



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

**The Breakers**  
**Palm Beach, Florida**

**Saturday, July 29, 2017**  
**9:45 a.m.**

**BRING THIS AGENDA TO THE MEETING**

Real Property, Probate and Trust Law Section  
Executive Council Meeting  
The Breakers  
Palm Beach, Florida  
July 29, 2017

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**Agenda**

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

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

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

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

Motion to approve the minutes of February 25, 2017 meeting of Executive Council held at the Hyatt Coconut Point, Bonita Springs **pp. 11 - 42**

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

1. Recognition of Guests: Michael Higer, President of The Florida Bar
2. Recognition of New Executive Council Members
3. Milestones
4. Motion of Lawrence J. Miller to adopt a Memorial Resolution honoring the dedicated service and accomplishments of Wilson Smith, a beloved past chair of the Section who passed away on August 7, 2016 **p. 43**
5. Recognition of General Sponsors and Friends of the Section. **pp. 44-46**
6. Report of Interim Action of the Executive Committee.

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

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

VI. **Chair-Elect's Report** — *Debra L. Boje, Chair-Elect* **pp. 47**

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

Statement of Current Financial Conditions. **pp. 48**

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

IX. **CLE Seminar Coordination Report** — *Steven H. Mezer (Real Property) and Shane Kelley (Probate & Trust), Co-Chairs* **p. 49**

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

**Action Item:**

1. **Legislation Committee** – *Sarah Butters and Cary Wright, Co-Chairs pp. 50-55*

Motion to approve the Dean Mead Agreement for legislative advisor services for a 2 year and 2-month term relating back to July 1, 2017 and to expend section funds.

**Information Items:**

1. **Ad Hoc Remote Notary Task Force** – *E. Burt Bruton, Chair pp. 56-103*
2. **Amicus Coordination** – *Kenneth Bell, Gerald Cope, Robert Goldman and John Little, Co-Chairs pp. 104-121*

Report from Task Force on remote notarization issues and legislative considerations.

Report on *Rigby v. Bank of New York Mellon* amicus filing.

3. **Fellows** – *Benjamin Diamond, Chair pp. 122*

Introduction of new Fellows.

4. **Homestead Issues Committee** – *Jeff Goethe and Michael Swaine, Co-Chairs pp. 123-134*

Proposed amendment to Chapter 732, Florida Statutes to provide clarification and guidance regarding the waiver of constitutional homestead protection for surviving spouses. The statute would provide language which, when used within a deed, would create a presumption that the spouse signing the deed waived the constitutional restrictions on the devise of homestead. This would supplement the existing procedures in section 732.701, Florida Statutes, which provides for the waiver of spousal rights by written agreement.

5. **Legislation** – *Cary Wright and Sarah Butters, Co- pp. 135-136*

Report on veto of electronic wills legislation.

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

Update on Clerks' activities.

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

**Action Items:**

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

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

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

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

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

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

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

Motion to (A) adopt as a Section position legislation to (1) clarify that the interest of a lessor is not subject to improvements made by the lessee of a mobile home lot in s. 713.10, F.S., and (2) eliminate ambiguity regarding whether the expiration date on a notice of commencement may be less than one year from the date of recording, including an amendment to s. 713.13, F.S.; (B) find that such legislative position is within the purview of the RPPTL Section; and (C) expend Section funds in support of the proposed legislative position. **pp.173-182**

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

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

**Information Item:**

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

Consideration of legislation proposed by the Florida Association of Court Clerks, Inc. (d/b/a Florida Court Clerks & Comptrollers) concerning disposition of excess proceeds from tax deed sales. **pp.195-207**

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

### **Information Items:**

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

Motion to (A) adopt as a Section legislative position support for a proposed amendment to F.S. Chapter 731 to provide that formal notice as provided in the Florida Probate Rules does not confer in personam jurisdiction over persons receiving formal notice; (B) find that such legislative position is within the purview of the RPPTL Section; and (c) expend Section funds in support of the proposed legislative position. **pp. 208-213**

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

Motion to (A) adopt as a Section legislative position support for proposed legislation defining “tangible personal property” in the Florida Probate Code to make it clear that tangible personal property, includes, but is not limited to, precious metals in any tangible form, such as bullion and coins; (B) find that such legislative position is within the purview of the RPPTL Section; and (c) expend Section funds in support of the proposed legislative position. **pp. 214-218**

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

1. **Attorney-Loan Officer Conference** – Robert G. Stern, Chair; Kristopher E. Fernandez and Wilhelmina F. Kightlinger, Co-Vice Chairs
2. **Commercial Real Estate** – Adele Ilene Stone, Chair; E. Burt Bruton, R. James Robbins, Jr. and Martin D. Schwartz, Co-Vice Chairs
3. **Community Association Law Certification Review Course** – Richard D. DeBoest, II and Sandra Krumbein, Co-Chairs
4. **Condominium and Planned Development** – William P. Sklar, Chair; Kenneth S. Direktor and Alexander B. Dobrev, Co-Vice Chairs

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

18. **Title Insurance and Title Insurance Liaison** – Raul P. Ballaga and Brian W. Hoffman, Co-Chairs; Alan B. Fields, Cynthia A. Riddell and Melissa N. VanSickle, Co-Vice Chairs
19. **Title Issues and Standards** – Christopher W. Smart, Chair; Robert M. Graham, Brian W. Hoffman, Melissa Sloan Scaletta and Karla J. Staker, Co-Vice Chairs

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

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

11. **Liaisons with Elder Law Section** – Charles F. Robinson and Marjorie Ellen Wolasky
12. **Liaisons with Tax Section** – Lauren Young Detzel, Cristin Keane, William Roy Lane, Jr., Brian Curtis Sparks and Donald Robert Tescher
13. **Principal and Income** – Edward F. Koren and Pamela O. Price, Co-Chairs, Joloyon D. Acosta and Keith Braun, Vice Chair
14. **Probate and Trust Litigation** – Jon Scuderi, Chair; John Richard Caskey, Robert Lee McElroy, IV and James Raymond George Co-Vice Chairs
15. **Probate Law and Procedure** – John Christopher Moran, Chair; Amy Beller, Michael Travis Hayes and Matthew Henry Triggs, Co-Vice Chairs
16. **Trust Law** – Angela McClendon Adams, Chair; Tami Foley Conetta, Jack A. Falk and Mary E. Karr, Co-Vice Chairs
17. **Wills, Trusts and Estates Certification Review Course** – Linda S. Griffin, Chair; Jeffrey Goethe, Rachel Lunsford, and Jerome L. Wolf, Co-Vice Chairs

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

1. **Florida Bar Leadership Academy** – Brian Sparks and Kris Fernandez, Co-Chairs
2. **Amicus Coordination** – Robert W. Goldman, John W. Little, III, Kenneth B. Bell and Gerald B. Cope, Jr., Co-Chairs
3. **Budget** – Tae Kelley Bronner, Chair; Linda Griffin, Robert Swaine, Robert S. Freedman and Pamela O. Price, Co-Vice Chairs
4. **CLE Seminar Coordination** – Steven Mezer and Shane Kelley, Co-Chairs; Thomas Karr, Silvia Rojas, Alex Hamrick, Theo Kypreos, Hardy L. Roberts, III, (General E-CLE) and Paul Roman (Ethics), Yoshimi O. Smith, Co-Vice Chairs
5. **Convention Coordination** – Dresden Brunner, Chair; Sancha Brennan Whynot and Jon Scuderi, Co-Vice Chairs
6. **Fellows** – Benjamin Diamond, Chair; Joshua Rosenberg, John Costello and Jennifer Bloodworth, Co-Vice Chairs
7. **Florida Electronic Filing & Service** – Rohan Kelley, Chair

8. **Homestead Issues Study** – Jeffrey S. Goethe (Probate & Trust) and J. Michael Swaine (Real Property), Co-Chairs; Melissa Murphy and Charles Nash, Co-Vice Chairs
9. **Legislation** – Sarah Butters (Probate & Trust) and Wm. Cary Wright (Real Property), Co-Chairs; Travis Hayes and Robert Lancaster (Probate & Trust), and Alan B. Fields and Art Menor (Real Property), Co-Vice Chairs
10. **Legislative Update (2017)** – Stacy O. Kalmanson, Chair; Brenda Ezell, Travis Hayes, Thomas Karr, Joshua Rosenberg, Kymberlee Curry Smith, Jennifer S. Tobin and Salome Zikakis, Co-Vice Chairs
11. **Legislative Update (2018)** – Stacy O. Kalmanson, Chair; Brenda Ezell, Travis Hayes, Thomas Karr, Joshua Rosenberg, Kymberlee Curry Smith, Jennifer S. Tobin and Salome Zikakis, Co-Vice Chairs
12. **Liaison with:**
  - a. **American Bar Association (ABA)** – Edward F. Koren, Julius J. Zschau, George Meyer and Robert S. Freedman
  - b. **Clerks of Circuit Court** – Laird A. Lile
  - c. **FLEA / FLSSI** – David C. Brennan and Roland “Chip” Waller
  - d. **Florida Bankers Association** – Mark T. Middlebrook
  - e. **Judiciary** – Judge Linda R. Allan, Judge Jaimie R. Goodman, Judge Hugh D. Hayes, Judge Janis B. Keyser, Judge Maria M. Korvick, Judge Norma S. Lindsey, Judge Celeste H. Muir, Judge Robert Pleus, Jr., Judge Morris Silberman, Judge Mark Speiser, Judge Richard J. Suarez, Judge Patricia V. Thomas, and Judge Jessica J. Ticktin
  - f. **Out of State Members** – Michael P. Stafford, John E. Fitzgerald, Jr., and Nicole Kibert Basler
  - g. **TFB Board of Governors** – John Stewart
  - h. **TFB Business Law Section** – Gwynne A. Young and Manuel Farach
  - i. **TFB CLE Committee** – Robert Swaine
  - j. **TFB Council of Sections** – Debra L. Boje and Andrew M. O’Malley
  - k. **TFB Pro Bono Committee** – Tasha K. Pepper-Dickinson
  - l. **TFB Tax Law Section** – Cristen Keane and Brian Malec
13. **Long-Range Planning** – Debra L. Boje, Chair
14. **Meetings Planning** – George J. Meyer, Chair
15. **Information Technology** – Neil Barry Shoter, Chair; William A. Parady, Alexander B. Dobrev, Michael Travis Hayes, Hardy Roberts, Jesse Friedman, Keith S. Kromash, Michael Sneeringer, and Erin Christy, Co-Vice Chairs
16. **Membership and Inclusion** – Brenda Ezell and Jason M. Ellison, Co-Chairs, Annabella Barboza, Phillip A. Baumann, Guy S. Emerich, and Kymberlee Curry Smith, Co-Vice Chairs
17. **Model and Uniform Acts** – Bruce M. Stone and Richard W. Taylor, Co-Chairs

18. **Professionalism and Ethics**— Gwynne A. Young, Chair; Tasha K. Pepper-Dickinson, Alexander B. Dobrev, and Andrew B. Sasso, Vice Chairs
19. **Publications (ActionLine)** – Jeffrey Alan Baskies and Michael A. Bedke, Co-Chairs (Editors in Chief); W. Cary Wright, Shari Ben Moussa, George D. Karibjanian, Sean M. Lebowitz, Paul Roman and Lee Weintraub, Co-Vice Chairs.
20. **Publications (Florida Bar Journal)** – Jeffrey S. Goethe (Probate & Trust) and Douglas G. Christy (Real Property), Co-Chairs; Brian Sparks (Editorial Board – Probate & Trust), Cindy Basham (Editorial Board – Probate & Trust), Michael A. Bedke (Editorial Board – Real Property), Homer Duvall (Editorial Board – Real Property) and Allison Archbold (Editorial Board), Co-Vice Chairs
21. **Sponsor Coordination** – Wilhelmina F. Kightlinger, Chair; Marsha G. Madorsky, Arlene C. Udick, J. Eric Virgil, J. Michael Swaine, Deborah L. Russell, John Cole, and Jason Quintero, Co-Vice Chairs
22. **Strategic Planning** – Debra L. Boje and Andrew M. O'Malley, Co-Chairs

**XVI. [Adjourn](#):** Motion to Adjourn.

**MINUTES  
OF THE  
REAL PROPERTY, PROBATE AND TRUST LAW SECTION  
Executive Council  
Saturday, June 3, 2017  
Bonita Springs, Florida**

**I. Call to Order – Deborah P. Goodall, Chair**

Ms. Deborah P. Goodall called her last meeting as Chair to order at 10 a.m. on Saturday, June 3, 2017 after a weekend of family fun at the 2017 RPPTL Convention. Your secretary was still shaking the water out of his ears after being pummeled mercilessly by the Swaine children in Thursday night's dunk tank on the carnival-themed midway... proving that it is never a good idea to insult a Swaine.

The meeting capped another fantastic week of events for the Council which included substantive committee meetings, good food, fellowship, and great weather (Yes, the sun was shining all weekend!)

**II. Attendance – William T. Hennessey, Secretary**

Mr. Hennessey reminded all members to sign the attendance roster. The roster showing members in attendance is attached as Addendum "A".

**III. Minutes of Previous Meeting – William T. Hennessey, Secretary**

Mr. Hennessey moved:

**To approve the Minutes of the February 25, 2017 meeting of the Executive Council held at Four Seasons in Austin, Texas. (See Agenda pages 11-29)**

**The Motion was unanimously approved.**

**IV. Chair's Report – Deborah P. Goodall, Chair**

**1. Recognition of Guests.**

**a. Michael J. Higer.** Ms. Goodall introduced incoming Florida Bar President Michael J. Higer, who addressed the Council. Mr. Higer reported that he is honored, excited, and ready to serve as the new Florida Bar President. He praised the Section for all of its efforts for the Bar and the public. He specifically thanked and recognized our Council members who serve on the Board of Governors, including Sandy Diamond, Lanse Scriven, Andy Sasso, and Laird Lile. Mr. Higer listed a number of goals and priorities for his term, including protecting the judicial branch as the Constitutional Revision Commission convenes to review and propose changes to the Florida Constitution, improving

access to justice for people in need of legal services, expanding and communicating the scope of benefits provided by the Bar to its members, improving the diversity and inclusiveness of the Bar so that all lawyers are on a level playing field, and, finally, focusing on improving technology so that the Bar and its attorneys can connect better with clients, the court, and the public. Above all, Mr. Higer's number one goal is to "pursue justice by serving the interest of lawyers, public, and judiciary." Ms. Goodall thanked Mr. Higer for his inspirational message and wished him well during the upcoming year.

**b. Sharon Bock, Palm Beach Clerk of Court and Comptroller.**

Mr. Lile introduced Clerk Bock as a longtime friend of the RPPTL Section who has worked together with the Section on initiatives in past years. Clerk Bock reported that the clerks' offices around the state continue to work under a budget crunch. One of the priorities for the clerks around the state continues to be enhancing the e-filing system so that it operates efficiently and with uniformity statewide. Clerk Bock reported that many millions have been spent on the e-filing portal and the case management system so that lawyer, the judiciary, and the public can access records statewide. She reported that most of the early problems and glitches have worked themselves out and that the process is now running efficiently. Ms. Bock reported that the e-filing portal is prepared to accept and store file formats other than standard document formats, including electronic video recordings (which is of interest given the issues concerning the Electronic Wills legislation).

**2. Milestones and Special Thanks.** Ms. Goodall recognized and thanked Mary Ann Obos, Whitney Kirk, Dresden Brunner, Sancha Whynot, and Jon Scuderi for their incredible work in planning this year's Convention. The weekend was a grand success.

Ms. Goodall recognized and thanked the Section's Annual Award recipients to much deserved applause:

**Rising Star Award: Ben Diamond and Scott Pence**

**At-Large Member of the Year: Michael Sneeringer**

**John Arthur Jones Annual Service Award: Lauren Detzel and Bill Sklar**

**Robert C. Scott Memorial Award: Angela Adams and Michael Gelfand**

**William S. Belcher Lifetime Professionalism Award: David Brennan and Peggy Rolando**

Ms. Goodall reported the sad news that Dr. Frank Diamond, husband of Sandy Diamond, and father of Ben Diamond, passed away on May 7, 2017. Dr. Diamond was a friend to many in the Section and he will be sorely missed.

On the good news front, Executive Council member, Nicole Kibbert, is married and expecting her first child. Keith Braun and Travis Hayes were both elected Fellows of ACTEC. Manny Farach, Cary Wright, Lee Weintraub, and Jim Russick were all elected Fellows of ACREL. Congrats to our Council members!

**3. John Norris Resolution.** Mr. Hennessey presented a RPPTL Section Resolution mourning the loss of our Past Chair and friend, John Norris, and recognizing and honoring his many achievements. A copy of the full resolution is included at page 30 of the Agenda. The Resolution was unanimously approved and the family of John Norris, including his son and RPPTL member, Guy Norris, were recognized and presented with the Resolution.

**4. Recognition of General Sponsors and Friends of the Section**

Ms. Goodall thanked each of our General Sponsors and Friends of the Section listed on pages 31-33 of the Agenda:

**General Sponsors**

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

**Thursday Lunch**

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

**Thursday Night Reception**

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

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

**Friday Night Reception**

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

**Friday Night Dinner**

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

**Probate Roundtable**

**SRR (Stout Risius Ross Inc.) – Garry Marshall**  
**Guardian Trust- Ashley Gonnelli**

**Real Property Roundtable**

**Fidelity National Title Group – Pat Hancock**

**Saturday Lunch**

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

Saturday Dinner  
**Wright Investors' Service** – Stephen Soper

RPPTL Meeting App  
**WFG National Title Insurance Company** – Joseph Tschida

**Friends of the Section**

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

**5. App Contest Winner.** At every meeting this year, Joe Tschida, on behalf of WFG National Title Insurance Company, has presented an Apple Watch to the Council member with the most posts on the App. The winner for the Bonita Springs meeting, after posting all night long on Friday night, was Jennifer Bloodworth.

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

**a. Criminal Penalties for Violation of Condominium Act**

Ms. Goodall reported that the Executive Committee was required to adopt a legislative position on a proposed condominium bill due to the time sensitivity inherent during the legislative process. On March 16, 2017, the Executive Committee adopted the following as a Section legislative position:

**Oppose creation of criminal penalties for violations of statutes pertaining to condominium association official records and condominium association elections, as well as any change to create criminal penalties for any violation of the Florida Condominium Act for which a criminal penalty does not already exist, including changes to Fla. Stat. Section 718.111(12) and creation of new statutory provisions within Fla. Statutes Chapter 718 or otherwise.”**

A full explanation of the Section position, including the white paper is included in the Agenda at pages 34-40.

**b. Honoring Jack Harkness**

Ms. Goodall reported that the Executive Committee voted to donate Section funds from the net profit of aftermarket sales from the weekend's seminar entitled "A Lawyer's Guide to Disaster Preparedness, Insurance, and Technology Security" to the Florida Bar Foundation in recognition of John Harkness's years of

service to the Florida Bar. Mr. Harkness is retiring as Executive Director after 37 years of service to the Florida Bar.

**7. Point of Order!** Upon completing her Chair's report, Ms. Goodall was interrupted with much-welcomed invitation to join her friends and Past Chairs of the Section in the back row. Ms. Goodall received a standing ovation for her leadership during the 2016-2017 year and her many, many years of tireless service.

**8. Special Presentations.** Chair-Elect Andrew O'Malley thanked and congratulated Ms. Goodall on a successful (if not stressful!) year as Chair of the Section. He recognized Ms. Goodall's family who sacrificed to allow her to dedicate her time and talents to the Section.

Mr. O'Malley presented Steven Goodall with the Section's Indispensable Man Award in recognition of the fact that Mr. Goodall has made the wheels of the Section turn for many, many years. In addition to the smiling face at the desk, Mr. Goodall is our website and app guru and assists with many of the tasks which help the Section run efficiently. Mr. Goodall was recognized and thanked to applause. He was presented with a gift of New England Patriots swag as a token of appreciation.

Thereupon, Ms. Ellie Goodall took to the podium... And, oh boy, did she... Ms. Goodall offered the "other" side of Steven Goodall that we at the Section never see--- that of a big brother. I will not repeat what Ellie said out of respect for Steven. Suffice it to say, that Ellie's roast of her brother left the Council in stitches and garnered a standing ovation as she "dropped the mic" and left the stage. Well done, Ms. Goodall!

The Section expressed their gratitude and thanks to the entire Goodall family for a fantastic year and for giving so much of themselves to the Section.

#### **V. Liaison with Board of Governor's Report, *Lansing C. Scriven***

Mr. Scriven had the daunting task of following Ellie Goodall. He reported that, at its recent meeting, the Florida Bar Board of Governors voted unanimously to recommend a new Rule of Judicial Procedure to allow lead attorneys to obtain a three-month continuance for parental leave, provided the continuance does not cause "substantial prejudice" to opposing parties. If this rule is approved by the Florida Supreme Court, it will be the first of its kind in the United States.

Mr. Scriven also reported that the Constitutional Revision Commission continues to meet at public hearings throughout the state on the "Floridians Speak, We Listen" tour. The recommendations of the CRC will be very important to the Florida Bar and will have an impact on our judiciary.

Mr. Scriven noted that it would be his last meeting as liaison. He praised the Section for its excellent committee work and for the high level of commitment of the Council members.

Mr. O'Malley thanked Mr. Scriven for his service to the Section and he was recognized by the Section.

**VI. Chair-Elect's Report, *Andrew M. O'Malley, Chair-Elect.***

Our new leader took to the podium to provide his report. The schedule and room block information for Mr. O'Malley's year is included in the Agenda at Pages 41-42. Mr. O'Malley reported that the links for the meetings are in the Agenda but that the blocks are filling up quickly. Waitlist and alternate hotel information are included on the schedule. Mr. O'Malley reported that plans for The Breakers are in place. There will be a Wine and Art Experience for spouses and guests. Saturday evening will feature a private event at the Palm Beach Zoo. Stacy Kalmanson as Chair of Legislative Update has organized a fantastic lineup of speakers. The Out-of-State Meeting will be in Boston giving Steven Goodall a place to wear his Patriot's swag without having to endure cat calls and dirty looks.

**VII. Treasurer's Report, *Tae Kelley Bronner***

Ms. Bronner presented her last report as Treasurer and as a member of the Executive Committee. Mr. O'Malley recognized Ms. Bronner for her years of dedicated service and let it be known that her wisdom on the Executive Committee would be sorely missed. Ms. Bronner was recognized and thanked by the Section with well-deserved applause.

With a huge smile on her face and her giddy demeanor (knowing that the end was near), Ms. Bronner reported that the Florida Bar has implemented a new accounting system which has significantly delayed the issuance of financial reports. From the preliminary numbers received, it is clear that investment and CLE numbers have exceeded budget. Final budget numbers and more detailed reports will be forthcoming. A statement of current financial condition is included in the Agenda at Pages 43-46.

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

Ms. Frazier reported that ALMs have been participating in the No Place Like Home project with local legal aid societies. The First, Second, Twelfth, Thirteenth, Fourteenth, Fifteenth, and Seventeenth circuits are all up and running. The volunteers will be assisting Florida residents in resolving real estate and probate-related title issues. They will be trained on how to handle the cases which will be vetted by the local legal aid societies. Further information for No Place Like Home is posted on the webpage for the ALMs.

**IX. CLE Seminar Coordination Report — *Robert Swaine (Real Property)* and *Shane Kelley (Probate & Trust), Co-Chairs***

Mr. Kelley reported that the weekend's Disaster Preparedness Seminar was a success. He suggested that everyone watch Mike Simon's presentation on a lawyer's duties as it relates to protecting client's electronic information. The upcoming lineup of

RPPTL Section CLE Seminars for 2017-2018 is included in the Agenda at Page 47. Mr. Kelley encouraged everyone to sign up for the Legislative and Case Law Update and for the annual Probate Law Seminar (which will take place on November 3). The Probate Law Seminar was winner of the Best CLE Presentation for 2017!

Mr. O'Malley thanked Shane Kelley and Bob Swaine for their service as CLE Chairs and for excellent results in 2016-2017.

**X. General Standing Division** — *Andrew M. O'Malley, General Standing Division Director and Chair-Elect*

**Action Item:**

**1. Sponsorship Coordination** – *Wilhelmina F. Kightlinger, Chair*

The Sponsorship Coordination Committee made a motion to approve, in accordance with past Section practice, the waiver of general sponsorship fees for The Florida Bar Foundation for fiscal year 2017-2018, and allowing The Florida Bar Foundation to have exhibitor space at the 2017 Legislative Update and the 2018 Convention without paying an exhibitor fee if space is available after registration of paying exhibitors.

The motion was approved unanimously.

**Information Items:**

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

Mr. Goldman provided a report and update on pending Amicus matters.

In *Smith v. Smith*, the 4th DCA certified as a matter of great public importance the following question: “Where the fundamental right to marry has not been removed from a ward under section 744.3215(2)(a), Florida Statutes, does the statute require the ward to obtain approval from the court prior to exercising the right to marry, without which approval the marriage is absolutely void, or does such failure render the marriage voidable, as court approval could be conferred after the marriage?” In the underlying opinion, the court found that a marriage of an incapacitated ward, who had the right to marry removed, could not be ratified after the marriage because the marriage was void. Mr. Goldman reported that amicus committee has filed a brief on behalf of the Section taking the position that the ward can seek later court approval of the marriage. The Elder Law Section has taken the opposite view. The Supreme Court has not yet ruled.

In *Ober v. Town of Lauderdale-By-The Sea*, the 4th DCA originally held that the lis pendens statute discharges liens that exist or arise prior to final judgement of foreclosure unless the appropriate steps are taken to protect those interests but that it does not affect liens that accrue after the final judgment but before the sale. The Section made the rare move of requesting to appear as an amicus on rehearing. The

Section believed that the statutory scheme reflects that the certificate of title, not the final judgment, ends the case and that liens filed after final judgment but before certificate of title is issued are subject to discharge under the *lis pendens* statute. On rehearing, the 4<sup>th</sup> DCA withdrew its opinion and agreed with the position of the Section. The 4<sup>th</sup> DCA certified the following question as one of great public importance: “WHETHER, PURSUANT TO [SECTION 48.23\(1\)\(D\), FLORIDA STATUTES](#), THE FILING OF A NOTICE OF LIS PENDENS AT THE COMMENCEMENT OF A BANK'S FORECLOSURE ACTION PREVENTS A LOCAL GOVERNMENT FROM EXERCISING AUTHORITY GRANTED TO IT BY CHAPTER 162, FLORIDA STATUTES, TO ENFORCE CODE VIOLATIONS EXISTING ON THE FORECLOSED PROPERTY AFTER FINAL FORECLOSURE JUDGMENT AND BEFORE JUDICIAL SALE, WHERE THE LOCAL GOVERNMENT'S INTEREST OR LIEN ON THE PROPERTY ARISES AFTER FINAL JUDGMENT AND DID NOT EXIST WITHIN THIRTY (30) DAYS AFTER THE RECORDING OF THE NOTICE OF LIS PENDENS.”

The amicus committee was prepared to address the 3d DCA's decision of *Save Calusa Trust v. Andrews Holdings, LTD*, wherein the court held that a restriction in a covenant that is required as part of a zoning approval is exempt from extinguishment by Florida's Marketable Record Title Act. However, the Florida Supreme Court declined jurisdiction.

On May 12, 2017 the First District Court of Appeal solicited amicus briefs from, among others, the RPPTL Section, in *Rigby v. Bank of New York Mellon*, Case No. 1D16-0665. The Court indicated that, *en banc*, it is considering “receding from the standing-at-inception rule doctrine in foreclosure cases.” The Court cited the concurring opinions in *Walton v. Deutsche Bank Nat'l Trust Co.*, 201 So. 3d 831 (Fla. 1<sup>st</sup> DCA 2016), *Corrigan v. Bank of America, N.A.*, 189 So. 3d 187 (Fla. 2d DCA 2016), and *Focht v. Wells Fargo Bank, N.A.*, 124 So. 3d 308 (Fla. 2d DCA 2013), as potential reasons to consider this issue. The amicus committee is currently studying this issue.

Mr. O'Malley commended the amicus committee for the tremendous amount of time they spend representing the interests of the Section and the public.

## **2. Information Technology and Communications – William A. Parady, Chair**

Mr. Parady reported that the developers of the software for our RPPTL website stopped supporting it. This ultimately required that new software be written and the website updated. The committee has been working to migrate all of the information from old website to the new website but some information may be missing. Mr. Parady encouraged all committee chairs to check their webpages as all of the kinks are worked out. The hope is that missing information will be replaced soon. The webmaster can assist in repairing a page if it is missing information. If you have lost authority to post to your webpage, reach out to webmaster.

**3. Legislation – Steven Mezer and Sarah Butters, Co-Chairs**

The post-session report from our legislative consultants is included in the Agenda behind pages 69-76. Mr. Mezer and Ms. Butters gave a brief rundown on items of interest to the Section. Ms. Butters reported that, because it is an election year, the legislature begins its session in January. Committee meetings will begin in September. As a consequence, any legislative items for 2018 should be in bill drafting by the end of summer.

**4. Liaison with Clerks of Court, Laird A. Lile and William “Ted” Conner, Liaisons**

The report of the liaisons was presented in connection with the introduction of Clerk Sharon Bock earlier in the meeting.

**5. Model and Uniform Acts – Bruce Stone and Richard Taylor, Co-Chairs**

Mr. Stone reported that a list of the current issues which have been assigned to drafting and study by the Uniform Law Commission is included in the Agenda at pages 76-77. Of particular interest, the Uniform Law Commission has taken the unusual step of skipping study and referring Electronic Wills directly to drafting.

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

Mr. Freedman recognized and thanked each of our committee sponsors in the Real Property Division, which are listed on Page 33 of the Agenda.

**Committee Sponsors**

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

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

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

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

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

**Action Item:**

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

Salome Zukakis presented as an **action item** a motion on behalf of the Residential Real Estate and Industry Liaison Committee to approve amendments to the Comprehensive Rider (part of the FAR/Bar residential purchase contract documentation) pertaining to homeowners' association and community disclosures. The final version of the Comprehensive Rider is attached to these minutes as Addendum "B". Ms. Zikakis reported that the changes were approved at the Real Property Roundtable.

The motion was approved.

**Information Items:**

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

Mr. Weintraub reported as an information item that the Open/Expired Permits Task Force has been working on legislation which would establish a procedure by which property owners may close open or expired permits, to protect from liability bona fide purchasers of property with open or expired permits, and to establish procedures to reduce the number of future open or expired permits. The proposed statute along with the whitepaper and Legislative Position Request Form are included in the Agenda package at pages 83-98. The Real Estate Roundtable approved the proposed legislation in Bonita Springs. The task force intends to present a motion for approval of a Legislative Position at the Breakers. Please let Mr. Weintraub know if you have any questions or comments concerning the proposed legislation.

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

Mr. Menor presented as an information item a report from the Real Property Problem Study Committee on the work of the committee on statutes relating to unlawful detainer. The unlawful detainer statutes provide for causes of action when a person was authorized to enter property but refuses to leave. The committee has proposed clarifications to the statutes so that they can be better applied by practitioners and the courts. The proposed legislation will provide a cause of action for unlawful detainer, clarify the applicability of actions for forcible entry and unlawful detainer, clarify that no pre-suit notice is required in such actions, remove procedural jury verdict forms, and modernize archaic language in the statutes. The proposed legislation, white paper, and Legislative Position Request Form are included in the Agenda at pages 99-111. The committee will be requesting that the Legislative Position be approved at the Breakers.

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

Mr. Menor then presented as an information item a report from the Real Property Problem Study Committee on the work of the committee on proposed statutory changes

relating to causes of action for ejectment. Again, the changes are intended to clarify the statute and its use in practice. The proposed legislation will provide a statutory definition for ejectment actions, provide for jurisdiction in the circuit courts for such actions, eliminate any ambiguity over whether pre-suit notice is required in such actions, and update the language in the existing ejectment statute. The proposed statutory changes, whitepaper, and Legislative Position Request Form are included in the Agenda at pages 112-119.

Both bills were presented and discussed at numerous committee meetings in the Real Property Division. The Real Problem Study Committee will be presenting the proposed changes as an action item at the Breakers.

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

Mr. Menor also presented as an information item proposed legislation which would clarify that the interest of a lessor is not subject to improvements made by the lessee of a mobile home lot in s. 713.10, F.S. and eliminate ambiguity regarding whether the expiration date on a notice of commencement may be less than one year from the date of recording, including an amendment to s. 713.13, F.S. The legislation will clarify when liens arise for work performed by tenant and what happens when a notice of commencement remains open even though work completed. The proposed legislation, white paper, and Legislative Position Request Form are included in the Agenda at pages 120-129. Minor wording changes were made and approved at Real Property Roundtable. The legislation will be presented as an action item at The Breakers.

#### **5. Real Property Litigation Committee – Susan Spurgeon, Chair**

Ms. Spurgeon reported as an information item that the Real Property Litigation Committee has been studying and working on a fix to address the court's decision in *Ober v. Town of Lauderdale-By-The Sea*. Ms. Spurgeon reported that judicial sales, as a matter of practice, generally do not take place within 30 days after judgment of foreclosure. As a result liens can be entered between foreclosure and the sale. Even though the 4<sup>th</sup> DCA changed its decision on rehearing in *Ober*, the Committee believes that proposed legislation is still necessary to clarify the law such that the lis pendens takes priority through the recording of transfer of title. The legislation will clarify s. 48.23(1)(d), F.S. to provide that, in proceedings involving a judicial sale, a valid recorded notice of lis pendens remains in effect through the recording of an instrument transferring title pursuant to the judicial sale, in order to eliminate intervening subordinate interests or liens. The proposed legislation, whitepaper, and Legislative Position Request Form are included in the Agenda at pages 130-141. The legislation will be presented as an action item at The Breakers.

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

Debra Boje recognized and thanked each of our committee sponsors in the Probate Division, which are listed on page 33 of the Agenda:

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

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

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

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

**Life Audit Professionals** – Joe Gitto and Andrea Obey  
IRA, Insurance & Employee Benefits Committee &  
Estate and Tax Planning Committee

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

**Northern Trust** – Tami Conetta  
Trust Law Committee

**Pluris Valuation Advisors**- Miranda McCray  
Asset Protection Committee

**Information Items:**

**1. Electronic Wills** – *William T. Hennessey and John Moran*

Messrs. Hennessey and Moran provided a report on the Electronic Wills Act and the Section efforts to defeat the legislation in Tallahassee during the 2017 Session. The presentation included a detailed background on history of the proposal, the efforts by the Section, and the final product which was ultimately passed by the Florida legislature. An outline of the history and copies of the various iterations of the bill are included in the Agenda at pages 142-371. The legislation would permit wills, revocable trusts, and living wills to be signed electronically and executed by witnesses using remote video technology over the internet. The Act also provided that electronic wills of both Florida residents and non-resident could be probated in Florida. These were obviously very significant changes to Florida. The RPPTL Section opposed the bill and was accused along the way of resisting welcome change and technology.



**Debbie Goodall, Debbie Boje, Bill Hennessey, and Sarah Butters—affectionately referred to by some legislators as the “Horse and Buggy Brigade”--- on their way to Tallahassee to testify in opposition to HB 277**

The Section was ultimately *unsuccessful* in opposing the final version of the bill but was able to provide input and comment throughout the process. Mr. Moran ran through the specific changes to the law in detail. He reported that the Section is continuing its efforts by seeking a veto of the bill. (P.S., after the meeting in Bonita Springs, Governor Scott vetoed HB 277! ).

## **2. Electronic Notarization, *Burt Bruton***

Mr. Hennessey reported that one of the shortcomings of the Electronic Wills Act is that it purported to allow for the remote notarization of wills and other testamentary documents using video technology without including adequate safeguards to address the notarization process. A number of other states now permit remote video notarization including Virginia, Texas, and Nevada. However, each of these states have specific statutes addressing how the notary goes about confirming identity remotely using enhanced identification techniques. None of these safeguards were included in the Florida Statutes. A task force was appointed by the Executive Committee to study the issue of remote notarization in Florida. The appointees were Burt Bruton, Melissa Murphy, Alan Fields, Raul Ballaga, Travis Hayes, Robert Freedman, and Bill Hennessey.

Mr. Bruton and Mr. Fields reported that the task force has been studying the issue of remote notarization and has identified a number of key safeguards and concepts which would need to be included as part of a remote notarization bill. Given the fact that the Florida legislature has decided to allow for remote notarization for wills, the task force is working on proposed legislation which would fully recognize remote notarization generally in Florida. The draft legislation will likely be in form where it can be discussed further at The Breakers meeting.

**XIII. Adjourn.**

Mr. O'Malley, once again, thanked Ms. Goodall for her leadership. There being no further business to come before the Executive Council a motion to adjourn was unanimously approved, bringing to a close a successful and eventful 2016-2017 year.

