

GENERAL INFORMATION

Submitted By Susan K. Spurgeon, Chair, Real Property Litigation Committee of the Real Property Probate & Trust Law Section (RPPTL Approval Date _____, 2015)

Address 2701 N. Rocky Point Dr. Suite 900
Tampa, FL 33607
Telephone: (813) 639-9599

Position Type Real Property Litigation Committee, Real Property Division, RPPTL Section, The Florida Bar

CONTACTS

Board & Legislation Committee Appearance **Susan K. Spurgeon**, Pennington, P.A., 2701 N. Rocky Point Dr. Suite 900, Tampa, FL 33607, Telephone (813) 639-9599.
susan@penningtonlaw.com; sue@penningtonlaw.com
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Martha J. Edenfield, Dean Mead, 215 S. Monroe St. Suite 815 Tallahassee, Florida 32301, Telephone (850) 577-0095
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If Applicable,

List The Following Amendment to Fla. Stat. § § 57.011 & 559.715

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

Indicate Position Support Oppose _____ Tech Asst. _____ Other _____

Proposed Wording of Position for Official Publication:

Delete the requirement that out of state plaintiffs file a \$100 cost bond as set out in § 57.011; and 2) clarify and codify existing law by providing that a condition precedent to filing a foreclosure action is not created by . § 559.715.

Reasons for Proposed Advocacy:

As set out in Judge Altenbernd's concurring opinion in *Focht v. Wells Fargo Bank, N.A.*, 124 So.3d 308, 312 (Fla. 2d DCA 2013) the judiciary have requested legislation to curb the use of non-substantive defenses to stall foreclosure actions. The proposed legislation will not harm debtors but will streamline some proceedings.

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 specifically as to these statutes.
(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

None]
(Name of Group or Organization) (Support, Oppose or No Position)

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

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WHITE PAPER

BILL TO DELETE NON-RESIDENT COST BOND AND AMEND ASSIGNMENT OF CONSUMER DEBT NOTICE - PROPOSED REVISIONS TO SECTION 57.011 AND SECTION 559.715, FLORIDA STATUTES

1. SUMMARY

The proposed bill will serve to remove the anachronism that requires a non-resident plaintiff to post a \$100 cost bond and codify and clarify that the notice a creditor must provide a borrower of the assignment of a debt is not a condition precedent to the filing of a suit to foreclose a mortgage or statutory lien.

2. CURRENT SITUATION

Florida continues to have elevated numbers of foreclosure cases with tens of thousands of cases pending and forecasts for continued foreclosures above the historical norm. Further, due to a number of reasons, many foreclosures take in excess of 600 days to reach sale once the suit is filed. A common tactic of the foreclosure defense bar is to delay the inevitable by using non – substantive defenses. Trial and Appellate judges have expressed their frustration at how these defenses slow the proceedings and waste judicial resources. The proposed legislation would address two of the commonly used technical defenses.

Florida Statutes Section 57.011 requires lenders who are not “residents” of Florida to post a \$100 cost bond. Defense counsel move to dismiss foreclosures filed by out of state lenders for failing to post the required bond, stalling the case until the bond is posted. Secondly, defense counsel have begun to assert with regularity within the past year that Florida Statutes Section 559.715 requires a lender to provide a written notice of assignment of the mortgage/note as a condition precedent, 30 days before filing suit.

3. EFFECT OF PROPOSED CHANGE

The proposed amendments will help expedite foreclosures by allowing cases to be addressed on their merits. The requirement of posting a \$100 cost recovery bond by “foreign” litigants will be eliminated, streamlining all litigation, including foreclosures. The statute will codify and clarify existing law by providing that Section 559.715 does not create a condition precedent to filing a foreclosure action.

4. ANALYSIS

The following describes the changes being proposed:

a. Section 57.011 would be deleted to remove the requirement that a non-resident post a \$100 cost bond. First enacted in 1828, this statute no longer serves a purpose. It is used to harass and as a stall tactic.

b. Section 559.715 would be amended to codify and clarify that it does not create a condition precedent to the filing of a suit to foreclose a mortgage or statutory lien. This codifies the holding of Judge Rondolino of the Sixth Judicial Circuit in *U.S. Bank N.A. v. Lord*, 2014 WL 3674680 (Fla. 6th Jud. Cir. 2014).

5. FISCAL IMPACT ON STATE AND LOCAL GOVERNMENTS

The proposal will have no fiscal impact on State and Local governments.

6. DIRECT IMPACT ON PRIVATE SECTOR

This proposal will streamline the foreclosure process by focusing litigation on substantive, rather than technical defenses. The impact of repealing Section 57.011 is negligible.

The amendment to Section 599.715 merely codifies and clarifies that this statute was never intended to create a condition precedent to a foreclosure suit. Substantively, the notice required to a borrower of a transfer of the loan rights is provided in the Federal law.

These amendments will help reduce the length of time between a borrower's default and the property being returned to the market.

7. CONSTITUTIONAL ISSUES

There is no constitutional issue raised by the repeal of Section 57.011 or the proposed amendment to Section 559.715.

8. OTHER INTERESTED PARTIES

Financial lending institutions, county clerks, judiciary, foreclosure defense bar, consumer attorneys.

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BILL

ORIGINAL

YEAR

1 A bill to be entitled
 2 An act relating to _____; providing an effective date.

3
 4 Be It Enacted by the Legislature of the State of Florida:

5
 6 **Section 1.** Section 57.011, F.S., is amended to read as
 7 follows:

8 ~~**57.011 Costs; security by nonresidents.** — When a nonresident~~
 9 ~~plaintiff begins an action or when a plaintiff after beginning an~~
 10 ~~action removes himself or herself or his or her effects from the~~
 11 ~~state, he or she shall file a bond with surety to be approved by~~
 12 ~~the clerk of \$100, conditioned to pay all costs which may be~~
 13 ~~adjudged against him or her in said action in the court in which~~
 14 ~~the action is brought. On failure to file such bond within 30 days~~
 15 ~~after such commencement or such removal, the defendant may, after~~
 16 ~~20 days' notice to plaintiff (during which the plaintiff may file~~
 17 ~~such bond), move to dismiss the action or may hold the attorney~~
 18 ~~bringing or prosecuting the action liable for said costs and if~~
 19 ~~they are adjudged against plaintiff, an execution shall issue~~
 20 ~~against said attorney.~~

21 **Section 2.** Section 559.715, F.S., is amended to read as
 22 follows:

23 559.715 Assignment of consumer debts.— This part does not
 24 prohibit the assignment, by a creditor, of the right to bill and

BILL

ORIGINAL

YEAR

25 collect a consumer debt. However, the assignee must give the debtor
 26 written notice of such assignment as soon as practical after the
 27 assignment is made, but at least 30 days before any action to
 28 collect the debt. The assignee is a real party in interest and may
 29 bring an action to collect a debt that has been assigned to the
 30 assignee and is in default. This Section shall not be considered
 31 as creating a condition precedent to the filing of actions to
 32 foreclose mortgages and statutory liens on real property.

33 **Section 3.** This act shall take effect upon becoming law.
 34
 35

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)

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Telephone: (407) 841-1200

Position Type The 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)

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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 Oppose Technical Assistance Other

Proposed Wording of Position for Official Publication:

Support adding new Section 689.151 to the Florida Statutes to allow for the creation of joint tenancies with rights of survivorship and tenancies by the entireties in certain kinds of personal (e.g., not real) property without regard to the common law unities of time and title.

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. New s. 689.151 does for personal property what s. 689.11 now does for real property: after the enactment of the new statute, all personal property within the scope of the statute owned by married persons will be owned by them as tenants by the entireties unless there is written evidence of a contrary intent. The statute also allows for the creation of joint tenancies with rights of survivorship 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.

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.

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 proposed statute would also provide that any personal property held in the name of married persons is tenants by the entireties property unless there is a writing to the contrary.

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 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 tenant 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 (Bkrcty, 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 (Bkrcty, S.D. Fla 2013), after struggling with the existing, muddled state of the law on creation 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 is to make those changes and to add much needed clarity and certainty to this area of the law.

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 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 entirety.

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 entirety, and the tenancy by the entirety 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 entirety.

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 entirety in personal property by conveying the property to herself and her spouse.

The conveyance or addition to title to create the tenancy by the entirety can be by written instrument or other record.

3. Subsection (3)

This subsection provides that personal property transferred to persons who are married to one another is held by them as tenants by the entirety unless a contrary intent is specified in writing. The proposed legislation does *not* create a presumption; instead, property transferred to married persons *is* tenancy by the entirety property absent written evidence of contrary intent signed by both spouses.

4. Subsection (4)

This subsection provides that the addition of the name of an owner’s spouse to title of personal property creates tenants by the entirety property unless provided to the contrary in a writing signed by both spouses. It imports the reasoning of Section 655.79(1), Florida Statutes, which provides that a bank deposit held by married persons “is considered to be” a tenancy by the entirety, and broadens the scope of tenancy by the entirety protection to all personal property. The statute does *not* create a rebuttable presumption: personal property formerly owned by one

spouse and subsequently owned by both spouses *is* tenants by the entireties property (absent a writing to the contrary) as long as the parties are married to one another.

5. Subsection (5)

The proposed legislation does not cover assets and financial arrangements already covered elsewhere in the Florida Statutes.

6. Subsection (6)

This subsection defines the terms “personal property” and “record” as used in the proposed statute.

7. Subsection (7)

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.

8. Subsection (8)

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.

1 A bill to be entitled

2 An act adding new s. 689.151 relating to the creation of tenancies by the entirety and joint
3 tenancies with right of survivorship in personal property without regard to the unities of time and
4 title.

5 Section 1. New section 689.151, F.S., is added to read:

6 **689.151. Tenancy by the Entireties and Joint Tenancy with Right of Survivorship**
7 **in Personal Property.**

8 (1) An owner of personal property may create a joint tenancy with right of
9 survivorship in such property by designating one or more additional persons as joint tenants with
10 right of survivorship in an instrument or record of transfer, or in an instrument or record
11 evidencing ownership of property, without the necessity of a transfer to or through a third
12 person.

13 (2) A spouse owning personal property may create a tenancy by the entirety in such
14 property by designating his or her spouse as a co-owner of the property in an instrument or
15 record of transfer, or in an instrument or record evidencing ownership of the property, without
16 the necessity of a transfer to or through a third person.

17 (3) A transfer of personal property to persons who are married to one another creates
18 a tenancy by the entirety unless a contrary intent is specified in writing.

19 (4) If a spouse adds the name of his or her spouse to an instrument or record
20 evidencing ownership of personal property, the property is held as a tenancy by the entirety
21 unless a contrary intent is specified in writing signed by both spouses.

22 (5) This section shall not apply to a motor vehicle or mobile home to which s. 319.22
23 applies, to a deposit or account to which s. 655.78 or s. 655.79 applies, or to a mortgage and the
24 obligation it secures to which s. 689.115 applies.

25 (6) As used in this section:

26 (a) The term "personal property" means all property other than "real property," as
27 that latter term is defined in s. 192.001.

28 (b) The term "record" has the meaning given it in s. 605.0102.

29 (7) The common law of tenancy by the entireties and of joint tenancy with rights of
30 survivorship supplements this section except to the extent modified by it.

31 (8) This section creates no inferences as to joint tenancies with rights of survivorship or
32 tenancies by the entireties in personal property in existence on its effective date.

33 Section 2. This Act shall become effective upon becoming law.

34

35 5184017.00012

LEGISLATIVE POSITION REQUEST FORM

GOVERNMENTAL AFFAIRS OFFICE

Date Form Received _____

GENERAL INFORMATION

Submitted By Jon Scuderi, Chair, Probate and Trust Litigation Committee of the Real Property Probate & Trust Law Section

Address Goldman Felcoski & Stone, P.A., 745 12th Avenue South, Suite 101, Naples, FL 34102; Telephone: 239-436-1988, Email: jscuderi@gfsestatelaw.com

Position Type Probate and Trust Litigation Committee, RPPT Section, The Florida Bar

CONTACTS

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Martha J. Edenfield, Dean Mead, 215 S. Monroe Street, Suite 815, Tallahassee, FL 32301, Telephone: 850-999-4100

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

(Bill or PCB #)

(Bill or PCB Sponsor)

Indicate Position

Support

Oppose

Technical

Other

Assistance

Proposed Wording of Position for Official Publication:

Support legislation that would (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 its legal fees when defending a breach of trust claim. The proposed legislation amends F.S. sections 736.0802(10), 736.0816(20) and 736.1007(1).

Reasons For Proposed Advocacy:

The amendments are intended to clarify statutory language that has caused confusion and uncertainty among practitioners and trustees regarding when a trustee may use trust assets to pay its legal fees.

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 at this time
(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.

Real Property Probate & Trust Law Section
White Paper Regarding a Trustee's Use of Trust Assets to Pay
Attorney's Fees and Costs in Connection with Claim or Defense of Breach of Trust

This White Paper relates to proposed amendments to section 736.0802(10) concerning a trustee's payment of its attorney's fees and costs from assets of the trust in connection with a claim or defense of breach of trust.

This White Paper also relates to proposed amendments to section 736.0816(20) and section 736.1007(1), the purpose of which amendments is to clarify that the authority granted in both of those statutes to pay a trustee's attorney's fees and costs from assets of the trust is subject to the limitations of section 736.0802(10).

I. SUMMARY

The bill proposes amendments to section 736.0802(10), section 736.0816(20) and section 736.1007(1) to clarify when a trustee may use trust assets to pay its legal fees and to provide further guidance to practitioners and courts with regard to the procedure to be employed when a trustee seeks to use trust assets to pay its legal fees when defending a breach of trust claim. The amendments are intended to make application of the statutes simpler for lawyers and the courts. The policy and purpose of the statutes remain unchanged.

The bill does not have an impact on state funds.

II. CURRENT SITUATION

A trustee's statutory power to pay its attorney's fees and costs from assets of the trust has been limited under certain circumstances by statute since 1974, when Chapter 737 was enacted. The initial statutory limitation, which was codified as section 737.403(2) and then construed by the court in Shriner v. Dyer, 462 So. 2d 1122 (Fla. 4th DCA 1984) and several subsequent cases, has been amended on multiple occasions. The most recent modification, which occurred in 2008, involved significant and complex changes. The current statute is codified as section 736.0802(10), entitled Duty of Loyalty.

Section 736.0802(10) generally confirms that a trustee may pay its attorney's fees and costs from trust assets even when the trustee is defending itself against an allegation of breach of trust. However, it also provides that in the latter instance (i) the trustee must provide prior notice of its intent to pay its attorney's fees and costs from the trust, and (ii) upon the motion of qualified beneficiaries of a trust whose share of the trust may be affected by such payment, the court may preclude a trustee from paying its attorney's fees and costs from the trust if it finds that there is a reasonable basis to conclude that there has been a breach of trust. The proposed amendments to the statute do nothing to change that policy and purpose.

However, the current statute lacks clarity, and thus fails to provide direction to lawyers and the court, with respect to a number of issues.

- It lacks clarity regarding the circumstances under which the limitations imposed by the statute are triggered.
- It lacks clarity regarding which categories of attorney's fees and costs are subject to the limitations.
- It lacks clarity regarding the circumstances under which the trustee must serve notice of an intention to pay attorney's fees and costs from trust assets and the consequences, if any, of paying such attorney's fees and costs from trust assets prior to serving notice.
- It literally and unconditionally mandates that qualified beneficiaries seek a court order to prohibit a trustee from using trust assets to pay attorney's fees and costs even when a trustee has no intention of doing so.
- It lacks clarity regarding whether a trustee may use trust assets to pay its attorney's fees and costs upon a final determination in its favor by the trial court or whether the trustee must wait until a final determination by the appellate court.
- And it lacks clarity regarding what type of showing is required to preclude a trustee from using trust assets to pay its attorney's fees and costs, and regarding the type of evidence that may be used to make or to rebut such a showing.

III. EFFECT OF PROPOSED CHANGES

A. Section 736.0802(10)

The bill substantially amends section 736.0802(10) to provide needed additional guidance to lawyers and the courts to understand and apply it. The policy and purpose of the statute remain unchanged.

The proposed amendments to the introductory paragraph clarify that the authority granted to a trustee under section 736.0816(20) and section 736.1007(1) to pay attorney's fees and costs from assets of the trust remains the general rule, whereas the provisions of section 736.0802(10) are merely an exception to the rule. That is consistent with the provisions of the current statute.

The proposed amendments to paragraph (a) clarify the type of event that triggers the limitations imposed by the statute, the type of fees and costs affected, and the requirements concerning the timing of the service of notice of intent to pay such fees and costs from trust assets. Specifically, the amendments to paragraph (a) provide that in the event that a trustee incurs attorney's fees or costs in connection with a claim or defense of breach of trust that is actually set forth in a filed pleading, the trustee continues to have the power to pay those fees and costs from assets of the trust. However, prior to payment of those fees and costs from assets of the trust, the trustee must serve a written notice of intent, which is described in paragraph (b), upon each qualified beneficiary whose share of the trust may be affected by the payment.

The proposed amendments to the other paragraphs of section 736.0802(10) include several references to the “attorney’s fees and costs described in paragraph (a),” which is intended to be a specific reference to attorney’s fees and costs incurred in connection with a claim or defense of breach of trust that is actually set forth in a filed pleading, as opposed to, for example, fees or costs incurred in connection with ordinary trust administration, a judicial proceeding not involving allegations of breach of trust or in connection with allegations of breach of trust that have not yet been set forth in a filed pleading.

The proposed amendments to paragraph (b) set forth the required content of the written notice of intent and the manner of service thereof. These requirements are consistent with the provisions of the current statute, but the proposed amendments add a requirement that the notice identify the judicial proceeding in which the claim or defense of breach of trust has been made. The proposed amendments also limit the availability of one of the authorized methods of service – service in the manner provided for service of pleadings and other documents by the Florida Rules of Civil Procedure – to those parties over whom the court has already acquired jurisdiction in that judicial proceeding.

The proposed amendments to paragraph (c) provide that in the event a trustee pays attorney’s fees and costs described in paragraph (a) from trust assets prior to serving a notice of intent, any qualified beneficiary whose share of the trust may have been affected by such payment, and who is not otherwise barred pursuant to the limitations provisions of section 736.1008, upon the filing of a motion is entitled to an order compelling the return of such payment, together with statutory interest, to the trust. Further, the court may award attorney’s fees and costs in connection with the beneficiary’s motion as provided in section 736.1004. The current statute does not specifically provide that a qualified beneficiary would be entitled to the relief set forth in these proposed amendments in that the current statute lacks clarity regarding whether a trustee is precluded from making payments of these types of attorney’s fees and costs prior to service of a notice of intent.

The proposed amendments to paragraph (d) clarify that a qualified beneficiary whose share of the trust may be affected by the payments at issue has the option of filing a motion to prohibit these payments and to seek the return to the trust of any such payment already made. The amendments to paragraph (d) also clarify that such a motion shall be denied unless the court makes a finding that “there is a reasonable basis to conclude there has been a breach of trust” and that if the court does make such a finding, the court shall grant the motion unless the court “also finds good cause to deny the motion.” These proposed amendments are consistent with the existing statute but serve to clarify that the qualified beneficiary need file this motion only if he or she wants to prohibit or compel the return of these payments and also clarifies that the court may not prohibit or compel the return of these payments in the absence of making the requisite finding.

The proposed amendments to paragraph (d) also identify the categories of evidence through which a movant may make a showing, or through which a trustee may rebut a showing, that a reasonable basis exists to conclude there has been a breach of trust. The categories of evidence permitted are affidavits, answers to interrogatories, admissions, depositions and any evidence otherwise admissible under the Florida Evidence Code. In other words, the categories

of evidence permitted are “summary judgment evidence” (as defined in Florida Rule of Civil Procedure 1.510(c)) and any other category of evidence admissible under the Florida Evidence Code, such as live witness testimony. The existing statute does not provide this level of specificity regarding the categories of evidence the parties may present.

The proposed amendments to paragraph (e) clarify that if a trustee fails to comply with an order of the court prohibiting or compelling the return of payments of these types of attorney’s fees and costs, the court may impose such remedies or sanctions as the court deems appropriate, which include but are not limited to striking the defenses or pleadings filed by the trustee. This is consistent with the provisions of the current statute.

