

Reasons For Proposed Advocacy Most court cases involving trusts require the joinder of trustees and beneficiaries as parties, many of whom are not residents of Florida. In order to ensure personal jurisdiction over nonresidents, a long-arm statute specific to trusts is required. Currently, there are few long-arm provisions in the Florida statutes that provide for jurisdiction over all nonresident trustees and beneficiaries necessary to a court decision binding on all parties to the trust.

PRIOR POSITIONS TAKEN ON THIS ISSUE

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

Most Recent Position

None

Others

(May attach list if more than one)

None

(Indicate Bar or Name Section)

(Support or Oppose)

(Date)

REFERRALS TO OTHER SECTIONS, COMMITTEES OR LEGAL ORGANIZATIONS

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

Referrals

1. Trial Lawyers Section, The Florida Bar
2. Florida Bankers Association

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.

2-5

A bill to be entitled

An act relating to court jurisdiction over trustees of trusts and trust beneficiaries; amending s. 736.0202, F.S.; providing for in rem jurisdiction over beneficiaries of trusts administered in Florida; creating s. 736.02023, F.S.; providing for long-arm jurisdiction over nonresident trustees and trust beneficiaries; creating s. 736.02025; providing for methods of service of process in actions involving trusts and trust beneficiaries; repealing s. 736.0205; providing for dismissal of actions involving trusts registered, or having a principal place of administration, in another state; repealing s. 736.0807(4).

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

Section 1. Section 736.0202, Florida Statutes, is amended to read (Substantial rewording of section. See s. 736.0202, F.S., for present text.):

736.0202 In Rem Jurisdiction.— Any beneficiary of a trust having its principal place of administration in this state is subject to the jurisdiction of the courts of this state to the extent of the beneficiary's interest in the trust.

Section 2. Section 736.02023, Florida Statutes, is created to read:

736.02023. Personal jurisdiction over trustees and other persons.---

(1) Any trustee, trust beneficiary, or other person, whether or not a citizen or resident of this state, who personally or through an agent does any of the following acts related to a trust submits to the jurisdiction of the courts of this state ~~regarding any matter~~ involving that trust:

(a) Accepting trusteeship of a trust having its principal place of administration in this state at the time of acceptance;

(b) Moving the principal place of administration of a trust to this state;

(c) Serving as trustee of a trust created by a settlor who was a resident of this state at the time of creation of the trust, or serving as trustee of a trust having its principal place of administration in this state;

(d) Accepting or exercising a delegation of powers or duties from the trustee of a trust having its principal place of administration in this state;

(e) Committing a breach of trust in this state, or committing a breach of trust with respect to a trust having its principal place of administration in this state at the time of the breach;

(f) Accepting compensation from a trust having its principal place of administration in this state;

(g) Performing any act or service for a trust having its principal place of administration in this state;

(h) Accepting a distribution from a trust having its principal place of administration in this state with respect to any matter involving the distribution;

37 (2) In addition, the courts of this state may exercise personal jurisdiction over
38 trustees, trust beneficiaries, or other persons, whether found within or outside the state, to the
39 maximum extent permitted by the Constitutions of this state and the United States.

40 Section 3. Section 736.02025, Florida Statutes, is created to read:

41 736.02025 Service of Process.—

42 (1) Except as otherwise provided in this section, service of process upon any person who
43 ~~is subject to the jurisdiction of the courts of this state~~ may be made as provided in Chapter 48.

44 (2) Where only in rem or quasi in rem relief is sought against a person in a matter
45 involving a trust, service of process on a ~~that~~ person may be made by sending a copy of the
46 summons and complaint by any commercial delivery service requiring a signed receipt or by any
47 form of mail requiring a signed receipt. Service under this subsection shall be complete upon
48 signing of a receipt by the addressee or by any person authorized to receive service of a
49 summons on behalf of the addressee as provided in Chapter 48. Proof of service shall be by
50 verified statement of the person serving the summons, to which must be attached the signed
51 receipt or other evidence satisfactory to the court that delivery was made to the addressee or
52 other authorized person.

53 (3) Under any of the following circumstances, service of original process pursuant to
54 subsection (2) may be made by first-class mail:

55 (a) If registered or certified mail service to the addressee is unavailable, and if delivery
56 by commercial delivery service is also unavailable;

57 (b) If delivery is attempted and is refused by the addressee;

58 (c) If delivery by mail requiring a signed receipt is unclaimed after notice to the
59 addressee by the United States Postal Service delivering entity.

60 (4) If service of process is obtained under subsection (3), proof of service shall be made
61 by verified statement of the person serving the summons. The verified statement must state the
62 basis for service by first-class mail, the date of mailing, and the address to which the mail was
63 sent.

64 Section 4. Section 736.0205, Florida Statutes, is repealed.

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66 Section 5. Subsection 736.0807(4), Florida Statutes, is repealed.

67
68 Section 6. This act shall take effect July 1, 2013.

WHITE PAPER

PROPOSED STATUTES ON ACQUIRING JURISDICTION OVER TRUSTEES AND TRUST BENEFICIARIES AND REPEALING §736.0205

I. SUMMARY

This proposed legislation provides a means for Florida courts to acquire jurisdiction over nonresident trustees and trust beneficiaries in cases involving trusts administered in Florida through enactment of trust-related “long-arm” provisions. Such provisions specify the acts that will give a Florida court jurisdiction over nonresident trustees and trust beneficiaries who have sufficient contacts with Florida to be subject to jurisdiction of its courts under constitutional due process principles, but which are not covered by the existing long-arm provisions in Chapter 48, Florida Statutes. The proposal is also intended to clarify existing law relating to the application of the principle of *forum non conveniens* to trust litigation pending in Florida by repealing §736.0205 and allowing courts to rely on rule 1.061 of the Florida Rules of Civil Procedure to determine the most appropriate forum for litigation concerning a trust. The bill does not have a fiscal impact on state funds.