William T. Hennessey, Secretary

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# **Exhibit A**

**ATTENDANCE ROSTER**  
**REAL PROPERTY PROBATE & TRUST LAW SECTION**  
**EXECUTIVE COUNCIL MEETINGS**  
**2016-2017**

Executive Committee	Division		July 30 Breakers	Oct 8 Disney	Dec 10 Key West	Feb 25 Austin TX	June 3 Bonita Spgs
	RP	P&T					
Goodall, Deborah P., Chair		√	√	√	√	√	DPG
O'Malley, Andrew M., Chair-Elect	√		√	√	√	√	AMO
Boje, Debra L., Probate & Trust Law Div. Director		√	√	√	√	√	<del>DPG</del>
Freedman, Robert S., Real Property Law Div. Director	√		√		√	√	RF
Frazier, S. Katherine, Director of At-Large Members	√		√	√	√	√	R
Hennessey, William T., Secretary		√	√	√	√	√	WH
Bronner, Tae K., Treasurer		√	√	√	√		TKB
Butters, Sarah S., Legislation Co-Chair (P&T)		√	√	√	√	√	SSB
Mezer, Steven H., Legislation Co-Chair (RP)	√		√	√	√	√	SHM
Kelley, Shane, Legislation CLE Seminar Coordination Co-Chair (P&T)		√	√	√	√		cku
Swaine, Robert S., CLE Seminar Coordination Co-Chair (RP)	√		√	√	√		RSS
Gelfand, Michael J., <b>Immediate Past Chair</b>	√		√	√	√	√	<del>DPG</del>

Executive Council Members	Division		July 30 Breakers	Oct 8 Disney	Dec 10 Key West	Feb 25 Austin TX	June 3 Bonita Spgs
	RP	P&T					
Adams, Angela M.		√	√	√	√	√	Ama
Adcock, Jr., Louie N., <b>Past Chair</b>		√					
Akins, David J.		√	√	√			DAJ
Allan, Honorable Linda		√					
Altman, Stuart H.		√	√			√	SHA
Amari, Richard		√	√	I was here	I was here		RSVP

Executive Council Members	Division		July 30 Breakers	Oct 8 Disney	Dec 10 Key West	Feb 25 Austin TX	June 3 Bonita Spgs
	RP	P&T					
Archbold, J. Allison		√	√			√	GAH
Arnold, Jr., Lynwood F.		√					<del>GAH</del>
Aron Jerry E. Past Chair	√		√		√		
Awerbach, Martin S.	√		√	√	√		
Bald, Kimberly A.		√	√				KAB
Ballaga, Raul P.	√		√		RAB		RAB
Barboza, Annabella	√		√	√	ABZ		ABZ
Basham, Cindy		√		√	√	√	CB
Baskies, Jeffrey		√	√				
Battle, Carlos A.		√	√		√	√	CAB
Baumann, Honorable Herbert J.		√					
Baumann, Phillip A.		√			√		
Beales, III, Walter R. Past Chair	√		√				
Bedke, Michael A.	√		√		√		
Belcher, William F. Past Chair		√	√	√	√	√	WFB
Bell, Kenneth B.	√						
Bell, Rebecca Coulter		√	√		√		LeB
Beller, Amy		√	√		√		ABB
Bellew, Brandon D.		√	√				BBB
Ben Moussa, Shari D.	√		√				
Bloodworth, Jennifer J.	√			√	√		JBH
Bonevac, Judy B.		√		√	√	√	JBB
Bowers, Elizabeth Anne		√	√	√	√		EAB
Boyd, Deborah	√				√		DB

Executive Council Members	Division		July 30 Breakers	Oct 8 Disney	Dec 10 Key West	Feb 25 Austin TX	June 3 Bonita Spgs
	RP	P&T					
Braun, Keith Brian		√	√		√		KBS
Brenes-Stahl, Tattiana P.		√	√	√			TBS
Brennan, David C. Past Chair		√	√				DBS
Brittain, David R.	√		√				DRB
Brown, Mark A.	√		√		√		-
Brown, Shawn	√		√	√			SBZ
Brunner, S. Dresden		√					sdb
Bruton, Jr., Ed Burt	√		√		√		BB
Bucher, Elaine M.		√	√		√		
Butler, Jonathan		√	√	√	√	√	JS
Callahan, Charles III		√	√		√		
Carlisle, David R.		√					
Caskey, John R.		√	√				
Christiansen, Patrick T. Past Chair	√		√				PTC
Christy, Douglas G. III	√		√		√		De
Christy, Erin Hope	√		√		√		ehc
Cohen, Howard Allen	√		√		√	√	HA
Cole, John P.		√					
Cole, Stacey L.		√	√	√			Stacey Cole
Conetta, Tami F.		√	√	√	√	√	Gretta
Conner, W. Theodore	√						
Cope, Jr., Gerald B.	√		√				
Costello, T. John, Jr.		√	√		TJC		TJC
Curley, Nick		√	√	√	√		NC

Executive Council Members	Division		July 30 Breakers	Oct 8 Disney	Dec 10 Key West	Feb 25 Austin TX	June 3 Bonita Spgs
	RP	P&T					
Detzel, Lauren Y.		√	√		√		<i>[Signature]</i>
Diamond, Benjamin F.		√			√		<i>[Signature]</i>
Diamond, Sandra F. Past Chair		√	√				<i>[Signature]</i>
Direktor, Kenneth Steven	√		√				<i>[Signature]</i>
Dobrev, Alex	√		<i>[Signature]</i>				<i>[Signature]</i>
Dollinger, Jeffrey	√						
Dribin, Michael Past Chair		√	√		√		<i>[Signature]</i>
Dudley, Frederick R.	√						
Duvall, III, Homer	√		√				<i>[Signature]</i>
Eckhard, Rick	√		√		√		
Ellison, Jason M.	√		√	√			<i>[Signature]</i>
Emans, Patrick C		√	√				
Emerich, Guy S.		√			√		<i>[Signature]</i>
Ertl, Christene M.	√		√				<i>[Signature]</i>
Ezell, Brenda B.	√		√		<i>[Signature]</i>	<i>[Signature]</i>	<i>[Signature]</i>
Fagan, Gail		√	√		√	√	<i>[Signature]</i>
Falk, Jr., Jack A.		√	√		√		<i>[Signature]</i>
Farach, Manuel	√		√		√	√	<i>[Signature]</i>
Faulkner, Debra Ann		√			√		
Felcoski, Brian J. Past Chair		√	√	√	√		
Fernandez, Kristopher E.	√		√	√	√	√	<i>[Signature]</i>
Fields, Alan B.	√		√			√	<i>[Signature]</i>
Fitzgerald, Jr., John E.		√	√	√	√		<i>[Signature]</i>
Flood, Gerard J.		√		√		√	<i>[Signature]</i>

Executive Council Members	Division		July 30 Breakers	Oct 8 Disney	Dec 10 Key West	Feb 25 Austin TX	June 3 Bonita Spgs
	RP	P&T					
Foreman, Michael L.		√	√		√		<i>MLF</i>
Frazier, Nathan	√		√	√	√		
Friedman, Jesse B.	<del>W</del>	√	√		√		<i>JBF</i>
Galler, Jonathan		√	√	√	√		<i>JG</i>
Gans, Richard R.		√	√		√		
Gentile, Melinda S.	√		√		√		<i>MS</i>
George, James		√	√				<i>SG</i>
Godelia, Vinette D.	√		√				<i>VDG</i>
Goethe, Jeffrey S.		√	√	√	√		<i>JS</i>
Goldman, Louis "Trey"	√		√		√	√	<i>LG</i>
Goldman, Robert W. <b>Past Chair</b>		√	√	√	√	√	<i>RWG</i>
Graham, Robert M.	√		√		√	√	<i>RM</i>
Granet, Lloyd	√		√				✓
Griffin, Linda S.		√	√	√	√		
Grimsley, John G. <b>Past Chair</b>		√					
Grossman, Honorable Melvin B.		√					
Gunther, Eamonn W.		√	√		√		<i>Gunther</i>
Gurgold, Eric		√	√		√		
Guttmann, III, Louis B. <b>Past Chair</b>	√		√				
Hamrick, Alexander H		√		√	√	√	<i>AH</i>
Hancock, Patricia J.	√		√				<i>BOA</i>
Hayes, Honorable Hugh D.		√					
Hayes, Michael Travis		√	√	√	√	√	<i>MT</i>
Hearn, Steven L. <b>Past Chair</b>		√	√		√		

Executive Council Members	Division		July 30 Breakers	Oct 8 Disney	Dec 10 Key West	Feb 25 Austin TX	June 3 Bonita Spgs
	RP	P&T					
Henderson, Jr., Reese J.	√						
Henderson, III, Thomas N.	√		√				<i>TNA</i>
Heuston, Stephen P.		√		√	√		<i>SPH</i>
Hipsman, Mitchell Alec		√			<i>MA</i>		<i>MA</i>
Hoffman, Brian W.	√		√		√		<i>BW H</i>
Isphording, Roger O. <b>Past Chair</b>		√	√	√		√	<i>RI</i>
Jennison, Julia Lee	√		√	√	√		<i>JL</i>
Johnson, Amber Jade F.		√	√	√	√		<i>AF</i>
Jones, Darby		√	√		√		<i>DJ</i>
Jones, Frederick W.	√		√	√	√		<i>FW</i>
Jones, Patricia P.H.	√		√	√	√		<i>PPH</i>
Judd, Robert B.		√	√		√		
Kalmanson, Stacy O.	√		√				<i>SO</i>
Karibjanian, George		√	√		√		
Karr, Mary		√	√				
Karr, Thomas M.		√	√		√		
Kayser, Joan B. <b>Past Chair</b>		√					
Keane, Cristin C.	√						
Kelley, Rohan <b>Past Chair</b>		√	√	√	√		<i>RK</i>
Kelley, Sean W.		√	√		√		<i>SK</i>
Khan, Nishad	√		√		√		
Kibert, Nicole C.	√		√	√			<i>NC</i>
Kightlinger, Wilhelmina F.	√		√				
Kinsolving, Ruth Barnes, <b>Past Chair</b>	√						

Executive Council Members	Division		July 30 Breakers	Oct 8 Disney	Dec 10 Key West	Feb 25 Austin TX	June 3 Bonita Spgs
	RP	P&T					
Koren, Edward F. Past Chair		√			√		
Korvick, Honorable Maria M.		√					
Kotler, Alan Stephen		√	√		√		ASK
Kromash, Keith S.		√	√				
Kurian, Sanjay	√						SK
Kypreos, Theodore S.		√	√	√			TSK
Lancaster, Robert L.		√	√		√	<del>RP</del>	RL
Lane, Jr., William R.		√					WRL
Larson, Roger A.	√		√		√	√	<del>RL</del>
Leathe, Jeremy Paul		√	√		√		JPL
Lebowitz, Sean M.		√	√		√		<del>SL</del>
Leebrick, Brian D.	√		√		<del>BL</del>		<del>BL</del>
Lile, Laird A. Past Chair		√	√		√	√	LA
Lindsey, Honorable Norma S.	√						
Little, III, John W.	√		√				
Lopez, Sophia A.		√	√				SA
Lynch, Kristen M.		√					
Madorsky, Marsha G.		√	√		√	√	
Malec, Brian		√	√	√	√		BM
Marger, Bruce Past Chair		√					
Marmor, Seth A.		√	√				
Marshall, III, Stewart A.		√	√	√			SM
Marx, James A.		√	√	√	√		<del>JM</del>
Mastin, Deborah Bovarnick	√		√		√		DBM

I was then RLM

Executive Council Members	Division		July 30 Breakers	Oct 8 Disney	Dec 10 Key West	Feb 25 Austin TX	June 3 Bonita Spgs
	RP	P&T					
McCall, Alan K.	√		√		√	√	ARM
McElroy, IV, Robert Lee		√	√				RLM
McIver, Richard		√		√	√	<del>RLM</del>	RLM
McRae, Ashley E.	√		√				
Melanson, Noelle	√		√				CA
Menor, Arthur J.		√	√		√		AM
Meyer, George F. Past Chair	√		√		√		TAT
Meyer, Michael	√		√	√	√	AM	TAT
Middlebrook, Mark T.		√	√			AM	AM
Miller, Lawrence J.		√	√		√		AM
Mize, Patrick		√	√				
Moran, John C.		√	√		√		gem
Moule, Rex E.		√					
Muir, Honorable Celeste H.		√	√				EMH
Murphy, Melissa J. Past Chair	√		√		√	√	MM
Nash, Charles I.		√	√			√	
Neukamm, John B. Past Chair	√		√	√	√	√	
Nguyen, Hung V.		√	√				HVN
Overhoff, Alex	√		√		√	√	AO
Parady, William A.	√		√	√	√	√	
Payne, L. Howard		√	√		√		LHP
Pence, Scott P.	√		√		√		SP
Pepper-Dickinson, Tasha K.		√	√		√		TWD
Perera, Diane	√				√		OPerr

I was in Key West

Executive Council Members	Division		July 30 Breakers	Oct 8 Disney	Dec 10 Key West	Feb 25 Austin TX	June 3 Bonita Spgs
	RP	P&T					
Pilotte, Frank		√	√	√	√	√	
Platt, William R.		√					
Pleus, Jr., Honorable Robert J.		√					
Pollack, Anne Q.	√		√	√		√	CUP
Price, Pamela O.		√		√			
Pyle, Michael A.		√	√		√		
Quintero, Jason	√						
Redding, John N.	√		√	√			
Renzio, Bryan	√						
Reynolds, Stephen H.		√	√				
Rieman, Alexandra V.		√	√				
Robbins, Jr., R.J.	√		√				
Roberts, III, Hardy L.	√		√				
Robinson, Charles F.		√	√	√	√		
Rodriguez, Carlos A.		√					✓
Rojas, Silvia B.	√		√	√	√	√	SM
Rolando, Margaret A. Past Chair	√		√		√	√	MAR
Roman, Paul E.		√	√		√	√	
Rosenberg, Joshua		√	√				
Rubin, Jenna		√					
Russell, Deborah L.		√	√				
Russick, James C.	√		√		√	√	
Rydberg, Marsha G.	√			√	√		
Sachs, Colleen C.	√		√				

I WAS  
~~in the~~ @  
 Key West  
 mls - R.

Executive Council Members	Division		July 30 Breakers	Oct 8 Disney	Dec 10 Key West	Feb 25 Austin TX	June 3 Bonita Spgs
	RP	P&T					
Sasso, Andrew	√		√				
Schafer, Jr., Honorable Walter L.		√					
Schwartz, Martin	√		√				<i>MS</i>
Schwartz, Robert M.	√		√		√		<i>MS</i>
Schwingamer, Jamie Beth		√	√				<i>MS</i>
Scriven, Lansing Charles	√		√	√			<i>MS</i>
Scuderi, Jon		√	√	√	√		<i>MS</i>
Seaford, Susan	√		√				<i>SRS</i>
Sheets, Sandra G.		√	√		√		<i>MS</i>
Sherrill, Richard Norton		√	√		√		<i>MS</i>
Shoter, Neil B.	√		√				<i>MS</i>
Silberman, Honorable Morris	√						
Silberstein, David M.		√	√				<i>DMS</i>
Simon, Michael		√					
Sivyer, Neal Allen	√		√		√		<i>MS</i>
Sklar, William P.	√		√				<i>MS</i>
Smart, Christopher W.	√		√		√		<i>CWS</i>
Smith, G. Thomas Past Chair	√		√		√		
Smith, Kymberlee	√		√				
Smith, Wilson Past Chair		√					
Sneeringer, Michael Alan		√	√		√		<i>Michael Sneeringer</i>
Solomon, Marty James	√		√	√	√	√	<i>MS</i>
Spalding, Ann		√					
Sparks, Brian C.		√	√				<i>MS</i>

Executive Council Members	Division		July 30 Breakers	Oct 8 Disney	Dec 10 Key West	Feb 25 Austin TX	June 3 Bonita Spgs
	RP	P&T					
Speiser, Honorable Mark A.		✓	✓				MAS
Spivey, Barry F.		✓	✓	✓	✓	✓	BFB
Spurgeon, Susan K.	✓		✓		✓		SDD
Stafford, Michael P.		✓	✓	✓	✓	✓	MPS
Staker, Karla J.	✓		✓		✓	✓	KJA
Stern, Robert G.	✓		✓				RCS
Stone, Adele I.	✓				AS		AS
Stone, Bruce M. Past Chair		✓	✓		✓		Electronically signed
Suarez, Honorable Richard J.		✓					
Sundberg, Laura K.		✓			✓	✓	
Swaine, Jack Michael Past Chair	✓		✓	✓		✓	out
Taylor, Richard W.	✓						RST
Tescher, Donald R.		✓	✓	✓			<del>RS</del>
Thomas, Honorable Patricia V.		✓	✓		✓	✓	
Tobin, Jennifer S.	✓		✓				<del>TS</del>
Triggs, Matthew H.		✓			✓		MT
Udick, Arlene C.	✓			✓	✓	✓	
Van Lenten, Jason Paul		✓	✓				AVL
VanSickle, Melissa	✓						
Villarroel, Nicole Marie	✓		✓				<del>MM</del>
Virgil, Eric		✓	✓				<del>EV</del>
Waller, Roland D. Past Chair	✓		✓	✓	✓	✓	WU
Wartenberg, Stephanie Harriet		✓	✓	✓	✓		SW
Weintraub, Lee A.	✓		✓	✓	✓	✓	WU

Executive Council Members	Division		July 30 Breakers	Oct 8 Disney	Dec 10 Key West	Feb 25 Austin TX	June 3 Bonita Spgs
	RP	P&T					
Wells, Jerry B.		√	√		√		JBW
White, Jr., Richard M.		√	√	√			RW
Whynot, Sancha B.	√		√	√	√		<del>SBW</del>
Wilder, Charles D.		√	√	√	√		<del>CDW</del>
Williams, Margaret A.	√		√		√		
Williamson, Julie Ann Past Chair	√		√				
Wintter, Christopher Q.		√	√		√		CW
Wohlust, Gary Charles		√	√	√	√		GCW
Wolasky, Marjorie E.		√	√		<u>I was there!</u>	<del>MW</del>	MW
Wolf, Jerome L.		√	√				
Wright, William Cary	√		√	√	√	√	CW
Young, Gwynne A.	√		√		√	√	
Zeydel, Diana S.C.		√					DZ
Zikakis, Salome J.		√	√		√	√	<del>SJZ</del>
Zschau, Julius J. Past Chair	√						JJZ

RPPTL Fellows	Division		July 30 Breakers	Oct 8 Disney	Dec 10 Key West	Feb 25 Austin TX	June 3 Bonita Spgs
	RP	P&T					
Ashton, Amber	√		√				Ashton
Santos, Angela		√	√		AS		AS
Villavicencio, Stephanie		√	√				
Work, Scott	√		√		SMW		SMW
Sajdera, Christopher	√		√		CS		CS
Friedman, Briget	√		√			√	BF
Rubel, Stacy		√	√	√	√		SR
Grosso, Jennifer		√	gy		gy		gy



# Exhibit B

# Comprehensive Rider to the Residential Contract For Sale And Purchase

THIS FORM HAS BEEN APPROVED BY THE FLORIDA REALTORS AND THE FLORIDA BAR

When initialed by all parties, the parties acknowledge that the disclosure set forth below was provided to Buyer prior to execution of the Florida Realtors/Florida Bar Contract For Sale and Purchase between the parties and the clauses below will be incorporated therein:

\_\_\_\_\_ (SELLER)  
and \_\_\_\_\_ (BUYER)  
concerning the Property described as \_\_\_\_\_

Buyer's Initials \_\_\_\_\_ Seller's Initials \_\_\_\_\_

## B. HOMEOWNERS' ASSOCIATION/COMMUNITY DISCLOSURE

### PART A. DISCLOSURE SUMMARY.

IF THE DISCLOSURE SUMMARY REQUIRED BY SECTION 720.401, FLORIDA STATUTES, HAS NOT BEEN PROVIDED TO THE PROSPECTIVE PURCHASER BEFORE EXECUTING THIS CONTRACT FOR SALE, THIS CONTRACT IS VOIDABLE BY BUYER BY DELIVERING TO SELLER OR SELLER'S AGENT OR REPRESENTATIVE WRITTEN NOTICE OF THE BUYER'S INTENTION TO CANCEL WITHIN 3 DAYS AFTER RECEIPT OF THE DISCLOSURE SUMMARY OR PRIOR TO CLOSING, WHICHEVER OCCURS FIRST. ANY PURPORTED WAIVER OF THIS VOIDABILITY RIGHT HAS NO EFFECT. BUYER'S RIGHT TO VOID THIS CONTRACT SHALL TERMINATE AT CLOSING.

BUYER SHOULD NOT EXECUTE THIS CONTRACT UNTIL BUYER HAS RECEIVED AND READ THIS DISCLOSURE.

DISCLOSURE SUMMARY FOR \_\_\_\_\_  
(Name of Community)

1. AS A BUYER OF PROPERTY IN THIS COMMUNITY, YOU WILL BE OBLIGATED TO BE A MEMBER OF A HOMEOWNERS' ASSOCIATION ("ASSOCIATION").
2. THERE HAVE BEEN OR WILL BE RECORDED RESTRICTIVE COVENANTS ("COVENANTS") GOVERNING THE USE AND OCCUPANCY OF PROPERTIES IN THIS COMMUNITY.
3. YOU WILL BE OBLIGATED TO PAY ASSESSMENTS TO THE ASSOCIATION. ASSESSMENTS MAY BE SUBJECT TO PERIODIC CHANGE. IF APPLICABLE, THE CURRENT AMOUNT IS \$ \_\_\_\_\_ per \_\_\_\_\_. YOU WILL ALSO BE OBLIGATED TO PAY ANY SPECIAL ASSESSMENTS IMPOSED BY THE ASSOCIATION. SUCH SPECIAL ASSESSMENTS MAY BE SUBJECT TO CHANGE. IF APPLICABLE, THE CURRENT AMOUNT IS \$ \_\_\_\_\_ per \_\_\_\_\_.
4. YOU MAY BE OBLIGATED TO PAY SPECIAL ASSESSMENTS TO THE RESPECTIVE MUNICIPALITY, COUNTY, OR SPECIAL DISTRICT. ALL ASSESSMENTS ARE SUBJECT TO PERIODIC CHANGE.
5. YOUR FAILURE TO PAY SPECIAL ASSESSMENTS OR ASSESSMENTS LEVIED BY A MANDATORY HOMEOWNERS' ASSOCIATION COULD RESULT IN A LIEN ON YOUR PROPERTY.
6. THERE MAY BE AN OBLIGATION TO PAY RENT OR LAND USE FEES FOR RECREATIONAL OR OTHER COMMONLY USED FACILITIES AS AN OBLIGATION OF MEMBERSHIP IN THE HOMEOWNERS' ASSOCIATION. IF APPLICABLE, THE CURRENT AMOUNT IS \$ \_\_\_\_\_ per \_\_\_\_\_.
7. THE DEVELOPER MAY HAVE THE RIGHT TO AMEND THE RESTRICTIVE COVENANTS WITHOUT THE APPROVAL OF THE ASSOCIATION MEMBERSHIP OR THE APPROVAL OF THE PARCEL OWNERS.
8. THE STATEMENTS CONTAINED IN THIS DISCLOSURE FORM ARE ONLY SUMMARY IN NATURE, AND, AS A PROSPECTIVE PURCHASER, YOU SHOULD REFER TO THE COVENANTS AND THE ASSOCIATION GOVERNING DOCUMENTS BEFORE PURCHASING PROPERTY.
9. THESE DOCUMENTS ARE EITHER MATTERS OF PUBLIC RECORD AND CAN BE OBTAINED FROM THE RECORD OFFICE IN THE COUNTY WHERE THE PROPERTY IS LOCATED, OR ARE NOT RECORDED AND CAN BE OBTAINED FROM THE DEVELOPER.

DATE \_\_\_\_\_ BUYER \_\_\_\_\_

DATE \_\_\_\_\_ BUYER \_\_\_\_\_



**B. HOMEOWNERS' ASSOCIATION/COMMUNITY DISCLOSURE (CONTINUED)**

**PART B.**

The Property is located in a community with a mandatory homeowners' association or an association that may require the payment of assessments, charges, or impose restrictions on the Property ("Association").

**1. APPROVAL:** If Association approval of this **transaction** or **the** Buyer is required, this Contract is contingent upon Association approval no later than \_\_\_\_\_ (if left blank, then 5) days prior to Closing. Within \_\_\_\_\_ (if left blank, then 5) days after Effective Date, the **Seller** shall **initiate** the approval process with Association. **Buyer shall pay application and related fees, as applicable, unless otherwise provided for in Association governing documents or agreed to by the parties.** Buyer and Seller shall sign and deliver any documents required by the Association, provide for interviews or personal appearances, if required, and use diligent effort to timely obtain Association approval. If approval is not granted within the stated time period above, Buyer may terminate this Contract, and shall be refunded the Deposit, thereby releasing Buyer and Seller from all further obligations under this Contract.

**2. PAYMENT OF FEES, ASSESSMENTS, AND OTHER ASSOCIATION CHARGES:**

(a) Buyer shall pay any application, initial contribution, and/or membership **or other** fees charged by Association **pursuant to its governing documents or applicable Florida Statutes.** If applicable, the current amount(s) is:

\$ _____	per _____	for _____
_____ to _____		
\$ _____	per _____	for _____
_____ to _____		
\$ _____	per _____	for _____
_____ to _____		
\$ _____	per _____	for _____
_____ to _____		

(b) If levied special or other assessments exist as of the Effective Date, or an assessment is levied after the Effective Date and prior to the Closing Date, and any such assessment(s) may be paid in installments, then Seller shall pay all installments due before Closing Date and **(CHECK ONE):**  Buyer  Seller (if left blank, then Buyer) shall pay installments due after Closing Date. **If Seller is checked, Seller shall pay the assessment in full prior to or at the time of Closing.**

**The Association or Management Company to which assessments, special assessments or rent/land use fees are due and payable, is/are:**

_____	_____
<b>Contact Person</b> _____	<b>Contact person</b> _____
<b>Phone</b> _____ <b>Email</b> _____	<b>Phone</b> _____ <b>Email</b> _____

**Additional contact information can be found on the Association's website, which is www. \_\_\_\_\_ .com**

# Resolution

## The Executive Council of the Real Property, Probate & Trust Law Section Of The Florida Bar Recognizing the Service and Contributions of

### Wilson Smith

**Whereas**, WILSON SMITH of Miami, Florida, was a respected and deeply loved member of the Real Property, Probate & Trust Law Section of The Florida Bar who passed away at the age 89 on August 7, 2016 survived by his loving family and friends, all of whom he dearly loved; and

**Whereas**, Wilson received his undergraduate degree in 1949 and law degree in 1952, both from the University of Florida; and

**Whereas**, Wilson began his legal career in Miami, Florida after he was admitted to The Florida Bar in 1952; and

**Whereas**, Wilson had a long and distinguished legal career in Miami, where he first developed expertise in areas of contributory negligence, the impact rule, and important early determinations regarding regulation of public utilities in Florida, and in the 1960's began specializing in estate and trust law, after which he eventually rose to the position of Chair for the Steel, Hector & Davis Trusts and Estates Department; and

**Whereas**, as Chair of the Department and in his legal practice as a whole Wilson insisted on the highest degree of professionalism in court, with clients, with staff, and with opposing lawyers. He was unbending on this point even as he insisted on a gregarious climate among those with whom he worked and preached that attorneys should not take the work or themselves too seriously. His approach to the practice was inspiring to all who worked with him and disarming to those lawyers who opposed him; and

**Whereas**, Wilson consistently and without fanfare would aid in the courtroom and on the streets people who had no or little resources, frequently without any interest in remuneration, was a leader in encouraging and engaging in pro bono activities in the firms in which he served, stood out as an exemplar of what it meant to serve the community and to give back, and encouraged all lawyers to follow his lead; and

**Whereas**, Wilson provided enormous benefit to the community through his activities on behalf of the charitable foundation established by his father MacGregor Smith and despite those significant charitable acts he never sought the limelight or any personal recognition for his own role; and

**Whereas**, Wilson was a true gentlemen, a mentor, and long considered one of the "Deans" of the Probate and Trust Bar, who dedicated countless hours of service to his practice, his community, his family's charitable foundation and The Florida Bar; and

**Whereas**, Wilson had many professional accomplishments as a lawyer but provided substantial time and effort to his local bar associations and The Florida Bar, where he served as Chair of the Florida Probate Rules Committee, and guided the Real Property Probate and Trust Law Section, substantively and socially, as its Chair from 2000 to 2001; and

**Whereas**, Wilson's long-standing and dedicated service to the Real Property, Probate & Trust Law Section of The Florida Bar is appreciated and missed; our aspirations always will be to seek the level of respect he accomplished through his knowledge, expertise, perfection, professionalism and humility as an attorney; and those of us who had the pleasure and honor to serve and socialize with him will warmly remember his extensive and dedicated participation on the Section's Executive Council, his tireless efforts and good humor as Chair (and host to some great meetings), and his service as mentor, educator, and leader for lawyers through the State of Florida; and

**Whereas**, the Executive Council of the Real Property, Probate & Trust Law Section of The Florida Bar recognizes the extraordinary dedication and service that Wilson provided during his lifetime to his community, his family and friends, and The Florida Bar, particularly the Real Property, Probate & Trust Law Section, and acknowledges that he will be sorely missed and fondly remembered.

**Now, Therefore**, be it resolved by the Executive Council of the Real Property, Probate & Trust Law Section of The Florida Bar that the loss of Wilson Smith is mourned, and that his distinguished service and rich contributions to the practice of law, particularly to the practice of probate and trust law, are respected, appreciated, acknowledged, and will be remembered forever.

**Unanimously Adopted** by the Executive Council of the Real Property, Probate & Trust Law Section of The Florida Bar in Bonita Springs, Florida, this 3rd day of June, 2017.

Deborah Packer Goodall, Chair  
Real Property, Probate & Trust Law Section  
The Florida Bar



**The Florida Bar  
Real Property, Probate & Trust Law Section**

**Special Thanks to the  
GENERAL SPONSORS**

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

Thursday Lunch  
**Management Planning, Inc. - Roy Meyers**

Thursday Night Reception  
**JP Morgan - Carlos Batlle / Alyssa Zebrowsky  
&  
Old Republic National Title Insurance Company - Jim Russick**

Friday Night Reception  
**Wells Fargo Private Bank - Mark Middlebrook / Alex Hamrick/ Johnathan Butler**

Friday Night Dinner  
**First American Title Insurance Company - Alan McCall**

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

Real Property Roundtable  
**Fidelity National Title Group - Pat Hancock**

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

Hospitality Room  
**Wright Investors' Service – Stephen Soper**

RPPTL Meeting App  
**WFG National Title Insurance Company – Joseph Tschida**



**The Florida Bar  
Real Property, Probate & Trust Law Section**

**Special Thanks to the  
FRIENDS OF THE SECTION**

**Business Valuation Analysts, LLC - *Tim Bronza***

**Corporate Valuation Services, Inc. - *Tony Garvy***

**Fiduciary Trust International - *Claudia Reithauser***

**Jones Lowry - *Marshall Jones***

**North American Title Insurance Company – *Valerie Grandin***

**Valley National Bank – *Jacquelyn McIntosh***

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

**Wilmington Trust – *David Fritz***



**The Florida Bar  
Real Property, Probate & Trust Law Section**

**Special Thanks to the  
COMMITTEE SPONSORS**

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

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

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

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

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

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

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

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

**Life Audit Professionals** – *Joe Gitto and Andrea Obey*  
*IRA, Insurance & Employee Benefits Committee*  
&  
*Estate and Trust Tax Planning Committee*

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

**Northern Trust** – *Tami Conetta*  
*Trust Law Committee*

**Pluris Valuation Advisors** – *Miranda McCray*  
*Asset Protection Committee*

**Seaside National Bank and Trust** – *H. Wayne Griest*  
*Commercial Real Estate*

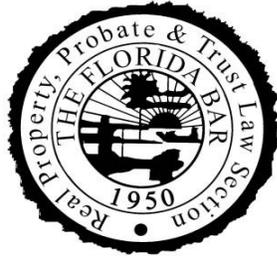
# Real Property, Probate & Trust Law Section Executive Council Meetings

## 2018-2019

(Dates/Locations)

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

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



**RPPTL Financial Summary from Separate Budgets**  
**2016-2017 [July 1 - May 31] YEAR**  
**TO DATE REPORT**

**General Budget**

**YTD**

Revenue	\$ 1,403,194
Expenses	\$ 1,079,543
<b>Net:</b>	<b>\$ 323,651</b>

**CLI**

**YTD**

Revenue	\$ 274,701
Expenses	\$ 166,607
<b>Net:</b>	<b>\$ 108,094</b>

**Trust Officer Conference**

Revenue	\$ 5,698
Expenses	\$ 11,196
<b>Net:</b>	<b>\$ (5,498)</b>

**Legislative Update**

Revenue	\$ 57,918
Expenses	\$ 120,874
<b>Net:</b>	<b>\$ (62,956)</b>

**Convention**

Revenue	\$ (467)
Expenses	\$ 29,280
<b>Net:</b>	<b>\$ (29,747)</b>

**Roll-up Summary (Total)**

Revenue:	\$ 1,741,512
Expenses	\$ 1,378,220
<b>Net Operations</b>	<b>\$ 363,292</b>

<b>Beginning Fund Balance:</b>	\$ 1,477,974
<b>Current Fund Balance (YTD):</b>	\$ 1,841,266
<b>Projected June 2017 Fund Balance</b>	<b>\$ 1,414,883</b>

## CLE COURSE SCHEDULE

\*AS OF 7/20/17

Date	Course Title	Course No.	Location
July 26, 2017	<b>Attorney Loan Officer Conference</b>	2410	The Breakers Kravis Center
July 28, 2017	<b>Legislative Update Seminar</b>	TBD	The Breakers
August 24 -27, 2017	<b>ATO 2017</b>	2458	The Breakers
November 3, 2017	<b>RPPTL Section Probate Law Seminar</b>	2574	Fort Lauderdale
December 1, 2017	<b>Estate and Trust Planning/Asset Protection</b>	2583	Orlando
February 9-10, 2018	<b>Advanced Real Property Certification Review Course</b>	2597	Orlando
February 9-10, 2018	<b>Advanced Condominium Law Certification Review</b>	2623	Orlando
March 2, 2018	<b>Trust and Estate Symposium</b>	2607	Tampa
March 8-11, 2018	<b>Construction Law Certification Review 2017</b>	2608	JW Marriott, Orlando
March 9-11, 2018	<b>11<sup>th</sup> Annual Construction Law Institute</b>	2609	JW Marriott, Orlando
April 6-7, 2018	<b>2018 Wills, Trusts and Estate Certification Review Course</b>	2621	Orlando
June 1, 2018	<b>Convention CLE</b>	2638	Tradewinds Island Resort

Note: The List above does not include all Audio Webcast Programs. These programs will be announced throughout the year.

## AGREEMENT

THIS AGREEMENT entered into this \_\_\_\_\_ day of \_\_\_\_\_, 2017 by and between the REAL PROPERTY, PROBATE AND TRUST LAW SECTION of THE FLORIDA BAR, hereinafter referred to as "SECTION" and Dean, Mead, Egerton, Bloodworth, Capouano & Bozarth, P.A., hereinafter referred to as "LEGISLATIVE ADVISOR", who, and in consideration as hereinafter expressed agree as follows: The LEGISLATIVE ADVISOR shall serve for two (2) years and two (2) months beginning July 1, 2017 and ending on August 31, 2019, as a legislative Advisor for the SECTION. The LEGISLATIVE ADVISOR agrees to comply with all policies adopted by The Florida Bar Board of Governors and by SECTION. The services that LEGISLATIVE ADVISOR shall provide to SECTION are as follows:

1. That the Legislative Advisor shall serve as Advisor regarding legislative, administrative and regulatory matters which affect the Section. Although other professional personnel at his law firm shall assist and support him, Peter M. Dunbar shall be the lead contact and shall be personally primarily responsible for performing the services (including coordinating and reporting) to the Section under this Agreement. In that regard, Peter M. Dunbar shall make a presentation at the Section's Annual Legislative Update Seminar and shall personally attend each Section Executive Council meeting held within the State of Florida. Peter M. Dunbar anticipates that Martha Edenfield, Cari Roth, and Brittany Finkbeiner shall perform work under his direction. Any other professional personnel from the Legislative Advisor's law firm may only provide service under this Agreement with the prior approval of the Section Chair.

2. The Legislative Advisor agrees that if Peter M. Dunbar individually, or the Legislative Advisor intends or desires to represent any client before the Florida Legislature or any regulatory or administrative body (other than those disclosed on the attachment to this Agreement), the Legislative Advisor shall notify, in writing, the Executive Director of The Florida Bar, the Chair of The Florida Bar's Legislation Committee, the Chair of the Section, and the Chair of the Section's Legislative Committee at least five (5) days prior to commencement of that representation.

3. If an actual conflict, or even the potential for a conflict, arises between a position of the Section and a position of any other client represented by the Legislative Advisor or his law firm, the Legislative Advisor shall immediately notify, in writing, the Chair of the Section and the Chair of the Section's Legislative Committee. The Legislative Advisor and the Section acknowledge that the services to be provided under this Agreement are governed by The Florida Bar's Rules of Professional Conduct, including those provisions relating to conflict of interest between clients. Consequently, the Legislative Advisor shall not represent any other client which would have a position which would conflict with a position of the Section. If a conflict arises between a position of the Section and another existing client of the Legislative Advisor or his law firm, unless such conflict is waived by the affected clients, then the Legislative Advisor agrees that neither he nor his law firm may represent either the Section or the other party. Under such circumstances, an appropriate reduction in the fee otherwise due

under this Agreement shall be made and the Section may engage other representation for the particular matter.

4. The Legislative Advisor agrees to work on Florida Bar legislative matters when directed by the Executive Director of The Florida Bar when the Executive Director believes that such participation is necessary and in the best interest of the membership of The Florida Bar. In this event, the fee for such services performed by the Legislative Advisor shall be assessed against the Section unless this creates a shortage or hardship on the Section. In that event, The Florida Bar may reimburse the Section for the appropriate amount of the legislative expense. This fee, if any, is deemed included within the total fee specified within this Agreement. The Legislative Advisor shall keep the Section advised of all such legislative matter requests from the Executive Director, and shall track and report to the Section the time expended and costs incurred by the Legislative Advisor in responding to such requests.

5. The Legislative Advisor agrees to coordinate all activities regarding the Florida Legislature which might affect the Section. "Coordination" shall include, but is not limited to, the following:

A. The Legislative Advisor shall identify legislative issues likely to come before the Legislature during the term of the Agreement and which shall require services under the Agreement.

B. The Legislative Advisor, in advance of (as well as during) the legislative session, shall notify the Section of any committee hearings of the Legislature dealing with an issue affecting or concerning any area within the purview of the Section.

C. The Legislative Advisor shall work with Section designated contacts to prepare presentations, where appropriate, to be made to legislators and their committee staff.

D. The Legislative Advisor shall provide to the Section summaries of prefiled and filed bills dealing with the areas within the purview of the Section and copies of the actual bills when appropriate. Special procedures approved by the Section shall be used to insure timely distribution during the legislative session.

E. The Legislative Advisor shall, during the legislative session, provide weekly written reports on the status of legislative matters on which the Section has taken a position or has a pending legislative proposal. Additionally, reports shall be given upon any new matters which are filed and which are within the purview of the Section.

F. The Legislative Advisor shall provide all services necessary to promote and support the Section's legislative proposals and other matters affecting the Section's areas of practice. The Legislative Advisor shall coordinate, with Section designated contacts, obtaining legislative sponsors for the Section's proposals. The Legislative Advisor shall use best efforts, working with Section representatives, to ensure that there is a diversity of legislators who sponsor Section legislation from year

to year. The Section's policy is to use as wide a group of sponsors as possible while at the same time recognizing that a sponsor must be an ardent proponent of the proposal.

G. The Legislative Advisor shall alert the Section to the activities of other interested groups relating to legislative proposals promoted by, supported, or opposed by the Section.