The proposed amendments include a new paragraph (f) providing that if the claim or defense of breach of trust is withdrawn, dismissed or resolved by the trial court without a determination that the trustee committed a breach of trust, the trustee may pay these types of attorney’s fees and costs from trust assets without serving a notice of intent and without court order even if the court had previously granted a motion to prohibit or compel the return of such payments. Further, the attorney’s fees and costs that the trustee may pay from trust assets under such circumstances include those payments that the trustee may have returned to the trust pursuant to court order. This is consistent with the provisions of the current statute, but the current statute does not specify whether such payment from trust assets may be made after a final determination by the trial court or whether the trustee must wait for a final determination by the appellate court.

The proposed amendments also include a new paragraph (g) providing that the statute does not operate to limit the right of any interested person to challenge or object to the payment of compensation or costs from the trust at any time, to seek review of compensation under section 736.0206, or to seek remedies for breach of trust under section 736.1001. These proposed amendments are consistent with provisions in the current statute.

B. Section 736.0816(20)

The bill amends section 736.0816(20) to alert lawyers and the courts that the authority of a trustee to use trust assets to pay the trustee’s attorney’s fees and costs is subject to the limitations of section 736.0802(10). It accomplishes this by inserting the language “subject to section 736.0802(10).”

C. Section 736.1007(1)

The bill amends section 736.1007(1) to alert lawyers and the courts that the authority of a trustee to use trust assets to pay the trustee’s attorney’s fees and costs is subject to the limitations of section 736.0802(10). It accomplishes this inserting the language “subject to section 736.0802(10).”

IV. FISCAL IMPACT ON STATE AND LOCAL GOVERNMENTS

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

V. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR

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

VI. CONSTITUTIONAL ISSUES

There do not appear to be any constitutional issues raised by this proposal.

VII. OTHER INTERESTED PARTIES

[_____]

1 A bill to be entitled

2 An act relating to a trustee's duty of loyalty; amending s. 736.0802, F.S.; amending s. 736.0816,
3 F.S.; amending s. 736.1007; clarifying the circumstances under which a trustee may pay or may
4 be precluded from paying attorney fees and costs from assets of the trust in connection with a
5 claim or defense of breach of trust that is set forth in a filed pleading.

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

7 Section 1. Subsection (10) of section 736.0802, Florida Statutes, is amended to read:

8 (10) ~~Payment~~Unless otherwise provided in this subsection, payment of costs or attorney's
9 fees incurred in any proceeding may be made by a trustee from the assets of the trust may be
10 made by the trustee without the approval of any person and without court authorization, unless
11 the court orders otherwise as provided in paragraph (b), section 736.0816(20) and section
12 736.1007(1).

13 ~~(a) If a claim or defense based upon a breach of trust is made against a trustee in a proceeding,~~
14 ~~the trustee shall provide written notice to each qualified beneficiary of the trust whose share of~~
15 ~~the trust may be affected by the payment of attorney's fees and costs of the intention to pay costs~~
16 ~~or attorney's fees incurred in the proceeding from the trust prior to making payment. The written~~
17 ~~notice shall be delivered by sending a copy by any commercial delivery service requiring a~~
18 ~~signed receipt, by any form of mail requiring a signed receipt, or as provided in the Florida Rules~~
19 ~~of Civil Procedure for service of process. The written notice shall inform each qualified~~
20 ~~beneficiary of the trust whose share of the trust may be affected by the payment of attorney's~~
21 ~~fees and costs of the right~~When attorney fees or costs are incurred by a trustee in connection with
22 a claim or defense of breach of trust that is set forth in a filed pleading, the trustee may pay such
23 attorney fees or costs from the assets of the trust without the approval of any person and without
24 any court authorization; however, the trustee may make such a payment only after serving a
25 written notice of intent, as described in paragraph (b), upon each qualified beneficiary of the trust
26 whose share of the trust may be affected by the payment. The notice of intent need not be served
27 upon a qualified beneficiary whose identity or location is unknown to and not reasonably
28 ascertainable by the trustee. As used in this section, "pleading" means a pleading as defined in
29 Rule 1.110 of the Florida Rules of Civil Procedure.

30 (b) The notice of intent shall identify the judicial proceeding in which the claim or defense of
31 breach of trust has been set forth in a filed pleading and shall inform the person served of his or

32 her right under paragraph (d) to apply to the court for an order prohibiting the trustee from
33 paying attorney's fees or costs from trust assets. If a trustee is served with a motion for an order
34 prohibiting the trustee from paying attorney's fees or costs in the proceeding and the trustee pays
35 attorney's fees or costs before an order is entered on the motion, the trustee and the trustee's
36 attorneys who have been paid attorney's fees or costs from trust assets to defend against the
37 claim or defense are subject to the remedies in paragraphs (b) and (c) using trust assets to pay
38 attorney fees or costs described in paragraph (a) or compelling the return of such attorney fees
39 and costs to the trust. The notice of intent shall be served by: (i) any commercial delivery
40 service requiring a signed receipt; (ii) any form of mail requiring a signed receipt; (iii) the
41 manner provided in the Florida Rules of Civil Procedure for service of process; or (iv) as to any
42 party over whom the court has already acquired jurisdiction in that judicial proceeding, in the
43 manner provided for service of pleadings and other documents by the Florida Rules of Civil
44 Procedure.

45 (c) If a trustee has used trust assets to pay attorney fees or costs described in paragraph (a) prior
46 to service of a notice of intent, any qualified beneficiary who is not barred as provided in s.
47 736.1008 and whose share of the trust may have been affected by such payment shall be entitled,
48 upon the filing of a motion to compel the return of such payment to the trust, to an order
49 compelling such payment, together with interest at the statutory rate, to be refunded to the trust.
50 Attorney fees and costs incurred in connection with a motion to compel under this section shall
51 be awarded by the court as provided in s. 736.1004.

52 (d) Upon the motion of any qualified beneficiary who is not barred as provided in s. 736.1008
53 and whose share of the trust may be affected by the use of trust assets to pay attorney fees or
54 costs described in paragraph (a), the court may prohibit the trustee from using trust assets to
55 make such payment and, if such payment has been made from trust assets after service of a
56 notice of intent, the court may enter an order compelling the return of such attorney fees and
57 costs to the trust, together with interest at the statutory rate. In connection with any hearing on a
58 motion brought under this paragraph (d):

59 (b) If a claim or defense based upon breach of trust is made against a trustee in a proceeding, a
60 party must obtain a court order to prohibit the trustee from paying costs or attorney's fees from
61 trust assets. To obtain an order prohibiting payment of costs or attorney's fees from trust assets, a
62 party must make a reasonable showing by evidence in the record or by proffering evidence that

63 ~~provides a reasonable basis for a court~~1. The motion shall be denied unless the court finds there
64 is a reasonable basis to conclude that there has been a breach of trust. ~~The trustee may proffer~~
65 ~~evidence to rebut the evidence submitted by a party. The court in its discretion may defer ruling~~
66 ~~on the motion, pending discovery to be taken by the parties. If the court finds that there is a~~
67 ~~reasonable basis to conclude that there has been a breach of trust, the motion shall be granted~~
68 ~~unless the court finds good cause, the court shall enter an order prohibiting the payment of~~
69 ~~further attorney's fees and costs from the assets of the trust and shall order attorney's fees or~~
70 ~~costs previously paid from assets of the trust to be refunded. An order entered under this~~
71 ~~paragraph shall not limit a trustee's right to seek an order permitting the payment of some or all~~
72 ~~of the attorney's fees or costs incurred in the proceeding from trust assets, including any fees~~
73 ~~required to be refunded, after the claim or defense is finally determined by the court. If a claim or~~
74 ~~defense based upon a breach of trust is withdrawn, dismissed, or resolved without a~~
75 ~~determination by the court that the trustee committed a breach of trust after the entry of an order~~
76 ~~prohibiting payment of attorney's fees and costs pursuant to this paragraph, the trustee may pay~~
77 ~~costs or attorney's fees incurred in the proceeding from the assets of the trust without further~~
78 ~~court authorization.~~it also finds good cause to deny the motion.

79 2. The movant may show that such reasonable basis exists, and the trustee may rebut any such
80 showing, by presenting affidavits, answers to interrogatories, admissions, depositions and any
81 evidence otherwise admissible under the Florida Evidence Code.

82 ~~(e) If the court orders a refund under paragraph (b)~~(e) If a trustee fails to comply with an order of
83 the court prohibiting the use of trust assets to pay attorney fees or costs described in paragraph
84 (a) or in the event of a failure to comply with an order compelling that such payment be refunded
85 to the trust, the court may enter impose such remedies or sanctions as are the court deems
86 appropriate if a refund is not made as directed by the court, including, but not limited to without
87 limitation, striking the defenses or pleadings filed by the trustee. Nothing in this subsection
88 limits other remedies and sanctions the court may employ for the failure to refund timely.

89 ~~(d) Nothing in this subsection limits the power of the court to review fees and costs or the right~~
90 ~~of any interested persons to challenge fees and costs after payment, after an accounting, or after~~
91 ~~conclusion of the litigation.~~(e) Notice under (f) Notwithstanding the entry of an order prohibiting
92 the use of trust assets to pay attorney fees and costs described in paragraph (a) is not required if
93 the action, or compelling the return of such attorney fees or costs, if a claim or defense of breach

94 of trust is later withdrawn or, dismissed by the party that is alleging a breach of trust or, or
95 judicially resolved in the trial court without a determination by the court that the trustee has
96 committed a breach of trust, the trustee is authorized to use trust assets to pay attorney fees and
97 costs described in paragraph (a) and may do so without service of a notice of intent or order of
98 court. Such attorney fees and costs may include fees and costs that were refunded to the trust
99 pursuant to order of court.

100 (g) Nothing in this subsection shall limit proceedings under s. 736.0206 or remedies for breach
101 of trust under s. 736.1001, or the right of any interested person to challenge or object to the
102 payment of compensation or costs from the trust, either before or after an accounting, or before
103 or after the conclusion of the judicial proceeding.

104 Section 2. Subsection (20) of section 736.0816, Florida Statutes, is amended to read:

105 (20) Employ persons, including, but not limited to, attorneys, accountants, investment
106 advisers, or agents, even if they are the trustee, an affiliate of the trustee, or otherwise associated
107 with the trustee, to advise or assist the trustee in the exercise of any of the trustee's powers and
108 pay reasonable compensation and costs incurred in connection with such employment from the
109 assets of the trust, subject to section 736.0802(10) with respect to attorney fees and costs, and act
110 without independent investigation on the recommendations of such persons.

111 Section 3. Subsection (1) of section 736.1007, Florida Statutes, is amended to read:

112 (1) If the trustee of a revocable trust retains an attorney to render legal services in
113 connection with the initial administration of the trust, the attorney is entitled to reasonable
114 compensation for those legal services, payable from the assets of the trust, subject to section
115 736.0802(10), without court order. The trustee and the attorney may agree to compensation that
116 is determined in a manner or amount other than the manner or amount provided in this section.
117 The agreement is not binding on a person who bears the impact of the compensation unless that
118 person is a party to or otherwise consents to be bound by the agreement. The agreement may
119 provide that the trustee is not individually liable for the attorney's fees and costs.

120 Section 4. The changes made by this act to s. 736.0802(10), Florida Statutes, shall take
121 effect July 1, 2016 and apply to all proceedings commenced on or after the effective date.

LEGISLATIVE POSITION REQUEST FORM

GOVERNMENTAL AFFAIRS OFFICE

Date Form Received _____

GENERAL INFORMATION

Submitted By John C. Moran, Chair, Probate Law and Procedure Committee of the Real Property Probate & Trust Law Section (RPPTL Approval Date August 1, 2015)

Address Gunster, Yoakley & Stewart, P.A., 777 S. Flagler Drive, Suite 500 East, West Palm Beach, FL 33401
Telephone: (561) 650-0515; Email: jmoran@gunster.com

Position Type Probate Law and Procedure Committee, RPPTL Section, The Florida Bar (Florida Bar, section, division, committee or both)

CONTACTS

Board & Legislation Committee Appearance

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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 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 § 731.106(2), Florida Statutes."

Reasons For Proposed Advocacy:

The proposed change reaffirms the legal principal that Florida law always governs the testamentary disposition of Florida real property, even when Florida real property is owned by a nonresident. The proposed change is necessary to address the holding in *Saunders v. Saunders*, 796 So.2d 1253 (Fla.1st DCA 2001) that Florida law does not govern the validity and effect of the disposition of Florida real property when the will of a nonresident testator does not provide that Florida law shall determine the validity and effect

of the disposition of the nonresident testator's Florida real property.

PRIOR POSITIONS TAKEN ON THIS ISSUE

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

Most Recent Position [NONE?]
(Indicate Bar or Name Section) (Support or Oppose) (Date)

Others

(May attach list if more than one)

 [NONE?]
(Indicate Bar or Name Section) (Support or Oppose) (Date)

REFERRALS TO OTHER SECTIONS, COMMITTEES OR LEGAL ORGANIZATIONS

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

Referrals

 [List here other Bar sections, committees or attorney organizations]
(Name of Group or Organization) (Support, Oppose or No Position)

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

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

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

WHITE PAPER

PROPOSED AMENDMENT TO SECTION 731.106, FLORIDA STATUTES

ASSETS OF NONDOMICILIARIES

I. SUMMARY

The proposed amendment reaffirms the legal principle that Florida law always governs the testamentary disposition of real property located in Florida, even real property owned by a nonresident. The proposed legislation is a product of study and analysis by the Probate Law and Procedure Committee, Real Property, Probate and Trust Law Section of the Florida Bar. The bill does not have a fiscal impact on state funds.

II. CURRENT SITUATION

“Lex loci rei sitae” is the fundamental legal principle that real property is governed by the law of the jurisdiction in which it is situate. In 1940, the Florida Supreme Court stated that this doctrine was absolute. *Trotter v. Van Pelt*, 144 Fla. 517, 523 (1940). In *Trotter*, the Court relied on its previous holding in *Connor v. Elliott* that: “[s]o far as real estate or immovable property is concerned, the laws of the state where it is situated furnish the rules which govern its descent, alienation, and transfer, the construction, validity, and effect of conveyances thereof, and the capacity of the parties to such contracts or conveyances, as well as their rights under the same.” *Connor v. Elliott*, 85 So. 164, 165 (Fla. 1920).

When Florida adopted the Uniform Probate Code in 1975, it included section 731.106, which states, in subsection (2), that when a nonresident decedent provides by will that property located in Florida, including real property, shall be governed by Florida law, then Florida law shall apply. As it related to real property, the statute was merely restating the well-known common law principle of *lex loci rei sitae*. The way the statute was worded, however, gave rise to a possible negative implication: if a testator could mandate that Florida law govern the disposition of real property in Florida, then in the absence of such a direction the law of the decedent’s domicile would apply.

The First District Court of Appeal, in *Saunders v. Saunders*, 796 So.2d 1253, 1254 (2001), applied that negative implication to reach its decision. The court held that the laws of the nonresident decedent’s domicile govern the disposition of the Florida real property when the will of a nonresident testator does not provide that Florida law shall determine the validity and effect of the disposition of the nonresident testator’s Florida property. In reaching its holding, the court stated that “[t]he common law is changed where a statute clearly, unequivocally, and specifically prescribes a different rule of law from a common law rule, as does section 731.106(2). *Saunders*, 796 So.2d at 1254.

After analyzing the background of the *lex loci rei sitae* doctrine and the legislative history of the adoption of the Uniform Probate Code, the Committee respectfully determined that the First District Court of Appeal erred in its conclusion in the *Saunders* case. Rules of statutory construction direct that statutory provisions altering common-law principles must be narrowly and strictly construed; presume that no change in the common law is intended unless the statute is explicit in this regard; and that inference and implication cannot be substituted for clear expression. The Committee does not believe that the Florida legislature intended to abandon the common law *lex loci rei sitae* doctrine when it adopted the Uniform Probate Code.

Accordingly, the Committee has proposed an amendment to section 731.106 to make clear that Florida law always governs the testamentary disposition of real property located in Florida, including real property owned by nonresidents.

III. EFFECT OF PROPOSED CHANGES

The proposal clarifies that Florida common law regarding the Florida real property of nonresident decedents was not changed, but rather codified, by the enactment of Section 731.106(2). The proposal confirms that Florida law governs the validity and effect of the disposition of Florida real property, whether owned by resident or nonresident and regardless of any directive in a will. The portion of Section 731.106(2) regarding personal property remains unchanged and, therefore, Florida law will only govern the Florida situated personal property of a nonresident testator when the testator's will directs the application of Florida law.

IV. FISCAL IMPACT ON STATE AND LOCAL GOVERNMENTS

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

V. DIRECT FISCAL IMPACT ON PRIVATE SECTOR

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

VI. CONSTITUTIONAL ISSUES

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

V. OTHER INTERESTED PARTIES.

None.

1 A bill to be entitled

2 An act relating to assets of nondomiciliaries.

3
4 Be it enacted by the Legislature of the State of Florida:

5 Section 1. Section 731.106(2) is amended as follows:

6 731.106 Assets of nondomiciliaries.-

7 (2) When a nonresident decedent, whether or not a citizen of
8 the United States, provides by will that the testamentary
9 disposition of tangible or intangible personal property having a
10 situs within this state, ~~or of real property in this state,~~ shall
11 be construed and regulated by the laws of this state, the
12 validity and effect of the dispositions shall be determined by
13 Florida law. The validity and the effect of a disposition,
14 whether intestate or testate, of real property in this state are
15 governed by Florida law. The court may, and in the case of a
16 decedent who was at the time of death a resident of a foreign
17 country the court shall, direct the personal representative
18 appointed in this state to make distribution directly to those
19 designated by the decedent's will as beneficiaries of the
20 tangible or intangible property or to the persons entitled to
21 receive the decedent's personal estate under the laws of the
22 decedent's domicile.

23 Section 2. This act shall take effect July 1, 2016.

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

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Position Type Trust Law Committee, Real Property, Probate & Trust Law Section of The Florida Bar

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Appearances before Legislators

N/A at this time
(List name and phone # of those appearing before House/Senate Committees)

Meetings with Legislators/staff

N/A at this time
(List name and phone # of those having face to face contact with Legislators)

PROPOSED ADVOCACY

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

If Applicable, List The Following

N/A at this time

(Bill or PCB #)

(Bill or PCB Sponsor)

Indicate Position

Support

Oppose

Technical Assistance

Other

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

WHITE PAPER

REVISION TO SECTION 736.0708 TO CLARIFY COMPENSATION FOR MULTIPLE TRUSTEES

I. SUMMARY

The proposed legislation is intended to clarify that when multiple trustees are serving as trustees, each trustee is entitled to reasonable compensation even if the aggregate compensation exceeds what would be reasonable compensation for a single trustee.

II. CURRENT SITUATION

Section 736.0708 sets forth the rule for trustee compensation under Florida law. That section states that a trustee is entitled to compensation as specified in the trust, or if none is specified by the trust, the trustee is entitled to compensation that is reasonable under the circumstances. The term “trustee” is defined in section 736.0103(23) to include “any cotrustee.” The issue is whether Florida law requires cotrustees to split what would be considered reasonable compensation for a single trustee; or, whether each cotrustee is entitled to reasonable compensation such that the aggregate fees charged by all the cotrustees could exceed what could be charged by a single trustee.

The older view, as expressed in the Restatement (Second) of Trusts and which was adopted by the Supreme Court of Florida in 1958 in *West Coast Hospital Association v. Florida National Bank of Jacksonville*, 100 So. 2d 807, 812 (Fla. 1958), is that cotrustees must share a single fee. The more modern view, which is expressed in the Restatement (Third) of Trusts § 38 and which was adopted by the Uniform Trust Code (UTC) and therefore incorporated into section 736.0708 (because that section was taken from the UTC), is that each cotrustee is entitled to reasonable compensation, and the aggregate fees can exceed what a single trustee would charge.