II. CURRENT SITUATION

Subsection 736.0202(1) of the Florida Trust Code (identical to Uniform Trust Code §202) states that a trustee, including a nonresident trustee, who accepts trusteeship of a trust having its principal place of administration in Florida, or who moves the principal place of administration of a trust to Florida, submits *personally* to the jurisdiction of the courts of Florida regarding any matter involving the trust. The acts of accepting trusteeship or moving a trust to Florida are hidden “long-arm” provisions, not contained in §48.193(1), Fla. Stat., designed to allow Florida courts to acquire personal jurisdiction over nonresidents who engage in those acts. Personal jurisdiction means that a monetary judgment, such as might result from a surcharge action, could be entered against a nonresident trustee and collected from the trustee’s personal assets, or that the court’s order can command the trustee to take some action, such as an order to account. Under decisions of the U.S. Supreme Court, followed in the leading Florida case of *Venetian Salami Co. v. Parthenais*, 554 So.2d 499 (Fla. 1989), a Florida court may exercise jurisdiction over a defendant who cannot be served with process within the state (and who does not appear voluntarily) only if Florida law authorizes it, and then only if the defendant has sufficient minimum contacts with Florida such that maintaining the suit does not offend traditional notions of fair play and substantial justice. That, in turn, depends on whether the relationship among the defendant, the forum, and the litigation is such that the defendant should reasonably expect to be sued in Florida. This “minimum contacts” requirement always requires a factual analysis. So-called “long-arm” statutes are intended to specify factual situations that are likely to satisfy a minimum contacts test, but falling within the statute’s parameters does not automatically satisfy that test. *Venetian Salami*, 554 So.2d at 502.

Many Florida trusts have trustees and beneficiaries who are not residents of the state, and it is often difficult under current laws to acquire jurisdiction over all necessary parties in a case

involving a trust. Florida's generic long-arm statute, §47.193(1), Fla. Stat., is far too limited to include the necessary parties in most actions involving trusts, and the first step in acquiring jurisdiction over a nonresident is that Florida law must authorize it.

Section 736.0205 is identical to former §737.203, which was enacted in 1974 before the Florida Supreme Court added rule 1.061 adopting the federal doctrine of *forum non conveniens* in 1996. Section 736.0205 on its face appears to provide a defendant in trust litigation an absolute right to object to allowing the trust litigation to proceed in Florida if the trust has its principal place of administration in another state (unless all interested parties could not be bound by litigation of the courts in the state where the trust is registered or has its principal place of administration). However, it has not been construed that way. Florida courts have held that §736.0205 is not jurisdictional but is rather a *forum non conveniens* statute which requires a court to determine the "most appropriate forum" in which the case should proceed. See, e.g., *Estate of McMillian*, 603 So. 2d 685 (Fla. 1st DCA 1992). Although §736.0205 has been labeled a statute of *forum non conveniens*, the wording of the statute suggests that courts have limited discretion in allowing litigation to proceed over the objection of a defendant. This has led to significant confusion and litigation over the standards and burdens of proof for Florida courts to apply in addressing objections raised under the statute. It has also been suggested that the statute shifts the burden to the plaintiff to prove that their choice of venue is appropriate. *McMillian*, 603 So. 2d at 688. This conflicts with Florida Rule of Civil Procedure 1.061 which provides specifically that the defendant has the burden of pleading and proving the facts necessary to obtain a change of venue, and provides for a balancing of interests before dismissing a lawsuit. Article V §2(a) of the Florida Constitution gives the Florida Supreme Court the exclusive authority to "adopt rules for the practice and procedure in all courts including... the transfer to the court having jurisdiction of any proceeding when the jurisdiction of another court has been improvidently invoked." Since a rule now comprehensively addresses issues of *forum non conveniens*, §736.0205 has outlived its usefulness and is a source of confusion.

In addition to conflict with Rule 1.061, §736.0205, in providing for a seemingly automatic dismissal of a trust case in which the trust's principal place of administration is in another state, is misleading to attorneys and their clients and is contrary to the long-arm jurisdictional principle that nonresidents should be accountable in Florida courts for tortious actions by them that have consequences or repercussions within Florida. See *Wendt v. Horowitz*, 822 So.2d 1252 (Fla. 2002); *Canale v. Rubin*, 20 So.3d 463 (Fla. 2d DCA 2009).

III. EFFECT OF PROPOSED CHANGES

A. Section 1 of the proposal amends §736.0202 by moving the first sentence of existing subsection (2), slightly rewording it without making substantive change, and making it a standalone provision governing *in rem* jurisdiction over beneficiaries' interests in a trust.

B. Section 2 of the proposal creates a new §736.02023 that is a comprehensive long-arm statute for litigation involving a trust. It specifies acts or conduct that will allow Florida courts to acquire personal jurisdiction over a trustee or trust beneficiary, even if a nonresident of Florida, provided the constitutional due process requirements of minimum contacts with the state are otherwise met. Subsection (2) of the new statute is a "catchall" provision that is, in some

states, the sole statutory long-arm provision, and it is sanctioned by *Venetian Salami*. See 554 So.2d 499, fn. 2.

C. Section 3 of the proposal creates a new section §736.02025 that provides for service of process as provided in Chapter 48, the general statute on service of process. It also provides for service of process by mail or commercial delivery service when the case involves an interest in trust property but does not seek a personal judgment or an order compelling a trustee or trust beneficiary to take specific action (i.e., an *in rem* or *quasi in rem* action). Subsection (2) of the proposed section parallels existing service by mail provisions in §48.194, Fla. Stat. Subsection (3) of the proposed statute, allowing service by first-class mail in certain circumstances, is patterned after §4-303 of the Uniform Probate Code and contains elements of §48.194(3), Fla. Stat.

D. The Section 4 repeal of §736.0205 will require courts to conduct the four-part analysis contained in Civil Rule of Procedure 1.061 in deciding a motion to dismiss a case on the basis of *forum non conveniens*. The repeal will also provide clarity in that existing law provides little guidance on the factors for a court to consider in deciding a motion to dismiss under §736.0205.