6. The Legislative Advisor shall coordinate other matters which might affect, or be of interest to, the Section and its legislative program, including but not limited to regulation, rulemaking, and the provisions of technical assistance to the Executive Branch, executive branch agencies and the Florida Legislature.

7. The Section will pay the Legislative Advisor for the provision of services as set forth here in an annual fee of One Hundred and Twenty Thousand and 00/100 DOLLARS (\$120,000.00) to paid in the following manner: \$50,000 payable on September 1, 2017, \$30,000 payable on December 1, 2017, \$30,000 payable on March 1, 2018, \$30,000 payable on June 1, 2018, \$30,000 payable on September 1, 2018, \$30,000 payable on December 1, 2018, \$30,000 payable on March 1, 2019, and \$30,000 payable on June 1, 2019 plus out-of-pocket expenses for attendance at in-state Executive Council meetings and certain incidental expenses approved by the Section. Transportation expenses shall be paid at the minimum rates approved by The Florida Bar for mileage and at the lowest coach class airfare available and lodging at the lowest negotiated group rates when attending Executive Council meetings.

WITNESS our hands and seal to be effective the day and year first written above.

\_\_\_\_\_  
Witness

\_\_\_\_\_  
Andrew O'Malley, Section Chair  
Real Property, Probate & Trust Law Section

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Witness

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Witness

\_\_\_\_\_  
Joshua Doyle., Executive Director  
The Florida Bar

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Peter M. Dunbar, Legislative Advisor  
Dean Mead

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Martha J. Edenfield, Legislative Advisor  
Dean Mead

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Cari L. Roth, Legislative Advisor  
Dean Mead

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Brittany O. Finkbeiner, Legislative Advisor  
Dean Mead

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Witness

**CONTRACT ADDENDUM**

By mutual consent of the parties hereto and consistent with the enactment of revisions to Sections 11.045 and 112.3215 and related provisions of the Florida Statutes during the 2005-B Special Session of the Legislature, the contract with DEAN, MEAD, EGERTON, BLOODWORTH, CAPOUANO & BOZARTH, P.A. is revised to identify the services and the compensation for said services in the following categories:

1. **Lobbying before the Legislature:** The client and Firm agree that the portion of time and services under the Agreement that is to be devoted to influencing or attempting to influence legislative action or non-action through oral or written communication or attempting to obtain the goodwill of members of the Legislature and employees of the Legislature shall be equal to forty percent (40%) of the total time and services to be provided under this Agreement. The annual compensation to be paid for these services shall be \$52,000.00.

2. **Lobbying before the Executive Branch:** The client and Firm agree that the portion of time and services under the Agreement that is to be devoted to influencing or attempting to influence an agency with respect to a decision of the agency in the area of policy through oral or written communication or attempting to obtain the goodwill of an agency official or employee shall be equal to twenty percent (20%) of the total time and services to be provided under this Agreement. The annual compensation to be paid for these services shall be \$26,000.00.

3. **Other Non-Lobbying Services:** The client and Firm agree that the portion of time and services under the Agreement to be devoted to non-lobbying services for the client, its members and employees, including, but not limited to, preparation of CLE educational written and oral offerings and briefings, legal research, attendance at meetings of the client and related travel, communications with judicial and court administration officials and the preparation of written articles, opinions and reports for the client, shall be equal to forty percent (40%) of the total time and services to be provided under this Agreement. The annual compensation to be paid for these services shall be \$52,000.00.

Except as modified hereby, the terms and conditions of the contract with Firm are ratified and confirmed to be effective this \_\_\_\_ day of \_\_\_\_\_, 2017.

DEAN, MEAD, EGERTON, BLOODWORTH,  
CAPOUANO & BOZARTH, P.A.

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

By: \_\_\_\_\_  
Peter M. Dunbar

By: \_\_\_\_\_  
Andrew O'Malley

THE FLORIDA BAR

By: \_\_\_\_\_  
Josh Doyle

**CLIENT NAME**

**BRANCH**

A. Duda & Sons, Inc. .	Legislative & Executive Branch
B.J. Alan Companies	Legislative & Executive Branch
Charlotte County	Legislative & Executive Branch
City of Clearwater	Legislative & Executive Branch
City of Holmes Beach	Legislative & Executive Branch
Conference of Circuit Judges of Florida	Legislative & Executive Branch
Evans Properties, Inc.	Legislative & Executive Branch
Florida Ambulance Association	Legislative & Executive Branch
Florida Bar, The	Legislative & Executive Branch
Florida Institute of Technology	Legislative & Executive Branch
Florida Outdoor Advertising Association	Legislative & Executive Branch
Geographic Solutions, Inc.	Legislative & Executive Branch
Homestead Communications, Inc.	Legislative & Executive Branch
Funeral Services, Inc.	Legislative & Executive Branch
Lee County Mosquito Control District	Executive Branch
Lykes Bros. Inc.	Legislative & Executive Branch
Manatee County Board of County Commissioners	Legislative & Executive Branch
Marriott International, Inc.	Legislative & Executive Branch
Marriott Vacations Worldwide Corporation	Legislative & Executive Branch
Orlando Lutheran Towers, Inc.	Legislative & Executive Branch
Palm Beach Aggregates, LLC	Legislative & Executive Branch
Parkway Maintenance & Management Company	Legislative & Executive Branch
PBA Holdings, Inc.	Legislative & Executive Branch
Pinellas County Board of County Commissioners	Legislative & Executive Branch
Real Property, Probate & Trust Law Section	Legislative & Executive Branch
Stronach Group, The	Legislative & Executive Branch
Tampa Bay Water	Legislative & Executive Branch
The Arc Tampa Bay Foundation	Legislative & Executive Branch
Town of Redington Beach	Legislative & Executive Branch

Updated (July 2017)

**Overview of  
Online Notarization Bill  
Discussion Draft of 7/13/17**

**Background**

1. Online (remote) notarization has been approved since 2012 in Virginia. During the 2017 legislative session, bills to allow online notarization have been approved in Texas, Nevada and Ohio. Bills have been and will be proposed in other states.
2. In Florida, the E-Will Bill (HB 277) was passed which would have approved online notarization and remote witnessing for wills and testamentary purposes without any standards for identity verification or technology requirements. Governor Scott vetoed this bill but encouraged the legislature to continue working on improving the concepts.
3. Florida has approved E-Signing of most types of contracts and other documents F.S. §668.50; for notaries to electronically sign and seal documents as part of their notarizations. F.S. §117.021, and for the electronic recording of documents in the land records. F.S. §§695.27 & .28.
4. Under existing law a Florida notary public is expressly prohibited from notarizing a signature on a document unless the person whose signature is being notarized is in the presence of the notary public at the time the signature is notarized. F.S. §117.107(9).<sup>1</sup>
5. To be entitled to recording in the Florida land records, an instrument affecting real property must be acknowledged, legalized or authenticated. For this purpose, and like all other states, Florida recognizes an out-of-state notary public (among others) as being authorized to perform this function. F.S. §695.03. Florida’s law on this subject, like the laws in other states, was drafted well before technology made online notarization a possibility. Given the era in which these statutes governing recording were adopted, there is uncertainty as to whether an online notarization performed by an out of state notary is entitled to be recorded in Florida.
6. Virginia remote notarizations do not distinguish between “in person” notarization and online notarization. Documents executed electronically and notarized by Virginia notaries are being accepted for recording in Florida’s land records. After recording, it is difficult, if not impossible, to determine if the instrument was notarized in person or remotely.
7. This ambiguity subjects otherwise valid deeds, mortgages and other instruments affecting Florida real property to potential challenges in bankruptcy questioning whether an out-of-state online notarization is entitled to be recorded.

**The Bill under Discussion**

1. Does NOT permit online notarization or “remote witnessing” to be used for performing marriages (Line 620) or in connection with the creation and execution of wills, codicils, testamentary trusts; powers of attorney, or advance directives under chapter 765. Lines 617-627, 860-862.
2. Does not alter the RPPTL Section’s position in opposition to Electronic Wills.

<sup>1</sup> There is a limited exception to this allowing law enforcement and correctional officers to take sworn statements using electronic means. F.S. 117.10.

3. Envisions the online notary process as follows: (overview at s. 117.280, starting line 781)
  - Parties must be able to hear and see each other using AV technology. Lines 611-616.
  - The person being notarized is asked at least 5 questions drawn from credit and other services. Which of these addresses haven't you lived at? What was your first Car? With a limited time to answer. (defined term "identity proofing") Lines 580, 892-909.
  - The person presents ID by holding it up to the camera – front and back (defined term "remote presentation"). This picture is recorded. Lines 605-610.
  - The notary software analyzes the ID – is layout correct for a Florida Driver license, holograms in the right place, does the bar code contain the right name, can they read the microprinting on the back? (defined term "credential analysis") See lines 565-570, 910-919.
  - The entire execution is video recorded. Lines 789-795.
  - The party E-signs the document, the witnesses (physically with the signer or remote from them) e-sign.
  - The notary completes the acknowledgement or jurat, e-signs and e-seals in accord with current Florida law regarding E-Notarization in person.
  - The entire e-document is "sealed" in a way that identifies if there have been any alterations after notarization. 919-927.

Details and standards for each of these can be fine-tuned in rule-making later.

4. We wanted to draft to allow the regulator to update the technical standards to take into account improvements in identity proofing and technology. We also wanted to set standards in the statute to apply in the interim (fearing that some interest groups would "jump the gun" as they did with E-Recording) and to guide and inform the formal rulemaking. §117.310 beginning line 842
5. We concluded that online notarization will never be as good at detecting an imposter, duress or incompetence as having a client come into your office. But this new type of process can be markedly more certain than the current practice of sending a package of documents to the party by Fed-Ex and asking them to find their own notary, or sending a mobile notary to meet them at a Denny's. We expect few identity thieves will volunteer to be video-recorded in this manner.
6. Like the Virginia, Texas and Nevada statutes, the bill does not require a "Florida Nexus" for the document being notarized (other than the notary being in Florida) for online notarization. The Florida notary can notarize parties anywhere, without regard to the nature of the document – something the notary isn't really equipped to determine anyway. It is "deemed" to be performed in this state. Lines 782-788.

Note that this doesn't mean that a Florida online notarization will be accepted by another state. That is a question for those states. Current notary recognition laws were drafted before online notarization was an option, so most laws suffer the same ambiguity as Florida's on this point.

7. The Bill includes three “blanket” provisions as to the acceptability of (1) out of state notarial acts; (2) acceptance of online notarizations; and (3) acceptance of remote witnessing. Those Blanket provisions apply to all areas of law other than those “governing the creation and execution of wills, codicils, testamentary trusts; powers of attorney, or advance directives under chapter 765.” §117.220 Lines 624-627.
8. Where found, the bill makes conforming changes to various provisions regarding notary forms (lines 363-521), how real estate is conveyed (lines 969-982), the acknowledgement forms contained in chapter 695 (lines 1118-1209) and recognition of out of state notarial acts (lines 94-138, 1030-1117) to eliminate potential ambiguities regarding the recognition of online notaries.
9. The Bill sets out the process to be followed for an online witness; and requires them to be identified in the same way as the party whose signature is being notarized and for the parties to be able to see and hear each other using the AV technology. §117.300 lines 842-862.
10. Because there isn’t an unambiguous visible act that an in-person or remote witness can see when the person E-signs a document, (my mouse isn’t likely to be on camera, and even if it is, the witness can’t tell where on the screen I’m clicking to sign) we defined the act of witnessing in this context as “hearing the principal signer make a statement to the effect that the principal signer has signed the electronic record.” Lines 854-859.
11. This bill introduces the concept of an Electronic Notary Journal ONLY for an online notary. §117.260 lines 698-702. The Section has resisted Notary Journals in the past. The benefits gained through the identify proofing, credential analysis and the recording are lost if those details are not maintained.
12. This contemplates additional training and testing of an online notary, over and above what is required for a “standard” notary, an additional fee (\$25), a higher bond (initially \$35,000 instead of \$7,500 – line 888) and cyber-insurance (initially \$100,000 – line 890).
13. We didn’t believe that a technical defect in notarization should entitle anyone to challenge validity of an otherwise valid document or the recording or the constructive notice provided by it. So there are a number of “savings clauses” built into this draft. We drafted so that it was NOT so broad a validation to prevent a challenge based on fraud, forgery, duress, undue influence, etc. lines 739-744, 828-835, 1111-1117, 1212-1245.
14. Allows Florida Civil Law Notaries to function as online notaries. Lines 596-599
15. Sets an Effective Date of January 1, 2019 to allow ample time to train.

A bill to be entitled

An act relating to notaries public; amending s. 28.222(3), F.S.; providing for the recording of certified copies of electronic documents; amending s. 92.50, F.S.; providing for taking or administering oaths, affidavits or acknowledgments in accordance with online notarization laws; amending s. 95.231(1); providing limitations period for certain recorded instruments; designating ss. 117.01 through 117.108, F.S., as Part I of chapter 117; amending s. 117.01(1), F.S.; providing for notaries public to exercise their offices while in this state; amending s. 117.021, F.S.; providing for the use of tamper-evident technology in electronic notarizations; amending s. 117.05, F.S.; providing for limitations on notary fees; providing for inclusion of certain information in a jurat or notarial certificate; providing for compliance with online notarization requirements; providing for notarial certification of a printed electronic record; revising statutory forms for jurats and notarial certifications; amending s. 117.107, F.S.; providing for electronic signatures by notaries public and notarization of documents in accordance with online notarization laws; creating ss. 117.201 through 117.320, F.S., as Part II of chapter 117, F.S.; providing standards for appointment, training and regulation of online notaries and providing for online notarization of signatures and documents; amending s. 689.01, F.S.; providing for witnessing of documents in connection with online notarial acts;

29 amending s. 694.08, F.S.; providing for validation of  
 30 certain recorded documents; amending s. 695.03, F.S.;  
 31 providing for making acknowledgments, proofs and other  
 32 documents in accordance with online notarization laws;  
 33 amending s. 695.25, F.S.; revising statutory short forms  
 34 of acknowledgment; amending 695.28, F.S.; providing for  
 35 validity of recorded documents; providing an effective  
 36 date.

37

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

39

40 Section 1. Subsection 28.222(3), Florida Statutes, is  
 41 amended to read:

42 28.222 Clerk to be county recorder.—

43 (3) The clerk of the circuit court shall record the  
 44 following kinds of instruments presented to him or her for  
 45 recording, upon payment of the service charges prescribed by  
 46 law:

47 (a) Deeds, leases, bills of sale, agreements, mortgages,  
 48 notices or claims of lien, notices of levy, tax warrants, tax  
 49 executions, and other instruments relating to the ownership,  
 50 transfer, or encumbrance of or claims against real or personal  
 51 property or any interest in it; extensions, assignments,  
 52 releases, cancellations, or satisfactions of mortgages and  
 53 liens; and powers of attorney relating to any of the  
 54 instruments.

55 (b) Notices of lis pendens, including notices of an action  
 56 pending in a United States court having jurisdiction in this

57 state.

58 (c) Judgments, including certified copies of judgments,  
 59 entered by any court of this state or by a United States court  
 60 having jurisdiction in this state and assignments, releases, and  
 61 satisfactions of the judgments.

62 (d) That portion of a certificate of discharge,  
 63 separation, or service which indicates the character of  
 64 discharge, separation, or service of any citizen of this state  
 65 with respect to the military, air, or naval forces of the United  
 66 States. Each certificate shall be recorded without cost to the  
 67 veteran, but the clerk shall receive from the board of county  
 68 commissioners or other governing body of the county the service  
 69 charge prescribed by law for the recording.

70 (e) Notices of liens for taxes payable to the United  
 71 States and other liens in favor of the United States, and  
 72 certificates discharging, partially discharging, or releasing  
 73 the liens, in accordance with the laws of the United States.

74 (f) Certified copies of petitions, with schedules omitted,  
 75 commencing proceedings under the Bankruptcy Act of the United  
 76 States, decrees of adjudication in the proceedings, and orders  
 77 approving the bonds of trustees appointed in the proceedings.

78 (g) Certified copies of death certificates authorized for  
 79 issuance by the Department of Health which exclude the  
 80 information that is confidential under s. 382.008, and certified  
 81 copies of death certificates issued by another state whether or  
 82 not they exclude the information described as confidential in s.  
 83 382.008.

84 (h) Copies of any of the foregoing instruments originally

85 created and executed using an electronic signature, as defined  
 86 in s. 695.27, and certified to be a true and correct copy by a  
 87 notary public in accordance with s 117.05(12) if the county  
 88 recorder is not then prepared to accept electronic documents for  
 89 recording.

90 ~~(h)~~(i) Any other instruments required or authorized by law  
 91 to be recorded.

92 Section 2. Section 92.50, Florida Statutes, is amended to  
 93 read:

94 92.50 Oaths, affidavits, and acknowledgments; who may take  
 95 or administer; requirements.—

96 (1) IN THIS STATE.-- Oaths, affidavits, and  
 97 acknowledgments required or authorized under the laws of this  
 98 state (except oaths to jurors and witnesses in court and such  
 99 other oaths, affidavits and acknowledgments as are required by  
 100 law to be taken or administered by or before particular  
 101 officers) may be taken or administered by or before any judge,  
 102 clerk, or deputy clerk of any court of record within this state,  
 103 including federal courts, or before any United States  
 104 commissioner or any notary public within this state. The jurat,  
 105 or certificate of proof or acknowledgment, shall be  
 106 authenticated by the signature and official seal of such officer  
 107 or person taking or administering the same; however, when taken  
 108 or administered before any judge, clerk, or deputy clerk of a  
 109 court of record, the seal of such court may be affixed as the  
 110 seal of such officer or person. Such oaths, affidavits and  
 111 acknowledgements may be made outside of the physical presence of  
 112 the party if completed by a Florida notary in accordance with

113 the online notarization provisions of chapter 117.

114 (2) IN OTHER STATES, TERRITORIES, AND DISTRICTS OF THE  
 115 UNITED STATES.--Oaths, affidavits, and acknowledgments required  
 116 or authorized under the laws of this state, may be taken or  
 117 administered in any other state, territory, or district of the  
 118 United States, before any judge, clerk or deputy clerk of any  
 119 court of record, within such state, territory, or district,  
 120 having a seal, or before any notary public or justice of the  
 121 peace, having a seal, in such state, territory, or district;  
 122 provided, however, such officer or person is authorized under  
 123 the laws of such state, territory, or district to take or  
 124 administer oaths, affidavits and acknowledgments. The jurat, or  
 125 certificate of proof or acknowledgment, shall be authenticated  
 126 by the signature and official seal of such officer or person  
 127 taking or administering the same; provided, however, when taken  
 128 or administered by or before any judge, clerk, or deputy clerk  
 129 of a court of record, the seal of such court may be affixed as  
 130 the seal of such officer or person. Such oaths, affidavits and  
 131 acknowledgements may be made outside of the physical presence of  
 132 the party if completed by a Florida notary in accordance with  
 133 the online notarization provisions of chapter 117, or by a  
 134 notary in another state pursuant to similar laws of the  
 135 appointing state regarding the remote notarization of  
 136 instruments. A statement in the acknowledgement or proof that  
 137 the laws of the appointing state were complied with conclusively  
 138 establishes such compliance for purposes of this section.

139 (3) IN FOREIGN COUNTRIES.--Oaths, affidavits, and  
 140 acknowledgments, required or authorized by the laws of this

141 state, may be taken or administered in any foreign country, by  
 142 or before any judge or justice of a court of last resort, any  
 143 notary public of such foreign country, any minister, consul  
 144 general, charge d'affaires, or consul of the United States  
 145 resident in such country. The jurat, or certificate of proof or  
 146 acknowledgment, shall be authenticated by the signature and  
 147 official seal of the officer or person taking or administering  
 148 the same; provided, however, when taken or administered by or  
 149 before any judge or justice of a court of last resort, the seal  
 150 of such court may be affixed as the seal of such judge or  
 151 justice.

152 Section 3. Subsection 95.231(1), Florida Statutes, is  
 153 amended to read:

154 95.231 Limitations where deed or will on record.--

155 (1) Five years after the recording of an instrument  
 156 required to be executed in accordance with s. 689.01; 5 years  
 157 after the recording of a power of attorney accompanying and used  
 158 for an instrument required to be executed in accordance with s.  
 159 689.01; or 5 years after the probate of a will purporting to  
 160 convey real property, from which it appears that the person  
 161 owning the property attempted to convey, affect, or devise it,  
 162 the instrument, power of attorney, or will shall be held to have  
 163 its purported effect to convey, affect, or devise, the title to  
 164 the real property of the person signing the instrument, as if  
 165 there had been no lack of seal or seals, witness or witnesses,  
 166 defect in, failure of, or absence of acknowledgment or  
 167 relinquishment of dower, in the absence of fraud, adverse  
 168 possession, or pending litigation. The instrument is admissible

169 in evidence. A power of attorney validated under this subsection  
 170 shall be valid only for the purpose of effectuating the  
 171 instrument with which it was recorded.

172 Section 4. Sections 117.01 through 117.108, inclusive, of  
 173 Chapter 117, Florida Statutes, are designated as "Part I" and  
 174 captioned "NOTARIES PUBLIC GENERALLY."

175 Section 5. Subsection 117.01(1), Florida Statutes, is  
 176 amended to read:

177 117.01 Appointment, application, suspension, revocation,  
 178 application fee, bond, and oath.--

179 (1) The Governor may appoint as many notaries public as he  
 180 or she deems necessary, each of whom shall be at least 18 years  
 181 of age and a legal resident of the state. A permanent resident  
 182 alien may apply and be appointed and shall file with his or her  
 183 application a recorded Declaration of Domicile. The residence  
 184 required for appointment must be maintained throughout the term  
 185 of appointment. Notaries public shall be appointed for 4 years  
 186 and shall use and exercise the office of notary public only  
 187 while the notary is within the boundaries of this state. An  
 188 applicant must be able to read, write, and understand the  
 189 English language.

190 Section 6. Section 117.021, Florida Statutes, is amended  
 191 to read:

192 117.021 Electronic notarization.-

193 (1) Any document requiring notarization may be notarized  
 194 electronically. The provisions of ss. 117.01, 117.03, 117.04,  
 195 117.05(1)-(11), (13), and (14), 117.105, and 117.107 apply to  
 196 all notarizations under this section.

197 (2) In performing an electronic notarial act, a notary  
 198 public shall use an electronic signature that is:  
 199 (a) Unique to the notary public;  
 200 (b) Capable of independent verification;  
 201 (c) Retained under the notary public's sole control; and  
 202 (d) Attached to or logically associated with the  
 203 electronic document in a manner that any subsequent alteration  
 204 to the electronic document displays evidence of the alteration.

205 (3) When a signature is required to be accompanied by a  
 206 notary public seal, the requirement is satisfied when the  
 207 electronic signature of the notary public contains all of the  
 208 following seal information:

- 209 (a) The full name of the notary public exactly as provided  
 210 on the notary public's application for commission;
- 211 (b) The words "Notary Public State of Florida";
- 212 (c) The date of expiration of the commission of the notary  
 213 public; and
- 214 (d) The notary public's commission number.

215 (4) For electronic notarizations performed after [the  
 216 effective date of this act], a notary public must use one or  
 217 more tamper evident technologies approved by the Department of  
 218 State or s. 117.310 which will indicate any alteration or change  
 219 to an electronic record after completion of the electronic  
 220 notarial act. A person may not require a notary public to  
 221 perform a notarial act with respect to an electronic record with  
 222 a technology that the notary public has not selected.

223 (5)~~(4)~~ Failure of a notary public to comply with any of  
 224 the requirements of this section may constitute grounds for

225 suspension of the notary public's commission by the Executive  
 226 Office of the Governor.

227 ~~(6)~~(5) The Department of State may adopt rules to ensure  
 228 the security, reliability, and uniformity of signatures and  
 229 seals authorized in this section.

230 Section 7. Subsections 117.05(2), (4), (5), (12), (13) and  
 231 (14), Florida Statutes, are amended to read:

232 117.05 Use of notary commission; unlawful use; notary fee;  
 233 seal; duties; employer liability; name change; advertising;  
 234 photocopies; penalties.--

235 (2)(a) The fee of a notary public may not exceed \$10 for  
 236 any one notarial act, except as provided in s. 117.045 and s.  
 237 117.290.

238 (b) A notary public may not charge a fee for witnessing a  
 239 vote-by-mail ballot in an election, and must witness such a  
 240 ballot upon the request of an elector, provided the notarial act  
 241 is in accordance with the provisions of this chapter.

242 (4) When notarizing a signature, a notary public shall  
 243 complete a jurat or notarial certificate in substantially the  
 244 same form as those found in subsection (13). The jurat or  
 245 certificate of acknowledgment shall contain the following  
 246 elements:

247 (a) The venue stating the location of the notary at the  
 248 time of the notarization in the format, "State of Florida,  
 249 County of ."

250 (b) The type of notarial act performed, an oath or an  
 251 acknowledgment, evidenced by the words "sworn" or  
 252 "acknowledged."

253 (c) That the signer ~~personally~~ appeared before the notary  
 254 public at the time of the notarization either in the notary  
 255 public's physical presence or by two-way video and audio  
 256 conference technology pursuant to Part II.

257 (d) The exact date of the notarial act.

258 (e) The name of the person whose signature is being  
 259 notarized. It is presumed, absent such specific notation by the  
 260 notary public, that notarization is to all signatures.

261 (f) The specific type of identification the notary public  
 262 is relying upon in identifying the signer, either based on  
 263 personal knowledge or satisfactory evidence specified in  
 264 subsection (5).

265 (g) The notary's official signature.

266 (h) The notary's name, typed, printed, or stamped below  
 267 the signature.

268 (i) The notary's official seal affixed below or to either  
 269 side of the notary's signature.

270 (5) A notary public may not notarize a signature on a  
 271 document unless he or she personally knows, or has satisfactory  
 272 evidence, that the person whose signature is to be notarized is  
 273 the individual who is described in and who is executing the  
 274 instrument. A notary public shall certify in the certificate of  
 275 acknowledgment or jurat the type of identification, either based  
 276 on personal knowledge or other form of identification, upon  
 277 which the notary public is relying. In the case of an online  
 278 notarization, the online notary public shall comply with the  
 279 procedures set forth in Part II.

280 (a) For purposes of this subsection, "personally knows"

281 means having an acquaintance, derived from association with the  
 282 individual, which establishes the individual's identity with at  
 283 least a reasonable certainty.

284 (b) For the purposes of this subsection, "satisfactory  
 285 evidence" means the absence of any information, evidence, or  
 286 other circumstances which would lead a reasonable person to  
 287 believe that the person whose signature is to be notarized is  
 288 not the person he or she claims to be and any one of the  
 289 following:

290 1. The sworn written statement of one credible witness  
 291 personally known to the notary public or the sworn written  
 292 statement of two credible witnesses whose identities are proven  
 293 to the notary public upon the presentation of satisfactory  
 294 evidence that each of the following is true:

295 a. That the person whose signature is to be notarized is  
 296 the person named in the document;

297 b. That the person whose signature is to be notarized is  
 298 personally known to the witnesses;

299 c. That it is the reasonable belief of the witnesses that  
 300 the circumstances of the person whose signature is to be  
 301 notarized are such that it would be very difficult or impossible  
 302 for that person to obtain another acceptable form of  
 303 identification;

304 d. That it is the reasonable belief of the witnesses that  
 305 the person whose signature is to be notarized does not possess  
 306 any of the identification documents specified in subparagraph  
 307 2.; and

308 e. That the witnesses do not have a financial interest in

309 nor are parties to the underlying transaction; or

310 2. Reasonable reliance on the presentation to the notary  
 311 public of any one of the following forms of identification, if  
 312 the document is current or has been issued within the past 5  
 313 years and bears a serial or other identifying number:

314 a. A Florida identification card or driver license issued  
 315 by the public agency authorized to issue driver licenses;

316 b. A passport issued by the Department of State of the  
 317 United States;

318 c. A passport issued by a foreign government if the  
 319 document is stamped by the United States Bureau of Citizenship  
 320 and Immigration Services;

321 d. A driver license or an identification card issued by a  
 322 public agency authorized to issue driver licenses in a state  
 323 other than Florida, a territory of the United States, or Canada  
 324 or Mexico;

325 e. An identification card issued by any branch of the  
 326 armed forces of the United States;

327 f. An inmate identification card issued on or after  
 328 January 1, 1991, by the Florida Department of Corrections for an  
 329 inmate who is in the custody of the department;

330 g. An inmate identification card issued by the United  
 331 States Department of Justice, Bureau of Prisons, for an inmate  
 332 who is in the custody of the department;

333 h. A sworn, written statement from a sworn law enforcement  
 334 officer that the forms of identification for an inmate in an  
 335 institution of confinement were confiscated upon confinement and  
 336 that the person named in the document is the person whose

337 signature is to be notarized; or

338 i. An identification card issued by the United States  
339 Bureau of Citizenship and Immigration Services.

340 (12)(a) A notary public may supervise the making of a  
341 photocopy of an original document or printing of an electronic  
342 record and attest to the trueness of the copy, provided the  
343 document is neither a vital record in this state, another state,  
344 a territory of the United States, or another country, nor a  
345 public record, if a copy can be made by the custodian of the  
346 public record.

347 (b) A notary public must use a certificate in  
348 substantially the following form in notarizing an attested copy:

349  
350 STATE OF FLORIDA

351 COUNTY OF \_\_\_\_\_

352 On this \_\_\_ day of \_\_\_\_\_, (year), I attest that the  
353 preceding or attached document is a true, exact, complete, and  
354 unaltered photocopy made by me of (description of document)  
355 presented to me by the document's custodian, \_\_\_\_\_, and, to the  
356 best of my knowledge, that the photocopied document is neither a  
357 vital record nor a public record, certified copies of which are  
358 available from an official source other than a notary public.

359  
360 \_\_\_\_\_  
361 (Official Notary Signature and Notary Seal)

362 \_\_\_\_\_  
363 (Name of Notary Typed, Printed or Stamped)

364 (c) A notary public must use a certificate in  
substantially the following form in notarizing an attested copy

365 of an electronic document:

366

367 STATE OF FLORIDA

368 COUNTY OF \_\_\_\_\_

369 On this \_\_\_\_ day of \_\_\_\_\_, (year) , I attest that the  
370 preceding or attached document is a true, exact, complete, and  
371 unaltered copy printed by me from an electronic record presented  
372 to me by the document's custodian. At the time of printing, no  
373 security features (if any) present on the electronic record  
374 indicated that the record had been altered since execution.

375

376 \_\_\_\_\_(Official Notary Signature and Notary Seal)\_\_\_\_\_

377 \_\_\_\_\_(Name of Notary Typed, Printed or Stamped)\_\_\_\_\_

378

379 (13) The following notarial certificates are sufficient  
380 for the purposes indicated, if completed with the information  
381 required by this chapter. The specification of forms under this  
382 subsection does not preclude the use of other forms.

383 (a) For an oath or affirmation:

384

385 STATE OF FLORIDA

386 COUNTY OF \_\_\_\_\_

387 Sworn to (or affirmed) and subscribed before me [ ] by  
388 personal appearance or [ ] by online notarization in compliance  
389 with the laws of this state, this \_\_\_\_ day of \_\_\_\_\_,  
390 \_\_\_\_(year)\_\_\_\_, by \_\_\_\_ (name of person making statement)\_\_\_\_.

391

392 \_\_\_\_\_(Signature of Notary Public - State of Florida)\_\_\_\_\_

393  (Print, Type, or Stamp Commissioned Name of Notary Public)   
394 Personally Known \_\_\_\_\_ OR Produced Identification \_\_\_\_\_  
395 Type of Identification Produced \_\_\_\_\_  
396

397 (b) For an acknowledgment in an individual capacity:  
398

399 STATE OF FLORIDA  
400 COUNTY OF \_\_\_\_\_

401 The foregoing instrument was acknowledged before me  [ ]  by  
402  personal appearance or [ ] by online notarization in compliance   
403  with the laws of this state, this \_\_\_ day of \_\_\_\_\_,   
404  \_\_ (year) \_\_, by \_\_ (name of person acknowledging) \_\_.   
405

406  (Signature of Notary Public - State of Florida)   
407  (Print, Type, or Stamp Commissioned Name of Notary Public)   
408 Personally Known \_\_\_\_\_ OR Produced Identification \_\_\_\_\_  
409 Type of Identification Produced \_\_\_\_\_  
410

411 (c) For an acknowledgment in a representative capacity:  
412

413 STATE OF FLORIDA  
414 COUNTY OF \_\_\_\_\_

415 The foregoing instrument was acknowledged before me  [ ]  by  
416  personal appearance or [ ] by online notarization in compliance   
417  with the laws of this state, this \_\_\_ day of \_\_\_\_\_,   
418  \_\_ (year) \_\_, by \_\_ (name of person) \_\_ as \_\_ (type of authority, \_\_.   
419  . e.g. officer, trustee, attorney in fact) \_\_ for \_\_ (name of   
420  party on behalf of whom instrument was executed) \_\_.

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\_\_\_\_\_(Signature of Notary Public - State of Florida)\_\_\_\_  
\_\_\_\_(Print, Type, or Stamp Commissioned Name of Notary Public)\_\_\_\_  
Personally Known \_\_\_\_\_ OR Produced Identification \_\_\_\_\_  
Type of Identification Produced \_\_\_\_\_

(14) A notary public must make reasonable accommodations to provide notarial services to persons with disabilities.

(a) A notary public may notarize the signature of a person who is blind after the notary public has read the entire instrument to that person.

(b) A notary public may notarize the signature of a person who signs with a mark if:

1. The document signing is witnessed by two disinterested persons;

2. The notary prints the person's first name at the beginning of the designated signature line and the person's last name at the end of the designated signature line; and

3. The notary prints the words "his (or her) mark" below the person's signature mark.

(c) The following notarial certificates are sufficient for the purpose of notarizing for a person who signs with a mark:

1. For an oath or affirmation:

\_\_\_\_(First Name)\_\_\_\_(Last Name)\_\_\_\_  
\_\_\_\_His (or Her) Mark\_\_\_\_

STATE OF FLORIDA  
COUNTY OF \_\_\_\_\_

449 Sworn to (or affirmed) and subscribed before me [ ] by  
450 personal appearance or [ ] by online notarization in compliance  
451 with the laws of this state, this \_\_\_ day of \_\_\_\_\_,  
452 \_\_(year)\_\_, by \_\_(name of person making statement)\_\_, who signed  
453 with a mark in the presence of these witnesses:

454  
455 \_\_(Signature of Notary Public - State of Florida)\_\_  
456 \_\_(Print, Type, or Stamp Commissioned Name of Notary Public)\_\_  
457 Personally Known \_\_\_\_\_ OR Produced Identification \_\_\_\_\_  
458 Type of Identification Produced \_\_\_\_\_  
459

460 2. For an acknowledgment in an individual capacity:

461  
462 \_\_(First Name)\_\_(Last Name)\_\_  
463 \_\_His (or Her) Mark\_\_

464 STATE OF FLORIDA  
465 COUNTY OF \_\_\_\_\_

466 The foregoing instrument was acknowledged before me [ ] by  
467 personal appearance or [ ] by online notarization in compliance  
468 with the laws of this state, this \_\_\_ day of \_\_\_\_\_,  
469 \_\_(year)\_\_, by \_\_(name of person acknowledging)\_\_, who signed  
470 with a mark in the presence of these witnesses:

471  
472 \_\_(Signature of Notary Public - State of Florida)\_\_  
473 \_\_(Print, Type, or Stamp Commissioned Name of Notary Public)\_\_  
474 Personally Known \_\_\_\_\_ OR Produced Identification \_\_\_\_\_  
475 Type of Identification Produced \_\_\_\_\_  
476

477 (d) A notary public may sign the name of a person whose  
478 signature is to be notarized when that person is physically  
479 unable to sign or make a signature mark on a document if:

480 1. The person with a disability directs the notary to sign  
481 in his or her presence;

482 2. The document signing is witnessed by two disinterested  
483 persons;

484 3. The notary writes below the signature the following  
485 statement: "Signature affixed by notary, pursuant to s.  
486 117.05(14), Florida Statutes," and states the circumstances of  
487 the signing in the notarial certificate.

488 (e) The following notarial certificates are sufficient for  
489 the purpose of notarizing for a person with a disability who  
490 directs the notary to sign his or her name:

491 1. For an oath or affirmation:

492

493 STATE OF FLORIDA

494 COUNTY OF \_\_\_\_\_

495 Sworn to (or affirmed) before me [ ] by personal appearance  
496 or [ ] by online notarization in compliance with the laws of the  
497 state that commissioned me this \_\_\_ day of \_\_\_\_\_, \_\_ (year) \_\_,  
498 by \_\_ (name of person making statement) \_\_, and subscribed by  
499 \_\_ (name of notary) \_\_ at the direction of and in the presence of  
500 \_\_ (name of person making statement) \_\_, and in the presence of  
501 these witnesses:

502

503 \_\_ (Signature of Notary Public - State of Florida) \_\_

504 \_\_ (Print, Type, or Stamp Commissioned Name of Notary Public) \_\_

505 Personally Known \_\_\_\_ OR Produced Identification \_\_\_\_  
506 Type of Identification Produced \_\_\_\_\_

507

508 2. For an acknowledgment in an individual capacity:

509

510 STATE OF FLORIDA

511 COUNTY OF \_\_\_\_\_

512 The foregoing instrument was acknowledged before me [  ] by  
513 personal appearance or [  ] by online notarization in compliance  
514 with the laws of this state, this \_\_\_\_ day of \_\_\_\_\_,  
515 \_\_(year)\_\_, by \_\_(name of person acknowledging)\_\_ and subscribed  
516 by \_\_(name of notary)\_\_ at the direction of and in the presence  
517 of \_\_(name of person acknowledging)\_\_, and in the presence of  
518 these witnesses:

519

520 \_\_\_\_\_  
(Signature of Notary Public - State of Florida)

521 \_\_\_\_\_  
(Print, Type, or Stamp Commissioned Name of Notary Public)

522 Personally Known \_\_\_\_ OR Produced Identification \_\_\_\_

523 Type of Identification Produced \_\_\_\_\_

524

525 Section 8. Subsections 117.107(2) and (9), Florida  
526 Statutes, are amended to read:

527 117.107 Prohibited acts.--

528 (2) A notary public may not sign notarial certificates  
529 using a facsimile signature stamp unless the notary public has a  
530 physical disability that limits or prohibits his or her ability  
531 to make a written signature and unless the notary public has  
532 first submitted written notice to the Department of State with

533 an exemplar of the facsimile signature stamp. This subsection  
 534 does not apply to or prohibit the use of an electronic signature  
 535 by a notary public performing notarial acts in accordance with  
 536 s. 117.021.