Florida adopted the trustee compensation portions of the UTC. Section 736.0708 provides that when compensation is not specified in the terms of a trust “a trustee is entitled to compensation that is reasonable under the circumstances.” Like the UTC, the term “trustee” is defined in section 736.0103(23) to include “any cotrustee.” Therefore, if following the approach adopted by the UTC, section 736.0708(a) should be the authority for entitling each cotrustee to reasonable compensation (which is a compensation model that is different than the Restatement (Second) of Trusts approach adopted in the *West Coast Hospital Association* holding).

However, the Florida Trust Code Scrivener’s Summary (the “Scrivener’s Summary”) provides that section 736.0708 doesn’t address the issue of compensation of multiple trustees, stating: “There is not *[sic]* existing statute covering the compensation of multiple trustees and the Code does not address this issue either. Compare 733.716(5) *[sic]* dealing with the compensation of multiple personal representatives.” This note in the Scrivener’s Summary is potentially ambiguous and inconsistent with the text of the actual statute which by its language would provide each co-trustee with the ability to receive reasonable compensation.

Therefore, under the language of the statute, trustees would appear to have authority to charge reasonable fees, even if the aggregate fees exceed what would be one single fee, a result which would overrule the decision in *West Coast Hospital Association*. But, because of the footnote in the scrivener's summary, it is not clear that the statute was intended to provide for multiple trustee fees or overrule *West Coast Hospital Association*.

Section 38 of the Restatement (Third) of Trusts articulated the reasoning for diverting from the "one fee" approach. The requirement that each trustee participate in all aspects of administration may result in some duplication of effort, but also can contribute to the quality of the administration. The factors relating to reasonable compensation (which are in comment *c* of section 38) remain relevant to establishing the compensation of each cotrustee. The Reporter's Notes to section 38 discusses the fact that section 242 of the Restatement (Second) of Trusts imposed a restriction that multiple cotrustees should ordinarily share what would be a reasonable fee for a single trustee. The notes observe that this restriction might be appropriate when the trustees' fees are set by a statute, a court rule, or a trust provision based on a percentage of the assets. But, the restriction "will prove unfair to the trustees in many situations, and may be counterproductive so far as the settlor's objectives are concerned, and is therefore inappropriate to (and not included in) the rules of this Section, under which each trustee is to receive 'reasonable' compensation based on the value of the services the trustee provides."

The analysis for determining the reasonableness of trustee compensation is to evaluate all the facts and circumstances, taking into account various factors including: community custom; the trustee's skill and experience; the time devoted to trustee duties; amount and character of the trust property; the degree of difficulty and the risk assumed and the type of work done in the administration; the nature and costs of services rendered by others; and the quality of the trustee's performance. Under the aggregate approach, the reasonable compensation for each cotrustee would be determined under this standard, such that a trustee that does nothing would not be entitled to duplicate the compensation charged by the trustee who does the majority of the work. Rather, what would be reasonable compensation for a trustee who does less work would, by definition, be less than what would be the reasonable compensation for a trustee who does more work.

III. EFFECT OF PROPOSED CHANGES

The proposal amends section 736.0708 to make it clear that multiple trustees are each entitled to a reasonable compensation, and that the aggregate compensation charged by all the trustees may be greater than what would be considered reasonable trustee compensation for a single trustee.

IV. FISCAL IMPACT ON STATE AND LOCAL GOVERNMENTS

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

V. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR

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

VI. CONSTITUTIONAL ISSUES

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

VII. OTHER INTERESTED PARTIES

Florida Department of Financial Services.

Florida Bankers Association.

MIA_ACTIVE 4343488.2

1 A bill to be entitled

2 An act relating to the administration of trusts; amending s. 736.0807(1).

3 Be it Enacted by the Legislature of the State of Florida:

4
5 Section 1. Subsection (1) of Section 736.0708, Florida Statutes, is amended to read:

6 736.0807. Compensation of trustee

7 (1) If the terms of a trust do not specify the trustee's compensation, a trustee, including
8 each cotrustee, is entitled to compensation that is reasonable under the circumstances. In
9 the aggregate, the reasonable compensation for multiple trustees may be greater than for a
10 single trustee.

LEGISLATIVE POSITION REQUEST FORM

GOVERNMENTAL AFFAIRS OFFICE

Date Form Received _____

GENERAL INFORMATION

Submitted By Shane Kelley and Patricia P. Jones, Co-Chairs, Homestead Issues Study Committee, a General Standing Committee of the Real Property Probate & Trust Law Section (June 18, 2015)

Addresses: Shane Kelley, 3365 Galt Ocean Drive, Ft. Lauderdale, FL 33308
Patricia P. Jones, 4036 Haws Lane, Orlando, FL 32814-1134

Position Type Homestead Issues Study Committee, a General Standing Committee of the RPPTL Section, The Florida Bar

CONTACTS

Board & Legislation Committee Appearance

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(List name, address and phone number)

Appearances Before Legislators (SAME)

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

Meetings with Legislators/staff (SAME)

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

PROPOSED ADVOCACY

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

If Applicable, List The Following N/A

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

Indicate Position Support Oppose Technical Other

Proposed Wording of Position for Official Publication:

To support proposed amendments to Chapter 736, Florida Statutes, 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.

Reasons For Proposed Advocacy:

While Florida probate law provides reasonable certainty regarding the rights of creditors, beneficiaries, and the personal representative when a decedent devises his or her homestead real property by will, that is not the case when homestead real property is devised by a settlor's revocable living trust, even though both may make similar testamentary dispositions. Currently Florida law does not adequately address two key issues involved when homestead real property passes pursuant to a revocable trust at the time of the settlor's death. The first issue is whether the exemption from forced sale under Article X, Section 4 of the Florida Constitution inures to homestead heirs who either receive the homestead property outright as a beneficiary under the decedent's revocable trust or as beneficiaries of ongoing or continuing trusts created under the decedent's revocable trust. The second issue is the timing and method of the passage of title to the homestead property, and, as between a trustee or the beneficiaries, who has the right to sell the homestead property and who is responsible for paying the expenses associated with the homestead property during the initial trust administration. The proposed legislation would recognize the homestead heirs' exemption from forced sale, protect the trustee who expends trust assets to protect and conserve the homestead real property, and provide for specific rules regarding the passage of title to homestead property devised by the terms of a revocable trust upon the death of the settlor of the trust. See White Paper for a more detailed analysis.

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

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

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)

The Florida Bankers Association
(Name of Group or Organization) (Support, Oppose or No
Position)

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

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

WHITE PAPER

PROPOSED AMENDMENTS TO §§ 736.0103, 736.0201, FLA. STAT., PROPOSED AMENDMENT TO FLA. R. PROB. P. 5.405, AND PROPOSED CREATION OF TWO ADDITIONAL STATUTES IN CHAPTER 736 FLA. STAT.

I. SUMMARY

While Florida probate law provides reasonable certainty regarding the rights of creditors, beneficiaries, and the personal representative when a decedent devises his or her homestead real property by will, that is not the case when homestead real property is devised by a settlor's revocable living trust, even though both may make similar testamentary dispositions. Currently Florida law does not adequately address two key issues when homestead real property passes pursuant to a revocable trust at the time of the settlor's death. The first issue is whether the exemption from forced sale under Article X, Section 4 of the Florida Constitution insures to homestead heirs who either receive the homestead property outright as a beneficiary under the decedent's revocable trust or as beneficiaries of ongoing or continuing trusts created under the decedent's revocable trust. The second issue is the timing and method of the passage of title to the homestead property, and, as between a trustee or the beneficiaries, who has the right to sell the homestead property and who is responsible for paying the expenses associated with the homestead property during the initial trust administration.

This legislation addresses (1) the inurement of a decedent's exemption from forced sale to the homestead heirs, whether devised outright or through a continuing trust and (2) the timing and passage of title to homestead property held by a revocable trust upon the death of the settlor as well as the responsibilities of the trustees and the beneficiaries with respect to the homestead property. The proposed legislation also addresses the inurement of the exemption from creditors when homestead property is devised in an ongoing or continuing trust for the benefit of heirs and

provides guidance to trustees and attorneys faced with homestead property that is devised to a continuing trust pursuant to a will or a revocable trust upon the death of the settlor. Finally, there are proposed changes to Section 736.0201, Florida Statutes and Fla. R. Prob. P. 5.405 to provide a process for the determination of the homestead status of real property that is held in a revocable trust upon the death of the settlor of that trust. The proposed legislation (and a proposed change to Fla. R. Prob. P. 5.405) removes potential pitfalls for the residents of the State of Florida who choose to own their homesteads in their revocable trusts and pass their homestead properties through revocable trusts upon their deaths.

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

II. CURRENT SITUATION

The general framework regarding homestead property for purposes of probate and trust administration is contained in Article X, Section 4 of the Florida Constitution, and to a lesser extent in Chapter 732 and Chapter 733 of the Florida Statutes. Article X, Section 4(a) of the Florida Constitution allows an exemption from forced sale for real property homestead owned by a natural person. Subsection 4(b) provides that the exemption shall inure to the decedent's heirs and Subsection (c) imposes restrictions on the devise of that property. Presently, there is no statutory guidance and inconsistency in the existing case law regarding several issues with respect to homestead property that is titled in a revocable trust upon the death of the settlor of the trust.

There are three main issues that must be addressed when a homestead owner dies with the homestead property in a revocable trust:

1. Devise Restrictions - The first issue is whether the devise restrictions and forced descent of homestead property pursuant to the Florida Constitution and

the Florida Statutes will apply.

2. Inurement of Exemption - The second issue is whether the exemption from forced sale pursuant to Article X, Section 4 of the Florida Constitution inures to homestead heirs who are either outright beneficiaries of homestead property pursuant to the testamentary provisions of a revocable trust or are beneficiaries of ongoing trusts into which the homestead property passes upon the death of the settlor of a revocable trust.
3. Passage of Title - The final issue is the timing and the passage of title to property titled in a revocable trust at the time of the settlor's death and what parties (trustee vs. beneficiaries) have the responsibilities for paying the expenses related with the property during the initial trust administration.

Devise Restrictions

Regarding the first issue, Florida statutes and case law are currently in agreement that the constitutional restrictions on the devise of homestead property apply to property held in a revocable trust. The relevant statutes indicate that property held in a revocable trust is devise restricted just as if the property held in the revocable trust was titled in the name of the settlor individually upon death. Currently, section 732.4015(2), Florida Statutes, clarifies that the definition of "owner" and "devise" found in section (2) of the statute includes revocable trusts. Application of this definition makes a revocable trust transparent for the constitutional limitations imposed upon the devise of homestead real property.

Inurement of Exemption

The second issue listed above that has not been adequately addressed by the Florida Statutes is whether a decedent's homestead exemption from forced sale inures under Art. X,

Section 4(b) of the Florida Constitution to homestead heirs who are either outright beneficiaries of homestead property pursuant to the provisions of a revocable trust or are beneficiaries of ongoing trusts into which the homestead property passes upon the death of the settlor of a revocable trust. While there are several cases that address the issue, there is a troubling split in the District Courts of Appeal that leads to uncertainty.

In *Elmowitz v. Estate of Zimmerman*, 647 So. 2d 1064 (Fla. 3d DCA 1994), the Third District Court of Appeal held that the devise of homestead to the decedent's revocable trust through a pour over will caused the homestead creditor exemption to be lost. Accordingly, the exemption from forced sale did not inure to the beneficiaries of a revocable trust upon the death of the settlor. Specifically, the homestead was devised through the residuary clause of the revocable trust which resulted in the loss of the homestead exemption from forced sale. The *Elmowitz* court noted in footnote one that the property was not specifically devised to the beneficiary of the trust. The beneficiary was entitled only to an amount equivalent in value to 50% of the trust assets and was not entitled to an undivided or equitable interest in the protected homestead property. There is an implication in footnote one that if the property had been specifically devised under the revocable trust, the exemption may have inured to the beneficiary. Specifically:

It is noted that the Zimmerman's property was not specifically devised to Plotkin, thus she could not claim protection under Article X, Section 4(b) of Florida's Constitution . . . and was only entitled to an equivalent in value from the assets of the trust.

Id. at n.1.¹

¹ While *Elmowitz* is the only case with this type of holding, it was cited by the Supreme Court of Florida as authority in *McKean v. Warburton*, 919 So. 2d 341 (Fla. 2005), albeit, for a different proposition.

The First District Court of Appeal reached an opposite result in *HCA Gulf Coast Hospital v. Estate of Downing*, 594 So. 2d 774 (Fla. 1st DCA 1992). In *Estate of Downing*, the appellate court focused on the substance rather than the form of the devise in holding that the property retained its exempt character. Mrs. Downing's will devised her homestead to her former husband, as trustee of a testamentary spendthrift trust, for the benefit of her adult daughter. Affirming the trial court, and relying on *In re: Donovan*, 550 So. 2d 37 (Fla. 2d DCA 1989), the First District Court of Appeal held that for purposes of Article X, Section 4 of the Florida Constitution, the benefit of the homestead exemption from forced sale inures to a spendthrift beneficiary, such as Mrs. Downing's daughter, who would be otherwise entitled to claim homestead protection had title passed directly to her by devise or intestacy. *Id.* at 776. Unfortunately, however, the *Downing* case's precedential value is questionable as the court's ruling was very fact specific and the court found that the trust in *Downing* was more in the nature of a nominee relationship and less in the nature of a truly discretionary trust. The court held that "the result we reach here relies on the fact that the trustee, Mr. Downing, although possessed of legal title in the subject property, exercised nothing more than a supervisory interest in the homestead. Were the facts otherwise, this result may have been different."

Similarly, the Fourth District Court of Appeal in *Engelke v. Engelke*, 921 So. 2d 693 (Fla. 4th DCA 2006), held that a settlor's ½ interest in a principal residence owned by his revocable trust was constitutionally protected homestead which could not be used to pay the estate's claims and expenses. In *Engelke*, the decedent's ½ interest in his residence was transferred to his revocable trust prior to his death. The decedent retained the right to live on the property and the right to revoke the trust at any time. On his death, the decedent's wife continued to have the right to live on the property during her lifetime and, upon her death or removal from the home,

the decedent's children would receive the home through the residuary provisions of the trust. *Id.* at 694. The appellate court held that the decedent's interest in the property was protected during his lifetime under Article X, Section 4(a) of the Florida Constitution and the exemption inured to his heirs under Subsection 4(b) of the constitution, upon his death. *Id.* at 696. In support of its holding, the Court relied upon its own precedent in *Hubert v. Hubert*, 622 So. 2d 1049 (Fla. 4th DCA 1993), in which the Court held the decedent's exemption inured to his sons where the decedent devised his property to a "good friend" for her life with a remainder to his sons. In the *Hubert* case, while the value of the life estate could be reached by the decedent's creditors, the value of the remainder interest remained protected. *Id.* at 1051.

Accordingly, there are presently inconsistencies between the District Courts of Appeal as to whether the homestead exemption inures to the recipients of the homestead property upon the death of the settlor of a revocable trust. This lack of guidance and the inconsistent results when these matters have been addressed by the courts have led to uncertainty in the legal community and for the citizens of Florida regarding an extremely important constitutional protection.

Passage of Title

The third issue listed above that has not been adequately addressed by the Florida Statutes or the case law is the timing and passage of title to homestead property titled in a revocable trust. The practical implications of this issue are as follows:

- a. As between a trustee or the beneficiaries, who has the right to possess the homestead property?
- b. Who has the right to sell the homestead property and who is responsible for paying the expenses associated with the homestead property during the initial trust administration such as mortgage payments, condo maintenance and assessments,

- upkeep, utilities, taxes?
- c. Who is responsible for damage to the property during initial administration such as hurricane damage or vandalism or theft?
 - d. Who is responsible for insuring the property?
 - e. Can the trustee and the attorney for the trustee base their fees on the value of the homestead property (i.e. – is the homestead real property and asset of the trust or does title pass at the moment of death as in the probate context)?
 - f. Under what circumstances and how can a trustee of a revocable trust take possession of protected homestead, take responsibility for the expenses of a protected homestead property, and then charge the expenses against other assets of the trust or homestead property?

Article X, Section 4 of the Florida Constitution does not provide when title passes upon the death of the owner of the homestead. Instead, with respect to homesteads owned by decedents in their individual names, the answer is found in the Probate Code. Generally, title to the decedent's real property vests in the beneficiaries at the moment of the decedent's death, subject to the administration of the estate. *See* sections 732.101 and 732.514, Florida Statutes. Section 733.607(1), Florida Statutes, provides that “[e]xcept as otherwise provided by a decedent's will, every personal representative has a right to, and shall take possession or control of, the decedent's property, *except the protected homestead, ...*”. Section 733.608(1)(a), Florida Statutes, provides, that “[a]ll real and personal property of the decedent, *except the protected homestead, ...* shall be assets in the hands of the personal representative . . .”. It is clear that both of those statutes apply only to a personal representative and not in a trust context. Section 733.607, Florida Statutes, even refers specifically to “a decedent's will” and both refer to “the

personal representative”.

There are no statutes in Chapter 736 of the Florida Statutes addressing this issue. In a trust context, assuming the trustee holds title prior to the death of the settlor of a revocable trust, the Florida Trust Code is unclear what happens upon the settlor’s death and when title to homestead property in the revocable trust vests in the beneficiaries.

However, case law supports treating homesteads in revocable trusts in the same manner as individually owned homesteads. *See, e.g., Engelke v. Estate of Engelke*, 921 So. 2d 693 (Fla. 4th DCA 2006); *see also Aronson v. Aronson*, 81 So. 3d 515 (Fla. 3d DCA 2012) (Aronson II). In the *Engelke* case, the Fourth District Court of Appeal held that the homestead property in the decedent’s revocable trust was not an asset available to the trustee to sell or to use to satisfy expenses of administration or creditor claims. In the *Aronson II* case, the Third District Court of Appeal ruled that where a husband invalidly devised his homestead property in his revocable trust (the property was titled in his revocable trust at the time of his death and the improper devise was in the trust) that the homestead property passed outside of probate and “in a twinkling of an eye, as it were” title vested as provided in Section 732.401, Florida Statutes. Further, from that moment forward (i.e. from the date of husband’s death on), “the trustees had no power or authority with respect to the homestead” and the widow – as life tenant - became responsible and liable for all of the expenses of maintaining the homestead. *Id.* at 519.

Given the lack of statutory clarity and authority, trustees and attorneys are at risk of being criticized by trust beneficiaries no matter how they currently choose to handle homestead property. Thus, the proposed legislation is also designed to provide an answer to all of the issues listed in subparagraphs a–f above, and the proposed legislation is intended to supply necessary guidance for trustees and attorneys who are faced with homestead property that is

devised pursuant to a revocable trust upon the death of the settlor. The proposed legislation seeks to provide a similar result to homestead property that is devised under a will. These proposed legislative amendments will simplify the administration of homestead property through a revocable trust and provide a consistent result with homestead property that passes pursuant to the provisions of a decedent's will.

Finally, the proposed legislation offers a process for the determination of the homestead status of real property owned by a trust by permitting a determination to be made in a probate proceeding for the trust settlor's estate. To accomplish this result, the proposed legislation offers a new subsection (7) to Section 736.0201, Florida Statutes, and also proposes a modification to Fla. Prob. R. 5.405.

III. EFFECT OF PROPOSED CHANGES

As set forth in more detail below, the proposed legislation will simplify the administration of homestead properties held in revocable trusts and will provide consistent results for homestead properties that pass through decedents' revocable trusts or pursuant to decedents' wills.

IV. SECTION-BY-SECTION ANALYSIS

A. Definition of Homestead Heir

The proposed legislation includes a definition for the term "homestead heir." The term is intended to identify those beneficiaries to whom the decedent's homestead exemption will inure pursuant to Article X, Section 4(c) of the Florida Constitution.