E. Section 5 repeals subsection 736.0807(4), which is substantively replaced by subsection 736.02023(1)(d) of the proposed statute.

IV. FISCAL IMPACT ON STATE AND LOCAL GOVERNMENTS

None.

V. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR

None.

VI. CONSTITUTIONAL ISSUES

Long-arm statutes do not, in themselves, present issues of constitutionality. It is the application of those statutes to particular defendants that is subject to scrutiny to determine whether the defendant in question is afforded due process by reason of contacts with the state that suggest the defendant should reasonably expect to be subject to suit in the estate by reason of those contacts.

VII. OTHER INTERESTED PARTIES

Trial Lawyers Section of the Florida Bar

Florida Bankers Association

Reasons For Proposed Advocacy Most court cases involving trusts require the joinder of trustees and beneficiaries as parties, many of whom are not residents of Florida. In order to ensure personal jurisdiction over nonresidents, a long-arm statute specific to trusts is required. Currently, there are few long-arm provisions in the Florida statutes that provide for jurisdiction over all nonresident trustees and beneficiaries necessary to a court decision binding on all parties to the trust.

PRIOR POSITIONS TAKEN ON THIS ISSUE

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

Most Recent Position

None

Others

(May attach list if more than one)

None

(Indicate Bar or Name Section)

(Support or Oppose)

(Date)

REFERRALS TO OTHER SECTIONS, COMMITTEES OR LEGAL ORGANIZATIONS

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2-5

1 A bill to be entitled

2 An act relating to court jurisdiction over trustees of trusts and trust beneficiaries;
 3 amending s. 736.0202, F.S.; providing for in rem jurisdiction over beneficiaries of trusts
 4 administered in Florida; creating s. 736.02023, F.S.; providing for long-arm jurisdiction
 5 over nonresident trustees and trust beneficiaries; creating s. 736.02025; providing for
 6 methods of service of process in actions involving trusts and trust beneficiaries; repealing
 7 s. 736.0205; providing for dismissal of actions involving trusts registered, or having a
 8 principal place of administration, in another state; repealing s. 736.0807(4).

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

10 Section 1. Section 736.0202, Florida Statutes, is amended to read (Substantial rewording
 11 of section. See s. 736.0202, F.S., for present text.):

12 736.0202 In Rem Jurisdiction.— Any beneficiary of a trust having its principal place of
 13 administration in this state is subject to the jurisdiction of the courts of this state to the extent of
 14 the beneficiary's interest in the trust.

15 Section 2. Section 736.02023, Florida Statutes, is created to read:

16 736.02023. Personal jurisdiction over trustees and other persons.---

17 (1) Any trustee, trust beneficiary, or other person, whether or not a citizen or resident
 18 of this state, who personally or through an agent does any of the following acts related to a trust
 19 submits to the jurisdiction of the courts of this state regarding any matter involving that trust:

20 (a) Accepting trusteeship of a trust having its principal place of administration in this
 21 state at the time of acceptance;

22 (b) Moving the principal place of administration of a trust to this state;

23 (c) Serving as trustee of a trust created by a settlor who was a resident of this state at
 24 the time of creation of the trust, or serving as trustee of a trust having its principal place of
 25 administration in this state;

26 (d) Accepting or exercising a delegation of powers or duties from the trustee of a trust
 27 having its principal place of administration in this state;

28 (e) Committing a breach of trust in this state, or committing a breach of trust with
 29 respect to a trust having its principal place of administration in this state at the time of the
 30 breach;

31 (f) Accepting compensation from a trust having its principal place of administration
 32 in this state;

33 (g) Performing any act or service for a trust having its principal place of
 34 administration in this state;

35 (h) Accepting a distribution from a trust having its principal place of administration
 36 in this state with respect to any matter involving the distribution;

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38 trustees, trust beneficiaries, or other persons, whether found within or outside the state, to the
39 maximum extent permitted by the Constitutions of this state and the United States.

40 Section 3. Section 736.02025, Florida Statutes, is created to read:

41 736.02025 Service of Process.—

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43 ~~is subject to the jurisdiction of the courts of this state~~ may be made as provided in Chapter 48.

44 (2) Where only in rem or quasi in rem relief is sought against a person in a matter
45 involving a trust, service of process on ~~a that~~ person may be made by sending a copy of the
46 summons and complaint by any commercial delivery service requiring a signed receipt or by any
47 form of mail requiring a signed receipt. Service under this subsection shall be complete upon
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54 subsection (2) may be made by first-class mail:

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59 addressee by the United States Postal Service delivering entity.

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62 basis for service by first-class mail, the date of mailing, and the address to which the mail was
63 sent.

64 Section 4. Section 736.0205, Florida Statutes, is repealed.

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66 Section 5. Subsection 736.0807(4), Florida Statutes, is repealed.

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68 Section 6. This act shall take effect July 1, 2013.

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II. CURRENT SITUATION

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involving a trust. Florida's generic long-arm statute, §47.193(1), Fla. Stat., is far too limited to include the necessary parties in most actions involving trusts, and the first step in acquiring jurisdiction over a nonresident is that Florida law must authorize it.

Section 736.0205 is identical to former §737.203, which was enacted in 1974 before the Florida Supreme Court added rule 1.061 adopting the federal doctrine of forum non conveniens in 1996. Section 736.0205 on its face appears to provide a defendant in trust litigation an absolute right to object to allowing the trust litigation to proceed in Florida if the trust has its principal place of administration in another state (unless all interested parties could not be bound by litigation of the courts in the state where the trust is registered or has its principal place of administration). However, it has not been construed that way. Florida courts have held that §736.0205 is not jurisdictional but is rather a *forum non conveniens* statute which requires a court to determine the "most appropriate forum" in which the case should proceed. See, e.g., *Estate of McMillian*, 603 So. 2d 685 (Fla. 1st DCA 1992). Although §736.0205 has been labeled a statute of forum non conveniens, the wording of the statute suggests that courts have limited discretion in allowing litigation to proceed over the objection of a defendant. This has led to significant confusion and litigation over the standards and burdens of proof for Florida courts to apply in addressing objections raised under the statute. It has also been suggested that the statute shifts the burden to the plaintiff to prove that their choice of venue is appropriate. *McMillian*, 603 So. 2d at 688. This conflicts with Florida Rule of Civil Procedure 1.061 which provides specifically that the defendant has the burden of pleading and proving the facts necessary to obtain a change of venue, and provides for a balancing of interests before dismissing a lawsuit. Article V §2(a) of the Florida Constitution gives the Florida Supreme Court the exclusive authority to "adopt rules for the practice and procedure in all courts including... the transfer to the court having jurisdiction of any proceeding when the jurisdiction of another court has been improvidently invoked." Since a rule now comprehensively addresses issues of forum non conveniens, §736.0205 has outlived its usefulness and is a source of confusion.