537 (9) A notary public may not notarize a signature on a  
 538 document if the person whose signature is being notarized is not  
 539 in the physical presence of or connected to an online notary  
 540 public through two-way video and audio communication technology,  
 541 in accordance with Part II, ~~the notary public~~ at the time the  
 542 signature is notarized. Any notary public who violates this  
 543 subsection or provides online notary services for a person not  
 544 personally known to the online notary without complying with the  
 545 provisions of part II regarding identity proofing, credential  
 546 analysis and knowledge based authentication is guilty of a civil  
 547 infraction, punishable by penalty not exceeding \$5,000, and such  
 548 violation constitutes malfeasance and misfeasance in the conduct  
 549 of official duties. It is no defense to the civil infraction  
 550 specified in this subsection that the notary public acted  
 551 without intent to defraud. A notary public who violates this  
 552 subsection with the intent to defraud is guilty of violating s.  
 553 117.105.

554 Section 9. Part II of Chapter 117, Florida Statutes, is  
 555 created to read:

556 Part II - ONLINE NOTARIZATION

557 117.201 Definitions.--

558 (1) Any term defined in the Uniform Electronic Transaction  
 559 Act, s. 668.50 shall have the same meaning when used in this  
 560 chapter.

561 (2) "Appointing state" when used in reference to a notary  
 562 public or certifying official of another state of the United  
 563 States, means the state which commissioned or appointed the  
 564 notary public or official.

565 (3) "Credential analysis" means a process or service  
 566 operating according to criteria approved by the Department of  
 567 State or in this part through which a third person provides  
 568 confidence as to the validity of a government-issued  
 569 identification credential through review of public and  
 570 proprietary data sources.

571 (4) "Cyber insurance" refers to insurance which covers an  
 572 online notary's potential liability for failure to prevent or  
 573 hinder unauthorized access to or use of its computer network or  
 574 equipment, loss of information stored thereon, or a data breach  
 575 in which unauthorized persons might gain access to non-public  
 576 personal information stored thereon.

577 (5) "Government-Issued Identity Credential" refers to any  
 578 of the approved credentials for verifying identity set forth in  
 579 s. 117.05(5)(b)2.

580 (6) "Identity proofing" means a process or service  
 581 operating according to criteria approved by the Department of  
 582 State or this part through which a third person provides  
 583 confidence as to the identity of an individual through use of  
 584 public and proprietary data sources and employing means such as  
 585 knowledge based authentication, or biometric verification such  
 586 as a fingerprint recognition, facial recognition or eye scans.

587 (7) "Knowledge-based authentication " means an identity  
 588 assessment that is based on a set of questions formulated from

589 public or proprietary data sources for which the principal has  
 590 not provided a prior answer during the course of the identity  
 591 proofing;

592 (8) "Online notarization" means the performance of an  
 593 electronic notarization by means of two-way video and audio  
 594 conference technology that meets the standards adopted under s.  
 595 117.310.

596 (9) "Online notary public" means a notary public who has  
 597 been authorized by the Office of the Governor to perform online  
 598 notarizations under this part or a civil law notary appointed  
 599 under chapter 118.

600 (10) "Principal Signer" means an individual:

601 (a) whose electronic signature is notarized in an  
 602 electronic notarization; or

603 (b) taking an oath or making an affirmation or  
 604 acknowledgment.

605 (11) "Remote presentation" means transmission to the  
 606 online notary public through communication technology of an  
 607 image of a government-issued identification credential, which  
 608 image is of sufficient quality to enable the online notary  
 609 public to identify the individual seeking the notary's services  
 610 and to perform credential analysis.

611 (12) "Two-way video and audio conference technology" shall  
 612 refer to technology approved by the Department of State or this  
 613 part which enables participants to be able to see, hear and  
 614 communicate with another individual in real time using  
 615 electronic means that allows the individuals communicating to  
 616 simultaneously see and speak to one another.

617 117.210 Authority to perform online notarizations -- An  
 618 online notary public has the authority to perform any of the  
 619 functions authorized under chapter 117 as an online  
 620 notarization, other than solemnize the rites of matrimony, or a  
 621 notarial act in connection with the creation and execution of  
 622 wills, codicils, testamentary trusts, powers of attorney, or  
 623 advance directives under chapter 765.

624 117.220 Relation to other laws.-- Other than those laws  
 625 governing the creation and execution of wills, codicils,  
 626 testamentary trusts, powers of attorney, or advance directives  
 627 under chapter 765:

628 (1) If a provision of law requires a signature, statement  
 629 or instrument to be acknowledged, sworn, affirmed, made under  
 630 oath, or subject to penalty of perjury, the acknowledgement or  
 631 proof may be made by any of the officials and in the manner  
 632 described in s. 695.03.

633 (2) If a provision of law requires a signature, statement  
 634 or instrument to be acknowledged, sworn, affirmed, made under  
 635 oath, or subject to penalty of perjury, an online notarization  
 636 satisfies that requirement if made in accordance with the online  
 637 notarization provisions of Part II, or laws of the appointing  
 638 state regarding the online notarization of instruments.

639 (3) If a provision of law requires a signature or act be  
 640 witnessed, compliance with the remote electronic witnessing  
 641 standards under s. 117.300 satisfies that requirement.

642 (4) If a provision of law requires a signature, statement  
 643 or instrument to be acknowledged, sworn, affirmed, made under  
 644 oath, proved, legalized, authenticated or otherwise made by a

645 principal signer before or in the presence of a notary public or  
 646 civil-law notary, the principal signer shall be deemed to have  
 647 done so before or in the presence of the notary public or civil  
 648 law notary if done by two-way video and audio conference  
 649 technology in accordance with the online notarization provisions  
 650 of this Part II, or in accordance with the laws of the  
 651 appointing state regarding the remote notarization of  
 652 instruments.

653 117.230 Application; qualifications.--

654 (1) A notary public or an applicant for appointment as a  
 655 notary public under Part I may apply to the Office of the  
 656 Governor to be appointed and commissioned as an online notary  
 657 public by:

658 (a) satisfying the qualification requirements for  
 659 appointment as a notary public under Part I;

660 (b) completing an additional live or online course, not to  
 661 exceed [\_\_\_\_\_] classroom hours in length, covering the duties,  
 662 obligations and technology requirements for serving as an online  
 663 notary public.

664 (c) passing a test covering the duties, obligations and  
 665 technology requirements for serving as an online notary public.

666 (d) paying an online notary public application fee in the  
 667 amount of \$25.00; and

668 (e) submitting to the Office of the Governor an  
 669 application for appointment as an online notary public, signed  
 670 and sworn to by the applicant.

671 (f) identifying the knowledge based authentication,  
 672 credential analysis, remote presentation, tamper evident and

673 two-way video and audio conference technologies the online  
 674 notary public intends to use in performing online notarizations.  
 675 If the Department of State has then established standards for  
 676 approval of technology pursuant to this Part II, each of the  
 677 technologies selected must conform to those standards. If a  
 678 technology conforms to the standards, the Department of State  
 679 shall approve the use of the technology. If the Department of  
 680 State has not yet established such standards, the online notary  
 681 public shall select technologies satisfying the provisions of s.  
 682 117.310.

683 (g) having an online notary public bond in an amount  
 684 determined by the Department of State which shall also satisfy  
 685 the bond required by s. 117.01(7).

686 (h) Maintain a cyber insurance policy on such terms and in  
 687 such amounts as may be determined by the Department of State.

688 117.240 Performance of notarial acts.—An online notary  
 689 public:

690 (1) is a notary public for purposes of Part I and is  
 691 subject to that part to the same extent as a notary public  
 692 appointed and commissioned only under that part, including the  
 693 provisions of s. 117.021 relating to electronic notarizations;

694 (2) may perform notarial acts as provided in s. 117.210 in  
 695 addition to performing online notarizations; and

696 (3) may perform an online notarization as authorized and  
 697 pursuant to the provisions of this part.

698 117.260 Electronic journal of online notarizations.--

699 (1) An online notary public shall keep a secure electronic  
 700 journal of electronic records notarized by the online notary

701 public. The electronic journal must contain for each online  
 702 notarization:  
 703 (a) the date and time of the notarization;  
 704 (b) the type of notarial act;  
 705 (c) the type, the title, or a description of the  
 706 electronic record or proceeding;  
 707 (d) the printed name and address of each principal signer  
 708 involved in the transaction or proceeding;  
 709 (e) evidence of identity of each principal signer involved  
 710 in the transaction or proceeding in the form of:  
 711 1. a statement that the person is personally known to the  
 712 online notary public; or  
 713 2. a notation of the type of identification document  
 714 provided to the online notary public; and  
 715 3. a copy of the government issued identity credential  
 716 provided; and  
 717 4. a copy of any other identity credential or information  
 718 provided.  
 719 (f) indication that the principal signer satisfactorily  
 720 passed the identity proofing.  
 721 (g) indication that the government-issued identity  
 722 credential satisfied the credential analysis.  
 723 (h) a recording of any video and audio conference used in  
 724 connection with the notarial act that took place during the  
 725 online notarization; and  
 726 (i) the fee, if any, charged for the notarization.  
 727 (2) The online notary public shall take reasonable steps  
 728 to:

729 (a) ensure the integrity, security, and authenticity of  
 730 online notarizations;

731 (b) maintain a backup copy of the electronic journal  
 732 required by subsection (1); and

733 (c) protect from unauthorized use the electronic journal,  
 734 the backup copy and any other records received by the online  
 735 notary in connection with the online notarial act.

736 (3) The electronic journal required by subsection (1)  
 737 shall be maintained for at least seven years after the date of  
 738 the transaction or proceeding.

739 (4) An omitted or incomplete entry in the electronic  
 740 journal shall not impair the validity of the notarial act or the  
 741 electronic record which was notarized, but may be introduced as  
 742 evidence to establish violations of this chapter or as an  
 743 indication of possible fraud, forgery, or impersonation or for  
 744 other evidentiary purposes.

745 117.270 Use of electronic journal, signature and seal.—

746 (1) An online notary public shall take reasonable steps to  
 747 ensure that any registered device used to create an electronic  
 748 signature is current and has not been revoked or terminated by  
 749 the device's issuing or registering authority.

750 (2) An online notary public shall keep his or her  
 751 electronic journal, electronic signature, and electronic seal  
 752 secure and under the exclusive control of the online notary  
 753 public. The online notary public may not allow another person  
 754 to use the electronic journal, electronic signature, or  
 755 electronic seal of the online notary public.

756 (3) An online notary public may use his or her electronic

757 signature only for performing online notarization.

758 (4) An online notary public shall attach or logically  
 759 associate his or her electronic signature and seal to the  
 760 electronic notarial certificate of an electronic record in a  
 761 manner that is capable of independent verification using tamper  
 762 evident technology which renders any subsequent change or  
 763 modification to the electronic record evident.

764 (5) An online notary public shall immediately notify an  
 765 appropriate law enforcement agency and the Department of State  
 766 or the Governor of theft or vandalism of the electronic journal,  
 767 electronic signature, or electronic seal of the online notary  
 768 public. An online notary public shall immediately notify the  
 769 Department of State or the Governor of the loss or use by  
 770 another person of the electronic journal, electronic signature,  
 771 or electronic seal of the online notary public.

772 (6) An online notary public shall upon request make copies  
 773 of the pertinent portions of the electronic journal and the  
 774 related audio and video recordings available to any of the  
 775 parties to the electronic records notarized, the attorney-agent,  
 776 title agent, settlement agent, or title insurer or other agent  
 777 or person which engaged the online notary with regard to the  
 778 transaction or proceeding. The online notary public may charge  
 779 a fee not in excess of \$\_\_\_\_\_ for copies of all journal  
 780 entries to a given series of related electronic records.

781 117.280 Online notarization procedures.--

782 (1) An online notary public, while located in the state,  
 783 may perform an online notarization that meets the requirements  
 784 of this Part II regardless of whether the principal signer or

785 any witnesses are physically located in this state at the time  
 786 of the online notarization. An online notarial act performed in  
 787 accordance with this chapter shall be deemed to have been  
 788 performed within the state and is governed by Florida law.

789 (2) In performing an online notarization, an online notary  
 790 public shall verify the identity of a person creating an  
 791 electronic signature at the time that the signature is taken by  
 792 using technology and processes that meet the requirements of  
 793 this part, and shall record the entire two-way video and audio  
 794 conference session between the notary public and principal  
 795 signer.

796 (3) In performing an online notarization of a principal  
 797 signer not located within the state, the online notary public  
 798 shall confirm that the principal signer desires for the notarial  
 799 act to be performed by a Florida notary and under Florida law.

800 (4) The online notary public shall verify the identity of  
 801 the principal signer or a witness by:

802 (a) the online notary public's personal knowledge of each  
 803 such individual; or

804 (b) each of the following, as the same may be refined or  
 805 supplemented in rules adopted pursuant to s. 117.310:

806 1. remote presentation by each such individual of a  
 807 government-issued identification credential;

808 2. credential analysis of each government-issued  
 809 identification credential; and

810 3. identity proofing of each individual.

811 If the online notary public is unable to satisfy each of the  
 812 foregoing, or if the databases consulted for knowledge-based

813 authentication do not contain sufficient information relative to  
 814 the individual to permit proper authentication, the online  
 815 notary public is not authorized to perform the online  
 816 notarization.

817 (5) The online notary public shall take reasonable steps  
 818 to ensure that the two-way video and audio conference technology  
 819 used in an online notarization is secure from unauthorized  
 820 interception.

821 (6) The electronic notarial certificate for an online  
 822 notarization shall include a notation that the notarization is  
 823 an online notarization and that the online notarization was  
 824 conducted in accordance with the laws of the State of Florida.

825 (7) Except as expressly modified in this part, the  
 826 provisions of Part I of this chapter shall also apply to an  
 827 online notarization and an online notary public.

828 (8) Any failure to comply with the online notarization  
 829 procedures of this section shall not impair the validity of the  
 830 notarial act or the electronic record which was notarized, but  
 831 may be introduced as evidence to establish violations of this  
 832 chapter or as an indication of possible fraud, forgery, or  
 833 impersonation or for other evidentiary purposes. This  
 834 subsection in no way alters the duty of the online notary public  
 835 to comply with this chapter and the rules adopted hereunder.

836 117.290 Fees for online notarization.--An online notary  
 837 public or his or her employer may charge a fee in an amount not  
 838 to exceed \$\_\_\_\_\_ for performing an online notarization in  
 839 addition to any other fees authorized under Part I. Fees for  
 840 services other than provision of notarial acts are not governed

841 by this chapter.

842 117.300 Supervising witnessing of electronic records.--

843 (1) An online notary public or an official of another  
 844 state authorized under the laws of the other state to perform  
 845 online notarization of documents may supervise the witnessing of  
 846 electronic records by the same two-way video and audio  
 847 conference technology used for online notarization, as follows:

848 (a) The identity of the witness shall be verified in the  
 849 same manner as the identity of the principal signer.

850 (b) The witness may physically be present with the  
 851 principal signer, or remote from the principal signer provided  
 852 the witness and principal signer may see and hear one another in  
 853 real time using two-way video and audio conference technology.

854 (c) The act of witnessing an electronic signature means  
 855 being in the physical presence of the principal signer or by  
 856 two-way video and audio conference technology at the time the  
 857 principal signer affixes the electronic signature and hearing  
 858 the principal signer make a statement to the effect that the  
 859 principal signer has signed the electronic record.

860 (2) This section does not apply to the creation and  
 861 execution of wills, codicils, testamentary trusts, powers of  
 862 attorney, or advance directives under chapter 765.

863 117.310 Standards for electronic and online notarization;  
 864 rulemaking authority.--

865 (1) The Legislature intends for the standards applicable  
 866 to electronic notarization under s. 117.021 and for online  
 867 notarization under this part to evolve to reflect improvements  
 868 in technology and methods of assuring the identity of principal

869 signers and the security of an electronic record. To further  
 870 that intent, the Department of State may adopt rules necessary  
 871 to implement the requirements of this chapter and such other  
 872 rules as may be required to facilitate the integrity, security  
 873 and reliability of online notarizations, including the amount of  
 874 an online notary public bond, details regarding cyber insurance,  
 875 standards regarding identity proofing, credential analysis,  
 876 unauthorized interception, remote presentation, tamper evident  
 877 technology and two-way video and audio conference technology,  
 878 and the Department of State may publish lists of technologies  
 879 satisfying the standards and approved for use in online  
 880 notarizations.

881 (2) Until such time as the Department of State adopts  
 882 rules addressing the amount of an online notary public bond,  
 883 details regarding cyber insurance, identity proofing, credential  
 884 analysis, unauthorized interception, remote presentation, tamper  
 885 evident technology and two-way video and audio conference  
 886 technology, the following standards shall apply to any  
 887 unaddressed technologies and matters:

888 (a) The amount of the online notary public bond shall be  
 889 no less than \$35,000.

890 (b) Cyber insurance shall be maintained with respect to  
 891 the online notary public in an amount of no less than \$100,000.

892 (c) Identity proofing shall have these or greater security  
 893 characteristics:

894 1. the principal signer shall be presented with five (5)  
 895 or more questions with a minimum of five (5) possible answer  
 896 choices per question;

897 2. each question shall be drawn from a third party  
 898 provider of public and proprietary data sources, which questions  
 899 are identifiable to the principal signer's social security  
 900 number or other identification information, or identifiable to  
 901 the principal signer's identity and historical events records;

902 3. responses to all questions shall be made within a two  
 903 (2) minute time constraint;

904 4. the principal signer shall have answered a minimum of  
 905 eighty percent (80%) of the questions correctly;

906 5. the principal signer may be offered one (1) additional  
 907 re-take in the event of a failed attempt; and

908 6. during the re-take, none of the prior questions shall  
 909 be repeated.

910 (d) Credential analysis shall include comparison of the  
 911 presented government-issued identity credential against public  
 912 or proprietary data sources to confirm that one or more data  
 913 elements thereon conforms to the asserted identity or that one  
 914 or more readable format features conform to those specified by  
 915 the issuing state or country, attempting to read of any bar  
 916 codes contained on the credential, and comparing them to the  
 917 identity of the principal signer, and attempting to verify any  
 918 micro-printing contained on the credential.

919 (e) Tamper-evident technology requirements will be deemed  
 920 satisfied by software that (i) creates a digest (or hash) value  
 921 based upon the contents of the document using a mathematical  
 922 function, (ii) encrypts the digest value with the private key of  
 923 the signer's certificate; and (iii) inserts the completed  
 924 signature (signed digest, certificate(s), and other information)

925 into the document to enable it's later validation. PDF  
 926 signature technology shall be deemed to meet the tamper-evident  
 927 technology standards.

928 (f) Two-way video and audio conference technology  
 929 requirements will be satisfied by a technology enabling the  
 930 participants to see, hear and communicate with one another in  
 931 real time using electronic means, and enabling the online notary  
 932 public to record the video and audio.

933 (g) Reasonable steps to prevent unauthorized interception  
 934 shall be satisfied by the online notary public using a secured  
 935 home or office network. The online notary public is not  
 936 responsible for the security of the systems used by the  
 937 principal signer or others to participate in the session.

938 117.320 Relation to E-SIGN Act.-- This law modifies,  
 939 limits and supersedes the Electronic Signatures in Global and  
 940 National Commerce Act, 15 U.S.C. Section 7001 et seq., but does  
 941 not modify, limit or supersede Section 101(c) of that act, 15  
 942 U.S.C. Section 7001(c), or authorize electronic delivery of any  
 943 of the notices described in Section 103(b) of that act, 15  
 944 U.S.C. Section 7003(b).

945 Section 10. Section 689.01, Florida Statutes, is amended  
 946 to read:

947 689.01 How real estate conveyed.—

948 (1) No estate or interest of freehold, or for a term of  
 949 more than 1 year, or any uncertain interest of, in or out of any  
 950 messuages, lands, tenements or hereditaments shall be created,  
 951 made, granted, transferred or released in any other manner than  
 952 by instrument in writing, signed in the presence of two

953 subscribing witnesses by the party creating, making, granting,  
 954 conveying, transferring or releasing such estate, interest, or  
 955 term of more than 1 year, or by the party's lawfully authorized  
 956 agent, unless by will and testament, or other testamentary  
 957 appointment, duly made according to law; and no estate or  
 958 interest, either of freehold, or of term of more than 1 year, or  
 959 any uncertain interest of, in, to, or out of any messuages,  
 960 lands, tenements or hereditaments, shall be assigned or  
 961 surrendered unless it be by instrument signed in the presence of  
 962 two subscribing witnesses by the party so assigning or  
 963 surrendering, or by the party's lawfully authorized agent, or by  
 964 the act and operation of law. No seal shall be necessary to give  
 965 validity to any instrument executed in conformity with this  
 966 section. Corporations may execute any and all conveyances in  
 967 accordance with the provisions of this section or ss. 692.01 and  
 968 692.02.

969 (2) For purposes of this chapter:

970 (a) any requirement that an instrument be signed in the  
 971 presence of two subscribing witnesses may be satisfied by  
 972 witnesses present by two-way video and audio conference  
 973 technology under standards required for online notarization  
 974 pursuant to chapter 117, including the identity verification  
 975 standards, or in accordance with the laws of the appointing  
 976 state regarding the remote notarization of instruments.

977 (b) the act of witnessing an electronic signature shall  
 978 mean being in the physical presence of the principal signer or  
 979 connected by two-way video and audio conference technology at  
 980 the time the principal signer affixes the electronic signature

981 and hearing the principal signer make a statement acknowledging  
 982 that the principal signer has signed the electronic record.

983 Section 11. Section 694.08, Florida Statutes, is amended  
 984 to read:

985 694.08 Certain instruments validated, notwithstanding lack  
 986 of seals or witnesses, or defect in acknowledgment, etc.—

987 (1) Whenever any power of attorney has been executed and  
 988 delivered, or any conveyance has been executed and delivered to  
 989 any grantee by the person owning the land therein described, or  
 990 conveying the same in an official or representative capacity,  
 991 and has, for a period of 7 years or more been spread upon the  
 992 records of the county wherein the land therein described has  
 993 been or was at the time situated, and one or more subsequent  
 994 conveyances of said land or parts thereof have been made,  
 995 executed, delivered and recorded by parties claiming under such  
 996 instrument or instruments, and such power of attorney or  
 997 conveyance, or the public record thereof, shows upon its face a  
 998 clear purpose and intent of the person executing the same to  
 999 authorize the conveyance of said land or to convey the said  
 1000 land, the same shall be taken and held by all the courts of this  
 1001 state, in the absence of any showing of fraud, adverse  
 1002 possession, or pending litigation, to have authorized the  
 1003 conveyance of, or to have conveyed, the fee simple title, or any  
 1004 interest therein, of the person signing such instruments, or the  
 1005 person in behalf of whom the same was conveyed by a person in an  
 1006 official or representative capacity, to the land therein  
 1007 described as effectively as if there had been no defect in,  
 1008 failure of, or absence of the acknowledgment or the certificate

1009 of acknowledgment, if acknowledged, or the relinquishment of  
 1010 dower, and as if there had been no lack of the word "as"  
 1011 preceding the title of the person conveying in an official or  
 1012 representative capacity, of any seal or seals, or of any witness  
 1013 or witnesses, and shall likewise be taken and held by all the  
 1014 courts of this state to have been duly recorded so as to be  
 1015 admissible in evidence;

1016 (2) Provided, however, that this section shall not apply  
 1017 to any conveyance the validity of which shall be contested or  
 1018 have been contested by suit commenced heretofore or within 1  
 1019 year of the effective date of this law.

1020 Section 12. Section 695.03, Florida Statutes, is amended  
 1021 to read:

1022 695.03 Acknowledgment and proof; validation of certain  
 1023 acknowledgments; legalization or authentication before foreign  
 1024 officials.--To entitle any instrument concerning real property  
 1025 to be recorded, the execution must be acknowledged by the party  
 1026 executing it, proved by a subscribing witness to it, or  
 1027 legalized or authenticated by a civil-law notary or notary  
 1028 public who affixes her or his official seal, by before the  
 1029 officers and in the form and manner following:

1030 (1) WITHIN THIS STATE.--An acknowledgment or proof may be  
 1031 legalized or authenticated within this state by ~~may be made~~  
 1032 ~~before~~ a judge, clerk, or deputy clerk of any court; a United  
 1033 States commissioner or magistrate; or a notary public or civil-  
 1034 law notary of this state, and the certificate of acknowledgment  
 1035 or proof must be under the seal of the court or officer, as the  
 1036 case may be. An acknowledgement or proof, including an

1037 acknowledgment or proof of a person who is not physically  
 1038 located within this state, may be made outside of the physical  
 1039 presence of a notary public or civil-law notary of this state in  
 1040 accordance with the provisions of part II, ch. 117 regarding the  
 1041 online notarization of instruments. A statement in the  
 1042 acknowledgement or proof that the laws of the appointing state  
 1043 were complied with conclusively establishes such compliance for  
 1044 purposes of this section. All affidavits and acknowledgments  
 1045 heretofore made or taken in this manner are hereby validated.

1046 (2) WITHOUT THIS STATE BUT WITHIN THE UNITED STATES.--An  
 1047 acknowledgment or proof may be legalized or authenticated ~~made~~  
 1048 ~~out of this state but within the United States by~~ ~~may be made~~  
 1049 ~~before~~ a civil-law notary of this state or a commissioner of  
 1050 deeds appointed by the Governor of this state; a judge or clerk  
 1051 of any court of the United States or of any state, territory, or  
 1052 district; a United States commissioner or magistrate; or a  
 1053 notary public, justice of the peace, master in chancery, or  
 1054 registrar or recorder of deeds of any state, territory, or  
 1055 district having a seal, and the certificate of acknowledgment or  
 1056 proof must be under the seal of the court or officer, as the  
 1057 case may be. If the acknowledgment or proof is legalized or  
 1058 authenticated by ~~made before~~ a notary public who does not affix  
 1059 a seal, it is sufficient for the notary public to type, print,  
 1060 or write by hand on the instrument, "I am a Notary Public of the  
 1061 State of \_\_(state)\_\_, and my commission expires on \_\_(date)\_\_."

1062 An acknowledgement or proof may be made outside of the physical  
 1063 presence of such officer in accordance with the laws of the  
 1064 appointing state regarding the remote notarization of

1065 instruments. A statement in the acknowledgement or proof that  
 1066 the laws of the appointing state were complied with conclusively  
 1067 establishes such compliance for purposes of this section.

1068 (3) WITHIN FOREIGN COUNTRIES.—

1069 (a) If the acknowledgment, legalization, authentication,  
 1070 or proof of a person who is physically located in a foreign  
 1071 country is made in a foreign country, it may be made before a  
 1072 commissioner of deeds appointed by the Governor of this state to  
 1073 act in such country; before a notary public of such foreign  
 1074 country or a civil-law notary of this state or of such foreign  
 1075 country who has an official seal; before an ambassador, envoy  
 1076 extraordinary, minister plenipotentiary, minister, commissioner,  
 1077 charge d'affaires, consul general, consul, vice consul, consular  
 1078 agent, or other diplomatic or consular officer of the United  
 1079 States appointed to reside in such country; or before a military  
 1080 ~~or naval~~ officer or other person authorized by 10 U.S.C. 1044a  
 1081 ~~the Laws or Articles of War of the United States~~ to perform the  
 1082 duties of notary public, and the certificate of acknowledgment,  
 1083 legalization, authentication, or proof must be under the seal of  
 1084 the officer. A certificate legalizing or authenticating the  
 1085 signature of a person executing an instrument concerning real  
 1086 property and to which a civil-law notary or notary public of  
 1087 that country has affixed her or his official seal is sufficient  
 1088 as an acknowledgment. For the purposes of this section, the term  
 1089 "civil-law notary" means a civil-law notary as defined in  
 1090 chapter 118 or an official of a foreign country who has an  
 1091 official seal and who is authorized to make legal or lawful the  
 1092 execution of any document in that jurisdiction, in which

1093 jurisdiction the affixing of her or his official seal is deemed  
 1094 proof of the execution of the document or deed in full  
 1095 compliance with the laws of that jurisdiction.

1096 (b) An acknowledgment, legalization, authentication, or  
 1097 proof of a person who is physically located in a foreign country  
 1098 may also be made outside of the physical presence of a notary  
 1099 public or civil-law notary of this state in accordance with the  
 1100 provisions of part II, ch. 117 regarding the online notarization  
 1101 of instruments, or outside the presence of a notary public or  
 1102 civil law notary of another state if completed in accordance  
 1103 with the laws of the appointing state regarding the remote  
 1104 notarization of instruments. A statement in the  
 1105 acknowledgement, legalization, authentication or proof that the  
 1106 laws of the appointing state were complied with conclusively  
 1107 establishes such compliance for purposes of this section.

1108 (4) All affidavits, legalizations, authentications, proofs  
 1109 and acknowledgments heretofore made or taken in any of the  
 1110 manners ~~manner~~ set forth in subsections (1), (2) or (3) above  
 1111 are hereby validated and upon recording shall not be denied to  
 1112 have provided constructive notice based on any alleged failure  
 1113 to have complied strictly with this section, as currently or  
 1114 previously in effect, or any alleged failure to have complied  
 1115 strictly with the laws governing online or standard notarization  
 1116 of instruments in chapter 117 or the laws of the appointing  
 1117 state governing remote or standard notarization.

1118 Section 13. Section 695.25, Florida Statutes, is amended  
 1119 to read:

1120 695.25 Short form of acknowledgment.--The forms of

1121 acknowledgment set forth in this section may be used, and are  
 1122 sufficient for their respective purposes, under any law of this  
 1123 state. The forms shall be known as "Statutory Short Forms of  
 1124 Acknowledgment" and may be referred to by that name. The  
 1125 authorization of the forms in this section does not preclude the  
 1126 use of other forms.

1127 (1) For an individual acting in his or her own right:

1128  
 1129 STATE OF \_\_\_\_\_

1130 COUNTY OF \_\_\_\_\_

1131 The foregoing instrument was acknowledged before me [ ] by  
 1132 personal appearance or [ ] by online notarization in compliance  
 1133 with the laws of this state, this \_\_ (date) \_\_, by \_\_ (name of  
 1134 person acknowledging) \_\_, who is personally known to me or who  
 1135 has produced \_\_ (type of identification) \_\_ as identification.

1136  
 1137 \_\_\_\_\_  
 1138 \_\_\_\_\_  
 1139 \_\_\_\_\_  
 1140 \_\_\_\_\_  
 1141 \_\_\_\_\_

\_\_\_\_\_ (Signature of person taking acknowledgment) \_\_\_\_\_

\_\_\_\_\_ (Name typed printed or stamped) \_\_\_\_\_

\_\_\_\_\_ (Title or rank) \_\_\_\_\_

\_\_\_\_\_ (Serial number, if any) \_\_\_\_\_

1142 (2) For a corporation:

1143  
 1144 STATE OF \_\_\_\_\_

1145 COUNTY OF \_\_\_\_\_

1146 The foregoing instrument was acknowledged before me [ ] by  
 1147 personal appearance or [ ] by online notarization in compliance  
 1148 with the laws of this state, this \_\_ (date) \_\_, by \_\_ (name of

1149 officer or agent, title of officer or agent) of (name of  
 1150 corporation acknowledging), a (state or place of  
 1151 incorporation) corporation, on behalf of the corporation.  
 1152 He/she is personally known to me or has produced (type of  
 1153 identification) as identification.

1154  
 1155 (Signature of person taking acknowledgment)  
 1156 (Name typed printed or stamped)  
 1157 (Title or rank)  
 1158 (Serial number, if any)  
 1159

1160 (3) For a partnership:

1161  
 1162 STATE OF \_\_\_\_\_  
 1163 COUNTY OF \_\_\_\_\_

1164 The foregoing instrument was acknowledged before me [\_] by  
 1165 personal appearance or [\_] by online notarization in compliance  
 1166 with the laws of this state, this (date), by (name of  
 1167 acknowledging partner or agent), partner (or agent) on behalf  
 1168 of (name of partnership), a partnership. He/she is  
 1169 personally known to me or has produced (type of  
 1170 identification) as identification.

1171  
 1172 (Signature of person taking acknowledgment)  
 1173 (Name typed printed or stamped)  
 1174 (Title or rank)  
 1175 (Serial number, if any)  
 1176

1177 (4) For an individual acting as principal by an attorney  
1178 in fact:

1179  
1180 STATE OF \_\_\_\_\_

1181 COUNTY OF \_\_\_\_\_

1182 The foregoing instrument was acknowledged before me [ ] by  
1183 personal appearance or [ ] by online notarization in compliance  
1184 with the laws of this state, this \_\_ (date) \_\_, by \_\_ (name of  
1185 attorney in fact) \_\_, as attorney in fact, who is personally  
1186 known to me or who has produced \_\_ (type of identification) \_\_ as  
1187 identification.

1188  
1189 \_\_\_\_\_  
1190 \_\_\_\_\_  
1191 \_\_\_\_\_  
1192 \_\_\_\_\_  
1193 \_\_\_\_\_

\_\_\_\_\_ (Signature of person taking acknowledgment)  
\_\_\_\_\_ (Name typed printed or stamped)  
\_\_\_\_\_ (Title or rank)  
\_\_\_\_\_ (Serial number, if any)

1194 (5) By any public officer, trustee, or personal  
1195 representative:

1196  
1197 STATE OF \_\_\_\_\_

1198 COUNTY OF \_\_\_\_\_

1199 The foregoing instrument was acknowledged before me [ ] by  
1200 personal appearance or [ ] by online notarization in compliance  
1201 with the laws of this state, this \_\_ (date) \_\_, by \_\_ (name and  
1202 title of position) \_\_, who is personally known to me or who has  
1203 produced \_\_ (type of identification) \_\_ as identification.

1204



1233 notarization of documents; or

1234 (d) That the document recorded was a certified printout of  
 1235 a document to which one or more electronic signatures have been  
 1236 affixed.

1237 (2) This section does not alter the duty of the clerk or  
 1238 recorder to comply with s. 28.222 or s. 695.27 or rules adopted  
 1239 pursuant to those sections ~~that section~~.

1240 (3) Nothing herein shall preclude a challenge to the  
 1241 validity or enforceability of an instrument or electronic record  
 1242 based upon fraud, forgery, impersonation, duress, undue  
 1243 influence, minority, illegality, unconscionability or any other  
 1244 basis not in the nature of those matters described in subsection  
 1245 (1).

1246 Section 15. This act shall take effect January 1, 2019.

IN THE DISTRICT COURT OF APPEAL OF FLORIDA,  
FIRST DISTRICT

CASE NO. 1D16-0665  
L.T. NO. 10-1313-CA

RICHARD M. RIGBY,  
appellant,

v.

BANK OF NEW YORK MELLON, ET AL.,  
appellees.

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

*AMICUS CURIAE* BRIEF  
OF  
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## IDENTITY AND INTEREST

The Real Property Probate & Trust Law Section of The Florida Bar (“RPPTL Section”) is a group of Florida lawyers who practice in the areas of real estate, guardianship, trust and estate law. The RPPTL Section is 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.<sup>1</sup> Our Section has over 10,000 members.

On May 12, 2017, this Court issued an order soliciting input from the RPPTL Section through an *amicus* brief. As required by the RPPTL Section’s bylaws, its Executive Committee voted unanimously to file the requested brief.

<sup>1</sup> For example, see *Jones v. Golden*, 176 So. 3d 242 (Fla. 2015); *Aldrich v. Basile*, 136 So. 3d 530 (Fla. 2014); *North Carillon LLC, v. CRC 603, LLC* 135 So. 3d 274 (Fla. 2014); *Chames v. DeMayo*, 972 So. 2d 850 (Fla. 2007); *McKean v. Warburton*, 919 So. 2d 341 (Fla. 2005); *Deuteche Bank Trust Co. Americas v. Beauvais*, 188 So. 3d 938, (Fla. 3d DCA *en banc* 2016); *Sims v. New Falls Corp.*, 37 So. 3d 358 (Fla. 3d DCA 2010); *JPG Enterprises, Inc., v. McLellan* 31 So. 3d 821 (Fla. 4<sup>th</sup> DCA 2010); *Skylake Insurance, Inc. v. NMB Plaza, LLC*, 23 So. 3d 175 (Fla. 3d DCA 2009).

The Florida Bar subsequently approved the RPPTL Section's involvement in this case.<sup>2</sup>

Our interest in this case stems from our experience and expertise with the real estate and foreclosure related issues presented by this Court in its May 12<sup>th</sup> order. Further, this Court's interpretation of the law pertaining to standing in foreclosure proceedings is very important to the RPPTL Section's members and their efforts to serve the citizens of Florida. Accordingly, the RPPTL Section welcomes the privilege of assisting the Court in its consideration of this matter.

The RPPTL Section does not align itself with a particular party in the underlying litigation and we do not present our views on standing based on the particular facts of this case.

## SUMMARY OF ARGUMENT

Under Florida law, standing and subject matter jurisdiction are distinct principles of law with distinct implications on a trial court's jurisdiction. As some

<sup>2</sup> 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 is submitted solely by the RPPTL Section and supported by the separate resources of this voluntary organization--not in the 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.

appellate judges have opined, some judicial decisions have failed to understand this distinction. This misunderstanding has led to misapplications of law in foreclosure cases that must be addressed. Receding from Florida's law on standing at the district court of appeal level, however, does not seem to be the most prudent way to correct this problem. Instead, the RPPTL Section recommends that this Court either certify the question as requiring immediate resolution by the Florida Supreme Court or, if not, to decide the standing question and certify the question as one of great public importance or to be in direct conflict with another district court of appeal.

## ARGUMENT

Non-criminal proceedings in Florida circuit courts have four common traits and requirements:

1. A cause of action is initiated by a person or entity with an interest in an actual controversy. *Florida Power & Light Co., v. Canal Authority of Florida*, 423 So. 2d 421, 423 (Fla. 5<sup>th</sup> DCA 1982); *Arbalaez v. Butterworth*, 738 So. 2d 326 (Fla. 1999).
2. The cause of action is commenced in a court with subject matter jurisdiction over the type of controversy asserted. *Chase Bank of Texas Nat.*

*Assn., v. Dept. of Insur.*, 860 So. 2d 472, 475 (Fla. 1<sup>st</sup> DCA 2003) (“Seventy-six years ago, the Florida Supreme Court defined subject matter jurisdiction as “the power of the court to deal with the class of cases to which the particular case belongs.” *Lovett v. Lovett*, 93 Fla. 611, 112 So. 768, 775 (Fla.1927). Since then, the court has consistently employed the same definition. *See Paulucci v. Gen. Dynamics Corp.*, 842 So. 2d 797, 800 n. 3 (Fla.2003); *Cunningham v. Standard Guar. Ins. Co.*, 630 So. 2d 179, 181 (Fla.1994).”).