B. Inurement of Exemption and Passage and Vesting of Title

The proposed legislation provides new rules regarding the passage and vesting of title for homestead property that is owned in a revocable trust upon the death of an owner. First, the

proposed legislation addresses the passage of title to homestead property upon the death of the settlor of a revocable trust. Second, the proposed legislation addresses the inurement of a decedent's homestead exemption if the homestead property is to be held in continuing trust as opposed to distributed outright (including testamentary trusts and revocable trusts). The intent of the statute is to create similar rules for the passage of title when homestead property is devised through a last will and testament or through a revocable trust. A simplified summary of the statutory provisions is as follows:

- If the homestead property is devise-restricted pursuant to Article X, Section 4(b) of the Florida Constitution, and a proposed devise of that property under the terms of a Revocable Trust violates those devise restrictions, the title to that homestead property passes pursuant to Section 732.401, Florida Statutes, at the moment of death.
- If homestead property is properly devised under the provisions of the trust, and the devise is an outright distribution to one or more "homestead heirs" as defined in Section 736.0103(11), Florida Statutes, legal and beneficial title shall vest in the homestead heirs at the moment of the settlor's or testator's death.
- If the provisions of a trust require the sale of homestead property, and that property is not otherwise devise-restricted, the title shall remain vested in the trustee to facilitate such a sale. Just as in the probate context, if the provisions of the trust specifically direct the sale of the homestead property, the exemption from forced sale will be lost. A power of sale or general direction to pay debts, expenses and claims within the trust instrument is not considered

the equivalent of a power of sale and will not affect the inurement of the decedent's exemption from forced sale.

- Finally, if homestead property is devised to a testamentary or continuing trust in which one or more "homestead heirs" of the deceased testator or settlor have a beneficial interest, the protection from the decedent's creditors, expenses of administration and obligations of the decedent's estate shall inure to the interests of the homestead heirs. Legal title shall remain vested in the trustee, subject to the terms of the trust. The interests passing to trust beneficiaries who are not "homestead heirs" shall not receive such protection.

C. Court Proceedings

The proposed legislation also resolves the difficulty in obtaining homestead determinations when homestead property is held in a revocable trust upon the death of the settlor. Currently there is no authority for having a homestead determination made in an ongoing probate proceeding because the property at issue is not passing pursuant to a will and was not titled in the decedent's name upon his or her death. The proposed revisions to Section 736.020, Florida Statutes, and to Fla. Prob. R. 5.405 are designed to create that authority and also provide the procedural guidelines for filing such a petition by a trustee or trust beneficiary. The proposed amendment to Fla. Prob. R. 5.405 also supplements the information that is required in a petition to determine the homestead status of property. These proposed changes will apply to all petitions to determine homestead in a probate proceeding because the current rule lacks sufficient information to allow the trier of fact and the parties to make a complete determination regarding the homestead status.

D. Taking Possession of the Homestead Property

Finally, the proposed legislation creates a method for the trustee of a revocable trust to take possession of homestead property if the beneficiaries/owners of such property do not act to protect such property. Further, the proposed legislation also creates a method for the trustee to seek reimbursement for any trust funds expended in the process.

As title to homestead property will vest in a similar manner as homestead property passing pursuant to a decedent's will, the duties of a trustee with regard to homestead property that passes outright to one or more "homestead heirs" upon the death of a settlor of a revocable trust will conclude at the moment of the settlor's death as the title to that property will be vested in those "homestead heirs" at the moment of the settlor's death. If there are no "homestead heirs" who are willing to protect or take possession of the homestead property, the proposed statute would allow the trustee to take possession of the homestead property and expend trust funds for the limited purposes of preserving, maintaining, insuring, and protecting the homestead property for the person having an interest in the property, in essentially the same manner as a Personal Representative may currently do under the Florida Probate Code. In fact, the proposed legislation is modeled after the homestead lien provisions currently found in Section 733.608, Florida Statutes.

V. FISCAL IMPACT ON STATE AND LOCAL GOVERNMENTS

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

VI. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR

The proposed legislation will benefit the private sector by providing certainty and predictability to the residents of the State of Florida who choose to devise their homestead property through a revocable trust upon their death. Similarly the proposed legislation is

anticipated to create savings by eliminating unnecessary court proceedings arising from the current uncertainty.

VII. CONSTITUTIONAL ISSUES

None. The proposed changes do not conflict with any constitutional provisions and are consistent with the public policy underlying the constitutional restrictions on the devise of homestead.

VIII. OTHER INTERESTED PARTIES

The title insurance companies will be interested in this matter as it will have some effect on the issuance of title insurance and the Elder Law Section of the Florida Bar may have an interest as it relates to creditor issues for residences held in revocable trusts. The Florida Bankers Association may also be interested.

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A bill to be entitled
An act relating to trust procedures; amending s.
736.0103, F.S., to add definition for homestead heir;
creating new s. 736.____, F.S., to provide that when a
devise of homestead violates the Florida
constitutional limitations on devise the title to the
homestead shall pass as provided in s. 732.401, F.S.,
at settlor's death; to provide that when a homestead
validly devised by trust and requiring outright
distribution to one or more homestead heirs, legal and
beneficial title shall vest in the homestead heirs at
the moment of settlor's death free of the claims of
decedent's creditors; to vest title to validly devised
homestead property in the trustee if the trust directs
the sale of otherwise protected homestead property; to
provide that when the trust directs the sale of the
homestead real property, title to that homestead
property remains vested in the trustee subject to the
provisions of the trust; to confirm the exemption from
creditors' claims inuring to homestead heirs who
receive a beneficial interest in the homestead real
property under a testamentary or continuing trust; to
provide that this section shall apply to the
administration of trusts and estates of settlors and
decedents who die on or after July 1, 2016; to state
that this section applies only to trusts described in
s. 733.707(3) and to testamentary trusts; amending s.
736.0201, F.S., to provide for a proceeding to
determine the homestead status of real property owned
by a trust; creating new s. 736.____, F.S., to

31 authorize (but not require) a trustee to take
32 possession of protected homestead real property and to
33 expend trust funds for the limited purpose of
34 preserving the property; to provide for written notice
35 to interested persons that the trustee has taken
36 possession of the property; to secure the expenditures
37 incurred by a lien; to provide for attachment,
38 perfection and priority of the lien; to prescribe the
39 contents of the notice of lien and methods of
40 enforcement of the lien.

41
42 Be It Enacted by the Legislature of the State of Florida:

43
44 Section 1. Section 736.0103, Florida Statutes, is amended
45 to add a new subsection (11) and renumbering existing (11)
46 through (23), to read:

47 (11) "Homestead heir" means the homestead owner's surviving
48 spouse or heirs under s. 4(b), Art. X of the State Constitution.

49
50 [the remaining subsections will be renumbered (12) - (24)]

51
52 Section 2. Section 736._____, Florida Statutes is created
53 to read:

54
55 736._____. Testamentary and revocable trusts; homestead
56 protections.

57 (1) If a devise of homestead under a trust violates the
58 limitations on the devise of homestead in s. 4(c), Art. X of the
59 State Constitution, title shall pass as provided in s. 732.401
60 at the moment of the settlor's death.

61 (2) If, upon the death of the settlor of a trust, the terms of
62 the trust do not violate the limitations on the devise of
63 homestead in s. 4(c), Art. X of the State Constitution, and
64 require the outright distribution of an interest in protected
65 homestead, whether by specific or residuary devise, to one or
66 more homestead heirs, legal and beneficial title vest in the
67 homestead heirs at the moment of the settlor's death. A power of
68 sale or general direction to pay debts, expenses and claims
69 within the trust instrument shall not subject the interest in
70 the protected homestead to the claims of decedent's creditors,
71 expenses of administration, and obligations of the decedent's
72 estate as provided in s. 736.05053.

73 (3) If a trust directs the sale of property that would otherwise
74 qualify as protected homestead, and the property is not subject
75 to the limitations on the devise of homestead under the Florida
76 Constitution, title will remain vested in the trustee and be
77 subject to the provisions of the trust.

78 (4) If a will or trust devises what would otherwise constitute
79 protected homestead of a decedent to a testamentary or
80 continuing trust in which a homestead heir of the deceased
81 testator or settlor has a beneficial interest, the protection
82 from the decedent's creditors, expenses of administration and
83 obligations of the decedent's estate will inure to the interests
84 of the homestead heirs. Legal title vests in the trustee,
85 subject to the terms of the trust. The beneficial interests
86 passing to persons who are not homestead heirs will not be
87 protected from the claims of the decedent's creditors, expenses
88 of administration, and obligations of the decedent's estate as
89 provided in s. 736.05053.

90 (5) This section shall apply to the administration of trusts and

91 estates of settlors and decedents who die on or after July 1,
92 2016.

93 (6) This section applies only to trusts described in s.
94 733.707(3) and to testamentary trusts.

95

96 Section 3. Section 736.0201 Role of court in trust proceedings,
97 is amended to add a new subsection (7), to read:

98

99 (7) A proceeding to determine the homestead status of real
100 property owned by a trust may be filed in the probate proceeding
101 for the settlor's estate if the settlor was treated as the owner
102 of the interest held in the trust pursuant to the provisions of
103 s. 732.4015. The proceeding shall be governed by the Florida
104 Probate Rules.

105

106 Section 4. New Section 736.____, F.S., is create to read:

107

108 736._____. Possession of Homestead; Trustee Powers.

109 (1)(a) If the trustee holds record title to property that
110 reasonably appears to the trustee to be protected homestead that
111 is to be distributed outright and free of trust or passes by
112 operation of law to one or more homestead heirs as a result of
113 the death of the settlor, and if the property is not occupied by
114 a person who appears to have an interest in the property, the
115 trustee is authorized, but shall have no duty, to take
116 possession of the property and to expend trust funds for the
117 limited purpose of preserving, maintaining, insuring, and
118 protecting it for the person having an interest in the property.
119 If the trustee takes possession of the property, any rents and
120 revenues may be collected by the trustee for the account of the

121 homestead heirs, but the trustee does not have a duty to rent or
122 otherwise make the property productive.

123

124 (b)The trustee shall deliver written notice to interested
125 persons, including any person in actual possession of the
126 property that contains:

127

128 1. A legal description of the property;

129

130 2. The name and address of the trustee and the trustee's
131 attorney, if any;

132

133 3. A statement that the trustee has taken possession of the
134 property for the limited purpose for preserving, maintaining,
135 insuring or protecting the property for the persons having an
136 interest in the property;

137

138 4. The date the trustee took possession of the property; and

139

140 5. The trustee's right to recover amounts expended and
141 obligations incurred for these purposes, including reasonable
142 attorney's and trustee's fees and costs.

143

144 (c) If the trustee expends trust funds or incurs obligations to
145 preserve, maintain, insure, or protect property that the trustee
146 reasonably believes to be protected homestead, the expenditures
147 and obligations incurred for these purposes, including
148 reasonable attorney's and trustee's fees and costs, will
149 constitute a debt owed to the trustee. The debt may be charged
150 against the protected homestead, and secured by a lien, as

151 provided in this section.

152

153 (d) The trustee's lien will attach to the property and take
154 priority as of the date and time a claim of lien is recorded in
155 the official records of the county where that property is
156 located, and the lien may secure the debt incurred before or
157 after recording the claim of lien. The claim of lien may be
158 recorded before adjudicating the amount of the debt. The claim
159 of lien may be filed in the proceeding to determine the
160 homestead status of the property, but failure to do so does not
161 affect the validity of the lien. A copy of the claim of lien
162 shall be served on each person appearing to have an interest in
163 the property.

164

165 (e) The notice of lien must state:

166

167 1. The legal description of the property;

168 _____

169 2. The name and address of the trustee and the trustee's
170 attorney, if any;

171

172 3. To the extent known to the trustee, the name and address of
173 each person appearing to have an interest in the property; and

174

175 4. That the trustee has expended or will expend funds to
176 preserve, maintain, insure, and protect the property and that
177 the lien stands as security for recovery of those expenditures
178 and obligations incurred, including reasonable attorney's and
179 trustee's fees and costs.

180 The claim of lien is valid if it substantially complies with the

181 requirements of this section.

182

183 (f) The trustee may seek a judicial determination of the
184 homestead status of any real property under s. 736.0201. The
185 court having jurisdiction of the determination of the homestead
186 status of the property may also adjudicate the amount of the
187 debt secured by the claim of lien after notice to the persons
188 appearing to have an interest in the property.

189

190 (g) The trustee may enforce payment of the debt through any of
191 the following methods:

192

193 1. By foreclosure of the lien in the manner of foreclosing a
194 mortgage under the provisions of chapter 702;

195

196 2. By offset of the debt against any other trust property in the
197 trustee's possession that would otherwise be distributable to or
198 for the benefit of any person having an interest in the
199 protected homestead, including assets held in further trust; or

200

201 3. By offsetting the debt against the revenues from the
202 protected homestead, if any, received by the trustee.

203

204 (h) Unless the trust instrument provides otherwise, the amount
205 of the debt payable by each person having an interest in the
206 property shall be apportioned pursuant to s. 738.801. Further
207 apportionment of the debt among two or more persons in the same
208 class as tenants or remaindermen will be pro rata according to
209 each person's interest in the property. The persons having an
210 interest in the property will have no personal liability for the

211 repayment of the debt unless the trust instrument or a
212 beneficiary agreement provides otherwise.

213
214 (i) Parties dealing with the trustee are not required to inquire
215 into the terms of the unrecorded trust agreement or any lien.
216 The doctrine of merger does not extinguish the debt, regardless
217 of the trustee's position as both obligee and holder of legal
218 title to the property.

219
220 (j) The lien will terminate upon the earliest of:

221
222 1. Recording a release of lien signed by the trustee in the
223 official records of the county where the property is located;

224
225 2. Five years from the recording of the lien in the official
226 records unless a proceeding to determine the debt or enforce the
227 lien has been filed prior to the expiration of the five years;

228
229 3. The entry of an order releasing the lien; or

230
231 4. The entry of an order determining the property to not be
232 protected homestead property.

233
234 (k) Any interested person may request an estoppel letter from
235 the trustee in writing to the trustee's address designated in
236 the claim of lien. The trustee must deliver the estoppel letter
237 within 14 days to the requesting person at the address
238 designated in the written request setting forth the unpaid
239 balance of the debt secured by the claim of lien. The trustee
240 must record a release of lien in the official records of the

241 county where the property is located within 30 days after
242 receipt of payment in full, or as agreed. If a judicial
243 proceeding is necessary to compel compliance with the provisions
244 of this subsection, the prevailing party will be entitled to an
245 award of attorney's fees and costs.

246
247 (1) To facilitate a sale or encumbrance of protected homestead
248 property subject to the trustee's claim of lien pending a final
249 determination and payment of the amount properly reimbursable to
250 the trustee under this section:

251
252 1. Any interested person may petition the court for a transfer
253 of the lien provided for in this section from the property to
254 the proceeds of the sale or encumbrance by requiring the deposit
255 of the proceeds into a restricted account subject to the lien,
256 to be held there subject to the continuing jurisdiction of the
257 court for disposition; or

258
259 2. The Trustee and the homestead heirs may agree to retain in
260 escrow the amount demanded to be held pending an agreement of
261 disposition, or judicial determination of the amount, if any,
262 properly reimbursable to the trustee under this section; or

263
264 3. The homestead heirs may transfer the lien from the property
265 to other security by depositing with the clerk of court of the
266 county where the property is located a sum of money in an amount
267 equal to (i) the amount demanded as reimbursement by the trustee
268 plus interest thereon at the legal rate for 3 years, plus (ii)
269 the greater of \$5,000 or 50% of the amount demanded as
270 reimbursement by the trustee to apply to any court attorneys'

271 fees and costs which may be taxed in any proceeding to enforce
272 the lien. Upon such deposit being made, the clerk must make and
273 record a certificate showing the transfer of the lien from the
274 real property to the security and mail a copy thereof by
275 registered or certified mail to the trustee at the address
276 designated in the claim of lien. Upon the filing of the
277 certificate of transfer, the real property will be released from
278 the lien claimed, and such lien will be transferred to the
279 security. The clerk will be entitled to a service charge of up
280 to \$15 for making and serving the certificate. Any excess of
281 the security over the amount of the liens or judgment rendered,
282 plus costs actually taxed, will be repaid to the party filing
283 the security or his or her successor in interest. Any deposit
284 of money will be considered as paid into the court and will be
285 subject to the provisions of law relative to payments of money
286 into court and the disposition of these payments. Any party
287 having an interest in the security or the property from which
288 the lien was transferred may at any time, and any number of
289 times, file a complaint in the circuit court of the county where
290 such security is deposited:

- 291
- 292 a. To require additional security;
 - 293
 - 294 b. To require reduction of security;
 - 295
 - 296 c. To require payment or discharge thereof; or
 - 297
 - 298 d. Relating to any other matter affecting said security.
 - 299
 - 300 (m) In any action for enforcement of the debt described in

301 this section, the court shall award taxable costs as in chancery
302 actions, including attorney fees.

303
304 (n) A trustee entitled to recover a debt for expenditures and
305 obligations incurred, including attorney fees and costs, under
306 this section may be relieved of the duty to enforce collection
307 by an order of the court finding:

308
309 1. That the estimated court costs and attorney fees in
310 collecting the debt will approximate or exceed the amount of the
311 recovery; or

312
313 2. That it is impracticable to enforce collection in view of the
314 improbability of collection.

315
316 (o) A trustee is not liable for failure to attempt to enforce
317 collection of the debt if the trustee reasonably believes it
318 would have been economically impracticable.

319
320 (p) The trustee is not liable for failure to take possession of
321 the property reasonably believed to be protected homestead or to
322 expend funds on its behalf.

323
324 (q) In the event that the property is determined by the court
325 not to be protected homestead, paragraphs (a)-(o) will not apply
326 and any liens previously filed will be deemed released upon
327 recording of the order in the official records of the county
328 where the property is located.

329
330 (2) If the trustee holds title to property that reasonably

331 appears to the trustee to be protected homestead subject to a
332 continuing trust, unless the trust instrument expressly provides
333 otherwise the trustee shall have full authority to expend trust
334 funds to preserve, maintain, insure, and protect the property
335 without notice to or reimbursement from the beneficiaries.

336
337
338

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**REAL PROPERTY,
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TRUST LAW
SECTION**



**THE
FLORIDA
BAR**

www.RPPTL.org

July 2, 2015

Mr. Peter M. Dunbar
Dean Mead et al.
215 South Monroe Street, Ste. 815
Tallahassee, FL 32301-1858

Dear Mr. Dunbar:

This letter confirms the extension of the 2013 Agreement between the Real Property, Probate & Trust Law Section of The Florida Bar and Dean Mead for legislative consultant services through June 30, 2015, subject to the written approval by The Florida Bar staff which is anticipated. A new agreement will not be able to be approved by the RPPTL Executive Council until its meeting on August 1, 2015, and then an agreement must be approved by The Florida Bar.

As you have arranged with outgoing Legislative Committee Co-Chair Robert Freedman, the contemplated new agreement, including payments from the Section to Dean Mead, will relate back to July, 1, 2015, if and when approved by the parties.

Please confirm Dean Mead's agreement with the above by signing below and providing the original to Mary Ann Obos.

Overall, it has been a good legislative year for the Section and Dean Mead. Thus, the Section looks forward to continuing working with you and your team.

Sincerely,

Michael J. Gelfand
Chair, Real Property, Probate &
Trust Law Section of The Florida Bar

The above is accepted this _____ day of July, 2015.

Peter M. Dunbar
Dean Mead et al.

For The Florida Bar

DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT

KARIM H. SAADEH,
Appellant,

v.

MICHAEL CONNORS, COLETTE MEYER, DEBORAH BARFIELD, and
JACOB NOBLE,
Appellees.

No. 4D13-4831

[June 24, 2015]

Appeal from the Circuit Court for the Fifteenth Judicial Circuit, Palm Beach County; Peter D. Blanc, Judge; L.T. Case No. 502010CA008347XXXXMB.

Bryan J. Yarnell and Irwin R. Gilbert of Gilbert|Yarnell, Palm Beach Gardens, for appellant.

David J. Sales of David J. Sales, P.A., Jupiter, for appellee Colette Meyer, Esq.

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

CIKLIN, J.

Karim H. Saadeh appeals the final summary judgment entered in favor of an attorney he sued for professional negligence. The trial court based its summary judgment on a finding that, as a matter of law, an attorney representing Saadeh's court-appointed guardian owed Saadeh no duty under a third-party beneficiary theory. We disagree with the trial court's finding and reverse.

This is not the first time the incapacitation proceedings involving Saadeh have resulted in litigation, and ultimately, an appeal. Our opinion in *Jasser v. Saadeh*, 97 So. 3d 241 (Fla. 4th DCA 2012), illuminates the

protracted path that has led the parties to this point.