In addition to conflict with Rule 1.061, §736.0205, in providing for a seemingly automatic dismissal of a trust case in which the trust's principal place of administration is in another state, is misleading to attorneys and their clients and is contrary to the long-arm jurisdictional principle that nonresidents should be accountable in Florida courts for tortious actions by them that have consequences or repercussions within Florida. See *Wendt v. Horowitz*, 822 So.2d 1252 (Fla. 2002); *Canale v. Rubin*, 20 So.3d 463 (Fla. 2d DCA 2009).

III. EFFECT OF PROPOSED CHANGES

A. Section 1 of the proposal amends §736.0202 by moving the first sentence of existing subsection (2), slightly rewording it without making substantive change, and making it a standalone provision governing *in rem* jurisdiction over beneficiaries' interests in a trust.

B. Section 2 of the proposal creates a new §736.02023 that is a comprehensive long-arm statute for litigation involving a trust. It specifies acts or conduct that will allow Florida courts to acquire personal jurisdiction over a trustee or trust beneficiary, even if a nonresident of Florida, provided the constitutional due process requirements of minimum contacts with the state are otherwise met. Subsection (2) of the new statute is a "catchall" provision that is, in some

states, the sole statutory long-arm provision, and it is sanctioned by *Venetian Salami*. See 554 So.2d 499, fn. 2.

C. Section 3 of the proposal creates a new section §736.02025 that provides for service of process as provided in Chapter 48, the general statute on service of process. It also provides for service of process by mail or commercial delivery service when the case involves an interest in trust property but does not seek a personal judgment or an order compelling a trustee or trust beneficiary to take specific action (i.e., an *in rem* or *quasi in rem* action). Subsection (2) of the proposed section parallels existing service by mail provisions in §48.194, Fla. Stat. Subsection (3) of the proposed statute, allowing service by first-class mail in certain circumstances, is patterned after §4-303 of the Uniform Probate Code and contains elements of §48.194(3), Fla. Stat.

D. The Section 4 repeal of §736.0205 will require courts to conduct the four-part analysis contained in Civil Rule of Procedure 1.061 in deciding a motion to dismiss a case on the basis of *forum non conveniens*. The repeal will also provide clarity in that existing law provides little guidance on the factors for a court to consider in deciding a motion to dismiss under §736.0205.

E. Section 5 repeals subsection 736.0807(4), which is substantively replaced by subsection 736.02023(1)(d) of the proposed statute.

IV. FISCAL IMPACT ON STATE AND LOCAL GOVERNMENTS

None.

V. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR

None.

VI. CONSTITUTIONAL ISSUES

Long-arm statutes do not, in themselves, present issues of constitutionality. It is the application of those statutes to particular defendants that is subject to scrutiny to determine whether the defendant in question is afforded due process by reason of contacts with the state that suggest the defendant should reasonably expect to be subject to suit in the estate by reason of those contacts.

VII. OTHER INTERESTED PARTIES

Trial Lawyers Section of the Florida Bar

Florida Bankers Association

LEGISLATIVE POSITION REQUEST FORM

GOVERNMENTAL AFFAIRS OFFICE

Date Form Received _____

GENERAL INFORMATION

Submitted By Tami F. Conetta, Chair, Power of Attorney Committee of the Real Property Probate & Trust Law Section (RPPTL Approval Date _____, 2012)

Address The Northern Trust Company, 1515 Ringling Blvd, Third Floor, Sarasota FL 34236
Telephone: (941) 329-2717

Position Type RPPTL Section, The Florida Bar

CONTACTS

Board & Legislation Committee Appearance **Tami F. Conetta**, The Northern Trust Company, 1515 Ringling Blvd, Third Floor, Sarasota FL 34236 Telephone: (941) 329-2717
Barry F. Spivey, Spivey & Fallon, PA, 1515 Ringling Blvd., Suite 885, Sarasota, FL 34236 Telephone 941-840-1991
Peter M. Dunbar, Pennington, Moore, Wilkinson, Bell & Dunbar, P.O. Box 10095, Tallahassee, Florida 32302-2095, Telephone (850) 222-3533
Martha J. Edenfield, Pennington, Moore, Wilkinson, Bell & Dunbar, P.O. Box 10095, Tallahassee FL 32302-2095, Telephone (850) 222-3533
(List name, address and phone number)

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

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

PROPOSED ADVOCACY

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

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

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

Proposed Wording of Position for Official Publication:

Support adoption of clarifications to chapter 709, the Florida Power of Attorney Act.

Reasons For Proposed Advocacy:

Chapter 709, the Florida Power of Attorney Act, was enacted effective October 1, 2011 and substantially revised chapter 709 to conform to the Uniform Power of Attorney Act. Several clarifications are proposed to facilitate the proper functioning of the Act.

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A bill to be entitled
An act relating to powers of attorney; technical corrections to
Ch. 709.

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

Section 1. Section 709.2102 is amended to include new subsections
(2) and (14) and re-number the remaining subsections, as follows:

(2) "Broker-dealer" means a broker-dealer registered with the
United States Securities and Exchange Commission or the Commodity
Futures Trading Commission if the broker-dealer is acting within the
course and scope of that regulation.