3. All elements of a cause of action must exist at the time the action is commenced. *Orlando Sports Stadium v. Sentinel Star Co.*, 316 So. 2d 607, 610 (Fla. 4<sup>th</sup> DCA 1975) (“A cause of action must exist and be complete before an action can be commenced or, as sometimes stated, the existence or non-existence of a cause of action is commonly dependent upon the state of facts existing when the action was begun. As a general rule the plaintiff may not be permitted to cure the defect of non-existence of a cause of action when suit was begun, by amendment of his pleadings to cover subsequently accruing rights, 1 Am.Jur.2d, Actions, Sec. 58.”); *Hasam Realty Corp., v. Dade County*, 178 So. 2d 747 (Fla. 3d DCA 1965); *Meredith v. Long*, 96 Fla. 719, 119 So. 114 (1928).<sup>3</sup>

<sup>3</sup> A premature cause of action is distinguishable from a mature action where the plaintiff is unable to prove an element of the action because the proof is missing or incomplete (e.g. missing or lost promissory note).

4. The circuit court lacks jurisdiction to entertain a proceeding in which the plaintiff or petitioner seeks an advisory opinion. *See Florida House of Representatives v. League of Women Voters of Florida*, 118 So. 3d 198, 206-07 (Fla. 2013) (“We specifically explained that a circuit court is *without jurisdiction* to render such an advisory opinion. *See id.* at 683 (“Circuit courts are not authorized to issue advisory opinions.”)).

Courts may separate these common traits and requirements into individual components, such as standing, in order to address the exigencies of a particular case. For example, while a lack of subject matter jurisdiction and a lack of standing are both affirmative defenses, they differ in part because standing is a defense a party can waive. *See Corrigan v. Bank of America*, 189 So. 3d 187 (Fla. 2d DCA 2016) (lack of standing does not deprive a court of subject matter jurisdiction as standing, unlike subject matter jurisdiction, is a waivable affirmative defense); *Jaffer v. Chase Home Finance, LLC*, 155 So. 3d 1199, 1202 (Fla. 4<sup>th</sup> DCA 2015) (“Even if there were merit to the Jaffers' argument, the substance of the argument is in the nature of an attack on Chase's standing. We have repeatedly held that standing is an affirmative defense and failure to raise it in a responsive pleading generally results in a waiver.”).

But, these traits and requirements are certainly related. *See In re True's Will*, 31 Fla. Supp. 1, 6 (Dade Cty. Ct. 1968) (court is without jurisdiction to allow action by one lacking an interest in the subject matter); *Benson v. Benson*, 533 So. 2d 889 (Fla. 3d DCA 1988) (standing impacts a court's jurisdiction). This is because without standing a claimant lacks a sufficient interest in a case or controversy with the defendant, which is required in order to have an action resolvable by a Florida court. *See Olen Properties Corp., v. Moss*, 981 So. 2d 515 (Fla. 4<sup>th</sup> DCA 2008).

Because of the relationship between standing and the court's subject matter jurisdiction, "...standing is a threshold determination necessary for the maintenance of all actions... ." *Ferreiro v. Philadelphia Indem. Ins. Co.*, 928 So. 2d 374, 378 (Fla. 3d DCA 2006); *Aery v. Wallace Lincoln-Mercury, LLC*, 118 So. 3d 904, 910 (Fla. 4<sup>th</sup> DCA 2013); *In re Pfeiffer's Will*, 34 Fla. Supp. 132 (Dade Cty. Ct. 1970), *aff'd without opinion*, 240 So. 2d 211 (Fla. 3d DCA 1970).

Waiting to address a lack of standing until the end of a case obviously may be a waste of judicial and client resources.

To be sure, certain proceedings, such as probate proceedings and foreclosures, have peculiar components that are often codified in rules of court. The above-stated common traits and requirements, however, remain extant in those

proceedings. See *In re Pfeiffer's Will, id.*; *Pennington v. Ocwen Loan Servicing*, 151 So. 3d 52, (Fla. 1<sup>st</sup> DCA 2014) (trial court erred in failing to dismiss action after plaintiff lost standing to pursue claim).

The criticisms of applying “standing-at-the inception” in foreclosure proceedings appear to have their genesis in the sheer number of those proceedings and multiple transfers of notes or loss of notes (or other evidence of standing) resulting in an ocean of foreclosure proceedings that turn on the standing issue. In many of those cases, the defense of lack of standing is not addressed and resolved by the courts until trial, which seems unfair to the foreclosing party who cannot cure a lack of standing on the fly, and is a waste of judicial and client resources. In many of these cases, he, she or it must start over. See *Walton v. Deutsche Bank National Trust Co.*, 201 So. 3d 831, 834. n. 2 (Fla. 1<sup>st</sup> DCA 2016) (“Deutsche Bank must file a new complaint if it wishes to again pursue foreclosure. [citation omitted]”). These criticisms, issued by some appellate judges, do not necessarily challenge the four common traits and requirements highlighted above. What is challenged is a requirement that a foreclosure action be dismissed with prejudice if standing does not exist at all times during the proceeding. In *Focht v. Wells Fargo Bank*, 124 So. 3d 308, 312 (Fla. 2d DCA 2013), the court held:

We note that the supreme court has not applied this standing principle in the exact context presented in this case. And we question whether, in

light of the ongoing foreclosure crisis in this State, the supreme court would adhere to this principle in cases in which a plaintiff has acquired standing by the time judgment is entered. Accordingly, we certify the following question as one of great public importance:

CAN A PLAINTIFF IN A FORECLOSURE ACTION CURE THE INABILITY TO PROVE STANDING AT THE INCEPTION OF SUIT BY PROOF THAT THE PLAINTIFF HAS SINCE ACQUIRED STANDING?

Part of that criticism may lie in a misunderstanding of the impact of the dismissal based on a lack of standing (premature case). Indeed, a dismissal “with prejudice” of a premature proceeding is somewhat of a misnomer. As the Court opined in *Shuck v. Bank of America*, 862 So. 2d 20, 24 (Fla. 2d DCA 2003):

The trial court's order dismissed the widow's amended complaint with prejudice because it was prematurely filed. The dismissal with prejudice of a prematurely filed claim does not bar a subsequent action once the claim has ripened. In the case of *Smith v. St. Vil*, 714 So.2d 603 (Fla. 4th DCA 1998), the Fourth District said: [I]t is not the inclusion of the words “with prejudice” which determines whether a dismissal is res judicata, but rather whether the order actually was an adjudication on the merits. *Id.* at 605 (citing *N. Shore Realty Corp. v. Gallaher*, 99 So.2d 255 (Fla. 3d DCA 1957)). The dismissal on the pleadings of a prematurely filed claim does not constitute an adjudication on the merits. Therefore, the doctrine of res judicata does not bar a second action on the claim.

*See Walton v. Deutsche Bank National Trust Co.*, 201 So. 3d 831, 834. N. 2 (Fla. 1<sup>st</sup> DCA 2016) (“Deutsche Bank must file a new complaint if it wishes to again pursue foreclosure. [citation omitted]”).

Another criticism by some appellate judges appears to be that some courts have, in essence, held that standing and subject matter jurisdiction are identical. From that premise, some courts have held that the defense of lack of standing is not waivable by the defendant and a foreclosure judgment is subject to being set aside as void even if the lack of standing defense was not timely raised by the defendant. This criticism appears in *Walton v. Deutsche Bank Nat. Trust Company, N.A.*, 201 So. 3d at 834-35 (concurring opinion); *Corrigan v. Bank of America*, 189 So. 3d at 191 (concurring opinion); *Focht v. Wells Fargo Bank, N.A.*, 124 So. 3d 312-13 (concurring opinion). As noted above, the criticism is justified. Standing and subject matter jurisdiction are not identical under Florida law and some circuit courts have erred in holding otherwise. In addition to the cases cited above, see *Phadael v. Deutsche Bank Trust Co. Americas*, 83 So. 3d 893, 895 (Fla. 4th DCA 2012); *Glynn v. First Union Nat'l Bank*, 912 So. 2d 357, 358 (Fla. 4th DCA 2005); *Kissman v. Panizzi*, 891 So. 2d 1147, 1150 (Fla. 4th DCA 2005); *Dage v. Deutsche Bank National Trust Company, N.A.*, 95 So. 3d 1021, 1024 (Fla. 2d DCA 2012) (Bank's alleged lack of standing at the time it filed foreclosure action, on the ground that promissory note had not yet been assigned to it, did not render default foreclosure judgment that was entered against mortgagors void, so as to enable mortgagors to seek relief from the judgment at any time; lack of standing was an

affirmative defense that was waived by the failure to timely assert it, entry of default terminated mortgagors' right to defend except as to the amount of unliquidated damages, and lack of standing would render judgment merely voidable, rather than void); *Farach v. Wells Fargo Bank, N.A.*, 116 So. 3d 570 (Fla. 3d DCA 2013) (same holding).

Receding from the “standing-at- inception” requirement in foreclosure proceedings, however, seems a bit extreme and “throws the baby out with the bath water.” And, developing a new doctrine that fits may be too convoluted and counter to traditional and constitutional notions of standing and subject matter jurisdiction. Further, and with deepest respect, it may not be within the purview of this Court (as judges from this and other courts have stated in concurring opinions). *See Walton v. Deutsche Bank National Trust Co., id.*; *Focht v. Wells Fargo Bank, N.A., id.*

Certified questions, on the other hand, may tease out this and related issues, for resolution by the Supreme Court of Florida, either through decisional law or the promulgation and adoption of clarifying rules of court. Consider the following questions of great public importance along with our footnoted annotations:

IN FORECLOSURE CASES WHERE LACK OF STANDING IS RAISED AS AN AFFIRMATIVE DEFENSE, SHOULD THAT DEFENSE BE RESOLVED AT THE INITIAL STAGE OF THE PROCEEDING AND AFTER AN EVIDENTIARY HEARING?

IN FORECLOSURE CASES WHERE LACK OF STANDING IS RAISED AS AN AFFIRMATIVE DEFENSE, SHOULD THE DEFENSE BE TREATED AND RESOLVED THROUGH A PROCESS SIMILAR TO THE ONE EMPLOYED WHEN THE DEFENSE OF LACK OF PERSONAL JURISDICTION IS RAISED IN A CASE?<sup>4</sup>

MAY A PLAINTIFF IN A FORECLOSURE ACTION CURE THE INABILITY TO PROVE STANDING AT THE INCEPTION OF SUIT BY PROOF THAT THE PLAINTIFF HAS SINCE ACQUIRED STANDING?

MAY A PLAINTIFF IN A FORECLOSURE CASE CURE A LACK OF STANDING AT THE INCEPTION OF THE CASE WITH A SUPPLEMENTAL PLEADING?<sup>5</sup>

ABSENT ANY HARM, AND TO AVOID AN INEQUITY, MAY THE CIRCUIT COURT IN A FORECLOSURE CASE EXERCISE ITS DISCRETION AND DISMISS A CASE FOR LACK OF STANDING WITHOUT PREJUDICE, OR TEMPORARILY STAY OR ABATE THE PROCEEDING IN ORDER TO PROPERLY CONSIDER THE STANDING ISSUE?<sup>6</sup>

<sup>4</sup> Consider *Chuck v. City of Homestead Police Dept.*, 888 So. 2d 736, 751 (Fla. 3d DCA 2004) (en banc) (“Consequently, we find contradictory evidence sufficient to require an evidentiary hearing on the issue of standing. See *Gonzalez v. City of Homestead*, 825 So. 2d 1050, 1053 & n. 1 (Fla. 3d DCA 2002). We believe the appropriate procedure to follow at the evidentiary hearing is similar to the one outlined in *Venetian Salami v. Parthenais*, 554 So. 2d 499 (Fla.1989), for long-arm jurisdiction disputes. See *Gonzalez*, 825 So. 2d at 1053 n. 1.”).

<sup>5</sup> See *Meredith v. Long*, 96 Fla. 719, 119 So. 114 (1928); Rule 1.190, Fla. R. Civ. P.

<sup>6</sup> Consider *O’Connell v. Citizens Nat. Bank of Hollywood*, 254 So. 2d 236, 237 (Fla. 4<sup>th</sup> DCA 1971) (“It seems clear to us that appellants are in no different position than they would have been had appellee voluntarily dismissed the original action, completed the instrument in accordance with its alleged authority, and

As noted above, the Supreme Court of Florida may address these questions by decision or by rule, or both. Indeed, the Supreme Court could resolve these issues temporarily and then compel a rulemaking process that results in thoughtful analysis and rule(s) addressing what may be truly broken and how to fix it. That rulemaking process need not limit itself to unresolved issues. For example, many practitioners question whether the plaintiff in a foreclosure case should ultimately have the burden of proving he, she or it has standing. But, the current law on that point, whether in foreclosure cases or other cases, is not in doubt. *See Lamb v. Nationsstar Mortgage*, 174 So. 3d 1039 (Fla. 4<sup>th</sup> DCA 2015); *Dickson v. Roseville Properties, LLC*, 198 So. 3d 48, 50 (Fla. 2d DCA 2015) (once the defense of lack of standing is raised, it is incumbent on the claimant to prove his standing); *Hayes v. Guardianship of Thompson*, 952 So. 2d 498, 505 (Fla. 2007) (“Standing is a legal concept that requires a would-be litigant to demonstrate that he or she reasonably expects to be affected by the outcome of the proceedings, either directly or indirectly.”); *Fraser v. Dept. of Highway Safety and Motor Vehicles*, 727 So. 2d

thereafter filed a new and separate action on the completed note. Thus, without deciding whether the court erred in allowing the amended complaint to stand, it seems clear that appellants sustained no harm or prejudice, nor has such action resulted in a miscarriage of justice, and hence the judgment from which the appeal is taken should be affirmed.”); *Cazares v. Church of Scientology of California*, 444 So. 2d 442, 449 (Fla. 5<sup>th</sup> DCA 1983) (same holding).

1021, 1024 (Fla. 4<sup>th</sup> DCA 1999) (“The burden of establishing standing in a forfeiture proceeding is on the claimant.”); *Brown v. Firestone*, 382 So. 2d 654, 662 (Fla. 1980) (“Regarding standing, this Court has long been committed to the rule that a party does not possess standing to sue unless he or she can demonstrate a direct and articulable stake in the outcome of a controversy.”).

## CONCLUSION

The RPPTL Section appreciates the Court's invitation to file a brief as *amicus curiae* and trusts that its brief will assist in the Court's consideration of the pending appeal.

Respectfully submitted,  
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## CERTIFICATE OF SERVICE

I CERTIFY that a true copy of this brief was served by electronic service on Mary J. Walter, Esq., of Liebler, Gonzalez & Portuondo, Courthouse Tower - 25th Floor, 44 West Flagler Street, Miami, FL 33130, at [service@lgplaw.com](mailto:service@lgplaw.com) and [mjw@lgplaw.com](mailto:mjw@lgplaw.com); Jason F. Joseph, Esq., of Gladstone Law Group, P.A., 1499 W. Palmetto Park Road, Suite 300, Boca Raton, FL 33486, at [eservice@gladstonelawgroup.com](mailto:eservice@gladstonelawgroup.com); Jonathan Jacobson, Esq., 1499 W. Palmetto Park Road, Suite 300, Boca Raton, FL 33486, at [eservice@gladstonelawgroup.com](mailto:eservice@gladstonelawgroup.com); and Douglas L. Smith, Esq., 221 McKenzie Avenue, Panama City, FL 32401, [dsmith@burkeblue.com](mailto:dsmith@burkeblue.com), on this 17<sup>th</sup> day of July, 2017.

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## CERTIFICATE OF FONT SIZE

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, FBN 339180

## **WELCOME NEW RPPTL FELLOWS!!**



**Jami Coleman (Probate and Trust)** – Jami practices at Viera Williams, P.A. in Tallahassee, where she focuses her practice on estate planning, probate administration, and tax matters. She is graduate of FSU's College of Law, where she was an editor of the Business Law Review, a member of the Mock Trial Team, and a director of the Black Law Students Association. She earned her Masters of Law in Taxation from Georgetown. In addition to her practice, Jami is an adjunct tax professor at Florida A&M University, and volunteers with Legal Services of North Florida, where she assists low income taxpayers in resolving disputes with the IRS. She is currently president of the Legal Aid Foundation of Tallahassee, and was a class III fellow with the Wm. Reece Smith Florida Bar Leadership Academy.



**Lian de la Riva (Probate and Trust)** – Lian practices at Palmer, Palmer & Mangiero, P.A. in Miami, where she focuses her practice on estate planning and probate, trust and guardianship administration. She is in her third year of practice but has already established herself as a leader in the Hispanic National Bar Association by building a Young Lawyers Division for the association in Florida, and coordinating several events for young Hispanic lawyers in South Florida. Prior to entering private practice, Lian served as law clerk for the Probate Division of the Circuit Court for the Eleventh Judicial Circuit.



**Daniel L. McDermott (Probate and Trust)** – Daniel practices at Adrian Philip Thomas, P.A. in Ft. Lauderdale, where he focuses his practice on probate and trust litigation. A 2013 graduate of the University of Miami School of Law, Daniel was invited to address the Florida Third District Court of Appeal on behalf of newly admitted attorneys to the Florida Bar as a result of his high performance on the Florida Bar examination. He has published articles relating to issues in probate and trust litigation in his local Bar Association journal.



**Jacqueline J. Peregrin (Real Property)** – Jacqueline is a solo practitioner in Naples, where she focuses her practice on real estate matters. She is a 2010 graduate of Stetson University College of Law and earned an MBA from the Crummer Graduate School of Business at Rollins College. Jacqueline has a business background in corporate realty and leasing, and is now involved through her practice in real estate matters throughout Florida. Jacqueline looks forward to becoming more involved in the Section's real property committees.

1 732.7025 Waiver of constitutional and spousal rights by conveyance.

2 If the following or substantially similar language is included in a deed, a  
3 spouse shall be presumed to have waived that spouse's rights as a  
4 surviving spouse with respect to the devise restrictions under homestead  
5 under Art. X, s. 4(c) of the Florida Constitution:

6 By joining in this deed, I intend to waive homestead rights that  
7 would otherwise prevent my spouse from devising the  
8 homestead property described in this deed to someone other  
9 than me.

10 This language shall not be considered to be a waiver of the protection  
11 against the owner's creditor claims during the owner's lifetime and after  
12 death, and shall not be a considered a waiver of the restrictions against  
13 alienation by mortgage, sale, gift, or deed without the joinder of the  
14 owner's spouse.

**RPPTL WHITE PAPER**  
**HOMESTEAD WAIVERS**

**I. SUMMARY**

Florida Statutes Section 732.702 provides a statutory procedure for waiving spousal rights, including homestead rights, under written contracts, agreements or waivers. This proposal provides a simplified method for a spouse to waive her or his homestead rights in a deed, by adding a new statutory Section 732.7025, to provide a “safe harbor” for the waiver of spousal homestead rights under a deed (with specially drafted language included in the deed). This proposed change relates solely to the waiver of a spouse’s inheritance rights as to homestead and does not concern the waiver of homestead asset protection rights or other spousal inheritance rights (such as elective share). The proposed legislation is a product of study and analysis of the Homestead Issues Study Committee of the 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**

The status of the Florida homestead devise restrictions and waivers of such restrictions may be summarized as follows:

A. Constitutional and Statutory Provisions Regarding Restrictions

Section 4(c) of Article X of the Florida Constitution provides:

The homestead shall not be subject to devise if the owner is survived by spouse or minor child, except the homestead may be devised to the owner’s spouse if there be no minor child. The owner of homestead real estate, joined by the spouse if married, may alienate the homestead by mortgage, sale or gift and, if married, may by deed transfer the title to an estate by the entirety with the spouse. If the owner or spouse is incompetent, the method of alienation or encumbrance shall be as provided by law.

While the Florida Constitution defines when a homestead cannot be devised, Florida Statutes Section 732.401 defines how the homestead vests if it is not devisable or is not validly devised in a manner authorized by Florida law (e.g., if the decedent is survived by a minor child and cannot devise the homestead or is survived by a spouse and no minor child but the decedent does not devise the homestead outright to the decedent’s surviving spouse).

Generally, if not devised as permitted by law, the homestead descends as other intestate property, unless the decedent is survived by a spouse and one or more descendants, in which case the surviving spouse receives a life estate with a vested remainder in the then living descendants, per stirpes; however, there is a 6 month post-death period in which there is a right of election for the surviving spouse to instead take a 50% tenant in common interest with the other 50% passing to the decedent’s then living descendants, per stirpes.

Florida Statutes Section 732.401 provides:

**732.401 Descent of homestead.—**

(1) If not devised as authorized by law and the constitution, the homestead shall descend in the same manner as other intestate property; but if the decedent is survived by a spouse and one or more descendants, the surviving spouse shall take a life estate in the homestead, with a vested remainder to the descendants in being at the time of the decedent's death per stirpes.

(2) In lieu of a life estate under subsection (1), the surviving spouse may elect to take an undivided one-half interest in the homestead as a tenant in common, with the remaining undivided one-half interest vesting in the decedent's descendants in being at the time of the decedent's death, per stirpes.

(a) The right of election may be exercised:

1. By the surviving spouse; or
2. With the approval of a court having jurisdiction of the real property, by an attorney in fact or guardian of the property of the surviving spouse. Before approving the election, the court shall determine that the election is in the best interests of the surviving spouse during the spouse's probable lifetime.

(b) The election must be made within 6 months after the decedent's death and during the surviving spouse's lifetime. The time for making the election may not be extended except as provided in paragraph (c).

(c) A petition by an attorney in fact or by a guardian of the property of the surviving spouse for approval to make the election must be filed within 6 months after the decedent's death and during the surviving spouse's lifetime. If the petition is timely filed, the time for making the election shall be extended for at least 30 days after the rendition of the order allowing the election.

(d) Once made, the election is irrevocable.

(e) The election shall be made by filing a notice of election containing the legal description of the homestead property for recording in the official record books of the county or counties where the homestead property is located. The notice must be in substantially the following form:

ELECTION OF SURVIVING SPOUSE  
TO TAKE A ONE-HALF INTEREST OF  
DECEDENT'S INTEREST IN  
HOMESTEAD PROPERTY

STATE OF  
COUNTY OF

1. The decedent, \_\_\_\_\_, died on \_\_\_\_\_. On the date of the decedent's death, The decedent was married to \_\_\_\_\_, who survived the decedent.

2. At the time of the decedent's death, the decedent owned an interest in real property that the affiant believes to be homestead property described in s. 4, Article X of the State Constitution, which real property being in \_\_\_\_\_ County, Florida, and described as: (description of homestead property).

3. Affiant elects to take one-half of decedent's interest in the homestead as a tenant in common in lieu of a life estate.

4. If affiant is not the surviving spouse, affiant is the surviving spouse's attorney in fact or guardian of the property, and an order has been rendered by a court having jurisdiction of the real property authorizing the undersigned to make this election.

(Affiant)

Sworn to (or affirmed) and subscribed before me this day  
of (month), (year), by (affiant)

(Signature of Notary Public-State of Florida)

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

Personally Known OR Produced Identification

(Type of Identification Produced)

(3) Unless and until an election is made under subsection (2), expenses relating to the ownership of the homestead shall be allocated between the surviving spouse, as life tenant, and the decedent's descendants, as remaindermen, in accordance with chapter 738. If an election is made, expenses relating to the ownership of the homestead shall be allocated between the surviving spouse and the descendants as tenants in common in proportion to their respective shares, effective as of the date the election is filed for recording.

(4) If the surviving spouse's life estate created in subsection (1) is disclaimed pursuant to chapter 739, the interests of the decedent's descendants may not be divested.

(5) This section does not apply to property that the decedent owned in tenancy by the entireties or in joint tenancy with rights of survivorship.

Florida Statutes Section 731.201(10) defines a "devise" and provides:

(10) "Devise," when used as a noun, means a testamentary disposition of real or personal property and, when used as a verb, means to dispose of real or personal property by will or trust. The term includes "gift," "give," "bequeath," "bequest," and "legacy." A devise is subject to charges for debts, expenses, and taxes as provided in this code, the will, or the trust.

Florida Statutes Section 732.4015 defines a devise of homestead property and provides as follows:

**732.4015 Devise of homestead.—**

(1) As provided by the Florida Constitution, the homestead shall not be subject to devise if the owner is survived by a spouse or a minor child or minor children, except that the homestead may be devised to the owner's spouse if there is no minor child or minor children.

(2) For the purposes of subsection (1), the term:

(a) "Owner" includes the grantor of a trust described in s. 733.707(3) that is evidenced by a written instrument which is in existence at the time

of the grantor's death as if the interest held in trust was owned by the grantor.

(b) "Devise" includes a disposition by trust of that portion of the trust estate which, if titled in the name of the grantor of the trust, would be the grantor's homestead.

(3) If an interest in homestead has been devised to the surviving spouse as authorized by law and the constitution, and the surviving spouse's interest is disclaimed, the disclaimed interest shall pass in accordance with chapter 739.

Thus, for homestead in a decedent's name or for homestead in a revocable trust, the devise restrictions apply.

#### B. Statutory Provisions Regarding Homestead Waivers

Florida Statutes Section 732.702 provides a statutory procedure for waiving spousal rights, including homestead rights, under written contracts, agreements or waivers.

Generally, under that statute, a waiver of "all rights" is sufficient to waive all spousal rights in an agreement under the statute. Florida Statutes Section 732.702(2) provides that if the agreement, contract or waiver is executed after marriage, then each spouse must make a fair disclosure to the other of that spouse's estate. No disclosure is required prior to marriage. Florida Statutes Section 732.702(3) provides that no consideration is required for the agreement, contract, or waiver to be valid.

Florida Statutes Section 732.702 provides:

##### **732.702 Waiver of spousal rights.—**

(1) The rights of a surviving spouse to an elective share, intestate share, pretermitted share, homestead, exempt property, family allowance, and preference in appointment as personal representative of an intestate estate or any of those rights, may be waived, wholly or partly, before or after marriage, by a written contract, agreement, or waiver, signed by the waiving party in the presence of two subscribing witnesses. The requirement of witnesses shall be applicable only to contracts, agreements, or waivers signed by Florida residents after the effective date of this law. Any contract, agreement, or waiver executed by a nonresident of Florida, either before or after this law takes effect, is valid in this state if valid when executed under the laws of the state or country where it was executed, whether or not he or she is a Florida resident at the time of death. Unless the waiver provides to the contrary, a waiver of "all rights," or equivalent language, in the property or estate of a present or prospective spouse, or a complete property settlement entered into after, or in anticipation of, separation, dissolution of marriage, or divorce, is a waiver of all rights to elective share, intestate share, pretermitted share, homestead, exempt property, family allowance, and preference in appointment as personal representative of an intestate estate, by the waiving party in the property of the other and a renunciation by the waiving party of all

benefits that would otherwise pass to the waiving party from the other by intestate succession or by the provisions of any will executed before the written contract, agreement, or waiver.

(2) Each spouse shall make a fair disclosure to the other of that spouse's estate if the agreement, contract, or waiver is executed after marriage. No disclosure shall be required for an agreement, contract, or waiver executed before marriage.

(3) No consideration other than the execution of the agreement, contract, or waiver shall be necessary to its validity, whether executed before or after marriage.

Recent case law has highlighted the issue of whether joining in a deed (without any more formal agreement or acknowledgement) constitutes a waiver of homestead rights. The purpose of this new statutory proposal is to clarify how to waive homestead rights in a deed and offer a safe harbor for practitioners and the public.

### C. Case Law

The first published case on the issue of whether joining in a deed might constitute a homestead waiver was *Habeeb v. Linder*, 36 Fla. L. Weekly D300 (Fla. 3d DCA 2011) (Feb. 9, 2011). The Third District Court of Appeal initially published an opinion holding that by joining in a deed from one's spouse to that spouse's revocable trust, the joining spouse waived her post-death homestead devise restriction rights. The court reasoned that the use of the word "hereditaments" in the deed constituted a waiver of homestead devise restrictions. Subsequently, however, on May 17, 2011, in a sua sponte Order, the Third District Court of Appeal withdrew the *Habeeb* decision. Thus, because of the withdrawal (and as a result of a settlement of that case which meant a final decision was not pursued), *Habeeb* is not citable precedent.

However, subsequently, Florida's Fourth District Court of Appeal, in *Stone v. Stone*, 157 So. 3d 295 (Fla. 4th DCA 2014), held that a spouse waived her homestead rights by joining in the execution of a deed, conveying her husband's one-half (1/2) interest in a homestead property to a qualified personal residence trust. The *Stone* decision is consistent with the withdrawn opinion in *Habeeb*, that joining in a deed can constitute a waiver, even if the deed contained no special waiver language and even if there was no evidence of a financial disclosure.

After the *Stone* decision, the Fourth District Court of Appeal held that where a deed conveying the wife's interest in a homestead residence to a qualified personal residence trust, without the joinder of the wife's spouse, the wife did not have standing to subsequently challenge the transfer. The court held that only the husband could challenge the transfer. *Lyons v. Lyons*, 155 So. 3d 1179 (Fla. 4th DCA 2014).

Although not expressly addressed in *Habeeb*, *Stone* or *Lyons*, Florida courts have consistently held that waivers of constitutional rights must be made knowingly and intelligently. See *Chames v. DeMayo*, 972 So. 2d 850 (Fla. 2007). Thus, with potentially conflicting case law, future litigation on the issue of whether a deed may constitute a waiver of homestead protections

seems likely. Confusion on this issue may impair efficacious planning and may also impair the process of transferring title to real estate after the owner has died.

It appears likely that in some situations, the facts might warrant a finding that a conveyance by one spouse to the other (or by joining in a conveyance to a trust) includes a waiver of all spousal rights to the homestead residence. In other situations the facts might warrant a finding that executing a deed, in and of itself, might not be considered a knowing and intelligent waiver.

Some Florida attorneys, as well as non-attorneys and out-of-state attorneys preparing deeds, may construe *Lyons* and *Stone* decisions as applicable to all situations in which one spouse conveys to the other spouse. Because those cases were judicial determinations involving specific facts, they cannot be relied upon to find that a deed from one spouse to the other is always a waiver of the alienation and devise restrictions.

Additionally, The Fund Title Notes, Title Note 16.04.14, provides that a pre-nuptial or post-nuptial agreement should not be relied upon without judicial approval to determine a waiver of the restrictions on the devise of homestead. Real estate practitioners cannot rely upon the *Lyons* and *Stone* rulings because they illustrate the need for judicial approval of any purported waiver. The *Stone* and *Lyons* decisions illustrate the need for a judicial determination of both the homestead status at the time of the owner's death and the validity of any purported waiver. The *Lyons* decision added the additional consideration of standing when evaluating the validity of a waiver of a constitutional right.

Therefore, it is believed adopting a statutory "safe harbor" defining the statutory requirements for a waiver of constitutional homestead protections within a deed would provide more certainty for both the citizens of Florida, their planning and litigation attorneys, and the courts.

#### D. Waiving Homestead Rights Via a Deed

Because ownership interests conveyed by a deed, interests devised by a will or trust, and the owner's personal circumstances can vary significantly at any point in time, Florida's "legal chameleon" (homestead) presents substantial and real difficulties in examining a waiver via deed.<sup>1</sup> Although there is an argument that Warranty and Quitclaim deeds constitute a conveyance of "all rights," it is not clear if there is or should be a distinction in whether either or both may constitute a homestead waiver. Both Warranty deeds and Quitclaim deeds are often

<sup>1</sup> For example, consider a Warranty deed to a one spouse's revocable trust by married Michigan residents. The property later becomes the primary residence of the couple. Is it reasonable to assume that the non-owner spouse understood that the home could be sold without his or her consent, leaving them homeless? Is it reasonable to assume that the non-owner spouse understood that the constitutional devise restrictions would not apply at the owner's death? The result is clearly against public policy, unless there was a knowing and intelligent waiver.

Also, consider a married couple seeking a reverse mortgage. The mortgage broker advises the couple that the wife is too young to qualify for a reverse mortgage, so the title company prepares a deed conveying ownership to the husband. Would the average Floridian understand that they may have no homestead rights upon their spouse's death.

used in estate planning and other circumstances. It is assumed that sometimes spouses signing such deeds intend to waive their homestead rights, sometimes spouses signing such deeds believe they will continue to enjoy the spousal rights (post-death devise restrictions) associated with the homestead real property owned by the other spouse, and sometimes the waiver of constitutional homestead protections is not considered at all.

Therefore, the adoption of a safe harbor rule and express deed waiver language should increase the chances that waivers within a deed are knowing and voluntary and reduce the chances that waivers are made by mistake or due to lack of understanding. The procedures set forth in Section 732.702 will continue to be available as a means for a spouse to waive constitutional homestead protections.

### **III. EFFECT OF PROPOSED CHANGE**

The addition of proposed Section 732.7025 will simplify the process by which a spouse may waive his or her right to inherit homestead property by allowing for a waiver of post-death homestead devise restrictions to be made via a deed, which includes certain safe harbor language.

The new section will create a presumption that the statutory language, or substantially similar language, constitutes an intentional waiver of a specific homestead protection for a married person that would otherwise apply upon the death of the other spouse. It is not the exclusive method for waiving such rights.

The proposed change is to add the following new statute to the Florida Probate Code:

#### **732.7025 Waiver of Constitutional and Spousal Rights by Conveyance -**

- (1) If the following or substantially similar language is included in a deed a spouse shall be presumed to have waived that spouse's rights as a surviving spouse with respect to the devise restrictions under Art. X, s. 4(c) of the Florida Constitution:

By joining in this deed, I intend to waive homestead rights that would otherwise prevent my spouse from devising the homestead property in this deed to someone other than me.

- (2) This language shall not be considered to be a waiver of the protection against the owner's creditor claims during the owner's lifetime and after death, and shall not be considered a waiver of the restrictions against alienation by mortgage, sale, gift, or deed without the joinder of the owner's spouse.

#### **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 benefit the private sector by providing certainty and predictability for Florida residents and their advisors as they plan for the disposition of constitutionally-protected homestead upon death.

#### **VI. CONSTITUTIONAL ISSUES**

It is anticipated that this legislation will not raise constitutional issues. The proposed changes do not conflict with the public policy underlying the constitutional homestead protections. In some instances, the proposed changes will alert Florida residents, persons who later become Florida residents after signing a deed for Florida real property, and their advisors that constitutional protections must be considered when a married person signs a deed.

#### **VII. OTHER INTERESTED PARTIES**

Other groups that may have an interest in the legislative proposal include the following:

The Family Law Section of the Florida Bar  
The Elder Law Section of the Florida Bar

# LEGISLATIVE POSITION REQUEST FORM

GOVERNMENTAL AFFAIRS OFFICE

Date Form Received \_\_\_\_\_

**GENERAL INFORMATION**

**Submitted By** Jeffrey S. Goethe, Co-Chair, Homestead Issues Study Committee, a General Standing Committee of the Real Property Probate & Trust Law Section

**Address** 3119 Manatee Avenue West, Bradenton, FL 34205  
Telephone: (941) 741-8224, ext. 1323

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

**CONTACTS**

**Board & Legislation Committee Appearance**

**Jeffrey S. Goethe**, Barnes Walker, Goethe, Hoonhout, Perron & Shea, PLLC, 3119 Manatee Avenue West, Bradenton, FL 34205; Telephone (941) 741-8224

**Andrew Marvel O'Malley**, Carey O'Malley Whitaker, et. al., 712 S Oregon Ave., Tampa, FL 33606-2516, Telephone (813) 250-0577

**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)

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(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** \_\_\_\_\_



---

(Name of Group or Organization)

(Support, Oppose or No Position)

---

(Name of Group or Organization)

(Support, Oppose or No Position)

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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.



**RICK SCOTT**  
GOVERNOR

June 26, 2017

FILED  
2017 JUN 26 PM 7:11  
OFFICE OF THE GOVERNOR  
TALLAHASSEE, FLORIDA

Secretary Ken Detzner  
Secretary of State  
Florida Department of State  
R.A. Gray Building  
500 South Bronough Street  
Tallahassee, Florida 32399

Dear Secretary Detzner:

By the authority vested in me as Governor of the State of Florida, under the provisions of Article III, Section 8, of the Constitution of Florida, I do hereby veto and transmit my objections to Committee Substitute for Committee Substitute for House Bill 277, enacted during the 119th Session of the Legislature of Florida, during the Regular Session of 2017 and entitled:

An act relating to wills and trusts...

The bill creates the "Florida Electronic Wills Act" which authorizes the creation of electronic wills, and provides that the execution of electronic wills may be witnessed and notarized through the use of remote technology. The bill also specifies that electronic wills of residents and nonresidents may be probated in Florida.

This bill has generated much debate among stakeholders who seek to find the right balance between providing safeguards to protect the will-making process from exploitation and fraud while also incorporating technological options that make wills financially accessible to a greater number of Florida's citizens. While the idea of electronic wills is innovative and may transform estate planning for Floridians, I believe this bill fails to strike the proper balance between competing concerns.

As Governor, I oversee the appointment of notaries public in the State of Florida and have a responsibility to ensure that notaries safeguard the most vulnerable Floridians against fraud and exploitation. While the concept of remote notarization is meant to provide increased access to legal services like estate planning, the remote notarization provisions in the bill do not adequately ensure authentication of the identity of the parties to the transaction and are not cohesive with the notary provisions set forth in Chapter 117, Florida Statutes.

Secretary Ken Detzner  
June 26, 2017  
Page Two

Furthermore, providing an additional Florida venue for the probate of nonresident wills based only upon the qualified custodian's location in this state could burden Florida's court system with the probate of estates that may have no Florida nexus other than that the wills were created and stored here. Additionally, if the state where the decedent is domiciled does not recognize electronic wills as a valid declaration of intent, the individual could be left intestate.

Furthermore, I have concerns with the delayed implementation of the remote witnessing, remote notarization, and nonresident venue provisions of this bill. The Legislature delayed these provisions to April 1, 2018, in order to address "substantive changes and outstanding questions" during the next legislative session. Rather than sign an imperfect bill into law, I encourage the Legislature to continue to work on answering these outstanding questions and address the issues comprehensively during the next legislative session.