Mr. Saadeh is a wealthy man of advanced years. After his wife passed away, a relative introduced him to a younger woman. Saadeh loaned money to the woman, which alarmed his adult children. In response, the children contacted attorney Colette Meyer who worked with a professional guardian, Deborah Barfield (“guardian”). The guardian filed an incapacitation petition, attaching a neurologist’s report diagnosing Saadeh with “dementia, probably Alzheimer’s.” *Id.* at 242-43.

After a hearing, the court appointed the guardian because of an “emergency.” Colette Meyer then became the [emergency temporary] guardian’s attorney (and will be referred to hereinafter as the “guardian’s attorney”). The court-ordered duration of the temporary guardianship was ninety days, pending a full hearing on incapacitation. *Id.* at 244. Three days after the guardian’s appointment—after two members of the examining committee submitted reports finding Saadeh competent—the guardian’s attorney and Saadeh’s court-appointed attorney “submitted to the court an agreed order to ‘settle’ the guardianship,” agreeing that Saadeh would execute a trust in lieu of plenary guardianship.¹ *Id.* The agreed order provided that Saadeh would execute the required trust within seven days, and that “[a]ll pending incapacity proceedings . . . are hereby dismissed” *Id.* at 244-45.

The trial court never dismissed the underlying emergency temporary guardianship (petition), and the parties and the court continued to conduct themselves as though the subject guardianship proceedings had never been dismissed, the agreed order notwithstanding. *Id.* at 245-46.

Saadeh was again found competent by a newly-appointed examining committee, and the incapacitation proceedings appear to have then finally and formally come to an end. The litigation, however, continued.

Saadeh sought an order from the trial court setting aside the establishment of the trust originally required by the agreed order to “settle” the guardianship. The trial court agreed with Mr. Saadeh and entered a summary judgment setting aside the trust which this court affirmed. *Id.*

¹ “Once formed, plenary guardianships grant all of the ward’s delegable rights over person and property to the guardian, while limited guardianships grant only that authority expressly set forth in the guardianship order.” *Whiting v. Whiting*, 160 So. 3d 921, 925 (Fla. 5th DCA 2015); *see also* § 744.344(5), Fla. Stat. (2009) (“A plenary guardian shall exercise all delegable rights and powers of the incapacitated person.”).

at 249.

Subsequently, in 2010, Saadeh brought suit against multiple players in the guardianship proceedings, including the guardian's attorney, the guardian, and Saadeh's court-appointed attorney. In count III of his complaint, Saadeh pled a count of professional negligence and breach of duty against the guardian's attorney. It is this malpractice action against the guardian's attorney which is the primary issue now before us.

Saadeh alleged the following. The guardian's attorney represented the guardian while the guardian was acting as a court-appointed emergency temporary guardian for Saadeh. The guardian, Saadeh's court-appointed attorney, and the guardian's attorney agreed that Saadeh would execute a trust in return for the dismissal of the incapacity proceedings. They engaged the services of an attorney to draft the irrevocable trust document. The guardian's attorney and Saadeh's adult children met with Saadeh in an attempt to pressure him to sign the document which established the trust. The guardian's attorney was aware Saadeh was elderly, lacked a formal education, and spoke English as a second language, yet she advised Saadeh regarding the mechanics of the trust. She led Saadeh to believe he would remain in control of the trust and its contents, and would be able to make decisions regarding the trust. Although Saadeh initially refused to sign the document, he succumbed to the pressure. Afterward, Saadeh discovered the trust was irrevocable and had actually granted all trust control to his adult children. The guardian's attorney failed to advise Mr. Saadeh of the significant negative tax consequences of establishing such a trust.

The guardian's attorney moved for summary judgment, arguing that there was no privity of contract between her and Mr. Saadeh (the ward), and thus she owed no duty directly to Mr. Saadeh. She also argued that Saadeh's interests were adverse to the interests of the children and the guardian.

After a hearing, the court granted summary judgment in favor of the guardian's attorney, rejecting the argument that Saadeh was an intended beneficiary. The court noted that Saadeh's court-appointed attorney invited the guardian's attorney to speak to Saadeh, and it compared this situation to a criminal defense attorney and his client engaging in plea negotiations with a prosecutor. The court also relied on section 744.331(2)(c), Florida Statutes, which precludes an attorney for the alleged incapacitated person from serving as either the guardian or the attorney for the guardian.

Here, the claim against the guardian's attorney was for professional negligence, and the court's entry of summary judgment was based on the element of duty. Our standard of review is de novo. *Chhabra v. Morales*, 906 So. 2d 1261, 1262 (Fla. 4th DCA 2005).

“[W]here a defendant establishes as a matter of law, that no duty is owed to the plaintiff, the trial court may properly grant summary judgment in favor of the defendant.” *Hanrahan v. Hometown Am., LLC*, 90 So. 3d 915, 917 (Fla. 4th DCA 2012) (citation omitted). “An attorney's liability for professional negligence is generally limited to clients with whom the attorney shares privity of contract.” *Dingle v. Dellinger*, 134 So. 3d 484, 487 (Fla. 5th DCA 2014). However, “[i]f the parties are not in privity, to bring a legal malpractice action, the plaintiff must be an intended third-party beneficiary of the lawyer's services.” *Id.* at 487-88.

Saadeh asserts that he was a third party beneficiary insofar as he was the ward and thus, by definition, the intended beneficiary of everything connected with the underlying guardianship proceeding. Even though legal services were technically provided to the guardian, Mr. Saadeh urges that since his guardianship estate was compensating *both the guardian and the guardian's attorney*, the attorney owed him a duty of care. Mr. Saadeh urges that as the “incapacitated ward,” he was the *intended* beneficiary of services provided by the guardian's attorney. He vigorously argues that it would be an oxymoron to consider him, as the ward of the estate, to ever be rendered as nothing more than an incidental third party beneficiary.

Generally, “[t]o assert a third-party beneficiary claim, the complaint must allege: (1) a contract; (2) an intent that the contract primarily and directly benefit the third party; (3) breach of the contract; and (4) resulting damages to the third party.” *Id.* at 488. “Florida has extended the third party beneficiary exception to the privity requirement in legal malpractice actions to very limited circumstances, mainly in the area of will drafting, where it can be demonstrated that the intent of the clients in engaging the services of the lawyer was to benefit a third party.” *Brennan v. Ruffner*, 640 So. 2d 143, 146 (Fla. 4th DCA 1994). However, although the “privity requirement has been relaxed most frequently in will drafting situations,” the third-party beneficiary exception to the rule of privity may apply in other contexts. *Dingle*, 134 So. 3d at 488 (citation omitted). It must be “apparent” that the “intent of the client” is “to benefit a third party” *Hewko v. Genovese*, 739 So. 2d 1189, 1191 (Fla. 4th DCA 1999) (citation omitted).

In determining whether the attorney for the emergency temporary

guardian owes a duty to the alleged incapacitated person under a third party beneficiary theory, we first turn to the guardianship statutes. Upon the filing of a petition to determine incapacity, the court must appoint an attorney to represent the alleged incapacitated person. § 744.331(2)(b), Fla. Stat. (2009). “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.” § 744.331(2)(c), Fla. Stat. (2009).

While the petition is pending, the court may appoint an emergency temporary guardian to protect the alleged incapacitated person and any property from imminent harm. See § 744.3031(1), Fla. Stat. (2009). The court must appoint counsel to represent the emergency temporary guardian. See *id.* During the temporary guardianship, the emergency temporary guardian is the alleged incapacitated person’s fiduciary to the extent defined by the court. See *Maxwell v. First Union Bank*, 782 So. 2d 931, 933-34 (Fla. 4th DCA 2001) (“Express fiduciary relationships are created by contract, such as principal/agent, or can be created by legal proceedings in the case of a guardian/ward.”); *Centrust Savings Bank v. Barnett Banks Trust Co., N.A.*, 483 So. 2d 867, 869 (Fla. 5th DCA 1986) (“The term fiduciary includes not only court appointed guardians, executors, and administrators, but every person acting in a fiduciary capacity for another and includes a trustee under any trust, express or implied, an officer of a corporation, and many others.”). Even though there is no lawyer-client relationship between the alleged incapacitated person who is a temporary ward and the lawyer for the emergency temporary guardian, counsel for the emergency temporary guardian owes a duty of care to the temporary ward.

An opinion of this court in a case involving incapacitation, albeit in the context of adoption of a minor, supports the proposition that the attorney for the emergency temporary guardian in incapacitation proceedings owes a duty to the ward. In *Rushing v. Bosse*, 652 So. 2d 869 (Fla. 4th DCA 1995), a professional negligence complaint was brought on behalf of a child against the attorneys who handled the private adoption proceeding which removed her from Florida and the care of relatives for a nine-month period. One of the attorneys for the adoptive parents also acted as intermediary for the child’s placement. The complaint alleged, among other things, that the attorney counseled the adoptive parents to falsify Florida residency and that he induced the mother of the child to give up any rights to the child by paying her money. This court reversed the dismissal of this count of the complaint, finding that privity of contract was not necessary where the child was the “intended beneficiary of the adoption” and the defendants were the attorneys for the adoptive parents, “who evidently intended to

benefit the child by adopting her.” *Id.* at 873. This court also reasoned that the attorney “served as an intermediary for the child,” and thus had other responsibilities he owed her. *Id.* We noted that adoption proceedings are “unique” in that, under the adoption statutes, the intended beneficiary of the proceeding is the child to be adopted. *Id.*

Here, as in *Rushing*, the proceedings were rooted in a Florida statute that involves the protection of incapacitated persons. Chapter 744, Florida Statutes, governs guardianship proceedings. The purpose of the act is “to protect the public welfare” by protecting the rights of incapacitated persons. § 744.1012, Fla. Stat. (2010).² Mr. Saadeh was the apparent intended beneficiary of the guardian’s attorney’s services. It would be antithetical to suggest that a guardian—appointed for the sacrosanct reason of providing protection to the ward and at the ward’s expense—could *ever* take *any* action which would knowingly be adverse to the alleged incapacitated person.

In a 1996 opinion of former Attorney General Robert Butterworth, the existence of this duty of care is explained:

Under the state’s guardianship statutes, it is clear that the ward is the intended beneficiary of the proceedings. Section 744.108, Florida Statutes, authorizes the payment of attorney’s fees to an attorney who has “rendered services to the ward or to the guardian on the ward’s behalf[.]” Thus, the statute itself recognizes that the services performed by an attorney who is compensated from the ward’s estate are performed on behalf of the ward even though the services are technically provided to the guardian. The relationship

² The statute provides in pertinent part:

Recognizing that every individual has unique needs and differing abilities, the Legislature declares that it is the purpose of this act to promote the public welfare by establishing a system that permits incapacitated persons to participate as fully as possible in all decisions affecting them; that assists such persons in meeting the essential requirements for their physical health and safety, in protecting their rights, in managing their financial resources, and in developing or regaining their abilities to the maximum extent possible; and that accomplishes these objectives through providing, in each case, the form of assistance that least interferes with the legal capacity of a person to act in her or his own behalf.

§ 744.1012, Fla. Stat. (2009).

between the guardian and the ward is such that the ward must be considered to be the primary or intended beneficiary and cannot be considered an “incidental third-party beneficiary.”

. . . .

Since the ward is the intended beneficiary of the guardianship, an attorney who represents a guardian of a person adjudicated incapacitated and who is compensated from the ward’s estate for such services owes a duty of care to the ward as well as to the guardian.

Fla. AGO 96-94, 1996 WL 680981.

In its amicus brief that we invited and appreciate, the Real Property Probate & Trust Law Section of the Florida Bar indicates agreement with the Attorney General opinion. The Section reminds us that the lack of privity does not foreclose the possibility of a duty of care to a third party intended to benefit from a lawyer’s services. The Section points out that the reasoning in the Attorney General opinion is supported by section 744.1012, Florida Statutes (2009), in which the Legislature states its willful intent to protect incapacitated persons.

Based on the foregoing analysis, we find that Saadeh and everything associated with his well-being is the very essence i.e. the exact point, of our guardianship statutes. As a matter of law, the ward in situations as this, is both the primary *and* intended beneficiary of *his* estate. To tolerate anything less would be nonsensical and would strip the ward of the dignity to which the ward is wholly entitled. Whether there was a breach of the duty which caused damages obviously remains to be determined. But Mr. Saadeh has a viable and legally recognizable cause of action against the guardian’s attorney which is available to Mr. Saadeh and which we direct be immediately reinstated. Accordingly, we remand for further proceedings.

Reversed and remanded for further proceedings.

WARNER and GERBER, JJ., concur.

* * *

Not final until disposition of timely filed motion for rehearing.

IN THE DISTRICT COURT OF APPEAL OF FLORIDA,
FOURTH DISTRICT

CASE NO. 4D13-4831

L.T. NO. 502010CA008347AA

KARIM H. SAADEH
appellant,

v.

MICHAEL CONNORS,
COLLETTE MEYER, ETAL.,
appellees.

ON APPEAL FROM THE CIRCUIT COURT OF FLORIDA,
FIFTEENTH JUDICIAL CIRCUIT

BRIEF OF *AMICUS CURIAE*
THE REAL PROPERTY PROBATE & TRUST LAW SECTION OF
THE FLORIDA BAR

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IDENTITY AND INTEREST

The Real Property Probate & Trust Law Section of The Florida Bar (“Section”) is a group of Florida lawyers 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. We produce educational materials and seminars, assist the public *pro bono*, draft legislation, draft rules of procedure, and occasionally serve as a friend of the court to assist on issues related to our fields of practice.¹ Our Section has over 10,000 members.

Our interest in this case stems from our expertise with the guardianship and fiduciary issues presented to us by the Court. Further, this Court invited us to participate in this case and we believe it is our professional duty to assist the Court if we are able.²

¹ For example, see *Chames v. DeMayo*, 972 So. 2d 850, 854-55 (Fla. 2007); *McKean v. Warburton*, 919 So. 2d 341 (Fla. 2005); *May v. Illinois Nat. Ins. Co.*, 771 So. 2d 1143 (Fla. 2000); *Friedberg v. SunBank/Miami*, 648 So. 2d 204 (Fla. 3d DCA 1994).

² The Executive committee of the Section approved the filing of this brief, which was subsequently approved by the Section’s executive council. Pursuant to Standing Board Policy 8.10, the Board of Governors of The Florida Bar (typically through its Executive Committee) must review a Section’s amicus brief and grant approval before the brief can be filed with the Court. Although reviewed by the Board of Governors, the amicus brief will be submitted solely by the Section and supported by the separate resources of this voluntary organization---not in the

SUMMARY OF ARGUMENT

The Court asked the Section to answer the following question:

In light of Florida Statutes Section 744.331(2) (b) and 744.3031(1), which requires the court to appoint an attorney to represent an alleged incapacitated person, does the attorney for the guardian owe a duty of care to the alleged incapacitated person?

We accept the invitation and we address the issue without reviewing the facts of the case, the testimony below, the record or prior decisions in the case.

Based on the statutes cited by the Court, the Section understands that the procedural posture imbedded in the above-quoted question is that an emergency temporary guardian (“ETG”) has been appointed and has counsel and the alleged incapacitated person, who is now at least a temporary ward, also has counsel.

Even though the alleged incapacitated person has his or her own counsel and the ETG has his or her or its own counsel, the attorney for the ETG owes a duty of care to the alleged incapacitated person, who is now a temporary ward under the protection of the ETG. Whether that duty of care is breached in a particular case depends on the facts and circumstances and the fact that the ward has counsel may or may not be significant.

name of The Florida Bar, and without implicating the mandatory membership dues paid by Florida Bar licensees. The Florida Bar approved our filing of this brief.

THE FUNDAMENTALS OF THE ATTORNEY-CLIENT RELATIONSHIP IN GUARDIANSHIP PROCEEDINGS

Upon the filing of a petition to determine incapacity, the alleged incapacitated person is provided counsel. §744.331(2), Fla. Stat. While the petition is pending, a court may appoint an ETG, who will have separate counsel. §744.3031(1), Fla. Stat.; F.P.R. 5.030. If not yet appointed, the court will appoint counsel to represent the alleged incapacitated person in the proceedings to establish an emergency temporary guardianship. §744.3031(1), Fla. Stat.

An ETG is a guardian who has court-defined responsibilities to protect the ward for a limited period of time. §§744.3031, 744.102(9), Fla. Stat. An alleged incapacitated person is a ward under the protection of the ETG. §§ 744.3031, 744.102(22), Fla. Stat. During this temporary guardianship the ETG is the ward's fiduciary to the extent defined by the court. *See Maxwell v. First United Bank*, 782 So. 2d 931, 933-34 (Fla. 4th DCA 2001) ("Express fiduciary relationships are created by contract, such as principal/agent, or can be created by legal proceedings in the case of a guardian/ward."); *Centrust Savings Bank v. Barnett Banks Trust Co., N.A.*, 483 So. 2d 867, 869 (Fla. 5th DCA 1986) ("The term fiduciary includes not only court appointed guardians, executors, and administrators, but every person

acting in a fiduciary capacity for another and includes a trustee under any trust, expressed or implied, an officer of a corporation, and many others.”).³

The services of the ETG and his, her or its attorney are paid only to the extent the guardian performs the court-defined job and the attorney for the guardian is paid only to the extent the lawyer’s services benefit the temporary ward or the services are rendered to the ETG on behalf of the ward. §744.108(1), Fla. Stat.; *Fitts v. Guardianship Estates of Campbell*, 466 So. 2d 431 (Fla. 5th DCA 1985); *Guardianship of Schoyahn*, 637 So. 2d 81 (Fla. 4th DCA 1994); *Guardianship of Rawl*, 133 So. 3d 1179 (Fla. 2d DCA 2014).

With respect to communications between the attorney for the ETG and the ETG, Florida recognizes they enjoy a lawyer-client relationship. *See Tripp v. Salkovitz*, 919 So. 2d 716 (Fla. 2d DCA 2006). But, it is unclear whether (or to what extent) those communications are privileged and may be kept from the ward or a representative of the ward. For years there was no statutory law on this issue and Florida courts seemed to recognize a fiduciary exception to the attorney-client privilege. Under this exception, other than in the context of litigation, the so-called “real client” was the person for whom fiduciary services were being provided and therefore the privilege did not prevent the “real client” from obtaining those

³In fact, the Florida Legislature is poised to amend §744.361, Fla. Stat. to explicitly state that a guardian is a fiduciary. *See C.S./C.S./H.B. 5, 117th Leg. (Fla.2015)*.

communications. *See Jacob v. Barton*, 877 So. 2d 935 (Fla. 2d DCA 2004); *Tripp*, 919 So. 2d at 718-19.

In 2011, however, the Legislature attempted to eliminate this fiduciary exception to the attorney-client privilege by adopting section 90.5021, Florida Statutes. As is customary, this law was then submitted to the Supreme Court of Florida so that the Court could adopt section 90.5021 as a rule and thereby avoid any constitutional infirmity that might arise if the statute was deemed procedural and outside the purview of the Legislature. *See In re Florida Evidence Code*, 372 So. 2d 1369, *clarified by*, 376 So. 2d 1161 (Fla. 1979). The Supreme Court refused to adopt section 90.5021 as a rule. *In re Amendments to the Florida Evidence Code*, 144 So. 3d 536 (Fla. 2014). The Court said:

In chapter 2011–183, section 1, Laws of Florida, the Legislature enacted section 90.5021, Florida Statutes, which establishes a “fiduciary lawyer-client privilege.” According to the Committee, whether a fiduciary is entitled to the lawyer-client privilege when the fiduciary employs an attorney in connection with his or her fiduciary duties has been an issue in several cases; for example, the Committee cites *Jacob v. Barton*, 877 So.2d 935 (Fla. 2d DCA 2004), and *Tripp v. Salkovitz*, 919 So.2d 716 (Fla. 2d DCA 2006). We decline to follow the Committee's recommendation to adopt the new provision of the Code because we question the need for the privilege to the extent that it is procedural.