(~~3~~) "Durable" means, with respect to a power of attorney, not
terminated by the principal's incapacity.

(~~3~~) "Electronic" means technology having electrical, digital,
magnetic,
wireless, optical, electromagnetic, or similar capabilities.

(~~4~~) "Financial institution" ~~has the same meaning as in s.~~
~~655.005~~ means a (i) state or federal savings or thrift association,
bank, savings bank, trust company, international bank agency,
international banking corporation, international branch, international
representative office, international administrative office,
international trust company representative office, credit union, or an
agreement corporation that is subject to regulation by the Florida
Office of Financial Regulation.

(~~5~~) "Incapacity" means the inability of an individual to take
those actions necessary to obtain, administer, and dispose of real and
personal property, intangible property, business property, benefits,
and income.

(~~6~~) "Knowledge" means a person has actual knowledge of the fact,
has received a notice or notification of the fact, or has reason to
know the fact from all other facts and circumstances known to the
person at the time in question. An organization that conducts
activities through employees has notice or knowledge of a fact
involving a power of attorney only from the time information was

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35 received by an employee having responsibility to act on matters
36 involving the power of attorney, or would have had if brought to the
37 employee's attention if the organization had exercised reasonable
38 diligence. An organization exercises reasonable diligence if the
39 organization maintains reasonable routines for communicating
40 significant information to the employee having responsibility to act
41 on matters involving the power of attorney and there is reasonable
42 compliance with the routines. Reasonable diligence does not require an
43 employee to communicate information unless the communication is part
44 of the individual's regular duties or the individual knows that a
45 matter involving the power of attorney would be materially
46 affected by the information.

47 (78) "Power of attorney" means a writing that grants authority to
48 an agent
49 to act in the place of the principal, whether or not the term is used
50 in that
51 writing.

52 (89) "Presently exercisable general power of appointment" means,
53 with respect to property or a property interest subject to a power of
54 appointment, power exercisable at the time in question to vest
55 absolute ownership in the principal individually, the principal's
56 estate, the principal's creditors, or the creditors of the principal's
57 estate. The term includes a power of appointment not exercisable until
58 the occurrence of a specified event, the satisfaction of an
59 ascertainable standard, or the passage of a specified period only
60 after the occurrence of the specified event, the satisfaction of the
61 ascertainable standard, or the passage of the specified period. The
62 term does not include a power exercisable in a fiduciary capacity or
63 only by will.

64 (910) "Principal" means an individual who grants authority to an
65 agent in a power of attorney.

66 (1011) "Property" means anything that may be the subject of
67 ownership, whether real or personal, legal or equitable, or any
68 interest or right therein.

69 (~~11~~12) "Record" means information that is inscribed on a tangible
70 medium or that is stored in an electronic or other medium and is
71 retrievable in perceivable form.

72 (~~12~~13) "Sign" means having present intent to authenticate or
73 adopt a record to:

74 (a) Execute or adopt a tangible symbol; or

75 (b) Attach to, or logically associate with the record an
76 electronic sound, symbol, or process.

77 (14) "State" means a state of the United States, the District of
78 Columbia, Puerto Rico, the United States Virgin Islands, or any
79 territory or insular possession subject to the jurisdiction of the
80 United States.

81 (~~13~~15) "Third person" means any person other than the principal,
82 or the agent in the agent's capacity as agent.

83 Section 2. Section 709.2103 is amended to read:

84 709.2103 Applicability.—This part applies to all powers of
85 attorney except:

86 (1) A proxy or other delegation to exercise voting rights or
87 management rights with respect to an entity;

88 (2) A power created on a form prescribed by a government or
89 governmental subdivision, agency, or instrumentality for a
90 governmental purpose;

91 (3) A power to the extent it is coupled with an interest in the
92 subject of the power, including a power given to or for the benefit of
93 a creditor in connection with a credit transaction; ~~and~~

94 (4) A power created by a person other than an individual~~;~~

95 (5) A power given to a transfer agent to facilitate a specific
96 transfer or disposition of one or more identified stocks, bonds or
97 other financial instruments;

98 (6) A power authorizing a financial institution or broker-dealer, or
99 an employee of the financial institution or broker-dealer, to act as
100 agent for the account owner in executing trades or transfers of cash,
101 securities, commodities, or other financial assets on behalf of the
102 account owner in its regular course of business.

103

104 Section 3. Section 709.2105 is amended to include a new subsection
105 (3), as follows:

106 (3) A notary public may sign the name of the principal when the
107 principal is physically unable to sign or make a signature mark on the
108 power of attorney if:

109 1. The principal with a disability directs the notary to sign in his
110 or her presence;

111 2. The document signing is witnessed by two disinterested persons; and

112 3. The notary writes below the signature the following statement:

113 "Signature affixed by notary, pursuant to ss. 709.2102(3) and
114 117.05(14), Florida Statutes," and states the circumstances of the
115 signing in the notarial certificate.
116

117 Section 4. Section 709.2106(3) is amended as follows:

118 709.2106 Validity of power of attorney.--

119 (3) A power of attorney executed in another state which does not
120 comply with the execution requirements of this part is valid in this
121 state if, when the power of attorney was executed, the power of
122 attorney and its execution complied with the law of the state of
123 execution. A third person who is requested to accept a power of
124 attorney that is valid in this state solely because of this subsection
125 may in good faith request, and rely upon, without further
126 investigation, an opinion of counsel as to any matter of law
127 concerning the power of attorney, including the due execution and
128 validity of the power of attorney. An opinion of counsel requested
129 under this subsection must be provided at the principal's expense. A
130 third person may refuse to accept a power of attorney that is valid in
131 this state solely because of this subsection if the agent does not
132 provide the requested opinion of counsel, and in such case, a third
133 person has no liability for refusing to accept the power of attorney.
134 This subsection does not affect any other rights of a third person who
135 is requested to accept the power of attorney under this part, or any
136 other provisions of applicable law.