For the reasons stated above, I withhold my approval of Committee Substitute for Committee Substitute for House Bill 277 and do hereby veto the same.

Sincerely,

A handwritten signature in black ink, appearing to be 'Rick Scott', with a large, sweeping flourish on the left side and a long horizontal line extending to the right.

Rick Scott  
Governor

1 A Bill To Be Entitled

2 An Act relating to open and expired permits;  
3 creating s. 553.7905 to provide procedures for  
4 closing open and expired building permits;  
5 amending s. 489.129 to clarify that failure to  
6 obtain inspections and close permits is a  
7 violation of a contractor's license; providing an  
8 effective date.

9  
10 Section 1. Section 553.7905, Florida Statutes,  
11 is created to read:

12 553.7905 Open and expired permits; procedures  
13 for closing; notices to owners applying for permits.

14 (1) Any building permit issued for any portion  
15 of construction of any commercial, residential or  
16 mixed-use project that has not received final  
17 inspection approval and complied with other  
18 requirements of the permit at issue within one year  
19 from the expiration of the notice of commencement or  
20 last amendment thereto, or in the absence of a notice  
21 of commencement within one year from the last  
22 inspection conducted under the permit or, if no  
23 inspections have been performed on a project without a  
24 notice of commencement, within two years from the date  
25 of issuance of the permit, shall be considered an open  
26 permit. If an open permit expires without receiving  
27 final inspection approval and complying with other  
28 requirements of the permit at issue, it shall also be  
29 considered an expired permit as defined in Section  
30 105.4 of the Florida Building Code. A closed permit  
31 is a permit in which any of the following apply: 1) a  
32 final inspection approval is authorized along with  
33 other permit requirements, 2) where no work was  
34 started under the original permit within six months  
35 after issuance of the permit, or 3) where the  
36 requirements of subsections 1(a) or (b) below have

37 been satisfied. Uncompleted permitted projects may be  
38 transferred or sold and completed by a new owner in  
39 accordance with any local governing jurisdiction's  
40 procedures or requirements. Open and expired permits  
41 may be closed by or on behalf of the current property  
42 owner, regardless of whether the property owner is the  
43 same owner who originally applied for the permit or is  
44 a subsequent owner, by complying with requirements for  
45 closing permits pursuant to a mutual agreement between  
46 the current property owner and the building department  
47 that issued the permit or, absent such an agreement,  
48 by complying with the following procedures:

49 (a) The property owner may retain the original  
50 contractor who obtained the permit or hire a different  
51 Florida licensed contractor, bearing any license  
52 required for the performance of any work necessary to  
53 satisfy conditions of the permit at issue to close the  
54 open or expired permit, to reactivate the permit if it  
55 is expired, perform any necessary work to fulfill all  
56 requirements of the open or expired permit, including  
57 correction of any code violations in accordance with  
58 the code in effect when the application for the permit  
59 was filed, satisfy any requirements of the permit at  
60 issue not yet satisfied, and obtain any necessary  
61 inspections and perform any other actions required for  
62 a proper closure of the permit. The Florida license  
63 of whichever contractor performs these functions shall  
64 be current and active. Said contractor and owner  
65 shall comply with the building department's change of  
66 contractor process, after which said contractor shall  
67 not be liable for any existing defects or existing  
68 work failing to comply with any applicable code,  
69 regulation, ordinance, requirement of the permit at  
70 issue or law other than as to work actually performed  
71 by said contractor. The property owner and permit  
72 holder under the original open or expired permit shall

73 remain liable, within the period of any applicable  
74 statute of limitations or repose, for any defects in  
75 its work or failure to comply with any applicable  
76 code, regulation, ordinance, permit requirement or  
77 law. To the extent required by Chapter 489, Fla.  
78 Stats., the owner or contractor may hire licensed  
79 subcontractors in the scope of the permitted work who  
80 may perform the functions of the contractor as  
81 outlined in this subsection to the extent of work  
82 covered by its license. All work required to properly  
83 close an open or expired permit under this section  
84 shall be performed in accordance with the building  
85 code in effect on the date of filing of the  
86 application for the open or expired permit.

87 (b) As an alternative to the procedure in  
88 subsection 1(a) above, the property owner may hire a  
89 licensed engineer or architect, possessing a current  
90 and active Florida license, experienced in designing,  
91 supervising or inspecting work of the nature of the  
92 work covered by the open or expired permit at issue  
93 and having at least three years' experience in  
94 performing field inspections as to such work, to  
95 inspect the construction work subject to the open or  
96 expired building permit, direct any repairs necessary  
97 to comply with all requirements of the permit at  
98 issue, then confirm compliance therewith by submitting  
99 an affidavit bearing the seal of the engineer or  
100 architect to the issuing building department. The  
101 affidavit shall be substantially in the following  
102 form:

103 I, (specify name), possess a current and active  
104 (specify architectural or engineering) license within  
105 the State of Florida and am experienced in designing,  
106 supervising, or inspecting work of the nature covered  
107 by the open or expired permit at the real property  
108 located at (specify address). I have at least three

109 years' experience in performing field inspections as  
110 to such work. I have inspected the construction work  
111 subject to the open or expired building permit number  
112 (specify number) and I confirm that the construction  
113 work complies with all known requirements of the  
114 permit at issue.

115  
116 Signed:

117  
118 (affix licensing seal)  
119

120 If any of the permitted work includes construction  
121 outside the engineer's or architect's area of  
122 expertise, the owner, engineer or architect may hire  
123 engineers or architects licensed in the scope of the  
124 permitted work, who may direct any necessary repairs  
125 to comply with all requirements of the permit at  
126 issue, then the engineer or architect hired by the  
127 property owner, engineer or architect shall confirm  
128 compliance by submitting to the issuing building  
129 department a signed and sealed affidavit attesting to  
130 same. The building department issuing the permit  
131 shall accept the affidavit or affidavits referenced in  
132 this subsection, as satisfaction of all requirements  
133 of the permit at issue and shall thereafter close the  
134 building permit, unless it conducts its own final  
135 inspections within seven business days of receipt of  
136 the affidavit or affidavits. If the building  
137 department conducts their own final inspection and  
138 discovers conditions constituting code or permit  
139 violations within the scope of work covered by the  
140 permit, then said conditions shall be repaired to the  
141 building department's satisfaction as a condition to  
142 closing the permit. All work required to properly  
143 close an open or expired permit under this section  
144 shall be performed in accordance with the building

145 code in effect on the date of filing of the  
146 application for the open or expired permit.

147 (c) The procedures in subsections 1(a) and (b)  
148 above shall apply regardless of whether the building  
149 permit is still open or has expired. In lieu of the  
150 procedures in subsections 1(a) and (b), the owner may  
151 use the original contractor to close the permit.

152 (2) A failure to properly close a building  
153 permit within five years after expiration of the date  
154 of recordation of the notice of commencement or last  
155 amendment thereto or, if no notice of commencement was  
156 recorded, then within seven years after the building  
157 permit was issued, shall not authorize the permitting  
158 authority to deny issuance of permits to, issue  
159 notices of violation to, or fine, penalize, sanction,  
160 or assess fees against a subsequent arms-length  
161 purchaser of the subject property for value. The  
162 permitting authority shall continue to have all rights  
163 and remedies against the property owner and contractor  
164 identified on the permit. The Florida Building  
165 Commission shall adopt rules and amend the applicable  
166 Florida Building Code to enact procedures designed to  
167 encourage property owners and contractors to close  
168 permits properly.

169 (3) Individual trade permits or other permit  
170 types as determined by the Building Official may be  
171 closed out when no apparent safety hazard exists, and  
172 for which no code violations have been previously  
173 documented, after six years from issuance of the  
174 permit. This provision shall not apply to permits for  
175 building projects still under construction with  
176 legally granted permit extensions. Local boards or  
177 governmental jurisdictions may adopt stricter  
178 standards to govern the closeout of building permits,  
179 provided that such stricter standards may be applied  
180 only prospectively and may not apply retroactively to

181 previously issued permits, regardless of whether the  
182 permits remain open or have expired, and provided that  
183 such stricter standards may not change the procedures  
184 referenced in subsections 1(a) and (b) above and may  
185 not supersede this statute.

186 (4) As an alternative to the procedures  
187 referenced in sections 1(a) and 1(b) above on real  
188 property consisting of single or multiple family  
189 dwellings up to and including four units, with the  
190 approval of the Building Official, the owner of a home  
191 for sale may assume the role of an owner/builder in  
192 order to resolve an open permit for a substantially  
193 completed project when the project is abandoned or  
194 otherwise not completed by the licensed contractor who  
195 obtained the permit, which shall not require the owner  
196 to continue to reside in the home for one year.

197 (5) A Building Official is authorized to refuse  
198 to accept new permit applications from any contractor  
199 who holds expired or inactive permits in excess of a  
200 specific publicized threshold, set in advance by  
201 written policy or ordinance in a local jurisdiction.  
202 A contractor shall be allowed to hold an unlimited  
203 number of active permits.

204 (6) Provisions authorizing permits to be  
205 administratively closed by the Building Official shall  
206 not be applicable to permits subject to regulation by  
207 external agencies not specifically enforcing the  
208 Florida Codes except where the Building Official has  
209 regulatory authority over other areas related to the  
210 permit, such as zoning or other land development code  
211 provisions. Such agencies and regulations not subject  
212 to these provisions include, but are not limited to,  
213 local zoning and land use regulations, local storm  
214 water management regulations, local platting and  
215 subdivision requirements, Department of Health  
216 regulations, Department of Business and Professional

217 Regulation requirements, local utility standards, and  
218 provisions of the National Flood Insurance Program and  
219 Community Rating System.

220 (7) When issuing any building permit, the  
221 building department shall provide to the property  
222 owner a mandatory written notice, which may be  
223 electronically provided if the permit package is  
224 electronically provided, in the following form:

225 IMPORTANT NOTICE REGARDING COMPLYING WITH THE  
226 INSPECTION AND APPROVAL PROCESS FOR ALL PERMITS

227 "You are receiving a building permit authorizing  
228 the construction referenced in the application that  
229 was submitted to this building department by you or on  
230 your behalf. The permit is issued with conditions,  
231 including required building inspections and assurances  
232 that the construction complies with the design  
233 submitted with the permit application and any other  
234 conditions referenced in the permit. It is critical  
235 that you ensure that all necessary building  
236 inspections are passed before the expiration of any  
237 notice of commencement or amendment thereto, as these  
238 inspections are important to ensure construction has  
239 been performed in a safe and proper manner. If you  
240 have any questions regarding these procedures, please  
241 call the building department. Your failure to comply  
242 may also result in unsafe conditions arising from your  
243 construction."

244 (8) The applicable governmental entity may  
245 charge only one search fee for searching for and  
246 identifying open or unexpired building permits for any  
247 units or subunits assigned by any municipality or  
248 county to a particular tax parcel identification  
249 number, in an amount commensurate with research and  
250 time costs incurred by the jurisdiction.

251 (9) As to all permits issued after the effective  
252 date of this section, the building department shall  
253 send a written notice to the current property owner at  
254 a point from one year to three years after issuance of  
255 any permit that has not been properly closed out  
256 within that time advising the property owner of the  
257 need to properly close out the permit upon completion  
258 of the work covered by same. Failure to send written  
259 notice shall not relieve the contractor or property  
260 owner from taking the necessary actions to legally  
261 close out a permit.

262 (10) Nothing in this Act shall prevent local  
263 government jurisdictions from enforcing any provision  
264 of a local land development code or other local  
265 ordinances to the extent not inconsistent with this  
266 section or prevent local governmental jurisdictions  
267 from enacting provisions that further enhance the  
268 process of closing out open or expired permits.

269 Section 2. Section 489.129(1)(o), Florida  
270 Statutes, is amended to read:

271 489.129 Disciplinary proceedings.-

272 (1) The board may take any of the following  
273 actions against any certificateholder or registrant:  
274 place on probation or reprimand the licensee, revoke,  
275 suspend, or deny the issuance or renewal of the  
276 certificate or registration, require financial  
277 restitution to a consumer for financial harm directly  
278 related to a violation of a provision of this part,  
279 impose an administrative fine not to exceed \$10,000  
280 per violation, require continuing education, or assess  
281 costs associated with investigation and prosecution,  
282 if the contractor, financially responsible officer, or  
283 business organization for which the contractor is a  
284 primary qualifying agent, a financially responsible  
285 officer, or a secondary qualifying agent responsible

286 under s. 489.1195 is found guilty of any of the  
287 following acts:

288 (o) Proceeding on any job without obtaining  
289 applicable local building department permits and  
290 inspections or failing to properly close out any  
291 permits or satisfy any applicable permit requirements.

292  
293 Section 3. This act shall take effect July 1,  
294 2017.

295  
296  
297  
298 ~~ACTIVE: 9489893\_1~~  
299 ACTIVE: 9689304\_1

## **WHITE PAPER**

### **OPEN AND EXPIRED PERMITS**

#### **I. SUMMARY**

This legislation provides a procedure by which property owners may close dormant open or expired building permits in instances when the contractor who obtained the permit is no longer around to close it by calling for a final inspection. Unfortunately, this is an all too frequent occurrence. It has frustrated countless sellers in the sale of real property, after a simple municipal search reveals the existence of a long open or expired building permit. In particular, this bill will provide a mechanism for sellers and purchasers of real property, on which a building permit was previously obtained, but not properly closed, to close the permits as part of the purchase and sale transaction for the property. The bill does not have a fiscal impact on state funds.

#### **II. CURRENT SITUATION**

Most homeowners hire contractors to perform home improvements. In most cases, the contractors obtain the proper building permits as required by law. The work is performed, the homeowner is satisfied. Unfortunately, often times, the job seems complete to the homeowner; however, they may not realize that a final inspection was never performed and thus the building permit was never properly closed.

These open or expired permits are usually undetected in the local municipalities' building department records. The property owner likely paid the contractor for the completed work, but has no mechanism to know that the permit was properly closed. It is anything but simple for a property owner to discover this information at or immediately after the contractor leaves the job. The work seems property completed from a visual standpoint. The contractor may tell the homeowner that the job is complete.

In many other situations, the construction work was not actually completed for any number of reasons and the failure to call for a final inspection left the incomplete nature of the work undetected by the building department. Regardless of whether the work has been completed or not, the problem becomes exacerbated when the owner sells the property to an innocent third party purchaser. The purchaser usually searches for open permits and, when they are detected, a decision must be made about whether to buy the property knowing a final inspection was not obtained, and hence that there may or may not be unremedied construction defects. This is not a title defect for which insurance is available, so the purchasers must either abandon their goal of buying the property based upon an unknown situation or proceed with the purchase, again not knowing whether the construction was properly performed, especially in the large number of cases where the construction work has been covered up and can no longer be inspected a part of the purchase transaction. By this time, the contractor is usually no longer available to provide information or remedial work, creating anxiety and uncertainty over the extent or existence of the risk of construction defects.

Unfortunately, if the permit was not properly closed with the local municipality, it may be many years before the property owners' are advised by their buyers' attorney/title company (or lenders' attorney/title company in a refinance) that the contractors failed to properly close the permits by calling for a final inspection and submitting the appropriate paperwork to the building department. Thereafter, these homeowners face incredible stress and pressure to get the dormant permits closed to allow for a sale or refinance to occur. They must hire an expeditor or another contractor to attempt to close a long dormant permit. Many in the trade do not want to take this on, given the stale nature of the permit, and fear of what each municipality may require under its particular building department requirements.

Further complicating this problem is that the most common purchase contract in the State is the FAR/BAR contract. For the past several years, the contract does not require a seller to close these permits; a situation that now promotes passing the problem on to the buyer, or frustrating the sale of the property entirely. This situation arises due to no fault of the homeowner who hired a licensed contractor, paid the contractor and assumed that the contractor performed all activities necessary to comply with their licensure. Although the Florida Construction Licensing Code in Chapter 489 contemplates licensed contractors obtaining all required inspections, that statute is not well enforced and this situation is pervasive.

### **III. EFFECT OF PROPOSED CHANGES**

#### **A. A Proposed New Statute Section 553.7905**

Any building permit that has not been properly closed by passing all necessary final inspections and complying with other permit requirements within one year from the expiration of the notice of commencement or last amendment thereto, or in the absence of a notice of commencement within one year from the last inspection conducted under the permit, or if no inspections have been performed on a project without a notice of commencement, within two years from the date of issuance of the permit, may be closed by or on behalf of the current property owner, even if the current owner is not the same owner who originally applied for the permit, by complying with one of the following procedures:

1. The property owner may hire a Florida licensed contractor to reopen the permit if it is expired, perform any necessary work to fulfill all requirements of the permit, and call for the necessary inspections and properly close the permit. The contractor will not be liable for any defects in the work performed by the prior contractor who failed to close the permit, but will be liable for any defects in its own work. All work required to properly close the permit shall be performed in accordance with the building code in effect on the date of issuance of the open or expired permit.

2. As an alternative procedure to the one listed above, the property owner may hire a licensed engineer or architect to inspect the work, direct any repairs necessary to comply with permit requirements, then confirm compliance by submitting an affidavit to the building department. The building department may conduct its own final inspections within five business days of receiving the affidavit or the statute provides that the building department shall be deemed to have accepted the affidavit as satisfaction of all permit requirements and shall thereafter close the permit.

A failure to properly close a building permit within five years after expiration of the date of recording of the notice of commencement or last amendment thereto or, if no notice of commencement was recorded, then within seven years after the building permit was issued, shall not, in and of itself, authorize the permitting authority to deny future permits to, or issue notices of violation, fines, penalties, sanctions or fees against, a subsequent bona fide purchaser of the residence for value. The permitting authority will, however, continue to have all rights and remedies against the original property owner and contractor who obtained and failed to close the permit. This provision preserves all legal rights the building department has, but makes clear the bona fide subsequent purchaser will not inherit the responsibility for same merely by purchasing the home.

When issuing any building permit, the building department shall provide to the property owner a mandatory written notice using the same language that is provided in the new statute advising the owner of the importance of properly closing permits.

The building department shall send a written notice to permit holders on one- to four-family residences one year after issuance of any permit that has not been properly closed within that time advising the permit holder of the need to properly close the permit upon completion of the work.

Municipalities, counties and building departments may not charge separate search fees for open or expired permits for separate units or sub-units assigned to a single tax parcel identification number. Only one search fee per tax parcel identification number may be charged, in an amount not to exceed \$150.00.

#### **B. Section 489.129**

Section 489.129 of the Florida Construction Licensing Code, governing disciplinary proceedings against licensed contractors, will be amended to specify that the failure to properly close permits or satisfy any permit requirements shall be grounds for disciplinary proceedings by the Construction Industry Licensing Board against the contractor who obtained the permit, but failed to properly close it. The scope of discipline, if any, will be determined by the Construction Industry Licensing Board and not set out in this proposed legislation.

### **IV. FISCAL IMPACT ON STATE AND LOCAL GOVERNMENTS**

The proposal does not have a fiscal impact on state or local governments. It does however benefit the local governments by clearing up dormant open or expired permits from their system, eliminating unnecessary recordkeeping and system maintenance of these old permits.

### **V. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR**

There are no economic costs to the private sector other than costs that would be incurred to properly close the permit, which costs would be required absent this law because the permits have to be closed anyway. The economic benefits to the private sector are enhanced because, with a specific, easy to follow procedure for closing permits, real estate sales transactions that may have not been pursued because of the uncertainty tied to open or expired permits will now move forward. Many other real estate professionals, including, but not limited to: lenders, real

estate agents, title companies would benefit from this legislation as it would provide a clear avenue for transactions to move forward.

**VI. CONSTITUTIONAL ISSUES**

The legislation does not raise any constitutional issues.

**VII. OTHER INTERESTED PARTIES**

The Building Officials Association of Florida were consulted regarding this proposal and may be interested in the final legislation. We believe they may generally support this legislation, although they may have further changes to the exact final language.

ACTIVE: BPUUsers/SMEZER:9718512\_1

# LEGISLATIVE POSITION REQUEST FORM

GOVERNMENTAL AFFAIRS OFFICE

Date Form Received \_\_\_\_\_

## GENERAL INFORMATION

**Submitted By** Lee A. Weintraub, Chair, Open/Expired Permits Task Force (Real Property Problems Study Committee) of the Real Property Probate & Trust Law Section (RPPTL Approval Date \_\_\_\_\_, 2017)

**Address** Becker & Poliakoff, P.A., One E. Broward Blvd., Suite 1800, Fort Lauderdale, FL 33301; (954) 985-4147

**Position Type** Open/Expired Permits Task Force (Real Property Problems Study Committee), RPPTL Section, The Florida Bar (Florida Bar, section, division, committee or both)

## CONTACTS

### Board & Legislation Committee Appearance

**Lee A. Weintraub**, Becker & Poliakoff, P.A., One E. Broward Blvd., Suite 1800, Fort Lauderdale, FL 33301 Telephone: (954) 985-4147  
Email: [lweintraub@bplegal.com](mailto:lweintraub@bplegal.com)

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Email: [medenfield@deanmead.com](mailto: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:

Support the establishment of a procedure by which property owners may close open or expired permits, the protection from liability of bona fide purchasers of property with open or expired permits, and the establishment of procedures to reduce the number of future open or expired permits.

**Reasons For Proposed Advocacy:**

Although open or expired permits are not title defects for which insurance or other protections are available, they may nevertheless create significant liability for purchasers of real property, thereby jeopardizing potential property sales. Where the original construction contractor is no longer available, it is often difficult to properly inspect work and close permits, especially in an expedited time frame sufficient to accommodate property closing schedules. An easy to follow procedure is necessary to permit an owner of property to expeditiously close building permits in a manner that will not jeopardize a potential sale of property. The number of instances in which property sales are lost because of open or expired permits is extremely high, necessitating a process to comply with permits and facilitate property sales.

**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**

In light of the immediacy of the need to advance this proposed legislation, it has not been referred to other Bar sections, committees or attorney organizations]

Building Officials Association of Florida Support  
(Name of Group or Organization) (Support, Oppose or No Position)

Florida Engineering Society 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.**

1 A bill to be entitled

2 An act relating to forcible entry and unlawful detainer;  
3 amending sections 82.01, 82.02, 82.03, 82.04, 82.05,  
4 82.091, 82.101, F.S.; renumbering section 82.045, F.S., to  
5 section 82.08, F.S.; creating section 82.08, F.S.;  
6 repealing section 82.061, F.S., relating to process to  
7 service complaint; repealing section 82.071, F.S., relating  
8 to evidence of damages; and repealing section 82.081, F.S.,  
9 relating to form of verdict; defining the terms "unlawful  
10 entry", "forcible entry" and "unlawful detention";  
11 providing a cause of action for terminating possession due  
12 to unlawful entry or forcible entry or unlawful detention;  
13 limiting the actions and the effect of judgment; providing  
14 for service of process; providing for damages; and  
15 providing an effective date.

16  
17 Be it Enacted by the Legislature of the State of Florida:

18  
19 Section 1. Section 82.01, Florida Statutes, is amended to  
20 read:

21 82.01. Definitions. ~~"Unlawful entry and forcible entry"~~  
22 ~~defined.~~

23 (1) "Unlawful entry" is defined as a person's entry into  
24 and possession of any property except when entry is given by a  
25 person entitled to possession thereof or as authorized by law,  
26 even if the possession is temporary or of a portion of the  
27 property.

28 (2) "Forcible entry" is defined as a person's entry into  
29 and possession of any property with force, not in a peaceable,  
30 easy and open manner, even when entry is authorized by a person  
31 entitled to possession thereof and even if the possession is  
32 temporary or of a portion of the property.

33           (3) "Unlawful detention" is defined as a person holding  
34 possession of property without the consent of a person entitled  
35 to possession or after consent is withdrawn, even if the  
36 possession is temporary or of a portion of the property.

37           (4) "Record title holder" is defined as a person holding  
38 title to property evidenced by an instrument or instruments  
39 recorded in the public records of the county where the property  
40 is located.

41           (5) "Property" is defined as land, tenements, and  
42 hereditaments, including any building or structure thereon, or  
43 any part thereof, existing, built, erected, or placed on land or  
44 other property, permanently or temporary, and the appurtenant  
45 facilities, grounds, areas and property held out for the use of  
46 persons in possession generally. ~~No person shall enter into any~~  
47 lands or tenements except when entry is given by law, nor shall  
48 any person, when entry is given by law, enter with strong hand  
49 or with multitude of people, but only in a peaceable, easy and  
50 open manner.

51           Section 2. Section 82.02, Florida Statutes, is amended to  
52 read:

53           82.02 Applicability. ~~"Unlawful entry and unlawful detention"~~  
54 ~~defined.~~

55           (1) This Chapter shall not apply with regard to possession  
56 under a residential tenancy governed by Chapter 83 Florida  
57 statutes.

58           (2) This Chapter shall not apply with regard to possession  
59 under Chapters 513 and 723.

60           ~~(1) No person who enters without consent in a peaceable,~~  
61 ~~easy and open manner into any lands or tenements shall hold them~~  
62 ~~afterwards against the consent of the party entitled to~~  
63 ~~possession.~~

64 ~~—— (2) This section shall not apply with regard to residential~~  
65 ~~tenancies.~~

66 Section 3. Section 82.03, Florida Statutes, is amended to  
67 read:

68 82.03 Remedies. ~~Remedy for unlawful entry and forcible~~  
69 ~~entry.~~

70 (1) By an action under this Chapter, a party entitled to  
71 possession of property, including constructive possession by a  
72 record title holder, may terminate the possession of all or of  
73 any portion of said property, by any person holding possession  
74 by "Unlawful entry" or "Forcible entry" or "Unlawful detention".

75 (2) A plaintiff is not required to give a defendant any  
76 pre-suit notice as a condition precedent to maintaining an  
77 action under this Chapter.

78 (3) The actions for possession and damages may be  
79 bifurcated. If the plaintiff recovers possession, the plaintiff  
80 shall recover from the defendant or defendants damages of double  
81 the reasonable rental value of the property for the time from  
82 the beginning of the "Unlawful entry" or "Forcible entry" or  
83 "Unlawful detention" until possession is delivered, if the trier  
84 of fact finds that the detention is willful and knowingly  
85 wrongful. Plaintiff may recover other damages to the property or  
86 for waste.

87 (4) All actions under this Chapter shall be conducted  
88 according to the summary procedure provided in s. 51.011, and  
89 the court shall advance the cause on the calendar. ~~If any person~~  
90 ~~enters or has entered into lands or tenements when entry is not~~  
91 ~~given by law, or if any person enters or has entered into any~~  
92 ~~lands or tenements with strong hand or with multitude of people,~~  
93 ~~even when entry is given by law, the party turned out or~~  
94 ~~deprived of possession by the unlawful or forcible entry, by~~  
95 ~~whatever right or title the party held possession, or whatever~~

96 ~~estate the party held or claimed in the lands or tenements of~~  
97 ~~which he or she was so dispossessed, is entitled to the summary~~  
98 ~~procedure under s. 51.011 within 3 years thereafter.~~

99 Section 4. Section 82.04, Florida Statutes, is amended to  
100 read:

101 82.04 Questions involved in this proceeding. ~~Remedy for~~  
102 ~~unlawful detention.~~

103 In actions under this Chapter, the court shall determine the  
104 right of possession and damages and no question of title of the  
105 property shall be determined, other than as necessary to  
106 determine the right of possession or the record title holder.

107 ~~(1) If any person enters or has entered in a peaceable manner~~  
108 ~~into any lands or tenements when the entry is lawful and after~~  
109 ~~the expiration of the person's right continues to hold them~~  
110 ~~against the consent of the party entitled to possession, the~~  
111 ~~party so entitled to possession is entitled to the summary~~  
112 ~~procedure under s. 51.011, at any time within 3 years after the~~  
113 ~~possession has been withheld from the party against his or her~~  
114 ~~consent.~~

115 ~~(2) This section shall not apply with regard to residential~~  
116 ~~tenancies.~~

117 Section 5. Section 82.045, Florida Statutes, is renumbered  
118 to Section 82.08, and amended to read:

119 82.08 ~~82.045~~ Remedy for unlawful detention by a transient  
120 occupant of residential property.

121 (1) As used in this section, the term "transient occupant"  
122 means a person whose residency in a property dwelling intended  
123 for residential use has occurred for a brief length of time, is  
124 not pursuant to a lease, and whose occupancy was intended as  
125 transient in nature.

126 (a) Factors that establish that a person is a transient  
127 occupant include, but are not limited to:

- 128           1.    The person does not have an ownership interest,  
129 financial interest, or leasehold interest in the property  
130 entitling him or her to occupancy of the property.
- 131           2.    The person does not have any property utility  
132 subscriptions.
- 133           3.    The person does not use the property address as an  
134 address of record with any governmental agency, including, but  
135 not limited to, the Department of Highway Safety and Motor  
136 Vehicles or the supervisor of elections.
- 137           4.    The person does not receive mail at the property.
- 138           5.    The person pays minimal or no rent for his or her stay  
139 at the property.
- 140           6.    The person does not have a designated space of his or  
141 her own, such as a room, at the property.
- 142           7.    The person has minimal, if any, personal belongings at  
143 the property.
- 144           8.    The person has an apparent permanent residence  
145 elsewhere.
- 146           (b) Minor contributions made for the purchase of household  
147 goods, or minor contributions towards other household expenses,  
148 do not establish residency.
- 149           (2) A transient occupant unlawfully detains a residential  
150 property if the transient occupant remains in occupancy of the  
151 residential property after the party entitled to possession of  
152 the property has directed the transient occupant to leave.
- 153           (3) Any law enforcement officer may, upon receipt of a  
154 sworn affidavit of the party entitled to possession that a  
155 person who is a transient occupant is unlawfully detaining  
156 residential property, direct a transient occupant to surrender  
157 possession of residential property. The sworn affidavit must set  
158 forth the facts, including the applicable factors listed in

159 paragraph (1)(a), which establish that a transient occupant is  
160 unlawfully detaining residential property.

161 (a) A person who fails to comply with the direction of the  
162 law enforcement officer to surrender possession or occupancy  
163 violates s. 810.08. In any prosecution of a violation of s.  
164 810.08 related to this section, whether the defendant was  
165 properly classified as a transient occupant is not an element of  
166 the offense, the state is not required to prove that the  
167 defendant was in fact a transient occupant, and the defendant's  
168 status as a permanent resident is not an affirmative defense.

169 (b) A person wrongfully removed pursuant to this  
170 subsection has a cause of action for wrongful removal against  
171 the person who requested the removal, and may recover injunctive  
172 relief and compensatory damages. However, a wrongfully removed  
173 person does not have a cause of action against the law  
174 enforcement officer or the agency employing the law enforcement  
175 officer absent a showing of bad faith by the law enforcement  
176 officer.

177 (4) A party entitled to possession of a property has a  
178 cause of action for unlawful detainer against a transient  
179 occupant pursuant to s. 82.03~~4~~. The party entitled to possession  
180 is not required to notify the transient occupant before filing  
181 the action. If the court finds that the defendant is not a  
182 transient occupant but is instead a tenant of  
183 residential property ~~dwelling~~ governed by part II of chapter 83,  
184 the court may not dismiss the action without first allowing the  
185 plaintiff to give the transient occupant the notice required by  
186 that part and to thereafter amend the complaint to pursue  
187 eviction under that part.

188 Section 6. Section 82.05, Florida Statutes, is amended to  
189 read:

190           82.05 Process, Service. ~~Questions involved in this~~  
191 ~~proceeding.~~

192           (1) After at least two attempts to obtain service as  
193 provided by law, if the defendant cannot be found in the county  
194 in which the action is pending and either the defendant has no  
195 usual place of abode in the county or there is no person 15  
196 years of age or older residing at the defendant's usual place of  
197 abode in the county, the sheriff shall serve the summons by  
198 attaching it to some part of the property involved in the  
199 proceeding. The minimum time delay between the two attempts to  
200 obtain service shall be 6 hours.

201           (2) If a plaintiff causes, or anticipates causing, a  
202 defendant to be served with a summons and complaint solely by  
203 attaching them to some conspicuous part of the property involved  
204 in the proceeding, the plaintiff shall provide the clerk of the  
205 court with two additional copies of the complaint and two  
206 prestamped envelopes addressed to the defendant. One envelope  
207 shall be addressed to the residence of the defendant, if known.  
208 The second envelope shall be addressed to the last known  
209 business address of the defendant, if known. The clerk of the  
210 court shall immediately mail the copies of the summons and  
211 complaint by first-class mail, note the fact of mailing in the  
212 docket, and file a certificate in the court file of the fact and  
213 date of mailing. Service shall be effective on the date of  
214 posting or mailing, whichever occurs later; and at least 5 days  
215 from the date of service must have elapsed before a judgment for  
216 final removal of the defendant may be entered. ~~No question of~~  
217 ~~title, but only right of possession and damages, is involved in~~  
218 ~~the action.~~

219           Section 7. Section 82.091, Florida Statutes, is amended to  
220 read:

221           82.091 Judgment and execution.—If the court shall enter  
222 judgment for verdict is in favor of plaintiff, the court shall  
223 enter judgment that plaintiff shall recover possession of the  
224 property to which plaintiff is entitled described in the  
225 complaint with his or her, and plaintiff's damages and costs,  
226 and the court shall award a writ of possession forthwith to be  
227 executed without delay and execution for plaintiff's damages and  
228 costs. If the judgment verdict is for defendant, the court shall  
229 enter judgment against plaintiff dismissing the complaint and  
230 order that defendant recover costs.

231           Section 8. Section 82.101, Florida Statutes, is amended to  
232 read:

233           82.101 Effect of judgment.—No judgment rendered either for  
234 plaintiff or defendant bars any action of trespass for injury to  
235 the property or ejectment or quiet title action between the same  
236 parties respecting the same property. No judgment verdict is  
237 conclusive as to ~~of~~ the facts therein ~~found~~ in any future  
238 action for ~~of~~ trespass or ejectment or quiet title. A judgment  
239 rendered either for plaintiff or defendant under this Chapter  
240 may be superseded, in whole or in part, by a subsequent judgment  
241 in an action for trespass for injury to the property or  
242 ejectment or quiet title action involving the same parties  
243 respecting the same property.

244           Section 9. Section 82.061, Florida Statutes, is repealed.

245           Section 10. Section 82.071, Florida Statutes, is repealed.

246           Section 11. Section 82.081, Florida Statutes, is repealed.

247           Section 12. This act shall take effect upon becoming a  
248 law.

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

**White Paper**

**Proposal To Amend Chapter 82, Fla. Stat.  
Forcible Entry and Unlawful Detainer**

**I. SUMMARY**

This proposal is intended to:

1. provide a cause of action for unlawful detainer where a person obtains possession of property with the consent of the person entitled to possession but that consent is later withdrawn,
2. clarify the forcible entry and unlawful detainer statutes by providing definitions,
3. eliminate any ambiguity as to whether pre-suit notice is a condition precedent to an action for forcible entry or unlawful detainer,
4. clarify that an action for unlawful detainer may be used where the property is residential but the relationship between the plaintiff and defendant is not that of landlord and tenant, which is subject to the provisions of Chapter 83, Part II, Florida Statutes,
5. remove the procedural jury verdict forms contained within the statute; and,
6. modernize much of the archaic language used in the current law which derives from old English statutes that makes it difficult to apply to current practice.

**II. CURRENT SITUATION**

The current Forcible Entry and Unlawful Detainer statute is generally intended to provide a procedure to expeditiously recover possession of property under certain circumstances. As written, it has generated confusion and uncertainty amongst practitioners, the courts and the general public. An absence of significant case law has contributed to the lack of guidance to the legal community. Chapter 82 contains numerous provisions the committee sought to address, including:

1. Under current § 82.01 and § 82.02, unlawful entry, forcible entry and unlawful detention are defined, but § 82.03 only provides remedies for unlawful entry and forcible entry. Although the title to § 82.04 is “[r]emedy for unlawful detention,” no explicit remedy for unlawful detention is given.
2. Current Chapter 82 does not contain a definition of the word “property” but uses a variety of similar meaning words that may be taken out of context or be ambiguous, nor does it contain a definition of “record title holder”.

3. The statute does not explicitly state whether pre-suit notice is a requirement prior to commencing an action under Chapter 82.
4. The current statute contains a procedural jury verdict form for forcible or unlawful entry and for unlawful detainer.

### **III. EFFECT OF PROPOSED CHANGES**

1. Chapter 82, Florida Statutes, has been limited in its use because as written, it does not expressly provide a cause of action to recover possession where a person has possession of property through the consent of the owner or person entitled to possession, but the owner revokes that consent (“unlawful detention”). Under a modern day scenario, two common factual situations where unlawful detainer would be applicable are: (1) where a property is purchased with a person already occupying the property, such as a “squatter,” or (2) a person entitled to possession invites a family member or other person to reside at the property, and the person who granted that possession subsequently revokes their consent. The affect of the proposed changes would be to provide a cause of action to remove the person and recover possession.
2. Pre-suit notice is generally a condition precedent to filing an action for possession under the residential and commercial eviction statutes. The current unlawful detainer statute contains no pre-suit notice requirement, but neither does it explicitly state that pre-suit notice is not a condition precedent to bringing an action. The proposed change to the statute would clarify that no pre-suit notice is required prior to filing an action under Chapter 82.
3. Revising the definitions of “unlawful entry”, “forcible entry” and “unlawful detention” and including definitions of “property” and “record title holder” provide clarity and uniformity that is absent from the current statute.
4. The removal of the procedural jury verdict forms from the statute brings the statute in line with modern day civil practice.

### **IV. FISCAL IMPACT ON STATE AND LOCAL GOVERNMENTS**

The proposal does not have a fiscal impact on state and 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**

The proposal raises no constitutional issues.

**VII. OTHER INTERESTED PARTIES**

No other parties of interest are identified.

# LEGISLATIVE POSITION REQUEST FORM

GOVERNMENTAL AFFAIRS OFFICE

Date Form Received \_\_\_\_\_

## GENERAL INFORMATION

**Submitted By** Arthur J. Menor, Chair, Real Property Problems Study Committee of the Real Property Probate & Trust Law Section (RPPTL Approval)  
Date \_\_\_\_\_, 2017

**Address** Shutts & Bowen LLP, City Place Tower, 525 Okeechobee Blvd., Suite 1100, West Palm Beach, FL 33401 Telephone (561) 650-8510.