144 So. 3d at 536-37. Query, whether the privilege is procedural, substantive or both, and whether section 90.5021 is an unconstitutional intrusion into the Supreme Court’s rule-making authority? The answers to those questions are far

from certain and, in part, may depend on the nature of the proceeding and what particular rules of court apply. For example, if the civil rules apply (and in certain cases they will, either in a civil action for malpractice or participation in a breach of duty involving guardianships) then rule 1.010's delegation of rule-making authority to the Legislature may cure an otherwise procedural and, therefore, unconstitutional statute. The complexity of the issue is fully explained in *In re Commitment of Cartwright*, 870 So. 2d 152, 157-64 (Fla. 2d DCA 2004).

The uncertainty surrounding section 90.5021 is further enhanced by the fact that prior to rejecting section 90.5021 as unnecessary, the Supreme Court of Florida adopted an amendment to rule 5.240, Florida Probate Rules, which requires that a Notice of Administration contain language that notifies interested persons: "... that the fiduciary lawyer-client privilege in section 90.5021, Florida Statutes, applies with respect to the personal representative and any attorney employed by the personal representative." *In re Amendments to the Florida Probate Rules*, 73 So. 3d 205, 206 (Fla. 2011).

In any event, none of these fundamental principles change because the temporary ward has separate counsel.

LAWYER FOR EMERGENCY TEMPORARY GUARDIAN'S DUTY OF CARE OWED TO WARD

Clearly, privity between a lawyer and a guardian creates a duty of care as a matter of law and it is then up to the trier of fact in a particular case to determine whether the duty of care was satisfied or breached based on the particular facts of a case. *See, e.g., Angel, Cohen & Rogovin v. Oberon Inv., N.V.*, 512 So.2d 192 (Fla.1987) (attorneys are liable in negligence to clients with whom they share privity of a contract for services). But, while privity may establish a duty of care, lack of privity does not foreclose the possibility of a duty of care to a third party intended to benefit from a lawyer's services. *Baskerville-Donovan Engineers v. Pensacola ExecutiveHouse Condominium Assoc.*, 581 So. 2d 1301, 1303 (Fla. 1991).

The relationship between a lawyer and a non-client, intended beneficiary of the lawyer's services, and a concomitant duty of care owed by the lawyer to the intended beneficiary of the lawyer's services, has a rich and expanding history in Florida jurisprudence. *See Rushing v. Bosse*, 652 So. 2d 869 (Fla. 4th DCA 1995) (lawyer not in privity with adopted child owed duty of care to adopted child in adoption proceedings, because adoption proceedings are uniquely for the benefit of child to be adopted); *Kinney v. Shinholser*, 663 So. 2d 643 (Fla. 5th DCA 1995) (lawyer and accountant not in privity with ultimate beneficiaries of estate plan

owed duties to those ultimate beneficiaries); *Dingle v. Dillinger*, 134 So. 3d 484 (Fla. 5th DCA 2014) (duty of lawyer for grantor to non-client grantee of deed). The concept is also embraced by other jurisdictions. See, e.g., *Bucquet v. Livingston*, 129 Cal.Rptr. 514 (Cal.Ct.App.1976) (beneficiary of trust may sue settlor's lawyer after settlor's death for failure to advise settlor of adverse estate-tax consequences of trust provision); *Holsapple v. McGrath*, 521 N.W.2d 711 (Iowa 1994) (lawyer for donor owes duty to donee, where donor died after executing invalid deed); *Admiral Merchants Motor Freight, Inc. v. O'Connor & Hannan*, 494 N.W.2d 261 (Minn.1992) (lawyer representing corporation may be liable to related corporation if related corporation was intended beneficiary, where client corporation had few assets, and lawyer knew that, if lawyer was unsuccessful, related corporation would bear large liability).

Even though there is no lawyer-client relationship between the alleged incapacitated person who is a temporary ward and the lawyer for the ETG, counsel for the ETG owes a duty of care to the temporary ward. In a nutshell, this is because in guardianship proceedings, the actions of the ETG and, the actions of the ETG's counsel must be for the temporary ward's benefit. In a scholarly opinion of former Attorney General Robert Butterworth, the existence of this duty of care is fully explained. See Fla. AGO 96-94, 1996 WL 680981. General Butterworth concluded:

Under the state’s guardianship statutes, it is clear that the ward is the intended beneficiary of the proceedings. Section 744.108, Florida Statutes, authorizes the payment of attorney’s fees to an attorney who “has rendered services to the ward or to the guardian on the ward’s behalf.” Thus, the statute itself recognizes that the services performed by an attorney who is compensated from the ward’s estate are performed on behalf of the ward even though the services are technically provided to the guardian. The relationship between the guardian and the ward is such that the ward must be considered to be the primary or intended beneficiary and cannot be considered an “incidental third-party beneficiary.

The Section agrees with this reasoning, which is buttressed by section 744.1012, Florida Statutes, in which the Legislature states its intent that the Florida Guardianship Law is wholly about the protection of the alleged incapacitated person and ward, and that the law must be liberally construed to that end.⁴ Courts in other jurisdictions have also agreed with this analysis of the duty of care in guardianship proceedings. *See Fickett v. Superior Court of Arizona*, 558 P.2d 988 (Az. Ct. App. 1976) (Attorney who undertakes to represent guardian of an incompetent assumes relationship not only with guardian but also with ward.); *In re Guardianship of Karan*, 38 P.3d 396 (Wa. Ct. App. 2002) (The primary reason to establish a guardianship is to preserve the ward’s property for his or her own use; it is not for the benefit of others.); *Guardianship of Sleeth*, 244 P.3d 1169,

⁴ At first blush, a very recent case involving a trust beneficiary and a lawyer for the trustee would seem to suggest a different result. In that case, however, the intended third-party beneficiary argument was abandoned by the beneficiary. *See Bain v. McIntosh*, 2015 WL 859481, 3, ft.n. 4 (11th Cir., March 2, 2015).

1176 (Az. Ct. App. 2010) (“Obligations go beyond the representation of a guardian, conservator, and trustee will require attorneys to remain keenly aware that they also serve the protected person and the trust beneficiary.”).

Whether a duty of care exists is a question of law. Whether the duty was breached in a particular case is a question of fact. *L.A. Fitness International, LLC v. Mayer*, 980 So. 2d 550, 557 (Fla. 4th DCA 2008). Typically the care owed by a lawyer is to exercise the competence and diligence normally exercised by lawyers in similar circumstances. *See* Restatement (3d), The Law Governing Lawyers, §52. Normally, of course, a lawyer would be expected to comply with his or her ethical obligations to a client and the duty of care should embrace that concept as a matter of law. Thus if an alleged breach of the duty of care required a lawyer to breach a client confidence, then, as a matter of law the claim should fail.⁵ *See Brennan v. Ruffner*, 640 So. 2d 143 (Fla. 4th DCA 1994) (attorney cannot have duty of care to third party where it would create conflict of interest); *Clagett v. Dacy*, 420 A.2d 1285 (Md. Ct. Sp. App. 1980) (Duty of care cannot exist where attorney’s actions for client would conflict with proper actions for third party); *Krawczyk v. Stingle*, 543 A.2d 733, 736 (Conn. 1988) (“Courts have refrained from imposing liability

⁵ Unlike confidentiality, the attorney-client privilege is not an ethical duty and, as discussed above, may or may not exist in a particular case.

when such liability had the potential of interfering with the ethical obligations owed by an attorney to his or her client.”).

Whether the duty of care is satisfied or breached as a matter of fact will of course depend on the particular circumstances of a case. The existence of counsel for the ward may be of some importance in that factual determination. For example, consider the circumstance where the ETG, temporary ward and perhaps family of the temporary ward are engaged in mediation over property issues and the appointment of a permanent guardian. There may be a range of outcomes being negotiated by the parties and in many cases the lawyer for the guardian might normally and competently rely on the lawyer for the temporary ward to negotiate and reach a fair result for his or her client and the lawyer for the guardian could not interfere with the ward’s attorney–client relationship with his or her court-appointed counsel.

Even without a privity exception, a lawyer may engage in, and be held liable for, participating in a client’s breach of fiduciary duty. *See Centrust Savings Bank v. Barnett Banks Trust Company*, 483 So. 2d 867 (Fla. 5th DCA 1986); *International Community Corporation v. Young*, 486 So. 2d 629 (Fla 5th DCA 1986); *see also Tripp v. Salkovitz*, 919 So. 2d at 717 (suit against guardian and its counsel for negligence and breach of fiduciary duty); *Jones v. Stubbeman, McRae*

Etal., 2002 WL 1301342 (Tex. Ct. App. 2002) (not designated for publication)
(lawyer may be liable for participation in guardian's breach of fiduciary duty).

CONCLUSION

For these reasons, the lawyer for the ETG owes a duty of care to the temporary ward (and alleged incapacitated person), even when the temporary ward has counsel.

Respectfully submitted,

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I CERTIFY that a true copy of this brief was served through the e-portal on John Scarola, Esquire, Searcy Denney Scarola et al., mep@searcylaw.com; Irwin R. Gilbert, Esquire, Gilbert Yarnell, igilbert@bizlit.net; Colette K. Meyer, Esquire, Colette K. Meyer, P.A., Colette@meyerlawfirmfl.com; William J. Berger, Esquire, Weiss Handler & Cornwell, P.A., wjb@weisshandlerpa.com; Bryan J. Yarnell, Esquire, Gilbert Yarnell, byarnell@gilbertyarnell.com; David J. Sales, Esquire, David J. Sales, P.A., david@salesappeals.com , this 9th day of April, 2015.

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CERTIFICATE OF FONT COMPLIANCE

I certify that this brief complies with the font requirement of rule 9.210 (a) (2), Florida Rules of Appellate Procedure.

/s/ Robert W. Goldman, FBN339180

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Christopher A. Sajdera is the director of the Litigation Department at the firm of Sajdera Morris. Mr. Sajdera concentrates his diverse general litigation practice on construction, land use, Condominium and HOA Community Association litigation and covenant enforcement, and all facets of real estate related matters.

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Mr. Morris is a graduate of Swarthmore College and Duke University School of Law. He is currently the President of the Young Lawyers Section of the South Palm Beach County Bar Association. He is also involved with Business Networks International (BNI), Partners for Prosperity Chapter, Kiwanis International, Emerge Broward, Young Professionals of Covenant House and the United Way.

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Bridget M. Friedman is a shareholder at the firm of Friedman & Friedman. Her legal practice is devoted to real estate (both transactional and litigation), banking, estate planning, including trusts, probate, and business law. She often focuses on disputes involving property boundaries, access issues, easements, quieting title, commercial leases, and real estate and business contracts.

Ms. Friedman is a former adjunct professor at the University of Central Florida where she taught legal writing. She also served as Chief Advisor to a commissioner at the Florida Public Service Commission.

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Jennifer is a partner with Williams Parker Harrison Dietz & Getzen, where she focuses on probate and trust litigation and general commercial litigation. She has extensive experience in state circuit and county court litigation involving complex commercial, real estate, and probate matters, as well as experience in mediation, administrative hearings, and arbitration.

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She received her undergraduate and law degrees from of the University of Florida and is AV rated with Martindale-Hubbell. She was named to Florida Super Lawyers, Rising Stars, 2010-2014

Stacy B. Rubel

Stacy is a partner at Chepenik Trushin LLP. She concentrates her practice on Probate and Trust Administration and Litigation, as well as Guardianship Administration and Litigation. She represents personal representatives, trustees, guardians (both professional and non-professional), beneficiaries and creditors in probate, trust and guardianship matters. She litigates adversary claims including, but not limited to, will contests, disputes over appointment of fiduciaries, removal of fiduciaries, breaches of fiduciary obligations, tortious interference with right of expectancy, elective share disputes, and elderly exploitation.

She was born and raised in Miami prior to attending the University of Florida for both her undergraduate and graduate degrees. Ms. Rubel obtained her B.A. in Political Science and Criminology, with a minor in Education, and received her J.D. from the University of Florida's Levin College of Law.

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FINAL 2015 POST SESSION REPORT

NUMERICAL INDEX SUMMARY OF 2015 LEGISLATIVE ISSUES

**Rob Freedman and Bill Hennessey, Legislative Co-Committee Chairmen
 and
 Peter Dunbar, Martha Edenfield and Brittany Finkbeiner
 RPPTL Legislative Counsel**

June 17, 2015

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 parts following list other items of interest that passed and 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

Guardianships: CS/CS/CS/HB 5 by Representative Passidomo contains the Section guardianship initiatives dealing with the payment of examiners fees and attorneys’ fees in guardianship proceedings. Other issues in the bill come from the working group assembled by Representative Passidomo that included stakeholders from both RPPTL and Elder Law. (**Chapter 2015-83, Laws of Florida.**)

Guardianships—Public Records Exemptions: CS/HB 7 by Representative Passidomo and Senator Stargel contain the Section’s public records exemption for settlements entered into by a guardian on behalf of a ward. **(Chapter 2015-84, Laws of Florida.)**

Construction Defects: CS/CS/CS/HB 87 by Representative Passidomo provides additional requirements for a notice of claim for construction defects; expands the claims to insurers; provides that completion of the building includes the issuance of a temporary certificate of occupancy; provides that the claims negotiation process is deemed confidential and revises the requirement for the production of records related to defect claims. **(Chapter 2015-165, Laws of Florida.)**

UTMA: HB 283 by Representative Berman and Senator Joyner revises the Uniform Transfer to Minors Act that will allow persons to establish accounts for minors which remain in a custodial status until the minor reaches the age of 25 years. **(Chapter 2015-140, Laws of Florida.)**

Landlord-Tenant: CS/CS/HB 305 by Representative Harrison removes “transient occupancy” from the landlord-tenant regulation under Chapter 83, and permits the removal of an unwanted occupant of a residence by law enforcement officials. The Section has provided technical assistance on the legislation at the request of the sponsors. **(Chapter 2015-89, Laws of Florida.)**

Guardianship—Developmentally Disabled: CS/CS/HB 437 by Representative Adkins proposes new procedures for the case plan of any child who is developmentally disabled or incapacitated; requires additional reporting by APD; and provides for the criteria in the appointment of guardian advocates. The Section had technical concerns with the legislation, but the issue has been corrected by amendment. **(Chapter 2015-112, Laws of Florida.)**

LLC—Limits on Transfer of Real Property: CS/CS/HB 531 by Representative McGhee is a bill on behalf of the Business Law Section providing that a limitation on persons authorized to transfer property contained in the articles of organization is not notice of such limitation to others. The legislation is consistent with the prior policy of RPPTL on the subject. **(Chapter 2015-148, Laws of Florida.)**

Condominiums—Termination: CS/CS/CS/HB 643 by Representative Sprowls and Senator Latvala modifies s. 718.117 of the Condominium Act relating to condominium terminations. The legislation imposes new restrictions on the termination of condominiums created by the conversion of existing improvements under Part VI of the Act; clarifies the methodology for determining market value of condominium units; and requires first mortgages to be fully satisfied prior to termination of the condominium. **(Chapter 2015-175, Laws of Florida.)**

Ad Litem: CS/CS/HB 775 by Representative Powell and Senator Latvala is the Section’s initiative that affirmatively permits the appointment of an ad litem

representative by a Circuit Judge in designated circumstances when service is obtained constructively. (**Chapter 2015-95, Laws of Florida.**)

Rental Agreements--Foreclosure: CS/CS/HB 779 by Representative Jones is an initiative from the Public Interest Law Section requiring notice to be given to a residential tenant after issuance of the certificate of title in a foreclosure. The notice provides a 30-day termination period before the rental agreement can be terminated and possession of the property given to the new title owner. (**Chapter 2015-96, Laws of Florida.**)

Community Associations: CS/CS/HB 791 Representative Moraitis and Senator Ring is the omnibus community association bill for the 2015 Session. Among the provisions in the legislation are changes that will:

Proxies and Records: The legislation will permit the use of copies, facsimiles or other reliable reproductions of proxies for voting at meetings of the membership as permitted by statute, and it provides that all "written" records maintained by a community association are official association records.

Electronic Voting: The legislation will permit the use of electronic voting in condominiums, cooperatives and mandatory homeowners associations.

Posting Notices: The legislation permits the posting of meeting notices on "association property," as well as on the common elements of a condominium, and it clarifies the categories to be used for the condominium association budget.

Bulk Buyers: The sunset of Part VII is extended to July 1, 2018.

Homeowners' Associations Act: The legislation formally names Chapter 720, F.S., the "Homeowners' Association Act," and it expands the definition of "governing documents in a homeowners' association to include the community's rules and regulations. (**Chapter 2015-97, Laws of Florida.**)

Estates and Tax Apportionment: CS/CS/SB 872 by Senator Hukill and Representative Moraitis contains the Section's tax apportionment initiative, as well as the Section's probate initiatives. The legislation updates the apportionment of estate taxes under the IRS Code; clarifies the factors a court may use in awarding fees in trust and estate litigation; provides a 3-month exception bar for making objections to the validity of a will; clarifies the duties of a personal representative who becomes ineligible to serve; and clarifies existing case law regarding to permit objections after a notice of administration is certain circumstances. (**Chapter 2015-27, Laws of Florida.**)

Health Care Surrogates: CS/CS/CS/HB 889 by Representative Wood and Senator Joyner is the legislation containing the Section's health care surrogacy initiatives that provides more flexibility and choices in choices for a health care surrogate; provides more access to patient records in a HIPAA compliant manner; and closes a gap in the current law regarding the designation of a health care surrogate for minors by parents and legal guardians. (**Chapter 2015-153, Laws of Florida.**)

Trust Accounts—Electronic Notice: CS/HB 961 by Representative Bronson authorizes the posting of documents to an electronic account or website; provide for the authority of a recipient for the posting; require the posting to remain accessible to the recipient for

a specific period of time; and establish the time when notice of the posting is deemed received by the recipient. **(Chapter 2015-176, Laws of Florida.)**

II. INITIATIVES OF INTEREST

Service Animals: CS/HB 71 by Representative Smith requires public accommodations to permit the use of service animals by individuals with disabilities. The legislation specifies the conditions where a service animal may be removed or excluded, and it provides for penalties for the misrepresentation of the use of a service animal. **(Chapter 2015-131, Laws of Florida.)**

Farms—Civil Liability: CS/SB 158 by Senator Evers provides an exemption from civil liability for a farm owner who permits a person to gratuitously enter the farm to remove farm produce or crops left in the field, unless the farm owner has been grossly negligent or fails to warn of a dangerous condition known to the owner. **(Chapter 2015-38, Laws of Florida.)**

Terminal Conditions—Experimental Treatment: CS/CS/HB 269 by Representative Pilon authorizes experimental drug treatments for the terminally ill; provides procedures to govern the process; and limits the liability for treating physicians and drug manufacturers. The POLST provision in legislation has been modified based upon the Section's concern. **(Chapter 2015-107, Laws of Florida.)**

Mobile Homes: CS/CS/HB 307 by Representative Chris Latvala revises the Mobile Home Act to provide education programs for association directors; provide revised procedures to govern rental increases and lifetime leases; and it revises operational procedures governing mobile homeowners associations. **(Chapter 2015-90, Laws of Florida.)**

Ad Valorem Tax Exemption—Military Housing: CS/CS/HB 361 provides an exemption from ad valorem taxes for leaseholds and appurtenant improvements on federal government properties used for military housing. The exemption does not apply to transient public lodging establishments defined by Chapter 509. **(Chapter 2015-80, Laws of Florida.)**

Private Property Rights: CS/CS/CS/HB 383 by Representative Edwards amends the Bert Harris Private Property Rights Act to provide for settlement agreements between property owners and governmental entities; provide intent concerning governmental exactions; and create a cause of action for unconstitutional exactions by local government. **(Chapter 2015-142, Laws of Florida.)**

Timeshares: CS/CS/HB 453 by Representative Eisnaugle contains ARDA revisions to Chapter 721. The legislation revises requirements for amendments to timeshare instruments; public offering statements; the relationship between the owners' association and the managing entity; and the provisions relating to relating to

reservation systems and multisite timeshare plans. (**Chapter 2015-144, Laws of Florida.**)

Value Adjustment Board—Joint Petitions: CS/HB 489 by Representative Sullivan modifies the filing process for an owner of multiple tangible personal property to permit the owner to file a single, joint petition if the property appraiser determines that the accounts are substantially similar. (**Chapter 2015-115, Laws of Florida.**)

Notaries: CS/SB 526 by Senator Grimsley amends Chapter 117 and authorizes the administration of oaths by “reliable electronic means” that would include the signing or transmission of a document in a manner compliant with the criminal justice information security system. (**Chapter 2015-23, Laws of Florida.**)

Amusement Machines—Timeshares and Hotels: CS/HB 641 by Representative Trumbull authorizes electronic amusement games for family entertainment centers including timeshares and hotel game rooms. The legislation was amended prior to final passage to specifically authorize “timeshare facilities defined in 721.05 (17)” to operate amusement games and machines. (**Chapter 2015-93, Laws of Florida.**)

Transitional Living Facilities—Client Personal Affairs: CS/SB 682 by Senator Grimsley creates the licensure and regulatory format for transitional living facilities. New section 400.9981 defines the restrictions and limitations on facilities employees to act on behalf of clients as an attorney in fact, manage funds and property of a client, and receive funds as a client’s payee when appropriately bonded. An employee or representative of a facility may not act as a guardian, trustee or conservator for a client or client’s property under the legislation. (**Chapter 2015-25, Laws of Florida.**)

Condominiums—Corrections to 718.116: SB 702 by Senator Simmons is a Reviser’s bill correcting parts of the Florida Statutes, and Section 89 of the legislation republishes 718.116 (6) to include paragraphs (c) and (d) that were inadvertently omitted in the passage of Chapter 2014-146, Laws of Florida. (**Chapter 2015-2, Laws of Florida.**)

Drone Surveillance—Real Property: CS/CS/SB 766 by Senator Hukill limits a person, state agency or political subdivision from using a drone to capture images on privately-owned property or images of the owner or occupant of the property. (**Chapter 2015-26, Laws of Florida.**)

Title Insurance: CS/HB 927 by Representative Hager provides for surcharge assessments to provide funding for the Insurance Regulatory Trust Fund and revising requirements for the payment of excess surcharges. (**Chapter 2015-154, Laws of Florida.**)

Residential Building Permits: CS/HB 1151 by Representative Ingoglia creates the option for a master building permit program for residential construction of repetitive structures for single-family and townhome properties. (**Chapter 2015-156, Laws of Florida.**)

Growth Management: CS/SB 1216 by Senator Simpson revises the growth management standards and policies under Chapter 163; it effectively eliminates the DRI process and provides that digital orthophotography may be the basis for a conservation easement; provides for the issuance of consumptive use permits to an approved master development for the same time period as the approved master development order. It also provides for the geographical areas for regional planning councils and coordination of planning between the councils. **(Chapter 2015-30, Laws of Florida.)**

III. INITIATIVES OF INTEREST THAT FAILED

Digital Assets: CS/CS/SB 102 by Senator Hukill and CS/HB 313 by Representative Fant are companion bills containing the Section’s initiative relating to digital assets. The legislation basically creates the “Florida Fiduciary Access to Digital Assets Act” based upon the Uniform Act. CS/CS/SB 102 was pending on the Senate Calendar and HB 313 was pending in committee when the Legislature adjourned.