137 Section 5. Section 709.2106(5) is amended as follows:

138 (5) Except as otherwise provided in the power of attorney, a
139 photocopy or electronically transmitted copy of an original power of
140 attorney has the same effect as the original. Notwithstanding, an
141 original of the power of attorney may be required for recording in the
142 official records.

143 Section 6. Section 709.2114(1)(b) is amended as follows:

144 709.2114 Agent's duties.--

145 (1) An agent is a fiduciary. Notwithstanding the provisions in
146 the power of attorney, an agent who has accepted appointment:

147 (a) [No change]

148 (b) May not delegate authority to a third person except: as
149 provided in s. 518.112.

150 1. As permitted by s.518.112;

151 2. As permitted by this act; or

152 3. By execution of a power of attorney on a form prescribed by
153 a government or governmental subdivision, agency, or instrumentality
154 for a governmental purpose.

155 Section 7. Section 709.2116(3) is amended as follows:

156 709.2116 Judicial relief; conflicts of interest.--

157 (3) In any proceeding commenced by the filing of a petition
158 under this section, including, but not limited to, the unreasonable
159 refusal of a third person to allow an agent to act pursuant to the
160 power, and challenges to the proper exercise of authority by the
161 agent, the court shall award reasonable attorney's fees and costs as
162 in chancery actions.

163 Section 8. Section 709.2119(2) is amended as follows:

164 709.2119 Acceptance of and reliance upon power of attorney.--

165 (2) A third person may require:

166 (a) An agent to execute an affidavit stating where the principal
167 is domiciled; that the principal is not deceased; that there has been
168 no revocation, partial or complete termination by adjudication of
169 incapacity or by the occurrence of an event referenced in the power of
170 attorney; that there has been no suspension by initiation of
171 proceedings to determine incapacity, or to appoint a guardian, of the
172 principal; the agent's authority has not been terminated by the filing

173 of an action for dissolution or annulment of marriage, or legal
174 separation of the agent and principal; and, if the affiant is a
175 successor agent, the reasons for the unavailability of the predecessor
176 agents, if any, at the time the authority is exercised.

177 (b) An officer of a financial institution acting as agent to
178 execute a separate affidavit, or include in the form of the affidavit,
179 the officer's title and a statement that the officer has full
180 authority to perform all acts and enter into all transactions
181 authorized by the power of attorney for and on behalf of the financial
182 institution in its capacity as agent. ~~A written affidavit executed by~~
183 ~~the agent under this subsection may, but need not, be in the following~~
184 ~~form:~~

185 (c) A written affidavit executed by the agent under this
186 subsection may, but need not, be in the following form:

187 STATE OF _____

188 COUNTY OF _____

189 Before me, the undersigned authority, personally appeared
190 ~~(attorney in fact)~~ (agent) ("Affiant"), who swore or affirmed that:

191 1. Affiant is the ~~attorney in fact~~ agent named in the Power of
192 Attorney executed by (principal) ("Principal") on (date).

193 2. This Power of Attorney is currently exercisable by Affiant.
194 The principal is domiciled in (insert name of state, territory, or
195 foreign country).

196 3. To the best of ~~the~~ Affiant's knowledge after diligent search
197 and inquiry:

198 a. The Principal is not deceased;

199 b. Affiant's authority has not been suspended by initiation of
200 proceedings to determine incapacity or to appoint a guardian or a
201 guardian advocate; ~~and~~

202 c. Affiant's authority has not been terminated by the filing of
203 an action for dissolution or annulment of Affiant's marriage to the
204 principal, or their legal separation; and

205 e.d. There has been no revocation, partial or complete
206 termination of the power of attorney or of ~~the~~ Affiant's authority.

207 4. ~~The~~ Affiant is acting within the scope of authority granted in
208 the power of attorney.

209 5. ~~The~~ Affiant is the successor to (insert name of predecessor
210 agent), who has resigned, died, become incapacitated, is no longer
211 qualified to serve, has declined to serve as agent, or is otherwise
212 unable to act, if applicable.

213 6. Affiant agrees not to exercise any powers granted by the Power
214 of Attorney if Affiant has knowledge that affiant's authority has been
215 revoked, terminated, suspended, or is no longer valid.

216 _____
217 (Affiant)

218 Sworn to (or affirmed) and subscribed before me this ____ day of
219 (month) , (year) , by (name of person making statement)

220 (Signature of Notary Public-State of Florida)

221 (Print, Type, or Stamp Commissioned Name of Notary Public)

222 Personally Known OR Produced Identification (Type of
223 Identification Produced);

224 Section 9. Section 709.2119(3) is amended as follows:

225 (3) A third person that is asked to accept a power of attorney
226 that appears to be executed in accordance with ~~s. 709.2103~~ s. 709.2105
227 may in good faith request, and rely upon, without further
228 investigation:

229 (a) A ~~verified~~ certified English translation of the power of
230 attorney if the power of attorney contains, in whole or in part,
231 language other than English;

232 (b) An opinion of counsel as to any matter of law concerning the
233 power of attorney if the third person making the request provides in a
234 writing or other record the reason for the request; or

235 (c) The affidavit described in subsection (2).

236 Section 10. Section 709.2120 is amended as follows:

237 709.2120 Liability for refusal to accept power of attorney.-

238 (1) Except as otherwise provided in subsection (2):

239 (a) A third person shall either accept or reject a power of
240 attorney within a reasonable time. A third person that rejects a

241 power of attorney for any reason other than as provided in subsection
242 (2)(a) must state in writing the reason for the rejection.

243 (b) Four days, excluding Saturdays, Sundays, and legal holidays,
244 shall be presumed to be a reasonable time for a financial institution
245 or broker-dealer to accept or reject a power of attorney:

246 1. With respect to banking transactions, if the power of
247 attorney expressly contains authority to conduct banking transactions
248 pursuant to s. 709.2208(1), Florida Statutes; or

249 2. With respect to ~~security~~ investment transactions, if the
250 power of attorney expressly contains authority to conduct ~~security~~
251 investment transactions pursuant to s. 709.2208(2), Florida Statutes.