**Position Type** Real Property Problems Study Committee, RPPTL Section, The Florida Bar (Florida Bar, section, division, committee or both)

## CONTACTS

### Board & Legislation Committee Appearance

**Arthur J. Menor**, Shutts & Bowen LLP, City Place Tower, 525 Okeechobee Blvd., Suite 1100, West Palm Beach, FL 33401 Telephone (561) 650-8510.  
**W. Cary Wright**, Carlton Fields Jordan Burt, P.A., 4221 W. Boy Scout Blvd., Suite 1000, Tampa, FL 33607, Telephone: (813) 223-7000  
**Peter M. Dunbar**, Dean, Mead & Dunbar, P.A., 215 S. Monroe Street, Suite 815, Tallahassee, FL 32301, Telephone: (850) 999-4100 Email: pdunbar@deanmead.com  
**Martha J. Edenfield**, Dean, Mead & Dunbar, P.A., 215 S. Monroe Street, Suite 815, Tallahassee, FL 32301, Telephone: (850) 999-4100 Email: medenfield@deanmead.com (List name, address and phone number)

### Appearances

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

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

## PROPOSED ADVOCACY

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

### If Applicable,

**List The Following** N/A \_\_\_\_\_  
(Bill or PCB #) (Bill or PCB Sponsor)

**Indicate Position** Support \_\_\_\_\_ Oppose \_\_\_\_\_ Tech Asst. \_\_\_\_\_ Other \_\_\_\_\_

### Proposed Wording of Position for Official Publication:

"Supports proposed legislation to provide a cause of action for unlawful detainer, clarify the applicability of actions for forcible entry and unlawful detainer, clarify that no pre-suit notice is required in such actions, remove procedural jury verdict forms, and modernize archaic language."

### Reasons For Proposed Advocacy:

Currently there is no remedy for unlawful detainer though it is defined in Chapter 82. In addition, the existing statute contains some ambiguous provisions and outdated language which should be clarified for the benefit of practitioners, the judiciary and the public.



1                   A bill to be entitled  
2           An act relating to ejectment; amending s. 66.021, F.S.;  
3           revising procedure for ejectment; providing for exclusive  
4           jurisdiction of circuit courts; providing an effective  
5           date.

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

8  
9           Section 1. Section 66.021, Florida Statutes, is amended to  
10 read:

11           66.021 Ejectment Procedure.

12           (1) RIGHT OF ACTION.—A person with a superior right to  
13 possession of real property may maintain an action in ejectment  
14 to recover possession of the property.

15           (2) JURISDICTION.—Circuit courts shall have exclusive  
16 jurisdiction for an ejectment action.

17           (3) NOTICE.—A plaintiff shall not be required to provide any  
18 pre-suit notice or demand to a defendant as a condition to  
19 maintaining an action under this part.

20           (4)(1) LANDLORD NOT A DEFENDANT. When it appears before  
21 trial that a defendant in ejectment is in possession as a tenant  
22 and that his or her landlord is not a party, the landlord shall  
23 be made a party before further proceeding unless otherwise  
24 ordered by the court.

25           (5)(2) DEFENSE MAY BE LIMITED. A defendant in an action of  
26 ejectment may limit his or her defense to a part of the property  
27 mentioned in the complaint, describing such part with reasonable  
28 certainty.

29           (6)~~(3)~~ WRIT OF POSSESSION; EXECUTION TO BE JOINT OR SEVERAL.  
30 When plaintiff recovers in ejectment, he or she may have one writ  
31 for possession, damages and costs or, if the plaintiff elects,  
32 have separate writs for possession and damages.

33           (7)~~(4)~~ CHAIN OF TITLE. ~~The Plaintiff with his or her~~  
34 ~~complaint and the defendant with his or her answer~~  
35 shall include ~~serve~~ a statement setting forth chronologically the  
36 chain of title on which the party ~~he or she~~ will rely at  
37 trial and attach copies of each instrument identified in the  
38 statement. ~~The If any part of the chain of title is recorded,~~  
39 statement shall set forth the names of the grantors and the  
40 grantees, the dates for each instrument, and if the instrument is  
41 recorded, the statement shall set forth the book and page of the  
42 record or instrument number of the record ~~thereof; if an~~  
43 ~~unrecorded~~  
44 ~~instrument is relied on, a copy shall be attached. The court may~~  
45 ~~require the original to be submitted to the opposite party for~~  
46 ~~inspection.~~ If the party relies on a claim or right without color  
47 of title, the statement shall specify how and when the claim  
48 originated and the facts on which the claim is based. If  
49 defendant and plaintiff claim under a common source, the  
50 statement need not deraign title before the common source.

51           (8)~~(5)~~ TESTING SUFFICIENCY. If either party seeks ~~wants~~ to  
52 test the legal sufficiency of any instrument or court proceeding

53 in the chain of title of the opposite party, the party shall do  
54 so before trial by motion setting up his or her objections with a  
55 copy of the instrument or court proceedings attached. The motion  
56 shall be disposed of before trial. If either party determines  
57 that he or she will be unable to maintain his or her claim by  
58 reason of the order, that party may so state in the record and  
59 final judgment shall be entered for the opposite party.

60 (9) OPERATION.—This section is cumulative to other existing  
61 remedies and shall not be construed to limit other remedies  
62 available under Florida law.

63 Section 2. This act shall take effect upon becoming a law.

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

**Proposal to Amend § 66.021, Fla. Stat.**

**I. SUMMARY**

This proposal is intended to:

- (1) provide a statutory definition for ejectment actions;
- (2) include in the ejectment statute a statement reflecting that circuit courts have exclusive jurisdiction over those actions;
- (3) eliminate any ambiguity as to whether pre-suit notice is a condition precedent to an ejectment action; and
- (4) update language in the statute.

**II. CURRENT SITUATION**

Under current § 66.021, Fla. Stat. the situation is as follows:

- (1) The statute provides no definition for ejectment actions;
- (2) The statute does not explicitly state whether a plaintiff in an ejectment action has a pre-suit obligation to provide notice to a defendant;
- (3) The Florida Statutes provide circuit courts with exclusive jurisdiction for ejectment actions in § 26.012(f), Fla. Stat. but this jurisdictional provision is not referenced in the ejectment statute;
- (4) Legal practitioners and lay people may encounter confusion as to the difference between ejectment actions and other possessory actions under Chapters 82 and 83 of the Florida Statutes. One example is *Pro-Art Dental Lab, Inc. v. V-strategic Group, LLC*, 986 So. 2d 1244 (Fla. 2007). There, a commercial tenant filed an ejectment action in county court. The Florida Supreme Court held that the proper result would be dismissal of the action, or removal, because county courts lack jurisdiction over ejectment actions. The Court suggested that the landlord's confusion may have occurred because possessory actions under Florida law can be "somewhat overlapping" and "may certainly be similar in some respects." *Id.* at 1250-1251. The *Pro-Art* case is a cautionary tale in that the landlord endured three rounds of appellate review before having to re-file the action in circuit court.

**III. EFFECT OF PROPOSED CHANGES**

1. **The proposal amends the statute to add a definition for ejectment actions: “A person with a superior right to possession of real property may maintain an action in ejectment to recover possession of the property.”**

This change provides a statutory definition for ejectment actions. The statute never previously defined this type of action, and litigants have relied upon case law and secondary sources to fill this gap. The definition provided by the proposal intends to make ejectment a comprehensive cause of action which can overlap with alternate possessory actions.

2. **The proposal includes a statement that circuit courts have exclusive jurisdiction over these actions.**

This change is superfluous to existing law, since § 26.012(f), Fla. Stat. already contains this jurisdictional provision. The inclusion of this language into § 66.021, Fla. Stat. intends to reduce the possibility that litigants incorrectly file an ejectment action in county rather than circuit court.

3. **The proposal clarifies that ejectment actions have no pre-suit notice requirement.**

The current ejectment statute does not impose a pre-suit notice requirement, but Chapter 83, Florida Statutes, does require a plaintiff to provide a specific form of pre-suit notice to defendants in other possessory actions. No cases from Florida’s District Courts of Appeal have found that a plaintiff in an ejectment action must provide a defendant a pre-suit notice similar to those found in possessory actions under Chapter 83, Florida Statutes. The proposal clarifies that a plaintiff’s right to possession in an ejectment action is not dependent upon any pre-suit notice. This clarification intends to eliminate the possibility of a dismissal of an ejectment action under a finding that the plaintiff failed to comply with conditions precedent. Conditions precedent for ejectment actions have never been explicitly adopted into the statute or previous case law.

4. **The proposal rewords the statutory requirement that the parties demonstrate a chain of title in their pleadings.**

The changes to the statutory pleading requirements demonstrating a chain of title intend to simplify the statute’s current language.

#### **IV. FISCAL IMPACT ON STATE AND LOCAL GOVERNMENTS**

The proposal does not have a fiscal impact on state and 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 are no known constitutional issues.

**VII. OTHER INTERESTED PARTIES**

No other parties of interest are identified.

# LEGISLATIVE POSITION REQUEST FORM

GOVERNMENTAL AFFAIRS OFFICE

Date Form Received \_\_\_\_\_

## GENERAL INFORMATION

**Submitted By** Arthur J. Menor, Chair, Real Property Problems Study Committee of the Real Property Probate & Trust Law Section (RPPTL Approval)  
Date \_\_\_\_\_, 2017

**Address** Shutts & Bowen LLP, City Place Tower, 525 Okeechobee Blvd., Suite 1100, West Palm Beach, FL 33401 Telephone (561) 650-8510.

**Position Type** Real Property Problems Study Committee, RPPTL Section, The Florida Bar (Florida Bar, section, division, committee or both)

## CONTACTS

### Board & Legislation Committee Appearance

**Arthur J. Menor**, Shutts & Bowen LLP, City Place Tower, 525 Okeechobee Blvd., Suite 1100, West Palm Beach, FL 33401 Telephone (561) 650-8510.  
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(List name, address and phone number)

### Appearances

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

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

## PROPOSED ADVOCACY

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

### If Applicable,

**List The Following** N/A  
(Bill or PCB #) (Bill or PCB Sponsor)

**Indicate Position** Support \_\_\_\_\_ Oppose \_\_\_\_\_ Tech Asst. \_\_\_\_\_ Other \_\_\_\_\_

### Proposed Wording of Position for Official Publication:

“Supports proposed legislation to provide a statutory definition for Ejectment actions, provide for jurisdiction in the circuit courts for such actions, eliminate any ambiguity over whether pre-suit notice is required in such actions, and update the language in the existing Ejectment statute.”

### Reasons For Proposed Advocacy:

The proposed legislation clarifies the ejectment statute to assist legal practitioners, lay people and the judiciary in understanding when this possessory action may be utilized.



1                                   A bill to be entitled  
2           An act relating to extent of liens; amending s.  
3           713.10, F.S.; clarifying existing law; revising  
4           language that provides that the interest of a lessor  
5           is not subject to a lessee's improvements if the  
6           lessee is leasing a mobile home lot; amending s.  
7           713.13, F.S.; clarifying existing law; providing that  
8           the notice of commencement can be for a term longer or  
9           shorter than one year; providing an effective date.

10

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

12

13           Section 1. Section 713.10(2)(b)3, Florida Statutes, is  
14           deleted in its entirety.

15

16           Section 2. Section 713.10, Florida Statutes, is revised to  
17           add a new subsection (4):

18

19           (4) The interest of the lessor is not subject to liens for  
20           improvements made by the lessee when the lessee is a mobile home  
21           owner who is leasing a mobile home lot in a mobile home park  
22           from the lessor.

23

24           Section 3. Section 713.13(1)(c), Florida Statutes, is  
25           revised to read:

26

27           (c) If the contract between the owner and a contractor  
28           named in the notice of commencement expresses a period of time  
29           for completion of the improvement, the notice of commencement  
30           must state that it is effective for at least that period of  
31           time. The expiration date stated in the notice of commencement  
32           may be more or less than one year. If no period of time is

33 stated, then the expiration date of the notice of commencement  
34 will be one year from the date of recording. The preceding  
35 sentence clarifies existing law and applies to all notices of  
36 commencement in this state, regardless of when recorded. Any  
37 payments made by the owner after the expiration of the notice of  
38 commencement are considered improper payments.

39

40 Section 4. Section 713.13(6), Florida Statutes is revised  
41 to read:

42

43 (6) A notice of commencement is not effectual in law or  
44 equity against a conveyance, transfer, or mortgage of or lien on  
45 the real property described in the notice, or against creditors  
46 or subsequent purchasers for a valuable consideration, after the  
47 expiration date of the notice of commencement. If no expiration  
48 date is stated in the notice of commencement, as it may be  
49 amended, the expiration date is one year after the date of the  
50 original recording of the notice of commencement. A notice of  
51 commencement may not be amended after its expiration.

52

53 Section 5. This act shall take effect July 1, 2017.

**WHITE PAPER**  
**PROPOSED REVISION OF SECTIONS 713.10 AND 713.13,**  
**FLORIDA STATUTES**

**Prepared by the Real Property, Probate & Trust Law Section of the Florida Bar**  
**Real Property Problems Study Committee**

**I. SUMMARY**

Section 713.10(2)(b), Florida Statutes, sets forth three separate circumstances for which the interest of the lessor is not subject to liens for improvements made by the lessee. However, the current statute omits the word “or” preceding clause 3 of subsection 713.10(2)(b), which causes the subsection to be ambiguous and subject to various interpretations. To remedy this ambiguity, that portion of the statute was deleted and a new subsection 713.10(4) was included.

Section 713.13, Florida Statutes provides that before a contractor begins construction or repair to any improvement on real property located in Florida, a notice of commencement must be recorded. It also sets forth the many procedures and requirements that must be followed by the contractor and the property owner in connection with the notice of commencement. In the statute's current form, a possible ambiguity exists regarding whether the expiration date on a notice of commencement may be less than one year from the date of recording. In situations where the construction or repair work will clearly last for less than a year, the parties frequently do not specify an expiration date, and thus the default expiration date of one year from recording is deemed to apply. Further, even if the parties specify an expiration date of less than a year, a title company may not rely on that date in addressing the notice of commencement as an exception or requirement in the title commitment. Problems may, and often do, arise where the construction or repair is only for a period much shorter than one year, but the parties fail to terminate the notice of commencement upon the completion of the work. Failure to properly terminate a notice of commencement causes extra, unanticipated, and unnecessary work on behalf of parties involved in a later real estate transactions when the notice of commencement must be properly terminated in accordance with Florida law. Ultimately, the parties to the transaction must locate and obtain a contractor's final payment affidavit and final lien waivers from any lienors giving notice or with a direct contract with respect to a notice of commencement recorded well before the contemplated transaction. This proposed revision to an existing statute is intended to achieve greater clarity regarding the duration of notices of commencement, which may encourage contractors and owners to specifically determine and state the time period that both parties expect the construction to last and avoid the time and expense necessary to terminate an unexpired notice of commencement in order to close a sale or loan transaction. The bill does not have a fiscal impact on state funds.

## II. SECTION-BY-SECTION ANALYSIS

### A. Section 713.10(2)(b)

#### Current Situation:

Section 713.10(2)(b) currently provides:

*(b) The interest of the lessor is not subject to liens for improvements made by the lessee when:*

*1. The lease, or a short form or a memorandum of the lease that contains the specific language in the lease prohibiting such liability, is recorded in the official records of the county where the premises are located before the recording of a notice of commencement for improvements to the premises and the terms of the lease expressly prohibit such liability; or*

*2. The terms of the lease expressly prohibit such liability, and a notice advising that leases for the rental of premises on a parcel of land prohibit such liability has been recorded in the official records of the county in which the parcel of land is located before the recording of a notice of commencement for improvements to the premises, and the notice includes the following:*

- a. The name of the lessor.*
- b. The legal description of the parcel of land to which the notice applies.*
- c. The specific language contained in the various leases prohibiting such liability.*
- d. A statement that all or a majority of the leases entered into for premises on the parcel of land expressly prohibit such liability.*

*3. The lessee is a mobile home owner who is leasing a mobile home lot in a mobile home park from the lessor.*

#### Effect of Proposed Changes:

By deleting 713.10(2)(b)(3) entirely and adding a new subsection 713.10(4) which states:

*“The interest of the lessor is not subject to liens for improvements made by the lessee when the lessee is a mobile home owner who is leasing a mobile home lot in a mobile home park from the lessor,”* clarifies that the foregoing is a separate and additional circumstance in which the interest of the lessor is not subject to liens for improvements made by the lessee.

## **B. Section 713.13(1)(c)**

### Current Situation:

In its current form, Statute 713.13 does not explicitly provide that the period for a notice of commencement may be for shorter than one (1) year. 713.13(1)(c) provides:

*“If the contract between the owner and a contractor named in the notice of commencement expresses a period of time for completion for the construction of the improvement greater than 1 year, the notice of commencement must state that it is effective for a period of 1 year plus any additional period of time. Any payments made by the owner after the expiration of the notice of commencement are considered improper payments.”*

Because this section only references situations where a notice of commencement may be for longer than one year, the language of this provision has been subject to different interpretations regarding whether the term of a notice of commencement must be for at least one year. In order to clarify that a notice of commencement may be for shorter than one year, this proposal seeks to replace the current statute with the following:

*“If the contract between the owner and a contractor named in the notice of commencement expresses a period of time for completion of the improvement, the notice of commencement must state that it is effective for at least that period of time. The expiration date stated in the notice of commencement may be more or less than one year but if no period of time is stated then the expiration date of the notice of commencement will be one year from the date of recording. The preceding sentence clarifies existing law and applies to all notices of commencement in this state, regardless of when recorded. Any payments made by the owner after the expiration of the notice of commencement are considered improper payments.”*

### Effect of Proposed Changes:

This revised section will clarify that a notice of commencement may have an expiration date that is less than one year from recording. This clarification may encourage parties to a notice of commencement to select an expiration date that is less

than one year from the date of recording, where previous uncertainty regarding the term may have caused the expiration date to be left blank, resulting in a one year term, a much longer period than is necessary to properly protect each party's interests.

### **C. Section 713.13(1)(d) [item 9 in the statutory form]**

#### Current Situation:

Item 9 of the statutory form provided in 713.13(1)(d) states:

*“9. Expiration date of notice of commencement (the expiration date will be 1 year from the date of recording unless a different date is specified)”*

This proposal seeks to slightly amend this item on the statutory form to state:

*“9. Expiration date of notice of commencement (the expiration date will be 1 year from the date of recording unless a longer or shorter time period is specified)”*

#### Effect of Proposed Changes:

Replacing “different date” with “longer or shorter time period” on the statutory form will clarify and clearly provide for parties completing a notice of commencement that the expiration date may be less than one year from the date of recording. Using this revised language on the notice of commencement form may encourage parties to select a shorter expiration date, when the parties may otherwise forget or not realize that a shorter expiration date can be selected if it was not specifically enumerated on the form. If parties to a notice of commencement select an expiration date which is earlier than one year from the date of recording, this will reduce the possibility of a notice of commencement remaining open longer than necessary and avoid the time and expense necessary to terminate the open notice of commencement in order to close a sale or loan transaction.

### **D. Section 713.13(6)**

#### Current Situation:

Section 713.13(6) currently provides:

*“Unless otherwise provided in the notice of commencement or a new or amended notice of commencement, a notice of commencement is not effectual in law or equity against a conveyance, transfer, or mortgage of or lien on the real property described in the notice, or against creditors or subsequent*

*purchasers for a valuable consideration, after 1 year after the date of recording the notice of commencement.”*

The proposed changes to 713.13(6) clarifies that the original recorded notice of commencement shall expire on its expiration date and if no expiration date is stated, then the notice of commencement shall expire after one year from the date it was originally recorded. The proposed changes further clarify that a notice of commencement may not be amended after its expiration. :

*“A notice of commencement is not effectual in law or equity against a conveyance, transfer, or mortgage of or lien on the real property described in the notice, or against creditors or subsequent purchasers for a valuable consideration, after the expiration date of the notice of commencement. If no expiration date is stated in the notice of commencement, as it may be amended, the expiration date is one year after the date of the original recording of the notice of commencement. A notice of commencement may not be amended after its expiration.”*

Effect of Proposed Changes:

As stated throughout this proposal, these changes are intended to encourage parties to construction contracts to be completed in less than one year or to select an expiration date for the notice of commencement that is less than one year from the date of recording, which may reduce the possibility of an open notice of commencement and the time and expense necessary to terminate it in order to close a sale or loan transaction.

**III. FISCAL IMPACT ON STATE AND LOCAL GOVERNMENTS**

There is no expected fiscal impact on state or local governments.

**IV. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR**

Revising the portion of the law regarding liens for improvements made by lessees of mobile home lots eliminates the potential for ambiguity and varying interpretations of the law. Further, clarifying that a notice of commencement may be for less than one year may encourage parties to choose an expiration date that is less than a year from the date of recording. If a notice of commencement is not properly terminated, but has an expiration date which is earlier than the default term of one year, the earlier expiration date reduces the probability of it becoming an open and stale notice of commencement which might delay the issuance of title insurance. As a result, this will help expedite and streamline real estate purchase and sale transactions. During the period between when a title commitment is first issued by a title insurance company and the date the transaction is expected to close, a stale notice of commencement can unnecessarily absorb limited time and resources, and in some situations it can delay closing. When a notice of commencement is no longer applicable, and obtaining a release or affidavit from a

contractor is difficult or even impossible, these proposed clarifications to the statute could save prospective buyers and sellers, law firms, title companies and agents from expending unnecessary efforts to achieve the formality of closing out stale and no longer relevant notice of commencements. These proposed revisions to the statute may result in more efficient transactions which save time and money for all parties involved, with no additional risk.

**V. CONSTITUTIONAL ISSUES**

No constitutional issues are expected to arise as a result of this proposal.

**VI. OTHER INTERESTED PARTIES**

Other interested parties include the construction law committee, real property litigation committee, title insurance companies, title agents and lobbying groups.

# LEGISLATIVE POSITION REQUEST FORM

GOVERNMENTAL AFFAIRS OFFICE

Date Form Received \_\_\_\_\_

## GENERAL INFORMATION

**Submitted By** Arthur J. Menor, Chair, Real Property Problems Study Committee of the Real Property Probate & Trust Law Section (RPPTL Approval Date \_\_\_\_\_, 2017)

**Address** Shutts & Bowen LLP, CityPlace Tower, 525 Okeechobee Blvd., Suite 1100, West Palm Beach, FL 33401 Telephone (561) 650-8510.

**Position Type** Real Property Problems Study Committee, RPPTL Section, The Florida Bar (Florida Bar, section, division, committee or both)

## CONTACTS

### Board & Legislation Committee Appearance

**Arthur J. Menor**, Shutts & Bowen LLP, CityPlace Tower, 525 Okeechobee Blvd., Suite 1100, West Palm Beach, FL 33401 Telephone (561) 650-8510.  
**W. Cary Wright**, Carlton Fields Jordan Burt, P.A., 4221 W. Boy Scout Blvd., Suite 1000, Tampa, FL 33607, Telephone: (813) 223-7000  
**Peter M. Dunbar**, Dean, Mead & Dunbar, P.A., 215 S. Monroe Street, Suite 815, Tallahassee, FL 32301, Telephone: (850) 999-4100 Email: pdunbar@deanmead.com  
**Martha J. Edenfield**, Dean, Mead & Dunbar, P.A., 215 S. Monroe Street, Suite 815, Tallahassee, FL 32301, Telephone: (850) 999-4100 Email: medenfield@deanmead.com  
(List name, address and phone number)

### Appearances

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

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

## PROPOSED ADVOCACY

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

### If Applicable,

**List The Following** N/A  
(Bill or PCB #) (Bill or PCB Sponsor)

**Indicate Position** Support \_\_\_\_\_ Oppose \_\_\_\_\_ Tech Asst. \_\_\_\_\_ Other \_\_\_\_\_

### Proposed Wording of Position for Official Publication:

"Supports proposed legislation to: (1) clarify that the interest of a lessor is not subject to improvements made by the lessee of a mobile home lot in s. 713.10, Florida Statutes; and (2) eliminate ambiguity regarding whether the expiration date on a notice of commencement may be less than one year from the date of recording, including an amendment to s. 713.13, Florida Statutes."

### Reasons For Proposed Advocacy:

The proposed revisions to s. 713.10, Florida Statutes, eliminates confusing language and clarifies that the interest of a landlord is not subject to liens for improvements made by a lessee of a mobile home lot. The proposed revisions to s. 713.13, Florida Statutes, further clarifies the duration of notices of commencement, which may encourage contractors and owners to specifically determine and state the time period that both parties expect the construction to last. Where construction or repair work is for a period much shorter than one



1 A bill to be entitled

2 An act relating to (a) the provision for liens upon  
3 real or personal property where no lis pendens has been  
4 recorded, has expired, been withdrawn or otherwise  
5 discharged; (b) the clarification of existing law to  
6 provide that a recorded lis pendens which has not  
7 expired, been withdrawn or otherwise discharged,  
8 remains in effect through the issuance of any  
9 instrument transferring title pursuant to a judicial  
10 sale; (c) amending sections 48.23(1)(b)2. and  
11 48.23(1)(d); and, (d) providing for an effective date.

12 WHEREAS, on August 24, 2016, the Fourth District  
13 Court of Appeal rendered a decision limiting the  
14 duration of the effectiveness of the lis pendens  
15 statute to the entry of a final judgment of  
16 foreclosure. *Ober v. Town of Lauderdale-by-the-Sea*,  
17 2016 WL 4468134 (Fla. 4th DCA 2016).

18 WHEREAS, on January 25, 2017, the Fourth District  
19 Court of Appeal granted rehearing and held that an  
20 effective lis pendens discharges subordinate liens  
21 placed on real property between the entry of a final  
22 judgment of foreclosure and a judicial sale, pursuant

23 to the lis pendens statute. *Ober v. Town of Lauderdale-*  
24 *by-the-Sea*, 2017 WL 361127 (Fla. 4th DCA Jan. 25,  
25 2017).

26 WHEREAS, the Fourth District Court of Appeal  
27 recently granted the Town of Lauderdale-by-the-Sea's  
28 motion for certification of a question of great public  
29 importance to the Florida Supreme Court. *Ober v. Town*  
30 *of Lauderdale-by-the-Sea*, 2017 WL 1076939 (Fla. 4th DCA  
31 Mar. 22, 2017), thereby confirming the need for  
32 legislative clarification.

33 WHEREAS, the Florida Legislature finds that, as a  
34 matter of public policy, the *Ober* case made evident the  
35 need to clarify the intent of the Legislature as to the  
36 duration of the effectiveness of a notice of lis  
37 pendens for proceedings that involve a judicial sale  
38 pursuant to Florida Statutes Section 48.23(1)(d).

39 NOW THEREFORE, Be It Enacted by the Legislature of  
40 the State of Florida:

41 Section 1. Section 48.23(1)(b)2., Florida Statutes, is  
42 amended to read as follows:

43           **48.23 Lis pendens.-**

44           (1)(b)2. Any person acquiring for value an interest in or  
45 lien upon the real or personal property during the pendency of an  
46 action described in subparagraph 1., other than a party to the  
47 proceeding or the legal successor by operation of law, or  
48 personal representative, heir, or devisee of a deceased party to  
49 the proceeding, shall take such interest or lien exempt from all  
50 claims against the property that were filed in such action by the  
51 party who failed to record a notice of lis pendens or whose  
52 notice expired or was withdrawn or discharged, and from any  
53 judgment entered in the proceeding, notwithstanding the  
54 provisions of s. 695.01, as if such person had no actual or  
55 constructive notice of the proceeding or of the claims made  
56 therein or the documents forming the causes of action against the  
57 property in the proceeding.

58           Section 2. Section 48.23(1)(d) is amended to read as  
59 follows:

60           (d) Except for the interest of persons in possession or  
61 easements of use, the recording of such notice of lis pendens,  
62 provided that during the pendency of the proceeding it has not  
63 expired pursuant to subsection (2) or been withdrawn or  
64 discharged, constitutes a bar to the enforcement against the

65 property described in the notice of all interests and liens,  
66 including, but not limited to, federal tax liens and levies,  
67 unrecorded at the time of recording the notice unless the holder  
68 of any such unrecorded interest or lien intervenes in such  
69 proceedings within 30 days after the recording of the notice. If  
70 the holder of any such unrecorded interest or lien does not  
71 intervene in the proceedings and if such proceedings are  
72 prosecuted to a judicial sale of the property described in the  
73 notice, the property shall be forever discharged from all such  
74 unrecorded interests and liens. Unless it expires, is withdrawn,  
75 or it is otherwise discharged, a recorded notice of lis pendens  
76 of such proceedings that are prosecuted to a judicial sale  
77 remains in effect through the recording of any instrument  
78 transferring title of the property described in the notice. The  
79 preceding sentence is intended to clarify existing law. If the  
80 notice of lis pendens expires or is withdrawn or discharged, the  
81 expiration, withdrawal, or discharge of the notice does not  
82 affect the validity of any unrecorded interest or lien.

83 Section 3. This proposal is intended to clarify existing  
84 law.

85 Section 4. This act shall take effect on becoming law.

86  
87

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Revision\Roundtable June 2017\Bill Amending 48.23.docx

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# REAL PROPERTY, PROBATE & TRUST LAW SECTION OF THE FLORIDA BAR

## White Paper

### Proposal to Amend §48.23, Fla. Stat. (Lis Pendens)

#### I. SUMMARY

This proposal to amend §48.23, Florida Statute, is intended to:

- a) Clarify §48.23(1)(d) to preserve the widely understood interpretation of the lis pendens statute that, in proceedings involving a judicial sale, a valid recorded notice lis pendens remains in effect through the recording of an instrument transferring title pursuant to the judicial sale (in order to provide the purchaser with title free and clear of intervening subordinate interests or liens); and
- b) Incorporate the revision to §48.23(1)(b)2., which was previously approved by the RPPTL Section, which extends to those acquiring a lien on real property the protection from litigation against the property where no Notice of Lis Pendens has been recorded, has expired, or was withdrawn.

#### II. SECTION BY SECTION ANALYSIS

##### A. Effectiveness of Notice of Lis Pendens

###### Current Situation

Consistent with the unique nature and purpose of a foreclosure action, a notice of lis pendens serves a dual purpose: to "protect future purchasers or encumbrancers of the property from becoming "embroiled" in the dispute, and to protect the plaintiff from "intervening liens that could impair any property rights claimed ... "' *Fischer v. Fischer*, 873 So. 2d 534, 536 (Fla. 4th DCA 2004) (citations omitted).

Accordingly, the long established and accepted understanding of the lis pendens statute is that its protection from intervening interests and liens remains in effect until the judicial sale of the property, and the subsequent issuance of the instrument transferring title (typically the certificate of title) are final, thereby providing the purchaser at a judicial sale with clear title to the property.

This understanding is consistent with the language of § 48.23(1)( d), Fla. Stat., which provides in part, as follows:

... [T]he recording of such notice of lis pendens ..., constitutes a bar to the enforcement against the property described in the notice of all interests and liens, ... unrecorded at the time of recording the notice unless the holder of any such unrecorded interest or lien intervenes in such proceedings within 30 days after the recording of the notice. If the holder of any such unrecorded interest or lien does not intervene in the proceedings and ***if such proceedings are prosecuted to a judicial sale of the property described in the notice, the property shall be forever discharged from all such unrecorded interests and liens.*** ... (*emphasis added*).

This provision of the lis pendens statute is the foundation for the following language found in Form 1.996(a) of the Florida Rules of Civil Procedure: "On filing the certificate of sale, defendant(s) and all persons claiming under or against defendant(s) since the filing of the notice of lis pendens shall be foreclosed."

Thousands of foreclosures are entered every year. The foreclosed real property is then sold at judicial sale and returned to productive use. Buyers, lenders and title insurers have acted on the understanding that any interest or lien recorded prior to the issuance of the instrument transferring title (typically a certificate of title) was foreclosed and barred from enforcement against the real property.

However, on August 24, 2016, the Fourth District Court of Appeals made a radical departure from common practice and held that the notice of lis pendens terminates when the time for appeal of the final judgment of foreclosure has passed. Thus, code enforcement liens, recorded after the final judgment of foreclosure and prior to the judicial sale were not discharged by the operation of the notice of lis pendens and remained an encumbrance on the real property foreclosed. *Ober v. Town of Lauderdale-by-the-Sea*, 2016 WL 4468134 (Fla. 4th DCA Aug. 24, 2016)

The *Ober* court characterizes the contrary provisions of Form 1.996(a) as a "misstatement of the law" which should be modified to bring it into conformity with the statute and the prevailing practices in the courts. *Ober* at \*2. In fact, the statute (as quoted above) and the prevailing practice is contrary to the interpretation of the *Ober* court.

On January 25, 2017, the Fourth District Court of Appeals granted rehearing and held that liens placed on property between the entry of a final judgment of foreclosure and a judicial sale are discharged by Section 48.23(1)(d), Florida Statutes. *Ober v. Town of Lauderdale-by-the-Sea*, 2017 WL 361127 (Fla. 4th DCA Jan. 25, 2017).

The Court concluded that a proper reading of section 48.23(1)(d) when the proceeding is prosecuted to a judicial sale, the sale discharges all liens, whether recorded before the final judgment or after the final judgment. This conclusion is consistent with Form 1.996(a) of the Florida Rules of Civil Procedure which provides a form for foreclosure judgments which states, in pertinent part, the following:

On filing the certificate of sale, defendant(s) and all persons claiming under or against defendant(s) since the filing of the notice of lis pendens shall be foreclosed of all estate or claim in the property [...]

This ruling confirms that the effect of the lis pendens statute is a bar to enforcement against the property of all interest or liens, recorded or unrecorded, from the time of recording of the notice of lis pendens through the transfer of title, as a result of a judicial sale.

On February 7, 2017, the Town of Lauderdale-by-the-Sea filed a Motion for Certification of a question of great public importance to the Florida Supreme Court. On March 22, 2017, the Fourth District Court of Appeals granted the Town's motion and certified the following question to the Florida Supreme Court:

Whether, pursuant to section 48.23(1)(d), Florida Statutes, the filing of a notice of lis pendens at the commencement of a bank's foreclosure action prevents a local government from exercising authority granted to it by Chapter 162, Florida Statutes, to enforce code violations existing on the foreclosed property after final

foreclosure judgment, where the local government's interest or lien on the property arises after final judgment and did not exist within 30 days after the recording of the notice of lis pendens.

In light of the *Ober* case, clarification of the legislative intent as to the duration of a notice of lis pendens for proceedings involving a judicial sale is paramount. Confirming the current application of the lis pendens statute to effectively bar enforcement of intervening interests and liens, recorded or unrecorded, through the instrument transferring title pursuant to a judicially ordered sale, will avoid potential impairment of numerous real estate titles previously foreclosed throughout the state. Unless the decision in *Ober* (on rehearing) is codified, title will have to be examined to determine whether it is encumbered by interests or liens recorded after the time for appeal of the final judgment of foreclosure had passed and prior to the issuance of the instrument transferring title. Litigation will then ensue to determine the validity of those interests or liens. There will also be a delay in returning foreclosed properties to the market and a burden on the overall economic recovery of the State of Florida, creating a greater burden on property owners, lenders, as well as counties, municipalities and homeowners' associations.

#### Effect of the Proposed Change

The proposed legislation will clarify the existing law to provide that the notice of lis pendens filed and recorded in a proceeding prosecuted to a judicial sale, remains in effect, not only until the time for appeal of the final judgment has passed (typically 30 days) but until the issuance of the instrument transferring title is recorded. This will codify the widely understood meaning of the current statute.

The Florida Legislature, by acting quickly to clarify the statute, the proposed legislation can be applied by the courts to litigation which may be pending at the time the legislation becomes law.

In *Madison at SoHo II Condo. Ass'n Inc. v. Devo Acquisition Ent., LLC.*, 2016 WL 4446527 (Fla. 2d DCA Aug. 24, 2016) the court notes:

Florida courts have 'the right and the duty' to consider the legislature's recently enacted statute clarifying its intent in a prior version of a statute, which was passed soon after a controversy arose in the interpretation of that original, pre-amended statute ... *Id.* at \*4 (citations omitted).

When the Florida legislature clarifies a statute, the amended statute can be used as a tool of statutory construction to guide the interpretation of the pre-amended version of the statute. *Id.* Thus, the proposed legislation will avoid the anticipated flood tide of litigation and the potential cost of discharging encumbrances which were understood to have been discharged by the prosecution of the foreclosure through a judicial sale.

It is recognized that an argument may be made that the current statutory language limits the effectiveness of the notice of lis pendens only through the issuance of the certificate of sale. The current understanding and practice is to the contrary, that the protection of the notice of lis pendens for proceedings that require a judicial sale, extends until the issuance of the instrument transferring title is recorded.

## **B. Additional "Protected" Parties**

### Current Situation

Subsection (1)(b)(2) of the Lis Pendens statute provides that any person acquiring for value an interest in real property during the pendency of an action [affecting such property] ... shall take such interest exempt from all claims against the property that were filed in such action by the party who failed to record a notice of lis pendens or whose notice expired or was withdrawn or discharged.

Florida follows the lien theory (as opposed to the title theory) as to mortgages, therefore, a mortgage does not convey title or “create any interest in real property.” *Southern Colonial Mort. Co., Inc. v. Medeiros*, 347 So. 2d 736, 738 (Fla. 4th DCA 1977). While it is likely that the Legislature intended to include those receiving a mortgage or other lien on the property among the persons protected by the statute, such parties are technically not protected.

#### Effect of the Proposed Change

The proposed change would incorporate the revision to §48.23(1)(b)2., which was previously approved by the RPPTL Section, which extends to those acquiring a lien on real property the protection from litigation against the property where no notice of lis pendens has been recorded, or has expired, or was withdrawn.

### **III. FISCAL IMPACT ON STATE AND LOCAL GOVERNMENTS**

The proposal does not have any fiscal impact on state government. In 2013, the Florida Supreme Court held that code enforcement liens are not entitled to super-priority status and, therefore, such liens are subject to be eliminated by a foreclosure action. *City of Palm Bay v. Wells Fargo Bank, N.A.*, 114 So. 3d 924 (Fla. 2013). The proposed clarification to §48.23(1)(d)1. is in concert with the *City of Palm Bay* holding and the current prevalent practice of barring the enforcement of liens recorded after the notice of lis pendens and prior to recording the instrument transferring title.