Power of Attorney: CS/SB 362 by Senator Lee and HB 459 by Representative Raburn is the initiative to allow the Sun City Center Program to use powers of attorney that the Section has consistently opposed. CS/SB 362 was pending on the Senate Calendar and HB 459 was pending in committee when the Legislature adjourned.

Family Trust Companies: CS/SB 568 by Senator Richter and CS/HB 825 by Representative Roberson are companion bills containing the Section’s initiative to complete the authorizing legislation for the creation and regulation of family trust companies in Florida. CS/SB 568 and CS/HB 825 were pending on the House Special Order Calendar when the Legislature adjourned.

Estoppel Letters—Residential Properties: CS/CS/HB 611 by Representative Wood and CS/CS/SB 736 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. CS/CS/HB 611 and CS/CS/SB 736 were pending on the House Special Order Calendar when the Legislature adjourned.

Notaries: SB 436 by Senator Soto and HB 663 by Representative DuBose are companion bills that amend Chapter 117 and require notaries to maintain a notarial journal with a record of certain acts completed by the notary. Both bills died in committee when the Legislature adjourned.

Legislation Approval and Education Process

This memorandum sets forth the Legislation Approval and Education Process for the RPPTL Section of the Florida Bar. This process is intended to improve the work product produced and submitted by our subcommittees, reduce the number of corrective “glitch” bills, avoid legislative redrafting that inadvertently changes a proposal’s effect, and to encourage collaboration among the Divisions of the RPPTL Section on legislative initiatives. It is not intended to create a new level of substantive review by the Legislative Committee.

Each RPPTL substantive committee Chair will select one or more of the appointed Vice Chairs of the substantive committee as “Vice Chair(s) of Legislation”. The Vice Chair of Legislation will assist with all bill drafting by their respective committees and will regularly update the Legislation Committee on the status of each committee’s legislative projects.

The Legislation Committee will be tasked with educating the substantive Committee Chairs and Vice Chairs of Legislation for each substantive committee on the: (a) applicable elements of the current House bill drafting guide for the text and format of legislation; (b) time deadlines to have proposed legislation approved by the committee and ultimately the Executive Council; and (c) the necessity for clear and concise white papers and legislation position request forms. Further, the Legislative Committee will educate the Chairs and Vice Chairs on effective approaches for facilitating discussion on legislation and best practices for structuring debate on legislative initiatives.

When a substantive committee has determined that new legislation is needed and has fully vetted the policy rationale underlying the proposed legislation, the Vice Chair of Legislation for the substantive committee shall be responsible for ensuring the proper preparation, including final proofing and editing, of the proposal consisting of a white paper and proposed bill text so that each document is technically sound and internally consistent. Once these documents are prepared, the Chair of the proponent committee shall review, approve and refer the proposal to the Legislation Committee for editorial review before the proposal is approved by final vote of the substantive committee. The proposal must be referred to the Legislation Committee no later than 45 days before the substantive committee is scheduled to vote on the proposal unless the appropriate Division Director determines that circumstances otherwise warrant expedited consideration.

The Chair and Vice Chair of Legislation for the proponent committee will participate in the review by the Legislation Committee to provide context, history and the policy rationale behind the proposed text to the extent not evident in the white paper. The Legislation Committee will work with its Legislative Reporters (currently Susan Spurgeon and Mike Bedke for Real Estate and Sarah Butters and Dresden Brunner for Probate/Trust) to edit the text to assure compliance with the House bill drafting guidelines and provide a “fresh set of eyes”. The Legislation Committee will then forward the text to the Division Directors of the RPPTL Section and, in consultation with the Division Directors, all Section committees whose areas of substantive law

may be impacted by the legislation. The Legislation Committee will work with the applicable Vice Chair of Legislation to integrate the beneficial responses into the proposal documents.

After the proposed bill text and white paper are approved by the Chairs of the Legislation Committee, the proposed bill text and white paper will be referred back to the proponent committee. The proposed bill text and white paper may then be vetted and voted on by the proponent Committee.

If the proponent Committee makes changes to either the bill text or white paper, the proposed documents will be referred back to the Legislative Committee for further action consistent with the goals and objectives described in this memorandum. The Legislative Committee, in consultation with the appropriate Division Director, will notify the chair of the proponent Committee of any additional steps required to be taken as a result of the changes and the timing associated with such steps.

The failure to follow the procedures and timeframes set forth above may cause a delay in Executive Council consideration of the proposal or require that the proposal be referred back to the proponent committee. The Division Director for the substantive Committee may adjust these procedures if exigent circumstances warrant.

WPB_ACTIVE 5749361.1

2016 SESSION DATES

August	1, 2015	Deadline for filing claim bills (Rule 4.81(2))
January	12, 2016	Regular Session convenes (Article III, section 3(b), Constitution)
January	12, 2016	12:00 noon, deadline for filing bills for introduction (Rule 3.7(1))
March	1, 2016	50th day—last day for regularly scheduled committee meetings (Rule 2.9(2))
March	7, 2016	All bills are immediately certified (Rule 6.8) Conference Committee Reports require only one reading (Rule 4.5(1)) Motion to reconsider made and considered the same day (Rule 6.4 (4))
March	11, 2016	60th day—last day of Regular Session (Article III, section 3(d), Constitution)

**REAL PROPERTY,
PROBATE &
TRUST LAW
SECTION**



**THE
FLORIDA
BAR**

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June 29, 2015

Via Email and U.S. Mail
Email: eto@flabar.org

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

Proposed RPPTL Section Letter to Elizabeth Tarbert, Florida Bar re:
Florida Bar Rule 4-4.2

Dear Ms. Tarbert:

The members of the Real Property, Probate & Trust Law Section of the Florida Bar (the "RPPTL Section") represent buyers, sellers, lenders, developers and others involved in all facets of real property transactions. The RPPTL Section is the largest section of the Florida Bar, having over 10,000 members practicing in the areas of real estate, construction, probate, trust and estate law. Our members are dedicated to serving the public in these fields of practice. The RPPTL Section produces educational materials and seminars, assists the public *pro bono*, drafts legislation, drafts rules of procedure, and occasionally offers advice to the judicial, legislative and executive branches to assist on issues related to our fields of practice.

Thus, the RPPTL Section with a large number of members integrally involved in the process of seeking entitlements for the development of real estate across Florida, respectfully submits the following comments with regard to the newly proposed amendments to the Comment on Florida Bar Rule 4-4.2 regarding communications with governmental agencies represented by counsel ("Proposed Amendment"). As you are aware, the Proposed Amendment seeks to replace previously proposed modifications to the Rule's Comment which modifications were initially opposed by the RPPTL Section and others. More directly, the Proposed Amendment attempts to respond to the comments and opposing views discussed at a working meeting about Rule 4-4.2 held at President Coleman's request among several of the Bar's Sections in late February, 2015. We sincerely appreciate and acknowledge the efforts of those submitting the Proposed Amendment in attempting to address such objections and concerns, but after careful review and discussion, we find that the Proposed Amendment should, as with its predecessor, be rejected.

In the first instance, the Proposed Amendment sets forth a detailed procedure which seeks to secure protection for government and government officials and assumes that such protections are not provided in the present Rule. While circumscribing the ground rules for permitted attorney contact with government representatives, the Proposed Amendment attempts to deal in detail with a unique fact scenario (*The Florida Bar v. Tobin*, Florida Bar Case No.

70,415B (October 21, 2013) which our Section believes is sufficiently addressed by the existing Rule and its Comment. Furthermore, by attempting to provide detail to the process, the proposal actually impedes the free government access provided in the more expansive language of the unamended Rule and Comment. As with the originally proposed change to the Comment, the Proposed Amendment poses substantial risk and cost to Federal and Florida Constitutional protections regarding a citizen's right to access government.

In opposing the Proposed Amendment, the RPPTL Section is mindful of the objective of stopping an attorney's inappropriate contact with those, including those in government, who are represented by counsel. But, after detailed review of the Proposed Amendment, we submit that leaving the Comment as it presently stands sufficiently addresses the issue covered by the Rule. Leaving the Rule and Comment in its present form provides the Bar and our regulatory process the proper parameters for sanctioning those who violate the Rule's terms. Adopting the Proposed Amendment gives unnecessary and constitutionally chilling detail when none is either needed or appropriate.

With the forgoing in mind and based on our previously submitted White Paper (an additional copy of which is attached), the RPPTL Section recommends that the Proposed Amendment be rejected.

Sincerely yours,



Michael A. Dribin, Chair

Real Property, Probate and Trust Law Section

Cc: (with enclosure, via email):

Ramon A. Abadin, Esq.
Sandra F. Diamond, Esq.
Laird A. Lile, Esq.
Andrew B. Sasso, Esq.
Michael J. Gelfand, Esq.
Deborah P. Goodall, Esq.
Andrew M. O'Malley, Esq.

REAL PROPERTY, PROBATE & TRUST LAW SECTION

**WHITE PAPER
IN OPPOSITION TO
PROPOSED AMENDMENT TO COMMENT ON FLA. BAR RULE 4-4.2
(Regarding Communications With Governmental Agencies Represented By Counsel)**

I. SUMMARY

The Proposed Amendment seeks to overturn the decision in *Florida Bar v. Tobin*, Florida Bar Case No. 70,451B (October 21, 2013) which interpreted the comments to Florida Bar Rule 4-4.2 regarding communications with persons represented by counsel. The stated justification for the Proposed Amendment is:

... a lawyer communicated directly with government officials, citing to the comment which states "Also, a lawyer having independent justification for communicating with the other party is permitted to do so. Permitted communications include, for example, the right of a party to a controversy with a government agency to speak with government officials about the matter."

In summary, the Proposed Amendment would significantly limit the ability of a citizen represented by counsel to communicate and interact with elected and appointed officials local and state agencies and all of their staff, in connection with matters before those elected governmental bodies or agencies. The Proposed Amendment creates traps for the practitioner, tips the balance of communications in favor of those with greater resources, infringes upon the constitutionally protected right to petition government, and proposes drawing lines that are confusing and impractical.

II. CURRENT STATUS OF RULE

A. Rule 4-4.2 of the Florida Bar

Rule 4-4.2(a) of the Rules Regulating the Florida Bar provides:

In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer. Notwithstanding the foregoing, an attorney may, without such prior consent, communicate with another's client in order to meet the requirements of any court rule, statute or contract requiring notice or service of process directly on an adverse party, in which event the communication shall be strictly restricted to that required by the court rule, statute or contract, and a copy shall be provided to the adverse party's attorney.

Undoubtedly recognizing the special place in American jurisprudence disfavoring barriers to communications between citizens and their government, - - twice encapsulated, at the start of the Bill of Rights (right "...to petition the Government for a redress of grievances." U.S. Const., Amend 1) and the Declaration of Rights (right "... to petition for redress of grievances." Fla. Const, §5), - - the Comment to this Rule which is the subject of the Proposed Amendment currently provides:

This rule does not prohibit communication with a represented person, or an employee or agent of such a person, concerning matters outside the representation. For example, the existence of a controversy between a government agency and a private party, or between 2 organizations, does not prohibit a lawyer for either from communicating with nonlawyer representatives of the other regarding a separate matter. Nor does this rule preclude communication with a represented person who is seeking advice from a lawyer who is not otherwise representing a client in the matter. A lawyer may not make a communication prohibited by this rule through the acts of another. See rule 4-8.4(a). Parties to a matter may communicate directly with each other, and a lawyer is not prohibited from advising a client concerning a communication that the client is legally entitled to make, provided that the client is not used to indirectly violate the Rules of Professional Conduct. Also, a lawyer having independent justification for communicating with the other party is permitted to do so. Permitted communications include, for example, the right of a party to a controversy with a government agency to speak with government officials about the matter.

(Emphasis added). Thus, a citizen who does not believe that he or she has the ability to communicate effectively with an elected body or governmental agency is not disadvantaged by retaining counsel as compared to an opposing party who either has confidence in his or her communication skills or has the resources to retain lobbyists or other professionals (land planners, engineers, environmental consultants, etc.) to communicate directly with a governmental body or agency.

B. Opinions Interpreting/Applying the Rule

Four Florida Bar Ethics Opinions frame this discussion.

1. Florida Bar Ethics Opinion 78-4

Approaching the issue generally, in a corporate rather than governmental context, Opinion 78-4 made findings relative to when representation of a party commences, specifically whether litigation must have commenced, and who in the corporate structure is considered to be a party within the meaning of the Rule, finding:

- a. representation of party commences whenever an attorney-client relationship has been established with regard to the matter in question, regardless of whether or not litigation has commenced. In the opinion of

the majority of the Committee, in the case of even an individual or corporation that has general counsel representing the individual or corporation in all legal matters, the DR would require communication on the matter to be with the party's attorney, and

- b. in the opinion of the majority of the Committee, the rule will apply to officers, directors, or managing agents of the corporation but will not apply to other employees of the corporation unless they have been directly involved in the incident or matter giving rise to the investigation or litigation.

2. **Florida Bar Ethics Opinion 87-2**

Narrowing the issue, Opinion 87-2, discussed the Rule as applied to a government agency represented by counsel, finding:

[w]hen the opposing party is a government agency represented by counsel, an attorney may not communicate concerning the matter with the agency's management or any other employee whose act or omission in connection with the matter may be imputed to the agency or whose statement may constitute an admission on the party of the agency, unless consent of the agency's counsel is obtained.

3. **Florida Bar Ethics Opinion, 09-1**

Further narrowing, and seeking to address thresholds, Opinion 09-1 interpreted the Rule, providing answers to three specific questions:

- a. Are all persons within an organization represented by the organization's counsel for the purposes of the rule?

Consent is required before communicating with State Agency's officers, directors or managers, or employees who are directly involved in the matter, or with public officials or employees whose acts or omissions in connection with the matter can be imputed to State Agency.

- b. When does the prohibition arise?

Rule 4-4.2 is not limited to matters in litigation and may extend to matters on which litigation has not yet commenced, as well as to specific transactional or non-litigation matters on which the agency's lawyer is providing representation. Pursuant to the language of the Comment, however, direct communications with represented persons, including protected employees, on matters other than specific matters for which the agency lawyer is providing representation are permissible.

- c. Does general counsel effectively represent the agency on all matters, merely by virtue of being in the continuous employ of the agency, thus preventing all communications with the State Agency's public officials and employees on all subjects?

The Comments suggest that this is not the intent of the Rule. The Comments expressly recognize that lawyers with an "independent justification" may communicate with a represented party. The Rule does not prohibit a lawyer from communicating with other agency employees who do not fall within the above categories, nor does it prohibit a lawyer from communicating with employees who are considered represented by State Agency's lawyer for purposes of this rule on subjects unrelated to those matters in which the agency lawyer is actually known to be providing representation.

4. The Tobin Case

The Florida Bar v. Tobin, Florida Bar Case No. 70,451B. (October 21, 2013), involved a land use attorney seeking redress from a county government for a client and at the same time representing the client in a circuit court action against the county. Essentially, there were two forums in which Tobin was advocating for his client, both with overlapping subject matter. Tobin was alleged to violate the Rule when Tobin met with the County Commission and, because of the overlapping nature of the issues, some of the conversations that occurred pertained to the pending Circuit Court litigation.

Tobin clarifies the distinction made in Opinion 09-1 seeking to define thresholds for when communication is, or is not, appropriate, by example. Expressly differentiating litigation communications from other circumstances of traditional citizen redress or petitioning government, the Referee found no violation stating:

Respondent's communications were independently justified as contemplated by the above referenced comment. The issues raised in Respondent's communications were squarely part of his efforts to convince county officials to grant his client administrative relief, or to reconsider previous action that was adverse to his client, and were, therefore, permitted communications. Even if some of his communications to county officials were also related to the subject matter of the lawsuit, the Comment to Rule 4-4.2 permits the communication with a government agency if the communication is independently justified.

The Florida Bar v. Tobin, Fla. Bar Case No. 70,451B. (Oct. 21, 2013). (Emphasis added).

The Referee continued, discussing Ethics Opinion 09-1 and expressly distinguishing *Tobin* from that Opinion, stating that:

[t]he Florida Bar's reliance on Ethics Opinion 09-1, does not change the analysis or conclusions herein because the circumstances set forth in that Opinion are different than the matter at hand. In the context of representing a client in a local zoning dispute, as Respondent was doing here, attorneys may be required to participate in the formal or informal administrative arena (to gather information, to make a record and to exhaust administrative remedies), the quasi-judicial arena, and in litigation, all at the same time. **These are precisely the types of parallel proceedings that are squarely addressed in the Comment to Rule 4-4.2 and are not construed in Opinion 09-1.**"

(Emphasis added.) Thus, the Referee recognized the multi-faceted, and historically appropriate role of counsel directly communicating with a governmental agency, even when the agency is represented by counsel.