252 (c) A third person may not require an additional or different
253 form of power of attorney for authority granted in the power of
254 attorney presented.

255 (2) A third person is not required to accept a power of attorney
256 if:

257 (a) The third person is not otherwise required to engage in a
258 transaction with the principal in the same circumstances;

259 (b) The third person has knowledge of the termination or
260 suspension of the agent's authority or of the power of attorney before
261 exercise of the power;

262 (c) A timely request by the third person for an affidavit,
263 English translation, or opinion of counsel under s. 709.2119(4),
264 Florida Statutes, is refused by the agent;

265 (d) Except as otherwise provided in paragraph (b), the third
266 person in good faith believes that the power is not valid or that the
267 agent does not have the authority to perform the act requested; or

268 (e) The third person makes, or has knowledge that another person
269 has made, a report to the local adult protective services office
270 stating a good faith belief that the principal may be subject to
271 physical or financial abuse, neglect, exploitation, or abandonment by
272 the agent or a person acting for or with the agent.

273 (3) A third person that refuses in violation of this section to
274 accept a power of attorney is subject to:

275 (a) A court order mandating acceptance of the power of attorney;
276 and

277 (b) Liability for damages, including reasonable attorney's fees
278 and costs, incurred in any action or proceeding that confirms for the
279 purpose tendered the validity of the power of attorney or mandates
280 acceptance of the power of attorney.

281 Section 11. Subsection 709.2121(3) is amended as follows:

282 (3) Notice to a financial institution or broker-dealer must
283 contain the name, address, and the last four digits of the principal's
284 taxpayer identification number and be directed to an officer or a
285 manager of the financial institution or broker-dealer in this state.

286 Section 11. Subsection 709.2207(4) is amended as follows:

287 (4) Notwithstanding subsection (1), if a power of attorney is
288 otherwise sufficient to grant an agent authority to conduct banking
289 transactions, as provided in s. 709.2208(1), conduct investment
290 transactions as provided in s. 709.2208(2), or otherwise make
291 additions to or withdrawals from an account of the principal, making a
292 deposit to or withdrawal from an insurance policy, retirement account,
293 individual retirement account, benefit plan, bank account, or any
294 other account held jointly or otherwise held in survivorship or
295 payable on death, is not considered to be a change to the survivorship
296 feature or beneficiary designation, and no further specific authority
297 is required for the agent to exercise such authority. A ~~bank or other~~
298 financial institution or broker-dealer does not have a duty to inquire
299 as to the appropriateness of the agent's exercise of that authority
300 and is not liable to the principal or any other person for actions
301 taken in good faith reliance on the appropriateness of the agent's
302 actions. This subsection does not eliminate the agent's fiduciary
303 duties to the principal with respect to any exercise of the power of
304 attorney.

305 Section 12. Subsection 709.2208(2) is amended as follows:

306 (2) A power of attorney that specifically includes the statement that
307 the agent has "authority to conduct investment transactions as
308 provided in section 709.2208(2), Florida Statutes" grants general
309 authority to the agent with respect to securities held by financial

310 institutions or broker-dealers to take the following actions without
311 additional specific enumeration in the power of attorney:
312 (a) Buy, sell, and exchange investment instruments.
313 (b) Establish, continue, modify, or terminate an account with respect
314 to investment instruments.
315 (c) Pledge investment instruments as security to borrow, pay, renew,
316 or extend the time of payment of a debt of the principal.
317 (d) Receive certificates and other evidences of ownership with respect
318 to investment instruments.
319 (e) Exercise voting rights with respect to investment instruments in
320 person or by proxy, enter into voting trusts, and consent to
321 limitations on the right to vote.
322 (f) Sell commodity futures contracts and call and put options on
323 stocks and stock indexes.
324 For purposes of this subsection, the term "investment instruments"
325 means stocks, bonds, mutual funds, and all other types of securities
326 and financial instruments, whether held directly, indirectly, or in
327 any other manner, including shares or interests in a private
328 investment fund, including, but not limited to, a private investment
329 fund organized as a limited partnership, a limited liability company,
330 a statutory or common law business trust, a statutory trust, or a real
331 estate investment trust, joint venture, or any other general or
332 limited partnership; derivatives or other interests of any nature in
333 securities such as options, options on futures, and variable forward
334 contracts; mutual funds; common trust funds; money market funds; hedge
335 funds; private equity or venture capital funds; insurance contracts;
336 and other entities or vehicles investing in securities or interests in
337 securities whether registered or otherwise, except commodity futures
338 contracts and call and put options on stocks and stock indexes.
339 Section 13. Effective date. These provisions shall take effect upon
340 becoming law.

Chapter 709 “Glitch” Bill White Paper

I. SUMMARY

The proposal seeks to clarify certain provisions of chapter 709, which was substantially re-written in 2011.

II. CURRENT SITUATION

Chapter 709, the Florida Power of Attorney Act (the “Act”), was enacted effective October 1, 2011, and substantially re-wrote chapter 709 to conform to the Uniform Power of Attorney Act. Several clarifications are proposed to facilitate the proper functioning of the Act.

III. EFFECT OF PROPOSED CHANGES

The proposed changes add definitions to clarify terms used in the Act, identify additional exceptions to the application of the Act, authorize a notary to sign a power of attorney on behalf of a disabled principal, clarify when a third party may reject an out-of-state power of attorney, address concerns raised by title agents as to the acceptance of copies of powers of attorney and the corresponding requirement to record only original documents, broadens the agent’s ability to delegate certain ministerial tasks, clarifies the court’s authority to award fees and costs in a judicial proceeding, clarifies the content and form of the affidavit to be provided by an agent, corrects a statutory reference, clarifies that an English translation must be certified rather than verified, clarifies when written notice of a third party’s rejection of a power of attorney is required, and clarifies the application of numerous sections to financial institutions and broker-dealers.

IV. SECTION BY SECTION ANALYSIS

1. Definitions – Section 709.2102

The proposal adds a definition for “broker-dealer” as a new subsection 2 and clarifies the definition of “financial institution” in subsection 5 (previously 4). The proposal also modifies sections 709.2120, 709.2121, 709.2207 and 709.2208 to clarify that the Act applies to both broker-dealers and financial institutions in almost all instances.