### **IV. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR**

The proposal will reconfirm for both potential purchasers at judicial sales and those that purchase directly from the foreclosing lender that the title received is clear and marketable without encumbrances recorded in the gap period. By eliminating the risk of liens recorded in the gap between the final judgment and recording of the instrument transferring title, the otherwise anticipated flood tide of litigation will be avoided, saving lenders, purchasers and title insurers the expense of litigation. This will further preserve the marketability and value of foreclosed real properties, and the overall recovery of the Florida real estate market.

### **V. CONSTITUTIONAL ISSUES**

The clarification of the lis pendens statute is a tool of statutory construction that can be used to guide the interpretation of the pre-amended version of the statute. It is not the retroactive application of an amended statute to existing litigation. Thus, it does not create constitutional concerns. *Madison at SoHo II Condo. Ass'n, Inc.*, 2016 WL 4446527 at 4.

### **VI. OTHER INTERESTED PARTIES**

This proposal has been approved by the RPPTL Real Property Litigation Committee. Support is anticipated from the RPPTL Real property Finance & Lending; Real Property Problems Study, and Condominium & Planned Developments Committees.

The Ober case has captured the interest of several organizations. Concerned with the negative impact of the original Ober decision, the following organizations filed an Amicus Curiae Brief:

- The Florida Land Title Association ("FLTA")
- The Business Law Section of The Florida Bar ("BLS")
- The Florida Bankers Association ("FBA")
- The Real Property, Probate & Trust Law Section of The Florida Bar ("RPPTL")
- The American Legal and Financial Network ("ALFN")

In support of the original Ober decision, the following local governments and organizations filed an Amicus Curiae Brief or an intent to do so:

- City of Coral Gables
- City of St. Petersburg
- City of Tampa
- City of Miami
- Florida Association of County Attorneys
- The City, County and Local Government Section of The Florida Bar ("CCLG")
- Additional local governments and organizations may request to file Amicus Curiae Briefs in this matter at any time.

# LEGISLATIVE POSITION REQUEST FORM

GOVERNMENTAL AFFAIRS OFFICE

Date Form Received \_\_\_\_\_

## GENERAL INFORMATION

**Submitted By** Susan Spurgeon, Co-Chair, Real Property Litigation Committee of the Real Property Probate & Trust Law Section  
(RPPTL Approval Date \_\_\_\_\_, 2017)

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

**Position Type** Real Property Litigation Committee, RPPTL Section, The Florida Bar  
(Florida Bar, section, division, committee or both)

## CONTACTS

### Board & Legislation Committee Appearance

**Susan Spurgeon**, Pennington, P.A., 2701 North Rocky Point Dr., Suite 900, Tampa FL, 33607 Telephone: (813) 639-9599  
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Email:cwright@carltonfields.com  
**Peter M. Dunbar**, Dean, Mead & Dunbar, P.A., 215 S. Monroe Street, Suite 815, Tallahassee, FL 32301, Telephone: (850) 999-4100  
Email: pdunbar@deanmead.com  
**Martha J. Edenfield**, Dean, Mead & Dunbar, P.A., 215 S. Monroe Street, Suite 815, Tallahassee, FL 32301, Telephone: (850) 999-4100  
Email:medenfield@deanmead.com

### Appearances

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

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

## PROPOSED ADVOCACY

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

### If Applicable, List the Following

N/A  
\_\_\_\_\_  
(Bill or PCB #) (Bill or PCB Sponsor)

**Indicate Position** Support  X  Oppose \_\_\_\_\_ Tech Asst. \_\_\_\_\_ Other \_\_\_\_\_

**Proposed Wording of Position for Official Publication:**

Support legislation which will clarify § 48.23(1)(d) to preserve the widely understood interpretation of the lis pendens statute that, in proceedings involving a judicial sale, a valid recorded notice lis pendens remains in effect through the recording of an instrument transferring title pursuant to the judicial sale, in order to eliminate intervening subordinate interests or liens; and will incorporate the revision to §48.23(1)(b)2. previously approved by the RPPTL Section, which extends certain protections to lienholders (as well as those having an interest in the real property).

**Reasons For Proposed Advocacy:**

The Legislation will clarify and codify that a notice of lis pendens remains in effect through the recording of the instrument which transfers title pursuant to a judicial sale, avoiding an anticipated flood tide of litigation; and incorporate the revisions to §48.23(1)(b)2., previously approved by the RPPTL Section, which extends certain protections to lienholders (as well as those having an interest in the 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**

In light of the immediacy of the need to advance this proposed legislation, it has not been referred to 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.**

## CLERK'S PROPOSED TAX DEED LEGISLATION

1 A bill to be entitled

2 An act related to revising the clerk's procedure for  
3 conducting tax deed sales and the disposition of tax  
4 excess funds; amending s. 197.502, F.S.; adding costs  
5 to redeem certificates; revising the tax collectors'  
6 obligation to provide clerks with information  
7 on persons required to receive notice; providing for  
8 updates on notice information provided to clerks;  
9 requiring clerks to record notices in the official  
10 records prior to tax deed sales; amending s. 197.582 F.S.;  
11 revising the notice requirements for distribution  
12 of excess funds; providing a form for notice; requiring  
13 persons receiving notice to file a claim; providing the  
14 form for a claim; providing for termination of rights for  
15 failure to file a claim; providing for filing objections  
16 to claims; requiring clerks to pay claims or file  
17 interpleader actions or treat the funds as unclaimed  
18 monies; requiring state and local government lienholders  
19 to file claims; authorizing tax deed recipients  
20 to pay government liens directly; providing for the  
21 disposition of unclaimed tax deed excess funds through  
22 s. 116.21, Florida Statutes-, NOW, THEREFORE,

23  
24 Be It Enacted by the Legislature of the State of Florida:

25 Section 1.Subsection (1) of section 197.502, Florida  
26 Statutes is amended to read:

27 197.502(1) Application for obtaining tax deed by holder  
28 of tax sale certificate; fees. -

29 (1) The holder of a tax certificate, at any time after 2  
30 years have elapsed since April 1 of the year of issuance of the  
31 tax certificate and before the cancellation of the certificate,  
32 may file the certificate and an application for a tax deed with

33 the tax collector of the county where the property described in  
34 the certificate is located. The tax collector may charge a tax  
35 deed application fee of \$75 and for reimbursement of the costs  
36 for providing online tax deed application services.

37 If the tax collector charges a combined fee in excess of \$75,  
38 applicants shall have the option of using the ~~electronic~~  
39 online tax deed application process or may file  
40 applications without using such service.

41 Section 2. Subsection (2) of section 197.502, Florida  
42 Statutes is amended to read:

43 (2) A certificateholder, other than the county, who makes  
44 application for a tax deed shall pay the tax collector at the  
45 time of application all amounts required for redemption or  
46 purchase of all other outstanding tax certificates, plus interest,  
47 any omitted taxes, plus interest, any delinquent taxes, plus  
48 interest, costs required to bring the property to sale as  
49 provided in ss. 197.532 and 197.542, including property information  
50 searches, information from locator services, and mailing costs,  
51 and current taxes, if due, covering the property. In addition,  
52 the certificateholder shall pay the costs of resale, if  
53 applicable, and failure to pay such costs within 30 days after  
54 notice from the clerk shall result in the clerk's entering the  
55 land on a list entitled "lands available for taxes."

56 Section 3. Subsection (5) of 197.502, Florida Statutes  
57 is amended to read:

58 (5)(a) For purposes of determining who must be noticed and  
59 provided the information required in subsection (4), the  
60 tax collector ~~may~~ must contract with a title company  
61 ~~or an abstract company to provide the minimum information required~~  
62 ~~in subsection (4), consistent with rules adopted by the department~~  
63 a property information report as defined in s. 627.7843(1), as  
64 well as a locator service that provides last-known

65 addresses of all persons or entities required to be notified. If  
66 additional information is required, the tax collector must  
67 make a written request to the title company and ~~abstract company~~  
68 locator service, stating the additional requirements. The tax  
69 collector may select any title or ~~abstract~~ company and any locator  
70 service, regardless of its location, as long as the fee is  
71 reasonable, the ~~minimum~~ required information is submitted, and the  
72 title or ~~abstract~~ company and locator service are ~~is~~ authorized to  
73 do business in this state. The tax collector may advertise and  
74 accept bids for the title or ~~abstract~~ company and locator service  
75 if he or she considers it appropriate to do so. For the purpose  
76 of this section, a "title company" includes a title insurer, as  
77 defined in s. 627.7711(3), Florida Statutes, as well as licensed  
78 title insurance agencies and attorneys authorized as agents for  
79 a Florida licensed title insurer. For the purpose of this  
80 subsection, a "locator service" means a commercially available  
81 online databank locator service which has the ability to  
82 query multiple government and commercial databases to identify  
83 last-known addresses for individuals or entities, or an  
84 equivalent service provider.

85 1. The property information ownership and encumbrance  
86 report must include the letterhead of the person, firm, or  
87 company that makes the search, and the signature of the  
88 individual who makes the search or of an officer of  
89 the firm. The tax collector is not liable for payment to the  
90 firm unless these requirements are met. The report may be  
91 submitted to the tax collector in an electronic format.

92 2. The tax collector may not accept or pay for  
93 any title search or ~~abstract~~ property information report if  
94 financial responsibility is not assumed for the search.  
95 However, reasonable restrictions as to the liability or  
96 responsibility of the title or ~~abstract~~ company are acceptable.

97 Notwithstanding s. 627.7843(3), the tax collector may contract  
98 for higher maximum liability limits.

99 3. In order to establish uniform prices for ~~ownership and~~  
100 ~~encumbrance~~ property information reports within the county,  
101 the tax collector must ensure that the contract for ~~ownership~~  
102 ~~and encumbrance~~ property information reports include all requests  
103 for ~~title searches or abstracts~~ property information reports  
104 for a given period of time.

105 4. The tax collector shall provide the clerk an updated  
106 property information report no earlier than 30 days prior to  
107 date of the notices required pursuant to s. 197.522(1).

108 (b) Any fee paid for a ~~title search or abstract~~ property  
109 information report must be collected at the time of application  
110 under subsection (1), and the amount of the fee must be added  
111 to the opening bid.

112 (c) ~~The clerk shall advertise and administer the sale~~  
113 Upon receipt of the tax deed application file from the tax  
114 collector, the clerk shall record a Notice of Tax Deed  
115 Application in the Official Records which is notice  
116 of the pendency of a tax deed application with respect to  
117 the property. Any person acquiring an interest in the subject  
118 property after the recording of the Notice of Tax Deed  
119 Application is deemed to be on notice of the pending  
120 tax deed sale and no additional notice is required. The  
121 payment of the taxes, through redemption or sale, shall  
122 automatically release any recorded Notice of Tax Deed  
123 Application. The contents of the Notice shall be the  
124 same as the contents of the Notice of Publication required by  
125 s. 197.512. The cost of recording must be collected at the  
126 time of application under subsection (1), and must be added  
127 to the opening bid.

128 (d) The Clerk must advertise the sale in conformance with

129 s. 197.512 and the clerk must administer the sale in conformance  
130 with s. 197.542 and receive such fees for the issuance  
131 of the deed and sale of the property as provided in s. 28.24.

132 (e)Notice of the application of the tax deed in accordance  
133 with s. 197.512 and s. 197.522 sent to the addresses shown  
134 on the statement described in subsection (4) shall  
135 conclusively be deemed sufficient to provide adequate  
136 notice of the tax deed application and the sale at public  
137 auction.

138 Section 4. Subsection (6) of section 197.502, Florida  
139 Statutes is amended to read:

140 (6) The opening bid:

141 (a) On county-held certificates on nonhomestead  
142 property shall be the sum of the value of all outstanding  
143 certificates against the property, plus omitted  
144 years' taxes, delinquent taxes, current taxes, if  
145 due, interest, and all costs and fees paid by the county.

146 (b) On an individual certificate must include, in  
147 addition to the amount of money paid to the tax collector by  
148 the certificateholder at the time of application, the amount  
149 required to redeem the applicant's tax certificate and all other  
150 costs ~~and~~, fees paid by the applicant, and any additional  
151 fees or costs incurred by the clerk, plus all tax certificates  
152 that were sold subsequent to the filing of the tax deed  
153 application, current taxes, if due, and omitted taxes, if any.

154 Effective Date: Applies to tax deed sales taking place on  
155 or after July 1, 2018.

156 Section 5. Subsections (2) and (3) of section 197.582,  
157 Florida Statutes are amended to read:

158 (2) If the property is purchased for an amount in excess  
159 of the statutory bid of the certificateholder, the excess must  
160 be paid over and disbursed by the clerk. ~~If the property~~

161 ~~purchased is homestead property and the statutory bid includes~~  
162 ~~an amount equal to at least one half of the assessed value of~~  
163 ~~the homestead, according to the procedure in subsections (3),~~  
164 ~~(5) and 6 below. If the opening bid included the homestead~~  
165 ~~assessment pursuant to s. 197.502(6)(c), that amount must be~~  
166 ~~treated as excess and distributed in the same manner. The clerk~~  
167 ~~shall distribute the excess to the governmental units for the~~  
168 ~~payment of any lien of record held by a governmental unit against~~  
169 ~~the property, including any tax certificates not incorporated in~~  
170 ~~the tax deed application, and omitted taxes, if any. If the~~  
171 ~~excess is not sufficient to pay all of such liens in full, the~~  
172 ~~excess shall be paid to each governmental unit pro rata.~~  
173 ~~If, after all liens of governmental units are paid in full,~~  
174 ~~there remains a balance of undistributed funds, the balance~~  
175 ~~shall be retained by the clerk for the benefit of persons~~  
176 ~~described in s. 197.522(1)(a), except those persons~~  
177 ~~described in s. 197.502(4)(h), as their interests may appear.~~  
178 ~~The clerk must mail notices to such persons certified mail~~  
179 ~~return receipt requested, notifying them of the funds held~~  
180 ~~for their benefit. ~~Such~~ If any notice constitutes compliance~~  
181 ~~with the requirements of s. 717.117(4). Any service charges,~~  
182 ~~at the rate prescribed in s. 28.24(10), and costs of mailing~~  
183 ~~notices shall be paid out of the excess balance held by~~  
184 ~~mail is returned as undelivered, the clerk. ~~Excess proceeds~~~~  
185 ~~shall be held and disbursed in the same manner as unclaimed~~  
186 ~~redemption moneys in s. 197.473. For purposes of identifying~~  
187 ~~unclaimed property pursuant to s. 717.113, excess proceeds~~  
188 ~~shall be presumed payable or distributable on the date the~~  
189 ~~must also publish a notice is sent. If excess proceeds are~~  
190 ~~not sufficient to cover the service charges and mailing costs,~~  
191 ~~the clerk shall receive the total amount of excess proceeds~~  
192 ~~of surplus funds once each week for two consecutive weeks~~

193 in a newspaper selected as a ~~service charge~~ provided in  
194 s. 197.402.  
195 Notice of Surplus Funds  
196 CLERK OF COURT  
197 \_\_\_\_\_COUNTY, FLORIDA  
198 NOTICE OF TAX DEED SALE SURPLUS FUNDS  
199 Tax Deed #\_\_\_\_\_  
200 Certificate #\_\_\_\_\_  
201 Property Description:\_\_\_\_\_  
202 Pursuant to Chapter 197, Florida Statutes, the above property was  
203 sold at public sale on \_\_\_\_\_, and a surplus of \$\_\_\_\_\_  
204 (subject to change) will be held by this office for a period of  
205 90 days from the first publication date of this notice for the  
206 benefit of persons having an interest in this property as described  
207 in FS 197.502(4), as their interests may appear (except for those  
208 persons described in s. 197.502(4)(h)).  
209 These funds will be used to satisfy in full, to the extent  
210 possible, each claimant with a senior mortgage or lien in the  
211 property before distribution of any funds to any junior mortgage  
212 or lien claimant or to the former property owners. To be  
213 considered for distribution of any funds, you must file a notarized  
214 statement of claim with this office, detailing the particulars of  
215 your lien, and the amounts currently due, within 90 days of the  
216 first publication date of this notice. Claims not filed within  
217 the 90-day deadline are barred.  
218 A copy of this notice must be attached to your statement of claim.  
219 After examination of the statements of claim filed, this office  
220 will notify you if you are entitled to any payment.  
221 Dated\_\_\_\_\_.  
222 Clerk of Court  
223  
224 The mailed notice shall include a form for making a claim under

225 subsection (3) below. Any service charges, at the rate  
226 prescribed in s. 28.24(10), costs of mailing, and publication  
227 must be paid out of the excess balance held by the clerk. If the  
228 clerk or comptroller certifies that excess proceeds are not  
229 sufficient to cover the service charges, mailing costs, and  
230 publication costs, if any, the clerk shall receive the total  
231 amount of excess proceeds as a service charge.

232 ~~(3) If unresolved claims against the property exist on the~~  
233 ~~date the property is purchased, the clerk shall ensure that the~~  
234 ~~excess funds are paid according to the priorities of the claims.~~  
235 ~~If a lien appears to be entitled to priority and the lienholder~~  
236 ~~has not made a claim against the excess funds, payment may not~~  
237 ~~be made on any lien that is junior in priority. If potentially~~  
238 ~~conflicting claims to the funds exist, the clerk may initiate~~  
239 ~~an interpleader action against the lienholders involved, and~~  
240 ~~the court shall determine the proper distribution of the~~  
241 ~~interpleaded funds. The clerk may move the court for an award of~~  
242 ~~reasonable fees and costs from the interpleaded funds. Persons~~  
243 receiving notice shall have 90 days from the date of the  
244 mailing or the date of first publication of notice, whichever  
245 is later, to file a written claim with the clerk for excess  
246 proceeds. At a minimum, in order to be considered a proper claim,  
247 the claim must (a) be made in writing, (b) be in the form of a  
248 sworn statement or a written declaration under s. 92.525,  
249 (c) identify the basis of the person making the claim,  
250 (d) reference the recorded document in the county official records  
251 as authority for the claim, and (e) include the amount of the  
252 claim, the amount of any interest, and the amount of costs and/or  
253 attorney fees that comprise the claim amount. A claim in  
254 substantially the following form shall be deemed sufficient:

255

256 CLAIM TO SURPLUS PROCEEDS OF A TAX DEED SALE

257 Complete and return to \_\_\_\_\_

258 By mail: \_\_\_\_\_  
259 By email: \_\_\_\_\_  
260 Note: The Clerk must pay all valid liens before distributing to  
261 to a titleholder  
262 Claimant's name \_\_\_\_\_  
263 Contact name, if applicable \_\_\_\_\_  
264 Address \_\_\_\_\_  
265 Phone no. \_\_\_\_\_ Email Address \_\_\_\_\_  
266 Tax deed no. \_\_\_\_\_ Date of sale (if known) \_\_\_\_\_  
267 \_\_\_I am not making a claim and waive any claim I might have to  
268 the surplus funds on this tax deed sale.  
269 \_\_\_I claim surplus proceeds resulting from the above tax deed  
270 sale. I am a \_\_\_Lienholder \_\_\_Titleholder.  
271 1. LIENHOLDER INFORMATION (Complete if claim is based on a  
272 lien against the sold property)  
273 A. Type of Lien: \_\_\_Mortgage; \_\_\_Court Judgment; \_\_\_Other-  
274 Describe in detail: \_\_\_\_\_  
275 If your lien is recorded in the County's Official Records,  
276 list the following, if known:  
277 Recording date \_\_\_\_\_; Instrument # \_\_\_\_\_; Book # \_\_\_\_\_ Page # \_\_\_\_\_  
278 B. Original Amount of Lien \$ \_\_\_\_\_  
279 C. Amounts due: (1) Principal Remaining due \$ \_\_\_\_\_ (2) Interest  
280 due \$ \_\_\_\_\_ (3) Fees and costs due, including late  
281 fees \$ \_\_\_\_\_ (describe costs in detail, include additional sheet  
282 if needed), and (4) attorney fees \$ \_\_\_\_\_ (include agreement  
283 to show entitlement to attorney's fees)  
284 D. Total Amount Claimed \$ \_\_\_\_\_  
285 2. TITLEHOLDER INFORMATION (Complete if claim is based on title  
286 formerly held on sold property)  
287 A. Nature of title: \_\_\_Deed; \_\_\_Court Judgment; \_\_\_Other-  
288 Describe in detail: \_\_\_\_\_  
289 If your former title is recorded in the county's Official Records,

290 List the following, if known: Recording date \_\_\_\_\_;   
291 Instrument # \_\_\_\_\_; Book # \_\_\_\_\_ Page # \_\_\_\_\_   
292 B. Amount of surplus tax deed sale proceeds claimed \$ \_\_\_\_\_   
293 C. Does titleholder claim the subject property was homestead?   
294 \_\_\_\_\_ Yes \_\_\_\_\_ No   
295 3. I hereby swear or affirm that all of the above information   
296 is true and correct.   
297 Date: \_\_\_\_\_   
298 Signature: \_\_\_\_\_   
299 STATE OF FLORIDA   
300 COUNTY \_\_\_\_\_   
301 Sworn to or affirmed and signed before me on \_\_\_\_\_ by \_\_\_\_\_   
302 \_\_\_\_\_   
303 NOTARY PUBLIC or DEPUTY CLERK   
304 \_\_\_\_\_   
305 [Print, type, or stamp commissioned name of notary]   
306 \_\_\_\_\_ Personally known   
307 \_\_\_\_\_ Produced identification; Type of identification produced \_\_\_\_\_   
308 \_\_\_\_\_   
309 (4) Claims and objections to claims may be mailed using the   
310 U.S. Postal Service, or delivered using either a commercial   
311 delivery service or in person. The postmark on a mailed claim is   
312 the filing date of the claim. For claims that are submitted   
313 using a commercial delivery service or delivered in person, the   
314 date of delivery is the filing date.   
315 (5) Claims not filed with the clerk or comptroller on or   
316 before close of business on the 90th day after the date of the   
317 mailed notice or first publication of notice as required by   
318 s. 197.582(2), whichever is later, are barred. Any person failing   
319 to ~~make~~ file a proper and timely claim is barred from receiving any   
320 disbursement of the excess funds. Within 30 days after the 90th   
321 day, the clerk or comptroller must determine the priority of

322 all proper claims timely ~~received~~ filed and the amount to be paid  
323 on such claims, and must send written notice to each person who  
324 ~~made~~-filed a timely, proper claim, identifying the priority of  
325 claims and the amount to be paid on each claim. Any person who  
326 objects must notify the clerk or comptroller of their objection  
327 in writing within 30 days and include the basis for the  
328 objection. The objection must be made by sworn statement  
329 or written declaration under s. 92.525 and must state  
330 the facts that support the objection and the legal basis  
331 for the objection. If no objections are ~~received~~-timely filed  
332 with ~~by~~-the clerk or comptroller within the 30 days, the clerk  
333 or comptroller must disburse the excess funds according  
334 to the notice of priority of claims within 30 days thereafter.  
335 If an objection is ~~received~~-timely filed with ~~by~~-the clerk or  
336 comptroller, the clerk or comptroller must provide a copy of  
337 the objection to all persons making a claim. The cost of all  
338 mailing under this section must be paid out of the excess  
339 balance held by the clerk or comptroller.

340 (6) Within 90 days after the last timely filed objection  
341 is filed, the clerk or comptroller may either file an  
342 interpleader action in circuit court to determine proper  
343 disbursement or pay the excess funds according to the clerk's  
344 determination of the priority of proper claims after  
345 reviewing all objections. If the clerk or comptroller  
346 fails to file an interpleader action or disburse the funds  
347 within the 90 days, any person who was provided proper notice and  
348 who filed an objection may thereafter file a declaratory action to  
349 determine rights to the excess funds. Except as provided in  
350 subsection (3) above, the failure of any person described in  
351 s. 197.502(4) to file a claim for excess funds within the 90  
352 days shall constitute a waiver of all interest in the excess  
353 funds and all claims thereto are forever barred.

354 (7) Holders of governmental liens of record, other than  
355 Federal governmental units, must file a request for disbursement  
356 of surplus funds within 90 days of the mailing of the notice  
357 of surplus funds except for ad valorem taxes. The clerk or  
358 comptroller must disburse payments to governmental units for  
359 the payment of any lien of record held by a governmental unit  
360 against the property, including any tax certificates not  
361 incorporated in the tax deed application and omitted taxes,  
362 if any, prior to any other disbursements from the surplus funds.  
363 Should the governmental unit, other than Federal governmental  
364 units, fail to file a timely claim, the failure shall constitute a  
365 waiver of all interests in the excess funds and as a waiver of any  
366 claim against the property to the extent that excess funds could  
367 have partially or completely satisfied the lien and the tax deed  
368 recipient shall have no liability for the payoff of any portion of  
369 the governmental lien that could have been paid from the surplus  
370 funds.

371 (8) The tax deed recipient may directly pay any and all  
372 liens to governmental units that could have been requested from  
373 surplus funds and, upon filing a timely claim under subsection (3)  
374 with proof of payment, the tax deed recipient shall be entitled to  
375 receive from the surplus funds payment for any and all amounts  
376 paid to governmental units in the same priority as the original  
377 lienholder.

378 (9) If the clerk receives no claims for the excess funds  
379 within the 90 day claim period, as required under s. 197.582(5),  
380 there is a conclusive presumption that the legal titleholder  
381 of record described in s. 197.502(4)(a) is entitled to the  
382 excess funds, which shall become "unclaimed monies" under  
383 s. 116.21, Florida Statutes. The clerk must process the unclaimed  
384 monies in the manner provided for in s. 116.21, Florida Statutes.

385

386 History.-s. 8, ch. 17457, 1935; CGL 1936 Supp. 999(143); s. 31,

387 ch. 20722, 1941; ss. 1, 2, ch. 69-55; s. 1, ch. 72-268; ss. 22,  
388 34, ch. 73-332; s. 4, ch. 77-354; s. 3, ch. 79-334; s. 6, ch.  
389 81-284; s. 6, ch. 82-205; s. 196, ch. 85-342; s. 1030, ch 95-147;  
390 s. 10, ch. 96-397; s. 2, ch. 2003-284; s. 90, ch. 2003-402; s. 51,  
391 ch. 2011-151; s. 8, ch. 2014-211.  
392 Note.-Former ss. 194.22, 197.535, 197.291.  
393 Effective for tax deed sales taking place on or after July 1, 2018.

1 A bill to be entitled

2 An act relating to personal jurisdiction of probate courts over persons having an interest  
3 in an estate; amending s. 731.301, F.S.; providing that in personam jurisdiction over  
4 interested persons cannot be acquired by service of formal notice.

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

6 Section 1. Subsection (2) of section 731.301, Florida Statutes, is amended to read:

7 731.301 Notice

8 (2) In a probate proceeding, formal notice is sufficient to acquire jurisdiction over the person  
9 receiving formal notice to the extent of the person's interest in the estate or in the decedent's  
10 protected homestead. Formal notice is not sufficient to invoke the court's personal jurisdiction  
11 over the person receiving notice.

12  
13 Section 2. This act shall take effect upon becoming law and shall apply to all  
14 proceedings pending on or before such date.

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

## WHITE PAPER

### Proposed amendment of § 731.301 to provide that service of formal notice does not confer in personam jurisdiction over the recipient.

#### I. SUMMARY

Appellate court opinions in several cases have determined that service by formal notice under the Florida Probate Rules is sufficient for a probate court to acquire *in personam* jurisdiction over persons deemed to be “interested persons” under the Florida Probate Code. There is no authority in statutes or the probate rules suggesting that to be the law, and the Ad Hoc Jurisdiction & Service of Process Committee, although acknowledging that it is possible to provide such authority in a manner that complies with due process, believes that it is preferable to limit the means of acquiring personal jurisdiction to service of summons or other process by traditional means currently allowed by statute or the Florida Rules of Civil Procedure.

#### II. CURRENT SITUATION

In a series of decisions, the Second District Court of Appeal has held that those who are deemed to be “interested persons” within the meaning of F.S. 731.201(23) (i.e., those who may reasonably be expected to be affected by the outcome of a particular proceeding) may be subjected to personal jurisdiction by the service of formal notice pursuant to F.S. 731.301(2). Payette v. Clark, 559 So.2d 630 (2d DCA 1990); Kountze v. Kountze, 20 So.3d 428 (2d DCA 2009); Hall v. Tungett, 980 So.2d 1289 (2d DCA 2008); Galego v. Robinson, 695 So.2d 443 (2d DCA 1997). The Fourth District Court of Appeal has agreed, at least in cases where law firms or attorneys have rendered legal services to a Florida probate estate, that they are interested persons and that *in personam* jurisdiction (for the purpose of reviewing and potentially ordering refund of fees paid) could be acquired by service of formal notice. Rogers & Wells v. Winston, 662 So.2d 1303 (4<sup>th</sup> DCA 1995); Simmons v. Est. of Baranowitz, 189 So.3d 819 (4<sup>th</sup> DCA 2015).

Prior to October 1, 2010, when all of the foregoing cases except Baranowitz were decided, F.S. 731.301(2) read as follows:

(2) Formal notice shall be sufficient to acquire jurisdiction over the person receiving formal notice to the extent of the person’s interest in the estate.

Effective October 1, 2010, the subsection was amended to read as it does today:

(2) *In a probate proceeding*, formal notice is sufficient to acquire jurisdiction over the person receiving formal notice to the extent of the

person's interest in the estate or in the decedent's protected homestead.  
[Emphasis added].

By statute, probate proceedings are *in rem*, meaning that the court has jurisdiction over the will, if any, the tangible and intangible assets of the decedent's estate (wherever located), and real estate located in Florida, all without the necessity of any original process. F.S. 731.105; *Also see In re: Estate of Williamson*, 95 So.2d 244 (Fla. 1957). Service by formal notice is one method of complying with due process requirements necessary to invoke the court's *in rem* jurisdiction over those receiving the notice to the extent of their interest in the estate. Even without addition of the phrase, "in a probate proceeding," the statute is easily read to be addressing only a means of notice to persons subject to the court's *in rem* jurisdiction that is calculated to effect due process over those receiving the notice.

Formal notice is not judicial process, and is not the equivalent of a summons. For example, nowhere in the Florida Probate Code does it provide that a default may be entered after service of Formal Notice, as would be the case with judicial process. Formal notice does not support *in personam* jurisdiction because formal notice is not judicial process, is not issued under the seal of the court, nor is it typically served as provided in Chapter 48. If the clerk's seal is not affixed to judicial process, it is void and cannot be used to obtain personal jurisdiction. 12A FLA.JUR2d *Courts and Judges* §§ 53-55 and 61-62. While acknowledging that it is possible to provide such authority in a manner that complies with due process, the Committee believes that it is preferable to limit the means of acquiring personal jurisdiction to service of summons or other judicial process by traditional means currently allowed by statute or the Florida Rules of Civil Procedure. By requiring compliance with the existing procedural rules for acquiring personal jurisdiction, the safeguards that assure actual notice by the person over whom personal jurisdiction is sought are preserved.

Personal jurisdiction is neither contemplated nor required in a majority of adversary proceedings in probate. Of those specific adversary proceedings listed in Probate Rule 5.025(a) that require service of formal notice, only surcharge of a personal representative or guardian requires *in personam* jurisdiction, and those fiduciaries have submitted to the court's personal jurisdiction by instituting or participating in the court proceedings. See Payette v. Clark, 559 So.2d 630 (2d DCA 1990) (filing of a petition for administration subjects the personal representative to *in personam* jurisdiction "for all purposes related to the administration").

Thus the formal notice procedure was never intended to be a method of obtaining personal jurisdiction over persons having an interest in the probate estate. In Re Estate of Black, 528 So.2d 1316 (Fla. 2d DCA 1988); In Re Estate of Vernon, 608 So.2d 510 (Fla. 4<sup>th</sup> DCA 1992). Formal notice is a method of service of notice to a person subject to the court's *in rem* jurisdiction. It is not a summons or judicial process that confers *in personam* jurisdiction over the recipient.

The notion that any person determined to be an “interested person” can be subjected to personal jurisdiction by service of formal notice is incorrect and can be made clear by the proposed amendment to F.S. 731.301.

### **III. EFFECT OF PROPOSED CHANGES**

The proposed amendment to section 7331.301(2) provides:

In a probate proceeding, formal notice is sufficient to acquire jurisdiction over the person receiving formal notice to the extent of the person’s interest in the estate or in the decedent’s protected homestead. Formal notice is not sufficient to invoke the court’s personal jurisdiction over the person receiving notice.

The proposed amendment would change the result in each of the cases cited in the first paragraph of Section II above. In those factual situations it would be necessary for the petitioners to obtain personal jurisdiction over the adverse parties by traditional means such as service of a summons pursuant to Chapter 48, Florida Statutes.

### **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 Justice Association, Inc.

# LEGISLATIVE POSITION REQUEST FORM

GOVERNMENTAL AFFAIRS OFFICE

Date Form Received \_\_\_\_\_

## GENERAL INFORMATION

**Submitted By** BARRY F. SPIVEY, Chair, Ad Hoc Jurisdiction & Service of Process Committee of the Real Property Probate & Trust Law Section (RPPTL Approval Date: June 2, 2017).

**Address** 1515 Ringling Blvd., Ste. 885, Sarasota, FL 34236  
Telephone: (941) 840-1991

**Position Type** RPPTL Section, The Florida Bar  
(Florida Bar, section, division, committee or both)

## CONTACTS

### Board & Legislation Committee Appearance

**Barry F. Spivey**, Spivey & Fallon, P.A., 1515 Ringling Boulevard, Suite 885, Sarasota, FL 34236 Telephone (941) 840-1991.  
**Peter M. Dunbar**, Dean Mead & Dunbar, 215 S. Monroe St., Ste 815, Tallahassee, Florida 32301, Telephone (850) 999-4100.  
**Martha J. Edenfield**, Dean Mead & Dunbar, 215 S. Monroe St., Ste 815, Tallahassee, Florida 32301, Telephone (850) 999-4100.  
(List name, address and phone number)

### Appearances

#### Before Legislators

(SAME)

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

#### Meetings with

#### Legislators/staff

(SAME)

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

## PROPOSED ADVOCACY

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

### If Applicable,

#### List The Following

N/A

(Bill or PCB #)

(Bill or PCB Sponsor)

#### Indicate Position

Support \_\_\_\_\_

Oppose \_\_\_\_\_

Tech Asst. \_\_\_\_\_

Other \_\_\_\_\_

### Proposed Wording of Position for Official Publication:

"Support the proposed amendment to F.S. Chapter 731 to provide that formal notice as provided in the Florida Probate Rules does not confer in personam jurisdiction over persons receiving formal notice."

### Reasons For Proposed Advocacy:

The proposed statutory change is necessary because several appellate courts in recent years have held that persons deemed "interested persons" under the Probate Rules (because they may reasonably be expected to be affected by the outcome of a particular proceeding) may be subjected to *in personam* jurisdiction upon service by formal notice without any authority in Florida statutes or the Florida Probate Rules. The Committee believes that such personal jurisdiction should be acquired by traditional means rather than service by certified mail or commercial delivery service, and that such formal notice to acquire personal jurisdiction be expressly negated by amendment of section 731.301, Florida Statutes.

## 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.



1 A bill to be entitled  
2 An act determining whether coins and bullion constitute  
3 tangible property; amending ss. 731.201 F.S.  
4

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

6 Present subsections (38), (39), and (40) of Section 731.201  
7 are redesignated as subsections (39), (40), and (41)  
8 respectively, and a new subsection (38) is added to that section,  
9 to read:

10 731.201 Definitions.

11 Subject to additional definitions in subsequent chapters that are  
12 applicable to specific chapters or parts, and unless the context  
13 otherwise requires, in this code, in s. 409.9101, and in chapters  
14 736, 738, 739, and 744, the term:

15 (38) "Tangible personal property" includes, but is not  
16 limited to, precious metals in any tangible form, such as bullion  
17 or coins kept and acquired for their historical, artistic,  
18 collectable, or investment value apart from their normal use as  
19 legal tender for payment.

Page 1 of 1

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

1 See §710.101 et seq.

**The Florida Bar  
Real Property, Probate and Trust Law Section  
Probate Law and Procedure Committee  
Coins and Bullion Subcommittee**

**WHITE PAPER**

**Proposed Revision to § 731.201, Florida Statutes**

**I. SUMMARY**

The proposed bill would add a new definition of “tangible personal property” to § 731.201, Fla. Stat. The purpose of this amendment is to: i) specify that precious metals in any tangible form, such as bullion and coins that are kept apart from their normal use as legal tender for payment, constitute tangible personal property for purposes of the Florida Probate Code without foreclosing the possibility that other items may also constitute tangible personal property; and ii) create a bright line rule as to the disposition of such items identified in a separate writing that complies with § 732.515, Fla. Stat.

**II. CURRENT SITUATION**

The relevant Florida law is unclear as to whether certain types of precious metals, such as coins and bullion, that are regularly held by individuals dying in this State constitute “tangible personal property” (which is subject to devise by a tangible personal property clause in a will or a separate writing) or intangible property (which generally passes in accordance with a residuary clause in a will in absence of other specific direction). Specifically:

- The Florida Probate Code does not specify whether these items are “tangible personal property.”
- No Florida cases specifically address this issue; only a Delaware state case has analyzed § 732.515. *In re Last Will and Testament and Trust Agreement of Moor*, 879 A.2d 648, 649 (Del.Ch. Jun 08, 2005) (court noted that money is not specifically excluded under Section 732.515; did not specifically address coins or bullion).

- There is a lack of consensus among practitioners on this issue.

### **III. EFFECT OF THE PROPOSED CHANGE**

Under the proposed changes to Section 731.201, s. 38, the following definition will be added to the general definitions section of the Florida Probate Code: “Tangible personal property includes, but is not limited to, precious metals in any tangible form, such as bullion or coins kept and acquired for their historical, artistic, collectable, or investment value apart from their normal use as legal tender for payment.”

While the definition does not create a bright line rule of construction for purposes of a tangible personal property clause in a will, the definition serves as indicia that bullion and coins are ordinarily considered tangible personal property in the probate context. As such, the definition may provide clarity in circumstances where the Will does not specify what tangible personal property is and no other evidence of the testator’s intent is apparent.

**IV. FISCAL IMPACT ON STATE AND LOCAL GOVERNMENT - None.**

**V. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR - None.**

**VI. CONSTITUTIONAL ISSUES – None.**

**VII. OTHER INTERESTED PARTIES - None.**

**VIII. EFFECTIVE DATE – July 1, 2018.**

# 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

**Address** Gunster, Yoakley & Stewart, P.A., 777 S. Flagler Drive, Suite 500 East, West Palm Beach, FL 33401  
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**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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### 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