III. EFFECT OF PROPOSED CHANGES

A. The Proposed Amendment to Rule 4-4.2 Comment

The Proposed Amendment to the Comment in Florida Bar Rule 4-4.2 (regarding communications with persons represented by counsel), came about because of concern over *Tobin*, a disciplinary proceeding, and its interpretation of the **independent justification exception** provided in the Comments to the Rule. The current version of the Proposed Amendment seeks to limit the independent justification exception by separating existing paragraph 4 into two paragraphs and revising it to provide as follows:

This rule ~~Not~~ does not ~~this rule~~ preclude communication with a represented person who is seeking advice from a lawyer who is not otherwise representing a client in the matter. A lawyer may not make a communication prohibited by this rule through the acts of another. See rule 4-8.4(a). Parties to a matter may communicate directly with each other, and a lawyer is not prohibited from advising a client concerning a communication that the client is legally entitled to make, provided that the client is not used to indirectly violate the Rules of Professional Conduct. Also, a lawyer having independent justification for communicating with the other party is permitted to do so as set forth in subdivision (a). Permitted communications include, for example, the right of a lawyer who is a party to a dispute controversy with a government agency to speak with government officials about the matter. This rule does not preclude routine communications with government officials on strictly procedural matters, or on general policy issues or other administrative matters that are not involving a legal matter, claim or threatened or pending litigation. Also in representing a client who has a dispute in a matter with a government agency, a lawyer may communicate with the elected officials who have authority over such agency and who are represented by a lawyer in the

matter only under the following circumstances: 1) in writing, if a copy of the writing is contemporaneously delivered to the government attorney who represents said officials; 2) orally, upon adequate and meaningful prior notice to the government attorney who represents said officials; or 3) as part of a public hearing when an administrative or quasi-judicial matter is pending before that agency as permitted by rules 4-3.5 and 4-3.9.

[~~strikethrough/underlined~~ language represents the proposed revisions to the Comments.]¹

B. Argument in Support

Proponents of the Proposed Amendment argue that the *Tobin* decision conflicts with certain provisions in Opinion 09-1, that *Tobin* effectively modified Opinion 09-1 and inappropriately extended the independent justification exception in the Rule. Proponents assert that Opinion 09-1 correctly applies Rule 4-4.2. Thus, the Proposed Amendment would codify that interpretation, limiting the independent justification exception as construed by the Referee, so that the exception does not swallow the rule:

...if such direct communications [as in Fla. Bar v. Tobin] with represented persons are allowed by the “independent justification” language from the Comment to Rule 4-4.2, there is no meaningful prohibition of direct contact. Within the context of represented government officials and employees, even direct questioning of those officials pertaining to matters in litigation without notice to the government counsel appears to be acceptable.

Florida Association of County Attorneys (“FACA”) Letter Re: Rule 4-4.2 (February 20, 2014). FACA argues that the proposed amendment protects government clients from over-reaching attorneys who contact government employees in an attempt to influence ongoing litigation.

C. Argument in Opposition/Potential Issues Created by the Amendment

The Proposed Amendment does not recognize the distinction between an attorney representing a client before an elected body (i.e. city commission), appointed body (i.e. zoning board) or agency in matters such as a comprehensive plan amendment, rezoning request, site plan or other permit application, as opposed to an attorney representing a client in a clearly declared dispute. In fact, the Proposed Amendment muddies the distinction, making it less clear as to when an attorney may interact with governmental staff.

¹ The Section’s response and recommendation analyzes what we understand to be the most recent version of the proposed changes to the Comment to Rule 4-4.2 submitted after the Board of Governor’s July, 2014 meeting. In this regard, representatives of the RPPTL Section communicated our concerns to the City, County and Local Government Section, and while we were not able to reach agreement, the RPPTL Section appreciates the opportunity for professional dialogue with members from our fellow Section.

While it is clear that the Rule applies to instances beyond litigation (*See* Ethics Opinion 87-2), when a governmental entity is involved, communications with elected and appointed officials should not be hampered. Moreover, it is in the context of these separate informational meetings with elected officials, which are then disclosed on the record in the public hearing as “ex parte communications” under the rule established in *Jennings v. Dade County*, 589 So.2d 1337 (Fla. 3d DCA 1991), that information is shared so that in the subsequent public meeting the elected officials can make informed decisions. Furthermore, it is these types of information exchanges that frequently allow compromises to be reached in the public hearings, thereby avoiding the need for judicial redress or continued litigation on another front. Finally, the loss of this access to elected officials and agency personnel by citizens represented by counsel would affect both proponents *and* opponents of the particular comprehensive plan, rezoning, site plan or other permit application.

The *Tobin* decision was fact specific, and expressly distinguished Opinion 09-1; therefore the current situation does not require an amendment to the Comments.

D. Constitutional Overtones

Modifying the Rule will impede the normal interplay between citizens and their government in which citizens (with and without representation) play an integral and fundamental role. Specifically, the Proposed Amendment paves the way for required government lawyer involvement in the daily non-judicial dialogue and resolution of administrative, regulatory and related governmental matters. The legislative, regulatory and other executive branch/governmental functioning will be heavily “chilled” by inhibiting the free, efficient and normal discussion between a citizen participating in the process of “governing” (e.g., a zoning matter) and the governmental body or agency charged with oversight responsibility. Delay, expense and inefficiency will be unnecessarily introduced into a process that has worked and continues to work. And, most importantly, the Proposed Amendment casts an unduly large net by introducing an overlay of legal formality that substantially inhibits the right of Florida citizens to petition government and redress their grievances.

I. Florida’s Constitutional Framework

a. Article 1, Section 5: Right to Assemble. “The people shall have the right to peaceably assemble, to instruct their representatives and to petition for redress of grievances.”

b. Article 1, Section 24: Access to Public Records and Meetings.

“(a.) Every person has the right to inspect or copy any public record made or received in connection with the official business of any public body, officer, or employee of the state, or persons acting on their behalf, except with respect to records exempted pursuant to this section or specifically made confidential by this Constitution. This section specifically includes the legislative, executive, and judicial branches of

government and each agency or department created thereunder; counties, municipalities, and districts; and each constitutional officer, board, and commission, or entity created pursuant to law or this Constitution.

(b.) All meetings of any collegial public body of the executive branch of state government or of any collegial public body of a county, municipality, school district, or special district, at which official acts are to be taken or at which public business of such body is to be transacted or discussed, shall be open and noticed to the public and meetings of the legislature shall be open and noticed as provided in Article III, Section 4(e), except with respect to meetings exempted pursuant to this section or specifically closed by this Constitution.”

2. Federal Constitutional Provisions

a. First Amendment

“Congress shall make no law . . . prohibiting . . . or inhibiting the right of the people peaceably to assemble, and to petition the government for a redress of grievances.”

The provisions of the First Amendment concerning redress of grievances have been applied to the states under the Fourteenth amendment. *DeJonge v. Oregon*, 299 U.S. 242 (1937). From its original parameters, the right to redress grievances and to “petition” has been expanded to include the “approach of citizens or groups of them to administrative agencies. . . and to courts Certainly the right to petition extends to all departments of the Government. . .” *Eastern R.R. Presidents Conference v. Trucking Unlimited*, 404 U.S. 508, 510 (1972). See, *NAACP v. Claiborne Hardware, Co.*, 458 U.S.886, 913-15 (1982). Later cases have seemingly merged the rights to petition government and redress grievances with the rights of assembly, speech and press, thereby heightening their constitutional import even more. By chilling or burdening free government access with unnecessary formality in areas of everyday regulation, discussion and resolution, the Proposed Amendment threatens interference with the most fundamental of citizens’ rights, guaranteed by both the Federal and Florida Constitutions and dating back to Magna Carta (1215). See, C. Stephenson & F. Marcham, *Sources of English Constitutional History* 125 (1937). Certainly, less restrictive alternatives abound to address any perceived or actual concerns.

E. Summary of Issues and Concerns

In summary, the Proposed Amendment creates numerous substantive and procedural concerns that militate towards rejection:

- The “independent justification” provision is limited without a full analysis.
- Access to an administrative remedy that does not involve a public hearing may be limited by the Proposed Amendment (for the above-stated reasons).
- The Proposed Amendment does not acknowledge that in dealing with governmental agencies it is common to seek administrative, judicial and legislative remedies all at the same time.
- The Proposed Amendment does not balance the need to protect the attorney-client relationship with the rights of citizens (through their lawyers) to engage their elected and appointed officials and does not acknowledge Florida’s open government system.
- A narrow interpretation of the Proposed Amendment could interfere with a represented party’s ability to interact with agency staff on issues before they arise to the level of litigation.
- If the Proposed Amendment is adopted, what rules apply when an attorney is acting as a registered lobbyist before the governmental body or agency?
- The Proposed Amendment is overkill to address the facts of one problematic case.
- The Proposed Amendment includes terms that are not adequately defined.
- The Proposed Amendment limits access to elected officials.

IV. RECOMMENDATIONS

- The Proposed Amendment should be rejected. While protecting government officials and employees from overreaching attorneys may be an important goal, the decision which is the basis of the Proposed Amendment is insufficient to warrant the substantial and far reaching overhaul of the law in light of the practical, political and constitutional implications it raises. The old adage “bad facts make bad law” comes to mind in this situation.
- If the Proposed Amendment is not rejected outright, other possible alternatives should be considered because the Proposed Amendment, as written, puts any client that is represented by legal counsel and does not have resources to retain lobbyists and other communicators at a significant disadvantage.
- At the very least, instead of approaching amendments to the Comments in a piecemeal fashion, a separate committee should be created to consider whether the Rule itself should be amended and/or whether amending and clarifying the Comments section in a holistic manner is more appropriate.

V. FISCAL IMPACT ON STATE AND LOCAL GOVERNMENTS

The Proposed Amendment would have an immediate and substantial adverse fiscal impact, requiring governmental bodies and agencies to allocate significant resources to legal departments because seemingly every communication by a citizen's counsel to the governmental body or agency will, if nothing else but in caution, be routed through the agencies legal department. In addition to the direct personnel expenses, handling citizen communications and decision making will take immeasurably longer, further raising the cost. Moreover, it is highly likely that many compromises previously achieved as part of the normal give and take process that one encounters going through governmental proceedings will be thwarted by the Proposed Amendment, thereby increasing the chances of the need for subsequent litigation and the attendant costs for both the public and private sectors.

VI. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR

The Proposed Amendment and subsequent interpretation and application would have an adverse economic impact on the private sector, in that involvement of attorneys for the governmental bodies and agencies could extend the time needed to seek a remedy, thus causing the private sector to spend more money.

VII. CONSTITUTIONAL ISSUES

By chilling or burdening free government access with unnecessary formality in areas of everyday regulation, discussion and resolution, the proposed amendments to Rule 4-4.2 threaten interference with the most fundamental of citizens' rights, guaranteed by both the Federal and Florida Constitutions.

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ActionLine Magazine Article Cover Sheet

(See Writer's Guidelines for further instructions.)

Title of Article: _____

Author(s) Name: _____

Author(s) Firm/Company: _____

Author(s) City: _____

Author(s) Phone Number: _____

Author(s) E-mail Address: _____

Please attach headshot photo in jpg format, preferably in color and preferably over 1 MB, and bio limited to a 100 word count - or state whether or not you will submit both or either prior to the deadline:

Submission of bio/headshot is optional. Articles of 1500 words or less will include only a headshot or a bio as preferred by the author or, if multiple authors, please choose whether all bios or all photos.

Short quote or blurb to emphasize and insert in article (optional): _____

If the article is submitted on behalf of a RPPTL Section Committee, please provide the name of the committee and the chairperson:

Please e-mail your article in Microsoft Word format to:

srojas@thefund.com

or any other staff editor. A list of the editors and contact information can be found at the Directory button in the ActionLine Committee website.

ActionLine Writer's Guidelines

Query (Optional):

Queries welcomed: As an author, you may send an email query (article proposal) to any editor of ActionLine (see list of editors and contact information on the committee directory located on the committee website) if the article is not yet written.

Contents of query: Include in the query the title, author, summary of article, approximate length of article (i.e. usually between 1,000-3,000 words) and timing of submission. If you wish the article to be published in a particular issue (spring, summer, fall or winter), please state. Also include your contact information. The editor will contact you upon receipt to discuss the article.

Submitting Article:

Purpose. Articles are submitted by Section members to educate and inform on recent laws, cases, and regulations of interest to Section members. Also, articles may be submitted by Section members that relate to professional activities and events involving the Section and its members.

Quality: The editorial board has discretion to approve or disapprove articles submitted. Analysis and opinions as to the current state of the law or regulations should be clear and concise. Practical considerations and solutions to assist Section members in their practice are encouraged. Articles are judged and edited for structure, grammar, syntax, clarity, and thoroughness, as well as significance of topic and practical advice. Articles previously published or simultaneously to be published with the same or similar content must contain a statement to that effect. Such articles may be rejected or may be considered for re-work if the topic discussed is of great significance.

Requirements for submission: When submitting an article (whether or not a query was previously sent), note the following:

- Completed ActionLine Magazine Article Cover Sheet available for download in the ActionLine Committee website must be included.
- Articles are to be submitted in Word format along with the cover sheet to one of the ActionLine editors via email. Do not submit in PDF format.
- Include title (please keep the title as short as possible), author(s), city/state followed by text in double-spaced 12 size font format.
- Articles should be no longer than 3,000 words (3 magazine pages) or shorter than 1,000 words. Deviation from that may be waived by the editorial board as necessary.
- Start with an anecdotal quote or blurb to be used as a header (optional).
- Include a paragraph towards the beginning that summarizes the essence of the article (optional).
- Add end notes when citing laws, cases, regulations or other references, as necessary.
- Any repetition of cites or names should be abbreviated on any subsequent mention within the article.

- Articles should be edited in-house and polished before submission.
- Please attach headshot photo in jpg format, preferably in color and preferably over 1 MB (1,000 KB), and bio limited to a 100 word count - or state whether or not you will be submitting both or either prior to the deadline. Submission is optional. Articles of 1500 words or less will include only a headshot or a bio as preferred by the author. If the article contains more than one author and it is 1500 words or less, then the authors shall choose whether to include all bios or all photos. If the article is over 1500 then both bios and photos may be included.

Staff Editing:

Time Frame: The submission deadlines are shown below. Authors should strive to submit their articles prior to the submission deadline to allow time for the editors to edit the articles prior to the articles being forwarded for layout in the magazine at the end of the following month. Articles are published online approximately 45 days after the submission deadline and in hardcopy three weeks thereafter. There are only 30 days to edit articles after the submission deadline and before the magazine layout deadline so promptness is requested and expected.

Procedure and Approvals: The article should be sent to the editor that solicited the article or if none, to the email address shown on the cover sheet. If the content is approved, the author will be contacted and the article will be reviewed and corrected, as necessary, for punctuation, grammar and minor changes in syntax. It may be sent back to the author if corrections are required for content, flow or other substantial changes.

All articles are subject to approval by editorial staff as to content and placement even after it has gone through some of the editing process. The author will be contacted if the article cannot be placed in the upcoming issue despite a previous approval.

Submission/Closing Dates:

Spring 1/31
 Summer 4/30
 Fall 7/31
 Winter 10/31

Review other documents in the ActionLine Committee website. The ActionLine Committee website "Staff Library" contains valuable information to further assist you in preparing a quality article.

Use of articles after publication: An author that submits an article to ActionLine keeps his/her copyright but upon submission grants a license to ActionLine for exclusive original publication and may re-publish his/her article but only after the Section members have received the hardcopy issue containing the article and such re-publication must include a statement as follows:

This article was originally published in the ...[state season], 20....., issue of ActionLine, a Florida Bar Real Property and Trust Law Section publication.

Florida Bar Journal Writer's Guidelines

Purpose and General Approach: The primary purpose of columns is to educate or inform the reader on issues of substantive law and practical concern to lawyers. Analysis, opinion, and criticism of the present state of the law also are encouraged and should be clearly identified by sufficient legal authority on all sides of an issue to enable the reader to assess the validity of the opinion. When criticism is voiced, suggestions for reform should also be included. Criticism should be directed to issues only.

Submission Standards: Columns submitted for possible publication should be typed on 8 ½" by 11" paper, double-spaced with one-inch margins. Length of columns is 12 pages including endnotes. Only completed columns will be considered (no outlines or abstracts). Endnotes must be concise and placed at the end of the column. Upon first reference to a case or statute, the cite should be provided in the text. Columns may be submitted in Microsoft Word via email.

Review and Timelines: Submissions will be reviewed by members of The Florida Bar Journal Editorial Board, who are appointed by the president of The Florida Bar. The Florida Bar Journal Editorial Board, which is composed of lawyers practicing various areas of law, has discretion over the acceptability of legal articles. The Bar Journal's staff is liaison between authors and The Florida Bar Journal Editorial Board. Columns should be submitted directly to Real Property, Probate and Trust Law Section column editors. The Florida Bar Journal Editorial Board generally takes 60 to 90 days to offer its judgment on each submission. After a submission is approved, it is usually published in the Bar Journal within six months. If this time frame is unacceptable, the author should provide his/her submission to another publication.

The deadlines for submission of potential column publications to The Florida Bar Journal Editorial Board for 2015-2016 on behalf of the Real Property, Probate and Trust Law Section are as follows:

July 1, 2015 (for the September/October edition);
September 1, 2015 (for the November/December edition);
November 1, 2015 (for the January/February edition);
January 1, 2016 (for the March/April edition);
March 1, 2016 (for the May edition);
April 1, 2016 (for the June edition); and
May 1, 2016 (for the July/August edition).

Before any column publications are submitted to The Florida Bar Journal Editorial Board on behalf of the Real Property, Probate and Trust Law Section, such columns should be submitted by the author(s) for review to the Co-Chairs of the Publications (Florida Bar Journal) Committee of the Real Property, Probate and Trust Law Section not less than 30 days prior to the next submission deadline for column publications to The Florida Bar Journal Editorial Board to allow for sufficient time for the Publications (Florida Bar Journal) Committee to review and provide comments on the submission. The current Co-Chairs of the Publications (Florida Bar Journal) Committee of the Real Property, Probate and Trust Law Section are Jeff Goethe (jgoethe@barneswalker.com) and Douglas Christy (dchristy@bplegal.com). Any authors

submitting a potential column publication also must submit a brief biography of themselves to accompany the column publication. The Publications (Florida Bar Journal) Committee of the Real Property, Probate and Trust Law Section generally attempts to alternate submissions between Real Property law and Probate and Trust law topics. Therefore, any column publication submissions received by the Publications (Florida Bar Journal) Committee may not be submitted immediately for, or published in, the upcoming edition of The Florida Bar Journal to account for this alternating topic preference and goal. The Publications (Florida Bar Journal) Committee is always welcoming of early submissions of any column publications.

Publication Agreement: All authors are required to sign a publication agreement prior to publication.

Quality and Style: The board members approve submissions for publication in the Journal only if they are of publishable quality. A submission possesses “publishable quality” by combining various virtues of good legal writing, such as originality, significance of topic, thoroughness of analysis or exposition, clarity of discussion, practicality, novelty of topic or approach, sensible organization, and good style. A submission need not satisfy any set formula to be of publishable quality, and it is not necessarily publishable merely because it exhibits a single mark of excellence (e.g., novelty) in the extreme. Thus, even the form (i.e., the structure and style) of a submission may add to or detract from its message; form is content, and good style cannot be divorced from substance. Although the members of the editorial board recognize that publishable submissions ordinarily will undergo some editing, authors should take care to edit and polish their submissions before offering them. Submissions requiring substantial editing will be rejected or returned to the authors for revision.

Pending Proceedings; Authorial Involvement: Submissions by authors currently involved in pending proceedings on the topic of the submission or by authors whose firm is involved in such proceedings will not be published, except as follows: The editor may publish submissions on broad, common topics on which numerous proceedings often are pending, such as jurisdiction, as well as submissions specifically approved by the editorial board as part of a forum for conflicting sides of one or more issues in any pending proceedings. All primary authorities cited in submissions should be final, not pending appellate review. Upon request by the author, the executive committee of the board will review any submission relying heavily on nonfinal authorities to determine whether to publish it to illuminate one or more important issues despite the pendency of any proceedings on point. Prior to publication consideration, authors must disclose or disclaim their involvement in such pending proceedings.

Citations: Citations should be consistent with the Uniform System of Citation. Endnotes must be concise and placed at the end of the column. Excessive endnotes are discouraged.

Simultaneous Submission; Reprint: The Florida Bar Journal Editorial Board does not review submissions submitted simultaneously to other publications. Prior to publication consideration, authors must notify the editorial office if the submission or any version of it has ever been published or is pending publication in another periodical.