A definition of “state” has also been included as it relates to acceptance of powers of attorney executed in compliance with the laws of another state.

2. Powers to which the Act does not apply – 709.2103

Section 709.2103 provides that the Act does not apply to powers of attorney frequently encountered in common agency relationships and commercial contexts. The Act currently excludes:

- A power created by an entity, such as a corporation;
- A proxy or other delegation to exercise voting or management rights;
- A power created on a form prescribed by a government or governmental subdivision, agency, or instrumentality for a governmental purpose; or

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- Powers coupled with an interest (such as powers given to a creditor to perfect or protect title in or to sell, pledged collateral).

The proposal would add the following powers to the list of excluded powers:

- Stock transfer powers. The Depository Trust Company and other transfer agents rely on these stock powers to facilitate transfers of certificates. They frequently are provided on pre-printed forms and do not meet the execution requirements of the Act. The provisions of the Act are not applicable to this type of agency appointment.
- Agent for trades and transfers. Most investment management agreements authorize the broker-dealer or financial institution to execute trades and transfers on the client's behalf by appointing the broker-dealer or financial institution (or their employee) as an agent of the client. This appointment is necessary to facilitate the sale and purchase of investments and transfers in a timely manner in response to market changes. The provisions of the Act are not applicable to this type of agency appointment.

3. Execution requirements – Section 709.2105

A power of attorney must be signed by the principal. A reasonable accommodation is needed to facilitate the “signing” of a power of attorney by a principal who is physically unable to sign his or her name but otherwise has the capacity to enter into a power of attorney. The proposal adopts the procedure for in section 117.05, Florida Statutes, to authorize the notary to sign the name of the disabled person when the following criteria are met:

- The principal with a disability directs the notary to sign in his or her presence;
- The document signing is witnessed by two disinterested persons;
- The notary writes below the signature the following statement: “Signature affixed by notary, pursuant to ss. 709.2102(3) and 117.05(14), Florida Statutes,” and states the circumstances of the signing in the notarial certificate.

4. Validity of Power of Attorney – Section 709.2106

One of the key provisions of the Act was to provide a mechanism for a power of attorney executed pursuant to the laws of another state to be recognized in Florida, even if its execution did not comply with the requirements of the Act. The mechanism allows third parties to request an opinion of counsel that the power of attorney was properly executed under the laws of the other state. The proposal modifies subsection 3 to clarify that if a third person requests such an opinion of counsel and it is not provided, that is sufficient grounds for the third person to refuse to accept the power of attorney. The current language is unclear regarding the third person's right to refuse to accept the power of attorney.

Another key provision of the Act was to allow third parties to accept a copy of a power of attorney rather than requiring the agent to produce an original each time. Title insurance agents expressed concern that an original must be recorded in the public records. The proposal amends subsection 5 to clarify that a third party, such as a title agent, may require an original power of attorney if the original must be recorded in the public records as part of the transaction.

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5. Agent's duties – Section 709.2114

A principal delegates authority to an agent to act for the principal by execution of the power of attorney. There are limited circumstances in which the agent is allowed to further delegate his or her authority to another person. The Act currently limits this to delegation of investment authority pursuant to section 518.112, Florida Statutes, to enable an agent to obtain qualified investment management on the principal's behalf. The proposal would allow the agent to also delegate his or her authority in situations using a prescribed governmental form, such as a power of attorney to a car dealer to facilitate the transfer of title for the sale of a vehicle, or the appointment of an agent for communication with the Internal Revenue Service using an IRS Form 2848.

6. Judicial relief; conflicts of interest – Section 709.2116

The Act allows a court to award attorney's fees and costs in any proceeding involving a power of attorney but it does not provide a standard for the award. The proposal includes the standard "as in chancery actions" to allow the court full discretion in whether or not to make an award and against whom.

7. Acceptance of and reliance upon power of attorney – section 709.2119

An important component of the Act is the ability of a third party to request that the agent provide an affidavit as to the validity of the power of attorney. The proposal clarifies the contents of the affidavit and a suggested form, specifically including statements regarding the marital status of the principal and agent, if appropriate.

A statutory reference in subsection 3 is corrected from 709.2103 to 709.2105.

The proposal also changes the requirement that an English translation be verified, to simply certified. Verification of a translation requires the certification by the translator that it is an accurate translation as well as a certification by a court that the translator has been approved to provide translation services. This additional requirement places too great of a burden on the agent. A certification by the translator is sufficient to ensure accuracy of the translation.

8. Liability for refusal to accept power of attorney - section 709.2120

Section 709.2120 of the Act identifies situations where it is appropriate for a third party to reject a power of attorney. It also includes a requirement that the third party notify the agent in writing of the reason for the rejection. The proposal clarifies that the written notice of rejection is not required when the third person is not otherwise required to engage in the same transaction with the principal. Conversely, notice is required in all other situations.

References to financial institutions in this section are amended to include broker-dealers and "security transactions" is changed to "investment transactions" to conform to the terminology in section 709.2208 of the Act.

9. Notice – section 709.2121

References to financial institutions in this section are amended to include broker-dealers.

10. Banks and other financial institutions – section 709.2208

A reference to banks and other financial institutions in this section is amended to specifically include broker-dealers.

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11. Effective Date.

The proposal has an immediate effective date as it is remedial in nature.

V. FISCAL IMPACT ON STATE AND LOCAL GOVERNMENTS

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

VI. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR

The proposal will provide economic benefit to the private sector by enhancing the usefulness of powers of attorney, while at the same time protecting the principal, the agent, and those who deal with the agent, and providing Florida citizens with an economical method to plan for the management of their person and finances, particularly in the event of incapacity.

VII. CONSTITUTIONAL ISSUES

There are no Constitutional issues.

VIII. OTHER INTERESTED PARTIES

Elder Law Section of The Florida Bar
Florida Bankers Association

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